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The State of South Carolina
In the Court of Appeals

Appeal from Aiken County
Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable Clifton Newman, Circuit Court Judge

Civil Action No.: 2011-CP-02-00868

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SC Court of Appeals

Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela,

Respondent,

versus

Sam English Grading, Inc.,

Appellant.

Record On Appeal
Volume III of IV (p.885 -1260)

Robert Hill
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108
(803) 405-1629

Ronald Maxwell
P.O. Box 1115
Aiken SC 29802
(803) 641-6700

J. Paul Detrick
Peters, Murdaugh, Eltzroth
& Detrick, PA
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

L. Lisa McPherson
McWhirter, Bellinger & Assoc
119 East Main St
Lexington, SC 29072
(803) 252-5522

Attorneys for Respondents Paige Weeks Johnson
as PR of the Estate of Christie Lane Valenzuela

Charles E. Carpenter, Jr.
Carpenter Appeals &
Trial Support, LLC
4825 Portobello Rd
Columbia, SC 29206
(803) 758-2886

James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
P O Box 2823
Columbia, SC 29202
(803) 731-0030
Attorneys for Appellants
Sam English Grading, Inc.

**Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela versus Sam English Grading, Inc.,**

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1 THE COURT: All right. I'll look at all that. All
2 right. Bring the jury in.

3 I'm sorry. Mr. Detrick?

4 MR. DETRICK: No, sir, I am just moving a little bit
5 before they come in.

6 (Whereupon, the jury came into open court at
7 approximately 10:23.)

8 THE COURT: Mr. Cox, you may call your first witness.

9 MR. COX: Your Honor, the defense calls Joe Dawes.

10 THE COURT: Mr. Cox, you're fully aware of my
11 pretrial ruling on this?

12 MR. COX: Yes, Your Honor.

13 JOE DAWES, after being duly sworn, testified as
14 follows:

15 THE CLERK: Please take a seat in the witness box and
16 state your name for the record.

17 THE WITNESS: My name is Joe Dawes.

18 THE COURT: Hold on a second.

19 (Whereupon, a bench conference was held.)

20 DIRECT EXAMINATION

21 BY MR. COX:

22 Q Mr. Dawes, where are you from, sir?

23 A I am from Columbia, South Carolina.

24 Q Very good. And what is your educational background?

25 A I graduated high school in 1975, attended one year of

1 college at the University of South Carolina with a major
2 in chemistry and then I joined the United States Air Force
3 in 1976.

4 Q Okay. Very good. I am going to move over here so we
5 can kind of address the jury a little better.

6 THE COURT: Mr. Cox, please ask your questions.

7 Q Okay. Have you -- do you have any military service?

8 A Yes, sir, United States Air Force.

9 Q Okay. When were you in the service?

10 A From 1976 through 1983.

11 Q All right. And where are you currently employed?

12 A I am employed at Midlands Technical College as an
13 adjunct instructor for the MSF -- motorcycle training
14 program.

15 Q Okay. And how long have you been employed as an
16 adjunct instructor at Midlands Tech?

17 A Since 2008; august of 2008.

18 Q You're an instructor of the motorcycle safety
19 program; correct?

20 A Yes, sir.

21 Q Okay. And did you have to undergo any training to
22 become certified to become an instructor of motorcycle
23 safety in the technical college?

24 A Yes, sir. I had to attend the basic riders course
25 that all students at our college that sign up for the

1 course take and then I had to take a two-week training
2 program there at the college.

3 Q Okay. And what did that two-week training program
4 entail?

5 A It was the curriculum as supplied by the Motorcycle
6 Safety Foundation. It covers all aspects of motorcycle
7 riding, clothing, things of that nature.

8 Q And the Motorcycle Safety Foundation -- is that the
9 curriculum that is required by South Carolina statute for
10 the technical college systems in South Carolina to -- for
11 the State Board of Technical and Comprehensive Education
12 in South Carolina to utilize in their motorcycle safety
13 programs at the colleges?

14 A Yes, sir.

15 MR. DETRICK: Your Honor, I object. That is not a
16 correct statement of the law, and, Your Honor, you're in
17 charge of the law.

18 THE COURT: Well, he is just qualifying him. I
19 assume you have to have some -- to get a license you have
20 to have some classes you have to pass; is that right? You
21 teach those classes?

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Move along.

24 MR. COX: Judge, I'd like for the court to take
25 judicial notice of SC Code 59-53-2020 wherein the

1 legislature authorized the State Board for Technical and
2 Comprehensive Education to establish a motorcycle safety
3 instruction program and in so doing requires it to use the
4 Motorcycle Safety Foundation curriculum or its equivalent.

5 MR. DETRICK: We stipulate to that.

6 THE COURT: Thank you.

7 MR. COX: Thank you.

8 And you have been certified by the Motorcycle Safety
9 Foundation to instruct motorcycle safety?

10 THE WITNESS: Yes, sir.

11 Q Also -- how long have you been driving a motorcycle?

12 A On the street with a license 40 years. I also rode
13 other motorcycles prior to that off road at a younger age.

14 Q Okay. And did you undergo any training, safe
15 operation of a motorcycle, proper operation of a
16 motorcycle training at the United States Air Force?

17 A Yes, sir. It was required.

18 Q Okay. And were you authorized -- did you pass that
19 course?

20 A Yes, sir, I did.

21 Q And did you receive a letter from the US Air Force
22 authorizing you to ride your motorcycle on the base?

23 A Yes, sir.

24 Q And was that a requirement of the United States Air
25 Force?

1 A Yes, sir.

2 Q Okay. And are you -- have you -- are you a licensed
3 motorcycle -- do you have a class M endorsement on your
4 driver's license in South Carolina?

5 A Yes, sir, I do.

6 Q And you have for many, many years?

7 A Yes, sir.

8 Q How many years?

9 A Since 1974, I believe it was, when the test was
10 implemented.

11 Q Okay. And to get your driver's license, what kind
12 of -- motorcycle driver's license -- what kind of testing
13 did you have to do through the South Carolina Department
14 of Motor Vehicles?

15 A You have to take a written test after studying the
16 driver's manual -- driver's handbook -- and then you have
17 to demonstrate your proficiency on a road course given by
18 a licensed examiner --

19 Q Okay.

20 A -- at the DMV.

21 Q And the knowledge test is -- you have to pass that
22 test?

23 A Yes, sir.

24 Q And that's to get your beginner's permit?

25 A Yes, sir.

1 Q Did you pass that test?

2 A Yes, sir.

3 Q Okay. And then subsequently you -- did you
4 immediately go in and get your motorcycle's endorsement?

5 A Yes, sir.

6 Q Okay. And that requires a skills test; correct?

7 A Yes, sir.

8 Q And administered by the DMV testers; correct?

9 A Yes, sir.

10 Q And did you pass that test?

11 A Yes, sir.

12 Q And that was many years ago?

13 A Yes, sir.

14 Q And you currently have a motorcycle license?

15 A Yes, sir.

16 Q Are you also a certified third party tester with the
17 South Carolina DMV?

18 A Yes, I am.

19 Q What does the Department of Motor Vehicles require
20 with regards to being able to drive a motorcycle -- with
21 regards to licensing to be able to drive a motorcycle in
22 South Carolina?

23 A They require that you take a skills test and a
24 knowledge test. The knowledge test is required for your
25 beginner's permit and after a certain amount of time you

1 can go back and take the riding skills portion and you
2 will get an endorsement if you successfully complete that
3 course.

4 Q Okay. And you can stay with the beginner's permit,
5 but you have the restrictions that are associated with the
6 beginner's permit?

7 A Yes, sir.

8 Q And if you want to get outside of those restrictions
9 you go and get the -- you have to pass the skills test?

10 A Yes, sir.

11 Q Is that right? To get your endorsement?

12 A Right.

13 Q And how long have you been an instructor certified by
14 the Motorcycle Safety Foundation to instruct motorcycle
15 safety to teach the program at Midlands Tech?

16 A Since August of 2008.

17 Q And how many classes have -- how many classes have
18 you -- courses have you taught at Midlands Tech since
19 2008?

20 A Since 2008 an exact number I do not know. I would
21 say it's on the order of 25 maybe, 30 classes.

22 Q Okay. And how many students have come through your
23 classes approximately since---

24 A Three-hundred-fifty, four-hundred students.

25 Q Okay. And have the great majority of those under

1 your instruction passed and gotten their certification?

2 A Yes, sir, they have.

3 Q Your Honor -- and is driving a motorcycle -- does
4 that require special skill and knowledge?

5 A Yes, sir, it does.

6 Q And does someone whose only operated a motorcycle --
7 I mean, only operated a car that's never driven a
8 motorcycle have the knowledge on how to operate a
9 motorcycle?

10 MR. DETRICK: Your Honor, I object to that.

11 THE COURT: He doesn't know that. Just go ahead and
12 move to qualify him.

13 MR. COX: Your Honor, at this time I would move
14 Mr. Dawes in -- offer him as an expert in the field of
15 motorcycle safety, safe and proper operation of a
16 motorcycle.

17 THE COURT: Any cross-examination on his
18 qualifications?

19 MR. DETRICK: No, sir.

20 THE COURT: All right. As I understand under
21 pretrial rulings this gentleman will be allowed to give
22 opinions in the area of operation of a motorcycle. You
23 know the areas that we're not going into.

24 MR. COX: Yes, sir. I am aware of the areas for this
25 case.

1 THE COURT: Certainly.

2 Q Mr. Dawes, let me ask you, your courses at Midlands
3 Tech when you teach motorcycle safety you have varying
4 levels?

5 A Yes, sir, we do. We have a basic riders course.
6 Then we have an intermediate course and we have an
7 experienced course in addition to an advanced riders class
8 for the sport bike riders.

9 Q And at what level is the proper braking techniques
10 taught?

11 A At the basic.

12 Q At the basic level?

13 A Yes, sir.

14 Q And with regards to braking techniques of a
15 motorcycle, what goes in to -- how do you brake a
16 motorcycle?

17 A Primarily, there are two controls. There is a front
18 brake lever on the right handle bar that controls the
19 front brake and there is a brake pedal on the right foot
20 rest that controls the rear brake and you can apply
21 varying amounts of pressure with each.

22 Q Okay. And do these require -- okay. Let me ask you
23 what -- how do you -- what is taught with regards to
24 proper braking technique at the basic level of your
25 course?

1 A We teach to apply both brakes simultaneously with a
2 gentle pressure and not to grab the front brake or to
3 stomp on the rear brake pedal, but to apply pressure
4 evenly and as the motorcycle begins to slow down we
5 steadily increase pressure on the front brake lever and as
6 we come to a stop ease off on that pressure coming to a
7 nice controlled stop.

8 Q Okay. And this requires doing those controls in
9 concert, doing them together in unison; is that right?

10 A Yes, sir. It requires that we brake. We must also
11 squeeze in the clutch lever which is on the left handle
12 bar. It disconnects power to the rear wheel and we come
13 to a controlled stop and left foot to the ground.

14 Q Okay. And when are riders instructed on utilizing
15 this proper braking technique?

16 A At the very beginning of the classroom sessions
17 Friday evening we discuss braking technique and then we
18 also on the first exercise on the range on Saturday
19 morning is when we first cover braking.

20 Q But with regards to -- once they're driving a
21 motorcycle on the roads of South Carolina when are they --
22 when is it taught that they are to utilize the proper
23 braking technique?

24 A Every time you come to a stop proper braking is to be
25 used all the time.

1 Q Okay. And why is that important?

2 A Because roughly 70 percent of your braking efficiency
3 comes from the front brake --

4 MR. DETRICK: Your Honor --

5 THE WITNESS: -- and 30 percent from the rear.

6 MR. DETRICK: -- I object. That is not part of what
7 he's been qualified to testify about. He can testify
8 about technique. He's got no expertise in the braking
9 capabilities of motorcycles.

10 THE COURT: That's correct. You hadn't laid a
11 foundation on the engineering side of it. He can testify
12 about all day long as long as you want him to on
13 technique, but he's not engineered -- strike that. He's
14 not qualified in an engineering field that would allow him
15 to give engineering opinions.

16 So, disregard that, ladies and gentlemen. That's
17 beyond the way I qualified him. He can testify about how
18 in his opinion the proper operation vis-a-vis with respect
19 to the braking system.

20 Q Okay. Mr. Dawes, did you bring your course materials
21 with you today?

22 A Yes, sir, I did.

23 Q Okay. And is proper braking technique addressed in
24 your course materials?

25 A Yes, sir, it is.

1 Q On what page of your course materials is it
2 addressed?

3 A Page 23. Do you want me to read the---

4 Q My next question is going to be what do your course
5 materials say the proper braking technique is?

6 A On page 23 it says, To stop the hands and feet work
7 together in a coordinated and smooth fashion. Squeeze the
8 clutch and front brake lever while pressing on the rear
9 brake pedal and downshift into first gear. The front
10 brake provides 70 percent or more of the stopping power of
11 your motorcycle. Both brakes should be applied at the
12 same time when stopping. Even though the full breaking
13 potential of each wheel may not be required for normal
14 planned stops it is important to develop the habit of
15 using both brakes so that your reflexes will be ready to
16 respond quickly and properly when an emergency situation
17 occurs. Be sure to develop your braking skills gradually.
18 Learn to make smooth controlled stops before practicing
19 quick stops. It is important to have a good sense of
20 touch when using the front brake lever and rear brake
21 pedal. Too much pressure too quickly can cause a skid and
22 loss of control.

23 Q Okay. And so it's important to apply both brakes so
24 that you form a habit and are ready for emergency
25 situations to utilize the proper brake technique? Is that

1 right?

2 A Yes, sir.

3 MR. COX: Your Honor, at this time I would offer the
4 course materials -- Motorcycle Safety Foundation course
5 materials. The page -- what page is that again?

6 THE WITNESS: Page 23.

7 MR. COX: Page 23 into evidence, Your Honor.

8 THE COURT: All right. Let's make sure that just
9 that page goes in because it contains a lot of other
10 stuff.

11 No objection; is that correct?

12 MR. DETRICK: No, sir.

13 THE COURT: Without objection. You can do that when
14 we break unless you got a separate page down there. You
15 can do it in a little bit.

16 MR. COX: We'll mark that as Defense...

17 THE COURT REPORTER: Twenty.

18 THE COURT: Anything else?

19 Q Just one more. Now, you're a certified tester with
20 the DMV?

21 A (Witness nods head.)

22 Q Were you also -- we've offered into evidence the
23 South Carolina Driver's Manual which has already been in
24 evidence in this case. Does the ---

25 THE COURT: That page out of the manual, I think.

1 MR. DETRICK: That's correct, Your Honor. Page 33.

2 MR. COX: I am going to ask him about page 33.

3 THE COURT: No problem. It's down there somewhere,
4 but you can ask him about the book.

5 MR. COX: Yes, sir.

6 I would ask you what does the South Carolina DMV -- I
7 am going to hand to you -- teach is the proper braking
8 technique necessary to be learned in order to pass the
9 driving test for your beginner's permit?

10 MR. DETRICK: Can I ask are you referring him to the
11 same page?

12 THE COURT: He did.

13 MR. DETRICK: Okay.

14 THE WITNESS: On page 133 of the South Carolina
15 Driver's Manual under the heading of braking it says, Use
16 both brakes every time you slow or stop. Using both
17 brakes for even normal stops will permit you to develop
18 the proper habit or skill of using both brakes properly in
19 an emergency. Squeeze the front brake and press down on
20 the rear. Grabbing at the front brake or jamming down on
21 the rear can cause the brakes to lock resulting in control
22 problems.

23 Q If someone just jams down on the rear, is that proper
24 braking technique?

25 A No, sir.

1 Q Why is that? You lose control?

2 A Yes, sir. It results in a loss of turning ability of
3 the motorcycle.

4 Q Okay. And is laying down the motorcycle proper
5 braking technique?

6 A No, sir.

7 MR. DETRICK: Your Honor---

8 MR. COX: Proper braking technique.

9 THE COURT: Proper braking technique.

10 MR. COX: That's one question.

11 THE COURT: You can answer it.

12 Q Is laying down the motorcycle part of proper braking
13 technique as taught by your course or in the DMV
14 materials?

15 A No, sir, it is not.

16 Q That's all the questions I have.

17 THE COURT: Thank you.

18 Mr. Detrick?

19 CROSS-EXAMINATION

20 BY MR. DETRICK:

21 Q I have just a few questions, Mr. Dawes. You said
22 laying down -- it's your testimony in deposition if I
23 remember right that you should never lay a motorcycle
24 down?

25 A Correct, sir.

1 Q And it is your testimony that if a 70,000-pound
2 scraper came in front of you -- right in front of you,
3 couldn't even put on the brakes -- that you still should
4 not lay the bike down?

5 A Yes, sir.

6 Q It is your testimony that instead of -- what you
7 would do if that happened is you just run square head on
8 into that scraper?

9 A No, sir. I would apply my brakes. I would---

10 Q I said -- Wait a second now.

11 THE COURT: Hold on.

12 MR. COX: Your Honor---

13 THE COURT: Whoa, whoa, whoa. He can answer the
14 question and then you can ask him again.

15 Q All right. Go ahead.

16 A I'm sorry, sir?

17 Q You can answer it. Go ahead.

18 A No, sir, I would not. I would apply my brakes and
19 come to a stop.

20 Q Okay. If it happened so quick that you had no -- you
21 couldn't do anything, couldn't brake, couldn't do nothing,
22 coming there right in front of you, you still don't lay
23 the bike down?

24 A No, sir, I do not.

25 Q That's all I have.

1 THE COURT: Redirect, if any, on that subject.

2 REDIRECT EXAMINATION

3 BY MR. COX:

4 Q Mr. Dawes, under the circumstances of this case have
5 you studied and learned what the facts of this case are?

6 THE COURT: No, sir.

7 MR. COX: Your Honor, he opened the door.

8 THE COURT: Huh?

9 MR. COX: He opened the door for me to ask him --

10 THE COURT: No, sir, he did not.

11 MR. COX: -- in this case --

12 THE COURT: No. No, sir. You know what the ruling
13 was. I am not going into that. Thank you. You can ask
14 him anything about the laying down like Mr. Detrick just
15 asked.

16 Q Okay. Now the laying down, why is it not appropriate
17 to ever lay your bike down?

18 A Because you're no longer in control of the machine,
19 sir.

20 Q And why is it that you as you testified would not
21 ever find a situation where you would have to lay your
22 bike down?

23 A Well, with maintaining the proper lookout and riding
24 techniques that we teach in the course we believe that it
25 is not a requirement that you lay a motorcycle down.

1 Q If you utilize proper braking techniques and other
2 techniques you're not going to find yourself in a
3 situation where you have to lay the bike down?

4 A Yes, sir. If you were maintaining your proper
5 lookout, your search, evaluate, and execute that we teach
6 in the course, you're aware of the situation, you adjust
7 your speed, you adjust your lane position, and you cover
8 the controls, and you're prepared for anything.

9 Q And if you utilize proper braking technique can a
10 motorcycle brake really well?

11 A Yes, sir.

12 Q Can it brake in a short distance?

13 A Very short.

14 Q And at significant speeds of 50, 60 miles per hour?

15 MR. DETRICK: Your Honor---

16 THE COURT: All right. All right. All right. He's
17 not been qualified. We went over that in the pretrial and
18 we know where we drew the line.

19 MR. COX: Thank you, Your Honor.

20 THE COURT: Thank you. You may step down.

21 MR. COX: That's all the questions I have.

22 THE COURT: You may step down. Next witness, please.

23 MR. COX: Your Honor, at this time we'd call Joe
24 Smith.

25 THE COURT REPORTER: We need to get that page.

1 THE COURT: Let the record reflect we're substituting
2 one page of the manual.

3 (Whereupon, Defendant's Exhibit No. 20 was marked for
4 identification and received into evidence.)

5 JOSEPH G. W. SMITH, after being duly sworn,
6 testified as follows:

7 THE CLERK: Have a seat in the witness box and state
8 your full name for the record.

9 DIRECT EXAMINATION

10 BY MR. COX:

11 Q Mr. Smith, give the jury some information. Where are
12 you from?

13 A I spent the first 12 years of my life in North
14 Augusta.

15 Q Okay.

16 A And then my family moved the Tennessee and I've been
17 traveling around since then.

18 Q Okay. Where do you currently reside?

19 A In Georgia.

20 Q Very good. What part of Georgia?

21 A In metro Atlanta.

22 Q And what is your education and background, Mr. Smith?

23 A I have a Bachelors of Science in Mechanical
24 Engineering from Tennessee Tech University. I have -- I
25 am a Licensed Professional Engineer in 10 states including

1 South Carolina. I have a Masters of Business
2 Administration from Georgia State University and I have --
3 in my work experience I worked two years for NASA in
4 Huntsville, Alabama and I worked 18 years in manufacturing
5 plants as a maintenance engineer, as a design engineer, as
6 a plant engineer and also as a manufacturing engineer and
7 then for the last 13 and a half years I have worked as a
8 Forensic Mechanical Engineer.

9 Q Okay. And how about what -- how many cases have you
10 worked on as an accident reconstructionist?

11 A In general as a mechanical engineer I have worked on
12 about 900 cases in the 13 years and I have -- our
13 marketing people looked up this number before. I have
14 worked on about 247 accident reconstruction cases
15 involving trucks and there is more than that not involving
16 trucks, but I don't know the exact number. I'm sorry.

17 Q Have you been qualified as an expert in our courts?

18 A Yes. I've been qualified as an expert in state and
19 federal court.

20 Q Okay. What special societies do you belong to, sir?

21 A I belong to the American Society of Mechanical
22 engineers and I am a 25-year-plus member of that
23 organization and I was named mechanical engineer of the
24 year for Atlanta section at one point and I am a member of
25 the National Society of Professional engineers since I am

1 a professionally-licensed engineer. It's a an
2 organization -- we cover professional issues in
3 engineering.

4 I am also a member of the American Academy of
5 Forensic Engineers. I am a senior member of that
6 organization and I'm a diplomate in forensic engineering
7 with them. I also belong to the Society of Automotive
8 Engineers and to the National Fire Protection Association.

9 MR. COX: Your Honor, at this time we'd offer Mr. Joe
10 Smith as an expert in the area of accident reconstruction.

11 MR. DETRICK: We don't have any questions.

12 THE COURT: All right. He'll be qualified just like
13 the other expert in the area of accident reconstruction
14 and will be allowed to render opinions in that area.

15 Q Now, Mr. Smith, what were you asked to do in this
16 case?

17 A I was asked to conduct an accident reconstruction of
18 a motorcycle accident.

19 Q Okay. And in that regard what did you do?

20 A I was hired for the case on August 12 of 2009 and
21 then on August 20 I actually went to the scene and
22 examined the scene. I met with Mr. English and Mr. Lewis,
23 Mr. Tindel and Mr. Pruitt. Mr. Pruitt just happened to
24 come through when we were working on the scene.

25 Q Okay.

1 A And so we asked him if he would help us out and I got
2 them to explain to me what had happened in the accident,
3 show me the accident scene. We actually brought in the
4 vehicles and placed them based on the police markings on
5 the roadway to as close as possible where the vehicles
6 were at different points -- did not see the motorcycle at
7 that point.

8 While the vehicles were there I also examined the
9 vehicles and then when we were done with the vehicles we
10 also examined the scene. When I say examined I mean I
11 look at them visually. I measured them. I get name plate
12 information off the vehicles. I make measurements of the
13 vehicles, take photographs. Likewise, with the scene I
14 measure the scene. I walk the scene back and forth. I
15 make measurements. I do hand sketches, things like that.

16 Q Okay. And when you did your investigation of the
17 scene it was a couple of weeks after the accident;
18 correct?

19 A Approximately two weeks after the accident.

20 Q The physical skid marks were still present?

21 A The motorcycle skid marks are still present.

22 Q Okay.

23 A And there was a police -- orange or red paint marks
24 the police had made on the roadway were still there. The
25 gouges were still there.

1 Q Okay. And when you were there Eric Pruitt -- let me,
2 if I can, refresh. Eric Pruitt was driving the Waste
3 Management truck?

4 A Yes.

5 Q Tell me about that. He just happened to---

6 A He was coming through and we asked him if he could
7 position his vehicle where it was at the time of the
8 accident.

9 Q Okay.

10 A And I confirmed his position because the bottom of
11 the engine of his truck had an oil leak and I knew where
12 the -- I measured where that was on his truck and there
13 was a grease spot on the roadway and so I assumed his
14 position of his truck was approximately -- the drip from
15 the engine would be approximately the middle of the oil
16 spot on the roadway.

17 During the police investigation I should note that
18 his vehicle was required to stay there for quite a bit of
19 time; so it developed a pretty nice grease spot.

20 Q I got you. I got you. Very good. And there was --
21 you were out there. It was during a workday and there was
22 activity and Mr. Pruitt happened to be one of the trucks
23 coming through; is that right?

24 A Yes, sir. He was delivering waste to the landfill as
25 I understand it.

1 Q Okay. And when you did this examination of the scene
2 as part of your accident reconstruction you said you
3 examined the vehicles. Specifically, what vehicles are
4 you referring to?

5 A I examined, as I said, Mr. Pruitt's Waste Management
6 truck.

7 Q Okay.

8 A Actually, it is not his -- his company's truck. I
9 examined the broom which is a Ford tractor with a sweeper
10 attachment on the back that Mr. Tindel was operating. I
11 looked at the scraper. Some people call it a pan. I
12 think in this trial we've been calling it a scraper --
13 that Mr. Lewis was operating. I did not get to observe
14 the motorcycle at this time.

15 Q Okay. But you ultimately did see---

16 A I did see that in 2011.

17 Q Okay. All right. And with regards to your -- what
18 did you -- specifically with the scraper, what did your
19 vehicle inspection involve? What did you look at?

20 A Well, I looked at the vehicle in general, took
21 photographs of it, looked around the entire vehicle,
22 looked underneath the vehicle looking for anything that
23 might be wrong with the vehicle. I get the name plate
24 information so I can search available data from the
25 vehicle. I watched -- Mr. Lewis actually drove it for me.

1 I sat in the cab, looked around to see different things
2 about the vehicle to see if there was any functional
3 issues with the vehicle that could contribute to the cause
4 of the accident.

5 Q Did you examine the brakes of the scraper?

6 A I looked underneath at them, yes, sir.

7 Q Okay. And we'll get to that in a moment. What did
8 you do next?

9 A Well, I did a similar thing with the Ford tractor and
10 the little broom attachment.

11 Q Okay. And why is it that you're examining all of
12 these vehicles as well?

13 A Well, a part of reconstruction of an accident you
14 need to know -- it's like putting together pieces of a
15 puzzle and each vehicle is a piece of the puzzle and the
16 condition and operation of the vehicle is a piece of the
17 puzzle. The roadway is a piece of the puzzle and I'm
18 collecting information so I can make a complete picture of
19 what happened.

20 Q Okay. And once you gathered all of this information
21 through your viewing the vehicles and the scene as you've
22 just testified, what happens next? What did you do next?

23 A Well, the next thing I would do is, of course, I'd
24 have to photographs developed or review the photographs.
25 Sometimes you can see things in photographs you don't

1 notice the first time you go. I use an AutoCAD program to
2 draw the scene for my measurements. I actually drew all
3 the vehicles and I got specification information on the
4 vehicles to help me with that and did research for
5 recalls, operational specification for the different
6 vehicles to see how that would apply to this accident.

7 Q Okay. And so you took photographs while you were out
8 there. Did you bring -- you brought a notebook with you
9 here today. What is in that notebook?

10 A I have some notes for reference for trial. I have a
11 copy of my report that I published on February 16, 2011.

12 Q Okay.

13 A And explains my -- explains my opinions and my
14 investigation. I also have photographs. I have
15 photograph -- I have a MAIT Team report. I have
16 photographs from the state police the day of the accident.
17 I have the photographs of the MAIT Team and they came
18 about a week later -- of the accident and I have my
19 photographs that I made of the three -- the tractor, the
20 scraper, and the Waste Management truck at the scene and I
21 did those on August 20, 2009 and then I also have
22 photographs of the motorcycle when I examined the
23 motorcycle on January 25, 2011.

24 Q Okay. And so all the photographs that you have
25 either taken or reviewed in this case are -- they're --

1 copies of them are in your---

2 A Yes, sir, they are.

3 Q Okay. And you did a scene drawing, did I hear you
4 say?

5 A Yes, I did.

6 Q Okay. And just for -- this jury is -- or the court
7 and the jury has heard from a prior expert and so they're
8 familiar with scene drawings I believe in general, but is
9 this a copy of your scene drawing which is Defendant's
10 Exhibit 18? Is that copy of it?

11 A Yes, it is.

12 Q Is this a blown-up scene drawing?

13 MR. DETRICK: Can I see it, please?

14 MR. COX: Yes.

15 THE WITNESS: You said that's defendant's 18? Oh,
16 I'm sorry.

17 THE COURT: Mr. Cox, what number is that?

18 Q It's 18. Just if you would, tell the jury what your
19 scene drawing is.

20 A This is a drawing I did shortly after visiting the
21 scene. It is a scale drawing of the roadway and different
22 features of the accident scene. It shows the skid mark,
23 the rest positions as marked by the police and shows the
24 locations of gouges.

25 Q Okay. And did you also do an accident analysis

1 drawing?

2 A Yes, I did.

3 Q And is that Defendant's 19?

4 A Yes, it is.

5 Q Okay.

6 A And -- go ahead.

7 MR. DETRICK: No objection.

8 Q Generally speaking, can you tell the jury what your
9 accident analysis drawing is?

10 A Okay. What this is the scene drawing we saw in
11 Exhibit 18 except I've added the vehicles and placed them
12 in different positions on the scene. I've got data
13 information about different events in the accident,
14 identified different things as I reconstructed the
15 accident. As the other expert said, we kind of work
16 backwards and we work from basic information to more
17 detailed information; so the first Exhibit 18 was basic
18 and then this is more detailed where I've added the
19 drawings of the vehicles and the motions of the vehicles,
20 et cetera.

21 Q And we're kind of brushing over this to some extent
22 right now because did the placement of the vehicles pretty
23 much correspond with Mr. Kennett's testimony?

24 A Well, at the rest positions.

25 Q Rest positions.

1 A Yes, sir.

2 Q Right. Okay. So like -- okay.

3 A I can explain that in more detail.

4 Q Okay. Let's do that. Well, let's go through and
5 then come back to that.

6 A Okay.

7 Q Okay? Now, with regards to the photographs you've
8 provided me with -- you've got a complete set of all the
9 photographs you've took or reviewed, but you provided me
10 -- you provided a selected set for illustration for the
11 jury; is that right?

12 A Yes, sir, I have.

13 Q Rather than going through each and every photograph
14 that was taken we've pulled some out. Let's go through
15 those, if we could --

16 A Okay.

17 Q -- okay? The first one is Defendant's Exhibit 6 and
18 I believe the plaintiffs have already seen the photographs
19 and have no objection.

20 MR. DETRICK: No objection, Your Honor.

21 MR. COX: Can we do the lights?

22 Do you have a pointer?

23 THE WITNESS: Yes, I do.

24 Q Now, what are we looking at here? Can you tell the
25 jury, please?

1 A This is a photograph taken by the state police on the
2 day of the accident and this is the scraper. This is the
3 front left wheel of the scraper and this is a mark made by
4 the left front wheel of the scraper.

5 Q On the day of the accident?

6 A On the day of the accident. There is little orange
7 dots. There is a dot there and a dot here put there by
8 the state police.

9 Q Okay. What's important about this photo?

10 A Okay. As I said, I examined the scraper. The
11 scraper is like a truck in that it has air brakes and like
12 a large truck -- a lot of large vehicles have air brakes
13 versus automobile. We have hydraulic brakes. Like a
14 truck all four wheels of the scraper are controlled by air
15 -- an air cylinder diaphragm device air cylinder at each
16 wheel except the front wheels are undersized and that's
17 important for any kind of a heavy vehicle like a truck on
18 our highway even such that the front wheels cannot be
19 locked up.

20 Q You're talking about the brakes are undersized?

21 A The brakes are slightly undersized so that the brakes
22 will not lock up. That's so you can maintain steering
23 control for your truck or in this case a scraper.

24 Q Just to be clear that's by design for a scraper like
25 that?

1 A That is by design, by experience. At one point they
2 had them where they would lock up and that was a mistake;
3 so they undersized them slightly so they would not lock up
4 so you maintain steering. However, the rear brakes can be
5 locked up. You can actually stop the tires from rotation
6 and you can slide them on the road. That's true with the
7 scraper as well.

8 Now, as this vehicle came to a stop it left a mark
9 and you can tell the wheel was still rotating as it was
10 coming to a stop because you can see the individual cleat
11 marks in the tire. The tire had cleats. You can see
12 those marks on the roadway and you can see that the width
13 of the marks is approximately the same width as the tire
14 itself. It is a little heavier on one side than the other
15 indicating that the vehicle was moving this way a couple
16 of inches as it made the turn. So it was a stopping turn.

17 Q Okay. And you know this information because you
18 examined the brakes of this particular scraper?

19 A I examined the brakes, this photograph, and it's a
20 similar braking system as trucking systems.

21 Q Okay. And was there anything wrong with the brakes
22 on this?

23 A As far as I could tell there was no functional issue
24 with the brakes.

25 Q Okay. And there was no modification to the brakes?

1 A No, sir.

2 Q It was the same as manufactured---

3 A They were factory brakes.

4 Q Okay. Now, let's move to the next photograph which
5 is Defendant's Exhibit 8. Is that the one to go to next?

6 A This is fine.

7 Q Okay. What are we looking at here?

8 A These are the rear tires of the scraper and as you
9 can see there is a skid mark after the left rear wheel and
10 that was left when this wheel stopped turning and it
11 started sliding on the road and left this black mark.

12 Q Okay.

13 A And this wheel on the scraper is approximately 6 feet
14 in diameter. The diameter of the -- when I stand next to
15 this machine the top of my head is about the same as the
16 top of the wheel. So, it's a big wheel and so using that
17 as a reference you can see that this skid mark here is
18 approximately 5 feet long.

19 Q Okay. What does that -- what does that indicate to
20 you?

21 A It tells me this rear tire was sliding for
22 approximately 5 feet. He had full braking for about
23 5 feet.

24 Q Okay. Based on your review of the---

25 A There is another photo --

1 Q Okay.

2 A -- I want to show. It is the one with the front tire
3 again.

4 Q Okay. Moving on to Defendant's 7.

5 A Okay. Once with gain we have the scraper. This is
6 the front left wheel. That's the cleat mark, tire mark we
7 saw before. Then you have a dirt pattern here and then
8 you have police dots at different places and you have
9 another black mark down here. It looks like some sort of
10 a tire mark.

11 Now, there is a tire mark here and then there is a
12 gap and then there is another tire mark. This tire mark
13 is a sliding tire mark. Notice there are no cleat marks
14 there. There are cleat marks here, but not here. It is
15 my opinion that this is a different tire from this tire --
16 that if this wheel had made these marks you would see
17 cleat marks here just like you see up here.

18 So, my other learned colleague on the other side---

19 THE COURT: No, sir. Don't be comparing witnesses.

20 THE WITNESS: Okay.

21 THE COURT: That's for the jury to do.

22 THE WITNESS: Okay. It is my opinion that the mark
23 made by this tire begins about here and goes to here and
24 then this is separate tire mark from a different vehicle,
25 a different event.

1 Q Okay. Now did you determine the speed of the scraper
2 at the beginning of its braking?

3 A Say that again, sir.

4 Q What did you determine with regard to speed of the
5 scraper?

6 A Okay. Based on this analysis of the markings here
7 and the rear tire mark that we saw in the previous exhibit
8 the stopping distance for this vehicle under braking was
9 approximately 5 feet. Using a factor -- a drag factor of
10 .3 that would give us a speed of approximately 7 miles an
11 hour.

12 Q Okay.

13 A So at the beginning of the skid mark the scraper was
14 going 7 miles an hour.

15 Q Okay.

16 A Give or take a mile an hour.

17 Q And is the .3 -- is that the same drag factor that
18 the plaintiff's expert used?

19 A Yes, it is.

20 Q For the scraper?

21 A Yes, sir.

22 Q Okay. And when the scraper brakes when he puts on
23 his brakes and you've heard the testimony that he applied
24 his brakes when signaled by Mr. Tindel, does that lock up
25 the rear brakes?

1 A You -- just like in a car if you locked up the brakes
2 then you'll leave a skid mark.

3 Q And that rear skid mark indicates the brakes were
4 locked up and slid 5 feet?

5 A Approximately 5 feet, yes, sir.

6 Q And that -- okay. Very good. And that 5 feet with
7 plaintiff's experts -- you agree with the .3 G's?

8 A Yes, sir. That's a fairly accepted value for a dirty
9 asphalt road.

10 Q And that tells you at the beginning of braking that
11 scraper was going you said approximately?

12 A Approximately 7 miles an hour.

13 Q Not 17 miles an hour?

14 A No, sir. I think there is another one I gave you
15 that shows more of the wheel, the rear of the wheel. Did
16 I do that?

17 Q You may. Why don't you check and see, if that's
18 important to talk about then.

19 A Okay. I'll look real quick. I guess this is the
20 closest view.

21 Q Okay. Going to the next photograph.

22 A Okay.

23 Q Defendant's Exhibit 9. What are we looking at here?

24 A This is a photograph taken by the state police on the
25 day of the accident. We see the scraper here, the left

1 front wheel again. Back here is Mr. Pruitt's Waste
2 Management truck. Here is the motorcycle and this is the
3 area marked by the police is where Mrs. Valenzuela came to
4 rest.

5 Q Okay. And why is that important?

6 A It shows the rest positions of four factors of the
7 accident: The scraper rest position, Mr. Pruitt's rest
8 position, the motorcycle rest position, and
9 Mrs. Valenzuela's rest position.

10 Q And what is important about the rest position --

11 A Well --

12 Q -- of each of those?

13 A -- experts -- we have to work backwards and we work
14 with mathematical equations with two unknowns and it's
15 easier to do the math if one of your unknowns is zero and
16 so if you look at speeds and timing of vehicles we know we
17 assigned this times zero and we know that all the vehicles
18 are stopped. They're traveling at speed zero and so
19 that's where we start from and we work backwards.

20 Q Okay.

21 A So this is my starting point for calculations and
22 everything.

23 Q Very good. Now, what does the motorcycle in the left
24 lane indicate?

25 A Okay. As we follow the motorcycle backwards -- and

1 we've seen this before -- going backwards the motorcycle
2 flipped from the right side to the left side. It's
3 sitting on its left side right now. Prior to that there
4 were a series of gouges made by the right side guard of
5 the motorcycle and then that leads us back. The
6 motorcycles comes back across the yellow line to the right
7 lane and there's a yaw mark on the road and that leads
8 into a skid mark that goes down the road back toward the
9 curve.

10 Q Okay.

11 A What I am interested in is determining the motion of
12 all of the vehicles starting from the zero-point of the
13 rest positions.

14 Q Okay. And as far as Mrs. Valenzuela can you point
15 where she unfortunately came to rest?

16 A She came to rest right here. It was marked by the
17 police by an orange dot approximately here for the head
18 location and two spots down here for the feet location.

19 Q And did that---

20 THE COURT: Hold on. Hold on one second. She might
21 need to walk out.

22 Are you okay, ma'am?

23 (Whereupon, a female exits the courtroom.)

24 Q With regards to when -- when were the passengers
25 ejected from the motorcycle?

1 A Could you -- there is another slash showing up the
2 road.

3 Q Okay.

4 A It would be better to show that -- the yaw mark; the
5 motorcycle yaw mark.

6 Q What are we -- this is Defendant's Exhibit 10.

7 A No. This is the beginning of the skid mark.

8 Q Okay. So you want to go---

9 A Go a different view.

10 MR. COX: May I approach the witness, Your Honor?

11 THE COURT: You may.

12 Q Which one you want me to start with, sir?

13 A Okay. This one right here.

14 Q The next one we'll show, Your Honor, is Defendant's
15 Exhibit 12.

16 A Okay. This is a MAIT Team photograph taken about a
17 week after the accident. If you'll recall the scraper was
18 parked about here -- came to rest here. The motorcycle
19 came to rest here. Mr. Pruitt's truck was here and
20 Mrs. Valenzuela came to rest there. This is the
21 motorcycle skid mark ending and becoming a yaw mark
22 curving this way and then you have the gouges going toward
23 the motorcycle. One thing I should note is that Isaac
24 Newton in the '1600's discovered the laws of motion and
25 quantifying them mathematically and that's what engineers

1 use to study the motion of vehicles and objects and things
2 like planets -- anything, bullets, cars, things like that
3 and one of the rules that he discovered is that a body in
4 motion continues in motion and it continues in a straight
5 line unless it's acted upon. It doesn't speed up or slow
6 down unless it's acted upon to slow down. It doesn't
7 change direction unless it's pushed to change direction.

8 In this case here the motorcycle was pushed to the
9 left by a steering input. That's what causes these yaw
10 marks or skipes (phonetic) as some people call them in the
11 roadway that indicates a steering input and from
12 Mr. Valenzuela's deposition he indicated he intended to
13 lay down the motorcycle in this area and when he did that
14 I'm assuming he intended to move the wheels forward,
15 but -- the motorcycle between him and the space ahead of
16 him, but the laws of physics wouldn't allow him to do
17 that.

18 The motorcycle weighs about 730 pounds and it -- with
19 the passengers it weighs over 1,000 pounds -- close to
20 1,090 pounds with both of them on the motorcycle as well.
21 So, instead of he is going -- let me see. He is going
22 like this. He intended to turn it like this, but because
23 the weight of the motorcycle it fell on its right side. I
24 think he was trying to lay it on its left side. That is
25 how most people describe wanting to lay down the bike,

1 want to put the bike in front, but physics doesn't allow
2 that to happen and so it makes him fall onto his right
3 side and as he falls on his right side Mrs. Valenzuela
4 becomes disconnected from the motorcycle.

5 So Mrs. Valenzuela left the motorcycle somewhere in
6 this area, continued in a straight line to where she came
7 to rest up here. So, at one point when the motorcycle is
8 laying over -- and it's called high-sided. She was
9 high-sided or thrown through the air until she impacted
10 the roadway and she would have tumbled to here. The
11 motorcycle, however, has a steering input, but once that
12 steering input ends you can see the gouges go in a
13 straight line following Isaac Newton again. There is no
14 longer a steering input. Once the motorcycle is on its
15 side, you have lost all steering control and you've lost
16 all braking control and so the motorcycle is just going to
17 go where it wants to go and that's what astronauts call
18 Isaac Newton is steering the vehicle because space ships,
19 motorcycles, everything follows the same rules.

20 So, once the steering input ended and the motorcycle
21 is on its side it slides over here. It is rotating as it
22 slides around. Mr. Valenzuela is still attached to the
23 motorcycle probably because he's hanging onto the handle
24 bars. Mrs. Valenzuela doesn't have anything substantial
25 to hang on to; so she -- there is no seatbelts on

1 motorcycles; so she's going to separate. So---

2 Q At what point does she separate from the motorcycle?

3 A Mrs. Valenzuela separated right in here.

4 Mr. Valenzuela separated when the bike flipped from the
5 right side to the left side.

6 Q Did you determine the cause for her separation from
7 the motorcycle?

8 A It is the centrifugal force of the motorcycle making
9 this turn.

10 Q And when did that happen?

11 A When Mr.---

12 MR. DETRICK: Your Honor, I object. Are we allowed
13 under our court rules as you know the take depositions and
14 to determine his opinions prior to trial. I object
15 because this is nothing that he has given his opinion at
16 any time prior to this date and not in his deposition.
17 Not that it matters, but...

18 MR. COX: Judge, that's---

19 THE COURT: Hold on. Y'all see me over here.

20 (Whereupon, a bench conference was held.)

21 THE COURT: Let's take a quick bathroom break. Don't
22 deliberate. Lunch will be here about 1 o'clock. Fair
23 enough? Where's my smokers?

24 (Whereupon, the jury exited the courtroom at 11:24.)

25 MS. PAYNE: Your Honor, just briefly before we break

1 during -- and I would let Trey address this, but he
2 doesn't know this. During the break when Trey was
3 questioning Mr. Smith Mr. Detrick came back and made a
4 very loud comment that the jurors heard including a cuss
5 word and I would just ask the court to instruct him no
6 further---

7 THE COURT: I didn't hear it.

8 MS. PAYNE: Well, I know I heard it.

9 THE COURT: Well, okay.

10 MR. COX: I actually heard it too.

11 THE COURT: Oh. Great.

12 Mr. Detrick, you know better than that. If you said
13 anything improper, please---

14 MR. DETRICK: I hadn't made any remarks that the jury
15 heard.

16 THE COURT: Well, listen. We've been very good.
17 We're getting down to the fourth day. Let's all behave
18 like ladies and gentlemen, please.

19 (Whereupon, a break was taken.)

20 THE COURT: Mr. Detrick, did you get your question
21 answered?

22 MR. DETRICK: Yes, sir. It is exactly like I
23 thought. It is nothing in his report or his deposition
24 that gave any opinion regarding Mrs. Valenzuela -- when
25 she came off and what effect, if any, that had on this

1 wreck.

2 THE COURT: Mr. Cox, you know the rules. You got to
3 supplement your interrogatories and tell us what he is
4 going to testify.

5 MR. COX: Your Honor, first off, Mr. Detrick has not
6 taken Mr. Smith's deposition in this case and, you know---

7 THE COURT: Okay.

8 MR. COX: He certainly had the opportunity to.

9 THE COURT: Very well. That answers that.
10 Is that correct? You didn't take his deposition?

11 MR. DETRICK: No, sir. Before you bring them in--

12 THE COURT: Hold on.

13 THE BAILIFF: Hold on for a minute.

14 MR. DETRICK: -- there is an agreement and there is
15 an order that the depositions in Michael Valenzuela's case
16 and Christie's Valenzuela's case were going to be
17 consolidated for discovery purposes. All discovery was
18 consolidated.

19 THE COURT: Well, you took it in---

20 MR. DETRICK: And I took it in Michael Valenzuela's
21 case.

22 THE COURT: What does it say in that deposition? It
23 does not mention it?

24 MR. DETRICK: It does not mention it, Your Honor.

25 MR. COX: Your Honor, I can't help if he doesn't ask

1 the right question. I can't control what he asks in his
2 deposition, but I'm not aware of an order requiring these
3 things being consolidated for discovery.

4 THE COURT: So, what is the opinion you want to
5 elicit?

6 MR. COX: All I'm saying is that based on this whole
7 thing where she ended up she came off the motorcycle when
8 it was in its lay-down. That's it.

9 THE COURT: I don't think that's a question. I think
10 everybody said that. I'll allow you to ask it.

11 MR. COX: Thank you, sir.

12 THE COURT: Bring them in.

13 (Whereupon, the jury came into open court at
14 approximately 11:37.)

15 Q Mr. Smith, do you have an opinion to a reasonable
16 degree of engineering certainty when Mrs. Valenzuela was
17 ejected from the motorcycle?

18 A Yes, sir.

19 Q When?

20 A At the point where the motorcycle was steered to the
21 left and fell over on to its right side.

22 Q Okay. Is that when Mr. Valenzuela was laying the
23 motorcycle down?

24 A Yes, sir.

25 Q Now, did you make -- you've provided us with few

1 photographs of the motorcycle skid mark?

2 A Yes, sir.

3 Q Okay. What other conclusions shall we draw -- what
4 other opinions do you have from those photographs?

5 A Maybe show the one that shows the beginning of the
6 skid mark.

7 Q Okay.

8 A It has the little bracket on it.

9 Q That's Defendant's Exhibit 10. What are we looking
10 at there, Mr. Smith?

11 A This is a photograph taken by the MAIT Team of the
12 motorcycle skid mark going through here. They marked the
13 little bracket right here to mark where they think the
14 beginning of the skid mark is and they put little dots
15 along to preserve it and then you can see the yaw to the
16 left here.

17 One of the things I did was to examine the
18 motorcycle. I examined the motorcycle on January 25, 2011
19 and did research on the motorcycle for recalls, et cetera.
20 The motorcycle has a hydraulic braking system similar to a
21 car. The front wheel has two disc brakes on it, two discs
22 and two calipers. The rear wheel has one disc and one
23 caliper and that's because approximately 70 percent of the
24 braking power of a motorcycle is on the front wheel; so it
25 needs two discs to get rid of heat. You're converting

1 motion into heat. That's what a brake system does.

2 Q Were those brakes operational during your inspection?

3 A Yes, sir. I examined the brakes. I examined the
4 pads, the rotors, the hydraulic fluid reservoirs for the
5 pedal and hand grips. I examined -- when you operated
6 each pedal to hand grip that the calipers actually
7 functioned. I saw nothing wrong with the brakes. There
8 were no recalls for the brakes. There was a recall for a
9 similar model built in a different plant, but this
10 motorcycle was built in York, Pennsylvania.

11 Q Okay.

12 A So it didn't apply in this case.

13 Q Did you make any determinations with regard to speed
14 based on your investigation?

15 A Yes, sir. That was important to know if all of the
16 brakes are functioning so we know that the brakes are
17 capable of functioning. In a normal emergency situation
18 if someone perceives there is an emergency, then they're
19 going to try to stop as best they can. In a car you put
20 the pedal to the floor board if you can. You stop it as
21 best you can and when you do skid like this you lose some
22 of braking efficiency, but not a lot. That's why you have
23 ABS on your car -- so you don't skid and so you get better
24 efficiency. It keeps the tires rotating slightly.

25 In a motorcycle in a panic stop a lot of times people

1 do skid, especially in a rear tire. Just because a tire
2 doesn't show a mark doesn't mean you're not using it for
3 brakes. When you do a lot of stopping you don't leave a
4 mark. In a proper motorcycle stop you would not leave a
5 mark if you were doing it as you should. That doesn't
6 always happen in a panic situation.

7 THE COURT: It doesn't happen when?

8 THE WITNESS: It does not always happen in a panic
9 situation.

10 THE COURT: Panic?

11 THE WITNESS: Panic. I'm sorry.

12 Q What is proper operation of the brakes?

13 THE COURT: In a panic situation or regular?

14 MR. COX: In any situation.

15 THE COURT: In any situation?

16 Q Strike that question.

17 A Okay.

18 Q Did you make any assumptions with regards to braking
19 in your analysis of speed?

20 A My assumption is that he would use braking -- the
21 maximum braking he could develop on the motorcycle so he
22 could stop as soon as possible.

23 Q Okay.

24 A That would involve using front and rear brakes.

25 Q Is that what's also referred to as full braking?

1 A As full braking, yes, sir.

2 Q Okay. And what did you use -- what drag factor did
3 you use? Can you speak to -- you analyzed it under full
4 braking which is both brakes and how did you arrive at
5 speed if you can speak to that to the jury, please?

6 A Based on the Society of Automotive Engineering
7 Testing of motorcycle braking there's a range of stopping
8 efficiencies for motorcycle. The middle range is
9 approximately .7. For a rear tire it's approximately .3.
10 So, you're getting more than twice the braking power if
11 you use front and rear and so what I -- the analysis I did
12 working backwards again I assumed a friction value of .7
13 for the motorcycle skid mark and so at the beginning of
14 the skid at this little bracket point here I had estimated
15 based on calculation from starting where the motorcycle
16 stopped to this point here that at this point the
17 motorcycle is traveling somewhere between 57 and 51 miles
18 an hour with the mid-range of around 54 miles an hour.

19 Q Okay. And that friction value of .7 -- you were here
20 when Mr. Kennett testified. He agreed with your friction
21 value, did he not, on full braking?

22 A Yes, sir.

23 Q Okay. And that's pretty well established in the
24 engineering field?

25 A It is.

1 Q Okay. Now and you heard Mr. Kennett testify. He
2 assumed -- he assumed rear-only braking in his
3 calculations. Does that sound accurate?

4 A Yes, sir.

5 Q Okay.

6 A That's my understanding.

7 Q What are your opinions with regards to those
8 differences -- whether or not it was full braking or
9 rear-only braking?

10 A Well, it's my opinion that if someone is proficient
11 on riding a motorcycle and knows how to operate their
12 motorcycle they would know how to stop in the most
13 efficient manner or close to the most efficient manner.

14 Q Okay.

15 A And the same thing with a car or any kind of a
16 vehicle, if you want to stop you should know how to stop
17 the fastest way possible.

18 Q Okay. Did you make any determinations as to based on
19 your view of the evidence where the skid mark starts
20 regarding the varying braking had he used mid -- just rear
21 brake and some front brake and stayed upright---

22 THE COURT: Mr. Cox, please ask that question again.
23 I'm sorry. I just can't---

24 Q What are your opinions with regards to the varying
25 degrees of braking that Michael Valenzuela had he used

1 the varying degrees of braking? Can you speak to that
2 with regards to whether or not Michael Valenzuela -- had
3 he just used mid-range braking, full braking -- how he
4 would have stopped in this accident had he stayed upright?

5 A It's a really wide range if you do that. We have to
6 -- if he was using rear-only braking then my calculations
7 matched Mr. Kennett's calculations.

8 Q Okay. And---

9 A If he is using full braking Mr. Kennett did a
10 calculation. His numbers were between 53 and 57 where
11 mine were between 51 and 57; so we basically agreed.

12 Q Good.

13 A The only difference is we disagree that he -- I'm of
14 the opinion that he was using full braking. Mr. Kennett
15 is of the opinion he was using rear-only braking.

16 Q Okay. Rear-only braking -- had Mr -- had
17 Mr. Valenzuela been traveling at speeds he testified --
18 you were here, correct, when he testified?

19 A Yes, sir.

20 Q Okay. And he was traveling at the speeds of he says
21 between 40 and 45?

22 A I believe it was 42 to 50.

23 Q Okay. That was Mr. Kennett's?

24 A And my math is approximately the same if I'm assuming
25 rear-only breaking.

1 Q I want to ask you if Mr. Valenzuela was traveling at
2 speeds between 40 and 45 at the beginning of the skid mark
3 had he stayed upright applying only rear braking would he
4 have been able to stop?

5 A Yes, and if I could refer to Exhibit 19 which is
6 the --

7 Q Okay.

8 A -- analysis.

9 Q Okay. Let me grab the easel.

10 I beg the court's indulgence.

11 THE COURT: Turn the lights on.

12 THE WITNESS: I think I am done with the slides.

13 THE COURT: You got a slide or you got easel?

14 MR. COX: I've got an easel, Your Honor.

15 THE COURT: All right. Turn the lights on.

16 MR. COX: Can I ask the witness Mr. Smith to come
17 down?

18 THE COURT: You may.

19 MR. COX: This is Exhibit 19.

20 MR. DETRICK: This is the same boards?

21 MR. COX: Same boards.

22 Q If you would explain to the jury---

23 A Okay.

24 THE COURT: Can y'all see?

25 THE JUROR: No, sir.

1 THE COURT: It takes a little while for it to come
2 up. Can everybody see?

3 MR. COX: Okay.

4 THE COURT: Mr. Detrick, you got to move a little
5 bit.

6 THE JUROR: Closer.

7 THE COURT: All right. Can everybody see it now?

8 Mr. Detrick, why don't you go right back over there?
9 Can you see from back there? Your eyes that good?

10 MR. DETRICK: I couldn't see it. It don't matter.

11 MR. COX: Your Honor, I may have a PDF we can put on
12 the projector.

13 THE COURT: Let's do that.

14 THE BAILIFF: Lights on?

15 THE COURT: Off. Move the board.

16 What number is it?

17 THE WITNESS: It is the Exhibit No. 19. It is the
18 same as on the large board.

19 THE COURT: Can you project it?

20 MR. COX: I will find out.

21 THE COURT: Give it to one of those technicians back
22 there. They know how to do it.

23 Can y'all all see it? Sir, can you see it? All
24 right.

25 Q Okay. Mr. Smith, can you see that okay?

1 A Yes, I can see it fine. Can you scoot it down some
2 to start with? Scoot it all the way down to the top.
3 There you go.

4 THE COURT: I have always wondered, is scooting down
5 an engineering term?

6 THE WITNESS: It is a vernacular.

7 Q Mr. Smith, what are we -- what are -- what does this
8 demonstrate?

9 A Okay. I'm showing you -- this shows -- I am showing
10 the motion of the motorcycle. This is the motorcycle here
11 at different points. This is the motorcycle at the
12 beginning of the skid mark. You got the front tire -- I
13 mean -- I'm sorry -- the rear tire placed on the skid mark
14 and this is one second to the skid mark and this is one
15 and a half seconds prior to the skid mark. This is the
16 perception reaction point where he would have first seen
17 the scraper which would be down here. This is where, of
18 course, Mr. Valenzuela is thinking about -- he's seen
19 what's happening, deciding what to do, and then this is
20 when he begins to take action. Actually, you would begin
21 to take action up in here. The action actually happens
22 right there and I've got the time and the distance to the
23 skid mark. That's 123 feet to the skid mark, one and a
24 half seconds. This is -- I'm showing this with the
25 motorcycle traveling at a speed of 54 miles an hour.

1 Q Why do you use 54?

2 A That is the mid-range of my calculation between 51
3 and 57.

4 Q Okay.

5 A That would assume full braking in the skid mark and
6 this little line right here is the skid. This is the
7 85-foot point. There is the yaw.

8 Q What does the 45 number indicate?

9 A I have two numbers -- a 45 and a 57. Those were -- I
10 think your previous question is given different kinds of
11 braking, what would happen. From an engineering point of
12 view it's easier to take the most extreme ends and see
13 what happens on the ends -- the maximum and the minimum.
14 And so if Mr. Valenzuela began stopping at this point just
15 like he did but he was going 45 miles an hour at the
16 beginning of the skid mark he would stop at about where
17 the number 45 is which is well before the intersection.
18 This is about where he would stop.

19 If Mr. Valenzuela was going 57 miles an hour and he
20 began to stop at the same point he would stop at about the
21 57. This is assuming he stays up on his tires and he uses
22 his brakes properly.

23 Q Okay. Now, are those your opinions with regards to
24 the stopping position of 57, 45 -- at 57 miles per hour
25 and 45 miles per hour as you just discussed -- are those

1 your opinions to a reasonable degree of engineering
2 certainty?

3 A Yes, sir, and that's because I have done it
4 mathematically and I've also done it with my car and also
5 observed a motorcycle stopping at 50 miles an hour and
6 60 miles an hour that showed that these placements are
7 approximately right.

8 Q Okay. And that motorcycle did that performance on
9 Redds Branch Road?

10 A Did a---

11 Q You tested it?

12 A It was August 15, 2012 -- had a motorcycle come down
13 Redds Branch Road at 50 miles an hour and at 60 miles an
14 hour.

15 Q And even at 60 miles an hour? Okay.

16 A Yes, well, because the other expert's high side of
17 his opinion was 50 miles an hour and my high side would be
18 around 60. So, we tested the motorcycle braking at 50 and
19 60 and it would stop before the intersection.

20 Q Okay.

21 A Both cases.

22 Q And that was utilizing proper braking or full braking
23 and just rear and just front?

24 A We did the test at 60 miles an hour with full
25 braking.

1 MR. DETRICK: Can I ask -- I'm sorry to interrupt.
2 What test -- are you talking about the test---

3 THE COURT: What test are you talking about?

4 MR. COX: The ones he's just testified to and this
5 whole line of questioning.

6 THE COURT: That's when he came out there with a
7 motorcycle a couple of years -- a weeks ago, I guess.

8 MR. DETRICK: Is that when you're talking about?

9 MR. COX: Yes.

10 MR. DETRICK: When Mr. Dawes was out there?

11 MR. COX: You get to ask him questions.

12 THE COURT: Sir, he is asking you a simple question.
13 Which test are you talking about?

14 MR. COX: Yes, yes.

15 THE COURT: Well, answer him. Y'all be nice to each
16 other. We're not trying to hide anything.

17 Q All right. Continue on with varying speeds during
18 that test.

19 A Yes, Mr. Dawes is riding -- was driving the
20 motorcycle and I was observing and instructing him and we
21 did four tests. We did them twice. The first test was
22 full braking at 50 miles an hour and then we did full
23 braking at 60 miles an hour and both cases we did stop
24 before the intersection and then he did front-wheel only,
25 no rear brake at all at 50 miles an hour and he stopped

1 before the intersection and then he did rear-braking only,
2 no front brake, at 50 miles an hour and he stopped in the
3 intersection.

4 Q Okay. Now what are your conclusions with regards to
5 your investigation in accident reconstruction?

6 A My primary conclusion for this case is that this
7 accident would not have happened if the motorcycle had not
8 been laid down and crashed into the roadway.

9 Q And is that your opinion to a reasonable degree of
10 engineering certainty?

11 A Yes, sir.

12 Q What other conclusions did you reach?

13 A Well, the fact that the motorcycle was laid down you
14 lose braking control. You lose steering control and if
15 the motorcycle had stood up on its wheels and used proper
16 braking then the motorcycle could have come to a stop
17 before the intersection.

18 I also have another one. There is an image of the
19 scene -- my recreation of the scene. I forgot to mention
20 that.

21 Q And is that last opinion expressed to a reasonable
22 degree of engineering certainty regarding if he had stayed
23 upright he would have stopped before the intersection?

24 A Yes. This one.

25 MR. COX: Your Honor, Defendant's Exhibit 17.

1 What are we looking at here, Mr. Smith?

2 THE WITNESS: This is the recreation of the accident
3 scene that I did on my visit on August 20, 2009.

4 Q Okay.

5 A It shows the scraper, the Waste Management truck, the
6 broom at their approximate locations -- this one based on
7 the grease mark, this one place based on the police mark,
8 and this one just based on where --

9 Q Mr. Tindel?

10 A -- Mr. Tindel, yes -- where Mr. Tindel said he was.

11 Q Okay.

12 A And approximately here is the rest position of the
13 motorcycle and this is approximate location where
14 Mrs. Valenzuela came to rest. There was still grease from
15 the motorcycle at the time I was there along with the
16 paint markings. There was still staining of the roadway
17 here as well.

18 Anyway, besides braking and stopping before the
19 intersection, also there is a clear lane here as well?

20 THE COURT: There is what?

21 THE WITNESS: He didn't have to stop. There is a
22 clear lane up through here because there is no vehicles
23 blocking this lane.

24 Q Okay. And this is recreating the scene as you
25 understand it from the evidence that it would have looked

1 like at the end of this incident?

2 A Yes, sir.

3 Q As far as the placement of the vehicles?

4 A Yes, sir. And it looks similar to the state police
5 photographs with the exception of the tractor. It shows
6 Mr. Pruitt's truck and Mr. Lewis' scraper where they -- in
7 these positions.

8 Q Did your investigation reveal whether or not the
9 scraper ever entered into Redds Branch Road?

10 A No, it did not.

11 Q And can you -- how far did it come from Redds Branch
12 Road -- any portion of it?

13 A As it is sitting right here this back fender --
14 corner of this fender is about eight and a half feet from
15 the edge of the road and so I can say that he did not
16 approach any closer than 8 feet.

17 Q Any portion of the scraper?

18 A Right.

19 Q Can you say that to a reasonable degree of
20 engineering certainty?

21 A Yes, sir.

22 Q Okay. And did the scraper stop before entering Redds
23 Branch Road?

24 A Yes, it did.

25 Q And you say that, too, to a reasonable degree of

1 engineering certainty?

2 A Yes.

3 Q Okay. Are we through with the photographs --

4 A Yes.

5 Q -- that are demonstrative?

6 A Yes, sir.

7 Q Okay.

8 We can turn the lights back on, Your Honor.

9 THE COURT: We are getting it done. Thank you for
10 telling me.

11 Q Now, Mr. Smith, I'll just ask you to hold these up
12 since we've already marked these. Just tell me briefly
13 what are these two photographs showing? If you'll
14 reference the exhibit number. Hold those up for the jury,
15 please.

16 A This is Exhibit 15.

17 THE COURT: Let me see it. All right.

18 THE WITNESS: This is the front of the subject
19 motorcycle that Mr. Valenzuela was driving.

20 Q What is important about this photograph?

21 A It shows damage to the right frame. This point right
22 here was sliding on the road.

23 Q And is that to show what---

24 A There is damage to the lights. There is damage to
25 the right side of the motorcycle. There is damage to the

1 fender here. There's -- the lights are broken out. This
2 one is -- these are undamaged, but these are damaged on
3 this side.

4 Q Okay. Does that show what side of the motorcycle---

5 A This shows what side of the motorcycle was down --

6 Q Okay.

7 A -- and it identifies what part of the motorcycle was
8 making the gouges.

9 Q Okay.

10 A And then Exhibit 16 --

11 Q Same thing with that?

12 A -- the same motorcycle, different view, and it is a
13 close-up view of the guard and this point of the guard
14 right here that's worn off, that's what actually made the
15 gouges in the roadway.

16 Q Okay. Now, are there -- after reviewing the
17 Exhibit 17 with the placement of the vehicles, are there
18 any other -- what other conclusions do you have with
19 regards to this case, Mr. Smith?

20 A Well, there's---

21 Q Or have we---

22 A I think we've covered everything.

23 Q Okay. Let me ask you the speed -- you testified
24 earlier that the speed of the scraper at the point of --
25 tell me the speed of the scraper at the point of applying

1 brakes.

2 A I would say it was approximately seven miles an hour.

3 Q Okay. Is that your opinion to a reasonable degree of
4 engineering certainty?

5 A Yes, sir.

6 MR. COX: I beg the court's indulgence, Your Honor.

7 Your Honor, at this time I'd move the photographs --

8 THE COURT: They're in.

9 MR. COX: Into evidence.

10 THE COURT: No objection, was there?

11 MR. DETRICK: No. They're already in evidence.

12 THE COURT: Thank you.

13 (Whereupon, Defendant's Exhibit Nos. 6 - 19 were
14 marked for identification and received into
15 evidence.)

16 MR. COX: I beg the court's indulgence, Your Honor.

17 THE COURT: I just did.

18 MR. COX: One more time.

19 THE COURT: One more time.

20 MR. COX: Okay.

21 THE COURT: It takes a lot of patience to have this
22 job.

23 MR. COX: That's it, Your Honor.

24 THE JUROR: This one, too.

25 THE COURT: All right, Mr. Detrick.

1 MR. DETRICK: I'm coming.

2 CROSS-EXAMINATION

3 BY MR. DETRICK:

4 Q Mr. Smith, let's go to the part you and I agree
5 about. You didn't used the tapping of Mrs. Valenzuela in
6 any of your opinions?

7 A I'm sorry? Say that again.

8 Q You remember Mr. Valenzuela said that his wife
9 Christie did some tapping. You didn't use those in your
10 opinions; correct?

11 A I read that in the deposition, yes.

12 Q You didn't use it?

13 A No, sir.

14 Q All right. Let's start off with these opinions
15 regarding speed that you've given. Now, that seemed to be
16 the -- I'll call it -- you came to the scene August 12 --
17 No, you were hired on the 12th; right?

18 A I was on the scene August 20.

19 Q So the first game plan is let's get the speed up as
20 high as we can get it because you're going to blame
21 Mr. Valenzuela; correct?

22 A No, sir.

23 Q Well, in getting that speed that you arrived at,
24 first off, you and I agree on one part. Your testimony is
25 that this was an emergency situation that Mr. Valenzuela

1 was facing; correct?

2 A That's according to his deposition, yes, sir.

3 Q That is according to your findings and your
4 conclusions; correct? That's what you testified to?

5 A Well, I'm assuming that there was an emergency
6 situation as perceived by the driver and that he would do
7 emergency procedures.

8 Q And I think you used also the words a panic stopping?

9 A Yes.

10 Q Correct?

11 A Yes, I did.

12 Q So it's your opinion that Mr. Valenzuela was placed
13 in a position of having to do a panic stopping; correct?

14 A I believe that's what he was doing, yes, sir.

15 Q And none of that panic stopping, none of that
16 emergency situation that you testified to was brought
17 about whenever he had to do that braking by anything that
18 Mr. Valenzuela would've done; correct?

19 A Do that again. I'm sorry.

20 Q That situation when he was placed in this emergency
21 situation that you've agreed to and this panic stopping
22 which he had to make, he did not -- he did not cause that.
23 He wasn't placed in that position, was he?

24 A No, sir.

25 Q All right. Now we get into the opinions regarding

1 braking. Your opinion is that it was full 100 percent
2 capacity braking by Mr. Valenzuela?

3 A If he's in a panic situation he would put on as much
4 braking as he could.

5 Q In other words, this other stuff that we've heard
6 from the testimony of Mr. Cox about his inadequate braking
7 or whatever, your opinion is he gave it all he had. He
8 gave it the full braking. He did all he could?

9 A That was my assumption that he would use front and
10 rear brakes.

11 Q Okay. So, your situation is he did all he could as
12 far as braking?

13 A Yes, sir.

14 Q All right. And then that assumption that you used
15 though whenever you first went there because you want to
16 get the speed up high you disagreed with what
17 Mr. Valenzuela said about he used rear braking, didn't
18 you? Even though he said it he did it, you said no?

19 A Sir---

20 THE COURT: Mr. Valenzuela.

21 THE WITNESS: Sir, the first thing, I do not -- I
22 work to the facts. My job is to find the facts and I've
23 admitted that if he just used rear braking it would be
24 lower speed. If he used front braking, it would be a
25 higher speed and I work to the facts. I measured the

1 scene as it is. I do not have a dog in this fight; so I
2 don't care what the answer is.

3 Q All right. You don't have a dog in this fight. How
4 much are you being paid for this dog that you don't have a
5 fight in?

6 A I'm paid a salary. I get paid every two weeks the
7 same amount regardless of whether I go to trial or what I
8 do.

9 THE COURT: That's not the question. Answer the
10 question, please.

11 THE WITNESS: What is the question then?

12 THE COURT: How much are you getting paid?

13 THE WITNESS: My salary?

14 THE COURT: For this trial.

15 THE WITNESS: I'm on -- I get paid for 40 hours a
16 week.

17 Q I don't know exactly what that means, but what --
18 this company you work for, how much do they get per hour
19 for your testimony?

20 A The billing rate for my time is \$235 hour.

21 Q All right.

22 A And that goes to the company.

23 Q Yet, you say that your testimony isn't paid for --
24 you're not being paid to come here?

25 A My company is being paid for me to be here.

1 Q All right. We got that straight anyway. You do have
2 a dog in the fight somewhat. You are getting paid?

3 A That's what I do for a living. I investigate
4 accidents.

5 Q I understand that. I am a lawyer. I understand
6 that. Going back to your opinions regarding rear braking,
7 you only -- no matter -- you read the depositions;
8 correct?

9 A Yes, sir.

10 Q You do rely upon and you do read the depositions and
11 you do listen to what other people said about the
12 accident. You weren't there so you have to do that.

13 A I use them as guidelines to help me to understand
14 what's going on in the accident and help me to form
15 hypotheses about what is happening.

16 Q If we can go back then to my original question,
17 Mr. Valenzuela testified that it was rear braking only;
18 correct?

19 A Actually, he mentioned that he used front brakes as
20 well.

21 Q A little bit of front braking right at the very
22 beginning? Very little squeeze; correct? You want me to
23 show you that in the deposition or do you disagree with
24 me?

25 A It seemed to me that he talked about using front

1 brakes.

2 Q Did Mr -- I don't want to dance with you and I'll get
3 the deposition, but Mr. Valenzuela testified he used very
4 little front braking at the very beginning; is that
5 correct?

6 A That's what he says in deposition, yes.

7 Q All right, sir. Now, and you admit that there -- you
8 were sitting here, obviously. You admit there is only one
9 mark in the road and that is put down -- excuse me -- by
10 the rear brakes; correct? On the skid mark?

11 A That's because he locked up his rear wheel.

12 Q And that's what that is?

13 A Yes, sir.

14 Q And there's no evidence of front-wheel braking in the
15 skidding or on the pavement; is that correct?

16 A The front wheels would not necessarily leave a mark
17 even if you're using full front braking.

18 Q I certainly understand that.

19 A That is also true of the rear wheel. It doesn't
20 always leave a mark.

21 Q But, again, there is no evidence of any front wheel
22 braking on the pavement, is there?

23 A Not specifically on the pavement itself, no, sir,
24 except at the end.

25 Q All right, sir. And the -- did you use the MAIT Team

1 reports and their measurements as such in your relying on
2 your opinions that you made?

3 A I use my own measurements.

4 Q Oh, you did?

5 A I made my own measurements of the skid marks and the
6 features of the roadway myself.

7 Q Did you look at the MAIT Team report?

8 A Yes, I did.

9 Q And, of course, you know do they went and
10 investigated it and they found only rear braking, didn't
11 they?

12 A That was their opinion, yes, sir.

13 Q And their opinion was the speed of 41 miles an hour
14 to I think 44 if I am not mistaken?

15 A I believe that's correct.

16 Q Okay. And they really weren't paid to have a dog in
17 the fight?

18 A They're paid to investigate accidents just like I am.

19 Q Just like you?

20 A Yes, sir.

21 Q Now, as far as this -- let me ask you this. This
22 testing you and Mr. Dawes done did is that to a reasonable
23 degree of engineering certainty?

24 A If you mean was it like a track test with markers and
25 timers, no, sir.

1 Q Was it a -- You testified about it. You testified --

2 A Yes, sir.

3 Q -- that you used it to arrive at your opinion?

4 A Yes, sir.

5 Q And I assume any testing that you do at the scene is
6 to a reasonable degree of engineering certainty?

7 A It confirmed that my calculations were correct.

8 Q Mr. Dawes -- Mr. Smith, answer my question, please,
9 sir.

10 A Yes, sir.

11 Q You are an engineer. You do testing?

12 A Yes, sir.

13 Q You did testing this day. Was that testing you done
14 did to a reasonable degree of engineering certainty?

15 A Yes, it was, because it confirmed the calculations I
16 had previously made.

17 Q All right, sir. I am going to hand you up -- we've
18 been provided the results of that testing which you didn't
19 quite go into and I assume that you have them, too. Am I
20 handing you what's the results of the testing you and
21 Mr. Dawes did out there at the scene at Redds Branch Road
22 a few weeks ago?

23 A Okay. This is not my handwriting; however, the
24 numbers appear to be the same as the ones I have on my
25 sheet.

1 Q What you were doing out there -- that testing -- you
2 were standing in a certain location and Mr. Dawes would
3 come around the -- come around at a certain speed and he
4 was supposed to start braking where you were standing;
5 correct?

6 A I was standing -- I had a cone and I was standing at
7 the beginning of the skid mark that the motorcycle left on
8 the day of the accident.

9 Q And then he would start braking and you measured
10 where it came to a stop at?

11 A That is correct.

12 Q And this testing that's done to a reasonable degree
13 of engineering certainty; correct?

14 A Yes.

15 Q Okay. And you testified about that testing before
16 this jury. Well, let's tell the jury a little bit about
17 what was going on out there. First off, it wasn't even --
18 it wasn't even close to a motorcycle like Mr. Valenzuela
19 was operating, wasn't it?

20 A It had two wheels and motorcycles tires --

21 Q And it had---

22 A -- and motorcycles brakes.

23 Q And that's about the only thing you can say about
24 similarities of the two motorcycles; correct?

25 A Motorcycles behave very similar to each other.

1 Q Mr -- There are motorcycles that are very long and
2 some that are very short. There are some that have wide
3 tires. There's some that have smaller tires. There are
4 some that have different braking systems. Whatever. A
5 lot of them out there are different, aren't they?

6 A There's a lot of different configurations of
7 motorcycles, yes, sir.

8 Q And this motorcycles y'all had out there was
9 Mr. Dawes' little scooter motorcycle, whatever I call it?
10 It wasn't like Mr. Valenzuela's, was it?

11 A It wasn't Mr. Valenzuela's motorcycles, no, sir.

12 Q And there wasn't anybody on the back such as his
13 wife, was there?

14 A No, there wasn't.

15 Q Under this testing that according to reasonable
16 engineering certainty by you, was it? There wasn't nobody
17 on the back of it, was there?

18 A Braking is independent---

19 THE COURT: He's asked you a question. Please answer
20 it.

21 THE WITNESS: Okay. There was no one on the back,
22 no, sir.

23 Q And you and Mr. Dawes---

24 MR. COX: Objection, Your Honor.

25 THE COURT: What is the objection?

1 MR. COX: Your Honor, Mr. Smith is allowed to explain
2 his answer --

3 THE COURT: He is.

4 MR. COX: -- just like Mr. Kennett did.

5 THE COURT: I agree. He didn't explain. You want to
6 explain anything?

7 THE WITNESS: Yes, I would.

8 THE COURT: Go ahead.

9 THE WITNESS: The weight of the motorcycle in the
10 mathematical calculations of stopping distance, the weight
11 is not included in the formula. It's not necessary for
12 the formula because the normal forces are canceled by the
13 friction forces.

14 Q I'm not going to get in an argument with you about
15 engineering---

16 A And so the weight of the motorcycle absolutely does
17 not effect the stopping distance.

18 Q All right, sir.

19 A Unless there was a brake failure which there was not
20 in this case.

21 Q I'll take you at your engineering degree of medical
22 -- degree of certainty opinion.

23 A Likewise, I also do accident reconstruction with cars
24 and trucks.

25 Q Yes, sir.

1 A And there are a lot of configuration of cars,
2 different sizes, different weights, but they all stop the
3 same. Given the roadway conditions and the condition of
4 the vehicles if they're in good condition for a given
5 roadway they all stop in the same distance.

6 Q All right. Well, I'll take you at that. One for
7 you. As far as now the -- Mr. Dawes knew you were
8 standing there, knew when to brake. There wasn't any
9 emergency situation that you previously testified to, but
10 he actually -- did he expect -- he knew what to expect and
11 did it; correct?

12 A Yes, sir.

13 Q That part is not similar to what Mr. Valenzuela had
14 to face, is it?

15 A It was confirming my calculations that you could stop
16 before you got to the intersection.

17 Q And you calculations that you testified to -- let's
18 let the jury kind of -- I am not going to go through every
19 one of them. I am just going to go through a couple of
20 them, okay, so we'll get the idea. First, the top of the
21 page your finding was that 50 miles an hour he stopped at
22 64 feet; correct?

23 A Yes, sir. That's what I measured.

24 Q And at 50 miles an hour at 71 feet per second;
25 correct?

1 A Approximately.

2 Q So in other words, you want this jury to believe to a
3 reasonable degree of engineering certainty that you could
4 stop a motorcycle in less than a second?

5 A That's what happened.

6 Q All right.

7 A We did the test again as you see on the bottom of the
8 page and got a little bit different result.

9 Q In other words, Mr. Valenzuela is going down the road
10 and according to your opinion he could stop
11 one-thousand-one?

12 A That's pretty good braking.

13 Q Pretty good.

14 A Yes, sir.

15 Q It sure is. And so the jury knows your other
16 reasonable degree of engineering certainty test, at
17 60 miles an hour you got him stopping in 91 feet; correct?

18 A Yes, and the two tests -- 91 and 103.

19 Q Sir?

20 A The two tests we did at 60 miles an hour, one
21 measured 91 and one measured 103. That's about a 12-foot
22 difference.

23 Q Obviously, I am going to use the quickest one. You
24 know that.

25 A Okay.

1 Q All right. The one you did -- let's make sure you're
2 standing beside your reasonable degree of engineering
3 certainty opinions. At 60 miles an hour you found that
4 this motorcycle could stop in 91 feet; correct?

5 A That's what we measured.

6 Q And at 60 miles an hour if my calculations are
7 correct that's 88 feet per second.

8 A Okay.

9 Q Is that correct?

10 A Yes, sir.

11 Q I'm not -- you're the math man?

12 A Well, you don't do the time directly on that
13 distance. It is a declining time; so it takes longer to
14 do a time slope.

15 Q Your opinion, though, and this is at 60 miles an hour
16 you can stop at 91 feet; correct?

17 A Right.

18 Q And at 60 miles an hour that's 88 feet per second; am
19 I correct?

20 A If he were traveling a constant speed for 91 feet
21 that would give you one type, but he is not traveling at a
22 constant speed. He is at a declining speed; so to get an
23 estimate you would use a much lower number more like
24 40 feet per second to give an estimate.

25 Q At the time he -- you measured him to start braking

1 he was going 60 miles an hour according to your testimony;
2 correct?

3 A This would be a stopping time of about two seconds; a
4 little more than two seconds.

5 Q Mr -- That isn't what you got here. You got him
6 stopping. Now you're changing it because you know I got
7 you.

8 A No, sir. No, sir. No, sir. At the beginning of the
9 stop he is going 60 miles an hour. At the end of the stop
10 he is going zero miles an hour.

11 Q We'll agree with that one.

12 A His average speed is 30 miles an hour which is
13 44 feet per second.

14 Q What is that---

15 A If you average that time over 91 feet --

16 THE COURT: Hold on.

17 THE WITNESS: -- you get a little more than two
18 seconds.

19 Q Let's go---

20 A About 2.2 seconds.

21 Q Let's go make sure. You got it down here -- and I
22 know you want to extend it out now.

23 A No, sir. That is the math.

24 Q At 60 miles an hour on your testing you got on this
25 sheet and you testified previously that he would stop in

1 91 feet; correct?

2 A He stopped -- from 60 miles an hour to zero in
3 91 feet.

4 Q And that stopping is a second?

5 A No, sir.

6 MR. COX: Your Honor, it would be easier if we just
7 showed the jury the video.

8 THE COURT: Mr. Cox, that is improper. Sit down. He
9 is on his examination. If you want to show it, you can
10 show it to them.

11 MR. COX: Thank you, Your Honor.

12 THE COURT: It might be easier for you. It might not
13 be easier for Mr. Detrick.

14 MR. COX: Thank you, Judge.

15 Q All right. Now let's go -- Mr. Valenzuela -- you got
16 some mighty criticisms of him, but his -- let's put that
17 exhibit that you had -- the one -- the chart.

18 A Oh, Exhibit 19?

19 Q This one. Can you put that on the board, please?

20 All right. We will agree on some stuff. There is
21 visibility problems for Mr. Valenzuela; right?

22 A Yes, sir, because of the trees.

23 Q And as a matter of fact your -- Move it on up a
24 little bit, please. Thank you, ma'am.

25 As a matter of fact, I think you testified in your

1 deposition that Mr -- you agreed with Mr. Valenzuela that
2 he would not see -- when he is traveling down this road,
3 he wouldn't see the scraper until he is within about --
4 the scraper is within 15 to 20 feet of the intersection;
5 correct?

6 A Could you move the drawing down just a hair?

7 THE COURT: Down?

8 THE WITNESS: Down.

9 THE COURT: Scoot it down.

10 THE WITNESS: Scoot it down. Yeah. Whoa, right
11 there. Okay. One second -- I've got a line to the front
12 -- from the motorcycle to the front of the scraper is the
13 visibility line. At that point the scraper would be
14 41 feet from the edge of the road.

15 Q Okay. Forty-one feet?

16 A Yes, sir.

17 Q Whenever the first possible whatever that he can see;
18 correct?

19 A Yeah, when -- further back it would be actually a
20 little closer, but at one second he can see him at
21 41 feet.

22 Q And you in the testimony when you and I took your
23 testimony and I said if Mr. Valenzuela saw it within 15 to
24 20 feet that was reasonable. You agreed with that;
25 correct?

1 A Well, if he is going -- he could stop before he got
2 to the intersection.

3 Q Was that my question?

4 A No, I don't understand your question. Do it again.
5 I'm sorry.

6 Q My question was in your deposition you said that
7 Mr. Valenzuela saw him within 15 or 20 feet of the
8 intersection and you thought that was reasonable?

9 A If he saw the scraper 15 feet from the intersection?

10 Q Yes, sir, when he first saw him it was 15 to 20 feet
11 are the intersection.

12 A That could be right, yes.

13 Q All right. You said that is reasonable. You don't
14 have any problem with in the timely reaction about
15 Mr. Valenzuela to this big scraper coming out---

16 A If you -- could you scooch [sic] it down just a
17 little more? Yeah. There you go, whoa. If
18 Mr. Valenzuela a second and a half out and he sees the pan
19 in here, yes, he would have time to stop at the
20 intersection.

21 Q Is that my question?

22 A He would have time -- yeah, he would---

23 Q Sir--

24 A -- okay. The answer your question --

25 Q -- that's not my question.

1 A -- start again. I'm not understanding you. I'm
2 sorry.

3 THE COURT: Hold on. Whoa, whoa, whoa. Both of you.

4 Q I've asked---

5 THE COURT: Both of you stop.

6 Ask it again, Mr. Detrick.

7 Listen carefully. Try to answer it.

8 If you want to ask it again.

9 Q Anyway, bottom line is this. As far as if this
10 scraper right here -- right there --

11 A Yes, sir.

12 Q -- is it -- and right here is the amount of distance
13 it's got to travel before it gets in the road; correct?

14 A Yes, it is 41.

15 Q That's when he first saw him according to your
16 opinion?

17 A Right.

18 Q Okay.

19 A Well, I don't know if he saw him here for sure.
20 That's the first time he could see him. He could have
21 been forward of that. He could have been right here when
22 Mr. Valenzuela first saw him.

23 Q He could have been forward of that?

24 A Yes, he could have been. I'm saying this is the rear
25 most position the scraper would be for Mr. Valenzuela. He

1 could have been forward of that. He could have been all
2 the way up and stopped. I don't know. He is somewhere
3 between here -- we got too many red lines. I'm sorry.

4 Q I'm sorry.

5 A He is somewhere between here and here. I don't know
6 exactly where he is. He's either here. He could be this
7 one extreme or this extreme. He is somewhere in between.

8 Q The first time you said according to your testimony
9 he was right there.

10 A Okay.

11 Q Right there.

12 A Maybe I wasn't clear. This is the first place that
13 he could see him from one second before the skid mark.
14 So, this gives an extremes of positions. So the scraper
15 is somewhere between these two positions.

16 Q Bottom line is this. Mr. Valenzuela, is reacting in
17 an emergency situation to that scraper going towards the
18 intersection; correct?

19 A That's what he says, yes, sir.

20 Q And that's your opinion?

21 A That is correct.

22 Q Okay. Now, as far as you know if -- I know you
23 criticize Mr. Valenzuela because he didn't ride right
24 through it.

25 A I -- Go ahead.

1 Q Just not do any braking?

2 A It is a possibility.

3 Q Okay.

4 A It is a possibility. He chose to brake and I have no
5 problem with that either. I have no problem with him
6 braking at all.

7 Q Thank you. Now, we'll go back as far as you got
8 Mr. Tindel right here; correct?

9 A Mr. Tindel -- yes.

10 Q And Mr. Tindel is sitting in his tractor. That's
11 where you -- right?

12 A That's where I understood he was, yes, sir.

13 Q Mr. Tindel has no flag; correct?

14 A That's my understanding.

15 Q Okay. And Mr. Tindel is not doing anything about
16 controlling the traffic on this intersection when this
17 occurred; correct?

18 A What I understood is he was flagging the scraper.

19 Q Wait a second now. You said he didn't have a flag.

20 A Well, waving his hands or signaling. Signaling I
21 guess is the proper word.

22 Q And you read Mr. Tindel's deposition where he said he
23 didn't have nothing to do with directing that -- when he
24 told the MAIT Team he didn't have nothing to do with
25 telling the scraper to come through the intersection --

1 that what he tried to do was stop him? Do you remember
2 that?

3 A I saw that, too. Yes.

4 Q All right. Now, this Mr. Lewis -- I think that I
5 asked you in your deposition if you had any criticism of
6 anything the operator did; correct?

7 A Yes, I believe you did.

8 Q I'll refer you to page 45 if you need to do that.

9 A All right. That would help me.

10 MR. COX: Page 45 of what, Paul?

11 MR. DETRICK: The deposition.

12 You got it with you?

13 THE WITNESS: Yes.

14 MR. COX: Of his deposition?

15 THE COURT: Forty-five of Mr. Smith's deposition. It
16 would obviously be his deposition.

17 THE WITNESS: Here it is. Page 45.

18 MR. DETRICK: Yes, sir, line 13.

19 THE COURT: What was your question?

20 Q Question was -- and I'll ask you now. Do you have
21 any criticism of Mr. Lewis in his actions?

22 A Okay. Yeah, I said that -- prior to that I said,
23 Well, it does look like he made a sudden or panic stop
24 coming to the side of the road. Then you said, What kind
25 of criticism do you have of that? I answered, Well,

1 ideally he would come to a stop before crossing the road,
2 but on the other hand those machines are hard to start and
3 he's probably on a timetable. He probably had somebody
4 watching the road.

5 Q So let's go through that a little bit. First off, in
6 your opinion Mr. Lewis also had a sudden -- that's what
7 you -- let's make sure I got it right -- a sudden or panic
8 stop?

9 A That's correct.

10 Q So we got a situation here where Mr. Chris English is
11 set up -- you don't think it is dangerous, but let's just
12 go like -- we got a situation set up here where
13 Mr. Valenzuela is having to make a panic stop. Mr. Lewis
14 is having to make a panic stop; correct?

15 A That appears to be case, yes.

16 Q That is dangerous, isn't it?

17 A Well, ideally, you don't want to have to make panic
18 stops. Right.

19 Q Ideally, you don't have dangerous situations set up
20 like that, don't you? Should you?

21 A I guess not. No, sir.

22 Q All right. And the other part you said is one of the
23 reasons they set this dangerous situation up is poor
24 Mr. Lewis it was your testimony he was probably on a
25 timetable and that's probably why he had someone watching

1 the road. Mr. Lewis was on a timetable; correct?

2 A Yes, sir.

3 MR. COX: Objection, Your Honor, as to --

4 THE COURT: What's your objection?

5 MR. COX: -- as to the intent of Lewis.

6 THE COURT: The intent?

7 MR. COX: What his mindset was -- the driver's.

8 THE COURT: This is your expert saying that he was on
9 a timetable. That's not intent. Overruled.

10 Q Now, let's get into your -- if you don't mind, your
11 speed of Mr. Lewis -- your opinion. I think this morning
12 today you came up with an opinion of 7 miles an hour;
13 correct?

14 A Yes, sir.

15 Q And you did not render that opinion in the deposition
16 that you gave me when I took your deposition, did you?

17 A No, sir.

18 Q And now you're at 7 miles an hour. You want this
19 jury to believe -- now, 7 miles an hour, that ain't too
20 fast, is it?

21 A No, sir.

22 Q It's kind of creeping along, isn't it?

23 A It's about 9 feet per second.

24 Q As a matter of fact, you made calculations -- put
25 this up here a little bit, please, Lynn.

1 You made calculations even though you want to now say
2 7 miles an hour, but if I am right -- I don't have my
3 glasses on, but I believe down there you've actually got
4 calculations between 15 and 20 miles an hour, Mr. Lewis,
5 don't you?

6 A I made a table right here showing different speeds --

7 Q Right.

8 A -- and let me get a copy where I can see it. I am
9 not sure if I have another copy.

10 Q Here. You want me to hand you mine?

11 A That would be helpful, yes, sir.

12 Q Sure. No problem. As long as you don't make me read
13 it.

14 A Thank you.

15 Q You've got calculations---

16 A I have different speeds. I have a column for 5 miles
17 an hour and then I have a column for 10 miles an hour,
18 15 miles an hour and 20 miles an hour.

19 Q That's because your opinions were to start in this
20 thing before you wanted to get it down to 7 miles an
21 hour --

22 A No, sir.

23 Q -- it could have been between 5 and 20 miles an hour?

24 A I was trying to see what the effect of different
25 speeds were for the position of the vehicle based on the

1 testimony of your expert and my opinions.

2 Q And what about the testimony that you totally ignored
3 of Mr. Lewis that he was doing about 17 miles an hour?

4 MR. COX: Objection, Your Honor.

5 THE COURT: What is the objection?

6 MR. COX: Mischaracterization of Mr. Lewis'
7 testimony.

8 THE COURT: The jury has heard it. They can make
9 their determination.

10 MR. COX: Okay. Thank you, Your Honor.

11 THE COURT: Overruled.

12 THE WITNESS: I believe Mr. Lewis also said he was
13 slowing down to come to the intersection.

14 Q And then he said he accelerated after that, did he
15 not?

16 A He started to accelerate and then Mr. Tindel flagging
17 him and he stopped.

18 Q Then he stopped. And then is when he tried to stop;
19 correct?

20 A Right.

21 Q That's when he made his panic stop according to your
22 testimony?

23 A Right.

24 Q Okay.

25 A And I'm estating when he made the panic stop he was

1 going about 7 miles an hour at that point.

2 Q I understand what you're saying.

3 A He may have been going 17 miles an hour before, but
4 at the time of the stop he was going about seven.

5 Q That isn't what his testimony was when you were
6 sitting here in court. He said he was going 17 miles an
7 hour within 20 feet of the intersection, did he not, when
8 you were sitting here in court? You heard that, didn't
9 you?

10 A I wasn't here when he was testifying.

11 Q I apologize. I thought you were here.

12 A I'm sorry.

13 Q That's all right. Anyway---

14 A I did want to explain the table. I have two lines
15 for speed. One is miles per hour. The next line is feet
16 per second because everything in the math is in feet. So
17 I am translating speed to feet per second. Then I have
18 two lines of skids. One is how far along the skids would
19 be and the next one is the time of the skid -- how long it
20 would take to stop from that speed to zero.

21 Q And all these -- let me --

22 A I am just making a table.

23 Q I got you.

24 A And then the next one I have two lines called
25 total --

1 Q Uh-huh.

2 A -- and one of them gives total feet which includes
3 perception reaction time and the skid. So you add the two
4 together and then you have the time for perception
5 reaction time of one and a half seconds plus the skidding
6 time --

7 Q I understand.

8 A -- for each speed and I was analyzing -- your expert
9 said he was going 17 and I came up with around 7 which is
10 between 5 and 10 and your expert has got him going between
11 15 and 20. That's why I created this table.

12 Q And Mr. Lewis says 17. So if Mr. Lewis and
13 Mr. Kennedy are right that he is going somewhere as far as
14 -- how many feet per second approaching that intersection?

15 A Okay; 15 is 22 feet per second.

16 Q Okay.

17 A And it would leave 25 feet of skid marks and it would
18 take -- perception reaction and everything would take 3.8
19 seconds to make a full stop. The skid mark stopping time
20 is 2.3 seconds.

21 Q And how fast is he going -- you said how many -- at
22 that speed skid marks?

23 A Okay. At 15 miles an hour is the same as 22 feet per
24 second. The skid mark is 25 feet long. The skid -- the
25 time to lay down the skids is 2.3 seconds. With the

1 perception reaction time is a total stopping distance of
2 58 feet and total stopping time of 3.8 seconds.

3 Q All right. You agree then that 33 feet of skid marks
4 is correct?

5 A No, sir.

6 Q You don't agree with that?

7 A No, I do not. I am just commenting on other expert's
8 opinion.

9 Q All right. Let me ask you this, then. You are going
10 at 7 miles an hour is what you want now to come up with,
11 7 miles an hour creeping along. He can just stop a in no
12 time, can't he?

13 A Once again -- let me borrow my paper again, please,
14 the chart. I'm sorry. I gave away my paper. I thought I
15 had another copy.

16 Q You can't see that on the board?

17 A It's a little hard.

18 THE COURT: Neither one of you can see.

19 Q I'm sorry. Did I give you the right one?

20 A Yes, this is the right one. Thank you.

21 THE COURT: What is the question about 7 miles an
22 hour? Let's get right to it. What was your question?

23 Q The question is at 7 miles an hour, I mean that's a
24 very slow speed. He can stop just in a real short period
25 of time, can't he? In a short distance?

1 A Well, from the table if you look at 10 miles an hour
2 which is this column here, that's the same as 15 feet per
3 second. That leaves 11 feet of skid marks. It is one and
4 a half second for the skid mark to form, 34 feet total
5 distance, 3 seconds total time or if you look at the
6 opposite end 5 miles an hour it takes 7.3 feet per second.
7 That's 2.8 feet of skid marks. The skids are -- it takes
8 .8 seconds to occur. The total stopping distance is
9 14 feet and the total stopping time is 2.3 seconds.

10 Q So according to that calculation you got 41 feet
11 back, he's got no problem in stopping very easily without
12 just stopping short of the intersection right here; right?

13 A Well, he did, in fact, stop 8 feet from the side of
14 the road.

15 Q Okay. I agree with that. We're not going to
16 disagree with that.

17 A Okay.

18 Q But I'm saying he just couldn't -- couldn't he have
19 just gone up here and stopped normally like most people do
20 right there in the road? Right just slowly at 7 miles an
21 hour, just kind of stop like you normally do?

22 A Well, he slammed on his brakes and left a skid mark
23 at the end.

24 Q You want to answer my question? Could he have
25 stopped just straight like everybody else very easily,

1 very slowly, very -- approaching that stop sign in a
2 normal manner at 7 miles an hour? That's a hard question?

3 A Well, I am just working the math in my head.

4 Q All right.

5 A That's why I make tables to help me. I run lots of
6 calculation to make a table so I can analyze it quicker.

7 THE COURT: Just answer the question, please.

8 THE WITNESS: It looks like in an easy manner it
9 would be difficult for him to stop. It would be
10 difficult. At a reasonable, slow, gentle stopping it may
11 have been difficult for him to stop before he reached the
12 edge of the road.

13 Q All righty. And, therefore, I guess it is your
14 opinion then that he had to knock the stop sign down in
15 order to stop?

16 A I did make the opinion that he was making a panic
17 stop.

18 Q I understand that. We agree on -- one of the things
19 we agree on it is a panic situation created by Mr. Chris
20 English, but I want to ask you, the question is it's your
21 opinion that he had to run over this stop sign in order to
22 stop?

23 A That was what he thought he had to do.

24 Q I didn't ask you that. You're the expert now, Mr. --
25 now you want to talk about what Mr. Lewis thought but

1 you're the expert coming in here. I want to know what
2 your opinion is regarding this was what was necessary for
3 him to run over the stop sign at the speed he was
4 traveling in order for him to stop short of that
5 intersection; is that correct?

6 A He could actually have stopped based on where he did
7 stop he would have ended up -- at 7 miles an hour he would
8 have ended up at about 2.6 feet -- two and a half feet
9 from the edge of the road if he had stopped straight
10 instead of curving.

11 Q He didn't have to run over the stop sign?

12 A No, he didn't.

13 Q But he did run over the stop sign?

14 A He gave -- it stopped him almost 6 feet further from
15 the road the way he did it.

16 Q All right. And he's just got -- this stop sign
17 running over, you consider that just a safe approach of
18 the intersection to go and run over the stop sign in order
19 to be able to stop?

20 A I did not say that.

21 Q He had to run over the stop sign. You said he didn't
22 have to run over the stop sign. He should have stopped
23 about 2 feet short without running over the stop sign?

24 A If he had stopped going straight he would have
25 stopped about two and a half feet from the edge of the

1 road.

2 Q Why is in world is he running over the stop sign
3 then?

4 A Well, that's a question of intent.

5 Q Well---

6 A He intended to stop.

7 Q Can you give me a scientific reason to an engineering
8 degree of certainty as to why he would run over the stop
9 sign?

10 A He was trying to stop sooner. That's how he
11 perceived to stop sooner.

12 Q In his panic stop?

13 A It actually did work. He stopped about 6 feet sooner
14 than he would have.

15 Q Is that the way you stop at stop signs?

16 A No, sir.

17 Q All right. I'm about through. Okay? Let's go to
18 some of the things that we can agree on.

19 You can take that off.

20 THE COURT: Turn the lights on.

21 THE WITNESS: I think that one is mine and this one
22 is his. We got them all switched around.

23 MR. DETRICK: That would be Exhibit 120.

24 THE WITNESS: Should we note that Exhibit 120---

25 THE COURT: Hold on.

1 (Whereupon, Plaintiff's Exhibit No. 120 was admitted
2 into evidence.)

3 Q They're doing this road crossing for this big piece
4 of equipment -- that scraper -- it is your opinion that
5 they should have had advanced construction warning signs
6 up, isn't it?

7 A I wasn't really hired to comment on the warning
8 signs.

9 Q You're not hired -- I didn't ask you what you were
10 hired. I want to ask you what your opinion is which I
11 thought you had already given it. What is your opinion?

12 MR. COX: Objection, Your Honor, outside of the
13 scope.

14 THE COURT: Outside of the scope of what?

15 MR. COX: Of his expert opinions that's been
16 qualified for in this case.

17 THE COURT: You're not an expert to give an opinion
18 about the safety of the intersection? Sir? Do you feel
19 uncomfortable doing that?

20 THE WITNESS: I'm not familiar with the South
21 Carolina laws.

22 THE COURT: Well...

23 THE WITNESS: We have other people in our company
24 that do that kind of work.

25 THE COURT: All right. Mr. Detrick, move along.

1 MR. DETRICK: All right.

2 THE COURT: Are you looking for something you've
3 lost, too?

4 Q Turn to page, if you would, I think page 61 in your
5 deposition.

6 A Okay.

7 Q I am not going to let you up so easy on that one.

8 A Okay.

9 Q Hold on. I'm sorry. All right.

10 THE COURT: Which page, please?

11 MR. DETRICK: It is page 61. I asked you basically
12 the same question.

13 THE COURT: Line, please?

14 MR. DETRICK: Line four.

15 THE COURT: What was the question at the time of the
16 deposition?

17 Q Do you have an opinion as to whether or not they
18 should have had any warning signs on the roadway prior to
19 this accident? And then you said, with any construction,
20 and then I said, They I mean English Grading Company, and
21 what was your answer?

22 A Line 14, something that says---

23 Q No. Line 10.

24 A Oh, line 10. English Grading, yes, sir. With
25 construction situation you should have warning signs if

1 you're near a roadway, yes.

2 THE COURT: Hold on. Read that. I can't.

3 THE WITNESS: Oh, I'm sorry. Starting with line
4 10 -- lines 10, 11, 12. Answer: English Grading, yes,
5 sir. With construction situations you should have a
6 warning signs if you're near a roadway, yes.

7 Q I said what kind of signs should they have had?

8 A Something that says road construction.

9 MR. COX: Objection.

10 THE COURT: What is the objection?

11 MR. COX: We object that it's outside of the scope,
12 Your Honor.

13 THE COURT: Well, he's asking him -- you can use
14 deposition for impeachment. He said he didn't have an
15 opinion. In his deposition he says he does have an
16 opinion. That's a proper use of the deposition.
17 Overruled. Please make -- nevermind.

18 Go ahead, Mr. Detrick. Reread it.

19 Q What kind of sign should they have had was my
20 question.

21 A That's on line 13?

22 Q That was my question on line 13. Your answer is on
23 line 14.

24 A Okay. My answer is on 14, 15, 16. Answer:
25 Something that says road construction ahead or

1 construction or heavy equipment, something like that.

2 Typically an orange diamond-shaped sign.

3 Q I asked you where should they have been located,
4 these warning signs?

5 A Line 19: North and south of the intersection.

6 Q Thank you, sir. All right, sir. Now, again, let's
7 get in as far as flagmen. Should they have had a flagman
8 there? They got warning signs that said flagman ahead or
9 Road Construction. Should they have had a flagman ahead?

10 MR. COX: Objection, Your Honor.

11 THE COURT: What's the objection?

12 MR. COX: Outside the scope.

13 THE COURT: Outside the scope.

14 MR. COX: He's testified that he doesn't know what
15 South Carolina law is.

16 THE COURT: I understand that. In a safe
17 intersection -- do you have an opinion as to that? You do
18 or you don't or are you not prepared to answer that or
19 what?

20 MR. COX: I think he asked about the flagman.

21 THE COURT: Sir? Do you feel comfortable answering
22 that?

23 THE WITNESS: I don't feel -- I am not prepared to
24 answer that question.

25 Q You're not prepared to answer my question?

1 A I didn't do any research on the stop signs or warning
2 signs.

3 Q You didn't do any research -- part of what you didn't
4 do any research is you weren't provided the contract where
5 Mr. English agreed to have the flagman there, were you?

6 A I have not seen the contract, no, sir.

7 Q All right. I'll leave it alone. Now as far as your
8 opinions regarding stopping at a stop sign -- remember me
9 asked you about that?

10 A Where are we at?

11 Q All right. Well, let's go, first off, you agree with
12 me that Mr. Lewis did not intend to stop at that stop
13 sign?

14 A From my understanding from Mr. Lewis that he was not
15 planning to stop, no, sir.

16 Q And I think -- do you have an opinion as to whether
17 he should have stopped at the stop sign?

18 A I don't know what his instructions were. He was
19 apparently instructed to do something different. So I
20 don't know the answer to the question.

21 Q So if -- in other words, if he was instructed by
22 Chris English to run the stop sign, then he had to run the
23 stop sign because he was working for Mr. English; is that
24 your opinion?

25 A I think the answer is that I didn't study that. I

1 didn't see the contract. I'm not familiar with South
2 Carolina law and so I don't know what arrangements there
3 were, what the effect of the stop sign is.

4 Q All right. Well, have you ever seen a stop sign that
5 you didn't have to stop at?

6 A I do know there are different rules for stop signs on
7 private land than stop signs on public land and it varies
8 from state to state. I don't really have an opinion one
9 way or another in this case.

10 Q Do you have an opinion as to whether Mr. Lewis should
11 have stopped at that stop sign?

12 A I do not know.

13 Q I don't have any further questions.

14 THE COURT: Redirect?

15 REDIRECT EXAMINATION

16 MR. COX: Your Honor, at this time we would---

17 THE COURT: Please stand.

18 Q Mr. Smith, we did a video of those motorcycles tests;
19 correct.

20 A Yes, sir.

21 MR. COX: Okay. At this time, Your Honor, we'd show
22 the video to the jury -- show them what happened regarding
23 these tests that Mr. Detrick questioned about.

24 THE COURT: Was that a question or what?

25 MR. COX: I am asking to play the individual video

1 for the jury.

2 THE COURT: You may.

3 There is no objection is there?

4 MR. DETRICK: No, sir.

5 (Whereupon, Defendant's Exhibit No. 21 was marked for
6 identification and received into evidence.)

7 MR. COX: Your Honor, she was asking should we play
8 the whole video?

9 THE COURT: You tell her. You're conducting it. Do
10 it how you want to do it.

11 MR. COX: Right. I can tell you when. There is like
12 four sequences, I believe.

13 Is that right, Mr. Smith?

14 THE WITNESS: Yes, there are.

15 MR. COX: There are four test runs and then we'll say
16 play, stop for the next one and then just so that we
17 know -- I am not going to have a lot of questions. It is
18 just to play it in sequence rather than just run it on
19 through. Okay? Do you have your notes in front of you?

20 THE WITNESS: I have them. Do you want me to tell
21 what each one is before you show it?

22 Q Yes. Let's start with the first one.

23 I'll tell you when to stop.

24 THE COURT: The first one is what?

25 THE WITNESS: The first one is the motorcycle going

1 50 miles an hour and stopping with both brakes.

2 (Whereupon, the video starts.)

3 THE WITNESS: I am standing at the end of the skid
4 mark. I am using a measuring wheel to measure the
5 position of the motorcycle from the beginning of the skid
6 mark.

7 Q What is that showing?

8 A That's the road going to the landfill.

9 THE COURT: That's where the scraper would have been
10 coming from?

11 THE WITNESS: Yes.

12 MR. COX: Stop the video.

13 (Whereupon, the video stops.)

14 MR. COX: Now this is Redds Branch Road?

15 THE WITNESS: This is Redds Branch Road. This is the
16 curve leading into the intersection.

17 Q This is the same direction that Mr. Valenzuela---

18 A He is coming the same direction and same way as
19 Mr. Valenzuela.

20 Q What is the next video going to show us?

21 A This one is the motorcycle going 60 miles an hour
22 using both brakes to stop.

23 THE COURT: Sixty?

24 THE WITNESS: Sixty miles an hour.

25 THE COURT: All right.

1 (Whereupon, the video starts.)

2 THE WITNESS: And then, once again, this is the
3 driveway.

4 Q How many feet did you stop in?

5 A That was 103 feet. I am writing that down and I am
6 telling Mr. Dawes that the next one that you're going to
7 see -- the next one he should do is 50 miles an hour,
8 front brake only.

9 Q Okay. That's this---

10 A I am giving him instructions what to do.

11 Q That's 50 miles per hour, front brake only?

12 A Fifty miles an hour, front brake only, and it was a
13 little more than 93 feet. Once again, that's the
14 driveway. Where I am standing each time there is a little
15 orange cone that marks where---

16 Q And this one is what?

17 A Fifty miles an hour, rear brakes only. You can see
18 the little cone.

19 Q Fifty miles per hour, rear brakes only.

20 A Fifty miles an hour, rear brakes only. He doesn't
21 leave a skid mark except for a short -- he leaves a
22 14-foot skid mark with that stop.

23 Q Okay.

24 A The rest of the time he doesn't leave any mark.

25 MR. COX: I think that's---

1 THE WITNESS: And that was 167 feet.

2 (Whereupon, the video stops.)

3 Q Now, your videos were run at speeds of 50 and
4 60 miles per hour; correct?

5 A Of 50, 60, 50, 50.

6 Q Okay. And Mr. Valenzuela testified he approached
7 that same area at a speed of 40 to 45?

8 A I believe that's correct.

9 Q Now, I just have three or four questions and we
10 should be done, Mr. Smith. Your opinions as to what type
11 of situation Mr. Valenzuela was perceiving is based on his
12 testimony; is that accurate?

13 A Yes.

14 Q Okay. I'm moving away from the video now.

15 A Okay.

16 Q You were asked questions about what type of emergency
17 situation -- did Mr. Valenzuela perceive emergency
18 situation and I want to be clear that your opinions as to
19 what Mr. Valenzuela was perceiving is based on his
20 testimony?

21 A Yes, sir.

22 Q Okay. And also your deposition -- your opinions --
23 your calculations in this case were arrived at before
24 Mr. Valenzuela's deposition was even taken; isn't that
25 correct?

1 A That is correct.

2 Q And so you were assuming full speed because the
3 allegations in the case were emergency situation?

4 A That is my assumption in an emergency situation you
5 use full braking.

6 Q Okay. And those tests that you confirmed on the
7 video just now that we played confirmed your opinions
8 arrived at this in case; correct?

9 A Yes.

10 Q To a reasonable degree of engineering certainty;
11 correct?

12 A Yes, sir.

13 Q At this time, Your Honor, I would introduce this
14 video into evidence.

15 MR. DETRICK: No objection.

16 THE COURT: Without objection.

17 Q And with this motorcycle you testified about how all
18 vehicles --

19 THE COURT: Which one are we talking about?

20 MR. COX: -- pretty much---

21 THE COURT: Which one?

22 Q Was the motorcycle in the video Defendant's Exhibit
23 21 and the Harley cruiser that Mr. Valenzuela was driving,
24 would they have the same or similar braking capacities?

25 A They have approximately the same capacity -- braking

1 capacities, yes, sir.

2 Q Okay. Now you were asked about Mr. Lewis who drove
3 the scraper. You said he had a sudden and panicked stop.
4 Is that right?

5 A Yes, sir.

6 Q And he had a sudden and panicked stop at what speed?

7 A At -- based on the skid mark from his rear tire it is
8 about 7 miles an hour.

9 Q Okay.

10 A It might be six. It might be eight, but around
11 seven.

12 Q And you can have a sudden stop at any miles per hour,
13 can't you?

14 A Yes, you can.

15 Q And if you see traffic coming shouldn't you suddenly
16 stop?

17 A Yes.

18 Q You were asked questions about your scraper speed of
19 7 miles per hour. Did Mr. Detrick, the plaintiff's
20 attorney, before today ask you the speed of the scraper?

21 A No, sir.

22 Q Okay. So when he says you used to be at 20 miles per
23 hour and all this, that's just not true, is it?

24 A I had a table on the thing that showed 20 miles an
25 hour. That was for analysis.

1 Q Right.

2 A I did not have an opinion on the scraper speed at the
3 time of the deposition.

4 Q Okay.

5 A And no one asked me in the deposition.

6 Q Okay. And the physical evidence does not lie, does
7 it, Mr. Smith?

8 A No, sir.

9 Q Now and Mr. Lewis started -- he testified that he
10 started to as he came to the stop sign at approaching
11 preparing to stop he was waved across. He says at that
12 time I started to accelerate. I pressed the gas half-way
13 down and then Mr. Detrick said, Oh, well, if you are
14 pressing it half-way down, half of 35 miles per hour if
15 that's the top speed of the scraper, you're at 17 miles
16 per hour.

17 MR. DETRICK: Your Honor---

18 MR. COX: That's just not possible. That's how he's
19 arriving --

20 THE COURT: Hold on.

21 MR. COX: -- at 17---

22 THE COURT: Hold on. That's not a proper question.
23 Possible. Anything is possible.

24 Mr. Detrick, you got an objection? You're back there
25 standing.

1 MR. DETRICK: He said he wasn't here when Mr. Lewis
2 testified and it wasn't anything to do with his opinion.

3 THE COURT: Well --

4 MR. COX: Okay.

5 THE COURT: -- rephrase the question, Mr. Cox. You
6 know asking somebody if something is possible -- we have
7 to ask with a reasonable degree of engineering certainty
8 more likely than not.

9 Q The physical evidence does not lie; is that right?

10 THE COURT: You just asked that.

11 THE WITNESS: No, sir.

12 Q And the physical evidence shows that the scraper was
13 going 7 miles per hour at the start of braking; correct?

14 A Approximately, yes, sir.

15 Q Now, you were asked questions about Mr. Lewis' turn
16 to the right at the end of his brake where he leaned
17 against the stop sign; okay? Is it possible that he
18 was --

19 THE COURT: Sir.

20 MR. COX: -- getting out of the way --

21 THE COURT: Sir, sir, sir. You can't ask that
22 question.

23 MR. COX: Is that---

24 THE COURT: That's pure speculation. Possibility.
25 If he wants to render an opinion he has to do it with a

1 reasonable degree engineering certainty, more likely than
2 not.

3 MR. COX: Okay. Thank you, Your Honor.

4 THE COURT: I am not fussing. That is just the rule.

5 MR. COX: I understand, Your Honor.

6 Is his turn to the right consistent with getting out
7 of the way of a crashing motorcycle?

8 THE WITNESS: It appears that he was turning away
9 from the roadway --

10 Q Okay.

11 A -- to prevent him from entering the roadway.

12 Q And that turn was also turning away from the
13 motorcycle?

14 A He was both steering and braking to avoid a
15 situation.

16 Q Okay. Did the scraper's wheels remain even at its
17 stopping position -- where the scraper's wheels still on
18 the private driveway?

19 A Yeah, the entire scraper was still on the private
20 driveway. I believe it was all on the asphalt still.

21 MR. COX: Your Honor, that's all.

22 THE COURT: Thank you. You may step down.

23 I don't do recross.

24 Madam forelady, ladies and gentlemen, we're going to
25 break for lunch. Your lunch is here. I got to give the

1 lawyers a little bit of time to eat. We'll break until
2 2 o'clock. That's 55 minutes. When you get through
3 eating if you want to walk outside and enjoy the fresh
4 air, please do so. Let's be back at 2 o'clock.

5 Don't discuss the case. Don't deliberate. Please
6 leave your notes in your chair. Thank you.

7 (Whereupon, the jury exited the courtroom at 1:07.)

8 THE COURT: Anything for the record by the plaintiff
9 before we break for lunch?

10 MR. DETRICK: No, sir.

11 THE COURT: Mr. Cox, Ms. Payne, anything for the
12 record?

13 MS. PAYNE: Not yet, Your Honor.

14 THE COURT: Not yet. Thank you. No problem.

15 (Whereupon, a lunch break was taken.)

16 MS. PAYNE: Your Honor, the next two witnesses we
17 have are our dangerous-conditions witnesses. It is my
18 understanding they have provided affidavits given to us by
19 the plaintiffs. Under Rule 11---

20 THE COURT: They -- the plaintiff has given you
21 affidavits by these people?

22 MS. PAYNE: Yes, sir, and it is my -- it is my
23 understanding that they plan to impeach these witnesses
24 with their affidavits; so before they get the opportunity
25 to do that I would like to move under Rule 11---

1 THE COURT: I like a lady with all the rules. Rule
2 11. Hold on a second. That's where you're supposed to
3 confer, isn't it?

4 MS. PAYNE: Eleven -- No, 11(c) is affidavits and
5 verification.

6 MR. DETRICK: Of evidence?

7 MS. PAYNE: No. Civil procedures.

8 THE COURT: All right. That's about the
9 verification?

10 MS. PAYNE: It is about what the affidavits must
11 require, Your Honor, and the Supreme Court has been
12 extremely precise in stating this is a hyper-technical
13 requirement in that these sworn statements and affidavits
14 must be complied with under Rule 11(c) so as to protect
15 the integrity of the truth-seeking process.

16 THE COURT: What part of the rule do you want me to
17 look at?

18 MS. PAYNE: Yes, sir. Specifically with respect to
19 11(c) that these affidavits do not state with spec -- I
20 never can say that.

21 THE COURT: Specificity.

22 MS. PAYNE: Yes, sir, that the affiant knows the
23 facts stated to be true of his own knowledge except to
24 those knowledge stated on information and belief and as to
25 those matters that he believes them to be true. That is

1 in neither one of these affidavits.

2 THE COURT: What's not in there?

3 MS. PAYNE: That --

4 THE COURT: That language?

5 MS. PAYNE: Yes, sir.

6 MS. MCPHERSON: I can show you the affidavits, Your
7 Honor.

8 THE COURT: Let me see them.

9 MS. MCPHERSON: And I have actually redacted in these
10 references to some things that happened after the wreck.

11 THE COURT: So, you want to use them to impeach these
12 ladies?

13 MS. MCPHERSON: Yes, sir. Certainly, they're --
14 Well, I assume they would be prior inconsistent
15 statements.

16 THE COURT: And you don't think these affidavits
17 are---

18 MS. PAYNE: Are properly executed under Rule 11(c),
19 Your Honor.

20 THE COURT: Simply because they don't have the
21 wording that the affiant knows the facts stated to be true
22 of his own knowledge?

23 MS. PAYNE: Yes, sir, and I've had many courts have
24 excluded this for those exact facts because the Supreme
25 Court requires strict compliance.

1 THE COURT: Well, it says personally appeared before
2 me Terby Thomas who being duly sworn deposes and says as
3 follows.

4 MS. PAYNE: But he has to say, knows the facts stated
5 to be true of his own knowledge.

6 THE COURT: Show me a case that says that -- that if
7 that exact language is not in it that it cannot be used.

8 MS. PAYNE: Your Honor, I dealt with this mainly in
9 federal court. I don't have a state court.

10 THE COURT: Thank you, ma'am.

11 MS. PAYNE: But I would ask---

12 THE COURT: Well, if on cross examination the
13 plaintiff -- they're going to use it to impeach somebody
14 and they hand the affidavit to the affiant and ask them to
15 look at it. Is this your sworn testimony? Did you sign
16 it under oath before a notary on such and such date, did
17 you do that? Then I am going to allow them to impeach
18 them on it if they say something different than is in the
19 affidavit.

20 All right. Bring if jury in, please.

21 (Whereupon, the jury came into open court at
22 approximately 2:05.)

23 THE COURT: All right. Madam forelady, ladies and
24 gentlemen, it is a little after two. Here is where I
25 anticipate we're going. I am hoping -- what is that --

1 Hoping and praying, wishing and hoping, whatever -- that
2 we're going to finish the testimony at 3:30 or four.
3 Okay? Once we finish all the testimony I have to listen
4 to motions after the case and then I have to go through --
5 depending on the rulings on the motions I have to go
6 through what we can jury charges with the lawyers and that
7 exercise could take us an hour, hour and a half to two
8 hours.

9 So, what I'm thinking about doing is if we finish
10 3:30 or four is excuse y'all for the balance of the day
11 and we'll start at nine or 9:30, whatever y'all want. The
12 only thing that would be left is for the lawyers to argue
13 and then I would charge you or instruct you on the law,
14 then order lunch in, and we can go straight new. I don't
15 want you having to sit here after we finish the testimony
16 today, wait for an hour, hour and a half, and then it is
17 going to be 5 o'clock. I just think -- does that suit
18 everybody?

19 THE FOREPERSON: And I don't mind starting at nine.

20 THE COURT: At nine in the morning?

21 THE FOREPERSON: Yeah, that would be---

22 THE COURT: I'll take a vote. Whatever y'all want to
23 do, that's what I want to do.

24 THE JUROR: Nine is fine.

25 THE COURT: Boy, she's a tough forelady.

1 THE JUROR: You don't know what goes on behind those
2 closed doors.

3 THE COURT: I know carrot cake is being eaten. I was
4 getting ready to go home last night and one of the jurors
5 was sitting out in the hall and he had his -- I knew what
6 it was -- his little take-home box. I said, What have you
7 got in there? He said carrot cake and he opened it up and
8 they gave him the wrong desert. Wasn't it pie or
9 something?

10 THE JUROR: It was caramel apple pie.

11 THE COURT: Did you eat it?

12 THE JUROR: I ate it anyway.

13 THE COURT: I don't blame you. Anyway, y'all have
14 been great. I appreciate it. Everybody has been taking
15 notes. I hope that I made it as pleasant as I can for
16 you. You know, it's not fun to sit up here a whole week,
17 but it is an important civic obligation. Y'all have been
18 wonderful. I wish all my juries were like you. I haven't
19 been done anything except to try to keep it going.

20 THE FOREPERSON: The exception is eating our
21 doughnuts this morning.

22 THE COURT: Please, sitting up here and trying to
23 referee the lawyers, if I have gotten a little short with
24 either one of them or both of them or all of them, that's
25 my problem. That's not theirs. Sometimes I get just a

1 little testy and I apologize in advance if I offended
2 anybody by fussing at any of them. I think they've done
3 great. They've been very congenial to each other. It's
4 run pretty smooth for something this lengthy and this
5 complex. Okay. You may call your next witness.

6 MR. COX: Your Honor, we call Terby Thomas.

7 TERBY THOMAS, after being duly sworn, testified
8 as follows:

9 THE CLERK: Have a seat in the witness box and state
10 your full name for the record.

11 DIRECT EXAMINATION

12 BY MR. COX:

13 Q Mr. Thomas, where are you from, sir?

14 A I am from here, Aiken, South Carolina.

15 Q Okay. How long have you lived in Aiken, South
16 Carolina?

17 A About 25 years.

18 Q Okay. And do I understand you used to work for Wyatt
19 Construction Company?

20 A Yes, sir.

21 Q Okay. And are you familiar with the -- Let me ask
22 you, with regards to your work with Wyatt Construction
23 Company, how long did you work for them?

24 A All together probably about seven years.

25 Q About seven years?

1 A Yes, sir.

2 Q And what types of -- what type of work did you do at
3 Wyatt Construction Company?

4 A Mostly utilities, various types.

5 Q Did you operate any equipment, tractors?

6 A Yes, sir.

7 Q Or anything like that?

8 A Yes, sir.

9 Q Okay. What types of equipment would you operate?

10 A Front-end loaders, Bobcats, backhoes.

11 Q And let me ask you, are you familiar with where the
12 accident in this case occurred?

13 A Yes, sir.

14 Q Okay. And when -- did you first learn about this
15 case from the plaintiff's attorneys?

16 A No. I don't know where I heard it from. It could
17 have been the newspaper, the TV.

18 Q Well, you heard about the accident?

19 A Right; the accident.

20 Q And did you first learn of this -- the lawsuit from
21 the plaintiff's attorneys?

22 A Yes, sir.

23 Q Okay. And did you meet me for the first time when I
24 took your deposition?

25 A Yes, sir, I believe so.

1 Q We had never met before?

2 A Never met.

3 Q Okay. And where do you -- where do you reside?

4 A I live on Redds Branch Road.

5 Q You live on Redds Branch Road?

6 A Yes, sir.

7 Q What is your address?

8 A 407.

9 Q Okay. And how long have you lived at 407 Redds
10 Branch Road?

11 A I have lived at that address probably about 18, 19
12 years.

13 Q Okay. And before that did you live just---

14 A I lived a house down about six years.

15 Q Okay. And that was your---

16 A That was my mom and dad's.

17 Q Okay. And where is your mom and dad's house and your
18 house since they're right there together in relation to
19 where the unfortunate accident that we're here on today
20 occurred?

21 A I guess that would be a mile; maybe three quarters of
22 a mile.

23 Q Okay. And during those 18 to 25 years that you've
24 lived there have you driven past the intersection where
25 this accident occurred?

1 A Yes, sir.

2 Q Okay. How often do you drive by that area?

3 A Probably two or three times a day.

4 Q Two or three times a day?

5 A Yes, sir.

6 Q And were you driving through that area two or three
7 times a day from 2000 to, say, 2009?

8 A Yes, sir.

9 Q Okay. This accident occurred on August 7, 2009.
10 Were you still driving through there two or three times a
11 day?

12 A Yeah, on average.

13 Q Okay. And you would drive through there to go to
14 work and things like that?

15 A Yeah, doctors' appointments, anything. That's the
16 only way I go.

17 Q Okay.

18 A In and out of there.

19 Q That's your ingress and egress to go places?

20 A Right.

21 Q Okay. In your 18 to 20 -- I keep saying 18 to 25
22 because you moved, but in your 25 years going through that
23 area frequently have you seen anything out of the ordinary
24 with regard to that intersection or crossing area where
25 this accident occurred?

1 A Nothing out of the ordinary up to the last three or
2 four years. I don't know what's going on back there or
3 anything, but never noticed anything until probably about
4 that time.

5 Q Okay. And what have you noticed during the last
6 three or four years?

7 A Every now and then I might see a piece of equipment
8 go across the road.

9 Q Okay.

10 A Maybe somebody in a truck or tractor sitting at that
11 intersection.

12 Q Okay.

13 A That's it.

14 Q So from time to time you may see somebody in a truck
15 or tractor sitting at the intersection?

16 A Yes, sir.

17 Q Off the road; right?

18 A Yes, sir.

19 Q And from time to time you would see a piece of
20 equipment going across the road?

21 A Yes, sir.

22 Q Okay. Anything in your mind unusual about what you
23 observed with regards to the equipment coming across the
24 road?

25 A No, sir; nothing to me that's unusual.

1 THE COURT: Nothing what? What did you say?

2 THE WITNESS: Nothing to me that was unusual.

3 Q Okay. And was that a pretty busy -- would you see
4 lots of dump trucks and things driving into that road?

5 A No, sir.

6 Q Okay. And do you know what's down that road?

7 A I have no clue.

8 Q Okay. And with regards to the equipment -- what did
9 the equipment look like that crossed the road?

10 A It seems like I have seen a -- one of those pans.

11 Q Okay.

12 A And maybe a dump truck. I am not positive.

13 Q Okay.

14 A I've never really focused on any of it before.

15 Q Okay. And you're familiar -- are you familiar
16 somewhat with the operation of large equipment like that?

17 A Yes, sir.

18 Q Okay. And that's through your experience working
19 with Wyatt Construction?

20 A Yes, sir.

21 Q Okay. And what did you observe with regards to --
22 did you observe anything that concerned you with regards
23 to how the pan got across the road?

24 A Other than the one time I was on the way home on the
25 straight-a-way and I could see the pan in the distance

1 coming up to the intersection and it slowed down. It
2 didn't completely stop and then it took off across.

3 Q Okay.

4 A It didn't concern me because I was -- I was in no
5 danger --

6 Q Okay.

7 A -- from where I was at.

8 Q Okay. And that's a straight shot?

9 A Yes, sir.

10 Q In both directions?

11 A Yes, sir, just one direction.

12 Q You were coming in one direction?

13 A Yes, sir.

14 Q Right. And but you're familiar with the road in both
15 directions?

16 A Yes, sir.

17 Q Okay. And is it -- would that -- did that concern
18 you at all with regards to safety how the pan slowed and
19 then came on across?

20 A I wasn't really over-focused on it, but when I would
21 leave to come in that direction I knew to slow down a
22 little bit when I got to that curve because I didn't know
23 what might be going on.

24 THE COURT: Didn't know what?

25 THE WITNESS: Didn't have a clue what might be going

1 on when I came around the curve.

2 Q Right. Well, tell me about your understanding of how
3 equipment like that---

4 MS. MCPHERSON: Objection, Your Honor.

5 THE COURT: That's -- sustained.

6 MR. COX: Rule 701, opinion testimony of lay
7 witnesses, Your Honor.

8 THE COURT: Sustained. Sustained.

9 Q All right. Now, in your 25 to 15 years -- I don't
10 know why I keep saying that, sir. I'm sorry. In your 25
11 years of traveling two to three times a day approximately
12 down Redds Branch Road you never had any emergency
13 situations or run-ins with any equipment crossing the
14 road?

15 A Other than the one day I was coming around the curve
16 and I come around the curve and slowed down because there
17 was a dump truck or something going across the road.

18 Q Okay.

19 A And there was somebody sitting there in a tractor.

20 Q Okay.

21 A It wasn't a truck. This was a tractor. They were
22 just sitting there.

23 Q Okay.

24 A I was not in any danger --

25 Q Okay.

1 A -- when I came.

2 Q Okay. And were you far enough away? That's why you
3 were not in any danger?

4 A Yes, sir.

5 Q Okay. I don't have any further questions.

6 CROSS-EXAMINATION

7 BY MS. MCPHERSON:

8 Q Afternoon, Mr. Thomas. You never in all the years
9 that you have lived out there have ever seen a flagman,
10 have you?

11 A No, ma'am.

12 Q No flagman. In all the years that you've lived out
13 there you've never seen any warning signs saying trucks
14 ahead or trucks entering the highway, have you?

15 A Not until after the accident happened did I notice
16 any signs.

17 MR. COX: Objection, Your Honor.

18 THE COURT: All right. Just disregard what happened
19 after the accident, ladies and gentlemen.

20 Q Mr. Thomas, in fact, you drove up and down the road
21 basically every day, if not every day back then; right?

22 A Right.

23 Q This is a well-traveled road by school buses,
24 families, you and people in that community, isn't it?

25 A Yes, ma'am.

1 Q You knew to slow down because you were familiar with
2 that road; isn't that right?

3 A Yes, ma'am.

4 Q Would you tell the jury whether there was anything in
5 the world -- a flagman, a sign, or any other warning to
6 somebody like Mr. Valenzuela or somebody that wasn't
7 familiar with how those trucks cross the road?

8 A If they were not familiar with that road they would
9 not have any idea what was going on.

10 Q And you just knew when you came -- in fact, every
11 time you came down that road because you knew what was
12 going on there and you had seen this equipment you slowed
13 down and took extra precaution, didn't you?

14 A Yes, ma'am.

15 Q Because you didn't want to get hit by that
16 70,000-pound pan, did you?

17 A No, ma'am.

18 Q Now, let me ask you, Mr. Johnson, do you know
19 Mrs. Virginia Gunter that lives right out there on Redds
20 Branch Road? Elderly lady.

21 A No, I don't know her.

22 Q Do you know Robbie and Laura Boozer that live right
23 out there?

24 A No, ma'am.

25 Q Do you know this lady in the white jacket standing

1 here -- Will you stand up for me? Do you know this lady
2 right here, Mrs. Ann Johnson?

3 A No, ma'am.

4 Q Thank you so much.

5 THE COURT: Anything on redirect?

6 REDIRECT EXAMINATION

7 BY MR. COX:

8 Q Sir, if someone is watching for traffic and flagging
9 that equipment across and the traffic is clear, there is
10 no vehicles in either direction, and the equipment at that
11 point starts coming across is the turn far enough away and
12 on the other side is it far enough away to where that's
13 not going to present a danger?

14 MS. MCPHERSON: Objection, Your Honor.

15 Q In your opinion?

16 MS. MCPHERSON: Objection.

17 THE COURT: Sustained. He can tell us what's out
18 there. He has. Is it dangerous to you? You can answer
19 that.

20 THE WITNESS: For me because I'm familiar with
21 it, it wasn't to me, but somebody else that didn't
22 realize it could be to them. I can't speak for anybody
23 else.

24 MS. MCPHERSON: I'd like for him to finish his
25 answer, please.

1 THE COURT: He did. He said he can't speak for
2 anybody else which is all he can testify to.

3 Q Okay. But my question is is it a straight enough
4 shot to that crossing to where if it starts crossing
5 before you -- before there is any traffic that it's not
6 going to present a problem?

7 A To me it is.

8 Q To anybody?

9 A I can't speak for nobody else.

10 Q You can't speak for nobody else.

11 THE COURT: All right. That's---

12 MR. COX: Thank you, Your Honor.

13 THE COURT: You may step down.

14 Call your next witness.

15 MR. COX: We'd call Ms. Dana Hall.

16 DANA HALL, after being duly sworn, testified as
17 follows:

18 THE CLERK: Please take a seat in the witness box and
19 state your name for the record.

20 DIRECT EXAMINATION

21 BY MR. COX:

22 Q Mrs. Hall, where are you from?

23 A I'm from Aiken.

24 Q Okay. And did you grow up in Aiken?

25 A I did.

1 Q Okay. And where did you graduate high school?
2 A South Aiken.
3 Q South Aiken. Where are you employed?
4 A Security Federal Bank.
5 Q And do you have any children?
6 A I have a daughter.
7 Q And how old is she?
8 A She's 10.
9 Q Very good. Where do you live, Mrs. Hall?
10 A On Mason Way right off of Redds Branch Road.
11 Q And where is 21 Mason Way in relation to Redds Branch
12 Road? Right off of it?
13 A It's the first road off the right.
14 Q And were you first contacted in this case by the
15 plaintiff's attorneys?
16 A No.
17 Q Okay.
18 A As far as the case?
19 Q You learned about the case, I presume---
20 A Through a neighbor.
21 Q But were you first contacted as a potential witness
22 in this case by the plaintiff's attorneys?
23 A I was questioned by them, yes.
24 Q Okay. And did you meet me for the first time at a
25 deposition?

1 A Yes.

2 Q And how many years have you lived at 21 Mason Way?

3 A Eleven, twelve.

4 Q Okay. And you're familiar with the area where this
5 accident that we're here on today on August 7, 2009
6 occurred?

7 A Yes, sir.

8 Q And how often do you cross through that area of Redds
9 Branch Road on a daily basis?

10 A Several times a day.

11 Q And you cross through several times a day since you
12 lived several -- since you -- for the many years that
13 you've --

14 A Right.

15 Q -- lived at your address?

16 A Yes.

17 Q Is that your regular route --

18 A It is.

19 Q -- to go to work?

20 A It is.

21 Q And to go pick up your daughter from school?

22 A Yes.

23 Q And you and your daughter ride through this area of
24 Redds Branch Road together pretty much every day?

25 A Every day.

1 Q Prior to August 7, 2009 what did you observe about
2 this intersection or crossing?

3 A Nothing out of the ordinary. Well, the only thing
4 that caught my attention was the truck sitting on the side
5 of the road --

6 Q Okay.

7 A -- on several occasions.

8 Q And why did that catch your attention?

9 A Just because I noticed a guy sitting in the truck and
10 I just wondered why he was just sitting there. He wasn't
11 actually on the road. He was off the side of the road.

12 Q Okay. And did you see any equipment crossing the
13 road there from time to time?

14 A From time to time.

15 Q Okay. And during your crossings every day did you
16 observe anything about the equipment crossing the road
17 that concerned you or that was unusual to you?

18 A No, sir.

19 Q Did you ever have any close calls with running into
20 any equipment crossing into the road?

21 A No, sir.

22 Q Did any of the equipment ever cross in front of you
23 without stopping?

24 A No, sir.

25 Q Did you ever believe -- did you ever have any

1 problems at that location of any kind?

2 A No.

3 Q And can you see the crossing as you approach it from
4 both directions?

5 A Yes.

6 Q Any visibility problems with seeing it as you come
7 out of the turn?

8 A No, sir.

9 Q And have any of your neighbors expressed concerns
10 about this crossing to you?

11 A No, sir.

12 Q And you're not familiar with---

13 MS. MCPHERSON: Objection.

14 THE COURT: She can't talk about that.

15 Q Do you have a lot of neighbors?

16 A There's eight houses out there.

17 Q Okay. And you're not familiar with Sam English
18 Grading, are you?

19 A No, sir.

20 Q That's all the questions I have. Please answer any
21 questions---

22 THE COURT: Ma'am?

23 CROSS-EXAMINATION

24 BY MS. MCPHERSON:

25 Q Good afternoon, Ms. Hall.

1 A Good afternoon.

2 Q You have a 10 year old daughter?

3 A I do.

4 Q And what is she, in the fifth grade now?

5 A Yes.

6 Q And time and time again every day and every week you
7 have your precious child in the car as you drive across---

8 MR. COX: Objection, Your Honor. Beyond the scope of
9 my direct.

10 THE COURT: Mr. Cox, she can cross-examine under the
11 rules any relevant subject in the case. Overruled.

12 Q With your 10-year-old little girl in the car you
13 travel this road and cross where Mr. Chris English is
14 working that construction back and forth across the road,
15 don't you?

16 A Yes, ma'am.

17 Q And is it important to you as a mother of a
18 10-year-old to be as safe as you can possibly be?

19 A Absolutely.

20 Q And to follow all the safety rules so that your child
21 or my child or someone else's child doesn't get hurt?

22 A Right.

23 Q And you would expect that as you travel the road that
24 other people are going to follow those safety rules; is
25 that fair to say?

1 A Yes, ma'am.

2 Q Now, there's schools and churches out there off Redds
3 Branch Road, aren't there?

4 A Right. Yes.

5 Q And school buses go up and down Redds Branch Road and
6 they pass right where this wreck happened every day, don't
7 they?

8 A Yes.

9 Q Full of children?

10 A I don't know if they're full of children. I don't
11 know, but I assume.

12 Q Now as you've crossed there have you seen the big
13 yellow piece of equipment that's very long?

14 A Not that I can recall. I don't remember what exactly
15 the equipment looks like.

16 Q Now as you come up there and let me just ask you up
17 until the day of this wreck had you seen any kind of
18 warning signs warning anybody driving on the road of a
19 flagman ahead or of trucks or equipment entering the
20 highway?

21 A No.

22 Q For somebody like Mr. Valenzuela and his wife who
23 were not familiar with Redds Branch Road was there any
24 warning at all that you know of that there was this
25 crossing there where they had the wreck?

1 A No.

2 Q Thank you, Ms. Hall.

3 THE COURT: Anything on redirect? I assume not.

4 MR. COX: Nothing, Your Honor.

5 THE COURT: Thank you, ma'am, for coming.

6 Next witness.

7 MR. COX: Your Honor, we'd call Johnny Tindel.

8 JOHNNY TINDEL, after being duly sworn, testified
9 as follows:

10 THE CLERK: Have a seat in the witness box and state
11 your full name for the record.

12 THE WITNESS: My name is Johnny Tindel.

13 DIRECT EXAMINATION

14 BY MR. COX:

15 Q Mr. Tindel, how old are you, sir?

16 A How old am I?

17 Q Yes, sir.

18 A Twenty-five.

19 Q Twenty-five?

20 A Yes, sir.

21 Q And where are you from?

22 A Aiken.

23 Q Aiken?

24 A Yes.

25 Q You lived here all your life?

- 1 A Yes.
- 2 Q Okay. Where did you go to high school?
- 3 A Aiken High.
- 4 Q Aiken High. Okay. And are you married?
- 5 A Yes.
- 6 Q Okay. And do you have any children?
- 7 A No.
- 8 Q And what do you do for a living, sir?
- 9 A I work for Sam English Grading.
- 10 Q And how long have you worked for Sam English Grading?
- 11 A About three years now.
- 12 Q About three years?
- 13 A Uh-huh.
- 14 Q Were you working for Sam English Grading on August 7,
- 15 2009?
- 16 A Yes.
- 17 Q And on -- how long had you been working at Sam
- 18 English Grading prior to August 7, 2009?
- 19 A Probably about a month.
- 20 Q About a month?
- 21 A Yeah.
- 22 Q Okay. And what did you do prior to going to work for
- 23 Sam English Grading?
- 24 A I worked for Tyler Tire.
- 25 Q Tyler Tire?

1 A Yes.

2 Q And tell me what was your -- what was your position
3 with Sam English Grading when you were hired?

4 A I was hired on as a laborer.

5 Q What does a laborer do?

6 A Just whatever needs to be done, grease machines, fuel
7 them up, you know, run -- do shovel work, raking,
8 sweeping, whatever.

9 Q And with regards to August 7, 2009 what time did you
10 get to work that morning? Do you remember that day?

11 A A few minutes before 7:30.

12 Q Okay. And so do you recall this accident occurred on
13 August 7, 2009; right?

14 A Right.

15 Q And what -- tell me what happened -- did the accident
16 happen a little before lunch, is that right, or right at
17 lunch?

18 A Yes, something like that.

19 Q Tell the jury what happened.

20 A Well, I had just got through sweeping the road off
21 and I had went and sat in my spot in the tractor on the
22 side of the road watching for traffic and I had been
23 sitting there for a few minutes just looking back and
24 forth scanning traffic and I saw Jeff -- Mr. Lewis --
25 coming up in the pan and he always -- he comes up slowing

1 down until I tell him it's all right to come on. I wave
2 him across and the whole time I'm looking back and forth
3 looking for traffic and I wave him across and I looked
4 back behind me towards 302 and I look back towards the
5 curve and that's when I see the motorcycle and then I
6 threw my hands up telling Mr. Lewis to stop the pan and
7 that's when he did. He hit the brakes and he started
8 scanning and that's when he did his turn, I guess.

9 Q Okay. And did he come to a stop?

10 A Yes.

11 Q Okay. And now, when you -- when Mr. Lewis was --
12 Mr. Lewis -- I mean, this was not -- this was -- he was --
13 during this day I think y'all had been in the process of
14 crossing the road. We've heard a lot about it through
15 this case and you've been here the whole time --

16 A Right.

17 Q -- but crossing the road -- I think y'all had been
18 under that -- been doing this job for a couple of weeks
19 already?

20 A That's right.

21 Q And it was a concerted effort to go across the road
22 back and forth getting dirt and take it to the landfill;
23 right?

24 A Right.

25 Q And so it wasn't unusual for Mr. Lewis to be driving

1 the scraper down Owens Corning's private drive to Redds
2 Branch Road; right?

3 A Right.

4 Q Normal occurrence?

5 A That's right.

6 Q Okay. And what was -- when you're there, you've
7 swept the road off?

8 A Right.

9 Q And when you're not sweeping the road off, what do
10 you then -- what is your job then?

11 A Then I just sit and watch for traffic and direct the
12 equipment across the road.

13 Q Okay. If you're not there watching for traffic, what
14 does the equipment do?

15 A Stops, looks both ways.

16 MR. DETRICK: How can he know if he's not there?

17 THE COURT: Sustained. I mean overruled. I mean --
18 if you know. Don't guess.

19 Q Do you know what the pan does if nobody -- if you're
20 not there to flag it across if traffic is clear?

21 A If I'm not there, he stops.

22 Q Okay.

23 THE COURT: Do you know that or is he supposed to?

24 THE WITNESS: No, I know that for a fact.

25 Q Okay. And if you are there is it your job to watch

1 for traffic?

2 A Yes.

3 Q Okay. Provided you're not sweeping?

4 A Right.

5 Q Okay. And Mr. Lewis knows this?

6 A That's right.

7 Q Okay. And when you -- did Mr. Lewis see you on his
8 approach?

9 A Yes.

10 Q Okay. And he understands that when you're there
11 flagging Sam English Grading equipment that it's for the
12 purpose of watching for traffic and giving him the signal
13 that it's safe to come across?

14 A That's right.

15 Q Okay. And on approach was Mr. Lewis -- was he
16 slowing down on approach to the stop sign?

17 A Yes.

18 Q And had he crept to a slow speed before you gave
19 him the signal to come across?

20 A Right.

21 MR. DETRICK: Your Honor, I object to the leading.

22 THE COURT: You are leading. He is your witness.

23 Ask direct questions.

24 Q Okay. Thank you.

25 THE COURT: I mean, nobody has objected up until now.

1 The rule is you can only ask direct questions.

2 Q Tell me how he approaches the Redds Branch Road.

3 A He comes up at a slow speed until I give him the okay
4 to come across. That's when he gets on the---

5 THE COURT: That's when he does what?

6 THE WITNESS: That's when he gets on the accelerator.

7 Q When you give him the signal to come across?

8 A That's right.

9 Q Okay. And you don't give -- what do you do before
10 you give him the signal to come across?

11 A I'm looking both ways scanning for traffic.

12 Q Okay. And do you look both ways and make sure no
13 traffic is coming?

14 A Yes.

15 Q If traffic is coming what do you do?

16 A I tell him to stop.

17 Q Okay. And on August 7, 2009 when you saw
18 Mr. Valenzuela what did you do?

19 A I told him to stop.

20 Q And then what did the scraper do when you told him to
21 stop?

22 A He stopped.

23 Q Now, from time to time when you're there and you have
24 given him the signal that it's clear because you've
25 scanned both ways --

1 A Uh-huh.

2 Q -- assuring that the traffic is clear, from time to
3 time will he come on across Redds Branch Road without
4 coming to a complete stop?

5 A Yes.

6 Q Okay. And what is -- why is that? Why sometimes do
7 you wave him across without him completely stopping?

8 A Why? If he comes to a complete stop it is just hard
9 for the machine to get going again. It takes longer for
10 it to get across the road.

11 Q That's a big ol' piece of equipment?

12 A Right.

13 THE COURT: How much longer?

14 MR. COX: I beg the court's indulgence, Your Honor.

15 THE COURT: How much longer?

16 THE WITNESS: Sir?

17 MR. COX: He's asking you a question.

18 THE COURT: How much longer does it take?

19 THE WITNESS: If he comes to a complete stop?

20 THE COURT: Let's say he goes through without
21 stopping and if he stops how much longer does it take
22 after he stops? How much time are we saving?

23 THE WITNESS: Probably about eight to ten seconds.

24 THE COURT: Eight to ten seconds. Thank you.

25 Anything else?

1 MR. COX: Your Honor, that's all the questions I have
2 at this time.

3 THE COURT: Mr. Detrick?

4 CROSS-EXAMINATION

5 BY MR. DETRICK:

6 Q Mr. Tindel, you're, of course, Sam English's
7 son-in-law; correct?

8 A Yes, sir.

9 Q And as far as you---

10 A I'm Chris English's son-in-law.

11 Q I'm sorry. As far as this particular day he came up
12 and you waved him across he was almost to the road right
13 then, wasn't he?

14 A No. He hadn't gotten on -- he had just started to
15 get on the asphalt driveway.

16 Q Which is fairly close to the road, isn't it?

17 A I don't know exactly how far it is, no.

18 Q When you signaled for him -- what you were doing
19 there was following the instructions of your
20 father-in-law; correct?

21 A Yes, sir.

22 Q And everything that everybody was doing out there was
23 the following the instructions of your father-in-law?

24 A Yes, sir.

25 Q And when you signaled him across then he hit the

1 accelerator?

2 A Yes.

3 Q And then he even got closer?

4 A He did.

5 Q And when he made that turn to the right he was very
6 close to the road, wasn't he?

7 A He was fairly close, yes, sir.

8 Q And so what y'all set this thing up to stop -- where
9 you wouldn't stop, that was because Mr. English wanted to
10 save eight to ten seconds every time on going across the
11 road?

12 A I suppose, yes.

13 Q Now you heard -- you were not a flagman?

14 A No, sir.

15 Q Never had a flag at all?

16 A No, sir.

17 Q You never in that month that you were there there
18 wasn't any warning signs?

19 A No, sir.

20 Q And the testimony of Mr. Lewis with you out there in
21 the middle of the road about flagging and stopping the
22 traffic, that wasn't true, was it?

23 A No, sir.

24 Q As a matter of fact, but if there had been a flagman
25 out there -- if you had been a flagman -- let me ask you

1 this. Did you have a vest on?

2 A No, sir.

3 Q If you had been a flagman and you had had a vest on
4 standing there and you had where the public -- where you
5 could stop the public and Mr. Valenzuela came along on his
6 motorcycle you would have stopped him, wouldn't you?

7 A If that was my job to stop public traffic, I would
8 have.

9 Q And if you're out there with a flag---

10 THE COURT: Hold on. Let him finish. You would
11 what?

12 THE WITNESS: If it was my job to stop public
13 traffic, I would have, yes.

14 Q And this death wouldn't have occurred, would it?

15 A No.

16 Q That's all I have.

17 THE COURT: Anything on redirect?

18 MR. COX: None, Your Honor.

19 THE COURT: You may step down.

20 Next witness.

21 MS. PAYNE: The defense calls Chris English.

22 THE COURT: All right, Mr. English, come around.

23 You're still under oath.

24 CHRISTOPHER W. ENGLISH, after being previously
25 duly sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MS. PAYNE:

3 Q Mr. English, you just heard your son-in-law Mr.
4 Tindel testify. One of the first questions that came to
5 my mind -- how far is the asphalt from the roadway Redds
6 Branch Road?

7 A 100 feet.

8 Q And you just heard Mr. Tindel testify that that is
9 when he flagged him to stop?

10 A That's correct.

11 Q Let's talk about houses on Redds Branch Road. Can
12 you approximate how many houses there are on Redds Branch
13 Road?

14 A Are you asking me from end to end?

15 Q Yes, sir?

16 A I would not have a clue.

17 Q More than 50?

18 A I would assume -- I would say that would be safe to
19 say, yes.

20 THE COURT: Ma'am, he doesn't have a clue. He can't
21 speculate. Do you know, sir? That's all we want to know.

22 THE WITNESS: No, sir. I do not know exactly. No,
23 sir.

24 Q You've been sitting in this trial the past four days;
25 is that correct?

1 A Yes, ma'am.

2 Q How many witnesses have you seen the plaintiff bring
3 up here to tell you about this condition at the
4 intersection?

5 A Five or six.

6 Q Okay. All related or somehow know Mr. Maxwell --
7 isn't that what they've all testified to?

8 MR. DETRICK: Your Honor, first off, I'd object to
9 the leading.

10 THE COURT: That's correct. That's sustained. You
11 can't lead and so ask direct questions, please.

12 Q Mr. English, have you seen one witness brought in---

13 THE COURT: What have you seen?

14 Q Have you seen any witness presented by the plaintiff
15 that has not been somehow related to Mr. Maxwell to talk
16 about the condition at the intersection?

17 MR. DETRICK: Your Honor, I object to that on
18 relevance. I don't know -- related? I don't know what
19 you're talking about.

20 THE COURT: What do you mean by related?

21 MS. PAYNE: That has been approached by Mr. Maxwell
22 to testify in this trial.

23 Have you heard one witness to come up here that has
24 not been approached to testify in this trial about the
25 condition of the intersection on August 7 of 2009 on Redds

1 Branch Road?

2 THE WITNESS: No, ma'am.

3 Q Let's talk about the condition of the road, the
4 visibility. Tell this jury can someone coming around the
5 curve see the pan through the trees when they're coming --
6 when they are coming down the road towards Redds Branch
7 Road?

8 A You may not be able to see it -- Well, I can tell you
9 truthfully you cannot see it solid, but could you not get
10 glimpses of things through there? Yes, you can. Can you
11 get a good enough glimpse to tell what it was? I will not
12 say that, but you could get glimpses here and there, you
13 know, and know something might be coming around through
14 there at certain points in time.

15 Q Okay. You heard Mr. Lewis testify earlier this week;
16 is that correct?

17 A Yes, ma'am.

18 Q How fast -- how long does it take the scraper when it
19 is slowing down to stop at a stop sign to get going to
20 17 miles per hour?

21 MR. DETRICK: Your Honor, I object. That's opinion
22 testimony. It doesn't have a speedometer in it.

23 THE COURT: Sustained.

24 MS. PAYNE: Your Honor---

25 THE COURT: Nor is he qualified to give speed

1 testimony.

2 Have you operated the machine?

3 THE WITNESS: Yes, sir, I do.

4 THE COURT: Does it have a speedometer on it?

5 THE WITNESS: No, sir, it does not.

6 MS. PAYNE: Your Honor, under 701 he has specialized
7 knowledge.

8 THE COURT: Ma'am. What is the question?

9 MS. PAYNE: The question is how long if he is slowing
10 down to stop at a stop sign would it take -- how many
11 second would it take to get going to 17 miles per hour
12 again?

13 THE COURT: Do you know?

14 THE WITNESS: Roughly four to five seconds.

15 THE COURT: Roughly four to five seconds? That's
16 fair.

17 Q Let's -- why is it -- tell the jury why it is
18 important for you to sweep the road.

19 A Keep the dust and debris off of the road to where the
20 public traffic does not have to run across it.

21 Q Why did you have Mr. Tindel sweeping the road and
22 being a spotter for Sam English Grading?

23 A Well, I mean, while he was sweeping the roads to get
24 the dirt and dust off the roads so the traffic wouldn't
25 have to run across it, if he didn't have any dirt to sweep

1 at time he could motion for the pans and trucks to come
2 across if it was clear just for the sake of time to where
3 if they were completely stopped it wouldn't take that
4 extra time to get across the road.

5 Q And why were we trying -- why was Sam English Grading
6 trying to save that time?

7 THE COURT: How much time are we saving?

8 THE WITNESS: Each load? I mean, it's not
9 necessarily the question of saving time for the company as
10 much as it is saving time to get the machine across the
11 road.

12 Q Why is that important?

13 A To get it across quicker so, doggone, it would not
14 interfere with traffic.

15 Q Yes, sir. Tell this jury why you instructed your
16 employees to not come to a complete stop at the stop sign
17 unless there is a flagger over there.

18 A If there is not a flagger there, they need to stop to
19 make sure there is nothing coming either way before they
20 cross.

21 Q Did you -- in directing your employees to conduct
22 them this way did you intend to create what the
23 plaintiff's allege to be a dangerous situation?

24 A No, ma'am.

25 Q What was your intent?

1 A Just to, doggone, get my job done and to get across
2 the road safely and as quickly as possible.

3 Q Did you think at all times that you were in
4 compliance in with the contract with Owens Corning?

5 A I did.

6 Q Did anyone with Owens Corning ever come and tell you
7 you're not in compliance with the contract?

8 A No, ma'am.

9 Q Were there people from Owens Corning coming in and
10 out and around and all about this area where you're
11 conducting your work?

12 A At different times.

13 Q Is Owens Corning at either one of these tables today?

14 A No, ma'am.

15 Q Sam English -- what kind of company is Sam English?
16 Is it a Fortune 500 company?

17 A Meaning?

18 THE COURT: Whoa, whoa, whoa. Walk over here.

19 (Whereupon, a bench conference was held.)

20 Q Chris, tell this jury how this wreck has affected
21 you.

22 A Well, I mean -- I mean, the way it would just about
23 affect anybody. I mean, you find out somebody is fixing
24 to sue your company. You find out that they're blaming
25 you for a wreck. I mean, it makes me upset and nervous.

1 Q Were you upset on the day of August 7, 2009 that
2 Mrs. Valenzuela had lost her life?

3 A Of course, I was.

4 Q Did that affect your family?

5 A Yes, ma'am.

6 Q Did it affect Mr. Tindel?

7 A Yes, ma'am.

8 Q No further questions.

9 CROSS-EXAMINATION

10 BY MR. DETRICK:

11 Q Mr. English --

12 A Yes, sir.

13 Q -- up until this date right now you wouldn't do
14 anything different as far as your situation out there,
15 would you?

16 MS. PAYNE: Objection, Your Honor.

17 THE COURT: And the objection is?

18 MS. PAYNE: Going into evidence that we have
19 previously ruled excluded.

20 MR. DETRICK: I'll rephrase it. I'll rephrase it.

21 As of what happened on August 7 -- what you had going
22 on on August 7, 2009, what you were doing there, you
23 wouldn't do it different then, would you?

24 THE WITNESS: I had -- I'm sorry. I just hadn't
25 100 percent understood your question.

1 Q That's all right.

2 A No. I'll---

3 Q I'll withdraw the question and leave you alone. I
4 have questioned you enough.

5 THE COURT: Thank you. You may sit down.

6 Next witness.

7 MR. COX: Can we take a five-minute break?

8 THE COURT: I'll let y'all step out there hurriedly.
9 Do you need five minutes?

10 MR. COX: Your Honor, the defense rests.

11 THE COURT: Anything in reply?

12 MR. DETRICK: Nothing in reply.

13 THE COURT: Well, I was about 10 minutes off.

14 THE JUROR: You're good.

15 THE COURT: No, I'm not. I have just been doing it a
16 long time. I know I don't look like I have. All right.
17 We'll start at nine in the morning. I'll have everything
18 done. When you walk out here at nine after you have your
19 little refreshments back there and your coffee, the way it
20 works is the plaintiff will open in full. They'll do
21 their final argument in full followed by the defendants
22 and then the plaintiff has the right to reply to anything
23 they may have argued.

24 I am going to tell them to get to the point with
25 their argument. I am not going to limit them, but I think

1 they'll be efficient with their time. Once that is done,
2 then my charge or my instruction to you on the law will
3 not be that long -- 15 or 20 minutes -- and then,
4 obviously, we'll turn it over to you.

5 So, once again, I thank you. Y'all have been just
6 fantastic. I hope you have a wonderful evening.

7 Don't you pull against my Gamecocks. I know you
8 will.

9 THE BAILIFF: They have requested cookies from
10 Tri-Development.

11 THE COURT: Oh, Yeah. Those are great. Get all
12 those different kinds and get a few extra. I don't want
13 to get accused of eating them.

14 Thank y'all, once again. I know these parties thank
15 you. You know, these things aren't fun, but y'all have
16 been wonderful. You've paid great attention. I'll see
17 you bright and early in the morning. Nine o'clock.

18 Everybody else remain seated, please.

19 Leave your pads in the seat.

20 We'll collect those, Ms. Barbara.

21 (Whereupon, the jury exited the courtroom at 2:53.)

22 THE COURT: All right. Motions by the defendant?

23 MS. PAYNE: Yes, Your Honor. We would renew all the
24 previous objections that were previously overruled and
25 directed verdict motion.

1 THE COURT: Thank you. I will respectfully deny that
2 based on the same reasons. In all the cases I've read
3 dealing with these types of situation and even not having
4 read the cases, this is obviously a jury question as to
5 whether or not the defendant was negligent in the whole
6 sort of global situation and if he was whether it was the
7 proximate cause of Mrs. Valenzuela's death and whether or
8 not Mr. Valenzuela was negligent -- to compare their
9 negligence. It is just a jury issue if I have ever seen
10 one; so, respectfully denied.

11 Now, do y'all need a quick break before we do the
12 jury charge or how do you want to handle that?

13 MR. DETRICK: If you don't mind.

14 THE COURT: It's not going to take but a short period
15 of time for the charges. Let's take a short break.

16 (Whereupon, a break was taken.)

17 THE COURT: All right. Here is what I intend to
18 charge. I have looked at the requests that y'all have
19 given me and 90 percent of it what you've asked me to do
20 is included in my general charge, but the general charge
21 is as follows. I start off by reminding them of my duty
22 and their duty, finders of the facts, judge of the law,
23 accept the law as I give it to them, if I have made any
24 facial expressions that I have any opinions about the
25 facts I don't, they're the finders of the facts, it is

1 their sole job to determine the facts in the case. In
2 order to do that, obviously, they have to determine the
3 credibility or the believability of the witnesses who have
4 testified in the case and it's the same -- believe all
5 witnesses, no witness. Y'all have heard that a million
6 times. Maybe not a million, but you've heard it a lot.

7 I will charge on the burden of proof, preponderance
8 of the evidence. I will also charge them on clear and
9 convincing evidence as to the special interrogatory
10 dealing with reckless, willful, wanton, conscious
11 disregard for the rights of others. I will charge them on
12 expert witness opinions, et cetera, et cetera. Y'all are
13 all familiar with that -- corporation as a person.

14 Then I will charge them that this is a negligence
15 cause of action and in a negligence cause of action the
16 plaintiff has to prove four things by the greater weight
17 or the preponderance of the evidence, duty of care, breach
18 of that duty, injuries and the injuries that were the
19 proximately caused by the breach. I will charge them what
20 proximate cause is.

21 I will then charge not only is the plaintiff claiming
22 that the defendant was negligent in this case, the
23 defendant likewise claims that Mr. Valenzuela was likewise
24 negligent and you will be asking to compare their
25 negligence of the two. I'll go through that exercise of

1 the comparative negligence and after that I will go the
2 various duties that people who operate either motorcycle
3 or vehicles on the road are required, what is required of
4 them by law, duty of due care, duty of proper -- maintain
5 proper lookout, keep the vehicle under control and then
6 I'll charge that there are certain statutes which our
7 legislature has enacted to also govern the operation of
8 vehicles and I will charge as 156-5-3610 -- that's the
9 general -- 56-5-3610. That's the general charge of
10 motorcycles have got the same rights as cars.

11 Then I will charge 56-5-2350 which is the entering a
12 roadway from a roadway other than a highway such as a
13 private drive. That's the yield right-of-way statute. I
14 will under that statute -- if you'll look in the
15 annotations there is a definition that we talked about
16 this morning and that Ms. Payne has in her charges about
17 what yield means and that's the case of Spencer v Kirby,
18 slow down, stop, or go through depending on what the
19 circumstances there existing.

20 I am still not yet decided whether I am going to
21 charge the stop sign statute which is two -- 56-5-2330,
22 but if I charge that statute I will tell them that there
23 is evidence in the record that the stop sign may or may
24 not have been put there by the SCDOT or it's not an
25 authorized stop sign and if that's the case then the

1 defendant would not be obligated to comply with that
2 statute; however, that is still evidence that they can
3 consider on the question of negligence.

4 I don't know of any other -- do I need to charge the
5 speed statute? We'll talk about that in a minute. Let me
6 tell me what else I am going to charge. I'll charge
7 failure to follow statutory rules is negligence, per se,
8 and then I am going to go from there to the wrongful death
9 statute and I'll charge my normal wrongful death charge
10 which is what both of you have given to me. Mine may not
11 be quite as wordy as what y'all have given me, but it sets
12 out what wrongful death is, who it is for the benefit of.
13 It includes pecuniary loss, mental shock and suffering,
14 wounded feelings, grief and sorrow, loss of companionship,
15 and those sorts of things, and charge unanimous verdict by
16 the jury. Going back to the negligence I will charge
17 sudden emergency. I think that covers it.

18 Now, Mr. Detrick, what else in addition to that do
19 you want?

20 MR. DETRICK: I assume you were talking about the
21 general charge there about keeping proper lookout, keeping
22 the vehicle under control, reasonable care you have to use
23 upon approaching intersection.

24 THE COURT: I don't know if I am going to get that
25 fact-specific. Just give me a second and I'll tell you

1 factually what I am going to say. The reason -- I don't
2 mean to be cutting you off. They have given us these
3 charges that have withstood the test of time and they
4 don't like us to get too much off path from them: The
5 operator of a motor vehicle is required by law to use the
6 same care that would be used by a person of ordinary
7 reason and prudence if that person who were driving the
8 same vehicle at the same time and place and under the same
9 circumstances; proper lookout; the driver of an automobile
10 has a duty to keep a proper lookout for other vehicles on
11 the road; this duty requires the driver to watch
12 attentively so that the driver is able to see a person or
13 object on the highway; keep it under control; the duty of
14 a driver of an automobile under proper control to be able
15 to slow down, stop, and turn to avoid colliding.

16 What do you want in addition to that, Mr. Detrick?

17 MR. DETRICK: Your Honor...

18 THE COURT: Which one of your numbers?

19 MR. DETRICK: It will be number two in particular.

20 THE COURT: That's that Warren versus Watkins Motor
21 Lines. I got that yesterday. I will consider your number
22 two.

23 MR. DETRICK: Yes, sir.

24 THE COURT: Anything else, Mr. Detrick?

25 MR. DETRICK: Other than as far as automobile you put

1 vehicle.

2 THE COURT: I will say motor vehicle or I won't use
3 automobile because there are no automobiles involved and
4 if you catch me doing automobile somebody -- I got a good
5 one up here. You got number three which is a charge I
6 often do about everybody will assume somebody else will
7 comply with the laws of the road. I will consider that;
8 more than likely will charge it.

9 MR. DETRICK: Thank you.

10 THE COURT: The rest of them are pretty much on the
11 facts, Mr. Detrick. You've got in here 56-5-3610. We've
12 talked about that. Both of you want that. I don't think
13 speed is---

14 MR. DETRICK: I think speed's under ordinary care.

15 THE COURT: That takes care of that. All right. As
16 far as, Ms. Payne---

17 MS. PAYNE: Yes, sir, and just to clarify---

18 MR. DETRICK: Before we get to her, Your Honor, what
19 about the section 56-5-1520, the speed.

20 THE COURT: Speed? I just said I wasn't going to do
21 speed.

22 MR. DETRICK: You said what, sir?

23 THE COURT: Speed? You said what.

24 MR. DETRICK: 56-5-1520 and, specifically, Your
25 Honor, F -- A and then F goes along with it. I think F is

1 the one that takes care of this situation and makes it
2 where you have to follow through. It just says other
3 traffic or highway---

4 THE COURT: That's just a general speed, don't
5 operate your car faster than it should be and not in
6 control to avoid colliding with people and F is
7 approaching an intersection.

8 MS. PAYNE: A and F? Is that what you're saying,
9 Your Honor?

10 THE COURT: Yes, ma'am. You don't have any problem
11 with that?

12 MS. PAYNE: No problem with that.

13 MR. DETRICK: All right, sir. Thank you.

14 THE COURT: 56-5-1520(a) and (f).

15 MS. PAYNE: Yes, sir.

16 THE COURT: And I'll delete out of F railroad
17 crossing and all that stuff.

18 MR. DETRICK: All right, sir. You were going to
19 charge the mortuary table, too; is that correct?

20 THE COURT: Mortuary table. That's correct.

21 MR. DETRICK: All right. Thank you.

22 THE COURT: Now, defendant, you've got your wrongful
23 death elements and introductory---

24 MR. DETRICK: I hadn't been provided with their
25 requests.

1 THE COURT: That is just my general charge on
2 wrongful death.

3 MS. PAYNE: It is just general.

4 THE COURT: If I get to something you need to know
5 you can get a copy of it and I'll tell you.

6 MR. DETRICK: All right.

7 THE COURT: Wrongful death has just got all of the
8 elements of the damages which is general. She's got life
9 expectancy, funeral expenses, loss of society, those sorts
10 of things which I'll do. She's got 56-5-450. That is
11 just defining a private road.

12 MS. PAYNE: I mean, we don't have---

13 THE COURT: Then you've got -- you've got that Morris
14 case -- a motorist entering a highway from a private drive
15 is required to yield the right-of-way and that's the whole
16 statute on the yielding the right-of-way and we're going
17 to talk about in those cases I talked about that you've
18 got trying here -- Spencer v Kirby. That's on about seven
19 over on your charges.

20 MS. PAYNE: Yes, sir.

21 THE COURT: And Brown versus Howell. I'll do all of
22 those at your request. Sudden emergency. I told you I
23 was going to do that.

24 MS. PAYNE: On the second part of the sudden
25 emergency, it is Clark v Cantrell. I'm sorry there are

1 not page numbers, Your Honor.

2 THE COURT: That's all right. I got it right here.

3 MS. PAYNE: It says that doctrine does not apply when
4 a party's own negligence creates the very emergency in
5 which she finds herself. Is that a part of the order?
6 Okay.

7 THE COURT: Your other ones are pretty much general.
8 Expert testimony, preponderance of the evidence,
9 negligence, the elements.

10 MS. PAYNE: Yes, sir. I think you've covered all of
11 ours.

12 THE COURT: I think so. The only one -- how about
13 this attorney conduct?

14 MS. PAYNE: That's standard. We just want to make
15 sure there is a few of plaintiff's that we want to make
16 sure you're not charging number 12, 17.

17 THE COURT: Whoa, whoa. Twelve?

18 MS. PAYNE: Twelve.

19 THE COURT: That's the first one I am going to
20 charge. I am just kidding.

21 MS. PAYNE: I hope not.

22 THE COURT: I just talked about that. I don't know
23 whether I am going to charge the stop sign. If I do I am
24 going to certainly say that's where it's an authorized
25 stop sign. If it's an unauthorized stop sign, the statute

1 doesn't apply to it, but still whether they did or didn't
2 obey it, that's a matter for you to decide and something
3 you can use in determining whether or not someone is
4 negligent or not. That would be as far as I would go with
5 that.

6 MS. PAYNE: Yes, sir.

7 MR. DETRICK: Can I address that, Your Honor? As far
8 as authorized stop sign, I gave you the statutes on that.
9 As I understand the law that before you can put up a stop
10 sign there is a DOT, you know, it is a traffic control
11 sign that you have to get approval by the Highway
12 Department or you don't put it up.

13 THE COURT: You do. It's is 56-5-910, but there is
14 no evidence in the record that he got approval and there
15 is no evidence in the record that he didn't get approval.

16 MR. DETRICK: And then the statute says further on
17 that if you do not do that, it is assumed you did.

18 THE COURT: Where does that say that?

19 MR. DETRICK: That's the next -- hold on.

20 THE COURT: That's 56-5-1020.

21 MR. DETRICK: That's correct.

22 THE COURT: Cannot display an unauthorized sign which
23 is imitation. That is not an imitation. That is the real
24 thing. This provision shall not be deemed to prohibit the
25 erection upon private property adjacent to highways of

1 signs giving useful, directional information of a type
2 that can not be mistaken for official signs.

3 MR. DETRICK: Correct. This is an official sign.

4 MS. PAYNE: I would, obviously, argue that that is
5 not applicable here, and, furthermore, plaintiff has not
6 presented any evidence to support any of this.

7 THE COURT: Well, I may tell them that there is a
8 statute about a stop sign. We all know about that and I
9 may say that stop sign is not authorized or if you find it
10 not to be authorized or a stop sign put up in accordance
11 with the law that you can still consider whether or not
12 they didn't comply with it in assessing or deciding
13 whether or not they were negligent -- something to that
14 effect.

15 MR. DETRICK: And if you do that, Your Honor, we'd
16 also like for you to charge the statute that says where
17 you're supposed to stop at a stop sign.

18 THE COURT: Well, that's the stop line, the pavement,
19 or there is one other part.

20 MR. DETRICK: Closest to the intersection where you
21 can perceive the traffic.

22 THE COURT: I'll look at that one. I'm struggling
23 with that a little bit.

24 MR. DETRICK: Okay, sir.

25 THE COURT: Mr. Detrick, you got enough ammunition.

1 You don't need that.

2 MR. DETRICK: Yes, sir.

3 THE COURT: Don't create a problem. I guess I need
4 to charge corporation acts through its people and some
5 type of master servant.

6 MR. DETRICK: And since there is no issue about
7 whether he was acting in the course and scope of his
8 employment we also had a request to charge on Mr. Lewis'
9 conduct that then that Sam English Grading Company would
10 be responsible. I have to find the request.

11 THE COURT: Well, you've got I charge at the time of
12 the wreck Jeffrey Lewis was an employee of Sam Grading and
13 I charge you that the employer is liable for his
14 negligence.

15 MR. DETRICK: That's correct.

16 THE COURT: I will get something on that. It may not
17 be that fact-specific. I'll tell you exactly what I am
18 going to do. I will say this, ladies and gentlemen:
19 Employer is liable for the negligent acts of its employees
20 which were -- which are within the scope of their
21 employment which proximately caused the injury to another
22 person.

23 I don't think it's any question in this case is that
24 all the employees -- the people operating the pan were
25 employees of the defendant and so it would make the

1 employer liable if they find there to be negligence,
2 something of that nature.

3 All right. I looked over the -- I looked over the
4 verdict form and here is what I am going to do. I am
5 going to do a regular comparative negligence verdict form
6 which is very similar to what you handed up to me,
7 Mr. Detrick, but I am going to put after questions one and
8 two you had, three, the amount of damages. Excuse me. I
9 am going to drop that down at the very end. I've
10 instructed Mr. Maxwell to do that.

11 Ronnie, if you don't mind tonight would you please
12 e-mail them a copy of what you do --

13 MR. MAXWELL: Sure.

14 THE COURT: -- so we can go from there? The way you
15 handed it up to me, that's exactly like they suggest we do
16 it.

17 MS. PAYNE: The only other objection we had was a
18 couple of the numbers were like typos because I guess they
19 had fixed it, but I just wanted to ---

20 THE COURT: Well, let's look and make sure they're
21 all---

22 MS. PAYNE: Like it says go to number three or
23 whatever.

24 MR. MAXWELL: I see that. Sure.

25 THE COURT: Ronnie, just go over that --

1 MR. MAXWELL: Yes, sir.

2 THE COURT: -- before you leave tonight. All right.
3 I'll see y'all. Let's be here a little bit before nine to
4 see if we have anything at the very last minute so we can
5 get cranked up.

6 I commend both of you -- when I say both, both sides.
7 I know these cases get a little testy, but by and large
8 y'all have been wonderful.

9 (Whereupon, the proceedings were concluded for the
10 day and were reconvened on August 31, 2012 as
11 follows:)

12 THE COURT: Anything from the plaintiff before we
13 start?

14 MR. DETRICK: No, sir.

15 THE COURT: Anything from the defendant? I got the
16 verdict form. I think y'all both have presented me the
17 same thing.

18 MS. PAYNE: Yes, sir. We agreed with plaintiff's
19 redacted except we would ask the court to add unanimously
20 find.

21 THE COURT: I'll tell us that it has to be unanimous.

22 MS. PAYNE: Whenever you tell us what you're going to
23 charge obviously we will---

24 THE COURT: I think I told you yesterday everything I
25 was going to charge and I was trying to decide on the stop

1 sign statute and I have made my mind up. I am going to
2 charge it, but I put the caveat in there that they find
3 that it was not authorized then, obviously, it still would
4 be a situation they could -- or a fact that they could
5 consider in determining the overall question of
6 negligence. Y'all can argue it however y'all want to
7 argue that.

8 MS. PAYNE: Yes, sir. And just for the record
9 purposes we would object to that instruction being given.

10 THE COURT: Sure.

11 MS. PAYNE: As well as the sudden emergency
12 instruction, Your Honor.

13 THE COURT: Sudden emergency instruction?

14 MS. PAYNE: Yes, sir.

15 THE COURT: Your expert said it was a panic stop.
16 How else can it be more emergent?

17 MS. PAYNE: Yes, sir.

18 THE COURT: Thank you.

19 MS. PAYNE: Thank you.

20 THE COURT: I am going to step back and as soon as we
21 get them all we'll get cranked up unless there is anything
22 else I can do.

23 (Whereupon, a break was taken.)

24 (Whereupon, the jury came into open court at
25 approximately 9:08.)

1 THE COURT: Let me announce Mr. Epps, our juror on
2 the back, had a brand new baby granddaughter last night.
3 I had two boys. I've got two granddaughters. They get
4 whatever they want. Nothing like them. Nothing like
5 them.

6 Okay. As I said yesterday what we have left are the
7 final arguments and then I'll charge you on the law.
8 Please bear in mind that you've already heard all of the
9 testimony; so that's where you will make, obviously, your
10 decision from, but the lawyers have an opportunity to
11 argue after the close of all the evidence, but the
12 arguments is not evidence in the case. It is simply both
13 of them are adversaries for their respective clients and,
14 obviously, they'll be arguing in the light most favorable
15 to their clients. This is simply argument. You've heard
16 all of the testimony and that's where you'll make your
17 decision.

18 At this time the plaintiff goes first. They have to
19 open in full and then followed by the defendant and then
20 the plaintiff has the right to reply to any of the
21 defendant's argument.

22 Mr. Detrick, good morning and you may start.

23 MR. DETRICK: Thank you, Your Honor. May it please
24 the court.

25 CLOSING STATEMENT

1 MR. DETRICK: Wow, what a wonderful day. I mean,
2 really, that news from the judge lifts us all up. I know
3 y'all don't believe it looking at me, but I got five
4 grandchildren and I got one 10-month-old great grandchild
5 and they live in Aiken and I ate with them Sunday night
6 and it was wonderful. You ask Lisa. We had a wonderful
7 time. It really puts life in perspective when you have
8 children like that and have grandchildren.
9 Congratulations, again.

10 THE JUROR: That's my third.

11 MR. DETRICK: We'll get down to business. I know
12 y'all have had enough of lawyers and everything. Thank
13 you very much for sitting here and serving on this jury.
14 I know it's an inconvenience. Y'all know how important it
15 is, and, you know, no matter what I say I understand y'all
16 realize that.

17 I am going to tell y'all something. Very few times
18 in my career have I really thought, okay, Paul, why give a
19 closing statement? You know? Why do you have to? I
20 really shouldn't -- I don't want to insult y'all's
21 intelligence at all by giving this statement because I
22 know y'all know what happened. I know y'all have sat and
23 listened to the facts and that's what matters, not what
24 Paul Detrick says, but, unfortunately, y'all are going to
25 have to listen to me because I am required to give a

1 closing statement, no matter what; so, bear with me.

2 I told y'all there is no doubt about this. Prior to
3 August 7, 2009 a very dangerous situation was created out
4 there on Redds Branch Road. It was unbelievable and we
5 put up witnesses at the start that lived out there who are
6 familiar with what was going on. We wanted y'all to
7 understand and know about that.

8 You remember those witnesses that know that it was
9 something getting ready to happen. Ann Johnson. I think
10 she's here. Yeah, she's here today. You remember her
11 testimony -- two days before I think it was. That doggone
12 thing -- scraper -- she's riding down the road and it goes
13 behind her full speed across the intersection not stopping
14 and if it had been -- if she had seen it, if she would
15 have had reacted as Mr. Valenzuela did -- had to react --
16 if it had been a few feet here or there or whatever, she
17 told you she would have been killed. She went to her
18 husband and she told him that day somebody is going to get
19 killed out there.

20 Then we have Laura Boozer and she's having to slam on
21 brakes and we have poor Mrs. Gunter. I mean, the poor
22 lady, she's having to live out there and you heard -- I
23 mean, really, you heard the fear in her testimony. She's
24 living out there and having to think as she goes -- a lady
25 her -- now, my mind is getting slower, folks, and when you

1 are having to get out your bed and think, okay, I got to
2 think about it now. There might be this equipment might
3 be coming across there today. I don't want to get killed
4 today. I would rather live a few more days or a few more
5 months or a few more years. A lady in her condition in
6 the later part of her life is worried about that.

7 Remember what she said and I think it's true. She
8 said they don't care we exist and they don't. You heard
9 it. They don't. Isn't that unbelievable? I mean, God, I
10 don't understand it, but that's what was created out
11 there. And so what happened? Unfortunately, Ann
12 Johnson's prediction occurred. It is really unbelievably
13 sad.

14 Michael Valenzuela that day had no idea. His life
15 and Mikey's life were just as happy you know as they could
16 possibly be. Don't get me wrong. I'm sure it wasn't
17 everything perfect. They weren't rich people. You know,
18 they were having to work hard to make things and get
19 things and Christie, you know, would have to do a lot of
20 the work herself. What a woman. What a woman. And so
21 this day on a beautiful day like today is like there where
22 we've had rain for all month, but the sun is up. We got
23 children. She's smiling. She's got her child at home and
24 she's got her husband and she's going on back of the
25 motorcycle going to get a part where they could again

1 enjoy another weekend together with the family to do
2 something at their house.

3 They had no idea what they were coming across --
4 coming across Redds Branch Road which they're not familiar
5 with. You know, this crossing at 525 feet from the curve
6 it comes around and they kept talking about how you can
7 see. Can't you see that intersection? You remember all
8 of that testimony. My goodness, it is all woods and it's
9 30 feet back and why should you have to look and worry
10 about some scraper that's coming out there? Why should
11 you? You got the right-of-way. You are riding down the
12 road. Why should you worry about how you brake or what
13 you look -- how should Mr. Cox want you to look out every
14 driveway?

15 That road -- they had a right to be on it. They had
16 a right to go get their part. They were put in a
17 position -- Mr. Valenzuela, unbelievably. He is going
18 along and what happened? A scraper going I won't say
19 17 miles an hour. I don't -- but, you know, it's 15 to
20 20 miles an hour, whatever. They are coming on there and
21 that scraper is going along with no intention
22 whatsoever -- 70,000-pound piece of equipment -- no
23 intention whatsoever of stopping. He is going to go on
24 through because they're on that road. They are on that
25 private road. They own that stop sign. We can do what we

1 want to and he comes up within 20 feet of that
2 intersection at that speed and what is Mr. Valenzuela
3 supposed do?

4 He can't read that guy's mind. He don't know what in
5 the world is going to happen. He don't know he can turn
6 that -- y'all saw how it turned. I had no idea it turned
7 like that. How do you know that? He was put in a
8 position to where he had to react. You know what? That's
9 about the only thing we've all agreed on in this case.
10 Everybody has said he was facing an emergency situation;
11 that he had a make a panic stop and he did the best he
12 could.

13 He didn't -- he put on his rear brakes. He -- the
14 guy is still looking ahead, not looking at him, and he was
15 hoping and praying that that guy was going to stop. It
16 goes through your mind, you know, the seconds like that
17 that you're still thinking, please stop, please stop. He
18 didn't think he was going to stop. He laid it down. He
19 tried to save his wife's life, but she's, unfortunately,
20 not with us. He had to react in seconds to this
21 intentional conduct they -- this dangerous situation they
22 put out.

23 And, you know, I feel -- I feel sorry for Mr. Jeffery
24 Lewis. I really do. He's not a bad man, ladies and
25 gentlemen of the jury. He is a man -- a working man like

1 so many others. He is going out there to make a living.
2 He is doing what the boss told him and he knew what
3 happened. He knew this was a dangerous situation and
4 that's the reason -- unfortunately, he was facing a
5 decision that he felt like that he had to not tell the
6 truth.

7 Why did he not tell the truth? Because he's talking
8 to the law. Somebody has died. And he knows that his
9 boss has made me go out there and run these stop signs.
10 He knows that isn't no way in the world Mr. Valenzuela --
11 nothing he could have done. He's already basically said
12 that. He did say that. He made a panic stop.
13 Mr. Valenzuela made a panic stop. They were both placed
14 in that position because Mr. English over there is
15 concerned about hauling dirt and concerned about eight
16 seconds here and there and concerned as his own expert
17 said about time and he places -- Mr. Lewis had to felt
18 like he knew what they were doing was dangerous. He knew
19 that the motoring public was being ignored. He,
20 unfortunately, was involved in the death of someone
21 because of that and he felt like he had -- he was scared,
22 I'm sure. Scared of the law. Scared of going to jail,
23 but he told an untruth.

24 And Mr. Eric Pruitt -- you know, everybody there --
25 we put him up on the stand. He is a friend of Chris -- I

1 guess he is a friend of Chris English. He is a friend of
2 Mr. Jeffery Lewis and he was sitting there. Y'all heard
3 his testimony. He said I thought he was coming out. I
4 was sitting there. I thought he was coming out in the
5 road. He said he turned within two or three feet of the
6 road. I asked him is there anything that Mr. Valenzuela
7 could have done besides lay the bike down? He said no.
8 There wasn't nothing else he could do.

9 So, given that, can there be any doubt that they are
10 responsible; that they were negligent; that they created a
11 dangerous situation? You know, we put up experts. We put
12 up to kind of explain the scene, to explain the best we
13 could of the scientific engineering principals of what
14 happened. We wanted to present everything to y'all.

15 We put up Mr. Kennett who I hired. All right? I am
16 not ashamed to say as Mr. Smith would say -- Mr. Smith
17 wouldn't say it -- that he was paid. Ladies and
18 gentlemen, I am telling the truth. I just want to truth.
19 I hired Mr. Kennett to do the best he could with the job.
20 I didn't hire -- the MAIT Team -- Sergeant Coffin -- who
21 testified to the same thing -- testified to the speed. He
22 was lower than the guy I hired. I should not have hired
23 him maybe. I don't know. But, anyway, the bottom line is
24 we put those up because we wanted y'all to hear and see
25 and know about what this area was like, the visibility

1 that was present, the fact of how many seconds go by
2 during this situation. Really 525 feet with no
3 visibility, I mean, that's pretty doggone quick if you're
4 riding 45 miles an hour at 66 feet per second. So, yeah,
5 we put them up to give -- you know, to let y'all know as
6 much as we could the truth.

7 You know, I've been practicing law too long I guess
8 -- 39 years. I've tried cases with the judge, you know,
9 and all over the state and in some other states and I'll
10 be honest with you. I ain't never seen anything like
11 what's going on in this courtroom this week. The excuses
12 that they've made for not accepting responsibility of
13 their intentional conduct just are unbelievable. They
14 defy logic. I really am shocked and y'all have heard
15 them.

16 What do they say in order to not be responsible?
17 They admit that they intentionally were going to run the
18 stop sign. They didn't care about the public. So, we'll
19 just go through a little bit. I promise, I'll try not --
20 but they say, okay, just some of the stuff they said is
21 unbelievable. The contract which they had which they
22 agreed to which -- you know what? This is what you got to
23 remember. Owens Corning hired safety engineers. We took
24 his testimony. They do studies. They know what is
25 necessary for safety. This isn't no little company, you

1 know, they hire people who know what is needed for safety.
2 They don't want to kill people and in this case
3 Mr. Merritt -- he had his opinion. He knew what was
4 needed out there and he told Mr. English and Mr. English
5 agreed to it and he relied -- you know, Mr. English signed
6 -- he didn't sign the contract, but he knew the
7 requirements.

8 Y'all heard Mr. Merritt say that when he went there
9 they were there. When they wasn't there -- you know,
10 Mr. English would know he was going to be there. How
11 intentional can you get? Here, let's play the word game
12 that they're playing. Can y'all believe it? I mean,
13 really. This is the so-called -- okay. We will provide a
14 flagman. Oh, Mr. English said, well, that's -- the
15 flagman -- we had a flagman out there. Well did he have a
16 flag? No. Well, but he is still a flagman.

17 He said we flag for the scraper. Where does it say
18 on there -- the scraper is 70,000 pounds. That guy in
19 that scraper -- Jeffrey Lewis -- he ain't going to get
20 hurt. Who is going to get hurt? Why do you have flagman?
21 Because, ladies and gentlemen, these cars, these
22 motorcycles, these school buses that go down that road,
23 they're the ones that get hurt. Everybody knew you needed
24 a flagman if you're going to go across that intersection.

25 They also -- it was specific. It wasn't like, you

1 know -- it also said, you know, that -- I mean, it was
2 specific what they were needing. It has to have advanced
3 warning signs. Why do we have them? We just don't want
4 people hurt. We really don't. You have them to prevent
5 these kind of things. In this case it says what they were
6 supposed to have and, you know, how did Mr. English -- he
7 says -- well -- everybody says it never happened, but
8 Mr. English comes around and gets around and he says,
9 well, yeah, it says a flagman Sign ahead at 500 feet, but
10 yet I didn't need a flagman. I had a flagman.

11 Which way is it? I don't know. I mean, I got
12 confused myself, but, obviously, he agreed with that and
13 they can say and they can make all of these excuses for
14 their responsibility that they want to and it was said the
15 flagman will be located at the crossing to maintain
16 traffic flow. It doesn't say maintain scraper's traffic
17 flow. I mean, that's unbelievable, and then obvious --
18 Can y'all imagine this? I never would have imagined all
19 of my days they say we put up a stop sign, you know.
20 Obviously, you put up a stop sign. You would think that
21 means stop.

22 How many times did you hear Mr. Cox, Mr. English's
23 people say we don't have to stop at the stop sign? It's
24 our stop sign. We put it up. We can do whatever we want
25 to with it. It's a private road. In his opening

1 statement could you believe -- I was shocked. I told
2 y'all I didn't know what he was going to say. To say that
3 they have no duty to the traveling public when they're
4 operating down their private road unless they enter the
5 intersection -- none whatsoever.

6 They don't have a duty to stop. They don't have a
7 duty to -- according to Mr. English, they don't have a
8 duty to approach that intersection at a decent safe speed.
9 They don't have a duty where you stop, look both ways.
10 They absolutely take the position unbelievably that they
11 are not required to do anything for the motoring public
12 other than stay on their private road. If I stay on my
13 private road I can do anything doggone thing I want to.
14 If anybody gets killed, too bad, too sad. That's their
15 position. Unbelievable.

16 Then they bring in this Mr. Smith. You know, he
17 definitely is not a hired -- I hated to say it. I asked
18 him did he had a dog in the fight. No, sir, I ain't paid.
19 You're not paid? Come on, you are here for free? I mean,
20 you know, let's be honest about it. Let's not try to fool
21 us. I mean, it's almost unbelievable. And then I asked
22 him -- really I thought he would agree because he had
23 already said in his deposition -- I said, all right, let's
24 get to the places you agree. You agree they should have
25 had the warning signs? No, I wasn't hired for that. Can

1 you believe he said that? I'm not hired for that.

2 Then I had to say, wait a second, Mr. Smith. What
3 did you testify to? Well, yeah, I did. I did. I
4 testified to that. I testified that they needed them.
5 What do you think, I was stupid? He wasn't going to think
6 I was going to come up with that? Wasn't going to ask him
7 about that?

8 What about some of the illogical stuff he said? He
9 goes out there and does a test out there on the road using
10 a motorcycle that looked to like a scooter to me that
11 looked like to me he was approaching on that video that he
12 was actually was slowing down, but I ain't on that
13 motorcycle. I ain't Joe Dawes. He said he was going
14 50 miles an hour. Okay. So be it. Whatever. He said he
15 is going 60 miles an hour. So be it. So, whatever. But
16 you ain't going to convince me that you could go on that
17 scooter and stop in less than a second.

18 That's their test -- less than a second he wants
19 y'all -- I mean, and in 60 miles an hour and just a little
20 bit over a second. What does he think y'all are? I mean,
21 really, y'all got common sense. I don't understand it and
22 then he comes in and he said, well, Mr. Valenzuela was
23 braking poorly. He had it -- the one thing we agree. One
24 thing everybody agrees on -- it's not an issue in this
25 case is and that is he was faced with a sudden emergency.

1 The judge is going to tell you about sudden emergency.
2 And Mr. Smith said was in an emergency. He had to make a
3 panic stop, and, therefore, he used full braking in his
4 opinion.

5 Now, why did he say full braking? Mr. Valenzuela
6 said he used rear braking. The MAIT Team said he used
7 rear braking. Why early on in the game did Mr. Smith come
8 up with this full braking? Well, I'll tell you why. It's
9 simple. See, at first they wanted speed. They wanted to,
10 okay, we're going to blame Mr. Valenzuela. We're going to
11 blame -- we got to figure out something to blame him with.
12 We know what we did.

13 So what do we do? We get him up high. We make it
14 full braking. That's going to make his speed high. Well,
15 nobody says that. The MAIT Team doesn't say that. The
16 physical evidence doesn't say that. Nothing says that,
17 but they wanted to make it full braking and, you know,
18 that's Mr. Smith's opinion. Again, they want to blame
19 Mr. Valenzuela for their intentional conduct.

20 Now, then they want to say all during this trial -- I
21 can't get it. I mean, really, they want to say, okay, he
22 had full braking. He was speeding, whatever. So then the
23 other side of the coin he didn't adequately brake. I
24 mean, which way are you going? You know, they say -- they
25 blame his braking. They blame the speed when he is

1 speeding. They blame the brake when they say he pulled
2 the brake. Why? They don't want the truth. That's what.
3 But you got to -- you heard Sergeant Coffin. He said in
4 his experience, a qualified person -- he ain't my man. He
5 said, look, my experience is when you put on that front
6 brake it is going to cause you to go over the bike and so,
7 in other words, Mr. Valenzuela made the right decision in
8 seconds and then they want to blame him for laying it down
9 and they get people to say I would have never laid it
10 down. I don't care what. It don't matter.

11 Can y'all -- do they want y'all to believe that? I
12 mean, if you got a 70,000-pound piece of equipment coming
13 at you 17 miles an hour 20 feet from the intersection that
14 you know that is coming out in front of you, that would
15 have come out in front of you -- nobody's, you know -- it
16 would've been there and so you got this 70,000-pound piece
17 of equipment and you're on a little motorcycle with your
18 wife on the back and you tell me you're just going to say,
19 okay, I think I'll run right through that thing and that's
20 the safest thing to do? I don't think that's logical. I
21 think I'd rather slide in there and hope for the best, my
22 God, and pray for it, but they, you know, want you to say
23 that. They want you to believe that.

24 Now, you know, and then -- of all the unbelievable
25 stuff they do, this amazes me and I guess it is showing.

1 It is telling. It shows they don't care. It shows what
2 was happening. It shows what Mrs. Gunter, Mrs. Boozer,
3 and Mrs. Johnson knew all along. They don't care. They
4 don't matter.

5 Mr. English gets up there on the stand. I called him
6 as a witness. I didn't know what he was going to say. I
7 called him as a witness and I said, Mr. English, do you
8 believe what your lawyer said? Y'all don't have any duty
9 to the traveling public out there? None? Unless you
10 cross that little line? Yes, sir. That's my private
11 road. And I said, Mr. English, you're telling me and we
12 know that there are school buses that operate down it, you
13 know that people's children, people's grandchildren are on
14 those buses, and I said, Mr. English, can y'all believe
15 this? I mean, I'm taken a back, but I said your scraper
16 in your orders are traveling down there 17 miles an hour
17 within 20 feet of that intersection and a school bus
18 operator comes along and sees it and has to react to it
19 and turns -- these school buses are top heavy, too, you
20 know, and makes a turn to the left because he thinks he is
21 going to get hit and he flips that darn bus and,
22 Mr. English, you don't think you caused that? You don't
23 think you got any responsibility for that? You think
24 that's okay? Do you know what he said? He -- remember
25 what he said? Yes, sir. I can do that as long as I don't

1 go in the road.

2 I don't get it. You know, ladies and gentlemen of
3 the jury, you know, even with this dangerous situation
4 they've created, even with this careless, intentional
5 conduct, they didn't really have to do that much to
6 prevent deaths, you know, out there. They really didn't.
7 It wouldn't have been that hard. I don't know how much
8 money it would cost Mr. English, but he isn't paying --
9 you know, these people out there, he didn't pay them that
10 much.

11 Just think of the things -- and I asked this in the
12 opening statement, but I never got a comment. I never got
13 a reply from Mr. Cox. Remember? They could have done
14 numerous things. Numerous is all they had to do is follow
15 the rules, follow the requirements that are out there for
16 everybody -- for the safety of everybody. That's what I
17 said. They're out there so people don't get killed.
18 That's why we have traffic control signs. That's way we
19 have advanced warning signs. We don't want people to get
20 killed, but you can't just not care. You cannot just not
21 care about the motoring public, but you got to do
22 something to save us from their extreme, intentional
23 conduct and what -- all they had to do any little things
24 that wouldn't have cost them money. Put up some advanced
25 warning signs like they agreed to. Put a flagman out

1 there. You know, stop the traffic. It wouldn't have
2 happened. Mrs. Christie Valenzuela would have been with
3 us today. I wouldn't be in this courtroom where I don't
4 want to be. I would rather be home, you know, with my
5 grandchildren.

6 All they had to do was stuff like that and how about
7 the worst thing -- the easiest thing they could do and we
8 wouldn't be here today -- stop at the stop sign like
9 everybody else out there in that's required to do in the
10 State of South Carolina and I don't mean coming up on it
11 at 17 miles an hour. Come on. You don't do that. You
12 don't come up there and all of a sudden skid real quick.
13 No. Please, all he had to do, Mr. English, was have your
14 people, if nothing else, if you're not going to have a
15 flagman, if you're not going to have it, please, even
16 though you know it's safety required, let's at least
17 lessen the danger some by stopping at the stop sign like
18 everybody else. Approach it, stop, and look, but can
19 y'all really believe that they've taken that position that
20 they don't have to stop at the stop sign? Unbelievable.

21 Mr. Valenzuela is not guilty as far as negligence.
22 Not one thing. He did all he can do. They blame him in
23 the courtroom. His son has had to listen to it. Can
24 y'all imagine? It's unbelievable.

25 Now I know y'all are going to hold them responsible.

1 Y'all are not going to condone this kind of conduct. They
2 are negligent; no question about it. So let's really -- I
3 think the hard job y'all got there is to arrive at the
4 damages involved that they have caused to
5 Mr. Valenzuela -- the husband and his son.

6 Now, our law says that they've had their loss. They
7 are entitled to be fully compensated for their loss. His
8 honor is going to tell you -- cut that on just a second.

9 THE BAILIFF: I'm sorry.

10 MR. DETRICK: I was a little bit ahead of the game.

11 THE BAILIFF: All right. It will take a minute to
12 come back up.

13 MR. DETRICK: Y'all have heard the unbelievable loss
14 that occurred in this case. Christie Valenzuela was,
15 obviously, just an extraordinary person. She cared about
16 everybody, loved her child, loved her husband, loved her
17 school, loved her children, would help anybody. She had
18 500 -- you know, they talk about Mikey and, you know, and
19 the people at the school, 500 brothers and sisters at that
20 school. This is a school where all of these little
21 children up to the fifth grade. A person who would go out
22 and try to raise money to make sure all of these children
23 have smart boards. I don't even know what a smart board
24 is, but it sounded good to me, but, you know, can you --
25 she -- unfortunately, isn't it the truth that it's the

1 Mr. English's of the world are arrogant, that don't care,
2 that cause injuries and death to the best of us. Y'all
3 ever notice that? The worst still live and the best,
4 unfortunately, die. God made it that way. These people
5 have to -- they have to live with that.

6 We can't bring Christie Valenzuela back. There is no
7 way, but we have to have a system. The way we stop this,
8 we compensate. It is the best system in the world. We
9 compensate for the losses of the loved ones. Y'all see
10 these pictures here of Christie, the loving family. Look
11 at them. There just was absolute love in this household.

12 I mean, I know we all -- that's just -- like Mikey
13 said, you know, he had the best life and it was taken away
14 from him and it is like he's living two lives as a young
15 man. You know, can you imagine? Y'all heard what he said
16 and y'all said -- you heard -- you know he learned -- he
17 said I had to grow up early. He learned in this courtroom
18 the things that he probably wished he didn't know that we
19 know. When we get older, unfortunately we know. We know
20 the cruelty of some people in this world. He said I would
21 never imagine someone being that cruel. But you know
22 what? When you got people that cruel, when you got people
23 that uncaring, when you got people who cause this much
24 harm you've got -- you have to make them compensate these
25 people for all they did. That's what our system is about.

1 All right. Now you can do it.

2 THE BAILIFF: Lights now?

3 MR. DETRICK: Yes, ma'am. Thank you.

4 I want you to know one thing for sure. I do not at
5 all stand in y'all's place as the jury. Y'all determine
6 what this case is worth. This is the hard part. You
7 know, I don't say I know and y'all's combined wisdom will
8 come up with what's right. The only thing I am doing here
9 is putting up to you what -- some -- you will listen to
10 His Honor's charge -- some of what His Honor charge is
11 they're entitled to be compensated for, and then the only
12 thing I've got here is a method that y'all can use to
13 arrive at your verdict. Please don't think I am standing
14 here trying to say anything other than we want what's
15 fair.

16 His honor is going the charge you that Mikey and
17 Michael are entitled to compensated for the rest of their
18 life or the rest of what -- Christie's life would have
19 been for the shock, the suffering, grief and sorrow that
20 Sam English Grading Company has caused. What is that
21 worth? Can you imagine what they've gone through? Can
22 you imagine Michael not even being with his wife when she
23 died? Can you imagine the loss? Can you imagine being at
24 that funeral? Can you imagine being at that funeral home
25 with 750 to 1,000 people came by and shook his hand? Can

1 you imagine the tears they shed during that time? Can you
2 imagine what they shed in grief and sorrow that they've
3 had to this day, even sitting in this courtroom where
4 they've had to relive all this?

5 I put, you know, a million dollars each for that
6 because under our laws Mrs. Weeks -- Mrs. Paige Weeks
7 Johnson is the personal representative and under our laws
8 she is helping Mikey and Michael and what we've got is
9 they're entitled -- since they're beneficiaries, they're
10 entitled to be fully compensated for the husband and the
11 children of the beneficiaries of the wrongful death and
12 under our law they're entitled to something fully for that
13 whenever a negligence causes the loss of their mama and
14 their wife.

15 Next -- and I've got it both of them. Can you
16 imagine they've lost -- they're entitled to be compensated
17 for all of her companionship, for being together,
18 companionship as a husband and as a mother. Mikey, you
19 know, being there every day putting stickers on the
20 bathroom, you know, getting Mikey's day started right, for
21 the guidance that she did for him, you know, for telling
22 Michael what to do. You know, he was working for her,
23 but, you know, I mean, this woman was unbelievable and the
24 loss of the experience she had and the knowledge she said,
25 the judgment she got help with her family. All of these

1 things -- household, she made -- you know, all she did
2 around the house with the pool and all they did
3 together -- all -- it was a family thing. Everything.
4 Their family was taken away from them and they are
5 entitled to be compensated for that. Y'all decide what
6 that's worth.

7 These others down here, she was making -- His Honor
8 is going to charge you they're entitled to whatever
9 pecuniary loss -- that means loss of earnings which they
10 lost as a result of her death and she's 28. She was
11 making about \$28,000 a year at the school now and at to
12 age 67 -- we all got to where we have to work until age 67
13 nowadays. If she's lucky enough at 65 you can reduce
14 that, but that's \$924,000 reduced to present value is what
15 they're entitled to at least that. That doesn't
16 include -- you know, this woman -- excuse me. She cleaned
17 houses. You know, I don't know what those are and she
18 sold jewelry. She gave jewelry away. She did, you know,
19 all of this stuff. That doesn't include any of that. I
20 don't know that -- whatever. You know, that's just --
21 take that into consideration if you want to.

22 She had -- this is just her medical expenses at her
23 death and that is a total of all these. This certainly is
24 not unreasonable, but it's up to y'all. It is totally up
25 to y'all. You can put it down.

1 Ladies and gentlemen, like I said, I think that's
2 your hard job. Y'all go back there and be fair. Y'all
3 follow the law. Y'all heard the testimony. I know you're
4 going to find him responsible. I think it is just a
5 matter of how much you think they're entitled to.

6 His Honor is going to next tell you the law and I
7 want -- y'all -- I want you to listen to that law because,
8 you know, one thing about our law is it's evolved over
9 time, good common sense and safety, and, you know, they've
10 talked about not getting -- all of this stuff, not having
11 any duties. Listen to the law. You'll find out what they
12 said is not true. We do have reasonable laws. They are
13 held to a standard and they're supposed to follow that
14 standard and you're going to find out they didn't. They
15 were negligent. They were reckless. They were willful.
16 They were wanton. They were everything. They were
17 intentional, and, therefore, listen to His Honor's law and
18 you'll understand we got some pretty good laws.

19 I put this up because I do it in every case but I
20 want you to make sure you understand. His Honor -- after
21 he charges the law he is going to give you a verdict form
22 and, Madam Foreman, you'll be the one to have to fill it
23 out. It's -- this is your verdict form. He'll give it to
24 you. You don't have to write it down. Basically, you
25 have to answer some questions. The first one, was the

1 defendant negligent? Absolutely, without a doubt,
2 amazingly, unbelievably. Number two -- so, you check yes.

3 Number two: Was the negligence the proximate cause
4 of Christie Valenzuela's death. Obviously, I mean, I
5 think those are easy questions. You ought to check yes.
6 This one here -- these next two they blame Michael
7 Valenzuela. That's their real defense. And it says here
8 was Michael Valenzuela negligent? Number four. What his
9 negligent a proximate cause? I pray to God -- I know the
10 facts do not support anything he did wrong and it should
11 be without a doubt no.

12 Ladies and gentlemen of the jury, they have been
13 through enough. They've been through enough. I don't
14 want Michael Valenzuela to be scarred the rest of his
15 life. It's not right. It is not the evidence. It didn't
16 happen. If you put a yes there, if you find him any bit
17 negligent, he's got to live with it. Mikey has got to
18 live with it. I know that y'all know this. He did what
19 he could do and it's really not fair to even have that up
20 there, but that is what it is and if you find yes, then
21 what that means is you have to come down to here and put
22 what percentage on number five that he was negligent to
23 cause this death of his wife, and if you did that His
24 Honor will take off whatever your verdict is -- take it
25 off of Michael's part. In other words, if you 5 percent,

1 he deducts the verdict by 5 percent for Michael.

2 That's not really that important. What is important
3 is the justice. What is important is what he has to live
4 with. What is important is what these people have done to
5 him and his family and to blame him for that is
6 unbelievable given these circumstances.

7 After that -- go to the next one, please.

8 And then what you have to do is what we talked
9 about -- find the amount for the actual damage we
10 previously talked about which I think is y'all's hardest
11 job. It's not easy, but I know one thing. They're
12 entitled to total full compensation under these -- under
13 the evidence presented in this case.

14 The next one is number seven: Was the defendant's
15 conduct grossly, negligent, willful, wanton, careless and
16 reckless? Wow. If that isn't -- if their conduct -- you
17 heard Mr. English. All this stuff we just talked about,
18 it wasn't just negligent. They intentionally did it. I
19 mean, they intentionally did it. I mean, that's above --
20 intention is not on there, but it's more than that. It
21 is -- you know, it's willful. It is definitely careless
22 and reckless. Their conduct -- and you know what? Please
23 think about that one. Please put what's the truth. It is
24 important. It is very, very important that y'all look at
25 the evidence and put yes there because their conduct was

1 definitely careless, reckless, wanton and Mr. English
2 needs to know that.

3 I am through speaking. I thank y'all. I'm confident
4 in y'all. Y'all are all good people. Y'all really are
5 the heart and soul and the make-up of what Aiken County is
6 all about and as you look at it, you know, I think it's --
7 you some people that are young. You see people that are
8 old. Excuse me, I didn't mean that.

9 THE COURT: Be careful.

10 MR. DETRICK: We see black. We see white. We see --
11 y'all are the community. Thank you for serving. Please
12 do what's right. That's all we ask. We ask you to hold
13 Sam English Grading fully responsible for their conduct.
14 Fully compensate Michael and Mikey for their loss as best
15 you can. I thank you very much.

16 THE COURT: We all okay? Need a bathroom break?

17 All right. Are you ready? Do you need a break?

18 MR. COX: No, thank you, Your Honor. May it please
19 the court.

20 THE COURT: Yes, sir.

21 CLOSING STATEMENT

22 MR. COX: Wow. This has been a long time coming for
23 me to have an opportunity to talk directly to y'all. It's
24 been five days since I spoke to y'all in the opening and,
25 certainly, I appreciate y'all's attention and interest in

1 this case. I certainly can't get up here and talk about
2 my grandchildren because I don't have any, but I can tell
3 you that---

4 THE COURT: You'll get old in a hurry.

5 MR. COX: That day will come, I hope. I hope. But I
6 do have two children and I know that we all -- we may not
7 have children, but we all have family that we love and
8 that we hold dear and I know that and throughout this
9 case -- I have been wanting to talk to y'all again because
10 throughout this case my clients have been painted as being
11 heartless and I know y'all are smarter than that. I know
12 y'all know my clients have family and they know what life
13 is about.

14 This case is a case of two stories. One that we
15 don't dispute for one second; that Mikey's mother and
16 Mr. Valenzuela's wife was a fantastic lady. A fantastic
17 lady. My clients don't dispute that. Never have. Y'all
18 know that. I know y'all know that. There is no way to
19 dispute that. This was a tragic, tragic, tragic
20 situation. A life was lost and we understand that and
21 that's not lost on Sam English Grading, Sam English
22 Grading family members which are in the back, their five
23 employees including Mr. English, it's not lost on them.

24 This case is also about liability and I know that's
25 not lost on y'all as well. This is a court of law and

1 when I get up here and I tell you that the facts of this
2 case don't amount to liability, I'm talking about the law
3 and you're going to hear the judge charge you on the law
4 and, y'all -- I know y'all know how to apply facts to the
5 law. I don't have a question about that.

6 I came up here in my opening and I showed you a
7 picture and we have spent -- I don't need the board
8 because I know y'all have benefit of that board back in
9 the jury room, but I showed you this picture and this
10 picture tells the entire story as to liability. It tells
11 the entire story as to liability. Why does that tell the
12 entire story as to liability? Because we all know -- we
13 have all driven on the roads of South Carolina. We all
14 know what our requirement as licensed drivers on the roads
15 of South Carolina are. We know what each other's
16 requirements on the roads of South Carolina are.

17 What are those requirements? We know this. We've
18 known this since the day we got our driver's license. We
19 probably knew it before we got our license because it is
20 based on logic and it's based on your common sense and the
21 responsibilities of every driver on the roads of South
22 Carolina are to you stay on your road and I'll stay on my
23 road. We know that. Y'all know that. I know that.
24 Everybody in this courtroom knows that. You stay on your
25 road and I'll stay on my road. You stay out of my lane

1 and I'll stay out of your lane. But we also have a
2 requirements to each other. We can expect that people
3 will do what they're required to do. We can expect that
4 they will always keep a proper lookout. We have a duty to
5 ourselves and to our passengers in our car or on our
6 motorcycle to keep a proper lookout, to maintain control,
7 to go a proper speed, to stay on our road -- ladies and
8 gentlemen, not to overreact to what's going on on a
9 different road. We have a responsibility to do that and
10 we all know it.

11 This picture tells you everything that you need to
12 know because this case is about August 7, 2009. The
13 plaintiff's attorneys -- they've got a problem with
14 August 7, 2009 and that's why we've been here for five
15 days. They want to talk about what's gone on since 1984.
16 This case -- don't check your logic and real life
17 experiences at the door. I know you didn't.

18 This case is about what happened on August 7, 2009.
19 This was a moment's encounter on August 7, 2009.
20 Mr. Valenzuela had never met Sam English Grading, had
21 never been down that road in 10 or 15 years. This was a
22 chance moment's encounter on August 7, 2009. What
23 happened before then is not relevant to what happened in
24 this accident. This is a traffic accident, ladies and
25 gentlemen, and I know y'all know who is responsible when

1 traffic accidents happen and who is not.

2 We are not trying to be heart less. We understand
3 that this is a tragic, tragic, tragic situation. What
4 does this photograph tell us? Look at that skid mark. I
5 am not trying to make Mr. Valenzuela feel bad for his
6 decisions and his actions that he took on that day, but
7 look at that skid mark. That's a mighty long skid mark.
8 That's a mighty long skid mark. That's been in question.

9 My expert before he ever met Mr. Valenzuela assumed,
10 one, that he knew how to operate his motorcycle; that he
11 knew how to apply his brakes properly and that skid mark
12 meant he was hauling -- he was moving out, but then when
13 we hear from Mr. Valenzuela he tells us, no no, no, I was
14 going 40 to 45 miles per hour. Okay. Well, then, how did
15 you leave that long skid mark?

16 You drive your motorcycle. You know how to drive a
17 motorcycle, don't you? Well, he is on a beginner's permit
18 and you'll read the South Carolina manual. Beginner's
19 permit. People that have even just a beginner's permit
20 who haven't gotten their license, you're required to study
21 how to use proper braking. If you're going to drive a
22 motorcycle, I'll venture most of y'all don't know how to
23 drive a motorcycle. You don't know how to operate it.
24 You don't know where the brakes are. There's two brakes.
25 You got to use them in tandem. It tells you right here

1 always apply both. So we learn -- and you'll see that in
2 the jury room. We learned that he -- well, he didn't
3 apply his brakes. He jammed on the rear brakes. He did
4 exactly -- if he is going 40 or 45 and there is an
5 extremely long skid mark, that's driver error.

6 And, then, so my expert comes in here and says I
7 agree with Mr. Kennett, their expert, if he is going the
8 slower speed. If he is not -- if he is not fully braking,
9 if he is just using his back brake 30 percent of his
10 braking capacity, well, then -- okay, well, then that
11 explains it, but then he also made the decision to lay the
12 bike down.

13 Again, I'm not trying to -- I am not trying to beat
14 on Mr. Valenzuela, but we're in a court of law and we've
15 got duties and responsibilities. He's got his wife on the
16 back of that motorcycle and he made a decision to lay it
17 down and I hate it. That's driver error. Either he was
18 speeding or he was way too inexperienced to be driving his
19 wife around on the back of that motorcycle.

20 Another thing that this picture tells you, even the
21 way he braked he came -- he laid it down. His motorcycle
22 stopped at the scraper. It would be one thing if he is
23 slamming on brakes and ends up feet away from the scraper.
24 That would show you the timing on it. Use your logic and
25 real life experiences. If that is the emergent situation

1 that he's talking about, he is going to be away from the
2 scraper. He's at the scraper.

3 What else does this photograph tell us? That scraper
4 never entered the roadway. It stopped a long way away
5 from the edge of that road -- eight and a half feet.
6 Remember what we all know? You stay out of my road. I
7 stay out of yours and you've carried your responsibility
8 as a motorist on the streets of South Carolina. We've all
9 been driving down the roads where we don't get the benefit
10 of a 30-foot-away-from-the-road tree line and there's
11 private drives and there's private roadways all throughout
12 our state. It looks pretty open and obvious. Are you
13 keeping a proper lookout? Mr. Valenzuela, are you keeping
14 a proper lookout?

15 There is the garbage truck. This is the day of the
16 accident. There is the garbage truck that's waiting to
17 turn left. Mr. Valenzuela didn't even see it. He didn't
18 even see it. Is he keeping a proper lookout? Is he
19 driving reasonably under conditions then and there
20 available? A big garbage truck getting ready to turn
21 left. He has just driven through an area with driveways
22 everywhere and curves and houses. Are you maintaining
23 control? Are you driving at a proper speed? Are you
24 keeping a proper lookout?

25 Ladies and gentlemen, this is all you needed to look

1 at with regards to liability because that -- he said the
2 physical evidence is all you need to look at. The
3 physical evidence doesn't lie. You've heard information
4 about the scraper. You heard a lot. It took a long
5 time -- I understand that -- to go through the evidence
6 regarding the scraper. There is only one thing you need
7 to know with your logical, real-life experiences -- 5-foot
8 skid mark.

9 You only heard from one expert, Mr. Joe Smith -- I
10 don't think anyone doubts his credentials. He worked for
11 NASA, the people that put people on the moon, but it
12 didn't require him to tell y'all. We didn't need any of
13 these experts. That's a 5-foot skid mark from the
14 scraper. 17 miles per hour? There is only one accident
15 reconstructionist who came in here who looked at the
16 brakes on the scraper, who had analyzed how the brakes on
17 the scraper worked. He talked to you about it. The front
18 brakes don't lock up. Only the rear brakes lock up and
19 they work together. You hit one brake pedal and all the
20 brakes work. When you hit that brake pedal, when you slam
21 on the brakes -- and Mr. Lewis said he slammed on the
22 brakes because he's carrying -- he is trying to avoid
23 anything that could possibly happen. He slammed on his
24 brakes and he leaves a 5-foot skid mark. The physical
25 evidence does not lie. He was going 7 miles per hour.

1 Using the same formulas as their expert used, that's a
2 5-foot skid mark doing the math -- 7 miles per hour.

3 You heard from their -- plaintiff -- they're making
4 an issue that Mr. Lewis turned to the right while he left
5 that 5-foot skid mark. Ladies and gentlemen, there is a
6 motorcycle crashing. He is getting out of the way. Had
7 he not gotten out of the way you heard Mr. Smith tell you
8 that the scraper would have stopped 2.5 feet from the
9 road. He still wouldn't have entered the road. He still
10 would have carried his responsibility as a motorist, his
11 responsibility on a private driveway.

12 We've all got private driveways. Your responsibility
13 is don't deny the right-of-way. Don't fail to yield the
14 right-of-way. You'll hear the judge charge you on that.
15 Everything that he's required to do on approach is for the
16 purpose of don't deny the right-of-way and it is
17 uncontradicted in this case, ladies and gentlemen, that we
18 did not fail to yield the right-of-way and that we stopped
19 at the stop -- at the stop sign.

20 You've been hearing -- that's been plaintiff's --
21 they've been saying, they tell you that they don't have to
22 stop, they don't have to stop, they don't have to stop.
23 Well, on August 7, 2009 the only moment that matters in
24 this case because it was the moment's encounter the
25 undisputed facts are Mr. Lewis did stop. He did stop. He

1 didn't go into the road. I am not excited to tell y'all
2 that. This isn't a case about who is excited. There is
3 nothing exciting about this case. So when I come up here
4 and I tell you he carried his responsibility and he
5 carried his requirements, I am not trying to be heartless.
6 This is about the law and this is about what we all know
7 with regards to operation of vehicles on the roads of
8 South Carolina.

9 Now, you've heard a little bit -- well, you've heard
10 a lot about the contract in this case. It is a contract
11 between Owens Corning and Sam English Grading. My client
12 Sam English Grading had been working for Owens Corning
13 since 1984 out at this landfill. They've been there every
14 day. This is a big -- an important big part of their
15 company. They will do whatever Owens Corning tells them
16 to do. Did anyone from Owens Corning ever come out and
17 say, Hey, guys, what you're doing is inconsistent with
18 what we asked you to do. You're not doing it right.

19 Owens Corning is right there. Their plant is right
20 there. They put up someone from Ohio. Where are the
21 people right there by the landfill? That's Owens
22 Corning's landfill. Where is the person from Owens
23 Corning that came and told our folks, Hey, guys you're not
24 doing it right. You're not doing it the way we told you
25 to do it, the way we asked you to do it. You've heard

1 from Mr. English. He said I thought I was in compliance
2 with my obligations under that contract with Owens
3 Corning. I thought we were doing everything right.

4 I've got -- and there's been a big issue about the
5 flag or is he a flagger or spotter or is he waving him
6 over? He didn't have a flag in his hand, but we've got
7 someone watching for traffic -- watching for traffic,
8 making sure it is clear, and waving across. What is wrong
9 with that? That's how you do it. You make sure traffic
10 is clear and when it's clear you wave them across. That's
11 how you do it.

12 Trooper McLaurin who is now a judge told you on that
13 stand, he goes, I thought that was how you did it. He
14 thought that's how you do it. He investigated that
15 accident. I talked to Mr. Tindel who was spotting for
16 them watching for traffic, waving them across, saw the
17 motorcycle, said stop. I thought that's how you do it.
18 That's looking out for the safety. That's undertaking
19 safety measures by Sam English Grading. If they're going
20 to come across that road they're going to have somebody
21 there watching for traffic and waving you across --
22 525 feet to the curb, even longer the other way. If the
23 traffic is clear and you've got somebody watching and they
24 know what they're doing -- Mr. Lewis and Mr. Tindel are
25 working together -- it's clear both ways, come on across.

1 What in the world is wrong with that? That is how you do
2 it and that is how Judge McLaurin thought you did it.

3 Let me tell you something else. Let me submit
4 something else to you. The MAIT Team -- you heard from
5 Corporal Coffin who sat in that chair. They had a whole
6 MAIT Team come out and investigate this thing and you saw
7 the video -- the video where they're operating the
8 scraper. What are they looking for? What are they
9 concerned with regard to the scraper? They wanted to see
10 did it go in the road. They weren't concerned about the
11 speed of the scraper. They weren't concerned about what
12 signs were out, if there was a flagman out. No, because
13 they were doing it right. They were doing it in a way
14 that is allowed in South Carolina under South Carolina
15 requirements.

16 You never heard anybody come in here and tell you on
17 that stand that you had to have a flagman or that you had
18 to have warning signs to cross from a private drive across
19 the road because if that was the requirement you better
20 bet ---five days in here, you better bet somebody would
21 have been right there in that chair telling you that
22 you're required to have a flagman and signs. This is
23 looking out for the safety of people by making sure if
24 you're coming across that road that you're watching in
25 both directions. You're making sure it is clear and you

1 wave them across.

2 And, Owens Corning wants to tell you, well, you know
3 we had a line in the contract which says you need to
4 comply with our encroachment permit that expired back in
5 1984 and, by the way, we'll send you a copy of that
6 encroachment permit which has the specifics of what we,
7 Owens Corning, wants you to do. They never gave it to us.
8 If you want us to comply with something and you're going
9 to put it in the contract, send us the encroachment permit
10 and tell us this is what you have to do. That plant is
11 right there by the landfill. Where is the local plant
12 manager in here to talk about, well, they weren't doing it
13 right?

14 And you hear about these folks that came in and
15 plaintiff's attorneys went out and canvassed the area and
16 found four people that come in here and tell you that
17 they've had an issue. Well, one of them was the safety
18 person for Owens Corning. If you've got a problem and you
19 think there is a danger out there, well, then report it to
20 somebody, for heaven sakes. This is an important job for
21 Sam English Grading. You don't think that they would --
22 if somebody has got a problem, hear it and heed it and
23 say, well, okay, we thought we were doing it right? But
24 if -- you know, we don't want you to kick us off the land.
25 We'll do it. We'll do it however you say.

1 Nobody ever told them. Nobody ever came and said,
2 Hey, guys in South Carolina -- by South Carolina law y'all
3 are required to have some signs out there. You don't
4 think all of these people going down that road, the law
5 enforcement that goes by -- the SCDOT members haven't gone
6 by and seen this operation? Don't you think if there was
7 something wrong with it they would have said something?
8 Nobody. Nobody came in here to tell you that there was
9 anything wrong with that operation.

10 Mrs. Dana Hall is very telling. She's got a
11 10-year-old daughter. She is very credible. South
12 Carolina Federal. She was one of the ones they found and
13 she didn't say what they thought she was going to say; so
14 they didn't call her. So I called her. I took her
15 deposition because they listed her as a witness. I took
16 her deposition. I was like you drive through there two or
17 three times every day with your 10-year-old daughter and
18 you've never seen any kind of problem, any kind of issue?
19 Well, we need to let the jury know about that. Nobody
20 ever reported these problems.

21 Now, let's talk about that video that we showed
22 y'all. That video was made for y'all, the jury, to help
23 you form decisions in this case and if -- that was Joe
24 Dawes. Y'all saw Joe Dawes come in here. He is an
25 instructor of motorcycle safety at Midlands Technical

1 College in Columbia. He teaches motorcycle safety. You
2 think he is going to come in here -- you think he is going
3 to do some video -- I know y'all don't think that -- that
4 he would come in here and do some doctored video. That
5 video was taken a month before this trial for y'all and
6 I'm glad y'all got to see it because it demonstrates
7 everything that Mr. Smith and even Mr. Kennett, the
8 experts, were saying with regards to how a motorcycle can
9 stop and what distances it can stop.

10 If you're operating the motorcycle the way it's
11 supposed to be operated, the way you're supposed to know
12 how to operate it when you get your license, then you're
13 able to stop way short of the intersection. Mr. Kennett
14 said had he stayed upright and not laid the bike down --
15 just apply your brakes and stop for this scraper which is
16 approaching the road, he would have stopped 85 feet -- not
17 10 feet, not 20 feet, not 30 feet, not -- 85 feet had he
18 just stayed on his brakes and it probably wouldn't have
19 been a conversation at the dinner table.

20 You're coming through at 40, 45. You apply your
21 brakes. You stop. It's not even a conversation to have.
22 This was clear driver error and I hate it. I hate it.
23 They hate it. We all hate it. It's tragic, but that is
24 clear driver error and it's negligent. It is negligent to
25 themselves and it's negligent, unfortunately, and, again,

1 I am not trying to -- I don't like being here and saying
2 this, but it is negligent to his wife, the passenger.

3 That video was for y'all. It was to demonstrate.
4 Mr. Smith was out there. He is an accident
5 reconstructionist. These two gentlemen would not come in
6 here -- that video shows and that video was conducted at
7 speeds of 50 and 60 miles per hour to demonstrate -- at
8 excessive speeds. You are going to stop way, way, way,
9 way, way short at that crossing. Stay on your brakes.
10 Don't lay her down.

11 Now, additionally, you heard from Corporal Coffin,
12 the MAIT Team -- and I am almost done, ladies and
13 gentlemen. I am almost done and I am going to go sit
14 down.

15 You heard from Mr. Coffin. He told you that
16 Mr. Valenzuela told him I know I contributed to this
17 accident. That had to be hard to say, but he told
18 Corporal Coffin I know I contributed to this accident.
19 Mr. Valenzuela knows he did. It's not easy and I don't
20 like saying it. I don't like being here, but he failed to
21 keep a proper lookout. He failed to maintain control of
22 his motorcycles. He failed to operate it the way it's
23 supposed to be operated. He failed to apply the brakes
24 properly.

25 Now, Sam English Grading -- five employees working

1 out of their mama's house, out at the landfill since
2 1982 -- they're trying to do what's right. They thought
3 they were doing what's right. They were doing what Judge
4 McLaurin thought was right and apparently the MAIT Team
5 because they didn't look into any of these other
6 peripheral issues that the plaintiff has spent all of
7 these days talking to you about.

8 I would ask that you use your logic and real life
9 experience; that when you go back in the deliberation room
10 look at the physical evidence which doesn't lie and I know
11 I'm starting to be a broken record. Look at the physical
12 evidence that doesn't lie. Use your logic and real life
13 experiences when driving on the road and return a verdict
14 that speaks the truth, that speaks to your logic and real
15 life experiences, and I know it's going to be difficult,
16 but on August 7, 2009 Sam English Grading did everything
17 they knew in their hearts was right looking out for the
18 safety, monitoring traffic. Stopped. The scraper
19 stopped. It didn't come into the road.

20 We would ask that you return a verdict that speaks to
21 that. We would ask that and it is going to be difficult
22 because our hearts go out to the Valenzuelas. It truly
23 goes out to the Valenzuelas. We have submitted -- we
24 have -- that Mr. Valenzuela was negligent and that he
25 committed driver error; that he panicked and overreacted.

1 He lacked what was necessary, lacked appropriate skills,
2 and that that was the direct cause of this accident at
3 this moment in time on August 7, 2009.

4 I appreciate your time and I appreciate's y'all's
5 attention to this case. I really do, and I appreciate
6 your respecting that this is a court of law and applying
7 the facts to the law using your everyday experiences and
8 logic and understanding of what everybody's responsibility
9 and requirements are on the roads of South Carolina.
10 Thank you so much.

11 THE COURT: Everybody still okay? This reply won't
12 be nearly as long.

13 CLOSING STATEMENT

14 MS. MCPHERSON: Ladies and gentlemen, I've heard it
15 all now. They were doing it right. They were undertaking
16 safety measures. Their heart goes out to Michael and
17 Mikey and Amanda and mothers and friends. Mr. Chris
18 English said to you -- and you can judge how much his
19 heart goes out to this family. His lawyer did her best
20 when they put him back up to make him come off a little
21 better and to get him to say his heart went out to them
22 and to get him to say he was sorry and to act like a
23 decent human being. When this wreck happened how did that
24 make you feel, Mr. English? She was spoon-feeding it to
25 him? Come on. Give me the easy answer the jury wants to

1 hear and that you didn't say the first time you were on
2 the stand.

3 They can sit there and tell you their heart goes out
4 to this family and you know what he said? And I thought
5 he was going to say it right for a minute. He said, well,
6 I felt like anybody would feel, any human being with any
7 decency. I felt like any human being would feel, and I
8 was shocked and appalled and angry at what he said. Do
9 you remember it? Well, I felt like everybody would feel.
10 I was a little nervous because, man, I got slapped with a
11 lawsuit.

12 Oh my gosh, did your knees just want to give out from
13 under you? They got the gall to say they did it right and
14 they ensued safety measures and their heart goes out to
15 this family and they got the gall to tell you that what
16 happened before this wasn't relevant.

17 Stand up, Mrs. Boozer. Is she relevant?

18 Stand up, Mrs. Johnson. Is she relevant? .

19 Mrs. Gunter -- is she relevant? I've heard it all
20 and you've heard it all when you've sat there this week
21 because you know what? When Mr. English, that defendant,
22 who made all this decisions about how this happened and
23 how Jeffery Lewis was supposed to do things and how his
24 guys were to do it, when he says I felt like everybody
25 would feel, well, he don't feel like I feel. He don't

1 feel like Mr. Detrick feels.

2 He don't feel like those people feel because those
3 people got a heart and it's been broken since August 7,
4 2009. He don't feel like I feel. I don't want to be that
5 heartless. God forbid when people get to that point that
6 they are that heartless and heartless people like that who
7 only care about themselves do things like happened on
8 August 7 of '09 because like Mrs. Gunter -- little
9 Mrs. Gunter who slowed down and was scared and said they
10 don't think anybody exists out there but them. When
11 people like him do what he did and things like that
12 Mrs. Gunter is at risk. Laura Boozer is at risk. Ann
13 Johnson almost gets run over and everybody in this
14 community is in danger of the same things happening.
15 Thank God we have some people who survived.

16 You know, they were playing Russian Roulette out
17 there. Russian Roulette. They shot across the road 25 to
18 50 times according to Jeffery Lewis a day and it was just
19 luck or bad luck whether you happened to be in their path.
20 This was about choices, ladies and gentlemen. This wasn't
21 an accident. An accident is something that if you -- you
22 know, you make a little mistake and we all make them,
23 don't we? We're not perfect. This was a wreck. It was a
24 choice. It was choice after choice after choice after
25 choice day after week about relevant people -- relevant

1 people and they got the gall to tell you it's not
2 relevant.

3 You know, their lawyers are just doing their jobs.
4 Mr. English's lawyers are just doing their job.

5 THE COURT: Ma'am, ma'am. Address the jury.

6 MS. MCPHERSON: I want to just touch on some things.
7 Mr. Cox said that they're not trying to beat up on Michael
8 Valenzuela because if we stay on our side of the road, you
9 just stay on your side of the road, that's what they say.
10 We don't owe you anything else. They say it was open and
11 obvious. Oh, yeah, it was open and obvious. You come
12 around a curve with trees that you can't see and the
13 machine can't see you, is it open and obvious?

14 They want to say that we stopped. That's like me
15 putting on a tutu and dancing around the stage and saying
16 I've performed the most wonderful ballet. We stopped.
17 You decide whether they did what they were supposed to do
18 because the Judge is going to instruct you and the law is
19 about rules and safety rules and they're reasonable, but
20 you know what it really is about? It's about justice.

21 They can say they aren't blaming Michael Valenzuela.
22 Ladies and gentlemen, what else in the world have they
23 done? Not beating up on him? That family never saw those
24 pictures, Mikey told you. He saw them yesterday. He saw
25 them all week. They are not beating up on them. And

1 Mr. Detrick was so right. How much more can this family
2 take? If you do what Chris English wants you to do and if
3 you say he had any part in causing this wreck, do you
4 believe that man can live with that?

5 You have the power to do what Christie told her son
6 twice a day -- that a job worth doing is doing well and
7 doing it right and you have the power to set the
8 standards. You have the power to say what you're willing
9 to accept and what you're not. If you give Chris English
10 a pass on this, anything less than 100 percent is a pass
11 for him and adds to what this family has been through.
12 Anything but 100 percent on Mr. English, you've given him
13 a pass.

14 We didn't paint them out to be heartless. Mr. Cox
15 said all week long, you know, oh, it's awful what we've
16 done; we've painted Mr. English out to be so bad. You
17 judge for yourself who held the paint brush. You saw him
18 testify not once, twice. Tell me who held the paint brush
19 to paint him out to be what I believe -- we believe that
20 you believe he is.

21 I agree with Mr. Cox that you can expect -- no, no,
22 no. You should be able to expect people to do what
23 they're supposed to do, to follow contracts. You know
24 what? My daddy taught me your word is your bond. I have
25 a 10-year-old daughter. I got a late start at motherhood.

1 I have two grown stepchildren and a two and three-year-old
2 grandbaby. I have lived at 51 years old 16 years longer
3 than Christie Valenzuela got the chance to live.

4 Her grandbaby she won't see and when he has his baby
5 and they have an expanding family they won't have her to
6 hold the babies and to give them a hug and to be at the
7 hospital and to be there through sickness and pain because
8 at 16 years old and 19 years old Christie and Michael
9 Valenzuela said I do, through thick and thin, through
10 sickness and in health until death do us part -- only they
11 thought death doing them part would be their old age. And
12 they did it right?

13 Mr. Cox didn't say anything about damages in this
14 case or the numbers that Mr. Detrick put on the board.
15 You can consider what he said and what he didn't say. You
16 can say I believe it. I don't believe it. I think it's
17 hog wash. I think it is baloney. But he didn't tell you
18 that you shouldn't look at those numbers. He didn't say
19 anything about it. He must not disagree that those would
20 be fair numbers because fairness is what it's about.

21 You have the power to do what's right, to do what's
22 just, to do what Mrs -- Mr. English didn't do on that day
23 and what he didn't do on the day before it. What a great
24 position to have the power to do the right thing. We
25 don't always get that. We get it in our daily lives. You

1 have the power to do something big and right and
2 three-years overdue and we ask that you do that because it
3 is the right thing and sometimes people just have to be
4 told what's right and what's wrong. They just have to be
5 told. They have to be shown.

6 She saw it through the trees. Michael is driving
7 along looking straight ahead. Christie saw it through the
8 trees. She knew what was coming at him and she patted him
9 on the side. She saw it coming. It was like nobody else
10 existed. You have the power today to say, oh,
11 Mr. English, Mrs. Gunter does exist and Mrs. Boozer does
12 exist and Mrs. Johnson does exist and these people, the
13 Valenzuela family, do exist and I'm fixing to show you
14 that they exist.

15 Intentional, reckless -- you'll have that very
16 important question to answer. If it ain't reckless, I'm
17 missing something. If it isn't intentional and careless
18 and grossly negligent, I am missing something. Cause and
19 effect is what we've had here this week, ladies and
20 gentlemen. The cause is disregarding everybody else and
21 the result is Mikey Valenzuela's words, Our lives have
22 been in ruins. Choices, inevitability. This was going to
23 happen. It was just a matter of when and to who. Now we
24 know the answer to that.

25 Thank you very much. This -- if I have offended you,

1 if I spoken too loud, this case speaks loud. It speaks
2 loud. Please speak loud. Speak loud when you come back
3 and tell Mr. English whether he did it the right way.
4 Thank you.

5 THE COURT: Madam forelady, ladies and gentlemen,
6 let's take a real quick bathroom break. Don't discuss the
7 case. Don't deliberate.

8 Mr. Whittle, y'all have had sandwiches three days in
9 a row. Four days. What would y'all like? We can order
10 pizza. Doughnuts? Y'all decide. Go tell Mrs. Barbara
11 she can give you some choices. Let's go ahead and get
12 those orders so you'll have them.

13 (Whereupon, the jury exited the courtroom at 10:41.)

14 THE COURT: Ladies and gentlemen, we're going to take
15 about a 10-minute break. Stretch your legs and we'll come
16 back in with the charge and we'll turn it over to the
17 jury.

18 (Whereupon, a break was taken.)

19 (Whereupon, the jury came into open court at
20 approximately 10:56.)

21 JURY CHARGE

22 THE COURT: Madam forelady, ladies and gentlemen, let
23 me tell you what the charge is. The charge is my
24 instruction to you on the law. The way I do this is the
25 beginning of the charge is simply some general

1 propositions that we talk about in every civil case and
2 then I'll go into the specifics of this case which is a
3 negligence case and what we call a comparative negligence
4 case. The plaintiff is saying that Sam English Grading
5 Company, Incorporated was negligent. They're saying that
6 the driver of the motorcycle was negligent. So, you have
7 to make some determinations on a number of things dealing
8 with those allegations, but we'll get into that more
9 specific in just a few minutes.

10 Let me remind you at the beginning of the charge
11 that, obviously, during the trial of this case that you
12 and I -- as I told you when we selected the jury, you and
13 I have separate jobs to perform. In my opinion your job
14 is much, much, much more important than my job, but my job
15 is basically two-fold. Number one, I instruct you -- I
16 charge you what the law is. So you've taken an oath to
17 accept the law as I give it to you and if you think the
18 law should be something else and it doesn't agree with
19 what I say, set that aside for this case and accept the
20 law as I give it to you.

21 Now my other responsibility is to rule on the
22 admissibility of the evidence and you've heard every now
23 and then there would be an objection or I would either
24 allow it or not allow it, but everything that's in the
25 record now is what you as the finders or the judges of the

1 facts consider in determining whether or not the defendant
2 was negligent and comparing any negligence, if any, by the
3 motorcycle driver. So, you are the finders of the facts.
4 You're the judges of the facts and the way it works is
5 that you determine what the true facts are and apply it to
6 the law as I give it to you now.

7 So, having said that, if there was -- this has been
8 five days and I've tried most of the time to be patient
9 but every now and then I get impatient; so if you've
10 looked up here and I'm frowning or got a scowl on my face
11 or I'm smiling or I'm doing whatever, don't let that make
12 you believe that I have any opinion about the facts. The
13 law does not allow me to have any opinion about the facts.
14 If I have done anything that you think I have, set that
15 aside. I just can't. That is your job and your job only,
16 and, obviously, to judge the true facts in this case you
17 are required as I told you earlier to judge the
18 credibility of the witnesses.

19 Now, credibility simply means believability. It is
20 your job to determine who you believe. You exercise that
21 responsibility every day dealing with children, husbands,
22 wives, boyfriends, girlfriends, employees, employers. You
23 know how to judge someone's credibility. You know how to
24 judge someone when they're telling the truth, but in doing
25 that our law says that you have the right to believe a lot

1 of witnesses over one, one witness over a lot. You can
2 disregard everything a witness says. You can believe
3 everything he says. You can believe a little bit of what
4 he says and disregard the rest.

5 It is up to you to judge the believability or the
6 credibility of the witnesses and in determining this case
7 you can determine whether or not the witness has an
8 interest in the result of the trial, whether the witness
9 is prejudiced towards the plaintiff or the defendant, and
10 any bias about the witnesses and also the opportunity for
11 the witness to have seen the matters that he's testifying
12 about.

13 One of the parties in this case is a corporation --
14 the defendant. Our courts make absolutely no distinction
15 between corporations and individuals. The corporation is
16 a person in the eyes of the law and the corporation is
17 entitled to the same fair and impartial consideration and
18 to justice by the same legal standards as an individual.
19 So, the fact that we have one party a corporation you
20 treat both of them as if they were individuals and give
21 them both the same consideration that you give anyone
22 else.

23 Now, in a civil case -- I think I said this in my
24 opening, but in a civil case the burden of proof is on the
25 plaintiff. They have to prove that Sam English Paving

1 Company -- What is the correct title? Sam English
2 Grading, Incorporated -- they have to prove that that
3 company was negligent in how they operated this
4 intersection and you can do that by a number of ways. You
5 can look at their policies and procedures, the methodology
6 by which they ran the intersection or allowed the
7 intersection to be run. Also, you can look at the driving
8 of the pan.

9 Likewise, you'll use the same methodology in
10 comparing any negligence, if any, by the plaintiff. So
11 both parties -- the plaintiff has the burden of proving
12 the paving company's negligence and the defendant has the
13 burden of proving the motorcycle driver's negligence and
14 the burden of proof in a civil case is not like in a
15 criminal case.

16 If we were over in Judge Newman's court this week,
17 obviously, you come into that courtroom with
18 constitutional presumption of innocence. So if these were
19 the scales of justice if you were charged with murder or
20 forging a check you would be presumed innocent under the
21 Constitution and you come in the courtroom presumed
22 innocent and for the state to prove you guilty they have
23 to prove your guilt by evidence beyond a reasonable doubt.

24 In a civil case these parties come in on equal
25 footing and in order for the plaintiff to prove that the

1 corporation was negligent they have -- by the
2 preponderance or greater weight of the evidence they have
3 to prove it ever so slightly. If they're able to do that,
4 they're entitled to a verdict. If they're not and the
5 scales remain the same, they're not, or if it tips in
6 favor of Sam English, they're not. Likewise, they're
7 claiming that Mr. Valenzuela was negligent in operating
8 the motor vehicle. They have to prove that by the
9 preponderance of the evidence. That's the burden of proof
10 in a civil case.

11 In this case -- let me say one other thing. There is
12 a question at the end of the verdict form where you'll be
13 asked to determine whether or not if you find certain
14 things was the defendant's conduct grossly negligent,
15 willful, wanton, reckless or careless. That has to be
16 done by a different standard of proof. That's by what we
17 call clear and convincing. It is hard to measure it, but
18 preponderance of the evidence, you're equal and you tip it
19 ever so slightly; beyond a reasonable doubt, you are
20 presumed innocent beyond a reasonable doubt; clear and
21 convincing is somewhere in between. There is no real
22 definition of it, but it is somewhere in between. It is
23 the degree of proof which will give you the firm belief as
24 to the facts to be proven. It is more than a
25 preponderance. It is less than beyond a reasonable doubt.

1 That that's three standards of proof, but that is only in
2 the question dealing with recklessness.

3 Now, we have had in this case a number of witnesses
4 who have testified as expert witnesses. Because of their
5 training and experience and education I've allowed them to
6 be qualified as an expert and by doing so they were
7 allowed to give opinions. Normally, our rules of evidence
8 do not permit witnesses to testify about opinions or
9 conclusions. The exception to that rule is when a witness
10 is qualified as an expert by reason of education,
11 training, or experience in some art, science, or
12 profession and he may give an opinion as to that subject.

13 Now, you should consider any expert opinion given by
14 a witness and like any other evidence give it the weight
15 you think it deserves. If you decide that an expert
16 witness' opinion is not based on sufficient education and
17 experience or if you decide that the reasons given in
18 support of the opinion are not sound or that the opinions
19 are outweighed by other evidence you can disregard it
20 completely. An expert witness' testimony is to be given
21 no greater weight than that of any other witness simply
22 because the witness is an expert and you do not have to
23 accept an expert's opinion even though it is
24 uncontradicted. So, that's the rule on expert witnesses.

25 Madam forelady, ladies and gentlemen, I tell all my

1 jurors that sort of basic principal of law required in all
2 civil cases. Let's turn to this case. In this case this
3 is a negligence cause of action.

4 First of all, the plaintiff claims that the defendant
5 was negligent and should compensate the plaintiff for the
6 death that was caused or allegedly caused as a result of
7 the defendant's negligence. Now, in order to prove the
8 defendant was negligent the plaintiff must prove by the
9 preponderance or greater weight of the evidence four
10 things. They have to show that the defendant owed them a
11 duty of care. Then you have to show that that duty of
12 care was breached; that their conduct fell below the duty
13 owed; they deviated from the standard of care. They
14 deviate from the duty they owed. Their conduct fell below
15 that duty. That is the second thing.

16 The third thing they have to prove damages. We'll
17 talk about those in a minute. The fourth thing they have
18 to prove by the preponderance or greater weight of the
19 evidence is that the failure to maintain that duty -- the
20 breach -- was the proximate cause of the death in this
21 case. Proximate cause is something that produces a
22 natural chain of events which in the end brings about the
23 injury. It is the direct cause of the injury. So, they
24 have to prove the defendant's negligence proximately
25 caused the death in this case.

1 Now, let's talk about comparative negligence and then
2 we'll go back to this duty. In this case and in our law
3 in South Carolina allows the defendant, when someone is
4 suing him for negligence, under certain circumstances he
5 can claim that the plaintiff in this case -- the husband
6 driving the motorcycle -- own negligence proximately
7 caused the plaintiff's injuries or the death if you find
8 that the defendant was negligent. So, you compare the
9 negligence if you find the defendant negligent and then
10 you have to make a determination of whether or not the
11 motorcycle driver was negligent.

12 In that case, obviously, the defendant must prove by
13 a preponderance or greater weight of the evidence that the
14 plaintiff in this case or the motorcycle driver breached
15 his duty of care which proximately caused the death by the
16 same law that I told you earlier what the standard of care
17 is, breached that standard of care, and it was a proximate
18 cause of the death. And we'll talk about how you fill out
19 the verdict form in just a few minutes on that.

20 So, what you have to do in this case is it is sort of
21 a two-step analysis. You'll be asked to determine whether
22 or not the defendant was negligent. Then you'll be asked
23 to determine whether or not the plaintiff was negligent.
24 If you find that they both were negligent you'll have to
25 assign percentages to each one of them. That's not hard

1 to do.

2 Now, in your analysis concerning the defendant
3 negligence is oftentimes defined by our courts as what a
4 reasonable person -- the duty is what a reasonable person
5 would do under like circumstances. So you have to ask
6 yourself the question did the defendant in this case
7 through the monitoring of the traffic and or the policies
8 and procedures in operating the vehicles in that
9 intersection, how they moved the dirt back and forth, was
10 that whole scheme -- you have to say the way -- did the
11 way they do it -- is that the way an ordinary, reasonable
12 person would do it? If you find that that is how an
13 ordinary, reasonable person would do it, then he is not
14 negligent.

15 If you find that the way he operated that
16 intersection was not how an ordinary, reasonable
17 corporation or person would do it, then you have to make
18 the decision whether or not that his operation proximately
19 caused the death of the -- Mrs. Valenzuela in this case.
20 So, when you analyze the corporation's negligence, that's
21 how you do it. It is just how an ordinary, reasonable
22 person would have acted in similar circumstances in
23 operating and running that intersection.

24 Now, there's some other more specific things that you
25 can look at in determining whether or not the defendant

1 was negligent and whether or not the motorcycle driver was
2 negligent because when you look at specific operations of
3 vehicles and or motorcycles or heavy equipment in this
4 case we have certain laws in our state, certain common
5 laws, and then we have certain statutory laws.

6 Our laws in this state say that the operator of any
7 type of motor vehicle, whether it be a heavy pan or
8 motorcycle, is required to use the same care that would be
9 used by a person of ordinary reason and prudence if that
10 person were driving the same vehicle at the same time and
11 place under the same circumstances. So, what would the
12 ordinary person do in operating that vehicle in the same
13 and similar circumstances. That's the standard by which
14 they're judged. If they didn't operate it like an
15 ordinary, reasonable person would have done it, then they
16 fell below that standard.

17 That's the driver's duty of care. Sometime it's
18 explained as follows. The person operating a motor
19 vehicle in this state owes a duty to exercise ordinary
20 care at all times to avoid placing himself or others in
21 danger and to use like care to avoid a wreck or an
22 accident.

23 That includes maintaining a proper lookout. The
24 driver of a vehicle has a duty to keep a proper lookout
25 for other vehicles on the road. This duty requires the

1 driver to watch attentively so that the driver is able to
2 see a person or object on the highway. Likewise, or
3 additionally, the driver of the vehicle also has the duty
4 to keep the vehicle under proper control so that the
5 driver is able to slow down, stop, or turn the vehicle to
6 avoid colliding with other vehicles or objects lawfully on
7 the road. So, they have a common law duty, duty of due
8 care, proper lookout, vehicles under control.

9 And motorists have the right to assume and to act
10 upon the assumption that others will observe the law and
11 the rules of the road. They are entitled to rely on that
12 assumption that others will keep their vehicles under
13 control and exercise due care and that all vehicles will
14 be proceeding at a reasonable, proper, and lawful speed
15 and will slow down when necessary. Furthermore, a driver
16 approaching or entering or crossing an intersection
17 ordinarily may assume that a an approaching motorist will
18 keep a proper lookout and give proper warning signals when
19 necessary.

20 Now, that's sort of common law duties that drivers
21 owe to the public. Now, there are certain statutes.
22 These statutes are laws that are enacted by our
23 legislature and are codified. There is a whole stack of
24 them over here. They're codified in volumes such as this.
25 These are laws they are not common laws, but they're laws

1 that are on the books. They're statutory laws. They deal
2 with a number of subjects and those subjects include
3 speed.

4 Now, the speed statute in South Carolina says this:
5 A person shall not drive a vehicle on a highway at a
6 greater speed than is reasonable and prudent under the
7 conditions and having regard to the actual and potential
8 hazards then existing. Speed must be also controlled to
9 avoiding -- to avoid colliding with a person, vehicle, or
10 other conveyance on or entering the highway in compliance
11 with legal requirements in the duty of a person to use
12 care. The driver of a vehicle shall drive consistent with
13 the requirements of this law at an appropriate reduced
14 speed when approaching and crossing an intersection when
15 special hazards exist with respect to other traffic or by
16 reason of weather or highway conditions. That's the
17 statute dealing with speed.

18 If you violate these statutes, that's negligence, per
19 se, and then, obviously, you have to look at whether or
20 not violating the statute was a proximate cause of the
21 death in this case.

22 Another law in the state that's codified deals with
23 motorcycles. It simply says that every person operating a
24 motorcycle shall be granted all the rights and shall be
25 subject to all the duties applicable to the drivers of

1 motor vehicles. That's in 56-5-3610.

2 There has been evidence in this case concerning a
3 stop sign. Obviously, you have to -- you're the finders
4 of the facts and so you determine whether or not that stop
5 sign was authorized, what the purpose of it was, those
6 sorts of things. That's for you as the fact finder, but
7 there is a law in South Carolina that says every driver of
8 a vehicle approaching a stop sign shall stop at a clearly
9 marked stop line, but if there is none, stop before
10 entering the crosswalk on the near side of the
11 intersection and if there is no crosswalk at the point
12 nearest the intersecting roadway where the driver has a
13 view of approaching traffic on the intersecting roadway
14 before entering. After having stopped the driver shall
15 yield the right-of-way to any vehicle in the intersection
16 or any vehicle approaching on any other roadway so closely
17 as to constitute an immediate hazard during the time when
18 such driver is moving across in the intersection of the
19 roadways.

20 If you find from your findings of fact that the stop
21 sign was not applicable, the law is that if it is an
22 unauthorized stop sign that's not violation of a statute,
23 per se, but that can be used by you as evidence in
24 determining the question of negligence. So, whether it's
25 authorized or not authorized, you make that determination,

1 and if it's not authorized you can still consider that as
2 a question of negligence. If it is supposed to be
3 complied with, if they fail to comply with it, then that's
4 negligence, per se, and then you have to look at the
5 proximate cause.

6 There is another law in this state dealing with
7 vehicles that are about to cross a roadway or a highway
8 from a place other than a roadway, such as a private
9 driveway. The law says they shall yield the right-of-way
10 of all vehicles approaching on the roadway to be entered
11 across. They shall yield the right-of-way from a private
12 driveway.

13 Now, our law has defined the word right-of-way is the
14 right of one vehicle to proceed in a lawful manner in
15 preference to another vehicle where that vehicle is
16 approaching under such circumstances of direction, speed,
17 et cetera. I think y'all all know what yield the
18 right-of-way means. Yield the right-of-way.

19 Now, in that regard, there's an issue in the case --
20 shall yield the right-of-way -- our courts have defined
21 the word yield, that's a requirement which one requires a
22 person to be alert to possible dangers and requires the
23 use of one's senses to apprehend that possible danger.
24 Our law says that under certain circumstances it may be
25 mandatory upon one to stop before entering the highway

1 where he has the duty to yield. It may be incumbent that
2 he stop before entering the highway or it may be
3 sufficient for him to slow down or under certain
4 circumstances it may be okay to slacken your speed, but
5 the law says under any and all circumstances whether you
6 have to stop, slow down, or whatever, you have to exercise
7 such care as a reasonable and prudent person would
8 exercise under such circumstances then and there existing.

9 The law says that reasonable caution and prudence
10 dictates that a driver before entering a main highway from
11 a private drive should look for vehicles which might
12 reasonably be expected thereon and wait until he can
13 safely enter into the highway. A motorist entering a
14 highway must look for traffic thereon in such a manner
15 that the purpose of looking is accomplished and he is
16 under a duty to see what is in plain site. It is the duty
17 of a motorist when entering a highway from a private drive
18 to be vigilant and watchful and to anticipate and expect
19 the presence of other vehicles on the highway and to
20 ascertain whether the highway is clear so that he may
21 enter without interfering with the use of the approaching
22 vehicle.

23 Now, as I said further, there's some question about
24 the stop sign. Y'all have to decide that. When you yield
25 the right-of-way, decide whether that's applicable, but

1 that's the law that you yield the right-of-way if you're
2 coming out of a private drive and under that statute
3 whether it is requiring a person to stop or whether he
4 merely has to yield the right-of-way to the driver on the
5 main highway, it is the duty of that driver who has to
6 yield the right-of-way or to stop, it is his duty, as I
7 said, to look both to the right and left and if the
8 vehicle is approaching on the main highway, it is his duty
9 to wait until such vehicle has passed unless a prudent
10 person with reasonable grounds to believe that the other
11 vehicle is so far away it wouldn't be any danger to cross
12 in front of him.

13 Now, in all of this we have in our law in South
14 Carolina that's been the law for a long time the law
15 recognizes that in certain circumstances drivers whether
16 they're on the pan or on the motorcycle will face sudden
17 emergencies. I think it's the testimony that talked about
18 panic stops or emergency stopping. The law is this on
19 emergencies or sudden emergencies. A driver by the
20 negligence of another person and by not his own negligence
21 is suddenly placed in an emergency and he's compelled to
22 act instantly to avoid a collision or an injury is not
23 guilty of negligence if he makes a choice that a person of
24 ordinary prudence placed in the same position might make
25 even though he did not make the wisest choice.

1 In other words, where a motorist is suddenly placed
2 in an emergency situation through no fault of his own and
3 is compelled to act instantly to avoid a collision, he is
4 not negligent if he makes a choice that a person of
5 ordinary judgment might make if placed in the same
6 emergency situation. The conduct of one who has without
7 fault of his own part been confronted with a sudden
8 emergency must be judged in the light of the emergency and
9 not by what hindsight might show to have been a safer or
10 more prudent course for him to have followed. This rule
11 necessarily makes allowances for errors of judgment by a
12 person who has been confronted with a sudden emergency or
13 peril even though it might afterwards appear the injury
14 could have been avoided if he had pursued a different
15 course provided the defendant acted reasonably in light of
16 the emergency.

17 In order for the doctrine of sudden emergency to
18 apply it must be shown that the person was confronted with
19 an emergency or what appeared to be an emergency, the
20 emergency was not caused or contributed to by the person,
21 and that in meeting the emergency the person acted as a
22 person of reasonable prudence would or might have acted
23 under the same or similar circumstances. The law says
24 that the sudden emergency doctrine is intended to protect
25 the driver who while acting with due care suddenly finds

1 himself in an emergency situation due to the negligent or
2 wrongful acts of another. This doctrine does not apply
3 when the plaintiff's own negligence creates the very
4 emergency in which he finds himself. Persons who have to
5 act in the face of sudden and imminent peril are not to be
6 judged in the light of hindsight or later events but are
7 to be judged under the circumstances which surround them
8 at the time by the standard of what a person of ordinary
9 prudence would have been likely to do under the same
10 circumstances.

11 Now, when you make your -- when you deliberate this
12 case and, obviously, as I told you you got certain things
13 to consider -- whether or not the defendant corporation
14 was negligent in its overall operation of the
15 intersection, how would a reasonable person under similar
16 circumstances have operated the intersection, included in
17 that you can use the statutes and these general rules to
18 look at how the pan driver drove. You can look at how the
19 motorcycle drove, and then you have to temper all that or
20 if you find it to be a sudden emergency you can apply the
21 law of sudden emergency. So, those are all the things you
22 got to decide in the situation.

23 Now, if you find the defendant was negligent, he
24 breached his duty and that negligence proximately caused
25 the death of Mrs. Valenzuela, then you, obviously, have to

1 consider what damages are appropriate in this case. This
2 is what in the law we call a wrongful death action. The
3 plaintiff Mrs. Johnson who is the personal representative
4 of Mrs. Valenzuela's estate, she claims that
5 Mrs. Valenzuela wrongfully died as a result of the
6 negligent acts or omissions of the defendant.

7 Whenever the death of a person is proximately caused
8 by the wrongful act or neglect of another and the act or
9 neglect is one which would have entitled the deceased to
10 recover damages if she had not died, then the personal
11 representative of the estate may bring an action under our
12 laws for what we call a wrongful death. The personal
13 representative is the person who has the right to
14 recover the compensatory or actual damages for the
15 wrongful death.

16 The plaintiff is not under a burden to show the exact
17 monetary value of the deceased's life since, obviously, it
18 is impossible to prove directly the value of human life.
19 So, what is a reasonable amount of compensation is left to
20 your sound judgment and discretion. If you find that
21 damages are appropriate, you can consider the following.

22 The following are elements of wrongful death. What
23 we call pecuniary loss, that's monetary loss. That is the
24 loss of the deceased's ability to earn money in which the
25 plaintiff might logically and reasonably have been

1 expected to share such as the money for the care and
2 protection of the deceased's spouse and her children and
3 for the education and training of the deceased's children.
4 Where there is a relationship of husband and wife or
5 parent and child the law presumes that there will be some
6 pecuniary loss.

7 Also, included in elements of wrongful death you can
8 compensate for mental shock and suffering, wounded
9 feelings, grief and sorrow, loss of companionship, loss of
10 the use and comfort of the deceased's society including
11 the loss of the deceased's experience, knowledge, and
12 judgment in managing the affairs of the deceased and her
13 beneficiaries. Any medical and funeral expenses also are
14 allowed. It is not necessary to show the exact amount of
15 damages suffered by the beneficiaries or that the
16 beneficiary suffered a monetary loss. In addition, the
17 persons for whom the benefit of the action is brought does
18 not have to be dependent upon the deceased for support.

19 When I told you that the elements included loss of
20 society, that would be you would consider what amount, if
21 any, the minor children and or the husband are entitled to
22 for losing her nurture, her guidance and training, her
23 companionship and comfort. Those sorts of things are what
24 is proper in a wrongful death case.

25 In this case Mrs. Valenzuela was how old at her

1 death?

2 MS. MCPHERSON: Thirty-five.

3 THE COURT: So she had a life expectancy of 46.

4 MR. DETRICK: I think it is on the request that we
5 had handed up.

6 THE COURT: What is it? Nineteen what? She's how
7 old? Thirty-six?

8 MS. MCPHERSON: Thirty-five.

9 THE COURT: If you find that Mrs. Valenzuela's death
10 was as a result of the defendant's actions, obviously, in
11 those elements I just gave you under wrongful death you
12 can consider how long she is -- would have been expected
13 to live. South Carolina has what we call a mortuary table
14 or life expectancy table and it sets out if you're X
15 amount years of old if you're a man or a woman it will
16 tell you what actuarially you're expected to live. So she
17 was 35; so her life expectancy is -- she was 35; so her
18 life expectancy is 43 years. So, you can consider that if
19 you choose and if you reach the issue of awarding damages.

20 I know I've said a lot and, you know, I've been doing
21 this for 39 years. It took me a long time to learn all
22 this stuff. If you get back in your jury room and you
23 have a question about something, just write it out on a
24 piece of paper, ma'am, and send it out here to me. I will
25 attempt to answer it the best I know how. Sometimes they

1 ask questions that I can't answer. I'll tell you if I
2 can't. If you get bogged down, just let me know and I'll
3 help you.

4 One thing I forgot to mention there is a general
5 rule of law when we're dealing with corporations that,
6 obviously, corporation is a legal entity to be treated as
7 a person and they have to act through their employees and
8 their agents. Therefore, a corporation is responsible for
9 any negligent acts or omissions of its employees or agents
10 while they're acting within the scope of their employment.

11 Now, I am going to go over this verdict form with
12 you. I don't think -- at first glance it looks like it
13 might be a little hard, but it's not. I think I've told
14 you what all y'all have to sort of look at -- whether or
15 not the defendant breached its duty of care for the
16 general global operation of the intersection and the
17 business and then you can specifically look at the common
18 law dealing with operation of vehicles and you can look at
19 the statutory requirements dealing with the vehicles and
20 operation of vehicles in assessing the whole situation.

21 So when you go back there the form is pretty easy,
22 the verdict form. The first question you have to answer
23 is whether or not the defendant was negligent. If you
24 answer yes to that question, you go to number two. If you
25 answer no to that question, was not negligent, you stop

1 and that's it.

2 If you find that he is negligent then you go to
3 number two and you say was his negligence the cause of her
4 death? If you don't think it is, no, and that's the end.
5 If you answer yes, you go to question three and that's
6 where you're asked to determine the conduct of Michael
7 Valenzuela, whether or not his operation of the motorcycle
8 -- did he operate it below the standard of care, violating
9 the statutes and rules of the road and then, of course,
10 that invokes that sudden emergency if you think it is an
11 emergency situation.

12 If you find he is negligent, then you would be asked
13 whether or not his negligence was the proximate cause of
14 her death. If you find that both Michael Valenzuela and
15 Sam English were both negligent and they both proximately
16 caused her death, you have to apportion the negligence
17 between Mr. Valenzuela and Sam English, and then if you
18 find that Mr. English was negligent or the company was
19 negligent, you then have to decide what the amount of
20 actual damages sustained by the beneficiaries, and the
21 beneficiaries in this case are dad and the young man, and
22 I just went through all of the elements of what that is.

23 Once you go through all of that exercise if you find
24 that the paving company -- grading company was negligent
25 there is a last question you have to ask whether or not

1 the defendant's conduct was so grossly negligent and
2 willful, wanton, reckless, or careless and if you -- when
3 you make that determination it's either yes or no, but
4 that has to be by clear and convincing evidence, not the
5 preponderance of the evidence. Once you reach your
6 decision, sign it, knock on the door, and we'll receive
7 you back in the courtroom for the verdict.

8 As I said if you have any questions or anything write
9 them out. Give them to Ms. Barbara.

10 THE BAILIFF: I'll give them a pad.

11 THE COURT: Y'all are welcome to refer to your notes.
12 You can carry those back there with you. Your verdict
13 must be unanimous. All twelve of you must agree. As I
14 tell all jurors, we don't -- sitting in your position we
15 have no friends to reward, no enemies to punish. It has
16 to be a decision based on cool and deliberate deliberation
17 of what y'all have heard, what the facts were -- your
18 findings of the facts and apply it to the law as I've
19 given it to you.

20 These lawyers have worked hard on this case and I've
21 had to serve as the judge in the case. I've enjoyed it --
22 not the facts of it, but it is a challenging case and now
23 we turn it over to the twelve citizens of Aiken and that's
24 how this system is so good. I mean, they couldn't agree.
25 They couldn't decide. So that's why they have you and I

1 trust that you'll do your job. I thank you.

2 Go back. Don't start deliberating yet, ma'am. I
3 have to ask the lawyers if I left anything out. It won't
4 take me but a second and then I'll have to gather up all
5 the exhibits and send it back to you. Okay.

6 (Whereupon, the jury exited the courtroom at 11:40.)

7 THE COURT: All right. Mr. Detrick, Mrs. McPherson,
8 any requested additions, deletions, to the charge?

9 MR. DETRICK: None from the plaintiff, Your Honor.

10 THE COURT: Ms. Payne, and I know what your
11 objections were. You're protected on that yesterday, but
12 anything as to the actual charge, any requested additions
13 or deletions?

14 MS. PAYNE: We would just renew our objections that
15 some of the characterizations by the court about the whole
16 scheme, the ordinary person would do it, running that
17 intersection, you can still consider unauthorized stop
18 signs to determine negligence.

19 THE COURT: Well, that's the law.

20 MS. PAYNE: Yes, sir. Those are our objections --
21 and failure to charge our failure to exercise due care not
22 intent is the critical element in negligence.

23 THE COURT: Not intent?

24 MS. PAYNE: Yes, sir.

25 THE COURT: I think I've covered ordinary, reasonable

1 person would act under like or similar circumstances.
2 Intent was never mentioned. Anything else? I am going to
3 stand by my charge. All right. Y'all please come make
4 sure I we got all exhibits. I understand Exhibit 119 --
5 my court reporter says she's never seen 119 even though
6 Mr. Detrick mentioned 119; so I don't think it exists.
7 Does anybody have anything to the contrary?

8 MR. DETRICK: No, sir. I stand with the court
9 reporter.

10 THE COURT: My court reporter is the best in the
11 state. If there was a 119 -- if there was a 119 it would
12 be up there. Please come up here and make sure we've got
13 them all and put on the record that y'all reviewed it.
14 We'll stand at ease. Don't get too far. We may have
15 questions.

16 (Whereupon, the jury begins to deliberate at 11:45.)

17 THE COURT: All right. I shared with all of the
18 lawyers the note I received from the foreperson. It says,
19 Copy of laws dealing with making a panic
20 decision/emergency situation, laws dealing with authorized
21 and unauthorized stop signs and signs on private roads.

22 I gave -- I can -- we discussed whether I should read
23 it back to them or send it back to them. I think the
24 better practice is to read it. So if you'll bring them
25 out, I'll read it to them.

1 (Whereupon, the jury came into open court at
2 approximately 2:04.)

3 THE COURT: Y'all got everything they need back
4 there?

5 You got them cold drinks, Ms. Barbara?

6 THE BAILIFF: Yes, sir. If they need more coffee, we
7 can. They have sodas and water.

8 THE COURT: We can get you some coffee, if you need
9 it.

10 THE FOREPERSON: We're fine right now.

11 THE COURT: All right. Just don't get uncomfortable.
12 The note was, Copy of the laws dealing with emergency
13 situation and laws with dealing with authorized and
14 unauthorized stop signs and signs on private road.

15 All right. Section 56-5-2330 says this -- this deals
16 with the stop signs and the yield signs. Every driver of
17 a vehicle approaching a stop sign shall stop at a clearly
18 marked stop line, but if there is no stop line before
19 entering the crosswalk and if there is no crosswalk, then
20 at a point nearest the intersecting roadway where the
21 driver has a view of approaching traffic on the
22 intersecting roadway before entering it.

23 If you find that the stop sign was unauthorized or
24 was not a state sign that would not be -- if someone did
25 not comply with that, that would not be the violation of a

1 statute which would be negligence, per se, but there is
2 case law that says that violation of an unauthorized stop
3 sign is evidence that the jury may consider in determining
4 the question of whether someone is negligent or not
5 negligent.

6 The other statute dealing with signs is -- no
7 signs -- is the driver of a vehicle about to enter or
8 cross a roadway from a private drive shall yield the
9 right-of-way to all vehicles approaching on the roadway to
10 be entered. The right-of-way is defined by our laws as
11 the right of one vehicle or pedestrian to proceed in a
12 lawful manner in preference to another vehicle entering or
13 approaching in circumstances of direction and speed.

14 Our courts have defined the word yield and yield
15 right-of-way. Yield means a driver must be alerted to all
16 possible danger and is required to use one's senses to
17 apprehend the possible danger. It may be mandatory upon
18 one to stop before entering the highway while under other
19 circumstances a slowing down would be sufficient to yield
20 to oncoming traffic and under different circumstances one
21 might yield without even slackening his speed, but under
22 all and any circumstances one must be required to exercise
23 such care as a reasonable person, a prudent person would
24 exercise under such circumstances.

25 Reasonable caution and prudence would dictate that a

1 driver before entering into a highway of travel from a
2 private drive shall look for vehicles which might
3 reasonably be expected thereon and has a duty to wait
4 until he can safely enter into the highway. A motorist
5 entering a highway shall look for traffic thereon in such
6 a manner that the purpose of looking is accomplished and
7 he is under a duty to see what is in plain sight. It is
8 the duty of the motorist when entering a highway from a
9 private drive to be diligent and watchful and anticipate
10 and expect the presence of other vehicles upon the highway
11 and to ascertain whether the highway is clear so he may
12 enter without interfering with the use thereon of the
13 approaching vehicles.

14 Whether a driver is required to stop by a stop sign
15 or merely to yield the right-of-way to the driver on the
16 main highway it is his duty to look both to the right and
17 left and if a vehicle is approaching on the main highway
18 it is his duty to wait until such vehicle has passed
19 unless a reasonable prudent person would have reasonable
20 ground to believe that such other vehicle is such a far
21 distance away that he could safely cross or advance.

22 All right. And then the law on what we call sudden
23 emergency says this: A driver who by the negligence of
24 another and not by his own negligence is suddenly placed
25 in an emergency and is compelled to act instantly to avoid

1 a collision or injury is not guilty of negligence if he
2 makes a choice that a person of ordinary prudence placed
3 in such a position might make even though he did not make
4 the wisest choice. In other words, where a motorist is
5 suddenly placed in an emergency situation through no fault
6 of his and is compelled to act instantly to avoid a
7 collision, he is not negligent if he makes a choice that a
8 person of ordinary judgment might make if placed in the
9 same emergency situation.

10 The conduct of one who has without fault of his own
11 been confronted with a sudden emergency must be judged in
12 the light of the emergency and not by what hindsight might
13 show to have been a safer or more prudent course for him
14 to have followed. This rule necessarily makes allowance
15 for errors in judgment by a person who's been confronted
16 with a sudden emergency or peril even though it might
17 afterwards appear the injury could have been avoided if he
18 had pursued a different course provided the defendant
19 acted reasonably in light of emergency.

20 In order for the document of sudden emergency to
21 apply it must be shown that the person was confronted with
22 an emergency or what appeared to be an emergency, the
23 emergency was not caused or contributed to by the person,
24 and that in meeting the emergency the person acted as a
25 person of reasonable prudence would or might have acted

1 under the same or similar circumstances. The sudden
2 emergency doctrine is intended to protect a driver who
3 while acting with due care suddenly finds himself in an
4 emergency situation due to the negligent or wrongful acts
5 of another.

6 This doctrine, however, does not apply when a party's
7 own negligence creates the very emergency in which he
8 finds himself. Persons who have to act in the face of
9 sudden emergency and imminent peril are not to be judged
10 in light of latter events or in hindsight. They're to be
11 judged under all circumstances which surround them at the
12 time by the standard of what a person of ordinary prudence
13 would have done if he had met the same emergency.

14 Those are the things I think you wanted to hear.
15 Anything else?

16 THE FOREPERSON: Your Honor, could we have a copy of
17 those to take with us?

18 THE COURT: No, ma'am.

19 THE FOREPERSON: Okay.

20 THE COURT: The rules just say I'm not supposed to
21 send it back there.

22 THE FOREPERSON: Okay. That's fine.

23 THE COURT: You know, it's funny. In federal court
24 they do. In state court, they asked us not to.

25 THE FOREPERSON: Do -- can I ask a question for the

1 jury or do I need to write it down?

2 THE COURT: You can ask it.

3 THE FOREPERSON: I am going to let her ask it just
4 because it's her question.

5 THE JUROR: The requirement to keep a vehicle under
6 control.

7 THE COURT: Okay.

8 THE JUROR: Where does that fall?

9 THE COURT: I'll give you the abbreviated version.
10 If you want further, I can do that. It is a common law
11 duty -- in other words, it's not a specific statute --
12 that the driver of a vehicle, motor vehicle, motorcycle,
13 motor grader, pan operator has a duty to keep a proper
14 lookout for other vehicles on the road. This duty
15 requires the driver to watch attentively so that the
16 driver is able to see a person or object in the highway.

17 Okay. Thank you. I am right here if you need
18 anything else.

19 THE FOREPERSON: Thank you, sir.

20 (Whereupon, the jury exited the courtroom at 2:14.)

21 THE COURT: All right. Any objection by the
22 plaintiff?

23 MR. DETRICK: None.

24 THE COURT: By the defendant?

25 MS. PAYNE: We just renew our previous objections to

1 sudden emergency doctrine, Your Honor.

2 THE COURT: So noted.

3 (Whereupon, a break was taken.).

4 THE COURT: All right. As I shared with y'all in
5 chambers I received a note about 15 minutes ago, question
6 -- or the note says, At what point do we declare a hung
7 jury? As I told y'all in chambers I am going to bring
8 them out. I am going to read verbatim the Allen versus
9 United States charge that it requires to read when we have
10 a potentially hung jury and then I am going to tell them
11 that I'll let them continue on. I'll buy them supper. If
12 we can't reach a verdict by nine, we'll come back
13 tomorrow. We're going to push it until we get it
14 concluded.

15 How long have y'all been working on this case?

16 MR. DETRICK: How long we been working on it? Three
17 years.

18 MS. PAYNE: It was filed August 2011.

19 MR. COX: It would be one year for this case.

20 MR. DETRICK: For this case, but I've been working on
21 it.

22 (Whereupon, the jury came into open court at
23 approximately 5:40.)

24 THE COURT: Okay. I got your note. You know, it's
25 not unusual that you can't come to a unanimous verdict.

1 Let me just tell you that oftentimes we're faced with this
2 situation and the United States Supreme Court a long time
3 ago -- this case is in 1896. It's called Allen versus
4 United States of America and I am going to read to you
5 what it says. This is in our charge book that our South
6 Carolina Supreme Court requires that we read when we have
7 problems with a jury not being able to reach a unanimous
8 verdict.

9 It simply says this: You told me that you've been
10 unable to reach a verdict in this case. As I've
11 instructed you earlier the verdict of the jury must be
12 unanimous. So when a matter is in dispute, it's not
13 always easy for even two people to agree. So when twelve
14 people must agree, it becomes even more difficult. In
15 most cases absolute certainty cannot be reached or
16 expected. However, you have a duty to make every
17 reasonable effort to reach a unanimous verdict.

18 In doing this you should consult with one another,
19 express your own views, listen to the opinions of your
20 fellow jurors, tell each other how you feel, and why you
21 feel that way, and discuss your differences with open
22 minds. Although the verdict of the jury must be unanimous
23 every one of you has the right to your own opinion. The
24 verdict you agree to must be your own verdict, the result
25 of your own convictions, and you should not give up your

1 firmly-held belief merely to be in agreement with the
2 other jurors.

3 The majority should consider the minority's view and
4 the minority should consider the majority's view. I ask
5 that each of you carefully consider and respect the
6 opinions of each other and reevaluate your position for
7 reasonableness, correctness, and impartiality. You must
8 lay aside all outside matters and reexamine the questions
9 before you based on the law and evidence in the case.

10 If you cannot agree on a verdict in this case,
11 obviously, I have to declare a mistrial, and in that case
12 it does not mean that anybody wins or loses. It simply
13 means this: That come next month or the month after next
14 I will have to try this case again. I'll try it with the
15 same parties, the same witnesses, the same facts, and with
16 a jury of twelve people from Aiken County just like the
17 twelve of you. It's not going to go away. It's here.
18 The lawyers will come in and they'll ask basically the
19 same questions. They can't change the facts. The facts
20 will be the same. The witnesses will be the same and
21 we'll have to go through this whole process again.

22 You were selected in the same manner and from the
23 same source as any future jury will be. You're chosen
24 from driver's licenses and voter registrations and from
25 the citizens of Aiken County and the case will be

1 submitted to twelve other jurors -- the same case on the
2 same facts and those jurors will be just like you. I will
3 ask for impartial, conscientious jurors. So, it's not
4 going to be anything any different. So, I just trust the
5 twelve of y'all can come to some understanding.

6 So, here is where we are. It is a quarter 'til six.
7 I'll be glad to order you supper. We can stay here until
8 nine, ten, eight, whatever you want to stay to. If we
9 can't agree, we can come back tomorrow, Saturday. If you
10 don't want to come back tomorrow we'll come back Tuesday
11 morning, but these lawyers have -- this case was filed
12 over a year ago. They have put untold hours into it. The
13 facts aren't going to change.

14 Y'all are twelve -- y'all have paid super attention.
15 You have done a super good job and I ask that you go back
16 and let's give it a good faith stab. If you can't get it
17 done tonight, we'll come back in the morning or if you
18 don't want to come back on Saturday we can come back
19 Tuesday and I'll be glad -- you're probably tired of
20 pizza. I am. It's the third time I've had it this week.
21 My wife is out of town. I'm sick of it; so we'll get
22 something different or if you want to -- if you want to go
23 home about 8 o'clock or 9 o'clock and come back fresh in
24 the morning if we can't reach -- but we're going to give
25 it a shot.

1 I ask, you know, please, on behalf of these parties
2 and all my court personnel have been here all week. We've
3 all put in a lot of time. Nobody has put in my harder
4 time than y'all have. Y'all have the hardest decision. I
5 am going to ask that you respect each other and try to
6 work it out.

7 Now, do you want me to order you supper or do you
8 want to wait a little while and let me know? Why don't
9 you send me a note 6:30 or a quarter 'til 7 and let me
10 know how we are.

11 THE FOREPERSON: Okay.

12 THE COURT: Y'all don't go back there and fuss at me
13 now, please. That's what the law requires me to do when
14 we reach this situation. That was -- what I was citing
15 y'all was an 1898 case of the US Supreme Court; so y'all
16 aren't the first jury or the first trial that couldn't
17 come to an agreement. You won't be the last, but every
18 one of them that's faced with this situation I urge you,
19 please, consider each other's opinion and in the spirit of
20 compromise or whatever let's reach a verdict in this case.
21 Thank you.

22 Madam forelady, I'll just wait to hear from you about
23 whether you want me to order you something or whether you
24 want to come back tomorrow.

25 THE FOREPERSON: You want me to find out?

1 THE COURT: Well, just keep going a little while.
2 We're not going to quit yet.

3 THE FOREPERSON: Oh, yeah, I know. Okay.

4 (Whereupon, the jury exited the courtroom at 5:47.)

5 THE COURT: Any objection by the plaintiff to those
6 remarks?

7 MR. DETRICK: None, Your Honor.

8 THE COURT: By the defense?

9 MS. PAYNE: Your Honor, our concern is -- I know you
10 aren't surprised that I had something to say. Our concern
11 is that you -- the instruction just kind of indicated that
12 they had to reach a verdict and I don't think that's what
13 the law requires.

14 THE COURT: Well, I don't think my instructions said
15 that at all. I asked them, urged them to try to. I told
16 them we'd come back, but we hadn't been out but less than
17 six hours; so that's not -- I certainly didn't indicate
18 that to them. Thank you.

19 MS. PAYNE: Thank you, Judge.

20 (Whereupon, a discussion was held off the record.)

21 (Whereupon, the jury came into open court at
22 approximately 7:04.)

23 THE FOREPERSON: We're working hard.

24 THE COURT: I know you are. Believe me. We thank
25 you. Everybody in here thanks you.

1 THE FOREPERSON: I assure you it's very civilized.
2 It is one person at the time talking and we got it under
3 control.

4 THE JUROR: We haven't gotten to the fist fights yet.

5 THE FOREPERSON: If this goes on much longer, we may.

6 THE COURT: No, ma'am. I'll come back there and put
7 my referee gloves on. First question you asked: If
8 Mr. Valenzuela is found negligent or some percentage, will
9 Mr. Valenzuela lose compensation totally? The way it
10 works is this. If you assign a percentage of negligence
11 to Mr. Valenzuela -- let's use this as an example. If you
12 award ten dollars and you find him 10 percent at fault.
13 Then that 10 dollars would be reduced by 10 percent to
14 nine dollars.

15 THE FOREPERSON: So it has to match?

16 THE COURT: No, ma'am. You don't do the math. You
17 put the percentage. I do the math.

18 THE FOREPERSON: That's right. The percentage has to
19 match the totals.

20 THE COURT: Well, the percentages have to match
21 100 percent.

22 THE FOREPERSON: Oh, okay.

23 THE COURT: If you find both of them to be negligent
24 the total percentage has to be 100. If you find that,
25 then you find the amount of damages and I do the

1 calculation.

2 THE FOREPERSON: Okay.

3 THE COURT: Now, that's not correct if you find that
4 Mr. Valenzuela is more than 50 percent. If his negligence
5 is more than 50 percent, then he is totally zero. He gets
6 nothing. Okay? So the other question is can the jury
7 ignore the percentages and assigned amounts the jury feels
8 is reasonable and justified? Well, you have to make that
9 -- you have to go through the steps and you have to
10 determine whether or not the defendant is negligent and
11 then if he is you have to go to whether Mr. Valenzuela is
12 negligent and if he is then you have to assign
13 percentages.

14 If you find that the defendant is not negligent, then
15 you quit. If you find that he is negligence and
16 Mr. Valenzuela is negligent, then you have to do a
17 percentage. If you find that -- it has to add up to 100
18 and if Mr. Valenzuela is more than 50 percent then you
19 stop, but if it is less than 50 percent then you decide
20 what his total amount of damages are and then I do
21 calculations because it's got two beneficiaries. It is a
22 legal matter that I have to do.

23 Your other question is this: Under sudden emergency
24 do the common laws and statutes apply; example, duty of
25 care, proper lookout, so forth and so on. The theory of a

1 sudden emergency only comes into play if a person is faced
2 with a sudden emergency and in that situation if they
3 react like a normal person may react to a sudden
4 emergency, you don't look at it in hindsight. In other
5 words, you would act different or you are allowed to act
6 differently faced with a sudden emergency than if you're
7 just riding down the road and no emergency occurs. Okay?

8 THE JUROR: Thank you.

9 THE COURT: Anything else? Send me back a question
10 if you have one.

11 THE FOREPERSON: Okay. Thank you.

12 (Whereupon, the jury exited the courtroom at 7:08.)

13 THE COURT: All right. Any objection to that
14 explanation by the plaintiff?

15 MR. DETRICK: Yes, sir, Your Honor. You told them
16 they do not have to find damages if they find
17 Mr. Valenzuela over 50 percent negligent, but that's not
18 true. They still have to proceed to damages because of
19 comparative doesn't apply to Mikey; therefore, they have
20 -- it would take 50 percent, we agree that Mr. Valenzuela
21 would not get his portion, but Mikey would get his
22 50 percent as long as they are finding a negligence and
23 proximate cause because he cannot be comparatively
24 negligent.

25 THE COURT: Any objections to the charge or to the

1 explanation, I should say?

2 MR. COX: Judge, we have -- we object to the sudden
3 emergency explanation.

4 THE COURT: Well, y'all -- on the same basis you've
5 always been?

6 MR. COX: It wasn't the full charge.

7 THE COURT: I'll give you the full charge if that's
8 what you want.

9 MS. PAYNE: Well, as to the analysis, Judge, I mean,
10 if they find that Michael Valenzuela was the proximate
11 cause, then they would not proceed on to---

12 MR. DETRICK: Yes, they would. That's just the
13 proximate cause for comparative---

14 THE COURT: I am going to stick by what I said. I
15 may bring them back in here about Mikey.

16 MR. DETRICK: I think the easiest way to do that as I
17 understood we agreed on would be to just do like you did
18 one, two, three, four, five, but do an amount for the
19 damages and then the court does it afterwards. Just come
20 to an amount of the damages.

21 MS. MCPHERSON: 100 percent of the damages.

22 MR. DETRICK: And then the court makes that
23 calculation.

24 MS. PAYNE: Well---

25 THE COURT: Ms. Barbara, bring the jury back, please.

1 MS. PAYNE: I think what Your Honor -- if they find
2 51 percent as to Michael Valenzuela, then he would not
3 recover, but continue on to assess damages for Mikey.

4 THE COURT: If they find your client negligent at
5 all.

6 MS. PAYNE: Yes.

7 THE COURT: That's correct.

8 MR. DETRICK: That's correct.

9 (Whereupon, the jury came into open court at
10 approximately 7:11.)

11 THE COURT: Just sit anywhere you want to. Let me
12 make sure I didn't mislead you. If you find that first
13 question that the defendant Sam English Grading Company
14 was negligent, then you need to go on through the whole
15 thing -- the proximate cause and then consider whether
16 Michael Valenzuela was negligent, whether he is or he
17 isn't. If he is, then you got to put a percentage. If
18 he's not, you don't put any percentage in there, but you
19 still have to -- if you find that the defendant was
20 negligent at all, you're going to have to ascertain the
21 full amount of the damages and then I will do the math
22 because we have two beneficiaries. We have Mikey and his
23 dad and it depends on how y'all handle the dad's
24 percentage of negligence, if any, depends on the math that
25 I have to do.

1 So, just fill out the whole form and if you find that
2 Mr. English -- Sam English Grading, Inc -- was negligent
3 at all, then you have to find the amount of damages. Does
4 that make sense?

5 THE FOREPERSON: Yeah.

6 THE COURT: Is that clear?

7 MR. DETRICK: Yes, sir.

8 MS. PAYNE: Your Honor, may we approach real quick so
9 we don't have to bring the jury back in?

10 (Whereupon, a bench conference was held.)

11 THE COURT: Okay. You understand? Just fill out the
12 whole form. If you answer that first question that the
13 defendant was negligent and the negligence was the
14 proximate cause, then you need to go through the whole
15 thing. Even if you find that Mr. Valenzuela was more than
16 50, still do the whole thing. Okay?

17 You look confused.

18 THE FOREPERSON: I understand that.

19 THE COURT: Follow those instructions.

20 THE FOREPERSON: I think I have one of these. I
21 didn't bring that with me.

22 (Whereupon, the jury exited the courtroom at 7:14.)

23 THE COURT: We'll stand at ease.

24 (Whereupon, a break was taken.)

25 THE COURT: All right. Ladies and gentlemen, the

1 jury has informed us that they've reached a verdict. Now,
2 I don't know what the verdict is. I'll tell you if you
3 cannot control yourself I will ask you to leave now.
4 Please, no outbursts, no showing of emotion. If you do,
5 I'll deal with you accordingly. Please don't make me do
6 that. So, if you cannot control yourself, please step out
7 now.

8 (Whereupon, the jury came into open court at
9 approximately 8:47.)

10 THE COURT: All right. Madam Forelady, have you
11 reached a verdict?

12 THE FOREPERSON: Yes, sir.

13 THE COURT: Will you pass it up to me, please, to the
14 bailiff?

15 THE FOREPERSON: Yes, sir.

16 THE COURT: You want me to do it?

17 THE CLERK: Your Honor, in case number
18 2011-CP-02-00868, Paige Weeks Johnson as personal
19 representative of the estate of Christie Lane Valenzuela
20 versus Sam English Grading, Inc. Was the defendant
21 negligent? Yes. Was the defendant's negligence a
22 proximate cause of Christie Lane's Valenzuela's death?
23 Yes. Was Michael Valenzuela negligent? Yes. Was Michael
24 Valenzuela's negligence a proximate cause of Christie Lane
25 Valenzuela's death? Yes.

1 Using the combined negligence that proximately caused
2 Christie Lane Valenzuela's death as 100 percent, what
3 percentage of that negligence is attributable to Michael
4 Valenzuela and what percentage is attributable to the
5 defendant? Michael Valenzuela, 35 percent; Sam English
6 Grading, Inc., 65 percent. Please state the amount of
7 damages, if any, sustained by the plaintiff. \$2.9 million
8 total actual damages. Was the defendant's conduct grossly
9 negligent, willful, wanton careless, or reckless? Yes.

10 If this be your final verdict, please indicate by
11 rising your right hand. You may put them down.

12 THE COURT: Thank you. Madam Forelady, ladies and
13 gentlemen, I commend you on your thorough, thorough,
14 thorough deliberations. I don't know that I've had a jury
15 in eight and a half years that I have been a judge that
16 has been more attentive and taking your job as serious as
17 you've taken it. I thank you.

18 Because of the verdict I hate to inform you, but I am
19 going need you for about one more half a day. That's the
20 bad news. The good news is this. I'll let y'all go back
21 in the jury room and I'll do it whatever day y'all want to
22 do it next week: Tuesday, Wednesday, Thursday. I'll need
23 about a half a day starting about 10 o'clock until about
24 2 o'clock. If you'll go back and let me know which day
25 suits you and you can just shoot me a little note?

1 THE FOREPERSON: You want us to pick a date?

2 THE COURT: Yes, ma'am. Or I can pick one. I'd
3 rather do it at y'all's convenience.

4 (Whereupon, the jury exited the courtroom at 8:49.)

5 THE COURT: Ms. Barbara, just get the lady to tell us
6 what day -- just send me a note as to what day they decide
7 on. They don't need to come back in here. Ask -- how
8 many of y'all do I have?

9 COURT SECURITY: I have about three deputies on
10 premises.

11 THE COURT: It's dark outside. I got some ladies on
12 this jury. Make sure---

13 COURT SECURITY: We'll walk them to their vehicles.

14 THE COURT: Ms. Barbara, just tell them I have
15 deputies to walk them -- the ladies, to walk them to --
16 well, guys, too -- walk them to their cars. Just let me
17 know what day they want.

18 THE BAILIFF: Okay.

19 THE COURT: What we'll do is find out what day they
20 want and then we'll go through that exercise and then
21 we'll see how that turns out and then, obviously, if y'all
22 have any post-trial motions after that, I'll give you 10
23 days after the decision on that is made.

24 Any objection to that procedure, Mr. Detrick?

25 MR. DETRICK: No, sir.

1 THE COURT: Mr. Cox?

2 MR. COX: None, Your Honor.

3 THE COURT: Let's just sit tight a second.

4 (Whereupon, Court's Exhibit Nos. 4 - 7 were marked
5 for identification only.)

6 (Whereupon, the proceedings were concluded for the
7 day and were reconvened on September 4, 2012 as
8 follows:)

9 THE COURT: All right. Mr. Cox, are you ready to
10 proceed?

11 MR. COX: Yes, Your Honor.

12 THE COURT: Do you need to talk to Mr. Detrick any at
13 all?

14 MR. COX: I don't know. Not yet.

15 MR. DETRICK: Your Honor, before you bring the jury
16 in could I put one thing on the record, please, sir?

17 THE COURT: Yes, sir.

18 MR. DETRICK: Two things. First off, Your Honor, we
19 had an order dated August 7, 2012 from Judge Newman
20 requiring the defendant to provide any financial
21 statements they had in their possession and control and
22 the response was that they have none; therefore, as Your
23 Honor knows that is -- our Supreme Court has said net
24 worth is what we present as far as punitive damages and we
25 have no way of doing that because of the response of the

1 defendant. If you want me to put that order in the
2 record, I'll---

3 THE COURT: It should be -- if Judge Newman signed it
4 it should be filed.

5 MR. DETRICK: It is filed.

6 THE COURT: And I had a pretrial hearing where I also
7 orally ordered it -- if there were any in existence to
8 turn it over to you.

9 MR. DETRICK: Yes, sir. In addition to that, Your
10 Honor, before the court rules on the amount of the verdict
11 we would like to bring the court's attention 15-38-15(f)
12 which says that this section does not apply -- talking
13 about the comparative negligence statute -- does not apply
14 to a defendant whose conduct is determined to be willful,
15 wanton or reckless, and, Your Honor, there has been
16 determination by the jury that this defendant's conduct
17 was willful, wanton or reckless; therefore, it is our
18 position that the verdict should be \$2.9 million actual
19 damages.

20 THE COURT: Well, obviously, those are things I will
21 rule on post-trial motions, but I am aware of that statute
22 and it says what it says. All right. My intent was to
23 bring the jury in and just sort of basically tell them why
24 they're here today.

25 As I understand you're not going to offer any

1 additional testimony Mr. Detrick?

2 MR. DETRICK: That's correct, Your Honor.

3 THE COURT: Mr. Cox, are you going to put up any?

4 MR. COX: Yes, Your Honor. We're going to put up
5 Mr. English.

6 THE COURT: I assume that's going to be as to his
7 ability to pay?

8 MR. COX: Correct, Your Honor.

9 THE COURT: Where are the financial statements you
10 were supposed to have provided?

11 MR. COX: Your Honor, my client provided his tax
12 returns as requested and those are there. That's the
13 financial information they have.

14 THE COURT: That's it? I mean, there is just none
15 other in existence?

16 MR. COX: Right. There is no other that they have.

17 (Whereupon, the jury came into open court at
18 approximately 10:33.)

19 THE COURT: Good morning, Madam Forelady, ladies and
20 gentlemen. I hope you had a wonderful Labor Day weekend
21 and enjoyed your families and yourself. Under our law
22 there are two types of damages that a jury can award. One
23 is what you did on Friday night. You awarded actual
24 damages for the wrongful death of Mrs. Valenzuela and you
25 also found that the defendant acted willful, wanton, and

1 reckless in his conduct.

2 Once that finding has been made then our law -- South
3 Carolina law -- also allows for the jury to consider the
4 issue of what we call punitive damages or damages that are
5 set by law that have been around for so long they're
6 intended to punish a defendant for his willful, wanton,
7 reckless conduct. So, in that regards, in just a few
8 minutes we're going to have very, very short testimony
9 from the defendant and then after that the lawyers will be
10 able to argue. I don't think the arguments will be very
11 long and once that is done I will instruct you on the law
12 on punitive damages which is very short and then you'll be
13 asked to consider that portion of the case and then once
14 you finish that that will complete your duties.

15 So, I would ask that you pay close attention. As I
16 understand, Mr. Detrick, you do not intend to offer any
17 additional witnesses; is that correct?

18 MR. DETRICK: That's correct.

19 THE COURT: You're going to stand on the testimony
20 already presented?

21 MR. DETRICK: That's correct, Your Honor.

22 THE COURT: Mr. Cox, I understand that you intend to
23 call Mr. English on just a narrow issue; is that correct?

24 MR. COX: That's correct, Your Honor.

25 THE COURT: All right. Well, you may do so at this

1 time.

2 Mr. English, please come around. Please remember
3 you're still under oath.

4 CHRISTOPHER W. ENGLISH, after being duly sworn,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. COX:

8 Q If it please the court, ladies and gentlemen of the
9 jury. Mr. English, tell the jury if you would about the
10 make up of Sam English Grading.

11 A Well, I mean, it is a business my father started back
12 in 1978. I mean, it's a grading business. I mean, we're
13 a family-owned and operated business. We don't have but
14 about five employees and, I mean, we're just a small
15 family-owned earth-moving business.

16 Q Okay. And a lot of -- there's been a lot of mention
17 about the corporation -- the corporation in this case.
18 You went to the Secretary -- your father went to the
19 Secretary of State's office and incorporated the company?

20 A Yes, sir, he did in -- I don't want to say the year
21 that he done that because I honestly cannot remember.

22 Q Okay. And now the -- tell me with regards to your
23 business with regards to -- obviously, we're here today.
24 My questions are geared at letting the jury know your
25 financial status of the business.

1 A Well, we---

2 Q And---

3 A Oh, I'm sorry.

4 Q And with regards to you've been -- the jury has
5 spoken and awarded 2.9 million damages in this case. If
6 -- if Sam English Grading is hit with a punitive award,
7 would that bankrupt the business?

8 MR. DETRICK: Your Honor, I object.

9 THE COURT: Sustained. You can ask him what the net
10 worth of the business is. Anything about his ability to
11 pay, you know, obviously, that question is not proper.

12 Q What is the net worth of the business?

13 THE COURT: Do you know what net worth means?

14 THE WITNESS: Yes, sir, I do. I'm thinking and I
15 would say half a million at best in this day's economy.

16 Q And is that what the value of -- you believe the
17 value of your equipment, fair market value of your all of
18 equipment combined would be?

19 A Yes, sir. In this day's economy, yes, sir.

20 Q Can you operate without that equipment?

21 A No, sir, you cannot.

22 Q Is there any additional equipment other than what you
23 just -- to add up to any more money?

24 A Not that I know of.

25 Q Okay. And the business -- you don't have a separate

1 office? You operate out of your house and your mama's
2 house?

3 A That is correct.

4 Q You don't have a separate shop?

5 A I got a building at my house. That's where we work
6 out of as a shop.

7 Q Okay. And y'all do your own work on the equipment?

8 A Yes, sir.

9 Q And that equipment is old and used?

10 A A lot of it is, yes, sir.

11 Q Okay. Now, were you profiting from not having a
12 flagman or signs out on August 7, 2009?

13 A No, sir.

14 Q Were you -- did you -- did Sam English Grading
15 through their operation of the landfill -- the Owens
16 Corning landfill -- since 1984, I believe, did you have
17 the interest of the -- the interest of the safety of the
18 public in mind when you were operating that landfill?

19 A Yes, sir.

20 Q And were you taking steps to make sure traffic was
21 clear before you came across -- before you would waive
22 across or allow your equipment to cross Redds Branch
23 Road?

24 A Yes, sir.

25 Q And was that in the interest of the public

1 safety?

2 A Yes, sir, it was.

3 Q Did you intend for this accident to happen?

4 A Not in a million years.

5 Q Did you want this accident to happen?

6 A No, sir.

7 Q Did you have steps in place to try to avoid accidents
8 like this from happening?

9 A Yes, sir.

10 Q Are you sorry that this happened?

11 A Yes, sir, more than anything.

12 MR. COX: Your Honor, I don't have any further
13 questions.

14 THE COURT: Mr. Detrick, anything on cross?

15 MR. DETRICK: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. DETRICK:

18 Q Mr. English, you obviously don't have to borrow money
19 from the bank, do you?

20 A Yes, sir, I do. If I have to buy a machine or
21 something of that nature, yes, sir, I would.

22 Q Mr. English, you have been ordered by this court to
23 preside your financial -- to provide all the financial
24 statements that you have; correct?

25 A Yes, sir.

1 Q And if you have borrowed money, then you have to file
2 -- as I understand when I borrow money from the bank I
3 have to file a financial statement.

4 A Yes, sir.

5 Q You did file financial statements with the bank;
6 didn't you?

7 A If I borrowed money, I have, yes, sir.

8 Q And---

9 THE COURT: Hold on. When is the last time you
10 borrowed money?

11 THE WITNESS: I haven't borrowed money from the bank
12 in I know seven or seven and a half years.

13 Q You hadn't brought any financial statements into this
14 court that you've been ordered to do so that the jury can
15 know what your financial situation is, have you?

16 A I have not brought anything in personally, no, sir.
17 Our accountant was supposed to doggone get all of that
18 stuff together and send.

19 Q At the end?

20 A And send.

21 Q Well, Mr. English, this order of the court -- You've
22 got an accountant?

23 A Yes, sir, we have a doggone certified CPA.

24 Q And you didn't go to that accountant when you were
25 ordered Judge Newman -- you didn't go to that accountant

1 and say I've been ordered to bring the financial
2 statements into this court that you have Mr. Accountant?

3 A Ask that again. I'm sorry.

4 Q You didn't go -- you got an accountant. My
5 understanding is accountants prepare financial statements.

6 A That's correct.

7 Q That's what he does for you, isn't it?

8 A Yes, sir.

9 Q And yet you are -- you were ordered by the court on
10 August 7 and you didn't go to that accountant and say, my
11 accountant for Sam English Grading Company, I've been
12 ordered to produce the financial records you have, the
13 financial statements you have. Would you give them to me?

14 A I was under the impression that they did.

15 Q Mr. English, we have not been presented any. You
16 heard this -- you heard as a matter of fact just before
17 the jury came in that there's been no -- your lawyer filed
18 and said you had none.

19 A The only ones we have is what they've got.

20 Q That your accountants got?

21 A That's correct.

22 Q That we don't have in this court even though you've
23 been ordered to produce those financial records?

24 A Okay, sir.

25 Q I don't have any further questions.

1 THE COURT: Anything on redirect?

2 REDIRECT EXAMINATION

3 BY MR. COX:

4 Q Mr. English, did you produce everything that I asked
5 you to produce with regards to your financials?

6 A To the best of my knowledge.

7 Q You were asked to produce copies?

8 THE COURT: Let me see the order, please. Which
9 number is it?

10 MR. DETRICK: Number four, Your Honor.

11 THE COURT: Do you know what a financial statement
12 is, Mr. English? It is simply where you list your assets,
13 all of your equipment, the amount of it, the value of it.
14 I am being pretty simple when I say this -- real estate
15 owned, money in the banks, any other assets that you own
16 less any liabilities and monies that you owe giving you a
17 net figure. You know what a financial statement is, don't
18 you?

19 THE WITNESS: Yes, sir.

20 THE COURT: And you were ordered to do so and you
21 asked your accountant to prepare that?

22 THE WITNESS: I'm pretty sure, Your Honor, that they
23 were asked to do that and they did I thought.

24 THE COURT: All right. Did they turn them over to
25 you?

1 THE WITNESS: No, sir. I think they -- if I remember
2 right they sent them to the attorney if I am not mistaken,
3 Your Honor.

4 THE COURT: Who is your accountant?

5 THE WITNESS: Cherry, Bekaert and Holland.

6 THE COURT: Is he right here in town?

7 THE WITNESS: Yes, sir.

8 THE COURT: Would you like to step down and go call
9 them and see where they are?

10 THE WITNESS: If you'll allow me, yes, sir, I will.

11 THE COURT: Absolutely. I will.

12 Mr. Whittle, where is the nearest phone?

13 THE WITNESS: I got a cellphone.

14 THE COURT: Why don't you step out there in the hall?
15 Just sit tight for a second.

16 (Whereupon, the witness exits the courtroom.)

17 (Whereupon, a bench conference was held and a break
18 was taken.)

19 THE COURT: We're trying to do two thing at once this
20 morning. Normally court administration sets one week for
21 our terms of court. This week I've got what we call
22 common pleas non-jury which is all the motions in the
23 second circuit and I had about 30-some-odd set for 9:30
24 this morning; so I came in at 9:30 and I heard some of
25 them and then we got lawyers coming back. As soon as I

1 send y'all back to deliberate I'll start hearing those
2 motions and then go to Barnwell and Bamberg to finish them
3 up. I am trying to do two things at once this morning.
4 That's why I got about 30 minutes behind.

5 (Whereupon, the witness returns to the witness
6 stand.)

7 (Whereupon, a bench conference was held.)

8 THE COURT: All right. Mr. English, I understand you
9 talked to your accountant; is that correct?

10 THE WITNESS: Yes, sir.

11 THE COURT: Had he prepared the financial statements?

12 THE WITNESS: Yes, sir. They're supposed to be
13 getting them ready now, yes, sir. I don't know if I
14 misunderstood your question or not, Your Honor. Whether
15 he had already sent them or not sent them, I'm not
16 100 percent sure on that.

17 THE COURT: That's fine. I am not suggesting that.
18 He said he could e-mail them right this second?

19 MRS. PAYNE: Yes, sir, Your Honor.

20 THE COURT: All right. As soon as you get them let
21 Mr. Detrick look at them. We'll print them and we'll put
22 them in evidence.

23 Yes, sir?

24 MR. COX: Am I back on?

25 THE COURT: No, sir. Mr. Detrick -- Did you finish,

1 Mr. Detrick?

2 MR. COX: He finished.

3 THE COURT: You're back on. Go ahead.

4 Q Mr. English, did you produce everything that I asked
5 you to produce with regards to financial information?

6 A To the best of my knowledge, yes, sir.

7 Q Right. And you produced every tax return that the
8 plaintiff's attorneys asked you for through discovery; is
9 that right?

10 A To the best of my knowledge, yes, sir.

11 Q Okay. And the order referenced by Mr. Detrick is
12 dated August 7, 2012 with regards to with the request that
13 you provide the latest financial statement of the
14 defendant. Did I call you -- did I talk to you after
15 August 7, 2012 and ask for that -- for you to produce
16 that?

17 A I can't remember.

18 Q That's because I didn't.

19 THE COURT: Cause you what?

20 MR. COX: Because I did not.

21 THE COURT: Sir?

22 MR. COX: Because I did not ask him. I did not show
23 him this order, Your Honor. That's what I wanted the jury
24 to know.

25 Did I show you this order?

1 THE WITNESS: Not that I recall.

2 MR. DETRICK: I'm lost.

3 THE COURT: Hold on one second.

4 MR. DETRICK: I'm sorry.

5 THE COURT: Y'all step back in the jury room for a
6 second.

7 (Whereupon, the jury exited the courtroom at 10:58.)

8 THE COURT: Let me make sure I understand what's
9 going on. Judge Newman on August 7, 2012 issued a consent
10 order or signed a consent order wherein the defendant
11 consented to produce all documents in its possession or
12 control regarding plaintiff's second requests numbers
13 three, four, five -- three, four, and five -- and the
14 consent order was signed by Mr. Cox. Three, four, and
15 five were the contracts -- four, provide the latest
16 financial statement of the defendant; five, provide the
17 federal income tax returns for 2009 through 11 of the
18 defendant.

19 Mr. Cox, please tell me, you consented to this order
20 yet you did not ask your client for the latest financial
21 statement?

22 MR. COX: Judge, I had---

23 THE COURT: Simple question, yes or no.

24 MR. COX: No. I had asked my client for the
25 financial statements and I had gone over and over these

1 issues with him and when I consented to that consent order
2 with Mr. Detrick I told him -- and there's an e-mail where
3 I said, Mr. Detrick, we have produced -- my client has
4 produced all financial documents. We do not have
5 financial statements. That was the information I had
6 through diligent discussion with -- well, in going to
7 produce the information and he said, well, let's just get
8 an order where you recognize that it is discoverable and I
9 recognize that it was discoverable, but as stated in there
10 we didn't have them.

11 THE COURT: Well, something is amiss here because
12 your client says he asked his accountant to provide them.
13 He didn't know whether the accountant sent them to you or
14 not. He goes back there and calls the accountant.
15 Apparently, the accountant has them because he is going to
16 e-mail them to us right now, but you didn't tell
17 Mr. English that he was under an order after August 12
18 that he had to produce these financial statements -- that
19 the judge signed an order requiring him to do so?

20 MR. COX: Judge, I had discussions with my client
21 regarding that motion to compel and the fact that we were
22 being compelled to produce all of the financials and it
23 was my understanding that we had produced everything and
24 that the tax returns contained the balance sheets in it,
25 Your Honor.

1 THE COURT: Well, I know of no tax return that
2 contains a balance sheet. My tax returns never contain
3 balance sheets. My question is simple. You're dancing
4 around it. After Judge Newman signed the order did you
5 ask your client -- tell him that the judge has now ordered
6 that you produce these financial statements? Yes or no?

7 MR. COX: Your Honor, I had -- Yes, I had discussions
8 with my client about producing all of the financials.

9 THE COURT: Well, then why did you just sit here and
10 tell the jury you didn't ask him to do it?

11 MR. COX: I asked him if I showed him the order,
12 Judge. What I'm trying to do---

13 THE COURT: Let's just -- let's get down to the
14 nitty-gritty. You had an order from Judge Newman to
15 produce the financial statements. After the judge signed
16 the order did you call your client and say, Listen, the
17 judge has ordered us now to produce the financial
18 statements; if you have any, I need them. Did you tell
19 them that?

20 MR. COX: Judge, I don't know the timing of the call.
21 I really don't.

22 THE COURT: Why did you tell the jury a while ago
23 that you didn't ask him? I am not fussing, Mr. Cox, but
24 this case has been contentious from day one since I've
25 been involved in it and --

1 MR. COX: Judge, I'm trying---

2 THE COURT: -- we bifurcated the punitives at your
3 request and everybody's request and we weren't going to
4 put any financials in the record so it wouldn't be
5 prejudicial to your client in the actual damage phase and
6 we had an order that you had to get the financial
7 statements, had an order that you had to get the tax
8 returns. You gave the tax returns. You asked your client
9 on cross examination why didn't you turn them over. I
10 didn't ask you for them, did I? That was your question,
11 basically, and then we call the accountant. He is
12 e-mailing them now. Has he e-mailed them now yet?

13 MS. PAYNE: He has not, Your Honor.

14 MR. COX: Judge---

15 THE COURT: I am very frustrated. I have never run
16 into this. I'll listen to your explanation.

17 MR. COX: Judge, I've done what I understand to be my
18 due diligence with my client to obtain all of the
19 financial information that was requested through
20 discovery. We went to the accountant to get all of the
21 financial information and these conversations because
22 there's a couple -- as you know there's two cases and we
23 had -- you know, I've had several rounds of trying to
24 answer discovery --

25 THE COURT: Address it to me, please.

1 MR. COX: -- for the plaintiffs and --

2 THE COURT: Well, the consent order was signed in
3 this case.

4 MR. COX: -- what I was trying to do was take -- I
5 believe Mr. English has done everything with regards to
6 trying to get the financial information. He's not an
7 accountant. I'm not an accountant. We went to their
8 accountant and said here is what we need. We got all of
9 the tax returns.

10 THE COURT: Who went to the accountant?

11 MR. COX: I was informed by my client that we do not
12 have financial statements and so that has been -- and I've
13 told Paul that has been our -- that that is our response
14 to the discovery, Judge.

15 THE COURT: Well, then why would he ask -- when I
16 asked him about the financial statements he said I asked
17 my accountant to do so and I thought they had been sent in
18 and he goes back there and calls him. Sure enough they've
19 been prepared and they just hadn't been sent.

20 MR. COX: And, Judge, I don't know how to speak for
21 the accountant, but I have done everything I understood to
22 do under the rules of civil procedure to produce the
23 documents as requested.

24 THE COURT: But here we are. We have an order to
25 produce them. We are here Monday -- Tuesday morning after

1 a verdict on Friday night of \$2.9 million, knowing we're
2 grinning to deal with punitives this morning, knowing you
3 had an order and they're in existence and we don't have
4 them. That's what's gotten me frustrated.

5 MR. COX: Judge, that's the first I heard that
6 they're in existence. I don't know if he's generated them
7 based on the information. I don't know how accountants
8 work, but that is the first I have heard that they are in
9 existence.

10 THE WITNESS: Your Honor, may I?

11 THE COURT: You may.

12 THE WITNESS: Whenever I said they are in existence
13 all I was meaning is we do everything through our
14 accountant.

15 THE COURT: I understand that.

16 THE WITNESS: So I am assuming -- I'm assuming that
17 they have been prepared or as far as accounting goes, Your
18 Honor, I don't know a thing about it. That's the reason I
19 hire people to do it.

20 THE COURT: When did you ask him to do your financial
21 statement in regards to this litigation or did you?

22 THE WITNESS: Well, I mean, I did not personally, but
23 my secretary is the one that does.

24 THE COURT: Okay. I worked through my secretary for
25 many years. Do you recall when your secretary asked him

1 to do it?

2 THE WITNESS: Actual date, no, sir, I do not.

3 THE COURT: Approximately.

4 THE WITNESS: Well, I mean, whenever -- whenever it
5 was asked of us, she done it within a few days.

6 THE COURT: Okay. All right. Well, let's see if
7 they'll e-mail them on in here for us.

8 MRS. PAYNE: Would you like for me to call and follow
9 up?

10 THE COURT: Yes. Tell him I'm patiently waiting --
11 or impatiently. I am not fussing at you.

12 (Whereupon, a break was taken.)

13 THE COURT: Mr. Cox, you never have seen these?
14 Mr. Cox? We're on the record. Have you ever seen these?

15 MR. COX: Your Honor, I have not seen these before
16 today, no, sir.

17 THE COURT: Even though some of them are dated back
18 in 2009?

19 MR. COX: That's correct, Judge. I have not seen
20 them before today. They're consistent with the tax
21 returns that we produced.

22 THE COURT: I appreciate that.

23 (Whereupon, a break was taken.)

24 THE COURT: We'll go back on the record. Pursuant to
25 the telephone call made by Mr. English to his accountant

1 e-mailed to us approximately 30 minutes later are three
2 financial statements: One for the statement of assets and
3 liabilities, et al, as of December 31, 2009; a second one
4 as of assets and liabilities and equity as of December 31,
5 2010; and the last one for assets as of July 31, 2012. So
6 I assume they were in existence at the time they said.

7 Mr. Cox, you have never seen these?

8 MR. COX: Your Honor, I have not seen these before
9 today.

10 THE COURT: All right. Thank you.

11 Mr. Detrick, are you ready?

12 MR. DETRICK: Yes, sir, we're ready. Your Honor,
13 it's really not fair to us when you've got an order of the
14 court and it wasn't presented to us until now. We hadn't
15 had any opportunity to review it, but---

16 THE COURT: Nor any opportunity to take discovery or
17 turn it over to your accountant or whoever so he can look
18 at it.

19 MR. DETRICK: That's correct.

20 THE COURT: Or have someone here to testify about
21 what accumulated depreciation is. That's not fair.
22 That's why we have court orders.

23 MR. DETRICK: That's exactly my point, Your Honor.

24 THE COURT: What is your remedy? You want a
25 continuance?

1 MR. DETRICK: Sir?

2 THE COURT: You want to continue this case today?

3 MR. DETRICK: I do not, Your Honor. I just want to
4 put it on -- put that on the record that there was a court
5 order. It was not like the tax returns. The tax returns
6 did not have balance sheets in them. Mine don't. None
7 do. These were only given to us today, but I don't know
8 any remedy. We're ready to go forward.

9 THE COURT: Thank you. Do you want to cross-examine
10 him on the financial statements?

11 MR. DETRICK: Yes, sir, somewhat. I don't know.

12 THE COURT: Well, normally I don't allow recross, but
13 now that this has come up I will allow it in this unusual
14 situation.

15 MR. DETRICK: Thank you, Your Honor. We'd appreciate
16 that.

17 THE COURT: All right. Bring the jury in, please.
18 That doesn't mean you have to.

19 (Whereupon, the jury came into open court at
20 approximately 11:24.)

21 THE COURT: All right. Madam Court Reporter, make
22 sure that we have in the record Judge Newman's order of
23 August 7, 2012 signed in Columbia wherein the defendant
24 was ordered to provide the latest financial statements to
25 the plaintiff and also in the record please subsequent to

1 the telephone call made by the defendant to his CPA we
2 were e-mailed in the last few minutes three financial
3 declarations: One as of December 31, 2009, one as of
4 December 31, 2010, and one as of July 31, 2012. I'll make
5 those a part of the record.

6 Mr. Cox, I think you were asking your witness
7 questions. Do you have any additional questions you want
8 to ask him?

9 MR. COX: Your Honor, just a couple.

10 THE COURT: Go ahead.

11 Q Mr. English, I am going to show you these tax returns
12 which I understand to be Sam English Grading's tax returns
13 from 2009, 2010, and 2011. If you'll just please verify
14 that.

15 A I mean, yes, sir, it appears to be, yes, sir.

16 Q And did we produce those through discovery in this
17 case?

18 A Yes, sir.

19 THE COURT: And by court order; correct?

20 MR. COX: They were produced, yes, sir. Yes, Your
21 Honor. I would introduce these as Defendant's Exhibit 22.
22 (Whereupon, Defendant's Exhibit No. 22 was marked for
23 identification and received into evidence.)

24 Q And, Mr. English, I am going to hand you the
25 financial declarations and if you would please just

1 authenticate those as well.

2 A I mean, it appears to be, yes, sir.

3 Q And were these obtained---

4 MR. DETRICK: What is that, Mr. Cox?

5 Q These are the financial declarations as of July 31,
6 2012; is that correct?

7 A Yes, sir.

8 Q Financial declarations as of December 31, 2009?

9 A Yes, sir.

10 Q And financial declaration as of December 31, 2010?

11 A Yes, sir.

12 MR. COX: I would introduce these as a set.

13 THE COURT: Well, I've already put those in but you
14 can introduce them as well.

15 MR. COX: Okay.

16 (Whereupon, Defendant's Exhibit No. 23 was marked for
17 identification and received into evidence.)

18 (Whereupon, Court's Exhibit No. 8 was marked for
19 identification only.)

20 Q Were these obtained at your accountant's office?

21 A Yes, sir.

22 Q Did you keep these at your house?

23 A No, sir.

24 MR. COX: Your Honor, those are all the questions I
25 have.

1 THE COURT: All right. Mr. Detrick, you're allowed
2 to ask questions on the financial statements.

3 MR. DETRICK: Thank you, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. DETRICK:

6 Q Mr. English, you've heard this testimony and order
7 from the court. You were supposed to produce these to me
8 a long time ago; correct?

9 A That's what the order said, yes, sir, and I didn't
10 know that they weren't.

11 Q Well, your lawyer was ordered to, too; correct?

12 A Yes, sir.

13 Q Now you recognize that because of the late nature of
14 these financial statements I have no opportunity to talk
15 with your accountant; correct?

16 A Yes, sir.

17 Q And I could have asked him questions about the
18 \$1,317,000 in equipment you have?

19 A Yes, sir.

20 Q Okay. I could have asked him questions about how we
21 get to this, you know, some of this accumulated
22 depreciation of \$1,000,767?

23 A Yes, sir.

24 Q All right. I could have asked him how this -- how
25 this was prepared -- how this financial statement was

1 prepared; correct?

2 A Yes, sir.

3 Q Wasn't able to do that, was I?

4 A No, sir.

5 Q Was that intentional?

6 A No, sir, it was not intentional.

7 Q Do you know that that wasn't intentional?

8 A By me?

9 Q Yes, sir.

10 A Yes, sir. I'm 100 percent positive it was not
11 intentional.

12 MR. DETRICK: I don't have any further questions.

13 THE COURT: Thank you. You may step down.

14 All right. Madam forelady, ladies and gentlemen,
15 we'll now hear the arguments dealing strictly with the
16 issues of punitive damages. You've already awarded, as I
17 said, actual damages and you've already found by clear and
18 convincing evidence that the defendant was reckless,
19 willful, or wanton which now opens up this part of the
20 case to determine whether or not if and how much punitive
21 damages are appropriate in this case.

22 Mr. Detrick?

23 MR. DETRICK: If it please the court.

24 THE COURT: There is no motions; is that correct?

25 MR. DETRICK: None from the plaintiff.

1 MR. COX: None, Your Honor.

2 THE COURT: Thank you.

3 CLOSING STATEMENT

4 MR. DETRICK: Ladies and gentlemen of the jury, thank
5 you for coming back this morning. You know, y'all have
6 got one more important duty to render in this case. Your
7 Honor told you somewhat about what punitive damages are.
8 Punitive damages have been a very important role in our
9 judicial system in South Carolina since 1784, longer than
10 that case Your Honor told you about. Punitive damages
11 during that period of time took 225 years and made our
12 state a safer and a better place for us to live in. It's
13 made it safer for the public as a result of conduct like
14 y'all have seen.

15 It is -- His Honor is going to tell you the
16 considerations that y'all have take into consideration
17 when you determine whether punitive damages are
18 applicable. One of them is to deter. Y'all have the
19 power to stop by punitive damages reprehensible conduct
20 similar to what y'all have heard in this courtroom. Y'all
21 have the power to send a message out there to Mr. Chris
22 English's world and to Chris English himself that we that
23 we do not allow conduct such as this to be permitted in
24 our state -- this entirely. That's the power y'all have.
25 It is a very important power. Very important.

1 Now, y'all have heard I'm not going to go a long time
2 today. Y'all have heard in this courtroom -- heard the
3 testimony of the creation of a very dangerous, extremely
4 dangerous condition out on Redds Branch Road for many
5 years by Sam English Grading. Y'all have heard the
6 testimony of the endangerment of the lives of
7 Mrs. Johnson, Mrs. Gunter. You have heard and also -- I'm
8 sorry. Y'all have heard the testimony of Mrs. Gunter who
9 actually feared for her life.

10 Y'all have heard the testimony that even though they
11 knew that the safety requirements were necessary they
12 intentionally -- intentionally did not have -- did not do
13 what they agreed to do in which they knew and engineers
14 told them were necessary for the public safety, but they
15 intentionally didn't do it except whenever Mr. Merritt
16 might come down every four to five years, except whenever
17 it may affect somewhat -- somehow or another may affect
18 their pocket book. That would be the only time they
19 considered at any respect the public's danger which they
20 were creating.

21 You have heard the testimony where they said -- they
22 have a right to run the stop signs -- a right which no one
23 in the State of South Carolina to my knowledge has that
24 right. Safety of the public all these years to Sam
25 English Grading Company has meant nothing. Y'all have

1 heard that testimony. So, what was the inevitable result
2 of their flagrant violations of all the safety rules, all
3 the safety requirements?

4 What was the inevitable results of that was the death
5 of Christie Valenzuela. It was just gonna happen. Even
6 now you have heard even now that they have the same
7 attitude. It hadn't changed. You've heard the arrogance
8 of Mr. English, the uncaring of Mr. English, the cruelty
9 as Mikey said that he just couldn't believe there was such
10 cruelty in the world -- cruelty of Mr. English not wanting
11 to care about the public.

12 He still -- You've heard he still believes that he's
13 got no duty to the public. He has no duty to change. He
14 has no duty to change the reckless conduct. He's still
15 saying that. Y'all have heard his testimony when I asked
16 him, Mr. English, have you caused -- by your conduct a bus
17 load of children to turn over and wreck? He said that
18 didn't change his attitude. Not a bit. Can y'all
19 imagine? He didn't care.

20 So how do we change attitudes? How do we make the
21 public safer? How do we make where Mrs. Johnson and the
22 others of Redds Branch Road driving on that road will be
23 safe and will not have to worry, not have to live in
24 fear? How do we do that under our system? We have a
25 method and that is punitive damages. Y'all are the only

1 way -- the only way to stop this kind of reprehensible
2 conduct is for y'all to send a message -- a clear and
3 convincing message that, Mr. English, you have to stop
4 this conduct.

5 You need to send a message -- Mr. English, the public
6 safety does matter. You've got to be concerned about the
7 public safety when you're operating 70,000-pound pieces of
8 equipment across a road that the public has got a right to
9 be on. You've got to send a message that you do need
10 advanced warning signs; that you do need flagmen out
11 there; that we do need some safety out there.

12 That message has to be sent. You have to send a
13 message that says, Mr. English, you don't have a right to
14 run the stop signs. You're just like everybody -- every
15 other citizen of this state. You have to send a message,
16 ladies and gentlemen of the jury, that, Mr. English, you
17 have to stop. Stop endangering the public at Redds Branch
18 Road or anywhere else that you are at a crossing and these
19 big pieces of equipment. You have to send that message.

20 We have to change his attitude. Y'all have the
21 opportunity to send that message by your verdict of
22 punitive damages. It's got to be a clear message. Y'all
23 have heard him even today -- even today he was ordered by
24 the court to produce stuff. Ordered. He had arrogance
25 towards even the court system. Even though he had been

1 ordered to do so, he still doesn't do it.

2 You have got the opportunity to change that
3 arrogance. You've got the opportunity to change Redds
4 Branch Road by clear verdict of punitive damages. If you
5 don't do it, it won't stop. It's simple as that. I
6 promise you if you send that message, whatever it may be
7 that's the message, he'll hear it. He'll hear it loud and
8 clear and our roads will be safer. The public won't be in
9 danger, but it needs to be seen.

10 That's totally in y'all's discretion the amount, if
11 any, that y'all send that y'all's verdict renders in
12 punitive damages. Totally in your discretion. I am not
13 going to go there. I am not in your shoes. I do know
14 that our legislature has recently filed a piece of
15 legislation that wasn't in existence at the time of this
16 action but I believe it should be considered as far as
17 limiting the amount of punitive damages.

18 Our legislature said that you can't give any more now
19 than three times the actual damages. I think y'all should
20 consider that limitation. I really do. I think that's a
21 wise rule on the part of our legislature and I think using
22 actual damages as a guideline on punitive damages, I think
23 that's wise and I do -- in this case actual damages that
24 y'all found of 2.9 million, if you want to consider
25 one-half of that, that's up to y'all. Half is

1 1.5 million. Whatever -- up to the limits of the
2 legislature. I don't believe that you can give over that
3 and I know you wouldn't.

4 I do know this. I do know that the message needs to
5 be sent. I do know that all the cases in which punitive
6 damages -- Although, I hadn't been around for 225 years,
7 but I have been practicing law for 38 years and I don't
8 know of any facts, any arrogant behavior, any endangerment
9 of the public has more than called for punitive damages
10 more than this case, I just don't know it. I do know we
11 have to stop this kind of conduct and this will stop it.
12 Without it, it will not stop.

13 I just ask y'all to consider that. Consider the
14 public. Consider his conduct. Consider what's the death
15 in this case and go back there and determine whether
16 punitive damages are applicable, whether they're proper,
17 whether they're just in this case.

18 Ladies and gentlemen of the jury, on behalf of
19 everyone, everyone who is here, everyone who is out there
20 in the public, I thank y'all. I really do from the bottom
21 of my heart on behalf of Mikey and Michael and Christie's
22 mama and Mrs. Johnson, Mrs. Boozer, Mrs. Gunter -- all of
23 them, we thank you for sitting here and doing your duty
24 and making this very important decision regarding punitive
25 damages. Thank you.

1 CLOSING STATEMENT

2 MR. COX: Ladies and gentlemen of the jury, you have
3 -- I wanted to thank you for your interest and your
4 conscientious looking at the evidence in this case,
5 hearing all of the testimony. You have rendered your
6 decision in this case and we respectfully your decision
7 finding Sam English Grading 65 percent negligent and
8 Mr. Valenzuela 35 percent negligent and you have rendered
9 your award against Sam English Grading of \$2.9 million.
10 In so doing that you gave very deep consideration to all
11 of the evidence and you were very conscientious. You
12 deliberated. You took your time. You asked questions of
13 the court and you rendered your decision as to damages in
14 this case.

15 There is another analysis and that's what we're here
16 on. When you checked the box on the verdict form at the
17 end of the verdict form where you found the Sam English
18 Grading's conduct grossly negligent, reckless, willful,
19 that allowed us to come back today and to consider whether
20 or not this is a case for punitive damages. There is
21 under the law -- and the Judge will charge you on the law.
22 There is an additional analysis that's to take place in
23 order to find that punitive damages are proper in this
24 case or that they're warranted and that is that you have
25 to find that Sam English Grading acted with conscious

1 disregard -- and you'll hear this from the Judge --
2 conscious disregard for the safety -- and I would ask that
3 -- I would submit that the evidence demonstrates that Sam
4 English Grading was not acting in conscious disregard for
5 the safety.

6 They might -- You've spoken. They were negligent and
7 they breached a duty on August 7, 2009, but the evidence
8 is also clear that Sam English Grading had regard for the
9 safety of the motoring public. Their folks would stop and
10 look both ways before they came out and if they had a
11 spotter present, they would check traffic and then wave
12 them through if the traffic was clear. The reason they're
13 checking for traffic is because of their regard for the
14 safety of the motoring public, because they want to make
15 sure nobody is coming and that a safe crossing of the
16 intersection can take place.

17 That is -- that's conscious regard for the safety,
18 and, again, I respect. We respect that you've rendered
19 your decision to say this was not the way to do it. This
20 was not the best way to do it, but it doesn't demonstrate
21 conscious disregard for the motoring public and I -- if
22 you find that it doesn't constitute conscious disregard,
23 then under the law you can't return a punitive award and I
24 would ask that you consider -- You heard from Trooper
25 McLaurin who is now a judge and he indicated in his

1 investigation of this accident that he spoke to Mr. Tindel
2 who was -- who he used the phrase spotting, watching the
3 traffic, and he felt -- he thought that was how you do it.
4 He didn't see anything wrong by that -- certainly not
5 conscious disregard for the safety or I'm sure there would
6 have been far more punishments levied had that been the
7 case.

8 The MAIT Team came out to see if the scraper came out
9 into the road at the time of the accident to see if they
10 failed to yield the right-of-way. They didn't look at
11 flagman requirements or sign requirements or to see if Sam
12 English Grading's operation of that crossing was in
13 conscious disregard for the safety.

14 I would ask -- The award as rendered speaks volumes.
15 The message is clear. \$2.9 million is a lot of money and
16 it's going, obviously, to a very good cause, but that's an
17 award against Sam English Grading and the message is very,
18 very clear. I don't think anyone -- my folks, Sam English
19 Grading, Mr. English's wife and sister who -- the sister
20 Pam English -- Would y'all stand up? Pam English and
21 Marsha English -- his wife on the left, his sister on the
22 right. His sister runs -- Y'all can be seated -- runs the
23 office there at Mr. English's house.

24 They're a grading company, a family grading company,
25 and they operate out of their homes and they're trying to

1 make a living like everybody else. The message is loud
2 and clear. I don't think anyone up here questions and my
3 clients may not be the most -- you may find that they're
4 not the most artful with their words maybe kind of like
5 their lawyer, but I don't think anyone in the heart of
6 hearts thinks that this was intentional conduct; that this
7 was -- that this accident happened intentionally and if
8 they could have done something further, then certainly
9 they would've and they recognize your verdict and have --
10 no one from Owens Corning came out.

11 No one came out and say, Hey, folks, you're not doing
12 your spotter, watching for traffic, making sure it is
13 clear before they move across making sure they look to get
14 across. That is regard for the public. It's not perfect.
15 You have spoken. You recognize that. This is an
16 accident that happened and everyone is sorry that it
17 happened.

18 I would ask that you certainly not hold any of the
19 discovery issues against my client, but we have produced
20 everything with regards to their financials for you to see
21 that they're not -- the purpose of that is for you to see
22 that they're not a Fortune 500 corporation. They're local
23 Aiken County, City of Aiken grading company with five
24 employees and they've been at the Owens Corning landfill
25 running that thing for decades and the mistake was made

1 along in 2009 and things could have been done different,
2 but what happened, ladies and gentlemen, does not -- I
3 trust that you'll find it does not rise to the level of
4 conscious disregard for the safety and that you determine
5 that the award as rendered against Sam English Grading of
6 \$2.9 million sends any message in this case.

7 I thank you so much for your time and your serious
8 consideration of the charges from the Judge and applying
9 the facts to the law and I ask that you continue to do
10 that on this part of the case. My client's company,
11 lives, his employees are in your hands at this time, and
12 you've taken care of the Valenzuelas and we appreciate
13 that and as I said we fully respect your decision on that.
14 Thank you.

15 JURY CHARGE

16 THE COURT: Madam forelady, ladies and gentlemen, my
17 charge is five minutes, ten minutes at the most. Y'all
18 need a break? Bathroom? Everybody okay?

19 In most cases that we try in civil court a jury is
20 asked to decide everything at the same time. In other
21 words, if you find actual damages then you can consider
22 punitive damages if you have found that the defendant's
23 acts were reckless, willful, wanton. In this case as in a
24 number of cases and probably in bigger cases at the
25 request of the parties as they requested in this case we

1 bifurcate which means you decide one thing to start off
2 with and then if you make certain decisions you go to the
3 second thing and in this case that was the reason we asked
4 that if you found by clear and convincing evidence that
5 the defendant's acts were reckless, willful, and wanton,
6 that's why we had you check yes or no on that because once
7 you made that decision then the issue of punitive damages
8 became relevant.

9 So, you have already in this case found that the
10 evidence established that the defendant's acts were
11 reckless, willful and wanton which meant that there was a
12 conscious failure to exercise due care or there was a
13 conscious indifference to the rights and safety of others
14 or reckless disregard thereof. So you've made that
15 finding by finding that he was willful, wanton and
16 reckless.

17 When you make that finding as you have done in this
18 case, then you may award the plaintiff punitive damages in
19 addition to the actual damages and that has been a part of
20 our law for a long, long time. Obviously, to support an
21 award of punitive damages the plaintiff has to prove by
22 clear and convincing evidence that the conduct complained
23 of included a consciousness of wrongdoing at the time of
24 the conduct, but y'all have already made that finding; so
25 we go now to determine whether you will award punitive

1 damages in this case.

2 If you award punitive damages they are designed by
3 our law -- they are intended to punish the defendant for
4 extraordinary and outrageous misconduct and are designed
5 to prevent the defendant and others from committing
6 similar acts in the future. So that's what they're
7 designed to do. They're designed for punishment, for
8 extraordinary and outrageous misconduct and to prevent the
9 defendant from further committing the similar acts or
10 others from committing similar acts.

11 Before awarding punitive damages you must consider
12 and weigh certain elements which may be pertinent to the
13 facts in this case. You must consider the relationship
14 between any punitive damage award and the harm caused.
15 Any penalty imposed should take into account the
16 reprehensibility of the conduct, the harm caused, the
17 defendant's awareness of the conduct's wrongfulness, the
18 duration of the conduct, and any concealment. Thus, any
19 penalty imposed should bear relationship to the nature and
20 extent of the conduct and the harm caused including the
21 actual damage award made by you.

22 Secondly, any penalty imposed should take into
23 account as a mitigating factor any other penalty that may
24 have been imposed or which may be imposed for the conduct
25 involved including any criminal or civil penalty. Next

1 you can consider whether the award of and the amount of
2 any punitive damages award may derive the defendant of any
3 profits derived from the improper conduct and, finally, an
4 award of punitive damages must be limited to punishment
5 and thus may not effect economic bankruptcy. To this end
6 the defendant's ability to pay any punitive award should
7 be considered; however, economic bankruptcy is not an
8 absolute bar for an award of punitive damages.

9 So, having found by clear and convincing evidence in
10 this case that the defendant's act in this case were
11 reckless, willful, and a conscious disregard for the
12 rights of others you may consider punitive damages. The
13 punitive damages as I told you under our law is designed
14 for punishment and or making an example. So we try to
15 curtail similar or like circumstances or conduct in the
16 community.

17 So I am going to ask you to return to your jury room.
18 I'll send you a verdict form which will simply be we find
19 the defendant is entitled to blank dollars punitive
20 damages and it can be anywhere from zero to whatever your
21 decision is. Hold on one second until I send that word
22 back to you and you may start deliberating. I have to ask
23 if I left everything out.

24 It is 12 o'clock. Do you want me to order you some
25 lunch or y'all going to be long or -- You find out, Madam

1 Forelady. I am convinced you know how to do that. Thank
2 you.

3 (Whereupon, the jury exited the courtroom at 12:01.)

4 THE COURT: All right. Mr. Detrick, any exceptions,
5 objections, requested additions, or deletions to the
6 charge?

7 MR. DETRICK: None from the plaintiff.

8 THE COURT: Same question to the defendant.

9 MR. COX: Your Honor --

10 THE COURT: Sir?

11 MR. COX: -- we -- the charge that they've already
12 made the finding of conscious disregard, that was not on
13 the verdict form so---

14 THE COURT: Certainly it was; the last question
15 asked.

16 MR. COX: It left off the line to find reckless,
17 willful, wanton and with conscious disregard for the
18 safety was not on there.

19 THE COURT: Mr. Cox, you approved that verdict form.
20 It was sent back there. They found that there was -- that
21 your client's conduct was reckless, willful or wanton
22 which allows them -- they made that finding. They were
23 instructed as to what reckless was in the charge. Any
24 other objections?

25 MR. COX: That's it, Your Honor.

1 THE COURT: I'll stand by the charge. The verdict
2 form will be we find for the plaintiff blank dollars
3 punitive damages. Any objection to that by the plaintiff?

4 MR. DETRICK: That's fine.

5 MR. COX: Also, the line we find no punitive damages.

6 THE COURT: Well, blank dollars. They can put zero
7 to whatever they want to put. I told them that.

8 MR. COX: We would ask for a we find for the
9 plaintiff punitive damages in the amount of blank dollars
10 or we find zero dollars punitive damages.

11 THE COURT: Very well. You got me a copy? A
12 proposed form? I assume you don't.

13 MR. COX: I don't. I can have one in just a second.

14 THE COURT: So can I. We don't need -- what goes
15 back there? The tax returns and financial declarations?
16 Y'all agree with that?

17 MR. DETRICK: Yes, sir.

18 MR. COX: Yes, sir.

19 THE COURT: Get those exhibits and tell them they can
20 start deliberating. I'll send the verdict form in just a
21 few minutes.

22 THE BAILIFF: One of them wanted to go smoke.

23 THE COURT: Tell them they can go smoke, but they
24 can't start deliberating until the smoker returns.

25 All right. This is what it will say. Caption: We

1 find for the plaintiff in the amount of blank dollars
2 punitive damages or we find the plaintiff is not entitled
3 to punitive damages.

4 Any objection by the plaintiff?

5 MR. DETRICK: None.

6 THE COURT: By the defendant?

7 MR. COX: None, Your Honor.

8 THE COURT: All right. We're going to print it up
9 and y'all look at it. Both lawyers have had an
10 opportunity to review the verdict form. Both have agreed
11 that it is proper. I am giving it to the bailiff.

12 Mr. Bailiff, tell them as soon as the smoker returns
13 they may start their deliberation.

14 (Whereupon, the jury begins to deliberate at 12:15.)

15 (Whereupon, a break was taken.)

16 THE COURT: Is the plaintiff ready to receive the
17 verdict?

18 MR. DETRICK: Plaintiff is ready.

19 THE COURT: Defendant?

20 MR. COX: Yes, sir.

21 MRS. PAYNE: Yes, sir.

22 (Whereupon, the jury came into open court at
23 approximately 12:52.)

24 THE COURT: Mert, hand me the verdict, please.

25 All right. Madam Clerk?

1 THE CLERK: Your Honor, in case number
2 2011-CP-02-868, Paige Weeks Johnson as personal
3 representative of the Estate of Christie Lane Valenzuela
4 versus Sam English Grading, Incorporated, we find the
5 plaintiff is not entitled to punitive damages; signed
6 foreperson September 4, 2012.

7 If this be your final verdict please indicate by
8 rising your right hand. Thank you. You may put them
9 down.

10 THE COURT: Mr. Detrick, anything from the jury
11 before I dismiss them?

12 MR. DETRICK: Nothing, Your Honor.

13 THE COURT: Mr. Cox?

14 MR. COX: Nothing, Your Honor.

15 THE COURT: Madam forelady, ladies and gentlemen,
16 once again, I express my gratitude and thanks for your
17 duties for your wonderful jury service. I thank you.
18 I'll let you go now. We'll be sending you a check.
19 Hopefully we can get it out today or tomorrow for this
20 week. Y'all will step back in the jury room. I just want
21 to speak to you one second before you go.

22 (Whereupon, the jury exited the courtroom at 12:54.)

23 THE COURT: All right. I'll give both sides 10 days
24 to file any post-trial motions. Thank you very much.

25 (End of Transcript of Record.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the
Second 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
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for Aiken
County, South Carolina, on the 27th day of August, 2011.

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

May 3, 2013

Lisa H. Davenport, RPR

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1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF AIKEN) CIVIL ACTION NO.
4) 2011-CP-02-00868
5 - - -
6 Paige Weeks Johnson, as)
7 Personal Representative)
8 of the Estate of)
9 Christie Lane)
10 Valenzuela,)
11 Plaintiff,)
12 vs.)
13 Sam English Grading,)
14 Inc.,)
15 Defendant.)

16 - - -
17 VIDEO DEPOSITION OF
18 CLIFFORD A. MERRITT
19 THURSDAY, MAY 31, 2012
20 - - -

21
22
23
24
25

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1 Transcript of the video deposition of
2 Clifford A. Merritt, a witness herein, called by
3 the Plaintiff for direct examination under the
4 statute, taken before me, Linda D. Riffle,
5 Registered Diplomate Reporter, Certified Realtime
6 Reporter and Notary Public in and for the State of
7 Ohio, pursuant to notice and stipulations of
8 counsel hereinafter set forth, at the offices of
9 McGinnis & Associates, Inc., 5701 North High
10 Street, Third Floor, Columbus, Ohio, on Thursday,
11 May 31, 2012, beginning at 10:14 o'clock a.m. and
12 concluding on the same day.

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1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFF:

4 J. Paul Detrick, Esq. (via video conference)
5 Peters, Murdaugh, Parker, Eltzroth & Detrick,
6 PA
7 101 Mulberry Street, East
8 Hampton, South Carolina 29924
9 (803) 943-2111 Fax: (803) 943-3943
10 pdetrick@pmped.com

11

12 ON BEHALF OF THE DEFENDANT:

13 James C. Cox, III, Esq. (via video conference)
14 Grier, Cox & Cranshaw, LLC
15 2999 Sunset Boulevard, Suite 200
16 West Columbia, South Carolina 29169
17 (803) 731-0030 Fax: (803) 731-4059
18 tc Cox@griercoxandcranshaw.com

19

20

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1 APPEARANCES (continued):

2

3 ON BEHALF OF OWENS CORNING AND THE WITNESS:

4 Jessica L. Olsheski, Esq.

5 Timothy J. Boone Co., LPA

6 1654 East Broad Street, Second Floor

7 Columbus, Ohio 43203

8 (614) 252-5500 Fax: (614) 252-5058

9 jlj@justice-law.net

10

11 ALSO PRESENT:

12 Carey Champoux, Videographer

13 McGinnis & Associates, Inc.

14

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S T I P U L A T I O N S

- - -

It is stipulated by and among counsel for the respective parties herein that the video deposition of Clifford A. Merritt, a witness herein, called by the Plaintiff for direct examination under the statute, may be taken at this time and reduced to writing in stenotype by the Notary, whose notes may thereafter be transcribed out of the presence of the witness; that proof of the official character and qualification of the Notary is waived; that the examination, reading and signature of the said Clifford A. Merritt to the transcript of his video deposition are expressly waived by counsel and the witness; said transcript of his video deposition to have the same force and effect as though signed by the said Clifford A. Merritt.

- - -

— — —

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1	I N D E X (continued)	
2	- - -	
3	EXHIBITS	MARKED
4	Exhibit 6 -	8
5	Subpoena	
6	Exhibit 7 -	8
7	Northwest Berm to Elevation 515	
8	Exhibit 8 -	8
9	Bid Breakdown	
10	Exhibit 9 -	(late marked)
11	Affidavit of Clifford A. Merritt	
12	and Photograph	
13	- - -	
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1 P R O C E E D I N G S

2 - - -

3 Thursday, May 31, 2012

4 Morning Session

5 - - - 10:08

6 Thereupon, Exhibits 1 through 8
7 were marked for purposes of
8 identification.

9 - - -

10 THE VIDEOGRAPHER: Good morning. We 10:15
11 are on the record at 10:14 a.m. for the video
12 deposition of Clifford Merritt.

13 Will the counsel present please
14 identify themselves for the record, starting
15 with the counsel for Plaintiff. 10:15

16 MR. DETRICK: This is Paul Detrick,
17 and I represent the Estate of Christie
18 Valenzuela, and her son, Michael, Jr., and
19 the -- her husband, Michael, Sr.

20 MR. COX: My name is Trey Cox, 10:16
21 that's James C. Cox III; I represent the
22 Defendant Sam English Grading.

23 MS. OLSHESKI: Jessica Olsheski here
24 on behalf of Owens Corning.

25 THE VIDEOGRAPHER: Sir, would you 10:16

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1 please raise your right hand to be sworn in.

2 Do you solemnly swear or affirm the
3 testimony you are about to give will be the
4 truth, the whole truth, and nothing but the
5 truth, so help you God?

10:16

6 MR. MERRITT: I do.

7 (Witness placed under oath.)

8 THE VIDEOGRAPHER: Thank you.

9 Proceed, counsel.

10 - - -

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1 CLIFFORD A. MERRITT

2 of lawful age, being first duly placed under
3 oath, as prescribed by law, was examined and
4 testified as follows:

5 DIRECT EXAMINATION 10:16

6 BY MR. DETRICK:

7 Q. Mr. Merritt, as we just talked, my
8 name is Paul Detrick. I don't believe you
9 and I have ever actually talked to each other
10 or seen each other before today, have we? 10:16

11 A. We have not.

12 Q. And we are here to give your
13 testimony regarding some documents
14 particularly of Owens Corning, which I
15 believe you're employed with, and Sam English 10:17
16 Grading Company.

17 Could we start off, Mr. Merritt, by
18 you telling us what your position is with
19 Owens Corning?

20 A. I'm a -- I'm a Professional Engineer 10:17
21 with Owens Corning.

22 Q. And how long have you been an
23 engineer with Owens Corning?

24 A. Thirty-one-plus years.

25 Q. You're almost as old as me, then, I 10:17

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1 guess.

2 A. Possibly, yes.

3 Q. Would -- Did you have that position
4 in 2009?

5 A. I did. 10:17

6 Q. And did you have any involvement
7 with a contract, I think, in that period of
8 2009 between Owens Corning and Sam English
9 Grading?

10 A. I did. 10:17

11 Q. Could you just kind of generally
12 tell us what your involvement was at that
13 period of time regarding that contract?

14 A. The contract was -- The project was
15 to construct an earthen perimeter berm at our 10:18
16 landfill in Aiken, South Carolina. And I was
17 the technical person providing the technical
18 details and assembling the bid package for
19 constructing that earthen berm.

20 Q. Okay. And were you involved in the 10:18
21 actual bid process?

22 A. I was.

23 Q. Okay. Kind of tell us how that
24 worked, if you would.

25 A. We have a request for bidders that 10:18

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1 we sent -- excuse me -- a request for
2 proposals sent out to prospective bidders.
3 And it's -- establishes a -- a day of what we
4 call bid tours where we meet with the
5 prospective contractors and we walk through 10:18
6 the site and we review the details of the --
7 of the project. And then they are given a
8 certain time to review it and then submit a
9 proposal to us at a later date specified in
10 our -- in our invitation letter. 10:19

11 Q. I believe today you're in Columbus,
12 Ohio; is that correct?

13 A. Granville, Ohio.

14 Q. Granville, Ohio. Is that your
15 normal office, Mr. Merritt? 10:19

16 A. Yes.

17 Q. Granville or Columbus area. Okay.
18 And is that a -- one of the offices
19 of Owens Corning?

20 A. Yes, it is. 10:19

21 Q. Okay. Now, you mentioned that --
22 your involvement in the -- in the actual
23 contract and then you said you met with the
24 contractors about the bid. Did you,
25 yourself, actually go to Aiken, 10:19

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1 South Carolina, during that period of time to
2 meet with the contractors?

3 A. I did.

4 Q. Okay. And do you remember this --
5 that -- that actual meeting itself? 10:19

6 A. I do.

7 Q. A little bit about it. Okay. Tell
8 us about it.

9 A. Well, we have a specified time that
10 we meet at the -- at the site, and the 10:20
11 contractors show up and we go over the
12 drawings and the specifications. And then we
13 walk the site, and then they have -- may have
14 some questions.

15 And if they do have questions 10:20
16 that -- that are not officially answered in
17 the original set of bid documents, we will
18 issue an addendum. And we did issue an
19 addendum on this project. So that's usually
20 how it transpires. 10:20

21 Q. And do you remember actually seeing
22 Mr. Chris English with the Sam English
23 Grading Company during this time period?

24 A. Yes.

25 Q. Okay. And was Mr. English made 10:20

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1 aware of the terms and conditions of the bid
2 and contract if he was awarded the bid?

3 A. Not at the -- Not at that meeting.
4 The -- We discussed more the technical issues
5 of what has to be done. Later a purchase 10:21
6 order is issued to the selected successful
7 bidder, and in that purchase order we have
8 terms and conditions that deal with the
9 actual carrying out of the contract.

10 Q. Okay. All right. Like I started 10:21
11 off this deposition, we're here really to --
12 to talk about some documents regarding that
13 contract.

14 Prior to this deposition today did
15 you receive a subpoena from me regarding some 10:21
16 con- -- some documents?

17 A. I did.

18 Q. Okay. And is that -- I think prior
19 to the deposition, we marked that subpoena as
20 Exhibit No. 6; is that correct? 10:22

21 A. That is correct.

22 Q. Okay. And in -- after receiving
23 that subpoena, did you respond to each of the
24 items requested, which would be documents
25 listed 1 through 5 in the subpoena? 10:22

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1 A. I responded principally Items 1
2 through 4. Item No. 5 was really responded
3 to by Owens Corning representatives from the
4 Aiken, South Carolina, plant.

5 Q. Okay. And as far as, then, the 10:22
6 responses to the requests 1 through 5 in the
7 subpoena, have we re- -- previous to this
8 deposition marked those responses as
9 Exhibits 1 through 5 to your deposition?

10 A. Correct. 10:23

11 Q. Okay. So the record's clear,
12 Exhibit No. 1 would be the response to No. 1
13 in the subpoena, which is involving the
14 encroachment permit; Exhibit No. 2 would be
15 the response to No. 2 in the subpoena, which 10:23
16 is sort of safety specifications; and Exhibit
17 No. 3 regarding Purchase Order 4503498653;
18 and Exhibit No. 4 the File Project
19 No. 004074.4.1.3; and then Exhibit 5 exhibit
20 would be your contracts since August the 7th, 10:23
21 2009; is that correct?

22 A. That is correct.

23 Q. Okay. And you -- And that -- you
24 have those documents before you?

25 A. Yes. 10:24

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1 Q. And are they true and accurate
2 copies of the -- the documents in response to
3 the subpoena?

4 A. Yes.

5 Q. And I -- Those are documents that 10:24
6 were kept in the regular course of business
7 of Owens Corning; is that correct?

8 A. Yes.

9 Q. Okay. And so if we could,
10 Mr. Merritt, I would like to kind of -- let's 10:24
11 go through each of these -- these Exhibits 1
12 through 5 so that the jury can understand
13 what they are and that they're responsive to
14 the subpoena, then you can explain for us.
15 Okay? 10:24

16 A. Yes.

17 Q. So if you would start off and
18 have -- and we'll kind of have Exhibit 6 with
19 you and then -- and then each exhibit we --
20 we refer to. Is that okay? 10:24

21 A. Yes.

22 Q. All right. If you would, get
23 Exhibit No. 1, please, sir.

24 A. All right.

25 Q. And I think, like you previously 10:25

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1 said, you testified to that is the
2 South Carolina Department Encroachment Permit
3 referred to in Project File
4 No. 00004074.4.1.3, which was Exhibit 1 of
5 the subpoena; is that correct? 10:25

6 A. Correct.

7 Q. Okay. Now, if you would,
8 Mr. Merritt, this encroachment permit is a
9 Owens Corning encroachment permit with the
10 South Carolina Highway Department; is that 10:25
11 correct?

12 A. That is correct.

13 Q. And could you tell us what an
14 encroachment permit is?

15 A. This encroachment permit goes back 10:25
16 to 1984 and, actually, it is expired at this
17 point in time. We -- What is -- What's
18 required on an encroachment permit is, when
19 you do work along a public roadway, either in
20 the road or along the road or in the 10:26
21 right-of-way of the roadway, you need an
22 encroachment permit to -- to allow that work
23 to commence.

24 And so in 1984, when we first built
25 the crossover roadways across Redds Branch 10:26

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1 Road, we applied for and received a -- an
2 encroachment permit in 1984. And then we --
3 it has in specifications or conditions from
4 the State Highway Department at the time, and
5 the -- and the work was completed. So that's 10:26
6 why I say it's expired. We -- We do not
7 really have to -- We do not need an
8 encroachment permit any longer.

9 Q. And you're talking about -- Are you
10 talking about now or in two-thou- -- in 2009? 10:27

11 A. In 2009.

12 Why I --

13 Q. Okay.

14 A. -- included in it -- I --

15 I included -- 10:27

16 Q. Go ahead.

17 A. All right.

18 MS. OLSHESKI: Go ahead, Cliff.

19 BY MR. DETRICK:

20 Q. Go ahead. 10:27

21 A. I included the copy of the
22 encroachment permit as reference. One, it
23 does show that we actually -- it does show
24 the location of this -- of the crossovers,
25 and the -- it does also discuss the work that 10:27

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1 had to be done to complete the driveway
2 access, aprons, and paving next -- and
3 drainage next to the road. And it does show
4 that the State reviewed it and approved it.

5 And it also does discuss the need in our -- 10:27
6 in our guidelines for flagging and warning
7 signs along Redds Branch Road. That's why I
8 included it. But it has expired.

9 Q. Okay. But does -- You said it
10 includes the need and guidelines for 10:28
11 flaggings and warning signs. And could you
12 explain what you mean by that?

13 A. Well, it's stated in the application
14 for the permit of the warning signs needed
15 ahead of the crossover and the need for a 10:28
16 flagman at the crossover to provide temporary
17 traffic control while the -- while we're
18 crossing the Redds Branch Road.

19 Q. And you say "we're crossing,"
20 whoever the contractor was, in this case Sam 10:29
21 English Grading, if they were crossing Redds
22 Branch Road in -- with a piece of equipment,
23 were they required to have a flagman and also
24 warning signs?

25 A. Yes. 10:29

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1 MR. COX: Objection.

2 BY MR. DETRICK:

3 Q. Under the contract?

4 A. Yes.

5 Q. You can answer. 10:29

6 Okay. And what were they required
7 as far as flagmen and warning signs according
8 to the contract between Owens Corning and Sam
9 English Grading in May of -- in 2009?

10 A. Well, it's -- it's called out in 10:29
11 our -- in the discussion of our application
12 of the original encroachment permit, talking
13 about a sign ahead of the crossing that says
14 there will be trucks crossing, a sign that
15 says there's a flagman ahead, and then a 10:29
16 flagman actually at the crossing point.

17 Q. Okay. So even though the actual
18 encroachment permit expired, the guidelines
19 and need for the flagmen and -- and the
20 warning signs were still required; is that 10:30
21 correct?

22 A. That is correct. That is our -- our
23 plan for crossing that road from one side to
24 the other with -- with heavy equipment.

25 Q. And did Sam English Grading Company 10:30

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1 agree to these terms and conditions to
2 provide the flagman and the warning signs?

3 A. Yes.

4 Q. Now, these -- to be sure about it,
5 would you re- -- would you tell specifically 10:30
6 what warning signs were required of Sam
7 English Grading Company if they were to cross
8 over Redds Branch Road for the purpose of
9 hauling dirt across that highway?

10 A. Well, I just did. 10:30

11 Q. I -- I know you did, so I'm sorry,
12 but I -- and I don't mean to -- but if you
13 would just make sure exactly what the sign is
14 supposed to say.

15 A. The signs -- and it's right in 10:31
16 the -- in the application for the
17 encroachment permit -- talks about a road --
18 a truck crossing sign ahead of the crossing
19 point; a flagman sign, a sign that says
20 there's a flagman ahead; and then a flagman 10:31
21 at the crossing point.

22 Q. What distances is the cross -- of
23 the sign's required to be from the actual
24 crossing of the highway?

25 A. Our application said 1,000 feet for 10:31

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1 the initial sign and 500 feet for the flagman
2 sign.

3 Q. That would be in both directions
4 approaching the intersection?

5 A. Correct. 10:31

6 Q. And -- And then a flagman. And
7 what -- what is the requirement of the
8 flagman? What is he supposed to do?

9 A. He's there to warn the -- and stop,
10 if he has to, the traffic on Redds Branch 10:32
11 Road to allow the safe crossing of any kind
12 of earthwork trucks, earthwork equipment
13 across Redds Branch Road.

14 Q. And I believe in the exhibit we got
15 through -- sort of been talking about 10:32
16 attached is exhib- -- to the subpoena, I'm
17 sorry -- attached to Exhibit No. 1, the
18 Addendum No. 1; is that correct?

19 A. Say that again.

20 Q. Attached to the subpoena and on 10:32
21 our -- on our Request No. 1 of the subpoena
22 refers to "addendum no. 1 to the contract
23 between Sam English Grading and Owens Corning
24 Mat Plant...; Project File
25 No. 00004074.4.1.3" -- 10:32

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1 A. I -- I see it now.

2 Q. -- "attached as" --

3 Okay. And you had mentioned earlier
4 in your testimony an addendum. Is that what
5 you were referring to? 10:33

6 A. Correct.

7 Q. And what was -- Tell me about that
8 addendum, how it came about, and -- and why
9 it's an addendum to the contract.

10 A. As I mentioned previously, when we 10:33
11 have the bid tour walkthroughs, there are
12 some questions asked by the potential
13 contractors that may not have been directly
14 covered in the original request for
15 proposals. And so to make it specifically 10:33
16 clear, I then issue an addendum to the
17 details of the contract. And we did issue
18 one addendum, Addendum No. 1.

19 Q. And you have Addendum No. 1 in front
20 of you, Mr. Merritt? 10:33

21 A. Yes.

22 Q. And I think it's dated May 22nd,
23 2009; is that correct?

24 A. Yes.

25 Q. And specifically under No. 4 in that 10:34

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1 addendum, what was required of Sam English
2 Grading Company in this contract?

3 A. Well, there was a couple of things.
4 One, the first sentence deals with
5 maintaining dust control on all access roads 10:34
6 in and around the landfill. And then the
7 second part of it was a -- a requirement for
8 providing the flagman and the warning signs
9 along in -- in to -- in compliance with our
10 encroachment permit. 10:34

11 Q. And for the record, could you read
12 the specific language required of Mr. English
13 regarding the flagman and the crossing signs
14 and the encroachment permit?

15 A. It's a long paragraph, but I'll read 10:34
16 it. "Owens-Corning Fiberglas is applying for
17 an Encroachment Permit for crossing State
18 Hws." --

19 Q. I'm not talking about -- Sir, I'm
20 sorry. I'm -- misunderstood my question. 10:35

21 A. Okay.

22 Q. I'm referring to No. 4 --

23 A. Okay.

24 Q. -- of the Addendum.

25 A. All right. 10:35

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1 Q. I apol- -- I apologize.

2 A. Okay.

3 Q. Could you read what's required under
 4 Paragraph No. 4 of Addendum No. 1 regarding
 5 flagman's signs and encroachment permit? 10:35

6 A. Yes. "The Contractor will provide a
 7 flagman; maintain road crossing signs and
 8 other road crossing safety measures to comply
 9 with Owner's South Carolina Highway
 10 Department Encroachment Permit. A copy of 10:35
 11 the permit will be supplied by the Owner."

12 Q. And was Mr. -- Was Sam English
 13 Grading aware of this requirement in No. 4
 14 when they accepted the terms of the contract?

15 A. Yes. 10:36

16 Q. And do you know whether the actual
 17 encroachment permit was actually supplied to
 18 them or not?

19 A. I do not know. I -- I don't believe
 20 it was, and the reason is this: Sam English 10:36
 21 Grading has -- is aware of the -- of the
 22 requirements for the flagman. They have done
 23 previous construction projects on the -- on
 24 the landfill. And so when I found out that
 25 they were the successful bidder, we did not 10:36

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1 actually submit a copy of the encroachment
2 permit to them.

3 Q. Why is Owens Corning concerned about
4 having a flagman and warning signs present at
5 this location -- 10:36

6 A. Well --

7 Q. -- at that time?

8 A. It is and it has always been our
9 position that -- that this is required for
10 proper temporary traffic control and safety 10:37
11 along the -- along Redds Branch Road when
12 you're crossing the highway with -- with
13 heavy equipment.

14 Q. Was Sam English Grading Company
15 aware of that? 10:37

16 A. Yes.

17 Q. Now, if you would, let's go to
18 Exhibit No. 2 that's been premarked prior to
19 this deposition. And it's referred to in the
20 subpoena as No. 2, safety specifications and 10:37
21 safety requirements.

22 Do you have Exhibit No. 2 --

23 A. Yes.

24 Q. -- in front of you?

25 And if you would, tell me what 10:37

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1 Exhibit 2 is.

2 A. Exhibit No. 2 is the company's
3 general safety requirements for any
4 construction project that might occur at an
5 Owens Corning site. It -- It refers 10:38
6 principally to construction at a plant site.

7 Q. Uh-huh.

8 A. And this is not a plant site,
9 per se, where we're operating at the -- at
10 our landfill. It also is a -- It also 10:38
11 contains descriptions and details of a
12 contractor's safety program regarding his
13 employees or the -- or the sub- -- or his
14 subcontractor employees.

15 Q. As far as the training of safety -- 10:38
16 of personal for Sam English Grading Company
17 regarding the safety at this crossing, is
18 there anything in there that would be
19 applicable?

20 A. Not really. 10:39

21 Q. Okay. And that -- And I want to
22 be -- make sure. It -- Really, is Exhibit
23 No. 2 more regarding construction and not
24 much to do with what Sam English Grading was
25 involved in? 10:39

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1 A. It is construction primarily at a
2 manufacturing site where you have steel
3 erection and other kind of powered equipment
4 and so on. Our project at the landfill was
5 strictly earthwork, and these safety -- these 10:39
6 general safety requirements really don't
7 apply.

8 Q. So, again, say -- Exhibit No. 3, is
9 there anything that would apply to Sam
10 English Grading Company regarding their 10:39
11 contract with Owens Corning in 2009?

12 MS. OLSHESKI: Exhibit 2 or
13 Exhibit 3?

14 MR. DETRICK: I'm sorry. Exhibit 2.
15 Keep me straight there. 10:39

16 THE WITNESS: Well, Exhibit 2 does
17 talk about personal -- personal protective
18 equipment, PPE; so, yes, construction workers
19 need to have appropriate clothing and -- and
20 other kind of personal protective equipment. 10:40
21 So, in general, those would be the things
22 that would be applicable to this work at our
23 landfill. Most everything, such as
24 refractory tear-outs, hot welding -- welding
25 permits, all those kind of things are not 10:40

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1 applicable.

2 BY MR. DETRICK:

3 Q. If you would, let's go to Exhibit
4 No. 3, then, Mr. Merritt. And I believe it
5 is responsive to the Request No. 3 which 10:40
6 says, "All documents, letters, written
7 communications, contracts, addendums and
8 memorandum regarding purchase order number
9 4503498653."

10 Does Exhibit No. 3 -- is it 10:41
11 responsive to that subpoena request?

12 A. Yes, it is.

13 Q. Okay. And what is -- And I'm --
14 we're referring to the purchase order that I
15 just gave that long number -- what is that 10:41
16 purchase order involving?

17 A. That purchase order is the final
18 document between Owens Corning and a -- and
19 our contractor that actually, if you will,
20 hires the contractor to do the technical work 10:41
21 that I specified in the -- in the bid
22 documents.

23 Q. And could you describe for the jury
24 what documents are in Exhibit No. 3
25 responsive to the subpoena? Just generally 10:41

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1 what are attached to it.

2 A. Yeah. One, the -- is a -- is the
3 addendum. There's a drawing dealing with the
4 borrow area where we get the soil for
5 building the perimeter berm. There is a copy 10:42
6 of a purchase order issued to Sam English
7 Grading for the work to construct the -- the
8 perimeter containment berm. There's the
9 invitation letter to -- or, request for
10 proposals. There's submittal of information 10:42
11 from Sam English Grading dealing with his
12 insurance coverage and his safety numbers,
13 his EMRs, experience modification ratios.
14 And then there's some discussion about
15 internal -- a couple of internal -- internal 10:42
16 memos dealing with resolving the issue of
17 the -- of the experience modification ratios
18 for Sam English Grading.

19 Q. If you would now, Mr. Merritt, let's
20 go to Exhibit No. 4. And the subpoena 10:43
21 requested regarding Exhibit No. 4 "All
22 documents, letters, written communications,
23 contracts, addendums, and memorandum
24 regarding project file no. 00004074.4.1.3."

25 Does Exhibit No. 4 have the 10:43

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1 documents attached to it or responsive to
2 that request in the subpoena?

3 A. Yes, it does.

4 Q. And could you again, please, just
5 kind of describe these documents that are -- 10:43
6 are responsive to the -- the request for and
7 are attached to Exhibit No. 4?

8 A. Exhibit No. 4 does have some repeats
9 from Exhibit No. 3, mainly because this
10 project file number and the purchase order -- 10:44
11 the project file number is the financial
12 number that deals with funding the purchase
13 order. So it's -- it's essentially the same
14 reference for the project.

15 So the first thing on Exhibit 4, 10:44
16 again, is Addendum No. 1. And then there is
17 a drawing of the borrow area where we remove
18 the soil to build the earthen berm. And then
19 there's some discussions here on the
20 operation of the landfill, which might be 10:44
21 really more of Exhibit No. 5, but there -- in
22 my copy here, there's a couple of memos
23 dealing with the operation of the landfill.

24 Again, there's submittal from Sam --
25 Sam English Grading on his actual bid form 10:45

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1 for -- for the project in 2009.

2 I stand corrected. It is the -- It
3 is the bid form for the operation of the
4 landfill. I'm sorry. I apologize on that.

5 And then there's the -- some same -- 10:45
6 some language again dealing with the oper- --
7 some memos dealing with the operation of the
8 landfill and how they were going to actually
9 issue a purchase order for it.

10 So it looks like it's mi- -- there's 10:45
11 a mixture of -- of -- of documents dealing
12 with the actual project in 2009 that we're --
13 been discussing, and then some information on
14 the actual operation of the landfill.

15 During 2009 we were also bidding the 10:46
16 operation of the landfill in addition to the
17 construction of this earthen berm.

18 Q. And when you say, "the operation of
19 the landfill," could you explain what you
20 mean by that? 10:46

21 A. Yes. Our -- The operation of the
22 landfill requires that a contractor properly
23 dispose of our solid waste that comes from
24 our manufacturing plant. So waste will be
25 hauled out to the -- to the landfill and then 10:46

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1 the contractor grades it, compacts it, and
2 covers it periodically. And then operation
3 also involves proper drainage control, and --
4 and landscaping, and seeding, and control of
5 runoff, those kind of things. 10:47

6 Q. So Mr. -- Sam English Grading got
7 both of those contracts; is that correct?

8 A. Yes, he --

9 Q. Two separate contracts, they got
10 both of them? 10:47

11 A. Yes, they did.

12 Q. Okay. All right. And if we would,
13 then, I think on Exhibit No. 5, which is
14 responsive to subpoena Request No. 5, "All
15 contracts between Sam English Grading and 10:47
16 Owens Corning since August the 7th, 2009...",
17 do you have in front of you the documents of
18 Owens Corning regar- -- responsive to that to
19 that subpoena request --

20 A. I do. 10:47

21 Q. -- marked as Exhibit No. 5?

22 A. Yes.

23 Q. Okay. And I believe you previously
24 testified you didn't actually gather these
25 documents, Exhibit No. 5, but had -- you 10:47

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1 gathered the Exhibits 1 through 4; is that
2 correct?

3 A. Yes, that's correct.

4 Q. All right, sir. Could you just
5 then, please -- can -- can you identify 10:48
6 the -- the attachments on Exhibit No. 5?

7 A. I --

8 Q. Are you able to do that?

9 A. I am. These are solely the purchase
10 order -- purchase order for operation of the 10:48
11 landfill.

12 Q. Mr. Merritt, if you would, I think
13 prior to the deposition we also -- we marked
14 as Exhibit No. 7, I believe, the 40 -- I
15 think you all said 42-page document which is 10:48
16 the actual contract regarding the building of
17 the berm in May 2009 by -- by Sam English
18 Grading for Owens Corning; is that correct?

19 A. Yes. This is what we call the bid
20 documents. So we would supply these to the 10:48
21 prospective bidders ahead of the bid tours.

22 Q. And then Addendum No. 1 would be an
23 addendum to this contract, is that correct --

24 A. That is -- That is --

25 Q. -- this document? 10:49

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1 A. That is correct.

2 Q. Okay. And it refers to the project
 3 number we've been referring to --

4 A. Correct.

5 Q. -- correct? 10:49

6 And so the record is clear, we had
 7 also marked, I think, as Exhibit No. 8, and
 8 it also was Exhibit No. 2 of Sam -- of
 9 Mr. Chris English's deposition -- Do you have
 10 that in front of you? 10:49

11 A. I do.

12 Q. Could you identify that, please?

13 A. It's what we call Attachment A. And
 14 it is actually the breakdown of the bid by
 15 the prospective bidders. So they actually 10:49
 16 receive in the bid documents the blank spaces
 17 and -- and lines, and then as part of their
 18 bid submittal they fill this in with their
 19 proposals. So this is the -- Exhibit 8 is
 20 the filled-in proposal from Sam English 10:50
 21 Grading.

22 Q. All right. I appreciate it,
 23 Mr. Merritt. Just had -- did you learn of
 24 the -- of this -- this wreck that occurred on
 25 August the 7th, 2009, when Chris- -- 10:50

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1 Christie Valenzuela was killed; did -- did
2 you learn of that afterwards?

3 A. I did.

4 Q. Okay. And I -- I'm just asking you
5 because I don't know, I haven't talked with 10:50
6 you before. How -- How did you learn about
7 it?

8 A. I actually learned it from the plant
9 people, our plant people. And also Chris
10 English mentioned to me that there had been 10:50
11 an accident and a fatality along Redds Branch
12 Road.

13 Q. And when did Chris English, in
14 relation to the fatality, speak to you?

15 A. Sometime later. I don't know -- I 10:51
16 don't remember.

17 Q. Can you tell us about that
18 conversation?

19 A. That is -- What I just said was the
20 conversation. It started with the plant 10:51
21 people saying that there had been a -- an
22 accident, a fatality, on Redds Branch Road;
23 Chris -- Chris confirmed that there was.

24 Q. Did Mr. English call you or you call
25 Mr. English? 10:51

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1 A. I don't --

2 Q. Or -- Or how did this come about?

3 A. It was on a phone call. And we call
4 one another on technical details of what's
5 going on during the construction, so I don't 10:51
6 remember who called who.

7 Q. Okay. But it wasn't unusual, y'all
8 had conversations with each other on a not --
9 a regular basis, or -- or did you?

10 A. We do, because this was the -- how 10:52
11 we're following the progress of the
12 construction of the earthen berm.

13 Q. Now, specifically this conversation
14 regarding the fatality, can you tell me what
15 you remember, if anything, about what 10:52
16 Mr. English said?

17 A. That there was an accident involving
18 a motorcyclist. That's it.

19 Q. Any -- Okay. Nothing else?

20 A. Nothing else. 10:52

21 Q. Okay. Have you done anything in
22 follow-up to that conversation with Mr. --
23 with him -- with Sam English Grading Company?

24 A. None.

25 Q. Okay. No -- You haven't talked with 10:52

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1 Mr. -- you talked -- Regarding the fatality
 2 itself, have you talked with Mr. English
 3 since that conversation?

4 A. No. Not regarding the -- the
 5 accident. 10:52

6 Q. Has there been any -- just so it's
 7 clear -- any conversation regarding the
 8 failure of Mr. -- of Sam English Grading
 9 Company to have the required flagman and
 10 warning signs present at the time of the 10:53
 11 wreck?

12 A. No discussion.

13 MR. DETRICK: That's all the
 14 questions I have. Thank you, Mr. Merritt.

15 THE WITNESS: You're welcome. 10:53

16 - - -

17 CROSS-EXAMINATION

18 BY MR. COX:

19 Q. Mr. Merritt, my name is Trey Cox. I
 20 represent Sam English Grading. How are you? 10:53

21 A. I'm good.

22 Q. Do you need a break --

23 A. I'm okay.

24 Q. -- before -- I just have a few
 25 questions. 10:53

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1 Okay. Thank you, sir.

2 Would you -- I don't believe we --
3 you ever stated your full name for the
4 record. Could you just do that for the jury,
5 please?

10:53

6 A. Clifford A. Merritt.

7 Q. Okay. Thank you, sir. And you may
8 have and I just didn't catch that.

9 You did not do an investigation of
10 this accident to determine whether or not 10:53
11 what Plaintiff's attorney is referring to
12 as -- as proper safety precautions or -- or
13 flags or -- excuse me -- a flagman or signs
14 or traffic control was -- was present at the
15 scene at the time of this accident, did you? 10:54

16 A. I did not do an investigation.

17 Q. Okay. Would you agree -- and
18 you've -- it's fair to say, I think I
19 understand from your testimony, that you've
20 had a lot of interaction with -- with Chris 10:54
21 English and -- and his company, correct,
22 through -- through the years?

23 A. Yes.

24 Q. Okay. And you'd agree they're a --
25 a real small contractor, local contractor? 10:54

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1 A. Yes.

2 Q. Okay. And I just wanted to confirm,
3 if I understand your -- if I understand
4 correctly, the encroachment permit between
5 the South Carolina Highway Department and 10:55
6 Owens Corning referenced in Addendum No. 1 to
7 the contract was never provided to Sam
8 English Grading --

9 A. On this --

10 Q. -- is that correct? 10:55

11 A. On this project, correct.

12 Q. Okay. And was -- was it provided to
13 Sam English Grading on some other project?

14 A. Yes.

15 Q. What project? 10:55

16 A. One of the previous -- One of the
17 previous perimeter berm constructions.

18 Q. Okay. Back in 1984 when the permit
19 was issued?

20 A. I don't know if they were doing the 10:55
21 work in 1984, but they've done several berm
22 constructions, and this was part of the
23 documents on those. And they were the
24 successful bidder.

25 Q. Okay. When was the encroachment 10:56

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1 permit provided to Sam English Grading
2 Company?

3 A. I actually don't have the date, but
4 it was well known and he was -- he was using
5 signs and flagmen on previous projects. 10:56

6 Q. Okay. Well, you'll agree -- you've
7 testified that this encroachment permit
8 referenced in Addendum No. 1 is expired? The
9 1984 encroachment permit referenced in
10 Addendum No. 1 is expired -- 10:56

11 A. Correct.

12 Q. -- correct?

13 A. Yes.

14 Q. Okay. And -- And that permit was
15 issued in 1984, correct? 10:57

16 A. Yes.

17 Q. Okay. Do you know when that permit
18 expired?

19 A. It actually expires upon completion
20 of the -- of the work specified by the -- by 10:57
21 the South Carolina Highway Department. And
22 so on -- on their page Special Provisions, it
23 lists the things that had to be done. Once
24 those were done, it actually expires.
25 There's no need for another encroachment 10:57

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1 permit, and so we completed, and it expires
2 upon completion of the -- of the conditions.

3 Q. And what was the completion date of
4 those conditions?

5 A. We actually don't have the 10:57
6 completion date, but it was shortly
7 thereafter in -- in 1984 because that's
8 when -- that was the year we built the two
9 driveways that come across Redds Branch Road.

10 Q. Okay. So the encroachment permit 10:58
11 referenced in Addendum No. 1 expire --
12 expired sometime in 1984?

13 A. Correct.

14 Q. Okay. Now, referencing Addendum
15 No. -- Addendum No. 1, which was an addendum 10:58
16 to the contract between Owens Corning and Sam
17 English Grading, Addendum No. 1, Paragraph 4,
18 which you read into the record earlier,
19 states -- and I -- I'll read it again, and
20 read along with me, correct me if I read 10:59
21 something wrong -- "The Contractor" -- and,
22 sir, let me just ask you, "The Contractor"
23 refers to Sam English Grading; is that
24 correct?

25 A. Correct. 10:59

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1 Q. Okay. So "The Contractor must
2 maintain dust control on all access roads
3 between the borrow area and the landfill at
4 all times. The Contractor will provide a
5 flagman; maintain road crossing signs and 10:59
6 other road crossing safety measures to comply
7 with Owner's South Carolina Highway
8 Department Encroachment Permit. A copy of
9 the permit will be supplied by the Owner."

10 Sir, I wanted to ask you, upon 10:59
11 issuance of this Addendum No. 1, was a copy
12 of the permit supplied by the owner as
13 contemplated in No. 4 -- Paragraph No. 4 of
14 Addendum No. 1?

15 A. I did not. 11:00

16 Q. Okay. And -- And Addendum No. 1,
17 again for the jury, is -- is an -- is a
18 contract between Owens Corning and Sam
19 English Grading, correct?

20 A. Yes. 11:00

21 Q. And in -- in O- -- in your company,
22 Owens -- Owens Corning's contract with Sam
23 English Grading, you were asking Sam English
24 Grading to comply with Owens Corning's
25 South Carolina Highway Department 11:00

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1 Encroachment Permit; is that right?

2 A. Correct.

3 Q. Okay. So the requirements of a
 4 flagman to maintain road -- and to maintain
 5 road crossing signs and other road crossing 11:00
 6 safety measures is a requirement on Owens
 7 Corning; is that correct?

8 A. Correct. And the --

9 Q. Okay.

10 A. And the -- And the way the addendum 11:01
 11 is written, it identifies that a flagman and
 12 road crossing signs are required regardless
 13 of whether there's an encroachment permit.
 14 So the details of that en- -- of the signs
 15 and flagmen were part of that encroachment 11:01
 16 permit that expired and I used as reference.

17 Q. Okay. Do you know whether or not a
 18 flagman was present at the time of this
 19 accident?

20 A. I do not. 11:01

21 Q. Do you know whether or not main --
 22 road crossing signs were present --

23 A. I do not.

24 Q. -- at the time of the accident?

25 And do you know whether other road 11:01

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1 crossing safety measures were -- were
2 utilized by Sam English Grading at the time
3 of this accident?

4 A. I do not.

5 Q. Okay. At any time did Owens Corning 11:01
6 conduct periodic reviews of this crossing
7 location to determine the level and
8 effectiveness of Sam English Grading's safety
9 program?

10 A. We did not conduct an investigation, 11:02
11 but I was at the site on September the 1st,
12 2009, and -- to review the progress of the
13 construction of the landfill earthen berm,
14 and I did observe on that day the road
15 crossing signs and the flagman. 11:03

16 Q. Okay. Did -- But my -- my question
17 was whether Owens and Corning -- Owens
18 Corning conduct -- conducted periodic reviews
19 of the location -- of this crossing location
20 to determine the level and effectiveness of 11:03
21 Sam English Grading's safety program.

22 A. We did not do an investigation.

23 Q. Okay. Did you do periodic reviews
24 of -- of the location to determine if
25 appropriate safety measures as preferred by 11:03

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1 Owens Corning were -- were in place?

2 A. We did not do reviews at these --
3 periodic reviews during this particular
4 construction project.

5 Q. Okay. Now, Sam English Grading 11:04
6 has -- has maintained a -- they've had a
7 contract with Owens Corning since about 1984,
8 have they not?

9 A. Correct.

10 Q. To main -- To maintain the -- 11:04
11 correct?

12 A. To operate the landfill.

13 Q. To operate the landfill. Okay.
14 Correct. Thank you.

15 And in operating the landfill, there 11:04
16 is -- since 1984 there is regular or periodic
17 crossing of Redds Branch Road, correct, by
18 Sam English Grading?

19 A. Correct.

20 Q. Okay. Did Owens Corning conduct 11:05
21 periodic reviews at this location since 1984
22 through the date of this accident,
23 August 7th, 2009, regard -- to -- to confirm
24 that the provisions of their encroachment --
25 1984 encroachment permit were being followed? 11:05

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1 A. I did over the years, in the
2 construction of the previous perimeter berms,
3 have observed the signs and flagmen, as well
4 as I did on September the 1st of 2009.

5 Q. Okay. How -- How many times? How 11:05
6 often would you conduct those reviews?

7 A. Well, it was a function of how often
8 we built the -- the earthen berms. That's
9 a -- That's a concentrated effort to move a
10 lot of earth from one side of the road to the 11:06
11 other and so we did that every four to five
12 years. So that would be the frequency of
13 reviewing the signage and flagmen was -- was
14 needed during the -- that period of time
15 periodically every four or five years. 11:06

16 Q. Do you have any documentation
17 referencing those reviews or -- or what you
18 observed at the crossing to -- to assure that
19 the encroachment permit from 1984 was being
20 complied with? 11:06

21 A. I do not for the previous years, but
22 on September the 1st, I did take a photograph
23 of the signs on Redds Branch Road and the
24 flagman --

25 Q. Okay. 11:07

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1 A. -- so...

2 Q. Okay. Do you have a copy of that
3 photograph with you?

4 A. I do not.

5 Q. Have you -- Sir, has Owens Corning 11:07
6 ever provided Sam English Grading with a
7 current encroachment permit after the 1984
8 expired encroachment permit?

9 A. The one listed here in the exhibits?

10 Q. Correct. 11:08

11 A. I believe --

12 Q. What I am asking is -- I'm sorry.
13 Go ahead.

14 A. I was going to say, yes, I -- I -- I
15 have, in the -- in previous contracts with 11:08
16 Sam English to -- and Grading Company to
17 install previous containment berms.

18 Q. Well, I'm asking about the location
19 at Redds Branch Road, the landfill location
20 where this accident occurred. Has Owens 11:08
21 Corning provided Sam English Grading with
22 a -- a current, valid encroachment permit
23 with the South Carolina Highway Department?

24 A. No, there is no current --

25 Q. Because it's my under- -- 11:09

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1 A. Yeah.

2 Q. Okay.

3 A. There is no current --

4 Q. I didn't mean to interrupt. I'm
 5 sorry. 11:09

6 A. That's all right.

7 There is no current valid
 8 encroachment permit because we don't need
 9 one.

10 MR. COX: Okay. Sir, I believe 11:09
 11 that's all the questions I have and I
 12 appreciate your time.

13 THE WITNESS: Thank you.

14 - - -

15 REDIRECT EXAMINATION 11:10

16 BY MR. DETRICK:

17 Q. Mr. Merritt, I have a few follow-up
 18 questions.

19 First off, let's go back to the
 20 September 1st, 2009, visit to the site. 11:11

21 A. Okay.

22 Q. Did -- Did Chris English know you
 23 were going to be in Aiken, South Carolina, at
 24 the site at that period of time before you
 25 went? 11:11

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1 A. Yes.

2 Q. And so then they knew you were going
 3 to be at the site, there were flagmen and
 4 sign men present --

5 A. Correct. 11:11

6 Q. -- warning signs present; that --
 7 that correct?

8 A. Yes.

9 Q. Okay. Was Mr. English with you?

10 A. Yes. 11:11

11 Q. And did Mr. English make any comment
 12 about the flagmen or the signs that were
 13 present then?

14 A. No.

15 Q. Okay. And if you would, could you 11:11
 16 tell us what kind of signs were present, now,
 17 September 1st, 2009, that you -- you talked
 18 about responsive to Mr. Cox's questions?

19 A. Yes. The -- There was one sign on
 20 each side of the crossing that warned of 11:12
 21 trucks crossing the highway, and then there
 22 was the flagman at the crossing point.

23 Q. Okay. And now, if you would,
 24 Mr. Merritt, would you describe the flagmen
 25 that was present on September 1st, 2009, and 11:12

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1 what that flagman was doing?

2 A. He was actually sitting in a vehicle
3 at the time, because at the time we drove in,
4 there were no cars on Redds Branch Road.

5 Q. Did you observe that flagman have a 11:12
6 orange vest that normally flagmen have on
7 these kind of --

8 A. I believe so. I -- I -- He was
9 inside a vehicle; I am not sure.

10 Q. Okay. Did you observe that he had a 11:12
11 flag to direct traffic or some sort of sign
12 to direct traffic?

13 A. I did not because he was in -- in a
14 vehicle.

15 Q. All right. If he was in a 11:13
16 vehicle --

17 A. Right.

18 Q. -- Mr. Merritt --

19 A. Right.

20 Q. -- how did you know he was a 11:13
21 flagman, to do -- do his job?

22 A. Because he was waiting there at the
23 road, and we discussed with Chris that that
24 was the flagman's location, and he was then
25 waiting for any kind of earthwork or -- or 11:13

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1 trucks to cross the road and then he would
2 get out and do his flagman duties.

3 Q. The photographs you took, could you
4 tell me what they -- I don't know whether you
5 took more than one or one photographs. 11:13

6 A. I just took one photo.

7 Q. What did it show?

8 A. Showed the -- the warning sign that
9 says there's a truck crossing ahead, and
10 in -- in the distance you could see a -- a 11:14
11 vehicle where the flagman was sitting.

12 Q. Do you have that -- Can you get your
13 hands on that photograph? Is it available?

14 A. It's available.

15 MR. DETRICK: Would -- Mr. Cox, 11:14
16 would you have any problem in having
17 Mr. Merritt attach that photograph as an
18 Exhibit No. 9 to the deposition?

19 MR. COX: Let's go off the record,
20 please. 11:14

21 THE VIDEOGRAPHER: Going off --

22 MR. DETRICK: Just tell me whether
23 you're going to object or not object.

24 THE VIDEOGRAPHER: We're not off.

25 MR. COX: Well, I would -- I'm going 11:14

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1 to -- I want to go off the record.

2 THE VIDEOGRAPHER: Mr. Detrick, can
 3 we go off the record? He has to agree. They
 4 both have to agree before I can go off the
 5 record.

11:14

6 Mr. Detrick, can I go off the
 7 record?

8 MR. DETRICK: I don't know why --
 9 I'll go off the record.

10 THE VIDEOGRAPHER: All right.

11:15

11 MR. DETRICK: I don't know why, but
 12 I'll do it.

13 THE VIDEOGRAPHER: Going off the
 14 record; the time is 11:13 a.m.

15 (Discussion held off the record.)

11:15

16 THE VIDEOGRAPHER: We are back on
 17 the record. The time is 11:18.

18 Proceed.

19 BY MR. DETRICK:

20 Q. Mr. Merritt, before we went off the
 21 record, we were discussing a photograph you
 22 took on-site on September 1st, 2007 [sic], of
 23 Mr. Chris English --

11:19

24 A. 2009.

25 Q. -- is that correct?

11:20

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1 '09. I'm sorry.

2 A. Thank you.

3 Q. All the dates...

4 A. That's okay. Yes.

5 Q. Is that correct? 11:20

6 A. That is correct.

7 Q. All right. And where is this
8 photograph as we speak?

9 A. It's in my computer storage file.

10 Q. Okay. Is it available where you can 11:20
11 print a copy of the photograph?

12 A. Yes.

13 Q. Do you have any problem in -- in
14 doing that yourself, printing a copy of the
15 photograph? 11:20

16 A. No.

17 Q. Okay. And do you specifically
18 remember where Mr. English was when you took
19 this photograph?

20 A. He was back on the site, landfill 11:20
21 site someplace. I was leaving the site at
22 that time.

23 Q. All right, sir. And would you have
24 any problem, Mr. Merritt, in printing that
25 photograph and providing it to the court 11:21

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1 reporter as an additional Exhibit No. 9?

2 A. I have no problem.

3 Q. All right. Now, I --

4 MR. COX: I --

5 BY MR. DETRICK: 11:21

6 Q. -- request --

7 MR. COX: Go ahead.

8 BY MR. DETRICK:

9 Q. I, on behalf of -- of the
 10 Valenzuelas, request that you do that, 11:21
 11 Mr. Merritt, and provide it as Exhibit No. 9,
 12 and we can argue about its admissibility at a
 13 later date, if it's okay.

14 You have any problem with that?

15 A. No. 11:21

16 Q. Okay.

17 MR. COX: Now, that's for -- and for
 18 the record, I would like to preserve an
 19 objection, because this is Mr. Merritt's
 20 trial testimony, and we don't have the photo 11:21
 21 in front of us now and -- for me to talk to
 22 him about that photo. So I'd just like to
 23 preserve that objection for -- for that
 24 reason, simply because we do not have it --
 25 Mr. Merritt does not have it at the time of 11:22

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1 his testimony here.

2 BY MR. DETRICK:

3 Q. Mr. Merritt, now, you also said that
4 you did periodic reviews by going to the site
5 every four to five years to determine if Sam 11:22
6 English Grading Company was complying with
7 the contract provisions; is that correct?

8 A. Correct.

9 Q. And a part of your going to these
10 periodic reviews was to find -- to -- to see 11:22
11 if Mr. English had flagmen and warning signs
12 present at the location as he is required to
13 do under the contract; is that correct?

14 A. That's correct.

15 Q. And -- And all of these four to 11:23
16 five -- every four to five years times that
17 you would -- would go to the site, did
18 Mr. Chris English know that you were coming
19 before you came?

20 A. Probably. I can't remember all of 11:23
21 the events, but yes. More than likely, he
22 was.

23 Q. Okay. And when you would come every
24 four to five years to the site and -- did you
25 see the flagmen and the warning signs every 11:23

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1 time you went?

2 A. I did.

3 Q. Okay. And could you please describe
4 during these periodic reviews every four to
5 five years what kind of warning signs you 11:23
6 would see when you went to the site?

7 A. They were similar to what was
8 required in the encroachment permit and -- so
9 they were similar to what we had requested at
10 the time in our contract documents. 11:24

11 Q. And could you tell us, Mr. Merritt,
12 when you did your periodic reviews every four
13 to five years and went to the site, what kind
14 of -- could you describe the flagman that was
15 present at the site? 11:24

16 A. Well, there was a flagman and --
17 with the flag and the -- identifying himself
18 with a vest, so -- as I remember, so that was
19 typical of what I saw.

20 Q. And was that flagman directing the 11:24
21 traffic on the -- on Redds Branch Road
22 whenever a motor grader would cross Redds
23 Branch Road?

24 A. Yes.

25 MR. DETRICK: That's all the 11:24

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1 questions I have. Thank you.

2 - - -

3 RECROSS-EXAMINATION

4

5 BY MR. COX: 11:24

6 Q. Mr. Merritt, the -- the maintenance
7 of the -- if I understand correctly, and I
8 want the jury to be clear, since 1984 through
9 the present, Sam English Grading has had a
10 maintenance of the landfill contract with 11:25
11 Owens Corning --

12 A. Maintenance --

13 Q. -- is that right?

14 A. We call it operation, but
15 maintenance would be part of that 11:25
16 requirement, yes.

17 Q. Okay. And maintenance does -- The
18 regular routine maintenance does not require
19 crossing Redds Branch Road, does it?

20 A. The per- -- The operation of the 11:25
21 landfill would require low-frequency crossing
22 of Redds Branch Road, correct.

23 Q. Low-frequency crossing. And if
24 there's low-frequency crossing, we're talking
25 about weeks and sometimes months where 11:25

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25 about weeks and sometimes months where 11:25

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1 there's no crossing --

2 A. I would agree --

3 Q. -- of the road?

4 A. I would agree with that.

5 Q. And if there's weeks and months of 11:26
6 no crossing, there cannot be signs up warning
7 of crossing?

8 A. Yeah. And we don't -- we don't --
9 that is not a requirement. The -- The
10 requirement of the signs are strictly when -- 11:26
11 and flagmen is when we are building one of
12 these earthen berms and we have a -- a
13 concentrated effort of -- of trucks and
14 earth-moving equipment crossing Redds Branch
15 Road. Any other time, it's not required. 11:26

16 Q. Okay. So some of your inspections
17 every four to five years for which you do not
18 have documentation here today evidencing when
19 those were may have been during periods of
20 time where there was no crossing going on; is 11:26
21 that accurate?

22 A. I visited the landfill on numerous
23 occasions with -- while there was either a
24 construction of an earthen berm going on or
25 when there was no construction of an earthen 11:26

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1 berm. So I -- I visited the landfill under
2 both conditions.

3 Q. Okay. So sometimes there may be
4 signs up, sometimes there may not?

5 A. That is correct. And there's only 11:27
6 signs up when there's actually an earthwork
7 project, and that was every four to five
8 years.

9 Q. Okay. And I just want to be clear,
10 the contract that Sam English Grading was 11:27
11 under on August 7, 2009, of course, was
12 the -- the ongoing maintenance contract
13 that's -- that's renewed every so many years,
14 and then the construction of the earthen berm
15 contract dated May 2009, that -- that -- that 11:27
16 was a second contract for construction of the
17 berm that was entered on May 2009, I believe
18 the work started in August of 2009 and
19 completed in September or early October of
20 2009; is that right? 11:27

21 A. That's correct. So he had --

22 Q. So it was --

23 A. So he had the work of the -- the
24 concentrated effort of building the perimeter
25 berm during those periods of time, and at the 11:28

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1 same time he was also the landfill operator
2 and he was operating the landfill on a
3 regular daily basis.

4 Q. And -- And you would agree that
5 the -- the regular operation of the landfill 11:28
6 doesn't necessarily require, according to
7 Owens Corning, road crossing signs or
8 flagging --

9 A. It does not.

10 Q. -- right? 11:28

11 A. Correct.

12 Q. Okay. And the construction of the
13 berm contract was a relatively short in
14 duration, again, two- to three-month job?

15 A. That is correct. And they all were 11:28
16 like that. The -- Every four or five years,
17 we had one of these earthen projects that
18 were a -- a concentrated construction period
19 of a couple of months.

20 Q. Okay. And Addendum No. 1 to the 11:28
21 contract, Paragraph 4, is the only reference
22 by Owens Corning of crossing safety measures;
23 is that right? Paragraph 4 of Addendum
24 No. 1, that's the only place where crossing
25 safety measures are referenced in this two- 11:29

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1 to three-month contract --

2 A. That is correct.

3 Q. -- with Owens Corning in 2009?

4 A. That's correct.

5 Q. Okay. And -- Okay. And that -- And 11:29

6 that paragraph, Paragraph No. 4, seeks

7 compliance by Sam English Grading with Owens

8 Corning's encroachment permit that was to be

9 provided to Sam Eng- -- English Grading

10 which, one, was never provided; and, two, was 11:29

11 expired; is that accurate?

12 A. Correct.

13 MR. COX: I don't have any further

14 questions.

15 MR. DETRICK: Thank you, 11:29

16 Mr. Merritt. I don't have any further

17 questions.

18 THE VIDEOGRAPHER: Mr. Merritt, you

19 have the right to read the transcript of your

20 deposition once the court reporter has it 11:30

21 prepared, or you may waive that right. Do

22 you want to read --

23 THE WITNESS: No.

24 THE VIDEOGRAPHER: -- the

25 transcript? 11:30

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1 You also have the right to
2 immediately view your video deposition if you
3 desire, or you may waive that right.

4 THE WITNESS: I waive that.

5 THE VIDEOGRAPHER: Thank you. This 11:30
6 concludes the deposition. Off the record at
7 11:29 a.m.

8 (Signature waived.)

9 (Video review waived.)

10 - - -

11 (Thereupon, the video deposition was
12 concluded at 11:29 o'clock a.m. on
13 Thursday, May 31, 2012.)

14 - - -

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