

The State of South Carolina
In the Court of Appeals

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S.C. Supreme Court

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

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

Respondent,

versus

Sam English Grading, Inc.,

Appellant.

Record On Appeal
Volume I of IV (p.1 -448)

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FEB 05 2014

SC Court of Appeals

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

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 31 2012

SC 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

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

RESPONDENT,

versus

Sam English Grading, Inc.,

APPELLANT.

-and-

Civil Action No.: 2012-CP-02-01225

Michael Lee Valenzuela,

PLAINTIFF,

versus

Sam English Grading, Inc.,
Chris W. English, and Jeffrey
Dwayne Lewis

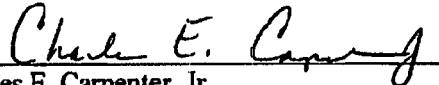
DEFENDANTS.

NOTICE OF APPEAL

The Defendant, Sam English Grading, Inc., appeals from (1) the Order of the
Honorable Clifton Newman, in which he verbally ruled on July 23, 2012 to deny the

COPY

Defendant's Motion to Consolidate as indicated in the attached Proposed Order which was not formally filed with the Court; (2) the Order of the Honorable Doyet A. Early, III in which he verbally ruled on August 8, 2012 to deny the Defendant's Motion for a Continuance as indicated in the attached Proposed Order which was not formally filed with the Court; (3) the jury's verdict entered against the Defendant on September 4, 2012; and (4) the Order of the Honorable Doyet A. Early, III, dated September 27, 2012 and filed October 4, 2012, denying Defendant's post-trial motions. The Defendant received written notice of this Order on October 2, 2012.


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October 31, 2012.

Other Counsel of Record:

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**ATTORNEYS FOR RESPONDENTS,
PAIGE WEEKS JOHNSON,
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF CHRISTIE LANE VALENZUELA**

-and-

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ATTORNEY FOR PLAINTIFF MICHAEL LEE VALENZUELA

CERTIFICATE OF SERVICE

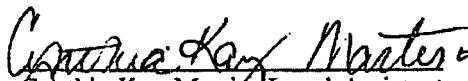
I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing Notice of Appeal, dated October 31, 2012, with attached Judgments and Orders, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

The Honorable Liz Godard
Clerk of Court for Aiken County
P.O. Box 583
Aiken, SC 29802-0583

J. Paul Detrick
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L. Lisa McPherson
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Cynthia Kay Martin, Legal Assistant
to Charles E. Carpenter, Jr.

Dated: October 31, 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	CIVIL ACTION NO.: 2011-CP-02-00868
	)	
PAIGE WEEKS JOHNSON, AS	)	
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF CHRISTIE LANE	)	
VALENZUELA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
SAM ENGLISH GRADING, INC.,	)	
	)	
Defendant.	)	

ORDER 10-4-12
 [Signature]
 Deputy Clerk

This matter comes before me on September 24, 2012, on the post-trial motions of the Defendant, which follow the trial of this case before an Aiken County jury. On August 31, 2012, the jury awarded the Plaintiff a verdict of \$2,900,000.00 actual damages. The jury found that Michael Valenzuela was 35% negligent. The jury also found that the Defendant's conduct was grossly negligent, wilful, wanton, careless or reckless. The jury declined to award any punitive damages by its verdict on September 4, 2012. The Court allowed post-trial motions to be submitted within ten (10) days. The Defendant filed its post-trial motions, along with its memorandum setting forth its position on its post-trial motions. The Court heard oral arguments of the parties on these motions on September 24, 2012. Appearing at the hearing were Trey Cox on behalf of the Defendant and Paul Detrick, Lisa McPherson and Ronald Maxwell on behalf of the Plaintiff.

The Court has fully considered all the post-trial motions of the Defendant, the memorandum of the Defendant and argument of counsel at the hearing on the post-trial motions.

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 #1

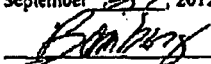
For the reasons set forth in the trial of this matter and at the post-trial motions hearing the Court finds that all post-trial motions of the Defendant should be respectfully denied.

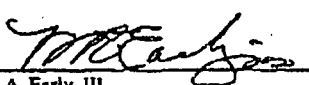
The Defendant also moved pursuant to Section 15-38-15 for a reduction of the jury's actual damages award based on the jury's finding of 35% comparative negligence on Michael Valenzuela. The jury found that the Defendant's conduct was grossly negligent, wilful, wanton or careless. Pursuant to Section 15-38-15(F) the Court finds that the comparative negligent finding of the jury does not apply since the Defendant's conduct was determined to be grossly negligent, wilful, reckless, or wanton and the jury's verdict should not be reduced.

The Defendant also moved for a set-off of the jury's award based on the settlement obtained by the Plaintiff of \$40,000.00 from the insurance carrier on the motorcycle involved in the accident. The Court grants this motion.

It is therefore, Ordered that the post-trial motions of the Defendant are hereby denied. It is further Ordered, that pursuant to Section 15-38-15 the verdict of the jury is not reduced by any comparative negligence of Michael Valenzuela. It is Ordered that the verdict of the jury is reduced by the \$40,000.00 settlement of the Plaintiff. It is Ordered that the Clerk shall enter judgment against the Defendant in the amount of Two Million Eight Hundred Sixty Thousand and 00/100 (\$2,860,000.00) Dollars.

IT IS SO ORDERED.

September 27, 2012
 SC


Doyce A. Early, III
Presiding Judge, Second Judicial Circuit

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) CIVIL ACTION NO.: 2011-CP-02-00868
) PAIGE WEEKS JOHNSON, AS)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF CHRISTIE LANE)
VALENZUELA,,)
Plaintiff,)
) v.)
) SAM ENGLISH GRADING, INC.,)
Defendant.)

VERDICT FORM

In the matter of Paige Weeks Johnson, as Personal Representative of the Estate of Christie Lane Valenzuela, we the Jury, find the following:

1. Was the Defendant negligent?
☒ YES - Go to Question 2
☐ NO - Stop deliberations
2. Was the Defendant's negligence a proximate cause of Christie Lane Valenzuela's death?
☒ YES - Go to Question 3
☐ NO - Stop deliberations
3. Was Michael Valenzuela negligent?
☒ YES - Go to Question 4
☐ NO - Go to Question 6
4. Was Michael Valenzuela's negligence a proximate cause of Christie Lane Valenzuela's death?
☒ YES - Go to Question 5
☐ NO - Go to Question 6
5. Using the combined negligence that proximately caused Christie Lane Valenzuela's death as one hundred percent (100%), what percentage of that negligence is attributable to Michael Valenzuela and what percentage is attributable to the Defendant? [The percentage must add up to 100.]

MICHAEL VALENZUELA 35 %
SAM ENGLISH GRADING, INC. 65 %
Total 100 %

FILED 9.4.12
[Signature]
CLERK OF COURT
Anita Knepper
Deputy Clerk

6. Please state the amount of damages, if any, sustained by the Plaintiff.

\$ 2.9 million Total Actual Damages

7. Was the Defendant's conduct grossly negligent, willful, wanton, careless, or reckless?

☒ YES
☐ NO

Debbie J. Muschick
FOREPERSON

WHEN YOU HAVE COMPLETED THE QUESTIONS, NOTIFY THE BAILIFF.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

Plaintiff,

vs.

Sam English Grading, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CIA NO.: 2011 CP 02-00808

SUMMONS

TO: SAM ENGLISH GRADING, INC., THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff or her attorney, Caroline Callison Tiffin, at her office, 119 East Main Street, Lexington, South Carolina 29072, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

McWHIRTER, BELLINGER & ASSOCIATES, P.A.
Attorneys for Plaintiff

BY:

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Lexington, South Carolina

April 18, 2011

ORIGINAL
APR 19 2011
119 800
AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

Plaintiff,

vs.

Sam English Grading, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT

) CVA NO.: 2011-CP-02-00868

) COMPLAINT
) (Jury Trial Demanded)

COMES NOW the Plaintiff as Personal Representative of the Estate of Christie Lane Valenzuela, complaining of the above-named Defendant and, upon information and belief, alleges as follows:

1. The Plaintiff, Paige Weeks Johnson, is a citizen and resident of the County of Aiken, State of South Carolina, and is the duly-appointed Personal Representative of the Estate of Christie Lane Valenzuela, deceased. She brings this action on behalf of the Estate of Christie Lane Valenzuela and for damages recoverable by the statutory beneficiaries of Christie Lane Valenzuela.

2. Defendant Sam English Grading, Inc. (hereinafter, "English Grading") is a corporation organized and existing under the laws of the State of South Carolina, with its principal place of business located in the County of Aiken, South Carolina, and which at all times relevant to this Complaint owned, operated, possessed, maintained, and controlled a 1998 Caterpillar machine/equipment, hereinafter referred to as "machine" (VIN: 6CB0070) that was involved in the wreck giving rise to this litigation.

3. Defendant English Grading was at all pertinent times engaged in the operation of and use of machinery and equipment for the purposes of grading, clearing, dirt removal, dirt placement, and other activities involved in construction and, at all times pertinent to this Complaint, were so engaged and were performing such services in the County of Aiken, State of South Carolina.

7. Defendant English Grading employed Jeffery Wayne Lewis, who was responsible

APR 13 2011
CLERK OF COURT

for driving the heavy equipment involved in the wreck.

8. Jeffery Dwayne Lewis (hereinafter "Lewis") is a citizen and resident of the County of Aiken, State of South Carolina, and was at all times pertinent to this Complaint, an employee, agent, and/or servant of Defendant English Grading. Furthermore, he was at all times pertinent to this Complaint acting within the course and scope of said employment, agency, or service of Defendant English Grading under the doctrine of *respondeat superior*.

9. On or about the afternoon of August 7, 2009, Lewis was the driver and operator of the above-referenced heavy machinery/equipment (hereinafter, "machinery") owned by English Grading and was traveling Eastbound on a private road headed toward the intersection with S-218/Redds Branch Road in Aiken County, South Carolina.

10. As Lewis traveled Eastbound at the time and place described in Paragraph 9, the Plaintiff's decedent, Christie Lane Valenzuela was a passenger on the back of a 2001 Honda motorcycle bearing South Carolina license tag ZY3630 that was traveling Southbound on Redds Branch Road, being operated by Michael Lee Valenzuela, the husband of Plaintiff's decedent.

11. The motorcycle on which Christie Lane Valenzuela and her husband were traveling had the Right of Way, and there was a Stop sign on the private road on which Lewis was traveling that was located at the intersection with Redds Branch Road. Both the Stop sign and the Right of Way of motorists on Redds Branch Road required Lewis to stop at the intersection, at which he should have looked left, right and left again in order to safely enter the intersection.

12. The ability of Lewis to safely, appropriately, and timely stop at the Stop sign before entering the intersection was dependent upon his appropriately and safely slowing his equipment down as he approached the Stop sign and then appropriately, safely, and timely applying his brakes and/or downshifting.

13. Lewis failed to take the necessary steps or to operate the equipment in a manner so as to safely, appropriately, and timely stop and yield to oncoming traffic.

14. As the motorcycle approached the intersection with the private road, Lewis continued toward the intersection at an unsafe speed without appropriately slowing, braking, and/or downshifting so as to be able to stop at the Stop sign and yield to the motorcycle.

15. The manner in which Lewis was operating the machinery and the speed at which he was traveling as he approached the intersection with Redds Branch Road clearly indicated his intent to run the Stop sign and enter Redds Branch Road without stopping.

16. The speed at which Lewis was traveling was reasonably interpreted by Michael Lee Valenzuela and Christie Valenzuela as his clear intent to run the Stop sign and enter Redds Branch Road without stopping.

17. Lewis, in fact, intended to run the Stop sign, to enter the intersection and cross the road without stopping, thereby creating a danger to Michael and Christie Lane Valenzuela.

18. As the motorcycle approached the intersection with the private road, Lewis suddenly and without warning negligently and wrongfully approached the intersection at an unsafe speed and/or entered the intersection.

19. Motorists Michael and Christie Lane Valenzuela were in reasonable and predictable fear for their safety and for their lives due to Lewis clearly exhibiting an intention to enter the roadway without stopping. Lewis' actions caused and forced Michael Valenzuela to take emergency evasive action to avoid crashing into or being run over by the machine, resulting in the motorcycle overturning in the roadway, and in Christie Lane Valenzuela suffering fatal injuries and dying shortly after the wreck.

20. Because Defendant English Grading failed to employ a competent, trained, skilled, and properly equipped flagman and failed to have any warning signs on the highway at all of the danger ahead, motorists Michael and Christie Lane Valenzuela had no warning of the danger created by Defendant English Grading, acting by and through its agents, servants and employees, at the point where Redds Branch Road and the private drive intersected.

FOR A FIRST CAUSE OF ACTION

(Negligence/Gross Negligence - Wrongful Death)

21. The Plaintiff realleges and reiterates all of the allegations contained in Paragraphs one through twenty, as fully as if repeated verbatim.

22. Defendant English Grading, acting by and through its agents, servants and employees owed Michael and Christie Lane Valenzuela, as well as other motorists on the roadways of Aiken County, a duty of care and breached that duty by their careless, negligent, and/or grossly negligent acts.

23. The fatal injuries suffered by Christie Lane Valenzuela were directly and proximately caused by the negligent, reckless, wilful, wanton and/or grossly negligent acts and/or omissions of the Defendant, acting through its agents, servants and employees in the following particulars, *to wit*:

- a. In Lewis failing to stop for the Stop sign;
- b. In Lewis entering or attempting to enter the intersection without stopping;
- c. In Lewis traveling too fast for conditions;
- d. In Lewis failing to yield the right of way;
- e. In Lewis failing to maintain a proper lookout;
- f. In Lewis failing to maintain proper control over the machinery/equipment he was operating;
- g. In Lewis failing to apply his brakes, if any he had;
- h. In Lewis operating the machinery/equipment in violation of mandatory safety laws, statutes, regulations and ordinances so as to constitute Negligence *per se*;
- i. In Lewis failing to use that degree of care and caution that a reasonably prudent person would have used under the same or similar circumstances; and
- j. In Lewis driving said vehicle in utter disregard of the rights and safety and well-being of Michael Lee Valenzuela and Christie Lane Valenzuela and other motorists lawfully using the public roadway at the time and place of this wreck;
- h. In failing to properly and adequately train and supervise driver Lewis so as to ensure that he could and would safely operate the machinery on the roadways of Aiken County, South Carolina;
- i. In failing to have in place adequate policies and procedures to train and monitor its drivers or, if such policies and procedures were in place, in failing to enforce them;
- j. In failing to have in place adequate policies and procedures to mandate compliance by its drivers with statutes, laws and regulations regarding the operations of heavy equipment or, if such policies and procedures were in place, in failing to enforce them;
- k. In failing to have in place an adequate safety program for the safety and protection of the motoring public;
- l. In negligently entrusting said machinery to the care, control, custody and use of Lewis without properly training him to operate said heavy equipment, without adequately checking his qualifications to drive this heavy equipment, and without adequately supervising him to ensure that he was safely driving and operating the

machinery;

- m. In permitting a careless driver to drive and operate its equipment;
- n. In failing to adequately warn the driving public with signs or other devices of the danger created by machinery entering the roadway without stopping or even slowing at the intersection or otherwise complying with laws and safety rules;
- o. In failing to have a properly and adequately trained and qualified flagman so as to safely and adequately warn the motoring public or otherwise prevent collisions between motorists and the company's machinery/equipment;
- p. In failing to properly and adequately equip a qualified flagman with gear and warning devices;
- q. In failing to warn the motoring public of the danger they created;
- r. In instructing and/or permitting its drivers to run the Stop sign at the intersection of Redds Branch Road and the private road where this wreck happened;
- s. In instructing and/or permitting its drivers to drive the machinery across Redds Branch Road without stopping and yielding the right of way;
- t. In failing to properly supervise its drivers with regard to their practices of driving across Redds Branch Road without stopping, looking for oncoming traffic, and otherwise taking necessary steps so as to not cause harm and injury to the motoring public on Redds Branch Road in Aiken County;
- u. In not monitoring the practices of its drivers, specifically, as to slowing, stopping, and then safely crossing Redds Branch Road;
- v. In not monitoring and properly supervising its drivers with regard to their speed as they approached Redds Branch Road;
- w. In failing to take any and all necessary steps to ensure that his drivers did not drive in a way that endangered the motoring public on Redds Branch Road;
- x. In failing to instruct drivers to stop at the Stop sign at the intersection of the private road and Redds Branch Road where this wreck happened;
- y. In failing to exercise the degree of care and caution which a reasonable, prudent entity would have exercised under the same or similar circumstances; and
- z. In other particulars that may be discovered and/or shown in the discovery process and/or trial of this case.

24. As a direct and proximate cause of the aforementioned careless, negligent, and/or grossly negligent acts and/or omissions of the Defendant, acting by and through its agents, servants and employees, as hereinabove more particularly set forth, Christie Lane Valenzuela suffered serious, severe, painful, debilitating, and fatal injuries which resulted in her death.

25. As a further direct and proximate result of the negligence, carelessness, and/or grossly negligent acts and/or omissions of Defendant, by and through its agents, servants and employees, Christie Lane Valenzuela's statutory beneficiaries have lost the aid, comfort, companionship, support and society of Ms. Valenzuela; have suffered economic loss; have suffered emotional distress, anxiety, grief, and sorrow, for which Plaintiff is entitled to recover on behalf of the statutory beneficiaries Actual and Punitive damages (when allowed by law) pursuant to S.C. Code Annotated §§15-51-10 *et seq.*, in an amount to be determined by the jury at the trial of this action.

FOR A SECOND CAUSE OF ACTION

(Negligence - Survivorship Action)

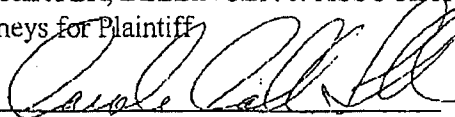
26. The Plaintiff realleges and reiterates all of the allegations contained in paragraphs one through twenty-five, as fully as if repeated verbatim:

27. Christie Lane Valenzuela's Estate, as a direct and proximate result of the actions and omissions of the Defendant, as aforesaid, has incurred expenses including but not limited to medical, funeral and cremation expenses. The Plaintiff is further informed and believes that Christie Lane Valenzuela suffered fear, excruciating physical pain and suffering, and mental and emotional distress and anguish prior to her death, as evidenced by her curled toes and weak pulse which was observed by medical first responders. That as a result, her estate is entitled to an award of Actual damages pursuant to S.C. Code Annotated §15-5-90 in an amount to be determined by the jury at the trial of this action.

WHEREFORE, Plaintiff prays for judgment against the Defendant for actual and punitive damages in a reasonable amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper. Plaintiff is informed and believes she is entitled to judgment against Defendant.

Signature page following

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Lexington, South Carolina

April 18, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	C/A NO.: 2011-CP-02-00868
	)	
Paige Weeks Johnson as the,	)	
Personal Representative of the	)	
Estate of Christi Lane Valenzuela,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ANSWER
	)	(Jury Trial Demanded)
	)	
Sam English Grading, Inc.,	)	
	)	
Defendants.	)	
	)	

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SEP 15 2011
Sal
AIKEN COUNTY
CLERK OF COURT

TO: L. LISA MCPHERSON, ESQUIRE, CAROLINE CALLISON TIFFIN, ESQUIRE, AND RONALD A. MAXWELL ATTORNEYS FOR THE PLAINTIFF AND PLAINTIFF:

The Defendant, Sam English Grading, Inc., hereby respond to the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in the Plaintiff's Complaint not hereinafter expressly admitted, modified or otherwise explained or qualified is hereby denied in their entirety and the Defendants demand strict proof thereof.

2. Defendant is without sufficient information or knowledge at this time upon which to form a belief as to the allegations of paragraph 1 and, therefore, denies the same in their entirety and demands strict proof thereof.

3. With regards to the allegations of Paragraph 2 of the Plaintiff's Complaint, Defendant admits ownership of a 1988 (not a 1998) Caterpillar bearing VIN#: 6CB0070. The Defendant denies the Caterpillar was involved in the wreck giving rise to this litigation and demands strict proof thereof. The remaining allegations of paragraph 2 not addressed by the foregoing are admitted.

4. Defendant admits paragraph 3.

5. Plaintiff's Complaint contains no paragraphs 4, 5 or 6, and therefore no response is necessary, but to the extent a response is deemed necessary, the same are denied.

6. Defendant admits paragraphs 7, 8, 9 and 10 upon information and belief.

7. As to the allegations of paragraph 11, the paragraph calls for legal conclusions. Therefore, the Defendant would refer the plaintiff to the traffic laws of South Carolina, denies any allegations of paragraph 11 inconsistent therewith, and denies Defendant violated any of the traffic laws of South Carolina. Any allegations of paragraph 11 deemed unaddressed by the foregoing are denied in their entirety and Defendant demands strict proof thereof.

8. Paragraph 12 is admitted.

9. Defendant denies the remaining allegations of the Plaintiff's Complaint, including but not limited to paragraphs 13 – 27, all sub paragraphs including a. – z. of paragraph 23, and the prayer for relief, in their entirety and demands strict proof thereof.

FOR A SECOND AND AFFIRMATIVE DEFENSE
(S.C.R.C.P. 12(b)(6))

10. Defendant realleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

11. The Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendant and, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, all claims against the Defendant should be dismissed with prejudice.

FOR A THIRD DEFENSE
(Intervening Acts of Third-Parties)

12. The Defendant re-alleges and incorporates by reference the above

paragraphs as if fully set forth herein verbatim.

13. The damages sought by the Plaintiff in this lawsuit were caused by the acts or omissions of another party or parties other than the Defendant, including but not limited to statutory beneficiary Michael Valenzuela, over which the Defendant had no control, and, therefore, the Plaintiff may not recover from the Defendant in any sum whatsoever due to the same.

FOR A FOURTH DEFENSE
(Comparative Negligence of Third Parties)

14. Defendant re-alleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

15. That by reason of the negligence, carelessness, recklessness and willfulness of parties other than the Defendant, including but not limited to statutory beneficiary Michael Valenzuela, the damages sought by the Plaintiff were due to and proximately caused by such, and combining, contributing and concurring with any negligence, carelessness, recklessness and willfulness on the part of Defendants so as to be a proximate cause of said damages sought by the Plaintiff without which the same would not have occurred. This court should compare the negligence of parties other than the Defendant, including but not limited to statutory beneficiary Michael Valenzuela, to any negligence of Defendant, and the amount of recovery available against Defendants should be reduced by that percentage of the parties other than the Defendant's, including but not limited to statutory beneficiary Michael Valenzuela, negligence, carelessness, recklessness and willfulness.

FOR A FIFTH DEFENSE
(Comparative Negligence of a Statutory Beneficiary)

16. Defendant re-alleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

17. That by reason of the negligence, carelessness, recklessness and willfulness of statutory beneficiary Michael Valenzuela, the damages sought by the Plaintiff on behalf of her decedents statutory beneficiaries were due to and proximately caused by such, and combining, contributing and concurring with any negligence, carelessness, recklessness and willfulness on the part of Defendant so as to be a proximate cause of said damages sought by the Plaintiff without which the same would not have occurred. This court should compare the negligence of statutory beneficiary Michael Valenzuela to any negligence of Defendant, and the amount of recovery available to Michael Valenzuela as a statutory beneficiary should be reduced by that percentage of Michael Valenzuela's, negligence, carelessness, recklessness and willfulness.

FOR A SIXTH DEFENSE
(Punitive Damages)

18. Defendant re-alleges and incorporates by reference the above paragraphs as if fully set forth herein verbatim.

19. Defendants would show that an award of punitive damages violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. any award of punitive damages based upon the wealth of the Defendants violate due process guarantees;

d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

f. the Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant.

20. The Plaintiff's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

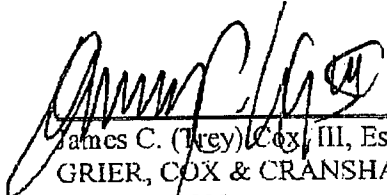
FOR A SEVENTH DEFENSE
(Reservation of Additional Defenses)

21. Defendant re-alleges and incorporates by reference the above Paragraphs as if fully set forth herein verbatim.

22. Defendant reserves any additional and further defenses as may be revealed by additional information during the course of any discovery and/or investigation, and as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Complaint, the Defendant prays the Complaint against it be dismissed with attorneys fees, costs and for such other and further relief as the court may deem just and proper under the circumstances.

Respectfully Submitted,



James C. (Trey) Cox, III, Esquire
GRIER, COX & CRANSHAW, LLC
P.O. Box 2823
Columbia, SC 29202
(803) 731-0030 (Office)
(803) 731-4059 (Fax)

ATTORNEY FOR DEFENDANT

September 13, 2011
Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

Plaintiff,

vs.

Sam English Grading, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT

) C/A NO.: 2011-CP-02-00868

CERTIFICATE OF SERVICE

COPY
ORIGINAL FILED

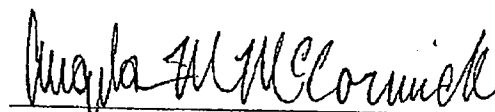
SEP 15 2011 *gaw*

AIKEN COUNTY
CLERK OF COURT

PLEADINGS:

ANSWER

On behalf of **Defendant** in the above-captioned matter, I hereby certify that I am an employee of Grier, Cox & Cranshaw, LLC, and that I have served a copy of the aforementioned documents upon the addressees below-named by placing the same in the United States Mail, proper First Class pre-paid postage affixed thereto, on this 13th day of September, 2011.


Angela M. McCormick

West Columbia, South Carolina

Addresses Served:

L. Lisa McPherson, Esquire
Caroline Callison Tiffin, Esquire
McWhirter Bellinger & Associates
119 E. Main Street
Lexington, SC 29072

Ronald A. Maxwell, Esquire
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29801

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

C/A NO.:

2011-CP-02-00868

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

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff,

vs.

Sam English Grading, Inc.,

Defendant.

Plaintiff's Attorney:

. Bar No.

Address:

Phone: Fax:

E-mail: Other

Defendant's Attorney:

James C. (Trey) Cox, III. Bar No. 16923

Address: 2999 Sunset Boulevard, Suite 200

West Columbia, SC 29169

Phone: (803) 731-0030 Fax: (803) 731-4059

E-mail: JCox@GrierCoxandCranshaw.com Other

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment or Partial Summary Judgment

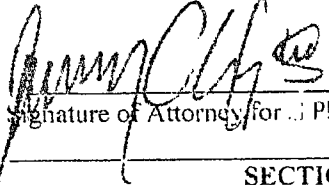
Estimated Time Needed: 45 min Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for the relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff/Defendant

August 7, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID-AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency vs. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, Reduce to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	C/A NO.: 2011-CP-02-00868
Paige Weeks Johnson as the Personal	)	
Representative of the Estate of Christie	)	
Lane Valenzuela,	)	MOTION FOR SUMMARY
	)	JUDGMENT OR PARTIAL
Plaintiff,	)	SUMMARY JUDGMENT
	)	
vs.	)	
	)	
Sam English Grading, Inc.,	)	
	)	
Defendants.	)	
	)	

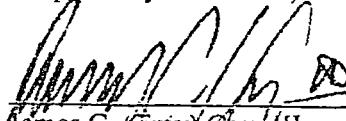
**TO: L. LISA MCPHERSON, ESQUIRE, AND J. PAUL DETRICK, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFF AND TO PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant will move before the presiding judge of the Second Judicial Circuit at such time and place as the Court may direct, for an Order granting Summary Judgment and/or partial summary judgment pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure* on the grounds that there is no genuine issue as to any material fact involved in this case and that Defendant, is, therefore, entitled to Summary Judgment as a matter of law.

This motion is made on, but is not limited to, the grounds the Plaintiff lacks any evidence, even when viewed in the light most favorable to the Plaintiff, to establish its alleged causes of action against Defendant and, therefore, Defendant is not liable to the Plaintiff for any of its alleged damages in this case.

The Defendant's Motion will further be based on the pleadings herein, affidavits, memorandums to be submitted as part of this Motion, rules of court, statutes, the applicable law, and any such other evidence as may be accepted by the Court.

Respectfully Submitted,



James C. (Trey) Cox III

Danielle F. Payne

GRIER, COX & CRANSHAW, LLC

Post Office Box 2823

Columbia, South Carolina 29202

Tele: (803)731-0030

Fax: (803)731-4059

ATTORNEYS FOR DEFENDANT

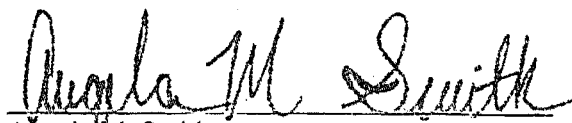
August 7, 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	C/A NO.: 2011-CP-02-00868
Paige Weeks Johnson as the Personal	)	
Representative of the Estate of Christie	)	
Lane Valenzuela,	)	
	)	CERTIFICATE OF SERVICE
Plaintiff,	)	
	)	
vs.	)	
	)	
Sam English Grading, Inc.,	)	
	)	
Defendant.	)	
_____	)	

DOCUMENTS:

MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

On behalf of **Defendant** in the above-captioned matter, I hereby certify that I am an employee of Grier, Cox & Cranshaw, LLC. and that I have served a copy of the aforementioned documents upon the addressees below-named by placing the same in the United States Mail, proper First Class pre-paid postage affixed thereto, on this 8 day of August, 2012.


 Angela M. Smith

West Columbia, South Carolina

Addresses Served:

L. Lisa McPherson, Esquire
 Caroline Callison Tiffin, Esquire
 MCWHIRTER BELLINGER & ASSOCIATES
 119 E. Main Street
 Lexington, SC 29072

J. Paul Detrick, Esquire
 PETERS, MURDAUGH, PARKER,
 ELTZROTH & DETRICK
 P.O. Box 457
 Hampton, SC 29924

Ronald A. Maxwell, Esquire
 MAXWELL LAW FIRM
 P.O. Box 1115
 Aiken, SC 29801

State of South Carolina)

County of Aiken)

Court of Common Pleas
2011-CP-02-00868

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

Plaintiff
vs.

Transcript of Record

Sam English Grading, Inc.)
Defendant)

August 21, 2012
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

J. Paul Detrick, Esq.
Ronald A. Maxwell, Sr., Esq.
Attorneys for the Plaintiff

James C. (Trey) Cox, III, Esq.
Danielle F. Payne, Esq.
Attorneys for the Defendant

Lisa H. Davenport, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

Statement by Mr. Detrick..... 3,38,45,50
Statement by Mr. Cox..... 3,56
Statement by Mr. Maxwell..... 5
Statement by Ms. Payne..... 43,59

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>

(None offered)

1 (Whereupon, on August 21, 2012 the following
2 proceedings were held:)

3 THE COURT: All right. As I understand I have a
4 motion by the defendant for summary judgment, motion by
5 the plaintiff to amend, a motion by the plaintiff in
6 limine, a motion by the defendant in limine; so let me
7 hear the motion for summary judgment. That may take care
8 of everything. If not, then we'll move forward with the
9 rest of it.

10 MS. PAYNE: Thank you, Judge.

11 MR. DETRICK: Your Honor, can I inform the court --
12 sometime I guess we're going to have to try this case if
13 you don't rule for summary judgment. I can't sit too
14 long; so I'll walk around some. I don't want to be
15 disrespectful to the attorneys or yourself. I just want
16 to let you know that.

17 THE COURT: No problem. I admire your tenacity.
18 Who is going to argue the motion for summary
19 judgment?

20 MR. COX: Thank you, Your Honor.

21 THE COURT: All I got was a motion. I don't see a
22 memo with it.

23 MR. COX: Your Honor, I've not done a memo.

24 THE COURT: Okay.

25 MR. COX: This is a negligence case and so the -- all

1 the causes of action are plead in negligence and there are
2 numerous particulars that are plead. Your Honor, the -- a
3 brief background of the facts of the case. You'll recall
4 or may recall that this case involves a motorcycle
5 accident that occurred on Redds Branch Road in Aiken on
6 August 7, 2009. Michael Valenzuela was driving his
7 motorcycle. He had his wife on the back of the motorcycle
8 as a passenger --

9 THE COURT: Uh-huh.

10 MR. COX: -- and the case -- this is actually a case
11 brought by the estate of his wife who at the time of the
12 accident was killed in the accident. Michael
13 Valenzuela---

14 THE COURT: All right. You got Michael riding a
15 motorcycle?

16 MR. COX: Michael, yes, sir.

17 THE COURT: And you got Christie riding as a
18 passenger on the back?

19 MR. COX: Correct. Michael is driving the
20 motorcycle, Your Honor. Christie is on the back.

21 THE COURT: All right. Then what happens?

22 MR. COX: And then Michael Valenzuela has his own
23 case pending for his personal injury; so this is the
24 wrongful death case.

25 THE COURT: Correct.

1 MR. COX: The plaintiff's counsel has withdrawn his
2 survivorship cause of action --

3 THE COURT: Completely.

4 MR. COX: -- so it is strictly wrongful death.

5 THE COURT: All right. So?

6 MR. COX: And we -- my client is Sam English
7 Grading --

8 THE COURT: Okay.

9 MR. COX: -- A small grading company out of Aiken.

10 THE COURT: Okay.

11 MR. COX: They maintain -- they operate the Owens
12 Corning landfill which is a private driveway that crosses
13 over Redds Branch Road and leads to the landfill.

14 THE COURT: Where is that?

15 MR. COX: Redds Branch Road. It is -- Owens Corning
16 is---

17 THE COURT REPORTER: It's across from Owens Corning.

18 MR. DETRICK: Ronnie can tell you.

19 MR. MAXWELL: If you go out, Judge, to Owens Corning.

20 THE COURT: I'm coming in from 78.

21 MR. MAXWELL: If you're coming in from Bamberg it'll
22 be to the right across Highway 78 from Owens Corning back
23 in there off of that highway; not on the same side of the
24 road as Owens Corning, but Redds Branch comes right off
25 that road and kind of curves back through there across the

1 street across 78 from Owens Corning to your right going in
2 from here.

3 THE COURT: Okay. Well, Owens Corning is right there
4 on the railroad track.

5 MR. MAXWELL: I'm sorry. I'm sorry.

6 THE COURT REPORTER: It's on 302.

7 MR. MAXWELL: Beyond Owens Corning, Highway 4. I got
8 mixed up on my roads. It is across that road.

9 THE COURT: Okay.

10 MR. MAXWELL: Where the intersection is Owens Corning
11 is in the middle. It is on the other side of Highway 4 if
12 you were heading towards Wagener.

13 THE SHERIFF: I thought it was 302.

14 MR. MAXWELL: Or 302. It turns into 4; that highway.

15 THE COURT: All right. So if I go right there to the
16 light and take a right and go to the next light and take a
17 right that's 302?

18 MR. MAXWELL: Go down there and go to the left.

19 THE COURT: Okay.

20 MR. MAXWELL: I'm sorry I messed you up.

21 THE COURT: I know where we are. Like you're going
22 out to Chase Ingram's pond?

23 MR. MAXWELL: Exactly.

24 THE COURT: All right. Now I know where I am.

25 MR. COX: Yes, sir, Your Honor.

1 THE COURT: So what happens?

2 MR. COX: What happens is my clients -- they operate
3 the landfill. They've got a piece of equipment called a
4 scraper, sometimes referred to as a motor grader,
5 sometimes referred to in the case as a pan, but we've been
6 more commonly calling it a scraper. It is a large yellow
7 equipment that---

8 THE COURT: You got a picture of it? I think I know
9 what it is. Is it is one of those things with a pan
10 underneath it?

11 MR. COX: If I may approach, Your Honor. It is the
12 small black and white picture.

13 THE COURT: Okay. All right.

14 MR. COX: And --

15 THE COURT: So what happens.

16 MR. COX: -- it is -- that vehicle is used to pick up
17 dirt, collect dirt to use in the landfill. Sometimes it's
18 used in the landfill side of Redds Branch Road because
19 there is dirt over there to use for that. Sometimes there
20 is a borrow pit across Redds Branch Road -- the driveway
21 goes across Redds Branch Road. There is a borrow pit that
22 they'll go and get dirt from when they're running low over
23 here at the landfill and bring it across.

24 THE COURT: Okay.

25 MR. COX: My client's scraper was coming up from the

1 landfill on a private drive approaching Redds Branch Road
2 to go across to get dirt from the borrow pit.

3 THE COURT: Okay.

4 MR. COX: We have a gentleman sitting on a tractor on
5 the other side of Redds Branch Road. His primary job is
6 to remove dirt that collects on Redds Branch Road so that
7 you don't have loose dirt on the road -- to sweep it off
8 with his tractor, but when he is there he will -- and
9 there is a tree line that sets at least 30 feet off the
10 side of the road -- I don't have those measurements in
11 front of me -- that does block to some extent the---

12 THE COURT: Hold on a second. We're not on the
13 record. Come up here and show me where we are.

14 (Whereupon, a discussion was held off the record.)

15 THE COURT: All right. We got that off of Google
16 Earth and he is going to show me how to do it on my new
17 iPad. That helps a lot. Now, go ahead. I've got you
18 covered.

19 MR. COX: Very good. I was just telling Danielle I
20 have a photograph that shows right off the scene -- We all
21 do, but I have it blown up and meant to bring it. I think
22 that gives a good visual, Your Honor.

23 The scraper is approaching Redds Branch Road. He's
24 got his co-employee on the farm tractor across the road
25 and when -- there is tree line which makes it difficult,

1 you know, from far back to see traffic approaching and so
2 my client is -- this is a big piece of equipment that can
3 take a while when you come to a dead stop to start up and
4 get across the road; so when his spotter is there he'll
5 approach the stop sign at a controlled speed and if his
6 spotter watches for traffic and if it is clear he'll wave
7 him on across.

8 THE COURT: Sure.

9 MR. COX: So the scraper is coming. The gentleman on
10 the tractor looks. It is clear. He waves him across. He
11 is continuing to look to monitor for traffic. He sees the
12 motorcycle coming and he says stop.

13 THE COURT: Stop to who?

14 MR. COX: To my scraper. To my gentleman on the
15 scraper he says stop and the scraper -- and the testimony
16 will be specific. He starts his stopping process, looks,
17 sees the motorcycle, hits his brakes hard on the brakes,
18 turns to the right. He hits his brakes to stop. The
19 motorcycle is coming. It starts skidding, laying down,
20 wrecking, and so my operator of the scraper testified I
21 turned to the right as an instinct to get further out of
22 the way of the oncoming wrecking motorcycle to get further
23 out of the way.

24 THE COURT: Well, that makes sense.

25 MR. COX: He stops and the evidence is uncontradicted

1 that the closest the scraper ever got to Redds Branch Road
2 was 8.25 feet. The experts have taken the physical
3 evidence, measured it. The accident reconstructionist for
4 the plaintiff and accident reconstructionist for me
5 measured the physical evidence said the closest any
6 portion of that scraper ever got to Redds Branch Road was
7 8.25 feet.

8 THE COURT: So he was not out in the road?

9 MR. COX: He was not out in the road.

10 THE COURT: They stopped him before?

11 MR. COX: He stopped before getting into the road.

12 He never failed to yield the right-of-way, never impeded
13 on the right-of-way, never denied the right-of-way and
14 so---

15 THE COURT: What did the motorcycle hit?

16 MR. COX: The motorcycle -- Michael Valenzuela
17 testified he saw the scraper, slammed -- tapped his front
18 brake and slammed on the rear brake and made the decision
19 to lay the motorcycle down to avoid what he perceived was
20 going to be a collision and laid the motorcycle down and
21 the experts testify how it skidded on the side and then it
22 flipped and vaulted Christie Valenzuela off. He was able
23 to hold on and the motorcycle stopped, came to a final
24 resting point just before it reaches in line with the
25 scraper. We think that's important information but---

1 THE COURT: Do you have a picture as to where the
2 scraper stopped?

3 MS. PAYNE: The picture that you have up there, Your
4 Honor.

5 THE COURT: So in this picture the motorcycle -- I
6 mean the scraper could have been coming from right to
7 left?

8 MR. COX: From right to left, yes, sir.

9 THE COURT: As I look at it.

10 MR. COX: Yes, sir.

11 MR. DETRICK: I think if you'll see the picture of
12 where he stopped it may help, Your Honor.

13 THE COURT: Is that it?

14 MR. DETRICK: No; where he stopped. We've got a
15 picture of where he stopped up against the stop sign. He
16 ran over the stop sign.

17 MR. COX: I can pull up the picture that shows --

18 THE COURT: Please do that.

19 MR. COX: -- shortly after. Shall we wait on that,
20 Your Honor?

21 THE COURT: No. Go ahead.

22 MR. COX: And so in this -- the plaintiffs, again,
23 they've plead negligence and they've listed A through Z
24 particulars as to support their negligence causes of
25 action. Your Honor, a recurring theme in my motion for

1 summary judgment is that they have not been able to
2 identify a duty that was breached by my client, and just
3 for the record in a negligence action the plaintiff must
4 show four things: Defendant owed a duty of care to the
5 plaintiff, defendant breached the duty by negligent act or
6 omission, and the defendant's breach was the actual and
7 proximate cause of the plaintiff's injury, and the
8 plaintiff suffered an injury or damages.

9 THE COURT: So your position mainly is there was no
10 duty by law owed from your client to these people coming
11 down the road on the motorcycle?

12 MR. COX: Well, there was no duty that was -- I guess
13 it is two-fold, Your Honor -- certainly, no duty that was
14 breached and I take the position that unless they crossed
15 into Redds Branch Road they owe no duty on the private
16 driveway to the motorist on Redds Branch Road except not
17 to deny the right-of-way.

18 THE COURT: And if there was a duty owed there was no
19 breach; correct?

20 MR. COX: Well, they certainly did not breach the one
21 duty that they do owe which is not to yield the
22 right-of-way.

23 THE COURT: That's what I am saying. You take the
24 position that they owed no duty, but if they did they
25 certainly didn't breach that duty.

1 MR. COX: That's correct, Your Honor.

2 THE COURT: All right. I'm listening.

3 MR. COX: And, Your Honor, we would---

4 MS. PAYNE: Do you want to look at the pictures?

5 THE COURT: Please, if you don't mind, Ms. Payne.

6 (Whereupon, a discussion is held off the record.)

7 THE COURT: So your position is -- back on the record
8 -- the fact that he did not ever get out into the highway
9 on where the motorcycle was traveling is that he owes no
10 duty and whatever duty he did owe he didn't breach it. Is
11 that basically it?

12 MR. COX: That's correct, Your Honor.

13 THE COURT: All right. Well, how do you support
14 that? What do you rely on to support that?

15 MR. COX: Well, what I rely on is the complete lack
16 of any statute, law, rule, regulation, case law or
17 otherwise that says a driver on a roadway different from
18 the road that the claimant is on owes absolutely no duty
19 to the driver on a different road. A driver on I-20 owes
20 no duty to a driver on I-26. The only duty he owes is not
21 to fail to yield the right-of-way if there is one to a
22 driver on a different road.

23 A driver on this private driveway could go wrecking
24 into the ditch on the private driveway. He could be doing
25 doughnuts on the private driveway. That doesn't give rise

1 to liability to motorists on a different road on Redds
2 Branch Road.

3 THE COURT: But isn't it a question of fact that he
4 is creating a dangerous condition by rapidly or however
5 fast approaching the --

6 MR. COX: Well---

7 THE COURT: -- main road and didn't appear to be
8 stopping until he's halted by his spotter and, obviously,
9 the guy on the motorcycle -- it's a question of fact as to
10 whether or not he is perceiving it to be coming out onto
11 his lane and he takes evasive action to miss it. Is that
12 all not questions of fact as to whether or not he created
13 a dangerous condition?

14 MR. COX: Judge---

15 THE COURT: Did he owe a duty to the motorcycle
16 driver not to create a dangerous or appearance of a
17 dangerous condition? I don't know. I am asking you.

18 MR. COX: There is no authority for it, Your Honor.
19 I can find no authority anywhere for that and they've
20 presented no evidence in this case to the contrary.

21 THE COURT: To the contrary being?

22 MR. COX: That there is a duty owed.

23 THE COURT: Okay.

24 MR. COX: And, Your Honor, for the record I would
25 like to for purposes of my motion---

1 THE COURT: Do we have any cases one way or the
2 other? Any case law?

3 MR. COX: Judge, it's hard to find case law to
4 support something that -- There is no case identifying the
5 duty. There is plenty of case law that says you have to
6 stop and not enter the road. You have to yield the
7 right-of-way. You have to keep your vehicle under
8 control. There is plenty of traffic statutes and traffic
9 laws. None of them apply to a vehicle stopping in time
10 before denying the right-of-way and the manner in which
11 you stop your vehicle.

12 There's been no evidence presented. There's been no
13 case law. There's been no statute. There's been no duty
14 identified whatsoever with regards to the operation of the
15 scraper on that driveway that he would owe to the
16 plaintiff.

17 THE COURT: Well, we all know that he owes a duty to
18 stop at the stop sign to the other motorist, but he
19 stopped, didn't he? That's your position? He stopped so
20 he didn't breach any duty?

21 MR. COX: That's correct.

22 THE COURT: All right. Anything else?

23 MR. COX: Yes, Your Honor. I beg the court's
24 indulgence, Your Honor. Furthermore, Your Honor, in
25 further support South Carolina Code Section 56-5-2745.

1 THE COURT: 56-5-27?

2 MR. COX: Four five.

3 THE COURT: Which is which statute?

4 MR. COX: Emerging from alley, driveway, or building
5 and that statute states: "The driver of a vehicle
6 emerging from an alley, building, private road, or
7 driveway within a business or residential district shall
8 stop the vehicle immediately prior to driving on to a
9 sidewalk or on to the sidewalk area extending across the
10 alley, building entrance, road, or driveway or in the
11 event there is no sidewalk shall stop at a point nearest
12 the street to be entered where the driver has a view of
13 approaching traffic," and, Your Honor, my client stopped
14 before the end of the roadway. That's the only statute I
15 can see that applies to a motorist exiting a private
16 driveway. We complied with the statutory obligation
17 there, Your Honor.

18 At this point I would -- and it may help to flesh
19 this out, Your Honor, to go through the particulars of the
20 plaintiff's complaint. Their first particular negligence
21 is based on they say Lewis -- Jeffrey Lewis was the driver
22 of the scraper. They say Mr. Lewis failed to stop for the
23 stop sign, and, Your Honor, I am asking for summary
24 judgment. There is no evidence and it's uncontradicted
25 that he stopped for the stop sign. There is no evidence

1 that he did not stop for the stop sign. He stopped and so
2 we'd ask for summary judgment on that one, Your Honor.

3 And then particular B, identify -- they state Lewis
4 was negligent in entering or attempting to enter the
5 intersection without stopping -- in entering or attempting
6 to enter the intersection without stopping. There is no
7 evidence of either of these, Your Honor. He did not enter
8 the intersection and he did not ever attempt to enter the
9 intersection. He stopped.

10 THE COURT: Okay.

11 MR. COX: And so I would ask for summary judgment on
12 that particular. C, in Lewis traveling too fast for
13 conditions. Your Honor, there's -- One, there is no speed
14 limit on a private driveway. Two, there is no evidence
15 that he was traveling too fast. There is no evidence he
16 was speeding and Lewis testified that he was driving at --
17 and prepared to stop. He could stop, and, in fact, he did
18 stop prior to entering Redds Branch Road.

19 There's been no evidence presented to the contrary
20 that he was traveling too fast for conditions because that
21 would imply you breached a duty as a result of how fast
22 you were going and had you been going at a different speed
23 you wouldn't have done that. He was able to stop which
24 was his duty on this road, Your Honor, to stop short of
25 denying the right-of-way; so we'd ask for summary judgment

1 on that particular.

2 Particular D, in Lewis failing to yield the
3 right-of-way, that one is obvious as well, Your Honor.
4 All evidence in the case says he did not fail to yield the
5 right-of-way and I can go into each bit of evidence that
6 he didn't, but I think that is clear in this case, Your
7 Honor. There's been no evidence presented to the contrary
8 that he failed to yield -- that he yielded the
9 right-of-way. [sic]

10 THE COURT: Are the facts undisputed that he had a
11 spotter out there at the highway and that he normally
12 would not stop if the right-of-way was clear. He would
13 pick up speed and go right on through it based on his
14 spotter telling him to come through and it was clear
15 because it was -- I guess when he -- had he crept up to
16 the stop sign and stopped to get up enough speed to go
17 back across it is just -- Why does he not just do like I
18 do when I drive up to a stop sign and stop? Why would he
19 not do it that way?

20 MR. COX: Well, Your Honor, because he's got someone
21 in addition to himself looking for traffic and if he is
22 able to -- you know, I think we've all done it before --
23 not to come to a complete stop at a stop sign. Now he
24 came to a complete stop on this date and time.

25 THE COURT: Well, I understand that, but he is moving

1 up there fairly fast or at some speed. His driver I
2 assume has signaled him to come on through and then all of
3 a sudden stops him.

4 MR. COX: Right.

5 THE COURT: What precludes him from driving like you
6 and I do? Ease up to the stop sign. Look both ways and
7 if it is clear to go on across.

8 MR. COX: He does that when he doesn't have a spotter
9 there.

10 THE COURT: Well, he had a spotter there; so what
11 precludes him -- even with a spotter, what keeps him from
12 doing that?

13 MR. COX: Because that piece of equipment takes a lot
14 of energy, time to get across the road and it's going to
15 take -- there's been testimony I think seven to six --
16 seven to eight seconds, I believe -- I could be wrong with
17 those precise numbers -- to get that piece of equipment
18 all the way across the road and that -- you know, that
19 could hold up traffic.

20 THE COURT: Okay.

21 MR. COX: But---

22 THE COURT: Okay. Six or seven seconds to go across
23 if he came to a stop and started back up?

24 MR. COX: Six or seven, yes, sir.

25 THE COURT: How far down the road---

1 MR. DETRICK: That's unloaded, Your Honor.

2 THE COURT: How far down the road is the curve?

3 MR. COX: Six hundred feet, Your Honor.

4 MR. DETRICK: Approximately.

5 MR. COX: Approximately.

6 THE COURT: Approximately six hundred and how long
7 does it take him to go across loaded?

8 MR. COX: I don't know if we've had that number
9 computed.

10 MR. DETRICK: Don't have it.

11 THE COURT: Okay. Go ahead. I didn't mean to
12 interrupt you.

13 MR. COX: It is mostly the ease of getting it on
14 across without having to break all the way down.

15 THE COURT: I understand that, but by doing it in
16 that fashion you're scaring the bejeebers out of a
17 motorcycle driver who is trying to avoid it. Go ahead.

18 MR. COX: Particular E, they contend Lewis was
19 negligent in failing to maintain a proper lookout.
20 Plaintiff's own expert, Your Honor, testified that the
21 gentleman sitting on the tractor saw the motorcycle at an
22 appropriate time and signaled as soon as he could see him
23 and told him to stop. We saw him and stopped and our
24 driver also said he was keeping a lookout, had control of
25 his vehicle, and indeed did have control of his vehicle

1 and was able to stop; so we'd ask for summary judgment
2 because there's been no evidence to the contrary that he
3 did not see the plaintiff and stop in time.

4 The next one, Your Honor, in Lewis failing to
5 maintain proper control. Your Honor, there is no evidence
6 that Lewis failed to maintain proper control. His
7 stopping is demonstrative of that. He stopped with all
8 wheels still on the driveway. He stayed on the driveway,
9 never left the driveway, and came to a complete stop
10 8.25 feet away from the fog line; so there's been no
11 evidence to the contrary and to indicate that he didn't
12 maintain control. We'd ask for summary judgment on that,
13 Your Honor.

14 And Lewis -- The next one is they contend Lewis
15 failed to apply his brakes. That's how it stopped, Your
16 Honor. He applied his brakes and so we'd ask for summary
17 judgment on that.

18 And so -- and the next one is they contend Lewis
19 failed to use that degree of care and caution that a
20 reasonably prudent person would have used under the same
21 or similar circumstances and, Your Honor, they have not
22 produced any evidence to demonstrate what a reasonable
23 prudent person should have done, but, Your Honor, we would
24 submit that a reasonably prudent person would see the
25 motorcycle and stop and that's what he did; so he has not

1 breached any duty owed to Michael Valenzuela through the
2 process of stopping before denying the right-of-way and
3 we'd ask for summary judgment on that particular one.

4 The next one is in Lewis driving said vehicle in
5 utter disregard of the rights and safety and wellbeing of
6 Michael Valenzuela and Christie Valenzuela and other
7 motorists lawfully using the public roadway at the time
8 and place of this wreck and I addressed that in the
9 beginning, Your Honor. The only duty Lewis owed to
10 motorists on Redds Branch Road was to stay out of their
11 right-of-way, not to fail to yield the right-of-way, and
12 the evidence in this case is uncontradicted he yielded the
13 right-of-way. He stopped and so I would ask for -- There
14 is no evidence to the contrary. We'd ask for summary
15 judgment on that one, Your Honor.

16 The next one is actually enumerated out of line in
17 the complaint. It is actually listed as H again, but it's
18 in failing to properly and adequately train and supervise
19 driver Lewis so as to ensure that he could and would
20 safely operate the machinery on the roadways of Aiken
21 County, South Carolina. They have not produced -- there's
22 been no evidence produced in this case, Your Honor, what
23 would constitute proper training and so we'd ask for --
24 and there's no way that any training -- there was no duty
25 breached by the operator at the time of this accident owed

1 to the motorists on Redds Branch Road and, therefore,
2 certainly no alleged improper training would have caused
3 that and so we moved for summary judgment on that
4 particular as well.

5 The next one they indicate in failing to have in
6 place adequate policies and procedures to train and
7 monitor its drivers or such policies or procedures were in
8 place failing to enforce them. Your Honor, there's been
9 no evidence presented in this case of what adequate
10 policies and procedures for drivers of scrapers are and
11 there is certainly no evidence that Lewis failed to abide
12 by any policies or procedures or that Sam English Grading
13 failed to enforce any policies or procedures and we'd seek
14 summary judgment on that particular as well.

15 The next one is in failing to have in place adequate
16 policies and procedures to mandate compliance by its
17 drivers with statutes, laws, and regulations regarding the
18 operations of heavy equipment or if such policy and
19 procedures were in place, failing to enforce them.

20 Your Honor, there's been no evidence of what adequate
21 policies and procedures for drivers of scrapers are that
22 have been produced in this case. They've not pointed to
23 any law, statute, or regulation that we were allegedly not
24 in compliance with on August 7 of 2009, Your Honor. Law
25 enforcement testified that we did not -- Sam English

1 Grading -- the driver did not violate any traffic laws and
2 so there's been no evidence to support that particular.
3 We would ask for summary judgment on that, Your Honor.

4 The next one is in failing to have in place an
5 adequate safety program for the safety and protection of
6 the motoring public. Your Honor, they've again pointed to
7 no requirement that we have a safety a program in place;
8 no evidence of what an adequate safety program is alleged
9 to be.

10 MR. DETRICK: We withdraw that one.

11 MR. COX: You withdraw that one? If there are any
12 others you would withdraw, please...

13 Thank you, Your Honor.

14 THE COURT: Go ahead.

15 MR. COX: Your Honor, the next one is in negligently
16 entrusting said machinery to the care, custody, control,
17 and use of Lewis without properly training him to operate
18 said heavy equipment, without adequately checking his
19 qualifications to drive his heavy equipment, and without
20 adequately supervising him to ensure that he was safely
21 driving and operating the machinery. Your Honor, he --
22 Lewis testified he had been driving machinery -- this type
23 of equipment for many years. He was qualified to do it.
24 He knew how to do it.

25 There's been no evidence that he was not properly

1 trained to drive the scraper presented. Quite the
2 contrary, he was able to execute emergency breaking and
3 avoidance maneuvers of this machine at the particular date
4 and time of this accident; and so we would submit that
5 they've presented no evidence on that particular and ask
6 for summary judgment on that one as well, Your Honor.

7 The next one, in permitting a careless driver to
8 drive and operate its equipment -- the same grounds as the
9 one before, Your Honor. There's no evidence he was a
10 careless driver and we would ask for summary judgment on
11 that.

12 The next one is in failing to adequately warn the
13 driving public with signs or other devices of the danger
14 created by machinery entering the roadway without stopping
15 or even slowing at the intersection or otherwise complying
16 with the laws and safety rules. Your Honor, there is no
17 evidence we entered the roadway on this date. There is no
18 duty to warn, no statute, law, or regulation requiring any
19 warning that's been identified in this case.

20 There is certainly no duty to warn when you're
21 stopping for traffic -- when you're looking out for
22 traffic and you're stopping for traffic. We were watching
23 for traffic and had a spotter there. Mr. Lewis was
24 looking, saw the traffic, and he stopped. We would ask
25 for summary judgment on that particular as well.

1 The next one in failing to have a properly and
2 adequately trained and qualified flagman so as to safely
3 and adequately warn the motoring public or otherwise
4 prevent collisions between motorist and the company's
5 machinery equipment. Your Honor, there is no duty to have
6 a flagman. There's been no statute, law, regulation,
7 ordinance, or anything pointed to indicating to the
8 contrary. Flagmen are for lane closures, not for regular
9 crossings with stop signs.

10 THE COURT: That's because you're supposed to stop at
11 the stop sign.

12 MR. COX: Right.

13 THE COURT: Go ahead.

14 MR. COX: Which we did, Your Honor. The next one, in
15 failing to -- We'd ask for summary judgment on that
16 particular.

17 The next one is in failing to properly and adequately
18 equip a qualified flagman with gear and warning devices.
19 Again, there is no duty to have a flagman. There is no
20 statute, law, or regulation requiring it and we'd ask
21 for -- certainly, if there is no duty to have one, we
22 don't have to equipment him properly; so we'd ask for
23 summary judgment on that as well.

24 THE COURT: Well, why did you have a flagman out
25 there if you had no duty to do it?

1 MR. COX: We had a -- Why did we have a flagman?

2 THE COURT: Yea.

3 MR. COX: We had a spotter watching for traffic. To
4 the extent that---

5 THE COURT: So your guy could come through the
6 intersection without stopping; right?

7 MR. COX: So that he could be informed if there was
8 traffic coming before he could get to see all the way down
9 the road and so to assist him in stopping for traffic --
10 in assisting him in fulfilling his duty not to fail to
11 yield the right-of-way and it's uncontradicted in this
12 case that we fulfilled our duty owed to motorists on Redds
13 Branch Road on that driveway.

14 THE COURT: But don't you have to concede that you
15 were creating the at least the appearance of a dangerous
16 situation?

17 MR. COX: No, sir, Your Honor. We were driving---

18 THE COURT: You don't concede that?

19 MR. COX: We don't concede that at all.

20 THE COURT: Well, you have a situation where you got
21 a spotter out there and if everything goes according to
22 your plans the guy comes down the road on this heavy
23 equipment and doesn't have to stop and just goes on across
24 because the spotter says it is safe. He is coming down
25 the road wanting to go on across and all of a sudden the

1 spotter says whoa, whoa, whoa, and the motorcycle driver
2 is coming and he sees the guy coming and the motorcycle
3 driver takes evasive action. Your guy likewise takes
4 evasive action and, thank God, stops. Unfortunately, the
5 motorcycle driver lays it on his side so he won't collide
6 with him or thinks he won't collide with him and we have
7 somebody dead.

8 MR. COX: He stops and turns to the right to avoid --
9 Your Honor, this happens at every intersection. Vehicles
10 approach stop signs.

11 THE COURT: That's just not true, now. Come on. I
12 don't know of any intersection I have ever been through
13 where I got a big road scraper coming down the road who is
14 not going to stop unless the flagman tells him to and I am
15 driving my car and I see it happening -- You don't think I
16 am going to put on brakes?

17 MR. COX: Well, the motorcycle driver has no idea
18 what the spotter is telling the scraper. The scraper is
19 approaching at a controlled speed prepared to stop if
20 traffic is coming. He sees traffic coming. He is
21 informed traffic is coming and he stops. That's what
22 everybody does at every intersection.

23 You know, somebody can approach a stop sign and say,
24 You know what? I am planning on running that thing
25 because I am in a hurry but I see traffic and I change my

1 mind. I stop. I'm not liable because I thought about
2 running or I wanted to run it provided I didn't breach any
3 duty owed to the motorist and there's been -- the trooper
4 who investigated this accident said the scraper broke
5 absolutely no traffic laws whatsoever.

6 Your Honor, the next particular -- Your Honor, they
7 claim in the next particular negligent in failing to warn
8 the motoring public of the danger they created. Your
9 Honor, there was no evidence of a danger. We stopped at
10 the stop sign without impeding the right-of-way.

11 THE COURT: Well, Mr. Cox, isn't it a question of
12 fact as to whether or not it was a dangerous situation?

13 MR. COX: We -- we -- the motorist -- there is no
14 identified duty, Your Honor. There is no duty not to
15 create the appearance of a dangerous situation, I'll
16 submit, on a private driveway.

17 THE COURT: There is no duty...

18 MR. COX: To refrain on private property from any
19 activity. We stopped at the stop sign without impeding
20 the right-of-way and there's no duty to warn that we're
21 going to stop and we'd ask for summary judgment on that
22 particular as well.

23 Your Honor, the next one they allege we were
24 negligent in instructing and or permitting its drivers to
25 run the stop sign at the intersection of Redds Branch Road

1 and the private road where this wreck happened. There's
2 no evidence in this case whatsoever that we ran the stop
3 sign. Running the stop sign when there is no traffic
4 creates -- actually creates no liability because even if
5 it's negligence per se running the stop sign you still
6 have to prove proximate cause and we did not run the stop
7 sign when Michael Valenzuela was on Redds Ranch Road.

8 THE COURT: Were you not operating your vehicle in
9 such a manner as to give the motoring public the
10 appearance or either in their mind thought that you were
11 going to run the stop sign; therefore, takes evasive
12 action and therefore ends up with somebody dying? Is that
13 not a question of fact?

14 MR. COX: That happens every day and there is no
15 single case reported anywhere that says you can bring a
16 cause of action for that or maintain one and there's no
17 law, statute, or ordinance saying that you got to behave
18 in a certain way on a different road to the motoring
19 public on the other road.

20 THE COURT: All right. Go ahead.

21 MR. COX: And they've not identified one and so we're
22 asking for summary judgment on that one.

23 Your Honor, the next one, in instructing and or
24 permitting its drivers to drive the machinery across Redds
25 Branch Road without stopping and yielding the

1 right-of-way. Your Honor, again, we stopped. We yielded
2 the right-of-way and the plaintiff cannot complain of what
3 happened in the past. He was not there. We would ask for
4 summary judgment on that particular as well. We're
5 getting close to the end here, Your Honor.

6 THE COURT: Take your time.

7 MR. COX: We're on T. We got to go to Y.

8 THE COURT: Go ahead.

9 MR. COX: The next one in failing to properly
10 supervise its drivers with regard to their practices of
11 driving across Redds Branch Road without stopping, looking
12 for oncoming traffic, and otherwise taking necessary steps
13 so as to cause harm and injury to the motoring public on
14 Redds Branch Road in Aiken County. Your Honor, the
15 evidence is uncontradicted we did the exact opposite of
16 this on August 7, 2009 at the time of this accident.

17 THE COURT: Then why did the motorcycle driver throw
18 his motorcycle down with his wife sitting on the back?

19 MR. COX: Because as I said in my answer he is solely
20 responsible for this accident. He failed to maintain
21 control. He didn't keep a proper lookout. He laid his
22 bike down. He crashed his motorcycle when he's got his
23 most prized possession on the back. You only have an
24 alleged few seconds or however many second to react and
25 the one thing you're going to decide to do is with my

1 helpless wife on the back lay it down intentionally?

2 THE COURT: It is either that or think you're going
3 to run into the side of that motor grader.

4 MR. COX: The evidence will show and it's not part of
5 necessarily the summary judgment, but the evidence will
6 show that he had plenty of time to stop by hundreds of
7 feet.

8 THE COURT: Well, that's a question of fact.

9 MR. COX: Right. And so they've not presented a duty
10 that was breached by my clients. We didn't drive across
11 without stopping. We were looking for oncoming traffic
12 and we otherwise took steps to avoid harm and injury to
13 the motoring public by staying on our road, all tires on
14 the road, stopping more than 8 feet from the Redds Branch
15 Road.

16 THE COURT: Then why is your motor grader leaving
17 skid marks when he stops and he is almost at a 90-degree
18 angle from the pan from the tractor itself?

19 MR. COX: I can answer that, Your Honor.

20 THE COURT: Please do.

21 MR. COX: The skid mark -- the expert -- there's
22 conflicting testimony on this and it's a question of fact,
23 but that scraper when it turns its tire -- when it just
24 turns it can be at a stop or the slow -- it has got to
25 turn to the right -- that cab to the right -- it is going

1 to leave those tire marks by the way it is set up off
2 center because it gets traction in dirt. It's not meant
3 to drive on asphalt and so if you look at the skid mark
4 behind the rear tire it is a mere two, three feet and---

5 THE COURT: Why is it turned all the way 90 degrees
6 to the right from the pan?

7 MR. COX: The motorcycle is crashing and Mr. Lewis is
8 getting out of the -- because it's out of control
9 crashing, getting out of the way as far as he can to
10 further avoid any further damage from the crashing
11 motorcycle.

12 THE COURT: Mr. Cox --

13 MR. COX: Yes, sir.

14 THE COURT: -- I am riding down the road on the
15 motorcycle. I am approaching an intersection. I see a
16 motor grader moving up with a flagman out there. Motor
17 grader has to slam on brakes so hard that he turns to a
18 90-degree angle to stop. Is it not a question of fact as
19 to whether or not it is appropriate for the motorcycle
20 driver to take the evasive action he did, whether or not
21 it was all of his fault, whether or not you had some
22 fault, whether or not it was all your fault? Isn't all of
23 that a question of fact surrounding this wreck?

24 MR. COX: No, sir. They have to identify -- They
25 plead negligence. They've got to identify a duty and

1 breach of that duty and they've not done so.

2 THE COURT: Okay.

3 MR. COX: And the motorcycle driver says he didn't
4 see the spotter.

5 THE COURT: Okay.

6 MR. COX: He only felt his wife tapping him on the
7 side who had already seen the scraper coming and he
8 testified, I thought it was a deer or I thought it might
9 be a rabbit so I thought about it and I kept thinking
10 about it and then I saw the scraper and then I laid her
11 down with my wife on the back.

12 THE COURT: What would you have done?

13 MR. COX: I would have brought it to a controlled
14 stop in plenty of time.

15 THE COURT: Isn't that a question of fact?

16 MR. COX: Or kept going. This happens everywhere.

17 THE COURT: No, sir. I have to respectfully disagree
18 with you.

19 MR. COX: Well---

20 THE COURT: I have been doing it a long time. I have
21 never seen it happen.

22 MR. COX: And, Your Honor, I understand the questions
23 that you've asking and I can appreciate those questions,
24 but I still -- he's got to identify a duty and breach of
25 that duty and there is no duty of it. As long as you stop

1 that vehicle, there is no further duty. As long as you
2 don't go into the right-of-way, there is no further duty.
3 At least if there is, they've not identified one. There
4 is no evidence in this case which would entitle us to
5 summary judgment.

6 Your Honor, the next one is in failing to properly
7 supervise its drivers with regard to their practices in
8 driving across Redds Branch Road. Actually, I just
9 addressed that one, Your Honor. Moving on to the next
10 one -- in not monitoring the practices of its drivers
11 specifically as to slowing, stopping, and then safely
12 crossing Redds Branch Road. Your Honor, there is no
13 evidence of the monitoring practices, what proper
14 monitoring practices would be. This is exactly what we
15 were doing. We were slowing enough to stop. We were
16 looking and stopping. We had a spotter and we were
17 stopping when there was traffic approaching. They are
18 contending we're negligent for failing to monitor
19 something that didn't happen; so we would submit summary
20 judgment is appropriate on that one as well, Your Honor.

21 The next one, negligent in not monitoring and
22 properly supervising its drivers with regard to their
23 speed as they approached Redds Branch Road. Your Honor,
24 there is no evidence that we were speeding or -- and there
25 is no speed limit on the private road. There is no duty

1 to go a certain speed on a private driveway to people on
2 an adjoining motorist's highway and no duty owed by the
3 scraper on a private road to the monitoring -- to the
4 motoring public on Redds Branch Road except to yield the
5 right-of-way which it's undisputed that we did in this
6 case, Your Honor; so we'd ask for summary judgment there
7 as well.

8 The next one, in failing to take any and all
9 necessary steps to ensure that his drivers did not drive
10 in away that endangered the motoring public on Redds
11 Branch Road. Your Honor, it is impossible to drive in
12 such a way on a private driveway that endangers those on
13 Redds Branch Road without entering Redds Branch Road.
14 They have identified no duty to the contrary. If there is
15 a duty to the contrary, they've not identified it and we
16 certainly did not go into the road and breach any
17 identified duty in this case. We ask for summary judgment
18 on that one as well.

19 In failing to instruct drivers to stop at the stop
20 sign at the intersection of the private road at Redds
21 Branch Road where this wreck happened. Your Honor, he
22 stopped at the time of this accident at the stop sign; so
23 he can't be negligent for failing to instruct to stop.
24 That's not what happened at the time of this accident.
25 Again, no -- there is no duty breached and we would ask --

1 and so that particular fails as well. We'd ask for
2 summary judgment on it. Your Honor---

3 THE COURT: You're telling me there is no cases out
4 there dealing with where I am coming up to a stop sign and
5 you're coming down the road and you think that I am coming
6 up to the stop sign and I am not going to stop and all of
7 a sudden you slam on brakes and I take evasive action?
8 There is no cases out there dealing with that factual
9 situation?

10 MR. COX: If there is, I've not seen it. I have
11 looked for it for all 11 months that I've had this case.

12 THE COURT: All right.

13 MR. COX: And Y is in failing to exercise the degree
14 of care and caution which a reasonably prudent entity
15 would have exercised under the same or similar
16 circumstances. Those similar circumstances were traffic
17 coming and to stop, don't go into the roadway, don't fail
18 to yield the right-of-way and we did that, Your Honor, and
19 so we'd ask for summary judgment on that particular as
20 well.

21 Your Honor, as to all -- and that's all the
22 particulars that they've plead in the complaint, Your
23 Honor, and with regards to all of those -- again, I went
24 through each one in particularity, but also they have
25 failed to identify a duty that my clients breached on

1 August 7, 2009 and I would submit summary judgment is
2 appropriate on all -- on the negligence cause of action as
3 to all particulars, Your Honor.

4 THE COURT: Thank you. All right. Mr. Detrick or
5 Mr. Maxwell?

6 MR. DETRICK: Sir?

7 THE COURT: Either one of you want to respond?

8 MR. DETRICK: If you want me to, Your Honor, I will.

9 THE COURT: I think you better. I think you need to.

10 MR. DETRICK: I just want to bring this up before I
11 respond. We got a motion to amend which I normally do in
12 a trial to clean up the allegations of negligence and I
13 don't know whether he wants to go through those just like
14 he did or whether he consents to that motion or whether
15 there is any reason -- I don't know how to approach that.
16 I don't want to---

17 THE COURT: Let's just go ahead with what he is
18 arguing and he may want to renew his motion.

19 MR. DETRICK: Your Honor, let me tell you what pretty
20 much the facts of this case are. Pretty much nobody
21 disagrees. This contractor Sam English has been going
22 across hauling dirt on a regular basis on this road since
23 1982, '84. They have a contract with Owens Corning and in
24 that contract which is the contract in existence on
25 August 7, 2009 they had agreed because they recognized --

1 I took the deposition of Owens Corning -- that they
2 recognized that this is a situation in this area that
3 could be dangerous to the motoring public, and, therefore,
4 because of that they agreed and Owens Corning put it in
5 the contract that they had to have numbers of things.

6 Number one, they had to have two advanced warning
7 signs.

8 THE COURT: Two advanced what?

9 MR. DETRICK: Warning signs. Equipment crossing the
10 road at 1000 feet and flagman ahead at 500 feet. Your
11 Honor, Your Honor, if I could, Mr. Cox is arguing later on
12 that this is not admissible, but I don't understand but
13 that is the contract.

14 MS. PAYNE: Your Honor --

15 THE COURT: Yes, ma'am?

16 MS. PAYNE: I'm sorry. I didn't mean to interrupt,
17 Paul. At this time Paul in his -- plaintiff in their
18 complaint has only alleged a negligence cause of action
19 based on negligent common law duties. In his motion to
20 amend is when he brings in our failure to abide by the
21 contract with Owens Corning. I would ask the court to not
22 consider the contract until the motion to amend and then
23 we can argue at that time because what, in fact, he is
24 trying to do is argue a third party beneficiary claim or
25 breach of contract in a negligence cause of action.

1 MR. DETRICK: Just in the interest of time, Your
2 Honor, I just wanted to put forth what the facts of this
3 case are.

4 THE COURT: Well, let's do the motion to amend.
5 Let's get that out of the way.

6 MR. DETRICK: All right. All I can say I really
7 don't know what he -- I really don't know the basis of not
8 agreeing to it, Your Honor. It is Rule 15 very liberally
9 construed.

10 THE COURT: All right. You want to move to amend to
11 failing to drive in an appropriate reduced speed when
12 approaching a crossing, failing to stop at the point
13 nearest the intersection, failing to stop where the driver
14 had a view of approaching traffic. I don't see anything
15 about the contract, do I? Creating an unreasonably
16 dangerous situation for the motorist on a highway.

17 MR. DETRICK: Number F there, exercise reasonable
18 care in the performance in the undertaking of his contract
19 with Owens Corning.

20 THE COURT: All right, Ma'am. Why would I not allow
21 them -- I mean, if we were trying the case and all of this
22 is in the case they could move to amend to conform to the
23 evidence. Why -- and we all know that there have been
24 talking about this addendum or this contract. You argued
25 that over there two or three weeks ago before me. So,

1 what is your opposition to the motion to amend?

2 MS. PAYNE: Yes, sir, Your Honor. For the past 11
3 months that we've been defending this case we've been
4 defending this case under a negligence cause of action.
5 What the plaintiff now wants to do is to backdoor a breach
6 of contract claim and or a third-party claim by using this
7 failing to exercise reasonable care in the performance in
8 the undertaking of his contract with Owens Corning. There
9 are several reasons why this is prejudicial under Rule 15
10 to the defendant.

11 THE COURT: I don't see any breach of contract claim.
12 It is all still negligence.

13 MS. PAYNE: Well, in failing to exercise reasonable
14 care in the performance of the undertaking of his contract
15 with Owens Corning that's saying we've breached our
16 contract. Just because it doesn't say it outright that's
17 saying that we breached our contract with Owens Corning.

18 THE COURT: Well, what they're saying is that the
19 contract creates this standard of care in this particular
20 unusual situation and this is just some evidence that
21 allegedly you failed to comply with the standard as set
22 out in the contract. It would be like pleading failure to
23 comply with certain rules and regulations of a housing
24 authority or the hospital if you got a malpractice case.
25 You got rules and regulations which is a contractual

1 situation, but it creates the standard of care. If you
2 failed to comply with those rules, then it's a negligence
3 type of situation, but I didn't mean to cut you off.

4 MS. PAYNE: No, Your Honor. I fully appreciate what
5 you're saying, but the difference here as in what you were
6 just saying is that this is a private contract between
7 Owens Corning and Sam English Grading to which
8 Mr. Valenzuela is not a direct beneficiary of that
9 contract. Not only that, Your Honor, this is an unsigned
10 contract. This is a contract that was not signed by
11 either party adopting all of the provisions of its
12 contract. This contract relies on an encroachment permit
13 from 1984, Your Honor, that expired in 1984 and was for a
14 completely different road. Since this time another road
15 where they've been crossing has been put in to which this
16 encroachment permit had absolutely no relevance to, Your
17 Honor. This contract is a contract solely between Owens
18 Corning and Sam English Grading and our failure---

19 THE COURT: And who?

20 MS. PAYNE: I'm sorry, Your Honor?

21 THE COURT: Owens Corning and who?

22 MS. PAYNE: Sam English Grading, our defendant.

23 THE COURT: Okay. He's handed me up --

24 MS. PAYNE: I'm happy to hand you---

25 THE COURT: -- it says addendum number one.

1 MS. PAYNE: I have a complete one, Your Honor.

2 MR. DETRICK: That's the applicable provision, Your
3 Honor. It's not the whole contract. The contract is that
4 thick.

5 THE COURT: Well, was it still in effect on the date
6 of this wreck?

7 MR. DETRICK: Admittedly by Sam English Grading and
8 admittedly by Owens Corning.

9 MS. PAYNE: May I approach? Sorry, Your Honor. And
10 I do have a copy of the encroachment permit that was never
11 provided to my client in 1984 and expired in 1984 to which
12 these requirements apply and I believe in Chris English's
13 deposition he said, yes, this contract was in force. He
14 did not say that all of those contract provisions were in
15 force at that time. He said we did put up signs sometimes
16 and we did have a flagman sometimes, but that does not
17 create a negligence duty. A contractual agreement between
18 two private parties does not create a negligence cause of
19 action. That is what we---

20 THE COURT: What was the purpose of the contract in
21 requiring your client to under the terms of it to put a
22 flagman at a thousand or sign at a thousand and flagman at
23 five hundred? What's the purpose of that?

24 MS. PAYNE: That is to comply with the encroachment
25 permit that expired.

1 THE COURT: And what's the -- why are you doing that?
2 Who are you trying to protect?

3 MS. PAYNE: We -- it was---

4 THE COURT: Aren't you trying to protect the motorist
5 on the highway? What other reason would you have warning
6 signs that you're crossing?

7 MS. PAYNE: Well, in every other intersection whether
8 a private -- a driveway where you're backing up or
9 anything else, you do not have to put out signs.

10 THE COURT: I know that, but you got a contract
11 requiring you to put them out.

12 MS. PAYNE: We have a document that says we would
13 voluntarily put them out. There is not a signed
14 enforceable contract, Your Honor.

15 THE COURT: Go ahead.

16 MS. PAYNE: We have proceeded for the past 11 months
17 under a negligence cause of action and they now want to
18 bring in as I said back-dooring a breach of contract
19 third-party beneficiary claim to which we would have
20 brought in had they properly plead a third-party
21 beneficiary claim which admittedly they haven't done it so
22 they acknowledge they cannot -- that we would have brought
23 in Owens Corning. So, it is completely prejudicial to us
24 to now proceed under this cause of action and not have the
25 proper parties here.

1 THE COURT: Ma'am, they're saying that there was a
2 contract that required your -- allegedly a contract that
3 required your client to have these flagmen out and that
4 creates sort of a standard of care and they failed to do
5 that which is a breach of the duty or breach of the
6 standard of care and whether or not that's the proximate
7 cause of the wreck is the question of fact for the jury.

8 MS. PAYNE: I don't think by entering into a private
9 contract with Owens Corning that it creates a legal -- a
10 common law duty which is what they would have to proceed
11 under in negligence.

12 THE COURT: Okay. Anything else?

13 MS. PAYNE: Just that it would be completely
14 prejudicial to allow them to amend on the eve of trial
15 when, in fact, they have not met the proper requirements
16 to do so. That would be our argument, Your Honor.

17 THE COURT: All right. Mr. Detrick?

18 MR. DETRICK: Your Honor, I assume you want me to
19 address the contract part. It -- from the very start when
20 we submitted discovery before I even got involved in the
21 case they requested all contracts regarding Sam English
22 Grading involving this crossing of Redds Branch Road.
23 What is before you was a part of what was provided. We
24 took the depositions. The first depositions we took
25 Mr. English admitted that that part you got

1 specifically -- I think it is paragraph four -- was a part
2 of the contract at the time this wreck occurred and he
3 admitted that he -- I asked him, Should he have had a
4 flagman and advanced warnings out there. He said, I
5 assume we should've, he said, but I didn't. Then he says
6 I did have a flagman out there. That's a person sitting
7 up on his tractor with no flag, not in accordance with any
8 kind of control of the traffic or the motoring highway.

9 Your Honor, he said he didn't have the encroachment
10 permit but he was supposed to comply with it. I then
11 subpoenaed because they -- from Owens Corning the
12 encroachment permit and all contracts involving this
13 particular location on this particular date. We were
14 provided by Owens Corning the encroachment permit, the
15 contracts, all of the contracts and I've tried to get
16 Mr. Cox to admit to the authenticity of the encroachment
17 permit; so he wouldn't do it.

18 So I took the deposition of Mr. Merritt who is in
19 Ohio who is the person who was involved in the
20 negotiations of the contract since 1984 with Sam English
21 Grading. He is the one who drew it up. He said he went
22 through it and said we went in detail with Mr. English.
23 Mr. English knew that he had to abide by these terms. He
24 thought Mr. English was abiding by these terms. He said
25 that the encroachment permit itself was referenced as a

1 safety guidelines on this particular road; that it was
2 referenced in the contract. Not only does paragraph four
3 say that they should have had a flagman and signs out
4 there, but if you read the encroachment permit which is
5 referenced and made a part of the contract it set forth
6 exactly what they should have done.

7 Mr. Merritt said, yes, they should have done it.
8 They're supposed to have done it. As a matter of fact, he
9 even said that he would on occasion since 1984 in response
10 to Mr. Cox's questions, he said -- Mr. Cox said, Did you
11 go out and inspect to make sure that my client is
12 complying with this contract? He said, Yes, sir, I did.
13 He said, We would go out there about every four or five
14 years and we would make sure they were out there, make
15 sure they had a flagman out there, make sure they had
16 advanced warning signs out there, and he said when I went
17 there they did, and I asked Mr. Merritt on direct, I said,
18 Mr. Merritt, before you went down there did you call
19 Mr. English and tell him you were coming? Yes, sir, I
20 did. And whenever you went down there and you told him
21 you were coming, of course, he had the flagman and the
22 warning signs out there, didn't he? Yes, sir, he did.

23 So, Your Honor, there is no question that -- I can
24 provide up the law, I'm sure. I've tried cases against
25 the DOT and contractors where they've had the contracts

1 that the DOT provides and they have to abide by. If you
2 want me to pass up the law---

3 THE COURT: No. That's pretty elementary.

4 MR. DETRICK: Pretty elementary. I thought so. And,
5 therefore, that is -- you know, it shows the -- just like
6 it is a third party beneficiary of that contract is the
7 traveling public and it shows a standard of care and it
8 shows a reasonable standard of care in this circumstance.

9 THE COURT: But you're not bringing it on a breach of
10 contract. You're bringing it on negligence cause of
11 action for failing to comply with what they set up was
12 supposed to be done.

13 MR. DETRICK: We did. That's what we did.

14 THE COURT: All right. Anything else?

15 MS. PAYNE: Your Honor --

16 THE COURT: Yes, ma'am?

17 MS. PAYNE: -- in the Dorel case and I'm happy to
18 provide it to the court.

19 THE COURT: Please.

20 MS. PAYNE: Everybody is familiar with the Dorel case
21 and I understand the court's argument about it being
22 elementary. There is a difference here that distinguishes
23 this case from Durel. Durel is a contract with the SCDOT.
24 In Durel it specifically says in two provisions that the
25 contract is to provide all safety guards to the -- and

1 protect the safety of the public and the employees on the
2 job, one, and, two, under---

3 THE COURT: Where are you reading?

4 MS. PAYNE: I'm sorry. Page six. And then in the
5 second provision, public convenience and safety. Based
6 on -- the court specifically says based on the plain
7 language of the contract APAC had a duty to provide for
8 the safety of the traveling public to perform the work in
9 a workman-like manner.

10 Our case is completely distinguishable, Your Honor.
11 Not only is this a private contract that does not involve
12 SCDOT who has -- who completely -- who owns Redds Branch
13 Road, this is a private road that we are on and our
14 contract does not say anything about protecting the
15 public. It does not give a direct benefit to the public
16 from our contract.

17 Furthermore -- I'm sorry, Your Honor. I just lost my
18 train of thought. The South Carolina Highway Department
19 -- the South Carolina Highway Department encroachment
20 permit which they specifically reference stating that we
21 will comply with that was not applicable to this roadway,
22 and, therefore, the terms of that encroachment permit has
23 nothing to do with this case. To allow the jury to
24 consider this information would completely confuse them on
25 a negligence cause of action and the common law duty.

1 Not only does Durel look at a contractual duty, but
2 they also look at common law duty and they established
3 that the common law duty existed independently of the
4 contract with the SCDOT.

5 In this case -- again, distinguishable -- the
6 plaintiffs have not presented any evidence that to support
7 a common law duty to put up signs and have a flagman while
8 we are crossing the road. There is no common law duty to
9 do that when we cross a road at any point. Either you
10 backing out of your driveway or us driving machinery
11 across the road, there is not a common law duty and
12 there's why Durel is distinguishable from this case and
13 that's why the jury should not be able to consider the
14 contractual duty between two private parties involving a
15 private roadway.

16 THE COURT: Thank you, ma'am. Anything else?

17 MS. PAYNE: Nothing further, Your Honor. Thank you.

18 THE COURT: All right. It's discretionary. I am
19 going to allow the amendment. Obviously, if we get to the
20 trial of the case and it's not admissible we'll deal with
21 it at that point, but I am going to allow the amendment to
22 the pleadings.

23 All right. Mr. Detrick, why should I not grant
24 summary judgment?

25 MR. DETRICK: Your Honor, just like I was proceeding

1 to tell the court from the facts of this case is under
2 that they agreed to have advanced warning signs. They
3 agreed to have a real flagman there. Mr. Merritt
4 testified it was for safety purposes.

5 They did not have any advanced warning signs. That
6 encroachment permit sets specifically exactly what they
7 ought to have. They did not have a flagman even though it
8 says in there for the public, to control traffic is, I
9 believe, what that encroachment permit says. They didn't
10 have that. They had a guy whose real job was to clean up
11 the road and on this particular occasion what happened
12 was -- and we'll have testimony if they had had that,
13 obviously, this wouldn't have happened. You know, you --
14 stop. You stop beforehand.

15 What happened on this occasion is Mr. Valenzuela with
16 his wife on the back comes around and not having been down
17 that road, not having any idea what he is facing, and what
18 do they have set up? They have set up a dangerous
19 situation, absolutely dangerous to the public. They have
20 a -- where they are going across and they are not stopping
21 at that stop sign because it gets them across quicker.
22 Well, obviously, it gets them across quicker and they
23 intended not to stop at that stop sign.

24 This motor -- this guy in this 70,000-pound piece of
25 equipment which has a -- it kind of articulates, Your

1 Honor -- that he's coming along. Mr. Valenzuela can't see
2 him. All of a sudden -- we will have testimony that he --
3 that the speed was involved. Our experts says he was
4 going at the time Mr. Valenzuela saw him at 17.3 miles an
5 hour. That is -- at that time, Your Honor, that is about
6 20 feet from the doggone intersection. He is seeing --
7 and he's seeing him at that speed 20 feet from the
8 intersection. He's approaching. He has less than two
9 seconds to make a decision whenever he is at that speed.

10 He puts on his rear brakes. He slides and then he
11 does lay it down. He has no idea that he had a take -- he
12 had no idea that that grader was going to be -- that that
13 scraper was going to be able to turn and not go into the
14 intersection. He had to make a decision about what he was
15 going to have to do because of the dangerous situation
16 they put him in.

17 Now, in addition to that, the motor grader -- he
18 comes along and they're trying to say he's at a controlled
19 speed and he is trying to say he turned it to the right to
20 keep it out of the way of the motorcycle. That isn't true
21 and I want you -- we'll get into the testimony later.
22 You're going to hear some strange testimony from this
23 operator, but no matter what he told the MAIT team that he
24 turned it to the right because he was getting ready to go
25 into the road, and, therefore, he made a quick turn to the

1 right and it was not a controlled turn. He was taking
2 evasive action, too, because he knew he was getting ready
3 to go in the road.

4 So what we have is we have to operators coming along
5 both of them almost at the exact time have to take evasive
6 action. The grader takes evasive action and runs over the
7 stop sign. Now, you know, that, obviously, Your Honor --
8 they created this situation. They're negligent. If you
9 want me to, you know -- he says there isn't any violation
10 of any statutes. Well, I disagree with that, you know.

11 THE COURT: What statutes?

12 MR. DETRICK: First off, they put a stop sign out
13 there. You got to stop at the stop sign and you have to
14 stop under 56 -- let me get---

15 THE COURT: Who put the stop sign up?

16 MR. DETRICK: They put -- I don't know who put the
17 stop sign up.

18 THE COURT: Is it a state stop sign or stop sign for
19 a private road?

20 MR. DETRICK: It is a probably a stop sign for a
21 private road. There is no markings about a DOT on the
22 back, but the statute says, Your Honor, when you put up
23 these traffic controlled situations -- stop signs,
24 whatever -- then you can't just put them up unless you had
25 to go in accordance to the law. They can't just put

1 things up and it -- you know, this is an official DOT stop
2 sign. Octagonal. When you put it up, then that creates
3 -- they can't do it, first off, without permission of the
4 DOT; so, obviously, we assumed that they had permission
5 from the DOT. I don't know.

6 Secondly, when they put it up---

7 THE COURT: You're supposed to stop.

8 MR. DETRICK: You got to stop. Then the traffic laws
9 regarding stop signs are applicable. It's simple as that.

10 THE COURT: And you come to a stop and give the
11 motoring public opportunity to pass without running into
12 them.

13 MR. DETRICK: You have to stop at a particular
14 location. You have to stop at the intersection to where
15 you can see down the road. You don't stop up against and
16 run over the stop sign. That isn't---

17 THE COURT: And you don't make your decision to stop
18 based on somebody standing out in the road waving you on
19 or not waving you on.

20 MR. DETRICK: Exactly. In addition to that, Your
21 Honor, they violate the speed statutes. You can't -- I
22 refer to 56-5-1520 that they're supposed to speed -- at no
23 greater speed than is reasonable and prudent under the
24 conditions having due regard for the actual and potential
25 hazards then existing. I won't read the rest of it.

1 In F, though, it says the driver of a vehicle shall
2 drive consistent with the requirements of, A, at an
3 appropriate reduced speed when approaching and crossing an
4 intersection -- approaching, I might add, and crossing an
5 intersection or railway grade crossing and it goes on down
6 there and when special hazards exist with respect to
7 pedestrians and other traffic or by reason of weather and
8 highway conditions. Well, obviously, they created a
9 condition there that they had to approach this stop sign
10 at a reasonable speed. You know, they can't just come up
11 flying up there and just because they don't go in the road
12 slam on brakes and cause this guy to have to take action.
13 He doesn't know that he is not coming to the stop sign.
14 We'll have proof that if he hadn't turned he would have
15 gone across both lanes of traffic.

16 If addition to that, obviously, Your Honor, there
17 is -- Mr. Cox is totally ignoring the law of negligence.
18 I mean that is first year torts. Reasonable care. This
19 is -- if this is reasonable care, I just don't understand
20 it. There is also the duty to keep a proper -- to have
21 your vehicle under proper control. He doesn't have his
22 vehicle under proper control when he is running over stop
23 signs, when he is running up to the stop sign at this
24 speed and causing other -- the traveling motoring public
25 to have the lay down their bike.

1 THE COURT: Well, Mr. Detrick, Mr. Cox may be totally
2 right, but at this stage of the game it is just a quagmire
3 of facts that the jury has got to determine. I can't
4 dismiss this case as not being any factual issues in
5 dispute.

6 MR. DETRICK: Thank you, Your Honor.

7 THE COURT: It is in my opinion nothing but a factual
8 dispute on a number of issues.

9 Mr. Cox, you may respond.

10 MR. COX: Judge, Your Honor, I would still submit
11 Paul Detrick failed to identify a duty that was breached.
12 You know, he mentions the signs. If we had crossing
13 guards at every -- people directing traffic at every
14 crossing in America there would be no accidents, but
15 it's not required that you have flagmen and crossing
16 guards---

17 THE COURT: Well, it is a question of fact as to
18 whether or not the contract required y'all to or what your
19 guy is saying required you to. Y'all created a unique
20 situation -- not to use the word dangerous. You created a
21 situation where normally you would rely on a flagman out
22 there or spotter, as you say, to tell the guy to come on
23 throughout without stopping. It is just a question of
24 fact as to whether or not what duties were owed to your --
25 to the plaintiff, whether or not y'all breached them,

1 whether or not y'all exercised control over this
2 right-of-way as an ordinary reasonable person would,
3 whether or not you exercised in compliance with the
4 alleged contract. All of that is questions of fact that I
5 just can't grant summary judgment on and dismiss the case.

6 MR. COX: Judge, I would just respectfully submit
7 that I don't believe it is a question of fact as to
8 whether or not there is an identifiable duty.

9 THE COURT: Well, I just ruled that it was.

10 MR. COX: Okay. Thank you.

11 THE COURT: You're protected fully on the record. I
12 let you go through every cause -- every allegation of
13 negligence. If you need to put anything else on the
14 record to protect yourself without being redundant, I'll
15 allow that, but I just take the position that it is just a
16 wealth of facts in this case that need to be decided by a
17 jury and they may believe you right down the line. They
18 very well could. You know, we did all we could. We
19 stopped. He is the one who laid it down. It's his fault,
20 not yours, but that ain't for me -- Strike that. That's
21 not for me to decide. That is for those 12 people in
22 Aiken to decide.

23 MR. COX: Your Honor, thank you.

24 THE COURT: Thank you very much and thank you for
25 being repaired. All right. Now we have motions in

1 limine. Let me do the plaintiff's first.

2 MR. DETRICK: Your Honor, do you have them before
3 you?

4 THE COURT: I think I do.

5 MS. PAYNE: You did put on the record that you
6 granted their motion to amend; correct?

7 THE COURT: I did.

8 MS. PAYNE: Okay.

9 THE COURT: Mr. Detrick, you got a copy of your
10 motion in limine?

11 MR. DETRICK: Yes, sir.

12 THE COURT: Pass it up. All right. First, evidence
13 to the reference of failure of the driver and deceased to
14 wear a helmet.

15 MR. DETRICK: Yes, sir, and Mr. Valenzuela. I got
16 Mr. Maxwell to hand up cases totally on point, Your Honor.

17 THE COURT: Mr. Maxwell, did you hand it up?

18 MR. MAXWELL: I handed it with those motions.

19 MR. DETRICK: I think he just handed it with you.
20 Mayes versus Paxton is exactly on point, Your Honor.

21 THE COURT: All right. Mr. Cox, any opposition to
22 that?

23 MS. PAYNE: I'll be arguing, Your Honor.

24 THE COURT: I'm sorry.

25 MS. PAYNE: Yes, we oppose his motion to exclude any

1 testimony of the helmet. He didn't provide us with a copy
2 of the case that he gave to the court.

3 MR. DETRICK: I'm sorry. Here you go.

4 MS. PAYNE: My argument is this is admissible as
5 relevant evidence under 401. There is a common law duty
6 to wear a helmet. The case that I have which talks about
7 a helmet -- if I could have just a second to look at their
8 case, Your Honor.

9 THE COURT: Well, the case says if you're under 21
10 you're required to wear one. If you're over 21 you're not
11 and this case says we decline to create a judicial penalty
12 from those exempted from the statutory duty.

13 MS. PAYNE: Are you on page 70, Your Honor?

14 THE COURT: Yes, ma'am.

15 MS. PAYNE: Okay.

16 THE COURT: Fourteen.

17 MS. PAYNE: Okay. And, Your Honor, we would submit
18 that this case does not say that it's not admissible
19 evidence. You can certainly limit -- give a limiting
20 instruction, but just because it says that there is no
21 judicial penalty does not mean that it's inadmissible in
22 the case. There is other reasons for the admissibility of
23 them wearing a helmet -- failure to mitigate damages.
24 This also involves having a passenger or allowing a
25 passenger to ride on the back of his vehicle without a

1 helmet goes to comparative negligence. It certainly does
2 not say that it's inadmissible.

3 There is no case law that says that it's
4 inadmissible. This is relevant evidence for which the
5 jury should be able to consider it and it's more probative
6 than prejudicial, Your Honor.

7 MR. DETRICK: I didn't have but one copy -- I'm
8 sorry -- on the other cases cited in the Mayes case and
9 that is the one involving the seatbelt. That's Keaton
10 versus Pearson and in that case also the same thing. It
11 said it's not admissible at all for damages or any reason.

12 It's clear that that was the ruling in both of these
13 cases that Mayes versus Paxton it is flat not admissible,
14 no judicial penalty, no statutory duty, nothing.

15 MS. PAYNE: I think the distinguishable factor here,
16 Your Honor, is that this court is saying that where it is
17 known that he understood and appreciated a known danger
18 created by the defendant and then -- I'm sorry -- as a
19 matter of law we find that a motorcyclist's decision to
20 ride without a helmet does not imply his consent that
21 motorists are relieved of the duty to use reasonable care
22 towards them.

23 We certainly would not be opposed to the court giving
24 a jury instruction in this matter, but the bottom line is
25 the case specifically does not say that it is

1 inadmissible. In the supreme -- I mean, the legislature
2 has enacted a seatbelt statute. It has specifically said
3 that it is inadmissible. They could have done so under
4 the motorcycle statute laws and they failed to do so. By
5 the plain reading of the failure of their to add this
6 inadmissibility of the failure to wear one shows that it
7 is admissible.

8 The difference in this case and the difference in the
9 Mayes case is that we have a passenger on the back.

10 THE COURT: Well, did she die from a head injury?

11 MS. PAYNE: Yes, Your Honor.

12 MR. DETRICK: I would read, Your Honor, the case as
13 far as the Keaton versus Pearson says, quote, We now hold
14 in the absence of the affirmative statutory duty --
15 absence. A plaintiff's failure to use a seatbelt does not
16 constitute contributory negligence or pre-injury failure
17 to minimize damages and that was accepted as the law in
18 this case. The Mayes versus Paxton cites that case in
19 which in the Mayes case it says since the legislature has
20 enacted the statutory requirement to use the helmet and is
21 specifically elected not to extend that requirement to
22 motorcyclists 21 years or older we decline to create a
23 judicial penalty -- any kind of judicial -- for those
24 exempted from the statutory duty. Then it says see Keaton
25 versus Pearson.

1 THE COURT: Thank you. All right. I am going to
2 take that under advisement. I will do one of two things.
3 I'll rule at the beginning of the trial on Monday or I
4 will ask that the defendant not mention the failure to
5 wear a helmet in opening. When it becomes relevant during
6 the trial of the case, then I would do a proffer on it and
7 rule at that time or I will rule outright at the beginning
8 of the case. I'll let you now how I am going to handle
9 that one on Monday morning.

10 MS. PAYNE: Thank you, Your Honor.

11 THE COURT: Two, any girlfriends that Michael may
12 have had since the death of his wife. That's pretty
13 standard. Any objection to that, ma'am?

14 MS. PAYNE: Your Honor, for the record we'll just say
15 that it's admissible evidence under 401. The case law
16 talks about remarriage. Obviously, this is
17 distinguishable in that it's girlfriends and not---

18 THE COURT: I assume you have to have a girlfriend
19 before you remarry so I -- maybe not in today's world.

20 MS. PAYNE: Your Honor, just under the damages that
21 the plaintiff is trying to prove, he's trying to prove
22 loss of companionship, et cetera.

23 THE COURT: Sure.

24 MS. PAYNE: We think this goes directly to his claim
25 for those damages. We would just ask the court to allow

1 us---

2 THE COURT: Thank you very much. That is granted.
3 There will be no reference to his dating since the death.
4 All right. E -- three -- I'm sorry. That's an easy one.

5 MS. PAYNE: Yea, we agree with that, Your Honor. We
6 would just be ask that we be allowed to use that for a
7 setoff if there should be one.

8 THE COURT: Well, that's a matter of law to be
9 done --

10 MS. PAYNE: Yes, sir.

11 THE COURT: -- at the conclusion of the trial if they
12 get a verdict.

13 THE COURT: Permit rather than a motorcycle driving
14 license -- four. Any opposition to that?

15 MS. PAYNE: Yes, sir, Your Honor.

16 THE COURT: And your -- Why do you oppose that?

17 MS. PAYNE: Okay, Your Honor. His failing to have a
18 class M license which is what is required for a motorcycle
19 -- I'm sorry. I'm getting a bunch of letters mixed
20 together. A class M goes directly to his comparative --
21 to our comparative negligence claim that he did not know,
22 did not use proper actions in avoiding or taking evasive
23 action, Your Honor. It is completely relevant under
24 401 -- and Rule 401 and Rule 402 of the statutory
25 beneficiaries comparative negligence and knowledge and

1 experience in motorcycle usage.

2 The trooper -- the highway patrolman talked about
3 that he had a permit only and that typically when a person
4 has had a permit for as long as he has that it indicates
5 his failure to pass the test which would go---

6 THE COURT: Well, certainly, that's not admissible.

7 MS. PAYNE: Well, I mean, she is the expert in her
8 field.

9 THE COURT: I know that, but that's not -- whether or
10 not he failed or -- either he failed or he didn't, but the
11 trooper can't say that indicates he failed it.

12 MS. PAYNE: Okay, Your Honor.

13 THE COURT: Mr. Detrick, I am going to probably allow
14 them to say that you only got a permit instead of a
15 license, but there is certainly not going to be any
16 speculation as to why he only had a permit as opposed to a
17 license.

18 MS. PAYNE: Thank you, Your Honor, and we won't go
19 into that.

20 MR. DETRICK: Let me make sure I understand the
21 court's ruling because this is going to come up later.
22 They've got a motorcycle safety guy that says, you know,
23 whatever, but you only are going to allow them to say he
24 had a permit.

25 THE COURT: That's right.

1 MR. DETRICK: And that's it.

2 THE COURT: Unless they got his driving record where
3 he flunked the license record four or five times.

4 MR. DETRICK: He just -- no, it's just -- it is
5 cheaper to pay two dollars for a permit every year.
6 That's it.

7 THE COURT: All right. I am going to deny that. You
8 can refer to that he had a permit.

9 MS. PAYNE: Thank you, Your Honor.

10 THE COURT: But you can't draw any speculative --
11 speculating conclusion from that. If you got the facts as
12 to why he doesn't have a license, that's one thing.

13 MS. PAYNE: Okay. And the other thing I think what
14 Mr. Detrick was getting at is that our proposed expert is
15 going to discuss what you learn, the manual that you get
16 when you get a permit and what's in there, and he's going
17 to discuss that and I think, you know, that would go along
18 with his having a permit versus having a license.

19 THE COURT: All right.

20 MS. PAYNE: Okay. Thank you, Your Honor.

21 THE COURT: Opinions regarding lack of experience.

22 MR. DETRICK: We can get into that, Your Honor, later
23 on.

24 THE COURT: Yea, let's --

25 MR. DETRICK: We got other motions.

1 THE COURT: -- come back to that one. Opinion of the
2 MAIT team as to who contributed to the wreck. The MAIT
3 guy is qualified. He can offer opinions as to what he
4 found out there, speed, and so forth and so on, but I
5 don't know if he can give the ultimate opinion as to who
6 caused the wreck. What do you say to that?

7 MS. PAYNE: Your Honor, we are okay with not allowing
8 them to give opinions regarding the contribution to the
9 wreck. However, we do disagree on the number seven -- or
10 I have it listed differently than they do, but opinions of
11 the MAIT team and investigating officers as to whether any
12 laws were broken. Clearly, they can opine as to whether
13 any of either of the parties failed to yield the
14 right-of-way or was given a speeding ticket or anything of
15 that. That's relevant evidence under 701 and the expert
16 testimony. Specifically, the case -- the Murphy case
17 which I have if Your Honor would like.

18 THE COURT: Well, here's what I am going to do on
19 that.

20 MS. PAYNE: Okay.

21 THE COURT: I am not granting it or denying it. I am
22 going to simply tell you this. When you get ready to put
23 your MAIT guy up and we get into the opinions as to
24 whether or not laws were broken or criminal charges
25 brought, you do a proffer. You do not do it in front of

1 the jury. I'll listen to the proffer, listen to arguments
2 at that time. I am not going to do it in a motion in
3 limine, per se, other than just to say don't go into it
4 without saying, Judge, we're getting ready to go into that
5 area and I'll excuse the jury and we'll proffer and then
6 we argue.

7 MS. PAYNE: Okay.

8 THE COURT: Fair enough?

9 MR. DETRICK: That's fine. My understanding is she
10 agrees to five and six?

11 MS. PAYNE: I agree to the opinions of the MAIT team
12 as to who contributed to the wreck.

13 THE COURT: Five. We're coming back to on the
14 expert.

15 MS. PAYNE: Yea.

16 MR. DETRICK: Sir?

17 THE COURT: Five, I assume, is their expert about
18 lack of experience contributing---

19 MR. DETRICK: Yes, sir.

20 THE COURT: We'll come back to that in a minute.

21 MS. PAYNE: Okay.

22 THE COURT: We may have to do a---

23 MR. DETRICK: Oh, we're coming back to that one.

24 Okay.

25 THE COURT: I think you asked me to come back to it.

1 MR. DETRICK: Okay. I apologize. That's what I
2 wanted to clear up.

3 MS. PAYNE: The other two were talking about the
4 opinions of the investigator. You may want to --
5 investigating officer. You may want to handle that the
6 same way -- proffer. I don't know.

7 THE COURT: Now, I can promise you one thing.

8 MS. PAYNE: Yes, sir.

9 THE COURT: I don't let investigating officers unless
10 they have the training or experience give any opinions at
11 all. The law is very clear on that. All they can do is
12 testify about what physical facts they found at the scene
13 of the wreck unless they're trained as a MAIT officer
14 normally has.

15 MS. PAYNE: Well, would it be applicable under Rule
16 701, opinion testimony by lay witnesses?

17 THE COURT: No, ma'am. There is case law on -- old
18 case law on what highway patrolmen can testify to -- the
19 facts. I saw the glass over here. I saw the skid marks
20 here. I saw the vehicle over here. I saw the motorcycle
21 there. I saw the body here, but to say that the skid
22 marks meant that he was going X amount of miles, I don't
23 allow that. I don't allow them to testify if he had not
24 laid the vehicle down it wouldn't have been as severe a
25 collision. Everybody knows that.

1 MS. PAYNE: Well, I think what the application of the
2 brakes is the issue because he did have individualized
3 knowledge about using both sets of brakes and I may be---

4 THE COURT: I'm not going to allow your investigating
5 officer unless you qualify him to give any opinion
6 whatsoever. He is like any other lay witness.

7 MS. PAYNE: Okay.

8 THE COURT: All right. Y'all have got a Joe Dawes as
9 a motorcycle expert.

10 MS. PAYNE: That's correct, Your Honor.

11 THE COURT: And I don't know how I can sit here today
12 and say what he can or he can't do without letting him do
13 a proffer as to what his testimony is going to be and what
14 his opinions are going to be sort of like we do -- is it
15 the new case that came out about -- not new now, but it is
16 Watson; right?

17 MS. PAYNE: Yes, sir.

18 MR. DETRICK: Yes, sir.

19 THE COURT: The way I've been doing that is I'll --
20 we've done them in several cases. We'll let the expert
21 get up and I make sure he meets all of the qualifications
22 and requirements that Watson requires and then we'll make
23 a determination at that time, but I got to hear him
24 testify and I got to hear his qualifications and I got to
25 hear all that; so what I propose to do is probably on

1 Monday morning -- I assume that the jury will be reporting
2 at probably at 9:30 and ready for us to draw them at 10
3 and what we would probably do is go ahead and select the
4 jury and start the trial of the case -- I don't know.
5 We'll just have talk come Monday morning. We may start
6 the trial of the case and go ahead and do openings and get
7 witnesses in and then I can do the proffer at lunch time.
8 It may be that we have enough stuff to do that I can do
9 the proffer before we start the trial of the case and
10 maybe start at 2 o'clock or 1 o'clock.

11 We'll just play it by ear, but I need Mr. Dawes there
12 Monday morning; so let's go through a Watson analysis
13 since there is a challenge to his testimony. We've been
14 doing that. We've did that in some of the train wreck
15 cases -- derailment cases. I did it in a seatbelt case
16 that Mr. Detrick's firm had here recently. That's how I
17 have been doing them. I think that's what Watson requires
18 of us.

19 MR. DETRICK: Yes, sir.

20 THE COURT: So that takes care of that.

21 MR. DETRICK: Yes, sir.

22 MS. PAYNE: And that would be we'll -- along with Joe
23 Dawes we'll look back at number five about that.

24 THE COURT: Yes, ma'am.

25 MS. PAYNE: Thank you, Your Honor.

1 THE COURT: You know, if he doesn't meet all the
2 Watson requirements, then, obviously, he can't testify.
3 If he does, then you got the whole issue of whether or not
4 the operation of a motor vehicle -- strike that --
5 operation of a motorcycle is something that you don't need
6 expert testimony on.

7 MS. PAYNE: Yes, sir.

8 THE COURT: You got all of those issues in there that
9 you got to deal with.

10 MR. DETRICK: Could I inquire -- I'm a little -- for
11 purposes of us having witnesses ready, what should we do?
12 Should we have some ready for Monday afternoon?

13 THE COURT: Let's do this. Let's finish all of this
14 and then we'll go off the record and I'll do the best way
15 to suit y'all.

16 MR. DETRICK: All right, sir.

17 MS. PAYNE: Thank you, Your Honor.

18 MR. DETRICK: Thank you. I think that's all on my
19 end.

20 MS. PAYNE: It is.

21 THE COURT: All right. Now, everybody need a
22 bathroom break? Everybody okay?

23 MS. PAYNE: We're good. Thank you.

24 THE COURT: Mr. Detrick, you're okay?

25 MR. DETRICK: Yes, sir.

1 THE COURT: Ms. Payne, you okay?

2 MS. PAYNE: I am, Your Honor.

3 THE COURT: We had a two-hour -- Off the record.

4 (Whereupon, a discussion was held off the record.)

5 THE COURT: All right. Ms. Payne, et al, others,
6 number one, on the encroachment permit what I am going to
7 probably do on that one is, Mr. Detrick, when you get to
8 the point where you want to go into that, let's do a
9 proffer and so we can have a full record. You'll have
10 your person there that you're going to try to get it in
11 through, et cetera, et cetera.

12 MR. DETRICK: Your Honor, we wanted to address that
13 in our opening statement.

14 THE COURT: All right. Well, have the witness there
15 Monday morning and we'll do the proffer with him Monday
16 morning.

17 MR. DETRICK: I got -- I think it can probably be
18 accomplished by video deposition of Mr. Merritt and I can
19 give you a copy of that.

20 THE COURT: Go ahead and give me that over the
21 weekend. Give it to me before you leave today.

22 MR. DETRICK: I don't have it with me.

23 THE COURT: Sir?

24 MR. DETRICK: I don't have it with me.

25 THE COURT: Well, I bet your law clerk -- you got a

1 new lawyer now. Let him scan it and send it to me. I'll
2 rule on that Monday morning. I will look at that.

3 MR. DETRICK: Yes, sir.

4 MS. PAYNE: Your Honor, are you talking about the
5 contract and the encroachment permit?

6 THE COURT: Yes, ma'am.

7 MS. PAYNE: Okay.

8 THE COURT: All right. Motion to exclude any
9 evidence that the scraper pan entered or crossed over the
10 roadway at the time of the incident.

11 MR. DETRICK: Before I get back into that -- I
12 apologize. Is it okay -- can I send portions of
13 Mr. English's deposition, not send him the whole doggone
14 thing?

15 THE COURT: I just need what you're going to rely on.

16 MR. DETRICK: Okay. I am going to send you portions
17 of that, too.

18 MR. COX: And you'll copy us.

19 MR. DETRICK: Sure. Yes.

20 THE COURT: All right. Number two, the evidence is
21 whatever the evidence is. I mean...

22 MS. PAYNE: This motion, Your Honor, is -- it's
23 uncontroverted that the -- at the time of this incident
24 this pan scraper did not go out into the roadway.
25 However, there has been testimony -- there have been some

1 witnesses who have said that it went out into the roadway
2 and then backed up. We're trying to keep that evidence
3 out as it is not supported by the evidence.

4 THE COURT: Well, I can't---

5 MR. COX: Actually, I don't think---

6 THE COURT: Paul, are y'all going to have anybody
7 that says that it came out in the roadway?

8 MR. DETRICK: Which one are we on?

9 MS. PAYNE: Two.

10 MR. DETRICK: Your Honor, the uncontradicted proof is
11 going to be that at the time he came up he did not enter
12 the intersection.

13 THE COURT: Sure.

14 MR. DETRICK: I agree to that.

15 MS. PAYNE: So you agree that Mr. Valenzuela is not
16 going to testify that we backed it up post-accident?

17 MR. DETRICK: I do have client problems, Your Honor.
18 I am going to be honest with you. What Mr. Valenzuela is
19 going to say is sometimes out of my control.

20 THE COURT: You would almost want him to say that.
21 Then you could really get on it.

22 MR. DETRICK: I am certainly going to tell him not to
23 say that.

24 THE COURT: Sure.

25 MR. DETRICK: It's just not the proof, Your Honor.

1 It's not the fact. I don't want to go into something
2 that's not true.

3 THE COURT: Absolutely, but, you know, ma'am, if he
4 says something outlandish like that you can jump on his
5 credibility.

6 MS. PAYNE: Well, and I understand that, but what
7 it's going to look like is that we tried to change the
8 scene when we didn't. It is going to be prejudicial if it
9 comes out, Your Honor.

10 THE COURT: Well --

11 MS. PAYNE: I mean, I'll---

12 THE COURT: -- I can't make him say that -- I wish I
13 could make witnesses not tell untruths, but I hadn't
14 figured out a way to do that, yet.

15 MS. PAYNE: As long as Mr. Detrick says that he is---

16 MR. DETRICK: Your Honor, this is what -- and I can't
17 -- Mr. Valenzuela is going to say, I assume, that he
18 thought that the pan went into the roadway and he did and
19 I can't tell -- he did, honest to God, think that. The
20 proof scientifically -- you can see the photographs. You
21 can see the skid marks. You see the gouge -- you know,
22 the yaw---

23 THE COURT: Well, he was probably scared to death.

24 MR. DETRICK: The yaw marks and everything showed
25 where the pan went.

1 THE COURT: And you're not going to get up there and
2 argue to the jury, My client said it came out. You're
3 going to do what the facts say.

4 MR. DETRICK: Absolutely.

5 THE COURT: I know Mr. Detrick. I have tried cases
6 against him. I've had him in my court before. He can't
7 make his client say that, but he is not going to argue
8 anything other than what the facts show.

9 MR. DETRICK: I'm not. I promise.

10 THE COURT: Same thing as two. I mean three.

11 MS. PAYNE: Well, Your Honor, the plaintiffs have
12 about, I don't know, 10 to 15 witnesses that they plan on
13 presenting to the court or to the jury that we failed to
14 stop at a stop sign before or after this incident. It is
15 completely irrelevant to what happened on August 7, 2009,
16 and, in fact, it is so prejudicial to our client because
17 Mr. Valenzuela had never been down this road before. He
18 had never encountered this position before; so to have
19 witnesses testify to something that he would not have been
20 aware of is creating an issue that is not there and it is
21 actually creating prejudicial testimony against our
22 client.

23 THE COURT: Well, the issue is whether or not you
24 created a dangerous situation and---

25 MS. PAYNE: And what we did before -- I'm sorry. I

1 didn't mean to cut you off.

2 THE COURT: Well, I am not going to let 20 people get
3 up there and testify to that, but it may be that that
4 becomes relevant. I don't know.

5 Mr. Detrick, do you plan to put people up to say what
6 they did before?

7 MR. DETRICK: Yes, sir, I do. They were running
8 through that stop sign, creating a dangerous situation.
9 They knew it was dangerous.

10 THE COURT: And they were going to do it that day
11 except the spotter told him to stop.

12 MR. DETRICK: That's exactly---

13 THE COURT: I will -- I am not going to exclude that.
14 I will not allow it to become cumulative, 403, but...

15 MS. PAYNE: Your Honor?

16 THE COURT: Yes, ma'am.

17 MS. PAYNE: What they're trying to do is prove habit
18 and I have a case -- the Halcomb case -- and I am happy to
19 hand that up to the court.

20 THE COURT: Well, they may be -- I don't know if
21 trying to prove habit or just trying to establish that the
22 way they were operating at that crossing could conceivably
23 be found by a jury to be a dangerous situation that
24 required flagmen and warnings.

25 MS. PAYNE: But, Your Honor, what they're going to

1 say is that we did not stop at the stop sign. First of
2 all, the plaintiff will not be able to prove that we were
3 required to stop at that stop sign because it's not a
4 DOT-authorized stop sign. There's been no evidence to
5 that fact, and if you look at the statute specifically it
6 says for us to be required to stop at that stop sign must
7 be -- at section 56-5-2330 it says, Preferential
8 right-of-way may be indicated by stop signs or yield signs
9 as authorized by the DOT or local authorities. This stop
10 sign was not authorized by the DOT.

11 THE COURT: But they still have to stop to yield the
12 right-of-way to the traffic coming to the right.

13 MS. PAYNE: And, Your Honor, the case of Guthrie
14 versus Morris the court said -- affirmed a trial court's
15 just instruction stating a motorist entering a highway
16 from a private gate or drive is required to yield the
17 right-of-way to traffic on the highway, but this does not
18 necessarily mean that the motorist must stop before
19 entering the highway.

20 THE COURT: That's all factual issues. I am going to
21 allow him to probably go into that. You can make your
22 objections when they try to do. I'll listen to it. I am
23 not going to allow them to do more than a couple if I do
24 allow it. I can't rule on that in limine for blanket
25 exclusion. I'll just have to hear it.

1 MS. PAYNE: And---

2 THE COURT: And I'll be looking out for it when it
3 comes in.

4 MS. PAYNE: Yes, sir, Your Honor, and just -- I just
5 want to make -- I have one for before the accident and for
6 after the accident that we can continue to do it after the
7 accident. That's completely irrelevant to this case.

8 THE COURT: Probably so and that probably comes to
9 like a subsequent remedial.

10 MS. PAYNE: Subsequent.

11 THE COURT: Maybe close to it, maybe not. I'll just
12 have to listen to all of that when you get to it.

13 MS. PAYNE: Yes, sir, Your Honor.

14 THE COURT: I mean, if he continued to do it
15 afterwards, I don't know. That's not a subsequent
16 remedial measure because --

17 MS. PAYNE: Well---

18 THE COURT: -- it's not like fixing something or not
19 fixing something. I don't know. I'll have to just hear
20 it in its context when it comes in.

21 MS. PAYNE: Okay. Thank you, Judge.

22 THE COURT: Four.

23 MR. DETRICK: We agree to that one.

24 MS. PAYNE: You're not going to have anything? And
25 specifically, Paul, what I'm saying is when he is giving

1 CPR he says both my arms are broken.

2 MR. DETRICK: That's a little bit different. I can't

3 -- I don't know about that part. I mean, I'm not talking

4 -- I am not going to try two cases at one time.

5 THE COURT: He's not going to go into --

6 MR. DETRICK: No.

7 THE COURT: -- Mr. Valenzuela's injuries.

8 MR. DETRICK: He couldn't give CPR because he was
9 injured, but, I mean, that's just part of the factual
10 situation at the scene.

11 MS. PAYNE: Well, I---

12 THE COURT: Yes, ma'am?

13 MR. DETRICK: But I am not going into that the fact
14 he broke his shoulder and had fractures and surgeries and
15 all of that junk. I assume that's what she meant.

16 THE COURT: Yea.

17 MS. PAYNE: And specifically I am asking for that to
18 be excluded as well as him saying while I'm giving CPR I
19 have two broken elbows or whatever he said. I'm asking
20 the court to exclude that as well.

21 THE COURT: Well, are you going to say if he had
22 given CPR properly she might have lived?

23 MS. PAYNE: No, sir. I am just saying that that's
24 going to his injuries in which is not relevant.

25 THE COURT: I'll just have to listen to it.

1 Mr. Detrick, don't say anything about his injuries in
2 your opening. If it gets to that, I'll move on.

3 MR. DETRICK: All right, sir.

4 THE COURT: All right. Five, how much defendant made
5 working for Owens Corning.

6 MS. PAYNE: Your Honor, we would just ask that how
7 much we made, our profit doing this project is completely
8 irrelevant to this accident. It has nothing to do and
9 will create an undue prejudice against our client. It
10 will be used to inflame the jury and we're asking that
11 that be excluded, Your Honor.

12 THE COURT: Mr. Detrick, I am assuming that y'all are
13 asking for punitives?

14 MR. DETRICK: Yes, sir.

15 THE COURT: We all know the rules under punitives
16 what you can and can't go into. Do y'all want me to
17 bifurcate it? If they find the defendants -- if they find
18 them negligent, do they find them willful, wanton,
19 reckless with a conscious disregard for the rights of
20 others and let them come back and hear about what -- their
21 net worth an all of that at that time? Or do you want to
22 just try it all together?

23 MS. PAYNE: Your Honor, we do have a motion to
24 exclude punitive damages at this point, but---

25 THE COURT: I can't exclude it at this point because

1 I haven't heard anything.

2 MS. PAYNE: Okay. Then I would ask that we---

3 THE COURT: The question is you can ask me to
4 bifurcate the actual and the punitives?

5 MS. PAYNE: Yes, Your Honor. Sorry, Your Honor.
6 We're asking to bifurcate, Your Honor.

7 THE COURT: It worked good for me over in Aiken one
8 time. I don't know how it'll work this time.

9 MR. DETRICK: Yea, it did. I'll take the same
10 results.

11 Ms. Payne, the last time we did that over there I was
12 the lawyer and we got a 3 million-dollar actual and then
13 new came back the second day and got a \$3.9 million in
14 punitives which was upheld by the Supreme Court.

15 MS. PAYNE: We had not considered that, Your Honor.
16 Can we consider that and tell you on Monday?

17 THE COURT: Sure.

18 MS. PAYNE: Thank you.

19 THE COURT: But if we try it all together then,
20 obviously, there is some factors that the plaintiff can go
21 into concerning punitives that I give instruction that
22 that can only be determined or only be considered not for
23 the negligence but for the punitive part of it, but y'all
24 just think about it.

25 MS. PAYNE: Well, Your Honor, I think under the

1 punitives they would be asked about their net worth, but
2 not about how much they made at this---

3 THE COURT: Well, that's exactly true, but---

4 MR. DETRICK: That really isn't true under the new
5 statute even though I know it took effect afterwards, Your
6 Honor, but if you read the new statute it allows more than
7 that, but also in addition to that, Your Honor, we got a
8 court order requiring them to produce their financial
9 statements and even though they got a pile of equipment
10 they must have paid cash for -- I don't know, but they
11 promised they hadn't got a financial statement; therefore,
12 the only proof we can prove -- submit regarding their net
13 worth or their financial situation probably be will be
14 these contracts because that's all they provided to us.

15 THE COURT: Well, I think the cleanest way to try the
16 case would be for a bifurcation and then we get into all
17 of that outside the liability side of it if it becomes an
18 issue, but I'll let y'all make that decision, but if you
19 decide to try it all together then I am going to have to,
20 obviously, address -- if you can't show net worth, then --
21 they don't have a financial statement?

22 MR. DETRICK: I don't know how -- you know, we'll ask
23 them that under oath, but they never borrowed money, I
24 guess, but, anyway, they say under order -- we've got an
25 order from the court to provide financial statements and

1 they said they have none, never had any.

2 THE COURT: Okay. Well, then, obviously, you can ask
3 him certain questions.

4 MR. DETRICK: Yes, sir.

5 THE COURT: All right. Number seven -- six.

6 MS. PAYNE: Yea.

7 THE COURT: Well, that's going to depend on how I
8 rule on number one.

9 MS. PAYNE: Right.

10 THE COURT: So I am holding that in abeyance. I'm
11 holding six in abeyance.

12 MS. PAYNE: So six and seven are held?

13 THE COURT: All right. That's six and seven in
14 abeyance. Number eight, that's discretionary with the
15 court. I will allow certain leeway, but they're not going
16 to be able to parade up there 15 or 20 of them.

17 MS. PAYNE: They have listed about 15 witnesses to
18 discuss Mrs. Valenzuela's lifestyle and family
19 relationships. We just, obviously, would argue that that
20 is cumulative under 403 and ask the court to limit that.

21 THE COURT: Well, and that's discretionary with me as
22 to when it becomes cumulative, you know. I am not going
23 to let them put up fifteen, but I am not going to limit
24 them to two. I'll see how it goes.

25 MS. PAYNE: We understand, Your Honor.

1 THE COURT: Nine.

2 MS. PAYNE: And I think nine you addressed under
3 three.

4 THE COURT: Yes, ma'am.

5 MS. PAYNE: You're going to allow them to present
6 some witnesses potentially.

7 THE COURT: Potentially, after I hear them.

8 MS. PAYNE: Are we going to proffer those witnesses?

9 THE COURT: Well, you know, if they start getting
10 into that subject and if you object, I will probably send
11 the jury out to have a proffer. Okay?

12 MS. PAYNE: Your Honor, sorry. Number three -- what
13 was your ruling on number three?

14 THE COURT: To listen to the testimony to determine
15 whether or not it's relevant, whether or not it's
16 subsequent remedial measure or the whole 9 yards. I just
17 got to hear it to see what they're going to say.

18 MR. COX: Yes, sir. My understanding---

19 MR. DETRICK: Number three is before. She's talking
20 about how it's relevant to the dangerous conditions
21 existing created by---

22 MR. COX: You're holding that in abeyance as well,
23 right, Your Honor, until trial?

24 THE COURT: Right. I can't rule on it until I hear
25 it.

1 MS. PAYNE: About before or after?

2 THE COURT: Yes, ma'am.

3 MS. PAYNE: Okay. I'm sorry. I just needed that
4 clarified. And that's the same with number nine?

5 THE COURT: Yes, ma'am.

6 MS. PAYNE: Okay.

7 THE COURT: Photographs.

8 MS. PAYNE: Your Honor, he has listed -- and I have
9 their -- I know we have to usually pick photograph by
10 photograph, but he has listed -- and I'll be happy to hand
11 up his discovery responses to the court.

12 THE COURT: I'm sure he has got a lot.

13 MS. PAYNE: Like, I don't know, close to a thousand.

14 THE COURT: We're not going to do a thousand. I can
15 promise you this. I am going to ask y'all between now and
16 Monday to try to agree on the exhibits, photographs, the
17 ones you're going to use -- certainly not a thousand --
18 any other exhibits that we can agree upon and those that
19 we can't agree upon go ahead and mark them and then we'll
20 deal with them as we come to them.

21 MS. PAYNE: Yes, sir.

22 THE COURT: Just like in any trials we have we try to
23 agree on the photographs.

24 MS. PAYNE: Yes, sir.

25 THE COURT: He will be allowed, you know, obviously,

1 enough to try to prove his case. Likewise will you, but I
2 am not going to -- I don't know how you can have a
3 thousand of this wreck.

4 MS. PAYNE: Well, it pictures of her school where she
5 worked, pictures of her dog, pictures of her house. I
6 mean, it just---

7 THE COURT: Well---

8 MS. PAYNE: I mean, I understand one or two.

9 THE COURT: Well, maybe three or four, five or six
10 but not 20.

11 MS. PAYNE: Okay, Your Honor. We'll try to work that
12 out between now and Monday.

13 THE COURT: We tried one here not long ago where we
14 had pig pens. He was a big lover of his animals. We had
15 all of his pig pen shots.

16 MS. PAYNE: Okay, Your Honor.

17 THE COURT: Eleven. She looked like an angel.
18 Motion to exclude.

19 MS. PAYNE: They're not proceeding with conscious
20 pain and suffering. We would just ask that any testimony
21 post-accident would be not relevant to liability and to
22 what -- In fact, it would be highly prejudicial and
23 inflammatory under 403.

24 THE COURT: Well, I don't know. I'll have to listen
25 to it. I tried a case one time where the daddy was killed

1 and the children had done paintings at school where their
2 daddy was portrayed as an angel floating up in Heaven and
3 how much they missed him. I don't know. I'll just have
4 to listen to it.

5 MS. PAYNE: So, when you're saying -- I am just
6 clarifying for my own edification. Are we going to
7 proffer all of this testimony or are we just going to let
8 it come in and then object simultaneously?

9 THE COURT: Well, I don't know what he is going to
10 say about his wife.

11 MS. PAYNE: Well, I just think at this point they've
12 withdrawn their survivorship and conscious pain and
13 suffering.

14 THE COURT: When did he say she looked like an angel?
15 While she was in the casket or while she was --

16 MS. PAYNE: No.

17 THE COURT: -- lying on the ground?

18 MS. PAYNE: While she was laying on the side of the
19 road and that would be signs of life. Supposedly she
20 squeezed his arm and fluttered her eyes and looked like an
21 angel. That's his entire statement.

22 MR. DETRICK: That just goes to the sorrow of the
23 whole situation. I don't know what he's going to say, to
24 be honest with you, but it is a situation where he is
25 looking at his wife---

1 THE COURT: Looking at his wife dying, dead.

2 MR. DETRICK: Yes, sir.

3 MR. COX: Judge, I don't have a problem with the
4 angel. It's the squeezed my hand; she's still alive.

5 THE COURT: I'll tell the jury that this is not a
6 survival action and that's not relevant in this case. If
7 he talks about her squeezing his hand I'll just give a
8 curative instruction that they're not seeking damages for
9 any conscious pain and suffering; so don't accept that for
10 that. I'll handle that.

11 Twelve.

12 MR. COX: Thank you.

13 THE COURT: That's granted.

14 MS. PAYNE: Thank you.

15 THE COURT: I don't need an argument on that.

16 MR. DETRICK: And I wouldn't do it.

17 THE COURT: Thirteen.

18 MS. PAYNE: Well, a couple of the witnesses -- the
19 dangerous witnesses have said in their transcripts murder
20 and stuff. I was just making sure that if Mr. Detrick is
21 going to call these witnesses that he instructs them that
22 they are not to say this.

23 THE COURT: And if they blurt it out, I will handle
24 it.

25 MS. PAYNE: Okay.

1 THE COURT: I promise you.

2 MS. PAYNE: Thank you.

3 THE COURT: Thirteen; exclude argument and testimony
4 regarding public safety as the purpose of the lawsuit.

5 THE COURT: Well, it's not the purpose of the
6 lawsuit, but, you know, if it gets to a punitive
7 standpoint the jury is the consciousness of the community
8 and -- What do you say to that, Mr. Detrick?

9 MR. DETRICK: Just what you said, Your Honor.

10 THE COURT: All right. We won't do it in the actual
11 side.

12 MR. DETRICK: Sir?

13 THE COURT: We won't do it in -- if we bifurcate it
14 we won't do it in the trial for actual damages.

15 MR. DETRICK: That's right.

16 MS. PAYNE: Thank you, Your Honor. That goes to, you
17 know, they were just completely disregarding the entire
18 safety of Aiken County. That's---

19 THE COURT: Well, when they argue that the conduct
20 was reckless and willful and wanton, they can argue or
21 they can introduce testimony about how allegedly dangerous
22 it was and that they were disregarding the public, but
23 that would be strictly as to punitive.

24 MS. PAYNE: Yes, sir, and I agree. I was just saying
25 in the actual damages trial -- liability trial of the

1 case.

2 THE COURT: All right. Fourteen is---

3 MR. DETRICK: Your Honor, only on regard to the
4 dangerous situation there that they perceived. I am not
5 going to -- they are going to describe whatever the
6 dangerous situation was.

7 THE COURT: Okay. Financial dealings. That goes --
8 if we get to the punitive stage we'll have to deal with
9 that since they hadn't provided any net worth. Fifteen is
10 not subject to a motion for in limine. If they fail to
11 introduce testimony that they were reckless, willful, and
12 wanton, that won't even go to the jury and if there is
13 testimony that could be perceived to be of a willful
14 nature then the jury will have to find whether or not
15 they've proven that by clear and convincing evidence.

16 MS. PAYNE: Yes, sir.

17 THE COURT: Sixteen is back to the punitive side of
18 it.

19 MS. PAYNE: Well, that motion is intended to keep out
20 testimony that they were making -- well, if he doesn't get
21 into this in the liability portion of the trial -- \$30,000
22 a month and they couldn't put out a sign, couldn't hire an
23 actual flagman. That's what I anticipate their argument
24 is going to be.

25 THE COURT: Well, if they get up there and your

1 people say, well, we just couldn't afford to put out that,
2 then he can go into it.

3 MS. PAYNE: Well, sure.

4 THE COURT: Who is Dr. Joseph Harmel? Seventeen.

5 MS. PAYNE: That's plaintiff's doctor to testify
6 about Mrs. Valenzuela's prior health condition. It's not
7 an issue in this case; therefore, we would just ask that
8 his testimony not be introduced.

9 MR. DETRICK: Why isn't her health an issue in a
10 wrongful death case?

11 THE COURT: It is.

12 MS. PAYNE: Well, she had a prior pulmonary issue and
13 we're not saying that that is what---

14 THE COURT: Yea, but when I charge wrongful death you
15 charge the mortuary table and part of the mortuary table
16 says that the jury can consider her other health issues as
17 to whether or not she may not have had a full life
18 expectancy; so it is relevant.

19 MR. COX: But, Your Honor, we don't contest that
20 she---

21 MS. PAYNE: No, that's fine.

22 THE COURT: What?

23 MS. PAYNE: We'll withdraw that one, Your Honor.

24 THE COURT: It will probably be in your benefit if
25 she has prior health issues.

1 MS. PAYNE: Yes, sir.

2 THE COURT: Eighteen. The defendant had any duty to
3 stop at a stop sign; that he intended to run the stop
4 sign. Well, the stop sign issue is -- you know, y'all are
5 both sort of raising it. You don't have to comply with it
6 because it wasn't an SCDOT-authorized stop sign, allegedly
7 ran over the stop sign; so I think the stop sign is an
8 issue that's got to be addressed. I don't see how that's
9 not relevant in the trial of the case.

10 If we get into it and you think it is objectionable,
11 please -- I can't do it in a motion in limine. If it is
12 objectionable, please object and tell me what your
13 objection is and I'll rule on at the time, but I can't do
14 it in a motion in limine.

15 MR. DETRICK: Your Honor, I would tell the court,
16 obviously, as to how we tell the story on opening
17 statement about what happened we intend to tell that this
18 man had it set up that they were going to run that stop
19 sign. That's the facts of this case.

20 THE COURT: Disregard it, run it.

21 MR. DETRICK: He intended to run it. He admitted he
22 intended to run it.

23 THE COURT: A spotter---

24 MR. DETRICK: The first thing he said he intended to
25 run it. I mean, it's absolutely not in dispute in this

1 case of what -- he intended to run that stop sign.

2 MS. PAYNE: Your Honor---

3 THE COURT: Well, he intended to comply with what his
4 spotter said and if his spotter said it was clear he was
5 not going to stop.

6 MR. DETRICK: He wasn't going to stop.

7 THE COURT: You said that in your argument in your
8 motion for summary judgment.

9 MR. COX: That is going to come out in the evidence,
10 but as far as a history of intent to run and this is a
11 practice that we did, I mean, that's something that I
12 would not want him going into the opening because you're
13 going to consider those---

14 THE COURT: Don't say they've been doing it for 20
15 years, but on this particular day and then once we get
16 into it if you can show us a history then we'll do it.

17 MR. DETRICK: Right. I will not in opening
18 statement, Your Honor, say anything about conduct before
19 as far as running the stop sign, but as of this date
20 August 9 -- August 7, 2009 -- I do intend to state that he
21 intended to run the stop sign and that Mr. English
22 testified he knew he was and that they set it up for him
23 to run the stop sign.

24 MS. PAYNE: And, Your Honor, if I may, just for the
25 record, our motion to -- number 18, our motion to exclude

1 the testimony or evidence that the defendant had any duty
2 to stop at a stop sign because they have not presented you
3 with any and I mean---

4 THE COURT: Well, there is a stop sign there, isn't
5 it?

6 MS. PAYNE: There is a stop sign there put up by
7 someone, but if it's not in compliance with the South
8 Carolina Highway Patrol then there is no duty on my client
9 to stop at it.

10 THE COURT: And, Ms. Payne, you can argue that until
11 you're blue in the face and if you find me some law on
12 that I will charge that.

13 MS. PAYNE: Well, I have cited you Guthrie versus
14 Morris.

15 THE COURT: Well, we aren't doing jury charges right
16 now. When it comes to that I'll be glad more than glad to
17 look at it.

18 MR. DETRICK: Can you give me a cite on that?

19 MS. PAYNE: It's 242 SC 56. Your Honor---

20 THE COURT: If Mr. Detrick says in his opening that
21 he was not going to stop for the stop sign and, obviously,
22 y'all in the opening can say, well, that stop sign was not
23 an SCDOT stop sign; he had no duty to comply with it if
24 you want to do that. Now you may not want to do that. I
25 don't know. That's pretty gutsy.

1 MS. PAYNE: Well, isn't it the plaintiff's burden to
2 prove that we had a duty to stop at that stop sign?

3 THE COURT: Yes, ma'am, and opening statement is not
4 evidence in the case. It is simply what the lawyers
5 contend they intend to prove. You cannot consider it as
6 evidence. I tell the jury that and if they say things in
7 opening that they can't later prove, don't consider the
8 opening as evidence or anything else. I'll tell them that
9 on both of you, but I can't preclude him from telling them
10 the theory of his case. I can't keep you from telling
11 them the theory of your case -- we didn't have to stop.
12 Maybe.

13 MS. PAYNE: Your Honor, number 19, motion to exclude
14 evidence of defendant's intent to run stop sign.
15 Negligence is conduct-based. It is not intent-based.
16 That would be citing a criminal statute or a criminal
17 conduct. Rule 401 and 402 and 403, more prejudicial than
18 probative, not relevant to what actually happened because
19 he actually stopped.

20 THE COURT: Well, isn't what actually happened is
21 this: That you have this situation set up at the road.
22 You have your spotter out there telling him to come on and
23 all of a sudden the spotter sees the motorcycle and he
24 tells him to stop. Had the motorcycle not been coming he
25 would have come straight on through the intersection or

1 whatever you call it. I mean, isn't that the facts of the
2 case? Had the motorcycle or nobody been coming he would
3 have come right straight on through because it is hard to
4 get the thing cranked back up and going again?

5 MS. PAYNE: But at the end of the day he stopped.

6 THE COURT: I know that.

7 MS. PAYNE: But I think that's where it is a red
8 herring in the case, Your Honor. He stopped.

9 THE COURT: Well, I disagree with you. It is a
10 totality of the whole event that occurred; so I will allow
11 it.

12 MS. PAYNE: Thank you, Your Honor.

13 THE COURT: You can make your objections and protect
14 the record as we go along.

15 MS. PAYNE: Yes, sir.

16 THE COURT: Twenty. We're getting close into
17 subsequent remedial measures.

18 Mr. Detrick, I'll just ask you to stay away from that
19 in opening and if you feel it is necessary just let me
20 know and we'll do a proffer on anything that happened
21 after the wreck.

22 MR. DETRICK: Yes, sir. So you'll know where we're
23 going, it's not subsequent remedial. They had meetings
24 afterwards and the guy said y'all better stop stopping for
25 the stop signs. That's going to be the testimony.

1 THE COURT: Okay. We'll do that with a proffer.

2 Just don't go into what happened afterwards.

3 MR. DETRICK: All right. I didn't plan on it.

4 THE COURT: Twenty-one. Jeffrey Lewis is the driver?

5 MS. PAYNE: Yes, sir.

6 THE COURT: Did not help him give CPR?

7 MS. PAYNE: Yes, sir.

8 THE COURT: How is that relevant and how is it -- how
9 is it not more prejudicial than probative, Mr. Detrick? I
10 wouldn't -- I wouldn't know how to give somebody CPR.

11 MR. DETRICK: I don't know that he did know how. As
12 a matter of fact, I think some people did help him, but it
13 wasn't Mr. Lewis. He is going to say that just aggravated
14 him at the scene. I don't know, to be honest with you.

15 THE COURT: Well, if he says that the driver of the
16 pan didn't jump down and help with CPR, I am going to say
17 that ain't relevant to this case.

18 MR. DETRICK: That's fine. I'll try to remember to
19 tell him that.

20 THE COURT: All right. Twenty-two. We backed up the
21 scraper after the accident. Well, either you did or
22 didn't. What does the evidence show?

23 MS. PAYNE: I think we had already talked about this.

24 THE COURT: We had.

25 MS. PAYNE: Twenty and number two, I think you've

1 already---

2 THE COURT: Mr. Detrick is going to stick with the
3 facts. I don't think there is any evidence that they
4 backed the scraper up afterwards, is it?

5 MR. DETRICK: No, sir. We've already discussed that.
6 Mr. Valenzuela believed that. It did not happen. We will
7 agree it did not happen. He believed that he did.

8 THE COURT: Well, that doesn't do -- I think it hurts
9 his credibility.

10 MR. DETRICK: I agree with that and I'm going to tell
11 him not to, but --

12 THE COURT: I understand.

13 MR. DETRICK: -- I don't have total control.

14 THE COURT: All right. Failure to hire, train,
15 supervise. You know, that's a negligent supervision and
16 negligent hiring and I don't know what the evidence is
17 going to be on that. If it is true, then it's relevant.
18 If it's -- Mr. Detrick, y'all got evidence that they hired
19 somebody that had a bad driving record or they failed to
20 have any safety meetings and they -- I don't know what the
21 evidence is.

22 MR. DETRICK: Well, as far as the safety meetings and
23 such as that, there is testimony that the safety meetings
24 they said y'all need to stop at the stop sign and yet they
25 didn't. I don't know. In this case sometimes I don't

1 know what's going to come out, Your Honor. It is all kind
2 of stuff you're going to hear. Mr. Lewis said at least
3 three or four different things. I am not sure what he is
4 going to say when he gets on the stand.

5 I would say this. As far as that's concerned, I
6 don't know of any particular training that we're going --
7 lack of training as far as operation of this pan by
8 Mr. Lewis. I think he could operate it, but as to how he
9 operated it and whether they were trained to operate in
10 this manner -- running a stop sign, no flagmen, all of
11 that -- is going to be the testimony.

12 THE COURT: Just don't go into it in opening.

13 MR. DETRICK: I will not.

14 THE COURT: If you think you're going into it, let me
15 know so we can give them an opportunity.

16 MR. DETRICK: I have no plans to go into that in
17 opening.

18 MS. PAYNE: And the final one, Your Honor, I always
19 put that in there. It is just I just want to make sure
20 that we comply with Rule 32(a)(5) in exchanging our
21 deposition transcripts and exhibits.

22 MR. DETRICK: I agree to that one. I am going to
23 comply with the rule as far as the designations.

24 THE COURT: Sure.

25 MS. PAYNE: Yes, sir.

1 THE COURT: All right. What else can I help on the
2 record today? Do we have anything else? All right.
3 Thank you very much.

4 MR. DETRICK: Can I just ask one thing, Your Honor?
5 This doesn't have to be on the record.

6 THE COURT: That's what I said. Anything else on the
7 record? Thank you very much.

8 (End of Transcript of Record.)
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CERTIFICATE OF REPORTER

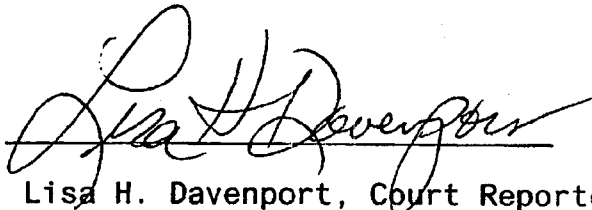
State of South Carolina)

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 21st day of August, 2012.

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

February 16, 2013


Lisa H. Davenport, Court Reporter

State of South Carolina)
County of Aiken)

Court of Common Pleas
2011-CP-02-00868

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

Plaintiff
vs.

Transcript of Record

Sam English Grading, Inc.)
Defendant)

August 27, 2012 through
September 4, 2012
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge; and a jury.

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20 Closing Statement by Mr. Cox.....1054
21 Jury Charge.....1059
22 Verdict.....1065
23
24
25

PLAINTIFF'S EXHIBITS

	NO.	DESCRIPTION	ID.	EVD.
1				
2				
3	1	Contract posterboard		449
4	2	Encroachment Permit		449
5	3	Contract		449
6	4	Purchase Order		449
7	5	*****NO EXHIBIT NO. 5*****		
8	6	Subpoena		449
9	7	Photo		415
10	8	Photo		415
11	9	Photo		415
12	10	Photo		415
13	11	Photo		415
14	12	Photo		415
15	13	Photo		415
16	14	Photo		415
17	15	Photo		415
18	16	Photo		415
19	17	Photo		415
20	18	Photo		415
21	19	Photo		312
22	20	Photo		312
23	21	Photo		312
24	22	Photo		312
25	23	Photo		312

1				
2		PLAINTIFF'S EXHIBITS		
3	NO.	DESCRIPTION	ID.	EVD.
4	24	Photo		312
5	25	Photo		312
6	26	Photo		415
7	27	Photo		415
8	28	Photo		415
9	29	Photo		415
10	30	Photo		415
11	31	Photo		415
12	32	Photo		415
13	33	Photo		415
14	34	*****NO EXHIBIT NO. 34*****		
15	35	*****NO EXHIBIT NO. 35*****		
16	36	"Flagman" sign photo		416
17	37	"Trucks entering" sign photo		416
18	38	*****NO EXHIBIT NO. 38*****		
19	39	Photo		613
20	40	Photo		613
21	41	Photo		613
22	42	Photo		613
23	43	Photo		613
24	44	Photo		613
25	45	Photo		613

PLAINTIFF'S EXHIBITS

	NO.	DESCRIPTION	ID.	EVD.
1				
2				
3				
4	46	Photo		613
5	47	Photo		613
6	48	Photo		613
7	49	Photo		613
8	50	Photo		613
9	51	Photo		613
10	52	Photo		613
11	53	Photo		613
12	54	Photo		613
13	55	Photo		613
14	56	Photo		613
15	57	Photo		613
16	58	Photo		613
17	59	Photo		613
18	60	Photo		613
19	61	Photo		613
20	62	Photo		613
21	63	Photo		613
22	64	Photo		613
23	65	Photo		613
24	66	Photo		613
25	67	Photo		613

1				
2		PLAINTIFF'S EXHIBITS		
3	NO.	DESCRIPTION	ID.	EVD.
4	68	Photo		613
5	69	Photo		613
6	70	Photo		613
7	71	Photo		613
8	72	Photo		613
9	73	Photo		613
10	74	Photo		613
11	75	Photo		613
12	76	Photo		613
13	77	Photo		613
14	78	Photo		613
15	79	Photo		613
16	80	Photo		613
17	81	Photo		613
18	82	Photo		613
19	83	Photo		613
20	84	Photo		613
21	85	Photo		613
22	86	Photo		613
23	87	Photo		613
24	88	Scene diagram		532
25	89	Scene diagram		532

PLAINTIFF'S EXHIBITS

	NO.	DESCRIPTION	ID.	EVD.
1				
2				
3				
4	90	Scene diagram		532
5	91	Photo		532
6	92	Photo		532
7	93	Photo		532
8	94	Scene diagram		532
9	95	Sequence diagram		532
10	96	Sequence diagram		532
11	97	Sequence diagram		532
12	98	Sequence diagram		532
13	99	Sequence diagram		532
14	100	Sequence diagram		532
15	101	Sequence diagram		532
16	102	Sequence diagram		532
17	103	Sequence diagram		532
18	104	Sequence diagram		532
19	105	Sequence diagram		532
20	106	Sequence diagram		532
21	107	Sequence diagram		532
22	108	Sequence diagram		532
23	109	Sequence diagram		532
24	110	C.D.		494
25	111	Wage Statement		331

1				
2		PLAINTIFF'S EXHIBITS		
3	NO.	DESCRIPTION	ID.	EVD.
4	112	Medical summary info.		350
5	113	Funeral bill		350
6	114	Certificate of Appointment		350
7	115	Posterboard photo		320
8	116	Posterboard photo		320
9	117	Posterboard photo		320
10	118	Posterboard photo		320
11	119	****NO. EXHIBIT NO. 119****		
12	120	Distance calculations		849
13	121	C.D.		-
14	122	Photo		-
15	123	Photo		701
16	124	Photo		642
17	125	Photo		642
18	126	Photo		532
19	127	Photo		532
20	128	Photo		532
21	129	Photo		532
22	130	Photo		532
23	131	Photo		532
24	132	Photo		532
25	133	Photo		532

PLAINTIFF'S EXHIBITS

NO.	DESCRIPTION	ID.	EVD.
134	Photo		642
135	Photo		642
136	Photo		-

DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	ID.	EVD.
1	Photo		67
2	Photo		-
3	Photo		-
4	Photo		301
5	DMV section		374
6	Photo		816
7	Photo		816
8	Photo		816
9	Photo		816
10	Photo		816
11	Photo		816
12	Photo		816
13	Photo		816
14	Photo		816
15	Photo		816
16	Photo		816

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DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	ID.	EVD.
17	Photo		816
18	Posterboard drawing		816
19	Posterboard drawing		816
20	Rider handbook page		772
21	C.D.		843
22	Tax returns		1045
23	Financial info.		1046

COURT'S EXHIBITS

NO.	DESCRIPTION	ID.	EVD.
1	Defendant's voir dire	245	
2	Plaintiff's voir dire	245	
3	Transcript of Clifford Merritt	449	
4	Jury note	1021	
5	Jury note	1021	
6	Jury note	1021	
7	Jury note	1021	
8	Financial info.	1046	

(All exhibits listed with the symbol "-" were agreed to be in evidence.)

1 (Whereupon, on August 27, 2012 the following
2 proceedings were held:)

3 THE COURT: What do we have to do to get ready?

4 MR. DETRICK: One of them was the helmet; the
5 contract and encroachment permit that we want to introduce
6 into evidence and want to use in our opening that you said
7 you were going to rule on this morning.

8 THE COURT: What else?

9 MR. DETRICK: Another thing is, Your Honor, you said
10 you were going to do a Watson hearing --

11 THE COURT: I am.

12 MR. DETRICK: -- on their safety -- motorcycle safety
13 expert.

14 THE COURT: I am, but I think what we'll probably do
15 on that is let's get the jury drawn and then we'll do the
16 Watson testimony. I think we said we were going to start
17 at 2 o'clock or 1:30; is that correct?

18 MR. DETRICK: Yes, sir.

19 THE COURT: Is that still agreeable? Or do you want
20 to crank it up early? Are y'all in a position to start
21 earlier if we get through with everything?

22 MR. DETRICK: Yea, we're ready.

23 THE COURT: All right. Let's just play it by ear.

24 All right. Mr. Cox, anything by you?

25 MR. COX: Your Honor, that sounds accurate and meets

1 with my approval as well.

2 THE COURT: Well, I don't think we need any
3 additional arguments on the helmet, do we?

4 All right. Over the weekend my law clerk has
5 provided to me a memo dealing with this and I have
6 reviewed Mayes, M-A-Y-E-S, versus Paxton which also cites
7 Keaton, K-E-A-T-O-N, versus Pearson and reviewed 56-5-3660
8 which is the statutory requirement for use of a helmet by
9 motorcycle operator if they're less than 21 years of age.

10 So, my reading of Keaton versus Pearson they say
11 that, quote, we find that Mayes' failure -- this is citing
12 the Mayes case -- to wear a helmet does not constitute
13 contributory negligence and obviously had no statutory
14 duty to wear the helmet and they declined to create a
15 judicial penalty for those exempted from the statutory
16 duty.

17 So, my ruling is this. Based on that statute in the
18 case is that -- and since they found that the failure to
19 wear does not constitute contributory negligence, i.e., or
20 comparative negligence that I will rule that the
21 admissibility of the helmet is not admissible. Not
22 admissible. So, please do not mention that.

23 Likewise, on the contract, I reviewed the contract
24 and, obviously, this case arrives or evolves around
25 whether or not what a reasonable person would have done

1 under like circumstances in regards to the operator of the
2 heavy equipment and it is, obviously, he owes them a duty
3 not to injure them and in that regard there are certain
4 contractual requirements that could be seen by the jury as
5 creating some type of standard of care and, therefore, I
6 will allow the introduction of the contracts regarding the
7 alleged necessity of a flagman, whatever else required.
8 So I will allow that in.

9 There was also a request to bifurcate the opening.
10 In other words, Mr. Detrick was going to do the law and
11 Mrs. McPherson was going to do the damages. Y'all had no
12 problem with that on Thursday or whenever we did it.
13 Obviously, I got an e-mail I think from Ms. Payne over the
14 weekend that said y'all do object to that.

15 What is your objection to that?

16 MS. PAYNE: Your Honor, we object to that as there is
17 no precedent or rule that allows for a bifurcated opening.
18 Your Honor, we believe that this would be prejudicial and
19 that to I guess book-end our opening would be prejudicial
20 to the defendant and we ask that the court deny the
21 plaintiff's motion and at the appropriate time -- I know
22 that Your Honor has ruled, but I just want to put on the
23 record about our memos -- your helmet and your contract,
24 if I may just put on a few more arguments.

25 THE COURT: I just asked you if there was any more

1 arguments. You said no.

2 MS. PAYNE: I was going to argue a little bit
3 further, but I didn't get a chance to do that.

4 THE COURT: You have a memo you want to submit?

5 MS. PAYNE: Your Honor, I did submit a memo with
6 respect to the contract and I would like to make that a
7 part of the record.

8 THE COURT: I will certainly allow that.

9 MS. PAYNE: Yes, sir. Your Honor, I would just argue
10 that the encroachment permit which was clearly testified
11 to by Clifford Merritt -- he testified that it was expired
12 in 1984 -- would be completely irrelevant in this case.

13 THE COURT: I think that goes to the weight as
14 opposed to admissibility.

15 MS. PAYNE: Thank you, Your Honor. I'd also---

16 THE COURT: You can put your memo in. That will
17 protect you.

18 MS. PAYNE: Yes, sir. Also, we addressed the helmet
19 issue in our letter to the court as did the plaintiff and
20 we would like to make all of that a part of the record as
21 well.

22 THE COURT: Well, it is up to you to get that letter
23 and whatever else you did and give it to the court
24 reporter so she can make it an exhibit in support of your
25 argument to allow the helmet in.

1 MS. PAYNE: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MS. PAYNE: We do have some exhibits that the
4 plaintiff is trying to present that we disagree with. I
5 don't know when the court would like to take those up as
6 they've already premarked them.

7 THE COURT: Well, if they're premarked, obviously,
8 they're not in evidence.

9 MS. PAYNE: Yes, sir.

10 THE COURT: So when they get ready to attempt to
11 introduce them then you make your objection and tell me
12 what your objection is and I'll rule on it at that time.
13 As far as the other ones go, y'all have agreed to all of
14 those that have come in so we won't have to stop with
15 that.

16 MS. PAYNE: Your Honor, they've listed contracts with
17 Owens Corning after 2009. I would ask that the court not
18 allow them to testify -- to talk about that in their
19 opening statement as that is---

20 MR. DETRICK: I have already agreed to that.

21 THE COURT: Yeah, you said you weren't going to---

22 MS. PAYNE: Okay. Well, that's the first time we
23 knew they were going to testify or introduce the contacts
24 in evidence. That's why I am just bringing it to the
25 court's attention.

1 THE COURT: Well, you did that the other day.

2 MS. PAYNE: Not the contracts, Your Honor.

3 THE COURT: Yes, ma'am.

4 MS. PAYNE: Okay. Thank you.

5 MR. DETRICK: Your Honor, since she brought that up I
6 believe the court had asked them if they wanted to
7 bifurcate the trial or not and I don't believe that's ever
8 been determined.

9 THE COURT: Y'all have requested to bifurcate it --
10 actual and punitives. What is your position on that?

11 MR. COX: We'd ask to bifurcate, Your Honor.

12 MR. DETRICK: That's fine with us, Your Honor.

13 THE COURT: Do y'all have any voir dire?

14 MR. DETRICK: Yes, sir.

15 MR. COX: Your Honor, also, we would ask to renew at
16 this point our motion for summary judgment as to all
17 causes of action.

18 THE COURT: Thank you. Respectfully denied for the
19 same reasons I ruled the other day. Y'all please
20 understand now there is a rule that once I have ruled
21 there will be no further argument on anything. You're
22 protected fully on that. Everything we did the other day
23 in pretrial is just like we did it here this morning.

24 MR. COX: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. COX: Your Honor, one matter that we did not take
2 up at the pretrial motions in limine which I would like to
3 renew at this time, we filed a motion for continuance in
4 this case and to preserve the record on that issue, Your
5 Honor, one of the reasons we moved to continue the case is
6 that this case should be consolidated with the personal
7 injury case of Michael Valenzuela.

8 THE COURT: Isn't this the same motion you made about
9 two weeks ago?

10 MR. COX: That is the motion, Your Honor. I'd like
11 to renew it before we get started for trial.

12 THE COURT: Thank you. Any additional grounds for
13 the motion to continue?

14 MR. COX: The grounds, Your Honor, are that it would
15 be highly prejudicial to the defense to allow Michael
16 Valenzuela to -- he is a statutory beneficiary of the
17 wrongful death case. He's got emotional damages and
18 that -- or wrongful death damages that are difficult to
19 separate from his mental anguish and emotional damages in
20 his personal case for personal injuries and it would be
21 highly prejudicial and potentially subject the defense to
22 a double recovery.

23 THE COURT: This is not a motion to continue. This
24 is a motion to sever, isn't it?

25 MR. COX: This is a motion -- Your Honor, we moved

1 for a motion to consolidate.

2 THE COURT: Okay.

3 MR. COX: That order has not been -- we've not been
4 provided notice of the entry of that order.

5 THE COURT: Hadn't Judge Newman ruled on that?

6 MR. COX: Judge Newman denied that motion.

7 THE COURT: Thank you.

8 MR. COX: We fully intend to provide a motion to
9 reconsider. He has not -- we have not been provided
10 notice of his entry of his order denying that; so we are
11 -- we want to preserve for the record our rights to raise
12 that -- that in the interest of judicial economy these
13 cases should be consolidated.

14 THE COURT: We argued this motion to continue, I want
15 to say, two and a half to three weeks ago, didn't we? Did
16 we not?

17 MR. COX: Yes, Your Honor. What I'm doing -- I am
18 trying to renew our positions on those two.

19 THE COURT: Well, in the last two and a half or three
20 weeks have you contacted Judge Newman to see where his
21 order is?

22 MR. COX: Yes, I have, Your Honor.

23 THE COURT: And where is it?

24 MR. COX: The report I got from Judge Newman's office
25 is that it had been mailed to the plaintiff's attorney's

1 office. I checked the records. It has not been filed. I
2 asked plaintiff's attorney's office to provide us with
3 their filing of the order with the court and copy us with
4 that and to do it as soon as possible.

5 THE COURT: Do you know where it is, Mr. Detrick?

6 MR. DETRICK: Yes. It just -- we just received that
7 order, I can't honestly tell you, but I think it was like
8 Wednesday, okay? I just handed it to my secretary and
9 told her to file it. I'm sorry if I didn't -- I
10 assumed---

11 THE COURT: Well, Judge Newman is right over there.
12 If you want to go move to reconsider, you can go over
13 there.

14 MR. DETRICK: I assumed he'd gotten a copy. He
15 didn't tell me. I didn't know he wanted me to send him a
16 copy, but what the order is just signed the order which I
17 submitted, Your Honor---

18 THE COURT: Just simply denied.

19 MR. DETRICK: It is the same order which I sent Trey
20 a copy -- Mr. Cox a copy and the same order he signed, the
21 same order he put on the record.

22 THE COURT: All right. I will, once again, deny it.
23 Hadn't you been able to do all of the discovery that you
24 wanted to that you were concerned about?

25 MR. COX: Judge, I will -- he is now bringing --

1 we've objected to the contract coming in. He is bringing
2 this contract in. We stand on that objection, but, Your
3 Honor, there are issues with that contract that, no, sir,
4 we need to run down and talk to more individuals at Owens
5 Corning regarding---

6 THE COURT: Hadn't you had two and a half weeks to do
7 that? Or three weeks?

8 MR. COX: Your Honor, this is a negligence case and
9 we did not anticipate that he would be allowed to bring in
10 a private contract issue in this case.

11 THE COURT: It's not a contractual issue. It is an
12 exercise or an attempt to establish the duty that was
13 required of your operator or your company.

14 It's not a contract case or breach of contracts.

15 Is that correct, Mr. Detrick? It is not a breach of
16 contract.

17 MR. COX: Well, Your Honor, he can raise those issues
18 without pointing to a private contract which the
19 plaintiffs in this case have no right to -- they're not
20 beneficiaries of and they can't argue and complain about
21 the private contract. There is no independent legal
22 obligation to have signs or flagmen out. The encroachment
23 permit was long expired, doesn't even apply. According to
24 Mr. Merritt it was not even -- was expired and does not
25 even --

1 THE COURT: We've already gone --

2 MR. COX: -- apply to the road.

3 THE COURT: -- through that, Mr. Cox. We've already
4 been through all of that. I will allow it. You're
5 protected. Motion to continue is denied. We're going to
6 try this case today.

7 MR. COX: Thank you, Your Honor.

8 MR. DETRICK: Your Honor, can I put something on the
9 record here since he got very concerned about records any
10 more, but I just want to make sure some of his reasons for
11 continuance this morning is the first time he brought them
12 up -- particularly, the issues about the wrongful death
13 and the elements of damages being the same in both
14 lawsuits which, obviously, are not.

15 The second thing we'd like to put on the record is
16 this contract he's been arguing about was provided
17 initially in discovery probably a year and a half ago.
18 I'm not sure. It's been a central issue in this case from
19 the very beginning. Mr. Cox had a year and a half or more
20 to do discovery on that issue and there is no reason he
21 didn't and so that is certainly not any reason for
22 continuance.

23 THE COURT: I have denied the motion to continue.
24 Thank you.

25 MR. DETRICK: Thank you, sir.

1 THE COURT: All right. We're going to bring the jury
2 in here in just a few minutes. Let me see y'all in
3 chambers for just a second. You got your -- is the
4 computer ready to go?

5 MR. DETRICK: No, sir. We've had to call in our
6 computer guy and that's not me. Maybe Adam can help me.

7 THE COURT: I don't loan him out.

8 MR. DETRICK: I'm just kidding.

9 THE COURT: His plate is full teaching me how to use
10 this thing.

11 MS. PAYNE: Your Honor, we have not seen what they've
12 planned to present in their opening. We would object to
13 evidence coming in during the opening that has not---

14 THE COURT: Ma'am, no evidence will be coming in in
15 the opening. If y'all have agreed on certain exhibits
16 that will be introduced in the trial of the case both of
17 you can use those that are agreed upon. Those that are
18 not agreed upon you can't use in opening statement.

19 MS. PAYNE: Yes, sir.

20 THE COURT: Thank you.

21 MR. DETRICK: Your Honor, can I address that issue,
22 please?

23 THE COURT: Yes, sir.

24 MR. DETRICK: You have ruled on -- it's always been
25 my practice if I use something in opening which,

1 obviously, what I am going to use in my part is just the
2 encroachment permit and the contract part and the couple
3 of the photographs that were taken at the scene. If I
4 can't get them into evidence, Your Honor, I'll worry about
5 -- You can deal with me later on that. You've already
6 ruled the contract in; therefore, we'd like to use that in
7 our opening. The photographs of the scene certainly is
8 allowed to be used in opening.

9 THE COURT: Well, haven't y'all agreed on the
10 photographs?

11 MR. DETRICK: Sir, they hadn't agreed on anything.
12 Nothing. Zero.

13 THE COURT: I thought you just said you agreed on a
14 lot of stuff.

15 MS. PAYNE: Your Honor, that is a misstatement and
16 I'd appreciate---

17 THE COURT: Look at me.

18 MS. PAYNE: Yes, sir.

19 THE COURT: Don't look at him.

20 MS. PAYNE: Yes, sir. We have not -- we have just
21 now seen the pictures that he plans on presenting.

22 THE COURT: Y'all agree between now and when we
23 start.

24 MS. PAYNE: Yes, sir.

25 THE COURT: How about that?

1 MR. DETRICK: That sounds good.

2 MS. PAYNE: Yes, sir, but I would like to know what
3 the video is just so -- can we review that?

4 THE COURT: What video?

5 MS. PAYNE: That they have that they plan to present.

6 MR. DETRICK: I don't know what she's talking about.

7 THE COURT: You don't have a video, do you?

8 MR. DETRICK: No, sir.

9 THE COURT: He will put those exhibits up on that
10 board.

11 MS. PAYNE: Okay.

12 THE COURT: I assume that's what you're going to do.

13 MR. DETRICK: Yes, sir.

14 MS. PAYNE: Okay.

15 THE COURT: He is just going to publish them by that
16 instead of passing them around.

17 MS. PAYNE: Than by using the boards he's marked?

18 MS. MCPHERSON: Well, I would plan to use some
19 photographs, Judge, and---

20 THE COURT: How many cases have y'all tried? C'mon,
21 y'all get together.

22 MS. PAYNE: I am just trying to figure out what is
23 going on with the computer. That's all, Your Honor.

24 THE COURT: He will probably -- tell her what you're
25 going to have on the computer. It will be the exhibits.

1 No video. Mrs. McPherson has got a board that she's going
2 to use for demonstrative or as---

3 MS. MCPHERSON: Judge, I can show them to you.
4 They're family photographs. They've had all of these
5 pictures for two years.

6 MS. PAYNE: Yeah, we just want to know. That's all.

7 MS. MCPHERSON: Yeah.

8 THE COURT: That's why I asked y'all to be over here
9 early this morning so you would know.

10 MS. PAYNE: Yes, sir.

11 (Whereupon, a break was taken.)

12 THE COURT: The first case we're going to try is
13 captioned as follows: Paige Weeks Johnson -- Mrs. Johnson
14 is a lawyer here in Aiken. She's serving as the personal
15 representative of the estate of a lady who was killed on a
16 motorcycle wreck. Her name is Christie Lane Valenzuela.
17 She is bringing -- her estate is bringing what we call a
18 wrongful death action and that action is being brought
19 against a company or corporation known as Sam English
20 Grading, Inc., and this involves a wreck at an
21 intersection located going out of Aiken like you're going
22 out towards Owens Corning. The lawyers will tell you more
23 about it, but it occurred on what date?

24 MR. DETRICK: August 7 of 2009.

25 THE COURT: August 7 of 2009. That's what this case

1 will be about here today; so let me ask you some questions
2 about it to make sure that you're qualified.

3 Is any member of the jury panel related by blood or
4 marriage now or in the past or do you now or have you in
5 the past had a close personal relationship with Mrs. Paige
6 Weeks Johnson who is in the courtroom -- Stand up,
7 Mrs. Johnson -- or the late Christie Lane Valenzuela? If
8 so, please stand.

9 Yes, sir, my school superintendent, your name?

10 THE JUROR: David Caver. I knew Mrs. Valenzuela.
11 She worked for us at JD Lever and I knew her very well.

12 THE COURT: She was an employee at one of the schools
13 that you're a superintendent over?

14 THE JUROR: Yes, sir.

15 THE COURT: The fact that the late Mrs. Valenzuela in
16 the past worked for you, sir, would that in any way
17 preclude or keep you from being a fair and impartial juror
18 and try this case based solely on --

19 THE JUROR: No, it wouldn't.

20 THE COURT: -- the evidence that you hear in the
21 courtroom? Can you be a fair juror?

22 THE JUROR: Yes, sir.

23 THE COURT: Thank you. You may be seated. My lady
24 whose husband is retired Navy.

25 THE JUROR: Navy, yes. Mrs. Paige has been assigned

1 the Guardian Ad Litem for my grandchildren.

2 THE COURT: Presently or in the past?

3 THE JUROR: Presently.

4 THE COURT: All right. I will excuse you from the
5 trial in this case.

6 THE CLERK: Your number, please, ma'am, for the
7 record.

8 THE JUROR: 146.

9 THE COURT: Just have a seat, please.

10 All right. Ladies and gentlemen, that same question
11 -- First of all, let me ask you this. Has any member of
12 the jury panel now or in the past have been employed by or
13 own stock in Sam English Grading, Incorporated, please
14 stand.

15 The potential witnesses -- I don't have a witness
16 list from y'all.

17 MR. DETRICK: Yes, sir. I---

18 THE COURT: I got one from you.

19 MR. DETRICK: I handed it up.

20 THE COURT: I got yours.

21 I think it's on your voir dire number four.

22 MS. PAYNE: That's some of them, Your Honor. We do
23 have an exhaustive list that includes our witnesses that
24 are in the courtroom today.

25 THE COURT: Well, I need the list.

1 MS. PAYNE: Yes, sir.

2 THE COURT: That's all right. Don't panic. We'll
3 handle it. Just have a seat.

4 MS. PAYNE: We'll find it, Your Honor.

5 THE COURT: No problem. No problem.

6 Ladies and gentlemen, I am going to read out the
7 witness list. Now don't get frightened. A lot of times I
8 make the lawyers give me all potential witnesses.
9 Sometimes they don't call but a third of them or half of
10 them, but not all of them. So listen and I am going to
11 read the list out and then I am going to ask you the same
12 question: Are you now or in the past related by blood or
13 marriage or do you now or in the past have a close
14 personal or social relationship.

15 If you're in the courtroom, please stand. Ann
16 Johnson, Laura Boozer, David Hall, Robert Boozer, John
17 Johnson, Virginia Gunter, Robert Wright. Stay standing.
18 Barbara Jean Wright, Clifton Merritt, McLaurin -- James,
19 Alex McLaurin -- Eric Pruitt, Jeffery Lewis, Johnny
20 Tindel, Michael Valenzuela -- however you say it -- Chris
21 English, Sam Curtis English, Corporal Mathew Coffin,
22 C-O-F-F-I-N, Corporal Sally Farmer, Corporal James A.
23 O'Donnell, Jr., Dr. Carmel Joseph, Kelly Kennett,
24 K-E-N-N-E-T-T, Mathew Coffin, Renee Mack, Michelle Davis
25 Clark, Amanda Washington, Dale Benhardt, Becky Hare, Paige

1 Weeks Johnson, and Michael Valenzuela, Jr.

2 Any additional ones by the defendant that I did not
3 call?

4 MR. COX: That seems to be all of them, Your Honor.

5 (Whereupon, the attorneys conferred.)

6 THE COURT: Any additional witnesses?

7 MS. PAYNE: No.

8 THE COURT: Thank you. My witnesses may be seated.

9 Now -- no, ma'am, you're a juror. Your name, please,
10 ma'am?

11 THE JUROR: 115, June Morrison.

12 THE COURT: And you are -- Which potential witness do
13 you have a situation with?

14 THE JUROR: I'm very close friends with Ann Johnson.

15 THE COURT: Okay. And the fact that Mrs. Ann Johnson
16 is a close friend of yours, ma'am, and may be a witness in
17 this case, would that preclude or keep you from being able
18 to listen to the evidence that is presented, determine
19 what the true facts are, and apply those facts to the law
20 as I give it to you and try the case based solely on
21 what's heard in the courtroom? Can you do that?

22 THE JUROR: No, I don't think I could.

23 THE COURT: Why is that?

24 THE JUROR: Well, I know the circumstances of---

25 THE COURT: Thank you. You may be seated.

1 All right. Excuse her from the trial of this case.

2 THE CLERK: Yes, sir.

3 THE COURT: But you'll still have to serve on
4 criminal court, ma'am.

5 THE JUROR: Right.

6 THE COURT: Yes, sir, you're an SRS worker?

7 THE JUROR: Yes, sir. Juror number 5, John Anderson.
8 Mr. Chris English is my best friend.

9 THE COURT: All right. I'll excuse you from the
10 trial of this case.

11 MR. DETRICK: What number was that?

12 THE COURT: Five.

13 You're Mr. English, aren't you?

14 MR. ENGLISH: Yes, sir.

15 THE COURT: Good morning.

16 MR. ENGLISH: Good morning to you.

17 THE COURT: All right. In this case we have lawyers
18 that are representing the plaintiff. The plaintiff is the
19 party that brings the lawsuit. The person that the
20 lawsuit is being brought against is the defendant. So
21 representing the plaintiff is Mr. Paul Detrick. He
22 practices law in Hampton with the law firm of Peters,
23 Murdaugh, Parker, Eltzroth and Detrick. He will be
24 assisted by Mrs. Lisa McPherson. She practices in
25 Lexington with the firm of McWhirter, Bellinger, and

1 Associates. Also in the case will be Mr. Ronald
2 Maxwell -- Ron Maxwell, Ronnie Maxwell. He practices here
3 in Aiken with his own law firm, the Maxwell Law Firm.

4 Y'all may be seated.

5 The defendant will be defended by lawyers from West
6 Columbia. The law firm is called Grier, Cox, and
7 Cranshaw. The two lawyers here on their behalf are James
8 C. Cox, III, and Ms. Danielle F. Payne. Thank you.

9 All right. The first set of questions is this. Any
10 member of the jury panel now or in the past have ever been
11 represented by any of the lawyers that have stood or by
12 members of their firm, please stand.

13 All right. Let's start over here. Sir, your name?

14 THE JUROR: James Marfino.

15 THE COURT: Number?

16 THE JUROR: Number 107. My mom and dad was
17 represented by them a couple of years ago.

18 THE COURT: Who is "them?"

19 THE JUROR: Joseph and Betty Marfino.

20 THE COURT: By which lawyer?

21 THE JUROR: That one with the red tie.

22 THE COURT: That one with the red tie. Mr. Cox.

23 That's a good way to refer to a lawyer -- by Mr. Red Tie.

24 All right. And the fact that your mother was represented
25 by Mr. Cox's firm in the past, sir, would that keep or

1 preclude you from being fair or impartial in the trial of
2 the case?

3 THE JUROR: Yes.

4 THE COURT: All right. I will excuse you from the
5 trial of this case, but you got to stay with us for
6 criminal court which may last a lot longer than this.
7 Have a seat.

8 MR. DETRICK: That's 187?

9 THE CLERK: 107.

10 THE COURT: Yes, ma'am, in the pretty multi-colored
11 blouse, your name?

12 THE JUROR: I am juror 188, Conesther Williams.
13 Mr. Maxwell represented my husband in a case.

14 THE COURT: Now or in the past?

15 THE JUROR: In the past.

16 THE COURT: The fact that his law office represented
17 you in the past would that keep you from being a fair or
18 impartial juror?

19 THE JUROR: No.

20 THE COURT: Thank you. You may be seated.

21 Last, but not least, ma'am?

22 THE JUROR: I am number 155, Donna Smith, and
23 Mr. Maxwell represents my husband in the case of his
24 father's estate.

25 THE COURT: Presently?

1 THE JUROR: Yes, sir.

2 THE COURT: All right. I'll excuse you from the
3 trial of this case.

4 Now, any member of the jury panel now or in the past
5 have been related by blood or marriage or do you now or
6 have you in the past had a close personal or social
7 relationship with any of the lawyers, please stand. It's
8 funny. Nobody ever has a personal relationship. I don't
9 blame you. I am just kidding. I was a lawyer for 30
10 years and practiced right here in this courtroom a many a
11 time.

12 All right. Ladies and gentlemen, in a civil case --
13 This is a civil case where a person is alleged to have
14 died as a result of some negligent act or alleged
15 negligent act by the defendant. In our civil system of
16 justice, obviously, we can't put the parties back where
17 they were before the wreck occurred. Obviously, we can't
18 bring back the lady that was killed; so in civil court as
19 has been since we declared our independence and our
20 Constitution was formed thereafter in a civil case the --
21 if you find that the plaintiff has proven their case
22 they're entitled to monetary damages. That's the only way
23 that the law has ever been here in the United States or
24 under our common laws that we derived mostly from England
25 and in that situation, obviously, the plaintiff has the

1 burden of proving their case -- a negligence case which
2 I'll tell you all about as we go along -- and they have to
3 prove it by what we call the preponderance or greater
4 weight of the evidence.

5 In a civil case the parties come in on equal footing.
6 For the plaintiff to prevail they have to prove their
7 case, as I said, by the preponderance or greater weight of
8 the evidence. So if these are the scales of justice
9 (indicating) they have to tip the scales ever so slightly
10 in their favor. If they're able to do that, then they're
11 entitled to an award for monetary compensation. If after
12 everything is over, said, and done and you feel like the
13 scales of justice remain equal or balance in favor of the
14 defendant, then they would not be entitled to monetary
15 compensation.

16 Now, the way the system works is this. We have two
17 judges in the trial of the case. My job makes me the
18 judge of the law in the case and I also rule on the
19 admissibility of evidence. So at the conclusion of the
20 case and during the case I'll tell you what the law is.
21 I'll instruct you on what the law is and you're under an
22 obligation to accept the law as I give it to you.

23 The other judge in the case are twelve jurors
24 collectively acting as one and your job is much, much,
25 much more important than mine. You are the judges of the

1 facts in the case and as thirty years as a lawyer and
2 eight years now as a judge I've tried literally thousands
3 of cases and I can promise you that in all of them there
4 will be a different version of the facts from different
5 witnesses. One may tell you it's A. One may tell you
6 it's C. One may tell you it's Z. One may say green. One
7 may say purple. One may say blue.

8 So, the twelve jurors that are selected, you judge
9 the facts. You judge the credibility or the believability
10 of the witnesses who testify in the case. That is your
11 job to analyze what these witnesses say and you become the
12 judges of the facts, twelve of you acting as one. Then
13 you take those facts as you find them to be and you apply
14 it to the law and you'll be in a position to render a true
15 and just verdict.

16 So, that's how the system works. So the twelve of
17 you will be the judges of the facts -- the most important
18 position in this courtroom. I say that as a background
19 because I want to know right now do I have any member of
20 the jury panel for any reason whatsoever -- personal
21 beliefs, religious beliefs, political beliefs, a
22 combination thereof, anything that would keep or preclude
23 you from performing that civic duty? Does anybody know of
24 any reason whatsoever why he or she should not serve in
25 the case as a juror, obviously, with particular emphasis

1 being placed on your ability to be fair both to the
2 plaintiff and to the defendant and follow my instructions
3 and determine what the facts are? Can anybody not do that
4 for any reason whatsoever? I need to know now.

5 I think you'll find it -- You know, we see all of
6 this stuff on TV about the law and Law and Order and all
7 that other stuff. This is to me the best system of
8 justice in the world. It's come a long time for it to be
9 evolved, but if two people disagree on something it's not
10 like the olden days like Alexander Hamilton and Aaron
11 Burr. They get out and duel. They shoot at each other
12 and kill each other. In other countries they get out and
13 slug it out or they have some omnipotent power that says
14 what is what, but in our country we have twelve citizens
15 who come in and provide this civic duty and it allows
16 these parties to resolve their dispute.

17 So, you'll be the conscience of the community.
18 You'll be the -- tell them what the true facts are. Y'all
19 make the decision. So if anybody cannot do that, please
20 let me know now.

21 Let me ask you a few general questions. Do I have
22 any member of the jury panel that's ever been involved in
23 a civil lawsuit both whether as a person bringing the suit
24 as the plaintiff or the person being sued as the
25 defendant? If so, please stand. Anybody ever been in a

1 civil lawsuit?

2 Yes, sir, your name, please?

3 THE JUROR: I am juror number 23, Joseph Campbell.

4 May I approach the bench?

5 THE COURT: Yes, sir. What number are you?

6 THE JUROR: Twenty-three.

7 THE COURT: Come right here.

8 MR. DETRICK: Can we approach?

9 THE COURT: Not until I hear what he is going to say.

10 MR. DETRICK: Can we come, too?

11 THE COURT: When I hear what he is going to say.

12 MR. DETRICK: Oh, I'm sorry.

13 (Whereupon, the juror spoke with the Court out of the
14 hearing of the court reporter.)

15 THE COURT: Go back there and tell me that out loud.

16 What is your name?

17 THE JUROR: Joseph Campbell.

18 THE COURT: What number is that?

19 THE JUROR: Juror 23.

20 THE COURT: Twenty-three. Mr. Campbell says that he
21 brought a lawsuit at one time in the past against his
22 employer.

23 Is that correct, sir?

24 THE JUROR: That's correct.

25 THE COURT: Thank you. You may be seated.

1 Ma'am, you want to have a seat, please?

2 MR. DETRICK: Have a seat. I was afraid that was in
3 the juror's way.

4 THE COURT: No problem. Any member of the jury panel
5 know anything about this matter -- know anything about the
6 facts, read anything about it in the newspaper, internet,
7 TV, radio?

8 Yes, sir, your name?

9 THE JUROR: I think I have a little bit of knowledge
10 about it.

11 THE COURT: Your name?

12 THE JUROR: My name is Michael Hintz. I'm juror
13 number 74.

14 THE COURT: All right, sir. It's hard to live in a
15 small community with a wreck where someone is killed not
16 to make the news. I read the newspaper in the morning and
17 I finally got an IPAD. I have joined the world. I read
18 news all day long, but what we're trying to accomplish
19 here is setting aside anything you may have read and the
20 lawyers will present the cases they want you to hear.
21 They'll bring up the witnesses and the defendant will put
22 up their witnesses who they support their position.

23 The fact that you read something about it or heard
24 something about it, can you set that aside and decide this
25 case based solely on what we do in the courtroom?

1 THE JUROR: Absolutely.

2 THE COURT: Thank you very much.

3 Ma'am, your name?

4 THE JUROR: Amanda Ergle, juror number 45.

5 THE COURT: And, likewise, you heard something about
6 it?

7 THE JUROR: My husband works with Mr. Valenzuela.

8 THE COURT: Ma'am?

9 THE JUROR: My husband works with Mr. Valenzuela.

10 THE COURT: Works presently with him?

11 THE JUROR: Yes, sir.

12 THE COURT: What number are you?

13 THE JUROR: Forty-five.

14 THE COURT: All right. I will excuse number 45.

15 All right. Any member of the jury panel ride
16 motorcycles? Just stand and give me your name. I am not
17 going to ask you any questions.

18 THE JUROR: Alton Pyatt, juror number 140.

19 THE COURT: Thank you. You may be seated. Sir?

20 THE JUROR: Richard Castles, juror number 28.

21 THE COURT: Thank you, sir.

22 THE JUROR: Number 81, Derwin Hunt.

23 THE COURT: Thank you.

24 THE JUROR: I used to ride.

25 THE COURT: Used to?

1 THE JUROR: Yes, sir.

2 THE JUROR: Juror 172, Stan Thompson.

3 THE COURT: Thank you.

4 THE JUROR: Juror 152, John Simmons.

5 THE COURT: Mr. Simmons, you're the crane operator;
6 right?

7 THE JUROR: Correct.

8 THE COURT: Ma'am?

9 THE JUROR: 167, Judy Taylor.

10 THE COURT: Other than my superintendent who has
11 already stood has any member of the jury panel or your
12 close family been employed by JD Lever, L-E-V-E-R,
13 Elementary for the Aiken County School District? Please
14 stand.

15 Yes, ma'am? You're the bus driver; right?

16 THE JUROR: Yes, sir.

17 THE COURT: And your name?

18 THE JUROR: Annie Derricott, juror number 38.

19 THE COURT: Thank you. Please remain standing.

20 Ma'am, in pretty multi-colored coat.

21 THE JUROR: Novia Pardue, juror 124. I have just
22 signed a contract to be a substitute teacher.

23 THE COURT: Thank you.

24 Ma'am, right here, the computer lab lady -- name,
25 please?

1 THE JUROR: Deborah Simmons, 151. I work at
2 Gloverville Elementary for the school district.

3 THE COURT: All right. Just remain standing.

4 You're the nurse?

5 THE JUROR: Yes. Hannah Richardson. My mom and my
6 aunt are employed by Aiken County Public Schools.

7 THE COURT: Thank you. Remain standing.

8 You're the fourth grade teacher?

9 THE JUROR: Yes, sir. Juror number 110, Justin
10 McKinney.

11 THE COURT: All right. Ma'am in the back, I thought
12 you told me you were unemployed.

13 THE JUROR: I am, but my sister-in-law works at
14 JD Lever.

15 THE COURT: All right. And your name, please?

16 THE JUROR: Annette Dickerson, Juror 39.

17 THE COURT: Thank you. And -- hold on -- social
18 worker?

19 THE JUROR: Yeah. No, DHEC. Close.

20 THE COURT: All right.

21 THE JUROR: Seventy-nine, Jennifer Hughes. My dad
22 retired but is currently employed by Aiken County Public
23 Schools.

24 THE COURT: Okay. And the fact that y'all -- I think
25 that the lady who is deceased worked with the public

1 school system; is that correct? The fact that y'all may
2 have some ties to the school district by way of
3 employment, would that in any way keep or preclude any of
4 you from participating as a juror in the trial of this
5 case?

6 I got a no from everybody. Thank you. Be seated.

7 Any additional questions by the plaintiff?

8 MR. DETRICK: No, sir. I'm sorry.

9 THE COURT: Let me ask one other question. Involved
10 in this case will be some testimony about a piece of heavy
11 equipment known as a scraper or a pan. It is an
12 earth-moving device. Any member of the jury panel, have
13 you ever operated a scraper or a pan equipment? It is the
14 big tires and the thing on the bottom that scrapes up the
15 dirt. Any member ever done that?

16 All right. We're going to go with three alternates;
17 right?

18 MR. DETRICK: Yes, sir.

19 THE COURT: All right. I need twenty, three, six,
20 nine; is that correct? How long will y'all need?

21 MR. DETRICK: As much time as you'll give us, Your
22 Honor.

23 THE COURT: Two seconds.

24 MS. PAYNE: Your Honor, there was some of the
25 questions on our voir dire that were unasked.

1 THE COURT: That's correct. You are protected. I
2 find it in my discretion -- I have been over most all of
3 it and --

4 MS. PAYNE: Okay.

5 THE COURT: -- you're protected.

6 MS. PAYNE: Thank you, Your Honor.

7 THE COURT: You can make it a part of the record.

8 MS. PAYNE: Yes, sir.

9 MR. DETRICK: I am not fast at anything anymore, Your
10 Honor.

11 THE COURT: Those of you who are selected, you'll
12 stay with me. Those who are not will go over to Judge
13 Newman's courtroom.

14 Go ahead and give me the names.

15 In a civil case they are going to print out a random
16 selection of 20 names and the plaintiff has four strikes.
17 The defendant has four strikes leaving us with 12 and then
18 we'll do some alternates. Those who are drawn will stay.
19 Those who are not will go to general sessions or criminal
20 court.

21 Over there if we were trying a murder case, drug
22 case, you-name-it case, once we get to this point then
23 your name is called randomly and if they call out juror
24 number 21 and then 21 would come up and stand right here
25 and face the state and face the defense lawyer and in

1 those cases the state has five strikes. Major felony
2 cases, they have ten strikes. Minor cases, they have five
3 strikes for the defendant. So, they strike back and
4 forth. They'll say accept the juror or dismiss the juror
5 or strike the juror and go through it that way.

6 It's a little different over here. What these
7 lawyers do -- they obviously have all prepared very
8 tirelessly for this case. You can see all the boxes back
9 here. There's been a lot of time, effort, and energy put
10 into the preparation of this case so it will be tried very
11 thoroughly. We've got good lawyers involved in the case.
12 It will take them probably about 15 minutes to get -- to
13 go through their notes and get the jury selected.

14 It is according to that clock just a little bit after
15 11. I am going to ask you or give you the opportunity to
16 step out until 11:20 -- bathroom, stretch your legs,
17 whatever you need to do. Be back in here at 11:20. Hold
18 on one second. We'll draw that jury and then -- Do you
19 know what y'all's situation is going to be?

20 MR. MILLER: We have two that are subject to being
21 called this morning, Your Honor.

22 THE COURT: This morning?

23 MR. MILLER: Yes, sir.

24 THE COURT: So we'll go over there and we'll try to
25 get y'all out over there so you can be free after lunch

1 depending on what the situation is so you won't be held up
2 any more than you have to be. Okay. I'll see y'all all
3 back in here at 20 minutes after.

4 Everybody else remain seated except my jurors.

5 You can step outside if you choose.

6 (Whereupon, a break was taken.)

7 THE COURT: Plaintiff ready to strike?

8 MR. DETRICK: Yes, sir.

9 THE COURT: Defendant ready to strike?

10 MR. COX: Yes, sir.

11 THE COURT: Ladies, gentlemen, please, please,
12 please, as my friend James Brown used to say, strike using
13 the number on the far left. The plaintiff may strike
14 first.

15 THE CLERK: Only from 1 through 20 and then we'll do
16 the alternates separately, please.

17 THE COURT: Mr. Detrick?

18 MR. DETRICK: Plaintiff strikes number 4.

19 THE CLERK: Plaintiff strikes number 4.

20 THE COURT: Mr. Cox?

21 MR. COX: Your Honor, the defendant strikes number
22 10.

23 THE CLERK: The defendant strikes number 10.

24 THE COURT: Mr. Detrick?

25 MR. DETRICK: Plaintiff strikes number 19.

1 THE CLERK: Plaintiff strikes number 19.

2 THE COURT: Mr. Cox?

3 MR. COX: The defendant strikes number 9.

4 THE CLERK: The defendant strikes number 9.

5 THE COURT: Mr. Detrick?

6 MR. DETRICK: The plaintiff strikes number 14.

7 THE CLERK: The plaintiff strikes number 14.

8 THE COURT: Mr. Cox?

9 MR. COX: The defendant strikes number 17.

10 THE CLERK: The defendant strikes number 17.

11 THE COURT: Mr. Detrick?

12 MR. DETRICK: Plaintiff strikes number 1.

13 THE CLERK: The plaintiff strikes number 1.

14 THE COURT: Mr. Cox?

15 MR. COX: The defendant strikes number 18.

16 THE CLERK: The defendant strikes number 18.

17 THE COURT: All right. The first juror -- the first
18 alternate will be 21, 22, and 23 or we can do three
19 strikes each on nine and leave us three, whichever way you
20 want to do it.

21 Mr. Detrick, which way you want to do it?

22 MR. DETRICK: I'm sorry?

23 THE COURT: I can do three each on the nine or out of
24 the first three we'll do two each, next three we'll do two
25 each, and the next three two each.

1 MR. DETRICK: You tell me, Your Honor.

2 THE COURT: Makes no difference to me. Y'all agree.

3 All right. Do the first three. Give me a strike out of
4 the first three. That will be 21, 22, and 23.

5 MR. DETRICK: The plaintiff strikes number 22.

6 THE CLERK: The plaintiff strikes 22.

7 THE COURT: Mr. Cox?

8 MR. COX: The defendant strikes number 21, Your
9 Honor.

10 THE CLERK: The defendant strikes number 21.

11 THE COURT: Mr. Detrick, out of 24, 25, 26.

12 MR. DETRICK: The plaintiff strikes number 24.

13 THE CLERK: Plaintiff strikes 24.

14 THE COURT: Mr. Cox?

15 MR. COX: The defendant strikes number 26.

16 THE CLERK: The defendant strikes 26.

17 THE COURT: All right. The last three: 27, 28, 29.

18 Mr. Detrick?

19 MR. DETRICK: Plaintiff strikes number 28.

20 THE CLERK: The plaintiff strikes number 28.

21 THE COURT: Mr. Cox?

22 MR. COX: The defendant strikes number 27.

23 THE CLERK: The defendant strikes 27.

24 THE COURT: Mr. Detrick, Mr. Cox, listen as the clerk
25 goes over the strikes.

1 THE CLERK: The plaintiff strikes are as follows:
2 Number 1, number 4, number 14, and number 19. Alternates
3 are 22, 24, and 28. Is that correct?

4 MR. DETRICK: That's correct.

5 THE CLERK: The defense are as follows: Number 9,
6 number 10, number 17, number 18, number 21, 26, and 27; is
7 that correct?

8 MR. COX: That's correct.

9 THE COURT: All right. As your name is called,
10 please come over here to this jury box. If you have a
11 pocketbook or whatever personal belongings, please bring
12 it with you.

13 Madam Clerk?

14 THE CLERK: Juror number 123, Patricia Owens.

15 THE COURT: Thank you, Ms. Owens. Go to Ms. Barbara.

16 THE CLERK: Juror 109, Timothy Mcferrin; juror number
17 11, Spencer Beard; juror number 44, George Epps; juror
18 number 103, Deidre Mack; juror number 70, Loretta Heard;
19 juror number 117, Offie Muschick; juror 191, Kenya
20 Williams; juror 124, Novia Pardue; juror number 65,
21 Terrance Hankerson; juror number 156, Patricia Smith;
22 juror number 149, Deborah Sessions.

23 Alternate number one is going to be 193, Timothy
24 Williams; alternate number two, 142, Hannah Richardson;
25 alternate number three, 42, Darell Dunn.

1 THE COURT: Any motion by the plaintiff in connection
2 with the selection of the jury?

3 MR. DETRICK: None from the plaintiff, Your Honor.

4 THE COURT: By the defendant?

5 MR. COX: None, Your Honor.

6 THE COURT: All right. Ladies and gentlemen, the
7 bailiff will show you back to the jury assembly room.

8 Please tell Judge Newman that they're here and let
9 them -- so he can get right to them and we can get them
10 out of here.

11 I won't see you for the rest of the week. Thank you
12 for coming. We cannot run either general sessions or
13 common pleas court without citizens ready, willing, and
14 able to help us and I appreciate it on behalf of the
15 judiciary and the citizens of Aiken. Thank you very much.
16 Just follow the bailiff.

17 (Whereupon, the remaining jurors exit the courtroom
18 and a bench conference is held.)

19 THE COURT: Ladies and gentlemen, this trial will
20 have someone witnesses who are -- who will be -- they'll
21 attempt to designate them as expert witnesses. When that
22 happens I have to listen to what field they're going to
23 testify about, their qualifications, and I have to
24 determine reliability. It's mandated by the South
25 Carolina Supreme Court. So, basically, I have to listen

1 to what the experts are going to testify to before y'all
2 ever hear it to determine whether the testimony of that
3 particular expert complies with our rules.

4 That's going to probably take me a good hour, hour
5 and 15 minutes to do that. Then, obviously, the lawyers
6 have to get a bite to eat as well as do I. I don't want
7 y'all sitting back there waiting while we do all that.
8 Let's start at 2 o'clock. So be back -- Ms. Barbara will
9 show you where to come back and how to come back.

10 We will run this afternoon, to give you some heads
11 up, until around five. It may be a few minutes before
12 five or a few minutes after five, but I am not going to
13 keep you up here half the night. We'll start tomorrow
14 morning about 9:30. I normally -- if I can get the county
15 to come up with some funds I'll buy y'all some biscuits or
16 whatever for breakfast in the morning and I normally will
17 try to buy you lunch tomorrow. We'll go down to the
18 Bowery or do something or order in or whatever.

19 Let's be back at 2 o'clock. Don't discuss the case
20 with anybody. Don't let anybody discuss it with you and
21 we'll start at 2 planning to go to 5 and starting at 9 or
22 9:30 in the morning. Ms. Barbara will show you where to
23 go and how to get there.

24 Everybody else remain seated. Thank you.

25 (Whereupon, the jury exited the courtroom at 11:40.)

1 THE COURT: Okay. I think the next order of
2 business -- y'all need your witnesses to stay here?

3 MS. PAYNE: That's what we're going to ask, Your
4 Honor.

5 THE COURT: They are fine to stay or go, whatever you
6 want them to do.

7 MS. PAYNE: I don't know if Mr. Detrick plans to call
8 them today. We just want to know if they need to come
9 back at two.

10 MR. DETRICK: They can come back tomorrow morning at
11 9:30.

12 MS. PAYNE: Okay.

13 THE COURT: Paul, please just get comfortable. You
14 don't have to stand for me; however makes you comfortable.

15 MR. DETRICK: Thank you. As Your Honor knows I just
16 have to walk around sometimes.

17 MS. PAYNE: Thank you, Judge. I am going to walk
18 them out.

19 THE COURT: All right. As I understand we have an
20 expert -- someone who is going to be offered as an expert
21 witness by the defendant. I am not sure what the field
22 is, but I thought y'all said something about motorcycle
23 operation.

24 MR. DETRICK: Yes, sir. Can I have -- I didn't have
25 chance to go to the restroom. Can I do that?

1 THE COURT: You know where my chambers are?

2 MR. DETRICK: Yes, sir.

3 THE COURT: Just scoot in there.

4 (Whereupon, a break was taken.)

5 THE COURT: Okay. Mr. Cox, you may call your first
6 witness.

7 MR. COX: Your Honor, at this time I'd call Mr. Joe
8 Dawes to the stand, please.

9 JOE W. DAWES, after being duly sworn, testified
10 as follows:

11 THE CLERK: Please take a seat in the witness box and
12 state your full name for the record.

13 THE WITNESS: My name is Joe W. Dawes; D-A-W-E-S.

14 THE COURT: All right. Mr. Cox, give me a succinct
15 summary of what you intend to show by Dr. Dawes and as
16 we're all aware that under Rule 702 that the expert must
17 offer either scientific, technical, or other specialized
18 knowledge which will assist the trier of fact to
19 understand the evidence or to determine a fact in issue
20 and we all know that expert evidence is allowed where a
21 factual issue must be resolved with scientific, technical,
22 or any other specialized knowledge. On the other hand, if
23 it is something within the ordinary knowledge of a lay
24 person, then, obviously, expert testimony is not allowed.

25 So the first thing I must determine is whether or not

1 the subject matter is beyond the ordinary knowledge of the
2 jury, thus requiring an expert to explain the matter to
3 the jury. So what is this expert going to do or explain
4 that requires specialized knowledge beyond the scope of an
5 ordinary knowledge of a juror?

6 MR. COX: Your Honor, we're offering Mr. Dawes as an
7 expert on motorcycle safety and the proper operation of a
8 motorcycle. He has---

9 THE COURT: Motorcycle safety.

10 MR. COX: -- which -- and proper operation of a
11 motorcycle. Your Honor, those go hand in hand, and, Your
12 Honor, it's specialized knowledge. One thing showing that
13 is the fact that only six of the jurors on the jury panel
14 operate a motorcycle and so he's going to testify
15 regarding the proper operation of a motorcycle and all of
16 the -- everything that goes in -- it is a complex set of
17 systems. It's not like driving a car, and, Your Honor, he
18 has specialized knowledge.

19 The South Carolina Code Section 59-53-2020 --
20 actually, that's the statute that authorizes -- the
21 legislature authorize the State Board of Technical and
22 Comprehensive Education to establish and provide
23 motorcycle safety instruction programs. That's the
24 statute that authorizes the technical colleges to do that
25 and they are---

1 THE COURT: I bet they teach driver training and I'll
2 bet they teach all kind of other stuff, too.

3 MR. COX: Well, Your Honor, they may.

4 THE COURT: You know they do. Well, I'm just having
5 -- I am going to listen to him, but I am just -- why do
6 you have to tell a juror how to run a motorcycle?

7 MR. COX: Your Honor, and if I could just going back
8 to the statute, the program -- the program -- safety
9 program the technical colleges must incorporate, it is
10 mandated by statute the Motorcycle Safety Foundations
11 curriculum and Mr. Dawes is certified by the Motorcycle
12 Safety Foundation as an instructor and riders coach to
13 offer these courses. So, it is a program set up by our
14 legislature to be taught.

15 THE COURT: Well, I am going to pay close attention
16 to whether or not this is an area that needs an expert to
17 explain how to operate a motorcycle to the jury. Move
18 along. Ask your questions.

19 IN-CAMERA DIRECT EXAMINATION

20 BY MR. COX:

21 Q Mr. Dawes, what is your educational background?

22 A I graduated high school in 1975. I attended one year
23 of college at the University of South Carolina and then I
24 enlisted in the United States Air Force as an electronics
25 technician.

1 Q Okay. And where are you currently employed, sir?

2 A Midlands Technical College.

3 Q Okay. And what is your position there at Midlands
4 Technical College?

5 A I am an adjunct instructor. I teach the MSF --

6 THE COURT: Teach what?

7 THE WITNESS: -- motorcycle course.

8 THE COURT: M?

9 THE WITNESS: I'm sorry, sir?

10 THE COURT: Teach what?

11 THE WITNESS: The motorcycle safety course as offered
12 by Midlands Tech.

13 THE COURT: Do you teach anything else besides
14 motorcycle safety course?

15 THE WITNESS: No, sir.

16 THE COURT: How long have you been at Midlands Tech?

17 THE WITNESS: Four years.

18 THE COURT: How often do you teach?

19 THE WITNESS: At least two weekends a month,
20 sometimes four.

21 THE COURT: How long during the weekend?

22 THE WITNESS: Classes start generally on a Friday
23 evening 6 pm and run to about 9 pm and then we have all
24 day Saturday from 8 am to about 4 pm and the same thing on
25 Sunday.

1 THE COURT: Are these for students or are these just
2 people signing up for this particular course?

3 THE WITNESS: They are -- they sign up for that
4 specific course, yes, sir.

5 THE COURT: That course required to obtain a
6 motorcycle license?

7 THE WITNESS: No, sir, it is not.

8 THE COURT: What do you do other than teach at
9 Midlands Tech?

10 THE WITNESS: I am also the site coordinator for
11 Midland Tech where I maintain the motorcycles.

12 THE COURT: Site coordinator?

13 THE WITNESS: Yes, sir.

14 THE COURT: How many motorcycle does Midland Tech
15 own?

16 THE WITNESS: Right now they have 15 on site, sir.

17 THE COURT: Thank you. Go ahead.

18 Q And what is a rider coach instructor at Midlands
19 Tech?

20 THE COURT: A rider coach instructor?

21 Q Now---

22 THE COURT: Is that what you said?

23 MR. COX: Yes, sir. Well, I asked -- I asked him how
24 you were employed at Midlands Tech with regards to your --
25 as an instructor. What is your position there?

1 THE WITNESS: At Midlands Tech?

2 Q Yes, sir; with regard to motorcycle safety.

3 A I am an adjunct instructor meaning that I teach the
4 course as provided by the Motorcycle Safety Foundation and
5 I also maintain the site as far as the vehicles that we
6 offer for the basic course and I do the scheduling of the
7 various rider coaches in the system that teach at Midland
8 Tech as well.

9 Q Okay. Are you also what's known as a rider coach?

10 A I'm sorry?

11 Q Are you also what's known as a rider coach?

12 A Yes, sir.

13 Q And as an instructor and rider coach, what do you do
14 with regards to instruction of students?

15 A We have students that have essentially no knowledge
16 of motorcycle operation. We take them to the classroom.
17 We explain proper riding techniques, proper motorcycle
18 maintenance, clothing, operational of controls and safety
19 awareness.

20 Q Okay. And do you teach them how to safely operate a
21 motorcycle?

22 A Yes, sir.

23 Q Do you teach them how to operate a motorcycle?

24 A Yes, sir.

25 Q Okay. Did you have to undergo any training to become

1 an MSF instructor?

2 A Yes, I did.

3 Q Okay. And what was that training? How long was it?
4 What was it?

5 A It was a course where I had to take the basic rider
6 course as offered by the college to all students to become
7 aware of the program and then I had to attend a two-week
8 training course, weekends included, to become certified as
9 a rider coach.

10 THE COURT: Where was that?

11 THE WITNESS: That was at Midlands Tech.

12 THE COURT: How long ago was that?

13 THE WITNESS: Four years ago, sir.

14 THE COURT: What other training -- what other
15 education in the motorcycle field have you had other than
16 taking the basic course and a two-week training program?

17 THE WITNESS: I was required to take a motorcycle
18 safety course when I enlisted in the US Air Force.

19 THE COURT: How long ago was that?

20 THE WITNESS: That was in 1976 -- excuse me, 1977
21 when I arrived at my first duty station.

22 THE COURT: Any education between 1977 and the Air
23 Force and taking the two-week training program at the
24 basic training course?

25 THE WITNESS: No, sir.

1 THE COURT: How did you get into teaching this class?
2 How did it fall into your lap?

3 THE WITNESS: I had thought about it for several
4 years because safety is a concern of mine and I finally
5 applied to the program. It was myself and a list of
6 applicants. We were chosen based upon our experience and
7 riding skills and driving record.

8 THE COURT: Are you certified by the State of South
9 Carolina in any -- or licensed by them to teach this
10 motorcycle class?

11 THE WITNESS: No, sir, not to teach motorcycles.

12 THE COURT: I assume that you got a motorcycle
13 license?

14 THE WITNESS: Yes, sir.

15 THE COURT: How long have you had that?

16 THE WITNESS: Since 1975, sir.

17 Q And so you've been licensed since 1975 to drive a
18 motorcycle; correct?

19 A Correct.

20 Q And did you go -- did you take the beginner's permit
21 test and then get a motorcycle and take the skills test to
22 get the motorcycle license?

23 A Yes, I did. I had to take a written test by studying
24 the SCDMV driver's handbook on motorcycle operation and
25 then I had to take a practical skills evaluation as

1 provided by licensed examiner.

2 Q Okay. And have you been operating a motorcycle since
3 1975?

4 A Yes, sir.

5 Q As a licensed motorcycle driver?

6 A Yes, sir.

7 Q Continuously?

8 A There was a couple of years where I may not have
9 ridden due to work that I did not have a motorcycle on the
10 road because I had so much time working that I just didn't
11 have time to ride.

12 Q Of those forty years though you drove how often? How
13 often have you been licensed?

14 A Oh, I've ridden motorcycles just about every day.

15 Q Okay.

16 THE COURT: Have you testified as an expert in a
17 court of law?

18 THE WITNESS: I'm sorry, sir?

19 THE COURT: Have you ever been qualified as an expert
20 in any court of law where you rendered opinion testimony
21 on the operation of a motorcycle?

22 THE WITNESS: No, sir.

23 THE COURT: Do you know of anyone else who's ever
24 been qualified as an expert in the field of motorcycle
25 safety --

1 THE WITNESS: No, sir.

2 THE COURT: -- that testified in a court of law?

3 THE WITNESS: No, sir.

4 THE COURT: Move along, Mr. Cox.

5 Q Now and you've been certified you mentioned by the
6 Motorcycle Safety Foundation; is that correct?

7 A Yes, sir.

8 Q What is the Motorcycle Safety Foundation?

9 A Motorcycle Safety Foundation is an organization that
10 promotes the safe operation of motorcycles, motorcycle
11 awareness, and various training programs at colleges
12 around the country.

13 Q Okay. And is this the internationally-recognized
14 developer of the comprehensive research-based rider
15 education training system that you teach?

16 A I'm sorry, sir.

17 Q Is the Motorcycle Safety Foundation the
18 internationally recognized developer of the comprehensive
19 research-based rider education and training system which
20 is curriculum is used by the technical college of South
21 Carolina?

22 A Yes.

23 Q Okay. And as far as you know is this an instruction
24 program authorized by statute in the State of South
25 Carolina?

1 A Yes, it is.

2 MR. COX: Okay. Your Honor, at this time I'd ask the
3 court to take judicial notice of South Carolina Code
4 59-53-2020 and I can hand that law up.

5 THE COURT: Thank you. Hand it up.

6 MR. COX: And that law I ask the court to take
7 recognition that the State of South Carolina has
8 authorized the technical colleges of South Carolina to
9 establish and offer motorcycle safety instruction programs
10 utilizing the Motorcycle Safety Foundation Motorcycle
11 Rider Course as the mandated core curriculum or its
12 equivalent.

13 Now, Mr. Dawes, are you a certified instructor that
14 implements the motorcycle safety instruction program at
15 Midlands Technical College?

16 THE WITNESS: Yes, sir.

17 Q And is the motorcycle -- and is -- I want to hand you
18 a copy of the curriculum handbook and ask you if this is
19 the -- if that contains the curriculum that under which
20 you received your training and under which you teach
21 motorcycle safety at Midlands Technical College?

22 A Yes, sir, it is.

23 MR. COX: Your Honor, I would introduce that as
24 Defense Exhibit 1.

25 THE COURT: Any objection? For the purpose of this?

1 MR. DETRICK: For the purpose of this hearing I have
2 no objection.

3 (Whereupon, Defendant's Exhibit No. 1 was marked for
4 identification and received into evidence.)

5 THE COURT: Let me see it.

6 THE WITNESS: Yes, sir.

7 Q Do you have an extra copy of that with you?

8 A Yes, I do.

9 Q You do?

10 A Yes, sir.

11 Q You have been riding a motorcycle for 40 years.

12 Before you ever started riding a motorcycle did you do
13 anything to educate yourself or to prepare yourself to
14 ride a motorcycle?

15 A Yes, sir, I did.

16 Q What was that?

17 A It was a self-study guide provided---

18 THE COURT: A what? What kind of study?

19 THE WITNESS: Self-study.

20 Q And, Joe, what I am doing is I am bringing you from
21 the beginning of your experience---

22 THE COURT: Hold on a minute. What is a self-study?

23 THE WITNESS: Self-study is a guide similar to the
24 MSF guide where it listed motorcycle familiarization, how
25 to properly operate the motorcycle, essentially the same

1 information that's in the MSF guide.

2 THE COURT: So you taught yourself how to do it?

3 THE WITNESS: Yes, sir.

4 Q Now this was a self-study in preparation of becoming
5 a licensed motorcycle driver?

6 A No, sir. This was not a requirement to become a
7 licensed motorcycle rider. This was something that I
8 undertook to further my knowledge of motorcycling. I had
9 been riding mini-bikes and dirt bikes and everything from
10 a very young age.

11 Q Okay. Okay. But then at some point when you got
12 started you studied the South Carolina DMV manual and you
13 passed the beginner's permit test; is that correct?

14 A Yes, I did.

15 Q And subsequent to that you passed the skills test
16 provided by the DMV to get the motorcycle endorsement to
17 have Class M license; is that correct?

18 A Yes, sir.

19 Q Okay. And then you underwent some training -- you
20 were in the US Air Force?

21 A Yes, sir.

22 Q And you underwent training to ride motorcycles on the
23 base there?

24 A Yes, sir.

25 Q Was that a requirement that the United States Air

1 Force had in order to ride a motorcycle on the base?

2 A Yes, it was.

3 Q Could you ride a motorcycle on the base without
4 taking the training course that the Air Force offered?

5 A No, sir.

6 Q Okay. When was that?

7 A That was in 1977 when I got to my first duty
8 assignment.

9 Q Okay. What things were taught through that training
10 course? What did you learn?

11 A Maintenance issues as provided by the motorcycle
12 owner's manual, how to safely operate the motorcycle in
13 traffic, how to be aware of things, a riding skills
14 portion as well with the entire class out on the road.

15 Q Okay. Did you have to pass that skills portion?

16 A Yes, I did.

17 Q And did you pass it?

18 A I'm sorry, sir?

19 Q And did you pass it?

20 A Yes, sir, I did.

21 Q Were you allowed to ride on the base?

22 A Yes, sir.

23 Q And you also underwent the Motorcycle Safety
24 Foundation two-week training, passed, and were certified
25 by the Motorcycle Safety Foundation; is that correct?

1 A Correct.

2 Q That was when, in 2008?

3 A Yes, sir, August of 2008.

4 Q Okay. Do you have to recertify every so often to
5 continue being an instructor of the motorcycle safety at
6 Midlands Tech?

7 A Yes, sir, I do.

8 Q Okay. And when -- tell me how you get recertified.

9 A Every two years we must fill out a questionnaire
10 explaining our coaching activities for the previous two
11 years. We must also provide proof that we have enrolled
12 in self-development courses outside of the motorcycling
13 community. My recertification was just this past July and
14 my proof was that I went through the private pilot's
15 ground school.

16 Q Okay. And so you've done that every two years since
17 you've been certified?

18 A Yes, sir.

19 Q Okay. And you've become recertified?

20 A Yes, sir.

21 Q Through the motorcycle safety instruction program
22 that you teach -- that you are certified to teach -- are
23 there different levels of courses?

24 A Yes, sir, there are.

25 Q On motorcycle safety?

1 A Yes, sir.

2 Q What are those courses?

3 A There is the basic rider's course which is provided
4 to everyone. Then we have an intermediate rider's course
5 for those that have already taken the basic course or
6 perhaps already have a motorcycle license and would like
7 to develop their skills further. We also have the
8 experienced rider's course which is offered as a skills
9 brush-up as it were -- very limited range time and no
10 classroom instruction. It is all done on the range.

11 Q Okay. And how many -- you've been teaching since
12 2008. How many classes have you taught?

13 A An exact number -- the records are kept at the state,
14 but I would have to say at least 30.

15 Q How many students have come through your classes
16 start to finish -- your motorcycle safety class?

17 A Twelve students per class. We are limited to 12
18 students; so we have 12 students in each class.

19 Q That's each of the 30 classes?

20 A Yes, sir.

21 Q So that's 360 students that you've taught motorcycle
22 safety and safe operation of motorcycle to?

23 A Yes, sir.

24 Q Okay. Are you a certified third-party tester with
25 the South Carolina Department of Motor Vehicles?

1 A Yes, I am.

2 Q And what is required to drive a motorcycle on the
3 roads of South Carolina?

4 A You must have a beginner's permit and you must have
5 passed the knowledge test.

6 Q Okay.

7 A You can then operate a motorcycle on the roads.

8 THE COURT: The same thing you got to do to have your
9 driver's license to drive a car; right? Pass the permit
10 test and have---

11 THE WITNESS: Yes, sir.

12 Q But now not everyone knows how to drive a motorcycle,
13 do they?

14 A Agreed.

15 Q Is that right?

16 A Yes, sir.

17 THE COURT: Not everyone knows how to drive a car,
18 either, do they?

19 THE WITNESS: No, sir.

20 Q Now as part of the program curriculum you teach that
21 motorcycles are not as prevalent as cars and trucks; is
22 that right?

23 A Yes, it is.

24 Q Okay. And are you familiar with the percentage of
25 licensed drivers in South Carolina that have a Class M

1 motorcycle license?

2 A I'm sorry. I'm not familiar with---

3 Q Are you familiar with the percentage of licensed
4 drivers in South Carolina that actually possess the
5 Class M motorcycle license?

6 A No, sir. I don't know the exact percentage, no, sir.

7 Q Okay. But are you familiar---

8 A We have numbers that come from the state office that
9 say roughly 10 percent of licensed motorcycle riders have
10 taken the safety course.

11 Q Okay.

12 (Whereupon, the attorneys conferred.)

13 MR. DETRICK: I'm sorry. I didn't hear his answer,
14 Your Honor.

15 THE COURT: He said he didn't know but he guessed
16 10 percent.

17 Q Now I am going to hand you -- Your Honor, if I may
18 approach the witness --

19 THE COURT: You may.

20 MR. COX: -- a copy of the State of South Carolina
21 Motorcycle Safety Program Assessment May 20 through 25,
22 2007 which does a study on the -- on motorcycle safety and
23 does that reference---

24 MR. DETRICK: Your Honor --

25 THE COURT: He's---

1 MR. DETRICK: -- I do object to that for two reasons:
2 Number one, I hadn't been provided it, and, number two,
3 this is not any study he did or has any knowledge -- I
4 really don't even know what it is.

5 THE COURT: Well, I mean, has he relied on it? Has
6 he looked at it before today?

7 MR. COX: Your Honor---

8 THE COURT: Have you? Hold on. Have you seen it
9 before today?

10 THE WITNESS: No, sir, not this document.

11 THE COURT: Sustained.

12 Q Okay. Now, but, sir, through your instruction at --
13 on motorcycle safety at Midlands Tech you teach the
14 course -- is it part of the premise of your instruction
15 that motorcycle drivers are not as prevalent as vehicles
16 -- as other vehicles on the road?

17 A Yes, it is.

18 Q And part of that reason is to talk about visibility
19 and assuming the responsibility to be seen as a motorcycle
20 driver; is that right?

21 A Yes, it is.

22 Q Okay. And it's your understanding and I believe you
23 testified earlier that only 10 percent of licensed drivers
24 have motorcycle licenses in South Carolina?

25 A Roughly 10 percent of motorcycle operators have

1 actually been through our training course.

2 Q Oh, I got you. Okay. But you agree a very low
3 percentage of drivers on the road of South Carolina drive
4 motorcycles?

5 A Yes, sir.

6 Q Would you agree that very few people know how to
7 operate a motorcycle properly?

8 THE COURT: He can't answer that. How does he know
9 what all people know? That's purely speculation.

10 Q Does your course at Midlands Tech equip your students
11 with knowledge and skills to be able to pass the knowledge
12 test and the skills test offered by the DMV?

13 A Yes, it does.

14 Q Okay.

15 THE COURT: It is sort of like a driver's education
16 program for motorcycles. Is that basically what it is?

17 THE WITNESS: Yes, sir.

18 Q Now, let's talk about operation of a motorcycle,
19 Mr. Dawes, and what you teach. Clearly, it's not like
20 driving a car, is it?

21 A No, sir, it is not.

22 Q Okay. What is the difference?

23 A Well, there are many differences between cars,
24 four-wheeled vehicles and motorcycles primarily being that
25 they are a single track vehicle. They require balance and

1 control skills not found in the four-wheeled community.
2 The controls are in different locations. If someone is
3 used to driving a car they are used to using their foot
4 for the accelerator pedal, but on a motorcycle it is on a
5 twist grip. The clutch is on the left handle bar. There
6 are separate switches for the headlights, the starter, the
7 turn signals. There are separate controls for the brakes.
8 There is a front brake lever and a rear brake lever and
9 those are not typically joined.

10 Q Okay. And how are the -- how are the braking
11 techniques different on a car and a motorcycle?

12 A I'm sorry. What techniques?

13 Q How are braking -- braking techniques.

14 A Yes, sir. We must apply both brakes. We start with
15 a gentle squeeze on the front brake lever and a press on
16 the rear brake pedal. As the motorcycle starts to slow
17 down we steadily increase pressure on the front brake
18 because of the weight transfer the front brake providing
19 70 percent of the stopping ability of the motorcycle.

20 Q Now, how about with regards to acceleration? What
21 are the controls involved with acceleration of a
22 motorcycle?

23 A We must slowly release the clutch lever easing into
24 the friction zone applying some throttle and moving away
25 from a stop and then keeping the wrist in a flat position

1 so as not to give it too much throttle.

2 Q Is the accelerator controlled with the right hand
3 grip?

4 A Yes, sir, it is.

5 Q Okay. The rear brake. How do you operate the rear
6 brake on a motorcycle?

7 A You press down with your right foot.

8 Q Okay. And the front brake?

9 A The front brake is a squeeze on the lever on the left
10 handle bar just in front of the throttle.

11 Q Okay. And the gear shift?

12 A The gear shift is on the left-hand side operated by
13 the left foot and it's a sequential shift in that there is
14 one neutral between the gear first and second gear and you
15 press down to go to first gear. You lift up to go to
16 neutral. You lift through neutral to go to second gear
17 and progressively lift up to go to a higher gear and then
18 you must press all of the way down through each gear in
19 order to get back down to the lower gear.

20 Q And the clutch control is located where?

21 A On the left handle bar.

22 Q So accelerating requires simultaneous smooth use of
23 various controls. Is that accurate?

24 A Yes, sir, it is.

25 Q And shifting requires simultaneous smooth use of

1 various controls?

2 A Yes, sir.

3 Q Okay. Now, what is the -- what is taught through
4 your course and through the DMV? What is the proper
5 braking technique for a motorcycle?

6 A To apply both brakes simultaneously, smoothly,
7 without sudden grabbing of the front brake lever or
8 depression of the rear brake pedal which would cause loss
9 of control.

10 Q Okay. What does grabbing on the front brake or
11 jamming down on the rear brake result in?

12 A It results in wheel lock-up. The front wheel will
13 stop turning and then start sliding across the pavement;
14 same thing with the rear wheel.

15 Q Okay. And then -- and do you teach -- what are the
16 do's and don'ts of braking of a motorcycle that are taught
17 through your -- through the Motorcycle Safety Foundation
18 course?

19 A We teach that you must apply both brakes fully with
20 light pressure at first steadily increasing pressure as
21 the motorcycle starts to slow down and weight is
22 transferred to the front. That allows more braking
23 pressure to be applied on the front brake and the
24 motorcycle comes to a stop.

25 Q Okay.

1 A We ease up on pressure just as we come to a stop,
2 smooth and controlled.

3 Q Okay. Now, is that technique also referenced in the
4 South Carolina Department of Motor Vehicles Driver's
5 Manual for which you've been certified as a third-party
6 tester?

7 A Yes, it is.

8 MR. COX: Your Honor, I'd approach and show him a
9 copy of the manual.

10 THE COURT: Okay.

11 Q In fact, on page 133 -- on page 133 of the South
12 Carolina Drivers Manual -- Now, first let me ask you what
13 is this manual, Mr. Dawes?

14 A This is the South Carolina Driver's Manual that is
15 studied before you take the written skills test or --
16 excuse me, the written test at the DMV.

17 Q Okay. And is this the study material offered by the
18 DMV in order to pass the knowledge test to drive a
19 motorcycle?

20 A Yes, it is.

21 Q Okay. And the driver's manual actually has different
22 sections and there is one section devoted to motorcycles;
23 is that correct?

24 A Yes, it is.

25 Q Okay. And you are required in order to get your

1 beginner's permit to study the information in the
2 motorcycle portion and pass the test; is that correct?

3 A Yes, sir.

4 Q And what does the DMV teach with regards to -- what
5 do the materials say with regards to braking?

6 A Page 133 on the driver's manual says that use both
7 brakes every time you slow or stop. Using both brakes for
8 even normal stops will permit you to develop the proper
9 habit or skill of using both brakes properly or in an
10 emergency. Squeeze the front brake and press down on the
11 rear. Grabbing at the front brake or jamming down on the
12 rear can cause the brakes to lock resulting in control
13 problems.

14 Q And is that paragraph that you just read from the
15 SCDMV manual the proper technique for braking a
16 motorcycle?

17 A Yes, sir, it is.

18 Q And is that the same technique that you teach at
19 Midlands Tech?

20 A Yes, sir.

21 Q Okay. What stopping power do the front and back
22 brakes of a motorcycle provide?

23 A From the rider course manual it states that it's
24 roughly 70 percent of your braking power comes from the
25 front brake with roughly 30 percent remaining from the

1 rear.

2 Q Okay. And are the -- so clearly the front brake and
3 the rear brake have different braking capabilities?

4 A Yes, sir.

5 Q Okay. The front brake is up to three times more
6 effective than the rear brake; is that right?

7 A Yes, sir.

8 Q Can the manner in which brakes are applied contribute
9 to a motorcyclist's inability to stop his vehicle in time
10 to avoid a collision?

11 A Yes, sir.

12 Q Does utilizing this proper braking technique equip a
13 driver with the skill to maintain proper control of his
14 motorcycle while braking and braking for emergencies?

15 A Yes, it does.

16 Q Okay. Is there ever reason to just use your rear
17 brake in an emergency stopping situation?

18 A No, sir.

19 Q And why is that?

20 A Because you only have roughly 30 percent of your
21 braking power comes from your rear brake. Most of your
22 braking ability comes from using the front brake.

23 Q Okay. Does the DMV or the course at Midlands Tech --
24 do you teach that laying down a motorcycle is proper?

25 A No, sir, it does not.

1 Q Is it ever proper to lay down a motorcycle?

2 A No, sir.

3 Q And why is that?

4 A Because if you're operating a motorcycle properly
5 you're not in a situation where that would be necessary.

6 THE COURT: What if somebody pulls right out in front
7 of you?

8 THE WITNESS: Yes, sir, and---

9 THE COURT: You'd rather just run into them head on
10 and not lay it down and go up underneath them?

11 THE WITNESS: No, sir. We do not teach to lay down
12 the motorcycle. If someone turns in front of you we're
13 trained to anticipate problems and to react accordingly.

14 THE COURT: So you didn't answer my question. If
15 somebody turns right dead in front of you and you don't
16 have a chance to put on the brakes, what are you supposed
17 to do? Just run into them?

18 THE WITNESS: At that point, sir, there would be no
19 option. You're going to hit them.

20 Q And that opens me to a good line of questioning as to
21 what is taught through the motorcycle safety program with
22 regards to potential hazards ahead.

23 A Right.

24 Q What is taught how to properly handle and be aware of
25 potential hazards?

1 A The first technique that we teach students is to
2 develop a strategy called SEE which is search, evaluate,
3 and execute. We search the roadway ahead. We search to
4 either side, and we search using our rear mirrors, and we
5 do head checks or turn our head to check for our blind
6 spots. We evaluate the situation and we have a plan
7 should something occur and we execute that plan.

8 Q Okay. And---

9 THE COURT: Well, you do that driving a car, don't
10 you? I mean, you always maintain a proper lookout and
11 evaluate the situation. If something comes up, you have a
12 plan.

13 THE WITNESS: Yes, sir.

14 THE COURT: That's basic driving skills, isn't it?

15 THE WITNESS: Yes, sir.

16 Q Now, Mr. Dawes, talk about rider radar and what is
17 taught to your students with regards to how to avoid a
18 situation where you ever have to lay the bike down. If
19 you're utilizing proper techniques, proper braking
20 techniques, and the proper hazard-avoidance techniques
21 taught, tell us about that.

22 A Rider radar involves 2-, 4-, and 12-second rules,
23 guidelines that we use. Your immediate path of travel we
24 must be ready to stop with anything that should occur,
25 enter our right-of-way within 4 seconds and then 12

1 seconds gives us a scan distance ahead for any potential
2 problems that may occur whether it be intersections or
3 vehicles in the roadway, construction, things of that
4 nature.

5 Q Okay. Now, the South Carolina Driver's Manual at the
6 page 9 of the manual it goes through the different license
7 types that one can obtain and one of those is a Class M
8 license; correct?

9 A Correct.

10 Q And that allows you to operate a two-wheel motorcycle
11 with a detachable side car or a three-wheel vehicle. Is
12 that accurate?

13 A Yes, sir.

14 Q Okay. And as stated earlier it's got the information
15 necessary to pass the beginner's permit test to drive --
16 to get your beginner's permit to drive a motorcycle;
17 correct?

18 A Correct.

19 Q And it's got the basic driving skills for motorcycle
20 in there including braking; is that accurate?

21 A Yes, it is.

22 MR. COX: Okay. Your Honor, at this time I'd ask the
23 court to take judicial notice of the South Carolina
24 Department of Motor Vehicles Manual.

25 THE COURT: Okay. You got a copy for me?

1 MR. COX: Yes, sir.

2 THE COURT: Mr. Cox, can you point me to any case in
3 any jurisdiction in this country that's ever -- a judge
4 has ever allowed a person to serve as an expert witness on
5 how to operate a motor vehicle -- I mean, how to operate a
6 motorcycle? I mean, it seems to me that is just something
7 that everybody knows. How do you get around the first
8 requirement of Rule 702? What page was it? Ten? I am
9 asking you a question. First of all --

10 MR. COX: Thank you, Your Honor.

11 THE COURT: -- do you have any other support that
12 this area is proper for expert testimony in any other
13 jurisdiction or in this state? First of all, this state
14 and, second, any other jurisdiction.

15 MR. COX: Your Honor, there's not been -- there's no
16 cases that I've seen in this state.

17 THE COURT: Well, how about other states?

18 MR. COX: Or any other states, Your Honor.

19 THE COURT: Are you aware of any court ever allowing
20 expert testimony when somebody testifies about how to
21 drive a car, how to drive a tractor, farm equipment, a
22 boat, any motorized vehicle? Can you point out where it
23 gets beyond the first rule that it has to be something
24 outside of the ordinary knowledge of the jury? I'm not
25 questioning he's, obviously, an expert in the area, but I

1 just don't think -- if I start opening the flood gates to
2 allow every automobile wreck case we have or automobile
3 motorcycle wreck case or tractor trailer wreck case for an
4 expert to come in and say how to operate the vehicles, I
5 just don't -- I have never seen that in all my years. I
6 am asking you for some guidance -- you, in offering this
7 man --

8 MR. COX: Your Honor---

9 THE COURT: -- Mr. Dawes. Can you point me to any
10 court that's ever done this or are you asking me to be the
11 first?

12 MR. COX: Your Honor, there have been cases where
13 boating experts have been used. Water-safety experts have
14 been used, but, Your Honor, his testimony is pertinent to
15 presenting our -- parts of our defenses in this case, Your
16 Honor, in that the plaintiff -- the evidence we believe
17 will show that the plaintiff did not exercise proper and
18 correct braking of his motorcycle.

19 He did not use -- he jammed on the rear brakes. The
20 plaintiff's expert contends he only used his rear brake
21 and that is only 30 percent of the motorcycle's stopping
22 capacity and the basic information necessary to obtain a
23 license in South Carolina is to know how to properly apply
24 your brakes and Mr. Dawes teaches that course by the
25 statute through the course authorized and mandated by

1 statute. He teaches that information and jurors don't
2 know -- typical juror who just drives a car does not know
3 how to operate a motorcycle, does not know that the front
4 brake is up on the hand grip and that the rear brake is at
5 the foot and there is -- it's a clearly spelled out and
6 defined proper technique for braking that was not utilized
7 in this case and every driver on the roads of South
8 Carolina is required to operate their brakes properly and
9 they're negligent if they don't, Your Honor.

10 THE COURT: Thank you. What have you gone through --
11 What is his basic opinions going to be? What opinions are
12 you going to ask him to opine to this jury?

13 MR. COX: I'm going to ask him to -- First, Mr. Dawes
14 has been to the scene.

15 THE COURT: Okay.

16 MR. COX: He has -- when we continue with the line of
17 questioning, he has reviewed the evidence in the case.
18 He's reviewed the testimony in the case. He's driven
19 Redds Branch Road, viewed and surveyed the curve that you
20 come out of and the straight of way.

21 THE COURT: Surveyed it? What do you mean surveyed
22 it?

23 MR. COX: You know, drove through, looked at it, took
24 notice of the landscape.

25 THE COURT: Sure. His opinions are going to be what?

1 MR. COX: His opinions are going to be that plaintiff
2 by his own testimony did not utilize proper braking.

3 THE COURT: Okay. In other words he only utilized
4 one brake?

5 MR. COX: He utilized one brake.

6 THE COURT: What else are you going to ask him other
7 than his alleged braking, failing to comply with the
8 handbook or other recognized motorcycle authorities?
9 Anything other than braking?

10 MR. COX: Your Honor, had he braked properly he would
11 have stopped well short of the intersection.

12 THE COURT: Does he have any training in recreating
13 accidents dealing with speed, braking distance, et cetera,
14 et cetera?

15 MR. COX: Your Honor, through his courses -- Let's
16 ask Mr. Dawes that question.

17 Mr. Dawes, what knowledge, training, and experience
18 do you have with regards to stopping distance of the
19 motorcycle?

20 THE WITNESS: We routinely train students to do
21 emergency stops from a safe parking lot speed roughly 15,
22 18 miles per hour, and we have a Q-cone set up on the
23 course and when they pass that Q-cone they are to apply
24 both brakes fully without locking either wheel and we
25 measure -- during the skills evaluation we measure the

1 distance traveled and the time that it takes them to
2 travel between the set of marks on the pavement. That way
3 we know their speed and we can evaluate them -- their
4 performance -- based upon that and points are assessed if
5 they either lock either wheel or exceed the distance and
6 they have to redo it if the speed is below the minimum.

7 Q And you've done that with each of your students that
8 have come through and taken the skills test?

9 A Yes, sir.

10 Q So you've evaluated their stopping distance and how
11 they stopped those motorcycles; is that correct?

12 A Yes, sir.

13 Q And that's been at least 360 students
14 approximately --

15 A Yes, sir.

16 Q -- as you've testified to earlier?

17 A Yes, sir.

18 Q And have you -- do you know -- you've also -- you
19 also ran tests out at the scene of this accident, did you
20 not?

21 A Yes, I did.

22 Q And do you have the information from those tests?

23 A Yes, I do.

24 Q Okay. What did you do at the scene of the accident
25 on Redds Branch Road?

1 A I rode my motorcycle at various speeds and at the
2 point where it was indicated that the rear tire locked up
3 on the motorcycle I applied maximum braking. Then I
4 applied front brakes. Then I applied rear brakes only and
5 we measured the stopping distances at speeds of 50 to
6 60 miles per hour for each of those.

7 Q Okay. And do you have -- then you did that on two
8 occasions, did you not?

9 A Yes, I did.

10 THE COURT: Have you ever done in it on any other
11 occasions in connection with litigation?

12 THE WITNESS: No, sir.

13 Q Sir, are you familiar with the average stopping
14 distance for a motorcycle?

15 A Yes, I am.

16 Q Okay.

17 A It's, generally, all motorcycle testing from the
18 various consumer magazines -- I have several subscriptions
19 and I always read the test data as provided by their
20 testers on the stopping distances on various motorcycles
21 and typically from 60 miles per hour a motorcycle will
22 stop somewhere between 120 to 130 feet. At 30 miles per
23 hour it is usually between 25 and 30 feet.

24 Q At how many miles per hour?

25 A Thirty miles per hour.

1 Q Okay. And these are studies that were done and these
2 are studies that you've read?

3 A Yes, test reports.

4 Q Do you utilize that information through your
5 teachings at Midlands Tech?

6 A Yes, I do.

7 Q And in what capacity?

8 A When we have discussions about various sources of
9 information and questions that the students may have I
10 point them in the direction of some of these publications.

11 Q And were your test results on Redds Branch Road
12 consistent with the studies that you've reviewed and
13 utilized?

14 A Yes, sir. In fact, the stopping distances that I
15 obtained actually were a little better than the average --
16 what I would consider the average from test reports.

17 Q Now, have you reviewed the evidence -- some of the
18 evidence -- what have you reviewed in this case?

19 A I read the deposition provided by the plaintiffs and
20 I read the accident report provided by the MAIT Team and
21 also the accident reconstruction team.

22 Q Okay.

23 THE COURT: Have you ever had any training whatsoever
24 in accident reconstruction?

25 THE WITNESS: No, sir.

1 THE COURT: Have you ever had any training in speed
2 calculations -- any formal training in speed calculations?

3 THE WITNESS: Yes, sir. With the MSF curriculum they
4 teach us how to use time and distance standards when
5 utilizing the stop watch and a predetermined course length
6 testing segment.

7 THE COURT: Have you ever been involved in an
8 educational program in recreating the speed and stopping
9 distance at an accident scene other than at your course
10 where you do the cones and the stopping?

11 THE WITNESS: No, sir.

12 Q Now---

13 THE COURT: Mr. Cox, what other opinions are you
14 trying to elicit from this witness? The braking
15 techniques and his test at the scene. What else?

16 MR. COX: Your Honor, the opinions that I'm trying to
17 elicit from Mr. Dawes are---

18 THE COURT: I just gave you two. Are there any more?

19 MR. COX: Your Honor, it's the braking technique. It
20 is the negligent braking. Those---

21 THE COURT: And his recalculation or calculation of
22 the stopping distance at the scene?

23 MR. COX: Correct, Your Honor. The tests that he ran
24 are consistent with his opinions that had proper braking
25 been utilized that the plaintiff could have stopped or

1 Mr. Valenzuela could have stopped short of the
2 intersection even at the high end of the speeds that have
3 been calculated in this case and he applied his theories
4 and the teachings that---

5 THE COURT: I understand your argument. I am just
6 asking you are there any other opinions other than those
7 two main opinions?

8 MR. COX: Your Honor, I want to offer him to show the
9 standard as to what is required to keep a proper lookout
10 and to maintain control of the motorcycle. Your Honor,
11 the opinions that the improper braking resulted in failure
12 to properly maintain control of the motorcycle and---

13 THE COURT: Well, that's all in one. If you
14 allegedly use improper braking techniques you're going to
15 lose control of the motorcycle. Is that where you're
16 going?

17 MR. COX: That is where I am going, yes, sir, Your
18 Honor.

19 THE COURT: Well, this is just a proffer; so how
20 about cut to the chase and tell me what other opinions, if
21 any, he is going to try to elicit -- or you're going to
22 try to elicit.

23 Q Mr. Dawes, what are some of the considerations with
24 regard to having a passenger?

25 A We have to adjust our riding accordingly because of

1 the added weight of the passenger and also the location of
2 that weight on the motorcycle. It changes the control
3 input to the motorcycle. We have to utilize lane position
4 in our daily riding to be able to react to anything that
5 may occur.

6 MR. COX: Okay. Your Honor, and I'd submit Mr. Dawes
7 has specialized knowledge with regards to how to operate a
8 motorcycle that will assist the trier of fact to
9 understand the evidence and to determine an issue in the
10 case which is whether or not Mr. Valenzuela properly
11 operated his motorcycle on August 7, 2009.

12 THE COURT: Mr. Detrick, do you want to cross examine
13 him on any of this?

14 MR. DETRICK: I believe I should, Your Honor, for
15 nothing else but the record if it's okay.

16 MR. COX: Your Honor, if I may. There is testimony
17 in this case even from the highway patrolman who
18 investigated the accident who says specifically in his
19 deposition on page 14, line 24, "Because I'm not a
20 motorcycle driver I don't have the technical knowledge
21 that someone who has grown up riding motorcycles knows
22 about them."

23 THE COURT: Thank you. Mr. Detrick, cross-examine.

24 CROSS-EXAMINATION

25 BY MR. DETRICK:

1 Q I got lost a little bit, Mr. Dawes, on some of your
2 opinions you intend to testify to. I want to make sure I
3 understand it. Okay?

4 A Yes, sir.

5 Q You want this court to allow you to testify that a
6 motorcycle is a complicated operation. That's one of your
7 opinions, isn't it?

8 A Yes, sir.

9 Q And as a matter of fact, you want to testify about
10 some sort of risk -- acceptance of risk and, therefore,
11 that motorcycle operators have to have sort of risk
12 acceptance they have to if they're going to get on the
13 motorcycle. That's your opinion along with the motorcycle
14 is complicated; isn't it correct?

15 A Yes, sir.

16 Q That's one of your opinions?

17 A That is what we teach.

18 Q And you also mentioned -- and I know Your Honor --
19 you mentioned I think I heard on your direct that you
20 wanted to talk about safety equipment and what -- what
21 they shouldn't wear when they're riding a motorcycle?

22 A Yes, sir. We teach that in the course.

23 Q You wanted to get that opinion, didn't you?

24 A We teach that in the course.

25 Q And you know that the judge has ruled out a helmet?

1 A I'm sorry, sir. About the helmet?

2 Q You intended to give an opinion on to helmet, didn't
3 you?

4 A Yes, sir, if asked.

5 Q You know now you can't?

6 MR. COX: Judge, I didn't go into that.

7 THE COURT: He is on cross-examination, Mr. Cox.
8 Please.

9 Q You -- I'm sorry if I am going into something. He
10 said also you wanted to give the opinions on certain stuff
11 under the law as to kind of the motorcycle licenses;
12 right?

13 A Yes, sir.

14 Q And you intended to give that opinion?

15 A Yes, sir.

16 Q And yet there was no violation of the law as far as
17 riding it with a permit; correct?

18 A I'm sorry. I don't understand the violation---

19 Q Under South Carolina law you're allowed to ride with
20 a permit?

21 A Yes, sir, you are.

22 Q You ride in the daytime with a permit?

23 A Yes, sir.

24 Q All right. So there wasn't any violation of the law
25 as far as that is concerned?

1 A No, sir.

2 Q Okay.

3 A No, sir.

4 Q And now as far as the proper technique now as you're
5 braking, you have never done any kind of studies on proper
6 braking techniques, have you?

7 A With the exception of riding -- going out to the
8 crash scene and doing that test.

9 Q Okay.

10 A No, sir.

11 Q And you've already admitted you've never been
12 qualified an as an expert in any court?

13 A No, sir.

14 Q About anything?

15 A No, sir.

16 Q And you've not written any kind of publications;
17 correct?

18 A Correct.

19 Q Okay. You've never actually did any testing other
20 than what you -- the testing you did out there on your
21 so-called testing on Redds Branch Road involved in the
22 litigation; correct?

23 A No, sir.

24 Q You never did any testing regarding braking other
25 than you said something about -- and correct me if I am

1 wrong -- I think I wrote it down on your course it is 15
2 to 18 miles an hour you do testing about stopping in
3 emergencies; correct?

4 A Yes, sir, in the basic course. During the
5 intermediate and advanced courses the speeds are higher.

6 Q And all you've done there is just telling them to
7 stop and then you measure it; correct?

8 A Yes, sir.

9 Q Is that -- any of these studies been published?

10 A No, sir, not published.

11 Q Beside you have no peer review on any of these
12 opinions; correct? You hadn't rendered anything to any of
13 your peers?

14 A No, sir.

15 Q As a matter of fact, you don't have any peers that
16 you know of, do you, that actually study what you're
17 talking about, do you?

18 A I do have some people that I work with that have been
19 involved with this many years in the military and have
20 formed opinions, yes, sir.

21 Q Sir?

22 THE COURT: Let me ask you this. You've not
23 published anything on your braking distances, have you?

24 THE WITNESS: No, sir.

25 THE COURT: Never had any peer review of it; is that

1 correct?

2 THE WITNESS: No, sir.

3 THE COURT: The application that you intend to
4 testify has never been approved by anyone; is that
5 correct?

6 THE WITNESS: Is the -- does that also include the
7 testing that we do for the license waiver?

8 THE COURT: No, sir.

9 THE WITNESS: Okay.

10 THE COURT: Going out there on the road --

11 THE WITNESS: Okay.

12 THE COURT: -- at the scene, you have never had that
13 application that you used reviewed by anyone, have you?

14 THE WITNESS: No, sir.

15 THE COURT: Have any quality controls to ensure
16 reliability?

17 THE WITNESS: With an accident reconstructionist
18 there monitoring the test?

19 THE COURT: No, sir. I'm talking about you, what you
20 intend to testify. Was there any quality control utilized
21 on that test?

22 THE WITNESS: No, sir.

23 THE COURT: And have ever compared your method with
24 recognized scientific laws and procedures?

25 THE WITNESS: No, sir.

1 THE COURT: Thank you. Move along.

2 Q And you've never given a deposition other than the
3 deposition I took of you, have you?

4 A Correct, sir.

5 Q And now just I think to make sure, you're going to
6 testify that he didn't use proper braking and as a result
7 of that lost control; correct?

8 A Yes.

9 Q And that that is the cause of this wreck. Is that
10 what you intend to testify to?

11 A Yes, sir.

12 Q And that is without any other than you are just an
13 instructor of a course at Midlands Tech and yet you want
14 to render opinions in this court about causation?

15 A Yes, sir.

16 Q That's what you feel like you're qualified to do?

17 A Yes, sir.

18 Q This wreck wouldn't have happened?

19 A Yes, sir.

20 Q Right? And I believe it's not only your opinion, you
21 testified in your deposition if the proper braking
22 techniques that you teach are utilized, then there would
23 never be any wrecks on this road -- on the highways of
24 South Carolina. Isn't that what you testified in your
25 deposition?

1 A No, sir, I did not say there would never be any
2 wrecks. I would say there would never be a reason to have
3 to lay a motorcycle down.

4 Q And I will -- Give me his deposition, please. Did
5 you say yourself that your testimony you're able to as a
6 motorcycle operator to avoid colliding with anything no
7 matter what the circumstances were because you utilized
8 your proper braking technique? Didn't you testify to
9 that?

10 A Yes, sir.

11 Q In other words, you could never get in a wreck.
12 That's your opinion?

13 A I'm not saying that I would never get into a wreck
14 sir, because, you know, we can't control everything around
15 us, but I am saying---

16 Q You testified that you would never get in to any
17 under any circumstances.

18 A That I would not lay a motorcycle down, no, sir.

19 Q No, sir. You testified---

20 THE COURT: Hold on, Mr. Detrick. Just show him what
21 you're talking about.

22 MR. DETRICK: Sir?

23 THE COURT: Just show him the line and page where he
24 testified to it.

25 Do you remember giving your deposition, sir?

1 MS. PAYNE: What page, Paul?

2 THE COURT: Mr. Detrick, give us the page you're
3 going to, please.

4 MR. DETRICK: Yes, sir. Page 82, line 17. The
5 question is, "So your testimony that you're able as a
6 motorcyclist to avoid colliding with anything regarding no
7 matter what the circumstances are; correct?" What was
8 your answer?

9 THE WITNESS: What line was that, sir? Yes, sir.
10 Line 21, "Yes, sir."

11 Q Your answer was yes, sir, wasn't it?

12 A Yes, sir.

13 Q Now in your deposition you also a part of your
14 opinion you intend to testify to as an instructor -- being
15 an instructor of motorcycles you want to testify that he
16 should have -- when he should have started braking, don't
17 you?

18 A Yes, sir.

19 Q You intend to -- and your opinion is he should have
20 started braking as 140 feet before he got to the
21 intersection; correct?

22 A Yes, sir.

23 Q And you also intend to testify that if he was doing
24 50 miles an hour and he started braking at 140 to 150 feet
25 he could have stopped in two seconds. That's what you

1 intend to testify to, isn't it?

2 A Yes, sir.

3 Q That's your opinion?

4 A Yes, sir.

5 THE COURT: Wait a minute now. He was going how
6 fast? Fifty miles an hour?

7 MR. DETRICK: Fifty miles an hour, two seconds you
8 can stop at 140 feet is what his opinion was. That's when
9 he should have started braking.

10 And you also testified and you intend to give an
11 opinion that he didn't really need to do any full braking;
12 that all he needed to do was do a slow controlled --
13 normal controlled slowing because of the circumstances he
14 had in front of him; correct?

15 A Correct.

16 Q That's your opinion you intend to testify to?

17 A Yes, sir.

18 Q And those controlled -- that circumstance in which
19 you said -- I asked you what kind of circumstances you
20 were talking about and your opinion -- in your opinion you
21 say those circumstances were a garbage truck stopped at
22 the stop getting ready to make a left-hand turn; correct?

23 A Correct.

24 Q And there was a tractor off to the left stopped?

25 A Yes, sir.

1 Q And there was a scraper which you said was to his
2 right; correct?

3 A Correct.

4 Q But you said that as far as you knew that scraper was
5 already up against the stop sign when he should have
6 started his controlled slow stopping?

7 A Yes, sir.

8 Q Correct? That was what Mr. Valenzuela -- you gave
9 the opinion that your opinion based of giving a normal
10 controlled slowing was based on those facts; is that
11 correct?

12 A Yes, sir.

13 Q And, therefore, there was no emergency situation.
14 There was no situation that Mr. Valenzuela had to react
15 properly to -- had to react quickly to according to your
16 opinion?

17 A Yes, sir, just normal -- normal braking.

18 Q Just normal situation. That's what he faced that day
19 and that was your opinion?

20 A Yes, sir.

21 Q And he didn't have to worry about this scraper
22 because it was already up against the stop sign; correct?

23 A Correct.

24 Q Now you want this court to allow you to testify that
25 there's misconception about riding motorcycles; is that

1 correct? In other words, that they're different and
2 misconceptions about what you have to do, the kind of
3 proper lookout you have to have?

4 A Yes, sir.

5 Q All of that in your opinion you intend to testify to?

6 A Yes, sir.

7 Q And you figure that's expert testimony?

8 A Yes, sir, I do.

9 Q Okay. You actually intend to testify to the type of
10 proper lookout -- you as a safety -- motorcycle safety
11 instructor -- you want this court to allow you to testify
12 of what kind of lookout Mr. Valenzuela should have had in
13 this particular area where this wreck happened, don't you?

14 A Yes, sir.

15 Q In other words, you say that is a difference because
16 in this particular area there is residences; correct?

17 A Correct.

18 Q And, therefore, according to you there is a different
19 -- he should have done something differently; right?

20 A Yes, sir.

21 Q And that's your opinion and you're an expert?

22 A Yes, sir.

23 Q On lookout? On proper lookout as you're driving a
24 motorcycle?

25 A Yes, sir.

1 Q You, also -- you testified -- you want to testify to
2 that the actual braking efficiency of the motorcycle,
3 don't you?

4 A Yes, sir.

5 Q And, yet, you have never even seen the motorcycle
6 involved in this case, have you?

7 A I've seen pictures of it, yes, sir.

8 Q You've seen pictures of it?

9 A Yes, sir.

10 Q Have you done any braking on that motorcycle?

11 A No, sir.

12 Q Have you done any similar kind of braking on
13 motorcycles of the same model and make?

14 A Same make, yes, sir.

15 Q You've done testing?

16 A I have never tested them other than when I---

17 Q Have you ever owned one?

18 A Not of that particular brand, no, sir, but that
19 style.

20 Q Let me make sure I went through some of the stuff.
21 You are going to testify that the back -- the front brake
22 utilized 70 percent of the braking capacity; correct?

23 A Generally, yes, sir. It's not---

24 Q Now, is that -- was that in any of these books you
25 were showing to the Judge? I am not sure.

1 A Yes, sir, it is.

2 Q Where was that?

3 A It is in the basic rider course guide.

4 Q That's in the course you teach?

5 A Yes, it is.

6 Q But actually as far as any studies, any peer reviews,
7 any publications other than your instruction course that
8 you ought to use front and rear brakes it is nothing that
9 you relied on, is it?

10 A No, sir.

11 Q On that opinion?

12 A No, sir.

13 Q Correct?

14 A Correct.

15 Q Now, the opinion regarding -- you intend to testify
16 to this jury that there is never a circumstance that you
17 ought to lay the bike down; correct?

18 A Correct, sir.

19 Q Is that correct?

20 A Correct.

21 Q In other words, if a 70,000-pound scraper comes in
22 front of you when you're riding a motorcycle your opinion
23 is -- and you can't stop -- your opinion is you ought to
24 hit it head on?

25 A No, sir. You can stop.

1 Q Oh, you can stop? No matter under all circumstances
2 you can stop?

3 A I'm sorry?

4 Q You can stop at all times?

5 A Yes, sir.

6 Q All right, sir. Now this rider radar -- is this some
7 sort of a scientific principal?

8 A It's a technique that is taught by the MSF.

9 Q It is a technique. It's -- Again, that's in your
10 course?

11 A Yes, sir.

12 Q This rider radar -- there is no studies on it that
13 you relied on, is it?

14 A Nothing other than what is taught --

15 Q No publication?

16 A -- by our courses. No, sir.

17 Q No testing?

18 A No, sir.

19 Q No peer review?

20 A No, sir.

21 Q Correct?

22 A Right.

23 Q And yet you want to testify that you're going to tell
24 this jury that you're -- I think I heard it is the
25 2-second, 4-second, 12-second rule.

1 A Yes, sir. If I may, I'll get it straight from the
2 book here. I may have said rule. I might have misspoken,
3 but I'll read it to you exactly as it says in the book.

4 Q And let me ask you, the 2-second rule -- the 2-second
5 rule --

6 A Right.

7 Q -- that you're going to testify to is what?

8 A Minimum following distance.

9 Q Minimum following distance?

10 A Yes, sir.

11 Q Who was Mr. Valenzuela following?

12 A No one, sir.

13 Q But he should have been heeding to this 2-second rule
14 according to your opinion?

15 A In rider radar, yes, sir.

16 Q Okay. And now the 4-second rule, what is that one?

17 A That is the reaction time that it takes for you to
18 process the information visual that you see for your brain
19 to process this information and then for you to -- the
20 brain to send the control signals to your muscles to
21 operate the controls on the motorcycle.

22 Q And Mr. -- what kind of studies -- let me ask you --
23 where have you other than your instructions book that is
24 basically everything you relied on, where is the studies
25 involved of that opinion?

1 A It's in the book, sir.

2 Q That's it?

3 A Yes, sir.

4 Q You don't know of any studies?

5 THE COURT: What page in the book? I assume this
6 book?

7 THE WITNESS: Yes, sir. We're starting on page 28
8 with mental processing, search, evaluate, and execute. We
9 go through on braking and risk acceptance.

10 THE COURT: Where is two, four, twelve mentioned?

11 THE WITNESS: I'm sorry.

12 THE COURT: How about page 27? That's rider radar.

13 THE WITNESS: Twenty-seven; right.

14 THE COURT: Where does it talk about mental
15 capacity --

16 THE WITNESS: Uh-huh.

17 THE COURT: -- and how long it takes your brain to
18 process something?

19 THE WITNESS: Rider radar, section C. Two section
20 following distance, 4-second immediate path and 12-second
21 anticipated path.

22 THE COURT: I understand that, but you're talking
23 about the brain function and brain control and how long it
24 takes something to process.

25 THE WITNESS: Right.

1 THE COURT: Where is that?

2 THE WITNESS: We will talk about that in the braking
3 section on page---

4 THE COURT: Section D is about mental processing.

5 THE WITNESS: Uh-huh.

6 THE COURT: I don't see anything about all this brain
7 processing.

8 THE WITNESS: Yes, sir.

9 THE COURT: That's pretty complicated stuff.

10 THE WITNESS: No, sir, it doesn't.

11 THE COURT: All right. Move along.

12 Q I assume that you intend to testify that if
13 Mr. Valenzuela would have followed the radar rules then
14 this wreck wouldn't have occurred; correct? That's your
15 opinion you want to testify to?

16 A Yes, sir.

17 Q All right. As far as these opinions you want to give
18 after going to the scene -- that's where I am going into
19 right now; correct? And did -- Your Honor, did he -- did
20 you introduce -- if I might, Your Honor.

21 THE COURT: Just hand it right here.

22 MR. DETRICK: These are his -- where he's testified
23 to what his findings were.

24 Do you have them in front of you, Mr. Dawes? You
25 want me to hand them to you?

1 THE WITNESS: What is that? The distances?

2 Q The testing.

3 A Yes, sir, I have that.

4 Q You got that?

5 A Yes, sir.

6 Q Okay. Now let's just be clear to the court what you
7 intend to testify to. You went out to the scene on your
8 motorcycle; correct?

9 A Yes, sir.

10 Q And you had Mr. Smith, the accident reconstructionist
11 that's been hired by the defense, stand where you were
12 going to start your -- immediately do your braking;
13 correct?

14 A He stood where the accident investigation team said
15 that the skid marks started.

16 Q And you were going to start your braking -- he stood
17 there so you know where to start. You had him standing
18 there; correct?

19 A Yes, sir, and there was an orange cone marking the
20 spot beside the road as well.

21 Q And you were going to start your braking at the place
22 where he was stopped; right?

23 THE COURT: Standing.

24 Q Standing. I'm sorry.

25 A Yes.

1 Q Okay. And you were going to operate your bike at a
2 certain speed -- 50 miles an hour and 60 miles an hour;
3 correct?

4 A Yes, sir.

5 Q And you were the only one out there clocking the
6 speed; correct?

7 A Yes, sir.

8 Q Mr. Smith wasn't clocking the speed?

9 A No, sir.

10 Q Okay. And there was no passenger on that vehicle?

11 A No, sir.

12 Q And there was a passenger on the vehicle with
13 Mr. Valenzuela, was there not?

14 A Yes, there was.

15 Q And you were using what -- you were using your little
16 cruiser motorcycle; correct?

17 A I'm using what, sir?

18 Q What you called a cruiser.

19 A No, sir. No, sir.

20 Q What were you using? What kind of motorcycle?

21 A It's a 2007 Benelli.

22 Q Benelli. That's not even close to what
23 Mr. Valenzuela was operating, is it?

24 A No, sir.

25 Q Now let's just for the court's -- I want you to --

1 you said previously that even the 130 feet at 60 miles an
2 hour; correct? That's what you previously testified to;
3 right?

4 THE COURT: Yes or no?

5 Q Let's look at your findings out there, Mr. Dawes and
6 then I want to court if it's possible -- Can we show that
7 CD? Let me get to this first. First off, your opinion is
8 at 50 miles an hour -- this is what your testing was. At
9 50 miles an hour you said you stopped at 64 feet; correct?

10 A Yes, sir, using both brakes.

11 Q Using both brakes. And I am not a mathematician and
12 correct me if I am wrong. You're the one that does the
13 time distance studies, but at 50 miles an hour you're
14 going 71 feet per second; is that correct?

15 A At 50 miles an hour?

16 Q Yes, sir. Am I wrong?

17 A That sound about right, sir.

18 Q Okay. And so you actually -- your testing -- you
19 want this court to believe that at 50 miles an hour you
20 could stop in less than a second?

21 A Yes, sir.

22 Q And at 60 miles an hour you said you went out there
23 and you stopped at 91 feet; correct?

24 A Yes, sir.

25 THE COURT: Wait a minute now. You're telling me I

1 can ride that motorcycle and 50 miles an hour I put on the
2 brakes and I can stop in less than one thousand one?

3 THE WITNESS: What---

4 THE COURT: Is that correct?

5 THE WITNESS: In 64 feet, yes, sir.

6 THE COURT: Well, if you're traveling at 70-some odd
7 feet at 50 miles an hour per second --

8 THE WITNESS: Right.

9 THE COURT: -- and if you put that brake on you're
10 stopping in less than a second?

11 THE WITNESS: Yes, sir.

12 THE COURT: 50 miles an hour, one thousand one I'm
13 stopping?

14 THE WITNESS: Yes, sir.

15 Q And that's the same what you found on 60 miles an
16 hour?

17 A Yes, sir.

18 Q At 88 feet per second you could stop at about a
19 second; correct?

20 A A little more than a second, yes, sir.

21 Q Let's show if you don't mind -- You're going to deny
22 to this court now that you slowed down before you got to
23 him, aren't you?

24 A I'm sorry?

25 Q You didn't do any stopping until you got to

1 Mr. Smith, did you? Didn't slow down any to have this---

2 A No, sir.

3 Q No, sir. Okay.

4 Your Honor, could you please look at the laptop?

5 THE COURT: What am I looking at?

6 MR. DETRICK: This is the video. This is a supposed
7 test that Mr. Dawes and Investigator Cox did out there at
8 the scene and I would request that Mr. Dawes look at it
9 and the court look at them and see if they don't show you
10 slowing down before you ever got to Mr. Smith, Mr. Dawes.

11 You did that, didn't you?

12 THE WITNESS: No, sir; not to my knowledge.

13 MR. DETRICK: All right, sir. Can we bring this up
14 to you?

15 THE COURT: Just show it to him.

16 MR. DETRICK: Okay. Let's play it.

17 THE COURT: Can you play it on the screen or can you
18 play it there?

19 MR. DETRICK: We have a computer problem.

20 THE COURT: Go ahead. This is the video of the
21 alleged test?

22 MR. DETRICK: Yes, sir. I'm sorry we don't have the
23 screen, Your Honor.

24 THE COURT: We'll get it after while if we have to.

25 (Whereupon, the video is played.)

1 Q That's you coming around the curve there; right?

2 A Yes, sir.

3 Q Tell me you aren't slowing down.

4 A No, sir, I'm not.

5 Q You're not slowing down?

6 A No, sir. I did not apply brakes until I got to
7 Mr. Smith.

8 Q All right, sir. There is your 64 feet. There is
9 Mr. Smith. He is up there. He's measuring that for you;
10 right?

11 A No, sir, that was not 64 feet. In this video the
12 first stop using both brakes was from 50 miles per hour
13 and I stopped that motorcycle in 93 feet.

14 Q You're not slowing down, are you?

15 A No, sir. I'm maintaining steady throttle and I am
16 not on the brakes.

17 THE COURT: Anything else on the video?

18 MR. DETRICK: No, sir, that will be enough. We'd
19 like to submit that as an exhibit, Your Honor, and the
20 test results as an exhibit for purposes of this hearing,
21 please.

22 THE COURT: Thank you.

23 Mr. Cox, anything in redirect?

24 MR. COX: Yes, Your Honor.

25 THE COURT: Briefly.

1 REDIRECT EXAMINATION

2 BY MR. COX:

3 Q Now the distances measured at the scene prior to your
4 running the test of the motorcycle, those distances were
5 provided to you through the experts in this case; is that
6 right?

7 A Correct.

8 Q The accident reconstruction experts, I should say?

9 A Correct.

10 THE COURT: Say that again.

11 Q The distances from where the skid mark started to the
12 middle of the intersection is a scientific number -- it is
13 an exact number that our experts pretty much agree on---

14 THE COURT: Yeah, but not the stopping distance.

15 MR. COX: Right. His stopping distance were measured
16 through his tests, but the other numbers -- he should have
17 started stopping at this point it's a fact of where---

18 THE COURT: Nobody is arguing that..

19 Q Now, Mr. Dawes, you were asked about studies
20 regarding proper braking techniques, but, sir, isn't it
21 true that the proper braking is an accepted standard as
22 set out by the state government of South Carolina through
23 the Department of Motor Vehicles driving manual; is that
24 right?

25 A Yes, sir.

1 Q Okay. And so I would ask you to turn to page 133 of
2 the manual.

3 MR. DETRICK: Your Honor, I'd ask---

4 THE COURT: It simply says use both brakes every time
5 you slow or stop. Using both brakes for even normal stops
6 will permit you to have a proper habit. That's what it
7 says.

8 THE WITNESS: Right.

9 MR. COX: But it says more than that, Your Honor.

10 THE COURT: Well, it does say more than that.

11 MR. COX: Develop the proper habit or skill of using
12 both brakes properly in an emergency. This is the basic
13 fundamental standard of care for operating a motorcycle.

14 THE COURT: I don't know about that. It says what it
15 says.

16 Q Then it says squeeze the front brake and press down
17 on the rear. Grabbing the front brake or jamming down on
18 the rear can cause the brakes to lock resulting in control
19 problems and more probably than not, Mr. Dawes, did you
20 review -- did Mr. Valenzuela based on his testimony jam
21 down on the rear brake resulting in control problems of
22 his motorcycle?

23 A Yes, sir, resulting in loss of steering capability.

24 Q And, sir, I'd also reference you to the government's
25 manual, page 132, where it says to know your vehicle and

1 its controls.

2 A Yes, sir.

3 Q And correct me if I read wrong. It says in order to
4 become a safe operator you must learn the location and
5 smooth operation of the motorcycle's controls. Is that
6 right?

7 A Yes, sir.

8 Q And then it goes on to mention what those controls
9 are in the next paragraph; correct?

10 I would ask the court to take judicial notice of that
11 paragraph as well.

12 THE COURT: I have.

13 Q And these are -- this is what you teach in your---

14 THE COURT: Mr. Cox, this is a proffer. You've been
15 over that about 10 times now. Come on. Move along.

16 Q Okay. Now, and, Mr. Dawes, is the subject matter
17 which you intend to testify beyond ordinary---

18 THE COURT: He can't -- That's my call. I have to
19 rule on that as a matter of law. You know that under the
20 Watson case.

21 MR. COX: That's correct, Your Honor.

22 And, Mr. Dawes, I've asked you to testify in this
23 case as to the proper braking technique as -- on the
24 motorcycle as prescribed as learned through your training
25 and experience as prescribed by the statutorily-mandated

1 curriculum; correct?

2 A Yes, sir.

3 Q Under which you're certified?

4 A Yes, sir.

5 Q And as prescribed by the government's manual---

6 THE COURT: Mr. Cox, you're really pressing my
7 patience. You've asked that question at least 10 times.
8 I understand your position.

9 MR. COX: Thank you, Your Honor.

10 THE COURT: Move it to another area, please, other
11 than braking techniques if you want to go into something
12 else.

13 Q And you're also being asked to testify regarding the
14 keeping -- regarding what you observed on Redds Branch
15 Road on what would constitute emergencies and traffic
16 conditions that would put a motorcycle driver on alert and
17 for what they should keep a proper lookout for; is that
18 right?

19 A Yes, sir.

20 THE COURT: Sir, was the earth mover out there the
21 day you did your testing?

22 THE WITNESS: Yes, sir.

23 THE COURT: He was?

24 THE WITNESS: Yes, sir.

25 THE COURT: He was parked over there on the correct

1 side of the road?

2 THE WITNESS: Yes, sir.

3 THE COURT: Just stopped?

4 THE WITNESS: Yes, sir.

5 Q And also that it is never proper to make a decision
6 to lay your motorcycle down; is that right?

7 A Correct, sir.

8 Q And that -- provisions for laying your motorcycle
9 down is not provided in any proper braking techniques or
10 emergency stopping techniques --

11 A No, sir.

12 Q -- taught through your course or the DMV manual;
13 correct?

14 A Correct, sir.

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

16 THE COURT: Thank you.

17 MR. DETRICK: Only one thing, Your Honor.

18 THE COURT: No, sir. Make sure y'all all know this.
19 My rule is no recross.

20 MR. DETRICK: Yes, sir.

21 THE COURT: What is good for the goose is good for
22 the gander. All right. Obviously, gentlemen -- You may
23 step down. Well, as we all know the court has put -- I am
24 not going to say added responsibilities on us, but it has
25 reminded us of our responsibilities dealing with expert

1 testimony to hold or exercise our function as the
2 gatekeeper and we must go through an exercise to determine
3 whether or not under 402 an expert testimony is admissible
4 and they set out three things that we must look at.

5 Number one, as we talked about earlier whether or not
6 it is testimony that will help the jury to determine the
7 issue -- to determine a fact in issue based on his
8 knowledge, experience, and skill, and that it falls
9 outside of the realm of an ordinary lay knowledge. Well,
10 the operation of a motor vehicle or motorcycle -- I just
11 can't for the life of me see how that's something that the
12 ordinary knowledge of the jury person doesn't know.

13 I mean, and you've been able to -- unable to cite me
14 cases saying that the operation of a motor vehicle is
15 something that an expert should be able to give testimony
16 on from this state or any other state; so I am real
17 concerned about that and whether or not we're going to be
18 opening the flood gates in every automobile wreck,
19 motorcycle wreck. We're going to have experts coming in
20 and telling the jury how they operate a vehicle and
21 particularly on how to maintain a proper lookout and that
22 sort of thing.

23 I don't think there is any question that Mr. Dawes is
24 -- if it were a proper subject would be -- have the
25 requisite knowledge to render an opinion. I don't think

1 -- that doesn't bother me. I think he is qualified to
2 render an opinion if an opinion -- if this is the type of
3 case we have opinions in.

4 So, I got problems with the first step as to whether
5 or not it's outside of the knowledge of the -- outside of
6 the realm of the ordinary lay knowledge and then the third
7 matter I have to look at is the reliability of the
8 testimony and the cases have specifically talked about
9 reliability starting with the State versus Council and we
10 just went over that in examination whether or not
11 publications and peer review of the technique, prior
12 application of the method to the type of evidence involved
13 in the case, quality control procedures used to ensure
14 reliability, and the consistency of the methods of
15 recognized scientific laws and procedures.

16 This goes more to his, quote, test, unquote, at the
17 scene. He has had absolutely no education in driver --
18 strike that -- in accident reconstruction. He said that
19 the methodology was never the subject of publication for
20 peer review. He's never applied this type of evidence
21 before to prior application. There was no quality control
22 and his method as far as he knew was not recognized by
23 scientific laws and procedures. That came out of his own
24 testimony.

25 So I am going to not allow -- I am going to

1 disallow -- I am not going to allow any testimony
2 concerning his tests at the scene, his radar -- rider
3 radar testimony about brain control and all that that we
4 just went through. He's not qualified to give that.

5 If he's allowed to do anything it would be to talk
6 about braking techniques which is simply use both brakes
7 as opposed to using one brake. I don't know why we have
8 to have an expert for that, but I am going to think about
9 that over lunch, and if he is allowed to testify it will
10 be limited to what are proper braking techniques and if
11 Mr. -- the driver of the motorcycle says he only used one
12 brake, then he can testify in his opinion that didn't
13 comply with the standard requirements.

14 He is not going to be allowed to give any opinion
15 testimony as to causation as to whether or not he put
16 those brakes on at a certain time and with both brakes
17 that he would avoided that -- too much going to his
18 testing which is not reliable as he's already testified.

19 So, that's where I stand. I'll let y'all know after
20 lunch, but it is very close, and, Mr. Cox, Ms. Payne, I
21 would welcome over the lunch break any cases y'all can
22 find me from any jurisdiction anywhere about motorcycle
23 operation and particularly braking being the subject of
24 expert testimony. I'll hold off on ruling on that until I
25 give y'all the opportunity to look over lunch.

1 All right. It is 1:15. What time did I tell the
2 jury? Can y'all eat in 45 minutes? We'll start back at
3 2:15. Let's be ready to go.

4 (Whereupon, a lunch break was taken.)

5 THE COURT: I am going to reserve ruling on the
6 expert on the motorcycle until late this afternoon or
7 first thing in the morning. Ms. Payne gave me a case over
8 the break out of Illinois. That dealt with a products
9 liability case. It was not an operation of a vehicle.

10 MS. PAYNE: I did e-mail you another one -- or Adam
11 another one.

12 THE COURT: And then we found one, but it came out
13 of, of all places, Louisiana, but it's really not on
14 point, but having done a word search those are the only
15 two we found. I am going to reserve ruling on that and we
16 will let you know something late this afternoon or first
17 thing in the morning so you won't be prejudiced. Just
18 don't mention it in opening statement.

19 MS. PAYNE: And if I may just tell the court the case
20 that I e-mailed to y'all, it specifically said that the
21 motorcycle safety operation was not in the common
22 knowledge of a juror and that's why they allowed it in; so
23 I sent that case with that highlighted.

24 THE COURT: We got it.

25 MS. PAYNE: And, also, Your Honor, we just wanted --

1 before you got started with the jury we just wanted to
2 bring up there are a few motions that you held in abeyance
3 from last Wednesday about potential witnesses that they're
4 planning on calling. I don't know who they're calling
5 today, but you had indicated that you wanted to proffer
6 some of their testimony and I don't want to get into a
7 situation where you say call the first witness and it's
8 that witness.

9 THE COURT: You know which ones we were going to
10 proffer; so don't call them without an opportunity to
11 proffer.

12 MR. DETRICK: She's probably right in that we do plan
13 on calling some of the stopping witnesses -- I'll call
14 them the pre-wreck witnesses. We plan on calling Ann
15 Johnson as first witness.

16 THE COURT: Is that one we need to proffer before we
17 do?

18 MR. DETRICK: I assume probably so.

19 THE COURT: How many of them do you have today that
20 we need to have a proffer on before I can get my jury in
21 here?

22 MR. DETRICK: I think four, Your Honor.

23 THE COURT: All right. Mr. Detrick, how long do you
24 think those four will last?

25 MR. DETRICK: Those witnesses are very short, Your

1 Honor. I'm sure that her part -- ten minutes, you know.
2 They're very short.

3 MS. PAYNE: It could be shorter if he would tell me
4 who they are.

5 THE COURT: He's getting ready to tell you --

6 MS. PAYNE: Okay.

7 THE COURT: -- who they are.

8 MR. DETRICK: Ann Johnson, Laura Boozer, John
9 Johnson, and Virginia Gunter will be our first four
10 witnesses.

11 THE COURT: Any other proffers we're going to need to
12 do other than those four witnesses?

13 MR. DETRICK: Not that I know of.

14 MS. PAYNE: And we had -- you had ordered last week
15 about any evidence that we had signs out before or after
16 the accident, a flagman out before or after the accident,
17 and then the dangerous condition witnesses and then the
18 damages witnesses.

19 THE COURT: Well, the damages witnesses we don't need
20 to do a proffer. I am just going to limit it.

21 MR. DETRICK: I'm sorry, sir?

22 THE COURT: On damage witnesses we will not need a
23 proffer.

24 MR. DETRICK: Oh, I know that. It is a lot of
25 witnesses we don't need a proffer on, but we do -- these

1 witnesses she's talking about are going to testify about
2 no signs, no flagmen.

3 THE COURT: Where are they?

4 MR. DETRICK: These four I told you about.

5 THE COURT: Oh, okay.

6 MS. MCPHERSON: Judge, we have---

7 MS. PAYNE: We just want to make sure they don't talk
8 about it in their opening because it's not been ruled on.

9 THE COURT: You're right.

10 MS. PAYNE: I understand. Thank you, Your Honor.

11 THE COURT: Well, it is 2:15. They've already been
12 back there waiting 15 minutes. We hadn't stopped except
13 for the last five minutes.

14 Isn't that right, Mrs. Court reporter?

15 THE COURT REPORTER: That's right.

16 THE COURT: Well, it's probably going to take us an
17 hour to do the proffers. That puts us at 3:15 to 3:30.
18 Do y'all want to do opening statements after that and then
19 come back tomorrow to start or do you want to stop after
20 the proffer and start anew fresh?

21 MR. DETRICK: What I would suggest, Your Honor --
22 openings would be -- I just as well do openings today and
23 then get into the proffers and the witnesses, but that's
24 up to you. I don't know of a good way to do it. Get the
25 openings out the way and then probably, Your Honor, your

1 rulings on -- you'll get a gist of what's going on. It
2 might not take us long.

3 THE COURT: All right. I am going to step back there
4 and tell the jury that I've got about 45 more minutes
5 worth of proffers. We'll do those in 45 minutes. We'll
6 do the openings and stop after openings and then go home.
7 How does that sound? Any objection to me telling the jury
8 back there?

9 MS. PAYNE: No objection.

10 (Whereupon, a break was taken.)

11 THE COURT: Let the record reflect I went back to the
12 jury room and I simply told them that we had about 45 more
13 minutes and I told them to go outside and get some fresh
14 air until 3 o'clock and that we would do opening
15 statements and be out of here around five today.

16 MS. MCPHERSON: Judge, I can do it now or later.
17 There are a few pictures I am not sure that we agree on.

18 THE COURT: We'll do that later. Let's get the
19 proffer out and then we can stay after five.

20 Right, Mrs. Lisa?

21 THE COURT REPORTER: Uh-huh.

22 THE COURT: All right. First witness.

23 MS. MCPHERSON: Mrs. Ann Johnson.

24 ANN C. JOHNSON, after being duly sworn,
25 testified as follows:

IN CAMERA DIRECT EXAMINATION

BY MS. MCPHERSON:

Q Mrs. Johnson, if you would, please introduce yourself to the court. Tell them who you are, where you live.

A My name is Ann C. Johnson and I live at 1066 New Bridge Road.

Q Do you live there with your husband Mr. John Johnson who is in the yellow striped shirt?

A Yes, I do.

Q How long have y'all lived at that address?

A Twenty-six years.

Q Y'all have children and grandchildren?

A I have eight grandchildren and two children.

THE COURT: All right. Ma'am, for the proffer just give me names and where they live. I don't need to go into the families and all that. Let's get straight to the point and proffer it. Obviously, when you have the witness before the jury you can develop all that.

MS. MCPHERSON: Yes, sir.

THE COURT: Is that fair enough?

MS. MCPHERSON: Yes, sir.

Mrs. Johnson do you know where this wreck happened on Redds Branch Road?

THE WITNESS: Yes, I do.

Q How far do you and your husband live from there?

1 A I would say approximately four to five miles. I
2 really have not measured it.

3 Q Now, how often do you or your husband travel Redds
4 Branch and pass by the spot where the wreck was?

5 A Many times a day, but sometimes I know up to four
6 times a day.

7 Q Was that the same before -- the same frequency before
8 the wreck happened?

9 A Yes.

10 Q Is that your main route to the south side of Aiken?

11 A Yes, it is.

12 Q Now before the wreck happened on August 7 of 2009
13 would you tell the court whether or not you had any safety
14 concerns about the spot on Redds Branch Road where the
15 landfill is?

16 A Yes, very much.

17 Q What were those concerns, Mrs. Johnson?

18 A We knew that they were subject to pass back and forth
19 across the road, but the one -- and we knew to look for
20 the gate being open or for dust.

21 Q Now let me ask you---

22 A That was a good indicator that activity was going on.

23 Q Is there a gate on the left side of Redds Branch
24 Road?

25 A As I'm coming to the left side -- to the south side

1 of town it would be to my left.

2 THE COURT: That would be coming into town?

3 THE WITNESS: Yes.

4 Q And is that gate right there at the crossing?

5 A Yes, it is.

6 Q If that gate was open you learned that that is a
7 signal that this equipment was working and --

8 A Yes.

9 Q -- going across the road; is that right?

10 A Yes.

11 Q And you mentioned dust. Why was dust a signal to
12 you?

13 A Because we knew that trucks or large equipment was
14 crossing the roads.

15 Q Did you have concerns about your own safety or
16 anybody else's?

17 A Absolutely. Mine and my entire family.

18 Q Up until---

19 A And---

20 Q Go ahead.

21 A Go ahead.

22 Q Mrs. Johnson, up until and through the date of the
23 wreck did you ever see any sign either -- on either side
24 of that crossing that said equipment or trucks crossing
25 the highway?

1 A No, absolutely not.

2 Q Before and up through the date of the wreck did you
3 ever see signs on either side of this crossing on Redds
4 Branch Road that said flagman ahead?

5 A No, I did not.

6 Q Up until and through the date of this wreck did you
7 ever see a flagman out there at that crossing?

8 A No.

9 Q Would you tell the Judge what happened to you at the
10 same place this wreck happened within two or three days
11 before the Valenzuela wreck?

12 A I was going to the south side and I was crossing
13 through the intersection and just out of the right side I
14 saw dust and I was not paying attention to the gate that
15 day and I don't know if the gate was open, but I did
16 notice the dust to my right and I went through and I
17 looked up in the rearview mirror and immediately this huge
18 piece of equipment came zooming across the road and I got
19 really nervous because I realized I had just come seconds
20 within death. Had this machine ran into my car I would
21 have perished. There is no doubt.

22 Q Let me show you a picture, Mrs. Johnson, and ask you
23 whether or not what's been marked---

24 THE COURT: That's been marked?

25 MS. MCPHERSON: It is Plaintiff's Number 18 -- is the

1 same piece of equipment?

2 THE WITNESS: Yes.

3 Q How quickly did it pass behind you?

4 A It zoomed across. There was no way -- had I seen the
5 piece of equipment and I had applied by brakes it would
6 have been right into me and I would have done that had --

7 Q If you had seen it?

8 A -- if I had seen it, but I didn't see it. I just
9 noticed the dust over to my right. The dust was not in
10 the road.

11 Q If you had seen it coming that fast you're saying you
12 would've---

13 A I would have applied---

14 THE COURT: Hold on. Let her finish the question --

15 MS. MCPHERSON: I'm sorry.

16 THE COURT: -- before you answer it. My court
17 reporter has to take it down.

18 THE WITNESS: I would have applied brakes.

19 Q As evasive action?

20 A Yes.

21 Q Who has the right-of-way through there, Mrs. Johnson?

22 A I assume that we do, but sometimes they cross in
23 front of us and there's nobody out there to direct the
24 traffic.

25 Q On the day that this happened to you just two or

1 three days before the Valenzuela wreck was there a sign of
2 warning of this --

3 A No.

4 Q -- anywhere?

5 A No.

6 Q Was there a flagman out there?

7 A No.

8 Q Was there anything at all that warned you that this
9 big piece of equipment---

10 A Absolutely not.

11 Q How close do you believe he came behind you once you
12 cleared the crossing?

13 A I looked up in my mirror and he was directly behind
14 me at a great rate of speed.

15 Q Based on the speed he crossed, Mrs. Johnson, are you
16 able to say whether or not he stopped there before---

17 A I would say that he didn't because there would have
18 been no way he could have stopped at the stop sign which
19 is very near the road and still pick up speed to zoom like
20 he did behind me. It was behind me.

21 Q Have you had other experiences with either the pan is
22 what I'll call Plaintiff's Number 18 or any other
23 equipment crossing there without stopping?

24 A Yes. We have, but we would be far enough away that
25 we didn't consider it a threat to us because we know the

1 road and we knew that they were always subject to cross
2 without giving you a notice.

3 Q When you say cross without notice, do you mean cross
4 without stopping?

5 A Yes.

6 Q The times that you've described, was it one or more
7 other than the one that was just two or three days before
8 this wreck that you've seen that happen?

9 A I'm not sure how many times it was, but we've lived
10 there for 26 years.

11 Q Were there times that it was within -- would you feel
12 safe saying within six months of the wreck or a year that
13 happening to you?

14 A I couldn't really say. I just know that every time
15 we go through the intersection to this day they're subject
16 to cross without stopping and we know they're not stopping
17 because you can come around the corner and you see them.
18 They're not. They're crossing.

19 Q You indicated -- I'm sorry. You indicated that you
20 had seen them come across but you were far enough distance
21 away; correct?

22 A Yes.

23 Q At those -- at that or those times was it clear to
24 you that they were coming straight across without stopping
25 based on the speed they were crossing?

1 A Yes.

2 Q And on those times, Mrs. Johnson, were there any
3 warning signs of any kind of or a flagman?

4 A No.

5 Q Was there anything out there, Mrs. Johnson, who would
6 warn people who were not familiar with Redds Branch Road
7 and with the fact that this happened to make them slow
8 down or to be more cautious?

9 A No.

10 Q That's all I have. Thank you, Mrs. Johnson.

11 THE COURT: Any cross?

12 MS. PAYNE: Yes, Your Honor.

13 IN CAMERA CROSS-EXAMINATION

14 BY MS. PAYNE:

15 Q Mrs. Johnson, I represent the defendant in this case.

16 A Uh-huh.

17 Q You weren't there on August 7, 2009 at the time of
18 this motorcycle accident?

19 A No, I was not.

20 Q Okay. So you don't know what the conditions were
21 existing at that time?

22 A No.

23 Q You don't know if there---

24 A I just know what happened to me.

25 Q Yes, ma'am. You don't know if there was any dust

1 that caused any visibility problems; correct?

2 A No.

3 Q And you lived there for 26 years; so you know that
4 these trucks have been crossing every so often for 26
5 years?

6 A I don't know that it was 26 years. I just know -- I
7 mean, I don't keep account of the times. I just know that
8 over the years that it's happened numerous times.

9 Q Well, you were very familiar with those 26 years that
10 there were a piece of equipment---

11 A There was danger.

12 Q Well, if you'll just allow me to finish my question
13 and then you can answer.

14 THE COURT: Hold on. Ma'am, the rules are this. She
15 gets to ask the whole question and you get to answer.

16 Q It is very easy to talk over one another.

17 THE COURT: It is.

18 Q I'll try not to do that to you if you'll do the same
19 for me. In your 26 years living at that home you were
20 very aware that there were large pieces of equipment
21 crossing the road?

22 A Yes.

23 Q Do you know if Mr. Valenzuela had ever been down that
24 road before?

25 A I do not know him.

1 Q Do you know -- do you recall giving a deposition
2 testimony in this case?

3 A Yes, I do.

4 Q Do you recall at that time that you said that you
5 weren't looking to see if there was somebody flagging the
6 traffic?

7 A There never has been in the past. I wasn't thinking
8 that it would be that day.

9 Q So do you know if there was a flagger there on the
10 day of this incident?

11 A No, I don't, but there never has been a flagman
12 there.

13 Q But, again, you were not there on the day of this
14 incident?

15 A Oh, no; not on that day.

16 Q And you also said in your deposition testimony that
17 there had been caution signs up before; is that correct?

18 A There were caution signs up after the accident.

19 Q Okay. Do you recall saying that they were up
20 beforehand?

21 A No, I don't.

22 Q Okay. Did you tell anybody after this incident two
23 or three days before about what had happened?

24 A I did. I told my husband and I warned my children to
25 be very cautious coming through there.

1 Q Okay. But you don't know if there was any dust at
2 the time of the accident?

3 THE COURT: Ma'am, you've asked that three times.
4 Move along.

5 Q Okay. Do you recall stating in your deposition
6 testimony that you were not paying attention? You were
7 just looking for -- looking at the dust?

8 A That is what caught my eye and I was not paying
9 attention to the gate, but I did see the dust to my right.

10 MS. PAYNE: No further questions, Your Honor.

11 THE COURT: Thank you. You may step down. Anything
12 else?

13 MS. MCPHERSON: Not from this witness.

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

15 JOHN E. JOHNSON, after being duly sworn,
16 testified as follows:

17 THE WITNESS: My name is John E. Johnson. My
18 nickname is Buddy Johnson. It started with a young
19 sister -- the Buddy.

20 IN CAMERA DIRECT EXAMINATION

21 BY MS. MCPHERSON:

22 Q Mr. Johnson, you are the husband of this lovely lady
23 that just testified?

24 A Yes.

25 Q And y'all live out on Redds Branch Road; right?

1 A Yes, ma'am.

2 Q Would you tell the Judge whether or not before this
3 wreck on August 7 of 2009 you had any concerns about the
4 exact spot where this wreck happened?

5 A Well, I can say that I noticed it after we retired.
6 We traveled that road much more -- both of us -- and I
7 remember seeing things happen that I thought could cause a
8 wreck and I saw that in the last few months and I think it
9 may have been the driver that was promoting these
10 non-stops -- the slow-downs or whatever you want to call
11 it and all these years back I saw them cross but I was a
12 long distance away. I'm talking a 100 yards, 30 yards or
13 something like that. So I did see it change in the last
14 three to six months back.

15 THE COURT: Back from when?

16 THE WITNESS: Back from 26 years ago or however long
17 they've been doing it. They may have had a different
18 vendor doing it all those other years.

19 Q You mean they changed after the wreck?

20 A No, no; prior to the wreck.

21 Q Okay. Let me ask you this. What was it specifically
22 about that crossing that gave you concerns about it?

23 A First of all, I can't see the gate open all the time
24 unless you get right on it. You can see the gate, but so
25 much shrubbery and growing up around the road -- I mean

1 around the fence -- and on the right side it is deep in
2 there with pine trees. That's the one that's dirt. That
3 is the one that you can see the dirt fly if it is dry and
4 they're coming through there pretty quick.

5 Q Up until the and through the date of this wreck
6 August 7 of 2009 did you ever see any signs up on either
7 side of the crossing that warned of trucks or equipment
8 entering the highway?

9 A No.

10 Q Up to and through the day of the wreck did you ever
11 see any signs that said there was a flagman ahead?

12 A No.

13 Q Did you up through that day ever see a flagman out
14 there?

15 A No.

16 Q Now, would you tell me whether or not you recognized
17 the piece of equipment that's shown in what's been marked
18 as Exhibit No. 18?

19 A Yes, it is a pan.

20 Q Would you tell me whether or not you've ever seen
21 that pan run across the road without stopping?

22 A Yes.

23 Q And describe that for me, if you would, please.

24 A I was going to the south side and there is a curve
25 before I get to the straight-a-way of the road and

1 half-way there I could see this pan -- I will call it
2 boogeying [sic] or moving across the road fast. I say
3 fast; just maybe like someone running.

4 Q Based upon the speed you saw it moving across,
5 Mr. Johnson, do you believe that it stopped at the stop
6 sign as it came up on Redds Branch Road?

7 A I can't say it stopped, but I know it is a hill. It
8 is a grade coming out of that place he came out of and he
9 probably has to give it more power to get up the hill, but
10 I don't know.

11 Q Did you -- was it a concern for you about your
12 family's safety coming through there?

13 A It is.

14 Q Did you and or your wife ever have discussions with
15 your own children about being extra cautious when they
16 came through there?

17 A I don't think we had a prayer meeting about it or
18 anything, but after the fact when she had that incident we
19 talked to them about it.

20 Q And that's what your wife just described two or three
21 days before the wreck it came out and almost hit her she
22 described?

23 A Right.

24 Q And at that point you talk to your children about it?

25 A Yes, we did.

1 Q How many times, Mr. Johnson, before the wreck do you
2 believe you saw the pan come out across Redds Branch Road
3 and appear to not stop at that stop sign?

4 A I think it's been three to four or maybe more, but
5 not that many, but one is enough.

6 Q And can you -- would those three or four times have
7 been in the months -- say, six months before this wreck
8 happened?

9 A I would say it was in that time frame; maybe a little
10 further back, but I can't remember the time frame. I just
11 got to where I watched it a lot.

12 Q Is there anything along that road, sir, that would
13 warn people not familiar with that spot that they should
14 be extra cautious or slow down as they approached it?

15 A Nothing but the 45-mile speed limit that puts you at
16 when you start coming from my side to the east side -- the
17 south side.

18 Q The speed limit is 45 all through there, isn't it?

19 A Yes.

20 Q And if I weren't familiar with that like you and your
21 wife are, is there anything that would warn me that there
22 may be big equipment crossing the road and that I should
23 slow down or be cautious of it?

24 A I would say, yes, you need to be.

25 Q That I would need to be?

1 A Right.

2 Q Is there anything there that would warn me of that?

3 That warned me before the wreck? Any signs up?

4 A Not really, no.

5 Q Thank you, sir.

6 THE COURT: Cross?

7 IN CAMERA CROSS-EXAMINATION

8 BY MS. PAYNE:

9 Q Mr. Johnson, were you there on August 7, 2009 when
10 this incident occurred?

11 A No, I was not.

12 Q Okay. I believe you testified earlier that when you
13 would cross or come down this road you would look to see
14 if the gate was open; is that correct?

15 A I would try to see the gate was opened or closed.

16 Q Yes, sir. And you lived there for 26 years?

17 A Yes, but I didn't drive there as much the 26 years
18 now.

19 Q Okay.

20 A I went a different direction every day to where I
21 worked.

22 Q Yes, sir. How often did you drive through that road
23 in 26 years?

24 A In the last four and a half to five years it was
25 probably two times a day or maybe more.

1 Q Okay. Do you know if Mr. Valenzuela had ever been
2 down that road before?

3 A Don't know him and don't know if he had ever been
4 there.

5 Q Okay. Did you look to see if there were signs out
6 before this incident?

7 A They should be obvious. I never saw one out before
8 that.

9 Q My question was did you look to see if they were out?

10 A Always looked. I am looking for the fence. I am
11 looking for the right road that the truck come out of.

12 Q Okay.

13 A The trucks come out 90 percent on the right side and
14 the pans on the blind side.

15 Q Yes, sir, and I'm asking about specifically
16 construction signs that say caution or road crossing.
17 Have you ever -- did you look for those types of signs
18 before this incident?

19 A Yes.

20 Q Okay. And your testimony today is that you never
21 seen a sign out there in the 26 years that you lived
22 there?

23 A Yes.

24 Q Okay. You have never seen a flagger out there?

25 A No.

1 Q Do you know if there was a flagger there at the time
2 of this incidents?

3 A I wasn't there.

4 Q Okay. Do you know if there were flags out there at
5 the time of this incident?

6 A I wasn't there.

7 Q When you testified earlier that you had seen three or
8 four times that a piece of machinery had crossed in front
9 of you, when were those times?

10 A It was prior to the wreck and it may have been back
11 three to six months.

12 Q Three to six months prior to the wreck?

13 A Back, prior to, yes.

14 Q So if it was in August, it could have been in March?

15 A Right.

16 Q Could have been before that?

17 A Could have been before that.

18 Q So you have no idea when that occurred?

19 A No.

20 Q Do you recall saying in your deposition testimony
21 that you've only seen a piece of machinery crossing one
22 time before?

23 A That was close to me.

24 Q Okay. So when you're testifying to the court under
25 oath that you've seen three times I don't understand. Can

1 you clarify for me?

2 A Yes. I would say the maximum of three times, but I
3 saw him a distance away more than that.

4 Q Okay. So you don't know if they stopped or didn't
5 stop if they were a distance away?

6 A Well, maybe not, but I'm almost 70 years old and I
7 don't remember time frames that well.

8 Q Yes, sir, I understand. Neither do I.

9 A I hope you're not 69.

10 Q Not yet. That's what is sad about it.

11 I think that's all the questions I have.

12 THE COURT: Thank you. Anything on redirect?

13 MR. DETRICK: No, sir.

14 THE COURT: Step down, please.

15 MS. MCPHERSON: Mrs. Laura Boozer.

16 LAURA BOOZER, after being duly sworn, testified
17 as follows:

18 IN CAMERA DIRECT EXAMINATION

19 BY MS. MCPHERSON:

20 Q Mrs. Boozer, you and your husband live out off Redds
21 Branch Road, don't you?

22 A Yes.

23 Q About how far do you live from where this wreck
24 happened?

25 A Not quite probably maybe a half a mile.

1 Q How often do you or he pass down Redds Branch Road
2 and exactly by this spot where this wreck happened?

3 A At least -- I go to work at least four times a day.

4 Q And what about him?

5 A Probably the same.

6 Q And was that about the same amount of times that you
7 traveled past there before this wreck happened August 7 of
8 2009?

9 A Yes.

10 Q Now, Laura, before the wreck happened -- before it
11 and up through the date of the wreck did you ever see any
12 warning signs that trucks or equipment were going to be
13 entering the highway?

14 A No.

15 Q Did you ever see any signs on either side of the
16 crossing that said there would be a flagman up ahead?

17 A No.

18 Q And did you ever see a flagman out there before the
19 wreck?

20 A No.

21 Q You know what a flagman is; right?

22 A Yes, ma'am.

23 Q A vest and a flag?

24 A Yes.

25 Q Never saw one of those out there?

1 A No.

2 Q Did you have concerns before this wreck happened,
3 Laura, about it -- about it being dangerous?

4 A Yes.

5 Q Why?

6 A Because before the wreck me and hubby -- Boozer is
7 what we called him -- we would go that way---

8 THE COURT: What do you call him?

9 THE WITNESS: Boozer. It's---

10 MS. MCPHERSON: His last name.

11 THE WITNESS: It's not a habit. It is his last name.

12 THE COURT: Oh, Boozer. Okay.

13 THE WITNESS: I'm sorry. Robert.

14 MS. MCPHERSON: It has nothing to do with drinking
15 habits.

16 THE WITNESS: But we would go that way and there was
17 times when the pan -- there is one time I know before and
18 after that we had to slam on brakes.

19 Q You had to slam on brakes?

20 A Yeah, we had to. Yes.

21 Q Let's talk about the time before. Who was with you?

22 A Hubby Boozer.

23 Q Who was driving?

24 A He was.

25 Q And about how long -- was this about a month before

1 the wreck?

2 A I think so; yes, ma'am.

3 Q And tell the Judge what happened. You're in the
4 passenger seat. Your husband is driving. What do you
5 see?

6 A Well, we live on that road and so knowing that they
7 travel dirt back and forth I can tell if the pan is going
8 across the road because I can tell the dirt in between the
9 road; so usually if when we're going if there is dirt in
10 between the road then we know it, but when we come up upon
11 it they were coming from -- I call it the landfill and the
12 sludge field. The landfill is on the right and the sludge
13 field is on the left, and they come through and they'll
14 just come straight across.

15 Q Now, when you say they'll come straight across do you
16 mean without stopping for Redds Branch Road?

17 A Yes.

18 Q Who's got the right-of-way through there, Laura?

19 A We do.

20 Q On Redds Branch Road?

21 A Yes.

22 Q So, is that what happened the day you were riding
23 with your husband? He came---

24 A Yes.

25 Q He came straight across?

1 A Uh-huh.

2 Q Was it the piece of equipment shown in what's been
3 marked as Number 18?

4 A Yes.

5 Q What do you call that?

6 A The pan.

7 Q So the pan came straight across without stopping?

8 A Yes.

9 Q And this was within a month of the wreck?

10 A I think so; yes, ma'am.

11 Q On that day -- that particular day that that happened
12 were there any warning signs of any kind out there?

13 A No, ma'am.

14 Q Any flagmen out there?

15 A No.

16 Q Now you said you had a second incident after the
17 wreck; is that right?

18 A That's correct.

19 Q What happened after the wreck?

20 A It was right after and we were going -- I think we
21 were going to the south side and it pulled out and we
22 couldn't believe it that that happened so close to when
23 Christie got killed.

24 Q When you call her Christie, did you know her?

25 A I didn't, but she's a fellow biker and we all have a

1 bond when it comes to bikers and there is a memorial right
2 there beside the road.

3 Q So you know her name because it's on the memorial?

4 A Exactly, yes.

5 Q So after the wreck this same thing happened?

6 A Yes, ma'am.

7 Q And you couldn't believe it happened because a wreck
8 had just happened?

9 A Right.

10 Q The day that it happened after the wreck, was there a
11 flagman out there?

12 A After the wreck they did put flags up, but I did not
13 see a flagman.

14 Q Now---

15 THE COURT: After the wreck they did what?

16 THE WITNESS: They had the little thing like that on
17 each side of the road, but I never seen a flagman. I seen
18 a gentleman on a tractor. He was sitting on the tractor
19 on the sludge sign.

20 THE COURT: So those signs -- trucks entering
21 highway -- are there all the time or just when they were
22 going across?

23 THE WITNESS: It was after the wreck.

24 THE COURT: All the time?

25 THE WITNESS: Just when they were going across.

1 THE COURT: After the wreck?

2 THE WITNESS: Yes, sir.

3 THE COURT: Okay.

4 Q Now, Laura, there is a big orange sign here that
5 we're holding up that says Trucks Entering Highway. Did
6 you ever see a sign like that or anything similar before
7 the wreck?

8 A No, ma'am.

9 Q And the day that -- the day that you described after
10 the wreck --

11 A Right.

12 Q -- this sign was up; right?

13 A Yes, on both sides.

14 Q Even with the sign up, the pan ran across the road?

15 A Yes.

16 Q Now, have you ever had incidences with dump trucks or
17 tractors running the stop sign in front of you?

18 A I have seen a tractor.

19 Q Come across without stopping?

20 A Yes, and the tractor was the one that swept the dirt
21 off the road.

22 Q When you and your husband had the incident before did
23 he have to slam on brakes?

24 A He put on brakes, yes, ma'am.

25 Q What were you doing?

1 A Cussing.

2 Q Cussing?

3 A Yes, ma'am.

4 MS. MCPHERSON: Thank you.

5 THE COURT: Ms. Payne?

6 IN CAMERA CROSS-EXAMINATION

7 BY MS. PAYNE:

8 Q Mrs. Boozer, prior to August 7, 2009 when is the last
9 time that you saw the pan and the pan only crossing
10 without stopping?

11 A I think in my deposition I got pin-pointed. I said
12 three to five times. I have lived on that road exactly
13 about nine years.

14 Q Okay.

15 A And so I said three to five.

16 Q My question was when prior to August 7 have you seen
17 the pan cross without stopping? I'm sorry. I am not
18 trying to cut you off.

19 A Okay. I want to say it might have been a little over
20 a month or two.

21 THE COURT: Hold on a second. Go ahead.

22 Q So you're not sure exactly when you saw the pan?

23 A No.

24 Q Okay. And you have lived there for nine years?

25 A Yes, ma'am.

1 Q How often do you travel that road?

2 A A good bit because I do work at Owens Corning.

3 Q Okay. And didn't you work the night shift at Owens
4 Corning?

5 A I used to. I work straight days, but if they call me
6 in I work whatever they told me to work.

7 Q Okay. The other times that you have encountered
8 issues with the pan, had you been driving or were you
9 riding as a passenger?

10 A I have drove and I would be in my vehicle.

11 Q Okay.

12 A And then there was two times with hubby.

13 Q Okay. So three times driving, two times passenger;
14 is that correct?

15 A Yes.

16 Q Okay.

17 A I mean, there were other times before that, but you
18 wanted me to pinpoint, but, yes --

19 Q Okay.

20 A -- there were other times with just me.

21 Q Okay. Was there dust causing any visibility
22 problems?

23 A That I don't know because I know that on the land
24 fill that they do have sprinklers on the backside of it
25 but not on the front side; so if you come up to a certain

1 part you'll be able to see the dust.

2 Q Okay.

3 A Now on the sludge side there is no sprinklers.

4 Q Did you look to see if the gate was open as you go
5 down the intersection?

6 A I don't look for the gate. I look for the dust in
7 the roads.

8 Q Okay. Any of these times that you testified about
9 the pan not stopping did you see dust?

10 A I really probably was not paying attention to the
11 dust versus the big piece of equipment.

12 Q Okay. So you saw the big piece of equipment coming
13 down the road?

14 A Yes.

15 Q Do you know how many times Mr. Valenzuela had been to
16 this road prior to the accident?

17 A I don't even know who he is.

18 Q Okay. Do you know if there's been any other
19 accidents at this intersection involving a pan not
20 stopping?

21 A Not -- I don't have a clue.

22 Q Do you intend to testify about any other pieces of
23 equipment other than the pan not stopping before crossing
24 the road?

25 A If you ask me to I will.

1 Q Okay. Who contacted you about testifying in this
2 case?

3 A Mrs. Lisa.

4 Q Did you contact Mr. English or anybody --

5 A No.

6 Q -- about the crossing?

7 A I have not, no.

8 Q And after the incident you've seen signs up since
9 then?

10 A Yes.

11 Q And before the incident did you see any flagmen?

12 A I will tell you that the day that -- and I am going
13 to say Christie just because.

14 Q I understand.

15 A But the day that the accident happened for some
16 reason I was leaving to go. I don't know if I was going
17 to the plant or whatever, but I did come upon the
18 accident, but the patrolman had the area blocked off and I
19 went up there. There was no flagman. I did see the pan
20 in the road now. I did not see ambulance or anything like
21 that; so I went all the way around to see what I could see
22 on the backside because I was calling the plant to let
23 them know something was going on in that area.

24 I did not see -- there was no flagmen. There was
25 cops. I don't remember seeing an ambulance. I did see

- 1 the pan. It was probably about this much in the road.
- 2 Q Okay. Do you have any pictures of that or anything?
- 3 A No.
- 4 Q Do you recall seeing the tractor on the side of the
- 5 road on the sludge side?
- 6 A I don't recall the tractor. I do remember the pan.
- 7 Q Do you recall---
- 8 A And you're talking about the day of the wreck?
- 9 Q Yes, I am. Any time before this accident do you
- 10 recall seeing a tractor with a man sitting on it cleaning
- 11 up debris off the road prior to this incident?
- 12 A Yes.
- 13 Q Okay. Do you know if he was flagging traffic or
- 14 anything prior to this incident?
- 15 A He never flagged me. He always sat on his tractor.
- 16 Q How many times did you---
- 17 A And he---
- 18 Q I'm sorry. Go ahead.
- 19 A I don't recall the orange vest or anything like that.
- 20 Q Okay.
- 21 A I don't recall, but I just remember he would be
- 22 sitting on the sludge side.
- 23 Q When you come across a flagman what are the usual
- 24 conditions?
- 25 A You normally slow down.

1 Q Okay. Is it usually on a lane closure?

2 A No. Usually whenever you see a flagman or anything
3 like that or any type of posting you automatically
4 supposed to slow down and show caution --

5 Q Okay.

6 A -- because you don't know what's ahead.

7 Q Okay. I beg the court's indulgence. I lost my train
8 of thought there. I'm sorry. Prior to this incident how
9 many times have you ridden your motorcycle down this road?

10 A Me and hubby drive. He rides a bike. I just got a
11 bike. So I've rode my bike down there a couple of times.
12 We used to ride a good bit down that road.

13 Q So before August 7, 2009 how many times have you
14 ridden your motorcycle?

15 A A good bit.

16 Q How many times before August 7, 2009 while riding
17 your motorcycle did you come across the pan not stopping?

18 A I know hubby did. I can't recall if I was on there
19 because, like I said, we always -- we always look at the
20 track.

21 Q Okay. You've never collided with the pan?

22 A Colliding?

23 Q You've never had an incident with the pan?

24 A Other than slamming, you know, stopping.

25 Q And the times that you slammed on your brakes were

1 those in your car or on the motorcycle?

2 A Hubby did it in the bike. I did it in the vehicle
3 and we've done it together in the vehicle.

4 Q When he stopped on the motorcycle he was able to stop
5 without hitting the pan; is that correct?

6 A Yes, but there is different things that happened;
7 different situations when you're on a bike.

8 Q Okay. Explain.

9 A There's a lot of explaining. I mean, you have -- the
10 experience. You also have if you scare the person on the
11 back of the bike if they get scared, if they move a
12 certain way. I mean, it's just a lot of different issues
13 that happens when you ride a bike. Every situation is not
14 the same.

15 Q Okay.

16 A Everything is different and they teach that.

17 Q Okay. And your husband was able to stop while on the
18 motorcycle when the pan crossed in front of him; is that
19 correct?

20 A Yes, but, like I said, I don't know the distance
21 where he stopped at.

22 MS. PAYNE: No further questions, Your Honor.

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

24 MS. MCPHERSON: Mrs. Virginia Gunter.

25 THE COURT: Are we going to have Mr. Boozer as

1 well?

2 MS. MCPHERSON: No, sir.

3 VIRGINIA GUNTER, after being duly sworn,
4 testified as follows:

5 IN CAMERA DIRECT EXAMINATION

6 BY MS. MCPHERSON:

7 Q Hey, Mrs. Gunter. I am just going to have you
8 testify in front of the judge right now, okay?

9 A All right.

10 Q I am just going to ask you just a handful of
11 questions. Mrs. Gunter, you and your husband live out off
12 Redds Branch Road, don't you?

13 A Yes. We are right on Redds Branch Road.

14 Q And do you on a daily or weekly basis pass by the
15 spot where this wreck happened?

16 A Yes.

17 Q Before it happened, Mrs. Gunter, did you have
18 concerns about that spot where the wreck happened?

19 A I've always had concerns about it.

20 Q Why?

21 A The -- Let me see. I don't know how to put this.

22 Q You take your time.

23 A The traffic, you know, coming across the road there
24 is pretty frequent, but it is something that you never
25 know whether somebody is coming or not because I think

1 maybe twice in all these years I've maybe seen some type
2 of sign put up and those times were since this accident.

3 Q Let me ask you about before the wreck. Before the
4 wreck did you ever see any signs that warned of equipment
5 or trucks entering the highway?

6 A No. The only signs I saw were the trucks coming --
7 just flying across there and to tell you the truth, it
8 took me a little while to get to the point that I
9 remembered to always look for that. Now I've complained.

10 THE COURT: Who did you complain to, ma'am?

11 THE WITNESS: I beg your pardon?

12 THE COURT: Did you complain to someone?

13 THE WITNESS: Yes.

14 THE COURT: To who?

15 THE WITNESS: I've called up at the place -- not the
16 actual place there, but I can't think right now.

17 Q Was it Owens Corning?

18 A Owens Corning; right.

19 Q And you complained that these trucks and the
20 equipment was coming across without stopping?

21 A Right.

22 Q Is there a piece of equipment shown in Plaintiff's --
23 what's been marked as Number 18 -- is that one of the
24 pieces of equipment that you've seen come across Redds
25 Branch Road without stopping?

1 A It is the same type. Almost every time it's been a
2 red -- big ol' red thing like that.

3 Q Something big like that?

4 A Right.

5 Q And when you saw that happen were there any signs up
6 warning that you should slow down or be extra cautious
7 because they were going to be coming right on across the
8 road?

9 A The only signs I have seen really that I can know
10 that I'm being totally truthful about it, I think it was
11 maybe like two weeks ago. They had put a sign way up
12 closer to the main highway.

13 Q Yes, ma'am.

14 A And then they had one past the place where the girl
15 was killed, but they were just the red signs.

16 Q And I'm going to only ask you about before the wreck.
17 Okay? So if you'll just let me talk about before the
18 wreck. Before the wreck did you ever see any warning
19 signs or ever see a flagman out there directing or
20 stopping traffic?

21 A In all these years I never have.

22 Q Did you yourself ever have any close calls, have to
23 slow down or break because equipment was passing there?

24 A Yes, when -- I guess when they first started driving
25 those big old red trucks across because I know one time I

1 had a time stopping, you know. I guess I should have been
2 looking in both directions, but I don't know about other
3 people, but I think it should be the person coming across
4 the road to make sure there was a sign or to make sure no
5 traffic was coming.

6 Q Thank you, Mrs. Gunter.

7 THE COURT: Cross. Any cross?

8 IN CAMERA CROSS-EXAMINATION

9 BY MS. PAYNE:

10 Q Mrs. Gunter?

11 A Yes.

12 Q How long did you testify -- yeah, how long did you
13 testify that you had lived on Redds Branch Road?

14 A My husband and I moved into a house we built in
15 December -- December 20. This December we will have been
16 in that home 63 years. Prior to that time my family and
17 me included lived right on down the road on the curve. We
18 were probably there about 15 years, I believe; so I'm
19 quite familiar with the whole road.

20 Q Yes, ma'am. Do you know when the first time you ever
21 saw a piece of machinery around the Owens Corning plant
22 begin crossing the road?

23 A Now you're saying machinery. I'm just going to use
24 that word as covering a lot of things.

25 Q Okay.

1 A Ever since Owens Corning opened I believe they bought
2 that property or rented it or something about the time
3 they really got busy over there, but there's always
4 traffic and for years we -- you couldn't see out of your
5 windows. You couldn't see out of the doors. I mean,
6 because they were -- I don't know what they were doing,
7 but they were coming down the road on past our home and
8 you just could hardly stand it with all that stuff, you
9 know, blowing into the house and everywhere else.

10 Q Well, let me get more specific. When is the first
11 time that you saw any piece of machinery cross the
12 intersection that we're here about today without stopping?
13 When is the first time?

14 A I didn't make a note as to what time, but it's been
15 quite a while.

16 Q Okay. When is the most recent time before the
17 accident August 7 that you saw a piece of machinery cross
18 the road without stopping?

19 A I don't keep a diary on when I see them --

20 Q Yes, ma'am.

21 A -- but it's pretty constant --

22 Q Okay.

23 A -- thing.

24 Q And you were describing a red piece of equipment?

25 A The main ones I have seen have been a red -- big ol'

1 red piece of equipment.

2 Q Okay.

3 A The trucks come in and out and everything, you know.

4 Q Okay. Do you know who owns the trucks that come in
5 and out?

6 A Yes, but I don't know if I am going to be able to
7 remember the name right this minute.

8 Q Okay. And you testified that you have never seen
9 anything stop at that intersection before. Are you
10 including cars, trucks, heavy machinery? Have you ever
11 seen anything stop at that intersection?

12 A Yes.

13 Q What have you seen stop?

14 A One time I saw one of those big trucks stop.

15 Q Okay. Was it one that we've talked about here that
16 you've seen the picture of?

17 A Right.

18 Q That's what you've seen stop?

19 A Right.

20 Q No further questions.

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

22 Ms. Barbara, Mr. Bill, help her.

23 Anything else on the proffer on the scene prior to?

24 MS. MCPHERSON: No, Your Honor.

25 THE COURT: All right. Anything y'all want to put on

1 the record about it?

2 MS. PAYNE: Yes, sir, your Honor. I would renew my
3 motion in limine to exclude any and all evidence about
4 what we term the dangerous-condition witnesses that we
5 testified about---

6 THE COURT: Hold on a second. Go ahead.

7 MS. PAYNE: Specifically with respect to failing to
8 stop before entering the stop way, before nearing the
9 intersection, failing to have signs or having a flagman up
10 -- all of these witnesses, Your Honor, live on this road.
11 They are very familiar with this condition and it is
12 completely prejudicial to the situation at bar where
13 Mr. Valenzuela is a first-time traveler of this road. It
14 is a completely different situation. It would be entirely
15 prejudicial.

16 THE COURT: So it's okay to be unsafe to -- allegedly
17 unsafe to the people who live around there because they
18 know about it, but it's okay to be unsafe to somebody
19 that's never been there?

20 MS. PAYNE: No, Your Honor. The difference lies in
21 looking for signs or construction signs or a flagger and
22 the proffered witnesses' testimony they were relying on
23 different things such as dust and grates -- gates, excuse
24 me -- which is different than the situation that we had
25 with Mr. Valenzuela.

1 Specifically, Mrs. Johnson -- excuse me -- testified
2 that when she encountered something it was because there
3 was a ton of dust. She did not see the pan and that is a
4 different situation that would be completely irrelevant to
5 this case.

6 THE COURT: Ma'am, I'm so sorry. I just disagree
7 with you. We're talking about a negligence case where
8 they're alleging that your clients created a dangerous
9 condition that led to the death of their client and also
10 they're seeking punitive damages and this shows allegedly
11 a pattern of conduct, the duration of the conduct, degree
12 of culpability, the defendants perhaps were aware of it or
13 were concealing it, existence of similar past conduct.
14 All of this fits into proper testimony to show whether or
15 not your clients did create a dangerous condition, and, if
16 they did, were they willful, wanton, and potential
17 disregards to the right of the people driving down that
18 road.

19 I think the law clearly allows this type of evidence
20 in this type of case. You've argued it in motions in
21 limine. I told you I would do a proffer today. I am
22 going to allow the testimony and you know---

23 MS. PAYNE: Are you allowing evidence of after the
24 accident under, you know, 407 with subsequent remedial
25 measures?

1 THE COURT: I don't know if it is a subsequent
2 remedial measure.

3 What is your position on after the accident,
4 Mr. Detrick? After the wreck.

5 MR. DETRICK: Your Honor, we do not intend to put in
6 any of the post-accident signs --

7 THE COURT: Very well.

8 MR. DETRICK: -- and flagmen except as I understand
9 you were going to have punitive damages.

10 THE COURT: If the jury comes back and finds for you
11 for negligence and finds that they were by clear and
12 convincing evidence willful, wanton, and with conscious
13 disregard for the rights of your client, then we'll have
14 some additional testimony that may allow post accident.
15 We'll deal with that when it comes. I will allow
16 pre-wreck testimony as set forth in the proffer.

17 MR. DETRICK: We also do intend though, Your Honor,
18 for continuing reckless conduct is not subsequent remedial
19 measure and that is the failure to stop at the stop sign
20 which is what they were doing that created this dangerous
21 condition which is our allegation -- not the signs because
22 that's a remedial measure, but they're supposed to stop at
23 the stop sign.

24 THE COURT: Continuing duration of the conduct?

25 MR. DETRICK: Yes, sir.

1 MS. PAYNE: And that would go to punitives or in the
2 case in chief?

3 THE COURT: In the case in chief because to get to
4 the second stage the jury has got to find by clear and
5 convincing evidence that your clients were willful,
6 wanton, with conscious disregard to the rights of others,
7 and they got to put up testimony for that for it to get to
8 that stage. So, yes, it is relevant.

9 MS. PAYNE: Yes, sir, Your Honor, and we would just
10 argue that our failure to continue to stop after the
11 incident is a misstatement of the facts because we did
12 stop at the time.

13 THE COURT: Well, that's not what these witnesses are
14 saying. That's what you're saying.

15 MS. PAYNE: At time of the incident -- these
16 witnesses weren't there at the time of the accident.

17 THE COURT: I understand that, ma'am. Thank you.

18 MS. PAYNE: Your Honor, I just want to put on the
19 record that the witnesses are testifying about us crossing
20 without stopping---

21 THE COURT: Ma'am, you need to read the rule when I
22 make a ruling.

23 MS. PAYNE: Yes, Your Honor.

24 THE COURT: You're protected.

25 MS. PAYNE: Thank you. That's all I wanted to do.

1 Thank you.

2 THE COURT: Mr. Detrick, we're going to get the jury
3 in here in just a second. I'm going to give everybody a
4 bathroom break. Let's take that sign down back there
5 before we get to where we are in the trial. We're going
6 to take a quick---

7 MS. MCPHERSON: Judge, photographs that I'd like to
8 use in opening, may we discuss that?

9 THE COURT: I asked y'all to discuss that.

10 MS. MCPHERSON: I think she won't agree to all of
11 them.

12 MS. PAYNE: I just asked her to put in a few of them;
13 not all of them.

14 THE COURT: How many do you have?

15 MS. MCPHERSON: Judge, I have four boards. I have
16 these two.

17 THE COURT: Okay.

18 MS. MCPHERSON: And these two.

19 THE COURT: All right. You object to that, ma'am?

20 MS. PAYNE: I just object to the cumulative nature.

21 THE COURT: Very well. Overruled.

22 MS. PAYNE: Thank you, Your Honor.

23 (Whereupon, a break was taken.)

24 THE COURT: Anything for the record by the plaintiff
25 before we start?

1 MR. DETRICK: Nothing, Your Honor.

2 THE COURT: By the defendant?

3 MS. PAYNE: Nothing, Your Honor.

4 (Whereupon, the jury came into open court at
5 approximately 3:22.)

6 THE COURT: All right. You're an alternate?

7 THE JUROR: I'm not.

8 THE COURT: Just sit right here. Everybody in this
9 courtroom, who looks like he is not a drag racecar driver?

10 THE JUROR: I had a matching cap but they said I
11 couldn't wear a hat.

12 THE COURT: All right. The next thing we have to do
13 is be sworn in one more time for this particular trial; so
14 if you would please stand and raise your right hand.

15 (Whereupon, the jury was sworn at 3:23.)

16 THE COURT: Ladies and gentlemen, normally at this
17 time I give a little pretrial instructions or tell you
18 what to expect, but, you know, when we qualified the jury
19 I went a little bit further today than I normally do
20 because I told you what my job is. I am the judge of the
21 law in the case and I tell you what the law is. I told
22 you what your job was. You're the judge of the facts in
23 the case; so it is your duty to listen to everyone who
24 testifies and judge the believability of them, judge the
25 credibility of them because you'll be asked to determine

1 what the true facts are and apply it to the law as I give
2 it to you at the conclusion of the case.

3 I also told you that in a civil case what the burden
4 of proof is. The plaintiff brings the lawsuit. They have
5 the burden of proving their case to you by the
6 preponderance or greater weight of the evidence. Simply,
7 the scales are even when they come in. For them to win
8 they have to tip it ever so lightly in their favor. If
9 they end up the same or in favor of the defendant then
10 they have not proved their case. So, that's basically
11 where we're going in this case.

12 Since the plaintiff has the burden of proof they will
13 present their case first by calling the witnesses followed
14 by the defendant who will call their witnesses and then
15 the plaintiff has the right to put up reply testimony.
16 Before we have testimony the lawyers will make opening
17 statements. Now, we're going to do that in just a few
18 minutes.

19 Opening statements -- they are not evidence in the
20 case. It is simply what the lawyers contend the issues
21 will be, what they intend to prove to you. It is sort of
22 a general road map as to how this case is going to move
23 and what their positions are. That is not evidence in the
24 case. Once we finish the opening statements we'll take
25 the testimony. Once we finish the testimony the lawyers

1 then have the right to make final arguments and that is
2 followed by me charging or instructing you on the law and
3 then it is turned over to you.

4 I try to be efficient with your time and the lawyers'
5 time and everyone else's time. Every now and then I run
6 into a little bit of a bog like I did today. We got
7 bogged down at lunch. I wanted to start at three and here
8 it is 3:25, but I try to be efficient. I'll try to be
9 better at it as we go along.

10 By being efficient I am not trying to run a road race
11 up here; so if at any time during the trial of the case
12 you become uncomfortable, you need to use the restroom,
13 you're tired of sitting, you're tired of listening to me,
14 raise your hand. If you get hot, cold -- we want to make
15 sure you're comfortable and don't get uneasy back there
16 sitting.

17 We're going to go today until about 5 o'clock, maybe
18 just a tad over. We'll start tomorrow morning at 9:30.
19 We'll have breakfast for you in the morning. I'll ask you
20 each time we take a break or break for the evening please
21 do not discuss the case among yourselves or with anyone
22 else. Do not start any deliberations until we have
23 concluded everything. You're free to talk about anything
24 you want to in the jury room, but don't talk about the
25 case until it's all over, said, and done and I turn it

1 over to you.

2 When we break for the evening and before we start
3 back tomorrow I would ask that you choose or select a
4 foreperson among the 12 regular jurors. The foreperson
5 simply is someone who acts as the spokesperson for the
6 jury, heads up the deliberation, and if you have any
7 concerns you bring it to my attention. If y'all can't
8 decide on someone, just let me know and I will randomly
9 choose one of you.

10 I think you'll find this to be an interesting case.
11 These lawyers on both sides have spent a lot of time and
12 effort preparing the case. It is sort of like putting on
13 a play. They've done all the practicing and they've done
14 all the preparation and talked to all of the witnesses and
15 they've taken depositions and they have all of these boxes
16 back there full of things they've done and they've
17 narrowed it down now to exactly what is relevant and what
18 they want to put before you for you to have all the facts
19 in which to make a decision at the conclusion of the case.

20 So I ask that you pay close attention and I think
21 you'll find it an enjoyable experience. I am going to
22 certainly try to make it enjoyable to you.

23 Any objections to my opening remarks by the
24 plaintiff?

25 MR. DETRICK: No, sir.

1 THE COURT: The defendant?

2 MR. COX: None, Your Honor.

3 THE COURT: Mr. Detrick, Mrs. McPherson?

4 MR. DETRICK: If it please the court.

5 THE COURT: Yes, sir.

6 OPENING STATEMENT

7 MR. DETRICK: Ladies and gentlemen, let me start off
8 by thanking you for your service. I will introduce all
9 the people that y'all will see and get to know involved in
10 this case. First off, my name is Paul Detrick. I am a
11 lawyer. I live in a small town of Hampton and Lisa
12 McPherson seated right over here, she is going to be --
13 and Ronnie Maxwell -- we represent the family of Christie
14 Valenzuela and that family is seated right here. This is
15 her husband Michael and this is her son who is really
16 Michael, Jr., but he goes by Mikey.

17 This is the person who is helping them. This is
18 Paige Weeks. She's what is called the personal
19 representative. She's the one that handles the affairs
20 since we have an estate. Any time you have an estate you
21 have a personal representative who is in charge of
22 handling that estate and she's been kind enough to help
23 Mikey and Michael in this bad situation with the death of
24 their mama and their wife and she also under our laws as
25 you've heard her name -- if you bring a case like this it

1 is in the name of the personal representative.

2 Let me tell y'all a little bit of the beginning here.
3 Under our society -- I know y'all know this. This is
4 somewhat what this case is going to be about. To have an
5 orderly society we have a lot of rules, regulations,
6 requirements that we're all required to abide by for each
7 of us's safety so we don't have any bad situations happen.
8 We have we all know on the traffic -- all of y'all, most
9 of y'all, I assume that you got driver's licenses and you
10 know that you have traffic control regulations, traffic
11 control laws, traffic control signs that you see every
12 day.

13 We all know that you're supposed to abide by them and
14 we all know that sometimes we also have signs out there,
15 but y'all rode along and you see commercials on TV where
16 there are signs that warn you, you know, like a
17 construction coming up or men ahead or working -- signs
18 that warn us, they are required for safety and the reason
19 they're required is so that you'll know that there may be
20 something ahead that may be dangerous to you, maybe
21 something you've got to slow down for, maybe something at
22 least you should be aware of for the safety of yourself,
23 for the safety of the family, and also for the workers who
24 are around there.

25 Also, sometimes -- and y'all have all seen it in

1 construction zones -- you have this heavy equipment going
2 across the road. We all know that in the interest of
3 safety and in the interest of the public traveling the
4 roads that sometimes you have to have a flagman out there.
5 Y'all have seen that. Why do you have them? Because, you
6 know, first off, you need to know they're going to be
7 there and then you need to stop because something is
8 happening such as big equipment crossing the road or
9 something that's going to be dangerous, you know, that you
10 need to heed to, and, of course, I don't think any of us
11 deny that's in the traffic control regulation sometimes
12 we, obviously, see stop signs all over the place.

13 What are you required to do when you see a stop sign?
14 Anybody deny what you do when you have a stop sign?
15 You're supposed to stop. That's the reason it is there
16 for you to stop to regulate the traffic because it's for
17 public safety. Now what happens in the event that these
18 rules, these regulations, these signs are not heeded to?
19 Someone gets seriously injured or killed.

20 In our society what happens when someone doesn't
21 follow the rules? In this case we're going to prove that
22 this corporation over here -- Sam English Grading
23 Company -- represented by Mr. Cox and Ms. Danielle Payne
24 who is seated over there, in this case we're going to show
25 that they didn't abide by the rules and regulations and

1 the signs and therefore they ought to be responsible for
2 the harm they caused when they do that.

3 Now, I want to tell you about this case. I want to
4 tell you about what happened and what y'all are going to
5 hear in the testimony. This is a case, obviously, I've
6 told you that's about the death of his mama and the death
7 of his wife. What happened? Who are you going to hear?

8 A long time prior to August 7, 2009 this Sam English
9 Grading Company had a contract. They had -- the Sam
10 English Grading Company. That's a big grading company.
11 They got big equipment. You're going to see 70,000-pound
12 equipment 41 feet long way up the in the air way taller
13 than me. They had a contract with Owens Corning. I
14 assume most of y'all know where that is.

15 Under that contract they were hauling -- it's been a
16 long-time contract. They were hauling dirt across what's
17 called Redds Branch Road near Owens Corning for the
18 purposes of the land fill operations at Owens Corning.
19 They would haul dirt across using big equipment that
20 you're going to see and back a long time ago Owens Corning
21 and Sam English Grading Company recognized that for the
22 safety of the public traveling in this area they're
23 hauling this dirt across with this big, big equipment and
24 in order to have safety then what they've done, they
25 require Sam English Grading Company as you'll see that

1 they -- and they agreed to it. Everybody agreed that it
2 was needed for safety and Sam English Grading Company
3 agreed to do it.

4 Here's what they agreed to do in this area because it
5 was necessary. They agreed to provide a flagman, maintain
6 road crossing signs, and other road crossing measures to
7 comply with the owner of South Carolina Highway Department
8 Encroachment Permit. Now, that encroachment permit we're
9 referring to which was made a part of every contract for
10 many years which Sam English Grading Company agreed to --
11 the corporation -- required very clear -- you know, my
12 10-year-old son I'm certain -- my 6-year-old
13 stepdaughter -- I meant grandson -- even can read it and
14 see what it requires. This is what Sam English Grading
15 Company and Owens Corning agreed was necessary and needed
16 for safety.

17 They agreed to provide on each side 1,500 feet
18 crossing signs, one flagman ahead, and the other that
19 would be placed that it would be for temporary truck
20 crossing signs. Y'all have seen those -- trucks crossing
21 the highway. They agreed to that and what happened? Sam
22 English Grading Company -- they said it. They agreed to
23 it, but they didn't do it for years. They didn't have any
24 warning signs. They didn't have any flagmen out there
25 even though they knew it was necessary.

1 So even though we're going to have some testimony
2 from Mr. Merritt who is with Owens Corning -- he is going
3 to testify by video and the only time they ever had any
4 signs up there was when Mr. Merritt who come from Ohio.
5 He is the big wig for Owens Corning. Every four or five
6 years he'd come. All of a sudden there would be a flagman
7 out there and there would be the warning signs out there,
8 but other than that the public safety was not even
9 considered, and the worst than that -- worst than that,
10 we're going to prove and the testimony is going to show
11 that not only did they not do what they should have done
12 there, but they created an extremely dangerous situation
13 on top of that.

14 What they did instead of having the flagman out there
15 or warning they had it where they had this big piece of
16 equipment -- I am going to show it to you in just a
17 minute -- called a scraper and what they would do, they'd
18 get a guy sitting on a tractor across the road. We're
19 talking about crossing a paved road -- coming from a dirt
20 road across Redds Branch Road in to the other side which
21 is where the actual land fill was and we know that in that
22 area -- and you're going to hear the testimony --
23 visibility because of big pine trees -- they planted pines
24 out there -- that you cannot see when that big equipment
25 is coming up crossing that road. You can't see 'til

1 you're right up on it.

2 They knew that. That's the reason that Owens Corning
3 and Sam English agreed these flagmen and these signs were
4 needed, and, yet, in this particular case not only did
5 they not have them, they had a situation set up there for
6 a long time. They had a man sitting on a tractor kind of
7 across so you got this big equipment coming this direction
8 and then you got a stop sign. That's the reason I
9 mentioned the stop sign.

10 They had a stop sign that he's supposed to stop at,
11 but that wasn't what they were doing. They had a guy
12 sitting on a tractor, not a flagman, not with a flag, not
13 directing traffic, you know, to stop the public to make it
14 where it is safe. They had this guy on this equipment --
15 this big 70,000-pound tractor. He wouldn't stop at the
16 stop sign. He would run the stop sign and go a cross and
17 this guy sitting on the tractor over there, he's supposed
18 to kind of look to see if someone is coming, you know,
19 sitting on the tractor and if he saw someone coming then
20 he'd, you know, stop. That was the way -- that was the
21 situation that they had set up.

22 What happened January 7 of 2009? Sam English Grading
23 Company was still doing the same thing. They still did
24 not have a flagman, didn't have any advanced warning signs
25 such as flagman ahead that they had on the encroachment

1 permit, and they had this guy sitting -- Mr. Tindel -- and
2 all of this was done now -- I want y'all to understand
3 this from the very get-go. These people -- Mr. Tindel,
4 Mr. Jeffery Lewis, who was operating the pan -- they were
5 doing exactly what they were told. What they thought
6 about what they were doing, I don't know, but they were
7 doing as we all do when you listen in your work -- your
8 boss says do it, you do it. You're on a job. You do it.
9 It's not their fault. They were doing their job, you
10 know, but it was the fault of Sam English Grading Company.

11 What happened on this day? Just like I said the same
12 thing was happening. The man waving him on. He run the
13 stop sign -- no sign, no flag. On this particular day it
14 was a normal day for Michael Valenzuela and his son Mikey.
15 They got up. They just -- you know, I think Mikey is a
16 teenager, sixteen years old at the time. Like mine, you
17 know, mama brought him breakfast in bed. It is a
18 beautiful day. You know, they were -- she was kind of --
19 we're going to hear some testimony about Christie
20 Valenzuela -- kind of a hands-on kind of person --
21 something I never was and never could possibly be.

22 She was a Miss Everything around the house and, you
23 know, doing everything and that day she got -- they are
24 off on a Friday. Both Mr. and Mrs. Valenzuela worked in
25 the school system. You're going to hear testimony about

1 that. That day they were off and so she said -- well, she
2 wanted -- she had the lawnmower they've had and she wanted
3 to get a part for it. I think Mr. Valenzuela told me it
4 was a belt. They were going to ride and get the part and
5 do some house work with the lawnmower and so she asked him
6 -- They have a motorcycle. It is something they enjoy.

7 It is a part of their relationship as husband and
8 wife to enjoy things together, you know, and on this
9 particular day Christie said, well, let's take the
10 motorcycle. Let's go to Lowes and let's get this part --
11 beautiful day, you know, just ride, and so they decided
12 not to go the major routes. They were kind of -- cruise
13 day, go to Lowes the back way. They hadn't been actually
14 down that road, were not aware that this dangerous
15 situation that Mr. Sam English Grading Company had up
16 ahead for them. Not at all aware.

17 So they come around this curve, okay, which we talked
18 about. It is about 525 feet from that curve to the
19 crossing. They come around there not any way aware of how
20 their life was going to change, not any way aware of what
21 they were going to face that day. And what happens? All
22 of a sudden out of that place approximately -- we'll show
23 you -- approximately 38 feet from the intersection comes
24 this big piece of equipment what they call a scraper
25 moving anywhere from -- the testimony is going to be

1 anywhere from 15 to 20 miles an hour 38 feet from the
2 intersection intending to run that stop sign like he
3 always was and Mr. Valenzuela sees him and sees him at
4 38 feet from the intersection which if y'all can figure
5 out that's probably less than two seconds. He's got to
6 make a decision.

7 At approximately 27 feet is before whenever this guy
8 did any kind of braking -- this guy who is Mr. Jeffery
9 Lewis who isn't in the courtroom but he will be, but he
10 sees this. He's got his wife on the back. He's got to
11 react because he's got seconds, literally less than
12 seconds to react and he lays on his back brakes and the
13 bike slides. He -- This man is not even looking at him --
14 Mr. Lewis. Mr. Lewis, obviously, is looking at this guy
15 who is by that time telling him to stop, but
16 Mr. Valenzuela figures he has to react, lays on his
17 brakes -- back brakes -- and then he figures it is coming
18 right out in front of him and he lays it down and,
19 unfortunately, ladies and gentlemen of the jury, his wife
20 went over it and she died as a result of that wreck.

21 Now what Mr. Lewis -- what was he doing during that
22 time? They were kind of coming together like this.
23 Mr. Lewis was intending to run that stop sign. Mr. Lewis
24 never -- he saw Mr. Tindel telling him to stop. He then
25 slams on his brakes. Mr. Tindel at that time -- I mean,

1 Mr. Lewis at that time like I said is very close to the
2 intersection. Mr. Lewis thinks he is going into the road,
3 too, because they're both trying to avoid a situation.

4 Mr. Lewis then throws it to the right and what he is
5 driving -- he is driving a piece of equipment here that it
6 can -- it's an articulated equipment and you'll see it can
7 turn very sharply. As you can see as it did it turns like
8 that. This part is the back. It is 41 feet long. He
9 turned real quickly. He left -- he braked. He left
10 33 feet of skid marks. He did -- he just -- he thought he
11 was going in the road, but what did he do? He runs over
12 the stop sign which he intended to run as we'll show.

13 This is the testimony -- This is how that ended up.
14 As you'll see he wasn't -- he was intending to run the
15 stop sign and instead ran over the stop sign. This is
16 another one -- picture -- as it ended up on the day.
17 We're going to show you all the -- in evidence when all
18 this happened. The bottom line is Mr. Valenzuela had no
19 way of knowing that that big 70,000-pound equipment which
20 would have been seconds to the intersection -- had no way
21 of knowing that it wasn't going to come -- as a matter of
22 fact, there was no way that this piece of equipment could
23 have stopped short of the intersection by just braking.
24 It had to turn in that quick maneuver like I said and run
25 over the stop sign.

1 At 17 miles an hour it intended to run the stop sign
2 and as a result Christie Valenzuela is not with us anymore
3 and that is why we have brought this lawsuit. That is why
4 we have sued Sam English Grading Company. That is why we
5 think they are responsible for what they did. That's
6 going to be y'all's job.

7 Now, y'all probably are wondering, well, then what in
8 the world is Sam English Grading Company going to say
9 about that kind of action that I have presented to you. I
10 really am not sure. I have been in this case for a while,
11 but I am not exactly sure. We'll see, but I do know one
12 thing. I do know that they -- and Mr. Cox as His Honor
13 has told you, he gets to speak. That's Mr. Cox right over
14 there. He gets to speak after me, and, you know, we may
15 can limit this time of this trial. We may can limit the
16 issues in this case if he'll just come forward at the very
17 beginning and answer a couple of questions. If he'll do
18 that, it may shorten the trial.

19 One of those questions is going to be -- it should
20 be -- I would ask Mr. Cox to please answer the question
21 was he required to have a flagman and the warning sign out
22 there that day as shown in this contract which he agreed
23 to and in the encroachment permit which was made a
24 reference and made a part of the contract? Will he say --
25 and I want him to answer. Will he say whether he was

1 required or not? I mean, it's right there in writing, but
2 I want him to answer that question. That way I'll know
3 what to do, you know what I mean? If he does answer that
4 question in the affirmative which I assume he will, then
5 if he had done that -- if Sam English Grading Company had
6 done that they would have had a flagman out there. They
7 would have warned Mr. Valenzuela and Mr. Valenzuela would
8 have stopped and if they had done what they should have
9 done under the safety requirements would this horrible
10 wreck have occurred that cost the life of Mrs. Valenzuela?

11 The second question that I'd like for him to answer
12 is -- and I think it is clear; I don't believe it is in
13 dispute -- is did Mr. Jeffery Lewis in this case as he has
14 before intended to run that stop sign? If he intended to
15 run that stop sign, then if he would have just gone up
16 there and this big equipment and stopped like we're
17 required to do at a stop sign -- Answer the question,
18 Mr. Cox. Would this death have occurred?

19 Those questions being answered, I know one thing they
20 are going to do and I know that they are going to blame
21 Mr. Michael Valenzuela for the death of his wife. They
22 intend to scar him for the rest of his life for this
23 trial. That's what you'll hear. They even know their
24 intentional conduct which I described, they're going to
25 blame Mr. Valenzuela for the seconds that, you know, how

1 he reacted.

2 Now even though I don't believe there is any dispute
3 about this -- even though that they will admit that
4 Mr. Valenzuela through no fault of his own was placed in a
5 situation where he had to react in seconds, they're going
6 to blame him for those seconds. Even though they're not
7 going to say it and I don't believe there is any testimony
8 to that effect and Mr. Cox can certainly, you know,
9 correct me if I say anything wrong, even though he reacted
10 in a timely manner, even though the testimony is going to
11 be I think from all sides that there is no way in the
12 world that he could have known that this big piece of
13 equipment was going to stop and not go into his
14 intersection -- in front of him and his wife. Even though
15 there is no way he could know it, they still are going to
16 blame Mr. Valenzuela. You're going to hear it.

17 Now what are they going to say? They're going to
18 blame Mr. Valenzuela even though they intentionally
19 created this dangerous situation. They're going to say,
20 oh, it didn't get in the road. This equipment never got
21 in the road; so, Mr. Valenzuela, you could have just
22 driven right through. It would have never happened.
23 That's true. I will agree with that. How is he going to
24 know it is coming in the intersection, not coming, I don't
25 know. They're going to say -- they're going to blame him

1 and say, you know, Mr. Valenzuela, even though you had
2 two, you know, seconds to react if you had done a better
3 job of braking, you know, maybe you would have stopped
4 short of the intersection. You're going to hear some
5 testimony about that.

6 They're going to blame him and they're going to say,
7 Mr. Valenzuela -- they're going to blame him and say,
8 Mr. Valenzuela, if you hadn't laid the bike down then it
9 might not have happened even though they will say --
10 admit -- that he laid it down because he was under a
11 life-threatening situation and had to make a decision
12 within seconds. That's going to be their case.

13 Now, we don't think y'all will buy that and not only
14 that, the law is -- and it should be and His Honor is
15 going to be about the law of sudden emergency and that is
16 if you are placed in an emergency situation through no
17 fault of your own just like Mr. Valenzuela and you are
18 required to react quickly, then -- say you did -- could
19 have made a better decision. That's not negligence under
20 the law because in an emergency situation you're doing the
21 best you could with seconds and you may not make the right
22 decision. I believe he made the right decision, but
23 they're going to blame him for his decisions.

24 They also are going to say, okay, Mr. Valenzuela,
25 there is such a thing called comparative negligence.

1 We're suing under negligence and we prove -- just as His
2 Honor told you, we proved they were negligent, careless
3 reckless in doing what they did in violating the safety
4 rules and in violating the safety requirements and
5 violating what they agreed to do and they're responsible.
6 That is definitely negligence.

7 They're going to say, well, you know, this blaming
8 Mr. Valenzuela, he -- you know, we need to take away from
9 his verdict. The law says if you are any part
10 negligent -- let's say he is 5 percent negligent, then it
11 takes away 5 percent of his verdict, of his compensation
12 which we don't believe that he is any bit at fault in this
13 case, nor should there be any comparative negligence.

14 Now, instead of accepting responsibility for their
15 intentional conduct it is hard to believe they're going to
16 blame Mr. Valenzuela, but that's what they're going to do.
17 Mr. Valenzuela, you'll see, did not cause this wreck. He
18 was trying to save the life of his wife. This wreck, this
19 death was caused because Sam English Grading Company
20 intentionally violated the safety rules which are out
21 there -- the safety rules, the regulations, the signs --
22 even though they agreed to it, intentionally running the
23 stop signs, violating these rules which are for all of our
24 safety and what happened? We had a death. That's why
25 y'all are here -- the loss of a mother and the loss of a

1 husband. That's what we're going to prove.

2 Now, I'm going to -- Lisa McPherson -- we feel like
3 that y'all will find him responsible, Sam English Grading
4 Company should be responsible for the intentional conduct,
5 and if they're responsible, then Mikey and Michael
6 Valenzuela are entitled to compensation as His Honor told
7 you of what they caused to them for the rest of their
8 lives and Lisa is going to talk about that as far as how
9 it affected them and what kind -- principal damages that
10 y'all ought to be thinking about. Thank you very much.

11 OPENING STATEMENT

12 MS. MCPHERSON: Ladies and gentlemen, like
13 Mr. Detrick told you when people don't obey simple safety
14 rules designed to keep all of us safe really bad things
15 happen. Sam English set up a dangerous situation and it
16 was just a matter of time. You're going to hear from
17 witness after witness tell you it was a matter of time
18 because of their choices. Choices, decisions to do things
19 a certain way, and not one choice, but choices made one
20 after another day after day, week after week to run that
21 stop sign. It's a fancy way of saying do what you say
22 you're going to do and keep people safe. That's what
23 this---

24 THE COURT: Mrs. McPherson, you're supposed to limit
25 yours to the damages.

1 MS. MCPHERSON: Let me tell you about the person who
2 is not in this courtroom today. It could have been
3 anybody's daughter or sister or wife or mother or best
4 friend, but it was Christie Valenzuela whose son was 16
5 years old when she was killed on Redds Branch Road. He
6 was 16 when his motivator, his hero, his guider, his
7 person that shined light into his world got taken away
8 from him.

9 She's not a piece of paper. She's not a name on a
10 court document. She was full of life and energy and
11 enthusiasm. She was the kind of person that lived her
12 life by the rules. She and the love of her life were
13 married as teenagers. She was just 16 years old. They
14 lived together. They adored each other. They were a
15 team. They have one child and Christie Valenzuela adored
16 both of these men and they adored her.

17 Outside their home was a plaque with their names on
18 it because they were the Valenzuelas. Christie isn't
19 there any more and we believe at the end of this case
20 you're going to say, Sam English Grading Company, that
21 beautiful, wonderful woman, that mother and that wife and
22 that person that nobody can really forget once they knew
23 her, it's your fault and we're holding you responsible
24 because you broke the rules.

25 You know, bad things happen to good people, but this

1 wasn't an illness. It wasn't something that was
2 unavoidable. It was needless and senseless and
3 predictable. How do you put a value on that? You have a
4 tough job, but y'all are the ones with the power to do
5 that to make things right, to put a full value on Christie
6 Valenzuela's life if there is any such thing.

7 Christie was 35 years old when she rode down Redds
8 Branch Road with her husband and that piece of equipment
9 that ran through that stop sign time and time and time
10 again every day headed to the stop sign intending to run
11 through it. She was beautiful and fun and left her
12 husband notes around the house -- Bug, I love you. I'll
13 always love you.

14 They were a team. They were a family that did
15 everything together. Christie had a smile that lit up the
16 room you'll hear from witnesses. She got things done when
17 nobody else could and when she set her mind to something
18 you could count on Christie because that's the way she did
19 things. She followed the rules.

20 She headed out that afternoon. Both of them worked
21 for the school district -- a holiday -- and they were
22 spending time together like they always did because they
23 were a team. Ironically, you'll hear that they took this
24 road that they weren't familiar with because they thought
25 it was safer. They thought it was safer.

1 She died that same afternoon. Her husband couldn't
2 be at her side because he was in the hospital being cared
3 for. She died in the hospital the same afternoon that
4 they set out on that Friday afternoon.

5 Only you at the end of this can say what it feels
6 like to wake up in your bed that you've waked up with the
7 same person since you were 18 or 19 years old and how deep
8 that loneliness runs, how empty that feels, how wrong it
9 feels -- not because she was sick and died, but because
10 people made some really bad choices again and again.

11 Ladies and gentlemen, I don't get to vote. None of
12 us does. You have to bring your life experiences, your
13 common sense to this and this is not on TV. It isn't a
14 trial run. This is about real life, real people, real
15 smiles, a real school that doesn't have Christie there.
16 You're going to hear from her co-workers about what a
17 special person she was and that she was the backbone of
18 this family. She took care of them. She went to work
19 every day. She loved them. She made beautiful jewelry.

20 She played by the rules and she had a bright future
21 with the family. It got taken away by somebody's bad
22 choices this day, that day, the next day. What do they
23 have the audacity to do? To blame her husband.

24 Listen to all the testimony, ladies and gentlemen.
25 There are some people who believe that the loneliness, the

1 emptiness, somebody being taken away from you because they
2 didn't have the respect to do what they were supposed to
3 do, some people think that this case is only worth a
4 million dollars a piece to Michael and to Mikey. Some
5 people think it is worth three to four million apiece for
6 them -- the loneliness, the emptiness, and to address what
7 happened here. Only y'all know that, but I can tell you
8 it is the kind of case -- and you I believe will agree
9 with me after this -- that we have to ask you for a very
10 substantial verdict. To do otherwise would not do justice
11 to that family, to Christie Valenzuela, and to the
12 community.

13 Render a verdict that speaks about what you believe
14 happened here. Render a verdict that makes your community
15 safer and when they point the finger at her husband, ask
16 yourself whether when somebody points a gun in your
17 direction you wait to see if it is loaded, you wait to see
18 if the person is a good shot, or do you duck? Do you take
19 evasive action and in that split second you do everything
20 you can to save your life and the life of the woman that
21 you've loved since you were 18 years old. Thank you very
22 much. If it was needless, if it was preventible, you have
23 your answer. Thank you.

24 THE COURT: You can take them all down.

25 MS. MCPHERSON: Take them all down?

1 THE COURT: Yes, ma'am. They can put up what they
2 want to.

3 Mr. Cox?

4 MR. COX: May it please the court, Your Honor.

5 THE COURT: Yes, sir.

6 OPENING STATEMENT

7 MR. COX: Ladies and gentlemen, let me move a few
8 things out of the way here.

9 Ladies and gentlemen, he stopped. My client stopped
10 the scraper before it went in to Redds Branch Road. He
11 stopped it 8 feet before entering into Redds Branch Road.
12 Ladies and gentlemen, he stopped and because he stopped
13 the vehicle before entering Redds Branch Road he is not
14 liable in this case.

15 Now, I represent Sam English Grading Company. This
16 is Mr. Chris English right here and before I get to
17 Mr. Chris English, I am here with one of my law partners
18 Danielle Payne. We practice out of West Columbia. We
19 represent Sam English Grading Company. Chris English owns
20 -- it is a family company based out of Aiken here in Aiken
21 and he and his mama own the company. It is a family
22 business. They've been in operation since about 1978.
23 Mr. English's father passed away in 2005 and he has taken
24 over the running of the business. They -- Sam English
25 Grading Company operates the Owens Corning landfill which

1 is located off of Redds Branch Road here in Aiken and
2 they've been operating the landfill since 1978 without
3 incident.

4 Now, this is indeed a tragic case. There is no
5 question about that. I don't think for one second anybody
6 questions whether or not we have compassion and sympathy
7 and are upset about what happened and the fact that this
8 is very tragic case.

9 Now, Mrs. Valenzuela's estate has brought a
10 negligence lawsuit against Sam English Grading for the
11 event of August 7, 2009. They're contending my client was
12 negligent in their conduct on that date. However, after
13 hearing the facts of this case the facts will dictate
14 otherwise. You are the judges of the facts and you'll be
15 asked at the end of the case to apply the facts to the law
16 and, ladies and gentlemen, my client was operating their
17 scraper on a private driveway that runs to the Owens
18 Corning landfill. That private driveway crosses over
19 Redds Branch Road onto the continued portion of the
20 private driveway down to a bar pit where they get dirt to
21 go across and to fill the landfill.

22 My client owes -- when you're on a private driveway
23 you owe absolutely no duty to the motoring public on a
24 different road except not to fail to yield the
25 right-of-way and when I say there is no liability in this

1 case, my client -- it is uncontradicted in this case they
2 never failed to yield the right-of-way. They never
3 entered Redds Branch Road. They are at all times located
4 on their private driveway at all times.

5 This is a picture from the accident -- from the time
6 of the accident. That is a picture of my client's scraper
7 wheels still on the private driveway. You hear -- you
8 heard plaintiff's attorney tell you he did not stop for
9 the stop sign. He bent -- that he ran over the stop sign.
10 He bent the stop sign because his nose comes out further
11 than the wheels, but the wheels are still on the private
12 drive. My client's vehicle never left the private
13 driveway and it is uncon -- that is uncontradicted in this
14 case. You're not going to hear one person come and tell
15 you that the vehicle entered Redds Branch Road and you're
16 not going to hear one person come to you and tell you that
17 the scraper -- any portion of it; that long nose or any
18 other portion of it -- came closer than 8 feet from Redds
19 Branch Road.

20 Now, the evidence is also uncontradicted that my
21 client broke no traffic laws of any kind whatsoever.

22 MR. DETRICK: Your Honor, I object to that. Number
23 one, that's not true. It is not appropriate argument.
24 You're the man of the law.

25 THE COURT: That's correct. I will tell you what the

1 law is, ladies and gentlemen.

2 MR. COX: Now -- and the judge will correct you on
3 the law.

4 THE COURT: I won't correct them. I'll instruct
5 them.

6 MR. DETRICK: Not only that, Your Honor, under our
7 previous motions you instructed Mr. Cox not to do what he
8 just did.

9 THE COURT: I understand. Y'all just -- he's -- I'll
10 tell you what the law is. I'll instruct you what the law
11 is. I'll tell you what statutes are applicable to this
12 situation. It will be up to you to determine whether if
13 anyone did or didn't break those laws. Move along.

14 MR. COX: All right. My client was on the private
15 driveway and he never entered Redds Branch Road. Now, you
16 heard the judge talking to you earlier before we got
17 started. We spent a lot of time deliberating and
18 selecting you jurors for the jury and we know one thing
19 for certain -- that you didn't check your common sense at
20 the door when you came in. You all know when you're
21 leaving here today to go home and you're traveling down
22 the road and you're thinking about this case, you're
23 thinking about the opening arguments, and suddenly you see
24 that red light and you think, oh, my goodness, there is a
25 red light, and you stop suddenly. You slam on brakes and

1 you stop and you avoid going out into the other road. You
2 have carried your obligation at that time and you are not
3 responsible if something happens after that. You're not
4 responsible if -- you're entitled to sit back in your car
5 and brush your brow and say, whew, I almost ran that red
6 light but I didn't. I stopped.

7 If somebody overreacts thinking you're coming out,
8 well, they have response -- the drivers on the other road
9 have responsibilities. They have duties the same as the
10 driver on any other road to keep a proper lookout, to
11 maintain a proper control, to go at appropriate speed. In
12 other words, we all have duties as drivers on the roads
13 not to overreact to something going on on a different road
14 and Mr. Valenzuela on August 7, 2009 -- you will hear
15 evidence that he was exceeding the speed limit at the time
16 and we would submit that he was not keeping a proper
17 lookout.

18 He did not maintain control of his vehicle, of his
19 motorcycling. He made decisions and those duties -- as a
20 driver of a motorcycle, those duties are heightened just
21 by common sense. You don't have the metal around you to
22 protect you like you do in a car. When you've got a
23 passenger on your motorcycle---

24 MR. DETRICK: Your Honor, I hate to object again, but
25 that is contrary to the law, and, again, you're the man

1 for the matter of law. The duty is the same.

2 THE COURT: You can argue or you can open in your
3 opening statement about the facts in this case and what
4 they indicate, but I'll instruct them on the law.

5 MR. COX: Instruct them -- Thank you, Your Honor.

6 Mr. Valenzuela made decisions on August 7, 2009 which
7 contributed to this accident. He was speeding. He was
8 operating with a beginner's permit, and he didn't apply
9 his brakes appropriately as you learn as they should be
10 applied. He laid the motorcycle down. Those are
11 decisions that were unnecessary and they represent an
12 extreme overreaction to what was going on on the private
13 drive way.

14 This is a picture of the scene as Mr. Valenzuela was
15 approaching. This is from the day of the accident. There
16 is the start of the skid mark. There is the scraper
17 positioned where it came to a stop. You'll see where the
18 motorcycle finally came to a stop. That is the scene that
19 Mr. Valenzuela approached as he drove down Redds Branch
20 Road.

21 Redds Branch Road is a rural suburban road. Some of
22 you may be familiar with it, but there are residences,
23 houses, churches. There's curves. There's driveways all
24 over Redds Branch Road, and as you come out of that turn
25 it's a straight shot to the stop sign where the Owens

1 Corning plant is down at the end of the road.

2 You'll also hear that there was -- and you can see it
3 in this picture as well -- a waste management truck that
4 was approaching that was waiting to turn left at the time
5 this accident occurred. That's another indicator of I'm
6 coming up on a crossing. I'm coming up on a place where
7 vehicles come in and out of the road, where vehicles turn
8 into the private driveway. There's no reason not to
9 already be on alert that things that happen every day on
10 the roads of South Carolina could be going -- could be
11 going on at that time.

12 Now, you've heard the plaintiffs discuss this
13 contract and this encroachment permit. What they didn't
14 tell you is that this is a private contract between Sam
15 English Grading Company and Owens Corning and it
16 references -- the contract will provide flagmen, maintain
17 road, road crossing signs, and other road crossing safety
18 measures to comply with other South Carolina Highway
19 Department Encroachment Permit. There is no mention of a
20 flagman in the contract and it says a copy of the permit
21 will be supplied by the owner.

22 You'll hear testimony that this encroachment permit
23 referenced -- allegedly referenced in that contract
24 expired over two decades ago. It is not even applicable
25 to the driveway where this accident occurred.

1 Furthermore, this encroachment permit was not provided to
2 Sam English Grading Company. That is a private contract
3 between Owens Corning and Sam English Grading Company and
4 the important part there is that there is no independent
5 legal obligation at a crossing with stop signs to have
6 road crossing signs up or to have a flagman out. There is
7 no state requirement whatsoever to have that and so my
8 clients were not obligated to have road crossing signs out
9 or flagman out.

10 Use your common sense. When is a flagman used? It
11 is when road construction going on and when there's been a
12 lane closure. You don't have a flagman out warning the
13 public that something could be coming out of a road,
14 something could be coming out of a stop sign. That
15 happens everywhere USA. They would have you believe that
16 at every stop light and every stop sign you should have a
17 flagman saying, hey, trucks could be coming through here.
18 Eighteen-wheelers could be coming through here. Cars
19 could be coming through here and stopping traffic. That's
20 just not a requirement. This is a private contract
21 between my client and Owens Corning.

22 The evidence will show in this case that the
23 plaintiff -- You'll hear from accident reconstruction
24 experts who will come in here and they'll tell you --
25 they'll give you the feet, the distance, the stopping

1 time, and all of those things for you to better consider
2 what was appropriate, you know, whether or not appropriate
3 speeds were taking place -- were being used at the time of
4 the accident, but this is a straight shot and there is
5 clear visibility and I ask you, your own common sense,
6 when was the last time you saw flagmen and road crossing
7 signs out in a situation like that?

8 That's everywhere USA and when you're operating your
9 motorcycle with your wife on the motorcycle you should be
10 extra prepared for all conditions, for all potential
11 crossing -- for vehicles coming out of crossings, but the
12 evidence remains uncontradicted in this case that the
13 scraper never entered Redds Branch Road. It stopped
14 before entering the road. It did not fail to yield the
15 right-of-way.

16 My client stopped. He did not violate -- He was on a
17 private driveway at all times. He did not go into Redds
18 Branch Road. He did not fail to yield the right-of-way,
19 and, ladies and gentlemen, we saw the motorcycle
20 approaching. The driver of that scraper stopped that
21 scraper because he saw the motorcycle. He stopped without
22 going into the road and for that we all know that if you
23 do that -- if you're watching for traffic and you don't
24 enter the road and you don't deny the right-of-way, then
25 you can't be liable for an overreaction.

1 There will be a lot of finger pointing in this case
2 and it is going to be a long case and they're going to
3 point to contracts. We all know what contracts are,
4 but this contract is flawed and you'll hear about flaws
5 in this contract in and of itself. There are no --
6 there's no obligation to have -- no obligation to have
7 warning signs, crossing sign, or flagman out for a
8 crossing from a driveway across a state highway in South
9 Carolina.

10 For over two decades my client has been operating
11 this landfill and they make sure that they check for
12 traffic before they cross the road. They have never had
13 one incident. They made sure they got someone on the
14 other side of the road watching for traffic if they're
15 going to come on through. They make sure traffic is
16 clear. They were observing and watching for traffic.
17 They had measures in place to make sure they didn't deny
18 the right-of-way and, ladies and gentlemen, on August 7,
19 2009 the facts remain and your common sense will tell you
20 there is no liability because Sam English Grading Company
21 scraper did not enter Redds Branch Road.

22 We would ask for that -- that you find there is no
23 liability on the defendant in this case and we certainly
24 appreciate your time and your service. Thank you.

25 THE COURT: Do you have a short one? A 30-minute

1 witness?

2 MS. MCPHERSON: The plaintiff calls Mrs. Ann Johnson.

3 ANN C. JOHNSON, after being duly sworn,
4 testified as follows:

5 THE COURT: Mr. Maxwell, how about use this easel so
6 my jurors can see.

7 Yes, sir?

8 THE JUROR: Restroom.

9 THE COURT: Anybody else need the bathroom? We'll
10 sit tight.

11 (Whereupon, two jurors exit the courtroom.)

12 THE COURT: Ladies and gentlemen, normally I make all
13 of my lawyers sit and not get up and walk around.
14 Mr. Detrick is -- I have given him permission to ease
15 around when he needs to.

16 (Whereupon, two jurors return to the courtroom.)

17 DIRECT EXAMINATION

18 BY MS. MCPHERSON:

19 Q Mrs. Johnson, would you please introduce yourself to
20 the jury? Tell them your name and where you live.

21 A My name is Ann C. Johnson and I live at 1066 New
22 Bridge Road.

23 Q I am going to ask you to speak up a little bit. How
24 long have you lived out there?

25 A Twenty-six years.

1 Q Who lives there with you, ma'am?

2 A My husband.

3 Q Now, where is that in relation to Redds Branch Road?

4 A That's probably about four or 5 miles from where I
5 live. The road itself is only probably about 3 miles 'til
6 you -- I go to Redds Branch, but I have to go Redds Branch
7 Road to get to the south side of town and I travel that
8 way sometimes three or four times a day.

9 Q Is that about the same frequency you traveled it
10 before the wreck in August?

11 A Yes.

12 Q Of '09?

13 A Uh-huh.

14 Q Does your husband travel that road?

15 A Yes, he does.

16 Q Do you have children and grandchildren?

17 A I have two children and eight grandchildren and I'm
18 constantly on the road.

19 Q Do your children and grandchildren travel Redds
20 Branch Road?

21 A Yes, they do.

22 Q Do you and your husband belong to a church,
23 Mrs. Johnson?

24 A Yes, Cedar Creek Church; Baptist Church.

25 Q Are you retired or still working?

1 A I am retired.

2 Q What did you do, ma'am, before you retired?

3 A I worked at Security Federal Bank.

4 Q Tell the jury, Mrs. Johnson, whether or not you know
5 where this wreck happened that involved Christie
6 Valenzuela?

7 A Yes, I'm very familiar with it. We travel that way
8 all the time and I had a near miss a couple of days before
9 the accident and I went home and told my husband that
10 somebody was going to lose their life there, but we've
11 always had trouble there --

12 Q Now you said---

13 A -- traveling back and forth. It's a very dangerous
14 location.

15 (Whereupon, a phone rings.)

16 THE COURT: Hold on a second.

17 Miss McDonald's Lady, just make sure your phone is
18 turned off, please, ma'am. Everybody make sure their
19 phone is on silent. Got it? Okay.

20 Q Mrs. Johnson, you said it was a very dangerous
21 location. Tell the jury why it is and why it was before
22 this wreck happened?

23 A Because there's always equipment going back and forth
24 across the road. There's a gate on one side of the road
25 and one side of the road is gravel and a key that I always

1 looked for was the gate being locked. Then I knew there
2 would probably not be any activity, but if the gate was
3 open, you know, dust would, you know -- you could see dust
4 from the right side.

5 Q Let me kind of set the scene if I can. If you're
6 leaving your house and headed down Redds Branch Road where
7 this wreck happened are you able to see the Owens Corning
8 or AGY --

9 A Yes.

10 Q -- plant at the end of that?

11 A Uh-huh.

12 Q And tell the jury what it was that you were concerned
13 about at this very spot.

14 A I was afraid that someone in my family would be
15 killed there, you know, not looking or watching.

16 Q What the you mean? Why do you -- why would you fear
17 for them?

18 A Because of what happened to me. I was traveling to
19 the south side a couple of days before and as I came down
20 the road I was not paying attention to the gate, but just
21 as I got even with the road I saw the dust and I said --
22 you know, you just kind of panic and I looked up in the
23 mirror as I went through and this huge piece of equipment
24 just zoomed across right behind me in the mirror and I was
25 so nervous I could hardly drive on.

1 Q How close did it come to hitting you, Mrs. Johnson?

2 A Very close. I was within seconds of death and I knew
3 it.

4 Q Let me show you what has been marked as Plaintiff's
5 Exhibit No. 18 and 19 and ask you, Mrs. Johnson, whether
6 or not this is the piece of equipment that two or three
7 days before Christie Valenzuela was killed almost hit you?

8 A Yes. It was huge.

9 Q And how did you describe -- what speed was it coming
10 across Redds Branch Road?

11 A It just zoomed across the road. There was no way he
12 could have stopped at that stop sign.

13 Q Whose got the right-of-way through there?

14 A I should have had it, but -- and I did, but had I
15 seen the piece of equipment before I got there I would
16 have applied brakes and he would have been right into me.

17 Q Are you thankful you didn't?

18 A I am. I thank God every day.

19 Q Was it so close that a split second made that much of
20 a difference?

21 A It did. It absolutely did.

22 Q Mrs. Johnson, tell these ladies and gentlemen whether
23 before the wreck and up through the date of the wreck
24 there were ever any warning signs on either side of that
25 crossing warning of trucks or equipment crossing without

1 stopping?

2 A No, there was not.

3 Q Before the wreck and up through the wreck was there
4 ever a sign that said there's a flagman ahead?

5 A There was not.

6 Q Was there ever up until and through the date of the
7 wreck an actual flagman out there?

8 A I never saw anyone there.

9 Q And on the day that this happened, this near-miss
10 that you've described, were any of those things there:
11 Signs or a flagman?

12 A No.

13 Q Were you concerned, Mrs. Johnson -- and you talked to
14 your husband about this?

15 A Oh, yes. I went home and I told him that we need to
16 call our children because they travel that road and warn
17 them because they -- I knew they would not be paying
18 attention -- to be very cautious coming through that area
19 because it was very, very dangerous.

20 Q Before this happened to you were you concerned about
21 the spot of this wreck because of---

22 A Always. We know the road and we knew what happens
23 there and we would see this equipment passing from one
24 side to the other without stopping and the other times
25 we've been far enough away that we could see it and it did

1 not stop.

2 Q Now, this is kind of a country road. Were there
3 houses all along that road, Mrs. Johnson?

4 A Yes.

5 Q Are there schools out in that area?

6 A There is up ahead.

7 Q Do school buses travel that road?

8 A Yes.

9 Q Is it your opinion that on the day Christie
10 Valenzuela and her husband had this wreck that it was a
11 dangerous crossing?

12 MS. PAYNE: Objection, Your Honor.

13 THE COURT: Hold on. Sustained. She can't give
14 opinion testimony.

15 Q How -- how frightened -- how did you react to looking
16 in your mirror and seeing this equipment?

17 A I was so nervous until my legs were just shaking and
18 I was just beside myself, really. It was really hard for
19 me to compose myself and drive on.

20 Q Mrs. Johnson, you're familiar with that particular
21 spot?

22 A Yes, to this day.

23 Q For someone that is not familiar with the road or
24 that crossing, is there anything as they come up on that
25 crossing to warn them to slow down or to be cautious or to

1 be --

2 A No.

3 Q -- extra careful?

4 A No.

5 Q You don't know the Valenzuelas, do you?

6 A I do not.

7 Q Mrs. Johnson, thank you very much.

8 THE COURT: Any questions by the defense?

9 MS. PAYNE: May it please the court..

10 CROSS-EXAMINATION

11 BY MS. PAYNE:

12 Q Mrs. Johnson, do you need water or anything?

13 A No, I'm good.

14 Q How many different types of vehicles go in and out of
15 this intersection?

16 A I can only tell you about the huge trucks and this
17 piece of equipment that I have seen there.

18 Q So are you telling this jury you never seen any dump
19 trucks go in that area?

20 A Oh, yes. It is big trucks --

21 Q Okay.

22 A -- going in and out.

23 Q You've never seen any regular vehicles going in and
24 out of this intersection?

25 A Not that I'm aware of.

1 Q Company trucks?

2 A No. I mean, I don't recall seeing any. I'll put it
3 that way.

4 Q Okay.

5 A It is mainly the huge vehicles.

6 Q Okay. But you've seen dump trucks go in there?

7 A Yes.

8 Q Okay. And you've seen other types of equipment other
9 than what you've just been shown?

10 A Right.

11 Q Okay. Under normal circumstances when you're coming
12 around that curve and you're approaching that intersection
13 you can see the intersection from the curve; isn't that
14 correct?

15 A Not -- Are you talking about the 90-degree curve
16 that's down the road? There's two curves.

17 Q Yes, ma'am. I'm not talking about the 90-degree
18 curve.

19 A Where it comes around --

20 Q Yes, ma'am.

21 A -- where the big tree is?

22 Q Yes, ma'am.

23 A You can see it, but there is debris and foliage there
24 on either side.

25 Q There's trees? There's big trees?

1 A There's trees there and where the gate is there's a
2 lot of trees.

3 Q Okay. But you can see the intersection for the most
4 part?

5 A Yes.

6 Q On August 7, 2009 were you at the scene at the time
7 that Mr. Valenzuela and Mrs. Valenzuela came around that
8 curve?

9 A I was not.

10 Q Do you know on August 7, 2009 whether there was any
11 dust that was created to inhibit Mr. Valenzuela's sight of
12 this piece of equipment?

13 A I could not know that because I wasn't there.

14 Q So you don't know at what point Mr. Valenzuela may or
15 may not have seen this big piece of equipment when he came
16 around that curve?

17 A No, I do not. I wasn't there. I just know what
18 happened to me.

19 Q Yes, ma'am.

20 A And it was a very close call.

21 Q Do you know if there were any signs up on August 7,
22 2009?

23 A I don't recall going through there that day, but if I
24 did -- I never saw any signs there at all until after --

25 Q Okay.

1 A -- the accident.

2 Q And you had lived in this area for 20 years?

3 A Twenty-six.

4 Q Okay. So you got used to the conditions around you?

5 A Yes.

6 Q So you weren't looking for -- specifically for signs;
7 isn't that correct?

8 A Well, there never has been any signs there. I
9 wouldn't think that that day would be any different.

10 Q But you don't know. You can't tell this jury under
11 oath.

12 A No, I can't.

13 Q Okay. And the same question with respect to a
14 flagger, Mrs. Johnson. Do you know if there was a flagger
15 there? Now, I'm not talking about someone in an orange
16 vest.

17 A Are you talking about the day of the accident?

18 Q I'm talking on August 7, 2009---

19 A I don't know.

20 Q Okay. So you cannot testify today to this jury what
21 the conditions were like when Mr. Valenzuela came around
22 that curve and approached the intersection, can you?

23 A I cannot, but I can tell you what it's been like for
24 26 years for me.

25 Q Okay. So during the -- you were in here during the

1 opening statements, weren't you?

2 A Uh-huh.

3 Q Did you hear Mr. Detrick, plaintiff's attorney, tell
4 the jury that there was a person out on a tractor
5 flagging? So you heard that; correct?

6 A That there was a what?

7 MR. DETRICK: I didn't say that.

8 MS. PAYNE: You did say that.

9 THE COURT: Just ask the question.

10 MS. PAYNE: Okay.

11 THE COURT: Do not pit witnesses in opening
12 statement. Ask her what she saw.

13 Q Okay. Did you see a flagger?

14 A A flagger on what day?

15 Q August 7, 2009.

16 A I do not recall because I do not recall what I was
17 doing on August 7 --

18 Q Okay.

19 A -- the day of the accident.

20 Q Yes, ma'am.

21 A That would be hard for me to tell you that.

22 Q Okay. Thank you.

23 A I wished I had that memory, but I don't. Sorry.

24 Q After your incident did you call anyone at Sam
25 English Grading Company to tell them what had happened?

1 A No, I did not. I did not even know -- I went home.
2 We discussed it and we discussed who to call if it would
3 be Owens Corning or if it would be the Highway Patrol
4 Department.

5 Q Okay.

6 A I did not know anything about Sam English.

7 Q Okay. Did your husband call anyone?

8 A No, he did not. We were still debating on who to
9 call when we heard of the accident.

10 Q After you heard about the accident did you call
11 anyone at Owens Corning or Sam English Grading and tell
12 them about what had happened with you?

13 A No, I didn't.

14 Q In fact, the first time that you came forward was
15 when Mrs. McPherson called you; isn't that correct?

16 A No. I think Ronnie knew where -- I go to church with
17 Ronnie.

18 THE COURT: That's Ronnie Maxwell?

19 Q Mr. Maxwell sitting right here?

20 A And he knows where we live and he happened to ask me
21 if I had ever had any problems --

22 Q Okay.

23 A -- and I've had problems. We've had problems ever
24 since we lived there.

25 Q Yes, ma'am. At the time of your incident two to

1 three days do you know if the driver of the pan saw you as
2 you were coming?

3 A I do not.

4 Q Okay. So you don't know what his intent was when he
5 was crossing the road?

6 A All I know is he is zoomed across me --

7 Q Okay.

8 A -- as I was looking up.

9 Q Do you know how fast a pan that weighs like thousands
10 of pounds can go?

11 A I have no clue.

12 Q Okay. Do you know if on August 7, 2009 the pan that
13 we've talked about today ever entered the roadway at this
14 intersection?

15 A That day?

16 Q Yes, ma'am.

17 A Of the day of the accident? I wasn't there. I don't
18 know.

19 Q Okay. No further questions.

20 THE COURT: Anything on redirect?

21 MS. MCPHERSON: No, sir. Thank you, Mrs. Johnson.

22 THE COURT: You may step down. Let's call one more.

23 MS. MCPHERSON: Mrs. Laura Boozer.

24 LAURA BOOZER, after being duly sworn, testified
25 as follows:

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

3 THE WITNESS: My name is Laura Boozer.

4 DIRECT EXAMINATION

5 BY MS. MCPHERSON:

6 Q Mrs. Boozer, tell the jury what you do for a living
7 and where you live, please.

8 A I live on 301 Redds Branch Road about maybe a half a
9 mile, if that, away from the incident and I work for Owens
10 Corning.

11 Q Who do you live on Redds Branch Road with?

12 A Robert Boozer. I call him hubby or you'll hear me
13 say Boozer.

14 Q Hubby or Boozer?

15 A Boozer, yes.

16 Q How long have y'all been married Laura?

17 A Oh, goodness. Geez, '06.

18 Q Married in '06?

19 A Six years, something like that, but I have lived
20 there for nine years.

21 Q Now would you tell the jury about Redds Branch Road?
22 Is it a well traveled road?

23 A Yes, it is. If you go down New Bridge Road you have
24 the New Bridge Polo where you have horse trucks coming up
25 and down the road. You also have schools. You have East

1 Aiken elementary that's going towards 302 and then
2 sometimes the buses come back to Aiken Middle School and
3 then you have -- I think the same districts may be Aiken
4 High.

5 Q So school buses --

6 A Yes.

7 Q -- drive on the road?

8 A Yes.

9 Q You and your husband travel it how often?

10 A A lot because we both work at Owens Corning; so we
11 can go to work and from and if we come home for lunch, you
12 know, up to six times, eight times a day.

13 Q Is that about the same as y'all did back before this
14 wreck happened in August of '09?

15 A Yes.

16 Q All right. If I left the courthouse and went
17 straight out to the fiberglass plant --

18 A Yes.

19 Q -- where would I pickup Redds Branch Road from that
20 point?

21 A When you pass I think Kent's Corner, right after you
22 pass there there is a little road right there. You want
23 to pass that to the very next road. So you would turn
24 left right there. It is some kind of welding shop. You
25 would turn left right there which would be at the end of

1 AGY and at the beginning of Owens Corning.

2 Q So if I am right there at the plant and make a
3 left --

4 A Yes.

5 Q -- where you described I am going to be headed
6 towards your house?

7 A Yes.

8 Q Is that right?

9 A That is correct.

10 Q And I will be headed towards where this wreck
11 happened; is that right?

12 A That is correct.

13 Q Now every time that you get on Redds Branch Road to
14 go to work --

15 A Uh-huh.

16 Q -- now and back before the wreck happened, would you
17 pass this spot where they have the landfill and the
18 crossing?

19 A Yes.

20 Q Now tell the jury whether or not before this wreck
21 happened -- before it happened whether or not you had any
22 concerns for you, your husband, your family about the
23 exact spot where Christie Valenzuela was killed?

24 A Yes. Probably before me and hubby was together and
25 we've had to put on brakes and probably afterwards --

1 after I had -- I drove because we drove different vehicles
2 because we are on different shifts; so there's been--

3 Q All right. I am going to back you up and ask you
4 some specifics.

5 A Okay.

6 Q Tell the jury the first time when you were with your
7 husband, was that before the wreck?

8 A Yes.

9 Q About how long before the wreck did this particular
10 incident happen?

11 A It was probably a little over a month before the
12 wreck.

13 Q So you think maybe some time in July of '09?

14 A Possibly, yes, ma'am.

15 Q All right. Tell them exactly happened, please.

16 A We were leaving home. Let me explain something to
17 you. I call it a little bit different than these guys.
18 On the right hand side when I am leaving going towards
19 Owens Corning you have the landfill and on the left hand
20 is what we call the sludge field. So usually what happens
21 is the pan would come from the landfill and go to the
22 sludge field to pick up dirt or whatever and then they'll
23 cross back over and go back over to the landfill. So,
24 that's the difference. So if you hear me say sludge
25 field, that's on the left-hand side and landfill is on the

1 right-hand side.

2 Q So they were doing work between the left- and the
3 right-hand side?

4 A Exactly; right.

5 Q And they were using various kinds of equipment during
6 the time that you've lived out there?

7 A Yes. They used the pan truck and then they had a
8 tractor and it had a -- like a brush guard on the back so
9 whenever they would take the dirt from one side to the
10 other they would clean the road to keep the dirt from
11 being on the roads.

12 Q Based on what you knew about that location, what
13 would you do as you approached it?

14 A Well, I always look for signs. I didn't look for the
15 open gate. I always did look at the open gate if it was
16 open, but my signs was if I seen a lot of dirt between the
17 sludge field and the land field I would look at the path
18 of the road; so then I knew if there was a lot of dirt on
19 the road I knew just to use caution going across.

20 Q Did your husband take those same precautions?

21 A Yes, ma'am.

22 Q Before this wreck happened and don't tell me what you
23 discussed, but did you and he have conversations about
24 this exact spot on Redds Branch Road?

25 A Yes.

- 1 Q Now let's talk about the time before the wreck.
- 2 A Okay.
- 3 Q It was about a month before; about July of '09.
- 4 A Uh-huh.
- 5 Q Are you leaving your house?
- 6 A Yes, ma'am.
- 7 Q And are you headed toward the fiberglass plant?
- 8 A Yes, ma'am.
- 9 Q Who's driving?
- 10 A He is.
- 11 Q You're in the front passenger seat?
- 12 A Yes, ma'am.
- 13 Q Tell the jury exactly what happened.
- 14 A There is a house right there and we call that the
- 15 pink palace. Owens Corning owns the little house. It is
- 16 around the corner. When you pass the pink palace then you
- 17 can see the road going across, the sludge field and
- 18 landfill. As you come across -- as we come closer to it I
- 19 seen -- you can see that something was coming; so it was
- 20 coming and he slammed on brakes.
- 21 Q Let me ask you whether the something that crossed the
- 22 road causing him to slam on brakes was the piece of
- 23 equipment pictured in Plaintiff's Exhibit No. 18?
- 24 A Yes.
- 25 Q And Number 15?

1 A Uh-huh, yes.

2 Q What do you call that piece of equipment, Laura?

3 A Pan truck.

4 Q Now, you were close enough that it required him to
5 slam on brakes?

6 A He pushed his brakes pretty good. Was there any skid
7 marks? I -- I was cussing.

8 Q You were what?

9 A Cussing.

10 Q Why?

11 A I mean, it kind of makes you mad whenever you think
12 that you're going down the road and somebody -- I mean,
13 when somebody goes to pull out in front of you and you're
14 legal and it upsets you.

15 Q Now when you say you're legal, who has got the
16 right-of-way there like y'all were coming?

17 A We do.

18 Q Based on the speed and the manner in which you saw
19 that pan cross in front of you requiring your husband to
20 slam on brakes, do you believe it stopped at the stop sign
21 as it came up on Redds Branch Road?

22 A No.

23 Q Now, before the wreck, Laura, and up through the date
24 of the wreck were there ever any signs out there that
25 said, Warning, Trucks Entering the Highway or Trucks

1 Crossing Without Stopping?

2 A No.

3 Q Were there ever any signs before then that said there
4 is a flagman ahead?

5 A No.

6 Q Was there ever a flagman up there before this wreck
7 happened?

8 A No.

9 Q Now, let's talk about after the wreck.

10 A Okay.

11 Q You said there was an incident after the wreck --

12 A Yes.

13 Q -- where you had a close call or something happen.
14 Would you tell the jury about that?

15 A Hubby was on his motorcycle and -- I think it was
16 twice. He was on his motorcycle one time and he couldn't
17 believe and -- we were together and he could not believe
18 that they pulled out in front as soon as -- right after
19 Christie got killed.

20 Q Now why do you remember that it was, in fact, after
21 the wreck happened that they did this?

22 A Because you couldn't believe it because, I mean, if
23 you ever go down that road there is a memorial for
24 Christie right there and that's how I know Christie's name
25 is because every day I go by there and her name is on that

1 cross and I'm -- me and hubby both ride bikes; so, you
2 know, we know how it is how people pull out in front of us
3 when you're on bikes.

4 Q Is there anything that you and your husband were
5 doing wrong the day that he had to slam on brakes?

6 A No.

7 Q Why -- what was the sole cause for him having to slam
8 on brakes?

9 A Something coming across the road. It catches your
10 eye.

11 Q And that something was that big yellow pan?

12 A Yes.

13 Q Laura, did you happen to come upon this wreck scene
14 the day it happened?

15 A Yes.

16 Q How did that happen?

17 A I don't remember if I was coming -- I was leaving. I
18 don't know if I was going to work or what was happening.
19 When I went around the corner by the pink palace the cops
20 was right there and they had it blocked off and I could
21 see.

22 MS. PAYNE: Objection, Your Honor.

23 THE COURT: What is your objection?

24 MS. PAYNE: Going into testimony that we discussed in
25 a motion in limine. May I approach?

1 THE COURT: You may, but she is just saying what she
2 saw at the time of the wreck.

3 MS. PAYNE: Yes, sir, and during our pretrial.

4 (Whereupon, a bench conference was held.)

5 Q Laura, because you came up on the wreck scene did you
6 have to turn around and go to other direction?

7 A I did.

8 Q Now you and your husband drove this road all the
9 time; right?

10 A That's correct.

11 Q And you were familiar with this particular spot;
12 true?

13 A That's correct.

14 Q And because you were familiar with it y'all would
15 slow down and be extra careful and watch out for trucks
16 coming in the road, wouldn't you?

17 A Yes.

18 Q Up until and through the date of the wreck was there
19 anything in the world out there on Redds Branch Road that
20 would have warned somebody who wasn't familiar with those
21 things running the road?

22 A No.

23 Q Thank you. That's all I have.

24 THE COURT: Cross.

25 CROSS-EXAMINATION

1 BY MS. PAYNE:

2 Q Mrs. Boozer, what is your position with Owens
3 Corning?

4 A I am a Production Training Specialist. My specialty
5 is in safety.

6 Q Okay. How long have you been with Owens Corning?

7 A Well, I started in '83, left in '96, got hired back
8 in 2002 and currently employed with them.

9 Q How many times did you tell Owens Corning about the
10 problems you were having on Redds Branch Road?

11 A Well, other than if it happened going to the smoking
12 table jabbering right there, but nine times out of ten if
13 something happens by the time you get to your work or
14 whatever it usually slips your mind or something comes up.

15 Q And you were the safety person for Owens Corning?

16 A Only in -- and I said safety champion and that was
17 just for the Owens Corning plant. I do not do
18 environmental or the landfill and that was talking about
19 lock-out, tag-out, confined space working, heights, stuff
20 like that.

21 Q Okay.

22 A That position I've only been for about a year now.

23 Q Okay.

24 A Okay?

25 Q Yes, ma'am. You testified earlier that Redds Branch

- 1 Road is a well-traveled road; is that correct?
- 2 A Yes..
- 3 Q You see garbage trucks on that road?
- 4 A Waste management, yes.
- 5 Q You see dump trucks on that road?
- 6 A Coming from AGY, yes.
- 7 Q Okay. So there are numerous other entities that are
- 8 running in and out of this intersection; isn't that
- 9 correct?
- 10 A That is correct, but I have never had to slam on
- 11 brakes for one of them.
- 12 Q Okay. Do you know if the driver of the pan that you
- 13 were talking about any of these incidents saw you or your
- 14 husband approaching at any point?
- 15 A I don't have a clue what he saw.
- 16 Q Okay. You testified that your husband drives
- 17 motorcycles?
- 18 A Yes.
- 19 Q I'm sure he keeps a proper lookout; is that correct?
- 20 A Yes.
- 21 Q He utilizes proper safety braking techniques?
- 22 A Yes.
- 23 Q Okay. And he stopped before --
- 24 A Yes.
- 25 Q -- having any collision with any piece of equipment

1 at the intersection on Redds Branch Road?

2 A Yes, but like I told you earlier every incident is
3 totally different. You cannot sit there and say that one
4 is going to do the exact same thing. Every situation when
5 you are driving a motorcycle or in a vehicle is totally
6 different.

7 Q And that's a very good point, Mrs. Boozer.

8 A Yes.

9 Q Every situation is different. So you and
10 Mrs. Johnson, your situations were completely different
11 than Mr. Valenzuela; isn't that correct?

12 A Yes, we were in a car.

13 Q Okay. But your husband was on a motorcycle?

14 A That's correct, but---

15 Q He was able to stop?

16 A The situation is totally different.

17 Q No further questions, Your Honor.

18 THE COURT: Anything on redirect?

19 MS. MCPHERSON: No, sir.

20 THE COURT: You may step down.

21 MS. MCPHERSON: Your Honor, may we approach just one
22 minute about the next witness?

23 THE COURT: You may. I said we were going to stop at
24 five, though. You want me to do something different and
25 not be truthful to my jury?

1 (Whereupon, a bench conference was held.)

2 THE COURT: All right. Let's get one more out of the
3 way and I'll give you 10 extra minutes tomorrow. Y'all
4 have been great, except for the phone.

5 Come around, please.

6 MS. MCPHERSON: Mrs. Virginia Gunter.

7 THE COURT: She's already been sworn. You're still
8 under oath, ma'am.

9 THE WITNESS: Yes, sir.

10 VIRGINIA GUNTER, after being previously duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. MCPHERSON:

14 Q Mrs. Gunter, would you tell the jury who you are and
15 where you live, ma'am?

16 A I'm Virginia S. Gunter, married to Floyd D. Gunter
17 and we live right on Redds Branch Road. I don't know the
18 exact distance from where we're talking about but...

19 Q How long have you and Mr. Gunter been married?

20 A This December we will have been married 63 years and
21 in the same house we built and went home to the night we
22 married.

23 Q He is not here with you today. He is not in good
24 health; is that right?

25 A He wouldn't even be able to walk in. No, he is not

1 in good health at all.

2 Q Mrs. Gunter, tell the jury whether or not you know
3 where this wreck happened on August 7 of 2009?

4 A Yes. I do.

5 Q Is it just within about a half a mile of where you
6 and your husband live?

7 A Probably. I'm not very good at distance, but it is
8 right up -- just go right up the road.

9 Q How often, ma'am, do you drive that a week would you
10 say?

11 A Pretty good bit. It depends on, you know, what has
12 to be taken care of.

13 Q And have -- throughout the time you've lived there
14 have y'all always used that road to drive into town or
15 back from town?

16 A Yes.

17 Q How long have you lived out there?

18 A Well, where we lived 63 years, but about 15 years
19 before that I lived down the road with my family before we
20 married.

21 Q You grew up right down there is that right?

22 A Yes.

23 Q Mrs. Gunter, tell the jury whether, in fact, you do
24 know where this wreck happened.

25 A Yes. I do know where it happened.

1 Q Now, do you know the Valenzuelas? Did you know
2 Christie or do you know her son or her husband?

3 A No. I don't.

4 Q Would you tell the jury, Mrs. Gunter, whether before
5 this wreck happened you had any safety concerns about the
6 very spot where she got killed?

7 A Yes, I have had because as some of the others have
8 been saying there is traffic coming in and out and they
9 don't always stop. It's a rare thing for one of them to
10 stop and I have just had to make myself remember, you
11 know, to look and slow down before I get there. I mean, I
12 don't think it is right that I have to do that, but I
13 don't want to get killed there.

14 Q Have you actually seen big pieces of equipment run
15 right across the road across Redds Branch without
16 stopping?

17 A Yes, it is a very usual thing.

18 Q Now let me show you -- You said it is a very usual
19 thing?

20 A It is. It is like they don't think anybody else
21 exists, you know. They'll just go.

22 Q Let me show you the equipment shown in Exhibit No. 15
23 and Number 18. Have you seen equipment like that go
24 across Redds Branch Road without stopping?

25 A Yes, mostly that one on the right.

1 Q The one in Number 18 is the one you've mostly seen go
2 across without stopping?

3 A I think so.

4 Q Mrs. Gunter, have you had to slow down or slam on
5 brakes or anything because that kind of equipment was
6 crossing without stopping?

7 A Yes, I have.

8 Q Now, tell the jury before, up until, and through the
9 date of this wreck were there ever any warning signs of
10 any kind down out there letting people know that this was
11 a dangerous crossing?

12 A I have never seen anything like that. About one or
13 two weeks ago---

14 THE COURT: Hold on.

15 Q I am going to stop you there. Now, up until and
16 through the date of the wreck did you ever see a flagman
17 out there? A man in a vest with a flag.

18 A I have never seen a flagman there.

19 Q What were your concerns even before this wreck,
20 Mrs. Gunter, for your own safety and for your friends or
21 family who were traveling that road?

22 A I've always worried about it because we have three
23 children who are married and have three grandchildren now
24 and one great grandchild. The little great grandchild
25 lives right down -- right past where this place is we're

1 talking about back in there and it's just scary. I mean,
2 it really is. I'm not trying to paint an ugly picture or
3 anything, but we've had a lot of trouble.

4 Q Thank you very much, Mrs. Gunter. I don't have any
5 more questions.

6 MS. PAYNE: No questions, Your Honor. Thank you.

7 THE COURT: Ms. Barbara, I got the pocketbook. You
8 help her down. Boy, you got a lot of stuff in there.

9 THE WITNESS: I can put some more in it.

10 THE COURT: I don't think so. I don't know that you
11 can get any more in there.

12 THE WITNESS: I'm so bad at laying my keys down so I
13 hang on to them. Thank you. I'm telling you, I'm getting
14 the treatment. I really am. Thank you.

15 THE COURT: All right. We're going to start at 9:45.
16 Mr. Whittle will get up early in the morning and fix
17 biscuits and sausage. You'll have that and some hot
18 coffee for you. I can't let you bring it out here in the
19 courtroom; so if you want to partake, please come early
20 and we'll start right at 9:45. I got a 9:30 status
21 conference real quick.

22 I have enjoyed being with y'all today. Y'all paid
23 great attention. We'll start back in the morning and keep
24 going. Please don't discuss the case tonight. Do not let
25 anybody discuss it with you. Have a very pleasant

1 evening.

2 What do you do with the badge, Mr. Whittle? Take it
3 up now?

4 THE BAILIFF: They can take them and wear them back
5 in the morning.

6 THE COURT: All right. Everybody else remain seated.
7 My jurors are excused for the evening.

8 Thank you very much once again.

9 (Whereupon, the jury exited the courtroom at 5:08.)

10 THE COURT: All right. Is there anything by the
11 plaintiff for the record before we break for the evening?

12 MR. DETRICK: No, sir. Nothing from the plaintiff.

13 THE COURT: Ma'am?

14 MS. PAYNE: Are you ready for the defendants?

15 THE COURT: I am. I said Ma'am.

16 MS. PAYNE: I jumped up a little early. I'm sorry.

17 THE COURT: Don't knock over the water.

18 MS. PAYNE: They shouldn't put it in front of me.

19 Your Honor, I was disturbed by one thing that
20 Mr. Detrick said when we had an off-the-record
21 conversation. My understanding when I cross-examined
22 Mrs. Johnson I asked her if there was any signs out on
23 August 7, 2009. She said, no, but they had put out signs
24 after that. I don't believe that that opens the door. I
25 just wanted to make sure since he said that and I just

1 wanted to clarify.

2 THE COURT: Signs is one thing. Whether they
3 allegedly ran the stop sign --

4 MS. PAYNE: Yes, sir.

5 THE COURT: -- is another thing. That's not remedial
6 measures.

7 MS. PAYNE: Yes, sir. We understand that.

8 THE COURT: That's continued conduct.

9 MS. PAYNE: And the other concern that I had is they
10 designated portions of deposition transcript and just for
11 purposes of planning for Mr. English's working tomorrow
12 they have asked for all of our employees basically that
13 work out there to be here at 9:30 in the morning. I just
14 want to know -- I'll relate it back to the deposition
15 transcript in a second, Your Honor. I just want to know
16 if they are planning on calling them tomorrow and or if
17 they're going to use the deposition designations.

18 THE COURT: I think that's certainly an appropriate
19 request.

20 Mr. Detrick, if you would just give her a guestimate
21 so they don't have to shut down out there of who you're
22 going to need and at what time. If we have to call
23 somebody out of order we will.

24 MR. DETRICK: Your Honor, I don't need Mr. Lawton.

25 MS. PAYNE: You don't need him at all?

1 MR. DETRICK: Well, probably not, but just don't --
2 unless I tell you.

3 MS. PAYNE: So the rest need to be here at 9:30?

4 THE COURT: Anybody else? You going to call one -- I
5 mean, I'm going to stay out of it.

6 MS. PAYNE: Yeah.

7 MR. DETRICK: Your Honor, I probably some time during
8 the day will need the rest of them, I think.

9 THE COURT: Hold on. Y'all discuss that and reach an
10 agreement between the two of you.

11 MS. PAYNE: The only reason I wanted to ask you
12 on the record is because I do have some objections
13 to the admissibility of the designations that they
14 have if they're going to call them, then it's not
15 relevant.

16 THE COURT: Well have to deal with that tomorrow when
17 it comes.

18 MS. PAYNE: Okay.

19 MR. DETRICK: I would request that she submit to me
20 her objections. I have not had them; so I don't know what
21 objection she has.

22 THE COURT: Y'all discuss that. Just comply with the
23 rules is all I ask.

24 MS. PAYNE: Yes, sir. Thank you.

25

1 (Whereupon, the proceedings were concluded for the
2 day and were reconvened on August 28, 2012 as
3 follows:)

4 THE COURT: Anything for the plaintiff before we
5 start?

6 MS. MCPHERSON: There will be, I know. Mr. Detrick
7 is going to address it.

8 THE COURT: Anything for the defendant?

9 MR. COX: Your Honor, I do have---

10 THE COURT: Hold on. Hold on.

11 (Whereupon, Mr. Detrick enters the courtroom.)

12 THE COURT: All right, Mr. Detrick. You're going to
13 get fined -- Let's see. No, you're not late.

14 MR. DETRICK: That's what I was getting ready to say.

15 THE COURT: I'm trying to get some extra money for
16 lunch.

17 Mr. Detrick, anything for the record before we start?

18 MR. DETRICK: No, sir. We do have some matters that
19 we wanted to bring to the court's attention that we need
20 to take up before lunch.

21 THE COURT: When?

22 MR. DETRICK: Before lunch --

23 THE COURT: All right.

24 MR. DETRICK: -- because it is deposition
25 designations.

1 THE COURT: That's fine. We can do that at the
2 break. I don't want to keep the jury waiting.

3 MR. DETRICK: That's fine. I just wanted to make --
4 because my staff is going to have to work on it during
5 lunch break.

6 THE COURT: Mr. Cox?

7 MR. COX: Your Honor, I recognize this is a sensitive
8 matter, I understand, in this request, but out of an
9 abundance of fairness, Your Honor, I'm recognizing that --
10 Mr. Valenzuela and his son are sitting right under the
11 jury box, right within arm's length of the jury box.

12 THE COURT: I don't see any other chairs.

13 MR. COX: Well, Judge, I would ask if the plaintiffs
14 would mind moving their materials down or maybe swapping
15 places so that they're not so under their nose. I'm
16 certainly not implying that they're doing anything---

17 THE COURT: They're not doing anything wrong. I have
18 been watching them the whole time. Y'all are fine. When
19 we have the lunch break then move the boxes. I am not
20 going to do that right this second.

21 Anything else?

22 MR. DETRICK: Your Honor, I see our first witness is
23 not present.

24 THE COURT: Who is it?

25 MR. COX: Judge McLaurin who used to be a highway

1 patrolman who investigated the wreck.

2 THE COURT: See if you see him out there.

3 MR. DETRICK: His name is James McLaurin.

4 THE COURT: All right. While we're looking, who's
5 got a strong back? Mr. Few? Let me put you to good use
6 this morning. Move those boxes and let them slide down.
7 Don't let Mr. Maxwell. He might hurt himself.

8 MR. MAXWELL: I appreciate the recommendation, Your
9 Honor.

10 MR. DETRICK: Before we start she brought to my
11 attention this is one of the witnesses they were going to
12 ask the question about whether they violated the law.
13 That was a part of your motions in limine you hadn't ruled
14 on yet.

15 THE COURT: I'm the judge of the law; so nobody can
16 tell the jury what is law is. Just don't go into that.
17 When he gets through you can put a proffer up, but I'm not
18 going to allow that.

19 MR. DETRICK: If he is not here in 10 minutes, we'll
20 make some adjustments Your Honor.

21 THE COURT: All right, sir. I am going to step back
22 in my office.

23 (Whereupon, a break was taken.).

24 THE COURT: Mr. Detrick, are you ready?

25 MR. DETRICK: Yes, sir. I am changing my plans a

1 little bit, but we're all right.

2 (Whereupon, Court's Exhibit Nos. 1 & 2 were marked
3 for identification only.)

4 (Whereupon, the jury came into open court at
5 approximately 9:57.)

6 THE COURT: Good morning. Were your biscuits good?
7 I'll get you some fruit tomorrow. You'll be on a good
8 diet tomorrow. Did y'all select a foreperson? You forgot
9 to do that? That's \$100 fine. We'll do it at the first
10 break. Just remind me to ask you to do it.

11 Now, one juror yesterday mentioned that a note pad
12 might be helpful and this could be a couple-of-days trial,
13 two or three days, three or four days; so I have
14 allowed -- everybody should have a note pad in their chair
15 and go ahead and put your name on the top of it.

16 Here's the rules on the notes. When we take breaks
17 for either the morning break or for lunch, please just
18 turn them over and leave them in your chair. We can't
19 take them back in the jury room until we're complete with
20 everything. At the end of the day we'll collect them and
21 they'll be locked and given back to you tomorrow.

22 You know, when I was in school I used to sit next to
23 a girl who was a great note-taker so I didn't take notes.
24 I relied on hers. Some people take better notes than
25 other people. Just be receptive to everybody's ideas when

1 you're sharing notes and all. That's just a good way to
2 help jog your memory as we go through it. We're going to
3 move right along.

4 Mr. Detrick, you may call your next witness.

5 MR. DETRICK: I would call Jeffery Lewis.

6 JEFFERY D. LEWIS, after being duly sworn,
7 testified as follows:

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

10 THE WITNESS: Jeffery Dwayne Lewis.

11 DIRECT EXAMINATION

12 BY MR. DETRICK:

13 Q Mr. Lewis, give us your full name, please, sir.

14 A Jeffery Dwayne Lewis.

15 Q I believe you are an equipment operator; correct?

16 A Yes, sir.

17 THE COURT: Hold on one second.

18 Ma'am, can you see? On the very end.

19 THE JUROR: Yes.

20 MR. DETRICK: Oh, I'm sorry. Am I in your way?

21 THE COURT: Do you need to have the machine moved
22 back or are you okay?

23 THE JUROR: I am okay.

24 THE COURT: Everybody okay?

25 Q Mr. Lewis, in 2009 who did you work for?

- 1 A I worked for Sam English Grading.
- 2 Q Talk up a little bit for me if you don't mind.
- 3 A I worked for Sam English Grading.
- 4 Q And how long did you worked with them?
- 5 A Off and on for about six years.
- 6 Q Six years?
- 7 A Yes, sir.
- 8 Q How long before 2009?
- 9 A Probably about three.
- 10 Q Three years?
- 11 A Yeah.
- 12 Q And your boss and the person you listened to giving
- 13 you instructions everyday was Mr. Chris English; correct?
- 14 A Yes, sir.
- 15 Q Okay. And when Mr. English told you how to operate
- 16 that equipment, you listened to him?
- 17 A Yes, sir.
- 18 Q Y'all talked about how to operate it, didn't you?
- 19 A Yes, sir.
- 20 Q And every day that you operated it it was according
- 21 to his instructions; correct?
- 22 A Yes, sir.
- 23 Q He is the boss?
- 24 A Yes, sir.
- 25 Q All right. Why don't you tell the jury if you don't

1 mind a little bit about what your job was with Sam English
2 Grading Company before August 7, 2009.

3 A It was just like any other job. It is go there and
4 try to make a living.

5 Q Sir, I'm sorry. I've got bad ears.

6 A Well, it is like any other job; just go there and do
7 your job and try to make a living.

8 Q Absolutely. I understand.

9 A Yes, sir.

10 Q And in your living, can you explain to the jury --
11 I'm a lawyer and I show up and do certain things every
12 day. What did you show up and do when you were trying to
13 make a living with Sam English Grading Company?

14 A I came there, checked my equipment out, made sure
15 everything was ready to go, and then I started moving
16 dirt.

17 Q And kind of you were -- I know that the jury has
18 heard in opening statements about this scraper. Is that
19 what you call it?

20 A I call it a pan.

21 Q You call it a pan? Isn't it the same thing?

22 A Yes, sir.

23 Q But that's what you were operating; correct?

24 A Yes, sir.

25 Q That was your job. That's what you did for Sam

1 English Grading Company was operate a pan; correct?

2 A Yes, sir, and that and more.

3 Q Sir?

4 A That and more.

5 Q Okay. Is that your main job?

6 A No, sir.

7 Q All right. What was your -- just tell me about your
8 employment then. I might have misunderstood you.

9 A Well, I run backhoes, dozers, trackhoes. I run it
10 all.

11 Q You run it all?

12 A Yes, sir.

13 Q Okay. And you've had a lot of experience with that?

14 A Yes, sir.

15 Q This particular day we're talking about like you said
16 a pan; correct?

17 A Yes, sir.

18 Q How about tell -- that, of course, is what's already
19 been marked as Plaintiff's Exhibit No. 18; correct?

20 A Yes, sir.

21 Q That's what you were operating?

22 A Yes, sir.

23 Q Now if you don't mind kind of tell the jury a little
24 bit about the operation of this pan -- how it operates,
25 how it turns and that kind of stuff.

1 A Well, it is all ran by hydraulics and what it does is
2 it picks up dirt and moves it from one place to another.

3 Q And how large is this -- big, isn't it?

4 A I couldn't tell you how large it was, but it's big.

5 Q It's big. And it can haul a large amount of dirt;
6 correct?

7 A Yes, sir.

8 Q And that's what you would do -- how -- describe to
9 the jury how you get the dirt into the pan and then, you
10 know, haul it to wherever you want to all it?

11 A Well it got a belt on it that puts the dirt into the
12 pan. I drops it down on the ground and move along and it
13 articulates and puts its in the pan.

14 THE COURT: Hold on a second. Please have a seat.
15 Don't let anybody else in. You know the rules,
16 Mr. Bailiff.

17 THE BAILIFF: Yes, sir.

18 THE COURT: I'm sorry, Mr. Detrick. Go ahead.

19 Q You were describing the operation of the pan,
20 Mr. Lewis.

21 A Okay, yes. What it does is it picks up the dirt from
22 one spot. It loads its up on the chain and puts its in
23 the back bowl and then I pick up and I go to where to dump
24 at.

25 Q Okay. And this machinery, you said something about

1 it's hydraulically, I believe -- did you use the word
2 articulate? Or is that my word?

3 A Yes, sir.

4 Q It does?

5 A Yes, sir.

6 Q Kind of tell the jury what you mean by that. How
7 does this thing turn at the front and the back and that
8 kind of stuff?

9 A The cylinder -- what it does is it turns the front
10 end. The back end just basically follows.

11 Q Okay. And as far as -- is it kind of like in two
12 sections?

13 A Nah, it's -- well, yeah. The front end is like
14 sitting on the tires. That's where the motor and stuff is
15 and the back part is the pan where all of the dirt and
16 stuff goes.

17 Q Okay. It might be better if you kind of describe it
18 using this exhibit here, Mr. Lewis. Can you see that?

19 A Yes, sir.

20 Q I'll tell you what. If you need something to point
21 with, that right there is a pointer believe it or not.

22 A Yes, sir.

23 Q If you need it. You just you know how to work it? I
24 don't.

25 A I don't either.

1 Q There you go. There it is right there. Push that
2 part. All right. Now, kind of, if you need to, tell them
3 how it works.

4 A Okay. That's the front end right there and that's
5 the back end where the dirt goes. The front end, it
6 goes -- it can turn left or right almost all the way
7 around almost and how it is sitting now, that's me
8 turning -- getting ready to turn around.

9 Q Sure. As far as the operation of this pan, the front
10 end you can really turn it real pretty quick; correct?

11 A Yes, sir.

12 Q In other words, you can be going along headed
13 straight and if you want to make a quick turn to the left
14 or to the right that thing will turn just right like that;
15 correct?

16 A It won't just turn just right like that, but it will
17 turn pretty quick.

18 Q It'll turn pretty quick?

19 A Yes, sir.

20 Q All right. And it's got brakes on it; correct?

21 A Yes, sir.

22 Q All right. Now, you were working out on the job for
23 Sam English Grading Company prior to August 7, 2009 at
24 Redds Branch Road; right?

25 A Yes, sir.

1 Q Okay. And if you would, how long had you been
2 working at this particular location?

3 A This location? I worked that location just about
4 every day.

5 Q About every day. How many months or years?

6 A I couldn't really tell you, but just about every day.
7 It was mostly our main concern was out there.

8 Q Sir?

9 A Mostly our main concern was out there at that dump
10 site.

11 Q Okay. And you said you were there, I believe -- what
12 did you tell me? Three years?

13 A Yes, sir.

14 Q Were you pretty much out there every day during those
15 three years?

16 A Pretty much, just about every day.

17 Q Pretty much. And doing the same job?

18 A No, not doing the same job.

19 Q All right. Well, then let's talk about the job as
20 far as moving dirt from the bar pit I think is what y'all
21 call it to the landfill at Owens Corning. That's what
22 y'all were doing; correct?

23 A Yes, sir.

24 Q Tell the jury about that job.

25 A Well, that job -- I go to across the road to the

1 other side to get the dirt to bring back to cover up the
2 fiberglass.

3 Q And you would cross -- you would go on this public
4 road -- I mean, private road like Mr. Cox was taking
5 about; right?

6 A Yes, sir.

7 Q And you would cross Redds Branch Road which is a road
8 that the public travels on; correct?

9 A Yes, sir.

10 Q Okay. And you would cross there to go over to haul
11 -- to dump the dirt after you got it from the borrow pit;
12 correct?

13 A Yes, sir.

14 Q And then you dump it and spread it around or someone
15 else do that? How does that work?

16 A Well, basically, the pan will spread it itself.

17 Q Okay. All right. And you're hauling a large volume
18 of dirt doing that. I mean, that's the best way to get
19 that dirt; right?

20 A Yes, sir.

21 Q I don't know how many thousands. Fifty thousand
22 pounds?

23 A I couldn't tell you. It was like a yard and a half,
24 I think.

25 Q I don't know yards. My yard -- I don't know.

1 A Yes, sir.

2 Q It is a large amount of dirt; correct?

3 A Yes, sir.

4 Q And then you dump it and you go across and then you
5 dump it and you go back in and get another load. That was
6 your job; correct?

7 A Yes, sir.

8 Q Okay. And at this location where you were during all
9 this period of time during the three years you were doing
10 that on a regular basis was there a stop sign at the area
11 where you would cross Redds Branch Road?

12 A Yes, sir.

13 Q There was a stop sign there, wasn't it?

14 A Yes, sir.

15 Q And it was a regular -- I mean, we're talking -- it
16 was a regular one like you would see that the Highway
17 Department would put up; correct?

18 A Yes, sir.

19 Q No difference?

20 A Yes, sir; no difference.

21 Q All right. Let's get into a little bit. We know
22 there was a stop sign there; correct?

23 A Yes, sir.

24 Q And now what about -- Mr. Lewis, you were here. You
25 heard the testimony. You know the issues. We'll kind --

1 I'm talking about now we're gonna -- now what we're going
2 to do is we'll go before August 7 so that the jury will
3 understand what happened before -- what was there -- and
4 then we'll get to the wreck; okay?

5 A All right.

6 Q Now before August 7, 2009 did you have any -- any
7 what I call them advanced warning signs, construction or
8 flagmen ahead? Were any of those signs there?

9 A Yes, sir.

10 Q They were there?

11 A Yes, sir.

12 Q You are still sticking by that testimony?

13 A Yes, sir.

14 Q Okay. Let's describe, if you would, were they there
15 -- You worked there for three years. Were they there
16 every day when you went to work?

17 A When I was there for three years.

18 Q Yes, sir.

19 A Well, we didn't have to put them up every day because
20 we wasn't hauling back and forth across the road every
21 day.

22 Q Okay. If you were hauling, if you were crossing with
23 that big pan, would they -- would those advanced warnings
24 be up every day?

25 A Yes, sir.

1 Q And just tell the jury now where they were located.

2 A One was located on the left side down the road and
3 the other one was located on the right side down the road.

4 Q And what -- How far down the road?

5 A I don't know how far down the road, but they was down
6 the road so you could see them before you get to where I
7 was at.

8 Q All right. Tell the jury what they said.

9 A I think one of them said construction ahead.

10 Q Flag -- I'm sorry?

11 A One of them said construction ahead and I don't know
12 what the other one said. I forget what the other one
13 said.

14 Q In your deposition didn't you testify that one of
15 them said flagman ahead?

16 A I don't remember.

17 Q Do you want me to show you?

18 A Yes, sir, you can show me.

19 MR. DETRICK: Lynn, if you'd put up 34 and line 2,
20 please.

21 This is what you testified to in your deposition, is
22 it not? About the signs.

23 (Whereupon, the video portion begins.)

24 MR. COX: Objection Your Honor.

25 (Whereupon, the video portion ends.)

1 THE COURT: What is your objection?

2 MR. COX: He is going beyond the scope of the
3 question that was asked which Mr. Lewis asked to see his
4 deposition response to.

5 THE COURT: Okay. You need to put anything else up?

6 MR. DETRICK: Yes, sir. He showed where they were
7 located. Supposedly located.

8 THE COURT: I'll allow it. Go ahead, ma'am.

9 (Whereupon, the video portion begins.)

10 MR. COX: Objection, Your Honor.

11 THE COURT: Hold on a second.

12 MR. DETRICK: That's good enough.

13 THE COURT: That's good enough. Move along.

14 (Whereupon, the video portion ends.)

15 Q Now, Mr. Lewis, you're under oath today before the
16 Judge and this court and this jury. You still want --
17 that's going to be your testimony? They were up every
18 day. When you went to work these signs were up when y'all
19 were crossing that road?

20 A Yes, sir.

21 Q That's still your testimony?

22 A Yes, sir.

23 Q And those signs you're talking about that supposedly
24 were up, one of them you said was a big flagman ahead
25 sign; right?

1 A Yes, sir.

2 Q And it was that big?

3 A It is as wide as I can open up my hands.

4 Q It is the big signs we see on the road --

5 A Yes, sir.

6 Q -- warning the public when construction is happening
7 ahead just like that right?

8 A Yes, sir.

9 Q And the other sign you said was something like truck
10 crossing or equipment crossing or something like that;
11 correct?

12 A No; road work ahead.

13 Q I'm sorry.

14 A Road work ahead.

15 Q Road work ahead. Okay. In other words, a big ol'
16 sign like that?

17 A Yes, sir.

18 Q It is your testimony that was up?

19 A Yes, sir.

20 Q Every day?

21 A Yes, sir.

22 Q All right. And, of course, you're testifying and you
23 knew as an equipment operator that the reason you want
24 those signs up is to warn the public that y'all are
25 crossing that road on this big piece of equipment;

1 correct?

2 A Yes, sir.

3 Q In other words, you want them to know so that they
4 can recognize that there is some danger up ahead if
5 they---

6 MR. COX: Objection, Your Honor.

7 THE COURT: Hold on. What is the objection?

8 MR. COX: He's testified that the signs were not his
9 job and he is not responsible for the signs.

10 THE COURT: Overruled. He can ask him whatever
11 questions that are relevant in this courtroom --

12 MR. COX: Thank you, Your Honor.

13 THE COURT: -- to this lawsuit. He can lead because
14 he is associated with the adverse party.

15 Move along, Mr. Detrick.

16 Q Mr. Lewis, those signs were up there and you as an
17 equipment operator recognized they were up so that the
18 public would be warned that this big equipment is coming
19 across Redds Branch Road?

20 A Yes, sir.

21 Q That way when they're warned of that, then they could
22 heed that. They could slow down. They could be looking.
23 They could be whatever because you had warned them that
24 there is a possibility of some danger up ahead; correct?

25 A Yes, sir.

1 Q And that's your testimony that that -- Is it your
2 testimony that was needed at that time so that this would
3 not be a dangerous crossing to the public on Redds Branch
4 Road; correct?

5 A Yes, sir.

6 Q And now the flagman ahead sign, obviously, the
7 flagman ahead was put up according to your testimony every
8 day because there is a flagman ahead; correct?

9 A Yes, sir.

10 Q All right. So, let's get into that -- your testimony
11 about the flagman. Now, Mr. Lewis, prior to August 7,
12 2009 and all the days which you were operating that
13 equipment on Redds Branch Road is it your testimony that
14 there was a flagman out there directing the traffic for
15 the public on Redds Branch Road?

16 A There was a flagman out there.

17 Q There was a -- your testimony -- you said a flagman
18 every day?

19 A Yes, sir.

20 Q And you're okay -- Well, Let's go into a little
21 detail about this flagman. This flagman, did he have a
22 flag?

23 A I'm thinking he did, but I'm not really sure.

24 Q Mr. Lewis---

25 A I think so.

1 Q Sir, I'm sorry?

2 A I think so; yes, sir.

3 Q As a matter of fact, in your testimony under oath
4 when we took your deposition there wasn't any question in
5 your mind on numerous times when I asked you about whether
6 there was a flagman there, was there?

7 A Yes, sir.

8 Q And now you've gotten a little bit of hesitation all
9 of a sudden in this courtroom. Why is that?

10 A Because I'm trying to think back. It's been three
11 years.

12 Q We took your testimony earlier right afterwards?

13 A Yes, sir.

14 Q As a matter of fact, Mr. Lewis, you -- not only did I
15 take your testimony, but MAIT Team -- you talked to them
16 right afterwards, didn't you?

17 A I talked to them the next day.

18 Q And you didn't tell them that there was any flagman
19 out there, did you? Not with a flag.

20 A No, I think I did tell them there was a flagman out
21 there.

22 Q Did you say there was a flagman with a flag,
23 Mr. Lewis?

24 A I don't remember what I told them, but I thought I
25 told them it was a flagman out there.

1 Q All right. And so it is your testimony -- now this
2 flagman -- you testified in your deposition you described
3 that flag and that flagman and the stick and the whole --
4 everything, didn't you?

5 A Yes, sir.

6 Q What did you say in your deposition about what kind
7 of flag there was out there that the flagman had?

8 A He had an orange flag with a wooden stick on it.

9 Q Sir?

10 A An orange flag that had a wooden stick leading down
11 to the end of it.

12 Q And he had that out there and I think you testified
13 in the deposition that he was doing it like this, didn't
14 you?

15 A No, I don't think I told you he was waving it, but he
16 was giving me the okay to come across the road with it.

17 Q All right. Well let's -- I understand what you're
18 saying as far as you -- there is a flagman ahead. Let's
19 make sure. I want to know your testimony. The flagman
20 ahead that you say that was out there --

21 A Yes, sir.

22 Q -- that had a warning sign out there according to
23 your testimony, quote, that flagman out there was for
24 directing the traffic of the public that's riding down
25 that road.

1 A Yes, if I was coming across the road he was supposed
2 to stop me.

3 Q He was going to stop the traffic; right?

4 A Yes, sir.

5 Q He was going to do like we always see -- according to
6 your testimony he was going to do like we always see when
7 we come up on -- as we're driving down the road and we
8 come up on first the signs and then the flagman and the
9 flagman is there to stop the traffic on the public road;
10 correct?

11 A Yes, sir.

12 Q That's what you're going to testify to that every day
13 when you worked every day you crossed that Redds Branch
14 Road with that dirt, with that big ol' pan, your testimony
15 is going to be to this court and jury that that was the
16 way that flagman was out there; correct?

17 A Yes, sir, unless no traffic wasn't coming. Then he
18 would look and just give me the okay to come across the
19 road.

20 Q He didn't have no traffic to stop if there wasn't no
21 traffic coming. Is that what you're saying?

22 A Yes, sir.

23 Q That makes sense?

24 A Yes, sir.

25 Q If there was traffic out there, though, he would stop

1 and he would actually -- you test -- he would actually
2 wave that flag that you described to stop the traffic,
3 wouldn't he?

4 A No. All he had to do is just put his hand up and
5 hold the traffic.

6 Q No, sir. You said he had a flag?

7 A Yeah, he had a flag.

8 Q Did he stop the traffic with that flag?

9 A He had the flag to stop the traffic so they could see
10 the yellow -- well, the orange flag. They could see to
11 stop; so they could see him.

12 Q I don't want to have to go through all of this again,
13 but let's make sure you understand. I want to make sure
14 you're testifying truthfully what you remember.

15 A Yes, sir.

16 Q That flag -- you previously testified in your
17 deposition that he used that flag and he used it to stop
18 the traveling public on Redds Branch Road when you were
19 crossing in that piece of equipment. Isn't that your
20 testimony?

21 A Yes, but it's not -- he didn't have to wave it. It
22 was there so they can know he's there to stop traffic.

23 Q All right. Okay. Let's make sure we understand. I
24 want you to tell the jury now whenever someone like
25 Mrs. Johnson would be riding down the road, okay, and

1 she's coming along and you are getting ready to cross,
2 show the jury -- you say you got a flag. I want you to
3 show the jury what your testimony is that that so-called
4 flagman did to stop Mrs. Johnson or anybody else who may
5 be on the traveling public?

6 A He would hold the flag up and hold his hand like that
7 right there to stop traffic.

8 Q Okay.

9 A That's how he did it.

10 Q And where would he get located?

11 A He would be located in the road.

12 Q Get in the road?

13 A Yes, sir.

14 Q In other words, he would get in the road so there
15 wasn't -- I mean, there isn't any way that they they're
16 going to see that man -- that man in the road with the
17 flag stopping; right?

18 A Yes, sir.

19 Q They're not going to run over him?

20 A No, sir.

21 Q It is just like a regular flagman?

22 A Yes, sir.

23 Q Okay. And that flagman now that you're talking about
24 we had prior to January -- prior to August 7, 2009 that
25 flagman according -- that flagman was Mr. Tindel?

1 A Yes, sir.

2 MR. DETRICK: Stand up Mr. Tindel, please, sir.

3 (Whereupon, audience member stands.)

4 Q And you're telling us -- this jury -- that Mr. Tindel
5 was out there with a flag every day?

6 A Yes, sir.

7 Q Stopping the public; correct?

8 A Yes, sir.

9 Q That's your testimony under oath?

10 A Yes, sir.

11 Q All right. With a big orange flag?

12 A Well, it wasn't no big orange flag, but it was an
13 orange flag.

14 Q Well, it's ---

15 A It was approximately about yay wide.

16 Q Okay. It's orange and it's big enough to indicate to
17 someone who is traveling the road to stop?

18 A Yes, sir.

19 Q And the reason that you needed a flagman out there
20 was because -- and with that flag to stop the traffic --
21 because if you didn't do that it was dangerous to the
22 traveling public such as Mrs. Johnson and Mrs. Gunter,
23 wasn't it?

24 A Yes, sir.

25 Q Okay. And your testimony is that was there every

1 day?

2 A Yes, sir.

3 Q All right. Let's go through a little bit what y'all
4 were doing now. On a regular basis every day -- let me
5 ask you this. That flagman -- before I get into this,
6 first off, that flagman who is supposedly out who you said
7 should have been out there, he worked for Mr. Chris
8 English, too, didn't he?

9 A Yes, sir.

10 Q He did his job just like you said you were doing
11 yours; right?

12 A Yes, sir.

13 Q Just listening to orders from the boss?

14 A Yes, sir.

15 Q Okay. And now as far as what y'all were doing across
16 this road with the flagman, I guess, according to your
17 testimony, you had a stop sign out there, didn't you?

18 A Yes.

19 Q And that stop sign wasn't -- that stop sign was
20 sitting straight up. It wasn't in -- up against, wasn't
21 it?

22 A Yes, sir. I hit the flag -- I mean, the stop sign.

23 Q All right. You knocked the stop sign?

24 A Yes, sir.

25 Q We'll get into that, but, anyway, you had a stop sign

1 right there at Redds Branch Road; correct?

2 A Yes, sir.

3 Q And Mr. Sam English had instructed you that when you
4 had Mr. Tindel across the road there that you could run
5 the stop sign, didn't you?

6 A No, sir.

7 Q Are you telling me your testimony is that you didn't
8 run the stop signs?

9 A No, sir. That's not my testimony. I would run the
10 stop sign, but I was coming up to a stop. If I got the
11 okay from the flagman that the road was straight to come
12 across, I went on across.

13 Q Without stopping?

14 A Without stopping.

15 Q In other words, you didn't stop at the stop sign?

16 A No, sir.

17 Q Okay. Is there anything -- I mean, I have a little
18 bit of difficulty with that. Did anything you know of
19 that allows you as a heavy equipment operator for Sam --
20 for Mr. Chris English to not stop at that stop sign?

21 A No, sir.

22 Q You're supposed to stop at the stop sign, aren't you?

23 A Yes, sir.

24 Q And the reason you're supposed to stop at the stop
25 sign is because if you don't stop at the stop sign then,

1 again, the traveling public has got some danger if

2 Mr. Tindel didn't see them; correct?

3 A Yes, sir.

4 Q And so we can be clear before I get into what
5 happened on August 7, 2009, y'all did what you should have
6 done. Mr. English had given you the right instructions
7 and that is to have -- like you said, a flagman out there
8 all the time?

9 A Yes, sir.

10 Q There is no danger to the public out there under
11 those circumstances, is there?

12 A No, sir.

13 Q You had a flagman out there?

14 A Yes, sir.

15 Q Correct?

16 A Yes, sir.

17 Q And you're not going to have anybody that's going to
18 get seriously injured or killed, are you?

19 A No, sir.

20 Q And as far as the stop sign, you know, it would have
21 certainly lessened the danger to the public if Mr. English
22 over there had not instructed you not to stop at the stop
23 sign?

24 A He didn't instruct me not to stop at the stop sign.

25 Q He told you not to stop at the stop sign, didn't he?

1 A No. I could have stopped at the stop sign.

2 Q Okay. But he had it set up where you weren't --
3 where you didn't -- as a matter of fact, Mr. English
4 himself -- you saw him operating that equipment and the
5 same thing you were operating and he would go up there and
6 not stop at the stop sign, wouldn't he?

7 A Yes, sir.

8 Q Okay. Did you ever know -- I know you wouldn't
9 probably. I just ask the question just to be safe so that
10 the jury will understand and know. Did you ever know that
11 Mr. English had actually -- not only was it safe like you
12 talked about and what was needed out there, did you know
13 that Mr. English had agreed to have a flagman out there?
14 Did he ever tell you that?

15 A No, sir.

16 Q Never told y'all that?

17 A Huh-uh.

18 Q Okay. Did you ever know that not only did he agree
19 to have the flagman out there, but under contract and even
20 though you said it was safe that the safe thing to do for
21 the traveling public such as Mrs. Johnson that actually
22 put in where you're supposed to have the warning signs;
23 correct? Did you know that?

24 A No, sir.

25 Q You didn't know that he had agreed to that, did you?

1 A No, sir.

2 Q You didn't know that he and Owens Corning had already
3 gotten together years back and determined that that was
4 needed?

5 A No, sir.

6 Q But you knew it was needed just like you said. I
7 mean --

8 A Yeah.

9 Q -- we don't need a contract. It was obvious to a
10 good common sense that that was needed for safety on this
11 crossing; correct?

12 A Yes, sir.

13 Q All right. Mr. Lewis, let's get into August 7, 2009.

14 A Yes, sir.

15 Q I'm sure you remember that day. Mr. Lewis, we
16 recognize that you're sorry you were put in the position
17 you were in, aren't you?

18 A Yes, sir.

19 Q You wouldn't have done anything yourself to do what's
20 the result of what happened that day --

21 A Yes, sir.

22 Q -- would you?

23 A No, sir.

24 Q And you were just following orders, weren't you?

25 A Yes, sir.

1 Q Mr. Lewis, that morning you were doing the same
2 things; right?

3 A Yes, sir.

4 Q You were hauling dirt across Redds Branch Road;
5 correct?

6 A Yes, sir.

7 Q And your testimony that -- again, I guess your
8 testimony is that Mr. Tindel -- I keep saying his name
9 wrong. I'm sorry.

10 A I call him Ronnie.

11 Q But he was out there with his flag flagging traffic
12 that morning has been your testimony before. I assume it
13 is still?

14 A Yes, sir.

15 Q Had that same flag we're talking about?

16 A Yes, sir.

17 Q Had that same flag you're talking about that was
18 stopping the public going down Redds Branch Road; correct?

19 A Yes, sir.

20 Q This is all before this happened on the morning of
21 August 7, 2009?

22 A Yes, sir.

23 Q Correct?

24 A Yes, sir.

25 Q And there were people -- this is a fairly well-driven

- 1 road; correct?
- 2 A Yes, sir.
- 3 Q And as there are schools around?
- 4 A Yes, sir.
- 5 Q There are churches around?
- 6 A Yes, sir.
- 7 Q There are buses around. There are cars traveling
- 8 regularly; correct?
- 9 A Yes, sir.
- 10 Q There are motorcycles. Did you see them? All of
- 11 these driving; right?
- 12 A Yes, sir.
- 13 Q And that's the reason you had the flagman out there?
- 14 A Yes, sir.
- 15 Q Correct?
- 16 A Yes, sir.
- 17 Q And on this day it is your testimony that Mr. Tindel
- 18 was out there with his flag stopping the traffic?
- 19 A Yes, sir.
- 20 Q All right. And now, Mr. Lewis, let's go through --
- 21 that is up until the unfortunate tragedy occurred;
- 22 correct?
- 23 A Yes, sir.
- 24 Q Let's go through what happened.
- 25 A Yes, sir.

1 Q Now, my understanding is --

2 A All right.

3 Q -- let me just go through it -- that Mr. Tindel had
4 -- you were coming along; correct?

5 A Yes, sir. I was coming up to a slow speed getting
6 ready to stop.

7 Q I'm sorry. I couldn't hear you.

8 A I was coming up to the stop sign at a slow speed just
9 in case I had to stop.

10 Q All right. Well, let's back it up a little bit.

11 A Yes, sir.

12 Q Okay. You were coming along and so the jury will
13 understand there is some -- you're coming from the
14 direction of Mr. Valenzuela there are pine trees that
15 obscure his vision; correct?

16 A Yes, sir.

17 Q And then you get closer to the intersection. I think
18 there is about 30 feet back when you get closer that that
19 is whenever he can see you; correct? Somewhere in that
20 neighborhood?

21 A Yes, something like that.

22 Q Okay. And until then he's not able to see you;
23 correct?

24 A No, sir.

25 Q And this day -- and my understanding -- you were

1 coming down like you normally did?

2 A Yes, sir.

3 Q Correct?

4 A Yes, sir.

5 Q And Mr. Tindel had flagged you across with the flag?

6 A Yes, sir. I got the okay to come on.

7 Q Did he flag you across with the flag?

8 A Well, he had his -- telling me to come on like this
9 right here.

10 Q You already testified Mr. Lewis that he was out there
11 directing traffic with the flag.

12 A Yes, sir. He was right there.

13 Q Did you direct you across with the flag?

14 A He was telling me to come on. I really don't
15 remember, but he was telling me to come on across.

16 Q He had the flag in his hand?

17 A Yes, sir.

18 Q So I assume he was using the flag?

19 A Well, he was using the flag or his hand. I don't
20 really remember. I think he was using his hand telling me
21 to come on.

22 Q All right, sir. We can approach this of what
23 happened on this day.

24 A Yes, sir.

25 Q You were coming along --

1 A Uh-huh.

2 Q -- and your front end of that pan scraper --

3 A Yes, sir.

4 Q -- had about cleared that part of the woods that come
5 out -- the 30 feet we're talking about; correct?

6 A Yes, sir.

7 Q You had already gotten within 30 feet of the
8 intersection; correct?

9 A Yes, sir.

10 Q And at that point in time is whenever according to
11 your testimony Mr. Tindel directed you with the flag or
12 the hand or whatever to come on across; right?

13 A Yes.

14 Q And that meant to you that there wasn't any traffic
15 coming; correct?

16 A That's right.

17 Q And that meant to you that you didn't have to stop at
18 the stop sign. You could go on through; correct?

19 A That's right.

20 Q And in your mind -- and I understand -- that since
21 there is no traffic then it would be safe --

22 A To come on across.

23 Q -- for you to go on through?

24 A Yes, sir.

25 Q Even though you should stop at the stop sign?

- 1 A Yes, sir.
- 2 Q But you weren't going to stop at the stop sign?
- 3 A No, sir.
- 4 Q All right. You were coming along about 30 feet away
5 and then after that all of a sudden Mr. Tindel changed his
6 mind, didn't he?
- 7 A Yes, sir. He told me to stop.
- 8 Q He said stop?
- 9 A Yes, sir.
- 10 Q But during that period of time you're still
11 approaching the intersection?
- 12 A Yes, sir.
- 13 Q Correct?
- 14 A Yes, sir.
- 15 Q You're getting closer from 30 feet to whatever feet;
16 correct?
- 17 A Yes, sir.
- 18 Q And then he tells you to stop?
- 19 A Yes, sir.
- 20 Q And you -- you don't know why really. You just know
21 you're supposed to stop; right?
- 22 A Yes, sir.
- 23 Q Correct?
- 24 A Yes, sir.
- 25 Q And at that point in time you had still gotten closer

1 to the intersection. Did you do anything to look to see
2 what he was talking about?

3 A Yes, sir.

4 Q What did you do?

5 A I glanced to my left and I seen the motorcycle; so I
6 hit the brakes hard.

7 Q So you glanced to your left. You are still moving
8 forward?

9 A Yes, sir.

10 Q And then you saw the motorcycle?

11 A Yes, sir.

12 Q Now Mr. -- when you hit the brakes and turned real
13 sharp to the right; is that correct?

14 A Yes, sir, so he could see that he could come on
15 through.

16 Q And when you did that you saw -- you thought you were
17 getting ready to go into the road, didn't you?

18 A No, sir. I know that I could stop it before I got
19 into the road, but I turned the wheel before, you know
20 what I'm saying, because the nose stick out a little bit.
21 I turned the wheel before so he can know he can come on
22 through.

23 Q Is that what you told the MAIT Team?

24 A Sir?

25 Q Is that what you told the MAIT them?

- 1 A Yes, sir.
- 2 Q You didn't tell the MAIT them that you were just
- 3 about to get in the road whenever you made your turn?
- 4 A When I was coming up, yes, I was getting ready to
- 5 cross the road. That's what I told them.
- 6 Q About to get in the road?
- 7 A Yea, I was getting ready to go across the road.
- 8 Q You were about -- you were close enough before you
- 9 made -- before you put on your brakes and before you made
- 10 that sharp turn to the right you were about to get in that
- 11 road; correct?
- 12 A Yes, I was getting ready to go across the road.
- 13 Q Okay. And Mr. Valenzuela who is driving down the
- 14 road here minding his own business with his wife Christie
- 15 on the back --
- 16 A Yes, sir.
- 17 Q -- you were coming along and there ain't no way in
- 18 the world he could know you were going to turn right and
- 19 put on your brakes and not get in the road, is it?
- 20 A Yes, sir.
- 21 Q That's correct, isn't it?
- 22 A That's correct.
- 23 Q And you -- he had to react. He had to do something.
- 24 He had to react, didn't he?
- 25 A Yes, sir.

1 Q And he reacted and, unfortunately, he laid his bike
2 down, didn't he?

3 A Yes, sir.

4 Q And you saw his wife go over it?

5 A Yes, sir. And I was off the equipment.

6 Q And you were placed in that position, were you not,
7 Mr. Lewis --

8 A In that same position.

9 Q -- where you were coming up on the road and had to
10 make that sharp turn the right --

11 A Yes, sir.

12 Q -- because you weren't going to stop at the stop sign
13 because Mr. English said that was what you ought to do?

14 A Yes, sir.

15 Q Isn't that right?

16 A Yes, sir.

17 Q In other words, the instructions of Mr. English --
18 you were placed in -- Mr. Valenzuela, unfortunately, was
19 placed in the position where he had to react in seconds;
20 correct?

21 A Yes, sir.

22 Q As a matter of fact, you turned and you were so close
23 you knocked -- went over the stop sign, didn't you?

24 A Yes, sir.

25 Q This is -- we're referring to Exhibit 15; correct?

1 A Yes, sir.

2 Q That's how your vehicle -- that's where that pan
3 ended up afterwards, isn't it?

4 A Yes, sir.

5 Q And again on Exhibit 18?

6 A Yes, sir.

7 Q Correct?

8 A Yes, sir.

9 Q You run over the stop sign?

10 A Yes, sir.

11 MR. DETRICK: We offer these into evidence, Your
12 Honor.

13 THE COURT: I think they're without objection.
14 No objection?

15 MR. COX: No objection.

16 (Whereupon, Plaintiff's Exhibit No. 15 & 18 were
17 admitted into evidence.)

18 Q As a matter of fact, Mr. Lewis, if you had been
19 Mr. Valenzuela -- I think you testified to this -- if you
20 had been on that bike you would have laid it down,
21 wouldn't you?

22 A Yes, sir.

23 Q Mr. Valenzuela, not only -- I mean, I'm sorry.
24 Mr. Lewis, after that happened you were upset, weren't
25 you?

1 A Yes, sir.

2 Q You didn't like being placed in that position, did
3 you?

4 A No, sir.

5 Q Now, let's go back and I just want to make sure the
6 jury understands the totality of the dangerousness of this
7 situation. Now, not only would you cross -- you weren't
8 loaded when you crossed that time, were you?

9 A No, sir. I wasn't loaded.

10 Q So in other words, you can go a lot faster?

11 A Yes, sir.

12 Q A lot faster; right?

13 A Yes, sir.

14 Q Okay. And if you're coming back when you're loaded
15 on the other side going back across loaded it takes a lot
16 longer, doesn't it?

17 A Yes, sir.

18 Q As a matter of fact, when you're there going that way
19 you need a flagman even worse, don't you?

20 A Yes, sir.

21 Q Because it takes longer?

22 A Yes, sir.

23 Q And if you don't have a flagman going that way it is
24 real dangerous, isn't it?

25 A Yes, sir. It takes me a lot longer to get back

1 across the road.

2 Q Now you -- I don't know whether you were in the
3 courtroom yesterday or not, but were you the one driving
4 the pan -- and I think you testified you were driving the
5 pan three years before; correct?

6 A Yes, sir.

7 Q Okay. And, obviously, then something happened to
8 Mrs. Johnson. Then you were the person operating that pan
9 at this time; correct? A couple of days before?

10 A What are you talking about now?

11 Q Excuse me. That's not a very good question. I
12 apologize. Did -- within two or three days before you,
13 obviously, were the one that was operating that pan across
14 Redds Branch Road; correct?

15 A Yes, sir.

16 Q Mr. Lewis, did you -- do you remember almost hitting
17 a lady that came right -- you came right behind her?

18 A No, sir.

19 Q You don't remember that?

20 A No, sir.

21 Q Do you deny it?

22 A No, sir.

23 Q You don't deny it?

24 A No, I don't deny it, but I don't remember almost
25 hitting nobody.

1 Q Okay. As far as you're concerned if Mr. English --
2 in your operating of equipment, you're concerned. You
3 don't want to hurt nobody; right?

4 A Exactly.

5 Q And Mr. English had the flagman out there like you
6 said he did and this particular day he had a flagman
7 according to your testimony?

8 A Yes, sir.

9 Q When you gave -- Let me just ask you this. Let me
10 just ask you this. I want to make sure I understand.
11 When you took this deposition -- it talks about the same
12 thing about having a flagman out there and having the
13 warning signs out there and directing the public with the
14 flag, you told that same story in the deposition, didn't
15 you?

16 A Yes, sir.

17 Q Under oath at that time?

18 A Yes, sir.

19 Q And Mr. English was there when you took that
20 deposition, wasn't he?

21 A Yes, sir.

22 Q He was sitting right there. And as a matter of fact,
23 did you come in there with him?

24 A No, he wasn't in there with me.

25 Q Okay. Did you talk with him -- did he know you were

1 going to give that story?

2 A No, sir.

3 Q Huh? Are you sure?

4 A Positive.

5 Q Okay. You went in under oath and has anything been
6 said to you, Mr. Lewis, by -- Mr. English says then,
7 Mr. Lewis, that ain't the way I remember it. You might
8 not should have told that that way. Did he say anything
9 to you like that?

10 A No, sir.

11 Q All right, sir. Now, as far as before and after
12 August 7, 2009 and even that day you were crossing that
13 road -- would it be an estimate you would give --
14 approximately 50 times a day?

15 A Fifty or more.

16 Q Fifty or more?

17 A Yes, sir, because I go back across it all day long.

18 Q Doing the same thing?

19 A Yes, sir.

20 Q Same way?

21 A Yes, sir.

22 Q Okay. And the same flagman out there?

23 A Yes, sir.

24 Q Supposedly. Now, like I was getting ready to say, in
25 the event that -- You didn't want nobody hurt and wouldn't

1 you rather -- all the time just like you've testified to,
2 wouldn't you feel better in not endangering the public,
3 not endangering Mrs. Johnson, not endangering Mrs. Gunter?
4 Wouldn't you rather Mr. English done this all the time
5 what he agreed to do and have a flagman out there?

6 A Yes, sir.

7 Q You would like to have had that, wouldn't you?

8 A Yes, sir.

9 Q It put you in a bad position when he don't do it,
10 doesn't it?

11 A Uh-huh.

12 Q That's all I have at this time.

13 THE COURT: Mr. Cox?

14 MR. COX: If it please the court, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. COX:

17 Q Mr. Lewis?

18 A Yes, sir.

19 Q How are you, sir?

20 A I'm doing fine. How are you?

21 Q Doing good. Doing good. Do you have experience
22 prior to working with Sam English Grading of driving pans
23 like this?

24 A Yes, sir.

25 Q And about how many years experience do you have?

- 1 A I probably got about 16 years in it now.
- 2 Q Okay. And so that would be if you were working for
- 3 Mr. English on and off for three years --
- 4 A Yes, sir.
- 5 Q -- before this accident?
- 6 A Yes, sir.
- 7 Q What, 10 years prior to that you had operated pans?
- 8 A Yes, sir.
- 9 Q Okay. So you knew how to operate them independent of
- 10 working with Mr. English?
- 11 A Yes, sir.
- 12 Q Okay. Now, what was your job with Sam English
- 13 Grading?
- 14 A Well, basically, like I said, I did it all.
- 15 Q Okay.
- 16 A It wasn't one specific job. We did it all.
- 17 Q Okay. But and you testified in your deposition signs
- 18 were not your job. Is that accurate?
- 19 A Yes, sir.
- 20 Q Okay. And your testimony, you don't know who was
- 21 responsible for putting up signs; is that right?
- 22 A That's right.
- 23 Q Okay. And this particular job of crossing the road
- 24 to build the burm that you were operating in August of
- 25 2009 y'all had been doing that job for just a couple of

1 weeks, hadn't you?

2 A Yes.

3 Q So you hadn't been on the job long?

4 A No, sir.

5 Q Okay. And you never said that the signs were up on
6 the day August 7, 2009 when the accident happened, did
7 you?

8 A No, sir.

9 Q Okay. In fact, they were not up on that day, were
10 they?

11 A No, sir.

12 Q Okay. Now, who -- and you've test -- who was your
13 flagman on August 7, 2009?

14 A I don't know his whole name, but I call him Danny.

15 Q Danny?

16 A Yeah.

17 Q Is it the gentleman in the blue back there that stood
18 up earlier?

19 A Yes, sir.

20 Q That's Johnny Tindel?

21 A Oh, yeah.

22 Q Is that right?

23 A Yes, sir.

24 Q But you call him Danny?

25 A Yes, sir.

1 Q And that was typically your flagger when you were
2 doing this job; correct?

3 A Yes, sir.

4 Q Okay. And Danny -- Mr. Tindel -- was not always
5 present when you were crossing the road, was he?

6 A No, sir.

7 Q Okay. There were times when he was not there in his
8 spot; is that right?

9 A That's right.

10 Q Okay. And on those occasions what would you do
11 before crossing the road?

12 A I would make a complete stop, look both ways, and
13 make sure it was clear for me to go across.

14 Q Okay. And then it takes a while to build up speed to
15 get that thing across the road, doesn't it?

16 A Yes.

17 Q Okay. So just to be clear, when Mr. Tindel, your
18 flagger, was not there across the road you would come to a
19 complete stop at the stop sign?

20 A Yes, sir.

21 Q Okay. And you're not testifying today that
22 Mr. Tindel, your flagger, was always there. I mean, there
23 were times when he was not there; is that right?

24 A Yes, sir.

25 Q Okay. Now, did you ever have any problems seeing

1 Mr. Johnny Tindel when he would flag you over?

2 A No, sir. He was straight ahead of me.

3 Q Okay. He was straight ahead of you. Did you ever
4 have any problems observing him and seeing what kind of
5 motion he was giving you?

6 A No, sir.

7 Q You were always able to interpret whether he was
8 saying stop or go?

9 A Yes, sir.

10 Q Okay. And on August 7, 2009 did you interpret his
11 signals accurately?

12 A Yes, sir.

13 Q Did you have any problem seeing Johnny Tindel on
14 August 7, 2009?

15 A No, sir.

16 Q Okay. When he told you to stop you noticed he was
17 telling you to stop?

18 A Yes, sir.

19 Q And did you stop when he told you to stop?

20 A Yes.

21 Q And did you stop without going into Redds Branch
22 Road?

23 A Yes, sir.

24 Q Okay. Now, let's talk about you've been doing this
25 job for a couple of weeks of building the burm --

1 A Yes, sir.

2 Q -- across Redds Branch Road; correct?

3 A Yes, sir.

4 Q Prior to August 7, 2009; is that correct?

5 A Yes, sir.

6 Q Okay. And you crossed the road many, many times a
7 day; is that right?

8 A Yes, sir.

9 Q All right. Tell us -- tell us what you would do each
10 time you crossed the road.

11 A Each time I crossed the road if Danny wasn't there to
12 flag me across I had to make a complete stop and look both
13 ways and proceed across the road and I crossed the road
14 and go over there and get the load and come back across
15 the same way.

16 Q Okay. And if Mr. Tindel was there what would you do?

17 A I would come, get it down to almost a stop, and if he
18 didn't tell me to come across I stopped. If he told me to
19 come on across, I came on across.

20 Q Okay. And Mr. Tindel -- what was he doing to
21 indicate to you to come across or not? What was his job?

22 A Well, when he told me to come on across he would be
23 already looking while I'm coming up to see if any traffic
24 is coming and if there is no traffic is not coming he'll
25 motion for me to come on across.

1 Q Okay. So Mr. Tindel was there to watch for traffic
2 on Redds Branch Road; is that right?

3 A Yes, sir.

4 Q And if traffic was coming he'd tell you to stop?

5 A Yes, sir.

6 Q And if traffic wasn't coming he'd motion you on
7 through?

8 A Yes, sir.

9 Q Okay. But at all times approaching that stop sign
10 were you prepared to stop every time?

11 A Yes, sir. I was getting down to a low enough speed I
12 could stop.

13 Q Okay. And would you -- even at times when Mr. Tindel
14 would motion to you across, would you also look
15 independently?

16 A Yes, sir. I was always looking across just in case
17 because I was down there on a curve.

18 Q Okay. So you got Mr. Tindel watching for traffic and
19 you got yourself watching for traffic; is that right?

20 A Yes, sir.

21 Q Did you ever have any instances where you pulled out
22 into Redds Branch Road in front of traffic?

23 A No, sir.

24 Q And is that because Mr. Tindel was watching traffic
25 for you and you were watching for traffic?

1 A Yes, sir.

2 Q When you're driving the streets of South Carolina
3 roads do you normally have somebody else watching for
4 traffic for you or are you normally the only one?

5 A I'm the only one.

6 Q Now, Mr. Tindel -- Excuse me, Mr. Lewis.

7 A Yes, sir.

8 Q When you would -- this is -- this private drive --
9 this is Owens Corning's private drive down to the
10 landfill; is that right?

11 A Yes, sir.

12 Q Okay. And this private drive, it comes around and it
13 turns. It is a dirt road. It comes around a turn and
14 then it approaches Redds Branch Road?

15 A Yes, sir.

16 Q And do you ever -- How fast do you drive on that dirt
17 road?

18 A I really can't tell you because it ain't got no speed
19 number on it.

20 THE COURT: Repeat what you said.

21 THE WITNESS: I really can't tell you. It doesn't
22 have a speeding number on it.

23 Q There is no speed limit on that road?

24 A Speedometer.

25 Q Oh, okay. There is no speedometer. Is there a speed

1 limit on the driveway?

2 A I don't think so.

3 Q Okay. Now, is there -- Do trucks and other equipment
4 come in and out of that driveway?

5 A Yes, sir. We have trucks coming in and out all day.

6 Q Okay. Let me ask you about that. What companies
7 have trucks coming in and out of the Owens Corning drive
8 -- landfill driveway?

9 A Owens Corning. They come in there with a truck and
10 waste management comes in there with trucks.

11 Q Is there also another company that drives a red truck
12 that goes in and out of there?

13 A I think that's Owens Corning's truck, too. It is a
14 red one and every now and then you have a back truck
15 coming in there and dumping sludge or something.

16 Q Okay. And these are big dump trucks?

17 A Yes, sir.

18 Q And there is a lot of activity with regards to dump
19 trucks going in and out of that landfill, aren't there?

20 A Yes, sir.

21 Q Okay. It is continuous all day, isn't it?

22 A Yes, sir.

23 Q And that's---

24 A Until around about 5 o'clock.

25 Q Okay. And that's irrespective of whether you're

1 building a burm or not. Every day that landfill is in
2 operation, isn't it?

3 A Yes, sir.

4 Q And there are garbage trucks and there are dump
5 trucks coming in and out of that landfill every day,
6 aren't there?

7 A Yes, sir.

8 Q Okay. And the garbage trucks are not Sam English
9 Grading trucks, are they?

10 A No, sir.

11 Q They're Waste Management?

12 A Yes, sir.

13 Q And the dump trucks are not -- some of them aren't
14 Sam English Grading's, are they? Is that right?

15 A No, sir.

16 Q They are Owens Corning's trucks?

17 A Yes, sir.

18 Q Now so when you're approaching Redds Branch Road from
19 the landfill are you looking out for those trucks that are
20 also driving on the driveway?

21 A Yes, sir.

22 Q Okay. Do you keep a fairly low speed driving down
23 that road at all times?

24 A Yes, sir, I have to.

25 Q Okay. So you never get up to a high speed. One,

1 does the scraper -- How fast does a scraper go? Do you
2 even know?

3 A Maybe around about 35, 40, something like that.

4 Q And do you ever get up past 25 miles per hour coming
5 down the driveway?

6 A No, sir, I can't.

7 Q Okay. And let's talk about August 7, 2009 when you
8 were -- you came from the landfill and you were
9 approaching -- you came around the curve of the driveway
10 and you were approaching Redds Branch Road and you
11 testified earlier that you were -- you were approaching
12 and you were slowing down preparing to stop; is that
13 right?

14 A Yes, sir.

15 Q Okay. And how slow had you slowed down to prior as
16 you were preparing to stop?

17 A I don't know. I was like mostly just like rolling up
18 to it.

19 Q Just rolling?

20 A Rolling up to it.

21 Q Okay. Just rolling up to it?

22 A Yes, sir.

23 Q So pretty slow speed?

24 A Yes, sir.

25 Q Okay. And, again, I know it doesn't have a

1 speedometer on it; right?

2 A Yes, sir.

3 Q Okay. And then as you're rolling up to it, what is
4 the purpose of rolling up to it at a slow speed?

5 A So I can brake my speed down so I can get ready to
6 stop.

7 Q Okay. And then at that point are you looking at that
8 time as well --

9 A Yes, sir.

10 Q -- on Redds Branch Road?

11 A Yes, sir. I'm glancing through the trees. I can see
12 through the trees because people come spraying, you know,
13 the vines and stuff all of them --

14 Q Okay.

15 A -- and you can look through the trees and see the
16 road a little bit.

17 Q Okay. So you do have some visibility through those
18 trees?

19 A Yes, sir.

20 Q And you also have a visibility around those trees as
21 well to a certain portion of Redds Branch Road; is that
22 right?

23 A Yes, sir.

24 Q Okay. So you approach it rolling up to it at a slow
25 speed and then Mr. Tindel looks for traffic for you?

1 A Yes, sir.

2 Q And then motions you across; is that right?

3 A Yes, sir.

4 Q And what speed did you get up to prior to applying
5 your brakes?

6 A Applying my brakes?

7 Q Do you have any idea?

8 A No, sir. All I know I was just starting to pick up
9 speed when he told me to come on across. I was just
10 starting to mash the fuel---

11 THE COURT: Just starting back to do what?

12 THE WITNESS: I was just applying the fuel back to
13 the machine to start back going across.

14 Q Okay. And had you gotten up -- What kind of speed
15 had you gotten up to?

16 A It wasn't fast. I was just getting up -- starting to
17 get it back going.

18 Q And then he signaled you to stop?

19 A Yes, sir.

20 Q Okay. And as he signaled you to stop did you also
21 see the motorcycle?

22 A That's when I -- When he signaled me to stop, that's
23 when I looked and I seen the motorcycle.

24 Q Okay. And then you stopped?

25 A Yes, sir.

1 Q Okay. And you hit the brakes hard to stop; right?

2 A Yes, sir.

3 Q As somebody would do when they see something -- stop
4 at a stop sign; right?

5 A Yes, sir.

6 Q Okay. And did you get out and look at your scraper
7 after the accident?

8 A Yes, sir.

9 Q Is this a picture of your scraper at the time of the
10 accident?

11 THE COURT: Number please, exhibit.

12 THE WITNESS: Yes, sir.

13 MR. COX: I'm going to enter this in---

14 THE COURT: We need to know the number, please.

15 MR. COX: Defense 4, Your Honor.

16 THE COURT: Any objection to Defense 4?

17 MR. DETRICK: Sir?

18 THE COURT: Any objection to that photograph,
19 Defense 4?

20 MR. DETRICK: No, sir.

21 THE COURT: All right. At the break y'all get all of
22 them marked and agreed upon.

23 MR. COX: Thank you, Your Honor.

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

1 Q Is that the skid mark that your scraper left at the
2 time of the -- behind that left tire there at the time of
3 the accident?

4 A Yes, sir.

5 MR. COX: May I show this to the jury, Your Honor?

6 THE COURT: You may. Hand it to the panel and let
7 them pass it through.

8 Q And how -- You saw the skid mark. About how long was
9 that thing?

10 A About a couple of feet.

11 Q Did you have the scraper under control at all
12 times --

13 A Yes, sir.

14 Q -- on August 7, 2009?

15 A Yes, sir.

16 Q And you turned to the right as you stopped. You
17 testified you turned to the right?

18 A Yes, sir.

19 Q And you turned to the right to get out of the way of
20 a motorcycle. You didn't know which way the motorcycle
21 was going to go; is that right?

22 A Yes, sir.

23 Q Okay. And your turning to the right was not part of
24 your stopping process. That was to get out of the way?

25 A Yes, sir.

1 Q Okay. You were asked the question about the stop
2 sign at the top of the driveway. You don't know whether
3 or not that was a state-issued stop sign or not, do you?

4 A No, sir.

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

6 Mr. Lewis, in fact, didn't Mr. English put up that
7 stop sign in compliance with the contract as a safety
8 measure?

9 THE WITNESS: I don't know.

10 Q You don't know?

11 A No, sir.

12 Q You---

13 A It was up when I got there.

14 Q Okay. It was up when you got there.

15 A Yes, sir.

16 Q Mr. Lewis, so present at the time of this accident at
17 the intersection was yourself, Mr. Tindel, and was there
18 another truck at the time?

19 A Yes.

20 Q Okay. Tell me about that.

21 A He was coming up the road when the accident happened.

22 Q Okay. And who was he?

23 A Eric. I can't think of his last name.

24 Q Who did he work for?

25 A I can't think of it. I just said it a while ago.

1 Q Was it the garbage company?

2 A Yes, sir.

3 Q Waste management?

4 A Waste management.

5 Q And was -- What was he doing at the time that you
6 were stopping?

7 A He was coming up the road.

8 Q Okay. And he was getting -- What was he about to do?

9 A He was coming in the dump.

10 Q He was coming in the dump?

11 A Yes, sir.

12 MR. COX: Your Honor, that's all the questions I
13 have.

14 THE COURT: Thank you. Redirect.

15 REDIRECT EXAMINATION

16 BY MR. DETRICK:

17 Q I want to make sure, Mr. Lewis. You said y'all were
18 just building a burm for two weeks; correct? That's what
19 he asked you.

20 A Yes.

21 Q That kind of acts like y'all weren't hauling dirt
22 across other than building that burm. The truth of the
23 matter is you went across that Redds Branch Road to go to
24 the landfill every day before -- with that burm being
25 built or not, didn't you?

- 1 A No, not every day.
- 2 Q Well, okay. Just about every day?
- 3 A Sometimes.
- 4 Q Longer than two weeks back; correct?
- 5 A Yes, sir.
- 6 Q In other words, this indication of it's only been a
- 7 burm within two weeks, the truth of the matter is -- just
- 8 tell the truth jury the truth, okay?
- 9 A Yes, sir.
- 10 Q Lay it out. Y'all were crossing and you crossed on a
- 11 regular basis Redds Branch Road in that scraper; correct?
- 12 A No, sir.
- 13 Q Sir?
- 14 A No, sir.
- 15 Q How continuous? What does continuous mean?
- 16 A Most of the time that pan crosses the road when we
- 17 were building a burm. Most of the time we're hauling it
- 18 with off-road trucks or dump trucks.
- 19 Q But you were crossing the road not just building that
- 20 burm?
- 21 A Yes, sir.
- 22 Q Right?
- 23 A Right.
- 24 Q Okay. And people in that neighborhood, they're
- 25 seeing y'all crossing the road. They're not just seeing

1 when you're going to the burm. They're seeing you going
2 across for other purposes associated with the landfill;
3 correct?

4 A Yes, sir.

5 Q Okay. I didn't get into the speed. You know, let's
6 talk about the speed on that day.

7 A Yes, sir.

8 Q Now you according to your testimony from Mr. Cox you
9 came along at a controlled speed?

10 A Yes, sir.

11 Q Correct?

12 A Yes, sir.

13 Q And the controlled speed according to you knocks down
14 the stop sign?

15 A Well, it takes a lot to get that big thing to stop.

16 Q Well, the truth of the matter is that you were coming
17 -- you were coming along and Mr. Tindel, the flagman,
18 supposedly; right --

19 A Yes, sir.

20 Q -- flagged you across.

21 A Yes, sir.

22 Q And when he flagged you across you had already gone
23 past that area where Mr. Valenzuela would have seen you
24 and at that point in time when he flagged you across you
25 accelerated?

1 A Yes, sir.

2 Q Right?

3 A Yes, sir.

4 Q In other words, you got faster and you put that
5 throttle -- I think in your deposition you said you put it
6 at least half-way down; correct?

7 A Yes, sir.

8 Q All right. And the speed according to you it would
9 go about 35 miles an hour; so if you put that throttle I
10 assume half-way down we're talking about 17 miles an hour?

11 A (No response.)

12 Q Pretty close?

13 A Pretty close.

14 Q And then so accelerated to 30 -- to that approximate
15 17 miles an hour and then is when Mr. Tindel told you to
16 stop?

17 A Yes, sir.

18 Q Correct?

19 A Uh-huh.

20 Q And at 17 miles an hour is about where now
21 Mr. Valenzuela -- he would have seen you moving. He
22 didn't know you would be braking when you were doing that
23 speed at 17 miles an hour; right? No way he would know
24 that?

25 A No, sir.

1 Q And that's when you started braking?

2 A Yes, sir.

3 Q And that's when you started turning?

4 A Yes, sir.

5 Q And that 17 miles an hour according to you is you're
6 coming within approximately 20 feet of this highway is
7 according to you controlled speed; correct?

8 A Yes, sir.

9 Q Okay. And you put on brakes and you turned it as
10 hard as you could as quick as you could; correct?

11 A Yes, sir.

12 Q Now let's show the jury Mr. -- right now, Mr. Tindel
13 -- I want to show -- You laid down approximately -- I
14 don't know whether you know that, but did you know that
15 you laid down about 33 feet of skid marks and yaw marks?
16 Does that sound reasonable?

17 A I guess.

18 Q You wouldn't know. I know that.

19 A I guess.

20 Q I know that. Well, let's go -- I'll tell you what.
21 Let's go through some of -- if you don't mind, can you
22 start with Exhibit 19, please? I think that's the one
23 that Mr. Cox is talking about.

24 THE COURT: Can y'all see that or do you need to dim
25 the lights? Just turn them off for a second.

1 Can everybody see that those exhibits?

2 Hit that one right there.

3 THE BAILIFF: I don't know which one it is.

4 THE COURT: Well, turn them all off. There you go.

5 All my jurors see that?

6 Mr. Detrick?

7 MR. DETRICK: Thank you, sir.

8 All right. This is what Mr. Cox was showing you;

9 correct?

10 THE WITNESS: No, sir.

11 Q I'm sorry. That wasn't the one he showed you?

12 A No, sir.

13 Q Oh, I thought it was. All right. Well, it doesn't
14 matter. This is your pan; right?

15 A Yes, sir.

16 Q That's how you turned it in the controlled speed
17 you're talking about where you ran over the stop sign on
18 the other side; right?

19 A Yes, sir.

20 Q And you put on brakes and it got braking on the back;
21 correct?

22 A Yes, sir.

23 Q It's got braking back here, too; right?

24 A Yes, sir.

25 Q And you see there is where you're turning and that's

1 your braking, isn't it?

2 A Yes, sir.

3 Q All right. If you would, Lynn, please go to 20.

4 This is at 17 miles an hour when you're turning,
5 correct, approximately?

6 A Yes, sir.

7 Q Okay. Here again, this is where you're putting on
8 those brakes; right?

9 A Yes, sir.

10 Q All right. Then if you go to the next one, pleas.

11 THE COURT: Give us the number, please.

12 MR. DETRICK: They're in order, Your Honor.

13 Twenty-one.

14 Again, this is your left side and there is your yaw
15 marks and brake marks; correct?

16 THE WITNESS: Yes, sir.

17 Q That's where you're breaking at 17 miles an hour
18 approximately 20 feet before you get to that intersection;
19 correct?

20 A Yes, sir.

21 Q If you would go to 22, please.

22 There we are. This is controlled-speed braking at 17
23 miles an hour 20 feet before the intersection; correct?

24 A Yes, sir.

25 Q All right. If you would please, 23, please, Lynn.

- 1 There is where you end up at; correct?
- 2 A Yes, sir.
- 3 Q If you could go to 24.
- 4 Ran over that stop sign; right?
- 5 A Yes, sir.
- 6 Q This is your back brakes. That is a big ol' thing
- 7 here, isn't it?
- 8 A Yes, sir.
- 9 Q How tall is it?
- 10 A I have no idea.
- 11 Q You don't have any -- How tall are you? You're like
- 12 me. You're short.
- 13 A Yes, sir.
- 14 Q It is a lot -- I would say -- would you estimate how
- 15 much taller it is than you?
- 16 A Three or four feet.
- 17 Q Sir?
- 18 A Three or four feet.
- 19 Q I'm sorry. Oh, three or four feet?
- 20 A Uh-huh.
- 21 Q If you see that going down the road getting ready to
- 22 come in that road to you at 17 miles an hour 20 feet from
- 23 the intersection it would scare the devil out of somebody,
- 24 won't it?
- 25 A Yes, I guess so. Yes, sir.

1 Q If you would 25, please, ma'am.

2 I am just showing you braking there, please. Again,
3 we got your back tires there, right?

4 A Yes, sir.

5 MR. DETRICK: You can get the lights, please.

6 We would offer 19 through 25 into evidence, Your
7 Honor.

8 THE BAILIFF: It will take them a little while to
9 come back on.

10 MR. COX: Without objection.

11 (Whereupon, Plaintiff's Exhibit Nos. 19 - 25 were
12 admitted into evidence.)

13 THE COURT: Thank you. They're coming back on.
14 They're like me. They're slow.

15 Q Now as far as Waste Management vehicles -- these
16 garbage trucks -- and any other vehicles going in there,
17 they are making a turn in left. They don't cross Redds
18 Branch Road, do they?

19 A No, sir.

20 Q So the public like Mrs. Boozer, Mrs. Gunter,
21 Mrs. Johnson, and those others that live in the
22 neighborhood, they're not concerned about them because
23 they're just making a regular ol' turn into the landfill?

24 MR. COX: Object, Your Honor, as to what others are
25 concerned about.

1 MR. DETRICK: Withdraw it, Your Honor.

2 There is no concern for the public safety unless
3 there is some big vehicles like yours crossing that Redds
4 Branch Road; correct?

5 MR. COX: Same objection, Your Honor.

6 THE COURT: Overruled.

7 Q Is that correct?

8 A Yes, sir.

9 Q As far as -- I heard that testimony. I had to write
10 it down. Let me see if I can read it. You said something
11 about you turned to get out of the way of the motorcycle.
12 Turning right was not the stopping process. So you want
13 this jury to believe that that 17-miles an hour turn that
14 you made turning right abruptly within 20 feet of the
15 intersection laying down that skid mark was to get out of
16 the way of the motorcycle?

17 A Yes, sir.

18 Q Huh?

19 A Yes, sir.

20 Q Now, mr. Lewis, you never did tell MAIT Team or any
21 police officer Mr. McLaurin -- now Judge McLaurin -- you
22 never did tell him that, did you? You never told anybody
23 until you took -- until I took your deposition anything
24 about turning to get out of the way of the motorcycle, did
25 you?

1 A No, sir.

2 Q In other words, that part of that part of that story
3 about getting out of the way of the motorcycle came up
4 after you had met with Mr. English and Mr. Cox before your
5 deposition, didn't it?

6 A No, sir.

7 Q But it wasn't told to the MAIT Team and it wasn't
8 told to the investigating officer. It wasn't told also in
9 a recorded statement you gave five days after the wreck,
10 did it?

11 A No, sir.

12 Q You didn't have that story then, did you?

13 A No, sir.

14 Q Did Mr. -- you talked with -- Did Mr. English tell
15 you afterwards anything about whether he approved what
16 happened that day?

17 A He just told me I did everything I should have did.

18 Q Okay. He said he had done everything he could do,
19 too?

20 A After he told me that I left.

21 Q Okay. And he could have and did according to you
22 have advanced warning signs there?

23 A Yes, sir.

24 Q Right?

25 A Yes, sir.

1 Q Because they were needed?

2 A Yes, sir.

3 Q And he had this flagman out there to stop

4 Mr. Valenzuela?

5 A Yes, sir.

6 Q Why in the world -- if that flagman was sitting out

7 there and Mr. Valenzuela is riding along, why would he

8 need to lay -- why would he need to lay that bike down?

9 He would stop for the flagman, wouldn't he?

10 A I guess he got scared because I was coming up.

11 MR. DETRICK: That's all I have. Thank you.

12 THE COURT: Thank you.

13 Ms. Barbara, how about come get these lights to work.

14 All right. You may step down.

15 I know she can do it. Hold on one second. Y'all

16 need a little quick bathroom break? All right. I think

17 it is raining outside or it was. Let me give you some

18 menus. Y'all order whatever you want from the Bowery up

19 there. They'll deliver it here. You can eat back there

20 and when we get through eating we'll walk around and

21 stretch, whatever. That way you don't have to go out and

22 get wet today. Tomorrow if it is pretty y'all can walk

23 down. Fair enough? Or would you rather go out and eat on

24 your own?

25 THE JUROR: No. We'd rather stay. We like your

1 company.

2 THE COURT: All right. Let's take our break. Don't
3 discuss the case. Don't deliberate. If you would select
4 a foreperson among the 12 of you and order your lunch.

5 Everybody else remain seated, please.

6 Leave your notes in your chair, please. Just turn
7 them over.

8 (Whereupon, the jury exited the courtroom at 11:21.)

9 THE COURT: Mr. Detrick, anything for the record
10 before we break?

11 MR. DETRICK: No, sir.

12 THE COURT: Mr. Cox?

13 MS. PAYNE: Judge, we brought Joe Dawes back here.

14 THE COURT: Who?

15 MS. PAYNE: Joe Dawes, our expert, in anticipation of
16 your ruling if you needed anything further from him. Is
17 it okay to excuse him the rest of the day?

18 THE COURT: Yes, ma'am.

19 MS. PAYNE: Okay. Thank you.

20 THE COURT: I do not need anything further.

21 MS. MCPHERSON: Your Honor, I am not sure that I did
22 it. I would just move to actually introduce into evidence
23 plaintiff's---

24 THE COURT: Well, they objected to it, didn't they?

25 MS. PAYNE: Yeah, you already overruled.

1 THE COURT: Well, when you get to the husband and you
2 start looking at the photographs then introduce them
3 through him.

4 MS. MCPHERSON: Thank you.

5 THE COURT: Since they objected. I guess they'll put
6 the objections on the record again. All right. Anything
7 else?

8 Mr. Cox, let me see you, please.

9 We'll stand at ease for about ten minutes.

10 (Whereupon, a break was taken.)

11 THE COURT: Anything for the record by the plaintiff?

12 MR. DETRICK: Your Honor, I hate to bring up the
13 other matters, but I am worried about the depositions
14 designations. I need to have them edited during the lunch
15 break or some time. How do you want me to handle that?

16 THE COURT: When do you want me to do it?

17 MR. DETRICK: I don't care as long as it's a ruling
18 before lunch, if possible.

19 THE COURT: Before lunch?

20 MR. DETRICK: Is that okay?

21 THE COURT: Let's get this witness out of the way.

22 MS. PAYNE: Sir.

23 THE COURT: Yes, ma'am.

24 MS. PAYNE: The plaintiff and I have agreed -- the
25 defense have agreed to allow Mr. Lewis to be excused if

1 the court is so inclined.

2 THE COURT: Absolutely.

3 MS. PAYNE: We may recall him, but just for today.

4 THE COURT: Thank you, Mr. Lewis.

5 (Whereupon, the jury came into open court at
6 approximately 11:45.)

7 THE COURT: Who did y'all select as the foreperson?

8 THE FOREPERSON: (Indicating.)

9 THE COURT: I am excited. A supervisor, great
10 choice. Your first election. You can run for political
11 office now.

12 THE FOREPERSON: I was president for my high school.

13 THE COURT: We were here about, what, six months ago
14 and we came back out and the lady was sitting there and I
15 said, What is wrong? She said I went into the bathroom
16 and when I came out they had elected me. There's more
17 than one way. Congratulations. I'm looking forward to
18 working with you. Thank you.

19 Mr. Detrick, next witness.

20 We got your orders and sending them out and we're
21 going to go for another hour or so and see how we do. Is
22 that okay?

23 MR. DETRICK: Your Honor, if it please, we would call
24 Michael Valenzuela.

25 MICHAEL VALENZUELA, after being duly sworn,