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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Barbara Gaines.....Petitioner,

v.

Joyce Ann Campbell.....Respondent.

Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)

**APPENDIX TO
PETITION FOR CERTIORARI
VOLUME I**

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The South Carolina Court of Appeals

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Barbara Gaines, Respondent,

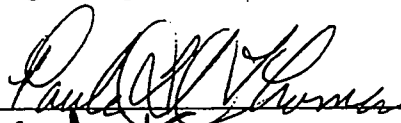
v.

Joyce Ann Campbell, Appellant.

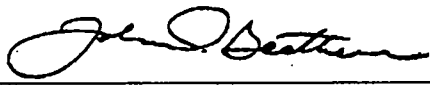
Appellate Case No. 2013-002367

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:
Marcus Kirk McGarr, Esquire
John Robert Peace, Esquire
The Honorable Edward W. Miller

FILED

October 19, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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SEP 02 2015

SC Court of Appeals

Barbara Gaines.....Respondent,

v.

Joyce Ann Campbell.....Appellant.

Case No. 2012-CP-23-1971

RESPONDENT'S PETITION FOR REHEARING

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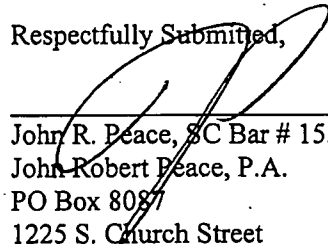
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Pursuant to Rule 221, SCACR, Respondent Barbara Gaines (hereinafter "Gaines") hereby petitions this Court for Rehearing regarding the Opinion issued on August 19, 2015. As discussed at length in Respondent's Memorandum filed herewith, this Court's 8/19/15 Opinion misapprehends the standard for granting a new trial under Rule 59, SCRCP. In addition, this Court's 8/19/15 Opinion further misapplies the standard of review of such an order on appeal. Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court's Order Granting a New Trial.

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September 1, 2015

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

SEP 02 2015

The Honorable Edward W. Miller, Circuit Court Judge **SC Court of Appeals**

Barbara Gaines.....Respondent,

v.

Joyce Ann Campbell.....Appellant..

Case No. 2012-CP-23-1971

**RESPONDENT'S MEMORANDUM IN SUPPORT OF
RESPONDENT'S PETITION FOR REHEARING**

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Attorney for Appellant Joyce Ann Campbell

Pursuant to Rule 221, SCACR, Respondent Barbara Gaines (hereinafter "Gaines") hereby petitions this Court for Rehearing regarding the Opinion issued on August 19, 2015. This Court's 8/19/15 Opinion misapprehends the standard for granting a new trial under Rule 59, SCRPC. In addition, this Court's 8/19/15 Opinion further misapplies the standard of review of such an order on appeal. Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court's Order Granting a New Trial.

DISCUSSION

This Court's 8/19/15 Opinion's "Law/Analysis" section begins:

We note at the outset the Circuit Court's order granting Gaines' motion for a new trial conflated the standards for a new trial pursuant to the thirteenth juror doctrine and a new trial absolute. We address the two standards below as well as the language of the Circuit Court's order.

8/19/15 Opinion, p. 2 (underline added). Since the adoption of the Rules of Civil Procedure in 1985, however, Rule 59 has provided the sole mechanism by which a party can move for a new trial. Accordingly, this Court's 8/19/15 Opinion misunderstands the interplay between Rule 59 and the long-standing "13th Juror Doctrine". Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court's Order Granting a New Trial.

Rule 59(a) provides that "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of this State" (bold added). Our Supreme Court has long recognized that "South Carolina's thirteenth juror doctrine is well established as the standard

for granting a new trial in state law actions.” *Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 477, 567 S.E.2d 851, 854 (2002)(bold added). This Court’s 8/19/15 Opinion is incorrect that there are “two standards”, one for a “new trial absolute” and another standard for the “thirteenth juror doctrine.” Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court’s Order Granting a New Trial.

In *Lane v. Gilbert Const. Co., Ltd.*, the Supreme Court summarized the 13th Juror Doctrine as follows:

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. **The doctrine “entitles the judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’ ”** *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), *citing Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict. *Id.*

383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)(bold added). In the present case, the

Circuit Court “hung” the jury because the Circuit Court found that the verdict was not supported by the evidence. The Circuit Court’s order identified the evidence supporting the Circuit Court’s decision to grant Gaines’ New Trial Motion:

Plaintiff’s New Trial Motion centered on the testimony of her two medical expert witnesses who each opined that this motor vehicle accident, more probably than not, to a reasonable degree of medical certainty, was the cause of injury to the Plaintiff which necessitated the disputed spinal surgery. Both witnesses were presented at trial through the use of *de bene esse* video depositions. Defendant did not present any evidence to refute these experts and relied solely on McGarr’s cross-examination of the witnesses to contest the proximate cause issue.

The Circuit Court’s order “hanging” the jury is clearly supported by the expert witnesses’

testimony introduced at trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

Regarding appellate review of an order granting a new trial, the *Lane v. Gilbert Const. Co., Ltd.* Court went on to explain that:

Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. This Court's review is limited to consideration of whether evidence exists to support the trial court's order. *Id.* at 478-79, 567 S.E.2d at 854. **As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed.** *Id.*

383 S.C. 590, 597-598, 681 S.E.2d 879, 883 (2009)(bold & underline added); *see also Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 478-479; 567 S.E.2d 851, 854 (2002). As discussed above, the Circuit Court's order specifically identified the testimony of Plaintiff's two expert witnesses as the evidence supporting the court's order granting a

new trial. Because the Circuit Court's order is supported by the evidence offered at trial,

this Court should not disturb the Circuit Court's order granting a new trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

In *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990), the Supreme likewise stated the rule as:

A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976). When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.

300 S.C. 251, 254-255, 387 S.E.2d 265, 267 (1990). Applying this rule, the *Folkens* Court analyzed the evidence presented at trial:

A review of this record reveals that the trial court's ruling is not "wholly unsupported by the evidence" because conflicting evidence was presented on the issues of liability and damages. For example, while McLendon complained about negligent advice rendered by the Hunt firm, evidence was presented that he consulted with independent advisers before making any decisions regarding the distribution of funds to Wellman. This would constitute evidence to support the trial judge's conclusion that McLendon may not have relied upon any erroneous advice from the Hunt firm. **If the testimony and evidence are in conflict, this court has consistently held that the trial judge's granting of a new trial upon the facts has support and will not be disturbed.** *S.C. Dept. of Highways and Public Transportation v. Mooneyham, supra*, 269 S.E.2d at 330. In the instant case, we find that evidence existed to support the judge's ruling granting a new trial upon the facts.

Folkens v. Hunt, 300 S.C. 251, 255, 387 S.E.2d 265, 267-68 (1990)(bold added). In the present case, the testimony and evidence regarding the issues of proximate cause and the amount of damages were clearly in conflict and the Circuit Court's Order is clearly supported by the evidence introduced at trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

Moreover, the Circuit Court's order was not "controlled by an error of law." Indeed, this Court specifically found that **"the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements."** Opinion, p. 6 (bold added). The Circuit Court's Order states that:

McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses. Not only did McGarr continuously ask Dr. Mina to comment on the Plaintiff's credibility using collateral sources but McGarr went so far as to ask Dr. Mina if she was calling the Emergency Room Physicians "quacks". This questioning was in clear violation of South Carolina's long standing and basic rule prohibiting the "pitting" of

witnesses.

Order, p. 2. However, this Court clearly misapplied the applicable standard for reviewing the Circuit Court's Order granting a new trial, when this Court found "little harm in this line of questioning". 8/19/15 Opinion, p. 6. This Court's 8/19/15 Opinion attempts to second-guess the trial judge on each reason cited by the Circuit Court for granting the motion for new trial. Accordingly, this Court's 8/19/15 Opinion fails to understand that **"The matter of granting a new trial on the grounds stated is left under our law to the discretion of the trial judge, who hears the evidence, sees the witnesses, and who is in much better position than this court to judge of the righteousness of verdicts."**

Worrell v. South Carolina Power Co., 195 S.E. 638, 642 (1938)(quoting *Byus v. Eason*, 178 S.C. 175, 179, 180, 182 S.E. 442, 444 (1935)(bold added). Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

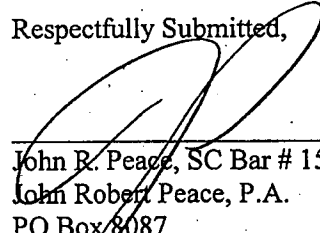
CONCLUSION

Under the "Thirteenth Juror" doctrine, based on the three day jury trial, first-hand observation of live witnesses, and subsequent arguments of counsel, the Circuit Court granted Gaines' Rule 59 Motion for New Trial. The Circuit Court properly ruled that a new trial was necessitated on the basis of the facts of this case. The Circuit Court's order specifically identified Gaines' experts' testimony as the evidence supporting the Circuit Court's ruling. Indeed, this Court specifically found that "the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements." 8/19/15 Opinion, p. 6. Although this Court may disagree with the Circuit Court regarding the impact of Campbell's counsel's misconduct, the Circuit Court

properly exercised its discretion in granting the Gaines's Rule 59 Motion for a New Trial.

Because the trial judge heard the evidence, saw the witnesses, and was in much better position than this Court to judge of the righteousness of the verdict, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

Respectfully Submitted,



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September 1, 2015

Attorney for Respondent Barbara Gaines

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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SSC Court of Appeals

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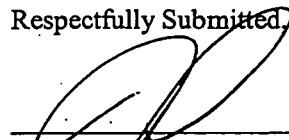
Joyce Ann Campbell.....Appellant.

Case No. 2012-CP-23-1971

PROOF OF SERVICE

I certify that I have served the Respondent's Memorandum In Support of Respondent's
Petition For Rehearing to be Included in the Record on Appeal by depositing a copy of it in the
U.S. Mail, postage prepaid, on September 1, 2015, addressed to attorney of record, Marcus K.
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September 1, 2015

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Barbara Gaines, Respondent,

v.

Joyce Ann Campbell, Appellant.

Appellate Case No. 2013-002367

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2015-UP-432
Heard June 3, 2015 – Filed August 19, 2015

REVERSED

Marcus Kirk McGarr, of Marcus K. McGarr, PA, of
Greenville, for Appellant.

John Robert Peace, of John Robert Peace, PA, of
Greenville, for Respondent.

PER CURIAM: Joyce Ann Campbell appeals the trial court's order granting Barbara Gaines's motion for a new trial. Campbell asserts the trial court erred in granting the new trial because its decision was based on the following misapprehensions of law: (1) a defendant must present an expert to contradict an

opposing expert's testimony; (2) cross-examining an expert amounts to the pitting of witnesses; (3) an expert cannot be cross-examined on other "possible" causes of an injury; and (4) a closing argument with no direct appeal to any specific juror violates the rule against appealing to a juror. Because the trial court's order granting Gaines's motion for a new trial was controlled by an error of law, we reverse.

FACTS/PROCEDURAL HISTORY

This appeal arises out of a car accident in which Campbell rear-ended Gaines in January 2010. While Campbell admitted she was negligent and at fault in causing the accident, she asserted her actions did not proximately cause the damages alleged by Gaines. A trial was held in August 2013.

During the trial, Campbell asked the jury to return a verdict in the amount of Gaines's emergency room bill, which totaled \$3,941, while Gaines sought compensation for all of her medical bills, including a spinal surgery she had after the accident, and an award for her physical pain, suffering, and emotional distress. The stipulated total of Gaines's medical bills was \$77,966.56. After deliberating, the jury returned a verdict for Gaines in the amount of \$3,941.

After the trial, Gaines moved for a new trial, arguing the verdict was contrary to both the law and the evidence of the case. After a hearing on Gaines's motion, the trial court invoked the thirteenth juror doctrine and granted a new trial, finding an award of damages for only the emergency room bill to be grossly inadequate and unsupported by the evidence. This appeal followed.

LAW/ANALYSIS

We note at the outset the trial court's order granting Gaines's motion for a new trial conflated the standards for a new trial pursuant to the thirteenth juror doctrine and a new trial absolute. We address the two standards below as well as the language of the trial court's order.

A trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive and clearly indicates the figure reached was the result of prejudice, passion, caprice, or some other improper motive. *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). However, the jury's determination of damages is entitled to substantial deference. *Vinson v. Hartley*, 324 S.C. 389, 404,

477 S.E.2d 715, 723 (Ct. App. 1996). The trial court must explain the reasons for granting or denying new trial motions based on inadequacy or excessiveness of the verdict. *Cf. Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993) (stating compelling reasons must be given to justify invading the jury's province). "The decision to grant a new trial absolute . . . rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000). A trial court abuses its discretion if its conclusions are controlled by an error of law or if its findings are wholly unsupported by the evidence. *Id.*

On the other hand, under the thirteenth juror doctrine, the trial court may grant a new trial if it finds the verdict is unsupported by the evidence. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "This ruling has also been termed granting a new trial upon the facts." *Id.* Basically, the court, "as the thirteenth juror[,] 'hangs' the jury." *Id.* "Neither [the court] nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the [court] is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial [court] to make factual findings." *Id.* When acting as the thirteenth juror, the trial court "possess[es] the veto power to the Nth degree" and is presumed to recognize and appreciate this responsibility and exercise its discretion with fairness and impartiality. *Worrell v. S.C. Power Co.*, 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938). "A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722.

In the instant case, the trial court gave several reasons for granting Gaines's motion, and it found the jury's award of damages "grossly inadequate," which are typically characteristics of a new trial absolute. However, at the end of the order, the court discussed case law on the thirteenth juror doctrine and stated it was "invoking the 'Thirteenth Juror Doctrine'" to grant a new trial. Thus, in light of this express wording, we will review this case under the thirteenth juror doctrine.

As discussed above, the trial court is not required to explain its rationale for granting a new trial under the thirteenth juror doctrine. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267. However, if the trial court chooses to do so, this court will review the reasons provided by the trial court. *See Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597-600, 681 S.E.2d 879, 883-84 (2009) (reviewing the trial court's

rationale for granting a new trial despite the fact the trial court granted the new trial under the thirteenth juror doctrine and was not required to provide any reasons for the outcome); *Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 287-88, 670 S.E.2d 1, 10, 13 (Ct. App. 2008) (holding that despite the discretion given the trial court by the thirteenth juror doctrine, it could not grant a new trial based on the brevity of the jury deliberations); *id.* at 282, 670 S.E.2d at 10 ("[G]ranting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.").

In the present case, the court gave several reasons for granting Gaines's motion. We discuss these reasons below.

I. Expert Witness Requirement

Campbell argues the trial court erroneously believed she was required to present expert witness testimony to contradict an opposing expert's testimony and failed to consider the fact that the credibility of the experts' statements was at issue.

We agree with Campbell that she was not required to present her own expert witness as the jury could choose not to believe the testimony of Gaines's expert witnesses. *See Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952) (finding the fact that testimony is not directly contradicted does not render it undisputed because questions remain on the inherent probability of the testimony and the credibility of the witness). However, we disagree with Campbell's claim that the trial court was requiring her to produce her own expert witness when it stated in its order that she "did not present any evidence to refute [Gaines's] experts and relied solely on [Campbell's] cross examination of the witnesses to contest the proximate cause issue." It appears, in making this statement, the trial court was merely recounting the events of the trial. The court never stated Campbell was required to present her own expert witness, and, furthermore, it agreed when Campbell's attorney stated during the new trial hearing that he did not have to bring in an expert. Accordingly, we disagree with Campbell's assertion of error.

II. Pitting of Witnesses

Campbell next contends the trial court erred when it found her cross-examination of Dr. Christie B. Mina objectionable because Campbell asked Dr. Mina to comment on Gaines's veracity and asked Dr. Mina if she was calling the emergency room physicians "quacks." Campbell argues she needed to question

Dr. Mina about the discrepancies in Gaines's testimony regarding her prior neck injuries because Dr. Mina had agreed it would be difficult to connect an incident to an injury, absent the patient giving an accurate and proper history. The trial court found Campbell's cross-examination of Dr. Mina objectionable because Campbell "repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses," which "was in clear violation of South Carolina's long standing and basic rule prohibiting the 'pitting' of witnesses."

"It is improper to cross-examine in a way that requires a witness to attack another witness's credibility." *State v. Benning*, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999); *see also Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) ("No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper."). "[A]n expert is not to comment on the veracity of another witness's statements." *S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 418, 669 S.E.2d 647, 653 (Ct. App. 2008).

In the present case, Campbell informed Dr. Mina that Gaines had stated during a deposition she had never had a problem with her neck significant enough to seek medical treatment before the accident. Subsequently, Campbell asked Dr. Mina to examine Gaines's medical records, which showed Gaines experienced neck pain from 1987 to 2009. Campbell proceeded to question Dr. Mina about Gaines's statement in the following manner:

Q. Would you agree that her history was not true, with regard to what she told me in her deposition?

A. That particular answer appears to not have been true.
....

Q. And again, when you compare that along with these other records, does it appear that what the history Ms. Gaines gave me in her deposition would appear to be incorrect and/or false?

A. Yes.
....

Q. But if she's capable of telling someone, while under oath, I've never had a problem with that neck -- and we've seen a discrepancy with her saying I was knocked out in the accident versus saying to the ER I was never knocked out -- is it possible that she could be giving histories to fit whatever she wanted to fit? It is possible?

A. Anything is possible, but unlikely.^[1]

While we acknowledge this line of questioning is markedly different from a situation in which a witness is asked to pit her own credibility against that of another testifying witness, we find the trial court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements.

However, we find little harm in this line of questioning as Dr. Mina ultimately stated during cross-examination that Gaines "told [her] the truth" and was a "pretty reliable historian" because Gaines told her when "not under oath, when she was not obliged to do so, the truth about her previous long neck history." These statements are important as they show Dr. Mina was aware of Gaines's medical history when she determined Gaines's surgery was more probably than not necessitated by the car accident.

III. Cross-Examination of Expert Witnesses on Proximate Cause

Campbell also asserts the trial court erred when it found Campbell's cross-examination of both witnesses regarding the issue of proximate cause objectionable because Campbell asked them whether "it was 'possible' for a disputed intervening event to have caused the necessity for surgery." The court believed this line of questioning was inappropriate because South Carolina law "requires that opinion testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not." However, Campbell believes the practice of using hypothetical scenarios to cross-examine witnesses is an appropriate and "viable means of cross-examination." We agree with Campbell.

¹ Gaines's attorney objected after Dr. Mina answered the last question, stating Dr. Mina was "not qualified as an expert in any legal matter or credibility of witnesses."

"When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). When expert testimony is the only evidence of proximate cause relied upon, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Id.*

However, "[o]pinion testimony of an expert witness may be based upon a hypothetical question." *Brown v. La France Indus.*, 286 S.C. 319, 326, 333 S.E.2d 348, 352 (Ct. App. 1985). The hypothetical question must be based on facts supported by the evidence. *Id.* Counsel posing the hypothetical may, however, frame the question on any theory that "can reasonably be deduced from the evidence and select as a predicate therefor such facts as the evidence proves or reasonably tends to establish." *Id.* at 328, 333 S.E.2d at 353; *see Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992) (stating the defendant "may produce other 'possible' causes of the plaintiff's injury" in proving his alleged negligence was not the legal cause of the plaintiff's injury); *id.* at 676-77 (holding that requiring a defendant to identify a specific cause to a medical probability standard when rebutting the plaintiff's prima facie case would improperly shift the burden to the defendant); *see, e.g., McKnight v. State*, 378 S.C. 33, 40-41, 661 S.E.2d 354, 357-58 (2008) (discussing the fact that the State's expert witness admitted there were other possible causes of death and the defense's two expert witnesses testified regarding possible alternative causes of death); *see also Ala. Power Co. v. Bruce*, 96 So. 346, 348 (Ala. 1923) (finding the "question was relevant and the answer permissible" when the plaintiff cross-examined the defendant's expert witness using a hypothetical question based on facts introduced in evidence and sought an opinion as to whether the existence of such facts would cause the plaintiff's appendicitis and ovarian condition and the witness replied it was possible).

In this case, Campbell asked both of Gaines's expert witnesses whether it was possible an injury Gaines sustained while mulching her yard after the car accident could have been the reason for Gaines's surgery, to which one expert replied, "It's possible." Campbell also asked that expert whether it was possible the car accident had nothing to do with the surgery but instead Gaines's arthritis had necessitated the surgery, and the expert again replied, "It's possible." At the close of Gaines's case, Campbell moved for a directed verdict. After denying the motion, the trial

court informed Campbell she "had the opportunity to present evidence to show that your claims of the other two or three things that you think possibly could have caused this injury, you could have put evidence -- you could have brought evidence in, if it existed." It further stated, "But you cannot use -- you can't come in here and try to use your opponent[']s expert and not live up to the same standard. You can't require him to have more probably than not to a reasonable degree of medical certainty and you just mere possibility."

During a hearing on Gaines's motion for a new trial, Campbell's attorney stated that the jury could have found that Gaines's surgery occurred as the result of a "natural . . . worsening of [her] pre-existing" condition. The trial court responded, "Was there any evidence in the record to show that? The only opinion testimony was that this accident caused it." When Campbell referenced the mulching accident that occurred in between the car accident and the surgery, the trial court referred to the mulching accident as "[a] disputed supposed intervening cause where there was no testimony to what [it] consider[ed] to be the required standard to say that it more probably than not caused it." It is clear the trial court failed to consider the testimony elicited on cross-examination when granting Gaines's new trial motion as it found the evidence that required a verdict to compensate Gaines for her surgery to be "[t]he only competent evidence admitted at trial."

In its new trial order, the trial court found this type of questioning "objectionable" and stated it "should have . . . been excluded." However, we believe Campbell was permitted to pose hypothetical questions to the expert witnesses to challenge the experts' testimony that the car accident necessitated the surgery. *See Ala. Power Co.*, 96 So. at 348 (permitting cross-examination of the expert witness on other possible causes of the plaintiff's medical conditions). These questions were supported by the evidence as Campbell produced medical records in which Gaines complained of arthritis and described suffering an injury when she fell while mulching. *See Brown*, 286 S.C. at 326, 333 S.E.2d at 352 (stating hypothetical question must be based on facts supported by the evidence).

Thus, this finding by the trial court was erroneous. Because the trial court failed to consider these other possible causes of Gaines's injury when weighing the evidence as the thirteenth juror, we find its order was controlled by an error of law. *See Vinson*, 324 S.C. at 403, 477 S.E.2d at 722 ("A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.").

IV. Appealing to the Jury

Finally, Campbell asserts the trial court erred when it found she violated Rule 43(i), SCRCP, by personally addressing and appealing to the jury during closing arguments. We agree.

Rule 43(i) states, "Counsel shall not address or refer to by name any member of the jury he is addressing, or otherwise personally appeal to any member thereof." *See, e.g., City of Columbia v. Myers*, 278 S.C. 288, 289, 294 S.E.2d 787, 788 (1982) (finding a statement in closing argument that the failure to render a verdict for the City would cause the damages to be paid from tax funds had no relevance to the merits of the case, "constituted an appeal to the self-interest of the jurors as taxpayers," and was "of such a prejudicial nature as to require reversal"); *Wall v. Keels*, 331 S.C. 310, 320-21, 501 S.E.2d 754, 759 (Ct. App. 1998) (finding a party's statement during closing argument that a suit against the defendant, Santee Electric Cooperative, was "*a suit against the members of the Co-op*" appealed to the economic self-interest of the cooperative members who were sitting on the jury and who would ultimately bear the cost of any verdict against the defendant). Additionally, "[i]n a closing argument to the jury, an attorney may not make such remarks which are unfairly calculated to arouse passion or prejudice." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Ct. App. 1984).

In the instant case, the trial court took exception to several comments by Campbell's attorney, including (1) "I request jury trials in Greenville County because when I do, I know that my Greenville County jurors are going to be fair and decent to me. And be honest with themselves with regard to what a case is about."; (2) "[Y]ou're bright enough and have the brains enough to know that that's what I said on Monday."; and (3) "[Y]ou guys are not so foolish or dumb and it's disingenuous to pretend like you are, that you didn't hear that the doctor says, She's got a bone spur that is squishing on that nerve that's causing a problem and makes it go down her arm."

We find Campbell is correct in her assertion that the above statements do not violate Rule 43(i). Counsel did not "address or refer to by name any member of the jury" nor did he "personally appeal to any member." Rule 43(i), SCRCP. Furthermore, while counsel's statement that his "Greenville County jurors are going to be fair and decent to [him]" could possibly be construed as "unfairly

calculated to arouse passion or prejudice," *see Gathers*, 282 S.C. at 231, 317 S.E.2d at 755, the trial court subsequently instructed the jury to "consider the evidence calmly and with measured reason, without passion, prejudice, bias or emotion." A similar instruction was deemed to have cured any error from the statements made during closing arguments in *Gathers*. *See id.* at 231-32, 317 S.E.2d at 755-56 (finding that plaintiff's attorney's statement during closing arguments in which he told the jury not to "think too hard with your head but to think with your heart" was cured by the trial court's instruction that the jury "cannot act through emotion" but needed to "weigh the evidence and do what is just"). Accordingly, the trial court's finding was in error.

CONCLUSION

Although the trial court correctly determined that questioning Dr. Mina regarding Gaines's veracity was improper, we find the trial court's new trial order was controlled by an error of law. *See Vinson*, 324 S.C. at 403, 477 S.E.2d at 722 ("A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law."). The trial court's determination that Campbell could not cross-examine Gaines's experts on other possible causes of Gaines's injury and its finding that Campbell violated Rule 43(i) by personally appealing to the jury were incorrect. Furthermore, if the trial court had believed Campbell's hypothetical questions were permissible, it could have considered other "possible" causes of Gaines's injury when it weighed the evidence as the thirteenth juror. Based on the foregoing reasons, the trial court's order granting a new trial is

REVERSED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Appellate Case No. 2013-002367

Barbara Gaines, ...Respondent,

v.

Joyce Ann Campbell, ...Appellant.

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August 25, 2014

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STATEMENT OF ISSUES ON APPEAL

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED A NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

I. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN OPPOSING EXPERT'S TESTIMONY.

II. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

III. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINING BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

IV. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC JUROR ACTUALLY VIOLATES THE RULE AGAINST APPEALING TO A JUROR.

V. THE TRIAL COURT'S MISAPPREHENSION OF THE LAW RESULTED IN A MISAPPREHENDING OF THE FACTS

STATEMENT OF THE CASE

This matter comes before the Court by way of a Summons and Complaint filed by Barbara Gaines, the plaintiff. The complaint was filed on March 20, 2012. The Summons and Complaint alleged that Joyce Ann Campbell, the defendant, was negligent in driving her automobile, which caused an accident on January 8, 2010. The negligence arose as a result of the fact that Ms. Campbell's vehicle hit the rear of Ms. Gaines's vehicle. (R. pp. 6-9) Ms. Campbell answered Ms. Gaines's complaint on April 16, 2012. At that time, Ms. Campbell conceded that she was negligent. However, she denied that she caused any longstanding injury to Ms. Gaines. Furthermore, she alleged that Ms. Gaines suffered from a preexisting or post-existing injury. Finally, Ms. Campbell

alleged that Ms. Gaines had failed to mitigate her damages. (R. pp. 10-12)

Discovery then proceeded, and the matter was ultimately called for trial on August 5, 2013. At the trial's conclusion, Ms. Campbell asked the jury to return a verdict in favor of Ms. Gaines. However, she suggested that the verdict be limited to the amount of the emergency room bill, as that bill was the only damage that could have been proximately caused by any action of Ms. Campbell. (R. p. 266, lines 7-18) That emergency room bill totaled Three Thousand Nine Hundred Forty-One Dollars and Zero Cents (\$3,941.00). Ms. Gaines, on the other hand, requested that the jury award medical bills in the amount of Seventy-Seven Thousand Nine Hundred Sixty-Six Dollars and Fifty-Six Cents (\$77,966.56). (R. p. 242, lines 4-23) That sum represented the medical expenses Ms. Gaines felt she had incurred as a result of the accident with Ms. Campbell. Ms. Gaines also requested that the jury award her for damages in excess of her medical bills, as a result of the personal injuries that she felt resulted from the accident. (R. p. 243, lines 5-24) The jury then deliberated, and, thereafter, returned a verdict for the emergency room bill only. (R. p. 286, lines 12-25; and, R. p. 5)

Ms. Gaines then made a motion for a new trial, or, in the alternative, a new trial additur. The formal hearing with regard to that request took place on August 15, 2013. At the conclusion of the hearing, the Court issued an oral ruling granting a new trial based upon the thirteenth juror doctrine. The Court's Order was formally executed on September 18, 2013. Ms. Campbell received written notice of the entry of that order on September 23, 2013. (R. pp. 1-4) Ms. Campbell then filed a notice of intent to appeal the Court's Order on October 23, 2013. On November 27, 2013, the Appellate Court forwarded a letter, wherein it requested that both parties submit a memorandum addressing the issue of appealability of the Court's Order. On December 6, 2013, Ms. Campbell filed a memorandum addressing the issue of appealability.

FACTS

The documents, photographs, and testimony from independent witnesses elicited facts as follows:

As early as July 23, 1987, Ms. Gaines was at a hospital for neck therapy treatments. By July 24, 1987, Ms. Gaines was on medical disability for a neck injury which occurred in the course of her then-employment. (R. p. 116, line 1-p. 119, line 5) In 1999, Ms. Gaines filled out a health questionnaire for the Jervey Eye Group, wherein she indicated that she was having arthritis in her spine. (R. p. 119, lines 11-19) On July 23, 1999, she told Dr. Beth Brown that she had a history of a neck injury which was the result of falling while performing a cartwheel. (R. p. 119, line 20-p. 120, line 2) On June 17, 2002, she was at Piedmont Orthopedics, wherein she filled out a document stating that she was suffering from pain in her joints or bones, swelling of her joints, arthritis, and stiffness. (R. p. 120, line 3-p. 122, line 20) On August 25, 2006, Ms. Gaines told a doctor at Adult Medical Specialists of Easley that she had injured her shoulder about two weeks prior, and since that injury, had experienced trouble moving her upper arm, as well as pain in her neck. (R. p. 123, lines 7-24) On August 29, 2006, she went to see Dr. Anne Claire Edwards, wherein she indicated that she was having neck pain. (R. p. 123, line 25-p. 124, line 9) Ms. Gaines then went to Doshier Physical Therapy on August 30, 2006, wherein she indicated that she was a sixty-five year old female who had been referred to physical therapy with a six-week history of left shoulder pain, with that left shoulder pain occurring especially with overhead movement. She also reported neck pain that had been in existence longer than the shoulder issue, as well as feeling stiff, achy, and tight. (R. p. 124, line 10-p. 126, line 4) On September 01, 2006, Ms. Gaines reported to the same physical therapist that one of her problems was neck tightness. (R. p. 126, lines 9-13) On September 07, 2006 she was back at the physical therapist's office, and noted that her neck tightness that was not

getting better. (R. p. 126, lines 14-25) On September 13, 2006, she advised the physical therapists that her arm, shoulder, and neck pain were better. However, this could have been attributed to the fact that her pain typically occurred in the mornings. Furthermore, it was noted that her neck might not have been as tight. (R. p. 126, lines 14-15) On September 18, 2006, it was noted that her neck and shoulder were tight. (R. p. 127, lines 1-4) On October 11, 2006, it was also noted that her neck was much better. (R. p. 127, lines 5-9) However, by October 13, 2006, she reported that her shoulders weren't not too bad, until her neck became stiff. (R. p. 127, lines 10-14) On October 18, 2006, she continued with complaints of cervical spine pain. (R. p. 127, line 15-p.128, line 2) On April 05, 2007, Ms. Gaines filled out a document wherein she specifically noted that her medical history included neck problems. (R. p. 128, lines 3-17) On April 05, 2007, she engaged physical therapy a second time, wherein she noted a history of left and right carpal tunnel syndrome, neck problems, diabetes, and arthritis. (R. p. 128, line 18-p. 129, line 20) On September 01, 2009, she went to Dr. Mark Baker of Easley Family Practice and Internal Medicine. At that point, it was noted that the patient had pain and stiffness in her upper trapezius and cervical spine muscles. (R. p. 129, line 21-p. 132, line 23) On August 27, 2009, she went to Dr. Lisa G. Harding's office, wherein she indicated that, in addition to other medications, she was taking Cymbalta and Tylenol Arthritis. (R. p. 444, lines 3-25; and, R. p. 448, line 1-p. 450, line 1) Indeed, by September 11, 2009, her doctor was continuing to prescribe Cymbalta, a medication capable of aiding nerve and muscle problems, as well as Tylenol Arthritis, an arthritic medication. However, Ms. Gaines's doctor then added Ultram, an opiate-type of pain medication, to Ms. Gaines's medical regimen. (R. p. 450, line 2-p. 451, line 20) On November 30, 2009, she was still taking the Tylenol Arthritis, Ultram, and Cymbalta. (R. p. 451, line 21-p. 452, line 18)

On January 8, 2010, Ms. Gaines and Ms. Campbell were involved in the automobile

accident which gives rise to this lawsuit. That accident resulted in very little visible damage to either party's vehicle. (R. pp. 13-18; R. p. 103, line 12-p. 106, line 12; R. p. 153, line 17-p. 154, line 22; R. p. 250, lines 3-22; and, R. p. 66, line 5-p. 68, line 2) In fact, Ms. Gaines testified that she told the investigating police officer that she did not know if she were injured at the time of the accident. (R. p. 79, lines 21-24; R. p. 68, lines 3-12; and, R. p. 155, line 23-p.156, line 6) Furthermore, after the investigation's conclusion, both Ms. Gaines and Ms. Campbell drove away from the scene of the accident. (R. p. 110, line 23-p. 111, line 1; and, R. p. 156, lines 13-23)

Shortly after the accident, Ms. Gaines went to the emergency room. While there, her pulse rate was checked and found to be seventy-six. (R. p. 453, line 2-p. 455, line 16) Her respiratory rate was checked and found to be sixteen. (R. p. 453, line 2-p. 455, line 16) Indeed, her pulse rate was lower and her respiratory rate was equal to measurements taken during a visit with her doctor, a few weeks before the accident. (R. p. 453, line 2-p. 455, line 16) While at the hospital, Ms. Gaines complained of headaches, neck pain, nausea, and low back pain. However, she did not present with an altered state of consciousness, denied any dizziness, and, most important, denied any loss of consciousness as a result of the accident. Indeed, her neurological system was examined and noted to be normal. Her neck was found to be supple, with no spasms, and no stiffness. She did have pain when moving her neck. However, that pain was characterized as mild. Thereafter, no blood was found in the tissues of her neck. On the other hand, she did report that her neck was tender to touch. Regardless, she never complained of right arm pain. Furthermore, her neck was x-rayed, and the radiologist determined that she had severe degenerative changes in the same. However, no acute abnormalities were noted. (R. p. 455, line 17-p. 464, line 13)

After the above examinations were completed, Ms. Gaines was released from the hospital. Twenty days thereafter, she went to her family physician so as to receive blood work. During that

visit, she made no request to see her doctor. (R. p. 464, line 21-p. 465, line 13)

On February 8, 2010, Ms. Gaines returned to her doctor, wherein her complaints were listed in this order: 1) hot flashes; 2) skin problems; 3) moles; and, 4) right arm pain. That doctor performed an exam, after which she felt there was a problem in Ms. Gaines's arm, which correlated to a pinched nerve at the C5-6 level. (R. p. 465, line 14-p. 470, line 10)

As a result, Ms. Gaines was sent for an MRI. Again, the MRI was to be performed as a result of Ms. Gaines's complaint of right arm numbness and weakness. The radiologist who interpreted that MRI indicated that Ms. Gaines suffered from severe bone spurring, a congenitally small spinal canal, and severe spinal canal stenosis. (R. p. 470, line 11-p. 475, line 7)

The findings of this MRI ultimately resulted in Mr. Gaines being referred to a neurosurgeon. Indeed, the neurosurgeon then placed her into physical therapy. In fact, on May 04, 2010, Ms. Gaines was at physical therapy, wherein she reported that she had been doing better, but had developed soreness in her shoulder and neck after putting out mulch over the weekend. (R. p. 396, line 6-p. 397, line 16) Thereafter, On June 07, 2011, Ms. Gaines underwent surgery to her neck, so as to have the bone spur that was pinching her nerve removed. (R. p. 343, line 24-p. 344, line 5; and, R. p. 346, lines 1-18) That spur, by all accounts, existed long before the automobile accident in question occurred. Indeed, once the bone spur was removed, Ms. Gaines's symptoms ceased to exist. (R. p. 475, line 4-p. 478, line 1; and, R. p. 92, lines 13-15)

The facts as elicited by Ms. Gaines are as follows:

Ms. Gaines testified that the impact to her automobile was as if a bomb had gone off. (R. p. 78, lines 10-18) In fact, she told the jury that the impact was so significant that it caused her to be knocked out. (R. p. 78, lines 10-18) Ms. Gaines did concede that she told Ms. Campbell that she did not know if she were injured, while at the scene. (R. p. 78, line 25-p. 79, line 1) Furthermore,

Ms. Gaines agreed that she said the same to the officer who investigated the accident. (R. p. 79, lines 21-24) Thereafter, upon completion of the police officer's investigation, she drove from the scene of the accident, to her home. (R. p. 110, line 23-p. 111, line 1) Thereafter, she presented to the emergency room, wherein she was ultimately released. (R. p. 80, line 21-p. 82, line 3) Ms. Gaines then waited for a period of time before seeking additional medical treatment, and, ultimately, surgery. Once she received said surgery, she experienced no recurrence of the symptoms that were in existence prior to the same. (R. p. 92, lines 13-15)

Upon cross examination, Ms. Gaines was forced to admit that, when given photographs of her vehicle during her deposition, it was evident that her vehicle suffered very little visible damage. (R. pp. 13-15; R. p. 103, line 12-p. 106, line 12; R. p. 153, line 17-p. 154, line 22; R. p. 66, line 5-p. 68, line 2; and, R. pp. 16-18) She was then forced to concede that she did not mention right arm problems while at the emergency room, shortly after the accident. (R. p. 81, lines 13-19; R. p. 122, lines 2-16; and, R. p. 455, line 17-p. 468, line 4; and, R. p. 474, line 5-p. 475, line 7) Ms. Gaines then had to confirm that during her deposition testimony, she indicated that she had never been treated for neck pain, prior to the automobile accident in question. (R. p. 114, lines 1-4) Furthermore, she was forced to acknowledge that, during her direct examination, she told the jury that she had been to the Piedmont Orthopedic Clinic before the accident with regard to a shoulder problem, only. (R. p. 114, lines 5-9) Last, Ms. Gaines had to admit that, during direct examination, she told the jury that she had never been on disability because of a neck issue. (R. p. 76, lines 18-22; and, R. p. 114, lines 10-12)

Again, it is important to note that the accident in question took place on January 8, 2010. Unfortunately, and in spite of Ms. Gaines's prior testimony regarding her neck, her medical records indicate a very different story. For example, Ms. Gaines was at a hospital engaging in neck therapy

treatments as early as July 23, 1987. It was then apparent that she was on disability as a result of a neck injury on July 24, 1987. She then filled out a health questionnaire in 1999, wherein she indicated that she had arthritis in her spine. On July 23, 1999, she told a doctor that she had medical history that included a neck injury. On June 17, 2002, she filled out a document at another physician's office, wherein she indicated that she was suffering from pain in her joints, her bones, slowing of her joints, arthritis and stiffness. She was then at another medical provider's office on August 25, 2006, wherein she stated that she had injured her shoulder two weeks earlier, and, since that time, had experienced trouble moving her arm. She also noted that she was experiencing pain in her neck. On August 29, 2006, she specifically told a doctor that she was having pain in her neck. On August 30, 2006, she was at physical therapy, wherein she reported a history of left shoulder pain and neck pain. On September 1, 2006, she reported having neck tightness. On September 7, 2006, she reported that her neck tightness was not getting better. On September 13, 2006, she reported that her neck pain was better. However, she noted that this improvement could have been due to the fact that her problems were primarily occurring in the mornings. She then reported, on September 18, 2006, that her neck was tight. On October 11, 2006, she indicated that her neck was better. Indeed, on October 13, 2006, she reported that her shoulders were not too bad, until the point at which her neck would become stiff. Thereafter, on October 18, 2006, she was still complaining of cervical spine pain. On April 5, 2007, she filled out a document wherein she specifically stated that her medical history included neck problems. On April 5, 2007, she began physical therapy for a second time, wherein she indicated a medical history positive for neck problems. On August 31, 2009, she told a physician that she was experiencing pain and stiffness, in part, in her cervical spinal muscles. (R. p. 111, line 10-p. 132, line 23) On August 27, 2009, she told a different physician that she was taking Cymbalta and Tylenol Arthritis. On September 11, 2009, she was

taking medications with applications regarding nerve and muscle problems, a medication for arthritis, and had added an opiate-type of pain medication. On November 30, 2009, she continued to take Tylenol Arthritis, Ultram, a synthetic opiate, and Cymbalta. (R. p. 444, line 13-p. 452, line 18) She was then involved in the accident which gives rise to this lawsuit on January 8, 2010.

Ms. Gaines also stated, during her deposition, that nothing had happened to her between the time of the accident on January 8, 2010, and the time of her July 5, 2012 deposition, which could have caused her additional problems with regard to her neck. (R. p. 395, line 21-p. 396, line 5) However, it is abundantly clear that she re-injured her neck on August 4, 2010. At that time, she specifically told her physical therapist that her "Right arm has been doing better, though sore in shoulder and neck since putting out mulch over the weekend." (R. p. 396, line 6-11) Obviously, her deposition testimony was incorrect. Just as important, one of her expert witnesses, Dr. Harding, unequivocally stated that the mulching incident could have created the need for Ms. Gaines's neck surgery. (R. p. 478, lines 11-16; and, R. p. 479, lines 8-10)

Dr. Mina, one of Ms. Gaines's experts, testified that, to a reasonable degree of medical certainty, the automobile accident caused Ms. Gaines to require an operation to remove the bone spur. (R. p. 355, line 22-p. 356, line 5) This surgery took place on June 7, 2011. However, this conclusion was made after Dr. Mina admitted that she did not necessarily agree with radiologists' reports. (R. p. 332, lines 11-17) She then questioned the reliability of the emergency room records. (R. p. 367, line 12-p. 371, line 3; R. p. 398, line 1-p. 402, line 6; and, R. p. 408, line 1-p. 410, line 22) Indeed, Dr. Mina implied that her examination would have been better than an emergency room doctor's examination. (R. p. 403, line 16-p. 410, line 22) She then testified that there existed no possibility that the mulching incident could have been the catalyst that ultimately facilitated Ms. Gaines's need for surgery. (R. p. 409, line 9-p. 410, line 1) This testimony was given despite the

fact that the mulching incident occurred eight months after the accident with Ms. Campbell, and ten months prior to her date of surgery.

Dr. Harding, Ms. Gaines's second expert, offered testimony. Unfortunately, most of this testimony was in direct contradiction with Dr. Mina's testimony. For example, Dr. Harding readily conceded that an emergency room physician, in addition to a family physician, would easily be able to diagnose a pinched nerve. (R. p. 468, line 1-p. 470, line 10) Furthermore, Dr. Harding never questioned the need to independently read radiologic films. (R. p. 463, line 9-p. 464, line 13) Just as important, Dr. Harding did not question an emergency room's ability to accurately gather information and/or perform proper evaluations of its patients. (R. p. 453, line 2-p. 464, line 13) In fact, she, unlike Dr. Mina, admitted that Ms. Gaines's need for surgery could have been created by the mulching incident. (R. p. 478, line 21-p. 480, line 3)

ARGUMENTS

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED A NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

A Trial Judge has the power to grant a new trial by utilizing the Thirteenth Juror Doctrine. However, this power may be exercised only when the verdict is, "shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (S.C. 2000). "The Trial Judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the Court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives" *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715,

723 (S.C.App. 1996). However, a jury's determination of damages is entitled to substantial deference. *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (S.C.App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (S.C. 2009). Just as important, the decision to grant or deny a new trial motion rests within the discretion of the Circuit Court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Brinkley v. S.C. Dep't of Corrs.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (S.C.App. 2009).

In essence, a court that "abuses its discretion," a term that sounds extraordinarily harsh, is simply misapprehending the facts or the law. However, if a court does misapprehend those issues, the same's new trial order must be reversed.

I. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN OPPOSING EXPERT'S TESTIMONY.

The Trial Court granted a new trial based upon a number of issues. The first issue is noted as follows: "Plaintiff's new trial motion centered on the testimony of her two medical expert witnesses who each opined that this motor vehicle accident more probably than not, to a reasonable degree of medical certainty, was the cause of the injury to the Plaintiff which necessitated the disputed spinal surgery. Both witnesses were presented at trial through the use of *de bene esse* video depositions. Defendant did not present any evidence to refute these experts and relied solely on McGarr's cross-examination of the witnesses to contest the proximate cause issue. No objections were made at the trial as to the admission of either deposition and no objections were made at trial as to the content of either deposition." In essence, the Court was of the opinion that a defendant, when confronted with a proximate cause issue, must present an expert to refute the testimony of a

plaintiff's expert.

The Trial Court's statement is absolutely correct. Two doctors testified for the Plaintiff, without objection from either party. The Defendant produced no experts to counter the opinions of the Plaintiff's experts. However, the credibility of the statements given by the experts was clearly the issue in question.

To the best of the undersigned's knowledge, the above-noted issue was first addressed by a court in 1935. At that time, our Supreme Court held that, "the fact that the evidence was not contradicted by direct evidence does not render it undisputed as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result." *Green v. Greenville County*, 176 S.C. 433, 439, 180 S.E. 471, 474 (S.C. 1935). Indeed, by 1952, the issue was unequivocally settled. At that time, our Supreme Court dealt with a Trial Court's jury charge that consisted of the following: "I charge you in that connection that the testimony of the witnesses, although uncontradicted, is not binding upon you. You have a right to determine it in the light of all circumstances and give it such weight as you think it is entitled to." Our Supreme Court, when dealing with that charge, reiterated, "the fact that evidence is not contradicted by direct evidence does not render it undisputed as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result." *Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E. 2d 165 (S.C. 1952). By 1991, a case, almost identical in every respect to the case being presented to the Court today, was reviewed by the Court of Appeals. *Black v. Hodge*, 306 S.C. 196, 196, 410 S.E. 2d 595 (S.C.App. 1991). In *Black*, the Plaintiff alleged substantial injuries from an admittedly minor collision. No witness directly contradicted the Plaintiff's testimony or that of the doctor she called to testify on her behalf. Nevertheless, the jury returned a verdict for the defendant. In affirming the verdict, the Court held that the jury does not have to believe uncontradicted

testimony. In fact, the Court stated, "Ms. Black makes several arguments on appeal, but the essential issue is whether the jury is required to accept her uncontradicted testimony that she was injured. Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no." Our Court of Appeals encountered yet another essentially identical case in 1996. Indeed, that matter was cited by the Trial Judge in the order granting a new trial. The case in question is *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (S.C.App. 1996). *Vinson* was also involved in a low impact automobile accident. Mr. Vinson then testified, as did his dentist. Defense counsel simply cross examined both witnesses, and, in the process, discredited their respective reliability. However, defense counsel did not present other witnesses to independently refute the testimony of the plaintiff's witnesses. When confronted with this appeal, the Court referred to *Black* and *Terwilliger*, so as to explain that the Trial Court need not have granted a new trial, as a trier of fact must not always believe uncontradicted testimony.

Unfortunately, the Trial Court's misapprehension of the law, with regard to this issue, caused it to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of the law amounts to an abuse of discretion, which facilitates a reversal of the Judge's Order.

II. THE TRIAL COURT MISAPPREHENDED THE LAW IN BELIEVING THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

The Trial Court further rooted its decision to grant a new trial on the basis of a second issue. To wit, the Court stated, "this Court finds that much of McGarr's cross-examination of Dr. Mina (Plaintiff's neurosurgeon who performed the surgery) was objectionable and should have been excluded. McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other

witnesses. Not only did McGarr continually ask Dr. Mina to comment on the Plaintiff's credibility using collateral sources, but McGarr went so far as to ask Dr. Mina if she was calling the Emergency Room physician's 'quacks'. This question was in clear violation of South Carolina's long-standing and basic rule prohibiting the 'pitting' of witnesses."

Dr. Mina unequivocally stated that the bone spur, which she removed from Ms. Gaines's neck, was not created or aggravated by the automobile accident in question. However, based upon the history given to her by Ms. Gaines, she was capable of ascertaining that Ms. Gaines had suffered from a severe flexion-extension injury, which, in turn, inflamed the nerve that abutted the bone spur. In order to resolve that inflammation, the bone spur had to be removed. Unfortunately, Ms. Gaines provided a history to Dr. Mina wherein she indicated that the impact from the accident in question was so significant that it caused her to be knocked out. This, according to Dr. Mina, created a significant flexion-extension injury mechanism, and confirmed her opinion that the nerve abutting the bone spur was inflamed as a result of the automobile accident.

Given the above matters of fact, discussing the emergency room records became absolutely essential. This was in part due to the fact that the emergency room records clearly indicated that Ms. Gaines never lost consciousness as a result of this automobile accident. Indeed, the fact that the automobile accident was: a) low impact by nature; and, b) resulted in no loss of consciousness, directly related to the absence of a mechanism for which Ms. Gaines could have suffered the aforementioned flexion-extension injury. Additionally, Dr. Mina's disparaging statements with regard to an emergency room's ability to obtain a proper history and/or perform a proper exam were, at best, rather curious.

Furthermore, Dr. Mina agreed as to the importance of having an accurate history of her patient's problems, prior to the incident in question. Indeed, she affirmed that it would be difficult,

given the facts of the case before the Court, to connect an incident to an injury, absent the patient giving an accurate and proper history.

If a true and accurate history is truly important with regard to relating an incident to an injury, that history should then be discussed. This is particularly true, given the fact that Ms. Gaines's testimony with regard to her prior neck history, which was given while she was under oath, was largely, if not completely, false.

Unfortunately, the law with regard to the cross-examination of expert witnesses is well settled. Indeed, the rules of evidence applicable to this trial were adopted on September 3, 1995. Rule 705 was incorporated during that adoption. Rule 705 states that during an expert's testimony, "The expert in any event may be required to disclose the underlying facts or data on cross-examination." This rule was more fully set forth in the case of *State v. Sclocumb*, 366 S.C. 619, 521 S.E.2d 507 (S.C.App. 1999). In that case, the Court stated, "Under this provision (Rule 705) a cross-examiner is permitted 'to ask the expert to reveal otherwise inadmissible, underlying information to the jury.' On cross-examination, in the process of probing the witness's qualifications; experience, biases, and assumptions, opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so, how, the nonexistence of any fact, data, or opinion, or the existence of a contrary version of the fact, data, or opinion supported by the evidence would affect the expert's opinion. Similarly, the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an

inquiry, subject to the requirements of Fed. R. Evid. 403, the cross-examiner is not limited to facts finding support in the record.” The Court went on to say that “Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert’s opinion; Rule 705 is the cross-examiner’s sword, and, within very broad limits, he may wield it as he or she likes.”
Id.

Obviously, one cannot pit a lay witness against another lay witness. In fact, it would be improper to ask a lay witness whether or not another lay witness had told the truth. Indeed, it would be equally improper to cross-examine a lay witness and ask him or her to explain why other witnesses testified contrary to the witness on the stand. However, by at least 1995, expert witnesses, particularly medical doctors, can be examined with regard to the ability of their patient to be a proper “historian.” Of note would be the frequency with which Justices have been forced to read transcripts with the following lines of questioning: “Doctor, in order to properly diagnose the patient, you first have to take their history, correct? The next question is, invariably, “And if the history is wrong, your diagnosis and/or ability to connect an injury to a particular incident is made much more difficult, am I correct?”

The sword, described above, allows a cross-examining attorney to present contrary versions of fact, so as to explore whether those contrary facts would affect an expert’s opinion. The fact that Ms. Gaines was noted to be fully conscious in the emergency room records fits squarely within this admissible form of cross-examination. That same sword allows an expert to be examined with regard to his or her patient’s ability to give a proper history. This is particularly evident when the patient’s history is given under oath. Moreover, the cross-examiner’s sword allows an expert’s biases and fairness to be questioned. Few statements could be more illuminating with regard to an expert’s bias and/or lack of fairness, than said expert making disparaging remarks toward her

colleagues, to the extent that Dr. Mina disparaged the emergency room doctors with data contradictory to her own version of her patient's history.

Unfortunately, the Court's misapprehension of the law, with regard to these issues, caused it to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of the law amounts to an abuse of discretion, which requires a reversal of the Judge's Order.

III. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINED BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

The Trial Court then bolstered its decision to grant a new trial with regard to a third issue. The Court stated, "Additionally, McGarr repeatedly requested Dr. Mina to state her opinion concerning the proximate cause of the injury which necessitated the surgery. McGarr asked Dr. Mina if it was 'possible' for a disputed intervening event to have caused the necessity for the surgery." In pertinent part, the Court felt that, at the end of Dr. Mina's testimony, "the law in South Carolina requires that opinion testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not. There is no distinction made as to who the questioning party is."

The practice of using of hypothetical scenarios in cross-examining witnesses has been in existence since before the South Carolina Civil Rules of Procedure were adopted. Those rules were adopted on September 3, 1995. Moreover, it has been well-established law, since at least 2000, that hypotheticals are still acceptable. Indeed, our Court of Appeals dealt with this matter in the case of *Gazes v. Dillard's Department Store, Inc.*, 341 S.C. 507, 534 S.E.2d 306 (S.C.App. 2000). In *Gazes*, the Trial Court erred in excluding an expert's answer to a hypothetical question, and the Court of Appeals stated that an expert's opinion testimony may be based on a hypothetical question.

Though the hypothetical question must be based upon facts supported by the evidence, counsel may pose the hypothetical on any theory which could reasonably be deduced from the evidence, and select as a predicate hypothetical such facts as the evidence proves or tends to prove. In essence, one can present a hypothetical by stating, "Hypothetically speaking, if this happened, would that change your opinion?" On the other hand, one can shorten the hypothetical by simply asking, "Is it possible that something else could actually have caused the problem." This practice was in effect long before the Rules of Evidence were adopted, and our Courts noted it to be a viable means of cross-examination even after the Rules of Evidence went into effect.

Unfortunately, the Trial Court's misapprehension of the law with regard to this issue, caused the Court to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of law amounts to an abuse of discretion, which necessitates a reversal of the Judge's Order.

**IV. THE TRIAL COURT MISAPPREHENDED THE LAW IN BELIEVING THAT
A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC
JUROR ACTUALLY VIOLATES THE RULE OF APPEALING TO THE JURY.**

The Trial Court further based its decision to grant a new trial with regard to a fourth issue. The Court stated, "McGarr also violated SCRPC Rule 43(i) in his closing argument. McGarr personally addressed and personally appealed to the jury in his closing remarks. The comments in McGarr's closing included: '...I know that my Greenville County Jurors are going to be fair and decent to me.' 'And, you're bright enough and have the brains enough to know that what I said on Monday.' 'And you guys are not so foolish or dumb.' 'When you have heard the evidence yourself, are you guys just not bright enough to remember?' While these indiscretions are not objected to by Peace, the Court finds them to have prejudiced the outcome of the trial."

It is important to remember that the South Carolina Rules of Civil Procedure were adopted on September 3, 1995. This would include Rule 43(i). Rule 43(i) states, in pertinent part: "Counsel should not address or refer to by name, any member of the jury to which he is addressing, or otherwise personally appeal to any member thereof." This rule was designed to prevent any attorney from addressing the jury, via one of the following examples: "Mr. Smith, as you know...." "You are a nurse and you heard." "Sir, in the blue tie, you must understand." Simply stated, the rule is designed to prevent an attorney from personally appealing to and/or intimidating an individual juror. It is not designed to prevent an attorney from discussing an issue with the jury, collectively.

There is no dispute that the statements cited in the Court's Order were made. However, the following additional statements were made by Ms. Gaines's counsel: 1) "Good afternoon ladies and gentlemen. My name is John Peace. I was introduced to you earlier today during jury selection during jury selection. Like the judge said, we really couldn't hold jury trials without you, obviously. You are the main event. You are the ultimate deciders of all issues of fact." 2) "So when you are in the jury room thinking, 'well, what is pain and suffering worth?' I can already tell you, I mean, Judge Miller's instructions is going to be, there is no market price for pain and suffering, it's not bought and sold. And there is no fixed amount that should be charged for it. You, in the exercise of your common sense, need to decide what its worth in this case, for this lady, under these circumstances. This is the individualized justice because this is the case that has been presented to you as the jury." 3) "Ladies and gentlemen, this is my closing argument. We are going to have these figures in the jury room with you. Which are the medical fees. It's also Dr. Mina's resumé. We are going to have this medical log so that you can look more closely at it. You are going to see the hardware as it is today, you can see the course of treatment starting with MRI's right after the wreck. And you can see up close what Dr. Mina showed you in her testimony yesterday. Ultimately,

I want you to go back to the jury room, after you have been instructed on the law and deliberate carefully. Discuss it amongst yourselves, use your common sense. But based, on the evidence that has been put before you in this trial, I would suggest that the only logical result would be a verdict for Barbara Gaines in the amount well in excess of the medical bills in this case. I thank you in advance for your hard work. Depending on what Mr. McGarr may say to you, I also have the right to respond to that. So I may be back here in just a moment and have a brief overview before you deliberate.”; 4) “Ladies and gentlemen, I know you have been living with this case for a few days and you are ready to get on with your job. It won’t take a lot of time, but I’ve got to tell you, its hard to sit here and listen to somebody accuse me of being disingenuous when he is calling Barbara Gaines a liar. You listened to her, you listened to her daughter, and you listened to her doctors. And I leave it to you to decide who is telling the truth as far as her injuries.”; and, 5) “So ladies and gentlemen, I am going to sit down and let the Judge instruct you all on the law. Please use your common sense. And weigh this for what it is and bring back a verdict that speaks the truth for both of these parties. I appreciate it.”

In essence, an opening and closing statements cannot be accomplished during a jury trial, if one cannot speak to the jurors collectively. Ms. Gaines’s attorney addressed the jurors in precisely that fashion. Mr. Campbell’s attorney did the same.

Unfortunately, the Court misconstrued Rule 43(i) by indicating that one attorney can present opening and closing statements to a jury, addressing the same as a collective, while the other attorney is prevented from doing the same. In other words, the statements from counsel with regard to both the plaintiff and defendant were proper. By misconstruing this law the Court abused its discretion, and the Judge’s Order granting a new trial should be reversed.

V. THE TRIAL COURT’S MISAPPREHENSION OF THE LAW RESULTED IN A

MISAPPREHENDING OF FACTS.

The Trial Court's final basis for granting a new trial is stated as follows: "The only competent evidence admitted in trial requires a verdict that compensates the Plaintiff, at a minimum, for the medical bills and expenses incurred as the result of the spinal surgery. This Court finds an award of damages for only the emergency room bills in their value of \$3,941.00 is grossly inadequate and unsupported by the evidence in this case."

This conclusion fails to take into consideration Ms. Gaines's longstanding preexisting issues with regard to her neck. This conclusion also fails to take into consideration that the pain medications Ms. Gaines had been utilizing were being increased just prior to the occurrence of the automobile accident in question. Additionally, this conclusion fails to take into consideration the minor nature of this automobile accident. Moreover, it fails to consider the credibility issues associated with a number of the plaintiff's witnesses. Furthermore, it does not consider the fact that Ms. Gaines's neck was doing better up until the point wherein she mulched her yard. At that point, her neck issues were exacerbated and, sometime thereafter, surgery was performed. Indeed, this conclusion fails to consider the fact that Ms. Gaines simply grew older, and, a defendant cannot be held responsible for the natural progression of the aging process, and the worsening of conditions associated therewith.

As stated above, almost identical versions of this case have previously been tried and discussed on appeal, *Black v. Hodge*, *Vinson v. Hartley*. In fact, *Vinson* was appealed because the Trial Court refused to invoke the Thirteenth Juror Doctrine, in spite of the plaintiff's attorney request that the same be done. Furthermore, the Court of Appeals upheld the Trial Court's refusal of that request.

To grant a new trial in the case before you, after citing *Vinson*, is clear evidence that the

Trial Court simply misapprehended the Rules of Evidence and Rules of Civil Procedure and, as a result, the facts of the matter. For that reason, the Trial Court abused its discretion, and its Order granting a new trial should be reversed.

CONCLUSION

To summarize, the jury was presented with a plaintiff that had a longstanding history of neck problems. Indeed, those neck issues were of a progressive nature, and were worsening in concurrence with the Plaintiff's natural aging process. In the meantime, the Plaintiff was involved in a low impact automobile accident. The same Plaintiff confirmed that, at the scene of this low impact accident, she advised the investigating officer who inquired as to her health that she did not know if the accident had caused her any injury. Moreover, she then drove away from the scene of that accident. Thereafter, she ultimately went to the hospital, wherein she was examined. While at the hospital, she did not complain of pain radiating into her arm. One month later, she went to her family physician's office, wherein she reported arm pain. However, that arm pain, by all accounts, was associated with and caused by a bone spur located in the Plaintiff's neck. That very bone spur had been in existence well before the automobile accident in question occurred. Regardless, the Plaintiff was then treated to improvement, until a point some time later, wherein she mulched her yard, and, during that process, re-injured her neck. Thereafter, the bone spur was surgically removed, and the Plaintiff's neck and arm symptoms were resolved.

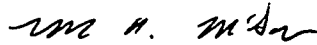
The jury then heard testimony from Ms. Gaines and a number of Ms. Gaines's witnesses. The credibility of all those witnesses was ultimately subjected to grave suspicion during the course of cross-examination.

In consideration of all the above, it was suggested to the jury that it award the Plaintiff an amount commensurate with the emergency room bill that she incurred on the date of the accident.

After deliberating, the jury logically and fairly returned a verdict in the amount of the emergency room bill. There is no competent evidence to suggest that this verdict was shockingly disproportionate to the injuries suffered, or affected by passion, caprice, or prejudice.

In conclusion, the Trial Court misapprehended multiple laws. Those misapprehensions of law led to misapprehensions of fact. In the course of these errors, the Trial Court erroneously granted a new trial based upon the Thirteenth Juror Doctrine. These errors represent a clear abuse of the Trial Court's discretion, and, as such, Counsel for Appellant respectfully requests a reversal of the Trial Court's Order, and a reinstatement of the jury's fair and reasonable verdict.

Respectfully submitted,



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None

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Circuit Court properly exercised its discretion by granting Plaintiff's Rule 59 Motion for a New Trial, where the Circuit Court heard a 3-day car-wreck jury trial in which multiple witnesses testified regarding the issues of proximate cause and damages, during which Appellant's counsel repeatedly mis-stated the law and made improper arguments during cross-examination of witnesses, where the Circuit Court then held a subsequent, fully briefed-hearing on Plaintiff's Rule 59 New Trial Motion, and where the Circuit Court made specific findings that, based on the Court's observations made during the jury trial, Appellant's counsel's improper arguments during the jury trial impermissibly affected the outcome of the trial.

STATEMENT OF THE CASE

On March 20, 2012, Barbara Gaines filed this action in the Greenville County Court of Common Pleas. Joyce Ann Campbell answered on April 23, 2012. This matter was tried to a jury on August 5-7, 2013. The jury returned a verdict for \$3,941.00. After the jury verdict in this case, pursuant to Rule 59, SCRPC, Plaintiff/Respondent Barbara Gaines moved for a New Trial, or in the alternative, for a New Trial *nisi additur*.¹ (R. p. 289, lines 8-20; R. p. 294 - p. 321).

After considering the 3-day jury trial in this case, as well as the several Memoranda and oral arguments for and against Plaintiff's Rule 59 Motions, the Circuit Court granted Plaintiff's Rule 59 Motion for a New Trial Absolute by Order filed on September 19, 2013. (R. p. 1-4). As discussed below, the Circuit Court properly exercised its discretion when it granted Plaintiff's Motion. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

¹The Circuit Court granted Plaintiff's Motion for New Trial, so this Brief does not address any issues regarding Plaintiff's Motion for New Trial *nisi additur*.

FACTS

At trial, Joyce Ann Campbell admitted negligence in colliding with the back of Barbara Gaines' car on January 8, 2010. (R. p. 148, lines 11-13). At trial, the elements of proximate cause and the amount of damages were the disputed issues of fact. (R. p. 272, lines 15-18).

At trial, and in her deposition testimony that was read into the record during her testimony at trial, Campbell estimated her speed at about 35-40 miles per hour before the collision. (R. p. 148, lines 15-18). According to Gaines and the investigating Easley City Police Officer, Gaines was at a complete stop a Stop Sign at the time of the collision. (R. p. 66, lines 13-15).

Gaines testified that the wreck caused Gaines to suffer neck injuries that caused neck pain, as well as pain radiating into her right arm and hand. (R. p. 84, lines 5-15). Barbara Gaines testified extensively about neck injuries caused by the wreck and about her pre-existing arthritis and prior neck injuries and complaints. (R. p. 82, lines 4-24). Gaines testified that she did not have neck pain radiating into her right arm prior to the wreck with the Campbell. (R. p. 82, lines 4-24). Gaines and daughter both testified that Gaines suffered from severe neck pain radiating into her right arm after the wreck. (R. p. 82, line 25- p. 87, line 10; R. p. 178, lines 182, line 22 - p. 183, line 19).

Gaines, both her physicians, and her adult daughter Joye Gaines all testified about Gaines's medical care. Barbara and Joye Gaines each testified that, at the time of trial, Barbara Gaines was 72 years old. Ms. Gaines is a retired the Pickens County School District, where she worked at a Special Needs Teachers Aide for many years. (R. p. 75, line 25 - p. 76, line 11). Barbara Gaines lives with daughter Joye, who works as a teacher in Pickens County. (R. p. 174,

line 23 - p. 175, line 9).

By video depositions taken for use at trial, Gaines offered the expert opinions of her primary care physician Dr. Lisa Harding (R. p. 416 - 491), and her neurosurgeon Dr. Christie Mina . (R. p. 323 - 414). Both Dr. Harding and Dr. Mina testified regarding their investigation of Gaines's injuries. Based on Gaines's reported symptoms, Dr. Harding ordered a cervical MRI. (R. p. 427, lines 16-23). Dr. Harding testified that Dr. Harding suspected a herniated disk at the C5-6 level in Gaines's neck. (R. p. 427, lines 16-23). Dr. Harding testified that she referred Gaines to Piedmont Neurosurgical and Spine for evaluation and specialized care by a neurosurgeon. (R. p. 428, lines 5-16).

Both Dr. Harding and Dr. Mina described the affected anatomical area of the Gaines's right arm and hand as the "C6 Distribution". (R. p. 441, lines 5-17; R. p. 343, lines 4-17). Both doctors described the nature of the medical diagnosis of "C6 Radiculopathy", a condition whereby a pinched nerve in the neck causes causing pain and sensory changes in the affected area of the neck, arm, and hand. . (R. p. 343, line 24- p. 345, p. 25).

Dr. Mina testified regarding Gaines's neurosurgical treatment. Dr. Mina testified about Gaines's neck surgery, an "anterior cervical discectomy and fusion" surgery designed to relieve pressure on Gaines's C6 nerve root. (R. p. 347, line 11- p. 353, p. 8). Gaines and her neurosurgeon both testified that Gaines had a complete resolution of her symptoms following the surgery. (R. p. 92, line 13-15; R. p. 353, line 22- p. 354, p. 18).

Both Dr. Harding and Dr. Mina testified that, to a reasonable degree of medical certainty, Gaines's C6 radiculopathy was caused by the wreck with Campbell. (R. p. 441, lines 5-21). Dr. Mina further testified that to a reasonable degree of medical certainty, Gaines's anterior cervical

diskectomy and fusion surgery was necessitated by neck injuries caused by the wreck on January 8, 2010. (R. p. 355, line 18- p. 356, line 1).

The parties stipulated that Gaines's medical expenses following the wreck, including the neck surgery, totaled \$77,966.56. (R. p. 1; R. p. 94, line 7 - p. 95, line 18). Gaines sought general damages for pain and suffering from the time of the wreck until after her neck surgery resolved her C6 radiculopathy.

Campbell's counsel vigorously cross-examined both Dr. Harding and Dr. Mina. When Dr. Mina's opinion differed from the report issued by the Emergency Room radiologist, Campbell's counsel pursued this line of questioning:

2 Q. So as far as you're concerned, the ER doctors are
3 quacks?

4 A. I beg your pardon?

5 MR. PEACE:

6 I'm going to object to that question --

7 EXAMINATION RESUMED BY MR. McGARR:

8 Q. You said more --

9 WITNESS:

10 I'll object to that question, too.

11 MR. PEACE:

12 -- as being argumentative.

13 EXAMINATION RESUMED BY MR. McGARR:

14 Q. You said, more than once, that you don't think the
15 emergency room records are reliable.

16 A. Correct. That does not mean that the emergency room
17 doctor is a quack. That means that the records here,
18 the history that's obtained from the patient and
19 family, is not necessarily exactly what happened or
20 what the patient was feeling at the time.

21 Q. Okay, and that's because two heads are never better
22 than one?

23 A. That has nothing to do with it.

24 Q. Okay. So, Doctor, the bottom line is everything I've
25 shown you and anything else I could show you, you
1 would end up saying no, this automobile accident

2 caused this surgery; is that correct?
3 A. No. I'm certain that if you could show me some other
4 evidence that was consistent with a C-6 radiculopathy
5 that pre-existed this -- this automobile accident,
6 then -- then I might reconsider.

(R. p. 410, line 2 - p. 411, line 8).

Without such evidence, of course, Dr. Mina declined to change her opinion that, to a reasonable degree of medical certainty, the wreck with the Campbell caused Gaines's neck injuries and C6 radiculopathy. The Circuit Court noted that, while the Campbell does not have the burden of proof, Campbell did not introduce any evidence or testimony contrary to the expert opinions of Dr. Mina and Dr. Harding that Gaines's C6 radiculopathy was caused by the wreck on January 8, 2010. (R. p. 306, line 11, p. 308, line 15). Accordingly, the Circuit Court found that the record did not contain evidence which would support the jury's verdict in the amount of \$3,941.00. (R. p. 4).

Based on the overwhelming weight of the evidence and testimony offered at trial, Barbara Gaines argued that the jury's verdict of \$3,941.00 was grossly inadequate and is unsupported by the evidence in this case. After considering the 3-day jury trial in this case, as well as the several Memoranda and oral arguments for and against Gaines's Rule 59 Motions, the Circuit Court properly exercised its discretion in granting Gaines's Rule 59 Motion for a New Trial Absolute. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

ARGUMENT

1. **Rule 59 Requires the Circuit Court to Grant a New Trial Where the Circuit Court Reasonably Believes that the Amount of the Verdict Was Grossly Inadequate Because of Improper Influences Outside the Evidence.**

Rule 59(a) states, in pertinent part, that "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of this State". In *O'Neal v. Bowles*, our Supreme Court observed that:

If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute. The failure of a trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.

314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)(italics in original). In the present case, the Circuit Court found that the jury verdict was grossly inadequate in light of the evidence and testimony offered at trial. After hearing the witnesses and arguments in this case, the Circuit Court properly exercised its discretion to grant Gaines's Rule 59 Motion for a New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

2. **Under the "Thirteenth Juror" Doctrine, the Circuit Court has Discretion to Grant New Trials where the Circuit Court finds that the jury's verdict is Not Supported by the Evidence.**

In *Vinson v. Hartley*, this Court noted that "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996)(citing *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). Considering the evidence and testimony offered at trial in this

case, the Circuit Court found that the evidence does not support the jury's verdict. The Circuit Court further found that counsel for Joyce Ann Campbell made arguments that may have confused the jury or otherwise interfered with the jury's proper role. The Circuit Court properly granted Gaines's Motion for New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

The *Vinson* Court further outlined the nature of the "Thirteenth Juror" doctrine:

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). See also *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion). In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the "thirteenth juror." *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). Such discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them...." *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950).

324 S.C. 389, 403-404, 477 S.E.2d 715, 722-723 (Ct. App. 1996). Under the "Thirteenth Juror" doctrine, based on the three day jury trial, first-hand observation of live witnesses, and subsequent arguments of counsel, the Circuit Court properly ruled that a new trial was necessitated on the basis of the facts of this case. The Circuit Court properly exercised its discretion when granting the Circuit Court's Order granting Gaines's Rule 59 Motion for a New

Trial. Therefore, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

"The matter of granting a new trial on the grounds stated is left under our law to the discretion of the trial judge, who hears the evidence, sees the witnesses, and who is in much better position than this court to judge of the righteousness of verdicts." *Worrell v. South Carolina Power Co.*, 195 S.E. 638, 642 (1938)(quoting *Byus v. Eason*, 178 S.C. 175, 179, 180, 182 S.E. 442, 444 (1935)). Analyzing the *Worrell* case, this Court further observed that:

The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). The Circuit Court properly exercised its discretion when granting the Circuit Court's Order granting Gaines's Rule 59 Motion for a New Trial. Therefore, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

3. **The Improper Conduct of Campbell's Counsel further supports the Circuit Court's Decision to Grant a New Trial.**

The Circuit Court further noted that counsel for Joyce Ann Campbell engaged in a variety of conduct which may have confused the jury or introduced passion, prejudice, or other improper influence on the jury. As the Circuit Court noted, counsel for Joyce Ann Campbell repeatedly sought to pit one witness against another. For example, defense counsel showed isolated pages from the Gaines's deposition to Gaines's physicians and asked the physicians if they believed that Gaines was lying under oath. During Dr. Mina's cross examination, Defense counsel

referred to the treating Emergency Room doctors as “quacks” after Dr. Mina testified that she questioned some of the information contained in Emergency Room treatment records. (R. p. 410, lines 2-23). In closing, Campbell’s counsel reiterated this “pitting” by arguing **“Do you really believe that emergency room physicians are so incompetent that they can’t list what your problems are?”** (R. p. 252, line 25 - p. 253, line 2. The Circuit Court reasonably believed that such inflammatory and improper argument, offered only as a rhetorical question, improperly influenced the outcome of the trial. Therefore, this Court should affirm the Circuit Court and remand for a New Trial.

Finally, during his closing arguments to the jury, defense counsel made various personal appeals to the jury’s intelligence and/or stupidity in weighing evidence introduced by Gaines.

Campbell’s counsel began his closing argument by saying:

But let me start with this. I request jury trials in Greenville County, because when I do, I know that my Greenville County jurors are going to be fair and decent to me. And be honest with yourselves with regard to what a case is about. We look to you because you will be fair to us and provide us justice. The other reason that I ask for jury trials is because you guys collectively are extraordinary [sic] intelligent. So much so that it becomes a bit disingenuous to give you bits and pieces of evidence and leave out other evidence that you guys have clearly heard. And think that you don’t remember the rest of the story.

(R. p. 79, line 21 - p. 80, line 7). Regarding the impact, however, Campbell’s counsel argued facts not in evidence, stating that “You’ve seen the crashes on television where they’re going 35 miles per hour, cars are ripped apart.” (R. p. 250, lines 14-16).

Campbell’s counsel confused the nature of the medical issues and testimony:

For example, **when I was here Monday, did I tell you guys that this is not an issue of whether or not Ms. Gaines had a problem with her neck that required surgery? Is that what I said? I don’t know where this argument comes up that she’s faking her problems. She didn’t. She had a problem with**

her neck at the C-5-6 area – C-4-5 area that caused a problem to go down her arm. There's no doubt. Nobody - - I told you nobody was going to dispute that. **That was on Monday, that was just three days ago. Did I not tell you that? And I want to tell you that gain, there's no question but that she had to have surgery to get it fixed. Said it on Monday and I [sic] it again today.** At no time have I said to a doctor or to Ms. Gaines or to any other witness, she's faking these problems. She's not. **And you're bright enough and have the brains enough to know that that's what I said on Monday.**

(R. p. 248, lines 8-25 (bold added)). Regarding the existence of Gaines' neck problems and need for surgery, however, Campbell's counsel mis-characterized Dr. Mina's testimony by arguing more facts that were not in evidence:

What did I tell you on Monday? The issue is not that she had the neck problems, the issue is what caused the problems. And what caused the problems, a bone spur that had to be drilled out and then other holes opened up wider so that this nerve would quite being pinched [sic]. That's what I told you. **That's what the doctors have told you. That's what she was showing when she did this. I'll come back to it, there's no disc herniation. I'm going to read the doctors depositions with regard to that. It was a bone spur. And you guys are not so foolish or so dumb and its disingenuous to pretend like you are, that you didn't hear that the doctor says, She's got a bone spur that is squishing on that nerve that's causing a problem and makes it go down her arm. I went in, had to take out the disc to get to the bone spur what I then had to remove. Then I opened some more holes so that she would have more space.**

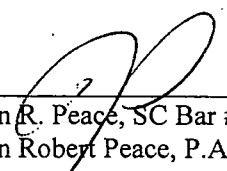
(R. p. 249, lines 1 - 16 (emphasis added)). Campbell's Counsel further told the jury that "you were told in closing that she had Ms. Gaines' old records and had been able to take a look at them. Told it in opening and told it in closing. As if you guys don't have enough brains . . ." (R. 256, lines 20-23). As a result of the improper influence of Campbell's counsel's argument, the jury's verdict was grossly inadequate. The Circuit Court properly exercised its discretion under the 13th Juror Doctrine by granting Gaines' Motion for New Trial. Therefore, this Court should affirm the Circuit Court and remand for a New Trial.

CONCLUSION

In the present case, the Circuit Court found that the jury's verdict of \$3,941.00 was grossly inadequate and warranted a New Trial Absolute. In *O'Neal v. Bowles*, the Supreme Court held that under Rule 59, "If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)(italics in original). Accordingly, considering the 3-day jury trial in this case and the subsequent hearing on the Rule 59 Motion, the Circuit Court properly granted Gaines' Motion New Trial Absolute. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

In the present case, after conducting a 3-day jury trial, the Circuit Court specifically found that the verdict was grossly inadequate and the result of the improper cross-examination of Dr. Mina and Dr. and argument by Campbell's counsel. Indeed, in the present case, as in *O'Neal v. Bowles*, "The failure of a trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). Had the Circuit Court failed to grant the New Trial Motion, then this Court would have reversed such an abuse of discretion and remanded for a New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

Respectfully Submitted,



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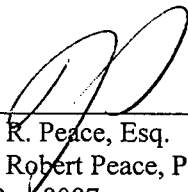
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Certificate of Counsel

The undersigned counsel for Appellant Barbara Gaines hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.



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November 11, 2014

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Appellate Case No. 2013-002367

Barbara Gaines, ...Respondent,

v.

Joyce Ann Campbell, ...Appellant.

APPELLANT'S REPLY BRIEF

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STATEMENT OF ISSUES ON APPEAL

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED A NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

I. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN OPPOSING EXPERT'S TESTIMONY.

II. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

III. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINING BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

IV. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC JUROR ACTUALLY VIOLATES THE RULE AGAINST APPEALING TO A JUROR.

V. THE TRIAL COURT'S MISAPPREHENSION OF THE LAW RESULTED IN A MISAPPREHENDING OF THE FACTS

FACTS

On January 8, 2010, Ms. Gaines and Ms. Campbell were involved in the automobile accident which gives rise to this lawsuit. That accident resulted in very little damage to either parties' vehicle. (R. pp. 13-18) In fact, Ms. Gaines testified that she told the investigating police officer that she did not know if she were injured at the time of the accident. (R. p. 79, lines 21-24; R. p. 68, lines 3-12; and, R. p. 156, lines 1-6) Thereafter, Ms. Gaines drove her vehicle from the scene of the accident. (R. p. 110, line 23-p. 111, line 1; and, R. p. 156, lines 13-23) At the time of the accident, Ms. Gaines was seventy years of age.

At some point shortly thereafter, Ms. Gaines went to the emergency room, wherein one of her complaints was with regard to neck pain. Furthermore, upon examination, her neck was found to be supple, without muscular spasms, and, absent any stiffness. Indeed, her complaint of neck pain was characterized as mild. Of more importance, Ms. Gaines failed to complain of right arm pain. Just as important, x-rays were obtained of Ms. Gaines's neck, wherein the radiologist determined that severe degenerative changes were present. However, the radiologist also noted that there were no acute injuries or abnormalities in Ms. Gaines's neck. (R. p. 455, line 17-p. 464, line 13)

Prior to the automobile accident, Ms. Gaines began experiencing problems with her neck as early as July 23, 1987. Please recognize that this problem would have occurred approximately twenty-two years prior to the automobile accident in question. (R. p. 114, line 17-p. 119, line 5) Ms. Gaines then proceeded to complain of problems with her neck through September 1, 2009. In other words, she was having continued trouble with her neck roughly four months prior to the subject accident. (R. p. 130, line 15-p. 133, line 6) Indeed, Ms. Gaines was taking pain medications, the dosages of which were actually being increased, as late as November 30, 2009. To clarify, this medication adjustment would have occurred approximately one month prior to her accident with Ms. Campbell. (R. p. 444, line 3-p. 452, line 18)

Regardless, one month after the accident in question, Ms. Gaines went to her doctor, wherein she promulgated a list of complaints, with the fourth item on that list being right arm pain. (R. p. 465, line 14-p. 466, line 10) As a result of that complaint, her doctor ordered an MRI. Thereafter, the radiologist who interpreted that MRI noted that Ms. Gaines suffered from severe bone spurring, a congenitally small spinal canal, and severe spinal canal stenosis. (R. p. 470, line 11-p. 472, line 18; and, missing exhibit)

Thereafter, that MRI was also reviewed by Dr. Mina, after which she opined, "she (meaning Ms. Gaines) had what is called an osteophyte, otherwise known as a bone spur, on the right side of her cervical 5-6 level, which was compressing the right C-6 nerve root." (R. p. 331, line 20-p. 332, line 10) Dr. Mina further stated, "my impression was that this bone spur that was pinching the nerve was the source of the symptoms." Furthermore, Dr. Mina stated that, "the bone spur could not have been caused by the automobile accident." (R. p. 343, line 24-p. 344, line 5) Indeed, Dr. Mina stated that she essentially removed the bone spur, which alleviated the pressure on the disc. This, in turn, relieved Ms. Gaines's symptoms. (R. p. 349, line 13-p. 350, line 21; R. p. 356, lines 2-5; R. p. 476, line 5-p. 477, line 1; R. p. 92, lines 13-15; and, missing exhibit recreated as R. p. 20) Furthermore, Dr. Mina ultimately conceded that the mere existence of a bone spur created potential for Ms. Gaines to have had problems, regardless of an accident. (R. p. 362, lines 5-12) Nevertheless, upon excision of the bone spur, Ms. Gaines experienced nearly complete resolution of her pre-operative symptoms, as the same ceased to exist.

ARGUMENTS

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED A NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

Appellant's Brief cited four separate and distinct legal principals that were misconstrued by the Trial Court when it made the determination to grant a new trial based upon the Thirteenth Juror Doctrine. Respondent's Brief failed to address any of those legal standards. Indeed, the thirteen page brief submitted by Respondent's Counsel never once indicated that Appellant's statement of the law was wrong or misleading.

The Appellant's Brief also stated that the Trial Court's misapprehension of four separate

and distinct legal principals led to the Court completely misapprehending the evidence set forth during the trial. Again, Respondent's Brief failed to even once negotiate those issues.

Please recognize that there is no question being posed with regard to the Trial Court's ability to invoke the Thirteenth Juror Doctrine. However, a court may only employ that doctrine when its conclusions are not controlled by an error of law. Again, Respondent's Brief failed to even once engage this statement, or mention that the same was, in any way, misleading.

In essence, the Respondent has conceded that the Appellant's Brief, with regard to its application of the law, is completely accurate. Unfortunately, that concession affirms the Appellant's position. The Trial Court simply misapprehended four separate and distinct principles of law in arriving to the incorrect conclusion that a new trial should be granted. Those repeated misapprehensions of the law culminated in a misapprehension of the facts, with the ultimate result being that the Trial Court incorrectly granted a new trial based upon the Thirteenth Juror Doctrine. There misapprehensions, unfortunately, are legally referred to as abuses of discretion. As such, and pursuant to that legal definition, the Trial Court abused its discretion.

**I. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT
DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN
OPPOSING EXPERT'S TESTIMONY.**

To reiterate, the Court's Order granting a new trial stated, in pertinent part, "The only **competent evidence** admitted at trial requires a verdict that compensates the Plaintiff, at a minimum, for the medical bills and expenses incurred as a result of the spinal surgery. This Court finds an award of damages for only the emergency bills in the value of \$3,901.00 is grossly inadequate and unsupported by the evidence in the case. Therefore, this Court grants Plaintiff's Motion for a New Trial Absolute." (Emphasis added) (R. pp.1-4)

Unfortunately, the Court misapprehended the law with regard to "competent evidence." The Court engaged its first misapprehension by specifically stating, "The Defendant did not present any evidence to refute (the Plaintiff's) experts, and relied solely on McGarr's cross-examination of the witnesses to contest the proximate cause issue." (R. pp.1-4) The Court granted a new trial based upon its misapprehension that a given expert's opinion can only be countered by that of an opposing expert. As set forth in the Appellant's Initial Brief, the Court's application of this principle is in direct contradiction of the law itself. Indeed, this misapprehension was the first of a series of the same which led to the improper granting of a new trial.

II. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

The Court then cited a second cause for granting a new trial in its finding that an attorney may not cross-examine an expert by doing the following: 1) inquiring as to the veracity of other witnesses; 2) utilizing collateral sources; and, 3) in bringing to the jurors' attention that a physician was essentially calling emergency room physicians quacks. In essence, the Court felt that the above consisted of "pitting" witnesses against one another. (R. pp.1-4) Again, as stated in Appellant's Initial Brief, the Court's application of the law, with regard to the cross-examination of experts, was, unfortunately, another misapprehension of the law. Therefore, its rationale for granting a new trial was additionally flawed.

III. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINED BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

The Court's third misapprehension of the law was with regard to its understanding that an expert may not be cross-examined based upon a hypothetical line of questioning. In other words,

the Court found it inappropriate to cross-examine an expert based upon asking if alternate scenarios were "possible." Indeed, the Court stated, "The law in South Carolina requires that opinion testimony by medical experts must to a reasonable degree of medical certainty, and more probably than not. There is no distinction made as to who the questioning party is." (R. pp.1-4) Again, as stated in Appellant's Initial Brief, the Court simply misapprehended the law with regard to this issue, as it failed to take into consideration Rules 702, 703, 704, and 705 of the South Carolina Rules of Evidence, in addition to South Carolina's longstanding rule with regard to utilizing hypotheticals whilst cross-examining experts. Unfortunately, through its misapprehension of this law, the Court improperly granted a new trial.

IV. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC JUROR ACTUALLY VIOLATES THE RULE AGAINST APPEALING TO A JUROR.

The issues at hand were then compounded by the Court's fourth rationale for granting a new trial. That rationale was based upon the fact that, "McGarr personally addressed and personally appealed to the jury in his closing remarks." (R. pp.1-4) Unfortunately, the Court misapprehended Rule 43(i) of the South Carolina Rules of Evidence. This fourth misapprehension of the law caused the Court to, on yet another ground, improperly grant a new trial.

V. THE TRIAL COURT'S MISAPPREHENSION OF THE LAW RESULTED IN A MISAPPREHENSION OF THE FACTS.

It is of vital importance to recognize that while the Trial Court felt the methods of cross-examination were improper, it noted that no objections were ever raised with regard to said cross-examination. (R. pp.1-4) The Trial Court also readily admitted that "indiscretions" of McGarr's

closing argument drew no objections from Peace. (R. pp.1-4) This, coupled with Respondent's failure to contend with the legal principles set forth in Appellant's Initial Brief, make it apparent that Counsel for Respondent understood the law, and the Trial Court, unfortunately, misapprehended the same.

Despite the above, Respondent's Brief cites, by page and line, selective portions of Appellant Counsel's cross-examination of Dr. Mina. However, please find below the complete dialogue associated with Appellant Counsel's discussion with Dr. Mina, regarding the aforementioned emergency room records. However, please recognize that the objections raised by Mr. Peace were either edited or ignored as the deposition video was shown the jurors. The entire discussion, with the objections removed, occurred as follows:

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- 6 Q. Does it appear that when she was being deposed,
7 -- and we were asking about her history while under
8 oath, that she was telling us that she had been
9 knocked out as a result of this accident?
10 A. Yes, sir, I believe that's referred to in my office
11 notes as well.
12 Q. So she was telling you the accident was severe enough
13 to have knocked her out; is that correct?
14 A. Right.
15 Q. Which would give you some indication of one heck of a
16 mechanism of injury, a good flexion extension type
17 injury --
18 A. Yes.
19 Q. -- if she got hit enough to --
20 A. In an -- in an impact to the head, yes.
21 Q. Yeah, a pretty good impact of the head.
22 A. Yes.
23 Q. If we could, going to the emergency room records on
24 the date of this accident, does it appear -- and I've
25 highlighted it. Does it appear that she never told

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- 1 them that she was knocked out? In fact, she said she

7

2 had no altered level of consciousness, denied
3 dizziness, and denied being knocked out? And I know
4 I'm using the lay people terms.

5 A. Yes, although when they say no altered level of
6 consciousness, I'm not sure if that's something that
7 the patient is saying that she is not altered now or
8 wasn't altered at the time of the accident. That it
9 doesn't specify.

10 Q. Wouldn't you think that if a patient had been knocked
11 out as a result of an automobile accident, that she
12 would report an injury to the police officer and
13 report to the emergency room that, I have been knocked
14 out?

15 A. It's possible - -

16 (INTERRUPTION)

17 WITNESS:

18 I'm sorry. Off the - -

19 VIDEOGRAPHER:

20 Going off the records at 17:59.

21 (OFF THE RECORD)

22 VIDEOGRAPHER:

23 Going back on the record at camera time 17:59.

24 EXAMINATION RESUMED BY MR. McGARR:

25 Q. Doctor, the question again would be, does it not

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1 strike you as extremely surprising that someone who
2 had been hit so hard that they were knocked out failed
3 to tell the police officer they were injured and fails
4 to tell the hospital that they were knocked out?

10 WITNESS CONTINUES:

11 A. If there was a significant head injury, then it might
12 not be unusual. Because the patient right after the
13 accident, right after a blow to the head, might be
14 confused.

15 Q. I understand. But by the time she has gotten to the
16 emergency room, she's specifically denying being
17 knocked out.

18 A. But again she could be confused at this point in time.

19 This is immediately after the accident.

20 Q. Don't you think if she's able to tell you that she
21 presents following a motor vehicle collision, the
22 onset was just prior to arrival, the collision was a
23 rear impact, the patient was the driver, there were

24 safety mechanisms including seat belt -- that if she's
25 able to give that much detail, that she probably

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1 should be able to remember, if she knows what's
2 hurting her, that she had been knocked out? I mean,
3 it would be very unusual to have that much detail and
4 not remember being knocked out.

5 A. Well, but is this the patient herself giving the
6 information? Because according to this, History
7 Source says "patient and family." So a lot of this
8 may be obtained from family members

9 Q. But the bottom line is, wouldn't you think that if the
10 family members were there and she had been knocked
11 out, that someone would have told the hospital?

12 A. Again, there might have been confusion right after the
13 accident.

14 Q. But nonetheless, this hospital note makes no mention
15 of her being knocked out. In fact, it specifically
16 denies that she was knocked out.

17 A. That's --

21 A. That's what the note says. Where the source of that
22 information comes from, I don't know.

23 Q. Okay, so at least with regard to what was stated on
24 the day of this accident when she goes to the
25 emergency room, the opposite of what she told us in

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1 the deposition is placed in these notes?

2 A. That's true. Again, I question the reliability of
3 this, this history, though.

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2 Q. So she was doing better until she started putting out
3 the mulch the weekend before, and now she's got a
4 flare-up; is that correct?

5 A. I'm sorry. I must be misunderstanding the timing of
6 something, because this implies to me that she has
7 some soreness in the shoulder and neck but that her
8 right arm at this point is feeling better.

9 Q. Does it say, "Right arm has been doing better, though
10 sore in shoulder and neck since putting out mulch over
11 the weekend?"

12 A. It is.

13 Q. Okay. So does it appear that she started having
14 soreness in her shoulder and her neck after putting

15 mulch out over the weekend?
16 A. It -- it does say that.
17 Q. And by the very act of putting out mulch, when you
18 have a spur to the extent that you have at C5-6, you
19 could inflame a nerve enough where you ultimately end
20 up doing surgery to fix it?
21 A. Well, you could. But if that were the case, then why
22 wouldn't the right arm be doing worse?
23 Q. Because --
24 A. Because that would be where the symptoms would come
25 from, from an inflamed nerve.

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1 Q. Except if we go and we look back under those -- under
2 that theory, then why didn't she have radiating pain
3 at the hospital the day of the accident?
4 A. I can't -- I wasn't there the day of --
5 Q. But they don't describe --
6 A. At the hospital, --
7 Q. -- radiating pain.
8 A. -- so I can't speak to that.
9 Q. But, the records that we saw, she doesn't refer to
10 radiating pain going into her right arm at the
11 hospital; did she?
12 A. Well, I'd have to look back at them to see.
13 Q. Can we do that?
14 A. There's no specific mention made of arm pain here.
15 Q. In fact, if we actually go through the ER records,
16 she's not complaining of arm pain. She's not
17 complaining of radiating pain. She's not complaining
18 of chest pain. She's not complaining of low back
19 pain. She's essentially complaining of head and neck
20 pain; is that correct?
21 A. Correct.
22 Q. So if there was a C -- a C5-6 issues, it
23 wasn't presenting itself at the emergency room; was
24 it?
25 A. Well, it's not mentioned in these notes. But again,

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1 here I'm questioning the reliability of this, this
2 history, because here it doesn't even talk about the
3 loss of consciousness that she had.
4 Q. It actually says the exact opposite, she denied having
5 a loss of consciousness; does it not?

6 A. Well, other records state - -
7 Q. It's not silent. It says it.
8 A. Other records state that she did, and that she clearly
9 had a head injury, and, therefore, she was likely to
10 have some confusion at the time.
11 Q. Is it your testimony, Doctor, that you think that an
12 emergency room doctor would hear that someone's been
13 involved in an automobile accident, claiming headache,
14 and then not check to see if they had a loss of
15 consciousness? Is that your - -
16 A. No, that's - -
17 Q. Is that your testimony?
18 A. That's not my testimony.
19 Q. Okay, so if they come in and they're presenting or
20 they're saying, I've got a headaches and I've been
21 involved in an automobile accident, one of the first
22 things they're going to check, and they obviously did,
23 because they went through a litany of question, are
24 you feeling different, are you having nausea, are you
25 - - were you knocked out? And all of these occasions,

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1 she said no; is that correct?
8 Then let's read them together.
16 Q. Does it state, Doctor, that her chief complaint was
17 that she was rear ended this p.m.? Patient complains
18 of low back pain and headache. Patient complains of
19 nausea also.
20 A. I'm sorry. I'm on a different page, evidently.
21 Q. Are you not on the ER visit?
22 A. This says ED visit. Where on the page, are we?
23 Q. Are you not at the History of Present Illness?
24 A. Okay, can you read what you were reading again?
25 Q. Okay, just above that, Chief Complaint. "Rear ended

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1 this p.m., complains - - patient complains of low back
2 pain and headache, complains of nausea also." Is that
3 what it says at the top?
4 A. Yes.
5 Q. And does it go on to say, "The patient presents
6 following motor vehicle collision. The onset was just
7 prior to arrival. The collision was rear impact. The
8 patient was the driver. There was a safety mechanism,
9 including seat belt. Location, head and neck. The

10 degree of pain severe. The degree of bleeding is
11 none. Risk factors consist of age. Therapy today,
12 none. Associated symptoms - - nausea, headache.
13 Denies shortness of breath. Denied chest pain.
14 Denied abdominal pain. Denies vomiting. Denies back
15 pain. No altered level of consciousness. Denies
16 dizziness. And denies syncope." Which means, in lay
17 people's terms, denied being knocked out. Is that
18 what the document says?
19 A. That's what this says, but again we don't know if this
20 is coming directly from the patient or from a family
21 member who may not have had all the information,
22 because up here the history of source says patient and
23 family.
24 Q. Which would mean you would get more accurate
25 information, not less?

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1 A. I'm sorry?
2 Q. You would get more accurate information, not less.
3 Would that be correct?
4 A. No, not necessarily.
5 Q. So two head are not better than one?
6 A. Not necessarily.

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5 Q. And even though she was doing better and she had these
6 post-existing events, they couldn't have had anything
7 to do with that surgery?
8 A. I'm sorry. Could you restate?
9 Q. Even though she's had these post-existing events,
10 those could have nothing to do with this surgery?
11 A. I'm sorry. What's a post-existing event?
12 Q. Mulching.
13 A. A pre-existing event?
14 Q. Post-existing, something that took place after the
15 accident. She was mulching and started having trouble
16 again.
17 A. Well, the trouble that she's describing with the
18 mulching does not fit with a C-6 radiculopathy in the
19 upper right extremity.
20 Q. If that's the case, the it doesn't fit with a C-6
21 radiculopathy when she went to the hospital either;
22 does it?
23 A. Well, that's - - again, that's documentation form the

24 emergency room visit, the reliability of which is
25 unclear. And I wasn't there at that time to question

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1 or examine the patient.

2 Q. So as far as you're concerned, the ER doctors are
3 quacks?

4 A. I beg your pardon?

8 Q. You said more - -

14 Q. You said, more than once, that you don't think the
15 emergency room records are reliable.

16 A. Correct. That does not mean that the emergency room
17 doctor is a quack. That mean that the records here,
18 the history that's obtained from the patient and
19 family, is not necessarily exactly what happened or
20 what the patient was feeling at the time.

21 Q. Okay, and that's because two heads are never better
22 than one?

23 A. That has nothing to do with it. (R. p. 367, line 6-p. 371, line 3; R. p. 397, line 2-p.
402, line 6; and, R. p. 409, line 5-p. 410, line 23)

Again, please recognize the amount of time spent on this cross-examination. Furthermore,
please recognize that no objections were made, presented, and/or brought forth during the trial,
with regard to that cross-examination.

Frankly, our form of jurisprudence is adversarial by nature. This adversarial system has
proven to be extremely effective with regard to unearthing the truth. Indeed, an effective cross-
examination is an integral part of that adversarial process. A cross-examination that illustrates the
nonexistence of a fact; the bias of a witness; the improper assumption of a witness; and/or, the
unfairness of a witness, is not improper. *State v. Sclocomb*, 266 S.C. 619, 521, S.E.2d 507 (S.C.
App. 1999) The manner of cross examination illustrated above is the very "sword" facilitated by
Rule 705. That "sword" must be sharp, or the system fails.

Respondent's Brief also spent a great deal of time highlighting selective portions of
Appellant Counsel's closing argument. Again, our system is adversarial by design. However,

please review several highlighted portions of Respondent's closing argument:

1) "Good afternoon ladies and gentlemen. My name is John Peace. I was introduced to you earlier today during jury selection during jury selection. Like the judge said, we really couldn't hold jury trials without you, obviously. You are the main event. You are the ultimate deciders of all issues of fact." 2) "So when you are in the jury room thinking, 'well, what is pain and suffering worth?' I can already tell you, I mean, Judge Miller's instructions is going to be, there is no market price for pain and suffering, it's not bought and sold. And there is no fixed amount that should be charged for it. You, in the exercise of your common sense, need to decide what its worth in this case, for this lady, under these circumstances. This is the individualized justice because this is the case that has been presented to you as the jury." 3) "Ladies and gentlemen, this is my closing argument. We are going to have these figures in the jury room with you. Which are the medical fees. It's also Dr. Mina's resumé. We are going to have this medical log so that you can look more closely at it. You are going to see the hardware as it is today, you can see the course of treatment starting with MRI's right after the wreck. And you can see up close what Dr. Mina showed you in her testimony yesterday. Ultimately, I want you to go back to the jury room, after you have been instructed on the law and deliberate carefully. Discuss it amongst yourselves, use your common sense. But based, on the evidence that has been put before you in this trial, I would suggest that the only logical result would be a verdict for Barbara Gaines in the amount well in excess of the medical bills in this case. I thank you in advance for your hard work. Depending on what Mr. McGarr may say to you, I also have the right to respond to that. So I may be back here in just a moment and have a brief overview before you deliberate."; 4) "Ladies and

gentlemen, I know you have been living with this case for a few days and you are ready to get on with your job. It won't take a lot of time, but I've got to tell you, its hard to sit here and listen to somebody accuse me of being disingenuous when he is calling Barbara Gaines a liar. You listened to her, you listened to her daughter, and you listened to her doctors. And I leave it to you to decide who is telling the truth as far as her injuries."; and, 5) "So ladies and gentlemen, I am going to sit down and let the Judge instruct you all on the law. Please use your common sense. And weigh this for what it is and bring back a verdict that speaks the truth for both of these parties. I appreciate it." (R. p. 224, line 14-p. 247, line 14;and, R. p. 266, line 20-p. 270, line 4).

In essence, a closing statement cannot be accomplished during a jury trial, if one cannot speak to the jurors collectively. Ms. Gaines's attorney properly addressed the jurors in exactly that fashion. Mr. Campbell's attorney did the same.

Please compare both closing arguments, (R. p. 224, line 14-p. 270, line 4) and, meanwhile, please note that neither party offered an objection during the other's closing statement. This is because neither closing argument, in any way, violated Rule 43(i) of the South Carolina Rules of Civil Procedure. Indeed, this issue was set forth in Appellant's Initial Brief, and, as such, this brief will refrain from boring the court by re-stating the same.

All of the above is brought to the Court's attention in order to contextualize the "offensive" comments, which are so heavily relied upon in Respondent's Brief. It also highlights the deficiency of Respondent's Brief, in addition to the Trial Court's numerous misapprehensions. Indeed, for Appellant's Counsel, the matter at hand calls forth the following adage: "If the law and the facts are with you, pound on both. If the law is against you, pound on the facts. If the law and the facts are against you, pound on the table."

It is quite possible that "pounding" resulted in the Court's final misapprehension of the facts, wherein the Court stated "The only **competent evidence** admitted in trial, requires a verdict that compensates the plaintiff, at a minimum, for the medical bills and expenses incurred as a result of the spinal surgery. This Court finds an award of damages for only the emergency room bills, in their value of \$3,941.00 is grossly inadequate and unsupported by the evidence in this case."

(Emphasis added) (R. pp.1-4).

This conclusion fails to consider Ms. Gaines's longstanding preexisting issues with regard to her neck. Furthermore, the conclusion fails to consider that the pain medications Ms. Gaines had been utilizing were actually being increased just prior to the occurrence of the automobile accident in question. Additionally, this conclusion fails to appreciate the minor nature of the automobile accident itself. Moreover, no consideration is given to the credibility issues associated with a number of the plaintiff's witnesses. Indeed, the conclusion does not consider the fact that Ms. Gaines's neck was actually doing better, until the point wherein she exacerbated her neck problems while mulching her yard. Furthermore, it fails to consider that surgery was not performed until some point after the aforementioned mulching incident. Alas, the Court's decision failed to consider the fact that Ms. Gaines simply grew older and, unfortunately, a defendant cannot be held responsible for the natural progression of the aging process, and the worsening conditions associated therewith.

As stated above, almost identical versions of this case have previously been tried and discussed on appeal, *Black v. Hodge*, and *Vinson v. Hartley*. In fact, *Vinson* was appealed because the Trial Court refused to invoke the Thirteenth Juror Doctrine, in spite of the plaintiff's attorney's request that the same be done. Furthermore, the Court of Appeals upheld the Trial Court's refusal of that request.

To grant a new trial in the case before you, after citing *Vinson*, is clear evidence that the

Trial Court simply misapprehended the Rules of Evidence and Rules of Civil Procedure, and, as a logical result, the facts of the matter. For that reason, the Trial Court abused its discretion, and its Order granting a new trial should be reversed.

CONCLUSION

To summarize, the jury was presented with a plaintiff who had a longstanding history of neck problems. Indeed, those neck issues were of a progressive nature, and were naturally worsening in proportion to the Plaintiff's aging process. In the meantime, the Plaintiff was involved in a low impact automobile accident. Indeed, the Plaintiff confirmed that, while at the scene of this low impact accident, she advised the investigating officer who inquired as to her health that she did not know if the accident had caused her any injury. Moreover, she subsequently drove herself away from the scene of that accident. Thereafter, she ultimately went to the hospital, wherein she was examined and noted to be without complaint of pain radiating into her arm. One month later, she went to her family physician's office, wherein she reported arm pain. However, that arm pain, by all accounts, was associated with and caused by a bone spur located in the Plaintiff's neck. That very bone spur had been in existence well before the automobile accident in question occurred. Regardless, the Plaintiff was then treated to improvement, until a point some time later, wherein she mulched her yard, and, during that process, re-injured her neck. Thereafter, the bone spur was surgically removed, and the Plaintiff's neck and arm symptoms were resolved.

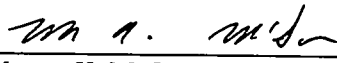
The jury then heard testimony from Ms. Gaines and a number of Ms. Gaines's witnesses. The credibility of all those witnesses was ultimately subjected to grave suspicion during the course of cross-examination.

In consideration of all the above, it was suggested to the jury that it award the Plaintiff an amount commensurate with the emergency room bill that she incurred on the date of the accident.

After deliberating, the jury logically and fairly returned a verdict in the amount of the emergency room bill. There is no competent evidence to suggest that this verdict was shockingly disproportionate to the injuries suffered, or affected by passion, caprice, or prejudice.

In conclusion, the Trial Court misapprehended multiple laws. Those misapprehensions of law engendered misapprehensions of fact. In the commission of these errors, the Trial Court improperly granted a new trial secondary to numerous errors of law. These errors represent a clear abuse of the Trial Court's discretion, and, as such, Counsel for Appellant respectfully requests a reversal of the Trial Court's Order, and a reinstatement of the jury's fair and reasonable verdict.

Respectfully submitted,



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August 25, 2014

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Appellate Case No. 2013-002367

Barbara Gaines, ...Respondent,

v.

Joyce Ann Campbell, ...Appellant.

RECORD ON APPEAL

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August 25, 2014

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FILED-CLERK OF COURT
GREENVILLE CO. S.C. IN THE COURT OF COMMON PLEAS
PAUL B. WICKENSIMER
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
2013 SEP 19 3 40
CA NO.: 2012-CP-23-1971

Barbara Gaines,

Plaintiff,

vs.

Joyce Ann Campbell,

Defendant.

ORDER

This matter comes before the Court pursuant to Plaintiff's Counsel's (herein after Peace) Motion for a new trial pursuant to SCRPC Rule 59. This motor vehicle accident case was called to trial before a jury on August 5, 2013. The Defendant admitted fault in causing the accident and, through her Counsel in Closing Argument, admitted the accident was the cause of injury to the Plaintiff. The dispute between the Parties revolved around the extent of the injuries and the amount of damages for which the Defendant should be held responsible.

On August 7, 2013, the jury returned a verdict for the Plaintiff in the amount of three thousand, nine hundred, forty-one dollars and no cents (\$3,941.00), which was the amount of the Emergency Room bill incurred by the Plaintiff; Counsel for Defendant (herein after McGarr) conceded owing only this amount to the Plaintiff. Plaintiff had sought compensation for the cost of spinal surgery and for other attendant personal injury damages. The stipulated total of Plaintiff's medical bills was \$77,966.56.

Plaintiff's New Trial Motion centered on the testimony of her two medical expert witnesses who each opined that this motor vehicle accident, more probably than not, to a reasonable degree of medical certainty, was the cause of injury to the Plaintiff which necessitated

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the disputed spinal surgery. Both witnesses were presented at trial through the use of *de bene esse* video depositions. Defendant did not present any evidence to refute these experts and relied solely on McGarr's cross examination of the witnesses to contest the proximate cause issue. No objections were made at trial to the admission of either deposition and no objections were made at trial as to the content of either deposition.

However, this Court finds that much of McGarr's cross examination of Dr. Mina (Plaintiff's neurosurgeon who performed the surgery) was objectionable and should have been excluded. McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses. Not only did McGarr continuously ask Dr. Mina to comment on the Plaintiff's credibility using collateral sources but McGarr went so far as to ask Dr. Mina if she was calling the Emergency Room Physicians "quacks". This questioning was in clear violation of South Carolina's long standing and basic rule prohibiting the "pitting" of witnesses.

Additionally, McGarr repeatedly requested Dr. Mina to state her opinion concerning the proximate cause of the injury which necessitated the surgery. McGarr asked Dr. Mina if it was "possible" for a disputed intervening event to have caused the necessity for surgery. Upon completion of Dr. Mina's deposition and after the jury was excused from the courtroom, the Court commented on the impropriety of both of these facets of the cross. McGarr adamantly stated that the form of his causation question was completely appropriate and that there was an abundance of case law to support his position. McGarr asserted that he was not required to use the more probably than not standard to obtain his version of proximate cause. The court broke for lunch and instructed McGarr to research and return, after lunch, with his supporting case law. McGarr brought no law in support of his position. McGarr continued to assert that his form of questioning concerning causation was legally correct, his rational being that he did not have the

2


burden of proof and was therefore not bound by the same rules as the Plaintiff. McGarr is incorrect. The law in South Carolina requires that opinion testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not. There is no distinction made as to who the questioning party is.

This Court also finds that much of McGarr's cross examination of Dr. Harding (Plaintiff's primary care physician who referred Plaintiff to Dr. Mina) followed a similar pattern as that of Dr. Mina. McGarr repeatedly requested Dr. Harding to state her opinion concerning the proximate cause of the injury which necessitated the surgery. Again, McGarr continued to question Dr. Harding in a manner that does not follow the law that testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not. Therefore, the questioning was objectionable and should have also been excluded.

McGarr also violated SCRPC Rule 43(i) in his closing argument. McGarr personally addressed and personally appealed to the jury in his closing remarks. Comments in McGarr's closing included: "...I know that my Greenville County jurors are going to be fair and decent to me." "And you're bright enough and have the brains enough to know that that's what I said on Monday." "And you guys are not so foolish or dumb." "When you heard the evidence yourself, are you guys just not bright enough to remember?" While these indiscretions were not objected to by Peace, the Court finds them to have prejudiced the outcome of the trial.

In *Vinson v. Hartley*, the Court of Appeals noted that "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts." 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996)(citing *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). Considering the evidence and testimony offered at trial in

this case, this Court finds that the evidence does not support the jury's verdict. I am invoking the "Thirteenth Juror Doctrine". The only competent evidence admitted at trial requires a verdict that compensates the Plaintiff, at a minimum, for the medical bills and expenses incurred as a result of the spinal surgery. This Court finds an award of damages for only the emergency room bills in the value of \$3,941.00 is grossly inadequate and unsupported by the evidence in this case. Therefore, this Court grants Plaintiff's Motion for a New Trial Absolute.

AND IT IS SO ORDERED.

ERIC W. DE [Signature]
Judge

7/12, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Barbara Gaines

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMR

2013 SEP 19 P 3 40
Plaintiffs,

v.

Joyce Ann Campbell

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2012-CP-23-1971

VERDICT FORM

VERDICT

We the jury, unanimously find as follows:

1. Was the defendant's negligence the proximate cause of the plaintiff's injuries?

☒ YES - Go to Question 2
☐ NO - Stop Deliberations

2. Please state the amount of damages, if any, sustained by the plaintiff.

\$ 3,941.00 Actual Damages

I certify this is decision was the unanimous decision of the jury.

Carlton B. Hill
Foreperson
August 7, 2013

ENTERED COMPUTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

C.A. NO. 12-CP-23-1971

2012 MAR 20 AM 8:47

Barbara Gaines,

Plaintiffs,

v.

Joyce Ann Campbell,

Defendants,

FILED-CLERK OF COURT
GREENVILLE CO S C.
PAUL B. WICKENSTON

COMPLAINT

(Jury Trial Requested)

Plaintiff Barbara Gaines, by and through her undersigned counsel, complaining of the above-named Defendant Joyce Ann Campbell, would respectfully show to this Honorable Court:

1. Plaintiff and Defendant are citizens and residents of Pickens County.
2. On or about January 8, 2010, Plaintiff Barbara Gaines was stopped at a stop sign on Rolling Hills Circle.
3. Driving carelessly and recklessly, Defendant Joyce Ann Campbell struck Plaintiff Barbara Gaines' vehicle from behind.
4. The resulting collision was of such force and violence as to cause Plaintiff Barbara Gaines to be hurled around the interior of her vehicle, causing her numerous, serious, agonizing and painful injuries.
5. The injuries and damages to Plaintiff Barbara Gaines were the direct and proximate result of the negligent, grossly negligent, careless, and reckless acts, omissions of the Defendant Joyce Ann Campbell, in one or more of the following particulars:
 - a. In then and there operating her vehicle at a rate of speed which was excessive for the circumstances then prevailing, and greater than is reasonable and prudent

under the conditions and having regard to the actual and potential hazards then existing, all in violation of S.C. Code §56-6-1520;

- b. In then and there failing to keep a proper lookout;
- c. In then and there failing to maintain proper control over her vehicle;
- d. In then and there failing to ensure that his vehicle was equipped with an adequate and safe steering mechanism as required by S.C. Code § 56-5-5310, regarding "Condition of vehicle and vehicle equipment"; and if so properly equipped, in failing to properly utilize them;
- e. In then and there failing to ensure that her vehicle was equipped with adequate and safe brakes in violation of S.C. Code § 56-5-4870, regarding "Maintenance and adjustment of brakes"; and if so properly equipped, in failing to properly utilize them;
- f. In then and there failing to properly observe the road and traffic conditions;
- g. In then and there to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances;
- h. In then and there operating a motor vehicle with a reckless disregard for the rights and safety of Plaintiff and others; and
- j. In other such particulars as the evidence may show.

6. In addition to other bases of liability, to the extent that Defendant Joyce Ann Campbell violated the statutes of South Carolina, Defendant Joyce Ann Campbell is liable for Plaintiff's damages by virtue of the doctrine of negligence *per se*.

7. As a direct and proximate result of the negligent, grossly negligent, careless, and reckless

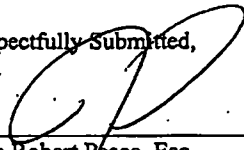
acts and omissions of the Defendant, Plaintiff Barbara Gaines:

- CP*
#3
- a. Was severely, seriously, and painfully injured;
 - b. Was subjected to the administration of strong and potent drugs;
 - c. Suffered extreme, painful and dangerous injuries from which Plaintiff Barbara Gaines is informed and believes that she will suffer from for the rest of her life and will have permanent adverse effects for the rest of her life;
 - d. Has incurred and will incur in the future substantial medical and doctor bills;
 - e. Was subjected to extreme pain, mental anguish, suffering, and discomfort over a long period of time;
 - f. Has been and will be prevented from attending her usual and ordinary household duties;
 - g. Has been and will be prevented from enjoying her usual and normal hobbies, and recreational pastimes; and
 - h. In other such particulars as the evidence may show.

All to her actual damages:

WHEREFORE, Plaintiff Barbara Gaines demands a jury trial and judgment against Defendant Joyce Ann Campbell for actual and punitive damages to be determined by the Court and jury as will fully compensate Plaintiff Barbara Gaines for her injuries, damages, and other losses, as well as for the costs of this action, and for such other relief as this Court deems just and equitable.
[signature on following page]

Respectfully Submitted,



John Robert Peace, Esq.
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PO Box 8087
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Greenville, SC 29604-8087
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FAX: (864) 271-3130
John@PeaceLawFirm.com

March 20, 2012

Attorneys for Plaintiff Barbara Gaines

Page 4 of 4

9

9

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STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Barbara Gaines,)

Plaintiff,)

vs.)

Joyce Ann Campbell,)

Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2012-CP-23-1971

ANSWER
(Jury Trial Requested)

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER
2012 APR 16 A 9 38

The defendant, answering the complaint of the plaintiff, would respectfully show unto the Court the following:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation contained in the plaintiff's complaint, which is not hereinafter specifically admitted, qualified, or otherwise modified below.

FOR A SECOND DEFENSE

2. The defendant reincorporates such of the preceding allegations as are consistent herewith.

3. Answering paragraph one of the plaintiff's complaint, the allegations contained therein are admitted upon information and belief.

4. Answering paragraph two of the plaintiff's complaint, it is admitted that on or about January 8, 2010, the plaintiff came to a stop at a stop sign on Rolling Hills Circle.

5. Answering paragraph three of the plaintiff's complaint, it is admitted that the defendant hit the rear of the plaintiff's vehicle.

6. Answering paragraph four of the plaintiff's complaint, the allegations contained therein are denied.

7. Answering paragraph five of the plaintiff's complaint, it is admitted that the defendant was negligent. However, the remaining allegations contained in paragraph number five are denied.

8. Answering paragraph six of the plaintiff's complaint, the allegations contained therein are denied.

9. Answering paragraph seven of the plaintiff's complaint, it is admitted that the defendant was negligent. However, this defendant is presently without sufficient knowledge or information so as to form a belief as to the remaining allegations contained in paragraph number seven and therefore must deny the same and demand strict proof thereof.

FOR A THIRD DEFENSE

10. The defendant reincorporates such of the preceding allegations as are consistent herewith.

11. The plaintiff's injuries, if longstanding, were in no way caused by contact made between the two parties' vehicles.

12. As such, there is no proximate cause between the damages complained of and the actions of this defendant.

13. Therefore, the plaintiff's complaint may need to be dismissed.

FOR A FOURTH DEFENSE

14. The defendant reincorporates such of the preceding allegations as are consistent herewith.

15. If there were any longstanding injuries suffered by the plaintiff, they were pre-existing or post-existing in nature and, therefore, are not proximately caused by this accident.

16. Therefore, the plaintiff's complaint may need to be dismissed.

FOR A FIFTH DEFENSE

17. The defendant reincorporates such of the preceding allegations as are consistent herewith.

18. The defendant is informed and believes that the plaintiff has sought medical treatment which is inapplicable to the injuries for which she complains.

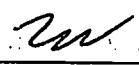
19. As such, the plaintiff has failed to mitigate her damages and any award against this defendant should be reduced accordingly.

WHEREFORE, the defendant, having answered the complaint of the plaintiff, would respectfully pray as follows:

(a) That the plaintiff's complaint be dismissed;

(b) For the costs and expenses associated with the defense of this action; and,

(c) For such other and further relief as the Court deems just and proper.

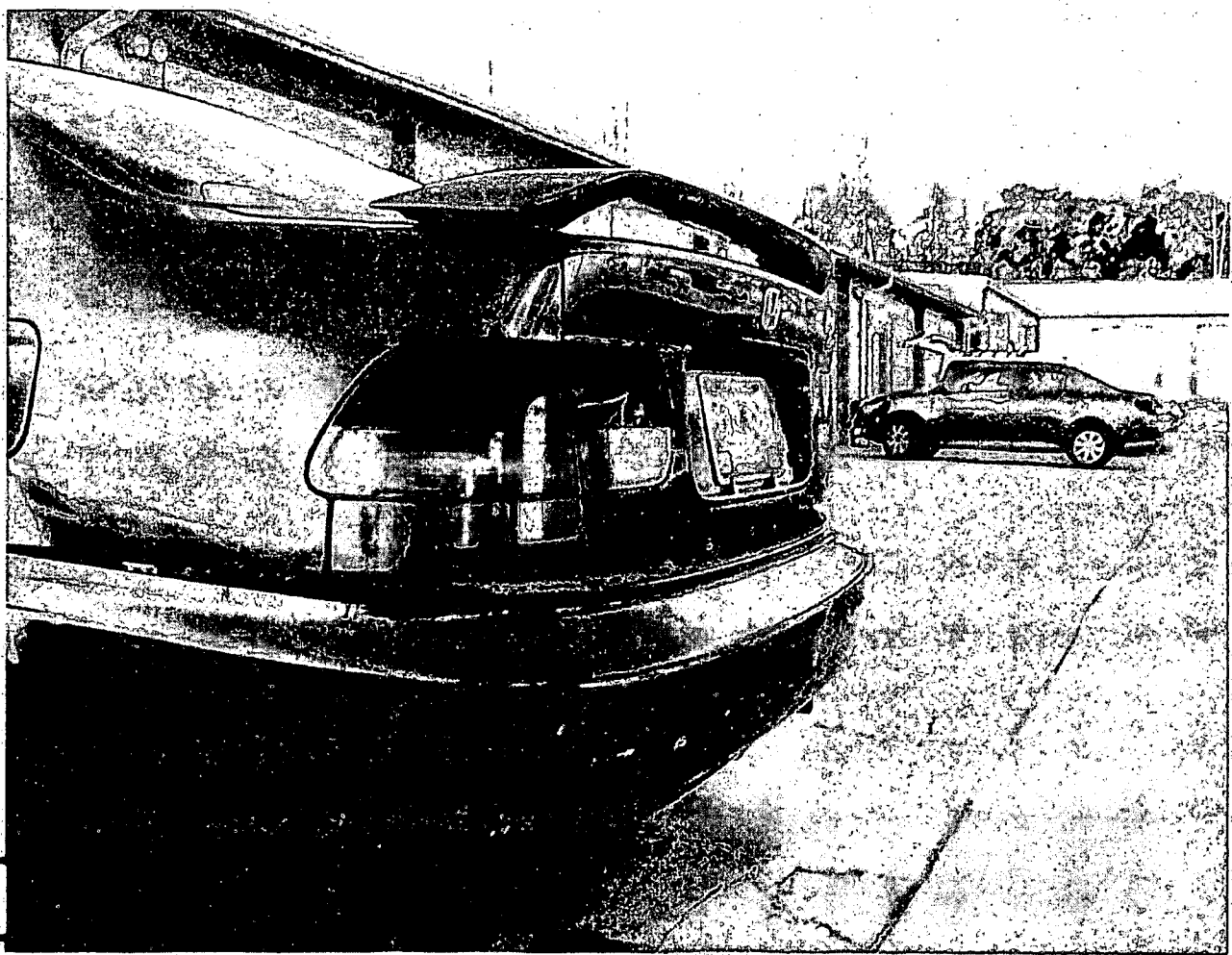


Marcus K. McGarr, Esq.
MARCUS K. MCGARR, P.A.
S.C. Bar No.: 011885
108 Whitsett Street
Greenville, S.C. 29601
Telephone (864) 298-0089
Facsimile (864) 235-0503
ATTORNEY FOR THE DEFENDANT

Greenville, South Carolina
April 12, 2012



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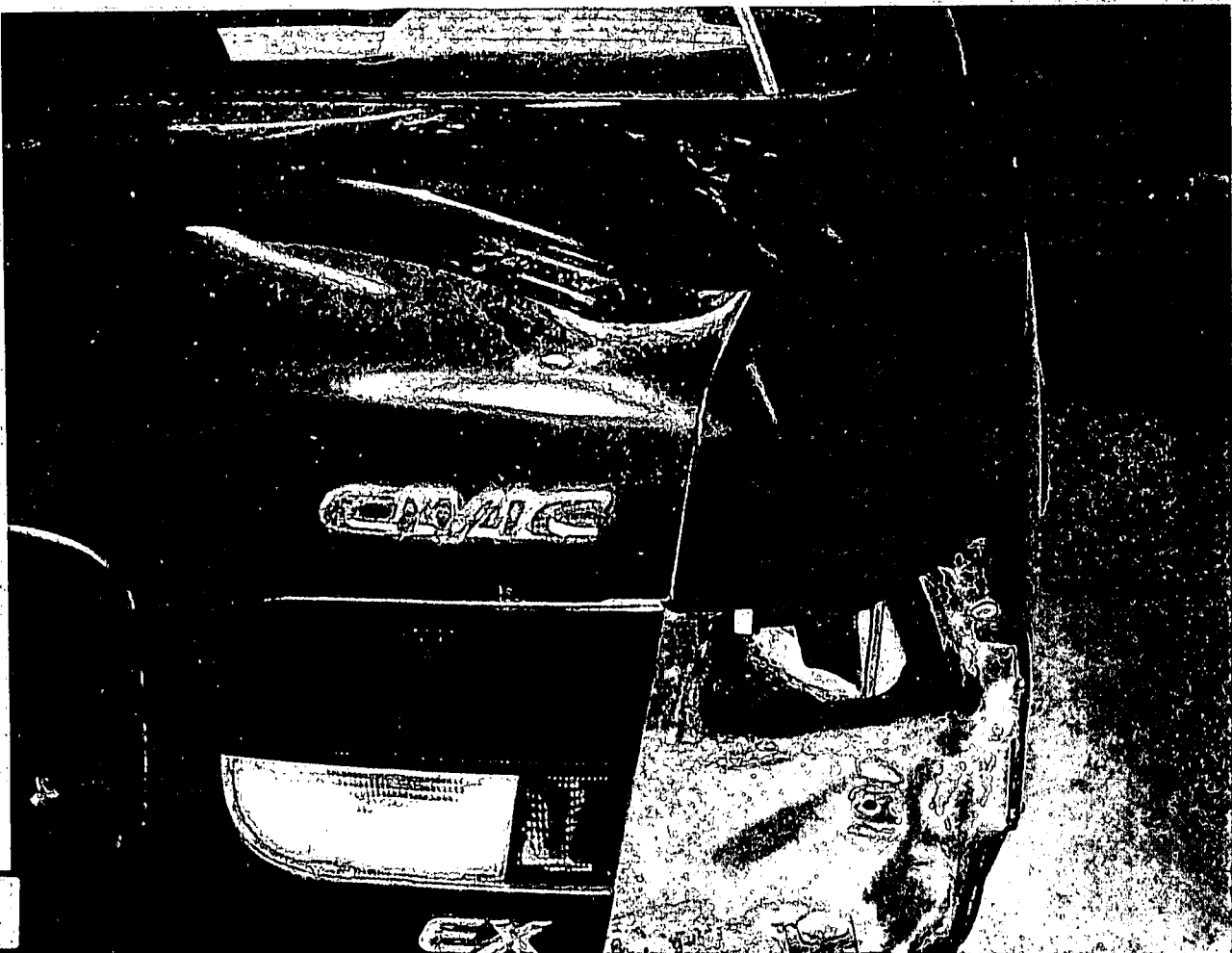


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DEFENDANT'S
EXHIBIT
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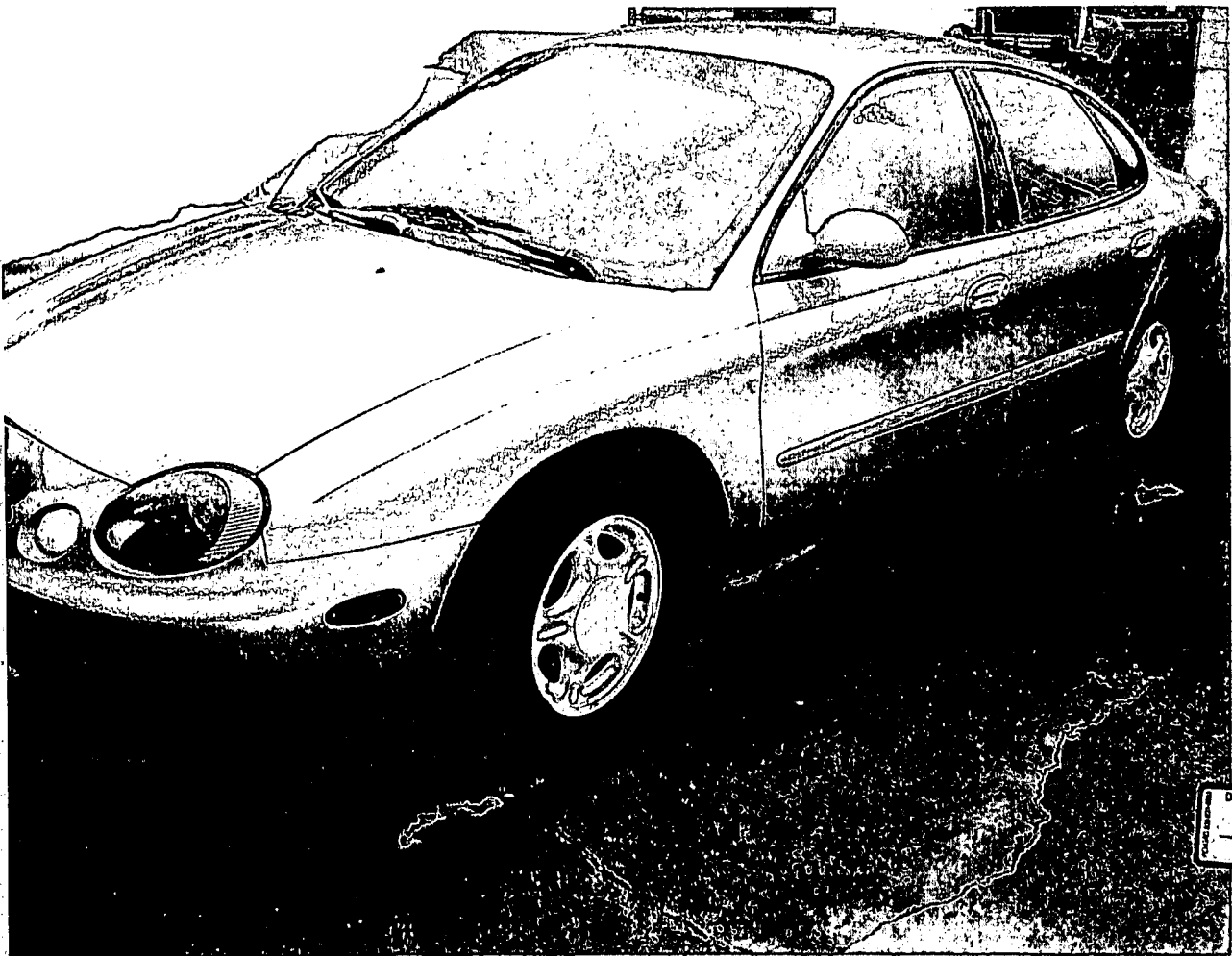
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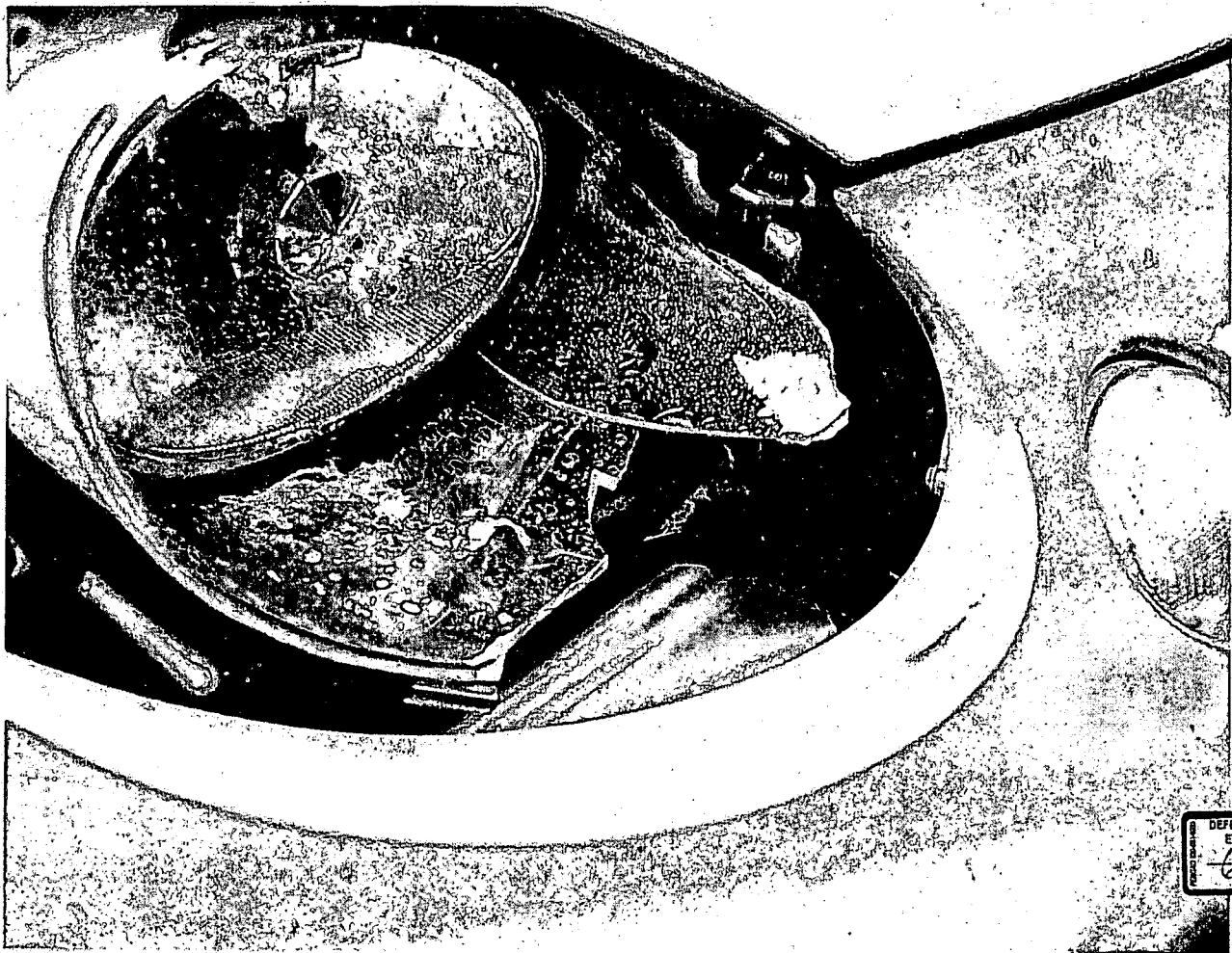


DEFENDANT'S
EXHIBIT
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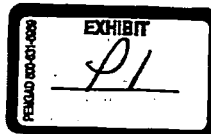
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BARBARA GAINES'
MEDICAL EXPENSES

<u>Providers</u>	<u>Date of Service</u>	<u>Charge Amt</u>	<u>Sub-Total</u>
<u>Easley Palmetto Baptist Hospital</u>			\$ 5,625.00
ER	01/08/10	\$3,941.00	
Cervical MRI	02/09/10	\$1,408.00	
X-Ray Shldr	07/13/10	\$ 276.00	
<u>Lisa Harding, MD, Foothills Internal Medicine</u>			\$ 125.00
Full Physical	02/08/10	\$ 50.00	
Follow Up	03/08/10	\$ 75.00	
<u>Piedmont Spine & Neurosurgical</u>			\$11,906.50
Dr. Russell	03/04/10	\$325.00	
Dr. Russell	04/12/10	\$110.00	
Dr. Russell	06/14/10	\$110.00	
Dr. Russell	02/01/11	\$110.00	
Dr. Russell	03/21/11	\$110.00	
Dr. Mina	04/18/11	\$225.00	
Dr. Mina	06/07/11	\$10,916.50	
Dr. Mina/Nurse Visit	06/15/11	\$0.00	
Dr. Mina	07/25/11	\$0.00	
Dr. Mina	8/31/11	\$0.00	
<u>St. Francis Hospital</u>			\$ 51,817.48
ESI	08/26/10	\$ 2,115.35	
ESI	12/27/10	\$ 2,180.60	
ESI	02/04/11	\$ 2,637.60	
Surgery	06/07/11-06/08/11	\$43,823.93	
X-Ray Cervical	07/25/11	\$ 530.00	
X-Ray Cervical	08/31/11	\$ 530.00	
<u>Dosher Physical Therapy</u>	03/08/10 - 8/13/10		\$ 6,907.08
<u>Upstate Carolina Radiology</u>			\$ 1,585.50
TOTAL MEDICAL BILLS:			\$ 77,966.56



Ms. Gaines' 6/7/11 ACDF Surgery

A Exposure

Soft tissues retracted exposing cervical spine

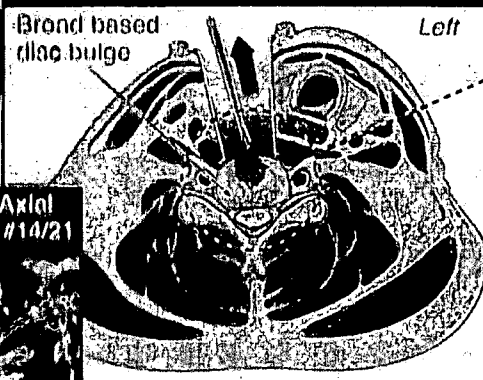
2/9/10 Sagittal MRI, Im. #5/11



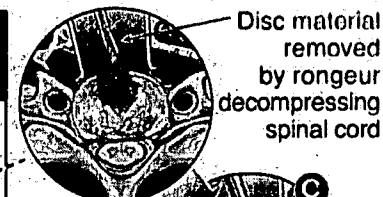
2/9/10 Sagittal MRI, Im. #7/11



B Discectomy in Cross Section (C5-C6 Level Viewed from Below)



2/9/10 Axial MRI, Im. #14/21



Disc material removed by rongeur decompressing spinal cord

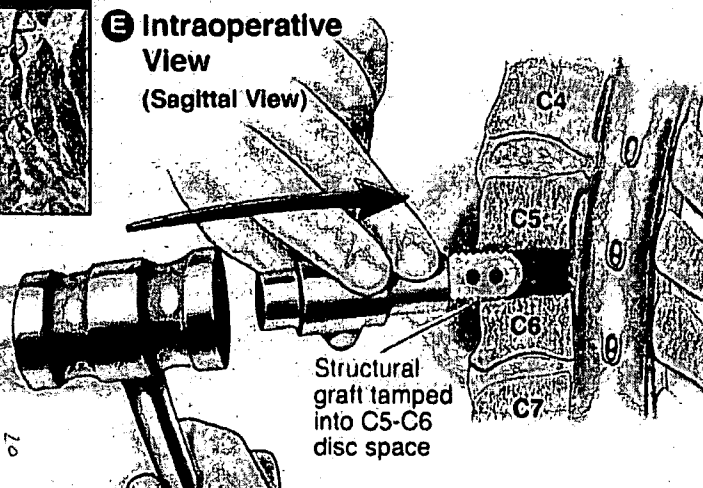


Endplates prepared by curette



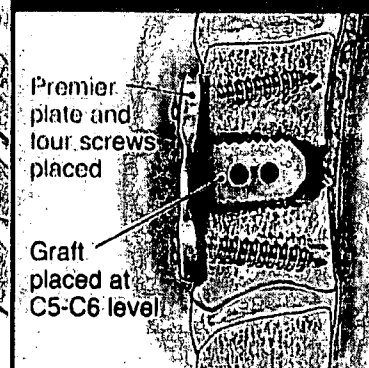
Posterior osteophytes drilled away decompressing nerve roots

E Intraoperative View (Sagittal View)



Structural graft tamped into C5-C6 disc space

Postoperative Appearance



Premier plate and four screws placed

Graft placed at C5-C6 level

Postoperative X-Ray



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MISSING EXHIBIT

(Should be MRI)

1 STATE OF SOUTH CAROLINA)
2) COURT OF COMMON PLEAS
3 COUNTY OF GREENVILLE)
4)
5 Barbara Gaines) TRANSCRIPT OF RECORD
6)
7 -vs-)
8 Joyce Ann Campbell)

9 August 5, 2013
Greenville, South Carolina
10 B E F O R E :
11 THE HONORABLE EDWARD W. MILLER, Judge.
12 A P P E A R A N C E S
13 John Peace, Esquire
14 Attorney for the Plaintiff
15 Mark McGarr, Esquire
16 Attorney for the Defendant
17
18 CAROLINE HISKELL
Thirteenth Circuit Court Reporter
19
20
21
22
23
24
25

1	I N D E X		
2	WITNESSES	DIR	CROSS
	Officer Connor Shivers	42	46
3	Barbara Gaines	53	81
	Joyce Ann Campbell		118
4			
5			
6	E X H I B I T S		
7	IDENTIFICATION	ID	IN EVD.
8	Plaintiff		
9	No. 1 Summary		
10	Defendant's		
11	No. 1 Photograph	87	87
	No. 2 Photograph	87	87
12	No. 3 Photograph	87	87
	No. 4 Photograph	133	133
13	No. 5 Photograph	133	133
	No. 6 Photograph	133	133
14			
15	Court's		
	No. 1 Note	26	26
16	No. 2 Deposition	146	146
17			
18			
19			
20			
21			
22			
23			
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P R O C E E D I N G S

THE COURT: Ladies and gentlemen, welcome up to Courtroom 4. I appreciate y'all being here. Let me introduce myself to you. My name is Ned Miller. I'm one of your local circuit court judges and I am holding a term of common pleas court this week, which commonly be known as civil court and you all have been qualified to serve as jurors under the law this week.

You have been selected our of cyberspace to come up to the courtroom to be qualified yet again to serve for this particular case.

So I need to ask you a few questions as it relates to this particular case before we strike the jury. Which is pick the jury because the sound of striking the jury is much more intimidating, isn't it?

So before we get started let me introduce the case to you. This is the State of South Carolina, Barbara Gaines, plaintiff, versus Joyce Ann Campbell.

This is a lawsuit revolving around a motor vehicle accident which has alleged to have occurred on January 8, 2010 on Rolling Hills Circle in Easley, South Carolina.

Ladies and gentlemen, before we get started, let me ask the attorneys to stand introduce themselves.

MR. PEACE: My name is John Peace and I

1 represent Barbara Peace who is seated next to me.

2 MR. MCGARR: My name is Mark McGarr and I
3 represent Ms. Campbell who is not present at this time.

4 THE COURT: Is there any member of the jury
5 panel who is related by blood or marriage or who has a
6 business, personal, or social relationship with any of the
7 attorneys involved in this case? If so, please stand.

8 (No response.)

9 Is there any member of the jury panel who is
10 related by blood or marriage, or has a business, personal,
11 or social relationship with any of the parties involved in
12 this case, Ms. Barbara Gaines or Ms. Joyce Ann Campbell?
13 If so, please stand.

14 (No response.)

15 Ladies and gentlemen, is there any member of
16 the jury panel who is aware of or have any knowledge about
17 the events that are alleged in the complaint in this case?
18 If so, please stand.

19 (No response.)

20 Is there any member of the jury panel who has
21 ever been a party to a lawsuit involving a motor vehicle
22 accident? If so, please stand.

23 Yes, sir. Let's start in the blue shirt you
24 name and number for us, please.

25 JUROR NO. 100: Eric Gogliotti.

1 THE COURT: Okay. Tell me.
2 JUROR NO. 100: I filed a personal lawsuit
3 two years ago for a personal automobile accident.
4 THE COURT: You were the defendant or the
5 plaintiff, do you remember?
6 JUROR NO. 100: Plaintiff.
7 THE COURT: Alright, sir, your name and
8 number.
9 JUROR NO. 242: 242, Zach Tethrow. This was
10 probable two, three years ago. I was the plaintiff on a
11 motor vehicle accident.
12 THE COURT: Thank you. Would the fact that
13 either of you have been a party to a lawsuit involving a
14 motor vehicle accident limit your ability to be fair and
15 impartial in this case to either the plaintiff or the
16 defendant?
17 JUROR NO. 242: No.
18 JUROR NO. 100: No.
19 THE COURT: Could you follow the law as I
20 would give it to you under your oath, if you were
21 selected, and decide this case based solely on the merits
22 of the evidence presented in this case. If you could not
23 do that, please let me know.
24 JUROR NO. 100: Absolutely, Your Honor.
25 THE COURT: Absolutely what?

26

1 JUROR NO. 100: I will be fair and impartial.
2 THE COURT: Thank you very much.
3 Yes, sir.
4 JUROR NO. 165: Juror 165, Your Honor. I
5 used to work with a Joyce Campbell and I don't know if it
6 is the same one or not.
7 THE COURT: Joyce Ann Campbell.
8 MR. MCGARR: He's about 60, Your Honor, and
9 she worked in Pickens.
10 JUROR NO. 165: She worked in Greenville any
11 time?
12 MR. MCGARR: Not to my knowledge.
13 THE COURT: Thank you, Your Honor, for
14 telling us about that.
15 I'll read a list of potential witnesses in
16 the case and you let me know if anyone has a connection
17 with any of these folks. These are potential witnesses,
18 Joy Gaines, daughter of Barbara Gaines, from the Easley
19 Police Department, Connor Shivers, Dr. Lisa Harding,
20 Dr. Christie Mina, the records custodian at Dozer Physical
21 Therapy, records custodian at Piedmont Orthopedics, the
22 records custodian at the Palmetto Baptist Hospital. Is
23 there any member of the jury panel related by blood or
24 marriage or has a business, personal, or social
25 relationship with any of those persons whose names I just

21

1 read or do you have any connection with any of the medical
2 facilities, have you been treated there or have conducted
3 business with those facilities? If so, please stand.

4 Yes, ma'am, your number.

5 JUROR NO. 265: Melissa Blackston, 265.
6 christine Mina did my back surgery.

7 JUROR NO. 240: Angela Thompson, No. 240.
8 I'm a patient at Piedmont Orthopedics.

9 JUROR NO. 155: Teresa Mann, No. 155. I'm a
10 registered nurse. I have not personally worked with the
11 physicians in those practices but as a nurse there have
12 been incidents where there might have been a patient that
13 I directly cared for.

14 THE COURT: Thank you, ma'am. To each of the
15 three of you, would the fact that you have that
16 relationship impair your ability to be fair and impartial
17 in this case to either the plaintiff or the defendant and
18 if you could not be fair and impartial, if you could not
19 judge this case based solely on the evidence presented in
20 the courtroom and the law as I would give it to you,
21 please stand.

22 (No response.)

23 Anything further from the plaintiff?

24 MS. PEACE: No, Your Honor.

25 THE COURT: From the defense?

1 MS. MCGARR: No, Your Honor.
2 THE COURT: Get ready to duck. We're going
3 to strike the jury.
4 THE CLERK: We'll be using numbers 1 through
5 20 on the left. Plaintiff strikes first.
6 MR. PEACE: Plaintiff strikes 2.
7 THE CLERK: Plaintiff strikes 2.
8 MR. MCGARR: Defendant strikes 11.
9 THE CLERK: Defendant strikes 11.
10 MR. PEACE: Plaintiff strikes 7.
11 THE CLERK: Plaintiff strikes 7.
12 MR. MCGARR: Defendant strikes 19.
13 THE CLERK: Defendant strikes 19.
14 MR. PEACE: Plaintiff strikes 14.
15 THE CLERK: Plaintiff strikes 14.
16 MR. MCGARR: Defendant strikes 18.
17 THE CLERK: Defendant strikes 18.
18 MR. PEACE: Plaintiff strikes 20.
19 THE CLERK: Plaintiff strikes 20.
20 MR. MCGARR: Defendant strikes 15.
21 THE CLERK: Defendant strikes 15.
22 Our alternate will come from 21, 22 and 23.
23 MR. PEACE: Plaintiff strikes 23.
24 THE CLERK: Plaintiff strikes 23.
25 MR. MCGARR: Defendant strikes 22.

1 THE CLERK: Defendant strikes 22.
2 Gentlemen, I'll call these back to you.
3 Plaintiff strikes 2, 7, 14, 20 and 23. Defendant strikes
4 11, 15, 18, 19 and 22.
5 MR. MCGARR: That's correct.
6 MR. PEACE: That's correct.
7 THE CLERK: Ladies and gentlemen, when I call
8 your name, please bring your things and have a seat in our
9 jury box. David Loso, Carlton Hill, Kimberly Barrett,
10 fred Lancaster, Lisa Atkinson, Desmond Thomas, Teresa
11 Mann, Karlee Ferreira, Kiara Torres, Jacqueline Gajoch,
12 Courtney Olivera, Shirley Truluck and the alternate is
13 Sabrina Sollee.
14 THE COURT: Any exception or objection to the
15 jury pursuant to Batson or Jebb?
16 MR. PEACE: None from the plaintiff.
17 MR. MCGARR: None from the defendant, Your
18 Honor.
19 THE COURT: Alright, ladies and gentlemen,
20 same joke. I tell it every time. One group thinks you
21 won the lottery and one thinks you lost and I just want to
22 say that I think the group that was selected are the
23 fortunate ones. They're the ones who win. They get to
24 actually participate in our justice system. And I want to
25 tell you that this courthouse and justice system doesn't

1 belong to any Judge. It doesn't belong to the lawyers or
2 the courthouse staff. It belongs to each and every one of
3 us and we do have the finest justice system in the world
4 and it doesn't work if we don't have citizens like you all
5 who agree to come up here and follow your civic duty and
6 participate in our justice system.

7 So it's a great experience and I will tell
8 you that it's a rare event to talk to someone who actually
9 serves on a jury who does not feel a deep sense of civic
10 pride and satisfaction when they're done.

11 So, unfortunately, for you all I can not seat
12 you on this jury but I hope you get a chance later on this
13 week and I know you all feel that same sentiment.

14 At this time I'll have to excuse you back
15 downstairs. Thank you.

16 (Remainder of jury pool exits the courtroom.)

17 MR. MCGARR: Your Honor, may we approach?

18 THE COURT: No, Mr. McGarr, not right now.

19 Ladies and gentlemen, I want to thank y'all
20 for being here and I appreciate all the sacrifices that
21 you have made and will make to serve on this jury and what
22 I just said to the whole group, I truly believe. It's a
23 sincere sentiment. This is our justice system. It
24 belongs to each and every one of us. It does not work if
25 we don't have responsible citizens who come up and perform

1 their civic duty on behalf of their fellow citizens so I
2 thank you very much for the sacrifices you've made to be
3 here. And I hope you do find it to be a rewarding
4 experience when it's all said and done.

5 I want to tell you that we do have a dispute
6 about the facts in the case that can't be resolved in any
7 fashion other than to ask a jury to come sit in the
8 courtroom, listen to the evidence as it's presented here
9 in the courtroom and the law as I will give it to you, and
10 to meet at the close of the case and come to a decision
11 which resolves the dispute. And that's your job.

12 You say well how do I do that? I have no
13 training and I don't know how to do it. Well, you all
14 know how to do it. We ask you just to bring your common
15 sense with you.

16 I will tell you that in civil court they have
17 different standards and different burdens of proof.
18 Criminal court is different from civil court which is
19 different from preliminary matters and those things. In
20 civil court the burden is on the plaintiff. I will tell
21 you the burden is always on the moving party, in this case
22 it's the plaintiff, to prove to you all by a preponderance
23 of the evidence their case.

24 Preponderance of the evidence simply means
25 the greater weight on the evidence. At the start of the

n

1 trial, the scales of justice -- if you can all imagine the
2 blind lady holding the scales -- they are completely even.
3 At the end of the case when all of the evidence is
4 presented, if those scales remain even or tilt in favor of
5 the defendant, the plaintiff will have failed to meet
6 their burden of proof and the plaintiff would not be
7 entitled a verdict.

8 If, however, the scales tip in favor of the
9 plaintiff and it doesn't matter if it's by the weight of a
10 feather or the weight of an anvil, they would have met
11 their burden of proof and they would be entitled to a
12 verdict.

13 That is the standard of proof here at civil
14 court by the greater weight of the evidence.

15 I want to tell you that you can divide a
16 trial into as many parts as you would like. I divide a
17 trial into five parts so that you the jury has a
18 procedural road map so that you know what's coming next.
19 I will tell you the five parts are not of equal length,
20 but the first part that we're sort of engaged in now is
21 the opening statement and I'm making a brief opening
22 statement to you. And then the lawyers will get up making
23 a brief, non argumentative opening statements to you.

24 After they have concluded that, we will go
25 into the real meat and potatoes of this and every case

1 which is the presentation of the evidence of the case. It
2 will come to you, I don't know how exactly, but it will
3 come to generally in one of three ways; evidence that we
4 all think of is witnesses from the witness stand, and some
5 I believe will come to you from video deposition and
6 that's perfectly legitimate and proper.

7 The second most common way other than oral
8 testimony is through the introduction of tangible items
9 and documents and then the third most common way is for
10 evidence to come to you by way of stipulation of that
11 parties. That is when everyone agrees is some fact is so
12 beyond dispute that you all should accept it as true. I
13 don't know the combination of how the evidence will come
14 to you but it will come to you in one of those ways.

15 And then the third part of the trial will be
16 when all of the evidence has been presented and it's all
17 been admitted. The lawyers will get up and make their
18 closing statements to you. By contrast to opening
19 statements which is non argumentative and brief, with a
20 closing argument is when the attorneys get up and advocate
21 their positions and urge you to resolve the dispute in
22 their client's favor.

23 The fourth part of the trial is when I give
24 you the charge on the law and I tell you what the law is
25 as it applies to this case.

1 The fifth part of the trial is when you all
2 retire to your jury room to deliberate this case, go
3 through the facts and the evidence, and apply the law and
4 come to a decision that resolves the dispute. Those are
5 the five parts of the trial and as you can image the
6 second part of the trial, the evidence, will be the
7 longest part of the trial.

8 I'll ask you to do a number of things
9 throughout the course of the trial but there are three
10 very important things I'll ask you to do. The first one
11 is the keep an open mind. We go through all this
12 questioning and qualifications to insure we have a jury
13 that doesn't come in with their mind made up about how
14 things ought to be decided. We want a fair and impartial
15 injury and every U.S. citizen is entitled to one. And
16 this is where it happens and you all make it happen.

17 The second important thing seems very simple
18 and that is just to pay attention. It would be so easy,
19 perhaps, to let your mind wander off. I won't ask for a
20 show of hands about whose guilty of doing this but I am,
21 but if you do let your mind wonder off, you may miss an
22 important piece of evidence or miss the way a witness acts
23 on the witness stand or a witness's demeanor and that may
24 become important in your deliberations. You would be at a
25 disadvantage with your fellow jurors if you miss that so

1 please pay attention.

2 Thirdly, I instruct you not to talk about
3 this case with anyone until you are free to do so during
4 your deliberations. That means you can't talk with the
5 bailiffs about it, you can't talk with your fellow jurors
6 about it, about the facts of the case. We're going to
7 break for lunch in just a minute and you can't go to lunch
8 and talk about it to some family friend about it. Of
9 course you know very little about it. If it goes over
10 into tomorrow and you go home and you see people who you
11 love and trust who, if you like me, can't decide what to
12 have for dinner without discussing it with my wife, you
13 all will have all that but you can't talk about this with
14 them. Even an innocent comment from someone who you like
15 and trust or someone who you don't like might have an
16 impact on your state of mind in this case. That would not
17 be fair to these parties, to your fellow jurors, or
18 yourself to allow someone who is not making the sacrifice
19 that you all make to have any input in the outcome of this
20 trial.

21 We don't care what they think and we don't
22 want to know what they think. We are only interested in
23 you, this jury, concludes after listening to the evidence
24 and the law and the evidence will be subject to
25 constitutional protections and scrutiny. So don't talk

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1 about it. That also includes doing research. It's so
2 easy to do research with the Internet, very tempting. I
3 don't do the social media stuff but you get on Face Book
4 and talk about it and what's happened in other cases is
5 the case gets thrown out and we start all over and it's
6 wasted a whole bunch of time and effort.

7 So don't talk about it, don't research it.
8 Everything you need to know to decide this case you will
9 hear and see in this courtroom.

10 I will tell you that you all are the sole
11 judges in this case and in every case. The trial judge by
12 law is not allowed to have an opinion about the facts of
13 the case, so don't think by anything I saw or do that I
14 have such an opinion. It's left entirely up to you all to
15 decide who to believe and what to believe and how much of
16 certain testimony to believe. It's entirely up to the
17 jury.

18 That same law that makes you the judge of the
19 facts makes me the sole judge of the law. So if you have
20 any ideas of what you think the law is or what the law
21 should be and it differs from what I tell you the law is,
22 from time to time throughout the case and at the close of
23 the case, you will swear an oath in just a second to set
24 aside your opinion and apply the law precisely as I state
25 it to you. That insures that every citizen is judged and

1 receives treatment under the same law. That's the reason.

2 Now, I'm going to ask the best docket clerk
3 in the State, and I'm serious about that, to place you
4 under oath.

5 THE CLERK: Ladies and gentlemen, please
6 raise your right hand for the oath. The response will be
7 "I will."

8 You shall well and truly try Case No.
9 2012-CP-23-1971, Barbara Gaines versus Joyce Ann Campbell
10 and a true verdict rendered according to the law and the
11 evidence so help you God.

12 COLLECTIVELY (I Will.)

13 Thank you. Please be seated.

14 THE COURT: Well, don't sit down yet because
15 I'm going to excuse you right now. 1:45 good for
16 everybody? When you come back I'm going to ask you to
17 please see if you can elect a fore person from among the
18 first 12. The fore person is the jury spokesperson in the
19 courtroom if that becomes necessary and moderators at the
20 end of the trial. If y'all can not do that, I'll do it
21 for you. I have a very scientific method. I have a lit
22 right here and I put my hand over my eyes and I put my
23 finger down but I always like to give y'all a chance to do
24 that one your own.

25 With that Mr. Fraizer will show y'all where

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1 to do and where to come back and y'all have a pleasant
2 lunch.
3 (Jury exits the courtroom for lunch.)
4 THE COURT: Anything before we break?
5 MR. MCGARR: What time are we supposed to be
6 back here?
7 THE COURT: Quarter til 2:00.
8 MR. MCGARR: I can not pick my client up by
9 that time. She is in Pickens.
10 THE COURT: Mr. McGarr, that is not my
11 problem. We're going to start at quarter til 2:00. You
12 get somebody else to do it. This is ---
13 MR. MCGARR: Your Honor, for the record ---
14 THE COURT: Yeah.
15 MR. MCGARR: For the record ---
16 THE COURT: Please.
17 MR. MCGARR: This case was called about the
18 time I walked out of my office to be here at 9:15. There
19 was a case that was supposed to be number one and it went
20 down because of illness. I came here and I explained to
21 you that I only had this portion of the file walking out
22 of the office. I have been given supplemental discovery
23 apparently as I was walking out of the office when I came
24 in today.
25 I've told you that I am short staffed in the

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1 office. I've told you that I need enough time to get
2 these people together. I have a Pickens County defendant
3 that needs to be here in Greenville.

4 There was another case, a day long case, that
5 said they were ready to go and we chose to do mine. I'm
6 not objecting to that, but I am objecting to another time
7 to get my staff and my people together to be here. If
8 not, I would at least ask that you tell the jury the
9 reason my client is not here is because I can't pick them
10 up at this short of notice and I was given notice that we
11 were going to be up for trial today.

12 I'm not trying to pick a fight with you. I
13 understand you're getting grumpy but at the same time ---

14 THE COURT: Excuse me, Mr. McGarr, you had
15 best watch your language. Sir, you've had enough. You
16 said this morning you could be ready to go at 2:00.

17 MR. MCGARR: This afternoon.

18 THE COURT: We are not responsible for
19 providing transportation for your client to be here.
20 That's your problem. They're going to be back at quarter
21 til 2:00, you be back at quarter til 2:00 and you be ready
22 to go.

23 MR. MCGARR: Your Honor, I would at least
24 like an explanation to the jury as to why my client can't
25 be here.

1 THE COURT: You can tell them all you want.

2 MR. MCGARR: Okay. So as long as I can do
3 that.

4 THE COURT: Mr. McGarr, I'll see you at
5 quarter til 2:00.

6 (Whereupon, there was a lunch break.)

7 THE BAILIFF: Remain seated, the Honorable
8 Edward Miller presiding.

9 THE COURT: Anything before we bring the
10 jury?

11 MR. PEACE: Nothing for the plaintiff, Your
12 Honor.

13 MR. MCGARR: Just to work out a little bit of
14 logistics. Mr. Peace has objected to some requests to
15 admit of mine that are related to medical records and I
16 need to know if that objection still stands. If it does,
17 I would have to bring in records custodians and I can't
18 imagine that we can't all agree that those are the actual
19 records.

20 MR. PEACE: I didn't object to the request
21 for admissions. He sent me request to admit authenticity
22 which I've admitted. However, those documents contain
23 various things that are inadmissible including subjective
24 opinions and other things that are simply not admissible
25 for independent reasons. It's not that he's altered the

1 documents, it's because there's no foundation and people
2 who actually wrote those subjective opinions aren't going
3 to come in here and testify, I don't think.

4 Now, if they do, my objection may be
5 different. The records custodian can't come in and report
6 what a diagnosis is because the diagnosis is subjective
7 opinion and belief performed by a professional that needs
8 to come in and testify for the basis for that diagnosis
9 for it to be admissible.

10 Mr. McGarr, what he's done throughout the
11 depositions in this case, we've got two physicians as well
12 as my client, he'll take their deposition and say did you
13 have chronic severe neck pain, she says, no, and he'll
14 pull 20 year old records out and say she, you know, went
15 into the eye doctor, and they say what problems do you
16 have, and she'll say, well, I'm diabetic and my neck is a
17 little stiff today and they write that down, and he wants
18 to say to the doctor, the neurosurgeon, did you know that
19 she had neck pain in 1993.

20 I objected to those hearsay documents coming
21 in because there's not going to be any foundation. There
22 is not going to be any witness who came come in other than
23 the records custodian who can come in and say, yeah, we
24 pulled that out of the box in the basement somewhere, but
25 that witness isn't going to be able to come in and testify

1 about the foundation.

2 THE COURT: You just object to the content.

3 MR. PEACE: Right.

4 MR. MCGARR: If it's just content, then,
5 statements made for purposes of medical treatment are
6 exceptions to the hearsay rule then I don't have a problem
7 because I can bring the records custodian. If it's that
8 there are medical records out there where other doctors
9 have diagnosed other things and I'm presenting that to an
10 expert, then the rules would say that I'm still allowed to
11 do that because it is stuff that they commonly look at and
12 they can testify as to hearsay.

13 So I guess my point is if it's a matter of
14 that the records are true and authentic and they're kept
15 in the ordinary course and scope of business, I don't need
16 those records custodians because I think the Rules of
17 Evidence will allow what I've done to come into evidence
18 anyway. So I just need to clarification.

19 If we're not arguing over authenticity of
20 records, and we're not arguing over the fact that they're
21 kept in the ordinary course and scope of business, I don't
22 need the records custodian and life is good, if that makes
23 sense. Do you understand my point?

24 THE COURT: I don't believe that's what
25 you're objecting to.

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1 MR. PEACE: If he brings the records
2 custodian or not, I will object to certain information in
3 those records coming into evidence. He can cross-examine
4 the doctors and he did. I objected on the record and
5 frankly he did cross-examine them on the record and I
6 think they answered his question. So that's not really
7 the biggest problem with it. I don't want him putting
8 those into evidence when nobody's come in here from said,
9 hey, yeah, in 1996 I took this history especially when
10 it's no clear who gave them the information.

11 In Dr. Mina's deposition, it says source of
12 information patient and family and she said I don't know
13 whether these are her words or her daughter's words or
14 another family members's words, so to attribute those
15 statements to my client, there's no foundation for it.
16 Now, if he called the person who took that information and
17 said, yeah, Ms. Gaines specifically said ---

18 THE COURT: I understand all that. From what
19 I understand Mr. McGarr wants to use them to impeach your
20 witnesses, apparently.

21 Am I correct about that?

22 MR. MCGARR: Yes, sir, but we can get into
23 that when we get into substance. I just need to know if
24 we're arguing over their authenticity or if they were kept
25 in the ordinary course and scope of business. If we're

1 not arguing over that, I don't need the record custodians.

2 The substance of that -- there's always the
3 substance of whether you allow that into evidence is up to
4 you and we can argue that at the time. I just need to
5 know if we're arguing over whether they're kept in the
6 ordinary ---

7 THE COURT: Mr. McGarr, are we talking about
8 admitting medical records as exhibits or are you talking
9 about using them to cross-examine witnesses?

10 MR. MCGARR: To cross-examine witnesses.

11 THE COURT: Well, that's a whole different
12 ball game from being admitted into evidence. Okay.

13 MR. PEACE: If they're aren't admitted into
14 evidence, then I don't think we have an objection.

15 MR. MCGARR: I'm making sure it's clear that
16 I don't need to bring in the records custodians to testify
17 that ---

18 THE COURT: Mr. McGarr, I don't know what's
19 clear. I have not lived with the case as you two have so
20 until I see it, until it's presented to me, I can't make a
21 ruling and I'm not going to give you an advisory opinion.
22 Okay. Is that clear?

23 MR. MCGARR: Yes, sir, but I'm not asking you
24 to, I'm asking to clarify with Mr. Peace ---

25 THE COURT: Mr. McGarr, you have arrived in

1 court and I guess you will find out what he objects to
2 when the situation arises. Do you understand that?
3 You're not asking him to agree to admit into evidence any
4 documents?

5 MR. MCGARR: No, sir.

6 THE COURT: Okay. Now, I will say this, I
7 was licensed to practice in 1978, the first time I have
8 ever seen or heard of a lawyer calling a circuit judge a
9 name on the record was today. The only other people I
10 know of who have ever done that are criminal defendants.
11 I will tell you this, if something like that occurs again,
12 I am going to feel compelled again to issue sanctions.
13 And when I issue sanctions, I am required to report it to
14 the Office of Disciplinary Counsel.

15 Anything else before we bring the jury?

16 MR. PEACE: No, Your Honor.

17 THE COURT: Okay. Let's get them.

18 (Jury re-enters the courtroom.)

19 Alright, ladies and gentlemen, welcome back.

20 Mr. Hill, were you late getting back from lunch?

21 JUROR HILL: No, sir.

22 THE COURT: I was just wondering if you were
23 out of the room when they took the vote or not. Thank you
24 for serving as fore person. At this time we'll begin the
25 first part of the trial, the opening statements from the

1 attorneys.
2 (Foreman name marked as Court's Exhibit No. 1
3 for identification.)
4 MR. PEACE: May it please the Court.
5 THE COURT: Yes, sir.
6 MR. PEACE: Good afternoon, ladies and
7 gentlemen. My name is John Peace. I was introduced to
8 you earlier today during jury selection and like the Judge
9 said we really couldn't hold jury trials without you,
10 obviously. You are the main event. You are the ultimate
11 deciders of all issues of fact.
12 Judge Miller, who is seated on the bench
13 behind me is an excellent judge of the law and Mr. McGarr
14 and I both have tried cases in front of Judge Miller
15 before. But without you, there's no one to decide issues
16 of fact. Judge Miller may rule on objections which are
17 legal questions. He may rule on admissibility of
18 evidence, but ultimately at the end of this case, you, the
19 jury, are going to take all of that evidence that he
20 admits into evidence, take it back in the jury room, and
21 you're going to render a verdict. So that makes you guys
22 front and center.
23 A little bit about me and my client, I've
24 been practicing law in Greenville since 1998. I've lived
25 here with my wife and family. Barbara Gaines lives over

1 in Easley. She lives with her daughter who is seated on
2 the front row of the courtroom. You're going to hear from
3 both of them today.

4 You're going to hear from several other
5 witnesses after our opening statements.

6 Opening statements, as the Judge told y'all,
7 is sort of a birds eye view of the case. It's sort of
8 like when you're trying to figure out what movie to see
9 and you call a friend whose already seen it. And, of
10 course, if you ask Mr. McGarr and myself, you're going to
11 get two pretty different summaries of the case.

12 If you ask me, what's Gaines versus Campbell
13 about, I'd say, oh, that's the one where the lady got rear
14 ended at the stop sign and then she went to the emergency
15 room and followed up with her family doctor. And then the
16 family doctor referred her to a neurosurgeon's office
17 where she treated for a little over a year before the
18 ultimately decided to do a cervical diskectomy and fusion
19 between her C5 and C6 vertebrae in her neck.

20 Mr. McGarr, on the other hand, if you called
21 him up and asked what's Gaines versus Campbell about and
22 he'd go, oh, that's that thriller where the woman had a
23 long history of chronic severe neck pain to herself until
24 the neck happened and then she sprung the trap.

25 So those are going to be the two versions of

1 the story you hear in this case.

2 The issue in the case really, and in any
3 wreck case, there's going to be three issues. One is
4 whose fault was it, number two, was anybody hurt, and
5 number three were the injuries and damages caused by the
6 negligence and the party that was involved.

7 Now, in this case it's a little bit simpler
8 because in this case, Ms. Campbell and her attorney have
9 already admitted that she was at fault. In fact, in their
10 answer, Paragraph No. 4, it says, "It's admitted that on
11 or about January 8, 2010, the plaintiff, that's Barbara
12 Gaines came to a stop at a stop sign on Rolling Hill
13 Circle." It's also admitted that the defendant hit the
14 rear of the plaintiff's vehicle. It's admitted the
15 defendant, Ms. Campbell, was negligent. Again, in
16 Paragraph 9, admitted that the defendant Ms. Campbell was
17 negligent.

18 So issue No. 1 is already decided. The
19 parties agree that Ms. Campbell negligently or or
20 carelessly ran into the back of Ms. Gaines's car.

21 Also you're going to have the medical bills
22 and you're going to hear from two treating physicians.
23 There's not much doubt about Barbara Gaines's surgery.
24 She really had an interior cervical diskectomy and fusion
25 surgery and Dr. Christie Mina at Piedmont Neurosurgery is

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1 the one who did it and you'll hear from her. You'll see
2 that video deposition.

3 The real question of fact in this case and
4 this is why you are here, you can tune me out the rest of
5 the time, but this is the question. Was the need for that
6 neck surgery and neck injuries in this case, were they
7 caused by Ms. Campbell running into the back of
8 Ms. Gaines. That's the issue for you to decide.

9 And once you hear the testimony in the case,
10 again, the damages sort of fall into place after you hear
11 from the doctors and the medical bills and that sort of
12 thing. So as we go forward, causation is going to be the
13 issue.

14 Now, as the Judge told y'all in his opening
15 before lunch, you're going to hear testimony from live
16 witnesses and in this case you're going to hear from
17 Officer Shivers. He's seated in the courtroom. You're
18 going to hear from Barbara Gaines, herself, Joy Gaines,
19 her daughter, and Joyce Campbell should be hear in just a
20 little while and you'll hear from her as well.

21 As far as the video depositions, quite
22 frankly, we take video deposition of physicians because
23 lord knows what it would cost to bring a neurosurgeon in
24 here and sit around and wait for us to get all our
25 housekeeping things taken care of and then put on the

1 stand. It's just not feasible. As Dr. Mina will tell you
2 she does a lot of surgery and the same goes for
3 Dr. Harding. She works full time in her practice in
4 Easley.

5 I will warn you all, video depositions when
6 they are done properly, are boring. When I do them
7 they're even more boring. And I tell you, they're boring
8 for a number of reasons. One, the people are working
9 really hard in these depositions and are trying not to
10 leave anything out. We prepare for hours preparing for
11 these things. It's excruciating just getting ready for
12 them. But when you're sitting there watching them, and
13 I've watched these depositions more than anybody has ever
14 will other than me because this trial will be over with
15 today and nobody will watch them again for entertainment.

16 But the point is, there's important
17 information in both these depositions. Dr. Harding, is
18 Barbara Gaines's family doctor. She can tell you about
19 her medical history going back to the 70's. She hasn't
20 been treating her for that long, she's about my age, but
21 she's got all the records from prior doctors. She'll tell
22 you how Barbara Gaines was doing before the wreck in 2010.

23 Dr. Mina is a neurosurgeon who went in and
24 did the surgery. You're going to hear all about it and
25 she's very soft spoken. It drags a lot simply because

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1 we're going through a lot of records and I apologize in
2 advance. I try to do my best but it's boring.

3 Once we introduce all of the evidence we
4 have, Ms. Campbell and her attorney may introduce some
5 evidence as well. When they rest, the Judge is then going
6 to charge y'all on the law. Like I said, Judge Miller, is
7 the judge of the law in the case and he will instruct
8 y'all on the law you are to consider.

9 Frankly, the laws in this case is not going
10 to be particularly controversial. He's explain it in
11 detail for you, but ultimately what you need to decide in
12 this case is is just common sense based on the facts in
13 this case which are pretty clear. Did Ms. Campbell cause
14 Ms. Barbara Gaines's injury and the need for this surgery.
15 And I think when you get into this case after the Judge
16 has instructed y'all on the law, y'all go back into the
17 jury room to deliberate, y'all will have all of the tools
18 you'll need to reach a proper verdict and the word verdict
19 simply means to speak the truth.

20 So y'all have come in here and take an oath
21 and I know you all take it seriously because I've been
22 watching to see if you're looking at the floor. Everybody
23 jokes about jury duty but I looked at the clerk and she
24 said raise your hand and do you swear to uphold the duties
25 you are charged with and I know you'll do that.

1 So, anyway, thank you for your help and your
2 hard work. This won't be easy but at the end of the case,
3 I'm going to come back to this area and we're going to
4 pull out some of the testimony and some of the exhibits
5 and look at them in detail for y'all to put back together
6 at the end of the case and render a verdict.

7 So thank y'all very much.

8 THE COURT: Alright.

9 MR. MCGARR: If it please the Court.

10 THE COURT: Yes, sir.

11 MR. MCGARR: Guys, unfortunately, when I
12 turned 40 I couldn't see at a distance better than I can
13 see up close so I may have to look at these notes.
14 Unfortunately, after I turned 40, I went brain dead so I
15 need notes.

16 Let me first explain a little bit of the
17 reason why I'm sitting at the table by myself. Cases are
18 called sort of as they fall in order based on when they
19 were filed. The earliest case goes first and the latest
20 case goes last. In this situation, as of Friday, a case
21 was supposed to be tried this morning. Unfortunately,
22 early this morning we found out and the court found out
23 that one of the attorneys involved in the case that has
24 that tummy bug, and not to be too graphic, causes problems
25 from both sides.

1 So there's no reason for that person to be in
2 court nor does anybody want that person to be in court.
3 But that gave -- I found out I was going to be in court
4 about 9:00 this morning. I had to be in a roster meeting
5 at 9:15. My client, who is not here, is Ms. Campbell.
6 Ms. Campbell is in her 60's. Don't quote me on this but I
7 think Ms. Campbell is 63 or 64. She is being treated for
8 an illness that causes her to take medication which makes
9 her really uncomfortable driving. In fact she was told
10 not to.

11 Unfortunately for me one of my paralegals is
12 actually trying to do a house closing. Not a house
13 closing, but the third time she is trying to do a house
14 closing so she's not in the office to help us today.

15 My other person that's in the office has to
16 man the phones and keep things going so I couldn't get
17 from here to Pickens today and have my client with me
18 today. In fact, she won't be here today. She will be
19 here today when I have time to go and get her.

20 So I can't apologize for that because it's
21 not my fault and it's not the court's fault. People get
22 sick and we can't waste your time and believe it or not,
23 collectively, y'all cost us a small fortune to be here
24 about \$5.00. We won't go broke but collectively, y'all
25 cost us a small fortune so we have to move forward.

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1 It's not uncommon and my client will be here tomorrow.

2 That's an explanation of why you see me with
3 no client.

4 Now, Mr. Peace, has actually told you that
5 they're actually two different sides of this story.
6 You're going to hear from one said and one is going to say
7 one things and you're going to hear from the other side
8 and that said is going to say something.

9 I happen to disagree because in a lot of
10 instances, he's already stolen my thunder. To begin with
11 I need to tell you this, I'd like to give you some
12 definitions because I will use my client's first name.

13 My client is Ms. Campbell. I will do my best
14 to call her Ms. Campbell. Technically you will hear a lot
15 of times her being referred to as the defendant. The
16 defendant simply means that's the person that's being
17 sued. I will call Ms. Gaines, Ms. Gaines, but she is also
18 going to be referred to a lot as the plaintiff. Plaintiff
19 on this side and defendant is on this side.

20 If I use first names or I use last names or I
21 use defendant or I use plaintiff, just understand who
22 those parties are.

23 Now, with regard to a few things, and
24 Mr. Peace has already eluded to one, what brings you into
25 court is what is called a complaint meaning I think you

1 did this to me. What brings the defendant into court is
2 what you just heard is what is called an answer saying
3 here's what we agree with and what you're complaining
4 about and here's what we disagree with.

5 As you've heard under normal circumstances
6 you have to decide first who caused the accident. Then
7 you have to decide secondly, did the accident cause a
8 problem, and third, what was that problem. Today you
9 don't have to do one, two and three.

10 As you've heard Ms. Peace say from the date
11 that the accident took place until today or whenever she
12 testifies, she caused the accident. There's no question
13 about that. That's not the issue. The issue also is not
14 that anybody disagrees. So it's not two different
15 versions of the story.

16 Ms. Gaines ended up having surgery after this
17 accident but the surgery was to remove bone spurs from her
18 neck that were causing the nerve in her neck to pinch on
19 her bone. Ms. Gaines agrees with that. Ms. Gaines
20 doctors agree with that, Mr. Peace, I think will agree
21 with that. But that's what happened. Over a time this
22 lady has had a long history of neck problems that started
23 causing a long history of arthritis and at some point it
24 caused a bone spur which means bones growing into your
25 neck bones to the point that finally it swishing on the

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1 nerve to the point it's called pinching the nerve.

2 Everybody will also agree that it wasn't that
3 Ms. Gaines had a herniated disc which is caused the nerve
4 to be pinched. It was the bone that caused the nerve to
5 be disc. In order to get to that bone, you have to remove
6 the disc. You're going to see, actually as an exhibit,
7 where the doctor is going in and pulling the disc which is
8 just a piece of stub between the bones in your neck, going
9 in behind it and cleaning out all the bony stuff and then
10 putting a fake disc in it's place because you have to.

11 Nobody is going to disagree with that. So
12 it's not that we're living in two different worlds or
13 telling two different stories.

14 The other thing that everybody will agree
15 with, or at least the doctors will agree with, is that the
16 bone had to be taken out. After this accident in no way
17 shape or form created or developed this as a result of
18 this automobile accident. It had been there for years and
19 years and years and years.

20 And you will hear will hear about
21 degenerative disc disease or they call it arthritis, the
22 typical name. Arthritis, yes, over time gets worse and
23 they operated on an arthritic condition, took the
24 arthritic bone out, and guess what? Ms. Gaines got
25 totally better. Nobody is going to disagree with that.

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1 It's not as if we're sitting hear dealing
2 with two different world views or two different events or
3 two different sets of facts. We're not.

4 Everybody will agree that Ms. Gaines had a
5 several arthritic problem prior to this automobile
6 accident. Everybody will agree that severe arthritic
7 problem doesn't get better, it can get worse. Everybody
8 will agree that that arthritic problem got to the point
9 that it was squishing on that nerve and everybody will
10 agree that we took the arthritis out and the problem got
11 better.

12 Here is the issue, evidence, I think as His
13 Honor has told you, come in in three different fashions.
14 I call it the gate keeper, but the person who tells you
15 whether you can see or hear evidence is His Honor and
16 because His Honor has said certain things are allowed into
17 evidence, we can't show them to you, but one form of
18 evidence is photographic evidence. Another form of
19 evidence would be documentary evidence, and another form
20 of evidence would be what you hear from the witness stand
21 whether it be somebody's talking to you live or whether it
22 be, as Mr. Peace has said, somebody is talking to you by
23 video. They are both one in the same. Those are the
24 forms of evidence that you're going to hear.

25 Through that evidence, I'm going to be able

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1 to show you -- or what the facts will show you is this --
2 when this accident took place, you're going to see
3 evidence, not according to my client but according to
4 Ms. Gaines, that we're dealing with a fender-bender and
5 was a fender-bender that knocked out a headlight or
6 cracked the headlight and cracked or took out the tail
7 light on one vehicle and did some damage to the bumpers of
8 each vehicle. That's where the case begins.

9 Where the case goes next, this again is
10 coming from Ms. Gaines, that Ms. Gaines had told us that
11 she didn't know that she was injured and told the officer
12 that she didn't know if she was injured or not at the
13 scene of the accident.

14 You will also hear that she says after that
15 she drove from the scene of the accident away from the
16 accident. She then gets to her daughter who is, I don't
17 remember her last name and I apologize, but she went to
18 her daughter. She and her daughter go to the emergency
19 room.

20 When she gets to the emergency room, she
21 complains of a headache and she complains of a neck
22 problem. She doesn't complain of what caused the surgery
23 that is her arm is going numb and her arm is hurting.
24 Headache and neck problem. She is released from the
25 emergency room and her treating physician who is from

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1 Foothills Family Medicine will tell you that she reviewed
2 the records and they are indicating a headache, a neck
3 problem, but no indication of a nerve being pinched.

4 And the ER physicians, if the nerve was
5 causing a problem ---

6 MR. PEACE: Your Honor, I'd object to him
7 mischaracterizing or characterizing ---

8 THE COURT: It's non argumentative. Just
9 move along let's get this over. It's taking too long.

10 MR. MCGARR: You'll hear that there was no
11 evidence of pinching at the hospital. You'll also hear
12 Ms. Gaines went to Foothills Family Medicine a short
13 period of time after the accident and had some work done
14 but it was like blood work or lipid work or whatever but
15 didn't chose to go see the doctor even though she could
16 have.

17 A month thereafter, a month from the day that
18 she goes to the emergency room, she does go to Foothills
19 Family Medicine, sees her doctor and says, I've got
20 problems with the neck but now it's going into my arm, a
21 month thereafter. And the doctor decides, hey, I think
22 you've got a herniated disc, sent her to a neurosurgeon,
23 turns out it's not a herniated disc, it is a bone growth
24 that is crunching on the nerve. That's what you'll hear.

25 You'll then hear, as I told you earlier, that

1 they took the bone growth out, had to by necessity, take
2 the disc out to get to the bone growth, put a fake disc in
3 and Ms. Gaines got better.

4 Now, here's where we come into the evidence.
5 You guys are the judges of the credibility and
6 believability of the evidence. His Honor is the judge of
7 the law. You will have to look at this evidence, take a
8 look at what the documents have to say and take a look at
9 what the people have to say.

10 But I'm going to tell you in advance that you
11 will need to take into consideration what Ms. Gaines told
12 us about her prior neck problems and even her prior back
13 problems, and you'll find that there's a big discrepancy
14 with her saying I've never had a problem with my neck
15 until this accident and, in fact, she's had problems with
16 her neck for at least 20 years prior to this accident.

17 You will also hear that she was on pain
18 medications, strong pain medications that had been
19 prescribed just before this automobile accident. They
20 hadn't been there before, arthritic medication that she
21 had been on before and some medication that you can use
22 for nerve and muscle problems.

23 MR. PEACE: Your Honor, he's -- he's ---

24 THE COURT: You're not going to argue the
25 whole case in opening statements. Okay.

1 MR. MCGARR: Yes, sir.

2 THE COURT: So move along.

3 MR. MCGARR: Yes, sir. You will hear that
4 there were medications that were in existence prior to
5 this automobile accident for those long standing problems.

6 You will also need to pay attention to the
7 doctors as Mr. Peace has said and we'll talk more about
8 that after you have because it's not -- a bit of the wrong
9 time until you have before you see and hear what they say,
10 but in the end you'll have to come up with a conclusion as
11 to whether or not this surgery was fixing the problem that
12 was years in the making and simply came about because
13 Ms. Gaines simply getting older or whether this fender-
14 bender to exist when everybody says it does or that bone
15 growth created a problem to cause the surgery.

16 So really we're not dealing with two
17 different versions of the case. We're dealing essentially
18 with the same version of the facts.

19 In the end what we're asking you to do is to
20 come back with a verdict that is fair for Ms. Gaines. It
21 is her day in court. She has every right to be here
22 because we have a dispute. How we solve these disputes,
23 as Mr. Peace has eloquently told you, is through you
24 folks. Otherwise we'd fight it out and that's not the way
25 we do it.

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1 And we also ask you to be fair and listen to
2 the evidence and be fair to my client, Ms. Campbell even
3 though she's not here today and we'll see her tomorrow.
4 We're just asking you to be fair to both parties because
5 it's my client's day in court also, and when you do so,
6 you will have done your job and that's all we're asking.

7 I thank you in advance.

8 THE COURT: Call your first witness.

9 MR. PEACE: Thank you, Your Honor.

10 Your Honor, the plaintiff calls Officer
11 Connor Shivers.

12 THE CLERK: Place your left hand on the Bible
13 and raise your right hand.

14 MARK CONNORS SHIVERS, having been duly sworn,
15 testified as follows:

16 Thank you. Please be seated. State your
17 name for the record.

18 THE WITNESS: Mark Connors Shivers.

19 DIRECT EXAMINATION

20 BY MR. PEACE:

21 Q. Good afternoon, officer, how are you?

22 A. I'm good.

23 Q. I'm going to just stand over here to make sure
24 the jury and I can hear you. The microphone is obviously
25 on and I think we'll all be able to hear you.

Shivers - Direct

1 Can you tell the jury where do you work for?
2 A. I work for Easley Police Department.
3 Q. And how long have you been there?
4 A. A little over seven-and-a-half, almost eight
5 years now.
6 Q. What is your job title? Obviously you're a
7 police officer.
8 A. At the time of this wreck, I was a master patrol
9 officer which is the highest ranking before becoming
10 supervisor. Since the wreck now I have become supervisor.
11 Q. So your title is supervisor?
12 A. I'm a sergeant.
13 Q. And have you been trained in responding to car
14 wrecks?
15 A. I have.
16 Q. Tell the jury about the training you had?
17 A. I had basic training in collision investigation
18 which is offered through the nine weeks at the Criminal
19 Justice Academy in Columbia before becoming certified in
20 basic law enforcement.
21 Q. What do they teach you about responding to a
22 wreck scene and basic accidents?
23 A. The main part of it dedicated to filling out the
24 PR310 which is the accident report, how to collect the
25 people's information, determining at fault and issuing a

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Shivers - Direct

1 citation to whom you do find at fault.

2 Q. Who do you gather information from at the scene?

3 A. Usually both parties involved in the accident and
4 if there are any independent witnesses that are available
5 then their information is taken also.

6 Q. Did you respond to this wreck that we're here
7 about today that happened on January 8, 2010?

8 A. I did.

9 Q. Do you have your report and notes there before
10 you?

11 A. I do.

12 Q. Do you have any specific recollection of this
13 wreck as you sit here today?

14 A. No, sir. It was a little over about three-
15 and-a-half years ago. I work usually somewhere between 30
16 to maybe 50 wrecks a year or so and that's 150 or maybe
17 200 wrecks ago.

18 Q. That's quite a few wrecks ago. Please refer to
19 your notes. Also, have you been trained to do things in
20 the same way wreck after wreck after wreck?

21 A. Procedurally I do everything the same from one
22 wreck to the next.

23 Q. Would you please just tell this jury how this
24 wreck occurred, please.

25 A. According to the report I have here in front of

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Shivers - Direct

1 me it says Ms. Gaines's vehicle was stopped at a stop sign
2 at Rolling Hill Circle within the city limits of Easley
3 and a second vehicle belong to Ms. Campbell struck
4 Ms. Gaines's vehicle in the rear bumper.

5 Q. Did you ask Ms. Campbell how fast she was going
6 when she hit Ms. Gaines?

7 A. I'm not sure if I asked. I determined her speed
8 based on the damage, and that's what I look at, as 30
9 miles per hour.

10 Q. Did you determine whose fault this was?

11 A. I did.

12 Q. Whose fault was it?

13 A. I determined it to be Ms. Campbell's fault in
14 that she struck Ms. Gaines in the rear bumper while
15 Ms. Gaines was stopped at a stop sign.

16 Q. My next question was how fast was Ms. Gaines
17 going at the time that Ms. Campbell hit her?

18 A. I believe she was stopped.

19 Q. Did Ms. Gaines report an injury to you at the
20 scene?

21 A. The procedure is when I arrive on the scene at an
22 accident is I only ask if anybody needs EMS. Nobody at
23 this scene requested for EMS to transport them to the
24 hospital immediately. However, I did note in the report
25 that there might be a possible injury to Ms. Gaines. I

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Shivers - Direct

1 don't remember if she specifically told me that she was
2 injury, but something there indicated to me there was a
3 possible injury.

4 Q. Do you remember anything about Ms. Gaines
5 demeanor on the day of the wreck?

6 A. I don't recall anything specific about the day of
7 the wreck.

8 Q. Officer Shivers, that's all the questions I have
9 for you. Please answer any Mr. McGarr might have.'

10 CROSS-EXAMINATION

11 BY MR. MCGARR:

12 Q. Officer, is it okay if I talk to you from here?

13 A. That's fine.

14 Q. The speed that my client was going is really just
15 a guess?

16 A. Yes.

17 Q. No more or less.

18 A. Yes.

19 Q. It could be 20 miles more, 20 miles less, it's
20 just a guess on your part?

21 A. Right.

22 Q. It has no bearing on actual how fast she was
23 going?

24 A. No, I don't do any measurements or anything.
25 It's just based on my experience and just working.

Shivers - Cross

1 Q. Essentially a guess?
2 A. Right.
3 Q. The other thing is if someone told you they
4 weren't sure they were injured, that would result in you
5 putting down a possible injury, is it not?
6 A. Yes.
7 Q. So that would be consistent with Ms. Gaines
8 telling you I'm not sure if I'm hurt?
9 A. Correct.
10 Q. That doesn't means she was hurt, it was just that
11 she couldn't decide?
12 A. Right.
13 MR. MCGARR: No further questions.
14 REDIRECT EXAMINATION
15 BY MR. PEACE:
16 Q. Officer Shivers, if I represented to you if I
17 asked M.s Campbell how fast she was going and she said 35
18 or 40, would that be consistent with your investigation?
19 A. Correct.
20 Q. Thank you very much.
21 THE COURT: Officer, you can step down. May
22 he be released from the subpoena?
23 MR. PEACE: Yes, Your Honor.
24 MR. MCGARR: Yes, Your Honor.
25 THE COURT: Call your next witness.

Shivers - Cross

1 MR. PEACE: Your Honor, the plaintiff calls
2 Barbara Gaines.
3 THE CLERK: Place your left hand on the Bible
4 and raise your right hand.
5 BARBARA GAINES, having been duly sworn,
6 testified as follows:
7 State your name, please.
8 THE WITNESS: Barbara Gaines.
9 THE CLERK: Please be seated.
10 MR. PEACE: Ms. Gaines, I apologize, I don't
11 stand ready to ask you some questions. I need to get some
12 exhibits marked.
13 MR. MCGARR: Your Honor, may we approach for
14 a minute.
15 THE COURT: Come on.
16 (Whereupon, there was an off-the-record
17 discussion.)
18 Ladies and gentlemen of the jury, I might
19 have neglected to tell you that from time to time there
20 are some legal issues that come up which I need to discuss
21 outside of your presence. I'd like you to know we are not
22 trying to deceive you in any way but we maybe trying to
23 keep something from you because we want to make sure that
24 everything you all hear is evidence in the case and it is
25 subject to constitutional scrutiny.

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Shivers - Cross

1 So if you all will retire to your jury room,
2 we'll get right back with you.

3 (Jury exits the courtroom.)

4 Okay.

5 MR. MCGARR: Your Honor, I'm only
6 anticipating. I don't know where we're heading but I
7 don't want anything cracked open without us talking about
8 it. I was just handed two documents, one is based on
9 medicare's payment towards Ms. Gaines medical expenses,
10 and one is based on ---

11 MR. PEACE: State Health Plan.

12 MR. MCGARR: State Health Plan. It does say
13 it, but I'll take Mr. Peace's word for it. And then we
14 also have Ms. Gaines's medical expenses that I got this
15 morning and if we're going to go into -- I don't
16 understand the voluntarily going into collateral sources
17 which is going to bring up the issue of insurance which is
18 going to open up an entire can of worms and my objection
19 is, let's don't do that.

20 THE COURT: Mr. Peace.

21 MR. PEACE: Your Honor, I offer the medical
22 evidence and, in fact, the case law specifically says that
23 evidence medicare, medicaid or health insurance has paid
24 medical expenses is admissible to show the reasonable
25 value of those services.

Shivers - Cross

1 In this case, she's going to testify, she's
2 retired after 30 plus years at the Pickens County School
3 System. The jurors are going to know just from that fact
4 that she's qualified for medicare because she's worked her
5 whole life and she's of retirement age. I offer it to
6 simply say the jury is not confused about the issues
7 because they're going to know she's got medicare. I don't
8 want them all thinking that her medical bills have all
9 been paid by medicare or the State Health Plan.

10 Both medicare and the State Health Plan have
11 indeed paid significant amounts of her medical bills,
12 however, she has more than \$30,000 worth of medical bills
13 that weren't submitted to either and what she actually
14 owes to her medical providers. So that's why I offer the
15 spread sheet we got from medicare that specifically --
16 it's a line item spread sheet that shows every single
17 claim and every single payment and every amount that was
18 paid by medicare and by the Health Plan, and I think if we
19 don't do that, my client is going to be prejudiced because
20 they're going to either assume that her medical bills are
21 already paid or that nobody expects her to pay them.

22 Now, there's no rule -- Rule 411 generally
23 says liability insurance is not admissible on the issue of
24 whether a person acting negligently or otherwise
25 wrongfully. This is far removed from that. This is

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Shivers - Cross

1 general health insurance medicare coverage. It has
2 nothing to do with whether anybody is at fault. It has to
3 do with the plaintiff's real damages in this case are.

4 Now, we've got to pay medicare back some ---

5 THE COURT: Wait. You're confusing the
6 damages, which a person, a plaintiff is injured in a
7 personal injury is entitled to receive with what is owed
8 by that person after -- owed by the person at the time the
9 case is resolved. That's not what you factor damages on.
10 You factor the damages on the medical costs of treatment
11 approximately caused by the injuries in the wreck, loss of
12 enjoyment of life, pain and suffering, mental anguish, all
13 that, and then knowing that she still owes amounts because
14 some of them have been paid by her insurance is not
15 appropriate for a jury to consider in determining what the
16 damages are.

17 So I agree with Mr. McGarr that you're
18 opening a door that is not proper to be opened and I'm not
19 going to allow you to get into this kind of collateral
20 source. Okay.

21 Now, if you ask her do you still owe your
22 doctors money, there's nothing wrong with that but you can
23 not go into who has paid the other sums.

24 MR. PEACE: Can I ask her if she's on
25 medicare or has retiree health insurance and this is

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Shivers - Cross

1 really for a separate issue? Mr. McGarr's primary
2 argument in this case is she was riding around with these
3 problems and looking for a wreck to happen so she could
4 blame her injuries on that wreck. If she really had those
5 injuries before the date of the wreck, she could have just
6 gone to the doctor and it wouldn't have caused her
7 anything. She has health insurance and she could have
8 gotten those problems taken care of.

9 THE COURT: What is it you want to ask her?
10 If she's got health insurance?

11 MR. PEACE: Yes.

12 THE COURT: No, I'm not going to allow you to
13 do that. But if he opens the door with some kind of if
14 she's out trying to cause a wreck and accusing her of some
15 kind of insurance fraud or crime, if he's going to do
16 that, then that opens the door that may well allow you to
17 get into that.

18 MR. PEACE: Your Honor, I've got the burden
19 of proof and I'm not sure why I just can't open the door.

20 THE COURT: Because I'm saying you can't.
21 It's collateral source. The jury doesn't base damages on
22 whose got health insurance and who doesn't. They base it
23 on the amount that it costs for reasonable medical bills
24 and treatment. We don't know what a jury knows and we
25 can't assume what they would rely on and that's just not

Gaines - Direct

1 appropriate as evidence.

2 MR. PEACE: May I take those two documents
3 back, please.

4 THE COURT: Yes, sir.

5 MR. MCGARR: And also I would ask that
6 everybody be forewarned that we not got into auto
7 insurance, neither is relevant to this ---

8 THE COURT: Everybody knows that. If they do
9 it, they're going to step deep in it, Mr. McGarr.

10 MR. MCGARR: Yes, sir.

11 MR. PEACE: Yes, sir. Your Honor, I'm just
12 going to hand my client the exhibits.

13 THE COURT: Sure. Like I said it's perfectly
14 expectable to say I still owe my doctors so much money but
15 you can't get into how the rest of it was paid.

16 DIRECT EXAMINATION

17 BY MR. PEACE:

18 Q. Barbara, I'm going to stand over here. You're
19 soft spoken so pull the microphone down close to your
20 mouth and just speak right into the microphone. How are
21 you doing today?

22 A. Good.

23 Q. A little bit nervous?

24 A. A lot.

25 Q. Take a deep breath and just relax and we're going

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Gaines - Direct

1 to talk about you, the easiest topic in the world.
2 Let's start off with your family. Who do you
3 live with, Barbara?
4 A. My daughter and I live together, my oldest
5 daughter.
6 Q. How many children do you have altogether?
7 A. Three, two daughters and one son.
8 Q. Name them for the jury.
9 A. Joy Gaines is my oldest, Kimberly Gaines is the
10 middle one, and Mark Gaines is the baby.
11 Q. And where do you and Joy live together?
12 A. Easley, 213 Jones Court.
13 Q. And how long has Joy lived with you?
14 A. All of her life.
15 Q. So y'all been roomies since the day she was born.
16 A. Yes.
17 Q. She knew you pretty well?
18 A. I think so.
19 Q. What do you do for a living these days?
20 A. I'm retired.
21 Q. And when did you retire?
22 A. In 2003.
23 Q. So you been retired for about 10 years now?
24 A. Yes.
25 Q. Tell the jury what you did for a living before

Gaines - Direct

1 you retired?
2 A. I was a teacher assistant for special aide
3 children.
4 Q. And which school did you teach at?
5 A. Pickens Elementary in Pickens, South Carolina.
6 Q. Did you work with special needs children the
7 whole time you worked in the school system?
8 A. Yes.
9 Q. How many years total did you work in the Pickens
10 County School System?
11 A. Twenty-eight years.
12 Q. So if you retired in 2003 when did you start?
13 A. Twenty-eight years back.
14 Q. And when you retired from the school district,
15 did you go out on disability or did you retire as a
16 function of you been there enough years?
17 A. I just retired.
18 Q. The reason I asked that, as you know, later on in
19 Dr. Mina's deposition Mr. McGarr asked Dr. Mina if she
20 knew that you were disabled from a neck injury. Is that
21 accurate?
22 A. No, sir.
23 Q. Had you injured your neck while at work?
24 A. One time while I was at work I injured my neck.
25 I was in with some children and the special teacher comes

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Gaines - Direct

1 in, occupational therapist I think, it's been so long ago
2 I can't remember, and she wanted me to show her how to cut
3 a flip and I wasn't no spring chicken then either and I
4 told her I couldn't. She just demanded so I did it and I
5 sprang my neck.

6 Q. When you say you cut a flip, did you run across
7 the floor like a gymnast?

8 A. No, I cut a summersault -- I guess a summersault.

9 Q. Just one the floor you rolled over?

10 A. Yes.

11 Q. And you hurt your neck.

12 A. Yes.

13 Q. What year was that?

14 A. '83, I think.

15 Q. Early in the Reagan years?

16 A. Yes.

17 Q. So about 30 years now.

18 A. Yes.

19 Q. You heard the opening statements in the case.

20 Did you have neck pain radiating into your right arm
21 before this wreck happened?

22 A. No.

23 Q. Did you have neck pain radiating into your right
24 arm after this wreck happened?

25 A. No. At the time of the wreck I had a sprain and

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Gaines - Direct

1 it took two or three weeks to get feeling better.

2 Q. You were here for Officer Shivers as well. Did
3 he explain the wreck the way it happened?

4 A. Yes.

5 Q. Were you sitting at a stop sign?

6 A. Yes.

7 Q. Did you see the car coming or you just get hit?

8 A. I didn't see the car. I just knew the car was
9 behind me.

10 Q. Describe for the jury what happened to you inside
11 of the wreck when you got rear ended.

12 A. I stopped at the stop sign and it was when they
13 were building that new big Walmart in Easley and they
14 detoured us around because they were working on something
15 and they detoured us around and I stopped at the stop sign
16 and describing it, it was like a bomb hit. There's a big
17 loud racket and it knocked me out and I had my grand
18 daughter with me. I went to pick her up at school and she
19 was in the back seat on the other side and I could hear in
20 the distance and it was like, you know, you can't get your
21 thoughts together and you don't know what's going on and I
22 could hear her saying nanny, nanny. And I said what,
23 darling, and she said what happened. I said nanny don't
24 know.

25 As I was sitting there some lady come up and

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Gaines - Direct

1 asked me are you alright and I said I don't know. This
2 one guy he come and he said what's the matter, you're
3 white as a piece of cotton and I said I don't know. And I
4 told him I said I'm a diabetic. He said can I go -- he
5 only lived two or three houses down the road -- and he
6 said can I go get you something and I said, no, I'm
7 alright, I'll just wait. And someone stood there until
8 the police got there.

9 There was another guy that came and said
10 there's something might be leaking from the back of your
11 car and he said y'all better get out. So I got my grand
12 daughter and it was so cold that day. It was the coldest
13 day I said that I had lived in. So we got out and the
14 policeman went back there and he put his hand under where
15 ever it was and he smelled under there and he come back up
16 to me and said it's cold, y'all get back in, it's not gas.

17 So I got back in the car -- we got back in
18 the car. After that I called my daughter-in-law, Emma's
19 mother. She lives down in Easley. I called her and she
20 come to the wreck. So she was with me then.

21 Q. Did Officer Shivers ask you if you needed an
22 ambulance to take you to the emergency room?

23 A. No. He asked me was I hurt and I told him I
24 didn't know and I didn't. I didn't know and my daughter
25 wasn't there and I knew that she would go with me.

-A

Gaines - Direct

1 Q. So you were worried about leaving your car and go
2 to the hospital without her?

3 A. Yes.

4 Q. So did your daughter-in-law come to the scene?

5 A. Yes.

6 Q. Tell me her name again.

7 A. Cathy.

8 Q. Cathy came to the scene and you had Emma with
9 you.

10 A. Yes.

11 Q. And what did y'all do next?

12 A. Cathy asked the police would it be alright to
13 drive it because I didn't want to leave there and I didn't
14 want us to have to come back to get it because I didn't
15 know what was going on and so she told me that she would
16 get in front of me and I could follow her until we got
17 home. We were just a few miles from our house there. She
18 had called Joy when she got there to the wreck. Joy
19 helped me inside. Joy come in about five minutes after
20 that.

21 Q. What did y'all do after Joy arrived?

22 A. She come in and she know how I was feeling and I
23 told her that I really didn't know and that I just felt
24 like (inaudible) in my ears, you know, and she said I'm
25 going to take you to the emergency room. So we got in the

80

Gaines - Direct

1 car and we went to the emergency room.
2 Q. Which emergency room did y'all go to?
3 A. Easley Baptist.
4 Q. I put copies of your medical bills in front of
5 you. Have you had an opportunity to look at those before
6 today?
7 A. Yes.
8 Q. And do you see the Easley Palmetto Baptist
9 Emergency Room there for January 8, 2010?
10 A. Yes.
11 Q. And is that a copy of the bill they sent you?
12 A. Yes.
13 Q. What did they do for you at the emergency room?
14 A. The doctor at the emergency room talked to me and
15 I told him my head was hurting and my stomach was hurting
16 because I was sick to my stomach and everything. So they
17 x-rayed me and I don't -- I still don't remember much of
18 what went on there because I don't know so Joy must have
19 been talking to the doctor.
20 Q. Was Joy with you the whole time you were at
21 Easley Baptist?
22 A. Yes, she was with me.
23 Q. Did she go back in the exam room with you, too?
24 A. No, she didn't go. They took me back there on a
25 stretcher.

81

Gaines - Direct

1 Q. Did they admit you or did they release you that
2 day?

3 A. They released me.

4 Q. And let me ask you before we move on to the rest
5 of your treating physician treatment and again you've
6 heard the opening statements thus far, do you have
7 arthritis?

8 A. Yes.

9 Q. When was the first time somebody told you you had
10 arthritis?

11 A. I don't remember exactly when it was.

12 Q. Was it before the wreck on January 8, 2010?

13 A. Yes.

14 Q. So you knew you had arthritis?

15 A. Yes.

16 Q. Have you also reported your physical symptoms and
17 diagnoses to your doctors when you've gone for treatment?

18 A. Yes.

19 Q. Before this wreck happened, did your neck hurt on
20 a daily basis?

21 A. No.

22 Q. Before this wreck happened, did pain run down
23 into your right arm?

24 A. No.

25 Q. Did your physical condition change as a result of

2

Gaines - Direct

- 1 the wreck in this case?
- 2 A. Yes, it did.
- 3 Q. Please tell the jury how it changed?
- 4 A. Well, the pain was so bad it would just hurt so
- 5 until I couldn't even do daily work and stuff like that.
- 6 It was halt to the pain and it was just -- I don't know
- 7 how to --
- 8 Q. Barbara, if it was hurting so bad, why didn't you
- 9 go to your family doctor the next day?
- 10 A. Because I wanted to wait to see if it got better
- 11 to see if it was just -- if I could do it. The biggest
- 12 thing was I just didn't want to go through all this time
- 13 until I knew if it was something.
- 14 Q. You hoped that it would go away?
- 15 A. I hoped it would go away.
- 16 Q. Did it go away?
- 17 A. No, it didn't.
- 18 Q. I realize it's been awhile, you don't have to
- 19 give me exact dates, but did you follow up with your
- 20 family doctor?
- 21 A. Yes.
- 22 Q. And your family doctor, what's her name?
- 23 A. Lisa Harding.
- 24 Q. How long has she been your family doctor?
- 25 A. About nine years or seven. I can't remember.

93

Gaines - Direct

1 I'm getting old.

2 Q. She's been your family doctor for a number of
3 years.

4 A. A number of years.

5 Q. And when you went into the see her what did you
6 tell her your problems were?

7 A. I told her that my neck was still hurting real
8 bad and my right arm was getting numb.

9 Q. Can you show for the jury where your arm was
10 numb?

11 A. It would start and sometimes it would run down in
12 my fingers and it just would just come down my back.

13 Q. Did you ever have that sort of pain or numbness
14 come down into your fingers before this wreck?

15 A. No.

16 Q. What did Dr. Harding do for you?

17 A. She wanted me to go and have a MRI or something
18 to have it checked.

19 Q. Did she send you to physical therapy?

20 A. Yes.

21 Q. Where did you go for physical therapy?

22 A. Doser Therapy.

23 Q. Do you see the charge for Doser Physical Therapy
24 on the medical list there?

25 A. Yes.

94

Gaines - Direct

1 Q. Have you looked through those bills before today
2 to make sure that those are statements from physical
3 therapy?

4 A. Yes.

5 Q. And as far as Dr. Harding it looks like from the
6 bill you went to see her on February 8, 2010, does that
7 sound right to you?

8 A. Yes.

9 Q. Who did your MRI on your neck?

10 A. Easley Baptist.

11 Q. And would that have been around February 9, 2010?

12 A. Yes.

13 Q. And do you see the charge for the cervical MRI
14 there?

15 A. Yes.

16 Q. After the MRI, what did you do next?

17 A. She sent me to Dr. Mina and Dr. Mina they tried
18 to see if they could help in any other way so I saw a
19 Dr. Rustle and I told him how the pain and everything was
20 and he suggested that I tried epidural needle shots to see
21 if that would help my neck.

22 Q. When you saw epidural shot, are we talking about
23 like a shot like a flu shot for the general population?

24 A. No.

25 Q. Tell the jury what an epidural steroid injection

85

Gaines - Direct

1 is like?

2 A. When you go in you have to lay down and put your
3 arms back and they come in and they put a needle down your
4 spine and I don't know what it does but it's supposed to
5 help to see if it could help and you could do your daily
6 work and things. The first one helped a little and the
7 second one really did help. The pain was gone but you
8 can't have one but every three months. That's the
9 shortest time and the pain was already coming back and
10 hurting and everything. After that I had another one and
11 they gave me another one and it didn't help at all.

12 Then they decided I would have to have
13 surgery but they made sure they could do all they could do
14 so I wouldn't have to have surgery.

15 Q. Before we move on the surgery, Barbara, we
16 touched on the Doser Physical Therapy from looking at the
17 dates on your bills. It looks like you have physical
18 therapy from March 8, 2010 until April 13, 2010.

19 A. Yes.

20 Q. How often were you going to physical therapy
21 during that time?

22 A. Twice a week.

23 Q. Twice a week. Can you tell the jury what the
24 therapist would have you do or what you would do for them?

25 A. They were trying to work that arm so that they

Gaines - Direct

1 could get it back into working order and they would have
2 me to raise it up and things like that and it would hurt
3 so bad. They couldn't do really what they wanted it to be
4 because it hurt so bad but I kept going and finally she
5 said that they felt that it wasn't helping any.

6 Q. You have gotten us now through the physical
7 therapy and you told us about the epidural steroid
8 injections in your neck. And so now I guess at this point
9 Dr. Rustle is referring you over to Dr. Mina.

10 A. Yes.

11 Q. What kind of doctor is Dr. Christie Mina?

12 A. I don't know the names of them. Anyway she's a
13 surgeon.

14 Q. She's in the same group as Dr. Rustle?

15 A. Yes.

16 Q. She's a Piedmont neurosurgeon?

17 A. Yes.

18 Q. What ultimately -- did you go in an meet with
19 Dr. Mina?

20 A. Yes.

21 Q. Did Joy go into that meeting too?

22 A. Yes.

23 Q. And were you able to discuss you medical
24 condition in great detail with Dr. Mina?

25 A. Yes.

71

Gaines - Direct

1 Q. Did she answer all of y'all's questions?

2 A. Yes.

3 Q. Did she take good care of you?

4 A. Yes, she did.

5 Q. Could you tell the jury in your own words what
6 Dr. Mina did for you when she performed this surgery?

7 A. She had to go in and make a cut and she had to
8 pull all of my voice box -- I don't know all these things
9 but she had to pull these things over to the side and go
10 in and put a bone and a plate in the back of my neck to
11 make it better.

12 Q. When did you walk up from -- if you look at the
13 medical bills -- I believe the medical bills says your
14 surgery and hospital bills were dated June 7, 2011, is
15 that when you had your surgery?

16 A. Yes.

17 Q. How long were you out -- when did you come to
18 after the surgery?

19 A. They done it about 8:30 that morning and I didn't
20 know anything all day long and I just stayed overnight but
21 I had to have a bowel movement before they would let me go
22 and they got me ready and they let me go home the next
23 day.

24 Q. What hospital did you have your surgical
25 diskectomy and infusion done?

91

Gaines - Direct

- 1 A. Saint Francis Hospital.
- 2 Q. The one downtown here?
- 3 A. Yes.
- 4 Q. And do you see the bill for Saint Francis
- 5 Hospital on the exhibit?
- 6 A. Yes.
- 7 Q. And under Saint Francis you have there charges
- 8 for epidural steroid injections, are those the bills that
- 9 you received for those injections?
- 10 A. Yes.
- 11 Q. And also I see the surgery charge from June 7th
- 12 to June 8, 2011, is that the amount that they billed you
- 13 for your surgery?
- 14 A. Yes.
- 15 Q. And how much did the hospital bill you for the
- 16 surgery?
- 17 A. The total amount of the bill?
- 18 Q. No, ma'am, just the bill for that surgery.
- 19 A. \$41,823.93.
- 20 Q. And I've got a little ahead of myself. I asked
- 21 you earlier when do you remember coming to after your neck
- 22 surgery, was it that day or was it the following day?
- 23 A. It might have been later that night that I work
- 24 up but I slept through the night and the next morning and
- 25 then I was more awake.

89

Gaines - Direct

1 Q. Did they give you pain medication after the
2 surgery?

3 A. Yes.

4 Q. When you came to what do you remember about how
5 you felt?

6 A. Well, it wasn't right then, it was after we come
7 home and they gave Joy stuff to spray in my mouth because
8 she said all of what she did it would make my throat feel
9 sore and I couldn't swallow hardly. She when she would
10 start to feed me and give me my breakfast, lunch and
11 diner, she would spray it with that numbing medicine so I
12 could eat. And then she found out -- she got me a
13 popcycle and I eat it before it got cold, real cold and
14 then I would eat better.

15 The next morning when she come in and bring
16 me my breakfast and I said, Joy, and she said what, I had
17 tears in my eyes and I said my neck's not hurting anymore
18 and it's the first time it hadn't hurt.

19 Q. So your neck wasn't hurting anymore?

20 A. It wasn't hurting.

21 Q. Did you have any symptoms, numbness or tingling
22 in your right hand?

23 A. No.

24 Q. How long after the surgery did you experience
25 that improvement?

Gaines - Direct

1 A. It was either the next day or the next one. I
2 think it was the next day.

3 Q. So you're pleased I suspect?

4 A. Yes, I sure was.

5 Q. Good. Let's see this wreck happened January 8,
6 2010, I believe.

7 A. Yes.

8 Q. And your surgery was nearly a year-and-a-half
9 later June 7, 2011. Can you tell jury what your day in
10 and day out symptoms were for that 17 months?

11 A. It was hard. I suffered a whole lot. It was
12 daily. I was hurting a whole lot so bad that I couldn't
13 do my daily work or anything like that I just suffered so
14 hard.

15 Q. Are you right-handed or left-handed?

16 A. I'm right-handed.

17 Q. Did it affect your ability to pick up and grasp
18 things?

19 A. Yes. I would drop things and sometimes I was
20 thinking I would drop it.

21 Q. Any other problems did it cost you?

22 A. Just pain and it's hard to explain how I felt.

23 Q. I know we're not use to discussing how much
24 something hurts especially with folks we don't know well
25 but such as sort of our burden here today. Did your

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Gaines - Direct

1 family help you?
2 A. Yes.
3 Q. Did they take good care of you?
4 A. Yes.
5 Q. Did it still hurt everyday?
6 A. Yes.
7 Q. Did you do everything your doctors and your
8 therapists and the other medical doctors recommend?
9 A. Yes. I went there twice a week every week and it
10 hurt so bad when they was trying -- and tears run down my
11 face when I was trying to do it but I was trying to do it
12 so I didn't have to have surgery.
13 Q. Well, then you had the surgery and you had a
14 great result.
15 A. Yes.
16 Q. That is at least part of the happy ending to the
17 story. Did you follow up with Dr. Mina after the surgery?
18 A. Yes.
19 Q. And was she pleased with your progress?
20 A. Yes, but I had to go back and she took x-rays
21 where she had put all that stuff and the bone hadn't quite
22 healed up so I had to wait a few more weeks and I went
23 back and she do another one and she showed it to me and it
24 had healed up and it was doing good.
25 Q. On the x-ray, could you actually see the plate

91

Gaines - Direct

1 and the screws in your neck?
2 A. Yes.
3 Q. What was it like actually seeing a plate and
4 screws on the x-ray?
5 A. I still until this day I can't figure out how she
6 did it.
7 Q. Is it still in there?
8 A. Yes, it's still in there.
9 Q. She hasn't gone in and taken it out?
10 A. No, it's still in there.
11 Q. Barbara, let me catch your medical bills up to
12 where we are now. You talked about you saw Dr. Mina
13 according to the bill April 18, 2011. Is that about the
14 time you first saw Dr. Mina?
15 A. Yes.
16 Q. And then it looks like she did the surgery on
17 June 7, 2011.
18 A. Yes.
19 Q. And did she bill you \$10,916.15 for the surgery?
20 A. Yes.
21 Q. And it looks like she didn't charge you for any
22 of your follow-ups after that, did she?
23 A. No.
24 Q. I see three follow-up in her office and they're
25 all zeros so it looks like she didn't charge you for the

93

Gaines - Direct

1 follow up.

2 A. No.

3 Q. And then is Upstate Carolina Radiology is just
4 the radiology bills for them reading your x-rays and your
5 MRIs?

6 A. Yes.

7 Q. Now, we've now going all of the medical bills
8 that are contained in Exhibit No. 1.

9 A. Yes.

10 Q. Are those correctly totaled on the front of
11 Exhibit No. 1?

12 A. Yes.

13 MR. PEACE: At this point we'd offer the
14 medical bills as Plaintiff's Exhibit No. 1.

15 THE COURT: Any objections?

16 MR. MCGARR: With some redactions, Your
17 Honor.

18 THE COURT: Mr. Peace, please go see what
19 he's talking about.

20 MR. MCGARR: Your Honor, the summary is
21 perfectly acceptable but the other would need a ---

22 THE COURT: I'll tell you what, ladies and
23 gentlemen, we're going to take a short break. Don't talk
24 about the case and we'll get right back where you.

25 (Jury exits the courtroom.)

au

Gaines - Direct

1 Alright, what is it?

2 MR. MCGARR: Your Honor, the summary is

3 perfectly acceptable but the main bills are medicare, Blue

4 Cross Blue Shield, everything that we were talking about

5 before. It can be fixed.

6 THE COURT: Okay.

7 MR. PEACE: Your Honor, I will dutifully

8 redact those and I will provide a copy to Mr. McGarr

9 before we start tomorrow to make sure. I did strike

10 through all references to automobile and liability

11 insurance. I didn't know what the Court's ruling was

12 going to be.

13 THE COURT: Okay.

14 MR. MCGARR: It's not a big deal but like I

15 said if it comes into evidence than, you know.

16 THE COURT: Alright. He's going to get it

17 cleaned up and admit it formally tomorrow.

18 MR. MCGARR: Yes, sir.

19 THE COURT: Ma'am, do you need to step down

20 for a minute? Do you need any relief?

21 THE WITNESS: How much longer?

22 MR. PEACE: I think she would like to get it

23 over with.

24 THE COURT: How much more do you have? She's

25 asking you.

Q5

Gaines - Direct

1 MR. PEACE: I'm nearly done, Your Honor. I
2 suspect cross may take a while but after that I'm going to
3 play a video for them.

4 THE COURT: How long?

5 MR. MCGARR: I need to go to the restroom.

6 THE COURT: That's not what I asked you. How
7 long is your cross going to be?

8 MR. MCGARR: Probably 35, 40 minutes.

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

10 Ma'am, if you need to go to the restroom,
11 please do, just don't talk about your testimony.

12 MR. PEACE: After this witness, I'll need to
13 set up the projector and stuff with the video deposition.
14 It won't take long.

15 THE COURT: Start getting ready now.

16 (At which time there was a brief recess.)

17 Alright, y'all ready?

18 MR. PEACE: Yes, Your Honor.

19 MR. MCGARR: Yes, sir.

20 (Jury re-enters the courtroom.)

21 BY MR. PEACE:

22 Q. From the beginning to the end of your medical
23 treatment, how are you doing now with your left and your
24 right arm?

25 A. Pretty good.

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Gaines - Direct

1 Q. So you haven't had any recurrence of the symptoms
2 you had before the surgery?
3 A. No.
4 Q. So life's improved a lot.
5 A. Yes.
6 Q. Now, let me ask you a few questions just about
7 your general medical history. You see Dr. Harding as your
8 regular family doctor, correct?
9 A. Yes.
10 Q. What sorts of problems do you have and do you see
11 her regularly for?
12 A. I'm a diabetic and she has to check me. I have
13 to come in every six months for her to do my blood work
14 and everything to make sure everything is okay.
15 Q. So she follows you on a regular basis?
16 A. Yes.
17 Q. Do you tell her when something's wrong?
18 A. Yes.
19 Q. I believe you've had a family doctor for most of
20 your adult life, haven't you?
21 A. Yes.
22 Q. Have you always reported your physical problems
23 to your physicians?
24 A. Yes.
25 Q. And have you occasionally needed to be referred

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Gaines - Direct

1 to a specialist?

2 A. Yes.

3 Q. In fact, I believe you were referred to Piedmont
4 Orthopedics at one time.

5 A. Yes.

6 Q. Can you tell the jury what that was about?

7 A. Around my mailbox I was weeding and I bent over
8 weeding and I stepped up to turn around and I fell on my
9 left shoulder and hurt it and had to go to Dr. Tom
10 Gardner(ph) or something like that.

11 Q. And what did he do for you?

12 A. He did surgery on my shoulder.

13 Q. And so when you're hurt you go to the doctor?

14 A. Yes.

15 Q. And when you need treatment you go get it ?

16 A. Yes.

17 Q. Did you need treatment due to your neck or
18 radiating problems into your right arm before the wreck of
19 January 8, 2010?

20 A. No, I didn't.

21 Q. If you had the same symptoms that you had after
22 the wreck, if you had them say November of 2009, what
23 would you have done?

24 A. Went to the doctor.

25 Q. Would you have gone to the Dr. Harding?

99

Gaines - Direct

1 A. Yes.
2 Q. And would you have asked her to examine you?
3 A. Yes.
4 Q. And would you have gone to her and sought
5 treatment?
6 A. Yes.
7 Q. Did you need to do that in November of 2009?
8 A. No.
9 Q. Did your symptoms begin after the wreck in
10 January of 2010?
11 A. Yes.
12 Q. Now, remember in your deposition Mr. McGarr asked
13 you some questions about your medical history, do you
14 remember that?
15 A. Yes, sir.
16 Q. It deposed you about this time last year, July 5,
17 2012, but you remember your deposition?
18 A. Yes.
19 Q. And he asked you the same question would you ask
20 your medical providers the truth with regard to when your
21 head problem first began, do you remember that?
22 A. Yes.
23 Q. And your answer would be?
24 A. When my neck and disc problem?
25 Q. Yes, ma'am.

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Gaines - Direct

1 A. In 2010 when I had my car accident.

2 Q. I'm sorry, I don't mean to confuse you. What I'm
3 asking is if you have a problem, you would seek medical
4 treatment?

5 A. Yes.

6 Q. And there wouldn't have been any reason you
7 couldn't have gone to the doctor before this wreck if you
8 didn't have a neck pain, could you?

9 A. That's right.

10 Q. At your deposition, he asked you, he said before
11 thea accident had you ever had problems with your neck
12 significant enough for you to seek medical treatment and
13 you said no. You've already told the jury back in 1983
14 about cutting the flip and hurting your neck. Did you
15 seek medical treatment for that injury?

16 A. Yes, and they said it was a sprain.

17 Q. Were you thinking about that when he asked you
18 have you ever had problems with your neck significant
19 enough for you to seek medical treatment, were you
20 thinking about that when he asked you?

21 A. No.

22 Q. Have you sought treatment for severe neck pain at
23 any time before January 8, 2010?

24 A. I have had migraine headaches all my life and it
25 hurts in the back of your neck. I'm 72 years old so when

100

Gaines - Direct

1 I was young, they didn't know what migraine headaches was
2 so they tried to find out why but it was migraine
3 headaches.

4 Q. Do you still have migraines today?

5 A. No.

6 Q. What happened to your migraines?

7 A. We were having revival at our church and I was
8 having a migraine and the visiting preacher he come out
9 and he said you having a migraine headache, aren't you,
10 and I looked at him and I said, yes, sir. He said my wife
11 have them and said the doctor found out if you gave her
12 Inderal, I think it's the way -- what it does is it
13 expands the blood vessels in the back of your neck and
14 keeps the blood flowing and it stops you from having
15 migraines.

16 Q. Did you follow up with your doctor or did he
17 prescribe the medication?

18 A. I went to him the next day and told him to give
19 me some Inderal.

20 Q. Who was your family doctor back then?

21 A. Oh, mercy, I think it was Dr. Holcombe in
22 Liberty.

23 Q. Have you had migraines since then?

24 A. I had one, one time and I haven't had any since.

25 Q. And do you still take Inderal when ---

101

Gaines - Cross

1 A. No, after I got a certain age they said to try it
2 without it and sometimes you quite having them.

3 Q. So did they put you on Inderal regularly for a
4 period of time?

5 A. Yes, I was on it for a while. I didn't want
6 another migraine to come on.

7 Q. And then at some point the doctor said you can
8 just discontinue it?

9 A. Yes.

10 Q. Barbara, in conclusion, is there any doubt in
11 your mind that this wreck caused your neck injury?

12 A. I know it did.

13 Q. Is there any doubt in your mind that that neck
14 injury was what was causing the pain running down in your
15 right arm?

16 A. Yes.

17 Q. Did you have any problems with pain or numbness
18 in your right arm before this wreck happened?

19 A. No, I didn't

20 Q. That's all the questions I have. Please answer
21 any questions Mr. McGarr may have for you.

22 THE COURT: Cross-examination

23 CROSS-EXAMINATION

24 BY MR. MCGARR:

25 Q. Ms. Gaines, only because of the medical issues,

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Gaines - Cross

1 how old are you?

2 A. I'm 72.

3 Q. So you would be roughly 69 at the time of the
4 accident?

5 A. Yes, 69.

6 Q. I'm going to show you ---

7 MR. MCGARR: Permission to approach, Your
8 Honor.

9 THE COURT: Yes, sir.

10 (Whereupon, there was a bench conference.)

11 BY MR. MCGARR:

12 Q. Ms. Gaines, I'm going to show you Defendant's
13 Exhibit No. 1. Is that the way your car or the car that
14 you were driving looked after the accident and before any
15 repairs were made?

16 A. Yes, I guess so.

17 MR. PEACE: Could you pull the microphone
18 over a little so we can all hear you.

19 THE WITNESS: I don't really know what but
20 the man who fixed it, he would know.

21 BY MR. MCGARR:

22 Q. I understand. At this point, you can't tell me
23 that's the way your car looked after the accident?

24 A. I didn't see it.

25 MR. MCGARR: Your Honor, we're going to need

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Gaines - Cross

1 to ---

2 THE COURT: Go ahead and open it up.

3 MR. MCGARR: And, Your Honor, we're going to
4 need an instruction as to what a deposition is, Your
5 Honor.

6 THE COURT: A deposition is an examination by
7 the lawyers of witnesses taken outside of court. They are
8 under oath and both parties are there and both sides are
9 afforded the opportunity to question the witness.

10 MR. MCGARR: Request permission to approach,
11 Your Honor.

12 THE COURT: Yes.

13 BY MR. MCGARR:

14 Q. Ms. Gaines, what I'm going to do is I'm going to
15 as you to refer to a page which would be on the upper
16 right hand corner and a line would be if I said, for
17 example, Page 8, Line 13, that would be where I was
18 talking about okay.

19 Ms. Gaines, if I could get you to go to Page
20 25. That would be that upper right hand portion of your
21 deposition.

22 MR. MCGARR: Permission to ask, Your Honor.

23 THE COURT: Yes. You don't need to ask
24 permission to approach.

25 BY MR. MCGARR:

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Gaines - Cross

1 Q. Ms. Gaines, if you were to go to Page 25 of your
2 deposition beginning on Line 4. Did I ask you at the time
3 of your deposition, "Let me show you what's been marked as
4 Defendant's Exhibit No.1. Doe this picture accurately
5 reflect the way your car looked after the accident and
6 before repairs were made?" And on Line 18, you said, "It
7 was just -- it had a broke place right around hear, you
8 know, down at the," and then on Line 11, I say, "Okay,
9 what I'm saying I'm going to give you more photos," and on
10 Line 13, "Okay." And then I ask again on Line 14, "But
11 with regard to that picture itself from that angle does it
12 accurately reflect the way your car looked after the
13 accident and before repairs were made?" And did you say on
14 Line 18, "Yes."

15 A. Yes.

16 Q. So at the time of your deposition would you agree
17 with me that you apparently had looked at your car and
18 this is Defendant's Exhibit No. 1 and you thought this was
19 exactly the way your car looked after the accident?

20 A. I hadn't say it until you showed it to me in the
21 deposition.

22 Q. Yes, ma'am. But at the time of the deposition,
23 would you agree you told me this accurately reflects the
24 way your car looked after the accident?

25 A. I guess.

Gaines - Cross

1 Q. Is that what the deposition says?

2 A. It says, yes.

3 Q. I'm going to show you Exhibit No. 2. Would you
4 agree with me that that accurately reflects the way the
5 car you were driving looked after the accident and before
6 any repairs were made?

7 A. Yes.

8 Q. And would you agree with me that Defendant's
9 Exhibit No. 3 accurately reflects from that angle the way
10 your car looked after the accident and before repairs were
11 made?

12 A. Yes.

13 Q. And would you agree with me showing you
14 Defendant's Exhibit No. 6 that this is the way that
15 Ms. Campbell's car looked from that angle after the
16 accident when you saw it?

17 A. I didn't see her car.

18 Q. If we could, let's go back to your deposition --
19 my apologies. Let me hold this back. I'm now going to
20 show you and we'll have to compare in contrast, does
21 Defendant's Exhibit No. 1 as seen in your deposition equal
22 what is shown in this photograph accept this is blown-up
23 and colored. Are they the same?

24 A. What are you asking me?

25 Q. Are these the same except one is black and white

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Gaines - Cross

1 and one is colored and slightly larger?

2 A. Yes.

3 Q. Let me show you Defendant's Exhibit No. 2. Does
4 2 and this color photographs and slightly larger, are
5 those identical photographs?

6 A. I can see better on this one where it's cracked.

7 Q. Yes, ma'am, but are they essentially the same
8 photographs accept one is colored and larger and one is
9 black and white?

10 A. I think so.

11 Q. And, again, showing you Defendant's No. 3, again,
12 would you agree that these are the same pictures accept
13 one is in black and white and one is colored and larger?

14 A. Yes.

15 Q. Would you agree that these three photographs
16 accurately reflected the way the car you were driving
17 looked after the accident and before the repairs were
18 made?

19 A. No.

20 MR. MCGARR: Your Honor, at this point we
21 would move ---

22 MR. PEACE: If it's just the pictures of
23 Ms. Gaines car without objection. She said she didn't see
24 the other car.

25 THE COURT: Okay.

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Gaines - Cross

1 MR. MCGARR: Can I move to have these marked
2 as Defendant's Exhibits 1, 2 and 3?
3 THE COURT: Without objection.
4 MR. PEACE: Without objection.
5 (Photographs marked as Defendant Exhibit Nos.
6 1, 2 and 3 for identification and admitted into evidence.)
7 MR. MCGARR: Permission to publish the
8 exhibits.
9 THE COURT: Yes.
10 BY MR. MCGARR:
11 Q. Ms. Gaines, do you remember me asking you to rate
12 this accident on a scale of 1 to 10 with 1 meaning you
13 heard it but you couldn't feel it and 10 being that you
14 were involved in an accident with a freight train?
15 A. Tell me again.
16 Q. Do you remember me asking you in this deposition
17 to rate this accident on a scale of 1 to 10 with 1 being
18 that you could hear it and couldn't feel it and 10 being
19 that you were involved in an accident with a freight,
20 train?
21 A. How would I rate it, is that what you're asking?
22 Q. Do you remember me asking that?
23 A. No.
24 Q. On a scale of that 1 to 10, 1 being you could
25 hear it and couldn't feel it, and 10 being that you were

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Gaines - Cross

1 involved in an accident with a freight train, where would
2 you rate this accident? How did it feel to you?

3 A. Well, I was sitting still at a stop sign, I
4 didn't know a car was behind me. When she hit me I didn't
5 know what it was. It was an awful awful noise. I didn't
6 know what was going on.

7 Q. If we could, let's go to your deposition again,
8 for a moment. Do you still have it?

9 A. What page?

10 Q. I'll get there in one moment. Let me get some of
11 this other junk out of the way.

12 MR. PEACE: Your Honor, I'm not sure if it's
13 Mr. McGarr's position that she testified inconsistently.
14 I'm not sure why he's going to the deposition at this
15 point.

16 THE COURT: I don't know. We're going to
17 find out.

18 BY MR. MCGARR:

19 Q. If you could, could you please go with me to Page
20 21 of your deposition. Are you there?

21 A. Yes.

22 Q. Go with me to Line 5. Are you there?

23 A. Yes.

24 Q. Did I ask in your deposition beginning on Line 5,
25 "That's okay. That's good work. My question is during

Gaines - Cross

1 the time frame when you were hearing the noise," ---

2 MR. PEACE: Excuse me. Are you on Page 21,
3 because Page 25 indicates -- I'm sorry, I apologize, I've
4 got the wrong transcript. I'm sorry this is Ms. Gaines's
5 transcript. Page 21, Line 5.

6 MR. MCGARR: Your Honor, this one is
7 condensed and we don't have another copy. It doesn't even
8 remotely come close to it.

9 MR. PEACE: Just go ask your questions and
10 I'll see what the answers are.

11 BY MR. MCGARR:

12 Q. Let me make sure -- again, we're going to go to
13 Page 21 of your deposition, Page 5. Did I ask you,
14 "That's okay. That's good work. My question is during
15 the time frame when you were hearing a noise and you're
16 thinking that it's taking place at a construction site,
17 you should be feeling an impact at the same time. Tell me
18 what the impact felt like on a scale of 1 to 10, 1 being
19 that you only heard it and 10 being you were involved in
20 an accident with a freight train." And on Line 13, did
21 you rate this accident a 7 in your deposition?

22 A. Yes.

23 Q. And I think I misspoke when I was talking to the
24 jury in my opening. Would you agree after the accident
25 you actually drove your car home?

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Gaines - Cross

1 A. Yes.

2 Q. And then sometime thereafter you went to the
3 hospital?

4 A. Five minutes after I got home.

5 Q. And when you got to the hospital I told the jury
6 that you were complaining of neck pain and headaches. In
7 reality you were also complaining of tummy aches; is that
8 correct?

9 A. Yes.

10 Q. So you told the doctors when you got there I've
11 got a tummy ache, headache, and neck pain; is that
12 correct?

13 A. Yes.

14 Q. But you never told them anything about your right
15 arm hurting in any way, shape, or form, did you?

16 A. I really didn't know what was hurting. I was
17 hurting all over.

18 Q. But what you told them was that I'm having to,
19 covering the basis, head pain, neck pain, and tummy
20 hurting or nausea?

21 A. Yes.

22 Q. You didn't say anything about arm hurting, did
23 you?

24 A. Probably didn't, I don't know.

25 Q. Because it wasn't hurting at the time, was it?

u

Gaines - Cross

1 A. Yes, it was.

2 Q. I thought you told the jury earlier that when you
3 got there it was hurting in your neck?

4 A. Yeah, it was hurting -- I was hurting all over.
5 When the car hit me -- I got short legs so I have to sit
6 up close and I have to pull my seat up close so when the
7 car hit me I went up like this and then when back, and
8 when it did, it knocked me out.

9 Q. So you unequivocally told the doctors at the
10 hospital my arm was hurting, is that what you're telling
11 the jury?

12 A. I don't remember what I told the doctor anything
13 because I was out of it.

14 Q. But you do remember saying I had a headache, neck
15 pain and my tummy hurt?

16 A. Yeah, I remember that.

17 Q. And you told the jury earlier that you couldn't
18 do anything after this accident like the normal acts of
19 daily living; is that correct?

20 A. Yes.

21 Q. It didn't totally incapacitate you; is that
22 correct?

23 A. I took my baths and done things like that.

24 Q. But for example you couldn't mulch out in your
25 yard; is that correct?

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Gaines - Cross

1 A. Talking about the mulch that you brought up the
2 other day, Joy, my best friend and her husband came and
3 was putting the mulch out and I was out telling them.

4 Q. So it's your testimony in front of this jury that
5 you had no part physically mulching your yard between the
6 time of this accident and before surgery; is that correct?

7 A. I was out telling them what to do.

8 Q. I understand but you didn't physically engage in
9 helping them mulch that yard, is that what you're telling
10 the jury?

11 A. (Witness nods.)

12 Q. I recognize that Mr. Peace has kind of gone over
13 some of this, but do you agree that when I asked you in
14 your deposition if you had ever had a problem with your
15 neck significant enough for you to seek medical treatment
16 before this accident and you told me no?

17 A. Where is it at?

18 Q. You can actual use that document. Go to the
19 second page of that document. It should be Page 34 and
20 tell me if I'm wrong. The second page of the document.

21 A. I can't see it here.

22 Q. The page number is always on the top right. So
23 on Page 34 of your deposition beginning on Line 22 and I
24 have it highlighted for you.

25 A. Yes.

w3

Gaines - Cross

1 Q. Did I ask you before the accident, did you ever
2 have problems with your neck significant enough for you to
3 seek medical treatment, and on Line 25 did you tell me no?

4 A. Yes.

5 Q. And did you just tell the jury that at one point
6 you did have problems with your shoulder that sent you to
7 Piedmont Orthopedic put it was only a problem with your
8 shoulder?

9 A. Yes.

10 Q. Earlier Mr. Peace said that you had never been on
11 disability because of your neck; is that correct?

12 A. That's right.

13 Q. If we could go to the next document in that set
14 of documents. We can do it this way, if you could just
15 flip them.

16 A. (Witness complies.)

17 Q. Does it appear that you were at the Greenville
18 Hospital Emergency Room on or about, and you'll have to
19 look at the upper left hand corner, 7/23/1987?

20 I may be able to help you. Right here.

21 A. Okay. But what am I --

22 Q. Does it appear that you were at Greenville
23 Hospital on 7/23 of '87?

24 A. I don't remember.

25 Q. I know but does the document say that you were at

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Gaines - Cross

1 the Greenville Hospital on 7/23/87?
2 A. Where does it --
3 Q. Does the top say Greenville Hospital System?
4 A. Yes.
5 Q. Does the name say Barbara Anne Gaines?
6 A. Yes.
7 Q. Is that your name?
8 A. Yes.
9 Q. Does the date where you're being treated is that
10 7/23/87?
11 A. Yes.
12 Q. And does it say when we get to the highlighted
13 portion, "The patient was at the hospital incidentally for
14 her neck therapy treatments and called her doctor," does
15 it say that right there?
16 A. I don't know where you're talking about.
17 Q. It's the highlighted portion.
18 A. I don't even know what doctor was I at.
19 Q. The Greenville Hospital System.
20 A. I see that but I don't know who sent me there.
21 Q. That's my question is look at the highlighted
22 part. It's not that hard. Does that document say, "The
23 patient was at the hospital incidentally for neck therapy
24 treatments and called her doctor." Is that what the
25 documents say?

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Gaines - Cross

1 MR. PEACE: I object to that. She said she
2 doesn't recall this. We stipulate that she can read but
3 bringing in documents she's never seen before -- this is
4 from 1987 and she doesn't remember.

5 MR. MCGARR: Your Honor, the rule with regard
6 to this issue ---

7 THE COURT: Hand on. Approach the bench.

8 (Whereupon, there was a brief bench
9 conference.)

10 BY MR. MCGARR:

11 Q. Ms. Gaines, I'm not asking you about your memory
12 or anything else. I'm just asking you about the document
13 itself. Does the document itself say, "The patient was at
14 the hospital incidentally for neck therapy treatments,
15 called her doctor"? That's on the first page highlighted.

16 A. Yes, but there's no reason why they said it.
17 They sent me over because I might have heart trouble.

18 Q. Yes, ma'am, but this document says that you were
19 at the hospital incidentally for neck therapy; is that
20 correct?

21 A. It says, "I was dizzy, feeling associated with
22 neck pain." I was having trouble in my check and I
23 thought I was having a heart attack. That's the reason
24 they put me in the hospital.

25 Q. Yes, ma'am, but my question was that you had been

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Gaines - Cross

1 at another hospital for neck therapy treatment according
2 to this document before you had started having heart
3 issues; is that correct?

4 A. I don't know what you're talking about.

5 Q. That's alright. I'm not trying to go astray.
6 Just does this document say, "The patient was at the
7 hospital incidentally for her neck therapy treatments and
8 called her doctor."

9 A. And here on the next line it says an EKG was done
10 at the time and reported as normal, "The patient continued
11 to complain of symptoms. The patient was admitted to the
12 hospital for a series of EKG and upper GI series were
13 performed." That's what I was in the hospital for.

14 Q. That's not my question. My question is real
15 simple and it's a yes or no answer. Does this document
16 say, "The patient was at the hospital incident for neck
17 therapy treatments and called her doctor."

18 A. That's what you're reading right there but you're
19 not reading all of it.

20 Q. I understand but in that part is that what the
21 document says?

22 A. That's what it says.

23 Q. Let's go to the next document in that set of
24 documents.

25 A. It's two pages.

in

Gaines - Cross

1 Q. The next document in that set of documents. I'm
2 sorry. Does it appear that you were again at the
3 Greenville Hospital System, I have it highlighted for you,
4 and you're Barbara Gaines?

5 A. Yes, I'm Barbara Gaines.

6 Q. And that on 7/24 of '87, that being the second
7 document.

8 A. That's the next day.

9 Q. Yes, ma'am. The document says the next day, "The
10 patient was on medical disability apparently for a neck
11 injury that was suffered on her job." Is that what that
12 document says?

13 A. Yes.

14 Q. So earlier when it was stated that you were not
15 on disability at one point for a neck problem, at least
16 you told the hospital that you were.

17 A. I was not on disability. I hurt my neck at
18 school that the -- what is it at the school when you work?

19 Q. Worker's Comp.

20 A. They ---

21 Q. Took you out of work.

22 A. No, I wasn't out of work. I was out of work one
23 or two days and the principal called me back and told me
24 to come back in.

25 Q. This document at least states that on 7/25 of

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Gaines - Cross

1 '87, the next day at the hospital it says, "The patient
2 was on medical disability apparently for a neck injury
3 that was suffered on her job." Is that what the document
4 says?

5 A. Yes, but I was not.

6 Q. But the document says that.

7 A. I don't know what ---

8 THE COURT: That was asked and answered. Go
9 ahead.

10 BY MR. MCGARR:

11 Q. Going to the next document in that set of
12 documents.

13 A. I don't know. I've never been through anything
14 like this.

15 Q. I'm helping you, I'm helping you. Does it appear
16 that in 1999 you were filling out a questionnaire and this
17 is this the Gervias(ph) Eye Group, you told them that you
18 were having arthritis in your spine.

19 A. Yeah.

20 Q. Going to that next document, does it appear that
21 on 7/23 of 1999 you were at Dr. Beth Brown's office and at
22 that point you told her that you had a history of neck
23 injury where you fell doing a cartwheel?

24 A. That's what I told you about.

25 Q. That's what you told the jury about; is that

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Gaines - Cross

1 correct?

2 A. Yes.

3 Q. And then going to the next document in that set
4 of documents, does it appear that you did go to Piedmont
5 Orthopedics at some point and if you go to the second page
6 of that document -- I'm sorry first page of that document
7 -- does it appear that on 6/17 of 2002 when you were
8 filling out a medical questionnaire with Piedmont
9 Orthopedics that you told them that your history was pain
10 in your joints or bones, swelling of joints, arthritis and
11 stiffness. They're highlighted for you.

12 A. Who is this?

13 Q. This is Piedmont Orthopedics and this is you
14 filling out this document.

15 A. Who's the doctor? See I don't remember.

16 Q. It's the Piedmont Orthopedic Clinic.

17 A. But who was my doctor?

18 Q. Ma'am, I don't know. It's the Piedmont
19 Orthopedic Clinic, did you fill out a document with the
20 Piedmont Orthopedic ---

21 A. I would be telling you a story if I tell you I
22 don't remember it.

23 Q. It doesn't matter if you remember it. What I'm
24 asking you is does this document indicate that you filled
25 out this document on 6/17 of 2002?

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Gaines - Cross

1 A. Right here it says, "Arthritis, sinus, allergies,
2 and," -- stuff like that.

3 Q. Migraines?

4 A. Uh-hum.

5 Q. But that's not my question. The question is does
6 this document appear to be filled out on 6/17 of 2002?

7 A. Yes, that's what it says.

8 Q. And does it appear to be filled out by Barbara
9 Gaines?

10 A. That's my name right there.

11 Q. And does it appear that when they ask about your
12 -- when they said muscular skeletal you circled, "Pain in
13 joints or bones, swelling in joints, arthritis and
14 stiffness,"?

15 A. The doctor told me years ago that I had arthritis
16 in my lower back -- spine in my back.

17 Q. That's not my question. It's easy to do. You
18 can explain but tell me yes or no if this document says
19 that you circled, "Pain in joints or bones, swelling of
20 joints, arthritis and stiffness."

21 A. (Inaudible).

22 Q. Do me a favor just answer yes or no. Is that
23 what the circle part says?

24 A. But you go anywhere and pick out anything and
25 make anything out of anything. I don't know what this is

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Gaines - Cross

1 about.

2 Q. Yes, ma'am, but this is what you filled out.

3 A. That's what I don't know what for.

4 Q. Yes, ma'am, I'm not asking you what for or when
5 or why -- I am asking when. I'm asking did you circle
6 those areas.

7 MR. PEACE: Your Honor, I believe he's asked
8 her several times. She says she doesn't remember and
9 there is no indication whether she actually filled this
10 out herself or whether someone else wrote it.

11 THE COURT: Okay.

12 BY MR. MCGARR:

13 Q. It's not a matter of memory, I'm just asking you
14 what the document says.

15 A. Like I said if I knew who the doctor was and why
16 I was there I would know.

17 Q. Ms. Gaines, I'm not trying to get in a --- |

18 THE COURT: Alright. Ms. Gaines, he's asking
19 you is that what the document says.

20 THE WITNESS: Yes, the document says that.

21 THE COURT: Okay. Now, let me just explain
22 this to you, you can answer his question yes or no and
23 then you can give any explanation that you need to. So if
24 he asks you is that what the document shows, you answer
25 yes or no and then you can explain what it means to you.

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Gaines - Cross

1 Okay?

2 THE WITNESS: Yes..

3 THE COURT: Does that make sense?

4 THE WITNESS: Yes.

5 THE COURT: Mr. McGarr.

6 BY MR. MCGARR:

7 Q. Ms. Gaines, if we could go to the next document

8 in that set of documents. It's this one right here. Does

9 it appear -- and you'll have to go up here to the very top

10 -- does it appear that on August 25, 2006 that you had

11 gone to Adult Medical Specialist of Easley, PA? Does it?

12 A. Now, what ---

13 Q. Does it appear that you were at Adult Medical

14 Specialist of Easley, PA on August 25, 2006 from this

15 document?

16 A. From this document, yes, that's what it says.

17 Q. Does it appear that it says in this document,

18 "She mentions today that she injured her shoulder about

19 two weeks ago and since that time she's had trouble moving

20 her upper arm and she's had some pain in her neck." Is

21 that what the document says?

22 A. That's when I fell and I hurt my arm.

23 Q. Yes, ma'am, but is that what the document says?

24 A. Yes.

25 Q. Let's go to the next document in that set of

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Gaines - Cross

1 documents. Does it appear that you had gone to see
2 Dr. Anne Claire Edwards on 8/29 of 2006?
3 A. What are you asking me?
4 Q. Does that appear to be what the document says?
5 A. Yes, that's what the document says.
6 Q. And further down and I've got it highlighted,
7 "Patient also has pain in her neck," is that what the
8 document says?
9 A. Yes, that's what the document says.
10 Q. Let's go to the next set of documents.
11 A. It says, "Patient denies tingling in her hands."
12 Q. Yes, ma'am. Let's go to the next document in
13 that set of documents. Does it appear that you were at
14 Doser Physical Therapy on 8/30 of 2006 and that it says,
15 "Ms. Gaines is a 65 year old female referred to physical
16 therapy with a six-week history of left shoulder pain
17 especially with overhead movement. She reports neck pain
18 has been going on longer and feels stiff, achy and tight."
19 A. That's when I fell and hurt my shoulder and had
20 to have surgery.
21 Q. Yes, ma'am. My question is does it appear that
22 contrary to what you told the jury earlier, this document
23 indicates that you were actually having neck pain also?
24 A. When I fell and hurt my shoulder, yes.
25 Q. And this document says that, doesn't it?

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Gaines - Cross

1 A. Yes.

2 Q. But when you told the jury earlier that you had
3 problems with your shoulder but not your neck after that
4 fall, is that correct?

5 A. When I fell I jolted myself on the street.

6 Q. Earlier you told the jury that when that fall
7 happened the only thing that happened to you was a
8 shoulder problem, correct?

9 A. That's what I said.

10 Q. In reality, we're actually dealing with a neck
11 problem as a result of that fall, is that correct, at
12 least according to the documents?

13 A. I don't know what you're ---

14 Q. Does the document indicate that your neck problem
15 was giving you trouble longer than your shoulder problem?

16 A. No.

17 Q. Let's read it again. Does it say, "Ms. Gaines
18 is a 65 year old female referred to PT with a six-week
19 history of left shoulder pain especially with overhead
20 movement. She reports neck pain has been going on longer
21 and feels stiff, achy, and tight." Is that what the
22 document says?

23 A. Yes, if you were 65 years old and fell and hurt
24 your arm, you're going to be sore.

25 Q. Yes, ma'am, but you told the jury it wasn't just

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Gaines - Cross

1 an arm problem, you told the jury when I fell it was just
2 my shoulder. You didn't say anything about the neck, did
3 you?

4 A. No.

5 THE COURT: That's been asked and answered.
6 You can argue to the jury in your closing argument,
7 Mr. McGarr. Let's move on.

8 BY MR. MCGARR:

9 Q. Going to the next document of that set of
10 documents, does it appear that you were at Doser Physical
11 Therapy on 9/1 of '06 and one of the problems you were
12 having was neck tightness?

13 A. Yes, after I had that surgery.

14 Q. And does it appear that on 9/7 of '06, you were
15 back there with neck tightness but it was getting better?

16 A. That was when I had that surgery on my shoulder.

17 Q. Yes, ma'am. Going to the next document in that
18 set of documents, does it appear that you're back at Doser
19 Physical Therapy on 9/13 of '06 and you reported, "Arm,
20 shoulder and neck pain is better, usually pain is in
21 the a.m., therapy, neck might not be as tight."

22 A. I can't read the writing. What are you asking
23 me.

24 Q. Is that what the document says?

25 A. Oh, yes, that's what it says.

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Gaines - Cross

1 Q. And then going down a little further on that
2 document, does it say on 9/18 of '06 that your neck and
3 shoulder are tight?

4 A. Yes.

5 Q. Going to the next document, please, does it
6 appear on 10/11 '06 that you were still at physical
7 therapy but your neck was actually much better. Does it
8 appear to say, "Neck is much better?"

9 A. Yes.

10 Q. The next document in that set of documents does
11 it appear on 10/13 of '06 that your, "Shoulder isn't too
12 bad until my neck gets stiff." Is that what the document
13 says?

14 A. Yes.

15 Q. And just below that on 10/18 of '06 does it say
16 that you're complaining of or C/O, "Cervical spine pain."
17 That's the highlighted portion.

18 A. I can't read it.

19 Q. It says, "Cervical spine pain."

20 A. Yeah, and it also says other stuff. You can pick
21 anything out and make something out of it.

22 Q. I'm not intending to do that. Let's read the
23 whole thing. "Pain is the same, increased a little in
24 arm, complained of cervical spine pain." Is that what the
25 entire sentence says?

Gaines - Cross

1 A. Yes, and I told you after I fell my neck did
2 hurt.

3 Q. I'm going to the next document in this set of
4 documents. It appears that you signed a document at Doser
5 Physical Therapy in 4/5 of '07?

6 A. Uh-hum.

7 Q. And you are Barbara C. Gaines?

8 A. Yes.

9 Q. Going to the second page of that document, does
10 it appear that you filled this document out and one of the
11 questions was Past History form and you specifically check
12 neck problems; is that correct?

13 A. Yes, because I had it after that accident when I
14 was much younger.

15 Q. And also after the accident at school; is that
16 correct?

17 A. That was a long time before that.

18 Q. If we could go to the next document in that set
19 of documents, does it appear that on 4/5 of '07, you were
20 at Doser Physical Therapy again for initial evaluation; is
21 that correct?

22 A. Yeah.

23 Q. So you were back again on a different occasion;
24 is that correct?

25 A. Yeah.

Gaines - Cross

1 Q. And does it state down there in the highlighted
2 portion and I'll read the entire thing, "History of left
3 and right carpal tunnel syndrome, neck problems, diabetes
4 and arthritis."

5 A. Yeah, I had arthritis a long time ago. The
6 doctor told me I had it in my spine a long time ago.

7 Q. Yes, ma'am. Ms. Gaines, as the Judge says, can
8 you tell me if this document says that or not first and
9 then explain. Is that what the document says?

10 A. What do you want me to read?

11 Q. Does it say, "She reports a history of left and
12 right carpal tunnel syndrome, neck problem, diabetes and
13 arthritis?"

14 A. Yes, that was after I had my surgery.

15 Q. This was after you had shoulder surgery?

16 A. Yeah, uh-hum.

17 Q. So this would be a different occasion from the
18 fall at the mailbox; is that correct?

19 A. It was longer than that because I had to have
20 surgery after that.

21 Q. If we go to the next document that you're at a
22 different doctor's office, Adult Medical Specialist of
23 Easley, that would be at the top, do you see that?

24 A. Where is that?

25 Q. At the top.

114

Gaines - Cross

1 A. I see that but where is it? What I'm saying is I
2 don't know where it's at.

3 Q. Ms. Gaines, I'll have to admit I don't know
4 either but I know that there's a place called Adult
5 Medical Specialists of Easley, PA and does it appear that
6 if you will look down here, does it appear that on
7 7/1/2008 one of your complaints with this outfit was right
8 neck pain?

9 A. I don't know -- I don't remember that for
10 anything.

11 Q. Ms. Gaines, what I'm asking you to do is, like
12 the Judge said, does this document say that?

13 A. That's what this document says but I don't know
14 where it's at.

15 Q. And then going to the next document in that set
16 of documents, does it appear that you had gone to a
17 different doctor's office called Easley Family Practice
18 and Internal Medicine? Do you see that highlighted
19 portion?

20 A. Yes.

21 Q. And does it appear that this was done on
22 9/1/2009? Everything is highlighted.

23 A. Yeah, I'm reading trying to find out who was the
24 doctor.

25 Q. This would be Dr. Mark Baker.

Gaines - Cross

1 A. Where does it say that?
2 Q. Down here.
3 A. I don't remember seeing a Dr. Baker.
4 Q. That's not my question.
5 A. Okay.
6 Q. My question is does it appear that you were at
7 Easley Family Practice and Internal Medicine on 9/1 of
8 2009.
9 A. That's what's there but I don't know a Dr. Baker.
10 Q. Nonetheless does the documents say, "Patient has
11 some pain and stiffness in her upper trapezius and
12 cervical spine muscles."
13 A. It says here that my blood sugar that she brought
14 in today was over 300.
15 Q. Yes, Ms. Gaines, but that's not my question.
16 A. That was why I was there.
17 Q. That's not my question. My question is does the
18 documents say, "That patient has some pain and stiffness
19 in the upper trapezius and cervical spine muscles." It's
20 highlighted.
21 A. I know but it's not an important thing.
22 Q. Why don't you read everything and then we'll ask
23 if that's what the document says.
24 A. (Witness complies.) Yes, that's when I was
25 fixing to have surgery of my sinuses and that's what this

Gaines - Cross

1 was about. They were trying to get my blood sugars down
2 so I could have surgery on my sinuses.

3 Q. Yes, ma'am, but that is still not my question.
4 My question is does the document state, "Patient has some
5 pain and stiffness in the upper trapezius and cervical
6 spine muscles."

7 A. What does that mean?

8 Q. Upper trapezius and cervical spine muscles.

9 A. What is that? I don't know.

10 Q. In your shoulder.

11 THE COURT: Ladies and gentlemen, let me just
12 tell you something, what the lawyers say and the lawyers
13 ask is not evidence. It's the responses to the questions,
14 okay. It is inappropriate for a lawyer to testify.

15 Mr. McGarr, proceed. Go ahead.

16 BY MR. MCGARR:

17 Q. Could you please pull that document back up for
18 me.

19 A. Okay.

20 Q. Does the document say, "The patient has some pain
21 and stiffness in the upper trapezius and cervical spine
22 muscles."

23 A. Yes.

24 Q. "Otherwise unremarkable for acute neurologic
25 change or symptoms."

172

Gaines - Cross

1 A. Yes.

2 Q. Does it appear that we have had problems with
3 your neck going back to 1987 and coming up through 9/1 of
4 2009?

5 A. I told you I had migraine headaches all my life.
6 They never did find out what was causing it.

7 Q. Ma'am, did you not tell the jury earlier that
8 years and years ago you went to a Reverend or someone who
9 was in the ministry and they said we think you have
10 migraines and go take this medication?

11 A. No, I had been going to doctors to try to find
12 out what it was. He told me that his wife was taking
13 Inderal and I went to the doctor and ask if they would
14 give me that and he said they would try it.

15 Q. And you also told the jury that long ago that you
16 took you off of Inderal, not in 2009, but long ago they
17 took you off Inderal; is that correct?

18 A. Yes.

19 Q. So does it appear that we're looking at neck
20 problems that go back as far as 1987 and as far as we can
21 find come up through 9/1 of 2009?

22 A. Well, right now, my head is killing me because
23 I'm mixed up and I'm all nervous and I'm having headaches
24 right now, but that didn't cause it.

25 Q. That's not my question. Does it appear that we

vn

Gaines - Cross

1 had neck problems from 1987 until as far as I can find 9/1
2 of 2009?

3 A. What I felt like you're trying to say that I'm
4 lying and I'm not.

5 Q. I'm not asking that. I'm asking does it appear
6 from these documents ---

7 A. What's there is what's there but I don't
8 remember.

9 Q. I understand but do you actually remember going
10 to them to get your blood sugar under control and it's
11 Dr. Baker ---

12 A. No, I don't know Dr. Baker. I still don't know
13 who Dr. Baker is.

14 Q. I guess my question is does it appear that at
15 last as far back as 1987 and continuing through 2009 you
16 have actually been complaining to various medical
17 providers about neck problems?

18 A. Like I told you, yes, I've always had -- because
19 when I get nervous I get tight. Right now I'm hurting so
20 bad I can't hardly stand it.

21 Q. Yes, ma'am, but that's not what you told the jury
22 earlier. Earlier you told the jury you had neck problems
23 but those neck problems were associated with migraines.
24 Is that what you told the jury earlier?

25 A. Yes.

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Gaines - Cross

1 Q. And you told the jury earlier the reason for you
2 going to Piedmont Orthopedic Clinic was because of a
3 shoulder problem and it had nothing to do with the neck.
4 Isn't that what you told the jury?

5 A. Yes.

6 Q. And these documents indicate that you were
7 actually there is neck problems, also; is that correct?

8 A. Like I told you when I went my neck was hurting
9 too because I had fell on my shoulder and hurt it.

10 Q. But that's not what you told the jury earlier, is
11 it?

12 A. I don't know. You've got me so confused I don't
13 know.

14 Q. You told the jury earlier that when you're
15 checking off the arthritis problems over the years, you
16 were referring to low back problems; is that correct?

17 A. Yes.

18 Q. And would you agree that you've been treated for
19 those low back problems over the years?

20 A. Yes.

21 Q. If we could, let's go to Page -- it's easier to
22 do it this way.

23 MR. PEACE: Your Honor, I object to the
24 deposition when there's been no evidence she's testified
25 inconsistently therewith which is think is the proper use

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Gaines - Cross

1 of the deposition in a courtroom proceeding.

2 THE COURT: Okay. That's a well taken
3 objection.

4 Where are you going?

5 MR. MCGARR: She just said she had been
6 treated in the past for low back problems over the years
7 and (inaudible).

8 THE COURT: You have to speak up.

9 MR. MCGARR: Can we approach?

10 THE COURT: No, you said it. What was it you
11 just said?

12 MR. MCGARR: That's not what she said in the
13 deposition.

14 THE COURT: You're going to impeach her with
15 the deposition. Go ahead, Mr. McGarr.

16 BY MR. MCGARR:

17 Q. It's easier to do it this way. Does it appear
18 that on Page 35 of your deposition, did I ask you and this
19 is on Line 20 which would be on that lower left hand
20 corner, "Have you ever had problems with low back
21 significant enough for you to seek medical treatment
22 before the accident with my client?" And on Line 23, did
23 you say no?

24 A. The doctor just told me one time he asked me did
25 you know you had arthritis in your back and I said no, I

36

Gaines - Cross

1 didn't and I didn't.

2 Q. Ms. Gaines, just about a minute ago you told the
3 jury that you had been treated by physicians over the
4 years for low back problems; is that correct?

5 A. Explain it to me. I didn't understand you.

6 Q. Just about a minute ago, you told the jury that
7 you had, in fact, been treated for low back problems in
8 the past and when you were referring to arthritis that was
9 what you were referring to; is that correct?

10 A. Yes.

11 Q. And would you agree in your deposition you told
12 me the exact opposite?

13 A. When? I don't remember.

14 Q. Go to the front page of that document, the very
15 first page.

16 A. Yes.

17 Q. Does it appear we took your deposition on July 5
18 of 2012?

19 A. Yes.

20 Q. And were you placed under oath like you were
21 placed under oath today?

22 A. Yes.

23 Q. And does it appear when we go to that next page,
24 Page 35, that you specifically told me you had never
25 sought treatment for low back pain prior to the accident

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Gaines - Redirect

1 with my client?

2 A. I know I didn't go to a doctor for my back.

3 Q. I'm not asking about your neck this time.

4 A. I said my back.

5 Q. I'm sorry, I didn't hear that. But you told the
6 jury earlier you actually were treated for your low back
7 and it was related to all these arthritis things that you
8 been signing off on.

9 A. That's when I had been for arthritis and he asked
10 me did I know I had it in my lower spine and I told him
11 no, I didn't know that.

12 Q. But that's not what you told the jury earlier, is
13 it?

14 A. I don't remember all this way back years ago.
15 I'm getting old. I don't remember all this stuff and I
16 don't go back years ago. I don't know, I've never been in
17 a place like this before. I don't know what I'm supposed
18 to do and what I'm not supposed to do.

19 Q. I'm not asking you to go back years, I'm asking
20 you to go about 60 seconds ago with regard to what you
21 told the jury earlier.

22 A. What?

23 Q. It's okay.

24 MR. MCGARR: Your Honor, the only thing we
25 would like to do is mark Ms. Gaines deposition as, I

Gaines - Redirect

1 guess, a Court's Exhibit 2.

2 MR. PEACE: I have no objection.

3 (Deposition marked as Court's Exhibit No. 2
4 for identification.)

5 MR. MCGARR: I have no further questions.

6 THE COURT: Redirect.

7 REDIRECT EXAMINATION

8 BY MR. PEACE:

9 Q. Barbara, what Mr. McGarr seems to be driving at
10 is when he asked you at your deposition, he said, "Before
11 the accident had you ever had problems with your neck
12 significant enough for you to seek medical treatment," and
13 you said, "No." That's what has driving most of these
14 questions. Let me just ask you, in 1987 when they thought
15 you had a heart attack and apparently they admitted you
16 for a cardiac catheterization, were you there for neck
17 pain?

18 A. No.

19 Q. When they kept you at the hospital, that wasn't
20 for neck pain, that was for your heart, wasn't it?

21 A. Yes.

22 Q. Dr. Brown, I believe she's a primary care doctor,
23 did you see her for neck pain? This is in 1999 if you
24 even remember?

25 A. No, I don't.

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Gaines - Redirect

1 Q. Piedmont Orthopedics, you told us that was about
2 your left shoulder?

3 A. Yes.

4 Q. That wasn't about your neck?

5 A. No.

6 Q. Adult Medicine Specialists of Easley, it says,
7 "Female presents today with complaint of left shoulder
8 pain." Were you there about that pain that day?

9 A. Yes.

10 Q. When you went to Ann Claire Edwards, M.D., it
11 looks like Dr. Edwards noted you had, "Full range of
12 motion in your right shoulder fully normal." Do you
13 remember that? Was your neck bothering you that day?

14 A. (Witness nods.)

15 Q. Doser Physical, I believe you testified that you
16 treated there for your left shoulder problem after
17 Dr. Bomgarden worked on your shoulder.

18 A. Yes.

19 Q. Was that for neck pain?

20 A. No.

21 Q. Before you were referred to Doser by Dr. Harding
22 for your neck pain in this case, had you been to Doser for
23 neck related physical therapy before the wreck?

24 A. Yes.

25 Q. We are going around and around. I asked a bad

Gaines - Redirect

1 question. Before the wreck, did you ever go to physical
2 therapy for your neck?

3 A. No, I went for my shoulder.

4 Q. So with the exception of your somersault injury
5 in the 1980's, is there any other neck injury that
6 requires you go to the doctor and say I'm having neck
7 pain?

8 A. No.

9 Q. Did you know you had arthritis before this car
10 wreck?

11 A. Yes, I had arthritis.

12 Q. Was that arthritis causing you severe daily neck
13 pain?

14 A. No.

15 Q. Was it causing you pain radiating into your arm?
16 Is that what you had after the wreck?

17 A. Yes.

18 MR. PEACE: That's all the questions.

19 THE COURT: Thank you, ma'am. You can step
20 down.

21 How long is this next witness?

22 MR. PEACE: It's the video deposition.

23 THE COURT: Alright, ladies and gentlemen,
24 we're not going to keep going tonight. Unfortunately,
25 several weeks ago I scheduled two matters to be heard

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Gaines vs. Campbell

1 tomorrow morning so we can't start right back up tomorrow
2 morning which may be a great relief to all of you. So
3 we're going to have to start again at 2:00 tomorrow
4 afternoon.

5 Now, remember what I told you in my opening
6 comments about not discussing the case and it's human
7 nature to want to do that. It's human nature for the
8 people you're going to see tonight to want to talk with
9 you about it and you just tell them why you can't and, you
10 know, this is where the rubber meets the road. If you all
11 don't effect this important legal concept, precedent, rule
12 or whatever you want to call it, in this case, it starts
13 to crumble the foundation so just don't do it. Don't do
14 any research and we'll see y'all tomorrow at 2:00. Thank
15 you so much.

16 (Jury dismissed for the day.)

17 Anything before we break?

18 MR. PEACE: Nothing from the plaintiff, Your
19 Honor.

20 THE COURT: Yes, sir. You can see your stuff
21 or do whatever you want to do. But you probably want to
22 close your computers.

23 ---END OF TRANSCRIPT RECORD FOR DAY ONE---

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25

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Gaines vs. Campbell

1 I, the undersigned, Caroline Hiskell,
2 the Official Court Reporter for the Thirteenth Judicial
3 Circuit of the state of South Carolina, do hereby certify
4 that the foregoing is a true, accurate, and complete
5 transcript of record of all the proceedings had and
6 evidence introduced in the trial of the captioned case,
7 relative to appeal, in the Court of Common Pleas, South
8 Carolina, 5th of August, 2013.

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

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Gaines vs. Campbell

1 STATE OF SOUTH CAROLINA)
 2) COURT OF COMMON PLEAS
 3 COUNTY OF GREENVILLE)
 4)
 5 Barbara Gaines) TRANSCRIPT OF RECORD
 6)
 7 -vs-)
 8 Joyce Ann Campbell)
 9 _____
 10 August 5, 2013
 11 Greenville, South Carolina
 12 B E F O R E:
 13 THE HONORABLE EDWARD W. MILLER, Judge.
 14 A P P E A R A N C E S
 15 John Peace, Esquire
 16 Attorney for the Plaintiff
 17 Mark McGarr, Esquire
 18 Attorney for the Defendant
 19 CAROLINE HISKELL
 20 Thirteenth Circuit Court Reporter
 21
 22
 23
 24
 25

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Gaines vs. Campbell

1	I N D E X			
2	WITNESSES	DIR	CROSS	REDIRECT
3	Joyce Ann Campbell	125	130	138
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Campbell - Direct

1 P R O C E E D I N G S
 2 THE COURT: Good afternoon, ladies and
 3 gentlemen, welcome back. Thank you for your patience.
 4 The matter ran a little longer than we anticipated but
 5 we're ready to go.
 6 Mr. Peace.
 7 MR. PEACE: Thank you, Your Honor. The
 8 plaintiff calls Joyce Anne Campbell.
 9 THE COURT: Okay. Come on around.
 10 THE CLERK: Place your left hand on the Bible
 11 and raise your right hand.
 12 JOYCE ANNE CAMPBELL, having been duly sworn,
 13 testified as follows:
 14 Thank you. State your name for the record.
 15 THE WITNESS: Joyce Anne Campbell.
 16 THE CLERK: Thank you.
 17 DIRECT EXAMINATION
 18 BY MR. PEACE:
 19 Q. Hi, Ms. Campbell, how are you today?
 20 A. I'm fine. How are you?
 21 Q. Doing well. Ms. Campbell, what type of car were
 22 you driving on January 8, 2010?
 23 A. 1997 Ford Taurus.
 24 Q. Can you tell the jury how this wreck happened?
 25 A. Well, I was going to the day care to pick up my

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Campbell - Direct

1 nieces to take them to their grandmother and I stopped at
2 the stop sign. I pulled up and I didn't see her stopped.
3 I seen her brakes, I hit my brakes and I hit her. It was
4 my fault. I hit her.

5 Q. Now, I'm little confused. You say you stopped at
6 the stop sign. Were you the first car at the stop sign or
7 was Ms. Gaines in front of you?

8 A. She had went through the stop sign.

9 Q. Did she come to a stop at the stop sign?

10 A. I don't. I didn't see her at the stop sign.

11 Q. Okay. On this road is there a curve where you
12 couldn't see the stop sign before you got there?

13 A. No. You come around the curve and just go
14 straight.

15 Q. Ms. Campbell, I understand you weren't here
16 yesterday. I'll represent to you that the police said
17 that Ms. Gaines was stopped at a stop sign and you ran
18 into the back of her. Do you disagree with that?

19 A. Yes, I do. What difference does it make? I hit
20 her from behind. I hit her.

21 Q. And I appreciate that. I'm just not sure she
22 would have stopped if she wasn't sitting at the stop sign?

23 A. I'm not sure why she was stopped either, but she
24 was.

25 Q. So it's your testimony that she stopped at the

W7

Campbell - Direct

1 stop sign, correct?

2 A. I didn't see her at the stop sign, that's what
3 I'm saying. I didn't see her at the stop sign.

4 Q. So your testimony is you stopped at the stop
5 sign?

6 A. Yes, sir.

7 Q. And then you started off from the stop sign?

8 A. Yes.

9 Q. And how far after that did you strike the back of
10 Ms. Gaines's car?

11 A. It didn't take long. It just happened so fast.
12 I seen her brakes, I hit my brakes, and I hit her. Like I
13 said it was my fault.

14 Q. How fast were you going before you hit her?

15 A. I don't really know how fast I was going. I'm
16 guessing 35 to 40 but I don't know how fast I was going
17 before I hit her because I put on the brakes.

18 Q. So you stopped at the stop sign and came to a
19 complete stop?

20 A. Yes.

21 Q. And then at some point out ahead of you your
22 testimony is Ms. Gaines stopped?

23 A. Yes.

24 Q. For a reason your not sure of?

25 A. I'm not sure why she stopped, no.

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Campbell - Direct

- 1 Q. And you got up to a speed of 35, 40 miles an hour
2 before you ran into the back of her?
- 3 A. Yes.
- 4 Q. How far did you travel from the stop sign?
- 5 A. I don't know distance. I don't know.
- 6 Q. Was it more than a car length?
- 7 A. I don't know.
- 8 Q. So it could have been as little as five or ten
9 feet? You just don't know. Ms. Campbell, do you remember
10 when we were at my office for depositions back in July of
11 2012? Do you remember when I asked you questions about
12 this wreck?
- 13 A. Yes.
- 14 Q. And do you remember your attorney asked
15 Ms. Gaines about the wreck as well?
- 16 A. Yes.
- 17 Q. Do you remember when he asked her to rank on a
18 scale from 0 to 10?
- 19 A. Yes.
- 20 Q. Where 0 is you can barely hear it and 10 is a
21 collision with a freight train.
- 22 A. Right.
- 23 Q. Do you remember what she said the impact was?
- 24 A. No, I don't remember.
- 25 Q. Do you remember when I asked you the exact same

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Campbell - Direct

1 question and I said how would you describe the impact in
2 this wreck? Do you remember what you told me?

3 A. I said 6.

4 Q. So if 10 is a freight train collision and 0 is
5 nothing, you would say this was a 6?

6 A. Yeah, but I was just guessing.

7 Q. There's no real right answer here, it's an
8 opinion question.

9 A. Right.

10 Q. From 0 to infinity where does it fall and you say
11 a 6, is that still your opinion today?

12 A. Yes.

13 Q. Do you think that Ms. Gaines was injured in this
14 collision that on your scale was a 6 out of 10?

15 A. No.

16 Q. Tell me why.

17 A. Because I didn't hit her hard enough to -- this
18 accident was just an accident. I didn't hit her hard
19 enough to me to cause her any damage.

20 Q. If 10 is a collision with a freight train and a 6
21 out of 10 is what you did to Ms. Gaines, what rate do you
22 think it would have to be for her to have a neck injury in
23 this wreck?

24 A. I don't know. I never been in a wreck.

25 Q. Ms. Campbell, do you know anything about Barbara

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Campbell - Cross

1 Gaines's medical treatment?

2 A. No.

3 Q. Do you know anything about what kind of shape
4 Ms. Gaines was in before this wreck happened?

5 A. No, sir.

6 Q. Do you know anything about the treatment or
7 surgery she's had since this wreck happened?

8 A. No.

9 Q. Okay. So is it just your belief based on the
10 impact in this collision you just don't think anybody
11 could have been hurt?

12 A. No, I don't think so.

13 Q. Is there anything else that's based on? That's
14 just your opinion.

15 A. It's my opinion.

16 Q. Ms. Campbell, that's all the questions I have for
17 you. Please answer any questions your attorney may have
18 for you.

19 CROSS-EXAMINATION

20 BY MR. MCGARR:

21 Q. Ms. Campbell, first can you tell the jury your
22 full name.

23 A. My name is Joyce Anne Campbell.

24 Q. Where do you live?

25 A. I live at 111 Twin Pine Road, Easley, South

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Campbell - Cross

1 Carolina.

2 Q. At the time of this accident, were you working?

3 A. Yes.

4 Q. Are you presently suffering from a medical
5 condition?

6 A. Yes.

7 Q. Without going into great detail, can you tell the
8 jury what your immediate issue right now is?

9 A. Blood clots.

10 Q. And where are they?

11 A. They're in my lungs and one beside my heart.

12 Q. Are you taking medications?

13 A. Yes.

14 Q. Have you taken them today?

15 A. Yes.

16 Q. And can they make you a little wuzzy?

17 A. They make me a little sleepy.

18 Q. Where were you working at the time of the
19 accident?

20 A. I was working at Piedmont Arrow Printing. That's
21 in Piedmont.

22 Q. Did that company have a big layoff?

23 A. Yes.

24 Q. And were you part of that layoff?

25 A. Yes.

42

Campbell - Cross

1 Q. And after that did you essentially retire?
2 A. Yes.
3 Q. Are you still retired?
4 A. Yes.
5 Q. I forgot to ask you and this is not being mean
6 but how old are you, ma'am?
7 A. I'm 63.
8 Q. The accident took place back when Mr. Peace was
9 asking you questions, did you tell him way back then that
10 this was not a significant automobile accident?
11 A. Yes.
12 Q. Let me show you ---
13 MR. MCGARR: Permission to approach, Your
14 Honor.
15 THE COURT: Yes.
16 BY MR. MCGARR:
17 Q. Ms. Campbell, I'm going to show you a picture and
18 can you tell me from that angle if that's the way your car
19 looked after the accident and before any repairs were
20 made?
21 A. Yes.
22 Q. Let me show you another picture and ask if you
23 can tell me or tell the jury is that the way your car
24 looked from that side from that angle after the accident
25 and before the repairs were made?

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Campbell - Cross

1 A. Yes.

2 Q. Let me show you a really big close-up. Looking a
3 real close-up, is that the way the headlight looked after
4 this accident?

5 A. Yes.

6 Q. Did it break the glass out?

7 A. Yes.

8 Q. Was the headlight still operable, though?

9 A. Yes.

10 Q. But collectively would you agree that all three
11 of these pictures accurately depict the damage that was
12 done to your car after this automobile accident?

13 A. Yes.

14 MR. MCGARR: Your Honor, we would ask that
15 these be marked as Defendant's Exhibit -- and I apologize.
16 I don't know which one this would be.

17 THE COURT: Any objection?

18 MR. PEACE: No objection.

19 THE COURT: Without objection.

20 (Photographs marked as Defendant Exhibits
21 Nos. 4, 5, 6 for identification and admitted into
22 evidence.)

23 MR. MCGARR: Permission to publish, Your
24 Honor.

25 THE COURT: Yes.

Campbell - Cross

1 BY MR. MCGARR:
2 Q. Ms. Campbell, at the time of your deposition were
3 you even aware of how -- is this a road that you typically
4 travelled on?
5 A. No.
6 Q. Can you tell the jury why you were on that road
7 that day?
8 A. They had the road closed off where they were
9 building the new Walmart and they had a detour that way.
10 Q. So this was the detour road?
11 A. Yes.
12 Q. Were you aware of the speed limit on that road at
13 the time of the deposition?
14 A. No.
15 Q. Since that time, are you aware that the speed
16 limit is 35?
17 A. Yes.
18 Q. When you said that you were going 35 to 40 miles
19 an hour before this accident took place, now that you
20 recognize that it's a 35 mile per hour speed limit was
21 that just a bad guess?
22 A. Yes.
23 Q. After the accident, what did you do? After the
24 accident did you have a conversation with Ms. Gaines?
25 A. Yes.

155

Campbell - Cross

1 Q. What did you ask her?
2 A. I asked her if she was okay and she said yeah it
3 just scared me.
4 Q. She told you she was scared but otherwise she was
5 okay?
6 A. Yes.
7 Q. How fast did that happen after the accident? Was
8 it pretty quick?
9 A. Yes. I got there as fast as I could and then I
10 seen her grandchild in the back seat.
11 Q. So she did have a grand baby with her.
12 A. Yes.
13 Q. So after the accident was investigated, did you
14 leave the scene of the accident?
15 A. Yes.
16 Q. How did you leave the scene of the accident? Did
17 you leave in your car or did you have to have somebody
18 come and get you?
19 A. I drove my car.
20 Q. Where did you go?
21 A. I went to the day care.
22 Q. Was that where you were going to begin with?
23 A. Yes.
24 Q. And what were you going to the day care for
25 again?

156

Campbell - Cross

- 1 A. To pick up my nieces and take them to their
2 grandmother.
- 3 Q. And after you picked up your nieces where did you
4 go?
- 5 A. I took them to their grandmother and I went home.
- 6 Q. Is that where you were going to head anyway?
- 7 A. Yes.
- 8 Q. And did you drive your car to the day care, to
9 the grand parents house, and then back to your house?
- 10 A. Yes.
- 11 Q. Did it drive like a normal car?
- 12 A. Yes.
- 13 Q. Were you hurt in this accident?
- 14 A. No.
- 15 Q. Did you seek any medical treatment from this
16 accident?
- 17 A. No.
- 18 Q. The accident took place January 2010, roughly
19 speaking, how old would you have been at the time?
- 20 A. Sixty-two. Oh, my God, I can't even count. I
21 was closer to 61.
- 22 Q. Mr. Peace asked you if you were aware of
23 Ms. Gaines medical situation. I know you didn't go with
24 her to any doctor's visits or anything but are you aware
25 of her situation prior to this automobile accident?

157

Campbell - Cross

1 A. No.

2 Q. Are you aware if she had any neck problems prior

3 to this accident?

4 A. No.

5 Q. You haven't see any records given from me to you?

6 A. I seen them but I really didn't --

7 Q. But you are aware she had problems with her neck?

8 A. Yes.

9 Q. And she had problems with her low back.

10 A. Yes.

11 Q. Way before you ever met her.

12 A. I never met her before.

13 Q. Right before you met her when you had the

14 accident?

15 A. Yes.

16 Q. And would you agree that when this accident took

17 place that you did hit her in the rear?

18 A. Yes.

19 Q. And that this accident is unequivocally your

20 fault. She didn't do anything wrong.

21 A. No, she didn't do anything wrong. It was my

22 fault.

23 Q. No further questions.

24 THE COURT: Anything else?

25 MR. PEACE: Very briefly.

Campbell - Redirect

1 REDIRECT EXAMINATION
2 BY MR. PEACE:
3 Q. Ms. Campbell, I'm a little confused. You said
4 that your speed was about 40 miles an hour and that now
5 that was a bad guess. Is that your testimony here today?
6 A. Yes.
7 Q. Do you remember when I asked you at your
8 deposition, "How fast were you going before you struck the
9 back of Ms. Gaines's car," and you said, "35 or 40," and I
10 said, "35 or 40 miles an hour, what's the speed limit
11 along there," and you said, "I don't know." I said,
12 "Alright how fast was she going when you hit her," and you
13 said, "She wasn't." She was going zero miles per hour.
14 A. I say no brake lights.
15 Q. Is this just a bad guess or if you were just
16 conjecturing back in July of 2012 more than a year ago,
17 why didn't you say I don't know what my speed was or I'm
18 just going to give you a bad guess at 35, 40 miles an
19 hour?
20 A. I don't know.
21 Q. Frankly you didn't seem like you were guessing
22 when you gave this testimony under oath in July, 2012.
23 A. I might have been going 35 or 40 but I wasn't
24 going that fast when I put on my brakes when I hit her.
25 Q. Did your opinion of your speed change after

159

Campbell - Redirect

1 Mr. McGarr told you what the speed limit was along that
2 stretch of road?
3 A. No, I been up through there since.
4 Q. So the speed limit is 35?
5 A. Yes..
6 Q. So your best guess or maybe worse guess is you
7 were traveling at least the speed limit or maybe a little
8 more?
9 A. Maybe a little more.
10 Q. How long -- you said you realized the first time
11 she was stopped is when her brake lights came on?
12 A. Yes.
13 Q. How long after that when you hit the back of her?
14 A. I didn't realize I was this close to her but I
15 was and I hit my brakes but I didn't hit her.
16 Q. Bang, bang.
17 A. I hit her. It was my fault, I hit her.
18 Q. I understand it was her fault but I'm just trying
19 to understand how hard you hit her if you were going 35 or
20 40.
21 A. I didn't hit her hard enough to ---
22 Q. Ms. Campbell, let me ask the question and then
23 you can have all the time to answer it.
24 A. Sorry.
25 Q. You were doing 35 or 40 miles an hour and the

Campbell - Redirect

1 first time you realized you stopped and her brakes come
2 on?
3 A. Yes.
4 Q. And you say it was more than a second before you
5 hit her?
6 A. Like I say I don't know. I just realized I hit
7 her.
8 Q. Mr. McGarr also asked whether you talked to
9 Ms. Gaines about any injuries she was feeling at the time
10 of the wreck.
11 A. Yeah.
12 Q. I believe you just told this jury she said it
13 scared her; is that correct?
14 A. Yes, she did say it scared her. I said, are you
15 okay and she said, yes, it just scared me.
16 Q. Did she say anything else about feeling bad or
17 injured?
18 A. She said dizzy.
19 Q. Do you remember when I asked you the same
20 question in your deposition?
21 A. Yes.
22 MR. PEACE: Your Honor, may I open the
23 deposition?
24 THE COURT: Yes, sir.
25 BY MR. PEACE:

Campbell - Redirect

1 Q. Ms. Campbell, has transcripts on each page and
2 each page has lines running down the side. I'm going to
3 turn it for you to Page 23. I'll read my question and if
4 you can read your answer. It's actually Page 20, Line 8,
5 I said, "Well what happened after you hit the back of her
6 car?" And if you would read for the jury your answer.

7 A. "I got out of my car and walked up to her car and
8 I asked her are you alright and she said, yes, it just
9 scared me. And I seen the car in the back seat and then
10 she got out of the car and then she --".

11 Q. That's when your cell phone rang.

12 A. Where do you want me to start from now?

13 Q. "Thank you."

14 A. "Thank you. I got out of the car and asked her
15 if she okay and she said yes and she got out of her car
16 and she said my head hurt."

17 Q. And would you agree with me tha she reported she
18 had a headache after this wreck?

19 A. Yes.

20 Q. You didn't tell Mr. McGarr about that when he was
21 asking you questions on direct, did you?

22 A. No.

23 Q. You just forgot that?

24 A. No.

25 Q. He said did he report an injury to you and you

w1

Campbell - Redirect

1 said I was ---
2 A. I didn't understand the question.
3 MR. MCGARR: Objection, Your Honor.
4 THE COURT: What's the basis of your
5 objection?
6 MR. MCGARR: Mischaracterization of your her
7 testimony. She said I was just scared and ---
8 THE COURT: Thank you for your objection.
9 Let her answer the question.
10 BY MR. PEACE:
11 Q. Did you forget that she reported to you at the
12 time she was suffering from a headache?
13 A Yeah, but I misunderstood what Mr. McGarr said.
14 Q. Did you see her later in the day?
15 A. No.
16 Q. Why not?
17 A. I wasn't there.
18 Q. And where were you?
19 A. I was gone.
20 Q. So you left the scene before Ms. Gaines did?
21 A. Yes.
22 Q. Do you know how she left the scene?
23 A. No.
24 Q. Do you know how she was doing when she left the
25 scene?

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Campbell - Redirect

1 A. No.
2 Q. Do you know if she went to the emergency room?
3 A. No.
4 Q. Thank you very much.
5 MR. MCGARR: No, Your Honor.
6 THE COURT: Thank you. You can step down.
7 Call your next witness.
8 MR. PEACE: Your Honor, we're going to play
9 the video of the doctor.
10 THE COURT: Ladies and gentlemen, like I told
11 you this is the video deposition. This deposition was
12 taken in anticipation of trial and they should judge it by
13 the same standards and give it the weight that you think
14 it deserves.
15 MR. PEACE: Your Honor, it runs about an hour
16 and a half.
17 THE COURT: So at some point we'll stop and
18 make sure you all are doing okay.
19 MR. PEACE: Thank you, Your Honor.
20 (Whereupon, the deposition video was played
21 in open court.)
22 THE COURT: Alright, Mr. Foreman, ladies and
23 gentlemen of the jury, let's take a short recess. Please
24 don't discuss the case, we'll be back with you shortly.
25 (Jury exits the courtroom.)

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Campbell - Redirect

1 Mr. McGarr, I am very concerned with your
2 improper petting of the witness. It is totally improper
3 to pet a witness against another witness and ask them to
4 comment on the veracity of a separate witness.

5 To characterize emergency room doctors as
6 quacks because a witness disagrees with the question you
7 asked and then for you to ask is it possible that
8 something caused this and ask an opinion, it's got to be
9 to a reasonable degree of medical certainty.

10 What else do you have?

11 MR. PEACE: After this, Your Honor, we've got
12 the family doctor's video deposition. It runs about an
13 hour and 18 minutes.

14 THE COURT: Is that all you have?

15 MR. PEACE: No, Your Honor. We're going to
16 call Ms. Gaines's daughter as our last witness.

17 THE COURT: What do you have, Mr. McGarr?

18 MR. MCGARR: Cross-examination of
19 Ms. Gaines's daughter and introduction of the request to
20 admit and request for authenticity.

21 THE COURT: No witnesses.

22 MR. MCGARR: No, Your Honor.

23 THE COURT: We'll leave it up to the jury.

24 MR. PEACE: Your Honor, at this time we'd
25 offer the exhibits, the CV and the medical art that she

WS

Campbell - Redirect

1 discussed in the deposition and we also have the medical
2 bills.

3 THE COURT: Did you get them redacted?

4 MR. PEACE: I started redacting them last
5 night and ultimately they're going to turn into mostly
6 redacted so what I discussed with Mr. McGarr is he's
7 willing to stipulate that the summary page after that
8 describes all the charges and dates of service if that's
9 acceptable.

10 THE COURT: Alright. It's an hour and 18
11 minutes. I think we'll come back tomorrow anyway. Let's
12 bring them.

13 MR. PEACE: Your Honor, as far as the
14 exhibits go from the deposition, can I enter those?

15 THE COURT: Sure.

16 MR. MCGARR: Those are entered without
17 objection.

18 We'll make the deposition a Court's Exhibit.

19 (Deposition marked as Court's Exhibit No. 2
20 for identification.)

21 (Jury re-enters the courtroom.)

22 THE COURT: Ladies and gentlemen of the jury,
23 the next witness will be a one hour and eighteen minute
24 video deposition. If that was all the evidence I would
25 say that we go ahead but there is at least one more

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Campbell - Redirect

1 witness in addition to that so we'll break for the evening
2 and ask y'all to be back at 9:30 in the morning. I'm
3 going to ask you not to discuss it. Not to do any
4 research of any kind and y'all have a pleasant evening and
5 we'll see y'all at 9:30.

6 Thank you.

7 (Jury dismissed for the evening.)

8 Mr. McGarr, when the jury is coming in and
9 out you need to keep the tone of your voice much lower.

10 Are there any charges in specific that
11 anybody is interested in that they know about at this
12 time?

13 MR. PEACE: I'd like to hand you up the
14 charges tomorrow. I don't think I'm going to ask you for
15 anything outside of your normal charges for a car wreck
16 case. So really it's the proximate cause of damages.

17 THE COURT: Are you asking for punitives?

18 MR. PEACE: No.

19 THE COURT: Do you have any?

20 MR. MCGARR: No. I would just be your
21 pre-existing condition charges.

22 THE COURT: We'll see y'all tomorrow.

23 ---END OF TRANSCRIPT RECORD---

24

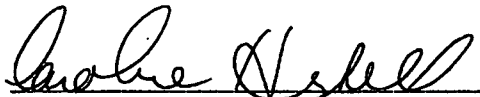
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Gaines vs. Campbell

1 I, the undersigned, Caroline Hiskell,
2 the Official Court Reporter for the Thirteenth Judicial
3 Circuit of the state of South Carolina, do hereby certify
4 that the foregoing is a true, accurate, and complete
5 transcript of record of all the proceedings had and
6 evidence introduced in the trial of the captioned case,
7 relative to appeal, in the Court of General Sessions
8 Court, South Carolina, 5th of August, 2013.

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

11
12
13 

14 Caroline Hiskell
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STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
2012-CP-23-1971

ORIGINAL

BARBARA GAINES)

PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

JOYCE ANN CAMPBELL)

DEFENDANT)

August 7, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, Judge; and a jury.

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

JOHN ROBERT PEACE, IV, ESQ.
Attorney for the Plaintiff

MARCUS K. MCGARR, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

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1 THE COURT: Before we start, I'd like to thank
2 Ms. April Herron for stepping in and being our Court
3 Reporter today so that we wouldn't have to have a
4 mistrial.

5 So, thank you, very much, Ms. Herron.

6 THE COURT REPORTER: Thank you, Judge. You're
7 welcome.

8 THE COURT: Mr. Peace, how many more witnesses
9 do you have?

10 MR. PEACE: Your Honor, I have a video
11 deposition that's about an hour and 18 minutes. I got one
12 more witness that should be relatively short, so should
13 the cross-examination. And then about--

14 THE COURT: Is it going to be replete with
15 pitting witnesses?

16 MR. PEACE: Your Honor, there are not many
17 objections in this one by comparison. I don't think that
18 there's a great deal of dispute or not as much argument in
19 this one as the other.

20 THE COURT: Okay.

21 MR. MCGARR: Your Honor, before we began --
22 nevermind.

23 MR. PEACE: Your Honor, the only other thing, I
24 handed up copies on the bench of Anderson's request to
25 charge and pre-existing condition and collateral source.

1 THE COURT: What is the collateral source?

2 MR. PEACE: Well--

3 THE COURT: That hasn't come out at all.

4 MR. PEACE: That's true, Your Honor. Just
5 because she's -- my concern was originally the jury might
6 think that medicare paid the bills but you're right,
7 there's been no testimony to that so I'll withdraw that.

8 THE COURT: Okay.

9 MR. PEACE: Thank you, Your Honor.

10 MR. MCGARR: Your Honor, we will do a charge
11 conference before we do the charge.

12 THE COURT: We will? Would you like to have
13 one?

14 MR. MCGARR: Yes, sir, I would like to. I
15 thought we would.

16 THE COURT: Okay.

17 They out there?

18 THE BAILIFF: Yes, sir, they're ready.

19 THE COURT: Okay.

20 (WHEREUPON, the jury came into open court at
21 approximately 10:30 a.m.)

22 THE COURT: All right. Ladies and gentlemen
23 welcome back, I apologize for the delay. And I don't know
24 if you've been told but we had some issues with court
25 personnel but we're all set up and ready to go. Turn it

nl

1 back over to the attorneys.

2 Mr. Peace.

3 MR. PEACE: Thank you, Your Honor. At this time
4 the Plaintiff would like to play the video deposition of
5 Dr. Lisa Harding.

6 THE COURT: All right.

7 (WHEREUPON, the video deposition of Dr. Lisa
8 Harding was played.)

9 (WHEREUPON, Court's Exhibit No. 5 was marked for
10 identification and received into evidence.)

11 THE COURT: All right, ladies and gentlemen,
12 why don't we just take a short break. Please don't
13 discuss the case, we'll get right back with you. Thank
14 you.

15 (WHEREUPON, the jury left open court at
16 approximately 12:00 p.m.)

17 THE COURT: All right, why don't you disassemble
18 all that stuff, we'll take a couple of minutes.

19 MR. PEACE: Your Honor, I was going to use the
20 equipment in closing, as well.

21 THE COURT: All right, that's fine. Okay.

22 MR. PEACE: Thank you.

23 (WHEREUPON, a short break was taken.)

24 THE COURT: All right, ready to go?

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

1 (WHEREUPON, the jury came into open court at
2 approximately 12:15 p.m.)

3 THE COURT: All right, Mr. Peace.

4 MR. PEACE: Your Honor, the Plaintiff calls Joy
5 Gaines.

6 THE COURT: All right.

7 THE CLERK: Please, place your left hand on the
8 Bible, raise your right.

9 JOY GAINES, after being duly sworn, testified as
10 follows:

11 THE CLERK: State your name, please.

12 THE WITNESS: Joy Gaines.

13 THE CLERK: Thank you, please be seated.

14 DIRECT EXAMINATION

15 BY MR. PEACE:

16 Q Hi, Joy, you've been sitting patiently throughout
17 this trial and now you're on the stand. We won't
18 take a lot of time but let me ask you just some
19 general background. Tell the jury or remind the jury
20 where you live.

21 A I live in Easley with my mom. We've lived together
22 my whole life.

23 Q And what do you do for a living?

24 A I'm a teacher.

25 Q How long have you been a teacher?

- 1 A Twenty-eight years.
- 2 Q Where do you teach?
- 3 A At Six Mile in Pickens County.
- 4 Q What grade do you teach?
- 5 A Third graders.
- 6 Q So what age kids are we talking about?
- 7 A Seven, eight, nine years old, around that area.
- 8 Q Okay. So, apparently teaching runs in the family?
- 9 A Yes.
- 10 Q Okay. All right. And so you and your mother have
- 11 lived together for your whole life?
- 12 A My entire life.
- 13 Q When did your mother retire from the school district?
- 14 A I believe it was 2003.
- 15 Q And we talked about this with her earlier but did she
- 16 go out on medical disability:
- 17 A No, she just retired.
- 18 Q She just retired through years of service?
- 19 A Of experience, right.
- 20 Q Okay. You heard a little bit about when she injured
- 21 her neck doing a somersault sometime in the 80's, do
- 22 you recall that?
- 23 A Yes.
- 24 Q Okay. What kind of problems did she have from that
- 25 neck injury?

1 A Normal things like when you're doing something and
2 you kind of irritate the muscle and everything and it
3 gets a little tight. And they gave her some stuff
4 for that and she was fine.

5 Q Did she miss time from work because of that?

6 A A day or two.

7 Q Did those problems resolve?

8 A Yes.

9 Q Did she get any continuing medical care for that?

10 A No.

11 Q Okay. Let's talk about your mother's health
12 generally. What is her most single biggest health
13 issue since -- well, what's her single biggest health
14 issue?

15 A Her diabetes. We have to keep a watch on her blood
16 sugars and making sure that she's exercising, eating
17 properly. And that's the biggest thing we worry
18 about right now.

19 Q Does she take any medication for her diabetes?

20 A She does. They give her a pill that she takes and
21 also give her insulin every night.

22 Q Okay. You actually administer the injections?

23 A I do.

24 Q Okay. And, of course, we saw Dr. Harding's
25 deposition a few minutes ago, is Dr. Harding her

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- 1 primary care doctor?
- 2 A She is.
- 3 Q And Dr. Harding is the doctor that she sees for
- 4 whatever ails her.
- 5 A For whatever is going on we see Dr. Harding.
- 6 Q Who was her family doctor before Dr. Harding?
- 7 A We went through -- she had Dr. Freeman for a while
- 8 and there were some things there about getting blood
- 9 sugars regulated and things that didn't work out.
- 10 So, we went to a couple of different doctors in
- 11 between, once or twice trying to find a new physician
- 12 and then we found doctor Harding.
- 13 Q So, your mother's happy with Dr. Harding?
- 14 A Yes, Dr. Harding is very good to her.
- 15 Q Are y'all pleased with the amount of care that
- 16 Dr. Harding provides?
- 17 A Yes, she always follows through with everything.
- 18 Q Do you take your mother to her medical appointments?
- 19 A A lot of them.. Sometime I can't make it to every
- 20 physical she has or just her blood sugar check-ups
- 21 and everything. The doctor will tell me to call the
- 22 office, leave a message when she had an appointment I
- 23 couldn't come to and she would call me that afternoon
- 24 and keep me updated.
- 25 Q Okay. Do you also see Dr. Harding as your physician?

1 A I do.

2 Q So, do you have a good relationship with Dr. Harding?

3 A Yes. She's a very easy doctor to work with.

4 Q Okay. Do you help your mother ask questions and get
5 answers about her medical issues?

6 A Yes. If I go with I ask anything that I'm concerned
7 about that I've noticed about her. Or if I can't go
8 with her for some reason, I give her a list of
9 questions to give to Dr. Harding.

10 Q All right. Joy, I'd like to -- we've talked about
11 one of the issues is the condition of your mother's
12 neck before this wreck happened. Did she have
13 on-going severe, chronic neck pain before this wreck
14 happened?

15 A No.

16 Q Did she have arthritis in her neck before this wreck
17 happened?

18 A Yes.

19 Q And had her prior doctors identified that problem?

20 A Yes, we've been told about the arthritis and that she
21 might have to take some medication for the pain for
22 the arthritis.

23 Q Before the wreck in January 2010, did your mother
24 have neck pain radiating into her right arm?

25 A No.

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- 1 Q After the wreck in January 2010, did your mother
2 began to have radiating pain into her right arm?
- 3 A Yes.
- 4 Q Okay. Joy, let's talk about the day of the wreck in
5 particular. Where were you when you found out your
6 mother had been involved in this collision?
- 7 A I was at school.
- 8 Q Okay. What time of day was that?
- 9 A It was after 2:30 because my children had already
10 been dismissed.
- 11 Q What did you do after you heard?
- 12 A I left school and went straight home because my
13 sister-in-law told that they would meet me at the
14 house.
- 15 Q Okay. And your sister-in-law's name again?
- 16 A Cathy.
- 17 Q Cathy. So, Cathy's the one that called you?
- 18 A Yes, she got there with mom because Emma's her
19 daughter. And she was there with mom and she called
20 me from there and told me that she would get her to
21 the house.
- 22 Q Okay. So, when you arrived at the house, tell the
23 jury how your mother was doing when you first saw
24 her.
- 25 A When I first went in the first thing I did was just

1 sit down and start talking to her to see what her
2 frame of mind was. Because I knew she would be
3 upset. As I kept talking to her I noticed that she
4 wasn't quite clear on things. She kept telling me
5 she felt weird, she just felt funny. She couldn't
6 think straight. She would tell me something and I'd
7 ask her about it and she would say, I don't know, did
8 I tell you that or not? And it was very obvious to
9 me that she was very confused. And that concerned
10 me. And then she was telling me that she hurt all
11 over. Every where, every part of her body she was
12 hurting. So, I told her we would go to the emergency
13 room. And usually if I tell her, she'll do I tell
14 her to do. So, my sister-in-law and I both agreed
15 that she needed to go to the emergency room to see
16 what was wrong. Because I could tell it wasn't her
17 normal way of behaving.

18 Q What emergency room did y'all go to?

19 A Easley Baptist.

20 Q How did she get there?

21 A I drove her.

22 Q Okay. And let's see, when y'all got to the ER, did
23 you go back in the examine room with her?

24 A Part of the time, they had me filling out paper work.
25 You have to go in and fill out all the stuff for them

1 to do and give the insurance information and things.
2 So, I was doing that while they took her back. So, I
3 was back there for part of it.

4 Q How long were y'all at the emergency room that day?

5 A Hours. It took a while to get in and to get
6 everything settled and for them to do what they were
7 doing.

8 Q Was it dark out by time y'all left?

9 A Getting that way.

10 Q Okay. And this wreck happened you say mid to early
11 afternoon, three o'clock?

12 A Right, around three o'clock.

13 Q All right. By the time y'all left the emergency
14 room, how was your mother doing then?

15 A She was still kind of disoriented about things still.
16 They had given her something to help relax her so she
17 would be more calmed and relaxed and everything. But
18 even when we got home she was still telling me that
19 she was hurting.

20 Q Okay. What symptoms was she having that you recall?

21 A Right after the accident, when we went to the
22 emergency room she was just more telling me about
23 hurting everywhere. She was just hurting all over.
24 And it was difficult to pinpoint where she was
25 hurting because she would say, I hurt here, I hurt

1 here. So, that was difficult to pinpoint. But she
2 kept telling me she just hurt. Then, as the time
3 went on, the next morning and everything, she started
4 telling me about hurting. She said it was hurting
5 real bad in her neck and her arm was hurting. And it
6 just gradually kept getting worse and worse and worse
7 and worse. The pain really started bothering her a
8 lot.

9 Q Mr. McGarr asked Dr. Harding about whether your
10 mother requested a work-in, why didn't your mother
11 request she work her in?

12 A She already had an appointment for a physical. And
13 she kept thinking, Well, it will go away, it will get
14 better. It's just because I got beat up in the
15 wreck, it will get better. I'm going to get better.
16 I don't need to see her, I'll get better. And then
17 finally when she went to see her for her physical, I
18 told her, I said, You got to tell Dr. Harding about
19 this, you're not getting better. It's not getting
20 any relief. But she's the type of person that she
21 just thinks it will get better and it didn't.

22 Q What sorts of problems was she having after the
23 wreck?

24 A She got where she couldn't do a lot of things because
25 the arm would hurt so much. Picking up things was

1 difficult, she would drop stuff. And then the pain
2 would cause her not to want to do anything. She
3 didn't want to go anywhere, she didn't want to do
4 anything. Everything that she'd done before -- she
5 loves cleaning house. I don't know why but she does.
6 She likes to iron. She couldn't even do that. I
7 wound up doing all the stuff because she just hurt so
8 bad she couldn't do anything.

9 Q Had she ever had radiating symptoms into her right
10 arm before this wreck?

11 A No.

12 Q And Joy, have you now described pretty well all the
13 symptoms that your mother started experiencing after
14 this wreck in January 2010?

15 A Pretty much. I mean, the pain started and she was
16 having the pain in the arm and everything. Then that
17 would contribute to getting depressed. Because she
18 hurt so much she stayed depressed about it. Because
19 she was in so much pain.

20 MR. PEACE: Thank you, Joy, that's all the
21 questions I have for you. Please answer any Mr. McGarr
22 has.

23 CROSS-EXAMINATION

24 BY MR. MCGARR:

25 Q Ms. Gaines, you not only help your mom get to the doc

1 and know who her doctors are and so forth, but you've
2 been with her throughout this entire process, have
3 you not?

4 A Yes, sir.

5 Q Been to every deposition?

6 A Yes, sir.

7 Q Been to every day of trial?

8 A Yes, sir.

9 Q Helped her when she was having to answer questions
10 with regard to her attorney?

11 A Yes.

12 Q Like what past doctors she's gone to see etcetera, so
13 on and so forth; is that correct?

14 A Yes.

15 Q Let me show you what is called an interrogatory, you
16 may have seen this as part of the process. This is
17 where we ask your mother through her attorney
18 questions in written form. Does it appear that on
19 page two of this interrogatory, that we ask question
20 number five, Set forth the names and addresses of all
21 physicians and chiropractors who treated the party
22 for any problem, parenthesis, physical or mental in
23 the past 15 years. And the response was Dr. Lisa
24 Harding, current primary care physician, Foothill
25 Internal medicine. The next one was Dr. Barbara S --

1 and I won't pronounce this correctly, Reffick [ph] of
2 Internal medicine. Next one is Plaintiff is informed
3 [verbatim] and believes that she saw a physician
4 named Dr. Flynn as her primary care physician for a
5 period of time after Dr. Freeman below and before
6 Dr. Reffick above. The best the Plaintiff recollects
7 of Dr. Flynn adopted a baby and then retired from the
8 practice. The Plaintiff believes that Dr. Flynn's
9 office was located on Highway 153 in Powdersville,
10 South Carolina.

11 And then does the next one say, Dr. Steve.
12 Freeman, PCP Diabetes Adult Medical Specialist. Or
13 Adult Medicine Specialist?

14 A Yes.

15 Q And then the next question on question number six
16 was, Set forth the name and addresses of all
17 hospitals, clinics, offices which the party has
18 received care or treatment for any problem,
19 parenthesis, physical or mental in the last 15 years.
20 And was the response, Greenville Memorial Hospital
21 treated for a suspected heart attack years ago. St.
22 Francis Hospital, rotator cuff repair approximately
23 2004. Piedmont Orthopedics, Dr. Tom Baumgardner or
24 Bombgardner performed rotator cuff repair in 2004.
25 Carolina Cardiology performed stress test to evaluate

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1 abdominal pain 2012?

2 A Yes.

3 Q So that's the list of people that you and your mother
4 put together as being people that she had seen in the
5 last 15 years, is that correct?

6 A Yes.

7 Q And this document, if you go to the next page of it,
8 would you agree that it was signed on June 4th of
9 2012?

10 A Yes.

11 Q So, roughly June 4 of 2000 -- in 1999, if I'm correct
12 or 1998, I'm not sure. Would have been about 15
13 years prior to that would be sometime, '98 or '97?

14 A Yes.

15 Q Going to the next document in that set of documents,
16 would you agree that you guys did not mention that
17 your mother had been to the Jervey Eye Group?

18 A I did not think that would fit in because it was an
19 eye doctor.

20 Q And yet would you agree that the Jervey Eye Group, if
21 we hadn't gotten it on our own, mentions that she has
22 arthritis?

23 A You do a form when you visit any doctor and fill out
24 anything in your past history. So yes, when they ask
25 if you've ever had arthritis, she would have said,

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- 1 yes.
- 2 Q And we wouldn't have known that from these answers,
- 3 would we?
- 4 A Well, I would not have known to list the eye doctor's
- 5 name.
- 6 Q And the next document, does that appear to be a
- 7 document from a Dr. Beth Brown -- second page, I'm
- 8 sorry. Is that not attached to the second page, I
- 9 apologize. It's at the very bottom.
- 10 A Yes.
- 11 Q Dr. Beth Brown does not mention in this answer to
- 12 interrogatory, is it?
- 13 A No.
- 14 Q And yet when we look at Ms. Brown's records, we find
- 15 out that on 12/23 of '99 she has a history or a neck
- 16 injury, is that correct?
- 17 A Yes, the same one you've been talking about.
- 18 Q And we wouldn't be able to discovery that from these
- 19 answers, could we?
- 20 A If you'd ask I'd very willing giving you anything you
- 21 wanted.
- 22 Q But we did ask and this is the only thing we got, is
- 23 that correct?
- 24 A Well, you know, when you see so many doctors you
- 25 don't always remember everyone of them. I was not

1 trying to hide anything from you.

2 Q But nonetheless this is what we had and yet it turns
3 out that we have a number of different medical
4 providers that she's gone to see. And when you
5 look--

6 THE COURT: Are you testifying?

7 MR. MCGARR: I'm asking. I should put it this
8 way.

9 Q Would you agree that we can go through all these
10 records that these records are from people that
11 aren't listed in these answers to interrogatories.

12 THE COURT: Mr. McGarr, she's not even a party
13 to this lawsuit.

14 MR. MCGARR: Yes, sir, but she helped answer
15 these.

16 THE COURT: Mr. McGarr, she's not a party. She
17 not responsible for those interrogatories.

18 MR. MCGARR: Okay, then we'll just recall
19 Ms. Gaines. I have no further questions.

20 THE COURT: Do you have anything else?

21 MR. PEACE: No, Your Honor.

22 THE COURT: All right, thank you, you can step
23 down.

24 All right.

25 MR. PEACE: Your Honor, the Plaintiff rests.

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1 THE COURT: Okay.

2 Mr. Foreman, ladies and gentlemen of the jury,
3 this is a time where we have to discuss some legal issues.
4 I think told you it has to be out of your presence. It's
5 also probably a good time to break for lunch.

6 Excuse me?

7 THE DEFENDANT: I was just clearing my throat.

8 THE COURT: Okay.

9 So, I'll ask y'all to be back at, if I said a
10 quarter of 2:00, would that give you enough time? An hour
11 and 15 minutes? Remember not to discuss the case and
12 we'll get back with you very shortly. Thank you, very
13 much.

14 (WHEREUPON, the jury left open court at
15 approximately 12:30 p.m.)

16 THE COURT: All right, any motions?

17 MR. PEACE: None from the Plaintiff, Your Honor.

18 MR. MCGARR: Your Honor, we would make a motion
19 for directed verdict. Plaintiff's own expert has
20 testified that if this accident were to have caused these
21 problems, then the problem should have shown up at the
22 emergency room.

23 THE COURT: Who are you referring to, there have
24 been two expert witnesses?

25 MR. MCGARR: My apologies. Dr. Harding. Yeah,

1 Dr. Harding.

2 THE COURT: The family physician?

3 MR. MCGARR: Yes, sir.

4 THE COURT: Who's qualified as an expert in
5 internal medicine, is that right?

6 MR. MCGARR: Yes, sir.

7 THE COURT: Okay, go ahead with your motion.

8 MR. MCGARR: She testified that if the problem
9 were caused by this automobile accident, it should have
10 shown up at the emergency room and yet it didn't.

11 THE COURT: Did you ask that question to
12 reasonable degree of medical certainty?

13 MR. MCGARR: No, Your Honor.

14 THE COURT: You asked if it was a possibility,
15 did you not? Was that not...

16 MR. MCGARR: That's absolutely correct, Your
17 Honor.

18 THE COURT: Okay. And is that admissible here
19 in court?

20 MR. MCGARR: Yes, sir.

21 THE COURT: As an expert opinion?

22 MR. MCGARR: Yes, sir, it is.

23 THE COURT: An expert can give an opinion if
24 something is possible?

25 MR. MCGARR: Absolutely, Your Honor.

1 THE COURT: Well I tell you what, we'll break
2 for lunch, get me some case law on that, Mr. McGarr. Get
3 me some case law. Finish making your motion, then I want
4 to see the cases.

5 MR. MCGARR: Your Honor, let me say this, the
6 standard from a Plaintiff's perspective is a doctor must
7 be able to say to a reasonable degree of medical certainty
8 it's related to this.

9 THE COURT: Okay, we've had enough argument on
10 that point.

11 MR. MCGARR: Yes, sir.

12 THE COURT: Finish whatever motion you want to
13 make. You're going to get me case law to back up what you
14 say is black letter law, okay. You'll do that at lunch.
15 Anything else?

16 MR. MCGARR: I don't know if I have enough time
17 to get that accomplished but I'll do the best I can.

18 THE COURT: Well, it's black letter law, it must
19 be right there. It must be easy to find.

20 MR. MCGARR: I'll investigate it, Your Honor.

21 THE COURT: All right, any other motions?

22 MR. MCGARR: That's my motion for directed
23 verdict.

24 THE COURT: And it's based on the testimony of
25 the internal medicine doctor because it's possible that--

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1 MR. MCGARR: No, she didn't say it was possible,
2 she said it should have been there at the time of the
3 emergency room visit if it was related to this automobile
4 accident.

5 THE COURT: And she's an internal medicine
6 expert?

7 MR. MCGARR: Yes, sir. She didn't say it was
8 possible--

9 THE COURT: Well, what do you have to say about
10 it, Mr. Peace? You think that holds any water?

11 MR. PEACE: Your Honor, I believe both experts
12 in the case testified that to a reasonable degree of
13 medical certainty, they both believed that the C-5, C-6
14 radiculopathy and neck injury was caused by the car wreck.
15 I believe that creates at least an issue of fact for the
16 jury to consider. And I believe the motion should be
17 denied.

18 THE COURT: Okay. Well I'm definitely going to
19 deny it. I will grant a directed verdict on the issue of
20 liability on behalf of the Plaintiff. That's been
21 admitted and there's no question.

22 MR. MCGARR: We didn't -- Your Honor, you do
23 realize we admitted -- when you're saying liability, we
24 admitted negligence, not that we caused an injury.

25 THE COURT: They still have to prove proximate

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1 cause of the injury, yes, sir, Mr. McGarr. Liability as
2 to the cause of the accident. Do you understand?

3 MR. MCGARR: I think I do. So, the issue is
4 still proximate cause and damages?

5 THE COURT: Correct. They have to prove that
6 the damages sustained were approximately caused by your
7 client's negligence.

8 MR. MCGARR: Yes, Your Honor.

9 THE COURT: But there is no question about who
10 was at fault in the motor vehicle accident, is that right?

11 MR. MCGARR: Yes, Your Honor. And -- yes, Your
12 Honor.

13 THE COURT: All right. See y'all at a quarter
14 till 2:00.

15 MR. MCGARR: Your Honor, I do have one more
16 thing if I could bring it to the Court's--

17 THE COURT: Yes.

18 MR. MCGARR: I have -- I think they're all here
19 now. I have three records custodians, we never really
20 resolved that issue, that I will be calling after lunch
21 unless we don't need the records custodians anymore. And
22 that's really in Mr. Peace's hands but I do need to know
23 that so I can tell them what to do.

24 THE COURT: Yes, sir, Mr. Peace.

25 MR. PEACE: Your Honor, I mean, I admit that

1 they're authentic copies for the most part. One might be
2 slightly incomplete. However, I don't believe that even
3 if he brings the records custodians, the documents aren't
4 admissible because they contain subjective information,
5 observations, diagnosis. And without the doctors that
6 forms those impressions diagnosis -- and for that matter
7 can detail sources of information as Dr. Mina made clear
8 in her deposition, sometimes things are attributed to the
9 patient, really is patient family. So unless he's going
10 to bring the specific nurse, triage nurse, physician,
11 physician's assistant that prepared the records, I don't
12 believe the records themselves are going to be admissible.
13 And even if those people came they would still be hearsay.
14 And I don't know that that would necessarily be admissible
15 under the business records as evidence.

16 MR. MCGARR: Your Honor, actually they're not
17 admissible because the exceptions to the hearsay rule
18 won't allow that diagnosis and treatment stuff to come in
19 at all. So, there's no way I can put these records into
20 evidence. No matter what. Or it would be a bad ruling if
21 you allowed it. Because that's not what the law says.
22 The issue was that Mr. Peace repeatedly objected during
23 Dr. Mina's testimony that these records have no
24 foundation. I'm going to put in the request to admit to
25 solve part of it, but he hasn't agreed to all of them so I

1 may need the records custodian just to say, yes, these are
2 true and accurate records. That's all I'm going to do.
3 I'm not -- I can't or I wouldn't dare try because it's not
4 the law. To try to put these records into evidence. I
5 just need to prove that they're authentic.

6 THE COURT: What in the world are you talking
7 about? You don't want to put them into evidence?

8 MR. MCGARR: I can't put them into evidence,
9 Your Honor.

10 THE COURT: Yeah, so why is there an issue here?

11 MR. MCGARR: Because Mr. Peace repeatedly
12 objected during Dr. Mina's deposition that these records
13 have no foundation, that nobody knows where there are,
14 they don't know if they're authentic, they don't know if
15 they're true. Well, we solved most of the problem with
16 the request to admit. But he has not agreed that they're
17 true and authentic with regard to no physical therapy.

18 THE COURT: I thought at the beginning of this
19 trial that you agreed that they were the records from
20 those, that they were the authentic records. You just
21 objected to them being admitted because of all the other
22 problems.

23 Is that right, Mr. Peace?

24 MR. PEACE: That is correct, Your Honor.

25 THE COURT: We've already visited this issue and

1 it's been resolved.

2 MR. MCGARR: According to you, Your Honor.

3 THE COURT: We did that before the trial
4 started. That's what Mr. Peace told you right here in
5 this courtroom.

6 MR. MCGARR: Your Honor, if you'll remember you
7 said Mr. Peace could make his objections and we'll deal
8 with it at the time. So, now I'm asking that we deal with
9 it now..

10 MR. PEACE: Your Honor, so long as the documents
11 aren't coming in, I'll withdraw the objection that he's
12 referring to.

13 THE COURT: All that was for documents you
14 weren't even going to offer into evidence, is that right?

15 MR. MCGARR: Is this on the record?

16 THE COURT: Yes, sir, it's on the record, every
17 bit of it.

18 MR. MCGARR: Yes, sir. It wasn't because I was
19 trying to put them into evidence, it was because of the
20 objection that was made and because we did not clarify the
21 issue when I earlier asked that it be clarified.

22 THE COURT: Mr. Peace, if I remember correctly,
23 correct me if I'm wrong, but you said you didn't -- you
24 acknowledged that they were the authentic records. You
25 objected to them coming into evidence, is that what you

1 said?

2 MR. PEACE: That's correct, Your Honor. I
3 admitted the authenticity, I objected to the admissibility
4 based on a variety of reasons. If the documents aren't
5 being offered as exhibits themselves, I don't think
6 there's an issue.

7 THE COURT: And that's what we said at the
8 beginning of the trial, isn't it?

9 MR. PEACE: Yes, Your Honor.

10 THE COURT: So all this was for naught.

11 MR. MCGARR: Your Honor, I respectfully --

12 THE COURT: This posturing is for naught.

13 All right, we'll see y'all--

14 MR. MCGARR: Your Honor--

15 THE COURT: Excuse me, yes, sir.

16 MR. MCGARR: For the record, there's no one in
17 this courtroom. So who am I posturing to?

18 THE COURT: I'm not sure, Mr. McGarr. I really
19 am not sure.

20 MR. MCGARR: Your Honor, I want it placed on the
21 record that your tone has been extraordinarily harsh in
22 front of -- in the presence of the jury, outside the
23 presence of the jury.

24 THE COURT: When? When?

25 MR. MCGARR: Even as we speak.

1 THE COURT: Outside the presence of the jury,
2 yes, sir. Because you have upset me. You called me a
3 name in your opening comments. You come up here with a
4 empty file and claim, Oh my, I didn't know I'm up for
5 trial. When you were one of four cases on the docket.
6 And you knew about this and you come up here and then
7 stand in front of the jury and go, It's not my fault.
8 Yes, sir, I'm upset. That's correct. And I have not
9 raised my tone of voice in front of this jury once.

10 MR. MCGARR: Your Honor, if you'll remember, I
11 was told at nine o'clock that I had to be here at 9:15.

12 THE COURT: Mr. McGarr, yes. If you don't like
13 the way we practice -- we handle -- if you don't like the
14 practice of law, this is the practice of law. This is
15 trial work. This is the way it has been since I was
16 licensed in 1978. Not once in my career, when I was
17 called up unexpectedly, did I show up with an empty file
18 and claimed that it was not my fault that I wasn't ready.

19 MR. MCGARR: Your Honor, neither lawyers had
20 their files with them that morning. We had jury
21 information--

22 THE COURT: Well, I tell you this, I don't know
23 that Mr. Peace didn't have his file with him. Because he
24 didn't get up and complain about it.

25 MR. MCGARR: All I asked you for, Your Honor,

1 was enough time to get my file.

2 THE COURT: Why are pursuing this, Mr. McGarr?

3 MR. MCGARR: Because I don't think it's in any
4 way shape or form fair.

5 THE COURT: How have you been prejudiced?

6 MR. MCGARR: That I have been --

7 THE COURT: How?

8 MR. MCGARR: So horribly abused throughout this
9 trial.

10 THE COURT: You have not been abused.

11 MR. MCGARR: -- asked for my file. Enough time
12 to pick it up and try to get my client from Pickens. When
13 I had 15 minutes notice to be up here.

14 THE COURT: You've had weeks or months notice.
15 You picked the date of the trial.

16 MR. MCGARR: Your Honor --

17 THE COURT: You go ahead and make an issue out
18 of this, Mr. McGarr.

19 MR. MCGARR: Your Honor, I can't help that
20 someone got sick and I found out about this trial 15
21 minutes before--

22 THE COURT: Well, it wouldn't have mattered if
23 they didn't get sick and your case got called. It
24 wouldn't matter.

25 MR. MCGARR: I know it wouldn't.

1 THE COURT: You be prepared. You were on the
2 docket and you have to be prepared to go forward,
3 Mr. McGarr.

4 MR. MCGARR: And I was.

5 THE COURT: We don't pander to anybody up here.

6 MR. MCGARR: Your Honor, all I needed was enough
7 time to go get my file like everyone else did. And that's
8 not grounds for you to be as cruel as you've been to me.

9 THE COURT: I have not been cruel to you, you
10 don't know what that is, Mr. McGarr. I'll tell you I am
11 very upset at your lack of professionalism. I'll see you
12 at a quarter of 2:00.

13 (WHEREUPON, a lunch break was taken.)

14 THE COURT: All right, Mr. McGarr, you got case
15 law?

16 MR. MCGARR: No, Your Honor.

17 THE COURT: In fact, there is no such case law.
18 In fact, the rule of law in South Carolina is just the
19 opposite. You cannot speculate or conjecture as to
20 proximate cause. Also, Mr. McGarr, for the record, I'd
21 like you to state right now what conduct that you claim
22 I've committed that is cruel. Right now.

23 MR. MCGARR: As you know I try tremendous amount
24 of cases. Probably more than anyone else in the upstate.

25 THE COURT: You go into criminal court?

1 MR. MCGARR: Let me say this.

2 THE COURT: And that has nothing to do with it.
3 I don't want to hear about your history. I want to know
4 what you say my conduct was that was cruel. You've
5 accused a Circuit Judge of being cruel.

6 MR. MCGARR: Your Honor, for the transgression
7 of not being able to get my file and my client from
8 Pickens, who cannot drive -- I mean, she can drive but she
9 can't drive right now because of medical conditions. For
10 that transgression, we have cut me off, we have been very
11 harsh toward me in your language.

12 THE COURT: What language are you referring to?

13 MR. MCGARR: Just when you're talking to me,
14 it's a very harsh voice. You have told me that I am
15 unprofessional. And those types of things strike me--

16 THE COURT: That was after you called me cruel.
17 So, what conduct before that was I cruel?

18 MR. MCGARR: The -- expecting that I can get to
19 Pickens and back and actually cutting the time by 15
20 minutes for us to get back here to this courthouse and
21 have my file. Being angry because I asked for the time to
22 get that done.

23 THE COURT: Being angry, tell me how I was
24 angry. Tell me about that, Mr. McGarr. And tell me when
25 one attorney gets to call cases. When has an attorney

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1 ever been the one to call a case to trial?

2 MR. MCGARR: Your Honor, that's not my job. And
3 I think it happened way before I practiced but it hasn't
4 happened since I practiced. The Court calls the cases.

5 THE COURT: Correct. So tell me -- that's what
6 you say I'm being cruel?

7 MR. MCGARR: The comments that you made, for
8 example, when Ms. Gains was repeatedly asking me to tell
9 her what a trapezes was. And I'm left in the situation
10 because we're not going to get an answer until I tell her
11 what a trapezes is. Well, then I do and then immediately,
12 in front of the jury, you get up and say, He can't do
13 that.

14 THE COURT: I did not say that, no, sir. I said
15 what lawyers say is not evidence. And I know you've
16 requested a copy of the transcript from both Court
17 Reporters and that's great. And I'm going to get a copy,
18 too.

19 MR. MCGARR: I'll send you a copy.

20 THE COURT: And I want to tell you that I gave
21 the jury a proper instruction because you were testifying.
22 If a witness doesn't know what it is, you don't have the
23 right to testify and fill in the blanks. You just have to
24 accept that a witness does not know what the answer to the
25 question is. Because you don't get the answer you want,

1 does not allow you to testify.

2 MR. MCGARR: I understand, Your Honor, but when
3 it happened -- when the question kept coming up to me time
4 and time again, it would be very easy to say, Ma'am, he
5 can't answer that question.

6 THE COURT: Your claim that you try all these
7 cases and you don't know that you request the Court for an
8 instruction at that point?

9 MR. MCGARR: Your Honor, I'm no longer going to
10 get any deeper in this because it's not--

11 THE COURT: Well, I am requiring you to say on
12 the record what it is that I've done that was cruel.

13 MR. MCGARR: I think I've listed the situation
14 where you're asking me to do what physically was
15 impossible. I can't get to Pickens and back and get a
16 file--

17 THE COURT: I didn't ask you to do that. I'm
18 not responsible for you having your client here. Or you
19 leaving your office with no file. Knowing you're on the
20 trial docket.

21 MR. MCGARR: We'll just agree to disagree, Your
22 Honor.

23 THE COURT: So you don't have anything other
24 than that? And you have called a Circuit Judge cruel.
25 You have complained about my tone of voice.

1 MR. MCGARR: Your Honor, I think the
2 transgression of having 15 minutes notice to be here has
3 not warranted the way I've been treated.

4 THE COURT: That has nothing to do with my
5 sentiment toward you, Mr. McGarr. Nothing. You knew
6 about the trial when this trial was set. Months ago.

7 MR. MCGARR: I think, Your Honor, keeps
8 forgetting that we were told at 9:00 that the other
9 attorney that was supposed to start the case was sick.

10 THE COURT: I haven't forgotten a thing. You
11 were on the trial docket and you knew about this months
12 ago. And you have the good fortune of being able to pick
13 the week of your trial.

14 MR. MCGARR: All I asked for, Your Honor, was to
15 be able to get my file and get my client.

16 THE COURT: And you got your file. You want me
17 to hold up the entire Circuit Court because you didn't get
18 prepared. And now you think I was cruel for not allowing
19 you -- for me not stopping, holding the whole jury
20 hostage, because you didn't get ready. Do you have
21 anything else? Because I'll tell you that is one of
22 the -- your conduct has been some of the most
23 unprofessional and disingenuous that I have ever seen as a
24 Judge or as a lawyer.

25 MR. MCGARR: I appreciate what you said, I think

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1 the record speaks for itself.

2 THE COURT: Oh, it will. The fact that you
3 claim it was black letter law that an expert witness can
4 testify as to possibilities, and then you come up here and
5 you don't have anything to back it up. And, in fact, the
6 law is not even remotely close to that. You had the
7 opportunity to present evidence to show that your claims
8 of the other two or three things that you think possibly
9 could have caused this injury, you could have put
10 evidence -- you could have brought evidence in, if it
11 existed. I don't know if you're going to put anything up
12 or not. I don't know if you have it or not. But you
13 cannot use -- you can't come in here and try to use your
14 opponents expert and not live up to the same standard.
15 You can't require him to have more probably than not to a
16 reasonable degree of medical certainty and you just mere
17 possibility.

18 Baughman vs. American Telephone and Telegraph,
19 410 S.E.2d 537. The rule has been succinctly stated as
20 follows. It is not sufficient for the expert to testify
21 merely that the ailment might or could have resulted from
22 the alleged cause. He must go further and testify. And
23 taking into consideration all the data, it is his
24 professional opinion that the result in question most
25 probably came from the cause alleged. You don't get to

1 say mere possibility..

2 MR. MCGARR: Your Honor, if you'll read the case
3 law with regard to that and what I said earlier was that
4 the standard for a Plaintiff, who is putting up a case, to
5 connect causation, is that the doctor must say,
6 essentially, to a reasonable degree of medical certainty,
7 I believe that this thing caused this thing. That's what
8 I told you before the break.

9 THE COURT: No. And you think that that
10 standard does not apply to you? Is that what you're
11 saying?

12 MR. MCGARR: It does not, Your Honor. I -- I --
13 this is--

14 THE COURT: Where is the law that you're talking
15 about? Where is it?

16 Mr. Peace, are you aware of any law to that
17 effect?

18 MR. PEACE: No, Your Honor.

19 MR. MCGARR: Your Honor, as I told you, there
20 was not going to be enough time to get to my office, get
21 on my computer and get that done.

22 THE COURT: Your office is five minutes away
23 from here. You claim this to be black letter law.

24 MR. MCGARR: Not what I told you, Your Honor. I
25 said the law is that I can ask it is possible. Because

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1 I'm not bound by the rules that says to a reasonable
2 degree of medical certainty. That's the person who has
3 the burden of proof. I can say are there other reasons
4 that this can happen. I've done it in your court and I've
5 done it every other court I've been in. But I'll provide
6 you--

7 THE COURT: Yeah, you get the case law.

8 All right, do you have anything else?

9 MR. PEACE: No, Your Honor, the Plaintiff rests.

10 THE COURT: Okay.

11 Are you going to call any witnesses?

12 MR. MCGARR: Your Honor, I will be calling
13 Ms. Gaines. And then I will be putting in the request --
14 ask to put in the request to admit and the request to
15 admit responses. And then I will rest.

16 THE COURT: Do you have any objection to any of
17 that?

18 MR. PEACE: Well, I mean, I thought we
19 established before lunch that he wasn't going to put the
20 documents into evidence so I'm not really sure what
21 purpose the request to admit are offered for. If there is
22 a admit purpose, I just haven't heard it.

23 THE COURT: He objects to them on relevancy
24 grounds.

25 MR. MCGARR: It became relevant when the

25

1 objections were repeatedly made in Dr. Mina's deposition
2 that these documents are not authentic, that these
3 documents, we don't know that they're accurate etcetera,
4 etcetera so forth and so on. So, I have to go, as you
5 heard, I kept saying I will do that at trial. Which is
6 what you do, authenticate records when you get in the
7 courtroom. So that's why it would be relevant.

8 MR. PEACE: Well, again, Your Honor, we've
9 discussed the difference between authentication and
10 admissibility. He hasn't established admissibility and
11 could not do so by record custodian. He would actually
12 need to bring the people in with firsthand knowledge--

13 THE COURT: Well, what are the requests to admit
14 say? What are they?

15 MR. MCGARR: They just admit that the documents
16 are true and authentic thing copies of originals.

17 MR. PEACE: And I don't doubt that they're true
18 and authentic copies but they're not admissible for a
19 variety of reasons.

20 THE COURT: Well, he's not asking to put the
21 documents in, he's asking to say you acknowledge that
22 they're true and authentic copies of the documents.

23 MR. PEACE: Your Honor, before lunch I even
24 offered to withdraw those objections so that we could go
25 ahead and proceed with the remainder of the trial.

W3

1 THE COURT: You still want to put them in?

2 MR. MCGARR: I don't have a problem if we enter
3 a stipulation that the documents are true and authentic
4 copies of the originals. I don't even need to do this if
5 we put that stipulation in.

6 MR. PEACE: So as long as they're not coming
7 into evidence, that's fine.

8 THE COURT: He's not offering them.

9 MR. PEACE: All right.

10 THE COURT: Okay. All right.

11 MR. MCGARR: In that case, it would be the
12 stipulation and 10 minutes with Ms. Gaines.

13 THE COURT: Bring the jury in.

14 (WHEREUPON, the jury came into open court at
15 approximately 2:15.)

16 THE COURT: All right, ladies and gentlemen,
17 welcome back. And we're ready to resume the trial.

18 Mr. McGarr.

19 MR. MCGARR: Your Honor, we would call
20 Ms. Gaines.

21 THE COURT: Which Ms. Gaines, the Plaintiff?

22 MR. MCGARR: The Plaintiff, Ms. Gaines, I'm
23 sorry.

24 THE COURT: Ms. Gaines, you're still under oath.

25 MR. MCGARR: May it please the Court?

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1 THE COURT: Yes.

2 DIRECT EXAMINATION

3 BY MR. MCGARR:

4 Q Ms. Gaines, have I presented you with a document that
5 says Plaintiff's Response to the Defendant's
6 Interrogatories and Request for Production?

7 A Yes.

8 Q If we could go to the second page of that document.
9 One of my questions asked of you through your
10 attorney was, does it say, Set forth the names and
11 addresses of all physicians and chiropractors who
12 treated the party for any problem, physical or mental
13 in the past 15 years. And in the response does it
14 say, Dr. Lisa Harding, current primary care
15 physician, Foothill Internal medicine. It would be
16 on page two.

17 A Yes, I see that.

18 Q And then does it say the next one is Dr. Barbara S.
19 Reffrick, M.D. Internal Medicine?

20 A Yes.

21 Q And the next one does it say, The Plaintiff is
22 informed [verbatim] and believes that she saw a
23 physician named Dr. Flynn as her primary care
24 physician for a period of time after Dr. Freeman,
25 parenthesis, below and before Dr. Reffrick,

1 parenthesis above --

2 A Excuse me, I can't hear you.

3 Q I'm sorry, I'm trying to read at the same time. Does
4 it say, The Plaintiff is informed [verbatim] and
5 believes that she saw a female physician named Dr.
6 Flynn as her primary care physician for a period of
7 time after Dr. Freeman, parenthesis, below and before
8 Dr. Reffrick, parenthesis above. The best the
9 Plaintiff recollects of Dr. Flynn adopted a baby and
10 then retired from the practice. The Plaintiff
11 believes that Dr. Flynn's office was located on
12 Highway 153 in Powdersville, South Carolina.

13 A Yes.

14 Q Then does the next one say, Dr. Steve Freeman, PCP
15 Diabetes Adult Medicine Specialist?

16 A No, he was before that.

17 Q We're not putting in time, I'm just saying, is that
18 what the document says?

19 A Yeah, Dr. Freeman was my doctor at one time.

20 Q And the next question does is say, Set forth the name
21 and addresses of all hospitals, clinics, offices at
22 which the party had received care or treatment for
23 any problem, parenthesis, physical or mental,
24 parenthesis, in the last 15 years. And does the
25 response say, Greenville Memorial Hospital treated

1 for a suspected heart attack years ago. St. Francis
2 Hospital, rotator cuff repair approximately 2004.
3 Piedmont Orthopedics, Dr. Tom Baumgardner performed
4 rotator cuff repair in 2004. And then the last one
5 is Carolina Cardiology performed stress test to
6 evaluate abdominal pain in 2012.

7 A Well, the -- when I had the shoulder was in 2007.

8 Q Yes, ma'am but is this what this document says?

9 A Yes, that what's what I'm reading here.

10 Q And it doesn't list the Jervey Eye Group, does it?

11 A I don't understand what you're trying to say. I
12 don't remember. I've been to a lot of doctors in my
13 lifetime. I don't remember all of them. Why would
14 you have to have my doctor -- I mean, my -- if I just
15 forgot, I wouldn't think it would be pertaining to
16 this at all.

17 Q Yes, ma'am. But my question is it doesn't list the
18 Jervey Eye Group, does it?

19 A I don't see it.

20 Q And yet if you look at that next document, you went
21 to the Jervey -- I apologize, the next document.

22 A Okay.

23 Q But you were, in fact, at the Jervey Eye Group on
24 7/16 of 1999 when you told them you had arthritis in
25 your spine, is that correct?

w

- 1 A When you fill out -- when you go to a doctor and you
2 fill out everything in your life that you have to
3 write and circle. Like I told you, I've had
4 headaches all my life. And I have arthritis. I say
5 that I have arthritis. I'm getting old. I'm 72
6 years old.
- 7 Q Yes, ma'am. Going to that next document, we have to
8 go to the second page first.
- 9 A That one?
- 10 Q Yes, ma'am. Have to go to the second page of it
11 first, though?
- 12 A The second page?
- 13 Q Yes, ma'am. Does this appear to be that you had been
14 to Dr. Beth Brown, is that the doctor that's listed?
- 15 A Yes, Beth Brown.
- 16 Q She's not listed in these answers, is she?
- 17 A I told you, I didn't know I had to have every doctor
18 I every had. I did not -- I mean, if I'd known you
19 needed those I would have told you. But I didn't
20 know all that.
- 21 Q Yes, ma'am. Going to the first page of that
22 document, does it indicate that you went to see
23 Dr. Brown on 12/23 of '99 and you told her about a
24 neck injury? First page, I apologize, first page.
- 25 A Now what?

- 1 Q The first page. Yes, ma'am, does it indicate on
2 12/23 of '99 you had gone to see Ms. Brown and one of
3 the things you told her about was a neck injury?
- 4 A Yes, where I told you about that when you questioned
5 me the first time. When I was working and I cut a
6 somersault for the teacher because she asked me to.
7 And it sprained my neck. And I already told you
8 about that one.
- 9 Q Yes, ma'am. But going to the next document -- the
10 next document.
- 11 A The next page?
- 12 Q No, ma'am, the next document.
- 13 A This one?
- 14 Q Yes, ma'am. Next document. That's from Palmetto
15 Baptist Medical Center, is it not?
- 16 A Yes.
- 17 Q And that's not listed in these answers, is it? You
18 didn't list Palmetto Baptist in these answers, did
19 you?
- 20 A I don't remember. I don't have them.
- 21 Q Let me give it to you again.
- 22 A Okay.
- 23 Q Do you see Palmetto Baptist listed in any of those
24 answers?
- 25 A I went to Palmetto Baptist a lot of times.

24

1 Q Yes, ma'am but is Palmetto Baptist listed in these
2 answers where I asked what doctors and physicians and
3 clinics you had been to in the last 15 years?

4 A I don't know.

5 Q Can you look at it and see if Palmetto--

6 A Where am I looking? I can't understand this.

7 Q Right here.

8 MR. PEACE: Your Honor.

9 THE COURT: Yes, sir.

10 MR. PEACE: I would object to him using this
11 commercial copy of our discovery responses. This is
12 obviously a seven page document judging from the page
13 number on the last page. He's given her pages one, an
14 unnumbered page which begins with question number five and
15 then a signature page, which is page number seven.
16 Clearly we put the medical bills for the amounts from
17 Palmetto Baptist in the evidence in this case. So to stay
18 that we didn't include Palmetto Baptist in response to
19 interrogatories is actually not true.

20 THE COURT: Okay. Well, you'll be allowed to
21 examine her with respect to that in cross-examination.

22 MR. PEACE: Thank you, Your Honor.

23 BY MR. MCGARR:

24 Q With regard to Palmetto Baptist in 2003, had you told
25 them that you had a past history of diabetes,

25

1 migraines, arthio arthritis and chronic back pain?

2 A Yes.

3 Q Going to the next document in that set of documents,

4 it would be the next document.

5 A The next document?

6 Q Yes, it would be this one.

7 A Okay.

8 Q Does it appear that you also saw a Ann Claire Edwards

9 on 8/29 of 2006?

10 A Yeah, that's when I had surgery on my shoulder.

11 Q And at that point you also told her you had pain in

12 your neck, is that correct?

13 A When you fall and apparently hurt your shoulder, yes

14 it's going to cause you to have pain in your neck.

15 Q And you didn't list Ann Clair Edwards in these

16 answers?

17 A I don't remember her now.

18 Q Yes, ma'am. But the question is, you didn't list it

19 in those answers, did you?

20 A No. Because I don't remember.

21 Q And we can keep going through but...

22 A What do you want me to look at now?

23 Q Palmetto Neurological, you didn't list them either,

24 did you?

25 A I don't know what it is, what is it?

- 1 Q You -- these answers don't mention Palmetto
2 Neurological, do they?
- 3 A If it's not there I didn't. Because I didn't know it
4 was that important.
- 5 Q And in 2007 you had actually gone to Palmetto
6 Neurological and told them that you had a long
7 history of abdominal pain and low back pain, is that
8 correct?
- 9 A Yeah, I mean, as you're getting older your back
10 hurts, it's worn out.
- 11 Q If we can go to this document. Does it appear that
12 you had gone to see a J. Mark Baker on 8/31 of 2009?
- 13 A Did you say Baker?
- 14 Q I highlighted, let me get a better look. Right here.
- 15 A I don't remember Dr. Baker.
- 16 Q Yes, ma'am. But doesn't it appear that you actually
17 did go see a J. Mark Baker?
- 18 A I don't remember.
- 19 Q But according to this document doesn't it say--
- 20 A According to this document, I've seen a lot of
21 documents.
- 22 Q And he would be with Easley Family Practice and
23 Internal Medicine, is that correct?
- 24 A If you say so.
- 25 Q And Easley Family Practice and Internal Medicine is

27

1 also someone that's not listed in this list, is it?

2 A I told you, if you had come told me, I would have
3 went back and went to every doctor I've ever been.
4 But I didn't know -- I didn't know it was that
5 important.

6 Q Okay. Would you agree that 8/31 of 2009 you were
7 there. And it says, In addition, about four weeks
8 ago she slipped and fell on some mulch and sat down
9 on her behind. She says she's got some upper quad
10 pain, pain in the neck and down to the lower back?

11 A That's what it says.

12 Q And again, would you agree that the question didn't
13 ask you to pick and choose. It actually said, Set
14 forth the names and addresses of all physicians and
15 chiropractors who treated the party for any problem,
16 physical or mental in the past 15 years.

17 A When am I supposed to be able to say that I don't
18 remember?

19 Q My question is, does it say all?

20 A I told you, I don't remember seeing that.

21 Q That's not my question. My question is does this
22 document say all?

23 A Yeah, that's what the document says.

24 Q It also says, Set forth the names and addresses of
25 all hospitals, clinics and offices at which the party

1 has received care or treatment for any problem,
2 parenthesis, physical or mental in the past 15 years.
3 Do number six say that?

4 A Yes, sir.

5 Q It says, All, not pick and choose, does it?

6 A I didn't pick and choose. I put down what I thought
7 -- I didn't know but -- that you're supposed to put
8 down every doctor you've ever had. I've had a lot of
9 doctors.

10 Q And a lot of these doctors that aren't listed end up
11 showing us evidence of low back problems and neck
12 problems, don't they?

13 A But you don't pick and choose either. You tell why I
14 was there and what they were doctoring me for. A lot
15 of times you have -- I told you, I have a whole line
16 of history of migraine headaches. I have suffered
17 years of migraine headaches. And I always -- a lot
18 of times they say that, that's the way you heard.
19 But the migraine headache. And yes.

20 Q But you would agree that a log of these people that
21 weren't listed are talking about you complaining of
22 neck and low back pain, correct?

23 A Mr. McGarr, I don't remember all this. I do not know
24 what you're trying to say.

25 MR. MCGARR: Your Honor, I would ask that you

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1 instruct the witness answer yes or no and then explain.

2 THE COURT: She just told you she couldn't
3 remember.

4 BY MR. MCGARR:

5 Q But my question is wasn't that you couldn't remember,
6 it's that looking at these documents, it's apparent
7 that a lot of the people that were left out are
8 talking about neck and low back problems that you
9 had; is that correct?

10 A No.

11 MR. MCGARR: Okay, no further questions.

12 THE COURT: Mr. Peace.

13 MR. PEACE: Very briefly, Your Honor.

14 THE COURT REPORTER: Judge, I need a second,
15 please.

16 THE COURT: Just a minute, we're having
17 technical problems.

18 THE COURT REPORTER: Okay, thank you.

19 THE COURT: Yes, sir, go ahead.

20 CROSS-EXAMINATION

21 BY MR. PEACE:

22 Q Barbara, looking at the record from Dr. Ann Clair
23 Edwards, it appears she --

24 THE COURT REPORTER: Just a second, I'm sorry.
25 Thank you.

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1 BY MR. PEACE:
2 Q Barbara, I believe we disclosed Dr. Steven Freeman as
3 one of your primary care physicians?
4 A Yes.
5 Q Do you recall Dr. Freeman?
6 A Yes.
7 Q Do you recall the Dr. Edwards worked with Dr. Freeman
8 at -- I don't see the name of the practice but on
9 Hillcrest Drive in Easley?
10 A Yes.
11 Q So, to the extent we listed Dr. Freeman, would you
12 expect Mr. McGarr to get the records from Dr. Edwards
13 who apparently worked with or Dr. Freeman?
14 A Yes.
15 Q Okay. Did you -- when we met to discuss discovery
16 responses, did you give me as complete information as
17 you could recall?
18 A Yes, as I recall.
19 Q Have you testified truthfully here in this courtroom?
20 A Yes.
21 Q Have you done your very best to remember a long
22 history of events?
23 A Yes, I have.
24 Q Okay. And -- all right.
25 MR. PEACE: Your Honor, that's all the questions

1 I have for this witness.

2 THE COURT: Any redirect?

3 MR. MCGARR: No, Your Honor.

4 THE COURT: All right, thank you, ma'am, you may
5 step down.

6 All right, call your next witness.

7 MR. MCGARR: Your Honor, it would just be the
8 stipulation then we would rest.

9 THE COURT: Well state what it is.

10 MR. MCGARR: The parties have stipulated that
11 the records that have been discussed with the witnesses
12 and the doctors are true and accurate copies of the
13 original documents kept with the places, the doctor
14 offices and the clinics that happen. In other words,
15 those documents are real, they're not the originals but
16 they're exact copies of the originals.

17 THE COURT: You agree with that?

18 MR. PEACE: I don't disagree with that
19 statement.

20 THE COURT: All right. Do you have anything in
21 reply, sir?

22 MR. PEACE: No, Your Honor.

23 THE COURT: All right. At this time, ladies and
24 gentlemen, I need to take up some legal issues with the
25 lawyers. If I could excuse you back to your jury room,

22

1 we'll be right back with you.

2 (WHEREUPON, the jury left open court at
3 approximately 2:23 p.m.)

4 THE COURT: All right, anything else?

5 MR. PEACE: Nothing from the Plaintiff, Your
6 Honor.

7 MR. MCGARR: Nothing from the Defendant, Your
8 Honor.

9 THE COURT: All right, you said you wanted a
10 charge conference, what is it you want?

11 MR. MCGARR: There's been a request to charge
12 given by Mr. Peace with regard to pre-existing conditions
13 and that is not the actual charge. The actual charge
14 would include that a defendant is responsible for an
15 aggravation of a pre-existing condition but not for it's
16 natural worsening or condition. Or acceleration. And I
17 think your charge, I've had it before--

18 THE COURT: I'm giving my charge.

19 MR. MCGARR: Yes, sir, then that's all I need to
20 know.

21 THE COURT: All right, yes, sir.

22 MR. PEACE: Nothing further from the Plaintiff,
23 Your Honor.

24 THE COURT: Y'all ready to go?

25 MR. PEACE: I'm ready now when we you're ready.

1 Whenever you're ready. .

2 THE COURT: Okay. Well, I think we need to give
3 the jury a minute probably. They're probably...

4 (WHEREUPON, the jury came into open court at
5 approximately 2:38 p.m.)

6 THE COURT: All right, ladies and gentlemen of
7 the jury, if you remember my opening comments to you, I
8 broke a trial into five parts. We have now completed the
9 first two parts. So, you've heard that opening statements
10 and you've heard all of the evidence and all of the
11 testimony that's going to be presented is now in. And
12 we're going to move to the third part of the trial which
13 are the closing arguments of the attorneys. Okay.

14 CLOSING STATEMENT

15 MR. PEACE: Thank you, Your Honor. May it
16 please the Court, Your Honor?

17 THE COURT: Yes, sir.

18 MR. PEACE: Can we lower just a few of the
19 lights?

20 I'm afraid that might put some of you to sleep.
21 Well, I hope my closing won't put you to sleep. Ladies
22 and gentlemen, this has been a relatively short trial. It
23 certainly hasn't gone weeks and weeks like you might have
24 seen on television. I'm going to take a few minutes and
25 pull out, like we talked about on Monday, I'm going to

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1 pull out some of the testimony you've heard. Especially
2 from the doctors. But in this case, of course, we've got
3 an admitted liability or admitted fault case.
4 Ms. Campbell took the stand and admitted it was her fault.
5 She testified she rear ended Barbara Gaines while travel
6 about 35, 40 miles an hour. So, that part, it's really
7 for anybody to dispute.

8 The real question in this case, and like we
9 talked about at the outset of trial, is the issue of
10 approximate cause. What damages were caused by this
11 wreck. And that's what you should award as damages in
12 this case. Now, Judge miller is going to instruct y'all
13 on the law of damages. But I can give you the cliff note
14 version of it in this case. It's the medical bills, the
15 physical pain and suffering which she experienced as a
16 result of those injuries and the emotional distress and
17 the angst that she suffered as a result of those physical
18 injuries.

19 So, in this case, as far as approximate cause
20 goes, the critical question for you to answer is did this
21 wreck cause the C-5, C-6 injury that ultimately resulted
22 in the radiating pain in the Barbara Gaines right arm
23 radiculopathy. And if so, you should bring back a verdict
24 for the medicals and the pain and suffering and emotional
25 distress in this case.

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1 Now, if you can, please, advance that.

2 We heard from Dr. Mina who was the neurosurgeon
3 who performed the surgery. And Mr. McGarr specifically
4 asked her about her opinions and whether she had changed
5 her opinions based on these prior medical records that
6 he's pulled out from 1987 and 1999 and 2006. And her
7 answer was this.

8 If you would please advance.

9 (WHEREUPON, excerpts from Dr. Mina's video
10 deposition were played.)

11 And there's the question, has he done that at all?
12 Is there any evidence of any other cause of the C-6
13 radiculopathy other than the car wreck in this case? I
14 offer you that there's been no such evidence produced in
15 this trial. Of course, Mr. McGarr's arguments are focused
16 at this point at specialist who doesn't have a long
17 history with Ms. Gaines. Dr. Russell, who's Dr. Mina's
18 partner, treated her over the course of about a year
19 before he referred her over to Dr. Mina. He tried
20 epidural steroid injections, physical therapy and
21 medications. And those concerted efforts were
22 unsuccessful in addressing the neck pain and the right arm
23 pain. And so Mr. McGarr wants to under mind Dr. Mina's
24 opinion by saying, Well, you've only known her a few
25 months when you did the surgery. How do you know she

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1 didn't have this secret history?

2 Remember at the opening I was describing this as a
3 movie synopsis, I characterized Mr. McGarr's summary of
4 the case of, Oh, this is that thriller where that woman
5 kept her neck pain a secret from not only her doctor and
6 her specialist but also from her daughter and apparently
7 everybody else whom knew her going back. Because
8 everybody knew that she had arthritis in her neck. But
9 there's no indication that she had radiating pain in her
10 right arm until after the wreck in this case. And so
11 that's why, and you'll notice we played specialist
12 deposition -- or took the specialist deposition back in
13 June. We didn't take the family doctor until July. And I
14 decided to take the family doctor because she's had more
15 of a history. And she's also got more records from a
16 prior doctors.

17 And Mr. McGarr can play gotcha with Ms. Gaines while
18 she's on the stand. I got to tell you, as her lawyer who
19 signed those discovery responses, it's hard for me to sit
20 there and listen him attack her on the stand. Because
21 that's not her fault, that's my fault. You know, if
22 anybody's to blame for the omission of the urologist or
23 the eye doctor or for that matter the dentist or anybody
24 else she may have seen in this case in the last 15 years,
25 blame me. Didn't blame my client. Because I signed the

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1 discovery responses. I'll leave it to you in your own
2 good judgment to decide whether the Jervey Eye Group
3 record from 1996 is really that important for our purposes
4 here today. You can certainly put as much weight or as
5 little weight on that evidence in your own discretion as
6 you choose to do.

7 But when we switch over to Dr. Harding --

8 If you could advance the slide for me.

9 Dr. Harding -- and I'm telling you, she's a pretty
10 smart cookie. She's reviewed a lot of records. She knows
11 Barbara Gaines well. She knows Barbara Gaines' family.
12 And Dr. Harding is the kind of doctor we all want. She
13 knows the details. She knows the background. And, in
14 fact --

15 If we could advance the video now.

16 (WHEREUPON, excerpts from Dr. Harding's video
17 deposition were played.)

18 Now, Mr. McGarr talked to Dr. Harding specifically
19 about the prior appointments in late 2009. And this is a
20 very thorough family doctor. If Barbara Gaines had had
21 prior right side neck pain radiating into her right arm,
22 she would have discovered that. She would have also
23 discovered the diminished reflexes on right versus left.
24 And she didn't because it didn't exist before this wreck
25 happened. So, that leaves us with basically from

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1 January 8th, which was the date of the wreck, to the first
2 doctors appointment which was February 8th, 2010. If
3 Mr. McGarr is going to pin this C-6 radiculopathy on
4 something other than a car wreck caused by his client,n
5 he's got to show us some evidence that there's something
6 that happened between the wreck and this visit. And
7 there's no evidence of that. And you heard that from Ms.
8 Gaines and you heard that from Joy Gaines.

9 So, if we could advance to the next one.
10 Specifically, the diminished reflexes. Start the video,
11 please.

12 (WHEREUPON, excerpts from the video deposition
13 of Dr. Harding were played.)

14 So, if this had pre-existed the car wreck, she would
15 have found this by doing the same test in a prior
16 appointment. Or for that matter, the primary care
17 physician before her would have discovered that. There's
18 just no evidence that this C-6 radiculopathy and
19 diminished reflexes on the right pre-existed the car
20 wreck.

21 Please advance.

22 So, ultimately Dr. Harding's impression based on
23 this examination is...

24 (WHEREUPON, excerpts from the video deposition
25 of Dr. Harding were played.)

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1 Herniated nucleus pulposa. Dr. Harding explains it,
2 Dr. Mina also explains it.

3 Please start the video.

4 (WHEREUPON, excerpts from the video deposition
5 of Dr. Harding were played.)

6 And as you might expect from her examination, using
7 the reflexes neurological examine, the MRI confirmed
8 problems in the C-6 distribution.

9 Would you, please advance to it.

10 (WHEREUPON, excerpts from the video deposition
11 of Dr. Harding were played.)

12 So, then Dr. Harding gets the MRI record and refers
13 her to a neurosurgeon.

14 (WHEREUPON, excerpts from the video deposition
15 of Dr. Harding were played.)

16 So, within six weeks beings direct Dr. Harding
17 identified the problem, gets the MRI and sends Barbara
18 Gaines to the neurosurgeon. And Dr. Mina tells you later
19 on that, Yeah, I actually reviewed the images. You can
20 review them yourself. Here's the MRI images from
21 February 9, 2010. You got the side view and the cross
22 section, here's C-5 and that's what Dr. Mina was looking
23 at when she made the diagnosis and decided on the surgical
24 treatment plan.

25 Please advance.

1 So ultimately, Dr. Harding's conclusion is...

2 (WHEREUPON, excerpts from the video deposition
3 of Dr. Harding were played.)

4 When y'all get back in the jury room to deliberate
5 after the Judge has charged you on the law, ask amongst
6 yourselves, has anybody seen any evidence to contradict
7 this? Has the Plaintiff carried the burden of proof in
8 this case? I suggest that Dr. Harding and especially
9 combined with Dr. Mina, we have. Dr. Harding says, Based
10 on diagnostic studies, reflex studies, neurological
11 examine, in office examine and history of her patient,
12 this all adds up to C-6 distribution that began after this
13 wreck in this case.

14 Please advance the video.

15 As far as proximate cause, which again is the issue
16 you're here to decide, we have Dr. Harding's testimony
17 again.

18 (WHEREUPON, excerpts of Dr. Harding's deposition
19 were played.)

20 And I realize we're hitting the same points over and
21 over and over again, but this is the point of the trial is
22 to show that these injuries were caused by the wreck. And
23 it's my job to make sure that you know the information
24 that you need to decide that question.

25 If you'd, please, advance the video.

1 Then we get Dr. Mina. Here's her summary of
2 what Dr. Russell informed her about Barbara Gaines'
3 treatment.

4 (WHEREUPON, excerpts of Dr. Mina's deposition
5 were played.)

6 Now, Barbara Gaines told y'all while she was on the
7 stand that she specifically did not want to have surgery.
8 Okay, this was her worst case scenario. She did
9 everything she could to avoid surgery. And, in fact, her
10 doctors, their normal routine is to say, Okay, let's try
11 medication, let's try epidural steroid injections, let's
12 try physical therapy. Let try thing that don't involve
13 cutting on a patient. And only when all of those things
14 fail, do we have then undertake a surgical procedure.
15 Because Barbara Gaines told you she didn't want anybody
16 cutting on her neck. She didn't want to be in a wreck.
17 She certainly didn't want to have to go through this.

18 Please advance the video.

19 When she gets to Dr. Mina office, here's what
20 Dr. Mina found on the initial exam.

21 (WHEREUPON, excerpts from the video deposition
22 of Dr. Mina were played.)

23 Of course again, if Barbara Gaines or anyone
24 were attempting to fake or make up or claim an injury from
25 some other cause, I don't think you're going to get it

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1 past Dr. Harding. You're certainly not going to get it
2 past Dr. Mina. I mean, just based on the wealth of
3 information that both of these physicians have when they
4 went through their course of treatment and diagnosis.

5 Positive Spurling's Test. And Dr. Mina told
6 y'all about this as well.

7 (WHEREUPON, excerpts of Dr. Mina's deposition
8 were played.)

9 When Mark McGarr's telling you about this case, he
10 wants to attack the history. Because he's going to have a
11 real hard time arguing Dr. Mina on a neurosurgical matter.
12 What he says is Well, if they fib about the history, then
13 this whole treatment diagnostic thing is thrown off the
14 tracks. Well, this isn't based on patient history anymore
15 than the reflex test by Dr. Harding was. And, in face,
16 Dr. Mina did the same relex test she saw from the prior
17 slide. It's clear that Dr. Mina has gone through and made
18 objective tests to determine the nature of the injury,
19 which is consistent with the injury and diagnostic
20 studies. And what she found was...

21 (WHEREUPON, excerpts from Dr. Mina's deposition
22 were played.)

23 Do you think that if you're just fibbing you're going
24 to be able to line all this up? Would anybody else in
25 this courtroom, unless you're a medical professional

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1 yourself, know what the C-6 distribution was? I suggest
2 that you wouldn't. And, in fact, Dr. Mina knows what to
3 look for. And as we'll see in a few slides when she and
4 Mr. McGarr start arguing about neuroanatomy, she seem to
5 know what she talking about.

6 Dr. Mina, of course, renders an opinion on causation
7 as well as she's a board certified neurosurgeon. And not
8 only diagnosed the problem and performed the surgery. But
9 within two months she saw a complete resolution of the
10 symptoms. If there's any further validation that you
11 needed -- how about Ms. Gaines' waking up one morning and
12 saying, Joy, my arm and neck don't hurt for the first time
13 in a year and a half. I think that's got to be proof in
14 the pudding right there. But here's what Dr. Mina said
15 specifically about the causation issue in this case.

16 (WHEREUPON, excerpts of Dr. Mina's deposition
17 were played.)

18 Dr. Mina performs two of these surgeries a week. By
19 the time Barbara Gaines got there or got to Dr. Mina's
20 office in mid 2011, she had finished her residency, I
21 believe, 10 years earlier. That's 50 weeks at two a week.
22 That's 100 a year. She's done maybe a thousand of these
23 things in a decade or the time of ten years before Barbara
24 Gaines showed up. I suggest to you that Dr. Mina knows a
25 herniated nucleus pulposa, taking a patient history, she's

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1 got a pretty good idea, just based on her extensive
2 experience as a treating physician here in Greenville, as
3 to what causes this sort of injury. And when you have a
4 car wreck, like the one in this case, I think Dr. Mina is
5 right on when she says, Yeah, there's no evidence of
6 anything but the car wreck causing this problem.

7 Let's advance it, please.

8 Okay, let's talk about a little bit about the
9 Defense's case.

10 You can go ahead and advance it again.

11 Again, the reason I went over -- you can see the date
12 July 30th, this is actually the month after we did
13 Dr. Mina's. Because again, Dr. Mina -- Mark McGarr is in
14 there saying, Well you don't know about the history and
15 you don't know what happened. And you don't know what she
16 told so and so. Well, here's the lady who does know about
17 that history. And, in fact, I started this closing
18 argument with the clip that was Mark McGarr's last
19 question to Dr. Mina where he says, Well, you haven't
20 changed your opinion based on this long history I've just
21 given you have you?

22 And she says, No, because you haven't shown me
23 evidence of a prior C-6 distribution.

24 Well, here's the first question he asked her
25 when he cross-examined her in the video deposition.

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1 (WHEREUPON, excerpts from the video deposition
2 of Dr. Mina were played.)

3 And, in fact, neither did anyone else. In fact,
4 in this case the evidence, we all acknowledge she had
5 arthritis in her neck. Mark McGarr's theory of the case
6 suffers from this deficiency. He can't distinguish
7 between pre-existing arthritis, which everybody knows she
8 had from the x rays and the MRI. But he can't distinguish
9 that from C-6 radiculopathy. Which she didn't have until
10 after the wreck. These symptoms didn't cause the -- this
11 wreck didn't cause the arthritis, it was there. But it a
12 symptomatic, it wasn't hurting her. It wasn't causing
13 pain into her right arm. It was only after the wreck.
14 Dr. Mina explains how this happened. It bruises the nerve
15 and causes inflammation that runs down into the arm and
16 causes pain, numbness and tingling down the arm and into
17 the thumb and the forefinger.

18 So, here's going on -- I talked earlier about
19 the discussion between Mark McGarr and Dr. Mina, a board
20 certified neurosurgeon. Here's the difference in their
21 understanding of the neuroanatomy in this case.

22 (WHEREUPON, excerpts from the video deposition
23 of Dr. Mina were played.)

24 Now, Mr. McGarr may have a neurosurgeon in the
25 family, I don't know. That's what he told Dr. Mina in the

1 deposition. I think if I were looking at Mark McGarr's
2 theory of the neuroanatomy versus this board certified
3 neurosurgeon who's also done a fellowship in complex spine
4 reconstruction, that's who I'd think listen to. If you
5 were the patient, would you have faith in this physician
6 based on her experience, her training, the diagnostic
7 studies, the examination she did? I suggest you would be
8 well advised to listen to somebody with her credentials.

9 Advance it, please.

10 And then we come to the post-existing event that
11 Mr. McGarr talks about. The problem with this theory here
12 is his theory is, Well maybe she didn't have a prior
13 history of C-6 radiculopathy, maybe it's something that
14 happened after the wreck. And of course the mulching
15 situation, as such as it is, occurred in May or June.
16 Though it's well after the wreck, it's well after the
17 first visit with Dr. Harding. In fact, I believe it's
18 after the first visit with Dr. Russell at Piedmont
19 Neurosurgical. But the problem, too, is that the symptoms
20 don't line up with the underlining diagnosis.

21 (WHEREUPON, excerpts from the video deposition
22 of Dr. Mina were played.)

23 So, to the extent there's any problem at all, it
24 doesn't line up with the symptoms and it's out of place
25 and time. Because she's already got C-6 radiculopathy on

1 February 8th, 2010. And this is months later.

2 Let's advance it from there.

3 Then ultimately, again, when we talked to Dr. Harding
4 the question is, is she making this up? Is she blaming a
5 old injury on a car wreck in January? Is she blaming a
6 later injury back on a car wreck? Now, we can discuss why
7 she would want to do that, if at all. But the bottom line
8 is Dr. Harding's her family doctor. And she hasn't been
9 the family doctor for too awfully long when all this
10 happened. However, she's been her family doctor ever
11 since. And she's continued to see Ms. Gaines on a regular
12 basis. And she told you how often she sees her. She sees
13 her several times a year.

14 And here's what Dr. Harding said about Ms. Gaines'
15 reputation -- not reputation, actually her -- her
16 reporting her symptoms and problems that she's having from
17 medical treatment.

18 (WHEREUPON, excerpts from the video deposition
19 of Dr. Harding were played.)

20 And before we move on to damages, one more thing
21 about the Defense's case, the only other testimony you've
22 heard about the potential causes of the injuries in this
23 case came from Ms. Campbell.

24 Ms. Campbell said, I was doing 35 or 40 miles an hour
25 and I hit Barbara Gaines. Barbara Gaines was sitting

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1 still.

2 But to Ms. Campbell that impact wasn't enough to
3 cause an injury. Of course, Ms. Campbell said, I don't
4 know anything about her medical condition. I don't know
5 anything about how she was doing before I hit her. I
6 don't really know much about how she's been doing since.
7 But I just don't think that I hit her hard enough to cause
8 an injury.

9 Mr. McGarr is going to walk over in a little while
10 and show you these pictures and say, Oh, this clearly
11 wasn't enough impact to cause an injury. I mean, you got
12 a broken car bumper.

13 Look at Barbara Gaines sitting here. Barbara Gaines
14 was 69 years old when she got rear ended. Is there
15 anybody in this courtroom, you might ask yourself, that
16 really thinks that a broken car bumper and this lady
17 sitting in that car couldn't have sustained a injury in
18 this case? Dr. Mina said this is a classic flexion
19 extension injury. At least once and maybe it went back
20 several times. That trauma is what caused this C-6
21 radiculopathy.

22 Also, I found it interesting too, with Ms. Campbell
23 and Ms. Gaines, Mark McGarr asked Ms. Gaines, On a zero to
24 10 scale, with 10 being a collision with a freight train,
25 how would you rate this collision? Barbara Gaines'

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1 testimony, I believe in her deposition and here in trial
2 was, I think it was about a seven. On the other hand I
3 asked the same question of Ms. Campbell.

4 Ms. Campbell, how would you rate the impact?

5 And she goes, Oh, it's a six. Like a six.

6 And I didn't event put in terms of zero to 10 but she
7 sat through Barbara Gaines' deposition. So, just like
8 when Mr. McGarr asked about 10 being a freight train, you
9 say this is a six. You know, I don't know, maybe she's
10 had some soft collisions with freight trains but the
11 bottom lines is these ladies rate the impact at nearly the
12 same amount. Six out of 10 or seven out of 10. I suggest
13 that their impressions of the impact aren't that
14 different. You, as the jury, can think to yourself, now
15 why night Ms. Campbell want to minimize the impact in this
16 case? Well, let's see, she's the Defendant who we're
17 asking you to hold her responsible for the medical bills
18 and the treatment in this case. So, if that's what you in
19 the exercise of your own good judgment and common sense
20 decide, I think you would probably be on pretty solid
21 ground. But again, that's one of the issues that y'all
22 need to think about while you're in the jury room.

23 But you'll see a bunch of these in just a little bit
24 because this is the only evidence that the Defense has
25 really introduced. Look, it's not that beat up, the car's

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1 not crushed, therefore, who in the world could have been
2 injured in this wreck? Barbara Gaines was, that's who.

3 If we could advance that.

4 You got the medical totals here. And, in fact, with
5 the two -- mark McGarr and I agree that these are the
6 medical charges, the providers and the dates. We did not
7 put all the individual bills in simply because there's a
8 lot of other information that's extraneous, dates of
9 birth, social. By the time you blacked it all out it
10 winds up being mostly magic marker. So, we have agreed
11 that these are the dates of service. Y'all have this in
12 the jury room. You can see the providers, the dates of
13 service and announced [verbatim].

14 There is one thing I would point out. You've heard
15 testimony both from Dr. Mina and from Barbara Gaines,
16 about four epidural steroid injections. There are three
17 listed here. And I will just tell you, it's my
18 understanding there were four based on the evidence in the
19 case. I looked high and I looked low and I can't find a
20 bill for one of them. Actually, we've got August 26,
21 2010, December 2010 and February 2011. I'm missing one of
22 those bills. These shots run about \$2,000-2,100. One of
23 them was 2630. So that's what that charge would have been
24 if we had a bill for it. There's no doubt in my mind that
25 it occurred, I just don't have a bill for it. So, if

24

1 y'all get in the deliberation room and somebody says,
2 Well, I thought there four, I only see three here, that's
3 why. Because I just couldn't find a bill for it.

4 But ultimately Barbara Gaines has sustained medical
5 expenses in the amount of \$77,966.56. That's not really
6 in debate anymore and whose fault this wreck was. The
7 question is, was this necessitated by a 35 mile an hour
8 collision between Ms. Campbell's care and the back of
9 Ms. Gaines' car?

10 So, if we could advance the...

11 Now, here -- the other element of damage -- in fact,
12 what's usual about this case and over the years, if you do
13 this type of trial work, you see people with neck injuries
14 and you see people with anterior cervical discectomy and
15 fusion surgeries. Dr. Mina does, as I say, at least two a
16 week. So, I mean, this isn't that uncommon a problem.
17 What's unusual about this situation is Barbara Gaines had
18 a complete resolution of her symptoms. And we're not
19 claiming any permit injury. Although, you can see she's
20 still got four screws and a plate in her neck. Which I
21 don't think anybody that doesn't already have them really
22 wants those in there just so they can set off the metal
23 detectors downstairs.

24 But the bottom line is she's had a great result.
25 Thank goodness for Dr. Mina. And, in fact, that morning

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1 when she woke up and say, Joy, I am feeling -- my arm's
2 not hurting, my neck's not hurting. It's one of those
3 moments of salvation. Quite frankly, it's all too rare in
4 human existence and nearly non-existent in the course of
5 trial practice. But in this case we're not looking for
6 permit injury, she's just happy she's better. But she's
7 still got \$77,966.00 worth of medical bills to contend
8 with. So, that's the evidence in this case.

9 Now, as far as a the physical pain and suffering that
10 she suffered in this case, Barbara Gaines told you what it
11 was like. And, in fact, Dr. Mina and Dr. Harding both
12 talked about at worst it was a nine out of ten level of
13 pain. And at other times it might have been less, it came
14 and went. But we're talking about daily pain. So, when
15 you're in the jury room and you're thinking, Well, what is
16 pain and suffering worth? And I can already tell you, I
17 mean, Judge Miller's instructions going to be, there's no
18 market price for pain and suffering, it's not bought and
19 sold. And there's no fixed amount that should be charged
20 for it. You, in the exercise of your common sense, need
21 to decide what it's worth in this case, for this lady,
22 under those circumstances. This is individualized justice
23 because this is the case that's been presented to you as
24 the jury.

25 To further guide you on that issue, we have

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1 Dr. Harding describing the pain and emotional distress
2 which was evidenced by an increased heart rate. So --

3 If we could advance this one.

4 (WHEREUPON, excerpts from the video deposition
5 of Dr. Harding was played.)

6 We've got the moment that she realizes the pain's
7 gone. And, in fact, that's one of those moments that
8 somebody in her condition was looking for and living for.
9 This was the low point when she thought there wasn't much
10 else she can do. And, in fact, remember Dr. Harding said
11 she came in and she was really down, she didn't know that
12 there were other options available to her before she was
13 referred to Dr. Mina. In this case, she endured a lot of
14 pain over a long period of time.

15 If we could advance the slide.

16 When you bring back a verdict, I suggest that the
17 starting point is the medical bills. Because with these
18 dates of treatment, I don't think there's going to be any
19 serious doubt in anybody's mind that these medical charges
20 are related to the wreck on January 2010. In addition, to
21 that, Barbara Gaines and I are asking you to make an award
22 for physical pain and suffering and for emotional
23 distress. Now, one of the ways you can calculate that is,
24 as I said, is looking at how long she had to deal with
25 that pain. She's happy to tell you now that she no longer

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1 suffers from those problems.

2 And, in fact, it was at some point after the June 7,
3 2011 surgery that she sat up, was lying in bed and said, I
4 don't hurt anymore. But that was after June 7, 2011. I
5 calculate that 538 days passed between the day of the
6 wreck, when Joy told you they went to the emergency room
7 and she was kind of out of it, was hurting all over and
8 then experienced the right arm pain radiating in her neck.
9 So, that's 538 days to the surgery date. After the
10 surgery date she told you about having this hole cut in
11 her neck and retractors used to pull the skin and the
12 tissue back so that Dr. Mina could get to her spine.
13 Certainly they used anesthesia and thank goodness for it,
14 but any doubts in anybody's mind how bad this had to hurt?
15 Think about waking up from the surgery.

16 Now again, they had her on pain medication but that
17 didn't completely eliminate the pain. And over a period
18 of time after the surgery, she testified, Well they gave
19 me this spray that I could put in there that would reduce
20 the pain. And she found out through experience that just
21 eating ice pops and that sort of thing would numb it up
22 some. So that she could eat a soft diet. But that was
23 her life for a period of time after this surgery. That's
24 the sort of thing that pain and suffering you should award
25 damages for. So, by the time she's released from

p.5

1 Dr. Mina's office on the last day of August of 2011, 621
2 days had passed from the wreck since the day she was
3 released.

4 In calculating pain and suffering and emotional
5 distress, one way to calculate it and certainly there's no
6 exhaustive list but I would suggest one way to do it is
7 look at the number of days. 621 days total treatment. Or
8 538 days from the wreck to surgery. And come up with an
9 amount per day or per diem amount. By doing that, if you
10 come back with a figure of say \$50.00, \$50.00 times 500, a
11 rough calculation would be \$25,000.00. If it were \$100.00
12 a day times 500 days, it would be \$50,000.00. So, get out
13 a pencil, ask for a calculator and come up with a figure
14 per day and multiply that times the number of days that
15 she had to contend with right side neck pain with a nine
16 out of 10 level radiating in the right arm. And that's at
17 least one way that you, in your discretion, could come up
18 with an award of damages in this case.

19 Please advance it from there.

20 Ladies and gentlemen, that is my closing argument.
21 You're going to have these figures in the jury room with
22 you. Which are the medical figures. It's also Dr. Mina's
23 resume. You're going to have this medical log so you can
24 look more closely at it. You can see the hardware as it
25 is today, you can see course of the treatment starting

JW

1 with MRI's right after the wreck. And you can see up
2 close what Dr. Mina showed you in her testimony yesterday.
3 But ultimately, I want you to go back in the jury room
4 after you've been instructed on the law and deliberate
5 carefully. Discuss it amongst yourselves, use your common
6 sense. But based on the evidence that's been put before
7 you in this trial, I would suggest that the only logical
8 result would be a verdict for Barbara Gaines in the amount
9 well in excess of the medical bills in this case.

10 I thank you in advance for your hard work. Depending
11 on what Mr. McGarr may say to you, I also have the right
12 to respond to that. So, I may be back here in just a
13 moment and have a brief word with you before you
14 deliberate. Thank you.

15 THE COURT: All right, Mr. McGarr.

16 CLOSING STATEMENT

17 MR. MCGARR: May it please the Court.

18 I wouldn't bring this monstrosity up to you but
19 I really do not see well from a distance and I have to be
20 able to read my notes because I'm not smart enough to keep
21 up with it. But let me start with this. I request jury
22 trials in Greenville County because when I do, I know that
23 my Greenville County jurors are going to be fair and
24 decent to me. And be honest with themselves with regard
25 to what a case is about. We look to you because you will

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1 be fair to us and provide us justice. The other reason
2 that I ask for jury trials is because you guys
3 collectively are extraordinary intelligent. So much so
4 that it becomes a bit disingenuous to give you bits and
5 pieces of evidence and leave out other evidence that you
6 guys have clearly heard. And think that you don't
7 remember the rest of the story.

8 For example, when I was here Monday, did I tell
9 you guys that this is not an issue of whether or not
10 Ms. Gaines had a problem with her neck that required
11 surgery? Is that what I said? I don't know where this
12 argument comes up that she's faking her problems. She
13 didn't. She had a problem with her neck at the C-5-6
14 area -- C-4-5 area that caused a problem to go down her
15 arm. There's no doubt. Nobody -- I told you nobody was
16 going to dispute that. That was on Monday, that was just
17 three days ago. Did I not tell you that? And I want to
18 tell you that again, there's no question but that she had
19 a problem in that area. And there's no question but that
20 she had to have surgery to get it fixed. Said it on
21 Monday and I it again today. At no time have I said to a
22 doctor or to Ms. Gaines or to any other witness, she's
23 faking these problems. She's not. And you're bright
24 enough and have the brains enough to know that that's what
25 I said on Monday.

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1 What did I tell you on Monday? The issue is not
2 that she had the problems, the issue is what caused the
3 problems. And what caused the problems, a bone spur that
4 had to be drilled out and then other holes opened up wider
5 so that this nerve would quite being pinched. That's what
6 I told you. That's what the doctors have told you.
7 That's what she was showing when she did this. I'll come
8 back to it, there's no disc herniation. I'm going to read
9 the doctors deposition with regard to that. It was bone
10 spur. And you guys are not so foolish or dumb and it's
11 disingenuous to pretend like you are, that you didn't hear
12 that the doctor says, She's got a bone spur that is
13 squishing on that nerve that's causing a problem and makes
14 it go down her arm. I went in, had to take out the disc
15 to get to the bone spur that I then had to remove. Then I
16 opened some more holes so that she would have more space.

17 What did I also tell you on Monday? That bone
18 spur, according to all the evidence, and the bony
19 arthritic growths that were there, were there years and
20 years prior to this automobile accident. Did I not?
21 She's not faking the fact that that bone spur is pinching
22 and hurting that nerve. And she's not faking that it
23 causes a problem that goes down this side of your arm.
24 It's absolutely medically, perfectly fixed. That's not,
25 and I told you that on Monday, the issue in this case.

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1 The issue in this case is what caused that surgery? What
2 was the need for it?

3 And yes, let's begin, maybe I won't. With this.
4 Joyce and Ms. Gaines, if she's minimizing this automobile
5 accident, why is she saying six and the other saying
6 seven? They're describing essentially the same automobile
7 accident. However, it is a little disingenuous to tell
8 you that this automobile accident happened at 35 to
9 40 miles an hour. That's not what Joy Campbell said. You
10 heard her say was going 30 to going 35 -- 35 to 40 miles
11 an hour before the accident took place. What else did she
12 tell you? I hit my breaks before I came into contact with
13 her. Is that an automobile accident where someone has hit
14 a car at 35 or 40 miles an hour? You've seen the crashes
15 on television where they're going 35 miles an hour, cars
16 are ripped apart.

17 Is that a 35 or 45 miles an hour impact? Or is
18 it what I told you on Monday, that basically we started
19 off with a fender bender. Joy, Ms. Campbell, may have
20 been going 35, 40 miles an hour before the accident took
21 place. But when she hit her breaks, of course, she didn't
22 know how fast she was going then. If you're driving down
23 the road and you're about to hit somebody, are you really
24 going to look down at your speedometer to see how fast
25 you're going before you hit them? No, you're going to hit

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1 your breaks as hard as you can and try to get away. That
2 is not a 35 miles an hour impact and you know it as well
3 as I do.

4 Now, let's do move to some areas that are a bit
5 more important. Do realize that, according to the story
6 you've been told, after being hit at 35 to 45, 40 miles an
7 hour, both of these vehicles drive away. In fact, one
8 drivers away and goes to its home. The other drives away,
9 picks up a niece and goes takes the niece from where she
10 picked her up to her mother's house, then drives the car
11 home. You really think a massive impact is going to let
12 you drive a car -- the car according to Ms. Campbell. And
13 wouldn't you expect that they would? Given that that's
14 what they look like.

15 Here is the issue that I most dislike about the
16 practice of law. As His Honor has told you and as you
17 are, you guys are what they call the judges of the facts.
18 You're the judges of the believability and credibility of
19 the various witnesses who testified. Now, I can sit back
20 and say nothing and elicit no testimony. But if I do
21 that, I've committed malpractice and I haven't represented
22 Joyce. But more important, I've done you a massive
23 disservice. Because how can you judge the credibility and
24 believability of the witnesses if I don't bring the entire
25 story to you? What did Ms. Gaines tell you about this

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1 automobile accident? Said it knocked her out. How does
2 that work or why does it matter? Because Dr. Mina says,
3 Yep, it knocks you out, you got a bad crash.

4 Here's the problem. If you're knocked out, how
5 do you remember the boom? How did you remember telling
6 the police officer you're not sure if you're okay? How do
7 you remember driving away? How do you remember going to
8 the ER? But more important, when you get to the emergency
9 room, every doctor whose testified says that the emergency
10 room doctor says this lady specifically told him she was
11 not knocked out. But if you're knocked out, then you guys
12 hear just that, you're going, I bet you she did break her
13 neck or hurt her neck real bad. Do you really believe
14 that an emergency room physician, in the world we live in,
15 when you walk in there and say, I got a headache, I was in
16 an automobile accident. You think they're not going to
17 question you extensively like they did? You feeling
18 weird? Altered mental state? Were you ever -- were you
19 ever knocked out? They ask those questions and the answer
20 was, no. But it gives Dr. Mina a mechanism to create the
21 injury.

22 You heard that from Ms. Gaines' daughter, that
23 she hurt all over as a result of this accident. And that
24 she was hurting all over when she got to the emergency
25 room. Do you really believe that emergency room

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1 physicians are so incompetent that they can't list what
2 your problems are? Isn't that their job is to find out
3 okay, what's wrong with you and let's see what we need to
4 do with it? And what did the emergency room physicians,
5 and you heard it from two folks, what did they decide was
6 going on? They said, and I misspoke in opening when I
7 forgot about the nausea. What did they say the complaints
8 were? Head pain, neck pain and nausea. Not pain all
9 over. In fact, she denied low back pain at the hospital.

10 More important and probably the most important
11 is she never once mentioned that my arm is giving me
12 trouble. You've heard the record read time and time again
13 with the doctors and with Ms. Gaines. If they said
14 anything different, don't you believe that someone would
15 have introduced those documents to you and said, Hey,
16 McGarr's reading of it's wrong. Here is the crux. She
17 had an x ray done at a hospital, which revealed the
18 degenerative -- severe degenerative disease. But nothing
19 acute. Is the term they used. But you heard them say,
20 the doctor say, the family physician in particular say,
21 nothing acute means nothing from this automobile accident.
22 What we're seeing on x rays is something that took years
23 and year and years and years to be created. But nothing
24 happened as a result of this automobile accident when
25 you're looking at those x rays. Got bad problems but the

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1 accident didn't create it. If the record -- if that
2 radiology record didn't say it, the doctors would have
3 told me, Mark you're wrong. And that record will be
4 before you now.

5 Next thing, you've heard that after the accident
6 or at least the day after the accident, Ms. Gains could
7 essentially do nothing. Like cleaning house, like doing
8 this, that and the other. She was essentially incapable
9 of doing anything. And was in horrific pain. Folks, I
10 don't know how many of you have been in pain, much less
11 horrific pain, but let's just assume that it's very
12 significant pain. Are you going to go to your doctor's
13 office and have blood work done while you can't do
14 anything in the house? You're basically totally
15 debilitated and not say, Hey, while I'm here, please help
16 me. And you heard her family physician say, Yeah, we can
17 easily work you in.

18 More importantly, if the problem is so severe
19 that you can't do anything, do you think that a doctor,
20 who apparently likes Ms. Gaines, isn't going to say,
21 Honey, get on in here, let's take a look and see what's
22 going on, you can't do anything, let's see what's
23 happening. Yet Ms. Gaines did not avail herself of that
24 opportunity. Why?

25 What happens is one month after this automobile

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1 accident, after she had already been to Foothills Family
2 Medicine, Ms. Gaines shows up. And if you remember, she
3 had three complaints and the last was my arm. One month
4 later. Let me repeat again, there's no question at some
5 point that bony spur was going to cause that nerve to
6 start hurting. And there's no question that it's going to
7 hurt in this area. Not because I have a neurosurgeon in
8 the family, because I do this for a living. And that's
9 what I told you on Monday.

10 But we went from a neck problem, no problem with
11 the arm whatsoever and as you heard no vocal deficits by
12 the emergency room physicians. And do you really think
13 that they're that atrocious? That they wouldn't be
14 checking those things if you're coming in complaining of
15 an automobile accident. If so, why do we have emergency
16 rooms? And there is -- and I'm going to tell you one.
17 There are mistakes that you make because you're dealing
18 with massive amounts of documents. And guess what? Mark
19 McGarr in this trial has made two. One was to tell you or
20 forgot that Ms. Gaines did go to the hospital with nausea.
21 That was one of the complaints. Because I told you in
22 opening that it was -- I told you -- I know I told you in
23 opening that it was -- that she went there for headaches
24 and neck pain and that was it. I misspoke, I was dead
25 wrong.

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1 You know what else I was deal wrong on? I had
2 seen the top portion of the MRI that was done of
3 Ms. Gaines neck and said, Here's what they're saying.
4 She's got problems but it says nothing about an automobile
5 accident. And yet the radiology says, Hey, this is a
6 problem that needs neurosurgical intervention. If you
7 read further down into it, actually it did say she had
8 been in an automobile accident. So, I was dead wrong.
9 And every time I asked her family doctor, and I would say,
10 he's -- doesn't even know she's been in an automobile
11 accident, that was an incorrect question. Because as it
12 turns out, that radiologist did know she was in an
13 accident. Those mistakes happen. And they happened to me
14 twice in one case. And I'm readily capable of saying that
15 they did and that I did it. There's a distinction between
16 making a mistake and not telling you an accurate story.

17 And let me bring this to your attention. You've
18 been told in opening arguments that her family physician
19 had all of her prior records or a large percentage of her
20 prior records. You were told in closing that she had
21 Ms. Gaines' old records and had been able to take a look
22 at them. Told it in opening and told it in closing. As
23 if you guys don't have enough brains and I'm going to do
24 it this way.

25 Page 27 of Dr. Harding's deposition, line 15.

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1 Are you aware that she had chronic, long
2 standing neck problems?

3 The answer, No, I did not.

4 She didn't tell you that?

5 Not that I'm aware of.

6 What were you -- what was your understanding of
7 the back issue prior to this accident? Or low back issue?

8 I'll have to review if you'll give me a second.

9 Yes, ma'am.

10 Answer, I don't have any documentation of
11 chronic neck or back issues.

12 So, then it goes -- so would it be fair to say
13 that you're testifying here without any knowledge of her
14 prior chronic conditions with regard to neck or low back?

15 The answer is, Correct.

16 But it has been presented to you as if she had
17 all of these records with regard to Ms. Gaines and still
18 came up with her conclusions. When unequivocally
19 Dr. Harding said, I don't have any evidence. Said it in
20 opening and said it in closing. Is that a mistake or is
21 that assuming you guys don't have enough intelligence to
22 remember what was said?

23 You heard from Ms. Gaines that she had been
24 going to Dr. Harding for years. Folks, as it turns out,
25 she filled out paper work what five and a half months --

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1 five months and a week before this accident but didn't see
2 she for about a month after that. Her history with
3 Dr. Harding is A, there are no prior records and B, she'd
4 only been to see her for about four months before this
5 accident took place. Dr. Mina does not know what this
6 lady's history is and she's not a long standing patient of
7 Dr. Mina's. She's a short standing patient of Dr. Mina's.
8 But that is not what was represented to you.

9 Here is the essence of this case. You heard
10 from Dr. Mina -- I'm sorry, Dr. Harding, that when people
11 are in bad pain, that they start breathing more. And
12 they'll start -- and then they'll start having heartbeat a
13 little bit faster. Not something you control, it's just a
14 response to pain. And yet when she was at the emergency
15 room, being Ms. Gaines, on the date of this accident, when
16 all this horrific pain that caused this problem existed,
17 what happened? She actually had a heart rate that was
18 lower that had been tested the last time she had been to
19 her doctor's office. And her breathing rate was
20 identical. Nobody's told you that your heart slows down
21 when you're in pain, they say it speeds up.

22 How much pain could she have been in if those
23 involuntarily systems that nobody controls, hadn't kicked
24 in? Unequivocally, months and months after this accident,
25 she was in such pain that actually her heart rate had

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1 increased dramatically. But not after this accident when
2 she was at the emergency room. More important, her neck
3 was supple. There was no stiffness and there was not the
4 least bit of spasm in Ms. Gaines' neck when she was at the
5 emergency room. And unless you think that they're
6 completely incompetent when they do exams, that's what the
7 record says. In fact, when you go to the emergency room,
8 there was no evidence whatsoever, and this comes from
9 Dr. Harding herself, that there was a pinched nerve in
10 Ms. Gaines' neck. None. She didn't complain of arm
11 problem, they tested her neurologically and found her to
12 be absolutely normal. So, heart rate's normal, breathing
13 rate's normal, neck is supple, there is no spasm and there
14 is no neurological or pinched nerve evidence at the
15 hospital.

16 But what becomes even more important is this.
17 She unequivocally says, Oh, let me go back one moment.
18 When you've been told, again and again, that one of the
19 reasons or the problem exist was a disk herniation. A
20 disk herniation, meaning that this soft thing between
21 these two bones blew out. Allegedly as a result of this
22 automobile accident. Her exact quote, Herniated nucleus
23 pulposa. Or herniated disk.

24 Going to do it again. This is Dr. Harding, this
25 is on Page 61, Line 5. My question, I'll do it again.

25^a

1 They're not -- the MRI is not showing a
2 herniated disk problem, it's showing --

3 The answer is, Yes --

4 That the bones are pressing directly on this
5 lady's nerve?

6 Answer, correct.

7 There is not a herniated disk which could have
8 essentially come as a result of this automobile accident.
9 It's bones squishing on that nerve. And every doctor has
10 said that those bones were bad long before this automobile
11 accident. Mistakes are one thing when you heard the
12 evidence yourself. Are you guys just not bright enough to
13 remember?

14 There is a reason for me asking you to tell me
15 all of your medical providers from 15 -- from the date of
16 the accident until going back 15 years. The reason is,
17 how do I let you know what someone's medical history is if
18 I don't know what it is? Well folks, guess what? We got
19 a very partial list of Ms. Gaines' medical providers. I
20 had to search independently to find the other ones. And
21 to this day I cannot tell you that I have all those
22 records. It's impossible on to find them all if somebody
23 is not going to give them to you. But what did we
24 discover when we did get the records from the people we
25 hadn't been told about? Chronic neck problems and chronic

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1 lower back problems. Does that worry you a little bit?

2 More important, when you're in a deposition and
3 you're under oath and I ask you a question that's
4 extremely simple, Have you ever had a problem with your
5 neck significant enough to send you to a medical provider.
6 It's easy to say, Yeah. Let me tell you. I had one when
7 I was on the job. I had one when I was doing this. Had
8 one when I fell. Was having problems even up to 2009 with
9 my neck. You just say it. I'm not saying that you're not
10 going to -- that you're going to remember every time
11 you've been to a doctor with a neck problem.

12 Particularly, if you had it as long as Ms. Gaines has had
13 it. But if you guys were cartwheeling against your will
14 at work and you hurt yourself so bad that you're out of
15 work, would you not remember that?

16 Fifteen year-old kid was spotting weights for
17 his brother. Popped my back. I may be old enough where I
18 can't see, I can still tell you I popped my back. I
19 wasn't out of work. I didn't even go to the doctor. And
20 it healed up right. But she told us unequivocally, no.
21 Told us in the deposition. Every been treated for low
22 back problems before? She tells us, no. And yet tells
23 you, was it Monday, that, in fact, she'd been treated for
24 chronic problems with her low back for years. After I
25 have the records.

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1 Told you that she was supervising the mulching.
2 Why is the mulching important? Yes, she started having
3 some problems with that arm a month after this accident.
4 There's no question about it. But those problems had
5 gotten so good and so much better, that she -- and you
6 heard the record time and time again, and if it was wrong
7 it would be before you right now, that Mark McGarr
8 misrepresented what that record said, you'd have it blown
9 up.

10 I was doing better until I was mulching. And
11 now I'm having pain again.

12 Well folks, yes, she may have been having
13 problems but they were getting better. And then the
14 mulching happens and it's after the mulching and after she
15 hurts herself while she's working in her home, that she
16 finally had surgery. Could that not be the straw that
17 broke the camels back? And isn't there a huge difference
18 between supervising and actually mulching? No offense, I
19 don't know how many of you mulch, but that's a tough job.
20 You got to be feeling pretty don't good to get out there
21 and -- (Defense attorney makes noise.) The evidence of
22 the mulching along said we may have had a problem but it
23 got dramatically better. And we weren't supervising.

24 You've heard that I'm not really very good at
25 describing neurological conditions. Well -- and you got

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1 this clip of a brief section of Dr. Mina's deposition,
2 that would be the neurosurgeon, that after the mulching
3 issue, well that if your arm is hurting, I said, If
4 someone's arm is hurting, it would make it a little more
5 difficult to lift. Just like if my ankle was broken, it's
6 going to make it a little more difficult to walk.
7 Nothing wrong with my foot, it's the ankle that's causing
8 the problem walking. Well, if you got a problem in your
9 neck then why would we have to mince words? She had
10 already shown you that the C-6 distribution goes this
11 direction and then into your thumbs and sometimes here.
12 So, I'm saying it would give you pain down in your arm and
13 that would make it more problematic to deal with that arm.
14 I don't know how many pages we went through before she
15 ever finally conceded, yes, again -- because she's
16 going -- actually I'm saying arm. If it's -- is that not
17 your entire arm? But I had to get, wait a second, okay,
18 the C-6 distribution, which is still the entire arm. But
19 you only heard a piece of that. Then, but you saw it and
20 you heard it in the deposition just yesterday.

21 There is no herniated disk. Dr. Mina herself
22 said, We pulled this out -- where is she? We pulled this
23 out to get back here to get to that bone spur. And then
24 we opened up the little holes in the side, which are a
25 little harder to see here, so that we can give some space

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1 face for that disk to work. And then, we have to stick
2 this -- put this thing in place because we've taken the
3 disk out.

4 And no one has come in here to tell you that
5 that bone growth came about as a result of this automobile
6 accident. The radiologist said severe problems the date
7 of the accident but nothing from the accident. The MRI
8 doesn't say herniated disk, it says, Bones. And what has
9 everyone said? Degeneration gets worse, arthritis gets
10 worse over time. And do you need a doctor to tell you
11 that?

12 I want to remind you again, Dr. Harding said if
13 you got a problem as severe as this is and you end up in
14 this automobile accident and the automobile accident
15 creates the issue, then guess what, you should be
16 suffering from that problem at the emergency room. Said,
17 Yes, that's right, it is extremely unusual. Because this
18 kind of condition, the problem is severe as it is, it
19 should have popped up right then and there. And it
20 didn't. It popped up a month later. And that leads me to
21 this. The law says, essentially -- and by the way, if I'm
22 a little wrong on this, you actually have to follow His
23 Honor's instructions because I'm not a judge, just a
24 lawyer. But it's called an aggravation of a pre-existing
25 condition. If you have a problem that it was there before

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1 this automobile accident and the automobile accident makes
2 that problem worse, then the automobile accident makes
3 that problem worse. You don't pay for the problem but
4 years Joyce would be responsible for paying for that
5 aggravation. That's essentially the law, not quite,
6 you'll hear better from the Judge unequivocally. But
7 here's also the law of pre-existing conditions. If the
8 problem is a problem and it continues to naturally
9 progress, meaning arthritis but its very nature gets
10 worse, and it progresses to a point that a month after the
11 automobile accident you're starting to have problems in
12 your shoulder, that is not something that we can pay for.
13 Because that has nothing to do with the accident, it's a
14 natural progression of events. And if this accident had
15 caused that problem, why didn't we hear about it at the
16 emergency room? Her family physician who apparently likes
17 her very much, says it should have. But it cropped up a
18 month after.

19 I submit that it's because we've had years and
20 years of problems with that neck. Years and years of
21 degenerative problems with that neck. That ultimately
22 happened to get worse a month after this accident. To the
23 point where you go to the doctor and you list it as your
24 fourth complaint. And then, guess what? It continues to
25 get worse over time. And then you do things like mulch

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1 after it feels a little bit better and gets even worse.
2 And then you finally have surgery. Well, that's the
3 natural progression of someone who has some age on them.
4 And someone who has severe degenerative problems in that
5 neck. That had nothing to do with this automobile
6 accident.

7 Have I left things out? My job is to present
8 you with the evidence. Your job is, as I said in opening,
9 is to come back with a verdict that is fair for
10 Ms. Gaines. Because as you heard from Joyce, Joyce caused
11 this accident. And you have to come back with a verdict
12 for the emergency room bill. Just have to. She hit her.
13 She has every right to be checked out. But when you're
14 checked out and there's no evidence of pinching and a
15 month later you start having evidence of pinching, is that
16 fair to say, Defense team, pay for those problems that
17 have been coming along for years and were going to happen
18 because you're getting older anyway. Thank you.

19 THE COURT: Mr. Peace.

20 CLOSING STATEMENT

21 MR. PEACE: Very briefly, Your Honor.

22 Ladies and gentlemen, I know you've been living
23 with this case for a few days and you're ready to get on
24 with your job. I won't take a lot of time but I got to
25 tell you, it's hard to sit here and listen to somebody

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1 accuse me of being disingenuous when he's calling Barbara
2 Gaines a liar. You listened to her, you listened to her
3 daughter and you listened to her doctors. And I leave it
4 to you to decide who's telling the truth as far as her
5 injuries.

6 Mr. McGarr would suggest and in face he
7 specifically said, No one says that she did not have an
8 injury or did not have a neck problem that required
9 surgery. So, in his theory of the world in this case,
10 it's just a sheer coincidence that she's in a wreck in
11 January where she gets rear ended by a car where this lady
12 admits at doing 35 miles an hour and she winds up with a
13 C-6 radiculopathy. And two board certified physicians
14 say, Yeah, that wreck caused it. He comes in here and
15 accuses us of leaving out records and lying to you, it's
16 hard to sit there and take that without responding and
17 that's why I'm up here.

18 And again, to say there's no evidence of a
19 pinched nerve and there's no evidence of a herniated disk,
20 if you listened to Dr. Harding who said, I was concerned
21 about HNP. I got an MRI, went to a neurosurgeon. She
22 looked at it with her own two eye and see hundreds if not
23 thousands of these things and said herniated disk. This
24 thing doesn't respond to conservative treatment, we're
25 going to have to do surgery. She knows. And he comes in

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1 here and tells y'all that we're lying to you, I find that
2 objectionable.

3 And then, he says, Oh well, we all know from
4 watching TV that 35 miles an hour would have crushed these
5 cars. Well, Officer Shivers handles two wrecks a week.
6 He testified on the stand, in uniform, before y'all and
7 said -- I said, Did Ms. Campbell tell you 35?

8 He said, No, I just looked at the damage. And
9 he said, That looks like about a 35 miles an hour
10 collision.

11 He does this for a living. Not only was he the
12 responding officer, they've since made him a supervisor.
13 You don't think he knows what he's doing? He's still
14 doing it today. He came in here and swore on that Bible
15 over there to tell you the truth. And he thought this was
16 a 35 mile an hour collision. So did she. She told you
17 she was doing 35, 40 miles an hour until Mark McGarr puts
18 her on the stand and decides, oh, that was just a bad
19 guess. Oh now, it's a 35 miles an hour zone, it couldn't
20 have been more than the speed limit.

21 Well, ladies and gentlemen, y'all listened to
22 the testimony. And the thing is he says, I'm not saying
23 she's lying about needing the surgery. Well, she's got to
24 be lying if she says it was caused by the wreck and it
25 wasn't really. Are y'all really going to say that this is

1 just the biggest coincidence in the world that she's in a
2 wreck and what do you know, it was about time that
3 pre-existing arthritis finally blossomed into a C- 6
4 radiculopathy? Come on. Use your common sense. That's
5 not what happened here. Y'all know it's not what happened
6 here.

7 So finally, he talks about worsening and
8 aggravation, she had arthritis. Nobody expects you to pay
9 for that, they didn't cause that. But you know what she
10 didn't have before Joyce Campbell and into Barbara Gaines?
11 She didn't have chronic severe neck pain. And when he
12 asked Dr. Harding, Did you know she had a long history of
13 chronic severe neck pain?

14 Dr. Harding said, No.

15 Because she didn't. She had arthritis. She
16 didn't have chronic, daily neck pain. And after this
17 wreck she did. And after this wreck she required surgery
18 to correct that problem. And guess what? She had the
19 surgery prescribed by the neurosurgeon that read that MRI.
20 And guess what? It fixed the problem. If there were any
21 proof -- if you needed any more proof in this case that
22 that injury was what -- what was caused by this wreck and
23 this doctor made that right diagnosis, it's the fact that
24 she did the treatment and it was fixed.

25 So, ladies and gentlemen, I'm going to sit down

26A

1 and let the Judge instruct y'all on the law. But use your
2 common sense. And weigh this for what it is and bring
3 back a verdict that speaks the truth for both of these
4 parties. I appreciate it.

5 JURY CHARGE

6 THE COURT: All right, thank you, Mr. Fraizer.

7 During this trial you and I have certain duties
8 to perform. As the trial judge it is my responsibility to
9 preside over the trial of the case and to rule on the
10 admissibility of the evidence offered during this trial.
11 It is also by duty to charge you the law applicable to the
12 case. And it is your duty as jurors to accept and apply
13 the law as I now state it to you. As I told you in my
14 open comments, if you think you have any idea as to what
15 the law is or what the should be and it disagrees from
16 what I now tell you the law is, you've sworn an oath to
17 set aside your own opinion an apply the law precisely as I
18 state it to you.

19 I also remind you that in every case tried in
20 this court before a jury, you, the jury, are the sole and
21 exclusive judges of the facts. And a trial judge cannot
22 comment on or make any statement about the facts in a
23 case. Now necessarily, you must determine the credibility
24 or believability of the witnesses who testify. And it
25 becomes your duty as jurors to evaluate the evidence and

1 to determine which evidence convinces you it is true. And
2 in determining the believability of the witness who have
3 testified in the case, you may believe one witness over
4 several or several over one. You may believe a part of
5 the testimony of a witness and reject the remaining part.
6 You may believe the testimony of a witness in its entirety
7 or you may reject that same testimony in its entirety.
8 You may consider whether the witness has an interest in
9 the result of the trial, whether the witness is prejudiced
10 towards either party, the opportunity for the witness to
11 have seen the matters and things about which the witness
12 has testified. And the way the witness acts on the
13 witness stand or what we call a witness' demeanor.

14 Now, our rules of evidence ordinarily do not
15 permit witnesses to testify to opines or conclusions. And
16 an exception to this rule exists for witnesses we call
17 experts. A witness, who by education and experience, has
18 become expert in some art, science or profession, may give
19 an opinion as to relevant and material in which the
20 witness has been qualified as an expert. And may also
21 give the reasons for that opinion. And you all should
22 consider any expert opinion given by a witness and like
23 all the other evidence in the case, give it the weight
24 that you think it deserves.

25 I remind you that the burden of proof in the

21

1 case is by a preponderance of the evidence. And the
2 preponderance of the evidence simply means the greater
3 weight of the evidence. It is evidence that as a whole,
4 shows that the fact sought to be proven is more likely
5 true than not true. Now, this can be illustrated by
6 imagining a set of scales. When the case began the scales
7 were even. Now, that after all the evidence has been
8 presented, if the scales remain even or if they tip even
9 slightly in favor of the Defendant, then the Plaintiff
10 will have failed to meet their burden of proof and would
11 not be entitled to recover in the case. If on the other
12 hand, the scales tip ever so slightly in favor of the
13 Plaintiff, the Plaintiff will have met their burden of
14 proof and you should return a verdict for the Plaintiff.

15 Now, in this matter the Defendant has admitted
16 fault in her conduct in connection with the case. The
17 Plaintiff must prove that the Defendant's negligence
18 proximately caused the Plaintiff's damages. Approximate
19 cause is something that produces a natural chain of
20 events, which in the end, brings about the injury. It is
21 a direct cause of the injury. Now, to prove that a
22 Defendant's negligence proximately caused the Plaintiff's
23 injuries, the Plaintiff must first prove causation in
24 fact. And this is proven by showing that the injury would
25 not have occurred but for the negligence of the Defendant.

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1 The Plaintiff must also prove legal cause. And
2 legal cause is proven by showing that the injury was
3 foreseeable. This means that the injury occurred as a
4 natural and probable consequences of the Defendant's
5 negligence. And the Plaintiff must prove that some injury
6 from the Defendant's negligence was foreseeable. But does
7 not have to prove that the particular injury that occurred
8 was foreseeable. However, the Defendant cannot be held
9 responsible for something which could not be expected to
10 happen. And approximate cause does not mean the only
11 cause. The Defendant's act or negligence can be an
12 approximate cause of the Plaintiff's injury if it was at
13 least one of the direct incurring causes of the injury.

14 Now, a Defendant who causes injury to a
15 Plaintiff with a pre-existing condition, must take the
16 Plaintiff as the Plaintiff is found. Although not
17 responsible for the pre-existing condition itself, the
18 Defendant is liable for any exacerbation of that condition
19 caused by the negligent conduct. And the Plaintiff can
20 recover for pre-existing injuries only to the extent that
21 they that were aggravated by the Defendant's actions. It
22 is the law of this state that one who negligently inflicts
23 a personal injury on another is responsible for all ill
24 effects, which considering the condition of health in
25 which the Plaintiff was in when the Plaintiff received the

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1 injury, naturally and necessarily, follows such injury.
2 Hence, the Defendant's liability is no way lessened or
3 effected by reason of the fact that the injury would not
4 have resulted had the plaintiff been in good health. In
5 other words, if the presence of an existing physical
6 condition, aggravated and prolongs the injury and
7 correspondingly increases the damages, such increased or
8 added damages may be recovered.

9 Now, if you decide that the Plaintiff is
10 entitled to a verdict, your next step would be to decide
11 how much money the Defendant should be required to pay.
12 Actually damages are to compensate a Plaintiff for the
13 Plaintiff's injuries or loss. And to put the Plaintiff as
14 nearly as possible, in the same position that the
15 Plaintiff was in before the incident occurred. In other
16 words, actual damages would be the actual losses and
17 expenses which the Plaintiff has suffered because of the
18 Defendant's negligent conduct.

19 Now, Plaintiff, with respect to personal injury,
20 the Plaintiff must prove that expenses caused by the
21 injury were necessary and reasonable. Actual damages for
22 a Plaintiff who has been physically injured include, pain
23 and suffering, both past and future, as well as mental
24 anguish, impairment of health or physical condition. In
25 determining the amount of compensation for personal

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1 injuries, it is proper to consider past and present
2 aspects of the injury. And this would include the
3 physical and mental pain and suffering and expenses
4 incurred for necessary medical treatment. Also, the loss
5 of enjoyment of life suffered as a result of the injury
6 and any other losses which are reflected by the character
7 of the injury.

8 Pain and suffering compensates a Plaintiff for
9 the physical discomfort and emotional response to the
10 sensation of pain caused by the injury itself. There is
11 no definite standard by which to compensate a Plaintiff
12 for pain and suffering. You, the jury, have the authority
13 to determine the amount, if any, to be allowed for pain
14 and suffering. Using calm and reasonable judgment to
15 ensure that the damages are just and reasonable in light
16 of the testimony and the evidence presented in this case.
17 Loss of enjoyment of life is an of actually damages,
18 separate and apart from pain and suffering. Loss of
19 enjoyment of life compensates a Plaintiff for limitations
20 on a Plaintiff's ability to participate in and derive
21 pleasure from the normal activities of daily life. Or the
22 individuals inability to pursue their talents,
23 recreational interests, hobbies or advocations.

24 Mental suffering, apprehension, shock, fright,
25 emotional upset, humiliation, anxiety, either present or

1 expected in the future, can be properly considered as an
2 element of damages in this case. And the amount of
3 damages for mental suffering cannot be exactly measured
4 and is left up to the calm and reasonable judgment of you,
5 the jury.

6 Now, ladies and gentlemen, there are two
7 possible verdicts which you can reach in the case.
8 There's no -- and we prepared a verdict form which we will
9 send back into the jury room with you. I think it's
10 pretty self-explanatory. If you find that the Plaintiff
11 has failed to meet their burden of proof, then you would
12 find for the Defendant. If you find that the Plaintiff
13 has met their burden of proof, you would find for the
14 Plaintiff and you would determine an amount of damages,
15 actual damages, to award using the legal instructions that
16 I've given you. I want to tell you that your verdict must
17 be unanimous. All 12 of you must agree. And you should
18 consider the evidence calmly and with measured reason,
19 without passion, prejudice, bias or emotion. You have no
20 friends to reward, you have no enemies to punish.

21 Now, I'm going to excuse you all back to your
22 jury room in just a second. Ask you not to begin your
23 deliberations just yet. I've got to go over my charge on
24 the law with the lawyers, make sure I didn't misstate
25 something or omit it. And when the verdict form comes

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1 back to you with the evidence in the case, you may begin
2 your deliberations. All right, thank you. Everyone
3 except Ms. Sollee, please head on back. Y'all say
4 good-bye to Ms. Sollee.

5 (WHEREUPON, the jury left open court at
6 approximately 4:18 p.m.)

7 Ms. Sollee, am I pronouncing your name
8 correctly?

9 MS. SOLLEE: Yes, sir.

10 THE COURT: This is always kind of hard for me,
11 I made you sit here through this trial the whole time,
12 you're just as qualified as all 12 of those folks. Just
13 as good a juror, but the law only allows 12. So, you're
14 good with that?

15 MS. SOLLEE: I'm good.

16 THE COURT: Okay. Well, listen, thank you so
17 much for your service, you're done for the week. And -- I
18 believe that's right.

19 THE CLERK: I think she's got her statement.

20 THE COURT: Okay, all right. And you can talk
21 about it with whoever you want to or you don't have to
22 talk about it. If somebody bothers you, let the Clerk's
23 Office know about it and well fix it. We're not going to
24 have you be harassed in anyway. How much longer do you
25 have?

27

1 MS. SOLLEE: I have three months.

2 THE COURT: Three months, well great. Best of
3 luck with that.

4 MS. SOLLEE: Thank you, so much.

5 THE COURT: Yes, ma'am, thank you.

6 (WHEREUPON, the alternate was excused.)

7 THE COURT: Any exception or objections to the
8 charge from the Plaintiff?

9 MR. PEACE: None from the Plaintiff.

10 THE COURT: From the Defense?

11 MR. MCGARR: Yes, Your Honor. I have an
12 exception with regard to your pre-existing condition
13 charge. It did not accurately reflect the charge with
14 regard to the law of pre-existing conditions in the sense
15 that it failed to mention that a Defendant is not
16 responsible for a pre-existing conditions natural
17 worsening.

18 THE COURT: Well, you can -- if it becomes
19 necessary to appeal that to the Supreme Court and tell
20 them they wrote a bad instruction. Okay. All right.

21 Let's go ahead and get the evidence and let them
22 start.

23 Just be at ease.

24 MR. PEACE: Thank you, Your Honor.

25 (WHEREUPON, deliberations began at approximately

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1 4:23 p.m.)

2 (WHEREUPON, court was in recess awaiting a
3 verdict.)

4 THE COURT: All right, I have a note from the
5 jury. Two questions.

6 Can we vote yes and aware [verbatim] the ER
7 charge of 3,941 only? Or if we vote no, can the \$3,941
8 charge still be awarded?

9 MR. MCGARR: The obvious answer to the first
10 question is yes. The obvious answer to the second
11 question is no. They can't say -- they can't say -- they
12 can't do no and then award anyway. They have to say yes
13 but they could award the emergency room bill.

14 MR. PEACE: Well, in closing argument I think
15 Mr. McGarr told them they had to award the emergency room
16 bill in any case. I don't see how they can find for the
17 Defendant and make an award of damages for the Plaintiff
18 because it's a inconsistent verdict.

19 THE COURT: Well...

20 MR. MCGARR: Believe it or not, I agree with
21 Mr. Peace. They can't say, No, we find for the Defendant
22 and pay money. They have to say, Yes, and then they can
23 pay the emergency room bill.

24 THE COURT: I guess do you want me to bring them
25 out here or is writing an answer to the question on this

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1 piece of paper sufficient? I'll show it to you before it
2 goes back.

3 MR. MCGARR: That's --

4 MR. PEACE: Just answer if that's okay.

5 MR. MCGARR: That will be faster.

6 (WHEREUPON, Court's Exhibit No. 6 was marked for
7 identification and received into evidence.)

8 THE COURT: How about I write, You cannot find
9 for the Defendant and award any damages?

10 MR. PEACE: I think that's accurate.

11 MR. MCGARR: My preference would be, Your Honor,
12 that the first question be answered yes, the next question
13 be answered no.

14 THE COURT: All right, y'all want to look at
15 this?

16 MR. MCGARR: Your Honor, I, just for the record.

17 THE COURT: Yeah, for the record, what,
18 Mr. McGarr?

19 MR. MCGARR: I understand what you put but I'm
20 going to object to it because I think you could go yes and
21 no accomplish it.

22 THE COURT: Thank you so much for your input.

23 MR. MCGARR: Yes, sir.

24 THE COURT: Do you have anything, Mr. Peace?

25 MR. PEACE: No, Your Honor.

1 THE COURT: All right, is it marked?

2 THE COURT REPORTER: Yes sir.

3 THE COURT: Yes, sir, just tell them we have to
4 keep it with the rest of the evidence.

5 (WHEREUPON, deliberations continued. And court
6 was in recess awaiting a verdict.)

7 THE COURT: Question number 1 A, B, C.

8 One, was the Defendant's negligence the
9 approximate cause of the Plaintiff's injuries or expenses?

10 A, Can a yes vote amount to only the ER charges
11 of 3941.00 only?

12 B, In statement number two quote the amount of
13 damages if any sustained by the Plaintiff.

14 That must be on the verdict form.

15 Can we substitute damages with expenses?

16 C, Did insurance already pay the ER expenses?

17 All right, let's see. Well, I think I'll
18 recharge them on proximate cause. Tell them that no, they
19 can't change the verdict form from damages to expenses,
20 that's what they want to do. Tell them they're not to
21 consider any --insurance was never mentioned in this
22 trial. I'll just give them a little charge on that. So,
23 let's bring them back in.

24 (WHEREUPON, the jury came into open court at
25 approximately 5:31 p.m.)

1 THE COURT: Okay, ladies and gentlemen, I have
2 your note. And I'm going to recharge you on proximate
3 cause. Now, in this matter the Defendant has admitted
4 fault in her conduct in connection with the case. The
5 Plaintiff must prove that the Defendant's negligent
6 conduct approximately caused the Plaintiff's damages. And
7 let me just tell you that damages is a legal term which
8 encompasses the expenses and other items of damage
9 including pain and suffering, loss of enjoyment of life,
10 personal injury type damages. It is a legal term. So,
11 expenses would be included in sort of the umbrella of the
12 term damages.

13 Now proximate cause is something that produces a
14 natural chain of events which in the end brings about the
15 injury. It is the direct cause of the injury. To prove
16 that the Defendant's negligent conduct approximately
17 caused the Plaintiff's injury. The Plaintiff must first
18 prove causation in fact. This is proven by showing that
19 the injury would not have occurred but for the Defendant's
20 negligence. The Plaintiff must also prove legal cause.
21 Legal cause is proven by showing that the injury was
22 foreseeable. This means that the injury occurred as a
23 natural and probable consequence of the Defendant's
24 negligent conduct. The Plaintiff must prove that some
25 injury from the Defendant's negligence was foreseeable.

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1 Does not have to prove that the particular injury that
2 occurred was foreseeable. However, a Defendant cannot be
3 held responsible for something which will could not be
4 expected to happen. Approximate cause does not mean the
5 only cause. The Defendant's act can be a proximate cause
6 of the Plaintiff's injury if it was at least one of the
7 direct concurring causes of the injury.

8 Now, in reaching your verdict, you should not
9 consider whether any party in this case was or was not
10 covered by insurance. As you may know, some parties are
11 covered and some are not. And some have various forms of
12 partial coverage. The law does not allow the parties to
13 present any evidence about insurance or lack of insurance
14 or amount of insurance. And there is no way that you can
15 accurately determine whether any party in this case has
16 insurance coverage. Or if they have it, how much
17 insurance they have. Insurance or lack of insurance has
18 no bearing on whether the Defendant was or was not
19 approximately responsible for the damage, if any, that the
20 Plaintiff has suffered. Okay.

21 All right, thank y'all very much.

22 (WHEREUPON, the jury left open court at
23 approximately 5:36 p.m.)

24 MR. MCGARR: Your Honor, I would have an
25 exception.

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1 THE COURT: Yes, Mr. McGarr, I am totally not
2 surprised. What's your exception?

3 MR. MCGARR: My exception would be that the
4 question that they were asking was can they award a
5 verdict for emergency room bill? And I think the simple
6 answer would have been yes. The next question was, was it
7 paid by insurance and I think--

8 THE COURT: That was not the next question but
9 that was the third question.

10 MR. MCGARR: I'm sorry, the third question, was
11 it paid by insurance? And that should have been that is
12 not of your concern. That would be my objection.

13 THE COURT: Did I not say that in my charge
14 about insurance, Mr. Peace?

15 MR. PEACE: I believe you did, Your Honor.

16 THE COURT: Well, I'm not going to specifically
17 answer their question. I think that would be delving too
18 closely into the facts. I think the recharge gives them
19 the answer that they need. So your exception, noted for
20 the record, is denied.

21 (WHEREUPON, deliberations continued. And court
22 was in recess awaiting a verdict.)

23 (WHEREUPON, Court's Exhibit No. 7 was marked for
24 identification and received into evidence.)

25 THE COURT: All right, got another question.

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1 Can we vote yes for the Plaintiff and only award
2 the ER charge of 3941.00? No punitive damages.

3 So, I'm going to write, If you find for the
4 Plaintiff you can award whatever you think is appropriate.

5 (WHEREUPON, Court's Exhibit No. 8 was marked for
6 identification and received into evidence.)

7 THE COURT: If you find for the Plaintiff you
8 can award whatever amount you, the jury, find appropriate.
9 Punitive damages have not been sought in this case and you
10 may not award any amount for punitive damages.

11 Okay, and it's been marked as a Court's Exhibit
12 and we'll send it back.

13 (WHEREUPON, deliberations continued. And court
14 was in recess awaiting a verdict.)

15 THE COURT: We are stuck on the word injuries on
16 line number 1. Can we consider the word expenses to be
17 included within the umbrella of injuries?

18 (WHEREUPON, Court's Exhibit No. 9 was marked for
19 identification and received into evidence.)

20 THE COURT: Yes.

21 MR. MCGARR: Your Honor, could you read the jury
22 verdict form to us? I've never seen it.

23 THE COURT: Well, it was here for your pursual
24 before it went back.

25 Was the Defendant's negligence the proximate

25

1 cause of the Plaintiff's injuries?

2 Okay.

3 (WHEREUPON, deliberations continued. And court
4 was in recess awaiting a verdict.)

5 THE COURT: All right, Mr. Foreman, I understand
6 you've reached a verdict?

7 MR. FOREMAN: Yes, sir.

8 THE COURT: Okay, would you hand it to the
9 Bailiff for me, please, sir.

10 All right, Madam Clerk, please publish.

11 VERDICT

12 THE CLERK: Your Honor, this is case No.
13 2012-CP-23-1971, Barbara Gaines versus Joyce Ann Campbell,
14 we, the jury, unanimously find as follows.

15 Was the Defendant negligent of the proximate
16 cause of the Plaintiff's injuries?

17 Yes.

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

20 \$3,941.00 actually damages. Signed, Carlton
21 Hill, foreperson, August 7th, 2013.

22 If this is your verdict so say you all. Please,
23 signify by raising your right hand if yes.

24 (WHEREUPON, all members of the jury raised their
25 right hand.)

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1 THE COURT: All right, anything further from the
2 Plaintiff?

3 MR. PEACE: May we poll the jury, please?

4 THE COURT: All right.

5 THE CLERK: Was the verdict that was just
6 published was the verdict you reached in the jury room. I
7 ask you was it your verdict then and it is your verdict
8 now? Please answer yes when I call your name or no.

9 David Loso?

10 JUROR: Yes.

11 THE CLERK: Carlton Hill?

12 JUROR: Yes.

13 THE CLERK: Kimberly Barrett?

14 JUROR: Yes.

15 THE CLERK: Fred Lancaster?

16 JUROR: Yes.

17 THE CLERK: Lisa Atkinson?

18 JUROR: Yes.

19 THE CLERK: Desmond Thomas?

20 JUROR: Yes.

21 THE CLERK: Teresa Mann?

22 Juror: Yes.

23 THE CLERK: Karlee Ferreira?

24 JUROR: Yes.

25 THE CLERK: Kiara Torres?

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1 JUROR: Yes.

2 THE CLERK: Jacqueline Gajoch?

3 JUROR: Yes.

4 THE CLERK: Courtney Olivero?

5 JUROR: Yes.

6 THE CLERK: Shirley Truluck?

7 JUROR: Yes.

8 THE CLERK: Thank you.

9 THE COURT: All right.

10 Anything further from the Defense?

11 MR. MCGARR: No, Your Honor.

12 THE COURT: Okay, Mr. Foreman, ladies and

13 gentlemen of the jury, I want to thank you very much for

14 your hard work. And I hope that I didn't make a liar out

15 of myself when I told you just how important your job is.

16 We couldn't have resolved this matter without y'all coming

17 up here and performing your duty as jurors. I'm also

18 happy to tell you and I'm sure you will be pleased to hear

19 that you finished your service for the week. So, at least

20 you didn't jump and... So, we thank you so much for your

21 service. You're free to talk about it with anybody you'd

22 like to. You're also free not to talk about it. So, if

23 someone contacts you and doesn't to -- and you don't want

24 to talk to them about it and they persist, just let the

25 Clerk's Office know who that person is because we will

1 take care of it. We're not going to allow any juror to be
2 harassed in any way. So, thank y'all, very much.

3 (WHEREUPON, the jury left open court at
4 approximately 6:37 p.m.)

5 THE COURT: All right, any motions?

6 MR. PEACE: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. PEACE: Plaintiff moves, pursuant to Rule 59
9 for a new trial absolute because the verdict appears to be
10 contrary to both the law and the evidence of the case. In
11 the case the Plaintiff introduced the expert opinions of
12 two board certified physicians, one neurosurgeon, one
13 family doctor. Who both said to a reasonable degree of
14 medical certainty that the Plaintiff's injury resulting in
15 a C-5, C-6 radiculopathy. And then anterior cervical
16 discectomy fusion and surgery were caused by the wreck in
17 the case. I believe that the jury failed to follow the
18 evidence in the case and I would ask the Court to invoke
19 the 13th juror standard to correct the verdict that
20 contrary to the preponderance of the evidence in the case.

21 In the alternative, I would urge this Court to
22 grant a nisi additur. We introduced medical bills in the
23 total of \$77,966.00. The jury brought back a verdict for
24 \$3,941.00. I believe that is grossly inadequate and I
25 would ask this Court under the doctrine announced in the

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1 Supreme Court case of O'Neil vs. Bolles to grant us a nisi
2 additur verdict. And if necessary, a new trial.

3 THE COURT: All right. Well, I'm going to take
4 it under advisement. Normally, I don't interfere with the
5 jury verdict. But I'm concerned about in this case about
6 what you argued and also a personal appeal made to the
7 jurors in closing argument. Among a number of other
8 things. So, I'm going to take it under advisement. Right
9 now I think I am -- I need to reflect on it. And get a
10 little bit away from this case. I am -- have been very
11 disturbed by some of the conduct that's gone on in this
12 case. So, I think I need to let my -- just have some time
13 for cool reflection. Okay. Thank you, very much. Thank
14 you, Your Honor.

15 MR. PEACE: Thank you, Your Honor.

16 (WHEREUPON, the proceedings were concluded.)
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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth 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 Greenville County, South Carolina, on the Seventh day of August, 2013.

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

November 13, 2013

C. April P. Kerens

APRIL P. HERRON, Court Reporter

State of South Carolina

County of Anderson

In the Court of Common Pleas

Barbara Gaines,

Plaintiff,

-vs-

Joyce Ann Campbell,

Defendant.

2012-CP-23-1971

August 15, 2013

Transcript of Record

BEFORE:

The Honorable Ned Miller, Judge

APPEARANCES:

John Peace, Esquire
Attorney for the Plaintiff

Marcus McGarr, Esquire
Attorney for Defendants

Renee Tollison
Circuit Court Reporter

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1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 10:17 a.m.)

4 THE COURT: All right. We're here on Gaines
5 versus Campbell. It's Mr. Peace's motion for a new
6 trial.

7 MR. PEACE: That's correct, Your Honor. Your
8 Honor, after the verdict was returned last week, I moved
9 this Court for a new trial or in the alternative, new
10 trial nisi additur pursuant to Rule 59 of the Rules of
11 Civil Procedure. In particular, Rule 59 states that a
12 new trial may be granted to any party, number one, in an
13 action unless there's been a trail by jury for any
14 reasons for which new trials have heretofore been granted
15 in actions at law in accordance of this State. In
16 particular, I cited inadequacy of the verdict in this
17 case because we introduced seventy-seven thousand nine
18 hundred and sixty-six dollars worth of medical bills as
19 well as two expert opinions that said that those medical
20 bills were necessitated by the injury sustained in the
21 wreck on January 10th of -- January 8th, 2010.

22 Also, I ask the Court to invoke the doctrine, the
23 thirteenth juror doctrine, to find that the verdict was
24 inadequate and grant us either a new trial or a new trial
25 nisi additur. Since ---

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1 THE COURT: Do you have any case law that would
2 allow the thirteenth juror doctrine to grant additur?

3 MR. PEACE: Yes, Your Honor, I do. In
4 particular I would -- and I've got a copy in hand. But
5 Vinson versus Hartley. It discusses Rule 59, new trial
6 on the facts. This is the Court of Appeals. The cite is
7 324 S.C. 389, a 1996 case. In that case, Judge Ralph
8 King Anderson gave us a lengthy dissertation on the
9 thirteenth juror doctrine, citing the seminal case of
10 Worrell versus South Carolina Power Company and cited
11 that case, 186 South Carolina, S.C. 306. That was a 1938
12 case. I also have a copy of that case if the Court would
13 like it.

14 THE COURT: What was the Vinson cite?

15 MR. PEACE: 324 S.C. 389.

16 THE COURT: Okay.

17 MR. PEACE: And in fact, in the Vinson case the
18 Court of Appeals acknowledged that a review of the
19 thirteenth juror doctrine was further undertaken in
20 Faulkins (phonic) versus Hunt, which is 300 S.C. 251.
21 Let's see. Generally, Judge Anderson noted the
22 thirteenth juror doctrine is a vehicle by which the trial
23 court may grant a new trial absolute when he finds that
24 the evidence does not justify the verdict. This ruling
25 has also been termed granting a new trial upon the facts.

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1 And there he cites South Carolina Highway Department
2 versus Townsend. The cite there is 265 S.C. 253.

3 Judge Anderson goes on to say, the effect is the
4 same as if the jury failed to reach a verdict. The
5 judge, as the thirteenth juror, quote, hangs, close
6 quote, the jury. When a jury fails to reach a verdict, a
7 new trial is ordered. Neither the judge nor the jury is
8 required to give reasons for this outcome.

9 Similarly, because the result of the thirteenth
10 juror vote by the judge is a new trial rather than
11 adjustment to the verdict, no purpose would be served by
12 requiring the trial judge to make factual findings. This
13 is distinct from a new trial nisi additur in which the
14 court is required to provide compelling reasons for
15 adding to the verdict that was rendered by the jury in
16 the case. As far as the ---

17 THE COURT: So the thirteenth juror doctrine
18 does not apply to additur?

19 MR. PEACE: The thirteenth juror doctrine
20 allows the Court to ---

21 THE COURT: I know what it -- but I've asked if
22 you have any cases that say that it's appropriate to
23 invoke the thirteenth juror doctrine in a new trial nisi
24 additur. I don't believe there are.

25 MR. PEACE: Your Honor, as I look at this, I

1 believe the thirteenth juror doctrine does apply simply
2 to new trials absolute.

3 THE COURT: Yeah. Okay.

4 MR. PEACE: And of course, the nisi additur
5 simply gives the defendant the option of paying the
6 additur or retrying the case in a new trial. Regarding
7 the cases cited in Defendant's return ---

8 THE COURT: Well, I was just curious. Based on
9 the way this proceeding has progressed, that would more
10 than likely result in a new trial anyway. But go ahead.
11 That's just an editorial comment on my part. Go ahead.
12 I'm sorry to interrupt you.

13 MR. PEACE: Just as an observation, only two
14 cases cited in the Defendant's return to motion for a
15 judgment notwithstanding the verdict, as I've indicated
16 in my reply to that return, I didn't file a motion for
17 J.N.O.V., nor did I file a motion for directed verdict in
18 this case.

19 And contrary to the assertion in Defendant's return,
20 no directed verdict motion is required as a prerequisite
21 for a new trial motion or a new trial nisi additur motion
22 under Rule 59. In fact, the citation to Parr versus
23 Gaines refers to a footnote in the Court of Appeals
24 decision from 1992.

25 That case in turn cites another Court of Appeals

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1 decision, Freeman versus A&M Mobile Home Sales. The cite
2 there is 293 S.C. 255. The Freeman case, in fact, did
3 not say -- it was, I believe, mis-cited by the Court of
4 Appeals in the Parr case. But in Freeman versus A&M
5 Mobile Home case, the J.N.O.V. motion -- in fact, the
6 court acknowledged before a motion for J.N.O.V. can be
7 properly made, a party must move for directed verdict at
8 the close of all the evidence. However, that didn't
9 prevent the Court of Appeals in Freeman from then going
10 on to consider a new trial motion, a new trial absolute.

11 The same is indicated in the case of O'Neal versus
12 Bowles which I cited verbally in my motion at the end of
13 the trial. Of course, O'Neal versus Bowles is the
14 Supreme Court case, 314 S.C. 525. In that case, very
15 much like Gaines versus Campbell, it was an admitted
16 liability case. In that case the doctor had severed a
17 nerve and didn't dispute the facts of the case. He
18 admitted severing the nerve, but disputed the amount of
19 damages. And in that case, O'Neal versus Bowles, there
20 was no directed verdict motion made in that case because
21 it was admitted liability. The case went to the jury,
22 and the court again recited the standards that we've
23 already discussed regarding a new trial nisi,
24 specifically saying that the trial judge alone has the
25 power to grant a new trial nisi when he finds the amount

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1 of the verdict to be merely inadequate or excessive.

2 The Supreme Court then went on to say, if the amount
3 of the verdict is grossly inadequate or excessive so as
4 to be the result of passion, increased prejudice or some
5 other influence outside the evidence, the trial judge
6 must grant a new trial absolute. And then, of course,
7 goes through the standard on appeal would be an abuse of
8 discretion standard simply because the trial judge is the
9 person in the best position to evaluate the atmosphere of
10 trial, the credibility of witnesses, and so on.

11 In the other case that was cited in Defendant's
12 memorandum, Smith versus Ridgeway Pools, the case is
13 actually Smith versus Ridgeway Chemicals. And in that
14 case, the court noted there was no directed verdict, but
15 that didn't stop the court again from considering a Rule
16 59 motion. So I don't believe that defense counsel is
17 correct in stating that a directed verdict motion is a
18 prerequisite for a Rule 59 motion. The distinction being
19 a Rule 50 motion would be relief as a matter of law.
20 Rule 59 deals with a new trial upon facts, as Judge
21 Anderson summarized -- not summarized. He stated it at
22 length in the Vinson case.

23 THE COURT: Okay.

24 MR. PEACE: So I'll be glad to answer questions
25 the Court may have.

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1 THE COURT: Well, to change the subject just a
2 little bit. And what time were you noticed to be -- that
3 you were going to be first up for trial last Monday?

4 MR. PEACE: We received an email from Lyndell,
5 the jury coordinator, on Wednesday or Thursday. I was
6 attending a board meeting in Hilton Head and returned to
7 the office on Thursday. Ms. Coker had asked counsel from
8 the four cases on the roster during the week to respond.
9 She said one attorney's response was sufficient. Mr.
10 McGarr responded to Ms. Coker and said, we are completely
11 ready to try Campbell versus -- Gaines versus Campbell
12 which was absolutely correct. I did not respond.

13 THE COURT: Okay.

14 MR. PEACE: I arrived on Monday morning with my
15 clients with me. And I was informed after arriving at
16 the courthouse in the courtroom that another attorney was
17 ill and that we would be proceeding as the first case.

18 THE COURT: Okay. And what time was that? Do
19 you know?

20 MR. PEACE: I believe I was sitting in the
21 courtroom at about nine a.m. when I found that out.

22 THE COURT: Okay. Did you have your file with
23 you?

24 MR. PEACE: I had everything I needed to begin
25 the trial. I didn't bring my projector, my laptop or the

1 medical art simply because I knew that wasn't going to
2 come in until well after lunch and probably into the
3 second day of trial. So I didn't have all of the
4 materials, but I had my file and everything I needed to
5 pick a jury, do an opening, and put the first two or
6 three witnesses up.

7 THE COURT: Okay. All right. Thank you, very
8 much.

9 MR. PEACE: Thank you, Your Honor.

10 THE COURT: Mr. McGarr?

11 MR. MCGARR: Your Honor, as you know, Mr. Peace
12 did make a motion for a new trial additur. And I
13 inadvertently sent in the reply to the Defendant's return
14 to that motion. I mean, Defendant's return to the motion
15 referring to it in the incorrect terms. Mr. Peace then
16 sent his reply to my return. And then -- I have then --
17 I then sent in to the Court and to Mr. Peace ---

18 THE COURT: I have it, and I've read it.

19 MR. MCGARR: The Defendant's response?

20 THE COURT: Response to the response. Yeah,
21 I've read it.

22 MR. MCGARR: Yes, sir.

23 THE COURT: Uh-huh (affirmative).

24 MR. MCGARR: Now, in that case, Your Honor, the
25 case of -- and first, I understand that he doesn't --

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1 essentially, I'm making this motion because I have to
2 protect my client. In order to make the motion for a new
3 trial, one must first make a motion for a directed
4 verdict. That is specifically set forth in -- the Court
5 had told us to bring all the case law that we'd planned
6 to utilize.

7 If I could have this marked as Defendant's B and
8 have His Honor take that one.

9 THE COURT: Wait, wait.

10 MR. MCGARR: No, Defendant's Exhibit A.

11 THE COURT: Well, this is case law. You don't
12 need to introduce it as exhibit. I'll take judicial
13 notice of published case law. We don't need exhibits in
14 this. Yeah, you can hand it up to me.

15 MR. MCGARR: In looking at that document, in
16 particular going to page nine which is part of the Smith
17 versus Ridgeway case, it specifically states, we hold
18 that the trial judge properly overruled all motions for
19 judgment notwithstanding the verdict. This motion is
20 available to one suffering an adverse ruling of the jury
21 only when the same issues were submitted to the judge,
22 and directed verdict stays. Inasmuch as no motion was
23 made for directed verdict at the conclusion of trial, no
24 motion for relief as a matter of law is available after
25 the jury verdict.

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1 On page six, Parr versus Gaines, it is actually
2 taken a step further. And it says, a motion for a
3 directed verdict is a prerequisite for a motion
4 notwithstanding the verdict and a motion for a new trial
5 on the grounds that the evidence does not sufficiently
6 support the cause of action. By not making a motion for
7 directed verdict on the issues of strict liability,
8 negligence and that negligent repair, Volvo and
9 Christopher (phonic) in effect conceded that after trial
10 that some evidence existed for those issues to go to the
11 jury.

12 In this instance, no motion for a directed verdict
13 was made, and yet we're making a motion for an additur.
14 The motion for the additur is made as an -- and I'm not
15 going to repeat the argument because it's in writing.
16 But Rule 59 is saying you can grant a new trial based
17 upon the reasons that new trials have been granted in the
18 past. Well, it's just simply making reference to Rule 50
19 because that is the rule that now exists. Prior to that,
20 it was by statute.

21 And so, quite frankly, you do have to make a motion
22 for a directed verdict. And if you don't, you can't
23 avail yourself of asking for a new trial or a new trial
24 additur.

25 And so that's my position on that issue. However --

1 and I want to make it clear -- despite that thought, it
2 doesn't matter because the bottom line is the evidence --
3 the standard with regard to granting a new trial,
4 including the thirteenth juror, is as stated on page
5 fourteen of this package which would be the Sharpe versus
6 Suttle case.

7 On appeal, the Sharpes argued that the trial court
8 erred in granting Oakridge's motion for judgment
9 notwithstanding the verdict on a breach of contract
10 action. We agree. In ruling on a motion for judgment
11 notwithstanding the verdict, the trial court must view
12 the evidence and inferences therefrom in the light most
13 favorable to the non-moving party and must deny the
14 motions if either the evidence yields more than one
15 reasonable inference or the inferences are invalid. The
16 verdict will be upheld if there is any evidence to
17 sustain the factual findings implicit in the jury's
18 verdict.

19 The case involved is Stevens versus Allen. It will
20 show up on page nineteen of this package. And the
21 court's quote is as follows. If the -- the trial judge
22 alone has the power to grant a new trial nisi when he
23 finds the amount of the verdict to be merely inadequate
24 or excessive, citing *McCourt versus Abernathy*. But it
25 goes on to say, compelling reasons, however, must be

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1 given to justify invading the jury's province in this
2 matter.

3 That's my case law. But the case law that Mr. Peace
4 has sent up to you, in particular the case of Carson
5 versus CSX Transportation, specifically says on page
6 eight of eighteen, an abuse of discretion occurs when the
7 conclusions of the circuit court are either controlled by
8 an error of law or are based on unsupported factual
9 conclusions.

10 THE COURT: So what you're saying is if I were
11 to grant this motion, that there are no facts in the
12 record which would support the grant of the motion. Is
13 that what you're saying?

14 MR. MCGARR: Your Honor, we'd like to have this
15 marked as an exhibit with regard to the doctor's
16 deposition as exhibit A.

17 THE COURT: The whole deposition is in the
18 record.

19 MR. MCGARR: I did not know that.

20 THE COURT: You put it in -- or Mr. Peace put
21 it in without your objection. But you can go ahead if
22 you want to. But cumulative stuff ain't going to help.
23 That's fine.

24 MR. MCGARR: Thank you.

25 (WHEREUPON, Defendant's Exhibit A was marked for

25

1 identification only.)

2 MR. MCGARR: Your Honor, in a nutshell and what
3 I've given you is -- and the reason I gave it to you was
4 not to be cumulative. It's because it sets out in black
5 and white that Ms. Gaines' treating physician first and
6 foremost said that Ms. Gaines, if she was truly in pain
7 at the hospital, should have shown an increase in her
8 heart rate and her breathing rate and that she did not.
9 That begins on page 39 and ends on page 40 of Dr.

10 Harding's deposition. She also goes on on page 42 ---
11 THE COURT: Okay. Let me ask you this. Does
12 she say that to a reasonable degree of medical certainty
13 more probably than not?

14 MR. MCGARR: She does not have to, Your Honor.

15 THE COURT: Does she say that? Answer my
16 question.

17 MR. MCGARR: I'm sorry. No, she does not, Your
18 Honor.

19 THE COURT: And it is your position that you
20 can elicit an expert opinion based on a mere possibility;
21 is that right? That was your position stated at trial.

22 MR. MCGARR: Your Honor, I didn't ask her in
23 this case about a mere possibility. I said ---

24 THE COURT: Was that your position stated at
25 trial?

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1 MR. MCGARR: It still is, Your Honor.

2 THE COURT: And did you bring case law to
3 support that?

4 MR. MCGARR: And if we could mark this as
5 Defendant's Exhibit B, Your Honor.

6 (WHEREUPON, Defendant's Exhibit B was marked for
7 identification only.)

8 THE COURT: Warren Moise's book. Okay.

9 MR. MCGARR: Well, you said black. You wanted
10 black letter.

11 THE COURT: No, Mr. McGarr, I did not say I
12 wanted black letter. And I have the transcript. And you
13 said, absolutely. I said, Mr. McGarr, we're breaking for
14 lunch. Bring case law after lunch. And did you make any
15 effort to find case law during lunch? Did you make any
16 effort?

17 MR. MCGARR: Your Honor, as I told you, that
18 was physically impossible to accomplish that goal.

19 THE COURT: Physically impossible. Your office
20 is five minutes from this courthouse. You asserted that
21 this was in -- it was definitely my words, black-letter
22 law. But you said, absolutely. And I don't know how you
23 could interpret that any other way. And so what made it
24 physically impossible for you to go do the research that
25 a circuit judge ordered you to do? What made it

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1 physically impossible?

2 MR. MCGARR: Your Honor, I couldn't get from
3 the parking garage, to my office, get on the computer,
4 pull this stuff, get back here and be here back in time
5 to actually continue with the case. And I'm not trying
6 to ---

7 THE COURT: Whose book is this?

8 MR. MCGARR: That's Warren Moise's book.

9 THE COURT: Who owns the actual physical book?

10 MR. MCGARR: I actually own that book.

11 THE COURT: And it's in your office?

12 MR. MCGARR: Yes, sir.

13 THE COURT: And this is just his summation of
14 what the law of South Carolina is; is that correct?

15 MR. MCGARR: Yes, sir. Your Honor, I'm not
16 trying to make you upset.

17 THE COURT: Well, you've already done that, Mr.
18 McGarr. Let me ask you this. When did you hear that you
19 were first up for trial?

20 MR. MCGARR: As I told you, Your Honor, as I
21 was walking out the door at nine o'clock.

22 THE COURT: And you brought with you an empty
23 file folder, did you not?

24 MR. MCGARR: No, Your Honor, that is incorrect.
25 I brought all of the information associated with being

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1 able to select a jury.

2 THE COURT: You sat here in front of me and
3 picked up an empty expandable file folder and said, this
4 is what I could bring. You said, Mr. Peace didn't bring
5 his file.

6 MR. MCGARR: Your Honor.

7 THE COURT: You then claimed to have tried more
8 cases in the Upstate of South Carolina than any other
9 lawyer. And you had been licensed to practice in excess
10 of twenty years. And are you telling me that this is the
11 first time in your vast experience that you found out
12 Monday morning you're first up to go?

13 MR. MCGARR: No, Your Honor, that's not what I
14 said. And I'll be frank ---

15 THE COURT: No, I'm asking you that now.

16 MR. MCGARR: No, that has not been the case.

17 THE COURT: In fact, it happens quite
18 frequently, doesn't it?

19 MR. MCGARR: Your Honor, I need to put on the
20 record that I brought a file with everything associated
21 with picking that jury. I had all that information with
22 me because I was going to have to use it, regardless if I
23 was first up or not, to view the jury and determine what
24 they were about.

25 THE COURT: But you consciously made the

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1 decision to leave your office without your file in this
2 case knowing you were first up and then represented to
3 this Court that you did not have time to get your file in
4 this case; is that correct?

5 MR. MCGARR: That's correct, Your Honor.

6 THE COURT: Do you consider that to be
7 disingenuous, Mr. McGarr?

8 MR. MCGARR: No, Your Honor. You saw my file.
9 It's a banker's box full.

10 THE COURT: I consider it to be disingenuous.
11 And I said it on the record at trial, and I repeat it
12 now, that I have never in all my time since I've been
13 licensed to practice law seen an attorney behave the way
14 that you behaved in that trial. Very upset. However, do
15 you have anything else you want to present on this
16 argument with respect to the new trial?

17 MR. MCGARR: Yes, Your Honor.

18 THE COURT: Go ahead, finish out.

19 MR. MCGARR: The other thing that the doctor
20 did -- and again, these aren't asking her possibilities.
21 She specifically said that not only was her pulse rate
22 and the heart rate not up and it should have been, if
23 there were pain, if there were problems, she went on to
24 state that when she was physically examined, meaning the
25 Plaintiff was physically examined at the hospital, that

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1 her neck revealed no evidence of muscle spasms or
2 stiffness.

3 She went on to state that x-rays were done at the
4 hospital, and the x-rays revealed severe degenerative
5 changes and -- but revealed nothing that would have been
6 caused by an automobile accident.

7 Last, but not least, she went on to state -- and
8 these aren't possibilities -- that she thought it was
9 strange that someone with a neck in this type of shape
10 was not showing evidence of a pinched nerve while at the
11 hospital, but she agreed that the lady did not show
12 evidence of a pinched nerve at the hospital. So ---

13 THE COURT: And this was the family physician?

14 MR. MCGARR: It's the family physician, yes,
15 sir. It's Dr. ---

16 THE COURT: Internal medicine expert?

17 MR. MCGARR: Yeah. Dr. Lisa G. Harding.

18 THE COURT: Okay.

19 MR. MCGARR: As you know, Your Honor, we then
20 argued to the jury that this evidence alone was enough
21 for the jury to come to the conclusion that Ms. Gaines
22 was at the hospital but was not really in pain and
23 certainly did not have a bone problem that was hurt by
24 this accident. In fact, the Plaintiff's own expert had
25 said the bone problem had nothing to do with the

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1 automobile accident. That is what she ultimately
2 removed. And we asked the jury ---

3 THE COURT: Well, there were two experts, so
4 you be specific about which expert you're talking about.

5 MR. MCGARR: It would be the neurosurgeon, Dr.
6 ---

7 THE COURT: Mina.

8 MR. MCGARR: Mina, M-I-N-A. And so she was
9 telling the jury that she removed the bone spur that was
10 squishing on the nerve. And so my argument to the jury
11 was based on this evidence -- and I put it in this
12 concise form -- you should come back -- and I think I
13 even might have said, must come back with a verdict for
14 an emergency room bill because everyone has the right to
15 be checked out. But this lady had a pre-existing
16 condition that had nothing to do with this automobile
17 accident, and in fact, didn't flare to the point where
18 she needed surgery until after she was mulching in the
19 yard.

20 THE COURT: That was a disputed fact, was it
21 not? I believe she testified under oath up here that she
22 was supervising the mulching of her yard. Wasn't that
23 what it was?

24 MR. MCGARR: That's what she testified to.

25 THE COURT: Yeah. That was under oath here in

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1 the courtroom.

2 MR. MCGARR: Yes, sir.

3 THE COURT: And you characterized it to a jury
4 that she was mulching, she was physically mulching; is
5 that right?

6 MR. MCGARR: No, Your Honor. The record ---

7 THE COURT: That's not right?

8 MR. MCGARR: The record stated that she was
9 mulching. I didn't characterize it that way. And so
10 based upon that, Your Honor ---

11 THE COURT: How did you characterize it?

12 MR. MCGARR: Exactly way the documents stated
13 it was.

14 THE COURT: And which documents were those?

15 MR. MCGARR: They were the records from --
16 those are physical therapy saying that she was doing fine
17 until she was mulching.

18 THE COURT: She was out in the yard mulching,
19 huh? And then her testimony, non-hearsay, right here in
20 the courtroom under oath said she wasn't doing the
21 mulching; she was supervising it, right? Isn't that what
22 she said? I don't want to misstate anything.

23 MR. MCGARR: That's what she said, but the
24 statement ---

25 THE COURT: But you don't believe it?

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1 MR. MCGARR: The statement made for purposes of
2 medical treatment is not hearsay. It is an exception to
3 the hearsay rule. And it said the exact opposite of what
4 she said. And the jury -- it doesn't matter what I
5 think. The jury ---

6 THE COURT: That is a matter of interpretation.
7 But clearly, we know what your interpretation is.

8 MR. MCGARR: And the jury could easily have
9 interpreted it the same way. And it's their job to do
10 that. And the jury listened to this evidence, heard the
11 argument that I'm basically making now which is plenty of
12 evidence to support a verdict that the lady had the right
13 to be checked out, but that her problems didn't develop
14 until at least a month after this automobile accident
15 because that's when she actually sought treatment, and
16 that that was because of the natural progression
17 (phonic) and/or worsening of her very severe arthritic
18 condition.

19 THE COURT: Did you have an expert opinion that
20 stated that?

21 MR. MCGARR: Your Honor, I don't have to have
22 one.

23 THE COURT: Mr. McGarr, I'm asking you was
24 there -- did you present any evidence, expert opinion,
25 that would back up what you've just asserted?

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1 MR. MCGARR: No, I did not, Your Honor, but
2 that's not the standard.

3 THE COURT: Not the standard for what?

4 MR. MCGARR: I don't carry the burden of proof.
5 I don't have to bring an expert in.

6 THE COURT: No, you don't. You're absolutely
7 right. But when you ask for an expert opinion -- your
8 position is that you're not -- that it doesn't matter --
9 that it matters who the plaintiff is with respect to
10 getting an expert opinion to state more probably than
11 not, to a reasonable degree of whatever certainty some
12 fact occurred, right?

13 MR. MCGARR: No, Your Honor. That's not my --
14 that's never been my standard throughout this process. I
15 have an expert that I'm bringing in as a defense expert
16 -- and they've loosened it up a bit. But if I bring in a
17 defense expert to try to tie A to B, that expert has to
18 say to a reasonable degree of whatever-type-expert's-they
19 may-be certainty that A ---

20 THE COURT: Well -- and I'm not as concerned
21 with that as I was because I don't have your full closing
22 argument. And I don't remember whether or not you argued
23 that the expert said this could have caused -- the
24 mulching could have caused it. I don't know if you said
25 that or not. And so I'm not that concerned with it. The

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1 expert did say to a reasonable degree of medical
2 certainty more probably than not -- both experts said
3 that -- that this automobile accident caused the injury
4 which necessitated the spinal surgery.

5 And yes, there was a pre-existing condition. And
6 the law is that the at-fault party is responsible not for
7 the pre-existing condition, but for aggravation thereof.
8 Would you agree with that?

9 MR. MCGARR: Not necessarily, Your Honor.

10 THE COURT: Yeah.

11 MR. MCGARR: The charge is -- the total charge
12 is that that's the case unless the jury finds that the
13 problem that ultimately required Ms. Gaines' surgery came
14 about as the result of a natural progression or
15 worsening of that pre-existing ---

16 THE COURT: Was there any evidence in the
17 record to show that? The only opinion testimony was that
18 this accident caused it.

19 MR. MCGARR: Okay. Your Honor, she aged
20 between the time of the accident and the time she had
21 surgery and had a mulching incident in the process.

22 THE COURT: A disputed supposed intervening
23 cause where there was no testimony to what I consider to
24 be the required standard to say that it more probably
25 than not caused it. Mr. McGarr, it's pretty obvious that

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1 -- I said it on the record and I say it now -- I was very
2 upset at your conduct in this case. I just didn't -- it
3 just floored me that you came here and waved an empty
4 folder at me and told me you didn't have time to get your
5 file. And at the time, I didn't realize, I did not know
6 that Ms. Coker had called your office and told you you
7 were first up. I didn't know that.

8 MR. MCGARR: Your Honor, I need to dispute on
9 the record that I was here with an empty file. That's
10 absolutely not the case.

11 THE COURT: Well, Mr. McGarr, I've got the
12 transcript here where you say, I don't have my file.
13 That's what you said on the record to me in court.

14 MR. MCGARR: I don't have my trial file.

15 THE COURT: That's not what you said, and you
16 waved an empty folder at me. I was sitting here looking
17 at it. You blamed the Court for you not having your
18 client here. That is incredible to me.

19 MR. MCGARR: Your Honor, I apologize.

20 THE COURT: An experienced trial lawyer should
21 know that you come to court prepared to go to trial.

22 MR. MCGARR: I was here with -- if I need
23 affidavits from my staff with regard to what we prepared
24 and what I walked out through the door with. I was here
25 with the main jury file, the skinny jury file and our

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1 research on that jury. And I was here, ready, willing
2 and able and did strike that jury, Your Honor. I had
3 those documents before me.

4 THE COURT: Great.. That's not what you
5 represented to me. You held up an empty file folder and
6 said, I didn't have time to get my file.

7 MR. MCGARR: I did not hold up an empty file
8 folder, Your Honor, and ---

9 THE COURT: Well, I'll tell you what. You are
10 now calling a circuit judge a liar.

11 MR. MCGARR: Yes, sir. You just called me one.

12 THE COURT: I did not call you a liar. I'm
13 just telling you what's in the record. You not only --
14 you called me grumpy in these opening comments. You
15 called me cruel. You said I was -- let's see here -- I
16 horrible -- you were horribly abused. Horribly abused.

17 MR. MCGARR: Your Honor, in the sense that ---

18 THE COURT: You said, all I needed was enough
19 time to get my file like everyone else did, and that's
20 not grounds for you to be as cruel to me as you've been.
21 Did I treat Mr. Peace any differently than I treated you?

22 MR. MCGARR: In my opinion, yes, Your Honor.

23 THE COURT: Oh, because you sat there and told
24 me you weren't ready.

25 MR. MCGARR: Mr. Peace didn't have his stuff.

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1 He didn't have his stuff with him either, Your Honor.

2 THE COURT: He had his file. He was ready to
3 go.

4 MR. MCGARR: And Your Honor, I need to put on
5 the record that what I did say was, I know you're grumpy.
6 What I meant to say -- and it should have come out clear
7 in context -- that I know my asking for a little extra
8 time was making you grumpy.

9 THE COURT: Well, that's not what you said.
10 Regardless.

11 MR. MCGARR: In context ---

12 THE COURT: Mr. McGarr, I'm interrupting you.
13 And I apologize. But I'm going to interrupt you.

14 MR. MCGARR: Yes, sir.

15 THE COURT: You do not -- and it's not -- you
16 know, personally, yes, I'm upset. But you do not address
17 a circuit judge, any circuit judge, the way that you
18 addressed this Court during that trial. All you could
19 come up with was how you were cruel, was that I made you
20 go to trial. That's cruel? That's all you came up with.
21 And I asked you a couple of times to tell, for the
22 record, because you certainly want a record of this, what
23 I did that was cruel. And I acknowledge my tone with you
24 was harsh. It's harsh right now. I was never harsh in
25 front of a jury although you asserted that I was. Your

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1 complaint about me charging the jury that what a lawyer
2 says is not evidence, you said that was cruel. Well, I
3 do want to say that, yes, I'm upset. And I'm upset at
4 the conduct that you displayed in this trial.

5 I am going to invoke the thirteenth juror doctrine
6 because I think an injustice was done. I would refer to
7 your comments in the closing argument to a jury, to this
8 jury, in violation of Rule 43(i). You personally
9 addressed the jury. Your quote, "I know my Greenville
10 County jurors are going to be fair and decent to me." end
11 quote. Quote, "And you're bright enough and have the
12 brains enough to know that that's what I said on Monday."
13 end quote. Quote, "And you guys are not so foolish or
14 dumb." end quote. "When you hear the evidence
15 yourselves, are you guys just not bright enough to
16 remember?" end quote. Under anybody's interpretation,
17 you were personally addressing the jury.

18 Your cross-examination of Dr. Mina. You're very
19 skilled at that, Mr. McGarr. You're skilled at using
20 records. And that's -- I mean, every trial lawyer should
21 be good at that. But you don't get to cross the line and
22 say, so you're calling emergency room doctors quacks.
23 You do not -- you are not allowed to pit witnesses. You
24 are not allowed to question one witness' veracity through
25 another witness. You can ask about what happened and

30

1 argue it to a jury, but you are not allowed to do that.

2 And it is just so simple and basic.

3 I'm going to ask Mr. Peace to prepare a proposed

4 order and share it with Mr. McGarr before I see it. I'm

5 granting a new trial absolute based on the thirteenth

6 juror doctrine.

7 Okay. Thank you very much.

8 MR. PEACE: Thank you, Your Honor.

9 (WHEREUPON, the hearing ended at approximately 10:55

10 a.m.)

11 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Barbara Gaines,
Plaintiff,
-vs-
Joyce Ann Campbell,
Defendant.

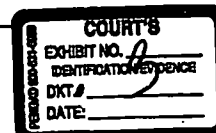
C.A. No. 20012-CP-23-1971

DEPOSITION OF CHRISTIE B. MINA, M.D.

PURSUANT to Notice and/or agreement between the parties, the deposition of CHRISTIE B. MINA, M.D., was taken via videotape at the offices of Piedmont Neurosurgical Group, 3 St. Francis Drive, Suite 490, Greenville, South Carolina, on Wednesday, June 5, 2013, commencing at the hour of approximately 5:05 p.m.

KAREN A. BELANGER, CVR-M

CAMPBELL/HADAWAY & ASSOCIATES
Deposition and Court Reporters
Post Office Box 4034
Greenville, South Carolina 29608-4034
(864) 801-4007



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APPEARANCES:

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..... on behalf of the Plaintiff

MARCUS K. MCGARR, ESQUIRE
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Greenville, South Carolina 29601

..... on behalf of the Defendant

ALSO PRESENT:

Cliff Williams, Argyle Multimedia (videographer)
Barbara Gaines, Plaintiff
Joy Gaines

STIPULATIONS:

1. The deposition is taken pursuant to the South Carolina Circuit Court Rules of Civil Procedure.
2. The reading and signing of the deposition transcript by the deponent are expressly waived.

EXHIBITS:

See Index, page 2.

1 VIDEOGRAPHER:

2 We're going on the record at camera time 17:05. This
3 is the video deposition of Dr. Christie B. Mina, M.D.,
4 taken by the Plaintiff in the matter of Barbara
5 Gaines, the Plaintiff, versus Joyce Ann Campbell, the
6 Defendant. The case number is 2012-CP-23-1971 in the
7 Court of Common Pleas, Greenville County, South
8 Carolina. Today is Wednesday, June 5th, 2013. We are
9 in Greenville, South Carolina. The court reporter is
10 Karen Belanger from the firm of Campbell/Hadaway and
11 Associates. Videographer is Cliff Williams from the
12 firm of Argyle Multimedia, LLC. Will counsel present
13 please introduce themselves for the record?

14 MR. PEACE:

15 My name is John Peace, and I'm here on behalf of
16 Barbara Gaines.

17 MR. MCGARR:

18 And I'm Marc McGarr on behalf of Ms. Campbell.

19 VIDEOGRAPHER:

20 And will the court reporter please swear in the
21 witness?

22 CHRISTIE B. MINA, M.D.,

23 being first duly sworn, was examined and testified as
24 follows:

25 EXAMINATION BY MR. PEACE:

- 4 -

CAMPBELL/HADAWAY & ASSOCIATES - (864) 681-4007

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1 Q. Hi, Dr. Mina. We're here at your offices of Piedmont
2 Neurosurgical Group, located at St. Francis Hospital,
3 to take your deposition for use at trial. Of course
4 we're making a video of your testimony to show the
5 jury at trial, just as though you were sitting in a
6 courtroom. Dr. Mina, if you could -- just to start
7 with, could you tell the jury about your educational
8 background, please?

9 A. Yes. I went to undergraduate school at Erskine
10 College in Due West, South Carolina. After graduating
11 there, went to the Medical University of South
12 Carolina in Charleston, where I earned an M.D. degree;
13 and then went to residency training at the University
14 of Tennessee, Simms Murphy Clinic, for neurosurgical
15 residency.

16 Q. All right. And, Dr. Mina, I've printed your resume
17 off of your practice's website. Is that an up-to-date
18 resume or CV of your educational experience?

19 A. The last time this was updated was probably two to
20 three years ago, but for the most part I think it's
21 probably accurate.

22 Q. All right. And I see you also studied at Oxford
23 University in England.

24 A. I did.

25 Q. And what -- when were you there, and what did you

- 1 study there?
- 2 A. That was a junior year abroad in undergraduate school.
- 3 And I studied something called PPE, which is politics,
- 4 philosophy, and economics.
- 5 Q. Okay. And then you came back to the United States
- 6 and, I guess, completed your training at the Medical
- 7 University of South Carolina?
- 8 A. Yes.
- 9 Q. And what degree did you earn there?
- 10 A. M.D.
- 11 Q. And I see here post-doctoral training. Can you tell
- 12 the jury what a -- what, what your neurosurgical
- 13 residency -- what is that? Can you explain what that
- 14 is?
- 15 A. Yes, that -- when you go to medical school, that's
- 16 general medical training, but when you do the
- 17 residency, that's training in a particular specialty
- 18 and it's more hands-on working with patients than
- 19 medical school is.
- 20 Q. All right. How long was your neurosurgical residency?
- 21 A. Six years.
- 22 Q. And what sort of things do you do during that
- 23 residency?
- 24 A. Everything that you would do as a, as a practicing
- 25 physician taking care of patients both in the office

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1 and in the hospital, assisting with and ultimately
2 doing surgery, taking care of emergencies. All those
3 things.

4 Q. Okay. And where did you do your residency?

5 A. Memphis, Tennessee.

6 Q. And from your resume, it says you completed your
7 residency in 2001.

8 A. Yes, that's right.

9 Q. And then it says fellowship in complex spine surgery
10 at the University of Tennessee. Can you tell the jury
11 what that is?

12 A. That's extra training in a specific area of
13 neurosurgery called complex spine reconstruction. We
14 were able to do a six-month fellowship during our
15 residency during that six years, because of the high
16 volume of cases that we saw in Memphis.

17 Q. Okay. And it also mentions board certification. Can
18 you tell the jury what board certification is?

19 A. Yes. Two years after you graduate from residency,
20 you've been out in practice, you create a database of
21 a certain number of your cases that you've performed.
22 You provide that information and ultimately take a set
23 of board examinations, one written and one oral. And
24 in order to become board certified in the specialty of
25 neurosurgery, you have to pass those examinations.

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1 Q. All right. And I understand you hold some other
2 special certifications. Can you tell the jury about
3 that?

4 A. These special certifications are probably incomplete
5 at this point, but include Frameless Stereotaxy, which
6 is a form of surgical navigation. Midas Rex workshop,
7 which was training in the use of the high-speed power
8 drills that we use in surgery. Microendoscopic
9 disectomy training, which was -- I did that at the
10 onset of the minimally invasive surgical techniques in
11 the spine. Charite' Artificial Disc Training was
12 special training in the placement of artificial discs
13 in the lumbar spine. And X-Stop training is for the
14 use of another spinal device, that I don't actually
15 -- I don't use at this point.

16 Q. Okay. And I see, too, you're a member of the South
17 Carolina Association of Neurological Surgeons.

18 A. Yes, although I didn't actually serve as president.
19 I was vice president and secretary/treasurer of that
20 organization.

21 MR. PEACE:

22 Okay, Doctor, at this point we'd offer your resume and
23 also offer you as an expert in neurological surgery.

24 MR. MCGARR:

25 Without objection.

1 (Plaintiff's Exhibit No. 1 marked for identification.)

2 EXAMINATION RESUMED BY MR. PEACE:

3 Q. Dr. Mina, if we could, let's talk now specifically
4 about Barbara Gaines' treatment with your practice.
5 How did Barbara Gaines first come to Piedmont
6 Neurosurgical Group?

7 A. She was initially referred to my office and saw my
8 associate, Dr. Russell, for an initial evaluation of
9 her condition.

10 Q. And, Dr. Mina, does your, does your chart reflect who
11 referred her to you?

12 A. She was referred by Dr. Lisa Harding.

13 Q. Okay, and I believe Dr. Harding's at Foothills
14 Internal Medicine?

15 A. I believe that's correct.

16 Q. What problems was Ms. Gaines having that -- that Dr.
17 Harding referred her here for?

18 A. She was having difficulty with her cervical spine,
19 including symptoms of neck and arm pain.

20 Q. Okay. And, let's see, had Dr. Harding ordered
21 diagnostic studies before she referred Ms. Gaines to
22 you?

23 A. Yes, she had. She had ordered an MRI of the cervical
24 spine.

25 Q. What did the MRI show? Do you have -- I'm sorry. I

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- 1 didn't ask was that something you can access from your
2 computer there.
- 3 A. Yeah, based on my notes from the first time I saw Ms.
4 Gaines, her MRI showed that she had what's called an
5 osteophyte, otherwise known as a bone spur, on the
6 right side at the cervical 5-6 level which was
7 compressing the right C-6 nerve root. And she also
8 had what's called an autofusion between cervical 2 and
9 3, which just means that those two bones had at some
10 point fused themselves together on their own.
- 11 Q. And would it be helpful -- I mean, I've got a hard
12 copy of the MRI report, if that would be helpful just
13 to refresh your recollection.
- 14 A. Well, again, though, I read my own films, and I don't
15 always necessarily agree with all the details of the
16 radiologist's report. So I don't usually like to go
17 by these reports.
- 18 Q. Okay. And so reading from your own notes, regarding
19 the MRI, would be for you better recollection than
20 reading the radiologist report?
- 21 A. Yes, and also the radiologists are required to
22 describe anything that's the slightest bit abnormal on
23 the scan in words. And so you end up oftentimes with
24 a very wordy report, describing a lot of things that
25 are not really clinically significant.

1 Q. Okay. Well, let's see, when Ms. Gaines first came to
2 Piedmont Neurosurgical, can you just kind of walk
3 through the notes and give us a tour of her course of
4 treatment with Dr. Russell?

5 A. So initially she came to see Dr. Russell on March the
6 4th, 2010, and he did a full history and physical at
7 that time. He talks in here about trouble she was
8 having with neck and arm pain, as well as some back
9 pain in the lower back. At that point he reviewed her
10 cervical MRI films, the ones that we just discussed,
11 and he also ordered an MRI of the lumbar spine to
12 assess the back pain problems that she was having at
13 that time. She then returned to see him on April
14 12th, 2010.

15 Q. Dr. Mina, if I could interrupt you. Just going back
16 to the March 4th, 2010 visit, did Dr. Russell take a
17 history from her at that March 4th, 2010 appointment?

18 A. Yes, he did.

19 Q. Could you just read the paragraph, History of Present
20 Illness, for the jury?

21 A. Yes. "The patient is a 69-year-old female who
22 presents with a complaint of neck pain. She has had
23 a long history of neck problems. On January 8th, 2010
24 she was in a car wreck, which gave her a flexion
25 extension injury of the neck and lower back. Since

1 that time she's had pain in her neck, which is a 9 out
2 of 10 at the worst and is usually an 8 out of 10. She
3 has been on muscle relaxers and pain medicines, but
4 has not improved. Her neck hurts a lot at night and
5 she is not able to sleep. The pain is primarily in
6 the lower neck and down the shoulder, and into her
7 arm."

8 Q. And, Dr. Mina, let me ask you a couple of questions
9 about that. Can you -- first of all, can you explain
10 for the jury what a flexion extension injury of the
11 neck would be?

12 A. Yes, flexion means to go forward and then extension
13 means to go backwards like this. So it's describing
14 a typical whiplash injury, where a car would stop
15 suddenly and a person would be thrown forward and then
16 thrown backward again, maybe perhaps multiple times.

17 Q. Okay. And the note also mentioned that she had pain
18 into her shoulder and her arm. What does that tell
19 you about her neck injury?

20 A. That indicates to me that there's a significant chance
21 of a nerve injury, as well as a soft tissue ligament
22 injury.

23 Q. Okay. Now Dr. Russell also noted that she had a long
24 history of neck problems.

25 A. Yes.

- 1 Q. Does that affect how you approach her neck injury,
2 when you see her in your clinic?
- 3 A. And certainly we take that into consideration.
- 4 Q. Okay. And do you believe -- and, of course, you've
5 been treating Ms. Gaines for quite a while, and we're
6 going to go through all the records. But how can you
7 tell prior neck problems from problems that may have
8 been caused by a car wreck?
- 9 A. You can tell by the history that a patient gives you,
10 at the time of the visit. You can tell by office
11 notes that come from other physicians prior to the
12 injury. You can also make some educated guesses based
13 on the appearance of the imaging studies, such as
14 MRIs.
- 15 Q. Okay. And did you do that in this case?
- 16 A. Yes.
- 17 Q. And you, of course -- did you review Dr. Russell's
18 records before you first saw Ms. Gaines?
- 19 A. Yes.
- 20 Q. And I interrupted you. You had moved on to, I guess,
21 the next visit when she returned to see him.
22 Actually, did he refer her to another medical provider
23 for therapy after that first visit?
- 24 A. Yes, that was for the low back pain issues.
- 25 Q. Where did he send her for physical therapy?

- 1 A. Doshier Physical Therapy.
- 2 Q. And does your chart also contain the Doshier Physical
- 3 Therapy records as well?
- 4 A. Yes.
- 5 Q. And again would these have been the types of records
- 6 that you would have reviewed in the course of treating
- 7 Ms. Gaines?
- 8 A. Yes.
- 9 Q. You mentioned a lumbar MRI. Did Dr. Russell send her
- 10 for a low back MRI as well?
- 11 A. He did.
- 12 Q. What were the results of that MRI?
- 13 A. Well, here, I must point out that I didn't really
- 14 treat Ms. Gaines for any lumbar issues. That was
- 15 strictly done by Dr. Russell. And so I didn't
- 16 actually -- I don't recall reading those MRI films
- 17 myself, of the lumbar spine, because they weren't
- 18 relevant to what we were addressing at that time.
- 19 According to the radiologist's report, which again
- 20 sometimes I agree with and sometimes not, it seems
- 21 that the MRI showed some diffuse degenerative changes
- 22 throughout the lumbar spine.
- 23 Q. Okay.
- 24 A. They don't mention any evidence of significant nerve
- 25 compression.

1 Q. Okay. Moving on from there, when did she next see Dr.
2 Russell?
3 A. That was on June 14th, 2010.
4 Q. Okay. Let's see, did we already cover the April 12th,
5 2010 visit?
6 A. Yes.
7 Q. Okay. The -- okay. And --
8 A. Well, we touched on it. I'm not sure we discussed it
9 --
10 Q. Yeah, I guess --
11 A. -- in detail.
12 Q. -- I wanted to ask you about the April 12th visit. I
13 saw that he sent her for an epidural steroid
14 injection.
15 A. Yes.
16 Q. What is an epidural steroid injection?
17 A. It's a steroid injection, usually containing a type of
18 steroid that's designed to stay put mostly where it's
19 injected and release slowly over a fairly long period
20 of time. That's usually dissolved in a carrier of
21 some kind, whether it's saline or some type of local
22 numbing medication. For the cervical spine, or for
23 the neck, then usually this type of injection is done
24 with or without sedation with a little bit of numbing
25 medication placed in the skin at the injection site.

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- 1 The needle is inserted into the spine under continuous
 2 x-ray guidance. And then once correct placement has
 3 been achieved, then the medication is injected into
 4 the space around the spinal cord and nerve roots.
- 5 Q. Okay, so using the x-ray to actually guide the needle
 6 down into the space between the discs, or between the
 7 vertebrae?
- 8 A. Yes, into the spinal canal where the nerves are.
- 9 Q. Okay. And what sort of result did Ms. Gaines get from
 10 the epidural steroid injection? I think that would be
 11 in the --
- 12 A. That would be in the next note.
- 13 Q. The June 14, 2010 note.
- 14 A. After that injection, she had 80 percent improvement
 15 in her neck and arm pain overall.
- 16 Q. Okay. And what was Dr. Russell's plan of treatment at
 17 that point?
- 18 A. At that point, his plan was to see her back on an
 19 as-needed basis.
- 20 Q. Okay. And, Dr. Mina, looking through the chart that
 21 we got from your office, it looks like she then had an
 22 epidural steroid injection on August 26th, 2010. Do
 23 you see the St. Francis Hospital record regarding that
 24 injection?
- 25 A. No, I don't. I can't immediately pull that up here.

- 1 It's probably in here somewhere.
- 2 Q. Let me just hand you a hard copy of it. I guess what
- 3 I wanted to ask you, I see that she -- Dr. Russell we
- 4 talked about had released her PRN after the June 14,
- 5 2010 visit. And then we see that she had an injection
- 6 on August 26th, 2010.
- 7 A. Yes.
- 8 Q. Is it unusual that there's not an office visit in
- 9 between her last visit with Dr. Russell and her next
- 10 epidural steroid injection?
- 11 A. Not at all unusual. What usually will happen is, if
- 12 an epidural injection wears off and the pain recurs,
- 13 then often the patient will call to let us know that.
- 14 And then to save time, especially if they've had good
- 15 results with the first injection, we'll just go ahead
- 16 over the phone and set them up to have a second
- 17 injection done.
- 18 Q. Okay. And is that what Dr. Russell did here?
- 19 A. Yes.
- 20 Q. Okay. Okay, and then it looks like the next office
- 21 note we have from your office is February 1st, 2011.
- 22 A. Yes.
- 23 Q. And if you could tell us what history Dr. Russell
- 24 recorded in his February 1st, 2011 office note?
- 25 A. So at this point she returns having had a third

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- 1 epidural injection in December, which he stated did
2 not work at all. And at this point she was not
3 enthusiastic about surgery and wanted to try another
4 epidural.
- 5 Q. Okay. And then did your office then set that up?
- 6 A. Yes.
- 7 Q. Dr. Mina, just a question about the nature of epidural
8 steroid injections. If -- the first one seems to have
9 worked pretty well. She reported 80 percent
10 resolution of her symptoms. Why is it that that 80
11 percent improvement didn't, didn't last?
- 12 A. Oftentimes injections might be temporary because the
13 medication, as I mentioned earlier, is designed to
14 stay put for an extended period of time in the place
15 where you inject it and release slowly over that
16 period of time. But eventually it will be reabsorbed
17 completely. And then at that point, if there's
18 ongoing nerve compression and ongoing, you know, other
19 structural problem, then the symptoms may come back.
- 20 Q. And would a second or third shot -- would it be more
21 or less effective than the first one?
- 22 A. It might be either.
- 23 Q. Okay. And in this case, did she -- she apparently
24 didn't have very good results from the second and the
25 third injection.

1 A. Certainly not as good as she had with the first.

2 Q. Okay. All right. And then it looks like she had a
3 fourth epidural steroid injection at St. Francis
4 Hospital on February 4th.

5 A. Yes.

6 Q. When did Dr. Russell see Ms. Gaines again after that,
7 after that shot?

8 A. On March 21st, 2011.

9 Q. And, Dr. Mina, if you could read his History of
10 Present Illness for the jury from that visit, please.

11 A. "The patient is a 70-year-old female who presents with
12 a complaint of neck pain. She has been followed here
13 since June of 2010. She has had multiple conservative
14 therapies including physical therapy, epidural
15 steroids, and medications. She continues to have neck
16 pain and right arm pain, with occasional left arm pain
17 as well. Review of her cervical MRI shows multilevel
18 cervical stenosis. I think we have given her the
19 maximum amount of conservative therapy. And I think
20 at least she would like to have a visit with Dr. Mina
21 to talk about the pros and cons of cervical
22 decompression and fusion. We will make those
23 arrangements."

24 Q. And is that the visit then that they set her up for an
25 appointment to see you?

1 A. Yes.

2 Q. Okay. Well, let's see if we could move on to when you
3 first saw her. And I guess that was April 18, 2011.

4 A. Yes.

5 Q. Okay. Can you tell the jury about the examination you
6 performed when she came in to see you?

7 A. Well, she and I talked about the pain that she had
8 been having. In the examination, the physical
9 examination that I did, the pertinent positives would
10 include a positive Spurling sign on the right side,
11 mild tenderness of the neck, diffusely decreased
12 reflexes, a tender right anterior shoulder joint. All
13 the other findings were essentially normal.

14 Q. What is a positive Spurling's test?

15 A. That's a -- it's a, it's a nerve compression test, to
16 see if a nerve is symptomatically being pinched. So
17 in this case, for a positive Spurling's sign on the
18 right, the patient would turn their head to the right
19 like this, and then lean their head back like this.
20 If it's positive, that reproduces their usual pain
21 going down into the shoulder and arm.

22 Q. Okay. And, and so what does that tell you about that
23 patient's condition?

24 A. That tells me that there's a pinched nerve involved
25 that's causing the symptoms.

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- 1 Q. Okay.
- 2 A. Or certainly it's one piece of information that leads
- 3 you to that conclusion.
- 4 Q. Okay. All right. And I saw in your notes that you
- 5 mentioned she had neck pain radiating into her right
- 6 C-6 distribution.
- 7 A. Yes.
- 8 Q. Can you tell the jury what the C-6 distribution means?
- 9 A. Yes, it's where the C-6 nerve root goes after it
- 10 leaves the spinal cord in the neck, which the C-6
- 11 nerve goes down into the shoulder blade and then it
- 12 comes out over the front of the arm like this, into
- 13 the forearm like this, into the thumb, and sometimes
- 14 into the first finger.
- 15 Q. Okay. And is -- so was that the -- how she described
- 16 her pain when she came to see you?
- 17 A. Yes.
- 18 Q. And was that consistent with the other tests that you
- 19 performed while she was in the office?
- 20 A. Yes.
- 21 Q. And was that consistent with the MRI studies that you
- 22 reviewed?
- 23 A. Yes.
- 24 Q. Okay. Well, based on all of that, what was your
- 25 impression?

1 A. My impression was that this bone spur that was
2 pinching the nerve was the source of the symptoms.

3 Q. Okay. Now, could the bone spur have been caused by
4 the car wreck?

5 A. No.

6 Q. Okay. Why then would her symptoms begin after a car
7 wreck, if the bone spur had existed before the wreck
8 occurred?

9 A. Well, a bone spur is the result of arthritis and how
10 it affects the joint. The inflammation from the
11 arthritis stimulates the bone just to grow. And then
12 the bone spur then slowly, gradually grows into the
13 space where the nerve exits the spine. It narrows
14 that space, but it does so very gradually over a long
15 period of time. And oftentimes changes that pinch
16 nerves, whether it's in the brain or the spine,
17 wherever, if those changes happen very slowly then the
18 nerve can accommodate and get used to that and not
19 have any symptoms as a result. Eventually if the
20 pinching gets too tight, then the nerve will become
21 unhappy. But over a -- slowly over a long period of
22 time, there may be no symptoms until some sudden
23 incident occurs which causes bruising of the nerve
24 such as an accident or a fall. And at that point,
25 when the nerve becomes bruised, it also becomes

1 swollen and inflamed, starts causing symptoms similar
2 to what Ms. Gaines had. And because the pressure is
3 ongoing because the bone spur's not gone away, the
4 bone spur's still pinching the nerve, and therefore
5 oftentimes at that point the nerve won't be able to
6 heal.

7 Q. Okay. Well, when you have that situation, what do you
8 do for the patient?

9 A. Then you try all the things that were tried in this
10 case such as physical therapy, different medications
11 like anti-inflammatories or muscle relaxers, things
12 like epidural injections or oral steroids. And
13 ultimately, if none of those things work, then
14 sometimes surgery has to be performed.

15 Q. Okay. And, Doctor, based on all the information we've
16 discussed -- the tests, the diagnostic studies, the
17 examination -- is it your opinion -- or let me ask
18 you, to a reasonable degree of medical certainty, did
19 Barbara Gaines sustain a neck injury in this car wreck
20 on January 8th, 2010?

21 A. Yes.

22 Q. And likewise, to a reasonable degree of medical
23 certainty, did the car wreck cause this radiating pain
24 from her neck into her right arm and hand?

25 A. Yes.

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1 Q. Now, again, I suspect my friend Marc McGarr is going
2 to point out that Ms. Gaines did have a history of
3 some neck pain. How can you be so sure that the wreck
4 caused the neck injury and the resulting right arm and
5 hand pain?

6 A. Well, you can never be a hundred percent sure of much
7 of anything in medicine or surgery. But certainly
8 according to the history that she provided and, you
9 know, based on how things went over the course of
10 treatment, it seems almost certain that, that this
11 injury caused that pain due to the bruising of the
12 nerve.

13 Q. Well, based on all that, your recommendation was what
14 for Ms. Gaines?

15 A. At this point, surgery to decompress the nerve, remove
16 the bone spur.

17 Q. Okay. And when did you perform that surgery?

18 A. On June 7th, 2011.

19 Q. Okay. And where was the surgery performed?

20 A. St. Francis Hospital, downtown Greenville.

21 Q. Okay. And do you have the operative note there on
22 your computer?

23 A. I do.

24 Q. Can -- and I'll tell you we've prepared some medical
25 art. Let me pull this out. We've marked this as

- 1 Exhibit Number 2 to your deposition. And if you look
2 to your left, you'll see we prepared a larger copy as
3 well.
- 4 A. Oh, okay.
- 5 Q. Have you had an opportunity to review this medical
6 art?
- 7 A. Yes.
- 8 Q. And does this -- we'll go through it step by step, but
9 does this generally depict the surgery you performed?
- 10 A. Yes.
- 11 Q. Okay. If you could just describe for the jury, going
12 through step by step, how, how you go about performing
13 the surgery?
- 14 A. Okay, for this particular surgery, the approach is
15 through the front of the neck with a horizontal
16 incision just off to the right-hand side. Go down
17 through the soft tissues between the muscles, between
18 the carotid artery and the trachea, and then move the
19 esophagus gently off to one side, because that lies
20 right on top of the spine. And then put a retractor
21 in the neck, in those tissues, to help hold everything
22 to the side, so that I can see the spine and access,
23 you know, what I need to do.
- 24 Q. And, Dr. Mina, can we see the retractors in the
25 Exhibit Number 2?

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- 1 A. That's here.
- 2 Q. Okay, so those are those metal hardware looking things
- 3 that are pulling the skin back and exposing the spinal
- 4 cord --
- 5 A. Yes, although --
- 6 Q. -- or the spinal column?
- 7 A. -- fortunately when you're working on one disc, the
- 8 exposure doesn't need to be quite that wide or
- 9 stretched quite so much. But -- but, yes.
- 10 Q. Okay. So that's the purpose of those devices?
- 11 A. Yes.
- 12 Q. And then we see a black and white, or two black and
- 13 white images on the left-hand side there. What, what
- 14 are we looking at there?
- 15 A. Those are MRI images of the cervical spine.
- 16 Q. Okay, so that's actually taken from the MRI that you
- 17 -- you reviewed the films yourself on?
- 18 A. Yes.
- 19 Q. And is that how those films appeared to you when you
- 20 reviewed the films?
- 21 A. Yes.
- 22 Q. Okay. Moving to the right, we see another black and
- 23 white image in the center of the page. Can you tell
- 24 the jury what that shows?
- 25 A. That's another MRI image taken in a different plane

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- 1 from the ones on the left.
- 2 Q. Okay. And can you point out for the jury where the
- 3 C5-C6 space is?
- 4 A. On which images?
- 5 Q. Well, let's start with the ones on the left-hand side.
- 6 A. The C5-6 space is right here.
- 7 Q. Okay, and I believe they've --
- 8 A. And there.
- 9 Q. We've actually got C-5 and C-6 labeled on that MRI
- 10 image.
- 11 A. Yes, there. And this is a cross-section through that
- 12 C5-6 disc.
- 13 Q. Okay. So when you reviewed the films from an MRI, you
- 14 can see a side view as well as a cross-section view?
- 15 A. Yes.
- 16 Q. Okay. Okay, well, and I interrupted you. I guess we
- 17 were up to the center section, section B. Can you
- 18 tell us what we're looking at there?
- 19 A. Okay, so at this point, then I'm looking directly at
- 20 the front part of the spine. And I can see the front
- 21 of the bones and the front of the discs. And so at
- 22 this point I cut out the cartilage component of the
- 23 disc. Anything that's left there, including the ends
- 24 of the bone above and below, I drill down so that the
- 25 edges are nice and parallel to one another and all the

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- 1 fragments of the cartilage are removed. Once I get to
2 the very bottom of the disc, that's where the bone
3 spur's located right on top of the nerve. So then I
4 find the bone spur and remove it, usually with a
5 combination of a tiny high-speed drill and a biting
6 instrument. And then that gets the bone spur off the
7 nerve. Then I inspect the nerve to make sure that all
8 the pressure is off and the space is open.
- 9 Q. Okay. And so do we see that procedure here on the
10 medical art?
- 11 A. And this is where the disc is being removed. This is
12 the little high-speed drill -- or this is a curette
13 actually. But here's the drill removing the bone spur
14 from the nerve.
- 15 Q. Oh, okay, and that's in a circle that's labeled D. It
16 says posterior osteophytes are drilled away,
17 decompressing the nerve roots?
- 18 A. Yes.
- 19 Q. All right. And so once you decompress the nerve
20 roots, what's the next step in the procedure?
- 21 A. Okay, so now the nerve is unpinched. And that was
22 really the primary goal of the surgery. But now you
23 also have a gap left in the spine where the disc came
24 out, and that has to be filled in with something.
25 Otherwise it just collapses down. So there are a

1 number of different ways to do that. And here, I took
2 a piece of bone from the bone bank. And that's
3 already cut to fit the exact size of the gap where the
4 disc used to be. That gets tapped in. It wedges into
5 that gap very snugly so that it's hard to make it move
6 around. Eventually the bone will grow. The person's
7 own bone will grow from the bottom up, and the top
8 down, through and around that piece of bone bank bone.
9 That will all turn into one segment of bone. Once
10 that's in place, then to hold everything together
11 while that bone growth occurs, which takes about three
12 months on the average, then you put a metal plate over
13 the front of the spine like this. And then the plate
14 has holes in it, and through the holes go these metal
15 screws into the bone above and into the bone below.
16 So that plate not only holds the spine together there
17 and restricts the motion allowing the bone to heal
18 better, but it also provides a barrier for that piece
19 of bone bank bone to come out into the front of the
20 throat.

21 Q. Where, where does the bone at the bone bank come from?

22 A. It comes from a human cadaver.

23 Q. Okay. And they can preserve that bone tissue for use
24 on a surgery like this?

25 A. Yes. And it's not live tissue at all. The live bone

1 cells in that tissue have been killed and processed
2 out. So really it's just -- even though we call it
3 bone bank bone, it's just a scaffold of minerals for
4 a person's own bone cells to grow in through there.
5 It kind of acts as condos for new bone cells.

6 Q. Okay. And then we see a black and white image in the
7 lower right-hand corner of the exhibit. Can you tell
8 us what we're looking at there?

9 A. That's this image here. That's an x-ray looking from
10 the spine, from the side, with the person -- their
11 face is facing me. So this is a side view of the
12 plate that goes on the front of the spine, and that's
13 a side view of the screws. Now there would be four
14 screws actually, but they're superimposed here and
15 here. So it just looks like two on that image.

16 Q. Okay, so there would be two screws at the top and two
17 screws at the bottom holding the plate in place?

18 A. That's correct.

19 MR. PEACE:

20 Okay. At this point we'd offer Exhibit Number 2 as an
21 Exhibit to Dr. Mina's deposition.

22 (Plaintiff's Exhibit No. 2 marked for identification.)

23 EXAMINATION RESUMED BY MR. PEACE:

24 Q. Dr. Mina, how long did this surgical procedure take?

25 A. My guess, probably about an hour to an hour and a

- 1 half.
- 2 Q. Okay. How many of these procedures have you
- 3 performed?
- 4 A. Hundreds.
- 5 Q. How many do you do, say, in a month?
- 6 A. Probably eight.
- 7 Q. Okay, so maybe two a week?
- 8 A. That's about right.
- 9 Q. Okay. And how long does the surgery normally take
- 10 after the surgery's completed? I said that wrong.
- 11 A. Sorry.
- 12 Q. How long does the recovery typically take following
- 13 the surgery?
- 14 A. The restrictions usually include no driving for a week
- 15 and no lifting anything heavier than five pounds for
- 16 four weeks. The patient is usually in the hospital
- 17 overnight. Most people go home the next day. I
- 18 usually recommend that patients take a soft diet
- 19 instead of solid food for the first few days, because
- 20 they usually get a lump in the throat afterwards for
- 21 a little while. Really that's, that's about it.
- 22 Q. Okay. And how did Ms. Gaines do following the
- 23 surgery?
- 24 A. Oh, she did exceedingly well.
- 25 Q. Okay, well, let's look at the notes following the

- 1 surgery. It looks like you saw her back on -- well,
2 when was the next visit?
- 3 A. On July 25th, 2011.
- 4 Q. And from your notes, how was she doing then?
- 5 A. So at this point, she's almost two months out from the
6 surgery and she has done very well with near complete
7 resolution of her preoperative symptoms.
- 8 Q. Okay. And did you order diagnostic studies to check
9 the position of the hardware?
- 10 A. Yes, I always do that.
- 11 Q. Okay, and is that the x-ray image we're looking at, in
12 the lower right-hand corner here?
- 13 A. It is.
- 14 Q. Okay. And I think your note says, "She's done very
15 well with near complete resolution of her pre-op
16 symptoms." What does that tell you about the
17 diagnosis from before the surgery?
- 18 A. That means the diagnosis was correct.
- 19 Q. And the surgery went well and seems to address the
20 problem she had?
- 21 A. Yes.
- 22 Q. Okay. When did you next see Ms. Gaines in your
23 office?
- 24 A. The next visit was on August 31st, 2011.
- 25 Q. Okay. And if you could tell the jury how she was

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- 1 doing on that visit.
- 2 A. So this states, "The patient returns about three
3 months after a C5-6 fusion. She continues to do very
4 well with minimal symptoms."
- 5 Q. Okay. And, let's see, so what, what did you do then?
- 6 A. At that point I'd reviewed the new x-rays, because I
7 always get another set of x-rays at three months after
8 surgery. And at that point the bone had healed
9 solidly so I released her.
- 10 Q. Great. And, Dr. Mina, just in conclusion, let me go
11 over some basic points. To a reasonable degree of
12 medical certainty, based on a review of the medical
13 information, diagnostic testing regarding her injuries
14 and treatment, did Barbara Gaines sustain a neck
15 injury at C5-C6 in the motor vehicle collision on
16 January 8th, 2010?
- 17 A. Yes.
- 18 Q. Okay. Following the motor vehicle collision on
19 January 8th, 2010, did she suffer from neck pain
20 radiating into the C-6 distribution?
- 21 A. Yes.
- 22 Q. Okay. To a reasonable degree of medical certainty,
23 did those wreck related injuries necessitate the
24 anterior cervical discectomy and fusion surgery, which
25 you've just described for the jury?

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1 A. Yes.

2 Q. And, let's see, based on your July 25th and August
3 31st, 2011 examinations, has Barbara Gaines had a near
4 complete resolution of her preoperative symptoms?

5 A. Yes.

6 MR. PEACE:

7 Dr. Mina, that's all the questions I have for you.
8 Please answer any that Mr. McGarr may want to ask.

9 WITNESS:

10 Thank you.

11 EXAMINATION BY MR. MCGARR:

12 Q. Dr. Mina, I'm Marc McGarr. I'm probably going to be
13 giving you records that you haven't had access to
14 prior to today, which may change some of your
15 opinions. And that's not un -- that's not unnormal or
16 unnatural, because I have access to much more records
17 than you have access to, because this is my job.

18 A. Sure.

19 Q. Going to the first record, does it appear that Ms.
20 Gaines had gone to see a Dr. Stephen Freeman as far
21 back as 8/29 of 2006?

22 A. Yes.

23 Q. And going to page 2 of that note, does it appear that
24 at that time he had done x-rays of her cervical spine?
25 And I'm going to use English, by the way.

- 1 A. Good.
- 2 Q. Which is of her neck, and that he was finding
3 degenerative arthritic changes especially at C4-C5,
4 C5-C6?
- 5 A. Yes.
- 6 Q. So he, as far back as 8/29 of 2006, is finding some
7 bone spurring at C5-6 just like you found when you
8 went and looked at her MRIs; is that correct?
- 9 A. Well, it doesn't say necessarily specifically bone
10 spurring. Yeah, degenerative changes can mean other
11 things, too, but certainly there's some degenerative
12 change.
- 13 Q. And degenerative change is, by definition, something
14 that comes about as a result of age and time, and
15 little traumas like turning your head too far or me
16 whopping somebody on the top of the head. A number of
17 things like that. I mean, the degenerative change is
18 not an acute thing, it's something that takes place
19 over time; is that correct?
- 20 A. That's correct.
- 21 Q. So she was having degenerative problems at C5-6, where
22 you ultimately found that bone spur, as far back as
23 2006?
- 24 A. Yes.
- 25 Q. Going to the next document in this set of documents,

- 1 I'll represent to you that this is an x-ray that was
- 2 done of Ms. Gaines' neck at the Baptist Easley
- 3 Hospital on the day of the accident. Does it appear
- 4 that when they did an x-ray of her neck, that they
- 5 found severe degenerative changes?
- 6 A. Yes, that's what the report says. Again, reports, I
- 7 don't always necessarily agree with the radiologist's
- 8 interpretation.
- 9 Q. And I'm not really wanting you to agree or disagree,
- 10 necessarily. Just from this perspective, does it
- 11 appear that this doctor is saying she has severe
- 12 degenerative changes in that neck?
- 13 A. Yes.
- 14 Q. But he doesn't find any acute abnormalities or
- 15 anything that had happened as a result of something
- 16 that just immediately took place?
- 17 A. No.
- 18 Q. A car accident, that sort of thing?
- 19 A. No, not on these plain x-rays.
- 20 Q. So on plain x-ray he's seeing what they saw back or
- 21 seeing maybe worse, and that's not unnatural, a worse
- 22 set of degeneration in 2010 than existed in 2006?
- 23 A. Correct.
- 24 Q. But he's not seeing anything acute that would have
- 25 happened from an injury right then and there?

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1 A. That's right.
2 Q. And it may be a she. I don't know who the radiologist
3 was.
4 A. She, actually.
5 Q. It's a she.
6 A. Yes.
7 Q. It is.
8 A. Never assume, right?
9 Q. You can't anymore, ever. There's more girls out there
10 than guys. Going to the next -- going to the next
11 one, and I realize this is the MRI that you discussed
12 earlier. I'm not going to beat that horse to death.
13 But the bottom line is, would you agree with me that
14 what you found when you reviewed the MRI of Ms.
15 Gaines' neck that was done, what, a month or so after
16 this accident, was that she had a bone spur? And I'm
17 going to use people terms, because I can't speak
18 doctor terms. But she basically has bone that is
19 growing into and around the area where her nerve is
20 trying to come out of her spinal column and into her
21 arm; is that correct?
22 A. Yes.
23 Q. And that, in and of itself, would be defined -- when
24 you're having bone spurs to the point where they're
25 pinching on a nerve, that is a severe degenerative

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- 1 problem that has taken years and years to develop?
- 2 A. Well, it's a degenerative problem that's taken years
- 3 to develop. I don't -- it might not necessarily be
- 4 considered severe. It could be mild or moderate.
- 5 Q. If it's grown enough to pinch that nerve -- and it had
- 6 done that; am I correct?
- 7 A. Yes.
- 8 Q. Then it's become severe, because once you start
- 9 pinching a nerve you could start having symptoms.
- 10 A. You can. I still would -- there are severe
- 11 osteophytes or bone spurs. And there are also, you
- 12 know, medium sized, moderate ones that can both still
- 13 pinch nerves. One might be bigger than the other.
- 14 Q. But the bottom line is, you knew when you saw that
- 15 spur that, oh, we've got an issue here. And when
- 16 she's describing the pain going down that arm, you're
- 17 going, there's a bone spur pinching this nerve that's
- 18 affecting that arm, and I can get it to reproduce
- 19 itself or I can get it to hurt in the arm by simply
- 20 moving that head backwards?
- 21 A. Yes.
- 22 Q. And I'm going to tell you a little -- I've got a
- 23 neurosurgeon in the family. So essentially that bone
- 24 spur could never have been created by this automobile
- 25 accident?

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- 1 A. No, it could not.
- 2 Q. And that bone spur could have developed into these
- 3 symptoms, and I think they already had. And I'll get
- 4 to more records that will show you that, that could
- 5 have developed into the symptoms that Ms. Gaines was
- 6 complaining of whether she was involved in an
- 7 automobile accident or whether she was not.
- 8 A. It's certainly possible.
- 9 Q. And, in fact, bone spurs, just about by their very
- 10 nature, grow more and more over the years.
- 11 Degeneration gets more and more as you get older?
- 12 A. Slowly, gradually, yes.
- 13 Q. And at some point, that bone spur's going to finally
- 14 tighten up enough where it's going to encapsulate that
- 15 nerve and you're going to have to go in and chisel it
- 16 out?
- 17 A. Not -- again, not necessarily, because you would be
- 18 surprised. You can actually have some really big, bad
- 19 looking bone spurs and not much in the way of symptoms
- 20 from that.
- 21 Q. But you can also have one that's not so big and bad,
- 22 and it be symptomatic and it just becomes symptomatic
- 23 for no reason whatsoever?
- 24 A. Yes, it's possible.
- 25 Q. So it's possible that what you did, is you repaired

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1 something that was giving -- was going to give Ms.
2 Gaines a problem regardless of whether this accident
3 took place or not?

4 A. Sorry. Could you restate?

5 Q. So it's possible that what you did, is you repaired
6 something that was going to give Ms. Gaines problems
7 regardless of whether this accident took place or not?

8 A. Right, it might or might not have ever caused her
9 problems had it not been from the accident.

10 Q. But it's possible that it could have, regardless?

11 A. It's possible that it could have anytime, at some
12 point down the road.

13 Q. And it becomes pretty important to pay attention to
14 her history and her giving you a truthful accurate
15 rendition of how the accident took place and what
16 happened before and after the accident; is that
17 correct?

18 A. Yes.

19 Q. In fact, in a situation where you've got pretty severe
20 degenerative changes, the more likely reason for a
21 problem is the severe degenerative change unless they
22 are completely honest in their history. And if their
23 history is bad, then connecting it to that historical
24 event is inevitably going to be bad. In other words,
25 if they fib to you about what happened, then your

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1 ability to say that this caused that is almost
2 impossible to do?
3 A. That's probably fair to say.
4 Q. Because you've got to -- you weren't there. You've
5 got to rely on your client -- I mean on your patient,
6 not your client. And you've got to rely on your
7 patient being honest; is that correct?
8 A. That's true.
9 Q. Does it appear that we essentially took a history of
10 Ms. Gaines by taking her deposition on July 5th of
11 2012?
12 A. Yes.
13 Q. And on the second page of that document, does it
14 appear that we asked her essentially, "Remember number
15 1 would be --
16 MR. PEACE:
17 Marc, excuse me. Do you have a copy of that for me,
18 please?
19 MR. MCGARR:
20 I don't. You didn't have any copies for me. I just
21 -- I was in a rush.
22 MR. PEACE:
23 I did. They're right here.
24 MR. MCGARR:
25 Okay, you had two.

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1 MR. PEACE:

2 I'll need a copy so I can read along.

3 MR. MCGARR:

4 Okay, well, you've got a copy of her deposition, or I
5 can give you one.

6 MR. PEACE:

7 Thank you, sir. What page?

8 MR. MCGARR:

9 Page 19.

10 EXAMINATION RESUMED BY MR. MCGARR:

11 Q. Does it state that, "Remember, number 1 would be just
12 the sound. You only heard it, but you didn't feel
13 anything. A 10 would be that you were involved in an
14 accident with a freight train. And between those two
15 areas, the 1 and the 10, where would you rate this
16 accident?" And did Ms. Gaines state to me, "Well, I
17 told you I -- it knocked me out and my granddaughter
18 was saying Nanny, Nanny. And I came to and I said
19 what, darling? And she said what's the matter? I
20 said I don't know. I don't know." And then I said,
21 "Okay, before you were knocked unconscious, how did it
22 feel on that scale of 1 to 10?" Is that what we were
23 discussing in the deposition?

24 A. It appears so.

25 Q. If we could go to the second document in that set of

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1 documents?

2 A. Okay.

3 Q. Does it appear that she went to the hospital on 1/08
4 of 2010?

5 A. Yes.

6 Q. And when she got to the --

7 MR. PEACE:

8 I'm sorry. Can I have a copy of what you're
9 cross-examining the witness with?

10 MR. MCGARR:

11 I apologize. I don't have one.

12 MR. PEACE:

13 Okay, well, we'll need to make a copy then. I don't
14 know what you're questioning her about or why.

15 MR. MCGARR:

16 Okay, but -- no offense, but you didn't have a copy
17 for me. And so I can't --

18 MR. PEACE:

19 Your copies are right here.

20 MR. MCGARR:

21 No, there's only two and you've got an entire package.

22 MR. PEACE:

23 Marc, these -- these are the copies that I got from
24 your office --

25 MR. MCGARR:

1 Okay, you have --

2 MR. PEACE:

3 -- by way of subpoena.

4 MR. MCGARR:

5 Okay.

6 MR. PEACE:

7 So, you know, I don't have the records. If we could
8 just take a break and make copies, that would be
9 great.

10 MR. MCGARR:

11 We can do that, if we need to.

12 MR. PEACE:

13 We need to.

14 VIDEOGRAPHER:

15 Going off the record at camera time 17:53.

16 (OFF RECORD)

17 VIDEOGRAPHER:

18 We're going back on the record at camera time 17:57.

19 EXAMINATION RESUMED BY MR. MCGARR:

20 Q. Doctor, so does it appear that when we were asking
21 about her --

22 MR. PEACE:

23 I'm sorry, I still don't have a copy.

24 MR. MCGARR:

25 I thought --

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1 WITNESS:

2 It should be in the stack. Stack. Here we go.

3 MR. PEACE:

4 Thank you.

5 EXAMINATION RESUMED BY MR. MCGARR:

6 Q. Does it appear that when she was being deposed, that
7 -- and we were asking about her history while under
8 oath, that she was telling us that she had been
9 knocked out as a result of this accident?

10 A. Yes, sir, I believe that's referred to in my office
11 notes as well.

12 Q. So she was telling you the accident was severe enough
13 to have knocked her out; is that correct?

14 A. Right.

15 Q. Which would give you some indication of one heck of a
16 mechanism of injury, a good flexion extension type
17 injury --

18 A. Yes.

19 Q. -- if she got hit enough to --

20 A. In an -- in an impact to the head, yes.

21 Q. Yeah, a pretty good impact of the head.

22 A. Yes.

23 Q. If we could, going to the emergency room records on
24 the date of this accident, does it appear -- and I've
25 highlighted it. Does it appear that she never told

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5 A. Yes, although when they say no altered level of
6 consciousness, I'm not sure if that's something that
7 the patient is saying that she is not altered now or
8 wasn't altered at the time of the accident. That it
9 doesn't specify.

10 Q. Wouldn't you think that if a patient had been knocked
11 out as a result of an automobile accident, that she
12 would report an injury to the police officer and
13 report to the emergency room that, I have been knocked
14 out?

15 | A. It's possible --

(INTERRUPTION)

17 | WITNESS:

18 I'm sorry. Off the --

19 | VIDEOGRAPHER:

20 | Going off the record at 17:59.

21 (OFF THE RECORD)

22 | **VIDEOGRAPHER:**

23 | Going back on the record at camera time 17:59.

24 EXAMINATION RESUMED BY MR. McGARR:

25 Q. Doctor, the question again would be, does it not

1 strike you as extremely surprising that someone who
2 had been hit so hard that they were knocked out failed
3 to tell the police officer they were injured and fails
4 to tell the hospital that they were knocked out?

5 MR. PEACE:

6 Object to the question. There's no foundation for
7 what anybody told a police officer in this case.

8 MR. MCGARR:

9 Okay, but there will be.

10 WITNESS CONTINUES:

11 A. If there was a significant head injury, then it might
12 not be unusual. Because the patient right after the
13 accident, right after a blow to the head, might be
14 confused.

15 Q. I understand. But by the time she has gotten to the
16 emergency room, she's specifically denying being
17 knocked out.

18 A. But again she could be confused at this point in time.
19 This is immediately after the accident.

20 Q. Don't you think if she's able to tell you that she
21 presents following a motor vehicle collision, the
22 onset was just prior to arrival, the collision was a
23 rear impact, the patient was the driver, there were
24 safety mechanisms including seat belt -- that if she's
25 able to give that much detail, that she probably

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1 should be able to remember, if she knows what's
2 hurting her, that she had been knocked out? I mean,
3 it would be very unusual to have that much detail and
4 not remember being knocked out.

5 A. Well, but is this the patient herself giving the
6 information? Because according to this, History
7 Source says "patient and family." So a lot of this
8 may be obtained from family members.

9 Q. But the bottom line is, wouldn't you think that if the
10 family members were there and she had been knocked
11 out, that someone would have told the hospital?

12 A. Again, there might have been confusion right after the
13 accident.

14 Q. But nonetheless, this hospital note makes no mention
15 of her being knocked out. In fact, it specifically
16 denies that she was knocked out.

17 A. That's --

18 MR. PEACE:

19 Object.

20 WITNESS CONTINUES:

21 A. That's what the note says. Where the source of that
22 information comes from, I don't know.

23 Q. Okay, so at least with regard to what was stated on
24 the day of this accident when she goes to the
25 emergency room, the opposite of what she told us in

- 1 the deposition is placed in these notes?
- 2 A. That's true. Again, I question the reliability of
- 3 this, this history, though.
- 4 Q. Let's go a little deeper into the history. Let me
- 5 give you this packet, this package, and let me try to
- 6 put the package back together. Does it appear that we
- 7 took a history of Ms. Gaines on July 5 of 2012 and
- 8 that we asked her on page 34 of her deposition,
- 9 "Before the accident had you ever had a problem with
- 10 your neck significant enough for you to seek medical
- 11 treatment," and did she answer and say no?
- 12 A. Correct.
- 13 Q. So while under oath, when we were asking about her
- 14 history, does it appear that she told us that she had
- 15 never had a problem with her neck until our accident
- 16 happened?
- 17 A. Yes.
- 18 Q. Going to the next document in that set of documents,
- 19 does it appear that she went to the Greenville
- 20 Hospital on or about 7/23 of 1987?
- 21 A. Yes.
- 22 Q. And does it appear that she had been at the Cannon
- 23 Hospital, incidently having neck therapy done, when
- 24 another issue developed?
- 25 A. Yes.

1 Q. And does it appear that at that time, back as far as
2 1987, they were stating she was having a history of
3 neck -- of arthritis in the neck?

4 A. Yes.

5 Q. Going to the next document in that set of documents,
6 does it appear on 7/24 of '87 she's at the Greenville
7 Hospital System and it's noted that she was a patient
8 on medical disability apparently for a neck injury
9 that was suffered on her job?

10 A. Yes.

11 Q. So does it appear that so far what she told us in her
12 deposition about never seeking treatment with regard
13 to her neck is an incorrect history?

14 A. Yes.

15 Q. Because she had actually been having problems with her
16 neck -- our accident was 2010 -- 13 years before the
17 accident ever took place?

18 A. Right, which she also related to Dr. Russell when she
19 first came to see us in the office.

20 Q. But when she's telling me about a history, she's
21 saying never been to a doctor for a neck problem;
22 isn't that correct?

23 A. That's correct.

24 Q. And yet it appears that she was actually out on
25 medical disability because of an on-the-job injury

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- 1 related to her neck, as far back as '87?
- 2 A. According to this, yes.
- 3 Q. So the history she gave me was incorrect?
- 4 A. Yes.
- 5 Q. And does it appear that she was at the Jervey Eye
- 6 Group on 7/16 of 1999 and she listed that she was
- 7 suffering from arthritis in her spine?
- 8 A. I'm sorry. Which page are you on?
- 9 Q. Neck. Neck. That one.
- 10 A. This one.
- 11 Q. And you don't have to keep those together, because you
- 12 can pull them apart and -- I know they look pretty
- 13 together, but they're difficult to read that way.
- 14 MR. PEACE:
- 15 I'm not sure where you are either.
- 16 MR. MCGARR:
- 17 It's the next document in the set of documents after
- 18 the two Greenville Hospital documents.
- 19 WITNESS:
- 20 Sir, where does it say Jervey Eye Group?
- 21 EXAMINATION RESUMED BY MR. MCGARR:
- 22 Q. It does not. This is just a Jervey Eye Group record.
- 23 I'll just represent that it is. They do not list
- 24 Jervey on the individual record --
- 25 A. Okay.

1 Q. -- but it is a -- I'll represent to you it's a Jervey
2 Eye Group record. And does it appear that she has
3 listed that she had arthritis --

4 MR. PEACE:

5 I'm --

6 EXAMINATION RESUMED BY MR. MCGARR:

7 Q. -- in her spine?

8 MR. PEACE:

9 I'm going -- I'm going to object to this being a
10 Jervey Eye Group. There's no foundation for this
11 document. I -- I've never seen this before either.
12 Do you have any foundation? Do you have a records
13 custodian affidavit, anything like that?

14 MR. MCGARR:

15 I will at trial.

16 MR. PEACE:

17 Well, the witness is here now, and you can't really
18 rely on your representations about what this document
19 is, if she's never seen it before.

20 MR. MCGARR:

21 Doctor, if I'm fool enough to lie while under oath,
22 because I am just like you are --

23 MR. PEACE:

24 Marc, you're --

25 MR. MCGARR:

1 -- they'll take my license.

2 MR. PEACE:

3 You're not under oath here and --

4 MR. MCGARR:

5 So, thank you.

6 MR. PEACE:

7 And you didn't swear to tell the truth. So I'm going
8 to object to this document being used to cross-examine
9 the witness, because we don't know where it came from.

10 EXAMINATION RESUMED BY MR. MCGARR:

11 Q. He actually has a copy of this, because he's requested
12 all of our records. And it came from the Jervey Eye
13 Group.

14 MR. PEACE:

15 Actually I did not receive any Jervey Eye Group. I
16 didn't request any Jervey Eye Group records from you
17 and I've never seen this document before. And neither
18 has this physician, I don't believe, although you can
19 ask her that if you like.

20 EXAMINATION RESUMED BY MR. MCGARR:

21 Q. Doctor, no offense, but didn't I begin by saying I'm
22 going to be giving you records that you would not have
23 had access to?

24 A. Yes.

25 Q. I'm giving you a record that you would not have had

1 access to.

2 MR. PEACE:

3 We don't even know if this is really about -- is Ms.
4 Gaines' name on this document?

5 MR. MCGARR:

6 It is. It's at the top.

7 MR. PEACE:

8 Okay.

9 EXAMINATION RESUMED BY MR. MCGARR:

10 Q. Doctor, I'm going to represent to you, and I will
11 prove at Court, that this is a record from the Jervey
12 Eye Group. And does it appear that Ms. Gaines went
13 there on 7/16 of 1999 complaining of arthritis in her
14 spine?

15 A. Yes.

16 Q. And if that spine arthritis happens to be the same
17 arthritic spine/neck problems that she was having in
18 1987, then she's had a longstanding history of neck
19 problems that she didn't tell us about in her
20 deposition; didn't she?

21 A. Well, that's with the assumption that she's talking
22 about the spine and her neck, but it could also be the
23 spine in her lower back.

24 Q. I agree. That's --

25 A. She doesn't specify.

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- 1 Q. That's why I didn't -- I don't want to put words in
2 somebody's mouth, necessarily. Going to the next
3 document in this set of documents, and we'll have to
4 start off on the back page and come forward, does it
5 appear that she saw Dr. Beth Brown -- back page first,
6 and then first front page next -- on December 23rd of
7 1999?
- 8 A. Yes.
- 9 Q. And at that point, was she having problems that were
10 going into her right hand and right arm?
- 11 A. In one place it talks about left arm and hand
12 parasthesias, and in another place it says right hand
13 and arm parasthesias. So I'm not sure which one it
14 actually is.
- 15 Q. Does it appear that she's at least having a history of
16 neck injury, where she fell down doing a cartwheel?
- 17 A. Yes.
- 18 Q. And that she had had nerve conduction studies done?
- 19 A. Yes.
- 20 Q. And that she denied any weakness in her hand or arm,
21 and it being her left hand and arm?
- 22 A. Yes.
- 23 Q. And that she's right-handed?
- 24 A. Yes.
- 25 Q. Does it make sense that it appears that, at that

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1 point, she was actually complaining of numbness in her
2 right arm and hand, not her left arm and hand, when
3 you read it all together?

4 A. That's not clear to me.

5 Q. Okay.

6 MR. PEACE:

7 Marc, I'm just going to make a continuing objection to
8 these records that haven't been authenticated. This
9 physician's never seen these records. All you're
10 having her do is agree or disagree with the black and
11 white text on a page that she's never seen before. So
12 I'm going to object to this entire line of
13 questioning.

14 MR. MCGARR:

15 And you may, but again we'll do this through record
16 custodians and request it, like we always do.

17 EXAMINATION RESUMED BY MR. MCGARR:

18 Q. Going to that next document in that set of documents,
19 does it appear that Ms. Gaines went to Piedmont
20 Orthopaedics on or about 6/17 of 2002?

21 A. Yes.

22 Q. And that one of the things that she was listing at
23 that point was pain in joints or bones, swelling of
24 joints, arthritis, and stiffness?

25 A. Yes.

- 1 Q. And if that's related to her neck, then we have
2 longstanding problems with her neck; is that correct?
- 3 A. If that's related to her neck, which again she doesn't
4 specify the location here.
- 5 Q. And I -- that's where we're going to stop the question
6 at that, at this point. However, does it appear that
7 on the next document, that on 4/21 of 2003, that she
8 went to Palmetto Baptist Health? And at that point
9 they thought she was having problems with her chest,
10 but it was left -- it was radiating into her left
11 shoulder and the left side of her neck?
- 12 A. Yes.
- 13 Q. And does it appear that the next document, in that set
14 of documents, is her discharge from Palmetto Baptist?
- 15 A. Yes.
- 16 Q. And when they discharged her, they said it was chest
17 discomfort, non-cardiac, meaning not from the heart,
18 but it's probably musculoskeletal?
- 19 A. Yes.
- 20 Q. And at that point they said she's got chronic
21 backaches, but apparently it also was causing pain in
22 her neck?
- 23 A. Yes, at this point the left side of her neck.
- 24 Q. Yes, ma'am. And then going to the next document in
25 this set of documents, does it appear that she went to

1 Adult Medicine Specialists of Easley on or about
2 August 6th of 2005, where she said that she had
3 injured her shoulder about two weeks ago, and since
4 that time she's having trouble moving her upper arm
5 and she's had some pain in her neck?

6 A. Well, this was actually 2006, but, yes.

7 Q. August 25, 2006. Yes, ma'am. Is that --

8 A. Yes.

9 Q. So --

10 A. Yes.

11 Q. -- does it appear at this point that we can at least
12 find issues with regard to her neck where she's
13 seeking treatment associated with the neck, going back
14 as far as 1987 and continuing up through at this point
15 2006?

16 A. Yes, I mean, there are several documents here across
17 a long period of time that talk about a whole bunch of
18 different issues, you know, that may have been related
19 to her neck.

20 Q. And did she tell us she'd never been treated by any
21 doctor with regard to her neck, prior to our
22 automobile accident?

23 A. Well, it -- in the deposition she said that. In the
24 visit with Dr. Russell, she said the opposite.

25 Q. I understand, but the history that she gave us and the

1 history --

2 MR. PEACE:

3 And -- and again, I'm going to object, because Dr.
4 Mina didn't attend that deposition. She doesn't know
5 anything other than the page you've handed her. So
6 I'm just going to object that there's no foundation
7 for these questions to Dr. Mina, who wasn't there for
8 the deposition.

9 EXAMINATION RESUMED BY MR. McGARR:

10 Q. Okay, you don't have to be, Doc. The deposition is
11 what it is. And did she say she had never been
12 treated for her neck prior to this automobile accident
13 in that deposition --

14 MR. PEACE:

15 The deposition --

16 EXAMINATION RESUMED BY MR. McGARR:

17 Q. -- from what you read?

18 MR. PEACE:

19 -- speaks for itself. Continuing objection.

20 WITNESS ANSWERS:

21 A. Yes.

22 Q. And when she said no, she meant no, I hadn't been
23 treated for my neck until this automobile accident; is
24 that correct?

25 A. Yes.

1 Q. And that's me asking the history of her, while she's
2 under oath just like you are today?

3 A. Yes.

4 Q. And her history that she gave me was absolutely not
5 true.

6 MR. PEACE:

7 Objection.

8 WITNESS CONTINUES:

9 A. That part of the history --

10 Q. From what you've seen so far.

11 MR. PEACE:

12 Was that even a --

13 WITNESS CONTINUES:

14 A. That part of the history --

15 MR. PEACE:

16 I'm sorry, Doctor, that wasn't a question. Would you
17 --

18 EXAMINATION RESUMED BY MR. MCGARR:

19 Q. Would you agree that her history was not true, with
20 regard to what she told me in her deposition?

21 A. That particular answer appears to not have been true.

22 Q. Going to the next document, in the set of documents,
23 does it appear that she is going to see Dr. -- I
24 believe this is, at this point, Dr. Edwards on 8/29 of
25 2008.

- 1 A. Yes.
- 2 Q. And at that point, was she having pain in her neck?
- 3 A. Yes.
- 4 Q. And at that point, was it significant enough for her
- 5 to -- for Dr. Edwards to have done an x-ray of this
- 6 lady's neck?
- 7 A. Yes.
- 8 Q. And the x-ray revealed that degenerative arthritic
- 9 changes at the C5-C6 level --
- 10 A. Yes.
- 11 Q. -- that you did the surgery on?
- 12 A. And C4-5.
- 13 Q. And C4-5.
- 14 A. Yes.
- 15 Q. But the one I'm concerned about is C5-C6.
- 16 A. Yes.
- 17 Q. And he -- she described her as having cervical
- 18 spondylosis at that point; is that correct?
- 19 A. Yes.
- 20 Q. That alone can create the symptoms that she would be
- 21 complaining of, when she came to see you, if it gets
- 22 severe enough?
- 23 A. If it gets severe enough, which here in this record
- 24 she's not complaining of any right upper extremity
- 25 symptoms.

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- 1 Q. I would agree. Does it appear that she was sent to
2 physical therapy on 8/30 of '06, the next document?
- 3 A. Yes.
- 4 Q. And part of her reason for going there was because of
5 that cervical spondylosis or the thinning of her
6 -- the inside area where her spinal cord goes?
- 7 A. I'm sorry. Could you restate?
- 8 Q. That the areas where her spinal column and/or nerves
9 are going are getting thinner or getting smaller, the
10 spondylosis?
- 11 A. Well, spondylosis is just a medical term meaning
12 degenerative arthritis in the spine. It doesn't
13 necessarily specify that anything is narrowed.
- 14 Q. I mean, well, I guess what I'm doing is, I'm using lay
15 people terms. In other words, things are growing to
16 the point where things are getting tight in that area.
- 17 A. No, spondylosis doesn't mean that necessarily.
- 18 Q. It means degenerative changes where, for example, bone
19 spurs, et cetera, so forth and so on -- where areas at
20 the nerves are trying to flow through are getting
21 crowded.
- 22 A. Well, you can also have bone spurs on the front of the
23 spine, where they're not affecting any nerves --
- 24 Q. Wouldn't bother --
- 25 A. -- and that can still be spondylosis, though.

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- 1 Q. I understand. But if it's a spondylosis that's not
2 affecting the nerves, who gives a darn? Right?
- 3 A. Well, usually that's the case. Occasionally you might
4 give a darn, but not very frequently.
- 5 Q. Almost never would you give a darn, right?
- 6 A. Unless the person's having trouble swallowing.
- 7 Q. Of course, but we're not -- we're not talking about a
8 swallowing issue.
- 9 A. No.
- 10 Q. We're talking about a nerve issue.
- 11 A. No, we're not.
- 12 Q. Okay. And does it appear that, at that point, she was
13 telling the physical therapist that her neck pain had
14 been going on longer and feels stiff, achy, and tight?
- 15 A. Yes.
- 16 Q. And did it appear that when she was checking her out,
17 that she was having -- she was having pain with range
18 of motion and activities of daily living, and
19 increased muscular tightness in the cervical spine?
- 20 A. Yes.
- 21 Q. So again -- and I'm not going to keep going through
22 these, but does it appear that throughout 2006, or at
23 least through 11/07 of 2006, that the physical
24 therapists were at least in part dealing with Ms.
25 Gaines having neck tightness and stiffness and pain?

1 A. Yes.

2 Q. And again, when you compare that along with these
3 other records, does it appear that what the history
4 Ms. Gaines gave me in her deposition would appear to
5 be incorrect and/or false?

6 A. Yes.

7 Q. Does it appear that on 4/05 of '07, Ms. Gaines
8 actually filled out another form, for Doshier Physical
9 Therapy? And now we're into the year 2007, where she
10 specifically listed that one of the problems that she
11 had had in the past was neck problems? Page 2.

12 A. Yes.

13 Q. And again, does it appear that when she's talking to
14 them she's giving a history and we see a long history
15 of neck issues? And yet what she said to me under
16 oath, when I asked her about her history, was that she
17 didn't have a problem with her neck until this
18 accident?

19 A. Yes.

20 Q. Does it appear that she's back at Doshier Physical
21 Therapy on the fourth month, fifth day of 2007, and
22 one of the problems that she was having was neck
23 problems and arthritis?

24 A. Yes.

25 Q. Does it appear that on the next document, that she was

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- 1 at the Adult Medicine Specialties of Easley on
 2 5/30/08, and one of the problems she was having was
 3 right neck pain?
- 4 A. Yes.
- 5 Q. And would you agree that the area that you were
 6 dealing with was right neck pain?
- 7 A. Most of the problem I was dealing with was right
 8 scapula or shoulder blade, and down the right C-6
 9 distribution in the arm.
- 10 Q. And when you're saying right neck pain, that's in the
 11 same side; is that correct?
- 12 A. Right neck pain would be right in here, yes.
- 13 Q. And does it appear that on 9/01/2009 she had pain and
 14 stiffness in her shoulder, and she was having cervical
 15 or neck spinal muscles -- pain in her neck, spinal
 16 muscles?
- 17 A. Yes.
- 18 Q. So does it appear that she was gradually growing into
 19 a problem in her neck and shoulders beginning in '07,
 20 continuing in '08, and then into '09?
- 21 A. I would agree with neck, but not necessarily
 22 shoulders.
- 23 Q. Trapezius. Upper trapezius is shoulder.
- 24 A. It's here.
- 25 Q. Yes. So in lay people's terms, that's shoulder.

- 1 You're referring to the same area that you were
2 referring to earlier; is that correct?
- 3 A. No, I'm referring to this area. That's the trapezius.
4 The shoulder's more out here.
- 5 Q. Okay, but that would be moving down the area that the
6 C-6 distribution would run through; is that correct?
- 7 A. Well, I mean, any nerve distribution is going to run
8 through the trapezius in the upper extremity.
- 9 Q. Has to. I know.
- 10 A. Right.
- 11 Q. I understand. So and one of them would be the C-6
12 area that you operated on; is that correct?
- 13 A. Yes.
- 14 Q. So does it appear, Dr. Mina, that the history that Ms.
15 Gaines gave me while under oath with regard to her
16 pre-existing neck issues is not a correct history,
17 because she's had years and years of problems with
18 this neck prior to ever being involved in this
19 automobile accident?
- 20 A. Yes, as she admitted to our office on her very first
21 visit.
- 22 Q. But if she's capable of telling someone, while under
23 oath, I've never had a problem with that neck -- and
24 we've seen a discrepancy with her saying I was knocked
25 out in the accident versus saying to the ER I was

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1 never knocked out -- is it possible that she could be
2 giving histories to fit whatever she wanted to fit?
3 Is it possible?

4 A. Anything is possible, but unlikely.

5 Q. Even though someone's under oath and has given me this
6 big a discrepancy in their prior neck histories?

7 MR. PEACE:

8 I'm going to object to this. Dr. Mina's qualified as
9 an expert in neurosurgery. She's not qualified as an
10 expert in any legal matter or credibility of
11 witnesses. This is wholly outside why she was called
12 as a witness in her area of expertise.

13 MR. McGARR:

14 I understand --

15 MR. PEACE:

16 The deposition speaks for itself and I'm going to
17 object to this entire line of questioning.

18 MR. McGARR:

19 I understand that you want to.

20 EXAMINATION RESUMED BY MR. McGARR:

21 Q. But the bottom line, Doc, is when you say that you're
22 having to take the history of the patient, that means
23 you're having to take the history of the patient; and
24 that patient's not giving proper histories, it creates
25 problems. That's what you told me earlier; is that

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1 correct?

2 A. Yes, but I would observe that based on the fact that

3 she told us not under oath, when she was not obliged

4 to do so, the truth about her previous long neck

5 history, then I would call her a pretty reliable

6 historian.

7 Q. Let's --

8 A. She told us the truth.

9 Q. Didn't tell me while under oath, though; did she?

10 MR. PEACE:

11 Objection. Dr. Mina has no way to know anything about

12 the deposition, which she didn't attend and never saw

13 before you handed her a copy of an isolated page here

14 today. I'd object to the --

15 EXAMINATION RESUMED BY MR. MCGARR:

16 Q. Have you ever been --

17 MR. PEACE:

18 -- entire line of questioning.

19 EXAMINATION RESUMED BY MR. MCGARR:

20 Q. -- placed under -- in a deposition where you're not

21 placed under oath?

22 A. No.

23 Q. They don't happen that way. So she had to have been

24 under oath when she was talking to me. And what she

25 told me absolutely doesn't fit with the records; does

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1 it?

2 MR. PEACE:

3 Objection.

4 WITNESS CONTINUES:

5 A. That statement --

6 MR. PEACE:

7 Move to strike that entire soliloquy.

8 WITNESS CONTINUES:

9 A. That statement appeared to be incorrect.

10 Q. Let me also show you another set of documents. Does
11 it appear that we asked Ms. Gaines about her prior low
12 back and tried to get a history with regard to that on
13 July 5, 2012?

14 A. Yes.

15 Q. And did we ask, "Have you ever had a problem with low
16 back significant enough for you to seek medical
17 treatment before the accident with my client," and did
18 she answer no?

19 A. Yes.

20 Q. Going to -- and I'm not sure we can connect it. You
21 can disregard the Jervey Eye Group record and you can
22 disregard the next record. But when we get to the
23 next record, does it appear that she was telling
24 Palmetto Baptist Medical Center on 4/21/2003 that she
25 suffered from chronic backaches?

- 1 A. Yes.
- 2 Q. Does it appear, going to the next record in that set
3 of documents, that she went to Palmetto Urological on
4 1/10 of 2007 where she said she had a long history of
5 lower back pain?
- 6 A. Yes.
- 7 Q. Does it appear that she returns to Palmetto Urological
8 on 1/19 of '07, where she was noted as having -- she
9 does have a -- she does have chronic back pain?
- 10 A. Yes.
- 11 Q. And does it appear that on 8/31 of 2009 she was at
12 Easley Family Practice and Internal Medicine, where
13 she was describing having pain going into her low
14 back?
- 15 A. Yes.
- 16 Q. Does it appear that, yet again, when we take a look at
17 what she said to me under oath about her low back
18 versus what she had to say to these medical providers,
19 that there's a big discrepancy between what she told
20 me, a/k/a, 'I've never had a problem with my low back
21 until this automobile accident,' and what the record
22 revealed?
- 23 A. Well, my interpretation of these records, the question
24 you asked her was if she had problems with her low
25 back significant enough to seek medical treatment.

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1 These records, she's just stating that she's had
2 trouble with her lower back or had backache as part of
3 sort of a review of systems. It's not the reason that
4 she is seeking treatment in these records.

5 Q. Let's go to the very last --

6 A. It's just sort of incidentally stated.

7 Q. No, because if you go to the very last document on
8 8/31/2009, not only has she been telling people, I
9 have chronic back problems, but she said she took a
10 fall and she specifically hurt her back on that date.
11 Is that correct?

12 A. No, she's talking here about pain in the neck and down
13 to the lower back.

14 Q. Let's read it, in particular. "In addition, about
15 four weeks ago she slipped and fell on some mulch and
16 sat down on her behind. She says she's still got some
17 upper quadrant pain, pain in the neck, and down to the
18 lower back."

19 A. Yes.

20 Q. So she's specifically seeking medical treatment for
21 low back problems on that date; is she not?

22 A. It's mentioned again sort of incidentally. It looks
23 like the reason she's here is mainly for her blood
24 sugar and for this fall, which she's describing pain
25 in the neck down to the lower back.

- 1 Q. Doctor, does it appear that she has had a long chronic
2 history of low back problems and has complained of
3 those problems to doctors, per these records?
- 4 A. Yeah, she's mentioned it to doctors. I don't see
5 where she specifically sought medical treatment for
6 it.
- 7 Q. Even though she specifically landed on her bottom, and
8 then she goes to a doctor and says my bottom hurts?
- 9 A. I don't think she said that her bottom hurts.
- 10 Q. Low back hurts? That I landed on my bottom and my low
11 back hurts?
- 12 A. Pain in the neck and down to the lower back doesn't
13 --
- 14 Q. That would mean that it hurt all the way into the low
15 back.
- 16 A. Or to the lower back, but not necessarily including
17 the lower back.
- 18 Q. I appreciate the help, but nonetheless there's a
19 discrepancy there.
- 20 A. I don't think that she's answering this question
21 incorrectly, because you're specifically asking her if
22 the lower back pain was significant enough for her to
23 seek medical treatment. I think her answer in this
24 case is correct, because I don't see in any of the
25 assessment and plans here that the back pain is

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1 anything more than an incidental mentioning it, that
2 it's there.

3 Q. If I told you that she was taking arthritis medication
4 throughout that time for low back problems, would that
5 change your mind?

6 A. No.

7 Q. Still wouldn't change your mind?

8 A. Because she's -- she's also complaining of arthritis
9 pain in the neck.

10 Q. Okay. Let me show you another document.

11 WITNESS:

12 Can we go off the record for just one moment, please?

13 MR. MCGARR:

14 Yes, ma'am.

15 VIDEOGRAPHER:

16 Going off the record at camera time 18:26.

17 (OFF THE RECORD)

18 VIDEOGRAPHER:

19 We're going back on the record at camera time 18:28.

20 EXAMINATION RESUMED BY MR. MCGARR:

21 Q. Doctor, looking at the next set of records, does it
22 appear that we were asking Ms. Gaines on July 5 of
23 2012 to give us a history with regard to what might
24 have caused her neck problems between the time of the
25 accident and a rather lengthy time between when she

1 had surgery? And did we ask her, "Did anything happen
2 to you between the time of the accident and now, that
3 would cause you to have ongoing neck pain?" And did
4 she say no?

5 A. Yes.

6 Q. Does it appear that she was at Doshier Physical Therapy
7 on 5/04/2010, which would be after the accident with
8 my client, and she said she had been -- she said she
9 had been doing better, though sore in shoulder and
10 neck since putting out mulch over the weekend?

11 A. Yes.

12 Q. The act of putting out mulch can inflame a nerve
13 enough to cause a spur that is pinching on it, to
14 inflame it to the point that you finally had to do
15 surgery?

16 A. And it's certainly possible that it might have
17 inflamed a nerve.

18 Q. So putting out that mulch could be the reason that she
19 ultimately had surgery, because it had calmed down and
20 then it flared back up. And that's not uncommon?

21 A. Well, here she says that it's been doing better.

22 Q. That's my point, is she specifically said right arm
23 has been doing better, though sore in shoulder and
24 neck since putting out mulch over weekend. Is that
25 correct?

- 1 A. That's what it says.
- 2 Q. So she was doing better until she started putting out
- 3 the mulch the weekend before, and now she's got a
- 4 flare-up; is that correct?
- 5 A. I'm sorry. I must be misunderstanding the timing of
- 6 something, because this implies to me that she has
- 7 some soreness in the shoulder and neck but that her
- 8 right arm at this point is feeling better.
- 9 Q. Does it say, "Right arm has been doing better, though
- 10 sore in shoulder and neck since putting out mulch over
- 11 the weekend?"
- 12 A. It is.
- 13 Q. Okay. So does it appear that she started having
- 14 soreness in her shoulder and her neck after putting
- 15 mulch out over the weekend?
- 16 A. It -- it does say that.
- 17 Q. And by the very act of putting out mulch, when you
- 18 have a spur to the extent that you have at C5-6, you
- 19 could inflame a nerve enough where you ultimately end
- 20 up doing surgery to fix it?
- 21 A. Well, you could. But if that were the case, then why
- 22 wouldn't the right arm be doing worse?
- 23 Q. Because --
- 24 A. Because that would be where the symptoms would come
- 25 from, from an inflamed nerve.

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- 1 Q. Except if we go and we look back under those -- under
- 2 that theory, then why didn't she have radiating pain
- 3 at the hospital the day of the accident?
- 4 A. I can't -- I wasn't there the day of --
- 5 Q. But they don't describe --
- 6 A. At the hospital, --
- 7 Q. -- radiating pain.
- 8 A. -- so I can't speak to that.
- 9 Q. But, but the records that we saw, she doesn't refer to
- 10 radiating pain going into her right arm at the
- 11 hospital; did she?
- 12 A. Well, I'd have to look back at them to see.
- 13 Q. Can we do that?
- 14 A. There's no specific mention made of arm pain here.
- 15 Q. In fact, if we actually go through the ER records,
- 16 she's not complaining of arm pain. She's not
- 17 complaining of radiating pain. She's not complaining
- 18 of chest pain. She's not complaining of low back
- 19 pain. She's essentially complaining of head and neck
- 20 pain; is that correct?
- 21 A. Correct.
- 22 Q. So if there was a C -- a C5-C6 -- C5-6 issue, it
- 23 wasn't presenting itself at the emergency room; was
- 24 it?
- 25 A. Well, it's not mentioned in these notes. But again,

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1 here I'm questioning the reliability of this, this
 2 history, because here it doesn't even talk about the
 3 loss of consciousness that she had.
 4 Q. It actually says the exact opposite, she denied having
 5 a loss of consciousness; does it not?
 6 A. Well, other records state --
 7 Q. It's not silent. It says it.
 8 A. Other records state that she did, and that she clearly
 9 had a head injury, and, therefore, she was likely to
 10 have some confusion at the time.
 11 Q. Is it your testimony, Doctor, that you think that an
 12 emergency room doctor would hear that someone's been
 13 involved in an automobile accident, claiming headache,
 14 and then not check to see if they had a loss of
 15 consciousness? Is that your --
 16 A. No, that's --
 17 Q. Is that your testimony?
 18 A. That's not my testimony.
 19 Q. Okay, so if they come in and they're presenting or
 20 they're saying, I've got a headache and I've been
 21 involved in an automobile accident, one of the first
 22 things they're going to check, and they obviously did,
 23 because they went through a litany of questions, are
 24 you feeling different, are you having nausea, are you
 25 -- were you knocked out? And all of those occasions,

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1 she said no; is that correct?

2 MR. PEACE:

3 Object to that question. The records don't indicate
4 that. You're putting -- there's no basis for this
5 question. There's no foundation for these records.
6 The records simply do not say what you say they say.

7 MR. MCGARR:

8 Then let's read them together.

9 MR. PEACE:

10 This document's not an exhibit. It hasn't been
11 authenticated. The author of this document is
12 unidentified. And I object to you cross-examining the
13 witness with these hearsay statements, which she's
14 never heard before.

15 EXAMINATION RESUMED BY MR. MCGARR:

16 Q. Does it state, Doctor, that her chief complaint was
17 that she was rear ended this p.m.? Patient complains
18 of low back pain and headache. Patient complains of
19 nausea also.

20 A. I'm sorry. I'm on a different page, evidently.

21 Q. Are you not on the ER visit?

22 A. This says ED visit. Where, on the page, are we?

23 Q. Are you not at the History of Present Illness?

24 A. Okay, can you read what you were reading again?

25 Q. Okay, just above that, Chief Complaint. "Rear ended

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1 this p.m., complains -- patient complains of low back
2 pain and headache, complains of nausea also." Is that
3 what it says at the top?

4 A. Yes.

5 Q. And does it go on to say, "The patient presents
6 following motor vehicle collision. The onset was just
7 prior to arrival. The collision was rear impact. The
8 patient was the driver. There was safety mechanism,
9 including seat belt. Location, head and neck. The
10 degree of pain severe. The degree of bleeding is
11 none. Risk factors consist of age. Therapy today,
12 none. Associated symptoms -- nausea, headache.
13 Denies shortness of breath. Denies chest pain.
14 Denies abdominal pain. Denies vomiting. Denies back
15 pain. No altered level of consciousness. Denies
16 dizziness. And denies syncope." Which means, in lay
17 people's terms, denies being knocked out. Is that
18 what the document says?

19 A. That's what this says, but again we don't know if this
20 is coming directly from the patient or from a family
21 member who may not have had all the information,
22 because up here the history of source says patient and
23 family.

24 Q. Which would mean you would get more accurate
25 information, not less?

1 A. I'm sorry?

2 Q. You would get more accurate information, not less.
3 Would that be correct?

4 A. No, not necessarily.

5 Q. So two heads are not better than one?

6 A. Not necessarily.

7 Q. Going back to this document, would you agree --

8 MR. PEACE:

9 Which document are you referring to?

10 MR. MCGARR:

11 Going back to the 5/14/10 document, where she was
12 doing the mulch.

13 EXAMINATION RESUMED BY MR. MCGARR:

14 Q. That again she's presenting again with pain in her
15 neck and shoulder, which is more than she presented
16 with at the hospital, because at the hospital it was
17 only neck; is that correct?

18 A. I don't know that you can quantify that, because
19 nobody's quantifying, you know, the severity of pain.
20 When you say more --

21 Q. Doctor, I'm not asking you to second guess their
22 records. I'm saying, does the record mention anything
23 about a shoulder or an arm, on the day of the hospital
24 visit?

25 A. No.

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- 1 Q. Okay. Does it mention that she's having pain in her
2 neck and shoulder on 5/04 of 2010?
- 3 A. Yes.
- 4 Q. And did that come about after she was mulching her
5 yard?
- 6 A. Yes.
- 7 Q. Could that have been the reason that ultimately
8 resulted in her having surgery, since she had been
9 doing better before that time?
- 10 A. I don't think you can come to that conclusion from
11 that information.
- 12 Q. Is it possible that that could be the reason that she
13 ultimately had to have the surgery? Is it a
14 possibility?
- 15 A. No.
- 16 Q. Okay. Is it a possibility, looking at the second set
17 of documents, the 7/08/2010 where she said she hurt
18 her arm yesterday? "Must have twisted or turned it
19 wrong as I was putting away towels. Hurts when trying
20 to raise it up." Could that be indicative of someone
21 who has injured that nerve and she thinks it's a
22 shoulder issue when, in reality, what it is, it's a
23 nerve issue?
- 24 A. No.
- 25 Q. No? Would you agree that if you have a C5-6 problem,

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- 1 that it is going to affect your shoulder and your arm?
- 2 A. It will affect the shoulder and arm, but it will not
- 3 affect your ability to raise the arm.
- 4 Q. It doesn't affect your ability -- it doesn't cause
- 5 pain -- actually can cause pain. It can cause burning
- 6 feeling or an electrical pain type feeling, if you
- 7 have a C5-6 problem and you're playing with that arm.
- 8 A. It has no effect on -- this is called abduction of the
- 9 arm. It has no effect on your ability to raise the
- 10 arm or what you feel when you try to do that.
- 11 Q. Doctor, if someone is trying to raise their arm and an
- 12 electrical shock goes through it or, in the
- 13 alternative, it -- it hurts really bad, then you don't
- 14 want to lift that arm; do you? That's a possibility?
- 15 A. Not really, because that's actually one thing that we
- 16 use in the physical examination to distinguish a
- 17 shoulder joint problem from a nerve root problem, is
- 18 AB duction or abduction of the arm.
- 19 Q. Okay, let me put it to you this way. If I break my
- 20 ankle, walking on it hurts. But it's not a problem
- 21 with my foot; it's my ankle. So if you have a problem
- 22 with your neck that's going into your arm, it can
- 23 affect your ability to deal with that arm. It doesn't
- 24 mean you can't lift it or put it down, but it can
- 25 affect your ability to want to lift it up and put it

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1 down.

2 MR. PEACE:

3 Is that a question?

4 MR. McGARR:

5 That's a question.

6 WITNESS:

7 Could you state it a little more concisely, please?

8 EXAMINATION CONTINUES BY MR. McGARR:

9 Q. Okay, concisely. If I am having pain because I'm
10 trying to lift my arm, can that, in and of itself,
11 restrict you from wanting to lift your arm and saying,
12 I don't want to lift my arm, I'm having trouble doing
13 it?

14 A. If you have pain because you're lifting your arm, then
15 that's not typically a nerve root type of syndrome.

16 Q. The very act of having a C5-6 problem is that it can
17 actually leave your arm completely numb.

18 A. No, it can't. It goes to one specific area, into the
19 thumb and first finger. It can cause numbness in the
20 area --

21 Q. It runs down your --

22 A. -- here, but it will not cause your entire arm to be
23 numb.

24 Q. Did you earlier trace the C5-6 nerve? It runs down
25 the arm and into the finger, into the thumb and this

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1 finger; does it not?

2 A. Yes, and I wouldn't describe that as the entire arm.

3 Q. Okay, you don't have to. But it comes out of the

4 neck, goes down the shoulder into the arm, because it

5 has to finally reach the -- the -- the thumb and the

6 finger; does it not?

7 A. Yes.

8 Q. In order to do that, that nerve is going down the

9 entire arm; is that correct?

10 A. It's going down the length of the arm.

11 Q. And so by very -- by its very nature, it affects the

12 entire arm.

13 A. No, it doesn't affect, for instance, this part of the

14 arm at all, or this part of the arm.

15 Q. But it affects this part of the arm?

16 A. Yes.

17 Q. So it's affecting -- when it's affecting your arm --

18 maybe I should put it this way -- it's affecting a

19 large portion of the arm. Obvious it's not affecting

20 all of the arm, because you've got other C roots that

21 are going down there also.

22 A. Correct.

23 Q. So if it affects that portion of the arm, it can make

24 you say, 'oh, don't want to play with my arm anymore.'

25 Is that possible?

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- 1 A. Not really.
- 2 Q. Okay, and that's according to your testimony?
- 3 A. Yes.
- 4 Q. Doctor, in the end, I have given you a great deal of
- 5 information that you haven't had before. And can I
- 6 assume correctly that it has changed your opinion not
- 7 one iota with regard to what caused this surgery?
- 8 A. No, it does not change my opinion.
- 9 Q. It hasn't even shaken it in any way, shape, or form;
- 10 has it?
- 11 A. No.
- 12 Q. Because you're here and you've been paid, and you've
- 13 testified that this automobile accident caused this
- 14 surgery?
- 15 A. No, that's not the reason why. The fact that I've
- 16 been paid has absolutely nothing to do with it.
- 17 Q. Have you been paid?
- 18 A. I don't even know whether I've been paid for this
- 19 specific surgery or not.
- 20 Q. No. Have you been paid to testify? That has to be
- 21 done before we can walk in here; doesn't it?
- 22 A. I'm actually owed some additional money. So I have
- 23 not been paid in full for this.
- 24 Q. So you haven't been paid in full yet?
- 25 A. Not yet, but that's not an issue.

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- 1 Q. But nonetheless, you've been paid to testify; is that
- 2 correct?
- 3 A. Yes.
- 4 Q. And despite everything I've shown you, the answer is,
- 5 and your only answer is, that the only thing that
- 6 could have caused this surgery is this automobile
- 7 accident? Nothing else could be in existence?
- 8 A. Well, I mean, you -- you can't ever speak with surgery
- 9 or medicine in absolute terms like that. But to a
- 10 degree of medical certainty, I feel that the
- 11 automobile accident is what caused her to require the
- 12 surgery.
- 13 Q. And that's because the automobile accident was so
- 14 severe that it knocked her out?
- 15 A. No, it has nothing to do with the loss of
- 16 consciousness.
- 17 Q. Earlier you said that was a severe automobile accident
- 18 that would give you an extreme flexion/extension
- 19 injury; did you not?
- 20 A. Yes, but --
- 21 Q. So it is a huge factor in it?
- 22 A. Well, you're restating things. You know, the --
- 23 Q. No, I'm using your words.
- 24 A. Okay, well, you're restating my words. So the factor
- 25 that's important is that she had an automobile

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- 1 accident with an appropriate mechanism of injury to
2 cause a flexion and extension problem with the neck,
3 that caused bruising of the nerve because there was a
4 bone spur there.
- 5 Q. And even though she was doing better and she had these
6 post-existing events, they couldn't have had anything
7 to do with that surgery?
- 8 A. I'm sorry. Could you restate?
- 9 Q. Even though she's had these post-existing events,
10 those could have nothing to do with this surgery?
- 11 A. I'm sorry. What's a post-existing event?
- 12 Q. Mulching.
- 13 A. A pre-existing event?
- 14 Q. Post-existing, something that took place after the
15 accident. She was mulching and started having trouble
16 again.
- 17 A. Well, the trouble that she's describing with the
18 mulching does not fit with a C-6 radiculopathy in the
19 right upper extremity.
- 20 Q. If that's the case, then it doesn't fit with a C-6
21 radiculopathy when she went to the hospital either;
22 does it?
- 23 A. Well, that's -- again, that's documentation from the
24 emergency room visit, the reliability of which is
25 unclear. And I wasn't there at that time to question

1 or examine the patient.
2 Q. So as far as you're concerned, the ER doctors are
3 quacks?
4 A. I beg your pardon?
5 MR. PEACE:
6 I'm going to object to that question --
7 EXAMINATION RESUMED BY MR. McGARR:
8 Q. You said more --
9 WITNESS:
10 I'll object to that question, too.
11 MR. PEACE:
12 -- as being argumentative.
13 EXAMINATION RESUMED BY MR. McGARR:
14 Q. You said, more than once, that you don't think the
15 emergency room records are reliable.
16 A. Correct. That does not mean that the emergency room
17 doctor is a quack. That means that the records here,
18 the history that's obtained from the patient and
19 family, is not necessarily exactly what happened or
20 what the patient was feeling at the time.
21 Q. Okay, and that's because two heads are never better
22 than one?
23 A. That has nothing to do with it.
24 Q. Okay. So, Doctor, the bottom line is everything I've
25 shown you and anything else I could show you, you

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1 would end up saying no, this automobile accident
2 caused this surgery; is that correct?

3 A. No. I'm certain that if you could show me some other
4 evidence that was consistent with a C-6 radiculopathy
5 that pre-existed this -- this automobile accident,
6 then -- then I might reconsider.

7 MR. MCGARR:

8 We'll do that at trial. Thank you.

9 WITNESS:

10 Thank you.

11 MR. PEACE:

12 Nothing further.

13 VIDEOGRAPHER:

14 Going off the record at camera time 18:44.
15

16 DEPOSITION CONCLUDED AT APPROXIMATELY 6:44 P.M.
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STATE OF SOUTH CAROLINA }
COUNTY OF GREENVILLE } C E R T I F I C A T E

I, Karen A. Belanger, notary public in and for the State of South Carolina, acting as court reporter, do hereby certify that pursuant to agreement and/or notice in the foregoing cause, the deposition of Christie B. Mina, M.D., was taken by me at Greenville, South Carolina, on Wednesday, June 5, 2013.

I further certify that the said Christie B. Mina, M.D., was first duly sworn to testify as hereinabove shown, and the testimony of said deponent was reduced to writing.

I further certify that I am neither counsel nor attorney to either of the parties in said litigation nor interested in the event of the cause.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 27th day of June, 2013.

Karen Belanger

Karen A. Belanger
Notary Public for South Carolina
My Commission Expires 4/18/13