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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-002366

SC Court of Appeals

Briett Johnson, Employee, ... Appellant,

v.

Pike Electric, Inc., Employer, and Liberty Mutual
Insurance Company, Carrier, ... Respondents.

RECORD ON APPEAL
VOLUME II OF II

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(603) 430-1517

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY REPORTNIKKIR, HALEY
GovernorMARK A. KEEL
ChiefDeputy Coroner Don A. Reynolds
Florence County Coroner's Office
180 N Irby Street, Box-F
Florence, SC 29501TOXICOLOGY DEPARTMENT
July 16, 2012
SLED No: L12-06036
Your Case No:
Incident Date: 05/17/2012
[V] Briett Johnson

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Mark A. Keel, Chief
South Carolina Law Enforcement Division**ITEMS OF EVIDENCE**

Item: 1 Sample Type: Blood (Toxicology) - labeled "Briett Johnson"

Analysis by Headspace Gas Chromatography (GC) and/or Headspace Gas Chromatography/Mass Spectrometry (GC/MS)

Analyte	Result	Units	Threshold
Ethanol	0.208	% w/v	0.01
Methanol	Negative	% w/v	0.01
Acetone	Negative	% w/v	0.01
Isopropanol	Negative	% w/v	0.01



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

SLED No :L12-06036

Page 2 of 2

7/18/12

Screen by Enzyme Linked Immunosorbent Assay (ELISA)

Analyte	Result	Units	Threshold
Amphetamine	Negative	mg/L	0.10
Benzodiazepines	Negative	mg/L	0.05
Methamphetamine	Negative	mg/L	0.10
Oxycodone	Negative	mg/L	0.10
Cannabinoids	Negative	mg/L	0.03

Screen by Fluorescence Polarization Immunoassay (FPIA)

Analyte	Result	Units	Threshold
Cocaine Metabolite	Negative	mg/L	0.20
Opiates	Negative	mg/L	0.10



Robert M. Sears
Forensic Toxicologist

For any additional interpretation of results please contact the Toxicologist above at the SLED Toxicology Department, (803) 896-7305.



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TOTAL P.03

Brief Psychiatric and Pharmacological Report on Briett Johnson

Mr. Briett Johnson died in a vehicular accident on 5/17/12. The police reports state that he passed in a no passing zone, on a curve, drove off of the right side of the road, overturned and hit a utility pole. His vehicle then continued on to hit a parked car where it came to rest. His estimated speed just before the accident was 95 miles an hour. He was driving a 2010 Ford F-350 Crew Cab SRW 4 x 4 and hit a 2003 Cadillac SLS. A witness, Ms. Caitlin Stone, stated that "he passed me and then disappeared. He was going pretty fast, and I saw him rolling." The time of the collision was 1805. His blood alcohol level was drawn at the morgue approximately three hours later, and the result was 0.208 % /v.

Mr. Johnson had three previous speeding tickets, only one of which was greater than 10 miles an hour over the speed limit (but less than 25 miles an hour).

Analysis:

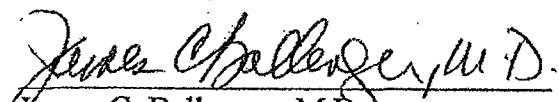
Although Mr. Johnson had three speeding tickets, he had been known to be a careful driver to the point of being said to be a boring driver by his co-workers. However, on the date of the accident, he appeared to be driving uncharacteristically quite recklessly. The police estimate of his speed was that he was travelling at 95 miles an hour and passed on a curve in a no passing zone. He drove off the right side of the road, apparently because he could not handle the curve at the speed he was driving. The witness, Caitlin Stone, stated that he was "going pretty fast." It would appear that the most likely explanation for the marked change in his driving pattern and the accident was that he was quite inebriated at the time. His body was transported to the Coroner's Office and his blood alcohol level was drawn, approximately three hours after his death. His

blood alcohol could have continued to be metabolized at some rate after death, although it is impossible to estimate how much metabolism would have occurred after his death. Bacterial growth in that time would not likely have contributed significantly to the blood alcohol level. Therefore, his blood alcohol content (BAC) was 0.208%/v when drawn and his level at the time of the accident would likely have been slightly higher. For the most conservative analysis and using the BAC level of 0.208%/v, Mr. Johnson was beyond "sloppy drunk" which occurs at 0.160-0.190%/v. Above the 0.200 level, most individuals are dazed or confused and may need help to stand or even to walk. They frequently have blackouts and do not remember what occurred during the time their blood alcohol level was that high. At the higher level of 0.250 (higher than Mr. Johnson's), most individuals are severely impaired mentally and physically, and stupor and coma occurs at 0.300 or higher. At levels below Mr. Johnson's level of 0.208%/v, individuals fail to recognize their impairment, their muscular coordination is poor, and judgment is reduced. At levels as low as 0.130-0.150, there is a major loss of balance and gross motor impairment. There is blurred vision and severe impairment of judgment. At 0.150, there is far less muscle control than normal, vomiting may occur, and there is "substantial impairment in vehicle control while driving." At 0.100 there is clear deterioration in reaction time and motor control and reduced ability to maintain position in the lane when driving. The rationale for placing the legal D.U.I. limit at 0.08%/v is because muscle coordination has already become poor, and balance, speech, vision, reaction times and hearing abilities are all reduced. At these levels, it is harder for individuals to detect danger, and judgment, self-control, reasoning and memory are all impaired. Also, control of vehicle speed and the processing of visual, auditory and mental information is significantly impaired.

Therefore, based on the above analysis, it is my medical opinion to a reasonable degree of medical certainty that the proximate cause of Briett Johnson's vehicular accident was that he was severely impaired from consumption of alcohol. At the time of the accident, it was his high blood alcohol content (BAC) that led to his poor judgment and loss of his ability to drive safely.

Qualifications:

I am a board certified psychiatrist, as well as board certified forensic psychiatrist. I was Professor and Chairman of the Department of Psychiatry & Behavioral Sciences at the Medical University of South Carolina for 17 years. I was the Founding Director of the Institute of Psychiatry, as well as the Founding Executive Director for the Center for Drug and Alcohol Programs there. I have published over 350 articles and 16 books (see enclosed CV). I have considerable experience and expertise in psychopharmacology, drug abuse and in pharmacology. I have testified as an expert in multiple cases involving blood alcohol level determinations and their role in accidents, as well as other issues in psychopharmacology.


James C. Ballenger, M.D.

Retired, Professor and Chairman
Department of Psychiatry & Behavioral Sciences
Director, Institute of Psychiatry
Medical University of South Carolina


Date

Before the South Carolina
Workers' Compensation Commission
WCC File # 1205798

Briett Johnson (Deceased),
Employee,
Claimant,
v.

Pike Electric, Inc.,
Employer,
Liberty Mutual Insurance Company,
Carrier,
Defendants.

Deposition of: Don Reynolds

Location: 319 South Irby Street

Florence, South Carolina

Date: Tuesday, August 28, 2012

Time: 2:26 p.m. - 2:59 p.m.

Court Reporter: Roger R. Williamson

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Job No. CS414318

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E X H I B I T S

Defendants':

Pg/ln	Ex.	Description
11/1	1	SLED Report
12/23	2	SLEd Toxicology Report
36/24	3	SLED Forensic Sciences Request

** uh-huh = affirmative
huh-uh = negative

S T I P U L A T I O N S

It is stipulated among counsel that this deposition is being taken pursuant to the South Carolina rules of civil procedure and that all objections except as to the form of the question are reserved until the time of trial.

It is also stipulated among counsel for the respective parties and the deponent that the deponent will waive the right to read and sign this transcript.

Thereupon,

Don Reynolds,
having been first duly sworn by the court reporter, testified as follows:

E X A M I N A T I O N

BY MR. HYLTON:

Q Hi, Mr. Reynolds. My name is Brandon Hylton. I'm an attorney here with Turner Padget, and I'm representing Pike Electric and their insurance company, Liberty Mutual, on a Workers' Compensation claim related to the death of Mr. Briett Johnson.

A Uh-huh.

Q Mr. Reynolds, first, have you ever had your deposition taken before?

1 A Yes, I have.

2 Q Okay. Well, the rules of those
3 depositions are going to pretty much apply here
4 today. You're supposed to, basically, listen to
5 the question that's asked. If you don't
6 understand that question, please don't answer that
7 question. Either ask me to rephrase or repeat the
8 question until you do understand what I'm asking
9 you.

10 A Okay.

11 Q If you answer a question, I'm going to
12 assume that you understood it and gave a correct
13 answer, okay?

14 A Okay.

15 Q Also if you're going to say yes or no,
16 just please say yes or no so the court reporter
17 can take that down --

18 A Uh-huh.

19 Q -- in his written transcript. And,
20 again, I don't expect this to last too long, but
21 if you want to take a break at any time, let me
22 know.

23 A Okay.

24 Q Okay?

25 A Okay.

1 Q Mr. Reynolds, what -- where do you
2 work?

3 A I work at the coroner's office in
4 Florence.

5 Q Okay. What's your position there?

6 A Deputy Coroner.

7 Q How long have you held that position?

8 A Eighteen and a half years.

9 Q As a deputy coroner, what are your
10 duties?

11 A I investigate deaths.

12 Q And what do you do as part of your
13 investigation in deaths, what does that --

14 A Well, from the time I receive a call to
15 the time I get to the house, I meet with families.
16 I go in to look at the person who is dead to make
17 sure that it's either a natural or what kind of
18 death it is. If it's a natural death, I normally
19 would talk with the family and try to get an idea
20 of their medical history. And then we will come
21 up with a probable time of death. And whenever I
22 leave there, the reports are turned to our office,
23 and the secretary will call the doctor, if there's
24 one that we have, and he will give a -- a most
25 probable cause of death.

1 Q All right. What type of training or
2 education do you have to have for the deputy
3 coroner position?

4 A When I first started, there was no
5 training at -- of any kind. And in -- within
6 about a year, we had to go to SLED. There was a
7 state law that came up then that all coroners from
8 henceforth had to be -- have training. And we
9 went to SLED headquarters. I stayed there a week
10 and got training from various doctors and
11 personnel that was on the scene. And over the
12 years, we have had continuing education of sixteen
13 hours each year that is mandated.

14 Q All right. Now, do you recall getting
15 a call regarding an automobile accident occurring
16 on July 16th, 2012?

17 A I do.

18 Q When did you receive a call?

19 A I received a call about 6:55 p.m.

20 Q Okay. And what was told to you on that
21 telephone call?

22 A That there had been a wreck at the
23 location aforementioned.

24 Q Okay. And did you travel out to the
25 location at that time?

1 A I did travel.

2 Q Okay. And when you got there, what
3 time did you arrive on the scene?

4 A I got on the scene at 7:30 p.m.

5 Q Okay. What did you witness when you
6 arrived on the scene?

7 A When I first got on the scene, I
8 noticed a utility pole that was broken down. The
9 car was up on top of another car.

10 Q Okay.

11 MR. HYLTON: Did I make an error with
12 the date? Is it May 17? Did I say June?

13 MR. ASKINS: Yeah, May 17th.

14 MR. HYLTON: I'm sorry.

15 MR. ASKINS: You said July.

16 MR. HYLTON: I'm sorry.

17 MR. ASKINS: You confused you. I was
18 looking to see.

19 BY MR. HYLTON:

20 Q And just to re-clarify, the date we're
21 talking about is May 17th, 2012 --

22 A Uh-huh.

23 Q -- is that correct?

24 A That's correct.

25 Q I'm sorry. I apologize. So you

1 arrived on the scene at 7:30. And, again, just
2 tell me quickly what you saw?

3 A I saw a pickup lying on top of another
4 vehicle. And looking to my right, there was a
5 utility pole that had been broken down.

6 Q Okay. Was there anyone inside the
7 vehicle at that time?

8 A Yes, there was.

9 Q All right. Tell me what the condition
10 of the individual in the truck was.

11 A The condition was that he had severe
12 trauma. He was pinned into the vehicle. And it
13 took a little while for the E.M.S., rescue people,
14 to get him out of the vehicle.

15 Q Okay. About how long did it take him
16 to get out of the vehicle?

17 A Well, from the time I arrived and the
18 time that I got and drew blood was one hour. So
19 I -- I can't give you a precise time that he was
20 in that vehicle.

21 Q Okay. But you believe that an hour
22 after you got on the scene you were taking blood
23 from the --

24 A I got a -- a statement from SLED here
25 saying that.

1 Q Okay. And is that something you filled
2 out --

3 A Yes, sir.

4 Q -- and sent to SLED?

5 A Yes, sir.

6 Q Okay. Can I see that copy of that?

7 A Yes, sir.

8 Q Okay.

9 A Now, she's supposed fix -- send me a
10 true copy. This is a faxed copy. So --

11 Q Okay.

12 A -- the fax, you know, is not
13 necessarily that plain, but that was what was
14 taken and sent to me.

15 Q Okay.

16 MR. ASKINS: What's that time? Do you
17 see it, Steven?

18 MR. DEBERRY: Let's see, 8:30.

19 MS. ASKINS: Eighty thirty. Okay.

20 BY MR. HYLTON:

21 Q All right. Can I see that again? I'm
22 sorry.

23 A Uh-huh.

24 MR. HYLTON: Can I go ahead and mark
25 that? We can get a copy for you if we need to.

1 (Exhibit Number 1
2 marked for identification.)

3 MR. HYLTON: All right.

4 BY MR. HYLTON:

5 Q Mr. Reynolds, I believe it says that on
6 May 17th, 2012, you took blood at 8:30 p.m.; is
7 that correct?

8 A That's correct.

9 Q And is that your signature right there?

10 A Yes, sir.

11 Q Okay.

12 MR. HYLTON: I'd like to offer that in
13 the deposition.

14 MR. ASKINS: Okay. No objection.

15 MR. HYLTON: Okay. Any --

16 MR. DEBERRY: No objection.

17 MR. HYLTON: Okay. All right. I'll
18 just give that back.

19 BY MR. HYLTON:

20 Q How did you take blood from the
21 claimant?

22 A I went into this point right here of
23 the -- directly into the heart with a long spine
24 needle. It's about three inches long directly in
25 here and drew a vial.

1 Q Okay. And when you say in here, you're
2 pointing at around the sternum area; is that
3 correct?

4 A Right in -- directly between the
5 ribcage into the heart.

6 Q Okay. And how much blood did you pull?

7 A I don't know how many cc's that I
8 actually drew. But I would say that the tube --
9 the tube is about that long and it's probably half
10 full.

11 Q Okay. And when did you send that to
12 SLED?

13 A It would have been the very next day.

14 Q Did you receive any report back from
15 SLED?

16 A The office did.

17 Q Okay. What's your understanding of
18 what the toxicology report showed?

19 A The result is right here.

20 Q Okay.

21 MR. HYLTON: And again, we can mark
22 that one as well.

23 (Exhibit Number 2
24 marked for identification.)

25 MR. HYLTON: All right.

1 BY MR. HYLTON:

2 Q According to this report, did the
3 claimant have a blood alcohol level at .208?

4 A That's correct.

5 Q All right. Do you have any knowledge
6 or experience in dealing with blood alcohol
7 levels?

8 A No, sir, I don't.

9 Q Okay. Was there anything unusual or
10 out of the ordinary with regard to taking blood
11 from this individual and taking it to SLED --

12 A No, sir.

13 Q -- or took it to SLED?

14 A No, sir.

15 Q Did y'all deviate from your standard
16 protocol at all in dealing with this blood test?

17 A No, I did not.

18 Q Okay. And what is your standard
19 protocol?

20 A At that particular time, whenever I got
21 the call, we got him out of the vehicle. We took
22 him to the closest place which was the rescue
23 squad building. It was a few miles down the road.
24 I went in with the personnel that was there. I
25 got my tox kit out, marked it, time, the date and

1 everything and signed my name to it. I drew the
2 blood. I sealed it up with the proper seal over
3 the cap, put it back in the box. And from there I
4 left, went home. Went to the work the next day
5 and give it to the secretary, and she in turn put
6 it in the mail to mail it.

7 Q All right.

8 MR. HYLTON: I believe that's all the
9 questions I have for Mr. Reynolds. Please answer
10 any questions the other attorneys may have.

11 MR. ASKINS: You want me to go first?

12 MR. DEBERRY: Sure.

13 E X A M I N A T I O N

14 BY MR. ASKINS:

15 Q Mr. Reynolds, my name is Greg Askins.

16 A Uh-huh.

17 Q I'm from Hemingway in this matter. And
18 I'm going to do the same thing that Brandon just
19 did and ask you some questions.

20 A Uh-huh.

21 Q If you don't understand me, please -- I
22 tend to talk fast sometimes so --

23 A Okay.

24 Q -- slow me down. You talked about
25 training and going to some seminars and so forth.

1 Have you ever had any particular training in the
2 chemistry of blood?

3 A No, sir.

4 Q So you don't know anything about blood
5 alcohol levels --

6 A No, sir.

7 Q -- other than just drawing it; is that
8 correct?

9 A That's correct.

10 Q As far as drawing blood or extracting
11 blood, did you ever have any -- any training on
12 that, particularly?

13 A The only training that I had was on
14 autopsies in Charleston under a doctor there that
15 showed me how to do it, drawing vistri out the eye
16 and drawing blood out of the heart.

17 Q Okay. And I want to go back, and I
18 don't mean to be redundant, but you were --

19 A Uh-huh.

20 Q -- where were you when you were
21 dispatched or called?

22 A I was at home.

23 Q Okay. And where do you live, exactly?

24 A We live on Willow Creek Road.

25 Q Willow Creek?

1 A Yes, sir.

2 Q Okay. About how long did it take you
3 to get to the accident scene?

4 A From the time I got the call until the
5 time I got there, I would say roughly around
6 thirty minutes.

7 Q So --

8 A Twenty-five, 30 minutes.

9 Q Okay. So it's a 30-minute drive. So
10 you say you got there around 7:30, so you were
11 called around seven?

12 A Yeah. Yes, sir.

13 Q Would that be correct?

14 A About -- about 6:55, probably, to be
15 exact. Now, bear in mind that time's different a
16 little bit with some people's watches. But I
17 would say around the 7:00 range I got a call.

18 Q Okay. And you were on the scene
19 at 7:30?

20 A Yes, sir.

21 Q Okay. And it took probably an hour to
22 extract the body, is that what you told me?

23 A It -- from the time we -- I got there
24 until the time I drew blood was about an hour.

25 Q Okay. Did anyone else take any body

1 fluids that you know of that --

2 A No, sir.

3 Q -- night? All right. When the body --

4 you -- I think you said when the body -- fluid was

5 taken was the body laying flat, prone or how?

6 A When I took the fluids?

7 Q Yes, sir.

8 A He was flat on his back in -- on the

9 gurney --

10 Q Okay.

11 A -- in the rescue squad truck.

12 Q Okay. Was there any straps on him?

13 A No, sir.

14 Q Did you see him, the -- the body when

15 it was in the vehicle?

16 A Yes, sir.

17 Q And was it suspended or was it -- you

18 said -- I believe you said the truck was upside

19 down?

20 A I can't give you an exact picture of

21 how it was, but the car was upside down and

22 squashed down in there and he's inside. And I

23 can't tell you exactly how he was lying. It's

24 been a while back.

25 Q All right. Well, we -- I think we have

1 a MAIT report and some other evidence of -- of him
2 in the car, so we can look at that.

3 A Uh-huh.

4 Q But you do remember him being pinned in
5 the car?

6 A Yes, sir.

7 Q And there was a lot of pressure on his
8 body from the -- from the impact?

9 A Yeah, I would think so. Yes, sir.

10 Q Did you notice any blood on the victim?

11 A No, sir.

12 Q You said in the -- or it says in the
13 death certificate severe head trauma due to auto
14 accident. What -- what made you think there was
15 head trauma?

16 A The way the neck is -- was positioned
17 and the -- when we -- when I talked with the
18 E.M.S. personnel they kind of -- they have a
19 tendency to kind of move their head around to see
20 if it's broken or anything of that sort.

21 Q Uh-huh.

22 A And that was -- between the two of us
23 together, that's what we come up with.

24 Q Okay. But did you notice any -- a lot
25 of blood or no?

1 A There was some blood, but I can't tell
2 you how much. I mean, you've got to bear in mind
3 it's been some time back and there's been --

4 Q Right.

5 A -- lots of wrecks since then.

6 Q Okay. So if -- if you've got the time
7 of death on the death certificate at -- I believe
8 it was 6:05; is that correct, 6:07 p.m.?

9 A That's correct.

10 Q Is that correct?

11 A Yes, sir.

12 Q All right. And you got the specimen at
13 8:30 p.m.; is that right?

14 A Yes, sir.

15 Q All right. Do you -- do you think in
16 your experience, and I know you're not an expert
17 medical professional or anything like that, but in
18 your experience do you think this man died
19 instantly?

20 A You know, I get my facts and figures
21 from talking with highway patrol, witnesses on the
22 scene. We all concluded that we feel like he died
23 immediately.

24 Q Okay. So it's pretty safe to say when
25 the accident happened he died and then -- at 6:07,

1 and 8:30 p.m. that you took a blood sample?

2 A Yes, sir.

3 Q All right. When you say you took --

4 when you used this syringe, the spinal syringe you
5 said --

6 A Yes, sir. Uh-huh.

7 Q -- do you use that over and over?

8 A No, sir.

9 Q Is that a disposable --

10 A Yes, sir.

11 Q -- syringe?

12 A Yes, sir.

13 Q Is it pre-sterilized?

14 A It comes --

15 Q Does it come sterilized?

16 A Yes, sir.

17 Q And do you do anything to sterilize it?

18 A No, sir.

19 Q Do you do anything to -- do you -- do
20 you ever -- do you ever insert into a body, pull
21 it out, and then -- and re--- and reinsert into
22 the body at another place?

23 A No, sir.

24 Q So you inserted it one time into --

25 A Yes, sir.

1 Q -- the body --

2 A Yes, sir.

3 Q -- and that was in the heart area?

4 A Yes, sir.

5 Q Okay. Did you use any kind of swab or
6 alcohol or cleaning fluid or a rag or anything to
7 clean --

8 A No, sir.

9 Q -- off the area before --

10 A No, sir.

11 Q -- you inserted it?

12 A The nurses do that. I don't.

13 Q All right.

14 THE COURT REPORTER: Excuse me, sir.

15 If you'd give him a chance to finish his --

16 THE DEPONENT: Okay.

17 THE COURT REPORTER: -- question before
18 you --

19 THE DEPONENT: Okay.

20 THE COURT REPORTER: Thanks.

21 BY MR. ASKINS:

22 Q I'm sorry. I go too fast --

23 A Okay.

24 Q -- sometimes and that causes you to go
25 fast. Okay.

1 A Okay.

2 Q Let me -- let me repeat it. Did you --

3 A Okay.

4 Q -- did you use any kind of swab or
5 anything else to clean the area before you
6 inserted that needle?

7 A No.

8 Q Did anyone else do that --

9 A No.

10 Q -- to your knowledge? You -- you
11 mentioned a minute ago, you said sometimes nurses
12 and E.M.S. people do that. Do you know anybody
13 that used any kind of swab or alcohol on this
14 man --

15 A No.

16 Q -- to clean him up or anything?

17 A Huh-uh.

18 Q That's a no?

19 A That's a no.

20 Q Okay. All right. Did you notice --
21 did you talk to any witnesses at the scene?

22 A I got my information from the highway
23 patrol.

24 Q Okay. How many highway patrolmen were
25 there; do you know?

1 A I cannot tell you now. It might have
2 been four or five. Usually there are a pile of
3 them that come and everybody tries to help out.
4 And then the MAIT team comes and --

5 Q That's correct.

6 A But I can't tell you exactly how many
7 was there.

8 Q All right. Did you talk to any lay
9 witnesses?

10 A I did not.

11 Q E.M.S. personnel or anybody else?

12 A I talked to the E.M.S. personnel on the
13 scene as we were discussing his body in the
14 vehicle, about getting him out and all that.

15 Q Okay. Now, the sample you took, does
16 it come in -- do you send the whole syringe or is
17 there a capsule that catches the --

18 A It's a little vial, a closed vial,
19 glass vial. You take the needle, insert it into
20 the vial. Let the blood go in. Remove it. And
21 then there's some powder residue inside that
22 supposed to help it. You shake it up. And then
23 there's a cover that you fill out, you put over
24 the top of it which seals it down. The needle is
25 thrown away.

1 Q Okay. And did you throw -- you don't
2 have that needle?

3 A No, sir.

4 Q Okay. When you -- when you put the
5 syringe or inserted the syringe into this -- this
6 victim's heart area, did you aspirate the -- the
7 syringe or you just drew the -- drew it right
8 away?

9 A I put the needle inside through the
10 ribcage into the heart. And when it went in, I
11 held it with one hand and take my plunger and
12 gradually work it until I can get the blood to
13 start flowing. When I pulled it up the blood
14 comes back up into the vial. When I get as much
15 as I feel like I can get, I pull the thing out and
16 quit with it.

17 Q Does your protocol tell you how long
18 after a decedent passes that your -- the syringe
19 in the heart would actually give a sample of
20 blood?

21 A No, sir.

22 Q Do you know how long blood would last
23 after someone perishes?

24 A No, sir.

25 Q So this -- this was some two -- two

1 some odd hours after we presumed he died, and
2 that's when you took this sample?

3 A Yes, sir.

4 Q Was the blood fluid?

5 A Yes, sir.

6 Q All right. Does blood con--- was it
7 congealed in any way to your knowledge?

8 A Not the blood out of the heart.

9 Q Okay. All right. Did you use any
10 other test, or do you use any other test in this
11 situation?

12 A No, sir.

13 Q Okay. Have you ever done it before?

14 A Done what before?

15 Q Take another test?

16 A No, sir.

17 Q Okay. Y'all ever take any hair
18 follicle tests or samples?

19 A Only -- the time that I take a hair
20 follicle test if I -- we suspect poisons.

21 Q Okay.

22 A That's the only time that I have ever
23 done that.

24 Q All right. You don't -- you mentioned
25 a few minutes ago about eye fluid. You ever take

1 any eye fluid?

2 A I have done that too in -- in a case
3 where we suspected poisoning.

4 Q Okay. How about urine or feces
5 samples?

6 A I have not.

7 Q Okay. How about mouth fluids?

8 A No, sir.

9 Q Any other bodily fluids y'all take --

10 A No, sir.

11 Q -- samples? So in this case, you did
12 not take a hair follicle, or you did not take any
13 other eye fluid test?

14 A No.

15 Q Okay. Did you ever examine the clothes
16 of the victim?

17 A For what?

18 Q For anything?

19 A I had no reason to.

20 Q Okay. Well, I'm not -- I'm not
21 trying --

22 A Yeah, I -- I know I had --

23 Q -- I'm not trying to criticize you.

24 A I know that. I had no reason to --
25 to --

1 Q Okay.

2 A -- do that.

3 Q All right.

4 A Uh-huh.

5 Q It's pretty obvious --

6 A The only thing that --

7 Q -- he got in a wreck.

8 A The only --

9 Q I understand that.

10 A -- thing that I examine clothes for we

11 pull things out like wallet or keys or whatever.

12 If there's any kind of drugs in that pocket that

13 comes out. Everything is documented.

14 Q Okay.

15 A But there was nothing of that sort in

16 there.

17 Q Okay. All right.

18 A I have -- I -- I did get I think some

19 personal items out of his pocket which was turned

20 over to his family.

21 Q Okay. Did you see any evidence of any

22 kind of beer cans, alcohol bottles or anything?

23 A Not to my recollection.

24 Q Okay. All right. Does your -- does

25 your training tell you there's any difference in

1 getting a blood sample from the heart area versus
2 the brain area?

3 A Repeat that.

4 Q Let me ask it this way. Is there any
5 difference in the blood sampling protocol from a
6 blood sample from a brain versus a blood sample
7 from a heart?

8 A I can't answer that.

9 Q Okay. So there's no protocol that you
10 know about?

11 A No, sir.

12 Q Okay. No training that tells you to do
13 anything different --

14 A No, sir.

15 Q -- than that?

16 A No, sir.

17 Q All right. From the time of the
18 accident until the time you got there and the body
19 was actually extracted, was -- you said it was
20 around -- it was at 7:30? He died at 6:07, and it
21 was around 7:30 when you got there?

22 A Yes, sir.

23 Q And then it was another hour before he
24 was --

25 A Yes, sir.

1 Q -- actually released from the pressure
2 in that -- in that truck?

3 A Well, he was released from the pressure
4 before the 8:30 period. As I told you earlier, he
5 was -- he was taken out of the vehicle, loaded up
6 in a gurney, and by the vehicle transported to the
7 E.M.S. squad building where I followed along and
8 met them at 8:30 and took the vial.

9 Q Okay. So maybe 30 minutes earlier is
10 when he was released from the car?

11 A Most probably.

12 Q All right. So -- and --

13 A Uh-huh.

14 Q -- for that length of time he was
15 under -- his body was under pressure?

16 A Yes, sir.

17 Q Okay. Do you ever do any kind of
18 chromatogram or chromatograph or have you ever had
19 any --

20 A No, sir.

21 Q -- familiarity with that?

22 Mr. Reynolds, do you have any connection with
23 Pike Electric Company or New Hampshire Insurance
24 or Chartiss Claims or Turner Padgett Law Firm or
25 Liberty Mutual Insurance Company?

1 A No, sir.

2 Q Do you have any family members that
3 have any connection with them?

4 A No, sir.

5 Q Do you have any friends that are close
6 connection with them?

7 A Not to my knowledge.

8 Q Okay. You mentioned earlier that your
9 protocol is after -- maybe the day after
10 investigating a death you would call the physician
11 of the decedent. Did you do that in --

12 A It --

13 Q -- this case?

14 A No, sir. I said as a natural death.

15 Q Right.

16 A This is a motor vehicle death. There's
17 a difference there.

18 Q Okay. All right. So you didn't do
19 that?

20 A No, sir.

21 Q Okay. Bear with me one second.

22 A Uh-huh.

23 Q Just let me make sure I -- I talk fast
24 and I -- and I write worse, and I'm trying -- I'm
25 trying to read my own writing.

1 A It's all right.

2 Q Mr. Reynolds, do you use gloves or
3 anything when you're taking these samples?

4 A Yes, sir.

5 Q And the blood samples, are they
6 returned to you, or do they keep them at the SLED
7 lab or is that --

8 A They don't -- they're not returned to
9 us.

10 Q Okay. So it's just disposed of there?

11 A Yes, sir.

12 Q Do you put it in the refrigerator when
13 you take it?

14 A No, sir.

15 Q Okay.

16 A It's a mailable box.

17 Q Okay. Well, I'm talking about from the
18 time you drew until the time you mailed it --

19 A No, sir.

20 Q -- the next day it's not --

21 A Huh-uh.

22 Q -- refrigerated?

23 A No, sir. I put it in the -- I put it
24 in the box, and the box goes in my car. From
25 there it's taken to the office where it's mailed

1 out.

2 Q Okay.

3 MR. ASKINS: Thank you, Mr. Reynolds.

4 Please answer any questions.

5 THE DEPONENT: Uh-huh.

6 E X A M I N A T I O N

7 BY MR. DEBERRY:

8 Q Mr. Reynolds, I'm Steven Deberry. I've
9 got just a few short questions --

10 A Uh-huh.

11 Q -- for you. You mentioned, at one
12 point, that you had some training from maybe an
13 autopsy doctor down in Charleston?

14 A That's where I got my knowledge of
15 doing what I did, that and on-the-job training.
16 Like I said earlier, we did not have any formal
17 education when I -- whenever I became a deputy.
18 My boss, the coroner, Bubba Matthews, I would
19 follow his protocol. He showed me how to do it.
20 And then when I went to SLED for the school, they
21 gave us some slides and stuff of that sort because
22 we didn't have no bodies to draw any from, so they
23 showed pictures of how to do it. Then when I went
24 on autopsies to Charleston, I asked the doctor,
25 Dr. Conratti, the pathologist, to give me some

1 instructions of how to do it, and I was shown
2 then. Now, different people draw blood different
3 ways. Some draw what -- if they can get it out of
4 a vein. Some try to get it out of carotid
5 arteries. Some try to get it out of the feet.
6 Myself, I get it out of the heart because it's
7 direct and straight in, and that's where I usually
8 get mine from.

9 Q Now, you -- you -- you testified
10 earlier that you also learned how to take an
11 ocular fluid --

12 A Yes, I --

13 Q -- sample?

14 A -- did.

15 Q All right. And did you learn during
16 your training that -- that eye fluid or ocular
17 fluid would be much more precise in -- in being
18 able to -- the toxicology report?

19 MR. HYLTON: Object to the form of the
20 question.

21 BY MR. DEBERRY:

22 Q Do you have any knowledge that -- that
23 ocular fluid would be more --

24 A No, sir.

25 Q Okay. And you testified earlier that

1 there's been many wrecks since this one, and that
2 you've probably responded to in your duties. Were
3 there any others that day?

4 A No, sir.

5 Q Was that the only call that you had
6 that day?

7 A I can't recall that, sir.

8 Q Okay.

9 A The only wreck I had.

10 Q Okay. Do you draw fluid or -- or blood
11 from -- from everybody you encounter?

12 A No, sir, just -- just wrecks or
13 suspected drug overdose. We may draw some from
14 them, or anything -- any kind of activity where we
15 feel like there's foul play involved.

16 Q Okay. But on every wreck you would
17 draw blood?

18 A Yes, sir.

19 Q Okay.

20 A Now, otherwise, if we do not send him
21 for an autopsy, we draw blood. That's standard
22 procedure.

23 Q And --

24 A If we send him for an autopsy, I do not
25 draw it, they draw it. And so they go into a

1 cooler. The next day or whenever we can get them
2 transported, that's when it's drawn then.

3 Q So you made the decision for no
4 autopsy?

5 A Yes, sir.

6 Q All right. And what did you base that
7 decision on?

8 A I talked with the highway patrol, and
9 from their -- we all get our heads together. I
10 asked them, I said, do you need an autopsy? I was
11 told, we don't need one. I said, well, I'll draw
12 fluid. They said that's okay, and that's what I
13 did.

14 Q Was there any inclination from anybody
15 that you gathered whether or not the individual
16 may have been under the influence?

17 A Nobody told me anything about that.

18 Q So there was no evidence that you saw
19 on the scene that would indicate that?

20 A Not that I can recall, sir.

21 Q All right. And you said when you --
22 when you drew the blood, you put it into a -- a
23 box. Is that box sealed?

24 A Yes, sir.

25 Q Okay. And it's sealed by you?

1 A Yes, sir.

2 Q And then it left your possession when
3 you handed it to your secretary?

4 A Well, what happens, I take the box.
5 The seal is put over the vial of blood. The box
6 then is transported to the secretary who fills out
7 a form of what we want and everything. I have a
8 copy of that here somewhere or another. She puts
9 it back into the box and it's sent down.

10 Q So she does open the box?

11 A She opens the box but not breaking the
12 seal or anything with the blood.

13 Q Okay.

14 A This is the form here that the
15 secretary fills out the next day and puts it in
16 the mail.

17 MR. ASKINS: Mark that as our next
18 exhibit.

19 MR. DEBERRY: Sure.

20 MR. ASKINS: Can we make that another
21 exhibit, but let's let Brandon look at it.

22 MR. DEBERRY: Okay. Sorry about that.

23 MR. HYLTON: That's okay.

24 (Exhibit Number 3
25 marked for identification.)

1 BY MR. DEBERRY:

2 Q Mr. Reynolds, would there be any time
3 when -- when the secretary for the coroner's
4 office has multiple samples and multiple reports
5 that she has to place these into the boxes before
6 they send -- send them to SLED?

7 A As a general rule, we have one and
8 that's about all she would work on, one at the
9 time. We don't -- I've never taken more than one
10 at the time. Now, I might take one in the next
11 day, but only one at the time. And that's done --
12 as soon as she can get time, she writes it up,
13 puts it in the box, and then takes it down to the
14 mailroom and mails it out.

15 Q Okay. And there's other -- are there
16 other deputy coroners in Florence County?

17 A There's only two investigators that
18 work part time with the coroner's office. And the
19 rest of the time they work with the sheriff's
20 department.

21 Q And -- and also the coroner performs
22 these duties?

23 A Yes, sir.

24 Q So, I mean, at any time three or four
25 of you could be in different directions?

1 A There's only one working at the time.

2 Q Oh, okay. So there's never been a time
3 where you had to respond to two calls at one time?

4 A I have but I had to do it in -- in --
5 in the time frame allowed.

6 Q Okay.

7 A Eleven calls in 24 hours.

8 Q That's a bad day.

9 MR. DEBERRY: I think that's all I
10 have.

11 THE DEPONENT: Okay.

12 MR. DEBERRY: Thank you very much.

13 THE DEPONENT: Okay.

14 FURTHER EXAMINATION

15 BY MR. HYLTON:

16 Q Just a few follow-up.

17 A Uh-huh.

18 Q You've been doing this for eighteen
19 years, correct?

20 A Yes, sir.

21 Q And that -- over that eighteen years
22 how many times would you say you've drawn blood,
23 just tens of thousands? I mean, would you --

24 A I would say -- and I'm -- I'm just
25 giving you a rough estimate, now, don't hold me to

1 this, but I would say I have worked 4,000 deaths.
2 or better. A third of them or better has been
3 related to wrecks.

4 Q Okay. And --

5 A That's as close as I can come up.

6 Q And you used -- you used the same
7 procedure in this accident as you did in those in
8 drawing blood and sending the blood to SLED?

9 A When I first started in 1994, I did not
10 know the correct way to do it, and I would draw
11 from the -- I'd get a nurse down in the autopsy
12 room at McLeod. And they would go in there and
13 they'd prep the arm, and they'd beat it, you know,
14 do all the things that they normally do, which
15 I've learned was wrong. And so that's whenever I
16 went on the autopsy runs to Charleston to try to
17 get the proper way. Not -- the nurses are trained
18 one way to draw blood. Coroners are trained a
19 different way.

20 Q Okay. And so how long have you been
21 drawing it your way, the way you've been trained?

22 A Probably a year and a half after I got
23 the formal training from SLED.

24 Q Okay. And how long has that been to
25 date?

1 A Ninety-four, five, six, probably
2 since '97.

3 Q All right. And since '97, have you
4 been drawing the blood the same way?

5 A Yes, sir.

6 Q And is there any breach in the protocol
7 from what you've been doing from 1997 --

8 A No, sir.

9 Q -- to this case?

10 A No, sir.

11 Q Okay.

12 A Now, you don't always get blood when
13 you draw it.

14 Q Okay.

15 A I'll tell you that right now. If
16 somebody's been into a car wreck that is so
17 traumatic you might not get the first bit blood.

18 Q All right. But you were able to get
19 blood in this accident --

20 A Yes, sir.

21 Q -- without problems?

22 A Yes, sir.

23 Q All right.

24 MR. HYLTON: That's all the questions I
25 have.

1 FURTHER EXAMINATION

2 BY MR. ASKINS:

3 Q Just one more question. It's sort of a
4 follow-up on one Mr. Deberry asked.

5 A Uh-huh.

6 Q I think what he was trying to ask you,
7 Mr. Reynolds, was did you have more than one
8 sample in the office at the time you had this
9 sample in there?

10 A No, sir.

11 Q Okay.

12 MR. ASKINS: Thank you, Mr. Reynolds.

13 THE DEPONENT: You're quite welcome.

14 MR. HYLTON: Thank you.

15 (Deponent excused.)

16 (Whereupon, at 2:59 p.m., the
17 taking of the foregoing
18 deposition was concluded.)

19

20

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25

1 CERTIFICATE OF REPORTER

2 State of South Carolina

3 County of Florence

4

5 I, Roger R. Williamson, Court Reporter and
6 notary public for the State of South Carolina, do
7 hereby certify that the deponent in the foregoing
8 deposition was, by me, first duly sworn to testify
9 to the truth, the whole truth and nothing but the
10 truth; that said deposition transcript was taken
11 via stenomask with backup; that the foregoing
12 transcript contains a true record of the
13 deposition of said deponent.

14 I further certify that I am neither attorney
15 nor counsel for, nor related to or employed by any
16 of the parties connected to the action, nor am I
17 financially interested in the action.

18 Witness my hand at Florence, South Carolina,
19 this the 3rd day of September, 2012.

20

21

22

Roger R. Williamson
MY COMMISSION EXPIRES:
March 1, 2022

23

24

25

Before the South Carolina
Workers' Compensation Commission
WCC File # 1205798

Briett Johnson (Deceased),
Employee,
Claimant,
v.

Pike Electric, Inc.,
Employer,
Liberty Mutual Insurance Company,
Carrier,
Defendants..

Deposition of: Robert M. Sears

Location: 319 South Irby Street

Florence, South Carolina

Date: Tuesday, August 28, 2012

Time: 3:04 p.m. - 3:59 p.m.

Court Reporter: Roger R. Williamson

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Job No. CS414318

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E X H I B I T S

Pg/ln	Ex.	Description
9/17	1	Photo
9/17	2	Photo
9/17	3	Photo
9/17	4	Photo
9/17	5	Photo
25/17	6	SLED Toxicology Report
32/4	7	SLED Toxicology Sample 2
33/11	8	Quality Control Results

** uh-huh = affirmative
huh-uh = negative

S T I P U L A T I O N S

It is stipulated among counsel that this deposition is being taken pursuant to the South Carolina rules of civil procedure and that all objections except as to the form of the question are reserved until the time of trial.

It is also stipulated among counsel for the respective parties and the deponent that the deponent will waive the right to read and sign this transcript.

Thereupon,

Robert M. Sears,
having been first duly sworn by the court
reporter, testified as follows:

E X A M I N A T I O N

BY MR. HYLTON:

Q Mr. Sears, can you state your name for the record?

A My name is Robert Michael Sears.

Q Mr. Sears, where do you work?

A I work for the South Carolina Law Enforcement Division more commonly referred to as SLED.

Q Okay. And what is your position with SLED?

1 A I am the toxicology technical leader --
2 or the technical leader for our department. I'm a
3 toxicologist with SLED.

4 Q Okay. In laymen's terms what does a
5 toxicologist do?

6 A A toxicologist is someone who analyzes
7 blood, urine or other biological samples or bodily
8 fluids for the presence of drugs, alcohol and
9 poisons and then interprets those findings in
10 courts of law or in hearings, as we are today, as
11 to the impact that alcohol, poison or drug level
12 may have had on the individual in question.

13 Q All right. And how long have you held
14 the position of a forensic toxicologist --
15 toxicologist?

16 A I've been with SLED over 24 years.

17 Q Okay. Have you held that position the
18 entire time of a toxicologist?

19 A Yes, sir, I have.

20 Q Okay. And what's your procedures for
21 testing blood?

22 A Well, as in most cases, we are not the
23 individuals that receive the evidence at SLED.
24 Whether it's a coroner case or a highway patrol
25 case, evidence is brought to SLED, logged in in

1 our evidence log in area downstairs, assigned a
2 unique case number. And then the evidence is
3 actually assigned a tracking number as well. Once
4 that evidence is brought up to our department, one
5 of our technicians or toxicologists will be
6 responsible for photographing all items of
7 evidence for our permanent case record. Upon the
8 completion of the photographing, that evidence is
9 resealed, placed in a walk-in refrigerator that is
10 magnetically locked.

11 That evidence is then -- depending on the
12 type of case, the first thing would generally be a
13 blood alcohol that would be run on that evidence.
14 If there is a urine sample in the case, there may be
15 drug screen only. But in most cases, if blood is
16 submitted, the first thing is a blood alcohol.
17 That's run in at least duplicate. We try to split
18 that up on multiple days to ensure that the proper
19 evidence is being analyzed two days in a row. Those
20 results have to agree within eight percent in order
21 to be reported. The lowest of two readings is
22 reported. We feel that gives the benefit of the
23 doubt to the individual whose sample that we're --
24 we're actually analyzing. If additional work is
25 needed after the alcohol, then that sample is re---

1 I guess reaccessioned, passed off to somebody else
2 to actually run the drug screen on that case.

3 Q All right. Do you recall having a
4 blood vial sent to you on -- I think it was mailed
5 out on June 17th, 2000--- June 8--- sorry, I've
6 got my dates mixed up -- May 18th, 2012, of a
7 individual named Briett Johnson?

8 A I did receive a sample labeled
9 Briett Johnson.

10 Q Okay. When did you receive that
11 sample?

12 A Let's see. That sample was submitted
13 to our laboratory on May 21st. It actually
14 arrived in the toxicology department on the 22nd.
15 And the analysis was begun on the 23rd of May.

16 Q Okay. And do you have pictures of the
17 blood vials that arrived --

18 A I do.

19 Q -- with you?

20 A I do. We take pictures of the external
21 packaging as well as the tube. In this case,
22 there are one, two, five actual images. These are
23 in black and white, but you can see the external
24 packaging that the evidence was placed into once
25 it was received at SLED. This notates at the top

1 that it was received through the mail. So the
2 coroner in this case mailed that evidence in it
3 appears. And Doris Yarborough, D.P.Y., is the
4 sealing official here, is the individual in log in
5 that actually brought that evidence in and sealed
6 it in the bag. Opened it up and put in a bag.

7 The second picture that I have is
8 actually of the box that was mailed to SLED showing
9 the postage on there. And that came from M.G.
10 Matthews, coroner's office. The third picture is a
11 specimen seal on that cardboard box. And then the
12 last two images are actually of the blood tube that
13 was received at SLED showing that it had a specimen
14 seal over the top that was labeled Briett Johnson.
15 And the actual date of collection -- it says 8/17/12
16 at 8:30.

17 Q Okay. Is that -- can that be a five?
18 I believe we --

19 A I --

20 Q -- had a 5/17/12. Because, again, that
21 would have been after your date of receipt,
22 wouldn't it?

23 A I understand. All I can tell you is
24 that that's what it appears to be on that label.
25 I cannot tell you what it --

1 Q Okay. I think we just had the -- the
2 coroner -- deputy coroner testify that that was
3 May 17th, 2012, in which the blood was taken.

4 A Okay.

5 MR. HYLTON: And is that -- any
6 problems with submitting those?

7 MR. ASKINS: Your eyes are better than
8 mine. They've got to be better than mine.

9 MR. DEBERRY: Well, I didn't find
10 anything --

11 MR. ASKINS: Those are going to be fine
12 with me.

13 MR. DEBERRY: Yeah.

14 MR. ASKINS: No problem with those.

15 MR. HYLTON: All right. If you'll just
16 mark them individually?

17 (Exhibit Numbers 1 to 5
18 marked for identification.)

19 MR. HYLTON: All right.

20 BY MR. HYLTON:

21 Q In looking at this evidence in this
22 case and how it arrived to you, is there anything
23 unusual about how this package arrived to you?

24 A No, sir. As I said, generally
25 speaking, the toxicologist is not there to receive

1 the evidence directly from the coroner or whoever
2 the submitting official is. In this case, you can
3 see from the image of the heat sealed bag that
4 appears to still be sealed across the top. When
5 the evidence technician or custodian puts the
6 evidence in there, we actually have heat sealers
7 similar to what you would do for a vacuum packed
8 meal. And they heat seal across the top, and they
9 place their initials on it and the date that it
10 was sealed.

11 Once we receive it in our laboratory, we
12 ensure that it truly is sealed. If it's not sealed,
13 we have to go back and try to figure out why
14 evidence was brought to us that was not sealed
15 properly. In this case it appears that everything
16 was sealed properly, and the intake of the evidence
17 was done according to policy.

18 Q All right. Is there anything unusual
19 about receiving blood samples by the mail?

20 A No, sir. Many of the coroners in this
21 state submit samples through the mail to us.
22 Especially some of our more rural counties. They
23 don't feel that they need to make that trip or
24 can't afford to make that trip every time they get
25 a -- a biological sample in. So quite often we

1 receive samples through the mail.

2 Q Is there any risk of contamination
3 through that process?

4 A No, sir. The box -- as you can in
5 what's labeled Exhibit 2 and 3, this box was
6 actually sealed prior to putting it into the mail.
7 It was sealed when we received the evidence at
8 SLED. The blood itself is in a sealed tube.
9 There's no indication that anybody was able to
10 tamper with anything within that box.

11 Q All right. In looking at Exhibit 4, so
12 this is a picture of the actual test tube,
13 Exhibits 4 and 5?

14 A Yes, sir.

15 Q All right. And where the name's
16 written across here, is that a seal that goes
17 across the top of the -- the test tube?

18 A That's a -- it's actually a red and
19 white seal that's kept in the box that we provide
20 to coroner's when we provide these tubes for their
21 use. That label is -- is actually provided with
22 no writing on it. It had to be filled in by the
23 coroner or whoever actually drew the sample in
24 this case. It is placed over the specimen seal,
25 again, to indicate -- you know, if there had been

1 any tampering with that evidence, then that seal
2 would have to have been broken.

3 Q Okay. Did you witness or see any
4 tampering regarding that seal on that vial?

5 A No, sir.

6 Q Okay. All right. So when you received
7 this vial of blood, what did you do after you
8 opened it -- or after you received it?

9 A Okay. And as I -- I don't know that
10 everybody is aware of it, but these samples
11 actually go through multiple people. Just as I
12 said when I began the description of how that
13 evidence is handled. In this particular case, one
14 of our technicians opened that bag and
15 photographed these samples. I did not physically
16 photograph the samples. Okay. And then we would
17 have had another analyst actually open this tube
18 to do the first aliquot. In this case, they would
19 have aliquotted 200 microliters of blood into a
20 very large or a 20 mill head space vial. Not very
21 large, but a 20 milliliter head space vial.

22 Q And just to stop you quick. In
23 laymen's terms that aliquotted, what --

24 A They take a sample using a metering
25 device, basically, place it in another container.

1 Q Thank you.

2 A And they also added internal standard.
3 In this case, we used tertiary butanol as an
4 internal standard. The blood alcohol is run on a
5 headspace gas chromatograph. And a headspace gas
6 chromatograph is basically an oven. We take a
7 sample of the vapor above the biological sample
8 that we placed in that test -- in that vial and
9 analyze the vapor and look for ethanol as well as
10 other volatiles and also the internal standard
11 t-butanol.

12 That's run in this case on separate days.
13 Again, so that we can make sure that the instrument
14 is operating properly, and that the analyst took the
15 sample or -- or moved some of that sample from the
16 correct tube. The -- in -- in this case -- I just
17 want to make sure -- in this particular case, Kathy
18 Woodward is the actual analyst that ran the
19 headspace determination. And I would have been the
20 individual who reviewed all of her analytical data
21 and the quality control data to ensure that it met
22 laboratory policy. So she run -- ran the analysis
23 on it, and then turned the sample over to me upon
24 the completion of the analysis.

25 Q Okay. And you said there's two reports

1 that are run. What did the first report show?

2 A In this particular case there was a
3 0.221 blood alcohol and a 0.2088, 2088. Now, in
4 each of these cases, as I told you previously --
5 in -- in any case, we take the lower of the two
6 readings provided that they agree within eight
7 percent. That's our range that's allowed. And so
8 in this case the reported value is truncated .208.

9 Q Okay. And so your test was within
10 range to be valid?

11 A Yes, sir. There were -- there actually
12 was an additional sample that was run. One of the
13 quality control samples fell out, so it couldn't
14 be reported. So within a batch of samples, we
15 were on a positive control at position one, two,
16 and then every multiple of fifteen. If any of
17 those standards are out, you can't accept the
18 samples that were fractured by bad standards.

19 Q Okay.

20 A And that could be out because of a
21 pipetting error or any number of things.

22 Q Uh-huh.

23 A But if the quality control samples do
24 not meet our criteria, then that sample couldn't
25 be reported.

1 Q Okay. But two met your quality
2 control --

3 A That's correct.

4 Q -- standards? And in your opinion, the
5 .208 is the level reported as it's the lowest one,
6 correct?

7 A That's correct. Based on our policy,
8 the .0 -- .208 percent would have been the -- the
9 result that was reported.

10 Q All right. We've had some discussions
11 with the deputy coroner about how the blood was
12 drawn. And he has testified that he took a
13 syringe and injected it into the heart after the
14 death. Is there any problem or any contamination
15 or any other issue that you would have from a
16 coroner drawing blood directly from the heart of
17 an individual?

18 A In many cases, a heart stick is what
19 the coroner or assistant coroner will use because
20 they are not going to cut open the body as they
21 would with an autopsy. This is an accepted method
22 for them to draw the fluid. I guess, you know,
23 provided that they did an external exam on the
24 body, and felt like there was no significant
25 internal trauma that would be a very acceptable

1 way to do that.

2 Q Okay. And in this case I believe he
3 testified that he arrived on the -- I've got the
4 time of death was approximately 6:07 p.m. and that
5 he drew blood at approximately 8:30 p.m. Which is
6 I guess around two and a half hours after the
7 accident. Is there any issue, cause for concern
8 regarding a blood sample taken approximately two
9 and a half hours after a time of death?

10 A No, sir. The ethanol -- in order for
11 ethanol to be metabolized it requires energy.
12 Once the circulatory system in the body shuts
13 down, there's no more energy in the liver to -- to
14 provide for the metabolism. The sample that's
15 taken really is a snapshot that would reflect what
16 happened at the time of death. So this -- this
17 should be a valid result based on the fact that,
18 you know, that -- that, basically, there's no more
19 metabolism. There's no more absorption going on
20 in the body once the individual has passed away.

21 Q And, again, if there was absorption, it
22 would actually result in a lower alcohol level,
23 correct?

24 A Absorption -- absorption would actually
25 result in a higher alcohol content assuming that

1 there was a alcohol left in the stomach --

2 Q Okay.

3 A -- that could somehow get into the
4 bloodstream and could somehow circulate through
5 the body. But because the heart had stopped,
6 there's no more circulation. And for that reason,
7 it doesn't make sense to think that there would be
8 any absorption from the stomach.

9 Q Okay. And is there any concern from a
10 two-hour period of any type of -- of the alcohol
11 that's found in the body coming from some other
12 source other than alcohol consumed by the
13 individual?

14 A No, sir. I -- I -- in this particular
15 case, from my understanding and -- and I don't
16 have, obviously, all the notes that you have, but
17 the body would have been moved very rapidly from
18 the -- the accident scene after extraction from
19 the vehicle to the hospital and then on to the
20 morgue. It wasn't left outside at, you know,
21 105 degrees for ten or twelve hours prior to that
22 sample being taken. I don't see there being any
23 problem with any kind of postmortem generation of
24 ethanol, which I think is what you're alluding to.
25 There shouldn't have been any creation of ethanol.

1 Q Okay. Doctor, is it -- I'm sorry.

2 You're not a doctor, correct?

3 A No, ⁶ sir, I am not.

4 Q Okay. A .208 alcohol level, do you
5 have any understanding of what the effects are of
6 alcohol levels on the body?

7 A Yes, sir, I do.

8 Q And how did you gain that expertise?

9 A Not only do I have a bachelor's degree
10 in chemistry from Francis Marion, but I have a
11 master's degree in medicinal chemistry through the
12 school of pharmacy at the University of
13 South Carolina. In addition to that, I've
14 attended numerous trainings on not only how to
15 operate the equipment, but how to interpret our
16 findings and what these findings actually mean for
17 the average individual. One of the most notable
18 would be the Borkenstein school that directly
19 relates to alcohol analysis, interpretation, and
20 then legal issues related to gathering that
21 evidence and interpreting -- or interpreting it
22 in courts of law. So in-house training, outside
23 training recognized through the -- the field, as
24 well as formal education in pharmacology.

25 Q All right. And with a .208 blood

1 level, what type of effect would that have on an
2 individual?

3 A Well, as I'm sure you realize, ethanol
4 acts as a central nervous system depressant on
5 everybody. That is to say that it acts very much
6 like a sedative. At low levels of ethanol, one
7 drink, generally people become more euphoric
8 because it begins to -- to suppress our
9 inhibitions. It works to suppress areas of the
10 brain. As that level goes up, we begin to see
11 things such as slowed reaction time, poor motor
12 coordination. Once we reach a .15, we can see
13 short term memory losses. Generally speaking, at
14 a .15 you begin to see outward symptoms of
15 impairment that the average trained observer
16 would -- would notice. Things like leaning
17 against a wall for support instead of standing out
18 in an open room. Most people realize, if they are
19 regular drinkers, that once they've had a certain
20 amount this will allow them to look less impaired
21 if they stand against something. They begin to
22 speak more slowly because they know that at this
23 kind of level you would begin to detect
24 potentially slurred speech. Now, you know, as
25 that level goes up to a .20, all of these things

1 are -- are exacerbated even more. They're
2 definitely marked decrements in your ability to
3 safely operate a motor vehicle.

4 Q All right. And at a .20 level, would
5 you agree that most individuals would be dazed and
6 confused, and I believe you said may need even
7 help to stand or walk?

8 A I didn't say they need help.

9 Q Okay.

10 A I said that one of the learned
11 behaviors that most people pick up, if they are
12 regulars drinkers, is that they will brace
13 themselves against the side of the car or against
14 the bar when they're standing there drinking and
15 talking with their friends. It makes them appear
16 less impaired because that's, again, a learned
17 behavior to mask the impairment.

18 I would expect at a .20 that the
19 individual is going to have marked decreases in
20 retention -- in reaction time -- or I should say
21 increases. It's going to take longer to react. May
22 have issues with attention as far as not staying
23 focused. Most likely you would begin to notice a
24 little bit of a speech impediment because it does --
25 you know, alcohol affects the most recently learned

1 areas of your brain first. And that's why, you
2 know, we become a euphoric individual when we start
3 to drink, makes us a more giddy, more pleasant
4 person, generally speaking, because those things
5 that we learned last, including our inhibitions tend
6 to be suppressed first.

7 Q And with that, does that impair
8 judgment?

9 A Oh, most certainly.

10 Q Does it impair self-control?

11 A It most certainly can, yes.

12 Q And reasoning?

13 A Yes, sir.

14 Q Would a .208 alcohol level also affect
15 your visual, auditory, and mental information?

16 A It may very well affect visual. You
17 know again, what we're looking at is a complex set
18 of skills that are involved in driving. So all of
19 these things play into whether or not this
20 individual was a safe driver at that time and
21 place.

22 Q Okay. And, again, we -- South Carolina
23 has a D.U.I. limit at .08 percent; is that
24 correct?

25 A That's correct. There is an inference

1 at .08 that the individual is under the influence
2 of alcohol.

3 Q All right. And so a .208 would be
4 substantially higher than the legal limit?

5 A Almost three times.

6 Q Okay. And, again, I don't know if
7 you've had a chance to see the MAIT report in this
8 case.

9 A No, sir, we're not provided with that
10 information. Our results stand on their own.

11 Q Okay. And in the MAIT report, which
12 I'm not going to submit this whole thing, but it
13 was determined that the claimant in this case was
14 driving an F250 pickup truck at approximately
15 miles per hour. In this case, it appeared that he
16 was passing on a turn, ran off the road shoulder,
17 clipped a telephone pole and ended up upside down
18 on another car. Based on a .208 alcohol level and
19 the affects on the body, can you give an opinion
20 as to what would have caused the accident in this
21 case?

22 A Well, I can definitely give you an
23 opinion that this individual -- you know, we've
24 already talked about the fact that ethanol tends
25 to reduce your inhibitions. You tend to be

1 more -- you over --

2 MR. DEBERRY: If I can, I'm -- I'm
3 going to object to that question just based on the
4 fact that I don't think he would -- is in a
5 position, at this point, to give a -- an opinion
6 to the cause of an accident.

7 MR. HYLTON: All right.

8 BY MR. HYLTON:

9 Q You can still answer the question.

10 A The -- the fact that ethanol makes you
11 feel more sure of your abilities, makes you
12 overestimate your ability to drive that motor
13 vehicle, could definitely or would definitely, in
14 my opinion, have contributed to the likelihood
15 that he felt 95 was a reasonable speed. I think
16 the -- the slow reaction time associated with this
17 level of alcohol, the likelihood that he felt his
18 skill set was such that he could drive at that
19 speed, even with this level of alcohol, both
20 contributed to the accident.

21 Q And is that opinion based on your
22 expertise in the field of toxicology and your
23 studies that you have had over the years?

24 A Yes, sir.

25 Q And, again, your testimony today that

1 you've had, you've provided this testimony for
2 SLED on multiple occasions?

3 A Yes, sir. I've testified in over a
4 hundred trials in the States of South Carolina and
5 in Georgia, both D.U.I. trials, death
6 investigation trials, criminal sexual conduct
7 trials, assault and battery trials, you name it.

8 Q Do you also provide testimony regarding
9 causes of claims of accidents regarding alcohol
10 impairment?

11 A As it would relate to alcohol or drugs,
12 yes.

13 Q Okay. And how many times have you
14 testified in your career?

15 A Over a hundred times.

16 Q All right. And, again, based on the
17 evidence that you've seen in this case with a .208
18 alcohol level, what is your opinion, again,
19 arise--- regarding the causation of the accident
20 in this case?

21 A My opinion is that his ability to
22 safely operate a motor vehicle, that is as if he
23 were not impaired, was appreciably and materially
24 impaired by the presence of the alcohol in this
25 case and most likely contributed to the accident.

1 Q Okay. And is that your opinion to a
2 reasonable degree of certainty in your field?

3 A Yes, sir.

4 Q And, again, just for purposes of
5 organization, is this a copy of your toxicology
6 report that was the official report?

7 A I need to make sure that it compares
8 with this. Yes, sir. This is a copy of the --
9 it's equivalent to the copy that was maintained in
10 our permanent case file.

11 MR. ASKINS: Is that the same one you
12 sent me?

13 THE DEPONENT: Yes.

14 MR. HYLTON: Do you mind if I mark
15 that?

16 THE DEPONENT: Sure.

17 (Defendants' Exhibit Number 6
18 marked for identification.)

19 BY MR. HYLTON:

20 Q And, again, Mr. Sears, is there
21 anything in this case that leads you to believe
22 that the blood was either harvested in the wrong
23 procedure, that there's any contamination between
24 the harvesting and you taking the sample, and any
25 contamination or issues, concerns once the -- the

1 sample reached SLED facilities?

2 A The only information that I have about
3 how the sample was taken was what you presented
4 here today. Based on the information that you've
5 given, I don't see anything that would raise a
6 flag as to something being drawn improperly or
7 submitted improperly to SLED.

8 Q Okay.

9 MR. HYLTON: Thank you. That's all the
10 questions I have.

11 MR. ASKINS: You want to go ahead
12 first? Just go ahead.

13 MR. DEBERRY: Okay.

14 E X A M I N A T I O N

15 BY MR. DEBERRY:

16 Q I've just got a few questions for you.
17 You gave your opinion as to what you think caused
18 the accident; is that correct?

19 A I said that alcohol contributed to
20 this --

21 Q Contributed?

22 A -- accident, yes.

23 Q All right. And is it true that you
24 just base that opinion on your toxicology report?

25 A Yes, sir. Based on the .208 alcohol

1 that was found in this individual, that should be
2 sufficient to say that that had some causative
3 action in this case.

4 Q But had it, in fact, been some other
5 intervening cause of action or any other facts or
6 evidence that would relate to a different cause
7 that you wouldn't know of, then you couldn't say
8 for certain?

9 A No, sir. You're -- you're correct.
10 All I can say is that based on this level of
11 alcohol that it would have affect -- would have,
12 in fact, had an impairing affect on the
13 individual. If there were a mechanical failure,
14 the fact that he was impaired could have meant he
15 couldn't recover from the mechanical failure. I,
16 therefore, say I feel that this level of alcohol
17 is consistent with some impact or some partiality
18 in this -- in this cause of this accident. There
19 could be other factors as well. But this level of
20 alcohol is significant.

21 Q But you're saying that -- that there
22 could be other factors that -- that you're not
23 aware of that could have caused this accident?

24 A That's correct. As I said, I think the
25 ethanol contributed to this accident. It may not

1 be the only factor.

2 Q And Mr. Hylton asked you earlier, he --
3 he kept referring to a legal limit in
4 South Carolina, and you -- and you said there is
5 actually just a legal inference that can be made?

6 A Under the D.U.I. statute, it
7 specifically says at a .08 you can infer that
8 somebody is under the influence of ethanol. It
9 does not say that you can infer they are impaired.

10 Q Right. Okay. So there's just merely
11 an inference that you can imply?

12 A That's correct.

13 Q North of .08?

14 A That's correct.

15 Q Okay. And I just have one other
16 question I wanted to ask you. You said there's
17 two reports that are run, and you make sure that
18 they're within eight percent of each other?

19 A Right. The two samples that are --

20 Q Two --

21 A -- run.

22 Q -- samples?

23 A Yeah.

24 Q All right. And you said that one was a
25 .221 and one was a .208?

1 A Yes, sir.

2 Q And I was just curious, and I don't
3 know, and this may -- you know, I -- I don't know.
4 What is the difference, percentage wise, in those
5 two numbers?

6 A If you -- well, it's easier for me to
7 show you on paper because there's actually a
8 calculation for percent difference. And it is the
9 difference in the two numbers divided by the
10 average of the two numbers.

11 Q Okay.

12 A Okay. So it's the absolute difference
13 divided by the average. In this particular
14 case -- I don't really want to write on my -- my
15 case directory. I'll write on this real quick
16 here. 0.22, 0.02, 2088 -- and since we're -- if I
17 can get a calculator here, .22, 2088, 22, .22. I
18 still missed a point. Equals, divided by two.
19 Point -- or it's 5.6 percent. So that's 5.67
20 percent difference between the two numbers.

21 Q And -- and had it been eight or above?

22 A We would have had to repeat the
23 analysis.

24 Q You would repeat it?

25 A Yes, sir.

1 Q Okay.

2 MR. DEBERRY: Thank you very much.

3 E X A M I N A T I O N

4 BY MR. ASKINS:

5 Q Mr. Sears, I have a couple of questions
6 just to follow up. If the seal on the box had
7 been broken, could it be resealed without anybody
8 knowing that it had been broken to start with?

9 A I don't believe so. These are tamper
10 evidence seals that are displayed on the box. And
11 you can see they had to cut it open in order to
12 inventory it to begin with to -- you know, when
13 they logged it in. You can actually see the cut
14 on Exhibit 3 where they cut the box open to get
15 into it. So it's very unlikely that somebody
16 could have tampered with that without it not being
17 known or --

18 Q And is --

19 A -- identified.

20 Q -- is that the same way with the seal?

21 A Well, that's what I'm talking about.
22 They actually cut the seal. You can see it in
23 Exhibit --

24 Q I'm -- I'm --

25 A -- 3.

1 Q -- I'm sorry. I meant the seal of the
2 vial?

3 A That's correct. The seal on the vial
4 is a one time, one stick seal. You have to tear
5 that seal up in order to get it off.

6 Q Okay. So you can't reseal that?

7 A No, sir.

8 Q All right.. And you mentioned there
9 were two -- there were two tests performed that
10 you'd take the lower of the two as long as it
11 doesn't vary by eight percent?

12 A That's correct.

13 Q Can -- can we have a copy of the
14 second -- of the highest report and introduce
15 that, too?

16 A You -- I mean, you guys ----

17 Q Would you have a --

18 A -- are welcome to make a copy of either
19 of them. I mean...

20 MR. ASKINS: I -- just put that as my
21 number 1 over there if that's fine.

22 THE DEPONENT: I'll need this back so
23 I'll have to have -- because that's a formal -- a
24 permanent record.

25 MR. HYLTON: Let me make a copy of it

1 real quick.

2 (Whereupon, a break was taken
3 from the proceedings.)

4 (Exhibit Number 1
5 marked for identification.)

6 BY MR. ASKINS:

7 Q Mr. Sears, you also mentioned at one
8 time there was a -- a sample test that was run
9 that was -- that was not done correctly, or
10 something had to be rerun or thrown out?

11 A One of the quality control samples was
12 out of range. Our quality control samples must be
13 within five percent of their expected values. We
14 have a tighter window on those to make sure that
15 the instrument is in -- in proper operation.

16 Q Okay. And what was the reading on that
17 quality control sample?

18 A I didn't print out the quality control
19 for the runs that we didn't keep. I can get that
20 for court purposes. But I kept the -- I brought
21 the quality control samples with me for the runs
22 that we did accept.

23 Q Okay. Could I get those? I want to
24 introduce those also. And I'd like to get the
25 other one also, the ones you threw out.

1 A Okay. I mean, we maintain it for our
2 permanent record, but it wasn't any --

3 Q I understand.

4 MR. ASKINS: Can we just do all of that
5 later?

6 THE DEPONENT: Here's the --

7 MR. ASKINS: I think that's all.

8 THE DEPONENT: Actually I may have the
9 other ones that was out. Because here I've got --

10 MR. ASKINS: Can we mark these?

11 (Exhibit Number 2

12 marked for identification.)

13 THE DEPONENT: -- no, I don't. You'll
14 -- you'll see that enclosed in all the quality
15 control documents are two headspace runs, the drug
16 screen data, and a confirmation by G.C. headspace
17 mass spec. Everything that's positive gets a
18 confirmation to show that there's nothing
19 underneath that peak other than ethanol. So
20 you'll actually see a -- a run where you actually
21 have the mass spectrum of those volatiles. So all
22 of that is a part of my permanent case record or
23 my litigation package.

24 BY MR. ASKINS:

25 Q And you mentioned a minute ago about

1 some type of cromogram or metagram, is that --

2 A Well, gas--- gas chromatography is the
3 method that we utilize to run our blood alcohols.

4 Q Okay.

5 Q Now, I want to introduce all those
6 copies of those -- those quality control tests.

7 A Uh-huh.

8 Q Can I do that? We were talking -- I
9 think Mr. Hylton asked you about proper protocol
10 for getting a sample out of a corpse.

11 A Uh-huh.

12 Q And he -- he mentioned this particular
13 individual had been departed for two and a half
14 hours or so before the -- before the sample was
15 taken. He was also compressed in the vehicle --

16 A Uh-huh.

17 Q -- trapped in the vehicle and
18 compressed and so forth. And the coroner, the
19 deputy coroner on the accident -- on the death
20 certificate said he died of severe head trauma due
21 to automobile accident, but his body was -- from
22 the -- from the pictures and the MAIT report and
23 so forth was literally crushed in the vehicle
24 upside down. So -- and there was no autopsy
25 performed. And your records reflect no autopsy, I

1 think, too, right?

2 A We -- we are often times not told of
3 that. That is outside of my analysis.

4 Q Okay. Well, the information sheet that
5 was sent to you said no autopsy. But that's --
6 that's what I was getting at.

7 A I --

8 Q To your knowledge, there was no
9 autopsy?

10 A No.

11 Q Okay. But if there were internal
12 injuries to this individual --

13 A Uh-huh.

14 Q -- if his stomach had alcohol in the --
15 in the -- in -- in the stomach when he was -- when
16 the wreck happened, when the trauma happened and
17 his stomach ruptured --

18 A Uh-huh.

19 Q -- his chest ruptured, he was just --
20 you know, just mashed all inside, and then he took
21 the sample from -- a chest sample, could that have
22 an adverse affect on the reading?

23 A It -- it could if he was not paying
24 attention and he drew a mixture of body fluids.
25 It should be, generally, pretty obvious to

1 somebody who does this regularly. When you draw
2 from the heart, that the sample has the right
3 viscosity to be blood and not a mixture of what
4 may have been in his stomach. It is possible,
5 though, that the stomach could have ruptured and
6 could have resulted in additional fluids outside
7 of the stomach, outside of the heart that might
8 have been drawn up into that syringe.

9 Q Okay. Now, you mentioned that you
10 refrigerate the sample after it comes up to the
11 lab from the -- when it's received on the first
12 floor, and then somebody gets it the next day and
13 takes it to the lab and puts it in the
14 refrigerator after they do all of this picture?

15 A As soon as the sample is submitted to
16 SLED, it immediately goes into a refrigerator.

17 Q Okay.

18 A Even on the first floor. And then we
19 the sample at some point later after the evidence
20 is logged in.

21 Q How long do y'all keep those samples?

22 A We were keeping them 180 days --

23 Q Okay.

24 A -- after the analysis is completed.

25 We're trying to shorten that up right now because

1 we've run out of space. We're shipping them back
2 to the coroners.

3 Q What's the purpose of the
4 refrigeration?

5 A To prevent any decomposition of that
6 blood sample or -- or changes to that blood
7 sample.

8 Q Now, you -- you mentioned earlier that
9 you weren't concerned very much with the validity
10 of the test given the fact that the -- the sample
11 was taken some -- at least a couple or so hours
12 after the -- the death?

13 A No, sir, this is consistent. If an
14 autopsy is done, often times it's the next day or
15 sometimes even two days later. And we've shown
16 that that is consistent with sampling that's done,
17 you know, at the time of the death. The
18 literature would suggest that this is a reasonable
19 practice.

20 Q Okay. So if -- if it were extremely
21 hot and humid outside, it wouldn't have any affect
22 on this sampling?

23 A I don't feel like it would in that
24 short of period of time.

25 Q Okay. But could it?

1 A I guess in the realm of possibility
2 anything is possible. But based on the literature
3 that I've reviewed, it is not likely that it would
4 have affected that result.

5 Q Okay. I'm going to ask you a question,
6 and I'm not trying to offend you in any way by
7 asking this question. Do you have a bias against
8 anybody using alcohol?

9 A No, sir.

10 Q The -- you testified about the effects
11 of alcohol. You -- you got that -- those effects
12 from alcohol -- and I'm not asking you whether you
13 got it from personal experience or anything, but
14 you got it from your training, on-the-job
15 training, seminars, etcetera, everything you
16 testified to; is that correct?

17 A Yes, sir. And I've even been involved
18 in drinking studies where either I was the
19 drinker, or I was the person doing the field
20 sobriety testing.

21 Q Okay. Well, then you'd admit that --
22 that various levels of alcohol affect different
23 people different ways?

24 A I would admit that there are external
25 triggers that we look for that are different in

1 different people. Alcohol affects everybody as a
2 C.N.S. depressant.

3 Q Okay. Size has a factor sometimes,
4 maybe?

5 A Well, size is going to affect how much
6 you have to drink to get to that .20.

7 Q Okay. Tolerance, how much you drink or
8 used to drinking, the level -- the -- the habitual
9 abuse of this -- of the alcohol and so forth?

10 A Tolerance to alcohol is more of the
11 learned behaviors that I discussed earlier.
12 Individuals who are regular drinkers learn that if
13 they speak more slowly it's less noticeable that
14 they have had something to drink.

15 Q We're not talking about speaking here,
16 sir, we're talking about something entirely
17 different.

18 A Well --

19 Q Let me ask you this question. Do you
20 have an idea of how much alcohol would have to be
21 ingested to -- to read a .208?

22 A The average 150 pound man will get
23 about a .02 gram per deciliter for a single 12
24 ounce domestic beer. So to get to a .20, assuming
25 this individual is 150 pounds, you're looking at

1 ten to eleven beers in the course of an hour.

2 Your body's going to eliminate somewhere in the
3 neighbor of .015 gram per deciliter per hour. So
4 for each hour that you expand that drinking
5 period, you've got to add another domestic beer or
6 the equivalent in a shot or glass or of wine.

7 Q Okay. So let's say that -- just assume
8 that -- that this -- that this individual did not
9 begin ingesting alcohol until 5 p.m..

10 A Okay.

11 Q Let's assume -- or let's say 4:30 p.m.
12 And the accident happened at 6:05. 6:07, I think,
13 is the time of death.

14 A It takes approximately an hour to
15 absorb ethanol from your stomach. So he would
16 have had to drink very rapidly between 4:30 and 5
17 in order for it to reach a .20 in the
18 bloodstream --

19 Q Okay.

20 A -- by the time of the accident.

21 Q All right. Well, let's assume also
22 that he was drinking beer. We don't have any
23 evidence of that. Let's just assume this. Let's
24 just -- how many beer -- beers would he have to
25 drink in a two hour period to have a .208?

1 Because I believe you testified that it would --
2 that the -- the -- at the death, at the heartbeat
3 stopping --

4 A Uh-huh.

5 Q -- the metabolism is stopped?

6 A That's correct.

7 Q All right.

8 A There should be no more circulation.

9 There should be no more metabolism.

10 Q All right. So -- so at that point, we
11 can assume that at the time of death, under your
12 testimony, it would be a 0.208?

13 A That's correct.

14 Q All right. So how many beers would he
15 have to drink in a two hour period to get to that
16 level in your opinion?

17 A Well, assuming that he had time to
18 absorb that from his stomach, he'd have to have
19 that same eleven or twelve that I just talked
20 about. Because you -- you've added another hour
21 to the window. Your body's eliminating almost the
22 equivalent of one beer or mixed drink over that
23 one extra hour. So in order to stay at that 208,
24 now you have to add that one more drink. So
25 150 pound man, ten to eleven plus another hour,

1 there's eleven to twelve drinks.

2 Q Okay. And that -- drinks, that
3 includes beer and/or --

4 A Could be a twelve ounce domestic beer,
5 a liquor drink with one and a half ounces of 70
6 proof Vodka or a glass of wine.

7 Q Okay.

8 MR. ASKINS: I believe that's all I
9 have. Thank you, Mr. Sears.

10 FURTHER EXAMINATION

11 BY MR. HYLTON:

12 Q We talked about the refrigeration. The
13 packages don't come to you refrigerated, do they?

14 A No, they don't.

15 Q Okay. Is there any cause for concern
16 about the package not being --

17 A These containers that we provide have
18 sodium fluoride and potassium oxalate included in
19 the test tube. That's supposed to help prevent
20 any microbial growth and prevent any clotting.
21 Supposed to maintain the consistency of the blood.
22 Based on the time for shipping, no, I -- I really
23 don't have any real concern.

24 Q Okay. So from May 17th to it being
25 shipped on May 21st, that would be no concern

1 there?

2 A Well, I don't know how it was stored by
3 the coroner. But, you know, generally it's a day
4 to two days to get to my lab from the coroner's
5 office. So, no, I -- I don't -- we've actually
6 done in-house studies looking at the changes of
7 ethanol in tubes. And even incubated at higher
8 than -- than normal room temperature. We saw no
9 change provided that a gray top tube was used.

10 Q All right. And this one a gray top
11 tube was used?

12 A That's correct.

13 Q And that substance you're talking about
14 that helps with the blood, is that a powdery
15 substance that you find in the tube?

16 A Yes, sir. It's a white solid that's in
17 these tubes from the manufacturer.

18 Q Okay. And, again, with the quality
19 control where one failed and the other two were
20 reliable, is that something that causes concern
21 for you that one failed in any way?

22 A No. And, I mean, that's the reason
23 that we put those quality control samples in there
24 as part of the run is to ensure that the
25 instrument or that the system that we use to take

1 that sample of blood is working properly, that
2 it's dispensing 200 microliters, not 215. That
3 the instrument itself is working properly.
4 Occasionally you get a poor sample. And that's
5 why we want to run duplicates -- or I should say
6 replicates because they're not all on the same
7 day. Again, to ensure that we're getting good
8 consistent sample sizes, the instrument is
9 operating properly.

10 If there is ever a standard, and as you
11 can see when we do scan these documents into your
12 exhibits, we run multiple standards through the run.
13 As I said, sample 1, 2, 15, 30, and 42, in this
14 case, as a bracket at the end of the run. As long
15 as the two that bracket your samples are in control,
16 I feel very good about the instrument working
17 properly.

18 Q Okay. And in your expert opinion was
19 the .208 a valid reading?

20 A Yes, sir.

21 Q Okay. He also questioned you about
22 taking the blood from the individual and whether
23 the stomach ruptured, and you testified that it's
24 possible that fluid other than blood could have
25 been drawn and resulted in a bad test; is that

1 correct?

2 A It is possible that if the stomach
3 ruptured that that -- contents of the stomach is
4 inside the -- the chest cavity.

5 Q Okay.

6 A You know, this is something that could
7 have happened.

8 Q Okay. Did you see any evidence of any
9 additional fluid other than blood being in that
10 vial?

11 A No, sir. By the time I got it, it was
12 mixed and -- and appeared to be consistent of
13 blood.

14 Q Okay. Is there any cause for concern
15 that you have about blood in the vial, whether it
16 was contaminated in any way?

17 A Once it was drawn and sent to us, no.

18 Q Okay.

19 A Again, I didn't witness the drawing. I
20 can't speak for what the coroner may have done.
21 But the sample, once received by us, was not
22 contaminated.

23 Q Okay.

24 MR. HYLTON: That's all the questions I
25 have.

1 MR. DEBERRY: I don't have any.

2 FURTHER EXAMINATION

3 BY MR. ASKINS:

4 Q I've got a couple. Just a couple.

5 Mr. Sears, getting back on the stomach situation,

6 if he -- if this individual had massive chest

7 injuries --

8 A Uh-huh.

9 Q -- and his -- and he had alcohol in his
10 stomach and that alcohol -- and he was -- he was
11 in an awkward position pinned in the truck sort of
12 upside down, you know --

13 A Uh-huh.

14 Q -- where the -- with the -- with the
15 head/chest area down, wouldn't it be possible that
16 there could be some problems with the mixing of
17 those -- of the stomach fluids and the chest
18 fluids and the -- the heart tissue fluids, the
19 blood and all of that at that point?

20 A It's very unlikely because there is --
21 there is the potential for some passive diffusion.
22 But, again, once circulation stops, you -- you
23 shouldn't profuse into the heart.

24 Q I understand that. But he has to -- he
25 has to put that spinal needle through the chest

1 cavity to get to the heart, doesn't he?

2 A Right.

3 Q And at the same time he is pulling
4 that -- so it's possible to -- to -- to pull more
5 stuff in there than just the heart?

6 A If -- if you look at the concentration
7 of ethanol that would be in the gastric contents.

8 Q Okay.

9 A If its contaminated, chances are this
10 would be greater than a .5 blood alcohol.

11 Q Uh-huh.

12 A I mean, significantly elevated because
13 the concentration in a mixed drink or a beer is
14 three percent in a beer --

15 Q Uh-huh.

16 A -- ethanol to volume, where we're
17 looking at .0 percent. So it is possible but,
18 again, it would be likely that it would be much
19 higher elevated if there was a ruptured stomach.

20 Q All right. Okay. But there could be
21 a -- there could have been a smaller amount of
22 alcohol content in his stomach; could there not?

23 A I mean, we don't know because we have
24 no history of what he really did consume.

25 Q Well, that's my whole point.

1 A I don't --

2 Q We don't. But if he had a smaller
3 amount, that might -- that might mean that the
4 .208 is an elevated reading?

5 A There were no other volatiles found --
6 and you'll see that with the chromatograms as you
7 look at them -- that would indicate there were
8 other things there. If there was actually residue
9 from a mixed drink there are other volatiles
10 usually that might be found there as well.

11 Q Okay.

12 A Things like acetaldehyde and -- and key
13 tones and aldehydes that we might have seen in our
14 run.

15 Q Okay. The next question I have is
16 just -- and I might have asked you this the first
17 time. If somebody cleaned the individual up from
18 the time he was extracted from the car or the
19 truck and placed on a gurney, and -- and they used
20 some type of alcohol solution or something to --
21 to clean his chest area off where the -- the
22 needle was inserted, would that have any problem
23 with that -- could that cause a problem with that?

24 A Generally speaking, hospitals use
25 Betadine which --

1 Q Well, it --

2 A -- contains no ethanol.

3 Q Okay.

4 A If they were to use ethanol, if they
5 waited just a very small fraction of time, it
6 would evaporate.

7 Q Okay. But if they did use an
8 ethanol -- an ethanol solution, could it cause a
9 problem in the reading?

10 A If there's anybody that was using
11 ethanol, it could potentially cause a problem if
12 there was no time between when they applied it and
13 they drew the sample. That would need to go back
14 again to whomever drew the sample --

15 Q All right.

16 A -- what did they use to clean the site.

17 Q Okay.

18 MR. ASKINS: Thank you. I have no more
19 questions.

20 FURTHER EXAMINATION

21 BY MR. HYLTON:

22 Q And I'm sorry, just -- just to review
23 that.

24 A I'm fine.

25 Q Just a quick bounce off. You said that

1 if the stomach would have ruptured, the test would
2 have shown additional --

3 A There could have been other components
4 found other than ethanol just based on the fact
5 that in alcohol that we consume there are
6 aldehydes and key tones and many other things
7 besides just ethanol that give it flavor.

8 Q Uh-huh.

9 A And often times we could see that if
10 there was a stomach rupture and there were large
11 quantities of it there. We might have seen other
12 peaks, other things we couldn't identify.

13 Q Did you see any peaks in this test?

14 A In this particular case, the
15 chromatograms are very clean. The ethanol is very
16 sharp. I don't, again, see anything. One of the
17 reasons that we do the headspace mass spec, as I
18 mentioned earlier, is to show that ethanol is the
19 only component underneath the -- the peak of
20 interest. There's no medications or anything else
21 there. And in the headspace mass I see ethanol
22 and the internal standard and that's it.

23 Q Okay. So in your expert opinion, is it
24 likely that the stomach ruptured in this case
25 and --

1 A Without --

2 Q -- affected the sample?

3 A -- without visualizing the body and
4 being there when the sample was drawn, I would
5 hazard to guess one way or the other. I don't see
6 any peaks that would indicate to me that there was
7 a huge amount of any external compounds there.
8 But, again, that's something for the person who
9 drew the sample.

10 Q Okay. And, again, I believe the --
11 Mr. Askins was asking you about possibilities.
12 Those are probabilities, correct? There's a
13 difference, in your thinking, between possibility
14 and probability, correct?

15 A And -- and I think the way the question
16 was phrased, is it possible? Yes, it's -- it's
17 always possible that there could be a stomach
18 rupture, especially in a significant crash like
19 this.

20 Q Okay.

21 A And based on the description, this
22 individual was badly injured. It's interesting
23 that the -- the cause of death, as you've
24 described, was head injury. The coroner didn't
25 mention blunt force trauma to the body. So, you

1 know, all I can do is base my opinion on what's
2 been provided to me. I didn't see the body. I
3 don't know.

4 Q Okay. But, again, based on your test,
5 you don't have any elevated things other than
6 ethanol that would show a contaminated test?

7 A That -- that's the only thing that we
8 found. You know, the other thing is that we did
9 do a drug screen. And often times if there are
10 other things besides the blood, the drug screen
11 will give us odd readings. In this case,
12 everything was negative on the drug screen. So,
13 you know, again, using what information I have, it
14 appears this was a valid sample.

15 Q Okay.

16 MR. HYLTON: That's all the questions I
17 have.

18 FURTHER EXAMINATION

19 BY MR. ASKINS:

20 Q Just -- just one more or a follow-up or
21 two. Would an ocular fluid sample have been
22 better in this case?

23 A We like to run an ocular and a blood
24 when we can because an ocular -- even if a body is
25 badly decomposed, found in a trailer after a week,

1 the ocular tends not to change like the body does.
2 So it would have been nice to have both to be able
3 to compare.

4 Q All right. Another question following
5 up on what Mr. Hylton was asking you about the --
6 the probability or the -- the possibility, I -- I
7 think we were using those two words, about the
8 stomach rupturing and causing a problem with the
9 sample. You don't test for anything else in this
10 blood sample, do you, like triglycerides or
11 anything --

12 A No, sir.

13 Q -- like that?

14 A We -- we look for -- in this case, we
15 looked for the ethanol, and then we screened for
16 the classes of drugs that are routinely found
17 in -- in D.U.I. or death investigation cases. In
18 this case, amphetamines, benzodiazepines,
19 methamphetamine, oxycodone, cannabinoids, cocaine
20 and opiates. As I said, one of the things that
21 you often see when a sample is contaminated, you
22 might find intensity errors in these aspects.
23 These are color metric tests.

24 Q I understand.

25 A And because of that, they often will

1 give us false readings, falsely elevated readings
2 when there are other compounds there.

3 Q Okay. But you can't -- you can't take
4 a blood sample and do any kind of test to tell
5 whether that -- whether or not this man ingested
6 alcohol by beer or -- or liquor or used mixed
7 drinks versus straight alcohol or anything like
8 that, can you?

9 A No, because ethanol is ethanol.
10 Whether it comes from wine, beer or liquor, it's
11 still ethanol, and that's what we tested for.

12 Q Okay.

13 A Now, we also looked for methanol,
14 acetone, isopropanol, and acetaldehyde which can
15 be components that might be found in other things
16 that people consume. Acetaldehyde is actually a
17 metabolite of ethanol. So it's possible to see
18 acetaldehyde in somebody who's been chronically
19 drinking.

20 Q Okay.

21 MR. ASKINS: Thank you, Mr. Sears.
22 Thank you very much.

23 MR. HYLTON: I have no follow-up.

24 MR. DEBERRY: Nothing further.

25 (Deponent excused.)

(Whereupon, at 3:59 p.m., the
taking of the foregoing
deposition was concluded.)

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1 CERTIFICATE OF REPORTER

2 State of South Carolina

3 County of Florence

4

5 I, Roger R. Williamson, Court Reporter and
6 notary public for the State of South Carolina, do
7 hereby certify that the deponent in the foregoing
8 deposition was, by me, first duly sworn to testify
9 to the truth, the whole truth and nothing but the
10 truth; that said deposition transcript was taken
11 via stenomask with backup; that the foregoing
12 transcript contains a true record of the
13 deposition of said deponent.

14 I further certify that I am neither attorney
15 nor counsel for, nor related to or employed by any
16 of the parties connected to the action, nor am I
17 financially interested in the action.

18 Witness my hand at Florence, South Carolina,
19 this the 3rd day of September, 2012.

20

21

22

Roger R. Williamson
MY COMMISSION EXPIRES:
March 1, 2022

23

24

25

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PROFESSIONAL EXPERIENCE

Toxicologist 1988 - Present: South Carolina Law Enforcement Division, Forensic Services Section, Toxicology Department, Columbia, SC.

February 2008 - Present: Forensic Science Education Programs Accreditation Commission (FEPAC) on-site evaluator.

November 2009- Present: National Laboratory Certification Program (NLCP) Inspector.

February 2010 – Present: Scientific Working Group – Toxicology (SWG-TOX) / Certification Committee

EDUCATION

South Carolina Criminal Justice Academy: Basic Police Officer Training, Breathalyzer Operator Certification, Datamaster Operator Certification and DMT Operator Certification.

University of South Carolina, College of Pharmacy: MS in Medicinal Chemistry (1990-1997)

Francis Marion College: Bachelor of Science in Chemistry (1981 - 1985)

ADVANCED TRAINING

State of South Carolina Breathalyzer Operators Certificate, 1988-1992.

Abbott TDx (FPIA) Training, Abbott Diagnostics Division Training Center, 1988.

Robotics Py Technology Training, Zymark Learning Center, 1988.

Target Compound Analysis Training, THRU-PUT Systems, Inc., 1988.

TDx Advanced Troubleshooting, Abbott Diagnostics Division, 1988.

Advanced Zymate Robotics School, Zymark Learning Center, 1988.

Zymate Robotic System Maintenance Course, Zymark Learning Center, 1989.
TOXI-LAB Training Course, Marion Laboratories, 1989.

IRT Industrial X-Ray Systems, Operation and Maintenance IXRS 320/3200, IRT Corp., 1989.

GC Inlets - An Introduction, Hewlett Packard, 1989.

Zymate Robotic System Optimization Course, Zymark Learning Center, 1990.

Revised August 22, 2012 rms

Practical Applications and Troubleshooting of Capillary Gas Chromatography Systems, Hewlett Packard, Southern Association of Forensic Scientists, 1990.

BAC DataMaster Operator Trainer Certification, National Patent Analytical Systems, Inc., 1991.

State of South Carolina DataMaster Operator Certificate, 1991- 2009.

Drugs and Athletic Performance Enhancement, Midlands Area Health Education Center, 1991.

Fundamentals of HP-UX System, Hewlett Packard Educational Services, 1992.

Basic UNIX (SVR4) Usage, Unisys Education, 1992.

Advanced UNIX (SVR4) Usage, Unisys Education, 1992.

Advanced UNIX Administration (SVR4), Unisys Education, 1992.

UNIX Shell Scripting Workshop, Unisys Education, 1992.

National Draeger Breathing Apparatus Training, 1993.

Molecular Modeling In the Discovery of New Drugs, American Chemical Society Satellite Seminar Series, 1993.

Current Analytical Approaches in Forensic Toxicology, Forensic Toxicology Certification Board, Inc., 1993.

SuperNOVA Basic Developer's Class, Four Seasons Software Training Course, 1994.

SuperNOVA Character-Based Application Development Class, Four Seasons Software Training Course, 1994.

Current Approaches In Forensic Toxicology, Forensic Toxicologist Certification Board, Inc., Society of Forensic Toxicologists, 1994.

Rapid Drug Detection, Ansys, Inc., 1995.

Current Approaches in Forensic Toxicology, Forensic Toxicologist Certification Board, Inc., American Academy of Forensic Scientists, Nashville, TN, 1996.

Internet For Forensic Scientists, American Academy of Crime Laboratory Directors, American Academy of Forensic Scientists, Nashville, TN, 1996.

Toxicology of Inhalants, Society of Forensic Toxicologists, Denver, CO, 1996.

Isoenzyme-Specific Metabolism of Drugs, Society of Forensic Toxicologists, Denver, CO, 1996.

New Concepts in Forensic Urine Drug Testing, Society of Forensic Toxicologists, Denver, CO, 1996.

Forensic Ethanol Analysis and Interpretation, Southern Association of Forensic Scientists, Huntsville, AL, 1997.

Mass Spectrometry: Principles and Practice, American Chemical Society, Michigan State University, 1997.

Principles of Solid Phase Extraction, Society of Forensic Toxicologists, Salt Lake City, Utah, 1997.

Revised August 22, 2012 rms

2

Fundamentals of Alcohol Testing and Interpretation, Society of Forensic Toxicologists, Salt Lake City, Utah, 1997.

Forensic Applications of LC/MS, Society of Forensic Toxicologists, Salt Lake City, Utah, 1997.

Automated Sample Preparation for Chromatographic and Mass Spectral Analysis, Society of Forensic Toxicologists, Salt Lake City, Utah, 1997.

The Effects of Alcohol and Drugs on Human Performance and Behavior, American Academy of Forensic Sciences & California Association of Toxicologists, UCLA Conference Center, Los Angeles, CA, 1998.

Rohypnol Detection, Society of Forensic Toxicologists, Albuquerque, NM, 1998.

Practical Aspects of CI/MS for Drugs, Society of Forensic Toxicologists, Albuquerque, NM, 1998.

Marijuana: A Forensic Symposium, American Academy of Forensic Sciences, Orlando, FL, 1999.

Recent Developments in GC-MS Methodologies, Southern Association of Forensic Scientists, Atlanta, GA, 1999.

New Developments in SPE Technology, Southern Association of Forensic Scientists, Atlanta, GA, 1999.

Routine User Maintenance for the HP 5973 GC-MS, Southern Association of Forensic Scientists, Atlanta, GA, 1999.

Advanced Techniques of GC/MS, Varian, Norcross, GA, 1999.

Investigation of Drug Facilitated Sexual Battery, Society of Forensic Toxicologists, San Juan, Puerto Rico, 1999.

Ion Trap Users Workshop, Society of Forensic Toxicologists, San Juan, Puerto Rico, 1999.

Pharmacology Reviews: Selected New Drugs, Society of Forensic Toxicologists, San Juan, Puerto Rico, 1999.

Drugs, Driving, and Traffic Safety: Update, Society of Forensic Toxicologists, San Juan, Puerto Rico, 1999.

Fundamentals of Gas Chromatography – Mass Spectrometry, Applications to HP5973 GC/MS, Agilent Technologies, 1999.

Principles of Pharmacology, Southern Association of Forensic Scientists, Gatlinburg, TN, 2000.

Forensic Toxicology of Marijuana, Southern Association of Forensic Scientists, Gatlinburg, TN, 2000.

Forensic Application of Capillary Electrophoresis, Southern Association of Forensic Scientists, Gatlinburg, TN, 2000.

Automated Data Reduction of HP GC/MS, Society of Forensic Toxicologists, Milwaukee, WI, 2000.

Benzodiazepines: Pharmacology & Analytical Challenges, Society of Forensic Toxicologists, Milwaukee, WI, 2000.

Marijuana: A Forensic Symposium, Society of Forensic Toxicologists, Milwaukee, WI, 2000.

Revised August 22, 2012 rms

The Robert F. Borkenstein Course on Alcohol, Drugs, and Highway Safety: Testing, Research, and Litigation, Indiana University Center for Studies of Law in Action, Bloomington, IN, 2000.

Mass Spectral Interpretation Course, University of South Carolina, Columbia, SC, 2001.

The Science of Solid Phase Extraction Workshop, United Chemical Technologies, Inc., Columbia, SC, 2001.

MS/MS Workshop, Society of Forensic Toxicologists, Dearborn, MI, 2002.

Club Drugs and Drug-Facilitated Sexual Assault, Society of Forensic Toxicologists, Dearborn, MI, 2002.

Practical Applications of LCMS in Routine Toxicology Testing, Society of Forensic Toxicologists, Inc., 2003.

Forensic Toxicology of Metals, Society of Forensic Toxicologists, Inc., 2003.

Toxicology in the Emergency Room, Society of Forensic Toxicologists, Inc., 2003.

Forensic Toxicology Review Course, Society of Forensic Toxicologists, Inc., 2003

Statistics and Method Validation, FBI Laboratory Symposium on Forensic Toxicology, Washington, DC, 2004.

New and Unique Technologies for Forensic Toxicology Laboratories, FBI Laboratory Symposium on Forensic Toxicology, Washington, DC, 2004.

Advanced Mass Spectrometry Theory and Interpretation, FBI Laboratory Symposium on Forensic Toxicology, Washington, DC, 2004.

Chemical Terrorism Training for Forensic Toxicologists, FBI Laboratory Symposium on Forensic Toxicology, Washington, DC, 2004.

Receptor Site Theory and Drug Interactions, Society of Forensic Toxicologists, Inc., 2005.

Forensic Toxicology Update, Society of Forensic Toxicologists, Inc., 2005.

Method Validation and Measurement Uncertainty for Dummies....and Smarties Too, Society of Forensic Toxicologists, Inc., 2006.

Postmortem Pharmacokinetics – The Good, The Bad, and The Ugly, Society of Forensic Toxicologists, Inc., 2006.

Southeast Speed School Seminar, High Speed GC, LC, and MS Solutions, Agilent Technologies, 2007.

Pharmacodynamics for the Forensic Toxicologist, Southern Association of Forensic Scientists, 2007.

LC Tandem MS for Toxicology and Drugs, Southern Association of Forensic Scientists, 2007.

ISO 17025 Accreditation, Southern Association of Forensic Scientists, 2007.

Court Testimony and Alligator River, Southern Association of Forensic Scientists, 2007.

Solid Phase Extraction in Forensic Toxicology: Principles and Applications, Society of Forensic Toxicologists, Inc., 2007.

Revised August 22, 2012 rms

4

LC-MS in the 21st Century, Society of Forensic Toxicologists, Inc., 2007.

ChemStation® Productivity Workshop, American Academy of Forensic Sciences, 2008.

Accreditation of Forensic Science Academic Programs Through the AAFS FEPAC, American Academy of Forensic Sciences, 2008.

Fundamentals of LC/MS/MS, RTI International, 2008.

Expert Testimony for the Prosecutor and Scientist, RTI International, 2008.

Opioids and Pain Management, RTI International, 2008.

LC/MS Innovations Seminar, Agilent Technologies, 2008.

ChemStation Data Storage Concepts, Agilent Technologies e-Seminars, 2008.

Chemstation Navigation Table – How to Improve, Review, and Reprocess, Agilent Technologies e-Seminars, 2008.

Custom Acrobat 9.0, New Horizons Computer Learning Center, 2008.

Integrating My Results in ChemStation, Agilent Technologies e-Seminars, 2008.

Best Practices for Volumetric Measurement, RTI International, 2009.

How to Set Up a Calibration in ChemStation, Agilent Technologies eSeminar, 2009.

Carrier Gases in Capillary GC, Agilent Technologies eSeminar, 2009.

Various Reporting in ChemStation, Agilent Technologies eSeminar, 2009.

Solid Phase Extraction in Forensic Science – Principles and Applications, American Academy of Forensic Sciences, 2009.

Pharmacology and Pharmacokinetics for Forensic Toxicologists, American Academy of Forensic Sciences, 2009.

Installation, Care and Maintenance of Capillary GC Columns, Agilent Technologies eSeminar, 2009.

Secrets of GC Column Dimensions, Agilent Technologies eSeminar, 2009.

Techniques, Tips and Tricks of Troubleshooting Capillary GC Systems, Agilent Technologies eSeminar, 2009.

Selection of Capillary GC Columns, Agilent Technologies eSeminar, 2009.

Using the Best Technologies to Increase GC/MS Productivity: Benefiting from State-of-the-Art Tools, Agilent Technologies Webcast, 2009.

National Laboratory Certification Program (NLCP) Inspector and Lab Director Workshop, RTI International, 2009.

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Forensic and Toxicological Analyses Using the Latest LC/MS Technology with Confidence and Speed, Agilent Technologies Webcast, 2009.

The Advantages of LC-MS-MS versus GC-MS: What You Need to Know to Increase Your Throughput, Sensitivity and Return on Investment, LCGC North America Webcast, sponsored by Applied Biosystems and MDS Analytical Technologies, 2009.

Whitehouse Subcommittee on Forensic Sciences address to SOFT, RTI International Webcast, 2009.

Improved Speed and Confidence in Toxicology Screening Using the Latest GC/MS Technology, Agilent Technologies Webcast, 2009.

Understanding the Mechanisms of Solid Phase Extraction, LCGC North America Webcast, sponsored by Thermo Scientific, 2010.

Blood Alcohol Content by Headspace/Gas Chromatography, Forensic Magazine Webcast, sponsored by Perkin Elmer, 2010.

SPE Theory and Techniques, United Chemical Technologies, Columbia, SC 2010.

NLCP Manual and Checklist Changes Effective October 1, 2010, RTI International Webcast, 2010.

National Laboratory Certification Program (NLCP) Inspector and Lab Director Workshop, RTI International, 2010.

The Tools for DIY Methods Validation, Society of Forensic Toxicologists, Inc., 2010.

Elemental Analysis & Interpretation of Findings, Society of Forensic Toxicologists, Inc., 2010.

To Err is Human... To Identify It Is Devine, Society of Forensic Toxicologists, Inc., 2010.

Introduction to the National Laboratory Certification Program (NLCP), RTI International Webcast, 2010.

Analytical Methods for Specimen Validity Testing: The U.S. Experience in Workplace Drug Testing, RTI International Webcast, 2010.

Electrospray Ionization (ESI) for LC-MS (Part 1), LCGC CHROMacademy Webcast, sponsored by Parker Ballston, 2011.

Analytical Methods for in Workplace Drug Testing – Immunoassay, RTI International Webcast, 2011.

Solid Phase Extraction Practices & Principles in Forensic Toxicology, Society of Forensic Toxicologists, Inc., 2011.

Spice: Detection in Various Biological Matrices, Society of Forensic Toxicologists, Inc., 2011.

Fundamentals of Non-Mass Selective Detectors, RTI International Webcast, 2011.

Solid Phase Extraction Basics, Gilson/Phenomenex Webcast, 2011.

SPE Troubleshooting and Optimization: As applied to the Oasis 2 x 4 Method, Waters Webcast, 2011.

Revised August 22, 2012 rms

6

Deadly by Design: Forensic Toxicology, Adverse Effects of Synthetic Cannabinoids and Novel Designer Drugs ("Bath Salts"), American Academy of Forensic Sciences, 2012.

Analytical Methods in Workplace Drug Testing – Sample Preparation, RTI International Webcast, 2012.

State of South Carolina DMT Operators Certificate, 2012-present.

Analytical Methods in Workplace Drug Testing – Chromatography, RTI International Webcast, 2012.

PROFESSIONAL ORGANIZATIONS

American Academy of Forensic Sciences, Society of Forensic Toxicologists, Southern Association of Forensic Scientists, American Chemical Society, The International Association of Forensic Toxicologists, and South Carolina Law Enforcement Officers Association, Board Member of the Forensic Toxicologist Certification Board (Vice President 2008 – present, Treasurer 1998 – 2008).

PROFESSIONAL QUALIFICATIONS

State of South Carolina Breathalyzer Operator Certification, 1988 - 1992; South Carolina Datamaster Operator Certification, 1991 - 2009; Certified DataMaster Operator Trainer, 1991 - 2009; Certified DMT Operator Certification 2012-present, twenty-four years experience in courtroom testimony as an expert witness in municipal, magistrate, and state (South Carolina and Georgia) court (criminal and civil casework); Diplomat of the Forensic Toxicologist Certification Board, 1995 – present.

PUBLICATIONS

Proof of Concept for Automated SPE/HPLC/MS/MS Methods to Replace Traditional Immunoassay with MS Confirmation of Driving Under the Influence Samples, Proceedings of the Society of Forensic Toxicologists, Inc., San Francisco, CA 2011.

A Comprehensive Analysis of Benzodiazepines From Biological Matrices Utilizing LC-MS/MS Following A Class Specific Solid Phase Extraction, Proceedings of the Society of Forensic Toxicologists, Inc., Durham, NC, 2007.

Solid Phase Extraction of THC, THC-COOH, and 11-OH-THC from Whole Blood, Application Note, Varian, Inc., 2006.

Novel Carbamic Acid Ester, Ureido, and Amide Analogues of 3-Aminohexahydro-2H-Azepine-2-one: Synthesis and effects on *In Vitro* Transdermal Delivery of Hydrocortisone, Masters Thesis, University of South Carolina, 1997.

Liquid/Solid Extraction in Toxicology, Current Approaches in Forensic Toxicology, Forensic Toxicologist Certification Board, 1994, 1995, 1996.

Co-author South Carolina Law Enforcement Division, Forensic Services Section, Toxicology Department Protocol Manual.

Revised August 22, 2012 rms

7

Application of Robotics and Automation to a Forensic Toxicology Laboratory, Proceedings of the First International Symposium on Forensic Toxicology, U.S. Department of Justice, Federal Bureau of Investigation, 1992.

PRESENTATIONS

Solid Phase Extraction Validation and Troubleshooting SOFT/TIAFT Workshop 2011.

"SPE Theory and Techniques – Intro to Troubleshooting (Usual problems encountered)", United Chemical Technologies Workshop, Columbia, SC 2010.

"Solid Phase Extraction: Robotics and Automation", American Academy of Forensic Scientists, 2009.

"Solid Phase Extraction: Robotics and Automation", Society of Forensic Toxicologists, Inc., 2007.

"Continuing Education Committee: How Does Your QA/QC Program Measure Up?", Society of Forensic Toxicologists, Inc., 2006.

"Sample Preparation Techniques" in Forensic Toxicology Update, Society of Forensic Toxicologists, Inc., October, 18 2005.

"An Unusual Distribution in a Case of Cocaine Intoxication – Is there a better way to collate and disseminate information related to pediatric cases?", Southern Association of Forensic Scientists, September 14, 2003.

"Sample Preparation Techniques", presented for Forensic Toxicology Review, Society of Forensic Toxicologists Continuing Education Committee, August 18-19, 2003

"Rapid Sensitive Confirmation of Tetrahydrocannabinol and Major Metabolites in Blood by GC/MS/MS" Society of Forensic Toxicologists Meeting, Dearborn, MI, October 14, 2002.

"Rapid, Sensitive Confirmation of Tetrahydrocannabinol and Major Metabolites in Blood by GC/MS/MS" Tri-Service Drug Testing Laboratory Managers' Meeting", Baltimore, MD, October 25, 2000.

"Laboratory Robotics and Automation: Are we there yet?" Forensic Sciences & Crime Scene Technology Conference & Exposition, Washington D.C., 2000.

"A Unique Case of Methocarbamol Intoxication" Southern Association of Forensic Scientists, Decatur, GA, 1999

"Novel Carbamic Acid Ester, Ureido, and Amide Analogues of 3-Aminohexahydro-2H-Azepine-2-one: Synthesis and effects on *In Vitro* Transdermal Delivery of Hydrocortisone", University of South Carolina, 1997.

"Liquid/Solid Extraction in Toxicology", presented for Current Approaches in Forensic Toxicology, Forensic Toxicologist Certification Board, 1994, 1996.

"Carbamates of (Hydroxyphenoxy)Methyl Heteroaromatic Salts as Acetylcholinesterase Inhibitors and Protective Agents Against Organophosphorous Agents", presented for University of South Carolina, Basic Pharmaceutical Sciences, Seminar Series, 1994.

"Laboratory Robotics - Implementation and Effects on a Modern Forensics Laboratory." presented for Association of Analytical Chemists International, Southeast-USA Regional Section meeting, 1994

Revised August 22, 2012 rms

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"Cocaine Antagonists: Prospects in the Treatment of Cocaine Addiction", presented for University of South Carolina, Basic Pharmaceutical Sciences, Seminar Series, 1993.

"Application of Robotics and Automation to a Forensic Toxicology Laboratory", First International Symposium on Forensic Toxicology, Federal Bureau of Investigation, Forensic Science Research and Training Center, 1992.

"Automation: Pitfalls on the Road to Success - Applications of Robotics to Forensic Toxicology", Thirtieth Eastern Analytical Symposia, 1991.

"An Automated Method For The Isolation of 11-Nor-Delta-9-THC-Acid", Southern Association of Forensic Scientists, Toxicology Section, 1990.

AWARDS/HONORS

Excellence in SPE, United Chemical Technologies, 2012

Silver Beaver, Indian Waters Council BSA, 2004

Vigil Honor, Order of the Arrow, 2004

South Carolina Law Enforcement Division Certificate of Merit, 2000

Rho Chi Society, USC College of Pharmacy, 1992-1997

Eagle Scout, Boy Scouts of America 1977

PEER REVIEW

Reviewer for the Journal of Analytical Toxicology.

INSTRUMENTATION EXPERIENCE/TECHNIQUES

Thin layer chromatography, column (flash) chromatography, radioimmunoassay, enzyme immunoassay (FPIA and ELISA), high-performance liquid chromatography (HPLC), gas chromatography, gas chromatography-mass spectrometry (EI, CI, and GC/MS/MS), liquid chromatography-mass spectrometry (LC/MS and LC/MS/MS), infrared spectrometry (IR), proton magnetic resonance spectrometry (NMR), inductively coupled plasma-mass spectrometry (ICP/MS). Experience includes validation of robotic hardware, analytical method development and validation. Additional experience includes extensive involvement in the programming and implementation of a laboratory information management system (LIMS) and networking of existing instrumentation for remote data processing and long term storage and retrieval of analytical data.

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The deposition of ELLEN C. RIEMER, M.D.,
taken before Josie Allen, Professional Court Reporter
and Notary Public, at the Medical University of South
Carolina in Charleston, South Carolina 29425, on
November 5th, 2012 commencing at 10:01 a.m.

APPEARANCES

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INDEX TO EXAMINATION

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Riemer, Ellen C., M.D. (sworn)

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No exhibits were marked.

1 (Ellen C. Riemer, M.D., having been first
2 duly sworn, testified as follows:)

3 MR. ASKINS: We're going to take the
4 deposition pursuant to the rules just like we did the
5 rest of them. Is that okay, Brandon?

6 MR. HYLTON: That's fine.

7 MR. ASKINS: All right. All objections
8 except to the form of the question will be reserved.

9 EXAMINATION BY MR. ASKINS:

10 Q. Dr. Riemer, do you have -- is it Riemer or
11 Reimer (ph)?

12 A. Riemer.

13 Q. You have the option to sign your deposition
14 if you want to. Many people choose to waive the
15 signing of the deposition. This lady will take it
16 down in transcript form. It will look like the
17 depositions you've read in this case.

18 A. I'll be happy to sign it.

19 Q. Would you like to sign it, or do you want to
20 waive the signing? You have a choice basically.

21 A. I'll waive to sign it.

22 Q. Okay.

23 A. Because then I would have to review it.

24 Q. That's fine. All right. Now, Dr. Riemer,
25 you know, my name is Gregory B. Askins. I go by Greg

1 Askins. I represent one of the claimants in this
2 party -- in this case. This is a workmen's
3 compensation case. Mr. Steven DeBerry is present. He
4 represents another claimant in the case, and
5 Mr. Brandon Hylton is here, and he represents the
6 defendants in the case, which would be the employer
7 and the carrier for this case. Let me start by asking
8 your full name.

9 A. It's Ellen Carrie Riemer.

10 Q. Okay. And you live here in the Charleston
11 area?

12 A. Yes, I do.

13 Q. Okay. Could you give me your educational
14 background.

15 A. Yes. I went to -- I'll start with college.
16 I went to college at Bryn Mawr College, which is in
17 Pennsylvania. I received a bachelor or arts, and then
18 I went -- after graduating, I went to law school at
19 University of Wisconsin in Madison, Wisconsin and
20 received a JD [sic] in 1988. And then I practiced law
21 for five years before starting medical school in 1993
22 at Tel-Aviv University Sackler School of Medicine.
23 There is an American program there; they accept 16
24 American students a year. And I graduated from
25 medical school in four years -- the usual program --

1 in 1997, and then I returned to New York where I had
2 been practicing law and living prior to that.

3 And I did my residency in pathology at Columbia
4 University College of Physicians and Surgeons,
5 Columbia Presbyterian Medical Center in New York and
6 completed my pathology residency training and --
7 followed by -- I then did a fellowship in forensic
8 pathology at the office of the chief medical examiner
9 of the State of Maryland, which is in Baltimore. And
10 after satisfactorily completing my fellowship training
11 in forensic pathology, I did a second fellowship in
12 cardiovascular and pulmonary pathology at Johns
13 Hopkins University School of Medicine, which I
14 completed in 2003. And I am board certified in
15 anatomic and forensic pathology by the American Board
16 of Pathology. And then I took my first faculty
17 position after finishing my fellowships, and that's --
18 then I was working. And you don't want to know about
19 that, do you?

20 Q. You can just tell me: How did you end up in
21 Charleston?

22 A. Well, I actually took a position at Lake
23 Forest University after completing my fellowship at
24 Johns Hopkins. I was at Lake Forest for almost six
25 years as faculty in pathology work. I served as a

1 forensic pathologist and medical examiner there. And
2 while it was a lovely place to work, Salem wasn't
3 exactly where I wanted to continue living because it
4 seemed like -- I wanted a little bit more of a
5 cosmopolitan city, and I was recruited by the Medical
6 University of South Carolina for a similar position as
7 a forensic pathologist.

8 Q. And how long have you been here at MUSC?

9 A. This February will be four years.

10 Q. What is your job here? What do you actually
11 do here?

12 A. I am attending physician in anatomic
13 pathology, and I do -- I'm the director of pulmonary
14 pathology and -- on the -- and a forensic
15 pathologist. That's what I spend my time doing. I do
16 a little bit of teaching as well. I have -- we have
17 trainees, and so I have a very varied job. But
18 forensic pathology is a large part of it.

19 Q. As a forensic pathologist, what's a normal
20 course of the day for you? What do you do as far as
21 handling patients? Do you see live patients or --

22 A. When I'm on the forensic service, which may
23 be like 10 days out of the month because there are
24 other forensic staff, I do all of the autopsies that
25 come into our office that day. And that may be two

1 autopsies or it may be five autopsies. I try not to
2 do more than four or five in a day because that's when
3 mistakes get made. So I will do autopsies many days
4 in a row. And then when I'm not on service, I'm
5 reviewing results and looking at slides and writing up
6 reports. And then I also -- on a regular basis, I'm
7 looking at patient biopsies from lung [sic] specimens,
8 which is also an area of my specialty.

9 Q. Okay. Have you ever had the opportunity to
10 testify in circuit court in South Carolina?

11 A. Yes.

12 Q. About how many times?

13 A. You're talking about like --

14 Q. Criminal court --

15 A. -- criminal court? Yeah.

16 Q. -- civil court.

17 A. In South Carolina, in the four years I've
18 been here, it's probably been about 25 times. The
19 first year wasn't too many cases. It took a while for
20 those cases to get to trial.

21 Q. And those cases, did you qualify as an expert
22 witness?

23 A. Yes.

24 Q. And what did you qualify as an expert -- in
25 what field?

1 A. In forensic pathology.

2 Q. And as a forensic pathologist, do you also
3 have to work with toxicology-type medicines?

4 A. Yes.

5 Q. And it wouldn't be what you would qualify as
6 an expert in, but you would still be under the
7 forensic pathologist label; is that correct?

8 A. Yes. That's part of my knowledge base as a
9 forensic pathologist.

10 Q. Have you testified other places other
11 that South Carolina as a forensic pathologist?

12 A. Yes. In North Carolina many times.

13 Q. Okay. Have you ever been denied by any court
14 as qualifying as a forensic pathologist expert?

15 A. Never.

16 Q. Okay.

17 MR. ASKINS: We would move to qualify her as
18 an expert in the field of forensic pathology at this
19 point.

20 Q. All right. Dr. Riemer, you were called by me
21 some time ago concerning a toxicology performed on the
22 decedent in this case, in the Briett Johnson,
23 B-R-I-E-T-T, Johnson; is that correct?

24 A. Yes.

25 Q. And the toxicology report was performed by

1 the South Carolina Law Enforcement Division, and it
2 revealed an ethanol level of 0.208. Are you familiar
3 with that?

4 A. Yes.

5 Q. Now, as a part of your analysis of -- the
6 question I had concerning the validity of that result,
7 did you have an opportunity to examine the -- or to
8 read the deposition of Don Reynolds, the deputy for
9 Florence County?

10 A. Yes.

11 Q. Did I also send you the deposition of Robert
12 Sears, the toxicologist from SLED?

13 A. Yes.

14 Q. And as a part of that, I also sent you the
15 May report, or the South Carolina highway patrol
16 report in CD form concerning the pictures and
17 interviews and so forth of the accident; is that
18 correct?

19 A. Yes.

20 Q. As a part of that, you also had the
21 opportunity to review the toxicology report itself,
22 which was attached to Mr. Sears' deposition?

23 A. Yes.

24 Q. And also the death certificate that was
25 issued in this matter?

1 A. Yes..

2 Q. Okay. Now, the cause of death in this
3 accident on the death certificate says: Severe head
4 trauma due to auto accident. And the time of death
5 was 6:07 on May 17, 2012, which was approximately the
6 time of the accident. Do you understand the
7 circumstances of what happened in this case, the
8 accident itself --

9 A. Yes.

10 Q. -- from the May report? All right. Did you
11 also see pictures of the body of Mr. Johnson in the
12 vehicle from the May report?

13 A. Yes.

14 Q. You heard the interviews and the reports by
15 the highway patrolmen in the May report also about the
16 estimated speed of the vehicle, the amount of time --
17 or amount of distance from the time it left the
18 highway until it ended up resting and so forth?

19 A. Yes..

20 Q. In your course in doing autopsies and your
21 job as a forensic pathologist at MUSC, have you had
22 the opportunity to do autopsies on people who have
23 been in similar-type traumatic experiences?

24 A. On multiple occasions.

25 Q. In this case, when you read the deposition of

1 Mr. Reynolds, it indicates that the time of death was
2 6:07 p.m. on May 17th of 2012, and the body of
3 Mr. Johnson remained in the vehicle until some 30
4 minutes prior to the time he attempted to take a
5 specimen at around 8:30; is that correct?

6 A. Yes.

7 Q. And during that time, you could see the body
8 as it was suspended in the vehicle itself in those
9 pictures --

10 A. Yes.

11 Q. -- and analyze that? And according to the
12 report, Mr. Johnson was wearing a seat belt at the
13 time of the accident. So the entire time he was
14 restrained?

15 A. Yes.

16 Q. Okay. Now, Mr. Reynolds indicates that when
17 the body was taken out of the vehicle and put in a
18 prone position -- or a flat position, I would
19 assume -- that he removed a specimen of what he had
20 intended to be blood from the heart.

21 MR. Hylton: Object to the form of the
22 question.

23 Q. Okay. Do you understand what Mr. Reynolds,
24 the deputy coroner, did as far as when he tried to
25 collect the specimen?

1 A. Yes.

2 Q. All right. Do you remember how he collected
3 the specimen?

4 A. Yes. He states he took -- he inserted a
5 needle into the chest.

6 Q. Okay. I believe he said in the heart area;
7 is that correct?

8 A. Yes. That was what he estimated it to be.

9 Q. All right. Is it possible that Mr. Reynolds
10 -- what is the possibility of the heart not being in
11 that particular area after a traumatic incident such
12 as this?

13 A. Well, the heart is probably in the region,
14 but other organs could also be in that location.

15 Q. So there's no way to tell if Mr. Reynolds
16 actually got a specimen from the heart itself?

17 A. That's correct.

18 Q. As far as these accidents are concerned --
19 excuse me, specimens are concerned, Mr. Reynolds
20 testified that he took the specimen at about 8:30 p.m.
21 and put it in a sealed tube, I believe he said.

22 A. Yes.

23 Q. He kept it in a vehicle overnight, and he --
24 I believe that was on the 17th, mailed it on the 18th
25 from Florence to Columbia, and it arrived in Columbia

1 on 5/21/12. During that time, there was no
2 refrigeration. Does that cause any concern in this
3 matter?

4 A. Yes.

5 Q. And what concern does it cause?

6 A. Well, after death, there can be significant
7 amounts of bacteria proliferation which is associated
8 with postmortem ethanol production. And the
9 likelihood of that is increased when there is
10 extensive internal trauma as is likely in this case.
11 And second of all, when a specimen is stored at a
12 higher temperature, it is going to increase the rate
13 of postmortem bacteria production and ethanol
14 production.

15 Q. Okay. What is the protocol -- how do you
16 maintain specimens in your lab?

17 A. Well, first of all, when specimens of blood
18 are drawn, we -- if this is during an autopsy, one we
19 can actually see that the specimen -- the blood is
20 being drawn from a vascular source. So we can
21 actually see where the blood is being drawn from. So,
22 that's one big difference. And second of all, it
23 immediately gets put in -- under refrigeration, and
24 actually, I believe that the specimens are even frozen
25 before they're sent off overnight to reduce the chance

1 of artificial postmortem production.

2 Q. Okay. In this case, obviously, it would have
3 been better if an autopsy had been performed?

4 A. Absolutely.

5 Q. And the difference between having an autopsy
6 performed as you do it and draw specimens of blood
7 from inside the body cavity, you can see exactly where
8 you're getting the blood from, right?

9 A. Yes.

10 Q. And unfortunately, Mr. Reynolds -- even if
11 Mr. Reynolds was not -- he is not a trained
12 physician. Even if he were a trained physician,
13 there's no way he could be sure he was getting blood
14 from the heart.

15 A. That's correct. And, you know, heart blood
16 would have easily -- could get easily mixed with blood
17 leaking and spilling out of tears in internal organs.

18 Q. And Mr. Reynolds testified that he did not
19 clean the area where he took the sample from by swab,
20 but he said sometimes he didn't know whether EMS or
21 nurses or somebody else did it. But if somebody had
22 swabbed the area, could that contaminate this
23 specimen?

24 A. Yes. Ethanol swabs frequently -- ethanol
25 swabs done before a vein puncture, it does increase

1 the art [sic] ethanol to be present in the sample.

2 Q. Okay. As far as Mr. Johnson was concerned,
3 it's obvious he had severe body trauma to his head and
4 neck. And in that case, would you expect any
5 compromising of the internal organs?

6 A. I would expect them to be -- there to be
7 internal lacerations or injuries to internal organs.

8 Q. Is it possible when you have internal
9 injuries such as that and Mr. Johnson's body was in an
10 upside down position, that that fluid would collect in
11 the lowest possible place?

12 A. Well, it's likely to go with gravity. And so
13 it would end up in the region of the chest cavity.

14 Q. Okay. What about the possibility of a spleen
15 rupture or laceration or liver rupture or laceration,
16 would that be possible or probable in a case such as
17 this?

18 A. Either or both could be very likely.

19 Q. If Mr. Johnson had not consumed any alcohol
20 within, let's say, a 20-hour period prior to the time
21 this accident occurred, would there be any other way
22 for an ethanol reading of 0.208 to occur?

23 A. Yes.

24 Q. And how would that be?

25 A. Well, as I mentioned, when there is internal

1 trauma of internal organs, blood from those organs
2 gets mixed up -- it gets -- basically it goes into
3 body cavities. And this blood is -- there is
4 bacterial contamination from internal viscera and
5 bacteria consume the sugars in the blood, which the
6 sugars are very high in the liver and the spleen. And
7 so these -- blood from these organs is known to cause
8 very high levels of alcohol more than just isolated
9 peripheral blood. Second of all, blood could have
10 been elevated. The fact that it's being stored at a
11 warm temperature prior to refrigeration could also
12 elevate the postmortem production of ethanol, and even
13 the use of a swab to clean the area, that could have
14 contributed also to the increase in ethanol. So all
15 of these things in concert could lead to a
16 false-positive ethanol measurement.

17 Q. Okay. Even with that, any consumption or
18 evidence of consumption of alcohol by the victim?

19 A. That's correct. And investigation was also
20 involved to know if there was consumption. That's not
21 the only -- but there are other explanations here that
22 could -- that could explain the presence of the
23 ethanol concentration.

24 Q. Okay. You may have answered this question
25 already, but one of the -- I guess the question I

1 would ask is what is a likelihood -- or how would you
2 determine if an individual such as Mr. Johnson who
3 perished on May 17th and then his body was sent to
4 your lab and not autopsied until three days later, how
5 would you be able to discern whether or not you would
6 get accurate toxicology results even though the body
7 had been sitting up for that length of time?

8 A. Well, as I indicated, the blood would be
9 drawn from a very specific location, and that's the
10 only blood that we would do ethanol on. Actually,
11 vicreous fluid would also be done at the same time to
12 try to compare the results. And we might be able to
13 make a more rational determination about the relative
14 concentrations of blood in different fluids. But it
15 wouldn't be surprising -- even blood three days later
16 drawn from an isolated source would frequently have
17 ethanol in it as a measure of postmortem production.
18 And in that case, it would indicate in my report that
19 there is ethanol in postmortem blood, but it's not
20 certain blood that this was the result of consumption
21 prior to death or postmortem production.

22 Q. Okay.

23 A. So it's not an uncommon finding after storage
24 of the body at a room temperature.

25 Q. Okay. Not having been there and not having

1 examined this body or even autopsied this body, you
2 can't say for certain what caused the ethanol reading
3 in this report?

4 A. That's right. I don't know what the
5 underlying causes are.

6 Q. When you do autopsies on a regular basis, do
7 you get the outside facts, or do you just go from your
8 scientific findings?

9 A. Oh, no. Well, the investigation is an
10 important part of a medical legal investigation, and
11 so the investigative information is incorporated into
12 the interpretation of results.

13 Q. Okay. You may have answered this question
14 also, and I apologize if I'm being too repetitive.
15 But if Mr. Johnson had consumed alcohol the night
16 before the accident, let's say 9 p.m. the night before
17 the 6 p.m. accident, would that have an effect on an
18 ethanol reading the next day at 8:30?

19 A. The alcohol would have been metabolized by
20 that hour.

21 Q. Okay. If alcohol -- and there's obviously no
22 evidence either way whether it was or wasn't alcohol
23 consumption by Mr. Johnson on the afternoon or just
24 prior to the accident, but had he in fact -- if he had
25 in fact been consuming an alcoholic beverage and the

1 alcohol was in his stomach at the time of the
2 accident, what kind of reading would you expect the
3 ethanol level to be at that point?

4 A. It would be marketedly elevated. I mean,
5 even without a rupture of the stomach, there's mixing
6 of the -- alcohol in the stomach actually raises
7 cardiac blood levels, which is why cardiac blood is
8 not a good source to measure alcohol.

9 Q. And your specialty is a pathology of the
10 heart, is it not?

11 A. Yes. That's one of my specialties.

12 Q. Now, would you expect the ethanol level to be
13 higher than 0.208 in the example I just gave you?

14 A. It could very well be.

15 Q. Be higher than that?

16 A. Yes.

17 Q. All right. Now, we discussed this also, I
18 believe, but the effect of the actual weather -- the
19 temperature, humidity -- at the time of this accident
20 in the body itself being left in the position it was
21 for some two hours after the accident --

22 A. Yes.

23 Q. -- would that have any bearing on the test
24 results we received?

25 A. Yes. That would hasten the leakage of blood

1 and blood going into the region of the chest and the
2 heart to make it much more likely that there was
3 contaminated blood drawn from what was thought to be
4 blood just drawn from the heart.

5 Q. Tell me: If there had been ocular fluid
6 drawn in this case, would it have given a better
7 indication of the actual ethanol level?

8 A. It would have been a more reliable indicator.

9 Q. Okay. And is that what you guys frequently
10 do when you do autopsies? Do you use ocular fluid
11 tests?

12 A. Yes.

13 Q. Dr. Riemer, in your professional opinion,
14 within a reasonable degree of medical certainty, what
15 would you say about the reliability of the toxicology
16 result of 0.208 ethanol in this case?

17 A. To a reasonable degree of medical certainty,
18 it's not a reliable indicator of ethanol consumption.

19 MR. ASKINS: Answer any questions that
20 Mr. DeBerry might have.

21 EXAMINATION BY MR. DEBERRY:

22 Q. Thank you, Doctor. I just have a few
23 questions. When you talk about artificial postmortem
24 production of ethanol, can that vary -- is it likely
25 that that would vary from patient to patient or from

1 body to body depending on their chemical makeup?

2 A. Well, it would depend mostly on the degree of
3 internal traumas and also the source of -- I mean,
4 there's going to be a lot of postmortem production in
5 the stomach and less in peripheral blood. But it's
6 largely a degree of internal trauma and environmental
7 factors.

8 Q. And is that the reason that you would perform
9 a peripheral --

10 A. Right. It's not just me. That's the
11 standard.

12 Q. And that's because it's much less likely to
13 be contaminated?

14 A. Yes.

15 Q. And the contamination would be the artificial
16 postmortem production of ethanol?

17 A. Well, it's not artificial. It's real
18 postmortem production.

19 Q. Right. Okay.

20 A. But it creates an artificial result.

21 Q. Okay. And you say you've done many many
22 autopsies. How likely is it for there to be these
23 sorts of lacerations and internal trauma without maybe
24 the outward appearances of it after an accident like
25 this?

1 A. Very likely.

2 Q. Very likely?

3 A. Very likely. It happens all the time.

4 Q. So it's very common to find internal injuries
5 that may not be apparent from the outside?

6 A. That's correct. That's one of the reasons
7 why autopsies are requested because the body just
8 looks like there's a few scrapes and an accurate cause
9 of death cannot be determined.

10 Q. Okay. And you testified that a cardiac
11 sample or a sample that would be taken from the heart
12 even in the individual that had just consumed the
13 alcohol and then very soon after had a sample taken,
14 that would not be a reliable source because that blood
15 becomes --

16 A. Because it co-mixed with gastric fluid. It
17 becomes contaminated by flow from the portal vein, and
18 it's known that cardiac blood can falsely be elevated
19 from recent consumption even when it's not in the
20 blood.

21 Q. Okay. So just in a living person scenario, a
22 person who had consumed alcohol, you may get a
23 different reading from cardiac blood than you would
24 from --

25 A. Absolutely. We know that that's the truth.

1 It happens all the time.

2 Q. Okay.

3 A. And another thing that if he had consumed
4 like an alcoholic beverage, and then like in the
5 middle of the accident, he's aspirating his gastric
6 fluid. Well, that's going to end up in the trachea
7 and during a venereal puncture of the chest, it's very
8 likely that some of that fluid in the trachea could
9 have been aspirated along with high blood. So all
10 bets are off as far as determining the source of
11 ethanol that was present in the heart.

12 Q. So it could have actually been pure alcohol
13 that --

14 A. Well, it could have just really been -- there
15 could have been a lot of alcohol present that really
16 wasn't present from his blood.

17 Q. Right. Okay.

18 MR. DEBERRY: That's all I have. Thank you
19 very much.

20 EXAMINATION BY MR. HYLTON:

21 Q. Hello, Dr. Riemer. My name is Brian Hylton.
22 In this case, basically, your testimony is conjecture
23 and speculation; is that correct? Because you haven't
24 viewed the body. You haven't viewed the blood sample,
25 correct?

1 A. Well, I saw the photos of the accident and
2 the body at the scene.

3 Q. Right.

4 A. So that's not speculation.

5 Q. Well, your speculation about potential
6 lacerations in the body, correct. You don't know if
7 they were or not, correct?

8 A. Well, the details of the collision make it
9 likely there were internal injuries.

10 Q. Likely, but you don't know.

11 A. No. I did not do an autopsy. The autopsy is
12 the only way to know for certain.

13 Q. Right. So at this time, we're all
14 speculating there may be, correct?

15 A. Right. But it's not -- pure speculation
16 doesn't imply that somehow common sense doesn't come
17 into play. And I think that common sense in this case
18 suggests that it's more likely that he had internal
19 injuries that are obscured by not having had an
20 autopsy.

21 Q. All right. And also speculating that organs
22 may have been punctured when the needle was inserted
23 other than the heart, correct?

24 A. Well, we don't know what was actually the
25 source of the blood that was taken, so --

1 Q. Correct.

2 A. -- it's not possible to know.

3 Q. All right. And as we've been told, I think,
4 by the forensic psychologist that if other fluids were
5 drawn other than blood, it would have a different look
6 than blood; is that correct?

7 A. Well, visually, I don't know if that's -- I
8 mean, there could certainly be ethanol contamination.
9 And I'm not so sure it would influence the appearance
10 of the blood.

11 Q. All right.

12 A. I mean, if it was pure urine, yes, it's going
13 to look different.

14 Q. Well, if it was stomach fluid taken into the
15 --

16 A. Yeah, but I'm not saying it was pure stomach
17 fluid. It may have been stomach fluid mixed with
18 blood. So we really -- we just don't know the
19 source. And I'm not so sure that it frequently looks
20 that different.

21 Q. Okay.

22 A. If it's red, it looks red.

23 Q. But they haven't sent you a sample of the
24 blood that was taken for you to analyze --

25 A. No.

1 Q. -- parts of it, and whether there was
2 anything else in that blood other than pure blood?

3 A. No, I did not. I only have the report and
4 other people's interpretations.

5 Q. It would actually help you to have a sample
6 of that blood, wouldn't it?

7 A. Well, I would have to rely on a toxicologist
8 to perform the sample. So I may still -- it would put
9 me in the -- it wouldn't help me, really...

10 Q. In this case, the toxicologist did review
11 this sample, didn't he?

12 A. Well --

13 Q. From SLED?

14 A. Yes. He evaluated the sample.

15 Q. And he didn't find any inconsistencies
16 according to his deposition.

17 A. Inconsistencies with what?

18 Q. With the blood sample taken.

19 A. Well, he determined what the blood ethanol
20 was.

21 Q. Correct. And you said from the procedure
22 that was used, that wasn't anything out of the norm,
23 correct?

24 A. Well, that's right. Because frequently,
25 there are blood alcohol levels that are in that range

1 that toxicologists find all the time. So there was no
2 reason for him to think -- he didn't do this test with
3 any knowledge of the scene.

4 Q. Right. But you've read his deposition --

5 A. Yes.

6 Q. -- and they questioned him about the time
7 from taking of the blood --

8 A. Yes.

9 Q. -- to the time that it got to the lab --

10 A. Right.

11 Q. -- to it not being refrigerated, and none of
12 that was out of the order of standard practice; is
13 that correct?

14 A. Well, he stated from the time it got to his
15 lab, everything was under safety procedures.

16 Q. Right. But I believe he also said -- at the
17 time -- about when -- the package came to him, that it
18 was not refrigerated. He said: No. This is page 42.
19 "So is there any concern about the package not being
20 refrigerated?" And they talked about sodium chloride
21 and potassium oxalate being included in the test
22 tubes, correct?

23 A. Yes.

24 Q. And those two chemicals prevent decomposition
25 of the blood, correct?

1 A. Well, they do help.

2 Q. Right. And again, he didn't have any concern
3 about how it was shipped --

4 A. Well, it wasn't anything for him to be
5 concerned about. He did the test.

6 Q. Right. But he's saying --

7 A. I agree with what -- that he stated that.

8 Q. Okay. All right. And again, this is a
9 coroner -- or deputy coroner who's done this for 18
10 years, and I believe he said about 4,000 deaths he's
11 investigated, correct?

12 A. Yes.

13 Q. And he said that he didn't deviate from
14 standard protocol with this test, correct?

15 A. That's correct.

16 Q. And again, SLED uses these type of tests
17 constantly in courtroom settings.

18 A. They do testify to the results, yes.

19 Q. Okay. And again, you don't know when this
20 guy last drank alcohol, correct?

21 A. I don't.

22 Q. Okay. You know there was no beer wine or
23 things found in the car with him, correct?

24 A. Yes. That's what I was told.

25 Q. All right. So that would indicate that he

1 may not have been drinking right at the time of the
2 accident, correct?

3 A. That's correct.

4 Q. Okay. And again, there was no tampering with
5 the tubes that we saw from the accident. They were
6 sealed with the red top tube that SLED provides.

7 A. Right. That's correct.

8 Q. Okay. Now, I want to talk with you -- as a
9 forensic pathologist, you're aware of the effects of
10 alcohol in the body, correct?

11 A. Yes.

12 Q. And a .208 alcohol level, what type of effect
13 does that have on a person when they're driving?

14 A. That would make them less capable of
15 operating with good judgment and reaction time.

16 Q. Okay. There's a person that's -- I believe
17 his friends of -- in the past that says he was a
18 cautious, careful driver. They didn't even like
19 riding with him, he was so cautious and careful. And
20 this time, he was driving almost 100 miles an hour.
21 Does that indicate a loss of judgment or inhibition?

22 A. Possibly.

23 Q. All right. So a .208 alcohol level, it would
24 affect judgment, correct?

25 A. Yes.

1 Q. It would also affect your inhibitions and
2 cause you additional risk-taking, correct?

3 A. Most of the time, yes.

4 Q. Okay. It would also cause lack of muscle
5 control, correct?

6 A. Yes.

7 Q. And in fact, at this alcohol level, people
8 are known to pass out on?

9 A. Depends on your tolerance.

10 Q. But people -- general people --

11 A. Some people may pass out at that.

12 Q. All right. And these types of accidents in
13 the past that you've investigated, have those alcohol
14 levels been reasonable to your medical expertise as
15 the cause of those types of practice?

16 A. Well, I don't ever state that alcohol was a
17 contributing factor.

18 Q. So, you never state that alcohol is a
19 contributing factor?

20 A. Almost never.

21 Q. Okay.

22 A. And the reason is because there's a lot of
23 other factors that could cause somebody to veer off
24 the road. They could be changing the radio station;
25 they could be daydreaming about something or

1 conversations they had or -- there's a lot of
2 distractions on the road that could cause somebody to
3 go off the road and not pay attention to their speed.

4 Q. All right.

5 A. And so I never know for sure whether alcohol
6 played a role or not.

7 Q. Okay.

8 A. Even when present.

9 Q. Right. But that's why the courts developed
10 an alcohol level, correct?

11 A. Say that again.

12 Q. That's why the courts designated a .08 -- the
13 South Carolina, not the courts, the legislature
14 designated --

15 A. That's correct.

16 Q. -- that as to be intoxicated or at least
17 impaired at that point, correct?

18 A. Well, that's the -- there's a law for the
19 legal driving limit.

20 Q. Correct. Now, Dr. Riemer, you've been
21 contacted by the plaintiffs in this case to testify,
22 correct?

23 A. I was contacted to review the material.

24 Q. All right. Were you paid for reviewing the
25 material?

1 A. I was paid for my time. My opinion was I
2 wasn't paid for any specific opinion.

3 Q. Right. That's fine. And how much were you
4 paid?

5 A. Well, it's not payment to me; it's payment to
6 my department.

7 Q. Okay.

8 A. And I get maybe a small percentage of that
9 like after some months, which is very small. It's not
10 payment directly to me.

11 Q. And how much is the payment to your
12 department?

13 A. The payment is \$500 per hour.

14 Q. Per hour. How many hours did you spend on
15 this?

16 A. Two.

17 Q. Okay. And is this deposition time included
18 as well?

19 A. No.

20 Q. Okay. Is that extra?

21 A. Well, it's the same fee. I mean, it's the
22 same fee for my time.

23 Q. Okay.

24 A. That gets paid to the department. There is
25 no money given to me from this.

1 Q. Okay. And how often do you testify on behalf
2 of plaintiffs?

3 A. Well, I'm frequently asked to review
4 materials, to give my opinion. And the opinion is not
5 always favorable to the person who's requesting my
6 opinion. And it's independent of who is asking about
7 it. So I would give the same opinion in this case
8 whether it was you or Mr. Askins, who requested me to
9 review the material.

10 Q. And I understand that. But the question
11 was: What percentage do you do for plaintiffs versus
12 defendants?

13 A. Most of the time, it's defendants. Like 90
14 percent of the time I'm asked for my opinion, it's
15 defendants.

16 Q. And now, is that defendants in wreck cases
17 being charged with a DUI?

18 A. No. Just all of -- in general, not just
19 like -- not just an accident-type cases, but also
20 different, you know, injury cases or personal
21 injury-type.

22 Q. So are you usually contacted by the insurance
23 company?

24 A. No. I'm never contacted by an insurance
25 company. An attorney may contact me -- it's very

1 infrequent. I hardly do any of these. It's just a
2 handful of these a year that are of interest to me.
3 I'm not required to do any of these. And it's only if
4 the case is of interest to me. Like I have something
5 that I can contribute to an understanding of the case
6 that I'll even accept because like I said, it's really
7 not money that I'm getting directly. It's because I
8 seek to provide assistance to help clarify issues.

9 Q. Okay. You talked about ethanol being present
10 in the blood and decomposition possibly causing that.
11 Again, a couple of hours after the accident, we're not
12 expecting bacterial production and decomposition to be
13 taking place in that blood, correct?

14 A. Well, it certainly could have started
15 already.

16 Q. Okay. So in that case, any blood sample
17 taken after an accident could start being --

18 A. No. As I mentioned previously, the fact --
19 the possibility that there's visceral trauma would
20 hasten the rate of postmortem production.

21 Q. All right. But again, if there was visceral
22 trauma, you would -- as the expert said -- SLED --
23 when they test that blood, they would find other
24 chemicals, other materials in that blood when they're
25 reducing it down, correct?

1 A. It's possible.

2 Q. All right. In fact, it would be probable,
3 wouldn't it?

4 A. It's certainly possible. I've seen that
5 happen.

6 Q. All right. And in this case, there was no
7 indication that there were any other materials or any
8 other elements found in that blood, correct?

9 A. No. There was nothing.

10 Q. Okay. And in fact, metabolism stops after
11 that heart beat for the body metabolizing it, correct?

12 A. That's correct.

13 Q. So the .208 reading, if that was his blood
14 alcohol level, it didn't increase from the body
15 metabolizing after death, correct?

16 A. Wait, you mean the level -- the -- it
17 wouldn't -- the level wouldn't decrease from
18 metabolism --

19 Q. Correct.

20 A. -- of -- right. From metabolism of the
21 blood. It wouldn't decrease.

22 Q. It wouldn't decrease, so that would be the
23 highest level --

24 A. That would be --

25 Q. -- right at death?

1 A. No. It could potentially go up because of
2 postmortem production.

3 Q. But I'm saying from the body metabolizing
4 it.

5 A. The question is sort of awkward.

6 Q. Okay.

7 A. Okay. I'm not really --

8 Q .208 level --

9 A. Yes.

10 Q. -- that is the level at death which was when
11 the body stops, correct? Stops metabolizing.

12 A. Well, only if it was from pre-mortem
13 consumption.

14 Q. Correct.

15 A. But it's -- I mean, I don't know if that was
16 the actual level in his blood at death. So I can't
17 really -- it's very difficult for me to answer that
18 question. If you're asking if there's any -- the body
19 metabolizes ethanol after death, the answer is no.

20 Q. Okay. That's the question. Thank you. I
21 apologize.

22 A. That's all right.

23 Q. When autopsies are done, those aren't usually
24 done the same day after an accident, are they?

25 A. Not usually. Sometimes, depending on how

1 quickly we can get the body.

2 Q. All right. And you were talking about the
3 heat and the affect on it, and again, the forensic
4 pathologist was aware of that. They asked about --

5 A. The who?

6 Q. I'm sorry. The forensic toxicologist, SLED
7 toxicologist. Mr. Sears says: It's extremely hot
8 outside and humid. It wouldn't have any effect on the
9 samplings? He said: It did not feel like it would in
10 that short period of time.

11 A. I'm not sure I agree with that.

12 Q. Even with these being placed in the test
13 tube?

14 A. Yes. I don't agree with that statement.

15 Q. Okay. So do you believe all of the blood
16 samples that have been sent to SLED over the years
17 through the mail have been invalid?

18 A. No. But we interpret them in context in
19 autopsy findings as well.

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

21 FURTHER EXAMINATION BY MR. ASKINS:

22 Q. Just one followup question or two,
23 Dr. Riemer. Mr. Hylton was asking a lot of questions
24 concerning the validity of a forensic toxicologist,
25 and I think what he was really trying to say was --

1 talking about the testimony of Mr. Sears, who is a
2 toxicologist for SLED.

3 A. That's correct.

4 Q. Okay. So you're talking about this
5 deposition. On page 15 of the deposition, the answer
6 that Mr. Sears gave the question about the whether or
7 not a heart stick was a proper way to obtain a
8 specimen, his answer was this: In many cases, a heart
9 stick is what the coroner's assistant or coroner will
10 use because they're not going to cut up the body, as
11 they would not -- as they would with an autopsy. This
12 is an accepted method for them to draw the fluid. I
13 guess, you know, provided that they did an external
14 exam on the body and felt like there was no
15 significant internal trauma, that would be a very
16 acceptable way to do that. And you agree with that
17 statement because what you just said earlier is you'd
18 have to examine --

19 MR. HYLTON: Object to the form of the
20 question.

21 Q. Understanding that, the statement that he
22 made is correct, isn't it?

23 A. Yes.

24 Q. All right. The assistant coroner did the
25 heart stick, and he testified that he did not examine

1 the body. He went by what EMS personnel said
2 concerning the cause of death being severe head
3 trauma. You understand that to be --

4 A. Yes.

5 Q. Okay. Now, just a followup on Mr. Hylton's
6 question concerning your employment in this case, when
7 you were employed -- were you employed to give a
8 favorable opinion or to attack the toxicology report,
9 or are you employed to explain the toxicology results
10 to me and give your opinions as to that?

11 A. The latter.

12 Q. All right. Would you be for hire any other
13 way?

14 A. Never.

15 Q. As far as remuneration is concerned, your
16 department receives the money for this; is that
17 correct?

18 A. That's correct.

19 Q. When I contacted your department, I contacted
20 the forensic department, and then you ended up with
21 this case; is that correct?

22 A. That's correct. You contacted the director
23 of forensic pathology, and she didn't have any time or
24 interest in evaluating it, and I guess she told a
25 couple of people about me, and I thought it was

1 extremely interesting, and I would be interested in
2 evaluating -- so you didn't contact me, either.

3 Q. All right. And the other part of that is if
4 your expertise is a forensic pathologist, you also
5 specialize in cardiac pathology, correct?

6 A. Yes.

7 Q. And that's --

8 A. That's not -- that's a separate -- but it is
9 helpful to me as a forensic pathologist to know
10 abnormalities of the heart and cardiovascular system.

11 MR. ASKINS: Thank you. No further
12 questions.

13 (The deposition of Ellen C. Riemer, M.D. was
14 concluded at 10:51 a.m. on November 5th, 2012.)
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1 COURT REPORTER'S CERTIFICATE

2
3 I DO HEREBY CERTIFY THAT THE TESTIMONY
4 CONTAINED IN SAID DEPOSITION WAS, BY ME, REDUCED TO
5 WRITING IN THE PRESENCE OF SAID WITNESS BY MEANS OF A
6 COMPUTERIZED TRANSCRIPTION. THE SAID DEPOSITION IS A
7 TRUE AND ACCURATE TRANSCRIPT OF THE WHOLE OF THE
8 TESTIMONY GIVEN BY SAID WITNESS, AS AFORESAID.

9 I DO FURTHER CERTIFY THAT I AM NOT CONNECTED
10 BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR
11 ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF
12 EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY
13 IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL,
14 ATTORNEY, AGENT, OR OTHERWISE.

15 SIGNED THIS THE 26th DAY OF NOVEMBER,
16 2012.

17
18 Josie Allen

19 JOSIE ALLEN

20 My Commission Expires 9/14/22
21
22
23
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CURRICULUM VITAE

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Citizenship: USA

Education:

1981-1985	Bryn Mawr College, Bryn Mawr, PA. Bachelor of Arts (A.B.), Philosophy (5/85)
1985-1988	University of Wisconsin Law School, Madison, WI. Doctor of Jurisprudence (J.D.) (5/88)
1993-1997	Tel Aviv University, Sackler School of Medicine, Tel Aviv, Israel, Doctor of Medicine (M.D.) (5/97)

Residency/Fellowships:

1997-2001	Residency in Pathology, Columbia University College of Physicians and Surgeons, Columbia-Presbyterian Medical Center of New York Presbyterian Hospital, New York, NY
2001-2002	Fellowship in Forensic Pathology, Office of the Chief Medical Examiner of the State of Maryland, University of Maryland School of Medicine, Baltimore, MD
2002-2003	Fellowship in Cardiovascular and Pulmonary Pathology, Johns Hopkins Hospital, The Johns Hopkins University School of Medicine, Baltimore, MD

Specialty/Board Certification:

2003	American Board of Pathology, Anatomic Pathology
2004	American Board of Pathology, Forensic Pathology

Medical Licensure:

1998-2003	New York (inactive)
2001-2003	Maryland (inactive)
2003-2009	North Carolina (inactive)
2009-present	South Carolina (active)

Bar Admissions:

1988	Wisconsin
1989	New York

Faculty Appointments:

2003-09	Assistant Professor, Department of Pathology, Wake Forest University School of Medicine, Winston-Salem, NC
2007-09	Assistant Professor (Joint appointment), Division of Cardiology, Department of Internal Medicine, Wake Forest University School of Medicine, Winston-Salem, NC
2009-11	Assistant Professor, Department of Pathology and Laboratory Medicine, Medical University of South Carolina, Charleston, SC
2011-present	Associate Professor, Department of Pathology and Laboratory Medicine, Medical University of South Carolina, Charleston, SC

Administrative Appointments:

2003-09 Associate Director, Division of Forensic and Autopsy Pathology, Wake Forest University School of Medicine, Winston Salem, NC
2005-09 Director of Cardiovascular Pathology, Department of Pathology
Wake Forest University School of Medicine, Winston-Salem, NC
2009-present Director of Pulmonary Pathology, Medical University of South Carolina, Charleston, SC

Hospital Appointments:

2003-2009 Attending Physician, Wake Forest University Baptist Medical Center, Winston-Salem, NC
2009-present Attending Physician, MUSC Medical Center, Charleston, SC

Professional/Scientific Societies:

College of American Pathologists
Autopsy Committee, 2002-2004
Inspector, New York University Medical Center Pathology Laboratories, 2001
Inspector, WakeMed Pathology Laboratories, Raleigh, NC 2010
United States and Canadian Academy of Pathology
Pulmonary Pathology Society
American Thoracic Society
Assembly on Pulmonary Circulation
American College of Chest Physicians
American Academy of Forensic Sciences
Executive Committee on Recruitment and Retention (current)
Johns Hopkins Medical and Surgical Association
Evidence Based Medicine and Science
American Medical Association
Charleston County Medical Society

Editorial Positions:

Editorial Board, Journal of Cancer Research and Therapy
Reviewer/editor, Archives of Pathology and Laboratory Medicine
Reviewer/editor, Respiratory Medicine

Honors and Awards:

College of American Pathologists, Young Leader Award, 2001
Outstanding Case Presentation Award, American College of Chest Physicians: October 2013

Research:

Active Research:

Co-investigator, 2011-present: **A Viable Lung Cryopreservation Method to Rapidly Test Cancer Treatments.**
(Principal Investigator, D. Spyropoulos, Department of Pathology and Laboratory Medicine), Medical University of South Carolina

Co-investigator, 2011-present: **MicroRNA Regulation of Ionizing Radiation-Induced Premature Senescence.**
(Principal Investigator Y. Wang, Department of Pathology and Laboratory Medicine), Medical University of South Carolina

Co-investigator, 2011-present: **Caveolin 1 in Airway Inflammation and Remodeling in Asthma.** (Principal Investigator S. Bains, Department of Medicine, Division of Pulmonary and Critical Care Medicine), Medical University of South Carolina

Co-investigator, 2009-present: **PANTHER Interstitial Pulmonary Fibrosis Study**. (Principal Investigator S. Sahn, Department of Medicine, Division of Pulmonary and Critical Care Medicine), MUSC (Fund source: NIH)

Co-investigator, 2009-present: **A Phase 2, Multicenter, Randomized, Double-blind, Placebo-controlled, Parallel-group Study Evaluating the Safety and Efficacy of Treatment with Ustekinumab or Golimumab in Subjects with Chronic Sarcoidosis**. (Principal Investigator C. Strange, Department of Medicine, Division of Pulmonary and Critical Care Medicine), Medical University of South Carolina
Fund Source: Centocor (Johnson & Johnson)

Consultant, 2010-present: **CSB Peptide-Based Therapeutic Agents in Scleroderma Lung Disease** (Principal Investigator S. Hoffman, Department of Medicine, Division of Rheumatology and Immunology and Department of Cell Biology), Medical University of South Carolina
Fund Source: National Institutes of Health (NIH)

Past Research:

Co-investigator, 2005-2009:: **G Protein Coupled Receptor Regulation in Airway Myocytes**. (Principal Investigator R. Penn, Center for Human Genomics), Wake Forest University School of Medicine
Fund Source: National Institutes of Health (NIH)

University and Department Committees:

2004-08 Student Promotions and Progress Committee, Wake Forest University School of Medicine
2009-present Faculty Senate, MUSC
2009-present Committee for Institutional Advancement, Faculty Senate, MUSC
2010-2012 MUSC Women Scholars Initiative

Major Teaching Responsibilities:

Undergraduate Medical Education:

Pulmonary Pathology (7 hours/year)
Small group leader, case studies, Mechanisms of Disease (30 hours/year)

Undergraduate Dental Education:

Pulmonary Pathology (3 hours/year)

Graduate Medical Education:

Pathology of Lung and Pleura, Resident training conference (6 hours/year)
Forensic Pathology (2 hours/year)
Daily training and mentoring of pathology residents and fellows
Participate in weekly forensic pathology teaching conferences

Continuing Medical Education (past):

Annual Director, Western North Carolina Death Investigation Seminar, Wake Forest University School of Medicine, 2005-2008

Major Clinical Interests and Responsibilities:

1. Forensic and Autopsy Pathology

- Evaluation and diagnosis of trauma and disease by performance of medicolegal and medical autopsy examinations; determination of cause and manner of death

2. Pulmonary Pathology

- Evaluation and diagnosis of neoplastic and non-neoplastic lung biopsies from patients within MUSC and those referred to MUSC

- Director of monthly Interstitial Lung Disease conference, Medical University of South Carolina
- Consultation with radiologists and clinicians from various departments on pulmonary disease

Lectures and Presentations:

Invited lectures and presentations:

1. "Five Cases of ILD that Didn't Play by the Rules". American Lung Association, Southeast Division. Tri-State Consecutive Case Conference on Lung Disease, Ponte Vedra Beach, FL, September 16, 2012.
2. "Necrotizing Pulmonary Angiitis". Pulmonary Grand Rounds, Medical University of South Carolina Department of Medicine, Division of Pulmonary and Critical Care Medicine, April 24, 2012.
3. Medical University of South Carolina Department of Medicine, Division of Pulmonary and Critical Care Medicine, Core Lectures, Spring 2010
4. Aspen Lung Conference, Golden Anniversary, "Beta-agonist and prostaglandin E₂ (PGE₂)-mediated inhibition of airway smooth muscle (ASM) growth is PKA-dependent," Aspen, CO, June 2008
5. Baylor University School of Medicine, Department of Pathology, Houston, TX. "Acute Lung Injury", May 2008
6. University of Wisconsin School of Medicine, Department of Pathology and Laboratory Medicine, Madison, WI. "Sudden Unexpected Death from Natural Causes: Expect the Unexpected," March 2008
7. New York University School of Medicine, Department of Pathology, New York, NY. "Benign Lymphoid Lesions of the Lung", November 2007.
8. "Forensic Pathology for Emergency Medical Technicians, Forsyth County Medical Services Annual Meeting, Winston-Salem, NC, May 2007
9. Hebrew University of Jerusalem, Hadassah Medical School, Institute of Pulmonology, Jerusalem, Israel. "Pathology of Acute Lung Injury", March 2005.
10. University of Pittsburgh School of Medicine, Department of Pathology, Pittsburgh, PA. "Sudden Unexpected Death from Natural Causes: Expect the Unexpected". January 2003.
11. New York University School of Medicine, Department of Pathology, New York, NY. Sudden Unexpected Death from Natural Causes: Expect the Unexpected", November 2002.

Abstract Presentations:

1. Kummerfeldt CE, Holmes A, Riemer EC, Huggins JT. Organizing pneumonia and positive anti-CCP as initial presentation of rheumatoid arthritis. American College of Chest Physicians 2012 Annual meeting and Conference, October 2012, Atlanta, GA
2. Kummerfeldt CE, Riemer EC, Huggins JT. Pulmonary capillaritis and diffuse alveolar hemorrhage in a patient with moderately positive anti-PL-12 antibodies. American College of Chest Physicians 2012 Annual meeting and conference, October 2012, Atlanta, GA
3. Brooks SA, Riemer EC. An Autopsy Report of Primary Cardiac Lymphoma in an Immunocompetent Patient. College of American Pathologists, Annual Meeting and Conference, September 2012, San Diego, CA

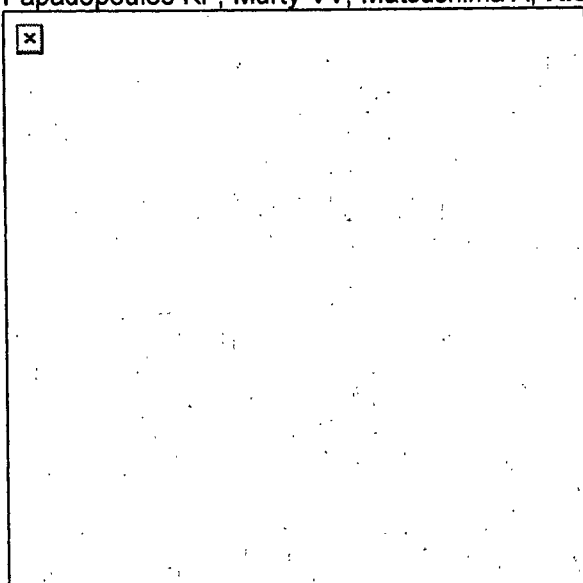
4. Butler SA, Bruner ET, **Riemer EC**, Self SE. Eosinophilic Vasculopathy as a Complication of Rejection following Orthotopic Heart Transplant. College of American Pathologists, Annual Meeting and Conference, September 2012, San Diego, CA
5. Spyropoulos DD, Denlinger CE, **Riemer EC**, Allen EM, Newton DA, Baatz JE. The Use Of Cryopreserved, Viable Lung Tissue From Patients To Study Drug Therapies American Thoracic Society 2012, Annual Meeting, May 2012, San Francisco, CA
6. **Riemer EC**, Yan H, Misior AM, Pascual R, Deshpande DA, Penn RB. Beta-agonist and prostaglandin E2 (PGE₂) -mediated inhibition of airway smooth muscle (ASM) growth is PKA-dependent. Platform Presentation, June 2008, Aspen Lung Conference, Aspen, CO
7. Garside D, Roper-Miller J, **Riemer EC**. Postmortem Tissue Distribution of Atomoxetine in Fatal and Non-Fatal Dosing Scenarios -- Three Case Reports. J. Forens Sci. 2006 (Abstr Issue). Platform presentation, American Academy of Forensic Sciences, Annual Scientific Meeting, Seattle, WA. February 2006
8. **Riemer EC**, Levine B, Titus JM, Fowler D. OxyCodone (Oxycontin) Related Deaths in Maryland, 1998-2000. J. Forens Sci. 2002(Abstr Issue). Platform Presentation, American Academy of Forensic Sciences, Annual Scientific Meeting, Atlanta, GA. February 2002.

Publications:

Peer Reviewed Publications:

1. Luo H, Yount C, Lang H, Yang A, Riemer EC, Lyons K, Vanek KN, Silvestri GA, Schulte BA, Wang GY. Activation of p53 with Nutlin-3a radiosensitizes lung cancer cells via enhancing radiation-induced premature senescence. Lung Cancer, *in press*
2. Kummerfeldt CE, Huggins JT, Riemer EC, Sahn SA. Pulmonary capillaritis in a patient with moderately positive anti-PL-12 antibodies. International Journal of Rheumatic Diseases, *in press*
3. Bains SN, Tourkina E, Atkinson C, Joseph K, Tholanikunnel B, Chu HW, Riemer EC, Martin R, Hoffman S. Loss of caveolin-1 from bronchial epithelial cells and monocytes in human subjects with asthma. Allergy, 2012 Dec;67(12):1601-4.
4. Al Gadban M, German J, Truman J, Smith KJ, Soodavar F, Heller D, **Riemer EC**, Twal WO, Oates JC, Hammad SM. Lack of nitric oxide synthases increases lipoprotein immune complex deposition in the aorta and elevates plasma sphingolipid levels in lupus. Cell Immunol 2012 Mar;276(1-2):42-51
5. Lambert L, Riemer EC Judson MA. Rapid Development of Sarcoid Tenosynovitis: A Case Report and literature Review. J. Clin Rheumatol 2011 Jun 17(4):201-3
6. Yan H, Deshpande DA, Misior AM, Miles MC, Saxema H, **Riemer EC**, Pascual RM, Panettieri RA Penn RB. Anti-mitogenic effects of beta-agonists and PGE2 on smooth muscle are PKA-dependent. FASEB J., 2011 Jan;25(1):389-97
7. Kokosi M, **Riemer EC**, Highland KB. Pulmonary Involvement in Sjogren's Syndrome. Clin Chest Med. 2010 Sep;31(3):489-500

8. **Rierner EC**, Yan H, Misor AM, Pascual R, Deshpande DA, Penn RB. Mechanisms underlying beta-agonist and prostaglandin E₂ (PGE₂)-mediated inhibition of airway smooth muscle (ASM) growth. Proc Am Thorac Soc 2009 May;6(3):327
9. Ford A, Swing DC, Tobin JR, **Rierner EC**, Shetty AK. A 10-day old neonate with fulminant hepatitis and respiratory failure. J. Paediatr Child Health, 2008; 44(7-8):471-2
10. Deshpande DA, Pascual, RM, Wang S, Eckman DM, **Rierner EC**, Funk CD, Penn RB. PKC-dependent regulation of the receptor locus dominates functional consequences of Cysteinyl Leukotriene Type 1 receptor activation. FASEB J. 2007 21: 2335-2342
11. Deshpande DA, Pascual RM, Mitchell C, **Rierner E**, Funk CD, Penn RB. Physiologic regulation of CysLT1 receptors: role of protein kinase C. Proc Am Thor Soc 2006;3:770
12. Mou S, Nakagawa T, **Rierner EC**, McLean T, Hines M, Shetty A. Hemophagocytic lymphohistiocytosis complicating Influenza A infection. Pediatrics, 2006 Jul;118(1):e216-9
13. Garside D, Ropero-Miller JL, **Rierner EC**. Postmortem tissue distribution of atomoxetine in fatal and non-fatal doses- three case reports. J. Forens Sci. 2006 Jan;51(1):179-82.
14. **Rierner EC**. Pulmonary Lymphangiomatosis. College of American Pathologists Autopsy Pathology Education Program, AU04-A4
15. Grand DS, Lawler LP, **Rierner EC**, Fishman EK. Mediastinal aspergilloma: a rare manifestation of a common infection with CT and pathologic correlation. Crit Rev Comput Tomogr. 2004;45(4):239-46
16. Rierner EC. Inflammatory Atherosclerosis: Characteristics of the Injurious Agent (review). Arch Pathol Lab Med 2003 Nov;127 (11):1533-34.
17. Papadopoulos KP, Murty VV, Matsushima A, **Rierner E**, Rao PH, Nichols GL.



Translocation (4;15)(p16;q24): a novel reciprocal translocation in a patient with BCR/ABL negative myeloproliferative syndrome progressing to blastic phase. Cancer Genet Cytogenet. 1999 May;111(1):18-20.

Other Publications:

1. **Riemer, Ellen C.** Pathologic Diagnosis of Lung Cancer in the Molecular Age: Current Implications and Future Directions. MUSC Pathology and Laboratory Medicine Newsletter, April 2010

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File # 1205798

Briett (Deceased) Johnson, Claimant

VS.

Pike Electric, Inc., Employer,

AND

Liberty Mutual Insurance Company, Carrier,

Defendants.

BRIEF OF THE APPELLANT

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QUESTION PRESENTED

Whether the Single Commissioner erred as a matter of fact or of law in concluding that the Defendant(s) had met their or its burden of establishing the defense of intoxication?

OVERVIEW

This case is about whether the Employer carried its burden of proving intoxication by the Worker at the time of his fatal accident, and more specifically, whether it carried its burden of showing that the “heart stick” on which its defense rests was valid. The method consists of sticking a needle between the ribs into the chest cavity. The goal is to get blood from the heart. Claimant presented the testimony of one of the State’s leading experts on such tests, a professor of forensic pathology at MUSC who studies these things. She testified without qualification that no valid conclusion could come from that blood draw in these circumstances. Among other reasons, she testified that the heart-stick method of drawing blood on which the Employer relies is only valid if one can be sure there was no internal hemorrhaging or moving of organs. The undisputed testimony, even from the Employer’s witnesses, was that hemorrhaging and moving of organs was in fact highly likely, due, for example, to the violent nature of the accident and the vehicle having flipped over. Strapped into his seat belt – which would have itself caused injury – the Worker was left hanging upside down in the vehicle for more than one and a half hours prior to the blood being drawn. Photographs confirmed the near-certainty of such internal injury.

The Employer presented no live testimony. It did present deposition or report evidence from three witnesses. One was a report from another professor at MUSC, this one a professor of psychiatry. He is board certified as a forensic psychiatrist. He never addressed the validity of that blood draw. Instead, he wrote that, based on the blood alcohol as shown by the test of that blood and the speed of the vehicle, he concluded the Worker was drunk. He further concluded that the intoxication was the proximate cause of the crash. This all assumes the blood draw was reliable, a question he never addressed. If that heart stick was not valid, nor are his report's conclusions valid. Defendants' second witness was the deputy coroner who drew the blood from the corpse. He stated at his deposition that his formal training was minimal: one week of education, plus 16 hours a year. He had been taught to use that method of drawing blood long ago, and so always had. He had never heard of the limits on when to use and when not to use that method. He admitted that he had not inspected the body to determine the cause of death or whether internal trauma had occurred. Defendant's third witness was a SLED toxicologist. He testified to his results, but also testified that the test was valid only if one had first determined that there was no internal injury, hemorrhaging or moving of organs. No such determination was made here.

Undisputed testimony was that there was no evidence of alcohol at or near the scene. No spills of liquid. No beer or booze containers. No odor of alcohol in the vehicle. Not a wisp. Nor on the Decedent. The experienced MAIT team scoured the area, searched through the vehicle, emptied the Decedent's pockets—and found nothing to indicate any alcohol use whatsoever. Several witnesses testified that they were in

intimate contact with the body after the accident—two kissed him—and no one detected even a trace of alcohol.

By relying on an invalid test, the Order reached the wrong result.

The burden of proof of intoxication is on the entity claiming it as a defense. S.C. Code Ann. § 42-9-60 (2013). *See also Chandler v. Suitt Constr. Co.*, 288 S.C. 503, 343 S.E.2d 633 (Ct. App. 1986) (emphasis added): “No compensation is payable when the injury or death is occasioned by the intoxication of the employee. The burden of proof of intoxication is on the person claiming it as a defense.”

Chandler affirmed a Commission finding (i.e., reversed a circuit court decision that had reversed the Commission’s finding) that test of blood drawn from an injured chest cavity, as here, was invalid, and that in such instances, “the proper procedure is to obtain vitreous fluid from the eye.” This is what Plaintiff’s expert testified to in this case: this test was invalid, and a proper procedure could have involved vitreous fluid from the eye.

Determinations of credibility are for the full commission. *E.g., Ford v. Allied Chemical Corp.*, 252 S.C. 561, 567, 167 S.E.2d 564, 567 (1969). Even more so here, as all the witnesses whose testimony concerned the invalid test “testified” solely via deposition transcripts. There was no live testimony on these issues. The single commissioner who made the decision received no assistance from tone of voice, facial expressions, body language, changes in rate of speech, or the like. The present panel is fully as capable as was the sole hearing officer to determine credibility of these witnesses.

STATEMENT OF THE CASE

This case stems from the untimely death of the Worker, Briett Johnson, on his way back from an out-of-town assignment on May 17, 2012. The Appellant, Shanice Hamilton, is his daughter; at the time of his death she lived with the Worker and was a senior in high school.

Additional claimants were, but no longer are, Sarah Ann Johnson, to whom the Plaintiff had been legally married and never officially divorced, although the two had lived apart for 19 years; and Margaret Ann Hamilton, Shanice's mother, who lived with Shanice and her father, the Decedent. Margaret and Briett never married because he was never officially divorced.

A hearing was held before Commissioner Avery B. Wilkerson, Jr. on November 4, 2013 at the Southeastern Institute of Manufacturing and Technology in Florence. Prior to the hearing, Ms. Hamilton abandoned her claim.

By Order filed February 28, 2014, Commissioner Wilkerson found that Shanice is the sole dependent, for workers compensation purposes, of the decedent, and that if the case were compensable, the compensation would go to her.

He further held that the case was not compensable, holding that the Defendants, Pike Electric, Inc. (Employer) and Liberty Mutual Insurance Company (Carrier) had carried their burden of proof that the Worker was intoxicated at the time of the fatal accident, and that this intoxication was the proximate cause of the accident.

Shanice timely filed her Form 30 to appeal the single commissioner's decision. No one else has appealed. The Notice of Brief Request mailed April 4, 2013 stated that the case was set for Full Commission Review.

ARGUMENT

I. BACKGROUND FACTS

On Sundays, after church, Decedent Briett Johnson would leave his home in Johnsonville, South Carolina, and drive to the worksite near Columbia, South Carolina, where he worked as a supervisor for Defendant Pike Electric. He would stay over in a motel until Thursday, when he would drive back home.¹

As he was returning on May 17, 2012, at 6:00 pm, just minutes away from his residence and the school gym where his daughter and her mother were attending an athletic banquet, he died in an automotive accident. Apparently he had just passed a vehicle, turned back into his lane just before a curve, and apparently lost control as he entered the curve. The vehicle went up and down the embankment, flipped over and over, clipped a light pole, broke the pole in half, landed upside down, and he died, while still strapped into his seatbelt. Defendants do not dispute that Mr. Johnson's travel was related to his employment. They merely claim that he was intoxicated. They further claim that they have carried their burden of proof, relying centrally on a "stick" test that both side's experts say is not valid without a check for internal trauma.

-
- ¹ A. He would leave on Sunday evening --
Q. Okay. And when would he normally --
A. -- after church.
Q. -- after church?
A. Yes.
Q. And when would he normally come home?
A. On Thursday evening.

Tr. Hr'g 88:7-13.

See also id. at 14:21-23 (statement of Defendants' counsel) ("no dispute" as to claims that he was working in Winnsboro and living in Johnsonville).

Briett Johnson and his daughter were close. Tr. Hr'g 96:20-97:1 (Testimony of Margaret); *id.* at 122:20-22 (testimony of Shanice). She was an honors student and was in Beta Club. *Id.* at 84:2-3, 115:9-16. He would often tell Shanice, or her mother, that due to his work obligations he would be unable to make an event – and then show up.

Q. Ms. Hamilton, Margaret, did Barry Johnson ever tell you he was going to be late from work and not be late from work -- coming home from work; did he ever surprise you?

A. Yes.

Q. And how would he do that?

A. He would just say, like, okay, I won't be to the house until a certain, certain, time and then I'd look around then he was there. And then, I'd ask him to come to the games and stuff like that, oh, I won't get home in time. I'd get to the game and then when I looked around in the stands he was sitting up in there.

Id. at 108:13-24. *See also id.* at 125:15-23 (testimony of Shanice) (similar).

The night in question, there was an athletic banquet at the high school. He knew that both Shanice and her mother were very involved in high school athletics.² He knew they both were planning to attend. *Id.* at 95:19-96:4. Although Barry had told Shanice he would be unable to attend, she didn't really believe him. She figured the odds were 50/50 that he would be there. *Id.* at 123:13-17.³ The athletic banquet was officially supposed to

² Indeed, that night, Shanice received the Student Athlete Award. Tr. Hr'g 116:1-3. Her mother is a volunteer assistant coach. *Id.* at 84:10-12.

³ *Id.* at 123:13-17:

Q. Okay. Did -- you indicated your father said he would not be at the banquet?

A. Correct.

Q. All right. Did you expect him to be there anyway?

A. Fifty-fifty (50/50).

begin at 6 PM. When Barry crashed, at almost exactly 6:00 pm, he was just minutes away. *Id.* at 109:14-24.

Witnesses testified that Mr. Johnson never drinks and drives.

Q. All right. Did Barry drink alcohol?

A. Yes.

Q. And what kind of alcohol did he drink?

A. He drunk brown and then beer.

Q. Are you talking about brown, are you talking like a whiskey?

A. Brown liquor, whiskey.

Q. All right. Did you ever know him to drink while he was driving?

A. No, sir.

Q. In the nineteen (19) years you were with him or more?

A. Never.

Q. Did you ever know him to drink alcohol and then drive a vehicle?

A. No.

Q. All right. Did you drink with him?

A. Yes.

Q. So, you would get a stationary position and consume your alcohol?

A. Yes, at home.

Id. at 99:13-100:7 (testimony of Margaret).

Shanice testified similarly:

Q. Did you ever know him to drink alcohol?

A. Yes.

.....

Q. All right. Did you ever know him to drink while driving a vehicle?

A. No, sir; not at all.

Q. Did you ever note -- know him to drink after -- or drive after having consumed alcohol?

A. No, sir.

Id. at 122:23-123:9.

There was no testimony from anybody that he was seen drinking or under the influence that day. Nor that he was ever known to drink and drive.

II. Governing Law.

This case is governed by S.C. Code Ann. § 42-9-60 (2013) and *Chandler v. Suitt Constr. Co.*, 288 S.C. 503, 343 S.E.2d 633 (Ct. App. 1986).

The statutory section provides (emphasis added),

No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. In the event that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

In *Chandler*, under facts less favorable to the plaintiff than in the current case, the Court of Appeals upheld the panel's conclusion that the defendants had not met their burden of proof. In reviewing the evidence, the Court of Appeals found it important that there, as here,

- the blood sample was taken from the chest cavity of the deceased after a violent crash;
- Claimant's expert testified a proper procedure is to obtain vitreous fluid from the eye;
- there was no evidence that the deceased had been drinking when he awakened, reported for work, or left on the fatal trip;
- the Emergency Medical Services attendant who arrived at the scene of the accident detected no evidence of alcoholic beverage;
- the EMS attendant and the wife of the deceased testified they were in close proximity to the body and detected no odor of alcoholic beverage.

288 S.C. at 505-06, 343 S.E.2d at 605. Here too, as will be shown below, the blood sample was taken from the chest cavity under circumstances indicating that ocular fluid would have been much more reliable; although the deceased was on an out-of-town job as a supervisor, which requires interaction with other employees, not a single person testified that he had been drinking; the EMS attendant searched the scene and found no containers or other evidence of alcohol; and the EMS, the wife of the decedent, and the decedent's daughter testified they were in very close proximity to the body and detected no odor of alcoholic beverage.

The present case is even more in Claimant's favor than were the facts in *Chandler*. The EMS there did not check inside the vehicle for evidence of alcohol, as the vehicle had burst into flames, *id.* at 506, 353 S.E.2d at 635; whereas here, the EMS inspected the inside of the vehicle. Here, not only the EMS but the MAIT team, too, scoured the car and the scene. The *Chandler* defendants introduced eye-witness testimony to reckless driving immediately before the accident, 288 S.C. at 507, 343 S.E.2d at 636 (Shaw, J. dissenting); here, if anything, the evidence is less weighty, as it was not sworn testimony but merely a second-hand report from the accident investigation team. There, the decedent had a history of alcoholism. *Id.* There, the chronology showed an unexplained two-hour gap: It had taken the decedent four hours to drive from Columbia and had not yet reached Charleston, normally a two-hour trip. *Id.*

Perhaps especially important given the *Chandler* plaintiff's history of alcoholism, Defendants presented no evidence that the Decedent ever drank to excess. Given Defendant Employers' ready access to Decedent's co-workers, it is noticeable that they produced not a single one of their employees to testify that he ever snuck a drink at work,

or even had a beer with the boys before driving home. Yet, according to Defendants, he suddenly emerged as a full-bore alcoholic, driving with a .208 blood level. Defense witness Mr. Sears testified that it would take ten or eleven drinks in an hour for a 150-pound man to reach the .208 level the test of the blood showed, Sears Depo. 39:19-42:1; it would have taken at least 13-plus drinks for a 204-pound man such as Mr. Johnson, *see* his driver's license, attached to the SLED report as page 28; even more if one assumes a longer time span. Common sense says alcoholism of this extent does not appear overnight.

Yet the Employer presented no testimony of the Decedent ever using alcohol while working. It presented no work records. There is no record whatsoever of him ever being reprimanded. If it had the records, it would most certainly have used them.

Nor is there any evidence of Mr. Johnson ever being charged with, much less convicted for, DUI, disorderly conduct, or the like.

III. The Commissioner Erred as a Matter of Fact or of Law in Concluding that the Defendant(s) Had Met Their or Its Burden of Establishing the Defense of Intoxication

A. The "Stick" Was Not Valid as There Is No Evidence the Requisite Examination Was Done.⁴

The Commission can decide this case very easily. Regarding the method used to draw blood from the Decedent, Defense expert Robert Sears testified at his deposition,

⁴ The Order refers to the blood draw as a "heart stick," p. 9, as the needle is placed into the area where the heart usually is. Certainly Mr. Reynold, who drew the blood, thought he was drawing it from the heart. Reynolds Depo. 11:22-25. Testimony described below indicates that other organs may have been moved to that area by the collision and subsequent suspension of the body; and that blood from ruptured organs would have accumulated in the chest cavity where the needle was inserted. By use of the term "heart stick," Claimant does not mean to indicate that Mr. Reynolds did in fact draw it from the heart.

I guess, you know, provided that they did an external exam on the body, and felt like there was no significant internal trauma that would be a very acceptable way to do that.

Sears Depo. 15:22-16:1 (emphasis added). His “guess” that the stick would be acceptable is predicated on one’s having examined the body to determine that there was no significant internal trauma. (His testimony is undisputed; Plaintiff’s expert agrees. Riemer Depo. 39:4-23.) But there is no evidence that such an exam was done. Defendants are thus unable to validate their test. As they have the burden of proof, S.C. Code Ann. § 42-9-60, it was their burden to establish the validity of the test. Instead, they have done the reverse.

Defendants’ attempt to shift the burden of proof of validating the test on which Defendants rely should be rejected.

B. The Stick Was Invalid for Additional Reasons.

1. The stick was not valid as the only evidence is that the requisite examination was not done.

Not only is there an absence of evidence of any examination performed by the blood-drawer, what evidence there is all to the effect that no such exam was done. As the Order properly recognizes, “Mr. Reynolds did not personally inspect the Decedent’s body to determine cause of death, but consulted with EMS personnel on the scene.” Order, p. 8. Don Reynolds, the deputy coroner who took the blood, testified that he took the cause of death from the EMS and the Highway Patrol; he did not even examine the clothes, let alone the body. E.g., Reynolds Depo. 18:16-20, 19:20-22, 22: 20-23, 23:12-13, 35:8-9 (took his information from the EMS and the highway patrol); 26:15-27:2 (did not even examine

the clothes). His testimony as to his lack of any exam for internal injuries is supported by EMS Paramedic Redmond.⁵

Because Defendants failed to present any evidence that the examination required for a test based on the stick draw to be valid was undertaken, and because the evidence is that no such examination was conducted, the test was not valid and should not have been considered.

2. The stick was not valid as internal trauma cannot otherwise be ruled out – indeed, internal trauma appears quite likely.

Defense witness Reynolds did not testify that there was no internal trauma. He did not testify that internal trauma was unlikely. Instead, he testified, “The condition was that he had severe trauma. He was pinned into the vehicle.” *Id.* at 9:11-12. “I can’t give you an exact picture of how it was, but the car was upside down and squashed down in there and he’s inside.” *Id.* at 17:20-22.

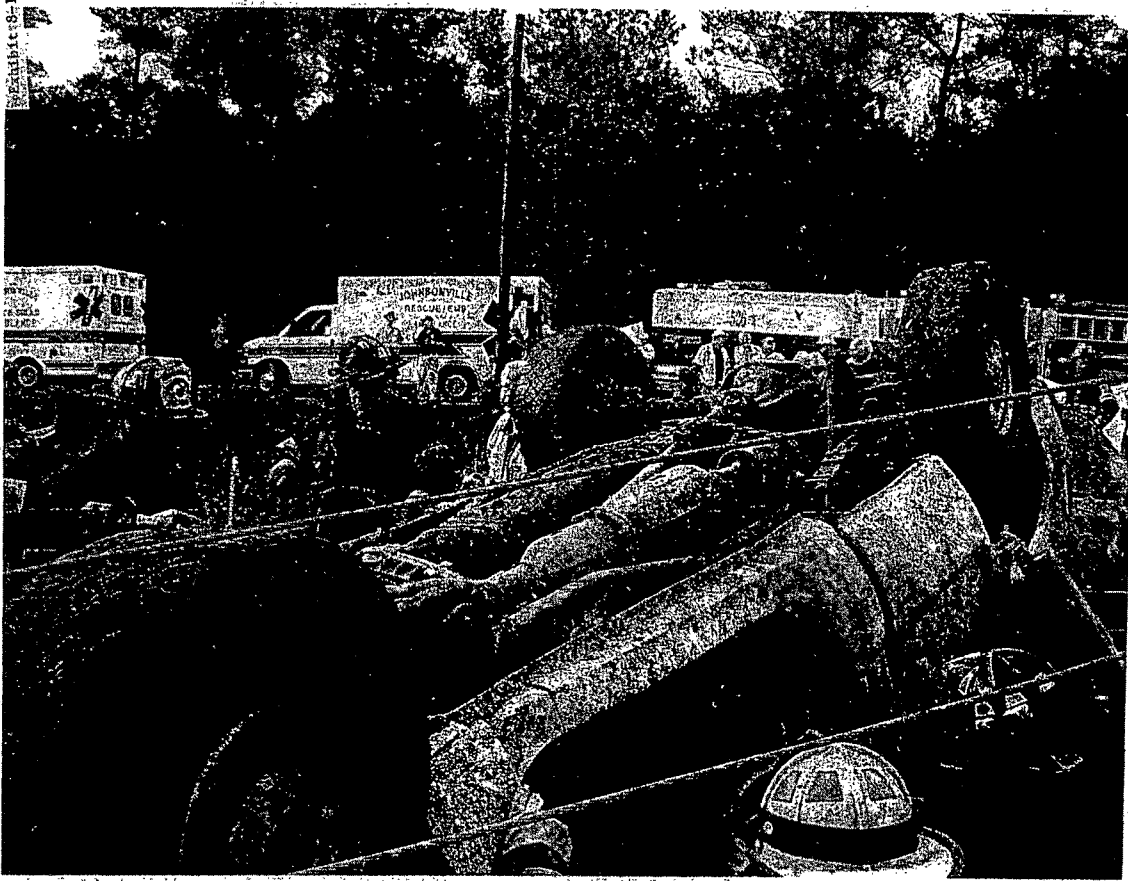
The photographic record assembled by the MAIT team confirms.

⁵ EMS Paramedic Redmond testified, Tr. Hr’g 46:1-8:

- Q. All right. Did any -- did the Assistant Coroner, Mr. Reynolds, did he do any kind of examination of the body?
- A. He just glanced at him and I want to say he took several pictures in the back of the unit and that’s all I knew --
- Q. Okay.
- A. -- know he did.

Mr. Redmond further testified that Mr. Reynolds spent “Probably ten minutes, max,” with the body. *Id.* at 56:1-3.

- Q. Okay. And, again, you don’t know how long the Deputy Coroner spent with the body at all, do you?
- A. Probably ten (10) minutes, max.



Photograph 1: The vehicle after the accident (APA 8-1).

Photograph 1 accurately shows the position the truck was in when EMS reached the accident site. Tr. Hr'g 34:8-24 (testimony of EMS Redmond).



Photograph 2. Decedent in vehicle. (APA 8-2)

Note that he is strapped in. *See* Tr. Hr'g 38:9-22 (testimony of EMS Redmond)
(photograph accurately displays Briett's position at time of the accident).

The body was suspended in the vehicle like this for an hour and a half. *Id.* at 42:9-15:

Q. Now, Mr. Redmond, how long was this body suspended in this vehicle?

.....

A. that would be better than an hour an [*sic*] a half.

When they cut the belt, the body dropped. *Id.* at 43:4-8:

We had to cut the seat -- seatbelt and it dropped him down some and his foot -- I believe it was his foot -- was pinned in under the -- under the

dash. And we had to cut the door off to get in and lift the dash up off of him a little bit



Photograph 3. Decedent in vehicle. (APA 8-3).

See Tr. Hr'g 38:9-22 (testimony of EMS Redmond) (photograph accurately displays Briett's position at time of the accident).

So too does other testimony confirm the almost-certain existence of internal injuries. Although Defense counsel fought to prevent evidence of internal injuries from being considered,⁶ Plaintiff's counsel was able to introduce such evidence. For example,

⁶ For example, in the examination of John Caughman Pinckney, the funeral director, the following exchange occurred when Claimant's counsel asked about the general condition of the body:

Thomas E. Redmond, who was one of the first EMTs in the State, Tr. Hr'g 32:24-25, and had been an EMS for 52 years, *id.* line 23, was allowed to testify. Based on his 52-years' experience, Mr. Redmond concluded that "he had internal injuries." *Id.* at 44:15.⁷

Q. Okay. What was the general condition of the body when you picked it up?

A. Well, no facial damage but you could tell basically by limberness in the neck and also the -- the movement that there were internal injuries.

Mr. Hylton: Objection, I don't think there's basis for internal injuries.

Commissioner Wilkerson: Yes, there is no basis for internal injuries.

Tr. Hr'g (examination of Mr. Pinckney) 65:3-10.

⁷ Even this was allowed only after Defense Counsel initially attempted to prevent consideration of the evidence.

Q. Okay. Could you describe any injuries that were ascertainable by you doing that?

A. He had some face trauma, abrasions and cuts, and his neck was real swollen; I don't know whether that was from the seatbelt or what. He had -- probably had internal -- a massive internal injury --

Mr. Hylton: Objection to --

Commissioner Wilkerson: Yes, because he doesn't know that.

Mr. Hylton: -- speculation.

Mr. Askins: Okay.

Q. All right.

A. -- and in my -- in my experience in fifty-two (52) years I -- I can say he had internal injuries --

Mr. Hylton: Same objection.

A. -- but I'm not a doctor.

Commissioner Wilkerson: Well, he -- he can give us what his opinion is --

Mr. Hylton: That's right.

Commissioner Wilkerson: -- based on fifty-two (52) years of experience.

Mr. Askins: Yes. Okay.

Q. All right.

Commissioner Wilkerson: I'll allow that, yes.

3. For similar reasons, the most credible expert testified that the blood test was invalid.

a. Prof. Riemer's qualifications.

Plaintiffs presented the deposition testimony of Ellen C. Riemer, M.D. She is a forensic pathologist on the faculty at MUSC. Reimer Depo. 7:12-18. She is a publishing scientist in the field, with many peer-reviewed publications. Reimer c.v. pp. 5-6 (listing peer-reviewed scientific publications). Following her graduation from the Tel Aviv University School of Medicine, she was further trained at Columbia-Presbyterian Medical Center in New York, in the Office of the Chief Medical Examiner of the State of Maryland, and at Johns Hopkins. She was on the faculty of Wake Forest University School of Medicine, also doing pathology, before coming to MUSC. Reimer Depo. 5:15-7:18.

Prof. Riemer is expert in precisely the field at issue here.

b. Prof. Riemer's motivations.

Over the five years she has been in South Carolina, she has testified twenty-five times, an average of five times a year, in South Carolina Circuit Court. She testified in courts in North Carolina during her time on the faculty of Wake Forest. She has never been denied qualification as an expert in forensic pathology. *Id.* at 8:9-9:15.

She testifies only if the issues are of interest to her. Otherwise, she will simply not take the case.

I hardly do any of these. It's just a handful of these a year that are of interest to me. I'm not required to do any of these. And it's only if the case is of interest to me. Like I have something that I can contribute to an understanding of the case that I'll even accept because like I said, it's really not money that I'm getting directly. It's because I seek to provide assistance to help clarify issues.

Reimer Depo. 35:1-8.

She is not motivated to testify by money. Any money goes to the Department; she may eventually get "a small percentage" of that, "very small," *id.* at 33:5-10. This not enough to make her agree to take a case, let alone to bias her opinion.

When she does agree to take a case, it is to provide her honest opinion, not to come out one way or the other.

Q. Okay. Now, just a followup on Mr. Hylton's question concerning your employment in this case, when you were employed – were you employed to give a favorable opinion or to attack the toxicology report, or are you employed to explain the toxicology results to me and give your opinions as to that?

A. The latter.

Q. All right. Would you be for hire any other way?

A. Never.

Prof. Reimer is highly-qualified and properly-motivated.

c. Prof. Riemer's information base

In preparing her analysis, Prof. Riemer reviewed the MAIT report; the death certificate; the deposition of Deputy Coroner Reynolds; the deposition of SLED toxicologist Sears; and the toxicology report. Riemer Depo, 9:20-11:1. She reviewed the photographs presented above, and more. *Id.* at 12:7-15. She understood that the decedent was restrained. *Id.* In short, she had all the information.

As discussed below, none of Defendants' witnesses had all the information, and the gaps are telling.

d. Prof. Riemer's substantive testimony.

Prof. Riemer testified that, as common sense indicates, extensive internal trauma is likely in this case. "And the likelihood of that is increased when there is extensive internal trauma as is likely in this case." Riemer Depo. 14:8-10 (emphasis added). "A. I would expect them to be -- there to be internal lacerations or injuries to internal organs." *Id.* at 16:6-7.

Prof. Riemer pointed out that while Mr. Reynolds stuck the needle into what he thought was the heart, the region where the heart normally is, there is no way of telling, after an accident of that magnitude, what organs are in that region. *Id.* at 13:9-17. The heart will probably be in that region, but so will other organs. *Id.* "Q. So there's no way to tell if Mr. Reynolds actually got a specimen from the heart itself? A. That's correct." *Id.* at 15-17.

She testified that bacterial proliferation can be significant after death, causing postmortem ethanol production – by the bacteria, not by the human body, and that the possibility of such proliferation is increased where there is extensive internal trauma, as is likely here.⁸

⁸ Riemer Depo, 14:6-14:

Well, after death, there can be significant amounts of bacteria proliferation which is associated with postmortem ethanol production. And the likelihood of that is increased when there is extensive internal trauma as is likely in this case. And second of all, when a specimen is stored at a higher temperature, it is going to increase the rate of postmortem bacteria production and ethanol production.

She further testified that the blood in the heart region could easily have been comingled with blood spilling out of other organs. *Id.* at 15:15-17.⁹ Blood spilling out of other organs would go with gravity and end up in the region of the chest cavity, precisely where Mr. Reynolds drew it from. *Id.* at 16:8-13. Both spleen and liver rupture or laceration could be "very likely." *Id.* at 16:14-18.

As a result, a .208 reading could have occurred without Mr. Johnson having consumed any alcohol. *Id.* at 16:19-23.

when there is internal trauma of internal organs, blood from those organs gets mixed up -- it gets -- basically it goes into body cavities. And this blood is -- there is bacterial contamination from internal viscera and bacteria consume the sugars in the blood, which the sugars are very high in the liver and the spleen. And so these -- blood from these organs is known to cause very high levels of alcohol more than just isolated peripheral blood. Second of all, blood could have been elevated. The fact that it's being stored at a warm temperature prior to refrigeration could also elevate the postmortem production of ethanol, and even the use of a swab to clean the area, that could have contributed also to the increase in ethanol. So all of these things in concert could lead to a false-positive ethanol measurement.

Q. Okay. Even with that, any consumption or evidence of consumption of alcohol by the victim?

A. That's correct. And investigation was also involved to know if there was consumption. That's not the only -- but there are other explanations here that could -- that could explain the presence of the ethanol concentration.

Id. at 16:25-17:23.

She identified other problems with this test in this situation, *id.* at 18:8-21:12, and concluded that the test in this case, to a reasonable degree of medical certainty, is not a reliable indicator of ethanol consumption. *Id.* at 21:13-18:

⁹ "A. That's correct. And, you know, heart blood would have easily -- could get easily mixed with blood leaking and spilling out of tears in internal organs." *Id.* at 15:15-17.

Q. Dr. Riemer, in your professional opinion, within a reasonable degree of medical certainty, what would you say about the reliability of the toxicology result of 0.208 ethanol in this case?

A. To a reasonable degree of medical certainty, it's not a reliable indicator of ethanol consumption.

In other words, it is not a reliable indicator that he had been drinking.

e. Dr. Riemer is the most credible witness.

Five experts were presented (using the word “expert” in the broad sense to include those whom by experience can assist the fact-finder), three by the Defendants and two (Dr. Reimer and Mr. Redmond) by the Claimants. With all respect to Mr. Reynolds and Mr. Sears, the only defense expert who might be remotely qualified to go head-to-head with Prof. Riemer is Prof. Ballenger – and he does not address the issue. He basically assumed the blood-draw itself was proper.

That is not his fault: at the time of his report, Mr. Reynolds had not yet been deposed regarding where the blood had come from. Nor had Mr. Sears nor Dr. Riemer been deposed. Dr. Ballenger’s report is dated 8/24/12; Mr. Reynolds would not be deposed until 8/28/12. Mr. Sears was also deposed on 8/28/12; Dr. Riemer was deposed a little over two months later, on 11/5/12. There is no indication in his report that he was even aware of where the blood was drawn from. He simply does not address it.¹⁰

Nor does Dr. Ballenger even pretend to be anything here other than a gun-for-hire. There are certainly no interesting scientific issues apparent from his report that

¹⁰ Indeed, Dr. Ballenger nowhere states where he received the information that “His blood alcohol level was drawn at the morgue approximately three hours later, and the result was 0.208 %,” *id.* p. 1; for all that can be determined from his report, that information was provided to him by Defendants’ counsel.

could have enticed him to take this case. As Defense counsel conceded, "Dr. Ballenger was a paid expert."¹¹

Mr. Sears agreed with Dr. Reimer that the test would be valid only if the body were examined for internal injuries. To the extent, if any, that there may be a conflict between Mr. Sears and Prof. Reimer, Mr. Sears has a master's degree in pharmacology from the school of pharmacy at USC, and he similarly attends trainings. Sears Depo. 18:9-24. His c.v. makes clear that these trainings primarily concern how to operate the equipment once blood is sent to his agency, not how to initially take the blood. Sears c.v., pp. 1-7. His training in the issues relevant here is simply dwarfed by Prof. Reimer, who spent years studying the field, teaches these things professionally, continues to study them, and writes about them in scientific journals.

Also important is the different amounts of information about the facts of this matter that were available to each of them. Mr. Sears was not allowed to view the documents:

Q Okay. And, again, I don't know if you've had a chance to see the MAIT report in this case.

A No, sir, we're not provided with that information. Our results stand on their own.

Sears Depo., 22:6-10. In short, he gets the blood. He gets papers showing how the blood came to him. He gets the one-page "Forensic Sciences Request" form Mr. Reynolds

¹¹ The Order appears to find fault with Dr. Reimer because she "almost never" states that alcohol is a factor in an accident. Why should she? Her expertise is in matters such as the taking of blood samples to ensure accurate results. Where an eye-witness may testify that the person seemed drunk and that his actions that caused the accident appear to have been a result of intoxication, a valid test result showing a high alcohol concentration can be powerful. But without someone to describe the actions that led to the accident for a toxicologist to testify as to alcohol being the cause is beyond her field. She should be respected rather than criticized for remaining within the bounds of her field.

filled out, which does not even state from where in the body the blood was taken. Ex. 3 to Reynolds Depo. That is all he is allowed to look at.¹²

But again, he recognized the limitations of the information he had. He stated that the blood draw would be valid only if they first had done even an external exam of the body for internal injuries.¹³ Recognizing that he did not have all the relevant information, he repeatedly refused to "hazard a guess" as to whether a stomach rupture played a role. "[W]ithout visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other. . . . that's something for the person who drew the sample." Sears Depo. 51:3-9.¹⁴ "I didn't see the body. I don't know." *Id.* at 52:2-3.

In contrast, Prof. Reimer reviewed the MAIT report, the death certificate, and the deposition of Deputy Coroner Reynolds. (She also reviewed the deposition of Mr. Sears and his resulting report.) Reimer Depo, 9:20-11:1, 12:7-15.

¹² Even whether there had been an autopsy, which is stated on the form Mr. Reynolds sent in, is outside of Mr. Sears' analysis. "[A]nd there was no autopsy performed. And your records reflect no autopsy, I think, too, right? A. We -- we are often times not told of that. That is outside of my analysis." Sears Depo. 34:24-35:3.

¹³ His testimony on that point, briefly excerpted above, is more fully:

In many cases, a heart stick is what the coroner or assistant coroner will use because they are not going to cut open the body as they would with an autopsy. This is an accepted method for them to draw the fluid. I guess, you know, provided that they did an external exam on the body, and felt like there was no significant internal trauma that would be a very acceptable way to do that.

Sears Depo. 15:18-161.

¹⁴ Mr. Sears testified, Sears Depo. 50:23-51:9 (emphasis added),

Q. Okay. So in your expert opinion, is it likely that the stomach ruptured in this case and --

A. Without --

Q. -- affected the sample?

A. -- without visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other. I don't see any peaks that would indicate to me that there was a huge amount of any external compounds there. But, again, that's something for the person who drew the sample.

Mr. Reynolds had "a week" of training at SLED, and does 16 hours of continuing education each year. Reynolds Depo. 7:4-14. He also received some informal training from an autopsy doctor when he started his job. *Id.* at 32:11-15.

He takes blood from the heart because he simply likes that way.

Now, different people draw blood different ways. Some draw what -- if they can get it out of a vein. Some try to get it out of carotid arteries. Some try to get it out of the feet. Myself, I get it out of the heart because it's direct and straight in

Id. at 32:3-8.

When he first started with the coroner's office, he would do it the wrong way.

I'd get a nurse down in the autopsy room at McLeod. And they would go in there and they'd prep the arm, and they'd beat it, you know, do all the things that they normally do, which I've learned was wrong.

Id. at 39:11-15.

That's why he went on "autopsy runs" to Charleston, to learn another way. *Id.* at 39:15-18. Once he learned to do it another way, he stuck with that way: "Q. All right. And since '97, have you been drawing the blood the same way? A. Yes, sir." *Id.* at 340:3-5.

Although he had been shown how to draw fluid out of the eye, *id.* at 15:13-16, he never learned that ocular fluid would be more precise.

Q So you don't know anything about blood alcohol levels --

A No, sir.

Q -- other than just drawing it, is that correct?

A That's correct.

Q As far as drawing blood or extracting blood, did you ever have any -
- any training on that, particularly?

A The only training that I had was on autopsies in Charleston under a doctor there that showed me how to do it, drawing vistri out the eye and drawing blood out of the heart.

Id. at 15:13-16.

Q All right. And did you learn during your training that -- that eye fluid or ocular fluid would be much more precise in -- in being able to -- the toxicology report?

MR. HYLTON: Object to the form of the question.

BY MR. DEBERRY:

Q Do you have any knowledge that -- that ocular fluid would be more --

A No, sir.

Id. at 33:15-24.

In fact, Mr. Reynolds disclaims all knowledge of or relevant experience with blood alcohol levels. "Q. All right. Do you have any knowledge or experience in dealing with blood alcohol levels? A. No, sir, I don't." *Id.* at 13:5-8.

In sum, Dr. Reimer was expert, knowledgeable about the facts of the case, and consistent. Mr. Sears said the test would not be valid in these conditions. In the light most favorable to the Defendants, he then waffled. He never saw the MAIT report; she did. He never saw the photographs. She did. Thus she had both a deeper knowledge base from her work and a knowledge of all the relevant facts -- facts that were denied to him. She also had the benefit of considering his thoughts before reaching her conclusion; he never had the benefit of her thoughts. The panel should put its trust in the person with more expertise and all of the facts, rather than a person with lesser expertise from whom important facts were kept hidden.

4. Other tests could have provided more reliable results.

"Respondent's expert testified that because samples obtained in this manner are subject to contamination from a stomach contents the proper procedure is to obtain vitreous fluid from the eye." *Chandler v. Suitt Constr. Co.*, 288 S.C. 503, 505-06, 343

S.E.2d 633, 635 (Ct. App. 1986). In the present case, Appellant's expert testified that ocular fluid would have been more accurate, and that she tests using ocular fluid. Riemer Depo. 5-12; *see also id.* 18:8-12 (she takes vitreous fluid even when doing an autopsy, to compare the results of that fluid with the results of the blood drawn).

Defendants have presented no reason an ocular draw could not have been. Mr. Reynolds knows how to draw fluid from the eye.

5. Defendants have conceded their case.

Regarding internal trauma, Defense Counsel argued, "there is no way to know that without an autopsy being done, which was not done in this case." Tr. Hr'g 19:20-20:1 (emphasis added).¹⁵ The testimony, much of it elicited by Defense Counsel, backs him up on this point.

Q. Okay. And what did they teach you to look for regarding internal injuries?

A. The entire body.

Q. Okay. But you didn't review an autopsy at all in this case, did you?

A. No, sir.

Id. at 56:20-25 (cross-examination of Mr. Redmond).

Defense counsel continued, *id.* at 57:1-13 (emphasis added),

Q. Okay. And, again, you wouldn't disagree with Dr. Riemer that you would have to view a -- an autopsy in order to definitively determine internal injuries, would you?

¹⁵ 19:20-20:1 (emphasis added):

It was noted that he died of severe head trauma; APA page 75, and had a crush injury to his neck and that's page 85, and there is no mention of trauma -- internal trauma; again, there -- there is no way to know that without an autopsy being done, which was not done in this case.

(Argument of Mr. Hylton).

A. I'd have to view that autopsy. I have viewed autopsies before.

Q. Right.

A. Yeah, but --

Q. But that's the only way to determine internal lacerations and injuries, correct?

A. -- correct. That's the only way a doctor can determine it by exposing the body parts and x-rays and MRI's and so forth.

Thus, testimony elicited by Defense Counsel backs up the point he argued to the Commissioner: the only way to tell is with an autopsy.¹⁶ As also brought out by Defense Counsel, Dr. Reimer agreed that although internal trauma was highly likely, the only way to be sure was via autopsy.

A. Well, the details of the collision make it likely there were internal injuries.

Q. Likely, but you don't know.

A. No. I did not do an autopsy. The autopsy is the only way to know for certain.

¹⁶ The decision not to have an autopsy was Mr. Reynolds', on which he deferred to the highway patrol.

Q So you made the decision for no autopsy?

A Yes, sir.

Q All right. And what did you base that decision on?

A I talked with the highway patrol, and from their [sic] -- we all get our heads together. I asked them, I said, do you need an autopsy? I was told, we don't need one. I said, well, I'll draw fluid. They said that's okay, and that's what I did.

Reynolds Depo. 35:3-13.

(It appears the highway patrol might have asked for an autopsy, had there been any reason to suspect alcohol.

Q Was there any inclination from anybody that you gathered whether or not the individual may have been under the influence?

A Nobody told me anything about that.

Q So there was no evidence that you saw on the scene that would indicate that?

A Not that I can recall, sir.

Reynolds Depo. 35:14-20.)

Riemer Depo. 25:8-12 (emphasis added) (cross-examination by Mr. Hilton). Other testimony also indicates that an autopsy is the most reliable method.

But this point is fatal to Defendants' case. They have the burden of proof. By testimony they elicited, the only way to tell would have been an autopsy.

Section summation.

The one expert who studies these things says the test is not reliable under these circumstances. The one expert who had all the facts says the test is not reliable. Defendants' most highly-trained expert did not address the issue. Defendant's other expert says the test is valid only under conditions not present here. Defendants' counsel agrees that one cannot tell if the conditions that would make the test valid exist. The test should not be taken as reliable.

C. Without The Invalid Stick Test, Defendants Cannot Carry Their Burden of Proof.

Without the stick test, Defendants' case falls apart. All they have is that Mr. Johnson was speeding at a high rate. Speeding is not a defense.

Defendants speculate that Mr. Johnson must have been drunk, because the testimony was that he was usually a careful driver, rarely known to speed; it would have been anomalous for him to be speeding at such a high rate. But the testimony was even stronger that he never drank and drive. So it would be even more anomalous to conclude that he was drinking than it would be to conclude that he was speeding for another, unknown reason.

Q. All right. Did Barry drink alcohol?

A. Yes.

- Q. And what kind of alcohol did he drink?
- A. He drunk brown and then beer.
- Q. Are you talking about brown, are you talking like a whiskey?
- A. Brown liquor, whiskey.
- Q. All right. Did you ever know him to drink while he was driving?
- A. No, sir.
- Q. In the nineteen (19) years you were with him or more?
- A. Never.
- Q. Did you ever know him to drink alcohol and then drive a vehicle?
- A. No.
- Q. All right. Did you drink with him?
- A. Yes.
- Q. So, you would get a stationary position and consume your alcohol?
- A. Yes, at home.

Tr. Hr'g 99:13-100:7 (testimony of Margaret).

Shanice testified similarly:

- Q. Did you ever know him to drink alcohol?
- A. Yes.
- Q. What kind of alcohol would he drink?
- A. Brown whiskey, liquor.
- Q. Okay. Did he ever drink any beer?
- A. Yes, sir.
- Q. All right. Did you ever know him to drink while driving a vehicle?
- A. No, sir; not at all.
- Q. Did you ever note -- know him to drink after -- or drive after having consumed alcohol?
- A. No, sir.

Id. at 122:23-123:9.

The highly experienced MAIT team scoured the area. *See* MAIT report. At least five MAIT members participated in the investigation. *See* page 7 of APA 8 (MAIT report) (Document entitled, "SCENE CASE. NOTES.") Two others assisted, *see* page 31 of APA 8 (noting contributions of two others). The MAIT team are not rookie highway patrol. They checked out the vehicle. They checked out the body. Numerous photographs they provided document that they searched the entire scene. They even have a picture of a speeding ticket he had in his pocket. Photograph DSCN0106.JPG (MEIT report CD). What were they looking for? A beer cap, a bottle opener, a receipt showing a purchase of alcohol. Drugs. Anything else that would show drug or alcohol use. They are trained to look for evidence of alcohol. They found nothing.

They stated in writing that they found no evidence of alcohol use. MAIT Report, p. 4 (document entitled, "ORIGINAL-AMENDED," with "FINDING #1" stamped on top.) They so stated again. *Id.* at. 35 (document entitled, "Collisions," stating "Alcohol Related . . . (check box for yes)" (emphasis in original), with box not checked).

They are trained to look for evidence of alcohol, as noted above, and as noted in footnote 16, they were the ones who told Mr. Reynolds that an autopsy was not needed. If they had had any evidence of alcohol or drug use, presumably they would have not declined an autopsy.

Members of the volunteer Fire Department searched as well. They, too, found no evidence of alcohol.

EMS Redmond also spoke to the absence of signs of alcohol. "I spent probably eighteen (18) months in Paramedic school." Tr. Hr'g 56:18-19. As noted earlier, he was one of the first EMTs in South Carolina. He is ALS, BTLS and PALS certified, was a

Certified Instructor "for Red Cross and American Heart," and has attended numerous seminars and workshops over the years. *Id.* at 33:5-8. He has been an EMS for 52 years and a paramedic for 24. *Id.* at 32:23-33:3.

He has been to 1,500 to 2,000 wreck cases in his career; approximately half of those involve alcohol. He looks for signs of alcohol. But in this case, although he crawled into the cab, and got up close and personal with the body, and searched the cab and the surrounding area, he smelled nothing and saw no containers.

He testified,

Q. . . . All right. Now, about how many wreck cases have you been to, Mr. Redmond?

A. In my career probably fifteen hundred (1,500) to two thousand (2,000).

Q. Okay. Have you ever been to any that involved someone who had been using alcohol?

A. Yes, sir; probably fifty percent (50%).

Q. Okay. It -- it -- during those times could you ever ascertain the use of alcohol by odor or any other method?

A. Yes, sir. I've been able to smell the alcohol odor in the car and on the person. Also, normally you've got beer bottles or liquor bottles or whatever --

Q. Okay.

A. -- and they're normally thrown out at the scene in a rollover like this.

Id. at 40:8-23 (emphasis added). But in this case, there was no such evidence.

He was in close proximity to the body.

And when we got to him I was able to crawl through the back window and ascertained there was no life. The first thing you check is the carotid pulse, that's our protocol, and there was not -- you could not feel a carotid pulse and I could tell he wasn't moving or breathing and hadn't moved or breathed in a few minutes.

Id. at 33:21-33:2 (emphasis added).

Q. During your examination of the body and waiting on the body did you have -- did you see any evidence of alcohol consumption?

A. No, sir.

Id. at 41:12-15. He was asked again and again stated the same:

Q. Did -- did -- and you testified earlier that you went up in the cab, as I recall; is that correct?

A. Yes, sir.

Q. And checked his carotid artery --

A. Yes, sir.

Q. -- and to see if there were any signs of life?

A. That's correct.

Q. All right. Did you ascertain any odor of alcohol at that point?

A. None, whatsoever.

Id. at 41:16-25.

He was also "up close" with the body while cleaning the Decedent's face, and again, there was no odor of alcohol. *Id.* at 46:21-47:3.

Q. Now, when you said you were cleaning his face with two-by-two (2x2) and sterile water did you get up close to that body at that point?

A. Yes, sir.

Q. Did you detect any odor of alcohol at that point?

A. None whatsoever.

Q. All right.

A. And my report designates that also.

Id. at 46:21-47:3 (emphasis added):

Funeral director Pinckney was also in close proximity to the body, and smelled no alcohol. "Q. Okay. No odor of alcohol -- A. None. Q. -- about his person or his clothes or anything? A. None." *Id.* at 66:1-4.¹⁷

Margaret and Shanice also got "up close and personal" with the body, and neither smelled even a wisp of alcohol. As Mr. Redmond explained, *id.* at 48:19-49:3,

A. -- they were crying and leaned over and kissed him.

Q. Did each of them kiss him?

A. Yes, sir.

Q. And when they kissed him, where did they kiss him?

A. On the cheek.

Q. Okay. So, they both got up close and personal with the body themselves?

A. Yes, sir. Shanice just laid her head on him and --

Q. Okay.

A. -- and -- and was crying.

But neither one smelled any odor of alcohol on him. "Q. All right. Did you detect any type of alcohol odor on him? A. No, sir; I didn't smell anything on him." *Id.* at 99:11-12 (Margaret). Shanice testified similarly.

Q. Now, your mother testified and got very emotional about hugging your father; did you do anything like that?

A. Yes, sir; I did.

Q. What did you do?

A. I hugged him and I kissed him on his cheek and forehead.

Q. Okay. Did you -- did you ascertain any odor of alcohol about him?

¹⁷ To the extent the Order places any weight on its statement that the testimony of Mr. Pinckney and Mr. Redmond conflicts as to who was standing where, ¶ 19, the Order errs. It seems obvious that EMS Redmond had been to many more wrecks since the accident and funeral director Pinckney to many more funerals. It would be unfair to say, if that is what the Order implies, that they are not credible because they did not explain to the Commissioner's satisfaction where they were at the instant the body was rolled from one gurney to another.

A. No, sir; I didn't.

Id. at 120:12-20.

Mr. Redmond finds it important to examine the accident scene and the larger area for alcohol containers. He is not actually trained in it ("Actually trained for it; no, sir," *id.* at 51:16); it is just common sense. It is also validated by his 52 years experience.

He affirmatively sought evidence of alcohol use. *Id.* at 51:23-25. But there wasn't any.

Because I was crawling in the back window of that truck and there was a lot of trash in there and -- and boots and -- but I did not smell any alcohol. Normally if somebody is drinking in -- in a vehicle like that and alcohol is in there its going to spill all -- all over the vehicle, whether it be a cup or a beer can, and -- and you're going to smell it and I have got it on me before.

Id. at 52:2-9 (emphasis added).

But in this case, there wasn't any. ("Q. Okay. And you found -- in this case what did you find? A. I found none." *Id.* at 52:10-11). He even walked around the scene looking for evidence:

Q. Okay. What about did you also look for containers: Beer bottles, beer cans, liquor bottles; that sort of thing?

A. Yes, sir. I even walked around the scene looking for that kind of stuff and I walked down the road where he ran off the road originally.

Id. at 52:12-17.

Thus, in 750 to 1,000 wrecks involving alcohol that he has responded to in his career, "normally" there is going to be an odor of alcohol about the person; here there was none. "Normally" there will be an odor of alcohol in the vehicle; here there was none. "Normally" there will be alcohol containers in the vehicle and/or near the scene; here there were none.

One can attempt to speculate away the absence, as the Defendants did. The Order unfortunately accepts that speculation. But that is all it is: speculation.

The Order erroneously rejects or disparages all this evidence. It rejects the testimony of the extensive search for containers as “inconsequential,” speculating that Mr. Johnson may have consumed the alcohol before entering his car. It states, ¶ 8, “The lack of alcohol containers at the scene is inconsequential, as the Decedent may have consumed alcohol before entering his car” If that is the theory, certainly Defendant Employer could have provided one of its employees to testify that Mr. Johnson had indeed become drunk before embarking on the trip. He was working as a supervisor up until the moment he left. That job requires interaction with the Defendant’s employees. But they produced not a single witness in support of this idea. *Chandler* found it important that “the deceased did not appear to be intoxicated when he awakened, reported for work, left for Columbia, arrived in and departed from Columbia.” *Chandler v. Suitt Constr. Co.*, 288 S.C. at 506, 343 S.E.2d at 635. It is Defendants’ burden of proof, by statute specific to these sorts of claims. Even without the statute, it would have been their burden to provide evidence in support of any fact they assert. *Landbank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 628, 632 S.E.2d 882, 886 (Ct. App. 2006) (“the burden is on a party pleading a fact to prove it.”)

Defendants’ assertion is that Mr. Johnson had a blood alcohol level of .208. That’s ten to eleven drinks in an hour for a 150-pound man; according to their witness, Sears Depo. 39:19-42:1; which works out to approximately 14 drinks for a 204-pound man such as Mr. Johnson, *see* his driver’s license at page 28 of the SLED report. If Defendants’ theory is that he stopped en route and drank 14 drinks, where is the missing

time? Defendants have done nothing to establish a timeline that would allow for that. *See Chandler* (holding that Defendants had not met their burden of proof even after establishing an unexplained two-hour gap in the Decedent's travel time.)

The Order rejects the evidence of the absence of alcohol containers based on speculation that the Decedent might have thrown the containers out of the vehicle. But that is all it is: speculation. *Chandler* found it important that there were no alcohol containers found – even though the vehicle itself was unsearchable, due to a fire. “The Emergency Medical Services attendant who arrived at the scene of the accident detected no evidence of alcoholic beverage although he admitted that he could not check the inside of the van because it was on fire.” *Id.* at 506, 343 S.E.2d at 635. Here, the EMS/Paramedic searched the area, and climbed into the cab, and found no containers. MAIT and the Fire Department scoured the scene. Moreover, here, given that the vehicle turned over, it was almost certain that any open container would have spilled, leaving an odor of spilled alcohol, as Mr. Redmond testified. But here there was no such odor.

And none of this even begins to explain the absence of any odor of alcohol on the decedent. As to that, all the Order has to say is that the witnesses who were in close proximity to the body were laypersons: “no detectable odor of alcohol in the truck or on the Decedent's body; however, none of the witnesses had training on the detection of alcohol.” Order, ¶ 7. This is in direct contradiction to *Chandler*, where the Court of Appeals found it telling that “the EMS attendant and the wife of the deceased testified they were in close proximity to the body and detected no odor of alcoholic beverage.” 288 S.C. at 506, 343 S.E.2d at 635. It also ignores the fact that the highly experienced MAIT team does have training in the detection of alcohol, and they twice stated that no alcohol was

involved. If more is required, one can rely on Mr. Redmond's 52 years of doing this. More generally: The man supposedly had a .208 level throughout his blood—and one needs training to detect an odor at that level? One can use one's common sense.

This is especially so because the testimony was that when he drank, he drank brown whiskey or beer. It is common knowledge that beer has a smell, and that brown whiskey has a strong smell. Each is well-known for odor in comparison to clear whiskeys such as vodka.¹⁸

The Commission should not speculate, as Defense Counsel did, that some alcohols have so little smell that they are unnoticeable on a body at a .208 blood alcohol concentration, and that the containers were very fortunately thrown out of the window shortly before the accident – the validity of both speculations being required to uphold the finding of intoxication. More reasonable to conclude that if he was speeding, it was because he was close the location where the awards banquet was about to start at his daughter's high school. The Order dismisses this as speculation, ¶ 22, while inexplicably accepting speculation that Mr. Johnson was drinking before he entered the vehicle, for which there is no testimony. This is error. Why accept speculation that he drank before entering the vehicle, which there is no testimony that he had ever done such a thing, and reject the idea that he was going to show up at the banquet after saying he would have to miss it, when there was testimony that this was a regular practice? Regardless of whether

¹⁸ Defense Counsel's argument that some alcohols do not have smells cuts against Defendant. ("Q. Right. And are you aware there are some alcohols that don't smell and some that do? A. I -- I -- you know, I -- I guess so; I don't know." Tr. Hr'g 74:8-11 (cross-examination of Mr. Pinckney); *see also id.* 54:7-11 (Defense counsel raising same argument in cross-examining Mr. Redmond). Assuming for the sake of argument that some alcoholic beverages that humans consume (as distinct from pure refined alcohol) do not have a smell, beer and brown whiskey most definitely do have noticeable smells.

he had been informed of the precise award his daughter was to receive, it seems reasonable to conclude that he was speeding so that he could timely join his daughter and his female partner at the banquet.

Without the invalid stick test, the conclusion that he was speeding due to drunkenness is more speculative than is the conclusion that he was rushing to an event. Since Defendants have the burden of proof, they cannot carry it with mere speculation.

In fact, all the evidence other than the discredited heart-stick points to an absence of alcohol. There were no containers in the car; no smell of spilled alcohol in the car; no containers on the ground anywhere near the vehicle. An extensive search was performed; these searches are performed precisely because they are relevant.

CONCLUSION

Defendants had the burden of proof. Even if the statute had not placed the burden on them, it would have been their burden to establish the validity of the test on which they rely. *Landbank Fund VII, LLC v. Dickerson*. By the standard their own expert testified to, they failed to validate the test.

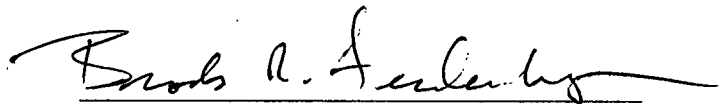
Moreover, Plaintiff presented evidence from an expert who does this for a living that under these circumstances, the test was unreliable. It was error to rely on a test that does not meet the standards proposed for it.

Without the test, Defendants did not come near to meeting their burden of proof. They ask this panel to speculate that a man who never drinks and drives suddenly drank beyond oblivion while driving. They ask this panel to speculate that the absence of containers in or near the vehicle and the absence of spilled alcohol in the vehicle might

have been due to his throwing the bottles out the window. They ask this panel to speculate that the absence of any smell of alcohol on a person with a supposed .208 level is due to laypersons not being trained to identify the smell of alcohol.

The panel should not rest its decision on speculation. If it were inclined to speculate, a much more reasonable conclusion for the absence of any alcohol-related object or odor of alcohol is that the decedent was speeding so he could attend the athletic banquet that he knew was important to his daughter and his girlfriend.

Respectfully submitted,



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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1205798

BR IETT JOHNSON (Decedent),

Employee,

Claimant,

vs.

PIKE ELECTRIC, INC.,

Employer,

AND

LIBERTY MUTUAL INSURANCE
COMPANY

Carrier,

Defendants.

RESPONDENTS' BRIEF

BACKGROUND

Decedent was an employee of Pike Electric, Inc. On the date of the accident, Decedent was working in Winnsboro, South Carolina. Decedent was returning to his home in Johnsonville, South Carolina in a company work truck when he crashed on Highway 341 near Johnsonville, South Carolina. The crash occurred around 6:00 or 6:30. According to the M.A.I.T. Report, Decedent was traveling at 95 miles per hour at the time of the accident. Florence County Deputy Coroner, Don Reynolds, drew blood from the Decedent shortly after the accident, and sent the sample to the South Carolina Law Enforcement Division ("SLED") to be analyzed. The blood sample showed the Claimant had a .208 blood alcohol level.

Defendants denied the claim asserting that the Decedent was intoxicated at the time of the

accident and such intoxication was the proximate cause of the accident and, therefore, the claim for benefits is barred pursuant to §42-9-60 of the South Carolina Workers' Compensation Act.

Sarah Ann Johnson and Shanice Hamilton both claim to be beneficiaries of Decedent. Both assert that the claim should not be barred due to the intoxication of Claimant. They both assert that the sample was drawn improperly and is invalid. They further assert that there is no proof that Claimant was intoxicated at the scene of the accident or that the intoxication was the cause of the accident.

With regard to dependency, Sarah Ann Johnson claims that she is a beneficiary as the surviving spouse of Claimant. Shanice Hamilton argues that she is the sole beneficiary as the minor daughter of Claimant at the time of the accident. She further asserts that Sarah Ann Johnson does not meet the definition of a surviving spouse under the South Carolina Workers' Compensation Act.

Both Sarah Ann Johnson and Shanice Hamilton filed a Form 52, Request for Hearing asserting their right to benefits pursuant to §42-9-290 of the South Carolina Workers' Compensation Act. Defendants filed a Form 53 denying the claim based on the intoxication defense.

A Hearing in the above-referenced matter was held on November 4, 2013. In an Order filed on February 28, 2014, the Single Commissioner found that Decedent was intoxicated at the time of the accident, and the intoxication was the cause of the accident. In his Findings of Fact, the Single Commissioner gave greater weight to the testimony and reports of the Florence County Deputy Coroner Don Reynolds and the SLED toxicology report and the testimony of SLED toxicologist Robert Michael Sears regarding the validity of the blood sample and the cause of the accident. Commissioner Wilkerson further found that even though the case is

denied, if it were to be found compensable, Shanice Hamilton would be the sole beneficiary.

Sarah Ann Johnson did not appeal the Single Commissioner's Decision and Order. Shanice Hamilton filed a Form 30, Notice of Appeal, on March 20, 2014. On the Form 30, Shanice Hamilton identified the only issue on appeal is whether the Single Commissioner erred as matter of fact or law in concluding that Defendants had met the burden of proof in establishing the defense of intoxication.

SUMMARY OF ARGUMENT

Claimant Shanice Hamilton failed to timely appeal the Single Commissioner's Decision and Order to the Full Commission. To appeal to the Full Commission, a party must file a Form 30, Notice Appeal and required documents with the Commission 14 days from the date of the Single Commissioner's Decision and Order. In the case at hand, the Single Commissioner's Decision and Order was served on the parties on February 28, 2014. The Notice of Appeal and required documents would have had to have been filed with the Commission on or before March 14, 2014. The Claimant did not properly file her Notice of Appeal until March 20, 2014. Therefore, the Commission no longer has jurisdiction and the Single Commissioner's Decision and Order controls.

Commissioner Wilkerson was correct in finding that Defendants had met their burden of proving the intoxication defense under the South Carolina Workers' Compensation Act. The testimony of Florence County Deputy Coroner Don Reynolds, and SLED toxicologist Robert Michael Sears support Commissioner Wilkerson's finding that the blood sample was taken properly. Further, the SLED report and the testimony of Mr. Sears support Commissioner Wilkerson's finding that the blood sample was valid and that Decedent had a .208 blood alcohol level at the time of his death.

The testimony of Mr. Sears, the M.A.I.T. Report and the medical report of Dr. James Ballinger, support Commissioner Wilkerson's finding that Decedent's intoxication was, in fact, the cause of the accident and his subsequent death.

ARGUMENT

I. CLAIMANT, SHANICE HAMILTON, FAILED TO TIMELY APPEAL THE SINGLE COMMISSIONER'S DECISION AND ORDER TO THE FULL COMMISSION.

Pursuant to §42-17-50 of the South Carolina Workers' Compensation Act, an application for review must be made "... within fourteen (14) days from the date of when the award shall have been given. ..." Pursuant to Regulation 67-701, to appeal the Single Commissioner's Order, the moving party must file an original and three copies of the Form 30, Request for Commission Review, with the Judicial Department within fourteen (14) days from the date the Order is received. It further states, "**The 14-day period is jurisdictional.**" Moreover, Regulation 67-701 states, "The Appellant shall attach a copy of the Order and Decision being appealed to the Form 30 and to the brief." In addition, the Form 30 and attached documents must be served on opposing parties.

In this case, Claimant failed to timely file her Request for Appeal. The Decision and Order was served on the parties on February 28, 2014. Therefore, Claimant would have had to file the Form 30 and other documents with the Commission within fourteen (14) days, which would have been March 14, 2014. Even allowing for a five-day grace period for mailing, the Form 30 and supporting documents would have been due on or before March 19, 2014. As indicated on the Certificate of Service, Claimant did not serve her Form 30 and supporting documents until March 20, 2014.

Claimant attempted to file her Form 30 on March 14, 2014 (see Exhibit A); however, the

Form 30 was not proper as evidenced by eCase. (see Exhibit B). The Form 30 was not properly filed until March 20, 2014 (see Exhibit C). Therefore, because the Appellate deadline is jurisdictional, Claimant's appeal is barred.

II. THE "HEART STICK" WAS A PROPER WAY TO DRAW BLOOD AND SCIENTIFIC EVIDENCE PROVES THE SAMPLE WAS NOT CONTAMINATED.

The heart stick is an accepted procedure to draw blood. Robert Sears, a toxicologist with SLED, tested Decedent's blood. Mr. Sears is an unpaid expert unlike Claimant's expert, Dr. Ellen Riemer. With regard to the heart stick, Mr. Sears testified, "This [heart stick] is an accepted method for them [coroners] to draw the fluid." (Depo. of Mr. Sears, p. 15, ll. 18-22).

In the case at hand, the Decedent wrecked his car between 6:00 and 6:30. Florence County Deputy Coroner Don Reynolds received a phone call notifying him of the accident at approximately 6:55 p.m. (Depo. of Don Reynolds, p. 7, ll. 18-19). Mr. Reynolds arrived on the scene at approximately 7:30 p.m. and drew blood at approximately 8:30 p.m. (Depo. of Don Reynolds, p. 9, ll. 1-2; 15-20). Mr. Reynolds did not swab Decedent with alcohol. (Depo. of Don Reynolds, p. 21, ll. 5-7). Mr. Reynolds collected the blood in a tube and placed a tamper-proof seal on it and his secretary mailed the tube to SLED the next day. The sample arrived in the SLED Toxicology Department on May 22, 2013.

Claimant's counsel inaccurately characterizes Mr. Reynolds as an incompetent and untrained individual with respect to investigating deaths and drawing blood. Mr. Reynolds has held the position of Florence County Deputy Coroner for over eighteen years and his duty is to investigate deaths. (Depo. of Don Reynolds, p. 6, ll. 7-11). Mr. Reynolds was trained by SLED and undergoes sixteen hours of continuing education each year. (Depo. of Don Reynolds, p. 7, ll. 1-13). Mr. Reynolds also received additional training on drawing blood from Dr. Conratti, a

pathologist in Charleston, SC. (Dep. of Don Reynolds, p. 32, ll. 14-25). Mr. Reynolds has investigated approximately 4,000 deaths, with over 1,000 of those deaths being related to wrecks. (Depo. of Don Reynolds, p. 39, ll. 1-3). Needless to say, Mr. Reynolds is proficient in his job as Deputy Coroner and knows how to properly draw blood as part of his investigation of an accident.

Next, Claimant's counsel has asserted that Mr. Reynolds did not inspect the Decedent's body. This assertion is false. Mr. Reynolds arrived on the scene at 7:30 p.m. (Depo. of Don Reynolds, p. 8, ll. 2-4). He inspected the Decedent while he (the Decedent) was still in the vehicle (Depo. of Don Reynolds, p. 9, ll. 11-14). Mr. Reynolds was able to determine that the Decedent died as a result of a broken neck. (Depo of Don Reynolds, p. 18, ll. 16-20). After the Decedent was removed from the vehicle, he was transported to the E.M.S squad building where Mr. Reynolds drew blood for the sample (Depo of Don Reynold, p. 29, ll. 3-8).

Mr. Reynolds testified that he followed the standard protocol and there was nothing unusual or out of the ordinary in with regard to drawing blood from the Decedent. (Depo of Don Reynold, p. 13, ll. 9-17). Mr. Reynolds further testified that he had no problems drawing the blood. (Depo of Don Reynolds, p. 40, ll. 18-22).

Next, Claimant's attorney incorrectly asserts that Defendants are unable to validate the test. Mr. Sears, the SLED toxicologist, testified extensively regarding the validity of the test. First, on a visual inspection, Mr. Sears testified that he did not see any evidence of additional fluid other than blood being the vial. (Depo. of Mr. Sears, p. 45, ll. 8-13). Second, Mr. Sears testified that if the sample fluid would have been contaminated with gastric contents, the blood alcohol level reading would have registered a .5 or greater. (Depo. of Mr. Sears, p. 47, ll. 6-10). Third, Mr. Sears testified that if the sample was contaminated, there would have been

components other than blood and alcohol in the sample. (Depo. of Mr. Sears, p. 50, ll. 3-7) Mr. Sears explained that if there were internal injuries, such as a stomach rupture, the chromatograms would have produced other peaks that they would not have been able to identify. (Depo. of Mr. Sears, p. 50, ll. 9-12). With regard to the chromatograms, Mr. Sears testified as follows:

In this particular case, the chromatograms are very clean. The ethanol is very sharp. I don't, again, see anything. One of the reasons that we did the head space mass spec, as I mentioned earlier, is to show the ethanol is the only component underneath the - - the peak of interest. There is no medications or anything else there. And in the head space mass I see ethanol in the internal standard and that's it. (emphasis added, Depo. of Mr. Sears, p. 50, ll. 14-22).

Further, Mr. Sears testified,

Q: Okay. But, again, based on your test, you don't have any elevated things other than ethanol that would show a contaminated test?

A: That's - - that's the only thing that we found. You know, the other thing is that we did do a drug screen. And oftentimes if there are other things besides the blood, the drug screen will give us odd readings. In this case, everything was negative on the drug screen. So you know, again, using what information I had, it appears that this was a valid sample. (emphasis added, Depo. of Mr. Sears, p. 52, ll. 4-14).

In another part of his deposition, Mr. Sears also testified regarding the validity of the heart stick. Mr. Sears testified, "I don't see anything that would raise a flag as to something being drawn improperly or submitted improperly to SLED." (emphasis added, Depo of Mr. Sears, p. 26, ll.5-7). Therefore, when using scientific indicators, the sample was clean, and according to Mr. Sears' unbiased expert testimony, the sample was valid.

III. THE COMMISSION WAS CORRECT IN FINDING DR. RIEMER WAS NOT THE MOST CREDIBLE EXPERT REGARDING THE VALIDITY OF BLOOD SAMPLE.

Claimant's sole expert that the blood sample was invalid is the testimony of Dr. Ellen C.

Riemer. Dr. Riemer is a paid expert of Claimant. Dr. Riemer testified that she was paid \$500.00 an hour to review the evidence and provide a report. (Depo. of Dr. Riemer, p. 32, ll. 11-14). Claimant's counsel's argument that Dr. Riemer was not motivated by money, as any money she received for her opinion goes to the department and that she would only receive a percentage. That is the same as saying that an attorney is unpaid, as any money received for legal representation goes to the law firm, for which the attorney receive a percentage. While Claimant's counsel tried to dance around the facts, it is uncontroverted that Dr. Riemer is a paid, and thus, biased expert.

However, even more disturbing is Dr. Riemer's deposition testimony that **she never states that alcohol is a contributing factor** in cases where she has been an expert witness. (emphasis added, Depo. of Dr. Riemer, p. 31, ll. 13-20). Dr. Riemer testified:

Q: All right. And these types of accidents in the past that you have investigated, have those alcohol levels been reasonable to your medical expertise as the cause of those types of accidents?

A: **Well, I don't ever state that alcohol was a contributing factor.**

Q: So, you never state that alcohol is a contributing factor?

A: Almost never. (emphasis added, Depo. of Dr. Riemer, p. 31, ll. 12-20).

Clearly, Dr. Riemer was an expert sought out by Claimant to obtain a favorable opinion, unlike Mr. Sears and Mr. Reynolds, both of whom are unpaid experts who are employees of the County and State, respectively, and investigated the Decedent's death as part of their normal job duties.

Further, Dr. Riemer's testimony is purely speculative. Dr. Riemer did not view or examine a blood sample from the Decedent to determine whether there were any other components other than blood and ethanol in the sample, as was done by Mr. Sears. (Depo. of Dr. Riemer, p. 26, ll. 23-25). In fact, Dr. Riemer admits, **"I only have the report and other people's interpretations."** (emphasis added, Depo. of Dr. Riemer, p. 27, ll. 3-4).

Finally, Dr. Riemer admits that she was speculating regarding that Claimant had internal injuries as a result of the accident and that the only way for her to definitively determine whether internal injuries existed was for an autopsy to be performed. (Depo. of Dr. Riemer, p. 25, ll. 11-12).

IV. DEFENDANTS MET THEIR BURDEN OF PROOF THAT CLAIMANT WAS INTOXICATED AT THE TIME OF HIS DEATH AND THAT THE INTOXICATION WAS THE CAUSE OF THE ACCIDENT.

As mentioned above, Mr. Sears has determined that the test was valid and that Claimant had a blood alcohol level of .208 at the time of his accident. Further, both Margaret and Shanice Hamilton testified that they had never known Decedent to drive erratically. Shanice Hamilton was asked in her deposition whether it would be out of character for the Decedent to drive his company truck 95 miles an hour. (Hrg. Trans., p. 107, ll. 9-14). Shanice Hamilton, Decedent's daughter, testified that the Decedent was a "careful driver" and "defensive driver" and that 95 miles an hour would not be Decedent's normal character. (Hrg. Trans., p. 124, l. 22 – p. 125, l. 4).

Claimant's counsel also improperly included in his brief testimony regarding the Decedent possibly trying to arrive in time for an athletic banquet. Such testimony is entirely speculative and was objected to by Defense counsel at the hearing. Margaret was the assistant high school basketball coach; therefore, the Decedent would have expected Margaret and Shanice to attend the banquet. However, both Shanice and Margaret Hamilton testified that the Decedent did not know the Shanice was going to receive any awards (Hrg. Trans., p. 116, ll. 14-16). Moreover, the last time Margaret and Shanice spoke with the Decedent, he told them that he was not going to come to the banquet (Hrg. Trans., p. 108, ll. 6-9; p. 125, ll. 5-9).

Claimant also focuses on the fact that there was no alcohol found at the scene of the

accident. This is not unusual. Claimant's witness, Mr. Redmond, was asked:

Q: Finding alcohol, the containers, in the car where somebody has had alcohol, that's not always the case either. You don't always find the containers where someone's been drinking do - - do you?

A: No sir.

Q: All right. In fact, people can throw out their containers so they don't keep evidence in their car when they're drinking, don't they?

A: That's correct. (Hrg. Trans. p. 54, ll. 12-22).

Mr. Reynolds continued in his testimony:

Q: All right. And, again, the reason they collect blood and send it off to SLED is to determine if there was alcohol or other substances; isn't that correct?

A: That's correct.

Q: Even if they don't find alcohol containers, correct?

A: That's correct.

Therefore, the lack of alcohol containers at the scene of the accident is irrelevant in this case. It is only a further example of Claimant's attorney trying to muddy the waters as to prevent the Commission from seeing that all the scientific evidence in this case proves that the Claimant was intoxicated at the time of his accident.

Moreover, Mr. Redmond's lack of detection of alcohol in this matter is not relevant. Mr. Redmond testified that he is not trained in the detection of alcohol. (Hrg. Trans. p. 54, ll. 7-11). Further, Mr. Redmond was a close personal friend of Decedent and Shanice and Margaret Hamilton and in fact previously worked with Margaret Hamilton. (Hrg. Trans. p. 55, ll. 10-25). He even became emotional at the hearing. Therefore, Mr. Redmond is also a biased witness in

this case.

V. **CHANDLER V. SUITT CONSTRUCTION, 288 S.C. 503, 343 S.E.2D 633 (CT. APP. 1986) ADDRESSES ONLY WHETHER THE CIRCUIT COURT CAN SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION WHEN SUFFICIENT EVIDENCE EXISTS.**

Chandler stands for the premise that the Circuit Court cannot substitute its judgment of the facts for that of the Commissions when sufficient evidence exists. In the Chandler case, the Single Commissioner granted benefits after concluding that the respondents had not met the burden of proving intoxication and the Full Commission affirmed that decision. The Circuit Court then reversed the Commission's ruling, finding that the decedent's intoxication was the proximate cause of the accident. The Court of Appeal correctly stated that when sufficient evidence exists, a higher court cannot substitute its judgment of the facts in a case.

In Chandler, the Commission, based on the evidence before them regarding a decedent's internal injuries, found that the heart stick was contaminated. The Chandler case was decided in 1986. There is not mention on how the blood sample was tested; there is no mention of the SLED toxicologist or Deputy Coroner being deposed and there is not mention of chromatograms being reviewed – all of which the Single Commissioner reviewed in the case at hand - that proves the blood sample was not contaminated. If such evidence was submitted in the Chandler case, the Commission could have relied on it and found that the sample was valid and a higher court could not substitute its judgment for the Commission's.

CONCLUSION

The Claimant failed to timely file her Notice of Appeal to the Full Commission. Therefore, the Commission no longer has jurisdiction of the claim and the Single Commissioner's Decision and Order controls.

Even if the Claimant would have timely filed her appeal, the Single Commissioner's

Decision and Order should be affirmed. The Deputy Coroner properly drew blood from the Decedent. The sample was tested three times by the SLED toxicologist. The tests prove the blood sample was not contaminated. Thus, to reverse the Single Commissioner's Decision and Order, one would have to completely disregard the only objective scientific evidence in the record.

Respectfully submitted,



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March 14, 2014

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715

Re: Briett (Deceased) Johnson
WCC File # 1205798

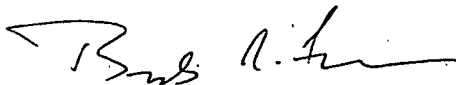
Dear Sir or Madam:

Enclosed please find:

1. a Form 30 on behalf of the Claimant;
2. my firm check in the amount of \$150.00 as the filing fee;
3. a proof of service on counsel for all parties;
4. a copy of this letter;
5. a copy of the proof of service; and
6. a return envelope.

It would be appreciated if you would send a clocked copy of this letter and of the proof of service in the enclosed envelope.

Sincerely,



Brooks R. Fudenberg
Attorney for Appellant

cc: Brown W. Johnson, Esquire
H. Steven DeBerry, IV, Esquire

J. Brandon Hylton, Esquire
Gregory B. Askins, Esq.

13

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Report run: 07/18/14 09:28

Report Criteria: Case Status

Appeal a Fine

Ask a Question

Case #	Caption	Date of Injury	Carrier	Attorney for Defendant	Attorney for Claimant	Status
1205798	BRIETT JOHNSON -VS- PIKE ELECTRIC INC.	05/17/12	Liberty Insurance Corporation PO Box 31204 TAMPA FL 33631 CMC555Tampa@libertymutual.com (800) 282-6218	J. Brandon Hylton McAngus Goudelock & Courie PO Box 7489 Florence SC 29502 Brandon.hylton@mgclaw.com (843) 519-1802	H Steven DeBerry DeBerry Law Firm 129 South Coit St. Florence SC 29501 sdeberry@deberrylawfirm.com Gregory B. Askins Askins, Chandler & Askins P O Box 10 Hemingway SC 29554 askingsgregg@gmail.com (843) 558-2588 Brooks R. Fudenberg Law Office of Brooks R. Fudenberg 1004 Anna Knapp Blvd, Suite 3 Mount Pleasant SC 29464 BRF@Fudenberglaw.com (843) 416-2558 Brown W. Johnson Was released 09/11/12.	Appeal scheduled 08/11/14, 03:00 PM at South Carolina Workers' Compensation Commission 1333 Main Street, Suite 500, Columbia, SC Set on Review 07/17/14 Scheduled for appeal hearing 07/08/14 Set for Appeal Hearing 07/08/14 Appellants Brief received 06/09/14 Appeal Brief extension granted 05/30/14 Form 18 Received 05/15/14 Appeal Brief extension granted 05/14/14 Appeal Brief extension granted 04/03/14 Appeal Brief requested 03/26/14 Oral Argument requested 03/20/14 Form 30 Received; Not Proper 03/20/14 Appeal filed 02/28/14 Order Served 12/11/13 Order Assigned to be Written 12/11/13 Hearing Held 11/13/13 Form 18 Received 09/27/13 Notice Printed 09/27/13 Scheduled for Hearing

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09/06/13 Hearing
Schedule Pending
09/06/13
Mediation Impasse
08/07/13
Mediation
Scheduled
07/30/13
Mediation
Mandated
07/24/13 Notice
Printed
07/24/13
Scheduled for
Hearing
07/19/13 Form 53
Received
Untimely
07/19/13 Form 53
Received Timely
07/17/13 Consent
Order filed
06/26/13 Form 52
Hearing Requested
06/13/13 Form 52
Hearing Requested
05/29/13 Form 52
Withdrawn
05/16/13 Form 18
Received
04/22/13 Form 53
Received Timely
04/22/13 Notice
Printed
04/22/13
Scheduled for
Hearing
04/19/13 Form 52
Hearing Requested
04/19/13 Hearing
Schedule Pending
04/19/13 Form 53
Received Timely
03/20/13 Form 52
Hearing Requested
03/19/13 Form 52
Hearing Requested
11/09/12 Form 18
Received
10/08/12 Order
Served
09/13/12 Order
Assigned to be
Written
08/27/12 Form
50 /52 Claim
Received
08/07/12 Notice
Printed
08/07/12
Scheduled for
Hearing
08/06/12 Hearing
Schedule Pending
08/06/12 Form 53
Received Timely

TB

							07/16/12 Form 52 Hearing Requested
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March 20, 2014

Eugenia Hollmon, Judicial Docketing Director
South Carolina Workers' Compensation Commission
P.O. BOX 1715
Columbia, SC 29202-1715

Re: Briett (Deceased) Johnson
WCC File # 1205798

Dear Ms. Hollmon:

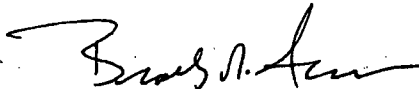
Per my recent communications with your office, please find enclosed a revised certificate of service; copies of the Plaintiff's Form 30, the Order and Decision in this case, this letter, and the revised proof of service; and a self-addressed stamped envelope.

It would be appreciated if you would send a clocked copy of this letter and of the proof of service in the enclosed envelope.

Thank you.

As always, if I may provide additional information, please do not hesitate to contact me.

Sincerely,



Brooks R. Fudenberg
Attorney for Appellant

cc: Brown W. Johnson, Esquire
H. Steven DeBerry, IV, Esquire

J. Brandon Hylton, Esquire
Gregory B. Askins, Esq.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File # 1205798

Briett (Deceased) Johnson, Claimant

VS.

Pike Electric, Inc., Employer,

AND

Liberty Mutual Insurance Company, Carrier,
Defendants.

REPLY BRIEF OF THE APPELLANT

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APPELLANT'S NOTICE OF APPEAL WAS TIMELY

Respondents first attempt to deny Shanice her father's inheritance on grounds that counsel did not timely file her Form 30.

A. Procedural History

Preliminary Matter: Proffer

In addressing Respondents' request that the Appeal be dismissed, Appellant would proffer to the Commission the following procedural evidence: an email from Workers Compensation Commission Judicial Docketing Director Eugenia Hollman, dated March 19, 2014, stating that she is in receipt of the Form 30, and requesting that counsel "Please reserve Mr. Hylton" at the address the WCC system had for him (Proffer A); Affidavit of counsel for Appellant, dated August 4, 2014, stating that it is his recollection that when he received the above-referenced email, he confirmed that the mailing address at which he had served Mr. Hylton was still Mr. Hylton's mailing address as listed by the South Carolina Bar's website (Proffer B); and an email from Robert S. Wells, Executive Director, South Carolina Bar, dated July 23, 2014, stating that the addresses on the Bar's website are up-to-the-minute direct representations of the mailing addresses on South Carolina's Attorney Information System, which is the official source for mailing addresses for Bar members (Proffer C).

Procedural Facts

Respondents argue that counsel for Appellant served her Form 30 twice, once on March 14, 2014, and again on March 20. Counsel did serve it twice. This is because the Judicial Docketing Director emailed counsel on March 19, stating "I am in receipt of your Form 30 appeal on behalf of Mr. Johnson" and requesting that counsel "Please reserve Mr. Hylton" at the

address the WCC system had for him. Proffer A. The address at which counsel had initially served Mr. Hylton was the same address provided by the transcript of the hearing before the single commissioner. Tr. Hr'g, Nov. 4, 2013 p. 2. This is the same address that the South Carolina Bar website listed for Mr. Hylton on the date the Form 30 was served. Proffer B. The South Carolina Bar website is linked directly to the Attorney Information System that provides the official address for all attorneys. Proffer C.¹ One is supposed to serve at the address shown there. *See* Supreme Court Order 2011-10-17-01 (entitled, "RE: Attorney Information System Amendments and Requirements") (stating, "The mailing and e-mail address shown in the AIS shall be used for all purposes of notifying and serving the attorney or foreign legal consultant.") Rather than stand on his right to use the official mailing address, Appellant's counsel reserved Respondents' counsel.² Counsel for the Appellant thought doing so would make things easier on everyone. Instead, Respondents are now attempting to use this to deny Shanice her inheritance.

But to no avail.

Respondents mis-state the language of the law. South Carolina Code. Ann. Section 42-17-50, upon which Respondents rely, actually states, in relevant part,³

¹ Appellant would be delighted to provide briefing on this issue pursuant to WCC Regulation 67-705(E), if the Panel so desires.

² Appellant does not mean to suggest that the Judicial Docketing Director's request was anything less than admirable. She sought to ensure that Respondents' counsel was in fact served.

³ The entire text of the section is provided here for the convenience of the reader.

§ 42-17-50. Review and rehearing by Commission.

If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.

Each application for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review. If the commission determines at the conclusion of the review that the appeal was without merit, it may charge, in its sole discretion, the appellant an additional fee not to exceed two hundred fifty dollars.

If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award

§ 42-17-50 (emphasis added). Under the plain language of the statute, what is required is that an application for review be made within the fourteen days; if an application is made within that period, the Commission “shall” review it. Appellant did make an application within fourteen days: she mailed the Form 30. See Attachment A to Respondents’ Brief. “If a statute’s language is plain, unambiguous, and conveys a clear meaning, ‘the rules of statutory interpretation are not needed and the court has no right to impose another meaning.’” *Curiel v. Hampton County E.M.S.*, 401 S.C. 646, 650-51, 737 S.E.2d 854, 856 (Ct. App. 2012) (quoting *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011)). Under the plain language of the statute, the Commission not only may review the case, it is required to review the case.

Respondents argue that WCC regulation 67-701 makes it a jurisdictional requirement that a copy of the order being appealed from be attached to the Form 30. Respondents triply err:

(1) It is a matter of well-established law that regulations cannot add to the jurisdictional requirements of a statute. Moreover, the South Carolina Supreme Court has specifically held that even a letter stating one’s intent to appeal suffices to confer jurisdiction on the full Commission. (2) The regulation need not be read the way Respondents read it. (3) Appellant has substantially complied with both the regulation and the statute.

(1) The Supreme Court has already rejected Respondents’ argument.

The Supreme Court has already held that a simple letter notifying the Workers Compensation Commission of an intent to appeal the order of a single commissioner suffices to confer upon the commission jurisdiction to hear the appeal. *Goodman v. City of Columbia*, 318

S.C. 488, 458 S.E.2d 531 (1995). It is settled law that a regulation may not add to or subtract from the requirements of a statute. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 498-499, 685 S.E.2d 600, 609-09 (2009).⁴ Accordingly, in *Goodman*, the Supreme Court specifically held that the attempt to add, via the regulation Respondents cite here, to the jurisdictional requirements is a nullity. *Id.* at 490-91, 458 S.E.2d at 532. It thus confirmed the simple sending of a letter within the 14 days, when neither an Order nor the Form 30 were filed within the fourteen-day period.

(2) The regulation need not be read to create a conflict with the statute.

As explained above, if the regulation is read as attempting to add to the statute's jurisdictional requirement, that aspect of the regulation would fail, as a regulation may neither add to nor subtract from a statute. Moreover, the regulation need not be read as Respondents read it. The regulation does indeed state, "The fourteen day period is jurisdictional." The next sentence explains what that means: "The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the Hearing Commissioner's order." What this means is that a Form 30 must be postmarked or delivered within that period, and if it is not, the Form 30 will not be accepted. The regulation need not be read to attempt to include additional copies of the Form 30, or copies of the order appealed from, in the "jurisdictional" requirement. Under the maxim *expressio unius est*

⁴ As the Supreme Court stated in *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 498-499, 685 S.E.2d 600, 609-09 (2009) (emphasis added),

Although regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute. *Gaffney Ledger v. S.C. Ethics Comm'n*, 360 S.C. 107, 600 S.E.2d 540 (2004); *Goodman v. City of Columbia*, 318 S.C. 488, 458 S.E.2d 531 (1995); *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943); *see also Society of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.").

exclusio alterius (the expression of one thing means the exclusion of the other), the regulation should not be read as an attempt to make a jurisdictional requirement out of anything except the mailing-or-delivery of a Form 30 within the specified time period. *See Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 556 S.E.2d 357, (2001) (applying the applying maxim *expressio unius est exclusio alterius*).

Here, the Form 30 was mailed and postmarked within the 30-day period. It was actually doubly timely, as WCC Regulation 67-205 (C) also provides (emphasis added), “A form or document delivered to the Commission by certified or registered mail is deemed filed the date of deposit in the United States Postal Service as indicated by the date of postmark.”

In sum, why read the regulations to create a conflict with the statute, when they are capable of being read to avoid a conflict? Why even reach the question of whether the statute trumps, when that question can be avoided? *Cf. Clark v. Martinez*, 543 U.S. 371, 385 (2005) (where a statute can be read two ways, one of which raises a question of conflict with the federal Constitution, the better practice is to adopt the reading that avoids the need to interpret the Constitution); *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring) (similar); *United States v. Davis*, 184 F.3d 366, 371 (4th Cir. 1999) (similar).

(3) Appellant has substantially complied with both the regulation and the statute.

The Commission may be able to bypass this entire question of choosing between the statute and the regulations, and if it chooses the regulations, which reading of the regulations, by finding that under any of the above, Appellant has substantially complied. The Commission here may not need to go as far as the Supreme Court did in *Goodman* via stating that attempts to add to the statutory requirements are void. It could simply find that Appellant “substantially complied” with the regulations’ requirements, as the Supreme Court did in it what appears to be

an in-the-alternative holding in *Goodman*. There, “The Commission denied the City’s motion to dismiss, finding that petitioner’s letter of October 2nd constituted substantial compliance with S.C. Code Ann. § 42-17-50.” *Id.* at 490, 458 S.E.2d at 532 (emphasis added). The Supreme Court stated, “Petitioner contends that the Court of Appeals erred by holding that the October 2, letter did not substantially comply with the Commission’s requirements for review of a hearing commissioner’s decision. We agree.” *Id.*

Section Summation. Appellant’s appeal is properly before the Commission. Either by finding that Appellant fulfilled the statutory requirements, as stated by settled law, and need do no more, as also stated by settled law; or by interpreting the regulations to track the statute’s jurisdictional requirements, and concluding that mailing a Form 30 by the deadline suffices; or by concluding that Appellant substantially complied, the Commission should conclude that it has jurisdiction, and proceed to address the merits.

THE MERITS

I. PRELIMINARY MATTER:

UNCHALLENGED POINTS FROM APPELLANT’S MAIN BRIEF MANDATE A DECISION IN FAVOR OF APPELLANT

A. In her main Brief, Appellant pointed out that (1) the burden of proof is on Respondents; (2) Respondents’ own expert testified that the test on which Respondents rely is not reliable unless an examination is first undertaken to ensure there is no internal trauma; and (3) no such examination was done.

Respondents never address this. Instead, they attempt to substitute a different question: i.e., was any sort of inspection done at all? The testimony they present never even

purports to address the real question. The evidence clearly shows that no such examination was done. This suffices to mandate a decision in favor of Appellant.

B. In her main Brief, Appellant also pointed out (4) that Respondents' counsel had conceded the case below, in conceding that "there is no way to know that [whether there was such internal trauma as to make the heart stick unreliable] without an autopsy being done, which was not done in this case.", Appellant's Br. at 28 (quoting Tr. Hr'g 19:20-20:1). As pointed out in Appellant's main brief, if there is no way to know, then neither party carried the burden of proof, and since the burden was on Respondents, the decision must be in favor of Appellant. Respondents offer no rebuttal.

C. In her main Brief, Appellant also pointed out (5) that Respondents' theory was implausible, as it required that a man who had never known to drink and drive, never been known to drink at work, never had any alcohol-related arrests, never been known to abuse alcohol, suddenly emerged as a full-bore alcoholic, driving at 95 miles per hour with .208 blood alcohol level. Appellant's Brief asked the Commission to use its common sense and conclude that Respondents' theory was implausible. Respondents offer no rebuttal.

D. In her main Brief, Appellant also pointed out that (6) Respondents' theory was contradicted by the testimony of four witnesses, who each testified that he or she was in close contact with the decedent after his death, and did not smell even a wisp of alcohol. It was not possible that four witnesses would be up close and personal with a man who had drank to .208 level and not notice a smell, as Appellant pointed out. She further pointed out that one did not need formal training in alcohol detection to notice a smell on a person with .208 level.

Defendants respond only that one of the witnesses knew the family,⁵ and some of the witnesses lack training in alcohol detection, but they never address the point that training is not necessary to detect alcohol at a .208 blood concentration.

Appellant further pointed out that the decedent was known to drink only beer and brown whisky, each of which leave a markedly noticeable odor, in comparison to clear whiskeys such as vodka. It was not possible that four witnesses would be in such close proximity to one with a .208 level from beer or brown whiskey and not smell anything. Respondents have no response.

And Appellant pointed out that the MAIT team, which is trained in detection of alcohol, and who were in close contact with the decedent, examining his clothes and emptying his pockets, also noticed nothing that would raise an eyebrow. Certainly, had they smelled alcohol on the decedent, they would not have marked their report “No” for alcohol. To this point, too, Respondents have no response.

Moreover, the arguments that Respondents do make rely on misrepresentations of the law and the record, as discussed below.

II. REGARDING THE ARGUMENTS RESPONDENTS DO MAKE

A. Respondents Have Failed to Show that the Stick Test Is Valid Even Under Their Own Terms.

Respondents begin their defense of the stick test with a misleading-by-omission quotation from Mr. Sears. They quote their expert, Mr. Sears, to the effect that the heart stick is an accepted method to draw the blood, Respondents’ Br., page 5, quoting Depo. of Mr. Sears,

⁵ Even there, Respondents present a distorted view of the testimony. Mr. Redmond testified that he knew the family well, that he knew everybody in the small town; he never said he was a “close personal friend” of the decedent, as Respondents have it.

p. 15, 11. 18-22, and leave off the very next sentence, where Mr. Sears said the heart stick was acceptable provided an external exam was conducted to rule out internal trauma.⁶

Respondents never attempt to demonstrate that Mr. Reynolds conducted an examination to rule out internal trauma. Instead, they try a bait and switch, arguing that some sort of inspection was done. Respondents next attempt to mislead as to the kind of examination required to validate the heart test. Respondents attempt to switch the requirement from an examination to rule out internal injuries, to whether any sort of inspection was conducted at all.⁷

Respondents do not even attempt to put forth evidence to the effect that Mr. Reynolds examined the body to rule out internal trauma. Respondents attempt to provide transcript sections that will show that Mr. Reynolds did some sort of inspection – maybe not to determine internal injury, but at least some sort of inspection. The transcript citations they reference provide scant cannot support for even this weak hypothesis. Notably, they did not quote the sections. For the convenience of the reader, the full text of those transcript references is

⁶ Mr. Sears testified,

This [heart stick] is an accepted method for them [coroners] to draw the fluid. I guess, you know, provided that they did an external exam on the body, and felt like there was no significant internal trauma that would be a very acceptable way to do that.

Sears Depo. 15:21-16:1. Respondents' brief omits the second sentence.

⁷ Respondents erroneously accuse Claimant's counsel of having falsely claimed that Mr. Reynolds "did not inspect" the Decedent's body. Claimant's counsel's only claim in the Brief of Appellant was that Mr. Reynolds did not examine the body to rule out internal injuries (and, as a subsidiary point, that Mr. Reynolds did not even examine the body to determine the cause of death. Mr. Reynolds admitted as much, and the Order so found, Order p. 8.) Claimant never made the argument that Respondents claim is "false."

provided in the note attached to this sentence.⁸ None of these references do anything to support any kind of claim that Mr. Reynolds examined the body to rule out internal injuries.

Mr. Reynolds made no such exam. He did not examine the body even to determine the cause of death. *See* Order, p. 8 ("Mr. Reynolds did not personally inspect the Decedent's body to

⁸Respondents first cite the deposition transcript, p. 8, lines 2-4 for the proposition that Mr. Reynolds arrived at 7:30 pm – this is not disputed, and provides no support for any suggestion that he examined anything.

Immediately thereafter, Mr. Reynolds was asked what he witnessed when he arrived, and he responded, "When I first got on the scene, I noticed a utility pole that was broken down. The car was up on top of another car." *Id.*, lines 5-9. After some discussion regarding the date, *id.* lines 10-24, he was asked what he saw when he arrived, and he explained, *id.* line 25-page nine, line 14. This brings us to page nine, lines 11-14, on which Respondents rely. Including the intervening material, the testimony was,

- Q: So you arrived on the scene at 7:30. And, again, just tell me quickly what you saw?
- A I saw a pickup lying on top of another vehicle. And looking to my right, there was a utility pole that had been broken down.
- Q Okay. Was there anyone inside the vehicle at that time?
- A Yes, there was.
- Q All right. Tell me what the condition of the individual in the truck was.
- A The condition was that he had severe trauma. He was pinned into the vehicle. And it took a little while for the E.M.S., rescue people, to get him out of the vehicle.

Id., page 8, line 25 – page 9, line 14. This cannot be read as Mr. Reynolds conducting an "inspection" in any meaningful sense, and certainly cannot be read as establishing that Mr. Reynolds conducted an examination to rule out internal trauma. Rather, if anything, it suggests that internal trauma was present.

Respondents next rely on page 18, lines 16-20. Appellant provides a bit more, beginning the quotation on line 12:

- Q You said in the -- or it says in the death certificate severe head trauma due to auto accident. What-- what made you think there was head trauma?
- A The way the neck is -- was positioned and the -- when we -- when I talked with the E.M.S. personnel they kind of -- they have a tendency to kind of move their head around to see if it's broken or anything of that sort.

Nor can this remotely be read as Mr. Reynolds having conducted an inspection for internal trauma.

The final testimony on which Respondents rely – again, they do so without quoting the transcript – is page 29, lines 3-8. Those lines actually state:

- A Well, he was released from the pressure before the 8:30 period. As I told you earlier, he was -- he was taken out of the vehicle, loaded up in a gurney, and by the vehicle transported to the E.M.S. squad building where I followed along and met them at 8:30 and took the vial.

In short, the transcript sections cited by Respondents provide no support for any contention that Mr. Reynolds examined the body to attempt to rule out internal trauma. To the contrary, the sections on which Respondents rely back up what Appellant said in her prior Brief: Mr. Reynolds did not examine the body for internal trauma, took the cause of death from the EMS and highway patrol, and did not even examine the clothes.

determine cause of death,"); *see also* Reynolds Depo. 18:16-20, 19:20-22, 22:20-23, 23:12-13, 35:8-9; 26:15-27:2; Tr. Hr'g 46:1-8, 56:1-3.

Defendant's response seems to be to stick their heads in the sand: to leave off Mr. Sears' requirement that an examination be conducted for internal injuries in order for the draw to be valid, and to hope the Commission will not notice they presented no evidence of such an examination. Indeed, as noted in Appellant's main brief, Respondents' counsel inadvertently conceded their case when he argued that "there is no way to know that," i.e., whether such internal trauma existed as to invalidate the test, "without an autopsy being done, which was not done in this case." Tr. Hr'g 19:20-20:1 (emphasis added). Defense counsel apparently thought he had thus established that since one could not know whether the test was valid, Appellant had not proven her case. But it is not Appellant's burden, it is Respondents'. Respondents' counsel is correct: one cannot know whether their test is valid on this record. Since they have the burden of proof, the decision must be for Appellant.

Nor did Appellant claim that Mr. Reynolds is incompetent and untrained. His training appears adequate for the usual case. But this is not the usual case. It is undisputed that Mr. Reynolds knew nothing about when one would want vitreous fluid; it is undisputed that he knew nothing about the possibility of severe internal trauma affecting the rupturing of organs, the movement of organs, or the like. Respondents provide no evidence to the contrary, because there is none. Mr. Reynolds is a holdover from an earlier era when training was not required to start on the job. Once training was required, all he received was one week. That one week presumably includes many topics other than blood draws, including deaths by disease, by foul play, etc. He now receives 16 hours a year of "continuing" training. His training is likely sufficient for the vast majority of cases that come before him. It failed him on this one.

More importantly, Respondents' task was not simply to show that the people involved had adequate training for their jobs in general. Respondents' task was to carry the burden of showing that the Decedent was intoxicated. Recall that both Appellant's expert, Prof. Riemer, and Respondents' expert, Mr. Sears, testified that the heart test would be invalid, given a crash such as this, unless there was an examination of the body for internal trauma. Mr. Reynolds' training is only relevant as background: he admits he did not do any such examination; he admits he never heard that such an examination would be necessary.⁹

Respondents next argue that the sample was valid because Mr. Sears testified that based "on what information I had," the sample appeared valid. Respondents' Br., at 7 (quoting Sears Depo. page 52) (Respondents' emphasis removed; Appellant's emphasis added) ("using what information I had, it appears that this was a valid sample."). His testimony was replete with references to the incomplete information he had available. It is replete with testimony that he did not want to state a position, due to the lack of information. He finally succumbed and hypothesized, but was careful to restate that his statements were based only on what information he had.

He did not get to see the MAIT report. Sears Depo., 22:6-10. He did not see the pictures. He is not informed whether there was an autopsy. Sears Depo. 34:24-35:3.

Respondents ask the panel to conclude that Mr. Sears offered an expert opinion that the blood draw was valid. However, asked point-blank to give an expert opinion on whether the blood sample taken by the heart stick was valid, Mr. Sears flat-out refused.

⁹ He also admitted that he did not know why one would ever draw vitreous fluid – he had been trained how to draw vitreous, but not when or why to do so. He also testified that he always uses the heart stick test – he had no understanding of when one type of draw is preferable to another. For fifteen years, he has used that test, and only that test, Reynolds Depo. 40:3-5, except perhaps in some training sessions as distinct from being at work.

Q Okay. So in your expert opinion, is it likely that the stomach ruptured in this case and –

A Without –

Q -- affected the sample?

A -- without visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other. I don't see any peaks that would indicate to me that there was a huge amount of any external compounds there. But, again, that's something for the person who drew the sample.

50:24–51:9 (emphasis added).

In short, Respondents are asking this panel to “accept” expert conclusions that the expert explicitly refused to draw.

Such problems run throughout Respondents’ rendition of this testimony. They cite Mr. Sears as saying that a stomach rupture “would” have resulted in unusual peaks; he actually said “could have” and “might.” Indeed, he corrected them when they tried to say that he had said “would.” Sears Depo., 49:25-50:12.¹⁰ Their long block quotation about the “clean” chromatograms, Sears Depo 50:14-22, was followed almost immediately by their asking him to state that as an expert opinion, 50:24–51:9, and his refusal to do so.¹¹ Their quotation about Mr.

¹⁰Sears Depo., 49:25-50:12 (emphasis added):

Q Just a quick bounce off. You said that if the stomach would have ruptured, the test would have shown additional --

A There could have been other components found other than ethanol just based on the fact that in alcohol that we consume there are aldehydes and key tones and many other things besides just ethanol that give it flavor.

Q Uh-huh.

A And often times we could see that if there was a stomach rupture and there were large quantities of it there. We might have seen other peaks, other things we couldn't identify.

¹¹ Respondents’ and the Order’s desire to override his refusal to state an opinion is especially problematic. The Order, on page 8, found it worth noting that Mr. Sears took courses that “directly relate . . . to legal issues related to . . . interpreting such evidence in courts of law.” They put him forth as having expertise in knowing when and what one can say in court, and then in effect say, “He doesn’t know what he is talking about. He might think he does not have sufficient information to state a conclusion, he might think that any conclusion lacks the requisite certainty, but we know better.”

Sears' not "see[ing] anything that would raise a flag" is from page 26, early in his deposition – after he had said that the test is valid if an examination was done for internal injury, and before he was told there was no such examination (in fact, it is not clear he was ever told such in so many words).¹² Their final block quotation, in which Mr. Sears says that "often times" a blood draw so contaminated will give an unusual reading, and since there was none here, it "appears" – not "is", but "appears" to be that the draw was valid, based on "what information I had," means simply that: if he had to guess, he would say it is valid. But there is not enough there for him to venture an expert opinion one way or the other.

He stated again,

the cause of death, as you've described, was head injury. The coroner didn't mention blunt force trauma to the body. So, you know, all I can do is base my opinion on what's been provided to me. I didn't see the body. I don't know.

Sears Depo. 51:22-53:3 (emphasis added). He again made clear the importance of internal injury:

In many cases, a heart stick is what the coroner or assistant coroner will use because they are not going to cut open the body as they would with an autopsy. This is an accepted method for them to draw the fluid. I guess, you know, provided that they did an external exam on the body, and felt like there was no significant internal trauma that would be a very acceptable way to do that.

Sears Depo. 15:18-161 (emphasis added).

In short, he expects a coroner to inform him if there was blunt force trauma to the body.

Here, there clearly was blunt force trauma to the body, but the coroner did not mention it. He can base his opinion only on the information he had. He did not have the necessary information to validate the test. He said so repeatedly.

¹² As he stated (Respondents leave out this preceding sentence, and the first half of the sentence they do quote), "The only information that I have about how the sample was taken was what you [Defendants' counsel] presented here today. Based on the information that you've given, . . ." *Id.*, 26:2-5.

Asked to state an expert opinion as to whether it was likely the decedent's stomach had ruptured and affected the sample, Mr. Sears flat-out refused. He cited the limits on his knowledge. He did not have enough information to offer an expert opinion "one way or the other."

And he stated that the test would be valid only if they did at least an external exam for significant internal injury. No such exam was done.

In sum, Respondents "quote" Mr. Sears – and leave out his requirement that an examination be conducted for internal injury. They then claim that Mr. Reynolds did inspect the body – and leave out that the requirement was to examine the body for internal injury. They attempt to create a conflict between Mr. Sears' statement that the test is acceptable provided such an examination was done, on the one hand, and selected other statements, on the other hand. But Mr. Sears repeatedly corrected them in the deposition: he did not know, he could not say, he would not offer an expert opinion on the validity of the blood presented to his office.

B. Dr. Riemer Remains The Most Credible Witness.

In her main Brief, Appellant pointed out that Dr. Riemer studies these things professionally and is the most qualified to speak to the issues present here; and that her knowledge base of the specific facts at issue here was also much greater than any other witness: Prof. Riemer reviewed the MAIT report; the death certificate; the deposition of Deputy Coroner Reynolds; the toxicology report and deposition of Mr. Sears; the photographs of the decedent in the vehicle; and more. She had all the information the other "experts" had, and more. Respondents do not, and cannot, challenge this. Her vastly greater underlying knowledge base and her far greater knowledge of the facts here make her by far the most knowledgeable expert.

Appellant also pointed out that Dr. Ballenger's report was beside the point, as it rested on the assumption that the blood draw was reliable; he never addressed the issue, as he wrote his report before the source of the blood draw was learned by the parties. If that heart stick was not valid, nor are his report's conclusions valid. Respondents apparently agree, as they do not mention Dr. Ballenger in their Brief (other than a brief reference in their Summary of Argument that simply says his testimony supports their case). Appellant further pointed out that there was really no conflict in the testimony, as Mr. Reynolds admitted he knew nothing about alcohol testing nor about when one blood test was preferable to another, and that Mr. Sears agreed with Dr. Riemer that the stick was not reliable unless an examination was conducted to rule out internal injury.

Respondents challenge none of this. Instead, they attack Dr. Reimer's character.

1. Respondents Err in Equating Academic Departments with Law Firms.

Faced with Dr. Riemer's qualifications, which are unparalleled by Respondents' experts, and her testimony that she takes cases only when she has something to contribute, and then to provide an honest answer, not to be a gun-for-hire, *see* Brief of Appellant at 17-18, and the fact that she had all the facts that Mr. Sears complained he would have wanted to have before issuing an opinion, Respondents fall back on equating an academic department at the Medical University of South Carolina – a state-run, not-for-profit, educational institution – with law firms. If a partner at a law firm, who receives a share of the money coming to the firm, will argue for the conclusion the client desires because the firm is paid, Respondents argue, so too will Professor Riemer. Respondents' Br., p. 18. This simply misunderstands the nature of the two beasts. Professor Riemer testified that she may receive a "small," "very small," percentage of the fee after some months. Riemer Depo. 33:5-10. Her true "payment" is in the intellectual challenge of

working with an interesting issue. *Id.* at 35:1-8. She only reviews legal files when she thinks there is an interesting issue on which her knowledge and skills can provide light. *Id.* That is why she turns down most of the requests she receives. *Id.*

This is her general policy. This is what happened in this case, specifically. She was not contacted directly by Claimant's counsel. Counsel had contacted another scientist, and the case was referred to her. She thought it would be interesting, and so took the case. *Id.* 40:19-41:1.

She was engaged in this case not to come out one way or the other, but to explain the results and give her honest opinion. *Id.*, 40:7-11. She would "Never" consult in any other way. *Id.* line 14.¹³

2. Dr. Riemer Testifies As to what She is Expert in, and Not on Other Matters.

Professor Riemer was not hired to state whether alcohol was a contributing factor. Her expertise is specialized: blood draws and forensic pathology, especially of the heart. Whether

¹³ Riemer Depo., 40:7-14.

Q. Okay. Now, just a followup on Mr. Hylton's question concerning your employment in this case, when you were employed – were you employed to give a favorable opinion or to attack the toxicology report, or are you employed to explain the toxicology results to me and give your opinions as to that?

A. The latter.

Q. All right. Would you be for hire any other way?

A. Never.

In fact, when Respondents' attorney tried to get her to say that she is generally hired to testify on behalf of a party, she corrected him: When she accepts employment, it is to review the material, not to testify, for her opinion might be disadvantageous to the party engaging her.

When Respondents' counsel asked, "Now, Dr. Riemer, you've been contacted by the plaintiffs in this case to testify, correct?" she corrected him: "A. I was contacted to review the material." *Id.* 32:2023. She further explained,

Well, I'm frequently asked to review materials, to give my opinion. And the opinion is not always favorable to the person who's requesting my opinion. And it's independent of who is asking about it. So I would give the same opinion in this case whether it was you or Mr. Askins, who requested me to review the material.

Id., 34:3-9.

an accident was caused by intoxication, or mechanical failure, or another vehicle swerving into one's lane causing one to swerve in turn, are not matters in which she has any expertise. She is not a MAIT team member. She is not an engineer. Nor was she hired to determine whether the decedent was in fact intoxicated. She was engaged to explain only one issue: whether the blood test was reliable. And on that, she was hired to give her honest opinion.

Respondents erroneously attempt to make much Dr. Riemer's statement that she never states that alcohol was a contributing factor into a demonstration of bias.¹⁴ But nor did she indicate that she testifies that alcohol was not a contributing factor. With perhaps a rare case as an "almost never" exception, whether alcohol caused an accident is simply beyond her world of test-tubes and blood draws and the range of scientific validity for different tests.¹⁵

This is certainly not evidence of bias. It shows, instead, a proper understanding of the limits of one's knowledge, as one would expect from a learned professor.

3. Dr. Riemer Was Not "Speculating"¹⁶

¹⁴ She actually stated that she "almost never" does so, Riemer Depo, 31:20, leaving open the possibility that in a rare case, it might be appropriate to do so.

¹⁵ She is engaged by both plaintiffs and defendants, Riemer Depo, 34:1-15, so her refusal to testify outside her area of expertise presumably frustrates some of those who engage her.

¹⁶ In her initial Brief, Appellant pointed out that both Prof. Riemer and Mr. Sears said the heart stick was reliable only if an examination was conducted to rule out internal trauma, and no such examination was conducted. Because Respondents strive to convince this panel that gastric material in the blood would have resulted in unusual readings on the chromatograph -- arguing that Mr. Sears said so, after he had corrected them and said "might," and after he refused to state an expert opinion one way or the other on whether there was gastric material in this sample, it should be pointed out that Professor Riemer, like Mr. Sears, shot down Respondents when they tried to get her to speculate that if there were gastric materials in the blood draw, these "would" have shown on the chromatographs. She too made clear that this was a possibility, and refused to speculate that it "would" have happened. Riemer Depo., 35:21-36:5 (examination by Respondents' counsel) (emphasis added):

Q. All right. But again, if there was visceral trauma, you would -- as the expert said -- SLED -- when they test that blood, they would find other chemicals, other materials in that blood when they're reducing it down, correct?

A. It's possible.

Q. All right. In fact, it would be probable, wouldn't it?

Dr. Riemer pointed out many things that would have to be known in order to establish the validity of the test. She pointed out that these were not known. Respondents attempt to twist these into "speculations." If you cannot be sure about X, they argue, you cannot be sure whether the test was valid or invalid. If you cannot be sure about Y, they argue, you cannot be sure whether the test was valid or invalid. Dr. Riemer and Appellant agree with these propositions. Too much is unknown to rely on that test.¹⁷ Sure, if Appellant had the burden of proving a lack of intoxication, the Commission could find that Appellant failed to meet that burden. But it is

A. It's certainly possible. I've seen that happen.

Thus, Respondents ask this panel to draw an "expert" conclusion that both experts refused to make.

¹⁷ Respondents paint a misleading picture when they write that Dr. Riemer "admits that she was speculating regarding that Claimant had internal injuries." Respondents' Br. p. 9 (citing Riemer Depo. p. 25, ll 11-12). More fully, the testimony was, 24:21-26-3 (emphasis added),

Q. Hello, Dr. Riemer. My name is Brian Hylton. In this case, basically, your testimony is conjecture and speculation; is that correct? Because you haven't viewed the body. You haven't viewed the blood sample, correct?

A. Well, I saw the photos of the accident and the body at the scene.

Q. Right.

A. So that's not speculation.

Q. Well, your speculation about potential lacerations in the body, correct. You don't know if they were or not, correct?

A. Well, the details of the collision make it likely there were internal injuries.

Q. Likely, but you don't know.

A. No. I did not do an autopsy. The autopsy is the only way to know for certain.

Q. Right. So at this time, we're all speculating there may be, correct?

A. Right. But it's not -- pure speculation doesn't imply that somehow common sense doesn't come into play. And I think that common sense in this case suggests that it's more likely that he had internal injuries that are obscured by not having had an autopsy.

Q. All right. And also speculating that organs may have been punctured when the needle was inserted other than the heart, correct?

A. Well, we don't know what was actually the source of the blood that was taken, so --

Q. Correct.

A. -- it's not possible to know.

Q. All right.

Respondents who have the burden. All the “unknowns” that they point out cut against them. And even if there were no statute providing the evidentiary burden in these workers compensation cases regarding alcohol, the burden of establishing the validity of a test would be on the party promulgating that test. *Jackson v. Frier*, 146 S.C. 322, 329, 144 S.E. 66, 68 (1928) (citing *McCall v. Alexander*, 81 S.C. 131, 61 S. E. 1106, *Heiden v. R. Co.*, 84 S.C. 117, 65 S.E. 987; *Scott v. Ins. Co.*, 102 S.C. 115, 86 S.E. 484, and *Newton v. Bennett*, 111 S.C. 1, 96 S.E. 620); *Landbank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 628, 632 S.E.2d 882, 886 (Ct. App. 2006); *Hammond v. Halsey*, 287 S.C. 46, 48-49 (S.C. Ct. App. 1985). Here, Respondents have failed to establish the minimal requirements their own expert says are needed. They have completely failed to carry their burden.¹⁸

C. The Remaining Evidence All Indicates Mr. Johnson Was Not Drinking.

There was nothing improper about including the testimony Appellant wants the panel to consider. Respondents claim, page 9, that Appellant “improperly” included testimony regarding the likelihood that the Decedent was attempting to arrive in time for an athletic banquet that he knew his daughter and his female companion were attending. Respondents argue that the testimony was objected-to. Perhaps Respondents are confused. Appellant did cite objected-to testimony, where the objection was sustained, regarding the likelihood of internal injury – but that was only to demonstrate how hard Defense counsel fought to try to avoid that

¹⁸ Respondents inaccurately suggest there was something improper in Dr. Riemer not herself running a test of the blood. As an initial matter, the blood one would have wanted to have was long gone by that time, as Mr. Johnson had been embalmed. Tr. Hr’g 66:16-17; 67:9-13.

Nor was there any point in re-running the tests conducted by Mr. Sears. Dr. Riemer’s concern was not with the data shown by Mr. Sears’s machines. She was not saying he must have used too much or too little blood, or that he failed to calibrate his machine, or the like. She accepted that data as accurately reflecting what was in the blood, and explained that the blood itself was unreliable. What would be the point of having a second unreliable test? Testing the blood more often does not cause the blood to become more accurate.

evidence coming in. Appellant's Br. n.6 at 15-16 (quoting Tr. Hr'g 65:3-10). Even there, the larger point was the testimony that was allowed over objection, and the testimony that was introduced without objection. *See id.* at 16 (quoting Tr. Hr'g 45:2-25); 19 (quoting Riemer Depo. 14:8-10, 16:6-7).¹⁹

As to testimony about the banquet, Respondents point to no objection. Nor do they even state which of the several citations in Appellant's brief are to objected-to testimony. Nevertheless, Appellant has reviewed all the testimony on this issue to which she cited in her brief, and finds but two objections.²⁰ In neither case did Appellant improperly cite testimony.

(1) Appellant cited, at page 6 of her main Brief, to the transcript at 95:19-96:4 for the proposition that the decedent "knew they both were planning to attend." *Id.* at 95:19-96:4. Immediately prior to that, the witness had been asked whether the decedent knew there would be a banquet. Defense counsel objected and was sustained, because "she doesn't know how he would know." *Id.* at 95, lines 14-15 (statement by Commissioner Wilkerson). Claimant's counsel thereupon asked the witness, "Did you tell him?" *Id.* line 19 (emphasis added). Commissioner Wilkerson thereupon ruled that the witness could testify to what she told him, and Mr. Hylton agreed. *Id.* lines 19-22. We then pick up with the testimony cited in Appellant's

¹⁹ Nor should there be anything improper about including testimony even where the objection was sustained: the panel is entitled to review the decision of the single commissioner, and would be free to consider testimony that the commissioner refused to consider.

²⁰ Appellant's brief also cited unobjected-to testimony regarding the decedent's habit of telling his daughter and her mother that he would not be at events, and then showing up. Br. p. 6 (quoting Tr. Hr'g 108:13-24, and citing to Tr. Hr'g 125:15-23).

brief, which ends with, "Did you and him discuss it [the athletic banquet]? A. Yes." There was nothing improper about that.²¹

(2) The other objection concerns Shanice's testimony that the odds were 50-50 that he would show up.²² Respondents' objection was overruled.

In short, the testimony was that in that small town, "everybody knows when the athletic banquet is," Tr. Hr'g 96:1-2, that the Decedent specifically discussed the banquet with his female partner, and that he knew his wife and daughter would be attending. There was nothing improper about bringing this testimony to the attention of the Commission.

Evidence of lack of alcohol containers is probative. So, especially, is evidence of the lack of any odor of alcohol about the person. Appellant's Brief cited testimony that "normally" there are alcohol containers at the scene of an alcohol-related flip-over crash. Appellant's Brief quoted *Chandler v. Suitt Constr. Co.*, 288 S.C. 503, 343 S.E.2d 633 (Ct. App. 1986), wherein the Court of Appeals found the lack of such containers an important piece of evidence. Respondents urge this panel to go the other way. Respondents attempt to convince the panel that the Commission's decision in *Chandler*, and the Court of Appeals' affirmance, are wrong, because, in Respondents' view, such evidence is irrelevant. They attempt to do so via the most erroneous logic: they want to convince the panel that if something does prove a result

²¹ He did not know his daughter was going to receive the award. But there can be no reasonable dispute that he knew about the awards banquet, and knew his wife and daughter and were going to attend, and that it was important to them. That is enough for Appellant's purposes.

But there is more: he would have suspected his daughter might be receiving an award. Given her academic achievements – she was on honor roll, Tr. Hr'g 84:2-3, 115:9-16 – and athletic participation, she was obviously a candidate. (In fact, that night, she won the Student Athlete Award, *id.*, 116:1-3, with a scholarship to continue her schooling, 84:7-18.) What parent does not know and is not proud of his high school children's accomplishments? To say that she had the qualifications to win the award – but that her father would not have considered her even a plausible candidate – there is no justification for that.

²² The Order inaccurately has this as Shanice would have been surprised if he had shown up. She actually said the chances were even ("50/50"). Tr. Hr'g 123:13-17.

100% of the time, it is not evidence. Resp. Br. at 10 (erroneously arguing that the lack of alcohol containers is irrelevant because there are “not always” containers at the scene of an alcohol-related accident). Agreed, there are not always containers at the scene. But “normally” there are. Just because something does not prove a fact with 100% certainty (“always”) does not mean it is not evidence. Respondents’ position is contrary to common sense, contrary to the rules of evidence, and contrary to *Chandler*.

Respondents argue that Mr. Redmond was biased because he was a close personal friend of the decedent. The testimony does not establish that: rather, the testimony was that he knew the family well, but it is a small town where everybody knows everybody, and he was mayor for six years – of course he knows everybody well. Tr. Hr’g 58:12-17.²³ So, he is not supposed to investigate crashes involving people he knows? He knows everybody in the area! He is not supposed to testify regarding crashes he investigates involving people he knows? He knows everybody in the area.

The issues on which he testified are not the sort of issues where this sort of bias would affect the answer. It is not as if he was testifying, “He didn’t seem all that drunk to me,” or “in my view, the other guy started it.” These were not judgment calls or matters of degree. Either he found a container, or he didn’t. Either Respondents are correct – the blood alcohol was .208, in which case Briett would be reeking of alcohol – or they are not. He did not state, “Sure, I

²³ Respondents erroneously claim, Respondents’ Br., p. 10, that he “in fact previously worked with Margaret Hamilton.” He did not. He had worked with Margaret Hamilton’s mother. Tr. Hr’g 55:10. Nor did he say that he was a close personal friend of the Decedent. See, e.g., Tr. Hr’g 58:12-17

Q. You -- you did indicate -- and I just wanted to make this clear for the record -- Johnsonville is a small town and you do know everybody?

A. Yes, sir.

Q. You were the Mayor for how many years?

A. Six (6) years.

smelled some alcohol, but not so much as to indicate he was drunk.” This was not a matter of degree. To state that his knowledge of the family makes his testimony inaccurate is to say that he was outright lying.

Nor do the Respondents even attempt to explain away Mr. Pinckney’s repeated observations that he was close to the decedent and smelled no alcohol,²⁴ nor that Margaret and

²⁴ Mr. Pinckney repeatedly testified that there was no odor of alcohol. He based this on his sense of smell.

Q. I’m talking about transferring him from gurney to gurney?

A. That’s correct.

Q. All right. Did you ascertain any -- any indication that alcohol had been used by this decedent?

A. None.

Q. Okay. No odor of alcohol --

A. None.

Q. -- about his person or his clothes or anything?

A. None.

Tr. Hr’g 65:20-25 (direct exam).

Q. All right. In moving the body around from that standpoint did you ascertain any odor of alcohol?

A. No, sir.

67:1-3 (cross-examination by Mr. Johnson).

Q. Okay. And in regards to alcohol did you --

A. No, I didn’t detect any alcohol, sir.

73:21-22.

Q. Sir, are you trained at all in detection of alcohol?

A. My -- my -- I can smell.

Q. Yes, I know but have you had any training?

A. No, I don’t have any training but I have -- I have -- I have a sense of smell.

Q. Right. And are you aware there are some alcohols that don’t smell and some that do?

A. I -- I -- you know, I -- I guess so; I don’t know.

Q. All right.

A. I’m not -- I’m not an expert on alcohol and what, you know.

Q. Great. That’s -- that’s exactly what I was trying to get at, so. Again, you’re just basing it on your --

A. My sense of smell.

Shanice kissed him, and Shanice rested her head on his chest, and smelled no alcohol. Were all these witnesses lying? Respondents' case fails unless they all were lying.

Similarly, Respondents attempt to discredit Mr. Redmond by arguing that he is not trained in the detection of alcohol. He has been detecting alcohol longer than Mr. Reynolds has been drawing blood – and Mr. Reynolds did so for years without training. Respondents cannot have it both ways. Are Respondents saying that all Mr. Reynolds' blood draws prior to his first training should be thrown out? Of course not.

Respondents make no attempt to rebut the point in Appellant's main brief that no training is needed to detect an odor of alcohol about the person if one has a .208 blood level. Lay people detect alcohol at those concentrations all the time. It is just common sense.

Especially with beer and brown whiskey, which is all the decedent was ever known to drink – it simply defies common sense to say that he was at that level, and none of the witnesses could smell it.

Respondents' own witness, Mr. Reynolds, was in close enough proximity to the decedent to stick him with a needle – and he reported no odor of alcohol.²⁵

74:1-16 (cross-examination by Mr. Hylton).

²⁵ He testified that he got his information from the highway patrol and other witnesses, that none mentioned anything about alcohol, and that he did not recall anything that would indicate alcohol use by the decedent.

He testified, "I get my facts and figures from talking with highway patrol, witnesses on the scene. We all concluded that we feel like he died immediately." Reynolds Depo., 19:20-23. Asked, "Did you notice -- did you talk to any witnesses at the scene?" he repeated, "A. I got my information from the highway patrol." *Id.*, 22:20-24. He then testified, *id.*, 35:14-20,

Q Was there any inclination from anybody that you gathered whether or not the individual may have been under the influence?

A Nobody told me anything about that.

Q So there was no evidence that you saw on the scene that would indicate that?

A Not that I can recall, sir.

Nor do Respondents address the fact that the experienced MAIT team is trained in detecting alcohol, went through Briett's pockets, even found a speeding ticket in his pocket, and none of them noticed any alcohol on the person, nor in the vehicle, nor containers in the area, nor receipts nor bottle caps nor any indication of alcohol. Instead, they reported "no." APA # 8 (MAIT report). They did so twice. They did so on the first page of their findings, page 4 of the final report. They did so again on the last substantive page of their findings, p. 35 (just before the next of kin notification and the photographs of the scene).

Was the MAIT team not doing its job? ("This guy smells drunk as a skunk. But let's not mention it in our report. Where it asks about alcohol, let's just say no."?) That is what the Respondents' argument boils down to: the MAIT team not doing its job or outright lying, Mr. Reynolds forgetting that he smelled alcohol, Mr. Redmond, Shanice, Margaret, and Mr. Pinckney all lying.

D. Chandler Says More than Respondents Let On.

Chandler v. Suitt Constr. Co., 288 S.C. 503, 343 S.E.2d 633 (Ct. App. 1986) affirmed a commission determination, on facts more favorable to the employer than are the facts here, that the employer had not carried its burden of proving the intoxication defense. Respondents argue that "*Chandler* stands for the premise that the Circuit Court cannot substitute its judgment of the facts for that of the Commissions when sufficient evidence exists." It does stand for that; but it stands for more. In reversing the circuit court and reinstating the Commission's finding that the defendant had not carried its burden of proving intoxication, *Chandler* specifically noted that the blood sample was taken from the chest cavity of the deceased after a violent crash. Imagine what the *Chandler* court would have done if the Defendant's own witnesses had testified that

such blood draws are not valid without an examination for internal injuries! One can imagine that court going on about how ridiculous it would have been to consider that test.

Instead, Respondents speculate that had the *Chandler* court been presented with testimony from an expert that he didn't want to "hazard [a] guess," that whether the blood was drawn from a proper place for an accident of that type is "something for the person who drew the sample," and not for him; that he wasn't there, "didn't see the body. I don't know." – that the *Chandler* court would nevertheless have found a determination that the Defendant had met its burden to be within the discretion of the factfinder.

Admittedly, this is something that cannot be known with complete certainty unless and until this matter is appealed to the courts. But notably, *Chandler* contains no language to the effect of "we think Defendants did carry their burden, but we defer to the panel" – nothing to indicate that the *Chandler* majority in any way disagreed with the determination that the evidence there was insufficient to carry the burden. In short, the *Chandler* judges seemed to agree with the conclusion that the evidence was insufficient to carry the burden. Here, where the inside of the vehicle was searched – not just the surrounding scene, as in *Chandler*; by numerous teams (MAIT, EMS, Fire Department) – not by a single EMS, as in *Chandler*; where there is no unaccounted for two-hours between the beginning of the trip and the crash as was established in *Chandler*; where there is no history of alcoholism, unlike in *Chandler*: at some point, a reviewing court has to say, "discretion of the fact-finder is one thing, but this goes too far. We cannot have such contradictory results."

Moreover, regardless of what the appellate court will do, there should be some consistency to workers compensation opinions. Results should not be so topsy-turvy as to find a

lack of proof of intoxication in *Chandler*, and proof of intoxication here, where the facts are so much stronger in favor of the worker. There should be greater consistency to the process.

THE BIG PICTURE

The foregoing analysis was of details: Respondents quote a statute, and leave off the words that show the statute stands for the opposite of the proposition they cite it for.

Respondents cite to testimony without quotation – and the testimony does not support their reading. It is important as well to focus on the big picture.

Respondents ask the Commission to accord no weight to the testimony that there were no alcohol containers found on the scene, on grounds that a lack of containers does not with 100% accuracy (“not always”) mean there was no alcohol involved. This defies common sense. It runs contrary to the consistent practice in the courts and adjudicative bodies of this state, and indeed, of every jurisdiction with which counsel is aware. Evidence that does not 100% always mean that X happened or that X is unlikely to have happened is constantly introduced at trials and hearings. Respondents’ position is directly contrary to the findings of the single commissioner, the panel, and the Court of Appeals in *Chandler*. There, the single commissioner and the panel found it highly relevant that there were no containers. Under the Respondents’ logic, the commissioner and the panel there erred: such evidence is irrelevant, Respondents argue, because it does not always indicate a lack of alcohol. Respondents’ theory is contrary to the Court of Appeals’ decision in *Chandler*. That Court did not say, “Whatever the commission wants to look at is fine.” That Court cited the statute, which allowed reversal only if the panel’s decision was clearly erroneous in light of “the reliable, probative and substantial evidence.” *Id.* at 505,

343 S.E.2d at 634 (quoting S.C. Code. Ann. § 1-23-380). It then examined “the reliable, probative and substantial evidence,” and specifically held:

The Emergency Medical Services attendant who arrived at the scene of the accident detected no evidence of alcoholic beverage although he admitted that he could not check the inside of the van because it was on fire. Also, the EMS attendant and the wife of the deceased testified they were in close proximity to the body and detected no odor of alcoholic beverage.

That is, the *Chandler* court held that evidence of a lack of containers is reliable. If it had considered that evidence “irrelevant,” it would not have cited it as proper justification for the commissioner’s and panel’s decision.

Either evidence of the absence of containers is relevant, or it isn’t. It cannot be relevant in *Chandler*, and irrelevant here. Here, the entire scene, including the inside of the vehicle, was scoured: by the EMS, by the Fire Department, and by the MAIT team.

Respondents’ illogic is even more pronounced in regards to the lack of odor of an alcoholic beverage. The Order appears to give this no weight, due to a lack of training of the witnesses in detecting alcohol. This too is entirely counter to *Chandler*, where the single commissioner, the panel, and the Court of Appeals all found it relevant that two persons – neither of whom appear to have had any training in alcohol detection – were in close proximity to the body and detected no odor of alcohol. The Court of Appeals approvingly cited this as reliable evidence in support of the decision there. How could the lack of any odor detectable by lay witnesses be probative in the one case, and not in the other? Respondents do not attempt to address this problem.

In order to find for the Employer/Carrier, the Commission would have to find that the following witnesses were lying or amazingly forgetful: Mr. Redmond, who was repeatedly in close contact with the decedent, climbing through the window of the SUV, going up in the cab,

checking the carotid artery, cleaning the face with 2x2 and water, and smelled not a wisp of alcohol; Margaret Hamilton, who kissed the decedent, and smelled no alcohol; Shanice Johnson, who kissed him and laid her head on his chest, and smelled no alcohol; Deputy Coroner Reynolds, who was at least close enough to the decedent to inject a needle into his chest, and smelled no alcohol; funeral director Pinckney, who was in close proximity to the decedent, and smelled no alcohol; and the MAIT team, who examined the decedent's clothes, emptied his pockets, and reported there was no reason to suspect alcohol; one would also have to discount, as insufficiently learned, the testimony of Dr. Reimer and Mr. Sears, who each testified that the heart stick was reliable only if the body was first examined to rule out internal trauma.

In contrast, to find for the Appellant, the Commission would have to find that the following witnesses were lying, misinformed about their own training, forgetful, or otherwise erred: no one. There is not a single witness whose testimony has to be disregarded in order to decide in Appellant's favor.

Rather, to decide in favor of the Employer/Carrier, one would need, at a minimum, to take Dr. Sears as having stated to a reasonable degree of medical certainty something he refused to state to a reasonable degree of medical certainty; something he repeatedly stated he did not know – that is, to read his testimony opposite to what he said. One would then have to add to that disbelief of Dr. Reimer, Mr. Redmond, the MAIT team, the whole lot.

Why adopt a view that necessitates a conflict with all the witnesses, rather than a view that accords with them all?

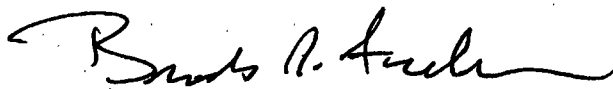
CONCLUSION

As explained in Appellant's main Brief, Defendants had the burden of proof. Even if the statute had not placed the burden on them, it would have been their burden to establish the validity of the test on which they rely. By the standard their own expert testified to, they failed to validate the test. It was error to rely on a test that does not meet the standards proposed for it.

Moreover, Plaintiff presented evidence from an expert who does this for a living that under these circumstances, the test was unreliable.

If all of these witnesses were in close proximity with the decedent, and none smelled any odor of alcohol, maybe that is because the two experts were right: without an examination for internal injuries, the heart stick test is unreliable.

Respectfully submitted,



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

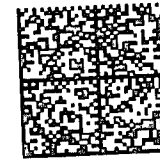
June 12, 2015



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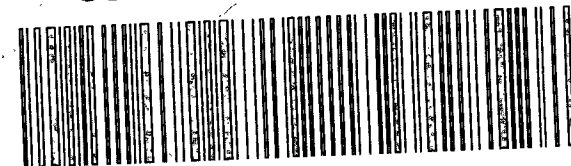
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