

Tort
ORIGINAL

THE STATE OF SOUTH CAROLINA

RECEIVED

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IN THE COURT OF APPEALS

SC Court of Appeals

**APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas**

Honorable Larry R. Patterson, Circuit Court Judge

Case No. 2004-CP-24-38

**Jon E. Hartfield, by and through his Conservator,
Haskell L. Hartfield and Haskell L. Hartfield, Individually Repsodent,**

VS

**The Getaway Lounge & Grill, Inc., and Shou Mei Morris, individually and as President of
The Getaway Lounge & Grill, Inc., ... Appellants.**

**RECORD ON APPEAL
VOLUME ONE**

Other Counsel of Record

**JON E. NEWLON
McCRAVY NEWLON LAW FIRM
1629 ByPass 72 NE
(864) 388-9100**

Attorneys for Respondent

**C. RAUCH WISE
ATTORNEY AT LAW
305 Main Street
Greenwood, SC 29646
(864) 229-5010**

**Attorney for Appellant, The
Getaway Lounge & Grill, Inc.,
And Shou Mei Morris,
individually and as President of
The Getaway Lounge & Grill, Inc.**

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STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,

Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina Eight
Ball Lounge, and The Getaway Lounge &
Grill, Inc., and Shou-Mei Morris,
individually and as President of The
Getaway Lounge & Grill, Inc., and The
South Carolina Department of
Transportation,

Defendants.

SUMMONS

04 - CP - 24 - 38

(JURY TRIAL REQUESTED)

2004 JAN - 9 PM 2:30

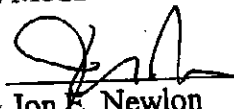
FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC.

TO: SCDOT:

THIS SUMMONS requires you to answer attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 By-Pass 72 NE, Greenwood, South Carolina, within **THIRTY (30) DAYS** after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY:


Jon E. Newlon
State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, S.C.

JAN. 9, 2004

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,
Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina Eight
Ball Lounge, and The Getaway Lounge &
Grill, Inc., and Shou-Mei Morris,
individually and as President of The
Getaway Lounge & Grill, Inc., and The
South Carolina Department of
Transportation,
Defendants.

SUMMONS

04 - CP - 24 - 38

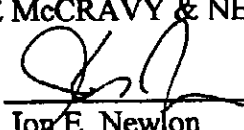
(JURY TRIAL REQUESTED)

TO: DEFENDANT GETAWAY LOUNGE & GRILL, INC.:

THIS SUMMONS requires you to answer attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 By-Pass 72 NE, Greenwood, South Carolina, within **THIRTY (30) DAYS** after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY:


Jon E. Newlon

State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, S.C.

Jan. 9, 2004

2004 JAN -9 PM 3:53

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,

Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina Eight
Ball Lounge, and The Getaway Lounge &
Grill, Inc., and Shou-Mei Morris,
individually and as President of The
Getaway Lounge & Grill, Inc., and The
South Carolina Department of
Transportation,

Defendants.

SUMMONS

04 - CP - 24 - 38

(JURY TRIAL REQUESTED)

2004 JAN -9 PM 3:53

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

TO: DEFENDANT SHOU-MEI MORRIS:

THIS SUMMONS requires you to answer attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 By-Pass 72 NE, Greenwood, South Carolina, within **THIRTY (30) DAYS** after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY:

Jon E. Newlon

State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, S.C.

JAN. 9, 2004

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,

Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina Eight
Ball Lounge, and The Getaway Lounge &
Grill, Inc., and Shou-Mei Morris,
individually and as President of The
Getaway Lounge & Grill, Inc., and The
South Carolina Department of
Transportation,

Defendants.

S U M M O N S

04 - CP - 24 - 38

(JURY TRIAL REQUESTED)

2004 JAN -9 PM 3:53

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

TO: DEFENDANT GLENN McDONALD d/b/a CAROLINA EIGHT BALL LOUNGE:

THIS SUMMONS requires you to answer attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 By-Pass 72 NE, Greenwood, South Carolina, within **THIRTY (30) DAYS** after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY:

Jon E. Newlon
State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, S.C.

JAN. 9, 2004

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,

Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina Eight
Ball Lounge, and The Getaway Lounge &
Grill, Inc., and Shou-Mei Morris,
individually and as President of The
Getaway Lounge & Grill, Inc., and The
South Carolina Department of
Transportation,

Defendants.

COMPLAINT

04 - CP - 24 - _____

(JURY TRIAL REQUESTED)

Plaintiff, by and through his undersigned attorney, would respectfully show unto the
Court the following:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff Jon E. Hartfield is a citizen and resident of Greenwood County, S.C.,
and is an incapacitated person as defined by the laws of this State. Plaintiff Haskell L.
Hartfield is a citizen and resident of Greenwood County, S.C., and is Plaintiff Jon E.
Hartfield's natural parent and duly appointed conservator.

2. Defendant Glenn McDonald is, upon information and belief, a citizen and
resident of the County of Greenwood, and is doing business as The Carolina Eight Ball
Lounge in Greenwood County, S.C.

3. Defendant The Getaway Lounge & Grill, Inc., is a corporation organized and
existing pursuant to the laws of South Carolina and does business in Greenwood County, S.C.

4. Defendant Morris is the President of The Getaway Lounge & Grill and, upon information and belief, is the sole shareholder of said corporation and has used the corporate posture as a sham to avoid liability and used the corporation as a facade for her own operations. Defendant Morris, therefore, is personally liable for her corporation's actions.

5. Defendant South Carolina Department of Transportation (hereinafter, "SCDOT") is a state agency existing under the laws of the State of South Carolina.

6. Defendant SCDOT at all times herein was, and is, through its agents and employees, in charge of the design, construction, maintenance, upkeep and supervision of certain streets, highways and roadways in the County of Greenwood, including the section of S.C. Highway 254 near the intersection with Rutledge Drive and approximately six (6) miles south of the City of Greenwood, in the County of Greenwood, State of South Carolina.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT MCDONALD,
D/B/A THE CAROLINA EIGHT BALL LOUNGE**

7. Plaintiff's incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this First Cause of Action only, "Defendant" refers to Glenn McDonald, d/b/a The Carolina Eight Ball Lounge.

8. On or about July 11, 2003, Hoyt Helton, stopped at Defendant's place of business on Highway 72 in Greenwood County, Greenwood, S.C., wherein Defendant, individually and/or through his agents and/or employees, served Mr. Helton alcoholic beverages with actual or constructive knowledge of Mr. Helton's intoxicated condition and permitted Mr. Helton to drive away in an intoxicated state.

9. While in an intoxicated state, Mr. Helton left Defendant's place of business and drove his vehicle north on S.C. Highway 254. At the same time, Laura F. Riddle was

driving her vehicle south on S.C. Highway 254 with Plaintiff Jon E. Hartfield riding as her passenger. As both drivers approached the intersection of S.C. Highway 254 and Secondary Road 618, Mr. Helton drove his vehicle into the southbound median lane and in the opposite direction of Ms. Riddle's vehicle, thereby causing his vehicle to collide head-on with Ms. Riddle's vehicle and causing Plaintiffs to suffer traumatic personal injury and other damages.

10. The essential purpose of SC Code Ann. § 61-4-580 (Supp. 1995) is to protect Plaintiffs from the harm they have suffered, and Defendant, individually and through his agents and employees, had a duty to protect Plaintiffs from said harm.

11. Further, Plaintiffs, as persons injured as a result of Defendant's continued service of alcoholic beverages to an intoxicated driver, are members of an identifiable class of persons this statute is intended to protect.

12. Defendant, individually and/or by his agents and/or employees, breached his duty to Plaintiffs by having actual or constructive knowledge Mr. Helton was intoxicated and then serving Mr. Helton with alcoholic beverages when he was intoxicated, thereby causing the subsequent automobile accident resulting in Plaintiffs' injuries and damages.

13. Defendant, individually and/or by his agents and/or employees, was negligent, grossly negligent, careless, reckless, willful and wanton at the time and place above mentioned in the following particulars:

- (a) In serving Mr. Helton alcoholic beverages after Defendant had actual or constructive knowledge that Mr. Helton was intoxicated;
- (b) In continuing to serve Mr. Helton alcoholic beverages even after he was intoxicated;
- (c) In failing to stop serving alcoholic beverages to Mr. Helton even after he was intoxicated;

- (d) In failing to adhere to Defendant's own policies; and
- (e) In failing to institute adequate policies along the chain of command within the business to ensure the safety of Defendant's patrons and the general public.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

14. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

15. As a further result, Plaintiff suffered past and future lost earnings.

16. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual and punitive damages.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS SHOU-MEI MORRIS AND THE GETAWAY LOUNGE & GRILL, INC.

17. Plaintiff's incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this Second Cause of Action only, "Defendants" refers to The Getaway Lounge & Grill, Inc., and Shou-Mei Morris.

18. On or about July 11, 2003, Hoyt Helton, stopped at Defendants' place of business located on Highway 25 South in Greenwood, S.C., wherein Defendants, individually and/or through his agents and/or employees, served Mr. Helton alcoholic beverages when Defendants had actual or constructive knowledge of Mr. Helton's intoxicated state and let

Mr. Helton drive away in an intoxicated state.

19. While in an intoxicated state, Mr. Helton left Defendants' place of business and drove his vehicle north on S.C. Highway 254. At the same time, Laura F. Riddle was driving her vehicle south on S.C. Highway 254 with Plaintiff Jon E. Hartfield riding as her passenger. As both drivers approached the intersection of S.C. Highway 254 and Secondary Road 618, Mr. Helton drove his vehicle into the southbound median lane and in the opposite direction of Ms. Riddle's vehicle, thereby causing his vehicle to collide with Ms. Riddle's vehicle head-on and causing Plaintiffs to suffer traumatic personal injury and other damages.

20. The essential purpose of SC Code Ann. § 61-4-580 (Supp. 1995) is to protect Plaintiffs from the harm they have suffered, and Defendants, individually and through their agents and employees, had a duty to protect Plaintiffs from said harm.

21. Further, Plaintiffs, as persons injured as a result of Defendants' continual service of alcoholic beverages to an intoxicated driver, are members of the class of persons this statute is intended to protect.

22. Defendant, individually and/or by his agents and/or employees, breached his duty to Plaintiffs by having actual or constructive knowledge Mr. Helton was intoxicated and then serving Mr. Helton with alcoholic beverages when he was intoxicated, thereby causing the subsequent automobile accident resulting in Plaintiffs' injuries and damages.

23. Defendants, individually and by and through their agents and/or employees, were negligent, grossly negligent, careless, reckless, willful and wanton at the time and place above mentioned in the following particulars:

- (a) In serving Mr. Helton alcoholic beverages after Defendants had actual or constructive knowledge that Mr. Helton was intoxicated;

- (b) In continuing to serve Mr. Helton alcoholic beverages even after he was intoxicated;
- (c) In failing to stop serving alcoholic beverages to Mr. Helton even after he was intoxicated;
- (d) In failing to adhere to Defendants' own policies; and
- (e) In failing to institute adequate policies along the chain of command within the business to ensure the safety of Defendants' patrons and the general public.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

24. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

25. As a further result, Plaintiff Hartfield suffered past and future lost wages.

26. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual and punitive damages.

**FOR A THIRD CAUSE OF ACTION AGAINST THE SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION**

27. Plaintiff's incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this Third Cause of Action only, "Defendant" refers to The South Carolina Department of Transportation.

28. Prior to July 11, 2003, Defendant resurfaced the section of road along S.C. Highway 254 and Secondary Road 618 and did not properly paint traffic control markings on

the road in front of the intersection prior to the subject accident.

29. On or about July 11, 2003, Laura F. Riddle was driving her vehicle south on S.C. Highway 254 with Plaintiff Jon-Erik Hartfield riding as a passenger. At the same time, Hoyt Helton was driving his vehicle north on S.C. Highway 254. Upon information and belief, Mr. Helton became confused by the absence of traffic control markings as he approached the intersection of S.C. Highway 254 and Secondary Road 618, and drove his vehicle into the southbound lane whereupon his vehicle collided with Ms. Riddle's vehicle, causing Plaintiff Jon-Erik Hartfield to suffer traumatic personal injury and other damages.

30. Defendant, by and through their agents and/or employees, was negligent, grossly negligent, careless, and reckless at the time and place above mentioned by failing to properly mark the subject roadway with traffic control markings in a timely and reasonable manner and by failing to adhere to its own policies regarding the timely and reasonable manner of marking roadways with traffic control markings. All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

31. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

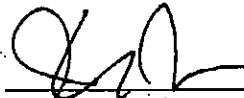
32. As a further result, Plaintiff Hartfield suffered past and future lost wages.

33. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual damages.

WHEREFORE, Plaintiff demands a jury trial and prays for judgment as follows:

1. On Plaintiffs' First Cause of Action, for a judgment for Negligence with actual and punitive damages;
2. On Plaintiffs' Second Cause of Action, for a judgment for Negligence with actual and punitive damages;
3. On Plaintiffs' First Cause of Action, for a judgment for Negligence with an award of actual damages;
4. For a judgment that the Defendants' are jointly and severally liable for their combined actions;
5. For costs and disbursements associated with this action; and
6. For any such other and further relief this Court deems just, equitable and proper.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, S.C.

Jan. 9, 2004

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon-Erik Hartfield, through his conservator)
Haskall L. Hartfield, and Haskall L.)
Hartfield, individually,)

Plaintiffs,)

vs.)

Hoyt G. Helton, through his special)
administrator, Joseph C. Smithdeal,)

Defendant.)

CONSENT ORDER

03 - CP - 24 - 952

The above-captioned matter is now pending before this Court. Pursuant to Rule 15(a), SCRCF, the parties hereto, in the interest of justice and in the absence of prejudice to either party, have agreed to permit the amendment of the Complaint in the above-captioned matter. A proposed Amended Complaint is attached as Exhibit A.

I find that the aforementioned amendment comports with notions of justice and fairness, does not prejudice the rights of either party and would promote the proper resolution of this case and, therefore, should be approved by this Court as requested by the parties without further conditions.

WHEREFORE, IT IS ORDERED that Plaintiff be permitted to amend the Complaint to include reflect additional information discovered in the course of litigation.

IT IS SO ORDERED.

[Signature], S.C.

[Signature], 2004

ISO MOVE:

BY:

Jon E. Newlon
Attorney for Plaintiff

[Signature]
Administrative Judge, Eighth Judicial Circuit

WE CONSENT:

BY:

John Grantland
Attorney for Defendant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his)
conservator, Haskell L. Hartfield, and)
Haskell L. Hartfield, individually,)
Plaintiffs,)

vs.)

**AMENDED
SUMMONS**

04 - CP - 24 -38

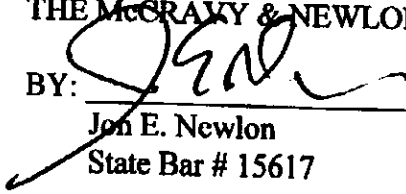
(JURY TRIAL REQUESTED)

Glenn McDonald, d/b/a The Carolina)
Lounge, and The Getaway Lounge & Grill,)
Inc., and Shou-Mei Morris, individually)
and as President of The Getaway Lounge &)
Grill, Inc., Robert C. Cockrell, individually)
and d/b/a Williams Package and South)
Pointe Pub,)
Defendants.)

TO: DEFENDANTS:

THIS SUMMONS requires you to answer attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 By-Pass 72 NE, Greenwood, South Carolina, within **THIRTY (30) DAYS** after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, South Carolina
February 5, 2007

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually,
Plaintiffs,

vs.

Glenn McDonald, d/b/a The Carolina
Lounge, and The Getaway Lounge & Grill,
Inc., and Shou-Mei Morris, individually
and as President of The Getaway Lounge &
Grill, Inc., Robert C. Cockrell, individually
and d/b/a Williams Package and South
Pointe Pub,
Defendants.

**AMENDED
COMPLAINT**

04 - CP - 24 -38

(JURY TRIAL REQUESTED)

Plaintiff, through his attorney, would respectfully show unto the Court the following:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff Jon E. Hartfield is a citizen and resident of Greenwood County, S.C., and is an incapacitated person as defined by the laws of this State. Plaintiff Haskell L. Hartfield is a citizen and resident of Greenwood County, S.C., and is Plaintiff Jon E. Hartfield's natural parent and duly appointed conservator.

2. Defendant Glenn McDonald is, upon information and belief, a citizen and resident of the County of Greenwood, and is doing business as The Carolina Lounge in Greenwood County, S.C.

3. Defendant The Getaway Lounge & Grill, Inc., is a corporation organized and existing under the laws of South Carolina and does business in Greenwood County, S.C.

4. Defendant Robert C. Cockrell, upon information and belief, a citizen and resident of Greenwood County and is doing business as Williams Package in Greenwood County, S.C.

5. Defendant Morris is the President of The Getaway Lounge & Grill and, upon information and belief, is the sole shareholder of said corporation and has used the corporate posture as a sham to avoid liability and used the corporation as a facade for her own operations. Defendant Morris, therefore, is personally liable for her corporation's actions.

6. Defendant South Carolina Department of Transportation (hereinafter, "SCDOT") is a state agency existing under the laws of the State of South Carolina.

**FOR A CAUSE OF ACTION AGAINST ROBERT C. COCKRELL,
D/B/A WILLIAMS PACKAGE**

7. Plaintiffs' incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this Cause of Action only, "Defendant" refers to Robert C. Cockrell, d/b/a Williams Package.

8. On or about July 11, 2003, Hoyt Helton, stopped at Defendant's place of business on S.C. Highway 25 South in Greenwood County, Greenwood, S.C., wherein Defendant, individually and/or through his agents and/or employees, served Mr. Helton alcoholic beverages with actual or constructive knowledge of Mr. Helton's intoxicated condition and permitted Mr. Helton to drive away in an intoxicated state.

9. While in an intoxicated state, Mr. Helton left Defendant's place of business and, within several hours and after stopping at The Getaway and Carolina Lounge, drove his vehicle north on S.C. Highway 254. At the same time, Laura F. Riddle was driving her vehicle south on S.C. Highway 254 with Plaintiff Jon E. Hartfield riding as her passenger.

As both drivers approached the intersection of S.C. Highway 254 and Secondary Road 618, Mr. Helton drove his vehicle into the southbound median lane and in the opposite direction of Ms. Riddle's vehicle, thereby causing his vehicle to collide head-on with Ms. Riddle's vehicle and causing Plaintiffs to suffer traumatic personal injury and other damages.

10. The essential purpose of SC Code Ann. § 61-4-580 (Supp. 1995) is to protect Plaintiffs from the harm they have suffered, and Defendant, individually and through his agents and employees, had a duty to protect Plaintiffs from said harm.

11. Further, Plaintiffs, as persons injured as a result of Defendant's continued service of alcoholic beverages to an intoxicated driver, are members of an identifiable class of persons this statute is intended to protect.

12. Defendant, individually and/or by his agents and/or employees, breached his duty to Plaintiffs by having actual or constructive knowledge Mr. Helton was intoxicated and then serving Mr. Helton with alcoholic beverages when he was intoxicated, thereby causing the subsequent automobile accident resulting in Plaintiffs' injuries and damages.

13. Defendant, individually and/or by his agents and/or employees, was negligent, grossly negligent, careless, reckless, willful and wanton at the time and place above mentioned in the following particulars:

- (a) In serving Mr. Helton alcoholic beverages after Defendant had actual or constructive knowledge that Mr. Helton was intoxicated;
- (b) In continuing to serve Mr. Helton alcoholic beverages even after he was intoxicated;
- (c) In failing to stop serving alcoholic beverages to Mr. Helton even after he was intoxicated;
- (d) In failing to adhere to Defendant's own policies; and
- (e) In failing to institute adequate policies along the chain of command within the business to ensure the safety of Defendant's patrons and the general public.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

14. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

15. As a further result, Plaintiff suffered past and future lost earnings.

16. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual and punitive damages.

**FOR A CAUSE OF ACTION AGAINST DEFENDANTS SHOU-MEI MORRIS
AND THE GETAWAY LOUNGE & GRILL, INC.**

17. Plaintiff's incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this Cause of Action only, "Defendants" refers to The Getaway Lounge & Grill, Inc., and Shou-Mei Morris.

18. On or about July 11, 2003, Hoyt Helton, after stopping at Williams Package, stopped at Defendants' place of business located on Highway 25 South in Greenwood, S.C., wherein Defendants, individually and/or through his agents and/or employees, served Mr. Helton alcoholic beverages when Defendants had actual or constructive knowledge of Mr. Helton's intoxicated state and let Mr. Helton drive away in an intoxicated state.

19. While in an intoxicated state, Mr. Helton left Defendants' place of business, drove to the Carolina Lounge and then drove his vehicle north on S.C. Highway 254. At the

same time, Laura F. Riddle was driving her vehicle south on S.C. Highway 254 with Plaintiff Jon E. Hartfield riding as her passenger. As both drivers approached the intersection of S.C. Highway 254 and Secondary Road 618, Mr. Helton drove his vehicle into the southbound median lane and in the opposite direction of Ms. Riddle's vehicle, thereby causing his vehicle to collide with Ms. Riddle's vehicle head-on and causing Plaintiffs to suffer traumatic personal injury and other damages.

20. The essential purpose of SC Code Ann. § 61-4-580 (Supp. 1995) is to protect Plaintiffs from the harm they have suffered, and Defendants, individually and through their agents and employees, had a duty to protect Plaintiffs from said harm.

21. Further, Plaintiffs, as persons injured as a result of Defendants' continual service of alcoholic beverages to an intoxicated driver, are members of the class of persons this statute is intended to protect.

22. Defendant, individually and/or by his agents and/or employees, breached his duty to Plaintiffs by having actual or constructive knowledge Mr. Helton was intoxicated and then serving Mr. Helton with alcoholic beverages when he was intoxicated, thereby causing the subsequent automobile accident resulting in Plaintiffs' injuries and damages.

23. Defendants, individually and by and through their agents and/or employees, were negligent, grossly negligent, careless, reckless, willful and wanton at the time and place above mentioned in the following particulars:

- (a) In serving Mr. Helton alcoholic beverages after Defendants had actual or constructive knowledge that Mr. Helton was intoxicated;
- (b) In continuing to serve Mr. Helton alcoholic beverages even after he was intoxicated;
- (c) In failing to stop serving alcoholic beverages to Mr. Helton even after he was intoxicated;
- (d) In failing to adhere to Defendants' own policies; and

- (e) In failing to institute adequate policies along the chain of command within the business to ensure the safety of Defendants' patrons and the general public.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

24. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

25. As a further result, Plaintiff Hartfield suffered past and future lost wages.

26. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual and punitive damages.

**FOR A CAUSE OF ACTION AGAINST DEFENDANT MCDONALD,
D/B/A THE CAROLINA EIGHT BALL LOUNGE**

27. Plaintiffs' incorporate herein by reference all previous allegations to the extent they are consistent herewith. For purposes of this Cause of Action only, "Defendant" refers to Glenn McDonald, d/b/a The Carolina Lounge.

28. On or about July 11, 2003, Hoyt Helton, stopped at Defendant's place of business on Highway 72 in Greenwood County, Greenwood, S.C., wherein Defendant, individually and/or through his agents and/or employees, served Mr. Helton alcoholic beverages with actual or constructive knowledge of Mr. Helton's intoxicated condition and permitted Mr. Helton to drive away in an intoxicated state.

29. While in an intoxicated state, Mr. Helton, after visiting Williams Package and The Getaway, left Defendant's place of business and drove his vehicle north on S.C.

Highway 254 headed for home. At the same time, Laura F. Riddle was driving her vehicle south on S.C. Highway 254 with Plaintiff Jon E. Hartfield riding as her passenger. As both drivers approached the intersection of S.C. Highway 254 and Secondary Road 618, Mr. Helton drove his vehicle into the southbound median lane and in the opposite direction of Ms. Riddle's vehicle, thereby causing his vehicle to collide head-on with Ms. Riddle's vehicle and causing Plaintiffs to suffer traumatic personal injury and other damages.

30. The essential purpose of SC Code Ann. § 61-4-580 (Supp. 1995) is to protect Plaintiffs from the harm they have suffered, and Defendant, individually and through his agents and employees, had a duty to protect Plaintiffs from said harm.

31. Further, Plaintiffs, as persons injured as a result of Defendant's continued service of alcoholic beverages to an intoxicated driver, are members of an identifiable class of persons this statute is intended to protect.

32. Defendant, individually and/or by his agents and/or employees, breached his duty to Plaintiffs by having actual or constructive knowledge Mr. Helton was intoxicated and then serving Mr. Helton with alcoholic beverages when he was intoxicated, thereby causing the subsequent automobile accident resulting in Plaintiffs' injuries and damages.

33. Defendant, individually and/or by his agents and/or employees, was negligent, grossly negligent, careless, reckless, willful and wanton at the time and place above mentioned in the following particulars:

- (a) In serving Mr. Helton alcoholic beverages after Defendant had actual or constructive knowledge that Mr. Helton was intoxicated;
- (b) In continuing to serve Mr. Helton alcoholic beverages even after he was intoxicated;
- (c) In failing to stop serving alcoholic beverages to Mr. Helton even after he was intoxicated;
- (d) In failing to adhere to Defendant's own policies; and
- (e) In failing to institute adequate policies along the chain of command

within the business to ensure the safety of Defendant's patrons and the general public.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, said acts being in violation of the Laws of the State of South Carolina.

34. As a result, Plaintiff Jon E. Hartfield suffered physical harm and injuries including, but not limited to, trauma to his head and other trauma which has caused and will in the future cause him to undergo much physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency, and has caused and will in the future cause both Plaintiffs to have to spend money for Plaintiff Jon E. Hartfield's medical services and other medical assistance.

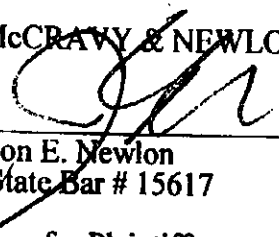
35. As a further result, Plaintiff suffered past and future lost earnings.

36. Based on the above, Plaintiffs are informed and believe they are entitled to judgment for actual and punitive damages.

WHEREFORE, Plaintiff demands a jury trial and prays for judgment as follows:

1. On Plaintiffs' Cause of Action against Robert C. Cockrell, d/b/a Williams Package, for a judgment for Negligence with actual and punitive damages;
2. On Plaintiffs' Cause of Action against The Getaway Lounge & Grill, Inc., and Shou-Mei Morris, individually and as President of The Getaway Lounge & Grill, Inc., for a judgment for Negligence with actual and punitive damages;
3. On Plaintiffs' Cause of Action against Glenn McDonald, d/b/a Carolina Lounge, for a judgment for Negligence with actual and punitive damages;
4. For a judgment that Defendants' are jointly and severally liable for their combined actions;
5. For costs and disbursements associated with this action; and
6. For any such other and further relief this Court deems just, equitable and proper.

THE McCRAVY & NEWLON LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar # 15617

Attorney for Plaintiff
1629 ByPass 72 NE
Greenwood, SC 29649
(864)388-9100, 9104 (fax)

Greenwood, South Carolina
February 5, 2007

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS

John E. Hatfield, by and through)
his conservator, Haskell L. Hartfield)
L. Hartfield, and Haskell L.)
Hartfield, individually,)

Plaintiffs,)

vs)

ANSWER
04-CP-24-38

Glen McDonald, d/b/a The Carolina)
Eight Ball Lounge, and The Getaway)
Lounge & Grill, Inc., and Shou Mei Morris,)
individually and as President of The)
Getaway Lounge & Grill, Inc., and The)
South Carolina Department of)
Transportation,)

Defendants.)

The Defendants, The Getaway Lounge and Grill, Inc., and Shou Mei Morris, individually and as president of The Getaway Lounge, and Grill, Inc., answering the allegations of the Complaint, would respectfully allege and show unto the Court as follows:

1. These Defendants admit the allegations of paragraphs one (1), two (2) and three (3) of the Complaint.

2. These Defendants deny the allegations of paragraphs four (4) of the complaint, except that allegation of paragraph four (4) of the Complaint that states that the Defendant Morris is the president of The Getaway Lounge and Grill, Inc.

3. This Defendant admits the allegations of paragraphs five (5) and six (6) of the complaint.

ANSWER TO THE FIRST CAUSE OF ACTION AGAINST DEFENDANT

McDONALD, d/b/a THE CAROLINA EIGHT BALL LOUNGE

4. These Defendants, admits the allegations of paragraph seven (7) which have been previously admitted and deny the allegations of paragraph seven (7) which have been previously denied.

5. These Defendants deny for lack of information upon which to form a belief the allegations of paragraph eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15) and sixteen (16) of the complaint.

ANSWER TO THE SECOND CAUSE OF ACTION AGAINST DEFENDANTS,

SHOU MEI MORRIS AND THE GETAWAY LOUNGE AND GRILL, INC.

6. These Defendants admit the allegations of paragraph seventeen (17) which have been previously admitted and deny the allegations of paragraph seventeen (17) which have been previously denied.

7. These Defendants deny the allegations of paragraph eighteen (18) of the complaint.

8. These Defendants deny for lack of information upon which to form a belief the allegations of paragraph nineteen (19) of the complaint.

9. These Defendants deny the allegations of paragraph twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25) and twenty-six (26) of the complaint.

ANSWER TO THIRD CAUSE OF ACTION AGAINST THE SOUTH

CAROLINA DEPARTMENT OF TRANSPORTATION

10. These Defendants deny the allegations of paragraph twenty-seven (27) which have been previously denied, and admit the allegations of paragraph twenty-seven (27) which have been previous admitted.

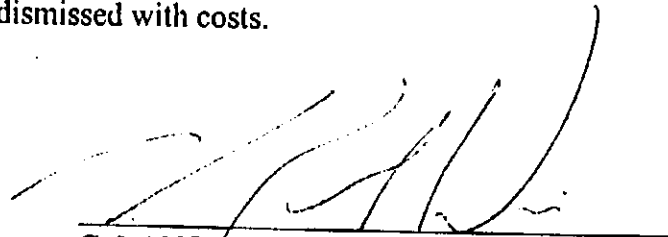
11. These Defendants deny for lack of information upon which to form a belief the allegations of paragraph twenty-eight, twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), and thirty-three (33) of the complaint.

FOR A SECOND DEFENSE AS TO SHOU MEI MORRIS

12. The complaint fails to state a cause of action against Shou Mei Morris in that she is a stock holder of The Getaway Lounge and Grill, Inc., and has no individual liability to the matters involved in this litigation.

Wherefore, the Defendants having fully answered the allegations of the Complaint, pray that the complaint be dismissed with costs.

Mar 19th, 2004



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STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

Jon E. Hartfield, by and through his
conservator, Haskell L. Hartfield, and
Haskell L. Hartfield, individually

Plaintiffs,

-vs-

Glenn McDonald, d/b/a The Carolina
Eight Ball Lounge, The Getaway Lounge
& Grill, Inc., and Shou-Mei Morris,
individually and as President of the
Getaway Lounge & Grill, Inc., Robert
Cockrell individually and d/b/a William
Package, and The South Carolina
Department of Transportation,

Defendants.

Motion for New Trial and

Judgement Notwithstanding the

Verdict under Rule 59(a) and (e)

Pursuant to Rule 59(a) of the South Carolina Rules of Civil Procedure, the defendant The Getaway Lounge & Grill, Inc. and Shou Mei Morris individually and as President of the Getaway Lounge & Grill, Inc. moves the court for a new trial upon the following grounds.

1. The trial court erred in charging the jury that they may infer that Hoyt Helton was under the influence if he had a blood alcohol reading in excess of .10%. The court erred because the inference in South Carolina is applicable to a criminal case and not a civil case. In addition the charge had the effect of telling the jury they could infer that the employee of the Getaway Lounge & Grill, Inc. should have known that Hoyt Helton was intoxicated if the blood alcohol reading was in excess of .10%. *Ackerman v. Delcomico*, 336 Pa. Super. 569, 486 A.2d

410 (1985)

2. The trial court erred in admitting the testimony by the expert for the plaintiff who extrapolated the blood alcohol level of Hoyt Helton and testified as to what the blood alcohol level was at various times before the accident. The court erred because the times used by the expert did not fully account for the time after Hoyt Helton left the Getaway lounge and therefore permitted the jury to speculate as to the condition of Mr. Helton when he left the Getaway and as to whether Mr. Helton consumed any alcohol after he left the Getaway.

3. The trial court erred in failing to give charge N^o 6 requested by the defendant Getaway Lounge & Grill, Inc. The court erred in that the requirement that Mr. Helton be visibly intoxicated is a correct statement of the law as well as the fact that a high blood alcohol content or the fact that Mr. Helton was in fact intoxicated are not sufficient to find liability on the part of the Getaway Lounge, Inc.

4. The trial court erred in charging the jury that these defendants were liable if the employees of the defendants should have known Hoyt Helton was intoxicated. The court erred because the "should have known" standard was not approved by the court in *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 12 (Ct. App. 1990).

CW
#1 ✓
5. The trial court erred in failing to charge the Defendants' Request to Charge N^o 1 in that the charge is a correct statement of the law as stated in *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 12 (Ct. App. 1990).

6. The trial court erred in failing to charge the Defendants' Request to Charge N^o 2 in that the statement is a correct statement of the law as to the burden of proof that the plaintiff has to prove the liability of the defendants.

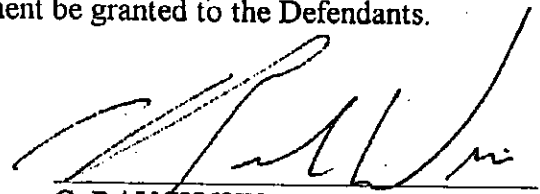
7. The trial court should pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure grant a judgment notwithstanding the verdict in that in taking the evidence in the light most favorable to the plaintiff, the plaintiff failed to prove that any employee of the defendants knew or should have known that Hoyt Helton was intoxicated at the time he left the Getaway Lounge and Grill, Inc.

8. The trial court should pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure grant a judgment notwithstanding the verdict on the ground that the only evidence against the defendants is a high blood alcohol reading that was extrapolated back to the time he was in the Getaway Lounge & Grill, Inc. and such evidence as a matter of law is not sufficient to find the defendants liable.

9. The defendants should be given a new trial as the evidence was contrary to the weight of the evidence and was a result of prejudice and undue compassion for the plaintiff.

For the foregoing reasons, the Defendants request that a new trial be granted on the alternative for a judgment notwithstanding the judgment be granted to the Defendants.

#3
February 13, 2007



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Ackerman v. Delcomico Pa.Super., 1984.
Superior Court of Pennsylvania.
John ACKERMAN, Appellant,

v.

Ronald M. DELCOMICO.

Argued Jan. 10, 1984.

Filed Dec. 12, 1984.

Reargument Denied Jan. 28, 1985.

Pedestrian brought action against motorist for damages resulting from an accidental injury. The Court of Common Pleas, Civil Division, Centre County, No. 1980-600, Brown, J., entered judgment on a jury verdict in favor of motorist, and pedestrian appealed.

The Superior Court, No. 1499 Philadelphia, 1982, Cavanaugh, J., held that: (1) evidence of pedestrian's intoxication was properly admitted; (2) where there was independent evidence of pedestrian's intoxication including pedestrian's alcohol consumption and his demeanor and appearance, pedestrian's blood alcohol content was relevant circumstantial evidence relating to his alleged intoxication and thus was admissible; and (3) charge of presumption of intoxication of pedestrian based on evidence of blood alcohol content under motor vehicle code provision presuming intoxication of driver whose blood alcohol indicant is .10% or more was prejudicially erroneous.

Reversed and remanded.

McEwen, J., filed dissenting opinion.
West Headnotes

[1] Automobiles 48A ⇨ 243(17)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak243 Admissibility

48Ak243(17) k. Contributory

Negligence. Most Cited Cases

Evidence of intoxication of a pedestrian allegedly under the influence of alcohol was properly admitted in pedestrian's suit against motorist for damages resulting from accidental injury.

[2] Evidence 157 ⇨ 150

157 Evidence

157IV Admissibility in General

157IV(E) Competency

157k150 k. Results of Experiments. Most

Cited Cases

Only if there is other evidence showing the actor's conduct which suggests intoxication, and if other safeguards are present, may blood alcohol level be admitted in a civil case for the purpose of proving intoxication.

[3] Automobiles 48A ⇨ 243(17)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak243 Admissibility

48Ak243(17) k. Contributory

Negligence. Most Cited Cases

Where there was independent evidence of pedestrian's intoxication, including pedestrian's alcohol consumption and his demeanor and appearance, pedestrian's blood alcohol content was relevant circumstantial evidence relating to his alleged intoxication and thus was admissible in pedestrian's action against motorist for damages resulting from an accidental injury, though the better practice would be to admit the evidence of blood alcohol content with explanatory expert testimony.

[4] Evidence 157 ⇨ 53

157 Evidence

157II Presumptions

157k53 k. Nature and Scope in General. Most

Cited Cases

The use of a presumption is proscribed when the fact is properly to be found by the jury.

[5] New Trial 275 ⇨ 39(1)

275 New Trial

275II Grounds

275II(C) Rulings and Instructions at Trial

275k39 Instructions

275k39(1) k. In General. Most Cited

Cases

If erroneous fundamental instructions may have been responsible for the complained of verdict, a new trial is mandatory.

[6] Trial 388 ⇨ 295(1)

388 Trial

388VII Instructions to Jury

388VII(G) Construction and Operation

388k295 Construction and Effect of Charge as a Whole

388k295(1) k. In General. Most Cited

Cases

Superior Court must look to the charge in its entirety against the background of the evidence in order to determine if there was prejudicial error.

[7] Appeal and Error 30 ⇨ 1066(8)

30 Appeal and Error

30XVI Review

30XVI(D) Harmless Error

30XVI(J)18 Instructions

30k1066 Applicability to Issues and

Evidence

30k1066(5) Application to Facts and

Evidence

30k1066(8) k. Automobile Cases;

Crossing Accidents. Most Cited Cases

Trial 388 ⇨ 251(8)

388 Trial

388VII Instructions to Jury

388VII(D) Applicability to Pleadings and Evidence

388k249 Application of Instructions to Case

388k251 Pleadings and Issues

388k251(8) k. Actions for Personal Injuries. Most Cited Cases

In action by pedestrian against motorist for damages resulting from accidental injury, charge of presumption of pedestrian's intoxication based on evidence of blood alcohol content pursuant to motor vehicle code provision presuming intoxication of driver whose blood alcohol indicant is .10% or more was prejudicially erroneous as the presumption under the code was not relevant or admissible in regard to the question of whether a pedestrian is under the influence of alcohol to a degree which renders him a hazard as to be legally unfit to walk upon the highway. 75 Pa.C.S.A. §§ 1547, 1547(d)(3), 3550.

**411 *571 Henry E. Rea, Jr., Pittsburgh, for appellant.

John W. Blasko, State College, for appellee.

Before CAVANAUGH, McEWEN and HOFFMAN, JJ.

CAVANAUGH, Judge.

This is an appeal from an order of the Court of Common Pleas of Centre County, sitting *en banc*, denying appellant's Motion for New Trial, and entering judgment on the verdict in favor of appellee.

In his suit, appellant, Ackerman, a pedestrian, sought **412 damages from appellee, Delcomico, a motorist, as a result of accidental injury.

Ackerman contends that the lower court erred in: (1) allowing the introduction of evidence on the issue of intoxication of appellant, and, (2) charging the jury on 75 Pa.C.S. § 3550, when there was no evidence that the appellant was a "hazard" under that section. We agree with appellant that the lower court erred in its charge to the jury on 75 Pa.C.S. § 3550, insofar as it expressly incorporated the *572 presumption under 75 Pa.C.S. § 1547(d)(3), which was unduly prejudicial to appellant. We therefore reverse and remand for a new

trial.

The record reveals the following. Appellant, who was on foot, was struck by a vehicle operated by appellee at an intersection in State College, Pennsylvania. The accident occurred on March 4, 1979 at approximately 11:00 P.M. The night was foggy and rainy. The only witness to the accident were the two parties herein and Janet Zoller, appellant's girlfriend. Ackerman testified that he had no independent recollection of the events in question. Appellee testified that he did not see appellant until after he had hit him. Therefore, Zoller was the only witness able to observe and testify to appellant's conduct before being struck.

The accident occurred as Ackerman and Zoller, who was walking five feet behind appellant, proceeded to cross Atherton Street, at its intersection with Westerly Parkway. The street is approximately forty feet wide, and has two lanes running south and one running north. When they first stepped off the curb, thus entering the northbound lane, the green light for the traffic was in their favor, and they started to cross the street. About the time Zoller reached the double yellow line, she looked up and noticed appellee coming down the downgrade of Atherton Street towards them, in the far southbound lane, that is, the lane closest to the curb. At that time she also looked at the traffic signal and noticed that the light had changed, so that they were then crossing against the light. Appellee testified that he saw Zoller from about a distance of twenty yards from the intersection, but did not see Ackerman. Zoller testified that she saw appellant glance in the direction of appellee's car, but that he continued to walk at the same rate of speed. Appellant was struck approximately three feet from the curb.

Zoller and Martin Brown, appellant's roommate, testified that appellant had been drinking beer since late in the afternoon on the day of the accident. Appellee testified, as did the medical personnel who treated appellant after being *573 struck, that appellant's breath smelled strongly of beer. In addition, a blood alcohol content of .195 was read into

the record from appellant's hospital record. Additional evidence from appellant's hospital record was read into the record which revealed that appellant admitted drinking heavily that afternoon, and that after the accident he had slurred speech and an unusually low level of alertness. Notably, however, Zoller testified that before the accident, appellant was not slurring his speech, staggering, or swaying in his gait or exhibiting any type of conduct evidencing an intoxicated state.

The issues on appeal are whether the court erred: in admitting into evidence certain testimony proffered for the purpose of proving appellant was intoxicated; and, in its charge to the jury.

There are several statutory provisions pertinent to our consideration:

75 Pa.C.S. § 3550. Pedestrians under influence of alcohol or controlled substance

A pedestrian who is under the influence of alcohol or any controlled substance to a degree which renders the pedestrian a hazard shall not walk or be upon a highway except on a sidewalk.

75 Pa.C.S. § 1547. Chemical testing to determine amount of alcohol or controlled substance, in effect at the time of trial, provided in pertinent part:(c) Test results admissible in evidence.-In any summary proceeding or **413 criminal proceeding in which the defendant is charged with driving a motor vehicle while under the influence of alcohol, the amount of alcohol in the defendant's blood, as shown by a chemical analysis of his breath or blood, which analysis was conducted with equipment of a type approved by the Department of Health and operated by qualified personnel, shall be admissible in evidence. (d) Presumptions from amount of alcohol.-If chemical analysis of a person's breath or blood shows:

*574 (3) That the amount of alcohol by weight in the blood of the person tested is 0.10% or more, it shall be presumed that the defendant was under the influence of alcohol.

To facilitate our discussion of this case, we have distilled the analysis into three distinct parts.

1. *Evidence of Intoxication Regarding A Pedestrian Allegedly Under the Influence of Alcohol*

[1] There has been scant case law involving an allegedly intoxicated pedestrian who has been struck by a motor vehicle. In Kriner v. McDonald, 223 Pa.Super. 531, 533-34, 302 A.2d 392, 394 (1973), the court stated:

evidence tending to establish intoxication on the part of a pedestrian is inadmissible unless such evidence proves unfitness to be crossing the street. Pennsylvania courts have gone to great lengths to enforce this rule. Consequently, *no reference should be made to a pedestrian's use of alcohol unless there is evidence of intoxication or copious drinking on the part of the pedestrian; for example, evidence that the injured party was staggering or had liquor on his breath gives support to such an inference.* (Emphasis added.)

In Sentz v. Dixon, 224 Pa.Super. 70, 73, 302 A.2d 434, 436 (1973), the court said: Although the allegedly intoxicated party here was a pedestrian, rather than the driver of an automobile, the question of intoxication still relates to his recklessness or carelessness in conducting himself at the time he was struck by appellee's vehicle. The factual issue involved is similar to that in the cited motor vehicle collision cases, e.g., was appellant intoxicated to a degree showing recklessness or carelessness which might relieve appellee of liability due to appellant's contributory negligence.

*575 In the case at bar, there is evidence which could reasonably establish that appellant was intoxicated, so as to make it necessary to place before the jury the

issue of whether he was so influenced by alcohol to be a "hazard." There was corroborated testimony that appellant had been drinking heavily in the late afternoon and evening before the accident. There is also corroborated testimony that appellant had a strong odor of alcohol and slurred speech after the accident. Looking at all the evidence, there is much more than a suggestion of intoxication and, therefore, we conclude that the evidence of appellant's intoxication was properly admitted, and was not prejudicial as determined in Morreale v. Prince, 436 Pa. 51, 258 A.2d 508 (1969) and Vignoli v. Standard Motor Freight, Inc., 418 Pa. 214, 210 A.2d 271 (1965) (when carelessness or recklessness is at issue, mere fact of consuming alcohol not admissible, being unfairly prejudicial, unless it reasonably establishes intoxication).

2. *Is Evidence of Blood Alcohol Content Admissible Under These Circumstances?*

Neither Kriner nor Sentz, *supra*, consider whether blood alcohol content of a party should be admissible under the circumstances. The sole statutory provision concerning blood alcohol content is in 75 Pa.C.S. § 1547, relating to criminal prosecution for driving under the influence. However, in related contexts, civil cases pursuant to the Dram Shop Act, **41447 P.S. § 4-493(1), where a party was allegedly served alcohol while visibly intoxicated, and, civil motor vehicle cases where the driver of a motor vehicle was allegedly intoxicated, our courts have addressed this issue. We have permitted evidence of blood alcohol content in civil cases where visible intoxication or recklessness or carelessness of a driver is sought to be proved. Couts v. Ghion, 281 Pa.Super. 135, 421 A.2d 1184 (1980) (Spaeth, J. concurring in the result, Van der Voort, J. dissenting); Cusatis v. Reichert, 267 Pa.Super. 247, 406 A.2d 787 (1979); Schwarzbach v. Dunn, 252 Pa.Super. 454, 381 A.2d 1295 (1977) (blood alcohol content generally admissible, but not when *576 given three hours after accident). Cf. Billow v. Farmers Trust Co., 438 Pa. 514, 266 A.2d 92 (1970) (breathalyzer result was sole evidence of

alleged intoxication and therefore inadmissible). Likewise, we have recently permitted such evidence in a case where the issue was whether a visibly intoxicated person was served intoxicating beverages. Suskey v. Moose Lodge No. 86, 325 Pa.Super. 94, 472 A.2d 663 (1984).

It should be noted that in cases involving civil suits, that is, service to a visibly intoxicated person and unfitness to operate a motor vehicle, evidence of alcohol consumption may be admitted only if there is evidence of the conduct of the party which fairly suggests that he was intoxicated. However, we are careful to underscore that only in criminal prosecutions under the Motor Vehicle Code has the "presumption" of intoxication under 75 Pa.C.S. § 1547(d)(3) been permissibly charged to the jury.

[2] The theory behind allowing a blood alcohol level to be admitted into evidence in a civil case is that it is relevant circumstantial evidence relating to intoxication. However, blood alcohol level alone may not be admitted for the purpose of proving intoxication. There must be other evidence showing the actor's conduct which suggests intoxication. Only then, and if other safeguards are present, may a blood alcohol level be admitted. Cusatis v. Reichert, *supra*; Couts v. Ghion, *supra* (test must be given within a reasonable time after accident); Schwarzbach v. Dunn, *supra* (test results, where test given three hours after accident, may not be extrapolated by expert who will testify as to probable blood alcohol level at time of accident).

[3] Under the circumstances of this case and based upon existing authority, where there was independent evidence of intoxication, we believe that appellant's blood alcohol content was relevant circumstantial evidence relating to his alleged intoxication. The evidence as to Ackerman's alcohol consumption, his demeanor and appearance would, under these cases, appear to be sufficient to present the issue of *577 intoxication for jury consideration of whether or not he was so influenced by alcohol to be a "hazard". Under prior authority, Sentz, *supra*, and Kriner, *supra*, in

which allegedly intoxicated pedestrians were involved, we believe that evidence of intoxication and blood alcohol content are relevant and admissible when it shows a pedestrian's unfitness in crossing the street. See also Cook v. Philadelphia Transportation Co., 414 Pa. 154, 199 A.2d 446 (1964).

However, in determining that the admission of blood alcohol level was proper, we would nonetheless underscore the concern of this Court in Suskey v. Moose Lodge No. 86, 325 Pa.Super. 94, 472 A.2d 663 (1984), of admitting into evidence a blood alcohol level without explanatory expert testimony in a civil case. Although the admission of the blood alcohol content has been condoned by this court in both Dram Shop Act cases and civil motor vehicle cases where there is a fair inference of intoxication already established, and we felt compelled to follow these precedents in Suskey as well as presently, we remain skeptical as to the value of this evidence to the jury. Without explanation, the blood alcohol content has little meaning to factfinders and quite possibly great potential for resulting prejudice to the party against whom it is used. However, for the above reasons, we find that **415 the court below did not err in allowing the introduction of evidence, including appellant's blood alcohol level, on the issue of intoxication of appellant.

3. Was It Proper to Charge the Jury With Respect to the "Presumption" of Being Under the Influence of Alcohol?

The next contention appellant makes is that the court committed reversible error in instructing the jury.

[4][5][6][7] The court's charge was as follows: Now, in this case you are instructed that from our Motor Vehicle Code, Section 1547, there are certain presumptions, one of which applies here. If chemical analysis of a person's breath or blood shows: That the amount of alcohol by weight in the blood of the person tested is *578 0.10 percent or more, it shall be presumed that the defendant was under the influence

of alcohol. You are instructed that that applies in this case.

We agree with appellant that the court's charge was erroneous, causing sufficient prejudice to appellant so as to warrant a new trial.^{FN1}

^{FN1} We disagree with the conclusion of the court below that because the jurors answered question \$1, "Was the defendant Ronald M. Delcomico negligent?", on a special verdict form, in the negative, any error in the admission of evidence relating to appellant's alleged intoxication or in the charge relating to 75 Pa.C.S. § 3550 is harmless.

We do not believe that the use of special interrogatories could circumvent the prejudice caused by the erroneous charge or trial court error. We note that the charge, which we find caused reversible error, was prejudicial to appellant's case in that it embodied a *presumption* of intoxication of appellant based on the evidence. We believe that Pennsylvania caselaw proscribes the use of a presumption where the fact is properly to be found by the jury. Richmond v. A.F. of L. Medical Service Plan of Philadelphia, 421 Pa. 269, 218 A.2d 303 (1966). The determining consideration is, "[i]f erroneous fundamental instructions *may* have been responsible for the complained of verdict, a new trial is mandatory." *Id.* at 271-72, 218 A.2d at 304; Vaughn v. Philadelphia Trans. Co., 417 Pa. 464, 209 A.2d 279 (1965); Pedretti v. Pittsburgh Railways Co., 417 Pa. 581, 209 A.2d 289 (1965). See also Criner v. Greco, 190 Pa.Super. 316, 154 A.2d 294 (1959).

Moreover, the erroneous charge involved the presumption of intoxication of appellant under the *Motor Vehicle Code*. The issue in the case is not whether appellant was fit to operate a motor vehicle, but whether he was under the influence of alcohol to a degree which rendered him a hazard when walking

upon the highway. What the lower court did, in effect, was to charge that appellant was, for the purposes of the pedestrian statute, *presumed* to be intoxicated according to his blood alcohol indicant. If the jury believed none of the evidence pertaining to appellant's consumption of alcohol that night, except for the blood alcohol indicant, and followed the judge's instructions, it would have found appellant to be intoxicated for the sole purpose of driving a car, *not* walking upon a highway. We believe that due to the potentially inflammatory effect of evidence having to do with the consumption of alcohol, see e.g., Suskey v. Moose Lodge No. 86, 325 Pa.Super. 94, 472 A.2d 663 (1984); Billow v. Farmers Trust, 438 Pa. 514, 266 A.2d 92 (1970); Cusatis v. Reichert, 267 Pa.Super. 247, 406 A.2d 787 (1979); Couts v. Ghion, 281 Pa.Super. 135, 421 A.2d 1184 (1980), the judge's charge of the presumption of intoxication based on the evidence of blood alcohol content was highly prejudicial and *may* have been responsible for the appealed-from verdict.

While a jury found that the appellee was not negligent, this does not remove the prejudice to the appellant by the error in the charge. The error pertaining to the "presumption" of appellant's intoxication permeated the entire charge and we cannot say that the jury's finding that the appellee was not negligent is unrelated to the erroneous charge pertaining to appellant's intoxication. "The primary duty of the trial judge in charging a jury is to clarify the issues so that the jury is able to comprehend the questions they are to decide." Carrender v. Fitterer, 310 Pa.Super. 433, 437, 456 A.2d 1013, 1015 (1983). We must look to the charge in its entirety *against the background of the evidence* in order to determine if there was prejudicial error. Berry v. Friday, 324 Pa.Super. 499, 472 A.2d 191 (1984); Jacob Kline Cooperage, Inc. v. George W. Kistler, Inc., 286 Pa.Super. 84, 428 A.2d 583 (1981); Smith v. Chardak, 291

Pa.Super. 173, 435 A.2d 624 (1981); Hargrove v. Frommeyer & Co., 229 Pa.Super. 298, 323 A.2d 300 (1974). The key is whether the jury has been misled, and to determine this we must consider the entire charge. "Unless the charge as a whole can be demonstrated to have caused prejudicial error, we will not reverse for isolated inaccuracies." Riddle Memorial Hospital v. Dohan, 504 Pa. 571, —, 475 Pa. 1314, 1316 (1984). In this case, the error in the charge went to the very important issue, the degree of appellant's intoxication. In the instant case, the charge could well have misled the jury to the extent that it found the appellee was not negligent. In our opinion, the error was not harmless, and in the light of the evidence presented at trial, was sufficiently prejudicial to warrant a new trial.

****416 *579** We believe that the charge without more, even if it were given in a criminal prosecution under the Motor Vehicle Code, is erroneous. We base this belief on two prior Pennsylvania cases which discuss the presumption of 75 P.S. 1547(d)(3). See Commonwealth v. DiFrancesco, 458 Pa. 188, 329 A.2d 204 (1974); Commonwealth v. Gearhart, 253 Pa.Super. 238, 384 A.2d 1321 (1978). In Commonwealth v. DiFrancesco, *supra*, the court, using 75 P.S. § 624(1)(c), the precursor of the statute in effect at the time of trial, held:

What the statute refers to as a "presumption" is, strictly speaking, only a standardized permissible inference. Although the terms "inference" and "presumption" are often used interchangeably, this Court has adhered to the prevailing view among legal commentators, and drawn a distinction between these two concepts. See Commonwealth v. Turner, 456 Pa. 116, 317 A.2d 298 (1974); Commonwealth v. Shaffer, 447 Pa. 91, 105-106, 288 A.2d 727, 735 (1972). See generally McCormick's Handbook of the Law of Evidence § 342 ff. (2d ed. E. Cleary 1972); 9 J. Wigmore, Treatise on Evidence § 2490 ff. (3d ed. 1940). According to this view, an inference is *580 merely a logical tool which permits the trier of fact to

proceed from one fact to another. A presumption, on the other hand, is a procedural device which not only permits an inference of the "presumed" fact, but also shifts to the opposing party the burden of producing evidence to disprove the presumed fact. Failure to meet this burden of production will normally result in binding instructions on the issue of the presumed fact's existence in favor of the party invoking the presumption. But the notion of a directed verdict against a criminal defendant is contrary to accepted tenets of criminal justice. Placing the burden of production on a defendant under the threat of such a sanction would run afoul of the presumption of innocence, see Commonwealth v. Bonomo, 396 Pa. 222, 229-230, 151 A.2d 441, 445-446 (1959), as well as the defendant's privilege of declining to testify. Thus, where the presumed fact comprises an element of the crime charged, the inference authorized by a presumption can never be compelled by the court. See generally Commonwealth v. Turner, 456 Pa. 116, 317 A.2d 298 (1974).

From this perspective, it is apparent that virtually all so-called "criminal presumptions" are really no more than permissible inferences. Subsection (c)(3) of § 624.1 is no exception. Our lower courts have so construed it; see, e.g., Commonwealth v. Thompson, 27 Som. 241 (1971), *aff'd* 221 Pa.Super. 824, 292 A.2d 425 (1972) *allocatur* refused, which contains a thorough and scholarly discussion of the question. See also, People v. Guilford, 20 App.Div.2d 192, 245 N.Y.S.2d 781 (1964); *cf.* State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Of course a permissible inference may affect the burden of production in the practical sense that it increases the risk that a defendant who fails to produce countervailing evidence may suffer an adverse verdict.

In this sense, the evidence forming the basis of a statutory inference functions no differently from the other evidence in the prosecution's case: the stronger the evidence against a defendant the greater will be the pressure on *581 him to come forward with evidence in his own defense. It is in this loose, practical sense that courts and legislatures occasionally speak of shifting a burden to the defendant in a criminal case.

See, e.g., Barnes v. United States, 412 U.S. 837,

845-846, nn. 9, 11, 93 S.Ct. 2357 [2362-2363, nn. 9, 11], 37 L.Ed.2d 380, 387-388 (1973); *Tot v. United States*, 319 U.S. 463, 469-470, 63 S.Ct. 1241 [1245-1246], **41787 L.Ed. 1519, 1525 (1943); *DeWoody v. Superior Court*, 8 Cal.App.3d 52, 56-57, 87 Cal.Rptr. 210, 212-213 (1970), construing California Vehicle Code § 23126.

Id. 458 Pa. at 193-94 n. 3, 329 A.2d 207-08 n. 3.

This decision was rendered as a result of an attack by appellant on the constitutionality of § 624.1 of the Motor Vehicle Code.

Section 624.1(b) provides:

"(b) In any summary proceeding or criminal proceeding in which the defendant is charged with driving a motor vehicle or tractor while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood, as shown by a chemical analysis of his breath, his blood, or his urine, which analysis was conducted with equipment approved by the secretary and operated by qualified personnel, shall be admissible in evidence.

"(c) If chemical analysis of a person's breath, blood or urine shows-

....

(3) That the amount of alcohol by weight in the blood of the person tested is ten one-hundredths (0.10) percent or more, it shall be presumed that the defendant was under the influence of intoxicating liquor.

The precise issue before our Supreme Court was whether § 624.1(c)(3) was an infringement upon appellant's constitutional rights because of its provision that a person whose blood alcohol indicant was 0.10 per cent or more "shall be presumed" to be under the influence of intoxicating liquor. The Supreme Court held that § 624.1 was not unconstitutional*582 because the " 'presumption' raised is really no more than an inference which the jury may accept or reject

in light of all the evidence in the case." *Commonwealth v. DiFrancesco*, 458 Pa. at 199, 329 A.2d at 211, *quoted with approval in Commonwealth v. Gearhart*, 253 Pa.Super. 238, 244, 384 A.2d 1321, 1324 (1978) (footnote omitted). As stated in *Gearhart*, although the statute at issue herein passes constitutional muster, "a simple reading of the statute to the jury is not acceptable. The trial judge must bring home to the jury the non-compulsory nature of the inference." *Id.* at 244, 384 A.2d at 1324.

The court in the present case did qualify the presumption. However, since we find that there should have been no reference to the statutory presumption we need not decide the sufficiency of the court's explanation.

Although we do not agree with appellant that the blood alcohol content was inadmissible, it is clear that the correlative presumption ^{FN2} under 75 Pa.C.S. § 1547(d)(3) is not relevant or admissible in regard to the question of whether a pedestrian is under the influence of alcohol to a degree *583 which renders him a hazard under § 3550, that is, legally unfit to walk upon the highway.

FN2. 75 Pa.C.S. § 1547, as amended, (amended December 15, 1982, effective January 15, 1983), provides in pertinent part: (c) Test results admissible in evidence.-In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3731 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.

....

(d) Presumptions from amount of alcohol.-If chemical testing of a person's breath, blood or urine shows:

....
 (3) That the amount of alcohol by weight in the blood of the person tested is 0.10% or more, this fact may be introduced into evidence if the person is charged with violating section 3731.

Of particular note is the fact that in § 1547(d)(3), the language has been changed significantly with the 1982 amendment. There is presently no language regarding a presumption if a blood alcohol content is greater than or equal to .10. *Cf.* 75 Pa.C.S. § 1547(d)(3), prior to the 1982 amendment, *supra* at 412, 413.

It is noteworthy that in the statute, Pedestrians under the influence of alcohol or controlled substance, 75 Pa.C.S. § 3550, **418 there is no mention of measuring blood alcohol content or applying any presumption arising therefrom which is similar to the provisions of 75 Pa.C.S. § 1547. The express provisions in the Motor Vehicle Code under § 1547(c), (d), designed for the purpose of determining whether one was driving while under the influence in a criminal prosecution pursuant to 75 Pa.C.S. 3731, are specifically related to motor vehicle operation and should not, absent clear legislative authority, be borrowed by or read into the Pedestrian Statute (§ 3550). We, therefore, conclude that the use of the presumption is inappropriate in a hazardous pedestrian case. In *Suskev v. Moose Lodge No. 86*, 325 Pa.Super. 94, 472 A.2d 663 (1984), we held that the presumption of legal intoxication pursuant to § 1547(d)(3) shall not be charged where the issue is visible intoxication. The functions of operating a motor vehicle, appearing to be visibly intoxicated and walking upon a public street are so unrelated that charging the presumption of intoxication under § 1547, even as modified to be understood as a permissible inference, in either of the latter two cases is not logical and causes undue prejudice to the appellant.

As previously discussed in *Suskey v. Moose Lodge No. 86*, *supra*, there has been much confusion generated by

the court's use of the presumption of intoxication where a party's blood alcohol level is greater than or equal to .10. This presumption was not intended by the Legislature to be used, and should not be used, in cases involving visible intoxication as in *Suskey*, or a hazardous pedestrian under § 3550. In addition, it is nowhere authoritatively stated or implied that the use of the presumption in § 1547(d)(3) shall apply to a civil case. We therefore hold that the court below erred in its charge to the jury regarding 75 Pa.C.S. § 3550, which referred to § 1547(d)(3) and therefore order a new trial.

*584 Reverse and remand for a new trial. We relinquish jurisdiction.

McEWEN, J., filed a dissenting opinion.
 McEWEN, Judge, dissenting.

I agree with the conclusions of the majority, first, that the evidence of the intoxication of appellant was properly admitted and was not prejudicial and, second, that the trial court properly allowed the introduction of evidence upon the issue of the intoxication of appellant, including the blood alcohol level of appellant. I am not, however, convinced that the "presumption" of 75 P.S. § 1547(d)(3) should not be applied in a civil case. It is, nonetheless, unnecessary to analyze and address my hesitation to accept this conclusion of the majority for the reason that even if, *arguendo*, the trial court erred in its charge to the jury that the presumption of § 1547(d)(3) was applicable to the pedestrians referred to in 75 Pa.C.S. § 3550, the error was, in my opinion, harmless.

The author of the majority opinion has in his usual fashion provided a careful analysis as well as a most persuasive expression of view for holding that a new trial is necessary. Since, however, the jury returned a specific finding that the defendant driver was *not* negligent, surely, as the distinguished trial judge declared, the error found by the majority in but a quite limited portion of the charge is harmless. Moreover, I am convinced that however favorably to the plaintiff or unfavorably to the defendant the trial judge may be forced to alter his charge, ninety-nine out of one

hundred juries would render a verdict against this plaintiff.

Since we are, of course, precluded from reliance upon such instinct or odds, but are obliged to attempt an erudite articulation of position, I will simply reiterate the rationale for upholding jury verdicts that I earlier expressed in a dissenting opinion in Saylor v. Rose, 319 Pa.Super. 560, 466 A.2d 686, 690-1 (1983):

*585 The right to a trial by a jury is zealously guarded because the benefits of a trial by jury are not simply theoretical but have through the centuries proven so real as to become self-evident. As a **419 result, our trust in the value of the jury verdict in resolving the type of factual issue here presented-as distinguished from a verdict upon a complex question of medical or product liability-should be near absolute. The founders concluded that a band of the citizenry-peers, says the Magna Carta-is naturally suited to the task of resolving factual disputes, whether the difference in testimony be innocent or influenced by personal interest; in addition, of course, it is an obvious and certain fact that the court room cause-whether it be of an accused or of a litigant-is, if not prudently never left to the sovereign, always more wisely entrusted to the people than to the government of any of its branches. Once we acknowledge that the value of the jury system is not mere premise but fact, it naturally follows that the verdict of a jury should be considered to be controlling and final. While it is undisputed that a safety valve is necessary and that a trial judge should be able to reject a verdict, that safety valve should be triggered only when there is a gross disparity between the verdict and the evidence or there has been gross and harmful error. Neither of those tests are here met.

The fundamental purpose of the instructions by a court is to express to the jury in general, survey fashion a basic outline of the applicable principles of law so that the jury might have the benefit of certain essential rules as the members assort the testimony, reflect upon the evidence and assemble a verdict.... If the charge of the court is to achieve the goal of assisting the jury and

is not to be considered as a credit balance available for redemption in the event of an adverse verdict, then a verdict should be final, absent a gross shortcoming in the trial-specifically, as earlier noted, unless there is a gross disparity *586 between the verdict and the evidence or there has been gross and harmful error.

It cannot reasonably be asserted that there is here a gross disparity between the verdict and the evidence and, for my part, there has been neither gross nor harmful error. Therefore, the verdict should stand.

Pa.Super., 1984.
Ackerman v. Delcomico
336 Pa.Super. 569, 486 A.2d 410

END OF DOCUMENT

State of South Carolina)
County of Greenwood)

Judgment In A Civil Case

Common Pleas Court

Case# 2004-CP-24-38

JON E. HARTFIELD

Plaintiff

GLENN MCDONALD, ETAL

Defendant

- ☒ JURY VERDICT. This action came before the court for a trial by jury. The issue have been tried and a verdict rendered.
- ☐ DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED. (CHECK REASON) ☐ rule 12b, SCRPC ☐ rule 41(a), SCRPC (vol. Nonsuit); ☐ rule 43(k), SCRPC (settled); ☐ other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ rule 40(j), SCRPC; ☐ bankruptcy; ☐ other _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order:

☒ Statement of Judgment by Court;

- 1) Plaintiff Jon E. Hartfield verdict against Defendant Shou Mae Morris for \$8 million dollars actual damage.
- 2) Plaintiff Haskell L. Hartfield verdict against Defendant Shou Mae Morris for \$2 million dollars actual damage.
- 3) Mistrial as to Defendant Glenn McDonald.

Dated at Greenwood, South Carolina, this 8th day of FEBRUARY 2007,

L. B. Patterson
MON. LARRY R. PATTERSON
Presiding Judge

This judgment was entered on the 8th day of FEBRUARY 2007,
and a copy mailed first class this 8th day of FEBRUARY 2007,
to attorneys of record or to parties (when appearing pro se) as follows:

JON E. NEWLON

Attorney(s) for Plaintiff

W. GREG SEIGLER/

C. RAUCH WISE

Attorney(s) for Defendant

Ingram Moon
Clerk of Court

South Carolina
County of Greenwood

Judgment In A Civil Case

Common Pleas Court

Case# 2004-CP-24-38

JON E HARTFIELD, ETAL
Plaintiff

THE GETAWAY LOUNGE, ETAL
Defendant

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
FEB 26 PM 11 24

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issue have been tried and a verdict rendered.
- ☒ DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED. (CHECK REASON) ☐ rule 12b, SCRCP ☐ rule 41(a), SCRCP (vol. Nonsuit); ☐ rule 43(k), SCRCP (settled); ☐ other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ rule 40(j), SCRCP; ☐ bankruptcy; ☐ other _____

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order;
☐ Statement of Judgment by Court;

ORDER GRANTING MOTION TO PIERCE THE CORPORATE VEIL OF THE GETAWAY LOUNGE & GRILL, INC.

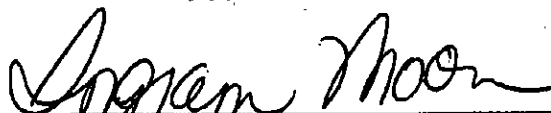
Dated at Greenwood, South Carolina, this 22ND day of FEBRUARY 2007,


HON. LARRY B. PATTERSON
Presiding Judge

This judgment was entered on the 26TH day of FEBRUARY 2007,
and a copy mailed first class this 26TH day of FEBRUARY 2007,
to attorneys of record or to parties (when appearing pro se) as follows:

JON E. NEWLON
Attorney(s) for Plaintiff

C. RAUCH WISE
Attorney(s) for Defendant


Ingram Moon
Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

Jon E. Hartfield, by and through his,)
Conservator, Haskell L. Hartfield)
and Haskell L. Hartfield,)
individually,)

Plaintiffs,)

v.)

The Getaway Lounge & Grill, Inc.,)
Shou Mei Morris, individually and)
As President of the The Getaway)
Lounge & Grill, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Case No. 2004-CP-24-38

ORDER

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2007 FEB 26 AM 11 24

This matter comes before the Court on Plaintiffs' Motion to pierce the corporate veil of the Getaway Lounge & Grill, Inc. ("Getaway"), a non-profit corporation incorporated in 1992 under South Carolina law.

Plaintiff Jon E. Harfield sustained significant injuries in a car accident when Mr. Hoyt ^eHilton, who died from injuries sustained in the collision, drifted into the wrong lane and crashed head on into a vehicle in which Plaintiff was a passenger. Earlier that evening, Mr. ^eHilton had visited several bars including the Getaway where an eyewitness observed him consuming alcohol. His blood alcohol level was above .21 at the time of the accident.

The jury found the Defendant Getaway negligent per se in violation of statute §61-4-580 for selling alcohol to a person they knew or reasonably should have known

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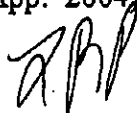
was intoxicated. Thereafter, Plaintiffs moved to pierce the corporate veil and the Court conducted a hearing and took testimony.

An action to pierce the corporate veil lies in equity, and thus, it is a decision for the Court. *Dumas v. InfoSafe Corp.* 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995). In *Sturkie v. Sifly* 280 S.C. 453, 456, 313 S.E.2d 316, 318 (Ct. App. 1984), a two-prong test was established to determine whether to pierce the corporate veil. "The first part of the test, an eight-factor analysis, looks to observance of corporate formalities by the dominant shareholders. The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." *Id.*

The Plaintiffs have met their burden of proof under the first prong because there was a sufficient showing that the Getaway failed to function properly as a South Carolina Corporation. First, there was a manifest disregard for corporate record keeping or any adherence to corporate formalities. The entire corporation file submitted to the Court consisted of income tax returns from 2003-2005. There was no documentation of meeting minutes, cash receipts, or other daily record keeping that would normally be expected of a corporation that had been in operation since 1992.

Second, Shou Mei Morris failed to function as president of the corporation. She exhibited little knowledge of the corporation's recent affairs during her testimony. In addition, she also admitted that she has been pre-occupied with other business ventures and had not been involved with the running of the corporation for some time.

Third, the corporation was not adequately capitalized. In *Hunting v. Elders* 359 S.C. 217, 227, 597 S.E.2d 803, 808 (Ct. App. 2004), the Court noted that the key



component of this inquiry is whether or not "the corporation was grossly undercapitalized for the purposes of the corporate undertaking." In this regard, it further stated that a corporation incorporated for the purpose of serving alcohol has more inherent risk and needs to be adequately protected from liability associated with those risks. *Id.* The Getaway had few corporate assets and never obtained liquor liability insurance even though it was at a high risk of liability as a drinking establishment. Thus, it clearly did not maintain adequate capital to satisfy potential liability claims against the corporation.

Under the second prong for fundamental unfairness, the Plaintiffs must establish "(1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." *Sturkie* 280 S.C. at 459, 313 S.E.2d at 319. The essence of the test is that "an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Hunting* 359 S.C. at 228, 597 S.E.2d at 809.

This determination is made more difficult by the fact that, despite Plaintiffs' request to produce and a Court hearing, the only information submitted to the Court consisted of income tax returns from the years 2003-2005. The Getaway failed to provide any records of the corporation prior to the accident and claimed all of their corporate documents were stolen out of a filing cabinet. Moreover, Ms. Morris and her daughter failed to remedy the gap of information caused by the lack of corporate documentation during their testimony. This Court has not been fully informed on how the corporation conducted itself and the Defendant should not be able to hide behind missing or stolen documents in seeking to avoid personal liability.

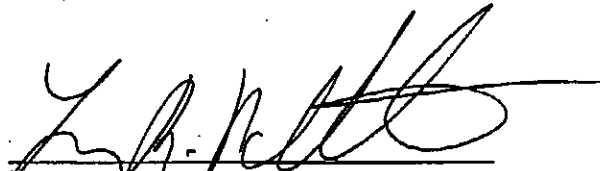


Furthermore, given the inherent risks associated with a bar and the undercapitalization of the corporation, it would be fundamentally unfair to allow the Defendant to avoid personal liability through the use of the corporate form. An alcohol establishment operating with few corporate assets and no insurance is acting, at the very least, with a "reckless disregard" of the high risk of liability inherent in this type of business. Additional weight is given to the fact that Plaintiffs are "involuntary creditors." They did not choose to become a creditor of the corporation and should not be expected to bear the burden for the way the Getaway conducted itself as a South Carolina corporation.

Plaintiffs' Motion to pierce the corporate veil is GRANTED. A judgment shall be entered in favor of the Plaintiffs against the corporation and Shou Mei Morris individually in the amount awarded by the jury.

IT IS SO ORDERED.

February 22, 2007


Hon. Larry R. Patterson

State of South Carolina)

County of Greenwood)

Judgment In A Civil Case

Common Pleas Court

Case# 2004-CP-24-38

JON E HARTFIELD, ETAL

Plaintiff

THE GETAWAY LOUNGE, ETAL

Defendant

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issue have been tried and a verdict rendered.
- ☒ DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED. (CHECK REASON) ☐ rule 12b, SCRPC ☐ rule 41(a), SCRPC (vol. Nonsuit); ☐ rule 43(k), SCRPC (settled); ☐ other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ rule 40(j), SCRPC; ☐ bankruptcy; ☐ other _____

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order:
☐ Statement of Judgment by Court;

ORDER DENYING RULE 59 MOTIONS

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2007 FEB 26 AM 11 23

Dated at Greenwood, South Carolina, this 22ND day of FEBRUARY 2007,


MON. LARRY R. PATTERSON
Presiding Judge

This judgment was entered on the 26TH day of FEBRUARY 2007,
and a copy mailed first class this 26TH day of FEBRUARY 2007,
to attorneys of record or to parties (when appearing pro se) as follows:

JON E. NEWLON

Attorney(s) for Plaintiff

C. RAUCH WISE

Attorney(s) for Defendant


Ingram Moon
Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

Jon E. Hartfield, by and through his,)
Conservator, Haskell L. Hartfield)
and Haskell L. Hartfield,)
individually,)

Plaintiffs,)

v.)

The Getaway Lounge & Grill, Inc.,)
Shou Mei Morris, individually and)
As President of the The Getaway)
Lounge & Grill, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Case No. 2004-CP-24-38

ORDER

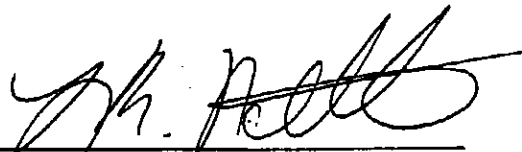
FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2007 FEB 26 AM 11 23

This matter comes before the Court on Defendant's Motion for a New Trial and Judgment Notwithstanding the Verdict under Rule 59(a) and (e).

The evidence and testimony presented by the Plaintiffs' expert, who extrapolated the blood alcohol content of Hoyt Helton from the time of the accident back to the time he could have been at the Getaway Lounge & Grill, Inc., showed that a reasonable person would know or should have known that Mr. Helton was intoxicated. Consequently, Defendant's Rule 59 Motions are DENIED.

IT IS SO ORDERED.

February 22, 2007


Hon. Larry R. Patterson

Custody Details Report

Verified

Custody Details

LSN: L0307386.1 Blood

Date	From	To	Bin/Pin	Container/Tag
7/16/03 10:44:00 AM	Calvert, Dennis (SCSHP0200/10103819)	Tox drop box in login (By Corley, L.E.)	TOX-BOX	E196325
7/16/03 2:59:00 PM	Tox drop box in login (By Reed, B..)	TOX WALK-IN REFRIGERATOR 443 (TOXR)	TOXR	E196325
8/5/03 11:00:00 AM	TOX WALK-IN REFRIGERATOR 443 (TOXR)	Lewis, Alex G. (SCLED0000/ALG1)	ALG1	E196325
8/13/03 5:36:00 PM	Lewis, Alex (SCLED0000/ALG1)	Temporary evidence disposal bins - To (By Lewis, A	TOXD	E196325

LSN: L0307386.2 Urine

Date	From	To	Bin/Pin	Container/Tag
7/16/03 10:44:00 AM	Calvert, Dennis (SCSHP0200/10103819)	Tox drop box in login (By Corley, L.E.)	TOX-BOX	E196325
7/16/03 2:59:00 PM	Tox drop box in login (By Reed, B..)	TOX WALK-IN REFRIGERATOR 443 (TOXR)	TOXR	E196325
8/5/03 11:00:00 AM	TOX WALK-IN REFRIGERATOR 443 (TOXR)	Lewis, Alex G. (SCLED0000/ALG1)	ALG1	E196325
8/13/03 5:36:00 PM	Lewis, Alex (SCLED0000/ALG1)	Temporary evidence disposal bins - To (By Lewis, A	TOXD	E196325

LSN: L0307386.3 Ocular

Date	From	To	Bin/Pin	Container/Tag
7/16/03 10:44:00 AM	Calvert, Dennis (SCSHP0200/10103819)	Tox drop box in login (By Corley, L.E.)	TOX-BOX	E196325
7/16/03 2:59:00 PM	Tox drop box in login (By Reed, B..)	TOX WALK-IN REFRIGERATOR 443 (TOXR)	TOXR	E196325
8/5/03 11:00:00 AM	TOX WALK-IN REFRIGERATOR 443 (TOXR)	Lewis, Alex G. (SCLED0000/ALG1)	ALG1	E196325
8/13/03 5:36:00 PM	Lewis, Alex (SCLED0000/ALG1)	Temporary evidence disposal bins - To (By Lewis, A	TOXD	E196325

VERIFIED CHAIN OF
CUSTODY RECORDS
ALL 11/13/03

43

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

TOXICOLOGY DEPARTMENT

Coroner Jim Coursey
Greenwood Coroner's Office
422 Trestle Road
Greenwood, SC 29646

August 14, 2003
SLED Lab No: L03-07386
Your Case No: Not Listed
Incident Date: 07/12/03
(V) Helton, Gary Hoyt

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.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item 1: Blood labeled "Gary Helton"

RESULTS:

0.212 % (w/v) Ethanol found in blood (Calculated from serum/plasma Ethanol level).

Negative screen for Benzodiazepines.

(Oxazepam, nordiazepam, et al.)

Urine threshold 0.2 mg/L; blood threshold 0.05 mg/L.

Negative screen for Cocaine and/or Cocaine metabolites.

(Cocaine, benzoylecgonine, et al.)

Urine threshold 0.3 mg/L; blood threshold 0.1 mg/L.

Negative screen for Opiates.

(Morphine, codeine, et al.)

Urine threshold 0.2 mg/L; blood threshold 0.2 mg/L.



Supplemental Report of Cause of Death
Office of Vital Records and Public Health Statistics

September 23, 2003

Death Certificate No. :

03-019539

(State Office Use Only)

Name of Deceased: Hoyt Gary Helton Age: 54

Date of Death: 7/11/03 County of Death: Greenwood Sex: M Race: W

Reason for supplemental information:

- ☐ Autopsy Findings.
 ☐ Cause of Death Pending on Original Certificate.
 ☐ Additional information for Classifying Cause of Death.
 ☐ Requested by physician/coroner/medical examiner.
 ☐ Other, specify:
 ☐ Manner of death and/or accident information.

TIME OF DEATH 24 <u>11:00 P</u> M		DATE PRONOUNCED DEAD (Month, Day, Year) 25. <u>7/11/03</u>		WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER? (Yes or No) 26. <u>Yes</u>	
27. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line.					
IMMEDIATE CAUSE (Final disease or condition resulting in death) SEQUENTIALLY list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (disease or injury that initiated events resulting in death) LAST	a. <u>Blunt force trauma to the head</u>				Approximate Interval Between Onset and Death
	b. DUE TO (OR AS A CONSEQUENCE OF): <u>Motor vehicle accident</u>				
	c. DUE TO (OR AS A CONSEQUENCE OF):				
	d. DUE TO (OR AS A CONSEQUENCE OF):				
PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.				AUTOPSY (Yes or No) 28a. <u>No</u>	
29. MANNER OF DEATH ☐ Natural ☐ Pending Investigation ☐ Accident ☐ Could not be Determined ☐ Suicide ☐ Homicide		DATE OF INJURY (Month, Day, Year) 30a. <u>7/11/03</u>	TIME OF INJURY 30b. <u>11 PM</u>	INJURY AT WORK? (Yes or No) 30c. <u>No</u>	
		PLACE OF INJURY - (Home, Farm, Street, Factory, Office, etc.) (Specify) 30a. <u>Street</u>	DESCRIBE HOW INJURY OCCURRED 30d. <u>Automobile Accident</u>		
		LOCATION (Street and Number or Rural Route Number, City or Town, State) 30e. <u>Highway 254 North Greenwood SC</u>			

* Additional information Requested:

Check the appropriate blocks as follows:

The accident was a Collision involving ☒ another motor vehicle; ☐ animal; ☐ train; ☐ pedestrian; ☐ fixed object (state object):

The accident was a Non-Collision due to ☐ loss of control; ☐ overturning; ☐ running off road; ☐ other, specify:

The decedent was the ☒ driver /type vehicle-car, truck, van, 18-wheeler; ☐ passenger /type vehicle-car, truck, van, 18-wheeler; ☐ pedestrian; ☐ motorcycle driver; ☐ motorcycle passenger; ☐ bicyclist; ☐ tricyclist; ☐ skateboarder.

The decedent was: ☐ not drinking or on drugs; ☒ drinking; ☐ on drugs

Signature and Title of Certifying Officer

Date Signed

Marcia Kelley, Deputy Coroner
600 Monument St., Box P-127
Greenwood, SC 29646

(State Office Use Only)

Death certificate updated pursuant to SC Reg. 61-19, Section 18(f)

(Nosologist)

Defendant's Request to Charge N° 4

To find that Hoyt Helton was intoxicated at the time he was served an alcoholic beverage and that the defendant knew he was intoxicated, the plaintiff must prove more than the fact that Hoyt Helton had a high blood alcohol level.

Defendant's Request to Charge N° 6

Before you can find a defendant liable, the plaintiff must prove that Hoyt Helton was visibly intoxicated at the time he was served an alcoholic beverage. It is not sufficient to prove only that Mr. Helton was intoxicated or he had a high blood alcohol level.

1 LAURA RIDDLE,
2 after being first duly sworn, testified as follows:
3 DIRECT EXAMINATION
4 QUESTIONS BY MR. NEWLON:
5 Q Can you please state your name for the
6 record?
7 A Laura Riddle.
8 Q Okay. Where do you live?
9 A I currently live in Rock Hill where I'm going
10 to school. My parents live in Creekside.
11 Q Okay. At the time of this accident back in
12 July of 2003 where were you living?
13 A In Creekside.
14 Q With your parents?
15 A Yes.
16 Q Okay. Do you know Jon Eric Hartfield?
17 A Yes.
18 Q Do you see him in the courtroom today?
19 A Yes.
20 Q Where is he sitting?
21 A (Indicating).
22 Q Back then at the time of this accident did
23 you know him?
24 A Yes.
25 Q Okay. On the evening of July 11th, 2003, did

1 you have an occasion to be with him that day?

2 A Yes. We were at my parents' house.

3 Q Okay. At some point that evening did you
4 leave your parents' house?

5 A Yes.

6 Q Okay. And what car were you driving?

7 A My car.

8 Q What kind of car was it?

9 A It's a '96 Honda Accord -- that is what I
10 drive now. It was a burgundy Honda Accord, a '94.

11 Q When you left the house that evening about
12 what time was it?

13 A After, between 10:30 and 11:00.

14 Q Okay. When you left who was driving?

15 A I was.

16 Q Where was Jon Eric seated?

17 A In the front passenger seat.

18 Q Okay. Where were you all headed?

19 A We were going to his house.

20 Q Okay. Did you make it to his house?

21 A No.

22 Q Okay. Can you tell the jury, do you remember
23 what time, was it dark?

24 A Yes.

25 Q Okay. And what was the weather like?

1 A It had been raining heavily earlier but it
2 had stopped raining, it was a little foggy and the
3 roads were still wet.

4 Q All right. Where about did this accident
5 happen? Do you remember about approximately where
6 on the road?

7 A It was almost directly in front of the Forest
8 Hills Subdivision.

9 Q That is Highway 254?

10 A Right.

11 Q Can you describe for the jury what you recall
12 about how this accident took place?

13 A I was driving down 254, Cokesbury Road,
14 toward Greenwood High School, I came over the hill
15 where you can see the lights for the intersection
16 right at the high school, I noticed a car heading
17 toward me and when I first noticed he was still in
18 front of the intersection but I watched, he
19 suddenly jumped over in my lane so by the time I
20 got to the intersection he was directly in front of
21 me in my lane coming at me. So, I swerved to the
22 left because if I had gone right I would have run
23 directly into a brick sign. I figured if I went
24 left I would avoid him but he turned back to his
25 right and ran directly into the front right side of

1 my car.

2 Q Okay.

3 MR. NEWLON: Your Honor, if I may approach
4 the witness?

5 THE COURT: Okay.

6 Q I'm just simply going to hand you what I have
7 marked as Plaintiff's Exhibit 1 and ask if you can
8 identify whether or not that's the general area
9 where this accident occurred?

10 A Yes, it is.

11 Q Okay. That being the entrance to Creekside,
12 I mean --

13 A Forest Hills.

14 Q Forest Hills, okay. And I'm going to hand
15 you what I have previously marked as Plaintiff's
16 Exhibits 2 through 8 and have you take a moment to
17 look through those just to make sure you can
18 identify the vehicle in those photographs.

19 MR. WATSON: Judge, if I may make an inquiry
20 of Mr. Newlon? I'm assuming you are going exactly
21 by the ones you sent us?

22 MR. NEWLON: Yes.

23 MR. WATSON: You haven't let us look at them
24 yet -- if he's going exactly by the copies he made
25 us, that's fine.

1 MR. NEWLON: Yes, and I did let you look at
2 them.

3 THE WITNESS: This is my car.

4 BY MR. NEWLON:

5 Q Okay. Is that the way the car appeared
6 following this particular accident?

7 A Yes.

8 Q Okay.

9 MR. NEWLON: Your Honor, I move into evidence
10 Exhibits 1 through 8.

11 THE COURT: Okay, without objection.

12 MR. WATSON: I have no objection.

13 THE COURT: In addition to the car there is
14 one showing a roadway, I think, too.

15 MR. WATSON: I'm assuming I will -- I would
16 like to make sure, we have some other copies here.
17 I have no objection.

18 THE COURT: All right. Without objection
19 those eight will be in evidence.

20 (Eight photographs marked and received in
21 evidence as Plaintiff's Exhibits 1, 2, 3,
22 4, 5, 6, 7 and 8).

23 BY MR. NEWLON:

24 Q Now, Miss Riddle, can you describe for the
25 jury the nature of the collision?

1 A It was very violent and loud. Right after
2 impact I was knocked unconscious, so I don't really
3 know much about what happened. I just remember he
4 ran up the front side, the front right side of my
5 car and when I woke up my dashboard was completely
6 crushed in on my legs and Jon Eric's legs weren't
7 crushed because he had pulled them up in the seat
8 at the time.

9 Q Okay. Did you observe Jon Eric?

10 A Yes.

11 Q What was, what injuries or anything did you
12 observe regarding Jon Eric at that time?

13 A There was blood everywhere and he wasn't
14 responding, he was making noises and I was trying
15 to wake him up, and at that time one of the
16 neighbors had heard the accident and came and he
17 called the ambulance, the firefighters got there,
18 but I could never wake him up, but I didn't see any
19 injuries because it was dark but his blood was all
20 over me, and his head, I couldn't see his face.

21 Q Okay. Did he ever regain any consciousness?

22 A Huh-uh (negative).

23 Q What happened after that? Did you, were you
24 taken to the hospital?

25 A I was taken to the hospital and he was air

1 lifted to Greenville and I didn't see him after I
2 was taken to the hospital.

3 Q Okay. Have you seen Jon Eric since, after
4 this accident and he has recovered and come back
5 from the hospital?

6 A Yes, many times.

7 Q Has he changed in any way?

8 A Yes.

9 Q How has he changed?

10 A He's regained some motor control but from
11 where I saw him, because I spent the first three
12 months there with him in a coma and then I didn't
13 see him for awhile, and when I saw him again he
14 still wasn't walking but he regained some muscle
15 control and he was still doing physical therapy,
16 but he's still not who I knew.

17 MR. NEWLON: Okay, Laura, thank you very
18 much. Answer any questions these attorneys may
19 have for you.

20 THE COURT: Mr. Seigler?

21 MR. SEIGLER: Your Honor, I have no questions
22 for Miss Riddle.

23 THE COURT: Mr. Wise?

24 MR. WISE: Just a few.

25

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Was that turn arrow out there that night?

4 MR. NEWLON: Your Honor, we need to approach.

5 (Unrecorded bench conference).

6 BY MR. WISE:

7 Q Was there a turn arrow out there that night?

8 A A what?

9 Q A turn arrow. In Plaintiff's Exhibit 1 you

10 see --

11 A On the road.

12 Q You see some turn arrows?

13 A They were not.

14 Q There were no turn arrows there?

15 A No.

16 Q And the road was very wet, I assume?

17 A Yes.

18 Q Did it make seeing the dividing line somewhat
19 difficult?20 A No. The dividing lines had just recently
21 been painted because they had just repaved the
22 road, so the yellow lines were very visible but
23 they had not painted the turn arrows yet.24 Q No turn arrows for the turning lanes out
25 there?

1 A No.
2 MR. WISE: Thank you.
3 MR. WATSON: No questions.
4 THE COURT: Thank you.
5 MR. NEWLON: Just one.
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REDIRECT EXAMINATION

QUESTIONS BY MR. NEWLON:

Q From what you saw in this particular accident, this Hoyt Helton, he drifted --

MR. WISE: Your Honor --

THE COURT I sustain the objection.

MR. NEWLON: All right.

THE COURT: All right.

(Witness excused).

THE COURT: Okay, Mr. Newlon.

MR. NEWLON: The plaintiff would call Susan Helton to the stand.

1 SUSAN HELTON,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Good afternoon. State your name for the
6 record, please.

7 A Susan Helton.

8 Q Okay. Susan, back in July of 2003 where
9 where were you living?

10 A On Highway 246 in Cokesbury, Hodges.

11 Q Who was living with you there at that time?

12 A Just me and my husband.

13 Q And your husband's name?

14 A Hoyt.

15 Q Okay. Hoyt Helton, people knew him as Punk?

16 A Punk, yes, sir.

17 Q And you and Punk were married?

18 A Yes.

19 Q How long had you lived there with Hoyt?

20 A Since 1992.

21 Q Okay. About eleven years?

22 A About eleven years.

23 Q Had you ever ridden -- let me ask you this.

24 Hoyt, did he go to Greenwood often?

25 A Probably three or four times a week.

1 Q Okay. And when he went how would he go, what
2 highway did he take?

3 A He would go down 254.

4 Q Okay. Had you actually been with him going
5 into town?

6 A I probably have but usually he went alone
7 because I worked nights at Greenwood Mills.

8 Q Did you occasionally go into town with him,
9 either meet him or ride with him to visit any bars
10 or anything?

11 A Usually I would drive, if I went with him I
12 would drive.

13 Q Okay. But you had gone together with him?

14 A Yes.

15 Q Okay. Hoyt, did he have a speech impediment
16 or anything?

17 A No.

18 Q Okay. So, any problems with the way he
19 talked, that you could tell?

20 A No.

21 Q Do you recall the accident in this case that
22 happened back in July of 2003?

23 A Yes.

24 Q Okay. How did you hear about it?

25 A Two police officers came to my job and told

1 me about it.

2 Q All right. Did Hoyt call you that night
3 before he came home?

4 A Yes, he did. He called me on my cell phone
5 and left a message.

6 Q Okay. Did you share that message with
7 anybody?

8 A I did. There was a trooper that heard it, I
9 think maybe his two daughters and his son heard it.

10 Q Okay.

11 A I'm not sure if anybody else heard it.

12 Q I want to talk about Hoyt real quick. Did
13 Hoyt drink?

14 A Yes, he did.

15 Q What did he drink?

16 A He dranked Bud Light beer.

17 Q Did he typically drink anything else that you
18 are aware of?

19 A No. Usually just Bud Light beer.

20 Q Okay. What type of drinker was he? Did he
21 chug it, sip it?

22 A He was a sipper, he sipped beer.

23 Q All right. In the eleven years you were
24 married, about what time of day would he typically
25 start drinking?

1 A I would say around 12:00 to 1:00, something
2 like that.

3 Q Okay. On this particular day of this
4 accident back on July 11th, 2003, do you remember
5 approximately what time he left the house that day?

6 A No, I don't.

7 MR. NEWLON: Your Honor, I'm going to need to
8 open the deposition of Susan Helton.

9 Q Ma'am, do you recall when I took your
10 deposition back in January of '06?

11 A Yes, I do.

12 Q Okay. If you would for me --

13 THE COURT: Why don't you ask her the
14 question first, Mr. Newlon, then if she says
15 something contrary you can use the deposition but
16 let her testify under oath in front of the jury
17 first.

18 MR. NEWLON: I am, Your Honor. She --

19 THE COURT: You don't use the deposition and
20 publish it, you ask her the questions first. If
21 she testifies to something contrary to that you can
22 impeach her with it.

23 MR. NEWLON: That's what I'm doing, sir.

24 THE COURT: I hadn't heard her testimony.

25 MR. NEWLON: She denied knowing when he left

1 that afternoon.

2 THE COURT: Oh, okay.

3 THE WITNESS: I was asleep, how would I know
4 when he left?

5 BY MR. NEWLON:

6 Q I understand. Would you please turn to page
7 14 for me? Line 10 I asked, "When he went out
8 typically to go where he goes, to what he did, what
9 time of day would he normally leave?"

10 What time did you say?

11 A 4:00, 4:30.

12 Q All right.

13 A But I don't know exactly when he left that
14 day.

15 Q But that is when he typically would leave?

16 A Typically.

17 Q All right. I just want to make sure because
18 you said earlier it was 1:00 o'clock or 2:00
19 o'clock, but actually it was 4:00 to 4:30 when he
20 typically left?

21 A Yes.

22 Q All right. On that particular day did you
23 see him at all that day?

24 A Yes, I did.

25 Q What was the last time you saw him?

- 1 A It was about 1:10, 1:15.
- 2 Q All right. And when you saw him that last
3 time where were you going, what were you doing,
4 what was he doing?
- 5 A He woke me up, our puppy had gotten out, was
6 loose, and he was on crutches, he couldn't run
7 after the puppy, so he got me up to go get the
8 puppy and I got the puppy in and went straight back
9 to bed.
- 10 Q Okay. At that point right then when that
11 happened do you recall whether or not he had been
12 drinking at that point at anytime?
- 13 A No, I don't recall.
- 14 Q You have no recollection at all?
- 15 A No.
- 16 Q Okay. And then you went back to bed and then
17 when did you wake up?
- 18 A At 5:45.
- 19 Q Okay. Was he there at 5:45?
- 20 A No.
- 21 Q Was the car gone?
- 22 A Yes.
- 23 Q And that car would have been?
- 24 A The Blazer.
- 25 Q Okay.

1 MR. NEWLON: Your Honor, if I may approach
2 the witness?

3 Q I'm going to hand you what I have previously
4 marked as Exhibits 9, 10 and 11 and ask you to take
5 a look at those and see if you can identify the
6 vehicle in those photographs?

7 A Yes. It looks like it.

8 Q Is that the Blazer that Hoyt was driving the
9 night of the accident?

10 A I would say so, yes.

11 Q Is that how it appeared after the accident?

12 A I don't know. This is the first time I have
13 seen it.

14 Q Was the car towed back to your yard?

15 A Yes, it was.

16 Q Is that the back of your yard?

17 A Yes, it is.

18 Q Okay.

19 MR. NEWLON: Your Honor, I move to have
20 Exhibits 9, 10 and 11 into evidence.

21 THE COURT: Without objection they are in
22 evidence.

23 MR. WATSON: No objection.

24 (Three photographs marked and received in
25 evidence as Plaintiff's Exhibit Numbers 9,

1 10 and 11).

2 BY MR. NEWLON:

3 Q Let me ask you this, Susan. Had you ever
4 seen Hoyt drunk before?

5 A Yes.

6 Q Typically what did he, how did he appear when
7 he was drunk?

8 A He had slurred speech, maybe wobbly, he would
9 be wobbly.

10 Q Did he get red eyes, glassy eyes?

11 A Yes. Yes, I'm sure he did.

12 Q Could you tell when he was intoxicated?

13 A When he was very intoxicated I could tell.

14 Q Okay. So, there was an occasion where he got
15 very intoxicated and you saw him?

16 A Yes.

17 Q How much did he weigh, approximately?

18 A Probably 130 to 150.

19 Q Okay. On that occasion -- were you ever
20 aware of an occasion where he would drink and
21 drive?

22 A Yes.

23 Q Had he gotten in trouble for that in the
24 past?

25 A Yes.

1 Q A number of times?

2 A A number of times, yes.

3 Q Okay. Were there any particular places that
4 you're personally aware of that he frequented?

5 A Yes.

6 Q Where?

7 A That would be Williams Package, The Getaway,
8 Lucky's and Simon's.

9 Q Okay. On this particular night of July 11th,
10 2003, do you have any personal knowledge of where
11 he went that night, what he disclosed to you?

12 A He didn't disclose to me where he went.

13 Q When he called you on the phone he didn't
14 tell you where he was coming from?

15 A No.

16 Q You have no personal knowledge where he went
17 that night?

18 A No.

19 Q Okay. How often would he go to the Getaway?

20 A I would say two or three, maybe two or three
21 times a week, I'm just guessing.

22 Q Okay. Had you ever been with him to the
23 Getaway?

24 A Yes.

25 Q Okay. Do you know in the eleven years of

- 1 marriage that was a place he frequented?
- 2 A Well, not the whole eleven years, I wouldn't
3 say.
- 4 Q Okay.
- 5 A But the last few years.
- 6 Q The last few years, up until this accident?
- 7 A Yes.
- 8 Q Okay. Did he go to Williams Package
9 frequently?
- 10 A Yes.
- 11 Q Okay. Did he go to the Carolina Drive-In
12 frequently?
- 13 A I have never known him to go to Carolina
14 Drive-In.
- 15 Q You never went to the Carolina Drive-In with
16 him before?
- 17 A No.
- 18 Q Okay. Was Hoyt an alcoholic, based on your
19 observations?
- 20 A Yes, he was an alcoholic.
- 21 Q He would drink all the time?
- 22 A Pretty much.
- 23 Q Was that a mystery to his friends and family?
- 24 A No.
- 25 MR. WISE: Your Honor, objection, calls for

1 speculation.

2 THE COURT: I sustain the objection.

3 MR. NEWLON: Thank you.

4 BY MR. NEWLON:

5 Q Did you ever have to go pick him up from any
6 bars because he was too drunk?

7 A Yes.

8 Q Did you ever have to go pick him up at either
9 The Getaway or Williams Package?

10 A Yes.

11 Q Did he ever come home drunk after driving
12 home?

13 A Yes.

14 MR. NEWLON: Your Honor, I don't have any
15 further questions. Thank you very much.

16 THE COURT: Mr. Seigler.

17 MR. SEIGLER: If it please the Court.
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CROSS EXAMINATION

QUESTIONS BY MR. SEIGLER:

Q Good afternoon, Miss Helton. Miss Helton, he asked you about the bars Mr. Helton frequented?

A Yes.

Q You stated the Carolina wasn't one of those?

A No.

Q You all didn't go there together?

A No.

Q Would it be fair to say he didn't go there frequently?

A Yes.

Q You said 1:10, 1:15 was the last time you saw him?

A Right.

Q You have no idea where he went or what he did after that time?

A No.

Q Okay. Mr. Newlon asked you if Mr. Helton ever got intoxicated. Based on your observations how much would it take for Mr. Helton on a typical day to get intoxicated?

A I wouldn't say he would get intoxicated. The fact that he dranked, you know, every day, he probably had some level of intoxication in his

1 system at anytime but he didn't appear to be
2 intoxicated every day.

3 Q But he did drink every day?

4 A He did drink every day.

5 Q Just for clarification, you said Mr. Helton
6 went to the Getaway, Williams Package, Lucky's and
7 Simon's frequently, not the Carolina?

8 A No.

9 MR. SEIGLER: Thank you. I have no further
10 questions.

11 THE COURT: Mr. Wise.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Mrs. Helton, do you remember when your
4 husband got the cast off his leg?

5 A When?

6 Q Yes, ma'am.

7 A I'm thinking it was approximately two weeks
8 before the accident.

9 Q Two weeks before?

10 A Yes. Maybe three.

11 Q You say he sipped his beer?

12 A Yes.

13 Q It would take about, what, an hour to drink a
14 beer?

15 A An hour, hour and a half.

16 Q Just a real slow drinker?

17 A A slow drinker, yes.

18 Q And would you go out with him on occasion?

19 A Yes, I did.

20 Q You would observe how he drank?

21 A Yes.

22 Q And it was at that rate?

23 A Right.

24 Q Okay. And you say that you have gone to pick
25 him up at different lounges around town?

- 1 A Yes.
- 2 Q Would they call you and tell you to come get
3 him, that he shouldn't be driving?
- 4 A Sometimes they would call and sometimes he
5 would call me.
- 6 Q Sometimes he would call?
- 7 A Or some friend would call.
- 8 Q And has the Getaway ever called you?
- 9 A I believe so, yes.
- 10 Q And you had no problem doing that?
- 11 A No.
- 12 Q Okay. And do you know where Lucky's and
13 Simon's are located?
- 14 A Yes.
- 15 Q Are they fairly close to each other?
- 16 A Well, Lucky's is on Emerald Road.
- 17 Q Okay.
- 18 A Simon's is on the Bypass.
- 19 Q At the end of Emerald Road?
- 20 A Right.
- 21 Q And how close are those two to the Carolina?
22 The Carolina is out on 72?
- 23 A On 72.
- 24 Q In the same general area?
- 25 A Yes.

1 Q And when you heard the telephone conversation
2 that he left on the recording his speech sounded
3 fine to you?

4 A Yes, sir.

5 Q It didn't sound like he had had too much to
6 drink, from that speech?

7 A No.

8 Q From the way he talked, anyway?

9 A Right.

10 Q You have heard him when he has had too much
11 to drink?

12 A Right.

13 Q Noticeably different?

14 A Right.

15 MR. WISE: Thank you.

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATSON:

3 Q Miss Helton, let's give the jury the benefit
4 of the doubt, the benefit of your information, not
5 doubt. I believe Mr. Helton was an Army veteran,
6 is that correct?

7 A Yes.

8 Q He was on disability?

9 A Yes.

10 Q Was he drawing disability from the military
11 and Social Security?

12 A Yes.

13 Q And where had he been in service, was it
14 Korea or Vietnam?

15 A Vietnam.

16 Q And I believe he had been exposed to Agent
17 Orange?

18 A Yes.

19 Q And he had been to treatment on a regular
20 basis in Augusta?

21 A Right.

22 Q Do you know the last time he went down to
23 Augusta for treatment?

24 A I would say it was over a year before he
25 died.

1 Q And he was on a lot of medication?

2 MR. NEWLON: Your Honor, objection.

3 A Yes.

4 THE COURT: I'm going to overrule the
5 objection at this time. Go ahead.

6 Q He was on a lot of medication, was he not?

7 A Yes, sir.

8 Q And how did he walk?

9 A He had to walk on crutches.

10 Q He was on crutches?

11 A Yes. He broke the same leg five times in one
12 year, so his leg was pretty messed up.

13 Q Now, when Mr. Wise asked you when he got out
14 of his cast, what was that for, what did he do when
15 he got out of his cast?

16 A He had broke that leg again.

17 Q So, he was on crutches?

18 A He was on crutches.

19 Q You say he weighed about 130 pounds?

20 A Yes.

21 Q And how tall was he?

22 A Six feet tall.

23 MR. WATSON: I have no further questions.

24 MR. NEWLON: No.

25 THE COURT: Thank you ma'am.

1 (Witness excused).

2 MR. NEWLON: Thank you, Your Honor.

3 The plaintiff calls Robert Cockrell to the
4 stand.

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1 ROBERT COCKRELL,
2 after being first duly sworn, testified as follows:

3 MR. WATSON: Judge, all the lawyers approach
4 the bench just a minute, something has come up back
5 here.

6 (Unrecorded bench conference).

7 MR. NEWLON: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 QUESTIONS BY MR. NEWLON:

10 Q Mr. Cockrell, do you own and operate Williams
11 Package and South End Pub?

12 A Yes, sir.

13 Q Is it a partnership?

14 A Yes, sir.

15 Q Is that the name of the partnership, Williams
16 Package and South End Pub?

17 A Right, yes, sir.

18 Q Who's your partner?

19 A Harry Metts.

20 Q And how long have you had this business
21 relationship?

22 A Approximately going on 18 years.

23 Q Okay. And that partnership was in place on
24 July of 2003 when this accident took place?

25 A Yes, sir.

1 Q Okay.

2 MR. NEWLON: Your Honor, if I may approach
3 the witness?

4 Q I'm going to hand you what I have previously
5 marked Plaintiff's Exhibit 12 to your deposition,
6 to your testimony. Can you identify that structure
7 for me?

8 A That's my place of business.

9 Q Thank you.

10 MR. NEWLON: Your Honor, I move --

11 MR. WATSON: No objection.

12 THE COURT: Without objection.

13 (Photograph marked and received in evidence
14 as Plaintiff's Exhibit Number 12).

15 BY MR. NEWLON:

16 Q Just for the benefit of the jury, as I look at
17 that picture it looks like there are two sides?

18 A Yes, sir.

19 Q Can you explain to the jury what is on the
20 right side as you face it?

21 A Facing the building, on the right side is the
22 liquor store and on the left side is a party shop.

23 Q Okay. What's the difference between the
24 liquor store and party shop?

25 A On the right-hand side, the liquor store, we

1 sell liquor to go. On the left side we had beer on
2 premises.

3 Q Okay. So, if somebody came to drink beer on
4 premises they would come to the left side?

5 A Yes, sir.

6 Q They could drink inside the building?

7 A Yes, sir.

8 Q Okay, thank you. Inside the beer side on the
9 left side, what is inside the building, tables,
10 chairs, pool tables?

11 A Approximately nine or ten chairs, pool table,
12 a bar, and that's approximately it, snack food.

13 Q I'm sorry, go ahead.

14 A That's about it.

15 Q When you say bar, you mean like an elevated
16 bar, somebody come up, it's a little higher than a
17 table?

18 A Higher than a pool table. We only have one
19 table, that's a pool table. We had another table
20 sits over there the people normally sit on and
21 watch people shoot pool.

22 Q Okay. Do you physically operate the South
23 Point Pub.

24 A I operate both sides. My partner comes in
25 late in the afternoon and helps.

1 Q Okay. Do you actually serve beer yourself?

2 A Yes, sir.

3 Q You have been doing that for how many years?

4 A Almost 18.

5 Q Okay. In that 18 years have you ever seen
6 anybody intoxicated at that place?

7 A Yes, sir. I have refused service before.

8 Q Okay. About how many times in a year do you
9 think that happens?

10 A That's hard to say because, you know, you run
11 into that kind of people coming in and out, I would
12 be scared to guess.

13 Q Does it happen a lot?

14 A Not a lot, not a lot. Most people, most of
15 our customers are regulars, occasionally you will
16 have someone stop in there in the morning that's
17 been out all night I have refused service. Most of
18 the regulars, they look out for one another, they
19 take one another home if they have had too much to
20 drink.

21 Q How long had Hoyt been coming there?

22 A I can't remember the number of years. It's
23 been years.

24 Q Did you consider him a regular?

25 A Yes, sir.

1 Q Okay. Has he ever been, have you ever seen
2 him intoxicated at your place?

3 A Not really, not really intoxicated. Of
4 course I have seen him with the walking stick, have
5 seen him with crutches, I have seen him on a
6 wheelchair. He's had a lot of surgeries, a lot of
7 complications from being in the military. He had
8 some self inflicted wounds.

9 Q Thank you for that but my question was have
10 you seen him intoxicated before at your place?

11 A I have seen him that people would take him
12 home, yes, sir.

13 Q Okay. Have you ever refused him alcohol?

14 A No, sir.

15 Q Even when he was intoxicated?

16 A He was not intoxicated, sir. They would keep
17 him from getting a DUI.

18 Q Okay. When you are running your
19 establishment what kind of things do you look for
20 in a person to determine whether or not they're
21 intoxicated and whether or not you should serve
22 them?

23 A You can normally tell by looking at someone's
24 eyes, the way they walk, their speech.

25 Q Anything else?

1 A If they are getting obnoxious and out of line
2 you can tell when someone has had too much.

3 Q Okay. Those times when somebody came to pick
4 up Hoyt, what was he showing at that time?

5 A Like I say, I have never seen him actually
6 falling down drunk, never. Most of the people,
7 like I said, are regulars and when it comes time
8 for me to close they would always take him home or
9 a lot of times his wife would pick him up.

10 Q Okay. On the day of this particular
11 accident, July 11th, 2003, do you remember that
12 day?

13 A Yes, sir.

14 Q Do you have a recollection about that day?

15 A Yes, sir.

16 Q Okay. What time did you open up?

17 A I normally get there about 7:30, we don't
18 open until 9:00, I have people from nextdoor coming
19 over from my restaurant, sit around and drink
20 coffee, retirees, and talk about what's in the
21 news.

22 Q Do you recall what time Hoyt showed up that
23 day?

24 A Around 4:15 -- 4:00, 4:15.

25 Q Okay. How long did he stay there?

1 A He stayed in the store approximately until
2 about 5:30.

3 Q And then what did he do?

4 A My partner came in and was picking at him
5 about being sick that day, everybody knew him, his
6 name was Punk, Harry called him Punky, said,
7 "Punky, you sick today," and all this and he got
8 aggravated and left, he went outside and I never
9 saw him again until 7:00 o'clock when I was closing
10 up.

11 Q When you were closing up where was he?

12 A Sitting on a bench in front of the party
13 shop.

14 Q So, he had basically been inside for an hour
15 and a half or so, then went outside and hung around
16 until 7:00?

17 A Right.

18 Q Okay. And then you left and he was still
19 there when you left?

20 A Yes, sir, he was still on the bench when I
21 left.

22 Q Okay. Was anybody with him, that you recall?

23 A Johnny Teague. He had been out there with
24 Mr. Teague, I think the whole time.

25 Q Okay. About how many times a week would you

1 say that Hoyt came to Williams Package a couple
2 years prior to this accident?

3 A Sometimes he would come two or three times a
4 week, then again he might be in the hospital or
5 somewhere sick, I wouldn't see him for a week.

6 Q On average how many times a week?

7 A A couple times, two, three.

8 Q Okay. Did you ever consider Hoyt Helton,
9 from your observations of him and the time you have
10 known him, did you ever consider him to be an
11 alcoholic?

12 A I would say so, yes, sir.

13 Q Did you ever observe him when he dranked
14 beer, how he dranked?

15 A Slow.

16 Q Sipped it?

17 A Yes, sir.

18 Q What did he drink, what kind of beer did he
19 like?

20 A Budweiser.

21 Q Do you know where, do you have any knowledge
22 where Hoyt typically went after he left Williams
23 Package?

24 A No, sir.

25 Q You have no idea? Did he ever tell you, did

1 he share with you where he went typically?

2 A Well, he frequented a lot of bars, I know
3 that.

4 MR. NEWLON: Your Honor, if I may approach
5 the witness --

6 THE COURT: Okay.

7 MR. NEWLON: -- and open up this deposition?
8 Thank you.

9 BY MR. NEWLON:

10 Q Sir, you recall when I took your deposition
11 back in July of '06?

12 A Yes, sir.

13 Q If you would for me, please turn to page 30.
14 Starting at line 11 I said, "Okay, but he never
15 indicated to you in all those years like where he
16 would go or what was his favorite place of work,"
17 and you said, "No, sir, I know his favorite place
18 was to come stand where I was because all his
19 friends and most of the guys grew up together." I
20 asked you, "What places did he mention in the
21 aftermath when you would talked to him later? You
22 all would tell stories?" "Tell stories." And I
23 said, "You already mentioned The Getaway." What
24 did you say? Line 21.

25 A "Yes, he would always mention the Getaway."

1 Q So, did he mention the Getaway, that he would
2 go there?

3 A Oh, yes, sir.

4 Q Okay. So, you knew he would go to the
5 Getaway sometimes after he left Williams Package?

6 A He would tell me.

7 MR. WATSON: Your Honor, that is a leading
8 question. He doesn't know what he did or didn't
9 do.

10 A I don't know where he went.

11 MR. NEWLON: I didn't ask him what he knew.

12 THE COURT: Just ask the question. Mr.
13 Newlon, let me hear your question.

14 BY MR. NEWLON:

15 Q The question was, did he disclose to you
16 where he would go after he left Williams Package?

17 THE COURT: Go ahead.

18 A Yes, sir, he has told me that he had been to
19 The Getaway at times, you know.

20 Q And your testimony was, as I tried to point
21 out, yes, he would always mention the Getaway?

22 A Yes, he has mentioned the Getaway.

23 Q Okay, thank you.

24 Did you serve Mr. Helton any beer that day?

25 A No, sir.

1 Q Did you see Mr. Helton show up at Williams
2 Package with any beer in his hand?

3 A No, sir.

4 Q When you left at 7:00 and saw Mr. Helton did
5 he have a beer in his possession?

6 A No, sir.

7 Q Did you get close enough to tell whether or
8 not he had been drinking before he came to Williams
9 Package?

10 A No, sir.

11 Q Is there any way he could have dranked a beer
12 while he was there and you not see him?

13 A I didn't see Mr. Helton from 5:30 until about
14 five after 7:00, sir.

15 Q Okay. As far as you are concerned he didn't
16 have a drop of Budweiser while he was at your
17 place?

18 A No, sir.

19 MR. NEWLON: Okay, thank you very much.

20 THE WITNESS: Yes, sir.

21 MR. SEIGLER: If it please the Court, Your
22 Honor.

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CROSS EXAMINATION

QUESTIONS BY MR. SEIGLER:

Q I just have a few questions, sir. Mr. Helton got there at 4:00, you said somewhere in that area?

A Between 4:00 and 4:15.

Q You left about 7:00 or so, you saw him, he was there from 4:00 to 7:00?

A As far -- yes, he was there when I went out the door and locked the alarm, set the alarm, he was sitting on the bench when I locked the alarm.

Q Do you have any idea what he did after that?

A No, sir.

Q Okay. Earlier Mr. Newlon asked you if he mentioned any bars he attended. He never said anything about the Carolina, did he?

A Not that I recall.

MR. SEIGLER: Thank you, sir.

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Mr. Cockrell, you are one of the ones that
4 serve people in the bar?

5 A Yes, sir.

6 Q If he got something to drink he would have to
7 come through you?

8 A Yes, sir.

9 Q And until he got mad at Mr. Metts he hadn't
10 had anything to drink in the bar?

11 A No, sir.

12 Q And did you see who he was talking to
13 outside?

14 A Not until I set the alarm.

15 Q And how long did you spend talking to him
16 when you walked outside?

17 A How long?

18 Q How long did you spend talking to him when
19 you saw him outside?

20 A None at all.

21 Q You just spoke to him?

22 A I didn't speak when I went out the door.

23 Q Other than saying hello or whatever?

24 A You know, I normally leave, when I lock up
25 and close I normally go home.

1 Q Was he sitting down or standing up?

2 A As far as I remember he was sitting.

3 Q So, as far as you know he got there about
4 4:00 to 4:15?

5 A Yes, sir.

6 Q And left sometime after 7:00?

7 A Yes, sir.

8 Q And those approximate three hours he had
9 nothing alcoholic to drink at your place?

10 A Not to my knowledge.

11 Q Is that correct?

12 A Yes, sir.

13 Q And when he got there did he give any
14 appearance of being under the influence when he got
15 there?

16 A No, sir. He talked about being sick.

17 MR. WISE: Okay, thank you.

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CROSS EXAMINATION

QUESTIONS BY MR. WATSON:

Q Mr. Cockrell, you're the same Robert C. Cockrell being sued in this case, is that right?

A Yes, sir.

Q And the plaintiff saw fit to call you as their witness?

A Yes, sir.

Q Now, do you know why these friends of Helton's, and I assume there was some friends, all met at your place, I believe this was on a Friday, wasn't it?

A Yes, sir.

Q Do you know why they always, or did they always meet at your place on Friday?

A Yes, sir.

Q Why did they do that?

A To enter a NASCAR race they all got up among friends.

Q NASCAR racers, all of them were big NASCAR fans, is that right?

A Yes, sir.

Q And they met down at your place on Friday?

A Yes, sir.

Q Some of them would drink a beer and some of

1 them would not drink a beer?

2 A Yes, sir.

3 Q Is that the reason they met down there that

4 day?

5 A Yes, sir.

6 Q And you did not serve any alcoholic beverages

7 whatsoever to Mr. Helton --

8 A No, sir.

9 Q -- on that day?

10 A No, sir.

11 Q And when he left you about 5:30 he was mad at

12 Harry?

13 A Yes, sir.

14 Q Because Harry was kidding him about being

15 sick?

16 A Yes, sir.

17 Q Was he sick?

18 A Yes, sir. You could look at him and tell he

19 was sick.

20 Q What do you mean, how was he sick?

21 A He was sitting at a table watching these guys

22 shoot pool and he was leaning over holding his

23 stomach.

24 Q So, he left and went outside?

25 A Yes, sir.

1 Q And then some of his friends who were the
2 NASCAR friends went out there and talked to him?

3 A Yes, sir.

4 Q And then when you left at 7:00 o'clock -- you
5 closed at 7:00 o'clock?

6 A Yes, sir.

7 Q When you left he was still there on the
8 bench?

9 A Yes, sir.

10 Q And some of his friends were there?

11 A Yes, sir.

12 Q Did you see his ex-wife Vickie Sizemore,
13 Skidmore, at that time?

14 A Yes, sir.

15 Q I believe he was married to her at one time?

16 A Yes, sir.

17 Q Was she out there at that time when you left?

18 A I don't remember whether she was out there
19 when I left or not.

20 Q But did you see her down there when Helton
21 was down there?

22 A I saw her there, yes, sir.

23 Q So, if he drank anything after 5:30 he had it
24 in his automobile or he bought it somewhere else,
25 is that right?

1 MR. NEWLON: Objection, calls for
2 speculation.

3 A Yes, sir.

4 THE COURT: I would sustain the objection.

5 MR. WATSON: All right.

6 BY MR. WATSON:

7 Q But you didn't sell him anything to drink?

8 A No, sir.

9 Q And the last time he was in your building was
10 about 5:30?

11 A Yes, sir.

12 Q And he got there sometime a little after
13 4:00?

14 A Yes, sir.

15 MR. WATSON: No further questions.

16 MR. NEWLON: Just one question, Your Honor.
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REDIRECT EXAMINATION

QUESTIONS BY MR. NEWLON:

Q What was the exact conversation you had with Hoyt when he was there?

A I didn't have, carry on a conversation with him.

Q You didn't?

A But I knew he was sick because you can, it's such a small place, you can hear.

Q Did you talk to him at all, have conversation with him, is my question?

A I might have. I'm sure I spoke to him or said something to him.

Q But you're surmising he was sick because he was leaning over and holding his stomach?

A Well, he said he was sick, he announced it to everybody.

Q He did say that?

A Yes.

Q Did he say from what?

A No, sir.

MR. NEWLON: Thank you. No further questions.

THE COURT: Thank you, sir.

(Witness excused).

1 MR. NEWLON: Your Honor, the plaintiff calls
2 Brad Harrison to the stand.
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1 BRAD HARRISON,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Please state your full name for the record.

6 A Timothy B. Harrison.

7 Q How long have you known Hoyt?

8 A About two years.

9 Q This was before the accident?

10 A Yes, sir.

11 Q Okay. Were you all social friends?

12 A I would say so.

13 Q Okay. Did you drink together?

14 A Yes, sir.

15 Q What places have you been with him where you
16 all would be drinking?

17 A Williams and the Getaway.

18 Q Williams, that's Williams Package and South
19 Point Pub?

20 A Yes, sir.

21 Q Have you been drinking with him any other
22 places other than Williams and the Getaway?

23 A No, sir.

24 Q On these occasions where you were with him at
25 South Point Pub and the Getaway was there ever an

1 occasion where he showed up and didn't have
2 anything to drink?

3 A Yes, sir.

4 Q How often would that happen?

5 A It all depends on how he felt. If he was
6 sick he wouldn't drink.

7 Q Okay. Did he drink more than not when he
8 went to these places?

9 A I guess, yes, sir.

10 Q Would you see him about every week?

11 A Yes, sir.

12 Q On this particular day of this accident, July
13 11th, 2003, did you see him on that day?

14 A Yes, sir.

15 Q When is the first time you saw Hoyt?

16 A I got off work, I got down at Williams
17 Package about 6:00 or 6:15 and he was there sitting
18 on the bench outside.

19 Q Okay. You have been there before with him,
20 to Williams Package?

21 A Yes, sir.

22 Q Do you know what time he typically showed up
23 at Williams Package?

24 A I don't know because I don't get there that
25 early because I work.

1 Q Okay. Do you recall me taking your
2 deposition a while back and you telling me that he
3 got there typically between 5:30 and 6:00?

4 A Well, yes, we do have the NASCAR thing.

5 Q All right. And when you got there typically
6 where did you all go, the package side, the pub
7 side?

8 A To the pub.

9 Q Okay. What would he typically order?

10 A Me?

11 Q What would Hoyt typically order to drink?

12 A If he was drinking he ordered a beer.

13 Q What kind of beer?

14 A Budweiser.

15 Q How did he drink it?

16 A Slow.

17 Q Sip?

18 A Pretty much.

19 Q Did you ever see him chug beer?

20 A No.

21 Q Okay. Have you ever seen Hoyt drunk?

22 A Oh, yes.

23 Q What was he like when he was drunk? How
24 would you know he was drunk?

25 A I know he slurred his words, he was wobbly,

1 just typical Punk.

2 Q Okay. How often would you say a month you
3 would observe him like that?

4 A Two or three times.

5 Q Okay. Had you ever seen him intoxicated when
6 you all were at Williams Package and South Point
7 Pub?

8 A Not in that kind of shape, no.

9 Q Never?

10 A Huh-uh (negative).

11 Q Is that a no? I need it for the record.

12 A That's no.

13 Q Okay. Had you ever been with him to The
14 Getaway?

15 A Yes, sir.

16 Q Okay. About how often -- back up just a
17 second. Williams Package and South Point Pub, how
18 often would you see him there in a week?

19 A At which one?

20 Q South Point.

21 A It's hard to say because I don't go down
22 there every day. I don't know how many times he
23 goes there.

24 Q Did you ever go there when he wasn't there?

25 A Yes, sir.

1 Q Okay. You have no idea how often he went to
2 Williams Package?

3 A No, sir.

4 Q Okay. You said, you were talking about The
5 Getaway, you have been to The Getaway with him. To
6 your knowledge how often would he go to the Getaway
7 in a week?

8 A Just every now and then I would see him up
9 there.

10 Q When you say every now and then, any kind of
11 idea at all?

12 A Two, three times a month.

13 Q Okay. What would he do when he went to The
14 Getaway?

15 A Drink.

16 Q Drink Budweiser?

17 A Yes, sir.

18 Q Sip it?

19 A Sip it.

20 Q Okay. Have you ever been with him to
21 Carolina Drive-In?

22 A No, sir.

23 Q Let's talk about on the evening of July 11th,
24 2003, at Williams Package. You say you showed up
25 about what time?

1 A About 6:00 or 6:15.

2 Q Okay. And you saw Hoyt already there?

3 A He was there.

4 Q Was he drinking anything?

5 A No, sir.

6 Q Okay. Did you see him the entire time he was

7 there until you left?

8 A I left.

9 Q Yes, I'm saying did you see him the entire

10 time he was there until you left?

11 A Yes.

12 Q How long, about how long, when did you leave?

13 A I left about 10 after 7:00.

14 Q Okay. When you left he was still there?

15 A Yes.

16 Q Had he had anything to drink?

17 A Not to my knowledge.

18 Q You never saw him holding a beer or anything?

19 A No.

20 Q Did he appear intoxicated in any way?

21 A No, sir.

22 Q Okay. Did you get close enough to smell his

23 breath?

24 A No, sir.

25 Q Did he give you any indication at all he had

1 been drinking, told you he had been drinking?

2 A No, sir.

3 Q Based on your observations of Hoyt Helton
4 would you consider him an alcoholic?

5 A Yes, sir.

6 Q About how often in a given month, all bars,
7 wherever you all showed up together, about how many
8 times a month would you, would you be able to
9 detect he was drunk?

10 A Maybe twice.

11 Q Did he talk about his problems with you?

12 A Not really.

13 Q Have you ever, on any other occasion where
14 you saw him at Williams Package did you ever also
15 see him at The Getaway, other than this night?

16 A Yes, sir.

17 Q Was that something he did on a regular basis?

18 A No, sir.

19 Q All right. When you left at 7:10, 7:15, who
20 was with you or out there with Hoyt when you left
21 at 7:10, 7:15?

22 A Johnny Teague.

23 Q Okay. Anybody else?

24 A I was there, I know Johnny Teague was. I
25 can't recollect who else was there.

1 Q Did you have any beer or any alcohol during
2 that time you were at Williams Package between the
3 time you arrived and the time you left at?
4 A Yes, sir.
5 Q How much did you drink?
6 A I dranked two beers.
7 Q Okay. Mr. Teague, did he drink, too?
8 A Yes, sir.
9 Q Do you have any idea how much he dranked?
10 A No, sir.
11 Q All right. After Williams Package at 7:00
12 where did you go?
13 A I went home to start with, then I went to The
14 Getaway.
15 Q What time did you get to The Getaway?
16 A Approximately 8:00 o'clock.
17 Q Okay. Did you see Hoyt there when you
18 arrived?
19 A Yes, sir.
20 Q What was he doing?
21 A He was sitting inside drinking a beer.
22 Q Was he at the bar?
23 A Yes, sir.
24 Q Okay. What time did you leave?
25 A Maybe 9:00, 9:15.

1 Q Okay. Do you remember testifying that you
2 left possibly at 9:30?

3 A Yes.

4 Q Okay. How many beers did you have while you
5 were at The Getaway?

6 A Three.

7 Q Do you recall how many Hoyt had while you
8 were there?

9 A Two.

10 Q That's it?

11 A That's it.

12 Q Following this particular accident were you
13 interviewed by a police officer?

14 A Yes, sir.

15 Q Was that officer name Keller?

16 A I don't recall.

17 Q Highway Patrol?

18 A Highway Patrolman.

19 Q Did he talk to you about your time at The
20 Getaway with Hoyt that evening?

21 A Yes, sir.

22 Q Did he ask you how much you had to drink and
23 how much Hoyt had to drink?

24 A Yes, sir.

25 Q And did you tell him the truth?

- 1 A Yes, sir.
- 2 Q Okay. When you left at approximately 9:30
3 that night did you, did you ever see Hoyt again
4 that evening?
- 5 A No, sir.
- 6 Q How did he appear while you all were at The
7 Getaway?
- 8 A He was fine.
- 9 Q Did he appear intoxicated in any way?
- 10 A No, sir.
- 11 Q He didn't have glassy eyes?
- 12 A No, sir.
- 13 Q Speech, how was his speech?
- 14 A Just fine.
- 15 Q Was he awkward in any way?
- 16 A No, sir.
- 17 Q How were you doing at that time?
- 18 A I was fine.
- 19 Q You weren't intoxicated?
- 20 A No, sir.
- 21 Q Had you ever seen, at anytime you were at The
22 Getaway when Hoyt was there had you ever seen
23 anyone from The Getaway cut him off, tell him he
24 was too drunk, they couldn't serve him?
- 25 A No, sir.

1 Q Was he a regular at The Getaway?

2 A No, sir.

3 Q He wasn't?

4 A No, sir.

5 Q Okay. They didn't really know him that well
6 there?

7 A They knew him but I wouldn't say he was a
8 regular.

9 Q Okay.

10 MR. NEWLON: Your Honor, can I just approach
11 the witness?

12 THE COURT: Yes, sir.

13 (Two photographs marked as Plaintiff's
14 Exhibits 13 and 14).

15 BY MR. NEWLON:

16 Q I'm going to hand you what I have previously
17 marked as Plaintiff's Exhibit 13 and 14 and ask you
18 to take a look at those for a second.

19 Do you recognize those photos as The Getaway?

20 A Yes, sir.

21 Q I was just curious, you say he wasn't a
22 regular, they knew him. Can you explain why they
23 would go to all the trouble of putting out on the
24 marquis, "Good-bye, Punk, we'll miss you"?

25 MR. WISE: Your Honor, that calls for

1 speculation unless he has direct knowledge of it.

2 THE COURT: I sustain the objection.

3 MR. NEWLON: Thank you, Your Honor. I have
4 no further questions of this witness

5 MR. WISE: If it please Your Honor.

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q You stated you were friends with Mr. Helton?

4 A Yes, sir.

5 Q I believe you said you did not frequently but
6 occasionally met up at Williams Package Store or
7 The Getaway?

8 A Yes, sir.

9 Q You all had seen each other out there several
10 times and drank a beer or two?

11 A Yes, sir.

12 Q Have you ever been to the Carolina with Mr.
13 Helton?

14 A No, sir.

15 Q You said you left around 9:15, 9:30 from The
16 Getaway?

17 A Yes, sir.

18 Q Did you see Mr. Helton at anytime after that?

19 A No, sir.

20 MR. SEIGLER: No further questions, Judge.
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CROSS EXAMINATION

QUESTIONS BY MR. WISE:

Q Mr. Harrison, I believe you were at home by 9:30. Is that when your girlfriend got home?

A Yes, sir.

Q I believe you testified that you knew that because when she came in you looked at the clock?

A Yes, sir.

Q So, you had been home a few minutes before she got there?

A Yes, sir.

Q Okay. Now, do you recall how Mr. Helton paid for his beer at The Getaway?

A Yes, sir.

Q How?

A Cash.

Q All right. You were with him for a good hour, hour and a half?

A Yes, sir.

Q And was he still drinking his beer, sipping it?

A Yes, sir.

Q And during the time that you were there you talked to him the whole time?

A Yes, sir.

- 1 Q Sitting right next to him?
- 2 A Yes, sir.
- 3 Q And did you ever see any indication that he,
- 4 that he was physically intoxicated?
- 5 A No, sir.
- 6 Q Did you see any indication that he was not
- 7 able to drive an automobile?
- 8 A No, sir.
- 9 Q Did you -- have you ever heard him slur his
- 10 speech before?
- 11 A I have before.
- 12 Q Was he slurring his speech that night?
- 13 A No, sir.
- 14 Q He was like you normally see him?
- 15 A Yes, sir.
- 16 Q In the sense he hadn't had too much to drink?
- 17 A Yes, sir.
- 18 Q Correct?
- 19 A Yes, sir.
- 20 Q And I believe if he had had too much to drink
- 21 you would have driven him home?
- 22 A Yes, sir.
- 23 Q Any problem with that?
- 24 A No, sir.
- 25 Q You have known him a good while?

1 A Two years.

2 Q Did you all ever go to Lucky's together?

3 A No, sir.

4 Q What about Simon's?

5 A No, sir.

6 Q The only place you would see him would be
7 either Williams or at The Getaway?

8 A Yes, sir.

9 Q Okay. And you all didn't have any
10 discussions about where he was going after that?

11 A No, sir.

12 MR. WISE: Thank you.

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CROSS EXAMINATION

QUESTIONS BY MR. WATSON:

Q Mr. Harrison, I want to make sure I'm on the right timeline with you. You think you got to Williams somewhere around 6:00 o'clock, a little before or after?

A Around about 6:15.

Q Mr. Helton was sitting outside?

A On the bench.

Q When you left he was sitting outside on the bench?

A Yes, sir.

Q Did you see him drink anything while he was sitting on the bench?

A No, sir.

Q Now, there is some indication that he may have been sick. Did you hear him mention anything about being sick?

A Yes, sir, he said he was sick.

Q And were some of his friends out there talking to him?

A Yes, sir.

Q Sitting with him and talking to him?

A Yes, sir.

Q And was this a pretty common thing, for all

1 of you to meet down there on Friday about the
2 NASCAR?

3 A Yes, sir.

4 Q And you all got up a pool or did something
5 about the NASCAR?

6 A Yes, sir.

7 Q You did that on Friday?

8 A Every Friday.

9 Q And of course you knew that Mr. Cockrell
10 closed at 7:00 o'clock?

11 A Yes, sir.

12 Q Have you ever seen him stay open past 7:00
13 o'clock?

14 A No, sir.

15 Q When that 7:00 o'clock came he closed the
16 door?

17 A That's it.

18 Q And if somebody else was there they was
19 outside?

20 A Yes, sir.

21 Q And then you saw him again maybe 8:00 o'clock
22 or something like that?

23 A Yes, sir.

24 Q Up at The Getaway?

25 A Yes, sir.

1 Q I'm assuming, you tell me if I'm right or
2 wrong, you left before he left Williams?

3 A Yes, sir.

4 Q Is that right?

5 A Yes, sir.

6 Q And where did you go after you left Williams?

7 A I went home to start with.

8 Q All right.

9 A Then I went to The Getaway.

10 Q Where did you live?

11 A On Piedmont Avenue.

12 Q So, that's sort of on the way, I guess, isn't
13 it?

14 A Yes.

15 Q And when you got to The Getaway he was
16 already there?

17 A Yes, sir.

18 Q Now, was he there when you left?

19 A Me and him left at the same time.

20 Q You both left at the same time?

21 A Yes.

22 Q And he got in his car and drove away?

23 A Yes, sir.

24 Q And you got in your car and drove away?

25 A Yes, sir.

1 Q What was the weather conditions at that
2 particular time?

3 A At that particular time it wasn't doing
4 nothing.

5 Q All right.

6 A It wasn't even raining or nothing.

7 Q Was there any thundering and lightning?

8 A Back in the background it was.

9 Q And you went home?

10 A Yes, sir.

11 Q And when did you find out Mr. Helton had been
12 in an automobile collision?

13 A The next morning.

14 MR. WATSON: I have no further questions.

15 MR. NEWLON: I have a couple on redirect,
16 Your Honor.

17 THE COURT: Thank you, sir. You may come
18 down.

19 MR. NEWLON: I'm sorry, Your Honor, I have a
20 couple on redirect.

21 THE COURT: I'm sorry, go ahead.
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REDIRECT EXAMINATION

QUESTIONS BY MR. NEWLON:

Q Mr. Harrison, do you recall me taking your deposition back in June of last year?

A Yes, sir.

Q Okay. And I asked you back then how many beers Hoyt had. Do you remember what you told me?

A You asked me what?

Q I asked you how many beers did Hoyt have at The Getaway. Do you remember what you told me?

A He had two or either three.

Q Three beers?

A Two or three. He was drinking one when I got there and he dranked two more.

Q Okay. That would be three beers?

A Yes.

Q Okay. I want to get this straight. In this same deposition I asked you about that time when you left and how you knew when you left. Did your girlfriend show up at The Getaway?

A No.

Q In that deposition I asked you, you said it was about 9:30 when she come in. Come in where?

A At the house.

Q Okay. So, it was at the house?

1 A Right.

2 Q Not at The Getaway?

3 A Not at The Getaway.

4 Q Okay. So it was about 9:30 but it could have
5 been a little earlier than that you left The
6 Getaway?

7 A Yes, sir.

8 MR. NEWLON: All right, no further questions.
9 Thank you.

10 THE COURT: All right.
11 (Witness excused.)

12 THE COURT: We will take a short 10 or 15
13 minute break, then we'll start back and then go on
14 until we get through a little after 5:00. Do not
15 discuss the case at this time. Just take a short
16 recess.

17 (Jury excused from the courtroom).

18 (Recessed at 3:55 p.m.).

19 (Reconvened at 4:13 p.m.).

20 THE COURT: All right, Mr. Newlon, next
21 witness.

22 MR. NEWLON: Thank you, Your Honor. Your
23 Honor, the plaintiff would call Dianna Bice to the
24 stand.
25

1 DIANNA BICE,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Dianna Bice? State your name for the record.

6 Is that it, Dianna Bice?

7 A Dianna Chandler Bice.

8 Q Where do you live?

9 A 348 Creswell.

10 Q Okay.

11 Q Back in July of 2003 did you own or operate
12 or manage in any way a place called The Getaway?

13 A Yes, I did.

14 Q What exactly was your job at The Getaway?

15 A I was the daily manager, I was running the
16 daily business.

17 Q Okay. Were you aware that I subpoenaed your
18 appearance today and in that subpoena I asked you
19 to bring some records with you?

20 A I spoke to my lawyer, and the records he
21 asked me to give you I did.

22 Q Whatever you have has been given to me, is
23 that correct?

24 A Yes, sir.

25 Q You don't have anything else?

- 1 A No, sir.
- 2 Q Okay. The Getaway, is it incorporated?
- 3 A Yes, it is.
- 4 Q What kind of corporation is it?
- 5 A It's a nonprofit organization.
- 6 Q How is it a nonprofit organization?
- 7 A We make donations. If there is any profit
- 8 shown at the end of the year we make a donation to
- 9 a nonprofit organization.
- 10 Q Okay. You say you make donations?
- 11 A Yes, sir.
- 12 Q All right. Do you have any record of those
- 13 donations with you today?
- 14 A No, sir.
- 15 Q Do you have any records of any meetings that
- 16 you held with the corporation?
- 17 A Meetings?
- 18 Q Yes.
- 19 A No, sir.
- 20 Q When would have been the last time you would
- 21 have done anything as a nonprofit corporation for
- 22 the benefit of some group or organization?
- 23 A I donated to Pine Grove Church every year, I
- 24 do that on a yearly basis, and what was the rest of
- 25 the question?

1 Q Who else would you give to?

2 A I give to people that come into the bar, they
3 eat for free.

4 Q All right. But you don't have any record of
5 that stuff with you today?

6 A No, sir.

7 Q What is your title in this nonprofit
8 corporation called The Getaway?

9 A I'm the vice-president.

10 Q And who's the president?

11 A Shou Mei Morris.

12 Q Does she have anything to do with the day to
13 day operations?

14 A No, she has not, not for the last seven years
15 she hadn't.

16 Q Who primarily takes care of the day to day
17 operations?

18 A Me.

19 Q So, if there were any records or any
20 information with regard to this non-profit
21 corporation you would have knowledge of it or have
22 possession of that, correct?

23 A Yes, sir. I mean, as far as the minutes of
24 the meetings, we never kept like physical records
25 but me and her spoke on a regular basis.

1 Q All right.

2 A About what was going on in the business.

3 Q All right. Can you explain to me how serving
4 alcohol at a bar can serve a nonprofit purpose?

5 A The serving the alcohol is not serving a
6 nonprofit organization, but we take any profits
7 that are made at the end of the year and we would
8 donate to a nonprofit organization if there was any
9 profits made.

10 Q Okay. Do you tend bar at The Getaway?

11 A Sometimes I do, yes, sir.

12 Q Okay. And you have -- do you know Hoyt, did
13 you know Hoyt Helton before this accident in July
14 of 2003?

15 A Yes, sir, I did.

16 Q How long had you been knowing him?

17 A I had seen him around for a long time.
18 Probably say at least ten years I have probably
19 seen him around but I probably knew him more and on
20 a personal level when I took over The Getaway seven
21 years ago.

22 Q Have you known him since high school?

23 A I knew his son and his daughter.

24 Q Okay. How often did Hoyt come into The
25 Getaway on a typical week?

1 A You might see Hoyt once a week for maybe two
2 or three weeks, then you may not see him for two or
3 three weeks. He varied coming in.

4 Q Okay. Did you ever have an opportunity to
5 serve him when he came in as a patron?

6 A Yes, I did.

7 Q What did he drink?

8 A Bud Light.

9 Q Okay. How did he drink his Bud, did he like
10 it, did he guzzle it, sip it? How did he drink it?

11 A Normally when you are a bartender you know
12 your regular customers. I mean, I really can't say
13 he guzzled any beer. I mean, when he was ready for
14 another one I would serve him, probably every 30
15 minutes to an hour he would get a beer.

16 Q Okay. So, one beer every 30 minutes to an
17 hour, approximately?

18 A Yes, sir.

19 Q Based on your knowledge of him and his family
20 were you aware he was an alcoholic?

21 A I knew Punk dranked but I didn't know he was
22 an alcoholic.

23 Q Had you ever seen him intoxicated at anytime
24 prior to this accident?

25 A Yes, sir.

1 Q All right. You had indicated that you had
2 turned away or refused to serve Punk?

3 A Yes, we have.

4 Q Okay. How many times have you done that?

5 A I couldn't -- I mean, I don't know. I know I
6 have, on occasions he has come in and had too much
7 to drink and we have had to make arrangements for
8 him to get home, wouldn't serve him, had to make
9 arrangements for him to get home from there.

10 Q That would have been once a month, once a
11 year?

12 A Maybe two or three times in the three or four
13 years that I was running it back then.

14 Q Okay. Was there ever an occasion you know of
15 he came there as a patron and you weren't there?

16 A I'm sure he came times when I wasn't there.

17 Q What did Hoyt typically do when he came into
18 The Getaway on the occasions you were there?

19 A He would come to the bar and sit at the bar
20 and that is pretty much where he stayed because he
21 was usually on crutches.

22 Q On the night of this particular incident,
23 July of 2003, were you present at the bar when Hoyt
24 came in?

25 A Yes, I was.

1 Q Did you serve him that night?

2 A No, sir.

3 Q Do you have any personal knowledge of how
4 many beers he may have had that night?

5 A I can tell you I had a conversation with him.
6 From the time, I mean, he came in as I was doing
7 some preparing for the next day, I never seen him
8 with a beer but I'm not saying that he did not
9 drink one there. I never seen him with one from
10 the time that he was there and he left.

11 Q You didn't physically see him with a beer in
12 his hand?

13 A I never seen him purchase a beer. He stood
14 at the pool table and had a 20, 25 minute
15 conversation with me.

16 Q But you also said you saw him at the bar at
17 some point?

18 A No, I said I never seen him at the bar.

19 Q You didn't see him at the bar?

20 A I didn't see him, I mean, I seen him come in
21 the bar and we stood at the pool tables, I was
22 arranging some stuff for the next day.

23 Q I apologize, I misunderstood you. So, as far,
24 as you're concerned you didn't see him drink
25 anything between what time and what time?

1 A I got to the bar probably about 10 or 15
2 minutes after 7:30, he come in probably, well, I
3 unloaded some stuff while he come in, he stood over
4 by the pool table, I was arranging stuff, we was
5 talking, we stood there probably 20, 25 minutes, so
6 I know he didn't have anything then. We have a
7 shift change at 8:00 o'clock, when a bartender
8 comes in at 8:00, I walked behind the bar about 10
9 minutes after 8:00 to make sure everything was good
10 to go on the shift change, to make sure he didn't
11 need any change. I recall my bartender asked me
12 where Punk was. I said, "I don't know." He said,
13 "Well, he wanted to ask me something." Me and Punk
14 had had a discussion about it earlier and Punk, my
15 bartender said he never spoke to Punk. He looked
16 for him but he never had a chance to speak to him.

17 Q Okay. Let me back up just a second to make
18 sure I got this right. You showed up about 7:15
19 and you were unloading and while you were unloading
20 Punk appeared?

21 A Yes. I was, I had come in with one package
22 of stuff and my husband was unloading his truck
23 bringing in like tee-shirts and stuff we had
24 received from, to give away at our customer
25 appreciation day the next day.

1 Q That would have put Punk there sometime
2 between 7:15 and when?

3 A 7:30.

4 Q Okay. Do you know what time Punk left? Did
5 you see him, yourself, leave?

6 A I did not see Punk leave but I do remember, I
7 can tell you it was during the shift change at 10
8 minutes until 8:00 and my bartender did ask me
9 where did Punk go and I said, "I don't know." He
10 said, "I need to speak to him, Punk's wanting to
11 talk to me about something." I said, "Well --" I
12 explained to the bartender what Punk wanted to
13 speak to him about, he was like, "Where did he go,"
14 and I said, "I don't know." I never seen him
15 again, I never left that night, I was there for the
16 rest of the night.

17 Q So, as far as you know, what you are
18 testifying to, as of 8:00 o'clock you never saw
19 Punk again?

20 A I'm not saying he wasn't there. I was
21 standing, we were at the pool table, I was
22 promoting the next day customer appreciation day,
23 he could have been there for a few minutes longer
24 but I'm saying when he turned around to look for
25 him, when my bartender asked where he was at I did

1 not see him.

2 Q You just didn't see him?

3 A I did not see him.

4 Q Is it possible he could have been there until
5 9:30?

6 A No, I don't think Punk was there that late
7 because I was there the rest of the night
8 promoting, you know, public relations, talking to
9 different customers about what was going on the
10 next day.

11 Q And are you sure that Punk was never at the
12 bar that night, sitting up at the bar drinking a
13 beer?

14 A Yes, I'm sure. He was standing at the pool
15 table.

16 Q Okay. Did you see Brad Harrison that night

17 A I don't remember seeing Brad.

18 Q Okay. Were you drinking there that night?

19 A No, sir.

20 Q When you saw Hoyt that night did he, did you
21 smell any alcohol on his breath?

22 A No, sir.

23 Q Did he appear intoxicated in any way?

24 A No, sir.

25 Q Was he acting happy and jumping around like

1 you were talking about before?

2 A When we actually had conversation we was
3 laughing and cutting up and talking. We sat there
4 and talked about his cast he had had taken off his
5 leg.

6 Q Right, but did he give you any indication
7 from a physiological standpoint, anything he did,
8 said, acted, anything to suggest to you he was
9 intoxicated?

10 A No, sir.

11 Q Okay. So, if he had asked you for a beer
12 right there at that point would you have given him
13 one?

14 A Yes, sir, I probably, yes, sir, I would have.

15 Q Did you ever see, actually physically see
16 Hoyt get in his car and drive away from The
17 Getaway?

18 A No, sir.

19 Q Have you ever refused to serve others
20 alcohol?

21 A Yes.

22 Q When they have become visibly intoxicated?

23 A Yes, sir.

24 Q You all are very careful to do that?

25 A Yes, sir.

1 Q And based on your observations and knowledge
2 of Hoyt Helton, you have known him since high
3 school, you don't have any knowledge whether or not
4 he was an alcoholic or had a drinking problem?

5 A I mean, I can't determine, I couldn't
6 determine that. I mean, I don't know how many days
7 he dranked a week. I can tell you when he come in
8 The Getaway there were times he was intoxicated and
9 there were times he would come in and have one or
10 two beers and leave. Sometimes he would come in
11 and just talk to a few people and leave, sometimes
12 he --

13 Q Was he a regular at The Getaway?

14 A Like I said, I mean, you might see Punk
15 consecutively at least once a week for three weeks,
16 then you might not see Punk for two or three weeks.
17 I don't know what you call a regular. If you are
18 saying did I see him on a regular basis two or
19 three times a week, no, I didn't.

20 Q Okay.

21 MR. NEWLON: If I may approach the witness,
22 Your Honor.

23 Q I'm going to hand you what is previously
24 marked as Exhibits 13 and 14 and just one question.
25 The marquis, is that the same Punk in this case

1 that you are referring to in the marquis?

2 A Yes, it is.

3 Q Okay. And that marquis is saying, "Good-bye,
4 Punk, we'll miss you"?

5 A Yes, sir.

6 MR. NEWLON: Thank you. I have no further
7 questions.

8 MR. SEIGLER: If it please the Court, very
9 briefly.

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CROSS EXAMINATION

QUESTIONS BY MR. SEIGLER:

Q You said you left your establishment at 8:00 p.m. that evening, somewhere in that area?

A That I left?

Q Yes, ma'am.

A No, I never left after I got there.

Q But you never saw Mr. Helton?

A I never saw Mr. Helton leave but 8:00 o'clock we do a shift change, and after our shift change was complete my bartender asked me, "Where did Punk go, he wanted to talk to me about something," and when I looked around I didn't see Punk, I said, "I don't see Punk." I explained to him what Punk wanted to talk to him about and he said, "Okay, I'll just deal with it later," and I didn't see Punk after that.

Q The question was you didn't see him after that?

A No.

Q You have no idea what he did after he left there?

A No, sir.

MR. SEIGLER: No further questions.

CROSS EXAMINATION

QUESTIONS BY MR. WISE:

Q Miss Bice, The Getaway Lounge and Grill is a corporation?

A Yes, sir.

Q Do you all file an annual corporate income tax return?

A Yes, sir.

Q I believe you all also are regulated by the South Carolina Department of Revenue for alcohol licenses?

A Yes, sir.

Q You comply with all the regulations for the alcohol, Department of Revenue?

A Yes, sir.

Q And do you regularly file a corporate income tax return for the State of South Carolina?

A Yes, sir.

Q Is your charter in good standing with the Secretary of State?

A Yes, sir.

Q I hand you this and ask you if you recognize this?

A Yes, sir.

Q What is this?

1 A It's a copy, the --

2 Q Certificate?

3 A -- certificate, our charter is in good
4 standing.

5 MR. WISE: I would like to introduce this.

6 THE COURT: That's an equitable question, not
7 legal.

8 MR. WISE: Whether in good standing?

9 THE COURT: No, about whether or not the
10 person is an alter ego, or appears to be.

11 MR. WISE: Well, I think so, but --

12 THE COURT: The way it's going to be is the
13 way it's going to be. If it's an equitable
14 question it would be a question for the Court. If
15 it's a legal question it would be a question for
16 the jury.

17 MR. WISE: I agree. I think Mr. Newlon and I
18 may take different positions on that.

19 THE COURT: I have to decide.

20 MR. WISE: Then I would like, at least
21 nonjury the Court is going to decide it.

22 THE COURT: Okay.

23 (Certificate of Incorporation marked and
24 received in evidence as Defendant Getaway
25 Lounge Exhibit Number 1).

1 BY MR. WISE:

2 Q The marquis in Plaintiff's Exhibit Number 14,
3 do you know when that was put up?

4 A No, sir. I was, I believe, we heard about
5 the accident Saturday morning, I was pretty busy
6 all day Saturday, I was actually going on vacation
7 for a weak in Florida with my children and my
8 family, so my bartenders put that up. I don't know
9 when they put it up.

10 Q Sometime after?

11 A Sometime after I left. It wasn't put up when
12 I was in town.

13 Q Did they know Punk pretty well?

14 A Yes, sir.

15 MR. WISE: Thank you. That's all I have.

16 MR. WATSON: No questions.

17 MR. NEWLON: Your Honor, I have no further
18 questions of this witness.

19 THE COURT: All right. Thank you, ma'am.
20 (Witness excused).

21 MR. NEWLON: Your Honor, I would like to
22 recall Timothy Bradley Harrison for a brief bit of
23 testimony.

24 THE COURT: You are still under oath.
25

1 TIMOTHY BRADLEY HARRISON,
2 having been previously sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Mr. Harrison, go back to the night of this
6 accident, July 11, 2003, where was Mr. Helton?

7 A Sitting at the bar.

8 Q How long did he sit at the bar that night?

9 MR. WISE: Your Honor, if I may, this is what
10 he went over on direct testimony.

11 THE COURT: He testified he was sitting at
12 the bar already. You don't need to repeat it. I
13 heard his testimony the first time.

14 MR. NEWLON: Okay. Thank you.

15 THE COURT: Thank you.

16 (Witness excused).

17 MR. NEWLON: Your Honor, the plaintiff would
18 call Billy McDonald to the stand.

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1 BILLY McDONALD,
2 after being frist duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Good afternoon.

6 A How you doing?

7 Q Doing well. Please state your name for the
8 record.

9 A Billy McDonald.

10 Q Thank you, sir. July 11th, 2003, were you
11 attending bar at the Carolina Drive-In?

12 A Yes, I worked that night.

13 Q Were you the only bartender that night?

14 A Beg pardon?

15 Q Were you the only bartender that night?

16 A Yes, at that time when he came in.

17 Q Okay. Were you serving beer?

18 A Yes.

19 Q Okay. How long have you known Hoyt Helton?

20 A About 25 years, I imagine.

21 Q Okay. How often would you see him over that
22 period of years?

23 A I hadn't seen him in, up until that night,
24 probably about four years.

25 Q Okay. Prior to that were you aware that he

1 had a drinking problem?

2 A I knew he dranked, I didn't know about the
3 problem.

4 Q Have you ever seen him drunk before?

5 A No, I hadn't.

6 Q Never?

7 A No.

8 Q Okay. On that particular night, July 11th,
9 2003, did Hoyt come into the Carolina Drive-In?

10 A Yes, he did.

11 Q Did you talk to him?

12 A No, I did not.

13 Q Did you see him speak with anyone?

14 A Yes. He sat down right beside his half
15 brother or stepbrother, whatever, Charlie Brown,
16 because there was a stool open right there, he sat
17 right beside him.

18 Q How long did he stay there?

19 A Five or ten minutes at the most.

20 Q What did he do after that five or ten
21 minutes?

22 A He got up and left.

23 Q Okay. Did he have a beer while he was there?

24 A No, he did not.

25 Q Did he come in with a beer?

1 A I didn't see one.

2 Q Did you see him drinking anything while he
3 was there?

4 A No, I did not.

5 Q Did you serve him anything?

6 A No, I did not.

7 Q Okay. How long, how many years do you have
8 experience attending bar?

9 A How many years?

10 Q Yes, sir.

11 A Total?

12 Q Yes.

13 A Probably 20 years.

14 Q Have you ever had people come into the bar
15 and drink so much they get drunk?

16 A Oh, yes.

17 Q Did you ever refuse to serve --

18 A Yes, I have refused them.

19 Q What's your test, how do you determine when
20 someone has had too much to drink?

21 A Slurred words and staggering.

22 Q Anything else?

23 A Can't sit up on the stool.

24 Q Anything else?

25 A No, sir.

1 Q That's your test?

2 A Uh-huh (Affirmative).

3 Q Is that a yes?

4 A Yes, sir.

5 Q Prior, you said you hadn't seen him in four
6 years, prior to this night, July 11th, 2003, it is
7 your testimony you hadn't seen him in Carolina
8 Drive-In before that time?

9 A No, I have not.

10 Q Is it possible he came into the Carolina
11 Drive-In prior to July 11th, 2003, and you weren't
12 there tending bar?

13 A Beg pardon, I didn't hear the question.

14 Q Yes. In the few years prior to this July
15 11th, 2003, is it possible he came into the bar
16 when you weren't there tending bar?

17 A I wasn't there when he come in if he did come
18 in.

19 Q That's what I'm saying.

20 A No, I wasn't there then.

21 Q You didn't tend bar every night?

22 A No, huh-uh (negative).

23 Q Did you ever see his wife Susan Helton come
24 in?

25 A She never did come in out there.

- 1 Q Was anyone with Hoyt when he came in that
2 night on July the 11th, 2003?
- 3 A No, there wasn't.
- 4 Q Did anyone leave with him?
- 5 A No.
- 6 Q Okay. Did you observe him walk in or walk
7 out?
- 8 A I saw him when he come in but I didn't see
9 him when he walked out.
- 10 Q Did you recognize any problems in the way he
11 walked when he came in?
- 12 A No, I didn't.
- 13 Q Okay. Did you get close enough to smell his
14 breath that night?
- 15 A No, I didn't.
- 16 Q No?
- 17 A No.
- 18 Q Do you recall, following the accident on the
19 evening of July 11th, 2003, some days after that
20 being interviewed by Officer Keller from the
21 highway patrol?
- 22 A Yes, I remember getting a call.
- 23 Q When you spoke to the officer did you tell
24 him the truth?
- 25 A Beg pardon?

1 Q When you spoke to the officer about your
2 recollection of events that night did you tell him
3 the truth?

4 A Yes, sir, I told him the truth.

5 MR. NEWLON: Thank you. I have no further
6 questions.

7 MR. SEIGLER: Quickly, Your Honor.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q I believe your testimony is you did not serve
4 Mr. Helton anything that night?

5 A I did not serve him nothing, period.

6 Q Was anyone else working at the Carolina?

7 A Glenn was there, too, but I was the only one
8 at the time of, when Gary come in I was the only
9 one behind the bar.10 Q He talked to his brother five or ten minutes,
11 I believe you said?

12 A Correct.

13 Q If he got a beer that night it couldn't have
14 been from you, right?

15 A Right.

16 Q You didn't serve him?

17 A I didn't serve him

18 MR. SEIGLER: No further questions.

19 MR. WISE: I have no questions.

20 MR. WATSON: No questions.

21 MR. NEWLON: I just have one question.
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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. NEWLON:

3 Q Just identify that for me, Plaintiff's
4 Exhibit 15, please.

5 A Yes, that's it.

6 Q Is that the Carolina Drive-Inn?

7 A Yes.

8 MR. NEWLON: I move 15 into evidence, Your
9 Honor.

10 MR. SEIGLER: No objection, Judge.

11 (Photograph marked and received in evidence
12 as Plaintiff's Exhibit Number 15).13 THE COURT: Wait just a minute. What time
14 did he leave?15 THE WITNESS: he wasn't in there over ten
16 minutes. I want to say around about 10:10, 10:15,
17 something like that, I really don't exactly know
18 but he wasn't in there over ten minutes at the
19 most, very close, if he was there that much.

20 THE COURT: Okay, thank you.

21 (Witness excused).

22 THE COURT: All right, Mr. Newlon?

23 MR. NEWLON: Thank you, Your Honor. At this
24 time the plaintiff will call Hank Hartfield to the
25 stand.

1 HASKELL L. HARTFIELD,
2 after being first duly sworn, testified as follows:

3 MR. NEWLON: Your Honor, may we approach?

4 THE COURT: Okay.

5 (Unrecorded bench conference).

6 THE COURT: We've got to set up a couple
7 videos, one with this witness and then a doctor's
8 testimony, for about 15 minutes, which you can do
9 in court, so it's going to take some time to set
10 this up, so what we'll do is just break right now.
11 I'm going to ask you all to be back at 9:30
12 tomorrow morning and we'll get started in this
13 case. We're moving along pretty good. It's an
14 important case to both sides, I know you all are
15 paying very close attention to it and we appreciate
16 that but remember do not discuss this case with
17 anyone. You're going to see friends, your spouses,
18 your children, whoever you see in the evening, or
19 you might not see anybody, but do not discuss it.
20 Tell them simply that you are on a jury and you
21 can't discuss the case with them. You cannot talk
22 to anybody about this case because they haven't
23 seen the witnesses and heard the evidence. The
24 only people you can talk to about it until it's
25 over is each other when you begin deliberating but

1 you can't talk to each other until you start
2 deliberating, okay?

3 So, we want you to go home, come back at 9:30
4 in the morning. Now, once this case is over you
5 can talk to anybody you want to. You can write a
6 book about it or you can, you can tell them you
7 don't want to talk about it. If somebody calls you
8 up and asks you about the case you can say, "I
9 don't want to discuss it with you." If you have
10 any trouble with it you can notify me. So, once
11 it's over, whether you want to talk about it or not
12 is up to you but please do not discuss it with
13 anyone tonight. If you did we would have to do
14 something. We don't want to do that.

15 We appreciate your service, be back at 9:30.
16 Mr. Willingham will tell you what to do, how to get
17 back in and everything when they open the
18 courthouse. I don't get down here too often but I
19 enjoy being with you all. Be back at 9:30 in the
20 morning and we'll pick up with this gentleman on
21 the witness stand. Okay?

22 Thank you.

23 (Jury excused from the courtroom).

24 THE COURT: That's everybody?

25 BAILIFF: Yes, sir.

1 MR. NEWLON: Your Honor, if I may just for
2 planning purposes tomorrow, I forgot I have a note
3 here, Officer Keller is teaching a class in
4 Columbia, MAIT class or something, I'm going to put
5 him up first in the morning, he's just straight
6 testimony but I'm going to go ahead and set this up
7 tonight so after he's done I will be able to show
8 that video.

9 THE COURT: Go ahead and set it up. We'll do
10 the officer and let him go.

11 MR. NEWLON: It's okay if I have it up while
12 that testimony is going on?

13 THE COURT: No problem.

14 MR. NEWLON: Thank you.

15 MR. WISE: One question. In view of the fact
16 we moved pretty fast today, how long do you think
17 you are going to last tomorrow, for planning
18 purposes?

19 MR. NEWLON: Without breaks, not go to lunch
20 or anything, I think I can get done with my
21 testimony by 1:00 o'clock.

22 MR. WISE: We'll plan on having witnesses
23 here tomorrow afternoon?

24 MR. NEWLON: Yes.

25 MR. WISE: That's good. We're going to move

1 faster than I thought we were going to.

2 THE COURT: This is a liability issue, not a
3 damages issue.

4 MR. WISE: Correct.

5 THE COURT: What I can see.

6 MR. WISE: Correct.

7 THE COURT: Of course he has to present his
8 damages, and the word I got from the bailiff is
9 your witness said he was not going to go today but
10 he's going tomorrow.

11 MR. WATSON: Well, we've got him subpoenaed
12 but we've got some other witnesses that are going
13 to testify to the same thing. If he has to go in
14 on an emergency we can release him. We don't have
15 a problem with that.

16 THE COURT: That is up to him.

17 MR. WATSON: Yes, sir.

18 THE COURT: Thank you all.

19 MR. WATSON: I thought John might want to put
20 him up. If he doesn't want to put him up we don't
21 want to worry about it.

22 MR. NEWLON: I don't need it.

23 THE COURT: Okay.

24 (Recessed at 4:50 p.m.).

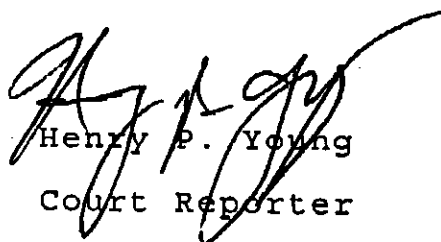
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Greenwood County, South Carolina, on the 5th day of February, 2007.

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

April 28, 2007


Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2004-CP-24-38

COUNTY OF GREENWOOD

JON E. HARTFIELD, by and through his conservator, Haskell Hartfield, and HASKELL L. HARTFIELD, individually,

- v 9 -

GLENN McDONALD, d/b/a The Carolina Eight Ball Lounge, and THE GETAWAY LOUNGE & GRILL, INC., and SHOU MEI MORRIS, individually and as President of The Getaway Lounge & Grill, Inc., and South Carolina Department of Transportation,

Defendants.

B E F O R E:

HONORABLE LARRY R. PATTERSON

Henry P. Young
Court Reporter

VOLUME II of IV

February 6, 2007

1 APPEARANCES:

2 JON E. NEWLON, Esquire
3 Attorney for the Plaintiff

4 RUACH C. WISE, Esquire
5 Attorney for the Defendant

6 W. CRAIG SEIGLER, Esquire
7 Attorney for the Defendant

8 MARVIN R. WATSON, Esquire
9 Attorney for the Defendant

- - - -

10 (Reconvened at 9:30 a.m., February 6, 2007)

11 THE COURT: Are we ready to begin? I think
12 we're going to take the highway patrolman, he's got
13 to be somewhere, rather than the gentleman that
14 called to the stand yesterday.

15 Mr. Newlon.

16 MR. NEWLON: The plaintiff calls Trooper
17 Keller to the stand.

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1 TONY C. KELLER,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Please state your full name for the record.

6 A Tony C. Keller.

7 Q Who do you work for?

8 A The South Carolina Highway Patrol.

9 Q How long have you been doing that?

10 A Fifteen years.

11 Q What is the nature of your activities with
12 the Highway Patrol?

13 A Enforce the traffic laws in the state of
14 South Carolina.

15 Q Okay. Did you happen to respond to an
16 accident on July 11th, 2003, up near the high
17 school, Greenwood High School?

18 A That's correct.

19 Q Okay. At the time of this accident had you
20 had any experience in responding to accidents?

21 A I don't know exactly what you're asking for.

22 Q Had you responded to other motor vehicle
23 accidents?

24 A I think at that time I had 13 years
25 experience working wrecks.

1 Q You had been working wrecks for quite a time?

2 A Yes, sir.

3 Q Okay. Were you able to determine, based on
4 the call you got, were you able to determine
5 approximately what time this accident happened?

6 A There is a stack of paperwork here so just
7 bear with me. Approximately 2251 is the time of
8 the accident.

9 Q All right. That particular evening do you
10 recall what the weather was like?

11 A It had been raining hard. Now, I can't tell
12 you what it was doing prior there but when I
13 arrived there it still was kind of a misty, the
14 rain had actually quit but I guess you would say
15 the moisture was still holding in the air,
16 basically.

17 Q Okay. Was it dark?

18 A Yes, no light.

19 Q Could you tell the jury just basically upon
20 your arrival what you observed at the scene
21 generally?

22 A There was a red vehicle, I came in headed
23 north, so I would have been looking, if you all are
24 familiar with where this is, it's 254 just right
25 above the high school, I think it's Cherokee

1 Heights and Forest Acres.

2 Q Cherokee Hills.

3 A Right in front of the entrance to those two
4 different developments. And I was going north when
5 I came in and there was a vehicle sitting
6 crossways, almost, partially some of it was in the
7 actual northbound lane. There was another vehicle
8 turned upside down in the southbound lane across
9 two lanes.

10 Q Okay.

11 MR. NEWLON: Your Honor, may I approach the
12 witness?

13 THE COURT: Yes.

14 MR. NEWLON: Thank you.

15 BY MR. NEWLON:

16 Q I'm going to hand you what I have previously
17 marked as Plaintiff's Exhibits 16 and 17 and ask
18 you to take a look at those for a moment and can
19 you identify the vehicles in those photographs?

20 A Yes. These are the two vehicles that were
21 involved in the collision.

22 Q Were those pictures taken by you?

23 A That's correct.

24 Q All right. Can you just show the jury, take
25 one at a time and just show the jury what is

1 depicted in those photographs, please.

2 THE COURT: No objection?

3 MR. WATSON: No, sir.

4 THE COURT: All right.

5 (Two photographs marked and received in
6 evidence as Plaintiff's Exhibits 15 and 16).

7 THE WITNESS: Can they see it here?

8 BY MR. NEWLON:

9 Q Turn it over.

10 A I don't know if you will be able to see it.
11 This, the bottom vehicle is a Honda, red, kind of a
12 red, burgundy color. It was going in -- when I
13 pulled up, at this point it is sitting in the
14 northbound lane partially. The top vehicle turned
15 upside down was, I think it was a Blazer, Chevrolet
16 Blazer and it was two tone. All you can see here
17 is the red but it had some silver on it and it's
18 turned upside down in the southbound lane, crossing
19 the two lanes, with the front of it facing that
20 development, the front was into that, facing that
21 development.

22 Q Thank you, that's good enough. Were you able
23 to determine the occupant of the Blazer that was
24 turned upside down?

25 A Was I -- I'm sorry, I didn't understand.

1 Q Were you able to determine who was the driver
2 or the occupant of the Blazer turned upside down?

3 A Mr. Helton, Hoyt Helton.

4 Q Hoyt Helton, and were you able do determine
5 the occupants of the Honda?

6 A When I arrived, hold on a minute, let me look
7 back at my notes to refer to the names where I'm
8 right, Hartfield, Mr. Hartfield was still entrapped
9 in the car.

10 Q Okay.

11 A When I arrived the paramedics were still
12 trying to remove him from the car. He was trapped
13 in the passenger side.

14 Q The front passenger side?

15 A Front passenger side of the vehicle. And the
16 driver, if I pronounce this correct, Riddle?

17 Q Riddle.

18 A She had already been transported to the
19 hospital when I arrived.

20 Q All right.

21 A And Mr. Helton was trapped underneath the
22 vehicle, it had overturned on him.

23 Q Okay. Did anyone die at the scene?

24 A Yes, he did.

25 Q Mr. Helton?

1 A Yes.

2 Q Were you there when they ultimately extracted
3 Mr. Hartfield?

4 A Well, I didn't really, I was there but I kind
5 of stay out of the way and let the EMS do their
6 job, that's their part. I kind of step away and
7 get out of the way and try to keep people out of
8 the way where they could do what they needed to do
9 to get him out.

10 Q Did you observe how Mr. Hartfield left the
11 scene?

12 A He was flown out by helicopter to Greenville.

13 Q Other than the parties involved, were you
14 able to determine whether there were any witnesses?

15 A Not that I know of, of the actual accident, I
16 never could find anybody that actually witnessed
17 the accident.

18 Q Okay. Did you inspect the scene around the
19 vehicles for debris?

20 A Yes.

21 Q Did you also look in the vehicles?

22 A That's correct.

23 Q Okay. Did you find any closed or open
24 containers of alcohol at the scene?

25 A No.

1 Q Did you find any like cups in the Blazer, did
2 you find any cups, anything to indicate any alcohol
3 was present?

4 A The only vehicle I recall seeing anything in
5 was the Honda, there was a soft drink, I think.

6 Q Okay.

7 A A can, and if I'm not mistaken, it's in one
8 of the photos.

9 Q Okay. Did you find any nonprescription
10 medication, drugs or anything?

11 A Huh-uh (negative), no.

12 Q Okay. While you were there, at anytime did
13 anyone remove anything from the scene?

14 A Not that I'm aware of.

15 Q Okay. Let me ask you about something else,
16 officer. Were you involved with the chain of
17 custody on any samples, fluid samples taken from
18 Mr. Helton?

19 A It seems like I was in this one. Let me
20 refer back.

21 Q Let me back up and ask you this. Did you go
22 to the hospital where the coroner --

23 A I'm thinking this is the case where the
24 coroner requested that I transport it to SLED.
25 That's unusual, we usually don't do that. That's

1 why I was wanting to refer back to make sure but
2 I'm thinking that this is it. That is what I was
3 looking for, is the chain of custody from where I
4 carried that.

5 Q Okay. Do you have an independent
6 recollection that you actually handled that sample?

7 A I think in this situation I did. That's what
8 I'm --

9 Q Okay. Were you present at the coroner's when
10 samples were taken?

11 A No.

12 Q Okay.

13 A No.

14 Q But you said a sealed container was handed to
15 you?

16 A That's correct, from the coroner.

17 Q All right.

18 MR. NEWLON: Your Honor, if I may approach
19 the witness?

20 THE COURT: Yes.

21 Q Trooper Keller, I'm going to hand you what I
22 have marked as Plaintiff's Exhibit 18.

23 A I will get all this stuff mixed up.

24 Q All right.

25 A All right.

1 Q Okay? Is that the chain of custody for this
2 case involving Hoyt Helton and this accident on
3 July 11th, 2003?

4 A I was looking for mine but it looks like the
5 same one.

6 Q Go ahead and take your time.

7 A I am showing, I got the results here, I'm not
8 showing that exact form.

9 Q Okay. Do you have any record --

10 A The form I'm showing shows that D. S. Calvert
11 actually took it to SLED.

12 Q Okay. Who is D. S. Calvert?

13 A He's another trooper with us.

14 Q Okay. Was he on this case with you?

15 A I don't recall him actually working on the
16 case. It might have been a situation where I was
17 off the next day or something and it was carried.

18 Q Okay.

19 A But I've got the SLED laboratory reports and
20 his name is on the bottom.

21 Q All right.

22 A And that's the one that actually carried,
23 whoever the delivering officer is, that's who would
24 carry it to them. At the very bottom you see
25 delivering officer?

1 Q Yes, sir. Okay.

2 MR. NEWLON: Your Honor, I would like to go
3 ahead and mark this please, as 26.

4 MR. WATSON: No objection.

5 THE COURT: Okay, without objection.

6 MR. WATSON: He'll want his original back, so
7 make him a copy.

8 (SLED laboratory report marked and received
9 in evidence as Plaintiff's Exhibit 26).

10 BY MR. NEWLON:

11 Q Okay. Trooper Keller, I'm handing you what I
12 have now marked as Exhibit 26.

13 A Okay.

14 Q Is this the -- what is this form?

15 A This is the SLED laboratory report. This is
16 what you have to request, you have to fill out when
17 you turn in a sample to SLED, to where they know
18 what they're getting and what you're requesting on
19 it.

20 Q Okay. And according to this report what type
21 of tests were done?

22 A There was a drug, there was a drug screen
23 done and, let's see, blood alcohol.

24 Q Okay.

25 A And there was one vial of blood, one vial of

1 urine and one vile of occular fluid.

2 Q Okay. And those samples would have been
3 taken, as you have testified, by Officer Calvert,
4 would have been taken to SLED?

5 A That's correct.

6 Q Okay, thank you.

7 MR. NEWLON: Your Honor, I move into evidence
8 16 and 17, which are the photographs of the
9 vehicles taken by the officer, and also move into
10 evidence Number 26, which is the report we just
11 discussed.

12 THE COURT: Okay. Without objection.

13 MR. NEWLON: I'm going to hold 18.

14 BY MR. NEWLON:

15 Q When these samples are taken in these kind of
16 situations and carried by the Highway Patrol to
17 SLED what type containers do you use?

18 A Well, if it was ours we use a box SLED
19 furnishes us but this was not, the coroner actually
20 drew this.

21 Q Okay.

22 A And I don't know what they use.

23 Q Okay.

24 A I can't tell you exactly what type of
25 packaging they do but it's sealed.

1 Q Okay.

2 A Now, I couldn't tell you how the coroner's
3 office goes about it.

4 Q All right.

5 A Like I said, this is the first time this has
6 ever happened.

7 Q Okay. What is a fatality package?

8 A It's a, I don't know how exactly, it's a
9 packet that's required by the Highway Patrol and
10 it's our, it's our department's packet. Basically
11 that packet consists of about everything you could
12 think of that would be involved in an accident and
13 it's laid out in stages to where you start from the
14 beginning to fill out this packet and you, by the
15 time you finish you should have everything
16 documented in that packet, but it's used by the
17 highway patrol. I don't know of any other agencies
18 that do it.

19 Q Did you prepare one in this case?

20 A I did.

21 Q Do you have all or part of it with you today?

22 A I think I've got it all. It's a pretty big
23 packet. I'm thinking all of it is present.

24 Q Okay. As part of your investigation did you
25 interview witnesses in this case or people at bars?

1 A I didn't actually go there and do it.

2 Q Did you interview them by phone or person?

3 A Yes.

4 Q Did they identify who they were to you over
5 the phone?

6 A Yes.

7 Q Okay.

8 MR. WISE: Your Honor, I would object to the
9 line of questioning. I don't think any of the
10 witnesses testified were asked specifically about
11 any conversation they had with this officer.

12 MR. NEWLON: Your Honor, I will point to
13 specific testimony where I asked them if they
14 discussed it with the officer, I specifically asked
15 them if they told him the truth.

16 THE COURT: You didn't ask him what they
17 said. I sustain the objection.

18 BY MR. NEWLON:

19 Q Did you have a conversation with Mr. Harrison
20 during your investigation?

21 A Timothy Brad Harrison, Bradford?

22 Q Yes, sir.

23 A Yes, sir.

24 Q Did he tell you, disclose to you about what
25 time he left The Getaway?

1 A He said between 9:30 and 10:00 o'clock.

2 Q Okay. Did you interview a man named Billy
3 McDonald in this case, a bartender at the Carolina
4 Drive-In.

5 MR. SEIGLER: Judge, I'm going to object to
6 any questions as to what Mr. McDonald said. He did
7 not specifically ask him --

8 THE COURT: Let me hear the question first,
9 then we will have to find out if Mr. McDonald was
10 asked about it.

11 THE WITNESS: Yes, I did, Billy McDonald, I
12 spoke to him on the phone.

13 BY MR. NEWLON:

14 Q Okay. Did he identify himself to you?

15 A That's correct, that's how I got his name.

16 Q Did he identify himself as the bartender at
17 the Carolina Drive-In that night?

18 A No. He actually said that he was the father
19 of the owner.

20 Q Did he say he was there that night?

21 A That's correct and that his son wasn't there,
22 because I asked for the owner when I called.

23 Q Okay.

24 MR. SEIGLER: Judge, he didn't ask him any
25 specific questions --

1 THE COURT: I sustain the objection.

2 MR. NEWLON: Thank you.

3 BY MR. NEWLON:

4 Q Did you ask him whether or not he served any
5 alcohol --

6 MR. SEIGLER: Judge --

7 MR. NEWLON: Your Honor, I did ask the
8 witness that.

9 MR. SEIGLER: All he asked Mr. McDonald was
10 whether he told him the truth or not, that's it.

11 THE COURT: Well, did he ask McDonald?

12 MR. NEWLON: I did ask him if he served him
13 alcohol and if he told the officers the truth.

14 THE COURT: I'll let you ask him. Go ahead.

15 BY MR. NEWLON:

16 Q Did Mr. Billy McDonald inform you whether or
17 not he served any alcohol --

18 A He said he had one beer, Mr. Helton.

19 Q Thank you. Officer, later on in the course
20 of your investigation did you ever interview Susan
21 Helton, the wife?

22 A Yes, I did.

23 Q Did you ever have an opportunity to hear a
24 taped phone message from Mr. Helton to her that
25 night?

1 A Yes, I did. It was on a cell phone, voice
2 mail.

3 Q All right. Let me ask you this. As part of
4 your training and practical experience have you in
5 the past -- let me strike that.

6 As part of your training are you trained in
7 detection of people who are intoxicated, to be able
8 to determine whether or not they are intoxicated or
9 not while they're driving?

10 A Well, I've got different training classes in
11 alcohol and drug detection.

12 Q Okay. And in the fifteen years have you had
13 an opportunity to stop and examine, evaluate people
14 in those conditions?

15 A Yes, sir.

16 Q Have you ever given people tickets for that?

17 A Oh, yes.

18 Q Okay. This particular phone message you
19 heard, did you actually hear Mr. Helton's voice?

20 A That's correct.

21 Q Based on your experience in detecting
22 intoxication, listening to people who may be
23 intoxicated, can you tell us what you observed
24 about Mr. Helton's voice?

25 A To me the voice I heard on the phone, and I

1 think I stated this during a deposition that I had
2 done, that I can't tell you, I never met the man in
3 my life, I couldn't tell you if he had a speech
4 impediment or anything else but if he did not, then
5 that man was under the influence that was on that
6 cell phone.

7 Q Any doubt in your mind?

8 A None whatsoever.

9 Q You just mentioned your deposition. Do you
10 recall saying, in your deposition saying he was
11 highly intoxicated and was slurring his speech?

12 A That's correct.

13 Q In the course of your experience in the
14 Highway Patrol, when you stop someone for driving
15 under the influence and eventually cite them, do
16 you go back and try to find out how much alcohol
17 they consumed, typically?

18 A You do the best you can but that's kind of
19 hard to do without knowing that what you're told is
20 the truth. Basically when you're doing a DUI
21 arrest, I like to refer to it as building a house,
22 you have to lay the foundation and get everything
23 right before you make that arrest or you shouldn't
24 make it, and that's the way I do it. I gather my
25 evidence, which may be little things that the

1 common person may see on an everyday basis and
2 those things build up to the total case. You don't
3 just smell alcohol and arrest, that's not the way
4 it's done. You have to be able to prove whatever
5 you are going to put, you know, you are going to
6 charge this ticket for, and that's the way I do it.
7 I always like to base it, and always the way I
8 refer to it is a DUI case is a lot like building a
9 house, it's one of the largest investments in your
10 life or a person's life, so that shows the
11 importance of it and I know that it's hard on some
12 people and that's why I try to make and take the
13 special extra time to do what's right, but without
14 a good foundation you don't have a good house, and
15 that's the way I go about my DUI cases.

16 Q As part of your fatality package do you also
17 investigate the driver's driving record?

18 A Yes. The fatality package requests a
19 driver's record.

20 Q Do you get a certified copy or certified true
21 copy of that when you do that investigation?

22 A That's correct.

23 Q Okay. In this particular case --

24 MR. WISE: Your Honor, I object. I don't
25 know whether the driving record has any relevance

1 in this case.

2 THE COURT: Sustain the objection.

3 MR. NEWLON: Thank you.

4 MR. NEWLON: Trooper Keller, thank you very
5 much. I don't have any further questions. Answer
6 any questions these gentlemen may have for you.

7 THE WITNESS: Yes, sir.

8 MR. SEIGLER: If it please the Court, Your
9 Honor.

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q Trooper Keller, did you have the opportunity
4 to speak with Mr. McDonald about Mr. Helton's, his
5 status when he came to the Carolina, as far as his
6 condition?

7 A I can tell you exactly what he said. If you
8 want me to read it off, I'll read it off --

9 THE COURT: Hold on, answer his question,
10 don't read it. Just answer his question.

11 Q What did Mr. McDonald tell you Mr. Hilton's
12 condition was at the Carolina?

13 A Let me read through this right quick and I'll
14 tell you.

15 Q Okay.

16 A The only thing on here that would refer to
17 the, I think your question, as far as his
18 condition, is he said he was sober when he left.

19 MR. SEIGLER: Thank you, sir.
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CROSS EXAMINATION

QUESTIONS BY MR. WISE:

Q Trooper Keller, you talked to the people at The Getaway Lounge?

A That Harrison, he was from there.

Q He was a patron there, you talked to some people that worked there?

A The bartender put him on the phone with me.

Q Correct.

A So, he was there. You asked me did I talk to anybody there, yes.

Q Let me rephrase my question. Did you talk to some people who worked at The Getaway Lounge?

A I talked to a bartender.

Q Named Barry?

A I'm thinking that's it.

Q Could I see your notes? You talked to a bartender Barry, you --

A If you hand my notes back to me I can answer your questions when you get ready to ask them.

Q Hold on one second.

A You've got my notes, how can I answer them?

Q All right, go ahead. You talked to a bartender named Barry?

A His name was Barry.

1 Q You didn't get the last name?
2 A No.
3 Q Okay.
4 A He just said he was a bartender.
5 Q All right. He told you that, that Mr. Helton
6 had been there?
7 A That's correct.
8 Q All right.
9 A Well, I will read to you exactly what he
10 said.
11 Q All right.
12 A He said that Mr. Helton wanted to talk to him
13 and he turned around and he was gone but then he
14 comes back and says that Mr. Helton was sober when
15 he talked to him.
16 Q Right.
17 A So, he turned around to talk to him and he's
18 gone but he says he's sober and he wasn't there.
19 Q You don't know if he talked to him earlier?
20 A That's all that was said with the bartender.
21 Q You didn't clarify that?
22 A That is all was said with the bartender.
23 Q Then maybe he told you that someone else was
24 there that had seen him?
25 A That's how I got in touch with a Harrison.

1 Q So, The Getaway, did you tell Barry why you
2 were calling?

3 A I think I did. I think I told him about the
4 subject.

5 Q Generally?

6 A What was going on was an investigation of the
7 accident.

8 Q He cooperated with you and gave you
9 additional names?

10 A He give me the Harrison subject's name, that
11 is how I got his name.

12 Q All right. I believe Barry told you he was
13 sober when he left?

14 A That's correct.

15 MR. WISE: Okay, thank you.

16 MR. WATSON: No questions.

17 MR. NEWLON: One follow-up, Your Honor.
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REDIRECT EXAMINATION

QUESTIONS BY MR. NEWLON:

Q This particular note you're talking about, that you just mentioned, "Barry said he wanted to talk to him, he turned around and was gone, sober when I talked to him."

Did Barry tell you that Helton was sober when Barry talked to him?

A Let me read it again and then I'll clarify my understanding of it.

Q Okay.

A Okay. Barry said that Mr. Helton, he was told that Mr. Helton wanted to talk to him. When he turned around, supposedly Mr. Helton was sitting at the bar, when he turned around he was gone, so my understanding from that statement is Mr. Helton wanted to talk to him but when he turned around to talk to him he had already left, but then he comes back and says that he was sober when he talked to him, so if he turned around to talk to him and he's not there, I don't know how that statement would be true, but that's what was told to me.

Q You mean the statement that he was sober when he talked to him?

A That's correct.

1 MR. NEWLON: Thank you very much. No further
2 questions.

3 MR. WISE: Just one on recross.
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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Mr. Keller, could he have talked to him when
4 he first got there?

5 A He didn't tell me that. He might have.

6 Q Did you ask him that?

7 A I asked him about his dealings with him.

8 Q Did you ask him specifically did he talk to
9 him when he first got there?10 A I couldn't tell you that, I just asked him,
11 you know, his reference to him.

12 MR. WISE: Thank you.

13 THE COURT: Thank you, sir.

14 MR. NEWLON: Your Honor, just one more.
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1 FURTHER REDIRECT EXAMINATION

2 QUESTIONS BY MR. NEWLON:

3 Q When you interviewed this witness did you ask
4 him if he had any conversations with Mr. Helton?5 A I just asked him about that situation. That
6 was his comment to me.

7 Q Okay.

8 A He said he left, I think if I'm recalling
9 correctly, he left work at 8:05.10 Q Okay. Did you limit what Mr. Barry told you
11 in any way?12 A No. That's what I was told and he gave me
13 the other subject's name.

14 MR. NEWLON: Thank you.

15 THE COURT: Thank you, sir.

16 (Witness excused).

17 MR. NEWLON: Does anybody need the highway
18 patrolman to stay?

19 MR. WATSON: We have no problem excusing him.

20 THE COURT: Okay.

21 MR. NEWLON: Your Honor, at this time I would
22 call Hank Hartfield to the stand.

23 THE CLERK: He was sworn in yesterday.

24 THE COURT: You were sworn in yesterday, you
25 are still under oath.

1 THE WITNESS: Yes, sir.

2 HASKELL L. HARTFIELD,
3 having been previously sworn, testified as follows:

4 DIRECT EXAMINATION

5 QUESTIONS BY MR. NEWLON:

6 Q Please state your name for the record.

7 A My name is Haskell L. Hartfield.

8 Q Just a second. Mr. Hartfield, this is your
9 son?

10 A Yes, sir, that's Jon Eric, my son.

11 Q Where is his mother?

12 A His mother is deceased, she died with a brain
13 injury in 2000.

14 Q Right before this accident, can you tell the
15 jury what was going on in this young man's life?

16 A He just previously graduated from high school
17 and he was accepted to go to the University of
18 South Carolina in Columbia and had gone to
19 orientation on July 2nd for the rest of his
20 classes, and he was going to major in psychiatry,
21 was his major, and that was on July 2nd, and that
22 is what he was doing just prior to the accident,
23 getting ready to go to college in the fall.

24 Q Okay. Do you recall the accident that
25 happened on July 11th, 2003?

1 A Yes, sir.

2 Q Do you recall what Jon Eric happened to be
3 doing that evening?

4 A We had a busy day that day. He decided to go
5 out with Laura and ride in her car, he said he was
6 going over to Laura's parents' house, he ate over
7 there, he ate with the parents over there at her
8 house that night.

9 Q Speak up, please.

10 A Thank you.

11 Q Okay. How did you find out about the
12 accident?

13 A About 11:15 a Greenwood County deputy came to
14 my door, rang the doorbell and he was on a cell
15 phone, told me Jon Eric, asked me first was I Jon
16 Eric's father, I said yes, he said he's been
17 involved in a major car accident and was being
18 airlifted to Greenville, to Greenville Memorial
19 Hospital and I needed to get ready and go. I did
20 go to the hospital.

21 Q Okay. Tell the jury pretty much what you
22 went through for the next 24 to 48 hours with your
23 son.

24 A I arrived at the hospital approximately 1:00
25 o'clock. His older brother went with us and a

1 neighbor went with us, too, she went with us, and
2 we got to the hospital around 1:00 o'clock. I went
3 to the emergency room area, told them my name, they
4 said, "We have a room for you," and they had a room
5 and after we got there two chaplains came in the
6 room and I didn't know whether Jon Eric was dead or
7 what I expected at that point, and which I found
8 out he was very critical and still alive, they were
9 going to do surgery on him that night, and it was
10 touch and go, very much so for the next several
11 days whether he would even live or not.

12 And I had, I had a talk with the doctors
13 later that night, 5:00 o'clock the morning after
14 surgery and they said he had a real traumatic brain
15 injury, which means that his head hit the
16 windshield part of the car, he didn't have an
17 airbag on his side, it was an older model Honda
18 Accord, he didn't have an airbag on his side of the
19 car, and said his head hit the windshield and his
20 brain was scrambled when it hit, impacted, there
21 was a lot of bleeding of the brain, and they put a
22 monitor on his head to determine the swelling of
23 the brain during the process, and that morning at
24 5:00 o'clock they did transfer him to ICU where he
25 stayed a period of time in ICU. But during the

1 first 48 hours, if I would leave the ICU area, stay
2 in the hospital, go to the cafeteria, they would
3 give me a little beeper thing like a restaurant has
4 that goes off immediately, that is how critical it
5 was whether he was going to make it or not, and it
6 was, I stayed there from Friday night, early
7 Saturday morning when we got there, Sunday
8 afternoon. I went home Sunday afternoon, took a
9 break and went home to the house in Greenwood
10 Sunday afternoon and came back by 254, by the wreck
11 scene where the wreck happened, I saw the tire
12 marks, and a very traumatic time for me. That is
13 basically 48 hours of the time you asked me. Thank
14 you.

15 Q Yes, sir. In the days following, within a
16 few days following did you have an opportunity to
17 videotape your son at the hospital?

18 A On the 22nd of July we did. We were going to
19 video him prior to that but he turned worse, the
20 first four to five to six days, I told, would not
21 allow video to go on at that time until later.

22 Q Okay.

23 MR. WATSON: Judge, we're going to have to
24 move over a little bit so we can see.

25 THE COURT: Okay.

1 MR. NEWLON: Your Honor, may I approach the
2 witness?

3 THE COURT: Yes, sir.

4 MR. NEWLON: Thank you.

5 BY MR. NEWLON:

6 Q I'm going to hand you what I have marked as
7 Plaintiff's Exhibit 20. Is that the videotape of
8 your son?

9 A Yes, it is, sir.

10 Q Okay.

11 MR. NEWLON: Your Honor, I move that Exhibit
12 20 be moved into evidence in this case.

13 THE COURT: Without objection, all right.
14 (Videotape marked and received in evidence
15 as Plaintiff's Exhibit Number 20).

16 MR. NEWLON: At this time I would like to
17 play a CD equivalent of the tape, if there is no
18 objection.

19 THE COURT: Okay.

20 (Exhibit Number 20 played to the jury).

21 Q Is this the videotape you shot?

22 A Yes, sir.

23 Q Mr. Hartfield, was he able to breathe on his
24 own?

25 A I think they had oxygen they gave him at this

1 time, as far as I know.

2 MR. NEWLON: May we approach?

3 (Unrecorded bench conference).

4 THE COURT: We'll take a short ten minute
5 recess, okay? You all can step back. Do not
6 discuss the case now. Thank you.

7 (The jury was excused from the courtroom).

8 THE COURT: Okay, we'll take a short recess.

9 (Recessed at 10:25 a.m.).

10 (Reconvened at 10:54 a.m.).

11 THE COURT: I'm sorry, I wouldn't have taken
12 so long but Justice Moore came in, we were having a
13 little conversation back there. It's not often I
14 get to talk to him that much.

15 Okay.

16 MR. NEWLON: Your Honor, while the jury was
17 out I thought it might be appropriate to take
18 something up so we don't get interrupted during the
19 course of the testimony. There is a piece of
20 demonstrative evidence I would like to put in this
21 case, it's a time line of events based on the
22 testimony of all the witnesses in this case at this
23 point and I intend to, Dr. Brewer, the
24 toxicologist, intends to use that as a reference
25 where he explains his findings in reference to the

1 events in this case, and there has been an
2 objection to that and I would like to go ahead and
3 see if we can't get that resolved.

4 THE COURT: I haven't seen it, I don't know
5 what it is.

6 MR. NEWLON: I've provided the parties with
7 an exact copy.

8 THE COURT: Okay, what do you all have to say
9 about this?

10 MR. WISE: Well, one, we've got more
11 witnesses who are going to be coming, so if he is
12 going to try to put the information in, it's
13 something he can argue but certainly not an exhibit
14 which highlights certain specific testimony of
15 certain witnesses as opposed to the others, to go
16 to the jury. He can argue it all day long, he can
17 argue something to the jury.

18 MR. WATSON: I don't have any objection to
19 it. He said my man said the man was sober sitting
20 outside my place of business, the man I'm
21 representing, so I don't have any objection to it
22 at all.

23 MR. NEWLON: Your Honor, I think it would aid
24 the jury.

25 THE COURT: It might aid the jury but you

1 can't put in testimony, you can't highlight
2 testimony and put that on a graph.

3 MR. NEWLON: How about tracking the
4 references to the testimony, then, where I just put
5 in parenthetical the name of the person.

6 THE COURT: Well, you've got one person
7 saying he left at 8:00, another person saying he
8 left at 9:30. This is argument. That's just
9 discrepancies in testimony, it's not a real firm
10 timeline. I'm going to sustain the objection to
11 this.

12 MR. NEWLON: Thank you, Your Honor. Would it
13 be all right if I simply kept it marked as an
14 exhibit to present to the toxicologist and he can
15 use as reference?

16 THE COURT: Well, he can't refer to any
17 testimony by other people. He can use times, if he
18 came there between 4:00 and 4:10, whatever, like a
19 hypothetical question, he can use the times but not
20 refer to testimony by somebody.

21 MR. NEWLON: Correct.

22 THE COURT: Okay.

23 MR. NEWLON: That's what I was using it for.

24 THE COURT: It's up to the jury who they
25 believe as to what time he left and all that sort

1 of thing.

2 MR. NEWLON: I will explain that to him.

3 THE COURT: All right. Bring them in.

4 (The jury returned to the courtroom).

5 MR. NEWLON: Thank you, Your Honor.

6 BY MR. NEWLON:

7 Q Mr. Hartfield, we were just finishing looking
8 at the video, I was about to ask you can you
9 explain to the jury what's going on in Jon Eric's
10 life the next seven to ten months following this 48
11 hour period?

12 A He was in the hospital a total of ten months
13 and three days, I believe we calculated it, or 302
14 days he was in the hospital, 30 days in ICU, four
15 months on the brain and spinal cord floor of the
16 hospital, and after about six weeks in the hospital
17 they wanted to transfer him to a nursing home and I
18 refused to allow them to transfer him to a nursing
19 home. They said he would probably never come out
20 of the coma, chances were grave.

21 So, I didn't allow them to discharge him, he
22 stayed on the brain and spinal cord floor for four
23 months and then around Thanksgiving or so of that
24 year they transferred him to Roger C. Peace over
25 there but he was still in a coma, still not

1 responding, and after about a month over there he
2 wasn't responding, they were trying to transfer him
3 again to a nursing home, I would not sign him out
4 of the hospital and they had to keep him, and he
5 stayed there doing therapy in the hospital, they
6 did therapy with him in the brain and spinal cord
7 floor as well as Roger C. Peace, and I made a visit
8 to the hospital those 302 days all except about
9 eleven days I didn't go to the hospital at some
10 point in time to be with Jon Eric, and it was, they
11 were still feeding him with a feeding tube and they
12 taken a trach out when he went over to the Roger C.
13 Peace because they wouldn't take him over there
14 with the trach in.

15 Q What is a trach?

16 A A trach is where you have a hole in your neck
17 and they can suction fluid out of the body, and
18 they took -- that's a trach.

19 Q Okay. Go ahead.

20 A And it was early January of '04, about the
21 first week of January before Jon Eric talked. He
22 wasn't talking, he was moving, they were doing
23 therapy with him and his eyes was open, he was
24 moving but not in a real conscious state, so to try
25 to feed him food, he would spit the food out, in

1 his mouth, and it was early January of '04 I had
2 him down in the cafeteria one Saturday and I had
3 ambrosia for my salad, I gave him some of that, he
4 ate the ambrosia out of the salad. He ate some
5 cookies from Subway. And the following day I
6 fixed, I asked him, he was starting to just come
7 around, he was starting to come around at this
8 point, I asked him what he wanted the next day, he
9 said, "I want chicken and dumplings." I fixed him
10 chicken and dumplings the next day and carried it
11 up to the hospital and fed him. The hospital at
12 this point was not feeding him with a spoon or fork
13 at this point because it had to be done by a speech
14 therapist to do it, which being a father I could do
15 it. He ate fine and after two or three days of
16 that feeding tube, he snatched his feeding tube out
17 and we had to feed him by mouth. That hole closes
18 up real fast in the stomach. They started feeding
19 him by mouth then.

20 For about 45 days he started doing a lot
21 better in therapy, he started responding and doing
22 things they asked him to do, still very slow. That
23 45 days, he came around more in that 45 days, than
24 he had the whole time in the hospital, and it was
25 May 14th when he was discharged, you know, came

1 home from the hospital. At this point in time he
2 was in a wheelchair, not using a walker at this
3 point in time, in a wheelchair, but I had to help
4 him out of the bathroom and things like that at
5 that point and help dress him and everything at
6 that point. Being a single parent, I had it where
7 he could help take care of himself, at that point
8 he had to have help with his personal needs at that
9 point.

10 Q You have been appointed his conservator?

11 A Yes, I have been.

12 Q Okay. Now let's move forward to when Jon
13 Eric is home. What has it been like since Jon Eric
14 has been home from the hospital, up until the
15 present time?

16 A Well, his care has been where basically 24/7
17 someone would be with him or around him. There has
18 been points in time the last several months where
19 he could be at the house a few hours by himself but
20 as far as preparing his meals and making sure he
21 takes his medication and everything, somebody had
22 to do that for him and be responsible for that. He
23 can dress himself, go to the bathroom by himself,
24 except he has a leg brace on his left leg he can't
25 put on by himself. He has to have help with that

1 leg brace.

2 Q Okay. Does he have any other problems, with
3 his memory, brain function or anything like that?

4 A His short term memory, in fact the last time,
5 last night he asked me, "When are we going back to
6 court, what day, daddy?" He probably asked me six
7 times last night when are we going back to court,
8 not remembering that the judge has said we're back
9 the next day at 9:30.

10 Q Okay. Has he been through vocational
11 training?

12 A He went to voc rehab in Columbia for four and
13 a half weeks.

14 Q Okay. In your observations of him around the
15 house and since he's been back can you see things
16 he is able to do as far as work goes?

17 A Very little things he could accomplish or
18 work with.

19 Q Have you tried to use him in your business?

20 A Sometimes I will take him to the office to
21 stay with me at the office while I'm there.
22 Sometimes he answers the phone, maybe take a phone
23 number down to call somebody back. That is
24 basically what he will help me do at the office
25 when I have to leave the house.

1 Q Is he able to drive?

2 A No, sir.

3 Q Okay. How has this accident affected yours
4 and Jon Eric's life?

5 A Well, being self-employed it's really put a
6 damper on my business. I probably do a whole lot
7 less business than I did before, because I'm in the
8 car business, I'm not able to travel to car
9 auctions like I did before and it's been a tough
10 situation taking care of him because I take care of
11 him first.

12 Q How did he get to vocational training and
13 physical therapy and doctors' appointments?

14 A Doctor appointments and going to physical
15 therapy, I have to do the transportation or
16 somebody takes him at all times to the location and
17 picks him back up, 95 percent of the time it's me.

18 Q Have you kept track of Jon Eric's medical
19 bills in this case?

20 A Yes, we have, sir.

21 MR. NEWLON: Your Honor, if I may approach
22 the witness.

23 THE COURT: All right, sir.

24 Q I'm going to hand you what I have marked as
25 Plaintiff's Exhibit 21 and ask you to take a moment

1 and see if you can identify that document for me?

2 A Yes, sir.

3 Q Okay. Would you take a moment to look at the
4 facilities and everything. Are those the
5 facilities he attended, where he was treated?

6 A Yes, sir.

7 Q What have been his total medical bills in
8 this case?

9 A Through I guess June 6th of this past year,
10 which would have been '06, was \$977,012.

11 Q \$977,000?

12 A And \$12, yes, sir.

13 Q Thank you.

14 MR. NEWLON: Your Honor, I move that Exhibit
15 21 be put into evidence.

16 MR. WISE: No objection.

17 THE COURT: Without objection.

18 (Medical expenses marked and received in
19 evidence as Plaintiff's Exhibit Number 21).

20 BY MR. NEWLON:

21 Q Mr. Hartfield, what are you asking this jury
22 to do?

23 A Do what's in your heart, and I guess a
24 situation like this, unless you have been in my
25 shoes it's really hard to know what, but take

1 someone's life and almost totally restore it and
2 have to build it back a day at a time, and it
3 affects the rest of his life as long as he lives,
4 it's something where somebody sent this drunk
5 driver on the road, got him drunk, he went on the
6 road and hit my son in this collision, and these
7 facilities that operate and sell beer --

8 MR. WISE: Your Honor, I think --

9 THE COURT: I sustain the objection.

10 MR. NEWLON: Thank you. Thank you, Mr.
11 Hartfield. Answer any questions these attorneys
12 may have.

13 THE WITNESS: All right, sir.

14 MR. SEIGLER: No questions, Your Honor.

15 MR. WISE: I don't have any questions.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATSON:

3 Q I'm going to ask you a couple questions. I
4 always call you Hank. Is that right?

5 A That's my nickname, sir.

6 Q And you and I go back, what, a good many
7 years?

8 A Twenty-five years ago.

9 Q Twenty-five years ago. You say this is your
10 second son or your oldest son?

11 A He's my youngest son.

12 Q Youngest son. You had another son, I
13 believe?

14 A Jason.

15 Q Okay. Time does pass, doesn't it?

16 A Yes, sir.

17 MR. WATSON: No further questions.

18 THE COURT: Thank you, sir.

19 (Witness excused).

20 MR. NEWLON: The plaintiff calls Alex Lewis
21 to the stand, Your Honor.
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1 ALEX LEWIS,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Please state your name for the record.

6 A It's Alex Lewis.

7 Q Okay. What do you do for a living?

8 A Currently I'm a student at York Technical
9 College in Rock Hill pursuing a career in nursing.

10 Q Back in July of 2003 what were you doing?

11 A I was employed with the State Law Enforcement
12 Division, also known as SLED.

13 Q Where are they located?

14 A In Columbia.

15 Q As what was your title or whatever they
16 called you for SLED?

17 A I was employed as a forensic toxicologist in
18 the toxicology department within SLED.

19 Q What did you typically do as a forensic
20 toxicologist for SLED?

21 A What I did was I analyzed biological
22 specimens such as blood, urine, even tissues, for
23 the presence and absence of drugs, alcohol and/or
24 poisons and then be able to interpret these results
25 for the coroners, pathologists and courts of law.

1 Q Okay. Have you actually testified before?

2 A I have, yes.

3 Q Have you ever been disqualified for any
4 reason?

5 A No, I have not.

6 Q Typically what happens when you are at the
7 office, I assume in Columbia?

8 A Uh-huh (Affirmative).

9 Q Typically what happens with samples as they
10 come in? How do they come in and how are they
11 handled?

12 A All right. Well, our office has four floors
13 and our department is on the fourth floor. On the
14 first floor we have what is called the log-in
15 department, and this is where officers will come in
16 and bring their samples, their evidence into that
17 log-in department. During that time the samples
18 will be given what we call a lab number, a SLED lab
19 number, which is basically just a tracking number
20 for that evidence. The officer will fill out
21 paperwork and then he will place the evidence
22 inside a locked refrigerator, kind of like a mail
23 slot. You can put samples in, you just can't take
24 anything out. Again it's a locked refrigerator,
25 and it's stored there until one of our employees

1 from our department, the toxicology department,
2 will be able to go downstairs, collect the
3 evidence, bring it back upstairs to the fourth
4 floor, put it into another, excuse me, another
5 locked refrigerator until it gets ready for analysis
6 by the assigned toxicologist.

7 Q Okay. Do you have evidence custodians?

8 A Yes, we do.

9 Q At this time were you an evidence custodian?

10 A I was not, no, I was the toxicologist.

11 Q Okay. This particular case that we're
12 talking about today, an accident that happened July
13 11, 2003, were you an evidence custodian for
14 samples in this case?

15 A Actually no, I was not. The evidence was
16 brought up by our technician at that time who was
17 Brooke Reed.

18 Q Okay. And the samples that came to you on
19 this particular occasion, how were they presented
20 to you?

21 A Well --

22 Q In what form, what type of containers?

23 A All right. This is our evidence bag that we
24 have that we store the evidence in. Each evidence,
25 each case has its own bag. When I received this

1 case I had the original bag that the evidence was
2 sealed in inside our evidence bag and it was sealed
3 across the top and it was dated and initialed by
4 the delivering officer.

5 Q Okay. So, the sample itself was sealed and
6 then it was also sealed in an envelope when it came
7 to you?

8 A That's correct.

9 Q And it was delivered by -- do you know who it
10 was delivered by?

11 A It was delivered by Dennis Calvert.

12 Q Okay, thank you.

13 MR. NEWLON: If I may approach the witness,
14 Your Honor? Your Honor, I'm going to hand what I
15 have already marked Plaintiff's Exhibit 18 to the
16 witness.

17 BY MR. NEWLON:

18 Q Miss Lewis, do you recognize that document?

19 A Yes, I do.

20 Q What is that document?

21 A It's our computerized custody details report.
22 It shows the time and date that the evidence was
23 moved within SLED.

24 Q Okay. Does that track how this sample was
25 handled?

1 A It does, yes.

2 Q Is it a certified copy?

3 A It is, it's a verified chain of record.

4 MR. NEWLON: Your Honor, I move to have
5 Plaintiff's Exhibit 18 in evidence.

6 THE COURT: I think they already let it in
7 evidence. Okay.

8 MR. NEWLON: We didn't.

9 (Evidence custody report marked and received
10 in evidence as Plaintiff's Exhibit Number 18.

11 BY MR. NEWLON:

12 Q I'm sorry, I took it away from you. I don't
13 know if you have one or not?

14 A I do, actually.

15 Q Well, you can use that one. Tell the jury
16 basically once this, these -- let me ask you this.
17 What samples were you given?

18 A In this particular case I was given, I was
19 given a red top tube of blood, a red top tube of
20 urine and a red top tube of ocular fluid.

21 Q And all those were sealed when you received
22 them?

23 A They were sealed inside that evidence, the
24 original evidence custody bag.

25 Q Did you open them up?

1 A I did, yes.

2 Q Okay. Did you test those samples?

3 A I did, yes.

4 Q Can you tell the jury exactly what you did?
5 Just go through each one, the blood, the urine and
6 then the ocular.

7 A Certainly. The blood labeled Gary Helton, my
8 results were as follows. .212 percent weight per
9 volume ethanol found in blood. That was calculated
10 from serum plasma ethanol level.

11 The blood screened negative for the following
12 classes of drugs, which were negative screen for
13 benzodiazamine, negative screen for cocaine and/or
14 cocaine metabolized, negative screen for opiates.

15 Urine, the results are as follows. .304
16 parts weight per volume ethanol found in urine,
17 negative screen for amphetamine, methamphetamine,
18 negative screen for barbituate, negative screen for
19 cannabis.

20 Ocular fluid results as follows. .29 parts
21 weight per volume ethanol found in ocular fluid.

22 Q Let's go back to the blood. What type method
23 did you use to test this?

24 A We ran our sample on a gas chromatograph.
25 Basically what that is, it just separates out the

1 different alcohols, separates them out according to
2 their density, so from this I was able to determine
3 that ethanol was present and also able to calculate
4 how much was in that given sample.

5 Q Is ethanol the alcohol that's contained in
6 beer?

7 A That is drinking alcohol, yes.

8 Q Okay. How about the urine, how did you
9 exactly test that?

10 A It was, the urine and ocular fluid were both
11 tested using the exact same instrument and method.

12 Q Okay. From your observations of how these
13 samples were handled when they arrived at your
14 offices for testing, were they altered in any way,
15 to your knowledge?

16 A No, they were not.

17 Q And did you personally test each one?

18 A I did. Yes, I did.

19 Q Okay. Did you actually prepare the report
20 that contained the results?

21 A Yes, sir, I did.

22 MR. NEWLON: Your Honor, I don't have any
23 further questions for Miss Lewis. I offer her to
24 the defense. Thank you.

25 MR. SEIGLER: No questions.

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Miss Lewis, you used a serum versus full
4 blood method?

5 A Yes, sir.

6 Q What is the difference between the two?

7 A Well, the serum contains more water in the
8 sample, so what we did was we had to do a
9 calculation that converts that serum back to whole
10 blood.

11 Q So, the reading you have is after the
12 calculation is done from serum reading to whole
13 blood reading?

14 A That's right.

15 Q And actually you have to reduce it by what,
16 15, 20 percent?

17 A The conversion factor is 1.18, we divide it
18 by 1.18.

19 Q What does that come out to, 12 percent?

20 A Yes, sir.

21 Q All right. And the ethanol, ethanol alcohol
22 is the same alcohol found in any drinking beverage?

23 A That's correct.

24 Q Be it liquor, beer or whatever?

25 A That's correct.

1 MR. WISE: Thank you.

2 MR. NEWLON: One follow-up.

3 MR. WATSON: I don't believe I will ask her
4 anything.

5 THE COURT: Okay. One follow-up.
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REDIRECT EXAMINATION

QUESTIONS BY MR. NEWLON:

Q Ma'am, excuse me, the 12 percent or the 1.18 calculation you did, can you explain what that's all about?

A Basically it's just a conversion factor, again, that is used to bring the serum level or the serum sample back to the whole blood. I know it states, I guess within the law, that we're supposed to, I guess whole blood is to be used, and in this case I had serum, which again is just more water inside that sample, so we used that conversion factor to bring that sample back to a whole blood.

Q Okay. Does that in any way affect the accuracy of your results?

A No. No, sir, not at all.

MR. NEWLON: Thank you very much. No further questions.

THE COURT: Thank you.

(Witness excused).

MR. NEWLON: Your Honor, the plaintiff would call Dr. Brewer to the stand at this time.

1 WILLIAM EDWARD BREWER,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. NEWLON:

5 Q Good morning, Dr. Brewer. Can you state your
6 full name for the record?

7 A William Edward Brewer, B-r-e-w-e-r.

8 Q Where are you currently employed?

9 A The University of South Carolina.

10 Q What is your title?

11 A I'm an instructor, it's a faculty position, I
12 teach forensic chemistry and analytical chemistry
13 courses and physical chemistry courses in the
14 Department of Biochemistry.

15 Q Were you doing the same thing back in July of
16 2003?

17 A July, 2003, I was the chief toxicologist for
18 the Clemson Veterinary Diagnostic Center, I guess
19 you could refer to it as, as determining causes of
20 death of animals.

21 Q Okay. Let's go back to that job as a
22 toxicologist. How long had you been in practice as
23 a toxicologist?

24 A In 1992 I got a position as a toxicologist
25 working for State Law Enforcement Division,

1 probably better known by its acronym SLED, and I
2 worked there for approximately six and a half to
3 seven years, and I worked at Clemson Veterinary,
4 Diagnostic Center the same amount of time, about
5 seven years. I just started this position fulltime
6 teaching at the University of South Carolina.

7 Q As a toxicologist for SLED what was the
8 nature of your activities?

9 A Much like the previous expert that was here
10 prior to me. A lot of it was analyzing biological
11 specimens for presence of alcohol, drugs, poisons,
12 metabolites, and determining those levels in terms
13 of either cause of death or related to driving
14 impairment.

15 Q Would you for the benefit of the jury go
16 through basically your educational background?

17 A I got a Bachelor of Science Degree in
18 chemistry from North Carolina State University,
19 then I got my Ph.D in chemistry from the University
20 of South Carolina. I taught chemistry at the
21 University of Louisville for one year, a ten month
22 appointment, and decided to come back to the
23 Palmetto State to pursue a career. Well, actually
24 I started out working in toxicology at SLED,
25 thinking it was going to be a jumping point for me

1 to pursue a career in pharmaceutical history but I
2 actually really enjoyed toxicology so much I
3 decided to make a career in it. During that time
4 of training at SLED I became Board certified in
5 forensic toxicology, which is a comprehensive exam
6 that pretty much just shows you're proficient in
7 the categories that associate with pharmacology,
8 chemistry, organic chemistry and all those things
9 to be useful as an expert witness.

10 Q What license did you hold back in July of
11 2003?

12 A Well, there aren't any licenses. I was a
13 Diplomate of the forensic toxicology certification
14 Board but I was also members of other professional
15 organizations like Society of Forensic Toxicology,
16 the American Academy of Forensic Scientists,
17 American Chemical Society and so forth.

18 Q You kind of touched on it a little bit but
19 what teaching experiences have you had since you
20 got your Ph.D?

21 A In 1996 I started the forensic analytical
22 chemistry course, advanced course at the University
23 of South Carolina where I was teaching in the
24 evenings. I was teaching this with another
25 analyst, DNA analyst at SLED. We taught a forensic

1 chemical chemistry course. About one-third of the
2 course covers toxicology, and I'm teaching this to
3 mainly undergraduate students but also graduate
4 students on occasion.

5 Q Okay. Have you previously testified in court
6 as a toxicologist?

7 A Yes, sir.

8 Q Have you ever been disqualified?

9 A No, sir.

10 Q Now let's talk about this particular case.
11 Have you reviewed any materials involving an
12 accident that happened on July 11th, 2003,
13 involving Jon Eric Hartfield?

14 A Yes, sir, I did.

15 Q What were some of the things that you have
16 reviewed in preparing for this case?

17 A I guess for a matter of record, to be sure I
18 don't miss anything, I guess, numerous depositions
19 that I reviewed. I pretty much have all the
20 records right here with me. I'm not going to sit
21 here and rifle through all these but I have a
22 report.

23 Q Did you have --

24 A Some of the depositions, William McDonald,
25 Dianna Bice, Tony Keller, accident investigative

1 report of the accident, also the toxicology report
2 that was just presented.

3 Q Okay.

4 MR. NEWLON: Your Honor, at this time I would
5 like to offer Dr. Brewer as an expert toxicologist.

6 THE COURT: Without objection he can offer
7 his opinions in regard to toxicology.

8 MR. NEWLON: Thank you Your Honor.

9 BY MR. NEWLON:

10 Q Okay, I'm going to --

11 MR. NEWLON: If I may approach the witness,
12 Your Honor.

13 THE COURT: Okay.

14 Q I'm going to hand you what has previously
15 been marked and admitted in evidence as Plaintiff's
16 Exhibit 18. Is that the custody report? Have you
17 had a chance to look at that?

18 A I don't know if I saw this particular report
19 itself but I'm familiar with this report.

20 Q Okay. I'm going to --

21 MR. NEWLON: If I may approach the witness?

22 Q Dr. Brewer, I'm going to hand you what has
23 already been marked Plaintiff's Exhibit 19 and ask
24 if you recognize that?

25 A Yes, sir, I do.

1 Q What is that?

2 A This is the SLED toxicology report that they
3 issue regarding any forensic toxicology testing on
4 this particular case.

5 Q Is that the report you used in this case?

6 A Yes, sir.

7 MR. NEWLON: Your Honor, I move that
8 Plaintiff's 19 be moved into evidence.

9 MR. WISE: I thought it was already in.

10 THE COURT: I think that's already in, too.

11 MR. NEWLON: Thank you.

12 (Toxicology report marked and received
13 in evidence as Plaintiff's Exhibit 19).

14 BY MR. NEWLON:

15 Q Basically what is the substance of this
16 report?

17 A Basically it shows that the victim Gary
18 Helton had a blood alcohol concentration of .212,
19 which is a very high level.

20 Q In this particular case have you been made
21 aware of Mr. Hoyt Helton's drinking habits?

22 A I have during some of the depositions and so
23 forth.

24 Q All right. Are you aware of his physical
25 attributes, his weight and height?

1 A Yes, sir.

2 Q Okay. What is your understanding of
3 basically a general timeline of events that
4 occurred on the evening of July 11th, 2003, where
5 Mr. Helton went that evening?

6 A There are a series of testimony that
7 indicates basically a timeline of where he was, and
8 of course the times aren't going to be exact, but
9 somewhere around the 4:00 o'clock range, 4:10 to
10 4:30.

11 Q Doctor, if I may interrupt you, please just
12 tell the jury the nature of the timeline, not who
13 said what.

14 A Okay. The timeline as I see it from what I
15 have been able to gather is that Mr. Helton was at
16 a package store around 4:00. Around 7:00 o'clock
17 he was seen leaving there and I believe somewhere
18 in that time 7:00 to 8:00 arrives at The Getaway.
19 Also from there, there is testimony he somewhere
20 between 9:00 and 10:00, let's say, that he leaves
21 The Getaway and arrives at another establishment
22 called the Carolina Lounge. And of course the
23 accident occurs at around 10:50, let's say,
24 somewhere around that time, 10:40, 10:50.

25 Q Have you read or done any study on the

1 effects of alcohol on people?

2 A Yes, sir.

3 Q Can you tell the jury basically, kind of give
4 them a background of what you have done or what you
5 studied?

6 A During my time at SLED, actually this has
7 been not encouraged, I guess now, but back during
8 my time at SLED or early on we actually did some
9 drinking experiments to determine effects. We
10 actually used one of the Datamaster breath testing
11 instruments and went through a series of tests
12 where we actually had people drinking alcohol, we
13 would count the number of drinks and then do some
14 simple measurements of impairment, had everything
15 from, you know, very experienced drinkers to
16 nonexperienced drinkers. This is something they
17 actually used to do at the police academy at one
18 time, too, and I believe they quit doing that as
19 well, but I guess for liability reasons, I take it.
20 But some of those studies. Also the numerous
21 literature we had to review to even get to the
22 position where you could even analyze blood and do
23 testimony. Like the previous witness does, you
24 have a series of very vigorous series of tests that
25 you have to go through. It is not just being able

1 to do the analytical chemistry correctly, but it is
2 also to be able to interpret the results and take a
3 written test. So, all these things form the basis
4 of your educational background to become an expert
5 witness.

6 Q In your experience what can you -- can you
7 explain to the jury what effects, physiological
8 effects a person might exhibit in consuming
9 alcohol?

10 A Ethanol is what we're referring to when we
11 talk about alcohol, that's the alcohol that is in
12 alcoholic beverages, a central nervous system
13 depressant. What that means is, at low doses it
14 gives kind of a relaxing feeling but it slows, it
15 slows a lot of things. It impairs judgment. One
16 of the first things to go is inhibitions being
17 lowered, hearing becomes impaired as the levels
18 start to increase, and of course as you get toward
19 levels we're referring to here there is generally
20 slurred speech, stumbling, uneasy on the feet,
21 being loud because of the hearing being affected,
22 and just really judgment being drastically
23 impaired.

24 Q Does it affect the eyes in any way?

25 A Vision is certainly, when you start getting

1 around .15 percent blood alcohol concentration the
2 general effects, vision will certainly be impaired
3 dramatically at that stage.

4 Q What does body weight have to do with these
5 kind of physiological effects?

6 A A simple way of thinking about it is, use
7 this as an example, I don't know if this is a good
8 example or not, but we're talking about
9 concentrations of alcohol. It's going to be
10 dependent upon the body weight. The bigger a
11 person is the more alcohol they have to consume to
12 get to that same concentration. Using, let's say,
13 let's use sweet tea as an example. If you make a
14 half a pitcher of sweet tea and you put the same
15 amount of sugar in it as you would a full pitcher
16 of sweet tea, the half a pitcher is going to have a
17 higher concentration of sugar even though they have
18 the same amount of sugar that you put into each
19 container. So, if I put X amount of sugar in half
20 a pitcher and X amount in a full pitcher, the one
21 that is a half a pitcher is going to be a lot
22 sweeter. It's the same thing with blood alcohol
23 concentration. A 300 pound man, for instance, can
24 consume twice the amount of alcohol as a 150 pound
25 man. So we have to take all these into account to

1 try to calculate blood alcohol concentrations or
2 extrapolate from blood alcohol concentrations like
3 in this particular case.

4 Q What about an individual's drinking habits,
5 say you have an habitual alcoholic, versus someone
6 who may be drinking for the first time, how can
7 that affect their physiological symptoms?

8 A There is such a thing as impairment, you
9 know, somebody who is an experienced drinker, what
10 they tend to do is, it's kind of learned behavior,
11 they may tend to, for instance, not walk or stand
12 on both feet with their weight equally distributed,
13 they may lean against something so they are not
14 seen as being unsteady on their feet. They may
15 speak a little bit slower so they don't sound like
16 they're slurring. But when you start getting to,
17 you know, higher and higher levels like what we're
18 looking at here, I mean, there is going to be
19 visible signs of impairment.

20 Ethanol is a central nervous system
21 depressant for everybody. Each and every one of
22 us, it's a central nervous system depressant. The
23 reason an alcoholic drinks is to achieve those
24 effects of the alcohol. They are not drinking all
25 these alcoholic beverages because they're thirsty.

1 They drink all these alcoholic beverages because
2 they're trying to get an effect from drinking.

3 Q Okay. What about the manner in which someone
4 consumes alcohol, whether he's a pitcher chugger or
5 whether he's a sipper?

6 A Well, the amount of time, for instance, if
7 somebody was chugging beer, then to achieve that
8 concentration of, blood alcohol concentration it
9 will take less alcohol if they drink over a shorter
10 period of time, to have that blood alcohol
11 concentration. Let me see if I can be a little bit
12 more clear about this. Using this as an example.
13 If somebody chugged four drinks, let's say he's a
14 150 pound man, to keep things kind of consistent,
15 if he drinks four alcoholic beverages in, let's
16 say, one minute on an empty stomach, in about
17 fifteen minutes he will have about a .10 percent
18 blood alcohol concentration. Okay, because we're
19 doing it, we're saying he's drinking them back to
20 back. Of course really nobody really can hold that
21 much beer down in that short a period of time.
22 That's a pretty much volume of beverage. But if he
23 were drinking over an extended period of time,
24 let's say over three hours, to get to that .10
25 percent over that three hour period he would have

1 to consume more alcohol to get to that level,
2 because for every hour he is actually eliminating
3 alcohol, and the way alcohol is eliminated, it's
4 eliminated from sweat, it's eliminated from breath,
5 things like that, and actually the majority of it
6 is metabolized.

7 Q You kind of touched on this, what about the
8 effects of time, limiting yourself to a two hour
9 period consumption versus six or seven hours?

10 A If you're going over six to seven hours that
11 just means there is more alcohol you have to
12 consume to have X amount of concentration. In this
13 case .212 percent alcohol concentration, let's say,
14 10:50 p.m., that would mean over a six or seven
15 hour period he had to consume a lot more alcohol
16 than if it were just an hour period.

17 Q Okay. What about when someone dies at some
18 point and you capture their system, basically their
19 system shut down. What effect does that have on
20 the accuracy or the measurement of blood alcohol
21 content?

22 A It won't have any effect at all. The only
23 time you're worried about death having an effect on
24 the alcohol level is if you have cases of
25 decomposition. But one of the things they did

1 here, SLED does a great job on blood alcohols in
2 particular. The analyst, Alex, actually did an
3 ocular analysis as well. I'm just pointing this
4 out mainly because of the fact that the ocular
5 fluid is a great medium to do alcohol testing and
6 it's consistent. She got .249 percent ethanol in
7 ocular fluid. That is very consistent with what
8 is present in the blood, so I'm 100 percent certain
9 there the results are accurate, the effects of
10 decomposition certainly aren't a factor at all in
11 this particular case. You wouldn't expect it to
12 be, actually.

13 Q All right. And from your experience what are
14 different ways you can measure a person's alcohol
15 content scientifically?

16 A Well, when you're saying measure it
17 scientifically, I'm assuming you mean by physical
18 measurement?

19 Q Right, sampling, how that's done.

20 A The best way to measure a blood alcohol
21 concentration is the way that Alex did here, to
22 analyze blood. A second way that is often done is
23 by analyzing breath, and the reason why that is
24 done for DUI cases, for instance, is because it's
25 kind of invasive to take blood from somebody.

1 That's a less accurate means because if you want to
2 analyze concentration of alcohol you should analyze
3 blood. If you analyze breath you have to do a
4 conversion factor that has some variance associated
5 with it.

6 So, the way this was analyzed, I don't mean
7 to get technical, basically ethanol is a volatile
8 substance, a gas chromatograph separates out the
9 compounds, it's the most accurate means of doing
10 alcohol testing. No possibility of false positive
11 results, in other words.

12 Q Okay. With regard to ocular sample, blood
13 sample, urine sample, does one test typically show
14 one thing another test doesn't show?

15 A I think what you're getting at is, well,
16 there is some extrapolations you can do and some
17 predictions about the levels in the various blood.
18 Ocular fluid is a great medium to analyze. For
19 one it's, I hate to say it this way, it's a clean
20 matrix to work with, we're talking about eye fluid.
21 But you expect that result to be consistent with
22 that in the blood, meaning typically it depends on
23 whether they are absorbing alcohol or eliminating
24 alcohol in a time frame with distribution. But the
25 ocular fluid level here is slightly higher than

1 that in the whole blood and that is consistent with
2 either the person having already been in the
3 elimination phase or you are not still absorbing
4 alcohol at this time, but it is also consistent
5 because ocular fluid has a higher percentage of
6 water. I think when I just walked in Alex was
7 finishing her testimony, she's talking about serum,
8 she analyzed serum. Serum holds a higher
9 percentage of water, alcohol likes water, and so
10 serum tends to have a higher concentration of
11 alcohol than whole blood and that's the reason why
12 she divided the number by 1.12, 12 percent.
13 Likewise for ocular fluid, ocular fluid is
14 typically going to be higher than ethanol, as long
15 as that distribution is completed and the person is
16 in the elimination phase. For example, if they are
17 still absorbing alcohol, sometimes the ocular
18 fluid level may be less than in whole blood.

19 Q Hypothetically, Doctor, if someone had ceased
20 drinking, say, within an hour of this particular
21 accident, hadn't had a drop, when you go to measure
22 blood alcohol and ocular levels what would you
23 expect to see as far as the difference between the
24 two?

25 A You mean if we compared it from the time and

1 then an hour later?

2 Q Just an individual, any individual, say they
3 were drinking over a period of time, stopped for an
4 hour and then didn't have a drop and then gets
5 killed in an accident, regarding blood and the
6 ocular levels, what difference, if any, would you
7 see?

8 A Well, the alcohol is being eliminated over
9 time, so after an hour it's pretty much at a
10 standard rate for everybody, about .015 percent or
11 .018, .015 is easier to convert the calculation, so
12 let's say a time at 10:00 o'clock p.m., let's say
13 he has a .20 percent blood alcohol concentration.
14 At 11:00 p.m., one hour later, he will have less,
15 .015 less if he's in the elimination phase, which
16 means he had a .185 percent, so he would have a
17 lower concentration if he's in the elimination
18 phase.

19 Q Okay. Let me ask you this. I'm going to ask
20 your opinions to a reasonable degree of
21 toxicological certainty, okay, as a toxicologist.

22 One question, the first question, is it
23 possible to get to .212 with these ocular
24 readings, with these urine readings and drink three
25 or four beers in a seven hour period?

1 A Not for a man at 140 to 150 pounds, it's
2 impossible.

3 Q Okay.

4 A If he weighed 50 pounds, we have to do some
5 calculation, but if he weighed 50 pounds, maybe.

6 Q Okay. All right. For a man, let's say, that
7 weighs between 130 to 150 pounds is it possible?

8 A No, absolutely not.

9 Q What about a man who sips as opposed to
10 chugging beer?

11 A Well, if he's drinking at a steady rate or
12 let's say sipping, it just means he has to drink
13 more alcohol, consume more alcohol to get to that
14 level, and so it's not possible, whether he's
15 chugging or not chugging, that three or four beers
16 is going to get him to that level at that body
17 weight. Let me just address it this way. At that
18 body weight, if he had four beers, and I think I
19 mentioned this earlier, at 150 pounds, if he had
20 four beers and dranked them all consecutively and
21 he has an empty stomach, he would achieve about a
22 .10 percent of alcohol concentration. If he
23 slammed them back to back and then 15 minutes from
24 then you analyze his blood he would have about a
25 .10 percent. That's less than half what we're

1 looking at here.

2 Q Okay. Based on what you reviewed in this
3 particular case do you have an opinion as to
4 whether or not Hoyt Helton was under the influence
5 of alcohol and impaired at the time of this
6 accident?

7 A He absolutely was intoxicated, he was
8 impaired, no question about it.

9 Q No doubt in your mind?

10 A No doubt in my mind.

11 Q Okay. I'm going to give you a hypothetical,
12 Doctor, okay? Let's assume that, I'm going work
13 backwards, let's assume that this individual,
14 habitual alcoholic who sips beer dies at
15 approximately 10:50, and going backward in time,
16 first of all, I mean, let me get this worked out,
17 do you know what retrograde extrapolation is?

18 A Yes, sir.

19 Q Explain to the jury what that is.

20 A Basically what we're looking at is we have a
21 blood alcohol concentration here that we know from
22 this report, we know at the time of the accident
23 what his blood alcohol concentration was, and what
24 we can do is back extrapolate, take certain
25 assumptions into play like, for instance, let's say

1 he's been drinking for three hours, we can do
2 calculations to accurately determine how many beers
3 he must have had to consume in order to get at that
4 level. We can basically do a drinking timeline.
5 That's what he's referring to.

6 Q To get back to my question, let's assume we
7 have an individual who is an alcoholic, habitual
8 drinker, he sips his beer, he sips a beer one at a
9 time, it takes him about 30 minutes to an hour to
10 drink that beer and he measures .212 at time of
11 death. With retrograde extrapolation can you tell
12 this jury, assuming everything else is equal, what
13 his alcohol content would have been an hour prior
14 and another hour prior?

15 A Okay. Are we going to say like --

16 MR. WATSON: I don't think that's a proper
17 question unless he knows where he drank it and that
18 sort of thing. There is evidence here he was not
19 drinking a certain period of time. I think he
20 could maybe testify to his opinion as to what he
21 might have had to drink during a three hour period
22 or four hour period or five hour period but not to
23 go back all the way back to the day before or
24 whatever he is planning on trying to show.

25 MR. NEWLON: Your Honor --

1 MR. WISE: It's a hypothetical.

2 THE COURT: Well, it's got to be based on the
3 evidence in the case. I'm not sure. State your
4 question, Mr. Newlon, so I can understand what he's
5 going to testify to.

6 MR. NEWLON: I'm asking the doctor whether or
7 not, given the fact that an individual is, any
8 individual, habitual drinker who sips his beer, one
9 between 30 minutes and an hour at a time, who dies
10 at 10:50 with a blood alcohol content of .212, I
11 want him to retrograde extrapolate for several
12 hours prior to that to determine what that
13 individual's blood alcohol content would be at
14 those points in time and then I'm going to ask him
15 what type of physiological symptoms would they be
16 exhibiting based on those amounts.

17 THE COURT: All right. I'm going to let the
18 jury step back. Let me go over this legal question
19 with the lawyers, you all go back to the jury room
20 just for a few minutes.

21 (Jury excused from the courtroom).

22 THE COURT: Part of the question is based on
23 evidence that I have heard. It seems like
24 everybody said he sipped his beer but the problem I
25 have is the testimony about the number of beers

1 that he had to drink. I don't know what he's going
2 to say but the testimony has been just a limited
3 number of beers at each place.

4 MR. WATSON: And none at the first place,
5 that's what I'm getting back to.

6 THE COURT: And none at the first place.

7 MR. NEWLON: Your Honor, may I?

8 THE COURT: So, that's the problem I have.
9 We're going to get some evidence in, we're going to
10 get, he can't base it on guesswork or something
11 like that. I mean, I don't know if the guy sipped
12 it the whole time or he might have chugged two or
13 three, I don't have a clue.

14 MR. WISE: The only problem I have, too, Your
15 Honor, there are time gaps in here in which we
16 don't know what he was doing. For example, if he
17 left the Carolina --

18 THE COURT: There is a 30 minute time gap,
19 all right, at least there was a time gap when he
20 went from place to place.

21 MR. WISE: Anywhere from an hour to 30
22 minutes we don't know what he's doing. It doesn't
23 take that long to drive to those places. Like the
24 40 minute time gap from the time he left the
25 Carolina, until the time of the wreck. We don't

1 know what he was doing those 40 minutes. It
2 doesn't take 40 minutes to get to where this
3 accident occurred. So, those are the problems I
4 have with his going back and saying at 10:50 he had
5 this reading, at 9:50 he had this reading, and so
6 forth. We don't know if he was drinking in those
7 places in between, and that's where it gets
8 speculative.

9 MR. NEWLON: Your Honor, it's not
10 speculative. It's a hypothetical just to show the
11 jury simply an individual with those conditions,
12 pre-conditions, what you would anticipate blood
13 alcohol content to be at given times with those
14 conditions, what type physiological symptoms they
15 would have exhibited. The testimony in this case
16 clearly by the defense, despite what the officer
17 says, conflicts with the officer's testimony, is
18 conflicting. They are attempting to eliminate
19 consumption of alcohol when clearly this man
20 consumed a large quantity of alcohol and this is a
21 circumstantial case on the plaintiff's part and we
22 take the position that this man, regardless of
23 whatever the defense testifies to, was consuming
24 alcohol continually for an extended period of time
25 and just because they are trying to deny it doesn't

1 make it an issue of fact that allows this man to
2 come in and based on the blood alcohol content
3 offer a circumstantial case to show that in fact
4 there was continuous drinking going on despite what
5 the defense says. It straps the plaintiff's case.
6 These Dram-Shop cases are circumstantial cases
7 because typically the bartenders in the bars deny
8 any consumption at all. In this case we've got
9 they admitted maybe three beers and I've got to be
10 able to use the blood alcohol content with my
11 expert to extrapolate what this guy's consumption
12 would have been, assuming he was a sipper and
13 assuming he continued to drink beer despite what
14 the defense says.

15 MR. WISE: The problem with it is, from The
16 Getaway Lounge standpoint right now, is that he is
17 using the extrapolation, based upon Mr. Helton
18 leaving, in a light most favorable to the
19 plaintiff, The Getaway Lounge shortly before 9:30.
20 We're talking about an hour and 20 minutes later in
21 which we don't know what he had to drink, and he's
22 assuming, I don't know if he's assuming he had a
23 drink every hour, a drink every 30 minutes or
24 nothing to drink from the time he left The Getaway.
25 These are assumptions that aren't in keeping with

1 the facts. It's not speculative -- let me, here is
2 what I'm getting at. If this wreck occurred two
3 blocks down from The Getaway and he had .21 and the
4 testimony was clear that he had just left The
5 Getaway or any bar, then an extrapolation is
6 beneficial to the jury because the time frames are
7 so tight they mean something. In other words, if
8 you had .21 three minutes down the road and nothing
9 in between, then that means something as to what
10 his condition was at that lounge, but here as it
11 relates to The Getaway, where you have anywhere
12 from Miss Bice testifying somewhere after 8:00
13 o'clock, to Mr. Harrison testifying somewhere
14 before 9:30, you've got anywhere from an hour to
15 two and a half hours of missing time. That doesn't
16 mean a thing as far as The Getaway is concerned.

17 MR. NEWLON: Your Honor, I take exception to
18 this missing time. He's going to the absolute
19 extreme. There has been testimony in this case
20 through Officer Keller that despite what Brad
21 Harrison said on the stand and in his deposition he
22 told that officer that it was up to 9:30 to 10:00
23 o'clock. That puts him at 10:00, that accident
24 happened at 10:50. If what Brad Harrison said
25 initially was the absolute truth that leaves him 50

1 minutes to leave The Getaway, go to the Carolina
2 Drive-In, get out, walk in his state, sit down,
3 have a beer, depending on whether you believe Billy
4 McDonald or the officer who testified, then get
5 back in his car and drive home. There is not a lot
6 of gap of time in those circumstances.

7 THE COURT: What are you basing your
8 testimony on, Doctor?

9 THE WITNESS: I'm just going to be basing it
10 on elimination and his body weight and then making
11 the assumption he's having, let's say he's drinking
12 up to two beers an hour, he's not a chugger, I
13 guess, the one thing that is definitely accurate, I
14 guess.

15 THE COURT: If he is drinking two beers an
16 hour and he's a sipper like they say, how would a
17 bartender know when he was intoxicated and not
18 serve him anymore?

19 THE WITNESS: Well, I guess there is two ways
20 of looking at that.

21 THE COURT: I mean, I don't know, he was an
22 alcoholic.

23 THE WITNESS: I think that is more of a legal
24 issue, I guess, and not a scientific issue, but if
25 you are asking how would a bartender know he's

1 impaired, is that what you are asking?

2 THE COURT: The legal issue is they can't
3 serve him alcohol if he's, if he is intoxicated or
4 they should know he's intoxicated. That's the
5 question.

6 THE WITNESS: Okay. I would have responded
7 by saying there is two issues. Either he consumed
8 a large quantity prior to arrival or let's say, as
9 an example, he didn't have anything to drink and he
10 arrives or leaves an establishment, to get to that
11 blood alcohol concentration, that means they had to
12 serve him a large quantity. So, either way, at one
13 of these establishments, let's say the later one,
14 he walks in and he is highly intoxicated and they
15 don't serve him anything, or he walks in sober and
16 they serve a large quantity of alcohol to get to
17 that level.

18 MR. WATSON: Let me ask one question. I'm an
19 old DUI trial lawyer, I used to try a lot of them.
20 You and I both know that to register, how high a
21 person registers on blood or breathalyzer or
22 anything, it depends on when he took that last
23 drink, isn't that right?

24 THE WITNESS: Yes, sir, if you are saying,
25 you know, when did you consume that last alcoholic

1 beverage.

2 MR. WATSON: When he took the last drink, if
3 he took the last drink and walked out of a building
4 and started home he would, it would take him about
5 15 minutes to get it in his system, then that is
6 when he would have took the last drink, made it
7 high?

8 THE WITNESS: That one drink can only at
9 maximum account for .025 percent.

10 MR. WATSON: Right. He was drinking the last
11 time he was there, he dranked, you are assuming he
12 dranked beer, but if he happened to drink some
13 other alcoholic beverage like bourbon that would
14 have a different impact, isn't that right?

15 THE WITNESS: Yes and no. The amount of
16 alcohol in a one ounce glass of bourbon, let's say
17 80 proof, is the same amount of alcohol as a 12
18 ounce can of beer.

19 MR. WATSON: You don't know what he had,
20 that's what we have to do?

21 THE WITNESS: It doesn't matter if it's in a
22 mixed drink or in a shot of bourbon, it's still the
23 same amount of alcohol.

24 MR. WATSON: You don't have a timeline
25 sufficient to know where all he went and where all

1 he dranked, all you can testify to is that he had a
2 .21, he would have had to drink so many, so much
3 within the last two hours or the third hour
4 somewhere, isn't that correct?

5 THE WITNESS: For the most part, for the most
6 part.

7 MR. WATSON: That's the reason I objected to
8 the form of the question.

9 THE WITNESS: I want to say one thing, since
10 he brought this up. The evidence here suggests
11 that he's probably in the elimination phase because
12 of the occular level being higher than the blood,
13 that means the distribution is completed, so in
14 that case I would say this evidence supports he
15 probably didn't have an alcoholic beverage within
16 30 minutes, probably, of the accident, otherwise I
17 would expect the occular level to be more at the
18 same level as opposed to higher.

19 THE COURT: He testified he hadn't had an
20 alcoholic beverage within 30 minutes of the
21 accident based on his test. Now, what is your
22 testimony going to be in regard to the evidence we
23 have about him being a sipper and drinking a beer,
24 in regard to him having a .21?

25 THE WITNESS: If he drinks a lot in a short

1 period of time, what that means is he has, to get
2 to this high a level, he could consume a less
3 number of alcoholic beverages to get to that level.
4 If he is sipping beer over an extended period of
5 time, then he has to consume more beers, the number
6 of alcoholic beverages he had to consume to get to
7 this level.

8 THE COURT: Your testimony, as I understand
9 it, is going to be that he had to consume a whole
10 lot more alcoholic beverages than what we have in
11 evidence?

12 THE WITNESS: Without any question the numbers
13 don't add up.

14 THE COURT: The numbers are not going to add
15 up, so the problem is that legally we have with it,
16 we can't be guessing about how to add those numbers
17 up, it's got to be based on some reasonable
18 probability or you've got to state with some
19 reasonable degree of certainty.

20 THE WITNESS: I can say emphatically with a
21 hundred percent accuracy with a .212 percent blood
22 alcohol this guy had to have consumed at a minimum,
23 even if we're just talking about a one hour period
24 of time, at a minimum ten beers, and that's a fact.

25 THE COURT: He would have to drink ten in one

1 hour?

2 THE WITNESS: Ten in one hour to get to this
3 level.

4 THE COURT: How about two hours?

5 THE WITNESS: Over a two hour period, then we
6 have to add in another .015. So, let's see, you
7 are probably looking at 12 beers, 11 or 12 beers,
8 say.

9 THE COURT: Okay.

10 MR. NEWLON: What about over six hours?

11 THE WITNESS: Over six hours, give me a
12 second.

13 MR. WATSON: Well, that is why I object,
14 because there is nothing showing he drank anything
15 six hours before.

16 THE WITNESS: So, if he's drinking over six
17 hours, he had to have at least 12 to 14 beers to be
18 at that level in a six hour period.

19 MR. NEWLON: Your Honor --

20 MR. WATSON: Let me ask him one question.
21 This might solve it. Are you familiar with this
22 chart?

23 THE WITNESS: Yes, sir, I am.

24 MR. WATSON: Do you think it's accurate?

25 THE WITNESS: Yes. It's based on the same

1 calculation that I'm using.

2 MR. WATSON: The same calculation you used?

3 THE WITNESS: Same calculation.

4 MR. WATSON: If he, in a three hour period,
5 he wants you to say he weighed, there is some
6 difference, you said he weighed 150 pounds, is that
7 right?

8 THE WITNESS: Yes, I'm using 150.

9 MR. WATSON: Say he weighed 140 pounds,
10 there is some evidence he weighed 130 pounds. Tell
11 me how many beers he would have to drink in a three
12 hour period, using that calculator at 140 pounds,
13 to go to 21 or 22?

14 THE WITNESS: What this is doing, it's not
15 accounting for elimination, so it's basically
16 calculating the number of beers, meaning he slammed
17 them down back to back. Bear with me. This is the
18 12 ounce, right? They're 12 ounce beers and you
19 are saying, I'm sorry?

20 MR. WATSON: I said in a three hour period.

21 THE WITNESS: Okay, three hours.

22 MR. WATSON? If he weighed 140 pounds how
23 many beers would he have to drink?

24 THE WITNESS: To get to a .221?

25 MR. WATSON: Yes.

1 THE WITNESS: Okay. Well, according to this
2 chart, if I'm reading this right, okay, read it
3 this way, like I said, I'm a little uncertain about
4 this chart, okay, nine beers.

5 MR. WATSON: Nine beers in three hours, is
6 that right?

7 THE WITNESS: That's what this says, yes.

8 MR. WATSON: There is also, you mentioned it
9 a minute ago with what the judge said, there is
10 also exceptions. Tell us what all the exceptions
11 are.

12 MR. NEWLON: Your Honor --

13 THE WITNESS: Okay, are you talking about
14 like food consumption?

15 MR. WATSON: Food consumption and his weight,
16 all sorts of things.

17 THE WITNESS: What you have to realize is
18 with food consumption that just means he has to
19 consume more to get to that level.

20 MR. WATSON: That's correct.

21 THE WITNESS: So, every one of these
22 exceptions means actually he had TO consume more,
23 not less.

24 MR. WATSON: Judge, that's the reason I
25 objected to the form of his question. If he's

1 going to go back, trying to go back, what he's
2 trying to do is go back beyond his testimony to say
3 that he had to have something at some other place,
4 and which everybody said he did not sell him
5 anything or give him anything, he did not drink
6 anything.

7 MR. NEWLON: Your Honor, that's what a
8 circumstantial case is, these DRAM-Shop cases are
9 just that and if the plaintiff is not afforded an
10 opportunity to try to do retrograde extrapolation
11 and discount what people are saying there would
12 never be a DRAM-Shop case. All I'm trying to do is
13 establish, based on this man's condition, what the
14 consumption by the hour, what intoxication level he
15 would exhibit, physiological symptoms, then I'm
16 going to go back to this man and I'm going to say
17 let's assume for argument's sake that he did not
18 have a beer at the Carolina Drive-In, let's assume
19 that he had only three beers at The Getaway, what
20 would he have had to have consumed prior to that to
21 get to this level of .212 at 10:50 when he died?
22 And he's able to do that. He can look at it and
23 extrapolate it and figure it out. What that will
24 show simply is that what they are saying about
25 Williams Package Store is absolutely not true, that

1 in fact he would have consumed alcohol then because
2 of his blood alcohol content, and assuming what The
3 Getaway is saying is true and saying what the
4 Drive-In is saying is true, I have three bars to
5 deal with and I have to make assumptions in each of
6 my scenerios that somebody is telling the truth and
7 somebody is not.

8 THE COURT: That's for the jury to decide
9 who's telling the truth and who is not.

10 MR. WATSON: It is also in the evidence. I
11 mean, he has to rely on his own evidence.

12 MR. NEWLON: But I should be able to present
13 it as a hypothetical to this man.

14 THE COURT: A hypothetical has got to be
15 based on the evidence that comes in in the case.
16 It just can't be based on speculation. I'm going
17 to let him testify as to a man of 130 to 150
18 pounds, how much they would have to consume to have
19 a .21, and he can take it back over whatever, two
20 or three hour period.

21 MR. NEWLON: Your Honor, if I give him the
22 testimony in this case and the evidence adduced in
23 this case which Mr. McDonald said no beer at the
24 Drive-In and Mr. Harrison said three beers at The
25 Getaway up to that time, how is it not possible or

1 I don't understand why he wouldn't be able to turn
2 around and say well, if that's true, he would have
3 had to have consumed beer prior to going into The
4 Getaway, to get to that level. It's scientifically
5 an absolute.

6 MR. WISE: Except, Your Honor, it is clearly
7 missing what happened from either 9:00 to 10:00 or
8 9:30 to 10:00 when he went from The Getaway to the
9 Carolina. We don't know what he did. We don't
10 know what he did when he left the Carolina. That's
11 the problem with it. If he would have consumed
12 alcohol some other place in between, that destroys
13 everything he's talking about.

14 THE COURT: He's got evidence at least
15 through the officer but, I mean, he's got an
16 inconsistent statement in regard to McDonald.
17 McDonald served him beer, based on what the officer
18 testified to, at Carolina. He can testify as to
19 that, you know.

20 MR. NEWLON: Your Honor --

21 MR. WISE: I just take exception with there
22 being some gap in time if you take the testimony
23 that's presented to the Court that --

24 THE COURT: You have to have evidence that
25 the establishment served him some beer. I think

1 all the cases will substantiate that.

2 MR. NEWLON: Correct and I agree, Your Honor.
3 And if I give him a hypothetical that an individual
4 has one beer approximately 10:00 to 10:15 and then
5 having three beers over a two hour period prior to
6 that, with a travel time of up to 30 minutes in
7 between, how can he get to .212 at 10:50? The only
8 scientific way he could is to have consumed beer
9 before that and that means that he would have had
10 to have dranked beer at Williams Package despite
11 what they are saying. The circumstantial evidence
12 refutes the fact they are denying he had anything
13 there.

14 MR. WISE: there is more than one scientific
15 theory based upon how you get a .212. You could
16 drink a bottle in the truck.

17 MR. NEWLON: That is exactly why I had him
18 testify what he found at the scene. There was
19 absolutely nothing found and nobody removed
20 anything.

21 THE COURT: There was no alcohol containers
22 found at the scene, no evidence of that, so he had
23 to consume the alcohol somewhere and the evidence
24 is that he was served alcohol at the Getaway Lounge
25 and at the Carolina Lounge. There is no evidence

1 that he was ever served any alcohol at the package
2 store. Now, they met there and the testimony of
3 the independent witnesses was he was sitting
4 outside. The testimony is undisputed that the
5 bartender closes that place every night at 7:00
6 o'clock and he did that night.

7 MR. NEWLON: Your Honor, may I offer
8 something?

9 THE COURT: The only thing is you have got
10 evidence he was served alcohol at The Getaway,
11 Getaway Lounge and the Carolina, that's all.

12 MR. NEWLON: Your Honor, can I offer
13 something, please? Let's assume that I'm dealing
14 with only two bars and I've got the Carolina
15 Drive-In admitting to one beer and I've got a guy
16 that's .212 and the bar prior to that completely
17 denies any alcohol consumption.

18 THE COURT: He had to drink more beer than
19 has been testified to at The Getaway and the
20 Carolina Lounge, to have a .21.

21 MR. NEWLON: That's what I want him to
22 testify to.

23 THE COURT: But you can't speculate that he
24 had it at Cockrell's place, you've got to have some
25 evidence that he can base an opinion on that he

1 dranked at that place.

2 MR. NEWLON: The evidence is --

3 THE COURT: I don't know where he dranked,
4 dranked in the car, dranked at home, nobody knows,
5 the jury can't guess about it, he can't speculate
6 on it. His testimony has got to be to a reasonable
7 degree of scientific certainty. He can testify as
8 to how much you would have to consume over a period
9 of time.

10 MR. NEWLON: Your Honor, can he testify to
11 this man's blood alcohol content when he left The
12 Getaway if what the Drive-In and what Getaway says
13 is true? If you take that evidence that's in right
14 now, take that as true, based on --

15 MR. WATSON: Judge, that is total
16 speculation, that is not anything.

17 MR. NEWLON: It's circumstantial evidence,
18 Your Honor, it's not speculation.

19 THE COURT: If you take the testimony of what
20 he dranked he wouldn't have had a .21 at any of
21 these places, but if he had a .21, you know, there
22 is, that's pretty intoxicated. Like he says, I
23 have been in lots of these cases, too, on DUI's and
24 what not, but he was intoxicated at the time but
25 how he got that way and where is a real question.

1 MR. NEWLON: Your Honor, that's what I'm
2 trying to get at.

3 THE COURT: That's not the only question.
4 The question in addition to that is should the
5 proprietor have known he was intoxicated when they
6 served him the alcohol. That's what we're dealing
7 with.

8 MR. SEIGLER: Also, just for the record, the
9 trooper stated Mr. McDonald said he served him one
10 beer. We have no way of, there is conflicting
11 testimony we intend to produce, I understand that's
12 for the jury, but we don't admit to serving Mr.
13 Helton anything.

14 THE COURT: You didn't admit it but the
15 officer said you admitted it to him.

16 MR. SEIGLER: I understand, Judge.

17 THE COURT: So, if he should have known he
18 was intoxicated, he shouldn't have served him
19 alcohol, that's the problem I've got. He can
20 testify as to how much alcohol he would have to
21 consume over a period of time to reach .21 at
22 different stages but I don't know how he's going to
23 testify, I don't know how you are going to tie that
24 into the fact he consumed alcohol at Williams
25 Package Store. You don't have any independent

1 witnesses or anybody that I have heard that says he
2 drank any alcohol there. That's the problem you've
3 got.

4 MR. NEWLON: I understand, Your Honor, but
5 again if that was the case in DRAM-Shop cases --

6 THE COURT: You give me a case that says that,
7 Mr. Newlon, and I will read it but every case I
8 know about they served nine beers or six beers, he
9 was drinking there. Have you got evidence the man
10 was in there drinking? You've got evidence he was
11 actually drinking at two places, you've got
12 independent witnesses, you've got nobody that says
13 he dranked anything at Williams Package Store. You
14 just don't have any evidence that he dranked
15 anything. Everybody that testified said he didn't
16 drink a thing there.

17 MR. NEWLON: Then it disregards the
18 circumstantial evidence presented --

19 THE COURT: You've got circumstantial
20 evidence on the other two establishments and that's
21 all you've got, is circumstantial evidence on the
22 other two. You've got actual evidence of drinking
23 but you've got circumstantial evidence that maybe
24 they had to know he was intoxicated when they
25 served him. That's the issue in the DRAM-Shop

1 MR. WATSON: As long as it's -- my objection
2 is limited to 8:00 o'clock forward.

3 THE COURT: I'm going to overrule the
4 objection. If you have to explain it, you have to
5 answer the question and then explain it.

6 THE WITNESS: What I'm going to do, I'm going
7 to say, let's say he's drinking two beers an hour,
8 just kind of a steady rate. Let me, I'm going to
9 do some scribbling here, I'm doing some
10 calculations.

11 The time I'm looking at is, you are talking
12 about probably if he's sipping beer at that rate,
13 he's probably drinking over a six hour period to
14 achieve a .212, so if he has two beers per hour,
15 then it would be two times six is two beers per
16 hour. In six hours, you're talking about 12 beers.
17 So, he would have had to consume 12 beers in a six
18 hour period if he's just steadily drinking two an
19 hour, to get to that level. That's a minimal. So,
20 it could be higher than that. When I say 12, if he
21 has food that comes into play. It could certainly
22 be more than that. 12 would be a minimum.

23 BY MR. NEWLON:

24 Q Over a six hour period?

25 A Over a six hour period to get to a .212, so

1 he is drinking two beers per hour, would it take
2 six hours to get to that level?

3 MR. WATSON: Judge, that was my objection.

4 THE COURT: I overrule your objection. Go
5 ahead.

6 MR. NEWLON: Thank you, Your Honor.

7 BY MR. NEWLON:

8 Q All right. I mean, another hypothetical,
9 let's assume these same conditions and this
10 individual has one beer within an hour of his death
11 and then 30 minutes prior to that he consumes three
12 beers. Could he get to a .212 blood alcohol
13 content under those circumstances?

14 A That's impossible.

15 Q Assuming that that's all the beer he consumed
16 in that period of time within a couple hours of the
17 accident, would he had to have consumed beer before
18 that?

19 A If that's all he had prior to the accident,
20 in that two hour window, he had to have consumed a
21 good bit more alcohol prior.

22 Q All right. Again, shifting gears here, let's
23 talk about physiological effects. Let's assume the
24 same conditions and he is served a beer at the
25 Carolina Drive-In between 10:00 and 10:15 and he

1 dies at 10:50 and he dies at .212. What would be
2 his approximate blood alcohol content at 10:00 to
3 10:15?

4 A You are looking at anywhere between .18
5 percent and .20 most likely at that stage.

6 Q Okay. Given the fact that he was, this
7 individual hypothetically is an habitual drinker,
8 what would have been his physiological symptoms at
9 that level?

10 MR. SEIGLER: I'm not sure, he's speculating
11 as to what this particular amount would affect this
12 particular individual. He wasn't present, he can't
13 say exactly what his actions would be at that time.
14 There is no way he can say he knows what this
15 person was displaying.

16 THE COURT: He can't say what he might be
17 doing but he can testify how intoxicated he would
18 be.

19 Q At that level?

20 A This is very high levels, we're not talking
21 about something here near the DUI level at .10.
22 .18 to .20 is considered an area of gross
23 intoxication, so slurred speech is one of the main
24 things. We're talking about he could be sitting
25 down so he may not be staggering, but unsteady on

1 the feet is another issue, being loud because of
2 hearing impairment, and there are some things that
3 wouldn't be, in conversation may not be apparent,
4 that's blurred vision and lowered inhibitions and
5 judgment being impaired. Those things could be
6 measurable and actually play a factor in driving a
7 motor vehicle.

8 Q Okay. Let's hypothetically, Doctor, let's
9 assume everything else is equal, as I said before,
10 and this gentleman had one beer between 10:00 and
11 10:15 at the Carolina Drive-In and that he left The
12 Getaway between 9:00 and 10:00, and you can talk
13 about 9:00, 9:30, 10:00 o'clock, what would have
14 been his alcohol, not his alcohol, what would have
15 been his physiological symptoms based on alcohol
16 content at the time he left The Getaway.

17 MR. WISE: Same objection, Your Honor, to The
18 Getaway, speculative.

19 A At this same what he is referring to there is
20 someone basically saying he only had one beer in
21 that time frame between leaving the two
22 establishments, from the time he got there he only
23 had one beer, and taking into account the
24 elimination, he would still be at that level of
25 about .18 to .20 percent, so again it would be the

1 same physiological effects.

2 Q Okay. I'm sorry, what physiological effects
3 would you see?

4 A The slurred speech would be the one that
5 would really stick out. Being loud is the other.
6 Those are the two main ones. Of course being
7 unsteady on their feet, their motor coordination
8 being impaired, grossly impaired.

9 Q Okay. In your opinion, Doctor, based on the
10 evidence in this case, when this gentleman was
11 served three beers between approximately 7:30 and,
12 depending on the testimony, one individual says he
13 left at 8:00, the other one says 9:30,
14 approximately 9:30, let's assume 7:00 to 9:30,
15 consumed three beers, one more beer between 10:00
16 and 10:15, dies at 10:50. When he was served those
17 beers at The Getaway, in your opinion would he have
18 been exhibiting signs of intoxication?

19 MR. WISE: I object to that. He cannot
20 testify what this specific individual was
21 exhibiting.

22 MR. NEWLON: It's a hypothetical.

23 MR. WISE: I understand but he asked about
24 this individual.

25 MR. NEWLON: An individual with these

1 symptoms. Do you want me to restate it?

2 THE COURT: Restate it.

3 MR. NEWLON: Thank you.

4 BY MR. NEWLON:

5 Q This is a hypothetical, Doctor. Assuming you
6 have an individual dies at 10:50, drinks one beer
7 between 10:00 and 10:15, and then you can talk
8 about assuming he left either at 8:00, 9:00, 9:30,
9 10:00 the second bar, which was The Getaway, had
10 three beers at The Getaway. My question is, while
11 he was at The Getaway would he have exhibited any
12 signs of intoxication, based on the consumption and
13 the amount was found in his body when he died?

14 MR. WISE: Same objection. I think he's
15 talking about this specific individual and I don't
16 think he can go that far.

17 THE COURT: All right. The question is if he
18 had three beers at The Getaway and one at the other
19 place. I will overrule the objection, just based
20 on that.

21 A Just based on general effects, we have to
22 keep taking into account that there is elimination,
23 too, which means he has to consume more alcohol to
24 get to that level we're referring to, because
25 you're talking about basically a three to four hour

1 window if you are starting at 7:00 o'clock, and so
2 you have to account for the elimination. So, in
3 other words, he has to have a higher level at that
4 stage when he has those three or four beers to get
5 to the .212, and so based on my calculations he
6 would certainly have over a .10, a .12 just having
7 that first beer, if we're making the assumption
8 that's all he had, was those four beers. That is
9 certainly well above the legal limit to operate a
10 motor vehicle. As he is being given more beer he
11 should be showing outward signs of great impairment
12 because his alcohol concentration is going up. So,
13 you know, I think that's general, but maybe at
14 first his speech may not be that impaired after
15 three or four beers, but with each beer he
16 certainly would be becoming more and more impaired.

17 Q The question is, in a situation where let's
18 assume for argument's sake and hypothetical this
19 individual did in fact leave the second bar at 9:30
20 and that he would have had to have consumed a third
21 beer, been handed to him and dranked it before he
22 left and then he has one more beer between 10:00
23 and 10:15 and then he dies. The question is, would
24 that individual, given that consumption, that
25 level, would he have exhibited physiological

1 symptoms of intoxication when that third beer was
2 served?

3 A Yes, he would.

4 Q Doctor, based on the information you were
5 provided in this case are you able to say with any
6 degree of toxicological certainty whether or not
7 this individual, assuming what is being presented
8 in this case, three beers at the second bar, one
9 beer at a third bar, can you say to a toxicological
10 certainty whether or not this individual would have
11 had to have consumed alcohol before this time?

12 A Yes, definitely.

13 MR. WATSON: Your Honor, I object to that.
14 That's not a proper question.

15 THE COURT: I'm going to overrule the
16 objection. Okay, next question, Mr. Newlon.

17 MR. NEWLON: Thank you, Your Honor.

18 BY MR. NEWLON:

19 Q I want to make sure of one thing. In
20 reviewing this record did this man, this particular
21 man, Hoyt Helton, did he have any drugs in his
22 system at the time of this accident?

23 A The drug screen was negative that SLED had
24 performed, so I can say that benzodiazepine,
25 cocaine, cocaine metabolites and opiates such as

1 morphine were all negative. The urine drug screen
2 is also negative for amphetamine, methamphetamine,
3 barbituates and cannibus, which is marijuana, and
4 seeing these results are negative, then there is no
5 indication of any drug use.

6 Q Okay.

7 A From these records.

8 MR. NEWLON: Thank you, Doctor. I appreciate
9 your testimony. Answer any questions these
10 gentlemen may have for you.

11 MR. SEIGLER: Your Honor.

12 MR. NEWLON: Your Honor, may we approach just
13 a second? Excuse me.

14 (Unrecorded bench conference).
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q Dr. Brewer, I represent Glenn McDonald. Mr.
4 Newlon just stated certain facts to you, or assumed
5 facts that were hypothetical in nature.

6 A Yes, sir.

7 Q I want the jury to understand you don't know
8 or have any knowledge as to what Mr. Helton
9 dranked, you have no firsthand knowledge
10 whatsoever?

11 A I have no firsthand knowledge, no.

12 THE COURT: How long is your examination
13 going to be, Mr. Wise?14 MR. WISE: It depends on how long he has.
15 About 15 or 20 minutes.16 THE COURT: All right. Ladies and gentlemen,
17 we will break now for lunch, since he has to be
18 excused for a few minutes. You all be back at 2:00
19 o'clock, we'll pick up right here.20 Do not discuss the case with anyone and as
21 soon as Mr. Willingham gets back in here he will
22 take care of you.23 We're going to break for lunch, Mr.
24 Willingham. If you all need to go back in there
25 you can. If you don't need to we'll excuse you,

1 just do not discuss the case with anyone, do not
2 permit anyone to discuss the case with you. Okay?

3 (The jury was excused from the courtroom).

4 THE COURT: Make sure all the jurors are out.
5 Okay?

6 BAILIFF: Yes, sir.

7 THE COURT: The problem we have here is we
8 have a person we know is an alcoholic, apparently,
9 it is almost undisputed by either side, and he
10 could have consumed, I think he said ten beers
11 within an hour and have a .21, a certain number
12 within two hours and a certain number within three
13 hours. The trouble is we don't know how much he
14 consumed and we know he consumed enough to have a
15 .21. There is no question about that, that's
16 pretty solid, uncontraverted evidence. But the
17 issue, as I understand, the statute says a person
18 selling beer cannot sell beer or wine to an
19 intoxicated person upon the premises, and so that's
20 what, that's what we're stuck with. They can't
21 knowingly sell beer and wine to an intoxicated
22 person. So, they either have to know or should
23 have known he was intoxicated. So, you've got to
24 proof the beer was sold on the premises and you
25 have to prove that they knowingly sold the beer or

1 wine to an intoxicated person. So, that's what
2 we're stuck with.

3 MR. WISE: Your Honor, I have some cases --

4 THE COURT: The point, with a .21 he could
5 have been intoxicated at the time he was at these
6 places.

7 I will be glad to read any cases you want to
8 give me.

9 MR. WISE: I will give them to your law
10 clerk, give him something to do during lunch.

11 THE COURT: Okay. Dr. Alford is here. Dr.
12 Alford is usually an expert in economics but I have
13 been reading affidavits he's been giving, he's
14 become an expert in corporate management and things
15 of that nature, too, and I need to talk to him
16 about that sometime. I have used him as a court
17 witness before and he's a pretty good economist but
18 I don't know what he knows about corporate
19 management. I got an affidavit from him in a case
20 last week.

21 MR. WATSON: I think we have all used him at
22 one time or other.

23 THE COURT: I think everybody has used him
24 one time or the other. All good people come out of
25 Alabama, I think. You'll have to come back, I'm

1 sorry.

2 When you testified about the 12 beers, him
3 blowing a .21 over that long a period of time, are
4 you talking into consideration the elimination?

5 THE WITNESS: Yes, sir. The elimination is
6 .015 per hour.

7 THE COURT: But you are saying, I thought you
8 said he would have to drink 20 an hour before to
9 have a .21?

10 THE WITNESS: I never said 20, sir.

11 THE COURT: Ten? How many did you say, ten?

12 THE WITNESS: I think I said 12 in the case
13 of --

14 THE COURT: What about --

15 THE WITNESS: He used 130 pounds as a
16 minimum, so that was nine beers using 130 pounds,
17 which is, you know, less than he weighed.

18 THE COURT: Nine beers in an hour?

19 THE WITNESS: Yes. There is one other area,
20 too, that needs to be taken into account. One is I
21 don't think it's physically possible to have nine
22 beers in their stomach because of the volume, so
23 that is not even humanly, not even a possibility.

24 The other issue, too, we're dealing with what
25 appears to be someone in the elimination phase.

1 So, I don't think he consumed right prior to the
2 accident, so I think probably realistically the
3 last time he had a beer was probably, say, 10:15, I
4 would say at least there has got to be a 30 minute
5 window there, based on the fact his occular level
6 was higher than blood.

7 THE COURT: There is evidence he may have had
8 beers, conflicting evidence, depending on what the
9 jury believes, he had one at 10:00 o'clock. You
10 say it was 12?

11 THE WITNESS: Over a six hour period, the way
12 I do that calculation, I account for the six hours
13 he's eliminated .015 percent per hour, which is the
14 standard rate for everybody. So, when you do that
15 based on his body weight, .3 percent, we have a .3
16 percent at no elimination, and if you subtract,
17 subtract six hours times .015 that's .09. So .3
18 minus .09 gives you a .21. That's how I come up
19 with the calculation, just algebra.

20 MR. WATSON: So, there is little --

21 THE COURT: Even though he's a Carolina man,
22 he uses Clemson math and that math sounds pretty
23 good to me.

24 MR. WATSON: Well, you know, he's been up to
25 both places.

1 You would also have to calculate, if you are
2 going back that far, six hours, whether or not he
3 would have been under the influence four hours
4 back, or what time he got to the point, that is
5 what my objection was about, what time he got to
6 the point that he would have been impaired to the
7 extent that people should have noticed.

8 THE COURT: I assume you are going to ask him
9 that on cross examination.

10 MR. WATSON: I may.

11 THE COURT: I will see you all at 2:00
12 o'clock, okay?

13 (Recessed at 12:40 p.m.).

14 (Resumed at 2:00 p.m.).

15 MR. NEWLON: Your Honor, before the jury
16 comes in could I address the Court?

17 THE COURT: Okay.

18 MR. NEWLON: Yes, sir. While the doctor is
19 on the stand we're taking the opportunity to
20 request the Court to allow me to proffer testimony
21 for the record from him regarding the issue having
22 to do with the Williams Package Store, and the
23 reason I want to do that, I'm taking the Court's
24 rulings and --

25 THE COURT: Go ahead, ask the questions,

1 okay?

2 MR. NEWLON: Thank you, Your Honor.

3 BY MR. NEWLON:

4 Q Doctor, given the circumstances you have been
5 presented with, where there was one beer served
6 between 10:00 and 10:15, three beers served
7 somewhere between 7:30 and 9:30, to get to .212 at
8 the time of death what level of toxicity would have
9 been in this guy's system at 7:30?

10 A Sure. I did that calcuation actually just
11 sitting there just now because I figured that was
12 one of the things that would come up. Based on
13 going to the other extreme that the defense was
14 bringing up about a 130 pound person, I went ahead
15 and did the calculation based on a 130 pound
16 person. He would have had to have had .145 percent
17 at 7:30 if he only had those four beers between
18 then and the time of the accident.

19 Q Okay. Is that assuming that normal
20 metabolism?

21 A That's taking into account the normal rate of
22 elimination.

23 Q Okay. At .145, based on the studies you
24 mentioned when I was qualifying you and personal
25 study you did, what type of physiological symptoms

1 would someone display at .145?

2 A Again we're not talking about a low level or
3 even close to borderline. This is a very high
4 alcohol concentration. Slurred speech, again is
5 one of the first things that you would anticipate
6 at that level, talking loud, loud because of
7 hearing impairment. These are things that I would
8 expect whether a person is an alcoholic or a first
9 time drinker. I mean, it would be obvious.

10 The other impairment factors are maybe not as
11 obvious, unless asking them questions dealing with
12 memory and things like that, their judgment is
13 impaired. For instance, if he knows he's impaired
14 he should know better not to get behind the wheel
15 of a car but with inhibitions being lowered and
16 judgment impaired, generally they think it's fine
17 to drive. These are all factors.

18 Q All right. And the basis for your
19 understanding of those physiological symptoms, does
20 that come from your studies you have done?

21 A It comes not just really from the studies I
22 have done, it's based on literature, scientific
23 literature.

24 Q Is that literature you use in your office,
25 you used in your office at the time?

1 A Yes, sir.

2 MR. NEWLON: Thank you. No further
3 questions. Thank you, Your Honor.

4 MR. WATSON: Wait a minute. I'm going to ask
5 him some questions if that is going to be for the
6 record.

7 THE COURT: Okay. We were going to let you
8 ask him, Mr. Watson.

9 MR. WATSON: I thought he was trying to cut
10 me off a little bit there.

11 QUESTIONS BY MR. WATSON:

12 Q I want to make sure I understood what you
13 just testified to. You testified previously that
14 you based it on a six hour period, is that right?

15 A What I said was if he was drinking two beers
16 an hour at a steady pace, to get to a .212 he would
17 be drinking two beers at a steady pace, it would
18 have been over a six hour period.

19 Q Over a six hour period?

20 A Yes, sir.

21 Q Is that what you just testified to a minute
22 ago?

23 A It's a different question. What he posed
24 was, the question was, at 7:30 if all he had was
25 four beers at 7:30, okay, if all he had was four

1 beers and the physical evidence, which does not
2 lie, he had .212 percent at 10:50, he asked what
3 was his blood alcohol concentration at 7:30 if he
4 only had those four beers.

5 Q What would that have been?

6 A .145 percent.

7 Q .145?

8 A Yes.

9 Q That would have been over ten?

10 A Based on the body weight of 130 pounds.

11 Q 130 pounds? Now, are you saying that that's
12 the point at 7:30 when somebody should have
13 recognized that he was impaired and shouldn't have
14 served him any more beer?

15 A What I'm saying is at that level, if there is
16 any interaction there would be noticeable levels of
17 impairment if they are interacting, if they are
18 talking and communicating there should be. Now,
19 that's a generalization for most people. At a .14,
20 a lot of people would be passed out at that level,
21 quite frankly.

22 Q All right. You testified previously about
23 the six hour period that he had to drink 12 beers?

24 A That was a different question.

25 Q All right. But, now, if you go back to the

1 six hour period that you emphasized previously,
2 what would he, what would he have dranked between
3 6:00 o'clock, I mean, say 5:00 o'clock and 7:30,
4 between 5:00 o'clock and 7:00 o'clock, to reach
5 that point?

6 A Okay, let me go back to what I said
7 previously about the six hour period. What you are
8 saying is, let's back extrapolate and say he is
9 drinking over a six hour period, you are saying now
10 he is going at a steady rate for the six hour
11 period. Now what you are asking me is how much
12 would he drink between 5:00 and 6:00?

13 Q Between 5:00 and 6:00?

14 A Between 5:00 and 6:00 o'clock?

15 Q What would you run?

16 A Okay, let me calculate that just a second.
17 We're going to say, just to keep numbers easy,
18 let's say it's 11:00 because it is easier to work
19 with 11:00 and not 10:50.

20 Q All right.

21 A So, if we subtract six hours from there, that
22 is 5:00 o'clock.

23 Q Back to 5:00 o'clock?

24 A Let's say he's starting at 5:00 o'clock. In
25 our hypothetical we're saying he's having two

1 drinks per hour, so he only would have had four
2 beers between 5:00 and 7:00. Between 5:00 and 6:00
3 he would have only consumed two alcoholic
4 beverages. So, if you use that scenario, then if
5 he only had two beers, based on, we'll use the body
6 weight of the 130 pounds, that would put him at a
7 .06 minus .015, which put him at a .045 percent.

8 Q Not under the influence?

9 A That's correct.

10 MR. WATSON: No further questions.

11 MR. NEWLON: Thank you, Your Honor.

12 THE COURT: Bring them in.

13 (The jury returned to the courtroom).

14 MR. SEIGLER: If it please the Court.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q Doctor, before we left you were asked if you
4 understood that Mr. Newlon, the facts that he
5 stated were all hypothetical.

6 A That's correct.

7 Q They were made up.

8 A Well --

9 Q Hypothetically means made up.

10 A Hypothetical doesn't necessarily mean being
11 made up. They are estimations, approximations.

12 Q Right. You weren't present on the evening of
13 July 11th, 2003?

14 A No, sir.

15 Q You don't know who served him?

16 A No, just based on depositions, no, I don't.

17 Q You don't know whether he was served at any
18 establishment, because you weren't there?

19 A Based on the facts of just the depositions,
20 obviously if I read a deposition I'm assuming
21 that's true.

22 Q But you weren't there, though?

23 A No.

24 Q You also stated that his ocular fluid level
25 was higher than his blood level?

1 A That's correct.

2 Q So, at the time of the accident he was in the
3 elimination phase?

4 A That's most likely the case. What that means
5 is when your body is absorbing alcohol it gets in
6 your bloodstream faster and it distributes
7 throughout the rest of your body, so if he is still
8 absorbing alcohol it would take longer for the
9 alcohol to be in the ocular fluid. In that level,
10 particularly the ocular level is about the same or
11 less, which means he is still absorbing alcohol.
12 But this suggests he's in the elimination phase,
13 which means he has drank all the alcohol and now
14 he's eliminating, he is not absorbing any at that
15 stage.

16 Q So, hypothetically he could have drank a beer
17 after he left the Carolina?

18 A Again we're looking at time frame. To be in
19 elimination phase, if the accident occurred at
20 10:50, say the accident occurred at 10:50, most
21 likely he didn't have anything, I would say, 30
22 minutes prior to the accident. And, so, if the
23 accident occurred, let's say 10:50, you know, back
24 extrapolate 30 minutes, at 10:20, he didn't have
25 anything to drink from 10:20, on. It could have

1 been longer than that. So, the question comes in
2 when did he leave that last establishment? If he
3 left at 10:15, then that is where he last had his
4 alcoholic beverage. If he left at 9:30 there is a
5 chance he could have had something after he left
6 there.

7 Q So, he could have had one on the way to the
8 Carolina?

9 A Again, absolutely, yes.

10 Q Or he could have brought one with him when he
11 left The Getaway?

12 A Yes.

13 Q So, he doesn't, your testimony is not
14 necessarily he had to have it at the Carolina, it
15 could have occurred before?

16 A Yes, sir.

17 Q Okay. I believe you also testified that an
18 experienced drinker as opposed to a one time
19 drinker or a binge dringer or whatever you want to
20 call it can easily conceal more so than the average
21 person the fact he's been drinking?

22 A Yes, sir.

23 Q So, with Mr. Helton being on crutches, able
24 to leave all these establishments, hypothetically
25 do you think he would be able to conceal it better

1 than the average person?

2 A That's a good question. You know, probably,
3 probably in respect to the balance, what makes that
4 revealing is that the unsteadiness on the feet, for
5 instance, is a dead giveaway. But if he is already
6 unsteady on his feet, then obviously you can't use
7 that as an interpretation.

8 Q Right. If he's walking on crutches in and
9 out, then it would be much harder to detect any
10 intoxication?

11 A Say to some extent. I guess it just depends
12 on the individual and how experienced he is walking
13 on crutches, because typically it's harder to walk
14 on crutches, obviously, than it is your own two
15 feet, so you would think he would be more obvious,
16 and to some extent falling over.

17 Q Based on individual characteristics, like you
18 said?

19 A Yes.

20 Q For each person?

21 A Yes, I would say that.

22 MR. SEIGLER: Thank you, sir.

23

24

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Dr. Brewer, the effects of alcohol on an
4 individual varies from individual to individual?

5 A Yes and no.

6 Q Let me rephrase it.

7 A Okay.

8 Q Eliminate the extremes, eliminate one drink
9 and eliminate people who are about .40 or .45.10 When you are in the middle it will vary a little
11 bit from individual to individual?12 A Again it depends on how you phrase the
13 question, okay. How they react to the alcohol,
14 there is some variation.15 Q Not everyone is going to have slurred speech,
16 some people won't, generally people will?17 A It depends on what level. I mean, there is
18 some level --

19 Q At a .15?

20 A To give you an example --

21 Q At a .15?

22 A .15 percent, I have yet to see anyone at a
23 .15 percent exhibit, not exhibit signs outwardly,
24 and that is from reviewing numerous videotapes of
25 DUI cases.

1 Q And how many beers would I have to drink in
2 an hour to get to .15?

3 A How many beers would you have to drink?

4 Q Well, any individual, let's say a 150 pound
5 person.

6 A A 150 pound person to get to a .15?

7 Q Yes.

8 A You are going to say they are doing it as a
9 minimal, no elimination, they are drinking back to
10 back, is that what you are saying?

11 Q One hour, one beer every 12 minutes.

12 A Okay. A 150 pound man per beer is .025
13 percent per drink, and that's, it's very easy to
14 show you the calculation just based on that, and
15 that is how that chart he showed me earlier, that
16 is what the chart is based on. Four beers gets
17 them to a .10, six beers get them to .15.

18 Now, he said in his hypothetical in one hour
19 we have to take into account that you are also
20 eliminating alcohol over time, so you have to
21 subtract that, so he would have to have had over
22 six beers, six to seven, probably six and a half to
23 get to .15.

24 Q Six and a half beers to get to .15 in one
25 hour, correct?

1 A That's correct.

2 Q Okay. Now, you would agree that someone who
3 knows somebody well would have a better ability to
4 detect whether or not they are under the influence
5 of alcohol than someone who meets him occasionally?

6 A Yes. I guess.

7 MR. NEWLON: Your Honor, I just object, it
8 calls for speculation.

9 THE COURT: We won't dwell on that. I think
10 he can answer it.

11 Q You agree with that?

12 A Well, define occasional.

13 Q Once a week, once every other week, three
14 times a month.

15 A Once a week --

16 Q Versus somebody who sees them two or three
17 times a week.

18 A Once a week over an extended period of time,
19 I think you can get a pretty good idea what their
20 normal behavior is. Now, if it's once, you know,
21 if you only met them once every, you know, in a
22 year's time met the person twice, that's a
23 different situation.

24 Q Someone who knows somebody very well and is a
25 good friend of his would be able to determine, as

1 well as someone who sees him once a week or two or
2 three times a month, whether or not they are under
3 the influence of alcohol?

4 A Yes.

5 Q Okay. And in reviewing this testimony for
6 this case did you review the testimony of Mr. Brad
7 Harrison?

8 A I just want to make sure I'm accurate on
9 this. Was he deposed?

10 Q Yes, he was.

11 A Okay.

12 Q Timothy Bradford Harrison.

13 A I'm just looking through my record just to
14 see.

15 Q Okay.

16 A So I can make sure I'm accurate. I'm not
17 real good with names, by the way. No, I was not.

18 Q You were not given the testimony of Mr.
19 Bradford Harrison?

20 A No, sir.

21 Q Okay. If Mr. Harrison were a good friend of
22 Mr. Helton's and at the time that he left, he and
23 Mr. Helton left The Getaway Lounge, if Mr. Harrison
24 testified in his opinion Mr. Helton was sober, that
25 would have some credibility, wouldn't it?

1 A I don't know Mr. Harrison. So, you know, I
2 mean, if you are asking me if I think he would have
3 knowledge, I would say yes. I mean, if he knew him
4 really well he should probably know.

5 Q And then if Mr. Helton were sober or did not
6 appear to be under the influence when he left The
7 Getaway Lounge at somewhere between 8:30 to 9:15,
8 then of course the consumption of alcohol that made
9 him intoxicated had to have occurred after that
10 point?

11 A I hate questions like this because they are
12 so ambiguous. I try to be real accurate.

13 Q Let me rephrase the question. You said Mr.
14 Helton was approximately, your estimation, he was
15 at .145 about the time when he was at The Getaway?

16 A What I'm saying is -- this actually, this
17 line of questioning was outside the presence of the
18 jury, so they are not even familiar with this line
19 of questioning.

20 Q What did you testify in response to Mr.
21 Newlon's case, questions in front of this jury,
22 about Mr. Helton, or a person, excuse me, in
23 consuming beer over a period of time -- let me
24 rephrase the question.

25 So, your testimony is that if an individual

1 had a .15 you would think that the average person
2 would notice it?

3 A I would definitely think so, based on, you
4 know, again this is the Highway Patrol that does
5 field sobriety tests, I mean, they never have any
6 problems getting somebody who is over .10, just
7 looking at when they are doing sobriety tests
8 before they give breath tests. I mean, yes, I
9 would say the majority of people. Can I say
10 everybody, probably.

11 Q You would agree that someone who knew a
12 person well, if they saw him with a .15 would
13 recognize they are under the influence?

14 A Yes, I would think so.

15 Q And if a person then was of the opinion that
16 they were not under the influence that would be
17 some probative evidence they weren't at .15?

18 A Yes, especially if they are someone skilled
19 in detection like a highway patrolman.

20 Q What if it was someone who knew the person
21 well?

22 A Well, is that person intoxicated, too, or is
23 that person sober.

24 Q They are sober, too.

25 A Because obviously if they are drinking their

1 judgment is impaired and they could look -- I could
2 digress, I better not.

3 Q But if a person had the opinion that the
4 person was not under the influence, then that would
5 be probative value, probative evidence that they
6 were not at .15 when that person saw them?

7 A I think it could be supportive evidence, as
8 long as the person is sober. I mean, for obvious
9 reasons, if a person had a .15 and he's trying to
10 judge another person at .15 and he thinks he's
11 fine, of course he thinks the other guy is fine,
12 too.

13 Q What if someone wasn't drinking and they
14 observed someone and has the opinion they were not
15 under the influence, would that be probative?

16 A Yes.

17 Q Then you are also assuming in your
18 calculations or testimony that -- well, let me
19 rephrase the question this way. You don't know
20 where Mr. Helton was from the time he left The
21 Getaway until the time he got to the Carolina?

22 A No.

23 Q You don't know whether he had anything to
24 drink during that period of time?

25 A I don't know.

1 Q You don't know if he stopped in another bar?

2 A No, sir.

3 Q You don't know if he dranked any liquor in
4 that period of time?

5 A I don't know that.

6 Q And liquor would get into the system I guess
7 more quickly than beer?

8 A It just depends. I mean, a shot of liquor,
9 one shot, like for instance, a one ounce shot glass
10 of 80 proof liquor has the same amount of alcohol
11 as a 12 ounce can of beer. A lot of people don't
12 realize that. The same amount of alcohol as a 12
13 ounce beer.

14 Q So, if a person was drinking liquor straight
15 it would get into his system quicker?

16 A Yes, because of a shorter period of time
17 drinking.

18 Q All right. And if more than one person
19 observed someone sober that would be even more
20 probative evidence that the person was not under
21 the influence?

22 A It could be. Again, I mean, you have to, you
23 just have to weigh who that person is and if they
24 are sober.

25 Q And if Mr. Helton had not, if a person -- let

1 me rephrase it. If a person had had nothing to
2 drink prior to 7:15 in the evening and they
3 consumed three beers over an hour and 15 minutes
4 what would their, what would their level be,
5 roughly?

6 A Well, you can look at two scenerios, if it is
7 a 130 pound man or 150 pound man.

8 Q Let's do both.

9 A A 130 pound man, you are looking at about .03
10 per drink. You said three beers, that would be
11 .09. And let's subtract .015 for an hour. You
12 said an hour and 15 minutes, so we'll say .02, so
13 that's .07 percent for a 130 pound man.

14 Q All right.

15 A A 150 pound man, you are looking at .025 per
16 drink, three drinks get him at .075, subtract .02,
17 .055 percent.

18 Q So, a person who walks into an establishment
19 without having had anything to drink and drinks
20 three beers over an hour is going to be at either,
21 somewhere between .05, .07, if they are between 130
22 and 150 pounds?

23 A Yes.

24 Q Okay.

25 A I'll rephrase it and say that's the maximum

1 amount that they would have, the maximum.

2 Q It could a little less if they had had
3 something to eat?

4 A Exactly.

5 Q A little less if their system absorbs it
6 slower for some reason?

7 A Yes, sir.

8 Q Because everybody is a little different?

9 A Yes, sir, the absorption.

10 Q Right.

11 MR. WISE: Thank you. That's all I have.

12 MR. WATSON: No questions.

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. NEWLON:

3 Q Doctor, you talked about this elimination
4 phase. Does the fact someone is in elimination
5 phase, does that absolutely preclude the
6 possibility of them drinking alcohol during that
7 time?

8 A During what time?

9 Q The elimination phase you talked about.

10 A Yes. What it means is he's not absorbing
11 alcohol, so the likelihood of him consuming during
12 that probably 30 minutes prior to the accident, it
13 is unlikely, with a reasonable degree of scientific
14 certainty.

15 Q All right. So, if the accident happened at
16 10:50, based on your analysis he probably to a
17 reasonable degree of toxicological certainty didn't
18 consume anything between 10:20 and 10:50?

19 A Based on the results, I would say that, yes.

20 Q Okay. You were asked questions about what
21 you reviewed in this case.

22 A I'm sorry, again I just want to be accurate.
23 I will say to this extent, you know. Is it
24 possible that he could have? If he did drink
25 during that time it's not contributing to his blood

1 alcohol concentration, right before the accident if
2 he chugged a beer that beer wouldn't have absorbed
3 into the system to begin with, so it wouldn't have
4 contributed to what we're seeing, I'm sorry.

5 Q Okay.

6 A I want to be accurate.

7 Q I understand.

8 A Not to be confusing.

9 Q He may have dranked but it may not show up?

10 A It wouldn't have any bearing on what we're
11 talking about here.

12 MR. NEWLON: If I may approach the witness?

13 Q Do you recall receiving materials from my
14 office?

15 A Yes, sir.

16 Q Do you recall whether I sent them on more
17 than one occasion?

18 A You did.

19 Q Okay. I'm simply going to hand you a fax
20 dated 6 July of '06 and ask you if you recall
21 receiving that?

22 A What he's showing me is he indicates he did
23 actually send me the deposition of Timothy
24 Harrison, and all these cases seem to run together,
25 so I apologize. Apparently I did review this. I

1 would have reviewed everything you sent me.

2 Q Okay.

3 A I did receive material sporadically. I don't
4 have that here, it doesn't mean I don't have it in
5 my office.

6 MR. NEWLON: Thank you, Doctor. I have no
7 further questions of this witness, Your Honor.

8 MR. SEIGLER: Quickly, Your Honor.

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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. SEIGLER:

3 Q Doctor, Mr. Newlon asked you if during the 30
4 minute period prior to the accident he had nothing
5 to drink?

6 A Most likely he didn't drink anything, or to
7 rephrase it, it wouldn't have contributed to what
8 we're seeing here when we're talking about the .212
9 percent.

10 Q It doesn't mean he couldn't have quit
11 drinking at 9:30, right?

12 A No, it doesn't mean he didn't.

13 Q 9:45, 10:00?

14 | A Yes, sir.

15 Q It could have been much prior to that?

16 | A Yes.

17 MR. SEIGLER: Thank you.

18 THE COURT: Thank you, Doctor. I think that
19 may be it.

20 THE WITNESS: Okay.

21 (Witness excused).

22 THE COURT: Anybody object to him leaving?

23 MR. WISE: No objection.

24 MR. NEWLON: No objection.

25 THE COURT: All right.

1 you said an awful lot, in summary and in very
2 simple terms what have you told the jury today?

3 A That I don't think Jon Eric Hartfield will be
4 able to work. Had he been able to work he probably
5 could have earned somewhere around \$20,000 a year
6 the first three years and up to about \$40,000 per
7 year after that, and had he been able to go to
8 college and finish college he could have earned
9 even more than that, and another thing was, I think
10 he's going to need some assistance in the future.

11 MR. NEWLON: Okay. Dr. Stewart, thank you
12 very much. Answer any questions these gentlemen
13 may have for you.

14 MR. SEIGLER: No questions.

15 MR. WISE: No questions.

16 MR. WATSON: No questions.

17 (Witness excused).

18 MR. NEWLON: Your Honor, at this time the
19 plaintiff will rest its case subject to one motion
20 out of the presence of the jury.

21 THE COURT: All right.

22 MR. WISE: We do have a matter for the Court.

23 THE COURT: All right, that's all the
24 testimony from the plaintiff. If everything goes
25 fairly well can you all finish tomorrow?

1 MR. WISE: He has a couple witnesses he needs
2 to get in this afternoon.

3 MR. SEIGLER: One, Judge, that absolutely
4 can't be here tomorrow due to some problems.

5 THE COURT: Okay. I'm going to let you all
6 step back, we need to go over some legal questions
7 before we go into the other case and then we'll
8 start take some witnesses from the defendant.
9 Okay?

10 (The jury was excused from the courtroom).

11 THE COURT: All right, Mr. Newlon.

12 MR. NEWLON: Yes, sir. I just want to
13 clarify this to make sure I have this on the
14 record, as far as proffered testimony in this case
15 by Dr. Brewer, I proffer that testimony and ask to
16 be able to read that testimony to the jury for
17 consideration before any motions by the defense,
18 based on arguments already made plus the cases
19 presented actually in an opinion provided by Mr.
20 Wise talking about that a forensic specialist with
21 appropriate training uses individual tested blood
22 alcohol levels and personal characteristics as a
23 base for extrapolating what their blood alcohol
24 level was at the time and the physiological
25 symptoms, which there is a number of cases that

1 adhere to that. I would simply reiterate to the
2 Court that that opinion in and of itself, given an
3 actual measurement of blood alcohol, is sufficient
4 to sustain, sufficient to show circumstantial
5 evidence to allow that testimony to come in and the
6 case go forward against Williams Package.

7 Thank you.

8 THE COURT: I guess, I don't know, that must
9 be, he gave me two New York cases and one Texas
10 case.

11 MR. WISE: That's correct.

12 THE COURT: Okay.

13 MR. WISE: Not any in South Carolina.

14 THE COURT: Have you got anything, Mr.
15 Seigler?

16 MR. SEIGLER: Your Honor, at this time I
17 would ask the Court to grant a directed verdict to
18 Carolina Lounge based on the testimony thus far.
19 There is no one that knew he was intoxicated. The
20 only evidence, supposedly the trooper asked Mr.
21 McDonald, he said he gave him one beer. Of course
22 we say he said not one beer. We ask the Court to
23 consider that.

24 THE COURT: Based on the evidence and
25 testimony that .212, Dr. Brewer's testimony, if the

1 jury believed that he was served one beer at 10:00
2 there is sufficient evidence that would indicate
3 that, considering the evidence in a light most
4 favorable to the plaintiff, he could have been
5 intoxicated at the time he was served. I deny the
6 motion.

7 MR. WISE: Your Honor, I have two motions.
8 Based upon the Court's ruling during the course of
9 the trial I understand that the issue, the issue of
10 offset is to be decided, in the event of a verdict,
11 is not by the jury.

12 THE COURT: When they get a verdict, or if
13 they get a verdict, I don't know if they are going
14 to get a verdict or not but that's up to the jury
15 as to whether or not they believe that one or more
16 of the defendants knew that he was intoxicated when
17 they sold him alcohol. Then the Court, everything
18 I can find is it's an equitable issue as to whether
19 or not, in a case like this we don't want to
20 confuse the jury with issues about piercing the
21 corporate veil, which they can't remember anyway, I
22 think it's --

23 MR. WISE: In doing some research last night
24 I concur, I think it's pretty clear in South
25 Carolina, it may not be in some other states.

1 THE COURT: But we can do that, if he gets a
2 verdict, if you all can't agree to the facts we can
3 hear the testimony.

4 MR. NEWLON: I agree with that, Your Honor.

5 THE COURT: All right.

6 MR. WISE: Then also I would move for a
7 directed verdict on behalf of Getaway Lounge on the
8 ground that taking the evidence in a light most
9 favorable to the plaintiff, in this case the
10 testimony shows he had nothing to drink prior to
11 getting to The Getaway Lounge. The testimony from
12 their witnesses said he had three drinks, three
13 beers at The Getaway Lounge. Their expert puts the
14 reading at .07 as the highest, which clearly isn't
15 sufficient to put one on notice that a person is
16 intoxicated, and from the time he left we have no
17 control over what he had to drink. The accident is
18 anywhere from an hour to hour and a half after he
19 left and I think that's, that becomes too
20 speculative to even try to fathom some
21 relationship, back extrapolation theory.

22 THE COURT: The only thing, I think it's
23 totally undisputed he had a .212 at the time of the
24 accident at 10:50, and that's the testimony when
25 the accident happened. And the testimony in a

1 light most favorable to the plaintiff, he was there
2 between 9:30 and 10:00, is what the officer said
3 Harrison told him, Mr. Harrison testified 9:30.
4 That's a factual question for the jury but we know
5 that somewhere he had more than three beers and
6 whether he had, when he had the drinks and how he
7 got up to .212, I can't say. That's not for me to
8 decide. He did have a good bit of Budweiser, if
9 that is what he had, or some other alcohol before
10 the accident at 10:50. Now, when he was sold those
11 two beers, three beers, whatever the jury
12 determines he was sold at the Getaway, right now
13 it's a jury question as to whether or not he was
14 intoxicated at the time, at 9:30 or whenever. You
15 have to argue that to the jury.

16 MR. WISE: I understand. Their testimony
17 shows from their witnesses he was not intoxicated.

18 MR. NEWLON: Your Honor, I would just like to
19 point out it is my recollection I asked him
20 specifically what the blood alcohol content was at
21 approximately 9:30 when he may have been served a
22 beer. He said 1.74, 1.74 to 1.64.

23 THE COURT: Well, I'm not sure, the jury is
24 going to have to determine, you know, I'm not sure
25 we can say with much certainty but all that had to

1 be based on how much he had to drink.

2 MR. WATSON: If it please the Court, I point
3 out to you this Statute 61-4-580, which I believe
4 is the statute involved, says a person must
5 knowingly sell beer or wine to an intoxicated
6 person. There is absolutely no evidence in the
7 record to indicate the Williams entity sold any
8 alcoholic beverages to this man at this particular
9 time. Therefore, we would move for a directed
10 verdict on behalf of Williams.

11 MR. NEWLON: Your Honor, just for the record,
12 if I may, I will go back to this line of cases
13 provided by Mr. Wise. In these particular cases,
14 there is no case in South Carolina directly on
15 point, the seeks jurisdiction from New York, he
16 cites a number of cases that adhere to this and in
17 this particular case Romono versus Stanley, in that
18 particular case that involved a sufficiency of an
19 expert's affidavit as opposed to live testimony,
20 very interesting, because in that case it involved
21 a series of bars that an individual went to.
22 One of the bars, the second bar the individual went
23 to they weren't real sure about what time he got
24 there and what time he left but the critical thing
25 in that case, as the court pointed out, even though

1 they decided, they made that decision for other
2 reasons, they said that they acknowledge that there
3 are a line of cases that allow circumstantial
4 evidence to establish visible intoxication, not
5 just by direct testimony, and they went on to say
6 blood and urine tests are the most common source of
7 circumstantial evidence and that high level of
8 blood alcohol is the same evidence of a condition
9 but in that particular case they applied to it a
10 different statute and applied to it an affidavit by
11 an expert, and so that case is not controlling but
12 it is guidance because from the plaintiff's
13 perspective, because I have a measurable blood
14 alcohol content, because there is a scientific
15 method to extrapolate blood alcohol content and
16 there is evidence in this case as to what this
17 individual dranked before he left, after he left
18 Williams Package, again I submit to the Court that
19 if proffered, 1.67 at the time he left Williams
20 Package, as the expert testified, that would have
21 put them on notice that this individual was
22 intoxicated and whether or not they say they served
23 him or not, he had to have had some beer.

24 MR. WATSON: Your Honor, he is calling all
25 his own witnesses liars.

1 THE COURT: Wait a minute. In this case, the
2 statute says that a person cannot sell beer or wine
3 to an intoxicated person and the case law says that
4 they must know or should have known he was
5 intoxicated at the time of the sale. The jury is
6 going to have to try to figure out, if they can,
7 when we get there, how much he dranked, when he
8 dranked it, and all that. But all the cases that I
9 have seen, including the New York cases and other
10 cases, they had actual evidence that they sold beer
11 and wine on the premises. In this case there is
12 absolutely no evidence from anyone that he was sold
13 any beer or wine at the package store. There is
14 absolutely no evidence of that. I don't know how
15 there could be circumstantial evidence on the sale
16 of beer at that establishment.

17 In addition to that, there is no way the
18 plaintiff could prove he was intoxicated at the
19 time he was there from 5:00 to 7:00 o'clock, it was
20 four hours, three hours and 50 minutes before the
21 accident, after the gentleman closed his store. It
22 is undisputed he ran a package store and a bar and
23 there is no evidence that he did not, he has to
24 close the package store by law at 7:00 o'clock, and
25 he testified every night he does the same thing, he

1 leaves both businesses at 7:00 o'clock and goes
2 home, that's his business and that's what he does.
3 There is no evidence to dispute his testimony.

4 Taking the evidence in a light most favorable
5 to the plaintiff, the undisputed evidence is he
6 went apparently, I don't know if anybody ever said,
7 by car, I assume driving himself, there is no
8 evidence of anybody else, he drove from there to
9 the other place, to another place and then he
10 finally got involved in a wreck. So, he drove his
11 car at least three times, the third time was the
12 fatal time. So, there is just no way this jury
13 could do anything except speculate, if they wanted
14 to speculate, and hold Mr. Cockrell in, so I'm
15 granting a motion as to Mr. Cockrell and Williams
16 Package.

17 MR. NEWLON: Thank you, Your Honor.

18 THE COURT: All right, now we'll take his
19 witnesses that have got to testify today.

20 MR. SEIGLER: Your Honor, there are a couple
21 of Mr. Watson's witnesses I wanted to use, too, we
22 will use them now.

23 MR. WATSON: With your permission, I would
24 leave.

25 THE COURT: All right, you may leave.

1 MR. WATSON: Thank you, sir.

2 MR. SEIGLER: Your Honor, I have
3 approximately six witnesses. Do you have any idea
4 how many you would allow me to call today? There
5 is only one I have to call today. If the Court
6 sees fit I will call as many as you would like.

7 THE COURT: You will call who?

8 MR. SEIGLER: Just one witness, Your Honor, I
9 will call all of them if you want to.

10 THE COURT: You call whoever you have got to
11 call today and and then if you don't use any of his
12 witnesses that's not going to be here you can call
13 them if you want to.

14 MR. WATSON: I've got them subpoenaed, he
15 better talk to them.

16 THE COURT: All right. Are you ready?

17 MR. SEIGLER: Yes, sir.

18 (The jury returned to the courtroom).

19 MR. SEIGLER: Judge, he informed me she can
20 come tomorrow if you want to wait and start in the
21 morning.

22 THE COURT: Go ahead and take them today.

23 MR. SEIGLER: Just call that one witness,
24 Judge?

25 THE COURT: We'll take as many as you can,

1 until about 5:00 or a little after.

2 Okay.

3 (The jury returned to the courtroom).

4 MR. SEIGLER: If it please the Court, Your
5 Honor, the Defendant Glenn McDonald, also doing
6 business as the Carolina, calls Doug Bohler.

7 THE COURT: There has to be some evidence to
8 support a decision that you find. There was
9 absolutely no evidence introduced that any alcohol
10 was consumed at Williams Package place that was run
11 by Mr. Cockrell, and the undisputed evidence is
12 that the deceased Mr. Helton drove his car or some
13 way he got to a couple other places within three
14 hours and 50 minutes after that, so I ruled there
15 was no evidence that he was sold any alcohol on the
16 premises and I ruled that Williams Package, I have
17 ruled there was no evidence that he sold it and
18 knew he was intoxicated at the time between 5:00
19 and 7:00 o'clock. So, I have let that defendant
20 go, so we will go forward with the other two
21 defendants in the case.

22 Yes, sir.

23

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25