

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Case No. 2011-CP-32-04981
Appellate Case No. 2014-000671

Mike Russell, ... Respondent,

v.

Randolph Gill and Pennsylvania Life Insurance
Company Defendants,

Of Whom Pennsylvania Life Insurance Company is Appellant.

RECORD ON APPEAL – VOLUME I

D. Larry Kristinik
Michael J. Anzelmo
Elizabeth Herlong Brogdon
Kristen E. Horne
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000
Attorneys for Appellant

S. Jahue Moore
John C. Bradley, Jr.
R. Nick Riley, Jr.
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
West Columbia, South Carolina 29169
803.796.9160
Attorneys for Respondent

**RECORD ON APPEAL
INDEX**

VOLUME I

ORDERS and JUDGMENTS

Order filed June 11, 2013	1
Form 4 Order denying Defendant's Motion to Reconsider filed March 10, 2014.....	13
Order granting Plaintiff's Motion to Remand filed October 1, 2010	15

PLEADINGS

Summons and Complaint filed February 10, 2010	28
Notice of Removal filed April 1, 2010.....	36
Defendant Pennsylvania Life Insurance Company's Answer filed April 15, 2010.....	63
Defendant Randolph Gill's Answer to Plaintiff's Complaint filed June 3, 2010.....	71
Amended Answer and Counterclaim of Defendant Pennsylvania Life Insurance Company filed June 29, 2010.....	77

TRANSCRIPTS

Transcript of Trial, December 13, 2012	88
Randolph Gill	
Direct by Moore	97
Cross by Kristinik.....	111
Redirect by Moore	121
Recross by Kristinik	123
John Thomas Mackin, Jr.	
Direct by Moore	125
Transcript of Trial, December 14, 2012	178
Dr. William H. Richardson III	
Direct by Horne	185
Cross by Moore	201

John Thomas Mackin, Jr. (continued)	
Direct by Moore	224
Cross by Kristinik.....	243
Redirect by Moore.....	262
Recross by Kristinik	271
Redirect by Moore.....	271
Christina Barlow	
Direct by Moore	273
Cross by Kristinik.....	319
Redirect by Moore.....	336
Recross by Kristinik	344
Susanne Russell	
Direct by Moore	346
Cross by Kristinik.....	372
Redirect by Moore.....	396
Transcript of Trial, December 20, 2012 (pp. 1-102)	399
Susanne Russell (continued)	
Direct by Moore	403
Cross by Kristinik.....	405
Mike Russell	
Direct by Moore	416
Cross by Kristinik.....	444
Trooper Gerald Rothell	
Direct by Horne	492

VOLUME II

Transcript of Trial, December 20, 2012 (pp. 103-167)	501
Trooper Gerald Rothell (continued)	
Direct by Horne	501
Cross by Moore	516
Redirect by Horne	534
Wendy Bell	
Direct by Horne	537
Cross by Moore	552

Transcript of Trial, December 21, 2012	566

Connie Collins

Direct by Horne	566
Cross by Moore	575

TRIAL EXHIBITS

Defendant's Trial Exhibits, D1-23

D-1 Specimen copy of disability policy (PLIC 0066-87)	602
D-2 Policy Holder's Claim Report signed 08/27/08 (PLIC 0369-372)	624
D-3 Receipt from Carolina Wings & Ribhouse dated June 18, 2008 (Russell 0104)	628
D-4 Affidavit of Mike Russell dated October 31, 2012 and exhibits	629
D-5 South Carolina Traffic Collision Report Form (PLIC 0411-412)	672
D-6 South Carolina FR-10 Notice of Requirement (PLIC 0413)	674
D-7 Uniform Traffic Tickets (PLIC 0414)	675
D-8 Advisement of Implied Consent Rights (MR_Lex Med Ctr_0187)	676
D-9 Application (PLIC 0542-551)	677
D-10 Receipt – unsigned	687
D-11 Second Application (PLIC 0558-568)	688
D-12 Receipt – dated 07/05/02	699
D-13 Change of Benefits Agreement (PLIC 0581)	700
D-14 Disability policy schedules and riders (Russell 0152-158)	701
D-15 Supporting Documents Re: Benefit Payments	708

VOLUME III

D-16 Summary of Benefit Payments (PLIC 0671)	979
D-17 Payment Report (PLIC 0669-670)	980
D-18 11/09/11 Referral to Medical Director (PLIC 146)	982
D-19 Reservation of Rights Letter (PLIC 0126)	983
D-20 Pick List (PLIC 0672-673)	984
D-21 Records from Lexington Medical Center (MR_Lex Med Ctr_0078-190)	986
D-22 Lab Information System records received from Lexington Medical Center (SUB_Lex Med Ctr_0001-29)	1099
D-23 Documents received from SLED (PLIC 0415-427)	1128

Plaintiff's Trial Exhibits P1-19

P-1 (A) Exhibit List	1141
P-1 (B) Depositions (5) and Exhibits	
Deposition of Connie Collins (full transcript only)	1143
Word Index	1179

Deposition of W.C. Harmon (full transcript only).....	1185
Word Index	1227
Dft. Exh. 1 South Carolina Traffic Collision Report Form (PLIC 0411-412).....	672
Dft. Exh. 2 SLED Toxicology Report (PLIC 0415-426).....	1128
Dft. Exh. 3 SLED Chain of Custody (PLIC 0427)	1140
Dft. Exh. 4 South Carolina FR-10 Notice of Requirement (PLIC 0286).....	1233
Dft. Exh. 5 Uniform Traffic Tickets (PLIC 0414).....	675
 Deposition of Wendi C. Knight (full transcript only).....	 1234
Word Index	1268
Dft. Exh. 1 Notice of Deposition	1274
Dft. Exh. 2 Medical Records (MR_Led Med Ctr_0077-0190).....	1277
 Deposition of Gerald D. Rothell (full transcript only).....	 1391
Word Index	1452
Dft. Exh. 1 South Carolina Traffic Collision Report Form (PLIC 0411-412).....	672
Dft. Exh. 2 Hand-drawn diagram.....	1462
Dft. Exh. 3 SLED Laboratory Report (PLIC 0415-426).....	1128
Dft. Exh. 4 SLED Chain of Custody (PLIC 0427)	1140
Dft. Exh. 5 South Carolina FR-10 Notice of Requirement (PLIC 0286).....	1233
Dft. Exh. 6 Uniform Traffic Tickets (PLIC 0414).....	675

VOLUME IV

Deposition of Mike Russell (full transcript only)	1463
Word Index	1601
Dft. Exh. 1 Chart of payments	1619
Dft. Exh. 2 Policy Schedule (Russell 0145-158)	1685
Dft. Exh. 3 Carolina Wings & Ribhouse receipt (Russell 0104)	628
Dft. Exh. 4 Lexington Family Practice record (MR_Lex Family Practice_0015).....	1699
Dft. Exh. 5 Transcription of Magistrate's Court Hearing	1700
Dft. Exh. 6 Court file 08-CP-32-3411.....	1705
Dft. Exh. 7 Accident Report (PLIC 0286)	1233
Dft. Exh. 8 Accident Report (PLIC 0369)	1751
Dft. Exh. 9 Accident Report (PLIC 0411-412).....	672
Dft. Exh. 10 Statement (PLIC 0366-372)	1752
Dft. Exh. 11 Field Adjuster's Report (PLIC 137-142)	1759
Dft. Exh. 12 Phone Call Report (PLIC 131).....	1765
 P-2 Affidavit of Mike Russell	 629
P-3 Penn Life's claim file (PLIC 0001-65, 0088-220)	1766

VOLUME V

P-3 Penn Life's claim file (PLIC 0221-410, 00429-540)	1963
P-4 Penn Life's application/underwriting file (PLIC 0541-617).....	2265
P-5 Receipt (Carolina Wings 6-18-08) (Russell 0104)	628

P-6 Disability Policy Schedules and riders (Russell 0145, 0152-158).....	2342
P-7 Letter (William Wehner) (Russell 0150).....	2350
P-8 Credit card statement (Russell 0163).....	2351
P-9 SC DMV documents (PLIC 0411-414)	672
P-10 SLED documents (PLIC 0415-427)	1128
P-11 Lexington Medical Center records (MR_Lex Med Ctr_0077-190).....	1277
P-12 Lexington Medical Center lab records (SUB_Lex Med Ctr_0001-24)	2352
P-13 CD (Magistrate court hearing 5-15-09) (PLIC 0428).....	2376
P-14 Unofficial transcript (5-15 Magistrate Hrg) (PLIC 0618-622).....	2377
P-15 Payment report (PLIC 0669-670)	980
P-16 Chart of benefit payments & Pick List	2382
P-17 Insurance brochure.....	2385
P-18 SC Code 38-71-30 (copy).....	2408
P-19 Policy and application (PLIC 0066-87)	602

OTHER MOTIONS AND DOCUMENTS

Defendant Pennsylvania Life Insurance Company's Motion to Alter or Amend Order filed June 25, 2013	2409
Transcript of Hearing on Defendant Pennsylvania Life Insurance Company's Motion to Alter or Amend Order, October 15, 2013	2414
Certificate of Counsel	
Certificate of Compliance	

ORIGINAL

rec'd 6/17/2013

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Mike Russell,

Plaintiff,

vs.

Pennsylvania Life Insurance Company,

Defendant.

FILED

IN THE COURT OF COMMON PLEAS

2013 JUN 11 A 3:35

Civil Action No. 2011-CP-32-04981

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

ORDER

BEFORE THE COURT are the claims of the Plaintiff related to his claim for benefits under an accident disability insurance policy and the Defendant's counterclaim for declaratory judgment seeking to enforce an intoxication exclusion in the insurance contract. By consent of the parties, all claims were tried nonjury on December 13 and 14, 2012 and December 20 and 21, 2012. Pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure, the Court sets forth its findings of fact and conclusions of law.

This action involves an accident disability insurance policy purchased by the Plaintiff from the Defendant in 1999. The Plaintiff was injured in a motorcycle wreck on June 18, 2008, and, thereafter, submitted to the Defendant a claim for disability benefits. After the accident, the Defendant began making payments of \$2,500 per month to the Plaintiff and has made those payments from 2008 up to the month before trial.

On February 10, 2010, the Plaintiff filed a Complaint against the Defendant and insurance agent Randolph Gill in the Charleston County Court of Common Pleas asserting claims for breach of contract, bad faith refusal to pay benefits, and breach of contract to procure insurance. The Defendant filed a counterclaim seeking to enforce an intoxication exclusion which it contends was part of the insurance policy. By Order dated December 16, 2011, the

SENT 1/10

venue of the action was transferred to the ~~FILED~~ Lexington County Court of Common Pleas. At the beginning of the trial, the Plaintiff voluntarily dismissed his claims against Randolph Gill.

During trial, the parties consented to each other's introduction of numerous exhibits without objection. Several witnesses were presented by both parties over the course of four days of trial. The Court has had the opportunity to review the exhibits submitted and has considered the testimony received during trial and is now ready to issue its ruling.

I. FINDINGS OF FACT

A. Purchase of the Accident Disability Policy

1. The Plaintiff decided to purchase accident disability insurance coverage in 1999. He met with an insurance agent on November 19, 1999 and completed an application requesting an accident disability policy from the Defendant that provided a monthly disability benefit of \$2,000. (Def.'s Exh. 9).

2. On June 27, 2002, the Plaintiff met with Randolph Gill, another insurance agent, and completed an application requesting an additional monthly benefit of \$500 for his accident disability policy. (Def.'s Exh. 11). This was intended to increase his total monthly benefit to \$2,500.

3. Mr. Gill presented the Plaintiff with a receipt indicating he had received from the Plaintiff a premium payment for the insurance policy. Defendant's Exhibit 12 is a copy of that receipt bearing the signature of Mr. Gill. The Plaintiff acknowledged that he received the receipt from Mr. Gill.

B. Whether Delivery of the Policy Occurred

4. The Defendant offered the testimony of Jack Mackin, a former employee of the Defendant who was knowledgeable about the Defendant's policy administrative systems. Mr.

2 JEA 2/10

FILED
JUL 30 11 43 AM '06
CLERK OF COURT
LEXINGTON, SC

Mackin testified that the company's policy was to send a copy of the insurance policy to the sales office in order for the policy to be delivered to the insured. 35

5. The Defendant presented no evidence, such as a transmittal letter or other document in Plaintiff's file, to indicate that a policy was ever mailed to an agent for delivery to the Plaintiff. The Plaintiff testified that he never received a copy of the insurance policy from either Randolph Gill or another insurance agent.

6. Mr. Mackin also testified that a copy of the 2002 policy would have been sent with the July 25, 2002 form letter from William E. Wehner, President of Pennsylvania Life Insurance Company. (Plf.'s Exh. 7) The letter states "Please read the enclosed description of your benefits and attach the information to your policy."

7. Plaintiff testified that he never received a copy of the 2002 policy with this letter. Defendant did not present any evidence to show that the policy had been sent with the copy of this letter.

C. The Defendant's Record of the Policy and Policy Terms

8. Mr. Mackin testified about the records that the Defendant maintains for policyholders and why and how specimen policies are created.

9. According to Mr. Mackin, to avoid storing huge amounts of paper, the Defendant would not image or create paper copies of policies it issued, but instead created a system, which was a standard in the industry, that would allow the Defendant to assemble a specimen version of the actual policy setting forth the identical policy language and terms of a certain individual's policy. The Defendant would maintain an actual imaged duplicate of three documents that would allow it to assemble the specimen policy. These documents would have been created at

See 3/10

the time the original policy was issued and would have included: (1) the declarations page, (2) the application, and (3) the "pick list."

FILED
2013 JUN 11 A 8:35

10. The Defendant introduced as its Exhibit 20 a copy of the pick list for the Plaintiff's accident disability policy. Mr. Mackin explained that this pick list was maintained in a file for the Plaintiff and lists all of the standard forms that the Defendant combined to form the Plaintiff's policy. Mr. Mackin stated that when a specimen policy is assembled, the company reviews the pick list, then selects the forms indicated from its collection of standardized forms.

11. Mr. Mackin further testified that he compared the pick list marked as Defendant's Exhibit 20 to the forms contained in the specimen policy marked as Defendant's Exhibit 1 and that the pick list and the specimen policy forms matched perfectly. Mr. Mackin also compared the pick list to the applications, and stated that they also matched. Based on his comparisons of the pick list to the specimen policy and the applications, Mr. Mackin confirmed that the specimen policy accurately set forth all of the terms, conditions, and limitations that were included in the policy at both the time it was originally issued to the Plaintiff in response to his application and the time as it existed when the Plaintiff had his wreck in June of 2008.

12. The Defendant presented evidence regarding the policy it issued to the Plaintiff. The Defendant introduced into evidence a specimen policy as Defendant's Exhibit 1. The Defendant asserts that this specimen policy accurately reflects the terms of the policy issued to the Plaintiff. The specimen policy reflected a policy number of [REDACTED] 9360 and a total monthly benefit of \$2,500. The "Policy Schedule" at page 3 provided for an original effective date of November 19, 1999, and an effective date of July 19, 2002, for the additional \$500 monthly benefit.

ser 4/10

13. Mr. Mackin specifically pointed out that the form that included the intoxication exclusion, Form P-1900 SC, was included on the pick list and was designated P-19005SC, with the "5" representing page 5, corresponding to the page of the policy on which the intoxication exclusion appears. Page 5 of the specimen policy is on a form designated in the lower left hand corner as P-1900 SC. On this page is a paragraph with the heading in all capital type-face "INTOXICANTS AND NARCOTICS." This paragraph states, "We will not be liable for any loss which results from being: (1) intoxicated" The Defendant contends that this intoxication exclusion is applicable to the Plaintiff's claim for disability benefits.

14. Mr. Mackin stated that there was one difference between the terms of the specimen policy and the actual terms of the Plaintiff's policy as it currently exists. He explained that in 2009, months after the wreck, the Plaintiff chose to delete a Return of Premium Rider. This is evidenced by a "Change of Benefits Agreement" dated April 20, 2009, and introduced as Defendant's Exhibit 13. The Plaintiff confirmed that he signed this document. According to Mr. Mackin, this rider was still reflected on the pick list and thus, became a part of the specimen policy, because the pick list represents the policy as it would have existed at the time of the issue of the policy. A comparison of the form number in the bottom left hand corner of the rider, PR-301 SC, shows that it matches the last form number listed on the pick list.

15. Mr. Mackin testified that back in 1999 and 2002, the Defendant issued only accident disability policies that included intoxication exclusions. He stated that, since he began working for the Defendant in 1991, every accident disability policy issued by the company would have included the same form containing the intoxication exclusion. He further testified that if the Plaintiff had requested the purchase of an accident disability policy without an intoxication exclusion, no such policy would have been available from the Defendant.

16. Based on the testimony of Mr. Mackin and the exhibits introduced at trial, the Court finds that the records of the Defendant reflect that a policy was issued in response to the applications submitted by the Plaintiff and that such policy would have included an intoxication exclusion. The Court further finds that the specimen policy introduced as Defendant's Exhibit 1 accurately reflects the terms of the policy as they existed in the records of the Defendant at the time of the Plaintiff's wreck.

D. Events Occurring on June 18, 2008

17. On June 18, 2008, the day of the motorcycle wreck, the Plaintiff had been working with his crew and had finished early and went home. He decided to take a motorcycle ride. After riding for a while, he decided to go to the Carolina Wings & Ribhouse restaurant located in West Columbia, South Carolina.

18. The Plaintiff testified that he had several alcoholic drinks while at the restaurant. According to the Plaintiff, he recalled consuming between two and three Crown Royal drinks over a period of time. The Plaintiff later departed the restaurant on his motorcycle to head home. He testified that he probably left the restaurant sometime after 8:00 p.m.

19. When riding home that evening, the Plaintiff took Interstate 26 eastbound towards Charleston. Exit 15 was the closest exit to his home.

20. Just before the Plaintiff had reached Exit 15, another motorist, Connie Collins, had parked her vehicle in the grass along the left side of the exit ramp, with her vehicle being almost entirely off the roadway. Ms. Collins testified that she had dropped her mobile phone and that it had fallen under one of her pedals, requiring her to pull over to retrieve it.

21. As the Plaintiff rode down the ramp for Exit 15, he collided with Ms. Collins' vehicle, causing him to be thrown from his motorcycle and injuring his left leg and hip. The Plaintiff was transported by ambulance to the Lexington Medical Center for treatment.

E. The Cause of the Wreck

22. The parties dispute whether the Plaintiff's consumption of alcohol was a contributing cause of the wreck. The Defendant introduced much testimony about the Plaintiff's blood alcohol level both at the hospital and upon passage of time when a second sample was provided by the Plaintiff to South Carolina Highway Patrol.

23. The testimony in court was that the Plaintiff's blood alcohol level was more than double the required statutory level to be charged with Driving Under the Influence.

F. The Payment of Disability Benefits

24. The Plaintiff submitted to the Defendant a claim form dated August 27, 2008, requesting disability benefits under the policy. (Def.'s Exh. 2).

25. By check dated September 22, 2008, the Defendant paid to the Plaintiff \$8,125. This payment included two months of total disability benefits, a surgical benefit, an ambulance benefit, and benefits related to emergency first aid and x-rays. (Def.'s Exh. 15).

26. The Plaintiff submitted to the Defendant a second claim form dated October 2, 2008, and, in response, the Defendant issued a check to the Plaintiff on October 9, 2008, for \$2,500 of total disability benefits. (Def.'s Exh. 15).

27. The Defendant introduced into evidence as Exhibit 15 all of the claim forms and corresponding benefit checks covering the period from August of 2008 through November of 2012. The Defendant also introduced into evidence as Exhibit 16 a summary showing the date

7 *JS*
7/10

each claim form was received from the Plaintiff and the date that each benefit check was issued by the Defendant.

28. The Defendant introduced a second summary chart as Exhibit 17. This chart showed each monthly period to which the Plaintiff claimed disability benefits and then indicated the check corresponding with each period. The chart referenced the date, amount, and number for each check issued. This chart demonstrates that the Defendant made a total disability benefit payment for every period for which the Plaintiff claimed disability benefits from the time of the onset of the disability until the end of November of 2012, the month before trial.

29. The Defendant offered the testimony of Christina Barlow, a disability claims supervisor for CHCS Services, Inc., a third party claims administrator that handles the claims of the Defendant's policyholders. Ms. Barlow confirmed that the claim forms and checks included in Defendant's Exhibit 15 were maintained in the records of her company and that the summary charts referenced above accurately reflected the information in the records.

30. Using the summary charts, Ms. Barlow testified that of the forty-one (41) checks issued by the Defendant to the Plaintiff, thirty-eight (38) were issued within thirty-one (31) days of the Defendant's receipt of the claim form from the Plaintiff.

31. Ms. Barlow pointed out that only three (3) checks were issued more than 31 days after the receipt of the claim form. Ms. Barlow offered explanations for the timing of each of these payments, including (a) a slowdown during the holidays, (b) the company operations were moved to a new building, and (c) a prior claim manager had departed the company and the file had to be transitioned to a new claim manager.

32. Ms. Barlow testified that there is no specific deadline in the policy for making benefit payments.

33. According to the testimony of Ms. Barlow, the Defendant first learned in November of 2009 of the Plaintiff's alcohol consumption on the day of the wreck when the use of alcohol was referenced in a medical record obtained through a follow up request to the Lexington Medical Center. After this discovery, the Plaintiff was informed that the Defendant was investigating the situation and a reservation of rights letter was issued in January of 2010. (Def.'s Exh. 19). The Plaintiff filed this lawsuit the following month, and the Defendant responded with its counterclaim seeking to enforce the intoxication exclusion. Benefit payments continued during this time and through the end of November 2012.

II. CONCLUSIONS OF LAW

34. The Court has jurisdiction over the parties and the subject matter of this action.

35. The Plaintiff has asserted a breach of contract claim related to the Defendant's payment of benefits. The evidence establishes that the Defendant has paid all benefits due under the policy as of the date of trial. The Plaintiff contends that many of the payments were late. The Court finds, however, that there is no specific deadline for payment that has been agreed to by the parties. The evidence establishes that the vast majority of benefit payments were mailed by the Defendant to the Plaintiff within thirty-one (31) days of receipt of the Plaintiff's claim form. The Court concludes that since all payments have been made and there has been no delay in payments that would rise to the level of supporting a claim for breach of contract. Accordingly, this claim is dismissed.

36. The Plaintiff has asserted a claim based on bad faith refusal to pay insurance benefits. There is ample evidence that the Defendant had difficulty in processing the claims from time to time and that many payments to the Plaintiff were unnecessarily delayed.

9 *SCA* 9/10

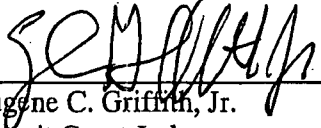
37. The Court finds that the delay in payment was a particular inconvenience to the Plaintiff in meeting his financial responsibilities. However, the Defendant has made all payments due under the policy at the time of hearing. Consequently, the claim for bad faith is denied.

38. The Plaintiff has asserted a claim based on failure to procure insurance. The Plaintiff offered no evidence that he did not receive the coverage that he requested or that he suffered any damages from an alleged failure to procure. Accordingly, this claim is dismissed.

39. The Defendant made a motion for Declaratory Judgment seeking to enforce the Intoxication Exclusion in the specimen policy. S.C. Code Ann. § 38-71-30 reads in pertinent part: "[E]very insurer doing accident or health insurance or health insurance business in the State shall deliver with each policy of insurance issued by it a copy of the application made by the insured so that the whole contract appears in the application and policy of insurance. If the insurer violates this requirement, no defense is allowed to the policy on account of anything contained in or omitted from the application." The Court found that the Defendant issued a policy in response to the Plaintiff's application. However, the Defendant offered no proof that a copy of the policy was ever delivered to the Plaintiff. Therefore, the Defendant is not entitled to enforce the intoxication exclusion.

40. The Court has not reached the issue as to whether the Plaintiff's level of impairment due to the consumption of alcohol and if such impairment contributed to the collision with Mrs. Collins' vehicle. The other issues presented in the case proved dispositive and made a decision on the causation of the wreck unnecessary and moot.

AND IT IS SO ORDERED.


Eugene C. Griffith, Jr.
Circuit Court Judge

Newberry, SC.
June 14, 2013

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS
Mike Russell

FORM 4

FILED

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP 32 04981

2013 JUN 11

Pennsylvania Life Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☒ Plaintiff ☐ Defendant
Or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE 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 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Se DM
Circuit Court Judge

2154

Judge Code

6-7-13
Date

For Clerk of Court Office Use Only

This judgment was entered on the 21st day of July, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of JUNE, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

MOORE

ATTORNEY(S) FOR THE PLAINTIFF(S)

BREWER

KRISTAK

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

Mike Russell

FORM 4

FILED

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP 32-04981

2014 MAR 10

ARADOLPH Gill and Pennsylvania Life
Insurance Company

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Defendant

Attorney for: Plaintiff X Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE 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 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: The defendant's motion to reconsider is respectfully denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2154
Judge Code

3/5/14
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

S. Jahue Moore

ATTORNEY(S) FOR THE PLAINTIFF(S)

Larry Kristinik

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
USDC, CLERK, CHARLESTON, SC
2010 OCT -1 P 1:07

Mike Russell,

Plaintiff,

v.

Randolph Gill and Pennsylvania Life
Insurance Company,

Defendants.

Case No. 2:10-cv-00816-RMG

ORDER

This matter is before the Court upon Plaintiff Mike Russell's ("Plaintiff") Motion to Remand. A hearing was held on this motion on October 1, 2010, at 10:00 A.M. For the reasons set forth herein, the Court grants Plaintiff's motion.¹

BACKGROUND

Plaintiff filed the instant action in the Charleston County Court of Common Pleas on or about February 10, 2010. Pennsylvania Life Insurance Company ("Penn Life"), served on March 2, 2010, removed the instant action on April 1, 2010, on the basis of diversity jurisdiction. (See Notice of Removal.) Although Defendant Randolph Gill ("Gill") is a citizen and resident of South Carolina, Penn Life asserts removal is proper because Gill 'has been 'fraudulently joined.'" (Id. at 3.) According to Penn Life, the Complaint "does not set forth any viable cause of action against Randolph Gill." (Id. at 5.)

¹On September 30, Penn Life filed a Motion for Leave to File Affidavit of Mirella Espejo, and Plaintiff consented to this motion. Accordingly, the Court grants Penn Life's Motion for Leave to File Affidavit of Mirella Espejo.

In his Complaint, Plaintiff alleges that Gill is an “agent or broker doing business in South Carolina” for Defendant Penn Life. (Compl. ¶ 5.) Plaintiff states that “[o]n or around July 9, 2002,” he “entered into an insurance contract with the Defendants whereby the Defendants agreed to pay the Plaintiff \$2,500.00 per month if the Plaintiff became disabled.” (Id. ¶ 6.) According to Plaintiff, Defendant Gill “was the agent that sold the Plaintiff said policy.” (Id.)

Plaintiff alleges that on or about June 18, 2008, he “became disabled as a result of injuries he sustained from a motorcycle accident.” (Id. ¶ 8.) Plaintiff asserts he “notified the Defendants of his injuries and asked the Defendants to begin making payments required by the insurance policy between the parties.” (Id. ¶ 9.) Plaintiff asserts the “Defendants began making the required payments to the Plaintiff until October of 2009 when the Defendants intentionally refused to make any future payments.” (Id. ¶ 10.) Plaintiff’s Complaint continues,

11. The Defendants have acted intentionally, unreasonably, and in bad faith by refusing to make the required payments to the Plaintiff.

12. The Defendants have knowingly failed to articulate a legitimate or arguable reason for failing to make the required payments.

13. The Defendants failure to make the required payments amounts to a breach of good faith and fair dealing.

14. The conduct complained of herein amounts to a bad faith refusal to pay a valid insurance claim.

15. As a direct and proximate result of the Defendants’ bad faith refusal to pay, Plaintiff has been damaged in that it [sic] has incurred costs, fees, delays as well as other items of damage as may be discovered through the pendency of this action, all to its damage both actual and punitive.

(Compl. ¶¶ 11-15.) Plaintiff seeks both actual and punitive damages and lists the following causes of action: (a) bad faith refusal to pay first party benefits; (b) breach of contract to procure insurance; and (c) breach of contract. (See generally Compl.)

Plaintiff filed a Motion to Remand on April 12, 2010.

STANDARD OF REVIEW

The fraudulent joinder doctrine “permits removal when a non-diverse party is (or has been) a defendant in the case.” Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999) (citing Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992); Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998)). Pursuant to this doctrine, a district court “can assume jurisdiction over a case even if . . . there are nondiverse named defendants at the time the case is removed.” Id. (citing Marshall v. Manville Sales Corp., 6 F.3d 229, 232-33 (4th Cir. 1993); Cobb v. Delta Exports, Inc., 186 F.3d 675, 677 (5th Cir. 1999)). The doctrine “effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” Id. (citing Cobb, 186 F.3d at 677-78).

In order to show fraudulent joinder, the removing party “must demonstrate either ‘outright fraud in the plaintiff’s pleading of jurisdictional facts’ or that ‘there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.’” Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999) (quoting Marshall, 6 F.3d at 232). The removing party’s burden is a heavy one—“it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff’s favor.” Id. (citing Marshall, 6 F.3d at 232-33). “This standard is even more favorable to the plaintiff than

the standard for ruling on a motion to dismiss” under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Id. (citing Batoff v. State Farm Ins. Co., 977 F.2d 848, 852 (3d Cir. 1992)).

“[U]ltimate success is not required to defeat removal[;]” instead, “there need only be a slight possibility of a right to relief.” Id. at 426 (citing Marshall, 6 F.3d at 233). In determining whether the attempted joinder is fraudulent, “the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available.” AIDS Counseling & Testing Centers v. Group W Television, Inc., 903 F.2d 1000, 1003-04 (4th Cir. 1990).

ANALYSIS

Plaintiff moved to remand on the basis that “Randolph Gill is a proper defendant who was not fraudulently joined.” (Mot. to Remand at 1.) Plaintiff asserts that in June of 2002, he was in need of accident/sickness insurance coverage and was contacted by Defendant Gill, who told Plaintiff that he (Gill) “was an expert in accident/sickness insurance policies.” (Mem. in Supp. at 1.) Plaintiff states that he and Gill discussed Plaintiff’s insurance needs, and Gill “stated that he could find a policy to meet all of Mr. Russell’s needs.” (Id. at 1-2.) Plaintiff asserts that he and Defendant Gill “entered into an agreement whereby Mr. Gill would procure Mr. Russell an accident/sickness insurance policy.” (Id. at 2.) Plaintiff states,

Mr. Gill found Mr. Russell an insurance policy which he claimed met each and every one of Mr. Russell’s needs. Mr. Gill filled out the insurance application for Mr. Russell and submitted it. Mr. Russell relied on Mr. Gill’s expertise and their agreement to procure the proper policy.

(Id. at 2.) Plaintiff asserts remand is proper because he has a legitimate claim against Defendant Gill, stating that “[i]f [an] agent . . . or broker fails to procure a proper policy of insurance, or the

proper coverage, for the insured, the agent or broker may be sued for breach of contract.” (*Id.* at 5.) Plaintiff further asserts that although it “has been alleged that Mr. Gill was acting as an agent for Pennsylvania Life Insurance Company, [Gill] would still be liable for breach of contract to procure insurance.” (*Id.* at 6.)

In Penn Life’s Response in Opposition, Penn Life asserts that Plaintiff’s supporting memorandum “tacitly concedes there is no breach of contract or bad faith claim against Gill for the alleged refusal to pay disability benefits.” (Resp. in Opp’n at 1.)² Penn Life argues the claim for failure to procure a suitable insurance policy is “not viable and could never succeed on these facts.” (*Id.*) Penn Life continues,

This is not a situation in which the insured requested a certain type of coverage but did not get it. To the contrary, as alleged in the Complaint, Penn Life actually paid disability benefits for months, treating this as a covered claim. The alleged wrong is simply the purported failure to continue to pay benefits, not the issuance of the wrong type of policy. Moreover, the failure to procure claim is time barred by the statute of limitations because the policy was issued in 2002—seven years before this suit was filed.

(*Id.* at 1-2.)

As Penn Life has not alleged outright fraud in the plaintiff’s pleading of jurisdictional facts, Penn Life has the burden to show there is “no possibility” that Plaintiff would be able to establish a cause of action against Gill in state court. Hartley, 187 F.3d at 424. In Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969), the South Carolina Supreme Court upheld the lower court’s denial of an insurance agent’s motion for a directed verdict where the plaintiff alleged the insurance agent was negligent in the procurement of a liability insurance

²Although Plaintiff’s Complaint attempts to assert a claim against the insurance agent for breach of contract and bad faith, Plaintiff does not argue these are appropriate claims against the insurance agent in his Motion to Remand.

policy. In that case, Duckworth met with the insurance agent Green, showed Green an elevator, and specifically requested coverage for that elevator. Riddle-Duckworth, 253 S.C. at 417, 171 S.E.2d at 488. Green undertook to provide such coverage and gave assurances to the plaintiff that the elevator was covered. Id. at 417, 171 S.E.2d at 486. Furthermore, at one point Duckworth read the policy, became concerned about coverage for the elevator, and asked the agent about it; the agent informed Duckworth that the policy provided the requested coverage. Id. at 418, 171 S.E.2d at 489. When a patron was injured by the elevator and recovered a verdict against the plaintiff, the plaintiff brought suit against the insurance agent Green and the insurance agency to recover the amount of the judgment. Id. at 419, 171 S.E.2d at 489.

The Supreme Court of South Carolina in Riddle-Duckworth re-stated the “long recognized general rule” that an insurance agent is “required to exercise due care in placing insurance and would be personally liable for the neglect of that duty.” Id. at 420, 171 S.E.2d at 490. The court continued,

The cited authorities state the applicable general principles to be that, where an insurance agent or broker, with a view toward being compensated, undertakes to procure insurance for a member of the public, the law holds the agent or broker to the exercise of good faith, and reasonable skill, care and diligence in performing the obligation. If the agent or broker fails, because of his fault or neglect, to procure the insurance, or does not follow instructions, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, he is liable to his principal for the loss sustained thereby in the amount that would have been due under the insurance policy if it had been obtained and provided the desired coverage.

In such cases, the burden is upon the insured to show with reasonable certainty the terms and conditions of the agreement. *Generally, a valid contract to procure insurance exists where there is established a promise by the insured to take a policy of insurance and an undertaking on the part of the agent or broker to procure it, with sufficient information provided upon which to procure the policy.* 43 Am.Jur.2d, Insurance, Section 174.

Riddle-Duckworth, 253 S.C. at 421, 171 S.E.2d at 490-91 (emphasis added).

Penn Life asserts there is no viable claim for failure to procure insurance because “(1) the Complaint is devoid of any description whatsoever of the policy terms that should have been included, and (2) this claim is barred by the three-year statute of limitations.” (Resp. in Opp’n at 4.) Penn Life’s first argument—that the claim for failure to procure insurance fails because Plaintiff failed to adequately describe the policy terms in the Complaint—is true but irrelevant. Pursuant to the elements set out in Riddle-Duckworth, a contract to procure insurance is established when there exists: (a) a promise by the insurance agent to procure an insurance policy; (b) an undertaking on the part of the agent to procure it; and (c) sufficient information provided to the agent upon which to procure the policy. Riddle-Duckworth, 253 S.C. at 421, 171 S.E.2d at 490-91. Furthermore, the elements of a cause of action for breach of contract are as follows: a contract, breach, and damages caused by the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 610 (1962); see also Taylor v. Cummins Atl., Inc., 852 F. Supp. 1279, 1286 (D.S.C. 1994). Plaintiff has alleged

21. Defendants discussed and advised Plaintiff regarding the procurement of the accident/sickness insurance policy to meet his needs.

22. Plaintiff discussed and advised Defendants regarding his accident/sickness insurance needs and provided to Defendants all information, documents and materials requested by them.

23. Defendants agreed and contracted to procure an accident/sickness insurance policy suitable to Plaintiff’s needs.

24. Defendants filled out the accident insurance application for Plaintiff and represented to him that the policy was in accordance with his needs and that he would be fully covered by the policy.

25. Plaintiff relied upon Defendants to procure the accident/sickness insurance policy and further relied upon Defendants' representations regarding the policy.

26. In or around July of 2002, Defendants issued Plaintiff the accident/sickness insurance policy. Plaintiff paid all premiums demanded by the policy and provided everything further requested of them by Defendants.

(Compl. ¶¶ 21-26.) Plaintiff further alleges he has been damaged by this failure to procure insurance in that he has lost, *inter alia*, the "benefits pursuant to the accident insurance policy" and "lost premiums." (*Id.* ¶ 29.)

While Plaintiff may not have alleged in his Complaint many details about the policy terms that were lacking, requiring such allegations at this stage of the proceedings would be error. As noted above, in order to prove fraudulent joinder of Gill, Penn Life must show "there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." Hartley, 187 F.3d at 424. The fact that the details in Plaintiff's Complaint were sparse does not indicate that there is *no possibility* Plaintiff can recover on this claim. Penn Life's argument that the claim for failure to procure insurance fails because Plaintiff failed to adequately describe the policy terms in the Complaint is without merit. Penn Life has not shown, on the basis of this argument, that there is no possibility Plaintiff can recover on the claim for failure to procure insurance.³

³Penn Life also argues this case is not one about failure to procure insurance, as "[t]his is not a situation in which the insured requested a certain type of coverage but did not get it. To the contrary, as alleged in the Complaint, Penn Life actually paid disability benefits for months, treating this as a covered claim. The alleged wrong is simply the purported failure to *continue* to pay benefits, not the issuance of the wrong type of policy." (Resp. in Opp'n at 1-2.) However, the standard of review for fraudulent joinder is a lenient one for the Plaintiff, and Plaintiff did allege that "Defendants agreed and contracted to procure an accident/sickness policy suitable to Plaintiff's needs." (Compl. ¶ 23.) As Riddle-Duckworth sets forth, it is possible for the agent to be liable when the agent procures insurance but does not procure all of the appropriate coverage. Riddle-Duckworth v. Sullivan, 253 S.C. 411, 171 S.E.2d 486.

Penn Life also argues the Motion to Remand should be denied because any claim Plaintiff may have against Gill is barred by the statute of limitations. As Penn Life notes, a claim for failure to procure insurance is governed by South Carolina's three-year statute of limitations. See S.C. CODE ANN. § 15-3-530 (setting forth a three-year statute of limitations for actions other than for the recovery of real property). Plaintiff's Complaint alleges that the policy was procured, or the failure to procure the policy, occurred in July of 2002. (See Compl. ¶ 6.)⁴ Plaintiff filed the instant Complaint on or about February 10, 2010, more than three years after July of 2002.

In Reply, Plaintiff asserts that the statute of limitations has not run because "[t]he parties' contract was broken in October of 2009" and his Complaint is therefore timely. (Reply at 3.) The Court must therefore determine when Plaintiff's claim against Gill accrued.

The South Carolina Supreme Court provided some guidance on this statute of limitations issue in Riddle-Duckworth. In that case, the defendant argued that judgment should have been entered in his favor because the action was barred by the statute of limitations, which was six years at that time. Riddle-Duckworth, 253 S.C. at 424-25, 171 S.E.2d at 492. The Supreme Court of South Carolina rejected that argument:

The initial transaction between the parties occurred in 1956 when the defendant agreed to procure a policy of insurance providing liability coverage on the elevator. It is inferable that the defendant undertook to provide coverage on the elevator in each of the policies issued from 1956 to 1962. However, the basis of plaintiff's cause of action was not that defendant negligently failed to provide the requested coverage in 1956 but that he failed to do so in securing the 1962 policy. The prior transactions between the parties were simply relevant upon the issue of

⁴Plaintiff alleges that "[o]n or around July 9, 2002, the Plaintiff entered into an insurance contract with the Defendants whereby the Defendants agreed to pay the Plaintiff \$2,500.00 per month if the Plaintiff became disabled." (Compl. ¶ 6.) Within the cause of action for breach of contract to procure insurance, Plaintiff alleges he met with Gill in July of 2002 and that a policy was issued in July of 2002. (Compl. ¶¶ 18-19, 26.)

whether defendant undertook to provide the particular coverage in the policy obtained in 1962. The present action was begun in the Summer of 1962, just a few months after the 1962 policy was issued and the loss was sustained. It is therefore timely instituted.

Id. at 425, 171 S.E.2d at 492-93. Earlier in the opinion, the court noted that the original policy was issued on January 16, 1956, for one year and was renewed annually thereafter. Id. at 417, 171 S.E.2d at 489. Each time prior to renewal, the insurance agent Green sent a new policy and a bill for the premium. Id. at 417-18, 171 S.E.2d at 489. "As the plaintiff added new items of merchandise to the appliance business, such as lawn mowers and a machine for making keys, Green was called in each instance to inquire if the liability policy covered the additions. Green assured the plaintiff each time that the business was 'fully covered and there was nothing to worry about.'" Id. at 418, 171 S.E.2d at 489. Pursuant to that authority, it seems that the policy renewal date—January 16, 1962—was the date the cause of action for failure to procure insurance accrued. Id. at 417-18, 171 S.E.2d at 489.

Using the reasoning of Riddle-Duckworth, Penn Life has not shown it is without possibility that Plaintiff can recover against Gill because the Complaint says nothing of renewals. It is unclear whether only one policy was issued in the case *sub judice* or whether, as in Riddle-Duckworth, the policy was renewed every year. Because it is uncertain as to whether Plaintiff's claim against Gill would be time-barred, Penn Life has failed to show there is no possibility that Plaintiff could recover against Gill.⁵

⁵At the hearing, Penn Life cited Trotter v. State Farm Mutual Automobile Insurance Co., 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988), to support its argument that the Motion to Remand should be denied. However, the Trotter opinion is inapposite because "Trotter's case does not involve a failure to procure insurance." Trotter, 297 S.C. at 478, 377 S.E.2d at 350.

CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that Penn Life's Motion for Leave to File Affidavit of Mirella Espejo is **GRANTED**. It is further **ORDERED** that Plaintiff's Motion to Remand is **GRANTED**.

AND IT IS SO ORDERED.



The Honorable Richard Mark Gergel
United States District Judge

Charleston, South Carolina
October 1, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESON

Mike Russell,

Plaintiff,

vs.

Randolph Gill and Pennsylvania Life Insurance,
Company,

Defendant.

IN THE COURT OF COMMON PLEAS

2010-CP-10-1144
CIVIL ACTION COVERSHEET

(Please Print)

Submitted By: S. Jahue Moore

Address: 1700 Sunset Boulevard

Post Office Box 5709

West Columbia, SC 29171

SC Bar #: 4063

Telephone #: 803-796-9160

Fax #: 803-791-8410

Other:

E-mail: Jake@mttlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Shunder/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Penden (750)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)

RECEIVED

MAR 15 2010

Market Conduct
Compliance

Submitting Party Signature: Joseph R. Moore Jr. for S. Jahue Moore Date: January 27, 2010

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (8/06)

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville, and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action is filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by the State;
 - g. mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Mike Russell,)
Plaintiff,)

SUMMONS

v.)

Civil Action Number:

Randolph Gill and Pennsylvania)
Life Insurance Company,)
Defendants.)

FILED
2010 FEB 10 AM 10:54
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this matter, a copy of which is herewith served upon you, and to serve a copy of your ANSWER to said Complaint upon the subscriber at his office, 1700 Sunset Boulevard, P.O. Box 5709, West Columbia, South Carolina, 29171, within THIRTY (30) days from the service thereof, exclusive of the day of such service; and if you fail to answer the COMPLAINT within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

MOORE, TAYLOR & THOMAS, P.A.

BY: Ralph N. Taylor sr. For,
S. Jahue Moore
Attorney for Plaintiff
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
January 27, 2010

RECEIVED

MAR 15 2010

Market Conduct
Compliance

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Mike Russell,)
)
Plaintiff,)

COMPLAINT

v.)

Civil Action Number:

Randolph Gill and Pennsylvania)
Life Insurance Company,)
)
Defendants.)

FILED
2010 FEB 10 AM 10:54
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff, complaining of Defendant, would respectfully show unto this Court:

FOR A FIRST CAUSE OF ACTION
(Bad Faith Refusal to First Party Benefits)

1. Plaintiff is a resident and citizen of Lexington County, South Carolina.
2. Upon information and belief the Defendant Randolph Gill, is a resident of Charleston County, South Carolina.
3. The Defendant Pennsylvania Life Insurance Company is a foreign business entity who regularly conducts and solicits business in South Carolina.
4. The Court has jurisdiction over the parties and subject matter herein, and venue is proper before this court.
5. The Defendant Randolph Gill, Agent number 173416, is an agent or broker doing business in South Carolina for Defendant, Pennsylvania Life Insurance Company,.
6. On or around July 9, 2002, the Plaintiff entered into an insurance contract with the Defendants whereby the Defendants agreed to pay the Plaintiff \$2,500.00 per month if the Plaintiff became disabled. The Defendant Randolph Gill was the agent that sold the Plaintiff said policy.

RECEIVED

MAR 15 2010

7. The Defendant Pennsylvania Life Insurance Company charged the Defendant \$130.00 per month as a premium for the policy. The Plaintiff made all of the policies required payments.
8. On or around June 18, 2008 the Plaintiff became disabled as a result of injuries he sustained from a motorcycle accident.
9. The Plaintiff notified the Defendants of his injuries and asked the Defendants to begin making payments required by the insurance policy between the parties.
10. The Defendants began making the required payments to the Plaintiff until October of 2009 when the Defendants intentionally refused to make any future payments.
11. The Defendants have acted intentionally, unreasonably, and in bad faith by refusing to make the required payments to the Plaintiff.
12. The Defendants have knowingly failed to articulate a legitimate or arguable reason for failing to make the required payments.
13. The Defendant's failure to make the required payments amounts to a breach of good faith and fair dealing.
14. The conduct complained of herein amounts to a bad faith refusal to pay a valid insurance claim.
15. As a direct and proximate result of the Defendants' bad faith refusal to pay, Plaintiff has been damaged in that it has incurred costs, fees, delays as well as other items of damage as may be discovered through the pendency of this action, all to its damage both actual and punitive.
16. Plaintiff is entitled to judgment against Defendants for actual and punitive damages.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

FOR A FIRST CAUSE OF ACTION
(Breach of Contract to Procure Insurance)

17. Plaintiff hereby reasserts and realleges each and every allegation set forth above as fully as if set forth verbatim.
18. In or around July of 2002, Mike Russell was in the market to obtain a new accident insurance policy naming him as the insured.
19. In or around July of 2002, Defendants solicited Plaintiff and encouraged him to buy an accident/sickness insurance policy through Defendants.
20. At all times pertinent hereto, Defendants held out and represented themselves to be experts in the field of accident/sickness insurance.
21. Defendants discussed and advised Plaintiff regarding the procurement of the accident/sickness insurance policy to meet his needs.
22. Plaintiff discussed and advised Defendants regarding his accident/sickness insurance needs and provided to Defendants all information, documents and materials requested by them.
23. Defendants agreed and contracted to procure an accident/sickness insurance policy suitable to Plaintiff's needs.
24. Defendants filled out the accident insurance application for Plaintiff and represented to him that the policy was in accordance with his needs and that he would be fully covered by the policy.
25. Plaintiff relied upon Defendants to procure the accident/sickness insurance policy and further relied upon Defendants' representations regarding the policy.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

26. In or around July of 2002, Defendants issued Plaintiff the accident/sickness insurance policy. Plaintiff paid all premiums demanded by the policy and provided everything further requested of them by Defendants.

27. On or around June 18, 2008 the Plaintiff became disabled as a result of injuries he sustained from a motorcycle accident.

28. The Defendants refusal to make required payments to the Plaintiff as required by the policy language amounts to a breach of contract to procure insurance.

29. As a direct and proximate result of the aforementioned breach of contract to procure insurance, Plaintiff has been damaged in that he has lost the benefit of his bargain, has lost benefits pursuant to the accident insurance policy, has lost premiums paid for the accident insurance policy, has lost interest upon withheld benefits, has incurred attorney fees and costs associated with bringing this action as well as other items of damages as may be discovered through the pendency of this action

30. Plaintiff is entitled to judgment against Defendants for actual, consequential and incidental damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

31. Plaintiff hereby reasserts and realleges each and every allegation set forth above as fully as if set forth verbatim.

32. The Defendants sold and issued its policy of Accident/Sickness Insurance Protection to Mike Russell, policy number [REDACTED] 9360. The policy requires the Defendants to pay the Plaintiff \$2,500.00 if the plaintiff becomes sick or disabled.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

33. At all times relevant hereto, the aforementioned policy was in full force and effect. All premium payments were current and Mike Russell complied with all conditions precedent to payment of the benefits.

34. On or around June 18, 2008 the Plaintiff became disabled and made a demand for his benefits under the policy

35. Pennsylvania Life Insurance Company has refused to make payments required by the policy.

36. The Defendant's failure to pay the benefits pursuant to the policy constitutes a breach of the insurance contract.

37. Upon information and belief, the Plaintiff is entitled to a judgment against the Plaintiff for breach of contract.

38. As a direct and proximate result of the aforementioned breach of contract, Plaintiff has been damaged in that he has lost the benefit of his bargain, has lost benefits pursuant to the accident insurance policy, has lost premiums paid for the accident insurance policy, has lost interest upon withheld benefits, has incurred attorney fees and costs associated with bringing this action as well as other items of damages as may be discovered through the pendency of this action

39. Plaintiff is entitled to judgment against Defendants for actual, consequential and incidental damages.

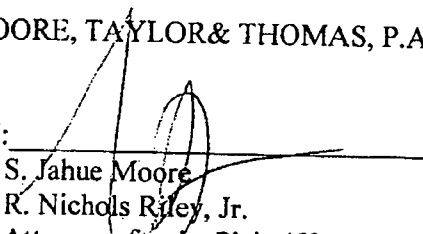
WHEREFORE, having fully complained against the Defendants herein, Plaintiff prays for an order of this Court for judgment against the Defendants for actual, consequential, and incidental damages; special damages; punitive damages; costs, interest; for attorney fees and costs; and for such other and further relief as this Court may deem just and proper.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

MOORE, TAYLOR & THOMAS, P.A.

BY: 

S. Jahue Moore

R. Nichols Riley, Jr.

Attorneys for the Plaintiff

P. O. Box 5709

West Columbia, SC 29171

(803) 796-9160

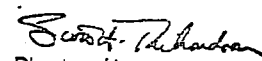
West Columbia, South Carolina
January 27, 2010

RECEIVED

MAR 15 2010

Market Conduct
Compliance

Summons and complaint on
within entitled cause received at
this office and service accepted
in accordance with law
this 2 day of May 2010


Director of Insurance
and Attorney to Accept Service
Columbia, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Mike Russell,	)	Civil Action No.
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	NOTICE OF REMOVAL
Randolph Gill and Pennsylvania Life	)	
Insurance Company,	)	
	)	
Defendants.	)	

YOU ARE HEREBY NOTIFIED that, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, the Defendant, Pennsylvania Life Insurance Company ("Penn Life"), hereby files this Notice of Removal of the above-captioned action from the Court of Common Pleas for Charleston County, State of South Carolina, to the U.S. District Court for the District of South Carolina, Charleston Division.

I. STATEMENT OF COMMENCEMENT OF ACTION

The above-captioned action was commenced by the Plaintiff by the filing of a Summons and Complaint on February 10, 2010, and serving same on Penn Life on March 2, 2010. Service on Penn Life was accomplished by sending a copy of the Summons and Complaint to the Director of the State of South Carolina Department of Insurance. Pursuant to 28 U.S.C. § 1446(b), this Notice of Removal is timely filed within thirty days of first receipt by Penn Life of the initial state court pleading.

II. PLEADINGS AND NOTICE TO STATE COURT

A true and correct copy of all process, pleadings, and orders served upon Penn Life are attached as Exhibit "A" and are being filed along with this Notice of Removal. Pursuant to 28 U.S.C. § 1446(d), written notice of this removal is being served on Plaintiff, and is being filed with the clerk of court for the Charleston County Court of Common Pleas.

III. STATEMENT OF STATUTORY BASIS FOR JURISDICTION

This action is within the original jurisdiction of the U.S. District Court pursuant to 28 U.S.C. § 1332. This statute provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). As discussed in detail below, this action satisfies both statutory requirements.

IV. AMOUNT IN CONTROVERSY

The Plaintiff claims that in October of 2009, Penn Life improperly ceased paying benefits of \$2,500 per month under a disability insurance policy. (Pl.'s Compl. ¶¶ 6, 10.) Based on these allegations, the Plaintiff would have actual damages of \$2,500 per month for six months, totaling \$15,000. Additionally, the Plaintiff asserts a bad faith claim seeking punitive damages. "Punitive damages are properly considered in determining whether the amount in controversy exceeds the jurisdictional minimum." 15 James Wm. Moore, *Moore's Federal Practice* § 102.106[4], at 102-176 (3d ed. 1999); *Thompson v. Victoria Fire & Cas. Co.*, 32 F. Supp. 2d 847, 849 (D.S.C. 1999). As the U.S. Supreme Court stated in *Bell v. Preferred Life Assurance Society*, 320 U.S. 238 (1948), "[W]here both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining the jurisdictional amount." *Id.* at 240. The Plaintiff also seeks the recovery of attorneys' fees, which are allowed

under § 38-59-40 of the South Carolina Code. Attorneys' fees count toward the amount in controversy for removal purposes when they are recoverable by statute. *See Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199 (U.S. 1933).

With an award of punitive damages based on a multiplier of 3 and an award of attorneys' fees of one-third of the total damages award, the judgment would exceed \$75,000. Indeed, as explained previously by this Court, a plaintiff's "claim for punitive damages alone makes it virtually impossible to say that the claim is for less than the jurisdictional amount." *Woodward v. Newcourt Commercial Fin. Corp.*, 60 F. Supp. 2d 530, 532 (D.S.C. 1999) (Shedd, J.). For these reasons, this action satisfies the amount in controversy requirement.¹

V. CITIZENSHIP OF THE PARTIES

The Complaint alleges that the Plaintiff is a citizen and resident of Lexington County, South Carolina. (Pl.'s Compl. ¶ 1). Penn Life was at the time of the filing of the Complaint, and still is, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in the state of Florida, and, accordingly, is not a citizen of the State of South Carolina pursuant to 28 U.S.C. § 1332(c)(1). Because Penn Life is not a citizen of the State of South Carolina, there is diversity between Penn Life and the Plaintiff.

The Complaint also names insurance agent Randolph Gill as a defendant and alleges that he is a citizen and resident of Charleston County, South Carolina. (Pls.' Compl. ¶ 2). The Plaintiffs' attempted joinder of Randolph Gill in this lawsuit does not preclude diversity jurisdiction because he has been "fraudulently joined." Under the doctrine of fraudulent joinder,

¹ Penn Life denies that the Plaintiff is entitled to any recovery, and by addressing the amount in controversy herein and removing this case to federal court, Penn Life does not waive and expressly reserves all arguments regarding the Plaintiff's claimed damages.

the citizenship of Randolph Gill can be disregarded for purposes of determining the existence of diversity jurisdiction.² See, e.g., *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999).

VI. FRAUDULENT JOINDER

A. Standard for Determining Fraudulent Joinder.

“The ‘fraudulent joinder’ doctrine permits removal when a non-diverse party is (or has been) a defendant in the case.” *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). As explained by the Fourth Circuit in *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000 (4th Cir. 1990):

“Fraudulent joinder” is a term of art, it does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against the non-diverse defendant, or *in fact* no cause of action exists.

Id. at 1003 (emphasis in original). To remove an action based on fraudulent joinder, “the defendant must show that the plaintiff cannot establish a claim against the non-diverse defendant even after resolving all issues of fact and law in the plaintiff’s favor.” *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232–33 (4th Cir. 1993).

B. Fraudulent Joinder Must Be Determined from the Allegations in the Complaint as They Exist at the Time of Removal.

Whether a case is appropriate for removal based on fraudulent joinder is determined by reference to the contents of the complaint *at the time of removal*, and factual allegations or causes of action not alleged in the complaint or which might be added by way of subsequent amendment need not be considered. See *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 262 (5th Cir. 1995) (affirming denial of motion to remand, rejecting plaintiffs’ reliance on

² Randolph Gill’s citizenship can also be disregarded with respect to the requirement of 28 U.S.C. § 1441(b) that no defendant be a citizen of the state in which the action was commenced.

cause of action not asserted in complaint). Here, because the original Complaint does not set forth any viable cause of action against Randolph Gill, the Court need not look any further and can conclude that removal is proper. *See, e.g., Chamberlain v. American Tobacco Co.*, 70 F. Supp. 2d 788, 796 (N.D. Ohio 1999) (“This theory of liability was also not alleged in plaintiffs’ state court complaint; therefore, it is also not necessary for the Court to address this theory in determining whether the Ohio defendants were fraudulently joined.”).

C. The Complaint Does Not Set Forth any Viable Cause of Action Against Randolph Gill.

The Plaintiff alleges in his Complaint that in or around July 2002, he “entered into an insurance contract with the Defendants,” and identifies Randolph Gill as “the agent that sold the Plaintiff said policy.” (Pl.’s Compl. ¶ 6.) The Complaint speaks only in conclusory terms and lacks any detail about the purported activities of Mr. Gill. Nowhere in the Complaint is there any viable cause of action asserted against Randolph Gill.

The Complaint attempts to articulate claims based on (1) bad faith refusal to pay first party benefits, (2) breach of contract to procure insurance, and (3) breach of contract. None of these provide a viable claim against Randolph Gill that would defeat Penn Life’s right to remove. Each of these three claims is based on an alleged contract between Penn Life and the Plaintiff. Even the bad faith claim has as a required element the existence of an enforceable contract of insurance between the parties. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 450 S.E.2d 582, 586 (S.C. 1994) (holding claim of bad faith requires “the existence of a mutually binding contract of insurance between the plaintiff and defendant”).

Randolph Gill cannot be subject to any claim based on the breach of a policy or other contract with Penn Life because, as alleged in the Complaint, he is a mere agent of Penn Life. It is a basic tenet of law that “an agent is not contractually liable to third parties for the obligations

of his principal.” *First Citizens Bank and Trust Co. v. Strable*, 355 S.E.2d 278, 279 (S.C. Ct. App. 1987). As stated in *Green v. Industrial Life & Health Ins. Co.*, 18 S.E.2d 873 (S.C. 1942), “Where an agent enters into a contract for a known principal, while acting within his authority as such agent, he is not personally liable on the resultant contract. The liability, if any, for a breach of such contract is that of the principal alone. *Id.* at 876–77.

Nowhere in the Complaint does the Plaintiff contend that Randolph Gill was ever acting on his own behalf and not on behalf of Penn Life. Thus, any policies or contracts alleged in the Complaint could be between only the Plaintiff and Penn Life. Randolph Gill, as a mere alleged agent for Penn Life, could never be liable under any such policies or contracts. For these reasons, the Complaint fails to state a viable cause of action against Randolph Gill. This was a basis for Judge Joseph Anderson’s denial of a motion to remand in January of this year in *Sullivan v. New York Life*, where it was found that removal was proper based on fraudulent joinder because there could not be a viable claim against the insurance agent for breach of contract accompanied by a fraudulent act, or for other causes of action. A copy of Judge Anderson’s order is attached as Exhibit “B.”³

VII. JOINDER OF DEFENDANTS IN REMOVAL

The joinder of Randolph Gill in this removal is unnecessary because he has been fraudulently joined in this matter. It is well settled that fraudulently joined defendants need not join in a Notice of Removal. *See, e.g., McKinney v. Rodney C. Hunt Co.*, 464 F. Supp. 59, 62 (W.D.N.C. 1978) (stating that while “each and every defendant who can meet the jurisdictional

³ There is an additional reason why no claim has been stated for one of the Plaintiff’s causes of action—breach of contract to procure insurance. The Complaint does not specify any particular type of policy or policy terms that Randolph Gill should have procured or was requested to procure and for which he failed to obtain for the Plaintiff. Instead, the Plaintiff simply alleges in Paragraph 28 of the Complaint that “[t]he Defendants refusal to make required payments to the Plaintiff as required by the policy language amounts to a breach of contract to procure insurance.” (Pl.’s Compl. ¶ 28).

requirements of 28 U.S.C.A. § 1441 must join in a petition for removal A caveat to the general rule is that . . . defendants fraudulently joined may be disregarded”).

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/Kristen E. Horne

D. Larry Kristinik
Federal Bar No. 5744
Kristen E. Horne
Federal Bar No. 10136
1320 Main Street / 17th Floor
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

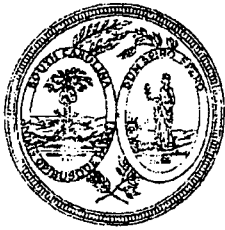
*Attorneys for Defendant Pennsylvania Life Insurance
Company*

Columbia, South Carolina

April 1, 2010

Exhibit A

(State Court Pleadings)



South Carolina
Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

MARK SANFORD
Governor

SCOTT H. RICHARDSON
Director of Insurance

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105
Telephone: (803) 737-6160

March 2, 2010

RECEIVED

MAR 15 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
PENNSYLVANIA LIFE INS CO
525 N. 12th Street
Lemoyne, PA 17043-0000

Market Conduct
Compliance

Dear Sir:

On March 2, 2010, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70 (Supp. 2003). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 15-9-270 (Supp. 2003). I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process. When replying, please refer to File Number 141245, Mike Russell v. PENNSYLVANIA LIFE INS CO, et al., 2010-CP-10-1144.

By:

Sincerely Yours,

A handwritten signature in black ink, appearing to read "Jeff Jacobs".

Jeff Jacobs
Chief Legal Counsel
(803)737-6200

Scott Richardson
Director
State of South Carolina
Department of Insurance

Attachment

CC: Nick Riley
Post Office Box 5709
West Columbia, SC 29171

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESON

Mike Russell,

Plaintiff,

vs.

Randolph Gill and Pennsylvania Life Insurance,
Company,

Defendant.

2010-CP-10-1144
CIVIL ACTION COVERSHEET

(Please Print)

Submitted By: S. Jahue Moore

Address: 1700 Sunset Boulevard

Post Office Box 5709

West Columbia, SC 29171

SC Bar #: 4063

Telephone #: 803-796-9160

Fax #: 803-791-8410

Other:

E-mail: Jake@mttlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/Med Mal (230)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Penden (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex/Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)

RECEIVED

MAR 15 2010

Market Conduct
Compliance

Submitting Party Signature: Adapt N. Ash SR. S. Jahue Date: January 27, 2010

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (8/06)

Florence, Horry, Lexington, Richland, Greenville, and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action is filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by the State;
 - g. mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

SCCA / 234 (8/06)

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Mike Russell,)
Plaintiff,)
SUMMONS

v.)
Civil Action Number:

Randolph Gill and Pennsylvania)
Life Insurance Company,)
Defendants.)

FILED
2010 FEB 10 AM 10:54
JULIE N. ARMSTRONG
CLERK OF COURT

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this matter, a copy of which is herewith served upon you, and to serve a copy of your ANSWER to said Complaint upon the subscriber at his office, 1700 Sunset Boulevard, P.O. Box 5709, West Columbia, South Carolina, 29171, within THIRTY (30) days from the service thereof, exclusive of the day of such service; and if you fail to answer the COMPLAINT within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

MOORE, TAYLOR & THOMAS, P.A.

BY: Ralph N. Moore Jr. For
S. Jahue Moore
Attorney for Plaintiff
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
January 27, 2010

RECEIVED

MAR 15 2010

Market Conduct
Compliance

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Mike Russell.)
)
Plaintiff,)
)
v.)
)
Randolph Gill and Pennsylvania)
Life Insurance Company,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

COMPLAINT

Civil Action Number:

FILED
2010 FEB 10 AM 10:54
CLERK OF COURT
JULIE J. ARSHSTROM

Plaintiff, complaining of Defendant, would respectfully show unto this Court:

FOR A FIRST CAUSE OF ACTION
(Bad Faith Refusal to First Party Benefits)

1. Plaintiff is a resident and citizen of Lexington County, South Carolina.
2. Upon information and belief the Defendant Randolph Gill, is a resident of Charleston County, South Carolina.
3. The Defendant Pennsylvania Life Insurance Company is a foreign business entity who regularly conducts and solicits business in South Carolina.
4. The Court has jurisdiction over the parties and subject matter herein, and venue is proper before this court.
5. The Defendant Randolph Gill, Agent number 173416, is an agent or broker doing business in South Carolina for Defendant, Pennsylvania Life Insurance Company,.
6. On or around July 9, 2002, the Plaintiff entered into an insurance contract with the Defendants whereby the Defendants agreed to pay the Plaintiff \$2,500.00 per month if the Plaintiff became disabled. The Defendant Randolph Gill was the agent that sold the Plaintiff said policy.

RECEIVED

MAR 15 2010

Market Conduct
Compliance

7. The Defendant Pennsylvania Life Insurance Company charged the Defendant \$130.00 per month as a premium for the policy. The Plaintiff made all of the policies required payments.

8. On or around June 18, 2008 the Plaintiff became disabled as a result of injuries he sustained from a motorcycle accident.

9. The Plaintiff notified the Defendants of his injuries and asked the Defendants to begin making payments required by the insurance policy between the parties.

10. The Defendants began making the required payments to the Plaintiff until October of 2009 when the Defendants intentionally refused to make any future payments.

11. The Defendants have acted intentionally, unreasonably, and in bad faith by refusing to make the required payments to the Plaintiff.

12. The Defendants have knowingly failed to articulate a legitimate or arguable reason for failing to make the required payments.

13. The Defendant's failure to make the required payments amounts to a breach of good faith and fair dealing.

14. The conduct complained of herein amounts to a bad faith refusal to pay a valid insurance claim.

15. As a direct and proximate result of the Defendants' bad faith refusal to pay, Plaintiff has been damaged in that it has incurred costs, fees, delays as well as other items of damage as may be discovered through the pendency of this action, all to its damage both actual and punitive.

16. Plaintiff is entitled to judgment against Defendants for actual and punitive damages.

RECEIVED

MAR 15 2010

Market Conduct
Compliance

FOR A FIRST CAUSE OF ACTION
(Breach of Contract to Procure Insurance)

17. Plaintiff hereby reasserts and realleges each and every allegation set forth above as fully as if set forth verbatim.
18. In or around July of 2002, Mike Russell was in the market to obtain a new accident insurance policy naming him as the insured.
19. In or around July of 2002, Defendants solicited Plaintiff and encouraged him to buy an accident/sickness insurance policy through Defendants.
20. At all times pertinent hereto, Defendants held out and represented themselves to be experts in the field of accident/sickness insurance.
21. Defendants discussed and advised Plaintiff regarding the procurement of the accident/sickness insurance policy to meet his needs.
22. Plaintiff discussed and advised Defendants regarding his accident/sickness insurance needs and provided to Defendants all information, documents and materials requested by them.
23. Defendants agreed and contracted to procure an accident/sickness insurance policy suitable to Plaintiff's needs.
24. Defendants filled out the accident insurance application for Plaintiff and represented to him that the policy was in accordance with his needs and that he would be fully covered by the policy.
25. Plaintiff relied upon Defendants to procure the accident/sickness insurance policy and further relied upon Defendants' representations regarding the policy.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

26. In or around July of 2002, Defendants issued Plaintiff the accident/sickness insurance policy. Plaintiff paid all premiums demanded by the policy and provided everything further requested of them by Defendants.

27. On or around June 18, 2008 the Plaintiff became disabled as a result of injuries he sustained from a motorcycle accident.

28. The Defendants refusal to make required payments to the Plaintiff as required by the policy language amounts to a breach of contract to procure insurance.

29. As a direct and proximate result of the aforementioned breach of contract to procure insurance, Plaintiff has been damaged in that he has lost the benefit of his bargain, has lost benefits pursuant to the accident insurance policy, has lost premiums paid for the accident insurance policy, has lost interest upon withheld benefits, has incurred attorney fees and costs associated with bringing this action as well as other items of damages as may be discovered through the pendency of this action

30. Plaintiff is entitled to judgment against Defendants for actual, consequential and incidental damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

31. Plaintiff hereby reasserts and realleges each and every allegation set forth above as fully as if set forth verbatim.

32. The Defendants sold and issued its policy of Accident/Sickness Insurance Protection to Mike Russell, policy number [REDACTED] 9360. The policy requires the Defendants to pay the Plaintiff \$2,500.00 if the plaintiff becomes sick or disabled.

RECEIVED

MAR 15 2010

Market Conduct
Compliance

33. At all times relevant hereto, the aforementioned policy was in full force and effect. All premium payments were current and Mike Russell complied with all conditions precedent to payment of the benefits.

34. On or around June 18, 2008 the Plaintiff became disabled and made a demand for his benefits under the policy

35. Pennsylvania Life Insurance Company has refused to make payments required by the policy.

36. The Defendant's failure to pay the benefits pursuant to the policy constitutes a breach of the insurance contract.

37. Upon information and belief, the Plaintiff is entitled to a judgment against the Plaintiff for breach of contract.

38. As a direct and proximate result of the aforementioned breach of contract, Plaintiff has been damaged in that he has lost the benefit of his bargain, has lost benefits pursuant to the accident insurance policy, has lost premiums paid for the accident insurance policy, has lost interest upon withheld benefits, has incurred attorney fees and costs associated with bringing this action as well as other items of damages as may be discovered through the pendency of this action

39. Plaintiff is entitled to judgment against Defendants for actual, consequential and incidental damages.

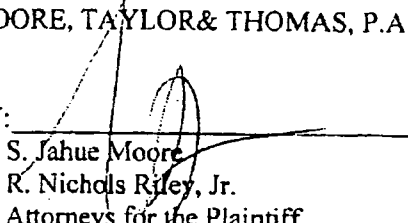
WHEREFORE, having fully complained against the Defendants herein, Plaintiff prays for an order of this Court for judgment against the Defendants for actual, consequential, and incidental damages; special damages; punitive damages; costs, interest; for attorney fees and costs; and for such other and further relief as this Court may deem just and proper.

RECEIVED

MAR 15 2010

**Market Conduct
Compliance**

MOORE, TAYLOR & THOMAS, P.A.

BY: 

S. Jahue Moore
R. Nichols Riley, Jr.
Attorneys for the Plaintiff
P. O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
January 27, 2010

RECEIVED

MAR 15 2010

Market Conduct
Compliance

Summons and complaint or
within entitled cause received at
this office and service accepted
in accordance with law
this 7 day of May 2010

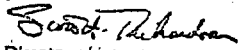

Director of Insurance
and Attorney to Accept Service
Columbia, SC

Exhibit B

(Order - Sullivan v. New York Life)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

William and Patra Sullivan,	)	c/a No. 3:09-1937-JFA
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER DENYING REMAND
	)	
Gene Sullivan and New York Life	)	
Insurance Company,	)	
	)	
Defendants.	)	
	)	

This matter is before the court on the plaintiff's motion for remand [dkt# 6]. For the following reasons, the court denies the motion to remand.

I. Factual and Procedural Background

Plaintiffs originally filed this action in the Richland County, South Carolina, Court of Common Pleas on June 1, 2009. The facts as alleged in the Complaint show that from 2003 to 2009, plaintiffs invested approximately \$250,000 with defendant New York Life Insurance Company (“New York Life”) through its agent defendant Gene Sullivan. Plaintiffs further allege that they received proof that their “money was in fact invested and was paying returns,” but state that the value of these investments is now zero. The Complaint is devoid of any allegations specifically describing any purported relationship between Gene Sullivan and the plaintiffs, but it appears from the record that Gene Sullivan is plaintiff William Sullivan’s brother.

Plaintiffs served a copy of the summons and complaint on New York Life, a foreign corporation, through service upon the South Carolina Secretary of State, in accordance with South Carolina law. The Secretary of State forwarded the summons and complaint to New York Life, which timely filed a notice of removal pursuant to 28 U.S.C. § 1446(b) on the basis of diversity of citizenship. Defendant Gene Sullivan is a South Carolina citizen, whom New York Life asserts was fraudulently joined as a defendant to defeat diversity jurisdiction. On July 28, 2009, plaintiffs filed a motion to remand, arguing that Gene Sullivan is a proper defendant against whom plaintiffs have legitimate claims.

II. Discussion

A defendant seeking removal of a state court action to federal court bears the heavy burden of establishing that a non-diverse defendant has been fraudulently joined. See Mayes v. Rapoport, 198 F.3d 457, 464 (4th Cir. 1999). In order to establish the existence of fraudulent joinder, New York Life must establish either that there is no possibility that the plaintiffs would be able to establish a cause of action against Gene Sullivan in state court; or that there has been outright fraud in the plaintiffs' pleading of jurisdictional facts. Id. The court is bound to resolve all issues of fact and law in the plaintiffs' favor. Marshall v. Manville Sales Corp., 6 F.3d 229, 232–33 (4th Cir. 1993). This standard is "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999). Further, the court is not bound by the allegations of the pleadings, but may instead "consider the

entire record, and determine the basis of joinder by any means available.” Mayes at 464 (internal citations omitted). In applying this strict standard, the court is instructed that “[a] claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted.” Marshall, 6 F.3d at 233.

Plaintiffs assert that they have set forth legitimate claims for breach of a contract accompanied by a fraudulent act, conversion, breach of fiduciary duty, and negligence against Gene Sullivan for his actions. The court considers each cause of action below:

1. Breach of Contract Accompanied by a Fraudulent Act

Breach of contract accompanied by a fraudulent act requires the following elements:

1) a breach of contract; 2) fraudulent intent relating to the breaching of the contract and not merely to its making; and 3) a fraudulent act accompanying the breach. Conner v. City of Forest Acres, 560 S.E.2d 606, 612 (S.C. 2002).

Plaintiffs argue that Gene Sullivan committed fraudulent acts when he provided false and misleading information to them. As defendants note, “where an agent enters into a contract for a known principal, while acting within his authority as such agent, he is not personally liable on the resultant contract. The liability, if any, for a breach of such contract is that of the principal alone.” Green v. Industrial Life & Health Ins. Co., 18 S.E.2d 876–77 (S.C. 1942).

In South Carolina, a plaintiff must first prove a breach of contract before there can be a recovery for breach of contract accompanied by a fraudulent act. Because the Complaint

alleges that “at all relevant times Gene Sullivan was acting as an agent of New York Life,” and does not allege that any contract existed between plaintiffs and Gene Sullivan independently of their contract with New York Life, the court finds that Gene Sullivan cannot be subject to an independent breach of contract claim.

2. Conversion

Under South Carolina law, wrongful conversion requires the following elements: 1) the unauthorized assumption and exercise of ownership, 2) over goods or personal chattels belonging to another, and 3) to the alteration of their condition or the exclusion of the owner’s rights. Powell v. A.K. Brown Motor Co., 20 S.E.2d 636, 637 (S.C. 1942). Plaintiffs assert that Gene Sullivan converted their money without their authority for his own use.

Generally, money can be the subject of conversion only when it is readily “capable of being identified.” Owens V. Andrews Bank & Trust Co., 220 S.E.2d 116, 119 (S.C. 1975). The court finds the investment proceeds at issue here are not an appropriate subject of conversion, as they are not readily capable of being identified. Plaintiffs seek return of their investment proceeds from New York Life, which is the proper subject of a breach of contract claim, not conversion.

3. Breach of a Fiduciary Duty

As to plaintiffs’ claim for breach of fiduciary duty against Gene Sullivan, the law is clear: “an agent is not contractually liable to third parties for the obligations of his principal.” First Citizens Bank and Trust Co. v. Strable, 355 S.E.2d 278, 279 (S.C. App.

Sullivan because when economic harm is at issue, the existence of a duty of care to the plaintiff cannot be presumed, especially when there are allegations of a contractual relationship. Felder v. Great American Ins. Co., 260 F. Supp. 575, 578 (D.S.C. 1966). Further, under the economic loss rule, plaintiffs are barred from asserting a tort claim on duties that arise by way of a purported contract. Stated differently, “[c]ontract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.” Sapp v. Ford Motor Co., --- S.E.2d ----, 2009 WL 4893648 (S.C. 2009). Therefore, plaintiffs cannot maintain an action in tort for what they also seek through a breach of contract claim.

III. Conclusion

A review of the Complaint in this case reveals that the alleged contract between the plaintiffs and defendant New York Life and the alleged failure by New York Life to perform that contract properly is the gravamen of the action. Thus, the nature of the action is one ex contractu and not otherwise altered by the allegations of the Complaint with respect to the alleged negligence, conversion, fraud, or breach of fiduciary duty on the part of Gene Sullivan. See Shaw v. Great Atlantic & Pacific Tea Co., 1 S.E.2d 499, 500 (S.C. 1939).

As the South Carolina courts have instructed, “While the motive prompting the breach and alleged acts accompanying same are characterized as ‘wicked,’ ‘unlawful,’ ‘fraudulent,’ etc., words sounding in tort, ‘recriminatory words sounding in tort, however numerous or

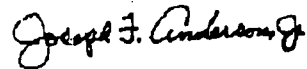
however oft-repeated, cannot change the structural essence of a cause of action.” Green v. Industrial Life & Health Ins. Co. et al., 18 S.E.2d 873, 876 (S.C. 1942)(internal citations omitted).

It appears to the court that the only reason Gene Sullivan was named as a party in this case was to attempt to prevent removal of this case to federal court. See, e.g., Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574 (D.S.C. 2003). Having determined that there is no possibility that the plaintiffs would be able to establish a cause of action against their brother Gene Sullivan in state court, the court finds that the motion to remand is not supported, and therefore, denies the same. The court expresses no opinion as to the availability of a cause of action by New York Life against Gene Sullivan.

A separate scheduling order will issue governing the remainder of this case.

IT IS SO ORDERED.

January 19, 2010
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Mike Russell,	)	Civil Action No. 2:10-cv-00816
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ANSWER
Randolph Gill and Pennsylvania Life	)	
Insurance Company,	)	
	)	
Defendants.	)	
	)	

The Defendant, Pennsylvania Life Insurance Company (hereinafter "Penn Life"), by and through its undersigned counsel, hereby responds to the Plaintiff's Complaint as follows:

GENERAL DENIAL

Each and every allegation of the Complaint is expressly denied unless specifically admitted, qualified, or explained herein.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

1. Penn Life admits the allegations of Paragraph 1.
2. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 2, and, therefore, denies same and demands strict proof thereof.
3. Responding to Paragraph 3, Penn Life states that it is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in the state of Florida and that it is authorized to engage in the business of insurance in the State of South Carolina. Penn Life denies any allegations in Paragraph 3 inconsistent with the above.

4. Responding to Paragraph 4, Penn Life states that it does not contest the jurisdiction of a South Carolina court over this action and further states that the action has been properly removed to the U.S. District Court for the District of South Carolina. Penn Life further responds to Paragraph 4 by stating that this action should be assigned to the Columbia Division.

5. Penn Life admits the allegations of Paragraph 5 insofar as they apply to the period of time during which the Plaintiff applied for the subject policy.

6. Penn Life admits only so much of the allegations in Paragraph 6 as allege that Randolph Gill was the agent that completed the application with the Plaintiff for the subject insurance policy and that it issued said policy to the Plaintiff. Penn Life craves reference to the terms of the subject policy and denies any allegations in Paragraph 6 inconsistent with the policy terms.

7. Penn Life admits the allegations in Paragraph 7.

8. Penn Life admits only so much of the allegations in Paragraph 8 as allege that, on or around June 18, 2008, the Plaintiff was injured in a motorcycle wreck.

9. Penn Life admits the allegations in Paragraph 9 insofar as they apply to Penn Life.

10. Penn Life denies the allegations in Paragraph 10.

11. Penn Life denies the allegations in Paragraph 11.

12. Penn Life denies the allegations in Paragraph 12.

13. Penn Life denies the allegations in Paragraph 13.

14. Penn Life denies the allegations in Paragraph 14.

15. Penn Life denies the allegations in Paragraph 15.

16. Penn Life denies the allegations in Paragraph 16.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION
(Identified as a second "First Cause of Action")**

17. Responding to the allegations in Paragraph 17, Penn Life realleges and incorporates by reference its responses to the allegations in the preceding paragraphs of the Complaint.

18. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 18, and, therefore, denies same and demands strict proof thereof.

19. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 19 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

20. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 20 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

21. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 21 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

22. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 22 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

23. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 23 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

24. Penn Life admits only so much of the allegations in Paragraph 24 as allege that the Plaintiff completed an application for the subject insurance policy. Penn Life is without sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 24 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

25. Penn Life is without sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 25, and, therefore, denies same and demands strict proof thereof.

26. Penn Life admits only so much of the allegations in Paragraph 26 as allege that the subject policy was issued in 2002 and that the Plaintiff paid the premiums required under the policy.

27. Penn Life admits only so much of the allegations in Paragraph 27 as allege that the Plaintiff was injured on or around June 18, 2008 in a motorcycle wreck.

28. Penn Life denies the allegations in Paragraph 28.

29. Penn Life denies the allegations in Paragraph 29.

30. Penn Life denies the allegations in Paragraph 30.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

31. Responding to the allegations in Paragraph 31, Penn Life realleges and incorporates by reference its responses to the allegations in the preceding paragraphs of the Complaint.

32. Penn Life admits only so much of the allegations in Paragraph 32 as allege that Penn Life issued the subject insurance policy to the Plaintiff. Penn Life craves reference to the

terms of the subject policy and denies any allegations in Paragraph 32 inconsistent with the policy terms.

33. Penn Life admits only so much of the allegations in Paragraph 33 as allege that the policy was in full force and effect at the time of the Plaintiff's motorcycle wreck and that the Plaintiff had made the required premium payments.

34. Penn Life admits only so much of the allegations in Paragraph 34 as allege that, on or about June 18, 2008, the Plaintiff was injured in a motorcycle wreck and that he subsequently submitted a claim to Penn Life requesting payment of policy benefits.

35. Penn Life denies the allegations in Paragraph 35.

36. Penn Life denies the allegations in Paragraph 36.

37. Penn Life denies the allegations in Paragraph 37.

38. Penn Life denies the allegations in Paragraph 38.

39. Penn Life denies the allegations in Paragraph 39.

**FOR A FIRST DEFENSE
TO THE PRAYER FOR RELIEF**

40. Penn Life denies the allegations in the paragraph at the end of the Complaint beginning with the word "WHEREFORE."

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

41. The Complaint fails to state facts sufficient to constitute a cause of action and, therefore, must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**FOR A THIRD DEFENSE
(Contract Terms and Conditions)**

42. Penn Life incorporates the terms, provisions, conditions, exclusions, exceptions, and limitations set forth in the Disability Insurance Contract between Penn Life and Mike Russell, dated July 30, 2002, and assigned Policy No. [REDACTED] 9360.

**FOR A FOURTH DEFENSE
(Intoxication Exclusion)**

43. Penn Life would show that there is no obligation to pay benefits under the subject insurance policy because of the application of the intoxication exclusion within said policy.

**FOR A FIFTH DEFENSE
(No Denial of Claim)**

44. Penn Life would show that it has made all payments to the Plaintiff for benefits due under the subject insurance policy, and, therefore, there has been no denial of a claim upon which the Plaintiff can base a claim for bad faith refusal to pay an insurance claim.

**FOR A SIXTH DEFENSE
(Failure of Condition Precedent)**

45. Penn Life would show that certain conditions precedent to its obligations under the subject insurance policy did not occur or did not occur in a timely manner.

**FOR A SEVENTH DEFENSE
(Performance)**

46. Penn Life would show that it has performed its obligations under the subject insurance policy.

**FOR AN EIGHTH DEFENSE
(Unconstitutionality of Punitive Damages)**

47. An award of punitive damages violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. any award of punitive damages based upon the wealth of Penn Life violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of Penn Life;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of Penn Life;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates Penn Life's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, Penn Life lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. the Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Penn Life.

WHEREFORE, having fully answered the Complaint, Penn Life prays that the Complaint be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/Kristen E. Horne

D. Larry Kristinik
Federal Bar No. 5744
Kristen E. Horne
Federal Bar No. 10136
1320 Main Street / 17th Floor
Post Office Box 11070 (29211)
Columbia, SC 29201
(803) 799-2000

*Attorneys for Defendant Pennsylvania Life Insurance
Company*

Columbia, South Carolina

April 15, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Mike Russell

Plaintiff

VS.

Randolph Gill and Pennsylvania
Life Insurance Company

Defendants

Case Number: 2:10-cv-00816-MBS

**DEFENDANT RANDOLPH GILL'S
ANSWER TO PLAINTIFF'S COMPLAINT
(Jury Trial Demanded)**

The Defendant, Randolph Gill, answering the Plaintiff's Complaint herein would respectfully show unto the court the following:

FOR A FIRST DEFENSE **(General Denial)**

1. The Defendant denies each and every allegation of the Plaintiff's Complaint not herein specifically admitted.
2. Paragraph 1 is admitted.
3. Paragraph 2 is denied.
4. As to paragraph 3, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraph 3 and therefore denies the same and demands strict proof thereof.

5. As to paragraph 4, the Defendant admits that the Court has jurisdiction over the parties but denies the remaining allegations of paragraph 4 and demands strict proof thereof.

6. As to paragraph 5, the Defendant admits that he was an insurance agent at the time the policy in question was sold and that he did have a valid insurance agent number and that he did sell a policy to the Plaintiff for Pennsylvania Life Insurance Company but was operating as an independent agent during that timeframe and for that reason but lacks sufficient information to admit the remaining allegations of paragraph 5 and demands strict proof thereof.

7. As to paragraph 6, the Defendant would crave reference to the contract between the Plaintiff and Pennsylvania Life Insurance Company and denies any and all allegations inconsistent therewith. As to the allegation that the Defendant Gill was the agent that sold the policy, the Defendant Gill admits that he did sell a policy to the Plaintiff but is not sure that he policy in question is the same policy and therefore denies the balance of paragraph 6 and demands strict proof thereof.

8. As to paragraph 7, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraph 7 and therefore denies the same and demands strict proof thereof.

9. As to paragraphs 8 through 13, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraphs 8 through 13 and therefore denies the same and demands strict proof thereof.

10. Paragraphs 14 through 16 are denied.

11. As to paragraph 17, the Defendant repeats and reiterates the defenses raised in paragraphs 1 through 10 above as fully as if set forth verbatim herein.

12. As to paragraph 18, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraph 18 and therefore denies the same and demands strict proof thereof.

13. As to paragraph 19, the Defendant admits that he did have contact with the Plaintiff and that there were discussions and the sale of a policy. However, the Defendant does not know that the policy in questions was actually sold by this Defendant and therefore denies the allegations of paragraph 19 inconsistent with his prior representations.

14. As to paragraph 20, the Defendant craves reference to the contract between the parties and denies any and all allegations inconsistent therewith.

15. As to paragraphs 21 and 22, the Defendant craves reference to the contract between the parties and denies each and every allegation inconsistent therewith.

16. As to paragraphs 23 and 24, the Defendant craves reference to the contract between the parties and denies each and every allegation inconsistent therewith.

17. Paragraph 25 is denied.

18. As to paragraph 26, the Defendant craves reference to the contract between the parties and denies each and every allegation inconsistent therewith and the Defendant lacks sufficient knowledge to form an opinion as to whether or not the Plaintiff met all the conditions presented for the coverage to be in force and effect.

19. As to paragraphs 27 and 28, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraphs 27 and 28 and therefore denies the same and demands strict proof thereof.

20. Paragraphs 29 and 30 are denied.

21. As to paragraph 31, the Defendant repeats and reiterates the defenses raised in paragraphs 1 through 20 above as fully as if set forth verbatim herein.

22. As to paragraph 32, the Defendant craves reference to the contract between the parties and denies each and every allegation inconsistent therewith.

23. As to paragraphs 33 through 37, the Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraphs 33 through 37 and therefore denies the same and demands strict proof thereof.

24. Paragraphs 38 and 39 are denied.

FOR A SECOND DEFENSE
(Improper Venue)

25. The Defendant would show, upon information and belief that the Defendant Gill is a citizen and resident of the County of Lexington, State of South Carolina and that the venue should be transferred to the Lexington County Court of Common Pleas.

FOR A THIRD DEFENSE
(Independent Contractor)

26. The Defendant Gill will show, upon information and belief that he was an independent contractor of Pennsylvania Life Insurance Company and for that reason has no liability for any and all acts and omissions complained of by that of Pennsylvania Life

Insurance Company and for that reason, any and all causes of action against the Defendant Gill should be dismissed with prejudice.

FOR A FOURTH DEFENSE
(Acts and/or Omissions of Others)

27. The Defendant would show, upon information and belief that any acts and/or omissions regarding the claims practices handled by Pennsylvania Life Insurance Company are due solely to the acts and/or omissions of Pennsylvania Life Insurance Company and/or any agents and/or employees of Pennsylvania Life Insurance Company and are not the responsibility of Randolph Gill and for that reason, the Plaintiff's Complaint should be dismissed against Randolph Gill.

FOR A FIFTH DEFENSE
(Punitive Damages)

28. The Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts, the self-incrimination clause is being violated because the Defendant can be compelled to give testimony against himself in a penalty situation such as punitive damages, the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature, Plaintiff's claim for punitive damages violates the Defendant's right to access to the courts as guaranteed by the Seventh and Fourteenth Amendments because

the threat of an award of punitive damages chills the Defendant's exercise of that right, the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, and the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards and, therefore, the Plaintiff's claim for punitive damages should be dismissed.

WHEREFORE, having fully answered, this Defendant prays that the Plaintiff's Complaint be dismissed with costs.

BROWN & BREHMER

By: S/Karl S. Brehmer
Karl S. Brehmer
Federal Bar No.: 5006
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorneys for Defendant Gill

June 3, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Mike Russell,	)	Civil Action No. 2:10-cv-00816
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED ANSWER AND
	)	COUNTERCLAIM OF DEFENDANT
Randolph Gill and Pennsylvania Life	)	PENNSYLVANIA LIFE INSURANCE
Insurance Company,	)	COMPANY
	)	
Defendants.	)	
	)	

The Defendant, Pennsylvania Life Insurance Company (hereinafter "Penn Life"), by and through its undersigned counsel, hereby submits its Amended Answer and Counterclaim to the Plaintiff's Complaint and states as follows:

GENERAL DENIAL

Each and every allegation of the Complaint is expressly denied unless specifically admitted, qualified, or explained herein.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

1. Penn Life admits the allegations of Paragraph 1.
2. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 2, and, therefore, denies same and demands strict proof thereof.
3. Responding to Paragraph 3, Penn Life states that it is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in the state of Florida and that it is authorized to engage in the business of insurance in

the State of South Carolina. Penn Life denies any allegations in Paragraph 3 inconsistent with the above.

4. Responding to Paragraph 4, Penn Life states that it does not contest the jurisdiction of a South Carolina court over this action and further states that the action has been properly removed to the U.S. District Court for the District of South Carolina. Penn Life further responds to Paragraph 4 by stating that this action should be assigned to the Columbia Division.

5. Penn Life admits the allegations of Paragraph 5 insofar as they apply to the period of time during which the Plaintiff applied for the subject policy.

6. Penn Life admits only so much of the allegations in Paragraph 6 as allege that Randolph Gill was the agent that completed the application with the Plaintiff for the subject insurance policy and that it issued said policy to the Plaintiff. Penn Life craves reference to the terms of the subject policy and denies any allegations in Paragraph 6 inconsistent with the policy terms.

7. Penn Life admits the allegations in Paragraph 7.

8. Penn Life admits only so much of the allegations in Paragraph 8 as allege that, on or around June 18, 2008, the Plaintiff was injured in a motorcycle wreck.

9. Penn Life admits the allegations in Paragraph 9 insofar as they apply to Penn Life.

10. Penn Life denies the allegations in Paragraph 10.

11. Penn Life denies the allegations in Paragraph 11.

12. Penn Life denies the allegations in Paragraph 12.

13. Penn Life denies the allegations in Paragraph 13.

14. Penn Life denies the allegations in Paragraph 14.

15. Penn Life denies the allegations in Paragraph 15.

16. Penn Life denies the allegations in Paragraph 16.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION
(Identified as a second "First Cause of Action")**

17. Responding to the allegations in Paragraph 17, Penn Life realleges and incorporates by reference its responses to the allegations in the preceding paragraphs of the Complaint.

18. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 18, and, therefore, denies same and demands strict proof thereof.

19. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 19 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

20. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 20 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

21. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 21 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

22. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 22 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

23. Penn Life is without sufficient knowledge or information to admit or deny the allegations in Paragraph 23 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

24. Penn Life admits only so much of the allegations in Paragraph 24 as allege that the Plaintiff completed an application for the subject insurance policy. Penn Life is without sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 24 as relate to the substance of any conversations between the Plaintiff and Randolph Gill, and, therefore, denies same and demands strict proof thereof.

25. Penn Life is without sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 25, and, therefore, denies same and demands strict proof thereof.

26. Penn Life admits only so much of the allegations in Paragraph 26 as allege that the subject policy was issued in 2002 and that the Plaintiff paid the premiums required under the policy.

27. Penn Life admits only so much of the allegations in Paragraph 27 as allege that the Plaintiff was injured on or around June 18, 2008 in a motorcycle wreck.

28. Penn Life denies the allegations in Paragraph 28.

29. Penn Life denies the allegations in Paragraph 29.

30. Penn Life denies the allegations in Paragraph 30.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

31. Responding to the allegations in Paragraph 31, Penn Life realleges and incorporates by reference its responses to the allegations in the preceding paragraphs of the Complaint.

32. Penn Life admits only so much of the allegations in Paragraph 32 as allege that Penn Life issued the subject insurance policy to the Plaintiff. Penn Life craves reference to the

terms of the subject policy and denies any allegations in Paragraph 32 inconsistent with the policy terms.

33. Penn Life admits only so much of the allegations in Paragraph 33 as allege that the policy was in full force and effect at the time of the Plaintiff's motorcycle wreck and that the Plaintiff had made the required premium payments.

34. Penn Life admits only so much of the allegations in Paragraph 34 as allege that, on or about June 18, 2008, the Plaintiff was injured in a motorcycle wreck and that he subsequently submitted a claim to Penn Life requesting payment of policy benefits.

35. Penn Life denies the allegations in Paragraph 35.

36. Penn Life denies the allegations in Paragraph 36.

37. Penn Life denies the allegations in Paragraph 37.

38. Penn Life denies the allegations in Paragraph 38.

39. Penn Life denies the allegations in Paragraph 39.

**FOR A FIRST DEFENSE
TO THE PRAYER FOR RELIEF**

40. Penn Life denies the allegations in the paragraph at the end of the Complaint beginning with the word "WHEREFORE."

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

41. The Complaint fails to state facts sufficient to constitute a cause of action and, therefore, must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**FOR A THIRD DEFENSE
(Contract Terms and Conditions)**

42. Penn Life incorporates the terms, provisions, conditions, exclusions, exceptions, and limitations set forth in the Disability Insurance Contract between Penn Life and Mike Russell assigned Policy No. [REDACTED] 9360.

**FOR A FOURTH DEFENSE
(Intoxication Exclusion)**

43. Penn Life would show that there is no obligation to pay benefits under the subject insurance policy because of the application of the intoxication exclusion within said policy.

**FOR A FIFTH DEFENSE
(No Denial of Claim)**

44. Penn Life would show that it has made all payments to the Plaintiff for benefits due under the subject insurance policy, and, therefore, there has been no denial of a claim upon which the Plaintiff can base a claim for bad faith refusal to pay an insurance claim.

**FOR A SIXTH DEFENSE
(Failure of Condition Precedent)**

45. Penn Life would show that certain conditions precedent to its obligations under the subject insurance policy did not occur or did not occur in a timely manner.

**FOR A SEVENTH DEFENSE
(Performance)**

46. Penn Life would show that it has performed its obligations under the subject insurance policy.

**FOR AN EIGHTH DEFENSE
(Unconstitutionality of Punitive Damages)**

47. An award of punitive damages violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. any award of punitive damages based upon the wealth of Penn Life violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of Penn Life;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of Penn Life;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates Penn Life's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, Penn Life lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. the Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Penn Life.

FOR A NINTH DEFENSE BY WAY OF COUNTERCLAIM

NOW COMES Penn Life, asserting its counterclaim against the Plaintiff, Mike Russell, and would respectfully show this Honorable Court the following:

PARTIES

48. Upon information and belief, the Plaintiff is a resident and citizen of Lexington County, South Carolina.

49. Penn Life is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in the state of Florida and is authorized to engage in the business of insurance in the State of South Carolina.

JURISDICTION AND VENUE

50. This counterclaim is brought pursuant to 28 U.S.C. § 2201 to obtain a judicial declaration of rights and/or legal relations with respect to an actual controversy between Penn Life and the Plaintiff as described herein.

51. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, in that there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.

52. This case has been properly removed to this Court and venue is appropriate pursuant to 28 U.S.C. § 1391(a).

FACTUAL ALLEGATIONS

53. The Plaintiff, Mike Russell, is the named insured for certificate number [REDACTED] 9360 issued by Penn Life (hereinafter the "Policy").

54. Upon information and belief, the Plaintiff was involved in a wreck with another vehicle while driving a motorcycle on or about June 18, 2008.

55. Thereafter, Penn Life received a written claim from the Plaintiff seeking benefits under the Policy.

56. Upon the receipt of evidence of total disability and satisfaction of other conditions and requirements under the Policy, Penn Life began making benefit payments to the Plaintiff.

57. During the following year, Penn Life became aware that, at the time of the wreck, the Plaintiff had an elevated blood alcohol level measured to be 0.232, or nearly three times the legal limit set forth in § 56-5-2933 of the South Carolina Code. The Plaintiff did not reveal this information to Penn Life at the time he submitted his claim for benefits.

58. Upon further investigation, Penn Life has learned that the Plaintiff was charged with the criminal offense of driving under the influence of alcohol in relation to the wreck that occurred on June 18, 2008.

59. There is evidence showing that the Plaintiff was operating his motorcycle while intoxicated and that his intoxicated condition was either the cause or a contributing cause of the wreck that led to the disability for which the Plaintiff claims benefits under the Policy.

60. The Policy contains an intoxication exclusion, which provides as follows: **“INTOXICANTS AND NARCOTICS—**We will not be liable for any loss which results from being: (1) intoxicated; or (2) under the influence of any narcotic unless taken on the advice of a Physician.”

61. The Plaintiff was advised in writing by Penn Life that benefit payments under the Policy were being made under a reservation of rights.

**FOR A FIRST COUNTERCLAIM
(Declaratory Judgment)**

62. The allegations of Paragraphs 1–61 are incorporated in this counterclaim by reference as if repeated verbatim herein.

63. The Plaintiff was intoxicated at the time of the wreck on June 18, 2008, which led to the disability for which he claims benefits under the Policy.

64. The aforesaid intoxication was the cause or a contributing cause of the wreck and, therefore, was a cause or contributing cause of the loss for which the Plaintiff claims benefits under the Policy.

65. The Policy contains an exclusion providing that Penn Life is not liable for any loss which results from the Plaintiff being intoxicated.

66. The intoxication exclusion applies to the loss for which the Plaintiff claims benefits under the Policy, and, therefore, the loss is not covered under the Policy and the Plaintiff is not entitled to Policy benefits.

67. Penn Life seeks a declaration from this Court that the intoxication exclusion is applicable to the subject loss, that the loss is not covered under the Policy, and that the Plaintiff is not entitled to Policy benefits.

WHEREFORE, having fully answered the Complaint, and having asserted its counterclaim against the Plaintiff, Penn Life prays that the Complaint be dismissed, with prejudice; that Penn Life be granted judgment in its favor on its counterclaim for declaratory judgment; and that Penn Life be awarded such other and further relief as the Court may deem just and proper.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/D. Larry Kristinik

D. Larry Kristinik
Federal Bar No. 5744
Kristen E. Horne
Federal Bar No. 10136
1320 Main Street / 17th Floor
Post Office Box 11070 (29201)
Columbia, SC 29201
(803) 799-2000

*Attorneys for Defendant Pennsylvania Life Insurance
Company*

Columbia, South Carolina

June 29, 2010

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON THE ELEVENTH JUDICIAL CIRCUIT

Mike Russell,)
)
PLAINTIFF,)
)
-VS-)
)
Randolph Gill and Pennsylvania) TRANSCRIPT OF RECORD
Life Insurance Company, 2011-CP-32-04981
)
DEFENDANTS.)

December 13, 2012
Lexington, South Carolina

B E F O R E:

THE HONORABLE EUGENE C. GRIFFITH, JR., Presiding Judge

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

S. JAHUE MOORE, ESQUIRE
Attorney for the Plaintiff

D. LARRY KRISTINIK, ESQUIRE
Attorney for the Defendants

*Janice D. Katz
Court Reporter
Post office Box 192
Columbia, South Carolina 29202*

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>

RANDOLPH GILL

Mr. Moore	10		34	

Mr. Kristinik		24		36

JOHN MACKIN

Mr. Moore	38			

E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
P-1 (A)	Exhibit List		10
P-1 (B)	Depositions (5) and Exhibits		10
P-2	Affidavit of Mike Russell		10
P-3	Penn Life's claim file		10
P-4	Penn Life's application/underwriting file		10
P-5	Receipt (Carolina Wings 6-18-08)		10
P-6	Disability Policy Schedules and riders		10
P-7	Letter (William Wehner)		10
P-8	Credit card statement		10
P-9	SC DMV documents		10
P-10	SLED documents		10
P-11	Lexington Medical Center records		10
P-12	Lexington Medical Center lab records		10
P-13	CD (Magistrate court hearing 5-15-09)		10
P-14	Unofficial transcript (5-15 Magistrate Hrg)		10
P-15	Payment report		10
P-16	Chart of benefit payments & Pick List		10
P-17	Insurance brochure		13
P-18	SC Code 38-71-30 (copy)		46
P-19	Policy and application		49

1 THE COURT: I understand one of the parties was
2 either dismissed or segregated out. Tell me what we've
3 got left, Mr. Moore.

4 MR. MOORE: Your Honor, this simply is a claim --
5 The only defendant is Pennsylvania Life Insurance
6 Company. We stipulated to let the agent, Mr. Gill, out.
7 He's here to testify if we want him, and that's about it.
8 So it's a case involving, what we believe to be, a
9 fraudulent and bad-faith refusal to pay in regard to a
10 disability policy. The payments are being made as we
11 speak on a monthly basis. We have a situation where the
12 insurance carrier wrote a policy, took the premiums and
13 now claims that there's an exclusion which applies as to
14 the fee coverage. Our position is if there is any such
15 exclusion, we were never given the policy. We've never
16 been delivered any policy of insurance anywhere, anytime,
17 anyhow. The only thing we were given were the
18 application and some solicitation documents which my
19 client understood to be his coverages. At some later
20 date after the coverage was acknowledge, they came in and
21 decided that they didn't know it. At present, they
22 apparently take the position -- Even though they're
23 making the monthly payments, they're taking the position
24 that my client is not disabled. They apparently take the
25 position that there's an alcohol exclusion in the policy.

1 We've never seen it until this last couple of weeks which
2 excludes the coverage, which it doesn't, and we're here
3 simply seeking our coverages pursuant to the policy.

4 THE COURT: They're paying the coverage right now?

5 MR. MOORE: They are paying that. Yes, sir.

6 THE COURT: Under protest?

7 MR. MOORE: Well, they paid ---

8 MR. KRISTINIK: Under Reservation of Rights, your
9 Honor.

10 THE COURT: All right.

11 MR. MOORE: They started paying and then they came
12 in and reserved their rights, so the question of whether
13 they're reserving rights or not is at issue, but they
14 claim they reserved their rights, yes, sir.

15 THE COURT: So, Mr. Kristinik, you are in agreement
16 that the issue is whether or not the policy requires your
17 continued payment?

18 MR. KRISTINIK: Well, it's a little bit more to it
19 than that. Of course, we heard Mr. Moore's version. I
20 have one question for Mr. Moore: Is the dismissal of Mr.
21 Gill with prejudice because I haven't seen anything in
22 writing?

23 MR. MOORE: Your Honor, he's dismissed without
24 prejudice, but it doesn't matter. The statute of -- I
25 mean, he's dismissed from the action.

1 MR. KRISTINIK: So you concede the Statute of
2 Limitations would prevent you from bringing any further
3 claims against him?

4 MR. MOORE: I wouldn't concede that, but I would
5 concede that he's dismissed as a party to this action.

6 THE COURT: Mr. Bremer represented him?

7 MR. KRISTINIK: Yes.

8 MR. MOORE: Correct.

9 THE COURT: Let me hear your side?

10 MR. KRISTINIK: Your Honor, we have paid all
11 payments including a payment for last month. About a
12 year and a half into the claim, the company discovered
13 that Mr. Russell had been consuming alcohol the night of
14 the accident. That information had not previously been
15 provided to the company. Once it discovered it, it
16 started looking into it, and shortly thereafter, Mr.
17 Moore filed this lawsuit. We counterclaimed for
18 declaratory judgment to enforce intoxication exclusion.
19 We think that it is a very convenient excuse that they
20 take the position that the policy was never delivered,
21 but we have a company witness here who will establish
22 exactly what the policy was, that it did have an
23 intoxication exclusion like every policy ever issued
24 using language approved by the state of South Carolina,
25 so we will establish the policy, that it had the

1 exclusion. We will establish that Ms. Russell was on
2 notice of that. We will establish that we have all
3 payments. Then, we will get into our evidence regarding
4 what actually happened that night, and you'll see why
5 they want to try to avoid the intoxication exclusions
6 because the evidence will show a .232 blood alcohol level
7 that night.

8 There are a couple of housekeeping matters. There
9 are two motions pending before the Court at this point.
10 One is our Motion for Summary Judgment, which we filed
11 over a year ago, and in another county before the case
12 was transferred to Lexington County.

13 THE COURT: Gill made that request to transfer it to
14 Lexington, so it's up here on his request, and he's out.
15 Do y'all want to leave it here, or do you want to go back
16 to Charleston?

17 MR. MOORE: We're fine right now.

18 MR. KRISTINIK: We need to dispose of this case
19 since it's been around for a while.

20 I would propose that we withdraw our Motion for
21 Summary Judgment without prejudice. We're all here;
22 we're ready to present the evidence.

23 THE COURT: Just as easy to go ahead and get it
24 done.

25 MR. KRISTINIK: It's just as easy to go ahead and

1 put up the evidence.

2 Then, there also is a Motion to Amend the Complaint
3 filed last week by the plaintiff adding several
4 additional causes of action. They did not consult with
5 me in advance. I really don't know what the basis is for
6 the claims. Maybe they could explain it to the Court,
7 and then I could make a decision whether or not to
8 consent to that.

9 THE COURT: So what causes of action are pending
10 right now, Mr. Moore?

11 MR. MOORE: We're happy, your Honor, with the
12 pleadings. They did stop making the payments for a
13 period. The bad-faith failure to pay, Declaratory
14 Judgment, Breach of Contract basically is what's pending.

15 THE COURT: Is that what you have notice of, those
16 three?

17 MR. KRISTINIK: Yes, your Honor. Those three are in
18 the original complaint, and we're fine going forward with
19 the three causes of action in the original complaint.

20 THE COURT: All right. That's what we're going
21 forward with.

22 Okay. Mr. Moore, are you ready?

23 MR. MOORE: We're ready, your Honor.

24 THE COURT: Call your witness.

25 MR. MOORE: Your Honor, Mr. Kristinik, has asked to

1 place a number of documents into evidence. If we might
2 go ahead and place those documents into evidence so that
3 we can chat about them as we move along.

4 THE COURT: Sure. Do y'all agree to have them
5 marked?

6 MR. MOORE: Yes. If he would go ahead and place his
7 documents into evidence, we would stipulate those into
8 evidence, and I have no problem with any of those.

9 MR. KRISTINIK: I don't have them. I'm just going
10 to work through the documents one at a time with the
11 witnesses. Y'all never signed the stipulation.

12 MR. MOORE: This is the way the case has been the
13 whole time. They asked us if we would stipulate
14 documents into evidence. We basically said, yes, but now
15 they ---

16 MR. KRISTINIK: We asked them three days ago ---

17 MR. MOORE: Now, they apparently say they won't put
18 the documents in evidence. If he wants me to object to
19 the documents, fine. We would agree that we put the
20 documents in evidence. There's no reason for us to be
21 signing these fancy stipulations and so forth. We had
22 consented to place the documents into evidence.

23 MR. KRISTINIK: I'm not going to object to any of
24 his documents.

25 MR. MOORE: I'd like to place all the documents that

1 he provided to us and that he asked me to agree to, I'd
2 like to move them into evidence in my case.

3 MR. KRISTINIK: I consent.

4 THE COURT: Okay. Have y'all got them marked yet?
5 How many is it?

6 MR. MOORE: It's about 16.

7 THE COURT: That notebook?

8 MR. MOORE: Yes, sir.

9 THE COURT: Why don't we call them Exhibits 1
10 through 16. Let the court reporter mark them so she
11 knows what they are. Then, y'all refer to them as
12 Plaintiff's 1 through 16.

13 MR. MOORE: That would be fine, your Honor.

14 MR. KRISTINIK: Yes, your Honor. Then, we would
15 have yet our own documents, defendant's, where we've
16 taken subsets of that so that we can compress it.

17 THE COURT: Okay. Let's take a break and have those
18 marked.

19 (RECEIVED IN EVIDENCE AND
20 MARKED PLAINTIFF'S EXHIBITS 1(A) AND (B) THROUGH 16.)

21 MR. MOORE: We'd call Randolph Gill.

22 RANDOLPH GILL, BEING FIRST DULY
23 SWORN, TESTIFIED AS FOLLOWS:

24 DIRECT EXAMINATION BY MR. MOORE:

25 Q What is your name?

1 A Randolph Gill.

2 Q Mr. Gill, I believe that until recently you were one
3 of the defendants in this action; is that correct?

4 A Yes, sir.

5 Q At any point in time, did you ever work for the
6 defendant insurance company in this case?

7 A Yes.

8 Q What was your job?

9 A Insurance sales.

10 Q What sort of insurance were you selling?

11 A Disability insurance.

12 Q It was also accident insurance; is that correct?

13 A Yes.

14 Q As a matter of fact, the Policy of Insurance is a
15 disability policy related to accidents in this case; is
16 that right?

17 A Yes, sir.

18 Q So this would basically be an accident and
19 disability policy?

20 MR. KRISTINIK: Your Honor, I'm okay with some
21 leading questions to speed it up, but this is on his
22 testimony for Mr. Moore.

23 THE COURT: Okay. Get through the preliminary
24 stuff. Don't lead him on the ---

25 Q Would this policy be an accident and disability

1 policy?

2 A Yes, sir.

3 Q Now, the policy that was originally sold to my
4 client would have been sold before you began dealing with
5 him, correct?

6 A That's correct.

7 Q What did you actually sell to the plaintiff in this
8 case?

9 A It was an increase -- As far as I remember, he
10 already had a policy. I went to visit him because the
11 company had a new increased rate to offer to people who
12 already had policies, so I would go visit those people,
13 and if they wanted to increase, then I would do that.

14 Q Now to the best of your knowledge, did you ever
15 deliver to my client the original policy that he bought
16 from this insurance carrier defendant?

17 A The original policy?

18 Q Yes.

19 A I wasn't involved in that, no?

20 Q To your knowledge, do you have any knowledge of
21 anyone ever delivering to Mike an actual Policy of
22 Insurance?

23 A I really don't remember that.

24 Q Now, in 2002, you basically sold him what?

25 A As far as I can remember, the number was -- It was

1 \$2,500 if they were out of work, \$2,500 per month.

2 Q What you mean by that is you sold him additional
3 coverage?

4 A I guess that's the way it was worded because he
5 already had \$2,000 and he increased it to \$2,500 as far
6 as I remember.

7 Q So then there would have been some sort of a
8 worksheet of increasing it from \$2,500 to \$500; is that
9 right? [sic]

10 A That's right.

11 Q Then, there would have been something that he would
12 have actually been given by you. Does this document
13 appear to be what you actually did give him in 2002?

14 A It appears so. Got my name and number right there
15 on it, my writing. Yes, sir.

16 MR. MOORE: We would like to offer this into
17 evidence.

18 THE COURT: What's the number?

19 COURT REPORTER: Seventeen (17).

20 THE COURT: Without objection, 17.

21 MR. KRISTINIK: No objection.

22 (RECEIVED IN EVIDENCE AND MARKED
23 PLAINTIFF'S EXHIBIT NUMBER 17.)

24 Q Now, when you gave him this little brochure, who had
25 you gotten the brochure from?

1 A It would have been our company.

2 Q And that company would have been the Pennsylvania
3 Life Insurance Company?

4 A You ask that question, but it was actually a
5 subsidiary of Penn Life, but they were actually ---

6 Q All right.

7 A It was through Penn Life, but, yeah, we were a
8 subsidiary of Penn Life.

9 Q Would you have provided the document I just handed
10 to Mike as part of your duties for Penn Life?

11 A Yes.

12 Q Go through and just explain to the judge what the
13 various documents are that are contained in the folder
14 that you gave to the plaintiff in this case.

15 A You're asking me to remember all this insurance
16 stuff that I forgot.

17 Q That's all right. You tell me what you can look at
18 that you do remember. Let's go back to the front. The
19 first one would be what?

20 A A Privacy Notice.

21 Q So you would have given him a Privacy Notice?

22 A Right.

23 Q The next piece of paper is what?

24 A Confidential Income Statement.

25 Q Now, that would be something that again he signs

1 making application for \$2,500 a month?

2 A That's right.

3 Q What's the next thing in there?

4 A Authorizations to Honor Checks Drawn by Pennsylvania
5 Life Insurance Company.

6 Q That's basically an automatic bank draft?

7 A Correct.

8 Q That's for him to get the \$2,500 a month in
9 coverage?

10 A Correct.

11 Q All right. What's the next thing?

12 A Underwriting Authorization to Obtain and Disclose
13 Information.

14 Q He signs that?

15 A That's right.

16 Q What does that authorize?

17 A I would assume Penn Life to get information -- that
18 he discloses for Penn Life to get information from him.

19 Q All right. What's the next thing in the file?

20 A Confidential Income Statement.

21 Q And he signed that as well?

22 A That's correct.

23 Q What's the next document?

24 A The same thing. Well, Underwriting Authorization to
25 Obtain and Disclose Information.

1 Q What's the next document? ,

2 A Authorization to Honor Checks Drawn by Pennsylvania
3 Life, which is a bank draft again.

4 Q Now, the next document is a letter from a Mr.
5 William E. Wehner, President, Pennsylvania Life Insurance
6 Company. Do you know what that is?

7 A It's a letter thanking him for his business it looks
8 like.

9 Q If you would just read that letter for us and give
10 us the date.

11 A It's July 25, 2002. It says, "Dear Mr. Russell: We
12 are pleased to advise you that the additional benefits
13 for which you recently applied have been approved. Your
14 new Policy Schedule reflects the benefits currently in
15 force. Please read the enclosed description of the
16 benefits and attach the information to your policy. If
17 you have any questions regarding your new benefits of
18 additional life, accidental, or health insurance needs,
19 please contact your agent or call one of our customer
20 service representatives toll free 1-800-275-7366."

21 Q Now, as of July 25, 2002, do you know if Mike
22 actually had a policy to attach that to?

23 A I really don't.

24 Q All right. Do you know what a transmittal letter
25 is?

1 A No.

2 Q When a policy is actually delivered, sometimes do
3 they have a letter transmitting the policy?

4 A I would assume.

5 Q Have you ever been given a policy from Pennsylvania
6 Life Insurance Company to give to a customer?

7 A I don't know. I really don't remember; it's been so
8 long ago. I can't recall doing that.

9 Q Let me ask you this: From what you do recall as
10 being an agent, was it the practice to or not to send the
11 policies to the agent to deliver to the customer or did
12 the insurance company take over that, or do you even
13 remember?

14 A I can't remember.

15 Q Okay. Let's take a look at the next document. Do
16 you know what this is?

17 A Application for Return of Premium Insurance.

18 Q That's part of the application; is that correct?

19 A It looks like it.

20 Q What's the next document in the file?

21 A It looks like just information.

22 Q All right. That's fine. What's the next document?

23 A Looks like an application.

24 Q That appears to be the application for the
25 insurance; is that correct?

1 A Correct.

2 Q Who signed that application?

3 A I'm looking. Am I missing something?

4 Q Do you know who filled it out?

5 A It doesn't look like my handwriting, but some of
6 these letters do, so I'm assuming it would be me. Some
7 of these letters do look like mine. It looks like I
8 filled that out.

9 Q Look on the back page.

10 A **(WITNESS COMPLIES)**

11 Q What's happening is, he's getting \$500 more on top
12 of the \$2,000 he already had.

13 A It looks like, yes, sir.

14 Q So the amount of disability insurance he had as a
15 result of an accident would be how much per month? You
16 already added 2,000 to this 500; how much is it per
17 month?

18 A Five hundred (500) more.

19 Q And the folder that you gave him, does that explain
20 how this thing works?

21 A Yes, sir.

22 Q So I can look at these five bullet points, and this
23 would have contained the explanation of what you told him
24 would be his coverage?

25 A Yes.

1 Q In that application folder that you gave to him,
2 does this application folder appear to be complete as far
3 as you know?

4 A As far as I know, yes.

5 Q Now, would there have been other work papers and so
6 forth that you would have filled out in your own
7 handwriting?

8 A Again, I don't remember what we did. I don't
9 remember. I'm sorry.

10 Q But this folder appears to be what you told him in
11 regard to his coverage?

12 A It looks like it.

13 Q Read for me just this first thing where it says
14 "Accident Total Disability," what that says.

15 A "Accident Total Disability: Accident total
16 disability benefit is paid to you each month while you
17 are totally disabled due to injury from the date the
18 elimination period ends, if any, up to the maximum
19 benefit period allowed. Total disability must start
20 within 30 days of the accident. You must be under the
21 regular and personal care of a physician. See your rider
22 for information of when total disability ends."

23 Q Now, what that basically tells him then is that if
24 he gets hurt in an accident under the care of a doctor,
25 can't work, he gets 2,500 bucks a month?

1 A Sure. I guess.

2 Q It sort of speaks for itself; doesn't it?

3 A Okay.

4 Q Now, let's take a look here. That document says see
5 your rider for what's going on. Have you ever seen the
6 rider in this case; do you know?

7 A Not recently.

8 Q I'm going to show you what the insurance company
9 gave us which we've now marked as our own exhibit Number
10 4. As part as exhibit Number 4, do you see the
11 application that we've talked about?

12 A Yeah.

13 Q I'm going to show you a document. We got this from
14 the insurance company. It says, "A and H Application
15 Receipt." Do you know what the letters "A" and "H" stand
16 for?

17 A I don't. Accident and health, I assuming.

18 Q This is an Accident and Health Application Receipt.
19 There's a portion down here talking about certification
20 and delivery. Do you see where anyone has ever signed
21 the Certification of Delivery.

22 A No.

23 Q Now, let's take a look at page 567. Also doesn't
24 appear that the applicant ever had anything delivered to
25 him, right?

1 A It doesn't look like it.

2 Q Now, if we look at page 555, does it appear that the
3 \$2,500 a month was in fact approved?

4 A It was checked "yes" on "approved."

5 Q Does you know what a dec. sheet is, declaration
6 sheet?

7 A I can't say that I remember.

8 Q I'm going to show you page 576. Have you ever seen
9 a declaration sheet such as this which appears to have
10 been sent to Mike?

11 A They don't really look familiar, but I can read it.

12 Q That's okay. If you don't recognize it, that's all
13 right. Have you ever seen a copy of the letter at page
14 594 where the increase was sent to Mike?

15 A Again, I don't remember seeing that.

16 Q All right. Would you read the letter of August 31,
17 2009?

18 A It says, "Dear Mr. Russell: Thank you for your
19 recent request received August 12, 2009 to remove all
20 premium riders attached to the above-referenced policy.
21 Please be advised that we have removed the Return of
22 Premium riders issued November 19, 1999, July 19, 2002,
23 and August 19, 2002, effective July 19, 2009. This
24 policy is currently paid to August 19, 2009, and the new
25 monthly premium is \$195.51. Enclosed please find our

1 check in the amount of \$71.73 which represents a refund
2 of unearned premium. We appreciate your business and
3 your continued confidence in Pennsylvania Life to meet
4 your insurance needs. We are glad for this opportunity
5 to be of service to you. If you have any questions or
6 further assistance is required, please contact our office
7 at 1-800-275-7366."

8 Q All right. Now, also if we look at, I believe, it's
9 0150. I'm going to show you exhibit Number 6. The first
10 page would basically show the additional coverage of July
11 19, '02; is that correct?

12 A That's right.

13 Q It shows the \$2,500 a month in disability benefits.
14 The 2,000 and the 5, right?

15 A Right.

16 Q Now I want you to read for me what this document
17 says in regard to the total disability benefit?

18 A "We will pay the monthly total disability benefit
19 shown in the policy schedule on page 3 when, (1) Injury
20 causes total disability which starts within 30 days after
21 the date of the accident and continues through the end of
22 the elimination period, if any; (2) You or your covered
23 spouse are under the regular and personal care of a
24 physician; (3) Total disability starts before your or
25 your covered spouse's 65th birthday or starts within two

1 years after the policy date of coverage issued to persons
2 age 63 and over."

3 Q And this appears to be ---

4 A The rider.

5 Q This is the rider, correct?

6 A That's what it looks like.

7 Q Have you ever seen this document that you know of?

8 A I don't think so.

9 Q How about just read for me the first paragraph which
10 talks about how the rider operates?

11 A "This rider is made a part of the policy to which it
12 is attached. It is issued in consideration of your
13 application and the payment of the first premium. All
14 definitions, provisions, exemptions, and limitations of
15 the policy apply to this rider except as modified in this
16 rider. Where there is a conflict between this rider and
17 the policy, the provisions of this rider will control."

18 Q All right. So what this says is that if the rider
19 conflicts with the policy, the rider applies?

20 A Right.

21 Q Now, let's take a look at what the rider again says.
22 It says if you get disabled, we're going to pay, right?

23 A No.

24 MR. KRISTINIK: Objection, your Honor, relevance.

25 This witness doesn't create the policies. He's part of

1 the sales process. I'm not sure where we're going with
2 this. We don't have a lot of court time.

3 MR. MOORE: Your Honor, I would assume we can come
4 back if we've got to come back. This is a very important
5 day in my client's life. This is the gentleman who sold
6 us the policy or who sold us the rider, and I just wanted
7 to make sure they've given us what they claim the rider
8 says. I just was trying to get that before the Court.
9 It would have been a lot easier, of course, if counsel
10 had cooperated with the documents, but he chose not to.
11 That's all right.

12 MR. KRISTINIK: I object to that, your Honor.

13 MR. MOORE: So I just wanted to make sure that we
14 are putting into evidence what the rider says.

15 THE COURT: I can read it.

16 MR. MOORE: Very fine. Thank you, your Honor.

17 With that, your Honor, I don't have any further
18 questions of this witness.

19 MR. KRISTINIK: I have a few questions, your Honor.

20 **CROSS-EXAMINATION BY MR. KRISTINIK:**

21 Q Thank you for being here with us this morning. I
22 know you've probably got better places to be, other
23 places you'd prefer to be.

24 You said that you worked for Penn Life, but you
25 weren't really an employee of Penn Life, right?

1 A That is correct.

2 Q You were just an appointed producer?

3 A Correct.

4 Q An appointment would have been filed with the South
5 Carolina Department of Insurance; is that right?

6 A I guess. As far as I remember. Again, that's, you
7 know ---

8 Q Were you an appointed producer for other insurance
9 companies back at that time?

10 A I don't remember if it was the same time. I think I
11 did maybe have a couple with a couple different
12 companies, but I don't remember exactly how the time
13 crossed. I don't remember.

14 Q Did you ever sell accident disability policies for
15 any other insurance companies that you recall?

16 A I don't recall I did, no.

17 Q You didn't sell the original policy to Mr. Gill in
18 1999; you had nothing to do with that, right?

19 A Right.

20 Q So you don't know anything about the delivery of
21 that policy, whether or not it was delivered?

22 A That's correct.

23 Q You don't know anything about what may have been
24 said between the agent and Mr. Russell at that time;
25 correct?

1 A I don't.

2 Q Let me show you what's been marked as exhibit Number
3 12. It's entitled Definitions, Exceptions, and
4 Limitations; is that correct?

5 A That's correct.

6 Q Then, down here in the middle of the page, it says
7 "Receipt?"

8 A Correct.

9 Q Is this a receipt that you filled out back on July
10 5, 2002?

11 A Yes, sir.

12 Q That's your handwriting on this document?

13 A It is.

14 Q You signed that document, correct?

15 A Yeah.

16 Q And you would have given this receipt to Mr.
17 Russell, right?

18 A I would assume so, yes.

19 Q You would have given it to him back in July of 2002,
20 correct?

21 A Yes, sir.

22 Q And on the right hand side of this document, it has
23 a heading entitled Exceptions and Limitations; do you see
24 that?

25 A I do.

1 Q It says, "Your coverage does not cover loss." Then,
2 it lists a bunch of things. Then, down near the end, it
3 says, quote, unquote, "being intoxicated." That's what
4 it says, right?

5 A Yes, sir.

6 Q Down a little further on the page, it says, "This is
7 not a contract but a brief description of the principle
8 provisions." That's what it says, correct?

9 A It does, yes, sir.

10 Q Then, in bold down beneath that, it says, "This is
11 limited coverage," right?

12 A Yes.

13 Q So this receipt serves as notice to whoever you hand
14 it to, that the Policy of Insurance that you're buying is
15 going to have an intoxication exclusion in it, right?

16 MR. MOORE: Object to the legal conclusion, your
17 Honor.

18 MR. KRISTINIK: That's the reason you've got the
19 insurers like Mr. Russell.

20 THE COURT: I believe the conclusion would be the
21 Court's decision. You can ask what it says. Not any
22 legal interpretation, so sustain as to the legal
23 conclusion. Rephrase it for me.

24 Q Is the purpose of giving this to insurers like Mr.
25 Russell is to put them on notice of the exclusions and

1 limitations that are in the policy?

2 A It seems like that's what it says, yeah.

3 Q When you sold this policy, when you were selling
4 upgrade coverage to Mr. Russell back in 2002, was it your
5 understanding that there would be an intoxication
6 exclusion in this policy?

7 A I probably didn't know every conclusion, but maybe I
8 should have, but I don't know if I would have known.

9 Q Now, let's look at an application we've marked as
10 Defendant's Exhibit Number 11. Before I get to that, let
11 me ask you this: Did you sell other accident disability
12 policies for Penn Life?

13 A I don't know if I know what you mean.

14 Q Do you have any recollection of selling any
15 disability policies to anyone other than Mr. Russell?

16 A Yeah. I mean, are you saying is he the only person
17 I've ever sold a policy to?

18 Q Correct.

19 A No.

20 Q How many other people do you think you may have sold
21 to?

22 A It wasn't very many; it was a very short time. I
23 can't give you a number.

24 Q Let's look at the application that's marked as
25 Defendant's Exhibit Number 11. Is this an application

1 that you completed for Mr. Russell back in 2002?

2 A Yes, sir. It looks like it.

3 Q It has your handwriting on it?

4 A It is.

5 Q You signed it on Page 4?

6 A Yes, sir.

7 Q You would have signed it on June 27, 2002; is that
8 right?

9 A That's correct.

10 Q The purpose of this application was to effectuate an
11 increase in coverage by \$500, right?

12 A Right.

13 Q But this application also allows you to make other
14 changes to the existing policy, right? You can add and
15 delete other riders, correct?

16 A I'm assuming so, yes.

17 Q There's a lot of boxes on Page 2, right? Take a
18 look at Page 2. You can go through and add and delete
19 riders, correct?

20 A That's right.

21 Q If you had a rider, there's a place for you to write
22 in the premium to indicate where a rider is being
23 purchased because it's going to increase the premium,
24 correct?

25 A Right.

1 Q Now, I want you to look at the bottom of Page 2.
2 There's a box for Waiver of Premium; do you see that,
3 lower left-hand corner?

4 A Right.

5 Q And there's a box there, right? **(NO RESPONSE)** Do
6 you see the box?

7 A I do.

8 Q The box is not checked, correct?

9 A Correct.

10 Q If you were applying for Waiver of Premium for Mr.
11 Russell, that box would be checked, correct?

12 A It should be.

13 Q Then, there would be a special premium amount
14 written in on the right-hand side, correct?

15 A Right.

16 Q But it is not, right?

17 A Right.

18 Q So looking at this application, wouldn't you agree
19 that Mr. Russell did not apply for Waiver of Premium when
20 he submitted this application in 2002?

21 A That's what it looks like, yes.

22 Q Let me ask you another question about intoxication
23 exclusion. Is there any place on this form or this
24 application where Mr. Russell could opt out of an
25 intoxication exclusion?

1 A I don't know.

2 Q All right. Fair enough. If you'd flip to the page
3 -- I've got a green tab here to help you find it. For
4 the record, it's Page 567, and this is a document that
5 Mr. Moore questioned you about. At the top, it's called
6 "A & H Application Receipt." He was asking you questions
7 about the fact that the boxes under Certificate of
8 Delivery are not checked. Does a single one of those
9 three boxes -- Do any of those boxes have anything to do
10 with the delivery of the actual policy? Take your time.

11 A It seems like the first one; does it not?

12 Q What does it say?

13 A It says, "To be completed when an Outline of
14 Coverage is given to the applicant."

15 Q Does it say anything about the policy being
16 delivered?

17 A Not the policy, no.

18 Q So you've had the time to read the language next to
19 those three boxes?

20 A Yes.

21 Q And it doesn't talk about delivery of the policy?

22 A The policy, no.

23 Q So this form isn't used for when it comes to
24 delivery of the policy; is that right?

25 A It doesn't look like it.

1 Q Now, Mr. Russell also at this same time in 2002, he
2 increased the coverage for his accidental death benefit,
3 right? And you can flip back to the other part of your
4 application. He increased it, right?

5 A Yes.

6 Q By how much?

7 A Seventy-five thousand (75,000).

8 Q And that's going to be in addition to whatever he
9 had under his original policy issued in 1999, right?

10 A Right.

11 Q Now, if Mr. Russell were to become disabled, and he
12 begins receiving his disability benefits, from your
13 prospective as someone who sells these types of policies,
14 would it make sense for him to continue paying his
15 premiums to keep that accidental death benefit coverage
16 in place?

17 A That would make sense.

18 Q Let me hand you what's been marked as Defendant's
19 Exhibit Number 13. Can you tell us what this is?

20 A Change of Benefits Agreement.

21 Q What's this used for?

22 A I'll read it. It says, "I acknowledge the fact that
23 I have changed my coverage on policy," and it gives the
24 policy number, "as follows:" And it's marked, "I have
25 deleted benefit riders that were effective" -- and I

1 don't know what these numbers are.

2 Q It says "ROP," right?

3 A Right.

4 Q Do you know what ROP stands for? Could that be

5 return of premium?

6 A Makes sense.

7 Q Okay. And this is not your handwriting?

8 A No, this one's not.

9 Q So you would not have been involved with this

10 particular form?

11 A Not this one, no.

12 Q Have you been dismissed from this case?

13 A Yes, sir.

14 Q Have you paid any money to the plaintiff to get that

15 dismissal?

16 A No.

17 Q Has he signed a release giving you a Release of

18 Claims against you?

19 A I haven't seen it. I'm assuming -- My attorney,

20 Carl, called me and told me I was released, so I haven't

21 seen it. I'm assuming Carl may have something; I don't

22 know.

23 Q Is it your understanding that you have been -- that

24 the claims have been released or not? What's your

25 understanding?

1 A From Carl ---

2 MR. MOORE: Object to any hearsay, your Honor.

3 MR. KRISTINIK: Well, I've got to be able to ask his
4 understanding of whether he thinks if there's live claims
5 against him.

6 MR. MOORE: The only understanding he would have,
7 your Honor, would be based on what someone's told him.
8 There has been no release signed. We simply dismissed
9 him as a party to this action.

10 THE COURT: Nothing has been filed in the clerk's
11 file yet that I know of.

12 MR. MOORE: Yes, sir. There's no release. He's
13 just not a party to the action any longer.

14 MR. KRISTINIK: No further questions, your Honor.

15 THE COURT: Very well.

16 MR. MOORE: I just want to ask him about one
17 document.

18 **REDIRECT EXAMINATION BY MR. MOORE:**

19 Q Mr. Gill, this Exhibit 12 you were asked about
20 having these exceptions and limitations, it indicates
21 it's a receipt; is that correct?

22 A That's correct.

23 Q Who signed the receipt?

24 A There's really no signature. It's just an actual
25 written name, not really a signature.

1 Q So in regard to the receipt, that calls itself a
2 "Receipt," did the plaintiff ever sign that document to
3 your knowledge?

4 A No, not this document.

5 Q Was it Exhibit Number 12 ever given to the plaintiff
6 as far as you know?

7 A All I can do is assume if I filled it out, it would
8 have been there, but I don't remember.

9 Q Do you know if the plaintiff was ever given this
10 document?

11 A I don't know for certain; I can't say one way or the
12 other.

13 Q Now, when it says that this is not the contract,
14 what is it; do you know?

15 A It looks like a brief description.

16 Q In order to get to the actual description, you would
17 have to look at the policy itself?

18 A Yes.

19 Q We've already been over the language of that, which
20 was the rider, correct?

21 A Correct.

22 Q Then, of course, if we look at the benefit options
23 that you gave him, we know you gave him this, saying if
24 he got hurt, he was going to get paid. That seems to be
25 different than the document you don't know if you gave

1 him saying if you got hurt with alcohol, he wasn't going
2 to get paid, right?

3 A It is different.

4 Q Why would they give two separate explanations, if
5 you know, of the coverage?

6 A It looks like, from my understanding, this is
7 options, I'm assuming, and this is definitions exceptions
8 and limitations to those options is what it looks like.

9 Q So you don't know?

10 A No.

11 Q That's fine. Then, the answer would be, no, you
12 don't know?

13 A Okay.

14 Q That's true; isn't it?

15 A Yes.

16 MR. MOORE: All right. Thank you so much. I don't
17 have any further questions, your Honor.

18 MR. KRISTINIK: I have one rebuttal question, your
19 Honor.

20 **RECROSS EXAMINATION BY MR. KRISTINIK:**

21 Q Mr. Gill, Exhibit Number 12, would it have been your
22 standard practice to provide that document to insureds
23 that you work with?

24 A It looks like it would have been -- It really does.
25 It looks like something that would have been there, but

1 like I say, I don't remember everything that was there.
2 I don't remember what policies were. I don't remember
3 what all was in each packet; I don't remember. It looks
4 like if I filled it out, it looks like it should have
5 been.

6 MR. KRISTINIK: Thank you. No further questions.

7 MR. MOORE: I think that's it.

8 THE COURT: I understand y'all agree to all of the
9 documents. It's just a matter of how y'all want to
10 handle them or how they're bound or how they are
11 numbered.

12 MR. KRISTINIK: Correct.

13 THE COURT: Y'all don't have objections to either
14 side's documents because they are mostly insurance
15 documents.

16 MR. MOORE: That's right.

17 THE COURT: It's just a matter of what we call them.

18 MR. MOORE: Yes.

19 MR. KRISTINIK: Yes.

20 THE COURT: Fair enough. Let's just make sure y'all
21 know what y'all want me to see.

22 All right. Let's take a break. You can step down.

23 MR. MOORE: Might this witness be excused?

24 THE COURT: Sure.

25 **(RECESS)**

1 JOHN THOMAS MACKIN, JR., BEING
2 FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION BY MR. MOORE:

4 Q State your name?

5 A John Thomas Mackin, Jr.

6 Q Do they call you Jack?

7 A They do.

8 Q Do you work for the Pennsylvania Life Insurance
9 Company?

10 A I do not currently work for the Pennsylvania Life
11 Insurance Company. I was employed by the Pennsylvania
12 Life Insurance Company at one time, but that company has
13 been sold.

14 Q Who has it been sold to?

15 A It was sold to CVS.

16 Q Do you work for CVS now?

17 A I do not.

18 Q My understanding is that you have been sent here
19 today as a representative of the Pennsylvania Life
20 Insurance Company?

21 A I work for the parent company that owned
22 Pennsylvania Life Insurance Company and the current
23 company that maintained the policies such as the accident
24 and disability policies.

25 Q So you work for the company that retained this

1 policy?

2 A That's correct, sir.

3 Q And you have been sent here today as a
4 representative of the Pennsylvania Life Insurance
5 Company, correct?

6 A Yes, sir.

7 Q To get it straight, let's see who you actually do
8 work for. Is there any such company today in existence
9 in the world known as the Pennsylvania Life Insurance
10 Company?

11 A There is, sir.

12 Q And that company is owned by the company that you
13 work for?

14 A I work for the company that has the responsibility
15 for administering the policies.

16 Q Well, who owns the Pennsylvania Life Insurance
17 Company?

18 A CVS owns Pennsylvania Life Insurance Company.

19 Q Who do you work for?

20 A I work for Universal American.

21 Q And did somebody at Universal American decided that
22 you would be the person to come down here today on behalf
23 of Pennsylvania Life Insurance ---

24 MR. KRISTINIK: Objection, relevance.

25 THE COURT: Rephrase that question. I want to know

1 why he's here too.

2 Q Who is it that sent you down here today as a
3 representative of the Pennsylvania Life Insurance
4 Company?

5 A Our in-house counsel asked me to represent the
6 company.

7 Q Well, when you say "our in-house counsel", when you
8 say "our", who is the our?

9 A Universal American.

10 Q So Universal American's lawyer asked you to come
11 down to represent Pennsylvania Life Insurance Company?

12 A That's correct.

13 Q Did anybody from Pennsylvania Life Insurance Company
14 ask you to come down?

15 A No, sir.

16 Q Now, when you worked for Pennsylvania Life Insurance
17 Company, what was your title?

18 A I've had various titles with the company. Currently
19 I'm the Vice President of the Agent Contracting.

20 Q So as of today, you still are an officer of
21 Pennsylvania Life Insurance Company?

22 A No, sir, I am not.

23 Q Well, when you say as of today, I am, whatever it is
24 you said you were, that's on behalf of whom?

25 A The subsidiary insurance companies of Universal

1 American.

2 Q All right. So how long has it been since you worked
3 for Pennsylvania Life Insurance Company?

4 A I started with Pennsylvania Life Insurance Company
5 in 1991.

6 Q And worked for them until when?

7 A Until the company was sold in May of last year.

8 Q May of 2011, the company got sold to somebody?

9 A That's correct.

10 Q What was your title when the company was sold?

11 A I was the Vice President of Sales Support and
12 Oversight.

13 Q I would assume then that you understand how sales of
14 insurances policies by Pennsylvania Life are supposed to
15 work?

16 A That's a true statement.

17 Q And you would understand the terms and provisions of
18 the policy?

19 A Yes, sir.

20 Q Now, you went from there to work for whom?

21 A Universal American purchased Pennsylvania Life
22 Insurance Company in approximately 1999, and I came along
23 with that acquisition.

24 Q Now, we do know though that you have the authority
25 today to speak on behalf of Pennsylvania Life Insurance

1 Company, correct?

2 A Correct.

3 Q Does the company acknowledge as of today that my
4 client Mike Russell is disabled within the terms of the
5 policy?

6 A I don't have that knowledge, sir.

7 Q Well, sir, if you're here to speak on behalf of the
8 company, who is it that would know if Mike Russell does,
9 in fact, meet the terms of the definition of "disability"
10 within the policy?

11 A That would be handled by our Claims Department.

12 Q You say "our" Claims Department. Who is "our?"

13 A Claims Department is with a company called CACS
14 Services. That's a third-party administrator, and they
15 handle the administration of these policies.

16 Q Well, has anybody from Pennsylvania Life Insurance
17 Company ever handled the administration of the claim that
18 we're talking about today?

19 A Employees of CACS handled the administration of the
20 disability income policies.

21 Q Well, who would know? I want the name of an
22 individual working for whoever it is; who is the person
23 who would know if Mike Russell meets the definition of
24 disabled within the terms of your policy?

25 MR. KRISTINIK: Objection, your Honor. There is no

1 foundation that this witness has the knowledge of that.
2 We haven't brought him here to testify about that. He
3 ought to ask him what he has knowledge about and then ask
4 him questions about what's within the knowledge of the
5 witness.

6 MR. MOORE: I thank counsel for telling me what I
7 ought to ask, but I would like to ask what I choose to
8 ask. If the witness doesn't know, all he has to do is
9 say he doesn't know.

10 THE COURT: I think y'all are agreeing, but I
11 sustain the objection. Rephrase your question. I
12 understand your question.

13 MR. MOORE: Sure.

14 Q Sir, is there somebody within the organizational
15 structure or however this thing works who makes the
16 decision if a person meets the definition of "disabled?"

17 A There are claims examiners that work for the third-
18 party administrator who are responsible for
19 administering the policies including the claims.

20 Q Do you know the name of the claims examiner who is
21 responsible for the handling of this file?

22 A I don't know the claims examiner off hand.

23 Q Is there a claims examiner who is responsible for
24 the handling of this fund?

25 A Yes.

1 Q Do you know the name of that individual?

2 A I don't know the name of the individual currently
3 involved in the handling of this claim.

4 Q Do you know the name of any claims examiner who has
5 ever been involved in the handling of this file?

6 A Yes, I do.

7 Q What's that person's name?

8 A Christine Corvallis.

9 Q Does Christine Corvallis still work for your
10 company?

11 A She works for the administrator who's responsible
12 for administrating the claims.

13 Q Do you know where Christine Corvallis is today?

14 A Yes, sir.

15 Q Where?

16 A She's right behind you.

17 Q All right. And she works for the administrator who
18 is handling the policy and this claim, correct?

19 A That's correct, sir.

20 Q When Mike Russell's policy was written in 2002, were
21 you working for the company?

22 A Sir, you asked about the policy and you stated that
23 it was written in 2002. The policy was originally
24 written in 1999.

25 Q Yes, sir. There's also a letter of transmittal

1 where it talks about your new policy. Have you seen that
2 letter?

3 A I've seen a lot of letters. I'd have to see the
4 specific letter you're referring to.

5 Q Well, my question is, when the coverage was written
6 in 2002, what was your position with the company?

7 A In 2002, I was the Vice President of Compliance.

8 Q And in 1999, what was your position?

9 A In 1999, I was in the Compliance Department as well.

10 Q Now, tell me what compliance consists of?

11 A Compliance consists of a number of things including
12 the responsibility for the filing of policies with
13 various states where we wish to sell our policies, the
14 review of the materials that are associated with
15 policies, the sales materials, as well as the sales
16 practices, and the overall activity of the agents as well
17 as the processes that are used by the company.

18 Q Therefore, you would have special expertise in the
19 field of compliance?

20 A I have worked in compliance for a number of years,
21 and I do have experience in compliance.

22 Q And since you have experience in compliance and had
23 this position with the company, it would be your job to
24 understand what your company would have to do in order to
25 comply with the various state laws?

1 A That's correct, sir.

2 Q And did you know that in South Carolina that any
3 insurer doing accident or health insurance business in
4 the state was required to deliver with each Policy of
5 Insurance issued by it a copy of the application so that
6 the whole contract appears in the application and the
7 Policy of Insurance?

8 MR. KRISTINIK: Objection, your Honor. That was
9 paraphrasing the statute. If he's going to ask the
10 witness a question about the statute, he ought to at
11 least present it to him instead of paraphrasing it.

12 MR. MOORE: I actually read the statute.

13 THE COURT: I'm sorry. I didn't follow the
14 question; it was so long.

15 THE COURT: Could I get a copy of it?

16 MR. MOORE: I'd offer SC Code Section 38-71-30 into
17 evidence, your Honor.

18 MR. KRISTINIK: No objection.

19 THE COURT: Sure.

20 (RECEIVED IN EVIDENCE AND MARKED
21 PLAINTIFF'S EXHIBIT NUMBER 18.)

22 Q The code section is SC Code, Section 38-71-30. Sir,
23 I'd like to hand you your copy, and I'll read along with
24 you. (HANDS DOCUMENT TO WITNESS.) Just correct me if I
25 read anything incorrectly.

1 "Every insurer doing accident or health insurance
2 business in the state shall deliver with each policy of
3 insurance issued by it a copy of the application made by
4 the insurer so that the whole contract appears in the
5 application and policy of insurance. If the insurer
6 violates this requirement, no defense is allowed to the
7 policy on account of anything contained in it or omitted
8 from the application. If the insurance policy is issued
9 upon an oral application, no defense is allowed on the
10 policy on account of anything contained in it or omitted
11 from the oral application."

12 I read that correctly, right?

13 A You've added a few words, but other than, you read
14 it correctly.

15 Q And since you would have been knowledgeable on
16 compliance, you would have understood that when a policy
17 of accident or health insurance is sold in South
18 Carolina, the application and the policy must be
19 delivered to the insured, correct?

20 MR. KRISTINIK: Objection, your Honor. That is an
21 interpretation of the statute. That is inaccurate. The
22 statute says that you have to attach the application to
23 the policy. That's what it's about. It's all about the
24 application, and he's trying to turn this into a delivery
25 statute, which it is not.

1 MR. MOORE: Your Honor, it says, "shall deliver with
2 each policy of insurance issued by it a copy of the
3 application." When it says "shall deliver", I'm assuming
4 that means "must deliver" with each policy a copy of the
5 application. It certainly appears to me as if the code
6 section requires them to deliver ---

7 MR. KRISTINIK: We'll leave the interpretation of
8 the statute to you, your Honor. There's no point in
9 asking the witness about Mr. Moore's interpretation of
10 the statute.

11 MR. MOORE: He's the compliance officer, your Honor.

12 THE COURT: I sure would like to see a copy of that
13 statute.

14 MR. KRISTINIK: Your Honor, I have an extra copy
15 that I could give you. **(HANDS DOCUMENT TO THE COURT.)**

16 **(WHEREUPON, THE COURT READS DOCUMENT.)**

17 THE COURT: All right. Go ahead.

18 Q We could agree according to the face of the brochure
19 this is an accident policy; can we not?

20 A May I see that?

21 **(WHEREUPON, MR. MOORE HANDS DOCUMENT TO**
22 **WITNESS.)**

23 A This is a brochure. This is not an accident policy.

24 Q Well, if we look at -- Let me show you this: This
25 document appears to be a specimen of what your company

1 now claims to be the policy we're talking about, correct?

2 A This does appear to be a specimen policy.

3 Q Now, when we talk about a specimen, what we mean is
4 this is what the policy would look like if it had ever
5 been actually physically written in 1999, correct?

6 A It would have included the application.

7 Q Right. But this document that I hold in my hand
8 would have been created after the lawsuit was filed,
9 right?

10 A I don't know the sequence of events.

11 Q This isn't the actual policy, but this is what the
12 policy should have looked like if it was ever printed
13 off, right?

14 A If I may review that again, I'll be able to answer
15 the question. **(READS DOCUMENT.)** This appears to be what
16 the policy would look like along with a copy of the
17 application.

18 MR. MOORE: We'd like to offer this into evidence,
19 your Honor.

20 MR. KRISTINIK: No objection, your Honor.

21 **(RECEIVED IN EVIDENCE AND MARKED**
22 **PLAINTIFF'S EXHIBIT NUMBER 19.)**

23 Q The policy we're talking about, is it an accident
24 policy?

25 A May I see the policy?

1 Q Let me just ask you the question before that:
2 You're the gentleman with compliance. Is it an accident
3 policy or is it something else?

4 A The policy in question is an accident policy.

5 Q Right. And that's why this specimen that was made
6 at some time we don't know says, "This is an accident
7 only policy," right?

8 A It states, "This is an accident only policy, and it
9 does not pay benefits for loss from sickness."

10 Q Where is the actual policy that you issued?

11 A The physical policy would have been sent or
12 delivered to the insured.

13 Q Do you have any document anywhere in your file where
14 the insured ever signed a receipt for actually getting
15 the policy?

16 A There is not a signed receipt in the file.

17 Q Do you have any transmittal letter where the policy
18 was actually prepared and sent to the insured?

19 A Yes, we do.

20 Q The actual 1999 policy?

21 A Yes, sir.

22 Q Well, I haven't seen that, sir. May I see that?

23 A I don't have it with me.

24 Q Does your lawyer have a copy of that?

25 A I don't -- You asked me do we have evidence in the

1 file that the policy was created in 1999?

2 Q No. My next question I asked you is, do you have
3 in your file a letter where once the policy was created
4 in 1999, it was mailed to your insured?

5 A I'd have to see the file.

6 Q Take your time. That's what we've been given. I've
7 been through every single piece of paper, and I've see no
8 such letter. How about look at it.

9 A If I may add, the practice of the company was to
10 send the policies to the sales office and have the sales
11 agent deliver the policy to the insured to be able to go
12 over the policy, and if the insured had any questions
13 regarding the policy, the agent would be able to answer
14 those questions at that time.

15 Q I see. So the way this thing worked was that the
16 practice of the company was to send the policy to whoever
17 sold it and that person was supposed to deliver it to the
18 insured?

19 A The practice of the company was to send it to the
20 sales office where the agent worked.

21 Q Right.

22 A And then either that agent or another agent would
23 deliver the policy.

24 Q And the way they would do that is they would
25 basically prepare what's called a letter of transmittal

1 which goes with the policy, and you would send it to the
2 agent and say, hey, give this to the insured and go over
3 it with him, right?

4 A There wasn't a letter that said, hey, go over this
5 with the insured. That was practice of the agents.

6 Q Well, the policy then according to your company
7 should have been sent to the selling agent who should
8 have delivered the policy to my client, correct?

9 A The policy would have been sent to the sales office
10 for the agent to be able to deliver it.

11 Q Well, tell me this: Give me the name of the
12 individual or company even that you sent the policy to in
13 1999 so that it could be delivered to your firm?

14 A We would have sent that to the sales office.

15 Q Who? Who did you send it to?

16 A I don't have the individual's name at my disposal.
17 We have a number of offices.

18 Q Do you have the company's name that you sent it to?

19 A It would have been a Pennsylvania Life branch
20 office.

21 Q Yes, sir. I understand that. I want to know, can
22 you tell me any document that you have seen to indicate
23 that the policy was, in fact, sent to whoever sold this
24 thing to Mike in 1999?

25 A What I am telling you, sir, is that the practice of

1 the company would be to send the policy to the sales
2 office.

3 Q Yes, sir. I understand that. Let me put it to you
4 this way: If you're going to tell me the same thing over
5 and over, was that the practice of the company?

6 A That was the practice of the company, sir.

7 Q I got it. I want to know now do you have anything
8 in your possession, any document, to prove that the
9 practice was, in fact, followed in this case?

10 A I don't have any document available that says it was
11 or was not followed in this particular case.

12 Q I didn't ask you about "was not"; did I?

13 A No, sir.

14 Q I asked you about what was. My question again is
15 this: Do you anywhere in the records of this company
16 have any document that would show the actual policy was
17 ever sent to the agent to be given to Mike?

18 A We do not have documentation in the file that
19 indicates that the policy was or was not sent to the
20 sales office for delivery to the insured.

21 Q Well, I guess then the answer is ---

22 MR. KRISTINIK: Objection, your Honor, asked and
23 answered twice.

24 MR. MOORE: He keeps hedging, your Honor. I just
25 want to make sure the answer to that question. I

1 understand it to be "no."

2 THE COURT: That's what I understand his answer to
3 be.

4 Q The answer is "no;" isn't it?

5 A What's the question?

6 Q You've got nothing to show where you ever
7 transmitted the policy to anybody; do you?

8 A We do know that the policy was produced.

9 Q Was that my question?

10 A No, sir.

11 Q Would you answer what I asked you instead of what I
12 didn't ask you?

13 A Will you repeat the question please?

14 Q Do you have any document in your file to indicate
15 that the policy when it was produced was ever either sent
16 to Mike or to the agent to be given to Mike?

17 A No, sir.

18 Q Now, sir, do you even have in your possession, the
19 possession of this company, does this company have
20 anywhere in its possession a copy of the actual policy
21 you claim was produced?

22 A I'd have to review the file, but the practice of the
23 company is not to keep a copy of the entire policy as it
24 was produced because all of those policies are the same.
25 What we do is we produce a record that the policy was, in

1 fact, printed and produced. The ---

2 Q Sir -- Go ahead.

3 A The standard practice of most companies that I'm
4 familiar with do not keep a copy of the policy in the
5 file. We keep a record of what was produced and sent.

6 Q So right now then -- Okay. We know that you keep a
7 record of what was produced and what was sent, right?

8 A That's correct, sir.

9 Q We know that you don't have any record of what was
10 produced ever being sent, that's correct, right?

11 A There were several questions in there. Could you
12 repeat the question please?

13 Q Yes, sir. You just testified that you keep a record
14 of what's produced and what was sent. I'm going to
15 change the question. How do you keep a record about
16 what's sent?

17 A We keep the record in the file of what is produced
18 and ultimately sent out. We have a record of each
19 document that would have been produced.

20 Q Right. And, of course, you keep records of your
21 letters, you keep copies of the letters, either
22 electronically or in paper form, right?

23 A That's the practice of the company is to keep the
24 copies of letters that were sent out. That's correct.

25 Q Now, y'all have been through this file and produced

1 hundreds of pieces of paper, right?

2 A We have produced documents that are contained in the
3 file.

4 Q We got every single piece of paper that we know of
5 either electronically or in paper that exists in the
6 file, correct?

7 A We've produced what was requested to be produced.

8 Q And you say you keep records of what was sent. You
9 keep records of who it was sent to?

10 A The practice of the company is to send it -- was to
11 send it to the sales office.

12 Q I understand that's the practice of the company.
13 What I'm trying to get to is, was the practice of the
14 company followed? Sir, you -- I'm explaining that to you
15 for this question: You understand my client claims he
16 never got the policy. You know that; don't you?

17 A I understand that claim has been made, yes, sir.

18 Q Your company is certainly capable of making
19 mistakes; isn't it?

20 A I think anyone is capable of making a mistake.

21 Q Your people are certainly capable of not following
22 policies from time to time, correct?

23 A There's no evidence in the file that practice was
24 not followed.

25 Q There's no evidence that it was either; is there?

1 A No, sir.

2 Q I'll ask the question this way: Do you have any
3 piece of paper anywhere that would dispute Mike's
4 position that he never got delivered a copy of his
5 policy?

6 A As I stated earlier, we do not have evidence that it
7 was or was not produced.

8 Q I didn't ask you again about whether ---

9 MR. KRISTINIK: Your Honor, the witness should be
10 allowed to answer the question.

11 MR. MOORE: I'll move on.

12 THE COURT: I understand your question. I think
13 it's been answered, but do it again.

14 Q Sir, let me move on. As the compliance officer, you
15 understand that your company was obligated to provide
16 Mike with a copy of the policy, correct?

17 A The regulation is that -- Will you ask the question
18 again please.

19 Q Sure. As the compliance officer, you understand
20 that your company was obligated to give the man what it
21 is he bought?

22 A Insurance companies are obligated to provide the
23 Policy of Insurance that the customer would purchase.

24 Q Now, we know that you kept a record of the 2002
25 addition because there was a letter that went with that,

1 right?

2 A Yes. There's a letter that went with the 2002
3 increase in coverage.

4 Q You know what a transmittal letter is; don't you?

5 A I'd have to see what you're referring to, sir.

6 Q Have you ever heard -- As an insurance executive,
7 have you ever heard the word "transmittal letter?"

8 A Yes.

9 Q Well, explain to me what a transmittal letter is?

10 A It may have been a number of things depending on
11 what was being transmitted.

12 Q Your company when it provides a policy to the agent,
13 the seller, like you say, so the agent can then give it
14 to the insured, does it provide transmittal letters that
15 go along with it, like, "Dear Mr. Jones, here's Harry's
16 policy; please make sure he gets it?" Anything like
17 that?

18 A I did not see such a letter in the policy. When you
19 say "Mr. Jones", you're referring to the agent?

20 Q Let me ask you this: Who was the agent, the actual
21 name of the company in 1999 that first sold Mike Russell
22 this Policy of Insurance?

23 A You asked about a company as well. Could you repeat
24 the question please?

25 Q Do you know the name of the person that sold Mike

1 Russell the Policy of Insurance in 1999?

2 A I believe the name of the person who sold the
3 original policy is named John Rothvich.

4 Q Do you know if John is still alive?

5 A I don't know that he's not.

6 Q Do you know if he is?

7 A I don't know.

8 Q Has anybody ever checked with John and said, "Hey,
9 John, did you give Mike his policy?"

10 A I'm not aware of that.

11 Q Do you know the company that John worked for?

12 A He was contracted with Pennsylvania Life Insurance
13 Company.

14 Q But do you know the name of his agency?

15 A I don't know that his agency had a name.

16 Q Was he just an independent insurance salesman?

17 A He was an independent contractor, yes, sir.

18 Q Have you seen any type of a transmittal letter to
19 John which says, "Hey, John: Here is a copy of Mike's
20 policy?"

21 A I have not seen such a letter.

22 Q We know according to your standard operating
23 procedure that Pennsylvania Life Insurance Company never
24 delivered the policy itself to Mike Russell, correct?

25 A What I am telling you is the standard procedure of

1 the company would be to send it to the sales office.

2 Q If standard procedure was followed, then
3 Pennsylvania Life Insurance Company in 1999 would not
4 itself have sent the policy to Mike Russell, correct?

5 A Not from the home office or the administrative
6 office. It would have been sent to the agent.

7 Q And that's if standard procedure was followed,
8 correct?

9 A Correct.

10 Q If standard procedure was followed and the policy
11 was sent to the agent, what assurances do you folks
12 receive to make positive that this independent agent does
13 what he's supposed to do and delivers the policy as
14 required?

15 A In reviewing the file, there's no assurance of that.

16 Q No. I'm talking about in regard -- You told us that
17 you folks were legally obligated to give people what they
18 buy from you, right?

19 MR. KRISTINIK: Objection, mischaracterization of
20 prior evidence.

21 THE COURT: That's what he said. If it's wrong, he
22 can tell him.

23 MR. KRISTINIK: No. He's talking about legal
24 obligation. That's the word I'm objecting to.

25 THE COURT: That's for the Court to decide.

1 Q Sir, regarding regulations and regarding the
2 policies of your company, you guys are obligated to give
3 people what they paid for, right?

4 A If someone purchases a policy, they are entitled to
5 receive that policy.

6 Q And the way you say it's supposed to be done in
7 standard procedure is you send it to these independent
8 third party people who sell it and they're supposed to
9 give it to the customer, right?

10 A We send it to the sales offices, and then the agents
11 are to take the policies and deliver them to those who
12 purchased the policies.

13 Q What policies do you have in place to ensure that
14 the sales offices give the policies to the customer?

15 A There's no policy in place that ensures that.

16 Q Have you ever heard of a Policy Receipt?

17 A I have.

18 Q Now, a Policy Receipt is something when a customer
19 is delivered a policy, he signs that he has received the
20 policy, correct?

21 A That's how a Policy Receipt would be used, yes, sir.

22 Q Policy Receipts are standard in the insurance
23 business, are they not?

24 A No, I don't believe so.

25 Q There is certainly no Policy Receipt we know of in

1 this case which acknowledges that Mike Russell ever got a
2 copy of his policy; is there?

3 A We do not have a signed Policy Receipt in the file.

4 Q How long have you known that Mike Russell has taken
5 the position he never got a copy of the policy that he
6 bought and paid for?

7 A How long have I personally known that?

8 Q Yes.

9 A It was told to me very recently.

10 Q When you learned that Mike Russell was taking the
11 position that he never got the policy he bought and paid
12 for, did do you do anything to see if that was true or
13 not?

14 A We reviewed the file.

15 Q What did the file show?

16 A The file showed that we produced the policy.

17 Q When you produced it, what did it show you did with
18 it?

19 A According to standard practice, we would send that
20 to the sales office.

21 Q No. Not about standard practice. You say that you
22 reviewed the file to see if you produced the policy. The
23 file showed that you produced the policy, correct?

24 A Correct, sir.

25 Q What in the file showed that you produced a policy?

1 A We have a copy of the Policy Schedule; we have a
2 copy of the application; we have a copy of what's known
3 as a pick list and that shows everything that was
4 produced at the time that the policy was printed.

5 Q The pick list shows everything that should have been
6 produced, correct?

7 A That's correct.

8 Q Now the way the pick list works is there's a piece
9 of paper that tells a technician in regard to what
10 documents are supposed to be put into the computer to
11 print out the policy, correct?

12 A Actually it's in the reverse. The computer prints
13 what was produced, and it prints the pick list. That's
14 in the current process.

15 Q How about in 1999, what was the process?

16 A And the process that would have been used in 1999.

17 Q The way I described it, or the way you described it?

18 A You'd have to describe it again, sir.

19 Q Basically there's a pick list, and it tells the
20 technician what to put in the computer to create the
21 policy?

22 A No, sir. That's the reverse. The pick list is
23 produced to indicate what has been printed.

24 Q I want to make sure I understand this. You keep the
25 pick list to show what's supposed to be in the policy and

1 yet you don't keep a copy of the policy, correct?

2 A The standard practice is to keep a copy of the pick
3 list in the file.

4 Q So you keep a copy of the pick list in the file, but
5 you don't keep a copy of the policy in the file, correct?

6 A The policy has standard language, and therefore we
7 don't keep the 12 or 15 pages that were actually produced
8 in the file.

9 Q Sir, what y'all sold Mike was Policy [REDACTED] 9360,
10 correct?

11 A I don't have the number memorized, but I have no
12 reason to dispute that.

13 Q To your knowledge in the entire world, have you ever
14 seen the original or a copy of Policy [REDACTED] 9360?

15 A I've seen the policy file.

16 Q I didn't ask you about the policy file. I want to
17 know about the policy.

18 A I have not seen the actual physical policy that
19 would have typically been produced and sent to the sales
20 office and delivered to our insured.

21 Q Are you telling me that when you sold Mike this
22 policy that your company did not actually even keep a
23 policy, a copy of the policy, it prepared?

24 A Standard practice is to keep a record of what was
25 prepared in the file.

1 Q So the answer to my question is, you don't keep
2 that?

3 A The answer to your question is that we don't keep
4 that.

5 Q So in order for you to determine what exclusions do
6 or don't apply, you have to make the assumption that the
7 things on a pick list actually went on to what the
8 customer was actually sent?

9 A That's correct.

10 Q As a matter of fact in this case, again we've
11 already established the customer wasn't sent the policy,
12 and we have no indication as to who it went to if it went
13 to anybody, right?

14 A The standard practice is to send it to the sales
15 office for delivery.

16 Q And there's no record that was done?

17 A There's no record that that was or was not done.

18 Q Let's talk about standard practice again because I
19 want to make sure I have this point exactly clear in my
20 mind. I've looked at lots of things that have been sent
21 from your company to lots of different people in regard
22 to this policy, all this paperwork. Do you see that?

23 A I see all the paperwork, sir.

24 Q Every time anything has ever been sent to somebody
25 from what I can tell from this file, there's always a

1 copy of a cover letter where it says, Dear, Sir, here it
2 is. Do y'all have a policy that when you send something
3 out, a cover letter goes with it?

4 A When a policy goes out, there's typically a welcome
5 letter with it.

6 Q Now, that welcome letter, would that go to the
7 customer or to the agent?

8 A That would go to the sales office along with the
9 policy.

10 Q Well, the letter though is written to the customer,
11 right?

12 A That's correct.

13 Q Do you have a copy of the welcome letter that you
14 prepared?

15 A I'd have to review the file.

16 Q Sir, I haven't seen it, and I've reviewed this file
17 until I'm sick of it. Now, would you explain to the
18 Court if there is no such welcome letter, why you don't
19 have a copy of that?

20 A You asked me why we wouldn't have a copy of
21 something that you don't believe was produced?

22 Q Well, sir ---

23 A I'm not sure I understand your question, sir.

24 Q The letter is not part of the policy; is it?

25 A The letter is not part of the policy.

1 Q You kept copies of all these letters that we've got.
2 Why didn't you keep a copy of the welcome letter?

3 A I'd have to review the file. As you've stated,
4 there's lots of papers.

5 Q Sir, you reviewed the file before coming here today;
6 haven't you?

7 A I have.

8 Q Well, you got copies of every letter in the world
9 that's gone along with anything that's ever been sent
10 except you don't have a copy of the letter that went with
11 the policy you claim somebody may have produced at some
12 time pursuant to a pick list that you don't have, right?

13 **(NO RESPONSE)** That's right; isn't it?

14 A What is right, sir?

15 Q If the welcome letter, if it actually did get
16 prepared, y'all ought to at least have a copy of that;
17 shouldn't you?

18 A If there was a welcome letter prepared, it would be
19 part of the file.

20 Q Where is it?

21 A I don't know, sir.

22 Q We haven't seen it. If it's not there, that's sort
23 of proof it ain't never got made, right?

24 A I'd have to review the file for that specific
25 document, sir.

1 Q Sir, it ain't here. There is no letter.

2 MR. KRISTINIK: Sir, if I may, I think Mr. Moore has
3 made his point. We are wasting valuable court time, and
4 we're going to be breaking early today. I would ask that
5 Mr. Moore please move on to his next topic.

6 THE COURT: There's no welcome letter.

7 MR. MOORE: Fine. Thank you, sir.

8 THE COURT: That's what I'm getting from it.

9 Q Now, the welcome letter would have been made at the
10 same time the policy was supposed to be made, right?

11 A That's standard practice.

12 Q And you might not keep the policies, but you do keep
13 the welcome letters, right?

14 A Also again, that's standard practice.

15 Q Does the welcome letter come off the typewriter the
16 same time that the policy comes off the typewriter as
17 part of the standard practice?

18 A The welcome letter is produced by the computer as
19 well.

20 Q At the same time the policy is produced?

21 A That is the practice.

22 Q The fact that you don't have a copy of the welcome
23 letter, would tend to indicate, there never was one;
24 wouldn't it?

25 A It would indicate that there wasn't one in the file.

1 I don't know if there was or was not one in the file.

2 Q Well, sir, you keep important documents in the file,
3 right?

4 A We do.

5 Q Can you think of any reason somebody would have
6 snuck into Mike's file, gone in there, grabbed the
7 welcome letter, tore it up and put it in the trash can?

8 **(NO RESPONSE)** Any reason in the world somebody would
9 have done that?

10 A There's no reason why someone would remove a
11 document from a file.

12 Q And again, the fact that there's no welcome letter
13 is evidence of the fact there never was a policy created;
14 isn't it?

15 A I don't draw that conclusion, sir.

16 Q Well, we know you would have kept it if it was made.
17 We know it was made at the same time the policy should
18 have been made. We know that you don't have it; it's
19 never been produced, and we have no idea how come it
20 ain't there. Now, if the welcome letter is something you
21 should have if the policy was produced and we know you
22 don't have it, that's evidence the policy never came off
23 the typewriter; isn't it?

24 MR. KRISTINIK: Objection, your Honor. That
25 question is so vague and ambiguous, even I couldn't

1 follow it.

2 THE COURT: I understand the point you made.
3 There's no welcome letter; it's indicative of something.

4 Q What's the purpose of the welcome letter?

5 A To welcome the customer to the company and to thank
6 the customer for purchasing the policy.

7 Q This gentleman, if procedure had been followed,
8 would have gotten possession of the non-existent welcome
9 letter and the policy if it was transmitted. Does he
10 still work with any of these companies that you still
11 work with?

12 A There was a lot in that question. Could you repeat
13 it please?

14 Q Pennsylvania Life as I understand it is now
15 affiliated with all these other companies, right? **(NO**
16 **RESPONSE)** You told us about them.

17 A Pennsylvania Life was owned by Universal American,
18 and Universal American owns a number of insurance
19 companies.

20 Q The gentleman who should have gotten the welcome
21 letter and the policy to give to Mike, does he still work
22 with Universal Life or any of its affiliated companies?

23 A Which gentleman is that, sir?

24 Q What's the man's name, John somebody, who should
25 have gotten the policy, if it was created, along with a

1 welcome letter, if it was created, and should have given
2 it to Mike if anybody did. What's his last name?

3 A John Rothvich is no longer associated with any of
4 the companies involved with Universal American.

5 Q I want to make sure I get back and get this question
6 answered because I'm not sure I remember. And I'm
7 getting older, and I mean that sincerely. We know you've
8 told us according to procedure the customer is supposed
9 to get the welcome letter and the policy, right?

10 A The welcome letter is supposed to be included with
11 the policy.

12 Q And the policy and the welcome letter are supposed
13 to go to the customer through the selling agent, right?

14 A That's the typical process.

15 Q The selling agent is supposed to supply the welcome
16 letter and the policy to the customer on behalf of
17 Pennsylvania Life?

18 A That's correct.

19 Q And that is to ensure compliance with the law and
20 your policies?

21 A That's to ensure that the policy is provided to the
22 customer, and the agent can answer any questions that the
23 new insured may have at that time.

24 Q What documentation is there that you maintain that
25 has the agents confirm back to Pennsylvania that they

1 have done what they're supposed to do and to give the
2 policy and the welcome letter to the customer?

3 A There's no confirmation of that in the file.

4 Q I know it's not in the file. My question is
5 pursuant to your ---

6 MR. KRISTINIK: Your Honor, I hate to intercede at
7 this point, but we've been going for a long time, and I
8 need to take a quick break.

9 THE COURT: Let's stand at ease for a few minutes.

10 MR. KRISTINIK: And I'll instruct the witness that
11 he's under oath and he cannot talk to anyone during the
12 break.

13 THE COURT: The way it works, if you talk to anybody
14 on the break, he can ask you, "What did y'all talk
15 about," so it's easier not to.

16 (RECESS)

17 THE COURT: All right. You may continue.

18 Q (MR. MOORE) Sir, you say that there is this pick
19 list that's in the file. Do you know who it is that ran
20 the pick list?

21 A Who specifically?

22 Q Yeah, the name of the individual who allegedly ran
23 the pick list. There ought to be some sort of
24 recollection that you can go back and see who did it?

25 A The pick list is actually generated by the computer.

1 Q Well, the computer generates it because somebody
2 tells it to, right?

3 A Upon approving the policy, then that would generate
4 the pick list and the policy pages.

5 Q Well, the underwriting committee says, we approve.
6 There's voice recognition software that hears that, and
7 prints out the policy and the pick list. Is that what
8 you're telling me?

9 A No, sir. That's not the way it goes.

10 Q There has to be some mechanical process in place
11 where the computer is told what to do, right?

12 A When the application first comes in, the specific
13 coverage that's requested on the application is entered
14 into the computer, and then that's assigned a number.
15 From there, the underwriter would review the application
16 and the accompanying documentation and make a
17 determination on whether or not the coverage as applied
18 would be approved.

19 Q My question is what's the name of the person that
20 inputted all of Mike's information in order to get the
21 policy printed out?

22 A I don't know the name of that person.

23 Q Do you have a record of that?

24 A There's a record of the coverage on the application
25 being input into the computer.

1 Q By whom?

2 A I don't know who that person is, sir.

3 Q Assuming that the policy may have been produced, who
4 got it when it came off the computer?

5 A It would have been someone in the Policy Issue
6 Department.

7 Q Who?

8 A I don't know, sir.

9 Q Has anybody checked with the Policy Issue Department
10 to see if, in fact, somebody in there ever got one?

11 A I'm not aware of checking with any particular
12 individual.

13 Q Well, you were responsible for compliance; weren't
14 you?

15 A I was responsible for compliance at that time, yes,
16 sir.

17 Q Well, who would have been the person responsible for
18 complying to put the policy and the welcome letter into
19 the hands of John, the selling agent?

20 A There were a lot of employees who worked for the
21 company. The company moved a couple of times, so, sir, I
22 don't know who that individual may have been at the time.

23 Q So you're telling me you believe a policy that we
24 don't even have a copy of, came off of a computer
25 somewhere, went to somebody who did something with it,

1 right?

2 A They are your words, sir.

3 Q That's true; isn't it?

4 A It's true that the process is to produce the policy
5 once it's approved and have that policy sent to the sales
6 office for delivery.

7 Q We know there was a policy in force and effect in
8 1999?

9 A That's the original issue date was in 1999, yes,
10 sir.

11 Q Do you know the definition of "disability," how bad
12 off a person's got to be in order to be disabled?

13 A I'd have to read the definition in the policy.

14 Q There's also no doubt but that his coverage was
15 increased in 2002?

16 A The coverage was increased in 2002.

17 Q So if he became disabled after 2002, the monthly
18 benefit was \$2,500 a month?

19 A The accident disability was \$2,500 a month.

20 Q That would continue until 65 years of age or until
21 he no longer was disable?

22 A It would continue as the policy indicated or until
23 he was able to return to work. Yes.

24 Q I know I've asked this question a thousand ways, but
25 I'm going to ask this one question. Has your company

1 ever done anything in order to see if in fact the policy
2 was ever delivered to your client?

3 A We reviewed the file to see if there was any further
4 indication in the policy records that would state that
5 the policy was, in fact, received by the insured.

6 Q And those records have shown what you've already
7 testified to?

8 A The records have shown what I've testified to.

9 Q When according to the records in the file, Mike's
10 been current with his payments ever since the policy was
11 initially issued in 2002, right?

12 A The policy is currently in force and the premiums
13 are being paid. I'm not aware of any indication where
14 there was a break in the premium payments.

15 Q What did he pay for this thing? How much did it
16 cost him?

17 A I don't remember without seeing the application or
18 the policy documents. I don't recall the exact premium.

19 Q Now, you do know that in June there was an
20 Application for Increase?

21 A June of when, sir?

22 Q 2002.

23 A I'm aware of the Application for Increase. Yes,
24 sir.

25 Q Do you know who approved the Application for

1 Increase?

2 A It would have been an underwriter. I don't remember
3 the specific underwriter.

4 Q Does any of the applications, either the 1999
5 Application for Insurance or the 2002 Application for
6 Insurance, mention anything about an alcohol exclusion?

7 A On the application?

8 Q Yes.

9 A I'd have to review the application, but I don't
10 believe that there is an exclusion stated on the
11 application.

12 Q I'm going to hand you a portion out of Exhibit
13 Number 4. It basically says A & H Application Receipt,
14 dated November, 1999. Do you see that?

15 A I see that, sir.

16 Q What is that?

17 A The state requires that we provide the applicants
18 with this application receipt, and there are a series of
19 questions there.

20 Q But under that -- And the thing is actually signed
21 by my client; is that right?

22 A I see a signature on there. I can't quite tell for
23 sure. It appears that it could be Mike Russell, yes.

24 Q There's a document on this application receipt
25 called Certification of Delivery, and that's not signed

1 by anybody is it?

2 A It states, "Certification of Delivery of the Outline
3 of Coverage, the Guide to Health Insurance for People
4 with Medicare, and the Medicare Duplication of Coverage
5 Notice."

6 Q Okay. And this thing says that this A & H
7 Application, this Certification of Delivery, is supposed
8 to be concluded when there's an Outline of Coverage given
9 to the applicant, right?

10 A If there was an Outline of Coverage delivered, then
11 that would have been signed.

12 Q So if, in fact, my client had been given anything at
13 all referred to as an Outline of Coverage, then he would
14 have had to sign a receipt in 1999 saying that he had
15 gotten it; is that right?

16 A This indicates that if any of these items were
17 delivered, then there would be a signature.

18 Q Hold that thought. This Exhibit Number 12 appears
19 to be in '02, but this Exhibit Number 12 basically
20 contains an Outline of Coverage, right?

21 A This contains definitions, exceptions and
22 limitations.

23 Q That basically outlines the coverages that are in
24 there. It basically says, injury means, sickness means,
25 disability means, total disability means, hospital means.

1 It's got exceptions and limitations, covered family
2 members, and it says it's not a contract. Sir, if that's
3 not an outline of coverage, what is it?

4 A It's not an Outline of Coverage as defined here.
5 It's the definitions, exceptions and limitations.

6 Q Let's make sure we can understand this. Since the
7 document I just showed you is blank, that would indicate
8 according to your records that in 1999 when Mike applied
9 for coverage, no Outline of Coverage was ever given to
10 him, correct?

11 A What this form indicates is that the applicant who
12 signed it indicates that he does not have a current
13 Medicaid card.

14 Q Right. Which there's also something down here which
15 says it's a receipt, and it says, "Certification of
16 Delivery," which basically says that there's an Outline
17 of Coverage, and it basically says it's to be completed
18 when the notice is given to an applicant, so we know that
19 as of November 19, 1999, the date of the application, by
20 the way, no Outline of Coverage was ever afforded to my
21 client by your company, right?

22 A What this indicates is that the applicant indicated
23 that he does not have Medicaid. The rest of this is not
24 completed.

25 Q He signed the first part, but Section B says that

1 it's a Certification of Delivery, and it says, "It's to
2 be completed when the notice is given to an applicant,
3 age 65 or over. This includes any person to be covered
4 who is 65 and over." And it says, "I acknowledge." Now,
5 Mike wasn't 65, but it does say, "Certification of
6 Delivery," and it basically talks about outlines of
7 coverage.

8 MR. KRISTINIK: Your Honor, the document speaks for
9 itself. This witness hasn't had any involvement in the
10 actual completion of the document. I couldn't see asking
11 any more questions about it, but the document speaks for
12 itself. I would suggest that we move on.

13 MR. MOORE: I appreciate his suggestion, your Honor,
14 but I think I'm trying my case. ,I know Mr. Kristinik
15 would love to try it for me, but ---

16 THE COURT: Go ahead and try your case.

17 MR. MOORE: Thank you.

18 Q Sir, do you have any type of receipt signed anywhere
19 where any form of Outline of Coverage was ever given to
20 my client?

21 A No, sir.

22 Q Now, according to the underwriting, I can show you
23 at page 555, but coverage was approved as applied for,
24 right? Pages 555 and 573 of the record. I'm going to
25 show you page 573 of this record, which is part of

1 Exhibit 4, says that the coverage was approved July 25 of
2 '02; is that correct?

3 A I see the indication that it was approved 7-25-02.
4 Yes, sir.

5 Q Then, down on the bottom of the page of 573, it says
6 "Assemble and Mail" and then "Assemble and Return To" and
7 "Special Instructions." Do you see that? **(NO RESPONSE)**
8 Right here. **(INDICATING)**

9 A I see it.

10 Q "Assemble and Mail" and then a line, correct?

11 A I see that, yes, sir.

12 Q That line is supposed to be initialed by the person
13 who assembles the policy and mails it; isn't it?

14 A I don't know that.

15 Q Well, sir, it's your form, and you're responsible
16 for compliance. Everything else that's got a line by it
17 has got something written into it, but where it says,
18 "Assemble and Mail, 1999," no signature or initial of
19 anybody; is it?

20 A I don't see anything on there, no, sir.

21 Q So where it talks about it being approved, it says
22 it's approved, but nobody ever gave the instructions
23 according to that to assemble the policy and to mail it,
24 right?

25 A I don't see anything on there under the assembly

1 instructions.

2 Q Well, the assembly instructions are supposed to have
3 somebody's initials by somebody telling somebody to
4 assemble the policy and mail it, right?

5 A I don't know that.

6 Q Can you give me any reason why the instruction blank
7 "Assembly and Mail" is left blank?

8 A I don't know why that's blank, sir.

9 Q If it had been assembled and mailed, that would be
10 somebody's signature there or initials; wouldn't it?

11 A I don't recall the exact procedures at that time.

12 Q Sir, you're the compliance officer. These forms
13 haven't changed over the years; have they?

14 A They may have changed some, but ---

15 Q You're responsible for the forms; aren't you?

16 A I can speak to that the "Assemble and Mail" is not
17 completed; the "Assemble and Return To" is not completed.

18 Q Right. And you're the compliance officer, right?

19 A I was the compliance officer.

20 Q You know how they are supposed to comply, right?

21 A Comply with the regulations of the state insurance
22 department.

23 Q And according to your testimony, the policies of the
24 company. This is a form you were responsible for
25 compliance on, correct?

1 A I didn't necessarily see all internal forms.

2 Q Sir, if this policy were, in fact, mailed and if
3 this policy were, in fact, put together, somebody's
4 initials should have been on that line on that form.
5 That's correct; isn't it?

6 A It would appear that way.

7 Q Thank you, sir. And it not appearing that way is an
8 indication the policy was never assembled and was never
9 mailed?

10 A That's not correct, sir.

11 Q You said, "It would appear that way."

12 A There's an indication in the file that a policy was
13 produced.

14 Q Yes, sir. And this is an indication in the file
15 that it wasn't.

16 A No, sir, it's not.

17 Q Well, when you said that it would appear that way in
18 answer to, if it was assembled and it was mailed,
19 someone's initials should have been there, that form
20 makes it appear as if the policy was never assembled or
21 mailed; doesn't it?

22 A You're asking me to draw that conclusion, and I
23 can't do that, sir.

24 Q You just did; didn't you, sir?

25 A No, sir, you did.

1 Q And you said, "It would appear that way," correct?

2 A In the context, I used those words, yes, sir.

3 Q So there are places in the file where it appears it
4 may have been assembled and mailed and places in the file
5 where it appears it may not have been assembled and
6 mailed. That's a fair statement; isn't it?

7 A No, sir.

8 Q Now, the declaration sheet that exists in this file,
9 also known as a Dec Page -- Do you know what a Dec Page
10 is?

11 A I know what a Dec Page is, yes, sir.

12 Q Does a Dec Page either for the '99 policy or the
13 2002 policy show any type of exclusions anywhere, anyhow,
14 any kind?

15 A You're asking me if this one page you're showing me
16 indicates an exclusion, and this is Page 3 of the Policy
17 Schedule otherwise known as the Declarations Page, I
18 don't see an exclusion on here.

19 Q Do you know if my client was even ever provided a
20 copy of his Declarations Page?

21 A The Declarations Page is included with the policy.

22 Q Right. It's supposed to be, right? It's supposed
23 to be?

24 A It's supposed to be, yes sir.

25 Q Now my question is, are you able to testify to any

1 human being on the face of the planet including you who
2 claimed to have delivered the Declarations Page to my
3 client?

4 A I did not personally deliver it, so I can't swear
5 that it was delivered.

6 Q Do you know the name of any person in the world on
7 the face of the planet who claims to have delivered the
8 Declarations Page to my client?

9 A That goes back to 1999. I don't know that anyone
10 could state absolutely if the policy was delivered.

11 Q Is there any piece of paper anywhere that shows what
12 person allegedly delivered the Declarations Page to my
13 client?

14 A I'm not aware of that, sir.

15 Q Have you seen the rider? Have you seen the rider
16 that was sold in 2002? Sir, do you have any proof that
17 the rider was ever delivered to my client?

18 A We do know that it was produced.

19 Q Do you have proof that the rider was ever produced?

20 A There's indications in the file that the rider was
21 produced.

22 Q Do you have any indications in the file that the
23 rider was ever delivered to my client?

24 A We have a letter in the file that is addressed to
25 the insured.

1 Q Right. And that would be this Number 7, this letter
2 right here, a letter in the file addressed to the insured
3 sending him a copy of the rider, correct?

4 A This is a letter indicating that "We're pleased to
5 advise that the additional benefits for which you
6 recently applied have been approved. The new Policy
7 Schedule that reflects the benefits currently in force"
8 -- It doesn't use the term "rider", the "additional
9 benefits."

10 Q But it's a transmittal letter; isn't it?

11 A You could call it that.

12 Q What's being transmitted with that letter?

13 A "Your new Policy Schedule reflects the benefits
14 currently in force. Please read the enclosed description
15 of your benefits and attach the information to your
16 policy."

17 Q Well, now if you've got a copy of the transmittal
18 letter for the rider in 2002, why don't you have a copy
19 of a transmittal for the actual policy in '99?

20 A I'd have to review the file, sir.

21 Q But we know you kept a copy of a transmittal letter
22 in 2002 because we've got that that y'all have given to
23 us, right?

24 A I see the copy of that letter, sir, yes.

25 Q Let's take a look at what the rider is. Is Exhibit

1 Number 6 here, is this supposed to be the rider that came
2 along with the transmittal letter?

3 A This would appear to be what was sent in 2002.

4 Q Let's take a look at that rider. Now, we do know
5 the client apparently got this, right? It said in the
6 rider, it appears that he got sent this, right?

7 A I believe that you told us that he did receive it.

8 Q And it says, "Total Disability Benefit." It says,
9 "We will pay the monthly total disability benefit shown
10 in the policy on Page 3 when injury causes total
11 disability which starts within 30 days after the date of
12 the accident and continues through the end of the
13 elimination period, if any, or (2) You or your covered
14 spouse are under the regular and personal care of a
15 physician, and (3) Total disability starts before your or
16 your covered spouse's 65th birthday," and something in
17 parenthesis. "This benefit is payable for each month
18 during which such total disability with regular and
19 personal care of physician continues up to the maximum
20 benefit period shown on the Policy Schedule for any one
21 accident." That's what it says, right?

22 A You just read it, so . . .

23 Q Okay. And it says, "Where there's a conflict
24 between this rider and the policy, the provisions of the
25 rider control." Right? See that language?

1 A I see it.

2 Q Just read it for us out loud, that last sentence?

3 A "Where there is a conflict between this rider and
4 the policy, the provisions of this rider will control."

5 Q The rider says he's got disability coverage, right?

6 A The rider describes the total disability benefits.

7 Q Show me in the rider where there is any exclusion
8 mentioned for alcohol usage?

9 A I don't see it in here, sir.

10 Q Yes, sir. And it also says though that, you got
11 this disability coverage and if the policy conflicts with
12 this rider, the terms of the rider apply and not the
13 policy, right?

14 A It states where there is a conflict between the
15 rider and the policy, the provisions of this rider will
16 control.

17 Q Okay. So we know then that to look at what coverage
18 he has, we look at the rider.

19 A That we look at the policy and the rider.

20 Q If the policy, which we think exists like Number 5
21 maybe, if the policy conflicts with the rider, the rider
22 controls?

23 A It states, "Where there is a conflict between the
24 rider and the policy, the provisions of this rider will
25 control."

1 MR. MOORE: Your Honor, this might be the
2 appropriate time to break.

3 THE COURT: Do y'all want to start at 9:00?

4 MR. KRISTINIK: Nine is fine with us.

5 THE COURT: Okay. We'll start at 9:00.

6 **(WHEREUPON, THE HEARING WAS RECESSED.)**

7 *****

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

C E R T I F I C A T E

I, THE UNDERSIGNED, JANICE D. KATZ, COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 13TH DAY OF DECEMBER, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JANICE D. KATZ

COURT REPORTER

1 STATE OF SOUTH CAROLINA
2 COUNTY OF LEXINGTON
3
4 MIKE RUSSELL
5 Plaintiff,
6 -vs-
7 RANDOLPH GILL
8 PENNSYLVANIA LIFE INSURANCE
9 COMPANY
10 Defendants.
11
12 December 14, 2012
13 Lexington, South Carolina
14
15 B E F O R E:
16 HONORABLE THE HONORABLE EUGENE C. GRIFFITH JR., Judge.
17
18 A P P E A R A N C E S:
19 S. Jahue Moore, Esquire
20 Attorney for the Plaintiff
21
22 Larry Kristinik, Esquire
23 Attorney for the Defendants
24
25 Lisa H. Davenport, RPR
Official Court Reporter

Transcribed by
Dinah M. Garvin
Official Court Reporter

INDEX

Certificate 221

INDEX OF WITNESSES

WITNESSES: PAGE

DR. WILLIAM H. RICHARDSON III

Direct By Mrs. Horn 8

Cross By Mr. Moore 24

JACK MACKIN

Cross By Mr. Moore 47

Cross By Mr. Kristinik 66

Redirect By Mr. Moore 85

Recross By Mr. Kristinik 94

Redirect By Mr. Moore 94

CHRISTINA BARLOW

Direct By Mr. Moore 96

Cross By Mr. Kristinik 142

Redirect By Mr. Moore 159

Recross By Mr. Kristinik 167

SUSANNE RUSSLE

Direct By Mr. Moore 170

Cross By Mr. Kristinik 195

Redirect By Mr. Moore 219

PLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
1-19	See List of Exhibits		4

1	20	List of Checks	174
2	21	1999 Policy	177

DEFENDANT'S EXHIBITS

4	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
5	1-23	See List of Exhibits		4

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Whereupon, on December 14, 2014 the following
2 proceedings were held:)Lexington County Judge
3 Griffith presiding.

4 (WHEREUPON, Plaintiff's Exhibits Nos. 1-19, having
5 been marked in previous testimony, were received into
6 evidence.)

7 (WHEREUPON, Defendant's Exhibits Nos. 1-23, having
8 been marked in previous testimony, were received into
9 evidence.)

10 MR. KRISTINIK: First we have one of the witnesses we
11 intend to call in our case in chief is Dr. William
12 Richardson. He is a licensed medical doctor. He needs to
13 be back at the hospital for a meeting. He's got to leave
14 here no later than 11:30. I was wondering if we can take
15 him out of order.

16 THE COURT: Sure. You want to take him this morning?

17 MR. KRISTINIK: We would be glad just to start with
18 him. He's here.

19 THE COURT: Let's get him done.

20 MR. KRISTINIK: And then a second thing, Your Honor,
21 I am not sure if this is an issue or not, but Jahue
22 indicated yesterday that he may want to call our company
23 representatives and he pointed to my in-house attorney
24 contact, Dan Howe, who is my litigation contact, who
25 manages the litigation. He is my contact, oversees the

1 litigation. He is here just to watch. We're not going to
2 call him as a witness.

3 MR. MOORE: I probably am.

4 MR. KRISTINIK: Well, on what basis? We've never
5 listed him as a witness. We haven't given any description
6 of any testimony he would ever give. I would have to
7 object to attorney/client privilege to every question
8 Mr. Moore would ask.

9 MR. MOORE: Well, Your Honor, I guess we'll cross
10 that bridge when we come to it, I would assume.

11 MR. KRISTINIK: Well, couldn't I just ask Mr. Howe to
12 just leave the room. He's not under subpoena.

13 MR. MOORE: I have no problem if he wants to leave.
14 I guess I can't control that.

15 THE COURT: I've heard of it happening in traffic
16 cases in small court where they don't have a witness to
17 identify the driver, where the passenger gets asked to
18 leave the courthouse unbeknownst to the Highway Patrol
19 man. It works quite well.

20 MR. MOORE: I think that he -- sure, I think that --
21 however, I would like the court to reflect that apparently
22 this gentleman, from what we can gather, I think the
23 testimony is going to be, from the adjustor, that he was
24 involved in making the decision to stop making these
25 payments back in November of '09, and the payments

1 stopped. And if they are -- if they don't want to give
2 The Court an explanation in regard to why they stopped
3 making payments, Hey, I guess that's up to them.

4 THE COURT: But you got a company representative.

5 MR. MOORE: Sure.

6 THE COURT: To call if that line of questioning is
7 going to be asked?

8 MR. KRISTINIK: Yea. He is free too ask Mr. Macken
9 and Mrs. Barlow what he wants about the handling of the
10 claim. Mr. Howe has flown all the way here from Florida.
11 He is my in-house attorney contact. I think he should get
12 to sit here and watch and not be called as a witness. We
13 would ask that that be a ruling.

14 THE COURT: Let's see how the testimony goes first.
15 If he gets called we'll deal with it then. How about
16 that? Mr. Moore, you're going to call the representative
17 first?

18 MR. MOORE: Yes. I am going to call Mrs. Barlow and
19 this gentleman, before I call the attorney and I'll see
20 what--

21 THE COURT: You may not need the attorney.

22 MR. MOORE: May not need him.

23 MR. KRISTINIK: That's fine, Your Honor. I am just
24 saying, we can address it when we get there. But if
25 Mr. Howe is on the stand, it would be all attorney/client

1 privilege. And we're just wasting more time. I think we
2 wasted a lot of time yesterday, unfortunately.

3 MR. MOORE: Your Honor, I heard about this wasting
4 time. I'm sorry counsel considers my examination of his
5 clients wasting time. I would hope that we were producing
6 relevant testimony to the trial of the case. I do take
7 some exception that we were wasting time yesterday with
8 the examination, which appeared to me to be fairly
9 relevant to some of the issues involved.

10 MR. KRISTINIK: I am fine with the wait and see, Your
11 Honor.

12 THE COURT: It is easier for me, because it gives me
13 a lot more basis to formulate a ruling. It is like a
14 motion in limine. I normally thank you for giving me an
15 alert I'm looking for it. It's easier to rule on it, as a
16 judge, right when it comes up, then. But, I like to know
17 it's coming.

18 MR. KRISTINIK: Thank you, Your Honor.

19 THE COURT: I am not ruling against you. We'll deal
20 with it when it gets there. Are we going to call the
21 physician first?

22 MR. KRISTINIK: Yes, Your Honor.

23 MRS. HORN: We would like to call Dr. Richardson,
24 please.

25 THE COURT: All right, Dr. Richardson, come forward

1 to be sworn.

2 DR. WILLIAM H. RICHARDSON III, after being duly
3 sworn, testified as follows:

4 THE WITNESS: My name is William Harrington
5 Richardson III. Last name R-i-c-h-a-r-d-s-o-n.

6 DIRECT EXAMINATION

7 BY MRS. HORN:

8 Q What is your occupation doctor?

9 A I am an emergency medical physician and medical
10 toxicologist.

11 Q Where are you employed?

12 A I am employed at Palmetto Health Richland, at the
13 hospital, and I also work as a medical director of the
14 Palmetto Poison Center, which is on University South
15 Carolina's campus and serves the state of South Carolina.

16 Q What are your duties as the director of the Palmetto
17 Poison Center?

18 A I am responsible for medical direction for the staff,
19 which are nurses and pharmacists. They're taking calls
20 from around the state 24/7 in regards to the
21 recommendations of overdoses, poisoning, exposure, drugs
22 of abuse, exposures and those sorts of calls. We get a
23 lot of those, thousands -- tens of thousands every year.

24 Q And you work in the ER at Palmetto Health Richland?

25 A I did. I am one of the core faculty and have been

1 working there since 2004.

2 Q What is your educational background?

3 A How far do you want me to go back?

4 Q Start with college.

5 A Okay. I was a mathematics major at Clemson
6 University; and I went to medical school at MUSC in
7 Charleston for four years; and then I was a resident in
8 emergency medicine at Palmetto Health Richland for three
9 years and chief resident there; and then I was a medical
10 toxicology fellow at University California San Diego
11 Medical Center for two years; and then I came back to
12 Columbia.

13 Q When did you finish your residency at Richland?

14 A 2002.

15 Q And then you moved to San Diego to do a medical
16 toxicology fellowship?

17 A That's correct.

18 Q What years were you there?

19 A 2002 to 2004.

20 Q Can you tell me about the toxicology fellowship about
21 the specialized training that you got.

22 A I'm a board certified medical toxicologist and this
23 day and age you have to complete a two year fellowship and
24 training, that is in hospital evaluations, poison center
25 work, seeing patients that are overdosed, patients that

1 have chemical exposure, patients that are intoxicated from
2 drugs of abuse, envenomation a wide range of medication
3 affects an overdoses and it is a sub specialty
4 certification, that's the kind of patients that I see in
5 that specialty.

6 Q So how do you become board certified?

7 A Well you have to have completed a two year
8 fellowship, and then there is the American Board of
9 Medical Specialties has a national examination that's
10 given every two years that you can sit for once you're out
11 of fellowship. I did that in 2004.

12 Q Have you had to do anything to maintain your
13 certification?

14 A There is a lot of on going CME activity and some
15 testing of the CME activities that you had to do every
16 year. You have to recert with another formal board
17 certification examination every 10 years so that will be
18 coming up for me in 2014.

19 Q CME is that continuing--

20 A Continuing Medical Education, yes, ma'am.

21 Q And you're certified by the American Board of
22 Emergency Medicine in medical toxicology; is that correct?

23 A I am board certified in emergency medicine, which is
24 through the American Board of Emergency Medicine, ABM and
25 the certification body for the sub special medical

1 toxicology fellowship and training is through the American
2 Board of Medical Specialties.

3 MRS. HORN: At this time I would present Dr. William
4 Richardson as an expert in the field of toxicology?

5 MR. MOORE: I have no objection at all.

6 THE COURT: All right. He is so qualified to give a
7 medical toxicology.

8 Q Dr. Richardson, these are documents that have been
9 marked as Defendant's Exhibit 21. Have you seen those
10 documents before?

11 A Just quickly flipping through them, I recognize these
12 are some records from the Lexington Medical Center. I
13 believe I've seen some of these, if not all.

14 Q Have you reviewed these documents in preparation for
15 testifying today?

16 A I have.

17 Q In your review of these medical records do they show
18 that Mr. Russell was admitted into the emergency room and
19 to the hospital at Lexington Medical Center on June 18,
20 2008 for treatment after a motorcycle wreck?

21 A Yes.

22 Q Do these medical records indicate that Mr. Russell
23 had an elevated blood alcohol level in the ER, after that
24 motorcycle wreck?

25 A Yes.

1 Q Will you look at page 114 of exhibit 21? Is this
2 page a lab report?

3 A Yes. It has some of the x-rays and labs and some of
4 the results interpreted on that page.

5 Q Does anything on this page indicate that Mr. Russell
6 had an elevated blood alcohol level?

7 A There is an ethanol level that's recorded at
8 232 milligrams per deciliter. It doesn't say milligrams
9 per deciliter on this particular page. But it says 0.232
10 which is representing that same concentration

11 Q Next to that notation on that page it says ETOH, what
12 does ETOH mean?

13 A That's ethanol.

14 Q So the test is measuring ethanol?

15 A I think the lay term might be alcohol. There are a
16 number different types of alcohol. But people use the
17 term alcohol and they really mean ethanol, which is what
18 is consumed in drinks.

19 Q So ethanol is the kind of alcohol that's in beer and
20 wine and liquor?

21 A That's correct.

22 Q And that's what this test measured?

23 A That's correct.

24 Q What does an ETOH result of .232 indicate?

25 A Well it's an elevated level. I mean, any of us in

1 here would be sitting here with a level of zero this
2 morning, if we hadn't had anything to drink. So it's a
3 significantly elevated level and it has a lot of clinical
4 implications into what kind of behavioral impact it would
5 have.

6 Q Well we can definitely talk about some of those
7 clinical implications. But, first, tell me a little bit
8 more about -- you said it was a significantly elevated
9 level. How many drinks would a person have to have a
10 blood alcohol level of .232?

11 A There is a lot of factors that contribute to that.
12 It is how long you drink, what time period you consume
13 alcohol over, and your -- your gender, your weight,
14 medications you can be on. A lot of things can impact
15 that level.

16 Q For Mr. Russell, having reviewed his medical records
17 here, how many drinks do you think that he would have had
18 to consume to have a blood alcohol level of .232 at 2248?

19 MR. MOORE: Object to the form of the question, Your
20 Honor, I don't believe it has an appropriate foundation.

21 THE COURT: Sustained to that. He's an expert.
22 Rephrase your question.

23 Q With a person who is approximately 175 or 185 pounds,
24 how many drinks would they have to consume to achieve a
25 blood alcohol level that would be measured at .232?

1 A That's a calculation you can make on the kind of dose
2 of ethanol -- alcohol someone would need. And if someone
3 with a weight of about 85 kilograms, which is kind of in
4 the range you're talking about, would have to consume at a
5 minimum seven, maybe even up to, 10 drinks to get to that
6 level. Again, it depends on the time frame in which it's
7 drunk. But it would take a minimum of seven to 10 drinks
8 to go to that ethanol level.

9 Q Is there anything that could have caused
10 Mr. Russell's blood alcohol at .232, other than consuming
11 alcoholic drinks?

12 A Not that I'm aware of.

13 Q Could he have received any medical treatment in the
14 hospital, based on the records you reviewed, that caused
15 that?

16 A From what I can tell it's on that same page. He
17 received morphine, IV fluids, Ancef, Cephalosporin
18 antibiotic. He got a tetanus shot. He received some
19 sedation, a drug called propofol to help reduce the
20 fractured injury that he sustained. But none of those
21 would contribute or change the measurable ethanol level
22 that was recorded.

23 Q Why would the ER have measured his blood alcohol
24 level?

25 A It is a pretty routine lab to order in the setting of

1 traumas. We do it to, essentially, almost every trauma
2 patient that comes in the emergency department for a lot
3 of reasons. I can get into them if you want.

4 Q Would they have done it, though, to provide medical
5 treatment?

6 A Yes. There is a lot of implications into whether how
7 much you may or may be concerned about head injuries and
8 their mental status, and also it is alcohol treatment
9 options at the end of medical hospitalization.

10 Q Are the tests that hospitals use for blood alcohol
11 reliable for medical treatment?

12 A They're used every day in the emergency department.

13 Q Do you have any reason to believe that this test was
14 not reliable?

15 A It is a very routine test it's done all the time in
16 emergency departments.

17 Q This document has been marked as Defendant's Exhibit
18 number three. What is on that document?

19 A It looks like a receipt.

20 Q Is it a receipt from Carolina Wings and Rib House?

21 A Yes, that's what it says at the time.

22 Q What items are listed on this receipt?

23 A It lists a Bud Lite bottle, Crown Royal, Southern
24 Comfort, Crown Royal, Yager, Yager and Crown Royal.

25 Q A moment ago you told us that based on your

1 experience in order for a person of Mr. Russell's size to
2 achieve a blood alcohol level of .232, he would have to
3 consume several drinks. If Mr. Russell drank only the
4 drinks that were on this receipt, could he have achieved
5 the blood level that was measured at the ER?

6 A If he drank all that in an hour or so period, it
7 would correlate with what about his level was. If he had
8 drank it over a longer period of time then that hour or
9 so, he would have to have had a few more drinks to
10 maintain that level.

11 Q How many drinks are on here? Is this seven?

12 A Yes.

13 Q Seven drinks. So at a minimum he would have had to
14 consume the number of drinks that are on this receipt?

15 A Again, it has a lot to do with time frame, as well as
16 other factors, I mentioned, with regards to absorption and
17 you have to account for on going elimination of ethanol
18 from his system. That would be the minimum he would be
19 able to drink to get that level of .232.

20 Q In a period of one hour?

21 A Yea, if this had been over five or six hours or three
22 or four hours, he probably would have had to drink more
23 than that to get to the level he had that was obtained at
24 the hospital.

25 Q You said the process by which the body is eliminating

1 alcohol. You said elimination. How does -- how do we
2 measure elimination? How can we predict that?

3 A Well that varies on the individual. But we know that
4 very experienced drinkers, like chronic alcoholics,
5 metabolize ethanol in the liver more rapidly than say a
6 casual or social drinker. So someone who is drinking
7 every day and heavily can metabolize like 30 or sometimes
8 even a little bit more milligrams per deciliter per hour.
9 So if you're talking about that level of 232, if an
10 alcoholic had that level we can see that level drop 30 in
11 and hour. A more casual or naive drinker that level may
12 just drop more in the range of like 15 to 20 milligrams
13 per deciliter per hour. So there is variation in that
14 depending upon the metabolic pathways in your liver that
15 are more enhanced if you drink very frequently in large
16 amounts.

17 Q If Mr. Russell only drank three Crown Royal drinks
18 over a period of three hours, would that be enough for him
19 to achieve a blood alcohol level of .232?

20 A No.

21 Q How much would he have to drink over a period of
22 three hours to achieve a blood alcohol level at .232 at
23 10:48?

24 A That -- again that's a difficult question to answer
25 just because not knowing the habits of Mr. Russell. That

1 would really depend on his body's ability to eliminate it.
2 But also how rapidly he is absorbing it. But, I would
3 say, that -- I mean, I can create the scenario if you were
4 drinking over a three or four hour period about everyone
5 of these drinks would contribute his weight about
6 30 milligrams, maybe up to 35 milligrams per deciliter of
7 ethanol. So if he drink seven of those that would be
8 around 210. If in that three hour period he was also
9 metabolizing you could see how he would be getting rid of
10 some of that as well. So if you said he was metabolizing
11 20 milligrams per deciliter per hour. He could lose 60 of
12 that say over a three hour period. So you can see where
13 we're getting with that, if he had enough of this to get
14 over 200 he's metabolizing a little bit, that's why he
15 would have to drink a few more drinks, if it was consumed
16 over a three or four hour period to get that level that
17 was measured at the hospital.

18 Q This document has been marked as Defendant's Exhibit
19 23, have you seen those documents before?

20 A Yes.

21 Q Are these South Carolina Law Enforcement Division
22 Forensic Services laboratory report?

23 A Yes.

24 Q Did you review them in preparation for testifying
25 today?

1 A I have seen these, yes.

2 Q Did these records indicate that Mr. Russell had an
3 elevated blood alcohol level?

4 A They do.

5 Q On page 415, the first page that you're looking at,
6 what does the front page of this report show?

7 A This is an ethanol alcohol level, it is a lay term
8 measurement of 199 at .199 would be in comparison to the
9 .232 that you saw. But this testing was done with head
10 space gas chromatography and mass spectrometry which is
11 even much more detailed testing and more sensitive and
12 specific testing.

13 Q Are these SLED results reliable?

14 A They would do this kind of testing very routinely
15 and, yes, I would expect it to be reliable.

16 Q On page 425 there's a label there. Does it indicate
17 what time this sample was collected from Mike Russell?

18 A The date on that is June 19, 2008, the time 0005 AM
19 so a few minutes after midnight.

20 Q If the SLED results at a few minutes -- a test on
21 blood that was drawn on a few minutes after midnight and
22 shown a blood alcohol level of .199 and the hospital
23 results that were measured at about 10:30 or 10:40 are at
24 .232, are these results consistent.

25 A Yes, they're based on what I was describing earlier

1 and, again, there is variation depending on how someone
2 eliminates and metabolizes the ethanol. But in that hour
3 or hour and a half period you could imagine 20 to 30
4 milligrams per deciliter per hour being metabolized if he
5 was having no on going absorption of alcohol, and most
6 ethanol is pretty rapidly absorbed. Most of it is
7 absorbed in the first hour, unless you have other issues
8 that would delay absorption, which I am not aware of any
9 in this case. And so, yes, going from a level of 232 to a
10 level of 199 over an hour and a half would be fairly
11 consistent.

12 Q Consistent with what you would expect in a normal --

13 A Well just not knowing the habits of Mr. Russell in
14 regards to his, you know, alcohol consumption. As an
15 example someone that was a really heavily alcoholic could
16 metabolize from 230 to 200 in an hour. But I would expect
17 someone who was more of a casual drinker to frequent
18 drinker to maybe metabolize a little bit less than that.

19 Q A few minutes ago you started talking about the
20 clinical implications of these elevated blood alcohol
21 levels. Can you talk to us more about that. How does
22 alcohol effect a person?

23 MR. MOORE: Your Honor, how alcohol would affect a
24 person. I would have to object to that. I believe the
25 question would be in regard to what impact he would expect

1 alcohol to have on this particular individual, if he knows
2 the individual.

3 THE COURT: He's already said he didn't know what his
4 habit is. Rephrase your question. I'll sustain the
5 objection as to relevance with particularity.

6 Q Does alcohol consumption have similar effects on most
7 people?

8 MR. MOORE: Same objection, Your Honor.

9 THE COURT: Where are we headed with this? Y'all
10 haven't disputed much of anything in this whole case,
11 other than delivery of a policy. I mean, he had a high
12 blood alcohol level. Okay. Where are we going past that?
13 What's the--

14 MRS. HORN: We're trying to demonstrate that
15 Mr. Russell's intoxication caused the motorcycle accident
16 that's at issue in this case and that the intoxication
17 exclusion will apply.

18 THE COURT: Let's go off the record a second.

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

20 THE COURT: All right I understand causation is an
21 issue. I'll let you proceed a little bit with your expert
22 witness.

23 MRS. HORN: Thank you, Your Honor.

24 Q Dr. Richardson, can you predict what effects an
25 individual of Mr. Russell's height, weight and age would

1 experience at specific blood alcohol level?

2 A There is a significant amount of individual variation
3 due to tolerance to ethanol. So it really depends on
4 someone's habits of how much they consume, how frequently
5 they drink alcohol. So there are certainly ranges of what
6 you would expect for more naive or social drinkers, if you
7 will, versus someone who is an extremely heavily drinker,
8 an alcoholic, would have much more tolerance of certain
9 levels of ethanol.

10 Q For a person who is a social drinker, can you predict
11 what effects an individual of Mr. Russell's height, weight
12 and age would experience at blood alcohol level?

13 A Again, there is a range of variation. But you
14 certainly can anticipate certain levels, kind of the
15 symptoms you would expect for someone who is a casual
16 drinker.

17 Q A blood alcohol level of around .2 in the range of
18 where we seen the results today, between .232 and .199,
19 can you describe the clinical implications of that?

20 MR. MOORE: Your Honor, I object to the form of the
21 question. I don't think it appropriately asked with the
22 appropriate hypothetical.

23 THE COURT: All right. I will sustain it. Rephrase
24 your question. You can ask hypothetical questions.

25 Q Can a person who is a social drinker of Mr. Russell's

1 size height, weight, age experience expected clinical
2 implications?

3 MR. MOORE: Same objection, Your Honor.

4 THE COURT: Sustain again.

5 Q Dr. Richardson, for a person who drinks two or three
6 drinks a night, two to three nights a week, who is
7 Mr. Russell's size, what effect -- what clinical effects
8 would you expect that person to experience at a blood
9 alcohol level of .2?

10 MR. MOORE: Same objection, please, Your Honor.

11 THE COURT: I think she has characterized a
12 hypothetical question on that case. I'm going to let him
13 answer it. I will overrule the objection.

14 MR. MOORE: Your Honor, my objection basically is
15 that she has not asked it in regard to the appropriate
16 level of certainty. Thank you, sir.

17 THE COURT: All right, I'll sustain as to that.

18 Q Can you answer that question to a degree of medical
19 certainty based on your expertise and experience?

20 A Yes.

21 THE COURT: Very well.

22 A Someone with a level of 232 milligrams per deciliter
23 of ethanol would be, that drinks casually that drinks a
24 few drinks a week, and not someone who is drinking heavily
25 every day, would be expected to initially as that level

1 goes up to have some disinhibition in regards to being
2 more talkative and more relaxed and kind of excited. And
3 as that level goes up and you're getting in certainly over
4 that 200 range and for a lot of people that were just
5 casual drinkers even lower, you would expect symptoms like
6 slurred speech. From a standpoint of driving, you would
7 expect symptoms like decreased coordination, decreased
8 reaction times, certainly delayed responses and decision
9 making in your coordination, fine motor coordination,
10 those kind of things.

11 The variation that I mentioned is that the individual
12 with variation is that sometimes you will see alcoholics
13 who can carry on a conversation with you at a level of
14 232. But there would be some people who don't drink very
15 frequently that would be unconscious at a level of 232,
16 and there is everything in between. So I would expect
17 some of those symptoms, as I described, from someone who
18 is a casual drinker, may have a mild amount of tolerance,
19 but has an ethanol level of 232.

20 MRS. HORN: We have no further questions.

21 CROSS-EXAMINATION

22 BY MR. MOORE:

23 Q Good morning, Doctor?

24 A Good morning.

25 Q My name is Jahue Moore. I am just going to ask you.

1 I may be with you for a little while. You know absolutely
2 nothing about the facts of this accident; is that correct?

3 A I wouldn't say that. I saw a report that had a
4 diagram of the accident. But primarily I've been asked to
5 look at the medical records and evaluation.

6 Q Sure, you have no firsthand knowledge at all of what
7 actually happened on the scene that evening; correct?

8 A I wasn't there.

9 Q So the answer would be, you don't have any firsthand
10 knowledge?

11 A Of being on the scene that night, no, I don't.

12 Q And actually you have no firsthand knowledge of the
13 actual injury sustained by my client; correct?

14 A Through the medical records I understand what they
15 are, but I wasn't there at the bedside, if that's what
16 you're asking.

17 Q Actually the injuries he sustained I believe he had a
18 broken pelvis, a broken hip, fractured tibia and fibula
19 and serious damage to a knee; correct?

20 A From records I saw he had a left acetabular fracture
21 which is the head of the femur, acetabulum in the pelvis
22 there, it was slightly fractured. But the more serious
23 injury at the time was the distal tibia fibula fracture
24 which was open fracture as well with a wound over it and
25 it was in the lower part of the leg.

1 Q So the things that I basically described, in layman's
2 terms, are pretty much what you just described in medical
3 terms; correct?

4 A Well the big injuries were the pelvic fracture and
5 the lower leg open fracture.

6 Q The pelvic, basically being the hip?

7 A Where the leg goes in the femur, the leg bone.

8 Q The ball and socket?

9 A Yes.

10 Q Where the ball goes into the socket that's basically
11 what he broke?

12 A Yea, and I just clarified it because there are a lot
13 of different types of pelvic fractures. But his was that
14 particular one acetabulum fracture.

15 Q Sure. And in medical terms, causation is a very
16 defined thing, is it not?

17 A You'll have to explain a little more.

18 Q Well, you have been an emergency room doctor for
19 quite some while; correct?

20 A Yea, I've been --

21 Q And you're board certified also in this medical
22 toxicology. So you're very keenly aware of the types of
23 things that can be caused by intoxication; correct?

24 A We see a lot of injuries caused by various kinds of
25 intoxication, yes.

1 Q Well, what actually happens is the injuries are
2 caused by trauma; correct?

3 A Well there is a lot of reasons leading up to
4 accidents whether it be trauma; that -- I guess that's all
5 how you look at the wording of it. But physically --

6 Q Sure.

7 A -- for the injury to occur. And in this case it was
8 a car accident that caused that -- or a motor vehicle
9 accident.

10 Q Right. But when we talk about medical causation we
11 talk about the sorts of medical conditions that actually
12 give rise to a particular condition; correct?

13 A If you're trying to say that there are certain
14 diagnoses medical conditions, whether it be trauma, or
15 medical problems specifically that lead to injury, I mean,
16 that's correct.

17 Q Well, I mean, you've seen -- here is what the
18 language of the policy says. Assuming that this is the
19 policy?

20 MRS. HORN: Object, Your Honor.

21 MR. MOORE: I'll read it to him.

22 MRS. HORN: Dr. Richardson has no basis to interpret
23 the policy here. He is discussing the medical situation
24 and not the contract between the parties.

25 MR. MOORE: He is on cross examination, Your Honor.

1 I believe we have an open cross examination rule in South
2 Carolina, and I am basically trying to get to what in the
3 heck this language -- I think I have a right to cross
4 examine my witness.

5 THE COURT: You can cross examine your witness. I am
6 not certain what your question is quite yet, because you
7 didn't quite get it out.

8 MR. MOORE: I got stopped before I did.

9 THE COURT: Rephrase your question, and then I'll
10 consider the objection. I want to know what the question
11 is.

12 Q Doctor, the language of this -- assuming this is the
13 policy, we don't know if it is or not, but the language
14 they're relying on says, we will not be liable for any
15 loss which results from being intoxicated. Do you see
16 that? Do you see that?

17 A Oh, I'm sorry I thought that was kind of redundant.
18 Yes, I do.

19 Q The sorts of things that can happen from being
20 intoxicated a person can go unconscious if he's
21 intoxicated; correct?

22 A In certain circumstances at high enough levels, yes.

23 Q A person can go into a coma from being intoxicated?

24 A In certain extreme circumstances.

25 Q A person can have brain injury from being

1 intoxicated?

2 A It would be really unusual just from intoxication.

3 Usually that's more seen with trauma secondary to that.

4 Q A diabetic can go into diabetic shock as a result of
5 being intoxicated?

6 A There is a lot of medical conditions that can cause
7 you to be very ill, yes.

8 Q Now you have seen people who are intoxicated do dumb
9 things that causes them to have physical injuries;
10 correct?

11 A I really don't try to judge people. But I certainly
12 see intoxications from various substances cause a lot of
13 pain and suffering and injuries, yes.

14 Q What you see is the intoxication causes the accident
15 that causes the injury; correct?

16 A I certainly think that happens frequently, yes.

17 Q Right. Well I want to get to the language we're
18 talking about, about the sorts of things that come simply
19 from being intoxicated, not from being involved in an
20 accident as a result of being intoxicated. All right?
21 Have you ever seen anybody have a broken hip just from
22 being intoxicated?

23 A Not if they don't fall or get involved in some trauma
24 as a result of it. That would be unusual.

25 Q So the answer would be, no you've never seen that?

1 A Well I could create a scenario to imagine that. I
2 have seen cancer patients that got intoxicated and their
3 hip fractured and they're just standing around.

4 Q Right.

5 A But those things would be very uncommon.

6 Q Right. I'm talking about -- I'm talking about
7 orthopedic injuries simply from being intoxicated. You've
8 never seen anybody with an orthopedic injury from being
9 intoxicated?

10 A That is really the wording that you're using there is
11 I'm not sure if it is confusing or if I'm not picking up
12 on it or maybe I'm not supposed to -- maybe I'm not even
13 qualified to get into the details of the policy and such.
14 But if someone is just physically standing and they have
15 an ethanol level, that would not break a bone, no.

16 Q Okay. And again, I'm confused with the language,
17 too. But we didn't write this. Somebody else did.
18 Apparently did somewhere some time. So from being
19 intoxicated you've never known anybody to simply have the
20 type of injuries that my client had?

21 A Well, from someone sitting there, standing there, not
22 involved in anything else --

23 Q Right?

24 A -- not involved in a trauma, being intoxicated alone,
25 I have seen injuries, but not usually -- not broken bones.

1 I have seen people get unconscious and get very sick and
2 as you mentioned earlier do a lot of things that may get
3 them injured. But the actual alcohol concentration in
4 their blood, no, it would not break a bone as we're
5 standing here.

6 Q All right. Then we understand, then, that in medical
7 terms causation has a very real definition; correct?

8 A We're kind of getting into semantics with some of
9 these words here. As a physician I make a diagnosis and
10 there are a lot of things that can cause it. As an
11 example you mentioned diabetes earlier. I had a patient
12 last night with that, and some of the cause of that is the
13 patient not taking their medicine. Some of the cause of
14 it was the patient was having bad gastrointestinal;
15 symptoms and dehydrated. So just for example there are
16 causes that would explain a condition. But I am not sure
17 I am following exactly what you're saying in regards to
18 the medical causation term you used.

19 Q Very fine. Well from the semantics problem you
20 recognize the problems that we're having with semantics
21 here are caused by what's written in what I just showed
22 you?

23 A I have not seen that policy before until you came up
24 here.

25 Q But you've seen it now.

1 A I saw the one line that you read, yes, sir.

2 Q And with that line, you can understand the problems
3 that I'm having with semantics, when it comes to actually
4 how those terms relate to the definition of causation from
5 medical terms; correct?

6 MR. KRISTINIK: I move to strike the question. It is
7 a statement about what Mr. Moore believes. It's not a
8 question.

9 MR. MOORE: I asked him if it was correct. He can
10 understand the problem with the semantics that's caused by
11 the policy.

12 THE WITNESS: I would just say --

13 THE COURT: Hang on. I am going to sustain that
14 objection. I am not sure I understood that question.
15 Obviously the interpretation of the terms of the policy is
16 a debate on the semantics, and that's why we're here. We
17 wouldn't be here if it wasn't a debate on the semantics.

18 Q Let's talk about medical causation again for a
19 moment. The broken bones that my client sustained, based
20 upon a reasonable degree of professional certainty, were
21 they caused by the trauma of the accident, or were they
22 caused by his being in a state of what you believe to be
23 intoxication?

24 A They were caused most directly by the motor vehicle
25 crash.

1 Q Thank you, sir. Now you certainly don't have any
2 firsthand knowledge even about what caused the motor
3 vehicle crash, do you?

4 A If you could define firsthand knowledge for me. I
5 have seen the medical records and have --

6 Q Okay.

7 A -- and see patients that are involved in traumas all
8 the time. So it depends on whether you mean was I there,
9 or whether you want me to tell you my opinion from the
10 medical records.

11 Q Based upon the medical records, based upon a
12 reasonable degree of professional certainty, the injuries
13 that you have seen were -- came about as a result of this
14 man being in a traumatic event; correct?

15 A That's correct.

16 Q If he had not been in the traumatic event, any level
17 of intoxication he may have had, he would not have had
18 these injuries; correct.

19 A That's a lot of double negatives. You'll have to
20 clarify that for me.

21 Q Very fine. The intoxication, based upon a reasonable
22 degree of professional certainty, the intoxication did not
23 cause the orthopedic injuries he had; correct?

24 A I think the intoxication would have affected his
25 ability to drive and lead a certain percentage -- let me

1 put it this way, I think his degree of intoxication very
2 likely contributed to his ability -- to him getting into
3 that accident and that led to his injuries.

4 Q Sir, there are many people who are intoxicated, who
5 are in accidents, that aren't their fault; correct.

6 A You would probably be in a better position to answer
7 that. I'm sure it's happened.

8 Q You just did. You just expressed an opinion. Now
9 you say you can't. Which of those is true?

10 A I can tell you -- to try to clarify what I just said,
11 if that would help you.

12 Q Well I want to make positive that I understand. Do
13 you have any firsthand knowledge that this collision, the
14 accident, was the fault of my client at all?

15 A I think that the level of ethanol intoxication that
16 your client had had a contributory factor to what caused
17 the accident because of the kind of symptoms that you
18 would expect from someone with that ethanol level. That
19 gets back to the lack of coordination, the delayed
20 response time, the disinhibition, the decision making, all
21 the things that are slowly changed when you have a degree
22 of ethanol intoxication. So I do think that contributed
23 to the accident and very likely or more likely than not
24 contributed to the accident.

25 Q Let me ask you this. Let's assume Mike had been

1 drink as he could possible my be. Just completely out of
2 his mind drunk, and he was sitting still on his
3 motorcycle, at a red light, and got run over by a tractor
4 trailer truck. Under that scenario, based upon a
5 reasonable degree of medical certainty, would his degree
6 of intoxication have contributed to that accident at all?

7 A If he was sitting there being entirely still, and a
8 vehicle hit someone in that situation, I don't think that
9 would be similar in this case.

10 Q Well do you even know what happened in this accident?

11 A I know some of the details. But I have not seen an
12 extensive records of the -- that you may have seen.

13 Q Well my question is, do you know what happened in the
14 accident?

15 A As -- I can tell you what I understand is that your
16 client was coming off of a -- on to an exit ramp and ran
17 into the back of another vehicle.

18 Q Would it surprise you to learn that the other vehicle
19 had veered off the road to the right, at night time, and
20 then veered back into the path of my client?

21 A I can't -- I don't have an opinion as to whether
22 that's, you know, fact or opinion.

23 Q Would that impact your opinion in regard to what roll
24 alcohol may have played?

25 A Well I think that anybody who has that kind of

1 ethanol level when they're driving would have a slowed
2 response to anything, whether it's completely their fault
3 or not, that's for the court to decide.

4 Q Or whether it's their fault at all would be for the
5 court to decide. Right.

6 A I am just stating from the medical perspective of
7 what I would expect the ethanol to have an effect in
8 regards to the kind of driving.

9 Q Right. So you can say what kind of effects you would
10 think the alcohol might have. But who was at fault, or
11 who was at cause in regards to this accident, you can't
12 say; correct?

13 A I am not interested in judging anybody. I am just
14 here to state the facts because that's what I am able to
15 do in regards to the intoxication.

16 Q From a medical causation standpoint then, would it be
17 fair to say, that the loss that resulted to this man, was
18 from the trauma of the accident? You can say that based
19 upon a reasonable degree of professional certainty.

20 A Repeat your question. The loss --

21 Q The injuries came from a trauma in an automobile
22 accident; correct?

23 A A motorcycle and automobile accident yes. That's
24 where the injuries were sustained.

25 Q Are you able to say, based upon a reasonable degree

1 of medical certainty, from a medical causation standpoint,
2 that this loss was from intoxication?

3 A Again, my opinion is that the accident more likely to
4 occur because of the symptoms and effect that you would
5 have from that degree of intoxication.

6 Q No, sir, I'm talking about from a medical cause an
7 effect standpoint. We know causation from medical is
8 you're drunk, that makes you pass out. You're drunk, that
9 can give you a coma. You're drunk, it causes to brain
10 injury. Those are medical causations from time to time;
11 correct?

12 A Yes.

13 Q All right. Trauma is not caused by being
14 intoxicated. Trauma can come from a wreck or an injury
15 that may be something that sets in motion -- intoxication
16 may set the trauma in motion, but trauma is what actually
17 caused this gentleman's injury; correct?

18 A Trauma causes injury. But having any kind of
19 intoxication also can complicate -- can complicate things.

20 Q Can complicate things, sure. But we're talking about
21 here in regard to medical causation. We know, that in
22 this case, the medical causation of Mike's injuries were
23 trauma; correct?

24 A The injuries were sustained in a trauma accident,
25 yes.

1 Q The medical injuries that he has were not sustained
2 from being intoxicated?

3 A If he was intoxicated and standing by that accident
4 and not involved with it, I do not think he would have the
5 injuries that he had.

6 Q I still want to make positive, there is a --

7 MR. KRISTINIK: Your Honor, asked and answered again
8 and gain and gain on this causation question.

9 THE COURT: Rephrase it, Mr. Moore.

10 Q Being intoxicated doesn't cause orthopedic injuries;
11 correct?

12 A Not unless you fall or have an effect from the
13 intoxication that leads to a trauma or injury.

14 Q The fall would be what would cause the trauma, not
15 being intoxicated; correct?

16 A I guess this is how maybe the legal system looks at
17 it differently than the medical system. But from a
18 standpoint of, if you weren't intoxicated, then it
19 probably wouldn't have happened, or much less likely for
20 an injury to happen, a fall, whatever, regardless of
21 whether it's this case or some other.

22 Q So then just the status you can tell us, based upon a
23 reasonable degree of medical certainty, that his status of
24 being intoxicated is not what caused these injuries;
25 correct?

1 A Well you keep kind of changing that around. Let me
2 express it to you as clearly as I can, again. I feel like
3 the degree of intoxication that he had, the symptoms he
4 would have had with that ethanol level, would very likely
5 increase his risk of being involved in an accident and
6 have contributed to some degree, maybe not 100 percent,
7 maybe not 5 percent, I don't know, but would have
8 contributed some degree to the trauma accident occurring.
9 But, physically, the broken bones in the leg, the broken
10 bone in the pelvis would have come from at the instant
11 that the motorcycle hit the car.

12 Q And not from the status of being intoxicated?

13 A Okay.

14 Q Very fine. Now, let's talk about blood alcohol for a
15 minute. We know that we have blood was taken at one time.
16 You could have all kinds of different tests in regard to
17 blood alcohol and get all kind of different results;
18 correct?

19 A There are different tests, but you usually don't get
20 all kinds of different results.

21 Q Well ocular fluid is going to be a better test than
22 simply a blood test, is it not?

23 A You're thinking of a vitreous fluid and--

24 Q Sure.

25 A -- that's used most commonly in the post mortem

1 state, not in the level that is obtained from someone
2 that's alive.

3 Q Normally if you do the vitreous fluid test and a
4 blood test it is going to be somewhat of a varied result;
5 right?

6 A No one would get vitreous fluid out of someone's high
7 or not, a person that's alive. So you really don't see
8 those values in a person that's alive.

9 Q Did I ask you that?

10 A I am not familiar with data on ethanol levels in
11 vitreous fluid in patients that are alive.

12 Q Well a breath test, blood test, vitreous fluid test
13 they're all going to have some varying degree of
14 fluctuation, they're never all going to be the same
15 result, are they?

16 A You might be referring to the difference between
17 plasma and whole alcohol blood levels and they can vary
18 about 10 percent based on the water content of whole blood
19 versus plasma. The urine ethanol levels are very
20 unreliable and that is why you don't check very much. You
21 look more at the whole blood ethanol level.

22 Q Now, as I understand it, if in fact this gentleman
23 had had two and a half drinks over three hours, you say
24 that one drink would be expected to increase his level by
25 about a .09?

1 A No, about a .03.

2 Q Point 03.

3 A But that can range. It depends on the drink. It
4 depends on the person. But I think that's a reasonable
5 estimate.

6 Q So if he had three drinks, say three drinks over
7 three hours you could expect it to go up to a .09?

8 A 90 milligrams.

9 Q But he --

10 A But he would also be metabolizing it over that three
11 hour period too so you would have to account for that.
12 That's where the extrapolation of looking at these ethanol
13 levels occur.

14 Q So if you did that, you say the elimination rate
15 would be about a .20; correct?

16 A It depends on whether your client was a very heavy
17 drinker or casual drinker. But it's probably somewhere in
18 the .15 to .20 range, if he's a social drinker.

19 Q So if it's, oh let's just say the .15 over three
20 hours, that's .45. If we subtract that from the .09, that
21 would give you a blood alcohol level of what, a .045?

22 A Yes. But you can't -- you're considering the
23 elimination to begin the instant your patient drinks the
24 alcohol. It wouldn't have three hours of elimination at
25 that time. It takes about an hour at least to absorb

1 about 80, 90 percent. So you'd be looking at maybe one or
2 two hours of elimination, so, probably if you said .15,
3 maybe .3 of it would be gone in two hours after that.

4 Q Well you also though have the concept of absorption
5 that alcohol, when it is in the stomach, does not create
6 any level of intoxication at all, does it?

7 A Not until it's absorbed.

8 Q And what creates the intoxication is the fact that
9 the alcohol is basically absorbed into the blood stream;
10 correct?

11 A Well its then distributed when its in the central
12 nervous system is where you get the primary effects. It
13 has to be absorbed into the bloodstream first.

14 Q So let's assume that Mike had chugged 10 crown
15 royals, just boom, got on his motorcycle and got in a
16 wreck. And let's assume that at the time of the accident
17 none of the alcohol had gotten into his bloodstream, zero
18 at the time of the wreck, from the time he's laying on the
19 scene bleeding with his hip busted open, to the time he's
20 being transported to the hospital, until he's waiting for
21 his exam, all of that alcohol is being absorbed into his
22 bloodstream and he's getting drunker, he's on his way to
23 the hospital and waiting for his test; right?

24 A There are things that can delay absorption if that's
25 what you're getting at. If you eat a lot of food. If

1 you're on medications like histamine blockers, if you take
2 medications that delay the movement of the alcohol into
3 the proximal small bowel where you absorbed it more. So,
4 yes, there are things like food and certain medicines that
5 can lead to delayed absorption. But other wise about 80,
6 90 percent is absorbed in the first 30 to 60 minutes.

7 Q Right, the first 30 to 60 minutes. It takes 30 to 60
8 minutes for the alcohol to be 100 percent absorbed into
9 the system to result in intoxication; correct?

10 A For all of it. If you're saying from the very first
11 minute that someone drinks to the last minute they drink.
12 I said, the last sip they would take it would probably
13 take 30 to 60 minutes.

14 Q Sure.

15 A Without any reasons. If there were no reasons for
16 delayed absorption for it to be absorbed.

17 Q Because just like there is an elimination rate, there
18 is an absorption rate?

19 A With all of those variables involved in regard to
20 elimination absorption that we're talking about.

21 Q Is there any way then with the absorption and
22 elimination rates, without knowing what he drank and when
23 he drank it, is there any way that we have any idea what
24 his blood alcohol level would have been at the time of the
25 accident?

1 A Well you can't extrapolate back when the levels are
2 that close to the time of the accident. You can't pin it
3 down to an absolute number. But you can definitely
4 extrapolate it back to something when the level is
5 obtained that closely to the accident.

6 Q Well, yes, sir. But, you wind up, assuming he still
7 has alcohol in his stomach at the time of the accident,
8 and is continuing to absorb, he is going to be absorbing
9 alcohol at a rate of .3 and eliminating it at a rate of
10 about .15; right?

11 A If he is a social drinker that would be the average
12 numbers, yes.

13 Q So, when we do the extrapolation back, in this case,
14 with the amount of absorption he's got going on, and the
15 amount of the elimination he's got on, how about do that
16 extrapolation for me, and give me an opinion based upon a
17 reasonable degree of professional certainty, as to what
18 his blood alcohol level would have been at the time of the
19 accident?

20 A Well if his level was 232 at 10:30, or 11 o'clock at
21 night, and assuming -- I saw that this accident occurred
22 about 9:30 PM, and now looking at that receipt it looked
23 like the account was closed out at right before 9 o'clock.
24 So it looks like the accident happened 30, to 40, 50
25 minutes after that account was closed out. So you would

1 presume that in that 30, 45 minutes a lot, maybe most, but
2 maybe not every bit of the alcohol if he drank up to the
3 moment that he left would have been absorbed. So given
4 that, you would conclude that most absorption probably
5 occurred, there could have been some on-going, but most
6 had probably occurred.

7 So if you took that level back that 232, and it was
8 very likely that his level was 200 or 210 at that time.
9 Again, this is a range. You have to consider a range,
10 because you cannot predict. People have individual
11 variations and absorption and elimination as we talked
12 about. So, you can't say exactly, but you can state that
13 there is a definite amount of ethanol he would have had to
14 consume, and already absorbed, to get to that level.

15 Q But you're also assuming, sir, that he drank
16 everything that is shown on that receipt; correct?

17 A I am not assuming that. That's part of the record
18 I've seen. I know how much ethanol it would take to get
19 to that level. So I am based on formulas that you can
20 calculate the dose of ethanol that must be consumed to get
21 to that level, based on someone's weight and volume of
22 distribution of ethanol, you can calculate exactly how
23 much had to be consumed to get to that level.

24 Q Do you know what time Mike actually began drinking?

25 A No, I would defer to him or other evidence in the

1 case. I don't have an exact opinion on that.

2 Q Well in order to do the extrapolation, you just did,
3 you have to basically know what time he began to consume
4 and at what time he quit consuming?

5 A It makes it harder to extrapolate it if the timing of
6 the ingestion has occurred over a longer period of time.
7 But that would kind of lead to what we talked about to
8 begin with, to have that level that time of night more
9 drinks would have had to been consumed to have a level
10 that late at night, if he had been drinking all through
11 out the afternoon.

12 Q And we actually -- you actually don't know how many
13 drinks he had had; correct?

14 A I don't have an opinion on how many drinks. I just
15 know how many grams of ethanol it takes to get to that
16 level, and that would imply a certain number of drinks at
17 a minimum.

18 Q You told us about this concept of alcohol tolerance,
19 that basically means some people can tolerate alcohol
20 better than others?

21 A That's correct.

22 Q Do you know anything about Mike's alcohol tolerance
23 levels?

24 A From the deposition I know that he stated that he
25 drank two drinks, I believe, two or three times a week.

1 So you would have mild amount of tolerance, but not to be
2 expected to have the tolerance of someone who is a heavy
3 drinker, a chronic alcoholic.

4 Q Very fine. I have no further questions. Thank you,
5 Doctor.

6 MRS. HORN: No questions.

7 THE COURT: Thank you for coming.

8 MR. KRISTINIK: Your Honor, we'd ask that he be
9 dismissed from the courtroom so he can get back to work.

10 THE COURT: Sure. No problem Do y'all need a break
11 before we put the insurance guy back on?

12 MR. MOORE: Yes, sir.

13 THE COURT: All right. Let's take a short break.
14 That is good for me.

15 (Whereupon, a short break was taken)

16 THE COURT: All right, Mr. Mackin, come forward.
17 Mr. Mackey, I remind you that you're still under oath.

18 JACK MACKIN, having been
19 previously duly sworn, resumed the witness stand and
20 testified as follows:

21 CROSS-EXAMINATION

22 BY MR. MOORE:

23 Q Mr. Mackin, this Exhibit No. 5 this specimen policy
24 that we don't know when it was actually made, do you know
25 who wrote this?

1 A Who actually wrote the policy?

2 Q Right. The policy --

3 A No, I don't recall exactly the name of the person who
4 would have written -- person or persons who would have
5 written the policy.

6 Q But one thing we do know, the policy, that your
7 company is relying upon to exclude coverage, would have
8 been prepared by somebody from Pennsylvania Life Insurance
9 Company; right?

10 A Either somebody employed by or contracted through
11 Pennsylvania Life would have -- person or persons would
12 have put together the policy language.

13 Q My client didn't write it, did he?

14 A No, sir.

15 Q Somebody on behalf of Pennsylvania Life wrote this
16 alleged policy?

17 A Someone on behalf of or employed by Pennsylvania Life
18 would have written the policy.

19 Q You were in the courtroom a minute ago when we were
20 talking to this physician about trying to figure out what
21 this wording meant about intoxicants and narcotics;
22 correct?

23 A I was present during the discussion with the
24 physician.

25 Q And we were talking about the semantics of what this

1 thing meant; right?

2 A I recall that discussion.

3 Q Who on behalf of Pennsylvania Life can tell us what
4 this language means in this claimed exclusion?

5 A I am actually not sure of your question, sir.

6 Q Right. My question is you saw the difficulty we were
7 having trying to determine what the heck this thing meant
8 under this claimed exclusion. You saw both the doctor and
9 I having that problem; right?

10 A I would not characterize the discussion that way.

11 Q Well if I want to read this claimed exclusion, and
12 understand what it's trying to exclude, who would I ask?
13 Who would do policy interpretations for you?

14 A The claims examiners review the policy language
15 against the claimed documentation.

16 Q Right. But if I want to know if a certain activity
17 is excluded under the policy who do we ask?

18 A You rely on the policy.

19 Q How do we know what it means?

20 A You look at the exclusions.

21 Q Well I mean, look, if I look at this thing it says
22 this: We will not be liable for any loss which results
23 from being intoxicated.

24 A Yes, sir.

25 Q From who being intoxicated? From you being

1 intoxicated, somebody else being intoxicated, the holder
2 being intoxicated. This just says from being intoxicated.

3 A The insured.

4 Q Where does it say that? How do you know it means the
5 insured?

6 A This is a policy of insurance covering the insured.

7 Q Well but it talks about all kind of things, third
8 parties, you, them, agents. It just says from being
9 intoxicated. How do I know that means the insured being
10 intoxicated? It don't say it, does it?

11 A The policy of insurance covers the insured.

12 Q All right. Well then let's look then at the
13 language. The language says we will not be liable for any
14 loss which results from being intoxicated. Now, in this
15 case, you claim that the loss came as a result of an
16 accident that was caused by him being intoxicated; right?

17 A I believe that to be the case.

18 Q So it doesn't say -- the policy doesn't say, that we
19 exclude losses when you're in an accident caused by being
20 intoxicated. It says, we don't cover a loss which results
21 from being intoxicated; right?

22 A This exclusion states we will not be liable for any
23 loss which results from being intoxicated.

24 Q Okay. Well the loss in this case we've heard a
25 doctor say, it didn't come from him being intoxicated it

1 came from him being in an accident; right?

2 A I'm not in a position to be able to state what the
3 doctor stated. That was the physician's role, not mine.

4 Q Well when it says, a loss from being intoxicated. Do
5 you have any evidence that this loss came from him simply
6 being intoxicated?

7 A The accident caused the injuries. This is an
8 accident policy and there is an exclusion for
9 intoxication.

10 Q No, sir. The exclusion, if I read it right, it says
11 will not pay for any loss which results from being
12 intoxicated. Now what I want to know is, where is the
13 language that says, we won't pay for any loss that comes
14 from an accident where you are intoxicated. It don't say
15 that, does it?

16 MR. KRISTINIK: Your Honor, I'd like to object to
17 this line of questioning. This would only be appropriate
18 if there was a finding that the terms of the policy were
19 ambiguous. This language is the language from the South
20 Carolina state statute. It cannot be ambiguous. It is
21 the language that the state legislature said to use in the
22 policy. And to ask witnesses to interpret what it means,
23 it is just purely a question for the court to read the
24 policy and decide.

25 MR. MOORE: Your Honor, does counsel sincerely urge

1 upon this court that the South Carolina legislators and
2 South Carolina General Assembly is incapable of writing
3 things that are ambiguous.

4 THE COURT: I think there is an appellate law that
5 says, how do you deal with something that is ambiguous.

6 MR. MOORE: Yes, sir. And I think that when we were
7 talking with the physician, we have pointed out the
8 problem which appears to be, at least from our standpoint,
9 an ambiguity which we think exists in the policy. I
10 simply have asked the man, what do you do -- he is talking
11 on behalf of the company, what do you do when you read the
12 policy and it ain't exactly clear what it means. He says,
13 you look at the policy.

14 THE COURT: Well, from where I'm sitting it appears
15 that the company has read the policy and they've made a
16 determination that it's an exclusion, and you're going the
17 other way with it. But, they've done that. By denying
18 coverage they're trying to stop payment for coverage.

19 MR. MOORE: What I was trying to get to, and I'll ask
20 this question.

21 Q Sir, who made the determination that that language
22 says, we're not liable for any loss which results from
23 intoxication. Who made the determination that, in this
24 case, the loss came from intoxication and not from the
25 accident?

1 A Could you repeat the question, please?

2 Q Right. Who is it that made the determination, in
3 this case, that the loss that resulted in disability came
4 from intoxication and not from the accident?

5 A Making determinations as to whether or not claimed
6 payments qualify under the terms of the contract; those
7 determinations are made by the claims personnel.

8 Q And that would be this lady sitting back here;
9 correct?

10 A That young lady works in the claims department.

11 Q So she's the one who's got to answer that question.
12 You can't answer that?

13 A I can't answer that.

14 Q You cannot answer that?

15 A I know who makes the determination, as I stated.
16 But, I'm not a claims manager.

17 Q Well let me ask you this, since we -- do you know if
18 when she made the determination to deny this claim --

19 MR. KRISTINIK: Objection, Your Honor. There is
20 nothing in the record that Mrs. Barlow denied this claim
21 or that there's even been a denial. In fact, the record
22 reflects that there is a declaratory judgment action
23 asking the court to make that determination.

24 MR. MOORE: And he's correct.

25 THE COURT: I thought the testimony earlier was that

1 she was one of the claims managers at one time and there
2 were perhaps others --

3 MR. MOORE: Yes, sir.

4 THE COURT: -- that have been involved to some
5 extent, but the others haven't been named --

6 MR. MOORE: Yes, sir.

7 THE COURT: -- thus far.

8 MR. MOORE: She's the only name we've been given.

9 Q Sir, there was a point in time when the insurance
10 company stopped making payments to my client; correct? Do
11 you know that? In November of 2009?

12 A I'm not familiar with the claims history.

13 Q All right. So if I were to ask you anything in
14 regard to how this claim was -- was handled, you wouldn't
15 know anything about that?

16 A That's correct.

17 Q In the insurance policy that you claim is this
18 specimen, is there anything that requires a claimant to
19 send you an accident report?

20 A I'd have to go through the policy.

21 Q Take your time.

22 A I don't see reference to an accident report.

23 Q Is there anything in the policy that requires him to
24 provide you any form of medical authorization form waiving
25 his rights to privacy in regards to his medical records?

1 A When someone applies for the policy, typically, that
2 document is signed in connection with the application.

3 Q That's not my question. My question is, is there
4 anything requiring the claimant, as a part of the claims
5 process, to provide you a medical authorization form
6 waiving his rights to privacy and confidentiality under
7 the law?

8 A I don't see it in the policy.

9 Q Do you know that one of the things your company
10 required in this case was for Mike to sign a medical
11 authorization form?

12 A That's typical practice in accordance with the
13 privacy laws.

14 Q What gives you the right to demand such a form from
15 your insureds?

16 A In order to make the determination of the cause of
17 the loss, we have the right to request proofs of that
18 loss. And if that proof requires medical records then
19 there are certain authorizations that the hospital doctors
20 require in order to release medical records.

21 Q There is no requirement that -- in your policy even
22 that the claimant provides you with medical records is
23 there? The policy don't require that, does it?

24 A The policy may not state that, but there are certain
25 duties and obligations that we, as an insurance company,

1 must maintain.

2 Q Right. That's what I want to get into, those duties
3 and obligations that you as the insurance company must
4 maintain. I just want to make sure we understand what's
5 in the policy, and what your company demands, as a matter
6 of policy, from its insureds. There is nothing in the
7 policy that requires my client to provide you with a
8 medical authorization form, is there?

9 A The policy does not state that.

10 Q And yet as a matter of practice, before a person is
11 allowed to be treated as a legitimate claimant and receive
12 benefits, the company insists that the medical
13 authorization documents be provided, does it not?

14 A In order to obtain medical records, a company would
15 need to have authorization to obtain those records.

16 Q The answer to that question is yes, is it not?

17 A That was a long question, you'll have to repeat that.

18 Q As a condition, preceding to paying the claim, your
19 company insists a medical authorization form be signed in
20 favor of your company; correct?

21 A We require a medical -- an authorization form to
22 obtain the medical records.

23 Q So in order for a person to process a claim, you
24 require documents, which the contract does not say the
25 claimant has to provide; right?

1 A The documentation that may be required is not
2 specifically stated in the policy.

3 Q Yes, sir. And it is required, though, in order to
4 process the claim; right?

5 A That's correct.

6 Q So you make the client do things, to process a claim,
7 that the policy does not say you have a right to demand;
8 correct?

9 A We're required to order the medical records in order
10 to determine the degree of the loss.

11 Q I just want to make positive that what you just
12 testified is true. You testified that as a part -- the
13 general practice of this company, is that, you insist upon
14 a medical authorization form, waiving rights from your
15 insureds, before you will pay on a claim?

16 A I can't speak to the waiving rights part. But, I do
17 know that we require an authorization to obtain medical
18 records.

19 Q Well this Exhibit No. 11 appears to be one of those
20 things that you require, that you don't have a right to
21 under the policy, but that you require to process claims,
22 does it not? I believe it is Exhibit No. 3.

23 A This is the policyholders claim report.

24 Q Is that the medical authorization form?

25 A There's an authorization at the bottom of the form.

1 Q Now who prepared this document?

2 A The company prepared this document.

3 Q And as I understand it this document has to be signed
4 before you'll process the claim; right?

5 A This document has to be signed before we will
6 consider the claim.

7 Q Read the language that you insist upon before
8 processing the claim that's on the bottom of the form that
9 your company prepared?

10 A I authorize any medical professional, medical care
11 institution, consumer reporting agency, insurance
12 institution, insurance support organization, institution
13 source government agency, including and not limited to the
14 Social Security Administration and the Veterans
15 Administration, the Medical Information Bureau, employer,
16 or any other individual or person to provide the company,
17 its officers, employees, agency or legal representative
18 and any insurance support organization, consumer reporting
19 agency on the companies benefit with any and all medical
20 records and personnel -- excuse me personal information
21 requested about me or any of my minor children. I
22 understand that this authorization will be used to obtain
23 information, diagnosis, treatment, and prognosis with
24 respect to any physical or mental condition, as well as
25 the use of drugs or alcohol. I understand the information

1 obtained by the use of this authorization will be listed
 2 -- excuse me, will be used by the insurance company or its
 3 agents to determine eligibility or benefits under an
 4 existing policy. I know that I, or my legal
 5 representative, may request to receive a copy of this
 6 authorization. I agree that a photographic copy of the
 7 authorization shall be as valid as the original. I
 8 understand that the duration of the authorization is from
 9 -- is for the term of coverage, of the policy, under
 10 which, a claim for benefits has been submitted. If the
 11 authorization is given in connection with a claim for
 12 disability or life insurance benefits. I understand that
 13 is valid for the duration of the claim.

14 Q And like you've told us this is one of the pen life
 15 claim forms?

16 A That correct.

17 Q And y'all insist that that be signed before you'll
 18 process the claim?

19 A We require a signature on the claim form in order to
 20 consider the claim.

21 Q And you require a signature on the bottom there with
 22 that medical authorization?

23 A We do.

24 Q What in the world does the health medical records of
 25 his children got to do with anything?

1 A If the children were insured.

2 Q Well, yes, sir. But his children weren't insured.

3 So I want to make sure I understand something. Your
4 company insisted upon him signing something to let you
5 look at his children's medical records as a condition
6 precedent to processing this claim; is that right?

7 A The language is in there regarding children.

8 Q Who made up their mind that in order for you to
9 process his claim he had to give you the right to look at
10 his children's medical records? Who was responsible for
11 that one?

12 MR. KRISTINIK: Objection, Your Honor, does
13 Mr. Russell have any children.

14 MR. MOORE: Well, I don't know. But it is her--

15 THE COURT: Is it relevant? I mean, is that an
16 issue?

17 MR. MOORE: Your Honor, one of the issues in this
18 case is bad faith. And, here, what they've done is to
19 extract rights as conditions precedent to processing a
20 claim to make him waive all kinds of privacy rights. The
21 policy doesn't say they have a right to do.

22 MR. KRISTINIK: The policy requires proof of loss,
23 and I can ask him on my cross examination.

24 THE COURT: The kids benefits, if any, are not an
25 issue in this case are they?

1 MR. MOORE: No, sir.

2 THE COURT: All right, lets move on from that. I
3 understand there is a lot of language in there. It sounds
4 like boiler plate. Additional information that could be
5 deleted and have the same effect.

6 Q Sir, there is nothing in the policy that says -- if
7 that is the policy, there is nothing in that specimen that
8 says if you make a claim you have got to give us all of
9 your medical records, is it?

10 A Under claim forms it states, after we received the
11 notice of claim, we will send the claimant our forms for
12 filing proof of loss.

13 Q A form to file a proof of loss, which basically says,
14 I have had a loss; right? That form is not described in
15 that policy, is it?

16 A It's under the heading claim forms.

17 Q Right.

18 A And this is a claim form.

19 Q But that form is not attached to the policy; right?

20 A That form is not attached to the policy.

21 Q And there is nothing in there that talks anything
22 about you have got to give us total access to all of your
23 records as part of your right to prove a claim, is it?

24 A The policy states that there are claim forms and we
25 will send the claimant our forms for filing proof of loss.

1 Q Right. A claim form and a proof of loss is different
2 from a medical authorization is it not?

3 A In order to obtain the documentation we need to have
4 an authorization.

5 Q You may need to have them, but the contract doesn't
6 require the client to give you one, does it?

7 A The policy states proof of loss.

8 Q Proof of loss. Proof of loss, basically is a form
9 which basically says, I've had a loss and here is the
10 proof of that loss. It could be an affidavit. It could
11 be all kinds of things; right?

12 A It states that we will send the claim form and this
13 is the claim form.

14 Q It is also -- it is a claim form with a medical
15 authorization giving you the authority to go in and look
16 at every single piece of record he's got medically during
17 the relevant period of time; right?

18 A It's requesting authorization to obtain the medical
19 records.

20 Q All right, sir and if he doesn't sign that then you
21 will not process his claim; correct?

22 A The claimant will meet the proof of loss requirements
23 by giving us a written statement of the nature and extent
24 of the loss within the time stated in the proof of loss
25 section.

1 Q Right. That's what the proof of loss is supposed to
2 do, is to give you a proof, which gives you the nature and
3 extent of the loss; right?

4 A That's correct.

5 Q It doesn't say that the proof of loss would include a
6 medical authorization allowing us to go into every single
7 piece of your medical record, and all your credit history,
8 and all these other things, does it?

9 A We have the right to require information to determine
10 the loss.

11 Q You don't have a right under the terms of your policy
12 to insist upon a total broad medical examination of this
13 gentleman's entire medical file?

14 MR. KRISTINIK: Objection. Asked and answered. The
15 witness said he's interpreting as saying he is allowed
16 that proof of loss, and that means medical records.

17 THE COURT: I sustain. I believe it's been asked an
18 answered.

19 Q Sir, who do you go to to determine what the proof of
20 loss is supposed to include? Who makes that decision?

21 A Claims management.

22 Q Would that be this lady back here again?

23 A She would follow the procedures that would have been
24 set.

25 Q Who sets the procedures to require all of that?

1 A It's standard practice.

2 Q You do know that my client was found not guilty of
3 driving under the influence, don't you?

4 MR. KRISTINIK: Objection, Your Honor, as to the
5 characterization of what happened with the DUI charge and
6 that ticket issued to Mr. Russell. That is not an
7 accurate characterization.

8 MR. MOORE: They had a transcript of the hearing
9 prepared and it's in the record, Exhibit 15.

10 THE WITNESS: We will show you Your Honor what it
11 says and it does not say we found him not guilty.

12 MR. MOORE: Your Honor --

13 THE COURT: I think I can take judicial notice of
14 what the disposition was when you show me the record.

15 MR. MOORE: Thank you, sir. It is exhibit 15, I
16 believe.

17 Q On the claim form, that you guys had him fill out, is
18 there any falsehood that you know of?

19 A I'm not aware of any inaccurate information completed
20 on the claim form.

21 Q I guess the answer to my question would be, no?

22 A Could you repeat the question.

23 Q Is there any inaccuracies or falsehoods contained in
24 the proof of loss that you know of?

25 A I'm not aware of anything that's stated inaccurately

1 or false.

2 Q Do you know of any lies that Mike has ever told
3 Pennsylvania Insurance Company?

4 A I'm not aware of any lies.

5 Q Now, your company prepared this proof of loss;
6 correct? Proof of loss form?

7 A You mean the standard form, yes.

8 Q Right. Well if in fact the policy that Mike bought
9 and paid for did include an alcohol exclusion, why doesn't
10 the proof of loss form ask the question, were you drunk?

11 A Those kinds of things are to be determined during the
12 claims review process.

13 Q Well before y'all started paying him any money, did
14 anybody ask him the question, Hey, Mike, were you drunk?

15 A I'm not aware of that.

16 Q You've looked at the claim file in this case, haven't
17 you?

18 A No, I have not.

19 Q You have certainly talked to the claims handlers in
20 this case, haven't you?

21 A I have not.

22 Q You were sent down here to speak on behalf of the
23 company weren't you?

24 A I was.

25 MR. KRISTINIK: Objection, Your Honor, he is not here

1 to speak on the claim file.

2 MR. MOORE: He said he's here to speak on behalf of
3 the company.

4 THE COURT: Whatever he has knowledge of he can
5 testify to. If he has no knowledge he can answer
6 questions in that fashion.

7 Q Do you know if anybody from the company, before they
8 made the decision to start paying Mike on his policy, ever
9 asked the question, Hey Mike were you drinking when you
10 got hurt?

11 A That information would be in the claim file if there
12 was any discussion regarding the circumstances involving
13 the accident.

14 MR. MOORE: Your Honor, I don't have any further
15 questions. Thank you, sir, for answering my questions.

16 THE WITNESS: You're welcome sir.

17 MR. KRISTINIK: Your Honor, I have a few questions
18 for Mr. Mackin.

19 CROSS-EXAMINATION

20 BY MR. KRISTINIK:

21 Q Mr. Mackin, you were just asked about the claim form
22 that was handed to you and you were asked if there were
23 any lies on it. That claim form asked about -- do you
24 have it in front of you?

25 A I do.

1 Q Here, I'll point out to you what I am referring to
2 since I know it is small type. It asks in the middle of
3 the page if this is an accident. When and where did it
4 happen. Give the date and time. And then it says
5 described how it happened. What is written there?

6 A Motorcycle accident.

7 Q Does it say anything about being charged with DUI?

8 A It does not.

9 Q Do you see anywhere on that page where Mr. Russell
10 disclosed to Pennsylvania Life that he had been charged
11 with DUI?

12 MR. MOORE: Object to the leading please, Your Honor.
13 I believe he is now trying to cross examine his own
14 witness.

15 THE COURT: This is cross exam; right?

16 MR. MOORE: No, sir. He is on redirect. I don't
17 think he had a right -- when I call a witness as an
18 adverse witness under the rules, I do not believe that
19 gives him a right to cross examine. It is still his
20 witness. That's why it's an adverse witness, Your Honor.
21 He basically testified he was here to speak on behalf of
22 the insurance company. When I call as an adverse witness,
23 he still remains the witness of my adverse party, that's
24 why I am allowed to cross examine. I don't believe
25 counsel can cross examine a witness that is his own

1 witness.

2 MR. KRISTINIK: Your Honor, I think the answer is
3 this, this is a bench trial. I would ask for leeway. I
4 intend to ask actually non-leading questions for most of
5 this. But to speed things up at certain points I would
6 ask that you allow my some leeway.

7 THE COURT: I'll allow you some leeway. Get to the
8 issues.

9 Q All right. Let's get right to it. Anywhere on that
10 form does it disclose that Mr. Russell was charged with
11 Driving Under the Influence?

12 A No, sir.

13 Q Any where on there does it even indicate that he was
14 at a bar that night?

15 A No, sir.

16 Q Anywhere on there does it even indicate that he was
17 charged with lesser offense of driving with a suspended
18 motorcycle license?

19 A It does not.

20 Q Okay. I'm done with that document. Are you familiar
21 with the computer systems and databases which Pen Life
22 disability policies are maintained?

23 A I am.

24 Q Can you tell me -- tell the court a little bit about
25 that and your experience with those systems?

1 A Yes. When I originally came on board with
2 Pennsylvania Life I was responsible for setting up a
3 computer system to bring on new policies and also convert
4 the existing policies to that new system. And I worked
5 with that system for several years -- and directly, and
6 then indirectly during the course of my other
7 responsibilities with the company. I am also familiar
8 with the imaging system that the system uses to store
9 all of its documents for each of its policyholders. The
10 computer system has been upgraded and actually converted
11 to yet another system, and I am familiar with that system
12 as well. And during the normal course of my duties, I
13 will have to review the records of that system.

14 Q And you began working for Pennsylvania Life in 1991?

15 A That's correct.

16 Q And these policies were issued in 1999, 2002?

17 A Also correct.

18 Q Are you familiar with the policy forms used for
19 disability policies that were issued under the name of
20 Pennsylvania Life Insurance Company?

21 A I am familiar with those.

22 Q Based on your employment during the past 20 years are
23 you familiar with the application issuance and policy
24 delivery practices of Pennsylvania Life?

25 A I am familiar with those practices, yes, sir.

1 Q Yesterday you were asked numerous questions about
2 delivery. Are there ever occasions when policyholders
3 call up and ask for a copy of their policy?

4 A Yes, that happens on a regular basis.

5 Q And how are those requests responded to?

6 A Those requests are responded by policyholder service
7 or customer service personnel. And what they'll do is
8 they'll code into the system regarding the call that took
9 place, notes like, policyholder called, lost policy. Says
10 never received policy. And then there are notes to follow
11 up in there that would say, sent policy out, along with
12 the date when the copy of the policy would have been sent.

13 Q So if a policyholder like Mr. Russell had realized
14 that he had not received his insurance policy that he
15 purchased and was paying premiums on, he could call the
16 company and get a copy -- a duplicate copy of the
17 copyright; right?

18 MR. MOORE: Object to the leading please, Your Honor.

19 THE COURT: Rephrase.

20 Q If Mr. Russell called Pennsylvania Life to request a
21 copy of his policy would there be an indication in the
22 systems -- in the administrative systems, for
23 policyholders, that would show that he made that request?

24 MR. MOORE: Same objection, Your Honor.

25 THE COURT: It is a different question. Sustained.

1 Q Have you reviewed the administrative systems for
2 Pennsylvania Life with respect to the records maintained
3 for Mr. Russell?

4 A I have.

5 Q Do they reflect that he made or did not make a call
6 to request a duplicate copy of his policy?

7 A There are no records in the policy files, or the
8 computer system, that indicate a request was made, and
9 therefore fulfilled, regarding requests for a copy of the
10 policy.

11 Q Let me show you what's been marked as Defendant's
12 Exhibit number 9. Can you tell us what that is?

13 A This is a completed application with the supporting
14 documentation dated 11/19/1999 on the last name Russell,
15 first name Mike.

16 Q Is this a copy of the application that you have on
17 file for Mr. Russell?

18 A This is a copy of the application we have on file for
19 Mr. Russell.

20 Q Okay would it be a true and accurate copy?

21 A This is a true and accurate copy, yes, sir.

22 Q Your Honor, normally I would move to admit it into
23 evidence. But I think we've got a streamlined procedure
24 here where any exhibits we present are in evidence. So to
25 save time as I go through exhibits --

1 MR. MOORE: I think that's already in evidence, isn't
2 it?

3 MR. KRISTINIK: Yea.

4 THE COURT: I think that's what he was trying to say.
5 What is it marked?

6 THE WITNESS: This is marked Defendant Exhibit 9.

7 THE COURT: Exhibit 9, that is already in.

8 MR. MOORE: I think that is now part of exhibit 8.

9 THE COURT: Part of Plaintiff's Exhibit 8. But
10 Plaintiff's Exhibit 8 is more or less discovery provided
11 by the insurance company.

12 MR. MOORE: Yes, sir.

13 MR. KRISTINIK: So I am not going to make a formal
14 motion to admit every exhibit. But I will call out every
15 exhibit number so the Court Reporter can reflect that in
16 the record.

17 Q Does this application request a waiver premium
18 benefit?

19 A The waiver of premium box is not checked and there is
20 no premium amount entered in the appropriate box? So, no,
21 waiver of premium was not requested.

22 Q When an application is completed with the insured, is
23 it standard practice for the agent to leave anything with
24 the applicant?

25 A Typically the agent would leave the receipt along

1 with -- along with a brochure. That's the standard
2 practice.

3 Q All right. You just said receipt. Let me hand you
4 what's been marked as Defendant's Exhibit number 10 and
5 number 12. Can you tell the court what these documents
6 are?

7 A Number 10 is a copy of a blank receipt which also
8 includes definitions exceptions and limitations. Number
9 12 is a completed receipt for the amount of \$232.74 with
10 the name Mike Russell, the date of July 5, 2002, and again
11 it's stated the sum of \$232.74. It also indicates the
12 total annual premium of \$931 and it states the agent's
13 name and the agent's number.

14 Q Based on your experience with the company are the
15 forms used back in 2002 the same as the forms you're
16 holding in your hand Defendant's Exhibit number 10 and
17 Defendant's Exhibit number 12?

18 A Yes.

19 Q Do these receipt forms indicate that there would be
20 an intoxication exclusion in the policy?

21 A Yes under exceptions and limitations it reads, Your
22 coverage does not cover loss that occurs outside of the
23 US, Canada and Mexico, or that results from any of the
24 following, and then it goes on to say -- it includes
25 engaging in an illegal occupation or felonious activity,

1 being intoxicated, or from being under the influence of
2 any narcotic, unless taken on the advice of a physician.

3 Q Let me get back from you exhibits 10 and 12 and let
4 me get exhibit 9 back from you.

5 Q Let me a hand you exhibit 11. Tell us what that is?

6 A This is an application dated 6/27/2002 for an
7 increase in coverage.

8 Q And do you have a copy of this application form in
9 your files for Mr. Russell?

10 A We do have a copy of this application form in our
11 files.

12 Q Does this appear to be a true and accurate copy?

13 A This does appear to be a true and accurate copy.

14 Q Does this application indicate whether or not
15 Mr. Russell requested the waiver of premium benefit back
16 in 2002?

17 A No there does not appear to be any request for waiver
18 of premium. That box is not checked off and there's no
19 premium calculation for the waiver of premium cost.

20 Q I'll take that from you. Let me hand you what's been
21 marked as Defendant's Exhibit number 13. Can you please
22 tell us what this is?

23 A This is a change of benefits agreement form that is
24 bearing the policy number [REDACTED] 9360 and the box marked, I
25 have deleted benefit riders that were effective, and then

1 there are three dates indicated 11/19/99 and 7/19/2002 and
2 8/19/99. Above it it indicates ROP and then there are
3 some numbers, 30100GG effective date of changes 4/20/09.
4 There is a signature here and then below it it states
5 Michael Russell and that's dated 7/20/09.

6 Q The letters ROP appear on that form; correct?

7 A They do.

8 Q Can you tell the court what those stand for?

9 A Return of premium.

10 Q Can you explain to the Court what Return of Premium
11 Benefit is?

12 A Return of premium benefit is a benefit that an
13 insured will request at the time of application and there
14 is a premium associated with that rider as well. And what
15 that does is after 20 years then all of the premiums that
16 the insured would have paid in, less any claims, would be
17 paid back to the insured.

18 Q And Mr. Russell is asking that that benefit be
19 deleted. Is that what the form does?

20 A That's correct.

21 Q Do you have a copy of the change of benefits
22 agreement form for Mr. Russell in the file that the
23 company maintains for Mr. Russell?

24 A Yes. This form is in Mr. Russell's file.

25 Q And is this a true and accurate copy.

1 A This is a true and accurate copy.

2 Q Let me get that back from you. You were asked
3 yesterday by Mr. Moore about whether the company actually
4 makes a copy of the policy that is assembled and then
5 delivered to the policyholder, and your testimony -- and
6 I'm setting up the question -- your testimony was that a
7 xeroxed copy of exactly what goes out the door to a
8 policyholder was not copied. And my question to you is,
9 why not and how do insurance companies -- what is their
10 practice to make sure that they know what the terms of a
11 policyholder's policy are?

12 A Each of the policy forms are unique and in this case
13 there's a series known as 1900, that's the base policy,
14 and then the riders would be something like 1901, 1903,
15 1905, so on and so forth. And once the policy is produced
16 there is record that the policy is produced and that's
17 kept in the file. The company knows exactly what those
18 policy forms are.

19 So for 1900 in South Carolina there is very specific
20 language in that contract, and the policy file itself
21 maintains the proof that was -- that what was sent out is
22 kept in the file, the actual policy file -- excuse me, the
23 actual policy language is maintained by the company in
24 order to administer it. In order -- so you don't have the
25 same exact copy in every single policyholders file who

1 purchased the 1900, but rather keeping a copy of that on
2 file with the company will allow us to review it during
3 the claims process or any other process, such as the
4 requests for duplicate policy that you referred to. So
5 the company would then make that copy and send it off to
6 the insured.

7 Q Does it make any sense for insurance company to make
8 a copy again and again and again of the same form that's
9 going out to policyholders?

10 A No, I'm not aware of any company that it's their
11 practice to keep an actual copy of exactly what was sent
12 out in its policy files.

13 Q All right. Let me hand you what's been marked as
14 Defendant's Exhibit number one. Can you please tell us
15 what this is and how it was created?

16 A This is a specimen copy of policy form P1900SC, along
17 with a policy schedule for the insured Mike Russell, along
18 with policy rider 1901, policy rider 1903, policy rider
19 1904, policy rider 1911, policy rider 1914 and policy
20 rider 1946, and policy rider PR301. And this was put
21 together as part of the preparation for this case.

22 Q If years and years after a policy is issued one
23 needed to be created and was created, would it look like
24 what you're holding there for any particular policyholder.

25 A Yes, it would.

1 Q How does the company know which forms -- years later
2 after issuance, how does the company know which forms need
3 to be part of the policy to make sure it's complete and
4 has all the same terms that are supposed to be in it?

5 A The policy -- the company keeps copies of the
6 policies as they have been filed with the state insurance
7 department, exactly as they have been filed, and we
8 maintain it in the computer system as well.

9 Q Okay. Is there a list that tells you what policy
10 forms need to be part of the policy?

11 A There is a pick list in the file and that pick list
12 indicates the policy form and the associated documents
13 that would go along with that policy form.

14 Q Let me show you what's been marked Defendant's
15 Exhibit number 20. Will you please tell me what that is?

16 A That is a pick list cover sheet for policy [REDACTED] 9360
17 in the name of Michael Russell issue state SC, company
18 Click, along with the pick list itself.

19 Q Did you -- where did you get a copy of this pick
20 list?

21 A This was in the policy file maintained for Mike
22 Russell.

23 Q How is the pick list kept in the file? How is it
24 stored?

25 A An image of the original pick list that was produced

1 at the time the policy was issued and prepared is kept in
2 the -- in each policyholders file.

3 Q So this isn't a print off of data off a computer
4 system. This is an actual image that's kept?

5 A That's correct.

6 Q Is it an image of the original pick list that was
7 used to assemble the policy?

8 A That's what it appears it is, yes.

9 Q And the document that you're holding there today,
10 Defendant's Exhibit number 20, is that a true and accurate
11 copy of pick list that is in Mr. Russell file?

12 A This is a true and accurate copy of what is in the
13 file for Mr. Russell.

14 Q Have you compared that pick list to Mr. Russell's
15 applications from 1999 and 2002?

16 A I have.

17 Q Does it match?

18 A It does match.

19 Q Have you compared the pick list, that you're holding
20 there marked as Defendant's Exhibit number 20, to copy of
21 the specimen policy, which we marked today as Defendant's
22 Exhibit number one. Have you made that comparison?

23 A I have made that comparison.

24 Q Does the policy reflect what is indicated on the pick
25 list should be in the policy?

1 A The policy documents, including all of the riders, do
2 match what is the pick list matches against the policy.

3 Q Looking at the pick list does it indicate, and
4 looking at the pick list and the specimen policy, can you
5 tell us where on the pick list there is an indication that
6 a form with an intoxication exclusion should be a part of
7 Mr. Russell's policy?

8 A The exceptions and limitations, are included in
9 policy form P1900SC and P1900SC is included in this
10 document, and specifically it's on page five, and P1905SC
11 is included in this pick list.

12 Q Okay. So if you look on the pick list at the form
13 P1900SC5, what is the five referring to on the pick list?

14 A Page five.

15 Q And if you look at specimen policy, Defendant's
16 Exhibit one, what page does the intoxication exclusion
17 appear on?

18 A Could you repeat the question please.

19 Q What page -- what is the page number at the bottom of
20 the page in which the intoxication exclusion appears?

21 A Page five.

22 Q Does that match the pick list?

23 A It does.

24 Q Is there anything about the specimen policy that
25 would actually -- that you're holding here today, that

1 would actually be different from the policy actually
2 delivered to Mr. Russell -- well that should have been
3 delivered to Mr. Russell, whether it is or isn't, we won't
4 debate that. But is there anything different from what
5 should have gone out the door to him back in 1999?

6 MR. MOORE: Your Honor, that's calling for
7 speculation on the part of the witness. We don't know
8 what that policy would have looked like.

9 Q He does.

10 THE COURT: I'll let him answer the question.

11 A The policy that would have originally been produced
12 would include a copy of the application.

13 MR. MOORE: Again, Your Honor, he is speculating. He
14 said, would have been produced. There is no evidence that
15 policy ever got produced.

16 Q And I stated in my question, what would be different
17 from the specimen policy to what should have gone out the
18 door?

19 MR. MOORE: That's fine.

20 THE COURT: That's a different question.

21 MR. KRISTINIK: I understand that is a disputed
22 issue.

23 A A copy of the application would have been included
24 along with privacy letters and a welcome letter.

25 Q Okay. Now look at one of the riders in the specimen

1 policy, and look at the signatures and the addresses,
2 because I want us to be very, very specific about what
3 that specimen policy is and understand that with respect
4 to what should have gone out the door?

5 A The signatures of the officers who have endorsed the
6 policy would have changed because at the time the policy
7 was issued, and then the increase was issued. There were
8 different officers, specifically the secretary of the
9 company, as well as the president of the company, are
10 different and the company moved. So therefore the
11 address, the return address, for the company would have
12 been different on the policy that was issued at the time
13 that it was first purchased, as well as the time that in
14 2002 when the policy was increased.

15 Q What about the substance of the terms and provisions
16 and language in those riders and the other forms?

17 A No, you can't change them. Once they're filed with
18 the State Department of Insurance they need to stay
19 intact.

20 Q So the forms that were pulled to create the specimen
21 policy they've got the same terms as the forms that would
22 have been originally assembled and what should have been
23 sent out the door in 1999?

24 A That's correct.

25 Q Now we discussed the change of benefit agreement

1 form. And I want to reference that, and bring your
2 attention to that, in asking my next question. I'll
3 actually give you a copy. And my question to you is would
4 -- if the -- if a specimen policy had been needed for the
5 time period of December of 2009, which is after the
6 accident in this case, but if a specimen policy is needed
7 at that time would it be different from what you're
8 holding there today, which has been marked as Defendant's
9 Exhibit number 1?

10 A It would reflect the removal of the return of premium
11 rider.

12 Q Okay. Is the return of premium rider in the exhibit
13 marked as exhibit number 1, Defense Exhibit 1, the
14 specimen policy?

15 A Yes, it's policy form PR301SC.

16 Q Okay. So the specimen policy you're holding is one
17 that would reflect the terms prior to the execution of
18 that change of benefit agreement?

19 A That's correct.

20 Q Let me get the exhibit, change form, thank you. So
21 the specimen policy, the copy of the specimen policy, you
22 have there as Defense Exhibit Number 1, does that have all
23 the terms and conditions and limitations and everything
24 else that would have existed for this policy back in June
25 of 2008 when the claim was initiated?

1 A Yes.

2 Q Is the form with the intoxication exclusion, is that
3 a standard form for Pen Life accident disability policies
4 back in 1999 and 2002?

5 A Yes, that's a standard exclusion.

6 Q Do you ever recall a time when it was not a standard
7 exclusion to have in an accident disability policies?

8 A No, I'm not aware of that.

9 Q Are you aware of any time that Pennsylvania Life sold
10 accident disability insurance policies when it did not
11 have an intoxication exclusion?

12 A I'm not aware of that, no.

13 Q Would it have been possible for Mr. Russell to
14 purchase from Pennsylvania Life back in 1999 or 2002 an
15 accident disability insurance policy that did not have an
16 intoxication exclusion?

17 A Not from Pennsylvania Life, no.

18 Q Is there a reason for having the intoxication
19 exclusion in the policy?

20 A It's standard language, as I'm aware, in the industry
21 because with an accident policy there would be a higher
22 incident of accidents causing loss due to intoxication,
23 and that's an allowable exclusion through the department
24 of insurance. If that answers the question.

25 Q That does, thank you. Let me get this exhibit from

1 you. And let me get the pick list from you. I want to
2 make sure we keep our exhibits organized. Your Honor,
3 that's all the questions I have for this witness.

4 THE COURT: Any redirect Mr. Moore?

5 MR. MOORE: Yes, sir, Your Honor, please.

6 REDIRECT EXAMINATION

7 BY MR. MOORE

8 Q I want to make sure I understand something. You're
9 telling me there is something in place that keeps a record
10 of every single telephone call that comes into your
11 company.

12 A There is a record for calls that come in for any
13 particular policyholder if there is a request for any type
14 of service, then that is recorded in the computer system
15 regarding the call that the policyholder made.

16 Q You keep records that are that detailed? Really?

17 A Yes, sir.

18 Q Well if you keep records that are that detailed on
19 the telephone calls that are made, why don't you have a
20 record where you ever sent this policy out to somebody to
21 be delivered for Mike?

22 A We have a record that the policy was produced.

23 Q You have a record that there was a pick sheet for the
24 policy and it should have been produced pursuant to the
25 pick list. But you have no record what it looked like nor

1 what was done with it; correct?

2 A We have a record that the policy was produced.

3 Q Well we know that you keep such detailed records that
4 every time you ever even get so much as a phonecall, from
5 a customer, it's documented. Why don't you have
6 documentation for having done something as serious as
7 sending the policy out for delivery to the customer?

8 A We have a record that the policy was produced.

9 Q That's not my question. You talked about all these
10 detailed records that you keep, even down to the minutia
11 of every telephone call, and yet you tell us that with all
12 these detailed records that you keep, with all this
13 computerized system, there is nothing in your record
14 system that would prove the policy was ever mailed in 99
15 or 2002. Correct?

16 A We have records that the policies were produced --
17 that the policy were produced in 1999. And then a record
18 of the increase in that documentation being produced in
19 2002.

20 Q All right. Now if you would answer what I asked of
21 you, and a not what I did not ask of you. My question is,
22 sir, if you got such detailed records down to every single
23 telephone call, why don't you have a record to show that
24 the policy, when it was produced, was ever given to the
25 guy who was supposed to have bought it?

1 A You're asking me to speculate.

2 Q You're the compliance man. You are the Vice
3 President of Compliance. You know there is a -- you know
4 there is an application and the policy. You are the man
5 who has these detailed phone records. You're the one who
6 knows about this computer system. You're the man who is
7 in charge of state compliance. My question is not to
8 speculate. I want you to explain to the court why, with
9 all of these detailed records you keep, you don't have any
10 record of ever providing my client with what he's
11 supposedly bought?

12 A We have a record that the policy was produced at the
13 time of issue.

14 Q Let's do it another way. Do you have a record that
15 the policy was produced at the time of issue?

16 A We do.

17 Q Asked an answered that one. Now let's get again to
18 the one I asked you? With all these detailed records you
19 keep--

20 THE COURT: He's already heard that. Ask the
21 question without that reference.

22 Q Why don't you have a record that you mailed to the
23 man what he supposedly bought?

24 A You're asking me to speculate.

25 Q Because the answer is you don't know?

1 A I do know that the policy was introduced and we have
2 a record of that.

3 Q Does your company keep or have a policy in place of
4 what's supposed to be done with a policy when it's
5 produced?

6 A What's supposed to be done when a policy is produced
7 it's supposed to be mailed out.

8 Q Is the policy of what to do with the policy, the
9 actual company policy, is that policy in writing?

10 A I imagine it is in writing.

11 Q Do you have a policy within your company that says
12 you're supposed to document what you do with the policy
13 when you produce it?

14 A I'm not aware of that.

15 Q Now I want to make sure that we can understand
16 something. Coverage became effective in 1999; correct?

17 A That's correct, sir.

18 Q Can we agree that nothing that was done in 2002 added
19 any additional exclusions to that coverage?

20 A It increased the existing coverage; so additional
21 exclusions would not have been added.

22 Q So whatever coverage there was in 1999 continued as
23 it was in 2002, except there was a different -- additional
24 monetary coverage added?

25 A That's correct.

1 MR. MOORE: Could the court indulge me just one
2 moment, Your Honor?

3 THE COURT: Sure.

4 Q Sir, while I'm looking for that, was there any piece
5 of paper that was produced in 2002 which added any type of
6 exclusions to this coverage?

7 A There were no exclusions added in 2002.

8 MR. MOORE: If the court would indulge me one moment.

9 Q I am going to refer you then to exhibit number 2
10 which has been placed into evidence. This second page
11 which says actness, sickness, if you qualify, which
12 program best fits your needs. That would be paid 82 it
13 looks like 82 something -- two months difference, paid
14 6/2/02. Do you see that?

15 A I do see that.

16 Q Is that just a receipt form? Do you know what that
17 is?

18 A What which is?

19 Q What this document is?

20 A This document is a worksheet.

21 Q Ah. All right. So that document is simply a
22 worksheet?

23 A That's correct.

24 Q Okay. So the document I am referring to is page two
25 of the accident and sickness protection which is carrying

1 the Bates number I believe -- well it carries the number
2 on the bottom CN96-1577. Do you see that?

3 A I see that.

4 Q So when we look at that this is no more than just a
5 worksheet. This doesn't add or subtract from the policy;
6 right?

7 A This is a calculation of the requested or recommended
8 it appears to be additional benefits.

9 Q Right, that simply is showing the additional benefits
10 requested and shows there was something paid; simply a
11 worksheet is all that is?

12 A That's a worksheet.

13 Q Okay. This worksheet would not have added to or
14 taken away from any coverages of any type?

15 A Not the worksheet in and of itself. There would have
16 to be an application completed.

17 Q Right. Well again the application is what would
18 govern and what was issued pursuant to the application;
19 right?

20 A The application would be the formal request for
21 additional coverage.

22 Q Again this CN96-1577, this appears simply to be a
23 worksheet showing the additional coverages and the
24 premiums?

25 A That's what it appears to be.

1 Q Okay. And if we look at the next one which appears
2 to be the same CN96-1577 which is further down on
3 exhibit 2 that would also be an additional worksheet; is
4 that correct?

5 A That's a worksheet as well. Yes.

6 Q And that one has a receipt signed by Russell Gill?

7 A By Randolph Gill

8 Q Randolph Gill. I'm sorry. And again that's just a
9 worksheet just like the first one we looked at?

10 A That's a worksheet as well.

11 Q So that work sheet would not have added to or
12 detracted from any coverage of any type; correct?

13 A Not the worksheet in and of itself.

14 Q Well what would add to or detract from coverage would
15 be the application in the policy.

16 A The application would be the request for additional
17 coverage. That's correct.

18 Q So what this is. These two pieces of paper, these
19 are worksheets that would be used in order to provide
20 things like how much more money you're going to be covered
21 for and how much it's going to cost you?

22 A That's correct.

23 Q Okay. Those things don't create exclusions or
24 anything of that nature; right?

25 A No, they are worksheets.

1 Q So we can agree then, that, any coverages that were
2 in effect in 1999 continued through 2002 and through
3 today, just like they were originally in '99, except for
4 the premium waiver?

5 A I believe you mean return of premium rider.

6 Q Right. return of premium rider. You're correct.

7 A The return of premium rider was deleted.

8 Q So from 1999 the only changes have been the return of
9 premium rider and the additional coverage. Those are the
10 only two changes from '99 to today?

11 A The policy was issued in 1999 and then additional
12 coverage was requested in 2002 and then the return of
13 premium rider was deleted.

14 Q Okay. Now, I want to make positive I understand
15 this. In 1999 what should have been delivered to Mike
16 Russell would have been his application and his policy;
17 correct? That's what he should have gotten; right?

18 A That's correct.

19 Q And in 2002 when he got his added coverage he should
20 have gotten the application and his rider; right?

21 A That's correct.

22 Q So what would have made up the policy would have been
23 the two applications, the '99 policy, and the 2002 riders;
24 correct?

25 A That's correct.

1 Q You talked about these detailed phone records that
2 you keep about people calling up and asking for service or
3 coverage. Do you know if Mike had any reason to call
4 y'all between 1999 and 2002?

5 A I would have to look at the records again. I don't
6 recall exactly what's documented in the file regarding
7 calls to the company.

8 Q He paid you every month, didn't he?

9 A The premiums were deducted from a checking account
10 each month.

11 Q Do you have any reason to know that he even knew that
12 he was supposed to be given an official policy?

13 A I can't speculate as to what the man would have known
14 or not known.

15 Q He just knew he was sending y'all checks and he's
16 supposed to be covered?

17 A Again, I can't assume what he knew or didn't know or
18 what he thought.

19 Q Did y'all ever tell him y'all had his policy and
20 hadn't given it to him?

21 A I don't see any reason that we would have done that.

22 Q All right. Thank you so much. Nothing further, Your
23 Honor.

24 THE COURT: Any recross?

25 MR. KRISTINIK: Just one question, Your Honor.

1 RE CROSS-EXAMINATION

2 BY MR. KRISTINIK:

3 Q Mr. Macken, if a policyholder purchases a policy and
4 realizes he hasn't received it and makes a request to pen
5 life for duplicate, would Pen Life honor that request?

6 A Yes, Pen Life would honor that request. That request
7 would be documented in the computer records and then
8 documentation of the request being fulfilled. That is the
9 policy being mailed out.

10 Q No further questions of this witness, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. MOORE:

13 Q So no doubt you guys have got some really detailed
14 sophisticated detailed records of what goes on with these
15 policies, don't you? Very detailed records of everything
16 that goes on with these policies; right?

17 A We try to detail requests for service in our computer
18 records.

19 Q Thank you so much. Nothing further.

20 THE COURT: Step down.

21 MR. KRISTINIK: Your Honor, at this point in the
22 trial there's been a lot of discussion of delivery. And,
23 Your Honor, may be asking himself, you know, is this
24 relevant and what does the law say about this. Last night
25 we prepared a pocket brief on this and I would like to

1 hand you a copy. It is only four pages long. I'd like to
2 present Mr. Moore with a copy right now. If I may
3 approach the bench?

4 MR. MOORE: Your Honor, may I ask counsel what a
5 pocket brief is. I've heard of lots of briefs, but I have
6 never heard of a pocket brief before. Can I ask the court
7 what that might be?

8 MR. KRISTINIK: You pull it out of your pocket, like
9 the old days.

10 THE COURT: It is like the pocket stipulation of
11 dismissal. I'm sure you're familiar with those.

12 MR. MOORE: May I take a moment and read the pocket
13 brief, Your Honor.

14 THE COURT: Sure. For planning purposes, where do we
15 stand now on witnesses. Mr. Moore, you've got a couple of
16 more, particularly the lady back here.

17 MR. MOORE: I've got this lady, probably this
18 gentleman and maybe one or two witnesses. We might be
19 able to finish today. We might not.

20 (Whereupon, a break was taken.).

21 (Whereupon, a lunch break was taken.)

22 MR. MOORE: Your Honor, it is Christina Cornella, I
23 would call her as an adverse witness.

24 MR. KRISTINIK: Christina Barlow, her name has
25 changed over the past couple of years. A couple of things.

1 To make her flight she needs to be out of here by
2 4 o'clock and so when Mr. Moore is done with her and I can
3 ask my questions. That's three hours. I think we're
4 okay. But I just wanted to go ahead and let everyone know
5 that now. Another thing she's pregnant. She may need
6 more breaks than a normal witness.

7 THE COURT: We've been very liberal with the breaks.
8 Anyone need one let me know and I'll take one with you.

9 MR. KRISTINIK: Another thing, Mr. Moore is very
10 thorough and intense in his cross examination and doing a
11 good job for his client. But, I would ask that he--

12 THE COURT: He has a daughter and I'm certain he'll
13 be aware of the problems accompanying her condition.

14 MR. MOORE: Been there done that, got the t-shirt
15 Your Honor. I also got a wife.

16 CHRISTINA BARLOW, after being duly sworn,
17 testified as follows:

18 THE WITNESS: My name is Christina Barlow.

19 DIRECT EXAMINATION

20 BY MR. MOORE:

21 Q For whom are you employed?

22 A CHCS Services.

23 Q What is CHCS Services?

24 A We are a third party administrator for different
25 insurance companies.

1 Q And is the defendant in this case, Pennsylvania Life,
2 one of the clients you guys have?

3 A Yes, sir.

4 Q Have you ever worked for as an employee for
5 Pennsylvania Life Insurance.

6 A No, sir.

7 Q So is the way I understand it, if there is a, claim
8 Pennsylvania Life hires your company and you guys handle
9 the claims?

10 A We administer the claims, yes, sir.

11 Q When you say, administer the claims, what does claims
12 administration entail?

13 A We handle all aspects of the claim.

14 Q How do you know how to do that?

15 A Through the claims background that all of the
16 employees have when they're hired.

17 Q Well, let's assume you're administering a claim.
18 Don't you have to see a policy to do that?

19 A Yes, sir.

20 Q Have you ever seen my client's policy?

21 A I've seen the policy that is on record that your
22 client had. I mean, I haven't seen the actual policy that
23 was mailed to him. But I have seen the one that is an
24 exact replica.

25 Q This policy that's on record, where did you see this

1 policy on record?

2 A We have a database of all of the policies that our
3 policy holders, you know, hold. So when a claim comes in,
4 we pull it up in our system and review it.

5 Q So there is a copy of my client's policy somewhere on
6 record in the database and you have been given a copy of
7 it?

8 A There is an identical form of the policy, yes.

9 Q Now I am asking you, and again, I know you're
10 pregnant and everything, but are you telling me that
11 you've seen what you believe to be a specimen copy of the
12 policy, or have you actually seen a copy of my client's
13 policy?

14 A It would be a specimen copy of the policy, yes.

15 Q To your knowledge no one has ever shown you my
16 client's actual policy?

17 A No, sir.

18 Q Nor a copy of my client's actual policy?

19 A No, sir.

20 Q All right. Now, when you get ready to administer
21 this pursuant to the contract your company has with the
22 insurance company, who teaches you how to do that?

23 A Well I had experience when I started working for this
24 company. We have managers. We have different departments
25 we consult with compliance. I mean, I don't really know.

1 Q Well have you ever had any training, specifically,
2 how to administer the policies of Pennsylvania Life
3 Insurance Company?

4 A Yes, sir, we have training department that provide
5 trainings to our examiners on going.

6 Q Did you get trained?

7 A Yes, sir.

8 Q Who makes the decision as to whether a person meets
9 the definition of disabled within the terms of the policy?

10 A The claims examiner.

11 Q And have you ever been the claims examiner on this
12 file?

13 A No, sir. I am the claim supervisor.

14 Q Have you supervised the claims examiners on this
15 file?

16 A Yes, sir.

17 Q Now, when you supervise the claims examiners what do
18 you do?

19 A All the supervisory duties, help review files, cases,
20 answers questions, general personnel work, reporting.

21 Q At some point in time was a determination made that
22 my client, Mr. Russell, meets the definition of disabled
23 within the terms of the policy?

24 A In the beginning of the claim we began paying due to
25 -- due to him being disabled, yes, sir.

1 Q Now, what was there about his condition that led you
2 to believe that he met the definition of disability within
3 the purview of the policy?

4 A Well the injuries he sustained in the accident.

5 Q Describe for me to injuries that he sustained in the
6 accident that led your company to conclude that he is in
7 fact disabled, within the terms of the policy?

8 A I don't recall them actually. I mean, he had
9 multiple fractures, I know there's the pelvic. But I
10 don't know without looking at the file every single one of
11 them again. It's been quite sometime since I've reviewed
12 exactly the injuries.

13 Q Well are you here to testify today in regard to the
14 claims handling of this file for which you had the
15 supervisory responsibility?

16 A Yes, sir.

17 Q To your knowledge once it was determined that he was
18 in fact disabled do you have any indication that he ever
19 improved?

20 A I don't have that indication, no, sir.

21 Q So that as of today you're able to tell the judge,
22 from the position of the Pennsylvania Life Insurance
23 Company, my client still meets the definition of disabled,
24 as that term is defined in the document that you looked at
25 that called itself the policy of insurance?

1 A The last supplemental claim form received by the
2 physician wasn't very clear. There would be a further --
3 if you were asking me to determine that, I would have to
4 further review the file. There's a lot of different
5 things that we would have to review in order to determine
6 his on going disability.

7 Q Ma'am, there was an initial determination that he
8 meets the definition of disabled within the purview of the
9 paperwork or computer you looked at that described
10 disability under the purported policy of insurance, right?

11 A Yes, sir, but it's an on going process.

12 Q You're the supervisor in that on going process;
13 correct?

14 A Yes, sir.

15 Q Has a decision ever been made to change the original
16 determination that he is in fact disabled?

17 A No, sir.

18 Q Well, if you make a decision that he's disabled and
19 you don't change your opinion, then I would assume that
20 disability continues until such time as you determine that
21 he's not?

22 A Right, with the further review.

23 Q And there hasn't been any further review that has
24 determined that he's not disabled?

25 A No, sir because the lawsuit was filed.

1 Q Well you also, though, have continued to secure
2 information from his physician from time to time; correct?

3 A Yes, sir.

4 Q And none of that information caused the Pennsylvania
5 Life Insurance Company to change its position in regard to
6 whether he is disabled, did it?

7 A No, sir, not at this point, no.

8 Q So at this point from the company's position he still
9 remains disabled within the purview of the policy?

10 A That's correct.

11 Q Okay. Now, at any point in time has Mike Russell
12 ever lied to you?

13 A Not that I -- no, sir.

14 Q At any point in time has Mike Russell ever lied to
15 anybody to whom you supervise?

16 A I'm not aware of it.

17 Q At any point in time has Mike Russell ever provided
18 the Pennsylvania Life Insurance Company any false
19 information?

20 A Not that I'm aware.

21 Q Now, at some point in time a claim was made; is that
22 correct?

23 A Yes, sir.

24 Q How was that was a claim made?

25 A How was the -- did Mr. Russle make the claim.

1 Q Yes, ma'am.

2 A With the proper preliminary claim form, claim report.

3 Q He filled out a preliminary claim report; is that
4 right?

5 A Yes, sir.

6 Q Now, what does the preliminary claim form look like?

7 A It is right here.

8 Q That would be exhibit number which one?

9 A Three.

10 Q Now, exhibit number 3, that would basically be
11 something that calls itself a Pennsylvania Life Insurance
12 Company policyholders claim report; is that correct?

13 A Yes, sir.

14 Q Show me where the name, temporary, appears upon that
15 anywhere.

16 A It doesn't appear on here.

17 Q Now, ma'am, explain to the Judge why, if that doesn't
18 call itself a temporary claim report, you would refer to
19 that document as something it's not?

20 THE COURT: I thought she said preliminary claim
21 form.

22 A I did.

23 Q The word preliminary doesn't appear on there, does
24 it?

25 A No, sir. But it is just the initial claim form

1 that's sent in. We call it a preliminary claim form. So
2 I should call it the policyholders claim report for the
3 record.

4 Q Right. That's what you call a proof of loss; is that
5 right?

6 A It would be the initial proof of loss, yes.

7 Q All right. So we know that the policyholder provided
8 you with a proof of loss, but he provided it on one of the
9 insurance companies's claim forms; is that right?

10 A Yes, sir.

11 Q Do you have any idea where he got the claim form that
12 you guys printed up?

13 A The normal practice is for a policyholder to call and
14 claim report is generated with their name an address and
15 mailed out to them.

16 Q Does the claim report have any questioning on there
17 about intoxication?

18 A No, sir.

19 Q Do you know who it is that drew up that claim form
20 that y'all sent to Mike and asked him to fill out?

21 A No, sir.

22 Q Ma'am, if there is an intoxication exclusion in
23 whatever policy this company did print out, if they
24 printed out one, do you know who made the decision not to
25 ask about intoxication on the claim form?

1 A No, sir.

2 Q From whom do you secure the claim forms?

3 A I don't know what you mean.

4 Q We know that you don't actually work for Pennsylvania
5 Life Insurance Company; right?

6 A Right.

7 Q Yet, this claim form came from Pennsylvania Life; is
8 that right?

9 A The forms are provided to the claims department. I'm
10 not sure who provides them to us. Our manager is the one
11 that would handle the claim form.

12 Q Who sent the claim form to Mike to be filled out?

13 A Whoever answered at the time when he called.

14 Q Do you have a record of that?

15 A I'm sure there would be a record in the claim system.

16 Q That's because the company keeps a record of
17 everything it does; right?

18 A They try to keep a record of any requests from the
19 policyholder, yes.

20 Q If you send correspondence to the policyholder do you
21 keep a record of that?

22 A Yes, sir they're suppose to.

23 Q If you get a telephone call from the policy holder
24 you keep a record of that; right?

25 A Supposed to, yes, sir.

1 Q Because Pennsylvania Life has instructed you that
2 it's important that you keep a record of everything that
3 is done for a client; correct?

4 A Yes, sir.

5 Q Have you ever seen any record, that anybody actually
6 gave Mike, that which he purchased, a policy of insurance?
7 Do you see any record to show he ever got it?

8 A That wouldn't be in the claims part of the file. So,
9 no, sir, I mean, I saw that the policy was produced. But
10 no, sir.

11 Q Now as part of that claim form there is a medical
12 authorization form, do you see that?

13 A Uh-huh.

14 Q Did Mike sign that?

15 A Yes, sir.

16 Q If the claim form is incomplete, not to your
17 satisfaction, you basically either sent it back or called
18 and get it updated; correct?

19 A Yes, sir.

20 Q So, the way Mike filled this thing out was true,
21 accurate and complete as far as you were concerned;
22 correct?

23 A Yes, sir.

24 Q There was no requirement that he put on there, I had
25 a wreck and got a DUI charge; correct? He didn't have to

1 put that on there?

2 A Well it asked for a description of the accident. But
3 no, sir, it doesn't specifically say what you said.

4 Q And he told you it was a motorcycle accident; right?

5 A Yes, sir.

6 Q If you had not found that a complete answer, you
7 could have called him back and said send me more
8 information; right?

9 A We could have yes, sir.

10 Q Or rejected the form; correct?

11 A Yes, sir.

12 Q But your company accepted the form as complete and
13 accurate and processed it; correct?

14 A Yes, sir.

15 Q Now as I understand it, there is on the bottom of
16 that claim form, a medical authorization form, which
17 authorizes you to get a whole lot of personal information
18 about Mike and his family; correct?

19 A It is the medical authorization, yes.

20 Q When you're working for this insurance company,
21 Pennsylvania Life Insurance Company, if the client says
22 I'm not going to give you that information. I am not
23 going to sign that form. I'll sign the claim form the
24 proof of loss form. But I am not going to let you into my
25 private information, what do you do?

1 A Well, we have to have the information to evaluate the
2 claim. We would order what is necessary to that claim.

3 But -- I mean.

4 Q Well the contract all it says that he has to do is to
5 make a claim and give you sufficient proof that he
6 qualifies as disability; correct?

7 A Repeat that one more time. I'm sorry.

8 Q Yes, ma'am. You told us that you looked at this
9 electronic copy of what's supposed to be the policy;
10 right?

11 A Yes, sir.

12 Q So you were familiar and able to look at all the
13 terms of that; right?

14 A Yes, sir.

15 Q All according to that the man is required to do is to
16 provide you a claim and proof that he meets the definition
17 of disability; correct?

18 A Yes, sir.

19 Q Do you know of anything in that policy that you have
20 looked at -- that supposed policy -- that says he's got to
21 open up his entire medical history to you?

22 A There is nothing that says he has to open his entire
23 medical history, no. But there is a proof of loss
24 provision.

25 Q Sure it says that he's going to give you a proof of

1 loss, basically proving that the loss happened, and
2 document that he meets the definition of disabled. That's
3 what it says; right?

4 A Well, there is more to documenting that he's disabled
5 than just a claim form, though.

6 Q Sure. He's got to give you enough proof to
7 demonstrate that he meets the terms of disability within
8 the purview of the policy; correct?

9 A Correct.

10 Q It is his job to prove it and your job to analyze it;
11 correct?

12 A Yes, sir.

13 Q You have to analyze that which he submits to you;
14 correct?

15 A Correct.

16 Q In this case, however, what the company did and does
17 to all of its customers, as a matter of policy, is to
18 insist upon the right to examine the full medical history
19 of the client for a period of time?

20 MR. KRISTINIK: Your Honor, I object on relevance.
21 We've made all the payments to date. Why does this form
22 or this request have anything to do with the case.

23 MR. MOORE: Your Honor, I think the questions are
24 relevant. I can answer his question. We have -- we have
25 several claims here. One is simply we want to be paid on

1 our policy of insurance. But we also have an allegation
2 of bad faith in regard to the handling of the file.

3 And here is what we say, we don't think the case was
4 properly reviewed; we don't think it was properly
5 evaluated; we don't think it was properly handled. But,
6 we also think that if this insurance carrier claims it has
7 a policy, then it only is entitled to the legal rights it
8 is entitled to under its policy.

9 Now, if as a pre condition -- if as a condition
10 precedent to even processing the claim, the insurance
11 carrier makes demands, on all of its customers, that are
12 not set forth as they are entitled to make under the
13 policy. Then what's happening is the carrier is insisting
14 upon the waiver of privacy rights in a shotgun approach,
15 which is more than the carrier is entitled to under any
16 purview of insurance law.

17 What they're entitled to is this, a proof of claim
18 which has documentation attached to it from the insured to
19 establish entitlement to benefits. That's what the policy
20 says they're entitled to. How do you do that? You submit
21 a claim form. I got hurt. They want to here hear how I
22 got hurt. But I got hurt. Here is an affidavit from my
23 doctor saying my hip is torn up, my knee is torn up, my
24 leg is torn up. I can't work. I'm permanently disable.
25 That's it. What they now do is come back in and say, oh,

1 no, that's not enough. You got to do more than the policy
2 calls for.

3 In order for you to be allowed to even have your
4 claim considered we insist upon the right to have your
5 total federally protected medical history opened up to us
6 and made available to us, and even though the policy
7 doesn't say you have to do that, we say you have to do it
8 and here's what we're telling you; that if you don't agree
9 to waive your federally protected confidential rights in
10 regard to health insurance, health insurance information,
11 medical history, your children's medical history, we won't
12 even process your claim. So what they insist upon --

13 THE COURT: Well how is all that -- there is not an
14 allegation that this company did that.

15 MR. MOORE: Yes. Yes, there is. That is part of the
16 bad faith handling of the claim. We have to establish
17 several things. To get punitive damages against these
18 folks, we have to establish that they mishandled the
19 claim; that they breached the contract and did things they
20 were not entitled to do.

21 Now what we have here is -- that's the bad faith --
22 that is part of our bad faith claim, that they extracted,
23 as a condition precedent, to the handling of this claim,
24 they extracted privacy information they were not entitled
25 to under the policy, insisted upon it, and would not

1 process the claim absent information they were not
2 entitled to. Both as to my client and members of his
3 family.

4 All we were entitled to do, all we're required to do
5 under their policy. If they're relying upon their policy
6 then what is good for the goose is good for the gander.
7 It works both ways. They're coming in and saying -- we're
8 saying show us. This gentleman back here, I forget his
9 name, but the man who testified said under our policy we
10 have no right to all of that. He's told us, under our
11 policy we have no right to all that stuff.

12 THE COURT: No, he says there is no term of the
13 policy says they can ask for that.

14 MR. MOORE: Right. And there is a difference between
15 asking for it and systematically demanding it. If all
16 they had done was to ask for it, it is okay. The client
17 can say no. But both of them have said, we will not
18 process your claim unless you sign this medical
19 authorization form authorizing us to have things that's
20 got nothing to do with your claim and that basically waive
21 all kinds of federally protected rights.

22 Now our position is this, they have a right to see
23 the medical records, and the proof related to the accident
24 and the disability.

25 THE COURT: Well you got proof. I mean, is there

1 going to be testimony that they went beyond that and went
2 behind the motorcycle wreck to look when he was -- got his
3 tetanus shot when he was 12?

4 MR. MOORE: They've gotten every single medical
5 record he's got.

6 MR. KRISTINIK: Objection, Your Honor, that is not
7 true.

8 MR. MOORE: They have sought and gotten permission
9 for every single record. They insisted that he basically
10 and I am going to ask them what all they went to. What
11 records they got. What did they pull. How did they pull
12 them. They pulled them on a basis -- and you know did you
13 get records that did not -- I want to ask her did they
14 secure records over and above what was related to the
15 motorcycle accident.

16 MR. KRISTINIK: Your Honor, this is really absurd.
17 He ought to ask her whether the claim was ever denied. To
18 have a bad faith claim you have to have a denial at some
19 point. He ought to ask her that and get her answer and
20 see what her answer is. That's what he should be asking
21 her if he wants to set up a bad faith claim.

22 MR. MOORE: I appreciate him telling me what I ought
23 to ask. But I think I'm placing in the record what I
24 basically need.

25 THE COURT: Is your bad faith claim a bad faith

1 processing claim or bad faith refusal to pay your first
2 cause of action?

3 MR. MOORE: Both. It would be both.

4 THE COURT: All right.

5 MR. MOORE: The refusal to pay came about the way the
6 claim was being processed is basically what happened.

7 MR. KRISTINIK: It says refusal to first party
8 benefits.

9 MR. MOORE: Right. They basically -- what happened
10 is they quit paying in November of 2009. Then we had to
11 sue and when we sued they began to pay again.

12 MR. KRISTINIK: Objection, to the statement that they
13 quit paying. He needs to ask the witness about that as
14 well.

15 THE COURT: All right. Go on and get to that. Go
16 ahead.

17 Q Ma'am, do you know that at some point in time the
18 Pennsylvania Life Insurance Company even demanded a copy
19 of the man's tax return?

20 A I am not aware of that, no.

21 Q Well in the appropriate handling of this claim should
22 they have demanded such a thing?

23 A There are times that we have to request the tax
24 returns because the policy is a loss of time from work
25 policy.

1 Q Well this policy, though, isn't one of those, is it?

2 A Yes, sir.

3 Q This policy is one that has a defined benefit so long
4 as the disability continues?

5 A It is an accident policy and lots of time. It is one
6 of those policies, yes, sir.

7 Q It is a defined benefit policy, which basically says,
8 if you're disabled you get paid for a defined period of
9 time; right?

10 A Well that's not really how I interpret it, but...

11 Q Well, ma'am, it says you're supposed to get \$2,500 a
12 month if you're disabled until you turn 65?

13 A If you meet all the terms and definition of the
14 policy.

15 Q Now, explain to me how a tax return would indicate
16 that a person wasn't disabled?

17 A Well it could show that he had continued to work when
18 he was supposed to be off of work, since that's what type
19 of policy it is. It could show he was making more than,
20 you know, he told us at the time of the accident. There's
21 several things.

22 Q When did you start making payments?

23 A When did we start making payments?

24 Q Yes, ma'am.

25 A I would have to see my chart, but it was very soon

1 after his claim for benefits and accident.

2 Q How long was it after that that you stopped making
3 payments?

4 A We haven't stopped making payments.

5 Q Payments were not made in November of 2009, were
6 they?

7 A Yes, sir.

8 Q Payments were made in January of 2010 for November of
9 2009, were they not?

10 A I don't have it memorized. I would have to see the
11 chart.

12 Q Well the chart is over here somewhere and if I knew
13 which one of these exhibits had the chart I would show it
14 to you. I can find out. Ma'am, if you need a break or
15 you need water then you let me know.

16 A Okay. Thank you.

17 Q Exhibit number 15 is that this chart?

18 A That's one of them, yea. There is another summary
19 chart. But, I can use this one.

20 Q This one has got bigger handwriting. This is number
21 16?

22 A Okay. Thank you.

23 Q Sure. May I see that with you?

24 A So which one are we talking about. November of --

25 Q The payment was made in October of 2009 and another

1 one wasn't made until December of 2009.

2 A This was the date that the report was signed. This
3 is the check date right here. So there was one made in
4 October and November.

5 Q All right and then the next one after November was
6 not until January;right?

7 A But it was paying him for the period of December --
8 the disability benefits are paid in arrears. They pay the
9 month.

10 Q A check was written in October of 2009?

11 A Yes, sir 10/9/09.

12 Q When was it mailed?

13 A I don't have that information. They're usually
14 mailed -- well the system generates the check and they're
15 mailed immediately.

16 Q A check was written in November of 2009?

17 A 11/13/09.

18 Q When was it mailed?

19 A It would have been mailed immediately.

20 Q December of 2009?

21 A There is a check that went out January 12, 2010.

22 That one was a little late but it went out covering the
23 period of December.

24 Q Would you explain to me why there was not a payment
25 made on time in December of 09?

1 A The file doesn't actually reflect any particular
2 reason. But there's -- the one thing that would come to
3 mind is that it was around the holidays. Sometimes, you
4 know, that creates a little bit of a back log for an
5 examiner, that could be a reason. But I do not have a
6 specific reason for the file.

7 Q And those times also create needs for the customer
8 who relies upon those funds to live; right?

9 A Yes, sir. And we try our hardest to get them out on
10 time.

11 Q But we do know this they missed a check in December
12 of 09; right? You made it up in January?

13 A Early January. Yes, sir.

14 Q And then you had two checks went out in February of
15 '10, or did they?

16 A There is just a check in February and then in March.
17 I don't see two checks in February.

18 Q Then there was a check in April of '10?

19 A Yes, sir -- no, no. I'm sorry.

20 Q Check of May of '10?

21 A No. But that payment was caught up in July of 2010.

22 Q A check in June of '10?

23 A Again that was the check that was caught up July of
24 2010.

25 Q I just want to make sure we understand the way this

1 thing is supposed to work. Your company is obligated to
2 make payments every single month to my client; right?

3 A It is a monthly benefit. There is not a specific
4 time limit that we have to make them, but we do try and
5 make them as timely as possible.

6 Q Well the monthly benefit basically means it is
7 supposed to be a benefit by the month; right?

8 A We don't have a specific policy wording that says we
9 have to get it out within that time frame. It is just a
10 monthly benefit.

11 Q So if my monthly benefit is December of 2012, it is
12 okay for you to pay me in December of 2013. Is that what
13 you're telling me?

14 A No, sir, that's not what I'm telling you.

15 Q Is a monthly benefit not supposed to be paid monthly?

16 A There are circumstances that arise that could delay a
17 payment is what I'm telling you.

18 Q Is a monthly benefit supposed to be paid monthly if
19 you do your job correctly?

20 A There is nothing specifically in writing that says
21 that.

22 Q Just like there is nothing specifically in writing
23 that says you're entitled to a medical authorization form
24 either; right?

25 A That's just a standard insurance practice.

1 Q So the standard insurance practice is for you to get
2 things you're not entitled to, but not pay a monthly
3 benefit on a monthly basis?

4 A We wouldn't have any other way to evaluate the claim
5 for loss.

6 Q Let's talk about standard insurance practices. Are
7 you telling me that standard insurance practices don't say
8 that monthly insurance benefits are to be paid monthly?

9 A That's not what I said no, sir.

10 Q Standard insurance practices say that monthly
11 insurance benefits are supposed to be paid monthly;
12 correct?

13 A And we've made all the monthly benefit payments. If
14 there was one that was a little late, we have caught him
15 up. We have not missed any payments.

16 Q Is the answer to my question yes?

17 A Can you repeat it again, please.

18 Q Standard insurance requirement require that monthly
19 insurance benefits be paid monthly?

20 A I haven't seen that anywhere no, sir.

21 Q All right, well we do know that according to the
22 policy the gentleman was entitled to monthly payments for
23 \$2,500 a month; correct?

24 A For each period that he is to be paid, if he
25 qualifies for that month, yes.

1 Q 2008, '09, '10, '11, and '12 he's been deemed
2 disabled according to your company; right?

3 A We have continued the payments through then, yes.

4 Q Is the answer yes?

5 A Yes, sir.

6 Q We know that he did not get -- during the the month
7 of December of 2009 he did not receive the check he was --
8 his monthly check for December of 2009 until later; right?

9 A Right.

10 Q Now, we know that in May of 2010, he didn't receive
11 his check until when?

12 A July 20, 2010.

13 Q In April of 2010 he didn't receive his check until
14 when?

15 A July 20, 2010.

16 Q In June of 2010 he didn't receive his payments until
17 when?

18 A He received it the same date I just said, July 20, he
19 received a \$7,500 check catching him up from those missed
20 payments.

21 Q Oh, what missed payments did he have?

22 A From the months we just went over.

23 Q So there were three payments when y'all missed paying
24 him?

25 A Well maybe I worded it incorrectly. But there was a

1 time frame, during that time, when the examiner who was
2 handling the case left the company and we also had a
3 complete switch of our buildings, and it was right around
4 that time frame. So I am assuming that is what created
5 the back log in his checks. But we caught him up
6 immediately.

7 Q Do you not know that when the December of 2010
8 payment was missed that is when contact was made through
9 an attorney on his behalf?

10 A I'm sorry, say this again.

11 Q Do you have your claim file with you?

12 A I just have whatever is with my attorney. I don't
13 think it is the entire claim file.

14 Q Do you know that what happened was in December of
15 2010 when that payment was missed that is when Mr. Russell
16 went to an attorney and contact was made with Pennsylvania
17 Life to have the money started back again?

18 A I thought that the lawsuit was February of 2010.

19 Q Yes, ma'am, it was?

20 A Okay.

21 Q But did you know that the controversy arose in
22 December of 2010 as a result of the payment your company
23 admittedly missed in December of 2010?

24 A No, sir, I didn't know that that is what caused it.

25 No.

1 Q Well, explain to me why three months worth of
2 payments were missed in April, May, and June of 2010.

3 A That was what I just explained about the examiner
4 leaving the company, Ella Lee, she was the examiner on the
5 case and we also switched buildings. I am not saying that
6 that is the exact reason why. I am letting you know that
7 that is the time frame when it happened when I went back
8 and reviewed the file. The claim file doesn't reflect
9 that. It will create a back log when a new examiner is
10 handed an entire case load.

11 Q So the only reason why the payments were missed for
12 those four months is just a clerical error; right?

13 A That's all I could determine, yes, sir.

14 Q So Pennsylvania Life doesn't deny this claim?

15 A We have not denied this claim, no.

16 Q As a matter of fact you've accepted the claim.

17 A Yes, sir.

18 Q The claim is due and payable as far as you're
19 concerned and you are still paying it?

20 A We are still paying it, yes.

21 Q Okay. And so you're working with Pennsylvania Life;
22 correct?

23 A I work for CSCS we're a third party administrator for
24 Pennsylvania Life.

25 Q And y'all have just apologized for not paying the

1 money the man is lawfully due?

2 A But we did pay him.

3 Q But you missed three or four months there and that
4 was a clerical snafu and y'all are sorry that y'all did
5 that; correct?

6 A Yea. that's how --

7 MR. KRISTINIK: Objection, Your Honor. Apologies. I
8 would request that he be asked to move on to his next
9 question.

10 MR. MOORE: I appreciate that he'd like me to move on
11 but I kind of like that question.

12 MR. KRISTINIK: I am sure you do.

13 THE COURT: I think she's answered the question.

14 Q So as of right now from Pennsylvania Life Insurance
15 Company's position, Mike is disabled; right?

16 A As of -- like I said earlier, the last supplemental
17 claim form showed not applicable by the physician so
18 that's not really sufficient information. But we don't
19 have any information yet that he has not. So we have
20 continued payments until that review is complete.

21 Q All right. So until the review is complete and
22 something shows otherwise, Mike is disabled; right?

23 A Yes, sir.

24 Q He is entitled to his benefits?

25 A Yes, sir.

1 Q There is no reason not to pay him; right?

2 A Not at this point, no.

3 Q He complies with the policy that you've looked at;
4 right?

5 A I don't really know how to answer that he complies
6 with the policy.

7 Q Well he's complied. He's made the claims. He's
8 given you all the medical--

9 A We haven't found any reason to deny the claim.

10 Q All right. So the claim has been accepted?

11 A Yes, sir. We've been paying the claim, yes.

12 Q Due and payable right now; right?

13 A Right. We just went over that part.

14 Q And the person who would be responsible to make the
15 determinations, if it is due and payable, would be you as
16 the supervisor of the claims; right?

17 A I don't make all the decisions. The claims examiner
18 if they have any questions they may come to me. They've
19 been given authority make that determination.

20 Q But you have got them?

21 A I don't make any every decision on every claim no,
22 sir.

23 Q But that hadn't happened in this file?

24 A Right.

25 Q So right now the person who can tell this judge if

1 this claim is due and payable by this insurance company is
2 you; right?

3 A Well I thought that we have already gone over that.
4 I have explained that we're currently paying the claim.

5 Q But that's you make the decision as to the supervisor
6 of the claims looking at the policy and knowing what's
7 what?

8 A I don't make all the decisions on every claim, no.

9 Q But so far you're the person that had the
10 responsibility to make the decisions and call on this
11 claim?

12 A No, sir.

13 Q All right.. Who makes the decision on this claim?

14 A The claims examiner.

15 Q Who is that?

16 A Currently her name is Melinda Riley. But the claim
17 has since been with legal. So there hasn't been a lot of
18 claims activity within the file.

19 Q Do you know where Melinda Riley is today?

20 A She just inherited the file so she wouldn't have any
21 background of this case.

22 Q Who was her predecessor?

23 A Who handled it before her.

24 Q Yes.

25 A She's not with the company. That's what I was

1 telling you earlier.

2 Q What is her name?

3 A Ella lee.

4 Q Has Mrs. Lee or Riley or any of these claims
5 examiners ever told you that this claim is something to be
6 denied?

7 A We have never denied this case. The exclusion came
8 up and -- but we never denied the case.

9 Q Okay. So the company at this time is not taking the
10 position that that exclusion denies the claim?

11 MR. KRISTINIK: Objection, Your Honor, that is
12 completely in conflict --

13 THE COURT: The fact that they filed the declaratory
14 judgment is exactly in contrast to what you're saying to
15 her.

16 MR. MOORE: Yes, and I think it is in contrast of
17 what she was saying to me. That's what I was trying to
18 get to apparently, apparently the lawyer is taking a
19 position contrary than what the claims people say is the
20 truth. So what I got to get to is the truth.

21 THE COURT: No. I knew where you were going. But
22 all your questions were regarding disability, disability,
23 not exclusion.

24 THE WITNESS: Right, exactly.

25 THE COURT: Hang on. This is my. Disability an

1 exclusion are all kind of part and parcel to this lawsuit
2 and I was watching. I understand. But that is a trap.

3 MR. MOORE: Yes, sir.

4 THE COURT: Let's take a break.

5 MR. MOORE: But the record is the record. What she's
6 trying to say. Let me follow in with that--

7 THE COURT: I want to break. I need a break.

8 (Whereupon, a break was taken.).

9 BY MR. MOORE:

10 Q Ma'am, let's talk about.

11 MR. KRISTINIK: Hold on one second.

12 (whereupon, the attorneys conferred.)

13 Q Let's talk about this alcohol exclusion situation,
14 okay?

15 A Okay.

16 Q When is it that Pennsylvania Life first learned that
17 Mike had been drinking at the time of the accident, which
18 gives rise to his claim?

19 A It was first learned in the medical records received
20 around -- in August of 2010. I can't remember exactly
21 without seeing the file. I apologize. But it was in
22 medical information received in referrals to our medical
23 consultant which confirmed it.

24 Q So it was only after August of 2010 that you folks
25 learned of the fact that Mike had been drinking

1 A I don't remember if it was 2009 or 2010 without
2 looking at the file.

3 Q Yes, ma'am. It was actually August of 2009 that you
4 learned that there had been some alcohol involved;

5 A Okay.

6 Q Isn't that correct? Does that sound right?

7 A Yes, sir.

8 Q And when they learned in August of 2009 that there
9 might have been some alcohol involved, there was no
10 decision at that time to stop paying him, was there?

11 A No, sir.

12 Q And you would have had the accident report, and the
13 medical records, and the blood reports, and the alcohol
14 levels, and all of that as early as August of 2009;
15 correct?

16 A I don't believe we had the correct accident report.

17 Q Certainly you would have had the blood alcohol levels
18 and everything.

19 A That was what was in the medical information when we
20 first found out about it, yes.

21 Q And after you got that and knew about the blood
22 alcohol levels, and all of that, the decision was made to
23 just keep right on paying?

24 A Well the examiner referred the file to our medical
25 consultant to confirm what was in the medical records.

1 Q And the decision was made to keep paying?

2 A Under reservation of rights, while we performed our
3 review, yes, sir.

4 Q When was the reservation of rights sent to Mike?

5 A It was -- I know it was right after a call was made
6 to Mr. Russell. I don't remember the exact date without
7 seeing it.

8 Q So there was a contact made at some point in time
9 with Mr. Russell; correct?

10 A Yes, sir, the examiner called and explained to him
11 what was found in the medical information.

12 Q Now, did you know that he -- that the DUI charge
13 against him was dismissed?

14 A I haven't heard any of that, no, sir.

15 Q Let me ask this question. From a claims form -- a
16 claim file, your position, or you can tell me if you know
17 or don't know, if he was standing dead stopped at a
18 traffic light -- let's say his alcohol level was 40, just
19 off the charts, dead stopped at a traffic light and was
20 plowed into from the rear by an 18 wheel tractor trailer,
21 would he be entitled to the coverage if you know?

22 A I don't know.

23 Q Who would make that decision?

24 A There would be a number of things done to review the
25 file to form an opinion or decision.

1 Q Since the time of the reservation of rights letter,
2 has your -- has the insurance company done anything at all
3 to investigate if the alcohol had anything to do with the
4 wreck?

5 A Since the time of the reservation letter the lawsuit
6 was filed and we haven't -- I don't know. I am not sure.

7 Q How about before the lawsuits was filed? Did the
8 insurance company do anything to investigate if alcohol
9 had anything to do with the wreck?

10 A That would all be in the medical information in the
11 file.

12 Q Well the medical information is just going to tell
13 you he had alcohol in his system; right?

14 A Right.

15 Q But my question is this, to your knowledge, as the
16 supervisor of the claim in this file, has anyone ever done
17 any investigation to see if alcohol was the cause of the
18 wreck?

19 A I'm not aware of that specifically, no, sir.

20 Q Has anybody ever talked to the other driver?

21 A I don't think so. I'm not aware of that either, no.

22 Q So then there really has been no investigation, that
23 you know of, as the claim supervisor, as to whether or not
24 any alcohol Mike may have had contributed to him having an
25 accident?

1 A If it was done, it wasn't done within the claims
2 department. Once the lawsuit is filed, you know, we refer
3 it over to the legal department. And since, you know, we
4 would no longer have any handling with it at that point.

5 Q Right. But as best as you know, before we wound up
6 in litigation, the insurance carrier had done nothing to
7 determine if alcohol was in fact a cause of the accident.

8 A Well there was a pretty quick turn around from when
9 we did find out that there was alcohol involved to
10 notifying Mr. Russell and then the lawsuit. So there
11 wasn't a lot of time for that.

12 Q The lawsuit pretty much came on the heels of the
13 reservation of rights letter?

14 A Yes, sir.

15 Q Y'all sent the letter and got sued; right?

16 A Yes, sir.

17 Q All right. And it was about the same time that the
18 reservation of rights letter went out, and the lawsuit
19 happened, that some of these missed payments happened?

20 A It might have been right around that time, but it
21 wasn't due to that.

22 Q Okay. I got it. And we know then that before the
23 lawsuit the carrier had done nothing you know of, as the
24 supervisor of claims, to investigate if alcohol was a
25 cause?

1 A Well --

2 Q And my question --

3 A I'm sorry.

4 Q And my question is, after the lawsuit, do you know of
5 anything that was done to determine if alcohol was in fact
6 a cause?

7 A So after the lawsuit is your question?

8 Q Right.

9 A No, sir, I wouldn't know. I am not sure.

10 Q So as far as you know, neither before or after the
11 lawsuit, has the carrier done anything to determine if
12 alcohol was or was not a cause of the accident?

13 A Well before the lawsuit just a general file review
14 was done with ordering the medical records and that's when
15 it was revealed that there was alcohol involved. We don't
16 normally just start digging for exclusions and limitations
17 if we don't want to pay the claim.

18 Q But you have got to have -- as your understanding of
19 the claims handler you got to have more than just alcohol
20 was involved; right?

21 A I don't know what you mean.

22 Q Doesn't it really have to be that the alcohol caused
23 the disability?

24 A It's an accident only policy and the exclusion is
25 that -- the way I interpret it, would be, that the

1 accident cannot result from being intoxicated.

2 Q And that's my question. Did anybody ever do any
3 investigation to see if the accident was caused by being
4 intoxicated, or if he was just intoxicated and an accident
5 happened?

6 A Just the general claim review was done and when the
7 intoxication -- you know, the same thing I just said,
8 there wasn't -- after that the lawsuit was filed.

9 Q Let me ask you this, if you know. Let's assume that
10 it's a different situation than I've asked you about. The
11 first -- the first incident I asked you about is if the
12 accident caused the disability. Okay. He got drunk and
13 his drunkenness caused the wreck. The other one is, he's
14 totally innocent, he is drunk, and he gets run over by and
15 18 wheeler. In one you claim there should be no coverage,
16 the other you ought to be able to pay because alcohol
17 didn't have anything to do with the accident; right?

18 A But we didn't come to any conclusion regarding that,
19 though.

20 Q And still haven't?

21 A Right.

22 Q Well let me ask you this question, from a claims
23 standpoint, what if the wreck is mostly the fault of
24 somebody else? Let's say alcohol contributes 1 percent,
25 Mike gets drunk and his actions are 1 percent contributing

1 but somebody else is 99 percent at fault. Can I read the
2 policy and see whether coverage applies or not?

3 A Really can't adjudicate a claim like that. There are
4 so many different factors involved in the claims
5 processing. I can't answer that.

6 Q Can you read that -- the policy language I showed you
7 and determine does it cover that?

8 A I wouldn't be able to without -- I mean, like I said
9 there is so many different -- there would be more to it
10 than what you just said so I can't say yes or no to that.

11 Q Well let's assume there was a lawsuit and it was
12 determined that Mike was 1 percent at fault due to
13 alcohol, and the other lady is 99 percent at fault for
14 driving off the road in front of him and doing crazy
15 things, covered, not covered, under the language of the
16 policy?

17 A The language of the policy states that the accident
18 cannot result from intoxication. That is what I know.

19 Q As a result from his intoxication?

20 A From being intoxicated.

21 Q Do you have any idea what that means?

22 A To me it means that -- intoxication means being drunk
23 so the accident cannot be the result of that. That's how
24 I interpret it.

25 Q What if it's the result mostly of something else? Do

1 you know?

2 A I mean, I would have to know what that was, so, no,
3 sir, I can't say that.

4 Q That's for somebody else to decide, isn't it.

5 A Yea, I wouldn't be able to decide that, no, sir.

6 Q Has anybody ever attempted to make or to have Mike
7 take a lump sum of money and walk away?

8 A If they have I'm not aware of it.

9 Q Do you know that someone was actually sent to Mike's
10 home to persuade him to take a lump sum of money and walk
11 away?

12 A No, sir.

13 Q Should that have been done?

14 A We had -- at the time we had field representatives
15 that would go out and that would be my only knowledge of
16 anyone visiting a policyholder. As far as the lump sum of
17 money part, I don't know anything about that.

18 Q Let me show you -- I don't even know what exhibit
19 these are in. It is something called Bate Stamps. I
20 never understood who Mr. Bates was, but they call them
21 Bates Stamped. Nelson, Mullins put this on there, Bates
22 Stamps PLIC? I have no idea what PLIC stands for.

23 MR. KRISTINIK: Pennsylvania Life Insurance Company
24 for the record.

25 Q But PLIC180 is the page number. This appears to be a

1 letter from somebody, Ella Lee, from the disability claims
2 examiner. Can you tell me what this is?

3 A That is a request for medical records, the diagnostic
4 test results, emergency room records and toxicology
5 report. And it was specifically dated for the date of
6 6/18/08.

7 Q All right. June 18 of 08, Mrs. Ella Lee writes to
8 the Palmetto Health and says please give us the toxicology
9 report, the ER records and the diagnostic result for the
10 records of June 18, '08.

11 A She did that on May 15 of '09. She dated asking for
12 the records of 6/18/09?

13 Q So we know that by May of '09 you already had a
14 medical authorization form back from Mike, and this
15 Mrs. Lee writes a letter to the hospital saying, give us
16 the medical records; right.

17 A Right. We don't always receive them right away. But
18 she did send this, yes.

19 Q And the next thing is this Bates Stamp PLIC0131.
20 What does this appear to be in a phonecall report log?

21 A Yes, sir.

22 Q Parenthetically, y'all actually keep logs for your
23 phonecalls?

24 A Yes, sir.

25 Q So they log in telephone messages. But no log in for

1 sending policies, as far as you know?

2 A I'm not sure about the sending policy. But the
3 claims -- we do keep a phone record.

4 Q Does PLIC ask y'all to keep these logs?

5 A It is just a claims practice. We need to keep all of
6 the information in the claim file of what's occurred.

7 Q This PLIC log number bates stamp 0131 indicate that
8 what happened?

9 A It appears that Mrs. Lee received a message from
10 Mr. Russell on December 30, 2009. She returned his call
11 on the 31st -- December 31, informed him that his claim is
12 currently being reviewed due to the current medical
13 records we received stating he was intoxicated at the time
14 of the accident. His policy has an exclusion for
15 intoxication.

16 Q All right. So we know then that according to the
17 claim filed as of this date, whatever it is?

18 A December 31, 2009.

19 Q December 31, 2009, PLIC, for Pennsylvania life
20 Insurance Company, knows about the medical records showing
21 about the intoxication?

22 A Yes, sir.

23 Q Knows about the facts of the case and what happened
24 and is telling the client, they're going to review it to
25 see what to do with it; right?

1 A Right.

2 Q Well, let me show you PLIC0130 and ask you to read
3 what it is Mrs. Lee tells him after they've finished their
4 review. January 6, 2010. Read what Mrs. Lee tells him?

5 A Called the insured back informing him that the claim
6 will stay active until his release to work.

7 Q All right. So with full knowledge of everything in
8 the medical records. Full knowledge of the toxicology
9 reports. In January of 2010 the client is called back and
10 told his claim will stay active until such time as he's
11 released to go back to work.

12 A That's what the phone report says, yes.

13 Q What that means is in regard to active means that
14 it's going to remain being handled and being paid;
15 correct?

16 A Being active doesn't necessarily mean that it would
17 be paid. It just means that it's active and in review as
18 it is on a monthly basis on going disability.

19 Q Right, it is going to remain an active accepted file.
20 It can still be reviewed and all that stuff, but it's an
21 accepted file until he goes back to work, unless his
22 condition changes.

23 A It will remain active is what it says, yes, sir.

24 Q What that means is y'all are going to keep paying him
25 unless something changes?

1 A Unless something changes. That doesn't necessarily
2 mean we're going to continue paying him. The claim can be
3 active, as I said.

4 Q Right. Unless something changes. He can get
5 miraculously well?

6 A Right.

7 Q But unless he gets well, or none disabled, or
8 something like that, you're going to keep paying him?

9 A She stated his claim will stay active until he's
10 released for work.

11 Q From a claims stand point?

12 A Yea, I didn't make this phone record. But it means
13 his claim will remain active. We're going to keep
14 performing our review under reservation of rights.

15 Q Had the reservation of rights letter already been
16 sent by that time?

17 A I believe it was sent immediately after this
18 phonecall, but I don't remember right off.

19 Q Why would you tell the man, if you know, why would
20 your boss tell the man that we're going to keep your file
21 active until you return to work.

22 A I'm not sure why she said it that way honestly.

23 Q She didn't say until the reservation of rights is
24 resolved, did she?

25 A Well the claims are always and on going review

1 evaluation. So, you know, I can only say that that is
2 probably what she meant. And then immediately following
3 that we sent the letter.

4 Q She didn't say until some judge says otherwise, did
5 she?

6 A No, sir.

7 Q She didn't say until Nelson Mullins law firm gets
8 involved and files a counterclaim, did she?

9 A No, sir.

10 Q She basically said your claim is going to be active
11 until you go back to work; right?

12 A She stated that the claim will remain active at this
13 time, yes, until he returns to work. That's what the
14 phone report says.

15 Q And that statement in January of 2010 telling this
16 man that they review the the claim and it will remain
17 active until he went back to work, was made, with full
18 knowledge of the toxicology reports and the accident
19 reports; correct?

20 A Correct.

21 Q And after a review of the file?

22 A Well the review wasn't quite complete because the
23 lawsuit was filed.

24 Q Well then if the review wasn't quite complete,
25 explain to me why you would tell a man on one hand that

1 things are going to stay open until you go back to work
2 and the next month or two you turn around and sue him?

3 A I don't know why she said that.

4 Q Thank you. I don't have any further questions.

5 CROSS-EXAMINATION

6 BY MR. KRISTINIK:

7 Q Mrs. Barlow, Mr. Moore just asked you if that
8 conversation was had after full knowledge of the medical
9 records, but then he also said full knowledge of the
10 accident report. Do you know if the accident report was
11 in the claim file by the time that call was made?

12 A Not the true accident report, no.

13 Q Okay. Something else was in the claim file that
14 looked like the accident report?

15 A Right.

16 Q But it wasn't, was it?

17 A No, sir.

18 Q And I'll be using that as an exhibit in a little bit
19 to make that point. You were asked a lot of questions
20 about Mr. Russell's disability. First of all, have you
21 ever been asked to make a determination as to his level of
22 disability at any time during his claim?

23 A No, sir.

24 Q Has that ever been your responsibility?

25 A No.

1 Q If you wanted to know whether he was disabled today
2 what would you want to do? What kind of information would
3 you need?

4 A Updated medical information. We could possibly write
5 a letter to his his physician, order a function capacity
6 exam, independent exam. There are several things that we
7 could do. I would have to, you know, review the file
8 currently and determine.

9 Q Let's assume he was disabled today under the
10 definition in the policy. Let's assume that. Do you know
11 if he would be disabled in January of 2013?

12 A I wouldn't know that.

13 Q February of 2013? Would you have any idea?

14 A No.

15 Q As you sit there today are you able to make any
16 statement as to whether or not he's going to qualify for
17 disability under the terms of this policy at any point in
18 the future?

19 A No.

20 Q Mr. Moore asked you a lot of questions about the fact
21 that CHCS asks for medical information for insureds. He
22 asked you those questions, many of them. Let me ask you a
23 question. In your experience, and your many years of
24 handling claim files, has fraud from policyholders ever
25 been a problem?

1 A Yes, it has.

2 Q And does the request of medical records help with
3 that?

4 A Yes, they do.

5 Q Have you ever seen instances where an insured made a
6 claim under a disability policy when they weren't really
7 disabled?

8 A Yes.

9 Q And how did you discover that they weren't really
10 disabled?

11 A By medical records or reviews, as I just said, you
12 know, independent exams, our medical consultant can help
13 with that.

14 Q Mr. Moore didn't -- I don't think he probably when
15 over your background. I want to touch on a couple of
16 things. First of all, I want you to tell the court where
17 you're from, where your office is?

18 A Pensacola Florida.

19 Q Please describe your general job duties.

20 A Disability claim supervisor. It is just a general
21 supervisor over disability claims, about seven examiners
22 reviewing case files with them, training one on one, you
23 know, reporting. That's about it.

24 Q Have you had occasion to handle the payment of
25 disability claims before?

1 A On occasion.

2 Q How many disability claim files do you think you've
3 worked on or reviewed over the years?

4 A Oh probably hundreds.

5 Q All right. Let me hand you what has been marked as
6 Defendant's Exhibit Number 15. It is a stack of papers.
7 Why don't you tell us what that is.

8 A On top is the claim report, policyholder claim
9 report, along with the attending physician's report, a Fed
10 Ex receipt from Mr. Russell, or well from some -- maybe
11 Mrs. Russell --

12 Q You don't have to go through every sheet of paper?

13 A And then the rest of it appears to be or it is the
14 check information and supplemental claim reports and
15 attending physician reports.

16 Q And are these documents maintained in the file at
17 CHCS for Mr. Russell?

18 A Yes, they all are.

19 Q And by looking at these reports can you see when
20 claim forms were dated and then received by CHCS? Then
21 can you see when checks were issued in response to those?

22 A Yes.

23 Q Let me hand you what's been marked as exhibit
24 number 16. Can you tell us what that?

25 A It's a summary of benefit payments to Mr. Russell.

1 Q And I've got a piece of paper here that looks just
2 like it with handwritten notes on it?

3 A Right.

4 Q Can you tell us what that is?

5 A It's the same exact chart that I had made notes on.

6 Q For the record, the defendant is not putting into
7 evidence her handwritten notes on that summary chart.
8 Opposing counsel is welcome to look at it. If they want
9 to put it into evidence, they're welcome to, they can
10 cross examine her on it. Why did you have handwritten
11 notes on that form?

12 A Just so I could have a quick glance of the check
13 information and how many days you know it took. I was
14 asked to review that.

15 Q And tell us real quick looking at exhibit number 16
16 what kind of information does that provide?

17 A The date that the claim report was signed and
18 received the check date, check number and amount, and also
19 the period of time that it would -- well this one doesn't
20 have that. The other report has the period of time it
21 would cover.

22 Q All right. Exhibit number 16, that summary chart,
23 have you compared that to the claim forms and the checks
24 that are attached -- that are part of exhibit 15. Have
25 you made that comparison to determine whether the chart

1 marked exhibit 16 is accurate?

2 A Yes, I did.

3 Q Is it accurate or not accurate?

4 A It is accurate.

5 Q Let me show you what's been marked as number 17 if
6 you could tell me what that?

7 A This is the system generated claim payment report.

8 Q How was that created?

9 A I go into the system and basically ask it to print
10 the report.

11 Q So were you the one that keyed it in?

12 A Yes, I did.

13 Q When did you create that report?

14 A On December 11, 2012.

15 Q How do you compare the information on that report
16 with the actual hard copies of checks and claim forms that
17 are marked as exhibit number 15?

18 A Yes, sir, I did.

19 Q What is the total dollar amount of -- and was it
20 accurate?

21 A Yes, it was.

22 Q And that's the chart marked as exhibit 17; correct?

23 A Yes.

24 Q What is the total dollar amount of payments reflected
25 on that chart that have been made to Mr. Russell?

1 A \$135,958.33.

2 Q And does that match the total in the summary chart
3 marked as Defendant's Exhibit number 16?

4 A Yes, it is exactly.

5 Q When was the last benefit check sent to Mr. Russell?

6 A The last check was sent on November 30, 2012.

7 Q What period of time did that benefit payment cover?

8 A That would have covered -- sorry 11/1 to 11/30, 2012.

9 Q When was the last time a claim form was received from
10 Mr. Russell?

11 A The last time we received one was on November 12 --
12 November 5, 2012.

13 Q So is the claim paid up to date?

14 A Yes, it is. Based on the supplemental claim form
15 received, yes.

16 Q When did Mr. Russell first qualify for disability
17 benefits?

18 A June 18, 2008. But he did have a seven day
19 elimination period.

20 Q Has Mr. Russell been provided with disability
21 benefits payments for all months between June of 2008 and
22 November of 2012?

23 A Yes.

24 Q Was there any period of time in between there for
25 which a month where he was disabled was not paid?

1 A No.

2 Q Can you explain by looking at chart number 17,
3 Defendant's Exhibit number 17, can you explain why payment
4 number 23 is in the am of \$333.33?

5 A Yes. That was the month that we had a system
6 conversion. We converted all of our claims from one
7 system to another and due to that new system it was
8 issuing him the rest of February from the 25th to the 28th
9 so we could get him started on the first of the month of
10 the following month. So it was the remaining payments
11 would be from the first to the end of the month, due to
12 the new conversion.

13 Q So he was on the calendar month?

14 A Yes.

15 Q After that point?

16 A Yes.

17 Q And please explain to us why the first check is in
18 the amount of \$8,125?

19 A It was more than one month and it was also his
20 surgical payment and then any miscellaneous benefits that
21 were due such as hospital or first aid.

22 Q Okay. Let's go back to the summary chart marked as
23 Defendant's Exhibit Number 16?

24 A Okay.

25 Q How long did it take to issue the second and third

1 benefit checks, after the time of receipt of the claim
2 form, from Mr. Russell?

3 A Two days.

4 Q So two days for each one?

5 A Uh-huh.

6 Q Is that a quick turn around in your book?

7 A Yes.

8 Q How quickly did CHCS issue the benefit checks in
9 response to the next seven claim forms?

10 A The next seven were within two weeks.

11 Q How quick was the response to the next six claim
12 forms?

13 A Four were less than three weeks. One was within 26
14 days and one 35 days.

15 Q And what do you think the reason might be for that
16 one that took 35 days?

17 A That was the one that I had explained could possibly
18 be due to the holidays. There was nothing, as I
19 mentioned, that the claim file reflected. But sometimes
20 it will create a back log.

21 Q Okay. All right. I am going to ask you about the
22 next one on that chart. What happened with the claim form
23 dated April 12, 2010 which was filed about two months
24 after this lawsuit was initiated?

25 A That was the time period -- the payment was initially

1 -- was eventually made July 20 of 2010. And again there
2 was nothing reflected. But when I performed my review I
3 was trying to, you know, determine what happened. And
4 what I could come up with was that was when Ella Lee left
5 the company. And when we switched from one building to
6 another and we had paper files. It was a big transition.
7 So there was some back log on every examiner, every
8 policyholder, you know, unfortunately.

9 Q How quickly were the benefit checks issued for the
10 next eight claim forms received?

11 A Those were all within 25 days or less.

12 Q What happened with the claim form received on June 2,
13 2011 -- now we're talking about three and a half months
14 after the lawsuit had been initiated? What happened to
15 the check in response to that?

16 A There was not anything reflected in the file that
17 would have happened, other than another examiner taking
18 over the case.

19 Q When was the check written in response to that,
20 June 2, 2011 claim for.

21 A July 27, 2011.

22 Q And again tell us if you know, if you have any
23 explanation for that?

24 A That was what I just was talking about, a new
25 examiner taking over the case at that point. She caught

1 his payments up from it had switched examiners a couple of
2 times, is what I could review when I was reviewing the
3 file for this.

4 Q Let's talk about the final group of claim forms on
5 that list after that June 2nd one you just talked about.
6 The last 14 claim forms, how quickly were checks issued
7 after receipt of those 14 claim forms?

8 A The remaining 14 within 27 days or less and it looks
9 like one was in 31 days.

10 Q Were there any benefit checks issued within within
11 week of receiving the claim form?

12 A Eleven check were issued within one week.

13 Q How many times were benefit checks issued within
14 three weeks of the receipt of the claim form?

15 A Within three weeks 30 were issued.

16 Q Okay. Thirty out of how many total?

17 A 41 total.

18 Q What percent of would that be?

19 A Seventy-three.

20 Q Okay. So 73 percent of the time the checks were
21 issued within three weeks of receipt of the claim form?

22 A Yes.

23 Q On how many occasions were benefit checks issued in
24 31 days or less?

25 A Thirty-eight out of the 41.

1 Q What percentage would that be?

2 A 92 percent.

3 Q So 92 percent paid within within 31 days of receipt
4 of the claim form from Mr. Russell?

5 A Yes, sir.

6 Q And on how many occasions did it take longer than 31
7 days.

8 A There were the three occasions.

9 Q And have we already discussed those?

10 A Yes.

11 Q What is the deadline for making a payment, after you
12 received a claim form from the insured?

13 A There is not a specific deadline in writing. We try
14 to make them as soon as possible, you know, with it being
15 a monthly benefit. But we do not have any specific guide
16 lines on how long we have to make the payment.

17 Q Okay. Are there occasions when you're doing your job
18 right and it might still take longer than a month for a
19 benefit check to be issued?

20 A Oh yes. There could be a lot of reasons. We could
21 have to further review the file at that point, you know,
22 send it to the medical consultant. Write to his
23 physician. There could be a lot of reasons it could take
24 longer than 30 days.

25 Q If a claims handler sees a situation like that and

1 they anticipate it's going to take a long amount of time
2 before a check is issued, what would the claims person do?
3 Is there anything special they do?

4 A Send a delay letter is what it's called.

5 Q Who does that go to?

6 A The policyholder.

7 Q Have there been months in which CHCS did not receive
8 a claim form from Mr. Russell?

9 A Yes, there has, 10 months.

10 Q And can you tell us real quick which months those
11 were?

12 A July of 2009, November of 2009, February of 2010, May
13 of 2010, July of 2010, October of 2010, April of 11,
14 November of 11, February of 12, and September of 12.

15 Q Does CHCS and Pen Life have an obligation to make a
16 payment for any period of time for which you do not have
17 proof of disability?

18 A No, we do not.

19 Q All right. The claim file reflects -- now reflects
20 that there is evidence that Mr. Russell had consumed
21 alcohol on the night of the wreck?

22 A That's correct.

23 Q As you and Mr. Moore talked about?

24 A Yes.

25 Q Let me show you what's been marked as exhibit

1 number 18, can you tell us what this is.

2 A This is one of our medical referrals to our medical
3 consultant.

4 Q What is the date on it?

5 A November 9, 2009.

6 Q Okay was this record in the claim file for
7 Mr. Russell?

8 A Yes, sir.

9 Q Does it appear to be a true and accurate copy of that
10 document?

11 A Yes, it is.

12 Q Okay. What is Ella Lee asking Dr. Nye to do.

13 A She's explaining that we received a new diagnosis and
14 asked his medical opinion on that diagnosis, connected
15 with the accident and also to please see the attached
16 records from Lexington Medical Center, and please note if
17 the insured was or was not intoxicated at the time of
18 injuries.

19 Q Prior to this November 2009 note from Ella Lee, is
20 there any other note or comment from Mrs. Lee or Dr. Nye
21 which indicates that they were aware that Mr. Russell had
22 been drinking on the night of the wreck?

23 A No, there's not.

24 Q So this November of 2009 note is the first indication
25 that either one of them had ever made reference to the

1 drinking?

2 A That's correct.

3 MR. MOORE: Object to leading please, Your Honor.

4 THE COURT: All right.

5 Q Look through the records in the claim file can you
6 assess how it was discovered that Mr. Russell had been
7 drinking on the night of the wreck?

8 A It was before this referral was made a review of the
9 file came up as all the files do, they are directed for
10 review and medical records were ordered, and when they
11 were received the examiner performs their review, and
12 then, if needed, in most cases would then refer it to our
13 medical consultant. So it was in the medical information
14 ordered as a result of this referral.

15 Q Let me show you what's been marked as exhibit
16 number 2. Can you tell us what this is?

17 A That is the initial policy order claim report.

18 Q Okay.

19 A And the attending physician's report along with it
20 and then a notice of requirement from South Carolina
21 Department of Motor Vehicles.

22 Q And were these -- go ahead?

23 A And the Fed Ex copy of the Fed Ex that they were sent
24 in.

25 Q Were these documents in the claim file for

1 Mr. Russell?

2 A Yes, they are.

3 Q Is there an indication where these documents came --
4 who they came from?

5 A It looks like it would be his wife Mrs. Russle,
6 Susanne Russell.

7 Q Who signed the claim form?

8 A Mike Russell.

9 Q All right. I want you to look at -- let's look at
10 the claim form, the first page there, Bates page 370, and
11 do you see there a question asking for description of the
12 accident?

13 A There is a question that says, describe how it
14 happened. And right before that it says, is this an
15 accident, you know, when and where, and then describe how
16 it happened. Yes.

17 Q Okay and what's the response?

18 A Motorcycle accident.

19 Q Okay. Does it say anything about a ticket being
20 issued.

21 A No, sir.

22 Q Does it say anything about DUI?

23 A No, sir.

24 Q Does it say anything about the ticket issued for the
25 suspended license?

1 A No, sir.

2 Q Does the claim form request a copy of a police report
3 if the disability relates to a motor vehicle accident?

4 A Yes, it does.

5 Q Please look at Bates page 369, which is part of that
6 exhibit?

7 A Okay.

8 Q What's that document? Do you know?

9 A It's state notice of requirement, South Carolina
10 Department of Motor Vehicles.

11 Q Okay. Take a close look at that document. Does
12 anywhere on that document is it indicated that Mr. Russell
13 had been charged with a DUI?

14 A No. I have reviewed this. There is not.

15 Q Does I say anything about drinking?

16 A No, it doesn't.

17 Q Is there any indication anywhere in the documents
18 received from Mr. Russell that he had been charged with
19 DUI or had been drinking that night?

20 A No.

21 Q Have you seen any reference in either the documents
22 you're holding, with the original claim form, or any other
23 documents in the claim file, where he even disclosed that
24 he was coming home from a bar that night?

25 A No.

1 Q What happened after -- according to your review of
2 the claim file, what happened after the alcohol
3 consumption had been discovered by the claims handler for
4 CHCS? Can you go through the things that happened?

5 A Yes. The claims handler referred the file to the
6 medical consultant. And I know that she made a phonecall
7 to Mr. Russell explaining that it was under review and,
8 you know, what the results of the records had revealed.
9 Immediately following the phonecall a reservation of
10 rights letter was mailed to him, along with his payment,
11 and then the lawsuit was filed.

12 Q Let me show you what's been marked as Defendant's
13 Exhibit number 19. Can you please tell us what this is?

14 A This is the letter that Mrs. Lee sent to Mr. Russell
15 informing him that his benefit payment was being made and
16 that it was under reservation of rights.

17 Q Okay and would that be -- would folks in the claims
18 at CSCH refer to that as reservation of rights letter?

19 A Yes, sir.

20 MR. KRISTINIK: Those are all my questions, Your
21 Honor.

22 THE COURT: Any Redirect.

23 REDIRECT EXAMINATION

24 BY MR. MOORE:

25 Q Counsel asked you it didn't say anything about the

1 wreck or anything. It didn't say anything about Barack
2 Obama, did it?

3 A No, sir, it didn't.

4 Q It didn't ask anything about Barack Obama?

5 A No, sir.

6 Q It didn't ask about alcohol uses either, did it?

7 A No.

8 Q The claim form asked as many questions about alcohol
9 usage as it did about Barack Obama, didn't it? The exact
10 same which is zero.

11 A Well it asked to describe how the accident happened.

12 Q He put down motorcycle accident and y'all accepted
13 that; right?

14 A Well, as I stated, we don't normally, you know, go
15 digging for reasons to decline the claim. But we hope
16 that the policyholder would provide us with as much
17 truthful information regarding the claim as they can.

18 Q Y'all accepted that and didn't ask for more; right?

19 A Throughout the file we did ask for more.

20 Q There was never a time you asked him were you using
21 alcohol and he said no, was there?

22 A No, sir.

23 Q Never a time he said one thing that was untruthful to
24 you, was it?

25 A Not that I'm aware of. I didn't speak to him.

1 Q He gave y'all everything you asked for?

2 A Yes.

3 Q All right. Now, I want to make sure I understand
4 this. You got a man who the doctor has written you, told
5 you his hip is tore up, his leg is tore up, his knee is
6 tore up. He is having trouble walking, and you got all of
7 these documentation of the permanent medical injuries.
8 The file documents serious permanent medical injuries;
9 right?

10 A The file does document his medical injuries, yes,
11 sir.

12 Q Even though the file documents that the man has
13 serious disabling permanent injuries. Are you telling
14 this court that you require him to file a claim form each
15 and every month?

16 A Yes, sir.

17 Q So every month he's got to file a new claim form,
18 even though the documentation in the file shows that he
19 has serious and permanently disabling injuries?

20 A Yes, sir. We have lots of policyholders on claims.
21 We have to have some type of undate, they pass away. I
22 know he is disabled. Some miraculously return to work.
23 There is a lot of things that could happen. Yes, we do
24 ask for the update monthly.

25 Q Where does the policy say, if we determine you to be

1 permanently and totally disabled, you're still going to
2 have to file a claim form each and every month as a
3 condition precedent from getting a check from us?

4 A The policy does not state that, it just has the proof
5 of loss provision.

6 Q Right. All the policy says is you prove you're
7 permanently disabled, we pay you each month; correct?

8 A No, sir it doesn't state that.

9 Q Well it says if you prove you're disabled, you're
10 entitled to a monthly benefit of \$2,500; right?

11 A I haven't seen where it says those words, no, sir.

12 Q It says what you have to do is provide us with a
13 proof of claim?

14 A For each month that you're entitled to benefits.

15 Q Show me where the policy says I have to file a
16 separate proof of claim for each month?

17 A There's not a -- it doesn't say it how you said it.
18 But it is a monthly benefit and it says for each--

19 Q I understand it. I am just trying to make sure I
20 understand, you told us that as a requirement to get your
21 monthly check, you make them file a claim form every
22 single month?

23 A Well as I pointed out we did pay the claims 10 times
24 without a claim form. I believe it was 10, so we--

25 Q I just want to make sure I understand something.

1 You're telling me, that as a practice, your company
2 requires the filling out of a claim form every single
3 month to somebody that is totally and permanently
4 disabled?

5 A That's not what I said, no, sir.

6 Q Well did you require him to fill out monthly claim
7 forms?

8 A Yes. We have required him to fill out monthly claim
9 forms. But there's also been times when we accepted it
10 without a claim form.

11 Q Do those claim forms have to be signed by his doctor
12 every month?

13 A Yes, sir.

14 Q So what you do is you tell him that he is required,
15 as part of his policy, to have his doctor, every single
16 month, certify that he remains disabled and to file a
17 separate claim form for every month.

18 A For his monthly benefit yes, sir.

19 Q Now as I understand it you've given us dates that you
20 claim payments were made; correct?

21 A Yes, sir.

22 Q What you've actually given us are the dates the
23 checks were written; right?

24 A The check dated, yes.

25 Q You're not able to say that the checks were actually

1 mailed the same days -- the same day they were written,
2 are you.

3 A No that's what we were just going over within how
4 many days they were mailed each time.

5 Q You have actual detailed records on the exact date
6 the checks were put in the mail.

7 A They immediately go out after the system generates
8 the check.

9 Q That's what they're supposed to do; correct?

10 A Correct.

11 Q Do you have an actual detailed record of when they
12 actually do go out?

13 A I have the record of the check date.

14 Q Right. That's not the same date it goes out;
15 correct?

16 A It would actually depend on what time period you're
17 talking about, because early on in the claim they within
18 out immediately. The system generates the check, the
19 check goes out from the mail. It doesn't even come to the
20 claims department. It just -- it automatically mailed
21 from the mail room. Once our system conversion happened
22 they are mailed on Wednesday on every week, unless it is
23 special handled for any reason and need to go out right
24 and that's with every policyholder.

25 Q They're supposed to be mailed out on Wednesday of

1 every week?

2 A Right.

3 Q You can't say that what's supposed to be done got
4 done every time, can you?

5 A Well the system automatically does that. So, I mean,
6 someone doesn't handle the check and then mail it out. It
7 automatically goes out.

8 Q Let me ask you this, when you send this month's
9 check, does a claim form for the next month's payment go
10 with that check?

11 A Yes, sir.

12 Q So if the check arrives late, the claim form for the
13 following month is going to be late because the people
14 can't get their next month's check until they fill out the
15 claim form; right?

16 A Yes. But when that happens we normally would notice
17 that the claim form hasn't arrived and the examiner would
18 then call the policyholder or the doctor's office and see
19 if we could reach out and send the report and help in
20 anyway.

21 Q Now I've asked for my claim file, and I got some
22 paper. But are there telephone logs and so forth that
23 write down all of these telephone conversations and so
24 forth that are supposed to take place?

25 A They are supposed to. The claims examiner manually

1 enters that. So I can't guarantee you that every single
2 phonecall that was ever made. But, they are supposed to,
3 that is our practice to do so, yes.

4 Q Do you know why we wouldn't have been given such a
5 log as that?

6 A No, sir.

7 MR. KRISTINIK: Objection, Your Honor, he is implying
8 that part of the claim file was not provided. In
9 discovery the entire claim file was provided. He is free
10 to hand her the claims file and ask her if it is complete
11 or not.

12 MR. MOORE: I appreciate counsel telling me how to
13 try my case. If she says it's all been itemized--,

14 MR. KRISTINIK: But, if you're asking a question
15 based on a false premise, then, I have to object.

16 MR. MOORE: I guess he is trying to testify. I guess
17 the witness can tell me.

18 THE COURT: Rephrase your question. If you can
19 provide it.

20 Q Ma'am, how many times have there been communications
21 with my clients calling trying to find out where in the
22 heck is their check, and where in the heck is the next
23 month's claim form.

24 A I don't know that.

25 Q If a person is totally and permanently disabled, and

1 we know that, why in the world do you require a person to
2 certify that by way of a physician each and every month in
3 order to get the little disability check?

4 A Because things change on a claim constantly, and we
5 have to have an update on the file from a physician.
6 We're not doctors; so it's a monthly benefit. So we have
7 to provide -- receive an update monthly.

8 Q Thank you. I have no further questions.

9 A Thank you.

10 MR. KRISTINIK: Just a couple of question, Your
11 Honor.

12 **RECROSS EXAMINATION**

13 BY MR. KRISTINIK

14 Q I understand Mrs. Barlow has been on the stand for
15 close to two hours. We maybe make it two hours and two
16 minutes.

17 A Okay.

18 Q Mr. Moore asked you several times about why do you
19 ask for a claim form when someone is permanently and
20 totally disabled? --From your understanding of the claim
21 file is there -- has there been any determination as to
22 the permanency of Mr. Russell's disability?

23 A No, there hasn't.

24 Q To determine whether some one is disabled, is it
25 important to know what kind of job they do?

1 A Yes. The occupation, wages, functional capacity, all
2 of that is formulated into, you know, to provide that
3 decision to us to help and then to our medical consultant
4 as well.

5 Q Is it necessary before a payment is made on a claim
6 -- is it necessary for the claim handler to assess what
7 kind of job -- what kind of employment the insure could
8 have based on their injuries that are reflected in the
9 medical records?

10 A Yes. Their education, training experience.

11 Q Have you had any experience where you had a blind
12 person who was still able to work?

13 A I'm sure there has been. But I, you know. . .

14 Q Are you aware of whether Mr. Russell could work at
15 home on his computer?

16 A We haven't made that determination yet. We would
17 have to review all of those aspects you just said. But
18 it's quite a possibility.

19 Q If you wanted to know whether he was disabled today,
20 would you have to do an assessment of the type of jobs he
21 would be capable of doing?

22 A Yes.

23 Q Those are all my questions.

24 A Do you need these back.

25 MR. MOORE: No further questions, Your Honor.

1 THE COURT: Can I ask one question. You said there
2 was a call or transmission or communication from Mrs. Lee.

3 THE WITNESS: Yes, sir.

4 THE COURT: That it would be paid until he returned
5 to work on January of '10.

6 THE WITNESS: It is stated that the claim will remain
7 active until he returned to work.

8 MR. KRISTINIK: Is that all, Your Honor?

9 THE COURT: That's it.

10 MR. KRISTINIK: I was just going to come get the
11 exhibits.

12 THE WITNESS: Okay.

13 MR. MOORE: Your Honor, we have another pocket memo,
14 we might hand up.

15 THE COURT: You got another pocket memo?

16 MR. MOORE: That's my second pocket memo.

17 THE COURT: Y'all got big pockets.

18 MR. MOORE: There is another code section we handed
19 up to you on 38-71-550.

20 THE COURT: I've got that.

21 (Whereupon, a break was taken.).

22 SUSANNE RUSSLE, after being duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25

1 BY MR. MOORE:

2 Q Susanne, how are you related to Mike?

3 A I am his wife.

4 Q How long have y'all been married?

5 A Fourteen and a half years.

6 Q Physically how is he?

7 A Physically, how is he now?

8 Q Right now, yes.

9 A Extremely damaged.

10 Q Is he able to work?

11 A No.

12 Q Help me briefly. Okay. Just briefly. From the top
13 of his head bottom of his feet what is wrong with him?

14 A He has horrible, horrible migraine headaches that we
15 can't get rid of. He has constant wringing in his ears.
16 He has a lot of pain in his right shoulder. He has a lot
17 -- the most of the pain in his pelvic area from his broken
18 pelvic bone and broken hip. His knee is damaged and
19 causes a lot of pain. He has pain from where the break in
20 his leg was, pain in his ankle.

21 Q Can he walk?

22 A He can walk, yes.

23 Q Does he use any type of device to help him walk?

24 A A cane.

25 Q Can he walk without a cane?

- 1 A He can, but not very long distances.
- 2 Q Can he stoop, bend?
- 3 A He could bend, but I'm not sure about stoop. He
- 4 might could, but it would be extremely painful.
- 5 Q How far did he go to school.
- 6 A He quit in the middle of the ninth grade.
- 7 Q Why?
- 8 A His father died, and he had to go to work to feed his
- 9 family.
- 10 Q So he's finished the eighth grade?
- 11 A Uh-huh.
- 12 Q Is that yes?
- 13 A Yes, I'm sorry.
- 14 Q Has the ringing in his ears and the constant migraine
- 15 that he now has, has it been treated by a physician?
- 16 A They -- he's seeing a physician. He has seen a
- 17 physician. He's seen a neurologist.
- 18 Q Can they make it go away?
- 19 A They cannot make it go away.
- 20 Q The constant migraine that he has and the constant
- 21 ringing in his ears, have you noticed any impact in regard
- 22 to his mood or his ability to concentrate?
- 23 A Oh, yea.
- 24 Q Explain that to me?
- 25 A Well, I mean it's depressing. He'll be in a bad mood

1 because of the headache and the ringing in his ears. We
2 have to sit in the dark. He has to lay down a lot. I get
3 home from work, fix dinner and sometimes he has to go lay
4 down because he's just in too much pain.

5 Q Does he have problems concentrating?

6 A Uh-huh.

7 Q How well does he read and write?

8 A I am not really sure how to answer that. He can read
9 and write.

10 Q Does he do it well.

11 A He doesn't spell very well and I know that he doesn't
12 comprehend very well.

13 Q How many children do y'all have?

14 A None.

15 Q Do you work?

16 A Yes.

17 Q What do you do?

18 A I am a CPA.

19 Q Where do you work?

20 A Barb and Company PA.

21 Q How much do you folks rely upon this disability
22 benefit in your daily lives?

23 A It is probably about 40 percent of our income. So, a
24 lot.

25 Q Is there any way Mike can work?

1 A No.

2 Q Now, there's been some discussion in this case about
3 the regularity of these payments that you have received.
4 We just heard this claims adjustor testify as to what she
5 believes to be the truth. Do you agree or disagree with
6 the dates that have basically been provided by the
7 insurance company?

8 A Disagree.

9 Q Do you -- have you -- do you have in your possession
10 -- do you have the ability to tell us what days checks
11 were written and what days they were deposited -- what
12 days you got them?

13 A Yes. I can tell you what day we received every
14 single check.

15 Q Go through. Tell me from the beginning to end?

16 A Every single one?

17 Q Or do you have a list there?

18 A I do have a list.

19 Q So to save the testimony you can provide the list
20 that you prepared for us?

21 A Okay.

22 MR. MOORE: We'd like to offer this into evidence.

23 MR. KRISTINIK: Let me take a quick peek at it.

24 MR. MOORE: Sure.

25 MR. KRISTINIK: We will not oppose the admissibility

1 of that just under the understanding that she is the one
2 that created it.

3 MR. MOORE: She just testified to that.

4 (Plaintiff's Exhibit Number 20 is received into
5 evidence.)

6 Q How cooperative were these folks in paying you the
7 benefits on time?

8 A Not very.

9 Q If you need them how hard are they to get them on the
10 telephone?

11 A You can't.

12 Q Why can't you get them on the phone? What happens
13 when you try to call them?

14 A You're put on hold -- either you're put on hold and
15 no one ever comes back to the phone or you're transferred
16 to a voicemail and you never get a return call.

17 Q So if the check is supposed to be there that don't
18 show up what can you do?

19 A Nothing.

20 Q How many times do you suppose, in the last several
21 years, you called up trying to say, hey, where is my
22 monthly check, and be totally unable to get anybody on the
23 phone?

24 A Ten to 15 probably.

25 Q And is it regular or irregular for these folks to

1 send you the checks late?

2 A It's a huge surprise when we get one on time.

3 Q How late are they on a regular basis?

4 A It varies. Sometimes they're two weeks late.

5 Sometimes they're two months late. They've been up to
6 five months late.

7 Q When a check comes 30 days late, does that impact
8 your ability to get your money on time the next month?

9 A Well, yea, because we can't fill out the claim form
10 until we get the check. And they say they won't send a
11 check until we send in a claim form. Well we can't send
12 in a form that we don't have.

13 Q So what they do is they send the claim form for the
14 next month with this month's check?

15 A Uh-huh.

16 Q Is that yes?

17 A Yes, sorry.

18 Q So with if this month's check is two weeks late
19 that's going to throw the claim form late?

20 A Yes.

21 Q Now are you required to fill out and submit a claim
22 form each and every month?

23 A Yes.

24 Q So you send the claim form in. What has to be on
25 that claim form every single month?

1 A It is the same form every month. One side we fill
2 out. Basically it asks the doctors, that he's under the
3 care of, has he been back to work yet. Do we expect him
4 to go back to work any time soon, and what does he do
5 during the day. And the back side the doctor fills out
6 whether he's examined him or not.

7 Q So you had to get your doctor to fill out this
8 written form every single month?

9 A Yes.

10 Q So when the doctor fills it out, how does it get to
11 the insurance company? Do you mail it, or do you have to
12 go back and get it and mail it?

13 A We have to go back to the doctor and pick it up and
14 then I mail it.

15 Q All right. Now, at any point in time from 1999 until
16 today, have you ever received an actual policy of
17 insurance that looks like exhibit number 19?

18 A No. No.

19 Q Have you ever seen anything that looks like that
20 until right before the trial of this case?

21 A No. What we had was in the packets that the agent
22 gave us.

23 Q Yes.

24 A We thought that was the policy. I mean, it
25 explained -- it had a page that explained the policy. It

1 showed the amounts that we were to receive. We didn't
2 know something like this existed.

3 Q Do you recall the man's name that you bought the
4 policy from in 1999?

5 A John Rothmitch (ph).

6 Q I am going to show you this pocket here and does this
7 appear to be what you and your husband got from John?

8 A Yes.

9 MR. MOORE: We'd like to offer this into evidence?

10 A This is what I thought the policy was.

11 Q All right. May I hold that. Let them put a sticker
12 on it. First we'll let the lawyer look at it.

13 THE COURT: I thought it was already admitted.

14 MR. MOORE: This will be the 1999 policy. What was
15 admitted was the update in 2002.

16 (Plaintiff's Exhibit Number 21 is received into
17 evidence.)

18 Q Now would you look at exhibit 21, which you testified
19 y'all thought was the policy, and see if there is anything
20 in here describing any type of exclusion for the usage of
21 alcohol?

22 A I already know it doesn't. But I am just looking
23 again.

24 Q Okay.

25 A No.

1 Q All right. Let's take a look at what you were
2 provided in 1999. What was purchased. Would you read
3 this part here that says total disability -- actually
4 start off here, at the beginning, at the top, and then go
5 to total disability benefit and read that.

6 A This rider is made a part of the policy to which it
7 is attached. It is issued in consideration of your
8 application and the payment of the first premium. All
9 definitions, provisions, exception and limitations of the
10 policy apply to this rider, except as modified in this
11 rider. Where there is a conflict between this rider and
12 the policy, the provisions of this rider will control.

13 Then there is a paragraph labeled total disability
14 benefit. We will pay the monthly total disability benefit
15 shown in the policy scheduled on page three when, number
16 one, injury causes total disability, which starts within
17 30 days after the date of the accident and continues
18 through the end of the elimination period, if any. Two,
19 you or your covered spouse are under the regular and
20 personal care of a physician. And, three, total
21 disability starts before your or your covered spouse's
22 65th birthday, or starts within two years after the policy
23 date for coverage issued to persons 63 and over. This
24 benefit is payable for each month during which such total
25 disability with regular and personal care of a physician

1 continues up to the maximum benefit period shown in the
2 policy schedule for any one accident.

3 Q Right. Now were you ever given any type of outline
4 of coverage; you say you thought this was the policy, this
5 is what you were given by John. Were you ever given an
6 outline of coverage?

7 A There is a page somewhere that has numbers on it.

8 Q Okay.

9 A That showed the 2,000 amount.

10 Q I think that's the declaration page you're talking
11 about.

12 A Yes.

13 Q I'm talking about an outline of coverage. Were you
14 given any type of outline of coverage before or at the
15 time you were given this policy?

16 A Just this.

17 Q That's all you were given in '99?

18 A Yes.

19 Q Before I move on you reminded me of something. At
20 any point in time, at this motorcycle accident, was Mike
21 policy under suspension.

22 A His policy.

23 Q His driver's license under suspension.

24 A His driver's license has never been under suspension,
25 no.

1 Q All right. Now Mike was hurt in what year?

2 A 2008.

3 Q And y'all had increased your coverage for him by \$500
4 a month in 2002?

5 A Uh-huh, yes.

6 Q Were you current on your premiums?

7 A Yes.

8 Q Pay your premiums every month.

9 A They're drafted out of our account every month.

10 Q Are they still drafting the premiums out of your
11 account every month now?

12 A Yes.

13 Q Are there month they draft the premium and don't give
14 you the payment?

15 A Yes.

16 Q Now when they take your money for the coverage, and
17 don't give you the payment that you're entitled to, how
18 does that impact you?

19 A Well we don't receive income that we're expecting but
20 yet we're out more money. So we can't pay bills.

21 Q How many times have they taken the money that they're
22 entitled to and not paid you the money that you're
23 entitled to?

24 A I could try to look at this and see. But I know at
25 least 16 times. That's just a quick glance over.

1 Q Now, how does it impact your family budget when they
2 take their money and don't pay you what you're supposed to
3 get?

4 A I mean, you can't plan on anything at all because you
5 don't know if you're going to have money or not. You
6 can't pay the bills on time or else you're having to pay
7 less than what you should be paying on something.

8 Q How many months have they missed because of a
9 clerical mistake taking their money from you?

10 A They have never missed a month of taking our money.

11 Q So they're pretty good at taking their money?

12 A They have never even been late.

13 Q So they're never late taking their money?

14 A No.

15 Q But they have real problems paying you what they owe
16 you?

17 A Yes.

18 Q Have you complained about that?

19 A Yea.

20 Q Let me ask you this question. When you first called
21 this Pennsylvania Life Insurance Company and reported the
22 claim, did they do or say anything to try to avoid paying
23 you?

24 A Yes, they did.

25 Q Would you explain that please to Judge Griffith?

1 A I probably called about three to four weeks after the
2 accident. I can't remember. It was not too long after
3 Mike got out of the hospital. And I found a number in one
4 of these packets and called and asked, you know -- I
5 explained my husband was in an accident and what do I need
6 to do to file a claim. And the girl that had answered the
7 phone told me that since I didn't call within seven days
8 of the accident date that we could not file a claim.

9 Q How long was Mike in the hospital?

10 A Right at or a little over two weeks.

11 Q During that period of time that Mike was laid up in
12 the hospital with all these broken bones and stuff, what
13 were you doing?

14 A I was there with him all the time.

15 Q Were you able to actually make the call during the
16 two weeks he was at the hospital?

17 A No.

18 Q When he got home was your life easy or was it hard?

19 A It was hard.

20 Q How come?

21 A I had to care for him at first 24 hours a day. I
22 tried to work a little bit from home, when I could. But
23 he basically needed 24 hour a daycare because he couldn't
24 move. He couldn't get up by himself. He couldn't do
25 anything.

1 Q Are the doctors still certifying his disability each
2 month?

3 A Yes.

4 Q As requested?

5 A Yes.

6 Q Now there's been some discussion from this claims
7 handler about some discrepancy in the claim forms. Are
8 they being filled out the way they've always been filled
9 out?

10 A Yes.

11 Q Who is the doctor who, on a monthly basis, is
12 certifying to this insurance company that, in fact, your
13 husband is disabled?

14 A Dr. Motto.

15 Q And does Dr. Motto -- can you spell his last name?

16 A M-O-T-T-O.

17 Q What type of doctor is Dr. Motto?

18 A He is a pain management doctor.

19 Q Is Mike still being treated by him?

20 A Yes.

21 Q Is Mike still regularly under his care?

22 A Yes.

23 Q Does Mike take regular medications for his
24 difficulty?

25 A Yes.

1 Q Are they narcotic pain type of medications?

2 A Yes.

3 Q Before he got hurt had he ever taken anything like
4 that?

5 A No. He wouldn't even take a Tylenol before he got
6 hurt.

7 Q How reliant is he on those things to control the pain
8 that he is in?

9 A 100 percent reliant.

10 Q Will Dr. Motto release him to go back to work?

11 A No.

12 Q What type of work did Mike do when he was working?

13 A Construction work.

14 Q What sort of construction?

15 A Mainly the application of vinyl siding.

16 Q He was on ladders and hammering nails?

17 A Yes.

18 Q Does he know any other way to make a living that you
19 know of.

20 A Not that I know of.

21 Q How does he do with a computer?

22 A He breaks it.

23 Q He's not very good with that sort of thing?

24 A No.

25 Q Y'all have been married how long?

1 A Fourteen and a half years, I think. Let me think for
2 a minute. I'm sorry. Fifteen and a half years.

3 Q Do you love him?

4 A Yes.

5 Q Has the injury changed your marriage?

6 A Yes.

7 Q You stayed with him?

8 A Yes.

9 Q Now, let's talk about this policy of insurance that
10 the Pennsylvania Life Insurance Company sold you. Did you
11 contact them or did they contact you?

12 A They contacted Mike.

13 Q Are you crying?

14 A (Witness nods head.)

15 Q Take you some water. Take you some time. This has
16 been hard, hadn't it, Sweetie?

17 A (Witness nods head.)

18 Q We need some kleenex. I know we got them somewhere?

19 A Thank you.

20 Q Take a very, very, very deep breath, deep breath and
21 count out loud slowly to 10 and take a drink of that
22 water?

23 A I'm good.

24 Q Ten. Are you okay?

25 A Yea.

1 Q Have these people from the start been respectful or
2 disrespectful of you?

3 A Disrespectful.

4 Q Would you please tell Judge Griffith how they have
5 disrespected you? I know about the problems you can't get
6 through on the telephone and all that.

7 A Right.

8 Q But just tell me how they treat you?

9 A Well, I mean, from the very get go they tried to
10 trick me into believing that we couldn't even file a
11 claim. You can't get anybody on the phone.

12 Q Did you have a hard time just getting a claim form?

13 A No. After that conversation she mailed me the claim
14 form, because I was pretty upset with the girl on the
15 phone.

16 Q Tell the Judge what you had to go through just to get
17 a claim form?

18 A Well, I mean, I had to convince her that my policy,
19 or what I believed was my policy, that I was holding in my
20 hand, did not state anywhere in it that I had to call
21 within seven days. And finally she said, well, sometimes
22 they'll make an exception so I guess I'll go ahead and
23 send you the form.

24 Q Now what you believed would be the policy was that
25 folder thing that we've been talking about?

1 A Yes.

2 Q A question again, I don't mean to be beating a dead
3 horse. But, exhibit number 19?

4 A Uh-huh.

5 Q How certain are you that nothing resembling this was
6 ever delivered to you or your husband?

7 A 100 percent.

8 Q All right. So we're talking about how you with
9 disrespected. We know you had to basically go through
10 this hassle to get a claim form. From there how did it
11 go?

12 A Basically just there's been no communication. I have
13 one phonecall with Ella Lee early on in the process. We
14 had a problem with the first doctor Mike was seeing. He
15 wasn't signing the form. It wasn't just Mike's form. He
16 wasn't signing anybody's form. And I tried -- I called
17 her to ask for advice on what to do. You know, because
18 they're saying we have to have this form once a month and
19 the doctor is holding it for 30 or 40 days before he'll
20 give it back to us and, you know, she pretty much just
21 said that she had no advice for me. She had never heard
22 of that happening ever before; that we just had to get the
23 forms sent in once a month.

24 Q Now, what doctor was that?

25 A Iaquinto.

1 Q Was that something that was creating difficulty, too,
2 with you getting paid on time?

3 A Yes.

4 Q There's been some discussion here about the use of
5 alcohol. Did you or Mike ever lie to these people?

6 A No.

7 Q Or mislead them?

8 A Never.

9 Q Now, when the claim form was sent, did you send them
10 the accident report?

11 A We sent them what we thought was the accident report.

12 Q Now, there's been some discussion that one page was
13 sent instead of two?

14 A We never had two pages of anything. The police
15 officer gave me, at the ER, a green piece of paper. The
16 same green piece of paper that I've gotten in the past
17 when I was in an accident. I have always thought that was
18 the accident report. That's what we sent in with the
19 form. We have never been given anything else to send in
20 with the form.

21 Q Have you ever modified, changed. Doctored, cut up,
22 or shorted sending any document that you've gotten from my
23 government official?

24 A No.

25 Q Now, there is a report that was -- the accident

1 report that's got two pages. The original has got two
2 pages. It's got a picture of the wreck. Did y'all send
3 them that?

4 A No. We never had that in our possession to send.

5 Q Now, how much does this insurance cost you a month?

6 A Well in -- before -- when we still had the rider for
7 the return of premium.

8 Q Right.

9 A We were paying 260, 65 a month and once we dropped
10 that it went down to 195.51 a month.

11 Q Y'all are still paying that to this day by way of
12 automatic bank draft?

13 A Yes.

14 Q Were you a part of the discussions with the agent for
15 Pennsylvania Life Insurance Company, which led to the
16 initial decision to buy insurance with them?

17 A No. The agent had came out to the job site and
18 that's how he met with Mike. So, no, I was not on the job
19 site.

20 Q How about the discussions with Mr. Gill when it was
21 upped? Did you do that either?

22 A No, again that was on the job site.

23 Q So the discussions and the negotiations were between
24 your husband Mike and the agents representing the
25 Pennsylvania Life Insurance Company?

1 A Yes.

2 Q Before Mike got hurt had you ever heard anything at
3 all about an alcohol exclusion?

4 A No.

5 Q There is a notation here that in December of 2010
6 there was a missed payment. Do you recall that?

7 A There's been so many. I have to check my sheet.

8 Q Did you get paid during Christmas month of 2010?

9 A Now we did -- according to my sheet we received -- no
10 you're talking about 2009; right.

11 Q I'm sorry, 2009?

12 A No, we received a payment November 18 and the next
13 payment was January 18th.

14 Q So they missed December 2009?

15 A Yes.

16 Q Somewhat shortly before they missed that payment, had
17 somebody from the insurance company come out and tried to
18 get y'all to do something?

19 A Well according to him he wasn't with the insurance
20 company.

21 Q All right. Hold on.

22 A Okay.

23 Q Was he representing the insurance company?

24 A He was an independent contractor hired by the
25 insurance company.

1 Q So there was a gentleman who was sent to your house,
2 hired by the insurance company, to talk to you?

3 A To talk to Mike.

4 Q Were you a part of those discussions?

5 A Yes.

6 Q What is it that he wanted Mike to do?

7 A He asked us if we would be willing to take a
8 settlement.

9 Q Lump sum?

10 A Yes.

11 Q And sign a release?

12 A Yes.

13 Q Were y'all willing to do that?

14 A We told him that it would depend on what the
15 settlement was.

16 Q And what did he say?

17 A He said that he would report back to Pen Life and.

18 Q Did you ever hear back from him?

19 A No.

20 Q Now how long was it, after that man came to your
21 house wanting Mike to sign a release, that the check we're
22 talking about for Christmas 2009 got missed?

23 A Well he was at our house, I'm wanting to say, mid
24 November. I know it was in November.

25 Q Of 2009?

1 A Yes. Because --

2 Q And you didn't get your check Christmas?

3 A Correct.

4 Q All right. Now, you would have come to see me
5 following the missed payment Christmas of 2009; is that
6 correct?

7 A Actually I believe Mike came to see you during the
8 time that they went five months without paying us. I
9 think, I am not positive on that.

10 Q Y'all came to see me when you were having a real
11 problem getting paid?

12 A Yes, it was -- I think the beginning of 2010.

13 Q And because of the lack of communication; the lack of
14 timely payment; the lack of respect; the attempts to not
15 pay you to begin with; the attempts to force the
16 settlement, the failure to make the payment immediately
17 after coming to your house wanting a release, that's why
18 y'all came to see me?

19 A Yes.

20 Q And it's then that the lawsuit was filed; is that
21 correct?

22 A Correct.

23 Q And do you recall this conversation with Mrs. Lee
24 that we talked about where she told you that the file
25 would remain active until he returned to work?

1 A I'm not sure if that phonecall was with me.

2 Q All right. You don't recall having that
3 conversations yourself?

4 A No.

5 Q Why did you up the coverage in 2002.

6 A When we initially got the policy in 1999 we had
7 wanted to get the maximum coverage because Mike's business
8 was very successful and we were trying to get as close to
9 our usual monthly income as we could. We were told that
10 2000 was the state limit that we could get. And in 2002,
11 I believe, it was John initially that contacted Mike and
12 told him that the rules had changed and we were allowed to
13 get an additional \$500 at that time.

14 Q Is Mike a drunk?

15 A No.

16 Q Does he drink from time to time?

17 A Yes.

18 Q Would you have taken this policy if you had known
19 there was an alcohol exclusion.

20 A No.

21 Q How often would Mike have consumed alcohol back, say,
22 in 1999 to 2008?

23 A That's a big time span. So it's going to be really
24 different.

25 Q Did he have a problem with alcohol ever?

1 A No.

2 Q The type of money he was actually making did he own
3 his own business?

4 A Yes.

5 Q What was the name of his business?

6 A Initially in 1996 the name of his business was
7 Russell home improvements and then I believe in 2003 we
8 formed an LLC which is MCR construction LLC.

9 Q Who kept the books?

10 A Me.

11 Q What kind of money was he making?

12 A I'd say -- I mean, net?

13 Q I mean was he doing more than \$2,500 a month yet?

14 A Oh, yea, yea.

15 Q Does Mike have any metal in his body?

16 A Yea. He has a lot of metal in his body. I think I
17 told him on his last surgery I was getting a new husband
18 one piece at a time.

19 Q Now Mike was charged with DUI. What happened to the
20 DUI.

21 A He was never convicted.

22 Q Was it dismissed?

23 A Yea.

24 MR. KRISTINIK: I have to object. Lack of personal
25 knowledge.

1 Q Were you there when it was dismissed?

2 A Yes, I was.

3 MR. KRISTINIK: Withdraw the objection.

4 THE COURT: Very well overruled. Withdrawn.

5 Q How long had he owned a motorcycle before this wreck?

6 A I am not sure. A long time.

7 Q Did you ever ride with him?

8 A No.

9 MR. MOORE: One moment, Your Honor. Your Honor I
10 have no further questions. I have allowed Mr. Riley to
11 leave early. I hope the court will allow that. He tells
12 me that it is his girlfriend's birthday is tonight in
13 Greenville, and he needed to be there by six. So I told
14 him he could leave by four. I didn't think that the court
15 would have a problem with that.

16 THE COURT: No. I am good.

17 MR. KRISTINIK: Not only did we not have an objection
18 but we encouraged him to quickly and to be baring a gift.

19 THE COURT: I noticed that he did wave to y'all as he
20 left on this side. All right. You got any cross.

21 MR. KRISTINIK: I do have questions, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. KRISTINIK:

24 Q Good afternoon, Mrs. Russell, if you need to take a
25 break let me know?

1 A I'm fine.

2 Q I don't have a lot of questions. But there are a few
3 things I want to ask you about. Would you agree that you
4 and Mr. Russell have in fact received all the payments
5 from Pen Life that are due to you under the policy, it's
6 just that a lot of those payment were late?

7 A Yes.

8 Q So they were late on some payments but they would
9 eventually make it up; right?

10 A Eventually, yes.

11 Q So these people that tried to trick you, in your
12 words, have in fact made all the payments to you; right?

13 A Well, they have made all of the payments, not timely.
14 I don't think the electric bill lets you do that either.

15 Q Mr. Russell, he applied for social security benefits;
16 right?

17 A Uh-huh.

18 Q You certainly would have wanted that money, right?

19 A Yes.

20 MR. MOORE: Your Honor, I would have an objection. I
21 don't see what the relevance of Social Security benefits
22 would basically be to this case whether they applied or
23 not. Seem to have no relevance.

24 MR. KRISTINIK: I'll be glad to explain why it does.
25 They're talking a lot about their financial situation is

1 because they claim emotional distress damages, and that of
2 course would have to arise from whatever the financial
3 situation is. They're saying we made late payments, that
4 had a negative impact on their financial situation, and
5 this is in part exploring their financial situation. I
6 have about three questions.

7 THE COURT: I'll allow limited inquiry into that.

8 Q Okay. Let me back up a little bit. Was a claim made
9 with the Social Security Administration?

10 A Yes.

11 Q And that was for disability benefits; right?

12 A Yes.

13 Q But that claim was denied; right?

14 A Yes.

15 Q But sitting here today you don't know the specific
16 reason?

17 A They deny everybody on the first try.

18 Q Well --

19 A I mean.

20 Q Well y'all needed the money, then y'all must have
21 reapplied; right?

22 A No, we did not reapply.

23 Q Is that because y'all didn't need that money that
24 bad?

25 A No, that was because Mike didn't want to take money

1 from the government that bad. He figured he had paid for
2 disability policy out of his own pocket and we should be
3 able to have the income from that policy.

4 Q Okay. Well just within more question?

5 MR. MOORE: Your Honor, I would now move to strike
6 the testimony. It was applied for and denied. What
7 conceivable impact would that have had on what he said it
8 was offered for.

9 MR. KRISTINIK: I think it is important for the court
10 to know they're not receiving money from Social Security
11 Disability. Every disability case I have ever handled
12 that's a component of it. Those two things are hand in
13 hand. I think it's important to know what their income
14 is, and that is not a component of it.

15 MR. MOORE: I obviously don't do disability cases
16 either. Apparently he does this all the time. But I
17 can't conceivably imagine what, every other case he may
18 ask that question in, but what does that got to do with
19 the fact did the boy get his policy like the law calls for
20 and the explanation that the law calls for and whether
21 he's disabled and what was the cause of the accident?

22 MR. KRISTINIK: I am just trying to try my case Your
23 Honor.

24 THE COURT: It is applied for and denied, and not
25 pursued. I don't know why it's got to be stricken. I

1 mean, there is no income coming from there. It was asked
2 for, declined by the administration and here we are.

3 MR. MOORE: Thank you, Your Honor.

4 Q Let's talk about a source of income or a source of
5 money that you do have. There is medical insurance paying
6 for Mr. Russell's medical bills; is that right?

7 A We do have health insurance, yes. It does not pay
8 100 percent of the bills.

9 Q How much goes unpaid each year?

10 A It changes from year to year. Our out of pocket max
11 I think is 4500. We usually reach outer out of pocket
12 max.

13 Q Has he had a lot of medical bills?

14 A Yes.

15 Q Is it really expensive?

16 A Yes. Very expensive.

17 Q Tens of thousands of dollars?

18 A Hundreds of thousands of dollars.

19 Q And insurance has paid for that except for 4300 a
20 year? ---

21 A Well it depends, because if you have to sigh and out
22 of network doctor, they don't pay for that. I mean, I can
23 tell you right now that on our 2011 tax return we had
24 almost \$12,000 in medical bills, if that helps to answer
25 the question.

1 Q So you deducted that on the tax return?

2 A Yes.

3 Q So I guess that's a benefit to being married to a
4 CPA. I am going to approach the witness stand, if I may
5 Your Honor, and I do this so that I can look at your form
6 with you?

7 A Uh-huh. Sure.

8 Q Can you put it over here? Thank you. I want to ask
9 you several questions about this, and for the record this
10 was not provided to the defendant Pennsylvania Life until
11 or shown to us until just moments before you testified
12 today but we have not objected to its admission but I am
13 going to need to explore it with you and learn about it
14 really at the same time judge Griffith learns about it so
15 I want you to walk us through some of this. First of all
16 you repaired this yourself?

17 A Yes.

18 Q And this is Plaintiff's Exhibit No. 20; correct?

19 A Uh-huh.

20 Q That's yes.

21 A Yes.

22 Q Did you prepare this on a computer at home or work?

23 A At work.

24 Q Is this Excel spreadsheet?

25 A Yes.

1 Q And you're familiar with the function of Excel. You
2 can run programs and information at the bottom of the
3 columns and those sorts of thing?

4 A Yes.

5 Q Okay, period check covered, and you have June 25,
6 2008 through October 25, 2008?

7 A August.

8 Q I'm sorry August 25, 2008. So that would be a period
9 of disability. That's you're -- that's what this first--

10 A Well, yes, in the first one -- after the first one
11 each period is a one month period. The first one runs
12 from the day the disability started, which was seven days
13 after the accident, until we -- when we received our first
14 check. It covered the period of June 25 to August 25.

15 Q Okay.

16 A After that it's a monthly period.

17 Q Okay and after that you go to a monthly basis with it
18 going from the 25th of one month to the 25th of another
19 month?

20 A Yes.

21 Q And then we've got the March payment. There is a
22 \$333.33 payment and that caught it up to an even calendar
23 month?

24 A Yes.

25 Q And then it goes from the first of the month to the

1 last day of the month?

2 A Yes.

3 Q So that's column one, periods of disability. Okay.

4 So let's look and going back to the very top line on

5 column one, it says, June 25, to 2008, we all know the

6 accident was on June 18, 2008 so that reflects there was a

7 seven day elimination period?

8 A Yes.

9 Q And that's a period of time that has to go by and
10 then on the eighth day then he becomes eligible for
11 benefits; right?

12 A Right?

13 Q That's how you understand the policy works?

14 A Yes.

15 Q All right. Now, let's look at your second column
16 here. Due date for check. You have NA for the first
17 line. Why do you have NA there. I know that means not
18 applicable.

19 A Well from the time we filed the very first claim form
20 I would expect that they had to go through a process
21 before they approved it, like looking at his medical
22 records to make sure he was actually disabled, looking at
23 the accident itself, and then approve the claim -- the
24 very first claim. So -- and I wouldn't have expected them
25 to do that in anyone month period. This is just what we

1 were paid when we got the first check.

2 Q Okay. I understand. Okay. So for that first claim
3 form, you submit the claim form. You agree they're
4 entitled to a reasonable amount of time to look into
5 things and make sure he is disabled?

6 A Yes.

7 Q All right. So now let's look at the second line of
8 column two and that date there is September 26, 2008 and
9 it looks like and this is under the column called due date
10 of check?

11 A Uh-huh.

12 Q So it looks like you put a date there that is one day
13 after the period covered by the check?

14 A Yes.

15 Q Okay. And why have you -- why have you picked that
16 as the due date?

17 A For two reasons. One, because I would expect that to
18 be the monthly due date. And, two, because when the
19 payments were made on time, that's usually when we
20 received them.

21 Q Okay. So when they're paid on time you're usually
22 getting -- actually receiving them at your house in the
23 mailbox?

24 A Uh-huh.

25 Q The day after --

1 A And also--

2 Q -- the disability period?

3 A And also they like to date the checks for the day
4 after the disability period.

5 Q Okay?

6 A Regardless of when they send them out.

7 Q Is that just based on your observation of reviewing
8 the checks and looking at the dates on the checks?

9 A Yes. That would be based on, for instance, if I
10 received a check today, which is December 14, and it was
11 for the November period, it would be dated December 1.

12 Q So for example, January -- for the January 1 to
13 January 30th period you would expect the date of the check
14 to be February 1?

15 A That's how it has been a lot of the times, yea.

16 Q Okay. If I may beg the Court's indulgence for a
17 moment. What is the last day of the benefit period on
18 your chart for December of 2008?

19 A I don't understand your question.

20 Q So --

21 A December 2008 would be December 31, 2008.

22 Q Well here you got it as December 25, 2008?

23 A Well that's because when we started the policy they
24 were going from the 25th to the 25th, until they made that
25 \$300 payment that you mentioned and then it moved to a

1 calendar month.

2 Q When would you expect this check to be dated?

3 A This December check?

4 Q Yea.

5 A I would expect for it to be dated December 26.

6 Q Would it surprise you --

7 A But I don't know if that's when it was dated.

8 Q Would it surprise you to know that it was dated
9 December 23, 2008 and I'm making reference to Bates page
10 17?

11 A That's really odd because we didn't receive it until
12 February 16 of 2009.

13 Q Oh we'll get to that column in a minute. I'm talking
14 about the checks. You said these checks are dated --
15 usually just dated one day after these benefit periods,
16 regardless of when they're sent out or whatever?

17 A A lot of the times they are dated.

18 Q Okay was this one? Does this one agree with what you
19 just said?

20 A Well this one was actually dated early.

21 Q Oh, okay.

22 A But it was dated almost two months before received
23 it.

24 Q Let's look at another one. Was this one dated the
25 day after the benefit period?

1 A This one was dated approximately 15 days after the
2 period but it was a check for two periods. This was a
3 \$5,000 check because y'all had missed a period.

4 Q Okay. Thanks. And for the record that was Bates
5 page 23 and these checks I'm looking at were all in
6 Defendant's Exhibit 15. Let's just look at one more. Was
7 this one dated the day after the benefit period?

8 A No. Again about 15 days late.

9 Q Okay. You can hand it back to me. Okay, so I think
10 I've made my point with the dates on the checks.

11 A Like I said this is the date that I would have
12 expected it to be.

13 Q Okay. All right. So let's keep a look at the chart
14 here. Thank you. Okay, so, looking at the due date of
15 the check you have calculated it to be the day after the
16 benefit period?

17 A Uh-huh.

18 Q That's a yes?

19 A Yes.

20 Q And the benefit periods you have recorded all of them
21 in the first column; correct?

22 A Yes.

23 Q So if we go -- let's go half way down this to the due
24 date of July 26, 2010. The benefit period you have there
25 goes from June 25, 2010 to July 26, 2010 and that's why

1 you made your due date the next day July 26, 2010?

2 A It went through July 25.

3 Q That's correct.

4 A Yes.

5 Q I misspoke. Okay. All right. So now I think we
6 understand why you have the due date. Now you put due
7 date there, is that due date required by the language of
8 the policy?

9 A Well the policy says it pays once a month so I would
10 expect to be paid around the same day each month, yes.

11 Q That's what you would expect; right?

12 A Based on what I read in the policy.

13 Q But did the policy actually say a specific number of
14 days when the payment should be made?

15 A It certainly didn't say that they were going to be
16 months late.

17 Q Does it provide a specific number of days?

18 A It says monthly.

19 Q It uses the word monthly?

20 A Monthly, yes.

21 Q It doesn't say 30 days.

22 A Monthly means once a month.

23 Q It doesn't say next day? It doesn't say that; right?

24 A It says monthly.

25 Q Okay. This is a two page chart. When did you

1 prepare this chart by the way?

2 A Before mediation.

3 Q Okay. That was October 30, 2012?

4 A I don't remember the exact date of mediation.

5 Q All right. So the last entry you had -- the last due
6 date you have is for October 1, 2012 and that's for the
7 benefit period ending September 30, 2012?

8 A Correct.

9 Q And next to it you have the words, have not received?

10 A At the date of mediation we had not yet received that
11 check.

12 Q Okay. All right. Okay. Date received column.

13 That's column number three?

14 A Uh-huh.

15 Q What is this column tell us?

16 A It's telling us the day that we got the check in the
17 mail.

18 Q And that means the day it arrived in your mailbox?

19 A Yes.

20 Q And the first date here you got the first check on
21 September 25, 2008; right?

22 A Yes.

23 Q Now, this chart goes all the way back to 2008?

24 A To the first check.

25 Q How were you recording the date that each check was

1 received?

2 A The deposit date that it went into the bank, I have
3 always taken the check to the bank the day after we get it
4 in the mail. I come home from work. I check the mail.
5 If the check is in there, the next day it goes in the
6 bank. Unless that is a Friday in which case it would go
7 in the bank on Monday.

8 Q So you're able to go to your bank records --

9 A Yes.

10 Q And look at the deposit dates for the check?

11 A Yes.

12 Q All right. Then we have the fourth column is days
13 late and let's go down one, two, three, four -- one, two,
14 three, four, five, six, seven, eight. Let's go down eight
15 lines here, and we've got the benefit period ending
16 March 25, 2009 and you've got a due date for the check of
17 March 26, 2009, the next day. And you've recorded that
18 the check was received on April 16, 2009 and then you've
19 got 21 days late; correct?

20 A Yes.

21 Q So what you've just done to calculate the days late
22 is just to calculate the number of days between what you
23 believe to be the due date and the date that you've
24 recorded that the check was received?

25 A Yes, the once a month date. The difference between

1 the one day every single month and the date that it was
2 received.

3 Q Okay. Now, something that is absent from your chart
4 here -- let me put it back down -- is a column indicating
5 when you mailed out each claim form to pennsylvania life.
6 That's not on your chart; right?

7 A No.

8 Q So, for example, here we've got, here is one 77 days
9 late. You received the check on September 11, 2009. We
10 can't tell from your chart what day the claim form was
11 received; right?

12 A No.

13 Q Or what day it was mailed to Pen Life, we can't see
14 that; right?

15 A No.

16 Q Okay. So it's possible that that claim form wasn't
17 received by Pen Life until August 31st?

18 A Probably not, because the previous check to that was
19 received July 10th. So, when we received that check on
20 July 10th we would have taken the claim form, and took it
21 to the doctor, and then mailed it in. But since we didn't
22 get another check until September 11th we can't send in a
23 claim form that we don't have; and the claim forms come
24 with the checks. So if the checks are late, obviously the
25 claim forms are going to be late.

1 Q Okay. Well let's talk about that because you know
2 what's interesting is this check you received it on
3 July 10th, 2009?

4 A Uh-huh.

5 Q Which means you got the claim form on July 10, 2009.

6 A Yes.

7 Q Well this next check you didn't receive until
8 September 11th. That's over two months later.

9 A Uh-huh.

10 Q Well, I mean, when do you think you mailed in the
11 claim form during that two month period.

12 A It would depend on how long the doctor had it before
13 we could get it back.

14 Q Are you holding Pennsylvania Life and CHCS at fault
15 for you not mailing the claim in?

16 A I can't mail in a form that doesn't exist.

17 Q And that's because -- well, didn't you just say that
18 you had to wait for the doctor sometimes?

19 A If I have a form, yes. We take the form to the
20 doctor. We drop it off at the doctor's office and say,
21 here is my form, my monthly disability form that needs to
22 be filled out by the doctor.

23 Q And you don't control the doctor?

24 A No, we do not control the doctor.

25 Q Nobody does.

1 A As soon as the doctor has signed the form and their
2 office calls us and tells us it's ready. Come pick it up.

3 Q Well if the doctor takes several weeks before he
4 calls you to come pick up that form, should Pennsylvania
5 Life be held responsible for that?

6 A Yes, because it says in the policy that we will be
7 paid monthly. Not you'll be paid when you receive the
8 claim form.

9 Q I don't need to ask any more questions about that.
10 Let me show what has been marked as Defendant's Exhibit
11 Number 2. I'll hand this to you. This is a claim form.
12 Is that your handwriting on it?

13 A Yes.

14 Q Did your husband sign it or did you have to sign it
15 for him.

16 A He signed it.

17 Q Look at the last page of that exhibit. It is Federal
18 Express transmittal form?

19 A Okay.

20 Q Did you send that from your CPA office?

21 A Yes.

22 Q So you mailed this package to Pennsylvania Life?

23 A Yes.

24 Q And if you turn back to the front page of the form,
25 you've described it as a motorcycle accident, right?

1 A Uh-huh.

2 Q And because it was a motor vehicle accident it asked
3 for a police report and you actually attached a report
4 that came from the Highway Patrol; right?

5 A Yes, I attached the report we were given by the
6 police.

7 Q Why don't you flip to that. And that's called the
8 FR10 notice of requirement form; right.

9 A Yes.

10 Q Have you ever had an accident before?

11 A Yes.

12 Q In a car?

13 A Yes.

14 Q Let me show you what's been marked as Defendant's
15 Exhibit Number 5. Have you ever seen one of these before?

16 A The only time I have ever seen this is from our
17 attorney.

18 Q In your prior experience, though, and other accident
19 you may have had, have you ever seen one of those
20 collision reports?

21 A No, the green form is the only thing I've ever been
22 given in any accident that I've had.

23 Q You have never seen a collision report like this
24 marked as Defendant's Exhibit Number 5?

25 A No, I never have. I have never been given one of

1 these.

2 Q Now at the time that you mailed in this claim form, I
3 just want to make absolutely sure, what you mailed in
4 doesn't talk about any tickets issued or DUI; right?

5 A I would have to try and read it and it's not really
6 legible.

7 Q Do you think DUI is mentioned on that form? Do you
8 really think it is?

9 A It doesn't appear to be.

10 Q Look on defense exhibit 5, is driving under the
11 influence referenced on that document?

12 A Yes.

13 Q Are you sure you didn't have a copy of the collision
14 report?

15 A I'm positive.

16 Q Do you think that it would have been important to
17 Pennsylvania Life to know that Mr. Russell was driving
18 from a bar that night and had been charged with DUI?

19 MR. MOORE: Object to the question. That's calling
20 for speculation. She has no way of what might be
21 important to Pennsylvania Life. They certainly didn't ask
22 for it.

23 THE COURT: I'll sustain that.

24 Q Now, Mr. Moore he asked you a question about whether
25 or not Mr. Russell's motorcycle license had ever been

1 suspended, and he used the word, suspended?

2 A Yes.

3 Q The way I want to ask you that question, but I want
4 to ask it a little differently. Had Mr. Russell -- was he
5 charge with an expired motorcycle license?

6 A Yes, he was charged with and expired motorcycle
7 license. Twice today you've mentioned that it was
8 suspended. And I think we were just trying to clear up
9 that point.

10 Q But he did get a ticket, but it was for expired?

11 A Expired, yes.

12 Q Okay. When did you know that there was a seven day
13 elimination period?

14 A When the girl told me on the phone that since i
15 hadn't called within seven days, we couldn't file a claim.
16 Then I went home that night and pull out the paperwork and
17 the policy, what we thought was the policy, mentioned a
18 seven day elimination period.

19 Q Where is what you think the policy was?

20 A Right here. I don't know if I looked at this one or
21 the 2002 one that we have.

22 Q I'm very curious at where the elimination period is
23 it on that first page?

24 A It says through the end of the elimination period, if
25 any, so I'm guessing on that page with the numbers it must

1 show the elimination period as seven days, the deck page.

2 Q So you're saying you thought this was the policy
3 and -- but you look at this and it doesn't say?

4 A I looked at either this or what is in our 2002
5 packet. I don't have the 2002 packet in front of me.

6 Q I'll make it easy for you. I'll just get right to my
7 point, Mrs. Russell, is it possible that you knew there
8 was a seven day elimination period because you actually
9 had a copy of the real policy?

10 A No. It's in either this packet or that one.

11 Q Okay. Okay. I'm sure your lawyer will find it if it
12 is. He'll find it and point that out for us. You
13 testified earlier about this call you had with someone
14 from Pennsylvania Life and they were telling you that
15 because seven days had passed you couldn't make a claim
16 anymore?

17 A Yes.

18 Q That conversation would have been over four years
19 ago. Is it possible that what they were talking about was
20 the elimination period and the fact that seven days had to
21 pass before eligibility?

22 A No. Because I questioned her several times, and you
23 can probably call in everyone from my office, because I
24 was extremely upset that she was telling me we could not
25 file a claim.

1 Q But then you did file a claim and they started making
2 payments?

3 A Yes.

4 Q Okay. And y'all are still making a premiums on this
5 policy; right.

6 A Yes, we've never missed a premium. It's directly
7 drafted out of the account. The money has always been
8 there.

9 Q And I certainly hope that Mr. Russell is around for a
10 long time. But it does have a \$100,000 death benefit;
11 Right. It is like an accident life insurance policy;
12 right?

13 A I don't know about that. I would have to look and
14 see.

15 Q You don't know if it has a life insurance benefit?

16 A No, I don't.

17 Q Okay. Okay. A representative came to your house,
18 you talked about that conversation. You were there, you
19 were in the room or wherever y'all were so you could hear
20 that conversation; right?

21 A Yes, we with were at my kitchen table.

22 Q Okay. Was there any discussion of the motorcycle
23 wreck?

24 A Yes, they discussed the accident. They discussed
25 Mike's injuries. He took pictures of Mike, took pictures

1 -- I can't remember if he had him lift up his pants leg to
2 take pictures of his scars or if he just took a picture of
3 him standing in the kitchen. But he took pictures. He
4 had us sign forms so that y'all could get our tax returns
5 from the IRS. He took a lot of notes.

6 Q Was he very thorough in asking about these things and
7 talking about these things?

8 A Yes.

9 Q And so was he asking some questions about the wreck?

10 A I'm sure he did.

11 Q Did y'all ever tell this person that Mr. Russell had
12 been coming from a bar that night?

13 A I don't know. I don't have the conversation
14 recorded.

15 Q Did you?

16 A We had just drove in from a funeral from Tennessee,
17 so it was not a very good time for us, very emotional,
18 five hour trip and we were just trying to get done
19 whatever he was wanting to get done.

20 Q Okay. So you didn't tell him about the bar. Did you
21 tell them about the traffic ticket for the expired
22 motorcycle license?

23 A We answered the questions that he asked. That's all
24 I can tell you.

25 Q I am assuming that you didn't tell him about the DUI

1 charge?

2 A If he asked. I don't know. I mean this was after
3 y'all already knew about all of this. So I can't imagine
4 us not talking about it.

5 Q When did you meet with this gentleman?

6 A November 2009.

7 Q All right.

8 A There should be a record of it somewhere.

9 Q Okay.

10 A We haven't seen it. But there should be.

11 Q There is a record and that's actually part of the
12 claim file which is an exhibit. I am not going to cover
13 that with you but His Honor it will be available. Just
14 one moment, Your Honor. I may be done. Those are all my
15 questions at the time, Your Honor.

16 MR. MOORE: I just have one question.

17 REDIRECT EXAMINATION

18 BY MR. MOORE:

19 Q Is it possible that you got the seven year number
20 from something you were told on the telephone and not from
21 something you read?

22 A It's possible. I would have to look through the
23 documents.

24 MR. MOORE: That's fine. No further questions.

25 Thank you.

1 MR. KRISTINIK: Nothing further.

2 MR. MOORE: I've got one final witness, Your Honor.

3 I swore to the bailiffs I would have them out here by

4 5 o'clock today. My last witness is going to be the

5 plaintiff himself, but I would imagine he is going to be

6 probably a couple of hours.

7 THE COURT: All right. Let's do this.

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

9 MR. KRISTINIK: Your Honor, permission to take the
10 Defendant's exhibits.

11 THE COURT: That's fine.

12 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

13

14

15

16

17

18

19

20

21

22

23

24

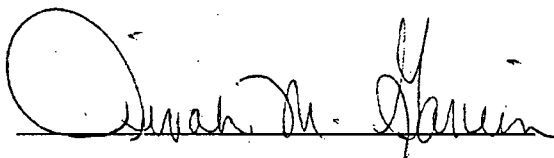
25

C E R T I F I C A T E

I, the undersigned Dinah M. Garvin, Official Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify to the best of my ability that the foregoing is a true, accurate, and complete Transcript of Record transcribed by me, for Lisa Hicklin Davenport, all of the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Civil Court for Lexington County, South Carolina on the 14th day of December, 2012.

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

May 29, 2014

A handwritten signature in cursive script, reading "Dinah M. Garvin", written over a horizontal line.

Court Reporter

State of South Carolina) In the Court of Common Pleas
County of Lexington) Eleventh Judicial Circuit
2011-CP-32-4981

Mike Russell,)
Plaintiff,)
vs.) Transcript of Record
Randolph Gill and)
Pennsylvania Life)
Insurance Company,)
Defendants.)

December 20 - 21, 2012
Laurens, South Carolina

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge

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

S. Jahue Moore, Esquire
Ralph Nichols Riley, Jr.
Attorneys for Plaintiff

D. Lawrence Kristinik, III, Esquire
Kristen E. Horne, Esquire
Attorneys for Defendants

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

I N D E X

Proceedings	4
TESTIMONY - WITNESS	
Susanne Russell,	
Direct Examination by Mr. Moore	5
Cross-Examination by Mr. Kristinik	7
Mike Russell,	
Direct Examination by Mr. Moore	18
Cross-Examination by Mr. Kristinik	46
Gerald Rothell,	
Direct Examination by Ms. Horne	94
Cross-Examination by Mr. Moore	118
Redirect Examination by Ms. Horne	136
Wendy Bell,	
Direct Examination by Ms. Horne	139
Cross-Examination by Mr. Moore	154
Connie Collins,	
Direct Examination by Ms. Horne	168
Cross-Examination by Mr. Moore	177
Certificate Page	203

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>

No Exhibits Introduced.

TRANSCRIPT OF RECORD

TRIAL DAY 1 - 12/20/12

(Whereupon, the proceeding was commenced at 9:52 a.m.)

THE COURT: We're back on the record with the case *Russell v. Gill and Pennsylvania Life*. (To the court reporter) And that has the Lexington County caption on it? Does it -- or Charleston?

THE COURT REPORTER: Lexington.

THE COURT: All right. It was originally filed in Charleston. It was transferred to Lexington. I want the Lexington caption on the record.

We're still in the plaintiff's case. Everyone's present. Are we ready to go, Mr. Moore and Mr. Kristinik?

MR. MOORE: Yes, sir, Your Honor.

THE COURT: All right.

MR. KRISTINIK: Ready, Your Honor.

THE COURT: All right. Mr. Moore, still your case.

MR. MOORE: We recall Susanne Russell.

THE COURT: All right. Ms. Russell, come forward over here to Mr. Bolt.

(Whereupon, the witness came forward.)

THE BAILIFF: Your Honor, do you want to swear them or they've already ---

THE COURT: No.

THE BAILIFF: --- been sworn in?

1 THE COURT: Ma'am, you've been placed under oath.

2 THE WITNESS: Yes.

3 THE COURT: And you remain under oath.

4 THE WITNESS: Okay.

5 THE BAILIFF: All right. Very good.

6 THE COURT: All right.

7 SUSANNE RUSSELL, having been previously duly
8 sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. MOORE:

11 Q Susanne, you are a certified public accountant; is
12 that correct?

13 A Yes. Uh-huh.

14 Q How long have you been one?

15 A Approximately nine years.

16 Q And you've been practicing accountancy for how long?

17 A Approximately 11 years. Uh-huh.

18 Q The -- when we finished the testimony in Lexington the
19 other day, you had talked about seeing a seven-day-
20 elimination period in the actual application materials that
21 existed in 2002; is that correct?

22 A Yes. Uh-huh.

23 Q When you got off the stand, did you go look?

24 A Yes. Uh-huh.

25 Q Is it in writing in what you had actually been given?

1 A Yes. It was in the 2002 packet of information.

2 Q All right. And notwithstanding that, the -- the claim
3 was accepted and handled; is that right?

4 A Yes.

5 Q Now, we've talked about the -- the -- the months that
6 went by when you were not paid. During those periods of
7 times, did you have all of the claim forms and everything
8 in place to get paid?

9 A We sent in a claim form. And if we did not receive a
10 check, we couldn't send in a claim form. The claim forms
11 came in the mail with the checks.

12 Q Did you do everything that you were required to do to
13 get paid?

14 A Yes. Uh-huh.

15 Q And didn't get paid for periods of months?

16 A Yes. Uh-huh.

17 Q All right. Have you done a present-day value of this
18 policy?

19 A Yes. Uh-huh.

20 Q What is that?

21 A Approximately \$540,000.

22 Q And what was the interest rate that you used? Do you
23 recall exactly?

24 A It was between 2 and 3 percent. Uh-huh.

25 Q So factoring that in, if -- if Mike stays disabled

1 till 65 as he appears that he will ---

2 A Uh-huh.

3 Q --- the present-day value of his policy is \$540,000?

4 A Approximately, yes. Uh-huh.

5 Q Okay. That would be give or take a small amount?

6 A Yes. Uh-huh.

7 Q All right. Thank you so much.

8 CROSS-EXAMINATION

9 BY MR. KRISTINIK:

10 Q Good morning, Ms. Russell. What was your purpose for
11 calculating the present value? Why'd you do that?

12 A We calculated that before mediation for information
13 purposes.

14 Q Okay. And how many years of payments were you
15 assuming when you made that present-value calculation?

16 A Until Mike turns 65. Uh-huh.

17 Q Okay. And then, your discount rate, you said, was
18 between 2 percent and 3 percent; is that correct?

19 A Yes. Uh-huh.

20 Q Okay. And why -- what was your basis for selecting
21 that discount rate?

22 A We based that on a -- a low-risk present-day interest
23 rates. Uh-huh.

24 Q Okay. Did you get it from any particular source:
25 treasury-bond rates or anything of that nature?

1 A It was just an estimate of present-day rates. Uh-huh.

2 Q Uh-huh. Okay. What -- the -- this suit was filed in
3 -- on February 10th, 2010, in Charleston County. What was
4 the longest period of time that you had gone without
5 receiving a payment prior to when this suit was filed?

6 A I would have to look at the document. Uh-huh.

7 Q Okay. And we -- and we don't have your chart here
8 with us at this ---

9 A Right.

10 Q --- point, correct?

11 A Uh-huh. Right. Uh-huh.

12 Q Okay. I may -- with the consent of opposing counsel,
13 may want to ask you some more questions after we get that
14 form back.

15 A Okay. Uh-huh.

16 Q Okay? Is that -- I understand that that's a long time
17 ago, and it's hard for you to just testify from memory.

18 So you say you -- there were some late benefit
19 payments made to you and Mr. Russell. Did you still have
20 other -- access to other funds? I mean, you've been
21 working the entire time, haven't you?

22 A Yes. I work. Uh-huh.

23 Q Okay. Were you able to pay the cable bill?

24 A The cable bill? Yes, we were able to pay the cable
25 bill. Uh-huh.

1 Q All right. Were you always able to pay your power
2 bill, even when you hadn't received a benefit check?

3 A It may have been late. Uh-huh. But it was paid.

4 Q Did -- did the utility penalize you?

5 A Yes. We've been penalized ---

6 Q How -- how could ---

7 A --- on utilities.

8 Q --- that happen? How?

9 A If you don't pay the bill on time, they charge you a
10 late fee.

11 Q Did you bring in documentation showing that?

12 A No. I do not have documentation with me showing that.

13 Q Was there anyone else that penalized you for making a
14 late payment?

15 A Credit cards penalize you for making late payments.
16 Uh-huh.

17 Q Well, why didn't you pay them?

18 A I didn't have the money.

19 Q Do you have documentation showing that you didn't have
20 sufficient funds absent the benefit checks?

21 A Bank records would show that. Yes. Uh-huh.

22 Q Do you have any of that here in court today?

23 A No. Uh-huh.

24 Q Okay. And you don't have any documentation showing
25 any penalties, any interest, or other penalties that you

1 were assessed for making a late payment?

2 A Not with me here today. Uh-huh.

3 Q And I ask that because I would really -- if you did, I
4 would want to match that up to the payment checks that we
5 have so that I could confirm what you're saying.

6 MR. MOORE: Objection, Your Honor. Please, may I ask
7 that the counsel ask a question, rather than tell her what
8 he would like to do.

9 THE COURT: Certainly.

10 MR. KRISTINIK: I'll move along, Your Honor.

11 THE COURT: Move along. Sustained as to the
12 objection.

13 Q Did any provider cut off service to your house because
14 of a late payment the last ---

15 A No.

16 Q --- few years?

17 A Uh-huh. We obtained loans to be able to pay our
18 bills. Uh-huh.

19 Q Who'd you obtain the loans from?

20 A The bank. Uh-huh.

21 Q How much money did you get a loan for?

22 A At one point in time, we got a \$40,000 loan to
23 consolidate bills so payments would be lower. We have a
24 home-equity line on our house that we've drawn money off
25 of.

1 Q Now, you're not blaming those loans on late payments
2 from my client, are you?

3 A If we had the payments on time, I would've had more
4 money to make payments. And I would probably not have
5 needed to consolidate bills.

6 Q Now, you just testified, in response to Mr. Moore's
7 questions, that you had to wait for the check to come in so
8 that you would have another form that would come with the
9 check so that you could fill out that form, get the
10 information from the doctor, and send it in?

11 A The claim form. Yes. Uh-huh.

12 Q Okay. So you were waiting for the claim forms to come
13 in with each check, right?

14 A Yes. Uh-huh.

15 Q Okay. Why didn't you just make a copy of the claim
16 form?

17 A Because I was told from Ella Lee in the beginning of
18 this case that we had to send in the original form.

19 Q The -- is there a reason for that?

20 A I don't know what the reason for that is.

21 Q Isn't just a ---

22 A Because ---

23 Q --- piece of ---

24 A --- I wanted ---

25 Q --- paper?

1 A --- to fax the forms in, instead of mailing them. She
2 said she had to have the original form.

3 Q But it had to be the original form that came from
4 Pennsylvania Life?

5 A That's what I was told by Ella Lee. Uh-huh.

6 Q Was there ever a time when you did make a Xerox copy
7 and just use a -- a copy? That ever happen?

8 A I don't believe so. No. Uh-huh.

9 Q Let's see if maybe I can refresh your recollection.
10 For the record, this is Defendant's Exhibit No. 15. It's a
11 stack of checks and -- and forms. And there's some
12 anomalies in here that I want to discuss with you. And
13 then -- and that may shed light on the question I just
14 asked. So first, I'm going to -- and let me put these in
15 ---

16 MR. MOORE: Your Honor, if counsel could just refrain
17 from lecturing the witness and simply ask the question.

18 THE COURT: Sure. I think he's just trying to -- the
19 gap in the hearing between the first hearing and the
20 continuation hearing.

21 Q Ms. Russell -- and -- and we're looking at Bates page
22 388. Here's a check dated March 15th, 2010. You see that?

23 A Uh-huh.

24 Q Okay. So -- and is that a "yes"?

25 A Yes.

1 Q Yeah. For -- the court reporter ---

2 A Yes.

3 Q --- has ---

4 A Uh-huh. Sorry.

5 Q --- to record what we're saying.

6 And so when this was mailed to you, a claim form
7 would've come with it?

8 A Yes. Uh-huh.

9 Q Okay. So I look and I see a claim form a -- a week or
10 so later, April 5th, 2010. And this is one of those gaps
11 where you didn't get a check in April and you didn't get
12 one in may. But then, I see another form dated ---

13 A Uh-huh.

14 Q --- June 17th, 2010. So it looks like you've sent two
15 forms in, but you didn't get a check in between.

16 A There were times, back in the beginning, when before
17 they -- well, let me start -- in the beginning when we were
18 receiving payments -- uh-huh -- they would send the check
19 and two or three days later, we would get the claim form in
20 the mail. Uh-huh. That was probably for about the first
21 year. After that they started actually inserting the claim
22 forms with the check.

23 So in the beginning when we were receiving claim forms
24 separate from the checks, sometimes they would send two.
25 And so when they did, I kept the extra claim form to use in

1 instances like this.

2 Q Oh. Well, how many -- if they occasionally sent two
3 from time to time and you would save them all, I mean, did
4 you have a stack of them ---

5 A No.

6 Q --- five or six?

7 A Wasn't that -- I mean, they didn't do it very often,
8 maybe three -- two or three times. Uh-huh.

9 Q Okay. So ---

10 A I'm not sure exactly. Uh-huh.

11 Q So if you had an extra claim form, then you wouldn't
12 have to wait for the next check if it was time -- if
13 another month of disability had passed, you could go ahead
14 and take your extra claim form; take it to the doctor; get
15 the information you needed from him; and send it in; you
16 wouldn't have to wait ---

17 A Uh-huh.

18 Q --- for that next check ---

19 A Well, if I only had two extra claim forms, once those
20 were used, they were gone. Uh-huh.

21 Q Well, I wonder how many times this happened -- let's
22 look at another example. Here the check is dated September
23 23rd, 2010. So it was mailed to you sometime that day or
24 thereafter.

25 A I ---

1 Q But ---

2 A --- don't know ---

3 MR. MOORE: Whoa, whoa.

4 A --- when it was ---

5 MR. MOORE: Objection ---

6 A --- mailed.

7 MR. MOORE: --- Your Honor. He's now assuming facts
8 that are not in evidence.

9 MR. KRISTINIK: I said thereafter.

10 MR. MOORE: You -- you said ---

11 MR. KRISTINIK: I mean ---

12 MR. MOORE: --- sometimes ---

13 MR. KRISTINIK: Same day or thereafter. I mean, isn't
14 that ---

15 THE COURT: All right.

16 MR. KRISTINIK: --- the universe ---

17 THE COURT: Yeah. Rephrase the question. Keep
18 moving.

19 MR. KRISTINIK: Okay.

20 Q The check is dated September 23rd, 2010, right?

21 A Yes.

22 Q You would've gotten it sometime after that date,
23 right?

24 A Sometime after that date. But there's no telling how
25 long after it was.

1 Q Right. But if you look at the next claim form, it's
2 date the day before: September 22nd, 2010. And this is
3 Bates page 397.

4 A That could have been the previous claim form that came
5 with the August check.

6 Q Let's look at another example.

7 A I mean ---

8 Q The check at Bates page 481, it's dated May 27th,
9 2011. And then, you flip -- let's go to Bates -- we flip
10 to the claim form, the next claim form at Bates page 3 --
11 431. It's dated the day before: May 27th, 2011. And you
12 can flip back if you ---

13 A Yeah.

14 Q --- want to.

15 A Uh-huh. Well, like I said, you know, we may have
16 gotten the April check. Uh-huh. I mean, what's the check
17 before this one? This check right here is dated April 29th
18 ---

19 Q Uh-huh.

20 A --- 2011. We would've received a claim form with this
21 check.

22 Q Okay.

23 A Assuming that we received this check on or about that
24 date -- uh-huh -- or a week after, we need the other sheet.
25 Uh-huh. Then we would've had a claim form with this April

1 check that we would've then taken to the doctor; waited for
2 him to sign it; picked it up. And it's very reasonable
3 that it was around May 26th when we got that back from the
4 doctor.

5 Q Okay. Let's look at one final example. Bates page
6 461, it's a check dated March 1st, 2012. And then, you
7 flip to the next claim form, and it's dated February 28,
8 2012, Bates page 445.

9 A Same thing. Uh-huh. This is probably the claim form
10 that we received with the February check -- uh-huh -- not
11 the March check. Uh-huh. We would've received this
12 possibly in the first or second week of February with the
13 February check -- uh-huh -- taken it to the doctor; waited
14 for him to fill it out; picked it up; and mailed it off at
15 the end of February.

16 Q Okay. All right. Those are all my questions.

17 MR. MOORE: Nothing further, Your Honor.

18 THE COURT: Ms. Russell, you may step down.

19 (Whereupon, the witness exited the witness stand.)

20 MR. MOORE: Call Mike Russell.

21 (Whereupon, the witness came forward.)

22 THE BAILIFF: Have you testified before?

23 THE WITNESS: No, sir, I haven't.

24 THE BAILIFF: Okay. If you'll place your left hand
25 here and raise your right hand.

1 THE WITNESS: (Complied.)

2 THE BAILIFF: Okay.

3 MIKE RUSSELL, having been first duly sworn,
4 testified as follows:

5 (Off the record briefly.)

6 DIRECT EXAMINATION

7 BY MR. MOORE:

8 Q What is your name?

9 A Michael Russell.

10 Q Where you live, Mike?

11 A 1469 Dogwood Road; that's West Columbia, South
12 Carolina.

13 Q And you are the plaintiff in this case; is that
14 correct?

15 A Yes.

16 Q Before you got hurt, what kind of work were you doing?

17 A I ran my own construction company.

18 Q How much money were you making a year doing ---

19 A Between 40 to 70 thousand a year.

20 Q What ---

21 A It varied.

22 Q All right. And before I get into the questioning
23 about this policy, let -- let me ask you this question:

24 You -- you've seen the -- this so-called policy that has
25 this exclusion in it; is that correct?

1 A No, sir, I haven't.

2 Q Okay. I mean, you've seen it while we're getting
3 ready for trial and all?

4 A (No audible response.)

5 Q At -- even -- I mean, I'm not sure -- have you ever
6 even seen it today?

7 A No, sir, I haven't.

8 Q Was it ever delivered to you?

9 A No, sir, it was not delivered.

10 Q The -- the -- well, let's get into that. Who sold you
11 the policy?

12 A John Rothmitch sold me the original policy in 1999.
13 And I cannot remember Gill's last name.

14 Q Now, you've heard the gentleman refer to those two
15 sheets that we talked about being "worksheets"?

16 A Yes, sir.

17 Q Do you agree that's what they were?

18 A Yes, sir.

19 Q And who is it that explained to you those were simply
20 worksheets?

21 A I don't know that anyone really explained it to me. I
22 had heard the other gentleman testify. That's what he
23 referred to them as.

24 Q And you agree that's what they are?

25 A Now I do. Yes.

1 Q All right. The -- the -- the -- the documents that we
2 referred to as "your policy," were those, those things that
3 were actually the language contained in those two folders?

4 A Correct.

5 Q All right. Other than what was contained in those two
6 folders, until you got hurt, had you ever seen any other
7 policy or thing referring to itself as a "policy"?

8 A No, sir.

9 Q Had you ever seen anything that had anything referring
10 to an "exclusion"?

11 A No, sir.

12 Q Now, do you drink beer?

13 A Occasionally.

14 Q Do you drink mixed drinks?

15 A I do.

16 Q Are you an alcoholic?

17 A No, sir.

18 Q Are you a drunk?

19 A No.

20 Q -- Would you have taken a disability policy that had an
21 alcohol exclusion in it?

22 A No, sir, I would not. I wouldn't have taken a policy
23 if it had any exclusions ---

24 Q All right.

25 A --- alcohol or otherwise.

1 Q Now, you paid your premiums every month?

2 A Yes, sir.

3 Q And you raised the amount of that premium in 2002, I
4 believe.

5 A Correct.

6 Q And the amount of your benefit is supposed to be \$2500
7 a month?

8 A Correct.

9 Q When -- when the agent for this insurance company sold
10 it to you, what was explained to you about how this was
11 supposed to work?

12 A I was told that regardless of what happened, that
13 that's -- that policy would kick in and pay me \$2500 a
14 month -- after seven days, the policy would kick in and pay
15 me \$2500 a month until I could go back to work.

16 Q And that's if you got injured?

17 A Correct.

18 Q All right. And did both of the agents tell you that,
19 both the original agent, as well as the -- the increasing
20 agent?

21 A Yes.

22 Q Did you believe them?

23 A Yes.

24 Q Did you start getting your bills?

25 A I'm sorry. Repeat ---

1 Q Did you start getting the bills for premium?

2 A Yes, sir.

3 Q Were they drafted out of your bank account?

4 A Yes, sir.

5 Q All right. Now, let's talk about your present
6 condition a little bit before we go into what actually
7 happened to you. I'd like for you to start at the top of
8 your head and go to the bottom of your feet and detail --
9 let Judge Griffith know what's wrong with you.

10 A I suffer from severe migraines that started shortly
11 after the accident. My ears ring.

12 Q Hold on. Let's -- let's talk about the migraines
13 before we get to your ears. How often do you have these
14 migraines?

15 A I've had them for four straight years. They never
16 quit.

17 Q All right. Well, do you have one right now?

18 A Yes, sir.

19 Q All right. So your head hurts all the time?

20 A Yes.

21 Q Now, you talked about the ringing in your ears. Can
22 you tell me -- just describe to Judge Griffith how your
23 ears ring.

24 A The best way I can describe it is you've ever heard --
25 I don't know. It's Christmastime, so I'll use this as a

1 reference. The Santa Claus on the side, kind of ringing
2 the -- a little bell, standing on the sidewalk, that's ---

3 Q Yeah.

4 A --- pretty much what my ears . . .

5 Q And is there any cure for the ringing in your ear?

6 A Not according to the doctors. No.

7 Q Any cure for your headaches?

8 A No, sir. They -- the neurologist has taken an MRI and
9 MRAs of my head, and he can't seem to find the problem.

10 Q All right. So you have a constant headache and a
11 constant ringing in your ears. Let's go down the rest of
12 your body.

13 A I have slight tearing in my -- I'm not sure what joint
14 they call it -- in my right shoulder from where I was
15 walking on a walker after the accident. But, you know, the
16 main -- the main injuries is in my leg.

17 Q All right. Let's talk about your legs. In the
18 accident you crushed your hip?

19 A Shattered my left hip. Correct -- or pelvic bone.

20 Q And describe for me what present difficulties you have
21 in regard to your -- your hip and your legs.

22 A Everything a difficult -- I mean, it's -- it's
23 impossible to really do anything with any kind of normalcy
24 anymore.

25 Q Can you walk?

1 A I can for short distances. But I can't be up on my
2 leg for, you know, more than 45 minutes to an hour on a
3 given day.

4 Q Now, do you use a cane?

5 A I do.

6 Q Do you got the cane with you?

7 A I do.

8 Q Do you use it all the time?

9 A Ninety-five percent of the time, I have to. I mean,
10 around my house, I don't use it simply because I'm tired of
11 scuffing up my floors. But for the most part, yes.

12 Q All right. Do your legs still hurt you?

13 A Constant.

14 Q Tell me the type of pain that you have in your legs.

15 A I don't really know how to describe it. It is -- it
16 -- it -- it's -- it's never below moderate. I mean, it --
17 it -- it's a constant pain. I just -- the more I -- the
18 more active I have to be in a given day, the -- the more
19 severe the pain gets.

20 Q Is there nerve damage to the legs?

21 A There's nerve damage, bone damage, muscle damage.

22 It's -- it's a mess.

23 Q Is there any numbness?

24 A Yes, sir.

25 Q Where is the leg numb?

1 A In spots all the way down my left leg. It's -- it's
2 really rather odd.

3 Q Do you have any type of electricity-type feeling in
4 your legs?

5 A I don't know if that's what I would call it. But I
6 guess -- well, I don't want to guess at it. I mean, yes.
7 If it -- the way the nerve damage shoots through my leg on
8 occasion, that's a -- that's what I would have to -- to say
9 it would feel like.

10 Q All right. Can you stoop?

11 A No, sir. I can ---

12 Q All right.

13 A --- bend at the waist on occasion. But it's -- it --
14 it's -- it's rare for me to have to do that.

15 Q All right. So you -- where in your left leg are you
16 having the problems? Start in your hip and just tell us
17 what it is all the way down.

18 A Well, like I said, the -- the left pelvic area was
19 shattered. They had to piece it back together with metal
20 plates and screws. And then, the knob on my hip -- on my
21 hip joint -- I do not know the technical name for it -- it
22 was broke off. They had to replace it.

23 And then, I've -- I have muscle and ligament damage in
24 my knee. And I had a compound fracture of the tibia and
25 fibia [sic], I believe, in my lower left leg. And it is

1 held together now by a metal rod and screws.

2 Q All right. And you meet the definition of disabled,
3 according to the insurance company, right now and they've
4 been paying you?

5 A Yes, sir.

6 Q Any chance of it getting any better?

7 A No, sir. My understanding is, depending on how much I
8 have to use my left leg, I can be back if I have to use it
9 -- say, if I had to go back to work, I would -- I could
10 expect to be back in the hospital having it replaced within
11 3 to 10 years; or it could last as long as 15 to 20. My
12 doctor said it was just a -- it's just a matter of how much
13 I use it, will determine how long it lasts.

14 Q What's in there now lasts?

15 A Correct.

16 Q All right. So you have artificial -- an artificial
17 hip -- or artificial pieces in your hip?

18 A Correct.

19 Q And there's no chance of you getting better than you
20 are right now?

21 A No, sir. As time goes by, it'll just deteriorate
22 until I start the process over again.

23 Q What's your birthday?

24 A 7/7/72.

25 Q That makes you how many years old?

1 A Forty.

2 Q Now, I want to get back and ask you some questions
3 about the night in question when you got hurt. Where had
4 you been?

5 A I had stopped at a local bar and grill in Columbia
6 that we frequented.

7 Q What's the name of it?

8 A Carolina Wings and Ribs.

9 Q Now, there's a receipt where you had bought some
10 alcohol. Did -- did you drink all that alcohol?

11 A No, sir, I did not.

12 Q Who did you buy alcohol for?

13 A A friend of mine that -- well, I say a friend -- a
14 buddy of mine that I'd met -- I'd seen there on occasion.
15 J.R. Smith is his name.

16 Q How much did you have to drink that night?

17 A I drank the three Crowns, which was typically what I
18 would drink.

19 Q Did you drink all three of them?

20 A No. I did not finish the third one.

21 Q And you drank that alcohol over what period of time?

22 A Like -- I did not -- I don't wear jewelry, so I don't
23 have a -- I -- I wasn't wearing a watch. But it would've
24 had to have been between 4:30 and 5 when I had gotten
25 there. And it was sometime after 8 when I left.

1 Q Were you intoxicated?

2 A No, sir. I -- I know the blood alcohol says I was,
3 but I was not intoxicated.

4 Q Now, you were riding your motorcycle?

5 A Correct.

6 Q And where were you going?

7 A I was headed home.

8 Q Had you stopped at Carolina Wings -- had you stopped
9 at Carolina Wings after work?

10 A Yes.

11 Q You had had three drinks over a several-hour period,
12 and you were on your way home?

13 A Correct.

14 Q What had you done at Carolina Wings? Had you eaten?
15 Had you played pool? Had you done anything there?

16 A Me and a friend of -- the guy I was there with, J.R.,
17 had actually played a video-golf game.

18 Q Remember the name of it? Golden Tee?

19 A That -- that was it.

20 Q All right. Now, how far would home be from Carolina
21 Wings?

22 A Fifteen-minute ride.

23 Q And you were riding your motorcycle?

24 A Correct.

25 Q Did you have to get onto the interstate?

1 A I did not have to, but I chose to that particular day.

2 Q And as you were getting off the interstate, tell the
3 judge what happened.

4 A The lady in front of me had slammed on her brakes,
5 which I -- I assumed that she was slowing down for the
6 curve ahead. And once I realized that she wasn't just
7 coming -- slowing down, that she was actually stopping, I
8 had swerved to the left to avoid her. But she went to the
9 left with me for whatever reason. I have no idea.

10 Q All right.

11 A There is nowhere to park on that off-ramp on the -- on
12 the left-hand side. The right-hand side of that off-ramp,
13 like any interstate system, there's 25 feet of asphalt on
14 the right-hand side. On the left-hand side, there's 2 feet
15 of asphalt that rolls into a grass that leads down into the
16 drainage ditch. I mean, there -- why she went left, I have
17 absolutely no idea.

18 Q So she slammed on her brakes?

19 A Correct.

20 Q When you realized that she was slamming them on
21 instead of just stopping, you went to go around her to the
22 left?

23 A Yes, sir. I -- a motorcycle does not stop as quickly
24 as an auto -- as a car does. And again, I assumed that she
25 was just going to get off on the right-hand side like

1 anyone would and then I could just go around her on the
2 left. I -- again, I have no idea why she -- why she went
3 left for.

4 Q So as you were going around to the left, she swerved
5 into the left and hit you?

6 A Correct. Well, technically, I hit her because I did
7 hit the back end of her car. But I just could not get
8 stopped as quickly as she could.

9 Q How far would you have been behind her when she
10 swerved to the left?

11 A Oh, at that point in time, I couldn't been no more
12 than 10 or 15 feet.

13 Q All right. Behind her?

14 A Correct.

15 Q Do you have any idea what caused her to swerve to the
16 left?

17 A I had heard that what she had told the police officer
18 afterwards: that she had dropped her cell phone and she
19 was fumbling for it. Now, like I -- again, I -- that's
20 what I had heard. I don't know for sure.

21 Q Okay. Do you perceive this collision to have been
22 your fault?

23 A No. Absolutely not.

24 Q Did the alcohol have anything to do with your reaction
25 time or anything?

1 A No, sir. I -- it wouldn't have mattered. When she --
2 when she decided to turn left, there was -- was nothing no
3 one could do.

4 Q When she went left, did she actually go off onto the
5 -- was there a shoulder or a marker line there that she
6 crossed?

7 A There's a solid-yellow line there. I -- where she
8 wind up parking at, I don't know. But she was not over
9 there -- she was not on the other side of the yellow line
10 when I hit her because there's nothing over there but
11 grass. And obviously, I'm not going to ride a motorcycle
12 into the ---

13 Q Okay.

14 A --- off the road. I mean, at that speed I was just --
15 there's no way I'm going to run off the road.

16 Q Were you decelerating when you came off the ramp?

17 A Oh, of course. I'd -- I'd -- I'd letting up off the
18 throttle.

19 Q When the -- when the motorcycle hit her -- when she
20 turned in front of you to the left and the motorcycle hit
21 her in the rear end of her vehicle, what happened to you?

22 A At that point in time, I honestly could not say.

23 Q You woke up in the hospital?

24 A I woke up in the hospital.

25 Q Hurt pretty bad?

1 A Yes, sir.

2 Q Have you been able to work since?

3 A No, sir.

4 Q Now, Mike, have these people paid you like they were
5 supposed to?

6 A No, sir. It has been -- it -- it has been one
7 headache after another with these people.

8 Q Have you been able to communicate with them on the
9 telephone?

10 A No, sir.

11 Q What happens when you try to communicate with them?

12 A Basically, you're told that your policy is under
13 review. And that's about the only answer you'll get.

14 Q All right. Now, have there been times when you've
15 sent claim forms in and had to wait for, say, months?

16 A Yes, sir.

17 Q How has that impacted the ability of your family to
18 function?

19 A Well, it puts a lot of stress on my wife for sure. I
20 mean, that's -- I think that goes without saying. It -- it
21 has definitely bothered her.

22 Q How about you?

23 A Oh, I mean, it bothers me too, obviously. I mean, I

24 ---

25 Q Has it created financial difficulties for you?

1 A Yes, sir, it has.

2 Q Explain what happens when they haven't paid you on
3 time like they're supposed to.

4 A I'm not sure I understand the question.

5 Q Well, how -- how has it -- has it made you late on any
6 payments?

7 A You would have to ask my wife that. I'd -- I don't
8 make the payments. I married a CPA, so my hands were
9 chopped out of that jar a long time ago.

10 Q Okay. The -- when the -- when this -- when this
11 insurance coverage was originally sold to you, did you call
12 the insurance company or were you solicited by the
13 Pennsylvania Life Insurance Company agent to buy it?

14 A The agent had seen me on a job site and had stopped
15 and talked to me.

16 Q All right. So they solicited you?

17 A Correct.

18 Q And did -- what were -- what did the man tell you
19 about the coverages that you would have?

20 A Basically, he told me that at that time, the original
21 policy was for the 2,000. He said that as long as I was
22 hurt or disabled to the point I could not work, that that
23 policy would pay every month until I turn 65.

24 Q Did you believe him?

25 A Yes, sir. I had no reason not to.

1 Q Did you fill out the application?

2 A I did.

3 Q And did he give you those documents that you referred
4 to as the "policy"?

5 A Yes, sir. In the folder.

6 Q Now, those worksheets, did you ever actually see
7 those, or do -- do -- do you know?

8 A In the original policy, I did -- me and my -- I --
9 what I refer to as the "policy" in that folder -- me and my
10 wife read through that one extensively before we decided to
11 buy it. I mean, my wife is so particular about that,
12 especially with having to give up our bank account
13 information because they would not let you make a monthly
14 payment by mailing them a check. They had to direct-draft
15 it. My wife called the Better Business Bureau and
16 everything to make sure that everything was legit.

17 Q Now, those are -- that's the application you're
18 talking about?

19 A Correct.

20 Q All right. Now, I'm talking about those -- those
21 worksheets that -- that the agent filled out. Do you know
22 if -- if you -- if you even paid any attention to those?

23 A Oh, no, sir. If it was something he filled out, I
24 wouldn't have.

25 Q All right. And the documents that he gave you, the --

1 both the -- the two exhibits, the 2000 policy and the 2002
2 policy, that's what you were given and were told was your
3 policy?

4 A Correct.

5 Q And did you rely upon that?

6 A Yes.

7 Q When is the first time you learned that there was
8 something called a "policy" that you had never been given?

9 A At mediation.

10 Q All right. And that was only a few months ago?

11 A Correct.

12 Q As a matter of fact, do you even know when the first
13 time the Pennsylvania Life Insurance Company ever produced
14 what it claimed to be the policy?

15 A No, sir. I have no idea. As I said, I've not seen
16 one to this day.

17 Q All right. So you -- you -- if, in 1999, when you
18 bought -- bought that first policy, you'd been told there
19 was an alcohol exclusion, would you have bought it?

20 A No, sir, I would not have.

21 Q Why not?

22 A Because a disability policy with exclusions isn't --
23 it, as far as I'm concerned, isn't worth the paper it's
24 written on.

25 Q All right. Now, you came back -- and I believe that's

1 when Mr. Gill came and sold you the additional coverage; is
2 that right?

3 A Correct.

4 Q And did he also give you what he told you was the
5 policy?

6 A Yes, sir.

7 Q And that's what's been introduced already into
8 evidence. That's what you understood the policy to be,
9 correct?

10 A Correct.

11 Q Neither of those folders that you were given that you
12 were told policy contained any exclusion, did they?

13 A No, sir.

14 Q The documents that you were given that you were told
15 were actually the policy, who gave you those?

16 A That would've been John Rothmitch and Gill.

17 Q The agents?

18 A Correct.

19 Q All right. And you heard the gentleman refer about
20 those other two sheets as simply "worksheets," and you
21 agree that's all they were?

22 A Yes, sir.

23 Q Is -- was it your understanding they were not part of
24 the actual policy?

25 A Yes, sir.

1 Q They were not part of the policy?

2 A Correct.

3 Q Did you know that there was more policy out there that
4 you could ask for and get if you wanted it?

5 A No, sir.

6 Q There's been a question about why you didn't call and
7 ask the company to send you the policy. Why didn't you
8 call and ask the company to send you the policy?

9 A Because I thought I had the policy. Why would I call
10 for an extra of something I already had.

11 Q So you thought what you had was the policy?

12 A Yes, sir. Why else give it to me? If it's not the
13 policy, what's the purpose of -- in me even having it?

14 Q And every month they were deducting money out of your
15 bank account?

16 A Yes, sir.

17 Q Are you still paying premiums on this policy?

18 A Yes, sir.

19 Q And it was in 2002 that the policy was increased to
20 \$2500 a month?

21 A Correct.

22 Q And they have paid you current through today; is that
23 right?

24 A Yes, sir.

25 Q But they have been late on some occasions or many

1 occasions?

2 A Many.

3 Q All right. What's the longest you recall them ever
4 going without paying you the benefits to which you were
5 entitled?

6 A I believe it was a little over five months, if I
7 remember correctly.

8 Q All right. And when those five months occurred, had
9 your wife done what she was supposed to do, as far as
10 making claims?

11 A Yes, sir.

12 Q The doctor had filled it out?

13 A Yes, sir.

14 Q Was there ever any explanation given to you as to why
15 they kept your money for so long?

16 A No, sir. It -- back then when I would call, the only
17 explanation I would get is that: "Your policy is under
18 review."

19 Q Were you given a letter -- a reservation-of-rights
20 letter, which mentioned an alcohol exclusion?

21 A No, sir.

22 Q You don't recall them sending you a letter, telling
23 you that they were reviewing it, reserving it because of a
24 potential exclusion?

25 A I remember receiving the letter. And I remember my

1 wife telling me about it. I don't know that I ever -- that
2 I actually ever read the letter myself.

3 Q All right. Were you intensive care for any period of
4 time, Mike?

5 A Yes, sir.

6 Q How long did they actually have you in intensive care
7 in the hospital?

8 A I don't remember the exact days or the exact -- how
9 many days I was in the intensive care. The -- prior to the
10 accident, the ambulance took me to Lexington County
11 Hospital. And unfortunately, the doctor who was -- who was
12 certified to be able to do the type of surgery that I
13 needed ---

14 Q Right.

15 A --- was on vacation. So they had to transfer me over
16 to Richland. And there I set in traction in just an
17 unbelievable amount of pain for several days, because they
18 had to -- they had to allow for the swelling to go down
19 before the surgery. I do not remember the exact amount of
20 days.

21 Q Were you in the hospital for more than seven days?

22 A Yes, sir.

23 Q Were you able physically to make a claim within seven
24 days due to your hospitalization?

25 A No, sir. Absolutely not.

1 Q And who did you have handling your business for you
2 during that period of time while you were in the hospital?

3 A My wife was.

4 Q How long did you actually stay in the hospital or the
5 convalescent center before you got to go home?

6 A I'm -- I think it was a little over three weeks. But
7 I really -- I -- I -- the exact amount of days, I really
8 just -- I do not remember. It was a long time. I do
9 remember that.

10 Q How long was it after you made a request for your
11 disability till the payments actually started?

12 A I -- I -- if I remember correctly, it was -- it was
13 about a two-month span before the first check got there.

14 Q And you've told us that they have often been late in
15 making the payments you're entitled to, correct?

16 A Yes, sir.

17 Q How many times have they ever been late drafting your
18 account to take your money to pay for this policy?

19 A Not the first time. They've never skipped a day.

20 Q Do you also have a cancer policy with the Pennsylvania
21 Life Insurance Company?

22 A I do.

23 Q Have you ever been given a copy of that policy?

24 A No, sir, I have not.

25 Q What have you been given for the cancer policy?

1 A Me and my wife discussed that. And to both of our
2 recollection, all we have is a single piece of paper. And
3 I was going to bring that up, but I actually think it got
4 put into a 2002 folder that got presented into evidence.
5 So we don't actually have access to it.

6 Q All right. The document which -- that big, thick
7 document, which we've talked about as what they claim to be
8 the policy, at any time before you got hurt, did you ever
9 see that document?

10 A No, sir, I ---

11 Q Was it ---

12 A --- have not.

13 Q --- ever delivered to you?

14 A No, sir.

15 Q Ever mailed to you?

16 A No.

17 Q Now, let's talk about the -- the wreck. Were you
18 charged with driving under the influence?

19 A I was.

20 Q Were you convicted of driving under the influence?

21 A No, sir.

22 Q Did you plead guilty to reckless driving, or was the
23 charge just -- just dismissed?

24 A I don't believe there was a reckless driving. I was
25 charged with driving with a expired license.

1 Q And your -- your license had expired?

2 A Correct.

3 Q Was it ever suspended?

4 A No, sir.

5 Q It just had run out and you just hadn't renewed it? A
6 Correct.

7 Q Were you convicted of the driving-under-the-influence
8 charge?

9 A No, sir.

10 Q And I believe the transcript of those proceedings is
11 in evidence; is that correct?

12 A I believe so.

13 Q After the accident, were you provided any type of
14 assistance by medical personnel?

15 A I don't -- I don't -- I don't think I understand ---

16 Q Did the ---

17 A --- the question.

18 Q You were taken to the hospital by ambulance?

19 A Yes, sir.

20 Q Did they put substances in you? Did they have IVs and
21 that sort of stuff ---

22 A Oh ---

23 Q --- going ---

24 A --- yes, sir.

25 Q You have any idea what sort of substances were placed

1 in your body on your way to or prior to the -- at -- or --
2 or -- or at the hospital?

3 A No, sir. I have no idea what they were.

4 Q Now, a -- a man came to your house sometime in about
5 November of 2009 to talk to you?

6 A Yes, sir.

7 Q Was he representing the Pennsylvania Life Insurance
8 Company?

9 A Yes, sir.

10 Q What did he want to do? Did he want to give you a sum
11 of money for you to go away?

12 A That was one of the things that he had mentioned while
13 he was there. Yes.

14 Q All right. Following his -- were -- were you willing
15 to do that?

16 A Yes, sir, I was.

17 Q All right. Following his visit, did you begin having
18 more difficulties with the Pennsylvania Life Insurance
19 Company?

20 A Yes, sir. That is when we really had issues with
21 them.

22 Q All right. Explain those issues that you had after
23 the man from Pennsylvania Life Insurance Company came to
24 visit you at your house.

25 A Before that we were just having issues getting it on

1 time every month. You know, it would just be a couple -- a
2 week or two late. After he visited, they started skipping
3 months at a time.

4 Q Do you feel like they were trying to put pressure on
5 you to get you to take a lump sum and go away?

6 MR. KRISTINIK: Objection, Your Honor: leading
7 question.

8 THE COURT: Rephrase your question. Sustained as to

9 ---

10 A Actually ---

11 THE COURT: --- leading.

12 A --- I never could ---

13 THE COURT: Well ---

14 A --- I ---

15 Q That's all right. Don't answer that question. That's
16 all right.

17 After that man visited you in November of 2009, how
18 bad did the problems escalate?

19 A It got extremely bad. I mean, like I said, they had
20 gotten to where they was skipping up to as many as five
21 months at a time.

22 (Whereupon, Mr. Moore and Mr. Riley conferred.)

23 Q Mike, after the accident -- after the motorcycle
24 wreck, did the other driver move her car?

25 A I have no way of knowing that.

1 Q All right. You just don't recall?

2 A I'm not sure I was conscious.

3 Q Okay. Very fine. Thank you.

4 MR. MOORE: Your Honor, we have no further questions.

5 THE COURT: All right. I want -- I want to take a
6 brief break, and then I'll allow Mr. Kristinik to cross-
7 examine. So we'll stand at ease for about ten minutes.

8 (Off the record from 10:40 a.m. until 10:58 a.m.)

9 THE COURT: All right. We ready? Mr. Kristinik, you
10 ready?

11 MR. KRISTINIK: Yes, Your Honor.

12 THE COURT: Your witness.

13 (Off the record briefly.)

14 MR. KRISTINIK: Your Honor, one housekeeping matter:
15 We do not have the original deposition transcripts for the
16 reasons that we've all discussed earlier today. I do have
17 a clean copy of Mr. Russell's deposition. I don't know if
18 I'll have to use it. But ---

19 THE COURT: Okay.

20 MR. KRISTINIK: --- I just wanted to let opposing
21 counsel and the Court know.

22 THE COURT: Well, this being a bench trial, we can --
23 we'll -- we'll relax the rules as the original deposition.
24 It may be here this afternoon.

25 MR. KRISTINIK: Thank you, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. KRISTINIK:

3 Q Good morning, Mr. Russell.

4 A Good morning.

5 Q If at any time you need to take a break, if -- if
6 you're not good at sitting too long, just say; we will --
7 we'll take a break; we'll do whatever we need to, to
8 accommodate you to make sure that you're not uncomfortable.
9 I do have a few questions for you.

10 You know, one thing that you said on your direct when
11 you were talking with Mr. Moore was that you would not have
12 bought this policy if you had known there was an exclusion,
13 right?

14 A Correct.

15 Q Okay. But it's true that if you had not bought this
16 policy back in 1999, then you would not have received over
17 \$135,000 in benefit payments, right?

18 A Correct.

19 Q Okay. I want to talk with you for a moment about, you
20 know, the -- the quickness of payments. And I don't want
21 to go through -- through a ton of them. But I just want to
22 go through the very beginning, because that's what you
23 talked about on direct. So I want to cover some of the
24 payments in the very beginning. For the record, I've got
25 Defendant's Exhibit No. 15. And the original claim form,

1 is this your signature on this original form there at the
2 bottom?

3 A Yes.

4 Q Okay. And this is dated August 27th, 2008; is that
5 right?

6 A 8/27/08, correct.

7 Q Okay. August 27, 2008. Then, let's flip a little
8 further back to the check -- the first check sent to you,
9 Bates page 5 of this exhibit. And the date on this check
10 is September 22nd, 2008. So that's a little bit less than
11 a month, right?

12 A Would appear to be.

13 Q Okay. And -- and would you agree that that was
14 sufficiently speedy for them to receive your original claim
15 form and evaluate your claim and then mail you the check?

16 A Yes.

17 Q Okay. Let's look at a couple more. Here's your next
18 claim form dated October 3rd, 2008, Bates page 6. October
19 3rd, 2008 -- and we have a check dated October 9th, 2008,
20 page No. 9. You -- would you agree that that -- that was
21 pretty fast response to that claim form?

22 A Appeared to be.

23 Q Okay. Let's just look at one more. This claim form's
24 dated November 3rd, 2008, Bates page 10, correct?

25 A Yes.

1 Q Okay. So November 3rd is the date on the claim form.
2 And if we turn to the check -- it's at Bates page 13 --
3 it's dated November 14th, 2008. You would agree that was a
4 pretty fast turnaround?

5 A Yes.

6 Q Okay. And I know you take the position that there
7 were payments that were late. And I'm not going to go
8 through all of these to -- to address that. We're not
9 going to use the court time for that at this moment.

10 Now, you testified on direct that the agent didn't say
11 anything to you about -- well, you said that the agent said
12 that if you're disabled, then the policy would pay, right?

13 A Correct.

14 Q Okay. Did -- did the agent give you any indication
15 that there was an exclusion? Did he call it a "limitation"
16 or something else?

17 A No, sir.

18 Q So he didn't use the word "exclusion" with you?

19 A No, sir.

20 Q Okay. So is it correct, then, that the agent didn't
21 tell you whether there was an exclusion or not an exclusion
22 in the policy?

23 A That would be correct.

24 Q He just didn't say anything about exclusions?

25 A Correct.

1 Q And that's true for both agents, Mr. Rothmitch and Mr.
2 Gill?

3 A Correct.

4 Q Okay. So it's correct, then, that at no time did
5 either one of these agents tell you that there would not be
6 exclusions in the policy; is that correct?

7 A Correct.

8 Q Okay. All right. You bought your first disability
9 policy back in 1999?

10 A Correct.

11 Q Okay. And that was 2,000 in coverage per month,
12 right?

13 A Correct.

14 Q Okay. Is it correct, you don't remember asking the
15 agent anything specific when buying the policy; you just
16 remember telling him that you wanted a disability policy?

17 A Actually, there was one question that I'd asked him.
18 And that referred to if I -- owning my own construction
19 company, I had wondered if I would be able -- if it covered
20 me, per se, in actual physical working or if I would be
21 able to keep my business going as well.

22 Q Okay. So you remember asking that question?

23 A That -- that was a particular question that I had
24 asked.

25 Q Okay.

1 A Yes.

2 Q Do you remember anything else that you asked either
3 one of these agents?

4 A No, sir.

5 Q Okay. So that includes the 1999 time and the 2002
6 times that you met with the agent? That's the only
7 question you remember asking them?

8 A Yes.

9 Q Okay. All right. In 2002 that's when you bought the
10 additional \$500 per month in coverage, right?

11 A Correct.

12 Q Okay. And that was with Mr. Gill, correct?

13 A Correct.

14 Q Okay. In 2002 all you wanted to do was just add the
15 \$500 in coverage; you weren't trying to change any other
16 terms of the policy you had originally purchased in 1999?

17 A Correct.

18 Q Okay. Is it -- would you agree that you're unaware of
19 anything that agent Randy Gill did incorrectly?

20 A That would be correct.

21 Q Okay. Sitting here today, you can't think of anything
22 that -- from your perspective, that Mr. Gill did wrong?

23 A I -- other than giving me a copy of the policy, I
24 suppose now would be the only thing I could think of. But
25 no.

1 Q Okay.

2 A Then I wasn't aware of anything that he done wrong.

3 Q Okay. Now, with your disability policy, your
4 disability coverage, you also purchased life insurance
5 coverage, right?

6 A I was -- with that same policy, I -- I would have to
7 go back and look at it. I had -- I had tried to -- I have
8 a life insurance policy that I carry on myself through
9 another insurer. I had tried to add a life insurance
10 policy to that or through Pennsylvania Life several years
11 ago and was rejected.

12 Q Well, let's take a look at your application. This is
13 marked as Defendant's Exhibit No. 9. It's your application
14 for the 1999 policy. And let me hand this to you, and --
15 and take a look at the signature on page 4, and please
16 confirm that that's your application and your signature.

17 A You said page 4?

18 Q Yes, sir.

19 A Yeah. That's my signature.

20 Q Okay. All right. So this is your 1999 application,
21 right?

22 A It would appear to be. Yes.

23 Q Okay. If you'll hand that back to me.

24 A (Complied.)

25 Q Let's -- first, let's talk about life insurance. Here

1 it says "accidental death" on page 2 of this exhibit. And
2 it's checked, and it's indicated that there's going to be a
3 premium; and then, a death-benefit amount of \$25,000; is
4 that right?

5 A That's correct.

6 Q Okay. Does that refresh your recollection that when
7 you first bought the policy in 1999, that you had asked for
8 \$25,000 of accidental-death coverage as well?

9 A Apparently, I did.

10 Q Okay. Let's look down at the bottom-left-hand corner
11 of page 2 of Exhibit No. 9, the application. It had a
12 waiver of premium, right, and the box is not checked. Did
13 I read that correctly?

14 A Yeah. But it also says "yes." It doesn't say you
15 have to check the box.

16 Q Did you buy a waiver of premium?

17 A Not that I was aware of. No.

18 Q Okay. And you didn't -- it doesn't indicate any
19 premium ---

20 A No, it ---

21 Q --- for that ---

22 A --- does not.

23 Q --- does it?

24 Okay. Would you agree that you've never bought
25 waiver-of-premium benefit with your disability policy with

1 ---

2 A That's correct.

3 Q Okay. Let me show you what's been marked as
4 Defendant's Exhibit No. 11. And this is another
5 application. If you could review that; make sure that that
6 is your application for your 2002 increase in coverage and
7 that your signature appears on page 4.

8 A Yes.

9 Q That is your signature?

10 A Yes.

11 Q Okay. And you would agree that this is your --
12 appears to be your application for the ---

13 A It appears to ---

14 Q --- 2002 ---

15 A --- be. Yes.

16 Q Okay. And let's take a look. And looks here that --
17 if you look on page 2, you can see the increase in \$500 a
18 month for disability coverage, right?

19 A Correct.

20 Q Okay. If we go down to the middle of the page next to
21 "accidental death," it looks like you're adding an
22 additional \$75,000 of coverage, correct?

23 A Correct.

24 Q Okay. So now you've got a policy with \$100,000 of
25 accidental-death coverage, correct?

1 A Correct.

2 Q Okay. And you pay a premium for that accidental-death
3 coverage ---

4 A Correct.

5 Q --- right?

6 Okay. And again, down here at the bottom-left-hand
7 side of page 2 under "waiver of premium," there's a box but
8 there's no check mark in it, correct?

9 A Correct.

10 Q Okay. Let me show you what's been marked as Exhibit
11 No. 13. It's entitled "Change of Benefits Agreement." Do
12 you -- do you recall this form -- executing this form or
13 talking with an -- with anyone at Penn Life or an agent
14 about this form?

15 A Yes.

16 Q Okay. And was the purpose of this to drop the return-
17 of-premium benefit so you wouldn't have to pay for it
18 anymore?

19 A Correct.

20 Q Okay. Thank you. Well, let me show what's been
21 marked as Defendant's Exhibit No. 4. It's entitled
22 "Affidavit of Mike Russell." So let me go ahead and hand
23 that to you. If you would take a look at that and turn to
24 the last page, page 6, the signature page, and confirm that
25 that is your affidavit and that you have, in fact, signed

1 that affidavit. Well, I would start from the beginning and
2 go to page 6. Those are the ---

3 A Oh, I ---

4 Q --- attached ---

5 A --- thought you said go to the last page and see my
6 signature.

7 Q I'm sorry. Go to page 6 of the affidavit, the last
8 page of that.

9 A Yes.

10 Q And that is your signature?

11 A Appears to be.

12 Q Okay. And it says, over here: "Sworn to, subscribed
13 . . ." -- and it's notarized. When you were signing this
14 affidavit, was it your understanding that you're required
15 to make only true statements in it?

16 A Yes.

17 Q And to the best of your ability, were you trying to be
18 accurate and tell the truth in this affidavit?

19 A Yes.

20 Q Okay. Okay. There's some pages attached to the
21 affidavit, right?

22 A They appear to be.

23 Q Okay. And you can feel free to flip through, though,
24 because my question to you is -- or, you know, did you
25 intend for those pages to be attached to the affidavit?

1 A Did I intend for them to be attached?

2 Q Yes. You signed the affidavit, right?

3 A I don't understand the question.

4 Q There's pages attached to the affidavits as Exhibits 1
5 and 2?

6 A Yes.

7 Q Okay. And you wanted to attach those pages to your
8 affidavit? They're supposed to be a part of it?

9 A This is the first time I've ever had to deal with
10 anything like this. How am I supposed to know if they're
11 supposed to be part of it?

12 Q I'll move on to my next question.

13 A Okay.

14 Q Look at Paragraphs 13 and 14. Let's flip to those.
15 Let's flip back a page. I'm going to come around here with
16 you. Paragraph 13 says: "I completed the application on
17 June 27, 2002. My application is attached as Exhibit 2.
18 Again, I did not receive a copy of the policy. The
19 documents I received as Exhibit 2 were the only documents I
20 received from my agent."

21 Okay. That's what your affidavit says, right?

22 A That's correct.

23 Q Okay. And let's go to Exhibit 2. And these are
24 attached documents. Okay. So you would agree that the
25 documents attached as Exhibit 2 are documents you received

1 from your agent in 2002, and that would've been Randy Gill?

2 A Correct. The documents I received are in that -- are
3 in the folders. I don't know what this is.

4 Q This is your affidavit. This is what I received from
5 your lawyer.

6 A Okay. So this is copies of what was in the folders.

7 Q I want you to take a look at this document that --
8 marked with a green tab for purposes of convenience.

9 A Okay.

10 Q It's entitled "Definitions, Exceptions, and
11 Limitations" at the top. If you'll look down at the
12 bottom, it's been filed out and has the name Randy Gill at
13 the bottom. Okay. Is this a document that Mr. Gill gave
14 you back in 2002?

15 A I'm -- I have never seen this particular form until we
16 was at the deposition.

17 Q Okay. But you say in your affidavit, Paragraph 14,
18 that these documents attached, Exhibit 2, were provided to
19 you by the agent in 2002.

20 A Correct.

21 Q And if that's correct, then you would've received this
22 document entitled "Definitions, Exceptions, and
23 Limitations" from Mr. Gill, correct?

24 A In 2002.

25 Q Correct. Okay.

1 A Correct.

2 Q So you agree you received this document in 2002 from
3 Mr. Gill?

4 A Yes.

5 Q Okay. And that's the document entitled "Definitions,
6 Exceptions, and Limitations," right?

7 A Correct.

8 Q And it has the word "receipt" down in the middle of
9 the page?

10 A Correct.

11 Q All right. If we take a look at the heading over
12 here, there's a heading that says "Exception and
13 Limitations," correct?

14 A Yes.

15 Q And it says: "Your coverage does not cover loss" --
16 and then, it lists a whole bunch of things. And down here
17 at the bottom, it says: "Or from being" -- well, let's see
18 -- "being intoxicated." Did I read that correctly?

19 A It does say that.

20 Q You -- you can read, right?

21 A Yes, I can read.

22 Q Okay. You can read.

23 If you'd taken the time to read this form, you agree
24 that you would've understood that your insurance policy was
25 going to have an intoxication exclusion?

1 MR. MOORE: Objection ---

2 A No.

3 MR. MOORE: --- Your Honor.

4 A I ---

5 MR. MOORE: The testimony has been that that was
6 simply, I believe, the worksheet's what he's reading from.
7 Their -- their witness and he have described that simply as
8 a "worksheet." Now, what's going on is counsel now is
9 saying, "This is part of your policy."

10 MR. KRISTINIK: Is this ---

11 MR. MOORE: Both ---

12 MR. KRISTINIK: --- an objection ---

13 MR. MOORE: Yes.

14 MR. KRISTINIK: --- to my question?

15 MR. MOORE: He's mischaracterizing the -- the
16 testimony. What he's basically trying to do is say, "I can
17 take a worksheet and -- and graft that onto the policy."
18 The man -- both -- both sides have -- have acknowledged
19 that that piece of paper is no more than a worksheet. Now
20 counsel is basically saying, "Oh, well, then, this is part
21 of your policy," which both people have said it's not. So
22 he's mischaracterizing the testimony ---

23 THE COURT: Well ---

24 MR. MOORE: --- as the -- the basis of the objection.

25 THE COURT: --- I think he's described as -- as a

1 "document." He hadn't said "worksheet" or "policy." He
2 said "document." And so I understand your objection. Just
3 recharacterize your question, Mr. Kristinik.

4 MR. KRISTINIK: Okay.

5 Q And just ask the question again. And I -- we'd just
6 point out where this ---

7 A Yes.

8 Q --- language ---

9 A In 2002 I was under the impression that the only thing
10 I was doing was adding \$500 to my policy.

11 Q Okay.

12 A There were not adding or subtracting anything else.
13 They was just adding \$500 to the 2,000 coverage I had had
14 from '99 to -- up to the 2002 when Mr. Gill had phoned me
15 and said that South Carolina had changed the laws; that
16 they was allowed to add more ---

17 Q Uh-huh.

18 A --- from 2,000 to \$2500 a month in disability coverage
19 and asked me if I wanted the \$500 coverage.

20 Q Okay. So my question to you, though, is: Mr. Gill,
21 he provides you with this form. And it says on the form
22 that -- it has a heading for exclusions and limitations.
23 And under that it says that there will not be coverage for
24 being intoxicated. And my question to you, Mr. Russell,
25 is: If you had taken the time to read that form back in

1 2002, would it have been your understanding that your
2 policy had an exclusion for intoxication?

3 A Yeah. That's a fair assumption.

4 Q Okay. I'll take that back from you. Thank you.

5 A But again, that policy was only to add the \$500.
6 That's the -- the original policy had nothing like that in
7 it.

8 Q Okay. Let's me show you what's been marked as Exhibit
9 No. 12. Is this -- this is another copy of the same
10 document you were looking at, entitled "Definitions,
11 Exceptions, and Limitations" with Mr. Gill's name at the
12 bottom?

13 A It appears to be the exact same thing I just looked
14 at.

15 Q Okay. And I just want to put that in the record,
16 that's that's also been marked as Defendant's Exhibit No.
17 12.

18 Okay. Let me show you what's been marked as
19 Defendant's Exhibit No. 2. And this is -- this was the
20 original claim form that you and your wife submitted,
21 correct?

22 A Correct.

23 Q And that's your wife's handwriting and -- really, on
24 the entire form, but with your signature at the bottom?

25 A Correct.

1 Q Okay. Now, in the middle it asks for a description of
2 the accident. So if you go right there, it says:

3 "Describe how it happened." And what's the answer?

4 A A motorcycle accident.

5 Q Okay. And does it say anything about you being
6 charged with any traffic violations?

7 A No.

8 Q Does it say anything about you being charged with DUI?

9 A No.

10 Q Does it say anything about you coming from a -- back
11 from a bar that evening?

12 A No. But again, it doesn't ask for that information
13 either.

14 Q Okay. And nowhere have you indicated on the form that
15 you had been drinking that night?

16 A No.

17 Q Okay.

18 A But again, nowhere on there does it ask, so . . .

19 Q Let me hand this back to you. Take a look at the last
20 page. It's a FedEx transmission. And it's -- it's from a
21 business, Barb Snyder.

22 A Yes.

23 Q Okay. That -- is -- is it your recollection that your
24 wife would've mailed this in for you?

25 A Yes.

1 Q Okay. Look at the next-to-last page of that -- this
2 exhibit. Okay. That's a form called an "FR-10 Notice of
3 Requirement," right, if you'll look at the print up top?

4 A That's what it says.

5 Q Okay. Kind of looks like an accident report. But
6 this isn't an accident report, is it?

7 A It's the only thing I've ever been given at an
8 accident.

9 Q Does -- anywhere on that form, does it mention that
10 you were charged with DUI?

11 A No.

12 Q Does it even mention that you were charged with -- or
13 given a ticket for having an expired license?

14 A No.

15 Q Anywhere on there does it indicate where you were
16 coming from, that you were coming from a bar, or that you
17 had been drinking that night?

18 A No.

19 Q Okay. Thanks.

20 Let me show you what's been marked as Defendant's
21 Exhibit No. 5. This -- let me hand that to you. Now, this
22 is a copy of the collision report for your accident, right?

23 A It appears to be.

24 Q Have you ever seen this before?

25 A I had seen it once during my trial for the DUI.

1 Q Okay. Did you ever provide a copy of this to
2 Pennsylvania Life?

3 A No, I did not.

4 Q If you take a look at the description in the box on
5 the lower-right-hand side, you'll see where it says: "Unit
6 1 driving under the influence." And when it refers to
7 "Unit 1," it's referring to you, correct?

8 A Correct.

9 Q Now I'll take that back. Thanks.

10 Now, you talked about the visit you had from a field
11 adjuster for Pennsylvania Life back in November of 2009.
12 Couple questions about that: Did you speak with him for a
13 while? Did you talk with him for a while, or was it a
14 short visit?

15 A No. I specifically remember it being at least an
16 hour, because I had -- I had just returned from Tennessee
17 from a funeral and he was in the driveway when I pulled in.
18 So I was kind of anxious for him to go. But he just hung
19 around forever, it seemed like.

20 Q Okay. So during those conversations, did you talk
21 about the night of the wreck and tell him that you were
22 coming back from a bar that night?

23 A I honestly don't remember what I told him. That's
24 just been too long ago for me to remember word for word
25 what I had said to someone.

1 Q Do you remember telling him about the fact that you
2 had been drinking or the fact that you had been charged
3 with DUI?

4 A Again, I couldn't say "yes" or "no" to that.

5 Q Okay. Now, you've testified that Penn Life was late
6 in making payments. How many days does Penn Life get to --
7 how many days does it get to have before it has to issue a
8 benefit check to you?

9 A Well, I would expect the same service from them that
10 they get from me.

11 Q Okay. And what is that?

12 A They get their check on the day that they want it or
13 on the day that it's scheduled for them to receive it.

14 Q So what does that mean for you, with respect to
15 benefit payments?

16 A It means if, on the 3rd of every month they take their
17 money, regardless of whether or not I've gotten mine or
18 not, it seems to me that I reasonably could expect -- if
19 the check is due to me on the 15th, then I should very well
20 expect it to be there on -- on or about the 15th.

21 Q Well, what day is the check due to you?

22 A It's earlier in the month.

23 Q Well, what day?

24 A I don't know the exact day.

25 Q Well, how can -- I mean, how do we know if a -- a

1 check is late if we don't know which day serves as the
2 deadline?

3 A My wife handles all of that. You would have to ask
4 her.

5 Q Okay. Does Penn Life, as it -- you would agree it was
6 entitled to proof that you were hurt in the beginning of
7 the claim, right?

8 A Agreed.

9 Q It should get to see medical records, right?

10 A Yes.

11 Q And y'all provided those, and the first check was
12 written, right?

13 A I didn't provide them with the records. They -- I --
14 I mean, I -- I signed the form to release my rights to
15 them. But I didn't provide them with the records. No.

16 Q They went and got the records?

17 A Correct.

18 Q Okay. And then, going forward, Pennsylvania Life --
19 they don't live next door to you; they don't see you each
20 day; so they don't know what your condition is months
21 later; would you agree with that?

22 A No. If they have my medical records, they can see
23 that my condition is not going to change.

24 Q What about a year later? Wouldn't you agree that
25 Pennsylvania a -- Life, a year later, would be entitled to

1 seek your medical records and confirm what your condition
2 is?

3 A Yes.

4 MR. MOORE: Objection, Your Honor, as to them -- him
5 asking for a legal conclusion of what they have a right to
6 do or not to do. Matter of law, I believe.

7 THE COURT: Let's move on to something else. I
8 understand that it's a cumbersome way to keep asking for
9 benefits and going to the doctor. I got it. Go to
10 something else.

11 MR. KRISTINIK: Okay. I'll move on, then.

12 THE COURT: Social security disability doesn't make
13 you do that.

14 MR. KRISTINIK: Okay.

15 Q Is it written anywhere what the deadline is for a
16 payment?

17 A Not that I'm aware of. No.

18 Q Okay. So you're saying that Pennsylvania Life is late
19 in making payments, but you don't know what the deadline is
20 each month and you don't know where it is in writing that
21 there is a due date for these payments?

22 A I guess that would -- I guess that would be correct.
23 They can just pick whichever day of the month they want to
24 mail it, I suppose.

25 Q Now, you testified a little bit earlier today that

1 they missed payments for five months.

2 A Yes. That's the -- why the lawsuit came to -- came to
3 be.

4 Q Which five months was that?

5 A It was from April through -- through August, if I
6 remember correctly. Again, I would have to talk to my
7 wife. That's ---

8 Q What year?

9 A --- not --- 2009.

10 Q 2000 ---

11 A Or -- I'm sorry. 2010, not 2009.

12 Q 2010.

13 You -- so you think maybe April through August of
14 2010, they missed payments?

15 A Well, they've missed so many. I really can't -- I
16 mean, you can pretty much pick a month and it would've been
17 late or missed. I mean, that's just the way it's been.

18 Q When you say "five months," do you mean you actually
19 went five months without receiving a check in your mailbox?
20 That's your testimony today?

21 A Yes.

22 Q Okay. And would you -- would ---

23 A Now ---

24 Q --- one ---

25 A --- let me back -- I would have to confirm that with

1 my wife because, again, I don't -- I don't -- I do not
2 handle the money in my house.

3 Q Okay.

4 A I'm married to a CPA. She handles all of that.

5 Q And your wife deposits the checks into your bank
6 account, right?

7 A Correct.

8 Q Okay. And so if we looked at records of your bank
9 account, we could see exactly how often you received your
10 checks, right?

11 A Correct.

12 Q Okay. The missed payments, you just testified, you
13 thought -- although you're unsure -- started in April of
14 2010. But you sued in February of 2010, right?

15 A That sounds correct.

16 Q Why did you sue in February of 2010?

17 A Because they had missed payments, obviously, in 2009.

18 Q And do you remember what months they missed payments
19 in 2009?

20 A Again, you could probably pick a month. They would've
21 either been late or skipped it.

22 Q Okay.

23 A But no. I do not remember the exact months off the
24 top of my head. Again, you would have to ask my wife.
25 That's her department.

1 Q The one thing you do know is that you have received
2 all your payments; you're totally paid up to date by Penn
3 Life, right?

4 A Up to this point, yes.

5 Q Okay. So when you say "missed a payment," they
6 ultimately did come back and make the payment?

7 A Yes, sir.

8 Q So you have, in fact, received every penny -- penny
9 that you believe you're entitled to?

10 A Correct.

11 Q Now, you said these payments -- late payments from
12 Penn Life caused you some problems; that they caused you to
13 make some of your bill payments late?

14 A That's a question you would have to ask my wife.
15 Again, I don't pay the bills.

16 Q Okay. So you wouldn't know?

17 A No, I ---

18 Q Okay.

19 A --- wouldn't.

20 Q So as you sit here today, you're actually unaware of
21 any adverse financial consequences that you and your wife
22 have experienced due to late payments from Pennsylvania
23 Life?

24 A No. I wouldn't go so far as to say that.

25 Q You sure? Remember what you told me during -- or you

1 remember what you told Ms. Horne during her deposition?

2 A Not off the top of my head. No.

3 Q Let's take a quick look. I'll go to page 28. Well,
4 first of all, let me back up. When you were deposed, you
5 were put under oath, right?

6 A Correct.

7 Q And you swore to tell the truth, right?

8 A To my -- best of my ability. Yes.

9 Q You intended to -- to do so, right, during your
10 deposition?

11 A Correct.

12 Q Okay. So if we go to page 28 and we start at line 13:

13 QUESTION: Did the payments that you received
14 later than you'd like cause problems?

15 ANSWER: Of course.

16 Exactly what problems?

17 ANSWER: It would've made my bills late.

18 QUESTION: Exactly which bills were late?

19 ANSWER: It would've been a combination of all of
20 them.

21 QUESTION: Specifically, which ones?

22 ANSWER: Electric, satellite.

23 QUESTION: Which electric bills were late?

24 ANSWER: I do not know the months off the top of
25 my head.

1 Just a few more lines.

2 QUESTION: Which satellite bills were late?

3 ANSWER: I do not know the months off the top of
4 my head. Again, I do not pay the bills at my
5 house. My wife does.

6 A That's exactly what I said here.

7 Q Next question:

8 Were there any other adverse consequences?

9 ANSWER: Just causing marital problems for me and
10 my wife because money was so tight.

11 QUESTION: Were there any other financial
12 problems?

13 ANSWER: No.

14 That was your testimony during your deposition,
15 correct?

16 A Correct.

17 Q And that was accurate, right?

18 A Yes. For the ---

19 Q And what ---

20 A --- most part.

21 Q --- I just read is, in fact, the situation?

22 A For the most part, it is.

23 Q And here in the courtroom today you have no
24 documentation related to any adverse financial consequences
25 you've suffered related to any late bill payments that you

1 and your wife made?

2 A No, sir. There -- none of that -- none of that was
3 asked for, so we do not have that with us.

4 Q Okay. And you applied for social security disability,
5 right?

6 A Correct.

7 Q And that was denied?

8 A Correct.

9 Q Okay. And do you know why it was denied?

10 A I don't know that I ever heard back from them.

11 Q Okay. And you've not appealed that denial? You've
12 not looked into it any further?

13 A I have not. Basically -- how can I put this? I'm not
14 greedy. I don't need the government's money and my
15 disability policy. If my disability policy paid on time
16 and paid every month, I would not need the government's
17 money.

18 Q Okay.

19 A And that's pretty much the way I look at it.

20 Q All right. You did -- you just -- you just felt you
21 didn't need -- do you know how much it would've been from
22 the government that you were applying for?

23 A No, I do not.

24 Q Okay. All right. You do have health insurance,
25 right?

- 1 A I do.
- 2 Q And that's paying your medical bills?
- 3 A Correct.
- 4 Q Okay. So if you have -- and it's going -- do you know
- 5 -- have any reason to believe that your health insurance
- 6 would not pay for any significant procedures or operations
- 7 or medical bills you're going to have in the future?
- 8 A I would hope not.
- 9 Q Okay. But you're not aware of any reason that ---
- 10 A No, I'm ---
- 11 Q --- you would ---
- 12 A --- not aware ---
- 13 Q --- discontinue ---
- 14 A No.
- 15 Q Okay. All right. Let's talk about the day of the
- 16 accident: June 18th, 2008, right?
- 17 A (Nodded head up and down.)
- 18 Q Okay. You'd been working that day; you got home
- 19 sometime around 4 or 4:30, right?
- 20 A Correct.
- 21 Q Okay.
- 22 A Closer to 4, if I remember correctly.
- 23 Q Okay. You had skipped lunch, but you had had a
- 24 sandwich when you got home?
- 25 A Correct.

1 Q Okay. Then you decided to go for a motorcycle ride,
2 and you rode for about an hour/hour and a half?

3 A Thereabouts.

4 Q Okay.

5 A Again, I don't wear watches, so I don't -- I don't
6 know the exact time.

7 Q These are your best estimates?

8 A Correct.

9 Q Okay. Then you decided to go to Carolina Wings and
10 Rib House; you wanted to have a drink and get something
11 else to eat, right?

12 A That was my intentions. Yes.

13 Q Okay. But you never got anything to eat while you
14 were there?

15 A No, I did not.

16 Q You think you arrived sometime between five and six
17 o'clock, right?

18 A Yeah.

19 Q Okay. When you got there, you started playing the
20 golf game, Golden Tee?

21 A Not immediately. No.

22 Q Okay. Would you say that the vast majority of the
23 time you were there, you were spent -- you spent playing
24 the golf game and -- with J.R., your friend?

25 A Not really, because that game don't take but about 45

1 minutes to play, so no. I mean ---

2 Q Okay.

3 A --- we just kind of stood around and talked.

4 Q Okay. All right. We -- you testified you had three
5 Crown Royal drinks, Crown and Cokes, but you didn't quite
6 finish the third one?

7 A Correct.

8 Q Okay. And let me show you what's been marked as
9 Defendant's Exhibit No. 3. And can you tell us what this
10 is?

11 A Yes. That's a receipt from Carolina Wings and Rib
12 House.

13 Q And you would've received this from the bartender,
14 right?

15 A I would assume so. Yes.

16 Q Okay. It's got a Bud -- bottle of Bud Light at the
17 top, right?

18 A Correct.

19 Q And Crown Royal, which you would've had, right?

20 A Correct.

21 Q And a Southern Comfort; and then, another Crown Royal.
22 And you would've had that Crown Royal as well, right?

23 A Correct.

24 Q Had a Jager drink on it?

25 A Yes.

1 Q Okay. Do you know if that was a shot or some other
2 kind of drink?

3 A From looking at it, I -- no. I couldn't say. It's
4 the same as the Crown Royals are, and it's the same price.
5 So I would assume that it was a drink. But ---

6 Q Uh-huh.

7 A --- again, I can't tell from looking at this.

8 Q Then, there's a second Jager drink?

9 A Correct.

10 Q And then, a third Crown Royal drink, and that also
11 would've been for you?

12 A The Crown, yes.

13 Q Okay. So it's a total of seven drinks, right?

14 A Yes.

15 Q Okay. Did you have any other drinks at that bar that
16 night, other than the three Crown Royal drinks?

17 A No, I did not.

18 Q Okay. That's your testimony under oath?

19 A That is correct.

20 Q Okay. Did you have your first drink right after you
21 arrived at the bar?

22 A Yes.

23 Q Okay. And you had -- did you have your other drinks
24 while you were playing the golf game?

25 A Yes. I mean, it would've coincided with one another.

1 Q Okay. Did you have these drinks over a period of,
2 what, about an hour and a half or two hours?

3 A Well, again ---

4 Q What ---

5 A --- I mean ---

6 Q --- would you ---

7 A --- I would ---

8 Q --- estimate?

9 A --- I would have to say over two hours.

10 Q Okay. You left sometime after eight o'clock, right?

11 A Correct.

12 Q Okay. You were expecting that your wife was going to
13 get home that night sometime between 8 and 8:30?

14 A Yeah. Thereabouts, I would suppose.

15 Q Okay. All right. And when you left, you were
16 planning to drive yourself home on your motorcycle, right?

17 A Correct.

18 Q Okay. And this was not the first time you had ridden
19 a motorcycle; in fact, you'd been riding motorbikes since,
20 what, you were 8 years old?

21 A Pretty much, yes.

22 Q Okay. That you'd consider yourself to be an excellent
23 motorcycle rider?

24 A Yes, I do.

25 Q Okay. You've never had a wreck on the road while

1 riding a motorcycle; is that right?

2 A No, I haven't, other than this one, obviously.

3 Q Right. Obviously.

4 You'd owned your Harley-Davidson -- at the time of the
5 wreck, you had already owned it for two or three years; is
6 that right?

7 A Sounds correct.

8 Q Okay. So you were very familiar with how it operated?

9 A Yes.

10 Q Okay. And before the wreck, your Harley-Davidson, it
11 was in good condition; everything was in good working
12 order; is that right?

13 A Yes. There was nothing wrong with the machine.

14 Q Okay. There was nothing about your Harley-Davidson
15 that malfunctioned that night?

16 A No.

17 Q Okay. When you were leaving Carolina Wings, your plan
18 was to go straight home, right?

19 A Yes.

20 Q Okay. And you chose to take the interstate home?

21 A Correct.

22 Q Okay. So Carolina Wings is located on Augusta Road.
23 So you got on Augusta road and then took an exit ramp onto
24 I-26?

25 A Not immediately. No..

1 Q Where did you go before I-26?

2 A I had just circled down -- I had went -- I had
3 actually turned right on Augusta Road and had rode further
4 into downtown Columbia -- not actually into downtown
5 Columbia. But I just kind of circled around in there. I'd
6 rode through that area for ten or fifteen minutes before I
7 had gotten on the interstate.

8 Q Okay.

9 A I wasn't in a big hurry to go home, so I was just
10 riding.

11 Q All right.

12 A Didn't really have a plotted course. It's just if I
13 felt like turning there, I turned.

14 Q Okay. So that would mean that -- how long was it from
15 the time you had your last drink till the time you walked
16 out of the bar?

17 A Oh, that would've happened within five minutes.

18 Q Okay. Maybe five minutes there. And then, another 15
19 minutes of riding around before you even got on the
20 interstate, right?

21 A Correct.

22 Q Okay. And then, you got on the interstate I-26,
23 correct?

24 A Correct.

25 Q Okay. And you drove down to your exit, the exit you

1 needed to take?

2 A 115.

3 Q About how many minutes do you think you were on I-26
4 from where you got on to where you -- Exit 115?

5 A Two. I mean ---

6 Q Okay.

7 A --- it's only three miles that separates the exits, so
8 ---

9 Q Okay. So we're talking at least 20 minutes from the
10 time of your last drink to the time you arrived at Exit
11 115?

12 A That sounds right.

13 Q Okay. Now, Exit 115, you're familiar with that exit,
14 right?

15 A Yes.

16 Q Okay. You've taken that exit probably five times a
17 week, every week, for 20 years?

18 A Thereabouts. Yes.

19 Q Okay. So you've taken Exit No. 115 thousands of
20 times?

21 A Yes.

22 Q Okay. You believe that exit ramp to be safe?

23 A Yes.

24 Q Okay. You're not aware of anything unusual about that
25 exit ramp?

1 A None that I'm aware of.

2 Q You're not aware of any -- anything improper about the
3 construction of that exit ramp?

4 A No.

5 Q Okay. Now, when you got on the exit ramp, you got to
6 the point where the first curve starts going to the right.
7 And that's where you hit the car belonging to Colleen --
8 Connie Collins, right?

9 A Correct.

10 Q Okay. And you hit the back of Ms. Collins' car, not
11 quite in the center, but a little bit to the right of
12 center; is that correct?

13 A Correct.

14 Q Okay. You would agree that her brake lights were on
15 at the time that ---

16 A Yes.

17 Q --- this wreck happened?

18 A (Nodded head up and down.)

19 Q You would agree that you noticed that she applied her
20 brake lights?

21 A Yes.

22 Q Okay. You just didn't have time to get around her,
23 and you ended up running smack into her bumper, right?

24 A Well, time didn't really have anything to do with it.
25 She turned left on an interstate.

1 Q So she's ---

2 A There's nowhere ---

3 Q --- on ---

4 A --- to go over there.

5 Q She's on a curve that's going around to the right?

6 A Correct.

7 Q And you're saying she swerved left?

8 A Correct.

9 Q In front of you?

10 A Correct. Well, she ---

11 Q So ---

12 A --- was always in front of me.

13 Q Is it your testimony that her car was moving at the
14 time you made contact with it?

15 A Yes.

16 Q Just want to make sure I'm understanding the story
17 here, or your version of events. Where was her car when
18 you first made contact with it? Was any part of her car
19 over the line?

20 A When I made contact with it?

21 Q Yes.

22 A If there was any part of her car that had crossed a
23 line, it would've just been -- her driver's-side tires
24 would've just gotten to the line because I -- I -- I mean,
25 by the time -- when I was in the process of making contact

1 with her, I wasn't really concerned with where she was at.
2 I was trying to get around her, because she couldn't make
3 up her mind where she wanted to go.

4 Q Let's take another look at the accident report, marked
5 as Defendant's Exhibit No. 5. Let me hand that to you. If
6 you take a look at the drawing, that's showing --
7 indicating that Ms. Collins' car is off the road. So
8 whoever filled this out was told or believed or saw or
9 whatever that that car was off the road. I mean, is it
10 your position that -- do you have an explanation for where
11 -- how her car could've been off the road if that, in fact,
12 was the case after the accident?

13 A After the accident?

14 Q (Nodded head up and down.)

15 A Well, I'm sure she pulled it off the road so she
16 wasn't obstructing any more traffic.

17 Q Okay. But it's your testimony that you're unaware of
18 anything that happened after you made contact, right?

19 A Correct.

20 Q Okay. So you really don't know what would've happened

21 ---

22 A I ---

23 Q --- after the -- after the collision?

24 A Absolutely not idea.

25 Q Okay. Let me get that back from you. Thank you.

1 All right. The investigating highway patrol officer
2 charged you with driving under the influence, right?

3 A Correct.

4 Q And let me show you what's been marked as Defendant's
5 Exhibit No. 7. Is this a copy of the two tickets that you
6 would've received related to this wreck?

7 A They appear to be.

8 Q Okay. And the one on the left is a ticket charging
9 with driving under the influence, right?

10 A Yes.

11 Q And the other charge is a ticket for an expired
12 motorcycle license, right?

13 A Correct.

14 Q Okay. Thank you. Let me show you what's been marked
15 as Exhibit No. 8. This form is entitled "Advisement of
16 Implied Consent Rights." Was that presented to you at some
17 point in time?

18 A I don't see my signature on it anywhere, so I can't
19 say yes or no to that. I ---

20 Q Okay.

21 A --- don't know. My signature's not on it, so I don't
22 know if I would be ---

23 Q Do ---

24 A --- able to ---

25 Q --- do you remember reading anything with small type

1 like this, you know, with the -- the first bullet starts
2 with: "You're under arrest for driving under influence"?

3 A No, I do not.

4 Q Okay. When did you first understand that you had been
5 charged with driving under the influence?

6 A It would've been after my surgery.

7 Q Do you remember how much after -- how long after?

8 A No. Not an exact day, I do not.

9 Q Do you remember how you were informed?

10 A No. Actually, I don't recall that either.

11 Q Okay. Let's go back to your affidavit marked as
12 Exhibit No. 4. I'm going to flip ahead to page 4,
13 Paragraph 33. You say: "I was charged with DUI after the
14 wreck." And then, page 5, Paragraph -- I just read
15 Paragraph 33 -- Paragraph 34 says: "I was found not guilty
16 of that charge." That's what you said in your affidavit,
17 right?

18 A That's the truth. So yes.

19 Q But at the magistrate's court where your -- where you
20 DUI charge was addressed and where you were present that
21 day -- you were there that day, right?

22 A Correct.

23 Q Okay. Well, you weren't found not guilty; your charge
24 was dismissed because a necessary witness didn't show up;
25 isn't that what happened?

1 A I don't know how they phrased it, whether it was a
2 dismissed or found ---

3 MR. MOORE: Your Honor ---

4 A --- as far as ---

5 MR. MOORE: --- I would ---

6 A --- I was concerned ---

7 MR. MOORE: --- object that it ---

8 A --- I was found ---

9 MR. MOORE: --- calls for a ---

10 A --- not guilty.

11 MR. MOORE: --- legal conclusion. If a charge is
12 dismissed based upon a lack of evidence, that is the same
13 thing as a finding of not guilty. The charge is over;
14 jeopardies apply. It's a not guilty. Apparently, counsel
15 doesn't do any criminal work. But a dismissal and not
16 guilty are the same thing.

17 MR. KRISTINIK: I'm done with my questions. And to
18 respond to Mr. Moore, he can put whatever spin he wants on
19 what's in the record.

20 THE COURT: Okay.

21 MR. MOORE: Double ---

22 THE COURT: As long as ---

23 MR. MOORE: --- jeopardy ---

24 THE COURT: --- it's in the record, I understand what
25 happened. It -- that -- that is not an uncommon incident.

1 that there's a failure to meet the burden of proof or you
2 don't even try it because you can't meet the burden of
3 proof from the outset. I understand. A jury wasn't
4 empaneled?

5 MR. MOORE: Yes, sir.

6 MR. KRISTINIK: Correct.

7 THE COURT: I got it.

8 MR. KRISTINIK: All right. (To the witness) I'll
9 take the exhibit back from you.

10 THE WITNESS: Can we take a break for a minute?

11 MR. KRISTINIK: Oh, yeah, absolutely.

12 THE COURT: All right.

13 THE WITNESS: I'm starting ---

14 MR. KRISTINIK: Your Honor ---

15 THE WITNESS: --- to -- my leg is cramping up on me.

16 THE COURT: All right. We'll stand down for about --
17 till about -- till 12 noon.

18 (Off the record briefly.)

19 Q Mr. Russell, you talked about substances being given
20 you that -- the night of the wreck. You believe something
21 was given to you by medical personnel?

22 A Something would've had to have to make the results
23 come out the way they did.

24 Q And when you talk about results, you're talking about
25 the blood-alcohol level?

1 A Correct.

2 Q Okay. And -- and the 0.232 in particular?

3 A Correct.

4 Q Okay. You don't think that that could've been that
5 high unless you had received something from medical
6 personnel; is that right?

7 A Correct.

8 Q Okay. But you don't know what the something could be,
9 correct?

10 A No idea. No.

11 Q And you have no special training in toxicology or the
12 effects of any substances on people's ETOH levels in their
13 bloodstream?

14 A No.

15 Q Okay.

16 A Don't even know what that is, so . . .

17 Q Okay. Now, June 18th, 2008, that's not the first time
18 that you'd ever had a drink before, right?

19 A No.

20 Q Okay. And back in 2008 you would probably have a
21 drink maybe two or three times a week; is that fair?

22 A Yes, sir, that'd be ---

23 Q Okay.

24 A --- fair to say.

25 Q But you've never been a heavy drinker, right?

1 A No, sir.

2 Q Okay. You would describe yourself as a social
3 drinker? Would that be fair characterization?

4 A I'd -- two or three -- two or three or four nights a
5 week. I don't know if that makes you ---

6 Q Uh-huh.

7 A --- a social drinker ---

8 Q Did ---

9 A --- or not. I don't know what a social drinker is, so
10 ---

11 Q And how many drinks each night when you would have
12 drinks?

13 A Two or three.

14 Q Okay.

15 A Again, at four o'clock the following morning, I was
16 out baking in the Carolina sunshine, so that . . .

17 Q Now, the motorcycle wreck happened on June -- or in
18 June of 2008, as we've discussed. Now, you had actually
19 been injured earlier that year because of something that
20 had happened while you were drinking. Do you recall New
21 Year's Eve earlier that year, when ---

22 A Yes.

23 Q --- you had been -- and you had been drinking that
24 night?

25 A Yes.

1 Q You were wrestling with your wife and you ended up
2 cracking your ribs?

3 A Yes.

4 Q Okay. You would agree that drinking that night had
5 something to do with your injury, right?

6 A No. Me ---

7 Q Well, if ---

8 A --- falling ---

9 Q --- you had no ---

10 A --- had something to do with my injury.

11 Q Well, you had to go to the doctor because of that
12 injury, right?

13 A Yes.

14 Q It wasn't that night, but it was a few days later,
15 right?

16 A Correct. Once I realized it wasn't just a pulled
17 muscle.

18 Q And the doctor you saw was Dr. Terry Nagel?

19 A Dr. Nagel -- that's my -- yes. That's -- that was my
20 family doctor.

21 Q And you told Dr. Nagel that on New Year's Eve, you,
22 quote/unquote, got drunk ---

23 MR. MOORE: Your Honor, I ---

24 Q --- and then ---

25 MR. MOORE: --- with all ---

1 Q --- were messing ---

2 MR. MOORE: --- due respect ---

3 Q --- around when ---

4 MR. MOORE: --- to counsel, I have objected to
5 relevance. There are a lot of people who have gotten drunk
6 on New Year's Eve, probably myself included. And I -- I
7 don't understand where that has any relevance at all to
8 what happened in regard to whether they gave him a policy,
9 whether they sent it to him, whether they delivered to him,
10 what happened on the day in question. The fact that he may
11 have gotten intoxicated on New Year's Eve, I -- I'm at a
12 total loss to understand the relevance.

13 MR. KRISTINIK: Your Honor, evidence of a -- that
14 alcohol does have impairing effects on this witness. In
15 addition, the record I'm reading from, which I'm getting
16 ready to indicate the exhibit number, is a -- is stipulated
17 to be admissible.

18 THE COURT: I understand that. But what's it got to
19 do with this case? It's New Year's Eve. Ten months --
20 when was this, -- September? --

21 MR. MOORE: Yes, sir.

22 THE COURT: I've lost the date.

23 MR. MOORE: I think it was September.

24 MR. KRISTINIK: Yeah. And that was my last question,
25 Your Honor.

1 THE COURT: Okay.

2 MR. KRISTINIK: And for the record, it -- it's Exhibit
3 No. 28.

4 THE COURT: All right. I mean, it -- it's in the
5 record. I trust y'all want me to review the entire record.
6 All right.

7 MR. MOORE: Yes, Your Honor.

8 MR. KRISTINIK: Yes, Your Honor. No further
9 questions, Your Honor.

10 MR. MOORE: I don't have any further questions, Your
11 Honor. That's our case.

12 THE COURT: Good. You can step down.

13 THE WITNESS: Thank you, sir.

14 (Whereupon, the witness exited the witness stand.)

15 (Off the record from 11:55 a.m. until 1:38 p.m.)

16 MR. KRISTINIK: Your Honor, just whenever you're ready
17 to begin.

18 THE COURT: Ready to go.

19 MR. KRISTINIK: It's our understanding that the
20 plaintiff has rested their case-in-chief. Under Rule
21 41(b), we can file a motion for nonsuit. We've prepared
22 something in -- in writing that just very summarily states
23 our grounds. And if I may approach the bench and present
24 it to you?

25 THE COURT: Certainly.

1 MR. KRISTINIK: We will have one of these filed with
2 the clerk of court's office in Lexington and pay the
3 appropriate tribute of \$25. I -- I know that under the
4 rules, Your Honor has the discretion to -- to decline to
5 rule on it and to hear the rest of the evidence. But we --
6 we wanted to make sure that we had these grounds in the
7 record in writing.

8 THE COURT: All right. And so for purposes of the
9 record, the motion you've filed for nonsuit, all the
10 appropriate grounds are now at the time in the Court, and
11 we'll defer ruling on them. We'll go ahead and get the
12 testimony done. But for purpose of your record, you're in.

13 MR. KRISTINIK: Very good, Your Honor. Thank you.
14 The defense will now proceed with its case-in-chief, if
15 you're ready.

16 THE COURT: Yes, sir. Go ahead.

17 MS. HORNE: Your Honor, we'd like to call Trooper
18 Gerald Rothell to the stand.

19 (Whereupon, the witness came forward.)

20 (Off the record briefly.)

21 GERALD ROTHELL, having been first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MS. HORNE:

25 Q Thanks for coming this afternoon, Trooper Rothell.

1 How long have you been with the highway patrol?

2 A Since April -- I believe it was the 7th -- 1991.

3 Q Have you served with the military?

4 A Yes, ma'am.

5 Q How long and in what service?

6 A I spent three years on active duty with the U.S. Army;
7 served as a military police officer.

8 Q What was your first job in law enforcement?

9 A Military police officer.

10 Q And then what?

11 A I got off active duty. I spent six or eight months
12 working private security, waiting on applications to come
13 through, through law enforcement, and was then hired by the
14 highway patrol in April of 1991.

15 Q Okay. And what's your current post with the highway
16 patrol?

17 A I'm a corporal with the highway patrol and a shift
18 supervisor. I'm assigned to Lexington County, which is
19 Troop 1, Post C.

20 Q How long have you been in this position?

21 A About two years and three days.

22 Q What are your responsibilities with the highway
23 patrol?

24 A As a shift supervisor, I still go out and patrol; work
25 the road; investigate traffic collisions. As a supervisor,

1 I'm also responsible for the people that are working under
2 me. So I'm charged with the responsibility of making sure
3 that they're doing things properly also.

4 Q Do you investigate collisions and wreck scenes?

5 A Yes, ma'am.

6 Q Have you ever been involved with the DUI team with the
7 highway patrol?

8 A Yes, ma'am. I spent almost two years assigned to the
9 DUI team. I was actually assigned to the DUI team up till
10 when I got promoted two years ago.

11 Q What does the DUI team do?

12 A DUI team was part -- on -- the part that I was on was
13 part of a grant. I worked straight night shift, unless I
14 had court during daytime. And my sole purpose was DUI
15 detection and trying to get impaired drivers off the
16 roadway.

17 Q Were you on the DUI team in the summer of 2009 when
18 this accident happened? 2008. Excuse me.

19 A At the time that this collision occurred, I was still
20 assigned to the road. I was a field training officer for
21 Trooper Harmon.

22 Q What's a field training officer do?

23 A When troopers graduate the academy, they're assigned
24 to a training period, which is general an eight-week
25 period. It's set up into four different phases, and it

1 helps transition the officer where he can take what he
2 learned in the academy and learn to apply it to what he
3 sees on the roadway. It starts off with him basically
4 observing; steps him through into -- basically, baby steps,
5 where he starts interacting some; then a little bit more.

6 And then, the fourth phase, he's pretty much doing it
7 all. That's the final two weeks. And that's the point
8 where I step back, watch, and evaluate, and determine
9 whether or not he's ready to go on his own or needs
10 additional field training.

11 Q During that training phase, if someone that you're
12 training does something that they shouldn't be doing, do
13 you intervene and change the way that the -- the course of
14 that action?

15 A Yes, ma'am.

16 Q Have you had any training specifically directed to the
17 investigation of wreck scenes?

18 A Yes, ma'am. I received training in the military
19 through our vast individual training. And then, again, I
20 received it at the Criminal Justice Academy. And then, in
21 our in-service training periodically, they will provide
22 additional training in that regards.

23 Q How many wrecks do you think you've investigated
24 during your career?

25 A Probably over a thousand, easy.

1 Q What is the purpose of a wreck-scene investigation?

2 A Our purpose is to determine whether or not -- is
3 determine what happened in the collision. Once you
4 determine what happened in the collision, you look at the
5 factors involved; determine if the law has been violated.
6 If it has, then you make the appropriate criminal charge to
7 coincide with that.

8 And then, there's always the report that goes to the
9 insurance companies. And periodically, you'll get calls
10 from the insurance companies, trying to get additional
11 information to resolve the civil issues.

12 Q Is a part of wreck-scene investigation to determine if
13 there's anything unsafe about the roadway?

14 A Yes, ma'am.

15 Q Do you report unsafe conditions that you discover so
16 they can be corrected?

17 A Yes, ma'am. Immediate hazards we'll report directly
18 and have the Department of Transportation come out. If
19 there's something that we perceive that is an engineering
20 problem that needs to be looked at, then we'll refer that
21 through our dispatch and they'll have them come out.

22 For example, I-26 at Exit 119, we kept noticing we had
23 wrecks there when it rained. Once we kind of got a history
24 of it to determine it, DOT actually came out and had to
25 basically level the roadway. It was creating a problem

1 when it rained where people were hitting a puddle and going
2 off.

3 Those types of things, they'll come out and look at
4 later from an engineering standpoint. But immediate
5 hazards with potholes or things of that nature, they'll
6 come out that night and repair.

7 Q Do you recall being called to a wreck scene inviting
8 -- involving Michael Russell on the evening of June 18th,
9 2008?

10 A Yes, ma'am.

11 Q Who notified you of the wreck?

12 A Dispatch.

13 Q Over the radio?

14 A Yes, ma'am.

15 Q I'd like to show you a document that's been marked as
16 Defendant's Exhibit No. 5.

17 (Whereupon, Ms. Horne and Mr. Moore conferred.)

18 Q What's this document?

19 A It's a copy of the TR-310 of the traffic-collision
20 report that was completed by Trooper Harmon and checked by
21 me as a result of the traffic collision involving Mr.
22 Russell and Ms. Collins.

23 Q When was this document prepared?

24 A It would've been completed either that night or within
25 24 to 48 hours of the collision occurring.

1 Q Did you review this document around the time of the
2 wreck?

3 A Yes, ma'am.

4 Q Have you signed it as reviewer at the bottom of the
5 first page?

6 A Yes, ma'am.

7 Q Where did the wreck happen?

8 A Happened on I-26 eastbound exit ramp to US 321 at Mile
9 Marker 115 in Lexington County.

10 Q What was your role when you arrived at the scene?

11 A I was serving as Trooper Harmon's field training
12 officer. He was at the stage where he was doing the
13 interaction with the public. My job was to remain close
14 enough to him to allow him -- to be able to observe what
15 was going on, to hear what was being said, to make sure
16 that he was asking appropriate questions, following up to
17 review the evidence that he was looking at. And then, once
18 he had made a determination that it was proper to allow him
19 to proceed; if not, then try to redirect him to let him see
20 his problem. In this case he came to the same conclusions
21 that I did.

22 Q What did you do when you arrived at the wreck scene?

23 A First thing we did when we pull up is you notice the
24 scene. We saw a vehicle off the left shoulder of the --
25 off the left side of the road between where the ramp goes

1 off and the interstate goes straight. Then, there was a
2 motorcycle in the lane of traffic. For that reason we
3 positioned the vehicle to protect the motorcycle that was
4 in the road to keep from having a secondary collision
5 occur.

6 Q What did you see when you got to the scene?

7 A Saw the motorcycle laying in the roadway in the -- I
8 mean, lane of travel itself. Again, the car was off the
9 left shoulder of the roadway. Because the ramp was
10 breaking to go to the right, there's an area there that's
11 not designed for vehicle traffic.

12 And I call it a gore area, but it's basically the
13 middle of the triangle that the ramp forms. The car was
14 sitting there. And there was debris that was in the
15 roadway and debris that was behind -- directly behind the
16 Hyundai, which was the car parked in the gore area.

17 Q Did the other car have its lights on?

18 A To be honest, at this time I don't recall.

19 Q Where did the motorcycle strike the car?

20 A Struck it in the right rear, right at the edge of the
21 tail light, almost to a sideswipe where it hit it slightly
22 in the right-rear corner of the bumper, but also down the
23 right side slightly.

24 Q Were the motorcycle's lights on when you got there?

25 A No, ma'am. I think all that had been disabled at that

1 point.

2 Q And where was the motorcycle with relationship to the
3 vehicle?

4 A It was slightly behind it and to the right of it.

5 Q Was there anybody else at the scene?

6 A Ms. Collins was at the scene. Mr. Russell had been
7 transported to the hospital at that time. I don't recall
8 specifically if EMS was still on scene or not or if the
9 fire service had come out.

10 Q What did you do to investigate the wreck while you
11 were at the scene?

12 A You're going to speak to any witnesses that are there.
13 In this case we did not identify any witnesses that were
14 independent. We did speak with Ms. Collins and got her
15 statement. We were unable to get Mr. Russell's, but we
16 also observed the evidence in the roadway, being the debris
17 the damage to the vehicle, and any marks that were left by
18 the tires.

19 Q Were there marks left by the tires?

20 A Ms. Collins' vehicle, yes, there was on the right
21 rear. There was a mark that was no more than a couple feet
22 long on the front of the right-rear tire that indicated to
23 us that the right rear of her car had been right at the
24 edge of the white line but on the roadway at the time that
25 the collision occurred. And post impact it had slid, as