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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-26-1665
Appellate Case No. 2015-000680

Emily Carlson and Alice Preyer, ... Petitioners,

v.

John C. Dockery, III, ... Respondent.

In re Emily Cheshire Dockery,

Of whom Emily Carlson and Alice Preyer are the Respondents,

and

Emily Cheshire Dockery is the Appellant.

RECORD ON APPEAL
VOLUME II

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1 STATE OF SOUTH CAROLINA

PROBATE COURT

2 COUNTY OF HORRY

3
4 Emily Carlson and
5 Alice Preyer,

6 Petitioner(s),

7 vs.

CIVIL ACTION NO.
2010-GC-26-0068 & 0069

8 John C. Dockery, III,

9 Respondent(s).

COPY

10 In re: Emily Cheshire Dockery

11
12 HEARING BEFORE
13 THE HONORABLE:

DEIRDRE W. EDMONDS

14 DATE:

Monday, September 16, 2013

15 TIME:

2:18 p.m. through 2:45 p.m.

16 LOCATION:

Horry County Courthouse
Probate Court, Second Floor
Conway, South Carolina

17
18 TAKEN BY:

Attorneys for Respondent(s)

19 COURT REPORTER:

Michele E. Starkey
Certified Shorthand Reporter

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21
22
23
24
25
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22
 23 Also Present: Emily Carlson
 24 Alice Preyer
 John C. Dockery, III
 25 Emily Cheshire Dockery

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1 THE COURT: We are here this afternoon
2 on the matter of Emily Cheshire Dockery,
3 file numbers 2010-GC-26-68 and 69. The
4 matters before the Court today are numerous
5 motions to alter or amend and reconsider
6 filed by Ms. Dockery, who I understand is
7 present.

8 Good afternoon. How are you, ma'am?

9 MS. DOCKERY: I can't hear you.

10 THE COURT: I'm sorry. How are you
11 ma'am?

12 MS. DOCKERY: Fine, thank you. I hope
13 you are.

14 THE COURT: Yes, I am. Thank you.

15 Mr. Brittain, you represent
16 Ms. Dockery?

17 MR. BRITTAIN: Yes, I do, Your Honor.

18 THE COURT: And, Mr. Monckton, you are
19 here representing John Dockery?

20 MR. MONCKTON: Yes, ma'am. He is
21 present in the courtroom as well.

22 THE COURT: Thank you so much. Also
23 present is Jim McCrackin with his clients, the
24 petitioners, Ms. Carlton and Ms. Preyer.

25 MR. MCCRACKIN: Yes, Your Honor.

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1 Preyer.

2 THE COURT: Preyer. I'm sorry.

3 And Lee Moore is court-appointed
4 guardian ad litem for Ms. Dockery.

5 MS. MOORE: Yes, ma'am, Your Honor.

6 THE COURT: Thank you.

7 Mr. Brittain, you have filed numerous
8 motions and I'll allow you to take those
9 however you -- unless there's an objection,
10 however you so choose.

11 MR. BRITTAIN: Okay, Your Honor. I --
12 what I would propose to do is just sort of
13 summarize the argument. The way I've broken
14 down, one deals with the agreement that the
15 Court enforced, which -- upon a motion of
16 Mr. McCrackin, which prevented Mr. John
17 Dockery from testifying in connection with
18 the capacity issue.

19 We -- we made a motion for you to
20 reconsider your decision made with respect
21 to Dr. Goldschmidt's process and procedures
22 under Dalbert, and excluding Dr. Benjamin's
23 about the process and his lack of confidence
24 in it. We filed motions about the fees
25 associated with it, and are asking the Court

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1 to reconsider making Ms. Dockery pay all
2 those fees. We think this is an unusual
3 case, and that the Court should look at it
4 as such; and that portions of these fees
5 that should be borne by the petitioners and
6 not by Ms. Dockery.

7 We respectfully objected to the Court
8 listening to and hearing from Lee Moore.
9 Kind of offered that she's a fine lawyer and
10 she's our guardian ad litem, but in this
11 case, her statement really to the Court came
12 after the Court had made a ruling, and we
13 would ask the Court not to consider -- wants
14 you to change the approach from considering
15 her testimony.

16 Now, I think the most important part of
17 our motion deals with the Court's decision
18 to enforce an "agreement," and I put that in
19 quotation marks, that occurred as part of a
20 mediation process. I think the Court has
21 heard, in connection with that matter, that
22 there was a mediation. Ms. Dockery was not
23 present. Mr. Dockery was, his lawyer was
24 there, the petitioners were present, and so
25 was their lawyer, and so was Ms. Moore. We

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1 -- we want to preserve our right of
2 confidentiality but we have to discuss this
3 matter with the Court, of course. We
4 believe that everything that occurred there
5 was confidential and that Ms. Dockery is a
6 real party in interest here. I think I've
7 heard some discussion that, well, she's not
8 a party. Well, this is in the matter of
9 Emily Dockery. The decision that the Court
10 made, we believe, ended her chance to remain
11 a free and independent citizen making her
12 own decisions, which is what she wants to
13 be. There was no written signed document.
14 You've heard presentations by the lawyers
15 that John Dockery agreed to there being a
16 financial conservator put in place. I
17 believe there's some question as to whether
18 or not he was going to check with his mother
19 on that point. That's what he did, in fact.
20 And of course, we checked with Ms. Dockery
21 and she said she did not want to agree to
22 that. And so Mr. McCrackin was informed
23 that she was not going to agree to it and
24 neither was John Dockery.

25 Now, the South Carolina Supreme Court,

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1 as you might imagine, has visited this
2 issue, and I have handed to Ms. Moore and
3 Mr. Monckton and Mr. McCrackin today two
4 cases that we found. If I could hand them
5 up to the Court.

6 THE COURT: Yes, sir. Thank you.

7 MR. BRITTAIN: Yes, ma'am. That deals
8 specifically with this issue. And it's --
9 it really deals with Circuit Court Rule 43K,
10 and you might expect, these two cases deal
11 with agreements that had been made by
12 lawyers and/or parties. And the Supreme
13 Court was interpreting Circuit Court Rule
14 43K in these cases. And the finding of the
15 Court is that unless the agreement is
16 reduced to writing and signed by all the
17 parties, and entered into the record of the
18 Court, it's unenforceable. That's Gallaway
19 and Farnsworth; one of them involving a
20 mediation, and one of them involved
21 agreement.

22 And in these cases, there was an
23 admission by the parties that there was
24 agreement, that there wasn't any question
25 about whether I was going to go check it

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1 with my mother or not.

2 There was an agreement but the Court
3 strictly construed that statute. And so in
4 this case, we believe the Court should
5 change its ruling and not enforce that
6 settlement agreement because it runs counter
7 to the law in the state of South Carolina so
8 to do.

9 Secondly, there are confidentiality
10 issues with respect to an alternate
11 disposition rule, Rule No. 8, which says
12 that the trier, the judge or the trier of
13 fact, should never have information based on
14 discussions that took place at a mediation.
15 Of course, you have those.

16 That created a situation where the
17 Court refused to allow or decided not to
18 allow John Dockery to testify as far as the
19 capacity inquiry. He's been with
20 Ms. Dockery more than any other person.

21 In the Court's order, it says that even
22 if you would not enforce the agreement, you
23 will make certain findings about Mr. Dockery
24 and that he would not be the conservator,
25 financial conservator. That's in the last

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1 paragraph.

2 But our point would be that we haven't
3 had a hearing on that issue because he
4 wasn't allowed to testify about his mother's
5 capacity, and about what he has or hasn't
6 done as far as being a conservator.

7 So that's a very important gap for
8 Ms. Dockery, and the enforcement of that
9 agreement couldn't be, from a common sense
10 standpoint, dismissed so quickly and the
11 Court determine that their finding would be
12 something otherwise.

13 So we would ask you to reconsider the
14 -- enforcing the settlement, and that would,
15 of course, require additional testimony be
16 taken in the case. And if we got to that
17 point, we'd have to figure out exactly how
18 to go about doing that.

19 I believe our other positions are set
20 forth in our written orders. There was some
21 suggestion somewhere along the line that
22 maybe we should have filed a motion to
23 reconsider after Mr. McCrackin made the
24 motion to enforce the agreement. And I
25 would make this comment there. I don't know

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1 that -- that's clearly an evidentiary
2 ruling, much like a motion in limine as far
3 as Ms. Dockery is concerned, because the
4 impact of it was that John Dockery didn't
5 testify. There's certainly no requirement
6 to make a motion for a judge to reconsider
7 that sort of ruling.

8 Secondly, we didn't know how the case
9 was going to turn out. This Court could
10 have determined, because remember, we had a
11 neurologist who's highly regarded that clear
12 opinion is Ms. Dockery has full capacity,
13 and the Court could have taken that as
14 evidence and determined that she had it,
15 which would have made asking for you to
16 reconsider enforcement of the settlement
17 unnecessary.

18 So we don't believe that it was
19 required of us to file a motion to
20 reconsider at that time. Everyone was put
21 on notice, the Court included, we had strong
22 objections to it. Otherwise, Mr. McCrackin
23 wouldn't have filed a motion to enforce it;
24 so this notice is clear, that's all that's
25 required.

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1 And so we are asking the Court to
2 review cases that we have handed up, take a
3 look at the motions that we filed. You
4 know, it's -- I'm sure everyone is weary of
5 this case. It's really something. I've
6 been doing this a long time and this one's
7 got legs like nothing I've ever seen, but I
8 do want to point out to the Court that as
9 far as Ms. Dockery is concerned, having a
10 court appoint someone for her is something
11 she does not want. I mean, she wants to
12 have the right to make her own decisions,
13 good or bad. She feels like she has a
14 doctor that's a member of the medical
15 profession that supports that, and so she is
16 going through a lot to just try to prevail
17 there.

18 The costs in connection with this thing
19 are substantial and they are getting more.
20 When this motion to enforce the settlement,
21 Mr. McCrackin asked you to award him
22 attorney's fees, and it violates the rule
23 enforcement, violates the Supreme Court,
24 decisions to enforce it, but you awarded him
25 \$7500 for bringing a motion to enforce it.

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1 And that was for Ms. Dockery to pay, or
2 Mr. Dockery.

3 And so the other thing to keep in mind,
4 I think, is I think Ms. Moore mentioned
5 commingling of funds and this sort of thing.
6 Ms. Dockery went through a very significant
7 estate planning process, and as I believe is
8 the better procedure, she chose who she
9 wanted to be her financial conservator back
10 in 2007 when there were no issues with
11 respect to capacity.

12 And one of the things that they tried
13 to accomplish there, I'm sure the Court
14 knows this too, to vest a person of a lot of
15 things for tax purposes and tax reasons, so
16 all of the commingling really that has taken
17 place, if there has been any, has been John
18 Dockery paying for Ms. Dockery's things, or
19 giving her money to pay for these things.

20 But in this case, no matter which one
21 of those pots, so to speak, it comes out of,
22 you're talking about a substantial amount of
23 money that's all being laid at the feet of
24 Ms. Dockery. We think that should that be
25 -- that burden should at least be shared.

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1 And there may be a statute that prohibits
2 it. I couldn't find one. I believe it's in
3 the Court's discretion from an equity
4 standpoint to make those changes.

5 I believe that's all I have, Your
6 Honor.

7 THE COURT: Mr. Monckton?

8 MR. MONCKTON: May it please the Court,
9 Your Honor. For brevity purposes, I would
10 just state for the record that I would be
11 adopting the arguments set forth by
12 Mr. Brittain as well.

13 We have already preliminarily earlier
14 had an issue with regard to the motions to
15 enforce settlement agreement. I think the
16 rule and the Supreme Court has set that out
17 fairly clear, although I think everybody
18 would agree that it was not reduced to
19 writing and signed by all parties pursuant
20 to the rule. And under the Farnsworth case
21 that was written by Judge McConas, it's
22 fairly clear from that case what needs to be
23 done.

24 Your Honor, I'd ask that you set aside
25 this order because based upon the settlement

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1 agreement that you enforced, and what we
2 consider to be on behalf of John Dockery the
3 violation of Rule 8 with regards to
4 information from a mediation being
5 introduced to the trier of fact, I think the
6 rule is fairly clear that that is supposed
7 to be a very confidential procedure and is
8 not to be shared with the Court. We believe
9 that that may have been violated in this
10 matter.

11 Your Honor, with those two main issues
12 set forth, we would ask that you reconsider
13 your order of which you've already signed
14 and that has been filed in this case. Thank
15 you.

16 THE COURT: Thank you.

17 Mr. McCrackin?

18 MR. MCCRACKIN: Thank you, Your Honor.
19 Your Honor, we filed a motion some time ago
20 that addressed many of the arguments that
21 were made in the first round of motions to
22 reconsider, and I won't go back into that.
23 Your Honor can read it and I think it's
24 fairly clear.

25 I do want to address for a minute the

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1 arguments related to the settlement
2 agreement and to confidentiality of
3 mediation because I think those are
4 important in this case.

5 In regard to confidentiality first,
6 Your Honor, Your Honor has a record of what
7 happened. There was a mediation in which
8 the parties that were there -- and I should
9 say this. While Ms. Dockery wasn't there,
10 that was of her own choosing. She was
11 ordered to be at mediation. Her counsel,
12 Mary Madison Brittain, was there. So it
13 wasn't like she was totally unrepresented or
14 totally oblivious to what was going on. She
15 had counsel there at the mediation.

16 The parties that were at the mediation
17 -- and Ms. Moore has verified this when this
18 motion first came before Your Honor to
19 enforce the agreement -- agreed with the
20 settlement agreement that was provided to
21 your court, to Your Honor.

22 We also agreed that it was highly
23 likely that Ms. Dockery would not agree to
24 it and so we made no attempt to bind
25 Ms. Dockery to that. We did, however, agree

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1 that everyone else would be bound.

2 Now, keep in mind, Your Honor, when we
3 did that, we all knew there was going to
4 have to be a hearing to accommodate Ms.
5 Dockery's Objection. So everyone said okay,
6 we're not going to need a full two days, but
7 we still wanted a hearing. And so everyone
8 authorized me, Your Honor, to send you an
9 e-mail that said we have reached an
10 agreement. We don't think we need to have a
11 full trial but we still need to have a
12 one-day trial in order to accommodate
13 Ms. Dockery.

14 At that point, it's important, Your
15 Honor, to know, at that point no one
16 objected to my communication to the Court.
17 It was a communication made with the
18 agreement of all parties. It was specific
19 as to what the parties had agreed to. It
20 was sent to Your Honor and not a single
21 objection was made at that point. In fact,
22 Your Honor, and you can see this in the
23 record, you sent an e-mail to all of the
24 parties saying is this actually your
25 agreement because I'm going to cancel the

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1 time that I have allotted for you in
2 September if that's the case. And you asked
3 everyone to contact you by five o'clock the
4 following day if there was any objection.

5 Again, Your Honor, there was not a
6 single objection; not confidentiality, not
7 to the settlement agreement itself as it was
8 communicated to the Court. But that's not
9 where it ends, Your Honor. A written
10 settlement agreement was circulated with
11 exactly what the parties had agreed to. And
12 Mr. Monckton twice sent me e-mails saying
13 they agreed to it.

14 Now, all this came out before, Your
15 Honor, when we first asked for the motion to
16 enforce, but somehow over time the story has
17 gotten manipulated so that somehow
18 Ms. Dockery had nothing -- and her counsel
19 had nothing at all to do with it, which
20 isn't true. Her counsel was there, and
21 agreed to my communication, and to somehow
22 accuse me of breaching confidentiality, when
23 everyone agreed that I was to contact the
24 Court and tell the Court what happened.

25 Now, Your Honor, in regard to 43K, the

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1 rule says that either -- let me back up.
2 Before we even get to Rule 43K, in' regards
3 to Mr. Dockery, this was an appealable order
4 and he didn't appeal it, and that's the end
5 of it.

6 Your Honor correctly noted in the
7 previous order that he should have filed a
8 motion for reconsideration; that you were
9 treating your ruling as a denial or lack of
10 timeliness.

11 Well, as to Mr. Dockery, it was an
12 appealable order. It affected his
13 substantial rights in regard to this
14 litigation.

15 In regard to Ms. Dockery, I would
16 concede that it's not appealable, had
17 absolutely nothing to do with her position.
18 We were going to have a hearing in which
19 where Your Honor could make a determination
20 as to whether or not she had capacity or
21 not. However, no one, including
22 Ms. Dockery, has a right to have a witness
23 testify in any particular way. If that
24 witness enters a binding agreement that
25 they're not going to take a certain

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1 position, then that's it. You don't somehow
2 have a right to force a witness or to have a
3 witness testify a certain way. And if the
4 witness agrees they're not going to testify
5 that way, then they can't. And so I don't
6 think it's appealable at this point by
7 Ms. Dockery either.

8 Having said that, Your Honor, you got
9 the procedural hurdle to start with, which
10 almost clearly binds Mr. Dockery. You've
11 got totally different facts from anything in
12 the case that have been handed up to Your
13 Honor. You've got a situation here where it
14 was communicated to the Court, and the Court
15 actually asked the parties to give you their
16 objections and no one did, which is a tacit
17 admission that yes, we do have an agreement.
18 And it's in writing by e-mail Your
19 Honor. So I think you've got a totally
20 different set of facts than what those cases
21 have.

22 And, finally, Your Honor, I think Your
23 Honor could clearly say, you know, it
24 doesn't matter if I enforced the agreement
25 or not. The evidence in this case was

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1 overwhelming that she lacked capacity and
2 that a third party conservator should be
3 appointed.

4 And it may be helpful to the appellate
5 court, assuming that the matter gets
6 appealed, Your Honor, for you to clarify
7 that you didn't make your decision based on
8 this settlement agreement. You made your
9 decision based on all the facts that was
10 presented.

11 Now, it's been stated several times
12 that you prevented Mr. Dockery from
13 testifying. Well, that's just not the case
14 and the record doesn't show that. You did
15 allow Mr. Dockery to testify. In fact, he
16 proffered testimony in which we all agree
17 that he would have testified that she did
18 have capacity, and so that was out there.

19 Your Honor could certainly consider
20 that, and Your Honor could certainly tell
21 the appellate court look, whether or not I
22 enforce this agreement, I know what Mr.
23 Dockery was going to say, but I just find
24 that the overwhelming evidence was the other
25 way and that the settlement agreement

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1 doesn't matter.
2 Your Honor, there's been some
3 suggestion that if you were to reverse
4 yourself on the settlement agreement, that
5 additional testimony would have to be taken.
6 Well, clearly there wouldn't be any need for
7 additional testimony. That's why we proffer
8 testimony, so that the appellate court can
9 see if the settlement agreement was not
10 enforced, here's what John Dockery would
11 have testified to; and Your Honor had the
12 benefit of knowing what he was testifying
13 to. And I think Your Honor could say at
14 this point, it doesn't matter what I ruled
15 on the settlement agreement, even though
16 it's -- you're procedurally bound by it; you
17 didn't appeal it. The facts are completely
18 different than any of these cases you handed
19 up to me.

20 Even if I didn't enforce it, there is
21 overwhelming evidence in this case that
22 Ms. Dockery not only lacks capacity but is
23 in need of a third-party conservator, so I
24 think Your Honor got it exactly right.

25 I think it would be helpful,

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1 Your Honor, if you were to clarify at this
2 point perhaps to the appellate court that it
3 wouldn't make any difference to Your Honor.

4 And I think, Your Honor, on the other
5 issues that have been raised, I think
6 everything has been adequately addressed in
7 our previous memo and so I won't speak to
8 any of those other issues at this point.
9 Suffice to say that I suppose if Your Honor
10 were to decide that the settlement agreement
11 should not have been enforced, then
12 correspondingly you might well decide we're
13 not entitled to attorney's fees on it. On
14 the other hand, all of the same arguments
15 about why it should have been enforced are
16 certainly justification for Your Honor's
17 finding that attorney's fees were
18 appropriate, given the correspondence that
19 took place with the Court.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 Ms. Moore?

23 MS. MOORE: I don't really have
24 anything to add to the issues that have been
25 specifically addressed by oral argument, but

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1 the one thing I did want to address with the
2 Court were some concerns that I had with
3 regard to motions raised as to the award of
4 guardian fees and as to the testimony which
5 I provided to the Court.

6 Specifically, there was an indication
7 that the manner in which I testified was
8 inappropriate. I'm not sure what the basis
9 for that was, but I think if I recall
10 correctly, when I provided my testimony, I
11 was subject to cross-examination. Both
12 parties had ample opportunity and chose to
13 cross-examine me to some extent. So I don't
14 believe that there's any basis with regard
15 to a concern expressed either by the
16 petitioner or by Mr. Dockery's attorney that
17 somehow the method by which I testified be
18 inappropriate.

19 The other issue having to do with some
20 indication that I caused an escalation of
21 the fees by virtue of the fact that a
22 continuance had to be granted when I was ill
23 at one of the scheduled hearing dates. I
24 simply point out to the Court that there are
25 often times where issues come up, and I

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1 don't believe that that would be an
2 appropriate complaint to be lodged.

3 What occurred, in case the Court
4 doesn't recall, is there was a substantial
5 period of time between the first time that
6 Dr. Goldschmidt evaluated Ms. Dockery,
7 performed a second evaluation, and then
8 there was a lapse of time between the time
9 of the continuance until the hearing
10 actually went forward.

11 Dr. Goldschmidt then performed a
12 subsequent evaluation. He in his testimony
13 indicated that he does not like for a period
14 in excess of six months to go by without
15 there being some type of follow-up
16 evaluation to take place before we come to a
17 hearing.

18 But those were simply two issues that I
19 wished to address to the Court with regard
20 to both the manner in which I provided
21 testimony to the Court, as well as any
22 occasion that somehow the escalation of fees
23 was as a result of my having asked for a
24 continuance.

25 Thank you.

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1 THE COURT: Thank you.

2 Mr. Brittain, anything else from you?

3 MR. BRITTAIN: No.

4 THE COURT: Mr. Monckton?

5 MR. MONCKTON: Just one thing, Your
6 Honor. With regard to the settlement
7 agreement, Mr. McCrackin's office was sent
8 an e-mail that Mr. Dockery would not agree
9 and would not be signing the agreement; and
10 in fact, Mr. Dockery never did sign the
11 agreement.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Anything else from anyone?

15 MR. McCrackin: No, Your Honor.

16 MR. BRITTAIN: No, Judge.

17 THE COURT: All right. Thank you very
18 much. I will take these into consideration.
19 Thank you for coming in today.

20 MR. MONCKTON: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 (This hearing was concluded 2:45 p.m.)

23

24

25

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1 CERTIFICATE OF REPORTER

2 I, MICHELE E. STARKEY, Court Reporter and
3 Notary Public, in and for the State of South
4 Carolina, do hereby certify that the hearing was
5 recorded stenographically by me and transcribed
6 through computer-aided transcription by me to the
7 best of my ability.

8 I FURTHER CERTIFY that the foregoing
9 transcript is a true and correct transcript of the
10 hearing at the time and place specified.

11 I FURTHER CERTIFY that I am neither attorney
12 or counsel for, nor related to or employed by any
13 of the parties to the action in which this hearing
14 is taken, or financially interested in this action.

15 IN WITNESS WHEREOF, I have set my hand and
16 seal this 3rd day of October, 2013.

17
18
19 *Michele E. Starkey*

20 MICHELE E. STARKEY
21 Court Reporter and Notary Public
22 My Commission expires
23 September 29, 2021
24
25

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392 Oak Moss Court, Murrells Inlet, SC 29576

1
2 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
3 COUNTY OF HORRY) CASE NO: 2014-CP-26-1635
4

5 -----
6 B E F O R E: The Honorable Larry Hyman
7 October 1, 2014
8 -----

8 EMILY DOCKERY, et al.

9 Petitioners,

10 vs.

 ORIGINAL

11 EMILY CARLSON, et al.

12 Respondents.
13 -----

14 APPEARANCES:

15 James F. McCrackin, Esq.

16 Thomas Brittain, Esq.

17 V. Lee Moore, Esq.

18 William Monckton, VI, Esq.
19
20
21

22 Court Reporter:
23 Natalie Dahl, RPR
24
25

1 MR. BRITTAIN: It is tough. Those are always
2 hard for everybody. Let me try to give you our view
3 as simply as I can and set forth our arguments. What
4 we're seeking is a remand and a new hearing on the
5 issue of her capacity. Why would we do that? This is
6 a sad case. Ms. Dockery is a very classy Southern
7 lady, great character and substance. You may have
8 remembered Ms. Dockery and her late husband when you
9 were growing up in Horry County. She's like a
10 Ms. Cook or Ms. Schneider or Ms. Ambrose, great sense
11 of humor.

12 Her and her husband were very successful,
13 accumulated a good bit of wealth, some property, some
14 corporate interests, and over the years, really after
15 her husband died, John Dockery became her stand-by
16 companion.

17 THE COURT: Mr. Brittain, I appreciate those
18 remarks, and I want you to continue with them, but did
19 I understand you to say that as the appellant in this
20 matter, what you want me to do is remand it back to
21 the same probate judge for a rehearing?

22 MR. BRITTAIN: Here is what I want. I don't
23 think Ms. Dockery had a fair trial on the issue of
24 capacity.

25 THE COURT: Okay.

1 MR. BRITTAIN: Now, when you hear what the basis
2 of that is, I really don't think it is appropriate for
3 the same judge to hear the next case, and let me tell
4 you why.

5 THE COURT: I think it is obvious.

6 MR. BRITTAIN: I think it is, too. In this case,
7 like I said, there were discussions to try to resolve
8 it. Ms. Dockery wasn't present, John Dockery and her
9 daughters were, and lawyers for all of the parties
10 were there. I wasn't there. Mary Madison was there
11 on behalf of Ms. Dockery. There was discussions about
12 trying to resolve the issue -- oh, and Ms. Moore was
13 there; she was the guardian ad litem in the case.

14 MS. MOORE: Over here, Judge. I realize you
15 didn't see --

16 THE COURT: Oh, I didn't see you there, Lee,
17 sorry.

18 MR. BRITTAIN: She was very involved from the
19 start.

20 THE COURT: Lee -- Ms. Moore was Ms. Dockery's
21 guardian?

22 MS. MOORE: Correct.

23 MR. BRITTAIN: So discussions took place on how
24 to resolve the issues, and there was some progress
25 made by people present on trying to reach some sort of

1 a resolution. All of this, you know, by word of
2 mouth.

3 Thereafter, it was discussed with Ms. Dockery,
4 and she told Mary Madison and I that she wanted to
5 maintain the ability to make her own decisions; that
6 is my job, put that forward until the end of time.
7 She didn't want John Dockery or her daughters or some
8 third-party doing it, she wanted to make her own
9 decisions. So we sat down and talked about the
10 discussions taking place, and she said absolutely not,
11 I told you from the start that I don't want a
12 conservator, don't want to spend the money, I'm happy
13 here in my house with my cats, doing fine, I will not
14 agree to such a thing. So we notified Mr. McCrackin
15 that there was no agreement.

16 The case was going to proceed to trial. He
17 circulated a written agreement that was signed by his
18 client that was never signed by John Dockery or
19 Ms. Dockery or the lawyers for John Dockery and
20 Ms. Dockery.

21 THE COURT: Isn't Ms. Dockery's competency at the
22 very root of the other case, this case, everything?

23 MR. BRITTAIN: Yes.

24 THE COURT: Where do I sign? I mean, I'm to that
25 point. Ms. Dockery, how are you doing?

1 MR. BRITTAIN: She's hard of hearing.

2 THE COURT: How are you doing?

3 MS. DOCKERY: I'm doing fine.

4 THE COURT: I'm glad to see you finally in the
5 courtroom with us.

6 MS. DOCKERY: It is good to be here.

7 THE COURT: I'm going to turn these people over
8 to you and see if you can straighten them out.

9 MS. DOCKERY: I can't quite hear you.

10 THE COURT: Do you think you could straighten all
11 these people out if I turn them over to you?

12 MS. DOCKERY: I would like to.

13 THE COURT: I'm sure you would. Mr. Brittain --
14 thank you, Ms. Dockery.

15 MR. BRITTAIN: What ended up happening there --
16 and, Your Honor, I don't want to get contentious,
17 we're past the point of that, but that became an
18 effort to enforce that agreement. Mr. McCrackin filed
19 a motion to enforce the agreement; we objected to
20 that. One, it was part of a mediation process. We
21 couldn't call John Leiter because of the
22 confidentiality present in the mediation process.
23 There was no writing signed by the parties, and so
24 Judge Edmonson enforced that part of the agreement.
25 She would not allow John Dockery to testify at the

1 proceedings. The man with Ms. Dockery all of these
2 years, it went forward without his testimony based on
3 an unsigned, never submitted to the Court or an
4 agreement at a mediation that was immediately rejected
5 by Ms. Dockery. I'm not trying to -- I don't
6 understand this.

7 THE COURT: My recollection is that
8 Ms. Dockery's -- was her guardian even there? She was
9 there?

10 MR. BRITTAIN: Yes. Yes. Lee was present there.
11 There is no question -- I mean, I don't think there is
12 a disagreement there. I think that they had reached
13 the beginnings of something to work it out, no
14 question about it. What happened was Ms. Dockery was
15 not going forward consistent with her earlier
16 position. Of course, John had said it was subject to
17 what his mother wanted to do. My point is this, from
18 a procedural standpoint, not just in this case, which
19 is very important to Ms. Dockery, but as a pillar of
20 our system, we cannot have a mediation discussion
21 becoming the basis of an evidentiary ruling in a
22 courtroom by a judge who also is a fact finder.

23 THE COURT: Isn't that one of the rules of
24 mediation, any agreement has to be signed by the
25 parties?

1 MR. BRITTAIN: Yes, and the Supreme Court issued
2 two holdings on it -- one by Toal -- in the last
3 couple of years. Not only does it have to be signed,
4 but it has to be read into the record of the court so
5 the Court can do what you did with Mr. Reeves, talk to
6 him about it, make sure that they understand it. Both
7 of those are requirements in order for it to be part
8 of an enforcement. None of that happened here.

9 What did it take away from Ms. Dockery? Is this
10 some technical argument? No, sir. It took away the
11 man that lived with her for 15 years taking care of
12 her, knows about her sense of humor, knows what she
13 can and can't do; he never testified. How can that be
14 a fair trial for a woman fighting for her own rights
15 to make her own decisions? That is not a fair trial.
16 So we want that for her. We want her to have a chance
17 to put up her best witnesses and her side. Now, the
18 numerology that is involved of hiring --

19 THE COURT: Dr. Benjamin.

20 MR. BRITTAIN: Yes. He testified that she had
21 capacity; that is her doctor. What was the testimony
22 on the other side? A fellow by the name of
23 Dr. Goldschmid. He is not a medical physician; he is
24 a psychologist. Everybody gets mad when I say this,
25 but he put her through a bunch of tests where she drew

1 pictures and stuff. There was more to it than that,
2 but it was not a straight-forward medical diagnosis
3 and opinion like a neurologist.

4 So we wanted that process subjected to the
5 Daubert criteria. Let someone prove if this is
6 something or some kind of psuedo something. Didn't do
7 it.

8 THE COURT: Did you raise it?

9 MR. BRITTAIN: Yes, sir. Would not let
10 Dr. Benjamin challenge the validity of the process,
11 which he had testified he had no confidence in.

12 Now, the second issue is Clifford Tall's
13 testimony. He is a respected member of the Horry
14 County Bar. He has a degree in tax --

15 THE COURT: Isn't he the guy taking care of the
16 accounting and -- I remember that.

17 MR. BRITTAIN: You might be thinking of Brett
18 Davis. He is another fine lawyer here, and he is the
19 lawyer for the conservator. This thing has cost
20 Ms. Dockery like no one's business, because she has a
21 conservator, and that conservator has a lawyer, and
22 she just paid them \$50,000 a couple of weeks ago.

23 Anyway, Clifford Tall drew up the estate plan for
24 Ms. Dockery and the late Mr. Dockery in 2008 or
25 thereabouts. What the probate judges say is pick who

1 will run things in case you have a problem; that is
2 what he drew up. He drew up the set of documents. He
3 put some things in trust, and she named John Dockery
4 to have that role. So we put Cliff Tall as an expert
5 witness in these matters. He testified as an expert
6 before, has a degree in taxation, a lawyer of great
7 reputation, but they wouldn't qualify him as an
8 expert.

9 The statute requires that deference be made to
10 that early decision as to who you want in charge if
11 something happens to you. We didn't get that here
12 because John Dockery could never testify about what he
13 had and hadn't. He never got to testify. So those
14 are -- we set forth a brief, and this has been --
15 everybody worked hard on this case. You have a lot of
16 information there, but those are the main issues, I
17 think, with no hard feelings, errors on the part of
18 the judge that made it impossible for Ms. Dockery to
19 fight effectively to maintain her rights as a citizen
20 of this country to make her own decisions, no John,
21 nobody else. She's no Warren Buffet, but she doesn't
22 have to be. We are requesting that she have a chance
23 to put those forth.

24 THE COURT: Mr. Brittain, as a practical matter,
25 let me ask you a couple of questions. First of all,

1 are matters of competency exclusively vested in the
2 probate court?

3 MR. BRITTAIN: I don't think so. That is where
4 the action was filed. When we get to --

5 THE COURT: This is where I'm going. I haven't
6 heard Mr. McCrackin now, please understand that.

7 MR. BRITTAIN: I understand. Sure. Right.

8 THE COURT: What would you propose if I were to
9 rule in favor of your client Ms. Dockery, that I do
10 with this? What can I do other than remand it back to
11 the probate court, and if the probate court were to
12 recuse herself -- suppose I even directed that the
13 probate court recuse herself -- where is it going to
14 go then?

15 MR. BRITTAIN: We'll have a different judge. I
16 would say --

17 THE COURT: Who?

18 MR. BRITTAIN: As luck would have it, or
19 circumstances, Judge Edmonson, as I'm sure you know,
20 will leave office in the next couple of --

21 THE COURT: January 1.

22 MR. BRITTAIN: Yeah. Of course, I'll tell you
23 that we'll be happy to try it in circuit court. The
24 case was brought in probate court. You are going to
25 have -- somebody in circuit court has to deal with

1 Ms. Dockery's competence because she was going to be a
2 witness in some of these proceedings that go forward.
3 One of these cases was disposed of by Judge Howe and
4 leaving the real estate trust part of it in tact. The
5 29th Avenue Corporation case is getting ready to go to
6 trial.

7 THE COURT: Isn't there a presumption in favor of
8 competence?

9 MR. BRITTAIN: Yes.

10 THE COURT: If I were to reverse, doesn't she, by
11 law -- I mean, isn't she competent?

12 MR. BRITTAIN: Yes. No question about it. It
13 would take another challenge with all of the trappings
14 and proof required to undo that finding, and that is
15 what we're hoping for, that if we prevail here, that
16 is the end. Ms. Dockery can make her own decisions
17 again. There would be -- the previous order to find
18 her incapacitate would have been vacated.

19 THE COURT: As a practical matter, generally
20 speaking, on a remand that the reviewing Court has
21 found error in certain instances and remands for a
22 rehearing in keeping with the Court's rulings, well,
23 you just told me about two dozen things that you don't
24 like.

25 MR. BRITTAIN: Yes, sir.

1 THE COURT: You don't think it was appropriate in
2 the prior hearing.

3 MR. BRITTAIN: Yes, sir. I'm trying to
4 characterize them as --

5 THE COURT: Assuming I would rule in your favor,
6 the choices would be affirm, reverse, remand.

7 MR. BRITTAIN: Right. Right. And I think the
8 practical effect is -- you know, what I would hope it
9 is is that the Court would find that this did not
10 produce a fair result, and we would be back to square
11 one. She would then have her capacity. They would
12 want to rechallenge, file another action, you know.
13 It certainly would be something they could do, I
14 guess, but -- and I want to say this, because like I
15 said, it has been so contentious. There are good
16 lawyers on the other side. Jim McCrackin has fought
17 hard for his position. Lee is a great lawyer; she's
18 done great things here, too. It is not easy on
19 anybody, but it is a very significant issue for
20 Ms. Dockery, and I don't think I've ever been involved
21 in a case where such a glaring evidentiary problem
22 existed, and not one that is just for testimony --
23 just for talking purposes, it went right to the heart
24 of what could be fair in one of the most important
25 things for a citizen, and that is whether they are

1 going to have a right to make their own decisions.

2 THE COURT: What does Mr. Monckton have to say
3 other than ditto?

4 MR. MONCKTON: Your Honor, from being in your
5 court a lot, I think that the biggest issue here is
6 the mediation issue. The agreements were not signed.
7 They were not put on the record. The fact finder, as
8 part of the motion to enforce the settlement
9 agreement, they were issued and put before the fact
10 finder that were discussed at mediation. As you know,
11 that is the core for all of us who mediate cases all
12 the time, to freely and openly discuss things and be
13 fearful that they don't be brought up at mediation.

14 THE COURT: Trial.

15 MR. MONCKTON: Yeah, when there hasn't been a
16 signed agreement. There was no signed agreement. I
17 will say that we had something working in progress. I
18 thought it was ready to be resolved, and when I met
19 with my client, he said, no, I'm not signing it or
20 agreeing to that. That was conveyed to Mr. McCrackin
21 and the Court, yet the Court went ahead and decided to
22 enforce the agreement, which dramatically hindered the
23 position I could take in the case from there on out.
24 That is the thing that scares me the most, the whole
25 mediation issue. I adopt the rest of the arguments

1 and the brief as well.

2 THE COURT: Ms. Moore, do you stand with one side
3 or the other on this issue?

4 MS. MOORE: I think, Your Honor, the information
5 that is addressed with the mediated agreement is not
6 quite accurate, and Mr. McCrackin laid it out clearly
7 in his brief, so I did not repeat his argument in my
8 brief.

9 My position is without regard to the issue of the
10 mediation agreement, that the trial was held as to
11 determine the capacity or lack of capacity of
12 Ms. Dockery, and that there was more than sufficient
13 evidence to reach that conclusion. The one thing that
14 I want the Court to realize, and that I found most
15 surprising, is there is a reference to a refusal to
16 allow Mr. Dockery to testify, and that simply is not
17 the case. In fact, there is a portion of the
18 proceedings where it is very clear that it was
19 contemplated that Mr. Dockery would be testifying and,
20 in fact, it was referenced in statements made by Mr.
21 Monckton. To be quite frank, I was surprised when the
22 case came to a conclusion and there was no testimony
23 presented by Mr. Dockery.

24 The Court was very clear that although she found
25 the agreement to be binding between the parties, in

1 slam-dunk, so to speak. Just because you are named as
2 an agent or power of attorney, you are listed as
3 having priority, but that doesn't mean that the Court
4 doesn't have discretion in terms of making a
5 determination as to who should be the appropriate
6 person to be selected.

7 One other issue that Mr. Brittain raised, there
8 was no specific objection raised as to a Daubert
9 hearing. There was no request for such a hearing.
10 That was not the issue with regard to whether or not
11 Mr. Thomas should be admitted as an expert. He was
12 called as a fact witness to testify as to the estate
13 plan document that he prepared, and as to whatever her
14 capacity may have been at that point in time.

15 One other issue, Your Honor, with regard to the
16 two physicians, two medical examiners --

17 THE COURT: Were those the only experts?

18 MS. MOORE: As far as the medical testimony,
19 correct. It was Dr. Benjamin, Dr. Goldschmid. They
20 were appointed by the Court to be the court appointed
21 examiners. Even with regard to Dr. Benjamin, you'll
22 see both briefs, although he came to the conclusion
23 that Ms. Dockery had capacity, he did testify to very
24 specific situations as to opinions as to areas where
25 she needed assistance and that she had problems, and

1 that she was subject to, perhaps, undo influence or
2 financial overbearing. So it is not a situation where
3 he did not see there being problems. The appellant
4 would like the Court to believe that because
5 Dr. Benjamin came to the conclusion that she had
6 capacity, that that should end the case because he's a
7 neurologist, therefore, that should be the end of the
8 case, but what we have is a situation where you have a
9 neurologist who testified in one fashion, and you have
10 a neuropsychologist who conducted tests and
11 examinations over an extended period of time, and his
12 testimony was -- as you have seen in the record --
13 quite replete with why he believed that she did not
14 have the capacity to handle her personal and financial
15 affairs.

16 So that is kind of my position in a nutshell,
17 without regard to the agreement, that there was more
18 than sufficient evidence to support the findings.

19 THE COURT: All right. Mr. McCrackin.

20 MR. MCCRACKIN: If it pleases the Court. Your
21 Honor, I have visuals I would like to put on the
22 screen so you could see portions of the record.

23 I'll begin by putting the nine issues raised on
24 appeal on the screen in front of you. Just as
25 important as to these issues raised on appeal, are

1 by herself. I believe that she has the capacity to
2 direct her estate, but I don't think she has the
3 capacity to manage it.

4 So even their own paid elder advocate agreed that
5 she didn't have the capacity to manage her own
6 financial affairs. Your Honor, Dr. Benjamin's
7 testimony was just as inconsistent and unpersuasive as
8 his written report. Although he attempted to claim
9 that Ms. Dockery was not incapacitated, he admitted
10 that she requires assistance to plan her finances and
11 was not -- and was vulnerable to being taken advantage
12 of. This is from his testimony.

13 Question: So is the real question in your mind
14 whether or not there is somebody available to assist
15 her?

16 Dr. Benjamin responds: That's correct.

17 Question: Okay. So you would agree with me,
18 wouldn't you, that she does need assistance?

19 Dr. Benjamin's response: Assistance, that's
20 correct.

21 Even Dr. Benjamin is agreeing that she needs
22 assistance with her financial affairs. Your Honor,
23 overall Dr. Benjamin's testimony that Ms. Dockery was
24 not --

25 THE COURT: Would you go back just a second. Go

1 agreement.

2 THE COURT: Are you saying that -- that gives me
3 quite a bit of concern, Mr. McCrackin. Are you
4 saying, Mr. Brittain, that the record supports a
5 finding by Judge Edmonson's that even though
6 Ms. Dockery is not bound by that -- and, quite
7 frankly, I don't think that the whole settlement
8 agreement is relevant at all, it shouldn't have even
9 be brought up, but -- but Ms. Dockery -- I don't care
10 if she found that it is not binding on Ms. Dockery, I
11 don't care if she found that Ms. Dockery's had nothing
12 to do with it, if she said Ms. Dockery can't testify
13 contrary to that, if that is what the record says, I
14 have a problem with that.

15 MR. MCCRACKIN: No. It was Mr. Dockery.

16 THE COURT: Oh, I thought you said Ms. Dockery.

17 MR. BRITTAIN: No, Mr. Dockery. He was not
18 allowed to testify inconsistent with the settlement
19 agreement that was never signed. He was bound by it.
20 It was enforced on him, and that affected my client's
21 ability to present her case. I just want to be sure
22 that that argument was coming through.

23 THE COURT: Was anything proffered?

24 MR. BRITTAIN: No, sir. Because we could not let
25 him get up there and say, hey, I didn't want her to be

1 found to be incapacitated, I just entered into that
2 agreement at the mediation. We were not going to be
3 allowed to produce that testimony.

4 MR. MCCRACKIN: Your Honor, the fact of the
5 matter is there is no proffer from John Dockery. It's
6 not before Your Honor. There is no issue.

7 MR. BRITTAIN: And that is no more a binding
8 agreement, according to the Supreme Court, than
9 anything in this courtroom that we have sat in here
10 and -- THE COURT: I agree, that is why I asked Mr.
11 McCrackin. Mr. McCrackin, you're now telling me that
12 even though it was a bad agreement, no one appealed it
13 so they're bound by it?

14 MR. MCCRACKIN: Well, the Court was very clear
15 that she would have found exactly the way she found,
16 whether or not she would have enforced the agreement.

17 MR. BRITTAIN: How do you unring the bell? She
18 had heard what these people had agreed to. And,
19 Judge, we don't have to appeal that as a final order,
20 she was still trying to make a decision as to
21 capacity.

22 THE COURT: These other people can't agree that
23 Ms. Dockery is incompetent without her. I mean, I
24 understand that, and I think Judge Edmonson understood
25 it, that is why I say the whole agreement is

1 absolutely irrelevant.

2 MR. McCrackin: It is irrelevant, Your Honor.
3 All the evidence supported the finding of incapacity,
4 not the settlement agreement. It's a red herring
5 thrown out to try to distract you from the issue in
6 the case, which is the incapacity.

7 THE COURT: Submit me orders in ten days, I'll get
8 you an order signed, review it before I leave. That
9 gives you seven days to do it. If you don't get it to
10 me in ten days, it can wait until I return.

11 MR. McCrackin: Thank you.

12 (The proceedings concluded.)
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25 CERTIFICATE OF REPORTER

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STATE OF SOUTH CAROLINA

PROBATE COURT

COUNTY OF HORRY

Emily Carlson and
Alice Preyer,

COPY

Petitioners,

vs.

CIVIL ACTION NOS.
2010-GC-26-0068 & 0069

John C. Dockery, III,

Respondent.

In re: Emily Cheshire Dockery

VIDEOTAPE

DEPOSITION OF: JEFF A. BENJAMIN, D.O.

DATE: Tuesday, February 7, 2012

TIME: 4:03 p.m. through 5:17 p.m.

LOCATION: Grand Strand Specialty Associates
8170 Rourk Street
Myrtle Beach, South Carolina

TAKEN BY: Attorneys for Emily Cheshire
Dockery

COURT REPORTER: TERESA J.F. BAUTZ
Registered Professional Reporter



STENOTYPE REPORTING SERVICE, LLC

Teresa J. F. Bautz, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 Brittain Law Firm.

2 MR. MONCKTON: William Henry Monckton,
3 VI, Monckton Law Firm.

4 MR. McCrackin: Jim McCrackin, Nelson
5 Mullins, Riley and Scarborough.

6 MS. MOORE: Lee Moore, guardian ad
7 litem for Emily Dockery.

8 VIDEOGRAPHER: Madam court reporter,
9 will you please swear in the witness.

10
11 JEFF A. BENJAMIN, D.O., being first
12 duly sworn, testified as follows:

13 CROSS-EXAMINATION

14 BY MR. McCrackin:

15 Q. Good afternoon, Dr. Benjamin, I'm Jim
16 McCrackin. This is a continuation of your previous
17 deposition. We are now doing cross-examination.
18 I'll ask you a few questions and then Ms. Moore
19 will.

04:05P

20 A. Okay.

04:06P

21 Q. If you have any questions as we go on, just
22 stop me. Dr. Benjamin, what is your understanding
23 of your role in this case?

24 A. Well, my understanding is that you're simply
25 asking my opinion as to whether she is or is not

04:06P

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1 capable of making decision making.

2 Q. Were you appointed by the Court to give an
3 opinion to that effect?

4 A. I been her physician., I don't think I was
5 appointed by the Court.

04:06PM

6 Q. You're not aware that you were appointed by
7 the Court?

8 A. No,, I don't think the Court actually
9 appointed me. I got subpoenaed a couple of times,
10 I'm not sure what that means, but...

04:06PM

11 Q. Who have you spoken to in connection with
12 this case?

13 A. In regards to since our -- since our earlier
14 deposition last time, so everybody here at the
15 table.

04:06PM

16 Q. Okay. Prior to that deposition, who did you
17 speak to about this case?

18 A. Just the patient and, I believe, her son who
19 was in the room at many visits.

20 Q. So the information that you have you would
21 have gotten from Ms. Dockery and her son?

04:07PM

22 A. That's correct.

23 Q. Did you ever have a conversation with any
24 counsel in the case, either Mr. Brittain,
25 Ms. Brittain, Mr. Monckton, me or Ms. Moore?

04:07PM

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1 A. No, not that I'm aware of. I don't recall.

2 Q. Did you exchange any correspondence with any
3 counsel?

4 A. Not that I'm aware of. I would have to go
5 back through and see if some letter was generated,
6 but none that I'm aware of.

04:07P

7 Q. In your original -- in the first part of
8 this deposition, Ms. Brittain made a comment that
9 you're the only doctor that's examined Ms. Dockery
10 in this case. Is that true, you're the only
11 doctor?

04:07P

12 A. Well, I'm sure her primary physician has
13 seen her as well.

14 Q. Any other doctors? And the reason I'm
15 asking, I didn't understand the significance of her
16 saying you were the only doctor that had seen
17 Ms. Dockery.

04:07P

18 A. I did not know. I know Dr. Huberty is her
19 doctor, her primary physician, and he, I'm sure,
20 has seen her at some point, he did.

04:08P

21 Q. And Dr. Goldschmidt has seen her at the
22 allray (phonetic)?

23 A. Well, that's what I assume.

24 Q. So you are not the only doctor that's
25 examined Ms. Dockery; are you?

04:08P

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1 A. No.

2 Q. Let's go through your reports, and tell me
3 when is the first time you met Ms. Dockery.

4 A. On our current system -- first I evaluated
5 her 7/19 of 2010.

04:08PM

6 Q. What problems did she have on that date?

7 A. At that day she was complaining of weakness.
8 She suffered from subdural hematoma early in July
9 after she fell and injured her head, was the main
10 problem.

04:08PM

11 Q. Was she cognitively slow on that date?

12 A. Yes, she was.

13 Q. Did you give her any tests on that date to
14 determine her capacity?

15 A. No, we did not.

04:09PM

16 Q. Did you note on that date that her baseline,
17 at this moment she is able to ambulate without a
18 walker or wheelchair but uses a wheelchair for
19 distance?

20 A. Let me see, are you getting that up in the
21 bulk of it?

04:09PM

22 Q. Yes, sir.

23 A. Yes.

24 Q. And what does that mean?

25 A. That she is at this moment able to ambulate

04:09PM

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1 without a walker or without a wheelchair, for
2 assistance.

3 Q. And when you say baseline, does that mean
4 that's the starting point that you'll measure her
5 by --

04:09P

6 A. At that moment, yeah.

7 Q. And you also note that she can only transfer
8 or ambulate a few feet?

9 A. That's correct.

10 Q. And why was that the case at that time?

04:10P

11 A. Well, we didn't know why at that time.

12 Q. Was she taking any medications then?

13 A. She had Combi -- Combivent and Singulair.

14 Q. And what are those for?

15 A. Both breathing medications.

04:10P

16 Q. Do you have an opinion as of that date as to
17 whether or not she had capacity?

18 A. I do not. I will go -- I recall her at that
19 point and say she did not have capacity.

20 Q. And when you say she did not have capacity,
21 what do you mean?

04:10P

22 A. She had problems that she couldn't make
23 decision making.

24 Q. What kind of decisions could she not make?

25 A. I wouldn't -- I would venture to say, of

04:10P

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1 course this is just in hindsight, but I believe
2 that probably financial as well as medical decision
3 making needed to be assisted with her.

4 Q. Okay. Did you find any memory loss on that
5 date?

04:11PM

6 A. She was cognitively slow, and that's really
7 all I can recall. We didn't do any formal memory
8 testing.

9 Q. Do you have any written, handwritten notes
10 in your record?

04:11PM

11 A. From that date?

12 Q. Yes, sir.

13 A. I do.

14 Q. And about halfway down those notes, does it
15 say, maybe: Patient presents with memory loss and
16 weakness again? No. Again?

04:11PM

17 A. Progressive worsening with memory loss and
18 weakness.

19 Q. Okay. So at that point she did have memory
20 loss?

04:11PM

21 A. That's correct.

22 Q. Anything else of significance on 7/19/2010,
23 doctor?

24 A. Well, actually, that's not what that meant.
25 The handwritten notes that you're referring to

04:12PM

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1 referred to the patient's progressively worse with
2 memory loss and weakness again, after he -- being
3 Dr. Giddens -- had drained spinal fluid.

4 Q. Okay.

5 A. And at that time, because she also had a bad
6 bladder infection.

7 Q. Would it still be fair to say she had memory
8 loss at that point?

9 A. At some point. She was in the hospital
10 at -- at that point.

11 Q. Approximately how long was that 7/19/2010
12 visit?

13 A. I don't know, I didn't time it.

14 Q. How long is a normal visit?

15 A. About 15 minutes.

16 Q. And you say you didn't give her any specific
17 test to determine cognitive ability or her ability
18 to process information. But nonetheless, you
19 determined at that point that she did not have
20 capacity to make decisions?

21 A. No. I determined at this point she didn't.
22 At that time we weren't worried about it or
23 concerned. She had a power of attorney with her,
24 and that was not a concern for her.

25 Q. Okay. Moving on, then, the next time you

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1 saw her was August 25, 2010?

2 A. That's correct.

3 Q. And what problems did she have at that
4 visit?

5 A. Well, on the first visit she had fallen and
6 had subdural hematomas, had them treated by Dr.
7 Giddens. And the concern was -- in hindsight at
8 that point was why did she fall, and was there
9 another processing on.

04:13PM

10 So we proceeded with doing another high
11 volume spinal tap under a situation where she
12 didn't have an infection, in a situation where she
13 wasn't medically compromised, to see if she had a
14 disorder called normal pressure hydrocephalous,
15 which is a correctable form of the dementia.

04:13PM

04:14PM

16 When we initially -- or when she was
17 initially looked into, it -- the spinal tap did not
18 show any improvement. But it didn't show
19 improvement because she had other problems that
20 were making her confused, i.e., the infections. At
21 this point this was after her second spinal tap,
22 she -- she was doing dramatically well.

04:14PM

23 Q. So at -- on 8/25/2010 she was doing well?

24 A. Well, if they felt -- they being Dr.
25 Giddens -- felt that she would be appropriate to

04:14PM

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1 proceed with an NPH shunting, which is the
2 treatment.

3 Q. So what you're saying is the spinal tap had
4 showed some sign of working, releasing the
5 pressure, helping her?

04:14P

6 A. That's correct.

7 Q. And is she still cognitively slow?

8 A. She was -- at that time she was alert and
9 oriented and was looking much better.

10 Q. But you noted here that she is cognitively a
11 little bit slow?

04:14P

12 A. That's true.

13 Q. Is she taking any medications at this point?

14 A. I didn't document any. I'm sure she was.

15 It was most probably the same medications. But I
16 don't have them documented.

04:15P

17 Q. Okay. You documented giving her a
18 prescription for Namenda; do you know?

19 A. On that day I gave her a prescription.

20 Q. Okay. Did she have the mental capacity to
21 manage her financial affairs at that time?

04:15P

22 A. In -- again, in hindsight, I believe she did
23 and to be able to make medical decisions. In fact,
24 I think she was the one who made the medical
25 decision to go through the NPH shunting.

04:15P

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1 Q. So between July 19th, 2010 and August 25th,
2 2010, roughly a month, it's your opinion that she
3 went from not having capacity to having capacity?

4 A. And that's what the shunt will do. And
5 that's what the high volume spinal tap will do.

04:15PM

6 Q. And on what did you base that or do you base
7 it now?

8 A. Just like you said, you asked me now and...

9 Q. But you didn't give her any tests that would
10 determine whether she had capacity or not.

04:16PM

11 A. No need to.

12 Q. Then how would you determine whether she had
13 capacity?

14 A. You just asked me. In hindsight.

15 Q. Yes. But even in hindsight you must base it
16 on something. Did you base it --

04:16PM

17 A. Well --

18 Q. -- on conversation with her, you ask her
19 questions that gave you that impression?

20 A. Well, I do recall back then, although it was
21 sketchy there's no question, but if you're asking
22 me right now in hindsight did she have that
23 capacity, and I do believe she did.

04:16PM

24 If I remember correctly, she actually was
25 the one who made the decision, the medical

04:16PM

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1 decision, to go forward with the brain surgery.

2 Q. And what I'm asking is how do you make that
3 determination?

4 A. Well, you just asked me.

5 Q. I know I asked you. And you may --

04:16P

6 A. But that's based on my recall of her.

7 Q. Recall of what?

8 A. Of her. And her decision making and her --
9 her evaluation that --

10 Q. You can't be any more specific than that?

04:16P

11 A. Well, no. We weren't asked to make that
12 decision at that time.

13 Q. Okay. How were you --

14 A. We weren't looking into that. She was alert
15 and oriented at that time, she was well-nourished,
16 she was appropriate at that time.

04:16P

17 Q. Okay.

18 A. So that's how I'm making the hindsight
19 opinion, again, just an opinion.

20 Q. And did you meet with her for 15 minutes
21 again?

04:17P

22 A. I can't recall, probably 10, 15.

23 Q. Okay. All right. Then you met with her
24 again on November the 3rd?

25 A. That is correct.

04:17P

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1 Q. And what was the situation on November
2 the 3rd?

3 MR. MONCKTON: Was that 2010, Jim?

4 THE WITNESS: That is correct. At that
5 point she had shunt replaced, and she was
6 now 100 percent better. And the only reason
7 I would put that is if she or somebody with
8 her told her -- told me that.

04:17PM

9 And that was 100 percent improvement
10 prior to the shunting. She was ambulating
11 better, she was walking better. She
12 improved cognitively. There was a short
13 period when she got confused, and that was
14 secondary to the medication I gave her on
15 the previous evaluation, which is not
16 uncommon.

04:17PM

04:18PM

17 BY MR. McCRACKIN:

18 Q. Is she still cognitively slow?

19 A. Yes.

20 Q. And what does that mean, cognitively slow?

04:18PM

21 A. Not as sharp as, I guess, the norm.

22 Q. And if you're cognitively slow, does it is
23 mean you have a diminished ability to process
24 information?

25 A. No.

04:18PM

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1 Q. What does it mean?

2 A. Just means you're a little slow, slow in
3 processing it, slow to answer.

4 Q. Okay. So it is an impairment in your
5 ability to process information?

04:18F

6 A. It's a slowing of the process.

7 Q. Okay.

8 A. Not an impairment.

9 Q. Is that different than an impairment?

10 A. Impairment I would interpret as being
11 somebody who makes an inappropriate decision.

04:18F

12 Q. Okay. So impairment to you would be a total
13 lack of ability to process information.

14 A. Or partial. Doesn't have to be total.

15 Q. In any event, you would admit, wouldn't you,
16 doctor, that her ability to process information had
17 slowed down; is that correct?

04:18F

18 A. She was slow.

19 Q. Now, you say in here that she is 100 percent
20 better. Does that mean she sort of reached maximum
21 improvement in regard to the shunting procedure?

04:19F

22 A. That -- the hundred percent is based on what
23 they were telling me. But yes, the improvement at
24 that point was significant. I don't know if it was
25 100 percent at that point, but it was significant.

04:19F

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1 100 percent is a subject of opinion from their
2 side.

3 Q. Is it your opinion that at that point she
4 should have reached her maximum improvement from
5 the shunt procedure?

04:19PM

6 A. No. It could take -- it can go over into
7 many months in improvement.

8 Q. Is there some point where it would not cause
9 any more improvement?

10 A. When the shunt starts breaking down and
11 getting worse. As we are -- you know, absolutely.
12 But there's no way to tell that. We get older, we
13 get more further memory changes, and we don't know
14 where --

04:19PM

15 Q. Isn't it true that generally when a shunt is
16 put in, you have immediate improvement?

04:19PM

17 A. You get significant improvement right off
18 the bat, that's true.

19 Q. And we reach a point where that's the
20 improvement that we expect to see?

04:20PM

21 A. Um-hum.

22 Q. Correct. Is this that point for her,
23 November 3rd, 2010?

24 A. I don't know.

25 Q. You have no opinion as to when that point

04:20PM

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1 is?

2 A. No. It's impossible to tell.

3 Q. Did you give her any type of test at that
4 point to determine her capacity?

5 A. No. She was fully capable of making all
6 decision making at that point.

04:20P

7 Q. How would you know if you didn't give her
8 any test whether or not she could process
9 information?

10 A. Discussion. You don't need a test to
11 determine whether you're --

04:20P

12 Q. Discussion of what?

13 A. You don't need a test to determine whether
14 you're competent or capable of making decision
15 making. You would be alert and oriented, you have
16 to understand your decision making.

04:20P

17 Q. In your opinion, then, just being alert and
18 having a conversation means you have capacity?

19 A. No. Being able to understand your decision
20 making with both the consequences to any decision
21 making.

04:21P

22 Q. How would you know at that point whether or
23 not she understood what assets she had; did you
24 have a discussion with her about that?

25 A. No, no. It wasn't a concern.

04:21P

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1 Q. Did you have any discussion that would
2 indicate she had any understanding of her situation
3 or her capacity?

4 A. She's the one who made the decision to go
5 further with the surgery. So if you make the
6 decision to have brain surgery, and that's
7 accepted, certainly --

04:21PM

8 Q. Did you ever use any sort of tests to
9 determine capacity?

10 A. In her?

04:21PM

11 Q. In any patient.

12 A. Yeah.

13 Q. What types of tests would you use?

14 A. Not the -- I don't use physical tests.

15 There's no reason to use -- for example, the
16 neuropsychic projecting image, really I don't see
17 any reason to using that.

04:21PM

18 You sit down and talk with the patient.
19 Just like five years ago or ten years ago when
20 attorneys wanted to know if somebody was competent,
21 they would sit down and ask them a few questions.

04:21PM

22 Q. My question to you is are there tests that
23 you give people to determine their capacity?

24 A. There's no formal test, other than sitting
25 down and discussing with them.

04:22PM

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1 Q. Do you ever --

2 A. Finding out how cognitively sharp they were,
3 whether they are making -- they're understanding
4 their decision making, whether they are oriented.

5 Q. When you do that, what kind of questions are
6 you asking them?

7 A. Well, that's the standard mini mental status
8 exam, which is a very shoddy way of finding out a
9 baseline to a patient. But you ask them about the
10 situation.

11 For example, do they know that, do they
12 understand that with brain surgery that they may
13 die with this brain surgery; are they aware of
14 that. Okay, they understand. If they understand
15 that there's a very small chance it may improve.

16 Q. How do you know that they understand you?

17 A. Nobody knows. The same way nobody knows I
18 understand anyone in this room and how they are.
19 We only can talk to them --

20 Q. But we do have a test to determine --

21 A. We don't have tests to determine that.

22 Q. What is the mini mental?

23 A. Mini mental status exam is just a simple
24 test to gauge somebody's baseline. So that if
25 you're going to treat them or reevaluate them down

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1 the road, you can see if they've gotten changes
2 from that evaluation.

3 Q. But there certainly are tests that you can
4 give people to determine their level of
5 understanding; are there not?

04:23PM

6 A. There's IQ testing. There's, as you're
7 going to get into, the neuropsychiatric testing,
8 but I don't believe in those. I think those --

9 Q. Doctor, does the mini mental involve
10 actually asking a question and getting a response
11 from the patient that shows some understanding of
12 the task that's assigned?

04:23PM

13 A. Of course.

14 Q. Okay. So there is a test that you can give
15 someone?

04:23PM

16 A. Those are questions. I don't know if that's
17 a test.

18 Q. Do they have to draw any figures?

19 A. Well, we do often have figure drawing, but
20 that's not -- that doesn't base their competency by
21 any means. If you want to know whether somebody's
22 visual -- visual spatial fields are off, you have
23 them draw a picture. Does that mean that they are
24 competent? No. You can't take a picture that --

04:23PM

25 Q. Okay. Would you ask them to recall certain

04:23PM

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1 things after a period of time in a mini mental?

2 A. Oh, yeah. Does that mean that they are
3 competent, no. If you're going to take the fact
4 that they can recall three of three objects in five
5 minutes which is part of the mini mental status
6 exam, and take that and say, well, they're not
7 competent based on that, that's completely
8 inappropriate.

04:23P

9 There's patients with different levels of
10 dementia who are diagnosed with Alzheimer's
11 dementia --

04:24P

12 Q. I agree with that, doctor.

13 A. -- that are very capable in making decision
14 making.

15 MR. MONCKTON: Let me interject here
16 just for a second. The court reporter is
17 having a tough time, so just please --

04:24P

18 THE WITNESS: I'm sorry.

19 MR. MONCKTON: -- don't talk over the
20 doctor.

04:24P

21 BY MR. McCRACKIN:

22 Q. Doctor, I agree with you that no single test
23 is going to do it. But nonetheless you have to
24 test, don't you, to determine whether or not they
25 are competent?

04:24P

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1 A. That's what the physical exam and knowing
2 the patient is about.

3 Q. Okay. So in your opinion, there is no room
4 for a mental exam in connection with competency?

5 A. There is room. There's room for everything. 04:24PM

6 Q. Okay.

7 A. There's room for checking their blood
8 pressure, there's room for checking their blood
9 sugar.

10 Q. Stay with me here. 04:24PM

11 A. Sure.

12 Q. If there's room for a mental examination --

13 A. Okay.

14 Q. -- what mental examination did you give
15 Ms. Dockery? 04:24PM

16 A. When?

17 Q. At any time.

18 A. Well, we gave her mini mental status exams
19 when it -- later when -- when this became such an
20 issue. But that doesn't determine it. You
21 conversation, you have conversations with the
22 patient, just like they've always done. You talk
23 to a patient. You actually find out, are they
24 cognitively sound. No patient situation is the
25 same as the other patient -- 04:25PM

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1 Q. I understand.

2 A. -- in regard to decision making.

3 Q. I understand. But you can't tell me what
4 questions or what conversations you had with her
5 that would indicate that she had capacity at that
6 point?

04:25P

7 A. At this point?

8 Q. Yes.

9 A. Oh, no.

10 Q. Okay.

04:25P

11 A. Because there wasn't an issue, like I said.
12 You're asking me in hindsight to make the decision
13 whether she was capable at that time. My
14 understanding is, and although I don't have it, she
15 probably signed the surgical consent forms, which
16 pretty much means that if you can do brain surgery
17 on somebody, then if that person's making the
18 decision to do brain surgery, thinks they're pretty
19 competent.

04:25P

20 Q. Any other problems on November the 3rd,
21 2010?

04:25P

22 A. She had some hearing loss, and I suggested
23 her seeing Dr. Izeman. I don't know, I'm not sure
24 if she ever did see him.

25 Q. Okay. And just to conclude this visit, on

04:26P

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1 November 3rd, 2010 it was your opinion or it is
2 your opinion now that she had capacity on that date
3 as a result of the shunt placement and that she was
4 doing remarkably well?

5 A. That's correct.

04:26PM

6 Q. Okay. The next time you saw her was on
7 April the 20th, 2011; is that correct?

8 A. That's correct.

9 Q. And what problems was she having at this
10 point?

04:26PM

11 A. I do recall her being very upset that she
12 saw Dr. Vanhorn who prescribed -- who prescribed
13 her Pristiq now, even though she was not depressed.
14 And she was adamant about that.

15 I wasn't sure why he would give her that as
16 well. At that point they had informed me that they
17 had seen Dr. Goldschmidt and that there was some
18 kind of family dynamics. The daughters were trying
19 to gain control of her. And apparently she has
20 attorneys, her son also had an attorney trying --
21 trying to protect her. And these are terms that
22 she used, this is all in the subjective.

04:26PM

04:27PM

23 She still had 100 percent improvement from
24 the shunt, other than some difficulties in
25 ambulating.

04:27PM

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1 Q. Okay. Your comment that there's some family
2 dynamic where the daughters are trying to gain
3 control of her, who told you that?

4 A. She did.

5 Q. And if she was mistaken, if that's not true,
6 would that be significant to you?

7 A. I -- no, I didn't get into any detail
8 whatsoever with her, so I don't --

9 Q. I understand.

10 A. It would not be significant at that time nor
11 at this time.

12 Q. If -- my question is, if she didn't
13 understand the nature of this proceeding, would
14 that be important to your opinion?

15 A. If she did not understand the nature of
16 what's going on?

17 Q. Yes. If the comment you have here is not
18 accurate.

19 A. It depends on how inaccurate it is.

20 Q. Okay.

21 A. She may perceive what you -- what you
22 perceive as not being what she thinks is going on,
23 then, no. Then what she thinks is right.

24 Q. If she doesn't have the ability to
25 understand the nature of the proceeding, would that

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1 be an indication of a lack of capacity and ability
2 to process information?

3 A. Again, it all depends on how you're changing
4 the situation. You're talking about an elderly
5 woman who also was thrown into attorneys. You
6 mention attorneys to any elderly patient, they feel
7 that they are being attacked. And the attack is
8 usually perceived as somebody is trying to take
9 everything away from them.

04:28PM

10 And so it's the same if you lined up 100 old
11 people right in a row. So you perceiving that,
12 hey, this is no big deal, it is to her.

04:28PM

13 Q. But perceiving something that's not the case
14 would be --

15 A. But if her perception is -- is that that is
16 what it is, then if that's the case, then she's not
17 wrong. Even though it may not be a big deal to
18 you, and this may be just a small event, to her
19 it's a major event.

04:28PM

20 And that even though she perceives it
21 being -- what she perceives is being blown out of
22 proportion, that's -- that's for her perception.
23 That's not ours to determine whether she's right or
24 wrong.

04:29PM

25 Q. Would you also concede that it could be a

04:29PM

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1 sign that she lacks the ability to process
2 information?

3 A. No, I wouldn't.

4 Q. You would not concede that?

5 A. I would not, no.

04:29P

6 Q. That is not a possibility?

7 A. Well, it is a possibility. If it is
8 completely -- if this was a proceeding about trying
9 to obtain her -- her driver's license when it has
10 nothing to do with her power of attorney, that may
11 be different. But if all this has to do around one
12 aspect of her life, then, no, I would -- I would
13 pursue -- perceive to be correct.

04:29P

14 Q. Okay. On April the 20th, 2011, it's your
15 opinion that she was 100 percent improvement from
16 the shunt placement?

04:29P

17 A. Yeah.

18 Q. And is that your opinion, or is that
19 something someone told you?

20 A. Well, it is in the subjective area, and I
21 don't recall whether that was mine -- mine or
22 someone telling me that she is still 100 percent
23 improved. So I don't recall.

04:29P

24 Q. Okay. Did anyone tell you that two days
25 before that on April the 18th, 2011, she had her

04:30P

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1 deposition taken?

2 A. I don't think I was aware of that.

3 Q. Were you aware that in taking that
4 deposition she was not able to identify her assets,
5 and she could not correctly identify the day, month
6 or year?

04:30PM

7 A. No, no, I was not aware of that.

8 Q. Okay. If that were the case, would that be
9 important for your opinion?

10 A. Not in ways of whether she is capable --
11 capacity, no, absolutely not.

04:30PM

12 Q. Why would that not be important?

13 A. I wasn't there in those meetings, you know.
14 Depositions could be very intimidating. There's no
15 question that -- there's no question that even
16 getting their birth date could be wrong. People
17 get that way all the time when they are put under
18 pressure.

04:30PM

19 I wasn't there at her deposition, I don't
20 know what kind of situation she was in. In regards
21 to her assets, most people don't know their assets.
22 In fact, some of my assets I could barely tell you.

04:30PM

23 Q. It's your testimony here today that most
24 people don't know what their assets are?

25 A. All their individual assets, I would believe

04:31PM

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1 that.

2 Q. Were you aware that John Dockery had his
3 deposition taken on April the 19th, the day before
4 she saw you, and admitted under oath that she was
5 incompetent at her deposition; were you aware of
6 that?

04:31P

7 A. No.

8 Q. Okay. Would that affect your opinion?

9 A. I don't know what he's basing it on, so no.
10 I would have to know what he's basing it on. Why
11 does he feel that she is incompetent?

04:31P

12 Q. If he based it on her performance at the
13 deposition the previous day.

14 A. Okay.

15 Q. Would that be important to you?

04:31P

16 A. That could be important to me. As to why,
17 why does he feel that way?

18 Q. If he felt that way because she couldn't
19 identify her assets or correctly identify the day,
20 month or year at her deposition, would that be
21 significant?

04:31P

22 A. Not necessarily. Because, again, does he
23 understand that people can at times -- well, it may
24 be of benefit for that deposition and that moment
25 that he was not -- she was not capable. But does

04:32P

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1 he understand that during depositions, again,
2 people get scared and pretty intimidated, and they
3 can make decision making that's wrong, and that
4 it -- as soon as the stress level decreases, they
5 are back to normal.

04:32PM

6 Q. So do you --

7 A. So I don't know what medical background he
8 has nor -- of course he is the one that's with her
9 all the time, so he probably knows her better than
10 anyone. So it would probably be correct that at
11 that time she probably wasn't as sharp as what she
12 usually is.

04:32PM

13 Q. Would you defer to John's opinion --

14 A. No.

15 Q. -- as of that date?

04:32PM

16 A. Absolutely not.

17 Q.. Okay. So --

18 A. I wouldn't defer to anybody's opinion.

19 Q. -- a person who knows her better than anyone
20 else in the world swears under oath that she's
21 incompetent on April the 9th -- April the 18th of
22 2011, and you see her on April the 20th, 2011 and
23 you had been told that, would that have changed
24 your opinion?

04:32PM

25 A. I would have -- no, I wouldn't have.

04:33PM

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1 Because the day I saw her she was fine. It could
2 be the day after that whole deposition that she was
3 fine.

4 Q. Is it possible that someone might be -- lack
5 capacity entirely one day and be better the next
6 day?

04:33P

7 A. They fluctuate, absolutely.

8 Q. Did you do a mini mental at this exam?

9 A. I did.

10 Q. Okay. Well, you previously had not done any
11 mini mentals; right?

04:33P

12 A. Um-hum.

13 Q. Why did you do a mini mental on this date?

14 A. At this time there was the concern of -- of
15 her being challenged with her cognitive functions,
16 so I wanted to get a baseline.

04:33P

17 Q. Okay. And how did she do the on the mini
18 mental?

19 A. 25 out of 30.

20 Q. What does that mean?

04:34P

21 A. It means nothing other than to me -- again,
22 that's more subjective, and every neurologist has
23 their opinion as to levels of memory loss. And I
24 would say that's mild memory loss or mild cognition
25 changes.

04:34P

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1 Q. Do you have a copy of the mini mental you
2 gave her?

3 A. What do you mean, a copy?

4 Q. A copy of the mini mental. Is it a form
5 like this that says, mini mental?

04:34PM

6 A. No. That's a -- that's just a form that
7 people go off of.

8 Q. Okay. Would you ask her questions off of a
9 form like this one?

10 A. I do.

04:34PM

11 Q. But you wouldn't have the results of it?

12 A. I don't dictate the results of each
13 individual -- I just dictate the numbers.

14 Q. Does she write anything as a result or in
15 connection with the mini mental?

04:34PM

16 A. In the mini mental exam they do write, they
17 do make pictures. But sometimes they'll have them
18 write pictures, sometimes they'll have them do
19 visual changes.

20 Q. Do you have any record of what she may have
21 written?

04:34PM

22 A. I don't keep the records. I just keep the
23 numbers.

24 Q. Why would you not keep the records?

25 A. Records of what?

04:35PM

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1 Q. Of the mini mental, of anything that she
2 might have written.

3 A. But we don't. The only thing she writes is
4 a picture.

5 Q. But why wouldn't you keep the picture?
6 Wouldn't that be an indication of her capacity?

04:35P1

7 A. No. It has nothing to do with -- again,
8 I -- a four year old can draw pictures, that
9 doesn't make him incompetent. Actually, he is
10 incompetent. But a picture doesn't make somebody
11 incompetent. I'm not sure how a picture could make
12 someone incompetent.

04:35P1

13 Q. Well, it's --

14 A. A mini mental status exam is not determined,
15 or used to determine competency. It's used to
16 determine a level of cognition at a time, and then
17 you use it as a comparison. It's just a tool, it's
18 a very weak tool. It is a tool that most
19 neurologists don't even like.

04:35P1

20 Q. Are there any other records that would be
21 produced in the course of your examination of her
22 that wouldn't be kept?

04:35P1

23 A. Well, the -- you're asking for a record
24 that's not kept. There's no record. If I had to
25 write something down, if I had her drew a picture,

04:35P1

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1 and I don't recall if I do have a picture, which
2 many times I don't. So I don't know if she wrote a
3 picture.

4 Q. So you don't have any idea what questions
5 you may have asked her in that mini mental exam?

04:36PM

6 A. The mini mental status exam is sitting right
7 in front of you.

8 Q. Are the questions always the same as this
9 one?

10 A. Absolutely.

04:36PM

11 Q. So there's always a picture to draw.

12 A. There's always a picture, not always a
13 picture to draw. They don't have to draw a
14 picture. A picture is used for visual spatial, so
15 we changed that. You can use a picture. Not
16 everybody draws a picture. The questions are about
17 the same.

04:36PM

18 Same thing on an exam, you'll see that
19 there's three objects to remember. We don't use
20 the same three objects every time. We pick and
21 choose different objects. Serial three, serial
22 fours.

04:36PM

23 Q. Would you have --

24 A. Those are numbers that you count backwards.
25 You'll see serial threes on there, sometimes we use

04:36PM

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1 four, sometimes we go by sixes. Everybody has a
2 different way of doing the mini mental status exam,
3 everybody.

4 Q. Would we ask them to draw the face of the
5 clock?

6 A. I don't.

7 Q. Do some mini mental status ask that?

8 A. Do some? Yeah, some people do.

9 Q. Would the mini mental ask her to look at a
10 picture of some figures and try to redraw that
11 picture?

04:37B

12 A. You're referring to the pentagon that's
13 there. And the answer is yes, some people do that
14 but, again, some people don't.

15 Q. Is it your testimony that you didn't do
16 anything that had her write anything down?

04:37B

17 A. I -- I did not save anything, so I don't
18 know. If she wrote a picture, it's not this
19 picture you're referring to with the pentagon that
20 you -- interconnects lines. I didn't keep that
21 picture, if I did that.

04:37B

22 Q. Is there --

23 A. I tend not to do that, though.

24 Q. Is there any sort of suggested guideline for
25 determining the severity of cognitive impairment

04:37B

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1 based on a mini mental?

2 A. Ask that once again.

3 Q. Is there any suggested guideline for
4 determining the severity of cognitive impairment
5 based on the mini mental exam?

04:37PM

6 A. What are you referring to? Explain. What
7 we use it for?

8 Q. Is there a suggested guideline from the
9 score that she gets to work your way to what her
10 severity of cognitive impairment is?

04:38PM

11 A. There is probably suggested but -- that's
12 suggested, and very rarely will you go by that.

13 Q. Do you know what the suggested guidelines
14 are?

15 A. No. But a 25 out of 30, I put that in mild,
16 mild cognitive impairment.

04:38PM

17 Q. So at this point you would admit that she
18 was mildly cognitively impaired, even though she
19 had been through the shunt procedure and had
20 reached 100 percent improvement?

04:38PM

21 A. Well, I mentioned many times previously she
22 was cognitively slow. Even with 100 percent
23 improvement with the shunt could still be
24 cognitively slow. You could be -- have mild, you
25 could have moderate dementia and still be capable

04:38PM

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1 of decision making.

2 Q. Is there any objective evidence that if you
3 had known about it, might have changed your opinion?

4 A. No.

5 Q. So really no matter what the facts are in
6 this case, your opinion is not going to change?

7 A. What do you mean, facts?

8 Q. I told you that the person who knew her best
9 admitted that two days before your examination she
10 was incompetent.

11 A. And I had said that it doesn't change my
12 decision making that at this visit on this date she
13 was competent, and competent to make decision
14 making, both medical, financial decision making.

15 Q. All right. But you didn't ask her on that
16 day, did you, what her assets were?

17 A. No.

18 Q. Okay. And you apparently didn't ask her
19 what day or month or year it was?

20 A. We did a mini mental status exam which
21 involves the day of the year.

22 Q. All right. When is the next time you saw
23 her, doctor?

24 A. Let's take a look. 8/10 of 2011.

25 Q. And what problems did she have on 8/10 of

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1 2011?

2 A. At that time still memory loss and weakness,
3 or at least that's her chief complaint.

4 Significant improvement with the shunt, and she
5 still continues to improve. Again, these are all
6 subjective, meaning from the patient.

04:40PM

7 Q. Doctor, let me ask you this. Is she going
8 to have -- have memory loss and weakness forever?

9 A. Oh, yeah.

10 Q. So that's not going to improve; is it?

04:40PM

11 A. No, no. We get -- over -- over our life
12 span we get weaker and slower. She informs me
13 about her son has power of attorney, he has been
14 for 20 plus years. Again, these are all subjective
15 coming from them.

04:40PM

16 Q. Okay. Who told you she does live alone?

17 A. I don't know.

18 Q. That would have come from either her or
19 John?

20 A. I would suspect that.

04:40PM

21 Q. Now, if that's not true, is that
22 significant?

23 A. Unless I made a mistake. And again, I don't
24 know if that's significant.

25 Q. So assuming you didn't make a mistake, if

04:40PM

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1 she gave you incorrect information about whether
2 she lived alone or not, would you find that
3 significant?

4 A. I'd have to ask her if living alone means
5 living completely alone or living in an apartment
6 beside somebody or living with somebody who doesn't
7 take care of her. Everybody defines that a little
8 bit differently.

04:41PI

9 Q. Okay. But no one would define living alone
10 as living with your son; would they?

04:41PI

11 A. Living in your own apartment in the
12 building, in the house they wouldn't. Or somebody
13 whose son is living with them who is not taking
14 care of them, I suspect they might. You would have
15 to ask her.

04:41PI

16 Q. Okay. And it says here, he has been for 20
17 plus years and has done a remarkable job.

18 A. Um-hum.

19 Q. Okay. He has been what?

20 A. The sentence right before it.

04:41PI

21 Q. He's been her power of attorney for 20 plus
22 years?

23 A. According to this statement, her son is
24 power of attorney, has been for 20 plus years and
25 has been doing a remarkable job.

04:41PI

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1 Q. And who told you that?

2 A. Again, this is subjective coming from either
3 one of them. I'm sure it was her.

4 Q. And if that's not true, if he hasn't been
5 her power of attorney for 20 years, would that be
6 significant? 04:41PM

7 A. Well, again, it depends on what you're
8 defining, if you ask her or if you say if her power
9 of attorney meant that he has been or if she
10 defined her power of attorney as somebody who had
11 been taking care of her for 20 plus years, I would
12 say that's correct. 04:42PM

13 If you asked her was power of attorney
14 granted to her legally on paper for 20 plus years,
15 it may be a different decision. Talking about
16 somebody in the eighties, 80 years old -- 80 plus
17 years old. -- 04:42PM

18 Q. If she signed --

19 A. They define things differently.

20 Q. If she signed the power of attorney on
21 November 1st, 2007, that certainly wouldn't be 20
22 years; would it? 04:42PM

23 A. No.

24 Q. And then, again, it says she was living fine
25 alone? 04:42PM

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1 A. No, it doesn't say again, it's the same
2 sentence. Or no, it does say again, you're right,
3 I'm sorry.

4 Q. So twice it says she does live alone and she
5 was living fine alone.

04:42P

6 A. Okay.

7 Q. And it's your testimony that "has done a
8 remarkable job" was something she told you or he
9 told you?

10 A. It's not something I know, I wouldn't know
11 that. It would be something that she would have
12 told me.

04:42P

13 Q. Right. And if that's not true, would that
14 be significant?

15 A. I suppose. But she believes it is true, and
16 she wouldn't have told me.

04:43P

17 Q. But if it's not true, then isn't that an
18 indication that there's some impairment in her
19 processing information correctly and recognizing
20 the reality that he's not doing a good job, isn't
21 that a problem?

04:43P

22 A. I have no idea. There's no way for me to
23 know what somebody considers a good job and not a
24 good job. I'm not sure. I mean, this is a
25 subjective decision.

04:43P

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1 Q. All right. Let me ask you --

2 A. She says he's doing a good job. You can ask
3 her whether she thinks he did a good job.

4 Q. -- hypothetically. What if she owned an
5 interest in a corporation and her son was taking
6 lease payments that belonged to the corporation;
7 would that seem like a good job to you?

04:43PM

8 A. That is their decision making, it's not
9 mine. You can ask her or the judge or the Court
10 but not me. I -- listen, people blow money all the
11 time on a lot of silly things. It's not my thought
12 process as to whether they think they are doing the
13 right thing or not.

04:43PM

14 Q. Let me ask it to you this way. Do you think
15 it would be a good thing if that were taking place
16 for someone to be appointed to make sure that
17 doesn't take place?

04:44PM

18 A. Well, yeah. I think it would be smart to
19 have somebody overseeing that.

20 Q. Okay. All right.

04:44PM

21 A. As long as it's her decision. If she
22 decides that it's okay for him to take that money,
23 then that's fine. Right?

24 Q. Doctor, any other problems on August
25 the 10th, 2011?

04:44PM

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1 A. There's nothing else mentioned.

2 Q. Did John tell you that he had agreed in
3 mediation --

4 MR. MONCKTON: Objection, your --
5 objection.

04:44PT

6 MR. McCRACKIN: You can object.

7 MR. MONCKTON: I'm going to object.

8 MR. McCRACKIN: He can still answer the
9 question.

10 MR. MONCKTON: Anything in mediation is
11 confidential, Jim, okay.

04:44PT

12 MR. McCRACKIN: We have an agreement,
13 Billy, we have a court order.

14 MR. MONCKTON: I'm objecting.

15 MR. McCRACKIN: Well, you can object.

04:45PT

16 I'm going to ask the question.

17 BY MR. McCRACKIN:

18 Q. Did John tell you that he had -- has agreed
19 that Ms. Dockery is incapacitated and that there is
20 a court order finding that that settlement
21 agreement is valid?

04:45PT

22 A. No, nothing was ever --

23 Q. Never told you that?

24 A. Nothing was brought up. Again, court
25 orders --

04:45PT

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1 Q. Would that be important to you to know that
2 the person that's closest to her has already agreed
3 that she's incapacitated?

4 MR. MONCKTON: Again, objection.

5 THE WITNESS: Do I answer?

04:45PM

6 BY MR. MCCRACKIN:

7 Q. Um-hum.

8 A. The answer would be yes, it would be
9 important to know, but it would not change my
10 decision. Or anybody including a judge's
11 decision -- and I say, you know, even a judge told
12 me the patient's incompetent and I found the
13 patient to be competent, I would say the patient's
14 competent.

04:45PM

15 It's after evaluations and discussions. I
16 don't care what other people think. I don't care
17 what other attorneys say.

04:45PM

18 Q. Did you have some other notes?

19 A. You mean dictated notes?

20 Q. Attached on August the 10th, 2011.

04:45PM

21 A. Let me take a look. There's something here.
22 There was a letter dictated, which I think was
23 butchered, but -- but there's a letter dictated.

24 Q. And in that letter it appears that you said,
25 she cannot clearly make financial decisions on her

04:46PM

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1 own, but she does rely on her son for assistance
2 and physically paying for bills.

3 Is that your opinion as of that date?

4 A. Let me just find the sentence real quick.

5 MR. McCrackin: Off the record.

04:46P

6 (Off-the-record conference.)

7 THE WITNESS: Yeah, I mentioned she
8 cannot clearly make financial decisions on
9 her own, but she does rely on her son for
10 assistance with physically paying the bills,
11 that's correct.

04:46P

12 BY MR. McCrackin:

13 Q. So is it correct, then, that your opinion as
14 of that date was that she cannot clearly make
15 financial decisions on her own?

04:47P

16 A. No. I think that's a mistype. I think most
17 of this was a miss -- or was a mess. I think what
18 I meant to say there was simply she can make
19 financial decisions on her own, but she relies on
20 her son for assistance to physically pay the bills.
21 I think that's a mis-note -- I mean, mistake.

04:47P

22 Q. Next to the last sentence says, currently
23 her son who, again, is the power of attorney for 20
24 plus years is taking excellent care of her. Is
25 that your opinion?

04:47P

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1 A. The 20 plus years was obtained through my
2 records. So looking back on what she had said, the
3 excellent care of her was my opinion based on what
4 she had, you know -- the only -- the only time I
5 ever saw her was in my office. And he was with her
6 most of the time until the end.

04:47PM

7 And so it should say in the care that I -- I
8 think more specific, in the care that I have seen
9 him give her in the office and with the medical
10 decision making that she's done, he's done a great
11 job. But I can't tell you outside the office, and
12 I can't tell you -- that doesn't span anything
13 further than that what my eyes had seen.

04:48PM

14 Q. And has nothing to do with any financial
15 care he may have given her?

04:48PM

16 A. No. It only has to do with the medical care
17 and when I was with her.

18 Q. Did you write a letter in response to a
19 letter I sent to you in September of 2011?

20 A. It could be, that may probably be so.. One
21 of these I'd butchered terrible.

04:48PM

22 Q. Do you have a letter dated, looks like it's
23 electronically signed October 3rd, 2011?

24 A. Well, I have the -- sorry. Do you want to
25 do the September 28th one, or do you want to do the

04:48PM

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1 October?

2 Q. Let -- let's do both. I don't know that I
3 have the September 28th. What does that say?

4 A. I thought that was -- that was to you. That
5 was one to you.

04:49E

6 Q. What does the September 28th one say?

7 A. Dear James McCrackin, it says: In regards
8 to your letter dated 9/22/2011, I am unaware of the
9 situation that previously occurred, and I am sure
10 you are aware that the documents that you have just
11 sent me were from -- this is the one I butchered it
12 up. Do you want a copy of this or?

04:49E

13 Q. No. Let's continue to read that.

14 A. Okay.

15 Q. I want to see what you wrote there.

04:49E

16 A. I'm -- I'm unaware of the situation that
17 previously occurred, and I am sure you are aware
18 that the documents that you had sent me from
19 4/19/2011 where she may have -- may -- where she
20 may have mixed up her name and was not as sharp as
21 you would expect her. Actually there are two
22 documents dated of that date. There is also a
23 report from a neuropsychologist with the -- with
24 the evaluations being from December 20th of 2010 to
25 January 11th, 2011.

04:49E

04:50E

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1 I would like to make mention that in -- in
2 between that time her last evaluation she -- she
3 had received a ventricular peritoneal shunt. That
4 was incorrect.

5 Q. Okay.

04:50PM

6 A. That was the one that was butchered.

7 Q. So that sentence, the timing that you're
8 referring to is not correct; is it?

9 A. The timing of the shunt was incorrect.

10 Q. The shunt was --

04:50PM

11 A. The psychologist's evaluation was correct.

12 Q. Okay. But the shunt was actually placed --

13 A. Before that.

14 Q. -- before the neuropsychologist's evaluation
15 and before April 19th of 2011?

04:50PM

16 A. That's correct.

17 Q. When I pointed out to you that not only --

18 A. That's when --

19 Q. -- had she not been able to identify the
20 day, date or month, she was --

04:50PM

21 A. That was the records you had sent me.

22 Q. Her son had also testified under oath that
23 she was incompetent?

24 A. Um-hum, that's correct.

25 Q. Okay. So did you ever correct this letter

04:50PM

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1 to me?

2 A. I don't know. Let's look. Well, there's a
3 lengthy letter there. Was this one to you or to --
4 it says, to whom it may concern, but it may have
5 been to you. It's dated 10/19/2011; is that the
6 one you're referring to?

04:51B

7 Q. I'm just wondering if -- you're saying you
8 butchered this one, that --

9 A. I think this is --

10 Q. -- you're saying this is incorrect, did you
11 ever send me a follow-up letter correcting that?

04:51B

12 A. On 10/19/2009 there was a letter.

13 Q. And does it correct this misstatement?

14 A. I -- I can read through it and see.

15 Q. Okay. Would just like to read the 10/19.

04:51B

16 A. We're going to be out of time. This is
17 basically just a summary of everything that we've
18 talked about. My understanding is this is where
19 the neuro -- neuropsychiatric testing where you
20 came up with.

04:52B

21 Somewhere along the line she was put on
22 Pristiq for depression, which she -- she adamantly
23 was against. And I'm not sure of the physician who
24 did this, apparently a psychiatrist. And I want --
25 and she wanted off of it. I'm not sure what that

04:52B

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1 was.

2 And a neuro psycho -- psychiatric evaluation
3 showed that she is not found to be sound mind, and
4 I strongly ask that the Court reconsider that the
5 at least -- do you know what, this is to the Court.
6 I was recommending the Court to reconsider that the
7 -- said the least, said must be -- at least the
8 situation would be as to have the patient evaluated
9 down MUSC by a psychiatric opinions before any
10 consideration about taking rights away from her.
11 She lives in a situation that I stated was very
12 functional for her. That's to the best of my
13 knowledge, though.

04:52PM

04:53PM

14 Q. Okay.

15 A. She has the power of attorney.

04:53PM

16 Q. All right. So it appears that you never
17 corrected the misstatement from the previous
18 letter, from the October 3rd letter?

19 A. Maybe not. But this was the response to --

20 Q. All right. And is it clear, then, that the
21 placement of the shunt could not have solved or
22 been an explanation for why the neuropsychologist
23 would have found that she was incapacitated or that
24 she would have not been able to identify her assets
25 or identify the correct date, month, or year in

04:53PM

04:53PM

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1 April of 2011?

2 A. Of that deposition?

3 Q. Because the shunt would have already been
4 in.

5 A. The shunt was in long before the deposition
6 and neuropsychiatric evaluation.

7 Q. And that's not --

8 A. And the psychiatric evaluation was pretty
9 much what it is.

10 Q. Okay. Didn't you also indicate to me that
11 you recommended having another neuropsychiatric
12 evaluation?

13 A. Yeah. And this -- and this report I did
14 too, report.

15 Q. And you indicated that we should do that
16 after the procedure that helped her; is that
17 correct?

18 A. Where are you reading? I'm sorry.

19 Q. This is from October 3rd, 2011.

20 A. Let me see that because I don't have that.

21 Q. And it's at the top of that second page.

22 A. Yeah, this is -- this is the letter I read
23 before, okay.

24 Q. And my question is at the top of that second
25 page, you are recommending to me that we have a

04:53P

04:54P

04:54P

04:54P

04:54P

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1 neuropsychiatric evaluation after the shunt was put
2 in?

3 A. Right. That was incorrect.

4 Q. In fact, we did have a neuropsychiatric
5 evaluation after the shunt was put in; did we not?

04:55P

6 A. Right, that's correct.

7 Q. Okay. So we did exactly what you
8 recommended?

9 A. No. I would suggest getting a second
10 opinion, just like this letter that you're aware of
11 on 10/19/2011, would get a second opinion.

04:55P

12 You can put -- like we did on the first part
13 of the deposition, you put ten neuro --
14 neuropsychiatrists -- neuropsychologists into a
15 room, they are going to come up with ten different
16 opinions. We're using a test to determine whether
17 somebody cognitively is able to make decisions,
18 which isn't usually used.

04:55P

19 Q. Is it your opinion that a neuropsychiatric
20 evaluation is worthless in this case?

04:55P

21 A. Yes.

22 Q. And that if the Court routinely relies upon
23 neuropsychiatric evaluations to determine
24 competence, the Court is making a huge mistake?

25 A. Absolutely. Neuropsychiatric --

04:55P

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1 neuropsychiatric testing is a lengthy test that's
2 not really designed to determine whether somebody
3 is competent or not competent. In fact, like I
4 said, it's a -- it's extremely subjective objective
5 test.

04:56PM

6 What I mean by that is that you have
7 somebody sit down, they take an at-length
8 evaluation and question. They have an enormous
9 amount of names that they put on these tests. They
10 then turn around and make a subjective evaluation.
11 You can use the exact same in -- information that
12 one neuropsychiatrist has, give it to another
13 neuropsychiatrist who doesn't repeat the test, uses
14 just the information, and comes up with a
15 completely different evaluation. I see it with
16 this particular physician and many other
17 neuropsychiatrists as well.

04:56PM

04:56PM

18 Q. Doctor, if a neuropsychiatric evaluation is
19 worthless, why would you recommend it?

20 A. Well, in this particular case I tend not to
21 recommend it. In this particular case because you
22 already got one that's lambasting her, telling her
23 she's, you know, unable to make decision making,
24 that she doesn't know her name, that she doesn't
25 know the date, the year, the place. She knows her

04:56PM

04:57PM

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1 name. I picked up the phone and called her.

2 Q. Would it be fair to say that you are
3 recommending a worthless evaluation?

4 A. Another evaluation to use, the Court can
5 use. If that evaluation comes back and says, you
6 know, this is terrible, this is not right, this is
7 different, well, then, the Court would actually
8 take both of them and throw them away and go back
9 to having the judge take the patient back, have the
10 judge talk to the person.

04:57P

04:57P

11 Q. If we got another neuropsychiatric
12 evaluation and it agreed with Dr. Goldschmidt's,
13 would you then conclude that she is incapacitated?

14 A. I wouldn't conclude that, they would.

15 Q. Why would you recommend another examination?

04:57P

16 A. It would help the Court. Not me. My
17 decision making as to whether somebody is competent
18 is the same that you would make. You decide. You
19 sit there and you talk to them. This patient's
20 more responsive.

21 This patient's decided to spend \$200,000 on
22 a ball of twine. Is that normal? No. Is that
23 crazy? To you and I it is. But if that patient is
24 of sound mind to make that decision, they are
25 allowed to do that.

04:58P

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1 You know, and neuropsychiatric testing is
2 just a tool, that is all it is. It's a tool that's
3 subjectively used and often is bought and paid for.
4 Most neuropsychiatric evaluations in the country,
5 and not particularly this gentleman, but many are
6 bought and paid for. Somebody recommends them and
7 uses them, and they are paid to tell them a certain
8 thing.

04:58PM

9 Q. So you're suggesting that Dr. Goldschmidt's
10 report was just bought, that it's completely
11 invalid?

04:58PM

12 A. No. I just said not this gentleman.

13 Q. Okay. Are all your opinions that you gave
14 in your previous testimony to a reasonable degree
15 of medical certainty, doctor?

04:58PM

16 A. That is correct.

17 Q. When you testified previously that, quote,
18 "she is probably sharper than 85 percent of the
19 people in Horry County, and they are not
20 incapacitated or believed to be incapacitated," is
21 that your opinion?

04:59PM

22 A. Yeah, that's my opinion.

23 Q. Is that to a reasonable degree of medical
24 certainty?

25 A. That would be. Based on absolutely nothing.

04:59PM

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1 It's an opinion.

2 Q. It's an opinion to a reasonable degree of
3 medical certainty based on nothing?

4 A. That's correct.

5 Q. Is that what all of your opinions are based
6 on? 04:59P

7 A. That's not correct.

8 Q. How can it be to a reasonable degree of
9 medical certainty if it's based on nothing?

10 A. Well, I don't know everybody in Horry
11 County, I don't know what their capacity is. My
12 point was is that she is sharp, she is sharper than
13 most people and she -- she understands her decision
14 making. 04:59P

15 Q. Is it because you think most people in Horry
16 County are not smart? 05:00P

17 A. There's quite a few people in Horry County
18 who make decision making that's worse than hers.
19 It's not that they are not smart. Smart has
20 nothing to do with appropriate decision making. 05:00P

21 Q. So it's not really fair to say that this
22 opinion is within a degree of medical certainty?

23 A. Probably not.

24 Q. It's just an embellished opinion; isn't it?

25 A. That could very well be. 05:00P

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1 Q. So would it be fair to say, then, that at
2 least a portion of your testimony is just
3 embellished opinion based on nothing?

4 A. If you want to think that, you're welcome
5 to, but that's incorrect.

05:00PM

6 Q. You also testified previously that you
7 thought she did need help paying her bills; is that
8 correct?

9 A. That is correct.

10 Q. And I think you said it's easy to make
11 mistakes and to be taken advantage of?

05:01PM

12 A. That's correct.

13 Q. Okay. So is it your opinion, then, to a
14 reasonable degree of medical certainty that she
15 does have problems paying her bills or could have
16 problems paying her bills?

05:01PM

17 A. Well, my statement was meant that most
18 people when they get elderly should have somebody
19 watching over them. Just like I would want
20 somebody watching over me in my life if I make it
21 to the eighties.

05:01PM

22 Because there is easy -- it is easy to be
23 taken advantage of, write checks to people who
24 don't deserve checks. So I don't know if she's
25 done that. If she's done that, then absolutely she

05:01PM

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1 needs it. But I would encourage her to do that.

2 Q. Would you also agree --

3 MR. MCCRACKIN: You need to change the
4 video?

5 VIDEOGRAPHER: Going off the record at
6 5 o'clock p.m.

05:01P

7 (A recess transpired from 5:00 p.m.
8 through 5:01 p.m.)

9 VIDEOGRAPHER: Stand by. Going back on
10 the record at 5:01 p.m.

05:02P

11 BY MR. MCCRACKIN:

12 Q. Doctor, is Ms. Dockery able to use the
13 restroom by herself?

14 A. Physically able to ambulate to there and
15 physically, I don't know.

05:02P

16 Q. Perform the whole procedure by herself?

17 A. I don't know.

18 Q. And in your report you answered that yes.

19 A. That she is able to go to the bathroom by
20 herself?

05:03P

21 Q. Yes. Care for herself and -- now,
22 admittedly that's not exactly the bathroom, but...

23 A. For the most part she did.

24 Q. But you don't have any way to know that; do
25 you?

05:03P

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1 A. No, no. Not unless I'm there.

2 Q. You indicated that she could not prepare
3 meals, maintain bank accounts or pay bills; is that
4 correct?

5 A. I believe that's correct. 05:03PM

6 Q. And you indicated that she needs assistance
7 to effectively manage her property and financial
8 affairs; is that correct?

9 A. That is correct.

10 Q. So is the real question in your mind whether
11 or not there's somebody available to assist her? 05:03PM

12 A. That's correct.

13 Q. Okay. So you would agree with me, wouldn't
14 you, that she does need assistance?

15 A. Assistance, that's correct. 05:03PM

16 Q. And at her age and in her mental state, is
17 she subject to being easily persuaded and taken
18 advantage of?

19 A. I believe so, absolutely.

20 Q. And so we would certainly want to guard
21 against that; would we not? 05:04PM

22 A. Absolutely.

23 Q. And if you knew that someone who was very
24 close to her was abusing that position and taking
25 advantage of her, would that make your opinion be 05:04PM

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1 that maybe somebody else should be assisting her
2 with her affairs?

3 A. Absolutely.

4 Q. Okay.

5 MR. McCrackin: That's all the
6 questions I have, doctor. Answer any
7 questions Ms. Moore may have for you.

8 BY MS. MOORE:

9 Q. Dr. Benjamin, did I understand you
10 correctly, your evaluation as to her capacity would
11 be only as to the moment she may have been meeting
12 with you for any particular visit; is that correct?

13 A. That's correct, and the phone calls that I
14 made.

15 Q. Okay. How many phone calls did you make?

16 A. Well, I talked -- I have only documented one
17 that was in December 6th of 2011.

18 Q. And how long would that phone call have
19 taken place?

20 A. I think maybe five minutes at the most.

21 Q. So if I did my math correctly, and you've
22 seen her seven to eight times and maybe would have
23 had one telephone call?

24 A. Probably more than that, but that's about
25 correct.

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05:04P

05:04P

05:04P

05:05E

05:05E

1 Q. And each visit would be 10 to 15 minutes
2 each, so the total time spent with her would be
3 less than two hours?

4 A. If you add it up, yeah.

5 Q. All right. Would it not be important in
6 order to determine an individual's capacity to have
7 detailed and accurate information about her living
8 arrangements, her assets in terms of not only the
9 identity of the assets but any income or expenses
10 that might be her responsibility, would that not be
11 important?

05:05PM

12 A. That would be very beneficial.

13 Q. So how would you be able to arrive at the
14 conclusion that someone does have capacity without
15 having that specific information?

05:05PM

16 A. Well, that's just information that's added.
17 I mean, if you sit down with a person and discuss
18 their -- what decision needs to be made, do they
19 understand the decision making, do they understand
20 the consequences, then that's the most important
21 aspects of any kind of capability of making
22 decision making.

05:06PM

23 I mean, of course they have to be alert and
24 oriented and all that nonsense, but -- but do they
25 understand what's going on, do they truly

05:06PM

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1 understand.

2 Q. But as --

3 A. Yes, what you're referring to all is of
4 benefit.

5 Q. Okay. But as far as making a determination
6 of capacity in terms of whether they can take care
7 of their day-to-day affairs, both personal and
8 financial, would you not need to know and have
9 specific information as to such in order to arrive
10 at whatever your opinion might be?

05:06P

05:06P

11 A. I don't -- I don't think personally I need
12 to know what their assets are to know whether their
13 decision making is appropriate. I mean, if they
14 understand what their decision making is, of
15 course, again, much of that information is very
16 important.

05:06P

17 Q. And without that information, how would you
18 then be able to arrive --

19 A. I'm sorry.

20 Q. -- at the conclusion that a person has
21 capacity to make any such decision, whether it be
22 about a person, personal, day-to-day living
23 decisions or about their finances, how can you
24 arrive at a conclusion one way or the other if you
25 don't have that information?

05:07P

05:07E

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1 A. Well, I think you can make -- come to the
2 conclusion. Again, do you need to know their bank
3 accounts and what's in their bank accounts, and do
4 I need to know how much money they have to know or
5 to know whether them buying something is of a
6 normal sound mind?

05:07PM

7 No. Because I don't care whether -- it's up
8 to her whether she wants to buy something. Whether
9 I think it's a poor choice or not, it's not my
10 decision making. But some of the information is
11 very important, but not all of that information.

05:07PM

12 Q. But you have none of that information.

13 A. No.

14 Q. Yet you were able to make a decision that
15 she does have capacity?

05:07PM

16 A. Absolutely.

17 Q. And then as far as testing is concerned, the
18 only testing that you would have performed other
19 than simply having a conversation would have been,
20 I believe, two mini mental exams; is that correct?

05:08PM

21 A. Well, mini mental status is not used to
22 define capacity, so I don't believe that -- no,
23 it's not -- I don't use that for capacity.

24 Q. Right. And so there is no test that you use
25 for capacity?

05:08PM

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1 A. No.

2 Q. So the only evaluation --

3 A. Is physical exam.

4 Q. And based on conversation?

5 A. That's part of the physical exam, that's
6 correct. 05:08P

7 Q. Have you had any conversations with Dr.
8 Goldschmidt?

9 A. Dr. Goldschmidt called me about another
10 patient and mentioned this case. 05:08P

11 Q. And did you have any in-depth conversation
12 as far as the testing he may have performed?

13 A. No.

14 Q. And any input that he may have had as to
15 such testing? 05:09P

16 A. No. He suggested that we were going to go
17 at each other in court and that he wanted to know
18 how much I charged to go to court.

19 Q. All right. What was your response to that?

20 A. I have no idea, but I know it's not -- not
21 enough that I like to go. And he suggested that I
22 increase it up to whatever level he does. And
23 there's nothing wrong with that, it turned out to
24 be...

25 Q. All right. Do you --

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1 A. But that was the only conversation. There
2 was no conversation as to what I thought or he
3 thought.

4 Q. And knowing that such a full evaluation had
5 been performed by a neuropsychologist, would you
6 not consider that important to have follow up and
7 actually have a conversation with Dr. Goldschmidt?

05:09PM

8 A. I, again, if you -- and I don't know if you
9 heard the first one -- I have very little weight in
10 the actual neuropsychiatric evaluation. It's
11 just -- it's too subjective an evaluation. Again,
12 if you put two -- if you put two, three, four,
13 neuropsychiatrists in the room, they will take the
14 same data and re-interpret it three or four or five
15 different ways. So it's hard for me to make
16 judgment of such a subjective test that I am not --
17 I know how subjective they are, but I don't know
18 the semantics to argue and/or banter about them.

05:09PM

19 Q. All right. But the evaluation that you
20 perform in terms of your physical exam and
21 conversation with a patient, that's also
22 subjective; is it not?

05:10PM

23 A. I said that is subjective.

24 Q. Okay. And so as far as you're concerned,
25 there is no test that you would put importance or

05:10PM

05:10PM

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1 reliance upon other than simply a physical exam and
2 conversation?

3 A. That's true.

4 Q. But there's no question that you do believe
5 that she needs assistance with managing her
6 financial affairs?

05:10P

7 A. Yes.

8 Q. And that she is in a position to where she
9 could be vulnerable in terms of people being able
10 to take advantage of her?

05:11P

11 A. Extremely.

12 MS. MOORE: That's all the questions I
13 have.

14 BY MS. MADISON:

15 Q. I have just a few follow-ups, that's okay.
16 I'll try and be quick. Dr. Benjamin, I'm Ms.
17 Langway again. Remember we spoke before the
18 deposition. If you could, please, a couple times
19 both Ms. Moore and Mr. McCrackin had mentioned that
20 your testimony, I believe, is that she needed --
21 Ms. Dockery needs assistance?

05:11P

05:11P

22 A. That's correct.

23 Q. Do you think that assistance and incapacity
24 are the same thing, in your opinion?

25 A. Well, no. No. I think she can make

05:11P

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1 A. Well, she was physically -- I mean, she is
2 80 something years old, she has a lot of arthritis
3 so. She has difficulties in ambulating, but most
4 people get that way as we get older. And I don't
5 remember off the top of my head whether she was
6 using a cane or a walker, usually I dictate that,
7 but -- to ambulate around. So I would think she
8 would need physically a little bit of -- a little
9 bit of assistance just getting to any room.

05:17P

10 Q. Okay.

05:17P

11 A. Let alone the bathroom.

12 Q. Just to reiterate, is it your medical
13 opinion to a reasonable degree of medical certainty
14 that Ms. Dockery is capable of making her own
15 decisions?

05:17P

16 A. It is my opinion that she is.

17 Q. Okay, thank you.

18 MS. MADISON: I have no further
19 questions.

20 MR. MONCKTON: No questions.

05:17P

21 MS. MOORE: I have one question.

22 BY MS. MOORE:

23 Q. Dr. Benjamin, would Ms. Dockery have the
24 ability to evaluate information to determine
25 whether or not the information was accurate or

05:18P

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1 whether she needed to conduct further
2 investigation?

3 A. I think that she would probably need some
4 assistance in getting the appropriate information
5 put in front of her. But then that comes into the
6 question of who is putting it in front of her.

05:18PM

7 But I think if the right information was put
8 in front of her in a way that she could understand
9 it, I think she could make an appropriate decision
10 as long as she's not being pressured into it.

05:18PM

11 Q. But that's based on her being provided with
12 the correct information?

13 A. The correct information, not being
14 pressured, and given the appropriate time that she
15 needs to process it and make a decision, yeah.

05:18PM

16 MS. MOORE: That's all I have.

17 VIDEOGRAPHER: This concludes this
18 deposition. Going off the record at 5:17.

19 (The video deposition concluded at
20 approximately 5:17 p.m.)

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392 Oak Moss Court, Murrells Inlet, SC 29576

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY
PROBATE COURT
Emily Carlson and
Alice Preyer,
Petitioners,
vs.
John C. Dockery, III,
Respondent.
CIVIL ACTION NOS.
2010-GC-26-0068 & 0069
In re: Emily Cheshire Dockery

COPY

VIDEOTAPE
DEPOSITION OF: LEONARD GOLDSCHMIDT, J.D., Psy.D.
DATE: Thursday, March 15, 2012
TIME: 10:00 a.m. through 3:27 p.m.
LOCATION: Nelson, Mullins, Riley &
Scarborough
3751 Robert Grissom Parkway
Myrtle Beach, South Carolina
TAKEN BY: Attorneys for Emily Carlson
& Alice Preyer
COURT REPORTER: MADONNA M. PERKINS, RPR, CLR
Registered Professional Reporter



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1 at 10:05 a.m.

2 LEONARD GOLDSCHMIDT, J.D., PSY.D.,

3 being first duly sworn, testified as

4 follows:

5 **EXAMINATION**

6 **BY MR. McCrackin:**

7 Q. Good morning, Dr. Goldschmidt. My name is
8 Jim McCrackin. I represent Emily Carlson and Alice
9 Preyer. I assume you've had your deposition taken
10 before.

10:06A

11 A. Many times, yes.

12 MR. McCrackin: Okay. For the record,

13 I guess we are going to reserve all

14 objections except to the form of the

15 question.

10:06A

16 MS. MOORE: (Moves head up and down.)

17 **BY MR. McCrackin:**

18 Q. If you have any questions you don't

19 understand, one of our questions, just tell us if

20 you don't understand it. "I don't know" is

10:06A

21 certainly an acceptable answer.

22 Dr. Goldschmidt, will you give us the

23 benefit of your education experience?

24 A. Professionally, my education is -- I have a

25 doctorate in clinical psychology from the Widener

10:06A

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1 Institute, Graduate Clinical Psychology out of
2 Chester, Pennsylvania, with specializations in
3 clinical neuropsychology and forensic psychology.

4 I also have a law degree from Widener
5 University School of Law.

10:06AM

6 Q. Do you have certifications or degrees that
7 you use in your current job?

8 A. I do use my degrees in my current job, yes.
9 I do not have a certification. It's by diploma and
10 license.

10:07AM

11 Q. And what do you do currently?

12 A. I practice in my clinical practice out of
13 Murrells Inlet, South Carolina as a clinical
14 psychologist, clinical neuropsychologist and
15 forensic psychologist and do both clinical work as
16 well as medical/legal evaluations and
17 consultations.

10:07AM

18 Q. Can you describe for us in general terms
19 what that involves?

20 A. Well, it's a fairly diverse workload due to
21 the diversity of the type of legal cases that
22 frequently come to my desk. I'm commonly involved
23 in evaluating people's functionality in terms of
24 their cognitive functionality, as well as their
25 behavioral and psychiatric functionality, and what

10:07AM

10:07AM

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1 those can do on in terms of a person's impact on
2 their general living and well-being, also regarding
3 healthcare, differential diagnostics of cerebral
4 pathology such as traumatic brain injuries,
5 dementias, post-cerebrovascular accident dementias,
6 Alzheimer's dementias and so forth.

10:08AM

7 I'm frequently called as a medical examiner
8 for the surrounding probate courts for examinations
9 regarding competent capacity.

10 Q. Approximately how long have you been serving
11 as a court-appointed position for purposes of
12 determining capacity?

10:08AM

13 A. Let me be clear, I'm not a physician. I am
14 -- I've been court appointed as a medical examiner.
15 I am -- I have my doctorate's in psychology, with
16 specializations in neuropsychology and forensic
17 psychology, as well as clinical.

10:08AM

18 But I've been practicing with the courts
19 since 2001, both in this area as well as in
20 Pennsylvania and New Jersey.

10:09AM

21 Q. All right. And approximately how many
22 patients have you examined pursuant to court order?

23 A. Pursuant to court order or pursuant to any
24 of the --

25 Q. Why don't give me both, as best you can.

10:09AM

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1 A. Well, I can try to break it down the best I
2 can. In terms of neuropsychological cases, I've
3 probably seen -- I believe our caseload is
4 currently approximately 20,000. I have seen in
5 forensic cases maybe one third of that.

10:09AM

6 And then in terms of actual being appointed
7 medical examiner for probate court cases by the
8 courts, roughly 30 cases, 40 cases, I'd have to go
9 into my records to determine exactly how many.

10 Q. All right. And when did you first evaluate
11 Ms. Dockery?

10:09AM

12 A. Ms. Dockery initially was seen -- I have to
13 go back to my records here -- on, looks like,
14 12/20/2010 and that was by referral by attorney
15 Cliff Tall because he had some concerns regarding
16 her having some cognitive difficulties and there
17 was some concerns regarding, ultimately that there
18 may be an issue of guardianship.

10:10AM

19 Q. Tell me, if you will, about your evaluation
20 of Ms. Dockery, what's involved with that and what
21 kind of test you might have put her through.

10:10AM

22 A. Yeah. Well, the initial testing and
23 evaluation was a different purpose than the
24 secondary evaluation and the testing.

25 The initial evaluation and testing was

10:10AM

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1 primarily for healthcare reasons, from my
2 standpoint. What I was asked to do was just to
3 take a look at her, determine if I had some
4 concerns regarding dementia within the context of
5 the possibility of there being a guardianship
6 issue. 10:11A

7 So when I did see her, she was brought in
8 for an initial examination which was approximately
9 an hour and a half to two hours, during which point
10 a medical history was taken, a psychological 10:11A
11 history was taken, general psychiatric history,
12 family history, social history and so forth and all
13 documented.

14 In addition to that, I also do reflex
15 examinations and motor examinations. After that, 10:11A
16 she was -- because I felt that it was medically
17 necessary -- she was put through a battery of tests
18 on 12/21, 12/27, 1/4 -- I'm sorry, excuse me.
19 Looks like, yeah, 1/4 and 1/11/2011, which was a
20 rather extensive battery of tests that measured her 10:12A
21 memory functioning, attention functioning,
22 intellectual functioning, general independent
23 living skills, psychiatric functioning, motor
24 skills, sensory/perceptual functioning, executive
25 functioning, orientation. So it was a diverse 10:12A

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1 evaluation meant for the purpose of determining
2 where her limitations were and for differential
3 diagnostic purposes to determine what the real
4 problem was, anything from what we could do in
5 terms of treatment recommendations.

10:12AM

6 That was the initial evaluation. The
7 secondary evaluation --

8 Q. Let me stop you there for a second,
9 Doctor --

10 A. I'm sorry.

10:12AM

11 Q. -- and ask you some specifics about the
12 initial evaluation.

13 A. Yes.

14 Q. Approximately how much time did you spend
15 with Ms. Dockery in that series of initial
16 evaluations?

10:12AM

17 A. Well, individually, I spent two hours with
18 -- roughly an hour and a half to two hours with her
19 in my examination room, in my office. And then she
20 was with a psychometrician in our testing room for
21 roughly nine hours, and then I would -- I
22 evaluate -- I then reviewed all of the
23 documentation that I was -- that was furnished to
24 our office, as well as -- then review all the
25 testing data and the information I had gleaned to

10:13AM

10:13AM

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1 put together in the report.

2 Q. Doctor, what information provided to you did
3 you rely upon in the course of your evaluation?

4 A. In the course of my initial evaluation?

5 Q. Yes.

10:13A

6 A. In the course of the initial evaluation, I
7 relied on a rather extensive set of medical records
8 that was provided by, I believe, Mr. Tall's office,
9 which is, in part, replicated through quotations in
10 the -- in the initial report, as well as the data
11 that I received and the -- the -- also the
12 examination that I -- that I had done, completed.

10:14A

13 Q. Do you also have copies of those records
14 that you relied upon?

15 A. I should have them here with me in this --
16 within this chart. If not, we may have them in a
17 secondary chart because I believe this is a rather
18 extensive chart that's here, I don't know if she
19 included both of those in this one here.

10:14A

20 MR. McCrackin: Would counsel like to
21 stipulate that if Dr. Goldschmidt prints
22 those records, that we will admit them into
23 evidence at the trial, if that's acceptable?

10:14A

24 MS. MOORE: That's fine.

25 MR. BRITTAIN: (Moves head up and

10:14A

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1 down.)

2 MR. McCRACKIN: Does anybody need to
3 see those now? Do you think we could have
4 somebody copy them?

5 MR. BRITTAIN: Are we talking about the 10:14AM
6 ones where he set out some -- some record --
7 he quotes from some of the records.

8 MR. McCRACKIN: Yes, sir.

9 MR. BRITTAIN: I have no problem.

10 BY MR. McCRACKIN: 10:15AM

11 Q. Dr. Goldschmidt, you didn't quote all the
12 records; you just took select provisions out of the
13 records and included them in your report?

14 A. The areas that I felt were most pertinent to
15 the evaluation and the basis for my -- my 10:15AM
16 conclusions, yes.

17 MR. BRITTAIN: Okay. We have no
18 problem doing it that way, Jim, if you want
19 to collect them, no problem.

20 MR. McCRACKIN: Okay. 10:15AM

21 BY MR. McCRACKIN:

22 Q. In the initial evaluation, Doctor, what --
23 what items did you include in your report that you
24 felt were important?

25 A. There's quite a number of them, and I'm 10:15AM

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1 going to refer to the report specifically to inform
2 you. It's under Chief Complaint and History of
3 Present Illness, from my neuropsychological
4 evaluation is what I'm referring to. I reviewed
5 records including records from Russell L. Derrick,
6 M.D., of a CT scan of the head without contrast
7 which was performed on January 8, 2010.

10:15A

8 Q. Doctor, rather than going through the list,
9 would it -- is it fair to say that the items listed
10 in your evaluation or report are the ones that you
11 found to be important in your initial evaluation?

10:16A

12 A. Yes, that I felt to be the most pertinent.

13 Q. Can you go into -- in some detail the
14 specific testing that took place in that initial
15 evaluation and what the results of those tests
16 were?

10:16A

17 A. I can. Once again, I'm going to refer to my
18 neuropsychological report from 12/2010 through
19 January of 2011, and I'll start off by discussing
20 in the same order the way they were placed in the
21 report. In that period of time, she was evaluated
22 with a battery of tests to consider her functional
23 capacity regarding her amnesic skills, which is her
24 memory skills and capacities. And, overall, her
25 scores indicated that she was performing within the

10:17A

10:17A

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1 5th percentile of the population at her age bracket,
2 meaning at the age of 86 and the surrounding years
3 within the normed data which has been several
4 years. In other words, she performed worse than 95
5 out of 100 people her age based on the population
6 standardization and norms.

10:17AM

7 Q. And is that an overall grade from each of
8 these tests combined or is that from a specific?

9 A. That's an overall score for the general
10 composite memory from a commonly-used battery that
11 is involved with looking at a wide array of memory
12 capacities, called the Wechsler Memory Scales.

10:17AM

13 Q. Okay. Am I following your report right
14 then, that's the functional -- under the functional
15 testing section, that was a memory function?

10:18AM

16 A. That was memory functions, yes. And then
17 that's broken down into the composite memory scores
18 that specifically look at different forms of memory
19 which are -- can be quite important in terms of
20 diagnostic purposes due to the different types of
21 profiles that we see in individuals with a diverse
22 array of neuropathologies or cerebral
23 neuropathologies.

10:18AM

24 COURT REPORTER: Of what?

25 THE DEPONENT: Of cerebral

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1 neuropathologies.

2 BY MR. McCRACKIN:

3 Q. And how do you test for memory?

4 A. There are several ways, depending on the
5 type of memory that is being evaluated. When --
6 there are times where facial recognition is tested
7 by showing a series of pictures of faces and then
8 giving an individual the opportunity to pick
9 between faces that they have and have not seen on a
10 prior moment.

11 There's also tests of memory in terms of
12 looking at pictures of common type of events, like
13 a family eating at a picnic or playing Frisbee; and
14 then after an amount of time, they are asked to
15 recall these -- these scenes, both in short or
16 immediate type of recall, as well as in long-term
17 recall which is -- or extended recall, which would
18 be 30 minutes or an hour, depending on what the
19 testing is.

20 Then there's also verbal type of memory
21 tests that are performed which are -- or an
22 individual has read a story, a paragraph, and then
23 they're asked to recall the specifics of that
24 paragraph both in an immediate fashion as well as a
25 delayed fashion and then, finally, ultimate

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1 recognition by giving the individual choices
2 between what they may or may not have heard.

3 Q. And how do we determine what percentile
4 someone score's in? Is there a database?

5 A. There's a database. Regarding all of the
6 testing that I use, I use the tests that are
7 standardized and normed tests that are accepted by
8 the community in general of neuropsychologists, as
9 well as clinical psychologists, and are also used
10 frequently in determination of capacities for both
11 differential diagnostics, baseline measurements,
12 treatment recommendations, which ultimately end up
13 in the hands of physicians, as well as in the hands
14 of the courts for reasons such as this, where there
15 is an issue of capacity.

10:20AM

10:20AM

10:21AM

16 Q. What other testing was performed?

17 A. Well, that -- within the memory testing,
18 there was two major types of testing, one was the
19 general types of areas that we just described which
20 came into that general memory score, and then there
21 are several composite memory scores which are all
22 listed in the following paragraph of the composite
23 memories of auditory recognition, delayed memory in
24 the 5th percentile and so forth --

10:21AM

25 COURT REPORTER: I'm sorry, could you

10:21AM

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1 slow down?

2 THE DEPONENT: I'm sorry, yes.

3 -- which are listed within the

4 following paragraph which discusses things

5 like moderate level of deficit for auditory

10:21A

6 recognition, delayed memory in the 5th

7 percentile, mild levels of deficit for

8 visual immediate memory, 7th percentile and

9 so on. I can list them if necessary.

10 Then there's a following test that we

10:21A

11 use that's very helpful in the idea of novel

12 learning that's not just -- that doesn't

13 look at general learning but non-contextual

14 learning for information that is not

15 portrayed in a way that can allow a person

10:22A

16 to elaborate as well. It gives us an idea

17 of where the learning systems are -- the

18 memory systems are having difficulty. We do

19 that for differential purposes because there

20 are differences in terms of how differing

10:22A

21 dementias show up. For example, people with

22 Alzheimer's tend to have a different of type

23 profile than we see in other types of

24 dementias, where they have great difficulty

25 with -- they have very high savings and very

10:22A

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1 little recall, and it tells us that the
2 issue is more of a problem with the HIPAA
3 campus, for example, encoding information
4 rather than an issue of retrieval.

5 So she was also evaluated with a second
6 test, which is called the California Verbal
7 Learning Test, Second Version. And in that
8 test, for initial -- essentially that test
9 is comprised of giving a list of 16
10 generally unrelated words that are -- that
11 are essentially repeated to the patient to
12 then repeat back. After they repeat it
13 back, they are then given the same list of
14 words a second time and have them to repeat
15 them back what they recall, and then a third
16 time, then a fourth time and a fifth time,
17 until they have completed that. And each of
18 those receives a score.

19 After that, they are given another list
20 as an interference list to see if there's
21 problems with interference and memory, and
22 these are the scores that are then captured
23 within this neuropsychological evaluation
24 from 2010 and early 2011.

25 And in that evaluation, Ms. Dockery

10:22AM

10:22AM

10:23AM

10:23AM

10:23AM

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1 scored within the 7th percentile for initial
2 trial recall. In other words, after giving
3 her that list of 16 words, within --
4 immediately upon having asked to recall
5 that, she scored within -- she scored a
6 certain amount of words that was comparable
7 to the bottom 7th percent -- percentile of
8 the population at her age, which is
9 considered a mild deficit, but it's
10 considered a deficit indicative of a
11 dementing process. That score is then --
12 there was more convergent evidence of
13 further deficit, which was showing that
14 there was -- outside of working memory,
15 which is that immediate ability to recall,
16 as time went -- preceded her ability to
17 learn new information, evidenced rather
18 severe deficits. What we saw is that by the
19 end of five learning trials, she scored
20 within less than the 1st percentile, which is
21 the lowest score that can be given within
22 that -- that norming data.
23 And in addition to that, her learning
24 curve was in the bottom 2 percent, meaning
25 that she learned -- her learning curve was

10:23A

10:24A

10:24A

10:24A

10:24A

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1 worse than 98 percent of the people her age,
2 at the age of 86 in the -- in the normed
3 bracket.

4 In addition to that, in terms of
5 delayed recall -- which is not a large
6 delay, we're talking a 30-minute delay --
7 within 30 minutes, her short delay free
8 recall, which is recalled basically, what do
9 you recall, evidenced that she was
10 functioning in less than the 1st percentile,
11 once again, in the bottom percentile that we
12 can give within that test. Regarding short
13 delay cued recall, in which case we give a
14 priming example stimulus to help the person
15 to use queues to recall the learned list.
16 For example, if there were -- if there were
17 modes of transportation within the list, we
18 would say, well, recall what you remember
19 that were modes of transportation or recall
20 what you remember that were vegetables or
21 recall what you remember that were animals.
22 And in terms of that, the queueing did not
23 seem to help her much. And she scored, once
24 again, within less than the 1st percentile.
25 This then -- this -- that was in the long

10:25AM

10:25AM

10:25AM

10:25AM

10:25AM

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1 delay. And then the short delay, ones which
2 were after 3 minutes, once again, we saw
3 this -- we saw this again, less than the 1st
4 percentile. So it was throughout the -- the
5 delayed recall that she -- that she scored
6 in the bottom percentiles.

10:26A

7 In addition, which was -- which is
8 quite telling, was in terms of how much she
9 was able to recall was her -- the ability
10 for her to be unable to recall things
11 regarding simple yes/no recognition. This
12 is something that we generally only see in
13 people that have already a -- a relatively
14 substantial decline in their cognitive
15 functionality, because recognition is a much
16 easier task than recall. It requires much
17 less. And in that case, she, once again,
18 scored in the severe level of deficit, in
19 less than the 1st percentile.

10:26A

10:26A

20 And then we looked -- I looked at her
21 visual abstract memory which is not -- once
22 again, another learning type of trial, but
23 this is more on -- on visual stimuli that
24 are not -- it doesn't give her a chance to
25 encode information based on meaning. She

10:26A

10:27A

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1 scored, once again, very poorly, a 3-minute
2 delayed recall at less than the 1st.
3 percentile, 30-minute delayed recall, less
4 -- in the 2nd percentile. And then for
5 recognition, which she was given pictures of
6 pieces of something she had -- a visual
7 stimulus, she had had the opportunity to
8 copy and pieces that were also not pictures
9 of -- parts that were not there. And she
10 was to circle what she had seen prior. And
11 she did very poorly there, scoring in less
12 than the 1st percentile.

10:27AM

10:27AM

13 BY MR. McCrackin:

14 Q. And, Doctor, that's all the --

15 A. That's under Memory, I'm sorry.

10:27AM

16 Q. -- all the memory testing then that was
17 done. It looks like next part of your report goes
18 to Attention and Concentration?

19 A. Yes.

20 Q. And tell me how that -- is that all done as
21 part of the memory testing, or is that specific --

10:27AM

22 A. That's done separately over -- in several
23 different tasks. The entire, as I said previously,
24 the entire evaluation is roughly nine hours of
25 testing. That is done in bits and pieces,

10:28AM

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1 depending on what test is being -- is involved.
2 The initial -- the result that she did was
3 regarding simple auditory attention span. There we
4 see her performance was within normal limits.
5 Simply auditory attention span is simply, if given
6 a list of numbers, can one repeat the numbers back
7 to you immediately? And then also backwards, both
8 forwards and backwards.

10:28AI

9 Then the next task is regarding attention
10 and discrimination for auditory attention. And
11 this is -- there are times where this can be an
12 artifact of hearing loss, but it can also be -- it
13 also measures auditory discrimination. And that's
14 why one of the things we do look at hearing
15 to some extent as well. In Mrs. Dockery's case,
16 there was evidence that she was having some
17 attention and discrimination deficits regarding
18 auditory attention, scoring within less than the 1st
19 percentile. Once again, the lowest score I can
20 give for that test.

10:28AI

10:29AI

10:29AI

21 Then looking at -- specifically to rhythm
22 patterns which is indicative to us as
23 neuropsychologists, that helps us determine what
24 type of dementing processes may be present, because
25 rhythm patterns are generally processed in this

10:29AI

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1 specific area of the brain, primarily the parietal
2 area, there was evidence that she -- substantial
3 evidence that she was performing with a moderate
4 level of deficit in the 2nd percentile. Then I
5 looked at her attention span from a visual
6 perspective, which, presenting visual stimuli to
7 see what -- how her immediate attention was, and
8 she scored with -- for immediate attention span in
9 the borderline level of deficit, 16th percentile.
10 And then when we look at actual visual-conceptual
11 tracking, which is a simple test -- it's
12 essentially a test very similar to follow the dots
13 that you would give even a small child, connect the
14 dots, numbers, 1, 2, 3, 4, 5, 6, all the way to 25
15 and simply follow them in order and connect the
16 dots as quickly as one can. And she was -- within
17 that test, she performed in less than the 1st
18 percentile, meaning in the -- worse than 99 out of
19 100 people within the population based on the
20 norms.

10:29AM

10:30AM

10:30AM

10:30AM

21 MR. BRITTAIN: Can I ask you where that
22 is in your report, what page that's on?

23 THE DEPONENT: Yes, that's on Page 8 of
24 14, under Attention/Concentration in the
25 second paragraph, second sentence, "Simple

10:30AM

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1 visual-conceptual tracking evidenced
2 functioning within the severe level of
3 deficit."

4 MR. BRITTAIN: All right.

5 BY MR. McCrackin:

10:31AM

6 Q. Doctor, is that all with regard to attention
7 and concentration?

8 A. No, it is not.

9 Q. What else?

10 A. In addition, she was then given a task, a
11 relatively simple task that most people her age can
12 do. The task is one in which -- it's a
13 connect-the-dot type of test again. But rather
14 than going simply 1, 2, 3, 4, 5 and so on, it's to
15 go from number to letter and do them in order. For
16 example, 1A, 2B, 3C, 4D, 5E and so on.

10:31AM

17 For Ms. Dockery, she was incapable of
18 understanding -- there's a practice part of the
19 test that we attempt to get the patient to
20 understand the task; once they've understood it and
21 can try it on a sample, then they are asked to do
22 it as quickly as they can.

10:31AM

23 Unfortunately, Ms. Dockery had very
24 significant difficulties understanding this test,
25 and so we simply chose not to include that test, or

10:31AM

10:31AM

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1 to continue with trying to get her to do something
2 that she was having great difficulty doing.

3 And that was -- that's the bulk of the
4 Attention and Concentration Testing.

5 Q. Okay. And you've also tested motor
6 function?

10:32AM

7 A. Yes, I did. Would you like me to answer
8 regarding --

9 Q. Yes, please. Tell me what test you did for
10 motor function and what the results were.

10:32AM

11 A. Okay. Well, initially, she was screened
12 with a release reflex evaluation, which can
13 commonly be found in degenerative diseases,
14 specifically ones that can have impact on
15 connections to the frontal lobes. What they are is
16 they are reflexes that children are born with, that
17 we are all born with if we have normal brains.
18 Things like the rooting response, where if you rub
19 a child's face, what will essentially happen is
20 they will turn their face in the direction in which
21 it is being rubbed. The purpose for -- seemingly,
22 the purpose for that -- I can't tell why we were
23 made that way -- but, essentially, it seems to have
24 a -- the purpose is to help the child locate the
25 mother's breast in suckling.

10:32AM

10:32AM

10:33AM

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1 In addition, there's another innate response
2 within these reflexes called the glabellar
3 response. The glabellar response is one where we
4 tap between the eyes on the nasal bridge, which
5 will cause a blinking response.

10:33AM

6 There's another response called the
7 palmomental response. The palmomental response is
8 where you take a stimulus, a rather, not sharp but
9 hard, somewhat pointy instrument and stylus and rub
10 it against the crease within the -- within the palm
11 between the thumb and the forefinger. And what
12 that will do is that will cause the -- the palm --
13 the mentalis muscle of the chin to rise up on the
14 same side of the face if they do have that
15 response. And that's -- we don't know why that
16 occurs; we just know that it occurs because of
17 certain connections within the brain. That, we
18 know but we don't know, you know, if there's a, you
19 know, value for that.

10:33AM

10:33AM

20 There's also a root -- the sucking response
21 or the snout response which happens by tapping the
22 cleft of the mouth under the nose and that will
23 cause a puckering response. That is, once again,
24 that's for babies for suckling.

10:34AM

25 And then the last one is the grasp response

10:34AM

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1 in which we have -- where you rub the inside
2 portions of the hand. And children, of course, and
3 babies, if you do that, they will grasp at your
4 finger.

5 So these responses, when they are found,
6 they -- from my perspective as a clinical
7 neuropsychologist, it helps me determine -- if they
8 are present, it's generally quite, especially if
9 it's repetitive, quite indicative of a clear and,
10 frequently, rather significant substantial severe
11 brain injury or brain pathology. The lack of does
12 not mean that there's not a dementia or brain
13 pathology. It just means if they are there, that
14 it's a positive sign for neurological impairment,
15 cerebral neurological impairment.

10:34AM

10:34AM

10:35AM

16 Regarding Ms. Dockery, all of those reflexes
17 were normal; there was no evidence of any deficit
18 whatsoever.

19 Now, there was -- there was some noted,
20 what's called ptosis of her right eye which is
21 where the eyelid is drooping but. Other than that,
22 there was no major asymmetry of the facial
23 musculature of the upper extremities, which, once
24 again, another neurological sign that we looking --
25 that we are looking for in differential

10:35AM

10:35AM

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1 diagnostics.

2 After that, she was evaluated regarding
3 general musculotone [sic], which she did show some
4 decreased musculotone. There was somewhat a degree
5 of weakness. Accuracy of movement for general
6 routine manual tasks, walking and so forth and
7 simple movement, was generally intact.

10:35A

8 We then use -- take a look at her grip
9 strength, which is done by using a hand
10 dynamometer, which is simply -- it's a device in
11 which an individual squeezes, and it measures the
12 strength within their hand. And in her case, for
13 her -- for her right hand, looks like she performed
14 within the 2nd percentile, so there was evidence of
15 some weakness in that right hand, and below average
16 functioning for her for non-dominate left hand.

10:36A

17 The reason that we do this is because it can be --
18 the motor dysfunction is frequently indicative, not
19 always indicative of, but it's frequently
20 indicative of a neurological issue. And once
21 again, when looking at this information, we don't
22 look at it within a vacuum; we look at it as
23 convergent data, what of the data points to certain
24 types of syndromes, indicating certain types of
25 pathology.

10:36A

10:36A

10:36A

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1 We then move on to her manual motor speed
2 functioning, which is simply measured by a tapping
3 type device. This is a device in which an
4 individual's hand is placed flat on a board and
5 there is a tapping device where they place their
6 finger and, as quickly as they can, move their
7 finger with the -- up and down on this device to
8 count how quickly they can do that. And compared
9 to other people her age, it was -- she performed
10 within the 10th percentile for the left hand and the
11 right hand.

10:37AM

10:37AM

12 And that's -- other than that, there was no
13 major motor testing done. And in her case, it
14 wasn't considered a major issue, so...

15 Q. Okay. The next item in your list is
16 Sensory-Perceptual Functions?

10:37AM

17 A. Correct.

18 Q. Can you describe the tests and results in
19 that area?

20 A. Regarding sensory-perceptual type functions,
21 that was a little bit of a difficulty. This is --
22 these are tests that -- they're fairly simple
23 tests. They are tests in which -- they can range
24 from visual field testing, which is just gross
25 visual field testing to see how far out a person is

10:37AM

10:38AM

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1 seeing out of each of their fields. These are
2 indicative of different types of pathologies
3 ranging from strokes, lesion activity and so forth.
4 And we do this commonly by simple gross evaluation.
5 Our fingers are used to see how far it takes for a
6 people to be able to see in, while one eye is
7 covered on each side, to check the visual fields.
8 We do this for looking at hemineglect, for people
9 that have strokes, lateralized strokes,
10 cerebrovascular type accidents. And what ends up
11 happening is we start to see some -- there are
12 certain patterns that we note based where in the
13 brain there may be damage. Things, for example,
14 what's called a homonymous hemianopsia --

10:38A

10:38A

15 COURT REPORTER: I'm sorry, a what?

16 THE DEPONENT: A homonymous
17 hemianopsia, h-o-m-o-n-y-m-o-u-s, space,
18 hemianopsia, h-e-m-i-a-n-o-p-s-i-a.

19 A homonymous hemianopsia is where an
20 individual will lose their vision out of the
21 field of the -- the visual field in both
22 eyes. So basically in the right eye, for
23 example, if they have a right-sided
24 homonymous hemianopsia, they can't see out
25 of the right visual field for not just the

10:39A

10:39A

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1 right eye but on the left eye as well and --
2 but they can on the left -- the left visual
3 field.

4 And it's indicated -- each of these
5 deficits are indicative to us of damage in a
6 certain area.

10:39AM

7 We also take a look at gross auditory
8 capacity to see if a person can hear, they
9 can't hear. We take a look at
10 sensory-perceptual capacity in terms of
11 tactile issues on both the face, if they can
12 feel on their face, and on their hands as
13 well. And we are not so interested, of
14 course, if the person can, but also if they
15 are having what's called suppression
16 deficits, where the individual can -- they
17 might be able to feel on one side and on the
18 other side, but when you give them -- when
19 you stimulate both sides of their body or
20 both ears or eyes, that one part of the
21 brain is suppressing the other, where they
22 can only respond -- where they are only
23 responding to another.

10:39AM

10:39AM

10:40AM

24 This is basically a commonly done
25 sensory-perceptual evaluation. And in

10:40AM

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1 Ms. Dockery's case, there was an attempt to
2 do this, and she had extreme difficulty
3 completing very simple tasks and validating
4 the results. So there was just a limitation
5 in what could be done in her case, which is
6 generally something that can be done in, in,
7 in -- most rather significantly and
8 substantially injured, brain injury and
9 dementia cases.

10:40A

10 BY MR. MCCRACKIN:

10:40A

11 Q. Okay. Doctor, next on your report is
12 Visual-Spatial Functions --

13 A. Yes.

14 Q. -- tests were done in that regard, and what
15 were those results?

10:40A

16 A. Visual-spatial functioning, there is several
17 tests that are done. One of them is a simple clock
18 drawing which is commonly used in dementia
19 diagnostics. And in her area, in her testing she
20 did evidence some rather significant problems in
21 visual organization and planning for the more
22 complex areas of drawing. The simple ones, she --
23 there wasn't any major issue, but when it became
24 more complex, she started missing details, started
25 distorting details of drawings. And in complex

10:41A

10:41A

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1 visual organization planning, which is a more
2 abstract design, she scored, compared to other
3 people her age, in the less than the 1st percentile.

4 Also, she was measured with an ability to
5 estimate line segment angulation, which is
6 essentially, she -- individuals in this test are
7 presented with a stimulus which is two parts: One
8 is an -- on a ray of lines at different angles as
9 an arc throughout the stimulus. And then on the --
10 on the top of that, there is another stimulus which
11 has two lines. Those two lines are arranged in
12 different ways throughout the testing. And the
13 individual is asked to point to, on the stimulus
14 part of the entire arc of angles, which one that
15 matches to determine if they are able to
16 appropriately perceptually and visually
17 perceptually-process this information.

18 In Ms. Dockery's case, she seemed to have
19 difficulty completing these -- this quite a bit and
20 became rather frustrated, and I couldn't get a
21 reading on that test because she basically refused
22 to continue and, as it says in my report, "I don't
23 care... I don't understand... this is not my cup of
24 tea, I could go all afternoon and not get any
25 right." That's regarding visual-spatial

10:41AM

10:42AM

10:42AM

10:42AM

10:42AM

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1 functioning.

2 Q. Doctor, would you have any sort of document
3 that would show her efforts in regard to any of
4 these tests?

5 A. What do you mean in terms of? 10:43A

6 Q. Did she draw something or --

7 A. Do I have the data, the actual data? Yes.

8 Q. Yes.

9 A. I do, I have it all.

10 Q. And that would be in the record that you -- 10:43A

11 A. I have that here (indicating).

12 MR. McCrackin: Okay. And I presume

13 that counsel agrees that that would be

14 presented in the documentation he's --

15 MR. BRITTAIN: He'd probably have to -- 10:43A

16 you'd probably have to take him through and

17 explain all that. I mean, I don't know that

18 we can interpret it unless you show it to

19 him and he's saying what it was.

20 THE DEPONENT: Yeah, I can't -- I can't 10:43A

21 actually disclose that information directly

22 to you. I can only disclose it under my

23 ethics by my profession, according to both

24 the American Psychological Association, as

25 well as the state licensure board, as well 10:43A

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1 as copyright law. I can't just hand that to
2 you. Even in -- even in Subpoena, I would
3 have to object to that and -- and it would
4 have to be an in camera order for me to
5 actually hand that over.

10:43AM

6 BY MR. McCrackin:

7 Q. So you would actually --

8 A. I would have to give it to another person
9 who is qualified to interpret that.

10 MR. BRITTAIN: And I don't have a
11 problem with it being admitted, don't
12 misunderstand me. But I'm afraid if I look
13 at that, without him telling me what it was,
14 I wouldn't know what it was. I think he
15 would have to show me the test and remind me
16 what he asked her to do and all that sort of
17 thing.

10:43AM

18 MR. McCrackin: Would you like to do
19 that now?

20 MR. BRITTAIN: Well, I mean, I think if
21 -- he's got this other issue, so, I mean --

10:44AM

22 BY MR. McCrackin:

23 Q. Can you show us the documents where she
24 tried to draw something and explain to us what
25 the --

10:44AM

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1 A. I can show you the data and explain the
2 data. I can't hand over the data unless it's
3 handed over to another professional with the
4 appropriate training.

5 Q. I understand. Will you at least show us the
6 data? 10:44A

7 A. Yes, I would be able to.

8 MR. MCCRACKIN: Will you be able to get
9 it -- a picture of the data?

10 MR. MONCKTON: Jim, I'm going to have
11 to object until we can see it and know
12 what's going on because I just don't want
13 something -- on the video, it's not going to
14 be clear. 10:44A

15 MR. BRITTAIN: We haven't seen it yet. 10:44A

16 MR. MCCRACKIN: I understand. Well --
17 and you are certainly capable -- we reserved
18 objections, so if there is a portion of the
19 video that you-all object to when we get to
20 trial. 10:45A

21 THE DEPONENT: I'm going to request a
22 brief interlude. I require the facilities.

23 MS. MOORE: That's what you get for
24 drinking that big cup of coffee.

25 MR. MCCRACKIN: Can we go off the 10:45A

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1 record, Madonna?

2 VIDEOGRAPHER: Going off the record at
3 10:45 a.m.

4 (A recess transpired from 10:45 a.m.
5 through 10:48 a.m.)

10:48AM

6 VIDEOGRAPHER: Going back on record at
7 10:48 a.m.

8 BY MR. MCCRACKIN:

9 Q. Dr. Goldschmidt, I was asking you if you had
10 any data showing work that Ms. Dockery had
11 attempted as part of these examinations, and you
12 said you did have that in your file. Are there a
13 couple of examples that you can show us of her
14 efforts on these tests?

10:48AM

15 A. I can show you examples of her efforts in
16 terms of two ways: One is her verbal responses to
17 -- or the recording of her verbal responses to the
18 testing, as well as the data that emanates from
19 that, and as well as some of her written responses
20 and behaviors in response to the tasks, yes.

10:49AM

21 Q. Okay. Will you do that for us?

22 A. It's quite extensive. And we are talking
23 about the first testing of 2010 through early 2011;
24 is that correct?

25 Q. Yes, that's correct. And I'm -- I'm

10:49AM

10:49AM

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1 suggesting maybe that you pull us some samples that
2 are indicative of those efforts and answers, not
3 necessarily the entire file.

4 A. Well, we were working on -- you were talking
5 just recently on visual-spatial functioning, that 10:50A
6 was our last area, where there was -- where there
7 was an evaluation -- where we were discussing.
8 And, yes, I will show you.

9 This test right here is -- this is the
10 recording form for the Rey Complex Figure Test and 10:50A
11 Recognition Trials and test booklet. This is
12 essentially a test in which Ms. Dockery was shown a
13 design on a large piece of paper, which I do not
14 have here, it was the stimulus design which is
15 reproduced with corresponding numbers to indicate 10:50A
16 the different parts of the stimulus and is this
17 shape right here on the top of the recording
18 booklet. Would you like me to hand that down or...

19 MR. BRITTAIN: I think you're just
20 going to have to make a copy of everything 10:50A
21 for us. If you start into it, you may as
22 well -- you can't just let him pick what he
23 wants to show us.

24 THE DEPONENT: I can go over anything
25 you wish. I can't hand these over for copy 10:51A

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1 without an in camera order.

2 MR. BRITTAIN: I mean, we -- we don't
3 know what we could use out of there. I
4 mean, you know, if he starts showing some of
5 it, I think we need to see it all.

10:51AM

6 THE DEPONENT: I'll be happy to show it
7 all if you like.

8 MR. McCRACKIN: I mean, I'm not --
9 let's go back off the record for a second
10 and see if we can figure it out.

10:51AM

11 VIDEOGRAPHER: Going off the record at
12 10:51 a.m.

13 (Off-the-record conference.)

14 VIDEOGRAPHER: Going back on record at
15 10:55 a.m.

10:55AM

16 MR. McCRACKIN: We've had a discussion
17 off the record, and I think our agreement is
18 that we are going to go forward in this
19 deposition, and I'm going to ask
20 Dr. Goldschmidt some questions about these
21 specific data.

10:55AM

22 Mr. Brittain and Mr. Monckton want to
23 reserve the right to object to admission of
24 this portion of the testimony at trial or to
25 make a motion to get all of the data. As

10:55AM

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1 Dr. Goldschmidt has informed us, that he's
2 limited through his ethical obligations to
3 give us copies at this time.

4 Is that fair?

5 MR. BRITTAIN: Yeah. I'll just state
6 it my our side that I've got no problem with
7 you proceeding now, that once we start
8 getting into the data itself, I think

9 several things pertain. Number 1, you have
10 to have an expert describe them to you. The
11 layman can't appreciate what's involved in
12 that data.

13 Number 2, such a significant issue,
14 that Dr. Goldschmidt has told us he would
15 not make it available to us without a court
16 order, and it's a matter of ethics for him.

17 Therefore, in order to fully evaluate
18 the significance and the completeness of the
19 data, anybody a party to this would want to
20 see it all first and have it made available
21 to a professional within the field for
22 review.

23 And so we can't do that right now. So
24 I would want to reserve that and make that
25 objection.

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1 MR. MONCKTON: I would join in that on
2 behalf of John Dockery.

3 MR. McCRACKIN: Very good.

4 BY MR. McCRACKIN:

5 Q. Dr. Goldschmidt, if you would proceed in
6 explaining to us what that particular piece of data
7 is.

10:57AM

8 A. As I was discussing regarding visual-spatial
9 functioning, this is one of the few areas where an
10 actual physical sample of what Ms. Dockery was able
11 to do is kept within the record or kept with the
12 record where it was actually requested of her. And
13 in --

10:57AM

14 MR. BRITTAIN: Excuse me one second, we
15 need to mark that as an exhibit.

10:57AM

16 MR. McCRACKIN: I don't think he can
17 give it to us, so --

18 MR. BRITTAIN: Well, we have got to
19 know what he's talking about when we go back
20 to the deposition. I mean, whether you put
21 it in --

22 MR. McCRACKIN: We are going to have a
23 picture, so...

24 MR. BRITTAIN: Oh, okay. Okay.

25 BY MR. McCRACKIN:

10:57AM

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1 Q. Please proceed, Dr. Goldschmidt.

2 A. As I was saying, there's a stimulus that is
3 given to the patient to make a reproduction of --
4 in copy form with pencil. And she was given as
5 much as time to do this as she needed, Ms. Dockery
6 being the "she."

10:57A

7 On the 15th page of the data booklet, this
8 is Ms. Dockery's reproduction of that design with
9 as much as time as she was given. In essence, this
10 seems to be a rather severe and gross distortion in
11 her capacity to reproduce what she had seen, which
12 is indicative to me of a rather substantial
13 cognitive deficit and indicative of a dementing
14 process, which is largely supported in the medical
15 record by much of the -- what I had included in my
16 report in terms of the CT and structural imaging
17 scans that were -- that I did note.

10:58A

10:58A

18 But that's -- the level deficit here is --
19 in scoring this reaches to the less than article of
20 1st percentile, meaning that she scored worse than
21 99 percent of the population. After three minutes,
22 Ms. Dockery was asked to recall in drawing any
23 parts of the design that she had seen, in which
24 case -- in her case, she worked on the design for a
25 total of 900 seconds, which was 15 minutes, at

10:58A

10:59A

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1 which point -- in that case, we request from the
2 patient -- if they choose to discontinue, that they
3 may simply because 15 minutes is beyond what we
4 consider severe deficits, and the score will remain
5 the same after 15 minutes or an hour or whatever.

10:59AM

6 However, she chose just to continue, and we
7 then asked her to recall after 15 minutes with that
8 stimulus what she remembered, and she had zero
9 recall, or at least in terms of what she gave as a
10 response.

11:00AM

11 And then after 30 minutes, she was asked
12 again to recall what she could, and that is on this
13 page here. And she does recall some of the design,
14 most of which is largely illegible and unscorable
15 and scores -- places her once again in the --

11:00AM

16 MR. BRITTAIN: Let me see that. Can I
17 see what you're talking about?

18 THE DEPONENT: Which one, the last one?

19 MR. BRITTAIN: Uh-huh.

20 THE DEPONENT: (Indicating.)

11:00AM

21 -- which places her in the
22 2nd percentile for 86-year-olds.

23 Now, I think it's important to note
24 that we're talking about, in comparison to
25 other 86-year-olds, which the research --

11:00AM

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1 the medical research indicates a rather
2 large portion of individuals of that age
3 bracket are considered demented of a rather
4 substantial cognitive limitations. The
5 numbers are -- somewhat range, but it's a
6 rather large percentage; it's a minority
7 percentage, but roughly one-third of the
8 population at that age has a rather
9 significant dementia. In her case, compared
10 to other 86-year-olds, she's performing in
11 that bottom, in the bottom -- less than the
12 1st percentile for copy, bottom less than the
13 1st percentile for immediate recall,
14 2nd percentile for delayed recall at 30
15 minutes, and at less than the 1st percentile
16 on a recognition file in which she is shown
17 parts of the design, which are included
18 within this booklet on Pages 7 through 10
19 and given -- asked to circle the parts of
20 the design that she recalls, and she scored
21 less than the 1st percentile there.

11:01A

11:01A

11:01A

11:01A

22 BY MR. McCrackin:

23 Q. Thank you, Doctor. Continuing on in your
24 report, it looks like the next area is Language
25 Functions?

11:02A

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1 A. Yes.

2 Q. Can you tell me what tests were given in
3 regards to language function and what her result
4 was?

5 A. Language functioning, there was a -- there
6 was two parts of the language functioning. One is
7 my opinion during examination of the individual in
8 having her speak with me and answer questions and
9 respond in terms of giving her history; and the
10 other is through objective testing.

11:02AM

11 In general, Ms. Dockery's speech was
12 actually quite coherent. And from what I recall of
13 her, as well as in -- in my documentation, she's --
14 was a seemingly -- a rather capable person of
15 speaking in terms of her communication. She was --
16 at one point, I believe, a rather fluent
17 individual. However, over time, as people age, we
18 start to see some decompensation there. And in
19 Ms. Dockery's case, in speaking with her, she was
20 generally coherent. She was able to talk and
21 communicate in some reasonable degree to at least
22 respond to many of our questions.

11:02AM

11:02AM

11:03AM

23 In terms of her ability to name familiar
24 objects, which is a test that is frequently used in
25 the evaluation of individuals for Alzheimer's

11:03AM

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1 disease, specifically, it gives us a lot of
2 information, rather dementia is not necessarily so
3 much -- unless it is a specific linguistic problem.
4 And her naming ability was in the 42nd percentile,
5 which is considered within normal limits. There
6 was --

11:03AM

7 Q. Doctor -- sorry to interrupt you.

8 A. Yes.

9 Q. I'm curious, you talked about her ability to
10 express herself --

11:04AM

11 A. Yes.

12 Q. -- almost fluently.

13 Is it possible that someone who doesn't
14 spend a significant amount of time with her,
15 looking beyond just normal conversation, might
16 determine that she has capacity based on --

11:04AM

17 MR. BRITTAIN: I object to the form of
18 the question. I don't -- I don't believe
19 this witness is qualified, there's no
20 foundation for it, and it would call for a
21 conclusion beyond his expertise, and it
22 states facts not in evidence. So I object.

11:04AM

23 BY MR. McCrackin:

24 Q. You can answer the question.

25 A. I don't want to overstep my bounds, but I'd

11:04AM

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1 like to clarify.

2 Q. Absolutely. You can answer the question.

3 A. Okay. But not just to answering your
4 question, but to clarify what you are saying that
5 it's out of my expertise.

11:04AM

6 MR. BRITTAIN: Don't worry about
7 clarifying. You, you, you -- Jim's telling
8 you right; you answer your question.

9 THE DEPONENT: Okay.

10 BY MR. McCRACKIN:

11:04AM

11 Q. But feel free to clarify, if you feel like
12 this is within your expertise --

13 A. Okay.

14 Q. -- will you please clarify that.

15 A. Yes. It's very much, I believe, an area
16 within my expertise as a clinical
17 neuropsychologist. It is my job to make clinical
18 judgments regarding a person's capacity in speaking
19 with him and frequently to be able to determine
20 what their functional losses are as well as what
21 their medical pathologies are underlying the
22 behavioral changes as well as physical changes.

11:04AM

23 So much of the time, I am confronted with
24 individuals who, on the face, face validly or
25 ecologically, seem to be functioning at a very high

11:05AM

11:05AM

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1 level. But in actuality, when given certain --
2 when given tasks that push those limits, they're no
3 longer able to cover up their deficits, or limit
4 their deficits by either the communication or the
5 presentation. And this is especially the case in 11:05A
6 individuals who pre-morbidly, meaning prior to
7 being ill, who were a rather intelligent and
8 capable people. Much of the time, people that were
9 intelligent at one point and capable at one point
10 and who are now experiencing dementia, they 11:05A
11 actually are very good at covering up the deficits
12 that they have. And I believe in Ms. Dockery's
13 case, that was the case. Because as a matter of
14 fact, Mr. Tall, when he sent Ms. Dockery to me, he
15 was -- he asked to discuss my findings after I was 11:06A
16 done for purposes of diagnostics and treatment to
17 determine whether there may or may not be an issue.
18 And, initially, when I first spoke with her,
19 in actually meeting with her, it was -- it was my
20 -- and I spoke this, and I said this to Mr. Tall -- 11:06A
21 which is I felt, in talking to her, without looking
22 at her competency or her capacities, because it was
23 not a question at the time, I did not evaluate her
24 capacities during the first evaluation -- the capa-
25 -- the -- for -- from a legal perspective or a 11:06A

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1 forensic perspective. I was looking at her from
2 the purposes of medical evaluation, diagnostics and
3 treatment planning.

4 And so what essentially happened is, in my
5 opinion, I actually believed that she was
6 functional, fairly well. I was -- I, I, I was
7 surprised actually by the data in speaking with
8 her, just in face value, because I didn't question
9 the issues of capacities, and I didn't -- and I
10 didn't have the objective data to show me what her
11 functioning was.

11:07AM

11:07AM

12 Q. Doctor, to be clear, the results of the data
13 surprised you because they contradicted your
14 initial impression based on her conversation with
15 you?

11:07AM

16 A. Very much so. I mean, I believed, in just
17 meeting with her, that she was a relatively
18 intelligent lady and that she was capable of
19 communicating what she needed to communicate. And
20 I believe at this point, that my data, even though
21 -- because at the time, I hadn't reviewed all of
22 the records. After having reviewed the medical
23 records and see what was there and then having the
24 data in existence, there was an overwhelming amount
25 of evidence substantiating a rather significant

11:07AM

11:08AM

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1 dementia.

2 And at that point, you know, I had -- that's
3 when I made my diagnostics impressions.

4 Q. Doctor, the next section of your report is
5 Executive Functions?

11:08A

6 A. The next part of my report is Executive
7 Functions.

8 Q. And can you explain what tests were given in
9 regard to Executive Function and what those results
10 were?

11:08A

11 A. Yes, the Executive Functions are functions
12 of planning, organization, general problem-solving,
13 it's higher-end cognitive capacity that is largely
14 determined by an integration of the brain's
15 capacities, largely within the frontal and
16 prefrontal lobes and orbitofrontal cortex.

11:08A

17 And there were several tests that were
18 given. One of them was previously mentioned, which
19 was the test of visual-spacial functioning, because
20 it measures both visual-spacial functioning, as
21 well as organization and planning, because the
22 person does have to organize the design in a
23 certain fashion and plan it appropriately to be
24 able to get it onto the -- onto the result page.
25 And, of course, she scored less than 1st percentile

11:09A

11:09A

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1 there.

2 And another test, which is a -- it's called
3 a Stroop Interference Test, where she was asked to
4 first look at a page full of different colored dots
5 and tell me the colors or tell the examiner the
6 colors that were on that page as quickly as she
7 could.

11:09AM

8 Then the next task, of course, is to read
9 familiar words that are printed in different color
10 ink and then to -- the third task is to read color
11 words, such as read the word "red," when it's
12 printed and the color green, or read the word
13 "green" when it's printed in the color yellow. And
14 so that's called a Stroop interference effect.
15 That's -- the brain has problems doing that. And
16 it's something that requires cognitive capacity to
17 push through, and so -- for that interference.

11:09AM

11:10AM

18 In Ms. Doctor's case, her capacity to push
19 through that interference that ranged from the less
20 than 0.3rd percentile, which is less than -- which
21 is essentially less than three people out of 1,000,
22 or one out of 333, and moderate level of deficit in
23 the 5th percentile.

11:10AM

24 She was also tested for
25 visual-constructional production. In other words,

11:10AM

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1 this is a test in which there are several dots that
2 she was -- basically, in an array, a page of
3 several dots, five dots per a square. And in each
4 of those squares, she's to make as many designs as
5 fast as she can within three minutes by connecting
6 those dots. And she was able to reproduce five
7 designs after three minutes -- or create five
8 designs after three minutes. It's a relatively
9 simple task. And the amount of designs she was
10 able to do is generally indicative of a person's
11 ability to organize and plan and think through in
12 the terms of the problem solving. And she scored
13 within the -- within the rather significant
14 deficits. We've only -- it's a gross deficit there
15 because in her age, there's no specific norming in
16 terms of -- they don't go up to that age, but it is
17 a test that we continue to use from a clinical
18 perspective to determine whether or not there's the
19 presence of a dementing process.

11:11A

11:11A

11:11A

20 Q. Okay. Doctor, let's go on to --

11:11A

21 A. I'm not done, I'm sorry.

22 Q. Okay, go ahead.

23 A. Of course, there's also visual-conceptual
24 tracking and divided complex visual-conceptual
25 tracking, which we previously discussed under

11:12A

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1 attention functioning, which is -- also because it
2 requires conceptualization, it's also included
3 within the executive functioning area.

4 Then there was another test which was given,
5 it's called the Digit-Symbol-Coding.

11:12AM

6 Digit- Symbol-Coding is part of the Wechsler Adult
7 Intelligent Scales, and it is one of the areas that
8 -- it is the subtest that is most, of all of the
9 Wechsler scales, sensitive to cerebral
10 neuropathology. And generally when we do
11 evaluations of individuals, we frequently see this
12 in decline when there is cerebral neuropathology
13 when other scales may not. And in her case, she
14 scored within the 1st percentile.

11:12AM

15 This is essentially a task in which she's
16 shown a group of symbols with corresponding numbers
17 and she's to -- then she's given a page that just
18 has the numbers, and then she needs to write the
19 correct symbol underneath it based on anywhere that
20 she sees it as quickly as she can. It measures
21 clerical speed, ability to follow directions,
22 accuracy, psychomotor speed and so forth.

11:13AM

23 I'm sorry, was I speaking too fast? I
24 apologize. Would you like me to repeat any of
25 that?

11:13AM

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1 COURT REPORTER: No.

2 THE DEPONENT: And she scored in the 1st
3 percentile.

4 On another test, a subtest of the WAIS,
5 called the subtest of Matrix Reasoning, 11:13A
6 which is a test of mental flexibility,
7 visual conceptualization, general pattern
8 recognition, one of the Executive Functions,
9 she scored in the 2nd percentile.

10 She was given another test where she 11:13A
11 was shown a number of pictures and asked to
12 put them in the appropriate order to make a
13 story that made sense. And compared to
14 other people her age, she scored within the
15 borderline deficit, 16th percentile. And 11:13A
16 then she was given several blocks to, to put
17 into a certain design she was shown, the
18 block design and scored in the 5th
19 percentile.

20 Normally in these cases, there's a test 11:13A
21 called the Wechsler -- not the Wechsler --
22 the Wisconsin Card Sorting Test. And in
23 Ms. Dockery's case, because she was having
24 rather substantial difficulties with the
25 evaluation up to this point and being able 11:14A

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1 to follow directions on certain areas, that
2 test was discontinued. So that's -- the
3 results of that are not within this -- this
4 report simply because it -- couldn't do it.

5 Then Orientation?

11:14AM

6 BY MR. McCRACKIN:

7 Q. Yes, Doctor, please tell me what tests were
8 administered in regard to orientation and what the
9 results were.

10 A. Okay. In speaking with Ms. Dockery during
11 initial interview, there's some prior sections in
12 here that there was some -- where there's some
13 deficit. But during actual testing, what was noted
14 was that she was asked the current year. I can
15 give you what her answer was at the time. And
16 from...

11:14AM

17 And she said, when asked what the current
18 year was, her answer was it was 2000.

19 Q. And, Doctor, for the record, this
20 examination was either in December of 2010 or
21 January of 2011?

11:15AM

22 A. The date of this question was on 1/4/2011.
23 I can give a list of all the questions she was
24 asked and what she did correctly and what she
25 didn't do correctly.

11:15AM

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1 Q. Please do that for us --

2 MR. BRITTAIN: Let me just say I object
3 to it unless I have the documents, which we
4 don't have. I'm just reiterating that
5 objection.

11:16A

6 You're referring to documents that you
7 aren't prepared to give today; is that
8 correct?

9 THE DEPONENT: I will give you verbally
10 what was asked, and I will give you verbally
11 what she responded.

11:16A

12 MR. BRITTAIN: But not the documents
13 themselves?

14 THE DEPONENT: No, the documents I
15 cannot.

16 MR. BRITTAIN: I understand.

17 THE DEPONENT: When she was asked what
18 her full name was, she was able to tell me
19 her full name, Emily Sheryl Cheshire
20 Dockery. I asked her her age; she was able
21 to tell me her correct age, 86. When she
22 was born, on 7/16/1924. Where she was born,
23 Raleigh, North Carolina. Her mother's first
24 name, Alice. Who the president of the
25 United States was, Barack Obama. Who the

11:16A

11:16A

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1 president before him was, she said Bush.
2 The current year, which she got wrong, she
3 said it was 2000. She asked what the
4 current month was. She said it was January.
5 She was asked what the day of the month was, 11:16AM
6 she was close on that, she said the 5th.

7 I asked her the name of the place she
8 was in. She said it was a healthcare
9 center. And what city it was. She said it
10 was rural, outside of Surfside, which was 11:17AM
11 somewhat correct, but she couldn't answer
12 the actual place. We were actually in
13 Murrells Inlet. What day of the week it is,
14 she said it was a Wednesday. I'd have to go
15 back on the calendar to see what date that 11:17AM
16 was. What time it was. She responded that
17 it was within several minutes of what the
18 time was, 2:37. Whether she was
19 right-handed or left-handed, she said left.
20 She has difficulty hearing, she said 11:17AM
21 sometimes. Does she need glasses for
22 reading, sometimes. And are you colorblind,
23 the answer was no.

24 COURT REPORTER: I'm sorry, what was
25 the last one? 11:17AM

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1 THE DEPONENT: Are you colorblind? The
2 answer was no.

3 So there was some evidence of
4 disorientation to some extent, some gross
5 evidence, but nothing that was overwhelming 11:17A
6 that she was clearly and evidently
7 disoriented. In general, she was rather
8 well oriented. She was -- as is stated
9 under orientation.

10 BY MR. MCCRACKIN: 11:18A

11 Q. Doctor, in regard to her intellectual
12 functions, did you perform tests, and what were the
13 results of any tests you performed?

14 A. Yes, I did. I performed a battery of tests
15 to determine what her current intellectual 11:18A
16 functioning was. At the time, she scored a full
17 scale IQ with the Wechsler Adult Intelligent Scales
18 of an 84 which is in 14th percentile, below average
19 range; a verbal IQ of 94 which is in the 34th
20 percentile, average range, and a performance IQ of 11:18A
21 73, which is in the 4th percentile, which is in the
22 borderline range.

23 There was a 21-point discrepancy between the
24 performance and verbal IQs, which is somewhat
25 unusual. It only occurs in less than or equal to 11:18A

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1 6 percent of the appropriate population in her age
2 bracket.

3 And then there's some specifics regarding
4 how she did in the subtests that is documented
5 within my report.

11:18AM

6 Q. Okay.

7 A. Would you like me to discuss those? No?
8 Yes?

9 Q. Doctor, were there any further tests beyond
10 that?

11:19AM

11 A. Yes, there were. She was given a test that
12 is frequently used in assisted living, in placement
13 for people for nursing care, in determination of
14 people's capacities to live independently and
15 safely, to manage money, to manage healthcare, to
16 manage transportation and home. It's called the
17 Independent Living Skills Test. And these are used
18 to measure ecologically valid and, and, and real
19 world conditions to determine whether or not the
20 tests that I'm giving, which are used for
21 diagnostic purposes, how they are impacting her
22 ability for independent living, or an individual's
23 ability for independent living.

11:19AM

11:19AM

24 In Ms. Dockery's case, she evidenced low
25 levels of functioning for managing money, managing

11:19AM

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1 health and safety, problem solving and performance
2 and information base. Low levels, meaning that she
3 shouldn't -- that I would not recommend that she be
4 doing these things on her own.

5 Now, of course, this is not the only
6 measurement that we use to make that determination.
7 This is -- once again, I will say that my
8 evaluations are based on convergent data, which is
9 based on the medical record examination, the test
10 data otherwise, as well as these tests here.

11 Q. Can you describe a little bit what test you
12 would use in determining her living skills?

13 A. Yes, but I wasn't completed on my last
14 question -- the last question.

15 Q. I'm sorry, please continue.

16 A. She also scored within the moderate levels
17 of functioning for memory and orientation; and,
18 otherwise, managing home and transportation and
19 social adjustment were high. In other words,
20 social adjustment is roughly how is she doing
21 emotionally, how is she dealing with things
22 emotionally.

23 Because of that, sometimes it overinflates
24 the other areas. In her case, the other scores
25 were so low that her overall independent living

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1 skills were considered low, suggesting that she
2 likely required high levels of supervision in her
3 daily activities. And I requested -- actually,
4 when I met with Mr. Dockery, I told him that I
5 would -- I feel that she should not be left on her
6 own from that point forward.

11:21AM

7 And to answer your next question, which was
8 what are the tasks?

9 Q. Yes.

10 A. Yes.

11:21AM

11 Mr. Brittain, is it?

12 MR. BRITTAIN: Yes, sir.

13 THE DEPONENT: Okay. Mr. Brittain, I'm
14 going to refer to these documents to answer
15 the question, if you -- is there any problem
16 with that?

11:21AM

17 MR. BRITTAIN: We aren't marking them,
18 so I don't even know what you're referring
19 to.

20 THE DEPONENT: Okay.

21 MR. BRITTAIN: And I don't know how I'm
22 going to go back and ask you about it,
23 because they're not being marked, and I
24 don't know what the picture is showing or
25 what it's not showing, so...

11:22AM

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1 But we are in it now, so just -- I'll
2 object to all of it, just you do the best
3 you can.

4 THE DEPONENT: Okay. What I am going
5 to be doing is essentially discussing the
6 tasks, as I was on the -- on many of the
7 other tests.

11:22A

8 What we do is we look specifically at
9 certain capacities by having people do some
10 real world type of activities. For example,
11 asking, roughly -- one question is, about
12 how much does a loaf of bread cost? And
13 there's a range based on what the current
14 standards are.

11:22A

15 There's -- she's asked to do some
16 mathematics problems. For example, if you
17 bought a dozen eggs for \$1.19, if you gave
18 the clerk, how much -- if you gave the clerk
19 \$5, how much should you get back? And the
20 answer was, "I don't know." And, of course,
21 when we get "I don't know," we don't just
22 automatically just assume "I don't know" is
23 okay. We say, you know, could you try to
24 think about it?

11:22A

11:23A

25 In my office, both myself and my

11:23A

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1 psychometrician have been doing this for
2 roughly 20 years. We -- it's very important
3 for me to, "push the limits," which is that
4 the data itself cannot reflect the pushing
5 of the limits. We can only score based on
6 the appropriate response, unless the testing
7 allows us to push the limits.

11:23AM

8 If the testing allows to push the
9 limits for the purposes of scoring, it is
10 marked. If it the testing does not allow us
11 to push the limits for purposes of scoring,
12 it does not stop us from -- from pushing the
13 limits for purposes of determination of
14 validity of the -- of the evaluation.

11:23AM

15 Sometimes people are lacking in
16 motivation and initiation, or they may have
17 problems with anxiety, which can cause an
18 artifact. And, certainly, I don't want to
19 report things that are based on artifact.

11:23AM

20 And when asked where her checks and
21 money orders come from, she said from the
22 bank.

11:23AM

23 She was asked -- she was given a fake
24 check or -- and money order to pay out to
25 the telephone company based on a bill that

11:24AM

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1 she was handed, a copy of a fake bill that
2 she was given from the telephone company and
3 asked to fill out the check. And she made
4 some mistakes on completing that based on
5 the bill and appropriately filling out the
6 check.

11:24AM

7 She was also asked to make out another
8 check and money order payable to the gas and
9 electric company, and there was some
10 deficits and difficulty there.

11:24AM

11 She was then asked to deduct the two
12 checks from the beginning balance and tell
13 how much money, if any, she would have left
14 over. And she was given a sheet of scratch
15 paper, which we have within the record, to
16 determine how much was left, and her
17 response was incorrect, and she said there
18 just was not enough to pay.

11:24AM

19 Then she was asked two reasons why it's
20 important to pay bills -- this is actually
21 quite lengthy. I mean, do you want me to go
22 through every --

11:25AM

23 MR. BRITTAIN: I don't. I objected to
24 all of it.

25 THE DEPONENT: I'm just asking and you

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1 guys --

2 BY MR. McCRACKIN:

3 Q. Doctor, I think you've given us a good
4 flavor of her response, and I think that's -- that
5 certainly has answered my question as to what kinds
6 of tests you gave her in connection with that.

11:25AM

7 Any other tests that were given to her,
8 Doctor, that we haven't covered?

9 A. On the initial evaluation of late 2010,
10 early January 2011, correct?

11:25AM

11 Q. That's correct.

12 A. January 2011. In terms of actual testing,
13 no. There was -- we did not discuss every single
14 test that I may have given her. We may have,
15 actually. We may not have. But everything that,
16 that, that -- the tests that were actually given is
17 all reflected within the neuropsychological report
18 from that date.

11:25AM

19 Q. Doctor, do you have an opinion as of that
20 date as to whether or not Ms. Dockery had capacity?

11:26AM

21 A. Well, that -- the answer to that question
22 is -- I would say there are certain individuals
23 whose cognitive dysfunction is so clear in the data
24 that we could -- I can make, I will make that
25 determination, but I will not -- I don't feel

11:26AM

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1 that's sufficient to meet the standards for the
2 court in and of itself, that -- which is that her
3 functional status was clearly -- evidencing clear
4 and substantial deficits, and her ecological
5 validity testing of independent living skills
6 showed some real significant substantial deficits
7 to the point where I made the recommendation that
8 she shouldn't be left unsupervised.

11:26A

9 So based on that and the medical record, I
10 would say that she was likely not -- did not have
11 the capacity to care for herself and her finances
12 and legal decisions.

11:27A

13 However, capacity evaluations are not
14 generally determined strictly on, on, on
15 neuropsychological data alone. When put to that
16 standard, we then require more testing to ask
17 questions regarding, you know, what would you do in
18 real life type situations? At which point, I
19 generally make those decisions.

11:27A

20 I did not make the decision in this document
21 because I -- it was not being asked of me. I just
22 feel that there was -- you know, there was clearly
23 some deficit that was there, and I had some
24 concerns regarding her daily functioning at home,
25 to the point where I thought it was severely

11:27A

11:28A

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1 impeding her independent living.

2 And that is why when she returned, there was
3 some questions asked during initial examination
4 that, unfortunately, there was a lot of -- there
5 was great difficulty in getting a response from her
6 because she became very frustrated with her
7 inability to answer those types of questions in the
8 latter evaluation.

11:28AM

9 Q. Was there a point in time, Doctor, where you
10 did make a determination as to whether or not she
11 had capacity pursuant to the court's request?

11:28AM

12 A. Yes. That was based on the following
13 evaluation from 8/16/2011, 8/22/2011, 8/29/2011,
14 8/31/2011 and 9/7/2011, with comparison to the
15 previous data from 12/2011 through 1/2011.

11:28AM

16 Q. The second series of evaluations that you
17 just mentioned, did those also take a similar
18 amount of time for the initial evaluation?

19 A. Yes. Ms. -- Ms. Dockery was brought -- was
20 brought in again, and I evaluated her in the
21 presence of John Dockery; he was there.

11:29AM

22 And she was asked questions regarding -- I
23 didn't get the entire history. It was questions
24 regarding, has there been any changes? What
25 changes have there been in your medical history?

11:29AM

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1 What changes have there been in your -- going on at
2 home? What -- is there anything substantial or
3 significant going on at home, either for the better
4 or for the worse? Any change in functionality?
5 Any change in her emotional state? And so forth.

11:29A

6 And that was documented with an intake note.
7 She was then set up for testing again to determine
8 if there was or wasn't a change, because Mr. John
9 Dockery had expressed some concern regarding that
10 she had had a urinary tract infection at the time,
11 that he felt may have substantially impeding her
12 capacity to function.

11:30A

13 So because of that concern, I normally would
14 not have repeated a neuropsychological battery
15 within that amount of time, but because
16 Mr. Dockery, Mr. John Dockery was telling me that
17 he felt there was a substantial difference in her
18 functioning since that period of time, I felt it
19 necessary, especially since it was going to become
20 an issue for the court, that I reevaluate her
21 cognitive functionality with neuropsychological
22 examination, as well as my standard forensic
23 examination regarding capacities, which I did then
24 do.

11:30A

11:30A

25 Q. Did either of them share with you at that

11:30A

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1 time that the parties had reached an agreement in
2 regard to this case?

3 MR. MONCKTON: Objection.

4 MR. BRITTAIN: Objection.

5 THE DEPONENT: I don't recall.

11:31AM

6 BY MR. McCrackin:

7 Q. So this next round of evaluations, Doctor,
8 you went through many of the same tests that you
9 did in the initial?

10 A. Yes, many of the same tests, largely the
11 same tests.. Let me check my record here. I
12 believe there may have been some alternate versions
13 used. Look at the record of that evaluation on
14 Page 7 of 16. Doesn't seem to be reflected there.
15 I'd have to check the actual data. I'll do it at
16 this moment.

11:31AM

17 It was the same testing.

18 Q. Okay. In general, Doctor, was there any
19 significant improvement in her condition?

20 A. Any improvement?

11:32AM

21 Q. (Moves head up and down.)

22 A. Well, there's evidence that there was some
23 change. However, evidence for change is -- it's
24 change in scores. Some of it may reflect actual
25 change; some of it may be within reasonable degrees

11:32AM

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1 of range that are expected. So what we determine
2 is based on significant change.

3 And there -- what I have here, if you take a
4 look, we can -- we'll have to go through the
5 functional areas again. Is that what you'd like me
6 to do?

11:32A

7 Q. Yes, Doctor.

8 A. Going toward memory functioning, we do see
9 that on Page 8 of 16, the first paragraph under
10 Functional Testing, where it says Memory Functions,
11 what we see is that Ms. Dockery scores for visual
12 immediate memory, which these are the composite
13 memory scores.

11:33A

14 Actually, let me go back one step to general
15 memory, which was reported in a different format
16 under the previous evaluation. Under general
17 memory, which is Line Number 5 under Comparison Of
18 Composite Memory Evidenced, it says, 5, below
19 average functioning was noted in the 21st
20 percentile, during the current evaluation -- that
21 was during that current evaluation -- in comparison
22 to within the moderate level of deficit during her
23 previous evaluation which was in the 5th percentile.

11:33A

11:33A

24 So there was a -- a rather significant --
25 and that, I, I, I, is actually significant

11:34A

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1 improvement within general memory overall from the
2 initial evaluation when I had seen her in late 2010
3 and early 2011.

4 So it remained, overall, within the below
5 average range.

11:34AM

6 In terms of composite memory for visual
7 immediate scores, there was no significant change.
8 The actual percentiles were no different than
9 prior. So visual immediate memory remained the
10 same in terms of result.

11:34AM

11 Deficits for immediate memory, there was a
12 3 percentile difference, which was nearly unchanged
13 from the previous evaluation. And under Line 3,
14 I'm referring to, there was a comparison between
15 working memory. And the initial evaluation was in
16 the 4th percentile, improving to 13th percentile,
17 suggesting, not to a significant degree, but
18 suggesting some degree of improvement in working
19 memory.

11:34AM

20 Visual delayed memory went from the
21 10th percentile during the initial evaluation up to
22 the 21st percentile during the second evaluation,
23 which is in the low average or below average range.
24 So there was some degree of improvement there which
25 would -- I would consider significant.

11:35AM

11:35AM

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1 Under -- we are going to skip 5 because it
2 was already discussed.

3 I'm referring to Number 6, under Comparison
4 of Composite Memory Evidenced, she scored within
5 the 25th percentile for auditory recognition delayed 11:35A
6 memory, which was in 25th percentile, the below
7 average range compared to the moderate levels
8 deficit noted in the previous evaluation. So there
9 was some significant and substantial improvement at
10 that time. 11:35A

11 At Line -- in Item Number 7 which was --
12 which is the -- in my report of composite scores
13 for auditory immediate memory, she had scored
14 within the below average range, during initial
15 evaluation, of the 23rd percentile, improving to the 11:36A
16 30th percentile, which is a 7 percent improvement,
17 which is not considered a significant. And then
18 for auditory delayed memory, improvement from the
19 9th percentile to the 34th percentile, which is
20 considered rather significant. 11:36A

21 So regarding memory functioning for general
22 composite memory, there seemed to have been a
23 substantial improvement overall to within the below
24 -- to within the -- within the general levels of
25 functioning within the below average range, 11:36A

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1 21st percentile.

2 She was -- in discussing the task of verbal
3 learning, which we had discussed previously in
4 terms of a list of words that was presented to her
5 and then asked her to recall those lists -- now,
6 I'd like to actually go back and comment here for a
7 moment.

11:36AM

8 Normally we do not do a WMS testing within
9 several months. The reason that I -- we don't
10 normally do the WMS testing within the several
11 months is because it's a memory test. And when you
12 expose someone to a stimulus, more than -- each
13 time, they are more likely to recall that stimulus.
14 That's why it's not recommended to do it that
15 often.

11:37AM

11:37AM

16 From my perspective, the purpose of the WMS
17 was to determine improvement. When I look at that
18 improvement, I say two things: One is if there's
19 still a deficit, what it tells me is -- is that
20 there was not -- there was not an artifact of
21 learning. When there is an improvement, I can't
22 tell whether that is an artifact of learning or is
23 an -- or is actual reliable results.

11:37AM

24 The norm data -- the reason that we do not
25 normally repeat it that often is because the norm

11:38AM

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1 data is done on an enough -- a significant enough
2 amount of time, that's why they recommend a year,
3 that there should be some forgetting.

4 So -- and, unfortunately, there's not an
5 alternative test that is -- from my perspective,
6 that I can make the comparisons as well to.

11:38A

7 So the improvement, even though it is there,
8 it may or may not be. I cannot determine and I
9 will not determine whether that is a -- secondary
10 to learning or if it is secondary to actual
11 improvement.

11:38A

12 Regarding Superspan verbal learning --

13 COURT REPORTER: Regarding what?

14 THE DEPONENT: Superspan verbal
15 learning.

16 -- this was the list of words that she
17 was given -- that is given, and she scored
18 within -- there was some evidence of -- of
19 deficit during the current evaluation
20 compared to the previous, which is when
21 given a list of 16 words, initially in
22 two-thousand- -- late 2010, early 2011, she
23 scored within the 7th percentile, the --
24 considered the mild level of deficit.

11:39A

25 The -- on the two -- the second

11:39A

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1 evaluation, on the 16-word trial, the first
2 trial she scored in less than the 1st
3 percentile. So what this indicated was a
4 level of decline.

5 Now, there's -- what is of import here
6 is that as you become further away from the
7 norm, the -- there's a bell curve. And as
8 you become further away from the norm, more
9 extreme scores become harder to achieve. So
10 the difference of the 7th to less than the
11 1st percentile, I do not consider
12 substantial, but it is what -- but I look at
13 it; and from a clinical perspective, it is
14 of some -- it does raise some concern that
15 there was some decline in terms of novel
16 initial trial learning.

17 By the end of five learning trials, she
18 had previously scored in less than the 1st
19 percentile. Once again, she scored in less
20 than the .03rd percentile, less than the
21 1st percentile. But a little bit further, in
22 terms of -- if you take the T-scores and
23 place them in, she was so out of the range
24 that we placed the T-scores in, and she
25 comes up with a score of -- of the actual

11:39AM

11:40AM

11:40AM

11:40AM

11:40AM

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1 percentile which was significantly lower.

2 The learning curve, this time is nearly
3 flat, however, better than the learning
4 curve during the initial evaluation in 2010,
5 late 2011, where she scored -- her learning
6 curve was initially in the 2nd percentile and
7 now it improved to the 7th, which is
8 considered mild deficits. However, there
9 just really wasn't -- she didn't have that
10 much to -- there just wasn't that much that
11 she learned either way.

11:41A

11:41A

12 There is -- there was continued to be
13 evidence of some proactive interference.

14 There was short --

15 COURT REPORTER: There was, what,
16 interference?

11:41A

17 THE DEPONENT: Proactive,
18 p-r-o-a-c-t-i-v-e.

19 -- short delay free recall. There was
20 a nominal difference from the less than
21 1st percentile in the previous evaluation,
22 the 2nd percentile in the second evaluation.

11:41A

23 Short delay cued recall, the same; went
24 from less than the 1st percentile to the 2nd
25 percentile.

11:41A

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1 Long delay free recall, long delay cued
2 recall and delayed recognition essentially
3 remained the same, other than delayed
4 recognition, I considered profoundly severe
5 because it seemed to be more evidence of a
6 deficit there.

11:42AM

7 There's not really that much of a
8 difference, from my perspective, between the
9 less than the 1st and the less than the
10 0.03rd, nor is there generally within the
11 clinical profession.

11:42AM

12 The test of Visual Abstract Memory, she
13 had -- there was some level of improvement
14 there. Once again, this becomes a little
15 bit of a problem because I don't have an
16 alternative version to give her. So there
17 may or may not be some recall of what she
18 had previously been exposed to. Once again,
19 this is a rather rapid turnaround for having
20 to do another evaluation. However, what we
21 see is that the three-minute recall, some
22 degree of improvement from less than the
23 1st percentile to the 16th percentile;
24 30-minute, from a non-significant difference
25 from 2nd to 5th during the second evaluation;

11:42AM

11:42AM

11:42AM

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1 and remaining basically in the -- basically
2 the 1st percentile during the second
3 evaluation compared to less than the 1st in
4 the -- in the -- I'm sorry, less than the 1st
5 during the second evaluation.

11:43A

6 Now, some of the improvement here may
7 also be due to some improvement in
8 Mrs. Dockery's condition. Evidently
9 Mr. John Dockery said that there was -- she
10 was suffering from a UTI at one point,
11 roughly around the period of time when I
12 evaluated initially, and that he felt that
13 there would be a difference. So, indeed, I
14 mean, like I said, it may be artifact; it
15 may be improvement.

11:43A

11:43A

16 BY MR. MCCRACKIN:

17 Q. Doctor, you also reevaluated her in regard
18 to attention and concentration?

19 A. Yes, I did.

20 Q. Same tests as the previous?

11:43A

21 A. Yes, Simple Auditory Attention. There was a
22 little bit of improvement, 13th percentile
23 improvement, indicating that -- that that's --
24 that's not likely practice based. That's unlikely
25 to have artifact. It's not a real great

11:44A

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1 difference; however, it's a difference of one
2 subscale point, which could simply be -- it's not
3 considered significant; it's there. As I said, as
4 you get toward the ends of the range, that's where
5 these differences can be or you can have -- if you
6 have 13 percent difference in the -- in the -- in
7 the ends of the range and when you get the end of
8 these ranges out, that the difference between -- it
9 can be a difference between low average to moderate
10 or a difference between mild to severe. So it's a
11 big difference, 13th percentile, when you are at the
12 end -- at the extremes.

11:44AM

11:44AM

13 When you're in the center of the bell curve
14 because we hold some -- so many people are held
15 within the center of the bell curve, within the
16 standard deviation, we essentially have -- let me
17 see, 68 percent of the population within one
18 standard deviation. So the other 16 percent -- on
19 each -- there's another 16 percent on each side
20 within -- or outside of that one standard
21 deviation. So the difference of 13th percentile is
22 not considered a significant difference. It's
23 considered that she was within normal limits
24 initially for auditory attention span and remains
25 within that area.

11:44AM

11:45AM

11:45AM

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1 Regarding Simple Auditory Attention and
2 Discrimination, previous results indicated less
3 than the 1st percentile and currently within the 5th
4 percentile. That's a 4-percent increase. That is
5 evidence that she was -- that there was some degree
6 of improvement. Even though it's only -- it looks
7 like on 4 percent, it's more than 4 percent because
8 it went from less than the 1st percentile to the 5th,
9 and we're talking about a difference from severe
10 deficit to moderate deficit. 11:45A

11 Simple Auditory Attention and Discrimination
12 for Rhythm Patterns, the difference was from the
13 1st percentile to the 2nd percentile. This is
14 considered non-significant. It's for basically it
15 remaining within the moderate to moderate severe
16 level. 11:45A

17 Visual Spacial Attention --

18 MR. BRITTAIN: Can I ask what page
19 you're on?

20 THE DEPONENT: Yes, Page 10 of 16 -- 11:46A

21 MR. BRITTAIN: 10, okay.

22 THE DEPONENT: -- Mr. Brittain.

23 MR. BRITTAIN: Thank you.

24 THE DEPONENT: We are now looking at
25 the first full paragraph on that page where 11:46A

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1 it says, Simple Visual Attention.

2 MR. BRITTAIN: Got you, thank you.

3 THE DEPONENT: Okay. Simple Visual
4 Attention, it was unchanged from the
5 borderline level of deficit, 16th percentile
6 in both evaluations. 11:46AM

7 Simple Visual Conceptual tracking,
8 which was that connect-the-dots task we were
9 talking about previously, she scored from --
10 she went from the less than the 11:46AM
11 1st percentile to the 2nd percentile,
12 indicating some degree of improvement but
13 still within rather substantially limited
14 deficits. We are talking about
15 2nd percentile is a moderate deficit compared 11:46AM
16 to 86-year-olds. Compared to younger
17 people, it's very low functioning.

18 Complex Visual Conceptual tracking were
19 again invalidated because of her continued
20 inability to understand the task. 11:47AM

21 She was given a test that she wasn't
22 given the first time. I apologize, I see
23 that here. It wasn't -- I didn't note it --
24 notice it in the -- in the earlier -- the
25 test was called the Connor's Continuous 11:47AM

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1 Performance Test. This is a highly
2 sensitive test of visual attention,
3 vigilance and impulsivity.

4 COURT REPORTER: Visual what?

5 THE DEPONENT: Visual -- visual
6 attention, vigilance and impulsivity. Now,
7 she was -- she -- the patient, herself, we
8 went through this evaluation, and it looked
9 like the patient prematurely stopped
10 responding. So there's some degree of
11 invalidity to this finding, and it holds
12 little weight from my perspective. I
13 recorded it because it was a completed test.
14 It does show some very extreme scores
15 regarding visual attention and impulsivity
16 and vigilance problems. However, because
17 she seemed to just stop responding during
18 the testing situation, I don't consider it
19 as an important part of her evaluation. I
20 cannot say that her attention is 99.9
21 percent likely to be neurologically based or
22 a clinical attention problem from that test
23 in and of itself.

24 In looking at the other tests, it's not
25 out of what's expected; however, she did

11:47A

11:47A

11:48A

11:48A

11:48A

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1 stop responding just out of the -- just out
2 of the blue while taking the evaluation.
3 It's a very simple task, which is
4 essentially a task that -- it's actually
5 rather unpleasant. It's a computer screen 11:49AM
6 where numbers and letters are shown, and
7 when an X comes up, you're to rapidly hit
8 the spacebar whenever the letter X comes up.
9 In her case, she just stopped at some point
10 and didn't go any further, but we have to 11:49AM
11 let the testing complete.

12 MR. McCrackin: Doctor, we need to stop
13 right here and let him change the tape.

14 THE DEPONENT: Yes.

15 VIDEOGRAPHER: Going off the record at 11:49AM
16 11:49 a.m.

17 (Off-the-record conference.)

18 (A recess transpired from 11:49 a.m.
19 through 11:57 a.m.)

20 VIDEOGRAPHER: Going back on record at 11:57AM
21 11:57 a.m.

22 BY MR. McCrackin:

23 Q. Dr. Goldschmidt, you were talking about
24 attention and concentration tests and the results,
25 and I think you were completed with that section. 11:57AM

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1 Overall, did Ms. Dockery continue to suffer
2 from significant attention and concentration
3 deficits?

4 A. From -- she did continue to experience
5 significant concentration deficits, based on -- on 11:57A
6 the testing, the only area in which I did not
7 evidence significant concentration deficit was
8 within simple auditory attention span, which was
9 within normal limits from the -- from the get-go
10 during the evaluation in late 2010, early 2011. 11:58A

11 Q. Doctor, motor functions, same tests as
12 previously given?

13 A. Yes. And during that testing, the release
14 reflexes, as were previously described, continued
15 to be negative. There was none of the evidence 11:58A
16 that there was a change there.

17 Her ptosis of the right eye remained, which
18 is the closing of the right eye, partial closing of
19 the right eye. And there was -- there was no
20 significant asymmetry of the upper/lower facial 11:58A
21 musculature otherwise.

22 Musculotone continued to be mildly to
23 minimally decreased from gross standpoint. "Gross"
24 not meaning that it's severe gross, meaning that
25 just from a -- without an objective measurement, 11:58A

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1 it's essentially by gripping at the fingers and,
2 and, and movement of the -- of the extremities,
3 whether it's appropriate.

4 Then in terms of grip strength that was
5 measured by the hand dynamometer, it was within the 11:59AM
6 moderate level of deficit. If the left hand
7 2nd percentile, which is the same as the prior
8 evaluation and below average functioning 27th
9 percentile for the other hand, which is -- it was
10 unusually similar; I mean there was no real 11:59AM
11 difference there.

12 Manual motor speed improved from mild levels
13 of deficit in the 10th percentile to just outside of
14 normal functioning -- just inside of normal
15 functioning in the below average range or in the 11:59AM
16 18th percentile.

17 The -- for the right hand, there was --
18 there was a substantial improvement in her motor
19 speed from the 10th percentile in mild deficits,
20 which went out to the 48th percentile. So there was 11:59AM
21 some improvement for the right hand.

22 That's regarding motor functioning.

23 Q. Doctor, as we continue through your report,
24 will you just give us what -- any significant
25 changes -- 12:00PM

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1 A. The significance?

2 Q. -- rather than --

3 A. Than -- yeah, I mean, that's a significant
4 change, that's a 38 percentile improvement --

5 Q. Okay.

12:00P

6 A. -- in the manual motor speed for that right
7 hand.

8 Q. And Sensory-Perceptual Functions?

9 A. And Sensory-Perceptual Functions, that was
10 -- and we were unable to complete them again

12:00P

11 because she continued to be unable to follow the
12 directions. Once again, a very simple task that's
13 usually easily well performed. She had some great
14 difficulty there, so it wasn't completed.

15 Q. Visual-Spatial Functions, any significant
16 differences from the initial examination?

12:00P

17 A. Yeah. There was a difference in -- not
18 necessarily in terms of the -- the score, because
19 in the judgment of line orientation, the test that
20 we talked about where the line arcs were, where she
21 refused to continue during the first examination,
22 she completed during the second evaluation; and
23 after completing it, scored within the
24 1st percentile within the severe level of deficit.
25 So there's no change, we can't really measure

12:01P

12:01P

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1 change, but I can tell you -- what we can say is
2 that the measured -- the measured -- the evidence
3 pointed to a severe level of deficit for -- under
4 that second measurement. And that's all the
5 difference regarding Visual-Spatial Functioning.

12:01PM

6 Q. Okay. Language Functions?

7 A. Regarding Language Functioning, there was no
8 significant differences or substantial differences.

9 Q. Executive Functions?

10 COURT REPORTER: I'm sorry?

12:01PM

11 BY MR. McCRACKIN:

12 Q. Executive Functions?

13 A. Regarding detailed and complex visual
14 organization and planning, no significant changes.
15 Regarding perceptual set in -- and ability to
16 suppress habitual responses, the -- it evidenced
17 function within the severe level of deficit,
18 overall which evidenced some possible decline from
19 the previous evaluation that ranged from profound
20 levels or severe levels of deficit to within the
21 moderate. It looks like there was some degree of
22 change there. Nothing that speaks too dramatically
23 from a professional -- from my professional
24 standpoint.

12:01PM

12:02PM

25 In terms of Visual Graphic Construction

12:02PM

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1 Production, there was no significant deficit.

2 There was clearly continuing Visual Construction --
3 well, production deficits that were severe.

4 At that point, her scores were so grossly
5 out of -- out of the norm that we -- that, I mean,
6 I'd have to take a look at the actual number that
7 she did, but it was -- it was in less than
8 1st percentile.

12:02P

9 Patient -- continued evidence of severe
10 deficits in word finding, which were changed.

12:03P

11 Abstract Visual Problem Solving, that was --
12 that was in the 2nd percentile. She didn't complete
13 that the last time because we had to -- it was one
14 that -- remember, I talked about earlier that there
15 was a test that I didn't give her due to lack of
16 capacity. So what we did is I added another test
17 in there. It wasn't the same one I didn't give
18 her; it was another one that would add -- that
19 would -- that I hoped that she would be able to
20 complete that was supposed to be given -- because
21 there were two of them that I was going to give
22 back then, and this one was one of the ones that
23 she didn't get.

12:03P

12:03P

24 And because she actually -- she was able to
25 do more this time than she had done the last time

12:03P

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1 in terms of the amount of testing that she had done
2 in roughly the same amount of time.

3 So Digit Symbol Coding, there was a pretty
4 substantial improvement. She had scored in the
5 1st percentile initially back in 2010, 2011; and
6 then in the second testing, she performed in the
7 below average range. So there was some significant
8 improvement there.

9 There was significant and substantial
10 improvement regarding her ability for mental
11 flexibility and visual conceptualization, went from
12 the 2nd percentile to the 37th percentile.

13 And then also -- and then for picture
14 arrangement, which is participation of
15 consequences, temporal sequencing and time
16 concepts, no significant change.

17 And regarding block design, which is the
18 ability to place blocks together to look for a
19 particular design, there was some degree of
20 improvement from the moderate level of dysfunction
21 in the 5th percentile up to the 16th percentile.

22 So overall, in terms of Executive
23 Functioning, there seemed to be some degree of
24 improvement.

25 Q. Orientation?

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1 A. Orientation, there continued to be some
2 difficulty stating day of the month, current city;
3 but generally speaking, she was well oriented.

4 Q. Intellectual Functions?

5 A. Intellectual Functions, the difference from
6 previous to current evaluation and full scale IQ
7 was a difference of 5 percentile points, which from
8 the -- it was not consider significant.

12:05PI

9 In terms of verbal IQ, verbal IQ was a
10 1-point difference, which was not significant.. And
11 performance IQ was a 12-point improvement, which
12 was consider significant improvement regarding
13 performance functionality, which is more the
14 Visual-Spatial Functioning, and that type of
15 problem-solving, nonverbal problem-solving.

12:05PI

16 Q. Okay. Anything else on --

17 A. Regarding Intellectual Functioning, there
18 was nothing more that I was concerned with.

19 Then we looked at living skills, which is
20 the independent living skills ability where
21 performance of general independent living
22 capacities. She continued to evidence -- there
23 was -- during the current evaluation, she evidenced
24 low functioning for managing health and safety and
25 low functioning for memory orientation, which was

12:05PI

12:05PI

12:06PI

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1 -- prior, I believe, she -- memory and orientation
2 was in the moderate levels; that seemed to go down.
3 Managing health and safety was -- continued to be
4 in the low levels.

5 Regarding managing money, the same task that
6 she was given before. She did a little bit better,
7 a significant enough better that I changed it from
8 low to moderate for that problem-solving and
9 performance and information base.

12:06PM

10 And managing home and transportation were
11 within the high levels, which was the same as
12 prior.

12:06PM

13 Overall, she was functioning within the
14 moderate level of deficit and, most importantly,
15 low levels of functioning for health and safety
16 which made -- once again, I made the recommendation
17 to Mr. Dockery, because of health and safety
18 concerns, which were really underscored by the
19 questioning that I asked her during clinical
20 examination, which was a little bit more
21 concerning.

12:06PM

12:07PM

22 Then Emotional Functioning, she --
23 Ms. Dockery discussed that she was having some
24 degree of anxiety regarding the entire situation,
25 but there was no -- there was no objective

12:07PM

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1 measurements that were completed due to her
2 noncompliance with completing questionnaires; she
3 just refused. And that's it regarding the actual
4 testing.

5 And then the only difference in the
6 evaluation was the -- my actual time with her,
7 within the initial clinical examination, where
8 Ms. Dockery -- and I believe both of you --
9 everyone in the room should have copies of the
10 notes from that, from those days -- but she noted
11 some pretty substantial levels of deficit,
12 primarily in ecological validity type of
13 questioning, where she was asked simple questions
14 of what you would do if, what you would do if your
15 water -- the water pipe broke in your kitchen and
16 was spewing water into the kitchen? She had great
17 difficulty coming up with a response to that, even
18 with prodding, after I had made a recommendation
19 that she should turn off the -- could turn off the
20 water; but let's say it wouldn't turn off and the
21 water was filling up and she started hearing
22 electric appliances shorting out, the response was,
23 "Well, I would have to call someone."

24 I said, "Where are you?"

25 She says, "There, trying to take care of the

12:07PI

12:08PI

12:08PI

12:08PI

12:08PI

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1 things in the kitchen. Try to call plumber, wait
2 for plumber."

3 So there was a lot of concern.

4 I said, you know, "What about the
5 possibility of electrocution?"

12:09PM

6 She said, "Well, I shouldn't figure things
7 out like that."

8 And so these were the type of situations
9 that were coming up, and she became very
10 frustrated. So it -- highly limiting what I could
11 ask her, because I would her ask her these type of
12 questions, and after several prods, she basically
13 refused to continue to answer. She said, "These
14 aren't appropriate questions. Who would know how
15 to do this type of stuff?" So...

12:09PM

12:09PM

16 (Proceedings were interrupted.)

17 THE DEPONENT: As I said earlier, I
18 can't really turn this off. I'm on call at
19 the hospital, so...

20 MR. BRITTAIN: No problem, sir.

12:09PM

21 THE DEPONENT: Unfortunately, not
22 everyone listens to my requests not to call
23 me.

24 BY MR. McCrackin:

25 Q. Doctor, as a result of this second series of

12:09PM

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1 evaluations, did you arrive with an opinion within
2 a reasonable degree of neuropsychological certainty
3 about Ms. Dockery's capacity?

4 A. Yes, I did. Based on the presence of clear
5 medical evidence in the record of significant and
6 substantial cerebral neuropathology, I diagnosed
7 her with a mixed dementia, including probable
8 vascular dementia with depressed mood and probable
9 dementia of the Alzheimer's type with late onset
10 and depressed mood, some possible dementia
11 secondary to closed-head traumatic brain injury
12 with depressed mood, and dementia secondary to
13 normal pressure hydrocephalus possible, because --

14 COURT REPORTER: I'm sorry, could you
15 repeat that?

16 THE DEPONENT: I'm sorry. The last
17 one, possible dementia secondary to normal
18 pressure hydrocephalus.
19 -- and that it was my opinion within a
20 reasonable degree of neuropsychological
21 certainty that Ms. Dockery was an
22 incapacitated person and required guardian
23 and conservator to be appropriately managed
24 in a safe environment and maintain
25 appropriate care of her property.

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1 BY MR. McCRACKIN:

2 Q. Doctor, there has been some suggestion by
3 Dr. Benjamin that a neuropsychological evaluation
4 is worthless, that no one could possibly pass it.

5 MR. BRITTAIN: I object to the
6 question. That's pitting the witness.
7 That's an improper question.

8 You may answer.

9 MR. MONCKTON: I join in the objection.

10 MR. BRITTAIN: You may answer.

11 BY MR. McCRACKIN:

12 Q. Will you comment for me on the validity of
13 neuropsychological evaluation and its use?

14 A. Yes, neuropsychological evaluation --
15 neuropsychology is based on the standardized, valid
16 peer-reviewed, scientific measurement to determine
17 brain pathology and its impact and effect and to
18 make recommendations -- and clinical
19 neuropsychology for treatment of these diseased
20 processes.

21 Specifically -- that's actually what my
22 dissertation was on, on the qualification of
23 neuropsychological expertise regarding these type
24 of issues.

25 And the answer to that question is that

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1 neuropsychological science is, is, is documented,
2 it's, it's under the standards in general, has met
3 peer reviews under the standards of evidence for
4 Frye, for Dovair, for ALI and we use -- it's
5 considered valid enough to utilize both in the 12:12P
6 courts, as well as in medical decision-making
7 throughout the country and the world, and is at
8 every major medical school -- I believe every major
9 medical school -- I would be surprised if there
10 were major medical schools that did not have a 12:12P
11 department of neuropsychology within them.

12 We are considered medical diagnosticians.
13 That's why the insurance companies cover us as
14 medical practitioners even though we do not have
15 medical degrees. We have similar training in the 12:13P
16 areas of brain pathology and diagnostics and, to
17 some degree, extended practice within that area
18 above and beyond what they receive within the
19 general medical community in certain areas.

20 Q. Doctor, I'd ask you just to look at your 12:13P
21 Examiner's Affidavit and report to the court.

22 A. Dated October 26 of 2011?

23 Q. Yes, that's correct. Are there any comments
24 or clarifications that you need to make in regard
25 to this report? 12:14P

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1 A. I think the report speaks for itself. I
2 don't know if -- if there's any specific questions,
3 I'd be happy to answer them.

4 Q. Okay. And it is your opinion now that
5 Ms. Dockery is an incapacitated person in need of a
6 guardian and conservator? 12:14PM

7 A. It's my opinion, as of the last evaluation
8 that I performed, that at that time, she was in
9 need -- that she was in need of a guardian and/or
10 conservator, yes. 12:14PM

11 Q. Is there any reason to believe that her
12 condition would substantially improve in the future
13 or since the time of your previous report?

14 A. I don't have any specific reason why that
15 would have occurred. However, there -- that
16 doesn't mean that there has not been that capacity.
17 It is possible, however, quite unlikely based on
18 the fact that I have two neuropsychological
19 evaluations, that although there seems to be some
20 degree of improvement, were so substantially
21 impaired -- showed so much substantial impairment
22 and significant impairment, that it's unlikely that
23 there would be that much change at any point, that
24 would change her functional capacity within to no
25 longer require guardian and/or conservator. 12:15PM

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1 However, that doesn't mean that it's completely out
2 of possibility; it's just -- it's highly unlikely.

3 MR. McCrackin: Thank you, Doctor. I
4 don't have anything further.

5 **EXAMINATION**

6 **BY MR. BRITTAIN:**

7 Q. Okay. Dr. Goldschmidt, I'm Tommy Brittain.
8 I represent Ms. Dockery.

9 A. Yes, Mr. Brittain.

10 Q. Nice to meet you here this morning.

12:15P

11 First, I'd like to talk a little bit about
12 what your educational background is.

13 A. Yes.

14 Q. It seems like Mr. McCrackin asked you a
15 question about whether or not this -- if there's an
16 issue as to the validity of neuropsychology. So
17 tell us where you were trained, what your training
18 was like, what kind of degrees you hold.

12:16P

19 You said you're not a medical doctor; is
20 that correct?

21 A. Yes, I don't hold an M.D.; I'm not a
22 physician.

23 Q. Okay.

24 A. We do medical diagnostics regarding medical
25 pathologies and the impact of them and make

12:16P

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1 THE DEPONENT: A lot of it is done
2 orally, the description is done orally. We
3 do have situations for people that are
4 hearing-impaired. I'm dealing with people
5 that are hearing-impaired every day. We're
6 talking about people who are in their 70s
7 and their 80s with dementia.

12:37P

8 BY MR. BRITTAIN:

9 Q. Right.

10 A. I don't have a person who walks in that
11 office -- and most of the people that this is
12 normed on are hearing-impaired, because you can't
13 not be hearing-impaired when you're in your 70s and
14 80s and 90s. This is normal for the population.

12:37P

15 So we -- that's all accounted for, to make
16 sure that we don't have artifacts in that. That's
17 -- that's why the validity of this, that's why the
18 reliability of this, and that's why it meets the
19 standards of admissibility under evidentiary
20 standards.

12:38P

21 It's a well-accepted science. And we don't
22 -- we, we don't manipulate things or let artifact
23 get in so easily. If we are going to be making
24 scientific -- opinions based on scientific data, it
25 needs to -- what we need to do is to make sure that

12:38P

12:38P

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1 pretty much anyone who is trained to do it can
2 apply the tests, and anyone who is capable of
3 reading it should be able to read it and come up
4 with the same conclusions.

5 Q. Did -- were you asked to make any
6 concessions to her based on her inability to hear?

12:38PM

7 A. No, I wasn't asked to make any concessions.
8 However, because that we deal with people that are
9 hearing-impaired, I'm used to not only speaking up,
10 but our entire office gets very frustrated with the
11 fact that Becky, who does much of our testing, you
12 can hear her almost throughout the whole office
13 when you can't hear anyone else. And she's in the
14 back with air makers and a noise -- white noise
15 machines so that she doesn't bother us all. We put
16 her in the very back.

12:38PM

17 Q. Is there a process to do it in writing, or
18 does it have to be done orally?

19 A. Much of the tests -- there is a way to do it
20 in, in writing on some of the tests; and some of
21 them, it is done that way. However, in this case
22 there was no indication that that should be done.
23 The fact that she had some minimal hearing loss --
24 had she had extreme hearing loss or even severe
25 hearing loss, this is a person that you can talk

12:39PM

12:39PM

12:39PM

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1 to, and she would respond. She heard what I was
2 saying, and I know she heard what I was saying,
3 because she responded, maybe not appropriately to
4 every task, but she certainly heard what I was
5 saying because she could repeat back easily what I
6 was saying. We know this because when she was
7 given tests of, of, of auditory attention and
8 concentration, how did she do? She did normally.
9 We didn't speak up real loud for her in that.

10 Q. You keep saying "we." I thought that
11 someone else was administering most of these tests.

12 A. Some was me -- as I said, some was me in my
13 office and --

14 Q. How much did you do?

15 A. Of the test? I spent an hour and a half in
16 my office, and then -- for the first testing, and
17 an hour and a half in my office to two hours on the
18 first and second, plus feedback. And so I've --
19 I've had, you know, roughly six hours of in time --
20 in-person time with her.

21 Q. Out of how many?

22 A. Out of 24. So 25 percent of the time, she
23 was with me directly. And I think -- and during
24 six hours of being with her, outside of that, I
25 know she was hearing. It doesn't matter whether or

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1 not someone else knew or not. She took a simple
2 test of -- I'm going to repeat some numbers to you.
3 Repeat them back to me, all right? Very simple.
4 I'm going to say some numbers to you. Repeat them
5 back to me, okay? 7, 9, 4, 6.

12:40PM

6 Her response: 7, 9, 4, 6.

7 So why would she hear us on simple tests of
8 attention and concentration and do fine, normal,
9 and then when she has a complex test of attention
10 and concentration for functionality to drop down in
11 the severe levels? The reason is, is because she
12 can hear and she's got functional deficits. It's
13 not an issue of hearing loss.

12:40PM

14 If, if, if these tests were, were invalid
15 due to that situation then, then, they wouldn't
16 make -- there's no scientific sense there; they
17 wouldn't pass peer review.

12:41PM

18 Q. Let me go back and ask you the question I'm
19 asking you.

20 A. Of course.

12:41PM

21 Q. Did her son or Ms. Dockery ask you to make
22 any concessions to her based on her inability to
23 hear?

24 A. As I recall, I do not remember that he or
25 she did specifically.

12:41PM

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1 A. Uh-huh.

2 Q. Do you understand that?

3 A. I do.

4 Q. Okay. And especially when you're trying to
5 narrow this down to the performing of tasks,
6 independent living, for example.

01:06P

7 A. Yes.

8 Q. Okay. It looks like if you've got an honest
9 observer, that their opinion and recitation of
10 facts in that regard would be an important factor
11 as to whether or not the person is incapacitated.

01:07P

12 A. Yes.

13 Q. Do you agree with that?

14 A. Yes, it would be a factor that I would
15 consider, yes.

01:07P

16 Q. Okay. Now, but, but -- and maybe it's
17 because you don't want to, but you didn't talk to
18 any of those people.

19 A. I did.

20 Q. Oh, you did?

01:07P

21 A. I spoke to John Dockery.

22 Q. Okay. How about anybody beyond John
23 Dockery?

24 A. I did not speak to anyone beyond John
25 Dockery.

01:07P

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1 Q. Okay. Okay. And -- now, the second time
2 you talked to John Dockery, it seemed to me like
3 you were saying that he felt like she was much
4 better.

5 A. He did.

01:07PM

6 Q. Okay.

7 A. And I considered that, that's why I ran the
8 neuropsych eval a second time, just to make sure --

9 COURT REPORTER: That's why what?

10 THE DEPONENT: That's why I ran the
11 neuropsychological evaluation a second time,
12 because I was considering that. That's why
13 I went outside of the norm of, of, of when
14 it would be redone. I would normally wait a
15 year. But in this situation, there was
16 enough, from my standpoint, to say, hey,
17 this man is telling me she's substantially
18 improved. So you know what? Are you going
19 to check? I've got to check. He said she
20 was sick and now she's not. So I did.

01:07PM

01:08PM

01:08PM

21 BY MR. BRITTAIN:

22 Q. All right. And there was improvement in the
23 second data?

24 A. There was improvement in the results in some
25 of the data, meaning there was an increase in

01:08PM

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1 score. That does not -- that doesn't mean that
2 there was an improvement in functioning. That's --
3 as I said before, I can't answer whether that was
4 either artifact or true improvement because there
5 was -- there was some confounding factors in those
6 situations. And where there's confounding factors,
7 I won't give an opinion.

01:08P

8 Q. It looks to me like -- and here again, I
9 don't want to be attacking your process.

10 A. That's okay, we --

01:08P

11 Q. I'm just trying to talk my way through with
12 you. It looks to me like, if you've got somebody
13 -- and there was one test in there where she was a
14 -- more than one, I think.

15 A. A couple.

01:08P

16 Q. -- 0.03 percentile.

17 A. Yes.

18 Q. I think you said that's the three worst
19 people out of 1,000.

20 A. That is -- it's the three worst people out
21 of 1,000; 1 out of 333, roughly, yes.

01:09P

22 Q. Yeah.

23 A. 1 out of 333.3 ad infinitum.

24 Q. Yes.

25 And it looks like, you know, people that are

01:09P

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1 dealing with her in those areas on a regular
2 basis -- a nurse, a visitor -- would be
3 astoundingly aware of those shortcomings.

4 A. You know, that's interesting that you bring
5 that point up, and it really is a good point.

01:09PM

6 However, I'll tell you this, unfortunately, and I
7 wish people in the general population were better
8 at beng aware of the deficits that are being seen.
9 The difficulty is, is that -- two things. One, the
10 unfortunate reality is I have people coming into my
11 office many times far too late. They should have
12 come to my office five years ago, ten years ago,
13 when we could have gotten them some real help.

01:09PM

14 Unfortunately, their family members who are all
15 around them, seeing them living on a daily basis,
16 doing the things that they do day in and day out,
17 they say, Oh, they're just getting older. The
18 problem is, is they are not just getting older,
19 they have a disease process. And those disease
20 processes show up that we could have acted on and
21 really protected this person, given them a better
22 quality of life and a longer length of life.

01:10PM

23 Unfortunately, it's not so easy to see just
24 in speaking to a person and seeing what they do on
25 a daily basis, especially when -- when you're

01:10PM

01:10PM

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1 talking about all kinds of specific tasks, because
2 there's certain areas where people go, "He or she
3 just can't do they anymore."

4 Well, "he or she just can't do that anymore"
5 can show up very easily when we are talking about
6 1 out of 333 people over 100 tasks. That can
7 easily show up as a 0.03rd percentile.

01:10P

8 Now, if I saw 0.03rd percentile across the
9 board on most of how she was functioning, I would
10 say one of two things. One, if she was presenting
11 as highly functioning in speaking with me and then
12 doing 0.03rd on a consistent basis throughout the
13 testing, I would have said, no way, this is not
14 happening. Because what happens, this person has
15 gone so low on so many things, when I know, in
16 speaking with them, that they can do well, all
17 right, in some areas.

01:10P

01:11P

18 So I would say, hmm, this is clear evidence
19 of a lack of motivation, because we have reached
20 the absolute peak, or actually the opposite of
21 peak, the absolute -- the valley of, of, of how far
22 we can go in terms of functionality.

01:11P

23 In Ms. Dockery's case, that's not the
24 situation. In Ms. Dockery's case, we have a
25 sampling that's consistent over time, we have a

01:11P

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1 sampling that only occasionally shows really severe
2 valleys, which is normal within the normal
3 population to see that within a sampling of overall
4 tests.

5 When you take it outside -- when you take it
6 individually, that's where -- that's where the
7 problem of, of misanalysis in this evaluation
8 comes, is you can't take these, these tests
9 individually and say, oh, 0.03rd percentile, they
10 must be a mess. And that's not the way it is.
11 It's not they must be a mess. It's -- there are
12 times when that's going to happen. It's not
13 unusual. I see it on a regular basis in people
14 that are demented, where within all those different
15 tests, a couple of them are going to show up like
16 that. It's a non-substantial issue.

17 Q. But --

18 A. I mean, I don't mean to difficult about it,
19 just --

20 Q. No, no.

21 A. -- the point that you're making is --
22 unfortunately from my standpoint, it's, it's
23 really, it, it, it's, it's meaningless.

24 Q. Well, you --

25 A. It tells me -- it's part of -- she's

01:11PM

01:11PM

01:12PM

01:12PM

01:12PM

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1 A. If your question --

2 Q. Just do both.

3 A. -- is more, I don't know that I can --

4 Q. Just do both.

5 A. I don't know that I could answer. I'm sure
6 there's someone in this world who's more qualified.

01:26P

7 Q. I'm talking about in terms of a particular
8 field like, say, a neurologist or a neurosurgeon or
9 a medical physician.

10 A. Well, the answer to your question, in my
11 opinion --

01:26P

12 Q. Uh-huh.

13 A. -- is when it comes to traumatic brain
14 injuries --

15 Q. Uh-huh.

01:27P

16 A. -- the answer is, it depends on the, the
17 situation. However, I say that highly -- with
18 great qualification, because in neuropsychology, we
19 have a number of years in school, as we have talked
20 about before.

01:27P

21 In my situation, we have the neuropsych, the
22 psych and the forensics. So these are all areas
23 where I had extra studying. A general care
24 practitioner has their under- -- has their medical
25 degree.

01:27P

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1 If compared to a general care practitioner,
2 no, I do not believe that most general care
3 practitioners have more, or they may have some
4 added, which that's why I rely on some of the
5 information from general care practitioners.

01:27PM

6 When it comes to neurology, much of the time
7 neurologists send individuals to me because they
8 are unsure of whether or not that individual has a
9 brain injury.

10 As a matter of fact, it's very surprising to
11 me, and I don't know why this is the case, but I am
12 aware that Dr. Benjamin is not in agreement with
13 me. Dr. Benjamin doesn't seem to send patients to
14 me anymore. He used to send many patients to me
15 and to Dr. Wade and to Dr. Wagner and to Dr. -- to
16 Dr. Teichner, all of which are neuropsychologists.

01:28PM

17 So, evidently, at some point, he was
18 convinced that neuropsychology did have a place in
19 diagnostics. Why in this case it's changed? I
20 have no idea. What I can tell you is, is that
21 Dr. Benjamin, Dr. Sandoz and all the other
22 neurologists in this area, as far as I know, unless
23 there's a new one, have sent me many patients
24 regarding traumatic brain injury at some time, most
25 of which continue to do so on a consistent basis,

01:28PM

01:28PM

01:28PM

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1 when they have patients with traumatic brain
2 injuries.

3 (Proceedings were interrupted.)

4 MR. BRITTAIN: I turned this thing off.

5 BY MR. BRITTAIN:

01:28P

6 Q. Does a neurologist have more expertise in
7 the diagnostic approach to brain injury than you?
8 In the field, is it considered to be -- a
9 neurologist would have more expertise in diagnosing
10 a brain injuries than a neuropsychologist?

01:29P

11 A. No, they would have a differing expertise,
12 not more. Their expertise is based on --
13 neurologists are trained more on specifically being
14 able to read MRIs and CT scans, as a -- a
15 neuroradiologist, for example, are more trained in
16 reading CT scans and MRIs than a neurologist.
17 However, that doesn't mean that it's more; it just
18 means that it's different.

01:29P

19 So that's why, in the medical profession and
20 in psych and in neuropsych, which is -- in medical
21 diagnostics, that we attempt to utilize the data
22 coming from all of the different specialties and
23 subspecialties as our basis for decision making.

01:29P

24 And in this case, I believe I did so by
25 reviewing the records -- all the records that were

01:29P

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1 to give an opinion. What I'm saying is, is I don't
2 know that the Court would hold my opinion at this
3 time, if I were to give a new opinion at this time,
4 as still valid. That's an issue for -- I believe
5 for the Court to determine. Because under the
6 South Carolina statute, I believe the opinion
7 itself regarding the Affidavit, it needs to be
8 within a reasonable framework, a reasonable time.

02:54P

9 So even though I can give you my
10 professional opinion about what I feel would be
11 going on at this time, whether the Court would
12 consider that valid or not, based on what the --
13 based on the -- on the laws of South Carolina, I
14 think is not a -- it's not something that I can
15 answer.

02:54P

02:54P

16 Do you understand the, the, the difference,
17 is that I can give you an opinion. And I believe
18 under -- from my standpoint as a professional, as a
19 neuropsychologist, it's a valid opinion. Whether
20 the Court will consider that valid or not and
21 whether it's, it's appropriately timely, I can't
22 even answer that question --

02:55P

23 Q. Okay.

24 A. -- that's right or wrong.

25 Q. And to cut to the chase on that, the opinion

02:55P

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1 you have given thus far was that as of September
2 2011, Ms. Dockery did not have capacity?

3 A. Right. And from my professional standpoint,
4 I believe she probably does -- still does not have
5 capacity.

02:55PM

6 Q. That's my next question. Based on a
7 reasonable degree of medical certainty, can you, as
8 a neuropsychologist, give us an opinion as to
9 whether or not Ms. Dockery, based on all of your
10 clinical evaluations, your testing, et cetera,
11 whether she today has capacity?

02:55PM

12 A. Yes, I believe I can. And I --

13 Q. What would that opinion be?

14 A. That opinion would be that under a -- within
15 a degree of -- of reasonable neuropsychological
16 certainty, that Ms. Dockery very likely does not
17 have the capacity for, for -- just doesn't, does
18 not have -- does not have capacity for care of
19 herself or property.

02:55PM

20 Q. Okay. Now, Mr. Goldschmidt --
21 Dr. Goldschmidt, excuse me, before this deposition,
22 an appointment had been scheduled for you to meet
23 with Ms. Dockery; is that correct?

02:55PM

24 A. Before?

25 Q. Before this deposition --

02:56PM

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1 A. -- without causing some difficulty there as
2 well.

3 Q. I understand. But it's now been over a year
4 since the last, or approximately.

5 A. Yes.

02:58P

6 Q. Okay.

7 A. So at this point, it should be reasonable
8 but not, I don't feel, necessary.

9 Q. Okay. But for the appointment that was
10 scheduled, wasn't the purpose of that appointment
11 to basically interview Ms. Dockery and make a
12 determination of whether or not anything in
13 addition needed to be done as far as a follow-up
14 evaluation?

02:58P

15 A. It was.

02:58P

16 Q. Okay. So once again, at this point, other
17 than perhaps having that initial follow-up meeting,
18 we don't know what additional testing, if any, may
19 be necessary.

20 A. That is correct.

02:58P

21 Q. Okay. Do you believe that it is necessary
22 or prudent to have a follow-up appointment and/or a
23 follow-up evaluation of Ms. Dockery at this point?

24 A. At this time, with all of the questions that
25 have been placed, I would feel that it would be

02:59P

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1 appropriate.

2 COURT REPORTER: Would or would not be?

3 THE DEPONENT: Would be appropraite.

4 BY MS. MOORE:

5 Q. Is it uncommon for an individual who is
6 incapacitated to believe that they don't have any
7 deficits or problems?

02:59PM

8 A. It's one of the hallmark signs of
9 Alzheimer's dementia and is -- and is frequently
10 seen in other forms of dementia as well.

02:59PM

11 Q. Okay: Can a person who is fairly
12 conversational still be incapacitated?

13 A. Yes.

14 Q. Okay. Does a person with dementia typically
15 develop coping mechanisms to try to mask their
16 deficiencies?

03:00PM

17 A. Typically they do, yes.

18 Q. And what type of coping mechanisms does such
19 an individual typically develop?

20 A. It can -- one type of coping mechanism is
21 something called circumlocution. Circumlocution is
22 a way in which an individual, when they cannot --
23 should I continue the answer?

03:00PM

24 MS. MOORE: If you can do it in two
25 minutes.

03:00PM

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1 THE DEPONENT: No.

2 MS. MOORE: Okay. Hold on.

3 VIDEOGRAPHER: Going off record at
4 3:00 p.m.

5 (Off-the-record conference.)

03:01PI

6 VIDEOGRAPHER: Going back on record at
7 3:01.

8 THE DEPONENT: Should I continue my
9 answer?

10 BY MS. MOORE:

03:01PI

11 Q. Yes, sir, please.

12 A. We were talking about circumlocution is one
13 of the, the mechanisms that are used for -- by
14 individuals who have dementias.

15 And circumlocution, specifically, is when --
16 individuals especially with Alzheimer's disease,
17 have a problem with verbal fluency, or most of them
18 -- I think, better put, verbal disfluency,
19 d-i-s-f-l-u-e-n-c-y, in which they have difficulty
20 sometimes naming objects. And because they can
21 have difficulty naming objects, what they do is
22 they start to go around the name of the object by
23 defining the object or describing the object.

03:02PI

24 In Ms. Dockery's case, there wasn't much
25 evidence of circumlocution; there was, however --

03:02PI

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1 what was going on with her is that there was a, a
2 divergence between her capacities and what was --
3 what she was showing in speaking with me.

4 And that is another mechanism that
5 frequently comes into play, which is that -- 03:02PM
6 especially in intelligent people, this becomes an
7 issue. Intelligent people tend to know how to
8 speak well. Verbal capacity, outside of verbal
9 disfluency in Alzheimer's and some of the other
10 dementias is one of the ways that we determine 03:02PM
11 pre-morbid ability, meaning when there is cerebral
12 impairment, verbal capacity is one of the last
13 areas where a person evidences decline. So what we
14 do is we actually use that as an estimate of
15 pre-morbid intellectual and a pre-morbid cognitive 03:03PM
16 functionality. So that's why it's not uncommon,
17 because it is usually one of the last functions to
18 go, that that is one that is preserved. So when
19 people that are intelligent, what they do is if
20 they recognize that they are having deficits, they 03:03PM
21 simply communicate their way around them and
22 flat-out deny them, sometimes actively, and other
23 times they deny them simply due to what is called
24 anosognosia, spelled a-n-o-s-o-g-n-o-s-i-a,
25 anosognosia.

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1 Anosognosia is a deficit of, largely, the
2 frontal lobes and the connections to the frontal
3 lobes in where an individual is impaired in their
4 ability to recognize their own deficits. In
5 Ms. Dockery's case, there is evidence that she has
6 some frontal lobe deficits, based on the structural
7 imaging, to indicate that that would not be such an
8 unusual thing.

03:04PM

9 Specifically, if we take a look at -- on
10 some of the, the records, there's an
11 intraparenchymal hematoma --

03:04PM

12 COURT REPORTER: There's a what?

13 THE DEPONENT: Intraparenchymal,
14 i-n-t-r-a-p-a-r-e-n-c-h-y-m-a-l, hematoma
15 measuring 1.3 by .07 centimeters in the
16 right frontal lobe. Right frontal lobe is
17 the area most involved with self awareness
18 of deficits, one of the areas that have been
19 found to be most involved.

03:04PM

20 She also evidenced, according to the CT
21 scan of 1/8/2010 -- it appeared to -- there
22 appears to be an extraparenchymal, versus
23 intraparenchymal, hematoma -- do you want me
24 to spell those? -- in the left frontal lobe
25 measuring 1.5 by 2.1 centimeters.

03:04PM

03:04PM

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1 Another small extra-axial bleed is seen
2 in the high left parietal region and the
3 left frontal region, another small subdural
4 hematoma in the right parietal region and
5 diffuse atrophy and ventricular enlargement..

03:05PM

6 In other words, she has several areas
7 of the frontal portion of her brain that
8 have damage that would give her problems
9 being aware of her deficits and what is
10 going on, because she would be unaware of
11 those deficits. She would do everything she
12 could not to necessarily, purposely, cover
13 up her deficits, but it's because of her
14 lack of awareness of the deficits, she would
15 simply go around -- and it would be because
16 she does not recognize them -- state that
17 she doesn't have them, and that's as far as
18 it would go.

03:05PM

19 And we see not only that there's
20 frontal lobe damage, we see that she's had
21 parietal damage, we see that she's had --
22 that she also has diffuse atrophy, meaning
23 throughout her brain, it has shrunk.

03:05PM

24 And she has ventricular enlargement,
25 meaning with the central portions of her

03:05PM

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1 brain, involved with small vessels,
2 commensurate with the other evidence that
3 there's vascular issues in the frontal
4 portion and in the parietal portions of her
5 brain, that she is having small vessel
6 disease in the center portion of her brain,
7 the area of the brain that would likely go
8 first, and that's where you see the
9 enlargement because there's actually
10 significant amounts of change there, plus
11 the normal pressure hydrocephalus.

03:06P

03:06P

12 So between those two things, there's
13 indications that her central -- the central
14 portion of her brain, the deep white
15 matter --

16 COURT REPORTER: I'm sorry?

17 THE DEPONENT: The central portion of
18 her brain, the deep white matter --

19 COURT REPORTER: The deep?

20 THE DEPONENT: -- the deep white
21 matter -- I wasn't meaning to be terse; I
22 was just trying to be clear -- is evidencing
23 substantial pathology. And because of that
24 -- and which is involved in memory
25 functioning and learning functioning and

03:06P

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1 emotional control and, and, and, and the
2 frontal lobes are involved in decision
3 making and planning and organization. So
4 you've got a significant amount of brain
5 damage, which is actually more than what I
6 see in many of my rather significantly
7 disabled dementia patients. More than. And
8 the reason that I believe she's -- that,
9 that she seems to do better is because
10 people who are intelligent, once again, they
11 tend to seem like they are functioning
12 better, even when they have more brain
13 damage, when other -- when other individuals
14 with less education or less intelligence
15 would, would show more evidence or clear
16 ecological evidence of dysfunction. She,
17 because not -- she's not aware, she's able
18 to cover up for it, and I don't believe that
19 she's doing it intentionally.

03:06PM

03:07PM

03:07PM

20 BY MS. MOORE:

03:07PM

21 Q. Okay. And, Dr. Goldschmidt, is a typical
22 situation where such a person would try to redirect
23 the conversation --

24 A. Very much so.

25 Q. -- when they become confused or don't

03:07PM

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1 understand the content of the conversation?

2 A. Very much so.

3 Q. Is it unusual for a person who has mental
4 deficits to become frustrated when they are faced
5 with tasks that they are not able to understand or
6 complete?

03:07P

7 A. It is not unusual; it is extremely common.

8 Q. Okay. Why wouldn't a -- either nurse or
9 some other professional caregiver, who is on-site
10 or spends a lot of time with Ms. Dockery, why
11 wouldn't would they be more aware of any such
12 deficit?

03:08P

13 MR. BRITTAIN: I object to the
14 question. It calls for a conclusion on the
15 witness, and he's not authorized to give
16 that opinion.

03:08P

17 You go ahead and answer.

18 THE DEPONENT: Okay. I'm sorry, I got
19 distracted by your --

20 MR. BRITTAIN: I'm sorry.

03:08P

21 THE DEPONENT: No, no, no, it's okay.
22 You didn't do anything wrong. If you could
23 repeat the question.

24 BY MS. MOORE:

25 Q. Why wouldn't a nurse or some other

03:08P

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1 professional caregiver, who is on-site with
2 Ms. Dockery or, of course, spends a lot of time
3 with her on a daily basis, why might they not
4 notice any such deficits?

5 A. Yes. Well, there's a certain level of
6 functionality that, that the general population, I
7 think, is based on, on, on research, as well as
8 based on my clinical experience, that they expect a
9 person to have in terms of deficit as they age.

03:08PM

10 COURT REPORTER: In terms of deficit of
11 what?

12 THE DEPONENT: In terms of deficit as
13 they age. And because there's such a large
14 portion of the population at age 86 that has
15 dementia, it's not unusual for people to
16 consider that normal behavior. Normal
17 behavior at age 86 does not preclude, by any
18 means, capacity. However, dementia can
19 preclude capacity. And we are already
20 talking about a large portion of that
21 population.

03:09PM

22 These individuals who are involved in
23 the life of people just don't have, I
24 believe, the, the prerequisite knowledge of
25 where the deficits come first. They're not

03:09PM

03:09PM

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1 aware that language functioning is one of
2 the last areas of functionality to go,
3 especially when people who do start to lose
4 language function do things like redirect
5 and -- which is actually a form of
6 circumlocution, in some ways because -- or,
7 or, or actually true circumlocution where a
8 person starts to go around the word that
9 they can't remember. And we start to see
10 this -- and we look at, at advancing
11 dementias, as it really starts to become
12 severe, we start seeing people being unable
13 to actually communicate.

03:09P

03:09P

14 And this issue becomes especially
15 onerous regarding intelligent individuals
16 because they are easily missed. They're the
17 ones that I get the most -- very concerned
18 about much of the time. Because average
19 individuals, when they start to get -- to
20 show deficits, they are -- they're more
21 quickly picked up by their family members
22 because they don't really -- it doesn't
23 require as much damage to get there.

03:10P

03:10P

24 For people who are in -- who are more
25 -- who are above average, it just doesn't

03:10P

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1 get picked up as clearly because they've got
2 more compensatory strategies.

3 BY MS. MOORE:

4 Q. Okay. Can there be periods of time where,
5 once again, such an individual might do fairly
6 well, but that fact doesn't necessarily impact
7 whether or not they have or don't have capacity?

03:10PM

8 A. Well, I think to some extent --

9 Q. Peaks and valleys?

10 A. Yeah. I mean there are peaks and valleys.
11 And that's a normal part of -- more specifically,
12 that tends to be a normal part of dementia, but
13 even more common with vascular type dementias which
14 a -- because Ms. Dockery's etiology is
15 multiplicitous; it's a mixed etiology. And so we
16 have vascular issues, in addition to this head
17 injury and in addition to --

03:11PM

18 COURT REPORTER: I'm sorry, can you
19 slow down for me?

20 THE DEPONENT: I'm sorry.

21 -- vascular etiologies and the normal
22 pressure hydrocephalus and the traumatic
23 brain injury. So because there's
24 multiplicitous etiologies, there -- you are
25 going -- there will be -- each of them will

03:11PM

03:11PM

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1 have a pattern of, of, of responding,
2 particularly the vascular etiologies,
3 because much of the time what happens is --
4 these many -- there are basically -- there
5 are many events that can occur that can
6 cause a person to decompensate or improve.

03:11P

7 They also are very susceptible to
8 stress, which means that as stress
9 increases -- any stress, that doesn't mean
10 just emotional stress. It can mean
11 emotional stress, it can mean a cold, it can
12 mean lack of sleep that night. But they're
13 very susceptible to fluctuation.

03:12P

14 The problem is -- the thing with
15 capacity is, is you never can determine that
16 a person at this moment is going to have it
17 and that day, they're not going to have it.
18 It's if the person having enough of this
19 time that they are below the threshold for
20 appropriate capacity, that they -- that they
21 need someone to be there.

03:12P

03:12P

22 And in Ms. Dockery's case, much, much
23 of the time, clearly, she has been below, at
24 least during two of my evaluations, very
25 clearly below the standard for capacity for

03:12P

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1 self-care and management of property.

2 So, yeah, it does fluctuate.

3 BY MS. MOORE:

4 Q. Okay. Let me kind of go to a different
5 area. I'm trying to get a good understanding of
6 what the standard of care is in the medical
7 profession as to the method of evaluating a person
8 for capacity.

03:12PM

9 A. The, the, the standard of care, of course,
10 we have to -- we have to take the statute into
11 account. The statute is what governs regarding
12 capacity.

03:13PM

13 And so what has happened is there are
14 individuals like myself who are trained
15 specifically in that area. Through my training,
16 not as a lawyer, even though has helped, but my
17 training as a -- as a clinical neuropsychologist
18 and a forensic neuropsychologist to, to look at
19 specific areas of functionality to determine
20 whether a person likely or doesn't likely have the
21 requisite abilities to make decisions. And that's
22 why I'm -- that's pretty much 60 to 70 percent of
23 my consultations at the hospital, at both at
24 Waccamaw Community Hospital and previously at
25 Georgetown Hospital and at Grand Strand Hospital,

03:13PM

03:13PM

03:13PM

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1 which is that I get called for these -- for these
2 specific reasons when there's a question as to
3 whether this person can go home, whether they can
4 make the appropriate decisions, whether -- where
5 they can go and what needs to be done in terms of
6 the disposition, whether they can make appropriate
7 decisions regarding their healthcare.

03:14P

8 Q. I apologize. I probably didn't ask the
9 question artfully.

10 A. Okay.

03:14P

11 Q. What I am getting at is the actual
12 methodology, what type of evaluation to be
13 performed, what type of testing might be necessary.
14 I meant in terms of that aspect.

15 A. The methodology is, is, is -- multi parts to
16 it. Of course, what I've done here in evaluation
17 has been review of the medical record, creation of
18 data regarding a person's functionality ranging
19 from cognitive functionality, sensorimotor
20 functionality, perceptual functionality and
21 independent living skills assessment, which is done
22 in here as well, and then in addition to that,
23 questions regarding common daily types of decisions
24 that might be made, or even unusual decisions that
25 can come up in an individual's life, and to be able

03:14P

03:14P

03:15P

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1 to determine whether they have the capacity for
2 flexible -- especially when it comes to health and
3 safety -- flexible thinking, enough to be able to
4 respond appropriately to keep themselves safe from
5 harm or to -- or to seek appropriate medical care.

03:15PM

6 In Ms. Dockery's case, that's not what was
7 seen. What was seen is -- was areas where, that
8 out of lack of flexible thinking, she -- her
9 answers indicated that she was going -- that she
10 would do things that were dangerous to herself, not
11 intentionally but not -- but to omit behaviors that
12 would -- that would keep her safe. And that's what
13 became of, of substantial concern. It's just she
14 does not have the capacity to do these things in
15 general.

03:15PM

16 Q. I understand that.

17 A. And the methodology is the questioning.
18 It's, it's, the, the testing, the review of the
19 record and actually asking -- additional to that,
20 asking questions such as -- I can give you some
21 examples.

03:16PM

22 Q. Okay. Let me stop you there.

23 A. Yes.

24 Q. The methodology that you're describing, is
25 that a standard of care that should be followed by

03:16PM

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1 any doctor, whether it's a medical doctor, a
2 psychiatrist, a psychologist, any doctor, should
3 they adhere to that same methodology?

4 A. Well, they may or may not do
5 neuropsychological evaluations, per se, but they
6 would -- they should rely on those
7 neuropsychological evaluations if there's a
8 question of dementia.

9 Where I get my methodology from is from --
10 is from the literature that's out there
11 specifically regarding assessing competencies and
12 capacities, which is well documented in both books
13 and journals, the *Journal of Forensic*
14 *Neuropsychology*, the *Journal of Forensic Psychology*
15 and a number of books, specifically books like
16 *Evaluating Competencies and Capacities* -- I can get
17 you the authors and the dates of their
18 publications. But I use that standard -- I use the
19 same standard that, that was created to govern
20 those evaluations that -- I didn't create the
21 standard; I didn't create the evaluation. I just
22 follow what I've been taught from, from my years of
23 not just experience but my years of education to
24 follow these standards which are accepted by the --
25 not just the courts, but it's accepted by the

03:16PI

03:16PI

03:16PI

03:17PI

03:17PI

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1 healthcare professions.

2 Q. Okay. Now, there's been, throughout this
3 testimony, some references. And I'm going to call
4 it 16, 68, 16 and references to percentiles.

5 A. Yes.

03:17PM

6 Q. And references to normal, abnormal, below
7 normal, average, below average, mild, moderate,
8 severe.

9 A. Yes.

10 Q. Okay. As far as this testing that you have
11 performed, is there a scale that would be
12 applicable across the board in terms of quantifying
13 this number means this level in terms of dementia?

03:17PM

14 A. Right. Well, the answer to your question,
15 understand, I didn't give -- I didn't give
16 statements of mild, moderate, severe or below
17 average, low average, high average for capacity --

03:18PM

18 Q. I understand.

19 A. -- I did that regarding neuropsychological
20 findings --

03:18PM

21 Q. I understand.

22 A. -- so I, I, I have to speak from the -- from
23 the neuropsychological profession, there is a
24 standard. And that standard emanates from both
25 manuals, as well as from the general professional

03:18PM

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1 terms extremely low, which is basically two
2 standard deviations out, and then they use
3 borderline, and they use below average, and then
4 they use average -- I'm sorry, low average, then
5 average, then high average and then superior and
6 very superior. Different terminology than what we
7 generally use.

03:21P

8 Q. Okay. Now, getting back to Ms. Dockery.
9 You've testified to this probably *ad nauseam*, but
10 obviously during your initial meeting with her, you
11 felt there was a mild deficit, and that because of
12 that impression, you felt it necessary to conduct
13 additional testing.

03:21P

14 A. Yes -- not exactly, but largely, yes.

15 Q. Okay.

03:21P

16 A. The answer was not that I felt there was a
17 mild deficit; I felt that there was a mild
18 dementia, okay?

19 Q. Okay.

20 A. A mild dementia is an overall umbrella term.

03:21P

21 Q. I understand. I meant to actually use the
22 word "dementia," not deficit.

23 A. Okay. Because within that, there's --
24 there's areas where she may have been performing
25 severely or moderately and so forth. But an

03:22P

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1 overall picture, that it was mild.

2 Q. Okay.

3 A. And at that point, I felt that because there
4 was evidence of mild dementia, it was -- it was
5 necessary to evaluate her for the purposes of
6 differential diagnostics so that we have the right
7 diagnosis so we can get her appropriately treated,
8 based my measurements so that we can make
9 comparisons to see how, how things are going as she
10 is aging, make sure that we are doing what we can
11 in terms of appropriate treatment between myself
12 and other providers, so that we can do everything
13 we can to eliminate the progression or hopefully
14 improve things, to some extent, and for treatment
15 -- and as treatment planning, both -- immediately
16 so I can get her to the right -- make the right
17 referrals to the right providers.

03:22PM

03:22PM

03:22PM

18 Q. Okay. So what you are telling me is that in
19 this particular case, you didn't feel comfortable
20 making or giving your ultimate opinion based simply
21 on talking to her?

03:22PM

22 A. Absolutely not.

23 Q. Okay. Now, as far as Ms. Dockery's level of
24 dementia is concerned, is it such that she would
25 not be able to discern whether appropriate

03:23PM

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1 financial decisions are being made for her?

2 A. As per, once again, I'm sorry?

3 Q. Based on what you believe Ms. Dockery's
4 current level of dementia and, and her deficits
5 are, what her current level is?

03:23P

6 A. Today?

7 Q. Based on your opinion.

8 A. Based on my opinion, based on all the
9 information that I have, that she's incapable of
10 making financial decisions for herself?

03:23P

11 Q. Correct.

12 A. All right.

13 Q. But what I am asking is, would, would she be
14 able to discern whether other people are making
15 appropriate decisions for her?

03:23P

16 A. Well, she may be. I would suspect --
17 actually, not to suspect. It's my opinion that
18 based on the severity of the deficits that were
19 noted in the records so far, that just as she would
20 have difficulty making the decisions for herself,
21 it would make clear sense that she would,
22 therefore, also have problems being able to discern
23 whether others are doing it appropriately for her
24 as well --

03:24P

25 Q. Okay.

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1 A. -- and be especially susceptible to coercion
2 or to manipulation.

3 Q. Okay. So, specifically, when it comes to
4 monetary issues, would it be easy for someone like
5 Ms. Dockery to be taken advantage of?

03:24PM

6 A. I believe that, that, that that's the case
7 based on all the information I have prior.

8 Q. So if it were to be determined that the
9 agent or any agent under a power of attorney for
10 Ms. Dockery were taking advantage of her, do you
11 believe she'd be capable of recognizing that?

03:24PM

12 MR. BRITTAIN: I object to that
13 question. You may answer.

14 THE DEPONENT: All right. I may
15 answer?

03:24PM

16 MR. BRITTAIN: Go ahead.

17 THE DEPONENT: Okay. The answer to
18 that is, is that may she recognize that?
19 -She may. Is she likely to recognize that on
20 a consistent basis appropriately so that she
21 can appropriately care for the disposition
22 of her property? No, I don't believe she
23 can.

03:24PM

24 BY MS. MOORE:

25 Q. Would you agree that the determination of

03:25PM

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Emily Carlson and
Alice Preyer,
Petitioner(s),
vs. CIVIL ACTION NOS.
2010-GC-26-0068 & 0069
John C. Dockery, III,
Respondent(s).
In re: Emily Cheshire Dockery

VIDEOTAPE
DEPOSITION OF: JEFF A. BENJAMIN, D.O.
DATE: Friday, December 9, 2012
TIME: 2:43 p.m. through 4:12 p.m.
LOCATION: Grand Strand Specialty Associates
8170 Rourk Street
Myrtle Beach, South Carolina
TAKEN BY: Attorneys for Emily Cheshire Dockery
COURT REPORTER: MADONNA M. PERKINS
Registered Professional Reporter
Certified Livenote Reporter

COPY

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1 watched, but not directed. It's just too many
2 elderly are scammed, and they should be watched by
3 their power of attorney.

4 Q. Okay. I'm going to hand you, if I could,
5 Exhibit 3 again. I think you may have already seen
6 this. That is the form report. Did you, in fact,
7 fill out that report?

03:16P

8 A. I did.

9 Q. Okay. And those are your writings and
10 markings?

03:16P

11 A. Uh-huh, yes.

12 Q. Okay. And is that report signed and
13 notarized at the back page?

14 A. It is signed and notarized, that's correct.

15 Q. Okay. And you -- did you send that report
16 to the Court, to the Probate Court for filing?

03:16P

17 A. Yes, it was sent to Probate Court.

18 Q. Okay. Do you remember why you did that or
19 do you recall why --

20 A. Yes.

03:17P

21 Q. Okay. Why did you send that to the Probate
22 Court?

23 A. I was upset with the -- when I read the
24 psychiatric -- I was upset when they -- when there
25 was -- I believe there was a neuropsychiatric

03:17P

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1 evaluation, and they were basing things on a
2 neuropsychiatric evaluation, which I thought was
3 absolutely a pile of crap.

4 Q. Okay. And do you recall who performed the
5 neuropsychiatric evaluation?

03:17PM

6 A. I believe Dr. Goldschmidt performed two.

7 Q. Okay. And how did you become aware of
8 Dr. Goldschmidt's evaluations?

9 A. Well, she had told me originally that she
10 had neuropsychiatric testing back -- I think I
11 mentioned it in -- previously. So that was the
12 first time I was aware of it.

03:17PM

13 Q. And --

14 MR. McCrackin: Which one are we
15 looking at?

03:17PM

16 (Off-the-record conference.)

17 MS. LANGWAY: I think it's Exhibit 3.

18 MR. McCrackin: November 2, 2011?

19 MS. LANGWAY: That's correct. We
20 should have put a date on it, yes.

03:18PM

21 BY MS. LANGWAY:

22 Q. If we can, just go through this report a
23 little bit. As you see, this is a formal document
24 that is filed in the Probate Court. It obviously
25 says that up at the top. And it says,

03:18PM

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1 A. Probably the nurse. I don't know.

2 Q. Okay.

3 A. I don't know how it got to her. I don't
4 know what chain of command.

5 Q. Okay. Do you know what those notes say
6 underneath? I guess it says, "Set forth the
7 results of any tests which bear on the issue of
8 incapacity and the date of the test." I just can't
9 read -- fully read that.

10 A. Oh, sure you can, it's clear as can be.

11 What I wrote right below that was -- and
12 apparently I knew this was going to the Judge, but
13 I wrote that, "I have been treating patient for a
14 long time. Please do not put any weight into the
15 two psychiatric evaluations that supposedly had
16 been done."

17 Q. Okay. Okay. Going back up here to the
18 beginning section, which is clearly kind of
19 regulatory -- the first question says, you -- "Have
20 you had previous opportunities to evaluate the
21 patient?" And you checked the "yes" box; is that
22 correct?

23 A. Yeah.

24 Q. And obviously, as we have talked about
25 through this testimony, you have seen Ms. Dockery

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03:20P

03:20P

03:20P

03:21P

03:21P

1 the phone at length on 12/6 of 2011.

2 BY MS. LANGWAY:

3 Q. Okay. The next question says, "Is the
4 patient oriented to time and place?" And you
5 selected the "yes" box; is that correct?

03:22Pl

6 A. Yes.

7 Q. And in your experience with Ms. Dockery,
8 when you evaluate her, is she generally oriented to
9 time and place?

10 A. She has always been oriented to time, place
11 name, date, year.

03:22Pl

12 Q. Okay. The next question asked for the
13 "Physical condition and age of the patient" and it
14 says to, "...detail any other significant factors
15 that may be relevant to the Court."

03:23Pl

16 I don't know if this is extremely specific,
17 but I think -- I believe she's 87 years old.
18 That's probably in some of your documents somewhere
19 else.

20 A. That's correct.

03:23Pl

21 Q. At that point in time, do you recall
22 physically her condition?

23 A. At the time of this?

24 Q. Uh-huh.

25 A. Yes.

03:23Pl

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1 Q. Could you tell us what that was, please?

2 A. Well, she's 87 years old; she's a little old
3 lady. What kind of description do you want? She's
4 well-kept and well-groomed, she's always been,
5 ambulating.

03:23PM

6 Q. Ambulating?

7 A. Cognitively intact, thinking clearly,
8 participated with every evaluation I've done. Made
9 appropriate decision-making, I believe, throughout
10 this time. She did most of the talking. Usually
11 her son was present, but rarely did any of the
12 talking.

03:23PM

13 Q. Okay. Would you say she had decent vision,
14 hearing impairment?

15 A. For an 87-year-old? Yeah, I think she had
16 some hearing issues, but I think we referred her to
17 Dr. Osman for that.

03:24PM

18 Q. I think you mentioned she had had some
19 urinary tract infections. Do you recall if they
20 were around the time this report was done?

03:24PM

21 A. I don't recall.

22 Q. Okay.

23 A. It's a very common problem.

24 Q. To your knowledge, any other -- anything
25 else -- if you're just describing somebody's

03:24PM

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1 physical condition, anything else that you view as
2 important that would stick out about her physical
3 condition?

4 A. No.

5 Q. Okay. I think we already went over what
6 your notes were there.

03:24PM

7 The next section asks you to, "Answer the
8 following questions." And the first one is, "Has
9 the person been rated or found: Disabled?" And
10 you selected "no," and I'm assuming you base that
11 on your knowledge of her, as well as any reports
12 that have been given to you by other doctors.

03:24PM

13 A. That's correct.

14 Q. Okay. "Mentally ill or incompetent?" "No,"
15 to your knowledge she has not; is that correct?

03:25PM

16 A. That's true.

17 Q. Okay.

18 MR. MCCRACKIN: I'm just going to
19 object to the leading. I mean, if you have
20 got a question, ask it, but I don't think
21 it's appropriate for you to reread his
22 report.

03:25PM

23 BY MS. LANGWAY:

24 Q. Okay. The next one says, "Has this person
25 ever been rated or found: Chemically dependent?"

03:25PM

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1 A. No.

2 Q. Okay. The next section asks about grooming
3 and things that the person is or is not able to do.

4 What was your opinion as to whether or not
5 she was able to care for herself?

03:25PM

6 A. She could.

7 Q. Okay. How about prepare meals and/or clean
8 the house?

9 A. I don't think she could do that.

10 Q. Okay. When you say you don't think she can
11 do that, you don't think she can prepare any meals?

03:25PM

12 A. No, no. I think she can prepare some meals.
13 But on a regular basis, routinely around the clock,
14 I think it would be very difficult for her to

15 maintain a home, as well as maintain cooking for
16 herself continuously.

03:25PM

17 Q. Okay. Could she prepare small meals, simple
18 meals?

19 A. Oh, I'm sure she could.

20 Q. Okay. Could she keep her room cleaned, a
21 couple rooms cleaned?

03:26PM

22 A. Maybe.

23 Q. The reason you believe she -- what is the
24 reason you believe she would have a difficult time
25 keeping an entire house clean?

03:26PM

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1 A. It's physically hard.

2 Q. Does that have anything to do with her
3 mental ability?

4 A. No.

5 Q. Does whether or not she's able to prepare
6 meals have anything to do with her mental ability?

7 A. No.

8 Q. Okay. The next question has to do with
9 "maintaining bank accounts or funds." It asks if
10 you believe the person is capable of that. What
11 was your answer to that?

12 A. I put "no" to that, and the next one, which
13 was paying bills, but there's a reason for that.
14 That's a vague question. It's just -- that's a
15 black and white question. The reality is that she
16 may know her bank account, she may know her funds.
17 But, again, I mentioned previously, I think that
18 when it comes to the monetary issues in an 88-,
19 87-year-old, I think they should tread lightly and
20 have family members and/or the power of attorney
21 watching over them. It's too easy to make mistakes
22 and too easy to be taken advantage of.

23 Q. Okay. And so is it your testimony that she
24 has the mental capability of maintaining a bank
25 account and paying bills?

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1 A. Yes, I think she could, with assistance.

2 Q. Okay. When you say "with assistance," do
3 you mean that she's capable of making a decision as
4 to how her funds should be handled but she needs
5 someone in assisting the facilitation of that
6 happening?

03:27PM

7 MR. McCRACKIN: I'm going to object to
8 the leading.

9 MS. LANGWAY: Okay.

10 MR. McCRACKIN: Keep asking him
11 questions.

03:27PM

12 BY MS. LANGWAY:

13 Q. Okay. What does "maintain a bank account"
14 mean to you?

15 A. Well, maintain bank account is knowing where
16 your funds go, knowing what funds you have and
17 choosing how to use them.

03:27PM

18 Q. Okay. And does Ms. Dockery have the mental
19 ability to know those things?

20 A. Absolutely.

03:28PM

21 Q. Okay. With respect to paying bills, does --
22 in your opinion, does Ms. Dockery have the mental
23 capability to pay her own bills?

24 A. I think she has she mental capability. I
25 think it's easy to be -- I think it's easy to --

03:28PM

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1 it's easy to make mistakes with bills and again,
2 how many things come in the mail that look like
3 bills that are not bills? Again, I would strongly
4 encourage her to have a guardian do it with her.

5 Q. And in terms of living independently, what
6 was your opinion of whether or not she can live
7 independently?

03:28P

8 A. Well, I put "yes," she can live
9 independently. But, again, that's a black and
10 white question. She can live independently with
11 full assistance, is my -- well, with assistance; it
12 doesn't have to be full assistance. She's elderly,
13 she's frail, easy to fall, easy to hurt yourself.
14 So if you have the means to have, you know,
15 caregivers, she could still live independently.
16 And what I mean "independently," I mean at her
17 home.

03:28P

03:29P

18 Q. Okay. So it's your testimony that she could
19 live independently but would need caregivers.
20 Could you please explain full-time caregivers
21 versus not full-time caregivers?

03:29P

22 A. Well, full-time caregivers are basically
23 around-the-clock. And she probably does not need
24 around-the-clock, but she needs the majority of the
25 day, the awake times, somebody to check on her.

03:29P

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1 if she had any --

2 A. No, I don't think she had any.

3 Q. Okay. And the next two are "major medical
4 tests or psychological or psychiatric testing."

5 A. "No" to the major medical, and "yes" to the
6 psychological/psychiatric testing.

03:34PM

7 Q. Okay. And what would you consider major
8 medical tests?

9 A. I guess MRIs, I don't know, stress testing,
10 I don't know.

03:34PM

11 Q. Okay. And to your knowledge, she had not
12 had any of that?

13 A. No.

14 Q. Okay. Psychological or psychiatric testing,
15 you've already testified that you selected "yes" to
16 that. It looks as if you've written something over
17 in the corner there?

03:34PM

18 A. Yes. I put "Do not put any weight on those
19 evaluations."

20 Q. Okay. What are you referring to when you
21 say "those evaluations"?

03:34PM

22 A. I believe the neuropsychiatric testing, is
23 what I was referring to.

24 Q. Okay.

25 A. And I know she had seen Dr. Vanhorn at some

03:35PM

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1 Q. Okay. Which exhibit number is that one?

2 A. 5.

3 Q. Exhibit Number 5, you're saying is an office
4 visit?

5 A. Yeah.

03:50P

6 Q. Okay. So I gotcha.

7 A. The 11/23 visit.

8 Q. That's on the letter? Okay. So let's start
9 with Exhibit Number 5.

10 A. Okay.

03:50P

11 Q. Do you have that?

12 A. 5 is the evaluation.

13 Q. Right, okay. That's an evaluation. We'll
14 talk about that one first.

15 A. Uh-huh.

16 Q. Okay. This is -- is this a reevaluation?

17 A. Yeah, done 11/23 of 2011.

18 Q. Okay. And you performed this -- you, in
19 fact, performed this evaluation?

20 A. Yes. I actually called her into the office
21 because of all the nonsense that had been going on.

03:51P

22 Q. Okay. And this is, in fact, a report -- one
23 of your reports?

24 A. That's correct.

25 Q. Written by you, correct?

03:51P

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1 A. That's correct.

2 Q. Okay. And when you say you called her in
3 because of all the nonsense going on, could you
4 elaborate on that, please?

5 A. Four attorneys, two neuropsychiatric
6 testings, psychiatrists getting involved, you know,
7 threats of incompetency and threats of poor
8 decision-making.

03:51PM

9 Q. Okay. And what did you -- did you perform
10 any test on this particular day?

03:51PM

11 A. Well, other than -- well, no. Other than
12 Mini-Mental Status Exam, which is not a test, I
13 don't believe is a test, but no.

14 Q. Okay.

15 A. I sat down to talk to her and her -- I sat
16 down to talk to her. And at that time, her son was
17 not there, but a -- some caregiver was there with
18 her.

03:52PM

19 Q. Do you recall the caregiver's name?

20 A. No.

03:52PM

21 Q. Okay. Mr. Dockery did not attend this
22 appointment as far as you know?

23 A. He -- he may have -- I don't -- he was not
24 in the room, no.

25 Q. And I realize that you did a Mini-Mental

03:52PM

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1 prior eight or nine evaluations could have been
2 missed. The same reason I contacted her on 12/6 of
3 2011.

4 Q. Okay.

5 A. You can't determine -- it would be
6 inappropriate to determine somebody's capabilities
7 with sitting down one or two times. And so I just
8 wanted to make sure she was fine. I also wanted to
9 make sure she was fine without any influences
10 outside.

03:53P

03:54P

11 Q. Okay. And do you recall on that date if she
12 had any change in her mental ability?

13 A. No, she's exactly the same.

14 Q. And if we could just reiterate your opinion,
15 again, on that day of her mental ability, what was
16 your opinion on that day of her mental ability?

03:54P

17 A. Absolutely able and capable and was making
18 appropriate -- making the right -- making sound
19 decision-making, or was capable of making her own
20 decisions. Appropriate decision making is judgment
21 from outside, not from her.

03:54P

22 Q. Okay. About halfway down on your report, it
23 says, "This patient..." -- do you see where I'm
24 reading?

25 A. Yes.

03:54P

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1 Q. -- "if she was to do a neuropsychiatric
2 testing, would probably have great difficulties."

3 Could you explain why, in your opinion, she
4 would have difficulties with neuropsychiatric
5 testing?

03:55PM

6 A. Everybody does; they're a nightmare. I can
7 take a 20-year-old, a 30-year-old, a 40-year-old,
8 just about everybody who does them comes back and
9 says they're a nightmare. They're physically
10 demanding, they're -- they're nauseatingly long, a
11 multitude of different questions and testings.

03:55PM

12 Q. Are you aware of the testing procedures that
13 Ms. Dockery was -- completed through
14 Dr. Goldschmidt?

15 A. I don't know. What do you mean? I'm sorry.

03:55PM

16 Q. Are you aware of the testing procedure that
17 she would have completed with the neuropsychiatric
18 testing?

19 A. Am I aware of the procedure, like how he
20 does it and -- no, not specifically by any means.

03:55PM

21 Q. Okay. Are you generally aware of what a
22 neuropsychiatric testing involves?

23 A. Generally, yeah.

24 Q. Okay. And to your knowledge, what is that?

25 A. A multitude of different -- some physical,

03:55PM

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1 but mostly cognitive testing.

2 Q. Okay. And the other exhibit that you have,
3 I think is it 6 that is dated 12/6/2011?

4 A. That's correct.

5 Q. And this is a note from your records?

03:56P

6 A. Yes.

7 Q. Okay. And this, in fact, is a note that you
8 made?

9 A. That's correct.

10 Q. And it says "reevaluation," is that correct,
11 at the top?

03:56P

12 A. Yeah, it was a phone call.

13 Q. Okay. It was a phone call. Okay. And why
14 did you call Ms. Dockery on December 6, 2011?

15 A. Again, all right, I think that when you --
16 or when you are even considering the idea of
17 competency and decision-making, it should not be
18 taken lightly. And so I just decided to make a
19 phone call and see what -- see how she sounded at
20 home in her own environment without anybody else
21 around.

03:56P

22 Q. Okay. And could you please tell the Court
23 what your evaluation or what your experience was
24 when you called her on --

03:57P

25 A. Exactly the same as it's been, making

03:57P

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1 appropriate -- not appropriate, but she makes --
2 she's able to make decision-making. She's alert;
3 she's oriented. It's exactly the same she's been
4 on all previous evaluations --

5 Q. Okay.

6 A. -- except -- or way earlier when she needed
7 help.

8 Q. Okay. Moving right along, I'm going to hand
9 you what's been marked as Exhibits 9 and 10. And
10 they are Dr. Goldschmidt's reports; is that
11 correct?

03:57PM

12 A. I believe so, yeah.

13 Q. Okay. And do you see the dates of those
14 reports?

15 A. I do.

03:58PM

16 Q. Could you please state what those are?

17 A. 12/20 of 2010, 12/21 of 2010, 12/27 of 2010,
18 1/4 of 2010 and 1/11 of 2011.

19 Q. Okay.

20 A. This is not -- then I have another one --
21 booklet with 8/16 of 2011, 8/22 of 2011, 8/29 of
22 2011, 8/31 of 2011 and 9/7 of 2011.

03:58PM

23 Q. Okay. And have you had opportunity -- have
24 you seen either of these reports before?

25 A. I've seen the second neuropsychiatric

03:58PM

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1 testing for this one.

2 Q. Okay. And that would be the one that
3 contains the Probate Court form?

4 A. No.

5 Q. No? I think that may be attached to it.

03:58P

6 A. Yeah, that is the one.

7 Q. Okay.

8 A. Yeah, that's the one.

9 Q. Okay. And you -- have you reviewed all of
10 these -- this report along with the individual
11 markings that Dr. Goldschmidt made and the
12 selections that he made?

03:59P

13 A. No, I've never seen -- I've never seen that.

14 Q. Oh, you haven't seen this one? Okay.

15 A. No, I've seen the report; I've seen the
16 neuropsychiatric evaluation, but not the --

03:59P

17 Q. Not the form?

18 A. -- what he sent to the Probate.

19 Q. Okay. And based upon your medical opinion,
20 do you agree with Dr. Goldschmidt's report?

03:59P

21 A. No.

22 Q. Okay. Can you tell me what you disagree
23 with?

24 A. One, he's basing it on a neuropsychiatric
25 evaluation. I can give you three, five or ten

03:59P

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1 neuropsychiatrists in a room and the exact same
2 information he had, and they'll come up with ten
3 different opinions.

4 I'm involved in another case exactly the
5 same, with a similar -- similar position, that two 03:59PM
6 neuropsychiatric tests -- one neuropsychiatric test
7 was done, another neuropsychiatrist did the exact
8 same test and came up with a completely opposite
9 answer.

10 Q. Okay. 04:00PM

11 A. Neuropsychiatric -- I don't think that -- I
12 think neuropsychiatric test is a very fancy word
13 and a very fancy term. I think that people put a
14 lot of weight on it where it shouldn't be.

15 Q. And did you, in fact, read all -- I think -- 04:00PM
16 I believe there are 16 pages to his report?

17 A. No, I didn't read all of it.

18 Q. Okay.

19 A. I read much of it.

20 Q. Okay. Did you read the Summary? I think 04:00PM
21 it's on page 14 of 16.

22 A. I believe I did.

23 Q. I'm going to specifically direct your
24 attention to, I think, the third paragraph that
25 states, "The nature of Ms. Dockery's history..." 04:00PM

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1 do you see where I'm reading?

2 A. Yes, ma'am.

3 Q. Do you see that he says it's "consistent
4 with a diagnosis a of Mixed Dementia, including
5 Probable Vascular Dementia with Depressed Mood..."
6 and it goes on, as you can see, to list several
7 things there.

04:01P

8 Do you agree with his diagnosis of her
9 mental issues?

10 A. She may have a early dementia but, no, I
11 don't agree with it being a mixed dementia. I
12 don't think -- there's no way to -- it's not
13 possible to tell that, based on a neuropsychiatric
14 testing or not.

04:01P

15 A depressed mood? I do not think she's
16 depressed, no more than an 87-year-old patient
17 would be, which makes her in the norm.

04:01P

18 Do I think she has Alzheimer's type
19 dementia? No, absolutely not.

20 Q. Okay.

04:01P

21 A. "Possible Dementia Secondary to Closed Head
22 Trauma?" No.

23 Q. No.

24 A. "With depressed mood?" No.

25 "Possible Dementia Secondary to Normal

04:02P

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 Pressure Hydrocephalus?" No.

2 Q. And in your opinion, your medical opinion
3 and your evaluation of her, she does not exhibit
4 any of those particular diagnosis?

5 A. She has a -- she does have a mild dementia.
6 I mean, I think that's fair to say, but it is very
7 mild, which certainly does not incapacitate her.

04:02 PM

8 Q. Okay. And the very next paragraph states
9 Dr. Goldschmidt's opinion. Have you read that
10 paragraph?

04:02 PM

11 A. He says that she's an "incapacitated person
12 and requires a guardian and conservator to be
13 appropriately managed in a safe environment and
14 maintain appropriate care of her property."

15 Q. Do you disagree or agree with that
16 statement?

04:02 PM

17 A. I disagree with that statement.

18 Q. Okay. And I know it feels like we go over
19 this a lot, but could you elaborate on why you
20 disagree with that statement?

04:03 PM

21 A. She's alert, she's oriented, she has been
22 able to -- my understanding is she's been able to
23 assist with her legal care through her attorney.
24 She's been able to understand all these proceedings
25 and what they mean. She understands who's trying

04:03 PM

STENOTYPE REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 to do what to her. She understands, you know, her
2 daughters' points, she understands her son's point,
3 she understands what each one's role is.

4 She has not displayed anything that would
5 make me suggest that she doesn't understand the
6 situation. She's probably sharper than 85 percent
7 of the people in Horry County, and they're not
8 incapacitated or believed to be incapacitated.

04:03P.

9 Q. Okay. If you could, please, just move to
10 page 15 of 16. Are you familiar with the
11 Diagnostic Impressions on that page?

04:03P.

12 A. Are you referring to the Axis?

13 Q. Yes, sir.

14 A. Yeah, uh-huh.

15 Q. Okay. Can you tell me in your medical
16 opinion if you agree with those particular
17 findings?

04:04P.

18 A. Well, we went through those. Those are the
19 same things that we've mentioned on the previous
20 page.

04:04P.

21 Q. Okay. So your answer to that would be what?

22 A. For the most part, no.

23 Q. Okay. Moving down the page, it states that
24 are there are Recommendations. Have you had a
25 chance to review what his recommendations are?

04:04P.

STENOTYPE REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 A. I did.

2 Q. Okay. I don't really want to go through
3 each and every one of them individually because
4 there are numerous ones of them. But are there any
5 recommendations that -- I see 1 through 8 here --
6 that you agree with?

04:04PM

7 A. His first one suggests maybe continuing
8 neurologic supervision is recommended. I'm not
9 sure what that means, but follow-up care from a
10 neurologist being -- which is pretty standard for
11 anybody with NPH would be appropriate.

04:05PM

12 Q. Okay.

13 A. He suggests that the caregivers attend a
14 psychoeducational treatment to create an underlying
15 understanding of Ms. Dockery's deficits. I don't
16 think that exists, nor have I ever seen anybody go
17 through that.

04:05PM

18 "Due to the increasing levels of care,
19 Ms. Dockery will likely require a high degree of
20 stress involved in her caregiving." I'm not sure
21 what he's implying with that and what stresses
22 continue -- what -- I have no idea what he's
23 referring to in regards to having caregivers.
24 That's what they do. You know, they don't even
25 have to be -- they don't have to be educated. Most

04:05PM

04:05PM

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 of them are baby-sitters or adult sitters.

2 And he wants Ms. Dockery's caregivers to
3 attend psychotherapy, again, that's not going to
4 happen, ever.

5 He's considered -- he suggests "Psychiatric
6 consultation for psychopharmacological intervention
7 is recommended for anxiety and depression." She's
8 pretty much adamant about not doing that, which I
9 think is absolutely -- and what she's referring to
10 is antidepressants. Absolutely not. She does not
11 -- doesn't need those. If anything, she's proven
12 that she's very sensitive to medications, will make
13 things worse.

14 "Continued supervision by her family
15 physician" is absolutely appropriate. In fact, you
16 know, personally I think that her primary physician
17 is probably the Number 1 person who could attest to
18 her mentation, providing he's seen her as many
19 times as I have, which I assume he has. And I know
20 that's Dr. Huberty.

21 "Cease any operation of a motor vehicle."
22 I'd agree with that.

23 "Neuropsychological follow-up is recommended
24 in 9 to 12 months." No.

25 Suggesting she go into "an appropriate

04:06P

04:06P

04:06P

04:07P

04:07P

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 living situation, such as in-house nursing
2 assistance or residence in an appropriate living
3 facility." No, that's up to her, not to anybody
4 else.

5 Q. Okay.

04:07PM

6 A. Just because the decisions she makes aren't
7 decisions that somebody else likes doesn't make
8 them wrong.

9 MS. LANGWAY: Okay. I believe that may
10 be all I have for you, if you'll give me one
11 second.

04:08PM

12 BY MS. LANGWAY:

13 Q. All of the opinions that you gave today are
14 to a reasonable degree of medical certainty more
15 probable than not --

04:08PM

16 A. Yes.

17 Q. -- is that correct? Yes.

18 And in your medical opinion, Ms. Dockery is
19 not incapacitated; is that correct?

20 A. That's correct.

04:08PM

21 MS. LANGWAY: Okay. And I'd like to
22 offer him as an expert in adult neurology.

23 Do you have any objection to that?

24 MR. MCCRACKIN: No, I don't have an
25 objection.

04:08PM

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 MR. MONCKTON: No objection.

2 MS. LANGWAY: Ms. Moore?

3 MS. MOORE: No objection.

4 MS. LANGWAY: Okay. I think that's all
5 I have for you, Dr. Benjamin. I really
6 appreciate your time and patience with me --

04:09Pl

7 THE DEPONENT: Okay.

8 MS. LANGWAY: And you'll have to answer
9 any questions that these other fine
10 attorneys might have for you.

11 THE DEPONENT: Who's next?

12 EXAMINATION

13 BY MR. MONCKTON:

14 Q. Just a couple questions, Dr. Benjamin.
15 Again, my name is Billy Monckton, and I'm
16 representing John C. Dockery in this matter. And
17 I'm not going to go over, rehash everything that
18 you have done here.

04:09Pl

19 But it appears from your reports and your
20 testimony, you've had an opportunity to meet with
21 and speak with Ms. Dockery, seems like at least ten
22 to 12 times over the past year and a half; is that
23 correct?

04:09Pl

24 A. About ten times.

25 Q. And in those interviews, you had ample time

04:09Pl

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

1 to discuss with Ms. Dockery any number of things
2 concerning her health care; is that correct?

3 A. That's correct, yeah.

4 Q. And based upon your evaluations of her, you
5 have made the determination in your professional
6 opinion that she is incapacitated -- not
7 incapacitated; is that correct?

04:09PM

8 A. She is not incapacitated.

9 Q. And understanding the definition that you've
10 already reviewed of incapacity, it is your opinion
11 today and has been your opinion throughout this
12 case, that Ms. Dockery is not incapacitated; is
13 that correct?

04:10PM

14 A. That's correct.

15 MR. MONCKTON: No further questions.

04:10PM

16 Thank you.

17 MR. McCRACKIN: I just had a little
18 housekeeping question, because it's after
19 4:00. I'm guessing I'm going to go at least
20 two hours.

04:10PM

21 Lee, I don't know how many questions
22 you have.

23 MS. MOORE: It's really going to depend
24 on what you cover, Jim.

25 MR. McCRACKIN: So I'm guessing we're

04:10P.

STENOGRAPHY REPORTING SERVICE, LLC

Madonna Perkins, RPR *** (843) 685-0075
392 Oak Moss Court, Murrells Inlet, SC 29576

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
 COUNTY OF HORRY) Case No. 2010-GC-26-0068 AND 69

Emily Carlson and Alice Preyer,

Petitioner,

vs.

John C. Dockery, III,

Respondent.

In re Emily Cheshire Dockery

PETITIONER'S MOTION TO STRIKE
RESPONDENT'S COUNTERCLAIM

PROBATE COURT
 HORRY COUNTY, SC
 2011 FEB 16 PM 2:16
 BEIRDRE W. LINDON
 PROBATE JUDGE

Petitioners, Emily Carlson and Alice Preyer hereby moves this Court to strike Respondent's certain defenses and Counterclaim for frivolous lawsuit pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure and within thirty (30) days after receipt of his Answer and Counterclaim.

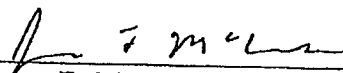
The grounds of this motion are that the Counterclaim is without merit and only serves to prejudice or embarrass the Petitioners. South Carolina Rule of Civil Procedure 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

The Respondent's Counterclaim for frivolous lawsuit is without merit. Pursuant to §§ 15-36-10 of the South Carolina Code, "The provisions of [the frivolous lawsuit statute] *do not apply* where an attorney . . . establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument" S.C. Code Ann. § 15-36-10 (1976) (*emphasis added*). Therefore, all that is needed to proceed with litigation is a single legitimate basis. According to (C)(1) of §§ 15-36-10 of the

South Carolina Code at the conclusion of a trial and after a verdict upon motion of the prevailing party, the court shall determine if the claim or defense was frivolous. The filing of a frivolous action is improper at this time.

WHEREFORE, Petitioners Emily Carlson and Alice Preyer requests that the Court strike the above described Counterclaim of Respondent Emily Cheshire Dockery requests costs and attorney's fees incurred by Petitioners in making this motion; and requests such other and further relief as the Court deems just and appropriate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
James F. McCrackin
SC Bar No. 064140
E-Mail: jim.mccrackin@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
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Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

February 16, 2011

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF HORRY) Case No. 2010-GC-26-0068 AND 69

Emily Carlson and Alice Preyer,)
)
) Petitioner,)
)

vs.)

John C. Dockery, III,)
)
) Respondent.)
)

In re Emily Cheshire Dockery)

)

MOTION TO ENFORCE
SETTLEMENT AGREEMENT

Pursuant to the South Carolina Rules of Civil Procedure, the Petitioners, Emily Carlson and Alice Preyer, hereby moves this Court for an Order requiring John C. Dockery, III, to comply with the terms of the settlement agreed upon by the above-named parties on or about July 22, 2011, a copy of which is attached hereto as "Exhibit A." In addition, Petitioners request that the Court order John C. Dockery, III, to pay Petitioners costs and attorneys' fees associated with having to file this Motion. The grounds for this Motion are as follows:

1. On July 22, 2011, the parties participated in mediation of the above-captioned matter. The mediation concluded with the parties reaching a settlement which was communicated to the Court by the mediator.
2. As part of the settlement agreement reached by the parties, John C. Dockery, III would serve as Guardian for Emily Cheshire Dockery. Within 30 days of the execution of the Agreement Petitioners and Respondent would each submit three names of proposed conservators. Counsel for the Petitioner's prepared a written Settlement Agreement which

was approved by counsel for each of the parties. Counsel for Emily Cheshire Dockery did not object to the Agreement but indicated she could not consent on her client's behalf.

3. Counsel for John C. Dockery confirmed he had no objections to the revised Settlement Agreement by email dated August 2, 2011, which is attached hereto as "Exhibit B".

4. The parties informed the Court that the matter had settled and the hearing scheduled for September 15 and 16, 2011, was no longer necessary. The Court emailed all parties on August 3, 2011, confirming the matter settled and the matter would be removed from the Courts calendar, a copy of which is attached hereto as "Exhibit C". Parties were asked to contact the Court by 5:00 pm on August 3, 2011 if there was any objection. No objections were submitted.

5. On August 23, 2011, counsel for John C. Dockery, III, indicated via email, an executed Settlement Agreement would be forwarded to us. A copy of the email is attached hereto as "Exhibit D".

6. On August 25, 2011, Petitioners were informed John C. Dockery, III is no longer in agreement to execute the Settlement Agreement, a copy of the email is attached hereto as "Exhibit E".

7. Petitioners received the signature page of the Settlement Agreement of V. Lee Moore, by letter dated August 25, 2011.

8. Due to the Courts calendar a new hearing for this matter can not be held until November 2 and 3, 2011, see email dated August 26, 2011, attached hereto as "Exhibit F".

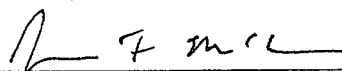
9. South Carolina Courts have jurisdiction to enforce settlement agreements entered into by parties. *Shelton v. Bressant*, 312 S.C. 183, 439 S.E.2d 833 (1993).

10. In light of John C. Dockery's failure to execute the Settlement Agreement, Petitioners have been forced to file this motion with this Court seeking to enforce the agreement.

11. Petitioners also request that this Court order John C. Dockery, III, to pay Petitioner's attorneys' fees and costs associated with the filing of this Motion as a result of John C. Dockery's failure to execute and comply with the terms of the settlement agreement. *See, e.g., Cheap-O's Truck Stop, Inc. v. Cloyd, et. al.*, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002) (upholding an award of attorney's fees arising out of a motion to enforce a settlement agreement).

Accordingly, Petitioners respectfully requests that this Court issue an order enforcing the settlement agreement pursuant to its terms and requiring John C. Dockery, III, to execute a the Settlement Agreement. Petitioners also seek any additional and further relief that the Court may deem necessary and appropriate under the circumstances to include the payment of the Petitioners attorney fees and costs.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
James F. McCrackin
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Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

August 31, 2011

STATE OF SOUTH CAROLINA }
COUNTY OF HORRY, }
Emily Carlson and Alice Preyer, }
Petitioner, }
Vs. }
John C. Dockery, III, }
Respondent, }
In re Emily Cheshire Dockery }

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-68 AND 69

RESPONSE TO MOTION TO
ENFORCE SETTLEMENT AGREEMENT

PROBATE COURT
HORRY COUNTY, SC
2011 SEP 14 PM 2:29
DEBORAH W. EDWARDS
PROBATE JUDGE

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS

That John C. Dockery, III by and through his attorney, William H. Monckton, VI, hereby Responds to the Motion to enforce Settlement Agreement proposed by Petitioners Emily Carlson and Alice Preyer.

1. That on July 22, 2011, Mediation was held regarding the above referenced matter.

2. That there were several items discussed orally; however the Agreement had not been reduced to writing.

3. That when the Agreement was finally reduced to writing and reviewed by Respondent John C. Dockery, III, he disagreed with one major written item contained within the Agreement.

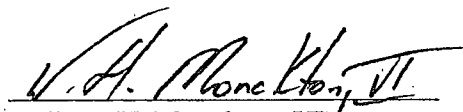
4. Settlement Agreements are regarded by contract law in that parties agree to resolve and settle lawsuits. It is basic contract law and the Respondent,

John C. Dockery, III, moves this court that there was not a meeting of the minds with regards to the above referenced Settlement Agreement.

5. That John C. Dockery, III, after reviewing the written Settlement Agreement refuses to sign and agree to the issue regarding Conservatorship.

THEREFORE, the Respondent, John C. Dockery, III, asks this court not to grant the Petitioners Motion to Enforce the Settlement Agreement.

MONCKTON LAW FIRM, PA

A handwritten signature in black ink, appearing to read "W. H. Monckton, VI", written over a horizontal line.

William H. Monckton, VI
Attorney for the Plaintiff
1300 Professional Drive, Suite 102
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

September 14, 2011

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Emily D. Carlson and Alice Preyer,

Petitioners,

Vs.

John C. Dockery, III.

Respondent.

In re: Emily Cheshire Dockery

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

AFFIDAVIT OF JOHN C. DOCKERY, III

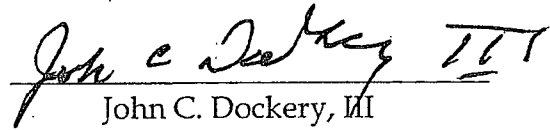
PROBATE COURT
HORRY COUNTY, SC
2011 SEP 14 PM 2:29
DEBORAH W. EDWARDS
PROBATE JUDGE

PERSONALLY APPEARED BEFORE ME, John C. Dockery, III, the Respondent who, upon being duly sworn, deposes and states as follows regarding the Motion to Enforce Settlement Agreement:

1. That I did participate in the Mediation on July 22, 2011 that has been described in the Motion.
2. That I was a party to the Mediation and we discussed several items concerning a Guardianship/Conservatorship and other issues.
3. That I can agree to everything contained in the Settlement Agreement except the Conservatorship for my mother, Emily Cheshire Dockery.
4. My mother, Emily Cheshire Dockery, has advised me that I am the only one she wants to manage her affairs and therefore I cannot agree with this Agreement as it is written.

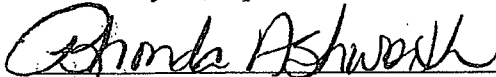
5. That I have informed my lawyer, William H. Monckton, VI, that I would not sign this Agreement with the Conservatorship issue contained within.

FURTHER YOUR AFFIANT SAYETH NOT.


John C. Dockery, III

Sworn to before me this

13th day of September, 2011



Notary Public for South Carolina

My Commission Expires: March 14, 2016

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Emily D. Carlson and Alice Preyer,

Petitioners,

Vs.

John C. Dockery, III.

Respondent.

In re: Emily Cheshire Dockery

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

MOTION TO VOID SETTLEMENT

AGREEMENT

PROBATE COURT
HORRY COUNTY, SC
2011 DEC 30 AM 8:49
DEIRDRE W. EDMONSON
PROBATE JUDGE

This matter is before the Court on behalf of the Respondent, John C. Dockery, III, by and through his attorney, William H. Monckton, VI. A settlement agreement was entered into in this case on July 22, 2011 wherein the parties were alleged to have agreed that Emily Cheshire Dockery was incapacitated and in need of a Guardian and Conservator pursuant to SC Code Sections 62-5-304 and 62-5-401(2). Mr. John Dockery III, refused to sign the settlement agreement on this matter and a Motion to Enforce the Settlement Agreement was brought before the court on October 31, 2011 where the Court signed an Order enforcing settlement.

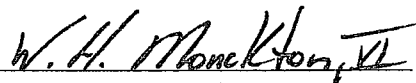
Since the time of the settlement agreement and the enforcement of the settlement agreement, the Deposition of the court-appointed medical examiner, Jeffrey Allen Benjamin, D. O. has been taken. Dr. Benjamin was deposed in a partial deposition on December 9, 2011 and his deposition was received by the Respondent on December 29, 2011. Dr. Benjamin has been Mrs. Dockery's treating neurologist for the past year and a

half. The pertinent part of Dr. Benjamin's deposition for the purposes of this Motion is that he opines that Mrs. Dockery is not incapacitated and is not incapacitated based upon the definitions contained within the statutes of the Probate Code. (See Exhibit "A" Examination by Mr. Monckton, in transcript.) Dr. Benjamin's last review of Mrs. Dockery, prior to giving this opinion, was on December 6, 2011.

Based upon the opinion of Dr. Benjamin, the Respondent, John C. Dockery, III, would move that this court would void the Settlement Agreement and that the settlement agreement is, as of this date, factually inaccurate with regards to the issue of the capacity of Mrs. Dockery. That barring John C. Dockery, III, from providing testimony or stating a fact consistent with the doctor's review of Mrs. Dockery on December 6, 2011 would prejudice not only John C. Dockery, III but also Emily Cheshire Dockery; and would be a violation of due process.

That the Respondent hereby moves for an Order voiding the previously ordered Settlement Agreement.

MONCKTON LAW FIRM, PA


William H. Monckton, VI
Attorney for the Respondent
1300 Professional Drive, Suite 102
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

December 29, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068 & 69

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO REQUIRE PETITIONERS
TO PAY FOR FEES AND COSTS
AND
MOTION TO REMOVE V. LEE MOORE,
ESQUIRE AS GUARDIAN AD LITEM

PROBATE COURT
HORRY COUNTY, SC
2012 MAR -1 AM 9:00
DEIRDRE W. EDMONDSON
PROBATE JUDGE

TO: THE HONORABLE COURT; JAMES F. McCRACKIN, ATTORNEY FOR
EMILY CARLSON AND ALICE PREYER; WILLIAM H. MONCKTON, VI,
ESQUIRE, COUNSEL JOHN DOCKERY; and V. LEE MOORE, GUARDIAN
FOR MRS. EMILY CHESHIRE DOCKERY:

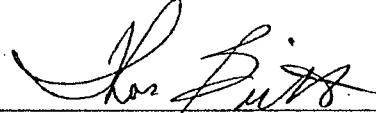
Now comes Thomas C. Brittain, Esquire, on behalf of Mrs. Emily Cheshire Dockery, seeking the an order from this Honorable Court, requiring the Petitioners to pay for all of Dr. Goldschmidt's examinations, both those that have already occurred and for any additional examinations requested prior to the hearing. Ms. Dockery has been examined by the Court appointed medical examiner and is prepared and willing to pay for the costs associated with these examinations, but does not believe it to be fair that she also have to pay for any and all examinations requested by Petitioners, given that this action was not brought by her, and she does not have control over the number of examinations ordered by Petitioners. Additionally, Ms. Dockery believes this action to be brought in bad faith, as evidenced by her counterclaim wherein she requests the court award her attorney's fees and costs of this litigation. As such, Ms. Dockery would ask that the Court either require Petitioners to pay for Dr. Goldschmidt's

examinations, or issue an order staying all payments until the action is concluded and Ms. Dockery's counterclaim for attorney's fees and costs can be heard and resolved.

Additionally, Ms. Dockery would move this Honorable Court to issue an Order removing V. Lee Moore as Guardian ad Litem in this case. While, Ms. Moore is certainly a very good attorney and competent Guardian ad Litem, Ms. Dockery recently hired Reagan Callaghan, a certified Elder Law Advocate, who is working with her, and on her behalf to do what is in her best interest. Ms. Callaghan routinely visits with Ms. Dockery in her home, she has familiarized herself with the home health care workers that tend to Ms. Dockery on a daily basis, and she plans to attend Ms. Dockery's court appointed doctor appointments. In addition, Ms. Dockery retained competent counsel whom she hired to represent her wishes and best interests. As such, Ms. Dockery feels that she does need the services of V. Lee Moore in this case, and it is her desire that the Court relieve her of those duties. Ms. Moore's fees are unnecessary.

Based upon the foregoing reasons, Motion of Ms. Emily C. Dockery, and the circumstances underlying this request, it is hereby requested that the Court issue an Order either requiring Petitioners to pay for the examination of Dr. Goldschmidt, or staying said payments until the matter is resolved, and issue an Order removing V. Lee Moore as Guardian ad Litem in this case.

THE BRITAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire

4614 Oleander Drive

Myrtle Beach, SC 29577

Telephone: (843) 449-8562

Facsimile: (843) 497-6124

ATTORNEY FOR Emily Cheshire Dockery

February 29, 2012
Myrtle Beach, South Carolina.



STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

EMILY CARLSON AND,)
ALICE PREYER)

Petitioners,)

vs.)

JOHN C. DOCKERY, III)

Respondent.)

In re: EMILY CHESHIRE DOCKERY)
_____)

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068 & 69

MOTION TO REQUIRE ALL COURT
EXAMINATIONS of EMILY C.
DOCKERY BE ADMINISTERED IN
WRITING

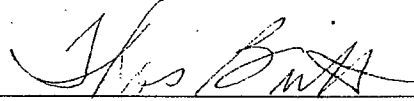
PROBATE COURT
HORRY COUNTY, SC
2012 MAR 20 AM 11:21
DEIRDRE W. EDWARDS
PROBATE JUDGE

TO: THE HONORABLE COURT; JAMES F. McCrackin, ATTORNEY FOR
EMILY CARLSON AND ALICE PREYER; WILLIAM H. MONCKTON, VI,
ESQUIRE, COUNSEL JOHN DOCKERY; and V. LEE MOORE, GUARDIAN
FOR MRS. EMILY CHESHIRE DOCKERY:

Now comes Thomas C. Brittain, Esquire, on behalf of Mrs. Emily Cheshire Dockery, seeking an order from this Honorable Court, requiring all counsel and guardians in the above referenced case to administer all examinations and questioning of Mrs. Emily C. Dockery in writing. Mrs. Dockery has a severe and profound hearing loss in her left ear that cannot be enhanced with any hearing device. She has a moderate to severe hearing loss in her right ear as well. The only ear she hears with is her right ear, and it requires her to wear a hearing aide in order for her to hear. Mrs. Dockery reads extremely well and is able to comprehend written documents and statements much better and more quickly than solely by listening. As such, counsel for Mrs. Dockery would request the Court issue an Order requiring all questions and examinations directed to Mrs. Dockery be administered in writing and not verbally. It would prejudiced Mrs. Dockery and could potentially give the Court an improper opinion of Mrs. Dockery if she is not afforded the opportunity to properly hear the questions being asked of her.

Based upon the foregoing reasons, Motion of Ms. Emily C. Dockery, and the circumstances underlying this request, it is hereby requested that the Court issue an Order requiring all questioning and examinations of Mrs. Emily C. Dockery be administered in writing.

THE BRITTAIN LAW FIRM, P.A.

A handwritten signature in dark ink, appearing to read "Thomas C. Brittain", is written over a horizontal line.

Thomas C. Brittain, Esquire

4614 Oleander Drive

Myrtle Beach, SC 29577

Telephone: (843) 449-8562

Facsimile: (843) 497-6124

ATTORNEY FOR Emily Cheshire Dockery

March 19, 2012

Myrtle Beach, South Carolina.



STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

EMILY CARLSON AND,)
ALICE PREYER)
)
Petitioners,)
)
vs.)
)
JOHN C. DOCKERY, III)
)
Respondent.)
)
In re: EMILY CHESHIRE DOCKERY)
_____)

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068 & 69

MOTION to require Dr.
Goldschmidt to produce any and all
data and testing generated during his
examination of Emily Cheshire Dockery

PROBATE COURT
HORRY COUNTY, SC
MAR 20 AM 11:21
JUDGE W. EDMONDS
PROBATE JUDGE

TO: THE HONORABLE COURT; JAMES F. McCrackin, ATTORNEY FOR
EMILY CARLSON AND ALICE PREYER; WILLIAM H. MONCKTON, VI,
ESQUIRE, COUNSEL JOHN DOCKERY; and V. LEE MOORE, GUARDIAN
FOR MRS. EMILY CHESHIRE DOCKERY:

Now comes Thomas C. Brittain, Esquire, on behalf of Mrs. Emily Cheshire Dockery, seeking an order from this Honorable Court, requiring Dr. Goldschmidt to produce any and all data, testing, or other information he used or relied on to form his report and opinion of Ms. Dockery's capacity. Additionally, Ms. Dockery would ask the Court to issue an order allowing her attorneys to share the data with other persons and most specifically, Dr. Benjamin, who is the court appointed medical examiner in this case. Dr. Goldschmidt was deposed on March 15, 2012. In his deposition, Dr. Goldschmidt mentioned he had relied on underlying data and other materials to form his opinion regarding Mrs. Dockery's capacity. When asked if he would provide this information to counsel for Mrs. Dockery, he replied that he would not share the information absent a court order.

Counsel for Mrs. Dockery believes the data and testing generated by Dr. Goldschmidt to be discoverable information. In addition, Dr. Benjamin, as the court appointed medical

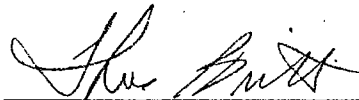
2010-GC-26-68 & 69

Page 1

examiner, should have the benefit of any and all data or other testing that has been generated regarding Mrs. Dockery. Moreover, Mrs. Dockery and her attorneys should have the ability to share this information with any person deemed necessary. As such, Counsel for Mrs. Dockery hereby requests that the Court issue an order requiring Dr. Goldschmidt to produce any and all data, testing or other information generated throughout his examinations of Mrs. Dockery, and that the Court allow counsel for Ms. Dockery to share this information with whomever they believe it to be necessary, but specifically with Dr. Benjamin.

Based upon the foregoing reasons, Motion of Ms. Emily C. Dockery, and the circumstances underlying this request, it is hereby requested that the Court issue an Order requiring Dr. Goldschmidt to produce any and all data, testing and other information generated during his examination of Mrs. Dockery and allow counsel for Mrs. Dockery to share this information with other persons associated with this action, and most specifically Dr. Benjamin.

THE BRITAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire

4614 Oleander Drive

Myrtle Beach, SC 29577

Telephone: (843) 449-8562

Facsimile: (843) 497-6124

ATTORNEY FOR Emily Cheshire Dockery

March 19, 2012
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF HORRY) Case No. 2010-GC-26-0068 AND 69

Emily Carlson and Alice Preyer,)

Petitioner,)

vs.)

John C. Dockery, III,)

Respondent.)

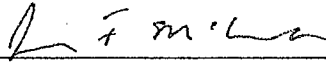
In re Emily Cheshire Dockery)

MOTION TO EXCLUDE EXPERT
TESTIMONY OF DR. JEFF BENJAMIN
REGARDING RAW PSYCHOLOGICAL
DATA

Petitioners, by and through their undersigned counsel, hereby submit this Motion to Exclude Expert Testimony of Dr. Jeff Benjamin Regarding Raw Psychological Data and respectfully move the Court for an order excluding any expert testimony and evidence of Dr. Jeff Benjamin regarding the raw psychological data provided by Dr. Leonard Goldschmidt, Psy.D., J.D. Dr. Benjamin can not be properly qualified as an expert to review raw psychological data and his report and any testimony related to it should be excluded pursuant to Rule 702 of the South Carolina Rules of Evidence. Petitioners do not dispute Dr. Benjamin's is a qualified neurologist, however, that does not qualify him to review and interpret raw psychological data. See S.C. Code Title 40, Chapter 55 which defines the acts and qualifications of psychologists. Dr. Benjamin is not a licensed psychologist and therefore is not qualified to testify regarding the interpretation of the raw psychological data.

For the reasons stated above, Petitioners respectfully request that the Court grant this Motion and prohibit Dr. Jeff Benjamin from testifying or submitting any written report regarding the raw psychological data provided by Leonard Goldschmidt, Psy.D., J.D.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

James F. McCrackin

SC Bar No. 064140

E-Mail: jim.mccrackin@nelsonmullins.com

3751 Robert M. Grissom Parkway / Suite 300

Post Office Box 3939 (29578-3939)

Myrtle Beach, SC 29577-3165

(843) 448-3500

Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

may 16, 2012

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
 COUNTY OF HORRY) Case No. 2010-GC-26-0068 AND 69

Emily Carlson and Alice Preyer,)
)
 Petitioner,)
)
 vs.)
)
 John C. Dockery, III,)
)
 Respondent.)
)
 In re Emily Cheshire Dockery)
)

MOTION IN LIMINE TO EXCLUDE
PORTIONS OF DEPOSITION AND
LIVE TESTIMONY AND WRITTEN
MATERIALS OF DR. JEFFREY
BENJAMIN

PROBATE COURT
 HORRY COUNTY, SC
 11-5 PM 3:30
 W. EDWARDS
 PROBATE JUDGE

Petitioners Emily Carlson and Alice Preyer, (hereinafter "Petitioners"), by and through its undersigned counsel, hereby submits this Motion in Limine and respectfully moves the Court for an order excluding portions of the deposition and/or live testimony and written materials of Dr. Jeffrey Benjamin. Dr. Jeffrey Benjamin was appointed by Order Granting Motion to Appoint a Medical Examiner dated July 26, 2011. Dr. Benjamin is a neurologist and can not be properly qualified as an expert in neuropsychology or neuropsychiatric testing and data review, and therefore, his deposition and/or live testimony and any written materials regarding the science of neuropsychology or neuropsychiatric testing and any written materials regarding the reports of Dr. Leonard Goldschmidt should be excluded pursuant to Rule 702 of the South Carolina Rules of Evidence.

The Petitioners request the following excerpts from the deposition testimony of Dr. Jeff Benjamin be excluded:

Transcript Dated December 9, 2011

Page 35, Lines 18-25

Page 36, Lines 1-12

Page 38, Lines 5-16

Page 45, Lines 1-6

Page 52, Lines 14-23

Page 63, Lines 21-25

Page 64, Lines, 1-7

Page 69, Lines 1-25

Page 71, Lines 8-25

Page 72, Lines 1-25

Page 73, Lines 1-25

Page 74, Lines 1-25

Page 75, Lines 1-25

Page 76, Lines 1-6 and 9-25

Page 77, Lines 1-25

Page 78, Lines 1-25

Page 79, Lines 1-8

Page 80, Lines 14-25

Page 81, Lines 1-14

Transcript Dated February 7, 2012

Page 54, Lines 12-25

Page 55, Lines 1-25

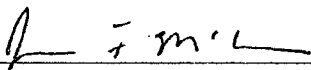
Page 56, Lines 1-25

Petitioners request that the statements in Dr. Benjamin's Examiner's Report dated October 28, 2011 which reads on page 1 "I have been treating the patient for a long time. Please DO NOT put any weight into the 2 psychological evaluations that supposedly have been done." and on page 2 "Do Not! Put any weight on those Evaluations" should be stricken and excluded from the record in this matter.

Petitioners request that Dr. Benjamin not be allowed to testify or submit any written evidence regarding Dr. Goldschmidt's Examiners Report, raw data, testing methods or conclusions regarding Ms. Dockery's capacity.

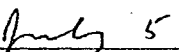
Petitioners respectfully request that the Court grant this Motion and prohibit Dr. Jeff Benjamin from testifying at the trial of this matter regarding Dr. Goldschmidt's Examiners Report, raw data, testing methods and conclusions regarding Ms. Dockery's capacity and excluding portions of the deposition transcripts and written materials with regards to neuropsychology or neuropsychiatric testing and data review.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
James F. McCrackin
SC Bar No. 064140
E-Mail: jim.mccrackin@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-3165
(843) 448-3500

Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

 5, 2012

copy

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068 and 69

MOTION TO PRESERVE RIGHT
TO CONTEST
ASSIGNMENT OF FEES

(Regarding TeAnne Oehler)

PROBATE COURT
HORRY COUNTY, SC
2012 OCT 15 AM 8:57
DEIRDRE W. DONOFS
PROBATE JUDGE

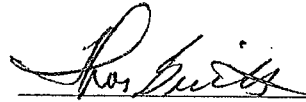
NOW COMES THOMAS C. BRITTAIN, attorney for Emily Cheshire Dockery and moves the Court for an Order requiring her daughters/Petitioners, who initiated this action, to pay the sum of \$1,505.00 back to Mrs. Dockery as a reimbursement for fees paid by Mrs. Dockery, **under protest**, to Ms. Oehler in connection with her activities in this case.

Attorney for Mrs. Dockery's daughters selected TeAnne Oehler. Ms. Oehler had a conflict in this particular case and should have been aware of it. Ms. Oehler was excused by the Court; she had very limited involvement; a fee of \$1,505.00 is prohibitive; not something Mrs. Dockery sought nor was it in her best interest. On Mrs. Dockery's behalf, the Brittain Law Firm, P.A. has paid Ms. Oehler the funds. Ms. Oehler is certainly entitled to be compensated for her activities in this regard, but consistent with the pleadings and answers filed hereto, Mrs. Dockery contends that all costs associated with this matter should be borne by her daughters, who through an improper motive and for improper reasons, brought this action.

RECEIVED
10/12

Recently, her daughters have filed civil litigation to acquire additional ownership in Mrs. Dockery's home in violation of her estate plan, which was completed many years ago. This is further evidence of bad faith in this regard. I attach a copy of that Complaint so that the Court can review it in connection with its decisions.

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire

4614 Oleander Drive

Myrtle Beach, SC 29577

(843) 449.8562

(843) 497.6124 (Fax)

Atty on behalf of Emily Cheshire Dockery

Myrtle Beach, SC

October 12, 2012

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
 COUNTY OF HORRY) Case No. 2010-GC-26-0068 AND 69

Emily Carlson and Alice Preyer,)
)
 Petitioner,)

vs.)

John C. Dockery, III,)
)
 Respondent.)

In re Emily Cheshire Dockery)
 _____)

MOTION FOR ATTORNEY'S FEES
AND COSTS IN CONNECTION WITH
MOTION TO ENFORCE
SETTLEMENT AGREEMENT

Pursuant to the South Carolina Rules of Civil Procedure, the Petitioners, Emily Carlson and Alice Preyer, hereby move this Court for an order requiring John C. Dockery, III, to pay attorney's fees and costs in connection with Petitioners' Motion to Enforce Settlement Agreement which was filed on September 1, 2011. This court issued an Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement on October 31, 2011 (the "Enforcement Order") in which the Court specifically found that Petitioners would be allowed to make a motion supported by affidavit of counsel regarding fees incurred in connection with the Motion to Enforce Settlement Agreement. An affidavit of Petitioners' counsel is attached hereto as Exhibit A, and the Petitioners request an order requiring John C. Dockery, III to pay such fees and costs set forth in the affidavit.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: J F mcl

James F. McCrackin

SC Bar No. 064140

E-Mail: jim.mccrackin@nelsonmullins.com

3751 Robert M. Grissom Parkway / Suite 300

Post Office Box 3939 (29578-3939)

Myrtle Beach, SC 29577-3165

(843) 448-3500

Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

December 7, 2012

EXHIBIT A
AFFIDAVIT OF ATTORNEYS
FEES AND COSTS

PERSONALLY APPEARED BEFORE ME, James F. McCrackin, who, upon being duly sworn, deposes and says as follows:

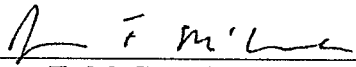
1. That he is a partner with the law firm of Nelson Mullins Riley & Scarborough, L.L.P., and is the attorney representing the Petitioners in the above-entitled action.

2. That Nelson Mullins Riley & Scarborough has spent a total of 26.3 hours for the representation of the Petitioners connection with Petitioners' Motion to Enforce Settlement Agreement, in the above-captioned action representing Seven Thousand Three Hundred Fifteen and 00/100 (\$7,315.00) Dollars in attorney fees, and that this represents a true and accurate reflection of the time, effort, and work with the representation of the Petitioners in the contested guardian and conservator matter.

3. The time involved in this matter included preparation of a Motion to Enforce Settlement Agreement, preparation for the hearing on the motion, travel to (and from) and attendance at the hearing on the motion, preparation of the Order to Enforce Settlement Agreement. A copy of the itemization is attached hereto at "Attachment A". Affiant reserves the right to update this affidavit for additional time spent on this motion for attorney's fees.

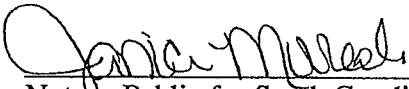
FURTHER AFFIANT SAYETH NOT.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
James F. McCrackin
SC Bar No. 064140
E-Mail: jim.mccrackin@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-3165
(843) 448-3500

Attorneys for Emily Carlson and Alice Preyer

SWORN to and subscribed before me
this 7 day of December, 2012

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 6/5/2017

"Attachment A"

DATE	ENTRY	HOURS	Amount	TIMEKEEPER
08/31/2011	Review and revise Motion to Enforce Settlement Agreement.	1.2	\$426.00	FJM
08/31/2011	Prepare Motion to Enforce Settlement and obtain exhibits to attach to same; prepare Proof of Delivery; telephone conference with Mr. Smith at Probate Court regarding hearing for same.	1.9	\$266.00	JEM
09/07/2011	Work on estate issues; prepare for hearing on Motion to enforce Settlement.	1.2	\$426.00	FJM
09/14/2011	Prepare for hearing; telephone conference with Ms. Carlson regarding various issues; conference with Probate Assistant Morreale regarding list of emails and doctor records.	3.1	\$1,100.50	FJM
09/14/2011	Assist Attorney McCrackin in preparation of Motions hearing and status conference.	7.5	\$1050.00	JEM
09/15/2011	Travel to Conway for hearing; attend hearing; prepare email to Ms. Carlson and Ms. Preyer regarding hearing and strategy moving forward; conference with Probate Assistant Morreale regarding Order and Motion to reconsider; telephone conference with Dr. Benjamin's office; call to Mr. Tall.	3.1	\$1100.50	FJM
09/26/2011	Work on Order.	1.1	\$390.50	FJM

09/27/2011	Review and revise Order	3.1	\$1100.50	FJM
09/28/2011	Review and revise Order and send to opposing counsel for review.	2.1	\$745.50	FJM
10/03/2011	Review incoming correspondence from Mr. Monckton; review incoming correspondence from Ms. Brittain; review incoming correspondence from Dr. Benjamin; review and revise Order.	2.0	\$710.00	FJM
		26.3	\$7,315.50	

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Emily D. Carlson and Alice Preyer,

Petitioners,

Vs.

John C. Dockery, III.

Respondent.

In re: Emily Cheshire Dockery

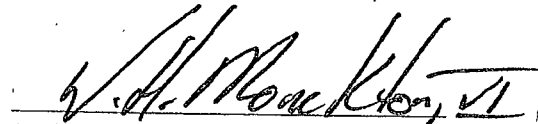
IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068 AND 69

**MOTION IN OPPOSITION FOR
ATTORNEY FEES AND COSTS
TO ENFORCE
SETTLEMENT AGREEMENT**

The Defendant John C. Dockery, III, by and through his attorney William H. Monckton, VI, hereby moves for an order denying Plaintiffs Motion for Attorney Fees and Costs in connection with Motion to Enforce Settlement Agreement. The Motion was made in good faith and based upon facts, that are in the record, and to award fees and costs would not be in the best interest of justice.

Respectively submitted,

MONCKTON LAW FIRM, PA



William H. Monckton, VI

Attorney for the Respondent

1300 Professional Drive, Suite 102

Myrtle Beach, South Carolina 29577

Phone: (843) 946-6556

December 17, 2012

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

) IN THE PROBATE COURT

) FIFTEENTH JUDICIAL CIRCUIT

) CASE NO: 2010-GC-26-0068 and 0069

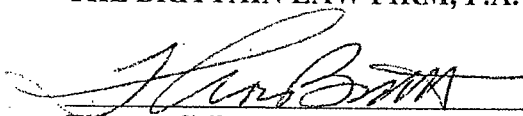
) MOTION IN OPPOSITION TO
) PETITIONERS' REQUEST FOR
) ATTORNEY'S FEES AND COSTS
) IN CONNECTION WITH MOTION
) TO ENFORCE SETTLEMENT
) AGREEMENT

TO: THE HONORABLE COURT; JAMES F. McCRACKIN, ESQUIRE; ATTORNEY
FOR EMILY CARLSON AND ALICE PREYER:

Now comes Thomas C. Brittain, Esquire, on behalf of Mrs. Emily Cheshire Dockery, and hereby moves before this Honorable Court, for an Order denying Petitioners' Motion For Attorney's Fees and Costs in connection with Motion To Enforce Settlement Agreement. The Motion was not made in good faith, and based upon the facts that are a part of the record; to award attorney's fees and costs would not be in the best interest of justice.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.


Thomas C. Brittain, Esquire
Mary Madison Brittain Langway
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562
Facsimile: (843) 497-6124
ATTORNEY FOR Emily Cheshire Dockery

December 27, 2012
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER FINDING
INCAPACITY OF EMILY C. DOCKERY

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H.
MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against her on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

1. The Court erred in stating that the parties participated in mediation, and that the mediation was concluded with the Petitioner, John Dockery and Ms. Moore reaching a settlement agreement. Counsel for Ms. Dockery has addressed this issue at length in a separate motion to reconsider, but factually speaking, this statement is incorrect. Ms. Dockery did not attend the mediation, nor did she give her Counsel, Ms. Langway the authority to enter into any type of arrangement involving her person or finances. As such, it was made clear to all present,

PROBATE COURT
HORRY COUNTY, SC
2013 FEB -1 AM 9:57
DEBORAH W. EDWARDS
PROBATE JUDGE

including the guardian, Ms. Moore and the Mediator, that there was NOT an agreement, until and unless Ms. Dockery was willing to agree. Ms. Langway approached Mr. Dockery and discussed the proposed agreement at length with her, however Ms. Dockery was adamant that she would not agree and she was not willing to allow any other person or institution to look after her finances. As such, Ms. Langway informed the other counsel and Ms. Moore that we in fact did not have an agreement and would have to proceed with a finding on capacity. Ms. Dockery, nor her counsel ever agreed to the settlement agreement. The Court's order is incorrect in stating otherwise.

2. The Court erred in accepting the testimony of Dr. Goldschmidt, who is not medical doctor, but a psychologist, over that of Dr. Benjamin. Dr. Benjamin is a Neurologist trained in the medical profession and an expert in the field of Neurology. Furthermore, Dr. Benjamin had been treating Ms. Dockery and was familiar with her as well as her medical history. Dr. Goldshmidt, on the other hand was hired by the Petitioner's to conduct an examination that consisted of a series of lengthy written and verbal tests, that were exhausting to Ms. Dockery and difficult for her to complete. As such, she failed to complete certain portions of the testing, for which she received the score of zero. There is no scientific basis for these tests, and the tests certainly are not indicative of a person's ability to insert capacity statute. Moreover, Ms. Dockery was made to endure over 6 sessions worth of testing, with each testing session lasting several hours, all of which is unfair and unbearable for a woman who is 82 years old.

3. The Court erred in finding that Ms. Dockery has the ability to direct some of her care and make some decision as to her personal affairs; but not her finances. It is inconsistent

that Ms. Dockery has the ability to be involved in the decisions affecting her personal care, but not her finances. If Ms. Dockery is capable of expressing her wants and desires with respect to her personal care, she is capable of doing so with respect to her finances, and specifically as to who she would like to manage her finances.

4. The Court erred in refusing to admit the testimony of Respondent John Dockery. As stated in a separate motion to reconsider, the Court barred John Dockery from testifying as to anything inconsistent with the statements made in a settlement document that was never agreed to by Mr. Dockery or signed by him. This greatly prejudiced Ms. Dockery and is error on the part of the Court. Mr. Dockery has been living with Ms. Dockery for many years and has the most knowledge of any person about her personal needs, abilities, finances and medical history.

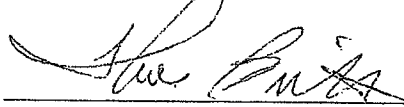
5. The Court erred in failing to make a specific ruling on evidence that was acquired by Ms. Dockery and submitted to the Court after the hearing. Petitioners repeatedly testified during the capacity hearing that they had no financial interest in their Mother, Ms. Dockery, nor were their action financially motivated. This testimony was heavily controverted by Ms. Dockery. After the hearing, Counsel for Ms. Dockery was served with a lawsuit in Horry County Common Pleas that was originally filed prior to the Probate proceeding, wherein the Petitioners are asking for money from their Mother, Ms. Dockery. This evidence clearly shows a motive of the Petitioners, and should have been taken into consideration by the Court, especially since it was denied, but the Court has not addressed this duplicity. The Court failed to specifically issue a ruling on the newly acquired evidence.

The Court erred in finding that Ms. Dockery is responsible for the fees of Dr. Goldshmidt and Lee Moore. The Order does not cite any authority for this finding, except to state that because she is incapacitated, she must pay these fees. As mentioned before this entire proceeding has been about money from the very start. The Petitioners are upset that their Mother, decided years ago not to leave them anything of substantial value in her last Will and Testament. Yet, they have ignored their mother in many ways. As such, Petitioners are upset and want what they consider to be "their fair share." Petitioner brought this action, forcing their Mother to hire an attorney, and now have asked that she also pay all of the costs for this action, including their "expert" who did nothing but subject her to numerous hours worth of testing at the request of Petitioners. Ms. Dockery specifically objects to being forced to pay for any of Dr. Goldshmidt's testimony, depositions, record production, etc. because he was the "expert" for the Petitioners. Rule 30 of the Federal Rules of Civil Procedure states that the person who notices the deposition bears the costs of recording for that deposition. Additionally, Dr. Goldshmidt's deposition was a video deposition. Rule 30 (h) (11) of the SC rules of Civil Procedure states that the cost of videotape, as a material, shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition." Petitioner's noticed the deposition of Dr. Goldschmidt and it was a videotaped deposition. As such, the rules are clear that Petitioner should bear the costs of these depositions.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

January 30, 2013
Myrtle Beach, South Carolina.

PROBATE COURT
HOBBS COUNTY, SC
2013 FEB -1 AM 9:58
DEIRDRE W. EDMONDS
PROBATE JUDGE

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION TO VOID SETTLEMENT
AGREEMENT

2013 FEB - 1 AM 9:59
PROBATE COURT
HORRY COUNTY, SC
CLIFFORD W. EDMONDS
PROBATE JUDGE

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H. MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against her on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent requests that the Court alter and/or reconsider its judgment for the following reasons:

The Court erred in enforcing a "Mediated Agreement" that was not signed by all parties, and most importantly; not signed by Ms. Dockery. (There was not agreement). Rule 43(k) of the South Carolina Rules of Civil Procedure states as follows:

"No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order, or written stipulation signed by counsel and entered in the record, or reduced to writing and signed by the parties and their counsel."

Based on Rule 43(k) of the SCRCF, the proposed "settlement agreement" presented to the Court by the attorney for the Petitioners does not qualify as a settlement agreement. Therefore, it shouldn't have even been introduced to the Probate Court for its consideration, much less approved and enforced by the Probate Court. Here, the Probate Court has enforced a "settlement" never signed or agreed to, and only signed by the Petitioners; which under no circumstance amounts to a "settlement document." The process here is indeed troubling.

Moreover, Rule 8 of the Mediation Rules specifically states as follows:

"Communications during a mediation settlement conference shall be confidential. The parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including but not limited to. . . (4) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator."

The Mediation process is a special and unique process where parties are encouraged to speak freely and negotiate freely, without having to worry that it will be used against them in Court. However, in this case, Petitioners have used the Mediation process against Ms. Dockery, who wasn't even present at the mediation, nor did she sign the proposed settlement document. Therefore, Petitioners have expressly broken the confidentiality rule of Mediation and have used the fact that Ms. Dockery, nor John Dockery were willing to agree and sign the document as evidence to support their position of the case. This behavior is in violation of the Mediation Process and everything that mediation seeks to accomplish. Further evidence that an agreement was not reached at Mediation is the Mediator's report which states that the parties worked in good faith to settle the matter. It does not state that the parties reached an agreement or executed an agreement at the mediation. We are in the incredible position of the Petitioner's representing

a "mediation agreement" to the Court in violation of their promise, which is inconsistent with the mediator's report; and ethically Ms. Dockery cannot subpoena the mediator.

The Court has also erred in finding that the motion to reconsider is not timely filed. Both Counsel for Ms. Dockery and Counsel for John Dockery repeatedly objected to the enforcement of the proposed Settlement agreement, including objecting at the hearing in which Petitioners sought to have the document enforced. However, at the time the court ruled on the document, the issue of Ms. Dockery's capacity had not been determined. In addition, Ms. Dockery's treating physician, Dr. Benjamin, had not yet given his opinion that Ms. Dockery had capacity. Therefore, the document could not be enforced against Ms. Dockery until such time that the Court made a determination as to her capacity. (had the Court ruled for capacity, no harm would have been done.) Moreover, Ms. Dockery's objections were certainly preserved and made aware to the Court, such that it is proper and timely to file a rule 59e or rule 60 motion at the conclusion of the case, and upon receiving a final order, which was received on January 23, 2013. Counsel for Ms. Dockery is unaware of any rule requiring him to file a motion to reconsider the outcome of a motion prior to the Court's final decision in the case; all objections were clearly made.

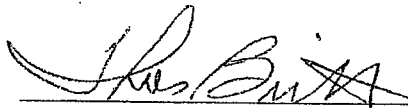
Finally, regardless of whether or not the Court erred in enforcing the proposed settlement agreement the court erred in refusing to allow and or admit testimony from John Dockery. As stated above, the mediation process is not to be used against a person and/or to keep him or her from being able to meaningfully participate in the trial. The proposed settlement agreement should have never been mentioned to the Court in any form, but most importantly, it should have never been used to keep John Dockery from testifying. By not allowing John Dockery to testify, the Court has greatly prejudiced Ms. Dockery. John Dockery has spent more time with Ms. Dockery than any person who testified. He knows her needs, abilities, and desires better than

any other person in the universe. It is a miscarriage of justice and error on the Court's part to limit his testimony in anyway.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

January 30, 2013
Myrtle Beach, South Carolina.

PROBATE COURT
Horry County, SC
2013 FEB -1 AM 9:59
DEIRDRE W. EDMONDS
PROBATE JUDGE

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND;
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION TO PAY FEES AND COSTS

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H. MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her undersigned attorneys hereby moves that this Court alter and amend the Judgment/ruling that was issued against her on January 23, 2013. This motion is made pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure. The Respondent requests that the Court alter and/or reconsider its judgment for the following reasons:

The Court erred in ruling that Ms. Dockery must be responsible for all of the fees associated with this case. First, the Court fails to cite any statute or law requiring Ms. Dockery to be responsible for these enormous fees. To date the costs total more than \$35,000.00 (for the probate matter alone!) Ms. Dockery did not bring this lawsuit and does not believe that her daughters brought the lawsuit in good faith. She was forced to defend her rights as a citizen, and hire an attorney due to the actions of her daughters.

PROBATE COURT
HORRY COUNTY, SC
2015 FEB -1 AM 9:58
JEROME W. EDMONDS
PROBATE JUDGE

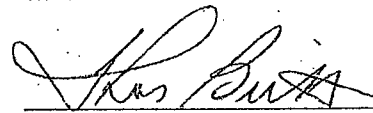
Moreover, Ms. Dockery should not be responsible for the costs of the depositions noticed and taken by the Petitioners or the Respondent, as well as any fees associated with Dr. Goldshmidts' testimony at the capacity hearing. Rule 30 of the Federal Rules of Civil Procedure states that the person who notices the deposition bears the costs of recording for that deposition. Additionally, Dr. Goldshmidt's deposition was a video deposition. Rule 30(h)(11) of the South Carolina Rules of Civil Procedure states that the cost of videotape, as a material, shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition." Petitioner's noticed the deposition of Dr. Goldschmidt and it was a videotaped deposition. As such, the rules are clear that Petitioner should bear the costs of these depositions.

Further, the services of Lee Moore were a convenience for others, Mrs. Dockery chose her lawyers; Ms. Moore's fees should not be borne by me objecting to her handling of these matters.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.


Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

January 30, 2013
Myrtle Beach, South Carolina.

PROBATE COURT
Horry County, SC
2013 FEB -1 AM 9:58
DEIRDRE W. EDMONDS
PROBATE JUDGE



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER GRANTING
PETITIONERS MOTION TO EXCLUDE
PORTIONS OF DEPOSITION AND LIVE
TESTIMONY AND WRITTEN
MATERIALS OF DR. JEFFREY
BENJAMIN

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H.
MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her under signed attorneys hereby moves
that this Court alter and amend the Judgment/ ruling that was issued against her on January 23,
2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil
Procedure. The Respondent requests that the Court alter and/or reconsider its judgment for the
following reasons:

The Court erred in granting Petitioner's motion in Limine to exclude portions of Dr.
Benjamin's testimony and written materials because Dr. Benjamin is a medical doctor,
specifically a neurologist, who is capable and qualified to give an opinion about the field of
neuropsychiatric testing. Dr. Benjamin opined that the entire field of neuropsychiatry is not
credible and should not be given any weight. As an expert in the field of neurology, his opinion
is admissible under rule 702 of the SCRPC. This is consistent with an agreement that Dr.

2013 FEB -1 AM 9:56
JUDGE W. EDWARDS
PROBATE JUDGE

PROBATE COURT
HORRY COUNTY, SC

Benjamin is not an expert in this "field." The Court's decision to exclude portions of Dr.

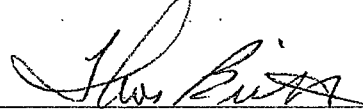
Benjamin's testimony and written report, were highly prejudicial to Ms. Dockery.

Moreover, the Court's order does not specifically state what portions of Dr. Benjamin's testimony and written report were excluded. Ms. Dockery would respectfully request that the court accurately reflect the record and specify which portions of her expert's testimony were excluded.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

January 30, 2013
Myrtle Beach, South Carolina.

PROBATE COURT
HORRY COUNTY, SC
2013 FEB -1 AM 9:56
DEIRDRE W. EDMONDS
PROBATE JUDGE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION TO VOID SETTLEMENT
AGREEMENT ON BEHALF OF
JOHN C. DOCKERY, III.

DEIRDRE W. EDMONSON
PROBATE JUDGE

2013 FEB - 1 AM 9:34

PROBATE COURT
HORRY COUNTY, SC

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS C. BRITTAIN AND MARY MADISON LANGWAY, ATTORNEYS FOR EMILY C. DOCKERY

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against her on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

The Court erred in enforcing a Mediated Agreement that was not signed by all parties, and most importantly; it was not signed by John C. Dockery, III. Rule 43(k) of the South Carolina Rules of Civil Procedure states as follows:

"No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order, or written stipulation signed by counsel and entered in the record, or reduced to writing and signed by the parties and their counsel."

Based on Rule 43(k) of the SCRCF, the proposed "settlement agreement" presented to the Court by the attorney for the Petitioners does not qualify as a settlement agreement.

Therefore, it shouldn't have even been introduced to the probate Court for its consideration, much less approved and enforced by the Probate Court. Here, the probate Court has enforced a written document, that is only signed by the Petitioners; which under no circumstance amounts to a settlement document.

Moreover, Rule 8 of the Mediation Rules specifically states as follows:

"Communications during a mediation settlement conference shall be confidential. The parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including but not limited to. . . (4) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator."

The Mediation process is a special and unique process where parties are encouraged to speak freely and negotiate freely, without having to worry that it will be used against them in Court. However, in this case, Petitioners have used the Mediation process against John C. Dockery, III, who did not sign the proposed settlement document. Therefore, Petitioners have expressly broken the confidentiality rule of Mediation and have used the fact that Ms. Dockery, nor John Dockery were willing to agree and sign the document as evidence to support their position of the case. This behavior is in violation of the Mediation Process and everything that mediation seeks to accomplish. Further evidence that an agreement was not reached at Mediation is the Mediator's report which states that the parties worked in good faith to settle the matter. It does not state that the parties reached an agreement or executed an agreement at the mediation.

The Court has also erred in finding that the motion to reconsider is not timely filed. Both Counsel for Ms. Dockery and Counsel for John Dockery repeatedly objected to the enforcement of the proposed Settlement document, including objecting at the hearing in which Petitioners sought to have the document enforced. However, at the time the court ruled on the document, the issue of Ms. Dockery's capacity had not been tried or determined. In addition, Ms. Dockery's treating physician, Dr. Benjamin, had not yet given his opinion that Ms. Dockery does have capacity. Therefore, the document could not actually be enforced against Mr. Dockery until such time that the Court made a determination as to Ms. Dockery's capacity. Moreover, Mr. Dockery's objections were certainly preserved and made aware to the Court, such that it is proper and timely to file a rule 59e or rule 60 motion at the conclusion of the case, and upon receiving a final order, which was received on January 23, 2013. Counsel for Mr. Dockery is unaware of any rule requiring him to file a motion to reconsider the outcome of a motion prior to the Court's final decision in the case.

Finally, regardless of whether or not the Court erred in enforcing the proposed settlement document, the court erred in refusing to allow and or admit testimony from John C. Dockery,III. As stated above, the mediation process is not to be used against a person and/or to keep him or her from being able to meaningfully participate in the trial. The proposed settlement document should have never been mentioned to the Court in any form, but most importantly, it should have never been used to keep John C. Dockery,III from testifying. By not allowing John C. Dockery,III to testify, the Court has greatly prejudiced Ms. Dockery. John C. Dockery,III has spent more time with Ms. Dockery than any person who testified. He knows her needs, abilities, and desires better than any other person in this universe. It is a miscarriage of justice and error on the Court's part to limit his testimony in anyway.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

MONCKTON LAW FIRM, PA

A handwritten signature in dark ink, appearing to read "W.H. Monckton, VI", written over a horizontal line.

William H. Monckton, VI
Attorney for the Respondent
1300 Professional Drive, Suite 102
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

January 29, 2013

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER FINDING
INCAPACITY OF EMILY C. DOCKERY
ON BEHALF OF JOHN C. DOCKERY, III

PROBATE COURT
HORRY COUNTY, SC
2013 FEB -1 AM 9:34
CLERK OF COURT
DEIRDRE W. ECHORD
PROBATE JUDGE

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS C.
BRITTAIN AND MARY MADDISON LANGWAY, ATTORNEYS FOR EMILY C.
DOCKERY

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

1. The Court erred in stating that the parties participated in mediation, and that the mediation was concluded with the Petitioner, John Dockery and Ms. Moore reaching a settlement agreement. Counsel for Ms. Dockery has addressed this issue at length in a separate motion to reconsider, but factually speaking, this statement is incorrect. Ms. Dockery did not attend the mediation, nor did she give her Counsel, Ms. Langway the authority to enter into any type of arrangement involving her person or finances. As such, it was made clear to all present,

including the guardian, Ms. Moore and the Mediator, that there was NOT an agreement, until and unless Ms. Dockery was willing to agree. After reviewing the agreement with John C. Dockery, III in written form he did not agree and still does not agree.

2. The Court erred in accepting the testimony of Dr. Goldschmidt, who is not medical doctor, but a psychologist, over that of Dr. Benjamin. Dr. Benjamin is a Neurologist trained in the medical profession and an expert in brains and the field of Neurology. Furthermore, Dr. Benjamin had been treating Ms. Dockery and was familiar with her as well as her medical history. Dr. Goldshmidt, on the other hand was hired by the Petitioner's to conduct an examination that consisted of a series of lengthy written and verbal tests, that were exhausting to Ms. Dockery and difficult for her to complete. As such, she failed to complete certain portions of the testing, for which she received the score of zero. There is no scientific basis for these tests, and the tests certainly are not indicative of a person's ability to insert capacity statute. Moreover, Ms. Dockery was made to endure over 6 sessions worth of testing, with each testing session lasting several hours, all of which is unfair and unbearable for a woman who is 82 years old.

3. The Court erred in finding that Ms. Dockery has the ability to direct some of her care and make some decision as to her personal affairs, but not her finances. It is inconsistent that Ms. Dockery has the ability to be involved in the decisions affecting her personal care, but not her finances. If Ms. Dockery is capable of expressing her wants and desires with respect to her personal care, she is capable of doing so with respect to her finances, and specifically as to who she would like to manage her finances.

4. The Court erred in refusing to admit the testimony of Respondent John C. Dockery, III. As stated in a separate motion to reconsider, the Court barred John C. Dockery, III from testifying as to anything inconsistent with the statements made in a settlement document that was never agreed to by Mr. Dockery or signed by him. This greatly prejudiced Ms. Dockery and is error on the part of the Court. Mr. Dockery has been living with Ms. Dockery for many years and has the most knowledge of any person about her personal needs, abilities, finances and medical history.

5. The Court erred in failing to make a specific ruling on evidence that was acquired by Ms. Dockery and submitted to the Court after the hearing. Petitioners repeatedly testified during the capacity hearing that they had no financial interest in their Mother, Ms. Dockery, nor were their action financially motivated. This testimony was heavily controverted by Ms. Dockery and respondent John C. Dockery, III. After the hearing, Counsel for Ms. Dockery was served with a lawsuit in Horry County Common Pleas that was originally filed prior to the Probate proceeding, wherein the Petitioners are asking for money from their Mother, Ms. Dockery. This evidence clearly shows the true motive of the Petitioners, and should have been taken into consideration by the Court, but was not done so. The Court failed to specifically issue a ruling on the newly acquired evidence.

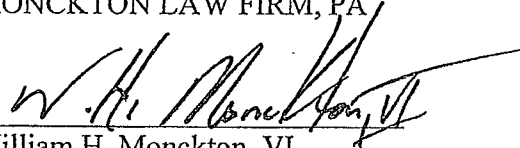
6. The Court erred in finding that Ms. Dockery is responsible for the fees of Dr. Goldshmidt and Lee Moore. The Order does not cite any authority for this finding, except to state that because she is incapacitated, she must pay these fees. As mentioned before this entire proceeding has been about money from the very start. The Petitioners are upset that their Mother, decided years ago not to leave them anything of substantial value in her last Will and Testament. Yet, they have ignored their mother in many ways. As such, Petitioners are upset

and want what they consider to be "their fair share." Petitioner brought this action, forcing their Mother to hire an attorney, and now have asked that she also pay all of the costs for this action, including their "expert" who did nothing but subject her to numerous hours' worth of testing at the request of Petitioners. Ms. Dockery specifically objects to being forced to pay for any of Dr. Goldshmidt's testimony, depositions, record production, etc. because he was the "expert" for the Petitioners. Rule 30 of the Federal Rules of Civil Procedure states that the person who notices the deposition bears the costs of recording for that deposition. Additionally, Dr. Goldshmidt's deposition was a video deposition. Rule 30 (h) (11) of the SC rules of Civil Procedure states that the cost of videotape, as a material, shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. Petitioner's noticed the deposition of Dr. Goldschmidt and it was a videotaped deposition. As such, the rules are clear that Petitioner should bear the costs of these depositions.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III, respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

MONCKTON LAW FIRM, PA


William H. Monckton, VI
Attorney for the Respondent
1300 Professional Drive, Suite 102
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

January 30, 2013

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION TO PAY FEES AND COSTS
ON BEHALF OF JOHN C. DOCKERY, III

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS
BRITTAIN AND MARY MADDISON LANGWAY, ATTORNEYS FOR EMILY C.
DOCKERY

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

The Court erred in ruling that Ms. Dockery must be responsible for all of the fees associated with this case. First, the Court fails to cite any statute or law requiring Ms. Dockery to be responsible for these enormous fees. To date the costs total more than \$35,000.00 (for the probate matter alone!) Ms. Dockery did not bring this lawsuit and does not believe that her daughters brought the lawsuit in good faith. She was forced to defend her rights as a citizen, and hire an attorney due to the actions of her daughters.

PROBATE COURT
HORRY COUNTY, SC
2013 FEB - 1 AM 9:32
DEIRDRE W. EDMONDSON
PROBATE JUDGE

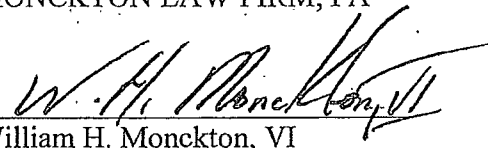
Moreover, Ms. Dockery should not be responsible for the costs of the depositions noticed and taken by the Petitioners or the Respondent, as well as any fees associated with Dr. Goldshmidts' testimony at the capacity hearing. Rule 30 of the Federal Rules of Civil Procedure states that the person who notices the deposition bears the costs of recording for that deposition. Additionally, Dr. Goldshmidts' deposition was a video deposition. Rule 30 (h) (11) of the SC rules of Civil Procedure states that the cost of videotape, as a material, shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony on videotape shall be borne by the party taking the videotape deposition. Petitioner's noticed the deposition of Dr. Goldschmidt and it was a videotaped deposition. As such, the rules are clear that Petitioner should bear the costs of these depositions.

Further, the services of Lee Moore were a convenience for others, Mrs. Dockery chose her lawyers; Ms. Moore's fees should not be borne by her since she objected to her handling of these matters.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III, respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

MONCKTON LAW FIRM, PA


William H. Monckton, VI
Attorney for the Respondent
1300 Professional Drive, Suite 102
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

January 30, 2013

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER GRANTING
PETITIONERS MOTION TO EXCLUDE
PORTIONS OF DEPOSITION AND LIVE
TESTIMONY AND WRITTEN
MATERIALS OF DR. JEFFREY
BENJAMIN ON BEHALF OF JOHN C.
DOCKERY, III

PROBATE COURT
HORRY COUNTY, SC
2013 FEB -1 AM 9:32
J. IRDOR W. EDMONDS
PROBATE JUDGE

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS C. BRITTAIN AND MARY MADDISON LANGWAY, ATTORNEYS FOR EMILY C. DOCKERY

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on January 23, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rues of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

The Court erred in granting Petitioner's motion in Limine to exclude portions of Dr. Benjamin's testimony and written materials because Dr. Benjamin is a medical doctor, specifically a neurologist, who is capable and qualified to give an opinion about the field of neuropsychiatric testing. Dr. Benjamin opined that the entire field of neuropsychiatry is not credible and should not be given any weight. As an expert in the field of neurology, his opinion is admissible under rule 702 of the SCRCPP. This is consistent with an agreement that Dr.

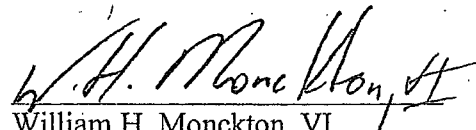
Benjamin is not an expert in this "field." The Court's decision to exclude portions of Dr. Benjamin's testimony and written report, were highly prejudicial to Ms. Dockery.

Moreover, the Court's order does not specifically state what portions of Dr. Benjamin's testimony and written report were excluded. Ms. Dockery would respectfully request that the court accurately reflect the record and specify which portions of her expert's testimony were excluded.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III, respectfully requests that this Court reconsider and alter or amend its Order denying the Motion to void the settlement agreement.

Respectfully submitted,

MONCKTON LAW FIRM, PA

A handwritten signature in black ink, appearing to read "W. H. Monckton, VI", is written over a horizontal line.

William H. Monckton, VI
Attorney for the Respondent
1300 Professional Drive, Suite 102.
Myrtle Beach, South Carolina 29577
Phone: (843) 946-6556

January 30, 2013

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
 COUNTY OF HORRY) Case No. 2010-GC-26-68 and 69

Emily Carlson and Alice Preyer,)
)
) Petitioners,)
)

vs.)

John C. Dockery, III,)
)
) Respondent.)
)

In re Emily Cheshire Dockery)
)
)
)

**PETITIONER'S RESPONSE IN
 OPPOSITION TO ALL MOTIONS
 FOR RECONSIDERATION**

Petitioners, through the undersigned counsel, hereby submits this Response in Opposition to all Motions for Reconsideration. John C. Dockery, III and Emily Cheshire Dockery ("Respondents") filed virtually identical Motions to Reconsider the following four (4) orders of the Court issued on January 23, 2013: (1) Order Denying Motion to Require Petitioners to Pay Fees and Costs, (2) Order Denying Motion to Void Settlement Agreement, (3) Order Granting Petitioners' Motion to Exclude Portions of Depositions and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, and (4) Order Finding Incapacity of Emily C. Dockery. Petitioners address the merits of all four motions below.

Order Denying Motion to Require Petitioners to Pay Fees and Costs

Respondents complain that the Court found Ms. Dockery's estate responsible for "all of the fees associated with this case." The Court made no such finding or ruling. The Court denied Ms. Dockery's motion to require the Petitioners to pay all of her fees and costs, and found that Ms. Dockery "shall be responsible for the costs and fees incurred by and/or on

her behalf in this matter." Respondents have offered no legal authority to justify an award of fees to Ms. Dockery. Furthermore, the Court found in favor of Petitioners on virtually every issue in the case. Respondents' motion is not only factually inaccurate, it is completely without merit.

Order Denying Motion to Void Settlement Agreement

Respondents complain that the Court erred in denying John C. Dockery, III's Motion to Void Settlement Agreement because there was no signed agreement as required by Rule 43(k). The Court was clear in the Order Denying Motion to Void Settlement Agreement that the Court viewed the motion as an untimely filed motion to reconsider. The Court is correct in its analysis. In fact, the order granting the Motion to Enforce Settlement Agreement was an appealable order pursuant to S.C. Code Section 14-3-330(2). Accordingly, Respondent's failure to move for reconsideration or notice an intent to appeal results in that order being a final order of the Court. No argument has ever been made by Respondents based on Rule 43(k) until the motions to reconsider were filed. At this point, any such argument is too late, but even assuming such an argument were timely, it is clear from the Court's order that the Court's finding was not based on an agreement being signed by the parties pursuant to Rule 43(k). The Court's finding that John C. Dockery, III should be bound by the agreement was based on his counsel's representations to Petitioner's counsel and to the Court. The Court determined correctly that by representing to Petitioners' counsel and the Court that an agreement had been reached, and the Court acting on that representation to cancel the upcoming hearing, John C. Dockery, III could not later elect not to honor the agreement. To allow such conduct would prejudice Petitioners who reasonably relied on

counsel's representations. The Court certainly has the discretion to provide appropriate remedies for conduct the Court believes shows contempt for the Court or is contrary to justice.

Respondents further complain that Petitioners have abused the mediation process by sharing confidential communications during mediation with the Court. Respondents' argument is without merit. Petitioners' counsel communicated the settlement agreement to the Court with the consent of all of the parties. In fact, no objection was made by any party to the communications of Petitioners' counsel to the Court regarding the agreement until the Respondents' current motions to reconsider. Nor were there any objections to the Court's email to all counsel asking counsel to confirm that there was an agreement between John C. Dockery, III, Petitioners and the Guardian ad Litem. The series of communications between the counsels of all parties and the court is attached to Petitioners' motion to enforce the settlement agreement, and leaves no doubt that Petitioners' counsel handled all communications in a reasonable and fair manner consistent with the Mediation Rules. Respondents' position that Petitioners have somehow wrongly disclosed confidential information from mediation is contrary to the clear record in this matter. Petitioners urge the Court to find specifically that Respondents consented to any communications regarding the settlement agreement.

Respondents complain that the Court erred in refusing to allow or admit the testimony of John C. Dockery, III. The Court did allow John C. Dockery, III to testify so long as his testimony was consistent with the Settlement Agreement. Petitioners urge the Court to clarify its Order to note that even if the Court allowed the stipulated testimony proffered by John C. Dockery, III, the Court would have found Ms. Dockery to be incapacitated. The overwhelming weight of the evidence including the testimony of the lay

witnesses including Ms. Dockery, the testimony and reports of Dr. Goldschmidt and the Guardian ad Litem's testimony supports a finding of incapacity.

Order Granting Motion in Limine to Exclude Portions of
Deposition and Live Testimony and Written Materials of
Dr. Jeffrey Benjamin

Respondents complain that the Court erred in granting Petitioners' motion in limine to exclude portions of Dr. Benjamin's testimony and written materials. Respondent's position is without merit. As stated in the Court's order, Dr. Benjamin is not qualified as an expert in neuropsychology and therefore cannot testify as to matters related to neuropsychology or neuropsychiatric testing. Petitioners urge the Court to clarify that even if the Court allowed all of Dr. Benjamin's testimony and written materials to be considered, the Court would still find Ms. Dockery incapacitated. Dr. Benjamin's testimony was unpersuasive and contrary to the Court's direct observations of Ms. Dockery's abilities as demonstrated during her testimony. Furthermore, Dr. Benjamin admitted that he performed no test to determine the extent of Ms. Dockery's capacity, but based his opinion on brief conversations that he had with her. At times, Dr. Benjamin's testimony was absurd. For example he opined that she was "sharper than 80% of the people in Horry County." When pressed by Petitioners' counsel on this statement, Dr. Benjamin insisted the statement was factual.

Order Finding Incapacity

Respondents claim that the Court erred in stating that the parties participated in mediation. Respondents' argument is without merit. The Court clearly ordered the parties to participate in mediation. Ms. Dockery chose not to attend the mediation in violation of the Court's directive. Ms. Langway did attend the mediation on Ms. Dockery's behalf. The correspondence sent to the Court with the express consent of counsel for each of the parties

makes clear that all of the parties other than Ms. Dockery had reached an agreement. Counsel for each of the parties agreed that Ms. Dockery would likely not consent, and that a short hearing would still be required. Importantly, as noted above, none of the parties objected to the communications with the Court at that time. In fact, the Court followed up with an email to all counsel asking that counsel confirm that there was an agreement and to inform the Court prior to 5:00 pm the following day if any party had an objection. No objection was made by any party or their counsel at that time. Furthermore, Mr. Monckton, counsel for John C. Dockery, III, confirmed with counsel for the Petitioners in two additional emails that there was an agreement and that John C. Dockery, III would be signing the agreement.

Respondents claim the Court erred in accepting the testimony of Dr. Goldschmidt over Dr. Benjamin. Respondents' claim is without merit. The Court made clear in its order why it found Dr. Goldschmidt's testimony persuasive. Petitioners urge the Court to point out that Dr. Benjamin admitted that he performed no tests, had no data to present to the Court in support of his opinion, and had referred numerous patients to neuropsychologists including Dr. Goldschmidt. Dr. Benjamin opined ludicrously that Ms. Dockery was "sharper than 80% of the people in Horry County." There is no question that Dr. Goldschmidt was far more thorough, believable and persuasive than Dr. Benjamin.

Respondents claim that the Court erred in finding that Ms. Dockery has the ability to direct some of her care and make some decisions as to her personal affairs, but not her finances. Respondents claim that the Court's findings in this regard are inconsistent. Respondent's position is without merit. As the Court noted, Ms. Dockery has the ability to make some decisions regarding her care, but is incapable of making decisions that require

significant understanding in regard to her finances. The Court's findings are fully supported by the evidence.

Respondents claim that the Court erred in refusing to admit the testimony of John C. Dockery, III. As stated above, while Petitioners believe the Court did not commit any error in limiting the testimony of John C. Dockery, III, Petitioners urge the Court to clarify its Order to note that even if the Court allowed the stipulated testimony proffered by John C. Dockery, III, the Court would have found Ms. Dockery to be incapacitated. The overwhelming weight of the evidence including the testimony of the lay witnesses including Ms. Dockery, the testimony and reports of Dr. Goldschmidt and the Guardian ad Litem's testimony supports a finding of incapacity.

Respondents claim that the Court erred in failing to make a specific ruling on evidence that was acquired by Ms. Dockery and submitted to the Court after the hearing. Respondents urge the Court to clarify that the Court did consider such evidence and found it irrelevant and unpersuasive in regard to the question of Ms. Dockery's capacity. Petitioners urge the Court to make a specific finding that Petitioners have not brought this action in bad faith or for any improper purposes.

Respondents again argue that the Court erred in finding that Ms. Dockery should be responsible for the fees of Dr. Goldschmidt and Ms. Moore. The Court's finding is in accordance with S.C. Code Section 62-5-414. Furthermore, Respondents incorrectly claim that Dr. Goldschmidt is Petitioners' expert. Dr. Goldschmidt was appointed as an examiner by the Court. In fact, Ms. Dockery chose to be evaluated by Dr. Goldschmidt prior to this action being filed. The Court chose to use Dr. Goldschmidt in part because Ms. Dockery had seen

him in the past. As an examiner appointed by the Court, Dr. Goldschmidt is entitled to be paid from Ms. Dockery's estate.

Appeal of All Orders

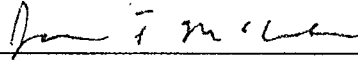
As to all of the Orders, Petitioners urge the Court to consider that the orders are not appealable at the current time. The parties agreed to bifurcate the proceedings in this matter for convenience and efficiency, but the proceedings are not concluded until the Court makes a determination of who should serve as Guardian and Conservator. Much like a death penalty trial or a bifurcated civil trial where liability and damages are heard in separate phases, appeals are not taken until all phases have been concluded. Under S.C. Code Section 14-3-330, the Court's current orders do not in effect determine the action and prevent a judgment from which an appeal might be taken nor do the orders discontinue the action. Any appeal in this matter regarding the issue of capacity should be taken upon the conclusion of the proceedings and appointment of a guardian and conservator.

Conclusion

For the foregoing reasons, Petitioners respectfully request that the Court deny all motions for reconsideration and that the Court amend the Orders for clarification as suggested herein.

SIGNATURE ON NEXT PAGE

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

James F. McCrackin

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Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

February 8, 2013

**IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068**

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

**MOTION IN LIMINE TO EXCLUDE
ANY AND ALL EVIDENCE RELATING
TO THE MANAGMEENT OF
MS. DOCKERY'S ASSETS AND FUNDS**

TO: THE HONORABLE COURT; JAMES F. McCRACKIN, ATTORNEY FOR
EMILY CARLSON AND ALICE PREYER; WILLIAM H. MONCKTON, VI,
ESQUIRE, COUNSEL JOHN DOCKERY; and V. LEE MOORE, GUARDIAN
FOR MRS. EMILY CHESHIRE DOCKERY:

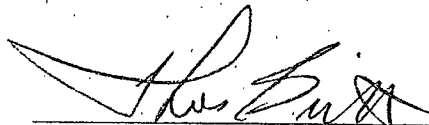
Ms. Emily Cheshire Dockery, by her undersigned counsel, hereby moves for an Order precluding any argument or evidence at the trial of this case regarding the management of Ms. Dockery's assets or monies whether currently or in the past. Counsel for Ms. Dockery would show that any evidence regarding the management of Ms. Dockery's assets is irrelevant because no person has a conservatorship over her finances, or has had a conservatorship over her assets in the past. As such, there has been no court supervision or accountings of the management of assets, and no person has had any obligation to provide such accountings or record keeping to the Court.

Moreover, Ms. Dockery would ask the Court to first hear testimony and arguments regarding her Durable Power of Attorney, which was signed on November 1, 2007, and a copy

of which is attached hereto. This document, which was executed prior to any issues as to Ms. Dockery's capacity, states that John C. Dockery, III shall be appointed conservator of her financial affairs in the event Ms. Dockery is deemed incapacitated by a Court. Based on this Court's prior ruling, that Ms. Dockery lacks some capacity and is in need of a conservator, Counsel for Ms. Dockery would assert that Ms. Dockery's durable power of attorney should be enforced and therefore John C. Dockery should be appointed the conservator of her assets and affairs.

Counsel certifies that pursuant to Rule 119a), SCRCP, counsel was under no duty to consult with opposing counsel before filing this Motion.

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562
Facsimile: (843) 497-6124
ATTORNEY FOR Emily Cheshire Dockery

May 24, 2013
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION IN LIMINE TO EXCLUDE
ANY AND ALL EVIDENCE RELATING
TO THE MANAGEMENT OF MS.
DOCKERY'S ASSETS AND FUNDS

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H.
MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against her, on June 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider its judgment for the following reasons:

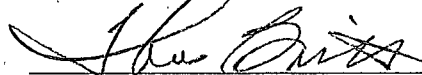
1. Ms. Dockery adopts all of her previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for Ms. Dockery has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider
2. With all due respect to the Court, Ms. Dockery specifically objects to the Courts' ruling that her counsel lacks understanding of the nature and purpose of these proceedings.

Counsel for Ms. Dockery would assert that they in fact understand the ramifications of taking away Ms. Dockery's rights and freedoms to exercise her independent judgments to such an extent that they have fought and continue to fight to ensure that the Court has an accurate picture and presentation of the facts by following the South Carolina Rules of Evidence. The Court erred in failing to exclude any and all evidence regarding the management of Ms. Dockery's assets by John c. Dockery, III because pursuant to the South Carolina Rules of Evidence 403, this information is so clearly prejudicial to Ms. Dockery that it outweighs any relevant value it could have to the Court. Moreover, Mr. Dockery was never engaged as a manager of her assets in any official way, but was simply assisting his elderly mother in carrying out her financial and day to day decisions. He has never been in a position of handling her affairs and making financial decisions for her. As such, to allow any testimony regarding his assistance with her finances is irrelevant evidence and should not have been admitted with a view to evaluate his performances as a conservator.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order Denying Motion in Limine to Exclude Any and All Evidence Relating to the Management of Ms. Dockery's Assets and Funds.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
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(843) 449-8562; 497-6124

June 18, 2013
Myrtle Beach, South Carolina.

RECEIVED
PROBATE W. EDMONDS
PROBATE JUDGE
2013 JUN 19 PM 2:37
PROBATE COURT
HARRY COUNTY, SC

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER APPOINTING
GUARDIAN AND CONSERVATOR

VS.

Respondent.

In re: EMILY CHESHIRE DOCKERY

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H. MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Emily Cheshire Dockery by and through her under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against her on January 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rues of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

1. Ms. Dockery adopts all of her previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for Ms. Dockery has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider.

2. The Court erred in requiring Petitioners as well as John C. Dockery, III and V. Lee Moore, to comply with the terms of the Settlement Agreement. Ms. Dockery has repeatedly stated that she, nor Mr. Dockery were parties to the Settlement Agreement. Mr. Dockery's presence at mediation in no way makes him a "party" to a settlement agreement. Rule 43(k) of the SCRCP states that "no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered into the record, or reduced to writing and signed by the parties and their counsel." As such, neither Mr. Dockery, nor Ms. Dockery should be bound in any way to the terms of the "settlement agreement" and any reference, mention, or enforcement of it is error. It was improper for anyone at the mediation to inform the "fact finding" Court of statements made there.
3. The Court erred in failing to admit Mr. Clifford H. Tall, Esq. as an expert. Mr. Tall has been practicing probate and estate law since 1980. As a thirty year veteran of the estate and probate practice, he certainly is qualified to testify as an expert and the Court should have allowed him to be admitted as such; it was error not to do so.
4. As detailed above and stated many times by Ms. Dockery and her Counsel, the Court erred in enforcing the settlement agreement. Therefore, Ms. Dockery objects to the terms as outlined in the Order regarding the appointment of a guardian, in as much as they are taken verbatim from a "settlement agreement" that Ms. Dockery never signed, never participated in, and repeatedly refused to agree to; neither did Mr. Dockery.
5. The Court erred in enforcing the settlement agreement, which states that a third-party should be appointed as a conservator. As stated previously by Counsel for Ms. Dockery, she is adamantly opposed to a person other than her son, taking care of her finances, and

did not agree to any third-party being appointed a conservator. Ms. Dockery was not present at the mediation, and her Counsel, specifically instructed all parties and lawyers that she could not agree to anything without first speaking to Ms. Dockery. Ms. Dockery was vehemently opposed to any person other than her son looking after her finances, and therefore did not sign the "settlement agreement" at all, and her refusal to do so was communicated as soon as possible to all parties and lawyers. (Keep in mind, almost all Ms. Dockery's property has, for years, been designated to go to her son.) It is error for the Court to enforce this non agreement on Ms. Dockery, especially when she made her wishes well known by selecting John Dockery, III as her power of attorney, to survive capacity, by executing a durable power of attorney with Clifford H. Tall, in 2007 prior to any issue of her capacity or competency.

6. The Court erred in finding that "good cause" was shown to pass over Mr. Dockery, who has priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery's attorney-in-fact. Petitioners did not present any evidence proving that Mr. Dockery had mismanaged any of Ms. Dockery's assets or finances. Moreover, as argued by Ms. Dockery's Counsel, Mr. Dockery had never been appointed by the Court, therefore had never taken an official role in managing his mother's affairs. Absent any evidence of Mr. Dockery's mismanagement of funds, it was error for the Court to find good cause to disregard Ms. Dockery's right to select her own conservator. These documents were created when no one disputed the capacity of Ms. Dockery.
7. The Court erred in finding that it is in Ms. Dockery's best interest to appoint a third-party conservator so that her children will no longer fight over her property, because none of her children will be in control. Ms. Dockery's will, and subsequent codicils, which were

admitted into evidence, and were all executed several years before any issue of capacity arose, do not leave any real property, or property of any monetary value to the Petitioners in this case. Therefore, there is nothing for the children to be "fighting over." The Court has effectively taken away Ms. Dockery's rights to select whom she wants as a conservator and to leave her assets to whom she wants.

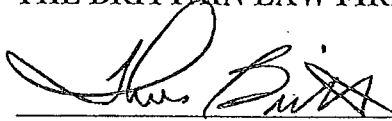
8. The Court erred in relying on the "testimony of Ms. Moore" as evidence. Ms. Moore was not introduced or called by Petitioner, Respondent, or Ms. Dockery. After the Court had already ruled that it would be enforcing the settlement agreement, Ms. Moore asked to "put on the record her reasons for not abiding by Ms. Dockery's wishes." As such, Ms. Moore's comments are not evidence and should not be used as such by the Court when issuing its ruling. (Keep in mind, Ms. Dockery did not consider Ms. Moore to be acting in her best interest and sought to discharge her.)
9. The court erred in terminating any and all previous power of attorneys executed by Ms. Dockery because as stated above Ms. Dockery executed her Durable Power of Attorney in 2007, prior to any issue arising regarding her capacity or competency. As such, her power of attorney should be valid and enforceable.
10. The Court erred in finding that the fees of Ms. Moore are reasonable and fair. Ms. Dockery expressed her problems and issues with Ms. Moore and desire to have the Court remove her, which the Court declined to do. Ms. Dockery has competent counsel of her choice, and therefore did not need a guardian ad litem. Moreover, due to Ms. Moore's sickness in January of 2013, the capacity hearing was continued, requiring Ms. Dockery to be examined again by Dr. Goldschmidt incurring excessive additional fees for both him and Ms. Moore, all of which could have been avoided had the hearing been in

January when it was scheduled to be heard. Any financial impact should not fall on Ms. Dockery.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery respectfully requests that this Court reconsider and alter or amend its Order appointing Guardian and Conservator.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

June 18, 2013
Myrtle Beach, South Carolina.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER
OR AMEND THE ORDER GRANTING
PETITIONERS' MOTION FOR
ATTORNEY FEES AND COSTS
IN CONNECTION WITH MOTION
TO ENFORCE SETTLEMENT
AGREEMENT

DEIRDRE W. EDMONDS
PROBATE JUDGE

2013 JUN 19 PM 2:35

PROBATE COURT
HORRY COUNTY, SC

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and WILLIAM H. MONCKTON, VI, ATTORNEY FOR RESPONDENT.

Ms. Dockery by and through her under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued June 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent requests that the Court alter and/or reconsider its judgment for the following reasons:

1. Ms. Dockery adopts all of her previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for Ms. Dockery has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider.
2. The Court erred in referencing that the Motion to Enforce the Settlement Agreement has not been appealed because the time for appealing such a ruling has not expired, and

DEIRDRE W. EDMONDS
PROBATE JUDGE

2013 JUN -3 AM 10:22

PROBATE COURT
HORRY COUNTY, SC

Respondent does intend on appealing this ruling and has repeatedly informed the Court of its error in enforcing an unsigned mediation agreement that was not signed by all parties to the litigation.

3. The Court erred in stating that there was no prejudice to Ms. Dockery, nor any violation of her due process rights by the Court's enforcement of the Settlement Agreement. As Counsel for Respondent and Counsel for Ms. Dockery has repeatedly informed the Court, Ms. Dockery was not a party to the mediation, or the unsigned mediation agreement in any way. She did not attend the mediation, her Counsel informed the mediator and all other counsel that there would be no agreement, unless and until Ms. Dockery was informed and agreed to it, and most importantly, Ms. Dockery never agreed to anything. As such, to enforce an unsigned agreement upon a person under these circumstances is a violation of her due process rights. She hasn't been given any rights by the Court's error in enforcing this "agreement;" her rights have been taken from her.
4. The Court erred in stating that based on the facts in the record; Petitioners should be granted fees and costs in connection with the motion to enforce the settlement. With all due respect to the Court, paragraph four, (4) of the Court's Order is an inaccurate reflection of what transpired between counsel in this case, and is obviously written from the perspective of Petitioner's Counsel.
5. The Court erred in finding that Petitioner's counsel handled all communications in a reasonable and fair manner consistent with the Mediation Rules. As Counsel for Ms. Dockery has repeatedly informed the Court, the entire process of Mediation has been comprised by the actions that have been taken by Petitioner's Counsel. Mediation is a special process that is highly confidential in order to encourage parties to speak freely

and openly about the pending litigation. Nothing that is said at mediation should ever be spoken to the Court. Therefore, any communications petitioner had with the Court about the mediation are improper and should have never been considered by this Court.

Moreover regardless of which counsel may have agreed with Petitioner's Counsel, the most important party in this case, Ms. Dockery and her counsel most certainly did not.

The Supreme Court has set forth rules to govern conduct here; the Petitioners have clearly violated them.

6. The Court erred in finding that Petitioner's fees are fair and reasonable. Respondent would assert that these fees are excessive based on the amount of work that was done.
7. Counsel for Ms. Dockery would ask the Court for clarification as to who is ordered to pay Petitioner's fees. The Order specifically states Respondent is to pay the fees. As such, Ms. Dockery is of the opinion she has not been ordered to pay these fees.

WHEREFORE, based upon the above stated reasons and applicable rules, Respondent respectfully requests that this Court reconsider and alter or amend its Order granting Petitioner's motion for Attorneys' fees and costs in connection with Motion to enforce settlement agreement.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

June 18, 2013
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
MOTION IN LIMINE TO EXCLUDE
ANY AND ALL EVIDENCE RELATING
TO THE MANAGEMENT OF MS.
DOCKERY'S ASSETS AND FUNDS
ON BEHALF OF JOHN C. DOCKERY, III

TO: JAMES F. MCCrackin, ATTORNEY FOR PETITIONERS, and THOMAS C. BRITTAIN AND MARY MADISON LANGWAY BRITTAIN, ATTORNEYS FOR EMILY CHESHIRE DOCKERY

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on June 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

1. John C. Dockery, III adopts all of his previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for John C. Dockery, III has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider
2. With all due respect to the Court, John C. Dockery, III specifically objects to the Courts' ruling that Ms. Dockery's counsel lacks understanding of the nature and purpose of these

PROBATE COURT
HORRY COUNTY, SC
2013 JUN 20 AM 10:38
DEBORAH E. EDWARDS
PROBATE JUDGE

proceedings. John C. Dockery, III would assert that counsel for Ms. Dockery does fact understand the ramifications of taking away Ms. Dockery's rights and freedoms to exercise her independent judgments to such an extent that they have fought and continue to fight to ensure that the Court has an accurate picture and presentation of the facts by following the South Carolina Rules of Evidence. The Court erred in failing to exclude any and all evidence regarding the management of Ms. Dockery's assets by John C. Dockery, III because pursuant to the South Carolina Rules of Evidence 403, this information is so clearly prejudicial to John C. Dockery, III and Ms. Dockery that it outweighs any relevant value it could have to the Court. Moreover, John C. Dockery, III was never engaged as a manager of Ms. Dockery's assets in any official way, but was simply assisting his elderly mother in carrying out her financial and day to day decisions. John C. Dockery, III has never been in a position of handling Ms. Dockery's affairs and making financial decisions for her. As such, to allow any testimony regarding his assistance with her finances is irrelevant evidence and should not have been admitted with a view to evaluate his performances as a conservator.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III respectfully requests that this Court reconsider and alter or amend its Order Denying Motion in Limine to Exclude Any and All Evidence Relating to the Management of Ms. Dockery's Assets and Funds.

*[SIGNATURE PAGE FOR MOTION FOR RECONSIDERATION/ ALTER OR
AMEND THE ORDER DENYING MOTION IN LIMINE TO EXCLUDE ANY AND
ALL EVIDENCE RELATING TO THE MANAGEMENT OF MS. DOCKERY'S
ASSETS AND FUNDS ON BEHALF OF JOHN C. DOCKERY, III]*

Respectfully submitted,

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June 19, 2013
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER APPOINTING
GUARDIAN AND COSERVATOR
ON BEHALF OF JOHN C. DOCKERY, III

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS C. BRITTAIN AND MARY MADISON BRITTAIN LANGWAY, ATTORNEYS FOR EMILY CHESHIRE DOCKERY

PROBATE COURT
HORRY COUNTY, SC
2013 JUN 20 AM 10:37
DEIRDRE W. EDWARDS
PROBATE CLERK

John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on January 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rules of Civil Procedure. The Respondent request that the Court alter and/or reconsider it judgment for the following reasons:

1. John C. Dockery, III adopts all of his previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for John C. Dockery, III has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider.

2. The Court erred in requiring John C. Dockery, III as well as Petitioners and V. Lee Moore, to comply with the terms of the Settlement Agreement. John C. Dockery, III has stated that he, nor Mr. Dockery were parties to the Settlement Agreement. John C. Dockery, III's presence at mediation in no way makes him a "party" to a settlement agreement. Rule 43(k) of the SCRCP states that "no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered into the record, or reduced to writing and signed by the parties and their counsel." As such, neither John C. Dockery, III, nor Ms. Dockery should be bound in any way to the terms of the "settlement agreement" and any reference, mention, or enforcement of it is error. It was improper for anyone at the mediation to inform the "fact finding" Court of statements made there.
3. The Court erred in failing to admit Mr. Clifford H. Tall, Esq. as an expert. Mr. Tall has been practicing probate and estate law since 1980. As a thirty year veteran of the estate and probate practice, he certainly is qualified to testify as an expert and the Court should have allowed him to be admitted as such; it was error not to do so.
4. As detailed above and stated many times by John C. Dockery, III and his Counsel, the Court erred in enforcing the settlement agreement. Therefore, John C. Dockery, III objects to the terms as outlined in the Order regarding the appointment of a guardian, in as much as they are taken verbatim from a "settlement agreement" that Ms. Dockery never signed, never participated in, and repeatedly refused to agree to; neither did John C. Dockery, III.

5. The Court erred in enforcing the settlement agreement, which states that a third-party should be appointed as a conservator. As stated previously by Counsel for Ms. Dockery, she is adamantly opposed to a person other than her son, John C. Dockery, III, taking care of her finances, and did not agree to any third-party being appointed a conservator. Ms. Dockery was not present at the mediation, and her Counsel, specifically instructed all parties and lawyers that she could not agree to anything without first speaking to Ms. Dockery. Ms. Dockery was vehemently opposed to any person other than her son looking after her finances, and therefore she, nor John C. Dockery, III signed the "settlement agreement" at all, and their refusal to do so was communicated as soon as possible to all parties and lawyers. (Keep in mind, almost all Ms. Dockery's property has, for years, been designated to go to her son, John C. Dockery, III.) It is error for the Court to enforce this non agreement on John C. Dockery, III and Ms. Dockery, especially when Ms. Dockery made her wishes well known by selecting John C. Dockery, III as her power of attorney, to survive capacity, by executing a durable power of attorney with Clifford H. Tall, in 2007 prior to any issue of her capacity or competency.
6. The Court erred in finding that "good cause" was shown to pass over John C. Dockery, III, who has priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery's attorney-in-fact. Petitioners did not present any evidence proving that John C. Dockery, III had mismanaged any of Ms. Dockery's assets or finances. Moreover, as argued John C. Dockery, III had never been appointed by the Court, therefore had never taken an official role in managing his mother's affairs. Absent any evidence of John C. Dockery, III's mismanagement of funds, it was error for the Court to find good cause to disregard Ms.

Dockery's right to select her own conservator. These documents were created when no one disputed the capacity of Ms. Dockery.

7. The Court erred in relying on the "testimony of Ms. Moore" as evidence. Ms. Moore was not introduced or called by Petitioner, John C. Dockery, III, or Ms. Dockery. After the Court had already ruled that it would be enforcing the settlement agreement, Ms. Moore asked to "put on the record her reasons for not abiding by Ms. Dockery's wishes." As such, Ms. Moore's comments are not evidence and should not be used as such by the Court when issuing its ruling. (Keep in mind, Ms. Dockery did not consider Ms. Moore to be acting in her best interest and sought to discharge her.)
8. The Court erred in finding that the fees of Ms. Moore are reasonable and fair. John C. Dockery, III along with Ms. Dockery expressed his problems and issues with Ms. Moore and desire to have the Court remove her, which the Court declined to do. Ms. Dockery has competent counsel of her choice, and therefore did not need a guardian ad litem. Moreover, due to Ms. Moore's sickness in January of 2013, the capacity hearing was continued, requiring Ms. Dockery to be examined again by Dr. Goldschmidt incurring excessive additional fees for both him and Ms. Moore, all of which could have been avoided had the hearing been in January when it was scheduled to be heard. Any financial impact should not fall on Ms. Dockery or John C. Dockery, III.

WHEREFORE, based upon the above stated reasons and applicable rules, John C. Dockery, III respectfully requests that this Court reconsider and alter or amend its Order appointing Guardian and Conservator.

Respectfully submitted,

THE MONCKTON LAW FIRM, P.A.

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June 19, 2013

Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2010-GC-26-0068

EMILY CARLSON AND,
ALICE PREYER

Petitioners,

vs.

JOHN C. DOCKERY, III

Respondent.

In re: EMILY CHESHIRE DOCKERY

MOTION TO RECONSIDER/ ALTER OR
AMEND THE ORDER DENYING
GRANTING PETITIONERS' MOTION
FOR ATTORNEY FES AND COSTS
IN CONNECTION WITH MOTION
TO ENFORCE SETTLEMENT
AGREEMENT ON BEHALF OF JOHN C.
DOCKERY, III

TO: JAMES F. MCCRACKIN, ATTORNEY FOR PETITIONERS, and THOMAS C. BRITTAIN AND MARY MADISON BRITTAIN LANGWAY, ATTORNEY FOR EMILY CHESHIRE DOCKERY

Respondent John C. Dockery, III by and through his under signed attorneys hereby moves that this Court alter and amend the Judgment/ ruling that was issued against him on June 10, 2013. This motion is made pursuant to Rules 59e and 60 of the South Carolina Rues of Civil Procedure. The Respondent requests that the Court alter and/or reconsider it judgment for the following reasons:

1. Respondent adopts all of his previously filed Motions for Reconsideration dealing with the incapacity hearings held on May 4, 2012 and July 6, 2012. For purposes of brevity and clarity for the Court, Counsel for Respondent has chosen not to address those particular arguments and issues again in this Motion, but would adopt all arguments previously made in the Motions to Reconsider

2. The Court erred in referencing that the Motion to Enforce the Settlement Agreement has not been appealed because the time for appealing such a ruling has not expired, and Respondent does intend on appealing this ruling and has repeatedly informed the Court of its error in enforcing an unsigned mediation agreement that was not signed by all parties to the litigation.
3. The Court erred in stating that there was no prejudice to Ms. Dockery, nor any violation of her due process rights by the Court's enforcement of the Settlement Agreement. As Counsel for Respondent and Counsel for Ms. Dockery has repeatedly informed the Court, Ms. Dockery was not a party to the mediation, or the unsigned mediation agreement in any way. She did not attend the mediation, her Counsel informed the mediator and all other counsel that there would be no agreement, unless and until Ms. Dockery was informed and agreed to it, and most importantly, Ms. Dockery never agreed to anything. As such, to enforce an unsigned agreement upon a person under these circumstances is a violation of her due process rights. She hasn't been given any rights by the Court's error in enforcing this "agreement;" her rights have been taken from her.
4. The Court erred in stating that based on the facts in the record; Petitioners should be granted fees and costs in connection with the motion to enforce the settlement. With all due respect to the Court, paragraph four, (4) of the Court's Order is an inaccurate reflection of what transpired between counsel in this case, and is obviously written from the perspective of Petitioner's Counsel.
5. The Court erred in finding that Petitioner's counsel handled all communications in a reasonable and fair manner consistent with the Mediation Rules. As Counsel for Ms. Dockery has repeatedly informed the Court, the entire process of Mediation has been

compromised by the actions that have been taken by Petitioner's Counsel. Mediation is a special process that is highly confidential in order to encourage parties to speak freely and openly about pending litigation. Nothing that is said at mediation should ever be spoken to the Court. Therefore, any communications petitioner had with the Court about the mediation are improper and should have never been considered by this Court.

Moreover regardless of which counsel may have agreed with Petitioner's Counsel, the most important party in this case, Ms. Dockery and her counsel most certainly did not.

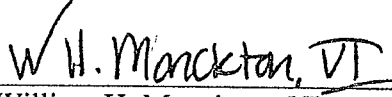
The Supreme Court has set forth rules to govern conduct here; the Petitioners have clearly violated them.

6. The Court erred in finding that Petitioner's fees are fair and reasonable. Respondent would assert that these fees are excessive based on the amount of work that was done.

WHEREFORE, based upon the above stated reasons and applicable rules, Respondent respectfully requests that this Court reconsider and alter or amend its Order appointing Guardian and Conservator.

Respectfully submitted,

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June 19, 2013
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE MATTER OF:

John C. Dockery, III

Petitioner,

vs.

Emily Carlson and Alice Preyer

Respondents.

IN THE CIRCUIT COURT

Appeal from Probate Court for Horry County

CASE NUMBER: 2014-CP-26-1665

INITIAL BRIEF OF
EMILY CHESHIRE DOCKERY

HORRY COUNTY
14 MAY 23 PM 2:14
CLERK OF COURT

IN RE: EMILY CHESHIRE DOCKERY
PROBATE CASE NUMBERS: 2010-GC-26-0068 & -0069

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Probate Court err in enforcing a "settlement agreement" that was not signed by all parties, not entered into during mediation, and not read into the record?
2. Did the Probate Court err in refusing to allow and/or admit testimony from John C. Dockery, III?
3. Did the Probate Court err in excluding portions of Dr. Benjamin's testimony regarding his opinion of neuropsychiatric testing?
4. Did the Probate Court err in appointing a person other than John C. Dockery, III as conservator when John C. Dockery, III had priority pursuant to S.C. code Section 62-5-410 as Ms. Dockery's attorney-in-fact?
5. Did the court err in accepting the testimony of Petitioner's witness, Dr. Goldschmidt who is not a medical doctor but a psychologist, over that of a medically licensed Neurologist, Dr. Benjamin?
6. Did the Court err in failing to consider after acquired evidence that was presented to the Court showing other pending litigation by Petitioners?
7. Did the Court err in finding that Ms. Dockery is responsible for all fees and costs of both the Guardian ad litem, and Dr. Goldschmidt?
8. Did the Court err in terminating any and all previous power of attorneys executed by Ms. Dockery?
9. Did the Court err in failing to admit Mr. Clifford H. Tall, Esq. as an expert?

STATEMENT OF THE CASE

Respondents, Emily Carlson and Alice Preyer filed a summons and petition for a finding of incapacity as to their mother, Emily Cheshire Dockery and for an order appointing them as guardian and conservator over their mother's well-being and financial affairs. Ms. Emily Cheshire Dockery filed an Answer and Counterclaim stating she was fully competent and able to make all decisions associated with her financial, physical and social well-being, and did not desire to have a guardian or conservator appointed to handle such decisions for her. In addition, Ms. Dockery stated that if a guardian or conservator was to be required pursuant to the Court, her desire was for her son, John C. Dockery, III who has been living and taking care of her for many years, be appointed to make such decisions on her behalf. Ms. Dockery also filed a counterclaim alleging the action brought was frivolous and requesting her daughters be responsible for her attorney's fees and the costs of the litigation. Respondents filed a Reply.

The Probate Court initially appointed Dr. Leonard Goldschmidt, a neurophysiologist, as the medical examiner. Upon motion of counsel for Ms. Dockery a second medical examiner, Dr. Jeffrey Benjamin, a neurologist, who was a treating physician of Ms. Dockery, was appointed. The Court appointed V. Lee Moore as guardian ad litem for Ms. Dockery.

On July 22, 2011, the parties participated in mediation. Present at the mediation were Respondents, Emily Carlson and Alice Preyer along with their attorney James F. McCrackin; John C. Dockery, III, and his attorney William H. Monckton; Mary Madison Brittain Langway attorney for Mrs. Dockery, and V. Lee Moore, Guardian ad Litem for Ms. Dockery. Ms. Dockery did not attend the mediation. All parties willingly participated in the mediation and attempted to reach a resolution. Ms. Langway consistently reminded all counsel that she would not be able to agree to anything at the mediation, since her client was not in attendance, but

would meet with her client subsequent to the mediation and discuss any potential settlement agreement with her at that time.

An agreement was not reached at the mediation. Those present made progress and were able to agree on a few issues, but not all. No settlement document was signed at the mediation. Subsequent to the mediation, Respondent's attorney, James F. McCrackin circulated a settlement agreement to all counsel for their signature and their client's signature. Neither petitioner John C. Dockery, III nor his attorney signed the document. Ms. Dockery did not sign the document, nor did her attorneys, Thomas C. Brittain and Ms. Langway. The only parties who signed the document were the Respondents and V. Lee Moore.

On August 31, 2011, Counsel for Respondents filed a motion to enforce the "settlement Agreement." Counsel for Ms. Dockery and John C. Dockery objected to the enforcement of this document at the hearing, on the basis that there was no settlement agreement since all parties had not signed it. The Probate Court found that the agreement was enforceable, but not binding on Ms. Dockery and therefore the action would still go forward as to her incapacity. The probate Court found that the "settlement agreement" was enforceable to the extent that it named John C. Dockery, III as the guardian of Ms. Dockery and stated that a third party would be appointed as the conservator of Ms. Dockery. The Probate Court further held that John C. Dockery would only be allowed to testify at the hearing on capacity to the extent that it was consistent with the "settlement agreement," which stated that Ms. Dockery was incapacitated.

May 4, 2012 and July 6, 2012, the court heard testimony on the capacity of Ms. Dockery, and ruled on January 22, 2013 that she was incapacitated, and in need of a limited conservatorship, because she was able to participate in decisions affecting her care and well-being, but in need of a conservatorship because she was not able to participate in decisions with

respect to her finances.

On May 30, 2013, the Probate Court held a hearing to determine who would be appointed as conservator. At this hearing, counsel for Ms. Dockery and counsel for John C. Dockery, III introduced into evidence Ms. Dockery's power of attorney, which had been drafted and prepared by Cliff Tall, Esquire, in 2007. This document named John C. Dockery, III as her power of attorney and it specifically stated that her appointment of him as power of attorney shall survive any determination by a court that she is incapacitated. Respondent's asked that Walter B. Godbold be appointed as a third-party conservator, pursuant to the "settlement agreement." Respondents did not introduce any evidence tending to show that John C. Dockery was incapable of functioning as power of attorney for Ms. Dockery. The only mention of John Dockery's abilities as a conservator came from V. Lee Moore, the Guardian ad Litem, whose positions were generally approved by Ms. Dockery voluntarily gave her "opinion" to the court. The Probate Court enforced the "settlement agreement" and appointed Walter B. Godbold as conservator of Ms. Emily Cheshire Dockery. Ms. Dockery and John C. Dockery, III filed numerous Motions to reconsider pursuant to Rule 59 (e), which were denied by the Probate Court. Ms. Dockery filed her notice of intent to appeal on March 17, 2014, and John C. Dockery, III, filed his notice of intent to appeal on March 14, 2014.

ARGUMENT

1. DID THE PROBATE COURT ERR IN ENFORCING A “SETTLEMENT AGREEMENT” THAT WAS NOT SIGNED BY ALL PARTIES, NOT ENTERED INTO DURING MEDIATION, AND NOT READ INTO THE RECORD?

The Court erred in enforcing a “Settlement Agreement” that was neither signed by all parties nor all counsel, and most importantly, not signed by Ms. Dockery. On July 22, 2011, the parties participated in mediation with John Leiter, Esq. serving as the Mediator. Several items were discussed orally but a final Agreement was not reached nor were any terms reduced to writing at that time. Subsequently, counsel for the Petitioner prepared and circulated a drafted Agreement via email between the parties. In addition, Petitioner’s counsel prematurely communicated to the Court that an Agreement was reached. Upon review of the drafted Settlement Agreement, Ms. Dockery, John C. Dockery, III, and their respective counsels disagreed with the incorporated terms and all refused to sign. There was not a meeting of the minds with regard to the Settlement Agreement. Upon learning that neither John C. Dockery, III nor their mother, Ms. Dockery was willing to sign the circulated settlement agreement, respondents filed a Motion to Enforce Settlement with the Probate Court. Counsel for Ms. Dockery and John C. Dockery, III strongly objected and explained to the Court that there was no full agreement reached at mediation, that no settlement document had been signed by all parties, either at mediation or subsequent to mediation and that therefore, no agreement had been reached. After a hearing on the matter, the Probate Court found that the unsigned “settlement agreement” should be enforced.

Rule 43(k) of the South Carolina Rules of Civil Procedure is “intended to prevent disputes as to the existence and terms of agreements regarding pending litigation.” *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94. The rule states as follows:

“No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order, or written stipulation signed by counsel and entered in the record, or reduced to writing and signed by the parties and their counsel.”

Based on Rule 43(k) of the SCRCRCP, the proposed “settlement agreement” conveyed to the Court by Petitioner’s counsel does not satisfy the requirements under the rule. “In interpreting the meaning of the SCRCRCP, the Court applies the same rules of construction used to interpret statutes.” *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634 (2006). Here, the rule clearly applies to the settlement agreement. The “settlement agreement” was not executed by all parties, therefore it is not an Agreement. In addition, the agreement was not reduced to the form of a consent order, nor was it entered into the record. Therefore, it should not have ever been presented to the Probate Court for its consideration, much less approved and enforced by the same. Here, the Probate Court has enforced a “settlement” never signed nor agreed to, which under no circumstance amounts to a “settlement document.” The process here is indeed troubling.

Moreover, Rule 8 of the Mediation Rules specifically states as follows:

“Communications during a mediation settlement conference shall be confidential. The parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce evidence in any arbitral, judicial, or other proceeding, any oral or written communication having occurred in a mediation proceeding, including but not limited to...(4) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.”

The mediation process is a special and unique process where parties are encouraged to speak freely and negotiate freely, without having to worry that it will be used against them in

Court. However, in this case, Petitioners have used the mediation process against Ms. Dockery, who was neither present at the mediation nor did she sign the proposed settlement document (a disturbing breach of the rules). Therefore, Petitioners have expressly broken the confidentiality rule of Mediation and have used the fact that Ms. Dockery nor John Dockery were willing to agree and sign the document as evidence to support their position of the case. This behavior is in violation of the mediation process and the core principles that mediation seeks to accomplish. Further evidence that an agreement was not reached at Mediation is the Mediator's Results Report, dated August 11, 2011, which states the parties worked in good faith to settle the matter but the matter was only "partially settled" with a mutual understanding of the parties that a settlement agreement was still in the drafting process. As to this point, it does not state that the parties reached an agreement or executed an agreement at the mediation. The Petitioner misrepresented to the Court that an agreement had been reached at mediation, which was inconsistent with the mediator's report but ethically Ms. Dockery cannot subpoena the mediator to testify about the determinations at mediation.

2. DID THE PROBATE COURT ERR IN REFUSING TO ALLOW AND/OR ADMIT TESTIMONY FROM JOHN C. DOCKERY, III?

In enforcing the "settlement document," the Probate Court also held that John C. Dockery, III (who did not sign the "agreement") was bound by the document and therefore he would only be allowed to testify in his mother's capacity hearing, to the extent that it was consistent with the settlement agreement. The Agreement states that Ms. Dockery is incapacitated. Therefore, the Probate Court's ruling kept John C. Dockery from testifying about his opinion as to his mother's capacity. The Court erred in refusing to allow and or admit testimony from John Dockery, her constant companion for many years. The mediation process is not to be used against a person and/or keep him or her from being able to meaningfully participate in the trial. The proposed settlement agreement should never have been mentioned to the Court in any form, but most importantly, it should have never been used to keep John Dockery from testifying. By not allowing John Dockery to testify, the Court significantly prejudiced Ms. Dockery. John Dockery has spent more time with Ms. Dockery than any other person who testified. He knows her needs, abilities, desires, and abilities better than any other person in the universe. It is a miscarriage of justice an error on the Court's part to limit his testimony.

3. DID THE PROBATE COURT ERR IN EXCLUDING PORTIONS OF DR. BENJAMIN'S TESTIMONY REGARDING HIS OPINION OF NEUROPSYCHIATRIC TESTING?

The Court appointed two medical examiners in this case. First, the court appointed Dr. Leonard Goldschmidt, a nueropsychiatrist, who performed a lengthy battery of tests on Ms. Dockery. The Court also appointed, Dr. Jeffrey Benjamin, who is a board certified Medical Doctor with a specialty in neurology and who also was one of Ms. Dockery's treating physicians. In his deposition, Dr. Benjamin stated that he disagreed with Dr. Goldschmidt's report, because he was basing it on a neuropsychiatric evaluation and that three, five or ten neuropsychiatrists in a room with the exact same information would come up with ten different opinions. He went on to state that in his opinion a Neuropsychiatric evaluation is worthless in this case and that the-if the Court routinely relies on this type of testing to determine competence it is making a huge mistake because it is a lengthy test that's not really designed to determine whether somebody is competent or incompetent. In fact, it's extremely subjective. Upon motion of Respondents, the Court excluded as evidence, those portions of Dr. Benjamin's deposition that dealt with his opinion of the field of Neuropsychiatric testing. The Court erred in excluding portions of Dr. Benjamin's testimony and written materials because Dr. Benjamin is a medical doctor, specifically a neurologist. Dr. Benjamin is capable and qualified to give an opinion about the field of neuropsychiatric testing. Dr. Benjamin opined that the entire field of neuropsychiatry is not credible and should not be given any weight. As an expert in the field of neurology, his opinion is admissible under Rule 702 of the SCRCP. The Court's decision to exclude portions of Dr. Benjamin's testimony and written report were highly prejudicial to Ms. Dockery.

4. **DID THE PROBATE COURT ERR IN ACCPETING TESTIMONY OF GOLDSCHMIDT, WHO IS NOT A MEDICAL DOCTOR BUT IS A PSYCHOLOGIST OVER THAT OF A MEDICALLY LICENSED NEUROLOGIST, DR. BENJAMIN?**

As mentioned above, the Probate Court appointed two examiners in this case; one was a nueropsychiatrists, and the other was a physician, a board certified neurologist. S.C. Code Section 62-5-303(b), requires that one of the examiners be a physician. Based on the South Carolina General Assembly's specific choice of words in requiring a "physician" to be one of the examiners, it would be prudent to assume a greater importance and therefore greater weight should be placed on the opinion of a person who is in fact a physician. As such, the Probate Court erred in accepting testimony of Dr. Goldsmith who has not graduated from medical school and is not a physician, over that of Dr. Benjamin who is a board certified practicing neurologist. Dr. Goldsmith, the neurologist, performed a battery of tests on Ms. Dockery that were essentially the same as an IQ test. Ms. Dockery and John C. Dockery, III introduced into evidence several examples of the questions Ms. Dockery was asked to answer as a part of the testing administered by Dr. Goldschmidt. The questions were not surprising, but the scoring was astounding. For example, Ms. Dockery was asked to make out a check with certain information that was provided to her. Ms. Dockery was able to fill in every blank appropriately. However, she did not receive a perfect score on that particular question because her handwriting was a bit tremulous. Moreover, she received numerous scores of zero (0) because she failed to provide an answer to many of the questions. After reviewing these tests, it is clear she simply tired out and couldn't continue, which does not mean she is incapacitated; it simple means she is elderly. Dr. Benjamin was her treating physician when she sustained a fall and had to have a shunt placed in her head to drain fluid from her brain. He performed the surgery and examined her many times, prior to the surgery, and subsequent to the surgery. He opined that Ms. Dockery was competent

and capable to make her own decisions. He based his opinion on physical examinations of her, her past surgeries, and his conversations and examinations of her over a period of several months. Therefore, it was error for the Court to accept the testimony of Dr. Goldschmidt over that of Dr. Benjamin (Dr. Goldschmidt and his “tests” do not meet the Daubert guidelines) *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

5. DID THE PROBATE COURT ERR IN APPOINTING A PERSON OTHER THAN MR. JOHN C. DOCKERY, III AS CONSERVATOR WHEN MR. DOCKERY HAD PRIORITY PURSUANT TO S.C. CODE SECTION 62-5-410 AS MS. EMILY DOCKERY'S ATTORNEY-IN-FACT?

On November 1, 2007, Ms. Dockery executed a durable power of attorney naming her son, John C. Dockery, III her power of attorney. This document was drafted by Clifford H. Tall, Esquire of Myrtle Beach, South Carolina. At this point in time, Ms. Dockery's capacity was not at issue. Mr. Tall, testified at the hearing that he believed she had full capacity to execute the power of attorney in 2007. On p. 4 of Ms. Dockery's power of attorney, it states as follows, "It is my intention that this power of attorney shall not be affected by my physical disability or mental incompetence, which renders me incapable of managing my own estate...It is further my intention that my said attorney-in-fact (or alternate) shall serve as such and shall continue to exercise the authority granted herein in spite of any attempt to appoint a guardian or conservator on my behalf, it being my specific intent that my said attorney-in-fact (or alternate) shall fulfill the obligations ordinarily reserved for a guardian and conservator, and that no application to court for the appointment of any other person(s) in either capacity shall be effective while my said attorney-in-fact (or alternative) is willing and able to so serve."

S.C. Code section 62-5-410 provides in part, "(a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed: (3) an attorney in fact appointed by such protected person pursuant to Section 62-5-501."

Therefore, John C. Dockery, III would have priority pursuant to S.C. Code Section, and the Court could only appoint someone other than John C. Dockery, III for "good cause" shown. The Court erred in finding that "good cause" was shown to pass over Mr. Dockery, who holds priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery's attorney-in-fact. Petitioners

did not present any evidence proving that John Dockery had mismanaged any of Ms. Dockery's assets or finances. Absent any evidence of John Dockery's mismanagement of funds, it was an error of the Court to find good cause to disregard Ms. Dockery's right to appoint a conservator of her choice and liking. Ms. Dockery selected her preferred conservator at a time when no issue or dispute was present in regard to her capacity. As such, the Probate Court erred in appointing a person other than John C. Dockery, III as conservator.

6. DID THE PROBATE COURT ERR IN FINDING THAT MS. DOCKERY IS RESPONSIBLE FOR ALL FEES AND COSTS ASSOCIATED WITH BOTH THE GUARDIAN AD LITEM AND DR. GOLDSCHMIDT?

The Court erred in finding that Ms. Dockery should be responsible for the fees and costs at issue here. The Court did not cite specific case law or statute supporting its decision to require Ms. Dockery to be responsible for the fees and costs of this action. Ms. Dockery did not bring this action, nor does she believe it was brought out of concern for her well-being. As such, Ms. Dockery should not be forced to pay for the costs of an action she had no choice in bringing, or defending. In order to keep her rights as a citizen, Ms. Dockery had no choice but to hire a lawyer to fight for her rights in Court. She understands that she is responsible for her own attorneys' fees, but it does not seem fair that she also have to be responsible for all the costs associated with this action. More specifically, Dr. Goldschmidt was the examiner preferred and requested by Respondents. He was subpoenaed to testify at the trial by the Respondents. In addition, due to the type of testing he conducts, Ms. Dockery was forced to undergo many different dates of testing, each time for hours at a time. Since Dr. Goldschmidt charges hourly, Ms. Dockery has been made to pay for the numerous hours of testing, all the hours he spent reviewing and preparing reports, his deposition (which was not noticed by her), and his time at trial (she did not call him as a witness).

Further, the services of Lee Moore serving as Guardian ad Litem were a convenience for others. Ms. Dockery desired to have her counsel serve in the role, and asked the Court to remove Lee Moore as guardian ad litem. The Court did not grant Ms. Dockery's motion and Ms. Moore continued to incur additional fees that Ms. Dockery was then ordered to pay. Ms. Moore's fees and costs should not be borne by the objecting party or the party objecting to her handling of these matters.

7. **DID THE PROBATE COURT ERR IN DENYING TO CERTIFY MR. CLIFFORD H. TALL, ESQ. AS AN EXPERT?**

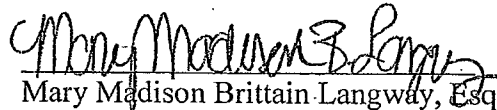
As mentioned above, Ms. Dockery called Mr. Clifford H. Tall, Esquire as a witness to testify about the power of attorney he prepared for her, what it states, and what her capacity was at the time she executed the document. Counsel for Ms. Dockery moved the Court to qualify Mr. Tall as an expert witness in the field of probate/estate law, and the Court declined to do so. The Court erred in failing to admit Mr. Clifford H. Tall, Esquire, as an expert. Mr. Tall has been practicing probate and estate law since 1980. As a thirty year veteran of the estate and probate practice, he certainly is qualified to testify as an expert and the Court should have allowed him to be admitted as such; it was an error to do otherwise.

CONCLUSION

THEREFORE, Ms. Emily Cheshire Dockery respectfully requests this court to reverse the Probate Court's Order and remand for a new trial.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.


Mary Madison Brittain Langway, Esquire
Thomas C. Brittain, Esquire
4614 Oleander Drive
Myrtle Beach, SC 29577
843-449-8562 Telephone
843-497-6124 Facsimile
ATTORNEY'S FOR PETITIONER

May 23, 2014
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE MATTER OF:)

John C. Dockery, III)

Petitioner,)

vs.)

Emily Carlson and Alice Preyer)

Respondents.)

IN THE CIRCUIT COURT

Appeal from Probate Court for Horry County

CASE NUMBER: 2014-CP-26-1635

NOTICE OF MOTION AND
MOTION TO RECONSIDER/
ALTER OR AMEND THE ORDER
AFFIRMING PROBATE COURT

HORRY COUNTY
CLERK OF COURT
OCT 30 PM 3:02

IN RE: EMILY CHESHIRE DOCKERY
PROBATE CASE NUMBERS: 2010-GC-26-0068 & -0069

Now comes Emily Dockery by and through her undersigned attorneys and moves the Court to reconsider, alter or amend its previous Order Affirming Probate Court filed on October 20, 2014. This motion is made pursuant to Rules 59(e) of the South Carolina Rules of Civil Procedure. Ms. Dockery respectfully requests this Honorable Court reconsider, alter and/or amend its ruling on the Appeal of this matter from Probate Court for the following reasons:

I.

Ms. Dockery believes the Court's ruling is tantamount to a finding that her children, however misguided, could by agreement (without her permission, participation or acquiescence) have her determined to be incapacitated. Therefore, a new hearing, in which the factfinder has no knowledge of any such "agreement," should take place. The entire probate proceeding was flawed by the admission and mere mention of this "agreement" and Ms. Dockery's rights have been impacted.

Specifically, with respect to the Order submitted by Respondents and signed by this

Honorable Court, Ms. Dockery would ask the Court to reconsider and or/alter its ruling with respect to the following:

The Order Affirming Probate Court (attached hereto as Exhibit A) states on page five that "Ms. Dockery lacks standing to challenge the enforcement of the Settlement Agreement as she was not a party to the agreement, and the Probate Court specifically noted that she was not bound by the agreement." This is error. Ms. Dockery is a real party in interest and, as such, maintains proper standing to challenge this agreement which addresses Ms. Dockery's mental capacity, her need for a conservator, her daily needs, her medical care, etc. (Please take note the Guardian Ad Litem, Conservator, lawyer for Conservator and neuropsychologist bills exceed, upon information and belief, \$70,000.00). Ms. Dockery certainly has standing to object to a ruling that substantially affects her daily life and ability to make decisions, and have who she wants helping her make decisions. Again, a ruling such as this would render all alleged incapacitated persons unable to protect their own rights, and give children and other "loved ones" the ability to control the system, its outcome, and thereby deprive such a person of his or her rights as a citizen.

II.

The Order Affirming Probate Court claims that the Probate Court's Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement ("Order Enforcing Settlement") dated October 31, 2011 was appealable and since it was not appealed, is now the law of the case. This is error. Both Petitioner and Ms. Dockery filed motions contesting the Probate Court's Order Enforcing Settlement. Further, the terms of the Settlement Agreement were contingent upon a later hearing by the Probate Court to determine capacity as to Ms. Dockery and, as such, the Order Enforcing Settlement would not be considered a final order and

therefore not immediately appealable (it was essentially an evidentiary ruling). An appeal of such Order would be interlocutory as the issue of her capacity and therefore the enforcement of the "Agreement," had not been decided yet. It was not until Judge Edmonds made a finding as to Ms. Dockery's capacity AND a finding that her son should not serve as her Conservator, that the Agreement was enforced and therefore become final and appealable. If the Probate Court had either found Ms. Dockery did not lack capacity, or found that she was not in need of a Guardian or a conservator, or that Mr. Dockery was perfectly suitable to be a conservator, then there would be no reason for an appeal by Ms. Dockery, and as such, the order enforcing settlement agreement was not final until those decisions were ordered by the Probate Court. Both Petitioner and Ms. Dockery have filed multiple motions in response to various rulings on this matter and have appropriately and timely preserved any and all issues on appeal expressed in their Briefs. The handling of mediation discussions here carry grave consequences for our judicial process.

III.

The Order Affirming Probate Court states on page seven that no allegations were made by any party to the Probate Court at the time the Court was notified that Rule 8 had been violated. This issue is somewhat of a red-herring and intended to redirect the argument. Rule 8 of the Mediation rules state that communications regarding settlement talks at mediation and all other communications are confidential. As such, it was not Respondents email to the Judge informing her of a possible settlement to which Ms. Dockery objects. Ms. Dockery objects to the unsigned, non-agreement being made available to the court, with its details, including what happened at the mediation being made available to the factfinder via a motion to enforce settlement. At that time, Counsel for Ms. Dockery and Mr. Dockery vehemently objected to and raised all issues regarding the mediation process, its confidentiality, and the need for a signed

writing by all parties. It is not necessary for the specific rule to be cited, the Probate Court clearly understood Ms. Dockery's objections to the agreement being enforced (see motions in Record on Appeal). Moreover, all counsel are subject to the confidentiality provision of the Mediation rules and are aware that it is improper to attempt to enforce an unsigned agreement by using the details of Mediation to do so. Respondents do not understand that even if an agreement was reached at mediation, since the agreement was not reduced to writing, no party is bound by a "verbal agreement" reached at mediation. Ms. Dockery's objections to the agreement were made clear to all parties to this action as well as the Probate Court from the time of the mediation. During the hearing to determine capacity of Ms. Dockery on May 4, 2012, counsel for Ms. Dockery openly objected upon attorney McCrackin's questioning of Ms. Dockery about the terms of the agreement. On page 19 of the hearing transcript, Lines 6-15, attorney Brittain made the following objection to the Court, "I don't think any of [the settlement agreement] should be admissible in any circumstances. It's a mediation and the system is such that unless there's an agreement by all parties, it has absolutely no admissibility in court. In fact, the Court should never even have reviewed the document, as far as I'm concerned, as a fact finder. I believe that is built into the process of mediation and so I object to it." Later, in their Motion to Reconsider/Alter or Amend the Order Denying Motion to Void Settlement Agreement ("Motion to Reconsider") dated January 30, 2013, counsel for Ms. Dockery raised both Rule 8 and Rule 43(k) of the South Carolina Rules of Civil Procedure in their argument that the Settlement Agreement should not be enforced and that the Court's previous Order Enforcing Settlement should be voided. The Probate Court later issued an Order Denying Ms. Dockery's Motion to Reconsider which has become one of the issues on appeal. Ms. Dockery has appropriately and timely raised all applicable court rules relevant to this agreement.

IV.

The Order Affirming Probate Court also states on page seven that "John Dockery was present at all hearings in this matter, and had the opportunity to testify at any of the hearings." We disagree. While John Dockery was present at all of the hearings, along with his attorney, he was essentially rendered unable to participate by the ruling of the Probate Court in its Order Enforcing Settlement. As evidenced on page 3, paragraph 10 of the Probate Court's Order Enforcing Settlement, Judge Edmonds ruled that "Petitioners, John Dockery, and the Guardian ad Litem shall not be allowed to make any argument or present any evidence at the hearing [to determine capacity] that is inconsistent with the terms of their settlement agreement." Counsel for Respondents now claim that, due to a failure to proffer his testimony, John Dockery has failed to preserve the issue. However, it was made abundantly clear to both Ms. Dockery and Petitioner through the Probate Court's rulings and findings of law, that any "proffered" testimony that was inconsistent with the terms of the settlement agreement would not be entertained by the Court and would, in fact, be in direct violation of her previous Order.

V.

The Order Affirming Probate Court states on page nine that the Probate Court found good cause, based on the testimony of the Guardian Ad Litem, for passing over Petitioner as Conservator and that, further, both Ms. Dockery and Petitioner have failed to challenge the Court's findings or produce any evidence showing an abuse of discretion. We disagree. Ms. Dockery's fully executed Power of Attorney dated November 1, 2007 gave Petitioner priority for appointment as conservator for Ms. Dockery pursuant to §62-5-410 of the South Carolina Code of Laws. The only testimony heard by the Probate Court contesting Petitioner's ability to serve as conservator was offered by the Guardian Ad Litem, V. Lee Moore. During her testimony, Ms.

Moore did not offer up to the Court any evidence to support her claims that Petitioner had “commingled funds” to Ms. Dockery’s detriment or that he had made “questionable financial decisions” on his mother’s behalf. Ms. Moore simply gave her opinion, with no documentation to back up any of her testimony, and so admitted she did not have any. To rely on such unsubstantiated and underqualified testimony in deciding to pass over Petitioner in appointing a Conservator for Ms. Dockery was an abuse of discretion by the Probate Court. This argument was raised on a Motion to reconsider to the Probate Court, raised again on appeal and argued in its brief to the circuit court. Again, there is no issue of preservation, as Respondents would have the Court believe.

VI.

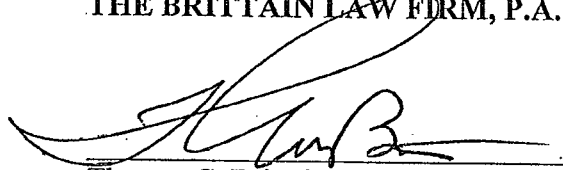
The Order Affirming Probate Court states on page eleven that all testimony offered during the hearing to determine capacity was “uncontested” in indicating that Ms. Dockery lacked capacity. We disagree. Dr. Jeffrey Benjamin’s testimony has been selected very carefully by the Respondents. However, upon reading Dr. Benjamin’s testimony as a whole, it is clear that he believes she has the capacity to make her own decisions. He testified that due to her advanced age, she could use assistance in carrying out those decisions, but not because she was incapable of making a decision, but because she was elderly. Dr. Benjamin specifically testified that Ms. Dockery had as much capacity as 75-80% of the citizens of Horry County. Ms. Dockery’s caregiver, Rita Cauthen, testified during the July 6, 2012 hearing that she had the capacity to communicate her wishes and desires and that, when she went out to dinner Ms. Dockery was always able to pay the bill and leave an appropriate tip on her own. During that same hearing Reagan Callaghan a geriatric case manager testified that Ms. Dockery had, in her opinion based upon her observations, capacity to direct her own care and to direct her estate.

Had Petitioner been allowed to testify without being bound by the Court to an unsigned Settlement Agreement he too would have testified that, based upon his observations and opinions, Ms. Dockery had capacity. As such, the statement that "The evidence in the record overwhelmingly supports the Probate Court's finding of capacity" contained in the Order Affirming Probate Court is inaccurate and misleading.

WHEREFORE, based upon the above stated reasons and applicable rules, Ms. Dockery, by and through her counsel, respectfully requests that this Court reconsider, alter or amend its Order Affirming Probate Court to correctly reflect the evidence supported in the Record on Appeal and contained in Ms. Dockery's Briefs.

Respectfully submitted,

THE BRITTAIN LAW FIRM, P.A.

A handwritten signature in black ink, appearing to read "T. Brittain", is written over a horizontal line.

Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
Myrtle Beach, SC 29577
(843) 449-8562; 497-6124

October 30, 2014
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE MATTER OF:

John C. Dockery and

Intervener: Emily Cheshire Dockery

vs.

Emily Carlson and Alice Preyer

Appellant(s),

Respondent(s).

FILED

HORRY COUNTY

2014 MAR 14 AM 9:03

MELANIE HUGGINS-WARD
CLERK OF COURT

IN THE CIRCUIT COURT

Appeal from Probate Court for Horry County

CASE NUMBER: 2010-GC-26-68 and 69

2014 CP 26 1635

NOTICE OF INTENT TO APPEAL TO
CIRCUIT COURT

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her/its Notice of Appellant's Intent to Appeal the Order/Sentence/Decree of the Probate Court dated March 10, 2014. Said Order/Sentence/Decree was received by the Appellant or Appellant's counsel on March 10, 2014. A copy of said Final Orders are attached.

SWORN to before me this 12th
day of March, 2014.

Kam Sandlin
Notary Public for: South Carolina

Respectfully submitted,

Signature: John C. Dockery
Print Name: John C. Dockery, III

Address: 6300 N. Ocean Blvd.
Myrtle Beach, SC 29572

My Commission Expires: 04/30/2019

Telephone (Work): none

(Home): 843-449-5206

(Cell): 843-907-1517

Email: none

Relationship to Decedent/Estate: _____

Attorney: W. H. Monckton, II
William H. Monckton, VI

Address: 1300 Professional Drive Suite 102
Myrtle Beach, SC 29577

Telephone: (843) 946-6556

Email: williammonckton@aol.com

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt of written notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.

2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(l) and the South Carolina Appellate Court Rules, as applicable.

FILED
STATE OF SOUTH CAROLINA Horry County
COUNTY OF HORRY 2014 MAR 17 AM 8:33
IN THE MATTER OF: MELANIE HUGGINS-WARD
Emily Chesire Dockery CLERK OF COURT

IN THE CIRCUIT COURT

Appeal from Probate Court for Horry County
CASE NUMBER: 2010-GC-26-68 and 69

John C. Dockery, III,

NOTICE OF INTENT TO APPEAL
TO THE CIRCUIT COURT

Appellant(s),)
vs.)
Emily Carlson and Alice Preyer,)
Respondent(s).)

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her Notice of Appellant's Intent to Appeal the Orders of the Probate Court dated March 10, 2014. Said Orders were received by the Appellant or Appellant's counsel on March 10, 2014. Copies of said Final Orders are attached.

Respectfully submitted,

SWORN to before me this 14th
day of March 20 14.

Notary Public for: South Carolina
My Commission Expires: 05/03/2021

Signature: Emily Chesire Dockery
Print Name: Emily Chesire Dockery

Address: 6300 N. Ocean Blvd.
Myrtle Beach, SC 29572
Telephone (Work): none
(Home): 843-449-5206
(Cell): 843-907-1517
Email: none

Attorney:

Thomas C. Brittain
Thomas C. Brittain, Esquire
Mary Madison Brittain Langway
Mary Madison Brittain Langway, Attorney
ATTORNEYS FOR APPELLANTS
THE BRITTAIN LAW FIRM, P.A.

Address: 4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: 843-449-8562
Email: tommy@brittainlawfirm.com and
marymadison@brittainlawfirm.com

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt of written notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.
2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(l) and the South Carolina Appellate Court Rules, as applicable.

FILED
STATE OF SOUTH CAROLINA Horry County

COUNTY OF HORRY 2014 MAR 17 AM 8:33

IN THE MATTER OF:
Emily Cheshire Dockery MELANIE HUGGINS-WARD
CLERK OF COURT

John C. Dockery, III,

IN THE CIRCUIT COURT

Appeal from Probate Court for Horry County
CASE NUMBER: 2010-GC-26-68 and 69

NOTICE OF INTENT TO APPEAL
TO THE CIRCUIT COURT

Appellant(s),)

vs.)

Emily Carlson and Alice Preyer,)

Respondent(s).)

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her Notice of Appellant's Intent to Appeal the Orders of the Probate Court dated March 10, 2014. Said Orders were received by the Appellant or Appellant's counsel on March 10, 2014. Copies of said Final Orders are attached.

SWORN to before me this 14th
day of March, 2014.
Michelle J. Blower
Notary Public for: South Carolina
My Commission Expires: 03/02/2021

Respectfully submitted,
Signature: John C. Dockery, III

Print Name: John C. Dockery, III, as Guardian of

Emily Cheshire Dockery

Address: 6300 N. Ocean Blvd.

Myrtle Beach, SC 29572

(Work): none

(Home): 843-449-5206

(Cell): 843-907-1517

Email: none

Attorney: Thomas C. Brittain

Thomas C. Brittain, Esquire

Mary Madison Brittain Langway
Mary Madison Brittain Langway, Attorney

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marymadison@brittainlawfirm.com

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt of written notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.

2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(I) and the South Carolina Appellate Court Rules, as applicable.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-26-1665

RECEIVED

APR 02 2015

SC Court of Appeals

In the Matter of Emily Cheshire Dockery

Emily Carlson and Alice Preyer.....Respondents,

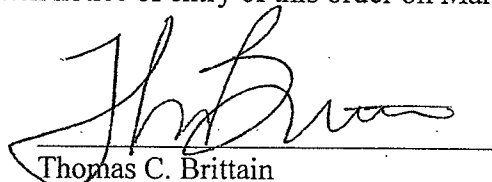
v.

Emily Cheshire Dockery and John C. Dockery, III,
of whom Emily Cheshire Dockery is the Appellant. Appellant.

NOTICE OF APPEAL

Emily Cheshire Dockery appeals the Order of the Honorable Larry B. Hyman, Jr. dated February 4, 2015. Appellant received written notice of entry of this order on March 4, 2015.

March 27, 2015



Thomas C. Brittain
Mary Madison B. Langway
4614 Oleander Dr.
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(843) 449-8562
Attorneys for Appellant

4/6/15

Other Counsel of Record:

James F. McCrackin, Esq.
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Attorney for Respondents Emily Carlson and Alice Preyer
843-946-5659

John C. Dockery, III
6300 North Ocean Boulevard
Myrtle Beach, South Carolina 29577
Party to this action whom is not a party to this appeal
843-449-5173

V. Lee Moore, Esq.
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P.O. Box 14737
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Court Appointed Guardian Ad Litem for Appellant
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