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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM Horry County
Court of Common Pleas

SC Court of Appeals

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2015-002095
Appellate Case No. 2015-002095

Donna Jensen Appellant,

v.

Matthew B. Wiseman and Peoples Underwriters, Inc. Respondents.

**RECORD ON APPEAL
VOLUME I**

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN,

Plaintiffs,

vs.

MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-2463

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

HORRY COUNTY
2015 AUG 20 PM 1:12
MELANIE L. WARD
CLERK OF COURT

This matter came before the Court on June 23, 2015 for a hearing on the Motion for Summary Judgment filed by Defendants Matthew B. Wiseman and Peoples Underwriters, Inc. (collectively referred to herein as "Peoples" or "Defendants"). The motion for summary judgment was heard following a hearing on the parties' pre-trial motions and after the parties selected a jury for the trial of this case, which trial was scheduled to go forward on the same day as the summary judgment hearing. Present at the hearing was counsel for Plaintiff Donna Jensen¹, Thomas C. Brittain, Esq. Also present at the hearing were Susan Taylor Wall, Esq., and Amanda C. Williams, Esq., counsel for Defendants. After considering the law, the pleadings filed by both parties, the motion for summary judgment and all attachments, the filings in opposition, the original deposition of Plaintiff Donna Jensen with exhibits, the deposition of Matthew Wiseman, and all evidence submitted in support and in opposition to Defendants' Motion, the Court concludes for the following reasons that Defendants' Motion for Summary Judgment shall be GRANTED.

¹ Plaintiff The Learning Station, CDC, LLC f/k/a Four J's & A D, LLC, d/b/a The Learning Station was dismissed pursuant to the Court's September 9, 2014 Order on Defendants' Motion to Dismiss on the grounds that the Daycare alleged no injury or damages, and thus, was not a real party in interest. Thus, Donna Jensen is the sole remaining Plaintiff in this case.

copy

I. STANDARD OF REVIEW

Rule 56, SCRPC, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). In ruling on a motion for summary judgment, the court may consider only the evidence in the record. Rule 56, SCRPC (the court may properly grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law”). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653-54, 661 S.E.2d 791, 796 (2008). “In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party.” *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 516, 759 S.E.2d 152, 156 (Ct. App. 2014).

II. UNDISPUTED FACTS

1. Plaintiff Donna Jensen (“Jensen”) is the owner of a daycare, The Learning Station CDC, LLC, f/k/a Four J’s & A D, LLC, d/b/a The Learning Station (“Daycare”).
2. Jensen opened the Daycare on or about 2005.
3. After procuring commercial insurance for the Daycare for a number of years through various insurance agencies, in 2010, the Daycare procured certain commercial insurance through Defendant Peoples Underwriters, Inc., an independent insurance agency in Horry

County, South Carolina, with the assistance of Matthew Wiseman, an insurance agent employed by Peoples.

4. When Peoples began assisting the Daycare in placing commercial insurance in 2010, Peoples was not the only insurance agency placing insurance for the Daycare.
5. Beginning in 2010, Peoples placed for the Daycare a commercial general liability policy, commercial property policy, commercial automobile insurance policy, and a commercial accident policy.
6. Peoples offered to place worker's compensation insurance, but Jensen chose not to procure this insurance through Peoples. Jensen told Peoples that she had worker's compensation insurance for the Daycare through a different company.
7. Jensen procured her personal automobile insurance through an agency other than Peoples.
8. On May 11, 2011, Jensen was seated and working at her desk when a car hit the side of the daycare building.
9. Jensen claims she was personally injured as a result of the accident.
10. Jensen recovered liability limits of \$25,000 from the at-fault driver's liability insurance carrier and, in exchange, gave the at-fault driver a covenant not to execute.
11. Jensen filed a claim with Allstate, her personal automobile insurance carrier, to recover her underinsured motorist ("UIM") limits of \$25,000. Allstate issued a check to Plaintiff in the amount of \$25,000.
12. Jensen testified that another insurance agent told her that she could not obtain worker's compensation insurance as the owner of the Daycare, and thus, she asserts that she did not have worker's compensation coverage at the time of the accident.
13. Jensen then filed a claim under the UIM provision of the Daycare's commercial automobile insurance policy with Selective Insurance Company ("Selective").

14. Selective denied the claim; in response, Jensen filed a declaratory judgment action which was removed to federal court.
15. In the declaratory judgment action, the District Court of South Carolina held in an Order dated June 19, 2013 that there was no coverage for the accident under the commercial automobile policy because Jensen was not in, on, getting in, on, or off, one of the Daycare's covered vehicles at the time of the accident.
16. Jensen thereafter filed the instant action claiming Defendants were negligent in placing the commercial automobile insurance policy because the policy did not cover Jensen for the accident on May 11, 2011.

III. DISCUSSION

A. **There is No Evidence to Support a Claim that Defendants Owed A Duty to Jensen Individually.**

The existence of a duty is a question of law for the court. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11-12, 620 S.E.2d 326, 329 (2005). If there is no duty, the defendant is entitled to judgment as a matter of law. *Simmons v. Tuomey Regional Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000). There is no evidence in the record that Peoples owed a duty to procure insurance on behalf of Donna Jensen individually. Jensen admits in her deposition that she had other agents who handled her personal insurance. She had her personal automobile insurance through Allstate for twenty years and she admits the limits of insurance and other decisions regarding her personal insurance were handled by her husband and were made independently of the Daycare's commercial insurance.

Q. So as far as you know the decision on what limits your husband selected for your personal auto were done completely independent of what was done for your business; is that right?

A. Two separate things.

(Jensen Dep. pp. 141:23-25 – 142:1-3)

Throughout her deposition, Jensen repeatedly acknowledged that the insurance placed by Peoples was for the Daycare. The named insured on the applications and policies was “Four J’s & a D, LLC” and Donna Jensen was not individually listed. There were no personal vehicles listed on the commercial automobile policy and the insurance application signed by Donna Jensen, on behalf of the Daycare, left the box for “additional insured” blank. Jensen had a duty, under the law, to read her policy. *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977). Because Jensen admittedly failed to read her policy, which was in her possession for a considerable time before the accident, and failed to ask questions regarding the policy, including the fact that she was not a named insured on the policy, under *Doub*, Jensen is barred from recovering from Defendants. Furthermore, Jensen is bound by the federal court’s Order, dated June 19, 2013, wherein the court held that the Daycare’s commercial automobile insurance policy was clear on its face that Jensen was not a named insured. Jensen did not appeal this Order.

The Court, in viewing the facts in the light most favorable to plaintiff, inquired at the June 23, 2015 hearing as to whether there was any evidence in the record that Jensen had an insurable interest. Counsel for Jensen stated that this issue never crossed his mind during the course of the litigation and confirmed that there was no evidence in the record that Jensen had an insurable interest. Although Jensen later told her attorney, during his oral argument opposing summary judgment, that the Daycare’s buses were titled in her name, there is no evidence in the record to support counsel’s statement. On a motion for summary judgment, the Court may only consider the evidence in the record. Rule 56, SCRCP (the court may properly grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and

that the moving party is entitled to judgment as a matter of law"). It is well-settled that argument of counsel is not evidence and cannot be considered on summary judgment. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991); *see also McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Accordingly, any statements by counsel for Defendants and counsel for Jensen regarding the ownership of the buses will not and cannot be considered by this Court in ruling on Defendants' Motion for Summary Judgment because statements of counsel are not evidence.

The only evidence in the record is that Defendants were asked to place commercial policies for the Daycare, not Jensen individually. Jensen repeatedly acknowledged in her deposition that she wanted commercial insurance through Peoples. In addition, the named insured on the applications, policies, and insurance cards all reflect the name of the business only. Because Plaintiff failed to present evidence to support a claim that Defendants owed her a duty individually, her claim fails as a matter of law.

B. There is No Evidence to Support a Claim that Defendants Breached A Duty to Jensen Individually.

Although the Court need not address the breach of duty issue where no duty exists, as set forth above, the Court notes that there is no evidence in the record that Defendants breached any duty to Jensen. First, Peoples' insurance expert has opined that Peoples complied with the standard of care in placing commercial insurance for the Daycare. Jensen has no expert to testify to the contrary. Without expert testimony, Jensen's claim of a breach of duty is unsupported and, in this case, directly contradicted by the testimony of Defendants' expert. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002) ("In South Carolina, a plaintiff in a professional

malpractice action is required to introduce expert testimony to establish the defendant's standard of care").

Pursuant to the Affidavit of Defendants' expert, Stuart Powell, Peoples properly titled the policy in the name of the Daycare, a limited liability company ("LLC"). In his affidavit, Mr. Powell attests that it is not the practice of insurance companies to include as a named insured the owner of an LLC under a commercial automobile policy because the added risk is not priced into the commercial policy and would be duplicative of the owner's personal automobile insurance. Indeed, Jensen admits in her deposition that she has no evidence that she could have been added as an individual named insured under the Daycare's commercial automobile insurance policy. Notably, both before and after the accident, when the Daycare's commercial automobile insurance policies were written through agencies other than Peoples, the Daycare's commercial automobile policies were titled in the same way and included the same limitations on UIM coverage as the policies placed by Peoples. There is no evidence in the record that Jensen made any material changes to the Daycare's commercial automobile policies after the accident or after filing the subject lawsuit.

Finally, there is evidence in the record, including the policy language, the federal court Order, and Mr. Wiseman's deposition, that the commercial automobile insurance placed for the Daycare through Peoples covered Jensen, her employees, and the children. As set forth in the federal court Order in the declaratory judgment action, the reason there was no coverage for Jensen for this specific accident was because she was sitting at her desk and was not in, on, getting in, on, or out of one of the Daycare's covered vehicles. Thus, there is no evidence that Defendants breached a duty to Jensen because Defendants placed a commercial automobile insurance policy that covered Jensen, just not for this particular accident, which accident Jensen admits in her deposition could not have been anticipated.

Based on the foregoing and viewing the facts in the light most favorable to Plaintiff, there is no evidence of a breach of duty by Defendants to Jensen and thus Plaintiff's claim fails for this additional reason.

C. Trotter is the Controlling Law.

Trotter v. State Farm Mutual Automobile Insurance Company, 297 S.C. 465, 377 S.E.2d 343a (Ct. App. 1988), is the controlling law in this case.² In *Trotter*, the plaintiff purchased a commercial automobile insurance policy for a truck that he used in the operation of his business. *Id.* at 469, 377 S.E.2d at 346. When he purchased the policy through defendant-insurance agency, he told the agency that he wanted "full protection" on his truck and explained his business, his employees, and how many miles the truck was driven. *Id.* The agency placed a commercial automobile insurance policy. The plaintiff and his employee were later involved in an automobile accident and the carrier denied coverage for the employee's injuries due to an exclusion in the policy for any injury to an employee of the insured arising out of his or her employment. *Id.* at 470, 377 S.E.2d at 346.

The *Trotter* court held that defendant-insurance agency was under no duty to advise the plaintiff of the employee exclusion in the policy or to advise him that he needed worker's compensation insurance. *Id.* at 473-74, 377 S.E.2d at 348. There was no evidence of an undertaking by the agent to advise him about his insurance needs. *Id.* at 472, 377 S.E.2d at 347.

² Plaintiff contends that *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969) is the controlling law. That case, however, is distinguishable from the subject action. In *Riddle-Duckworth*, the plaintiff purchased third party liability coverage for his place of business. The building contained an elevator and the plaintiff specifically asked the agent to procure a policy that covered the elevator. After the policy was issued, the plaintiff reviewed the policy and questioned the agent whether it covered the elevator and the agent told him that it did. The policy, however, did not cover the elevator, and thus, the insurance carrier denied coverage when the elevator fell and injured a third party. In the subject action, unlike *Riddle-Duckworth*, it is undisputed that Jensen did not read the policy and did not make a specific request for or pose a question about coverage for a workplace accident while not in a covered vehicle under the policy.

There was no additional consideration beyond the payment of premiums and no clear request from the plaintiff to the agent that his advice was being sought. *Id.* The court further held that “[a] request for ‘full coverage,’ ‘the best policy,’ or similar expressions does not place the agent under a duty to determine the insured’s full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase.” *Id.*

D. There is no evidence that Peoples expressly or impliedly undertook to advise Jensen personally.

“Generally, an insurer and its agents owe no duty to advise an insured.” *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347; *see also CRC Scrap Metal Recycling, LLC v. Hartford Cas. Ins. Co.*, 531 Fed. Appx. 333 (4th Cir. 2013); *Mullen v. State Farm Casualty and Fire Co.*, C/A No. 09-2392-JFA, 2010 WL 2228369 (D.S.C. 2010); *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005); *Carolina Prod. Maint. v. United States Fid. & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (1992). Such a duty may be assumed only if: (1) an agent expressly undertakes to advise the insured; or (2) an agent impliedly undertakes to advise the insured. *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347. An implied undertaking may be shown if: (1) the agent received consideration beyond a mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied upon. *Id.* The insured bears the burden of proving the undertaking. *Id.* Jensen has presented no competent evidence to satisfy her burden of proof.

a. There is no evidence that Peoples expressly undertook to advise.

Jensen presented no evidence to show that Peoples expressly undertook to advise her personally. Though Peoples made the initial contact with Jensen regarding commercial

insurance, this contact addressed only insurance for the Daycare, not Jensen personally. Thus, it does not rise to the level of an express undertaking by Peoples to advise Jensen personally. Similarly, Peoples' recommendation that the Daycare increase its underinsured motorist limits on the commercial automobile insurance policy to \$1 million does not rise to the level of an express undertaking to advise Jensen personally, particularly when the law requires that an insurance agent offer underinsured motorist coverage up to the limits of liability coverage on the policy. S.C. Code Ann. § 38-77-160. Under *Trotter*, an agent's simple recommendation that the insured raise his liability limits does not amount to a general undertaking to advise the insured about the policy. *Trotter*, 297 S.C. 465, 480, 377 S.E.2d 343, 352 (Ct. App. 1988).

b. There is no evidence that Peoples impliedly undertook to advise.

Jensen has failed to satisfy the elements of an implied undertaking by Peoples under the law set forth in *Trotter*. First, there is no evidence of additional consideration to Peoples beyond payment of a premium for the commercial automobile insurance policy. In addition, Jensen did not personally pay any money for the commercial insurance placed by Peoples. Rather, the premiums for the commercial policies were paid by the business as Jensen admits.

Second, there is no evidence of an implied undertaking through a course of dealing over an extended period of time. Neither Jensen nor the Daycare had an extended course of dealing with Peoples. Peoples contacted Jensen concerning commercial insurance in 2010, just one year before Jensen's accident. The evidence shows that the Daycare dealt with different insurance agencies before Peoples. In addition, when Jensen placed commercial insurance for the Daycare through Peoples, she chose to keep some of the commercial insurance with a prior agent, including worker's compensation insurance. As to personal insurance for Jensen, Jensen repeatedly testified in her deposition that the insurance placed through Peoples was for the Daycare and that she did not ask for personal automobile insurance through Peoples. Thus, there

was no course of dealing over an extended period of time that would put Peoples on notice that its advice regarding individual coverage was being sought and relied on. *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347.

Finally, there is no evidence that Jensen made a clear request for advice from Peoples regarding personal insurance coverage. Based on a review of the record, including the depositions of Donna Jensen, Matthew Wiseman, and the accompanying exhibits to those depositions, it is clear that the conversations between Wiseman and Jensen at the time of initial procurement of certain commercial insurance were limited. When Jensen placed certain of the Daycare's insurance through Peoples, she told Peoples, in an email, to focus only on building and liability insurance for the Daycare. Jensen testified that she did not request personal automobile insurance through Peoples because this coverage was handled by her husband through Allstate Insurance Company, not Peoples. After receiving the Daycare's commercial insurance, Jensen admits she did not ask Peoples if she would be covered for the type of accident at issue in this case, but rather only *assumed* she would have such coverage:

Q. Okay. Did you ask your agent if you would be covered for specifically this kind of incident?

A. I assumed that I would be covered for any incident. No one would have predicted this specific incident. That is ridiculous. I assumed I would be covered for any incident or injury.

(Jensen Dep. pp. 161:23-25 – 162:1-3.)

Under the law, a customer's "assumptions" are insufficient under the law to create an agreement regarding the purchase of insurance and the duty to advise. *Houck*, 366 S.C. at 16, 620 S.E.2d at 331; *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347 ("[t]here must be a clear oral or written agreement for a court to enforce"); see also *Hooters of Am. v. Phillips*, 39 F. Supp. 2d

582, 610 (D.S.C. 1998) (“[u]nder South Carolina law, in order for there to be an agreement, there must be a meeting of the minds of the parties”)).

Although Jensen alleges that she wanted “comprehensive coverage” from Peoples and requested that Peoples place insurance that would “cover herself, her employees, students and parents for any type of incident that may arise at her business,” under *Trotter*, a request to “cover me” and everyone who enters the Daycare’s building for any incident does not constitute a clear request for advice and creates no duty to advise. “A request for ‘full coverage,’ ‘the best policy,’ or similar expressions does not place the agent under a duty to determine the insured’s full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase.” *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347.

Jensen claims that Wiseman told her, after the accident, that she would be covered. Under the law, however, Jensen cannot seek to create an agreement that did not exist at the time of procurement. *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347 (holding a plaintiff “may not seek, after the fact, to have a court or jury create an undertaking favorable to him, if the parties themselves did not enter such an agreement.”)

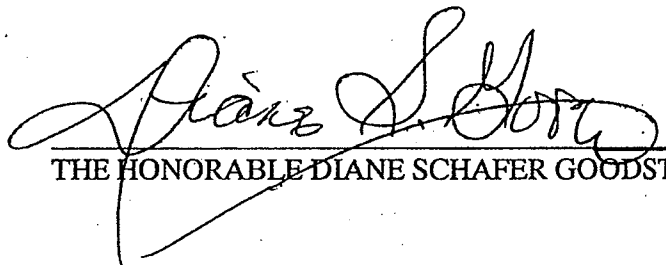
Nevertheless, taking the facts in the light most favorable to Jensen and assuming that Peoples told her, after the accident, that she “would be covered,” the only reasonable inference from the record is that Peoples was not referencing coverage under the commercial automobile policy. Peoples did not put the commercial automobile insurance carrier on notice until receiving a letter from Jensen’s attorney four months after the accident. Jensen’s accident, as stated in Mr. Powell’s expert affidavit, triggered worker’s compensation insurance, not commercial automobile insurance, and the record reflects that Jensen told Peoples she had procured worker’s compensation insurance through another company. Thus, like the plaintiff in

Trotter, worker's compensation insurance would have provided Jensen with an additional means of recovery for her workplace accident, but Jensen placed this coverage through another company, not through Peoples. Based on the foregoing, there is no evidence in the record of an implied undertaking by Peoples to advise Jensen personally on coverage.

IV. CONCLUSION

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's claims against Defendants be dismissed as a matter of law because she has not satisfied the elements of her negligence claim. Accordingly, Defendants' Motion for Summary Judgment is GRANTED and the case against Defendants is dismissed, with prejudice. In addition, Plaintiff's Motion for Summary Judgment is denied.

AND IT IS SO ORDERED.



THE HONORABLE DIANE SCHAFER GOODSTEIN

August 14, 2015
St. George, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Donna Jensen,

Plaintiff,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

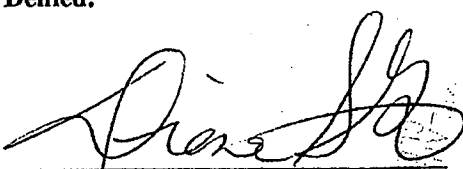
IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE No. 2012-CP-18-2797

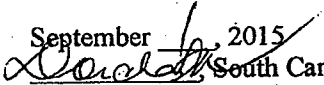
**ORDER DENYING MOTION TO
RECONSIDER, ALTER OR AMEND**

This matter is before the Court by way of the Plaintiff's Motion to Reconsider, Alter or Amend Order granting Defendants' Motion for Summary Judgment. The Plaintiff presents in his motion to reconsider several new pieces of evidence regarding the plaintiff's possible insurable interest in the company vehicles.¹ Statements of fact presented only in attorney's argument should not be considered by the court in determining whether a genuine issue of material fact exists. *See West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct.App.2000).

Furthermore, a party cannot use Rule 59(e) to present new evidence to the court. *See Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008). For the foregoing reasons the Court may not consider the new evidence presented in the Plaintiff's motion to reconsider. Therefore, the Plaintiff's motion fails to raise any novel issue for the Court's consideration. The Plaintiff's Motion to Alter or Amend Judgment is Denied.

AND IT IS SO ORDERED.


Judge Diane S. Goodstein

September 10, 2015

South Carolina

¹ There is no evidence that these documents were turned over during discovery.

Copy

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Donna Jensen,)
Plaintiff,)
vs.)
MATTHEW B. WISEMAN and PEOPLES)
UNDERWRITERS INC.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE No. 2012-CP-18-2797

ORDER DENYING MOTION FOR
NEW HEARING BASED ON NEWLY
DISCOVERED EVIDENCE

FILED
HORRY COUNTY
2015 OCT 14 AM 8:09
JULIA EUGENIS-WARD
CLERK OF COURT

This matter is before the Court by way of the Plaintiff's Motion for new hearing based on newly discovered evidence under Rule 60(b). To receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005).

The newly discovered evidence that is contemplated in this motion is evidence that was in the possession of the plaintiff at the time of the summary judgement motion but was not presented to the Court.¹ This evidence was subsequently presented to the Court in both the plaintiff's motion to reconsider and amended motion to reconsider which were both denied. Therefore, this evidence could have been presented to the Court at the time of the motion for summary judgment and cannot be considered newly discovered evidence as contemplated by

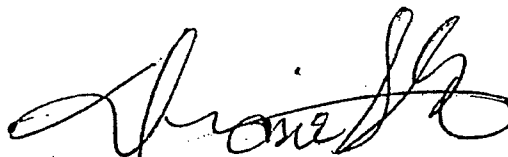
¹ During argument on this motion plaintiff's counsel turned to his client and then counsel indicated that the vehicles were registered in her name. Counsel failed to provide any evidence of ownership. As indicated in this Court's order denying plaintiff's motions to reconsider, our case law provides that statements of fact presented only in attorney's argument should not be considered by the court in determining whether a genuine issue of material fact exists. See *West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct.App.2000).

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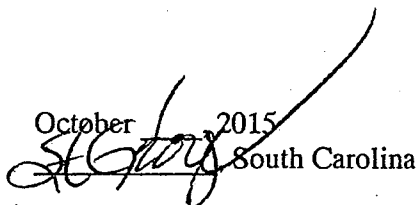
Rule 60(b). Evidence is not "newly discovered" if it is known to the party at trial and in the party's possession. *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct.App.2005).

Plaintiff's motion for new trial is **DENIED**.

AND IT IS SO ORDERED.



Judge Diane S. Goodstein

October 2015

South Carolina

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

Donna M. Jensen,	)	Civil Action No.: 4:12-cv-02133-RBH
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Selective Insurance Company of the	)	
Southeast,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Donna M. Jensen ("Plaintiff") filed this declaratory judgment action to determine the availability underinsured motorist ("UIM") benefits under a policy of insurance issued by Defendant Selective Insurance ("Defendant"). This matter is before the Court on Defendant's Motion for Summary Judgment [Doc. # 39]. For the reasons discussed herein, Defendant's Motion is granted.¹

Undisputed Facts

Plaintiff is the owner of Four J's & a D, LLC d/b/a The Learning Station ("Four J's"),² a day care facility. Defendant issued an insurance policy to Four J's which provided, among other benefits, UIM coverage under certain circumstances in an amount up to \$1,000,000. The policy also listed two separate 1995 Chevrolet 12-passenger vans as covered autos.

¹ Under Local Rule 7.08, "hearings on motions may be ordered by the Court in its discretion. Unless so ordered, motions may be determined without a hearing." The issues have been briefed by the parties, and the Court believes a hearing is not necessary.

² Four J's was originally a Plaintiff in this action, and Peoples Underwriters, Inc., the producer of the policy, was originally a Defendant in this action. However, in August 2012 the Court granted motions to dismiss filed by Defendant and Peoples Underwriters, Inc., which had the effect of eliminating both Four J's and Peoples Underwriters, Inc. as parties to this action. No party filed a motion requesting that the Court reconsider or amend this order.

On May 11, 2011, while Plaintiff was working at her desk in her office, Courtney Lynn Nelson ("Ms. Nelson") drove a car into the exterior wall of the office, causing injuries to Plaintiff. The parties agree that Plaintiff was not occupying either of the 1995 Chevrolet 12-passenger vans listed on the policy at the time of the accident.

Plaintiff filed this action seeking UIM benefits under Four J's policy.³ Plaintiff claims she was seeking individual protection when she acquired the policy issued to Four J's, and that she believe she was protected individually under the policy. Defendant argues Plaintiff was not an insured under the policy, and is thus not entitled to coverage.

Relevant Policy Provisions

The policy includes an endorsement titled "South Carolina Underinsured Motorists Coverage" which provides in pertinent part as follows:

A. Coverage

1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle". . . .

B. Who Is An Insured

If the Named Insured is designated in the Declarations as:

1. An individual, then the following are "insureds":
 - a. The Named insured and any "family members".

³ Plaintiff also sought coverage under a personal automobile policy with Allstate that included UIM. It is unclear how much Plaintiff received from Allstate. Further, Defendant alleges, and Plaintiff does not appear to dispute, that the insurance company for Ms. Nelson tendered \$25,000 to Plaintiff through Ms. Nelson's automobile liability policy.

b. Anyone else "occupying" a covered "auto"

....

2. A partnership limited liability company, corporation or any other form of organization, then the following are "insureds":

a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto"

....

c. The Named Insured for "property damage" only.

[See Policy, Doc. # 38-1, at 12.]

Standard of Review

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (holding that summary judgment is not "a disfavored procedural shortcut," rather, it is an important mechanism for weeding out "claims and defenses [that] have no factual bases").

If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or by "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

Regarding insurance policies specifically, South Carolina law⁴ subjects these policies “to the general rules of contract construction.” *M & M Corp. of S.C. v. AutoOwners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). We “interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.” *Id.*

Nevertheless, “the law is clear that, in construing an insurance contract, all of its provisions must be considered together.” *MGC Mgmt., Inc.*, 336 S.C. at 548, 520 S.E.2d. at 823. “[T]he court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so.” *Id.*

A court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary and popular meaning. *MGC Mgmt., Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d. 820, 823 (Ct. App. 1999); *see also State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 8–9, 530 S.E.2d 132, 136 (Ct. App. 2000) (“When a policy does not specifically define a term, the term should be defined according to the usual understanding of the term’s significance to the ordinary person.”). Thus, a court should not “torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties.” *Barrett*, 340 S.C. at 8, 530 S.E.2d at 135.

It is the insured’s burden to establish that a claim falls within the coverage of an insurance

⁴ The parties agree that the policy, which was issued to Four J’s in South Carolina, is governed by South Carolina law.

contract. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (S.C.1968). Alternatively, the insurer shoulders the burden of establishing the exclusions to coverage. *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565, 568 (1979).

Discussion

For the reasons discussed below, the Court finds that Plaintiff does not qualify as an insured under the unambiguous terms of the policy and the policy therefore does not afford UIM coverage under these circumstances.

In addition to the policy's definition of an "insured," South Carolina law defines an "insured" as follows:⁵

[T]he named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

S.C. Code Ann. § 38-77-30(7). Here, Plaintiff cannot meet either the statutory or policy definition of an insured.

First, Four J's was the only entity ever named as an insured under the policy. Plaintiff attempts to argue that the policy was ambiguous because it led Plaintiff to believe she was individually covered under the policy. This argument is simply untenable. The policy at issue is

⁵ Defendant's Motion discusses the distinction between Class I and Class II insureds. Under South Carolina law "[t]he two classes of insureds are: (1) the named insured, his spouse and relatives residing in his household; and (2) any person using, with the consent of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle." *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998). However, whether an insured is a Class I or Class II insured is relevant primarily on the issue of stacking. See *Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 211, 473 S.E.2d 843, 845 (Ct. App.1996). The issue here is not whether Plaintiff can stack coverage. Thus, the Court's analysis focuses on whether Plaintiff is covered under the policy at all.

plainly for a commercial enterprise as it identifies itself as a “Commercial Policy,” and includes a “Business Automobile Coverage Declaration.” [See Policy, Doc. # 38-1, at 1, 5.] In the description of the named insured, the policy lists the named insured as “FOUR JS & A D, LLC DBA THE LEARNING STATION,” and indicates in a subsequent box that the named insured is a “LTD LIABILITY.” [Id. at 1.] It is apparent that the insured is a business, and the subsequent description of the insured as a limited liability company bolsters this understanding. Further, on the Business Automobile Coverage Declaration, the policy lists the business of the named insured as “DAY CARE.” [Id. at 5.] Additionally, nowhere in the policy is Plaintiff listed as an insured. When examining the plain language of the policy as a whole, it is both clear and reasonable that the only named insured was Four J’s, a limited liability company that operated a day care.⁶

Second, because Four J’s is an LLC, Plaintiff cannot qualify as an insured as the company’s spouse, relative, or family member. [See Policy, Doc. # 38-1, at 12 (indicating that “family

⁶ Plaintiff appears to make a number of rather novel arguments with little citation to legal authority. Specifically, Plaintiff argues that Defendant has not provided a “trustworthy” policy because (1) the declarations page is unsigned; (2) while the declarations page states that the coverage period is from April 17, 2011, to April 17, 2012, the issue date of the policy is listed as May 22, 2012; and (3) the UIM endorsements are inadequate because they are unsigned and do not identify the named insured or contain key policy information. [See Resp., Doc. # 40-1, at 2–3.] These arguments are unavailing. First, as to any issues with the declarations page, including the date, Plaintiff attached an identical declarations page to her original complaint in this action. [See Compl., Doc. # 1-2, at 1.] The parties also filed a joint stipulation stating that Defendant “issued a policy of insurance to [Four J’s]. The relevant policy excerpts are attached . . .” [Stip. of Facts, Doc. # 38, at 1.] The attached policy also reveals an identical declarations page. [See Policy, Doc. # 38-1, at 1.] While the Court acknowledges that the “date issued” on the policy appears to occur after both the policy period and the accident at issue, no party disputes that the policy was in effect at the time of Plaintiff’s accident. Second, as to any challenge of the UIM endorsements, those endorsements were attached to the policy jointly submitted by the parties and this Court is to construe insurance contracts as a whole. [See Policy, Doc. # 38-1, at 12.] Moreover, page four of the policy itself specifically list the UIM endorsements. [Id. at 4.]

members” are only covered under the policy where the “named insured” is an individual and not a corporation).] *See also Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998) (“[A] corporation, as such, cannot have a spouse or family members.”).

Third, it is undisputed that Plaintiff was not occupying any of the vehicles covered under the policy at the time of the accident. [See Policy, Doc. # 38-1, at 12 (indicating that when the “named insured” is a corporation, “[a]nyone ‘occupying’ a covered ‘auto’” is also an insured).] “Moreover, she was not in, upon, getting in, on, out or off of either of those vehicles or any other vehicle at the time of the accident.” [Stip. of Facts, Doc. # 38, at 1.] *See also McWhite v. ACE Am. Ins. Co.*, No. 4:07-cv-01551, 2010 WL 1027872, at *6–8 (D.S.C. March 17, 2010), *aff’d*, 412 Fed. App’x 584 (4th Cir. 2011) (holding, under a similar definition of insured, that individual was not insured because he was not “occupying” a covered auto at the time of the accident).

Conclusion

Having thoroughly analyzed the record in this case, including the briefs filed by the parties and the respective arguments therein, the Court finds that because Plaintiff was neither a named insured nor occupying a covered auto at the time of the accident at issue, she is not entitled to UIM benefits under the policy’s plain and unambiguous terms.

It is **THEREFORE ORDERED** that Defendant’s Motion for Summary Judgment [Doc. # 39], is **GRANTED**, and Plaintiff’s declaratory judgment action is **DISMISSED**.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
June 18, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)
2015 MAR 30 PM 2:35) FIFTEENTH JUDICIAL CIRCUIT
Donna M. Jensen,) C/A No. 14-CP-26-819
MELANIE HUGGINS-WARD)
CLERK OF COURT)
Plaintiff,)
v.) **AWARD OF DAMAGES**
Courtney Lynn Nelson,)
Defendant.)

On March 16, 2015, attorney Thomas C. Brittain of the Horry County Bar, appeared before the Horry County Court of Common Pleas on behalf of Donna Jensen, Plaintiff in the above-referenced action and requested that the Court hear evidence, testimony and review documentation in connection with a Damages Hearing.

Further, Thomas C. Brittain handed up to the Court a consent order signed by Lisa Davis and Thomas C. Brittain. Ms. Davis, retained by Allstate Insurance Company, had assumed the defense of Ms. Nelson, the Defendant in the case pursuant to the underinsurance contract for insurance for Ms. Jensen. Further, Ms. Davis had been consulted by Thomas C. Brittain and on behalf of the Defendant had consented to the establishment of a date and time for the Damages Hearing.

Administrative Judge, Steven John, assigned such an order of consent and wrote in that it should be set forth at a term of Non-Jury Court.

Further, that Thomas C. Brittain on behalf of the Plaintiff introduced into evidence a letter dated February 12, 2015 addressed to Ms. Davis indicating that March 16, 2015 was established as the date for the Damages hearing and further, informed the Court that Ms. Davis did not plan to attend.

Further, Thomas C. Brittain advised the Court that the Plaintiff, Donna Jensen, had initiated a lawsuit against an insurance agency claiming that the insurance agency had negligently failed to provide with her with insurance coverage that would be relevant to this particular claim.

Mr. Brittain, attorney for the Plaintiff, made an opening statement informing the Court Ms. Jensen had been seated at her place of business, a day care center, which she owned in May of 2011 when the Defendant Nelson through a negligent act drove her car into the building jostling Ms. Jensen in a significant way.

Thereafter, Ms. Jensen was attended by a physician from Coastal Orthopedics in Conway, was inpatient at Conway Medical Center, that these physicians had to make a 3 to 4 inch incision in the front of her neck in an effort to repair several herniated discs.

Further, Ms. Jensen presented the Court with physical evidence of a significant scar in the front right section of her neck which was both indented and 3 to 4 inches long.

Ms. Jensen further testified that, as a part of her recovery, she began to experience significant discomfort through an "acid reflux type occurrence" significant in nature and eventually she had serious chest pains, throat pains, presented to the Conway Medical Center only to learn that based on the fact that she was taking on a regular basis in substantial quantities Advil and Prevacid, that she had an allergic reaction and her kidneys were at the point of failure.

Further, that she had never had acid reflux before, that tests indicated that her kidneys function was at 4%, that through the conscientious efforts of physicians including a period of dialysis and extended hospital stay Ms. Jensen has recovered to the point that her kidneys function now at 51%. Further, that she is 51 years old, she testified that she can no longer do the things she had done with her children who are in their teenage years, that she has become very much inactive based on these limitations, that she suffers pain on a daily basis, that she cannot sit

for very long. Further, that even though she operates a daycare center she cannot lift anything over 15 pounds, which means she cannot lift a child.

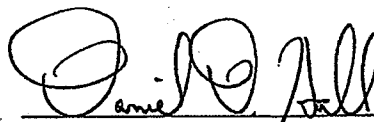
Further, that based on her inabilities and her significant limitations she has retained others to "run the daycare center". Her husband has given up his job. She has had to pay his salary and hire others to take up some of the responsibilities that she once took upon herself.

Further, that she testified that from a conservative stand point this was costing her Forty Thousand (\$40,000.00) Dollars a year based on additional sums she was paying to her husband and what he had lost and to other personnel who were assisting in the operation of the daycare center. Further, this has been the case since May of 2011, that she continues to suffer physically, that she has suffered emotional distress and mental anguish based on every day pain and the limitations that she faces with respect to what she can and cannot do.

Thereafter, her attorney Thomas C. Brittain asked the Court to award damages of Eight Hundred and Fifty Thousand (\$850,000.00) Dollars. The Court finds that based on the long-term nature of her injuries, the significance of those injuries, what she has lost and will lose based on her relatively young age, that this Plaintiff is entitled to an actual damage award of Eight Hundred and Fifty Thousand (\$850,000.000) Dollars due and payable based on the pleadings in the case, the evidence and the testimony.

Therefore, this Court orders that this Plaintiff is entitled to an award of Eight Hundred and Fifty Thousand (\$850,000.00) Dollars actual damages.

AND IT IS SO ORDERED this 18th day of March, 2015.



The Honorable Daniel Dewitt Hall

#300H

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2602463

Donna Jensen	Learning Station CDC LLC	Matthew B Wiseman	Peoples Underwriters Inc
Four Js & A D LLC	Learning Station		

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 12(b), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT GRANTED. FORMAL ORDER TO FOLLOW BY ATTY WALL WITHIN 30 DAYS.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Charles D. D... 212 6/23/2015

RECEIVED
7/6/15

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN, individually, and THE
LEARNING STATION, CDC, LLC f/k/a
FOUR J'S & A D, LLC d/b/a THE
LEARNING STATION,

Plaintiffs,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

TO: THE DEFENDANTS ABOVE NAMED:

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No. 14-CP-26-2463

SUMMONS
(Jury Trial Demanded)

14 APR 22 AM 8:17
CLERK OF COURT
JUDICIAL CIRCUIT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff's attorney, Thomas C. Brittain, at The Brittain Law Firm, P.A., 4614 Oleander Drive, Myrtle Beach, South Carolina 29577, within thirty (30) days after the service hereof, exclusive of the date of such service and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Dated at Myrtle Beach, South Carolina on the 21st day of April, 2014.

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449.8562
(843) 497.6124 (fax)
Attorney for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN, individually, and THE
LEARNING STATION, CDC, LLC f/k/a .
FOUR J'S & A D, LLC d/b/a THE
LEARNING STATION,

Plaintiffs,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No. 14-CP-26-2463

COMPLAINT
NEGLIGENCE
(Errors & Omissions)
(Jury Trial Demanded)

14 APR 22 AM 8:17
CLERK OF COURT
JAMES WARD

TO: THE ABOVE NAMED DEFENDANTS:

NOW COMES THOMAS C. BRITTAIN, on behalf of the Plaintiffs, and would respectfully show unto the Court:

1. That, Donna Jensen, hereinafter referred to as "Plaintiff Jensen" is a citizen and resident of the State of South Carolina, County of Horry.

2. That The Learning Station CDC, LLC f/k/a Four J'S & A D, LLC d/b/a The Learning Station, hereinafter referred to as "Plaintiff Business" is a corporation organized and existing under the laws of the State of South Carolina and operating and transacting business in the County of Horry, State of South Carolina.

3. That Plaintiff Jensen was operating as the principal of Plaintiff Business at all relevant times mentioned herein.

4. That Matthew B. Wiseman, hereinafter referred to as "Defendant Wiseman" upon information and belief, is a citizen and resident of the State of South Carolina, County of Horry.

5. That Peoples Underwriters Inc., hereinafter referred to as "Defendant Group" upon information and belief is a corporation organized and existing under the laws of the State of South Carolina and was operating and transacting business in the County of Horry (among others), State of South Carolina primarily as a producer of insurance policies.

6. Upon information and belief, at all relevant times mentioned herein, Defendant Wiseman was an agent and/or employee of Defendant Group and, as such, Defendant Group is vicariously liable for the actions of Defendant Wiseman.

7. That, in April 2011, Plaintiff Jensen did meet with Defendant Wiseman and purchased, through Defendant Group, commercial property coverage, commercial general liability coverage and commercial automobile coverage on two buses, as a part of an overall insurance policy.

8. That, prior to purchasing this policy, Plaintiff Jensen sat down and discussed with Defendant Wiseman her various insurance coverage needs, both individually and on behalf of Plaintiff Business.

9. That, specifically, Plaintiff Jensen discussed with Defendant Wiseman the importance of making sure that she, her employees and all of the students were fully covered under any and all events and circumstances included in the commercial policy.

10. That, based upon Defendant Wiseman's statements and assurances, Plaintiff Jensen purchased a large amount of under insurance coverage on the company vehicles as part of comprehensive coverage so as to protect both herself and others similarly situated to the extent of the law.

11. That Defendant Wiseman had a duty, as an agent and one earning a fee for this service, to listen carefully to Ms. Jensen's needs, ensure those needs were met and explain to her exactly what coverage she was purchasing.

12. That, based upon her conversation with Defendant Wiseman, Plaintiff Jensen believed she had available to her, as a part of the large commercial policy she purchased through Defendant Group, under insurance coverage in the amount of One Million Dollars on each of the two covered company vehicles.

13. Further, Plaintiff Jensen believed or was led to believe by Defendant Wiseman that the Two Million Dollars would be available to compensate her based upon the automobile insurance laws of the State of South Carolina.

14. Furthermore, Plaintiff Jensen and Plaintiff Business did, in fact, wholly pay such premiums as were requested and required by the Defendant Group.

15. That, on or about May 11, 2011 while at work, an at-fault driver drove into Plaintiff Business building. Further, that through this collision Plaintiff Jensen sustained significant injuries.

16. That Plaintiff Jensen, believing she was covered by the substantial under insurance policy she had purchased through Defendant Group, did not purchase significant under insurance coverage on her individual vehicles.

17. That Plaintiff Jensen reported this incident to representatives of Defendant Group and they too, upon information and belief, believed that she would be covered and that the Two Million Dollars under insurance policy provision would protect her and be made available to her as a part of an overall settlement of her claim.

18. That Plaintiff Jensen pursued a claim against the at-fault driver who had a limited amount of insurance coverage and no significant amounts of personal wealth.

19. That Plaintiff Jensen also made claims upon the policy that was issued through Defendant Group with Selective Insurance Company of the Southeast out of Charlotte, North Carolina.

20. That, after advising Plaintiff Jensen she would be covered in this regard, Plaintiff Jensen then learned from representatives of the Selective Insurance Company that they were denying her claim based upon some confusion concerning the way the policy was structured and who the parties were as far as purchasers of the policy.

21. Because her injuries are so significant and her surgeries have been numerous and her medical bills are so substantial, Plaintiff Jensen filed an action against Selective Insurance Company. Based upon some confusion with respect to the "named insured" and despite Plaintiff Jensen's wishes and expressed views to Defendant Wiseman and Defendant Group the federal court ruled that, based on "the way the policy was written", there was no coverage for her under the circumstances set forth in the pleading.

22. Therefore, Plaintiff Jensen has been left with serious injuries, substantial medical expenses, and great loss with no means of financial recovery.

23. That the Defendants, jointly and severally, were negligent and that this set of circumstances and current financial disaster is a direct and proximate result of one or more of the following particulars:

- (a) In failing to properly understand Plaintiff Jensen's requests and make sure she was individually covered;
- (b) In failing to accomplish for Plaintiff Jensen what she asked of them;
- (c) In failing to disclose to Plaintiff Jensen that based on the way the Defendant Wiseman and Defendant Group chose to title the policy she, personally, would not be entitled to any recovery; and
- (d) In breaching the fiduciary duty owed to the Plaintiffs by these Defendants.

24. That Defendants created a situation where Plaintiffs paid a substantial fee for an insurance policy with no potential for recovery as to under insurance. That Defendants failed to notify Plaintiffs of this problem. That Defendants negligently failed to inquire as to whom the proper parties should be. That Defendants failed to defend Plaintiff Jensen in connection with her claims against the carrier and instead took the carrier's position in this regard even though it was their decision to title the policies in the way it was titled or failed to discuss with Plaintiff Jensen and clarify that issue so that she could have personal coverage; all of which, are errors and omissions on the part of Defendant Wiseman and Defendant Group and inured to the detriment of Plaintiff Jensen.

25. That Plaintiff Jensen was owed a duty by Defendants. That said duty was negligently breached as set forth. That said breach was the proximate cause of damages as set forth herein.

WHEREFORE, Plaintiffs pray for damages against these Defendants for the full amount allowed under the under insurance policy to compensate Plaintiff Jensen for her injuries associated with the underlying automobile collision.

THE BRITAIN LAW FIRM, P.A.



Thomas C. Brittain, Esquire
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-8562
(843) 497-6124 Facsimile
Attorney for the Plaintiffs

April 21, 2014
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN, INDIVIDUALLY, AND
THE LEARNING STATION, CDC, LLC,
F/K/A FOUR J'S & A D, LLC, D/B/A THE
LEARNING STATION,

Plaintiffs,

vs.

MATTHEW B. WISEMAN AND PEOPLES
UNDERWRITERS, INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
)

C/A No.: 2014-CP-26-2463

**DEFENDANTS' ANSWER TO
COMPLAINT**

The Defendants, Matthew B. Wiseman and Peoples Underwriters, Inc. ("Defendants"), by and through their undersigned counsel, hereby answer the Plaintiffs' Complaint. In filing this Answer, Defendants reserve all arguments and defenses set forth in their Motion to Dismiss filed contemporaneously herewith.

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Complaint not hereinafter specifically admitted.
2. Defendants admit, upon information and belief, the allegations of Paragraphs 1 and 2 of the Complaint.
3. Defendants are without knowledge or information sufficient to form a belief as to the allegations of Paragraph 3 of the Complaint and therefore, deny the same and demand strict proof thereof.
4. Defendants admit the allegations of Paragraphs 4 of the Complaint.

5. As to the allegations of Paragraph 5 of the Complaint, Defendants admit only that Peoples Underwriters, Inc. is a corporation organized and existing under the laws of the State of South Carolina and was operating and transacting business in the County of Horry as an independent insurance agency and denies all remaining allegations of said Paragraph.

6. As to the allegations of Paragraph 6 of the Complaint, Defendants admit only that Defendant Wiseman was an employee of Defendant Group. The remaining allegations of said Paragraph constitute conclusions of law and therefore, require no response. To the extent a response is required, Defendants deny the same and demand strict proof thereof.

7. Defendants deny the allegations of Paragraph 7 of the Complaint and assert that Plaintiff Business, not Plaintiff Jensen individually, purchased certain commercial insurance through Defendant Group.

8. Defendants deny the allegations of Paragraphs 8, 9, and 10 of the Complaint.

9. Defendants deny the allegations of Paragraph 11 of the Complaint and assert that Defendants assisted Plaintiff Business, not Plaintiff Jensen individually, in purchasing the commercial insurance policy at issue.

10. Defendants deny the allegations of Paragraphs 12 and 13 of the Complaint.

11. Defendants deny the allegations of Paragraph 14 of the Complaint and assert that Defendant Group is an insurance agency, not an insurance carrier, and thus, does not require payment of premiums.

12. As to the allegations contained in Paragraph 15 of the Complaint, Defendants admit, upon information and belief, only that a driver drove into Plaintiff Business on or about May 11, 2011 and deny all remaining allegations of said Paragraph.

13. As to the allegations of Paragraph 16 of the Complaint, Defendants deny that Plaintiff Jensen individually purchased a "substantial underinsurance policy." As to the remaining allegations of Paragraph 16, Defendants are without knowledge or information sufficient to form a belief as to the allegations contained therein and therefore, deny the same and demand strict proof thereof.

14. Defendants deny the allegations of Paragraph 17 of the Complaint.

15. Defendants are without knowledge or information sufficient to form a belief as to the allegations of Paragraph 18 of the Complaint and therefore, deny the same and demand strict proof thereof.

16. Defendants admit the allegations of Paragraph 19 of the Complaint.

17. As to the allegations contained in Paragraph 20 of the Complaint, Defendants admit only that Selective Insurance Company denied Plaintiff Jensen's claim and deny all remaining allegations of said Paragraph.

18. As to the allegations contained in the first sentence of Paragraph 21 of the Complaint, Defendants admit only that Plaintiffs filed suit against Selective Insurance Company and deny the remaining allegations of said Paragraph. As to the allegations contained in the second sentence of Paragraph 21 of the Complaint, Defendants admit only that the federal court ruled there was no coverage for Plaintiff Jensen under the Selective Insurance policy and deny all remaining allegations of said Paragraph.

19. Defendants deny the allegations of Paragraphs 22, 23, 24, and 25 of the Complaint.

20. Defendants deny the WHEREFORE clause of the Complaint and the Prayer for Relief contained therein and specifically allege that Defendants have no liability to Plaintiffs and deny all damages claimed.

FOR A SECOND DEFENSE
(Failure to State a Claim)

21. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that each cause of action in Plaintiffs' Complaint fails to state a claim upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Failure to Mitigate)

22. Further answering the Complaint, and as and for a further defense thereto, upon information and belief, Plaintiffs have failed to mitigate their damages, which are expressly denied, and their failure to do so constitutes a bar and/or limitation on Plaintiffs' ability to recover against Defendants.

FOR A FOURTH DEFENSE
(Comparative Negligence)

23. Further answering the Complaint, and as and for a further defense thereto, Defendants would allege and show that even if Defendants were negligent in any respect, which is denied, Plaintiffs were comparatively negligent and/or otherwise at fault, which fault exceeded any fault on the part of Defendants, which is denied, and which fault proximately caused Plaintiffs' alleged damages, if any, which are denied, so as to bar any recovery herein pursuant to the doctrine of comparative negligence. Alternatively, Plaintiffs were comparatively negligent and/or otherwise at fault in an amount equal to or less than any fault of Defendants, which is denied, which fault proximately caused Plaintiffs' alleged damages, if any, which are denied, so

as to proportionally reduce any recovery herein pursuant to the doctrine of comparative negligence.

FOR A FIFTH DEFENSE
(Intervening/Superseding Acts)

24. Further answering the Complaint, and as and for a further defense thereto, any damages sustained by Plaintiffs, which are denied, were solely caused by the acts or omissions of parties or persons other than Defendants, over whom Defendants had no control, which acts or omissions constitute the intervening and/or superseding cause of Plaintiffs' alleged damages, if any, which are denied, and bar Plaintiffs' claims in the Complaint.

FOR A SIXTH DEFENSE
(Negligence of Third Parties)

25. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that any injuries and damages allegedly suffered by Plaintiffs, which are denied, were due to or caused by third persons over whom Defendants had no control, whose actions caused the alleged damages, if any, which are denied.

FOR A SEVENTH DEFENSE
(Res Judicata/Collateral Estoppel)

26. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that Plaintiffs' claims are barred by the doctrines of res judicata and/or collateral estoppel.

FOR AN EIGHTH DEFENSE
(Lack of Standing)

27. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that Plaintiffs' claims are barred because Plaintiffs lack standing to assert these claims.

FOR A NINTH DEFENSE
(No Damages)

28. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that Plaintiff The Learning Station, CDC, LLC f/k/a Four J's & A D, LLC, d/b/a The Learning Stations' claims are barred because it has neither suffered damages nor has it alleged any damages in the Complaint.

FOR A TENTH DEFENSE
(Waiver and Estoppel)

29. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that Plaintiffs' claims are or may be barred by the doctrines of waiver and estoppel.

FOR AN ELEVENTH DEFENSE
(Reservation of Rights)

30. Defendants hereby give notice that they reserve the right to assert, and do not waive, any additional or further defenses as may be revealed by additional information acquired during discovery or otherwise, and reserve the right to amend this Answer to assert any such defenses.

31. WHEREFORE, having answered the Complaint herein, Defendants pray that the same be dismissed as to it and the relief demanded by Plaintiffs be denied; that costs and fees be awarded to Defendants; and for such other relief as this Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS
MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.

May 20, 2014

Charleston, South Carolina

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State of South Carolina) Court of Common Pleas
County of Horry) 2014-CP-26-02463

Donna Jensen)
vs.) Transcript of Record
Matthew B. Wiseman and) (Pretrial Motions)
Peoples Underwriters,)
Inc.)

June 22, 2015
Conway, South Carolina

BEFORE:

Honorable Diane S. Goodstein, Judge.

APPEARANCES:

Thomas C. Brittain, Esq.
Attorneys for the Plaintiff

Susan Taylor Wall, Esq.
Attorneys for the Defendant

COPY

Teresa J. F. Bautz, RPR
Official Court Reporter

1 (The hearing commenced at approximately 3:58 p.m.)

2 THE COURT: All right, Plaintiff's motions.

3 MR. BRITTAIN: Yes. Your Honor, we have a motion
4 for summary judgment which, to be honest with you, my
5 experience with summary judgments these days is it
6 would just be wasting our time to hear them on either
7 side. I've gone up there, and if you win them, you
8 come back and have to try it again. So I'm prepared to
9 withdraw my motion for summary judgment and make one at
10 the close --

11 THE COURT: In a directed verdict?

12 MR. BRITTAIN: Yes, right.

13 THE COURT: Got it.

14 MR. BRITTAIN: Right. We do have a motion to
15 prevent certain things in this trial.

16 THE COURT: Okay.

17 MR. BRITTAIN: And if you would give me a minute,
18 I know you have sat patiently through two long
19 winded --

20 THE COURT: No, no, this is your time.

21 MR. BRITTAIN: -- two long-winded presentations.

22 THE COURT: That's not for any of you to be
23 concerned about.

24 MR. BRITTAIN: Because these are fine lawyers, and
25 I've dealt with them over the years, and they are great

1 lawyers. And we have a very different view of what
2 we're getting ready to do for the next couple of days.

3 MS. WALL: Your Honor, may I just interrupt for a
4 moment, and I don't know if you want to do these
5 motions in order, but we actually filed a motion to
6 strike before the motions in limine either by Plaintiff
7 or Defendants were filed. So just wanted to --

8 MR. BRITTAIN: And we can -- let me just give you
9 the factual background, then if you want to hear
10 Susan's first, that's fine with me.

11 THE COURT: Okay, all right.

12 MR. BRITTAIN: This is -- this is something I'm
13 familiar with, this is at its essence an automobile
14 collision. My client, Donna Jensen, was injured when a
15 lady, Ms. Nelson, drove her vehicle into a building
16 where Ms. Jensen worked. Ms. Jensen is a fine lady, no
17 record of any kind, just a hard-working business woman,
18 owned a day care for many years.

19 And so there's an underlying process where an
20 action was filed against Ms. Nelson for injuries that
21 she sustained in that collision. She was not in her
22 car, she was sitting at her desk, all right. So that
23 lawsuit is going on like you've seen a million of them,
24 that she drove where she shouldn't have, foot off the
25 brake, it hit the building, Ms. Jensen got hurt.

1 Now, Ms. Jensen had been called by Mr. Wiseman
2 who's in the courtroom, one of the Defendants, prior to
3 this. And he said to her words to this effect, having
4 looked at insurance stuff for a day care center, why
5 don't you come in and see me and let me discuss that
6 sort of thing with you, all right, which she does.

7 And part of that discussion, and you'll hear this
8 testimony if we go forward, is they come to a page that
9 deals with underinsurance coverage. And Ms. Jensen
10 says that she tells Mr. Wiseman, well, I want to make
11 sure that I get underinsurance coverage that will
12 protect me, and that he will say he doesn't recall
13 exactly how that was. But they increased the
14 underinsurance coverage to a million dollars.

15 So after this collision he comes out there to talk
16 with her about everything. And she asked him, you
17 know, hey, I'm covered; right? Yes, you are. She says
18 he says yes. He says he does not recall saying that,
19 doesn't dispute it. All right.

20 So we make a claim against that underinsurance
21 coverage because it's a million dollars. She wasn't
22 near the car. Her own automobile policy is a small
23 underinsurance coverage. So the carrier, then, to our
24 surprise and I think Mr. Wiseman's too, says there's no
25 coverage here.

1 So the first thing that's done is a declaratory
2 judgment action is filed and taken and removed to
3 Federal Court. And you can see Judge Hall's order, but
4 basically it said, among other things, the way the
5 policy was written, she's not covered. Okay.

6 So here again, this underlying automobile
7 insurance case is proceeding. Lisa Poe Davis is
8 representing Ms. Nelson, of the Horry County Bar, very
9 fine lawyer. And so then we file this action, saying,
10 hey, look, we had this conversation about covering us,
11 and the way you did this we're not covered. And we've
12 got a big case going on over here.

13 So this case is going on while the underlying
14 automobile insurance case is going on. And we have a
15 damages hearing in the underlying automobile insurance
16 case. Judge Hall heard the testimony and awarded my
17 client \$850,000. There was never an appeal from that
18 order. Nobody intervened or tried to get in the case,
19 it was issued, and this is the way I see it, that part
20 of this has been done.

21 Now, Ms. Wall and them want to go back into the
22 damages issues here. See, to me this is a simple case
23 of did he have a duty to advise her, properly obtain
24 insurance for her under the provisional cases in this
25 area. And did he fail to do so. If he did the damages

1 are already established by Court order. I don't want
2 to go back and have to try to prove all my damages
3 again in this case, because this case is not part of
4 that one. This is a separate action.

5 So that's the first motion we have. She wants to
6 strike Judge Hall's order for damages.

7 MS. WALL: Your Honor, may I respond to that now
8 before we go into yet another motion?

9 MR. BRITTAIN: Okay, yes.

10 MS. WALL: Thank you, Your Honor.

11 THE COURT: Sure.

12 MS. WALL: It's fundamental constitutional law,
13 you can't use an award of judgment in a separate case
14 wherein my client was not a party. It's just as simple
15 as that. The United States Supreme Court has so
16 stated, and as has every other court in the nation.

17 My clients, the Defendants in this lawsuit, were
18 not defendants in the personal injury action. It is
19 not my job to -- he suggests that because I'm a member
20 of the bar, I'm supposed to know what's going on in
21 other cases and go and intervene. That's not my job to
22 intervene, and in fact my clients wouldn't even have
23 any basis to intervene, but it doesn't matter anyway.

24 The fundamental constitutional law is if you are
25 not a party or a privy to a party in a lawsuit, another

1 party cannot use the findings in that case against you.
2 So that damages award of \$850,000 cannot be used in
3 this case. And there's another reason why not, that it
4 cannot be. This is a case of insurance agency
5 malpractice, it's a negligence case. Every negligence
6 case, every malpractice action, there are four elements
7 that the plaintiff has the burden of proving to the
8 jury.

9 The first element is the requisite relationship
10 giving rise to a duty. The second is the duty itself,
11 what is that duty. The third is a breach of that duty,
12 and then the fourth are damages proximately caused.
13 The proximate cause and the damages must be proved
14 within that case, that case against the insurance agent
15 which we are here about today.

16 So the Plaintiff has four elements that he has to
17 prove in this case before this jury. He can't short
18 circuit this case and say, well, too bad for you, I
19 don't have to do -- I've already got an award in a
20 completely separate case from a judge, and it's
21 \$850,000, therefore I get to use that here. He does
22 not, he cannot, because he has to prove his four
23 elements in this case before this jury, and it is
24 against Constitutional law, we absolutely, our due
25 process rights, our Defendant's due process rights, is

1 to examine, cross examine the allegations of damages in
2 this case.

3 Now, Your Honor, he talks about -- I lost my train
4 of thought, I'm sorry. Oh, he's talking about that as
5 part of his discussion with Your Honor on this issue of
6 whether or not he can use this judgment. And I do want
7 to mention, Your Honor, that -- and we have this in our
8 brief -- that award of damages was awarded by the Court
9 with no -- the party in opposition, the at-fault
10 driver, was not there. There was no one there.

11 But be that as it may, he mentions that the
12 plaintiff here went to my client, Matt Wiseman, to get
13 commercial insurance.

14 MR. BRITTAIN: It was the other way around, Ms.
15 Wall, your client called my client.

16 MS. WALL: Fine, my client called your client.
17 But, Your Honor, the point is they got together about
18 commercial insurance. She's admitted repeatedly that
19 she was not there for personal insurance, her husband
20 handled personal insurance. She didn't ask for any
21 personal insurance from Mr. Wiseman, it was all
22 commercial insurance for her day care.

23 Mr. Brittain said to you that Mr. Wiseman placed
24 commercial insurance for the day care, and one of those
25 elements of commercial insurance is a commercial auto

1 policy. And that's really what's going on in this
2 lawsuit, we'll be focussing on the commercial auto
3 policy. And he concluded by telling you that Donna
4 Jensen allegedly said that she wanted to be sure that
5 the UIM coverage covered her under the commercial auto
6 policy. Well, it does cover her. But it does not
7 cover her for this particular accident.

8 And why is that, because it's a workplace
9 accident, she was sitting at her desk. She was not in
10 the covered auto, she wasn't around the covered auto.
11 And that's what a commercial auto policy does. She was
12 at her desk in her building, in her day care. That is
13 a workers' compensation injury, it is a workplace
14 injury. Her workers' compensation insurance pays for
15 that.

16 The undisputed evidence in this case is that my
17 client, Matt Wiseman, offered to her, do you want me to
18 get the day care a workers comp policy. She said, no,
19 no, I already have that through another agent.

20 So not only can they not use the damages award
21 that they've been awarded or that she has been awarded
22 in a completely separate case, the personal injury
23 action. This, Your Honor, is not a personal injury
24 action. This action is a negligence action where all
25 four elements have to be met and proven by this

1 Plaintiff to this jury.

2 And then I'll argue the other ones when we get to
3 them, Your Honor. But that's my response to whether or
4 not they can be allowed or even mention that she has
5 been awarded in a personal injury lawsuit against the
6 at-fault driver and awarded \$850,000. And of course
7 our position is she absolutely cannot because it would
8 be a violation of the Defendants' in this case due
9 process rights.

10 THE COURT: I understand. Yes, sir.

11 MR. BRITTAIN: Briefly, Your Honor, since this
12 part is my motion, I guess you're kind of both of them.
13 My theory is when they start arguing United States
14 Constitution against you, you win it. There is no --
15 this is a simple automobile process in South Carolina.
16 And I think that, you know, these are the kind of
17 things I have cut my teeth on.

18 This is how it's done. You file the action, you
19 do a covenant with the tortfeasor, you proceed with the
20 case. The damages were so substantial in this case, no
21 reason -- no wonder Ms. Davis didn't come. She was
22 notified to be there for the Defendant. She didn't
23 come. We came in open court and put up our testimony,
24 the hundreds of thousands of medical bills, all the
25 complications associated with it.

1 Judge Hall strikes me as a very fair man, and he
2 issued an order.. Now, I'm not even sure that this
3 Court has the jurisdiction to change that order, let
4 alone, you know, all of a sudden retry what our damages
5 are. But here again, we both made our points on that.

6 I want not only to put it into evidence, I want it
7 to be the law of the case. Then there's no challenge
8 to it, no challenge has ever been made to it. The
9 cases that Ms. Wall cites deal with liability findings,
10 not the process we're talking about where you've got
11 defendant A and defendant B, and you take defendant A
12 and you litigate whether or not there's fault. And
13 then you try to turn around and apply that to defendant
14 B. We're not talking about a situation here.

15 Here what we're doing, we have an established
16 process in the South Carolina court system to determine
17 an amount of damages in an automobile case. And that's
18 what we did.

19 We also have responsibilities as professionals, a
20 lawyer, a doctor, an insurance person. And if you have
21 a duty and you fail to deliver under that duty, then
22 you may be responsible for damages. And if they've
23 been established in a proper procedure, that's it. You
24 don't come back in and start arguing, hey, you know, if
25 I had to do it and I preached it to you, I think you

1 were exaggerating your damages. There was another time
2 for that solid case. So that's where we differ
3 significantly.

4 MS. WALL: Your Honor, if I might respond to
5 that --

6 THE COURT: Well, hold on a second. All right,
7 let me ask this question. What if this Defendant in
8 fact does believe that the damages, just arguendo, that
9 this Defendant does believe that the amount of damages
10 is defensible. And what if this Defendant wishes to
11 cross examine, wishes to raise the issues of damages?

12 Because typically, normally if you have -- for
13 example, if you have a defendant and the insurance
14 company fails to appear, goes into default, you then
15 have a default hearing, you prove your damages. And
16 then the at-fault driver turns around and looks at the
17 insurance company and says, you have a problem.

18 That's not this circumstance. This is an
19 independent person from the process. This is a
20 separate action, it is a negligence action. And the
21 question would be what damages were caused to this
22 plaintiff as a result, you would argue, a direct result
23 of the negligence of this insurance agent, agency;
24 right?

25 MR. BRITTAIN: Yes. I mean, yeah. And I would

1 say that because of the way this process works, that
2 part of the equation in a normal course of affairs has
3 been decided. We can't have this jury second guessing
4 Judge Hall's decision as to how much damages Ms. Jensen
5 suffered. I mean, it just happens to have evolved this
6 way where the only real question in this case is, as
7 Ms. Wall has set out, was there a duty, was it
8 undertaken, and was there a breach.

9 We know what the damages are. She's got \$850,000
10 worth of damages. But, I mean, I don't -- they take
11 the position they don't even have any obligation or
12 responsibility. I can't sue them in that case. That
13 first case is about a wreck. I can't sue Matt Wiseman
14 in that case. And if they want to participate to hold
15 down the damages number or do anything, then they
16 intervene. If they can't intervene or don't intervene,
17 that's not my duty or responsibility.

18 You think about it for a second, Your Honor.
19 Let's say that it comes before you and you issue a
20 decision in a case where you write the order, what a
21 person is entitled to. And then three months later
22 another Court is making the same determinations that
23 you've already issued an order on, made without an
24 appeal or an objection. And I can't -- there's no way
25 tomorrow I'm going to have the doctors, the things.

1 I'm going to be -- if I'm required to prove my damages
2 again, then I won't be able to do that well tomorrow.
3 And I want you to know that, Ms. Jensen. And there's
4 no reason for me to have to do that, I've already done
5 it once. And I don't have just an opinion, I have got
6 a court order from a circuit judge that has never been
7 appealed.

8 So, and I don't think it comes up that much, but I
9 think the process is clear. This Court's position
10 should be damages are not an issue, they've been
11 decided.

12 MS. WALL: Your Honor, if I --

13 THE COURT: Well, it's not a creature -- it's not
14 a creature of collateral estoppel; right?

15 MR. BRITTAIN: That's right.

16 THE COURT: It can't be.

17 MR. BRITTAIN: That's right.

18 THE COURT: It can't be.

19 MS. WALL: I'm sorry?

20 THE COURT: This is not a creature of collateral
21 estoppel; right? But he's not collaterally estopped
22 to -- in other words --

23 MS. WALL: Absolutely not. And here's the
24 fundamental disconnect that is happening in the
25 argument that Mr. Brittain is trying to give to the

1 Court. In an agency malpractice case just like any
2 professional malpractice case, you have to prove, they
3 have to prove, the Plaintiff has to prove, those
4 damages that are proximately caused by the alleged
5 negligence. In this case, he has to prove there was a
6 different policy.

7 THE COURT: Well, let me stop for this reason.

8 MS. WALL: Sure.

9 THE COURT: Let's say, for example, let's say, for
10 example, that the conversation -- let's say there were
11 e-mails, there were e-mails going back and forth. And
12 let's say that this particular plaintiff said to this
13 agent, I want -- I don't care what you call it, you can
14 call it an umbrella, you can call it -- I don't care
15 what you call it, but I want to have coverage that
16 covers me in the event that I have someone run that
17 stop sign, because I've been worried about that
18 particular stop sign for the last 20 years.

19 I think somebody is going to run that stop sign
20 and run into this building and hurt me. And I want you
21 to be sure that I have available to me individually a
22 hundred thousand dollars worth of coverage so that if
23 that person doesn't have any insurance or doesn't have
24 enough insurance, I got a hundred thousand dollars
25 worth of insurance to cover me.

1 So the damages in that case, Mr. Brittain, are a
2 hundred thousand dollars; right?

3 MS. WALL: It would be limited by what policy
4 could have been placed.

5 THE COURT: But that's what you're talking about
6 in terms of proof of damages.

7 MS. WALL: But there's no policy that could have
8 been placed here.

9 THE COURT: I'm talking, focusing on the damages,
10 in other words --

11 MS. WALL: Well, I am, too.

12 THE COURT: In other words, the damages for the
13 personal injury are not necessarily the damages in the
14 negligence suit.

15 MS. WALL: Absolutely, Your Honor. Because what
16 she got an award for, it was just against the at-fault
17 driver. And she said, I have \$200,000 worth of medical
18 bills, and I want you, judge, to multiply that times
19 four -- which is what happened here, because it's
20 \$850,000 for my pain and suffering and everything else.

21 Well, we all know insurance policies don't work
22 that way to begin with. And in an insurance agency
23 action when you have an action against an agent, it's
24 completely different from an action against the
25 at-fault driver. Against the agent you have to prove,

1 well, gee, I told you all of these things, and I as a
2 plaintiff must prove that you could have gotten me a
3 policy that would have covered me for this accident in
4 the amount of whatever and after my accident would have
5 paid. That's all part of the proof that she must have
6 in this case.

7 She can't simply come in -- and Mr. Brittain seems
8 to think there's no case law. I mean, the case law is
9 replete. It says, due process prohibits estopping a
10 litigant who never had a chance to present their
11 evidence and arguments on a claim. My client wasn't --
12 he admits he didn't sue my client in the automobile
13 accident case against the at-fault driver. Of course
14 he didn't, we weren't part of that action.

15 Despite the fact that there is an adjudication of
16 the identical issue, that's United States Supreme
17 Court. He says I didn't cite any cases, he says that
18 only -- that doesn't go to damages, sure, it does.

19 Here's a case right here. And it's a defendant
20 insurance agency case. And it says: The defendant
21 insurance agency was not bound by damages awarded by
22 plaintiff in the personal injury lawsuit because the
23 defendant insurance agent was not a party to that
24 action and had no opportunity to challenge the
25 evidence, cross-examine the witnesses or challenge the

1 motion for additur. Apparently there was an additur in
2 that case.

3 But the point is, of course, that is basic black
4 letter law. My client has to have the opportunity to
5 challenge her claim of damages. She has the burden to
6 prove that my client could have placed a policy, a
7 commercial auto policy, that would have covered her and
8 that if it had so been placed, it would have covered
9 her for damages.

10 She can do none of those things. And, in fact,
11 Your Honor, the Plaintiff doesn't have an expert. So
12 he's going to fail on that alone.

13 MR. BRITTAIN: We don't need an expert. This is a
14 case where Mr. Wiseman has admitted everything I need
15 in this case to prove my case. And he's done it
16 because he's a fine person, by the way, and had a
17 chance maybe to say something different and protect
18 himself. But he's basically telling the truth.

19 But here's where these things get complex, judge.
20 And you can argue them all day long. I ask you to use
21 your noggin. On any case that involves underinsurance
22 coverage, we're in a whole separate world here. This
23 is how the job is done. Any case that she cites will
24 be different in terms of these facts. We march
25 forward, we settle or we prove our cases.

1 The insurance agent over here, and like I said,
2 this was going on, maybe they could have filed a motion
3 and said, hey, we want to be heard on this, and a judge
4 said no. That never took place. That would have
5 created a little bit of a different situation than what
6 we've got here. We marched forward and we didn't go in
7 there and tell the judge to multiply it by four, I have
8 never done anything like that. We put the evidence up
9 of how much wages she lost, how much her medical bills
10 were, all done in accordance with the law and proper
11 procedures.

12 So it's just one of those cases that if he didn't
13 give her an underinsurance policy to cover her in this
14 situation, if, and if he should have or told her he
15 could not, then this is what she lost. And that's
16 just -- it's just that simple. Like I said, for us to
17 go back in this case with an agent --

18 THE COURT: Let me ask you this question, Mr.
19 Brittain. It is your client's position that she --
20 that he was negligent for failing to provide for her an
21 insurance policy that would cover her...

22 MR. BRITTAIN: In this instance and, you know,
23 when you're not in your vehicle and underinsurance
24 coverage. And see, like I said, keep this in mind.
25 And there are two cases on point Ms. Wall and I had

1 briefed on, we did brief them for Judge Hyman. He
2 never ruled on the summary judgment motion. But there
3 are two cases on point and they deal with this
4 conversation that's taking place between an agent and
5 an insured.

6 There's a Trotter case which sort of helps her
7 side, and there's a case on point for us, two cases,
8 that we would say we set them out and compared them.
9 And we handed one of those up to you, and make sure you
10 get to chance to take a look at them.

11 But where there's a disconnect with me and
12 Ms. Wall is that underinsurance, the law says what it
13 is. There's a law in South Carolina that says what it
14 is. And you can't buy a policy provision, say, hey,
15 this is a commercial policy, and you got to be in the
16 bus in order to get underinsurance, okay.

17 There's a law in South Carolina, and that says if
18 you have two underinsurance policies and you're not in
19 your vehicle, you can pick the largest one, and there's
20 no insurance company in the world that can change that,
21 that's statutory law.

22 So here's what we're saying, we asked to be
23 covered, you raise the amount. So when we got hit and
24 weren't in either one of those cars, we wanted to step
25 over here and take the million-dollar policy. And you

1 thought we could because you thought we were covered.
2 You know, I thought I was covered if the agent thought
3 I was covered. And, low and behold, I'm not covered.
4 And I've lost \$850,000, and it's not enough insurance
5 to cover me.

6 So who's going to suffer, the doctors and the
7 hospitals that haven't been paid, Ms. Jensen who lost
8 all her wages, or the insurance agent who had a duty to
9 either inform her or get her the required insurance
10 coverage? It's -- like I said, there's no rancor in
11 this, there's no hard feelings in this. It's just
12 about assigning responsibility.

13 But if we came in here now and litigate damages,
14 think of what this creates. Judge Hall's order is out
15 there, un-appealed, sitting there. Now, we come in
16 here and have another trial. So you got another
17 tribunal that says, you know what, she wasn't hurt.
18 They're not going to be asking what kind of problems
19 Mr. Wiseman has had, they are going to be saying, oh,
20 it didn't hit the building that hard, at first you
21 weren't really hurt. And we're going to be
22 relitigating how bad she was hurt in this collision,
23 took too long to have the surgeries, all the stuff
24 you'd normally hear.

25 So what you create then possibly are two separate

1 orders from our court system setting two separate
2 damages. Now, we know that's not what's supposed to
3 happen, that's never supposed to take place. And if we
4 do, we undermine what Judge Hall did.

5 MS. WALL: Your Honor, Judge Hall's order is very
6 clear. It is in the case of Donna N. Jensen,
7 Plaintiff, versus Courtney Lynne Nelson, Defendant.
8 That order is for that case, it has nothing to do with
9 this case. This case is entitled, Jensen versus
10 Wiseman and Peoples Underwriters, Inc. And they have
11 to prove in this case that there were damages
12 proximately caused by this alleged duty, which we
13 contend never existed in the first place, she wasn't
14 the customer, the day care was, and a breach of duty.

15 They cannot use Judge Hall's order. Whatever
16 happens in this case has nothing to do with Judge
17 Hall's order because his order is only as to the
18 at-fault driver, Courtney Lynne Nelson, period. And as
19 Mr. Brittain said in that hearing or in his brief, this
20 is a separate and independent case. Of course it is.
21 This is a completely different case.

22 I don't represent and never did the at-fault
23 driver, I don't even know who she is. I don't know
24 anything about her except what I've seen on video.
25 That is someone else's case. My clients were not sued

1 in that case, they cannot be held to Judge Hall's order
2 which was as to the at-fault driver only. Of course
3 that hasn't been challenged, I don't have any standing
4 to challenge it. My client's not in that case. That
5 could only be challenged by Courtney Lynne Nelson, and
6 apparently she didn't even show up for the damages
7 hearing.

8 So, Your Honor, in this case we have every right
9 to challenge a claim of damages. We cannot be held to
10 \$850,000 as her personal injury because, again, the
11 burden of proof in this case isn't what she thinks all
12 of her injuries are, but what injuries were proximately
13 related to and caused by the insurance agent, which
14 this theory that Mr. Brittain is now telling us what
15 UIM law is.

16 And I want to make this very clear to the Court.
17 This commercial auto policy that was placed by my
18 client reads materially the same as the commercial auto
19 policy that Mrs. Jensen bought from a different agent
20 for five consecutive years before she came before my
21 agent -- my client reached out to her in 2010, one year
22 before her accident.

23 She had already been buying commercial auto
24 policies because her day care had two buses, it had to
25 have insurance, commercial insurance. We are talking

1 about business insurance. What's happening here is
2 we're getting this mushing together of commercial
3 insurance and personal insurance.

4 Donna Jensen admits repeatedly she did not talk to
5 my client, didn't come to purchase any personal
6 insurance. That was handled by her husband totally
7 separately. She came for insurance for the day care.
8 She got it.

9 The commercial auto policy that Matt Wiseman
10 placed reads just the same as the commercial auto
11 policies that she had for five years before she came to
12 him and, may I add, that the commercial auto policy
13 that she has today from a different agent.

14 Because this is how commercial auto policies work,
15 this is how they work. She was covered for UIM in a
16 million dollars if she had been in, on or around one of
17 the day care buses or the day care bus had run into
18 her. Not for a workplace accident, that's workers
19 comp. She didn't buy it from my agent, Your Honor.

20 MR. BRITTAIN: I thought you had to listen to a
21 lot from those last lawyers. And I'm afraid we've --
22 I've over said it, we've all said it the same way,
23 whatever. And I think we've covered all the issues. I
24 mean, we've discussed so many things.

25 MS. WALL: No, actually --

1 MR. BRITTAIN: Okay.

2 MS. WALL: -- Your Honor, we haven't. In our
3 motion in limine, there are two other matters. And I
4 can either leave it to the Court to look at overnight
5 or --

6 THE COURT: No, no. Certainly I'll give you an
7 opportunity to speak to it. You all need to be able to
8 prepare your case. And you are, of course -- and I'm
9 prepared to go ahead and rule.

10 I do not see that the damages that were allowed in
11 the personal injury case are the damages that are
12 applicable a negligence case, this negligence case,
13 with regards to a failure to secure insurance. They're
14 not the same, I mean, they're just simply not the same.

15 I don't know -- and I do believe that the
16 Plaintiff must prove what damages were proximately
17 caused by the negligence of the Defendant. It's an
18 element that must be proven. And I simply go back to
19 my example. If, for example, the conversations were
20 and the jury was to believe that the conversations
21 centered around the ascertainment of a policy for a
22 hundred thousand dollars, there are your damages,
23 assuming there are problems with who was to be the
24 owner of the policy, what was the policy to be, was it
25 a personal policy, was it a CGL policy, what kind of

1 policy are we talking about.

2 Setting all of that aside, what are the damages
3 that arise out of the negligence of -- the alleged
4 negligence of this Defendant have to be proven by the
5 Plaintiff. So it's difficult at this point to rule in
6 a vacuum whether or not the determined personal injury
7 damages, whether or not they are -- they evidentially
8 have some place in this case. And I'm not prepared to
9 rule with regards to the inadmissibility or the
10 admissibility of those, of the personal injury damages.

11 But those are not necessarily the damages that are
12 recoverable from this particular Defendant. So in the
13 event that the amount of personal injury damages
14 intends to be mentioned, I need to know about it in
15 advance.

16 MR. BRITTAIN: Yeah, that's what I would do to
17 keep us from attacking what's already been determined
18 by the Court. I think I understand what the Court's
19 saying. And I really don't have a problem with the
20 idea that, although I can't see it, but the idea that,
21 hey, look, just because I didn't get you the right kind
22 of insurance policy, that doesn't necessarily mean I
23 owe you for all the damages you've got based on your
24 insurance case. I'm not sure I see that.

25 But let's talk through it a little bit, so we know

1 what's going to happen tomorrow. When I put Ms. Jensen
2 up I say, now, let's talk about what kind of problems
3 you had in this underlying action. What kind of
4 damages do you have, how bad are you hurt? And she
5 would talk.

6 And I would say, have you had occasion to do this
7 before, yes, I have. And on what occasion did you do
8 it? I did it in the case of Ms. Nelson here. And was
9 there a determination made about what kind of damages
10 you had? Yes, there was. Who made that? Judge Hall
11 made it. And I'd hand her up an order.

12 Now, see, I don't even think anybody should be
13 able to challenge that. But what I -- I don't -- and I
14 think you said, I'm going to wait and see what happens.
15 What we're going to get into now is if it is challenged
16 is undermining that process. Let's look at the video,
17 you didn't go to the doctor for four weeks, all that
18 sort of thing. You know, that -- but I still want to
19 use my evidence. If I have to deal with all that, I
20 have to deal with it. But I still think I at least
21 ought to be able to put in what a circuit judge said.

22 THE COURT: Well, I don't know. It's got to be
23 relevant. You see, it has to be relevant.

24 MR. BRITTAIN: But how could it not be if I'm
25 looking for an underinsurance policy, you didn't give

1 it to me, and I have underinsurance damages?

2 THE COURT: Well, lots of reasons.

3 MR. BRITTAIN: Okay.

4 THE COURT: There are lots of reasons. And first
5 of all, as I understand it, as I understand it, the
6 policy was a commercial policy. It was a policy --
7 we're not talking -- you talked about stacking. It
8 sounded like you were going to the stacking which is a
9 problem with underinsurance in any event.

10 But there are a number of problems potentially in
11 this case because, number one, your burden has got to
12 be this, that you have an insurance agent who placed
13 insurance. And I gather your position is that he
14 failed to use due care to, first of all, place a
15 personal policy as opposed to a commercial policy and
16 failed to place it in some amount.

17 MR. BRITTAIN: I think y'all are imposing on
18 Ms. Jensen everything you know about commercial
19 insurance policies and personal insurance policies.
20 Here's what I'm saying to you. They've got a website,
21 they are the Peoples Insurance Company. Come in to see
22 us, we'll communicate with you. No. He's supposed to
23 explain these things to Ms. Jensen.

24 And the testimony is going to be, hey, you want me
25 to go up to a million dollars on my underinsurance

1 coverage, I want to make sure it covers me. It does,
2 ma'am, thank you. Then she gets hurt, and all of a
3 sudden it don't. Now, I blame him. I don't care how
4 many insurance policies she's seen, she's not in the
5 insurance business. She asked for that coverage.

6 THE COURT: Well, what is your position, what did
7 she ask for?

8 MR. BRITTAIN: Here's how it happened, they had an
9 application process. There were several documents,
10 okay.

11 THE COURT: Okay.

12 MR. BRITTAIN: And she testifies that she makes a
13 statement, hey, if I'm going to be buying this
14 insurance coverage, I'm going to make sure it protects
15 me.

16 THE COURT: Okay.

17 MR. BRITTAIN: Me, Donna Jensen, me, my business
18 is Four Learning Center, you know, whatever, doing
19 business as so and so, I want to make sure it protects
20 me. And through that process they come to a page that
21 has underinsurance options on it, okay.

22 THE COURT: Okay.

23 MR. BRITTAIN: And he recommends to her -- she's
24 already said, I want to be covered -- he recommends to
25 her, well, why don't you raise that to a million

1 dollars. All right. Now, what she's thinking at the
2 time is, hey, I raise that, I'm protecting myself for a
3 million dollars worth of underinsurance coverage.

4 And I believe he honestly felt like he --

5 THE COURT: And whose name, though, who owned the
6 policy?

7 MR. BRITTAIN: Okay, now, this is interesting.

8 THE COURT: Okay.

9 MR. BRITTAIN: Now, you know, if you go with the
10 fact that it was the doing business as name, of course,
11 then we know nobody could have ever gotten the
12 underinsurance coverage because the learning center
13 can't get hurt. So they -- he filled out how he wanted
14 it filled out. I think it's in the name of For Play so
15 and so, you know, her business name.

16 But this is -- she's in there, she's paying for
17 it, she's explaining the nature of her business. And
18 so our position is he either had a duty to get what
19 they talked about or say, wait a minute, just like you
20 and Ms. Wall are saying, you're getting a commercial
21 policy, don't you understand that.

22 You can't get what you're looking for. You -- I'm
23 a commercial insurance agent. You're just a -- you
24 know, you run a day care center, let me make sure you
25 understand something here. I'm not getting you any

1 underinsurance coverage, you're not going to be
2 covered.

3 And what they like to say is if she had been on
4 the bus, she would be. That's a misinterpretation of
5 the way the law works. If she's covered to be on the
6 bus, she's covered when she's a pedestrian. The facts
7 in this case is she is at work, she's not in her other
8 car. She's closer to the bus than anything else.
9 She's not on it. But that's the way underinsurance
10 works. You pick, if you're covered by two
11 underinsurance policies, and you're not in the
12 vehicle --

13 THE COURT: If you, an individual you; right?

14 MR. BRITTAIN: Well, I'm just saying if you're
15 covered. If he had told her she wasn't covered, I
16 mean, then we wouldn't have --

17 THE COURT: Well, she was covered, her business
18 was covered.

19 MS. WALL: Actually, Your Honor, she was covered.
20 If you read the policy --

21 THE COURT: Okay.

22 MS. WALL: -- and we'll have an expert to explain
23 the policy, and I think we've attached portions --

24 THE COURT: Okay.

25 MS. WALL: -- to our motions, but if you read the

1 policy, again, a commercial policy, same thing she had
2 before she came to Matt Wiseman, same thing she has
3 today. The way a commercial auto policy was --

4 THE COURT: In whose name was it?

5 MS. WALL: It is in the name of the day care. She
6 had -- it is not a DBA. She had the day care through
7 her lawyer five years before she ever came to Matt
8 Wiseman, she had it created as an LLC.

9 THE COURT: Okay.

10 MS. WALL: In underinsurance law, if it is an LLC,
11 your commercial policy has to be in the name of that
12 entity, of the LLC. You cannot put it in an individual
13 name, because it's a corporate entity.

14 THE COURT: Right.

15 MS. WALL: And, of course, she did that in order
16 to protect herself from liability. So she chose the
17 LLC, so she has the commercial policies. And by the
18 way, the policy she had before, the policy she has
19 today, they are all in the name of the day care. And
20 that's what a commercial policy for an LLC is always
21 titled that way. So it's titled that way, she is
22 covered under that policy if she had been in the
23 covered auto. She has those two buses. But she
24 wasn't, she was in her office.

25 THE COURT: As would be any other individual?

1 MS. WALL: Yes, exactly.

2 THE COURT: Because of the terms of the policy?

3 MS. WALL: That's correct, Your Honor. The
4 children, which is really what this is to protect, they
5 take the children to outings. And so, of course,
6 that's your first thought when you're running a day
7 care, we need to make sure we have a commercial auto
8 policy because we're driving these buses and they're
9 filled with children. So we want coverage.

10 Let me talk about that coverage for a moment. It
11 was Donna Jensen who wanted a million in liability.
12 Matt Wiseman suggested to her, well, if you're going to
13 have a million in liability, you should match UM/UIM,
14 again, to that same level, and it cost \$200 extra or
15 something like that. We'll look it up, we can look at
16 that policy and see, and that's what it was.

17 But there's, again, a reason for all of this,
18 because these buses are transporting people, they are
19 big either driven by Donna or one of her employees, and
20 they have little children on these buses. So that's
21 the point of a commercial auto policy. It has to do
22 with the commercial autos that are being used.

23 And if the commercial auto runs into Donna Jensen,
24 or Donna Jensen falls down the stairs or she's driving
25 and hits somebody else, but she's injured too in that

1 auto, she is going to be covered. But that's not the
2 accident here. So there's a complete disconnect.

3 This accident is a workplace accident. It's
4 covered by workers comp. She specifically told Matt
5 Wiseman, I don't want -- I'm not buying workers comp
6 through Peoples, I already have it from another agent.

7 MR. BRITTAIN: The workers comp never -- I mean,
8 this is -- you always have rights against a third
9 party. Workers comp, that's really not a --

10 THE COURT: But stop there. But that's Ms.
11 Nelson.

12 MR. BRITTAIN: Yes.

13 THE COURT: That's Ms. Nelson.

14 MR. BRITTAIN: That's right.

15 THE COURT: You're exactly correct. Workers comp,
16 she could have collected for the workers comp, she
17 could have sued Ms. Nelson, there would have been an
18 offset if any, and you would have gone that route. But
19 that's not this -- that's not the insurance company.

20 MR. BRITTAIN: No, not the -- I'll tell you, you
21 have the essence, and you know, you've got the essence
22 of this case. You don't need to hear anything else. I
23 mean, really, you have heard our arguments, and you can
24 read our briefs. I mean, it's real simple. What we
25 say is there was a miscommunication about what she was

1 getting, from Ms. Jensen, okay. That's what we're
2 saying. We're saying that, you know, because the way
3 the policy was written your knowledge of commercial
4 policies, underinsurance coverages, that that should
5 have been shared with Ms. Jensen, it wasn't. She
6 thought she was covered.

7 THE COURT: Let me ask you this question. What
8 should have been covered, this is -- what is it in
9 accordance with the Plaintiff that should have been
10 covered with her?

11 MR. BRITTAIN: This is what should have been said.

12 THE COURT: Okay.

13 MR. BRITTAIN: I guess.

14 THE COURT: Okay.

15 MR. BRITTAIN: Is, well, wait a minute now, let me
16 talk to you a second about how underinsurance coverage
17 works. This is not a personal underinsurance policy.
18 If you're not in this bus, it will not cover you. You
19 better go back to your underinsurance coverage on your
20 personal automobile policy and get you a million
21 dollars if you want it.

22 Do not think that this underinsurance coverage
23 policy associated with this bus and this business is
24 going to protect you. Because, you know, just a minute
25 or two before you told me you want to make sure you

1 were covered in this situation. And I want you to know
2 it doesn't work the same way as a personal automobile
3 policy, this is a commercial one.

4 Now, here's why he didn't do that. He didn't
5 know. He thought she was covered in this instance and
6 so did she. So he could not have explained it to her.
7 He called her offering his advice in this matter. He
8 stepped out with his professional expertise to advise
9 her. And with the best of intentions, and like I said,
10 there's no rancor in any of this, there was
11 miscommunication there from agent to the -- the basic
12 rules of agency. And she didn't get what she thought
13 she was getting, and he didn't tell her that.

14 So, but my point is this, we've argued this. I
15 mean, and if you feel that that's not enough, then you
16 should rule against me. I mean, I don't want to try to
17 get ten doctors up here tomorrow and scramble around
18 and get the medical records and everything when I don't
19 see the case, you know, heading that way.

20 You know, we all come and go and do, but I mean,
21 it's -- what we're talking about you're going to hear.
22 And I hear you kind of coming up with a solution which
23 is fine, I win some, I lose some. But we don't need to
24 spend two days in here. You can probably just take our
25 briefs and our summary judgment motions, you know,

1 Hyman hadn't heard them, let you hear them and make a
2 decision.

3 THE COURT: Okay.

4 MS. WALL: Your Honor, if I might just briefly,
5 it's undisputed in this case that he's now saying that
6 Matt Wiseman offered his advice. There's no question
7 they were talking only about commercial policies. She
8 specifically told him, I have a different agent for my
9 personal. And she did, she has a different agent. She
10 used Allstate for her commercial auto policies.

11 There is a case absolutely on all fours with what
12 we're talking about, and I am continually struck when
13 I'm listening to this. In the Trotter case, and I'll
14 be happy to hand a copy to Your Honor, it was this
15 case, it's this case, commercial policy. The customer
16 says, gee, I want full protection, but I'm coming to
17 you for commercial, not my personal, I have other
18 agents for that. I want full protection.

19 Well, that's in essence what Mr. Brittain is
20 arguing that the Plaintiff said here, well, I want to
21 be covered for everything. That's the -- I want full
22 protection. And what did our Court say? Our Court
23 categorically said that an agent has no duty to advise.
24 While he may assume a duty, how does that happen.

25 Well, he receives consideration beyond the mere

1 payment of the premium. There's no evidence of that
2 here. The insured makes a clear request for advice.
3 That didn't happen here. Because what they're trying
4 to argue is, well, Matt Wiseman allegedly after the
5 accident said, gee, don't worry, you're going to be
6 covered. Well, of course he was referencing because
7 she had already told him she had workers comp
8 insurance.

9 He knew it was a workplace accident because he
10 went over there right after the accident. And he saw
11 the video that she gave to him. Her office took a
12 video of the accident because it was running during the
13 accident. And he saw it was a workplace accident, so
14 of course it's workers comp insurance, and she had
15 already told him, I have workers comp insurance through
16 another agent.

17 And then, where there's a course of dealing over
18 an extended period of time. Certainly not. The first
19 time any conversations between Matt Wiseman and Donna
20 Jensen occurred with regard to insurance was in 2010.
21 This accident was a year later, a year and a month
22 later in 2011.

23 Our Court in Trotter made it very clear, there has
24 to be a clear oral and written agreement for a Court to
25 enforce. The customer may not seek after the fact to

1 have a Court or jury creating an undertaking favorable
2 to her if the parties themselves did not enter into
3 such an agreement. And the Court goes on to say, the
4 Court on appeal, that the trial court should have
5 granted a directed verdict.

6 And so, Your Honor, this is the Trotter case. We
7 have Donna Jensen stating in her deposition, the
8 question was: You did not procure personal automobile
9 insurance with Peoples Underwriters; is that right?
10 Donna Jensen says, and I quote, "No. We've had the
11 same insurance for 20 years plus," and that of course
12 was with Allstate.

13 She did not come, there was no discussion about
14 personal insurance. Now, Mr. Brittain would like this
15 Court to enforce upon an agent some duty to say, well,
16 you didn't come to me about your personal insurance,
17 but let me talk to you about your personal insurance.
18 Trotter is crystal clear that insurance agent has no
19 duty to do so, absolutely not. Because where you're
20 placing commercial insurance, that's it. The topic is
21 commercial insurance, not your personal insurance. And
22 Trotter is absolutely clear on that, Your Honor.

23 MR. BRITTAIN: Your Honor, on that point, just --
24 I know you're getting close to ruling and it's getting
25 late. What I did in that brief with the help of some

1 of my law partners, the real case is close to this is
2 the Duckworth case.

3 And so what we did was, and I'll hand this up to
4 you, we compared everything in the Jensen case to the
5 Duckworth case. In that case the agent was responsible
6 for failing to obtain the proper insurance. And
7 everything in Duckworth complies with us. For example,
8 in Jensen we have an independent agent, Peoples
9 Underwriters is an independent agent. In the Trotter
10 case it was a State Farm agent writing for the same
11 carrier, you see. And in Duckworth, the one we rely
12 on, that holds the agent responsible, was an
13 independent agent. In our case the agent contacted us,
14 in Trotter the plaintiff contacted the agent.

15 In our case the agent advised the plaintiff on
16 choices she should make. That did not happen in
17 Trotter, that did happen in Duckworth where they
18 discussion the agents. In ours we have a specific
19 request to cover me, none of that was in Trotter, and
20 in Duckworth they have a specific request, I want
21 coverage on my elevator.

22 We have a meeting of the minds expressed to cover
23 me, same thing in Duckworth. So we filled out this
24 grid for you as you get into it to look and see that
25 our case is closer to the Duckworth facts than the

1 Trotter facts. And, you know, like I said, the only
2 problem I got here at this late hour is trying to
3 figure out how to prove damages in this case tomorrow.

4 THE COURT: I'm with you.

5 MR. BRITTAIN: If --

6 MS. WALL: And, Your Honor, if I might, and then
7 I'll end it at this, I do want to mention that I'm very
8 familiar with the Duckworth case. In the Duckworth
9 case, the agent gives his customer the policy.
10 Customer actually reads his policy. Here Donna Jensen
11 admits she never read the policy, which of course she
12 has a duty to do under the law. But he actually read
13 his policy.

14 And he goes back to the agent and he says, wow, I
15 asked you to get me a policy that covered my elevator,
16 this policy doesn't seem to do that. And the agent
17 said, oh, yes, it does. And of course there was an
18 accident with the elevator, and of course it didn't
19 because the elevator wasn't part of the policy. That's
20 absolutely not what we have here.

21 What we have here is a day care owner who wants a
22 commercial policy for her day care. She gets that
23 commercial auto policy which reads the same way as the
24 commercial auto policies she had before she came to
25 Peoples and that she has to this very day, because

1 that's how they're written. That's how they work,
2 that's how they are written. That's how they are
3 written.

4 Your Honor, I cannot imagine that we're going to
5 -- and I hope and I would ask the Court not to allow
6 Mr. Brittain tomorrow to get up in front of this jury
7 and start talking about an order that his client
8 received from a different defendant in a different case
9 where we didn't have any opportunity whatsoever to
10 question the basis for it or anything else. That would
11 be so prejudicial.

12 THE COURT: Let me say this, here's where we are
13 with it. And there are two things that are going
14 through my mind at this moment. What I have learned is
15 that every time I rule in a motion in limine, I wish I
16 had not, I wish I had given myself a fail safe.
17 Because a trial is such a dynamic experience, and what
18 didn't appear to be relevant can become relevant.

19 That's the reason that I stated that it's very
20 difficult for me to at this moment tell you that the
21 damages received by the Plaintiff determined by another
22 circuit court judge in another case would have
23 absolutely no relevance in this case at all. It's a
24 very difficult position for me to take because I
25 haven't tried this case yet.

1 However, however, I'm comfortable saying that
2 based upon my view from what I've heard up to this
3 point, I don't know that they're going to be relevant.
4 Because and for this reason. If what she sought was a
5 million-dollar policy to cover herself personally and
6 he failed to get her a million-dollar policy to cover
7 her personally, aren't those the damages? I mean,
8 aren't those the damages?

9 If he was negligent and what she meant to get was
10 a personal policy to cover her personally, and she
11 didn't get it, it seems to me that those are the
12 damages, not the \$850,000 comes to my mind.

13 However, however, Ms. Wall, I tend to -- I really
14 want to turn to you and ask that which Mr. Brittain has
15 asked, and that is, judge, don't you really want to
16 treat this and look at these two motions for summary
17 judgment, and I kind want to look at you, Ms. Wall, and
18 say, don't you think that's appropriate.

19 MS. WALL: Do I think it's appropriate that the
20 Court --

21 THE COURT: That I have -- I know that
22 Mr. Brittain has filed a motion for summary judgment.

23 MS. WALL: Yes.

24 THE COURT: I know that you filed a motion for
25 summary judgment.

1 MS. WALL: Yes, I did.

2 THE COURT: I know that in order to get the case
3 moving for your client, you said, look, I just withdraw
4 that. I know that it's been argued before Judge Hyman,
5 I know that it has been withdrawn. The question is
6 whether or not it is not -- whether or not it is
7 appropriate for me to ask Judge Hyman if it is possible
8 for me to consider your motion for summary judgment.
9 It seems to me that that very well may be appropriate.

10 MS. WALL: It is appropriate, Your Honor. And I
11 withdraw my withdraw. That was done only this morning
12 because we were all here ready to --

13 THE COURT: I know.

14 MS. WALL: -- and we thought maybe we were going
15 to get a ruling, but we didn't. I would ask this Court
16 to please review our motion for summary judgment, and
17 I'll be happy to hand up another copy if you don't have
18 it.

19 THE COURT: Y'all better be sure that I have it
20 all.

21 MS. WALL: With all the attachments.

22 THE COURT: I think that's appropriate for me to
23 take a review. Now, if Judge Hyman does otherwise,
24 then that is certainly within his purview.

25 MS. WALL: Apparently, I don't know, Your Honor,

1 but apparently from what I understand this afternoon is
2 he's made no decision.

3 THE COURT: And --

4 MS. WALL: And which allows this Court, who now
5 has jurisdiction over this case, to make that decision.
6 And I would be very happy for you to --

7 THE COURT: Well, just so it's clear, I certainly
8 would ask whether or not he would have any opposition
9 to me doing that, and if he does, I would not.
10 However, I'm going to go forward and do the work
11 tonight that I think ought to be done, in all candor.

12 MS. WALL: Thank you, Your Honor.

13 THE COURT: Okay. And I agree with Mr. Brittain.

14 MR. BRITTAIN: Let's talk about, let's make sure
15 that I understand what we are doing. I agree with that
16 process and approach, because I think an informed Court
17 makes everything simpler and easier and all that sort
18 of thing.

19 Is this something you're going to decide over time
20 or, you know, how are we going to handle this as far as
21 tomorrow is concerned?

22 THE COURT: Got you. Great question.

23 MR. BRITTAIN: Okay. Because I want to --

24 THE COURT: I know, I know. I get that you're --
25 potentially you're in a box.

1 MR. BRITTAIN: Right.

2 THE COURT: If I deny the motion for summary
3 judgment, come on, let's go.

4 MR. BRITTAIN: Yeah.

5 THE COURT: Here's what I think is appropriate.
6 Here's what I think is appropriate. Given the late
7 hour, I'm not going to be able to reach my jury, but I
8 think what I'm inclined to do is when they come in in
9 the morning, they'll eat donuts and go away, just go
10 away and call back is what I think is appropriate.

11 And that way I don't think you're under a
12 particular pressure in terms of if you feel compelled
13 to get doctors or whatever, I don't think it's fair to
14 you to do that, I really don't.

15 MR. BRITTAIN: Well, thank you. I appreciate
16 that.

17 THE COURT: I think that what we ought -- I think
18 I need to take your documents and your paperwork, I
19 think I need to work tonight. And I think that my
20 inclination is to meet in the morning, I would like to
21 begin at nine. And if I need to send the jury away,
22 I'll send the jury away until two. If I don't, I
23 won't. But I think that's appropriate.

24 If, Mr. Brittain, I should deny the motion for
25 summary judgment, then we'll talk about it at that

1 point what makes sense.

2 MR. BRITTAIN: Okay.

3 THE COURT: We'll just talk about what makes
4 sense.

5 MR. BRITTAIN: Perfect. Let's make sure we've got
6 everything the judge needs.

7 THE COURT: Yeah. So all those notebooks over
8 there that you thought you could safely put to rest,
9 get them out. Bring them up.

10 MR. BRITTAIN: Both of us filed motions for
11 summary judgment.

12 THE COURT: I know, I know that. I am well aware
13 of that.

14 MS. WALL: And, Your Honor, I will ask if, do you
15 have our motion with attachments? We had 15
16 attachments, I just want to make sure you have them.

17 THE COURT: Y'all just come on up here and see
18 what we got.

19 (WHEREUPON, the hearing concluded at approximately
20 5:03 p.m.)

21 (End of Transcript of Record.)

22 - - -

23

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25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 18th day of August,
14 2015.

15

16 I FURTHER CERTIFY that I am neither of
17 kin, counsel nor interest to any party hereto.

18

19

20

21

S/Teresa J. F. Bautz
TERESA J.F. BAUTZ, RPR
Official Court Reporter

22

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25

1 State of South Carolina) Court of Common Pleas
2 County of Horry) 2014-CP-26-02463

3

4

Donna Jensen)

5

vs.)

6

Transcript of Record
(Seating of Jury)

7

Matthew B. Wiseman and
Peoples Underwriters,
Inc.)

8

9

June 22, 2015
Conway, South Carolina

10

11

12 BEFORE:

13

Honorable Diane S. Goodstein, Judge.

14

15 APPEARANCES:

16

Preston Brittain, Esq.
Attorney for the Plaintiff

17

18

Susan Taylor Wall, Esq.
Amanda Williams, Esq.
Attorneys for the Defendant

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20

21

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Teresa J. F. Bautz, RPR
Official Court Reporter

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ORIGINAL

E X H I B I T S

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1 (The hearing commenced at approximately 12:20
2 p.m.)

3 THE COURT: Thank you so much, and good morning.
4 All right, counsel do you have any short,
5 non-argumentative statement of the facts?

6 MS. WALL: Well, Your Honor, that's just what
7 we're working on right this moment.

8 THE COURT: Great.

9 MS. WALL: Might we approach.

10 THE COURT: Absolutely.

11 (Discussion off the record.)

12 THE COURT: Thank you. Good morning, ladies and
13 gentlemen. Oh, good afternoon, ladies and gentlemen.
14 Let me introduce myself, I'm Diane Goodstein and I am
15 one of the judges from the first judicial circuit.
16 This is not the first judicial circuit. I got lost
17 this morning, oh, my goodness. Ladies and gentlemen, I
18 have been so fortunate to be appointed by our chief
19 justice to be here in the 15th judicial circuit which
20 is where you live.

21 My circuit is the first circuit which is
22 Dorchester, Orangeburg and Calhoun Counties. But not
23 only do we get to rotate around our circuit, but we get
24 to go to other circuits, we get to ride the circuit
25 throughout the state. So this week I've been assigned

1 to be here, and I'm absolutely thrilled. I know that
2 Judge James has already thanked you all for being here.
3 I'm going to just reiterate that. We are a citizen
4 based judicial system in this country, and if you all
5 were not here, there would be no reason for any of us
6 to be here.

7 And I just want you to know that every single
8 solitary tick of the clock that you are with us is
9 critical, and we are all grateful for every moment that
10 you're giving to our system of justice, our way of
11 life. And I thank you for it.

12 I promise you that we will use as little of it, of
13 your time, as is absolutely necessary. And with that
14 in mind, ladies and gentlemen, we are going to get
15 right into jury qualification and the selection of our
16 jury for our first case for trial this week in this
17 courtroom, which is Common Pleas or civil court.
18 General sessions is criminal court. You all have
19 reported up here for the section of the jury in this
20 case which is for Common Pleas or civil court.

21 In a moment, I'm going to introduce you to this
22 case, I'm going to read you the caption, the title of
23 the case. I'm going to have the opportunity to
24 introduce you to some folks. I have a few questions to
25 ask of you, and then we're going to select our jury.

1 By then I'll be worried about your blood sugar having
2 plummeted, because that means it's time for lunch. And
3 then I'll be able to give you our schedule. But I
4 believe that we will be beginning in the morning to
5 just sort of give you an overall view of how we're
6 going to be proceeding. So let's get right to it.

7 Ladies and gentlemen, the caption or the title of
8 this case is Donna Jensen, Plaintiff -- she is the
9 person who has brought this action -- versus or against
10 Matthew B. Wiseman and People's Underwriters, Inc., the
11 Defendants. So Matthew Wiseman and People's
12 Underwriters, Inc., are the entities or individuals
13 against whom this action has been brought, they are the
14 Defendants.

15 I want to begin by telling you that one of the two
16 Defendants is a corporation. It is Peoples
17 Underwriters, Inc. or Incorporated. Ladies and
18 gentlemen, I will tell you even as we begin, that under
19 our way of life, under our system of justice, a
20 corporation is entitled to the same measure of justice
21 as would be a natural person. It is a person in the
22 eyes of the law. I'll share that with you, ab initio
23 as they say.

24 Now, ladies and gentlemen, the next -- in just a
25 moment I am going to read to you what is known as a

1 short, non-argumentative statement of the facts. The
2 reason that I'm going to be doing that is to find out
3 whether or not any of you know or think you may know,
4 or have you heard or think you may have heard anything
5 about this particular matter to include today. So
6 that's the reason that I'm going to be reading to you a
7 short non-argumentative statement of the facts. I'm
8 going to do that now.

9 Ladies and gentlemen, on the other end or on the
10 other side of me reading you what I'm about to read to
11 you, the question is going to be this. Do any of you
12 know or think you may know or have you heard or think
13 you may have heard anything about these allegations?

14 Ladies and gentlemen, this action, this lawsuit,
15 is brought by Donna Jensen, the Plaintiff, who resides
16 in Myrtle Beach, South Carolina. The Defendant,
17 Peoples Underwriters, Inc., is an independent insurance
18 agency located in Conway in Myrtle Beach, South
19 Carolina. The Defendant Matthew Wiseman is an
20 independent insurance agent who works for Peoples
21 Underwriters, Inc.

22 Ladies and gentlemen, in this action, the
23 Plaintiff, Ms. Jensen, claims that the Defendants,
24 Mr. Wiseman and Peoples Underwriters, Inc., were
25 negligent, were negligent -- which means they failed to

1 use due care. Of course we'll talk to those of you
2 that serve on the jury, we'll talk a whole lot more
3 about that.

4 Now, ladies and gentlemen, I ask you, do any of
5 you know or think you may know or have you heard or
6 think you may have heard anything about these
7 allegations? If so, please stand at this time. And I
8 find no one is -- oh. Yes, ma'am?

9 A JUROR: I don't know anything about the details,
10 but I do know the Defendant.

11 THE COURT: We'll get right there.

12 A JUROR: Okay.

13 THE COURT: Thank you so much. Now, ladies and
14 gentlemen, ladies and gentlemen, in a moment I'm going
15 to begin to introduce you to some folks. But I need to
16 define a phrase that I use, acquainted with, acquainted
17 with. I'm going to use that quite a bit. So I need to
18 define that for you because I actually intend a very
19 general definition of acquainted with. So in all
20 fairness, I wanted to talk with you a moment about
21 that. When I use the phrase acquainted with, what I am
22 trying to find out is do you have any connection with
23 those folks at all.

24 Let me give you some examples. Ladies and
25 gentlemen, it may be that you went to school with

1 someone whose name I'll mention 20 years ago. You
2 haven't thought about this person, you haven't seen
3 this person in 20 years, but you remember going to
4 school with this person. Now, believe it or not, that
5 relationship, as old and moldy as it may be, would be
6 encompassed within my very general definition of
7 acquainted with. And you would simply stand and we
8 would -- I'd ask you some follow-up questions, and you
9 would share that information with me.

10 Ladies and gentlemen, it may simply be that you
11 work at the same location with someone that I will ask
12 you about, maybe occasionally wave at each other across
13 the parking lot, and that is the sum total of your
14 relationship with that person. Well, believe it or
15 not, as limited as that relationship is, it would be
16 encompassed within my very general definition of
17 acquainted with. And you would simply stand and I
18 would ask you some questions, and you would share that
19 information with me.

20 Now, I ask that you please keep in mind the very
21 general definition that I intend when I use the phrase
22 acquainted with because, again, I'm trying to find out
23 if you have any connection with these folks that I'm
24 going to be asking you about at all.

25 Now, I'm going to begin that process now. Ladies

1 and gentlemen, please allow me to introduce you to
2 Ms. Donna Jensen who's going to stand and face our jury
3 panel, please, Ms. Jensen. Thank you so much. And
4 this is Ms. Jensen. Thank you, and you may be seated.
5 Ladies and gentlemen, are you related by blood, a
6 marriage or acquainted with Ms. Donna Jensen? If so,
7 please stand at this time. And I find no one standing.

8 Now, ladies and gentlemen, please allow me to
9 introduce you to Tommy Brittain who is representing
10 Ms. Jensen. And he's with the Brittain Law Firm in
11 Myrtle Beach, and he is going to go over the folks in
12 his firm.

13 MR. BRITTAIN: Yes, ma'am, Your Honor. I'm
14 Preston Brittain, judge. I apologize for the --

15 THE COURT: I knew that. I'm sorry, I knew that.

16 MR. BRITTAIN: Okay. My father Tommy will be
17 trying this case. And this morning, he is, like you,
18 held in court over in Florence County, so he'll be here
19 at the start of this trial. Also, my sister, Mary
20 Madison Langway, and my brother, Case Brittain, and my
21 father over in Myrtle Beach.

22 THE COURT: Thank you so much, I appreciate that.
23 And Preston, I'm sorry about that.

24 MR. BRITTAIN: No problem, Your Honor.

25 THE COURT: Your daddy would be very complimented

1 by that. Ladies and gentlemen, are you related by
2 blood or marriage or acquainted with or have you or any
3 member of your immediate family ever been represented
4 by Preston Brittain or Tommy Brittain or any of the
5 attorneys at the Brittain Law Firm? If so, please
6 stand at this time. All right.

7 I'm going to start right here. I'm looking for
8 numbers. If you don't remember your number, don't
9 worry about it, names work really nicely as well. Yes,
10 sir?

11 JUROR #106: 106, Ingerton. I'm familiar with the
12 Brittains, we go to the same church.

13 THE COURT: You go to the same church. Now, let
14 me ask you, I have to ask you some follow-up questions,
15 and I just want you to answer for me what I'm asking.
16 Do you visit in each other's homes?

17 JUROR #106: No, ma'am.

18 THE COURT: All right. Now, you would then
19 describe your relationship as more -- one more of an
20 acquaintanceship?

21 JUROR #106: Yes, ma'am.

22 THE COURT: Given your relationship just as you
23 have, just as you have described it, might that or
24 could that in any regard interfere with your ability to
25 be completely fair and impartial both to the Plaintiff

1 as well as to the Defendants? And that has to be a yes
2 or no.

3 JUROR #106: No, ma'am.

4 THE COURT: Thank you so much. Please be seated.
5 Your number, sir?

6 JUROR #205: 205.

7 THE COURT: And tell me who you know.

8 JUROR #205: My wife was represented by the
9 Brittain Law Firm.

10 THE COURT: And in the past?

11 JUROR #205: Yeah, about five years ago.

12 THE COURT: As the result of that representation,
13 might that or could that in any regard interfere with
14 your ability to be completely fair and impartial to the
15 Plaintiff as well as to the Defendants? Your response
16 must be yes or no.

17 JUROR #205: No.

18 THE COURT: It would not?

19 JUROR #205: It won't interfere.

20 THE COURT: Thank you, sir. Please be seated.

21 And your number?

22 JUROR #142: I don't know my number.

23 THE COURT: That's okay.

24 JUROR #142: My name is Lori Gorganus. My family
25 and I actually live right down the street from

1 Mr. Tommy Brittain.

2 THE COURT: Very well. And let me ask you this
3 question. Do you all visit in each others' homes?

4 JUROR #142: Not any time recently, no, ma'am.

5 THE COURT: Sometime in the past?

6 JUROR #142: My parents perhaps, not myself.

7 THE COURT: I understand. And do you still live
8 in that vicinity, or did you grow up in that vicinity?

9 JUROR #142: I do still live there.

10 THE COURT: You still do live there. Let me ask
11 you this question. As a result of that relationship
12 just as you have described it, might that or could that
13 interfere with your ability to be completely fair and
14 impartial both to the Plaintiff as well as the
15 Defendants? And I need your response yes or no.

16 JUROR #142: Not at all.

17 THE COURT: Thank you so much. Please be seated.
18 Your number?

19 JUROR #381: 381.

20 THE COURT: And tell me who you know.

21 JUROR #381: Mr. Brittain, attend church with him
22 as well.

23 THE COURT: Very well. And do you visit in each
24 others homes?

25 JUROR #381: No, ma'am.

1 THE COURT: As a result of that relationship just
2 as you have described it, might that, could that in any
3 regard interfere with your ability to be completely
4 fair and impartial both to the Plaintiff as well as the
5 Defendants?

6 JUROR #381: No, ma'am.

7 THE COURT: Very well, stay with us. Now, ladies
8 and gentlemen, please allow me to introduce you to
9 Mr. Matthew Wiseman, and he's going to stand. Thank
10 you, Mr. Wiseman. This is Matthew Wiseman. Thank you,
11 and you may be seated.

12 Ladies and gentlemen, are you related by blood or
13 marriage or acquainted with Mr. Matthew B. Wiseman? If
14 so, please stand at this time. Yes, ma'am, your
15 number?

16 JUROR #113: 113.

17 THE COURT: Now, I'm going to ask you the
18 questions, I'm going to ask you to respond to my
19 questions. Do you and Mr. Wiseman, do you visit each
20 others' homes?

21 JUROR #113: No, ma'am.

22 THE COURT: All right. And how often do you see
23 Mr. Wiseman?

24 JUROR #113: Here and there at church on Sundays.

25 THE COURT: Okay. And as a result of that

1 relationship just as you have described it, might that
2 or could that interfere with your ability to be
3 completely fair and impartial both to the Plaintiff as
4 well as to the Defendants?

5 JUROR #113: No, ma'am.

6 THE COURT: Very well, then. Please be seated.
7 Now, I want to introduce you to Dana Groom who is here
8 representing Peoples Underwriters, Inc. Thank you so
9 much. Ladies and gentlemen, are you related by blood
10 or marriage or acquainted with Dana Groom? If so,
11 please stand. And I find no one standing.

12 Ladies and gentlemen, are you a stockholder, are
13 you a director, are you an employee of Peoples
14 Underwriters, Inc.? If so, please stand at this time.
15 And I find no one standing.

16 Now, have you or any member of your immediate
17 family, either currently or in the past, ever been
18 employed by or done business with Peoples Underwriters,
19 Inc.? And I find no one standing. Very well.

20 Now, ladies and gentlemen, I am now going to read
21 to you a list of potential, potential witnesses. My
22 question as to each and every one of those witnesses is
23 are you related by blood or marriage or acquainted with
24 any of the following individuals.

25 Oh, I get to come back, yeah, and introduce you --

1 I'm so sorry. It is a delight to introduce you, ladies
2 and gentlemen, to the lawyers who are representing the
3 Defendants. I'm going to begin by introducing Susan
4 Wall.

5 MS. WALL: Thank you, Your Honor.

6 THE COURT: Ladies and gentlemen, this is Susan
7 Wall. She practices law at the McNair Law Firm. And
8 she is going to introduce her co-counsel as well as the
9 members of the law firm who are here in Horry County,
10 if you would be so kind and do that for me, Ms. Wall.

11 MS. WALL: I will, Your Honor, thank you. This is
12 Amanda Williams, and she practices with me at the
13 McNair Law Firm. The members of the McNair Law Firm
14 here in Horry County are Henrietta Golding, Alicia
15 Thompson, Amanda Bailey, Lynn Stevens and Jim Gillian.

16 THE COURT: Thank you so much. Thank you so much.

17 MS. WALL: Thank you, Your Honor.

18 THE COURT: Ladies and gentlemen, are you related
19 by blood or marriage or acquainted with, or have you or
20 any member of your immediate family to your knowledge
21 ever been represented by Ms. Wall or Ms. Williams or
22 any of the attorneys at the McNair Law Firm either
23 here, or McNair also practices -- has firms and offices
24 in other places, anyone associated with the McNair Law
25 Firm? If so, please stand. And I find no one

1 standing. Very well.

2 Now, we'll get to potential witnesses. Ladies and
3 gentlemen, it's at this time that the lawyers are kind
4 enough to give to me the list of potential witnesses so
5 that I might ask of you whether or not you are related
6 by blood or marriage or acquainted with any of the
7 following individuals. And I am going to go over that
8 list with you now. The question as to each and as to
9 every one of those folks is are you related by blood or
10 marriage or acquainted with the following individuals:

11 Delane -- oh, and if you happen to be in the
12 courtroom, please stand for me because it's so much
13 easier to put a face with the name than simply a name.
14 Delane Stevens. Thank you. If you would face our jury
15 panel. Thank you, Mr. Stevens. Jeffrey Jensen. Thank
16 you, Mr. Jensen. This is Mr. Jeffrey Jensen, thank you
17 kindly. Jeffrey Jensen, Jr., Jason Jensen, Jacob
18 Jensen, Jordan Jensen, and Stewart Powell, Modesty
19 Brentley, Brandy Duncan, Courtney Lynne Nelson.

20 Are you related by blood or marriage or acquainted
21 with any of those individuals? If so, please stand at
22 this time. And I find no one standing.

23 Ladies and gentlemen, have you or any member of
24 your immediate family to your knowledge ever had a
25 child who attended the Learning Station, CDC, LLC,

1 formerly known as Four J's and AD, LLC, doing business
2 as The Learning Station? Let me ask that again because
3 there was a lot of names in that.

4 Have you or any member of your immediate family to
5 your knowledge ever had a child who attended The
6 Learning Station, CDC, LLC, formerly known as Four Js,
7 and AD, LLC, doing business as The Learning Station?
8 If so, please stand at this time. And I find no one
9 standing.

10 Ladies and gentlemen, have you or any member of
11 your immediate family to your knowledge ever had a
12 child who attended St. James Child Development Center,
13 St. James Child Development Center? If so, please
14 stand at this time. And I find no one standing.

15 Have you or any member of your immediate family,
16 to your knowledge, ever had a child who attended a
17 Gymboree program in the Conway or Myrtle Beach area,
18 the Conway or Myrtle Beach area? If so, please stand.
19 And I find no one standing.

20 Ladies and gentlemen, have you or any member of
21 your immediate family to your knowledge ever had a
22 child who attended any program, any school or any camp
23 run by Donna Jensen? If so, please stand. And I find
24 no one standing.

25 Are you a member of New Spring Church in Myrtle

1 Beach, New Spring Church in Myrtle Beach? If so please
2 stand. And I find no one standing.

3 Have you or any member of your immediate family to
4 your knowledge ever had a dispute with an insurance
5 company? If so, please stand. And I find no one
6 standing.

7 Ladies and gentlemen, have you or any member of
8 your immediate family ever had a dispute with an
9 insurance agent or insurance agency? If so, please
10 stand. And I find no one standing.

11 Have you or any member of your immediate family
12 ever been a plaintiff or a defendant in a lawsuit
13 involving an insurance agency or an insurance company?
14 If so, please stand. All right. And your number?

15 JUROR #113: 113.

16 THE COURT: All right, thank you. That's all. I
17 don't need to know any more. Ladies and gentlemen,
18 have you or any member of your immediate family to your
19 knowledge ever made a claim for underinsurance motorist
20 coverage, underinsurance motorist coverage? If so
21 please stand. Your number?

22 JUROR #31: 31.

23 THE COURT: Thank you so much, you may be seated.
24 Ladies and gentlemen, have you or any member of your
25 immediate family ever been in a workplace accident? If

1 so, please stand. And your number?

2 JUROR #260: 260.

3 THE COURT: Thank you so much. Ladies and
4 gentlemen, have you ever made a claim under an
5 insurance policy in which you felt that you did not
6 have enough coverage? Have you ever made a claim under
7 an insurance policy in which you felt that you did not
8 have enough coverage? If so, please stand. And I find
9 no one standing.

10 Have you ever made a claim under an insurance
11 policy that was not paid? Have you ever made a claim
12 under an insurance policy that was not paid? If so,
13 please stand. And your number?

14 JUROR #312: 312.

15 THE COURT: Thank you, sir. Have you or any
16 member of your immediate family to your knowledge ever
17 been involved in a lawsuit as a plaintiff or as a
18 defendant? If so, please stand, plaintiff or
19 defendant.

20 JUROR #312: 312.

21 JUROR #338: 338.

22 JUROR #113: 113.

23 THE COURT: Thank you so much. Ladies and
24 gentlemen, my next question is going to be very broad.
25 And I just want you to know that I actually mean for it

1 to be as broad as it's going to be. Do you know any
2 reason why you ought not, should not, could not be a
3 juror in this case being ready, willing and able to
4 listen to the evidence and make up your mind based
5 solely on what you hear in court while court is in
6 session, being completely unaffected, being completely
7 unaffected by matters, the term used is extraneous
8 matters outside the Court, matters outside the Court?

9 For example, ladies and gentlemen, do you not like
10 lawsuits in general, do you not like these kind of
11 litigants, do you not like these chairs, do you not
12 like -- you know, is there something that is going on
13 in your life that you found out about between when you
14 were downstairs and came up, for example, you
15 remembered the trip to Tahiti you're supposed to leave
16 with this afternoon, and how in the world are you
17 supposed to -- now, tell me you forgot about the Tahiti
18 trip downstairs and, oh, my goodness wasn't back in
19 your memory. Well, it's all right. Not only will I
20 excuse you, we're all going with you. So get a big
21 suitcase.

22 Or this happened in Dorchester County, in my
23 county, so I wouldn't make -- I guess if I'm going to
24 make a comment, I suppose I'll make it in my own
25 county. This happened in my county, I reached this

1 point in the qualification of the jury, this darling
2 little man, young man stood up at this point in the
3 jury qualification, stood up and raised his -- I said,
4 yes, sir. He said, Your Honor, may I please be excused
5 to go be with my wife who's in labor down at Trident
6 Hospital.

7 Now, is anybody in labor, or is anyone's loved one
8 in labor? Wonderful, wonderful. I would like that
9 never to happen again. I wanted to drive him down to
10 the hospital, but then I was nervous. So that wouldn't
11 have worked very well.

12 Now, ladies and gentlemen, do you have any
13 concerns at all? In other words, was there something,
14 was there a question that you were asked downstairs,
15 you were shy and maybe now you've warmed up a little
16 bit, and now you're more comfortable disclosing what
17 you didn't disclose downstairs? I mean, really
18 anything, really anything, is there anything that --
19 because I'm going to have you approach and let us talk
20 about it, is there any reason why you're concerned as
21 perhaps you should not be a juror in this case?

22 And I will tell you that you are going to be
23 required to be completely fair and impartial to the
24 Plaintiff and to the Defendants, and you must make up
25 your mind based solely on what you hear in court while

1 court is in session. If you have any concerns about
2 your ability to be able to do this for any reason, I
3 want you to please come on, follow up and let's chat.
4 I find no one standing.

5 Any further voir dire from the Plaintiff?

6 MR. BRITTAIN: No, ma'am, Your Honor.

7 THE COURT: From the Defendants?

8 MS. WALL: No, Your Honor. Thank you.

9 THE COURT: Ladies and gentlemen, I'm going to
10 turn to our clerk, and we're going to ask -- oh, I'll
11 ask, do you waive the selection of the jury from a
12 blind person or small child? I love this.

13 MR. BRITTAIN: Not been an issue, Your Honor.

14 MS. WALL: We waive, thank you.

15 THE COURT: Very well. So do I have one or two
16 alternates, one or two?

17 MR. BRITTAIN: One, Your Honor.

18 MS. WALL: One is fine.

19 THE COURT: You think? I think two. This is a
20 longer term four hours, share that with everybody.
21 But, you know, once I've asked it, it jinxed us for
22 sure.

23 THE CLERK: We will start with the Plaintiff,
24 please strike from the numbers on the left.

25 THE COURT: Do you all have --

1 MS. WALL: Your Honor, we haven't had an
2 opportunity to --

3 THE COURT: Yeah, but you have your sheets, that's
4 brilliant. Yeah, I want you to have some time. I
5 didn't realize you had your sheets. Ladies, go, and in
6 ten minutes I'll see you. Please feel free to leave
7 the courtroom if you wish.

8 Ladies and gentlemen, let me tell you what's
9 happening now. I'm going to just tell the jury that
10 you're leaving to take a look, but feel free to go
11 ahead and go. Ladies and gentlemen, these lawyers need
12 just a few moments, if you will, to get one more look
13 at you, and when you -- when they return here's what
14 you're going to hear. You are going to hear them call
15 out some numbers. Those numbers are not your juror
16 numbers. We take your juror numbers and we process
17 those numbers.

18 It is like Thanksgiving when you have turkey,
19 beautiful golden turkey that's on the bone, as opposed
20 to the turkey that's in the little package, they don't
21 look a thing alike. The numbers that you're going to
22 hear are not your juror numbers. We are going to
23 process them so that the numbers, I can promise you the
24 numbers you're hearing are not your juror numbers.

25 And then, ladies and gentlemen, we're going to

1 seat our jury, and then once we have done that, then I
2 will give you some further instructions about what
3 happens next. But y'all got to go get some lunch at
4 that point. Right, because I know you guys are getting
5 hungry. Oh, yeah, you're getting real hungry, so y'all
6 ought to be ready for that. Does anybody need a little
7 snack, anybody diabetic? I don't want anybody letting
8 blood sugar plunge. All right, everybody okay? Very
9 well.

10 (Discussion off the record.)

11 THE COURT: All right. Now, there are going to be
12 four strikes each, with of course the Defendant sharing
13 those strikes. Plaintiff, you'll go first using
14 numbers on the left. The first alternate will come
15 from numbers 21, 22 and 23, the second alternate from
16 24, 25 and 26. And I'm going to turn it over to the
17 clerk.

18 THE CLERK: Thank you. I'm going to start with
19 the Plaintiff, please strike from the numbers on your
20 left.

21 MR. BRITTAIN: Number 11.

22 THE CLERK: Plaintiff strikes number 11.

23 MS. WALL: Defendant strikes number two.

24 THE CLERK: Defendant strikes number two.

25 MR. BRITTAIN: Number 20.

1 THE CLERK: Plaintiff strikes number 20.

2 MS. WALL: Defendant strikes number 29.

3 THE CLERK: We're going to go one through 20.

4 MS. WALL: One through 20, thank you. Defendant
5 strikes number four.

6 THE CLERK: Defendant strikes number four.

7 MR. BRITTAIN: Plaintiff strikes number seven.

8 THE CLERK: Plaintiff strikes number seven.

9 MS. WALL: Defendant strikes 17.

10 THE CLERK: Defendant strikes number 17.

11 MR. BRITTAIN: Plaintiff strikes number eight.

12 THE CLERK: Plaintiff strikes number eight.

13 MS. WALL: Defendant strikes number 18.

14 THE CLERK: Defendant strikes number 18. First
15 alternate 21 through 23, Plaintiff?

16 MR. BRITTAIN: Number 28.

17 THE CLERK: You going to choose from 21 to 23.

18 MR. BRITTAIN: Oh, I'm sorry.

19 THE CLERK: All right. Isn't that how we do it?

20 THE COURT: Yes, it is. That will be the first
21 alternate, 21, 22, 23. The second alternate will be
22 from 24, 25, 26. If you need a moment, just let me
23 know.

24 MR. BRITTAIN: Thank you, Your Honor.

25 THE COURT: Yes, absolutely.

1 MR. BRITTAIN: 21.

2 THE CLERK: Plaintiff strikes 21.

3 MS. WALL: Defendant strikes 23.

4 THE CLERK: Defendant strikes 23. Second
5 alternate, 24, 25 or 26.

6 MR. BRITTAIN: 25.

7 THE CLERK: Plaintiff strikes 25.

8 MS. WALL: Defendant strikes 24.

9 THE CLERK: Defendant strikes 24. May we review
10 the strikes, please. Plaintiff strikes numbers 7, 8,
11 11, 20, 21 and 25; is that correct?

12 MR. BRITTAIN: Madam clerk, that's correct.

13 THE CLERK: Thank you. Defendant strikes numbers
14 2, 4, 17, 18, 23 and 24; is that correct?

15 MS. WALL: That's correct.

16 THE COURT: Are there any matters regarding the
17 qualification or the selection of the jury from the
18 Plaintiff?

19 MR. BRITTAIN: No, ma'am, Your Honor.

20 THE COURT: From the Defendant?

21 MS. WALL: No, Your Honor.

22 THE COURT: Let us have our jury.

23 THE CLERK: Number 142, Lori Gorganus. As I call
24 your name, if you will come be seated in the jury box.
25 James Sturgen, 381; Eddie Harrison, 157; Joseph

1 Cornell, 78; Anthony Walland, 419; Mandy Matthews, 258;
2 Melanie Daniels, 89; Donald Eagerton, 106; Andrew
3 Roach, 338; Natalie Gore, 133; Janice Oldfield, 299;
4 Patricia Segal, 356; Roderick Hemingway, 169; Joel
5 Vaught, 26. I'm sorry, 413, Joel Vaught.

6 THE COURT: Very well, ladies and gentlemen. You
7 are now known as our remaining jurors. I want to thank
8 you for every single solitary tick of the clock. It is
9 my understanding that your presence is needed and
10 craved tomorrow morning at 9 o'clock in the jury
11 assembly room. Thank you so much.

12 Anybody that's running off to work this afternoon
13 and you need something for your employer so they will
14 know where you have been and what you have been up to,
15 clerk will tell you what to do about that if you need
16 that. And that would be to go?

17 THE CLERK: Downstairs to the clerk's office and
18 they'll give you a slip.

19 THE COURT: And where do they go?

20 THE CLERK: Straight downstairs on the first
21 floor, right when you get off the elevator or come off
22 the stairs, straight across it will say Clerk of Court.

23 THE COURT: Thank you so much, thank you so much.
24 Ladies and gentlemen, have a lovely afternoon. Can't
25 wait to see you later in the week. Bye, now.

1 (WHEREUPON, the remaining jury panel exited the
2 courtroom at 1:22 p.m.)

3 THE COURT: Let me see you just a second.

4 (WHEREUPON, a bench conference was held off the
5 record in the presence of the jury but out of the
6 hearing of the jury.)

7 THE COURT: All right. Ladies and gentlemen,
8 couple of things before I dismiss you. First and
9 foremost, when are we going to start? 9:30 in the
10 morning is when we're going to begin, 9:30 in the
11 morning.

12 So I'm going to -- before you leave, I'm going to
13 ask you to step to your jury room so that our bailiffs
14 can show you and discuss with you where you go in the
15 morning. I think you also go to the assembly room and
16 then they bring you up, I don't know, but they do. So
17 that way you can see your jury room. You won't do
18 anything other than here's your jury room and this is
19 how you come and go from the court house.

20 Ladies and gentlemen, when you return in the
21 morning, let me tell you what's going to occur. You're
22 going to be sworn in as the jury in this case. And
23 then we're going to get right -- I'm going to make a
24 few preliminary remarks, and then we're going to get
25 right into the trial of this case. So I share that

1 with you.

2 Now, I do need to give you this instruction, and
3 I'm actually going to give it to you each and every
4 time we leave each other, so I want to explain to you
5 why I'm doing that. Ladies and gentlemen, I'm going to
6 instruct you, do not discuss this matter or allow
7 anyone to discuss it with you. I will give you that
8 instruction every time we leave each other. And why do
9 I do that?

10 Well, ladies and gentlemen, I'm going to do that
11 because you are going to be the fact finders in this
12 case. There will be no one who will be permitted to
13 listen to the evidence and to make the determination of
14 the facts but you, our trial jury. Here's what we know
15 from trying cases in the United States over 200 years.

16 What we have learned about ourselves is that when
17 we begin to talk about something, we begin to make up
18 our minds about it. We can't help but do that, it is
19 the way we are made. The reason, then, that I give you
20 that instruction is because I want to support your
21 ability to listen open-mindedly to everything and not
22 make up your mind about anything until you have heard
23 everything. So the reason that that instruction is
24 given is to encourage you to support your ability to do
25 that.

1 Now, ladies and gentlemen, why would I give you
2 that instruction as you leave right now? Because you
3 would say, we just got here. We just heard you talk a
4 little bit, we met some folks, that's it.

5 Well, ladies and gentlemen, I have read to you a
6 short non-argumentative statement of the facts, and I
7 have introduced you to some people. You have a little
8 bit of information. Because you have that information,
9 it is important that I instruct you not to discuss this
10 matter or allow anyone to discuss it with you.

11 Now, you're going to be going home. No doubt you
12 may be going off to work this afternoon. And there's
13 no doubt somebody is going to be curious about where
14 you've been and what you have been up to. Well, I
15 don't want you to tell them, I can't talk to you about
16 that because you're liable to get into a disagreement.
17 So let's talk about what you can discuss.

18 You can say, you know, I showed up for my juror
19 summons, and I have been selected to serve on a jury.
20 And it's also fine to say that it is a civil case as
21 opposed to a criminal case. But the discussion must
22 end there, you must not discuss anything further. And
23 let me add to that as I don't want anybody upset with
24 you, be sure you put it on the judge. Just tell them
25 the judge told you not to talk about it any more than

1 that.

2 I will share with you that when you have been
3 discharged from your service on this jury, and I
4 promise you there will be no question in your minds
5 when that time has come because we're going to talk
6 about it, you will be at liberty to discuss this case
7 if you choose to. But until that time has come, you
8 must not discuss this case with anyone. And that means
9 your family, your friends, or any of your fellow
10 jurors.

11 You must not discuss this case until I
12 specifically instruct you to deliberate, and you must
13 not discuss this case with anyone outside of your jury
14 until I have instructed you that you have been
15 discharged and dismissed from this jury.

16 Now, ladies and gentlemen, I need to also tell
17 you, don't do any Columbo, do not do any investigation.
18 And that's so hard because we have the world of
19 information at our fingertips with our iPads, our
20 tablets, our smartphones. It's very difficult not to
21 do that. But you must not do any investigation to
22 include looking up words. You must receive all of the
23 information from which you will make up your minds here
24 in court while court is in session. So please keep
25 that in mind as well.

1 I am going to actually instruct you that you must
2 not bring your cell phones, your smartphones, your
3 tablets or any other communication device with you to
4 the courthouse tomorrow. You cannot have a cell phone
5 or a tablet or any other communication device with you
6 while you're serving on the jury. I'm going to tell
7 you why.

8 Here's what happened several years ago. It was in
9 Charleston County. We had a jury that was
10 deliberating, and the jury just reached a point where
11 they really needed to work together to recall the
12 testimony, recall the evidence, work through an issue.
13 Well, we had a juror that had a cell phone and said,
14 not a problem, I got a friend that can answer this chop
15 chop.

16 Well, it was like what was that television show,
17 Who Wants To Be a Millionaire, he called and phoned a
18 friend. Well, when that was disclosed to the Court,
19 the entire trial had to be scrapped and had to start
20 again. Because into the jury's deliberation had --
21 there was information that was injected that was not
22 received in court while court is in session.

23 So now we have an instructive from our chief
24 justice to tell jurors, do not bring in a cell phone,
25 smartphone or other communication device with you. You

1 cannot have that with you while you're serving on the
2 jury.

3 Now, we are all tethered to these things. You
4 know, you pick up your car keys, you pick up your cell
5 phone and you feel naked if you go out of the house
6 without your cell phone. So if you forget and you show
7 up tomorrow and you have it with you, don't try to hide
8 it, you'll be distracted, you won't be able to listen
9 to a thing because you're going to be worried about
10 that cell phone turning itself on and ringing right in
11 the middle of the proceedings. Just let one of our
12 bailiffs know and they will take great care of your
13 communication device, cell phone, whatever, while
14 you're serving on the jury.

15 Please don't think you can turn it off and put it
16 in your pocket or put it in your pocketbook because the
17 gremlins will invade and it will turn itself on and it
18 will ring right smack dab in the middle of everything.
19 So please just be mindful. If you happen to bring it
20 with you by accident, not a problem, just let us know
21 and we'll take good care of it.

22 You don't know a soul in Europe right now; right?

23 A JUROR: I'm sorry, ma'am?

24 THE COURT: I mean, you don't know anybody in
25 Europe, so it will be good and safe, that cell phone,

1 if you don't know anybody in Europe. You won't call
2 there.

3 A JUROR: Yeah.

4 THE COURT: We'll take good care of it to either
5 lunch or the end of the day. Does anybody work at
6 night, anybody go in like 11? Anybody work at night?
7 Wonderful, because I was going to tell you not tonight,
8 because I need you to be rested for tomorrow.

9 Now, if anyone has transportation issues, please
10 let us know and we can certainly assist you with those.
11 In other words, you know, if you have one car in your
12 family and your significant other needs to go to work
13 tomorrow, not a problem, let us know, we can certainly
14 assist in getting you transportation if you'll just --
15 yes, you let our deputy know. Please when you walk
16 back there, we will assist you in that regard. Happy
17 to do that well.

18 Ladies and gentlemen -- oh, assigned seating,
19 let's talk about assigned seating. Now, Mr. Hemingway,
20 Mr. Hemingway?

21 MR. HEMINGWAY: Yes, Your Honor.

22 THE COURT: And Mr. Vaught. Wonderful, you two
23 are our alternates. Now, what I'm going to ask you to
24 do for me you is that when you return tomorrow, if you
25 all will take the first two seats on the back row for

1 me, I need to keep up with you as our alternates. Now,
2 if y'all want to flip flop back and forth, that's fine.
3 You don't have to keep the one you pick. I really
4 actually need to keep up with you as our alternates, so
5 if you would do that for me that would be wonderful.

6 And then, our law provides that there should be
7 one of your number who is your presiding juror. There
8 are three additional tasks of the presiding juror, and
9 here they are. Number one, the presiding juror will
10 actually write the verdict of the jury on the verdict
11 form once the jury's deliberations are finished. So
12 you're the scrivener, you write the verdict.

13 Number two, the presiding juror presides in the
14 jury room during the jury's deliberations just so
15 everybody has a chance to talk and makes sure that
16 everybody has a chance to talk.

17 And finally, the presiding juror is the jury
18 spokesperson here in court. In other words, in the
19 event that the jury needs to communicate with me for
20 whatever reason, the presiding juror would take that
21 down in writing, give it probably to security who will
22 in turn get that to me. And those are the additional
23 tasks of the presiding juror, none of them very
24 difficult.

25 Ladies and gentlemen, on one of our breaks I'm

1 going to ask you to please select your own presiding
2 juror, and then that person will take this seat right
3 here where Mr. Vaught is sitting and keep that seat
4 throughout the balance of the trial. And that way I
5 can keep up with the presiding juror.

6 Now, with regards to the other seating, there is
7 no other assigned seating. If you get a seat that you
8 like, keep it. If not, get here early and get another
9 seat. There is no other assigned seating.

10 Now, ladies and gentlemen, just as a reminder,
11 when you come here in the morning, when you come to the
12 courtroom, you're going to be sworn in as the jury in
13 this case. You will then hear a few preliminary
14 remarks, and then we'll get right into the trial of
15 this case.

16 Lawyers always like for me to mention to you also
17 that if you happen to see the attorneys coming and
18 going as you come and go from the courthouse, and they
19 don't even look at you, please understand that they are
20 not being rude. Lawyers are very gregarious by their
21 very nature, but they know that they're not supposed to
22 interact with you at all.

23 So if you happen to see one of these lawyers and
24 they do like this (indicating), or perhaps somebody
25 involved in the litigation doesn't even look at you,

1 please understand they're not being rude, they just
2 know that they should not be interacting with the jury.
3 As a matter of fact, as a matter of fact, should
4 someone try to interact with you, please get their
5 name, if not, a description, and report that to me upon
6 your return to the courthouse. And I will certainly
7 deal with that individual because that would be highly
8 inappropriate.

9 Ladies and gentlemen, that will conclude my
10 remarks to you. I can't wait to see you in the morning
11 at 9:30. If you'll please go with our deputy, they
12 will take you to your jury room and then show you how
13 to come and go. So get some lunch and have a wonderful
14 afternoon, and see you in the morning at 9:30.

15 (WHEREUPON, the jury exited the courtroom at
16 1:34 p.m.)

17 THE COURT: All right. Now, I know y'all have
18 some pretrial matters. I've got to hear a motion.
19 It's scheduled at two, but we'll hear it at about 2:15,
20 if y'all want to put a note outside because court
21 people got to get some lunch. This is actually a
22 special reference from the Supreme Court. I don't
23 think y'all need to be back, unless you just want to
24 see, you know.

25 But in any event, why don't you all, can you do

1 your work in an hour and a half, you think?

2 MR. BRITTAIN: That would be fine, Your Honor.

3 I'm going to step next door for a plea too. And my
4 father should be here close to 3 o'clock, so that would
5 be perfect.

6 THE COURT: So about 3:30. I'll let you get some
7 lunch.

8 MS. WALL: Come back at 3:30?

9 THE COURT: Yes.

10 MS. WALL: That would be fine.

11 THE COURT: That way I'll be confident we'll be
12 finished. I'll see y'all at 3:30.

13 MR. BRITTAIN: Thank you very much.

14 MS. WALL: Your Honor, one other thing. We have
15 things such as the trial brief and that sort of thing.
16 Would you like us to wait until after the motions, so
17 then we'll give you all of that and close today?

18 THE COURT: That will be perfect. That would be
19 wonderful. But if you have memorandums on your
20 motions?

21 MS. WALL: We do.

22 THE COURT: Let me go ahead and get those, because
23 if you've done that I would like to read them. I would
24 like to prepare myself.

25 MS. WALL: Sure, let me get those to you now.

1 THE COURT: That would be great.

2 (Discussion off the record.)

3 MR. BRITTAIN: We are going to go downstairs and
4 grab ours and we'll get it right to you.

5 THE COURT: Not a problem at all, not a problem.

6 (The hearing adjourned at approximately 1:37 p.m.)

7 (The hearing resumed with pretrial motions being
8 heard.)

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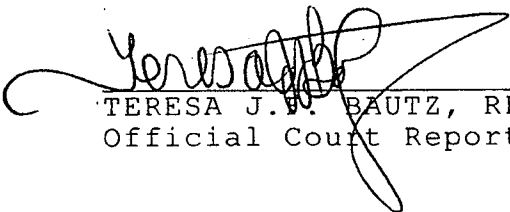
25

1 CERTIFICATE OF REPORTER
2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5
6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 9th day of December,
14 2015.

15
16 I FURTHER CERTIFY that I am neither of
17 kin, counsel nor interest to any party hereto.

18
19
20
21 
22 TERESA J.F. BAUTZ, RPR.
23 Official Court Reporter
24
25

1 (The hearing commenced at approximately
2 10:38 a.m.)

3 THE COURT: Here's what we agreed to do yesterday,
4 we agreed to go ahead and hear the summary judgment
5 motion. And I have communicated with Judge Hyman
6 because I know they were pending before him. And he,
7 as you know, did not complete his review or rule. And
8 he has absolutely no concern about you all proceeding
9 with your summary judgment motion before me before we
10 begin trial. So with that in mind, who filed their
11 summary judgment motion first? You did?

12 MS. WALL: Yes, ma'am.

13 THE COURT: Yes, ma'am, Ms. Wall, I'm listening to
14 you.

15 MS. WALL: Thank you, Your Honor. We are now
16 before the Court on Defendant's motion for summary
17 judgement which is a dispositive motion. We filed with
18 the Court a memorandum in support with 15 exhibits, and
19 in addition, we filed supplemental memoranda, two of
20 them which are also or should be a part of the record.

21 Very briefly, Your Honor, without repeating
22 everything that's in the memorandum, in this case, and
23 the Court is very familiar with the facts, that this
24 was an accident in which Ms. Jensen, the Plaintiff, was
25 sitting at her desk, and a car driven by one of the

1 mothers at the day care hit the wall of the building in
2 which her desk was, which was the building of the day
3 care.

4 In 2010, a year before the accident, Mr. Wiseman
5 at Peoples Insurance had sent to Ms. Jensen an e-mail
6 concerning day care commercial policies, business
7 policies. They met, and as a consequence a commercial
8 day care policy was put into place with Selective.
9 There were various parts to the commercial policy, one
10 part was a commercial automobile policy for the two
11 buses that were owned by the day care.

12 In this matter, Your Honor, after the accident,
13 Ms. Jensen recovered from the at-fault driver. She
14 then made a claim against her personal auto and was
15 offered her UIM limits under that policy. She then
16 went against the commercial auto policy carrier,
17 Selective. And that case was in Federal Court, and
18 there was a Federal Court order that was not appealed
19 by her, which said that the policy was clear on its
20 face that she was not an individually named insured.
21 The name insured was the day care and that because she
22 was not in, on or around one of the covered buses under
23 the commercial policy, she was not entitled to coverage
24 under that policy.

25 She then filed this lawsuit against Mr. Wiseman as

1 an agent with Peoples Underwriters and Peoples
2 Underwriters, and we're now before the Court on a
3 motion for summary judgment. The only Plaintiff in
4 this case at this time, because the other named
5 plaintiff being the day care was dismissed with
6 prejudice and that was not appealed, the only Plaintiff
7 is Donna Jensen individually.

8 So the first ground, Your Honor, for a motion for
9 summary judgment is that -- and when I refer to
10 Peoples, Your Honor, I'm referring to both
11 Defendants -- Peoples had no duty to advise the
12 Plaintiff individually concerning insurance because
13 Peoples was not the agent for Ms. Jensen's personal
14 insurance.

15 Plaintiff admits that she did not come to Peoples
16 for personal insurance, the record is replete with her
17 references of personal auto insurance being handled by
18 her husband. She in fact didn't know anything about
19 the limits or anything about it. They were -- they
20 kept personal insurance and commercial insurance
21 separate. Husband handled the commercial, she --
22 excuse me, the personal, she handled the commercial.

23 Because Plaintiff never procured her personal
24 insurance through Peoples and never requested personal
25 insurance through Peoples, Peoples owed her no duty as

1 a matter of law. The seminal case, Your Honor, that is
2 on all fours with all of the undisputed facts in this
3 case is, of course, the Trotter case, as we discuss it
4 in greater detail in our memorandum of law.

5 And in, very briefly, Trotter, the Court held that
6 an insurance agent/agency has no duty to advise of an
7 exclusion in a company's commercial automobile
8 insurance policy and no duty to advise that a customer
9 buying such commercial auto policy needs workers
10 compensation insurance.

11 Now, interestingly in this case, it's undisputed
12 that Peoples offered to obtain a workers comp policy
13 for the day care not once, not twice, not three times,
14 but four times, and to Ms. Jensen. And she declined
15 saying she already had workers comp insurance through
16 another agent. She later, after the accident, said
17 that, well, that other agent had told her she couldn't
18 be individually insured under this workers comp policy,
19 which, of course, we know is not the law in South
20 Carolina. If you pay an extra amount, you can be as
21 the owner of a business.

22 And we do know that this business which had
23 approximately 30 employees was required under South
24 Carolina law to have workers comp insurance. But
25 workers comp insurance is in no way connected to

1 Peoples because she, at the time in 2010, was offered
2 workers comp insurance by Peoples. She said no, I
3 already have it through another agent, which also takes
4 us to the point that it's undisputed that Peoples was
5 not her exclusive agent. She had other agents, she
6 works with a different agent for her personal
7 insurance -- her personal auto being Allstate that her
8 husband handled.

9 Under the standard set forth in Trotter, Your
10 Honor, the day care, there was no clear request for
11 advice with regard to the commercial auto policy. It's
12 undisputed that the commercial auto policy placed by
13 Peoples in 2010 and renewed by the Plaintiff in 2011
14 just before her accident was read materially the same
15 and was titled exactly the same as had been the
16 commercial auto policies that she had been buying from
17 a different agency that, I think it was the Johnson
18 Agency, for years before she came to Peoples,
19 approximately five years.

20 And those earlier policies, Your Honor, are in the
21 record, and they reflect that it's titled in the name
22 of the day care only, not Ms. Jensen individually. And
23 the material portions that say if -- for example, if
24 you have an accident in your workplace, it's not
25 covered by this policy, you have to be in or around the

1 covered auto. Those material provisions are the same.

2 And Your Honor, there's no evidence in the record
3 that Peoples expressly undertook to advise Jensen or
4 impliedly undertook to advise Jensen again, that is the
5 law as is set forth in the test for that in the Trotter
6 case. And none are satisfied under the undisputed
7 facts of this case.

8 And we must remember that Ms. Jensen does claim
9 that she said, well, I want to be covered for
10 everything that happens everywhere in and around my day
11 care. We know that the law is very clear, that is a
12 request for comprehensive or the best policy or full
13 coverage, that's in essence what it is. And the
14 Trotter case is crystal clear that -- and I quote,
15 "A request for full coverage, the best policy or
16 similar expressions does not place an insurance agent
17 under a duty to determine the insured's full insurance
18 needs or to advise the insured about coverage or to use
19 his discretion and expertise to determine what coverage
20 the insured should purchase," end quote.

21 After receiving the day care commercial insurance
22 policy through Peoples that was written by Selective in
23 2010, she was given a copy of that policy, it's
24 undisputed. She said she didn't read it, she of course
25 under the law had a duty to read. But she admits that

1 she asked no questions of Peoples for any additional
2 coverages or explanations.

3 She did not ask for advice, she testifies that she
4 simply assumed she had coverage. And I quote, "I
5 assumed that I would be covered for any incident."

6 But then she goes on to say, this is critical, no
7 one would have predicted this specific incident. That
8 is ridiculous. I assumed I would be covered for any
9 incident or injury. And an assumption, of course, Your
10 Honor, does not give rise to a duty on the part of an
11 agent to guess what your assumption is.

12 As Trotter says, a customer's assumptions are
13 insufficient to create an agreement regarding the
14 purchase of insurance and the duty to advise. And
15 further, when Ms. Jensen says, well, after my accident
16 we had conversations about the insurance, Trotter also
17 speaks to that issue and says, "A plaintiff" -- and I
18 quote -- "may not seek after the fact to have a Court
19 or a jury create an undertaking favorable to her if the
20 parties themselves did not enter into such an
21 agreement." The point being you have to see whether
22 there was an agreement at the time of procurement of
23 insurance, not what may have happened after an
24 accident.

25 Clearly, Peoples had no duty to advise Jensen

1 regarding her personal insurance coverage under the day
2 care's commercial policy. The question raised by
3 Mr. Brittain in his deposition of Mr. Wiseman having to
4 do with a gap in coverage, there was no gap in
5 coverage. Mr. Wiseman testified that if a gap meant
6 known discrepancies, which is what they were getting
7 at, and Mr. Brittain's question was very general, but
8 he went on to say and the evidence is clear that there
9 was no discrepancy between the insurance that Peoples
10 procured for the day care and the insurance that was
11 requested. Because that is what she requested,
12 insurance for the day care.

13 And as to any issue as to whether the Plaintiff,
14 Mrs. Jensen, individually had any insurable interest in
15 the day care buses, there is no -- there is nothing in
16 this record, and of course the Plaintiff has the burden
17 of proof, the Plaintiff would have the burden to prove
18 that she had an insurable interest in the buses. An
19 insurable interest would mean that the buses were
20 titled in her name as opposed to being titled in the
21 day care name.

22 Here's why we know that couldn't be. They had to
23 have been titled in the name of the day care. Because
24 the policies that she held before she came to Peoples,
25 all five years that we have, and that's as far back as

1 we've been able to get them, all of them are titled --
2 all the commercial auto policies are titled in the day
3 care's name. That tells you that the buses are titled
4 in the day care, not in Donna Jensen individually.

5 Furthermore, if we look at the policies that were
6 placed after Donna Jensen and the day care left Peoples
7 and started procuring their insurance for a while
8 directly with Markel Insurance Company, and those
9 policies are in the record, all of those policies, the
10 commercial auto policies, are also in the name of the
11 day care only. Mrs. Jensen's name, she is not an
12 individually named insured. And that also tells you
13 that the only insurable interest in the buses, title to
14 the buses, if we went out and went to the automobile
15 title place, would be the day care. And, of course,
16 that makes logical sense.

17 She has testified that when she created the day
18 care or started the day care, she went to a lawyer and
19 she made sure that it was made into an LLC because she
20 was trying to protect herself from individual
21 liability. Certainly part of that, even though it's
22 not in the record, that the only logical inference is
23 when the day care bought the buses, they would title
24 those buses in the day care and not in Jensen
25 individually, because then all of a sudden she's undone

1 what she's trying to do through the LLC, which is
2 protect her from individual liability.

3 So, Your Honor, we'd move for summary judgment on
4 the grounds that there was no duty to Donna Jensen
5 individually, the only plaintiff in this case, that
6 there was no breach of duty to Donna Jensen
7 individually. And we've also moved on the grounds that
8 there is no proximate cause to anything that the --
9 Peoples did proximately caused any injury to Donna
10 Jensen.

11 It's important to remember that Peoples offered to
12 explore with Jensen workers compensation insurance, and
13 she declined that, said she already had it. It's also
14 in the record that several months before the accident,
15 they spoke to her husband about personal automobile
16 insurance.

17 He had his insurance with Allstate, but he talked
18 to someone at Peoples about personal automobile
19 insurance. They recommended higher limits, and he
20 said, no, I'm staying with Allstate. And, of course,
21 the record does reflect all of his Allstate policies,
22 or their Allstate policies, are in the record. And
23 those Allstate policies he continues through to this
24 day. He doesn't raise the limits until, I believe it's
25 2013, two years after the accident.

1 Your Honor, in this case, and it's in the record,
2 the Defendants have an expert, the Plaintiff does not.
3 The expert's affidavit is attached to the motion. The
4 expert affidavit says that after 42 years in the
5 industry, to a reasonable degree of certainty, he
6 states that there is no breach in the standard of care
7 for an insurance agent and that this was a workplace
8 accident, and a workplace accident would not be covered
9 under a commercial automobile policy.

10 And what I read to the Court earlier, she of
11 course admits that this particular unusual accident no
12 one could have anticipated. So she cannot now say, you
13 should have told me that if I had been sitting at my
14 desk and a car had hit the wall and I had been injured,
15 the commercial auto policy wouldn't have applied.
16 Because she herself says no one could have anticipated
17 such an injury or such an accident, and of course we
18 know she didn't ask him that question.

19 The only evidence in this record is, Your Honor,
20 that under a commercial auto policy that for an LLC,
21 the owner cannot be named as an individual. That is
22 the only evidence in the record, there is no contrary
23 evidence to that whatsoever.

24 And the commercial auto policy that was placed
25 through Peoples was an ISO form. And I think that's

1 important. We've not mentioned this before. It is an
2 ISO form, a standard form that is approved by the South
3 Carolina Department of Insurance. So this wasn't some
4 weird, unusual commercial auto policy. As I said
5 before, read just like the one she had before and just
6 like the one she had afterwards.

7 The only difference was when she came to Peoples
8 the UM and UIM limits were raised. The expert also
9 speaks to this. It is best practice in the industry
10 for an insurance agent, when the customer makes a --
11 she wanted a million dollars liability limit. And it's
12 best practice to recommend that UM/UIM limits match
13 liability limits on a commercial policy; also that
14 UM/UIM policy -- or election, excuse me, election form
15 that is in the record, is the ISO standard form that is
16 in fact required. You must, an insurance agent, must
17 offer, get a meaningful offer, that's the law and the
18 statute, of UM/UIM coverage. And that was, of course,
19 satisfied here.

20 Your Honor, I promise I'm almost finished. In
21 addition, several other things. It is important that
22 we recognize that Donna Jensen was not a sole
23 proprietor. This is an LLC, and there is a difference.
24 Secondly, and I did mention -- and I mentioned that,
25 I'm sorry.

1 Secondly, we -- and again under Trotter, we need
2 to recognize that neither a Court and certainly a jury
3 can create a contract for a party. A miscommunication,
4 and I think I've heard that word used by Mr. Brittain,
5 that is the whole point, if there's not a meeting of
6 the minds, there is no agreement to do something if the
7 two parties do not have that clear agreement.

8 And we cannot impress that on them after the fact
9 when something goes wrong, when there's an accident and
10 the injured party says, well, gee, I didn't understand
11 or, gee, I wish I had known. But she admits that she
12 couldn't have -- she couldn't, no one, could have
13 anticipated this unusual accident and clearly didn't
14 ask about it with Mr. Wiseman.

15 And, Your Honor, I think -- and I don't want to
16 belabor this, and I know that the Court has spent
17 considerable time, and I thank the Court for doing so,
18 in reading all of the submissions, there's a great deal
19 of information -- and I would rest on, in addition to
20 what I've said, and I apologize if I've left anything
21 out, but our memorandum in support with all of our
22 attachments, also our two supplemental memoranda, and
23 then all of the other matters that are of record that
24 in this case that have been submitted to the Court.
25 And I'm happy to answer any questions. Thank you.

1 THE COURT: Thank you Ms. Wall, thank you. Yes,
2 sir, Mr. Brittain.

3 MR. BRITTAIN: Yes, Your Honor. Your Honor, I
4 think that the approach that we're taking here is the
5 kind of thing that has to be done, I'm sure, but it's
6 heartbreaking for somebody like Ms. Jensen. Because
7 we're discussing things today that have never been a
8 part of this case for all these years and months. And
9 that's just, I guess, the way things happen sometimes.

10 I like the thought that when you're in the
11 insurance business and there's a problem with your
12 customer, you're willing to accept some responsibility
13 for it. That's the way I am as a lawyer, most people
14 are that way. And our approach to this is much
15 different than Ms. Wall.

16 Donna Jensen has been a fine member of this
17 community, she likes Matt Wiseman, and Matt Wiseman is
18 one of the Defendants. Like I've said from the start,
19 there's certainly no hard feelings here, we're trying
20 to figure out where we are now that she's had these
21 problems. And as you know, Mr. Wiseman called her up
22 and said, hey, I been looking at some stuff with day
23 cares, may have some ideas for you.

24 And I would like you to kind of read between the
25 lines in terms of what Ms. Wall says, and much of what

1 she says, I trust you to go back and look at these
2 memorandums, she said things today I've never heard of.
3 Don't know that they're in the record. If they are,
4 that's fine.

5 But we know there was a conversation between
6 Ms. Jensen and Mr. Wiseman. We know that Peoples holds
7 them self out as the people's insurance company, asked
8 us questions, communication. And somewhere in this
9 process it's clear that Ms. Jensen, maybe it's because
10 of those five other insurance policies she had, she
11 made it clear that she, herself wanted to be covered
12 and anything that she was buying, cover me. And as Ms.
13 Wall loves to say, there's no dispute about that.

14 All right. Now, so let's freeze that frame right
15 there. Let's say that at that moment she has no
16 insurable interest. Is that something that she's going
17 to know? Or is that something that the Peoples
18 Insurance company's representative is going to say,
19 wait a minute, cover you. You're in here with an LLC,
20 ma'am, I can't cover you. You want to get covered, you
21 and your husband go out and talk to Allstate. Or do
22 you let that statement be made and move on to talk
23 about raising your underinsurance coverage, okay.

24 That's what happened here. They talk about her
25 being covered, they move to underinsurance coverage,

1 raised it, and she paid a premium.

2 THE COURT: Let me ask you this question,
3 Mr. Brittain, because when I was going through the
4 deposition of Ms. Jensen last night, I was looking for
5 that very general language. And can you direct me to
6 that for this reason. As I was going through her
7 deposition, she talks about an event that happened in
8 her life that her son had a fire and lost everything.

9 And at that moment she and her husband decided
10 that they would divide and conquer, if you will, that
11 she would handle the business, he would handle their
12 personal insurance life and that they would make
13 inquiries. She would do it on behalf of business, and
14 he would do it on behalf of their personal insurance.
15 And they would go and they would do an inquiry of their
16 carriers, of their agents, to see if they had
17 sufficient coverage, because they were concerned that
18 their son had lost everything.

19 So her husband then went, made those inquiries
20 from their personal insurance agents. She then was
21 doing the same with regards to the business. I was
22 looking for -- based on your argument yesterday, I was
23 looking for the language when she was having that
24 conversation with Mr. Wiseman where she said, I want to
25 be covered --

1 MR. BRITTAIN: I'll have them look for that.

2 THE COURT: That would be perfect, find that for
3 me.

4 MR. BRITTAIN: I think that you will find --

5 THE COURT: Okay.

6 MR. BRITTAIN: -- in her deposition, and you know
7 how we do, maybe I'm paraphrasing it to some extent.

8 THE COURT: Well, I went looking for that one and
9 wasn't anticipating the sort of division of duties. I
10 was looking for that language. And I really may have
11 missed it, so I'm really looking for you to help me
12 with that.

13 MR. BRITTAIN: Yeah, I'll see if I can cite you to
14 a particular statement. But I think a fair reading of
15 her deposition is, one of my interests in moving
16 forward with Mr. Wiseman and Peoples was to take care
17 of myself as part of this process.

18 And the point I'm making is we're in here arguing
19 all these LLC insurable interest issues, and I guess
20 that's what has to be done in here in the aftermath, I
21 don't like that. Because I believe in a process like
22 this, she is a hard-working diaper-changing woman who
23 goes in to see an insurance agent and is trying to get
24 some insurance coverage to protect herself. And by the
25 time it's all said and done and she has an injury, she

1 doesn't have an insurable interest. She's an LLC, you
2 know.

3 And my point is, under the summary judgment
4 standard, is there a scintilla of evidence that she had
5 created a relationship with an agent that had some
6 obligation to her to help her sort through these issues
7 and if she has fairly raised that she was covered, to
8 make sure that she understood that she was not. And I
9 say to you, based on his honest answers, that
10 Mr. Wiseman did not know the answer to that question.

11 We are now superimposing understanding on both of
12 these two very fine individuals that were not present
13 at the time, so that communication could not have taken
14 place.

15 Now, today for the first time two hours ago, I
16 heard the words insurable interest and thought about
17 it. And so of course I've come out, and it's not in
18 this record, and we are arguing summary judgment, and
19 I've explained this to my client. You know, we're all
20 human beings, talking about mistakes, I didn't put
21 anything in here about insurable interest, because it
22 never crossed my mind that that was part of the concept
23 of this case which has arisen.

24 These buses are titled in their names, not the
25 business names. That's what I --

1 THE COURT: Titled in whose names?

2 MR. BRITTAIN: In Ms. Jensen and her husband's
3 names. Now, that's what I've heard this morning. I
4 don't know, I've just -- when this was said earlier,
5 Ms. Wall said that it was clearly in the names of the
6 business, there's no question about that and
7 everything.

8 Then I was handed a note from the Jensens that
9 said, hey, those buses were titled in our names. Now,
10 I don't know the answer to that question. But, you
11 know, if that's what this case is going to hang on,
12 then I want to have a chance -- because this hadn't
13 been litigated between us. It's not like that's been
14 something that we've all been litigating.

15 I want to go back and see if I can produce those
16 titles and give them to Ms. Wall to see. Because that
17 would clearly be a red flag to an insurance agent on
18 who was to be covered and who wasn't to be covered, if
19 based on the title of those buses. Now, like I said, I
20 may find something different.

21 My point is this, we're getting ready to make a
22 summary judgment decision in this case. And I know
23 that nobody had put a lot of stock in the fact that
24 she's got \$850,000 worth of damages. You know, that
25 happened and it happened the way it happened. And I

1 don't know where that's going to go.

2 But, you know, it is a matter of some
3 significance. And, you know, if she doesn't have a
4 scintilla of evidence here, then I don't know that
5 you're ever going to have a scintilla of evidence.

6 The expert opinion in this case to me is
7 completely irrelevant. We're talking about a
8 conversation between two people. He wasn't there. He
9 has testified in court twice. He doesn't -- he's more
10 familiar with North Carolina law than he is South
11 Carolina law. He is going to be rendering opinions
12 about commercial policies and how they are effected,
13 but nothing about the interaction between these two
14 people and the conversations that took place.

15 So I don't see his affidavit in this case as the
16 kind of thing that overcomes what our position is, as
17 far as we're concerned. Ours is real simple for this
18 jury. Look, this is one of the finest organizations in
19 Horry County. They've been in the insurance business
20 for years, they are the best.

21 I'm a normal human being. I went in and discussed
22 certain things with them, I thought I was making myself
23 clear. I wanted certain things to happen, hoped I'd
24 never have a problem. My son has had one and it was a
25 disaster for him. I had a problem. I thought I was

1 covered, so did my agent. Something in there happened
2 where I wasn't covered.

3 That's a simple story. And I think it's one that
4 bears telling. And these legal arguments, you know,
5 don't arise -- don't rise to the level to satisfy the
6 Supreme Court's requirement that there is not a
7 scintilla of evidence on Ms. Jensen's behalf.

8 And so we don't want to lose on summary judgment,
9 we would like to proceed and put our case up. But I
10 want to be fair with the Court, that's all we have. I
11 mean, I can't manufacture anything and wouldn't that
12 didn't happen. Those are the facts. So if the Court
13 feels like those facts aren't sufficient, then we
14 understand the Court's decision. But I certainly want
15 to put up a spirited argument.

16 My understanding of it is in a situation like
17 this, Ms. Jensen ought to be able to say what happened,
18 and the jury should make its decision.

19 MS. WALL: Your Honor, if I may just briefly
20 respond.

21 THE COURT: The fact that these vehicles are not
22 titled in the LLC is a bit of a bombshell. How about
23 how helping me there.

24 MS. WALL: All right, I will help you there. The
25 Plaintiff has the burden to prove that they are not how

1 they're titled, and there is nothing in this record
2 that they were titled in their personal names. And
3 since there's nothing in this record that she went to
4 Matt Wiseman and said, oh, by the way, the buses are
5 titled in my name, she never said that. There's no
6 evidence of that.

7 His only reasonable conclusion would be that they
8 were titled in the day care because she was coming to
9 him with policies from Progressive for at least five
10 years which were titled in the day care and not her
11 personally. She continues to this day to have her
12 commercial auto policies titled in the day care.

13 Her name is nowhere on a single commercial auto
14 policy over the last more than ten years, absolutely.
15 So there is nothing in this record that would --
16 nothing that would lead an insurance agent to conclude,
17 well, gee, these buses must be titled in her name.
18 There's no evidence, there's absolutely nothing in this
19 record.

20 And the record -- I moved for summary judgment
21 some time ago. And the record, it is up to the
22 Plaintiff to place in the record the evidence. There
23 is no evidence. The only reasonable inference is since
24 over the last ten years to this moment that she has no
25 insurable interest.

1 But even if she did, she never told anyone at
2 Peoples that, ever. She never said, those buses, I
3 have individual liability, I own those buses in my
4 name, never. And Mr. Brittain may not care about the
5 law, but I certainly care about the law, and I know
6 that the Court cares about the law. And Trotter says
7 opinion testimony does not create a duty to advise
8 which does not exist at law.

9 There is no duty to advise by Mr. Wiseman to Donna
10 Jensen, to advise her on how the commercial policy
11 works, we know that, because the Trotter case was an
12 insurance agent who is selling commercial auto policies
13 to a person who had a trucking business, and he also
14 sold them personal insurance.

15 He never once gave that man advice on, now, just a
16 second, here's how the limits work and if you're in a
17 workplace accident this commercial policy is not going
18 to cover you. That's this case. And our Court twice
19 said he had no duty to talk about that. He had no duty
20 to explain the commercial policy, no duty whatsoever.

21 Furthermore, Your Honor, there was a huge issue
22 that I just -- oh. I keep hearing that this commercial
23 policy was sold and Donna Jensen had no coverage. Yes,
24 she did. She was covered under that policy if she was
25 in or around the covered buses. It's -- the only

1 reason she's not covered, Your Honor, is because of
2 this accident, this particular accident, who the
3 Plaintiff admits on the record no one could have
4 anticipated and went on to say, that's ridiculous, no
5 one could have anticipated such an unusual accident.

6 That is the only reason she's not covered. Not
7 because Mr. Wiseman sold her a policy that wasn't a
8 good policy or should have had her name in the title,
9 which it couldn't have because she's a -- the day care
10 is an LLC. She was covered. If she had been in that
11 bus or hit by one of those buses, she would have had a
12 million dollars in coverage. That's what the policies
13 say, and the policies are in the record, Your Honor.
14 The only reason she doesn't have the coverage is for
15 this particular accident.

16 THE COURT: Let me stop you, Ms. Wall, and ask you
17 this question. At any point in time during the
18 discovery of this case or at any other point, has it
19 ever been discussed, has it ever been discovered, has
20 it ever been responded to, has it ever been information
21 that has been in this case, that this day care, meaning
22 this LLC -- we're throwing that term around, day care,
23 but it is my position as I hear you all use the term
24 day care, that's the LLC.

25 MS. WALL: Correct, Your Honor.

1 THE COURT: The LLC. Have you ever had any
2 information up until this moment, up until this moment,
3 I should say five minutes ago that in fact these -- at
4 the time of the accident, that the vehicles, the
5 insured vehicles that were insured under this
6 commercial automobile policy, were owned by anyone
7 other than the LLC?

8 MS. WALL: No. Your Honor, no. Absolutely not.
9 Absolutely not.

10 MR. BRITTAIN: Your Honor, I've got those
11 citations for you that you asked for in my discussion.

12 THE COURT: Okay, just a second.

13 MS. WALL: And, Your Honor, I was going to address
14 that as well. The business about the son's fire loss,
15 I have that citation, it's pages 137 on. It's fairly
16 clear that -- or 141, I'm sorry -- it's fairly clear
17 that the son's fire loss was after her accident.

18 MR. BRITTAIN: On page -- and I'll just read them,
19 I mean, this is out of Ms. Jensen's deposition. She
20 said, I've known Matt for over 20 years, I trusted him
21 to give me insurance that was going to provide the
22 coverage that would take care of me and my business in
23 the event of any type of accident or injury or anything
24 that would happen.

25 THE COURT: Now, where is that? Tell me where

1 that is.

2 MR. BRITTAIN: Now, that is, let me see, that is,
3 line eight and nine, page 125 in Ms. Jensen's
4 deposition.

5 THE COURT: 125. Say again, 125?

6 MR. BRITTAIN: It says at the top of this thing,
7 says 125 to 128, so this is probably 127. That was
8 page 127. Okay. Then we go over to page 137. When
9 you went -- this is lines 10 through say 18 -- when you
10 went to Peoples, you were not seeking -- when you first
11 went to Peoples or when Peoples reached out to you
12 regarding a policy for your day care, was it ever
13 discussed that you were trying to get personal
14 automobile insurance on yourself?

15 No. I was trying to have coverage for every
16 person who went in and out of my building, including
17 myself, who was there every single day. But as my
18 insurance agent -- page 138 -- if none of this covered
19 me, I would have thought I would have been advised
20 maybe you should take out higher insurance on yourself
21 because you aren't covered. If someone else was in
22 this situation, they would be covered but you would not
23 be covered.

24 And then on page 157, what are you contending that
25 Peoples should have done differently in placing your

1 policy? I feel that if my own agent didn't know I
2 wasn't covered, that there maybe should be more
3 training on the part of their agents to write coverage
4 in a way that's going to cover the people that they are
5 providing a service to. I went to an expert to get
6 insurance, you know, like I said, before we had
7 multiple conversations and I was assured that it would
8 be taken care of, that I was covered.

9 And so if anyone who is an expert in the field
10 didn't know that the policy wasn't written in a way
11 that I would be covered, I don't know how I would be
12 expected to know that. If it's their business and
13 that's what they do, then I would certainly think that
14 that is what they would sit down and discuss with me.
15 So, I mean, and those are just a sampling. I mean, I
16 think that's the fairest characterization.

17 Let me address Trotter for just a second. This
18 case, I know how we tend to do as lawyers, we tend to
19 try to find the case that's just like it. I don't
20 think this is anything like Trotter. Trotter is a case
21 where the two people had a very casual conversation, no
22 full coverage. He said --

23 THE COURT: Hold on, hold on.

24 MR. BRITTAIN: All right.

25 THE COURT: On page 108 --

1 MR. BRITTAIN: All right.

2 THE COURT: -- and 107 they are talking about an
3 e-mail. Apparently this e-mail is sometime in April
4 of 2010. And at line six it says, question: Okay.
5 And in this e-mail he asked for various information
6 including the VIN numbers for the buses, the drivers of
7 the buses. He asked you about workers comp and whether
8 or not you have workers comp and if you're included or
9 excluded; is that right? Yes.

10 So this whole e-mail is discussing insurance
11 related to day care; is that right? Yes.

12 There is no mention here of any personal auto
13 insurance. All right. Now, direct me to that e-mail.

14 MS. WALL: The e-mail, Your Honor, is -- it does
15 ask for that information, and she never gives it to
16 him.

17 MR. BRITTAIN: It's Exhibit 8.

18 MS. WALL: It is, Your Honor Exhibit 7 to our
19 memorandum.

20 THE COURT: Exhibit 7 to your -- all right,
21 Defendant's Exhibit 9 is apparently from the depo,
22 okay.

23 MS. WALL: Seven to our memo in support of summary
24 judgment.

25 THE COURT: Okay.

1 MS. WALL: And he says, thank you for meeting with
2 me today. I do need a couple more things for from you,
3 federal ID number, then asks for workers --

4 THE COURT: Slow, slow, slow.

5 MS. WALL: I'm sorry. I need this for workers
6 comp. Do you know who your workers comp carrier is,
7 VIN numbers for the buses --

8 THE COURT: Slow down.

9 MS. WALL: -- drivers of the buses.

10 THE COURT: Slow down.

11 MS. WALL: Do you have number seven, Your Honor?

12 THE COURT: I'm looking at it.

13 MS. WALL: And then if you look at No. 8 is her
14 response to Mr. Wiseman which is, I don't have most of
15 the information you're asking for. Let's just focus on
16 building liability insurance for now since that is time
17 sensitive. And then she talks about a claim she's
18 already had.

19 THE COURT: Okay.

20 MR. BRITTAIN: On Trotter, just one last point. I
21 see them as two very different things. As you know,
22 Trotter was a State Farm insurance agent. A guy goes
23 in and says, I want full coverage. That's all that was
24 really said. And then the argument is he didn't give
25 him workers' comp coverage.

1 I mean, that's a State Farm automobile insurance
2 agency he goes in and talks to. He's not talking to an
3 independent agent whose job it is to look at the
4 various carriers and opportunities and have a long
5 ranging discussion about multiple coverages. It's just
6 a phrase that we all think in terms of the context is
7 automobile insurance coverage.

8 This is a very different situation here.
9 Mr. Wiseman reached out to her. They are dealing with
10 workers comp or not and it wasn't here, which is okay,
11 automobile insurance policies, VIN numbers, liability
12 coverage, underinsurance. So there's practically much
13 more of a role on the part of an independent insurance
14 agent than what we deal with in the Trotter case. And
15 if we try to impose Trotter facts on the
16 responsibilities of an independent insurance agent,
17 then I think we're expanding what happened in that case
18 too much.

19 Duckworth, I think, is more similar because you
20 had a peculiar conversation in Duckworth. It does
21 involve an elevator or not. But what makes it a little
22 bit more like our case is there are peculiarities of
23 discussion with respect to different types of
24 coverages. In Trotter it was really just an automobile
25 insurance policy for full coverage.

1 But, listen, we trust the Court to make a good
2 decision. If -- you know, I'd like to if it's not too
3 late -- and like I said, all I know to do is be honest
4 in life. I've never had a conversation with Ms. Walls
5 about insurable interest, I have never crossed my mind
6 in this case. It did this morning and I came out and
7 discussed it with my clients. They claimed that these
8 buses were titled in their names. I would like to be
9 able to submit that to the Court for its consideration.

10 I never put it in before, I admit it, but I never
11 saw it as an issue, it has just arisen. And if we go
12 forward at trial, obviously that's something I'm going
13 to introduce into evidence.

14 MS. WALL: But, Your Honor, he can't introduce it
15 into evidence because it isn't -- it's -- I mean, let
16 me back up. In response to summary judgment which was
17 filed probably three months ago, something like that,
18 he has the duty to -- he has the burden of proof in
19 this case. He would have the duty to prove that all of
20 a sudden there's this insurable interest.

21 But, Your Honor, even if he did -- had done that,
22 which he didn't, so it's too late now, he can't all of
23 a sudden run out and go get some evidence and bring it
24 to the Court, she didn't give Matt Wiseman any
25 information that the buses were titled in her name. We

1 know that, we have -- she was asked so many questions
2 in her deposition about all of the conversations and so
3 on and so forth.

4 There's no evidence in this record. And it
5 doesn't -- wouldn't make any sense because before she
6 came to him for at least five years, she had commercial
7 auto policies titled exactly the same way as Peoples
8 places the title with the Selective policies and
9 exactly the same way she currently has.

10 So it just doesn't even make any sense. I mean,
11 clearly there's nothing in this record that Matt
12 Wiseman was supposed to guess that the buses were
13 titled in her name. How could he possibly guess that?
14 That's not his job as an insurance agent. No insurance
15 agent has that job just to divine and guess, that's not
16 how it works. And that's not what the law says.

17 THE COURT: Got it, I got it. All right,
18 we're going to take --

19 MS. WALL: Your Honor, may I just --

20 MR. BRITTAIN: One last point, that was only
21 raised this morning. That was not in her original
22 summary judgment motion. She never said back there
23 when she filed it, you don't have an insurable
24 interest, you didn't tell them about an insurable
25 interest. Only point I'm making is for all three of us

1 that arose this morning, so you can decide how that
2 goes.

3 Also remember this, based on a conversation we had
4 yesterday, I agreed to return to a summary judgment
5 setting in order to move the case along and do what's
6 right and what's fair.

7 Now, this is just the way things happened. We
8 went back we discussed this case, the Court said
9 something about insurable interest. I came out and
10 started checking into it, so did Ms. Wall. But I don't
11 want the Court to think she raised this in her original
12 summary judgment motion, it never was mentioned. It
13 has just now become something we're arguing about.

14 MS. WALL: Your Honor, may I ask you a question.
15 You had raised the issue of somewhere in Donna Jensen's
16 deposition about how, and it's on page 145, the son had
17 the accident and they increased their personal auto
18 limits. That was in 2012, Your Honor. And how we --
19 that's after the accident, the accident was in 2011.

20 THE COURT: Got you, okay.

21 MS. WALL: And how we know that is because the
22 Allstate policies that the husband placed for the
23 family, the limits were not raised until
24 September 2012. So I was just answering that question
25 that Your Honor raised.

1 THE COURT: Well...

2 MS. WALL: We subpoenaed all of the Allstate
3 records and, of course, produced them to the other
4 side. And the Allstate records show that from 2008
5 until September 2012 they had minimum limits. They
6 increased those minimum limits in September 2012, which
7 would be after the son's fire loss when they relooked
8 at that issue.

9 And I'm sorry, did I cite you the page, it's page
10 145, line 6.

11 THE COURT: Yes. The fire was March 17th, 2012.
12 So you just need to -- you all just need to disregard
13 the portion that I said about the two of them dividing
14 the duties of her husband being involved with just
15 review of the personal as opposed to her review of the
16 business.

17 I don't know why I said that, what difference does
18 it make. It's interesting that it's in this deposition
19 but has nothing to do with this case. But you're
20 correct, the fire that she says prompted the two of
21 them to review their insurance in toto, you're right,
22 it happened in 2012. I'm not quite sure why it's in
23 this deposition, but apparently the date does come
24 after the 2011 accident.

25 So we need to disregard that as being a prompting

1 of the review of the insurance. I don't know why it's
2 in here, because there's a lot of discussion about it,
3 and I certainly looked at it, and a lot of discussion
4 about her -- that prompting her conversation with
5 Mr. Wiseman. I may take just a few moments, because if
6 I disregard all of that, it may take a minute just to
7 go back and review it for just a moment with that
8 correction.

9 MS. WALL: Your Honor, may I simply address one
10 last thing that was brought up for the first time here,
11 the argument that somehow the law places a greater
12 burden to advise on an independent agent than it
13 does --

14 THE COURT: I don't want to hear about that, I
15 don't want to hear about that. And, you know, it is --
16 it's very -- it's disconcerting a little bit the
17 comment about who owns these buses. Because this
18 deposition talks about the policy and whose name it's
19 in and that an individual -- there's a place where
20 individual ownership can be indicated on the policy.
21 It's not indicated on the policy.

22 It seems to me that if that's said in a
23 deposition, that surely it will come out that, yeah,
24 that doesn't make any sense because I own the buses, so
25 why would they be in the day care's name. All of that

1 is a bit of a mystery me to me, I might add.

2 Because when you look at the deposition, I just
3 read it again, it says, there's place where if it's
4 individually owned you can check that, and it's not
5 checked.

6 Seems to me if I got a policy and it's in my day
7 care -- it's in my LLC's name, I'm looking at the
8 policy whether it's in the deposition or whether or not
9 it's when I received the policy, seems to me if I'm
10 looking at it and it says it's in my LLC and individual
11 isn't checked, at some point it's going to dawn on me
12 to say, don't know why that happened because it's in
13 my -- it's in my individual name. I don't see that in
14 this deposition. Okay. Give me just a few. I'll be
15 right back.

16 (WHEREUPON, a brief recess was taken at
17 11:36 a.m.)

18 THE COURT: Please be seated and thank you, thank
19 you all. All right. I am prepared to the rule on the
20 motions for summary judgment. And I have reviewed the
21 record. I took some time to go back through and look
22 at the deposition of Ms. Jensen and some of the
23 exhibits, particularly e-mail exhibits and the
24 application submitted by the Plaintiff for commercial
25 automobile insurance on the two buses.

1 And I want to handle -- first of all, I want to
2 handle the information that arose this morning with
3 regards to the ownership of the buses. And I am
4 satisfied that, first of all, that the question
5 regarding the ownership of these buses arose for the
6 first time in a note during the latter part of the
7 argument of Plaintiff's counsel in a note from the
8 Plaintiff, apparently, according to counsel for the
9 Plaintiff, that in fact these two buses were owned by
10 the plaintiff individually and not the LLC, not the day
11 care LLC.

12 MR. BRITTAIN: Your Honor, just to make sure, I'm
13 not going to interrupt you, my paralegal came and told
14 me that my client told me that the buses were titled
15 in, quote, "their name," husband and wife.

16 THE COURT: Okay.

17 MR. BRITTAIN: Now, I haven't checked any of that
18 out. And, yeah, they are recalling something from
19 several years ago that I didn't get a note, but that's
20 what she whispered in my ear.

21 THE COURT: Got you.

22 MR. BRITTAIN: Okay.

23 THE COURT: And that was during your argument, the
24 last part of your argument?

25 MR. BRITTAIN: Yes, ma'am.

1 THE COURT: This morning.

2 MR. BRITTAIN: Yes, ma'am.

3 THE COURT: Right. Okay. Now, so that is what it
4 is. I have gone back and I have looked at the
5 deposition of Ms. Jensen, and I've looked at the
6 application and would note that it is very difficult to
7 believe that if, in fact, those vehicles were
8 individually owned that that information would not have
9 come out at some point during this litigation.

10 For example, and this is only for example, on page
11 113 of the deposition of Ms. Jensen, at line 14 we have
12 this question: Okay, all right. If you flip to the
13 next page, this is called the business auto section; is
14 that right? Yes. It doesn't say personal auto? No.
15 Okay. And, again, the named insured is listed as The
16 Learning Station? Yes.

17 And if you look at the bottom of the page, the
18 very, very bottom, there are more boxes to check off
19 with information. Under the drive to work, school and
20 the use, the commercial box is just checked; is that
21 right? Yes. None of the other boxes of pleasure or
22 retail or service are checked off? No.

23 Same thing for the second bus. It's also just
24 listed as for use -- for commercial use? Correct. On
25 that next page? Correct. There are no other vehicles

1 other than those two buses? No. And it goes on.

2 And on page 117, again, at line 15, looking on the
3 second page of that document, the title of that is,
4 business automobile coverage declaration; is that
5 right? Yes.

6 And a little bit earlier on line ten it says,
7 okay. And on the named insured, it also says, Four J's
8 and the LLC; is that correct? Yes. And your name is
9 not listed? No. Then it goes on, and at line 22,
10 there aren't any personal vehicles on there. And the
11 answer, no. This is really redundant.

12 So it just seems to me that it's -- that these
13 questions all surround the ownership of the vehicles,
14 and if they were personally owned and not commercial
15 vehicles not owned by the LLC, clearly that should have
16 come out. Didn't come out apparently.

17 And so I have no option but to consider what is in
18 the record. I cannot consider evidence only than that
19 which would be admissible at trial. And our rules are
20 very specific with regards to evidence that is
21 presented for summary judgment.

22 The fact that during the argument of counsel that
23 that information was conveyed that in fact these buses
24 were individually owned and not owned by the LLC is
25 just not -- it's troubling, but it's simply not

1 information that I can consider based upon our rules in
2 a motion for summary judgment that counsel agreed that
3 this matter would be heard as a motion for summary
4 judgment.

5 Now, so let me go back, then, to what is before
6 the Court on the motion for summary judgment.
7 Understanding that it is my duty to take the evidence
8 in the light most favorable to the non-moving party,
9 first of all, I don't believe that the Plaintiff is
10 entitled to motion for summary judgment. There are
11 many issues with regards -- the Plaintiff is simply not
12 entitled to a motion for summary judgment.

13 Unfortunately the other, I think is correct,
14 vis-a-vis the Plaintiff, and that is I believe that the
15 Defendant is entitled to a grant of summary judgment
16 for the following reasons.

17 First of all, this is a negligence cause of
18 action. And the first order of business is to
19 ascertain what is the duty, what is the duty between
20 the Defendants and the individual Plaintiff. And under
21 these facts, the duty was to procure a comprehensive
22 policy for the day care LLC, under Trotter, based upon
23 the testimony of Ms. Jensen.

24 Trotter, this is a Trotter case. And it is
25 insufficient under our law to just for an insurance

1 agent or insurance agency to be bound by concerns
2 expressed after an accident, I was supposed to be
3 covered for everything. That is not the law. That
4 doesn't express the duty under Trotter.

5 We have the Duckworth case that talks about the
6 elevator. This is absolutely not a Duckworth case.
7 The Duckworth case that we had talked about was that
8 there was coverage originally that touched and
9 concerned an elevator. While there was a move by the
10 plaintiffs to another building, the elevator was
11 likewise moved and the particular plaintiff called and
12 individually asked, what about coverage for the
13 elevator.

14 And the insurance agent said not a problem, it
15 continues to be covered, it was covered before and it
16 continues to be covered. Then there was an accident
17 regarding the elevator, and the -- that was a
18 representation that was made apparently, a negligent
19 representation on behalf of that agent, and liability
20 ensued. That's not this case.

21 It's clear to me that what was being attempted was
22 coverage for the day care LLC. This was an entity that
23 operated as an LLC. That is -- that decision was made
24 by this Plaintiff, she owned the stock, I gather, in
25 the LLC. But she operated this day care as an LLC, it

1 was an LLC.

2 And she's very clear in her deposition that all of
3 her personal coverage was handled by her husband. The
4 questions are asked repeatedly in this record, was this
5 a personal automobile policy, no, it wasn't. Were you
6 obtaining a personal automobile policy from the
7 Defendants, I was not. This was coverage which was to
8 protect my business, my day care, which was an LLC.

9 The coverage which was workers compensation
10 obviously that would have provided this Plaintiff with
11 a means of recovery was not handled by this Defendant
12 or Defendants, but for someone else. Although there
13 was inquiry made into the workers compensation, she was
14 happy with her coverage which was elsewhere. These
15 Defendants did not and were not at the time of this
16 accident involved with the coverage for workers comp.

17 Where the issue of being an additional insured
18 arose, it arose based on my review. Was there, could
19 there be a duty which arose in the Defendant based upon
20 some generalization of I wanted to be covered. The
21 depiction, and I have to say this, the depiction of a
22 request for this generalized desire for coverage
23 obviously arose based on testimony after this accident,
24 based on conversations after this accident.

25 The conversations that arose at the time that

1 this -- the policies were being purchased and entered
2 into were much more limited. And specifically, I am
3 talking about the e-mails, the initial e-mails where
4 Mr. Wiseman is asking for things such as VIN numbers of
5 the vehicles, drivers' names, that kind of information.
6 The e-mail in response is, whoa, whoa, don't be so
7 concerned about that. I'm in a time crunch here, focus
8 on liability and the building. I've got to make a
9 decision, I have to secure this coverage by tomorrow.
10 That's what I'm concerned about, focus there.

11 So that while I understand the argument of
12 counsel, when you look at the e-mails, and less clear
13 that perhaps those were the conversations, but even if
14 they were stated in those very general terms, we know
15 that under Trotter, what Trotter says is that you're
16 asking for a comprehensive policy.

17 The question is, did that include some vehicle
18 that would have provided personal insurance, personal
19 coverage for the Plaintiff. And that's at the end of
20 the day is what the Plaintiff is seeking.

21 Well, we know from the decision from the Federal
22 Court that this policy only provided coverage for this
23 Plaintiff if she had been at or near or in one of the
24 buses, we know that based upon that decision. So in
25 that this is a negligence determination, the question

1 is, is there a theory, was there a duty of this or
2 these Defendants to somehow provide more personal
3 coverage individually, personal coverage for this
4 Plaintiff.

5 As I review the information before me, the only --
6 and taking the evidence in the light most favorable to
7 the Plaintiff, the only theory that I could come up
8 with in light of the Trotter case was that -- was to
9 ponder whether this insurance agent or this insurance
10 agency had a duty to list this Plaintiff as an
11 additional insured.

12 Interestingly enough, on the application there's a
13 box that could have been checked expressing that
14 interest as an additional insured, and it is not
15 checked which is -- it's just interesting. So
16 obviously unless the Plaintiff has an insurable
17 interest, the Plaintiff cannot be listed as an
18 additional insured.

19 That prompted that inquiry this morning, because
20 last evening as I was going through the information
21 before me, I could find no information that led me to
22 believe that this Plaintiff had an insurable interest.
23 That was the question that I asked counsel in chambers
24 this morning, can you point me to a part of this record
25 where this Plaintiff has an insurable interest.

1 Because taking the evidence in the light most
2 favorable to the Plaintiff, the non-moving party, that
3 would in my mind have allowed the Plaintiff to survive
4 summary judgment. And being true to his duty to the
5 Court and as an officer of the Court, counsel for the
6 Plaintiff indicated that this record was void of any
7 evidence of this Plaintiff having an insurable
8 interest. And that's where all that came from this
9 morning.

10 So based upon the Trotter case which I find to be
11 controlling, based upon the record as I have reviewed
12 it, all the while acknowledging that this is a
13 Plaintiff that has suffered, and I acknowledge that, I
14 am unable to come up with a theory that would allow
15 this Plaintiff to survive the motion for summary
16 judgment by Defendant.

17 I note Plaintiff's objection and exception
18 thereto. Anything further from the Plaintiff at this
19 time.

20 MR. BRITTAIN: No, ma'am.

21 THE COURT: From the Defense?

22 MS. WALL: No, Your Honor.

23 THE COURT: All right. That would be the order.
24 I don't intend to reduce it to writing, just so you all
25 know. Okay.

1 MR. BRITTAIN: Oh, you're not going to reduce it
2 to writing?

3 THE COURT: Unless y'all want me to. You want me
4 to?

5 MR. BRITTAIN: Well, I mean, we'll need to...

6 THE COURT: You want me to, use a little more
7 time?

8 MR. BRITTAIN: Have something --

9 THE COURT: Okay, all right.

10 MR. BRITTAIN: -- to look at.

11 THE COURT: Well, I'm going to ask --

12 MS. WALL: Yes, Your Honor.

13 THE COURT: -- counsel, I'll ask you to draft a
14 proposed order. Please, of course, send it to counsel
15 before you sent it to me.

16 MR. BRITTAIN: I mean, you know how much we
17 respect this Court, but we're going to have to -- we're
18 going to have to let some other people look at what
19 you've done.

20 THE COURT: I respect that and I am excited you're
21 doing that, good for you.

22 MR. BRITTAIN: With nothing but with the best --
23 so I'm guessing it's better to have a written one.

24 THE COURT: I'm with you completely. And I'll
25 look to receive a proposed order.

1 MS. WALL: May we have two weeks?

2 THE COURT: I know, 30 days is what I typically
3 tell a lawyer.

4 MS. WALL: 30 days, I appreciate that, Your Honor.

5 THE COURT: If something comes up, I know you're
6 both very busy. Mr. Brittain's got to have an
7 opportunity to review it. If you need more time, all
8 you need to do is confer, you agree, let my law clerk
9 know, you'll have the time.

10 MS. WALL: Thank you, Your Honor, we will do that.

11 MR. BRITTAIN: Thank you very much.

12 THE COURT: Very well.

13 MS. WALL: And we appreciate your time.

14 THE COURT: All right. What I intend to do is I
15 now must deal with the jury. I want them to know this
16 is on me, not counsel. And I can do that out here, or
17 I can do that back there, whatever is your desire.

18 MS. WALL: Whatever you want.

19 MR. BRITTAIN: Whatever you want, back there is
20 fine.

21 THE COURT: Okay. Does that suit the Defense?

22 MS. WALL: That is fine, Your Honor.

23 THE COURT: Okay. I will dismiss the jury out of
24 the jury room. And I thank you for your hard work. I
25 apologize it took me so long. But these are --

1 MR. BRITTAIN: No problem.

2 THE COURT: -- brilliant lawyers and complicated
3 issues. All right, I will dismiss the jury.

4 (WHEREUPON, the hearing concluded at approximately
5 12:17 p.m.)

6 (End of Transcript of record.)

7 - - -

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

)

COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court
Reporter for the Fifteenth Judicial Circuit of the
State of South Carolina, do hereby certify that the
foregoing is a true, accurate and complete Transcript
of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative
to appeal, in the Court of Common Pleas for Horry
County, South Carolina, on the 19th day of August,
2015.

I FURTHER CERTIFY that I am neither of
kin, counsel nor interest to any party hereto.

S/Teresa J. F. Bautz
TERESA J.F. BAUTZ, RPR
Official Court Reporter

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF HORRY

3 DONNA JENSEN,

4 Plaintiff(s),

5 vs.

CIVIL ACTION NO.
14-CP-26-2463

6 MATTHEW B. WISEMAN, and
7 PEOPLES UNDERWRITERS, INC.,

COPY

8 Defendant(s).

9 DEPOSITION OF: MATTHEW B. WISEMAN

10 DATE: Monday January 12, 2015

11 TIME: 10:37 a.m. through 11:16 a.m.

12 LOCATION: Brittain Law Firm
13 4614 Oleander Drive
14 Myrtle Beach, South Carolina

15 TAKEN BY: Attorneys for the Plaintiff(s)

16 COURT REPORTER: MADONNA M. PERKINS
17 Registered Professional Reporter
18 Certified Livenote Reporter
19 CaseViewNet Realtime Reporter



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Madonna Farrell-Perkins, RPR *** (843) 685-0075
4350 Old Kings Highway, Murrells Inlet, SC 29576

1 more about the insurance options available in a
2 situation where Ms. Jensen sat down with you? You
3 or her?

4 A. Probably me.

5 Q. I mean, your job, right, is to hear what
6 the -- the customer says, and then you -- you go to
7 the various options that you have to try to find
8 what will suit that particular situation. Is that
9 a fair characterization of it?

10:45AM

10 A. Yes, sir.

10:46AM

11 Q. What duty, if any, do you owe somebody like
12 Ms. Jensen in that situation, if any?

13 A. Duty from a standpoint of what -- what is my
14 job?

15 Q. Yeah. I mean, you know, you're a -- by that
16 time, you're an insurance agent, right, that's what
17 you are?

10:46AM

18 A. Yes, sir.

19 Q. And you've got a lot of experience by that
20 time. When she comes to see you, you've been there
21 for, what, ten years or so?

10:46AM

22 A. Yes, sir.

23 Q. Okay. I mean, your lawyer and I, we have
24 duties. And do you have any duty to her?

25 A. My duty is to evaluate her insurance needs

10:46AM

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1 and -- and to, again, put together a program or a
2 package of insurance policies that would -- gosh,
3 how do I want to say that? -- that will, you know,
4 insure her business.

5 Q. And so that creates responsibility on your
6 part, would you agree with that?

10:47AM

7 A. Yes, sir.

8 Q. Okay. All right. Now, as part of that
9 process, and let's -- let's -- let's talk in
10 general first. What are the important things that
11 you need to do with a customer that comes in there
12 calling you about wanting to receive insurance?

10:47AM

13 What's -- what's an important part of your
14 interaction with them?

15 A. Well, listening to their -- what their needs
16 or what their desires are. Talking through
17 exposures of different types of, you know,
18 businesses. Every business is different and unique
19 in their -- in their needs for insurance.

10:47AM

20 Q. Okay. And why would -- why did you listen?
21 And that's a great word I think you used there. I
22 think that's very important. Why are you listening
23 to this? To -- what's -- why do you get that
24 information from them?

10:47AM

25 A. Well, just so that we're both on the same

10:48AM

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1 page as far as what is -- what their -- what they
2 want.

3 Q. Well, you have options, right, as an agent?

4 A. Yes, sir.

5 Q. Okay. So you're listening to the customer
6 to find out what's going on, so -- because you have
7 options in terms of what to suggest as far as
8 coverage is concerned?

10:48AM

9 A. Yes, sir.

10 Q. Okay. Now, once you -- once you hear what
11 you hear, what then do you do? You use your
12 knowledge, right? Is that the next thing that
13 happens? You use your experience or knowledge or
14 check with somebody in there to try to figure out
15 what kind of policy to come up with?

10:48AM

16 A. Yes, sir.

17 Q. Okay. And you're trying to adapt that to
18 the needs of the person that's sitting there with
19 you. Any question about that?

20 A. No, sir.

10:49AM

21 Q. Okay. That's what's going on.. So
22 communication is an important part of that,
23 right --

24 A. Yes, sir.

25 Q. -- from her to you? And wouldn't you agree

10:49AM

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1 from you to her?

2 A. Yes, sir.

3 Q. Okay. If there are situations where there
4 are going to be gaps, for lack of a better word, in
5 coverage or certain things aren't going to be
6 covered, would you agree with me it's important for
7 you to explain that to her?

10:49AM

8 A. Well, if there are known discrepancies in
9 what she's -- or what the insured is wanting versus
10 what insurance will provide or will cover, then
11 yes.

10:49AM

12 Q. In other words, you wouldn't want anybody to
13 leave there thinking certain things were covered
14 that weren't, right?

15 A. Correct.

10:49AM

16 Q. You want to make sure, as best you can, that
17 the communication going back and forth creates a
18 situation where the "customer" understands what is
19 and isn't covered in this process?

20 A. Yes, sir.

10:50AM

21 Q. Okay. And the reason for that is because
22 you could caution them. "Now, remember, you're not
23 covered for this or you're not covered for that."
24 That's an important part of the conversation,
25 wouldn't you agree?

10:50AM

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1 A. Yes, sir.

2 Q. Okay. Because a lot of times that means a
3 customer has some choices to make because it costs
4 more to have certain things than to have other
5 things, correct?

10:50AM

6 A. Yes, sir.

7 Q. Okay. Now, you didn't -- did you have that
8 kind of conversation with Ms. Jensen where you told
9 her certain things would be covered and what
10 wouldn't be covered and that sort of thing?

10:50AM

11 A. I don't recall specifically from -- you
12 know, when we were talking about exposures for the
13 daycare, you know, we -- we were going through what
14 exposures are most common, you know, for her type
15 of business --

10:50AM

16 Q. Right.

17 A. -- what exposures could be covered by
18 insurance and what couldn't be covered by
19 insurance. And we addressed the needs of those
20 that we knew that insurance would cover.

10:51AM

21 Q. Okay. But did you go on and have any
22 specific conversations about what things would not
23 be covered, if you recall?

24 A. Well, for example?

25 Q. Well, let's -- what I think I've seen in the

10:51AM

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1 policy -- and I've been doing this a long time.
2 I'll just tell you, I think they're hard to read.
3 I've always said that. And you may -- you read
4 more than I do, but I read a lot of them. It looks
5 like in the policy that we are here about, so to
6 speak, even though the Court has ruled that this
7 particular application doesn't apply to Ms. Jensen,
8 that policy, in general, that we're talking about
9 was marked in Ms. Jensen's deposition. There's an
10 underinsurance --

10:51AM

10:51AM

11 A. Uh-huh.

12 Q. -- provision. Okay? Did you discuss that
13 with her in any detail?

14 A. I don't recall.

15 Q. Okay. Do you -- what are you -- how do you
16 understand -- what do you understand about
17 underinsurance, in general?

10:52AM

18 A. Well, given certain, you know, criteria or
19 certain circumstances, if an accident or if a
20 situation were to happen, that the party who caused
21 the accident did not have sufficient insurance for
22 remedy, then, again, depending on the circumstances
23 surrounding the situation, un- -- or underinsured
24 motorist coverage could come into play as a -- as a
25 remedy for the claim to get additional liability.

10:52AM

10:52AM

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1 Q. Okay. All right. Now, did y'all have any
2 kind of conversation about this sort of thing of,
3 "Hey, you've got to be on the bus, in the office,"
4 or -- it never even was discussed between the two
5 of you, was it?

10:57AM

6 A. No, sir.

7 Q. Okay. And you were trying to get her the
8 best coverage you could; is that correct?

9 A. Yes, sir.

10 MS. WILLIAMS: Object to the form.

10:57AM

11 BY MR. BRITTAIN:

12 Q. Okay. Well, what were you trying to get
13 her, a bad coverage or good?

14 A. I was trying to get her coverage that would
15 insure the business that she had.

10:57AM

16 Q. I mean, you're working for her, right?

17 A. (Pause.)

18 Q. You're her agent?

19 A. Yes, sir.

20 Q. You have a duty to her; is that correct?

10:57AM

21 A. Yes, sir.

22 Q. Okay. So you're trying to do the best you
23 can for her?

24 A. Yes, sir.

25 Q. Get as much coverage as possible for as

10:58AM

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1 little a price as possible?

2 A. As affordable, yes, sir.

3 Q. Affordable. I mean, you know, I know you
4 don't want to mistreat the insurance company
5 either, but generally speaking, you're acting for
6 Ms. Jensen here, right?

10:58AM

7 A. Yes, sir.

8 MS. WILLIAMS: Object to the form.

9 BY MR. BRITTAIN:

10 Q. That's your -- that's your -- well, let's
11 just say -- I mean, who is your client? Is she
12 your client or is somebody else?

10:58AM

13 A. Well, it would be Ms. Jensen acting as the
14 representative of the business.

15 Q. Oh, yeah. Okay. Well, I mean, I don't mean
16 to be making that distinction. All right.
17 Ms. Jensen, the business.

10:58AM

18 Okay. And who decided how to -- to put what
19 group on the policy, whether it was Ms. Jensen or
20 the business? Was that your decision or
21 Ms. Jensen's?

10:58AM

22 A. It -- hmm... it was our decision at the
23 direction of the carrier. The carrier has certain
24 guidelines as to how they will work -- name a
25 policy or how they will put things on a policy.

10:59AM

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1 Q. So it was -- when you say "ours," the
2 carrier imposed certain conditions on it, and
3 you -- and you accepted the conditions they
4 imposed?

5 A. Yes, sir.

10:59AM

6 Q. Okay. Now, did you sit down with Ms. Jensen
7 and go over the policy?

8 A. I don't know that we specifically went page
9 by page, no.

10 Q. I mean, the fact of it is that you didn't
11 even have a policy for her when you were talking to
12 her, and she got one in the mail sometime later,
13 and you never went over any part of the policy with
14 her?

10:59AM

15 A. That's not entirely true.

10:59AM

16 Q. Okay. Well, I'm sorry then. If I'm wrong,
17 I'm asking you to correct me. What -- what did you
18 do and when did you go over the policy with her?

19 A. Well, again, I said I don't know that I
20 specifically went over the policy.

11:00AM

21 Q. Okay.

22 A. However, I hand delivered the policy to her.

23 Q. I understand that.

24 A. And then in the cover of the policy, it does
25 ask that, you know, she please review the policy.

11:00AM

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1 If there's any questions, if there's any changes
2 that have been made, if there's any concerns, to
3 please let us know.

4 Q. And that's a fair point. That's a fair
5 point. And I appreciate you pointing that out. 11:00AM
6 But what I'm saying is, that never happened, and
7 maybe that's her fault. But y'all never sat down
8 and went over the policy page by page together, did
9 you?

10 A. No, sir. 11:00AM

11 Q. Okay. And like you said, there was
12 something, when you delivered it, saying you come
13 back to me if you got all these questions?

14 A. Yes, sir.

15 Q. But it is a very sophisticated document, 11:00AM
16 isn't it?

17 A. Well, policies are -- yes, sir --

18 Q. Okay.

19 A. -- they are.

20 Q. Okay. Now, you don't dispute, do you, that 11:00AM
21 she has suffered serious injury here?

22 A. No, sir.

23 Q. I mean, you've got no reason to expect
24 Ms. Jensen to be anything but honest and fair about
25 her medical problems; isn't that true? 11:01AM

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1 with that?

2 A. Yes, sir.

3 Q. Okay. I made a lot of mistakes as a lawyer.
4 Have you made any as an insurance agent?

5 A. I'm sure that I have, yes, sir.

11:10AM

6 Q. Okay. And, you know, it doesn't make us bad
7 people, does it?

8 A. No, sir.

9 Q. But the consequences can be serious for
10 people if we make mistakes, you would agree with
11 that, wouldn't you?

11:10AM

12 A. Yes, sir.

13 MR. BRITTAIN: Okay. I appreciate it.

14 No further questions.

15 MS. WILLIAMS: I have one follow-up.

11:10AM

16 MR. BRITTAIN: Okay.

17 **EXAMINATION**

18 **BY MS. WILLIAMS:**

19 Q. Mr. Wiseman, earlier Mr. Brittain asked you
20 some questions about your discussions with
21 Ms. Jensen regarding underinsured motorist
22 coverage; is that correct?

11:10AM

23 A. Yes, ma'am.

24 Q. Okay. And as part of the application for
25 automobile insurance, isn't part of the process to

11:11AM

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1 have your customer fill out an underinsured
2 motorist application?

3 A. Yes, ma'am.

4 Q. Okay. And could you identify for me if this
5 particular document is a copy of the underinsured
6 motorist coverage provision that you would have
7 presented to Ms. Jensen as part of the application
8 process?

11:11AM

9 MR. BRITTAIN: We need to mark that
10 as a --

11:11AM

11 MS. WILLIAMS: Yes. And for the
12 record, it's -- this is Bates stamped
13 Peoples 343 through 345. We'll go ahead and
14 mark this as an exhibit to the deposition.

15 (DFT. EXH. 1, SC Auto Selection Form,
16 was marked for identification.)

11:11AM

17 THE DEPONENT: Yes, it is.

18 BY MS. WILLIAMS:

19 Q. Okay. And so as part of -- as part of the
20 application process, Ms. Jensen would have reviewed
21 this form with you regarding underinsured
22 motorist -- underinsured motorist coverage and
23 would have signed the application; is that correct?

11:12AM

24 A. Yes, that's correct.

25 Q. And as far as -- as far as you know, she --

11:12AM

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1 she signed this form?

2 A. That's correct, yes.

3 MR. BRITTAIN: I'm going to take a look
4 at that one here, okay?

5 BY MS. WILLIAMS:

11:12AM

6 Q. Mr. Brittain also questioned you about the
7 fact that you waited until Selective told you there
8 was no coverage to tell Ms. Jensen there was no
9 coverage; is that correct?

10 A. Yes.

11:12AM

11 Q. Okay. And is the reason for that that
12 Peoples is not an insurance adjuster?

13 A. Well, that's correct. We -- we don't
14 pretend to, you know, adjust insurance claims.
15 That's, you know, the carrier's responsibility and
16 that's the -- their job to do that.

11:13AM

17 Q. So an insurance agent doesn't typically make
18 coverage decisions one way or another whether there
19 is or isn't coverage. You would not tell your
20 customer that because it's ultimately the insurance
21 company who has to make that decision?

11:13AM

22 A. Yes.

23 MS. WILLIAMS: Okay. That's all the
24 questions I have.

25

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EXAMINATION

BY MR. BRITTAIN:

Q. Okay. On this exhibit that your very fine lawyer has introduced to you --

MR. BRITTAIN: This down here, is that the Bates numbers down there, 000344?

MS. WILLIAMS: Yes.

BY MR. BRITTAIN:

Q. Okay. All right. This is interesting to me. It looks like you had a conversation with Ms. Jensen that originally there was underinsurance of just 75,000, right?

A. Yes.

Q. But you talked -- she checked the box down there to get \$1 million worth of underinsurance coverage, right?

A. Yes, sir.

Q. And that costs more; is that correct?

A. Yes, sir.

Q. Okay. No question y'all had this document and there was some discussion that took place on underinsured coverage; is that correct?

A. Yes, sir.

Q. Okay. And she asked for more, right?

A. She selected more, yes, sir.

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1 Q. "I want to purchase," isn't that what it
2 says?

3 A. Yes, sir.

4 Q. Okay. All right. And on 000343, it's the
5 same thing here, basically the same series of
6 statements: "I want to purchase additional
7 underinsurance coverage," right?

11:14AM

8 A. Well, that's --

9 Q. Did you have any obligation to offer this to
10 her? Do you know whether you had to?

11:14AM

11 A. We -- as a practice in the agency, we like
12 to have the UM and UIM limits the same as the limit
13 of liability.

14 Q. Okay. So you were encouraging her to get
15 more?

11:15AM

16 A. I was suggesting that she purchase the same
17 limit as the limit of liability.

18 Q. Which was a million?

19 A. Yes, sir.

20 Q. So let me get this straight. When y'all
21 talked about it, you had a reason for whatever
22 internally, let's get that up to a million dollars,
23 right?

11:15AM

24 A. Yes, sir.

25 Q. So you discussed it with her. She went from

11:15AM

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1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF HORRY

3 DONNA JENSEN, Individually, and
4 the LEARNING STATION CDC, LLC
5 f/k/a FOUR J'S & a D, LLC,
6 d/b/a THE LEARNING CENTER,

Plaintiff,

vs.

CASE NO. 2014-CP-26-2463

7 MATTHEW B. WISEMAN and
8 PEOPLES UNDERWRITERS, INC.,

Defendants.

9
10 DEPOSITION OF: DONNA M. JENSEN

11 DATE: December 18, 2014

12 TIME: 10:07 AM

13 LOCATION: MCNAIR LAW FIRM, PA
14 Founders Centre, Suite 206
2411 Oak Street
15 Myrtle Beach, SC

16 TAKEN BY: Counsel for the Defendants

17 REPORTED BY: LINDA A. MAHONEY, Court Reporter

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFFS:

3 DONNA JENSEN, Individually, and
4 the LEARNING STATION CDC, LLC
f/k/a FOUR J'S & a D, LLC,
d/b/a THE LEARNING CENTER:

5 BRITTAIN LAW FIRM

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9
10 ATTORNEYS FOR THE DEFENDANTS

11 MATTHEW B. WISEMAN and

PEOPLES UNDERWRITERS, INC.:

12 MCNAIR LAW FIRM, PA

13 BY: AMANDA C. WILLIAMS

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14 Charelston, SC 29401

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15 awilliams@mcnair.net

16 ALSO PRESENT:

17 MATTHEW B. WISEMAN

18
19 (INDEX AT REAR OF TRANSCRIPT)
20
21
22
23
24
25



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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * *

DONNA M. JENSEN,

being first duly sworn, testified as follows:

EXAMINATION

BY MS. WILLIAMS:

Q. Okay. Ms. Jensen, we met just before the deposition. My name is Amanda Williams. I am representing Matt Wiseman and Peoples Underwriters in this case.

Before we get started, I wanted to go through a few of the ground rules of the deposition.

A. Sure.

Q. Have you ever been deposed before?

A. I've seen one before.

Q. Okay. But you yourself, have you ever

1 been deposed?

2 A. Yes.

3 Q. Okay. In what -- in what context were you
4 deposed?

5 A. For a security system case that we had
6 with the company that was providing security.

7 Q. For the day care?

8 A. For our business, um-hum.

9 Q. Okay. So going back to the ground rules,
10 if you, during the deposition, don't understand a
11 question that I ask, please let me know and I'll be
12 happy to rephrase it.

13 A. Sure.

14 Q. If you could use audible responses when
15 you answer a question, yes or no instead of uh-huh
16 or um-hum so the reporter can take it down.

17 If you can wait until I finish the
18 question and answer it, it makes it a lot easier on
19 the court reporter since she's taking down the whole
20 record of everything that we're -- we're going to
21 talk about today.

22 If you need a break at any time, please
23 let me know. We'll be happy to accommodate you on
24 that.

25 Are you under the influence of any

1 medications today that would affect your ability to
2 testify?

3 A. No, ma'am.

4 Q. Okay. What did you do today to prepare
5 for today's deposition? And I don't want to hear
6 about -- know about conversations you had with your
7 lawyer.

8 A. To prepare for it?

9 Q. Yes. If anything.

10 A. Nothing.

11 Q. Did you discuss the deposition with
12 anybody other than your attorney?

13 A. My husband knows I'm here and my staff
14 know I'm here because they have to cover for me
15 missing work.

16 Q. Have you ever been involved in other
17 lawsuits before? I know you mentioned just a minute
18 ago --

19 A. Just that one.

20 Q. Can you tell me a little bit more about
21 that litigation? Were you a plaintiff or defendant
22 in that --

23 A. Both.

24 Q. Both.

25 Okay. And can you tell me a little bit

1 more about what that matter involves?

2 A. We had a security system and service with
3 a company that stopped providing the service so we
4 could no longer access the camera footage.

5 Our parents of the children in our center
6 were able to view the camera system live online and
7 it went down. And after eight weeks of going back
8 and forth trying to get them to fix it, we did not
9 make our payment because we were not getting the
10 service that was provided.

11 Rather than try to work it out, they just
12 put a lawsuit and so we countersued to -- because we
13 weren't getting the service.

14 Q. Okay. Is that the lawsuit with the Lease
15 Investment Company?

16 A. Correct.

17 Q. Okay. Is that still ongoing?

18 A. It is tabled for now, I believe.

19 Q. Okay. Any other lawsuits?

20 A. Personal bankruptcy, if that's considered
21 a lawsuit. I'm not sure.

22 Q. Okay. You filed for personal bankruptcy?

23 A. Like 12 years ago approximately.

24 Q. Okay. And who was your bankruptcy
25 attorney for that matter?

1 A. Irby -- Irby -- I know his name was Irby.
2 I can't think of his last name.

3 Q. Okay.

4 (Off-the-record conference.)

5 BY MS. WILLIAMS:

6 Q. Do you currently have a pending lawsuit
7 against the at-fault driver, Courtney Nelson?

8 A. I believe that's been closed because her
9 insurance paid.

10 Q. Okay.

11 MR. BRITTAIN: Off the record.

12 (Off-the-record conference.)

13 BY MS. WILLIAMS:

14 Q. So any other litigation other than the
15 personal bankruptcy, the lawsuit against the
16 at-fault driver, and the security system?

17 A. No, ma'am.

18 Q. Okay. All right. I want to go through a
19 little bit of your background. Can you tell me what
20 your current address is?

21 A. 426 Blackberry Lane, Myrtle Beach, South
22 Carolina 29579.

23 Q. And do you own or rent your property?

24 A. We own.

25 Q. Do you own any other properties?

1 A. No, ma'am.

2 Q. And what's your date of birth?

3 A. 5/1/63.

4 Q. Okay. Who are your relatives by blood or
5 marriage in Horry County?

6 A. In Horry County, my children, my
7 husband --

8 Q. All have the last name Jensen?

9 A. Yes. My father-in-law.

10 Q. And can you just give me their last name?

11 A. Jensen.

12 Q. Jensen.

13 A. My brother-in-law, Jensen; and my
14 sister-in-law, Keane, K-E-A-N-E.

15 Q. Okay. Any other relatives in Horry County
16 by blood or marriage with a last name other than
17 Jensen or Keane?

18 A. If my son is married, do his in-laws --
19 his in-laws are not considered my blood, would not
20 be my relatives, so no.

21 Q. Who are his in-laws, their last names?

22 A. Biddle.

23 Q. Biddle, B-I-D-D-L-E?

24 A. Yes, ma'am.

25 Q. Okay. And you're currently married?

1 A. Yes, ma'am.

2 Q. How long have you been married?

3 A. Twenty-eight years.

4 Q. And you said you have children?

5 A. Four boys.

6 Q. Okay. And they all live in Horry County?

7 A. One just moved to Raleigh.

8 Q. Okay. And are they all over the age of
9 18?

10 A. No. 26, 24, 16, and 12.

11 Q. Tell me a little about your educational
12 background: High school, college, master's degree?

13 A. I graduated high school. I attended Keane
14 University for five years. I did not graduate.

15 Q. Okay. Any other educational institutions
16 that you attended? Any tech schools --

17 A. Nothing that would be with a degree, but I
18 have hundreds of hours of training in the early
19 childhood field.

20 Q. Okay. Where did you get your training?

21 A. Some of it at Horry-Georgetown Tech. Some
22 of it through the South Carolina Early Childhood
23 Association. Some through private trainers who are
24 certified trainers that would come in and provide
25 training. Some through South Carolina First Steps.

1 Some through Horry County First Steps.

2 Q. Okay. Anything else?

3 A. I mean, there's just hundreds of hours
4 over my career time.

5 Q. Okay. Great. And tell me about your job
6 history. After you have left Keane University, did
7 you get a job?

8 A. We got married. We moved to South
9 Carolina, which is why I didn't finish. I worked
10 briefly at Ann and Andy's Day Care in Conway.

11 Q. Okay. Where did you move from?

12 A. New Jersey.

13 Q. Is that where you're originally from?

14 A. Yes, ma'am.

15 Q. Okay. After you worked briefly at that
16 day care in Conway, what was next?

17 A. Then I was a stay-at-home mom. I had a
18 very small in-home child care for approximately
19 maybe seven years.

20 Then I opened a child development center
21 at our current church at the time, which was St.
22 James' Child Development Center.

23 Q. Approximately when was that?

24 A. 1992, I think.

25 Q. Okay. And you were the owner. Did you

1 start that business?

2 A. No. I was the director. I was employed
3 by St. James' Child Development Center.

4 Q. Okay. And how long did you work there?

5 A. I worked there until 2000.

6 Q. 2000.

7 A. I have to think of my children's ages and
8 birthdays.

9 Q. I am terrible with years.

10 A. I am very bad at that.

11 Q. Okay. And then after you left St. James,
12 did you then open --

13 A. We opened a franchise called Gymboree.

14 Q. And when you say "we," who is we?

15 A. My husband and I. It was -- but it was
16 under my name. It was my business.

17 Q. Okay.

18 A. So I opened it.

19 Q. Okay. And how long did you do that?

20 A. Too long. Four years. When that did not
21 work, because this area was not ready for something
22 of that nature, we went back to what I knew best and
23 opened a preschool, which we called The Learning
24 Station, but it was in a different location than it
25 is now.

1 Q. Okay. Where did it start out?

2 A. Started out on Highway 501 on Waccamaw
3 Drive -- Waccamaw Boulevard. Waccamaw Boulevard.

4 Q. Okay. And then you subsequently moved to
5 the Singleton Road location?

6 A. Correct.

7 Q. And when did you move there?

8 A. We moved there eight years ago.

9 Q. Okay. And was that building already
10 existing or did you build it?

11 A. It was existing, and we leased it.

12 Q. And you still are leasing that property?

13 A. Correct.

14 Q. Who do you lease it from?

15 A. From Eagle South, Incorporated, which is
16 Dr. Farrar and Dr. Quillen.

17 Q. Okay. So when the day care was first
18 opened, it started out as Four J's and a D doing
19 business as The Learning Station, correct?

20 A. Correct.

21 Q. Okay. And then at some point did the name
22 change?

23 A. We changed the name because when we did
24 that name, we were under the impression that it was
25 just for banking matters and it would never surface,



1 and it really didn't make a whole lot of sense, and
2 we were constantly running into issues with parents
3 writing checks incorrectly. So we changed it
4 officially to The Learning Station so that checks
5 and receipts and all of those types of things made
6 more sense.

7 Q. Okay. And that was in approximately
8 January 2013; is that right? Sound about right?

9 A. I would be guessing. I'm not sure.

10 Q. Okay. And -- and who are the owners of
11 the day care?

12 A. I am.

13 Q. Is it just you?

14 A. Just me.

15 Q. Is your husband an owner?

16 A. No, ma'am.

17 Q. Okay. Let me ask you: On your -- on your
18 website you have an overview of all the different
19 people.

20 A. Yes, ma'am.

21 Q. And on there your husband works at the day
22 care; is that right?

23 A. He does facility maintenance.

24 Q. I believe -- I believe he's listed as an
25 owner.

1 A. He probably is on the website.

2 Q. Okay.

3 A. I mean, we're married.

4 Q. Okay.

5 A. We consider ourselves as owners, but
6 legally on documents I am the owner.

7 Q. Okay. How many students approximately are
8 at the day care?

9 A. Approximately on any given day 170 to 175.

10 Q. Okay. How many teachers do you employ?

11 A. 32 on average. It changes.

12 Q. Can you describe for me what -- your
13 typical day, what your -- what your job duties are
14 on a daily basis?

15 A. My job duties involve marketing, customer
16 relations, working with my directors, providing
17 training for my staff. I'm a registered trainer. I
18 do invoices to the parents, advertising.

19 Q. Anything else?

20 A. Send bills out when they're due.

21 Q. Anything else?

22 A. I'm sure there is. I'm just trying to
23 think of the main things.

24 Q. Sure. The primary things.

25 A. Check e-mails, check voice mails,

1 follow-up, stay on top of the latest things for my
2 field.

3 Q. Okay.

4 A. Give information to parents, manage our
5 Facebook page, which is part of our marketing.

6 Q. Okay. So it would be fair to say most of
7 your duties are office work. You are in the office
8 doing -- you know, carrying out these
9 responsibilities as opposed to in the classroom, you
10 know, teaching and working with the kids directly?

11 A. Right. I have teachers who work with the
12 children directly. Previously I was in the
13 classroom a lot more often than I am now.

14 I have to be careful because I have
15 injuries and children don't have boundaries and they
16 like to run up and jump on you and hug you and
17 high-five you and all those things. So I don't go
18 in the classroom nearly much as I used to.

19 Q. Okay.

20 A. So that was part of it. You know, walk
21 around, go in, see how everyone's doing, give lots
22 of hugs and have those relationships with the
23 children. But I don't do that as much as I used to.

24 Q. Okay. How often -- so you're saying that
25 has changed since the accident?

1 A. Significantly.

2 Q. Okay. And how often did you go before the
3 accident into the classrooms?

4 A. Multiple times a day.

5 Q. Okay. It was part of your daily routine?

6 A. Yes, ma'am.

7 Q. And how about after the accident?

8 A. Some days I don't even go in the back of
9 the building.

10 Q. In the back of the building --

11 A. Which would be where the children are, out
12 of my office.

13 Q. Okay. Let's talk a little bit about the
14 accident. I wanted to -- I wanted to show you so we
15 can get a better idea of exactly what happened, the
16 video footage that you had pulled from the accident.

17 A. I've seen that footage 100 times.

18 Q. Okay.

19 (At which time a video was played.)

20 BY MS. WILLIAMS:

21 Q. Can you see this okay?

22 A. Yes, ma'am.

23 Q. This is video footage -- for purposes of
24 the record. This is the video footage of
25 Mrs. Jensen in her office on the day of the

1 accident.

2 And this is -- is this you sitting here at
3 the computer by the window?

4 A. Yes, ma'am.

5 Q. Okay. And who is that in the office with
6 you?

7 A. Modesty Brantley.

8 Q. Okay. And who is she?

9 A. She was one of my directors at the time.
10 She is no longer employed at The Learning Station.

11 Q. Okay. And that appears to be an accurate
12 clip from the footage pulled off of your security
13 cameras?

14 A. Yes, ma'am. It's not in real time; it's
15 in slow time.

16 Q. Okay.

17 A. But it is the accurate footage.

18 Q. Okay. Was Modesty the only one that was
19 in the office?

20 A. Actually in the room, yes.

21 Q. Okay. You said she's no longer with --
22 she's no longer with the day care?

23 A. She's not.

24 Q. When did she leave?

25 A. October of this year.

1 Q. And why did she leave?

2 A. She took a position at New Spring Church,
3 which is the church that we both attend.

4 Q. I am going to show you a couple of
5 pictures that were produced in the context of this
6 litigation. And hopefully this will help for you to
7 kind of educate me on exactly what happened with the
8 accident.

9 (DFT. EXH. 1, Five Black and White
10 Photographs, were marked for identification.)

11 BY MS. WILLIAMS:

12 Q. I'm going to mark this group of pictures
13 as Defendant's Exhibit 1.

14 Okay. So can you tell me on this first
15 picture document Bates stamped Peoples 602, what
16 we're looking at here, if you can tell?

17 A. That's one of the desks in the office. It
18 may have been my desk, but my desk isn't usually
19 that clean, so it may have been someone else's desk.
20 I'm really not sure.

21 Q. Okay. How about the -- how about the next
22 photo on 603?

23 A. The next photo is my desk. The messy one.

24 Q. And so let's take a look at what we're
25 seeing here. On the floor where I guess your chair

1 would go, what is that that is on the floor? Can
2 you tell?

3 A. There is a computer tower and a pencil
4 sharpener that was, I guess, knocked off of the --
5 it was sitting on a buffet, for lack of a better
6 word, cabinet.

7 Q. Okay.

8 A. And it flew off.

9 Q. Like in this little area?

10 A. Um-hum.

11 Q. Okay. And the computer towers, are there
12 two computer towers?

13 A. There is one on each side.

14 Q. Okay. And so your desk slides in right
15 next to -- to the right of those computer towers?

16 A. My desk or my chair?

17 Q. I'm sorry. Your chair.

18 A. My chair does, yes.

19 Q. Okay. And is there anything else under
20 your -- under your desk?

21 A. Computer tower and a trash can, I believe.

22 Q. Okay. So there are two computer towers on
23 the left and a trash can on the right?

24 A. Correct.

25 Q. All right. Flipping over the next

1 picture, Peoples 604. What are we looking at here?

2 A. You are looking at the furniture that was
3 moved from the impact. Furniture that took three
4 big guys to move out of the office when we cleaned
5 it out.

6 Q. Okay. Is this -- is this little shelf, or
7 whatever this is here on the left-hand side, is this
8 something by -- by your desk?

9 A. This?

10 Q. Yes.

11 A. This was on my desk. It's right here.

12 Q. Okay. So this is the far right-hand side
13 of your desk?

14 A. Yes.

15 Q. Okay. All right. And Peoples 615, is
16 this the bookshelf to the left of the window?

17 A. Correct. Which we already put back up.
18 It had fallen down before Mr. Wiseman came to take
19 pictures.

20 Q. Okay. So when you say this bookshelf came
21 down --

22 A. It came off the wall.

23 Q. And so was it laying flat? Did everything
24 come off the shelves?

25 A. Everything came off the shelves.



1 Q. Okay. Did the bookshelf itself fall?

2 A. Yes. It flipped off the wall.

3 Q. Okay. Because I don't recall seeing that
4 in the video.

5 A. I remember it being down and we had to
6 lift it back up.

7 (At which time a video was played.)

8 BY MS. WILLIAMS:

9 Q. Okay. So we are talking about the
10 bookshelf in the top of the screen?

11 A. Beyond that, in the back.

12 Q. Back here?

13 A. Yes.

14 Q. This is a bookshelf here?

15 A. Yes.

16 Q. Okay.

17 A. You can just see everything fall from the
18 side. It looks like a smaller one there.

19 Q. It just looked like papers falling. I
20 didn't see, like, it fall down.

21 A. I think it was the rest of this section of
22 the shelf that was there.

23 Q. Okay. Looking at the picture, can you
24 show me --

25 A. Like, all of this had fallen down and all

1 of it had to be picked back up. And then we were
2 told not to touch anything else until pictures were
3 taken.

4 Q. Okay. So when you say all of it had
5 fallen down, these binders here?

6 A. Everything, yeah, that was in the shelf.

7 Q. Okay. So the stuff in the shelf --

8 A. Fell down and we had to pick it back up.

9 Q. Okay. The shelf itself didn't fall?

10 A. The wooden part, no. The contents.

11 Q. Okay. That is what I wanted clarification
12 on.

13 A. I'm sorry I was not clear enough.

14 Q. Okay. So some of the books and papers on
15 the shelf flew off?

16 A. Right.

17 Q. But not the --

18 A. Right. And the plaque -- this plaque
19 that's sitting in this picture was on this shelf.

20 Q. And the plaque -- and can you refer to the
21 Bates Number --

22 A. This plaque --

23 Q. -- the plaque on Bates number --

24 A. 504.

25 Q. -- 504. Okay.

1 A. This plaque was hanging on this shelf.

2 Q. Okay.

3 A. And it came off.

4 Q. Okay.

5 A. And when our IT person looked at the video
6 again, you can actually see where it comes off and
7 it hit me in the neck.

8 Q. Okay. The plaque hit you in the neck?

9 A. Yes.

10 Q. Okay. Let's flip to the next page, which
11 is at the bottom, Peoples 632?

12 A. Yes.

13 Q. Okay. So what are we looking at here?

14 A. The underneath of my desk where the two
15 computer towers are.

16 Q. Okay.

17 A. Pencil sharpener was up on the desk, it
18 had fallen.

19 Q. Okay.

20 A. That's my desk.

21 Q. Okay. So are these -- these two towers,
22 had those been moved since the accident?

23 A. They were stood back up, yes.

24 Q. They had fallen all the way down?

25 A. I believe the one -- well, the one fell

1 over and hit my knee, and so as I jumped up, it
2 pushed back up.

3 Q. Okay. Looking at the picture of the tower
4 on the right, fell -- fell down onto your knee?

5 A. The tower on the right hit my knee.

6 Q. Okay.

7 A. Then I was pushed, the other side of my
8 leg went into the inside wall of the cabinet.

9 Q. Okay.

10 A. So if my desk had walls that come down the
11 right side and the left side, it's hard to talk and
12 not --

13 Q. Right.

14 A. When I was pushed, this leg -- my right
15 leg hit the right interior wall of the desk.

16 Q. Okay. So did the trash can on the right,
17 did that block -- so that didn't block your leg
18 from --

19 A. No, because it was pushed in further.
20 Because my legs would sit there and the trash can
21 was beyond my legs.

22 Q. Okay. So in terms of what knocked you at
23 the time of the impact, you had the tower --
24 computer tower underneath, the desk on the
25 right-hand side, your right knee kind of hitting to

1 the wall of the right-hand side of the desk?

2 A. Right. And then there was the desk -- I
3 don't know what the proper word is, but this --
4 what's holding this shelf up extended because it's
5 holding -- also holding a printer. So there was --
6 you know, it was longer than what you're seeing
7 here.

8 Q. Okay.

9 A. That also moved out, and that, I believe,
10 is what hit my chair and caused the whole motion to
11 go into place.

12 Q. Okay. And so after the video, it looked
13 like you and Modesty walked outside -- or started
14 walking out of the office, and I guess went to go
15 see what happened.

16 A. Yes.

17 Q. Okay. And so what happened when you --
18 when you walked outside?

19 A. When I stood up, I said, dang, or
20 something to that effect. What was that?

21 She said, Are you okay?

22 I said, I hurt my knee.

23 But at that point when we looked out the
24 window, we saw that it had been a car. My first
25 thought was, Who's in the car? Are they okay? Do

1 they have a child with them? Is everyone okay?

2 So we walked out. At that point she had
3 backed up and was back down in a parking space. We
4 made sure she was okay. Called the police and
5 called Mr. Wiseman.

6 Q. Okay. And was she in the car by herself?

7 A. She did have her child with her.

8 Q. Were either of them injured?

9 A. They were not.

10 Q. Okay. And did anybody else come out to
11 the scene of the accident other than the police and
12 Mr. Wiseman?

13 A. At that point my husband had come in to
14 work. My son was working in the kitchen. He heard
15 the explosion. He came out to see what happened.
16 There were probably other staff that came out, but I
17 honestly couldn't recall. I know my husband had
18 came in and my son came out --

19 Q. So your husband --

20 A. -- to see.

21 Q. I'm sorry. So your husband was not at the
22 day care yet?

23 A. He arrived shortly after it happened.

24 Q. Okay. Was there any --

25 A. I think Mr. Wiseman arrived probably

1 within ten minutes, and I think it's seven minutes
2 from his office.

3 Q. Okay.

4 A. So he was there pretty quickly.

5 Q. Okay. And was there anybody else outside
6 of the office that saw what happened?

7 A. Not that I am aware of.

8 Q. Okay.

9 A. There may have been other parents, but not
10 that I'm aware of. No one that -- I mean, it was
11 kind of just chaos of like, Is everybody okay? What
12 happened? What's going on?

13 Q. Right.

14 A. Turned into, Why is their police cars
15 here? That type of thing. But I couldn't tell you
16 names or -- it's kind of just a blur of just a crazy
17 morning. I was a bit shaken up.

18 Q. I'm sure.

19 And so this occurred first thing in the
20 morning?

21 A. I believe it was approximately 9 AM, or in
22 that vicinity.

23 Q. I am going to show you -- I am going to
24 mark this as Exhibit 2. This is a transcript of a
25 recorded interview you did with Nicole Cantrell of

1 GEICO.

2 (DFT. EXH. 2, Transcript of Recorded
3 Interview, was marked for identification.)

4 BY MS. WILLIAMS:

5 Q. Okay. If you could take a look at that
6 and maybe just take a minute to review it. And once
7 you've had a chance to take a look at it, just let
8 me know when you're finished.

9 Have you had a chance to review it?

10 A. Yes, ma'am.

11 Q. Okay. And does this appear to be an
12 accurate statement of the conversation that you had
13 with Nicole Cantrell at GEICO?

14 A. It is accurate. The only clarification
15 that I would make is where it says I went to the
16 chiropractor the next day. I was not able to see
17 the chiropractor that day, and I don't think that
18 that's clear in here. He did not start treating me
19 until -- I don't know what the date would be.

20 The accident happened on a Wednesday, I
21 went there on Thursday, but he was not available.
22 And then due to circumstances at The Learning
23 Station, I was not able to get back to him until
24 Monday.

25 Q. Okay.

1 A. I don't think that's very significant, but
2 it's not clear on here.

3 Q. Okay.

4 A. So his records would show my first visit
5 as whatever the Monday date was as opposed to the
6 Thursday date.

7 Q. Okay. And this statement was given on
8 May 24, 2011; is that correct?

9 A. Correct.

10 Q. Okay. So that was about two weeks after
11 the accident?

12 A. Approximately.

13 Q. Okay. And if you take a look at Page 2 of
14 the transcript at the bottom, Ms. Cantrell asked you
15 what you recalled when you were sitting at your
16 desk. And in reviewing your description of the
17 circumstances, does that appear to be -- still hold
18 true as to what happened at the time of the
19 accident?

20 A. Yes, ma'am.

21 Q. Okay. And when did you first start
22 experiencing any pain or injuries from the -- from
23 the impact of the accident?

24 A. My knee hurt immediately and my head hurt
25 immediately, which at the time I just attributed it

1 to stress. I mean, it was scary to be sitting there
2 just having a normal conversation, and the sound --
3 you know, you can't hear it on the video. It was
4 extremely loud and, you know, it just scared us.

5 So I thought that the headache was coming
6 from just stress of, you know -- I mean, I was
7 shaking, you know, for a good part of the morning.
8 I had -- you know, my hands were trembling and it
9 just, you know -- but that's when -- and my whole
10 entire back, just -- the only way I can describe it,
11 like I said, it just felt locked up. Just felt
12 extremely stiff.

13 It wasn't, you know, excruciating pain
14 where I needed to go to straight to an emergency
15 room. It was just stiff. And again, attributed it
16 to tension and stress of just a crazy unexpected
17 experience.

18 Q. Okay. And when did you start experiencing
19 the stiffness in your back?

20 A. It was just right up the back and into my
21 head from -- from as soon as I was speaking. You
22 know what I mean?

23 Q. Okay.

24 A. Immediately.

25 Q. Okay.

1 A. But I just looked at it as a headache.

2 Q. Okay. So is the stiffness in your whole
3 back or just the upper portion you were talk -- you
4 were pointing to your neck and your shoulders?

5 A. It was concentrated a lot in my neck and
6 my shoulders and straight up my head. But I would
7 say my whole back just felt tight, just kind of like
8 a muscle spasm that didn't un-spasm. Just tight.

9 Q. Okay.

10 A. The next day I went into work with
11 intentions of going to the chiropractor after I took
12 care of some things, and our state agency who
13 monitors us that comes once a year, that pretty much
14 has everything to do with everything that we do, was
15 in my office five minutes after I got there.

16 It's an unannounced visit, and it takes
17 two days. And it's two 10- to 12-hour days, which
18 is why I did not get there until Monday. Because I
19 cannot not be there when she's there.

20 So she came into an office that was torn
21 up. We had to explain, you know, all of that. And
22 that also attributed to tension and stress. So I
23 didn't really think anything unusual as far as the
24 severe headache because it was just like, All right.
25 What else is going to go wrong?

1 On Friday as she was leaving our facility,
2 our DSS person, which is social services, came for
3 her unannounced visit. And they actually passed in
4 the parking lot.

5 And so that continued her inspection for
6 the rest of Friday. And by the time I was able to
7 leave work, the chiropractor was closed.

8 Q. What's the difference between the --
9 what's the state agency and DSS? What -- how do
10 they differ?

11 A. The state agency is called ABC. It's
12 called Advocates for Better Care. It's an agency
13 that actually gives funding to our low income
14 parents to subsidize their child care. And we
15 get -- it's a 52-page evaluation that we are scored
16 on that will determine exactly how much subsidy a
17 parent will get based on how well we score. It's
18 very intensive and it's very stressful.

19 Q. What kind of things occur during that
20 two-day inspection?

21 A. She goes through all of your records in
22 the office. She goes into all of our classrooms.
23 She observes the teachers. They have to hit
24 criteria that is listed out. She's looking for
25 everything from what type of toys are in the



1 classroom, what type of materials, how the teachers
2 speak to the children, do they ask open-ended
3 questions, do they, you know, ask them -- do they
4 use positive discipline instead of negative. You
5 can't say, Don't run. You have to say, Please walk.

6 I mean, it's down to exactly like what
7 goes on throughout the entire facility.

8 Q. Okay.

9 A. So from our paperwork to the classroom,
10 you know, how the teachers are in the classroom.

11 Q. Okay. And has the day care scored well?

12 A. Yes. We are the highest scoring center in
13 Horry County.

14 Q. Okay. And then what about DSS? What does
15 her inspection entail?

16 A. DSS is for our license. And she also
17 checks most of the same paperwork that ABC checks.
18 Then she will also just go around and make sure that
19 we are meeting all licensing requirements.

20 So the easiest way to explain it is that
21 ABC's requirements are much more strict than regular
22 licensing. It just happened that they were there
23 within the same day checking.

24 And we still have to go through the same
25 process for them. They come every six months,

1 unannounced. ABC comes once a year.

2 Q. Okay. Has the day care ever had any
3 issues with its licensing being revoked or --

4 A. Absolutely not.

5 Q. Okay. So then I guess we were talking
6 about the injuries that you experienced after the
7 accident.

8 So you talked about your stiffness in your
9 back and your head and your knee which hurt
10 immediately. Anything else?

11 A. The headaches.

12 Q. Okay. Tell me about that.

13 A. At that point the headaches were worse.
14 They -- they were just severe headaches that I had
15 daily. I mean, long-term. I had them for 90 days
16 until I finally had surgery on my neck. But that's,
17 I guess, kind of jumping ahead.

18 I mean, I can kind of tell you the chain
19 of events without specific dates because I really
20 don't know the dates.

21 Q. Sure.

22 A. But basically I went to the chiropractor
23 every other day for approximately two, maybe three
24 weeks at the most. He kept just saying he couldn't
25 believe how tight my back was, how locked up

1 everything was. He didn't want to overdo the
2 treatment, knew how bad the headaches were.

3 Finally had said, I think you need to go
4 to your regular doctor. I think this is beyond what
5 I can do to help you.

6 I went to that doctor, who was Siena
7 Alford. She's been my primary physician for 20-plus
8 years. She sent me for X-rays. My blood pressure
9 was high when I was there, which she attributed to
10 the headaches.

11 Then I was sent to see Dr. Mills at
12 Coastal Orthopedics for follow-up. Both my
13 chiropractor and Dr. Mills initially thought I just
14 had whiplash. My chiropractor explained to me that
15 your spine is meant to do a forward-backwards
16 motion. I don't know how else to say that for the
17 reporter. But my injury was a side-to-side injury
18 so that you can actually have more damage for
19 whiplash from side to side than if it's a hit from
20 behind where you go forward and come backwards.

21 I was set up to do physical therapy. I
22 think that appointment was a few days after -- you
23 know, set up for a few days later.

24 In the meantime I went to a dentist
25 appointment, and they were going to have to use a

1 mild anesthetic, I guess. They were doing like an
2 under-gum cleaning. And my blood pressure was
3 extremely high, too high for them to the procedure.
4 They said, You should call your doctor immediately.

5 I went to her. She couldn't figure out
6 why my blood pressure was sky rocketing other than
7 the headaches. I did not have a history of having
8 blood pressure issues. My appointment was set up a
9 couple days later for the physical therapy. It was
10 a Monday.

11 Over the weekend I was having trouble with
12 double vision and dizziness. When I called
13 Dr. Alford's office Monday morning, she was not in.
14 They instructed me to call Dr. Mills' office. He
15 was in surgery.

16 So I went to my physical therapy
17 appointment, and when they took my blood pressure,
18 they took me straight to the ER because it was
19 extremely high. And that's when, one after another,
20 they started doing CAT-scans and MRIs and all of the
21 different injuries were found.

22 Q. Okay. What were they doing the CAT-scans
23 and MRIs to check for? Did they tell you?

24 A. For any type of damage that would be
25 causing the severe headaches. For, you know, injury

1 to the spine or injury to the brain, or anything of
2 that nature.

3 Q. Your understanding is that their goal in
4 doing the CAT-scans and MRI was trying to ID what
5 was causing your headaches?

6 A. What was causing the pain and the
7 headaches. Because my back still was locked up. It
8 would not release. And the headaches were getting
9 more and more intense. And then -- and then causing
10 double vision. So when I was in church, there were
11 two pastors on the stage instead of one. I mean, it
12 was -- I had to close one eye to be able to focus.

13 Q. Okay. And what is your understanding
14 of -- after those CAT-scans and MRIs were done, what
15 did the doctors tell you?

16 A. I had -- and I always mix up if it's
17 herniation or -- I don't know what the other word
18 is -- but injury to four disks in my neck. I
19 believe it's C4, C5, C6, and C7. I have to check
20 the records to make sure that's right.

21 We then found out that T11 and T12 had
22 issues. And L4 and L5, I believe. I know it's four
23 in the top, two in the middle, two on the bottom.

24 Q. Okay. And so after they identified the
25 issues with your back and neck, what was the next --

1 what were the next steps they advised that you take?

2 A. They also did MRIs for my knees. I had a
3 torn meniscus on each knee. And they did X-rays and
4 different things on my arm.

5 Q. Okay.

6 A. And then it was just the chain of events.
7 The first thing that they did was the surgery on my
8 neck because that is what they felt was causing the
9 headaches. I believe what he told me in the
10 recovery room was that it was actually pinching the
11 nerve in my neck. It was causing me to lose feeling
12 in this arm, which I still -- still just not the
13 same as this hand. I mean, it's just -- I lose
14 feeling in it.

15 Q. Which hand is that?

16 A. Left.

17 Q. Your left hand still has issues with
18 feeling?

19 A. But I also had to have surgery on that
20 hand. The drawer from the sidebar unit that was
21 next to me flew out and hit my arm.

22 Although, Dr. Haskin did the surgery and
23 he just coded it as carpal tunnel, because he got
24 paid from the -- my health insurance if he coded it
25 that way. And I argued with him in the office and I

1 even brought him pictures to show the drawer hitting
2 my desk -- the drawer hitting my arm. But he said
3 that wasn't his area of expertise and he was coding
4 it the way he felt it should be coded.

5 Q. Okay.

6 A. So they did the neck surgery first. When
7 I woke up in the recovery room, the headache was
8 gone completely. I still occasionally have issues
9 of just a pain that will just shoot down my arm.
10 Not often. It feels like a perpetual stiff neck.
11 That feeling of stiffness has really never left.

12 Anyone that knows me finds that I'm kind
13 of doing this kind of often or I will turn left to
14 right just to kind of try to stretch it. It always
15 just feels like I kind of slept crooked on it.

16 Had the hand surgery next. We were trying
17 to go in a chain of events that would be -- let one
18 recover while we started on the next.

19 Q. Can you tell me approximately how long
20 after the accident you had your neck surgery?

21 A. It was in August. I would have to look at
22 records to know the exact date.

23 Q. Of 2011?

24 A. Yes.

25 Q. Okay. And then how about your hand? Just

1 approximately.

2 A. I'm guessing, but approximately October.

3 Q. Of that same year?

4 A. Yes.

5 Q. Okay.

6 A. That's totally guessing. I'm trying to
7 think of events that went around it.

8 Q. Sure. And would it be fair to say that
9 your -- I don't obviously want to go through every
10 single page of your medical records.

11 A. Right.

12 Q. Would it be fair to say that your medical
13 records are an accurate reflection of the chain of
14 events in terms of the doctors that you saw and the
15 symptoms that you had and that sort of thing?

16 A. Yes. Because everything just took time.
17 I mean, they would schedule for a test and they
18 wouldn't have an opening for another week or ten
19 days, and then you go and then it would take time to
20 get the results back.

21 They wouldn't do all the MRIs on the same
22 day. I don't know if it's a radiation thing or a
23 time thing of how long you can stay in the tube.

24 So each set -- the upper, the middle, and
25 the lower -- were done on different days, weeks

1 apart.

2 They couldn't do the knee surgery because
3 my neck had to have a certain amount of time for
4 healing before I could use crutches and do that. I
5 still have not had the knee surgery, nor -- I was
6 supposed to have surgery on both knees and my lower
7 back. The lower back surgery was set up to be the
8 next surgery. And the day before I went in for my
9 pre-op Conway Hospital advised us that because we
10 had already had so much, you know, from the neck
11 surgery that, I guess, because it wasn't a
12 life-threatening thing, unless we paid \$65,000
13 upfront, if we didn't have the insurance to cover
14 it, which it was under the accident so they wouldn't
15 cover it, we would have to do it out-of-pocket and
16 then fight to get it back. And we didn't have that
17 in our possession to be able to do that. So that
18 has been put on hold.

19 This year in -- well, actually last year
20 in November I started to not feel well. I went to
21 Conway Medical Center. Thought I was having some
22 kind of heart issue. I was having heaviness on my
23 chest. Again, pain in the arm, dizziness, shortness
24 of breath. When they did my vitals and did blood
25 work, my potassium level was severely low and they

1 said it could cause heart-type symptoms. They did a
2 multitude of heart-related tests: Blood work, EKG,
3 stress tests, all of those types of things.
4 Everything came back perfectly normal.

5 I had to follow-up with Dr. Alford, which
6 I did. When I went to follow-up with her, she said
7 my creatinine level was a little bit off, that we
8 should watch it. I still was feeling very badly.
9 Went back to her within a week. They did more blood
10 work. My creatinine level had jumped higher.

11 She sent me to Coastal Kidney Center.
12 Within six weeks approximately, my creatinine level
13 went from a 1.3 to a 7.7, which is critical
14 condition. They did a kidney biopsy, and my kidneys
15 were going into kidney failure from a medication
16 called Prevacid which I had to start taking after I
17 had the neck surgery, because in the neck surgery
18 something happened. I was having trouble swallowing
19 and I have chronic reflux from the surgery.

20 So I had been on Prevacid for all of that
21 time, and Advil. And those were the only
22 medications that could cause the type of kidney
23 reaction that I had. And ended up in the hospital
24 for several weeks, had to have dialysis. They
25 weren't sure I was going to come home from the

1 hospital. It got to a point where the doctors
2 didn't think they were going to be able to turn it
3 around.

4 I went down to 7 percent kidney function.
5 Dr. Tantoco at Coastal Kidney saved my life by doing
6 some very aggressive types of treatment. And at
7 this point my kidneys are functioning at 42 percent.
8 And at my last visit she told me they may never get
9 better than that.

10 Q. And is there any danger with them only
11 functioning at 42 percent? I mean, do you have
12 to --

13 A. The danger is I could easily have to go
14 back to dialysis permanently.

15 Q. Do you have to have any sort of -- are you
16 a candidate for like a transplant or is that --

17 A. We haven't discussed that at this time.
18 Right now I am having to see her every three to four
19 months for follow-up. From the point I was -- when
20 I was released from the hospital, I think it went
21 from 7 percent to 10. And each visit it has gone a
22 little bit higher.

23 But at our last visit -- from whatever she
24 looks at with how the numbers change in the last
25 four months apart it only went from 38 to 42, which

1 told her it was tapering and it wasn't going to keep
2 climbing as much.

3 Now, I mean, I go back again in February
4 and I'm praying that it will be higher.

5 Q. Okay.

6 A. Because the closer I get to 100 percent,
7 the better off I'll be. But it still causes
8 fatigue. It causes weakness.

9 Q. Okay. And the doctor that you go to for
10 follow-up, is that your doctor at Coastal Kidney?

11 A. Yes.

12 Q. And what is her name?

13 A. Dr. Tantoco, T-A-N-T-O-C-O, I believe.
14 I'm not 100 percent. I started with Dr. Elms. And
15 Dr. Balachandran -- again, I couldn't tell you how
16 to spell it -- also was involved with my case. And
17 he was the one that kind of put it in high gear.
18 And I believe he is one of the lead physicians at
19 Conway Medical Center. But he's also part of
20 Coastal Kidney.

21 Q. Okay.

22 A. Chief of staff at Conway Medical Center.

23 Q. And you said his name is Balachandran?

24 A. Balachandran.

25 Q. Balachandran.

1 A. I couldn't even attempt to spell it.

2 Q. Okay.

3 A. They call him Dr. B, so it's hard to even
4 remember his full name.

5 Q. He's with Conway Medical Center and
6 Coastal Kidney Center?

7 A. As far as I -- yes. I mean, I know he was
8 with Coastal Kidney, and I was told he was chief of
9 staff at Conway. I'm not sure how accurate that is.

10 Q. Okay. All right. Now, let me go back and
11 ask you a few questions about some of the things you
12 just told me about your medical history.

13 You were talking about your lower back
14 surgery. You had that scheduled to be done at
15 Conway Medical Center; is that right?

16 A. Correct.

17 Q. Okay. And when --

18 A. With Dr. Mills.

19 Q. Okay. And when were you scheduled to have
20 that done?

21 A. I would have to look at my records to see.

22 Q. Was it within the last year? Two years?

23 A. No. It was within a year of the accident.

24 Q. Within a year of the accident --

25 A. So probably somewhere in 2012. It was

1 because we had to wait for recovery from each --

2 Q. Okay. And they said you couldn't go
3 forward with the surgery unless you paid \$65,000,
4 correct?

5 A. Correct.

6 Q. And with respect to the other surgeries
7 that you had, did your health insurance cover those?

8 A. No.

9 Q. Okay. So have those bills been paid?

10 A. No.

11 Q. Okay. So there's a medical lien on those
12 bills. And how much are those? Do you know?

13 A. All the records have been given to
14 Brittain Law Firm. I don't have them with me.

15 Q. Okay. So you have some medical liens at
16 the Conway Medical Center. Anywhere else?

17 A. Coastal Orthopedic.

18 Q. Okay. Anywhere else?

19 A. Those would be the two main ones. And
20 then I think there are smaller bills in there from
21 Dr. Sutton's office.

22 Q. Who is Dr. Sutton?

23 A. The ENT who had to go through all the
24 throat issues that I was having after the surgery.
25 Normally you should be able to swallow in three

1 days. It took me several weeks to be able to eat
2 normal food.

3 Q. And what did he say was the cause of that?

4 A. It was just a complication from the
5 surgery because they go in through the front of your
6 neck and they have to move everything to the side to
7 get to your spine.

8 And so I guess when they moved it back, it
9 just was very irritated and I just didn't recover as
10 quickly as normal. I went in for a swallow test to
11 Conway Medical Center, and I had an anaphylactic
12 reaction to the barium sulfate that they gave me,
13 which put me in the emergency room straight from the
14 test.

15 They gave me epinephrine, which made me
16 like I was having a heart attack. Horrible
17 experience. My throat closed. I couldn't breathe.
18 The last three years of my life have not been
19 pleasant.

20 Q. Who diagnosed you -- tell me again -- tell
21 me more about the Prevacid. Who -- who prescribed
22 the Prevacid?

23 A. Dr. Sutton told me to use it to alleviate
24 the acid reflux. I'd never even experienced that
25 before. I felt sorry for every child I've ever

1 cared for that I've been told they had it because I
2 didn't know what they were going through.

3 Q. When did the acid reflux start?

4 A. After the surgery when I would try to eat
5 regular food.

6 Q. Okay. And how often did you take the
7 Prevacid?

8 A. Daily.

9 Q. Are you still on it?

10 A. No.

11 Q. Are you still having acid reflux?

12 A. I have lost 35 pounds, and so since then I
13 have not had to take it as often, but I have Zantac
14 to take as needed.

15 Q. Okay. And why -- why don't you have to
16 take it? Because of the weight loss? How does that
17 effect it?

18 A. I guess it has helped in some way. Also
19 it's been three-and-a-half years since the surgery,
20 so things are going back to the way they're supposed
21 to be. The healing just took longer than the
22 average person.

23 Q. So how long had you been on the Prevacid
24 before the kidney problems started?

25 A. From the point of the accident until the

1 biopsy came back?

2 Q. Yes.

3 A. From --

4 Q. Okay.

5 A. So from the surgery in August of 2011 --

6 Q. Okay.

7 A. -- to December of 2014 -- 2013. This is
8 2014.

9 Q. 2013.

10 Okay. So when you said you had gone in,
11 your potassium levels were very low --

12 A. What that ended up being was that because
13 my kidneys were having problems, they weren't
14 absorbing the potassium.

15 Q. Okay.

16 A. So because my kidneys were starting to go
17 into kidney failure, the potassium could not be
18 absorbed. That's where your -- things get absorbed
19 through.

20 Q. Okay. And that was November of 2013?

21 A. Yes.

22 Q. Okay. Going back to the chain of events
23 where you said you went to the dentist and that was
24 when the high blood pressure was identified so you
25 couldn't get your dental procedure done. You went

1 to the PT, the physical therapist.

2 Did you ever go to the physical therapist
3 after the surgery?

4 A. No, because then they found the other
5 injury and so surgery was done. What they were
6 going to do is physical therapy for whiplash.

7 Q. Okay. So did the doctors tell you you did
8 not need to go back to the physical therapist?

9 A. Correct.

10 Q. So in terms of the surgeries you contend
11 that you still need -- it's the lower back surgery?

12 A. Correct.

13 Q. And they say that's going to cost \$65,000?

14 A. I don't know if that's the total cost.
15 That was the portion for Conway Medical Center. So
16 there would still be a portion for Coastal
17 Orthopedics.

18 Q. And you don't know what that number is?

19 A. I don't, but Brittain Law Firm has an
20 estimate that they have given us. I don't recall
21 the amount.

22 Q. Okay. And then you also said that you
23 believe you need surgery on your -- both of your
24 knees.

25 A. I was told both of them need surgery.

1 Q. And do you know how much those surgeries
2 will cost?

3 A. I do not. But again, they did do an
4 estimate.

5 Q. Okay. Any other -- any other treatments
6 that you contend you still need as a result of the
7 accident?

8 A. Ongoing kidney treatment indefinitely. I
9 don't know what that will bring.

10 Q. Okay. So you're also contending your
11 kidney problems are a result of the accident?

12 A. I would have never needed the Prevacid if
13 I didn't have neck surgery. Or Advil.

14 Q. Okay. Anything else?

15 A. Not that I can think of.

16 Q. Okay. Is there any other continuing
17 treatment that you're continuing to receive for your
18 medical injuries that you contend are a result of
19 the accident?

20 A. I need to continue going to Coastal
21 Orthopedic, but I'm not going to continue incurring
22 debt until I know that I can afford to pay for it.
23 So right now I've adapted to what I can and cannot
24 do, changed what I do drastically, and cope the best
25 that I can.

1 Q. Okay. Anywhere -- anywhere else that
2 you're continuing to receive treatment?

3 A. No, ma'am.

4 Q. While we're talking about medicals, let me
5 go ahead and let's talk about some of your damages.
6 We talked a little bit about that. But I want to
7 mark as an exhibit the damages sheet that your
8 attorney has provided to our office.

9 MR. BRITTAIN: The one that had like
10 \$101,000 on it?

11 MS. WILLIAMS: I think it's more than
12 that.

13 MR. BRITTAIN: It keeps going up. I have
14 one from April 2014 --

15 MS. WILLIAMS: Okay.

16 MR. BRITTAIN: -- if you want to use it.

17 MS. WILLIAMS: Okay. I will take a look.
18 I have notes on it though.

19 Okay. I'm going to mark this as
20 Defendant's Exhibit 3. This is the plaintiff's
21 damages sheet.

22 (DFT. EXH. 3, Plaintiff's Damages Sheet,
23 was marked for identification.)

24 MS. WILLIAMS: The one with the \$219,000
25 is the most recent, correct?

1 MR. BRITTAIN: I think you're right.

2 BY MS. WILLIAMS:

3 Q. Okay. Take a look at this damages sheet.
4 We have -- or you have a listing of various medical
5 expenses from different providers that you have seen
6 since the time of the accident; is that correct?

7 A. Correct.

8 MR. BRITTAIN: That's going to be Exhibit
9 Number 3?

10 MS. WILLIAMS: Yes.

11 MR. BRITTAIN: Okay.

12 BY MS. WILLIAMS:

13 Q. If we go through some of these, can you
14 tell me which, if any, have outstanding medical
15 liens on them, which have been paid, and what hasn't
16 been paid?

17 For the Carolina Clinic of Chiropractic,
18 is that \$410? Has that been paid or is there a lien
19 on that?

20 A. Mine says \$802.

21 Q. I'm sorry. I am looking at the old one.
22 \$802. Yes, that's right. Is that correct?

23 A. I believe that that part has not been
24 paid. Subsequently, in the past year I have been
25 paying as I go.

1 Q. Okay.

2 A. Because I don't want him to keep losing
3 money.

4 Q. Okay.

5 A. So when I do go to him -- we've made a
6 payments arrangement to pay per visit.

7 Q. So you're paying out of your pocket?

8 A. Yes.

9 Q. How about Conway Medical Center?

10 A. That has not been paid.

11 Q. Okay. So that whole \$178,868.61 --

12 A. Correct.

13 Q. -- is still unpaid?

14 A. And I don't know if the kidney expenses
15 from the dialysis are in that or not. I believe
16 that my medical insurance did kick in and cover some
17 of that. But I'm not 100 percent sure.

18 MR. BRITTAIN: Go off the record for just
19 a second.

20 (Off-the-record conference.)

21 BY MS. WILLIAMS:

22 Q. Put that on the record so I can remember
23 it.

24 So off the record you were just talking
25 about your health insurance at the time of the

1 accident, that it had lapsed.

2 A. It didn't lapse. We had Assurant Health.
3 I don't remember the name of the type of policy, but
4 every six months it had to be reinstated.

5 It was towards the end of the six-month
6 time period during the time of the accident, so it
7 initially covered, I believe, one visit in the
8 accident.

9 And then when they redid it and renewed
10 the policy, then they considered all of the injuries
11 to be preexisting and they would not cover them.

12 Q. And they wouldn't allow you to provide
13 documentation -- some carriers allow you to provide
14 certificate of coverage that you were covered
15 before.

16 A. It was the same company so they had
17 everything they needed.

18 Q. Okay.

19 A. They knew they had covered me for it.

20 Q. And who is your -- you said your insurance
21 is with Assurant Health. Is that through -- is that
22 a policy that you and your husband buy?

23 A. It was just a personal independent policy.
24 And I believe -- thinking back what happened was it
25 was supposed to be like on an automatic -- automated

1 payment. And they didn't automate it. So then they
2 sent us something saying you didn't pay and you have
3 to pay to renew, and I don't know if that was to
4 stop it and start it again to renew for the six
5 months.

6 So there like was a discrepancy over, What
7 do you mean it wasn't paid? You're supposed to be
8 taking it from our bank account.

9 Q. Okay.

10 A. So then that straightened out and they put
11 us back on, but then they considered everything
12 preexisting. Talked to supervisors. I mean, you
13 know, fussed and did everything I could but they
14 would not --

15 Q. Okay. So it wasn't that it had to be
16 renewed every six months that they considered it a
17 preexisting condition. It was because it had a
18 lapse in coverage --

19 A. It had to be renewed every six months, but
20 they were supposed to automatically renew it and
21 they didn't automatically renew it. So then it had
22 to be redone.

23 Q. Okay. So because the automatic renewal
24 didn't happen, the policy, I guess, lapsed for a
25 short period of time?

1 A. Like a day. Within a day it was fixed.

2 Q. Okay. And because of that day they are
3 saying that it's a new policy and so it's no --

4 A. Preexisting conditions.

5 Q. All preexisting conditions. Okay.

6 A. We don't have that company anymore.

7 Q. Who do you currently have your health
8 insurance with?

9 A. Blue Cross Blue Shield.

10 Q. Okay. Is that also a personal policy that
11 you have?

12 A. Correct.

13 Q. So you do not have health insurance
14 through your -- through the day care?

15 A. I do not.

16 MR. BRITTAIN: Off the record.

17 (Off-the-record conference.)

18 BY MS. WILLIAMS:

19 Q. Okay. So we just talked about Conway
20 Medical Center. Going back to Exhibit 3.

21 How about Rivertown Family Medicine?

22 A. That is Dr. Alford's office, and that has
23 not been paid.

24 Q. Okay. And how about Carolina Radiology?

25 A. To the best of my knowledge, none of these

1 have been paid.

2 Q. Okay. So just to cut to the chase here,
3 all the expenses that are listed on this sheet are
4 unpaid?

5 A. Correct. Except for Kroger Pharmacy,
6 which we paid out-of-pocket.

7 Q. Okay.

8 A. And that's what we used the \$8,000 that we
9 got from the \$25,000, to pay the credit card off
10 that was for those expenses.

11 Q. Okay. Now, there's a note on the bottom
12 of the damages sheet that says that you're currently
13 reviewing the damages for relevancy.

14 Are there some expenses in here that are
15 not attributable to the accident?

16 A. I'm not sure if any of the kidney stuff is
17 in here at all because I don't see Coastal Kidney
18 listed.

19 But again, Blue Cross Blue Shield kicked
20 in for that, so I'm not sure where we're at with
21 that.

22 Conway Medical has all of our stuff kind
23 of in holding. And I have not spoken with them to
24 know if there's any outstanding kidney -- with the
25 dialysis. And it's kind of like this where there's

1 so many entities involved, so the dialysis might be
2 listed under a different name, just like radiology
3 is and all of that.

4 Q. Okay.

5 MR. BRITTAIN: Off the record.

6 (Off-the-record conference.)

7 MS. WILLIAMS: This note that we were just
8 talking about -- the plaintiff is currently
9 reviewing the above-listed damages for relevancy.
10 BY MS. WILLIAMS:

11 Q. We talked about the fact that Coastal
12 Kidney is not on here and you're not sure yet if
13 that's attributable -- if the doctors will say
14 that's attributable to the accident.

15 A. Correct.

16 Q. Is there anything on this list as it is
17 set forth here on the paper on Exhibit 3 that is not
18 attributable to the accident?

19 A. No, ma'am.

20 Q. You're contending all the expenses here
21 that you have incurred with these various medical
22 providers have been incurred as a result of the
23 injuries you sustained in the accident?

24 A. Yes, ma'am.

25 Q. All right. Okay. Also attached to this

1 damages sheet was, I think, something that your
2 attorney provided earlier this week. It looks like
3 a bill, your transaction history from Carolina
4 Clinic of Chiropractic.

5 A. Correct.

6 Q. Okay. And so this sets forth all the
7 visits you have had with the chiropractor since the
8 time of the accident through August of this year; is
9 that correct?

10 A. Correct.

11 Q. Okay. And are you still continuing to
12 receive treatment from the chiropractor?

13 A. I do when needed. My husband's mom passed
14 away in August, and we've been very consumed with
15 some family emergencies and things of that nature.
16 So I have not gone on more of a regular basis as I
17 was.

18 Q. Okay. And when you go as you say
19 as-needed, what are you usually going to see him
20 for?

21 A. With the lower back injury, sometimes I
22 will get sciatic pain that will go down my leg. And
23 so if he does an adjustment, sometimes it will
24 relieve that. If I have bad headaches, I can go and
25 sometimes he can do an adjustment that will relieve



1 the headaches.

2 He is not the type of chiropractor that
3 makes you sign up for a year and you have to go so
4 many days a week. You go to him as-needed.

5 Q. Okay.

6 A. There's been lots of days where I've
7 wanted to go but missed his hours and was not able
8 to make it. He has different hours every day, and
9 so my schedule has to meet his schedule.

10 Q. Okay. And the treatment that you're
11 continuing to receive from him, is that treatment
12 for injuries you're contending are as a result of
13 the accident?

14 A. I wouldn't have the sciatic pain or the
15 neck problems if I didn't have the accident, so yes.

16 Q. So those are damages you're seeking to
17 recover in this lawsuit as well?

18 A. Yes.

19 Q. Had you seen a chiropractor prior to this
20 accident?

21 A. Occasionally.

22 Q. Okay. Was it -- was it the same
23 chiropractor?

24 A. Yes.

25 MR. BRITTAIN: You can go ahead. I need

1 to step out for just a second. You just keep right
2 on going.

3 (Mr. Brittain left the room.)

4 BY MS. WILLIAMS:

5 Q. Do you recall back in 2009 going to visit
6 him for pain in your lower back, muscle spasms in
7 your lower back?

8 A. Yes.

9 Q. Okay. And you were also experiencing mild
10 to moderate pain in the region of your upper back?

11 A. Yes. Tension.

12 Q. Okay. And you saw him, it looks like,
13 from about February of 2009 through about June of
14 2010 for various pain in your upper and lower back
15 and some pain in your head region; is that correct?

16 A. I've seen him off and on if I just felt
17 out of alignment. I believe in the chiropractic
18 care and my whole family sees him.

19 Q. Okay. So you previously had seen him for
20 issues with your lower, upper back, and head pain
21 issues.

22 A. For a headache. I do a lot of desk work.

23 Q. So headaches are something you experienced
24 prior to the accident?

25 A. Mildly. Never severe. And only



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1 occasionally.

2 Q. Okay. And how about the lower and upper
3 back pain?

4 A. Just occasionally. If I had been doing
5 lifting or exercising.

6 Q. Okay. And do you -- do you exercise
7 regularly or did you -- let me back up for a minute.

8 Before the accident, did you exercise
9 regularly?

10 A. I did not exercise at a gym, but I would
11 walk or do activities with my children.

12 Q. Okay. How about after the accident?

13 A. I have not.

14 Q. So no, like, walking around your
15 neighborhood or anything like that?

16 A. Very little.

17 Q. And why is that?

18 A. Because I never know at what point it will
19 be too much and I need to be able to turn around and
20 go back.

21 If the sciatic pain starts, sometimes I'll
22 lose -- like my whole leg will feel like it's going
23 to go out. My knees hurt all the time. Climbing
24 stairs is atrocious. When we've gone on family
25 vacation to amusement parks, I sit in a wheelchair

1 and watch my family go on the rides. I don't ride.
2 And I get pushed around in a wheelchair because I
3 can't do that much walking.

4 Q. Okay. Let's talk a little bit more about
5 some of the -- some of your medical conditions prior
6 to the accident.

7 So in looking at your medical records, it
8 appears that you were diagnosed with fibromyalgia in
9 2003; is that right?

10 A. That's correct.

11 Q. Okay.

12 A. But I have not had symptoms since 2000.

13 Q. You have not had symptoms since 2000 --

14 A. I mean since 2010. Sorry.

15 Q. Okay. So you were diagnosed in 2003 and
16 haven't had symptoms since 2010?

17 A. Correct.

18 Q. Okay. When you were having symptoms, what
19 kind of symptoms were you having?

20 A. It would hurt when you would touch
21 different areas of my body. Actually hurt -- felt
22 like it hurt your skin. I would have extreme
23 fatigue where I would just come home from work and
24 have to, like, go to sleep for an hour or two.

25 Q. Okay. Any other symptoms?



1 A. No. Just -- just that uncomfortableness
2 when -- you know when your skin would be touched in
3 different pressure points and different places --

4 Q. Was it only in certain places of your
5 body? I notice you are touching your arms. Was
6 there any other --

7 A. I felt it a lot -- I felt it a lot in my
8 arms primarily, but you don't usually get touched
9 too many other places besides there, so that's where
10 it would stand out. If my husband hugged me or my
11 kids hugged me, I would always feel it in those
12 areas.

13 Q. Okay.

14 A. I started liquid vitamins in 2010. And
15 after eight weeks of being on them, all of those
16 symptoms were gone, including the fatigue and the
17 pain.

18 Q. Taking the liquid vitamins, is that
19 something your doctor had recommended that you take?

20 A. No. It was something that I tried on my
21 own.

22 Q. Okay.

23 A. Every medication that the doctor tried
24 just didn't work. It would make me feel sick or
25 worse. I don't do well with prescription

1 medications.

2 Q. What kind of prescriptions did they give
3 you to try to help with the pain?

4 A. I think there was Lyrica. I literally
5 took it maybe four or five times and then just
6 didn't take it.

7 Q. Is that the only medication that you had
8 tried?

9 A. It's the only one that I recall the name
10 of.

11 Q. Okay. But you had tried a couple other
12 ones?

13 A. I don't even know that I tried anything
14 else. I think they may have prescribed something
15 else, but I didn't even take it because I was
16 frustrated. I just -- you take one thing and it
17 causes another side effect. I'm just not a big
18 medication person.

19 I have not taken ample pain medicine
20 through all the surgeries. I would take it the day
21 of or the day after, and then that would be it. You
22 know, I mean, I just don't react well to those types
23 of things.

24 Q. Right.

25 A. Just like the barium test. I mean, I --

1 my body doesn't respond well. I get nauseous. I'll
2 throw up from medication. I just -- I don't do well
3 with it. So I was determined to find something that
4 I could do on my own to do it.

5 Q. Did you ever take anything else, any other
6 over-the-counter medications other than liquid
7 vitamins to help with the pain, like Tylenol or
8 ibuprofen?

9 A. Rarely. I did not use a lot of
10 over-the-counter medications either. I have used
11 Advil on a regular basis after the accident because
12 I didn't want to take prescription medications. I
13 mean, way too many people have gotten themselves
14 into trouble with addiction to them.

15 Q. Okay. Okay. And also noted in your
16 family history is that your family has a history of
17 hypertension; is that correct?

18 A. My father had hypertension and my mom.

19 Q. Okay. And have you ever had -- have you
20 had any issues with that?

21 A. I've had it mildly, but all I was taking
22 for it was hydrochlorothiazide, which is basically
23 like a water pill. And that was enough to keep it
24 in check. Then I was put on a blood pressure
25 medicine when my -- when it was so high after the

1 accident. I can't think of what it was called. The
2 kidney doctors took me off of that.

3 Q. Can the hypertension cause high blood
4 pressure?

5 A. Can it cause it?

6 Q. Yes.

7 A. I don't know. I would have to ask.

8 Q. I didn't know if that was a symptom of it.
9 Okay. That's fair enough. You're not a doctor. I
10 was just curious to know.

11 How about diverticulitis? You were
12 diagnosed with that in 2010?

13 A. Yes, ma'am.

14 Q. Okay. Is that something that you are
15 still suffering with currently?

16 A. I have learned to control my diet and
17 regulate my bowel movements so that I don't have as
18 many issues as I used to. Found what triggers it
19 and what doesn't.

20 Q. Sure.

21 A. So I rarely have a problem with that.

22 Q. Okay. Were you on any medications for
23 that?

24 A. No, ma'am. Only if you have a flare-up
25 they will give you an antibiotic.

1 Q. And then let's see here.

2 Okay. Then also noted in your medical
3 records from Coastal Orthopedics, it looks like
4 these were sent over to them by Conway Medical
5 Center. But also in your history it's listed that
6 you have degenerative disk disease, degenerative
7 joint disease, and arthritis; is that correct?

8 A. That's recent, if that's in my recent
9 medical records.

10 Q. Okay. Has anybody --

11 A. I know they have said stuff about my
12 shoulder having arthritis in it. Never anything in
13 my back that I've been told.

14 Q. Okay. Have you ever been told that some
15 of the MRIs or CAT-scans that you have received
16 showed disk disease and arthritis?

17 A. No. Only in my shoulder. They've said --
18 they've mentioned arthritis in my shoulder. That's
19 from carrying hundreds of children in my left arm.

20 Q. Have you ever been told that you may have
21 an underlying rheumatological condition?

22 A. When they were talking about the
23 fibromyalgia, they did. I went to a rheumatologist.
24 There was nothing found. I have not had any issues
25 since then.

1 Q. Who is the rheumatologist that you went to
2 and when did you go?

3 A. She was a quack. I'd have to find out her
4 name.

5 Q. Okay.

6 A. I can't remember her name.

7 Q. How long ago roughly was that?

8 A. I would be guessing. Many years ago.

9 Q. More than ten?

10 A. This is 2014. Between five and ten, I
11 would guess.

12 Q. Okay. And so you said when you went to
13 the rheumatologist, did she do some tests?

14 A. We didn't -- I don't even think we got
15 that far. She gave -- I think she was the one that
16 gave me the Lyrica. I tried that. I tried calling;
17 she didn't return my phone calls. I just was not
18 impressed with her and I didn't go back to her.

19 Q. Okay.

20 A. It hasn't effected me at all that I needed
21 to go back.

22 Q. And who initially referred you to the
23 rheumatologist?

24 A. Dr. Alford.

25 Q. Okay. And then I understand that your



1 father had chronic renal failure; is that right?

2 A. He had heart issues. And towards the end
3 of his life he had some kidney issues.

4 Q. Okay.

5 A. But he wasn't ever in kidney failure. He
6 never had dialysis or anything of that nature.

7 Q. Okay. I'll just represent to you I'm
8 pulling that language from your medical records at
9 Coastal Kidney.

10 They noted in your history that your
11 father had chronic renal failure, but that you
12 didn't know the cause of the kidney disease.

13 Since they have discussed that they said
14 they were going to look into it, do you know if they
15 ever identified, from looking back at his records,
16 what the cause of his kidney failure was?

17 A. That was never discussed with me
18 whatsoever.

19 Q. Okay.

20 A. They discovered mine from a biopsy. It
21 was clear that it was a medication interaction.

22 Q. Okay.

23 A. And it's not kidney disease. It was an
24 allergic reaction that had to heal. So I'm not
25 considered to have kidney disease.

1 Q. Okay.

2 A. As far as -- that's the way I understand
3 it from my doctor.

4 Q. Okay. I also noted in your medical
5 records that you were on a proton pump inhibitor.
6 And what was that for?

7 A. I don't know what that is.

8 Q. Okay. I don't know either. That's why
9 I'm asking.

10 So you don't -- you're not aware that that
11 was being treated with proton pump inhibitor?

12 A. I don't know what that is --

13 Q. Okay.

14 A. -- so I don't want to answer yes or no.
15 They were giving me shots before I was hospitalized.
16 I don't know if that's what that is.

17 Q. Okay. So you're not --

18 A. Honestly, I don't know what you're talking
19 about.

20 Q. Okay.

21 A. So it doesn't mean they didn't give it to
22 me or do it or whatever.

23 Q. Okay.

24 A. But I don't know what that means.

25 Q. Okay.

1 A. That makes me think of a pump or
2 something. I don't know. I was given shots. A
3 very expensive liquid gold drug that was supposed to
4 help try to boost the kidneys, but it didn't work
5 and I ended up in the hospital.

6 Q. Okay. You had talked --

7 A. I don't know what they did there. It
8 could have been a pump type of thing. I don't know.

9 Q. Okay. You had talked earlier about your
10 carpal tunnel syndrome and surgery that you had had
11 for that.

12 You had talked about how you spoke with
13 Dr. Haskin about trying to relate it to the
14 accident; is that right?

15 A. Yes. I did not have any issues before the
16 accident --

17 Q. Okay.

18 A. -- that would be, like, you know, remotely
19 carpal tunnel.

20 Q. Okay.

21 A. But I know that the drawer hit my arm
22 right where the pain was at.

23 Q. Okay. And he said -- and he told you that
24 that was something --

25 A. He said he was doing -- it was the same

1 type of surgery as carpal tunnel, and that's what he
2 was coding it as. And then it would be up to my
3 attorneys to decide if it was caused by the accident
4 or not.

5 Q. Okay.

6 A. But he was coding it that way. So that is
7 not reflected in these bills. As far as I -- I
8 don't believe they are because I believe my
9 insurance company covered it.

10 Q. Okay. At some point I understand that you
11 had a torn meniscus in your right knee; is that
12 correct?

13 A. A long time ago.

14 Q. Okay. What caused that tear?

15 A. I fell down the stairs.

16 MR. BRITTAIN: I've been called away.
17 I've got my son coming to complete the deposition.

18 MS. WILLIAMS: Okay.

19 MR. BRITTAIN: I told Ms. Jensen I might
20 have to do it. Come on in, Case. This is Case
21 Brittain.

22 (At which time Mr. Case Brittain entered the
23 room and Mr. Tommy Brittain left.)

24 (Off-the-record conference.)

25 BY MS. WILLIAMS:



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1 Q. So, Ms. Jensen, before we went off the
2 record we were talking about your previous torn
3 meniscus in your right knee. You said that occurred
4 from the fall down the stairs.

5 A. I should rephrase that the proper way. I
6 missed a step. I didn't, like, fall down the
7 stairs. I missed a step going down the stairs and,
8 like, twisted. It just -- twisted my knee.

9 Q. Okay.

10 A. So, like, I misstepped. It was -- I
11 didn't fall down a flight of stairs.

12 Q. Okay. And so you had surgery. And did
13 you have any problems with your knee after the
14 surgery?

15 A. No, I did not.

16 Q. Do you play any sports? We talked about
17 exercise before, or any sports or anything like that
18 during your lifetime that has put a strain on
19 anything like your knees or your back?

20 A. No. I do not do any sports. I was a
21 cheerleader, but cheerleading in my day was not what
22 cheerleading is in this day. We just shook some
23 shakers. It was definitely not what it is now.

24 Q. Okay. Was that when you were in college?

25 A. No. High school.

1 Q. High school.

2 A. But it -- seriously, like, there was
3 not -- I would not consider it a sport.

4 Q. No throwing up in the air?

5 A. No, no, no, no, no. Not back in the day.
6 I watch the girls now and just, my gosh.

7 Q. Okay. And in looking -- we talked before
8 about you went back in 2009 and 2010 to the
9 chiropractor to get some treatment for your neck and
10 upper and lower back.

11 I also note in your medical records from
12 your primary care physician, which is Rivertown
13 Family Medicine, that in 2009 you went in
14 complaining of left shoulder pain; is that right?

15 A. Yes.

16 Q. Okay. Was that the same pain you were
17 experiencing that you were asking the chiropractor
18 to treat?

19 A. Yes.

20 Q. Okay. And --

21 A. Just that shoulder just gets locked. Like
22 I said, carrying -- it's how I've carried every
23 child I've taken care of, including my own, who are
24 not small by any sense of the word.

25 Q. So you carried children on your left side?

1 A. Yes.

2 Q. Are you left-handed?

3 A. No. That's why, so you can use your right
4 hand. So that's, you know, the shoulder issue,
5 which is not a complaint from the accident.

6 Q. Okay. Did you also have some previous
7 issues with some chronic headaches related to your
8 hypertension prior to the accident?

9 A. For a short period of time. I don't
10 remember when it was, but it was stress induced. I
11 believe during the time that my dad was ill and
12 passed away.

13 Q. Okay. And when was that?

14 A. February 2, 2011. But I was his caretaker
15 for 17 years. The last two years his health
16 deteriorated. It was just very stressful.

17 Q. Sure.

18 Earlier we talked about your kidney
19 issues. You had said that it was your understanding
20 that the kidney failure was a result of the
21 Prevacid --

22 A. Prevacid.

23 Q. -- that you were taking.

24 A. That's basically what Dr. Elms told me.

25 Q. Dr. Elms with Coastal Kidney?

1 A. Yes.

2 Q. Okay. Did it -- go ahead.

3 A. It was a medication interaction. The only
4 two medications that I was taking that could cause
5 that type of interaction was Advil and Prevacid.
6 And Prevacid was known to do those types of things.

7 So if you Google the side effects of
8 Prevacid, way down in the small print it will say,
9 Can cause kidney issues. So he pinpointed it to --
10 that it was most likely the Prevacid that would
11 cause that.

12 Q. Okay. Did they provide you with any other
13 possibilities of what may have caused the kidney
14 failure other than the Prevacid?

15 A. There was something else listed on the
16 biopsy, but there was testing for that and it came
17 back negative. I don't remember what it was called.
18 But there was -- if I had it in front of me I could
19 tell you. But there was something, a medication
20 interaction or something.

21 But then they did all the blood work and
22 everything to check for whatever that was and that
23 was negative.

24 Q. Okay.

25 A. It was not --

1 Q. Did anybody ever tell you that the -- your
2 use of the ibuprofen may have been a cause of the
3 kidney damage?

4 A. He said it could possibly be it, but that
5 he would lean towards it being the Prevacid. I
6 don't take either anymore.

7 Q. Okay. How about the thiazide diuretic
8 that you were taking from 2007 to 2013?

9 A. He said that would not be an issue.

10 Q. Okay. And there's also mention of the
11 fact that you had pleurisy in November of 2013.
12 Does that ring a bell?

13 A. No.

14 Q. Okay.

15 A. I'm not sure I know what pleurisy is.

16 Q. Did anyone ever tell you that you may have
17 had a viral illness that could have precipitated the
18 kidney injury?

19 A. No.

20 Q. Okay. So from your conversations with
21 your doctors, it's your understanding that Prevacid
22 is the most likely cause?

23 A. Yes.

24 Q. Okay. We already talked about your knee
25 surgery. Are there any other surgeries you had

1 prior to the accident?

2 A. Cesarean section.

3 Q. All right. Anything else?

4 A. Gallbladder.

5 Q. Is that it?

6 A. I think so.

7 Q. Other than the neck and back pain and
8 headaches that we talked about that you had
9 experienced to some extent before the accident, is
10 there any other conditions related to your back or
11 neck or knees that you experienced prior to the
12 accident?

13 A. No. And prior to the accident it was few
14 and far between. I mean, there would be isolated
15 incidents, go to the chiropractor, he'd work on me
16 and I would be fine after that. It wasn't an
17 ongoing issue. It was more just related to
18 circumstances at the time. Just normal chiropractic
19 care.

20 He would ask, Where are you stiff? Where
21 do you hurt? Yes, my neck and shoulder type of
22 thing.

23 Q. Okay. It looks like maybe you had gone in
24 for the chronic headaches related to the
25 hypertension in September of '08. Does that sound

1 about right?

2 A. Yeah. That would have been in the last
3 couple years with my dad.

4 Q. Okay.

5 A. Just was having some issues but then it
6 subsided.

7 Q. And they did a CT -- head CT?

8 A. I believe so. There was nothing. It
9 wasn't a headache where it was like every single
10 day, but they were coming once or twice in a week.
11 And I don't remember the period of time it lasted.
12 It wasn't like months type of thing.

13 Q. Okay. So following the accident, you made
14 claims with both the at-fault driver's carrier,
15 which was GEICO, and also your personal automobile
16 carrier, which is Allstate; is that correct?

17 A. Correct.

18 (DFT. EXH. 4, Property Damage Release,
19 were marked for identification.)

20 BY MS. WILLIAMS:

21 Q. Okay. I'm going to enter as Defendant's
22 Exhibit 4, what is a property damage release that
23 you entered into with GEICO and the at-fault driver
24 and I am assuming her husband.

25 A. I believe it was her father --

1 Q. Oh, her father.

2 A. -- was the owner of the car and the
3 insurance.

4 Q. David Nelson?

5 A. Yes.

6 Q. Okay. So this is your signature on this
7 property damage release that was marked?

8 A. Yes.

9 Q. Okay. And it says here that this is a
10 property damage release and that you were paid
11 \$5,000, I am assuming for the damage to the
12 building?

13 A. Yes.

14 Q. Okay. And did that \$5,000 cover the --
15 fully cover the cost of the damage to the building?

16 A. Yes.

17 Q. Okay. What needed to be done to the
18 building?

19 A. The concrete needed to be removed and
20 replaced where it was broken.

21 Q. Okay. And so you're not claiming any
22 damages related to -- any property damage in this
23 case, are you?

24 A. No, ma'am.

25 Q. And I note on this release you made a

1 note. Is this your handwriting that appears kind of
2 toward the bottom of the page?

3 A. Yes.

4 Q. As per our conversation, you're aware that
5 I have and will be making a substantial personal
6 injury claim. I am not releasing those claims.
7 Thank you. Donna Jensen.

8 A. Yes. Because at that point we knew there
9 was a lot more than what we had initially thought in
10 August.

11 Q. Okay. This was signed in August --
12 August 29th of 2011?

13 A. Yes.

14 Q. Okay. And at that point you -- had you
15 had your back surgery yet?

16 A. I'm trying to remember the date. But I
17 feel like, yes.

18 Q. Okay. Or at least if you hadn't had it,
19 you knew --

20 A. I knew I was having it, correct.

21 Q. Okay. I'm going to mark as Defendant's
22 Exhibit 5, a covenant not to execute.

23 (DFT. EXH. 5, Covenant Not to Execute,
24 was marked for identification.)

25

1 BY MS. WILLIAMS:

2 Q. Okay. And this appears to be a covenant
3 not to execute that was entered into between you,
4 David Nelson, Courtney Nelson, and GEICO; is that
5 correct?

6 A. I believe so, yes.

7 Q. Okay. And if you flip to the last page.
8 Is that your signature there?

9 A. Yes.

10 Q. Okay. Is this is dated February 28, 2012?

11 A. Yes.

12 Q. Okay. And under this covenant not to
13 execute, GEICO and the at-fault driver, who I
14 understand is her father, paid you \$25,000 for your
15 injuries resulting from this accident; is that
16 correct?

17 A. Correct.

18 Q. Okay. And in exchange you agreed not to
19 execute or attempt to execute any judgment in excess
20 of 25,000; is that right?

21 A. I believe so. My attorney has taken care
22 of all this.

23 Q. Okay. So you're not going to pursue any
24 additional -- trying to seek to recover any
25 additional monies from the at-fault driver or her

1 insurance carrier?

2 A. I don't believe that there were additional
3 monies to seek. She was a parent on subsidized
4 child care. She had no money. She was a single
5 mom.

6 Q. Did her daughter remain at the day care
7 after this accident?

8 A. She did.

9 Q. Okay. And is she still there?

10 A. She is not.

11 Q. I'm going to hand you what I'm going to
12 mark as Defendant's Exhibit 6.

13 (DFT. EXH. 6, Notice of Injury, was
14 marked for identification.)

15 BY MS. WILLIAMS:

16 Q. All right. Would you agree with that that
17 this is a notice of injury, proof of loss with
18 Allstate, and is this a document that you filled
19 out?

20 A. It's my handwriting, yes.

21 Q. Okay. And could you take a minute to look
22 at the last two paragraphs that describe the
23 accident and your injuries. And let me know when
24 you've had a chance to review that.

25 A. I'm finished.

1 Q. Okay. And did -- does your description
2 still hold true today the way you described your
3 injuries and the accident?

4 A. Yes.

5 Q. Okay. And it looks like the next page
6 you're providing them with consent to look at
7 your -- to release your medical records to them.
8 That was dated March of 2012; is that right?

9 A. That's my handwriting, yes.

10 Q. Okay. There's also attached here a notice
11 of claim. And I actually think this is -- yeah,
12 this is all part of the same thing.

13 Attached to this notice of claim is a work
14 hours lost sheet. And I wanted to talk to you a
15 minute about that. Do you see that?

16 A. Yes, ma'am.

17 Q. Okay. So you submitted this to the
18 insurance carrier asking for -- looks like lost
19 wages in the amount of \$43,740; is that right?

20 A. Yes, ma'am.

21 Q. Okay. Are you seeking those damages in
22 this case as well?

23 A. Yes, ma'am.

24 Q. Okay. Is that an accurate calculation of
25 the lost wages you're incurring -- I mean that



1 you're seeking to incur at this point in time?

2 A. Yes, ma'am.

3 Q. Okay. So they haven't increased or
4 decreased since this was prepared?

5 A. I haven't tracked any missed time since
6 this was prepared, so we'll just stay with that.

7 Q. Okay. Is it possible that you may be
8 seeking to claim additional missed time that's not
9 reported on here?

10 A. I would need to speak with my attorney
11 about that.

12 Q. Okay.

13 A. If the kidney issues are put in to the
14 case, I missed months of work.

15 Q. Okay. Let's talk about how you did
16 calculations here. So it looks like you have a
17 column for the date. And I assume those are the
18 dates that you missed work for various reasons.

19 A. Correct.

20 Q. You have a column listed with the reasons
21 that you missed work.

22 A. Uh-huh.

23 Q. Can you say yes?

24 A. Yes, ma'am.

25 Q. Okay. Thank you.

1 A. Sorry. I don't realize how much I do
2 that.

3 Q. I know.

4 Okay. And then there's a column for the
5 number of hours missed.

6 A. Yes, ma'am.

7 Q. Okay. Were these hours where you've noted
8 that you were on light duty -- did you have doctors'
9 notes or instructions from the doctor that told you
10 you needed to be on light duty for those days?

11 A. The doctor told me to work as I felt I
12 could.

13 Q. Okay.

14 A. So on most days I was not able to put in a
15 full day. Normally a full day to me is eight to ten
16 hours.

17 Q. And which doctor told you to just work
18 as -- as you could?

19 A. Dr. Mills and Dr. Alford, both.

20 I mean, I was the owner so I didn't need a
21 note saying what my restrictions were. So I just
22 went in when I had to and left when I couldn't stay
23 any longer.

24 Q. What's this on the entry for September 29,
25 2011, the nerve study? Dr. Mills and an appointment

1 with Dr. Alford. What was the nerve study for?

2 A. They did a nerve study on the nerves down
3 my arm to see if they could find out why I was still
4 having nerve pain from my hand, where the hand
5 injury was. I believe that was before they actually
6 did the nerve surgery -- the hand surgery.

7 Q. I see that you got some epidural shots in
8 your back after the accident.

9 A. Yes, ma'am.

10 Q. Have you gotten any more since your neck
11 surgery?

12 A. The shots that I did were a series of
13 shots. Once I completed the series, I did not have
14 additional ones.

15 Q. Okay.

16 A. I don't remember if the series concludes
17 before or after the neck surgery. It was some shots
18 over a certain period of time.

19 Q. And were those shots to treat a specific
20 part of your back?

21 A. It's the lower back pain --

22 Q. Lower back pain.

23 A. -- since I wasn't having the surgery yet.

24 Q. At the end of the sheet you have, Per our
25 accountant since I am the business owner and go by

1 owner's equity and profit a fair hourly rate for my
2 wages is \$60 per hour; is that correct?

3 A. That's correct.

4 Q. Who is your accountant? I know I'm
5 putting you on the spot.

6 A. Tim Hucks.

7 Q. Is that H-U-C-K-S?

8 A. Correct.

9 Q. Is he with a company or is he --

10 A. He's a private accountant, a CPA.

11 At the time I was not taking a paycheck, I
12 was doing owner's equity and profit type of things.
13 So he helped me calculate because I honestly didn't
14 know what formula to use to calculate.

15 Q. Okay.

16 A. So I went to an expert to help me look at
17 my books and figure out what that would look like.

18 Q. Okay. And is he still currently your
19 accountant?

20 A. Yes.

21 Q. Okay. So the total lost wages you're
22 contending you're owed in this case are \$43,740; is
23 that right?

24 A. Correct.

25 Q. And a total of 729 hours missed?

1 A. Correct. Without including anything from
2 the kidney issues.

3 Q. Okay. What is this 217 number that's
4 written above the 729? Do you know that's for?

5 A. I think I was adding page by page.

6 Q. Okay. I see.

7 Okay. So in terms of your damages, we've
8 talked about property damage, which you're not
9 alleging you're owed in this case. We've talked
10 about your lost wages. And we've talked about
11 medical expenses. Are there any other damages that
12 you're seeking to recover?

13 A. No, ma'am. I mean, attorney fees would be
14 in that.

15 Q. All right. It's my understanding that in
16 addition to the \$25,000 that you have received from
17 GEICO, the at-fault driver's carrier, you also were
18 given \$25,000 from Allstate; is that right?

19 A. It was returned.

20 Q. Okay. And why was it returned?

21 A. From my understanding Mr. Brittain is
22 trying to have clarification of whether or not
23 accepting the payment from Allstate would change
24 anything from our other insurance that we carry.

25 Q. Okay. Do you -- do you understand why

1 there might be -- what effect accepting that money
2 might have on anything --

3 A. You would have to ask him that question.

4 Q. Okay. Earlier we also, in going through
5 your specialist sheet that lists all the medical
6 expenses, we went through and talked about which
7 medical providers have liens.

8 Other than on that -- are there any others
9 other than those on that sheet that have not been
10 discussed today in today's deposition that may have
11 medical liens related to this?

12 A. Not that I can think of offhand. Other
13 than, again, I don't know what's been settled with
14 the kidney stuff.

15 Q. Okay. You're not receiving any sort of
16 Medicare or Medicaid, are you?

17 A. No, ma'am.

18 Q. Have you ever applied for disability
19 benefits with the Social Security Administration?

20 A. No, I have not.

21 MS. WILLIAMS: This might be a good place
22 to stop to take a break, stretch your legs. I have
23 a bit more to go through. So it's -- we can go off
24 the record.

25 (A recess transpired.)

1 BY MS. WILLIAMS:

2 Q. Ms. Jensen, before we start talking about
3 some of the insurance-related issues, I wanted to
4 refer to your answers to the interrogatories that we
5 served on you in conjunction with this litigation
6 and go through some of the witnesses that you had
7 listed.

8 One of the witnesses on here is Modesty
9 Brantley, who we talked about earlier. And I
10 understand she was in the office at the time of the
11 accident and was also one of your directors; is that
12 correct?

13 A. Yes, ma'am.

14 Q. So her knowledge is related to what she
15 saw at the time of the accident; is that right?

16 A. Yes, ma'am.

17 Q. Okay. Anything else that you suspect that
18 she may be a witness to?

19 A. She was there so she knew how much time I
20 missed from work. She knew of all my appointments.
21 I mean, I don't know that she could recall dates,
22 but she was aware of my coming and going and came to
23 the hospital. I mean, she just basically was part
24 of running the business while I wasn't there.

25 Q. Okay. So she helped you while you were

1 gone in terms of keeping things running?

2 A. Yes, ma'am.

3 Q. Okay. How about Brandy Duncan?

4 A. Brandy Duncan arrived shortly after the
5 incident. She was also a director and would serve
6 in the same capacities as Modesty.

7 Q. In terms of being able to testify about
8 your absence from work?

9 A. Absences, injuries.

10 Q. And is she still with the day care?

11 A. Yes, ma'am.

12 Q. Okay. How about your husband?

13 A. He could definitely attest to my injuries,
14 and just the emotional, physical, mental stress
15 since the day it happened.

16 Q. Okay. How about Jeffrey Jensen? I assume
17 that's your son?

18 A. He's my son who was also our cook at the
19 time. He was in the building, heard the accident,
20 came to find out what happened. So he was on-site
21 immediately. The kitchen is basically just across
22 the hall from the office.

23 Q. Okay. And so he would be testifying about
24 what he saw when he came shortly after the accident
25 occurred?

1 A. Correct.

2 Q. Okay. Anything else?

3 A. I mean, he would also be aware of my
4 limitations and everything that I went through; as
5 my child.

6 Q. Okay. Anything else.

7 A. I don't know what you're looking for. I
8 don't know what else you would ask --

9 Q. I'm just trying to find out what knowledge
10 he would have.

11 A. He's my son so he was involved in every
12 surgery. He was involved in, you know, helping to
13 keep things going at work when I couldn't be there.
14 I mean --

15 Q. Okay. How about Jason? Is that your
16 other son?

17 A. That's my other son. He was not on the
18 premises. He was just listed as far as being in the
19 household to know, you know, everything that was
20 going on. I did not list my other two sons because
21 they are underage.

22 Q. Okay. You also -- other than the
23 witnesses we just discussed, you've also listed
24 yourself and Matt Wiseman as witnesses.

25 Are there any other people that you have

1 not listed here that would be witnesses?

2 A. I guess it just depends in what sense
3 you're looking for. I mean, I have a whole staff
4 that knew I was out of work. They knew what
5 happened. They weren't there, but they were up
6 front. They were in their classrooms. There were
7 parents that walked in and out. But, I mean, I feel
8 like people that could give you specific details
9 have been listed.

10 Q. Okay. Are Modesty and Brandy, they were
11 both directors at the time. Was there anybody else
12 who was in a higher-up position like that?

13 A. Not at that time, no.

14 Q. So they were mostly responsible for
15 helping with the business while you were out --

16 A. Correct.

17 Q. Okay. I want to make sure that we have
18 the complete listing of all your medical providers.
19 We've talked about a lot of them earlier. But in
20 answers to interrogatories, you've listed the
21 following medical providers: Carolina Clinic of
22 Chiropractic, Carolina Forest Family Eye Care,
23 Coastal Orthopedics, Conway Medical Center, Strand
24 Regional Specialty Association, Rivertown Family
25 Medicine, and Coastal Kidney Center.

1 Are there any others that you can think of
2 that are not listed?

3 A. I just need to compare it to the list that
4 you have. Sometimes they are split off into
5 different entities.

6 Q. There's Carolina Clinic of Chiropractic on
7 that page, and then here's the --

8 A. Can I borrow your pen -- or a pen?

9 Q. Just make sure not -- you can mark on
10 this, but don't mark on the --

11 A. Don't mark on that.

12 Q. Yeah. Or how about -- we can do this:
13 Other than on the damages sheet and the
14 interrogatories, are there any other medical
15 providers that you're aware of that are not listed?

16 A. I hate to keep saying it, but unless the
17 kidney doctors need to be listed on there.

18 Q. Sure. Okay. Fair enough. Thank you.

19 Okay. One last housekeeping thing I
20 wanted to talk about before we get into the
21 insurance stuff was, just for purposes of the
22 record, prior to this lawsuit you brought a
23 declaratory judgment action against Selective
24 Insurance Company; is that right?

25 A. Yes.

1 Q. Okay. In that action the Court dismissed
2 the case that you had brought and granted summary
3 judgment to Selective; is that right?

4 A. I believe so.

5 Q. In that lawsuit you had previously named
6 Peoples, but they were subsequently dismissed. Is
7 that how you remember it?

8 A. You will have to ask Mr. Brittain. I'm
9 not sure.

10 Q. Okay. Let's go into -- let's go into the
11 insurance you have procured for your day care over
12 the years.

13 Prior to going to Peoples, who was your
14 insurance agent?

15 A. I'd have to look at my records.

16 Q. Okay. Does Anderson General Insurance
17 ring a bell?

18 A. I believe that was workmen's comp a long
19 time ago.

20 Q. Okay.

21 A. But I'm not sure. I'd have to look at my
22 files.

23 Q. Okay. Do you have records of -- copies of
24 your former policies or insurance documentation
25 that -- for the policies you procured prior to going



1 to Peoples Underwriters in 2010?

2 A. I would have to call them to get those.
3 Some of our records were damaged in a flood that we
4 had at the center from being in lower cabinets and
5 shelves and things. Some of them are in cabinets.
6 I just have to find them. In notebooks.

7 Q. Okay. So you think you may have --

8 A. Once we don't need them anymore, they just
9 get put either up high or in the back somewhere. I
10 would have to look for them.

11 Q. Okay. So you think you may have some of
12 the insurance documentation from before you went to
13 Peoples Underwriters?

14 A. I should have -- yeah, I should have most
15 of it. It would just be tracking it down and
16 figuring out where it is in the building. We had to
17 do redo our entire building. So things are not
18 where they always were before.

19 Q. And you can't recall who your prior agent
20 was before Peoples?

21 A. If you weren't sitting here asking me I
22 could, but I'm just going blank right now.

23 Q. All right. Let me go ahead and show
24 you -- I'm going to mark this as an exhibit. This
25 may help refresh your recollection. I'm going to

1 hand you what I've marked as Defendant's Exhibit 7.

2 (DFT. EXH. 7, Peoples Underwriters
3 Documents, was marked for identification.)

4 THE WITNESS: Thank you.

5 BY MS. WILLIAMS:

6 Q. These are some documentation -- these are
7 some documents -- I'll represent these are documents
8 that were in Peoples Underwriters' file that they
9 appear to have received in conjunction with
10 beginning to start the process to write -- to assist
11 you in procuring insurance for day care.

12 So if you take a look at the first page in
13 this exhibit, Peoples 196, there is a letter dated
14 March 29, 2010, addressed to Four J's and it's
15 regarding a renewal expiration notice of your
16 liability and property coverage.

17 A. Yes, ma'am.

18 Q. This letter is signed by Cheryl Heirs. Do
19 you see that at the bottom?

20 A. I do.

21 Q. Okay. And then it's got Anderson General
22 Insurance listed at the bottom with an address on
23 Wesley Street in Myrtle Beach.

24 A. I've always thought of them as being
25 called Standard Premium Finance. So maybe I just --

1 the Anderson General didn't sound familiar to me.

2 Q. Okay.

3 A. But at the top it says Standard Premium
4 Finance.

5 Q. Okay.

6 A. And that's what I would have thought it
7 was called.

8 Q. Okay. So do you recall working with
9 somebody named Cheryl Hiers?

10 A. I don't recall that name, no.

11 Q. Okay.

12 A. But I think it was done -- I feel like it
13 was a man who was the person who came in and sat
14 down.

15 Q. Maybe Robert Hiers?

16 A. I'm not sure. I really don't remember.

17 Q. Okay.

18 A. I have trouble knowing what I had for
19 breakfast yesterday.

20 Q. Okay. So looking at the second page,
21 which is that Premium Finance agreement you were
22 looking at, that's actually a -- kind of sets forth
23 a payment plan for you paying your premiums on this
24 policy; is that right?

25 A. Looks like it.

1 Q. Okay. So if you look in the box at the
2 top, it looks like you had a policy with United
3 States Liability/Southern Cross, and under type of
4 coverage it looks like they had your general
5 liability; is that right?

6 A. It looks like it. I think it was through
7 Chris Johnson Insurance Agency --

8 Q. Okay.

9 A. -- for some reason.

10 Q. Are they based here in Myrtle Beach?

11 A. I believe so.

12 Q. Then there's also listed a -- the carrier.
13 And again, these are carriers I'm listing, not the
14 agent. The Great Lakes Reinsurance/Johnson and
15 Johnson, who I believe might be the broker, for some
16 sort of other commercial insurance policy; is that
17 right?

18 A. That is what it looks like on here, but I
19 don't recall seeing these in my QuickBooks or any
20 other things. So I don't know if it was under a
21 different -- like when payments and things are made.

22 Q. Okay.

23 A. Or maybe I'm just forgetting.

24 Q. Okay.

25 A. I'm not sure.

1 Q. Okay. So in looking at this, Defendant's
2 Exhibit 7, it just doesn't -- you just aren't sure
3 what your -- who your prior agent was or who your
4 prior insurance carriers were?

5 A. No. I can get that information for you.

6 Q. Okay.

7 A. I just don't -- I want to say everything
8 was done -- I thought it was called Chris Johnson
9 Insurance Agency who was the broker.

10 Q. Okay. On the last page it looks like you
11 had some sort of loss regarding a water fountain
12 that leaked.

13 A. Correct.

14 Q. Okay. It looks like maybe Colony
15 Insurance was the carrier?

16 A. Correct.

17 Q. And, again, you don't remember who the
18 agent was who helped you place that policy?

19 A. We've always gone, like, through a broker.
20 So we've always dealt with them, and they, you know,
21 get all the different policies in place.

22 Q. Okay. All right. So you told me earlier
23 that you began your day care at The Learning Station
24 in -- what year was it?

25 A. When we moved -- when I moved to --

1 Q. When you first started The Learning
2 Station.

3 A. We moved from -- we moved to the other
4 location, I believe it was 2004, or 2002.

5 Started Gymboree in 2000, and then we
6 moved to the other location, somewhere between 2003
7 and 2004, and that was when it became The Learning
8 Station.

9 Q. Okay. So since about 2003, 2004, have you
10 been procuring commercial insurance for the
11 business?

12 A. Yes.

13 Q. Okay. And that would include commercial
14 auto?

15 A. Yes.

16 Q. Okay. Now, I know you already testified
17 that you can't recall who your agent was prior to
18 Peoples, but do you recall if it was one agent that
19 you had dealt with for a long time before going to
20 Peoples, or do you think you dealt with several
21 different agents?

22 A. I know that we've made changes. So I
23 couldn't tell you the length of time for each one.

24 Q. Okay.

25 A. And the auto insurance didn't start until

1 our Singleton Ridge Road location. We did not have
2 a bus at the other location.

3 Q. So you did not start procuring commercial
4 auto insurance until you moved to the Singleton Road
5 location?

6 A. Yes, as far as I remember. I do not
7 remember having a bus at the other location.

8 Q. Did you take kids out on different field
9 trips and things like that at the old location?

10 A. No.

11 Q. Okay.

12 A. I don't think we did. I'm almost -- I
13 can't remember a picture -- a bus being there. I'd
14 have to see, like, when we purchased the bus to have
15 an exact date.

16 Q. Okay.

17 A. But I'm pretty sure it's when we moved to
18 the new location so that we could provide
19 after-school service.

20 Q. And are those buses titled in the name of
21 day care?

22 A. I'd have to look. I know my name is
23 attached to everything, but I don't know how it's
24 titled.

25 Q. Okay. So at some point in time in the

1 spring of 2010 did Matt Wiseman reach out to you
2 about assisting you with getting a policy for day
3 care?

4 A. I'm not sure if that was the date, but I
5 did talk about a policy with him.

6 Q. Okay. I'm going to pull this --

7 MS. WILLIAMS: Off the record.

8 (Off-the-record conference.)

9 MS. WILLIAMS: For the record, I'm going
10 to mark as Defendant's Exhibit 8 a document that's
11 Bates-stamped Peoples 178.

12 (DFT. EXH. 8, Email from Matt Wiseman,
13 April 6, 2010, was marked for identification.)

14 BY MS. WILLIAMS:

15 Q. This is an email from Matt Wiseman to
16 Donna Jensen. And in this email Matt is reaching
17 out to you and asking if -- and telling you, One of
18 their company people came by the office to fill us
19 in on a new day care problem they have developed. I
20 tried it out with one that I currently insure and it
21 seems to be fairly competitive with some pretty good
22 coverages. And he wants to know if you're
23 interested and looking into this program.

24 You can take a look at that email and let
25 me know if that's accurate, what I just represented.

1 A. Yes, ma'am.

2 Q. Okay. So in April of 2010, Mr. Wiseman
3 reached out to you to inquire about placing day care
4 insurance for your company?

5 A. Yes.

6 Q. Okay. Okay. I'm going to hand you what
7 I'm going to mark as Defendant's Exhibit 9.

8 (DFT. EXH. 9, Email from Matt Wiseman,
9 April 12, 2010, was marked for identification.)

10 BY MS. WILLIAMS:

11 Q. Okay. This is an email dated April 12,
12 2010, from Matt to you; is that right?

13 A. Yes, ma'am.

14 Q. Okay. And in this email Matt thanks you
15 for meeting with him to discuss your insurance. The
16 subject line says, The Learning Center insurance; is
17 that right?

18 A. It's The Learning Station.

19 Q. But the email says -- the subject line
20 says, The Learning Center insurance?

21 A. Yes.

22 Q. Okay. Obviously just, you know, I guess,
23 a typo there on the name. But he's referring to
24 your day care, correct?

25 A. Correct.

1 Q. Okay. And do you understand that that was
2 what he was assisting you with in terms of the
3 insurance you were trying to place? He was
4 assisting you with insurance for day care?

5 A. Yes..

6 Q. Okay. And in this email he asked for
7 various information including the VIN numbers for
8 the buses, the drivers of the buses. He asked you
9 about workers' comp and whether or not you have
10 workers' comp and if you're included or excluded; is
11 that right?

12 A. Yes.

13 Q. Okay. So this whole email is discussing
14 insurance related to day care; is that right?

15 A. Yes.

16 Q. Okay. There's no mention here of any of
17 personal auto insurance.

18 A. No.

19 Q. I'm going to hand you what I'm going to
20 mark as Defendant's Exhibit 10.

21 (DFT. EXH. 10, Email from Matt Wiseman,
22 April 10, 2010, was marked for identification.)

23 BY MS. WILLIAMS:

24 Q. Okay. This is an email dated April 14,
25 2010, from you to Matt Wiseman with the subject line

1 of Learning Center insurance; is that right?

2 A. Yes.

3 Q. Okay. And in this email you tell Matt
4 Let's focus on building liability insurance for now
5 since that is time sensitive; is that right?

6 A. Yes.

7 Q. Okay. So again, you're just talking to
8 him about insurance related to day care?

9 A. Yes.

10 Q. Okay. And the time sensitivity was
11 because your prior policy was about to expire; is
12 that right?

13 A. Right.

14 Q. Is that right?

15 A. Yes. I said right. I'm sorry.

16 Q. That's okay. I didn't hear you.

17 This email -- in this email you're not
18 asking about any personal auto insurance, are you?

19 A. No.

20 Q. When you were switching your coverage over
21 from your prior carrier, were you in essence getting
22 the same types of coverages you had had with your
23 prior agent?

24 A. I was asking for the best recommendation.

25 Q. Okay. But in terms of the type of --

1 A. Similar, yes.

2 Q. Okay. So in terms of the type of coverage
3 you were looking for, commercial general liability,
4 property, commercial auto; those kinds of coverages?

5 A. Yes.

6 Q. Okay. Is that a yes?

7 A. Yes.

8 Q. And as you-all began speaking about -- you
9 know, once Matt sort of collected the information,
10 he prepared a quote for you to review, an insurance
11 quote.

12 A. Yes.

13 Q. I'm going to hand you what I'm marking as
14 Defendant's Exhibit 11.

15 (DFT. EXH. 11, Quotation of Commercial
16 Insurance, was marked for identification.)

17 BY MS. WILLIAMS:

18 Q. Does this appear to be the quote that
19 Peoples Underwriters prepared on behalf of Four J's
20 and a D, LLC?

21 A. It seems to be. I know that they have
22 given us lots and lots of papers.

23 Q. Okay. And looking at the front page it
24 says, Quotation of commercial insurance. It says it
25 was prepared for Four J's and a D, LLC; is that

1 right?

2 A. Yes.

3 Q. And this was prepared on April 16, 2010?

4 A. Yes.

5 Q. And if you flip to -- kind of toward the
6 end, if you look at the bottom there is the -- what
7 we call the Bates Number. It says Peoples 244.

8 A. Okay.

9 Q. Okay. This is a quote of commercial
10 insurance for automobile; is that right?

11 A. It looks like it, yes.

12 Q. Okay. And are there -- there are two
13 vehicles listed, correct?

14 A. Yes.

15 Q. Okay. And those are both the buses that
16 you referred to earlier that you used for purposes
17 of the day care's business?

18 A. Yes.

19 Q. And there aren't any personal automobiles
20 listed on this quote, are there?

21 A. No.

22 Q. All right. I am going to hand you what
23 I've marked as Defendant's Exhibit 12.

24 (DFT. EXH. 12, Commercial Insurance
25 Application, was marked for identification.)

1 BY MS. WILLIAMS:

2 Q. Okay. And is this a commercial insurance
3 application dated April 16, 2010?

4 A. Yes.

5 Q. Okay. And if you look in those little
6 boxes up at the top, there are a couple of them
7 checked off. And can you tell me which ones are
8 checked?

9 A. Business, auto, commercial general
10 liability, property.

11 Q. Okay. So it doesn't say anything on here
12 about personal auto?

13 A. There isn't a box for personal auto.

14 Q. Okay. And on the application the named
15 insured is listed as Four J's and a D, LLC, d/b/a
16 the Learning Center; is that right?

17 A. Yes.

18 Q. Your name is not listed under the name
19 insured box, is it?

20 A. Not on this page.

21 Q. Okay. And if you flip to the next page,
22 that is your -- is that your signature?

23 A. Yes.

24 Q. So you did review this application before
25 you signed it?

1 A. Obviously not very well, because it says
2 The Learning Center, not The Learning Station.

3 Q. Okay.

4 A. But I did sign it where I was told to sign
5 it.

6 Q. Okay. And if you look in on the third
7 page it looks like this lists some of your prior
8 carrier information. It looks like you had a
9 commercial general liability policy with USLI, an
10 automobile with Progressive, and a property with
11 Great Lakes; is that right?

12 A. That must be the subsidies that were under
13 the Underwriters.

14 Q. Okay. All right. If you flip to the next
15 page, this is called Business Auto Section; is that
16 right?

17 A. Yes.

18 Q. It doesn't say personal auto?

19 A. No.

20 Q. Okay. And, again, the named insured is
21 listed as The Learning Station?

22 A. Yes.

23 Q. Okay. And if you look at the bottom of
24 the page -- the very, very bottom -- there are more
25 boxes to check off with information. Under the

1 drive to work, school, and the use, the commercial
2 box is just checked; is that right?

3 A. Yes.

4 Q. None of the other boxes of pleasure or
5 retail or service are checked off?

6 A. No.

7 Q. Same thing for the second bus. It's also
8 just listed as for use for commercial use?

9 A. Correct.

10 Q. On that next page.

11 A. Correct.

12 Q. And there are no other vehicles other than
13 those two buses?

14 A. No.

15 Q. Okay. I'm going to hand you what I'm
16 going to mark as Defendant's Exhibit 13.

17 (DFT. EXH. 13, Letter to Donna Jensen
18 from M. Wiseman, May 21, 2010, was marked for
19 identification.)

20 BY MS. WILLIAMS:

21 Q. Okay. And is this a letter dated May 21,
22 2010, to Four J's from Matt Wiseman?

23 A. Yes.

24 Q. Okay. And in this letter it appears that
25 Matt is enclosing your insurance policies and asking

1 you to review them to verify the information and
2 coverages; is that right?

3 A. Yes.

4 Q. Okay. And did you review everything when
5 he sent it to you?

6 A. I trusted that everything he sent me was
7 the way it was supposed to be done, so I quickly
8 looked at it. But I didn't pay a lot of attention
9 to it. That's why I hired a professional to do it
10 for me.

11 Q. Okay. And then the second sentence it
12 says, If you have made any changes since the
13 inception of policies or have interest in additional
14 coverages or just have questions, please give me --
15 please give your own personal customer service
16 representative a call.

17 Did you ever call with any additional
18 questions or to say that you had interest in any
19 additional coverage?

20 A. I don't recall any questions. I don't
21 recall having to call them.

22 Q. Okay.

23 A. I mean, I spoke with Matt on many
24 occasions, but I don't remember having a specific
25 question I could tell you about.

1 Q. Okay. And you don't -- do you recall if
2 you asked for any additional coverages other than
3 what was sent in these policies?

4 A. No, I did not.

5 Q. Okay. I'm going to hand you what I'm
6 going to mark as Defendant's Exhibit 14.

7 (DFT. EXH. 14, Commercial Policy Common
8 Declaration, was marked for identification.)

9 BY MS. WILLIAMS:

10 Q. Does this appear to be the dec page for
11 the Selective policy that was placed on behalf of
12 the day care for the policy period of April 17,
13 2010, to April 17, 2011?

14 A. I don't know what a dec page is. This is,
15 like, Greek to me.

16 Q. I'm sorry.

17 A. It is dated April 17, 2010.

18 Q. Okay. If you look at the top of the
19 policy, in bold letters it says common policy --
20 commercial policy common declaration.

21 A. Okay.

22 Q. Okay. So a dec page is just short for --
23 this just kind of provides a summary of the amounts
24 of coverages on your policy. And on the schedule of
25 coverage, in the middle of the page it lists the

1 various types of coverages that you'll be getting.
2 And it says, commercial property coverage,
3 commercial general liability coverage, commercial
4 automobile coverage, abuse and molestation, and
5 social services; is that right?

6 A. Yes.

7 Q. Okay. So it doesn't say anything about
8 personal automobile coverage on here?

9 A. No.

10 Q. Okay. And on the named insured it also
11 says Four J's and a D, LLC, there; is that correct?

12 A. Yes.

13 Q. And your name is not listed?

14 A. No.

15 Q. Looking on the second page of that
16 document, the title of that is Business Automobile
17 Coverage Declaration; is that right?

18 A. Yes.

19 Q. Okay. And on the auto schedule, again,
20 the only two vehicles listed are your two buses?

21 A. Yes.

22 Q. There aren't any personal vehicles on
23 there?

24 A. No. This is really redundant.

25 Q. Well, I'm going to hand you what I've

1 marked as Defendant's Exhibit 15.

2 (DFT. EXH. 15, Insurance Identification
3 Card, was marked for identification.)

4 THE WITNESS: Okay.

5 BY MS. WILLIAMS:

6 Q. So in conjunction with receiving the
7 policy, or maybe sometime thereafter, you also
8 received insurance ID cards for the commercial auto
9 policy at issue; is that right?

10 A. Yes, ma'am.

11 Q. Okay. And these all list the named
12 insured as Four J's and a D, LLC?

13 A. Yes.

14 (DFT. EXH. 16, South Carolina Automobile
15 Selection Form, was marked for identification.)

16 MS. WILLIAMS: I'll hand you Exhibit 16.

17 MR. CASE BRITTAIN: This is quite comical.

18 BY MS. WILLIAMS:

19 Q. Okay. So this is the South Carolina
20 automobile selection form, the offer to purchase
21 underinsured motorist coverage?

22 A. Yes.

23 Q. Okay.. And on the third page in, is that
24 your signature on that page?

25 A. Yes.

1 Q. Okay. And on the following page, is that
2 your signature as well?

3 A. Yes.

4 Q. Okay. And so this is the -- part of the
5 application where you were opting to purchase
6 underinsured motorist limits in the amount of
7 \$1 million?

8 A. Yes.

9 Q. Okay. At some point after you and Matt
10 initially talked about the policy with Selective,
11 did he reach out -- do you recall him reaching out
12 to you to ask about placing workers' comp and
13 recommending that you consider that?

14 A. We did get workmen's comp through Peoples
15 Underwriters, so...

16 Q. Okay. But did you get it in 2010 when you
17 first moved over there?

18 A. I don't recall. I don't think it was
19 immediate. I think it was later on.

20 Q. Okay. If you could take a look at this
21 email, it's Bates numbered Peoples 251. In that
22 email is Matt asking you if you have workers' comp
23 and recommending that you strongly consider it?

24 A. That's what the email says, yes.

25 Q. And you can't -- and you don't recall

1 whether or not you got insurance right away with
2 them or not?

3 A. I don't recall.

4 Q. Okay. When Peoples sent you the insurance
5 policies, do you recall how you received them?

6 A. I'm pretty sure Matt delivered them to me
7 in person.

8 Q. Okay. Did he -- did he deliver them in,
9 like, a notebook?

10 A. I believe, yes, because we have notebooks
11 that say Peoples Underwriters on them.

12 Q. Okay.

13 A. So I'm almost positive it was, or there
14 was a folder and put into a notebook.

15 Q. Okay. And so you kept all those binders
16 in your office?

17 A. Yes, ma'am.

18 Q. Okay. Subsequently in April 17, 2011,
19 your policy would have been up for renewal; is that
20 right?

21 A. Correct.

22 Q. Okay. So I'm going to enter as
23 Defendant's Exhibit 17 the Selective Insurance
24 policy for the period of April 17, 2011, through
25 April 17, 2012. So that would be the policy that

1 was in effect at the time of the accident; is that
2 right?

3 A. Correct.

4 (DFT. EXH. 17; Selective Insurance
5 Policy, was marked for identification.)

6 BY MS. WILLIAMS:

7 Q. All right. Let's take a look at this. If
8 you look at the first page -- or the declaration
9 page that we talked about earlier, does this appear
10 to have the same information as when you initially
11 placed the policy that we talked about earlier, the
12 named insured still Four J's and a D doing business
13 as The Learning Station still has automobile
14 coverage; is that right?

15 A. Yes.

16 Q. Okay. And if you flip toward the end of
17 the policy, the Bates number on the bottom, Peoples
18 839, towards the back.

19 A. Okay.

20 Q. Does this appear to look the same as the
21 prior policy with the same buses listed, no personal
22 vehicles?

23 A. Seems to be, yes.

24 Q. For business auto. Okay.

25 I am going to hand you what I marked as

1 Defendant's Exhibit 18.

2 (DFT. EXH. 18, Insurance Identification
3 Card, Exp. 04/17/2012, was marked for
4 identification.)

5 BY MS. WILLIAMS:

6 Q. Again, that same year you received ID
7 cards for the two -- the two buses for the two ID
8 cards listed with the insured as Four J's and a D?

9 A. Yes.

10 Q. Okay. So you received those, again, for
11 policy year 2011 to 2012?

12 A. Yes.

13 Q. Okay. And do you recall Matt from Peoples
14 Underwriters again sending you a letter that same
15 year with the cover letter asking you to review the
16 coverage and if you had changes to give him a call?

17 A. I'm sure if you're holding a copy in your
18 hand that he did.

19 Q. Okay. And did you -- again, did you
20 review the policies that year?

21 A. I signed what he asked me to sign. When I
22 look at all of that, it's like a foreign language to
23 me.

24 Q. Okay. So shortly after the accident, I
25 guess just before the accident, you're -- oh, the



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1 accident occurred on May 11th of 2011; is that
2 right?

3 A. Yes, ma'am.

4 Q. Okay. So just before the accident, April
5 of 2012, your policy came up for renewal again; is
6 that right? Since it was going from April 2012 to
7 April -- I'm sorry. April 17th to April 17th were
8 the policy years?

9 A. Yes.

10 Q. So shortly after the accident the policy
11 came up for renewal again?

12 A. Should have been before the accident.

13 Q. Oh, I'm sorry. Yes, you're right. Before
14 the accident.

15 Shortly before the accident your policy
16 came up for renewal again?

17 A. Yes.

18 Q. Okay. All right. We just talked about
19 the policy that you renewed. And then after the
20 accident, about a year later, your policy came up
21 for renewal again and you placed it again with
22 Selective; is that right? You renewed again with
23 selective?

24 A. Yes.

25 Q. Okay.

1 A. I'm trying to think when we changed. We
2 changed this year.

3 (DFT. EXH. 19, Commercial Policy Common
4 Declaration, was marked for identification.)

5 BY MS. WILLIAMS:

6 Q. Okay. I'm going to hand you what I am
7 marking as Exhibit 19.

8 Again, does this appear to be the same
9 type of declaration page we talked about earlier --

10 A. Yes.

11 Q. -- for the policy year 2012 to 2013?

12 A. Yes.

13 Q. Okay. And for the named insured Four J's
14 and a D doing business as The Learning Station?

15 A. Yes.

16 Q. Okay. After the accident did you request
17 any changes to the policy?

18 A. Not that I recall.

19 Q. Okay. And when this policy was renewed,
20 you had already received a denial letter from
21 Selective saying that they weren't going to cover
22 your claims for damages in this case; is that right?

23 A. I don't remember if it was before or
24 after.

25 Q. On this dec page, the same thing. On the

1 second page as we saw before with the same vehicles
2 listed --

3 A. Yes.

4 Q. -- also for business auto?

5 A. Yes.

6 Q. And, again, I know this is a lot of paper,
7 but for purposes of the record, I just want to
8 establish that you received these same insurance ID
9 cards that you received for the past several years
10 from Selective.

11 I am going to mark as Defendant's Exhibit
12 20, the ID cards you received for the 2012-2013
13 policy period.

14 (DFT. EXH. 20, Insurance Identification
15 Card, Exp. 4/17/2013, were marked for
16 identification.)

17 BY MS. WILLIAMS:

18 Q. And, again, on those ID cards, the named
19 insured is Four J's and a D?

20 A. Yes.

21 Q. With the two buses?

22 A. Yes.

23 Q. Do you recall sending an email in February
24 of 2013 to Sue Ewald of Peoples Underwriters
25 discussing about -- discussing the fact that you had

1 an abundance of every type of insurance and you
2 don't understand why nobody's taking responsibility?

3 A. I don't know what the date was, but I
4 remember something of that effect. Yes.

5 Q. Okay. What type of insurance did you --
6 were you referring to here that you had an abundance
7 of that you think should you have covered the
8 damages you're seeking in this case?

9 A. I felt like we had liability insurance.
10 We had insurance that if someone got hurt on the
11 premises they would be covered.

12 We had automobile insurance. And at that
13 point it felt like the automobile company was saying
14 it was an accident that happened inside the building
15 and the liability insurance was saying it was an
16 automobile accident, and I was falling into a gray
17 hole in between so that neither one of them would
18 have to pay. And it was very, very frustrating.

19 As far as I'm concerned, I am Four J's and
20 a D. I'm the owner of the company. I pay every
21 penny of every insurance claim -- I mean, every
22 insurance premium. There's no reason in the world
23 to me that I wouldn't be covered. It just makes
24 absolutely no sense to me whatever.

25 If Four J's and a D had to stand before a

1 judge, I would be the person that would have to
2 represent them. Four J's and a D can't get hurt.
3 They can't sustain a personal injury. So if all of
4 this is going to be based on if Four J's and a D had
5 the coverage, then I feel like it's bogus insurance
6 because Four J's and a D can't get hurt. So that
7 was my frustration in writing this.

8 You know, and the only reason I stayed
9 with the company is because I've known Matt for over
10 20 years and I trusted him to give me insurance that
11 was going to provide the coverage that would take
12 care of me and my business in the event of any type
13 of accident or injury or anything that would.

14 Happen. Did I sit down and say if a car
15 drives through my building and I get hurt, is it
16 going to cover me? No. Who would ask that
17 question?

18 Q. Okay. Well, what about workers' comp
19 insurance here? You didn't have any workers' comp
20 insurance through Peoples at the time of the
21 accident.

22 A. I was advised that as an owner you can't
23 carry workers' comp. Matt did explain to me that
24 there was a way to write that in the policy, so
25 going forward that's what was done. But I had

1 always been told that an owner can't carry workmen's
2 comp.

3 Q. And do you recall who told you that? Was
4 that your prior agent?

5 A. Yes.

6 Q. Okay. So Peoples Underwriters didn't tell
7 you that you couldn't be insured under workers'
8 comp?

9 A. No. It was years before that. Like, when
10 we first started our business.

11 Q. Okay. So the workers' comp, is it your
12 understanding that the workers' comp would have come
13 into effect here if you had had a policy where you
14 were included?

15 A. No, I wouldn't think this was a workmen's
16 comp case. I mean, I'm sitting at my desk minding
17 my own business and a parent drove into the
18 building, and I'm getting put through the ringer for
19 it.

20 Q. Going back to your testimony earlier about
21 the company itself. Why did you -- why did you form
22 Four J's and a D? Why did you form a corporate
23 entity for purposes of your business?

24 A. I don't understand your question.

25 Q. Well, I mean, you could have, you know,



1 named it the Don -- you could have not formed it, a
2 limited liability company. Did you have an attorney
3 who assisted you in forming the company itself?

4 A. Yes.

5 Q. Okay. Who was your attorney for that?

6 A. Marshall Biddle.

7 Q. And when you went to him, did he explain
8 why it was important to get -- to have a limited
9 liability company?

10 A. Not particularly. He's a family friend.
11 I knew him. I was starting a company. We tried to
12 get The Learning Station. It was taken. We were
13 just sitting around.

14 Like, I have four boys, that four J's; I'm
15 a D. He just threw a name out there. It was a
16 stupid name.

17 Like I said earlier, I didn't think it
18 would ever, like -- I didn't realize it was going to
19 be on everything that we did and every check that
20 had to be written and all of that.

21 If you're asking me to tell you the
22 difference between a sole corporation, limited
23 liability and all that stuff, I have no idea.
24 That's why I went to an attorney to do that for me.

25 Q. Part of the reason -- is it your

1 understanding part of the reason you have the
2 corporate entity is to protect yourself individually
3 in liability?

4 A. Absolutely.

5 Q. Okay. So we just talked about the fact
6 that after the accident you renewed your Selective
7 policy in April of 2013 for the policy year April
8 2012 to April 2013.

9 When the policy came up for renewal in
10 April 2013, you canceled your policy with Selective;
11 is that right?

12 A. Correct. I tried to cancel it earlier,
13 but I was told I had to wait until it lapsed --
14 until the time came for it to end.

15 Q. Okay. So you canceled it -- you canceled
16 that insurance which included your commercial
17 package and your property. That would have also
18 encompassed your auto coverage. All the insurance
19 you had with Selective was canceled. Is that your
20 understanding?

21 A. Correct.

22 Q. And you subsequently asked Peoples
23 Underwriters to assist you in finding a different
24 carrier since you were unhappy with Selective; is
25 that right?

1 A. I believe so at the time.

2 Q. Okay. So I'm going to hand you what I'm
3 going to mark as Defendant's Exhibit 21.

4 (DFT. EXH. 21, Thomco Additional
5 Underwriting Information Documents, was marked for
6 identification.)

7 BY MS. WILLIAMS:

8 Q. I'll ask you to identify if this appears
9 to be your application of insurance with Markel --
10 Thomco and Markel Company.

11 A. Yes.

12 Q. Okay. And so this is dated with a
13 proposed effective date of April 17, 2013; is that
14 right? Second page in.

15 A. Yes.

16 Q. Okay. And they are proposing here to
17 place a child care complete policy with The Learning
18 Station, CDC, LLC, doing business as The Learning
19 Station?

20 A. Yes.

21 Q. Okay. Flip to -- six pages from the back.
22 You see the business auto supplement?

23 A. Yes.

24 Q. Okay. And so here it asks, about the
25 third question down, it says, Are all the vehicles

1 on the vehicle schedule titled to or leased to the
2 named insured? And the Yes box is checked; is that
3 right?

4 A. Yes.

5 Q. All right. And the name insured's, we
6 established earlier, was The Learning Station?

7 A. Yes.

8 Q. If you flip to two pages you'll see a page
9 with your signature. Can you identify if that is
10 your signature on that?

11 A. Yes.

12 Q. Okay. And on the following page, the
13 ACORD form dated April 17, 2013, for South Carolina
14 Commercial Auto, is that your signature page on
15 that?

16 A. Yes.

17 Q. And here it looks like you are signing a
18 form for the limits of liability to include
19 underinsured motorists in the amount of \$1 million?

20 A. Yes.

21 Q. And, again, this says business auto and
22 the named insured is The Learning Station?

23 A. Yes.

24 Q. And the next page after that, can you
25 identify your signature on that page as well?

1 A. Yes.

2 Q. And on that last page?

3 A. Yes.

4 Q. Okay. When the Markel policy was placed,
5 is it your understanding that any -- there were any
6 changes that were made to policies or anything
7 different about the Markel policy versus the
8 Selective policy?

9 A. Were their changes that were going to be
10 made to it?

11 Q. Yes. Did you request anything -- let me
12 rephrase that.

13 Was there something different about the
14 Markel policy versus the Selective policy that you
15 had asked Peoples Underwriters to implement as a
16 result of all the events that had transpired after
17 the accident?

18 A. I don't recall.

19 Q. Okay. So it's your understanding you were
20 getting the same type of coverage that you had had
21 with Selective, just with a different carrier?

22 A. I don't remember the timing of when we had
23 those conversations, if it was before or after the
24 claim was denied. Because my agent repeatedly
25 assured me that I was covered. So there would be no

1 reason for me to ask for anything to be changed
2 until I knew that it wasn't written correctly. So I
3 don't know the dates of when things happened.

4 Q. See if I can help you with that.

5 This is my only copy, so I apologize. I
6 don't have an extra one for you-all. But I'm going
7 to mark as Exhibit 22, a letter dated January 3,
8 2012, from Selective to the Brittain Law Firm.

9 A. Okay.

10 (DFT. EXH. 22, Selective Letter to Mr.
11 Brittain, January 3, 2012, was marked for
12 identification.)

13 THE WITNESS: What is the question?

14 BY MS. WILLIAMS:

15 Q. Okay. So does this help you in
16 identifying when Selective sent you the letter
17 denying coverage?

18 A. I would assume it would have been at the
19 same time. I believe Mr. Brittain is the one that
20 told me that it was denied. I don't recall even
21 getting a letter myself.

22 Q. Okay.

23 A. I may have, but I don't recall.

24 Q. Well, that letter is addressed to your
25 attorney; is that right?



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1 A. Correct.

2 Q. Okay. And so he would have subsequently
3 informed -- advised you or told you that he had
4 gotten that letter and that they were denying
5 coverage?

6 A. Correct.

7 Q. Okay. And so that letter, again, is
8 dated -- what's the date on there?

9 A. January 3, 2012.

10 Q. Okay. So the denial took place in January
11 of 2012. What we're trying to establish is the time
12 frame for when the Markel policy was first written
13 in April of 2013. It was after the denial; is that
14 right?

15 A. Right. But there was still back-and-forth
16 resubmitting and thinking that there was an error
17 and that surely it was going to cover it. So
18 everything was not settled as of January 3rd.

19 Q. Okay. What was your understanding as one
20 of the reasons that they were denying coverage?

21 A. My understanding is that they were
22 treating it as an accident that happened within the
23 building and not an automobile accident.

24 Q. Is it also your understanding that they
25 were denying it because you were not insured under

1 the policy?

2 A. No.

3 Q. Okay.

4 A. It was my understanding that at one point
5 it was said I was not in the bus. If I had been in
6 the bus, it would have covered it. There's no
7 reason I shouldn't have been insured. I was listed
8 as a driver.

9 Q. Right. So one of the reasons was that you
10 were not occupying a vehicle at the time of the
11 accident -- or the bus at the time of the accident,
12 correct?

13 A. That was their standpoint. But Allstate,
14 I wasn't in my car either and they were willing to
15 use the underinsured portion. So that's where none
16 of it makes sense to me, because one agency is more
17 than willing to say yes, you're entitled to this;
18 the other one is not.

19 Q. Under your Allstate policy, you are listed
20 as a named insured under that policy; is that right?

21 A. Yes.

22 Q. Under your Selective policy, you are not
23 listed as a named insured; is that right?

24 A. I consider myself to be the company. So
25 it was never explained that there should be a

1 differentiation.

2 Q. But the policy itself does not list --
3 does not have Donna Jensen, does it?

4 A. No. It lists my company that I am the
5 sole owner of.

6 Q. Okay.

7 A. If I should have been listed individually,
8 I would have expected my underwriter to advise me of
9 that.

10 Q. When you went to Peoples, you were not
11 seeking -- you -- when you first went to Peoples or
12 when Peoples reached out to you regarding the
13 procurement of a policy for your day care, was it
14 ever discussed that you were trying to get personal
15 automobile insurance on yourself?

16 A. No. I was trying to have coverage for
17 every person who went in and out of my building,
18 including myself who was there every single day.

19 Q. Okay. So did you ever have a discussion
20 with them that you wanted to have personal
21 automobile insurance coverage?

22 A. No. I already had that.

23 Q. Okay. Through Allstate?

24 A. Yes.

25 Q. Okay.

1 A. But as my insurance agent, if none of this
2 covers me, I would have thought I would have been
3 advised that maybe you should take out higher
4 insurance on yourself because you aren't covered.
5 If someone else was in this situation, they would be
6 covered, but you are not covered.

7 Q. Do you have any evidence that you could
8 have been covered under this policy as an
9 individual -- as an individual?

10 A. It was my understanding that if there were
11 any accidents or anyone was to get hurt, that's what
12 the coverage was for.

13 Q. My question is different, though. Do you
14 have any evidence that you could have been listed as
15 an individual named insured under this commercial
16 automobile policy?

17 A. I didn't know that that was even a
18 possibility. There are no people listed under it.

19 Q. So you don't have any evidence that you
20 could have been named as Donna Jensen -- as a named
21 insured under this commercial auto policy?

22 A. No. I'm only hearing about that recently.
23 Again, that's what I would expect my underwriter to
24 tell me existed.

25 Q. Okay. I'm going to hand you what I'm

1 going to mark as Defendant's Exhibit 23.

2 (DFT. EXH. 23, Thomco Commercial Package
3 Insurance Binder, was marked for identification.)

4 BY MS. WILLIAMS:

5 Q. So after you filled out the application
6 which we talked about earlier, you were subsequently
7 issued a policy with Markel; is that correct?

8 A. Yes.

9 Q. Okay. And this is just the -- what I've
10 given you here as Exhibit 23 is the commercial
11 package insurance binder?

12 A. Yes.

13 Q. Okay. And if you flip farther in,
14 starting at Peoples 1236, it also includes some of
15 the declaration pages outlining what kind of
16 coverage you have?

17 A. Yes.

18 Q. And again, here, the named insured is
19 listed as The Learning Station, CDC, LLC?

20 A. Yes.

21 Q. And looking -- looking at the business
22 auto insurance binder, which is the third page in,
23 looks like you again got underinsured motorist
24 coverage in the amount of \$1 million and that -- is
25 that correct?

1 A. Yes.

2 Q. And the two vehicles that were insured,
3 again, were the buses?

4 A. Yes.

5 Q. All right. And on the page Bates numbered
6 Peoples 1239, the business auto declarations, on the
7 form of business, the -- just the box for limited
8 liability company is checked; is that right?

9 A. Yes.

10 Q. The individual box is not checked?

11 A. No.

12 Q. Okay. So, again, on this policy you do
13 not -- your name does not individually appear on
14 this policy?

15 A. Correct.

16 Q. Okay.

17 A. Correct.

18 Q. I'm going to switch you over for just a
19 second, talk about your personal automobile
20 insurance.

21 You did not procure the personal
22 automobile insurance through Peoples Underwriters;
23 is that right?

24 A. No. We've had the same insurance for 20
25 years, plus.

1 Q. Okay. Who is your personal automobile
2 insurance with?

3 A. Allstate.

4 Q. Okay. Would it -- would you agree with me
5 that from 2008 through September 2012 you maintained
6 the same limits on your Allstate policy, that is
7 minimum limits of 25-, 50-, 25-?

8 A. I don't know. My husband takes care of
9 all that.

10 Q. Okay. Were the limits that you selected
11 on are your Allstate -- let me back up for a minute.

12 Were the limits that you selected on your
13 Allstate policy at all impacted by the policy that
14 you had on your business?

15 A. I don't handle anything to do with my
16 personal auto insurance.

17 Q. All that's handled by your husband?

18 A. Yes.

19 Q. Okay. Do you have any knowledge of him
20 reaching out to Peoples at some point to ask about
21 getting personal auto insurance through Peoples?

22 A. No.

23 Q. So as far as you know the decision on what
24 limits your husband selected for your personal auto
25 were done completely independent of what was done

1 for your business; is that right?

2 A. Two separate things.

3 Q. Okay. I'm not going to -- for the sake of
4 everyone, I'm not going to put all this in as an
5 exhibit.

6 But if you could take a look -- I had
7 asked you earlier about your coverage on the
8 personal auto, and you weren't sure what your limits
9 were.

10 If you could take a look at these dec
11 pages for your policy from 2008 through September --
12 sorry, March of 2013, and just verify for me that
13 the limits on these policies were 25-, 50-, 25-.
14 And you'll find that on the second page in.

15 A. Yes.

16 Q. Okay.

17 A. But I think it's important to understand
18 that it's only been in the last conversation that
19 I've had recently with Mr. Brittain that it's been
20 explained to me that all of this is because of how
21 it's written with my name and not the fact that it
22 was being played over whether it was automobile or
23 whether it was liability.

24 So there was no reason for us to even
25 consider changing our personal until when I had a

1 conversation with him on Monday and it was explained
2 in more detail.

3 Q. And just to clarify, I don't want you to
4 tell me about any conversations you had with your
5 lawyer because those are privileged.

6 A. I'm just saying why we haven't changed it
7 is because this is really the first that it's coming
8 to light that that's what they are trying to use as
9 far as not paying.

10 It's been my understanding that it was a
11 matter of whether this was considered an automobile
12 accident or an injury that happened inside the
13 building. So there would be no reason for us to
14 change anything prior.

15 Q. Well, you said that the -- this -- you're
16 just understanding now that the way the policy was
17 named is why they denied coverage. But wasn't that
18 what the whole lawsuit with Selective was about?

19 A. Through my attorney. But he did all of
20 that. So now it's all just coming together to be
21 explained. But my own insurance rep thought I was
22 covered all the way through and was shocked and
23 couldn't believe that I wasn't when it all came to
24 be.

25 Q. And which insurance rep are you talking

1 about?

2 A. Matt Wiseman.

3 Q. So are you saying that you're only just
4 now understanding like in the past week what went on
5 in the lawsuit against Selective?

6 A. That all of this has to do with -- like
7 that my name is needed to be listed on there. All
8 along it's been, Is it an automobile or a liability
9 type of thing. And I've had people handling this
10 for me, so...

11 Q. On your behalf as your agent?

12 A. On my behalf, right.

13 Q. All right. I'm going to hand you what
14 I've marked as Defendant's Exhibit Number 24.

15 (DFT. EXH. 24, Amended Policy, was
16 marked for identification.)

17 BY MS. WILLIAMS:

18 Q. And can you identify this for me as
19 communication from your Allstate agent regarding a
20 change in your insurance coverage for your personal
21 auto?

22 A. That's what this is. But again, my
23 husband handles this. So I've never even this
24 before.

25 Q. Okay. If you flip to page -- the page

1 that's Bates numbered Allstate 681. Here it's
2 indicating that your limits are now 100-, 300-
3 100-; is that right?

4 A. That's what it says.

5 Q. Okay. And this was for policy period
6 beginning September 13, 2012?

7 A. Yes.

8 Q. Do you know why the increase was made?

9 A. We increased all of our insurance after my
10 son had a fire. So my husband looked over
11 everything at home and I looked over everything at
12 work. My son lost everything in a fire and we
13 realized how underinsured he was so we reexamined
14 everything.

15 Q. Okay. When did -- when did that fire take
16 place?

17 A. March 17th -- they came back this -- this
18 was the year -- it was the year before last. It was
19 the fire in Windsor Green. The whole complex
20 burned. So right before -- it was March 17, 2012.
21 2013 was a year and then they went back in, I
22 believe.

23 Q. Okay. And then are you aware of -- is it
24 your understanding that your limits have then since
25 been maintained at 100-, 300-, 100- with your

1 Allstate since --

2 A. I have no idea.

3 Q. -- that increase?

4 A. I don't have anything to do with my
5 personal insurance. My husband handles all of it.

6 Q. You doing okay? Do you need a break?

7 A. I'm just ready to be done.

8 Q. Okay. So we just talked about the Markel
9 policy that you placed through Peoples beginning in
10 April of 2013.

11 After the policy was initially placed that
12 year you renewed again with Markel in April of 2014;
13 is that right?

14 A. Correct.

15 Q. Okay. That renewal policy, however, was
16 not placed through Peoples Underwriters; is that
17 right?

18 A. No, it was not.

19 Q. So sometime in 2014 you moved your
20 coverage to a different company?

21 A. Yes.

22 Q. Okay. What agency did you then go through
23 for your commercial insurance?

24 A. I went directly to Markel.

25 Q. So you didn't deal with an independent



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1 insurance agent, you went directly to the company?

2 A. Yes.

3 Q. Okay. When you went to Markel, what did
4 you -- what kind of insurance did you request that
5 they place for you?

6 A. They just renewed the policy that we had
7 in place.

8 Q. Okay. Did you request any specific
9 changes to what Peoples had previously done for you?

10 A. I don't recall.

11 Q. All right. I am going to hand you what
12 I'm going to mark as Defendant's Exhibit 25.

13 (DFT. EXH. 25, Commercial Lines Policy
14 Declarations, was marked for identification.)

15 BY MS. WILLIAMS:

16 Q. Is this the policy that you currently have
17 in place with Markel and through Markel?

18 A. It looks like it, yes.

19 Q. All right. Let me ask you one question:
20 When you-all produced this to us, it was noted in
21 the discovery responses that it was an incomplete
22 copy, and I wanted to ask you where this policy came
23 from. It looks like -- I see a fax on top.

24 A. I took the envelope they sent me, I faxed
25 it to my attorney. So it just -- everything that

1 was in that envelope was sent to them.

2 Q. Okay. Because it appears if you look,
3 like every other page is missing. So the dec page
4 here, it says 1 of 4, and then instead of saying 2
5 of 4, it goes to 3 of 4. So I wasn't -- I'm trying
6 to identify whether or not, when you scanned in to
7 your attorney or faxed -- did you fax it or scan it?

8 A. I faxed it.

9 Q. Faxed it. If some of the pages didn't get
10 pulled through.

11 A. That's the first I'm hearing of it.

12 Q. Okay. How does Markel send you policies?
13 They mail them to you?

14 A. They mailed it.

15 Q. Okay. So the Markel policy that you
16 currently have still has the same information as all
17 your prior policies with Selective and the Markel
18 policy with Peoples? It notes the named insured as
19 The Learning Station, CDC, LLC.

20 A. Yes.

21 Q. And did you ask Markel to put you on there
22 as a named insured?

23 A. I did not know that that was something
24 that could be done.

25 Q. Okay. And you still don't know if that is

1 something that could be done.

2 A. I obviously need to inquire with them.

3 Q. Okay. But you have not done that?

4 A. No. Like I said, this is the first I'm
5 hearing that it could be put onto this one.

6 Q. When you paid the premiums for all of
7 these policies, was that -- were those premiums paid
8 by day care, the day care's account?

9 A. Yes.

10 Q. So you didn't pay -- you didn't personally
11 pay any money for the policies, individually?

12 A. The business paid.

13 Q. The business paid?

14 A. I sign the check. It's my money. It's my
15 business.

16 Q. You have different accounts for your
17 business and your personal use, correct?

18 A. We have a home account, yes.

19 Q. What kind of software do you use for
20 purposes of maintaining your business account?

21 A. Procare, QuickBooks.

22 Q. Are those two separate things, Procare and
23 QuickBooks?

24 A. Yes.

25 Q. What is Procare?

1 A. It is a software for child care centers.

2 Q. Okay. What does that software do for you?

3 A. It tracks attendance. It tracks parents'
4 payments. It tracks time clocks and ...

5 Q. And then what do you use the QuickBooks
6 for? To pay bills, keep track of finances?

7 A. Just to do reports from. We don't pay
8 bills through QuickBooks.

9 Q. Okay.

10 (DFT. EXH. 26, Letter to Ms. Jensen from
11 Matt Wiseman, May 6, 2013, was marked for
12 identification.)

13 BY MS. WILLIAMS:

14 Q. I'm going to hand you Defendant's
15 Exhibit 26, which is a letter dated May 6, 2013,
16 from Peoples Underwriters -- Matt Wiseman at Peoples
17 Underwriters addressed to you. And if you can take
18 a look at the second paragraph.

19 Let's back up for a minute. This letter
20 is enclosing your Markel policy for the year
21 beginning April 2013. This is the first time the
22 Markel policy was placed; is that right?

23 A. Yes.

24 Q. Okay. And so in the second paragraph, he
25 notes a difference between your Selective policy and

1 your Markel policy.

2 It says, Your auto policy is written with
3 symbols 7, 8, and 9, which gives you coverage for
4 autos specifically listed on your policy. Your
5 policy through Selective Insurances uses symbol 1
6 which covered any auto.

7 And so taking a look at your policy --
8 unfortunately this is not Bates stamped so I can't
9 refer you to those numbers. But if you look at the
10 policy I provided, I'll refer you to my copy. On
11 the page following the business auto declaration it
12 lists the vehicles that are insured, and those are
13 the two buses.

14 A. Yes.

15 Q. And, again, in this letter Matt asked you
16 to take a minute to look at the policy and let him
17 know if anything was incorrect or if you had any
18 questions.

19 A. Yes.

20 Q. When you placed the Markel policy with
21 Peoples, do you recall having a discussion with Matt
22 regarding the underinsured motorist coverage and
23 that under the Markel policy you may have some of
24 the same issues that you had with Selective in terms
25 of the coverage issues that you were facing?

1 A. I don't recall that conversation.

2 Q. Okay. Earlier we talked about workers'
3 comp and the fact that when you first came over to
4 Peoples you did not have workers' comp through
5 Peoples Underwriters. It was through somebody else?

6 A. Correct.

7 Q. And I believe -- was it your payroll
8 company that you placed --

9 A. For a time.

10 Q. Okay.

11 A. But it switched.

12 Q. Okay.

13 A. I have to look it up for you.

14 Q. Okay. And so in April of 2013 you began
15 placing your workers' comp insurance through Peoples
16 Underwriters; is that right?

17 A. Correct.

18 Q. Okay. And when you placed that policy you
19 included yourself as covered under the policy?

20 A. Correct.

21 Q. Under your previous policy through another
22 company you were not included?

23 A. No.

24 Q. Okay. In conjunction with the production
25 of documents in this case, when your lawyer asked

1 you to pull communications, correspondence,
2 especially in particular emails, how did you perform
3 those searches when you were looking for those
4 emails?

5 A. I just put a search in with Matt's name
6 and looked, but most of our conversations were done
7 in person.

8 Q. Okay. So when you pulled the --

9 A. We didn't have very many email
10 conversations.

11 Q. Okay. So you just pulled any emails from
12 just Matt. Did you search for anything else other
13 than --

14 A. I think I searched for Peoples
15 Underwriters and Matt Wiseman.

16 Q. Did you have any other communications via
17 email with anybody else regarding this accident or
18 the insurance or your injuries?

19 A. If I did, I don't recall specific emails
20 or situations.

21 Q. Did you look for any emails or
22 correspondence that you had with other people other
23 than Peoples Underwriters or Matt Wiseman?

24 A. Those were the two names I searched.

25 Q. Okay.

1 A. Most of everything that we did was in
2 person in my office or out in the community. We
3 would see each other and have conversation. But we
4 did not email each other on a regular basis.

5 Q. You don't recall if you had any emails
6 with anybody else regarding the accident or the
7 insurance issues or injuries?

8 A. I mean, if someone emailed me and asked me
9 a question, I'm sure I answered it. But when I
10 pulled the search up, whatever I found I printed and
11 gave to my attorneys.

12 Q. Okay. But you didn't do any searches
13 using any keywords to pull up any of those emails?

14 A. Just Peoples Underwriters and Matt
15 Wiseman.

16 Q. Is it your understanding that there's any
17 difference between the policy that was placed
18 through Peoples versus the policy that was placed
19 through your new agent or your new -- I guess it's
20 through the company directly with Markel?

21 A. Are there differences?

22 Q. Um-hum.

23 A. I don't know.

24 Q. You didn't request anything different
25 about the policy that was -- the new policy?

1 A. I had conversations with them about my
2 circumstances and what happened and I asked for
3 everything to be done, whatever needed to be done.
4 But I couldn't tell you what was changed or, you
5 know, what. That's why I have people that do it.

6 You know, I can answer any question that
7 you want relating to the early childhood field and
8 any DSS regulations or OHAN or DHEC or CACP or
9 anything that regards what my business is.

10 But when it comes to things like this, I
11 have an accountant to do my accounting. I have
12 insurance agents to take care of those things. I
13 have a payroll company that does the areas that I
14 know nothing about.

15 So I tell them what I need and I expect
16 that that's what I'm getting. When I look at this
17 paperwork, it means nothing to me because I don't
18 understand any of it.

19 Q. Okay. But -- so you're not aware of any
20 difference in the way the underinsured motorists
21 coverage is handled under the policies that were
22 placed through Peoples versus the policy --

23 A. I don't -- I don't know.

24 Q. For the purposes of the court reporter,
25 let me finish my question so --

1 A. Sorry.

2 Q. -- she can get everything down.

3 Is there any difference between the
4 policies that were placed through Peoples versus the
5 policy that was placed with Markel?

6 A. If there are differences, I'm not aware.
7 I would have to have them compare it and explain it
8 to me.

9 Q. Okay.

10 A. We had conversations regarding, you know,
11 this is what happened, I don't think it will ever
12 happen again, but what do we have to do to fix this.

13 Q. Okay. Do you know if anything would be
14 different under the current Markel policy that you
15 have today if the same accident occurred?

16 A. I don't know.

17 Q. Okay. One thing that is different than at
18 the time of the accident would be that you are now
19 covered as the owner under your workers' comp
20 policy, correct?

21 A. That would be correct.

22 Q. And you also have higher personal auto UIM
23 limits; is that right?

24 A. Apparently. That's the first I've seen
25 that.

1 Q. What are you contending that Peoples
2 should have done differently in placing your policy?

3 A. I feel that if my own agent didn't know I
4 wasn't covered that there maybe should be more
5 training on the part of their agents to write
6 coverage in a way that's going to cover the people
7 that they are providing a service to.

8 I went to an expert to get insurance. You
9 know, like I said before, we had multiple
10 conversations and I was assured that it would be
11 taken care of, that I was covered.

12 And so if someone who is an expert in the
13 field didn't know that the policy wasn't written in
14 a way that I would be covered, I don't know how I
15 would be expected to know that.

16 If that's their business and that's what
17 they do, then I would certainly think that that is
18 what they would sit down and discuss with you.

19 Do you realize that this policy only
20 covers X, Y, Z; and that you as an owner, if you
21 were to get hurt, you're not covered so you should
22 have additional insurance? It would be a great
23 opportunity to sell me more insurance, actually.
24 But I was not advised of how any of that works.

25 Q. When did -- when did People -- when are

1 you saying that Peoples said you would be covered
2 for this?

3 A. The day of the accident I was told I was
4 covered. And on multiple occasions when I would see
5 Matt publicly, just let me know what you need. It's
6 not going to be a problem.

7 We were waiting to see what the person who
8 hit me's insurance was going to cover. But I was
9 told many times that it was all -- it would all be
10 taken care of. It would be submitted. It wouldn't
11 be a problem. Let me know what you need. If you
12 have bills you can't take care of, we'll go forward
13 with this. Over and over again.

14 Q. Well, but those comments -- none of those
15 comments that you're making are direct statements
16 that you would be covered under the Selective
17 policy. It sounds like he was asking for
18 information -- what he could do to help process the
19 claim.

20 A. No. It was under the policy through
21 Peoples Underwriters that we were discussing.

22 Q. Right. But did he specifically say
23 Selective is going to cover this loss?

24 A. That was the impression, because it would
25 be considered an automobile accident.

1 Q. Okay.

2 A. And so Selective is who I was told the
3 claim would be filed under and that there should be
4 no reason that it would not be covered.

5 Q. So you were told the claim would be filed
6 under Selective, but did he ever tell you that
7 her -- that for sure that they were going to pay the
8 claim?

9 A. I was told I had nothing to worry about,
10 everything would be covered, just get better. Take
11 care of yourself.

12 Q. So he said --

13 A. I believe there were also conversations
14 that if one didn't cover, the other one would.

15 Q. The other one being?

16 A. The liability insurance for getting hurt
17 on the premises.

18 Q. Okay. And which policy is that? A
19 separate ...

20 A. The commercial liability insurance.

21 Q. Okay. With Selective?

22 A. I don't think it was Selective. Whoever
23 else.

24 Q. Was that the Hartford?

25 A. I'd have to pull it out and look at it.

1 Q. Do you understand that Peoples
2 Underwriters isn't the one adjusting the claims and
3 making the decisions regarding coverage, that it's
4 Selective who does that?

5 A. I do. But I also feel that they should
6 understand the policies they are writing, and it
7 shouldn't be a surprise to them when something is
8 denied a claim.

9 That's their job. They are an
10 underwriter. They come to me to handle all of this
11 for me because it's not my area of expertise. And
12 that's why I have someone that I went to that I
13 trusted to do that.

14 Q. Would you agree with me that there are a
15 lot of scenarios in which there's no way that
16 anybody could predict that they are going to happen
17 and whether or not they would be covered?

18 MR. CASE BRITTAIN: Objection to the form.
19 BY MS. WILLIAMS:

20 Q. You can answer.

21 MR. CASE BRITTAIN: You can still answer.

22 THE WITNESS: I believe that I should be
23 covered under any circumstances if I was hurt while
24 in the building of the business that I own. Just
25 like I would expect that a customer would be covered

1 or an employee would be covered if there was
2 something that caused an injury. And I believe that
3 the insurance should encompass any type of injury or
4 accident, any type of accident.

5 BY MS. WILLIAMS:

6 Q. Right. Insurance policies have certain
7 provisions, endorsements, and exclusions. There are
8 certain endorsements and exclusions in every policy;
9 is that right?

10 A. I have no idea.

11 Q. Okay. Well, you get a big, thick packet
12 from your agent and your carrier every year --

13 A. Goes right in the closet.

14 Q. Okay. Those big packets set forth what
15 the terms of the contract that you have with the
16 carrier are?

17 A. Correct.

18 Q. Okay.

19 A. But I also would look at my agent and say,
20 I don't know what any of this is. Is it good? Do I
21 sign it?

22 Yes.

23 Q. Okay. Did you ask your agent if you would
24 be covered for specifically this kind of incident?

25 A. I assumed that I would be covered for any

1 incident. No one would have predicted this specific
2 incident. That is ridiculous. I assumed I would be
3 covered for any incident or injury.

4 Q. Okay. Did you think that under the
5 Selective policy any of your other family members
6 were individually covered under that policy?

7 A. If they were on the premises, just like
8 any customer or anyone else. That's why I had
9 liability insurance. If they were driving the bus
10 or if there was an accident, you know, yes. I would
11 think that if anyone was put in that position to be
12 in there, if it was one of my younger children, they
13 would have been considered a child at the center.

14 Q. So my understanding from your testimony is
15 that when you received the policies from Peoples
16 Underwriters or from the carrier you may have
17 briefly reviewed the first few pages, but you didn't
18 review the whole policy?

19 A. No. I sat with Matt. He put it all out
20 there. He knew we had conversations that I don't
21 know what any of this means. You know, is this
22 good? Is this what I need to do?

23 Yes. Sign here, here, here.

24 Okay.

25 All is said and done. I knew that I had

1 \$1 million underinsured on two individual buses. I
2 knew I had \$1 million liability. And I knew I had
3 the proper coverage that my landlord asked for for
4 the building, if something were to happen to the
5 premises. Those were the numbers that I looked at.
6 That's what I asked for.

7 I did not go page by page to see the names
8 obviously, because they are written incorrectly.
9 And I did not, like, tear it apart and go through
10 it, because to read -- like I said, it really
11 doesn't mean a whole lot to me. He gave me the
12 amounts of coverage that I asked for. But there was
13 no way to look through that to say you're not going
14 to be covered if you are involved in an auto
15 accident.

16 Q. You said earlier that the insurance
17 policies were written incorrectly. How should they
18 have been written?

19 A. Well, from what it sounds like, my name
20 should have been included in there as the owner of
21 the business. I'm still not clear if someone else
22 was sitting in that chair -- a child, a parent -- if
23 the same incident would have happened, would we
24 still be having all of this issue? I don't know the
25 answer to that.

1 Q. Okay.

2 A. I'm still not clear.

3 Q. Well, you testified earlier you're not
4 aware of whether or not you could even be put on the
5 policy --

6 A. I'm not. Obviously I have to make some
7 phone calls and find out.

8 Q. Let me finish the question.

9 So you're not aware that -- whether or not
10 you could be placed on the policy as, you know,
11 Donna Jensen as a named insured under the policy?

12 A. Correct.

13 Q. Okay.

14 A. Because then does that mean I have to have
15 every person who comes in and out of my building
16 named as an insured? I don't -- for a business,
17 company insurance, I would expect that it would be
18 an umbrella that would cover anyone that's in the
19 premises at any time for any reason would be insured
20 on that policy.

21 If I have to individually list myself and
22 30 teachers and 170 parents, that doesn't make sense
23 to me.

24 Q. Okay.

25 A. And if I don't have to list them but I

1 have to list myself, that really doesn't make sense
2 to me because I'm the one that pays for all the
3 insurance premiums and the coverage and I own the
4 business. So in all purposes I am The Learning
5 Station.

6 So if anyone is entitled to coverage, I
7 would think I would be entitled to that coverage.
8 Because The Learning Station can't go before the
9 Court and say, I hurt my back or my neck or -- so
10 then what good was that insurance if only The
11 Learning Station can use it.

12 MR. CASE BRITTAIN: Let's take a break.

13 (A recess transpired.)

14 BY MS. WILLIAMS:

15 Q. One question before I go into comparing
16 some of your policies. Under your current workers'
17 comp policy, are you still included?

18 A. As far as I know they kept it the same.

19 Q. Okay.

20 A. I would have to look to know 100 percent.

21 Q. And do you know who your agent is that
22 assisted you in placing that workers' comp policy?

23 A. I did everything through Markel.

24 Q. Okay. So you think your workers' comp is
25 through Markel also?

1 A. But it may not say Markel. It may have
2 some other name to it.

3 Q. Okay.

4 A. But I'd have to look.

5 Q. Okay.

6 A. Just like half the names in there, I don't
7 remember even seeing those names.

8 Q. Sure.

9 A. Because it was always the main name.

10 Q. Pay your premiums or forget about it.

11 A. Yes. Hopefully.

12 Q. I wanted to take a look at a couple of
13 the -- compare a couple of the policies that we
14 entered as exhibits.

15 But before we do that, I want to put in --
16 this would be Exhibit 27.

17 (DFT. EXH. 27, South Carolina
18 Underinsured Motorists Coverage Documents, was
19 marked for identification.)

20 BY MS. WILLIAMS:

21 Q. This is a portion of your commercial auto
22 policy with Markel from the policy year 2013 to
23 2014. It's just the provision regarding
24 underinsured motorist coverage.

25 Okay. And the reason I did this is

1 because we talked earlier on the record about how
2 your current policy with Markel that you-all
3 produced is missing pages. And unfortunately the
4 provision here regarding underinsured motorist
5 coverage is missing the -- one of the pages. And so
6 I'm pulling the language from the policy -- the
7 prior policy here.

8 If you could take a look at Exhibit 27.
9 And if you could pull for me Exhibits 17 and 25.

10 Again, we already established earlier that
11 the named insured under all of these policies is the
12 day care, whether it be the Four J's or The Learning
13 Station.

14 A. Yes, ma'am.

15 Q. Okay. So if we look specifically at the
16 provision in the policy regarding underinsured
17 motorist coverage in Exhibit 17, this would be kind
18 of almost to the end. And it's got the Bates Number
19 Peoples 846 on it.

20 A. Okay.

21 Q. And you can kind of hold that open and
22 look at Exhibit 27, which I just provided you. The
23 second page. And if you could just compare -- read
24 to yourself the Provision B of both of these
25 policies and let me know when you're through looking

1 at that.

2 A. They look the same.

3 Q. Okay. So they both have that same
4 provision describing who is an insured under the UIM
5 provision?

6 A. Yes.

7 Q. Is that the same language on both
8 policies?

9 A. It seems to be.

10 Q. Okay. Did you ever review the or did your
11 lawyer give you a copy of the order from the lawsuit
12 that you brought against Selective saying why the
13 Court found that there was no coverage under the
14 policy?

15 A. I've gotten lots of documents, but they
16 are all in a file --

17 Q. Okay.

18 A. -- from the accident, so ...

19 Q. Okay. So you just don't recall if you
20 received that or not?

21 A. I mean, I'm sure if it was sent, I
22 received it.

23 Q. Okay. Do you recall why the Court ruled
24 as it did regarding the coverage under the Selective
25 policy?

1 A. I was under the impression that because I
2 wasn't in the automobile, I wasn't covered.

3 MS. WILLIAMS: Okay. I think that's all
4 the questions I have.

5 MR. CASE BRITTAIN: Okay. I have no
6 questions.

7 (The deposition was concluded at 2:22 PM)
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CERTIFICATE OF REPORTER

I, Linda A. Mahoney, Court Reporter
and Notary Public for the State of South Carolina at
Large, do hereby certify that the foregoing
transcript is a true, accurate and complete record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 24th day of December,
2014 at Horry County, South Carolina.

Linda Mahoney

Linda A. Mahoney, Court Reporter
My Commission expires
October 12, 2017

I N D E X

Page/Line

WITNESS/EXAMINATION

DONNA M. JENSEN

3 11

EXAMINATION

BY MS. WILLIAMS:

3 13

CERTIFICATE OF REPORTER

170 1

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(No Information Requested)

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

DONNA JENSEN, INDIVIDUALLY, AND
THE LEARNING STATION, CDC, LLC,
F/K/A FOUR J'S & A D, LLC, D/B/A THE
LEARNING STATION,

C/A No.: 2014-CP-26-2463

Plaintiffs,

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

vs.

MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.,

Defendants.

TO: THOMAS C. BRITTAIN, ESQ., ATTORNEY FOR PLAINTIFFS:

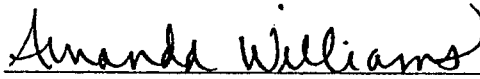
YOU WILL PLEASE TAKE NOTICE THAT Defendants Matthew B. Wiseman and Peoples Underwriters, Inc. ("Defendants"), by and through their undersigned counsel, hereby move the Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting summary judgment to Defendants on the claims asserted by the only remaining Plaintiff¹, Donna Jensen ("Plaintiff"), against Defendants. Plaintiff asserts one cause of action against Defendants for negligence. The grounds for this Motion are that Plaintiff cannot satisfy the elements of a negligence claim, including duty, breach of duty, or proximate cause to alleged damages, and thus, the claim fails as a matter of law.

This motion is based upon the pleadings, the controlling law, deposition testimony, and any memorandum of law or other material that may be submitted to the Court before or at the hearing on this motion, and such other further material as the Court may deem appropriate.

¹ Plaintiff The Learning Station, CDC, LLC, f/k/a Four J's & D, LLC, d/b/a The Learning Station was dismissed from the lawsuit pursuant to the Court's Order dated September 9, 2014.

WHEREFORE, Defendants respectfully request that the Court issue an Order granting its Motion for Summary Judgment and dismissing Plaintiff's Complaint with prejudice.

Respectfully submitted,



Susan Taylor Wall

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Amanda C. Williams

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ATTORNEYS FOR DEFENDANTS
MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.

February 12, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

DONNA JENSEN, INDIVIDUALLY, AND
THE LEARNING STATION, CDC, LLC,
F/K/A FOUR J'S & A D, LLC, D/B/A THE
LEARNING STATION,

C/A No.: 2014-CP-26-2463

Plaintiffs,

vs.

MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.,

Defendants.

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendants Peoples Underwriters, Inc. and Matthew B. Wiseman (collectively referred to herein as "Peoples"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

I. INTRODUCTION

This case arises from an unusual accident in which a car hit the side of a daycare building and the impact from the collision allegedly caused injury to Plaintiff Donna Jensen ("Jensen"), the owner of The Learning Station CDC, LLC ("Daycare"). Jensen was seated and working at her desk when the accident occurred. She collected \$25,000.00 from the at-fault driver's liability insurance carrier and was offered \$25,000 in underinsured motorist ("UIM") coverage from Allstate, her personal automobile insurance carrier. (Covenant Not to Execute, Ex. 1; Letter & Check from Allstate to Brittain, Ex. 2.) Jensen then sought additional insurance coverage under the UIM provision of the Daycare's commercial automobile policy with Selective Insurance Company, but the federal court held, among other things, that because Jensen was not in one of

the Daycare's covered buses when the accident took place, the UIM provision in the commercial automobile policy was inapplicable. (Order, Ex. 3.)

Jensen and the Daycare then filed the subject action against Defendants Peoples Underwriters, Inc., an independent insurance agency, and Matthew Wiseman, an independent insurance agent, (collectively referred to herein as "Peoples") for alleged negligence in the placement of commercial automobile insurance for the Daycare. However, this is a worker's compensation case and Peoples was not the agent for the Daycare's worker's compensation insurance. (Powell Aff. ¶¶ 17, 18, Ex. 4.) Jensen purchased worker's compensation insurance through an agent other than Peoples. (Jensen Dep. p. 152:3-6, Ex. 5.) Jensen's inability to recover for her alleged injuries is a result of her decision, made with another agent, not to purchase a worker's compensation policy for the Daycare that covered her as the owner of the business. (Jensen Dep. pp. 127:18-25 – 128:1-10, Ex. 5; Powell Aff. ¶ 20, Ex. 4.) Peoples correctly titled and placed the commercial automobile insurance for the Daycare. (Powell Aff. ¶¶ 15, 21 Ex. 4.) Accordingly, Peoples is entitled to dismissal from this lawsuit because Peoples was not the Daycare's worker's compensation agent and did not breach a duty to advise or place such coverage on behalf of the Daycare.

II. PROCEDURAL BACKGROUND

On June 25, 2012, Plaintiffs filed a declaratory judgment action against the Daycare's commercial automobile insurance carrier, Selective Insurance Company, and Peoples in the Horry County Court of Common Pleas. The case was removed to federal court and Peoples was dismissed without prejudice from the action. On June 19, 2013, the federal court held that because Jensen was not occupying a covered auto at the time of the accident and was not an individually named insured, she was not entitled to UIM benefits under the commercial

automobile policy's plain and unambiguous terms. (Order p. 7, Ex. 3). On April 22, 2014, Jensen and the Daycare brought the subject action against Peoples asserting a negligence claim. On May 23, 2014, Peoples filed a Motion to Dismiss the Daycare as a party plaintiff on the grounds that the Daycare alleged no injury or damages, and thus, was not a real party in interest. On September 9, 2014, the Court dismissed the Daycare. On September 24, 2014, Plaintiff filed a motion to reconsider the Order Granting Defendants' Motion to Dismiss the Daycare. The Court has not yet ruled on this motion. On February 18, 2015, Peoples filed a motion for summary judgment. On April 7, 2015, Plaintiff filed a motion for summary judgment.

III. LEGAL STANDARD

Rule 56, SCRPC, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Although the moving party bears the initial burden of demonstrating the absences of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' — that is, pointing out to the trial court—that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Id.* (emphasis in original); *see also Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts, "as would be admissible in evidence," to show that a true jury issue exists. *See* Rule 56(e), SCRPC. Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot

differ,” summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

IV. FACTUAL BACKGROUND

Jensen is the owner of the Daycare which has approximately thirty-two employees and one hundred and seventy-five children enrolled. (Jensen Dep. p. 14:7-11, Ex. 5.) Jensen began the Daycare in approximately 2004 after running a Gymboree franchise, working as the director of another daycare, and operating a daycare out of her home. (Jensen Dep. pp. 10:5-25 – 11-12, 103:22-25 – 104:1-8, Ex. 5.) Jensen is a sophisticated businesswoman who has purchased insurance for her businesses since at least 2004, including commercial general liability, commercial property, accident insurance, commercial automobile insurance, and worker’s compensation insurance. (Jensen Dep. p. 104:9-15, Ex. 5.) In procuring insurance for the Daycare, Jensen has utilized the services a number of different insurance agencies over the years. (Jensen Dep. p. 104:16-23, Ex. 5.) In fact, when Jensen, on behalf of the Daycare, began placing insurance for the Daycare through Peoples, Peoples was not the exclusive agent for the Daycare. (Jensen Dep. p. 152:2-6, Ex. 5.) In addition, it is undisputed that Jensen never sought personal insurance through Peoples. (Jensen Dep. pp. 137:10-25, 140:21-25, Ex. 5.) Jensen had another insurance agent who assisted her with her individual insurance needs. (*Id.*)

On May 11, 2011, while seated at her desk in her office at the Daycare, a car driven by a parent hit the exterior wall of the Daycare. (Order p. 2, Ex. 3.) Jensen asserts she suffered various injuries as a result of this workplace accident. Because this is a workplace accident, the Daycare’s worker’s compensation insurance is the primary source of recovery. (Powell Aff. ¶¶ 17, 18, Ex. 4.) Jensen, however, as the owner of the Daycare, was not covered under the Daycare’s worker’s compensation policy, which was purchased through an agent other than

Peoples. (Jensen Dep. p. 152:2-6, Ex. 5.) As owner of the Daycare, Jensen had to specifically elect to include herself as a covered employee under the Daycare's worker's compensation policy, and she chose not to do so. (Jensen Dep. pp. 127:18-25 – 128:1-10, 152:21-23, Ex. 5.)

Because Jensen did not elect worker's compensation coverage for herself, she then sought coverage for her workplace injuries under the Daycare's commercial automobile insurance policy even though she was not in or near the two buses that were covered under the policy. The commercial automobile insurance carrier, Selective Insurance Company, denied the claim and Jensen filed a declaratory judgment action claiming that she was *individually* covered under the Daycare's commercial automobile insurance policy. (Decl. Judgment Compl, Ex. 6.) The federal court held "because [Jensen] was neither a named insured nor occupying a covered auto at the time of the accident at issue, she is not entitled to UIM benefits under the policy's plain and unambiguous terms." (Order p. 7, Ex. 3.) Additionally, the federal court's Order in the declaratory judgment action held that the policy at issue was "plainly for a commercial enterprise" and "nowhere in the policy is Plaintiff listed as an insured." (Order p. 6, Ex. 3.)

Jensen now *individually* asserts a claim against Peoples for negligence in placing the commercial automobile insurance policy for the Daycare. Jensen, however, never procured individual insurance for herself through Peoples. (Jensen Dep. pp. 137:10-25, 140:21-25, Ex. 5.) Thus, Jensen cannot assert a claim against Peoples because she did not retain Peoples for individual insurance and Peoples had no duty to her. In addition, because both Jensen and the Daycare had an agent other than Peoples handling the particular types of insurance applicable to Jensen's workplace accident, Peoples did not owe a duty to advise, nor did it breach a duty. The only evidence is that Peoples complied with the standard of care in placing insurance for the

Daycare. (Powell Aff. ¶ 15, Ex. 4.) Thus, Peoples is entitled to summary judgment on all claims asserted against it.

V. DISCUSSION

A. Peoples had no duty to advise Jensen individually because Peoples was not her agent for personal insurance.

It is undisputed that Jensen did not procure her personal insurance through Peoples and did not request personal insurance through Peoples. It is undisputed that Jensen never asked for assistance with home insurance, flood insurance, personal auto insurance, or any other personal insurance. Jensen admits she had other agents who handled her personal insurance. As to personal automobile coverage, she admits she never discussed the subject with Peoples.

Q. Okay. So did you ever have a discussion with [Peoples] that you wanted to have personal automobile insurance coverage.

A. No. I already had that.

(Jensen Dep. p. 137:19-22, Ex. 5.) Jensen had the same personal automobile insurance through Allstate for twenty years and admits the limits of insurance and other decisions regarding her personal insurance were made completely independent of the Daycare's commercial insurance. (Jensen Dep. pp. 140:21-25, 141:23-25 – 142:1-3, Ex. 5.)

Because Jensen never procured her personal insurance through Peoples and never requested personal insurance through Peoples, Peoples owed her no duty under the law. *Trotter v. State Farm Mutual Automobile Insurance Company*, 297 S.C. 465, 473, 377 S.E.2d 343, 348 (Ct. App. 1988). In addition, Jensen cannot maintain a claim against Peoples regarding Peoples' alleged negligence in placing a commercial automobile insurance policy for the Daycare. The Daycare is not a party plaintiff in this action and has suffered no injuries. Accordingly, Jensen's Complaint against Peoples must be dismissed as a matter of law.

B. Peoples Had No Duty to Advise Jensen or the Daycare Pursuant to the Court's Ruling in *Trotter*.

Jensen claims that Peoples failed to advise her that she did not have individual coverage under the Daycare's commercial automobile policy for a workplace accident such as this one. Her claim is defeated on the undisputed facts and the holding in the seminal case on the duty of insurance agents in South Carolina. In *Trotter v. State Farm Mutual Automobile Insurance Company*, the court held that an insurance agency had no duty to advise its customer of an exclusion in the company's commercial automobile insurance policy and no duty to advise the customer that he needed worker's compensation insurance. 297 S.C. 465, 473-74, 377 S.E.2d 343, 348 (Ct. App. 1988).

1. The *Trotter* Case

In *Trotter*, the plaintiff purchased a commercial automobile insurance policy for a truck that he used in the operation of his business. 297 S.C. 465, 469, 377 S.E.2d 343, 346 (Ct. App. 1988). When he purchased the policy through defendant-insurance agency, he told the agency that he wanted "full protection" on his truck and explained his business, his employees, and how many miles the truck was driven. *Id.* The agency placed a commercial automobile insurance policy as requested. The plaintiff and his employee were later involved in an automobile accident and the carrier denied coverage for the employee's injuries due to a standard exclusion in the policy for any injury to an employee of the insured arising out of his or her employment. *Id.* at 470, 377 S.E.2d at 346.

The Court held that the defendant-insurance agency was under no duty to advise Plaintiff of the employee exclusion in the policy or to advise him that he needed worker's compensation insurance. *Id.* at 473-74, 377 S.E.2d at 348. There was no evidence of an undertaking by the agent to advise him about his insurance needs. *Id.* at 472, 377 S.E.2d at 347. There was no

additional consideration beyond the payment of premiums and no clear request from the plaintiff to the agent that his advice was being sought. *Id.* “A request for ‘full coverage,’ ‘the best policy,’ or similar expressions does not place the agent under a duty to determine the insured’s full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase.” *Id.* The plaintiff conceded he did not ask about worker’s compensation and relied on information from a prior agent that he did not need such coverage. *Id.* at 473, 377 S.E.2d at 348. Accordingly, the Court held that the plaintiff failed to show that the defendant-insurance agency owed a duty to advise on worker’s compensation insurance. *Id.*

2. Under the standard set forth in *Trotter*, the Daycare did not make a clear request for advice and Peoples did not undertake to give such advice.

Like the plaintiff in *Trotter*, Jensen was involved in a workplace accident that triggered worker’s compensation insurance (Powell Aff. ¶¶ 17, 18, Ex. 4), a type of coverage that neither Jensen, nor the plaintiff in *Trotter*, had in place, and a type of coverage that neither the plaintiff in *Trotter*, nor Jensen, requested from their insurance agent. Also as in *Trotter*, Jensen claims that she wanted “comprehensive coverage” from Peoples and requested that Peoples place insurance that would “cover herself, her employees, students and parents for any type of incident that may arise at her business” (Pl.’s Mem. in Opp. to Defs.’ Mot. for Summ. J. pp. 5-6.) Jensen’s claim, however, fails as a matter of law for two reasons. First, it is not supported by the undisputed facts and second, Jensen cannot show that Peoples expressly or impliedly undertook to advise her concerning her individual coverage under the commercial policy.

“Generally, an insurer and its agents owe no duty to advise an insured.” *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347. Such a duty may be assumed only if: (1) an agent expressly undertakes to advise the insured; or (2) an agent impliedly undertakes to advise the insured. *Id.*

An implied undertaking may be shown if: (1) the agent received consideration beyond a mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied upon. *Id.* The insured bears the burden of proving the undertaking. *Id.*

a. Peoples did not expressly undertake to advise Jensen.

There is no evidence that Peoples undertook to advise Jensen or the Daycare regarding all of its insurance needs. Peoples assisted the Daycare in placing only the requested coverages and Jensen admits she had other agents advising her as to other types of insurance. When Peoples first placed commercial insurance for the Daycare, Peoples was told to focus only on building and liability insurance. (4/12/10 Email from Wiseman to Jensen, Ex. 7; 4/14/10 Email from Jensen to Wiseman, Ex. 8; 6/2/10 Email from Wiseman to Jensen, Ex. 9; Peoples 2010 Activity Report p. 4, Ex. 10; Jensen Dep. p. 152:2-6, Ex. 5.) There is no evidence of an undertaking by Peoples to advise Jensen or the Daycare.

b. Peoples did not impliedly undertake to advise Jensen.

Jensen cannot satisfy the elements of an implied undertaking by Peoples under the law set forth in *Trotter*. First, there is no evidence of additional consideration to the agent beyond payment of a premium for the insurance policy at issue. Second, there is no evidence of an implied undertaking through a course of dealing between the Daycare and Peoples over an extended period of time and, third, there was no clear request for advice.

The Daycare did not have an extended course of dealing with Peoples. Jensen approached Peoples for commercial insurance only one year before the accident. The Daycare had many different insurance agencies before coming to Peoples and while dealing with Peoples.

(Jensen Dep. pp. 104:16-23, 152:3-6, Ex. 5.) When it began placing commercial insurance through Peoples, the Daycare chose to keep some of its insurance with its prior agent, including worker's compensation insurance. (Jensen Dep. p. 152:2-6, Ex. 5.) Thus, there was no course of dealing between the Daycare and Peoples over an extended period of time that put Peoples on notice that its advice was being sought and relied on. *See Trotter*, 297 S.C. at 473, 377 S.E.2d at 348.

There is also no evidence that Jensen made a clear request for advice from Peoples regarding personal insurance coverage for herself. Though Jensen claims that she requested, on behalf of the Daycare, "comprehensive coverage," such an assertion for "full coverage" is insufficient under *Trotter* to put an agency on notice that its advice is being sought and relied upon. "A request for 'full coverage,' 'the best policy,' or similar expressions does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347.

In addition, because Peoples was not Jensen's personal insurance agent, nor was it the exclusive agent for the Daycare, the alleged request for "comprehensive coverage" has no meaning. The Daycare specifically chose to place its worker's compensation insurance through an agency other than Peoples and relied on that agent's incorrect advice that Jensen, as owner of the Daycare, could not be included on the worker's compensation insurance policy.¹ (Jensen Dep. pp. 127:18-25 – 128:1-10, 152:21-23, Ex. 5.) Jensen never communicated with Peoples a

¹ The Daycare could have paid an additional premium to receive owner coverage under its worker's compensation insurance policy. (Powell Aff. ¶ 20, Ex. 4.) Thus, if any negligence occurred, it was that of the other agent and not Peoples that resulted in the lack of worker's compensation coverage for Jensen.

desire for worker's compensation insurance or any insurance other than the building and liability insurance that was correctly placed by Peoples.

Jensen admits that, after receiving the Daycare's commercial insurance, which was placed through Peoples, *she did not ask Peoples for any additional coverages or explanations.* (Jensen Dep. p. 116:1-4, Ex. 5.) The commercial automobile policy clearly stated on its face that Jensen was not an individually named insured. (Federal Court Order, Ex. 3.)

Jensen never requested advice, she simply *assumed* she had coverage. When asked if she told Peoples she wanted coverage for the type of accident at issue, Jensen testified she only *assumed* she would have such coverage:

Q. Okay. Did you ask your agent if you would be covered for specifically this kind of incident?

A. I assumed that I would be covered for any incident. No one would have predicted this specific incident. That is ridiculous. I assumed I would be covered for any incident or injury.

(Jensen Dep. pp. 161:23-25 – 162:1-3, Ex. 5.)

The law is clear that a customer's "assumptions" are insufficient to create an agreement regarding the purchase of insurance and the duty to advise. *Trotter*, 297 S.C. at 472, 337 S.E.2d at 347 ("[t]here must be a clear oral or written agreement for a court to enforce"); *see also Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998) ("[u]nder South Carolina law, in order for there to be an agreement, there must be a meeting of the minds of the parties").

As a matter of law, Jensen cannot now seek to create an agreement between Peoples and the Daycare that clearly did not exist at the time. *Trotter*, 297 S.C. at 472, 337 S.E.2d at 347 (holding a plaintiff "may not seek, after the fact, to have a court or jury create an undertaking favorable to him, if the parties themselves did not enter such an agreement.")

- c. Peoples had no duty to advise Jensen regarding her personal insurance coverage under the Daycare's commercial policies.

As a matter of law, under the *Trotter* case, Peoples had no duty to advise and did not undertake a duty to advise regarding Jensen's personal insurance coverage. Jensen argues in her Memorandum in Opposition to Defendants' Motion for Summary Judgment that Matthew Wiseman ("Wiseman"), an insurance agent with Peoples, allegedly testified that he owed Plaintiff a duty to advise and Jensen claims that he breached that duty. First, any duty owed by Peoples is a question of law for the court. The law in *Trotter* is the controlling law on the duties of an insurance agent. *Trotter* makes clear that an agent has no duty to advise where a customer does not request coverage and an insurance agent does not undertake to advise on coverage. *Trotter*, 297 S.C. at 471-72, 337 S.E.2d at 347.

Second, nowhere in Wiseman's testimony does he state that Peoples owed Jensen a duty to advise her that she would not have coverage for an incident such as the one at issue or that Peoples breached that duty. In fact, his testimony is to the contrary. Wiseman testified that he has a duty to advise a customer about "known discrepancies" in the type of insurance that the insured requests versus what the insurance placed provides or covers (Wiseman Dep. p. 15:3-10, Ex. 11.) Here, there was no known discrepancy between the insurance that Peoples procured for the Daycare and the insurance that was requested, specifically, building and liability insurance. (4/14/10 Email from Jensen to Wiseman, Ex. 8.) Jensen did not make a clear request for individual coverage under the commercial automobile policy and the policy was clear on its face that she was not an individually named insured. Indeed, she could not have been individually named under the Daycare's commercial automobile policy because the Daycare was created by Jensen as an LLC. Thus, there was no "known discrepancy" between the commercial automobile policy Peoples procured on behalf of the Daycare and what was requested, and

Wiseman's testimony does not reflect a known discrepancy. (Wiseman Dep. pp. 12-17, 34-36, Ex. 11.)

- d. **Jensen declined to explore additional insurance through Peoples that would have provided her additional coverage for the accident at issue.**

Peoples offered to explore with Jensen additional coverages, specifically worker's compensation insurance and a personal automobile policy with higher limits, both of which could have provided Jensen with more insurance coverage for this incident. (4/12/10 Email from Wiseman to Jensen, Ex. 7; 4/14/10 Email from Jensen to Wiseman, Ex. 8; 6/2/10 Email from Wiseman to Jensen, Ex. 9; Peoples 2010 Activity Report, Ex. 10; Peoples 2011 Activity Report, Ex. 12; Jensen Dep. p. 152:2-6, Ex. 5.) Jensen, however specifically declined to do so. (*Id.*; Jensen Dep. p. 152:3-6, Ex. 5.)

Because Jensen, on behalf of the Daycare, chose not to use Peoples as its exclusive insurance agent and specifically told the agency that it did not want to procure coverages such as worker's compensation and personal insurance through Peoples, Peoples had no duty to Jensen and did not breach a duty to advise Jensen regarding coverages.

B. Peoples Was Not The Proximate Cause of Jensen's Alleged Injury.

Jensen cannot show that Peoples could have done anything differently in placing the commercial automobile insurance policy that would have provided her with insurance coverage for her workplace accident. Peoples' insurance expert has opined that Peoples complied with the standard of care in placing commercial insurance for the Daycare. (Powell Aff. ¶ 15, Ex. 4.) Jensen has no expert to testify to the contrary.

When Jensen first started the Daycare in 2004, she chose to form a limited liability company ("LLC") in order to protect herself individually from liability. (Jensen Dep. pp. 129:25

-130:1-5, Ex. 5.) It is not the practice of insurance companies to include as a named insured the owner of an LLC under a commercial automobile policy because the added risk is not priced into the commercial policy and would be duplicative of the owner's personal automobile insurance. (Powell Aff. ¶ 15, Ex. 4.) Indeed, Jensen admits in her deposition that she has no evidence that she could have been added as an individual named insured under the Daycare's commercial automobile insurance policy. (Jensen Dep. p. 138:19-24, Ex. 5.) In addition, both before and after the accident, when the Daycare's commercial automobile insurance policies were written through agencies other than Peoples, the Daycare's commercial automobile policies were titled in the same way and included the same limitations on UIM coverage as the policy placed by Peoples. (Johnson Agency 2006-2010, Ex. 13; Peoples Agency 2010-2013, Ex. 14; Markel 2014 to present, Ex. 15.)

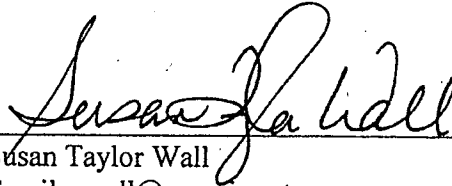
Pursuant to the Affidavit of Edwin Stuart Powell, Jr., the insurance expert, Peoples properly titled the policy in the name of the Daycare and complied with the standard of care in placing commercial automobile insurance for the Daycare. (Powell Aff. ¶¶ 15, 21 Ex. 4.) Jensen has no evidence to the contrary and no expert to testify that the policy was improperly placed or that Peoples breached the standard of care. (*See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002) ("In South Carolina, a plaintiff in a professional malpractice action is required to introduce expert testimony to establish the defendant's standard of care"))).

Because Plaintiff has the burden of proving that Peoples was negligent and that negligence was the proximate cause of her damages and because she cannot meet this burden, the subject action must be dismissed as a matter of law.

VI. CONCLUSION

For all of the foregoing reasons and any others appearing in the record, Defendants Peoples Underwriters, Inc. and Matthew B. Wiseman respectfully request that the Court issue an Order GRANTING its Motion for Summary Judgment and dismissing Plaintiff's Complaint against Peoples and all claims asserted therein, with prejudice.

Respectfully submitted,



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PEOPLES UNDERWRITERS, INC.

April 28, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN,

Plaintiff,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No. 14-CP-26-2463

MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

TO: THIS HONORABLE COURT AND AMANDA C. WILLIAMS, ESQUIRE,
ATTORNEY FOR DEFENDANTS:

The Plaintiff, Donna Jensen, ("Plaintiff") by and through her undersigned attorney, hereby files this Memorandum in Opposition to the Defendants' Motion for Summary Judgment, and in support thereof, would show the following:

STATEMENT OF THE FACTS

In April 2011 Plaintiff met with the Defendant Matthew B. Wiseman ("Defendant Wiseman"), an insurance agent with Defendant Peoples Underwriters, Inc. ("Defendant Business") to discuss her needs for commercial property coverage, commercial general liability coverage and commercial automobile coverage on two buses, as a part of an overall insurance policy pertaining to her day care business. Plaintiff discussed with Defendant Wiseman that she needed insurance that covered her, her employees, the children/students and their parents as well as any other visitors or guests that may be at her business under any and all events and circumstances. During this meeting Defendant Wiseman suggested Plaintiff increase the amount of under insurance coverage on the two buses associated with her business from \$750,000.00 to \$1Million.

Based upon Defendant Wiseman's statements and assurances, Plaintiff purchased \$1 Million of under insurance coverage on the company vehicles as part of comprehensive coverage

4/23/15

so as to protect both herself and others similarly situated to the extent of the law. Further, that based upon her conversation with Defendant Wiseman, Plaintiff believed she had available to her, as a part of the large commercial policy she purchased through Defendant Group, under insurance coverage in the amount of One Million Dollars on each of the two covered company vehicles.

Plaintiff paid the monthly premiums for the comprehensive policy she purchased through Defendant Business on time each month.

On May 11, 2011, while sitting at her desk at work, a vehicle driven by the parent of one of her students crashed into the building of the daycare facility in the same location where Plaintiff was sitting. That, as a result of this collision, Plaintiff suffered significant injuries (determined by Order of the Honorable Stuart Hall to be \$850,000.00). See attached Order marked as Exhibit A.

Immediately following the collision Plaintiff contacted Defendant Wiseman who immediately drove to the day care facility. That Defendant Wiseman indicated to Plaintiff that she would be covered under her large under insurance policy for this incident. Plaintiff pursued a claim against the at-fault driver who had limited insurance coverage and no personal wealth.

Plaintiff also pursued a claim against her own policy issued through Defendant Business for under insurance coverage. After being repeatedly assured by Defendant Wiseman that she would be covered, Plaintiff was informed her claim was being denied based upon confusion concerning the way the policy was structured and who would be considered a named insured.

Plaintiff has been left with significant injuries and significant medical bills with only limited recovery due to misrepresentations made by Defendant Wiseman and Defendant Business to Plaintiff.

STANDARD OF REVIEW

To grant a motion for summary judgment, the court must find that “there is no genuine issue as to any material fact.” *Fed.R.Civ.P.* 56(c). Summary Judgment is appropriate “when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed.” *Garvin v. Bi-Lo*, 343 S.C. 625, 541 S.E. 2d (2001). Summary judgment is not appropriate “when further inquiry into the facts of the case is desirable to clarify the application of the law.” *Doe v. Batson*, 338 S.C. 291, 525 S.E. 2d 909 (Ct. App. 1999). Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Further, “the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Vermeer Carolina’s, Inc. v. Wood Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E. 2d 301 (Ct. App. 1999). Further, “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 673 S.E. 2d 801 (S.C. 2009).

ARGUMENT

I. The Defendant is not entitled to summary judgment as Plaintiff has satisfied the elements of a negligence claim against Defendants.

Defendant Wiseman was deposed in this action on January 12, 2015. During his deposition, Defendant Wiseman admitted, under oath, that he owed the Plaintiff a duty and that he could not recall meeting that duty, as evidenced by the following deposition excerpts:

Page 12 Lines 5-12; Page 12 Line 25-Page 13 Line 7

Q: I mean, your job, right, is to hear what the—the customer says and then you—you go to the various options that you have to try to find what will suit the particular situation. Is that a fair characterization of it?

A: Yes, sir.

Q: What duty, if any do you owe somebody like Ms. Jensen in that situation, if any?

A: My duty is to evaluate her insurance needs and—and to, again, put together a program or a package of insurance policies that would...insure her business.

Q: And so that creates a responsibility on your part, would you agree with that?

A: Yes, sir.

Page 13 Lines 10-16

Q: What are the important things that you need to do with a customer that comes in there calling you about wanting to receive insurance? What's—what's an important part of your interaction with them?

A: Well, listening to their—what their needs or what their desires are.

Page 14 Lines 10-24

Q: [O]nce you hear what you hear, what then do you do? You use your knowledge right? Is that the next thing that happens? You use your experience or knowledge or check with somebody in there to try and figure out what kind of policy to come up with?

A: Yes, sir.

Q: Okay. And you're trying to adapt that to the needs of the person that's sitting there with you. Any question about that?

A: No, sir.

Q: Okay. That's what's going on. So communication is an important part of that, right—

A: Yes, sir.

Page 15 Lines 3-20

Q: If there are situations where there are going to be gaps...in coverage or certain things aren't going to be covered, would you agree with me it's important for you to explain that to her?

A: Well, if there are known discrepancies in what she's—or what the insured is wanting versus what insurance will provide or will cover, then yes.

Q: In other words, you wouldn't want anybody to leave there thinking certain things were covered that weren't, right?

A: Correct.

Q: You want to make sure, as best you can, that the communication going back and forth creates a situation where the "customer" understands what is and isn't covered in this process?

A: Yes, sir.

Page 16 Lines 7-11

Q: Okay. Now, you didn't – did you have that kind of conversation with Ms. Jensen where you told her certain things would be covered and what wouldn't be covered and that sort of thing?

A: I don't recall specifically...

Further, Plaintiff was deposed in this action on December 18, 2014, at which time she attested, under oath, that she relied upon Defendant Wiseman and Defendant Business to advise her what was and was not covered under the large comprehensive policy she purchased through them and that she relied upon assurances she received from Defendant Wiseman. Had Plaintiff

been informed by Defendants that she was not covered under the commercial policy she was purchasing she would have purchased additional coverage for herself, as evidenced by the following deposition excerpts:

Page 137 Line 10-Page 138 Line 6

Q: When you...first went to Peoples or when Peoples reached out to you regarding the procurement of a policy for your day care, was it ever discussed that you were trying to get personal automobile insurance on yourself?

A: No. I was trying to have coverage for every person who went in and out of my building, including myself who was there every single day.

Q: Okay. So did you ever have a discussion with them that you wanted to have personal automobile insurance coverage?

A: No. I already had that...But as my insurance agent, if none of this covers me, I would have thought I would have been advised that maybe you should take out higher insurance on yourself because you aren't covered. If someone else was in this situation, they would be covered, but you are not covered.

Page 157 Line 1-Page 158 Line 11

Q: What are you contending that Peoples should have done differently in placing your policy?

A: I feel that if my own agent didn't know I wasn't covered that there maybe should be more training on the part of their agents to write coverage in a way that's going to cover the people that they are providing a service to.

I went to an expert to get insurance. You know, like I said before, we had multiple conversations, and I was assured that it would be taken care of, that I was covered.

And so if someone who is an expert in the field didn't know that the policy wasn't written in a way that I would be covered, I don't know how I would be expected to know that.

If that's their business and that's what they do, then I would certainly think that this is what they would sit down and discuss with you.

Do you realize that this policy only covers X, Y, Z; and that you as an owner, if you were to get hurt, you're not covered so you should have additional insurance? It would be a great opportunity to sell me more insurance, actually. But I was not advised of how any of that works.

Q: When...are you saying that Peoples said you would be covered for this?

A: The day of the accident I was told I was covered. And on multiple occasions when I would see Matt publicly, just let me know what you need. It's not going to be a problem.

We were waiting to see what the person who hit me's insurance was going to cover. But I was told many times that it was all - it would all be taken care of. It would be submitted. It wouldn't be a problem.

Plaintiff relied upon Defendants to provide her with the comprehensive coverage she wanted and specifically requested to cover herself, her employees, students and parents for any type of incident that may arise at her business. She was assured by Defendants that the coverage

she purchased would be adequate to meet all of her insurance needs. Based upon these reliances, Plaintiff did not purchase any additional insurance on herself and only found out after sustaining significant injuries at the hands of an at-fault driver who crashed into her building that she was not covered due to confusion in the way the policy was written.

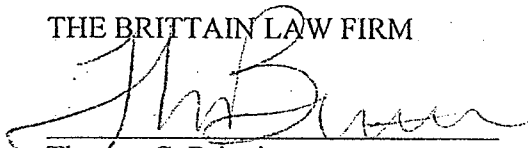
Defendant's negligent actions directly and proximately caused Plaintiff to incur substantial expense in the form of medical bills and lost wages.

For the foregoing reasons, Defendants have failed to meet the criteria required by the court in order for Summary Judgment to be granted in this matter.

CONCLUSION

Plaintiff, respectfully requests that this Court deny, in full, Defendants' Motion for Summary Judgment, and in doing so, any further action as this Court deems necessary, just, and proper.

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Attorney for Plaintiff Donna Jensen

April 16, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
 DONNA JENSEN, INDIVIDUALLY, AND	)	
THE LEARNING STATION, CDC, LLC,	)	C/A No.: 2014-CP-26-2463
F/K/A FOUR J'S & A D, LLC, D/B/A THE	)	
LEARNING STATION,	)	
	)	
Plaintiffs,	)	DEFENDANTS' SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT
MATTHEW B. WISEMAN AND	)	
PEOPLES UNDERWRITERS, INC.,	)	
	)	
Defendants.	)	

Defendants Peoples Underwriters, Inc. and Matthew B. Wiseman (collectively referred to herein as "Peoples"), by and through their undersigned counsel, respectfully submit this Supplemental Memorandum of Law in Support of their Motion for Summary Judgment.

I. Post-accident statements are irrelevant to the duty analysis under *Trotter*.

- Even if Peoples made statements about coverage after the accident, the duty to advise and any breach of that duty must be examined *at the time of procurement*. A plaintiff "may not seek, after the fact, to have a court or jury create an undertaking favorable to him, if the parties themselves did not enter such an agreement." *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347. Thus, the analysis must focus on the parties' agreement at the time the insurance was placed, not after the accident occurs.
- "Courts cannot create contracts for the parties. There must be a clear oral or written agreement for a court to enforce." *Id.* There is no evidence of a clear agreement between Peoples and Jensen, at the time of procurement, wherein Jensen requested and Peoples agreed to obtain individual coverage for Jensen. Further, Jensen admits that she asked no questions as to whether or not she was individually covered; she instructed only that a commercial auto policy be placed. It is undisputed that Peoples was not Jensen's agent for personal insurance and was not the Daycare's exclusive insurance agent. Any understanding Jensen had regarding coverage for herself as an individual was based purely on her admitted "assumptions" which are insufficient to create a duty to advise, as a matter of law. *Id.*; *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 16, 620 S.E.2d 326, 331 (2005).

II. No reasonable inference can be drawn from alleged post-accident statements.

- It cannot be reasonably inferred that Jensen and Peoples discussed individual coverage under the commercial auto policy at the time of procurement based upon alleged post-accident assurances that she would be covered. Taking the facts in the light most favorable to Jensen and assuming that Peoples told her, after the accident, that she “would be covered,” the undisputed evidence proves that Peoples was not referencing coverage under the commercial auto policy. A claim was filed with the at-fault driver’s insurance carrier (GEICO) and with the Daycare’s property insurance carrier (Hartford) (Peoples Activity Report, p. 9, Ex. 1.) It was not until four months after the accident that Jensen’s attorney thought there might be coverage under the commercial auto policy and requested that Peoples notify that carrier. (9/28/11 Letter from Brittain to Peoples, Ex. 2.) If Peoples had thought the commercial auto policy was implicated, Peoples would have put that carrier on notice immediately after the accident. However, this was not an accident that implicated such a policy. (Powell Aff. ¶¶ 17, 18, Ex. 4 to Def.’s Mem. in Supp. of Summ. J.)

III. Jensen’s admissions defeat any assertion that she would have changed her personal automobile insurance limits.

- Jensen’s husband handled their personal automobile insurance. Jensen was completely unaware of what limits her husband selected. (Jensen Dep. p. 141:4-9, Ex. 5 to Def.’s Mem. in Supp. of Summ. J.; Jensen Dep. pp. 144:9-14, 145:4-5, Ex. 3.)
- Jensen testified that the decision on the limits chosen by her husband for personal insurance and the limits chosen by her for her commercial insurance were completely independent of one another.

Q. So as far as you know the decision on what limits your husband selected for your personal auto were done completely independent of what was done for your business; is that right?

A. Two separate things.

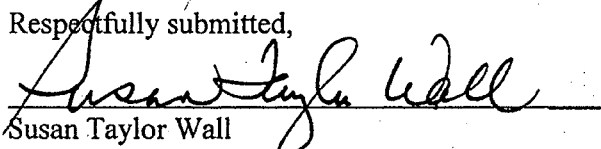
(Jensen Dep. pp. 141:23-25 – 142:1-3, Ex. 5 to Def.’s Mem. in Supp. of Summ. J.)

- Based on the evidence, even though Peoples had no duty to advise Jensen that she was not individually covered under the UIM provision of the Daycare’s commercial automobile policy if she was not in a covered bus, by Jensen’s own admission, she never discussed personal limits with her husband and the two areas of insurance (personal and commercial) were handled independently of each other. Thus, Jensen has failed to prove damages proximately caused by Peoples and her claim fails as a matter of law. When there are no damages proximately caused, plaintiff’s claim must be dismissed. *Lewis v. OMNI Indem. Co.*, 970 F. Supp. 2d 437, 454 (D.S.C. 2013) (holding defendant was entitled to summary judgment because plaintiff failed to present any evidence that the insurance agent’s negligence proximately caused his damages).

IV. Jensen was not Peoples' customer, and thus, Peoples owed her no duty.

- The existence of a duty is a question of law for the courts. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11-12, 620 S.E.2d 326, 329 (2005). If there is no duty, the defendant is entitled to judgment as a matter of law. *Simmons v. Tuomey Regional Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000).
- Jensen's undisputed testimony is that she never requested personal insurance for herself from Peoples. (Jensen Dep. p. 137:19-22, Ex. 5 to Def.'s Mem. in Supp. of Summ. J.)
- Jensen never individually paid for the commercial insurance procured through Peoples. (Jensen Dep. p. 149:10-12, Ex. 3.)
- Because Jensen was not the customer, Peoples owed her no duty to advise. *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 337 S.E.2d 343 (Ct. App. 1988); see also *CRC Scrap Metal Recycling, LLC v. Hartford Cas. Ins. Co.*, 531 Fed. Appx. 333 (4th Cir. 2013); *Mullen v. State Farm Casualty and Fire Co.*, C/A No. 09-2392-JFA, 2010 WL 2228369 (D.S.C. 2010); *Houck*, 366 S.C. at 16, 620 S.E.2d at 331; *Carolina Prod. Maint. v. United States Fid. & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (1992).
- The commercial automobile policy was "clear on its face" that Jensen was not individually insured. (Order, Ex. 3 to Def.'s Mem. in Supp. of Summ. J.) Jensen had a duty, under the law, to read her policy. *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977). Because Jensen admittedly failed to read her policy, which was in her possession for a considerable time before the accident, and failed to ask questions regarding the policy, under *Doub*, Jensen is not entitled to recover against Peoples. (Jensen Dep. pp. 114:21-25 – 115:1-21; 122:13-23, Ex. 3.)

Respectfully submitted,


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May 6, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
DONNA JENSEN,	)	C/A No. 14-CP-26-2463
	)	
Plaintiff,	)	
	)	
vs.	)	SUPPLEMENTATION TO
	)	PLAINTIFF'S MEMORANDUM
MATTHEW B. WISEMAN and PEOPLES	)	IN OPPOSITION TO DEFENDANTS'
UNDERWRITERS INC.,	)	MOTION FOR SUMMARY JUDGMENT
	)	
Defendants.	)	

TO: THE HONORABLE LARRY B. HYMAN AND AMANDA C. WILLIAMS,
ESQUIRE, ATTORNEY FOR DEFENDANTS:

PART I – BRIEF FACTS

In an effort to clarify the issues before the Court, the following brief facts are set out as follows.

1. Plaintiff Donna Jensen ("Plaintiff") has run a daycare center for many years. She is not a particularly sophisticated business woman.

2. Defendant Matthew Wiseman ("Defendant Wiseman") is an employee of Defendant Peoples Underwriters, Inc. ("Defendant Peoples") which is an independent insurance agency known in Horry County as the "Peoples Insurance Company" fully licensed as independent insurance agents.

3. Such an agency, unlike a State Farm or Allstate agent, advises and informs and helps the public choose insurance carriers, coverages and limits, etc. as part of their everyday activities.

4. Defendant Wiseman, who was at all times relevant to this action an employee and agent of Defendant Peoples, contacted Plaintiff. She did not go into Defendant Peoples, he e-mailed her and indicated that he had some special knowledge concerning daycare centers and had

read about some lines of insurance that he wished to recommend to her. He contacted her seeking to create a relationship with her where he would advise her on insurance matters [see deposition transcript of Plaintiff, p. 105, l. 25-p. 106, l. 23; see also deposition transcript of Defendant Wiseman p. 11, ll. 12-21]

5. Eventually, Plaintiff accepted Defendant Wiseman's solicitations and came in to listen and discuss her insurance needs with him. This meeting was of relatively long duration where many aspects of insurance coverage were discussed. Defendant Wiseman gave his advice on these topics. Plaintiff discussed with him what she wanted, that is that everyone connected with her business, specifically including herself, be covered in all of these lines of insurance [see deposition transcript of Plaintiff p. 137, ll. 16-18]

6. While going over some insurance documents, declaration pages and/or applications, Plaintiff told Defendant Wiseman that she expected the insurance to cover everyone who went in and out of her building, including herself who was there every single day. [see deposition transcript of Plaintiff p. 137, ll. 16-18]

7. Defendant Wiseman does not deny this.

8. Thereafter, among many items that were discussed where advice was given by Defendant Wiseman, and while Defendant Wiseman was listening to Plaintiff about her desires in connection with the insurance policy, a page in front of them both referred to underinsurance coverage which prompted a specific discussion concerning underinsurance coverage (despite what Defendants have alleged Plaintiff never sought Workers' Compensation coverage from these Defendants) [see deposition transcript of Defendant Wiseman p. 37, ll. 9-25]

9. Plaintiff and Defendant Wiseman specifically discussed underinsurance and Defendant Wiseman recommended that Plaintiff increase the limits on the underinsurance

coverage which, after more discussion, she did to One Million Dollars. [see deposition transcript of Defendant Wiseman p. 37, ll. 9-25, p. 38, l. 20-p. 39 l. 7; see also deposition transcript of Plaintiff p. 119, ll. 4-8]

10. Based upon Plaintiff's expressed desire for coverage that included her as the sole proprietor of the business she thought she herself was covered by the underinsurance policy. [see deposition transcript of Plaintiff p. 105, ll. 20-24, p. 133, ll. 24-25, p. 134, ll. 1-3, p. 137, ll. 16-18, p. 157, ll. 8-24]

11. Defendant Wiseman knew she wanted to be covered, specifically, and did not advise her that this underinsurance policy would not cover her. [see deposition transcript of Plaintiff p. 137, ll. 7-9, p. 143, ll. 21-24, p. 157, ll. 8-24]

12. Thereafter the collision which is the underlying tort in this matter occurred. Plaintiff received injuries which grew to be serious and began a conversation with Defendant Wiseman concerning payments from the underinsurance coverage she had purchased through Defendant Peoples.

13. Defendant Wiseman assured her that she was covered and that they were "waiting to see what the driver's insurance policy covered". [see deposition transcript of Plaintiff p. 157, ll. 8-24, p. 158, ll. 1-13].

14. Plaintiff testified to this under oath and Defendant Wiseman did not deny it saying he did not recall. [see deposition transcript of Defendant Wiseman p. 29, ll. 15-25, p. 30, ll. 4-6]

15. Plaintiff brought an action against the at-fault driver, Courtney Lynn Nelson. Ms. Nelson's carrier paid the policy limits of \$25,000.00 under a Covenant which was executed, allowing Ms. Jensen to fully pursue a full recovery. Ms. Lisa Davis of the Horry County Bar defended that action. Ms. Jensen received substantial medical treatment including surgeries, has

permanent disabilities of a significant nature, very extensive medical bills, loss of work and other problems all of which were put forward before the Honorable Daniel Dewitt Hall who awarded her \$850,000.00 in the underlying action.

16. Plaintiff does have a \$25,000.00 underinsurance coverage policy on her personal car but since she was in neither vehicle, under the laws of the State of South Carolina, despite any policy language if she is covered under two underinsurance policies she's entitled to pick the largest and recover there.

17. Even though Defendant Wiseman assured Plaintiff she was covered, the carrier chosen and recommended by Defendant Wiseman among several he could have chosen, Selective, denied that the underinsurance provision covered Plaintiff.

18. The United States District Court ruled that, among other things, "the way the policy had been written indeed excluded Plaintiff from coverage."

19. Defendant Wiseman, when asked about what he told Plaintiff concerning whether she was covered, replied that he did not recall. [see deposition transcript of Defendant Wiseman p. 29, ll. 15-25, p. 30, ll. 4-6]

20. This matter is before the Court on a Motion for Summary Judgment where all the Plaintiff needs to establish is a mere scintilla of evidence to move forward.

PART II - AS TO PLAINTIFF

Defendant Wiseman admitted in his deposition testimony that interpreting insurance contracts is a "sophisticated" endeavor. [see deposition transcript of Defendant Wiseman p. 25, ll. 15-19]

Still, Defendants would blame Plaintiff for not adequately studying the policy, understanding its contents and discussing it with her agent [see deposition transcript of Plaintiff p. 116, ll.6-15, p. 122, ll. 21-23]

Plaintiff relied upon her agent that he had procured the insurance discussed (and in fact verified the amounts) and believed him when he advised her to sign the insurance contract. [see deposition transcript of Plaintiff p. 161, ll. 19-21, p. 162, ll. 19-23]

The facts reveal that both Plaintiff and Defendant Wiseman believed that Plaintiff's injuries were covered. [see deposition transcript of Plaintiff p. 143, ll. 21-24, p. 158, ll. 1-13]

Defendants ask much of Plaintiff; to master both insurance and legal principals and overcome mistaken procurement and negligent advice.

PART III – CASE COMPARISON

General principles of agency apply to the causes of action set forth by the Plaintiff; that the agent has a duty to perform a service and must use reasonable care to perform that service and advise the principle. Below is a comparison of the facts of this case together with Trotter v. State Farm Mutual Automobile Insurance Company and D. Kim Ledford, 297 S.C. 465 (1988), 377 S.E.2d 343, and Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969).

<u>Jensen</u>	<u>Trotter</u>	<u>Duckworth</u>
• Independent Agent	• State Farm Agent	• Independent Agent
• Agent contacted Plaintiff	• Plaintiff contacted Agent	• Unknown
• Agent advised Plaintiff on choices	• Agent did not discuss or advise	• Agent advised Plaintiff
• Specific request to “cover me”	• No specific request “full coverage on truck”	• Specific request “on my elevator”

• Meeting of the minds expressed "cover me"; understood clearly	• No meeting of the minds; no mention	• Meeting of the minds expressed as to elevator; understood clearly
• Mutual understanding after collision "you are covered"	• No mutual understanding after collision	• Mutual understanding "elevator is covered"
• Discussed the coverage "underinsurance page and recommendation to increase	• Workers' Compensation coverage never discussed	• Discussed the application of coverage to elevator
• Carrier denied	• Carrier denied (State Farm)	• Carrier denied
• ?	• Agent not at fault to Plaintiff	• Agent responsible to Plaintiff

IV - BRIEF DISCUSSION

A quick reading of *Trotter* and *Duckworth*, both good law, in light of the facts in this action establishes without question a viable cause of action for Plaintiff.

An independent agent with access to numerous carriers, in our case, contacted the Plaintiff to set up a relationship where he would be advising her on insurance decisions. In *Trotter* Ledford was a State Farm insurance agent, not an independent insurance agent like Defendant Wiseman and Defendant Peoples and, furthermore, Ledford did not contact Trotter, Defendant Wiseman contacted Plaintiff. Trotter, based on information he heard in the community, sought out Agent Ledford.

This initiated a very different and deeper relationship between Plaintiff and Defendant Wiseman at Defendant Peoples because of the nature of his business, that being an independent agent, and because of the fact that he called her up seeking to establish an advisory relationship with her in connection with her insurance needs; none of this occurred in *Trotter*.

Trotter and Agent Ledford never discussed Workers' Compensation coverage in connection with Trotter's purchase of insurance from State Farm. The statement made was I want "full coverage on my truck". Workers' Compensation never came up; was never discussed. Plaintiff and Defendant Wiseman specifically discussed underinsurance and to whom it would apply. In fact, as part of his advice on coverage and limits throughout their discussions (remember, Defendant Wiseman had called Plaintiff seeking her business and seeking to advise her concerning new lines of insurance and their applicability to daycare centers); he recommended she increase underinsurance coverage after she had told him that she wanted the insurance she was purchasing to apply to her. In *Duckworth*, the facts are similar to the ones in this action, in that the Plaintiff sought and discussed specific coverage questions with the agent.

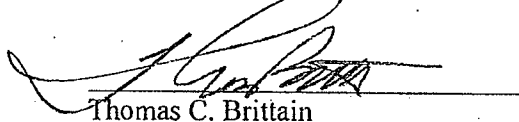
In this case there was a clear meeting of the minds that she was, in fact, covered by the underinsurance policy based on the discussions she had with Defendant Wiseman, his failure to deny those discussions and statements made by the agent after the collision in response to the question, "am I covered?"; "yes, don't worry, we are waiting to see what the driver's insurance coverage covers." When this set of facts was put to Defendant Wiseman he did not deny them but indicated "he could not recall them". [see deposition transcript of Defendant Wiseman p. 29, ll. 15-25, p. 30, ll. 4-6]

The state of the evidence in this regard is greatly in favor of Plaintiff's recollection of these conversations and it makes perfectly good sense in the sequence of events. In *Trotter*, at no time did Agent Ledford indicate that Trotter's employee would be covered under a Workers' Compensation policy. There was no discussion about it and Agent Ledford never implied or in any way stated that there was coverage. Unlike this action, this indicates there was no understanding of the parties while the terms of the insurance policy were being discussed.

In this case it is specifically admitted by all parties that underinsurance was discussed, advice was given and limits were raised which is another striking difference from the *Trotter* case where the only statement was I want "full protection" on my truck. Furthermore, in this action we have the factors present that the court could not find but was seeking in the *Trotter* case. Had Trotter and Agent Ledford discussed Workers' Compensation coverage and who it covered, a purchase then was made, a premium paid and thereafter Ledford refused to deny that Trotter was covered, the agent would clearly be responsible. We have those facts present in this action, which is much more similar to the *Duckworth* case where the agent was held responsible than it is to the *Trotter* case. In fact, the *Trotter* case has a completely opposite scenario of facts to those present here.

The Defendants' Motion for Summary Judgment, under the scintilla of evidence standard, should be denied.

THE BRITTAIN LAW FIRM



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Attorney for Plaintiff Donna Jensen

8 May 2015, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN,

Plaintiff,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No.: 2014-CP-26-2463

)

)

)

)

)

MOTION FOR SUMMARY JUDGMENT

Now comes Thomas C. Brittain, Esquire on behalf of Plaintiff Donna Jensen and moves this Court for an Order granting Summary Judgment in the above-referenced case.

That attached hereto as Exhibit A is an Order signed by the Honorable Daniel Dewitt Hall on March 18, 2015, granting Donna Jensen damages in the underlying case against the tortfeasor for \$850,000.00.

Further, that finding was substantiated by good and credible evidence and the amount of damages suffered in connection with the underlying incident has been legally established at \$850,000.00 is no longer subject to interpretation or contradictory evidence.

Based on the entrance of this Order and its signing there is no genuine issue of material fact as to the amount of damages Donna Jensen has sustained.

Further, Matthew Wiseman, a Defendant and agent of the Defendant Peoples Underwriters, Inc. has in his sworn testimony admitted that he had a duty to Ms. Jensen to affect insurance coverage at her request.

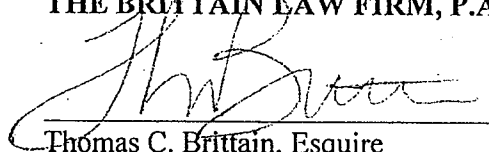
Further, that with respect to fulfilling that duty and communicating the effectiveness and content of that insurance coverage he admits either that he failed to do so or does not recall.

Further, he does not recall advising Ms. Jensen that she was "fully covered" after the collision.

On the other hand, Ms. Jensen has sworn under oath that she did seek a particular amount of underinsurance coverage that would cover her that Mr. Wiseman suggested not only that she get the underinsurance to cover her but that she get it in an increased amount which, at his request, she agreed to increase it to \$1 Million Dollars. Enclosed please find portions of the deposition of Mr. Wiseman as Exhibit B and Ms. Jensen as Exhibit C.

Wherefore, no genuine issue of material fact exists with respect to liability that is a failure to provide insurance coverage as an agent and the amount of damages sustained as a result thereof.

THE BRITTAIN LAW FIRM, P.A.



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April 7, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN,

Plaintiff,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No.: 2014-CP-26-2463

) **AMENDED MOTION TO RECONSIDER**
) **ORDER FOR SUMMARY JUDGMENT**
) **AS TO PLAINTIFF DONNA JENSEN**

TO: THIS HONORABLE COURT AND SUSAN TAYLOR WALL, ESQUIRE,
ATTORNEY FOR DEFENDANT:

Now comes attorney for Plaintiff Donna Jensen ("Plaintiff") and moves this Court to reconsider its previous Order for Summary Judgment as to Plaintiff on June 23, 2015. Plaintiff would ask the Court to reconsider granting Summary Judgment at the beginning of the trial of this action based upon relevant information recently received by counsel for the Plaintiff. Plaintiff initially filed her Motion to Reconsider shortly after the Court's oral ruling granting Summary Judgment, which counsel for Defendants objected to as being untimely, due to new pertinent evidence discovered. In response to the Court's recent written Order granting Summary Judgment, Plaintiff now submits this Amended Motion to Reconsider.

Defendants Matthew B. Wiseman's and Peoples Underwriters, Inc.'s ("Defendants") Motion for Summary Judgment was heard before the Honorable Diane Schafer Goodstein during pre-trial motions on June 22-23, 2015 at which time oral arguments were made by attorneys for Plaintiff and Defendants. On the morning of June 23, 2015, Judge Goodstein called attorneys for Plaintiff and Defendants into her chambers at which time she inquired as to any "insurable interest" Plaintiff may have had in her daycare business at the time the commercial policy in question was written. Plaintiff attorney, Thomas C. Brittain, advised the Court he did not have any such

evidence in his possession due to the fact the issue of insurable interests had never arisen during the duration of litigation of this action.

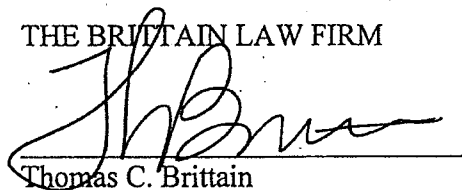
Following this in-chambers session, attorneys for Plaintiff and Defendants resumed oral arguments at which time attorney for the Defendants, Susan Wall, began discussing insurable interest, which had not been a part of her original Motion for Summary Judgment nor any of her subsequent memorandums in support of that motion. Attorney for the Plaintiff, Thomas C. Brittain, was unable to offer any evidence in response to this new argument given the fact no notice of the new issue was given. However, he did advise the Court that he had just learned, through the Plaintiff, that she believed the vans covered under the commercial policy for her daycare center were titled in her name and/or her husband's name individually but, due to the fact this was a new issue, he would need additional time to produce this evidence. Shortly following oral arguments, Judge Goodstein made her ruling granting Defendants' Motion for Summary Judgment based upon the arguments presented by Susan Wall, including this new issue of insurable interest.

On Thursday June 25, 2015, Thomas C. Brittain received from the Plaintiff a copy of the titles for the two vans covered under the commercial auto policy for her day care center (attached hereto as Exhibit A). The company van with Vehicle ID Number 1GBHG31K9SF121727 is titled under the name "Donna M. Jensen or Four J's & A D LLC or 426 Blackberry Ln, Myrtle Beach, SC 295791709"; the other company van with Vehicle ID Number 1GDHG31Y8SF522116 is titled under the name "Four J's & A D LLC 690 Singleton Ridge Rd, Conway, SC 295269154". The title for the first company van clearly indicates Ms. Jensen had an insurable interest at the time this commercial auto policy was written and that she should have been included as named insured on that policy along with the daycare.

Further, in the e-mail from Defendant Matthew Wiseman to Plaintiff dated April 12, 2010 (attached hereto as Exhibit B) he asks her for some additional information he will need pertaining to the new commercial policy. He requests from her, at that time, the VIN numbers for the busses as well as the names, dates of birth and drivers' license numbers for all drivers of the busses. However, he fails to ask her how the busses are titled. Had Defendant Wiseman inquired into this matter he would have known to include Plaintiff individually as well as her business name as named insureds on the commercial auto policy, as she specifically requested, and she would have been covered for the incident in question.

Based upon this newly discovered evidence, which is directly relevant to the issue of insurable interest argued by defense attorney Susan Wall during oral arguments, Plaintiff hereby requests this Court reconsider its Order for Summary Judgment as to the Plaintiff in this action and grant Plaintiff's Motion for Summary Judgment. Further, Plaintiff reiterates any and all statements, evidence, case law, etc. contained in her previous memorandums of law and/or briefs filed in relation to the motions for Summary Judgment in this action.

THE BRITTAIN LAW FIRM



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Attorney for Plaintiff Donna Jensen

August 25, 2015
Myrtle Beach, South Carolina

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-26-2463

vs.

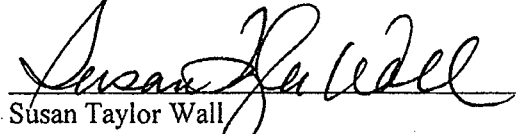
**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S PREMATURE MOTION
TO RECONSIDER ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Defendants.

Based on the foregoing, the Court should deny Plaintiffs' Motion to Reconsider the Order Granting Defendants' Motion for Summary Judgment on the grounds that it is premature and is not ripe for filing until the written order has been signed and filed by the Court. Defendants specifically reserve their right to respond substantially to the arguments raised in Plaintiffs'

Motion until such time as the Court enters a written Order granting Defendants' Motion for Summary Judgment.

Respectfully submitted,



Susan Taylor Wall

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ATTORNEYS FOR DEFENDANTS
MATTHEW B. WISEMAN AND
PEOPLES UNDERWRITERS, INC.

July 2, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
DONNA JENSEN,	)	
	)	C/A No.: 2014-CP-26-2463
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' OPPOSITION TO
	)	PLAINTIFF'S AMENDED MOTION TO
MATTHEW B. WISEMAN AND	)	RECONSIDER ORDER GRANTING
PEOPLES UNDERWRITERS, INC.,	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
Defendants.	)	
	)	
	)	

Defendants Matthew B. Wiseman and Peoples Underwriters, Inc. ("Defendants"), by and through their undersigned counsel, hereby respond to Plaintiff's Amended Motion to Reconsider Order Granting Defendants' Motion for Summary Judgment. The Court properly granted Defendants' Motion for Summary Judgment in the Order dated August 24, 2015, and Plaintiff's Motion should be denied because Plaintiff now improperly seeks to introduce new evidence in an attempt to challenge the Court's ruling. In its Amended Motion to Reconsider, Plaintiff attaches purported certificates of title for the Daycare buses, both of which reflect that the buses were titled in the name of the Daycare and one of which reflects that Donna Jensen was also an owner. As an initial matter, there is no proof of authenticity for the copies of titles attached and no evidence that the attachments are true and correct copies of the titles that were in effect at the time Peoples placed the commercial insurance policy in 2010. Regardless, the attachments cannot be considered.

As a matter of law, the Court cannot consider the attachments in ruling on the Amended Motion to Reconsider because Plaintiff did not present the documents, properly authenticated, as evidence before or at the summary judgment hearing. "A party cannot use Rule 59(e) to present

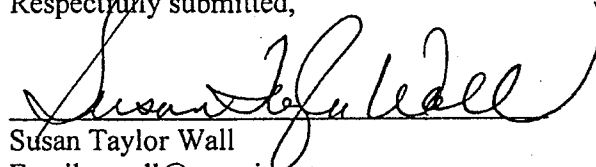
new evidence to the Court.” *Mozingo v. Ford Motor Co.*, No. 2009-UP-282, 2009 WL 9528979 (Ct. App. June 4, 2009) (holding summary judgment was appropriate where the evidence that was attached as an exhibit to plaintiff’s motion to reconsider was not submitted to the court prior to or at the summary judgment hearing). In addition, counsel’s statements regarding the ownership of the buses, made for the first time at the summary judgment hearing by Plaintiff’s counsel, are not evidence and could not be considered by the Court in ruling on Defendants’ Motion for Summary Judgment because statements of counsel are inadmissible as evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991); *see also McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933). Plaintiff could have raised the issue regarding her alleged ownership of the buses during the course of the litigation, but Plaintiff failed to do so. Jensen never raised the issue of her ownership interest in the declaratory judgment action against her insurer, nor did she raise the issue in her pleadings, discovery or litigation of this lawsuit. “Generally, ‘[a] party cannot use a motion...to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not.’” *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 344 (Ct. App. 2008). Accordingly, Plaintiff is now barred from introducing the attached title documents on a Rule 59(e) motion as a basis for reconsidering the Court’s order granting Defendants’ Motion for Summary Judgment.

Not only can the attachments not be considered by the Court on a Rule 59(e) Motion, Plaintiff has no expert to testify that Defendants breached the standard of care in placing the commercial automobile insurance policy or that Defendants were required to take any additional action in placing the policy at issue based on the attachments. Plaintiff summarily claims in her Amended Motion to Reconsider that if Defendants had asked her in whose name the buses were titled, she would have been listed on the policy as an additional named insured and would have

been covered for the accident at issue. Jensen, however, has no evidence to support this newly made claim. In fact, the only evidence in the record is to the contrary. As is reflected in Jensen's deposition and the attachments to her deposition, the application, signed by Jensen on behalf of the Daycare, provided Jensen with an opportunity to include herself as an additional insured, but she left that part of the application blank. The insurance policies and the insurance cards that Jensen received all reflected the name of the Daycare only. There is no evidence in the record that Jensen told Defendants that one of the buses was titled in her name and no evidence in the record that if Jensen had told Defendants that her name (allegedly) appeared on the title to one of the buses, the outcome regarding Jensen's coverage for the accident at issue in this lawsuit would have been any different. Because Jensen has no expert to counter the only expert testimony of record that Defendants complied with the standard of care in placing the commercial automobile insurance policy at issue, the Order Granting Defendants' Motion for Summary Judgment must stand.

For all of the foregoing reasons and any others appearing in the record, Defendants request that the Court deny Plaintiffs' Amended Motion to Reconsider the Order Granting Defendants' Motion for Summary Judgment.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS

MATTHEW B. WISEMAN AND

PEOPLES UNDERWRITERS, INC.

August 31, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DONNA JENSEN,

Plaintiff,

vs.

MATTHEW B. WISEMAN and PEOPLES
UNDERWRITERS INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No.: 2014-CP-26-2463

**NOTICE OF MOTION AND
MOTION FOR NEW HEARING
ON SUMMARY JUDGMENT
MOTIONS BASED ON NEWLY
DISCOVERED EVIDENCE**

**TO: THIS HONORABLE COURT AND SUSAN TAYLOR WALL, ESQUIRE,
ATTORNEY FOR DEFENDANT:**

Now comes attorney for Plaintiff Donna Jensen ("Plaintiff") and moves this Court to allow a new hearing on Summary Judgment motions in this action pursuant to the applicable rules of the South Carolina Rules of Civil Procedure. Plaintiff makes this request based upon relevant information pertaining to a new issue in this action which arose during pre-trial motions for Summary Judgment.

Defendants Matthew B. Wiseman's and Peoples Underwriters, Inc.'s ("Defendants") Motion for Summary Judgment was heard before the Honorable Diane Schafer Goodstein during pre-trial motions on June 22-23, 2015 at which time oral arguments were made by attorneys for Plaintiff and Defendants. On the morning of June 23, 2015, Judge Goodstein called attorneys for Plaintiff and Defendants into her chambers at which time she inquired as to any "insurable interest" Plaintiff may have had in her daycare business at the time the commercial policy in question was written. Plaintiff attorney, Thomas C. Brittain, advised the Court he did not have any such evidence in his possession due to the fact the issue of insurable interests had never arisen during the duration of litigation of this action.

FILED
HORRY COUNTY
2015 SEP 22 PM 4:06
MELANIE HUGHES-WARD
CLERK OF COURT

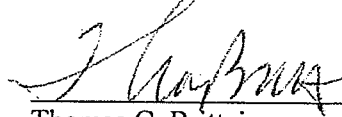
Following this in-chambers session, attorneys for Plaintiff and Defendants resumed oral arguments at which time attorney for the Defendants, Susan Wall, began discussing insurable interest, which had not been a part of her original Motion for Summary Judgment nor any of her subsequent memorandums in support of that motion. Attorney for the Plaintiff, Thomas C. Brittain, was unable to offer any evidence in response to this new argument given the fact no notice of the new issue was given. However, he did advise the Court that he had just learned, through the Plaintiff, that she believed the vans covered under the commercial policy for her daycare center were titled in her name and/or her husband's name individually but, due to the fact this was a new issue, he would need additional time to produce this evidence. Shortly following oral arguments, Judge Goodstein made her ruling granting Defendants' Motion for Summary Judgment based upon the arguments presented by Susan Wall, including this new issue of insurable interest.

On July 6, 2015, Plaintiff submitted a Motion to Reconsider Order for Summary Judgment (prior to the Court issuing its written Order) after receiving from the Plaintiff proof that one of the vans covered under the commercial insurance policy for her business was titled in her name. On August 14, 2015 The Honorable Diane Schafer Goodstein issued her Order Granting Defendants' Motion Summary Judgment in this action.

Further, on September 1, 2015, The Honorable Diane Schafer Goodstein issued her Order Denying Plaintiff's Motion to Reconsider. In her ruling, Judge Goodstein cited applicable case law and court rules barring Plaintiff from presenting new facts and/or evidence to the Court during oral arguments.

Based upon this newly discovered evidence, which is directly relevant to the issue of insurable interest argued by defense attorney Susan Wall during oral arguments, Plaintiff hereby requests this Court grant Plaintiff's Motion for a new hearing on motions for Summary Judgment.

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Attorney for Plaintiff Donna Jensen

Sept 22, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
 DONNA JENSEN,	)	
	)	C/A No.: 2014-CP-26-2463
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' OPPOSITION TO
	)	PLAINTIFF'S MOTION FOR NEW
MATTHEW B. WISEMAN AND	)	HEARING ON SUMMARY
PEOPLES UNDERWRITERS, INC.,	)	JUDGMENT MOTIONS BASED ON
	)	NEWLY DISCOVERED EVIDENCE
Defendants.	)	
	)	
	)	
	)	

Defendants Matthew B. Wiseman and Peoples Underwriters, Inc. ("Defendants"), by and through their undersigned counsel, hereby submit this Opposition to Plaintiff's Motion for New Hearing on Summary Judgment Motions Based on newly Discovered Evidence. By this motion, which was filed on September 22, 2015, Plaintiff seeks for the third time to have the Court reconsider its entry of summary judgment in favor of Defendants, which judgment was entered on August 20, 2015. The Court should deny Plaintiff's Motion for the following reasons.

First and foremost, the Rules of Civil Procedure do not provide for a "motion for new hearing." Rather, once judgment has been entered in a case, the only post-trial motions available to the losing party under the Rules are: (1) a Rule 59(a) motion for new trial, which must be filed within 10 days of the moving party receiving notice of the entry of judgment, (2) a Rule 59(e) motion to alter or amend the judgment, which also must be filed within 10 days the of moving party receiving notice of entry of judgment, or (3) a Rule 60 motion for relief from judgment, which is limited to a few extraordinary circumstances. Plaintiff's motion does not claim to be any of these things. It should therefore be denied out of hand.

In reality, Plaintiff's motion appears to be nothing more than a re-hash of her earlier Rule 59(e) motion to reconsider, which was filed on August 26, 2015, and denied by Order dated September 10, 2015. As such, Plaintiff's recent motion should be denied as untimely because it was not filed within 10 days of Plaintiff receiving notice of the entry of judgment as required by the rules, but rather was filed more than a month *after* the entry of judgment. See Rule 59(e), SCRPC.

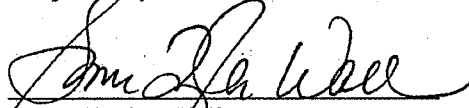
Moreover, even if Plaintiff's recent motion were to be considered as a Rule 60 motion for relief from judgment (and nothing in the motion cites the rule or otherwise suggests that such characterization would be proper), such a motion may only present new evidence if the moving party demonstrates that such evidence "could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2), SCRPC. Rule 59(b) requires that motions for a new trial be submitted within 10 days of the moving party receiving notice of the entry of the adverse judgment. Rule 59(b), SCRPC. Here, Plaintiff never filed a Rule 59(b) motion, and the deadline for doing so has long passed. In Plaintiff's recent motion, she attempts to present the exact same evidence that she has attempted to present twice before, and has done so improperly. This evidence was plainly available to Plaintiff before the Rule 59(b) deadline, and Plaintiff therefore cannot satisfy the Rule 60 requirement of showing that the "new" evidence could not have been discovered before that time. Accordingly, relief under Rule 60 is not available to Plaintiff, and Plaintiff's motion must be denied.

In addition to the grounds set forth above, Defendants incorporate all arguments and defenses raised in Defendants' Memorandum in Support of Motion for Summary Judgment, Defendants' Supplemental Memorandum in Support of Summary Judgment, Defendants' Response in Opposition to Plaintiff's Supplemental Memorandum in Opposition to Defendants'

Motion for Summary Judgment, Defendants' Motion to Strike Use of Order Awarding Damages from Personal Injury Case, Defendants' Opposition to Plaintiff's Premature Motion to Reconsider Order Granting Defendants' Motion for Summary Judgment, and Defendants' Opposition to Plaintiff's Amended Motion to Reconsider Order Granting Defendants' Motion for Summary Judgment.

WHEREFORE, for the reasons set forth above and all others in the filings incorporated by reference, Plaintiff's Motion for New Hearing on Summary Judgment Motions Based on newly Discovered Evidence should be DENIED.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS
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PEOPLES UNDERWRITERS, INC.

September 30, 2015
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 08 2015

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2014-CP-26-2463

Donna Jensen Appellant,

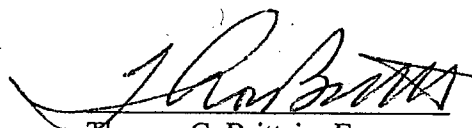
v.

Matthew B. Wiseman and Peoples Underwriters, Inc. Respondents.

NOTICE OF APPEAL

Donna Jensen appeals the Order Denying Motion to Reconsider, Alter or Amend Order granting Defendant's Motion for Summary Judgment of the Honorable Diane Schafer Goodstein dated September 1, 2015. Appellant received written notice of entry of this Order on September 8, 2015.

October 7, 2015



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843-449-8562
Attorney for Appellant

RECEIVED
10/15/15

Other Counsel of Record:
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Attorneys for Respondents

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 02 2015
SC Court of Appeals

APPEAL FROM Horry County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2014-CP-26-2463

Donna Jensen Appellant,

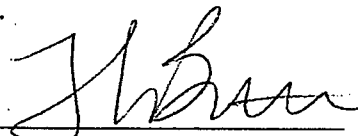
v.

Matthew B. Wiseman and Peoples Underwriters, Inc. Respondents.

NOTICE OF APPEAL

Donna Jensen appeals the Order Denying a post-trial Motion for New Hearing Based on Newly Discovered Evidence of the Honorable Diane Schafer Goodstein dated October 1, 2015. Appellant received written notice of entry of this Order on October 9, 2015. Appellant previously filed a Notice of Appeal on October 8, 2015, from the initial underlying Order Denying Motion to Reconsider, Alter or Amend dated September 8, 2015.

October 30, 2015


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Attorney for Appellant

Other Counsel of Record:
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