

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY CIRCUIT COURT

Roger M. Young, Sr., Circuit Court Judge

Civil Action Nos.: 14-CP-08-1231, 14-CP-08-1232

Appellate Case No.: 2016-000521

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SC Court of Appeals

Estate of John Fortney, Deceased,
By His Duly Appointed Personal
Representative, Constance S. Fortney,..... Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

AND

John Steven Robinson,.....Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

RECORD ON APPEAL
Volume 2 of 4

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INDEX

I.	ORDERS	
	Order of Berkeley County dated February 10, 2016.....	1
	Probate Court Order dated 8/6/08	20
II.	PLEADINGS	
	Fortney Wrongful Death Complaint dated 5/27/14	23
	Fortney Survival Action Complaint dated 5/27/14	26
	Answer of Respondent (Wrongful Death) dated 6/16/14	29
	Answer of Respondent (Survival) dated 6/16/14	34
	Robinson Complaint dated 5/27/14	38
	Answer of Respondent to Robinson Complaint dated 6/16/14	41
	Respondent's Discovery Response dated 9/16/09	46
	Respondent's Discovery Response dated 3/8/11	50
	Appellant's Pre-Trial Brief dated 9/22/15	52
	Respondent's Pre-Trial Brief dated 10/21/13	55
	Appellant's Memorandum on Apportionment dated 9/25/15	67
	Appellant's Proposed Order dated 12/14/15	77
	Respondent's Proposed Order dated 12/14/15	113
	Respondent's Proposed Order dated 12/29/15	135
	Respondent's Rebuttal to Plaintiff's Proposed Order	160
III.	TESTIMONY	
	Transcript of Hearing dated 9/28/15-10/2/15	197
	Deposition Transcript of Anthony Wilks dated 7/16/12	1188
	Deposition Transcript of Alexander Clayson dated 8/26/11	1305
IV.	CORRESPONDENCE	
	Email correspondence dated 12/14/15 (Respondent submits proposed Order)	1425
	Email correspondence dated 12/29/15 (Respondent submits 2 nd proposed Order)	1448
	Email correspondence dated 12/29/15 (Appellant's objections)	1474
	Email correspondence dated 12/30/15 (Court direction positions to be stated)	1476
	Email correspondence dated 12/30/15 (Appellant's objections/positions)	1478
V.	EXHIBITS	
	RUS 300 Forms dated 1990-2008	1479
	RUS Memo dated 1/26/98	1491
	7 C.F.R. § 1730.21	1506
	1993 NESC § 210-420	1507
	B.E.C. Safety Manual dated 2006	1515
	2002-2003 Pole Inspection Contract dated 10/30/01	1642
	Line Measurements dated 5/29/08	1667

Line Measurements dated 4/23/08	1669
Staking Sheet dated 2/1/93	1676
Job Description (undated)	1677
Maintenance Records dated 4/3/89-3/6/09	1680
Aerial Image of Thornhill Farms dated 1993	1693
Aerial Images of Thornhill Farms dated 2015	1694
Showdeo Promotional Plan dated 2/28/08	1696
Photos of tents dated 4/23/08	1697
Photos of power pole dated 4/23/08	1704
Cathleen Moore CV dated January 2014	1706

V. CERTIFICATE OF COUNSEL	1721

1 A. It would have been a big loop-around to come in
2 here..

3 MR. SMITH: Thank you, Ms. Yergin. That's
4 all I have.

5 THE COURT: Do you have anything else you
6 want to ask her?

7 MR. JOHNSON: No, sir.

8 THE COURT: You're free to go. All right.
9 You want to break for lunch then?

10 MR. SMITH: Yes.

11 (Plaintiff's Exhibit No. 13 was marked for
12 identification and admitted into evidence.)

13 (Recess taken.)

14 A F T E R N O O N S E S S I O N

15 THE COURT: All right. Are we ready to go
16 with the next witness?

17 MR. SMITH: Yes, sir. I have a couple of
18 matters to address before we call the next witness.

19 One: We moved quite fast this morning, and
20 we've got left today -- we have two witnesses scheduled
21 for today.

22 We've already had three or four for this
23 afternoon, but we've already gone through them all. Our
24 experts on the National Electric Safety Code are both
25 flying in tonight, and we just want to let you know that

1 after the two witnesses that go today, those would be the
2 last witnesses that we would like to put up for the day.
3 If it's all right with Your Honor, we can recess after
4 that.

5 THE COURT: That works for me.

6 MR. SMITH: And we anticipate we should close
7 our case by the end of the day tomorrow.

8 THE COURT: How long do you think y'all will
9 take to put your case up?

10 MR. JOHNSON: A day, Your Honor. One day.

11 THE COURT: Okay.

12 MR. JOHNSON: We're going to call three
13 witnesses by video linkup, and when Kevin gets close to
14 finishing his case, I should have an expert here
15 tomorrow, but you think you're going to take all day?

16 MR. SMITH: Yeah. Yes.

17 THE COURT: All right. I'm not trying to
18 rush y'all.

19 MR. SMITH: There is one other issue, and it
20 affects one of the witnesses by video.

21 Your Honor, in my pretrial filings, I had
22 made a motion to exclude the testimony of a witness
23 called Renee Brunmeier, and I had listed several reasons
24 in that motion regarding statements from the witness,
25 statements that were not provided to me, statements I

1 asked for, but basically never got an answer.

2 I also contended that her testimony was not
3 relevant and that if it is relevant, it's outweighed by
4 any prejudice, and that was filed in advance, but what I
5 want to bring to the Court, I have some additional
6 grounds for excluding that witness's testimony. And I'm
7 not sure if Your Honor will get to that at the time he
8 calls him, but since I have additional grounds, I don't
9 want to sandbag anybody with this, so if there's research
10 that needs to be made by Mr. Johnson or yourself, I want
11 to give everybody plenty of time to do that, so I will
12 state those grounds just so he's prepared.

13 Your Honor, I was reviewing the South
14 Carolina civil trial technique handbook, and in that
15 handbook --

16 THE COURT: I got a little flyer that they
17 released a new edition of that. I just had it here
18 today.

19 MR. SMITH: Well, in the chapter on
20 objections on page 178, Your Honor, it talks about the
21 Dead Man Statute, and I had probably a different
22 understanding of the Dead Man Statute until I read this,
23 and it basically says that a person who is interested in
24 the outcome of litigation against the personal
25 representative of the estate of a person deceased is

1 incompetent to testify about a transaction or
2 communication between such person and the deceased.

3 Your Honor, Ms. Brunmeier is an angry
4 ex-wife. She was divorced from Mr. Fortney back in the
5 '80s. They had a bad relationship. They had a short
6 relationship, but they had one child as a result of that
7 relationship. Parental rights -- Mr. Fortney agreed to
8 give up parental rights so that the child could be
9 adopted by the man that Ms. Brunmeier ended under
10 marrying.

11 Because of that, when Mr. Fortney had died,
12 she and her daughter rushed down here to Berkeley County
13 Courthouse and they applied and wanted Misty, her
14 daughter, to be the personal representative of the
15 lawsuit, because the parental rights were taken because
16 she wouldn't be an interested party at that point, she
17 was not granted that, and Mrs. Constance Fortney,
18 Mr. Fortney's mother, she was awarded the personal
19 representative.

20 In the deposition of Ms. Brunmeier, she
21 states she told the family that, Either you all are his
22 children and you get the money or none of you will, and
23 she explains in her deposition that what she meant was
24 that unless you agree to give a share of money to Misty,
25 because I know the Court can't order it at this point --

1 unless you agree to give a share to Misty, I'm going to
2 make an appointment with Pope Johnson because you're
3 either all going to get the money, or none of you are
4 going to get the money.

5 And, Your Honor, I think that falls right
6 into the definition of the Dead Man Statute. She clearly
7 has a very financial interest in this case, and that
8 interest is making sure that the two children don't get
9 anything. And you'll find that her testimony is -- you
10 know, all it does is trash a man that she was divorced
11 from a long time ago.

12 We asked her very specifically, Do you have
13 personal, firsthand knowledge of any interactions between
14 John and Emma?

15 No.

16 Do you have any personal interactions between
17 John and Gina?

18 No, but she will go into great latitude under
19 direct examination to talk about John and how terrible he
20 was and how he didn't love his kids and all this kind of
21 stuff. And, Your Honor, we would say in the context of
22 all of that, my original objection stands, but I think in
23 light of how I've read the Dead Man Statute here,
24 basically, I'm not asking for a response to this, but I
25 want to put the Court and Pope on notice that that is the

1 objection I will raise when he chooses to call her to
2 testify, which I understand is going to be by video.

3 Anyway, I didn't want to catch them off
4 guard.

5 THE COURT: Okay.

6 MR. SMITH: All right. Ready for the first
7 witness?

8 MR. JOHNSON: Your Honor, I'm going to mark
9 this drawing that you wrote on as an exhibit.

10 (Defendant's Exhibit No. 3 was marked for
11 identification and admitted into evidence.)

12 THE COURT: All right.

13 MR. JOHNSON: Other than to say I disagree
14 with the what the attorney said.

15 THE COURT: I appreciate the head's up. Now
16 I have to go back and read it again. All right? You got
17 your witness ready?

18 MR. SMITH: Yes. The plaintiff calls Beth
19 Donehue.

20 BETH DONEHUE,
21 having been first duly sworn,
22 was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. SMITH:

25 Q. Where do you work?

1 A. Memorable Meetings.

2 Q. And what is your job title?

3 A. Director of site selection services.

4 Q. What kind of work do you do for Memorable
5 Meetings?

6 A. We are -- the company is a corporate event
7 planning company, so they put on -- we're hired to put on
8 conferences, seminars, things like that for corporations.
9 My specific role is to source out the hotel or conference
10 center where it may be held, negotiate the contracts, the
11 terms, things like that.

12 Q. And were you working for Memorable Meetings back
13 in 2008?

14 A. Yes.

15 Q. And what was your job at that time?

16 A. I was in sales and marketing.

17 Q. The reason you're here today is because I
18 understand you were present and working the day that
19 Mr. Fortney was electrocuted by the power line?

20 A. Yes.

21 Q. Ms. Donehue, I'm going to start out with just the
22 basics, okay? I want to ask you about Thornhill Farms,
23 the Healing Ministries.

24 What do they do out there?

25 A. Well, Healing Farms Ministries is a nonprofit

1 organization that works with mentally disabled children
2 and adults. They do a lot of different community support
3 activities, teach them certain skills, training skills,
4 and so they would do a lot of activities and help teach
5 farming to the disabled on Thornhill Farms.

6 Q. Is that what they were doing back in 2008?

7 A. Yes.

8 Q. Did they have places where they grew crops?

9 A. Yes.

10 Q. I would like to show you an exhibit that we have
11 marked --

12 MR. SMITH: Your Honor, this will be tab
13 number 15, and I don't have a blowup of this one.

14 MR. JOHNSON: Could we ask for the foundation
15 of when she was there, when she learned they farmed and
16 grew crops? Because we're looking at 1993 as the time
17 that they determined what size pole and how high the
18 clearance had to be. I think this lady was only involved
19 in 2008.

20 MR. SMITH: Your Honor, I think those are
21 wonderful questions for cross-examination, but, you know,
22 this witness is going to testify as to what was going on
23 at Thornhill Farms at the time to obviously let the Court
24 know the use of the land had not changed and the height
25 requirements still existed, and she was present that day

1 also.

2 She is going to talk about the day of the
3 event, but she's going to testify about her knowledge of
4 what went on back in Thornhill Farms back in 2008, so --

5 MR. JOHNSON: I don't have any objection to
6 that. What I was hoping I could get was foundation that
7 shows when she first went out there because it will
8 affect the admissibility of other evidence.

9 MR. SMITH: I don't really --

10 THE COURT: It might be helpful to know.
11 Just ask the question.

12 MR. SMITH: What do you want to know?

13 MR. JOHNSON: I want her to be asked when she
14 first went to Thornhill Farms and became involved in
15 doing work for them, when.

16 BY MR. SMITH:

17 Q. Ms. Donehue, when was the first time that you had
18 been out to Thornhill Farms?

19 A. It would have been in the beginning planning
20 stages, so probably that January.

21 Q. Okay. The event was in -- I'm sorry, April of
22 2008?

23 A. Uh-huh.

24 Q. So starting in January?

25 A. January 2008.

1 Q. And what I've shown you there, Exhibit No. 15, I
2 went on Google maps and entered that address and printed
3 out that picture. Is this a fair and accurate
4 representation of Thornhill Farms?

5 A. Yes.

6 Q. All right. Is it a fair and accurate
7 representation of Thornhill Farms back in 2008?

8 A. Yes.

9 Q. Those fields in the top right-hand corner of the
10 document, right up here, Your Honor?

11 THE COURT: Okay.

12 BY MR. SMITH:

13 Q. Those fields at the top, are they part of
14 Thornhill Farms?

15 A. Yes.

16 Q. And what kind of an event were y'all throwing?

17 A. It was a community fundraiser to raise money for
18 Healing Farm Ministries and for their programs.

19 Q. And what was your role in the event planned for
20 Thornhill Farms back in April 2008?

21 A. I was the event volunteer coordinator.

22 Q. Give us an idea of what was involved.

23 A. It was family community day, so we had a lot of
24 activities for kids. We had a large, I think it was,
25 barbecue dinner provided for all the attendees. We had

1 entertainment. We had an auction, and we had dancing.
2 We had a band.

3 Q. It was called a Showdeo, right?

4 A. Yes.

5 Q. What does it mean by a Showdeo?

6 A. Well, we had an entertainer who came out and did
7 like lasso tricks and was dressed as a cowboy, and he was
8 just an actor, so it was just playing on the words rodeo
9 and a show to call it a Showdeo.

10 Q. And you just mentioned the lasso. Was livestock
11 out there?

12 A. I am not sure if livestock was out there at the
13 time. I know they have had livestock, but I don't know.

14 Q. Okay. How many people were you expecting?

15 A. We were hoping for a few hundred.

16 Q. Tell me what kind of things needed to be set up.

17 A. Tents, tables, chairs, Porta Potties, registration
18 areas, sort of all the general things that you would see
19 when you go to an event.

20 Q. Did you have a dance floor?

21 A. We had a dance floor, yes.

22 Q. And areas for serving food, preparing food, things
23 like that?

24 A. Yes.

25 Q. Was a company named Stage Presence hired to help

1 out?

2 A. Yes.

3 Q. Is that who Mr. Fortney worked for?

4 A. Yes.

5 Q. Did they hire laborers like Mr. Robinson?

6 A. Yes.

7 Q. Did you have the authority to direct and control
8 the work that was done by Mr. Fortney and Mr. Robinson?

9 A. I did.

10 Q. What kind of vehicles were needed?

11 A. There were larger trucks that would bring in --
12 have to bring in all the rental equipment, kind of the
13 big box trucks, some pickup trucks, some regular cars for
14 people like me going out there.

15 Q. The box trucks and the bigger trucks, did those
16 exceed eight feet in height?

17 A. Yes.

18 Q. Would some of those trucks drive up close to the
19 barn, to the tents?

20 A. Yes.

21 Q. Was there anything about the area around the barn
22 that prevented trucks from driving up close?

23 A. No.

24 Q. Have charity events been held out at Thornhill
25 Farms before this?

1 A. Yes, I believe so. I know that in the past
2 Healing Farm Ministries would have events out there for
3 the people that they helped support and so their families
4 could come.

5 I know they did a big Christmas event every year,
6 but I do know they did a lot of different things on the
7 property. I was never involved, but I am aware they had
8 events.

9 Q. Would you expect similar type vehicles to be
10 needed for the events out there?

11 A. I would.

12 Q. Did they have handicapped children out there?

13 A. Yes.

14 Q. And regular school kids?

15 A. Yeah.

16 Q. I'd like to hand you what's been marked as
17 Plaintiff's Exhibit No. 16.

18 MR. SMITH: Before I hand you that, Your
19 Honor, I would move to admit Exhibit No. 15.

20 MR. JOHNSON: Could I look at it?

21 MR. SMITH: You want me to show you the power
22 line?

23 THE COURT: He just wants to -- do you object
24 to its admission? You can ask her to identify stuff on
25 it later if she can.

1 MR. JOHNSON: I'll do it.

2 THE COURT: Okay. It's admitted.

3 (Plaintiff's Exhibit No. 15 was marked for
4 identification and admitted into evidence.)

5 BY MR. SMITH:

6 Q. Tell me what that is, 16?

7 A. It's the promotional planner, marketing for our
8 event.

9 Q. And how do you know that?

10 A. Because I put it together.

11 Q. Okay. Is this a document that was part of the
12 business of Memorable Meetings?

13 A. Well, let me make it clear that my role with the
14 Showdeo is completely as a volunteer. It's just a
15 coincidence I work for a corporate meeting planning
16 company, so this was done as a volunteer for Healing Farm
17 Ministries and the Showdeo.

18 Q. But either way, you wrote that document; you
19 created it?

20 A. Yes, I did.

21 Q. Would this be helpful to you in explaining what
22 sort of promotions y'all did for the event?

23 A. Sure. We did many press releases. We had local
24 radio sponsors, took some print ads out and did it
25 throughout the county so we could reach anybody and

1 everybody who would want to attend the event.

2 Q. Was the event sponsored by a radio station?

3 A. It was. WEZL was one of the sponsors.

4 Q. Did they advertise the event as well?

5 A. They did, quite a bit.

6 Q. Any other radio stations, other than WEZL?

7 A. I believe we had some PSAs, but I can't really
8 remember to tell which stations they were, how often.

9 Q. Public service announcements?

10 A. Yes. Sorry.

11 Q. It's no problem. And you were in sales and
12 marketing at the time, so is this something you were used
13 to doing?

14 A. Yes.

15 Q. Promoting?

16 A. Absolutely, yes.

17 Q. Did the promotions describe the event?

18 A. It did.

19 Q. Okay. Did the promotions describe what was going
20 to go on out there?

21 A. It did. Of course the promotions talked about
22 what the cause was for, talked about, you know, great
23 food, entertainment. We focussed on the entertainer that
24 was brought in, fun and games for the kids, auction,
25 yeah.

1 Q. What was the entertainer's name? Do you remember?

2 A. No.

3 Q. Okay. Was this event advertised in Charleston,
4 Dorchester, and Berkeley Counties?

5 A. Yes.

6 MR. SMITH: Your Honor, I'll move to admit
7 that Exhibit 16.

8 MR. JOHNSON: Your Honor, I object. I don't
9 see how it's relevant. He hasn't pointed to anything
10 that would make it relevant.

11 THE COURT: What's the relevance?

12 MR. SMITH: Your Honor, Berkeley Electric has
13 claimed over and over again they didn't know what was
14 going on out there at the time. This witness is now
15 testifying of all the promotional plans to let everybody
16 know in Charleston, Berkeley, and Dorchester County what
17 was going on, so it's offered to prove that, Your Honor.

18 THE COURT: For what it's worth, for that
19 purpose, it's admitted.

20 MR. SMITH: Thank you.

21 (Plaintiff's Exhibit No. 16 was marked for
22 identification and admitted into evidence.)

23 BY MR. SMITH:

24 Q. Now, Ms. Donehue, if you could -- well, I took it
25 away from you.

1 You're looking at Exhibit No. 15 again, and do you
2 see the barn in the picture?

3 A. I do.

4 Q. Is that the area where y'all were setting up?

5 A. It is.

6 Q. What was being set up in the area around the barn?

7 A. Everything was sort of centralized around that
8 barn. There was a very large tent that ran parallel with
9 the barn which served as the food and beverage tent, the
10 entertainment, the auction. There was a stage, seating
11 and tables. We had a skinny -- what's called a Marquee
12 tent that ran in between the barn and the large tent,
13 which was just a tent walkway in case it rains.

14 Behind the barn we had a dance floor set up, and
15 right next to the barn in that same area is the tent that
16 had that hit the power line.

17 Q. I'm going to hand you another picture,
18 Ms. Donehue. Is this a zoom in of Exhibit No. 15?

19 A. Yes.

20 Q. Closer image?

21 A. Yes.

22 Q. Ms. Donehue, I'm going to -- see what I've circled
23 there?

24 A. Yes.

25 Q. Are those the poles for the power lines that were

1 involved in this case?

2 A. Yes.

3 Q. Is this, again, a fair and accurate representation
4 of the property out at Thornhill Farms back in 2008?

5 A. Yes.

6 Q. So we can get some perspective, you talked about
7 the tents, and the tents were being placed around the
8 barn area. I hand you another Exhibit, a picture. It's
9 Exhibit No. 17.

10 MR. SMITH: Oh, Your Honor, I'll move to
11 admit the blowup contained on Exhibit No. 16.

12 THE COURT: 16 is the Showdeo promo plan?

13 MR. SMITH: The blowup is -- Exhibit No. 15
14 is the -- I'm sorry. Exhibit No. 14 is a blow-up of
15 Exhibit No. 15, a zoom-in.

16 MR. JOHNSON: No objection.

17 (Plaintiff's Exhibit Nos. 14 and 17 were
18 marked for identification and admitted into evidence.)

19 BY MR. SMITH:

20 Q. What I've handed you now is Exhibit No. 17. Is
21 this a fair and accurate representation of the placement
22 of the tents back in April of 2008?

23 A. Yes.

24 Q. Would this picture be helpful to you in explaining
25 where the tents were?

1 A. Yes.

2 MR. SMITH: Your Honor, I'll offer Exhibit
3 No. 17 into evidence.

4 MR. JOHNSON: Could we ask whether 17
5 includes the tent?

6 MR. SMITH: All of that, Pope.

7 MR. JOHNSON: I know, but if I can hear the
8 answer to that, I can --

9 MR. SMITH: It does, Pope. I'm not talking
10 about other tents.

11 THE COURT: She did say it was a fair and
12 accurate representation --

13 MR. JOHNSON: Yeah.

14 THE COURT: -- of the tents in April 2008.

15 MR. SMITH: I don't mind asking the question.

16 BY MR. SMITH:

17 Q. Is the tent involved in this case shown in that
18 picture?

19 A. Yes.

20 Q. Okay.

21 THE COURT: Which one is it?

22 MR. SMITH: (Indicating.) That one right
23 there, Your Honor.

24 THE COURT: The one that's in the middle?

25 MR. SMITH: Yes, sir. Right under the tree.

1 Well, I don't know about right under the tree --

2 THE COURT: The tree is on the other side of
3 the barn. This one?

4 MR. SMITH: That one.

5 BY MR. SMITH:

6 Q. And, Ms. Donehue, the reason I gave you that
7 exhibit there is I want to get some perspective in terms
8 of the placement of the tents, and I want to go back to
9 the Exhibit No. 14, the blowup.

10 And so the barn that we can see back there on
11 Exhibit No. 17, is that the barn that we see here on
12 Exhibit No. 14?

13 A. Yes.

14 Q. Okay. And as far as the placement of those tents
15 I think we can tell by looking at this thing there, would
16 the tents have been set up, or sort of in this area?

17 A. Yes. There would be a tent on the back side of
18 this barn, then the tent that we're here about, and then
19 next to that, running lengthwise parallel, would be that
20 larger tent.

21 Q. So what we're looking at here in Exhibit No. 17
22 basically is the tents, kind of in this area here?

23 A. Yes.

24 Q. Okay. And we already pointed out the tent that
25 was involved in this case. Was that the original place

1 the tent was set up?

2 A. No.

3 Q. Okay. Once the tent was originally set up, did
4 someone decide to move it?

5 A. Yes.

6 Q. And does this picture basically show where the
7 tent ended up?

8 A. Yes.

9 Q. Once it was moved, was there a decision to move it
10 again one last time?

11 A. Yes.

12 Q. In which direction?

13 A. They wanted to move it back just a little bit, and
14 then that's when it hit the line.

15 Q. Do you recall where you were standing?

16 A. Yes.

17 Q. Okay. Do you recall where David Richardson was
18 standing?

19 A. Yes.

20 Q. I'll show you a picture, what's been marked as
21 Exhibit No. 18. Let me grab my notes. Exhibit No. 18,
22 is this a fair and an accurate representation of about
23 where David Richardson was standing from the point of
24 view of the picture being taken?

25 A. Yes.

1 Q. Would that be helpful to you in explaining where
2 y'all were standing?

3 A. Yes.

4 MR. SMITH: Your Honor, I'll move to admit
5 Exhibit No. 18.

6 MR. JOHNSON: No objection.

7 THE COURT: Admitted.

8 (Plaintiff's Exhibit No. 18 was marked for
9 identification.)

10 BY MR. SMITH:

11 Q. So let's look at Exhibit No. 18, and I'm going to
12 come around here. So you talked about -- David
13 Richardson, I believe, was standing about where the
14 person would be standing taking this picture?

15 A. Uh-huh, yes.

16 Q. Ms. Donehue, where were you standing in relation
17 to David?

18 A. I would have been in about the same spot on the
19 complete opposite side.

20 Q. Y'all were basically facing each other with the
21 tent in the middle?

22 A. Yes.

23 Q. Okay. Did the relationship of the tent to the
24 power line look any different to you than it appears in
25 Exhibit No. 18?

1 A. Not too much. Actually, from where I was, it
2 probably looks like there was even more space than what
3 I'm seeing in this picture.

4 Q. Ms. Donehue, I don't mean to pick on you, but I
5 have to ask you, how tall are you?

6 A. I'm four ten and a half.

7 Q. How far did y'all want the tent moved, the last
8 movement?

9 A. I really don't remember the exact amount. I just
10 remember David suggesting that it get pushed back a
11 little bit farther.

12 THE COURT: Let me ask, David Richardson, I
13 don't know that name. Who is David Richardson?

14 THE WITNESS: David Richardson was also a
15 volunteer assisting with the event coordination that day.

16 THE COURT: Did he also work at Memorable
17 Meetings with you?

18 THE WITNESS: We both worked at Memorable
19 Meetings.

20 THE COURT: You were both volunteers?

21 THE WITNESS: Yes.

22 BY MR. SMITH:

23 Q. From where you were standing, did it look like the
24 tent was going to hit the power line?

25 A. No.

1 Q. Have you worked with tents before this day?

2 A. Yes.

3 Q. Have you worked with this size tent in particular?

4 A. Yes.

5 Q. Have you worked around power lines before this
6 day?

7 A. Yes.

8 Q. Why did you think the tent was not going to hit
9 it?

10 A. From where I was standing, it looked like it would
11 have been free and clear with plenty of room left over.
12 It did not look like it was going to hit.

13 Q. Ms. Donehue, you have lived with this day for
14 quite a long time, and I assume it's occupied a lot of
15 what you thought about, and I want to ask you, do you
16 have any regrets?

17 MR. JOHNSON: Objection, Your Honor. It
18 doesn't make any difference. We're being sued for what
19 we did, not whether she regrets what happens.

20 THE COURT: What's the relevance?

21 MR. SMITH: Well, Your Honor, I assume
22 Mr. Johnson is going to blame all this on her. I would
23 like to have her --

24 THE COURT: White don't you wait till
25 redirect to ask that.

1

2

BY MR. SMITH:

3

Q. Did you notice anything wrong with the power line?

4

A. No.

5

6

Q. Did you notice anything wrong with the poles holding up the power line?

7

A. No.

8

Q. Could you tell how high the power line was?

9

A. No, I just assumed it was standard height. I couldn't tell you that I thought it was a certain height.

10

11

Q. Did you know whether or not the power line was above the code standards?

12

13

A. No, I did not know.

14

Q. Did you feel like you were safe?

15

A. Yes.

16

17

Q. Did you feel like you were this danger of being electrocuted?

18

A. No.

19

MR. JOHNSON: I object as leading.

20

THE COURT: I don't really think he's suggesting an answer to the question, so overruled.

21

22

BY MR. SMITH:

23

24

25

Q. I need to ask you the same question again. You said you didn't feel like you were in danger of being electrocuted?

1 A. No.

2 Q. My answer is why? I'm sorry. My question is why?

3 A. Because -- we completely felt like we were within
4 a safe region to move the tent. If I felt there was any
5 fear in electrocution, or if anybody who was involved
6 felt there was a fear of electrocution, nobody would have
7 done what they did.

8 MR. SMITH: Your Honor, I'll move to admit
9 Exhibit No. 18 into evidence.

10 THE COURT: Any objection?

11 MR. JOHNSON: No.

12 (Plaintiff's Exhibit No. 18 was admitted into
13 evidence.)

14 MR. SMITH: All right, Ms. Donehue. That's
15 all the questions I have.

16 THE COURT: Cross?

17 MR. JOHNSON: Yes.

18 CROSS-EXAMINATION

19 BY MR. JOHNSON:

20 Q. Ms. Donehue, could you show me on these
21 photographs where the tent started out?

22 A. Yes. The original plan was to put the tent -- let
23 me make sure I'm looking at the right -- yeah. To put
24 the tent --

25 MR. JOHNSON: Judge, can you see it?

1 THE COURT: Yeah.

2 THE WITNESS: -- in this general area, and it
3 was to be used as registration. People arrive to check
4 in, buy tickets.

5 BY MR. JOHNSON:

6 Q. Where is the line?

7 A. Here's the power line, so this is the original
8 place, and once we were there, we realized that it was
9 not going to be easily accessible for handicapped
10 attendees, so the decision was made to move it around
11 here so that it could be easier assessed.

12 Q. And was it assembled and put together and set here
13 to start with?

14 A. Yes.

15 Q. And here would be to the -- Plaintiff's Exhibit
16 14, looking at the building, it would be to the left of
17 the building?

18 A. Yes.

19 Q. And when they put it up, how many poles did that
20 tent have?

21 A. Four. Well, four legs and then one center point.

22 Q. So five?

23 A. Yes.

24 Q. The center point, was that the longest pole or the
25 shortest pole?

1 A. That would be the tallest pole.

2 Q. So who decided that the tent needed to be moved?

3 A. David Richardson.

4 Q. And you've told me why he thought it ought to be
5 moved. It wouldn't be accessible?

6 A. Correct.

7 Q. And when they made the decision to have the tent
8 moved, did they strike the tent and take it down?

9 A. No.

10 Q. How did they move it?

11 A. They picked up the four poles and carried it
12 around this way and brought it through here.

13 Q. All right. And let me ask you this: Were you a
14 part of a meeting the day before and the crew chief of
15 the Stage Presence and his boss came out and did a survey
16 and had discussions with David Richardson about the tent
17 and where it was going?

18 MR. SMITH: Your Honor, I'll object for
19 hearsay.

20 THE COURT: He just asked if she was in a
21 meeting.

22 MR. SMITH: I don't object to that.

23 THE COURT: Okay. That's all he asked.

24 THE WITNESS: Yes, I was there the day before
25 to meet with them to talk about the layout.

1 BY MR. JOHNSON:

2 Q. In that meeting, was there any discussion about
3 the existence of the power line?

4 MR. SMITH: Your Honor, that's my objection,
5 to hearsay.

6 MR. JOHNSON: I didn't ask her what was said.

7 MR. SMITH: Well, if you say was there a
8 discussion about the pole, I think that's calling --

9 THE COURT: Technically, it's not hearsay
10 yet.

11 MR. JOHNSON: I'm getting close, I guess.
12 All right.

13 THE WITNESS: I don't recall.

14 BY MR. JOHNSON:

15 Q. Okay. Now, so the men, when they moved the tent
16 from the left side of the barn, or the side of the barn
17 that's closest to the highway, did they move it all at
18 one time, or did they move it, put it down, then move it
19 again?

20 A. They moved it around here. I don't recall if they
21 paused anywhere in here. Maybe it was heavy; they needed
22 a break. I don't know if they paused during this part.
23 When they came around, the power line was noticed, and
24 they stopped and they put it down.

25 Q. And when you say the power line was noted, what do

1 you mean?

2 A. I mean somebody saw it and said, Let's put the
3 tent down.

4 Q. And why did they want to put the tent down where
5 they were?

6 A. Because they didn't want to be close to a power
7 line.

8 Q. So they put it down and then what happened?

9 A. Then they moved it to where it ended -- well, sort
10 of ended up, and they put it down, and then that's when
11 somebody said, Push it back a little bit.

12 Q. So they stopped twice?

13 A. Yes.

14 Q. And at the time they stopped, both times they were
15 discussing looking at the wire and not getting close to
16 the wire?

17 A. No, just one time.

18 MR. SMITH: I'll object for hearsay, Your
19 Honor, again.

20 THE COURT: Sustained. Well, I guess it
21 depends on who is doing the discussing. If it was the
22 parties --

23 BY MR. JOHNSON:

24 Q. Were the men moving the tent present when they set
25 it down the first time and had some discussion?

1 A. Yes.

2 Q. And that would include Mr. Fortney and
3 Mr. Robinson?

4 A. Yes.

5 Q. And so during -- when they set it down the first
6 time, is that when they said, Electrical line. We better
7 not get near it?

8 MR. SMITH: Your Honor, I object.

9 THE COURT: You got to be able to ask who
10 said that.

11 BY MR. JOHNSON:

12 Q. Was it said in the presence of Mr. Fortney and
13 Mr. Robinson?

14 MR. SMITH: No, Your Honor. I object.

15 THE COURT: It wouldn't be hearsay if
16 Mr. Fortney or Mr. Robinson said it. If it was somebody
17 else, then that would be hearsay.

18 MR. JOHNSON: Well, Your Honor, I'm not
19 really offering it for the truth of the matter asserted.

20 THE COURT: What are you offering it for
21 then?

22 MR. JOHNSON: I'm offering it to show that
23 the parties all recognize that there was a problem --

24 MR. SMITH: That's the truth.

25 MR. JOHNSON: Let me ask her something else.

1 THE COURT: Okay.

2 BY MR. JOHNSON:

3 Q. Ma'am, was there a discussion held when they put
4 the tent down the first time?

5 A. The best, to my recollection, is that somebody
6 said we need to set it down --

7 MR. SMITH: Yeah, maybe we can give an
8 instruction to the witness to simply not repeat what
9 other people said unless those words came out of
10 Mr. Fortney's mouth or Mr. Robinson's mouth.

11 THE COURT: We have our own rules about what
12 you say other people said, because normally the best
13 thing to do is have somebody else come in and say what
14 they said, just like we have you come in and say what you
15 said, so its better if somebody else comes in and says
16 what they said.

17 Sometimes we let you say what other people
18 said if it's reliable circumstances and if it's against
19 another party, like Mr. Fortney or Mr. Robinson. You can
20 say what they said because they're parties, but some
21 other person who is not a party, we don't let you just
22 say what they said. We bring them in and let them
23 testify, and that way we can judge their credibility and
24 cross-examine them, so when you say there was a
25 discussion and it was said, you got to tell us if it was

1 Mr. Fortney or Mr. Robinson or if it was that third
2 person.

3 If it was the third person, I can't have you
4 tell what he said, he or she. You can tell me what
5 Mr. Fortney or Mr. Robinson said.

6 MR. SMITH: And, Your Honor, could I also ask
7 maybe counsel -- he seems to be a little bearing on the
8 witness, if he could back up a few steps.

9 THE COURT: He's not bothering you, is he?

10 THE WITNESS: I'm okay.

11 THE COURT: If he is, you can push him away.

12 THE WITNESS: Well, then with your
13 description of what I can say, I don't remember who said
14 it. I don't remember what was said. I just know
15 something was said to put the tent down because of a
16 power line. I don't know who, I don't know what -- I
17 don't know.

18 MR. SMITH: And, Your Honor, I'll just move
19 to strike the answer as hearsay.

20 THE COURT: I'm trying to remember. It's not
21 the first time she said that, and I'm trying to remember
22 if she didn't just say the exact same thing when you were
23 questioning her.

24 MR. SMITH: No, sir.

25 THE COURT: Well, it's hearsay because she

1 can't identify who said it.

2 BY MR. JOHNSON:

3 Q. Show me on this map, Plaintiff's Exhibit 14, where
4 it was put down to start with.

5 A. You mean at the very beginning, before it was ever
6 moved?

7 Q. Once they started moving it around the barn, where
8 was it put down the first time?

9 A. I don't remember very clearly at all. I would
10 have to say somewhere in this general area, but I'm not
11 100 percent positive about that.

12 Q. When you say the general area would be the corner
13 of the barn?

14 A. Yes, but I'm not 100 percent positive.

15 Q. All right. After the -- let me ask you this: As
16 a result of hearing what was said when it was put down in
17 the first place, did you look up and look to see if there
18 were any electrical lines around you?

19 A. Yes.

20 MR. SMITH: May I -- I don't know if I got an
21 answer to my objection and my request to strike the
22 hearsay from the record. I know you -- I just don't --

23 THE COURT: Stricken.

24 MR. SMITH: Sorry.

25 THE COURT: Usually remembering things,

1 that's the hard part.

2 You might just want to back up a step. There
3 you go.

4 BY MR. JOHNSON:

5 Q. So you looked up and saw the lines were where,
6 behind you, in front of you, or --

7 A. They would have been in front of me. The tent
8 would have been in front of me. The lines were behind
9 the tent, but all of it in front of me.

10 Q. And where were you? Were you at the back of the
11 tent?

12 A. So this is what I consider the back of the tent.
13 I was on the other side.

14 Q. Let's do this: What I would like for you to do is
15 draw the barn, the tent where it was moved around the
16 first time, and where the tent was.

17 A. This is the barn. That's the tent. So here's the
18 front of the barn. Here's that other larger tent, to
19 give you an idea of the direction, and I would have been
20 standing here.

21 Q. Where is the electric line?

22 A. Here (drawing).

23 Q. How far were you behind the tent?

24 A. I was about here.

25 Q. I mean in feet.

1 A. You know, I would have to guesstimate; maybe six,
2 seven feet.

3 Q. Okay. And where was Mr. Richardson?

4 A. He was closer to the tent. I couldn't tell you
5 how many feet he was, but he was probably about five
6 feet.

7 Q. Was he between the tent and the line?

8 A. I don't believe so. No, he couldn't have been.

9 Q. So put an X where you say he would have been when
10 the tent was put down the first time.

11 A. Oh, the first time?

12 Q. Yes.

13 A. The first time, he was carrying the tent.

14 Q. Where did they put it down?

15 A. Still in this general area.

16 Q. Okay.

17 A. And he was part of it, and he put it down, and
18 then they decided to move it back, but he didn't. He
19 wasn't part of that.

20 Q. Let's start the drawing over. What I would like
21 to have you do is draw the tents where they were in
22 relation to the line before they were moved at all.

23 A. Before they were moved at all?

24 Q. Yes.

25 A. So before it was moved all the way around, the

1 very beginning?

2 Q. Yes, ma'am.

3 A. All right. Got you. That's the one you're asking
4 about.

5 Q. Where is the electrical line? All right. And
6 what is the path to it to be moved.

7 A. (Indicating.)

8 Q. And is that where it was sat down the first time?

9 A. Yes. The best of my knowledge, it was somewhere
10 in this general area.

11 Q. Draw a little box and write tent, please. All
12 right. And who was where? Who had the poles?

13 A. I don't remember.

14 Q. Where did Mr. Richardson -- what did he pick up?

15 A. One of the poles. I don't remember who was on
16 each pole.

17 Q. So they set it down. They have some conversation,
18 and as a result you look up and see the power line,
19 right?

20 A. Yes.

21 Q. All right. And put an X where you would have been
22 when that occurred.

23 A. It would have been in this general area.

24 Q. All right. Now, the tent was moved a second time?

25 A. Yes.

1 Q. Draw the arrow to where it was moved towards?
2 Just put a number one there, and draw the tent where it
3 was put out after it was moved the second time. All
4 right. Let's put two. And where were you at the time it
5 was moved the second time?

6 A. All in the same spot.

7 Q. Did you tell if anybody to look out, be careful?
8 Did you see anything as the tent was being moved?

9 A. No, because I didn't think there was anything to
10 be careful of.

11 Q. Okay. So you said nothing, and where was
12 Mr. Richards when the tent was moved to the second
13 location?

14 A. He was in this general area.

15 Q. So he would have walked down to the line. He had
16 the tent here, and he would have walked under the line
17 this way?

18 A. Yes.

19 Q. And were you able to see the line yourself?

20 A. I was. When they stopped and then they looked and
21 decided to move it that way, I heard somebody say
22 something about the line, so I stopped and I looked.

23 MR. SMITH: I object again and move to strike
24 for hearsay, Your Honor, I heard someone say something
25 about the line.

1 THE COURT: I don't think it's being offered
2 to prove any particular point. I think she just said she
3 stopped and looked.

4 MR. SMITH: I think Mr. Johnson is definitely
5 going to offer that as proof that the line was noticed,
6 so I think it is being offered, and it will be argued for
7 absolutely the truth of the matter asserted.

8 MR. JOHNSON: Your Honor, what I asked her
9 was could she see the line and she said she could.

10 THE WITNESS: Yes.

11 MR. SMITH: I'm not saying the question
12 evoked hearsay, I'm just saying the hearsay came out
13 inadvertently with the answer, so I just move to strike
14 that portion of the answer with regards to hearsay.

15 MR. JOHNSON: Let me re-ask her a question.
16 BY MR. JOHNSON:

17 Q. When you looked up --

18 MR. SMITH: Your Honor, I'm sorry. Could I
19 get a ruling on it, or is he just withdrawing the
20 question and answer?

21 MR. JOHNSON: I'll withdraw. That's fine.

22 BY MR. JOHNSON:

23 Q. You looked up. You were able to see the line.

24 A. Yes.

25 Q. And you looked up and saw it after hearing some

1 conversation among the men.

2 A. Yes.

3 Q. And when the tent was moved the second time, what
4 direction was it moved?

5 A. It was moved sort of just where they sat it down.
6 It stayed going in this direction where this arrow is and
7 just came over farther here.

8 Q. So it came over this way?

9 A. Yes.

10 Q. All right. And did it go under the line?

11 A. Not at that point, no.

12 Q. Did it go under the line at any -- any part of the
13 tent go under the line at any time?

14 A. Yes.

15 Q. All right. And so how did it get from here,
16 generally, over to partially under the line?

17 A. It was decided for it to move back just a little
18 bit.

19 Q. When you say move back, move more toward
20 Mr. Richards?

21 A. Yes.

22 Q. And that would have taken it toward the line?

23 A. That's when it hit the line.

24 Q. What hit the line, was it the lone pole?

25 A. Yeah. The metal tip at the top of the tent.

1 Q. All right. And what -- did you see anything
2 happening when it contacted?

3 A. I did.

4 Q. What did you see?

5 A. I saw electricity flow through that top part. I
6 saw electricity flow through the poles that support the
7 tent.

8 Q. What -- what was the electricity you saw?

9 A. I don't know if it was directly with the poles,
10 but one of the men that was on one of these poles where I
11 would have been facing, I saw -- I saw sort of like a
12 blue, like, current go through him. I don't really know
13 how to explain it, but there was something that I saw go
14 through him right as he was dropping to the ground.

15 Q. All right. But what about the pole? What did you
16 see about the pole contacting the line? Did you see
17 anything spark, arc, go blue on the long pole in the
18 center of the tent down to the ground?

19 A. I thought I did.

20 Q. What did you think --

21 A. But my memory is fuzzy. It's not something I try
22 and think about all the time.

23 Q. Sure. Now, who was the man who was on this corner
24 where you said he was blue?

25 A. I'm not sure.

1 Q. You thought his whole body looked blue?

2 A. I saw a flash go through him.

3 Q. On the inside or outside?

4 A. I don't know. I just know I was standing there
5 and some sort of flash went through him and he fell to
6 the ground.

7 Q. All right. Now, what about the three other men
8 who had poles? Did you notice anything that happened to
9 them?

10 A. I just saw them all drop to the ground.

11 Q. Who had the pole in the middle?

12 A. I didn't recall a pole being --

13 Q. I thought you said there was a center pole that
14 was the tallest of the poles.

15 A. No. There is a pole on the top of the tent that
16 helps run the structure for the fabric of the tent.

17 Q. Does it go down, like a pole to the ground?

18 A. No, I don't believe so.

19 Q. Okay. So who had -- who did Mr. -- you said he
20 had held on to -- helped move it. Where was he when he
21 helped move it?

22 A. I don't recall.

23 Q. Do you know which of the men died as a result of
24 the electric contact?

25 A. I don't know which one of the men that were there.

1 I never actually met them.

2 Q. So you don't know which ones died and which ones
3 just had some injuries?

4 A. I know that two men died and then two men had
5 injuries. I don't know which man was which.

6 Q. Okay. Now, did you hear Mr. Richards -- is it
7 Richards or Richardson?

8 A. Richardson.

9 Q. Did you hear Mr. Richardson say anything to the
10 four guys moving the pole about moving through under the
11 line?

12 A. No.

13 MR. SMITH: Objection. Hearsay.

14 BY MR. JOHNSON:

15 Q. So you didn't hear any discussion --

16 THE COURT: Did you hear Mr. Richardson --
17 he's not a party, is he?

18 MR. SMITH: No, sir.

19 THE COURT: So that would be hearsay.

20 BY MR. JOHNSON:

21 Q. I'll ask it this way, Your Honor.

22 You don't know who Mr. Richardson replaced on the
23 pole, or was replaced by?

24 A. No, I do not.

25 Q. And tell me what else you saw when the accident

1 occurred..

2 A. That was about it. There was an employee of
3 Snyder Event Rentals who ran over to try and help one of
4 the men. I immediately got on my cellphone to start
5 calling 911.

6 Q. And did an ambulance come or a helicopter come?

7 A. Yes.

8 Q. And were the four men all taken from the scene?

9 A. I believe so.

10 Q. Did you ever have any contact with any of the four
11 men or their families after this occurred?

12 A. No.

13 Q. Now, you said you saw the line but thought there
14 was no risk of injury?

15 A. Correct.

16 Q. As they moved closer to the line and under the
17 line, did you see them doing that? I mean, were you
18 looking at the pole and --

19 A. Yes. I watched them move the tent.

20 Q. So you could see the tent pole coming closer and
21 closer and closer to the line?

22 A. From where I was standing, it didn't even look
23 close.

24 Q. But did you know it was close -- those steps,
25 every step they took, they were closer to the line,

1 weren't they?

2 A. Well, really, when they moved it this way, it just
3 stayed this direction, but yes, when they pushed it back
4 a little bit, obviously, it would have been going closer
5 to the line, but it didn't appear that way.

6 Q. Okay.

7 MR. JOHNSON: Your Honor, we would offer this
8 drawing into evidence.

9 MR. SMITH: No objection, Your Honor.

10 THE COURT: It's admitted.

11 (Defendant's Exhibit No. 4 was marked for
12 identification and admitted into evidence.)

13 BY MR. JOHNSON:

14 Q. Now, as an event planner, had you ever been
15 trained on matters of tent safety?

16 A. No.

17 Q. Had you ever been trained on the OSHA ten-foot
18 rule?

19 A. No.

20 Q. Do you know what that rule is?

21 A. I do now.

22 Q. And what do you understand it is?

23 A. That any sort of structure or placement cannot be
24 within ten feet.

25 Q. Of an energized conductor?

1 A. Yes.

2 Q. If these men had stayed ten feet away, complied
3 with the OSHA standard, would the line have hit the pole?

4 A. No.

5 MR. SMITH: Your Honor, I would object for
6 speculation and an opinion by a lay witness.

7 MR. JOHNSON: And I'm asking what she can
8 perceive with her eyes as to what occurred. That would,
9 I believe, fall within the area of an opinion.

10 THE COURT: I don't think it needs an expert
11 to say if they would have stayed away ten feet from a
12 power line, the he wouldn't have hit it. I don't think
13 they need an expert. It's something a lay witness can
14 testify to.

15 So go ahead. Well, it was overruled, and her
16 answer was no.

17 MR. JOHNSON: Thank you.

18 THE COURT: Redirect?

19 MR. SMITH: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. SMITH:

22 Q. Ms. Donehue, right before the contact, did you
23 still feel safe?

24 A. Yes.

25 Q. Did you still feel like the tent was going to hit

1 the power line, or did you feel like the tent was going
2 to hit the power line?

3 A. No. I did not feel like the tent was going to hit
4 the power line.

5 Q. And so we can get an idea, you talked about the
6 perspective between the tent and the power line on
7 Exhibit No. 18.

8 A. Yes.

9 Q. And is this how it looked to you?

10 A. Yes. But I was on the other side of that tent,
11 but yes, where I was standing and I looked at the top of
12 the tent with that little pole up there, and then the
13 electrical lines looked like there was tons of room in
14 between.

15 MR. SMITH: Thank you, Ms. Donehue.

16 THE WITNESS: You're welcome.

17 THE COURT: Recross? Okay. Well, you can
18 step down. Thank you.

19 MR. SMITH: May the witness be excused?

20 THE COURT: You may. You're free to go. Are
21 we ready?

22 MR. SMITH: Yes, Your Honor.

23 THE COURT: All right. Call your next
24 witness.

25 MR. GOULD: Plaintiff calls Dr. Kim Collins.

1 KIMBERLY COLLINS,
2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. GOULD:

6 Q. Good afternoon.

7 A. Good afternoon.

8 Q. How are you doing?

9 A. Fine, thank you.

10 Q. I know you've got a busy schedule. In fact,
11 you've got to be in Charlotte?

12 A. Yes, for the annual forensic meeting.

13 Q. Annual forensic meeting. So we'll try to be as
14 quick as we can.

15 Now, you're not a stranger to the courtroom, are
16 you?

17 A. No, I'm not.

18 Q. And before we get going, what are you a doctor of?

19 A. I'm a medical physician, and I'm not only a
20 pathologist, but then I sub-specialized in forensic
21 pathology.

22 Q. What is that?

23 A. Pathology is the study of diseases in the body
24 using the laboratory, such as a blood sample, urine
25 sample, biopsy. We look under the microscope and we also

1 use the autopsy.

2 Forensic pathology uses all of those disciplines
3 investigating unnatural death or trauma or suspicious
4 deaths and trauma and understanding how trauma and
5 poisonings affect the human body.

6 Q. And you had to go to medical school first?

7 A. Yes. I went to medical school at the Medical
8 College of Georgia for four years where I received my MD.
9 I then completed my combined anatomic and clinical
10 pathology residency for five years at Wake Forest
11 University/Bowman Gray School of Medicine. Following my
12 residency, I completed a forensic pathology fellowship at
13 the Medical University of South Carolina.

14 Q. And what what's your position today?

15 A. I stayed on in South Carolina as a professor of
16 pathology, and I am currently the medical director at
17 LifePoint organ and tissue procurement for South
18 Carolina, and I am a forensic pathologist with Newberry
19 Pathology Associates.

20 Q. How long have you been doing that again?

21 A. Forensic pathology?

22 Q. No, for Newberry in that position.

23 A. For Newberry, just recently. Forensic pathology,
24 it's been since '94.

25 Q. Okay. Where did you work before Newberry?

1 A. Before Newberry, for five years I worked at Fulton
2 County medical examiner's office in Atlanta.

3 Q. All right. And did you do the same thing there?

4 A. Yes. I was a forensic pathologist, did scene
5 investigations, forensic autopsies, teaching.

6 Q. So you do autopsies? When was the last autopsy
7 you did?

8 A. About a week ago.

9 Q. And after you leave this courtroom, which will
10 hopefully be soon, do you have autopsies scheduled?

11 A. I'm going to the NAME meeting, National
12 Association of Medical Examiners next week, and then I'll
13 be back in Newberry, but we don't know if we're scheduled
14 or not.

15 Q. As a doctor who performs autopsies, are you called
16 upon to give causes of death?

17 A. Yes, causes of death, or manner of death.

18 Q. Which could also be referred to as a mechanism of
19 injury as well?

20 A. It can be. There is also a separate category for
21 mechanism.

22 Q. Are you called upon then to give your opinions on
23 the mechanism of injury as well?

24 A. Yes.

25 Q. Let me backtrack. The mechanism of injury is the

1 very thing we're going to ask you about, particularly as
2 it pertains to John Fortney's electrocution death and the
3 electrocution injuries of the survivor, John Robinson.

4 Now, you're familiar with those, right?

5 A. Yes.

6 Q. All right. And did you learn as a student in
7 medical school how electricity can kill?

8 A. Yes.

9 Q. Approximately how many autopsies have you done
10 involving electrocution and death?

11 A. I would estimate approximately 40 to 50.

12 Q. Forty to fifty. So let's start with your personal
13 experience. Those 40 or 50, those are all deaths?

14 A. Yes.

15 Q. Are all deaths the same or are there differences?

16 A. The electrocution deaths, they're all different
17 because they have a different scene, a different voltage
18 amount, different part of the body that the current flows
19 through, as well as different resistance, such as
20 clothing or if a body is in the water, and the part of
21 the body that is in touch with the current makes a
22 difference also.

23 So they all look different. I suppose the two
24 main factors that make the bodies look different would be
25 the voltage and the other would be the direction of the

1 current through the body.

2 Q. So is it fair to say there are differences in
3 degrees of how electricity harms the body and results in
4 death?

5 A. Oh, definitely.

6 Q. If you can, in your own words, based on your
7 experience, just walk us through what electricity can do
8 to the body.

9 A. Well, what is happening when you come in contact
10 with at least a high enough voltage of electricity, you
11 have a flow of electrons through your body, and what is
12 happening as that flow or that current goes through your
13 body, you're actually heating up and damaging cells and
14 tissues along the way.

15 And so you'll have burns, often, to the skin,
16 burns within the body; and whatever organ or structure or
17 bone the current comes in contact with before exiting the
18 body, there will be damage along that track.

19 Q. And when you say damage, what do you mean? What
20 kind of damage are we talking about?

21 A. It depends on the path. We can have burns and
22 then nothing else, or we can have burns and heart
23 arrhythmias, damage to internal organs, damage and
24 fractures to bones. We can have blisters, and then we
25 can have all the way to charring.

1 Q. And what is charring?

2 A. Some would say the fourth degree burn, where you
3 have the black burning of the tissue, disintegration of
4 the tissue.

5 Q. An autopsy means you open up the body and you look
6 inside, correct?

7 A. That is correct.

8 Q. What do you look for when you open up the body and
9 look inside?

10 A. In forensic pathology, we do complete autopsies,
11 so we don't restrict it to one particular portion of the
12 body. So we always begin with the chest and abdomen, and
13 we're looking for normal anatomy. We're looking for
14 diseases that the person may have had all of his or her
15 life. We look for hereditary diseases because we
16 communicate this all with the families, and then we look
17 for abnormalities and any type of trauma.

18 Q. Why do you start with the chest?

19 A. It's a routine to obtain access into all the
20 organs of the body. You make a Y incision on the chest
21 and abdomen, and that way it's a simplified way to remove
22 the organs as well as to replace the skin for funeral
23 home preparation.

24 Q. And before you do that, do you try to ascertain
25 and determine where the electricity entered the body and

1 if it exited the body?

2 A. One of the most important parts of the autopsy is
3 the external examination, so we'll bring the person in,
4 as they are, with their clothes on, and photograph him or
5 her, take the clothes off, look for any types of
6 evidence, any type of injuries to the body. So that
7 would begin before the Y incision, what most people refer
8 to as the autopsy, but definitely the first part is the
9 external examination.

10 Q. Are you able to ascertain where the electricity
11 entered the body and if it exited the body by that
12 external examination?

13 A. Yes. Sometimes it's difficult to tell entrance
14 versus exit, but an electrocution burn has a classic
15 appearance that looks like no other burn, so when you
16 look at these points, you can see the charring and the
17 burn and very classic, and then you can notice -- it's
18 almost a connect-the-dots, where you can follow the
19 damage in the body to the exit point.

20 Q. All right. So you're able to determine by looking
21 at the body. Why is that important from your
22 perspective?

23 A. Well, if a person dies from -- say they have an
24 arrhythmia from electrocution and it's not witnessed.
25 You may not know why the individual had died, so you're

1 looking for any external signs to indicate what might
2 have transpired. And so, like I say, electrocution burns
3 have a very classic appearance, and then you do your
4 scene investigation and put it together.

5 Q. All right. And did you do John Fortney's autopsy?

6 A. Yes, I did.

7 Q. Now, combining all autopsies you've done involving
8 electrocutions -- which I believe you said was between 40
9 and 50?

10 A. Yes.

11 Q. Along with your extensive medical knowledge, were
12 you able to determine the point of entry in John
13 Fortney's body?

14 A. Yes, I was.

15 Q. All right. And tell us about that.

16 A. And this is also based on -- we did get some
17 information from the coroner, so the point of entry was
18 into the left hand, and he also had an entry burn to the
19 left shoulder, deltoid, near the biceps region, and so
20 this is all on the left side of the body.

21 So the points of contact with the blistering were
22 on the fingers of the hands and on the thumb, and then we
23 have the multiple burns on the left deltoid, or upper
24 arm.

25 Q. Okay. And you were able to determine that just by

1 looking at him during your external examination?

2 A. Yes.

3 Q. All right. And were you able to determine before
4 you opened the body where the exit point was?

5 A. Yes. The exit points were on the feet, the left
6 and right feet.

7 Q. All right. And how could you tell that? Was
8 there something that tipped you off?

9 A. These had the real classic look of the
10 electrocution burns because they were larger, and they
11 had the injury of -- let me get my diagram. They had the
12 injury of central charring, and sometimes it can even be
13 a little white. This was central charring surrounded by
14 a pale halo, and that is because the electricity will
15 actually -- the energy of the electricity will actually
16 push the red blood cells outward, and then surrounding
17 that pale halo is a red halo.

18 So it looks like a red doughnut, a white doughnut,
19 and then the black charring, so these were on both of the
20 great toes and on other areas of the left and right feet.

21 Q. I see you're looking at something, so did you make
22 a report of what you saw on the body?

23 A. Yes. I did an autopsy report. Also, during the
24 autopsy report itself, we're filling out diagrams just as
25 documentation, as well as photographs.

1 Q. Okay. I'm going to hand you what's been marked as
2 Plaintiff's Exhibit No. 28.

3 A. Okay.

4 Q. What is that?

5 A. This is the autopsy report on John Fortney. It
6 has a number of FA08273, and this was performed on
7 4/24/08. Included in the report is the autopsy report of
8 the body, toxicology report from National Medical
9 Services Laboratories as well as diagrams of the body and
10 clothing.

11 Q. All right. And did you write this?

12 A. Yes.

13 Q. And did you write this contemporaneously or
14 immediately after following John Fortney's autopsy?

15 A. During the autopsy.

16 Q. During the autopsy.

17 A. All the handwriting is my handwriting, and this is
18 during the autopsy. We take notes and then we have it
19 typed up.

20 Q. And is that report done in the regular course of
21 your job?

22 A. Yes.

23 Q. And it's stored away at the office, filed away?

24 A. It's filed and then it's made digital.

25 Q. What did you document in this report from an

1 injury standpoint about the entry wounds to his hands?
2 And I'll come over.

3 A. Okay. The injuries to the left hand, the third,
4 fourth, and fifth digits, or fingers, and also a blister
5 on the third -- I guess you call it the third middle,
6 which would be the knuckle, two blisters on the fourth
7 knuckle region, and another -- a second one there on the
8 fourth knuckle region.

9 And then on the fifth finger, there are three
10 blisters also present on the -- it just says on the back
11 of the fifth finger.

12 Q. Okay. And if we're looking at the drawing of the
13 specific hands, this is -- for Your Honor, this is the
14 preliminary autopsy report that we're looking at.

15 THE COURT: Is it under a certain tab?

16 MR. GOULD: Plaintiff Exhibit 28.

17 THE COURT: Before she starts giving her
18 opinion, you haven't offered her as an expert, although
19 I'm very familiar with her. She's testified in front of
20 me about a dozen times at least.

21 Is there any objection to her being qualified
22 as an expert?

23 MR. JOHNSON: No, Your Honor.

24 THE COURT: All right. Okay.

25 MR. GOULD: What you're looking at, for

1 references, is we're looking at the drawing she did of
2 the hands, which you'll find in that exhibit toward the
3 back of the preliminary autopsy report.

4 MR. JOHNSON: We never disputed he died from
5 electricity. He was electrocuted, so I don't know how
6 much time we need to spend proving something we say we
7 don't dispute.

8 MR. GOULD: Your Honor, we're walking through
9 for two reasons: First, from an educational standpoint
10 so we understand what we're looking at -- and it's not
11 going toward, necessarily, the cause of the death, but my
12 understanding, unless Mr. Johnson says otherwise now, is
13 they are disagreeing about any conscious pain and
14 suffering, so this is what we'll get into through these
15 photos, or these images.

16 THE COURT: Okay.

17 MR. GOULD: All right. Thank you.

18 BY MR. GOULD:

19 Q. So the blisters, what do they tell us?

20 A. It's heat-related, electrocution, because it
21 generates a great deal of heat and so you've got the
22 blistering of these areas, multiple areas of the left
23 hand.

24 Q. And which hand is this again?

25 A. The left.

1 Q. Is this the entrance point?

2 A. Yes.

3 Q. All right. And did you make any records about
4 what you saw on the shoulder?

5 A. Yes. The shoulder, there is a diagram of a man
6 standing sideways, and so the shoulder shows a triangle
7 area, 2 by 1.4 inch.

8 Q. Is that what those numbers are that we're looking
9 at?

10 A. Yes. And there are 18 punctates, or really small
11 burns, around this triangular burn, and then there's an
12 irregular abrasion, and posterior to the larger
13 triangular burn is a half inch separate burn.

14 Q. Do you have any idea how that became a triangle
15 burn based on the evidence you were given?

16 A. Only that it would have -- it was my opinion it
17 came in contact with the pole in some fashion.

18 Q. Okay. So that triangle would have developed from
19 contact with the pole as the electricity was running
20 through?

21 A. Yes. I can't explain the shape. There is
22 probably no explanation for the shape.

23 Q. And did you take note of his shirt?

24 A. Yes. We documented any defects in the shirts or
25 the clothing that correlate with injuries on the body.

1 Q. And why is that?

2 A. Mainly, again, just seeing if the injuries -- if
3 everything correlates and we see not only the holes in
4 the shirt, in the same location as the wounds on the
5 body, but there is also charring so you know there is
6 heat consistent with electricity on the defects of the
7 shirt.

8 Q. And what does it tell you, or tell us, when you
9 see holes in clothing like that, in an electrocution?

10 A. We know that the current was at least going down
11 the left arm and shoulder.

12 Q. So it gives you an idea of the route of the
13 electricity?

14 A. Yes.

15 Q. Did you make any notes or record anything about
16 what you saw about his feet?

17 A. Yes.

18 Q. And what was that?

19 A. We diagrammed the bottoms of the feet as mentioned
20 with the charring, the pale circular area, and then the
21 surrounding redness, and it was on the bottoms and sides
22 of both feet of varying sizes of typical or classical
23 electrical burns, and so these would have been the exit
24 points.

25 Q. So that we understand, you have multiple dots on

1 the feet.

2 A. Yes.

3 Q. On both feet.

4 A. Yes.

5 Q. And are you saying that all these different dots
6 have different exit wounds?

7 MR. JOHNSON: Object to the leading, Your
8 Honor. I object to the leading.

9 MR. GOULD: I'll rephrase the question, Your
10 Honor.

11 BY MR. GOULD:

12 Q. What are all these different dots?

13 A. They're burns. They're electrical burns. Now,
14 why does the current split when it gets into the feet and
15 go into different areas? I can't explain that.

16 It can split. It can run a current along a type
17 of bone or a type of muscle, but when it came into the
18 feet, we see the multiple exit areas.

19 Q. Exit areas.

20 A. Yes.

21 Q. And what is the -- some are black and some are
22 shaded in. Just help us explain what the shaded-in area
23 is versus just a solid black.

24 A. Well, this is just my drawing, but in the text of
25 the autopsy report, it describes there's charring, or a

1 charred area surrounded by powder, and a rim of
2 hyperemia, and so that is repeated for left foot and
3 right foot, and that is, again, the classical
4 electrocution burn.

5 Q. And the shaded-in area versus the dotted area,
6 what is that again? Tell us.

7 A. The shaded-in area is the actual exit point of the
8 heat of the electrons of the current. As it's coming out
9 of those areas, it pushes aside -- due to heat, pushes
10 aside the red blood cells and blood vessels so you have a
11 pale area surrounding the black, and then those red blood
12 cells are pushed over to the rim so you see this rim of
13 redness, which is the red stripe that goes around, like a
14 red doughnut.

15 Q. All right. And did you make any records about
16 socks?

17 A. Yes. We did diagram the socks as well as the
18 shoes, and we diagrammed the burns that were in the socks
19 and --

20 Q. What did that show us?

21 A. Left and right. They corresponded with, like, the
22 big toe lesions and the inner arch area of the right
23 foot, and we also see the current was able to burn
24 through the left and the right sneaker.

25 Q. And the sneakers and socks can be found in the

1 preliminary report that we're looking at?

2 A. Yes, preliminary and the final.

3 Q. And the final. Okay. And the holes that you
4 found in the shoes and the socks corresponded with the
5 exit wounds from the feet?

6 A. Yes, that's correct.

7 Q. And what does that tell us when you see that?

8 A. Well, some electrocutions we don't see any
9 entrance or exit points, but in this one, we see both
10 entrance and exit points on the body, but also a strong
11 enough current to burn the clothing and burn through the
12 shoes, so it's just an indicator of the strength of the
13 current.

14 Q. All right.

15 MR. GOULD: At this time, Your Honor, I move
16 to admit Plaintiff's Exhibit 28, the autopsy reports.

17 THE COURT: Without objection?

18 MR. JOHNSON: No objection.

19 THE COURT: Admitted.

20 (Plaintiff's Exhibit No. 28 was marked for
21 identification and admitted into evidence.)

22 BY MR. GOULD:

23 Q. The fact you found the electricity entered his
24 body through his hands and exiting through both his feet,
25 was that clinically significant to you?

1 A. It's clinically significant because you can now
2 get an idea of the route of the current, because some
3 individuals -- electrocution, rather, is not fatal, just
4 like lightning might not be fatal. It all depends on the
5 route and the strength of the current.

6 We know the current went from the left arm and
7 branched to the left and right legs to get out the feet,
8 but we also know it passed through the liver, because we
9 have a large liver laceration, and he was in ventricular
10 fibrillation when he was found, and that's very common
11 when the current crosses or goes near the heart.

12 Q. And what is that? You just used a big word,
13 ventricular fibrillation. What is that?

14 A. Ventricle is the part of the heart that pumps
15 blood through the body, and when it says fibrillation,
16 it's not doing the normal squeeze rhythmically when we
17 feel our heartbeat. Instead, it's kind of quickly
18 flopping, so to speak, and so it's not doing a good job
19 of supplying the body with blood and oxygen.

20 So that's the common rhythm that can result from
21 electrocution and lightning, and that is the rhythm that
22 we're trying to get rid of and get back into normal sinus
23 rhythm when we use our paddles or defibrillators.

24 Q. Now, based on your -- again, your extensive
25 personal knowledge with autopsies, dealing with

1 electrocution deaths, along with your medical knowledge,
2 do you believe within a reasonable degree of medical
3 certainty that John Fortney felt this electricity
4 entering and exiting his body?

5 MR. JOHNSON: Your Honor, I object. I don't
6 believe the witness is qualified to give an opinion on
7 that point. I would like to question her --

8 THE COURT: Well, lay a foundation and ask if
9 she can.

10 MR. GOULD: Well, she's already testified
11 she's done, you know, between 40 and 50 of these
12 autopsies.

13 BY MR. GOULD:

14 Q. Let me ask you this: What information do you look
15 to or rely on in these 40 to 50 autopsies you've done
16 regarding electrocution?

17 A. As far as if they felt it?

18 Q. Generally speaking, and then we'll --

19 THE COURT: Why don't you ask her, can she
20 tell if somebody felt it? And then if she can say that
21 somebody could feel it, does she have an opinion as to
22 whether or not the deceased did.

23 MR. GOULD: All right. Thank you.

24 BY MR. GOULD:

25 Q. Can you tell us if somebody feels the electricity

1 entering or exiting their body?

2 A. Yes, they do.

3 Q. All right. And based on that, can you describe
4 for us what that pain consists of?

5 A. Depending on the route, you definitely have the
6 burning, the sharp pain as it goes through the skin, and
7 the muscle. If it hits bone, you can have fracture. You
8 have the pain of the fracture.

9 This time it went through the liver. The liver
10 itself, the organ itself, doesn't have the pain
11 receptors, but the capsule surrounding the liver does
12 have pain receptors, and then going out the feet, you
13 also have the pain going out the feet.

14 Q. And you said there was sharp and there was heat,
15 so regarding the heat, can you tell us, does it get
16 hotter the longer a person is exposed to the electricity
17 or does it just plateau?

18 A. Well, the heat can build if you maintain your
19 connection with the electricity. Sometimes individuals
20 have a grip that they cannot let go of the current.
21 They're unable to move their hand, but what is happening
22 as the current flows through the body, you have heat.
23 You have damage to tissues, necrosis of the tissues as
24 it's going through the body, and that's why, depending on
25 the route, some are fatal and some are not. The ones

1 that are not, you have medical knowledge of how it feels.

2 Q. And are you able to tell us whether a person
3 feels -- well, strike that.

4 Are you able to describe the pain felt by -- or
5 are you able to tell us or describe for us the pain felt
6 by just the electrical current itself? Is that separate
7 from the heat?

8 A. Well, electrical current is described as a sharp
9 kind of stabbing pain. It's high voltage as opposed to
10 when we get shocked at home on some appliance, and then
11 simultaneously you've got the heating as the current
12 quickly goes through.

13 Q. So there is a difference between sticking your
14 finger in a light socket and getting electrocuted by a
15 power line, as far as that electrical current pain?

16 A. Yes, because the higher the voltage, the more
17 energy you have, and the energy, in this case, it's
18 creating heat.

19 Q. Well, getting back to John's autopsy itself, why
20 was it that you needed to open him up and see inside his
21 body?

22 A. Well, I knew, looking on the outside, he had been
23 electrocuted, and I wanted to see what damage the
24 electrocution, the route of electrocution, had taken as
25 it went from hand to shoulder down to both the feet.

1 And, plus, I do complete autopsies on all my
2 cases, but for the purpose of this case, my documentation
3 would be specifically looking at the internal areas of
4 the body that I could tell had been damaged by
5 electrocution.

6 Q. And did you start with the chest and abdomen?

7 A. We always start with the chest and abdomen.

8 Q. All right. And what did you look at when you
9 opened up the chest and abdomen, or what did you see?

10 A. Well, first we opened up the chest and removed the
11 heart and lungs, and there was nothing to the naked eye
12 that was remarkable.

13 When we looked in abdomen, there was a laceration,
14 or a tear of the liver, and there was half a liter, 500
15 CCs, of blood within the abdomen, within the belly.

16 Q. And after that, what did you do next?

17 A. Then we removed the other organs, spleen, kidney,
18 pancreas, intestines, the male genital organs and
19 examined those by dissecting organs and putting in
20 representative sections to look under the microscope.

21 Q. What is the significance of doing that?

22 A. So that we can see with the naked eye what might
23 not be visible, but we can look under the microscope and
24 we might find some damage, and also you want to confirm
25 microscopically what you see grossly, or with the naked

1 eye.

2 Q. And perhaps I missed it, Dr. Collins, but you said
3 earlier something about the liver, so when did you come
4 across the liver in that autopsy?

5 A. The liver is taken out. It's usually the second
6 organ taken out if you consider the lungs as one organ,
7 and so when we were looking at the liver, we saw that the
8 right anterior lobe, so the lobe nearest to the skin, had
9 a jagged laceration, and as a result of that, there were
10 500 CCs of blood in the peritoneum, or the belly.

11 Q. What caused that?

12 A. The current, electrical current.

13 Q. And what about the electrical current caused his
14 liver to do that, or look like that?

15 A. It's the energy, the heat and energy traveling
16 through the body.

17 Q. Switching gears, is it common during the autopsy
18 to do any kind of toxicology exam?

19 A. Yes. We do toxicology on all of our cases,
20 whether it's a newborn baby or a fetus or whether it's an
21 elderly individual.

22 Q. Why?

23 A. It's standard. You look for any types of alcohol,
24 drugs, legal or illegal, so we can understand the impact
25 of drugs and toxins on the body and possibly identify

1 overdoses or misuses of drugs or drugs that shouldn't be
2 given to a certain population.

3 Q. So how is that done? How is a toxicology exam
4 done on an autopsy?

5 A. Usually you'll try to do a screen on urine, and if
6 you don't have urine, you want to use peripheral blood,
7 not heart blood, because that can -- that can alter
8 postmortem. Peripheral blood is the closest to the blood
9 level of a drug at the time of death, and so we would use
10 peripheral blood.

11 We send our specimens to National Medical Services
12 Laboratory, which is the largest forensic laboratory in
13 the country, and we've worked with them for years, and
14 then we get the results back and include them in part of
15 our autopsy report.

16 Q. Was a toxicology exam done in John Fortney's case?

17 A. Yes. We had peripheral blood.

18 Q. And that's because that's part of your protocol to
19 do these?

20 A. Correct.

21 Q. So it wasn't anything specific to this case? You
22 do it for all your patients?

23 A. Yeah, no matter what. It could be an innocent
24 baby or it could be, you know, someone that is involved
25 in a police shooting. So it doesn't matter where we

1 do -- the same protocol for all of our cases.

2 Q. Tell us, what did you find when did you this
3 toxicology exam?

4 A. Looking at it, there was no alcohol identified.
5 There was some cotinine and nicotine, so he's smoking and
6 nicotine can break down into cotinine, so he smoked a
7 cigarette. And then as we started looking through the
8 confirmation of what they thought they saw in the screen,
9 we confirmed that there is what was called
10 benzoylecgonine, which some people say BEG, and so there
11 was 130 nanograms per milliliter.

12 Now, BEC is the primary metabolite of cocaine, so
13 he did have that on board. There was no cocaine or
14 apparent cocaine on board. Cocaine breaks down very
15 quickly, and the half life is about 40 minutes, so the
16 BEC will remain longer. Maybe the half life is like nine
17 hours, six to nine hours.

18 Q. So what does that mean when you found that?

19 A. Well, just looking at it, you say well, there's no
20 cocaine, and the benzoylecgonine is an inactive
21 metabolite, meaning that it doesn't get you high, or it's
22 not an upper, as the cocaine is.

23 Now, you cannot extrapolate backwards and say,
24 well, when did he do cocaine to result in 130 nanograms
25 per milliliter? He could have done a great, great

1 quantity several days ago, and as it's being broken down,
2 we're only left with this 130, and so you can't -- you
3 cannot extrapolate backwards to see.

4 Q. Does it mean he was high at the time of his death?

5 A. No. He was not -- he had no apparent cocaine in
6 his system, so no.

7 Q. Now, he was dead when you first saw him. That
8 might seem like common sense, but he was dead when you
9 first saw him, right?

10 A. Yes. I mean, some of my patients I'll be asked to
11 see before they die, but no, this patient of mine was
12 dead.

13 Q. And what was the cause of his death based on your
14 autopsy of him?

15 A. We classified the cause of death as electrocution
16 due to metal pole contacting a high voltage wire and the
17 manner of death was accident.

18 Q. And how did you determine that cause of death?
19 What did you rely on?

20 A. Based on the history that he was near the wire and
21 a pole, so you take your scene investigation, but even if
22 we didn't have that scene investigation, and sometimes we
23 don't, looking at the feet and the external aspect of the
24 body, they're classic for electrocution burns.

25 Also, when he was first found, his heart rhythm

1 was ventricular fibrillation, which is classic for
2 electrocution.

3 Q. Was it important for you at the time to determine
4 when it was the actual death occurred?

5 A. When he was -- you mean when asystole was
6 pronounced? It was important. We want to know, as you
7 can see on the front of the autopsy report, the interval,
8 the injury to death interval, and so sometimes it's
9 within seconds, and sometimes electrocution cases do not
10 die at all, and so we always want to provide as much
11 information as we can for vital statistics on how long
12 the injury to death time interval was.

13 Q. All right. And you got to my next question, so
14 what information did you gather, or do you have now to
15 help us understand what happened from the point in time
16 the electricity entered his body until you had him on the
17 autopsy table?

18 A. Our first route of information is usually the
19 coroner's report, because we're in a coroner system, and
20 so we were told the details about the metal part on the
21 wire and we were told the time. They said it occurred
22 around 4:10 p.m.

23 So then I had the EMS run sheet, and so they said
24 they received the call at 4:11, and then they're
25 dispatched. They're at the scene, and they're at the

1 patient, and what I can read from these numbers is that
2 4:42. When they first found the patient, upon arrival,
3 he was in ventricular fibrillation.

4 Q. Remind us. What is that again?

5 A. That's when the heart is not in normal sinus
6 rhythm. It's still beating. There's still a beat and
7 there is still electricity within the heart, and it's in
8 v-fib, so it's just kind of beating very erratically. So
9 you'll give medications and you'll try to defibrillate
10 with the paddles to try to get it to snap back into
11 normal sinus rhythm.

12 Q. Okay. And before we walk through the EMS records,
13 is it important to have those when formulating your
14 opinions?

15 A. Yes.

16 Q. Why?

17 A. This is the last witness to the death, actually,
18 before the death occurs. We know that the coroner
19 provides a very brief history because he or she will
20 gather details later, but as a physician, this is the
21 last medical record, unless he makes it to the hospital
22 and I get medical records from the hospital. If that
23 were the case, I would request all of those medical
24 records prior to starting my autopsy.

25 Q. And do you typically rely on documents like these

1 EMS records when drawing your conclusions?

2 A. Yes. Based on different conclusions, yes.

3 Q. And they would be helpful in explaining the basis
4 of your opinion?

5 A. Yes.

6 Q. All right. I'm handing you what's been labelled
7 Plaintiff's Exhibit 27. Can you just tell us what that
8 is.

9 A. This is a much clearer copy than mine of the EMS
10 records. Let's see. Yes, this is the complete EMS
11 record.

12 Q. And that is the copy of the records as you have
13 them?

14 A. Yes.

15 Q. What did you learn about the facts and
16 circumstances from these EMS records?

17 A. Learned about the time frame, learned that he was
18 in ventricular fibrillation which supports what I saw
19 grossly with the electrocution. Learned he was
20 intubated. He was placed on auto pulse, which is like
21 CPR. They defibrillated him, gave him the proper
22 medications. He remains in ventricular fibrillation
23 until -- there's time listed when he starts to go into
24 asystole, which is flat-linin. He starts to go into
25 that, getting around 1710 to 1716.

1 Q. You said 1716?

2 A. Yes.

3 Q. So 5:16?

4 A. Yes. Asystole is when he has no rhythm. They got
5 a little bit of an electrical impulse again at 716, but
6 after that, it was asystole.

7 Q. So a little over an hour, he's in the V-fib, based
8 on the EMS report?

9 A. Yes, since they received the call at 1611.

10 Q. Do you have an understanding based on the review
11 of the records about what happened once he got to the
12 hospital?

13 A. He was pronounced at the hospital.

14 Q. So he wasn't pronounced dead until he got to the
15 hospital?

16 A. That's correct.

17 Q. And do you have, based on your review, knowledge
18 of the time when he was pronounced dead?

19 A. We have that he was pronounced at 1730.

20 Q. So 5:30?

21 A. Yes.

22 Q. And the original call to 911 was at 4:11?

23 A. Yes.

24 Q. Of the 40 to 50 electrocution deaths, autopsies
25 that you've done, were there some where the death was

1 instantaneous, or as instantaneous as an electrocution
2 death can be?

3 A. Yes. If the current passes through the brain
4 stem, it will stop the heart and respiratory system, and
5 if it goes through the heart it can cause ventricular
6 fibrillation and directly go into asystole, so the person
7 just collapses and there is no rhythm. There is no
8 activity in the body whatsoever. So those would be, I
9 would say, within seconds.

10 Q. And did you see any evidence of a sliced brain
11 stem or anything like that with John Fortney?

12 A. No. This direction wouldn't have gone through the
13 brain stem because this was going down. We even have the
14 liver, we know the heart and through the feet, so it
15 wasn't going across.

16 MR. GOULD: At this time, Your Honor, I move
17 to admit Plaintiff's Exhibit 27, the EMS report.

18 MR. JOHNSON: No objection.

19 THE COURT: Admitted.

20 (Plaintiff's Exhibit No. 27 was marked for
21 identification and admitted into evidence.)

22 BY MR. GOULD:

23 Q. So just so we have the two time frames down, Dr.
24 Collings, how long was it from the moment the 911 call
25 came until John Fortney flatlined, to use your term?

1 A. Okay. The call was received by the dispatch at
2 4:11, and he was pronounced at 5:30, but we have at 5:16
3 he's in asystole. So from 5:10 to 5:16, he's kind of
4 going through pulseless, electrical activity and asystole
5 and back, but that's pretty much when he died.

6 Q. And so during this time of 4:11 and the flat-line,
7 he's in the v-fib?

8 A. Yes.

9 Q. And that means that he's still alive?

10 A. He's still alive, that's why they're continuing to
11 perform CPR. They're trying to convert him, cardio
12 convert him, to normal sinus rhythm, but he's receiving
13 oxygen from the paramedics. He's receiving circulation
14 by their compressions so he's -- he's considered alive,
15 yes. You would not say his time of death was anywhere
16 within that time frame.

17 Q. And is there anything else that the EMS folks, the
18 paramedics, were doing that we haven't covered during
19 that time frame?

20 A. I mentioned that they were providing oxygen, so
21 they intubated him. No, they were just resuscitating
22 him.

23 Q. I want to switch our attention to John Robinson
24 that we talked about at the beginning of this. Are you
25 aware he's a survivor of this incident?

1 A. I have not seen any of his records.

2 Q. I want you to assume what is in his medical
3 records and what will soon be in the testimony before
4 Your Honor about John Robinson, that he has burns in the
5 area of his right shoulder and burns in his feet as well
6 from the same power source that killed John Fortney.

7 Now, can you tell us with any -- or with your
8 knowledge, based on the medical school residency and your
9 autopsies, based on those burns, again, right shoulder,
10 both feet, what's the most likely path of the electrical
11 current in John Robinson, given these wounds?

12 A. You said right shoulder and both feet?

13 Q. Yes, ma'am.

14 A. It would be passing from the right shoulder down
15 to both of his feet.

16 Q. Through the chest, abdomen, and passing into both
17 legs?

18 A. Yeah. I would have to see if he had any abnormal
19 heart rhythms, but yes, it's just -- all I can say is
20 from his right shoulder down.

21 Q. Okay. And within a reasonable degree of medical
22 probability, can you tell us, would that have produced
23 pain for John Robinson?

24 A. Electrocution? Excuse me. Electrocution, as I
25 mentioned earlier, is painful. We know -- it's used as

1 an element of torture. It produces heat and causes
2 necrosis of tissues. It can break bones, blisters the
3 skin, can cause chronic problems, chronic scarring and
4 complications. It affects nerves. Wherever the current
5 runs, it affects the nerves.

6 Now, maybe -- you said his was on the right
7 shoulder, heart's on the left, maybe that's why he had a
8 better outcome in that as the current's passing through
9 the body, the heart is not in the way, and so that could
10 be a reason for that outcome.

11 Q. Now, I also want you to assume that we know he was
12 unconscious right before being put on the gurney, being
13 put inside the helicopter and taken to the hospital and
14 didn't regain total consciousness until sometime in the
15 hospital.

16 Can you tell us, based on your personal
17 experience, what could have been causing the unconscious
18 state of John Robinson during that time?

19 MR. JOHNSON: Object, Your Honor. What could
20 have caused it is not the standard.

21 MR. GOULD: Okay. And I'll rephrase.

22 BY MR. GOULD:

23 Q. Can you tell us, based on your personal
24 experience, what was causing the unconscious state in
25 John Robinson?

1 A. It could be a few things. It could be --

2 MR. JOHNSON: Your Honor, I object. It's
3 non-responsive. The standard is what most probably
4 caused. If she can't testify to the standard, her
5 testimony is irrelevant.

6 THE COURT: To a reasonable degree of medical
7 certainty, does she have an opinion?

8 MR. GOULD: I'll rephrase.

9 BY MR. GOULD:

10 Q. So can you tell us within a reasonable degree of
11 medical probability, Dr. Collins, what was causing the
12 unconscious state in John Robinson during that time?

13 A. An electrical instability relating either to his
14 heart or his nervous system.

15 Q. And within a reasonable degree of medical
16 probability, would that have caused pain -- or let me
17 ask -- I'm sorry. I asked the wrong question.

18 Could it have been caused by the pain?

19 A. I would have to look through his medical records
20 to see if his injuries were that degree that would cause
21 someone to pass out from the pain.

22 Q. How does a man who suffered an electrocution
23 injury six years ago still experience pain in his
24 shoulder and feet today?

25 A. That's really not uncommon because what you've

1 got, it's similar to having any type of injury, a burn
2 injury, a gunshot wound injury; you've got damage and
3 death to some of the tissues in this area, and you've got
4 nerves in this area, and then you've got your body trying
5 to heal, and the number way one way it heals is by scar
6 formation.

7 So it could be that certain nerves were irritated.
8 The tissues did not heal properly around those areas, and
9 so it has to do with two phases, what was actually
10 damaged initially and then how the body repaired itself.

11 Q. Again, based on what you know, your personal
12 experience and medical knowledge and the 40 to 50
13 autopsies you've done regarding electrocutions, could you
14 tell us within a reasonable degree of medical certainty
15 why John Fortney died and John Robinson did not?

16 A. It's the path -- the strength of the current.
17 Even though I understand they both had the same current,
18 but it's the strength of the current and the route
19 through the body, so the route through Mr. Fortney's body
20 involved more of the left and in the heart, and as it
21 went down to both feet, it actually went, in effect, to
22 the liver too, and so it was the route it takes through
23 the body, and sometimes you just can't explain the root,
24 but you know it went from the left hand and shoulder to
25 both of his feet, and you see what vital structures are

1 in the way.

2 MR. GOULD: Thank you.

3 THE WITNESS: Okay.

4 THE COURT: Cross?

5 MR. JOHNSON: Yes, sir.

6 CROSS-EXAMINATION

7 BY MR. JOHNSON:

8 Q. Dr. Collins, have you seen any of the medical
9 records on John Robinson?

10 A. No, sir, I have not.

11 Q. Have you ever met or interviewed or examined John
12 Robinson?

13 A. No, I have not.

14 Q. Would you agree with me it would be hard for you
15 to give an opinion to a reasonable degree of medical
16 certainty regarding Mr. Robinson and his injuries without
17 looking at the records first and interviewing him?

18 A. Yeah. On this particular patient, that's correct.
19 When I mentioned the chronic pain, I was saying it's
20 common in people who are electrocuted. For this
21 individual, yes, I would have to see his injuries and
22 know what his medical records report for this
23 examination.

24 Q. And as we stand here, or we're here today, you're
25 not in a position to give any opinion regarding him to a

1 reasonable degree of medical certainty because you've not
2 looked at the records nor examined him?

3 A. That's correct.

4 Q. Thank you.

5 Now, going back to Mr. Fortney, I was a little
6 confused about the cocaine and some pre-cursor or
7 residual evidence of cocaine. Could you explain that
8 again?

9 A. Yes. He has the metabolite in his blood, the
10 benzoylecgonine, which is not active in itself, but it
11 does mean that he was using cocaine in the past.

12 Now, I'm trying to get the page with the number.
13 Okay. So how does an individual get 130 nanograms per
14 milliliter of benzoylecgonine? Well, they could have
15 done a small amount of cocaine several hours before and
16 it broke itself down, it as does quickly, and so you're
17 only left with a small amount of benzoylecgonine at 130,
18 or he could have used a great deal amount of cocaine a
19 day or two ago, and as it's continuing to break down, it
20 finally took that much time to reach the 130 of the
21 benzoylecgonine, so you cannot take the number and
22 extrapolate how much he snorted or smoked of cocaine.

23 Q. So what you're saying is we know he used cocaine,
24 but we don't know when or what quantity he used it to end
25 up with that report?

1 A. That's correct.

2 Q. Do you have your file with you?

3 A. Yes, sir.

4 Q. Could I look and see what you have?

5 A. Yes, sir. That's what we're talking about, this
6 one, and EMS, EMS, autopsy, the diagrams, my notice to be
7 here, and then my affidavit.

8 Q. Okay. Let me hand you back your materials.

9 Referring to the ambulance report --

10 A. Okay.

11 Q. What did you draw from that report that was
12 relevant to you in your autopsy?

13 A. From that report, what was relevant mostly is when
14 they arrived, relative to the accident, so when they
15 arrived to the patient, he was still in ventricular
16 fibrillation and that he remained in ventricular
17 fibrillation despite resuscitative efforts until around
18 1716, or 5:16.

19 So that just told me that he did not die
20 instantaneously or within seconds, that he was still in
21 ventricular fibrillation and being oxygenated during the
22 treatment.

23 Q. Where on the report is the v-triculation {sic}?

24 A. The first part when they arrive, he's in
25 ventricular fibrillation.

1 Q. You're reading the third page?

2 A. Yes. It's kind of the summary, and then as you go
3 down the tabulated items, it says page 304, they'll talk
4 about different -- they'll enter different results, like
5 here is ventricular fibrillation, ventricular
6 fibrillation --

7 Q. Can you put the times?

8 A. They don't start doing times until 1650, but he is
9 still in ventricular fibrillation at one of those times.
10 Let me see. Here he is. At 1650, he's in ventricular
11 fibrillation. So they give him some more medication, and
12 then he starts to convert to a different rhythm, but he
13 goes into asystole at 1716.

14 Q. So are they trying to keep him alive by giving him
15 medication that would control v-triculation?

16 A. Yes. They're trying to cardio convert him by
17 medication as well as by electricity to snap the heart
18 back into its normal sinus rhythm.

19 Q. Do you know what would have happened to him if he
20 had not had that medication, try snapping that --

21 A. If he had not had any treatment, he more likely
22 than not would have died of ventricular fibrillation.

23 Q. When?

24 A. It's difficult to know. He remained in
25 ventricular fibrillation on his own until he arrived at

1 1642. It would be difficult to say when he would have
2 succumbed to asystole.

3 Q. Counsel asked you about when he was pronounced
4 dead.

5 A. Yes.

6 Q. Is that time related to when he was dead or was it
7 when he sees a doctor who says he's dead?

8 A. The pronouncement was by the doctor, or the
9 coroner, who says he's dead, and I was told that was
10 5:30. The asystole was at 5:16, so if I were the doctor
11 at the time, I would have said the time of death is 5:16,
12 and the coroner chose when someone, either she or the
13 emergency medicine physician, felt was more appropriate.
14 They chose the time of death at 5:30 p.m.

15 Q. The coroner's who pronounced him dead?

16 A. She's the coroner. She either pronounces him or
17 at the hospital they'll pronounce him. I don't see any
18 record from the hospital.

19 Q. Is the coroner a medically trained doctor?

20 A. No. They have a nurse -- it says nurse or
21 physician's signature. He received the body at 5:54, but
22 that is much later than the asystole, but I do want to
23 say before I insult the coroner of this county -- the
24 coroner at this time was not Rae Wooten, but it was Judy
25 Koelpin. This was Berkeley County, so now I'm going to

1 get everyone confused, but the Berkeley County coroner is
2 not a physician or a nurse.

3 Q. Okay. Now, so the pronouncement of death time you
4 gave us on this chart, is that before or after the
5 coroner pronounced him dead?

6 A. Before.

7 Q. Do you ever see live patients?

8 A. I do, but not that often. They're either in the
9 hospital or they sustained injuries and they want me to
10 see the injuries before maybe days go by, and children --
11 child abuse victims and elders, those are really the most
12 common groups that I will see while alive, and then in my
13 role looking at forensic live patients with LifePoint
14 organ and procurement, I'll see live patients also.

15 Q. Does it make a patient nervous to have a
16 pathologist --

17 A. It makes nurses and doctors nervous.

18 Q. Let me ask you this: When one has v-fib, are they
19 normally conscious or unconscious?

20 A. They can be conscious, but you said normally, I
21 guess you mean the majority of the time? The majority of
22 the time they're unconscious.

23 Q. Do you have any record from the EMS report that
24 you can point to where they would have said at some point
25 in this process that he was conscious?

1 A. I don't recall them ever stating he was conscious.
2 They state he was unconscious at 1650 they looked at when
3 they first arrived. No, I don't see any mention of being
4 conscious or unconscious.

5 Q. Out of the 40 or 50 electrocution cases you've
6 dealt with, how many of those have involved patients who
7 had v-fib?

8 A. Almost all of them would be v-fib or just asystole
9 by the time I saw them.

10 Q. Have you ever seen any of them before they died?

11 A. Not before I've been in residency. I have in my
12 medical training a while back.

13 Q. How many did you see who were actually alive?

14 A. During medical school?

15 Q. Yes.

16 A. Not many. I would say half dozen.

17 Q. Do you have any evidence from what your autopsy
18 showed or what you found from the EMS report that this
19 man was ever conscious from the time he was contacted?

20 A. So he's upright and moving and then he's
21 electrocuted.

22 Q. Right.

23 A. And then afterwards I don't have any witness
24 statements or any documentation that he made -- talks or
25 conversation.

1 MR. JOHNSON: Thank you. That's all I have.

2 THE COURT: Redirect?

3 MR. GOULD: No, Your Honor.

4 THE COURT: All right.

5 Well, you're free to go. Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: All right. Is that where you
8 wanted to break for today then?

9 MR. SMITH: Yes, sir, please.

10 THE COURT: Let's start back up at 9:30.

11 MR. KEENAN: Your Honor, may I inquire before
12 we go, consistent with a statement I made at the very
13 beginning by inviting Your Honor to ask questions? Are
14 you not asking questions because we're doing such a
15 horrible job at taking 10,000 questions or are you
16 satisfied or do you have a practice of not asking
17 questions?

18 THE COURT: I don't have any unanswered
19 questions at this point.

20 MR. KEENAN: Good.

21 THE COURT: Y'all are doing a good job.

22 (Recess taken.)

23 (September 30, 2015.)

24 THE COURT: Are you running into problems?

25 MR. SMITH: Not those problems. I've got an

1 issue that I think we need to talk about.

2 As you know, the two daughters of John
3 Fortney, Emma Fortney and Gina Fortney, are here and,
4 they're prepared to testify. Today Pope has told me that
5 he won't allow Gina to testify. He won't allow her to
6 testify, all right?

7 THE COURT: Well, I make that decision. He
8 may object.

9 MR. SMITH: And the reason is, he says I
10 haven't proven to him that Gina Fortney is the daughter
11 of John Fortney. Now, Your Honor, he raised this a while
12 back, right, and we felt that, you know, going to Gina --
13 and I thought about this. Going to Gina at the point
14 after she's losing her dad and saying, Hey, now I need a
15 DNA test from you, I was really apprehensive about it,
16 but since he asked the question, I had her go get a DNA
17 test done, and of course it back 99.99 percent positive.

18 THE COURT: All right.

19 MR. SMITH: Before that, there was a worker's
20 comp order. This case started out as a comp case. Of
21 course they have a lien, but this case started out as a
22 comp case.

23 Gina Fortney was listed as the statutory
24 beneficiary, Emma was listed as a statutory beneficiary.
25 I think Pope is taking the position now that you can't

1 determine that she's his daughter and that you can't
2 allow her to testify, and I apologize. I'm a little
3 emotional about it right now because I'm a little -- I'm
4 surprised by it, and I just -- I think you know, but,
5 anyway, we're rolling along here, Judge, and I will let
6 Pope explain to you.

7 MR. JOHNSON: Let me say first I didn't say
8 she couldn't testify. I know that it's your decision,
9 but Kevin asked me yesterday would I concede paternity on
10 Gina, who they had tested. I told him I needed to think
11 about it and I would let him know.

12 I've never agreed to concede paternity of
13 either of these young women. In doing research, I found
14 that paternity is in the exclusive jurisdiction of the
15 family court and the probate court.

16 This Court has no jurisdiction to determine
17 the issue of paternity. I called that to Kevin's
18 attention and told him I would not concede paternity, and
19 I would take the position that the Court lacks subject
20 matter jurisdiction to decide it.

21 What I handed up to you was Ballard v.
22 Thomasson. It's opinion number 26024, filed August 15,
23 2005.

24 THE COURT: Well, I'll give it some thought.
25 My first thought is your colleague there and I both in

1 our past used to the master in equity, and I know he
2 probably, as well as I, as a master of equity tried
3 dozens of cases in which who was the owner was the issue,
4 and we had jurisdiction to do that, and I -- that's my
5 first thought.

6 So, there are circumstances in which the
7 circuit court can make a determination that somebody is
8 the heir of somebody else. It's not an issue I have to
9 decide right this minute, so I'll think about it.

10 MR. SMITH: And, Your Honor, I guess I would
11 equate it to we go through a week, two-weeks, three-weeks
12 trials, and five seconds before a statutory beneficiary,
13 a daughter, stands up, they raise an issue with it.

14 In light of the -- and, Judge, I think also,
15 I don't know if this goes specifically to the point, but
16 the DNA tester, there's a deposition of the fellow as
17 well, so I just don't know how you can -- I don't know
18 that we have a duty to prove it to Pope. I think Pope
19 has got a duty to plead these things.

20 THE COURT: I don't think you need to
21 personalize it that much. He's doing his job, you're
22 doing your job. We'll sort it out.

23

24

25

CATHLEEN MOORE,

1 having been first duly sworn,
2 was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. GOULD:

5 Q. Good morning, Dr. Moore.

6 A. Good morning.

7 Q. And how are you?

8 A. Good, thanks.

9 Q. Now, you prefer to be called Cathleen, right?

10 A. Yes, please.

11 Q. All right, Cathleen. What are you here to do
12 today?

13 A. I'm here to testify in regard to issues of visual
14 perception with regard to the power lines.

15 Q. What qualifies you to speak about this?

16 A. So I do research in visual perception in the
17 Department of Psychological and Brain Sciences at the
18 University of Iowa where I have a lab that focusses on
19 these kinds of issues.

20 Q. All right. Now, you're a doctor. What are you a
21 doctor of?

22 A. Psychology.

23 Q. And what does psychology have to do with visual
24 perception?

25 A. So visual perception is a sub-field of

1 experimental psychology, so you can think of it as
2 genetics is to biology as vision to psychology. It's a
3 part of it, and, yeah, so I am housed in a psychology
4 department.

5 Q. At the University of Iowa?

6 A. At the University of Iowa.

7 Q. What is vision to you, then?

8 A. So vision is understanding how the brain in
9 particular processes the information that you have
10 available at the eye to make sense of the world around
11 you, to establish a representation of the external world
12 through visual mechanisms in the brain.

13 Q. So it's part eye, part brain?

14 A. More brain than eye, yes.

15 Q. All right. You said you work at the University of
16 Iowa. What do you do there?

17 A. So -- well, I'm a professor, which means it's a
18 research one university, so about 60 percent of my time
19 is given over to research, and then I also teach. I
20 teach visual perception and sensation courses at the
21 undergraduate and graduate level, and I oversee research
22 students in my lab, both graduate and undergraduate.

23 Q. And how long have you been teaching as a professor
24 at the university level?

25 A. Well, at the University of Iowa, I think this is

1 my eighth year, and then I was at Penn State doing the
2 same thing for 12 years.

3 Q. Teaching and doing research on vision perception
4 at Penn State?

5 A. Yes.

6 Q. When you say research, what kind of research are
7 you doing?

8 A. So, it's behavioral research. I work -- I have a
9 lab where I present student -- usually students,
10 undergraduate students, with visual stimuli that are
11 designed to ask how it is that they're interpreting those
12 stimuli, what kind of cues they're using to understand
13 what they're looking at. They record responses. We
14 analyze those data and draw inferences about the vision
15 system.

16 Q. And I think you answered this, but I may have
17 misheard. How much of your time is split doing research
18 and how much is teaching?

19 A. So about -- officially, 60 percent of my time is
20 research in terms of my appointment. I probably spend a
21 little bit more time researching.

22 Q. And you said you teach a number of courses. What
23 courses specifically related to visual perception do you
24 teach?

25 A. I teach a course, an undergraduate course, called

1 visual Cognition and Perception. That's directly related
2 to it. I've taught also a number of -- an undergraduate
3 course called Sensation Perception, which considers not
4 just vision, but other sensory processes as well,
5 audition and olfaction.

6 I teach a graduate course called Visual
7 Perception, which clearly has to do with visual
8 perception, and also a graduate course called attention,
9 which concerns the role of attention processes on
10 typically visual processes, and then I teach a cognitive
11 pro seminar for our graduates coming into the cognition
12 and perception area. They have an introductory course to
13 cognition more broadly that I team teach.

14 Q. In regards to the visual, the class that you said
15 was called Visual Perception that you teach to graduate
16 students, can you give us kind of a syllabus of exactly
17 what you teach in that course?

18 A. Sure. So we start with what I call the front end
19 of the system. So you have information at the eye, and
20 we try to understand what information is in principle
21 available to that and what are the early visual
22 mechanisms, so retina and early visual cortex, what kind
23 of information does it extract?

24 And then we move on up through the system, trying
25 to understand what is sort of characterized as perception

1 rather than sensation, and that is interpreting that
2 information which is, in fact, ambiguous, which we'll get
3 into a little bit later. And so we -- and at the
4 graduate level course, we have -- they read a textbook on
5 the side that's sort of an undergraduate textbook, but
6 primarily we're reading primary sourced journal articles,
7 both some classic historical ones and then more current
8 ones.

9 Q. During your time in academia, whether it was at
10 Penn State or the University of Iowa, have you ever
11 written any articles dealing with visual perception?

12 A. Yes.

13 Q. And, just roughly, how many would you say you've
14 written?

15 A. More than 40, maybe 50. I can't remember exactly.

16 Q. Dealing with visual perception and issues
17 regarding visual perception?

18 A. Yes, broadly extends into attention and visual
19 perception, yeah.

20 Q. Are there one or two examples that kind of come to
21 mind that you kind of use as examples of what we're going
22 to be talking about here today in terms of visual
23 perception?

24 A. So. Sure. So I've looked at questions of, for
25 example, how people use shading cues, so how shadows lie

1 within the image that they're looking at to try to
2 interpret where objects are relative to each other, what
3 level -- what colors they are, if you will, what colors
4 of gray, and how that guides their visual search within
5 the environment.

6 It's a task we call visual search. If they're
7 looking for some particular target, we can ask how do --
8 exactly what we put into the display, how does that alter
9 the way their search unfolds?

10 Q. And are these articles, these 40 or 50 that you've
11 written, are they peer reviewed?

12 A. Yeah, absolutely.

13 Q. Explain us, to what does peer review mean?

14 A. So they're submitted to academic journals where
15 they're received by an editor, and the editor assigns
16 them to -- invites people from the field, other experts
17 in the field, to read the paper and assess it for
18 soundness of design, for interpretation of the data, for
19 integration into the existing literature.

20 They write comments back saying, This is good;
21 this is bad; this has to be addressed. The authors
22 revise that. It gets resubmitted and reviewed by those
23 reviewers, and they say yay or nay. If they say nay,
24 then it doesn't get published. If they say yeah, it goes
25 into the journal.

1 Q. Is it fair to say it's being tested by folks in
2 your field?

3 A. Yes, for sure.

4 Q. Have you ever been -- in your time in academia,
5 have you ever published any books or book chapters about
6 visual perception?

7 A. Yes.

8 Q. And about how many?

9 A. Four or five, something like that. Sorry. Don't
10 remember exactly.

11 Q. Are you a member of any societies or associations
12 that deal with visual perception?

13 A. Yes. I'm a member of the Vision Sciences Society,
14 and I'm a member and chair elect of the governing board
15 of the Psychonomic Society, which is an experimental
16 psychology forum that houses perception, and, of course,
17 also the American Psychological Association and the
18 Society for Psychological Science.

19 Q. Can you tell us what, if anything, do these
20 associations or societies do regarding visual perception?

21 A. So their primary thing that they do is each one of
22 them hosts an annual conference where people come and
23 present original research. It's prior to being published
24 and give talks on it or present it in poster format,
25 receive feedback, talk to colleagues, that kind of thing.

1 They also, especially the Psychonomic Society one,
2 publishes journals in the field, these academic journals
3 that publish peer-reviewed papers, so that's their two
4 primary functions in the field.

5 Q. And do you hold any special positions? I think
6 you may have said you did. Do you hold any special
7 positions with any of these associations or societies?

8 A. Yes. So for the Psychonomic Society, I'm the
9 current chair elect, will be chair in 2016, and I was the
10 editor-in-chief of their main journal, Psychonomic
11 Bulletin and Review, for four years. I can't remember
12 the exact years, 2010 to 2014 or something, and for the
13 Vision Sciences Society, for years. I don't know how
14 many, ten-ish. I've been on the program review committee
15 for their annual conference where we review the abstracts
16 and assess whether they should be admitted to the
17 conference or not.

18 Q. Are there certain duties that come along with
19 being a chair elect?

20 A. Yes. They're primarily administrative duties, so
21 we oversee the organization of the conference. There's
22 awards to be given, scholarships to be given, decisions
23 to be made. Actually, we're just founding a new open
24 source journal, so there's been a lot of work getting
25 that rolling.

1 Q. This isn't your first time in court?

2 A. No.

3 Q. How many times has your work brought you into the
4 courtroom before?

5 A. One time.

6 Q. Where was that?

7 A. That was in Santa Barbara, California.

8 Q. Was that in regards to visual perception?

9 A. Yes.

10 Q. Have you ever provided deposition testimony?

11 A. Yes.

12 Q. About visual perception?

13 A. Yes.

14 Q. And how often?

15 A. Three or four times. I don't remember exactly,
16 but on the order of that.

17 Q. So in the few times you've provided opinions,
18 whether deposition or the one time at trial, were you
19 called by both sides or are you generally called by one
20 side more than the other?

21 A. Before this one, I've always been on the defense.

22 Q. All right.

23 MR. GOULD: I would now like to tender her as
24 an expert in visual perception.

25 THE COURT: Do you wish to voir dire or

1 challenge?

2 MR. JOHNSON: I do.

3 THE COURT: All right. Go ahead.

4 CROSS-EXAMINATION

5 BY MR. JOHNSON:

6 Q. Dr. Moore, we met when I took your deposition?

7 A. In Iowa.

8 Q. And at this time, I have this document. I'm going
9 to hand you the list of your opinions you will offer,
10 correct?

11 A. Yes.

12 MR. JOHNSON: Could I mark this, Your Honor?

13 THE COURT: Any objection?

14 MR. GOULD: No. Thank you.

15 (Defendant's Exhibit No. 5 was marked for
16 identification and admitted into evidence.)

17 BY MR. JOHNSON:

18 Q. Dr. Moore, I'm going to hand you Defendant's 5,
19 and do you remember telling me that your core opinion,
20 your principal opinion, was your first opinion set forth
21 there?

22 MR. GOULD: Objection, Your Honor. If he
23 wants to ask her questions about her qualifications, I
24 believe that's proper, but asking questions about her
25 opinions can come in on his cross-examination of

1 Dr. Moore.

2 MR. JOHNSON: Your Honor, I'm trying to
3 find -- I'm getting there, to the questions of her
4 qualifications.

5 THE COURT: I think he's allowed to explore
6 it somewhat because one of the things you have to
7 determine if you're an expert is, is this a real science
8 or is this junk science? And so if you're going there,
9 then go that way, and not just cross-examine her in
10 general about her testimony right now.

11 MR. JOHNSON: Right.

12 BY MR. JOHNSON:

13 Q. Would you read your first opinion?

14 A. Sure. The fact that the pole of the tent was in
15 close proximity to the power line and in danger of making
16 contact with it would not necessarily have been apparent
17 from the point of view of either the men moving the tent
18 or the event planners who are watching the tent be moved.

19 Q. Dr. Moore, did you do any specific research
20 into -- based on the facts of this case prior to issuing
21 that opinion?

22 A. Can you explain what you mean by specific to --

23 Q. Well, did you do any testing of your opinion? Did
24 you have a group come in and put a line up and see what
25 they said they saw or didn't see, which would be one way

1 of testing your opinions, correct?

2 A. This opinion is based on generally how the visual
3 system works, so no, I didn't do any testing with power
4 lines or individual groups pertaining directly to this.

5 Q. You were asked questions about the articles you
6 published and the reviews -- papers you put out. Do any
7 of them deal with the facts we have here?

8 A. They deal with the visual system that's being used
9 that's giving rise to this opinion, yes.

10 Q. Do any of them deal with power line and what --

11 A. Not power lines.

12 Q. -- and what people can see or not?

13 A. No, not power lines, about contours.

14 Q. So none specific to the facts of this case?

15 A. Not that specific, no.

16 Q. So you've offered opinions based upon your review
17 of the facts, but are they simply your opinions?

18 A. They're based on review of the facts, because the
19 power lines, regardless of which ones they were, are
20 stimuli in the visual field, and I'm basing it on what I
21 know about the way the visual process processes such
22 stimuli.

23 Q. When you do research, do the results sometimes
24 surprise you?

25 A. Yes.

1 Q. In other words, it might turn out like you thought
2 it would or it might turn out completely different?

3 A. That's the way science works, yes. You actually
4 try to focus it that way.

5 Q. And you've done none of that type of research
6 here?

7 A. I'm sorry. Can you repeat that?

8 Q. You've done none of that type of research on the
9 facts of this case?

10 A. I've done no research with power lines any way,
11 yes.

12 Q. So what we're getting is more on visual acuity, I
13 guess?

14 A. Not visual acuity, that's a very specific thing,
15 but vision in general.

16 Q. More on vision?

17 A. Yes.

18 Q. And it's just going to be your opinion that this
19 is the facts or the result or not?

20 A. It's going to be -- yes. My expert opinion is
21 with regard to how the visual system works, which would
22 be the system needed to process and perceive whatever
23 people were looking at at any given time, so it applies
24 generally.

25 Q. And have you reviewed your opinions with any of

1 your peers to see if your peers would share the same
2 view?

3 A. No, not these specific ones.

4 Q. Thank you.

5 MR. JOHNSON: Your Honor, I would move to
6 exclude the witness as an expert on the grounds that she
7 has done no research, testing, relied upon no data here
8 other than her own opinions.

9 It's the typical situation we used to have
10 before the rules on experts tightened up. Someone would
11 come in and say, I'm an expert, give opinions about
12 anything they wanted to do, and the Court would say,
13 Well, it's for the jury or the fact finder to determine
14 the credibility.

15 Now the requirements are more stringent, and
16 I object to this line of testimony.

17 THE COURT: I don't understand what your
18 challenge is, to her credentials or her methodology.

19 MR. JOHNSON: Your Honor, her methodology.

20 THE COURT: What's the problem with her
21 methodology? She's got a field of expertise. She's
22 basing it on a set of facts that based on her field of --
23 whatever she's an expert in, based on these facts, she
24 has an opinion.

25 Now, you can attack her methodology, whether

1 or not she's got credentials that allow her to be
2 qualified as an expert, but, you know, the challenge that
3 you're making sounds to me more like it goes to the
4 weight of her opinion type objection than it does to her
5 actual qualifications as an expert, and I don't see a
6 real challenge to her methodology.

7 MR. JOHNSON: Her methodology is no
8 methodology. She's not followed any -- described that
9 she's followed any particular pattern of research to
10 reach it. She hasn't relied upon any authoritative data.

11 It is truly the classic situation we used to
12 have when they would come in and have a briefcase and say
13 they were an expert, and the judge would say, Well, you
14 got -- you know, your objections go to the weight of the
15 evidence, not the admissibility, and now the Court has
16 said the trial judge is the gatekeeper.

17 THE COURT: Well, we've always been the
18 gatekeeper, they just said on a particular case you got
19 to do a little bit more than you did before.

20 MR. JOHNSON: There is no way to test her
21 opinion.

22 THE COURT: That's a valid argument. It's
23 Dr. Moore, right?

24 THE WITNESS: Yes.

25 THE COURT: Tell me what it is you do in

1 formulating an opinion in a case like this.

2 THE WITNESS: Right. So I consider what is
3 the best case scenario in terms of what could people be
4 perceiving under these circumstances. I don't know
5 exactly what they were looking at. Nobody does, I don't
6 think, but I can say, given these are the stimuli
7 available to them, what's the best they could do?

8 And then I can ask, would you expect them to
9 reliably see X, Y, Z, whatever it might be, and we can
10 speak to specifics, and I can offer my opinion, based on
11 what we know, about how the visual system processes the
12 information it has available generally. It's sort of
13 like you can make -- you can have an opinion about how
14 the heart behaves because the field has learned about
15 pumping, knows how it works, so I don't have to study
16 some particular person's heart to make a statement about
17 that particular person's heart. I'm offering it based on
18 what we know about visual processing.

19 THE COURT: And what sort of things do you
20 consider when you're coming up with an opinion about --
21 when you said what we know about visual processing? What
22 are the factors you look at?

23 What makes what you're about to tell us
24 different than what I think about what people might
25 perceive? How do you do something special? What is it

1 that you're looking at to help you -- what are the
2 particular things that help you decide in how you come up
3 with an opinion about what somebody else saw?

4 THE WITNESS: Right. So what vision
5 scientists do is they look at the information that is
6 available at the front end of the system, okay? So what
7 information is being projected on to the retina, and when
8 you analyze that information, you realize that what you
9 ultimately represent in terms of what's out in the world
10 is not given directly in that information.

11 And so what the large amount of the visual
12 brain does is process that information, use cues,
13 understand what's there in order to assess, for example,
14 how far away is something from me? What color is that?
15 Is that object, you know, a cat or is it a chair?

16 All of those things require integration of
17 cues, integration of past experience, memory, attention,
18 and those are, again, generally relevant, so they apply
19 to the circumstances here as they would anywhere.

20 THE COURT: I have no idea what you're
21 getting ready to testify about, all right? But what are
22 you going to do here, take a look at a picture and say,
23 This is what a person saw?

24 THE WITNESS: I'm going to -- we'll look at
25 the picture and say here is what, in the picture, you

1 could know, for example, how far something is away from
2 me. How far away is this wire from me? How far away is
3 this wire from the tent pole based on the front end, the
4 information that the person has to begin with.

5 I'll show that is ambiguous, that just at
6 that level it's not given where things are, and I'll talk
7 about what kinds of cues the visual system tends to use
8 under normal rich cue conditions to assess how far away
9 something is to me, whether something is going to collide
10 with me if I walk in a particular direction or if a ball
11 is coming at me, and then I will show that with regard to
12 the wires, there are very few of these cues that are
13 normally used to assess stuff.

14 And so based on that, under the best case
15 scenario, if they're staring straight at the wires,
16 they're focussed on that, they don't have in the front
17 end information what you need -- what the system normally
18 uses to assess how far away either I am from an object or
19 how far away a given object is from another object.

20 MR. JOHNSON: Your Honor, I asked her about
21 her core opinion, and her core opinion is that the pole
22 of the tent was in close proximity. The fact that the
23 pole of the tent was in close proximity to the power line
24 and in danger of making contact with it would not
25 necessarily have been apparent to the point of view of

1 either the men moving the tent or the event planners who
2 were watching the tent being moved.

3 She's wrong, because --

4 THE COURT: Well, that may be your opinion.

5 MR. JOHNSON: Because there's testimony that
6 they saw it, looked at it, discussed it, and said, We
7 need to stay away from that.

8 THE COURT: I haven't heard that testimony
9 yet.

10 MR. JOHNSON: What I'm forecasting the
11 evidence -- I'm forecasting the evidence in terms of the
12 methodology.

13 THE COURT: Well, then I'll disregard it. If
14 I hear something, like I instruct a jury every time I do
15 a case with an expert, I say, You're free to give this as
16 little or as much weight as you think, and if it's not
17 consistent with all the other facts that you hear
18 throughout the case, then you are free to disregard it
19 entirely.

20 Why can't I do that?

21 MR. JOHNSON: I guess I was addressing your
22 comment regarding methodology, and methodology, sound
23 methodology, would seem to include a review of what the
24 people who were there saw, because had she included that
25 in her methodology, she would have readily have seen that

1 they saw the line, knew it was there, talked about not
2 getting near it, and then did.

3 THE COURT: That sounds like a fertile ground
4 of cross-examination on your part.

5 MR. JOHNSON: Well, Your Honor, I think it's
6 also a good reason for excluding her opinion testimony.

7 THE COURT: Well, it's a field which I have
8 not dealt before, but it does sound like it is based on
9 established research, and the documents that she says
10 she's published in this field, it's peer-reviewed
11 documents. I haven't heard anything yet that says it's
12 not generally accepted in its field. You may present
13 something different, but I haven't heard that yet.

14 MR. JOHNSON: Your Honor, didn't she say she
15 did not do any research specific to this?

16 THE COURT: Specifically to power lines, but
17 you take whatever your field is and you apply it to
18 whatever the facts are, and you may say, well, on
19 cross-examination, you may convince me that it's total
20 hogwash, but that's not where we're at at this point,
21 it's whether or not she's an expert in that field and is
22 that field, you know, an established field.

23 You know, University of Iowa, as far as I
24 know, is a well-established school. She's been teaching
25 there for a while.

1 MR. JOHNSON: I don't suggest she isn't a
2 lovely person that isn't well qualified in what she does.

3 THE COURT: That's where we're at.

4 MR. JOHNSON: But what I do say, she said she
5 didn't rely on any research. She said she didn't rely on
6 any of her articles she published, so what we get is what
7 I like to refer to as a naked opinion from an expert
8 witness: No clothes, no support, nothing behind it, and
9 her methodology -- well, can I ask the witness, did she
10 talk to any of the witnesses as part of her methodology?

11 THE COURT: You can ask, sure.

12 BY MR. JOHNSON:

13 Q. Did you talk to any of the witnesses to the
14 accident as part of your methodology?

15 A. Talked directly with them?

16 Q. Yes.

17 A. No.

18 Q. Did you read any depositions?

19 A. Yes.

20 Q. Which depositions did you read?

21 A. I have read -- and forgive me if I don't get all
22 the names right. I read Rico Harrell. I have read --
23 I've got a list of them. Mr. Robinson's. I have read --
24 I don't remember the names.

25 Q. Did you read the crew chief's deposition?

1 A. Yes, Alex -- yes.

2 Q. And you -- so you would have read in his testimony
3 that the group did see the line, recognized it as being a
4 hazard?

5 MR. GOULD: Objection, Your Honor.

6 THE COURT: What is the objection?

7 MR. GOULD: He's trying to get in testimony
8 that's not even before this Court for the sole purpose of
9 him asking the question --

10 THE COURT: I'll sort through this. Go
11 ahead.

12 BY MR. JOHNSON:

13 Q. So you would have seen the testimony of Mr.
14 Clayson. The group, before they ever started moving the
15 tent, saw the line, discussed it as being a hazard, an
16 electrical hazard, and discussed staying away from the
17 line?

18 A. So you said that in my deposition, and I can't --
19 can you point out where that is?

20 Q. Sure.

21 THE COURT: That's cross-examination as to
22 what her opinion is going to be. You're going beyond the
23 scope of this, of what we're doing here. I understand
24 you may say, look, she needed to read the deposition.
25 What those depositions said, you may not agree with it.

1 Your expert, if you have one, may not agree with it, but
2 that's got nothing to do with whether or not she's
3 qualified.

4 MR. JOHNSON: May I ask her this question?

5 THE COURT: Sure. Maybe.

6 BY MR. JOHNSON:

7 Q. If you assume what I said was accurate about his
8 testimony, that the group saw it, recognized it as a
9 hazard, and discussed staying away from it, did you --
10 that would be contrary to your core opinion.

11 A. No.

12 Q. It would be consistent?

13 A. No, it would not, which we'll work out.

14 MR. JOHNSON: Your Honor, I would ask that
15 you exclude her as an expert.

16 THE COURT: Would you like to respond?

17 MR. GOULD: Just on one of the things he's
18 been talking about, that her opinion is going to be based
19 on the fact that they didn't see this power line, that is
20 not the basis of her opinion as she's going to draw out.
21 She's going to talk about how vision is a two-part
22 process. It's what we take in through the eyes and how
23 the brain processes that and explain how you can be
24 looking up at a power line and not be able to determine
25 the height.

1 We'll get into why that is, what it takes for
2 that, such as cues, points of references, why you need
3 cues from a scientific standpoint. She'll get into that,
4 you know, the 3-D world that we live in and why we only
5 process 2-D and the dimension that we lose and why that's
6 important and why, because of that, we rely on these
7 cues, and in the absence of cues, as Rico Harrell even
8 pointed out and as their own safety expert pointed out,
9 you're just guessing and shooting from the hip when
10 you're looking up at a power line, trying to determine
11 how high this is.

12 So she will provide testimony as to what
13 these folks were looking at, the cues that they had or
14 didn't have to rely on. That will help explain Beth's
15 testimony from yesterday when she said it looked to her
16 that they were free and clear of the line. She'll be
17 able to get into the science of why Beth can say that,
18 even though she's looking at the tent and the line at the
19 time of contact.

20 So the notion that she's going to say they
21 didn't see the line is not true, just to clarify that
22 issue with Your Honor.

23 THE COURT: All right. Well, I find that she
24 is qualified as an expert in the field of visual
25 perception, and we'll allow her to testify as an expert

1 in that field.

2 MR. GOULD: Thank you, Your Honor.

3 THE COURT: Go ahead.

4 DIRECT EXAMINATION (Cont'd)

5 BY MR. GOULD:

6 Q. Dr. Moore, I apologize for that delay, but before
7 we get into your opinions in the case, as Mr. Johnson
8 pointed out, you didn't witness the electrocution, did
9 you?

10 A. No.

11 Q. All right. So what materials were you provided in
12 order to give your opinions in the case to the best that
13 you can recall?

14 A. So I had several depositions, as I mentioned. I
15 had the incident report from Mr. Richardson, I think it
16 was. I had photographs, and -- yeah, and then I talked.

17 Q. Is that the type of information you typically rely
18 on in your field to formulate your opinions?

19 A. Yes. When applying it outside, yeah.

20 Q. Okay. And was there anything you wanted that you
21 didn't get?

22 A. No.

23 Q. So you're satisfied that you had enough to form
24 your opinions?

25 A. Yes.

1 Q. Before we cut right to the chase of your opinions,
2 based on the review of your records, are you familiar
3 with who Beth, the party planner, was in regards to this
4 case?

5 A. Yes.

6 Q. And who was she?

7 A. Well, she was the planner for the event that was
8 going on. She was there the day that they were
9 constructing the tent and moving the tents and she was
10 one of the people viewing the people as they moved the
11 tent.

12 Q. So she was there as they were moving the tent.
13 That's your understanding?

14 A. Yes.

15 Q. All right. Now, were you aware she testified
16 yesterday here in court?

17 A. I heard about that, yes, this morning.

18 Q. But you weren't here; you didn't witness her
19 testify?

20 A. No, I did not.

21 Q. Well, I want you to assume, once we get this --
22 have you seen this photograph before?

23 A. Yes.

24 Q. I want you to assume, since you weren't here
25 yesterday, that she testified yesterday, and during her

1 testimony, she used this photo, and she said that David
2 Richardson was standing roughly where this photo was
3 taken. So this photo would have been where David
4 Richardson would have been looking, and I also want you
5 to assume she testified she was on the opposite side of
6 the tent and in her testimony said she was facing toward
7 David.

8 I want you to also assume that in her testimony
9 yesterday, when she was asked about it, she testified
10 that from where she was standing, she said that it looked
11 like the tent was free and clear of the line. All right?

12 Now, putting the workers moving the tent to the
13 side for now, the four guys that were moving the tent,
14 put them aside, can you tell us, based on your experience
15 and expertise and education, from a visual perception
16 standpoint, given this photo, how can Beth say that from
17 where she was standing this tent was free and clear of
18 the line?

19 MR. JOHNSON: Your Honor, I object to the
20 hypothetical as inadequate because it fails to include
21 the hearsay testimony she was not allowed to give but
22 this witness can consider, that they said, Wait, look out
23 for the line, and that's why they stopped before moving
24 it the last time.

25 THE COURT: You can ask that on

1 cross-examination if that would change your opinion, but
2 he can ask his question.

3 BY MR. GOULD:

4 Q. Want me to re-ask it?

5 A. Yes, please.

6 Q. So assuming those things I asked you to assume,
7 she testified where they were positioned, okay, based on
8 this photo?

9 A. Uh-huh.

10 Q. And she testified that from where she was
11 standing, she was looking at them, shuffling the tent,
12 and said that she believed they were free and clear of
13 this power line.

14 A. Right.

15 Q. And you're aware this was a photo of the farm and
16 the tent and the power line at issue.

17 A. Yes, uh-huh.

18 Q. So how is it -- from a visual perception
19 standpoint, how is it possible that she could say, based
20 on what she saw, looking at the tent and the line, that
21 she could believe it was free and clear of the line?

22 MR. JOHNSON: Objection. Not dealing with
23 possibility. He's got to get it to a reasonable degree.

24 BY MR. GOULD:

25 Q. Sure. Can you tell us, from a reasonable degree

1 of visual perception standpoint, in this photo how could
2 she say it looked to her like they were free and clear of
3 the power line?

4 A. To answer the question there, you have to
5 understand what is the problem from the point of view of
6 the visual system in terms of what you're talking about.

7 The visual system has to come to the conclusion
8 that there's going to be a collision between two objects,
9 which involves where they are spaced in depth, relative
10 to each other and relative to the viewer.

11 Now, a critical thing about establishing that
12 interpretation of where things are, is that in the
13 retinal image, in the very first piece of information
14 that the visual system has available to it, you don't
15 have depth information. A three-dimensional world is
16 projected on to a two-dimensional surface, like a movie
17 screen.

18 Q. Would it be helpful to draw this out when you're
19 explaining this, or --

20 A. Yes.

21 MR. GOULD: Would you mind, Your Honor, if
22 she came down?

23 THE WITNESS: So I'll give kind of an example
24 of an ambiguity and how you can interpret it multiple
25 different ways and how adding cues to that ambiguity

1 resolves ambiguity.

2 BY MR. GOULD:

3 Q. I'll ask the questions as we go, but based on what
4 you were just testifying to, if you could draw that out
5 so we further understand.

6 A. Two-dimensional. Okay. So here is a very
7 particular example. So in the case of -- so here are two
8 objects in the world, two squares. I don't know if you
9 can -- do you want to see?

10 MR. JOHNSON: Yeah, I do.

11 THE WITNESS: Two squares in the world.
12 Looking at this one, which one would I say is in front?
13 Most people would say this one is in front because
14 there's cues with regard to that. Notice, however, that
15 there is no information there with regard to how far
16 behind this one is, right?

17 If this one were 500 feet behind this front
18 square, it would project the exact same image on the
19 retina as if it were just touching it behind it. The
20 information about where they are in depth is lost by
21 virtue of the fact that the image lands on to a
22 two-dimensional surface, so in order to assess whatever
23 image you have available to you where things are relative
24 to in depth, it has to take into consideration the
25 broader context of cues.

1 Q. Now, you've talked about this two-dimension
2 backboard, or whatever, that it falls on. Explain to us,
3 what do you mean by that?

4 A. So the retina is the sheet of cells in the back of
5 your eye which initially creates the signal in the neural
6 system that's representing what's out in the world.
7 Light -- we don't see objects. We see light bouncing off
8 of objects. That light creates an image on the retina,
9 like an image on a film in the back of a camera or an
10 image that gets projected on to a two-dimensional surface
11 of a movie screen, and so, yeah, that's the screen I'm
12 talking about, is the retina.

13 Q. So the retina is like the movie screen?

14 A. Exactly.

15 Q. And the world around us is --

16 MR. JOHNSON: Object to leading.

17 MR. GOULD: Just clarifying.

18 BY MR. GOULD:

19 Q. Now, as far as the ambiguity, are there any other
20 examples that you can give us that explain ambiguity
21 because of this 3-D/2-D situation?

22 A. So here again is a simple cartoon example. If I
23 show you here is an object, here an object, we can look
24 at that. We can interpret that a variety of different
25 ways: One, we have two objects, one that is smaller than

1 the other; two, we have two objects that are the same
2 size, but this one is farther away.

3 This particular image is completely ambiguous with
4 regard to which one of those are. It's consistent with
5 both of them, and a variety of others, actually, but it's
6 very rare that we are faced with such an impoverished
7 situation. This is ambiguous because there's nothing
8 else telling us about where things are. If you start
9 thinking about what else is in the world, things like
10 linear perspective, it gets a little bit clearer.

11 If we have things like texture compression, or
12 texture gradients, so if you think of these as railroad
13 tracks with the ties, they get further and further away
14 from each other. As you get closer, it becomes even
15 clearer. If we add more context, such as familiar size
16 and relative image size, so -- it becomes increasingly
17 clear that these are probably two objects that are the
18 same size, one that is farther away from you.

19 But that conclusion about depth was unavailable
20 without the greater context of the additional cues
21 pointing to it, because by virtue of the way things start
22 it's ambiguous and you need -- it's like a Sherlock
23 Holmes situation gathering as much clues about where
24 thing are as possible. You need that context.

25 Q. Okay. Thank you. What are cues?

1 A. So cues are, again, additional information that's
2 in the retinal image so that the system has available to
3 them so it can represent, integrate, and ask what is the
4 most likely three-dimensional object in the world that
5 produced this particular retinal image? So the cues are
6 all things that are consistent with a particular
7 configuration in depth, or a particular distance in
8 depth. In the case of depth, we have cues all over the
9 place.

10 Q. So everything that you drew up here was
11 essentially a cue?

12 A. Those are examples. There are many, many cues,
13 but yes, those are some examples.

14 Q. Did you have the opportunity to read the
15 deposition of Eric Jackson, Berkeley Electric's safety
16 expert?

17 A. No.

18 Q. I want you to assume that in his deposition when
19 he was asked, Do you believe untrained people will have
20 difficulty judging the height of a power line when
21 they're standing on the ground?

22 He responded, I think that both trained and
23 untrained people can have a difficulty determining the
24 height without a reference point.

25 Now, when you use the word cues, are you

1 essentially saying these are all reference points?

2 A. Yes. That's a way of characterizing, that they
3 each provide increasing reference with regard to the
4 question.

5 Q. And so without those reference points, it's
6 difficult to determine the height of any object?

7 A. That's right. It's just like the --

8 MR. JOHNSON: Objection, leading.

9 BY MR. GOULD:

10 Q. Okay. Can you tell us, Dr. Moore, without those
11 reference points, is it difficult to determine the height
12 of any object?

13 A. Yes. It would be akin to the very first part of
14 that picture where I just had the small circle and the
15 big circle. It's completely ambiguous with regard to
16 what the situation is in depth.

17 Q. All these reference points or cues, are they
18 all the same or are there different types of them?

19 A. I'm sorry. Can you ask that again?

20 Q. These reference points that you've drawn up here,
21 are they different in any way?

22 A. They are -- yes. They're different cues that are
23 converging toward the same conclusion, yeah.

24 Q. Okay. And what different types of reference
25 points or cues are there?

1 A. So we have occlusion, which is the covering up or
2 interposition, that's the one I first drew for you, the
3 two squares. There is texture gradients. As things get
4 further away from you, they get smaller and smaller and
5 compressed, so the train ties and the tracks get closer
6 and closer together. There is retinal image size, so the
7 one we started with, smaller, bigger, things that are the
8 same size will, in fact, project smaller retinal images
9 as they go back.

10 There's something called aerial perspective. As
11 you get way far away, things get blurrier and less
12 saturated. There is familiar size, so in general we know
13 that human beings are within a common size, so there
14 aren't, like, two three, four times taller than another,
15 so --

16 (Whereupon, the fire alarm was sounded and a
17 recess was taken.)

18 MR. SMITH: Your Honor, the order that I've
19 handed you, that is an order from the Berkeley County
20 probate court. You can see there on paragraph number one
21 that establishes Emma Fortney and Gina Fortney are the
22 heirs of John Fortney.

23 THE COURT: Okay.

24 MR. JOHNSON: Your Honor, I would point out
25 that order, whatever it says, isn't binding on us. We

1 weren't a party to the proceeding.

2 THE COURT: Why wouldn't it be?

3 MR. JOHNSON: Because we have a right to be
4 heard on it.

5 THE COURT: Well, you just said you didn't
6 have any jurisdiction to be heard on it.

7 MR. JOHNSON: I think what should have been
8 and what should now be done is a matter to be taken to
9 the probate court or the family court.

10 THE COURT: All right. Let's pick up where
11 we left off.

12 MR. GOULD: We'll do our best to do that,
13 Your Honor. Thank you.

14 BY MR. GOULD:

15 Q. We were talking about cues, reference points.
16 Before we go further into your opinions about this case,
17 tell us, is it important for us to know what these are as
18 it pertains to the facts of this case?

19 A. Yes, to know that they are and what they are.

20 Q. And why?

21 A. Because the lack of cues in the case of the wires
22 is the base of my opinion.

23 Q. Okay. How are reference points helpful when we've
24 talking about visual perception?

25 A. Right, sure. So, again, it comes down to the fact

1 that at the beginning, the information is ambiguous. If
2 you take anything out of context, and it is in the
3 context of sets of cues, multiple cues, that are all
4 pointing to the same answer, if you will, in terms of --
5 in the case of depth, where something is relative to each
6 other, and so they're critically important in terms of
7 the visual system processing the information it has
8 available to come to a conclusion, if you will.

9 I don't mean a conscious conclusion, but to come
10 to the result of a perception of where things are
11 relative to each other.

12 Q. And the way -- okay. And we got to talking
13 about -- you gave examples of a number of different cues.
14 Did we exhaust -- as far as from visual perceptions,
15 scientific standpoints, did we exhaust all the different
16 types of cues that there are?

17 A. No. We were starting to list them when the fire
18 alarm went off.

19 Q. So we can revisit that. Just from the visual
20 perception field, what are reference points that we rely
21 on?

22 A. Right. So some critical examples include
23 occlusion, or interposition, which is the one I started
24 with, with the square.

25 Q. Occlusion?

1 A. Occlusion. So we realize that the lower square is
2 in front of the higher square because of occlusion.

3 Q. If you could come down and explain what you mean
4 by occlusion.

5 A. So occlusion, or interposition, is if an object is
6 between your eye, you and another object, then the front
7 object is going to block the light bouncing off the far
8 object, that will result in this kind of retinal image,
9 where what the image has -- so in terms of this, you
10 don't know if the square is in depth, but you know that
11 this one is in front of this.

12 How do you know that? Because of things like
13 these T junctions, right here, so those are critical,
14 multiple features that the system extracts in order to
15 conclude this is in front of that.

16 Q. What others?

17 A. So linear perspective is one, so sort of heading
18 toward a vanishing point, like the railroad tracks going
19 into each other; texture compression, so as things get
20 further and further away from you, of course they project
21 a smaller image onto the retina, and parts of the
22 texture, like the railroad tracks, will project closer
23 and closer images, and that's a cue to depth, just like
24 linear perspective.

25 There is relative image size, the one we started

1 with, the small circle versus big circle. Out of
2 context, that's ambiguous, but it's still a cue. It's
3 consistent with it being far away.

4 There is familiar size, so, again, I was talking
5 about how we know in general people are, you know,
6 approximately the same size within, you know, six, seven
7 feet of each other. So if you have an image with a
8 really tiny person and another image with a big person,
9 you don't think, Oh, what a tiny person that is, you
10 think that person is farther away from the one that's
11 projecting big.

12 There's something called aerial perceptive for
13 very distant things. The image gets blurred and it's
14 less saturated in color. That's a clue to depth, and
15 then a big one is information across the two eyes, so any
16 object in depth relative to will project slightly
17 different positions on the two retinas so you can see
18 that if you sort of close your eyes with your finger this
19 close and then further away, you can see that it's
20 jumping, if you will, different amounts, because you're
21 seeing the different positions.

22 So that information gets fused in later areas of
23 the visual system up the cortex. That's what I'm talking
24 about, the brain being so critical, and that's the cue
25 they use in 3-D movies, so if you have these glasses,

1 they're artificially projecting things onto two different
2 locations. There is also relative motion, so things
3 further away from you, if you're moving, they'll move
4 more slowly on your retina, again because of the smaller
5 projection, and they'll actually change relative to
6 position, depending on where they are in depth.

7 Relative height and field, in general things that
8 are farther away from you will project higher in your two
9 dimensional retinal field and/or closer to a horizon
10 point, so those are clues as well. Again, all of these,
11 in the real world where it's rich with cues, will tend to
12 converge on the same answer, and so we have a very rich
13 sense of feeling like where we know things are relative
14 to each other and us.

15 Q. Okay. Thank you.

16 You talked about the brain and how it works. Can
17 you tell us, then, is it significant within the field of
18 visual perception to know how the brain processes these
19 cues when we're talking about visual perception?

20 A. That's something we study, and we're trying to
21 understand in vision science, yeah.

22 Q. Okay. Can you tell us then, based on your
23 experience and education, what's going on inside the
24 brain that will help us understand how we're processing
25 these points of reference, or reference points or cues

1 that you just walked us through?

2 A. Right. So it's probably easiest to think of the
3 visual brain as occurring in stages.

4 Q. Would it help to draw or is it better just to talk
5 about it?

6 A. I can draw something -- I need a picture.

7 So the visual system processes the information in
8 stages. It extracts very simple information and
9 converges and puts it together, so, in general, it's sort
10 of a cartoon of your brain. Your eyeballs are kind of
11 hanging off here. This is the back called the occipital
12 lobe; the front, parietal and temporal, so I just give
13 those as landmarks. The names aren't important.

14 So when light strikes the retina -- light's
15 bouncing off of objects towards the retina, the only
16 information you get is relative firing rate of
17 photoreceptors. Lots of light causes one to fire a lot,
18 a little bit of light causes it to fire not a lot, and so
19 what information you have there is kind of like a pixel
20 map for a computer if you had numbers. You wouldn't know
21 anything. You wouldn't be able to see it directly.

22 That information gets fed from the eyes to the
23 very first visual area, called V-1, where it's again
24 extracting very simple information but more than just
25 light versus dark regions. It's extracting oriented

1 bars, or lines, so it knows that there are things that
2 are oblique, knows things are horizontal and vertical.

3 And why this is important is that that
4 information, for example, is what's used in occlusion,
5 right, to recognize, how do we know this square is in
6 front of this square? It's this local information, which
7 is made up out of a vertical bar and a horizontal bar.

8 At this stage, we don't know that they're together
9 like that, so it gets fed up into a later area where you
10 now have configuration represented corners, Y-junction,
11 X-junctions, T-junctions and further. It gets more and
12 more complex as you go on up.

13 Finally, I'll just mention that you have top down
14 control from the parietal area, retention; the frontal
15 area with memory controlling attention, which can do
16 things like familiar size, can contribute to how you
17 interpret the integrated representations.

18 Q. Can you tell us -- based on your diagram, can you
19 tell us where these cues would be stored in the brain, or
20 are they stored in the brain, or are they stored --

21 A. They're not stored; they're constructed. So
22 vision is a very active process. What is stored would be
23 things like familiar size: I remember that people are,
24 you know, within a given range.

25 But in general, this is an active process. You're

1 building up this representation, converging the different
2 cues together to come to a conclusion.

3 Q. All right. Thank you.

4 A. Uh-huh.

5 Q. Now, we talked about cues or reference points from
6 a scientific standpoint, but can you help us understand
7 from an everyday standpoint what are some cues that we
8 can encounter? And can we focus on -- is it possible to
9 get the photo back up?

10 First, let me ask you, would it be helpful to
11 understand day-to-day reference points when we're talking
12 about the cues we just walked through in a scientific
13 sense?

14 A. Yes. We can look at an image from a real world
15 scene and ask what cues are in there that are telling us
16 about depth.

17 Q. Okay. All right. Relying on this photo, which
18 you've already seen -- which, Your Honor, I believe is
19 marked as Plaintiff's Exhibit No. 15, or 18 -- excuse me,
20 what are some cues that you see in this photo?

21 A. Sure. Can I stand up?

22 Q. Sure.

23 A. So if we think about the objects on the ground --
24 and we have a pretty rich sense, looking at this
25 two-dimensional photograph, of where they were in depth

1 when the photograph was taken, but keep in mind it's --
2 everything in the image is exactly the same depth from
3 you, but we perceive it as this part of the tent, for
4 example, being farther away from this leg on this tent.

5 And we could even possibly estimate sort of
6 coarsely kind of how far away and certainly whether or
7 not two legs of the tents over here might kind of collide
8 with each other in the event you were moving them.

9 Why is that? It's because it's actually a very
10 rich situation in terms of cues. We have linear
11 perspective, right? So here's a vanishing point going
12 in towards the horizon. We have texture compression or
13 texture gradient, so think about the legs of these tents.
14 They're far away from each other here --

15 Q. If I could interrupt you, moving away -- you
16 walked us through the scientific terms. Is there a way
17 that you can tell us from average language what we're
18 looking at as it pertains to the scientific terms that
19 you gave us?

20 So what is it about this -- in other words, can
21 you tell us, what is it about this photo that's telling
22 us, for instance, that this leg is further away from us
23 than this leg?

24 MR. JOHNSON: Your Honor, could I ask that
25 the witness be permitted to answer the question that was

1 asked? He interrupted her. She was identifying this as
2 having a rich amount of cues.

3 THE WITNESS: On the ground, yes.

4 THE COURT: Go ahead.

5 THE WITNESS: Right. So with regard to the
6 ground attention, the objects on the ground, you have --
7 why do I know that --

8 BY MR. GOULD:

9 Q. Sure. How do we know -- can you tell us, how do
10 we know that this leg is further away from this leg?

11 A. Right. So one reason is height in field, so this
12 is higher than that one.

13 Q. Okay.

14 A. So another is that it falls along diagonal, this
15 way, so leading toward a vanishing point in the picture.

16 Q. Okay.

17 A. Another is sort of relative to sort of the grass
18 grains here. They're bigger here versus here. It is a
19 smaller -- it will project a smaller retinal image, this
20 versus this. There are occlusion cues. I'm sorry. I'm
21 using those terms again.

22 So you can see that this is in front of this, this
23 is in front of that. Those two pieces of information
24 together imply a certain relation.

25 Q. Okay.

1 A. That's it.

2 Q. What other points of reference are you seeing as
3 far as how do we know that -- can you tell us, how do we
4 know that this is further away than this tent?

5 A. So part of it will, again, be covering up cues, so
6 as this goes up here, it's covering up there.

7 Q. Okay.

8 A. You have -- both the posts of this are projecting
9 closer together than the posts of this. This is higher
10 up in the image than this, closer to the horizon, so
11 height in field.

12 Q. Okay. All right. And, again, with the day-to-day
13 points of reference that we see every day, can you tell
14 us, is there an example in this courtroom that will help
15 us understand further what we're talking about as it
16 pertains to points of reference?

17 A. Yes. So how do we know that the people in the
18 back row are farther from us than the people in the front
19 row? If you think about sort of the distance between the
20 benches, the distance between the first two benches is,
21 you know, whatever size it is, the distance between the
22 next two is smaller. The distance between the next two
23 is smaller yet, and it's a consistent reduction in the
24 size of the distance, which tells us -- that happens
25 because of updates.

1 It is far away. It gets compressed, but it's a
2 cue to the visual system that specifically when that
3 happens it means it's going -- it's most likely further
4 away in depth.

5 Q. Can you tell us, how do we know Your Honor's bench
6 is protruding out toward us, from the cues and visual
7 perception?

8 A. Okay. So a large part of Your Honor is covered up
9 by -- is blocked off, so I don't think, Gosh, he doesn't
10 have any legs.

11 My visual perception perceives him as continuing
12 behind that vertical part, so that is giving me relative
13 information. There's sort of -- on my image, there's a
14 vanishing point this way as I focus there. In this case,
15 because it's a real world, if I move -- so I think about
16 the microphone relative to your face. It's left and
17 right. As I move, it reverses; now it's left, right, and
18 that's because the stuff that's closer to us is moving
19 faster on the retina than the stuff farther away, so
20 that's a strong cue to depth.

21 Q. Okay. Thank you. Based on your expertise, can
22 you tell us, is a measuring stick acute?

23 A. Yes. It can be a reference point, yes.

24 Q. Again, before we get into the facts of the case,
25 can you tell us, what happens when you remove all these

1 reference points from your visual perception?

2 A. The fewer reference points or cues means you have
3 a less strong sense and knowledge of depth. If you have
4 none, so you just sort of have a single thing you're
5 looking at -- again, think of the two circles I drew, one
6 bigger, one smaller.

7 There is one cue there, which is image size. It's
8 consistent with the smaller one being further away from
9 you, but it's also consistent with them being at the same
10 depth. So without the cues, you essentially lose the
11 representation of depth relative to you and depth,
12 importantly, relative between objects, so where is one
13 object relative to another?

14 Q. And when we were talking about the different
15 reference points in the photos, where were those
16 reference points you were referring to?

17 A. Those were all along the ground plane.

18 Q. On the ground?

19 A. Right, on the ground.

20 Q. In reference to taking these cues away, can you
21 explain to us how is this any different from, say, a
22 baseball player playing left field who has a similar blue
23 sky background?

24 How is this any different -- how is this case any
25 different from a baseball player who routinely makes play

1 after play in left field, center field, and right field?

2 A. In the case of baseball, which is similar to
3 thinking about the wire, which is up against the blue sky
4 and lacking the cues I was talking about, the baseball in
5 a single static image, if you just took a photograph of
6 it coming at you, that would be very cue core in terms of
7 where it is. It could be consistent with any number of
8 things.

9 Now, when what a baseball player really has is
10 dynamic information that the ball actually changes size
11 over time as it gets closer, and that is a good cue, but
12 still, in this situation, it's pretty impoverished in
13 terms of cue. There are very few of them, and what is
14 remarkable, and there is sort of a small sub-field of
15 vision that is interested in this particular problem, is
16 how do baseball players who are so good at it learn to do
17 it?

18 What they really learn to do -- they're not really
19 estimating distance, but they're learning to hold their
20 glove up at just right time, indicating their system
21 knows. And it requires expertise, it requires training,
22 and the point is, you and I -- I'll speak for myself. I
23 couldn't do that. I don't have that expertise.

24 Q. Continuing to use the analogy of the baseball
25 player, when he see the ball up in the air, are they able

1 to say, That's 60 feet?

2 A. No.

3 Q. Or 20 feet?

4 A. No. I wouldn't expect so.

5 Q. What are you saying then? What's going on?

6 A. That they are able to reliably predict the point
7 of collision, if you will, in the case of -- if it were
8 sort of, We can do this with looming objects, something
9 thrown at our head, we'll jerk away from it.

10 Even though, certainly, we couldn't tell at any
11 given point how far away from it it is, there is an
12 integration of the system. The baseball player is
13 learning to predict the collision point and the time of
14 where they hold their mitt with the ball.

15 Q. And how do they learn to do that?

16 A. Well, that's the big mystery. I think there's
17 some inborn differences in terms of sort of the
18 flexibility of the system, and then just time experience,
19 much, much experience, and, in fact, that's how we in
20 general learn to use cues. Walking around the world, we
21 have a lot of experience.

22 Q. You said that cues were important in this case.

23 A. Right.

24 Q. What cues are most important in this case, the
25 facts of this case?

1 A. Well, any cues to depth, any of the ones we've
2 been talking about, and the most relevant thing with
3 regard to this case is the lack of cues in the case of
4 the wire against the sky.

5 Q. And what do you mean by lack of cues?

6 A. So if you think about -- again, could we look at
7 the photo again? So we talked about the many different
8 cues that one has in general to depth, and we looked at
9 how many of them exist with regard to information on the
10 brainstem.

11 If we then ask the same question about the wires,
12 we want to know where are those wires, or those power
13 lines, relative to us and relative to these other
14 objects, and there are very few cues. It's basically a
15 very faint contour against uniform -- more or less
16 uniform background. There's no linear perspective.
17 There's no relative image size. There's very little
18 occlusion. There's no texture gradient.

19 There's not going to be any motion parallax.
20 There's no reliable binocular disparity, so it's like
21 those two circles that I told you, the small one and the
22 big one. You just don't know where they are.

23 Q. And you're pointing to this photo describing it as
24 the to --

25 A. The wires, power lines. Probably using the wrong

1 word. They're not wires, but --

2 Q. Based on this photo and your review of this case,
3 how many reference points did the party planners and tent
4 movers have that day?

5 A. With regard to the power lines?

6 Q. With regard to the power lines yes, ma'am.

7 A. So it would depend in part on kind of where their
8 perspective was, but at best -- so in this case, what
9 we're looking at here, which is from the point of view of
10 Mr. Richardson, there's virtually none, right?

11 So the question of interest is when -- so think
12 about the baseball player. Can we predict when or if the
13 central pole of the tent is going to collide with the
14 power lines? That's the critical question here.

15 Well, there's no information about that. The
16 image here, these two power lines, that's consistent with
17 the power lines being two miles away and quite large.
18 It's consistent with it being closer, well out of range
19 of where the tent would be. There's just no information
20 with regard to when or if it would collide.

21 You may have, depending on sort of point of
22 view -- and I don't know and I don't think anyone here
23 knows exactly how these people were looking at these
24 tents. You may have a little bit of occlusion, so the
25 wire might go in front of or behind the center pole, but

1 think about -- can I flip this down?

2 Q. Yes, ma'am.

3 A. If you think about in occlusion here, which is
4 super clear, you could easily say this square is in front
5 of this square, all right? But what if you had just
6 simple contours, right? Which one of those is in front?
7 It's unclear. It could go either way, right?

8 And, in fact, there are many examples of bi-stable
9 or multi-stable stimuli that are cue impoverished, and
10 your perception will vacillate in between
11 interpretations, and I would say this is more consistent
12 with what would be best case scenario with regard to the
13 center pole and the line in terms of where things are
14 relative to each other and when and if one might expect a
15 collision.

16 Q. So based on that and your experience and
17 knowledge, do you have an opinion as to whether being in
18 close proximity to the power line, whether the danger
19 would have been apparent from the point of view or --
20 within a reasonable degree of certainty, would it have
21 been readily viewed or apparent to those either moving
22 the tent or the party planners?

23 A. So I think it would -- it would not necessarily be
24 readily apparent because, as I've argued, you can't tell
25 what the height is, so you wouldn't necessarily conclude,

1 Oh, it's too close.

2 And, in fact, given -- we talked about the top
3 down control expectation and relative size. In general,
4 the expectation would be that power lines would be way
5 above anything that we're moving around or using, and so
6 you would -- that would feed into interpreting ambiguous
7 information to concluding that it's probably not a
8 problem.

9 Again, I don't intend -- I use this language
10 concluding because it's sort of the formal aspect of the
11 mechanisms. I don't mean this in a cognitive, conscious
12 sense that we're then thinking, Oh, where is that, out
13 loud.

14 Q. And based on your experience and knowledge, what
15 does it tell us -- when you said they had very few points
16 of reference, what does that tell us about their ability
17 to perceive the height of the power line?

18 A. So I think it tells us that it's a very difficult
19 and certainly unreliable task to try to judge the height
20 of the power lines from below, based on vision alone,
21 that there just isn't enough information at the front end
22 of the visual system to assess height of those power
23 lines.

24 Q. And based on your experience and knowledge and
25 education, can you tell us within a reasonable degree of

1 certainty within the visual perception field, would an
2 ordinary prudent person have been able to look up and
3 determine the height of the power line from where these
4 folks were standing that day?

5 A. No.

6 Q. And have we covered why that is?

7 A. Yes. Just to make sure I'm clear, because there
8 are not sufficient cues available to judge that.

9 Q. If you don't mind, which of these reference points
10 were available to him that day?

11 A. With regard to the wires?

12 Q. Yes. Was height in field that we talked about?

13 A. For relative -- insofar as there were two wires,
14 one would have projected higher than the other.

15 Q. Okay. What about --

16 A. But can I elaborate on the height and field one?

17 Q. Sure.

18 A. And -- actually, I don't know because it's
19 ambiguous. I don't know what the physical situation is.
20 Are these wires -- is actually one higher than the other
21 or is it -- because the key here is that image is
22 consistent with them being of a height, and you're
23 viewing it from either below, which you would be, or
24 above, and it will then project height in field, so if
25 you only have that information, that's like image size.

1 Q. All right. So smaller images?

2 A. No, you don't have that.

3 Q. If we're looking up, covering up?

4 A. Only the sort of impoverished version of
5 occlusion --

6 Q. Any others --

7 A. -- that they have.

8 Q. -- that we talked about?

9 A. No, not with regard to the wires.

10 Q. Okay. Now, getting back to the folks holding the
11 tent, how many of them were there, based on your review?

12 A. Four.

13 Q. And based on your review of the records and your
14 personal knowledge, could you tell us within a reasonable
15 degree of certainty, do you have an opinion as to why the
16 folks holding the tent couldn't simply look up and see
17 the wire?

18 A. Well, I don't know where they were relative to at
19 least all of them, where they were in terms of the tent
20 versus the wire. If they're under the tent, as I believe
21 Mr. Robinson reported being, anyway, then there's no
22 view. There is no image of the wires, so you're done
23 right there. So you'd look up and see the tent. The
24 tent is completing occluding the wire.

25 Q. I just want to go over one issue. When we talked

1 about the height as a possible reference point, we're
2 just simply talking there is one wire and we see another
3 wire, correct? So we see the two wires, or what are you
4 seeing? Excuse me.

5 A. So height and field shouldn't be confused with
6 height in the world. I'm talking about height in the
7 image, right, because that's acute in depth, how things
8 get projected from a three-dimensional world to a
9 two-dimensional object. Some are at a different position
10 in the field, and statistically things that are farther
11 away will project higher than things that are closer
12 together, but it's totally dependent, of course, on your
13 point of view.

14 And one of the things with regard to the wires is
15 that -- you know, the question is, can you judge height?
16 From the ground you're looking up, so you're having this
17 point of view this way, so it will. They'll be different
18 in points -- in terms of point of height and field, but
19 it's not telling you about depth.

20 Q. Okay. So as we talked about height in field with
21 regard to the photograph, did they have that when they
22 looked up?

23 A. In the way that I just described, yes.

24 Q. Is that the way we described it in the photograph?

25 A. Right.

1 Q. Okay. What is it about our eyes and -- can you
2 tell us, what is it about our eyes that forces us to rely
3 on cues to determine height of things around us?

4 A. So the reason we have to rely on them is that due
5 to -- mainly, in the case of depth, due to the
6 compression of information from the three-dimensional
7 world on to a two-dimensional retina, you literally don't
8 have in the image information about depth, and
9 therefore if we want to represent something about depth,
10 we need to rely on these cues that exist in the
11 two-dimensional image because notice that all of the cues
12 I'm talking about are in the two-dimensional image.

13 Q. And the dimension we're losing is?

14 A. It's distance from the viewer.

15 Q. Is that significant as we talk about the facts of
16 this case?

17 A. Yes.

18 Q. Why?

19 A. Because the question is -- concerns the would
20 people be able to reliably predict, for example, that the
21 tent pole would come in contact with the wire, the power
22 line, I guess it's called?

23 In order to be able to do that, you have to be
24 able to represent reliably where they are relative to
25 each other and you in depth, and that's what we need

1 these cues for, because that's exactly what's lost.
2 Because, again, notice if a tent pole was here and a wire
3 was, you know, 100 yards away, by the time it gets to the
4 retina, you're viewing it right here, so they cross. You
5 have occlusion. It's still going to project that way.
6 Even if it's clearly not going to come in contact with
7 each other, that's lost, how far away they are.

8 Q. And so cues help us, from a visual perception
9 standpoint, they help how in that regard?

10 A. They are -- they are regularities in the
11 two-dimensional image that occur due to the way things in
12 depth will project on to the two-dimensional image, and
13 that's the collection, though, the convergence of all of
14 them to the same conclusion about depth that allows us
15 to -- allows us to fairly reliable, in a rich cue world,
16 perceive where things are, relative to us.

17 Q. Based on your -- switching gears a little bit,
18 based on your review of the records and your experience,
19 do you have an opinion within a reasonable degree of
20 certainty as to whether or not Berkeley Electric knew or
21 should have known about the inability to determine the
22 height of the power lines by simply standing on the
23 ground?

24 A. Well, so my sense and opinion is that they should
25 because there's a vast, long literature in both the basic

1 research and in the applied world about the problems of
2 extracting depth, representing depth, and that it's a
3 difficult thing and that it relies on cues.

4 In addition, and sort of consistent with that in
5 sort of a ground truth thing is that reading Rico
6 Harrell's -- did I get that right -- deposition, he talks
7 about not being able to see it.

8 I mean, he basically describes exactly what one
9 would expect to be the case: I'm looking up at a wire.
10 All I see is this tiny, thin contour against a uniform
11 background. I don't know where it is relative to me and
12 therefore what's the height of the wire?

13 So it seems to me I just would expect that they
14 would know it's a problem.

15 Q. And do you have an opinion within again a
16 reasonable degree of certainty as to whether Berkeley
17 Electric knew or should have known at the time these
18 folks were killed and injured?

19 A. I do for exactly the same reasons. I mean, I
20 think those were true before the event, and so therefore,
21 for the same reasons, I think they should have.

22 Q. And this research you talked about, is that
23 readily available to the general public, or is it limited
24 to just the folks in your field?

25 A. Oh, no. It's broadly available.

1 Q. And for how long would you say?

2 A. Oh, early -- late 1800's, early 1900's. We're
3 talking, you know, basic perception.

4 Q. Before we leave reference points, would knowledge
5 of the power line being there affect in any way the way
6 your brain processes the cues or lack thereof around it?

7 A. Not substantially, because what -- it's sort of
8 like just -- I'll give you an analogy, and then I can
9 unpack it specifically there, but we see visual illusion.

10 All of us have seen some aspects of a visual
11 illusion, and when we're told that's an illusion, we
12 don't stop seeing the illusion. We can't overcome it
13 because the illusion is being caused by the way the
14 visual system works.

15 So, again, knowing that there's a wire in the
16 field in which you might be working might cause you to
17 change your behavior to do something differently. It's
18 not going -- and I can't speak to that. It's not going
19 to affect how you perceive it on line. It's not going to
20 change the way the visual system processes the cues that
21 are available to it online as it's doing its thing.

22 Q. In any of your opinions, are you saying anyone out
23 there that day wasn't looking at the line?

24 A. No. That's not my opinion.

25 Q. Okay. And are you a power line expert?

1 A. No.

2 Q. You have any expertise knowledge in power lines,
3 how high they're supposed to be on which property?

4 A. I don't, no.

5 Q. Are you an OSHA regulation expert or anything?

6 A. I'm not, no.

7 Q. Getting back to the three dimension, two dimension
8 that we talked about, Cathleen, have you told us
9 everything that would help us understand how that applies
10 in this case?

11 A. I believe so, but let me just emphasize what I
12 think is important.

13 So the task that's critical to the question of
14 this case is for the visual system to be able to
15 accurately represent where the wire is relative to the
16 viewer.

17 Q. Knowing what happened that day, and knowing what
18 Berkeley Electric knew or should have known about the
19 cues or the absence of cues out there that day, is there
20 anything -- within a reasonable degree of certainty, is
21 there anything that Berkeley Electric could have done to
22 increase the reference points or cues out there that day?

23 A. To increase for the viewers there and then?

24 Q. Yes, ma'am.

25 A. I guess they could. I don't know whether they do

1 this, but they could have a physical marker, like what I
2 would want or expect people who are inspecting the
3 heights of the lines to use and guess so you could have a
4 physical pole or a physical something that you know what
5 the height is, and therefore you sort of assess where
6 does it come relative to the height of the wire?

7 Q. All right.

8 Thank you, Cathleen.

9 THE COURT: Let me ask you something, just to
10 clarify. The point of her testimony is -- what issue are
11 you offering her on? Is it one or a multitude?

12 MR. GOULD: It's her opinions regarding what
13 the folks out there that day would have seen, based upon
14 the visual cues that they had or didn't have that day.
15 So, essentially providing us, Your Honor --

16 THE COURT: Are you on comparative negligence
17 or are you on third party liability?

18 MR. GOULD: Comparative negligence, Your
19 Honor.

20 THE COURT: Okay. And then you have -- I
21 interrupted you. What other issue --

22 MR. GOULD: No, that's it.

23 THE COURT: -- as it relates to Berkeley
24 Electric --

25 MR. GOULD: Correct.

1 THE COURT: -- in allowing, I guess what I'm
2 calling, eyeball inspections.

3 MR. GOULD: Eyeball inspections, yes, Your
4 Honor.

5 THE COURT: In other words, going, Oh, yeah,
6 that looks high enough to me.

7 MR. GOULD: And addressing any issue
8 regarding the third party liability as pertains to the
9 party planners. That too, Your Honor, because those were
10 the folks that were out there as well, in case that issue
11 were to come up.

12 MR. KEENAN: And, Your Honor, the fourth
13 reason is they should have known, or did know, of the
14 danger that the low-hanging power line posed to people
15 not in the power line business. They knew the danger.
16 Nobody else did.

17 THE COURT: That may be an argument on
18 liability. I'm asking about this witness's -- the
19 purpose of this witness testifying. She's not being
20 offered to say, well, anybody should know that if you
21 touch a power line, you're going to get electrocuted.

22 MR. KEENAN: This is what I wrote down
23 verbatim and put a star behind it: BEC should have known
24 the inability of lay people being able to perceive the
25 danger, and with that knowledge, then -- she's not going

1 to say what they should have done, but they had that
2 knowledge that none of the lay people did, and that's
3 very important.

4 MR. GOULD: And, Your Honor, that was an
5 opinion that was disclosed to the other side for
6 discovery.

7 THE COURT: That might go to comparative
8 negligence.

9 MR. KEENAN: Yes.

10 THE COURT: Okay.

11 MR. KEENAN: Also goes to punitive damages,
12 Your Honor.

13 THE COURT: Okay. Are you ready to do your
14 cross?

15 MR. JOHNSON: Yes. I object to two lawyers
16 arguing the same point.

17 THE COURT: Well, I usually don't allow that,
18 but they're both from out of town and they're new, so I
19 won't let you do that anymore. Whoever is doing the
20 argument is doing the answering when I ask the question.

21 CROSS-EXAMINATION (Cont'd)

22 BY MR. JOHNSON:

23 Q. Dr. Moore, have you ever been out to the scene of
24 the accident?

25 A. Have I been to the scene?

1 Q. Yes.

2 A. No.

3 Q. I'm asking him for help. Picture is up. Thank
4 you.

5 All you've done in preparation for your opinions
6 is look at photographs --

7 A. No.

8 Q. -- in terms of what you relied upon as to cues?

9 A. No. I've used the photographs to explain my
10 opinion.

11 Q. Okay. Well, you would agree it's always hard in a
12 photograph to judge depth.

13 A. Yes. I mean, that's the retinal image. That's
14 what I'm talking about. A photograph is a
15 two-dimensional image, so it's perfect for asking about
16 what cues might be available to the visual system on the
17 two-dimensional retina.

18 Q. But you haven't seen it on the ground to see what
19 you would have seen differently from the picture?

20 A. I haven't physically been to that farm, no.

21 Q. Now, do you know what John Fortney saw before the
22 accident?

23 A. I don't. I don't know what anyone saw.

24 Q. So you don't know what he saw, what Mr. Robinson
25 saw, what Mr. Clayson saw, what Mr. Richardson saw, or

1 Beth, the event planner, saw?

2 A. Just like everyone else involved, I think that's
3 true. I don't know exactly what they saw, so may I
4 elaborate?

5 My opinion is in regard to the best case scenario;
6 that is, assume they were looking. Assume they had this
7 image. What could they know about the depth? What could
8 they know about the existence of the wires?

9 Q. Whether or not the best way to know what they saw
10 would be to pick up the phone and call them and ask them
11 what they saw?

12 A. If it were about -- if my opinion were very, very
13 specific, yes.

14 Q. Yeah. And you hadn't done that in your
15 methodology?

16 A. No.

17 Q. Now, dimensional, if you ask them what they saw,
18 do you have any idea about what they would say?

19 A. Do I -- no, because I don't know what they saw.
20 That's the same question, isn't it?

21 Q. Well, Dr. Moore, if they were moving this tent
22 here in this photograph closer and closer to the line --

23 A. Right.

24 Q. -- and somebody said, Wait a minute. We're
25 getting too close, stop, that would indicate that they

1 saw it, recognized it as a hazard, and it should stop so
2 they don't hit it, correct?

3 A. If they said it, that it would indicate that they
4 saw something that was possibly consistent with that,
5 that would make them want to check with some sense that
6 is more reliable.

7 Q. Well, I want you to assume that Beth, the event
8 planner, said she heard someone as they were moving it
9 towards the line say, Wait a minute. Stop. You're
10 getting too close, or words to that effect.

11 MR. GOULD: Objection, Your Honor. That was
12 the testimony that was stricken yesterday. That was the
13 hearsay that was stricken.

14 MR. JOHNSON: This lady is an expert and can
15 rely upon --

16 THE COURT: If it was in the deposition, not
17 something that got struck yesterday. If it's somewhere
18 else in the evidence, she can rely on hearsay testimony.

19 Help me with where you're going.

20 MR. JOHNSON: You ruled that what Beth said
21 was hearsay.

22 THE COURT: Correct. So it didn't come into
23 evidence here, but an expert can normally rely on hearsay
24 if it's somewhere else in the record. Is what you're
25 saying somewhere else in the record?

1 MR. JOHNSON: I don't believe so, but, Your
2 Honor, I don't believe it's limited to that. I'm testing
3 her opinion whether she would know more if she knew what
4 the witnesses said, and the only way she could ever get
5 that would be hearsay.

6 THE COURT: And so you want to ask her what
7 again, what somebody else said?

8 MR. JOHNSON: Yes. I want you to assume as
9 being the truth --

10 MR. GOULD: Objection.

11 THE COURT: I got to understand what he's
12 saying before I can comprehend your objection. So go
13 ahead.

14 MR. JOHNSON: My question was, I want you to
15 assume that Beth, the event planner, said that she was on
16 the opposite end of the tent, the far end.
17 Mr. Richardson was on the near side of the tent and the
18 line, and they were moving the tent and getting close and
19 someone said, Let's look out. There's a line. We're
20 getting too close, or words to that effect.

21 THE COURT: A hypothetical has to be based on
22 evidence in the record. There's nothing in the record
23 right now that says she heard that. So other than -- I
24 struck it out yesterday, so is it somewhere in a
25 deposition or something?

1 MR. JOHNSON: No, sir.

2 THE COURT: All right. So you want to make a
3 proffer?

4 MR. JOHNSON: Please.

5 THE COURT: Go ahead.

6 BY MR. JOHNSON:

7 Q. I want you to assume that Beth, who is on the
8 opposite side of the tent, watching the movement, someone
9 hollers out or says, Wait a minute. We're getting too
10 close, and they put the tent down at that point.

11 If you assume that was true, wouldn't that
12 indicate that they saw the line, saw they were getting
13 close, recognized it as a hazard, and avoided it, at
14 least to that point?

15 A. So it would suggest to me that that -- whoever
16 that person was saw some cue that was consistent with
17 concern and, because it's a very important thing, would
18 have a low threshold for saying we have to check this
19 out.

20 So, yes, I think it would be consistent that they
21 saw some indication there was potential danger there.
22 Let's check it out.

23 Q. All right. I want you to assume that --

24 THE COURT: Are you finished with your
25 proffer?

1 MR. JOHNSON: Yes.

2 THE COURT: Or is this a different question
3 now?

4 MR. JOHNSON: Different question.

5 THE COURT: So we're back on.

6 MR. JOHNSON: Back on. Thank you, Your
7 Honor.

8 BY MR. JOHNSON:

9 Q. Dr. Moore, if you would have assumed that Alex
10 Clayson has said that he was at a meeting with David
11 Richardson and his employer and during the course of the
12 meeting, this was before the tent was -- this was the day
13 before the tent was being put up.

14 I want you to assume he's testified that, I
15 distinctly remember seeing the electrical line, and David
16 Richardson was out in the field. And he was thinking
17 about putting the tent up in the general -- in this
18 general vicinity and the line was directly above. We
19 noticed that, and we made a comment there was a line
20 above, and we decided to shift the tent well out of the
21 way.

22 When I say we decided, it was all agreed that the
23 tent wasn't going to go there. We were going to move it.
24 This tent was the largest tent as you've seen in the
25 pictures of the day. It was an enormous tent out there,

1 big tent pole, 60 feet by 120, and he's also asked and
2 answered, Why did y'all not want to put the tent in the
3 area of the electric lines?

4 And he says, Because it would be too close to the
5 electrical lines or could potentially touch the
6 electrical line and created some problems.

7 If you assume that to be true, would that indicate
8 to you that your opinion is wrong and that the crew, the
9 people who were out there on the scene, saw the line,
10 recognized it as an electrical line and decided they
11 would stay away from it because of concerns that someone
12 could hit it and get hurt?

13 A. No. It would not change my opinion with regard to
14 the people that day.

15 Q. I want you to assume that Alexander Clayson was
16 asked in his answer, Okay. Common sense was based on
17 train -- experience and training, that you didn't put the
18 tent in an area where you would be in close proximity to
19 an electrical line at the risk of contacting it?

20 And he answered, Right.

21 Would that indicate to you he, as a crew leader,
22 knew that there was an electrical line, there was a need
23 to stay away from it, and that it was hazardous if they
24 touched it?

25 A. That statement indicates to me, yes, that he knew

1 there was electrical wire in the area, but that doesn't
2 impact my opinion.

3 Q. Let me ask you this: --

4 THE COURT: Let me ask you, who is Alexander
5 Clayson?

6 MR. JOHNSON: He was the crew leader for the
7 Stage Presence. He was in charge of the crew, moving the
8 tent, putting the tent up.

9 THE COURT: Okay.

10 BY MR. JOHNSON:

11 Q. Do you know where this tent came from before it
12 was moved to the point of the accident?

13 A. No, I don't.

14 Q. So you don't know who was on which pole or --

15 A. I don't.

16 Q. -- in front or behind? If I were to tell you to
17 assume it was behind this barn originally and at the
18 direction of the event planner, it was moved around the
19 board in a position where they contacted a line?

20 A. Yeah, that's my impression, uh-huh.

21 Q. And you've talked about depth perception. If they
22 moved it from around there and were looking and had the
23 opportunity to see it, they would know, as they moved up
24 to where they ultimately hit the line, that they were
25 getting closer and closer to the electrical line every

1 step they took?

2 A. That's what I'm saying they wouldn't necessarily
3 have. What they would have a good sense of is the tent
4 is getting closer to them, but they don't have a good
5 sense of where the tent is relative to the lines.

6 Q. If you assumed that as they were moving it
7 somebody says, Wait a minute, we're getting too close to
8 the line, that would mean your opinion was wrong about
9 what they actually saw?

10 A. No. First, my opinion isn't about what they
11 actually saw, it's about the best case scenario given
12 what was available here, and, yeah, so, no, it would not.

13 Q. So you're not giving an opinion as to what they
14 saw, you're giving an opinion as to what some person
15 might see or might not see.

16 A. I'm giving an opinion of what is the best case
17 scenario of what somebody could have seen, could have
18 interpreted, with regard to depth in those circumstances.

19 Q. Well, if they say, Wait a minute, we're getting
20 too close, wouldn't that tell you, the best of
21 circumstances, what they could see?

22 A. Yeah. That would tell me that that person,
23 whoever that was, was flagged, saw some cue that
24 triggered, Oh, I'm worried, because it's a very important
25 thing.

1 So remember I talked about the task is critical to
2 interpretation. You're going to have a low threshold for
3 worrying about that, so any hint, any of the small
4 things, like the little amounts of occlusion that I
5 talked about, and here it is, I can imagine somebody
6 would say, Hey, hey, this is a power line, but that's all
7 it tells me. It doesn't change the fundamental.

8 Q. Doctor, if somebody can tell you what they saw,
9 you don't need an expert to offer an opinion about what
10 they might or might not have seen. You would agree with
11 that?

12 A. Stated that way, yes.

13 Q. And with these photographs here and what these
14 people are saying, they're saying, we saw it, we
15 recognize it, we decided we needed to stay away from it,
16 yet we kept getting closer and closer, and then we hit
17 it?

18 A. So that is not my understanding. I have offered
19 an opinion as to how it could be in circumstances like
20 this that wouldn't be recognized that the tent was coming
21 in connection. How could that be, based on what we know
22 about visual processing, and that is what I'm testifying.

23 Q. What is your understanding what part of the tent
24 contacted the line?

25 A. The center pole.

1 Q. And which line did it contact?

2 A. The lower one, I would assume, but that's an
3 assumption.

4 Q. Do you know whether it was the primary or the
5 neutral?

6 A. I don't know power.

7 Q. Okay. So if they were moving this tent to the
8 point that the center pole is a point of contact, they
9 are actually moving the tent on to the line to the point
10 that it gets to the pole, center pole, right?

11 A. Right.

12 Q. So somebody's standing here, seeing the tent pass
13 under the line to the point that he gets to the tip of
14 the tent, would be able to recognize that they're getting
15 closer and closer to the tip pointing -- hitting the
16 line?

17 A. Again, what they'll -- what they can say for
18 certainty is that the tent is getting closer to them.
19 Where the wire is relative to the tent is not given in
20 that tent getting bigger and bigger in the visual field,
21 which is what you're referring to.

22 Q. Well, if I'm standing here, at or about I'm under
23 the line and I see a tent passing beside me or coming
24 through and the first tent pole's coming under me, that
25 would be a good visual cue that the tip was going to hit

1 the line as you continued forward, wouldn't it?

2 A. So, to me, that sounds like begging the question,
3 you're saying if they saw it, wouldn't that mean they
4 could see it?

5 And, again, my opinion is to offer an explanation
6 as to why somebody might not have seen it, why some of
7 them could certainly claim they didn't see it. How could
8 that possibly be, given that they were right there? And
9 there is reasons why that could very reasonably be given,
10 even though they were right there.

11 Q. Doctor, you said in your opinions an ordinary
12 prudent person would not realize that they were in harm's
13 way by continuing to move the tent that they did in this
14 case because their eyes deceived them.

15 A. Right, and should -- their eyes can deceive them,
16 yes, uh-huh.

17 Q. And if they are saying, Wait a minute. There it
18 is. We're getting too close and we want to stay away
19 from that line, that would indicate what they -- that
20 they knew they were getting in an area of harm's way?

21 MR. GOULD: Objection, Your Honor. This is
22 the same thing he was getting into earlier that we went
23 through the proffer process, so if he wants to go through
24 that process again, but he's trying to get it in again,
25 Your Honor. This is the same hearsay that was stricken

1 yesterday.

2 THE COURT: Well, he did quote some -- this
3 Mr. Clayson's testimony who said, apparently -- he did
4 tell somebody there's a problem with the line, at least
5 the day before?

6 MR. JOHNSON: Yes.

7 THE COURT: Okay.

8 So I'll let you go ahead.

9 BY MR. JOHNSON:

10 Q. Would you answer my question?

11 A. I'm sorry. Can you repeat the question?

12 Q. I'll try. You said an ordinary prudent person
13 would not have realized that they were getting in harm's
14 way by moving the tent.

15 If you assume what Mr. Clayson has testified to in
16 his deposition, assume those facts to be true, it would
17 indicate that they recognized they were getting into
18 harm's way the closer they got to the tent?

19 A. Right. So my opinion is that they -- an ordinary
20 prudent person couldn't reliably perceive the height, or
21 whatever words I used, and you had asked before about Mr.
22 Clayson reporting it the day before, and I acknowledge
23 he's looking at the scene.

24 He saw that there was a power line and indicated,
25 This is something we should think about, you say. I

1 don't remember that from the deposition, but that's
2 there. That doesn't change my opinion with regard to
3 what the visual information that was available the day
4 that it was happening, how were people perceiving where
5 the tent pole was relative to the wire?

6 That's what my opinion is focussed on.

7 Q. So you're not saying these individuals themselves,
8 their eyes may have deceived them; you're saying the
9 normal person may have had their eyes deceive them in
10 that situation?

11 A. Yes. I'm saying because of the lack of cues, the
12 person -- a person cannot reliably, a normal, prudent
13 person I think is the words I used -- couldn't be
14 expected to reliably perceive where that wire was
15 relative to them or other objects.

16 Q. Who is an ordinary prudent person?

17 A. Anybody with a visual system, because my opinion
18 is being based on what could a visual -- what visual
19 information is there and how it would be expected to be
20 processed.

21 So I'm saying if I am just a person with my visual
22 system looking at the wire, trying to assess is it close,
23 is it far, is it a danger, you don't have enough
24 information, just based on vision. Vision is
25 insufficient for this task. That's what my statement

1 about any prudent person.

2 Q. And you haven't tested your theory by getting
3 people together and seeing what they see or don't see in
4 this setting?

5 A. Not in this particular scene, no.

6 Q. Do you know whether or not the defendant, Berkeley
7 Electric, was aware or wasn't aware that people might
8 have difficulty assessing heights of lines solely on the
9 basis of a visual inspection from the ground would be
10 unreliable?

11 A. My sense is that they didn't know based on Rico
12 Harrell's statement that he couldn't do it, even though
13 that's what he was supposed to be doing.

14 Q. Wasn't he asked the question in relation to just
15 the line, can you judge the height of the line against
16 the blue sky? Can you accurately estimate its height?

17 A. With just the line against the blue sky with just
18 your visual system? No. That's the basis of my opinion.

19 Q. No, that's what Rico Harrell was asked, and that's
20 the basis of your opinion about --

21 A. No. I'm saying no, you can't do that, and that's
22 the --

23 Q. I thought you were saying Rico Harrell agreed with
24 you that he couldn't do it.

25 A. Yeah. He said -- my opinion is one wouldn't be

1 expected to do that because the cues aren't there. I'm
2 saying Berkeley Electric or whoever he worked for should
3 have realized that indeed that was the case because his
4 experience, as a particular person looking at the wires,
5 couldn't, in fact, do it, consistent with what one would
6 expect.

7 Q. Looking at the line against the blue sky is
8 completely different than looking at it with all the cues
9 around it that are shown in this photograph, correct?

10 A. The cues are not -- we went through which cues are
11 actually there with regard to where the wires are, and
12 there's lots of cues for the ground plane objects. There
13 are very few clues, to none, for the wires.

14 Q. Dr. Moore, that wasn't my question. My question
15 was, there are entirely different cues from looking at a
16 line that is simply out on the countryside in the air
17 against the sky as opposed to looking at the line where
18 you have all this -- all the cues you have here?

19 A. There are different cues, yes.

20 Q. And you formed the opinion that Berkeley didn't
21 know that on the basis of Mr. Rico Harrell's testimony?

22 A. I'm not sure I ever said that Berkeley doesn't
23 know that. I said that people like Berkeley should know
24 that, given the literature, and that it's consistent with
25 them not knowing it reading Rico Harrell. You asked me

1 do they, and so based on Rico Harrell's testimony, I
2 would say probably they don't.

3 Q. Do you know whether or not there was a power pole
4 just cut off from this photograph right here?

5 A. I don't know the poles were here.

6 Q. If there was a pole there, right here, or in that
7 general area, would that be an additional cue?

8 A. That could help, uh-huh.

9 Q. Help the person --

10 A. It would be one more cue in the scene in general,
11 it being attached to the ground plane, yeah.

12 Q. The baseball questions, baseball players learn how
13 to see the ball to the point that they can catch it,
14 correct?

15 A. Right, right.

16 Q. Little teeny five- and six- and seven-year-olds
17 learn how to do that, correct?

18 A. Uh-huh. Not quite as well as the seasoned player,
19 but yes.

20 Q. A basketball hoop is how high off the ground?

21 A. Right.

22 Q. Do you know how high a basketball hoop is?

23 A. I don't.

24 Q. If I told you it was ten feet, would you know
25 that?

1 A. I don't know. I would say sure, okay.

2 Q. Accept for the purposes of the question it's ten
3 feet tall.

4 A. Uh-huh.

5 Q. People learn and regularly are able to judge the
6 height of the goal so they can shoot a goal at the
7 basketball court, don't they?

8 A. Uh-huh.

9 Q. Is that a yes?

10 A. Yes, but basketball is a very different situation
11 from either baseball or this situation because it's cue
12 rich. The basketball situation is a rich cue environment
13 for judging depth.

14 Q. What rich cues are you describing?

15 A. So you have the crowd in the background, you have
16 the motion of the basketball against the backboard as it
17 goes forward. All of that is consistent with
18 information, with not just relative depth, but metric
19 depth. You have the other players on the field.

20 It's all about context and reference frame. And,
21 you know, think of these cues essentially as, you know,
22 lots of reference frames, reference points.

23 In basketball, you know, it's very rich. Baseball
24 is an interesting situation, because baseball is like the
25 ground plane here.

1 Q. It's not always rich with cues, is it? Kids play
2 sandlot basketball or have a hoop in the back yard,
3 nothing against it other than sky itself, and they shoot
4 hopes successfully, correct?

5 A. Right, and I would predict that if you looked at
6 how they did that, under those circumstances it would be
7 more difficult than under more standard rich cued
8 positions.

9 Q. I asked you in your deposition as to whether or
10 not you were familiar with the national OSHA ten-foot
11 rule.

12 A. Yes.

13 Q. You told me you were not familiar with it.

14 A. I'm not.

15 Q. Have you done any research into the OSHA ten-foot
16 rule --

17 A. No.

18 Q. -- and how was it arrived at that ten feet was the
19 appropriate distance you should stay away from a
20 electrical line?

21 A. No. I'm not an OSHA expert and haven't become one
22 since my deposition.

23 Q. Well, in terms of being able to judge distance, do
24 you know how OSHA came up with a ten-foot rule as opposed
25 to a fifteen- or a seven- or eight-foot rule?

1 A. I don't.

2 Q. I want to ask you -- I'm going to pull this back
3 till it gets to point of ten feet and see if you --

4 A. You want me to look? Okay.

5 Q. So you're looking down at ten feet? If work men
6 on this job site stayed ten feet away from an energized
7 conductor, would there be an accident?

8 MR. GOULD: Objection, Your Honor. She's
9 already testified she's not an OSHA expert, and she's
10 asking him questions about the OSHA ten-foot rule, which
11 she already said she's not an expert in.

12 If he wants to ask about visual perception
13 issues, she's more than qualified to talk about that, but
14 that is outside of her expertise.

15 MR. JOHNSON: I didn't ask it in reference to
16 the ten-foot rule.

17 THE COURT: What are you asking her?

18 MR. JOHNSON: I asked her if the work men
19 stayed ten feet away from an energized conductor on that
20 job, that is the distance from me to her, would there
21 have been an accident?

22 THE COURT: That is outside the area of her
23 area of expertise. That isn't why she was brought in
24 here to offer an opinion.

25 BY MR. JOHNSON:

1 Q. Let me ask you this: Would you agree that a
2 person ought to be able to estimate the ten feet if they
3 need to stay that far away from the line?

4 A. Ten feet on the ground plane from -- if that is
5 OSHA's rule, then OSHA should be sure that people can do
6 that, on the ground plane.

7 Q. I'm asking you as a visual person. Can most
8 people tell what ten feet is --

9 A. Oh, exactly?

10 Q. Not exactly to the inch, but generally.

11 A. Could I tell if it were approximately this on the
12 ground plane? Because you're standing on the ground and
13 I'm standing here and there's lots of cues, I could do a
14 reasonable job of that, yes.

15 Q. Okay.

16 Your Honor, let me ask the witness this: Do you
17 know what it looks like from the other side? Have you
18 seen a picture from the other side?

19 A. I haven't seen a picture from the other side.

20 Q. If there are trees and vehicles and equipment on
21 the other side, would those constitute cues that would
22 help someone to make a determination as to whether they
23 were getting close to the line?

24 A. They would provide cues for where the tent was
25 relative to those other objects, but unless the wires

1 themselves were in the scope of those things, it wouldn't
2 help the question at hand, which is when and if they
3 would collide.

4 Q. But if there were trees here on this side, they
5 would help someone judge the distance, correct?

6 A. I don't think it's different from what we're
7 seeing on that side because we see other tents and other
8 things behind as well that provide reference frame.
9 Those are all ground plane issues and will provide
10 information about where the tent is, relative to those
11 things, but the question that I was asked to speak to was
12 understanding where the power line is relative to the
13 center pole of the tent.

14 MR. JOHNSON: Your Honor, I would repeat the
15 question that you prohibited me from asking her on the
16 grounds that the comment it seemed as if Beth, the event
17 planner, testified to, it could be viewed as being an
18 excited utterance. They were moving the tent. They see
19 high voltage lines they're getting close to, and somebody
20 says, Wait a minute, put the tent down, I would urge that
21 you consider allowing it as an excited utterance.

22 THE COURT: Wouldn't present sense impression
23 be more accurate?

24 MR. JOHNSON: Sure.

25 THE COURT: I mean, up until the moment

1 somebody got electrocuted, it didn't sound like there was
2 a lot going on to get excited about, so if that statement
3 got made, it got made before these fellows got
4 electrocuted. Anything said after the electrocution
5 would be an excited utterance, but up to that present
6 sense impression would be a little more accurate grounds.

7 MR. GOULD: He still has to identify the
8 declarant, though, Your Honor.

9 THE COURT: Who was the declarant? Was that
10 Richardson?

11 MR. JOHNSON: That was Beth, the event
12 planner.

13 THE COURT: The lady yesterday saying what
14 Richardson said?

15 MR. JOHNSON: Yeah.

16 MR. GOULD: She testified yes --

17 THE COURT: Is Richardson not available to
18 testify?

19 MR. JOHNSON: I have him under subpoena, so I
20 told him I was releasing him because I didn't think I
21 would need him, but I can get him back.

22 THE COURT: I would think this whole problem
23 solved if you get him in and he says, Wait a minute. We
24 got a line up here, and we need to think about that. Why
25 wouldn't I want to hear that?

1 MR. JOHNSON: I'm going to try to get him
2 back on board, but with this witness, present sense
3 impression to the hearsay rule, I'll allow that question
4 to be asked.

5 THE COURT: You asked her on the proffer.
6 Putting it in at this point is still problematical, but
7 you got it in as a proffer. If you bring this guy back
8 in, you'd ask her what would the effect of him saying
9 that would be so then it would be admitted as opposed to
10 just proffered.

11 MR. JOHNSON: All right.

12 THE COURT: Thank you.

13 MR. JOHNSON: I'll do it that way. Did we
14 get her answer?

15 THE COURT: I believe so because I allowed
16 you to ask her that question on proffer.

17 Before you do recross, let me ask you a
18 question, because I just want to clarify one point,
19 because this statement got made a couple of times, and,
20 gratefully, most of your testimony to me sounds like
21 common sense, so that's comforting in letting you testify
22 as an expert because I haven't heard anything that just
23 doesn't sound right, but you have -- you've stated that
24 the more cues, the better.

25 So, I mean, you start with a ruler hanging

1 down from the line saying, This is how high it is, well,
2 that would be your best.

3 THE WITNESS: That would be a great cue, yes.

4 THE COURT: Anything else, like a sign
5 hanging on a pole next to it saying, This is the height
6 that would be better, but, in essence, you're saying the
7 more cues, the better, and the absolute best would be to
8 have a ruler hanging down from the line so you know,
9 so --

10 THE WITNESS: Yes.

11 THE COURT: So that's kind of a common sense
12 sort of thing, all right? But the thing that I really
13 want to clarify on is that I think a couple of times the
14 questioning -- the question got asked, and maybe it was
15 just not a clear question. It said -- referenced people
16 didn't see the line, and by that -- or maybe you said it
17 in response to a question. I just wrote it down. Didn't
18 see the line doesn't mean it was invisible to them. By
19 that, do you mean they just misjudged the height of the
20 line?

21 THE WITNESS: Yes. So my testimony is not
22 that they didn't see the line. I don't know one way or
23 the other.

24 THE COURT: That got put in, and I just
25 wanted to make sure.

1 THE WITNESS: That's not what I'm speaking
2 to. I'm speaking to --

3 THE COURT: Misjudging the height.

4 THE WITNESS: And misjudging the point of
5 contact and whether there would be one. So misjudging
6 relative depth and height, right.

7 THE COURT: I thought that's what you meant,
8 but I wanted to clarify that. All right. So based on
9 that and the fact that you have redirect, you want to ask
10 any more questions?

11 MR. GOULD: Yes, Your Honor, and I would like
12 to take it from the most recent all the way back, okay?

13 REDIRECT EXAMINATION.

14 BY MR. GOULD:

15 Q. When Mr. Johnson was doing the whole tape
16 measuring thing and asking you questions about that,
17 remember that, and asking you whether they could
18 determine ten feet?

19 A. Right.

20 Q. Can folks determine ten feet up to the line, by
21 looking at the line?

22 A. I wouldn't think so, not reliably, no.

23 Q. Can folks tell if it's 15 feet, 20 feet?

24 A. Not if they can't tell where it is reliably.

25 Q. Based on what Mr. Johnson asked you, by looking at

1 the line, can you tell us, would they be able to
2 accurately determine if they were ten feet away from the
3 line?

4 A. From the line? No.

5 Q. Okay. You were asked a series of questions by
6 Mr. Johnson about the ordinary prudent person opinion you
7 have. Does that opinion apply to the folks who were out
8 on the farm that day?

9 A. Yes.

10 Q. Can you help us understand, Cathleen, how it's
11 possible to see the line but not see the line, if that
12 makes sense? I mean, how is it possible to see the line
13 and not ascertain the danger?

14 A. Right. So it's possible to see the line without
15 seeing the relative positioning of the line with the
16 tent, which is the danger, so yes, one could generalize
17 it as they could see the line, but they didn't -- there's
18 reason to imagine why they wouldn't see the danger.

19 Q. And what are your reasons for that?

20 A. There were insufficient cues as to what the
21 relative distances between the two important objects
22 were.

23 Q. Do you recall when Mr. Johnson asked you the
24 questions about Alex's deposition testimony?

25 A. Yes.

1 Q. And do you recall that you testified that that
2 testimony wouldn't change your opinion?

3 A. Right.

4 Q. All right. Can you tell us, why wouldn't that
5 testimony change your opinion?

6 A. Because my opinion concerns how things could be
7 expected to be perceived then and there. We refer to
8 that as on line perception. How are you interpreting and
9 representing the world as it is now?

10 What I understand Alex to have said is the day
11 before he was sort of scoping out the scene. He noted
12 there is a power line there, and that's something to be
13 aware of, I guess he said. I didn't see that, but
14 assuming he said that, that doesn't change anything about
15 what I've said about lack of cues at the moment in terms
16 of, you know, can people reliably see that the tent is
17 about to hit the wire?

18 Again, I was asked to see if people claim they
19 didn't see this danger, how could that possibly be? They
20 were there that day. The wire was there. What's the
21 problem? And I've offered what the problem could very
22 well have been, and that doesn't change -- the fact that
23 somebody saw there was a power line there the day before
24 doesn't change that at all.

25 Q. Does his testimony, based on what he was asking

1 you about --

2 A. Does that --

3 Q. Does that testimony in any way affect the number
4 of cues these folks had when looking at the power line?

5 A. No.

6 Q. And you were asked, right out of the gate, about
7 the difference between this photo and actually going out
8 on to the farm.

9 A. Right.

10 Q. When you're talking about visual perception cues,
11 the 2D/3D that we talked about here all morning, is there
12 a difference between looking at this photograph and
13 standing right here out on the farm in this same spot?

14 A. Not with regard to the issues I'm talking about,
15 no. In fact, the photograph is the perfect, you know,
16 model for it because it's a two-dimensional thing, and
17 all it has are the two-dimensional cues that the retina
18 would have.

19 Q. So what the photograph -- what are you saying that
20 the photograph provides that we would have out on the
21 farm, if we were there?

22 A. Sorry. What the photograph provides --

23 Q. Is there anything in addition that being out on
24 the farm would provide us with cues in 2D?

25 A. Not with regard to what would be projected on the

1 retina. I mean, you might have different -- this is one
2 view that's on the retina, yeah.

3 Q. Okay.

4 MR. GOULD: Thank you, Cathleen.

5 THE COURT: Recross?

6 MR. JOHNSON: Yes, just short.

7 RECROSS-EXAMINATION

8 BY MR. JOHNSON:

9 Q. Dr. Moore, you read Mr. Clayson's deposition?

10 A. I did. Quite a while ago, yes.

11 Q. Do you recall when you read it?

12 A. Back in spring of 2014, I believe.

13 Q. Actually, Mr. Clayson talked about saying
14 something to the crew when they were moving the tent and
15 got hurt. He said words, Guys, we need to watch out for
16 the line, and they then picked it up and moved and hit
17 the line.

18 You recall that from his deposition, don't you?

19 A. No, but you're reading it to me.

20 Q. I want you to assume he was asked:

21 Okay. Now, you said that. I want to go back to
22 the question I asked you. You were actually moving the
23 tent the second after you put it down initially, you and
24 the crew were moving the tent in the directional line,
25 weren't you?

1 Yes. We were moving in directional lines.

2 You were moving the tent further away from the
3 shed, weren't you, in the direction of the line?

4 Yes. We were doing that.

5 And whether you thought about it or didn't think
6 about it or relied upon him, you, in fact, were moving in
7 the direction of the line you had just said, Guys, we
8 need to watch out for?

9 Yes.

10 All right. And I want you to assume that he was
11 asked what happened as you and the crew were moving
12 towards the line.

13 We had barely picked it up. We were shuffling. I
14 was shuffling backwards. John was shuffling sideways.
15 Dexter was shuffling forward, John Robinson was shuffling
16 backwards, and I remember hearing a snap, crackle, and a
17 pop and my feet were very, very, hot, and I remember
18 thinking, Oh, my gosh, we've just hit the line.

19 Assume that to be true. It would be clear that
20 Mr. Clayson, while they were in the process of moving the
21 tent and just before they hit it, was discussing, We need
22 to watch out for the line?

23 A. Uh-huh.

24 Q. Correct?

25 A. What am I saying correct to, that he said that?

1 Q. If you assume he said that, it would be correct
2 that he saw and recognized the hazard.

3 A. It would be clear that he recognized that there
4 was a line there, yes, and that a line is a hazard unto
5 itself, yes.

6 Q. And just following making the statement, he's
7 saying they contacted the line, correct, if you assume
8 what I read was accurate?

9 A. Again, what am I saying correct to?

10 Q. He said to the crew, We got to watch out for it.
11 They picked the tent up and moved it and contacted it.

12 A. That sounds like that's what you just read,
13 uh-huh.

14 Q. And so he saw it the day before, said, we got to
15 stay out of it, recognized it was a hazard. When the
16 crew was in the process of moving the line, he says,
17 Wait. We got to watch out for the line, and just seconds
18 later, they hit.

19 So he saw and recognized the hazard that he was
20 putting his crew through.

21 A. Right. So he saw that there was a line there, and
22 that sort of speaks to the potential point. They see
23 that there is a line there. They're moving the tent
24 toward it, and yet they still hit it.

25 How could that possibly be? Why would that

1 happen? Clearly, they're not going to keep walking if
2 they see that it's going to hit, and so what I can speak
3 to is why they might not have seen that it was going to
4 hit.

5 Q. Dr. Moore, your opinion was that they would not
6 necessarily -- that the fact that the pole of the tent
7 was in close proximity that in danger of making contact
8 with it would not necessarily have been apparent to the
9 point of view of either the men moving the tent or the
10 event planners who are watching the tent be moved.

11 A. Yes.

12 Q. Mr. Clayson, if you assume what I read you is
13 true, clearly saw the risk?

14 A. What you read to me from Mr. Clayson is that he
15 saw the power line, and I agree, that's what it sounds
16 like he said. What it doesn't speak to is whether the
17 extent to which he saw the relative position of the pole
18 to the power line. The question is, why did they hit it
19 then, if they saw that? And my answer is because the
20 cues were unclear as to how close it was.

21 Q. But they saw that the line was there as a hazard?

22 A. They saw there was a power line there, and power
23 lines are hazards, yes.

24 Q. And when they continue to move forward, they are
25 continuing to get closer to the hazard?

1 A. Physically, that's what happened. What I'm saying
2 is that there's a reason why they might not have
3 perceived that fact.

4 MR. JOHNSON: I don't have any further
5 questions.

6 THE COURT: All right. I usually only let
7 two rounds of questioning, but since I'm just announcing
8 this to you, you're not used to my practice, I'll let you
9 go one more.

10 MR. GOULD: Okay. Thank you.

11 THE COURT: That's it.

12 MR. GOULD: I do want to object and move to
13 strike the language from Alex's deposition if they don't
14 intend to call him.

15 THE COURT: On what ground?

16 MR. GOULD: Well, they're reading into the
17 record some witness they don't intend to call.

18 THE COURT: I don't know that they're
19 required to call them under 703. If a type reasonably
20 relied upon by experts in a particular field in forming
21 opinions or inferences, the facts or data need not be
22 admissible in evidence, Rule 703.

23 MR. GOULD: If he reads it verbatim. If he's
24 paraphrasing, however, which we believe he was, it should
25 be stricken, unless he intends to call Alex to trial to

1 speak as it pertains to the exact testimony that was
2 provided in the deposition.

3 THE COURT: He read from a deposition. Are
4 you saying he misread from the deposition?

5 MR. GOULD: Paraphrasing.

6 THE COURT: I don't know. I don't have it to
7 compare with what you said. You're saying you just
8 paraphrased it as opposed to read it?

9 MR. JOHNSON: I read it, Your Honor.

10 THE COURT: It sounded to me like you were
11 reading from something, but if you've got something
12 different, bring it to my attention, what he read
13 different than what was said in the deposition.

14 MR. GOULD: I'll withdraw the objection, Your
15 Honor. I'll proceed to -- we can move along.

16 BY MR. GOULD:

17 Q. When you were talking with Mr. Johnson just now
18 about seeing the line and still backing up, why would
19 they not have seen it was going to hit the line?

20 A. Because there were insufficient cues regarding the
21 relative distance between the center pole and the line.

22 Q. All right. And as he was talking again about
23 Alex's testimony, would he have known the height of the
24 line when he saw the line?

25 A. All I can speak to is based on perception, I would

1 say no, he wouldn't necessarily know the height of the
2 line based on vision.

3 Q. And why?

4 A. Again, because there's insufficient cues for
5 viewing just from the ground up to the lines. Vision is
6 insufficient to assess height for all of the reasons I
7 talked about in terms of impoverished cue situation.

8 MR. GOULD: Thank you.

9 THE COURT: Anything else, Mr. Johnson?

10 MR. JOHNSON: No, sir.

11 THE COURT: All right. You're free to step
12 down. This looks like a good place to break for lunch.
13 How about we resume at 2:00?

14 MR. SMITH: Yes, sir.

15 (Recess taken.)

16 A F T E R N O O N S E S S I O N

17 THE COURT: All right. Are you ready with
18 your next witness?

19 MR. SMITH: We are, Your Honor.

20 THE COURT: Go ahead.

21 MR. SMITH: The plaintiff calls John
22 Dagenhart.

23 JOHN DAGENHART,

24 having been first duly sworn,

25 was examined and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. SMITH:

3 Q. Good afternoon, Mr. Dagenhart.

4 A. Good afternoon.

5 Q. What do you do for a living?

6 A. I'm an engineer, an electrical engineer.

7 Q. Did you go to school for that?

8 A. Yes.

9 Q. Tell us about your educational background.

10 A. Well, I have a bachelor of science degree in
11 electrical engineering from North Carolina State
12 University.13 Q. And do you have experience with the National
14 Electric Safety Code?

15 A. Yes.

16 Q. Do you participate in any of the National Electric
17 Safety Code committees?

18 A. Yes, I do.

19 Q. What committees have you served on and are you
20 severing on now?21 A. I currently serve as chair of the grounding
22 subcommittee. That's the one of the subcommittees that
23 works on issues regarding grounding utility lines and
24 communication lines. I'm also a member of subcommittee
25 one, which is a general committee that covers.

1 definitions, references, and the coordination of other
2 committee issues, and I also serve on the interpretations
3 subcommittee, so I'm active in all three of those.

4 Q. And as far as interpretations go, would those be
5 interpretations of the National Electric Safety Code?

6 A. Yes, sir.

7 Q. How long have you been working with the National
8 Electric Safety Code altogether?

9 A. Altogether?

10 Q. Yes, sir.

11 A. Well, including my utility work, probably close to
12 40 years now, but with the code itself, as on the
13 committees, I've been on the committee since 1990.

14 Q. Do you teach people about the National Electric
15 Safety Code?

16 A. Yes.

17 Q. Tell us about that.

18 A. Well, we have -- the company I work for now and my
19 past company, because of our involvement with the
20 National Electrical Safety Code, we've had requests over
21 the years to provide training on the National Electrical
22 Safety Code and we've done that, both for utility
23 companies and what we call public seminars where anybody
24 can come, and we've taught, last count, I think over
25 20,000 people over the years in the National Electrical

1 Safety Code.

2 Q. And as part of that teaching, does that include
3 construction, maintenance, and inspection of power lines
4 in relationship to the National Electric Safety Code?

5 A. Yes, it does.

6 Q. And you just mentioned that a moment ago you
7 worked for a power company?

8 A. Yes.

9 Q. Who is that?

10 A. That was called Duke Power. It's now called Duke
11 Energy.

12 Q. Where are they?

13 A. Well, at the time they were in -- at the time I
14 worked for them, they were northern South Carolina. At
15 the present time, they're in a lot more places than that.

16 Q. And what was your job at Duke?

17 A. I worked in an area called distribution. I was
18 what was called a distribution engineer. The
19 distribution part of the company is the part that handles
20 the local power lines, both overhead and underground,
21 that come from the local substations and provide service
22 to both the commercial, industrial, and residential
23 customers.

24 Q. And did you also grow up hearing about electrical
25 work?

1 A. Oh, yes.

2 Q. And how's that?

3 A. Well, my father was -- worked for Duke Power
4 Company and he was a lineman, so I grew up around line
5 trucks, and some of my earliest memories were hanging
6 around the warehouse with my dad when he would go in to
7 do things. It was lots of fun.

8 Q. Was there any sort of overlap time when he was
9 doing what he was doing and you were coming up in the
10 industry and y'all could have the opportunity to kind of
11 converse with each other?

12 A. Yes, there was. There was a time at which he was
13 still a line foreman and I was an engineer. We worked in
14 different areas, and we never worked directly with each
15 other, but we oftentimes had, over the dinner table,
16 discussions, and our mom would sometimes get aggravated
17 with us talking shop.

18 Q. Have you ever been qualified as an expert in court
19 before --

20 A. Yes.

21 Q. -- with regards to issues relating to the
22 construction, maintenance, and inspection of power lines
23 and the National Electric Safety Code?

24 A. Yes.

25 Q. Can you estimate for us how many times, sir?

1 A. Probably -- I think about a couple of dozen times.

2 Q. Okay. Who do you usually testify for?

3 A. Well, typically, in situations like this, by
4 default over the years, it's quite often been for the
5 power companies and utility companies because we've had a
6 lot of contracts with those companies, and we've
7 considered it to be a conflict of interest to do
8 otherwise.

9 MR. SMITH: Your Honor, I would offer
10 Mr. Dagenhart as an expert in the fields of construction,
11 maintenance, and inspection of power lines.

12 THE COURT: Do you wish to voir dire the
13 witness?

14 MR. JOHNSON: No, sir.

15 THE COURT: All right. Well, he is -- you're
16 okay with him being qualified in that field, in that area
17 of expertise? You said construction, maintenance and
18 inspection of lines?

19 MR. SMITH: And the National Electric Safety
20 Code.

21 THE COURT: And the National Electric Safety
22 Code.

23 MR. JOHNSON: I don't challenge his
24 qualification. I don't agree with his opinions, but --

25 THE COURT: He's qualified as an expert.

1 MR. SMITH: All right. We're even now.

2 BY MR. SMITH:

3 Q. Mr. Dagenhart, are there rules that apply to the
4 construction, maintenance, and inspection of power lines?

5 A. Well, yes, there are. I imagine you're talking
6 about the National Electrical Safety Code, and some other
7 regulations as well.

8 Q. Sure. And as an initial matter, a power company
9 must construct and maintain its power lines at least 18
10 and a half feet high above farms or lands with animals to
11 prevent injury to people or death by electrocution.

12 Do you agree with that?

13 A. Yes. I generally agree with that, yes, sir.

14 Q. Is that put in place to protect people?

15 A. Well, yes, it is.

16 Q. Okay. And does that come from the National
17 Electric Safety Code, the table, the chart?

18 A. The 18 and a half feet does. The rest of it comes
19 from other portions of the code, in a sense.

20 Q. Okay. Safety rule number two: A power company
21 must inspect their power lines to ensure they're at code
22 height to prevent injury to people or death by
23 electrocution.

24 Do you agree with that?

25 A. Yes.

1 Q. Is that also in place to protect people?

2 A. Well, yes, it is.

3 Q. And, finally, a power company must tell the truth
4 about its compliance with electrical safety laws when
5 reporting to the federal government to prevent injury to
6 people or death by electrocution.

7 Do you agree with that as well?

8 A. Yes, sir, I certainly do.

9 Q. All right. Is that also in place to protect
10 people?

11 A. It is because -- I always have to say yes because
12 not telling the truth would tend, in my opinion, to lead
13 to unsafe conditions, which consequently would lead to
14 the possible injury of people as a result.

15 Q. And I think that led to my next question, which
16 would be, why are these safety rules important?

17 A. Well, if it wasn't for -- if the safety wasn't
18 important, we wouldn't have the rules. The rules came
19 into place because of safety concerns.

20 Q. And is there any significance to the term National
21 Electric Safety Code? Is there a reason that word's in
22 there?

23 A. Well, yes. It is a safety code. You also have
24 the National Electrical Code, which is the code for
25 building wiring systems. This is the National Electrical

1 Safety Code that's somewhat the equivalent of that, but
2 it's the code for the electrical power lines and
3 communication lines that you would consider to be
4 utility-type systems.

5 Q. Is there a study that reports how often American
6 workers are killed by power lines?

7 A. Yes.

8 Q. And what were the results of that study?

9 MR. JOHNSON: Objection. Relevance.

10 THE COURT: What's the relevance?

11 MR. SMITH: Well, I think it goes back to the
12 purpose and the meaning for the rules, Your Honor.
13 They're in place to protect people, and this is a
14 problem.

15 THE COURT: Is that an issue in this case how
16 many people are killed by power lines annually?

17 MR. SMITH: Well, a lot of what Berkeley
18 Electric is going to claim is they didn't know and that
19 they didn't need to know, and you remember from my
20 opening what the statistic was. If we've got a statistic
21 out there that shows it's happening this much, the known
22 is affected, but the should have known is really
23 affected.

24 And if you recall the testimony from
25 Dr. Moore, talking about should they know that the

1 linemen would have difficulty judging the height of a
2 power line based on a visual inspection, well, if they
3 don't know it, they really should, and I think it goes to
4 the --

5 THE COURT: All right. I'll allow it. Go
6 ahead.

7 BY MR. SMITH:

8 Q. What were the results of the study?

9 A. Well --

10 MR. JOHNSON: Objection. Could we have the
11 study, the document itself?

12 THE COURT: Are they available? What is he
13 basing his opinion on?

14 BY MR. SMITH:

15 Q. Mr. Dagenhart, who did the study?

16 A. It's the Bureau of Labor, I believe, United States
17 Bureau of Labor.

18 Q. Okay. And how often are American workers killed
19 by power lines?

20 A. Those statistics are kept by year, and as I
21 recall, the data that I was looking at is over a ten-year
22 period, and it roughly translates -- if you calculate the
23 number of deaths contacting power lines with the number
24 of years and the number of power, it roughly comes out to
25 be one every three days.

1 Q. About every 72 hours?

2 A. Yes.

3 Q. What do you know about insulated power lines?
4 What does that term mean?

5 A. Well, the term insulated means -- it's describing
6 a material that is a poor, not a good conductor of
7 electricity. Rubber, for example, is a great insulator.
8 Air can be a great insulator as well, if you have enough
9 of it between an energized part and another part.

10 Q. Insulating power lines, does that protect people?

11 A. Generally, yes.

12 Q. Okay. And how how's that?

13 A. Well, in the case of a non-conductive material,
14 such as rubber or plastic that you see on regular
15 electrical wiring, that is a poor conductor of
16 electricity. Touching that wire decreases the likelihood
17 of someone being injured.

18 In the case of air, such as with electrical power
19 lines like we're talking about today, with air, the
20 combination of air and distance accomplishes the same
21 thing in a sense in that the distance combined with the
22 poor conductive nature of the air creates an insulation.

23 Q. Could we refer to that as isolation by elevation?

24 A. Yes. That's an appropriate term to use.

25 Q. Okay. And if power lines are not insulated, do

1 these rules become more important, less important, or
2 does it stay the same?

3 A. Well, all the rules are important. All of them
4 are important, it's just that if you have what we call
5 open conductors, and that's a term we use in the industry
6 to describe a line that doesn't have an intentional
7 covering over it with an open conductor, it becomes more
8 important, and, consequently, the clearances that we
9 specify in the code become larger because of that nature
10 of the line.

11 Q. I've heard power lines referred to as an invisible
12 danger. Have you heard that too?

13 A. Yes.

14 Q. What does that mean?

15 A. Well, it means you --

16 MR. JOHNSON: Your Honor, I will object.
17 Unless they tie it to the facts of this case, which they
18 haven't done yet, his testimony hasn't referred to the
19 facts of this case, it's irrelevant.

20 MR. SMITH: Your Honor, I think we're just at
21 this point --

22 THE COURT: Overruled. Go ahead.

23 BY MR. SMITH:

24 Q. What does that mean, sir, invisible danger?

25 A. Well, it means, in my mind, that because you can't

1 see it, you can't see electricity, you can't taste it,
2 it's -- it is, to a great degree, invisible until
3 something occurs to make you know it's there.

4 Q. Yesterday we heard Berkeley Electric's manager of
5 job training and loss control say it is foreseeable that
6 people will get too close to power lines. Do you agree
7 with that?

8 A. I would agree that it's known that it happens.

9 Q. And do you have an opinion to a reasonable degree
10 of certainty as to whether or not this is common
11 knowledge in the electrical power supply industry?

12 A. I would think that it would be.

13 Q. If the safety rules aren't followed, do you have
14 an opinion to a reasonable degree of engineering
15 certainty as to whether or not that places others at
16 risk?

17 A. Yes.

18 Q. And what is that?

19 A. Well, it does --

20 MR. JOHNSON: Your Honor, objection.
21 Relevance. What difference does it make whether it puts
22 other people at risk? We're trying this case.

23 MR. SMITH: Your Honor, do you want me to
24 respond?

25 THE COURT: Overruled. Go ahead.

1 THE WITNESS: Well, it does put people at
2 risk. For example, the safety code, the National
3 Electrical Safety Code, if you don't have safety, by
4 definition it's unsafe, and being unsafe causes people to
5 be exposed to hazards.

6 BY MR. SMITH:

7 Q. Hazards that could lead to injury or death?

8 A. Well, yes.

9 Q. What's the most important way the National
10 Electric Safety Code protects us?

11 A. Well, it's an overall protection in that the
12 requirements of the code are based on the hazards and the
13 expected conditions, and if the code is complied with,
14 based on those expected conditions, you have a safe
15 condition, and generally people are safe.

16 Q. Are you talking about the heights that the
17 National Electric Safety Code sets?

18 A. Well, that's one of them, but there are a lot of
19 other requirements in the code, yes.

20 Q. And there's also requirements in the code that
21 deal with protection of the actual electrical workers.
22 Isn't that --

23 MR. JOHNSON: Object to the leading.

24 BY MR. SMITH:

25 Q. Are there portions of the National Electric Safety

1 Code that also deal with the protection of the employees,
2 the workers of the of the company?

3 A. Oh, yes, there are. There is a special section in
4 the National Electrical Safety Code that is specific to
5 that.

6 Q. What I'd like to do -- let's go ahead and get the
7 opinions you have in this case, and we're going to break
8 those down, okay?

9 A. All right.

10 Q. Do you have an opinion as to whether or not the
11 line violated the National Electric Safety Code?

12 A. Well, yes. That was going to be my first opinion.
13 It does. It does violate the National Electrical Safety
14 Code.

15 Q. Do you have an opinion as to had the line met
16 code, would the tent have hit it?

17 A. My second -- had the line met code, the accident
18 would not have happened as it did.

19 THE COURT: When you say met code, what do
20 you mean by that?

21 THE WITNESS: Meaning the required height.

22 THE COURT: Thank you.

23 BY MR. SMITH:

24 Q. Do you have an opinion as to whether or not
25 Berkeley Electric violated the inspection requirements?

1 A. Yes. They did not comply with the inspection
2 requirements that are specified.

3 Q. Do you have an opinion as to whether or not
4 Berkeley Electric violated the recordkeeping requirements
5 of inspections and defects?

6 A. Yes. They didn't keep appropriate records either.

7 Q. And, finally, and I think you already discussed
8 this -- well, no, you haven't. Do you have an opinion as
9 to whether or not Berkeley Electric misrepresented their
10 inspection program?

11 A. Yes. They did misrepresent it. They weren't
12 being accurate with what they -- between what they said
13 they were doing and what they were doing.

14 Q. Do you hold these opinions to a reasonable degree
15 of engineering certainty?

16 A. Yes.

17 Q. Let's discuss the basis for the first opinion,
18 that the line -- I don't think it's there; but the line
19 violated the code.

20 What part of the National Electric Safety Code
21 governs the required height of power lines?

22 A. Well, it's covered in Rule 232 of the code, which
23 specifies the clearance over land, roadways, rails, and
24 water areas, generally both the earth in some fashion.

25 Q. And what conditions is the line required to still

1 meet that code?

2 A. I'm not sure I understand that question as that
3 you're giving me.

4 Q. Well, so I've got the -- we have the table marked
5 into evidence as Exhibit No. 7, and you said it was
6 section 232?

7 A. Yes. There is actually a table, 232-1 that is
8 contained in that rule, that specifies the clearances and
9 the land use beneath which determines the clearances.

10 Q. Under what conditions is the power line required
11 to still be at these required heights?

12 A. Well, as long as the land use stays the same, the
13 clearance stays the same. If the land use changes, then
14 the clearance changes.

15 Q. I guess what I'm asking about, are there
16 considerations in the National Electric Safety Code about
17 120 degrees or ice loading and things like that?

18 A. Oh, yes. Those clearances are to -- they do not
19 come below clearance.

20 Q. Okay.

21 A. These numbers that are contained in that table are
22 clearances above the road or the land, and they cannot
23 come below that under specified conditions of the line.

24 And now that can either be ice loading, if you
25 have an area of the company that has icing that can form

1 on the lines, or high temperature, and that's divided in
2 two different subcategories. It's either the highest
3 temperature the conductor could be at or 120 degrees, if
4 it's the lesser of -- well, it's one or the other, and if
5 you know the high temperature, if it's above 120 degrees,
6 you use that; otherwise, you use 120 degrees.

7 Q. Which one of those scenarios would cover our area,
8 in particular the area where this power line was?

9 A. It would be the 120 degree number.

10 Q. And is that to say that -- well -- and, first of
11 all, let me ask you: What happens as it gets hotter to
12 the power line?

13 A. As the metal in the power line heats up and gets
14 hotter, the metal expands. Metal expands when it gets
15 hot, and with the power line, the conductors and the wire
16 within the power line, as that expands, the conductor
17 gets longer, the wire gets longer.

18 Q. And because the wire gets longer, does that cause
19 the wire to sag further towards the ground?

20 A. Yes.. It goes in both directions. If it heats up,
21 it sags more; if it cools off, it gets less sag in it.
22 It goes up and down.

23 Q. And when you talk about temperature, are you
24 talking about the temperature outside, the weather?

25 A. It's actually the temperature of the wire itself,

1 but it's a combination of air temperature and any factors
2 that would cause the conductor to be at that temperature,
3 such as sunlight or electrical load on the line.

4 Q. So the table, the 232 table, does that set the
5 required height?

6 A. It does.

7 Q. All right. And does the section, I think it's
8 232(a)1, does that list the extra height under those
9 conditions?

10 A. It doesn't list the extra height. It says that
11 these clearances shall apply under the following
12 temperature and loading conditions, and what that's
13 really meaning is that when you get to these conditions,
14 you can't be lower than what the table value specifies.

15 Q. Okay. So even if it's 120 degrees outside and
16 that's the condition that's going to cause the power line
17 in this area to sag the most, the law requires that it
18 still be 18 and a half feet. Is that the reason for the
19 additional information you're talking about?

20 A. Yes, it is. You have to account for the worst
21 case condition, and, in this case, they specify those
22 worst case conditions, and under those conditions, you
23 can't get lower than what's in the table.

24 Q. Throughout the years, the weather changes and
25 conditions change, would you expect the height, the

1 actual height of the power line, to change along with
2 those conditions?

3 A. Oh, yes. It moves up and down throughout the
4 year.

5 Q. But under any of those conditions, does the law
6 allow the power line to dip under that minimum required
7 height from the chart?

8 A. No, it does not.

9 Q. All right. If you'll slip to the chart itself,
10 it's Exhibit No. 7.

11 A. The table 232-1? Yes, I'm there.

12 Q. Could you explain to the judge the way the table
13 works.

14 A. The way the table works is down in the left-hand
15 side of the chart, you determine the nature of the
16 surface underneath the wires, connectors or cables, and
17 you just go down the column and you find the area that
18 matches the situation that you're dealing with.

19 And then once you get into that proper category,
20 you go across the table to the right column, and you can
21 pick off the required clearance under that column.

22 Q. So is it, simply voltage plus land use equals
23 required height?

24 A. Essentially, yes.

25 Q. Would it require an expert in the National

1 Electric Safety Code to be able to determine what the
2 voltage is of a line, or could they just ask somebody?

3 A. Well, they could ask -- typically with utility
4 companies, they know the voltage of their lines.

5 Q. Does it take an expert in the National Electric
6 Safety Code to determine is this a farm? Are there
7 sailboats? Is this a railroad?

8 Does it take a National Electric Safety Code
9 expert to be able to determine the land use?

10 MR. JOHNSON: Object to the form. Your
11 Honor, this isn't in the area you qualified him in. He's
12 asking what other people want to know or think, and there
13 is nothing to show that he knows. No foundation for his
14 testimony.

15 THE COURT: Well, the answer -- he asked a
16 question: Does it take a National Electric Safety Code
17 expert to be able to determine the land use? I don't
18 know what the answer is going to be yet.

19 THE WITNESS: Typically, it doesn't; however,
20 there are footnotes and other parts of the tables that
21 provide additional information that can help one
22 determine those land use categories.

23 So you first need to know the table exists
24 and know the code exists, and it doesn't take a rocket
25 scientist to figure it out, but it does take a little bit

1 of expertise to know, first of all, where the table is,
2 what it says, and then read the footnotes and make that
3 determination.

4 Q. And is it true that some of the footnotes provide
5 further explanation for the land use categories?

6 A. Yes.

7 Q. Okay. And, for instance, I'm reading -- one of
8 the footnotes talks about riders on horseback, vehicles
9 or other mobile units exceeding eight feet in height. If
10 those are prohibited by regulation or permanent terrain
11 configurations, based on your experience and your
12 teaching of people along the years, is that the kind of
13 thing that an ordinary person could probably understand?
14 And by ordinary, I mean not an expert in the National
15 Electric Safety Code.

16 MR. JOHNSON: Objection, Your Honor, unless
17 there is some foundation he has expertise, he's
18 investigated it, checked it out, and has a basis for his
19 opinion.

20 THE COURT: Overruled.

21 BY MR. SMITH:

22 Q. Is that something non-National Electric Safety
23 Code experts could understand?

24 A. Well, I can answer it this way: With the 20,000
25 people that we've had through code seminars, I haven't

1 had anybody that has had any particular trouble figuring
2 this out once we've talked about it.

3 Q. Okay. What was the voltage of the power line that
4 killed Mr. Fortney?

5 A. As I recall, it was 14,400 volts phase to ground.

6 Q. What was the land use?

7 A. It was a farm.

8 Q. And do you have an opinion to a reasonable degree
9 of engineering certainty as to what the National Electric
10 Safety Code required for height of the energized power
11 line in this case?

12 A. Yes.

13 Q. And what is that opinion?

14 A. It's required to be at 18 and a half feet, at
15 worst case.

16 Q. Even at 120 degrees outside, when it's sagging the
17 most?

18 A. Yes.

19 Q. Okay. And you see the next category down,
20 category five.

21 A. Yes.

22 Q. Why wouldn't it be category five?

23 A. Well, category five is spaces and ways subject to
24 pedestrians or restricted traffic only, but you also have
25 the footnote number nine that we've already talked about

1 that gives you a better understanding when those -- it's
2 either -- it either is or isn't one of those categories,
3 such as riders on horseback or other mobile units in
4 excess of eight feet of height.

5 So those details are what give the reader the
6 information necessary to determine whether that's an
7 appropriate category or not.

8 (Plaintiff's Exhibit No. 63 was marked for
9 identification and admitted into evidence.)

10 BY MR. SMITH:

11 Q. I'm going to hand you what's been marked as
12 Plaintiff's Exhibit No. 63, and I represent to you this
13 is a pleading in this case, a discovery response, and we
14 asked that question of Berkeley Electric.

15 We asked, based upon the National Electric Safety
16 Code 1993 edition, what height should the power lines
17 that energized the tent pole carried by the plaintiff on
18 April 23rd, 2008 have been at its lowest point in
19 relationship to the ground?

20 What was their answer, sir?

21 A. The answer is: Basic clearance hyphen 14 feet 5
22 inches as per table 232-1 of the National Electric Safety
23 Code 1993 edition.

24 Q. Is there any question in your mind that the 1993
25 edition of the National Electric Safety Code governs the

1 power line in this case?

2 A. No. There is no doubt in my mind that's the
3 appropriate code to be using.

4 Q. All right. And, in fact, the number two response:
5 Identify the specific National Electric Safety Code
6 section and edition that's applicable to the height for
7 the tent pole carried by the plaintiff, and they
8 indicated National Electric Safety Code 1993 edition as
9 well.

10 A. Yes, they did.

11 Q. Okay. Basic clearance, 14 and a half feet, is
12 that the category five you just talked about?

13 A. Just let me look to make sure. I believe it is,
14 to refresh my memory on the table. Yes, it is. By the
15 way, that says 14 feet, 5 inches, and the answer is --
16 it's actually supposed to be 14 feet, 6 inches. A lot of
17 people confuse 5 inches with .5 feet, which .5 feet is 6
18 inches.

19 Q. There is no 14 feet 5 inch minimum requirement, is
20 there?

21 A. Really, there isn't.

22 Q. That doesn't exist.

23 A. No.

24 Q. But there is a 14.5, which would be 14 feet 6
25 inches, correct?

1 A. Correct.

2 Q. Is that a common mistake people make with the
3 point five?

4 A. It is. It happens quite often with the point
5 five. Even the 18 and a half feet, sometimes people will
6 say that and they don't realize they can often make a
7 mistake.

8 Q. I want you to assume for me for the purpose of
9 this question that the landowner who owned the land at
10 the time the line was built in 1993, that she testified
11 she had horses, that people rode those horses that she
12 had vehicles, that she had crops. She did farming. The
13 vehicles were over eight feet high.

14 One of the horses itself was about my height, just
15 at his back, right? And all of this took place all
16 around the power line. Assume for me that she testified
17 she grew hay in a big hay area but she also grew hay all
18 around the barn itself which is in the area of the power
19 line. Could you think of any conceivable way, any
20 conceivable way, that that 14 and a half foot clearance
21 could apply?

22 MR. JOHNSON: Judge, objection to the
23 hypothetical. The lady testified as he's described, but
24 she also testified she didn't know where the line was and
25 she had no recollection of the line. I ask that be

1 included in the hypothetical.

2 MR. SMITH: Your Honor, I think at this point
3 in the trial we know exactly where the line was, and
4 that's reflected on -- oh, if you recall from her
5 testimony, Your Honor, the barn is circled. This is that
6 barn.

7 Here is the defendant's diagram of where the
8 power line was, and her testimony was she rode horses all
9 around in this area, which had the dressage course over
10 here. She grew hay all over in this area, and the
11 vehicles that exceeded 18 feet in height were driven all
12 around in this area, under here, up here, over here, and
13 around here.

14 And, Mr. Dagenhart, accept that as the
15 description of the landowner's testimony, okay?

16 A. Yes, sir.

17 Q. And I'll ask you the question again: Is there any
18 way conceivable that anyone could contend that 14 and a
19 half feet would be the height required by the National
20 Electric Safety Code? Could you think of any way?

21 MR. JOHNSON: Same objection.

22 THE COURT: Overruled. Go ahead.

23 THE WITNESS: No, sir, I just can't. Plus,
24 that footnote also includes permanent terrain feature or
25 regulation. So there's really -- you know, in

1 combination with the footnote itself talking about the
2 horseback riding and the vehicles over eight feet in
3 height, there's nothing to prohibit those items being in
4 that area to begin with, so in combination with the
5 footnote, you just can't be in that category.

6 BY MR. SMITH:

7 Q. Now, Mr. Dagenhart, most of the time when we ask
8 experts for opinions, the legal standard is what's more
9 likely than not. We're looking for a 51 percent
10 probability, something that just tips the scales ever so
11 slightly in our favor.

12 What I want to ask you is how strong do you hold
13 that opinion that the line was required to be 18 and a
14 half feet, even under the worst conditions?

15 A. I'm 100 percent on that. There is no doubt in my
16 mind that that's the category that should be used, the 18
17 and a half feet.

18 Q. And after Mr. Johnson had pled that 14 and a half
19 feet was a required height, do you recall we took the
20 deposition of their expert, Eric Jackson? Did you review
21 that in your file?

22 A. Yes, I did.

23 Q. Is it fair to say that Eric Jackson refused to
24 even tell us what the required height was?

25 A. Of --

1 MR. JOHNSON: Your Honor, I object.

2 THE COURT: It's probably improper use of a
3 deposition.

4 MR. SMITH: I'll rephrase the question.

5 BY MR. SMITH:

6 Q. Part of your file was reviewing the deposition of
7 Eric Jackson, was it not?

8 A. Yes, sir, it was.

9 Q. Did Eric Jackson tell us what the required height
10 was?

11 A. He was not as -- he was just not real definite
12 with that.

13 Q. He was asked the question, wasn't he?

14 A. Yes, he was.

15 MR. JOHNSON: I move to strike the last
16 answer. That's asking one witness to comment on the
17 credibility of another, which is improper.

18 MR. SMITH: Your Honor, you may infer
19 credibility from that, but I certainly didn't raise that.
20 I asked did we ask him and did he answer. I think it's
21 important that we know that Mr. Johnson is the only
22 person in all of Berkeley, Charleston, and the tri-county
23 area to say that this power line had to be 14 and a half
24 feet.

25 You heard the testimony of the Berkeley

1 Electric witnesses who said it had to be 18 and a half
2 feet. I think it's significant that their own expert
3 simply won't answer the question, and you can infer from
4 that whatever you like.

5 THE COURT: Why don't we just let their
6 testimony speak for itself.

7 MR. SMITH: Yes, sir.

8 THE COURT: I'm sure I'm going to hear it.

9 MR. SMITH: All right.

10 BY MR. SMITH:

11 Q. Mr. Dagenhart, let's talk about the work -- the
12 conditions, 120 degrees. Now, first of all, I want to
13 hand you what's been previously marked as Exhibit 10 and
14 that would be the staking sheet in this case.

15 Have you seen that before?

16 A. Yes, I have.

17 Q. And I believe you testified that 120 degrees, that
18 would be the worst of the three scenarios in the area
19 where these power line located in this case was?

20 A. With this line, yes.

21 Q. Looking at the staking sheet, is there any number
22 on there that you could interpret as being the
23 temperature on the day the line was built?

24 A. I see a number that suggests to me it might be a
25 temperature next to the date of construction. I believe

1 there's a number that says 71, and I've seen different
2 discussions about it, and it's been suggested that that
3 might be a temperature, and I don't dispute that.

4 Q. Did you look up the temperatures for that time
5 frame?

6 A. Yes, I did.

7 Q. And was that within the range of the temperatures
8 that you found?

9 A. It was reasonable. I found some weather data that
10 suggested that that wouldn't be an unreasonable
11 temperature to assume that it was on that day.

12 Q. All right. Let's look at the day the men were
13 electrocuted, okay? We're going to jump ahead in time.
14 The day the men were electrocuted, do you recall what the
15 temperature was?

16 A. My recollection it was 64 degrees.

17 Q. Okay. And who do you -- where did you get that
18 information from?

19 A. That was from one of the Berkeley Electric
20 personnel who went out and made measurements that day.

21 Q. And I think on this Exhibit No. 8, second page,
22 it's a little smaller -- there we go. Is that consistent
23 with your memory?

24 A. Yes, it is.

25 Q. And what does that tell you?

1 A. Well, it tells me that on the day these
2 measurements were made, it was 64 degrees outside, and
3 that's a nice piece of information in order to conduct
4 sag and tension calculations to determine where that line
5 might be under other conditions.

6 Q. All right. So based on that temperature reading,
7 the 64 degrees, can you calculate how much extra height
8 would have been required at that temperature to keep the
9 line at 18 and a half feet, even under the worst case
10 scenario?

11 A. Yes. That's possible to calculate that.

12 Q. All right. And did you do that?

13 A. Yes.

14 Q. All right. And what is that measurement?

15 A. Well, I have to explain how I went through that.
16 I took -- can you ask me that question again, about what
17 I was trying to achieve?

18 Q. I'm just asking you, when you are calculating the
19 extra height required to keep the line at 18 and a half
20 feet, under the worst case scenario, all right, and
21 you're looking at that line on a particular day, do you
22 need to know the temperature it was outside to calculate
23 how high the line should be at that time so that even at
24 120 degrees it still stays above 18 and a half feet?

25 A. Yes, you do.

1 Q. Okay. And have you run those calculations?

2 A. Yes, I have.

3 Q. And so tell me how much extra clearance would be
4 needed at 64 degrees so the line, even at 120 degrees
5 outside, is going to stay at 18 and a half feet.

6 A. At 64 degrees, you'd need roughly one foot one
7 inch additional clearance, at 64 degrees, in order to not
8 be below 18 and a half feet at 120 degrees.

9 Q. So on the day in question that the men were
10 electrocuted, you've testified that the power line was
11 required to be 18 and a half feet.

12 Well, let me ask you this: Did the land use ever
13 change so as to require a different clearance?

14 A. Not that I'm aware of, no.

15 Q. So if the line has to be 18 and a half feet but
16 also under those conditions, are you saying you add one
17 foot one inch to 18 and a half feet to make it total
18 compliance?

19 A. On that day, yes. That's the clearance you have
20 to have on that day at that temperature such that when
21 you get to the worst case you don't get below 18 and a
22 half feet.

23 Q. And that reading that you're talking about, that's
24 at the mid-span, the lowest point of the line; is that
25 right?

1 A. Yes, sir. That's where the sag and clearance
2 calculations typically are done for convenience.

3 Q. So if we add 1 foot, 1 inch to 18 feet, 6 inches,
4 what do we get?

5 A. You get 19 feet, 7 inches of required clearance at
6 64 degrees in order to not violate the code at worst case
7 at 18 and a half feet.

8 Q. And that's at this point, right, the mid-span, the
9 lowest point?

10 A. Yes, sir. That's where that calculation is made.

11 Q. Okay. And did you visit the site? Did you go out
12 to the site where the men were electrocuted?

13 A. Yes.

14 Q. And is that the basis for your opinion, that the
15 land use never changed?

16 MR. JOHNSON: Object to the form, Your Honor.
17 Leading.

18 BY MR. SMITH:

19 Q. Did that help you to form the opinion that the
20 land use never changed?

21 A. Well, it was still farmland. It was still a
22 category that would require 18 and a half feet, so it
23 still is a farmland that would require that clearance.

24 Q. Okay. And is that your opinion to a reasonable
25 degree of engineering certainty?

1 A. Yes.

2 Q. Now, we've got a measurement over here that we've
3 seen several times, 16 feet, 11 inches, but this
4 measurement was taken on May the 29th. Do you see that?

5 A. Yes.

6 Q. I want you to look at the Exhibit No. 8 there, the
7 measurements that were taken by the Berkeley Electric
8 employee, John Hall, the staking engineer?

9 A. Yes.

10 Q. And that would be on the back side of this? I
11 know that's kind of small, but can you read it? There's
12 a blowup, if you can't.

13 A. The second page of this exhibit?

14 Q. Yeah. How high was the mid-span the day the men
15 were electrocuted when John Hall took the measurements?

16 A. I think that says 17 feet, 3 inches, and it's
17 pretty difficult to see, but that's what I think it's
18 saying.

19 Q. What was that total required height on the date of
20 the electrocution, 19-7?

21 A. It's 19 feet, 7 inches at mid-span.

22 Q. And you said John Hall measured the actual -- I'm
23 going to put mid-span right here, 17 feet 3 inches?

24 A. Yes.

25 Q. Do you have an opinion to a reasonable degree of

1 medical certainty as to whether or not the power line
2 that killed Mr. Fortney and injured Mr. Robinson was in
3 violation of the National Electric Safety Code based on
4 those measurements?

5 A. I think you said medical certainty.

6 Q. Did I?

7 A. You did, and I can't agree to that particular type
8 of --

9 Q. How about under engineering certainty?

10 A. Yes, sir.

11 Q. What is that opinion?

12 A. It doesn't -- what is your question? I got
13 distracted by the medical certainty question. Your
14 question is what again?

15 Q. Do you have an opinion to a reasonable degree of
16 engineering certainty as to whether or not the power line
17 that killed Mr. Fortney and injured Mr. Robinson was in
18 violation of the National Electric Safety Code?

19 A. Oh, yes. I do have an opinion on that.

20 Q. What is that?

21 A. And it does not -- it did not. Excuse me, it did
22 not.

23 Q. All right. So I asked you if it was in violation,
24 and you said it did not or was not, so was it in
25 violation or not?

1 A. It was in violation. It did not comply.

2 Q. It was a bad question. I'm sorry. All right.

3 Talk to me about construction zone. Have you ever
4 heard that term before?

5 A. Yes.

6 Q. Now, we read in one of the pretrial filings to
7 this case that there may be some question as to whether
8 or not the construction zone term would apply or have
9 some significance in this case.

10 What is the construction zone? What does that
11 mean to you in terms of the National Electric Safety
12 Code?

13 A. Well, the construction zone -- that question was
14 asked in a prior interpretation request, and it had a lot
15 to do with a building site where a building is being
16 built and cranes are in operation and other large pieces
17 of machinery, such as a large crane, and the question
18 around the interpretation request was asking, well, do we
19 need to build power lines to compensate for this crane,
20 which, just as an example, might be 50, 60 feet tall or
21 even higher in the air? Does the code have to allow for
22 that? And that's what they meant about the construction
23 zone.

24 Q. All right. So with the construction zone term as
25 you know it, would that alleviate Berkeley Electric from

1 the height requirements of the National Electric Safety
2 Code in this case?

3 A. No. It would still be at 18 and a half feet.

4 Q. Now, you've described the required height the day
5 the line was built and the day the men were electrocuted.
6 Is there a section in the National Electric Safety Code
7 that talks about maintaining these power lines at
8 required heights?

9 A. Oh, yes, there is.

10 Q. And what is that?

11 A. It's Rule 230(i), as India. It says the lines
12 shall be maintained at the required height and that rule
13 means that if your conditions change that cause a change
14 in land use that cause a change in code category that the
15 clearances would have to change as well.

16 Q. But if the line started out with the 1993 code, I
17 imagine there's other editions of the code that come out
18 afterwards, right?

19 A. Yes, sir.

20 Q. If the line was built in 1992, what version of the
21 code would continue to apply to the line?

22 A. Well, there is a 1993 edition of the National
23 Electric Safety Code, and that is the applicable edition
24 of the code that would go along with this line.

25 And that is the one that follows the line,

1 basically, throughout its lifetime, unless the company
2 has made some kind of change and has declared it to be in
3 compliance or brought it into compliance with another
4 edition, which they're not required to do.

5 Q. Okay. So when Berkeley Electric contended that
6 the National Electric Safety Code 1993 applies to the
7 vertical height of this power line being carried by the
8 plaintiff on April 23rd, 2008, you agree with that?

9 A. I would agree the 1993 code is the applicable
10 code.

11 Q. Okay. Whose responsibility is it to maintain
12 power lines at the required height?

13 A. Well, it's the utility company that installs and
14 maintains it.

15 Q. And, in this case, who would that be, with this
16 power line?

17 A. In this case, it would be Berkeley Electric
18 Cooperative.

19 Q. What are some of the possible reasons a power line
20 could be hanging too low?

21 A. Well, there are a number of reasons. It could be
22 installed wrong, to begin with, or it could be installed
23 correctly and something happens to it later to make it
24 cause to be at a lower level and be out of code
25 compliance.

1 Q. And when you say it's installed wrong, what would
2 be an example of how it would be installed wrong to cause
3 it to hang too low?

4 A. Well, one of the reasons it could be -- the ways
5 it could be installed incorrectly is if you just put too
6 much sag in the conductor to cause it to be too low to
7 begin with.

8 Q. So too much line from pole to pole?

9 A. Yes. You don't pull it up tight enough, which, in
10 effect, is too much line.

11 Q. Can leaning poles also affect whether or not a
12 power line sags too low?

13 A. Yes.

14 Q. All right. What's your understanding of how high
15 Berkeley Electric contends they actually built the power
16 line?

17 A. Well, my recollection of what has been said is
18 they -- I believe they said 24 feet.

19 Q. All right. And so if we look at the height the
20 day the men were electrocuted, is there roughly a 7 foot
21 difference between 24 feet and the actual height the day
22 it was measured?

23 A. Yes. I think that's approximately seven feet.

24 Q. And based on your observations of the poles, were
25 they leaning enough to account for seven feet of extra

1 sag?

2 A. In my opinion, no, they were not. They appeared
3 to me to be pretty straight up and down.

4 Q. And do you have an opinion to a reasonable degree
5 of medical certainty as to whether or not the power line
6 was constructed properly?

7 A. You know, I really can't come up with any other
8 conclusion that -- other than it was just built wrong to
9 begin with.

10 Q. And what was it that was wrong?

11 A. It had too much sag in it, and, as a consequence,
12 not enough clearance.

13 Q. Meaning they used too much line?

14 A. In effect, yes.

15 Q. And if we assume that the response from Berkeley
16 Electric's lawyer of 14 and a half feet was what was in
17 their mind when they were building it, how does that
18 relate to improper construction?

19 A. It relates to improper construction because you're
20 starting out in the wrong place to begin with, the whole
21 country saying you're in the wrong church and the wrong
22 pew, to start out with.

23 Q. You mentioned also that something could hit it and
24 take it out of compliance. Did you consider whether or
25 not something could hit the line and stretch it seven

1 feet below what they say they built to?

2 A. Yes, I did consider that.

3 Q. Is that plausible?

4 A. It just does not make sense to me. It does not
5 seem plausible to me, no, sir.

6 Q. Why is that?

7 A. Well, I've looked at the photographs of the line,
8 and they show an area of contact with something, and, in
9 my opinion, it's a superficial mark. It doesn't change
10 the overall diameter of the conductors which would be
11 what -- you would have to have a shrinking of the
12 diameter, which, in effect, causes the line to increase
13 in length. I just don't see any evidence of that.

14 Q. It's kind of like when you take a piece of bubble
15 gum and you stretch it off like this, it's thicker on the
16 sides and it gets thinner in the middle. Is that what
17 you're describing?

18 A. Yes. We call it pencilling. When you stretch
19 those wires to the point that you can actually see it, it
20 looks like the end of a pencil, eventually, that you
21 stuck in a pencil sharpener. It narrows down into a
22 point.

23 Q. And if we believe that is true, for something to
24 have hit it stretched it to seven feet below, how far
25 would they have actually had to take it down to make it

1 rest at seven feet below?

2 A. It's really difficult to say how much that would
3 have to happen. It would have to be a significant event.

4 Q. And the conductor in this case, was it steel
5 reenforced?

6 A. Yes. There's one strand of steel and six strands
7 of aluminum conductor wrapped around the inner steel
8 core.

9 Q. Now, when we heard about this, we saw some
10 pictures, the pictures you just described for
11 Mr. Jackson. Those were in your file, were they not?

12 A. Yes.

13 Q. Did you also see in those pictures damage to a
14 conduit riser?

15 A. Yes, I did.

16 Q. Have you reviewed the maintenance records for the
17 power lines out of the Healing Ministries?

18 A. Yes, I have.

19 Q. What have you learned with regards to the
20 maintenance records with regards to the conduit riser?

21 A. I learned there was a work order for a conduit
22 riser, which it appears to be what probably is that event
23 with the conduit riser being damaged to the point that it
24 had to be repaired and being struck on the pole.

25 Q. And what effect do you say that had to the lines

1 relating to the damage you saw on those pictures?

2 A. Well, it's not unusual if a pole is being struck
3 for lines to wrap up on each other, and that could very
4 well be the cause of those marks.

5 Q. And when you looked at those marks, was that kind
6 of consistent, mostly consistent, entirely consistent?
7 How you would rank that in terms of those marks being
8 caused by the two conductors the hot wire and the neutral
9 wire sort of wrapping up with each other?

10 A. From a visual perspective, those marks look like
11 strands of a conductor rubbing across the other
12 conductor. They appeared to be cylindrical in nature
13 across their path, and it sure didn't look like a piece
14 of flat metal scraping across the conductor.

15 Q. So we see the damage to the pole, we see the
16 damage to the conduit riser, and so what does that tell
17 you in terms of the damage to the line? Can you paint a
18 full picture for us of what you think happened?

19 A. Well, if you combine all those things together --
20 and, granted, we don't have a work order that says those
21 lines smacked together.

22 Q. Right.

23 A. But if you take the damage to the conduit, the
24 marks on the conductor, the conductors can wrap up with
25 each other when you have a pole being struck, that all

1 appears to make some sense.

2 As I said, we don't have a work order that says
3 has anybody repaired a wrapped up conductor, but we do
4 have these other things that go along with it.

5 Q. And that work order was from what year?

6 A. I don't remember.

7 Q. I can show you, but does 2003 sound correct?

8 A. Yes.

9 Q. And 2003 would be about five years before the men
10 were electrocuted in this case, correct?

11 A. That's correct.

12 Q. Mr. Dagenhart, before we move on to the second
13 opinion about the tent not hitting, do you have an
14 opinion to a reasonable degree of engineering certainty
15 as to whether or not Berkeley Electric violated safety
16 rule number one?

17 A. Yes.

18 Q. What is that opinion?

19 A. Well, they did violate it.

20 Q. Okay. Let's discuss your second opinion, that had
21 the line been up to code, the tent would not have hit the
22 energized line.

23 You've got those measurements there as well, and I
24 think you said, based on these measurements, the required
25 height at the mid-span on the date of the electrocution

1 was 19 feet, 7 inches; is that right?

2 A. That's correct.

3 Q. Now, the measurements done by the Berkeley
4 Electric staking engineer the day of the electrocution,
5 do those show the point of contact?

6 A. Yes, they do.

7 Q. And how did they term that point of contact? What
8 was the number they used?

9 A. As I recall, it was 119 feet from the pole, as I
10 call it, nearest the driveway.

11 Q. Okay. And if the mid-point, the lowest point in
12 the line, was 19 feet, 7 inches, can you calculate how
13 high that would have made the point of contact at 119
14 feet?

15 A. Yes.

16 Q. Have you done that?

17 A. Yes, I have.

18 Q. All right. So -- and what would that be?

19 A. With 19 feet, 7 inches at mid-point, my
20 calculations indicate that the height of the energized
21 conductor at the point of contact would be approximately
22 20 feet.

23 Q. So the height at the point of contact, if the
24 power line was at the proper height required by the code,
25 would be 20 feet, you said?

1 A. On that date, yes.

2 Q. Okay. And did Berkeley Electric also measure the
3 height of the tent?

4 A. Yes, they did.

5 Q. What did they measure the top of the tent to be,
6 the top of the tent, the spire?

7 A. They measured it to be 17 feet, 9 inches.

8 Q. You know, Mr. Dagenhart, I want you to assume for
9 the purpose of this question that John Robinson has
10 testified in his deposition and will testify before the
11 Court that he lifted the tent on that last maneuver
12 between four to six inches, okay?

13 A. Yes.

14 Q. I want to use the highest of those. I want to use
15 six inches, okay? So what would that have made the
16 height of the tent if they lifted it up six inches?

17 A. Well, I'll use a little bit of math here, which is
18 dangerous for me even sometimes, but if you add 6 inches
19 to 16 feet, 9 inches -- let's start out with 9 inches,
20 and we'll take part of that 6 inches. Let's take three
21 of it and add it to the nine inch inches. Three inches
22 plus nine inches equals twelve inches.

23 That's another foot. You've got three inches left
24 over, so that would be a total of 18 feet, 3 inches as
25 the height of the tent, top of the tent, if it's lifted

1 that 6 inches above the ground.

2 Q. So the question is, how much clearance would there
3 have been between the height at the point of contact if
4 it was at code and the tent if it was lifted at the
5 highest estimate of six inches?

6 A. It would be one foot, nine inches of clearance.

7 Q. What is that number again?

8 A. I said one foot, nine inches.

9 Q. Yeah. Are you familiar with the term arcing?

10 A. Yes.

11 Q. What is that?

12 A. Arcing is the breakdown of the air when you have
13 electricity flowing through it. You basically have
14 current flowing through the air and it causes an arc.
15 There is a glow, and the conduction of electricity
16 through the air, that's the arc occurring.

17 Q. Is that another way of saying the electricity
18 could be transferred from the power line to the tent
19 without them actually touching?

20 MR. JOHNSON: Object to the form. Leading.

21 THE WITNESS: Yes, it can be.

22 THE COURT: Overruled. He can answer.

23 BY MR. SMITH:

24 Q. And, Mr. Dagenhart, what is -- how -- what's the
25 distance for arcing to take place?

1 A. Well, it varies with voltage, but in the case of
2 14,400 volts, it's going to be less than an inch, and, as
3 I recall, it's about -- it's a little over half an inch
4 at 14,400 volts. I think I've calculated it to be
5 six-tenths of an inch, but for all practical purposes,
6 it's touching but it's not touching. It's less than an
7 inch. I would have to go back to my calculations to
8 determine the exact number, but it's certainly less than
9 an inch.

10 Q. Do you have an opinion to a reasonable degree of
11 engineering certainty as to whether or not the men would
12 have been electrocuted if the line was at the code
13 height?

14 A. Given this set of circumstances, had the line been
15 at code height, the accident would not have happened.

16 Q. Let's assume for argument's sake that they lifted
17 the tent six inches, but they went under the lowest point
18 of the power line, the mid-span. Let's assume they're
19 not way over here at this higher point. Let's assume
20 they lifted it over the lowest point of mid-span. Would
21 it even have hit then?

22 A. No, sir, it would not.

23 Q. And would arcing have taken place in that
24 situation?

25 A. Seventeen feet, nine inches and -- no, no, it

1 still wouldn't. You get another four inches to get --
2 let me look here. It's one foot, four inches, so no,
3 it's way beyond any arcing distance could take place.

4 Q. So at any point in the line when the men lifted
5 the tent, is it your opinion that there wouldn't have
6 been any contact, wouldn't have been any electrocution,
7 and those men would be alive today?

8 A. Yes, sir.

9 Q. I want to combine your third and your fourth
10 opinions. You don't mind going a little quicker, do you?

11 A. I certainly don't.

12 Q. Third opinion, violated the inspection
13 requirements; fourth opinion, violated the recordkeeping
14 requirements, all right?

15 And what I want to do is I want to flip back to an
16 exhibit we were using with one of the first witnesses
17 here, and this is a chart that we made here with some of
18 the Berkeley Electric witnesses.

19 I know you weren't here for it. I don't want you
20 to take my words for it. We've also got here the blowup
21 of the actual code section. Are you familiar with this
22 section, 7 CFR 1730.21?

23 A. Yes, I am.

24 Q. As relates to inspections and tests?

25 A. Yes, I am.

1 Q. And is it regulations of the federal government
2 Department of Agriculture?

3 A. Yes.

4 Q. And the Department of the Rural Utility Service
5 that is under them?

6 A. Yes, I am.

7 Q. And if we look under here in terms of part A --

8 MR. JOHNSON: Your Honor, I object. Unless
9 there's a basis for a private right of action under the
10 RUS regulations, this is irrelevant.

11 MR. SMITH: Your Honor, I think we had this
12 objection, I think, when this was first done, and it was
13 overruled because these are simply evidence of the
14 violation of the standard of care, the breach of duty.
15 We're discussing the rules that apply to them and which
16 rules they violated.

17 I'll be brief with this witness, Your Honor.

18 MR. JOHNSON: I understand you ruled against
19 me previously, but I want to make it.

20 THE COURT: Okay. Overruled again.

21 BY MR. SMITH:

22 Q. So based on this first part here of 17 CFR -- let
23 me ask you a question first off: 17 CFR 1730, is this
24 specifically mentioned in the RUS bulletins?

25 A. Well, yes, it is.

1 Q. When you open up the bulletin, does it say in the
2 bulletin, The standard practices are contained within 17
3 CFR 1730?

4 A. As I recall it does, yes.

5 Q. So part A here says each borrower shall conduct
6 necessary inspections and tests. I wrote inspections
7 required. Would that be fair to say?

8 A. Yes. I'll agree with that one.

9 Q. It also says maintain records of such inspections
10 and tests. I wrote made record of inspections. Is that
11 accurate as well?

12 A. Yes.

13 Q. And then we drop down to part C here. Inspections
14 must include a determination of whether the facility
15 complies with the National Electric Safety Code.

16 Number three: I wrote determine if up to code; is
17 that accurate?

18 A. Yes.

19 Q. All right. And then, towards the bottom of C, it
20 talks about deficiencies found and inspections. Those
21 records should be maintained.

22 I wrote here number four, record all deficiencies;
23 is that fair?

24 A. Well, yes.

25 Q. Okay. And then, finally, it talks about how long

1 you should keep them, and then it says look to paragraph
2 B, whichever is longer. We look at paragraph B, and it
3 talks about the retention period should be of a
4 sufficient time to identify long-term trends. I wrote
5 here at number five, keep records long enough to ID
6 long-term trends.

7 These five notes here, would these reflect the
8 requirements of the statutory section we've just gone
9 over?

10 A. Yes, we would.

11 Q. Do you have to be an expert in the National
12 Electric Safety Code to get this from that?

13 A. You just have to be able to read.

14 Q. You have to want to read it, don't you?

15 A. I guess if you read it, it's because you want to.

16 Q. Yeah. Do these laws, these federal requirements,
17 do they apply to Berkeley Electric?

18 A. In my opinion, they do.

19 Q. Another discovery response, and this is admitted
20 into evidence as well.

21 We asked Berkeley Electric: Please state when the
22 power line, which is the subject matter of the
23 plaintiff's complaint, was last inspected prior to April
24 23rd, 2008 for National Electric Safety Code compliance
25 and what items were inspected at that time.

1 The answer: The line in question has never been
2 inspected for National Electric Safety Code compliance.

3 Now, what does that tell you about whether or not
4 Berkeley Electric is in compliance with the law?

5 A. Well, it strongly suggests to me that they're not
6 in compliance.

7 Q. And is that your opinion to a reasonable degree of
8 engineering certainty?

9 A. Yes.

10 Q. If nearly every Berkeley Electric witness that has
11 testified in this case has testified they're not keeping
12 records of the inspections that they're doing, what is
13 your opinion as to whether or not they're in violation of
14 part two?

15 MR. JOHNSON: Object to the form of the
16 hypothetical. It leaves out the testimony that Berkeley
17 does a pole inspection eight-year cycle consistent with
18 what every utility, co-op utility, does in this case.

19 MR. SMITH: I'm talking about inspection of
20 power lines, okay? I'm not talking about the poles, all
21 right?

22 THE WITNESS: Yes, sir.

23 BY MR. SMITH:

24 Q. So if Berkeley Electric states that they are not
25 keeping records of the inspections they're doing --

1 they're keeping records of the pole inspections. The
2 pole inspectors are keeping those records, but they're
3 not keeping records of the inspections they're doing of
4 overhead power lines, right, for height compliance.

5 What's your opinion as to whether or not they're
6 in violation of part two?

7 MR. JOHNSON: Object to the hypothetical. It
8 says nothing about the testimony and the contractual
9 revisions that says that hazardous or unsafe conditions
10 identified by the pole inspector have to be reported.

11 THE COURT: Overruled.

12 BY MR. SMITH:

13 Q. If they're not making records of the inspections,
14 are they in violation of part two?

15 A. Yes, sir. In my opinion, they are in violation of
16 that one.

17 Q. If they are not determining in those
18 inspections -- I want to you assume that some inspections
19 are being done, okay? We don't know which ones, but
20 let's just assume they have inspected something at some
21 time, okay?

22 But those inspections are not ever pointed in the
23 direction of determining if the power line meets the
24 compliance, the high compliance, of the National Electric
25 Safety Code, okay? Would they be in violation of number

1 three?

2 A. Yes, they would be.

3 Q. All right. And if -- when they are out at power
4 lines -- and let's just say again they're actually doing
5 an inspection of a power line and they find something
6 wrong with it, but they're not recording that. In all
7 circumstances, for instance, if they see something that
8 can be fixed, they just fix it and move on. They don't
9 keep a record of that. There are some instances where
10 they may keep a record, but not in that case.

11 Do you have an opinion to a reasonable degree of
12 engineering certainty as to whether or not they're in
13 violation of number four, which says record all
14 deficiencies?

15 A. Well, that would be apparently another violation.

16 Q. And, Mr. Dagenhart, if you're not making the
17 records in the first place, is it possible to record
18 those records to keep them long enough to identify
19 long-term trends?

20 A. In my opinion, if you're not keeping records, you
21 can't identify long-term trends. It's, in my opinion,
22 impossible to do.

23 Q. And when we talk about inspections required, how
24 many lines are required to be inspected?

25 A. All of them.

1 Q. Okay. And if the testimony in this case is that
2 the inspection process is, number one, we tell our
3 workers to look at the power lines as they're driving
4 down the street. We tell our workers to look at the
5 power lines when they go service a power line.

6 We tell the pole inspectors to look for frayed
7 conditions, all right, but not the minimum requirements
8 under the code, right? If you assume that's the
9 inspection program, they violate number one. That just
10 says inspections are required, the most basic one. They
11 violate that one too if that is their inspection plan.

12 A. Well, they are in -- if you don't tell somebody
13 what to look for, it's hard to know what to look for.
14 It's just difficult for anybody to be reporting back on
15 something when they don't know what they're supposed to
16 be looking for. It's just hard to do.

17 Q. Now, in your years, Mr. Dagenhart, it sounds like
18 in your classes, you've taught over 20,000 people, you've
19 been doing this, and part of your education, you served
20 as an expert witness for power companies in all this, are
21 these minor violations?

22 A. No, they're not.

23 Q. How would you classify them?

24 A. Well, any violation of the safety code is a safety
25 violation, but in this case, if you're not inspecting,

1 you're not finding the things you need to find. You're
2 not fixing the things you need to fix. Eventually, they
3 say, the chickens come home to roost, and that's what
4 happened here, and apparently that's what happened here.

5 Q. And the opinions you've expressed with regards to
6 the violations of the federal statute, do you hold those
7 opinions to a reasonable degree of engineering certainty?

8 A. Yes, sir.

9 Q. Do you have an opinion to a reasonable degree of
10 engineering certainty as to whether or not Berkeley
11 Electric violated safety rule number two?

12 A. Yes, I do.

13 Q. What's that opinion?

14 A. And they did violate that, number two.

15 Q. Would it be difficult to teach a lineman to use
16 the National Electric Safety Code table that sets those
17 required heights?

18 A. No.

19 Q. I mean, you're an educator. Do you think you
20 could teach a Berkeley Electric lineman to pick up that
21 code and say, Hey, what's the voltage? What's the land
22 use? Here's the required height?

23 A. I'm confident I could do that.

24 Q. Has Berkeley Electric ever sent one of their
25 linemen to one of your classes and said, John, teach this

1 fellow what the code requires?

2 A. I honestly don't know the answer to that. We've
3 taught so many people. I haven't looked at the records.
4 I know I've been to South Carolina to do code training
5 seminars, and, at one point, it once or twice was for the
6 South Carolina Electric Cooperative Association, so I
7 honestly don't know the answer to that.

8 I would have to go back and look at the records,
9 but I have been to South Carolina to teach cooperatives
10 the National Electric Safety Code.

11 Q. Based on what you know as far as their violations
12 and their process here, would you agree to give them that
13 course for free if they sent them to you?

14 MR. JOHNSON: Objection, Your Honor.
15 Relevance.

16 THE COURT: Sustained.

17 BY MR. SMITH:

18 Q. Don't worry about it. I'll withdraw the question.

19 Let's discuss your fifth opinion, that Berkeley
20 Electric misrepresented their inspection program. Now,
21 are you familiar with RUS-300 forms?

22 A. Yes, I am.

23 Q. Are you familiar with the bulletins issued by the
24 RUS?

25 A. Yes.

1 Q. Exhibit No. 1 we started this trial with, those
2 RUS forms. Exhibit 2 is the RUS bulletin. You've seen
3 these before?

4 A. Yes, I have.

5 Q. All right. Mr. Dagenhart, if you could -- let's
6 compare the scores here.

7 First of all, is the bulletin a guideline in terms
8 of guiding electrical cooperatives in how they fill out
9 the RUS-300 form?

10 A. Well, yes, it is.

11 Q. Does it explain what the performance ranking are
12 and what those scores mean, the bulletin?

13 A. Well, yes, it does.

14 Q. And do you think that a person filling out the
15 RUS-300 form should have the form here and the bulletin
16 there so they know this score means that?

17 A. Yes. It's awfully hard to grade yourself unless
18 you have the grading mechanism beside you.

19 Q. But to be honest with you, once you read the
20 bulletin once and you know under the section compliance
21 with safety codes or inspections and records, if you have
22 already seen it once and you know in the bulletin it says
23 a three means all overhead lines patrolled annually, do
24 you think you ever even have to go back to the bulletin
25 to know what the three means?

1 MR. JOHNSON: Objection. Relevance, Your
2 Honor.

3 THE COURT: Overruled. Go ahead.

4 THE WITNESS: Yes, sir. I don't think that
5 once you've seen the directions and the instructions that
6 you have to look at it again, unless you change
7 personnel, maybe, but yeah, that once you do it, you
8 should know.

9 BY MR. SMITH:

10 Q. Just look at it once?

11 A. I would think so, yes, sir.

12 Q. The inspection program and records, let's talk
13 about that first. We're going to go with the 1998
14 version because that matches up with the 1998 bulletin,
15 okay? Inspection program and records, do you see that?

16 A. Yes, I do.

17 Q. What is that there?

18 A. It's a three.

19 Q. And turn to the bulletin here, and let's see what
20 a three means. This is an overhead distribution line.
21 Inspection and maintenance program and records.

22 Now, these are the conditions normally needed to
23 justify a rating of three; is that correct?

24 A. Yes, that's correct.

25 Q. So does a score of three in that section mean, and

1 I quote, All overhead lines patrolled annually?

2 A. Yes.

3 Q. And if a cooperative such as Berkeley Electric
4 puts a score such as what they did, three, on that
5 section, are they representing to the federal government
6 that all overhead lines are being patrolled annually?

7 A. Yes, they are.

8 Q. And if they are not patrolling all overhead lines
9 annually, are they misrepresenting their inspection
10 program?

11 A. Yes, they would be.

12 Q. Do you have to be an expert in the National
13 Electric Safety Code to match up that three with the
14 response in the bulletin?

15 A. No.

16 Q. Now, do you see on the same section compliance
17 with safety codes, clearances? Here we go. Compliance
18 with safety codes, clearances. Do you see that?

19 A. Yes.

20 Q. And clearances here, what is that score, three?

21 A. Yes.

22 Q. I'm sorry. I should have kept this on the same
23 page. Distribution lines overhead, compliance with
24 safety codes clearances. Number one: It says all
25 facilities state prior to construction by personnel

1 familiar with the National Electric Safety Code
2 requirements.

3 A. Yes, sir. That's what it says.

4 Q. But also says line patrols identify change
5 positions requiring greater clearance.

6 Are linemen one of the people that are doing line
7 patrols?

8 A. Linemen can be, are often the ones that do line
9 patrols. In my experience, engineers do it as well.

10 Q. And if we had a lineman here who was the
11 first-class lineman, he's actually been promoted to
12 foreman now, if it was his testimony he is never looking
13 for land use, he has never known what the land use was,
14 and he's never even been told to look for it, but he
15 would if someone told him to, if that's true, then would
16 that be a -- would a score of three be a
17 misrepresentation as well?

18 MR. JOHNSON: Objection. Hypothetical. It's
19 not based upon facts in the record.

20 MR. SMITH: Your Honor, I'll leave your
21 memory of the fellow's testimony -- if you think the
22 testimony was inaccurate, I can certainly rephrase it,
23 but that's what I recall it was.

24 THE COURT: Overruled. Go ahead. You can
25 answer.

1 THE WITNESS: Can you ask me that again, sir?

2 BY MR. SMITH:

3 Q. If the Berkeley Electric lineman in this case who
4 was in the district of the Thornhill Farms Healing
5 Ministries, if he testified that when he does inspections
6 of power lines he's working around that he's not looking
7 for land use, that he doesn't know what the land use
8 started at when it was built because it's not written
9 down, and he's not looking for any changes, and the
10 reason he's not looking for any changes is because he's
11 never been told to, all right?

12 If you assume that's true, that score of three
13 under that section, would that be a misrepresentation as
14 well?

15 A. In my opinion, it would be. It wouldn't be an
16 accurate representation of what's happening.

17 Q. And why are they looking for the land use? What
18 is the significance of that? Why is that important?

19 A. Well, the land use change can create another
20 clearance category that could require a different
21 clearance as a result of the land use changing
22 underneath.

23 Q. Do you have an opinion to a reasonable degree of
24 engineering certainty as to whether or not Berkeley
25 Electric violated safety rule number three? Tell the

1 truth.

2 A. Yes, they did violate that one. Yes, I do have an
3 opinion to a reasonable degree of engineering certainty.

4 Q. Now, Mr. Dagenhart, did you consider what the
5 opinions the local RUS official would have about that if
6 he was presented all this? Did you consider what
7 opinions he would have?

8 A. Yes.

9 Q. He's probably going to say it's just fine, huh?

10 MR. JOHNSON: Object to the form.

11 Speculation.

12 THE COURT: Sustained.

13 BY MR. SMITH:

14 Q. You've been around long enough to know what
15 Washington would feel about this, how is Washington, the
16 RUS supervisors, how would they feel about this if they
17 knew?

18 MR. JOHNSON: Object. Relevance.

19 THE COURT: Sustained. Speculation as well.

20 MR. SMITH: Yes, sir.

21 BY MR. SMITH:

22 Q. Is this in keeping with what -- the RUS, Rural
23 Utility Service, is this in keeping with what they want?

24 A. No, it is not.

25 Q. How much of a violation is it?

1 A. Well, it's difficult for me to characterize it on
2 any kind of scale. It's just not acceptable.

3 Q. Let me ask you this: Are we picking at little
4 things here? Are we nitpicking a little piece of line?
5 Are we nitpicking a little piece of statute? Are we
6 nitpicking here or is this a big problem?

7 A. In my opinion, it's a big problem because if
8 you're not doing it, it just opens the door for all kinds
9 of bad things to happen.

10 Q. Now, Berkeley Electric, they didn't know tents
11 were out there this day, did they?

12 A. No, they did not.

13 Q. But had they simply complied with the code, no
14 matter where these men lifted that tent, if Berkeley
15 Electric just complied with the code, would the men have
16 been electrocuted?

17 A. No.

18 Q. With or without knowledge that tents were being
19 erected that day or moved that day or an event was being
20 planned?

21 A. Given the circumstances, it just wouldn't have
22 happened if they had met the requirements of the code.

23 MR. SMITH: Thank you, Mr. Dagenhart. Those
24 are all the questions I have. Hold on. Sorry.

25 BY MR. SMITH:

1 Q. Let me ask you a general question because I
2 anticipate these are going to be the exact questions and
3 exact line of questioning Mr. Johnson is going to get
4 into.

5 Is this what everybody is doing, all of them?

6 A. All of them, what do you mean, all of them?

7 Q. All the other electrical cooperatives. We made a
8 case here about violation of every single part of this,
9 violation of every single part of that,
10 misrepresentations on the RUS-300 form; is that what
11 everybody is doing?

12 MR. JOHNSON: Object. Multiple questions.

13 THE WITNESS: I would hope not.

14 MR. JOHNSON: That was like four questions at
15 the same time. I object to it.

16 THE COURT: It's a compound question, but
17 it's all going to the same thing.

18 BY MR. SMITH:

19 Q. Is this what everybody is doing?

20 MR. JOHNSON: Foundation, Your Honor, that
21 he's done a survey or even knows.

22 THE COURT: If he's going to ask that
23 question, then we'll find out what his answer is, but
24 you're kind of -- there's no basis for asking that
25 question.

1 MR. SMITH: I'll lay some foundation, Your
2 Honor.

3 BY MR. SMITH:

4 Q. You served as a witness -- I'm sorry, as an expert
5 witness representing many different electrical
6 cooperatives, haven't you?

7 A. Yes.

8 Q. And you had occasion to examine their compliance
9 with the laws, right?

10 A. Yes.

11 Q. And that's because people were asserting they were
12 in violation of those laws, right, or that they did
13 something wrong?

14 A. Well, yes.

15 Q. Right. And sometimes you would say, Hey, guys,
16 you're toast. You all need to settle this case, and
17 sometimes you'd say, Hey, you've got a good case. Take
18 this to trial.

19 Is that what an expert does?

20 A. That's what I do. There are oftentimes I tell a
21 client, Look, you're in trouble.

22 Q. And then when you are teaching people or -- when
23 did you stop keeping track, at 20,000?

24 A. This past year.

25 Q. So when you taught the 20,000 people, were a fair

1 number of those people employees of power companies?

2 A. Most of them, yes.

3 Q. And as part of that training, did you discuss what
4 they're doing and whether that was right or whether that
5 was wrong or whether they could do it better?

6 A. It's all of those things. We discussed what the
7 requirements to code are. We've talked about, you know,
8 what are you doing? What should you be doing? So it's a
9 lot of different things we talked about over the years.

10 Q. Based on all that, is Berkeley Electric doing what
11 everybody is doing?

12 A. In my opinion, no.

13 Q. Okay. You hope not.

14 A. I certainly hope not.

15 MR. SMITH: All right. That's all I have.

16 THE COURT: All right. Let's take ten
17 minutes, and we'll come back for cross.

18 (Recess taken.)

19 MR. SMITH: Your Honor, when I handed you the
20 order from the probate court, I would just like to make
21 an official request you take judicial notice of this
22 order.

23 THE COURT: I don't have a choice. It's a
24 Court order. It's granted.

25 I'm going to have my law clerk go run a copy

1 of it and bring about three, four copies back. We'll
2 give one to the clerk of Court. All right. You ready?

3 MR. JOHNSON: Ready.

4 CROSS-EXAMINATION

5 BY MR. JOHNSON:

6 Q. Mr. Dagenhart?

7 A. Yes, sir.

8 Q. What experience have you had in filing RUS-300s?

9 A. I have not.

10 Q. Have you ever met with a co-op and represented
11 them in trying to comply with RUS-300?

12 A. No.

13 Q. Have you participated in any meetings with RUS
14 officials regarding RUS form 300s?

15 A. No.

16 Q. When did you first read the CFR?

17 A. It's been some time ago on different matters.

18 Q. What does some time ago mean?

19 A. It means before this case, before I worked on this
20 case. It was other types of matters that weren't this
21 one.

22 Q. So you have had the occasion to read Plaintiff's
23 Exhibit 3, which is a CFR regulation --

24 A. Yes.

25 Q. -- form?

1 A. Yes.

2 Q. And were you called upon to interpret it? Under
3 what circumstances were you reading it?

4 A. I don't recall it. Like I say, it was for another
5 case that I worked on. I can't tell you which one it was
6 about.

7 Q. How many cases have involved that federal
8 regulation that you've been in, you've testified about?

9 A. I don't know that I've ever testified about any of
10 the ones that would have this to do with it. I have
11 reviewed this document in relation to cases that I've
12 worked on.

13 Q. How many times?

14 A. Well, I think I told you, I don't know.

15 Q. Could you give me a range? Would it be three,
16 five, seven, eight, ten, twelve?

17 A. Three to six, probably.

18 Q. And in those cases, you were called upon to read
19 that CFR?

20 A. No. I read it because I knew about it.

21 Q. And what were you reading it for in relation to
22 the case?

23 A. I don't remember.

24 Q. Did you offer any opinions at any time to anybody
25 as to the requirements of this regulation 1730.21?

1 A. I don't recall.

2 Q. Counsel may have misspoken himself, but I want to
3 know, he kept asking you about statutes and the laws that
4 you were testifying about. Are you aware of any statute
5 that has been violated by Berkeley Electric in connection
6 with this accident?

7 A. I think you're asking me for a legal opinion, and
8 I'm an engineer.

9 Q. No, I'm really not --

10 MR. SMITH: I'm sorry, Your Honor. He cut
11 the witness off.

12 THE COURT: You specifically asked him about
13 statutes as opposed to regulations?

14 MR. JOHNSON: Yes, sir.

15 THE COURT: Or codes?

16 MR. JOHNSON: Yes, the statutes.

17 THE WITNESS: I don't know the answer to
18 that.

19 BY MR. JOHNSON:

20 Q. In your work as an engineer and an expert witness,
21 have you ever identified a statute that you now claim
22 Berkeley violated?

23 A. Again, I don't know the answer to that. I usually
24 rely on the attorneys to make those arguments.

25 Q. How about CFRs, federal regulations?

1 A. Same answer.

2 Q. How about RUS bulletins?

3 A. Same answer.

4 Q. When you say same answer, you mean what, you left
5 it to the lawyers to figure that out?

6 A. Yes, sir. I make them aware of such items, and
7 they determine what to do with it.

8 Q. Can you identify for me any federal regulation
9 that you contend was violated by Berkeley Electric?

10 A. Well, in my opinion, the CFR, the code of federal
11 regulation that we've been discussing, is violated.
12 That's my opinion as an engineer.

13 Q. How?

14 A. I think we've covered that.

15 Q. Well, I'm asking you now. Explain to me how you
16 feel that the federal code of regulations has been
17 violated by Berkeley.

18 MR. SMITH: Your Honor, may the witness see
19 the chart he was referring to when he gave that
20 testimony?

21 MR. JOHNSON: Sure.

22 MR. SMITH: I got it, Pope. No, this one.

23 MR. JOHNSON: No, I don't want him having
24 this. I want his opinions, not yours.

25 MR. SMITH: I know what you want. Your

1 Honor, may the witness have the benefit of the exhibit he
2 was --

3 THE COURT: No. You get to redo it. He can
4 request a copy of the actual statute. That's just a
5 demonstrative aid.

6 MR. SMITH: Does he have permission to take
7 it away from the witness if the witness wants to see it?

8 THE COURT: It's his witness. He can do
9 whatever he wants, within reason, but the code itself, if
10 the witness needs it, he can have that.

11 That's a demonstrative aid that you used
12 during your direct, so you can put it back up there in
13 yours, but it's his witness. He can conduct his
14 cross-examination without it if he prefers.

15 MR. SMITH: I was just saying if the witness
16 requests it.

17 THE COURT: If the witness feels like he
18 needs that.

19 THE WITNESS: I would like to have that, yes,
20 sir.

21 THE COURT: All right. Flip it over.
22 BY MR. JOHNSON:

23 Q. All right. Mr. Dagenhart, the question is
24 identify an item of the Code of Federal Regulations that
25 you claim was violated by Berkeley.

1 A. Well, first of all, and we've already covered
2 this, it says that the borrower shall conduct all
3 necessary inspections and tests of the component parts of
4 its electrical system annually, exercise its ERP, and
5 maintain records of such inspections and tests.

6 Q. All right. What, do you contend Berkeley somehow
7 violated one of those?

8 A. Well, first of all, the line wasn't inspected.
9 Second of all, there were no records maintained of such
10 inspections.

11 Q. What record on the recordkeeping are you familiar
12 with that Berkeley kept or did not keep?

13 A. Well, since they say they didn't inspect, I find
14 it difficult that they kept a record of something they
15 didn't do.

16 Q. I'm sorry. Go ahead.

17 A. So I'm confused about your question, because if
18 they didn't inspect, when they say they didn't do it, I
19 don't know how you can keep a record of something you
20 didn't do.

21 Q. Actually, Berkeley said they did inspect, didn't
22 they?

23 A. Their answer to the interrogatory said they had
24 never inspected the line.

25 Q. For National Electric Safety Code compliance, but

1 that the line had been inspected as part of a pole
2 inspection in 2002. That's what they said, isn't it?

3 A. Yes.

4 Q. And they had records, or copies of records,
5 relating to the 2002 inspection that reproduced and gave
6 to the plaintiff, correct?

7 A. Yes.

8 Q. So Berkeley did those inspections, correct?

9 A. They did those.

10 Q. Did the recordkeeping?

11 A. Yes, those, they did.

12 Q. All right. So tell me what it is you say they
13 violated.

14 A. They violated their inspection for the National
15 Electric Safety Code.

16 Q. If they have a program in place that the pole
17 inspector is supposed to identify and report unsafe and
18 hazardous conditions, that would include lines that were
19 sagging too much, wouldn't it?

20 A. I don't know that it would, at all, because that's
21 such a global request that I don't know how the inspector
22 would know what to look for.

23 Q. Let me ask you this: Is a low-hanging line an
24 unsafe and hazardous condition?

25 A. If it violates the code, yes. I mean, yes.

1 Q. Okay. And if they're requiring their inspectors
2 to look for any hazardous and unsafe conditions, that
3 would be one of the things they would look for, wouldn't
4 they?

5 A. I don't know, because it's such a -- as I said,
6 it's such a global request. I don't know how they would
7 know what to look for. I think that's my response to
8 that.

9 Q. Have you talked to any pole inspectors related to
10 this case?

11 A. No, I have not.

12 Q. Have you ever done a survey about what the pole
13 inspectors understand about the terms of the contract and
14 what they look for?

15 A. I don't know that I have.

16 Q. Mr. Dagenhart, any other paragraphs or provisions
17 in the regulation that you claim were violated?

18 A. Yes.

19 Q. Read it to me.

20 A. The frequency of inspection and testing will be
21 determined by the borrower in conformance with applicable
22 laws, regulations, national standards, and prudent
23 utility practice.

24 Q. And they did that, didn't they?

25 A. Not for the National Electric Safety Code, no, and

1 that's the national standard.

2 Q. They set up a schedule of inspections, based upon
3 their own experience, and had it done by pole inspectors,
4 correct?

5 A. Yes, but the response that you gave to the
6 interrogatory said that that line was never inspected for
7 National Electric Safety Code compliance. I mean, it's
8 not matching to me.

9 Q. Mr. Dagenhart, if Berkeley is building its lines
10 to exceed the national requirements of the National
11 Electric Safety Code and they are looking for low-hanging
12 lines, a low-hanging line would be one that was not --
13 not based upon what it was built at at the time of
14 construction, wouldn't it?

15 A. Yes.

16 Q. And if it was low hanging to the point that it was
17 hazardous or unsafe, there's a requirement to report.

18 A. Is that a question?

19 Q. Yes.

20 A. I really don't know the answer to that because,
21 once again, you're talking about the pole inspectors are
22 being asked to report hazardous conditions. To me, to
23 me, that is too global a requirement to know what they're
24 looking for.

25 Q. Is that just Dagenhart on inspections or can you

1 point me to some authority for that position?

2 A. Well, that's Dagenhart on inspections combined
3 with my work with Mr. Allen Clapp who is former chair of
4 the National Electrical Safety Code committee and writes
5 the NESC handbook, and we agree on that and have for
6 decades.

7 Q. Does the Code of Federal Regulations that you're
8 looking at describe how the inspection is to be done?

9 A. No.

10 Q. Does it require anything more than what Berkeley
11 was doing?

12 A. In my opinion, yes.

13 Q. What?

14 A. Well, being that this second sentence there I read
15 said in conformance with applicable laws, regulations,
16 national standards, you know, once again, Berkeley said
17 they never inspected this line for any SC code
18 compliance, and never is not the right way to do it.

19 Q. Let's move to the code, the National Electric
20 Safety Code. What does it say its requirements are for
21 inspection?

22 A. Well, I'll give you my memory of that rule.

23 Q. I don't want you --

24 A. If you like.

25 Q. Let's see if we can get the code.

1 MR. SMITH: That was already an exhibit, if
2 you want.

3 MR. JOHNSON: Okay. Show me.

4 BY MR. JOHNSON:

5 Q. I'm going to hand you 1993 Exhibit No. 7, and I'll
6 also give you the 2007 and let you tell me what you say
7 was violated.

8 A. All right. I'm looking at the 1993 code.

9 Q. Do you mind if I look with you?

10 A. It, first of all, says that lines and equipment
11 shall comply with these safety rules when placed in
12 service.

13 Q. Okay.

14 A. As I've already testified to, I can't find any
15 physically verifiable evidence of any kind that would
16 lead me to the conclusion other than this line was
17 built -- already built wrong.

18 Q. Built wrong?

19 A. Built wrong.

20 Q. And how was it built wrong?

21 A. There was not enough clearance.

22 Q. And what was the clearance at the time it was
23 built?

24 A. It was somewhere in the neighborhood of apparently
25 17 feet. I don't know the exact number, but it was not

1 compliant with the code.

2 Q. Have you calculated what the compliance was, what
3 the clearance was, when it was installed?

4 A. Based on the temperature of the staking sheet and
5 of the clearances that have been measured, I could come
6 up with that. I don't have it in my mind at the moment.

7 Q. So you haven't calculated what the clearance would
8 have been on the day it was installed?

9 A. I can tell you based on -- I'm trying to answer
10 your question.

11 Q. Well, it's really kind of subtle.

12 MR. SMITH: Objection, Your Honor.

13 THE COURT: Have you calculated it or not?

14 MR. JOHNSON: Thank you, Your Honor.

15 THE WITNESS: I need to think about this
16 question for a second. No, not exactly. Based on the
17 clearance that was measured on the day of the accident of
18 17 feet, the 17 foot number, I haven't calculated that.
19 It would be something higher than that, but I haven't
20 calculated the exact number.

21 BY MR. JOHNSON:

22 Q. Have you calculated what the point of contact, the
23 clearance for the point -- actual point of contact would
24 have been when the line was built initially?

25 A. No, not specifically; however, with the 17 feet

1 3 inches on the day the measurements were made, it
2 couldn't have been code compliant. I don't have the
3 exact number.

4 Q. Mr. Dagenhart, you were going to tell me what was
5 violated in the National Electric Safety Code.

6 A. Yes.

7 Q. Okay.

8 A. Next: Lines and equipment shall be inspected at
9 intervals as experience has shown to be necessary.

10 Q. And we've talked about that, and Berkeley had a
11 program in place and a schedule by which they did an
12 inspection of its system, correct?

13 A. Well, that inspection, yes, but the answer to the
14 interrogatory said that they had never inspected for any
15 SC code compliance, and that's what that requires.

16 Q. Show me the language.

17 A. It says, Lines and equipment shall be inspected at
18 such intervals as experience has shown to be necessary.

19 Q. Does it mention clearances?

20 A. It doesn't in that particular paragraph, but
21 elsewhere it does.

22 Q. Would you please point to me anything you think in
23 the National Electric Safety Code was violated in
24 addition to -- you know, other than what you've already
25 told me?

1 A. Do you mean with -- my interaction or throughout
2 this testimony?

3 Q. I'm talking about the National Electric Safety
4 Code, which part is marked Plaintiff's Exhibit 7, and I
5 want you to tell me specifically any provision that was
6 violated, that you contend was violated. Then we'll talk
7 about them, but let's get them identified.

8 A. I've already talked about Rule 232 on clearances.

9 Q. All right.

10 A. And then the rest of the parts of rule 214 would
11 be violated, and I can go through those.

12 Q. Please.

13 A. The recording of defects. Any defect affecting
14 compliance with this code revealed by inspection or test
15 if not promptly corrected shall be recorded. Such record
16 shall be maintain until defects are corrected.

17 Q. Which paragraph are you referring to --

18 A. That's four.

19 Q. I'm sorry. Section 21, paragraph 214-4, record of
20 defects. Read for the record what that paragraph says.

21 A. Any defects affecting compliance with this code
22 revealed by inspections or tests if not promptly
23 corrected, shall be recorded. Such records shall be
24 maintained until the defects are corrected.

25 Q. So it is promptly corrected, there is no

1 recordkeeping requirement.

2 A. That's correct, in that sense, yes, sir.

3 Q. And if it's not, there needs to be a record of it.

4 A. Yes.

5 Q. Such as a work order or something sending them
6 out, the crews to deal with it, correct?

7 A. Something.

8 Q. You need something. Tell me what your information
9 is about how Berkeley is somehow not doing what you say
10 was a violation?

11 A. Well, in that the line didn't meet code and that
12 the line was never inspected for code compliance, there's
13 not going to be a record of inspection for code
14 compliance to record the defect, which exists, so it just
15 keeps going.

16 Q. Mr. Dagenhart, if Berkeley is doing this pole
17 inspection in addition to telling their people to look be
18 on the look out for unusual, unsafe conditions and when
19 that occurs is not connected -- corrected promptly, they
20 do have paperwork showing they had a problem and were
21 correcting it, that would satisfy your requirement, would
22 it not?

23 A. Under some conditions, some other place, yes, but
24 for this line, no, because it just doesn't exist.

25 Q. What doesn't exist?

1 A. The inspection doesn't exist. The record of the
2 code violation doesn't exist. It's not there.

3 Q. Well, if it was patrolled and looked at and it
4 didn't have a defect in it at that time, there would be
5 nothing to record, would there?

6 A. If there is no code violation, yes, there would be
7 nothing to record, yes, sir.

8 Q. Anything else you think was violated in the
9 National Electric Safety Code?

10 A. I think that covers it in the 1993 edition.

11 Q. Okay. Is there some other edition you think is
12 relevant?

13 A. Well, you handed me the 2007. I thought we were
14 going to talk about it.

15 Q. Do you think the 2007 code has anything to do with
16 this case?

17 A. Other than the inspection requirements typically
18 in the current code are what applies, are what you're
19 supposed to use.

20 Q. For inspection?

21 A. Yes.

22 Q. Pull it out and let's see what it says.

23 A. It typically, by and large, has the same wording
24 as the 1993 edition.

25 Q. Can you find it in the code?

1 A. I just found it on page 70.

2 Q. And what does it say about record of defects?

3 A. Same thing as the 1993 says.

4 Q. Now, on the clearance requirements, you don't have
5 any exhibits up there, do you?

6 A. Not now.

7 Q. I want to hand you Plaintiff's Exhibit 63. You
8 were asked about interrogatory number one, and the answer
9 where Berkeley said basic clearance 145 per table 1332 of
10 the 1993 National Electric Safety Code. Do you see that?

11 A. Yes, sir, I do.

12 Q. What they're really asking is clearance on April
13 the 23rd, 2008, correct?

14 A. I didn't read it that way.

15 Q. Well, where do you read -- it says, on April 23rd,
16 2008 --

17 A. Yes, sir, it does.

18 Q. They were referring to what was the clearance on
19 the day of the accident?

20 A. I don't really read it that way. I read it as
21 being what's the clearance requirement, period, on the
22 line where the accident occurred, on this date.

23 Q. So you would just strike through April 23rd, 2008?

24 A. I wouldn't strike through it. I think it's
25 helpful to have a description of which line they're

1 talking about. It's the line that was contacted by the
2 pole on that date, so I think it's helpful to talk about
3 this specific line. That's the way I read the question.

4 Q. Read the question.

5 A. Based upon the National Electric Safety Code, 1993
6 edition, what height shall the power lines that energized
7 the tent pole carried by the plaintiff on April 23rd,
8 2008 have been at its lower point in relation to the
9 ground.

10 Q. All right. Let's say you're wrong about your
11 interpretation and I'm right about mine. Do you know
12 what the clearance should have been on April 23rd, 2008?

13 A. Yes.

14 Q. I want you to assume that the condition of the
15 land and the circumstances of the land were the same as
16 shown on Defendant's Exhibit 2. I want you to look at
17 this and tell me what the clearance should have been,
18 assuming it was in the condition it was on Exhibit 2.

19 MR. SMITH: Your Honor, I object and maybe
20 ask for a little clarification. What this is essentially
21 doing is asking Mr. Dagenhart to judge the use of the
22 land based on some picture Pope took at some time.

23 THE COURT: I think he's saying he's asking
24 him to do it based on his belief that under table 232-1
25 number 5 applies and not number 4. Is that the basis for

1 your question?

2 MR. JOHNSON: Yes, sir.

3 THE COURT: He just said, assume I'm correct
4 and you're incorrect, what should it be?

5 MR. SMITH: Yes, sir.

6 BY MR. JOHNSON:

7 Q. So having looked at the exhibit, Defendant's
8 Exhibit 2, can you tell me what the clearance should have
9 been and why?

10 A. Well, this is not the best photograph in the
11 world. It's an aerial photograph that's not very clear;
12 however, it still looks to me like farmland, and, in my
13 opinion, farmland still has to have 18 and a half feet of
14 clearance.

15 THE COURT: I don't think he's answering the
16 same thing you're asking. I think the answer should come
17 from table 232-1, because you're saying assume that he's
18 incorrect on the land use and you're correct on the land
19 use, what should the clearance be?

20 MR. JOHNSON: Exactly.

21 THE COURT: Not does he agree with your use
22 of the land.

23 BY MR. JOHNSON:

24 Q. Did you hear the judge's comments?

25 A. Can you reiterate that for me, please?

1 MR. SMITH: Maybe he could tell him what he
2 contends the use of the land to be.

3 BY MR. JOHNSON:

4 Q. No, what I'm interested in is if that's the
5 condition of the land at some point in time, what
6 clearance requirement would apply?

7 A. In my opinion, it would still be the clearance
8 requirement for other land, which would require 18 and a
9 half feet of clearance.

10 Q. And let's get the clearance chart out. Do you
11 have the clearance charge?

12 A. No, sir, I don't.

13 Q. Well, let's look at these. Here we go. I'll show
14 you Plaintiff's Exhibit No. 7, and I want you to tell me
15 what clearance would have been required based upon this
16 map.

17 A. Based upon this map --

18 THE COURT: That's not the question you asked
19 him earlier. That is based upon this map being what you
20 say the land use should be, which is number five, which
21 he and his side don't agree to, but it's confusing to put
22 a map in front of him and say, based on this map and have
23 him preface it, Assume you don't agree with me on that.

24 They're not going to agree with you on it, so
25 assume -- you're throwing him off by saying, Look at this

1 picture and answer it according to table 232. He didn't
2 need to look at the picture. He just needs to look at
3 the chart and say, Assume it's number five, what should
4 it be?

5 BY MR. JOHNSON:

6 Q. Assume the chart -- it was a number five under the
7 chart, what should the clearance have been?

8 A. If it's a category number 5, 14 and a half feet?

9 Q. And what things fall under that clearance, what
10 land uses?

11 A. It's called spaces and ways subjected to
12 pedestrians or restricted traffic only. It's the kind of
13 thing that you only have people just walking around, and
14 you don't have the capability of having things like
15 riders on horseback or vehicles raising eight feet, or,
16 as it says in the footnote, other mobile units exceeding
17 eight feet in height.

18 So there's the way that category is determined.

19 Q. Can you show me in this map, Exhibit 2, any
20 horses?

21 A. Once again, that photograph is so fuzzy, I
22 can't -- I see things on here. I don't know what they
23 are.

24 Q. Can you point to any tractors or vehicles that are
25 higher than eight feet?

1 A. Once again, it's the same answer. I see things on
2 the photograph. I don't know what they are, but it still
3 looks to me like farmland.

4 Q. So -- okay. Mr. Dagenhart, in the National
5 Electric Safety Code, do they publish their purpose,
6 purpose of the code?

7 A. Yes.

8 Q. It's consistent in each code, isn't it?

9 A. No. It changes a little bit from edition to
10 edition.

11 Q. Well, do you know what it said in the 1993
12 edition?

13 A. I don't commit it to memory, but I could probably
14 find it.

15 Q. I'll find it. Look at the 2007 code, and what
16 does it say as to the practice?

17 A. The purpose in the 2007 code, it says the purpose
18 of these rules is the practical safeguarding of persons
19 during the installation, operation, or maintenance of
20 electrical supply and communication lines and associated
21 equipment, period, and then a new paragraph.

22 It says, These rules contain the basic provisions
23 that are considered necessary for the safety of employees
24 and the public under the specified conditions, period,
25 and the next sentence says, This code is not intended as

1 a design specification or instruction manual.

2 Q. Have you now identified any and all violations you
3 say exist under the National Electric Safety Code?

4 A. I think I have.

5 Q. Mr. Dagenhart, I think you told me you haven't
6 done a survey of cooperatives across the state to see
7 what they do regarding inspection and construction.

8 A. Yes, I have not.

9 Q. If I were to tell you that every other co-op in
10 the state is doing what Berkeley is and has been doing
11 for years, which is build the lines to meet and exceed
12 codes and to inspect through pole inspections and
13 patrolling by the employees --

14 MR. SMITH: Your Honor, I object.

15 BY MR. JOHNSON:

16 Q. -- would that tell you what industry standards
17 were?

18 MR. SMITH: Your Honor, I object to facts in
19 evidence. The only evidence --

20 THE COURT: Is there any foundation for that
21 question being asked? I have no idea what the rest of
22 the co-ops do. He hasn't presented any evidence here
23 today.

24 MR. JOHNSON: Your Honor, I believe Mr. Tim
25 Mobley testified that what Berkeley was doing is what

1 every other co-op in the state is doing. It came in
2 through his testimony. It may have come in through -- I
3 think it came from Mr. Mobley, but I will tell you --

4 THE COURT: Well, if you want to extrapolate
5 with that, well, then ask the question. Go ahead.

6 MR. JOHNSON: Thank you.

7 MR. SMITH: Is he assuming that is true
8 before he answers the question?

9 MR. JOHNSON: Yes.

10 MR. SMITH: Okay.

11 THE WITNESS: To restate what I think your
12 question is, you're asking me if the all the other
13 co-ops -- you were talking about doing the exact same
14 thing as Berkeley is doing? What was your question?

15 BY MR. JOHNSON:

16 Q. My question was, wouldn't that represent what
17 industry practice and accepted industry practice is in
18 the State of South Carolina?

19 A. Not in my opinion, no. I mean, I say I haven't
20 done a survey, but I would be worried about everybody.
21 If all the co-ops are doing what Berkeley is doing, they
22 all have a problem.

23 Q. Name me one electrical co-op in the whole country
24 that is doing something different than what Berkeley says
25 it does in terms of construction of line to exceed code

1 requirement and inspections which are the pole
2 inspections and the patrolling by their employees.

3 A. I can't give you a particular co-op in that
4 respect.

5 Q. Mr. Dagenhart, you said Berkeley has
6 misrepresented something to the federal government. What
7 specifically do you say they have -- how have they
8 misrepresented and what is the misrepresentation?

9 A. Well, in that they say they inspect all their
10 lines for code compliance and then they don't, to me
11 that's a misrepresentation, and I think it's clear to me.

12 Q. Mr. Dagenhart -- here it is. Show me where
13 Berkeley is representing in those documents that it
14 inspects its entire system annually, either walking, by
15 vehicle, or an airplane or helicopter.

16 MR. SMITH: Your Honor, I object for a
17 confusing question. He handed him the wrong document.
18 Bulletin?

19 THE COURT: What document did you hand him?

20 MR. JOHNSON: I handed him the RUS-300.

21 MR. SMITH: He handed him the scores, not the
22 explanation of the scores.

23 BY MR. JOHNSON:

24 Q. Do you want the bulletin?

25 A. Could I respond?

1 Q. Could you point to me where they made a
2 misrepresentation in any of those filings?

3 A. Well, it says in the bulletin, it says for a
4 justified -- for a rating of three, it has all overhead
5 lines patrolled annually, either walking, riding, or
6 aerially, more frequently if experience dictates.

7 Q. That's the violation?

8 A. You can't get a three -- in a sense, if you can't
9 get a three, it's a violation. It's a little difficult
10 to answer your question. You're not doing what you're
11 supposed to do. In that sense, it is a violation.

12 Q. I'm talking about the claim that somehow Berkeley
13 has misrepresented its program to the federal government.
14 Where on the forms do they do that?

15 A. Well, to me, they do it on the forms that they're
16 giving themselves a passing grade and they don't deserve
17 it.

18 Q. That's your theory?

19 A. Yes.

20 Q. Where does the bulletin say they have to include
21 inspection of those systems every year in order to get a
22 three rating?

23 A. On that very sentence that I just read you.

24 Q. What sentence was that?

25 A. It says all overhead lines, including those on

1 private right-of-way, patrolled annually, walking,
2 riding, or aerial, more frequently if experience
3 dictates. It says annually.

4 Q. But it's headed conditions normally needed to
5 justify rating a three.

6 A. Yes, sir.

7 Q. It doesn't require it. It just says these are
8 things that are normally needed to have a rating of
9 three, correct?

10 A. Yes, but I don't follow your logic, sir, because
11 if you're giving yourself a grade of three based on what
12 it is you're supposed to do and you're not doing it, but
13 you're giving yourself a three anyway, to me it just
14 doesn't make any sense. I'm sorry, but it just doesn't.

15 Q. You haven't participated in any of the meetings
16 that Berkeley has had with RUS on these forms, have you?

17 A. No, you ask me -- I think you asked me that very
18 first thing, had I participated in that respect. No, I
19 haven't.

20 Q. Look on the last RUS-300 that's dated 2008 on the
21 explanatory notes under 13(a). Let me make sure -- I'm
22 sorry, 13(a), this paragraph here.

23 A. Yes, sir, I see it.

24 Q. Berkeley is telling them exactly what their
25 inspection program consists of there, didn't it?

1 A. It tells them in relationship to their pole
2 inspections.

3 Q. Read it, please, for the record so we'll have it
4 right.

5 A. It says under -- I'm not sure that's really 13(a).
6 It looks like Roman numeral number one point 3 point A.

7 Q. Whatever it is, if you agreed with what Berkeley
8 told the federal government.

9 A. It says approximately 10 percent of BEC's poles
10 are inspected annually by an outside contractor.
11 Employees are trained to visually inspect lines in their
12 daily operations. BEC is currently in the process of a
13 complete field inventory and GPS of their entire system.
14 Each location on the distribution system will be visited
15 during this project.

16 Q. And that's what Berkeley has maintained it does
17 throughout this case, isn't it?

18 A. Well, I haven't been privy to every testimony
19 here, but I would think that they're saying that's what
20 they're doing.

21 Q. Right. And if they tell them what they're doing,
22 they can't be misrepresenting anything to the federal
23 government, can they?

24 A. Well, I think we got to have apples and oranges
25 here. They're talking about their pole inspection, and

1 the other is annual inspection of all overhead lines. I
2 think they're apples and oranges.

3 Q. Would you please answer my question.

4 A. I thought I did.

5 Q. If Berkeley is telling them exactly what they are
6 doing as they are in this RUS-300, they can't possibly be
7 misrepresenting anything, can they?

8 MR. SMITH: Your Honor, I'm going to object
9 just for confusion, again. The scores of threes were in
10 the forms from 1990 through 2005, and that score of three
11 represents all the overhead lines. He's asking him about
12 comments from the 2008 form when they did not give the
13 three, and so he's trying to suggest, well, they gave
14 themselves a three, but they explain their process. He's
15 talking about two totally different forms, and I think
16 it's confusing the witness.

17 MR. JOHNSON: I object to speaking
18 objections.

19 THE COURT: Well, sustained as to that. You
20 can ask the question -- answer the question he asked you.
21 If you need to explain it in any way, then you can do
22 that.

23 BY MR. JOHNSON:

24 Q. In this paragraph, Berkeley is telling the federal
25 government exactly what it consists of, the inspection.

1 It may not be what you think is right, but they're
2 telling them what they're doing, aren't they?

3 A. Well, it's telling them what they're doing as of
4 2008.

5 Q. And if you were to assume for a second that the
6 McCall-Thomas engineer who helped Berkeley with its
7 filings from 2005 and helped some 10 or 12 other co-ops
8 with their filings, if he says, I met with the RUS guy
9 and told him exactly what we were doing. Pole inspection
10 and patrolling is outlined there in the document.

11 And they said, Fine. Three is fine. We have no
12 objection to a three. That would mean that Berkeley
13 hadn't misrepresented anything.

14 A. No, I'd think it would still mean they
15 misrepresented what they were doing, and it just happens
16 that the RUS guy is signing off on it. I don't think
17 that the two necessarily match up at all.

18 Q. Mr. Dagenhart, you were asked about a number of
19 deaths from electrical contact on an annual basis.
20 Remember that question from Mr. Smith?

21 A. Yes.

22 Q. Do you have the document that you were referring
23 to with you in the courtroom so we could see what you
24 base that on?

25 A. No, I do not.

1 Q. Can you tell me what the document is?

2 A. It's a document of reported worker accidents by
3 the United States Bureau of Labor, probably the Labor
4 Department, if I'm thinking about it correctly. It's a
5 set of numbers that they put out on a regular basis
6 showing the worker deaths, and they categorize it based
7 on the type of accident, and it's broken down by
8 sub-categories.

9 Q. Can you tell me, give me information to enable me
10 to find it?

11 A. Not as I'm sitting here, no.

12 Q. Where do you have it? Do you keep it?

13 A. It's back in my office.

14 Q. Can you produce it?

15 A. Can I? Yes.

16 Q. Does it describe how the accident occurred, how
17 all these accidents occurred?

18 A. No.

19 Q. How many millions of people are in the United
20 States?

21 A. I have no idea.

22 Q. How many people are killed by contact with
23 electricity in a particular year based upon what you tell
24 us that document said?

25 A. When you average it out over the ten-year period,

1 it's about one every three days, so you just have to do
2 the math to figure out what it ends up being.

3 Q. So -- does it compare with deaths in other
4 industries?

5 A. Well, I'm sure it does. I can't tell you how.

6 Q. Does it include information as to how the accident
7 occurred?

8 A. No. You've already asked me that, and I've
9 answered, no, it doesn't.

10 Q. Does it include or separate out accidents where
11 the OSHA ten-foot rule is violated?

12 A. No.

13 Q. Does it make recommendations as to how to reduce
14 accidents?

15 A. No.

16 Q. Can you tell me any worker it shows as dying in
17 that report who died in a manner that Mr. Fortney was
18 killed and Mr. Robinson was injured?

19 A. There's not enough detail to provide that answer.

20 Q. Do you know why this evidence was offered? Do you
21 know why this evidence was offered?

22 A. I think it was just to try to demonstrate the
23 frequency which such accidents occur.

24 Q. You've offered the opinion, opinion number one,
25 that that line was constructed improperly at the time it

1 was built. Is that your opinion today?

2 A. Yes, sir, it is.

3 Q. And how was it built, or constructed, improperly?

4 A. It didn't have enough -- it had too much sag in
5 it, and, as a result, didn't have enough clearance.

6 Q. Do you know what the sag was on the line on the
7 day it was built?

8 A. You've already asked me that question. I can't
9 give you an exact sag number, but it's not going to be
10 code compliant. It is not going to be above 18 and a
11 half feet at worst case. It can't be.

12 Q. And what is the basis that you're offering that
13 that was the sag on the day it was built? What facts in
14 the record are the basis of that?

15 A. What I can tell you is I can find no physically
16 verifiable evidence that would lead me to any other
17 conclusion.

18 Q. Mr. Dagenhart, this is an opinion you expressed
19 for the first time within the last three weeks, isn't it?

20 MR. SMITH: Your Honor, I object. I think he
21 just said he doesn't have an opinion on that.

22 MR. JOHNSON: Doesn't have an opinion on --

23 MR. SMITH: On the sag, on the day it was
24 built.

25 BY MR. JOHNSON:

1 Q. The opinion that the line was constructed
2 improperly is the question I have for you. That's an
3 opinion you've come up with within the last three weeks?

4 A. I guess officially, yes. It's an opinion I've
5 had, but officially, yes.

6 Q. Mr. Dagenhart, when I took your deposition
7 originally in 2012, you had a stack of information that
8 you had relied upon to come up with your opinions.

9 A. Yes.

10 Q. Correct?

11 A. Yes.

12 Q. You had not gotten another stack of materials
13 between when I deposed you and when I questioned you
14 about this new opinion, did you?

15 A. I did receive some new information.

16 Q. Not relating to this opinion?

17 A. No.

18 Q. The information you got relates to your opinion
19 that people were out there, employees were out there, at
20 some time in the early 2000's, correct?

21 A. What are you asking me? I'm not even sure I
22 understand the question.

23 Q. I am asking you, sir, that if the documents you've
24 received since I deposed you the first time are outage
25 reports and services, the sheets showing the trips to

1 Healing Farms?

2 A. Yes.

3 Q. And that relates to the fourth opinion you have,
4 doesn't it?

5 A. Yes. It's all encompassing.

6 Q. When I deposed you in 2012, you testified you
7 didn't have an opinion of the clearance on the line in
8 question on the day it was constructed because you didn't
9 see the line. That was your testimony, correct?

10 A. If you could show me that, I --

11 Q. I will.

12 MR. SMITH: Maybe I missed a question, but --

13 BY MR. JOHNSON:

14 Q. I want to show you your deposition, the original
15 of your deposition, taken on January 12, 2011, and I want
16 to call your attention to your testimony on page 93,
17 9 through 14; 93, 9 through 14. I'll read the question
18 if you'll let me stand here with you.

19 All right: Do you have an opinion as to
20 clearances on the line in question on the day it was
21 constructed?

22 What was your answer, sir?

23 A. No.

24 Q. I want you to turn to page 110, line 18. Are you
25 there?

1 A. Yes.

2 Q. Now, do you have an explanation or an opinion for
3 why that line was the clearance it was at the time of the
4 accident? In other words, what was the cause? Your
5 answer?

6 A. No.

7 Q. The question would be, and I think you were
8 told -- you told me earlier that you don't have an
9 opinion to a reasonable degree of engineering certainty
10 as to when it got clearance that was on -- that it was at
11 the time of the accident? Your answer?

12 A. No, unless it was installed that way to begin
13 with.

14 Q. And you then, on page 103, lines 3 through 11,
15 question: Let me ask you this: Have you ever seen a
16 line that was built by a crew initially that was supposed
17 to be of a particular clearance where the crew didn't
18 build it to the clearance requirement?

19 Your answer?

20 A. I don't think so.

21 Q. And then turn to page 157, line 11 through 18, and
22 I want to also ask you, I'm not sure I got this right.
23 Tell me again, do you have an opinion to a reasonable
24 degree of engineering certainty when the line in this
25 case came to have a clearance that was outside the code

1 of compliance?

2 Your answer?

3 A. You asked me that, and I answered and it was not.

4 Q. So when I took your deposition for the first time
5 three years ago, approximately three years ago, you told
6 me you had no opinion to a reasonable degree of
7 engineering certainty? You told me you didn't know what
8 the clearances were when it was built, and now it's your
9 testimony that the line was built improperly?

10 A. Yes, sir.

11 Q. Can you point to me any record or deposition that
12 would be a support for that change in your testimony?

13 A. I can't cite for you line and verse, but I said I
14 can't find any verifiable evidence to lead me to any
15 other conclusion.

16 Q. You had all the evidence before I deposed you the
17 first time, right, and you didn't tell me anything about
18 that, did you?

19 A. Well, I don't think I had everything at that time,
20 no, sir.

21 Q. Well, what else did you get after that time? I
22 thought we cleared this up on your deposition the other
23 day. You got this one sheet on outages at Healing Farms?

24 A. I may be misremembering, but I think I got some
25 photographs that Eric Jackson took after my original

1 deposition. I think that's some of it, and if I said I
2 didn't have that, I was incorrect at that time.

3 Q. When did you get records from Eric Jackson -- I
4 mean, photographs from Eric Jackson?

5 A. I don't recall when, but it was after the original
6 deposition.

7 Q. How long after?

8 A. I can't tell you. I don't know. It was after.

9 Q. Do you have your file here so we can look at your
10 file?

11 A. No, I don't.

12 Q. You didn't bring any documents that you can use?

13 A. No.

14 Q. You told me on your deposition the other day that
15 the only thing you got was the outage report?

16 A. Yes, I did tell you that, and as I'm sitting here
17 now, I was incorrect in telling you that statement.

18 Q. What in the photographs do you claim you have
19 gotten from Eric Jackson to provide you information for
20 an opinion as to the manner of which the line was
21 constructed in 1993?

22 A. Well, you know, what I was looking at was the
23 photographs -- I thought Mr. Jackson was saying that the
24 line had been struck at some point in time and it caused
25 the line to be at a lower clearance than it originally

1 had been, and in looking at those photographs, and I
2 just -- it just didn't make any sense to me.

3 That's what I was looking at, and, you know, based
4 on that, I had to come to the conclusion that the only
5 thing that could be would be that it just wasn't built
6 right to begin with.

7 Q. Mr. Dagenhart, you gave me one answer
8 two-and-a-half years ago and a completely different
9 answer last week, didn't you, on this point?

10 A. I did, yes.

11 Q. You also gave me several new opinions, several
12 other opinions, when I deposed you the other day,
13 correct?

14 A. Yes.

15 Q. And those -- do the photographs in any way relate
16 to those, in your opinion?

17 A. Well, we talked about -- I came to the conclusion
18 it was built wrong to begin with, yes, it did, and so a
19 lot of those stem from that.

20 Q. I'm talking about the other opinions you came up
21 with at your deposition. Did you get any records that
22 would have been a basis for those new opinions?

23 A. No new records that I can recall, no, sir.

24 Q. Isn't it a fact that you formed these opinions by
25 talking to Mr. Smith about them and you came up with four

1 or five whole new opinions?

2 A. Well, we did discuss the case, and based on my
3 review of the evidence and our discussions, yes, I came
4 to those conclusions.

5 Q. And all of the conclusions were in favor of
6 Mr. Smith's side of the case, weren't they?

7 A. They happened to be, yes.

8 Q. Just happened to be?

9 A. Yes.

10 Q. You're being paid by Mr. Smith. He needs some new
11 opinions, and thank goodness you came through for him.

12 A. No.

13 MR. SMITH: Your Honor, I think this is being
14 argumentative at this point. He's answered the question.

15 MR. JOHNSON: I'll withdraw it.

16 BY MR. JOHNSON:

17 Q. Can you tell me any statute, regulation, bulletin
18 from RUS or industry standard that you rely upon for your
19 opinion that the line was not built correctly when it was
20 built?

21 A. I think we've talked about everything.

22 Q. Mr. Dagenhart, the National Electric Safety Code
23 doesn't talk in terms of violations, does it?

24 A. Not directly. It does talk about defects that are
25 required to be recorded. In that context, it's a

1 violation.

2 Q. They call it a defect, don't they?

3 A. Yes, they do.

4 Q. The people who come up with the code use that
5 word, not a violation?

6 A. Yes.

7 Q. And a defect, if it's hazardous, should be
8 corrected immediately. If it's not, it can be done, and
9 hopefully within two weeks.

10 A. Well, the code doesn't say within two weeks. It
11 just says -- it doesn't say immediately.

12 Q. Do you have any information whatsoever that
13 Berkeley Electric knew that the crews and events planning
14 at Healing Farm were there working near or close to the
15 co-ops' lines?

16 A. No.

17 Q. Speaking about inspections and the schedule for
18 inspections, have you ever been asked by an electric
19 co-op to come up with a schedule cycle for inspections?

20 A. I've had questions about what they should do. I
21 haven't been asked for specific recommendations on a
22 particular cycle, but I have been asked, What should we
23 do?

24 Q. Didn't you tell me when I deposed you the first
25 time that the line was built in 1993 and an inspection in

1 September of 2002, it would be a proper interval for an
2 inspection?

3 A. I think that was in relationship to something that
4 I had come across about a five- to eight-year cycle which
5 some co-ops or utilities said that they did. I think
6 that's what that was in relation to.

7 Q. But you said if Berkeley did what I said they
8 would do, it was an acceptable scheduling for
9 inspections?

10 A. I don't know that I actually said that.

11 Q. Well, let's look. Turn to page 52 of your first
12 deposition. I'll take it back. We'll start here, on
13 page 52, line 10.

14 Okay. All right. Now, do you have a record of
15 when the cooperative did a pole inspection on this line?

16 Your answer?

17 A. I do somewhere.

18 Q. Okay.

19 A. In the file.

20 Q. Could you find it?

21 A. Answer: I'm not sure.

22 Q. Let's take a break and you can look for it.

23 Were you able to find it?

24 A. I was able to find -- this is the one I recall
25 seeing. It's what appears to be an inspection sheet for

1 Berkeley Electric Cooperative sheet number 68 and --

2 Q. May I see it?

3 A. This is the one I recall seeing.

4 Q. And what is the date?

5 A. The date is -- appears to be 9/02 which I would
6 take to be September 2002.

7 Q. And if the line were built in 1993 and there was
8 an inspection of the line, a pole inspection that
9 included an inspection, things you inspected in September
10 of 2002, would that be a proper interval for inspection?

11 Your answer?

12 A. Yes.

13 Q. Now, you say that wouldn't be a proper interval?

14 A. No.

15 Q. So you're not changing that testimony?

16 A. No, I'm not changing that.

17 Q. I want to show you what's been marked as
18 Defendant's Exhibit 1. Would you look at this document
19 and tell me, if that's the information you had, what
20 clearance would be required and why?

21 A. If I had this information available to me, I would
22 tend to have the opinion that the requirements for the
23 line on this property in question that we're talking
24 about would be 18 and a half feet, at worst case
25 clearance.

1 Q. Okay. And why would you say that, sir? What is
2 the basis for that?

3 A. Well, you have a barn, you have an open field, you
4 have an entrance off the driveway that would -- looks
5 like it would allow trucks to go into the area without
6 any problem at all. It's just regular farm field, and
7 that's the other land area that the code calls for. It's
8 very clear to me, just based on this photograph.

9 Q. Do you see any horses in the area where this line
10 was built?

11 A. Well, I don't see a horse, no.

12 Q. Do you see any farm equipment --

13 A. Well, wait a minute. I do see something that
14 looks like it may be an animal. It might be a horse.
15 It's a circle down near the -- there is a circle around
16 some object there. That sure looks like a horse to me.

17 Q. And how far is that from where the line was built?

18 A. Well, I don't know.

19 Q. So it's some distance, isn't it?

20 A. Well, I don't know the exact distance, but I do
21 see a dressage area that's labelled. I do see a riding
22 ring area, and I see open fields. Once again, to me,
23 this is a farm area, that it clearly complies with the
24 other land category in the code.

25 Q. Sir, the item you identified as possibly being a

1 horse is in a fenced in area, is it not?

2 A. Yes. According to what's drawn on this, it
3 appears to be.

4 Q. How much distance is there between the barn and
5 the fence?

6 A. I don't know the exact number.

7 Q. If there is a fence there that prevents or keeps
8 horses out of that area and there's adequate space to
9 have a line between the fence and the barn, would that
10 indicate to you that it was a 14.5 clearance?

11 A. No.

12 Q. Well, it wouldn't have had the things that you
13 looked for to get the 18.5, would it?

14 A. Well, yes.

15 Q. Well, let's look again at the requirements for an
16 18.5. Show us where the clearance is for it to be 18.5.

17 A. Other lands traversed by vehicles such as
18 cultivated, grazing, forest, orchard, et cetera.

19 Q. Do you see any cultivation on the clearing of land
20 on this document in the area between the fence and the
21 barn?

22 A. Not specifically in that area.

23 Q. What is your other criteria for the 18.5?

24 A. Grazing, forest, Orchards.

25 Q. Do you see any grazing taking place in the area in

1 this photograph on the area where the line is?

2 A. Well, I don't see evidence in this photograph, but
3 you have grass and you have a dressage area and you have
4 horses. I wouldn't be surprised if they graze while
5 they're in there. I mean, that's completely logical.

6 Q. I'm not asking you what you would assume or the
7 opinion you would form. The question I have is, there is
8 plenty of distance separating the barn from the fence for
9 running the line in there, correct?

10 MR. SMITH: Your Honor, I would object again
11 for confusion there. He's not asking him to assume, but
12 all he's giving him is an aerial picture, and he's not
13 telling him what the landowner described the property as,
14 but he's not asking him to assume. This is just going in
15 a really confusing route, Your Honor.

16 THE WITNESS: Maybe I can straighten it out.

17 THE COURT: How long are we going to do this
18 today? I'm just trying to get a feel for how much longer
19 you're going to have with this witness, not that I don't
20 find it enthralling, but I'm a -- I need to take a break,
21 is what I'm getting at.

22 MR. JOHNSON: Can we take a break and let me
23 look at my notes?

24 THE COURT: All right. Thank you. Five
25 minutes.

1 (Recess taken.)

2 MR. JOHNSON: Thirty minutes, I estimate.

3 THE COURT: Thirty minutes?

4 MR. JOHNSON: Yes, sir.

5 THE COURT: Keep it on point, all right?

6 MR. JOHNSON: Thank you.

7 BY MR. JOHNSON:

8 Q. Looking at Plaintiff's Exhibit 8, did the person
9 who made the measurements calculate clearances, point of
10 contact?

11 A. As I recall, they did. It's a little hard to
12 read, but I believe there's a place where that was done.

13 Q. Can you show me and read it, where it is?

14 A. On one of the areas, is -- what I think you're
15 asking me is did anybody make a measurement of the
16 clearance at the point of contact?

17 And on page two at the top, you have -- you have a
18 number on the left-hand side of the diagram, which I
19 believe says 18 feet, 2 inches, and it's my understanding
20 that was the clearance at the point of contact.

21 Q. Where does it say 18 --

22 A. Right -- it's on page two. There is a little
23 picture of the tent on the top of the diagram, and all
24 the way on the left-hand side it says 18 feet, 2 inches,
25 and it's to the primary conductor.

1 Q. And so 18 feet, 2 inches. Did you see in
2 Plaintiff's Exhibit 9 the McCall-Thomas who said there
3 were -- who is unable to identify point of contact?

4 A. Yes.

5 Q. Were you able to identify a point of contact when
6 you inspected the line?

7 A. No.

8 Q. Do you know whether the first report that has
9 18.2 -- what was the number?

10 A. Eighteen feet, two inches.

11 Q. Do you know whether that is the correct
12 measurement and determination of the point of contact, or
13 whether, since there are no marks on the line, it's
14 impossible to make the connection?

15 A. I have no reason to think that's an incorrect
16 measurement.

17 Q. Well, you got the one saying that you can't
18 determine it. You got him --

19 MR. SMITH: Your Honor, I would just object
20 for argumentative. He's answered the question.

21 THE COURT: Overruled.

22 BY MR. JOHNSON:

23 Q. You got a direct conflict on that, don't you?

24 A. I don't think it's a direct conflict. One set of
25 measurements was made, according to what I see here, on

1 May the 29th, 2008 with what looks like tent in place --
2 hold on a second. That's wrong.

3 It says May 28 on the first page, but it says all
4 measurements taken at 6:40 p.m. at April 23rd, 2008, and
5 this is the day of the accident, and the measurements
6 taken here -- it's a different time.

7 Q. So you picked this Exhibit No. 8 as being the
8 correct measurement and point of contact?

9 A. If I didn't have anything else, yes.

10 Q. You did have something else. You had
11 McCall-Thomas telling you they couldn't pick out a point
12 of contact, and you couldn't see it, identify one
13 yourself, so you did have all that information, didn't
14 you?

15 A. Well, other non-information.

16 Q. Mr. Dagenhart, one of your new opinions is if the
17 lines met code, there would be no accident.

18 A. Yes.

19 Q. And that's a function of your accepting what
20 Mr. Robinson has said that the crew -- he lifted his pole
21 three to six inches.

22 A. Yes.

23 Q. If it's lifted higher, it will hit the pole -- it
24 will hit the line, won't it?

25 A. It depends on how much higher it's lifted.

1 Q. How much higher does it have to be lifted to touch
2 the pole at the time of contact?

3 A. According to -- it would have to be lifted to the
4 point of getting to 18.2 inches.

5 Q. From where?

6 A. From where?

7 Q. Yeah. What was the clearance before they lifted
8 the tent?

9 A. I don't understand your question.

10 Q. Let me see if I can clarify it.

11 You got the line at 18.2, correct?

12 A. Yes, yes.

13 Q. And to hit the line, they got to get the tent up
14 to 18.2, correct?

15 A. Yes.

16 Q. Do you know whether they lifted it higher than
17 18.2 or less than 18.2?

18 A. Well, what I do -- what I think I know is that you
19 have a 17 foot, 9 inch tent, and it was allegedly lifted
20 another 6 inches, which makes it 18 feet, 3 inches, so
21 that gets it -- that gets it above that measurement.

22 Q. Right, but if they lift it higher, it will hit the
23 pole, hit the line, won't they?

24 A. Yeah, still hit it.

25 Q. And you don't know whether what they did was

1 lifted enough to hit it or lifted more than was enough to
2 hit it? In other words, if they lifted it higher then
3 and contacted the pole in doing so?

4 A. Yes, but I'm just not following your questioning
5 because once you get it lifted high enough to cause the
6 electricity to flow, it doesn't matter anymore.

7 Q. Mr. Dagenhart, have you built -- designed and/or
8 built electrical lines?

9 A. Yes.

10 Q. And when did you do that?

11 A. Designed and built, it would be back in the 1980's
12 when I worked at Duke Power Company.

13 Q. Did you stake lines and prepare staking sheets?

14 A. We didn't do staking sheets, but we did work
15 orders that were somewhat like that. It wasn't a co-op,
16 so we didn't do staking sheets like they do here.

17 Q. Did you also construct lines, or oversee the
18 construction of the lines?

19 A. Yes.

20 Q. And when you were out there constructing a line
21 yourself, how did you determine the proper sag?

22 A. How did I determine the proper sag?

23 Q. Yes.

24 A. Well --

25 Q. Let me ask it a different way. You claim when you

1 were building lines, you would go out and calibrate your
2 eyes so you would be able to recognize when you had the
3 lines at the proper level. Do you remember telling me
4 that?

5 A. Yeah. I didn't think that it would be necessary
6 for our installations for several reasons: First of all,
7 we typically use 40 foot poles or higher, and we had
8 construction specifications that with that height pole
9 and the span lengths that we typically used, it just
10 typically wasn't a problem.

11 Q. Did the plans or staking sheet, if you want to
12 call it that, that you got when you were building poles
13 include the land use on the document?

14 A. No, it did not.

15 Q. Did you -- did it include on the document the
16 National Electric Safety Code clearance requirement?

17 A. No.

18 Q. What you did is what Berkeley has done in this
19 case. You put the pole up, tightened the primary down,
20 look and see that you got it almost straight, and then
21 bring the neutral under, dropping it some particular
22 distance, according to the design, and then make sure the
23 sag was consistent with both lines, correct?

24 A. Generally that's correct, yeah.

25 Q. And you didn't measure each line you built, did

1 you?

2 A. No.

3 Q. You eyeballed it.

4 A. Yes.

5 Q. That's what is done in this industry, isn't it?

6 A. Not always, no.

7 Q. Not always, but most of the time, you did it when
8 you were at Duke. The Berkeley people testified they did
9 it.

10 A. Yes.

11 Q. Mr. Dagenhart, does the National Electric Safety
12 Code, or any RUS bulletin or any federal regulation
13 require that the land usage be on the staking sheet?

14 A. No.

15 Q. Does it require that the line be measured after
16 it's constructed?

17 A. No.

18 Q. So you were doing what was industry practice in
19 building a line in the fashion you described.

20 A. Yes.

21 Q. And is it correct that you've never seen a line
22 that was constructed by a line crew that didn't meet or
23 exceed the requirements of the National Electric Safety
24 Code?

25 A. No. I've seen plenty of lines that have been

1 built that didn't meet code.

2 Q. I'm talking about at the time of construction. Do
3 you want to see where you said it?

4 A. Yes.

5 Q. I want you to turn to page 103 of your deposition
6 testimony, the first deposition, and look at lines 3 to
7 11.

8 Okay. Let me ask you this: Have you ever seen a
9 line that was built by a crew initially that was supposed
10 to be of a particular clearance where the crew didn't
11 build it to that clearance requirement?

12 Your answer, sir?

13 A. I don't think so.

14 Q. That was your sworn testimony at that time,
15 correct?

16 A. Yes.

17 Q. Can you tell me if you remember changing your
18 testimony once again and saying that you do know of
19 situations where lines were not built to the clearance
20 requirement. Identify to me which ones you're talking
21 about.

22 A. Well, in relation to this line, once again, I'm
23 saying that I can find no physically verifiable evidence
24 to lead me to any other conclusion that this line was
25 built to code.

1 Q. Mr. Dagenhart, that wasn't what I asked you, was
2 it?

3 A. I thought it was.

4 Q. No. What I asked you was if you're now going to
5 change your testimony and claim that you've seen the
6 lines constructed that didn't have the proper clearance.
7 I'm asking you to tell me where and when and what lines
8 you saw. Can you give me any example, based upon your
9 extensive career in this area?

10 A. Not specifically, no.

11 Q. Mr. Dagenhart, one of the things you claim
12 expertise in is the OSHA workplace safety rules, isn't
13 it?

14 A. Yes.

15 Q. And isn't it correct that OSHA -- you say OSHA or
16 OSHA?

17 A. I do it both ways, depending on who I'm talking
18 to. If they happen to say OSHA, I'll say OSHA. If they
19 say OSHA, I'll say OSHA to be polite. I don't try to
20 correct anybody that way.

21 Q. Good. In terms of OSHA, they have a workplace
22 safety rule called the ten-foot rule, don't they?

23 A. Yes.

24 Q. And explain to the judge what the ten-foot rule
25 says and does.

1 A. Well, the ten-foot rule says that you are
2 prohibited from either taking an object or getting within
3 ten feet of an energized power line. That basically
4 applies to anything 50,000 volts or less.

5 Q. And do you teach the OSHA safety rule or have you
6 taught that as part of the teaching you described?

7 A. I don't know that we necessarily talk about that
8 in that respect. We talk about the National Electric
9 Safety Code. We may talk about the OSHA rules in
10 general, but I can't recall speaking about that
11 specifically, no.

12 Q. But it's something you've used in your testimony
13 for reports on cases that you've been designated as an
14 expert, is it not?

15 A. Oh, yes.

16 Q. And isn't it true that you have -- you are
17 representing a witness for the defendant. You quoted and
18 cited and relied upon the ten-foot OSHA rule to take a
19 position that that was the cause of the accident?

20 A. Yes.

21 Q. In this case, would you agree with me that
22 Mr. Robinson and Mr. Fortney did not comply with the OSHA
23 ten-foot rule?

24 A. Yes. I would agree that they did not.

25 Q. The other two men who were involved in moving the

1 tent, Mr. Gleason and the other gentleman, they violated
2 OSHA ten-foot rule, didn't they?

3 A. Well, yes, they did.

4 Q. And the event planners who were directing them,
5 they violated the rule, didn't they?

6 A. Yes.

7 Q. And isn't it true that you acknowledge and concede
8 that they were negligent or they should have complied
9 with the rule and they contributed to the accident
10 occurring?

11 MR. SMITH: Your Honor, I object for legal
12 conclusion, as far as negligence goes.

13 THE COURT: Negligence is a conclusion. You
14 can ask him to opine whether or not he thinks they
15 violated the standard of care.

16 BY MR. JOHNSON:

17 Q. Mr. Dagenhart, you would agree with me that these
18 people we just discussed violated the standard of care by
19 failing to comply with the ten-foot rule.

20 A. Yes.

21 Q. And, Mr. Dagenhart --

22 A. But if the line didn't make clearance, that
23 accident wouldn't have happened either.

24 Q. You don't know because you don't know how high the
25 men would have lifted the tent.

1 A. All I know is what the testimony is.

2 Q. Well, part of the testimony, Mr. Robinson -- it's
3 in Mr. Robinson's favor for him to have only lifted the
4 tent three to six inches, isn't it?

5 A. I don't know.

6 Q. Let's measure. Tell me when we get to ten feet.

7 A. There.

8 Q. If the line was on the ground and still energized
9 and the men honored the ten-foot rule and stayed away
10 from it, there wouldn't be an accident, would there?

11 A. Wow. You know, I'm not so sure I can say -- agree
12 with that, for a couple reasons.

13 Q. Let's hear them.

14 A. You have such a thing as called step potential.
15 If an energized line is on the ground and has -- a fuse
16 hasn't cleared to, you know -- can I give you this back?
17 If a fuse hasn't cleared or a breaker or something hasn't
18 cleared the line, you have voltage in the ground, and
19 step potential is the energy and the voltage in the
20 ground that can cause you to be shocked, just standing on
21 the ground, and ten feet away, I am not convinced, would
22 be safe.

23 Q. Well, what would be safe?

24 A. I don't know the answer to that.

25 Q. And how far would the electricity extend from the

1 line?

2 A. It varies from situation to situation.

3 Q. And are you offering an opinion to a reasonable
4 degree of engineering certainty that these -- this
5 accident, these men would have been shocked and
6 electrocuted based upon if the line was on the ground?

7 A. I can't tell you they would or would not. I just
8 don't consider it to be a safe situation. Let's say the
9 line is hanging two feet up.

10 THE COURT: Let me ask you this: What does
11 it matter? The ground -- it was up in the air, so where
12 are we going with this line of questioning?

13 MR. JOHNSON: I guess I'm just trying to make
14 the point that there would be no accident.

15 THE COURT: Well, it might be there would be
16 no accident, but it doesn't matter. The line wasn't on
17 the ground, and it wasn't two feet up. It was anywhere
18 from four feet, eight feet to fourteen feet up, depending
19 on who you believe, so let's just move it along to
20 something that's relevant to the case.

21 BY MR. JOHNSON:

22 Q. If the line is fourteen feet in the air suspended
23 there and these men had honored or complied with the
24 ten-foot rule, there wouldn't have been an accident,
25 would there?

1 A. You're correct, there wouldn't be.

2 Q. If it's 16 or 18, same thing, correct, no
3 accident, if they complied with the ten-foot rule?

4 A. Yes.

5 Q. And you've used that -- well, well, that's all
6 I'll ask.

7 MR. JOHNSON: That's it, Your Honor.

8 THE COURT: Redirect?

9 MR. SMITH: Yes. I'll be brief. I'm going
10 to jump around, just to move fast, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. SMITH:

13 Q. Mr. Dagenhart, with regards to the questions early
14 on about statutes and laws and CFRs, I just want to tell
15 you exactly what I was referring to at those times, okay?

16 A. Yes.

17 Q. When I referred to the CFR, or the federal
18 regulations, I was referring to 7 CFR 1730. Was that
19 your understanding?

20 A. Yes.

21 Q. And if I referred to the laws or statutes, I was
22 referring to, again, the law 7 CFR 1730, and I was
23 probably referring to this as a statute too. Does that
24 change any of your testimony with regards to when you
25 hard those words?

1 A. No.

2 Q. And I may have also been referring to laws as far
3 as the National Electric Safety Code. Has the National
4 Electric Safety Code been adopted by the South Carolina
5 Public Service Commission?

6 A. Yes.

7 MR. JOHNSON: Objection. Relevance. We're
8 not regulated by them at all.

9 THE COURT: Well, if they're not regulated by
10 them, I guess I'm curious as to why it would matter. I
11 mean, I really, truly understand nothing about the way
12 Berkeley Electric Co-op is governed. I assume they would
13 have been covered by the Public Service Commission, but I
14 suppose he's got some basis for saying no, so if they're
15 not governed by the Public Service Commission, who cares,
16 I guess is a good question.

17 MR. SMITH: At least we can get it on the
18 record that the South Carolina Public Service Commission
19 has adopted the National Electric Safety Code in total?

20 THE WITNESS: Yes.

21 THE COURT: Okay. Move on.

22 MR. SMITH: Yes, sir.

23 BY MR. SMITH:

24 Q. Mr. Dagenhart, you were asked that the National
25 Electric Safety Code doesn't require anything more than

1 what Berkeley Electric is doing. Do you remember that?

2 A. Yes.

3 Q. Does the National Electric Safety Code require
4 inspections?

5 A. Well, yes.

6 Q. And because it's in the National Electric Safety
7 Code, would those inspections be for the purpose of
8 determining if the line meets the National Electric
9 Safety Code?

10 A. Well, yes.

11 Q. Is that just implied simply because it's in the
12 code itself?

13 A. I think so, yes.

14 Q. And the frequency you talked about at intervals
15 such as experience that show necessary, do you remember
16 that question?

17 A. Yes.

18 Q. Is never an option?

19 A. No.

20 Q. Can you just choose never?

21 A. No.

22 Q. And you were asked about the required height on
23 the date of the accident and how much different would
24 that be from the date the line was built. Do you
25 remember that?

1 A. Yes.

2 Q. Now, the date of the accident, we know it was 64
3 degrees, right?

4 A. That's right.

5 Q. And the line was built, there is some information
6 on the staking sheet, was 71 degrees?

7 A. Right.

8 Q. The difference in those degrees 64 to 71, is that
9 going to produce much of a difference at all?

10 A. Very little.

11 Q. And with regards to the defects, you read some
12 language from the National Electric Safety Code that
13 talked about if a defect isn't fixed quickly, you shall
14 record that defect. Do you remember something to the
15 effect of that?

16 A. Yes.

17 Q. That's what the National Electric Safety Code
18 says, correct?

19 A. That's correct.

20 Q. But the law, the statute -- I'm sorry, the Code of
21 Federal Regulations says to record all deficiencies, does
22 it not?

23 A. Yes.

24 Q. Just a little different in that respect, right?

25 A. Yes.

1 Q. You were asked about any other violations of the
2 National Electric Safety Code, and I would like to point
3 you to section 420 of the National Electric Safety
4 Code -- do you have it up there? All right. Section
5 420 -- section 42 and it's labelled 420. It says
6 personal general precautions. It says quick
7 qualifications for employees. Employees whose duties --
8 whose duties require working on or in the vicinity of
9 energized equipment or a line shall perform only those
10 tasks for which they are trained, equipped, authorized
11 and so directed.

12 Do you see that?

13 A. Yes.

14 Q. If a lineman is required to inspect a power line
15 for code height, yet he doesn't know what the code
16 requires for code height, would you say that lineman is
17 trained to do that job?

18 MR. JOHNSON: Object to the form of the
19 hypothetical.

20 THE WITNESS: No.

21 THE COURT: You haven't really covered
22 anything new, so if you've got something that you want to
23 cover new, then let's do that, but you're just kind of
24 going back over what you did on direct.

25 BY MR. SMITH:

1 Q. When you were talking about the land use and you
2 looked at those pictures there, were you informed of the
3 testimony from the landowner that explained exactly what
4 they were doing on that property?

5 A. Yes.

6 Q. He just showed you the picture, right?

7 A. Oh, no.

8 Q. He didn't tell you what Ms. Yergin said?

9 A. No.

10 Q. If Ms. Yergin said horses were ridden all the way
11 around, the vehicles were driven up from around the hay
12 fields and up through the barn that crossed over the area
13 under the power line, you weren't told any of that, were
14 you?

15 A. No, I was not.

16 Q. And you weren't told that the landowner
17 specifically testified that this is where the hay was
18 grown. He didn't tell you that, as far as cultivation,
19 right?

20 A. No.

21 Q. But you had read that in Ms. Yergin's deposition
22 testimony from five years ago, didn't you?

23 A. I don't remember it.

24 Q. Long time ago?

25 A. Yeah. It's been a while since I've read that.

1 Q. Right. Accepted industry practice, what we've
2 gone over with regards to Berkeley Electric's plan, as
3 far as how they do inspections, what records they keep,
4 whether or not they're determining accepted code, the
5 fact that they have never inspected this power line in
6 question, and the fact that their manager of job training
7 and loss control has also testified that there's plenty
8 of other lines that have never been inspected for
9 National Electric Safety Code compliance, would you say
10 that Berkeley Electric is doing just the accepted
11 industry practice?

12 MR. JOHNSON: Object to the form, and it's a
13 leading question.

14 THE WITNESS: I would say they're not.

15 THE COURT: It's a long question, and I'm not
16 really sure that -- it's loaded with a lot more argument
17 than we need to get to today.

18 BY MR. SMITH:

19 Q. The conditions normally needed to justify a three,
20 what does the word needed in that sentence mean to you?

21 A. Needed to me means have to have.

22 Q. Okay. You were asked about whether or not the RUS
23 official was participating in the meetings leading up to
24 the completion of the RUS-300 forms. Do you remember
25 that?

1 A. Yes.

2 Q. And you were asked a hypothetical. What if
3 they're telling him exactly what they're doing? Do you
4 remember that?

5 A. Yes.

6 Q. And, Mr. Dagenhart, let me ask you this: If you
7 put on a form a misrepresentation that you're inspecting
8 all your lines annually, right, but you tell the person
9 this isn't really the truth, is that still a
10 misrepresentation when you write it on the form?

11 MR. JOHNSON: Object. Improper hypothetical.

12 THE COURT: That's almost a philosophical
13 question as opposed to a real proper question, so
14 sustained.

15 BY MR. SMITH:

16 Q. If we assume for a moment what Mr. Johnson said in
17 cross-examination was correct, okay, that the RUS
18 official was there and never mind what score we put on
19 it, we told him what we were doing, do you think if that
20 made its way up to Washington that this was the score
21 that was represented but they actually told us what they
22 were doing -- do you think if that made its way up to
23 Washington that there would be --

24 THE COURT: Speculation. I agree.

25 Sustained. Just for the record, Mr. Johnson is popping

1 up. I'm making his objection for him.

2 MR. SMITH: I don't mind you objecting on
3 your own, I'm not saying you were, but --

4 BY MR. SMITH:

5 Q. Mr. Dagenhart, you were asked a series of
6 questions about describing the inspection program, and we
7 ended up here with this last one, 2008. Approximately 10
8 percent of Berkeley Electric's poles are inspected
9 annually by an outside contractor. Do you see that?

10 A. Yes.

11 Q. It says, Employees are trained to visually inspect
12 lines in their daily operations.

13 Do you see that?

14 A. Yes.

15 Q. Does that infer there is some training program
16 that trains linemen on how to judge the height of power
17 lines in their inspections?

18 A. I would think so.

19 Q. And if Mr. Elrod, the manager of job training and
20 loss control, states There is no class for that and the
21 people that filled out that form, they didn't get that
22 from me and I assert they didn't even ask me, is that a
23 misrepresentation that employees are trained to visually
24 inspect lines in their daily operations?

25 MR. JOHNSON: Object to the hypothetical.

1 THE COURT: Overruled.

2 THE WITNESS: It would seem to be a
3 misrepresentation.

4 BY MR. SMITH:

5 Q. The statistic, every 72 hours, does that show the
6 importance of what we're doing here today?

7 MR. JOHNSON: Object to the form.

8 MR. SMITH: I'll withdraw it, Your Honor.
9 With regards to the line, the improper construction,
10 right.

11 THE WITNESS: Yes, sir.

12 BY MR. SMITH:

13 Q. I think you testified early on, page 110, you had
14 said -- do you have an explanation or opinion for why the
15 line was at the clearance it was at the time of the
16 accident? In other words, what was the cause?

17 No, and I think you told me earlier, you don't
18 have an opinion to a reasonable degree of engineering
19 certainty as to when it got that clearance at the time,
20 your answer was no, unless it was installed that way to
21 begin with.

22 Do you remember that?

23 A. Yes.

24 Q. And now that we've sort of -- we've been working
25 on this case for how many years?

1 A. I don't know exactly how long now.

2 Q. About five or six?

3 A. Yes.

4 Q. And at the point that we are sort of rounding up
5 all this and all the information is presented, what has
6 that led you to believe now that you have received all of
7 the information?

8 A. Well, as I said numerous times, it's just led me
9 to the conclusion that it had to have been built
10 improperly to begin with, once again because I can just
11 find no other explanation for it.

12 Q. There is not anything in particular you're
13 pointing to to say, Hey, they built it improperly, right?

14 A. No.

15 Q. It's just the fact we've been working on this
16 thing for five, six years now. We're in here going to
17 trial. Nothing else has been presented --

18 MR. JOHNSON: Objection.

19 THE COURT: Objection to the form of the
20 question is sustained.

21 MR. SMITH: Yes, sir.

22 BY MR. SMITH:

23 Q. And, Mr. Dagenhart, did we take the deposition --
24 assume we took your deposition in January 2012 and we
25 took Mr. Jackson's deposition twice, once later that

1 year, in December of 2012, and then again maybe a couple
2 years later.

3 Is it fair to say when you gave your deposition
4 testimony, you weren't privy to anything he was saying?

5 A. That's correct. I was not.

6 Q. And you were asked a question, did Berkeley
7 Electric have any information or know what was going on
8 the day the men were electrocuted?

9 Do you remember that question?

10 A. Yes.

11 Q. Were you provided -- well, I want you to assume
12 for me that there was testimony in this case by a lady
13 named Beth Donehue, and her job was promoting the event
14 that was happening. She testified that the event was
15 sponsored by a radio station, and they blasted what was
16 going on on the radio. They described what would happen,
17 when it would happen, all about it. They put flyers
18 everywhere. They promoted this event in all of
19 Charleston, Berkeley, and Dorchester Counties.

20 Do you know which county Berkeley's home office is
21 in?

22 A. I don't.

23 Q. Would it be reasonable to assume that information
24 might make its way to Berkeley Electric through all its
25 promotions?

1 THE COURT: What is the point of that
2 question?

3 BY MR. SMITH:

4 Q. Let me just say this: When you were asked the
5 question that BEC did not know what was going on that
6 day, you were not informed of the promotional plan that
7 Ms. Donehue had testified to; is that fair to say?

8 A. I had no knowledge of it.

9 Q. And you don't have any firsthand knowledge of what
10 the promotional plan was at this point, do you?

11 A. I do not.

12 Q. And when you testified in your deposition about
13 the proper interval, did you know that they had stated,
14 as far as interval goes, that the line had never been
15 inspected for National Electric Safety Code compliance?

16 MR. JOHNSON: I ask that counsel read the
17 entire answer.

18 BY MR. SMITH:

19 Q. However it was part of a pole inspection in 2002?

20 A. I don't remember the sequence of that, but I think
21 I was aware of it.

22 Q. Just with regards to the -- well, I think you
23 answered that already.

24 So McCall-Thomas, you were asked why did you just
25 pick that one? Do you remember that?

1 A. Yes.

2 Q. Why did you just pick the one, and I believe your
3 answer was, Well, I picked the one from the date of the
4 actual electrocution, correct?

5 A. Yes.

6 Q. As opposed to some date in May, right?

7 A. Correct.

8 Q. And these questions were more about identifying a
9 point of contact, right?

10 A. Yes.

11 Q. The people that took the measurements in May, do
12 you think the tents were even there in May?

13 A. I would think the answer would be no.

14 Q. And would you believe the Berkeley Electric
15 staking engineer that came out and did the measurements
16 reflected on Plaintiff's Exhibit No. 8, the day of the
17 electrocution?

18 A. I would tend to take that as it is what it is.

19 Q. Is it fair to say that Berkeley Electric
20 themselves determine the point of contact the day of the
21 electrocution?

22 A. It appears to be the case, yes.

23 Q. And did you rely on those measurements and the
24 information Berkeley Electric created themselves?

25 A. Yes.

1 Q. And you were asked -- Mr. Johnson asked you about
2 your new opinion that the line, the tent, would not hit
3 the line had it met the code; is that right?

4 A. Yes.

5 Q. All right. That wasn't a new opinion, was it?

6 A. No.

7 Q. You testified to that back three years ago in your
8 deposition, didn't you?

9 A. Yes.

10 Q. In fact, that was part of the summary judgment in
11 this case where I believe you filed an affidavit, and an
12 order was created and that was one of the particular
13 things discussed.

14 A. Yes.

15 Q. Now, Mr. Dagenhart, you were asked about the OSHA
16 ten-foot rule, and you were asked questions about would
17 this have happened had the OSHA ten-foot rule not been
18 violated. Do you remember that?

19 A. Yes.

20 Q. Mr. Dagenhart, would this have happened had
21 Berkeley Electric complied with the code?

22 A. No.

23 Q. Who was in the first position to take steps to
24 prevent this all from happening? Who was in the very
25 first position?

1 A. Well, since Berkeley was there first and had the
2 opportunity to get it right, they were in the first
3 position.

4 Q. Since 1993?

5 A. Yes.

6 Q. And who maintained control over the power line?

7 A. Berkeley Electric Cooperative.

8 Q. Who is responsible for maintaining the power line
9 at the height required by code?

10 A. Berkeley Electric Cooperative.

11 Q. And had Berkeley Electric Cooperative done what
12 they're required to do, would this have happened?

13 A. In my opinion, no.

14 Q. Have you ever given an opinion in a prior case or
15 even talking with somebody that says, you know what?
16 Your line was low, but it doesn't matter because we
17 should just take ten feet away.

18 Have you ever taken that position on a low line?

19 A. No.

20 Q. Maybe if a line is at code you could take that
21 position they got too close, right?

22 A. Yes.

23 Q. Would you have agreed to be our expert if this
24 line was at code?

25 A. No.

1 MR. JOHNSON: Objection, Your Honor.
2 Relevance.

3 THE COURT: Sustained.

4 MR. SMITH: Yes, sir. I think I'm done.
5 That's all the questions I have.

6 THE COURT: Recross?

7 MR. JOHNSON: No, sir. None.

8 THE COURT: All right. Well, that's a good
9 place to break for the day then, so do you need this
10 gentleman anymore?

11 MR. SMITH: No, sir.

12 THE COURT: Do you need him anymore?

13 MR. JOHNSON: No.

14 THE COURT: You're free to go. We'll see
15 y'all at 9:30 tomorrow.

16 (Recess taken.)

17 (October 1, 2015.)

18 THE COURT: All right. You got your next
19 witness ready?

20 MR. KEENAN: We sure do, Your Honor. We have
21 the plaintiff, John Robinson.

22 John?

23 THE COURT: All right.

24 JOHN STEPHEN ROBINSON,
25 having been first duly sworn,

1 was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. KEENAN:

4 Q. Tell me when you're comfortable, John.

5 A. All right.

6 Q. Okay. Let me -- to help us, I want to just kind
7 of tell you where I'm going and put your name up here
8 first. It's s-o-n?

9 A. Yes, sir.

10 Q. And how old are you?

11 A. Fifty.

12 Q. Do the math, if you will. How old would you have
13 been on the 23rd of April 2008?

14 A. Seven years ago, 43.

15 Q. Forty-three?

16 A. Approximately.

17 Q. How far did you get in school?

18 A. Tenth grade.

19 Q. Read and write?

20 A. Yes, sir.

21 Q. Now, on the 23rd of April 2008 where were you
22 working?

23 A. Wow, at a farm, assembling tents at a farm.

24 Q. All right. Now, who was your employer? Who had
25 hired you?

1 A. I forgot the name of the company. It's a tent
2 company.

3 Q. It's a tent company?

4 A. Yes.

5 Q. You weren't working for the farm?

6 A. No, sir.

7 Q. Now, tell the judge how long you've been working
8 for that tent company.

9 A. Approximately seven to eight days.

10 Q. Now, were you -- was that interim work? Were you
11 working here and then over here and then here? Was this
12 full time for you?

13 A. Like, a temp service.

14 Q. Temp service?

15 A. Day labor, yes, sir.

16 Q. So how much in advance would you know you would be
17 working?

18 A. Next morning.

19 Q. The next morning?

20 A. Yeah.

21 Q. So you didn't know?

22 A. If they didn't need me tomorrow -- you know, if
23 they need me tomorrow, they'll let me know.

24 Q. All right. Were you paid by the job or by the
25 hour or how?

1 A. By the hour.

2 Q. Okay. Now, so were you working for the temp
3 service who then sent you out to the tent company?

4 A. Yes, sir.

5 Q. Is that it?

6 A. Yes, sir.

7 Q. Well, how long had you been working for this
8 service?

9 A. About three months.

10 Q. All right.

11 A. Temp service.

12 Q. And so they would send you out to different kind
13 of jobs?

14 A. Yes, sir.

15 Q. How long had you been working in the tent business
16 doing whatever they were asking you to do?

17 A. About 20 years. Been a while.

18 Q. You had been working with tents that long?

19 A. Yeah, different temp services.

20 Q. Oh, I'm sorry. Let me get closer. Tent, t-e-n-t.

21 A. Oh, I'm sorry. Just for a few days. I'm sorry.

22 Q. Just for a couple days?

23 A. Yes, sir.

24 Q. So would you consider yourself an experienced tent
25 guy?

1 A. No, sir, not at all.

2 Q. All right. All right. And were you given any
3 instruction in how to construct tents in a safe manner?

4 A. Well, they just told us to put this leg here, put
5 that leg there. They didn't say nothing about the safety
6 or anything like that.

7 Q. All right. Well, more particularly, now, you've
8 been in court, haven't you?

9 A. Yes.

10 Q. And did you hear reference to this OSHA or OSHA
11 ten-foot rule? Did you hear that?

12 A. Yes, sir.

13 Q. Did you hear it on the date that this
14 electrocution occurred?

15 A. No, sir.

16 Q. Had you heard it before?

17 A. No, sir.

18 Q. All right. Now, let's get a little bit more
19 detail in terms of -- had you worked there the previous
20 day?

21 A. At the farm?

22 Q. Yes.

23 A. No, sir.

24 Q. Did you know how many people were going to be from
25 the temp service who were going to be doing whatever you

1 were going to be doing?

2 A. No, sir.

3 Q. Did you know who your boss was going to be on the
4 ground, the person you were to report to and to follow
5 instructions?

6 A. Clay? I think his name was Clay.

7 Q. Did you work with Clay before?

8 A. Yes, sir, at another event.

9 Q. Okay. So what time would you have gotten out
10 there?

11 A. I think it was about 9:00.

12 Q. In the morning?

13 A. Yes, sir.

14 Q. Did you even know what you were going to be doing
15 when you got out there, John?

16 A. I knew it had something to do with tents.

17 Q. Oh, did you?

18 A. I guess so.

19 Q. So you got out there 9:00, 9:30, and then what
20 happened?

21 A. We put up a bunch of tents, just put up a bunch of
22 tents all over the place, where they wanted it.

23 Q. How many people were like you from the temp
24 service doing tent, t-e-n-t, duty?

25 A. I want to say there was three of us.

1 Q. Three of you?

2 A. Yes.

3 Q. Can you tell the Court any of the names you
4 remember? Take your time.

5 A. The two deceased.

6 Q. The two men who were electrocuted and died. Okay.
7 Take a little sip of water, would you? Will you look in
8 that box to see if there are any tissues or if it's
9 empty? Okay.

10 I want your mind clear so you can give us details,
11 all right?

12 A. All right.

13 Q. Did you know their names?

14 A. From working with them, yes.

15 Q. And tell the Court their names.

16 A. Dexter Keyes and John Fortney.

17 Q. And then the fellow who was your boss that day?

18 A. His name was Clay -- I don't remember his last
19 name.

20 Q. Okay. Have you been back out there?

21 A. No, sir.

22 Q. Don't want to go?

23 A. No, sir.

24 Q. Kevin, could you help us with the picture. That's
25 your wife back there?

1 A. Yes, sir.

2 Q. And you were sitting about there yesterday?

3 A. Yes, sir.

4 Q. Could you see the screen? Because the judge and
5 we lawyers could see the tents, where the tents were.
6 Could you see that?

7 A. No, sir.

8 Q. All right. John, you got something shining on the
9 screen so you can't see it, or can you see?

10 A. I can see it from right here.

11 Q. All right. Can you tell us -- have you ever seen
12 this picture?

13 A. No.

14 Q. All right. And if you don't know, say you don't
15 know. Okay?

16 A. Yes, sir.

17 Q. No guessing.

18 A. Yes, sir.

19 Q. What is this structure here?

20 A. I can't really see. Can I --

21 Q. Well, you can come down, okay? In fact, I'll tell
22 you what: You stand right over here, okay, and I'll
23 stand right over here. This structure right here --

24 A. That's the barn, I think it was, yes.

25 Q. That's the barn?

1 A. Yes.

2 Q. Okay. Now, when you fellows got out there in the
3 morning, were there any tents up?

4 A. No, sir.

5 Q. Where were the tents?

6 A. We had to unload them off the vehicles.

7 Q. Okay. Did you pick up any tents and take them or
8 did you -- were they already there?

9 A. No. We loaded the truck up with some material.

10 Q. Where?

11 A. Downtown Charleston to the farm.

12 Q. Okay. So y'all brought them?

13 A. Yes, sir.

14 Q. Now, are these the tents?

15 A. Yeah.

16 Q. Yeah. Okay. Just concentrate now, okay? You can
17 use any of these here, and walk us through how you put
18 this thing up.

19 A. We'll, like, spread the top part out, like.

20 Q. The canvas?

21 A. Yes.

22 Q. All right.

23 A. And put the legs in -- there's a slot for the
24 canvas and we kind of lifted it up before it can -- all
25 the legs could go through the canvas hole or whatever, on

1 this one here, on these ones here I'm talking about.

2 Q. All right.

3 A. These here, there's like --

4 Q. These here, you're pointing to the far --

5 A. This big one.

6 Q. The far left, that's the tent?

7 A. How did we do that. I kind of -- I don't really
8 remember that one.

9 Q. Okay. Don't guess then. All right.

10 Well, does it this one, this one, this one, the
11 three that are on the left-hand portion, and this big one
12 in the middle, are they all the same, roughly?

13 A. Not as built wise, no, no. Basically, yeah, they
14 are the same, but as they was being built, it was, like,
15 different.

16 Q. Different way they built it?

17 A. Yeah.

18 Q. Like, in what way?

19 A. Basically -- oh, gosh, I wasn't -- I can't
20 remember, but it was -- it was totally different. It was
21 a different way we did it. Same procedure, but, like,
22 different things with it.

23 Q. Okay. Now, help us out. What is this pole here,
24 that looks like there is a guy-wire here that looks like
25 it's wrapped in canvas? What is that?

1 A. That's just a regular metal pole, and they covered
2 it for, I guess, like decoration.

3 Q. Wow.

4 A. And what's coming to the side there off it is --
5 we have to nail a spike into the ground for it won't blow
6 the tent away or the tent wouldn't collapse or anything.

7 Q. Is that the guy-wire you're doing there?

8 A. Yes, sir.

9 Q. Am I using the right word, guy-wire, or 20-degree
10 wire?

11 A. I think it was like a strap.

12 Q. A strap?

13 A. Yes, sir.

14 Q. Okay. Now, can you see underneath the middle
15 tent, there's another thing back here that appears to be
16 flat, and it appears to have some white things on the
17 ground. What is that?

18 A. It looks like sandbags on the ground. I don't
19 know if that's flat. It just might have the ruffle kind
20 of on the side.

21 Q. Okay. But did you boys do that?

22 A. I think we did, but I'm not for sure on that
23 neither.

24 Q. Okay. Now, you got out there at 9:00, 9:30 in the
25 morning.

1 A. Yes, sir.

2 Q. When did you understand these tents had to be up?

3 A. Before we went home.

4 Q. Like by what time?

5 A. At the end of the day.

6 Q. At the end of the day?

7 A. Yes, sir.

8 Q. The event you were working on, was it the next day

9 or that night?

10 A. I think it was for the weekend, I'm not sure.

11 Q. For that night?

12 A. No, I don't remember. I'm not going to say.

13 Q. Okay. So were you in a hurry or not?

14 A. No, we wasn't in no hurry.

15 Q. Just taking your time.

16 A. Yes, sir.

17 Q. Okay. Now, can you give the Court any idea of

18 what happened first in terms where did the first tent go?

19 Where did the second tent go?

20 A. My recall, I would say we was next to the barn.

21 We was putting one up near the barn.

22 Q. That was the first one.

23 A. Yes, my recollection.

24 Q. All right. So that was the first tent up. What

25 about the second one?

1 A. I can't remember the orders.

2 Q. Okay. Well, can you at least tell us that -- the
3 tent that you were holding the pole when the electricity
4 hit you, which tent was that?

5 A. (Indicating.)

6 Q. You're pointing to the one in the middle?

7 A. The one in the middle, the smaller one.

8 Q. And you don't remember that was the second tent,
9 the third tent, or the last tent --

10 A. No, sir.

11 Q. -- that went up?

12 A. Actually, it was the last one.

13 Q. The last one?

14 A. Yes, sir. That was the last one we was moving.

15 Q. Now, John, tell us, we heard some testimony quoted
16 through the depositions and things about this tent, the
17 one you were holding, when you got electrocuted, was
18 being moved around for some reason, was it?

19 A. Yes, sir. The first place that we had it, I don't
20 know if the male or female, they didn't it wasn't to be
21 there, and so we moved it -- well, Clay came and asked
22 us -- told us, rather, to move the tent.

23 Q. Now, I know it's been a long time, John, but the
24 lady that didn't want it where y'all had it, was that the
25 lady who came and testified from the party planner or --

1 if you know.

2 A. You know, just by her testimony yesterday, it
3 sounds like it was her, but as in -- I can't remember
4 seeing her face.

5 Q. Well, did you remember a four foot ten inch woman?

6 A. I remember she was kind of short, kind of slim,
7 like.

8 Q. All right.

9 A. But I don't recognize the face.

10 Q. Okay. Now, I know you said it, but is this the
11 last tent that was up?

12 A. That's the last one that we was moving, yes, sir,
13 for the day.

14 Q. Moving. Okay. And so you're not deciding where
15 the tent goes, are you?

16 A. No, sir.

17 Q. You're just doing what you're told?

18 A. Yes, sir.

19 Q. And what specifically was wrong with where the
20 tent had been, if you know?

21 A. They just -- well, Clay came back and told the
22 three of us that they wanted us to move it again, I think
23 like three feet forward or something like that.

24 Q. Three feet forward?

25 A. Two or three feet forward, yes.

1 Q. Okay. And maybe I didn't cover this. Are
2 these -- when you put up the tent, like over here, okay,
3 are you drilling a hole in the ground to put the pole in
4 the ground --

5 A. Or with a sledgehammer, yes, sir.

6 Q. With a sledgehammer?

7 A. With a sledgehammer, yes.

8 Q. Now these 90 degree guy-wires, what are the
9 substance of these things that come down in an angle?

10 A. It's not even a wire, it's like, a material,
11 not -- I can't say nylon, but like a material that they
12 clip on to the tent part and bring it down and nail it to
13 the ground.

14 Q. And the purpose is what?

15 A. To keep the tent from, I guess, flying away or
16 collapsing.

17 Q. Now, with that knowledge, tell us, on this last
18 tent that you were asked to move, had it already had it
19 secured by these guy-wires into the ground?

20 A. No, sir.

21 Q. Or nothing?

22 A. No, sir. Just had -- it was just set up.

23 Q. Okay. And so would the plan B, that when you
24 found a spot everybody was satisfied with it, that's when
25 you would anchor them down?

1 A. Yes, sir.

2 Q. But that one wouldn't anchor?

3 A. No, sir.

4 Q. Had you already been moving these other tents?

5 A. No, sir. That was the only one that they -- we
6 had to move a couple times.

7 Q. A couple times. Now, do you even know why it was
8 being moved a couple times?

9 A. No, sir.

10 Q. You didn't know.

11 A. I just did what my supervisor said to do.

12 Q. Told John Robinson to do it; John Robinson did it.

13 A. Yes, sir.

14 Q. Now, you told us you had never heard of the
15 100-foot rule before?

16 A. No, but now.

17 Q. Now you have, and we'll get to that, but not on
18 that day, not before that day?

19 A. No, sir.

20 Q. Not anything even close to it.

21 A. No, sir.

22 Q. Now, the other important thing is can you see
23 these wires in this photograph?

24 A. Yes, I can see them now.

25 Q. Do you have any problem seeing them?

1 A. No, sir.

2 Q. But on the 23rd of April -- I need another
3 question.

4 How long had y'all been out there putting up these
5 other tents before you put up the last tent that had to
6 be moved a couple times?

7 A. Well, we started at 9:00 and all the way through
8 till, I guess it happened like 4:15 we got
9 electrocuted -- executed, electrocuted. We was doing it
10 ever since that day.

11 Q. All right. Let me get another diagram to kind of
12 help you with. Did you see this one? This is the actual
13 line with the two power company poles, not tent poles,
14 okay?

15 A. Okay.

16 Q. And this was made either the day this occurred or
17 the next day by the power company. They made this?

18 A. Okay.

19 Q. Now, does the location of the line and its
20 proximity to the ground --

21 A. Sir, I don't even remember seeing that. I don't.
22 When we was out there, there wasn't really no wire on. I
23 never seen no wire -- I didn't even know nothing about
24 wire being out there until we got hit.

25 Q. Let's be specific. I know you haven't seen this.

1 A. Right.

2 Q. You haven't seen this until I put it up in front
3 of you.

4 A. Yes, sir.

5 Q. Now, look at the wire that's in that photograph.

6 A. Yes, sir.

7 Q. Did you, in fact, ever -- when you got there, the
8 first morning, you got there at 9:00 in the morning. You
9 worked until around 4:30 before you were electrocuted.
10 Did you ever see the line?

11 A. No, sir. I don't remember seeing it. I really
12 don't remember seeing it.

13 Q. Okay. Help us out, John. You can see it in the
14 photograph?

15 A. I can see it now.

16 Q. You can see it now.

17 A. Yes, sir.

18 Q. How come you didn't see it that day?

19 A. Well, we was just busy, busy, busy, trying to put
20 everything together. We was just working. I wasn't
21 really looking up in the sky. I was -- my main focus was
22 on the ground part, like, putting in the spikes and
23 putting the legs between the canvas and stuff like that
24 there.

25 Q. Did you have a specific job that day? Working in

1 teams and groups, sometimes this man does this, the other
2 man does that. Did y'all divide up the labor that way?

3 A. Well, all three of us -- the three of us, we was
4 just helping each other out. When one get tired of
5 digging a hole or sledgehammering the hole, the other
6 take over, just helping out as a team.

7 Q. All right. Now, did you have any special
8 equipment?

9 A. No, not really, no.

10 Q. Hold on right there. We'll get back to this.

11 Now, what I'm going to do here is I'm going to put
12 up a square where this tent is here, okay? So I'm going
13 to try -- don't laugh at the artistry, John, but can you
14 look at this thing and imagine you're looking down?

15 A. Yeah.

16 Q. Got that. All right. Now, I'm going to draw
17 where the poles are. Okay? So these two poles here,
18 would be those two poles there.

19 A. Yes, sir.

20 Q. Okay? Now, where I'm going is I want to know
21 where everybody was, where their positions were.

22 A. Okay.

23 Q. Okay. And, by the way, you see here that this is
24 all wrapped up in something.

25 A. Yes, sir.

1 Q. That's wrapped up. All four of them poles are
2 wrapped up.

3 A. Yes, sir.

4 Q. Right? And they're wrapped up with what kind of
5 material?

6 A. Like, a tablecloth thing.

7 Q. A tablecloth. Okay. But if the Court and we look
8 over here to the tents that are up and that are anchored,
9 we don't see that?

10 A. No, sir.

11 Q. Why not?

12 A. I guess -- well, because that's like a
13 two-by-four, a piece of wood, and this over here was
14 metal.

15 Q. Oh. So this is wood?

16 A. Yes.

17 Q. All these other tents are wood?

18 A. Some of them are wood, and some of them are metal.

19 Q. Okay. But this one, this last one that you were
20 moving around, was all metal?

21 A. Yes, sir.

22 Q. Did you connect any kind of reason for it, if you
23 know?

24 A. No, sir.

25 Q. No. Okay. So what were you supposed to do with

1 this canvas or tent-like material that was wrapped around
2 the pole? Were you supposed to take it off and put it
3 aside? Does it go up that way, or what do you do with
4 it?

5 A. I think after they put the tent together, I think
6 they wrap it around it, for a design.

7 Q. Wrap it around the pole?

8 A. The pole, the metal pole.

9 Q. Does it have any function, you think, other than
10 just looking pretty?

11 A. That's all. That's what I say.

12 Q. But the other ones don't have that.

13 A. No, sir.

14 Q. Do you know why?

15 A. No, sir.

16 Q. By the way, we've never talked about this, have
17 we?

18 A. No.

19 Q. This is just from your memory, flashing back from
20 that day?

21 A. Yes, sir.

22 Q. Remember, do not guess.

23 A. Yes, sir.

24 Q. These two poles are these two poles?

25 A. Okay.

1 Q. Closest to the barn, okay? And the other two
2 poles are opposite.

3 A. Yes, sir.

4 Q. Now, if you will, take Mr. Johnson's Sharpie and
5 mark an X on which pole you were on.

6 A. (Indicating.)

7 Q. So you would have been on the back right --

8 A. Yeah.

9 Q. -- looking at this photograph?

10 A. Yeah, looking at this photo.

11 Q. Okay. Now, the other person who survived, what
12 was his name?

13 A. Clay?

14 Q. Clay? Okay. Do you recall what pole he was on?

15 A. Yeah, I do.

16 Q. Good.

17 A. (Indicating).

18 Q. Can you put Clay? Just put Clay there. All
19 right. And you're putting John up there.

20 MR. KEENAN: What is our next number, Kevin,
21 exhibit number, so we can refer to it as an exhibit?

22 (Plaintiff's Exhibit No. 64 was marked for
23 identification and admitted into evidence.)

24 MR. KEENAN: Let the record reflect we have
25 been talking about Exhibit 64 for several minutes as it

1 relates to where the tent was and where the men were
2 positioned. Okay.

3 BY MR. KEENAN:

4 Q. Are you ready to go?

5 A. Yes, sir.

6 Q. Okay. Now, you survived and Clay survived?

7 A. Yes, sir.

8 Q. Now, where was John Fortney, if you remember?

9 A. (Indicating.)

10 Q. Let the record reflect you've indicated the lower
11 left pole?

12 A. Yes.

13 Q. And the other fellow?

14 A. (Indicating.)

15 Q. And he also didn't make it.

16 A. Yes, sir.

17 Q. Now, one last thing: You were in the courtroom --
18 were you here all day yesterday?

19 A. Yes, sir.

20 Q. -- listening? Could you hear pretty good back
21 there?

22 A. Yes, sir.

23 Q. Okay. I'm sorry. One other thing: Did y'all
24 kind of work as a group in terms of you worked on this
25 tent together and then you would go work on another tent

1 together?

2 Or did Clay say, Listen, John. You work on this
3 tent in the front. John Fortney, I want you in the back,
4 and so you were working independent of one another, or
5 did you work as a group?

6 A. As a group.

7 Q. As a group. So you were together most of the
8 time.

9 A. Yes, sir.

10 Q. All right. So on this day, while you were moving
11 this tent, all right, did you hear the testimony in the
12 court about someone saying, Don't get close to those
13 lines. That's too close to those lines.

14 A. No, sir. I did not hear that.

15 Q. You did not. By the way, is there anything wrong
16 with your hearing?

17 A. No, sir.

18 Q. Now, is it you just don't know if somebody said
19 that, or you categorically, absolutely remember nobody
20 said it?

21 A. I didn't hear that at all, at all. If I would
22 have -- if I would have heard that, I would have -- you
23 know, I would have looked to see what's going on, asked
24 why, you know, something. You know, I didn't hear that
25 at all.

1 Q. All right.

2 A. Not at all.

3 Q. Let's just put this to rest, then. When you were
4 putting up any of these other tents, these over here on
5 the left, on to the right, and behind the tent you were
6 moving, at any time, from 8:00 in the morning, did
7 anybody say, Hey, watch that line?

8 A. No, sir.

9 Q. Don't get close to it?

10 A. No, sir.

11 Q. Would you have heard it?

12 A. I would have heard it.

13 Q. Okay. Now, tell us about what you could see,
14 John, underneath the tent. I mean, if you're underneath
15 the tent and you're holding on to the pole up here,
16 okay -- and, by the way, which way were you moving? Were
17 you moving so you were the lead guy?

18 A. Yes, me and -- Clay and I, we was up -- let me
19 double-check it. Yes, because our back was more, like,
20 facing the guys.

21 Q. Your back was facing Keyes and Fortney.

22 A. Yes.

23 Q. So which direction were you moving this thing?

24 A. We was going to move it backwards -- well, move it
25 this way, which was forward. This way was, like, going

1 backwards.

2 Q. Okay. I'm not understanding, so what you need to
3 do here is if y'all were moving this way --

4 A. Yes, sir.

5 Q. -- you and Clay were moving this way --

6 A. Yes, sir.

7 Q. -- then I want you to put an arrow pointing in
8 that direction. I don't want you to do anything unless
9 it's what you did, but if your team is moving this way,
10 north, then I want you to put an arrow pointing north,
11 and, likewise, if we're moving south, put south. So put
12 the arrow where you were moving.

13 A. (Indicating.)

14 Q. And Clay was running the show, or was the lady
15 running the show about over here, Move this, move that?

16 A. Clay was telling us what to do.

17 Q. Okay.

18 A. So that's what -- they was over here --

19 Q. Uh-huh.

20 A. -- discussing, so when Clay made it back to his
21 pole, that's when he was telling us to just move it,
22 like, three feet, two or three feet.

23 Q. All right. Now, do you remember whether or not
24 the pole had this covering on it?

25 A. No, sir, I don't remember that.

1 Q. Or there was just a metal pole?

2 A. I think it was about -- I don't remember.

3 Q. Okay. Thank you.

4 A. I don't remember.

5 Q. We appreciate when you say, I don't remember.

6 A. Yes, sir.

7 Q. Okay. Now, when you were moving this thing
8 around -- could I get that yellow thing back there,
9 Kevin, the measuring thing?

10 Pretend this thing isn't a measuring thing but a
11 pole. The pole you were using to move, was it bigger or
12 smaller than this or the same or how can you describe it?

13 A. Well, it was like a -- around that size, but it
14 had, like a -- no, I can't even say that, because I don't
15 remember exactly, but I think it had -- like, adjustable,
16 where you could kind of lift the leg up like that.

17 Q. And after the electricity hit your body, you don't
18 remember anything.

19 A. I don't remember when it hit or whatever. I do --
20 I don't remember the person, black, white, or whatever,
21 but I know someone was talking to me when I was on the
22 ground, and before you knows -- yeah, that's --

23 Q. I'll tell you what. We're going to get there, but
24 what we need to first understand is how you were holding
25 the pole when you got electrocuted. Do you remember?

1 A. Huh-uh.

2 Q. Did you have both hands on it did you have your
3 shoulder into it?

4 A. Both hands here.

5 Q. Okay. So it's off the ground then.

6 A. Well, yeah, once we started.

7 Q. And where on your body, do you know without a
8 doubt, the electricity got you, touched your body, burned
9 your skin, and you can see it today?

10 A. My right side of my chest.

11 Q. Okay. And were you here when the coroner, doctor,
12 was here talking about the point of entry?

13 A. Yes, sir.

14 Q. Where the electricity came in?

15 A. Yes, sir.

16 Q. We'll get to that, but do you know if you had the
17 pole at any time next to your body?

18 A. No, sir.

19 Q. You didn't?

20 A. No, sir.

21 Q. And was it like this you were moving or like this
22 (indicating)?

23 A. Like that.

24 Q. Just like this (indicating).

25 A. Uh-huh.

1 Q. Okay. Something else I didn't ask you: When you
2 were moving this pole around --

3 A. Yes, sir.

4 Q. Okay, how far -- first of all, take a look at this
5 photograph, and also from your memory, is there anything
6 elevated about the land right under your tent where you
7 were moving? In other words, did it go up or and down,
8 or was it flat?

9 A. It was pretty --

10 Q. Flat?

11 A. -- even, yes, sir.

12 Q. And when you were up in the corner with this pole,
13 moving it around, okay, can you show the Court and tell
14 the Court in your own words how far off the ground you
15 got it?

16 A. Well, I had my hands like this here, lift it up no
17 higher than that, probably four to six inches, no more
18 than six. I would say four to six inches.

19 Q. Okay. Just enough so you could move it.

20 A. Yeah. We didn't even have to take a full step or
21 nothing, you know, like shuffle, yes, sir.

22 Q. Oh, you only took a --

23 A. Yeah, just like -- (indicating).

24 Q. That's it?

25 A. Yeah.

1 Q. And is it a shuffle, is that the right way to
2 describe what you meant?

3 A. It wasn't a step.

4 Q. Okay. Now, did you ever get it to where you
5 were --

6 A. No.

7 Q. Was there any reason to do that (indicating)?

8 A. No, sir.

9 Q. Now, were you in a position to look over at Clay,
10 Fortney, or Keyes to see just how high they were?

11 A. Clay, I was, -- you know, cause we more like side
12 to side -- I didn't look back or nothing about Dexter and
13 John, but Clay and I was both the same level.

14 Q. You said four to six?

15 A. Four to six.

16 Q. No more than six?

17 A. No, sir.

18 Q. Okay. Were you actually in the movement; that is,
19 you were moving when the electricity hit you, if you
20 know?

21 A. Yeah. I would say we was moving, because I don't
22 remember putting it down, the leg down.

23 Q. Okay. Well, now, John, you didn't see the power
24 line at all during that day.

25 A. No, sir.

1 Q. But after you gained consciousness in the hospital
2 several days later, you know you hit a power line?

3 A. Yes. Well, I didn't know until I made it to the
4 hospital and my ex, my girlfriend at the time, she was at
5 the hospital, and she told me what happened.

6 Q. Okay. Now, the reason I ask you that is you
7 didn't know the power line was there on that day, but now
8 that you know there was a power line there, now that you
9 know that you hit it, do you have any idea what point of
10 the tent made contact with the power line, or would you
11 be guessing?

12 A. As of now?

13 Q. Yeah.

14 A. Yeah, I would say the metal part of the tent.

15 Q. The who?

16 A. May I?

17 Q. Yes, absolutely.

18 A. The top part right there is the middle of the
19 tent, like.

20 Q. All right. The little metal thing that comes up,
21 that's been referred to as the spire?

22 A. Okay. Yes.

23 Q. Is that what you believe you hit?

24 A. I believe that touched the wire.

25 Q. All right. Before you go back and sit, is there

1 anything about that day that was important that I simply
2 hadn't had the sense to ask you about, anything important
3 about that day?

4 Take your time.

5 A. It did a lot to my life.

6 Q. Well, we're going to get there. We're going to
7 get there, and we're going to give you plenty of time to
8 talk about it, but I'm talking about the facts of the
9 tent, the location, what you were told, what you weren't
10 told, what you heard, what you didn't hear.

11 Have we covered everything that is important to
12 John Robinson?

13 A. Yes, sir. Like I said, I just -- all of us just
14 listened to what Clay had to say, and we just followed
15 his directions.

16 Q. Okay. Now, take a breath. Now, you've been hit
17 with electricity, right?

18 A. Uh-huh.

19 Q. And you fell forwards or backwards or what?

20 A. I don't know.

21 Q. You don't know.

22 A. No.

23 Q. Now, when you were on the ground, before the
24 gurney came, before the helicopter came, what did you
25 see?

1 A. I seen white. That's all I seen, was white.

2 Q. You saw white?

3 A. Yes, I do.

4 Q. Did you see any of the other men laying on the
5 ground?

6 A. No, sir. No, I -- no, I didn't see nobody else
7 laying on the ground until I was, like, getting on the
8 gurney.

9 Q. Okay. You're listening to my question. I
10 appreciate that. So did the gurney come to you or did
11 they pick you up and then take you over to where the
12 gurney was?

13 A. I don't remember that.

14 Q. All right. What did you see about the men when
15 they were about to put you on the gurney?

16 A. I was -- there was some guys, it was just a couple
17 guys that I remembered. They was moving kind of fast.

18 Q. Yeah.

19 A. I think it was two Caucasian guys. I really
20 don't --

21 Q. All right. Well, let me -- and we'll move on now,
22 we'll move on, but did you ever see anybody lying on the
23 ground next to the tent?

24 A. When I was getting on -- when I was on the gurney
25 going toward the helicopter.

1 Q. Yeah. What did you see?

2 A. I didn't know what was going on, but I seen
3 someone right there, laying on the ground from a quick
4 view, because they didn't let me look towards that
5 direction.

6 Q. Right, right.

7 A. It seemed like -- he was, like, right behind me.
8 It seemed like --

9 Q. Point it out on either the television --

10 A. And one over here, this leg right here.

11 Q. Okay. That would have been Mr. Keyes.

12 A. He was just laying right there.

13 Q. Laying.

14 A. He was like -- I don't know, it looks like he was
15 kind of praying, like -- he was on the ground. He was on
16 the ground.

17 Q. Did you see anything else?

18 A. No.

19 Q. Did you see any indication that somebody died?

20 A. No. I didn't know -- I don't even know what
21 happened to me at the time.

22 Q. All right. So you're on the gurney?

23 A. Yes, sir.

24 Q. Get on the helicopter?

25 A. Yes, sir.

1 Q. Went to the hospital?

2 A. Yes, sir.

3 Q. Go ahead and take a seat, and we'll go back to our
4 road map where we're going.

5 By the way, you don't know a thing about any of
6 these measurements.

7 A. No, sir.

8 Q. Not a bit.

9 A. No, sir.

10 Q. Okay. 23rd of April, you're in the hospital?

11 A. Yes, sir.

12 Q. Tell the Court the first indication that you had
13 any physical pain at all, you had any feeling at all.

14 A. I was in the helicopter, and I was talking to
15 them. I asked them, Why am I burning?

16 Q. Burning?

17 A. They said, Where are you burning?

18 They asked me where am I burning at, and I said my
19 chest. That's when they opened up my shirt and started
20 doing what they do, and a few seconds later, I said, I'm
21 burning, and they was like, Where you burning at? I said
22 my left foot.

23 Q. Your left foot. Okay. So that is your right
24 shoulder area?

25 A. Yes.

1 Q. And your left foot?

2 A. So when they took off my sneakers, when they took
3 off my sneaker, I see my socks with a big old hole in it,
4 and they started taking my socks off and doing what they
5 do.

6 Q. Were you hurting?

7 A. I was in pain.

8 Q. You know in a hospital when they say on a scale of
9 one to ten, how bad is the pain? Well, we're in a
10 courtroom. How bad was the pain?

11 A. That's it.

12 Q. A ten?

13 A. Easy.

14 Q. Were they giving you any drugs?

15 A. When I made it to the hospital?

16 Q. Yes.

17 A. Yes, they did.

18 Q. And after they got you to the hospital, what did
19 they do?

20 A. Well, I went through this one door. It was,
21 like -- looked like there was about 20 people right there
22 waiting for me, and they just started doing everything
23 they could do to me.

24 Q. And what did they do from your standpoint? You're
25 not a medical doctor, but what did you see them doing

1 that helped you?

2 A. I was in pain. I wasn't really focussing on what
3 they were doing. I was in pain.

4 Q. Did they give you anything for pain?

5 A. Yes. At one point they had an IV in me, I think.
6 No, I don't remember, so I'm not going to say that, but
7 they gave me something for my pain. They calmed me down,
8 and, you know put me in a little room and stuff.

9 That's when they gave me some -- I can't remember
10 the name of the pill or nothing, but that's when they
11 gave me a pill to calm me down.

12 Q. Okay. Did it?

13 A. Yeah, it relaxed me, but they said my heart was
14 still --

15 MR. JOHNSON: Objection. Hearsay.

16 BY MR. KEENAN:

17 Q. What were you feeling?

18 A. My heart was racing.

19 Q. Nobody told you that; you felt that?

20 A. Yes, sir.

21 Q. Okay. What else?

22 A. They moved me up into a room and kept, like, a
23 24-hour nurse around me to keep an eye on me.

24 Q. Did you and I go over about a ten-page summary
25 that listed out all the things that were done to you in

1 terms of what doctors you've seen, what tests were done,
2 all the way up till --

3 A. No, sir.

4 Q. And I asked you names, and you didn't remember any
5 of them.

6 A. Yes, sir.

7 Q. How long did you say in the hospital?

8 A. I think four or five days, approximately.

9 Q. Tell the Court how you were when you got out.

10 A. The day they released me from the hospital, they
11 had a correctional officer there because I was a few
12 months behind on my child support, and so a correctional
13 officer was there. So when they released me from the
14 hospital, they took me to the county.

15 Q. Okay. In fact, the whole time you were in the
16 hospital, those four days, there was --

17 A. A correctional officer.

18 Q. Outside the door?

19 A. No. He was right in the room with me.

20 Q. In the room with you?

21 A. Yes, sir.

22 Q. For child support?

23 A. Yes, sir.

24 Q. Okay. Well, did you ultimately pay that?

25 A. Oh, yeah. Child support is done.

1 Q. Taken care of?

2 A. By the time I went to court, I think it was that
3 Monday.

4 Q. Taken care of?

5 A. Yes, sir.

6 Q. Okay. Now, I'm not going to ask you to take your
7 shirt off, but if we got your shoe and your sock off,
8 would we see any abnormalities, things that your other
9 foot doesn't have?

10 A. It should. I don't even look at my foot no more,
11 my body.

12 Q. You don't?

13 A. No.

14 Q. You're emotional about that, John?

15 A. (Nods head.)

16 Q. I'm only going to ask you to do that one time.
17 Would you take your shoe off?

18 A. (Witness complies.)

19 MR. KEENAN: Your Honor, can you see it from
20 there?

21 THE COURT: Okay.

22 BY MR. KEENAN:

23 Q. Now, explain what it is that has no sensation or
24 has pain or whatever.

25 A. Right here (indicating).

1 Q. Right here what?

2 A. It feels like a pin sticking you.

3 Q. All the time?

4 A. Not all the time, but it comes and goes, but when
5 it do come and I'm at work, I have to stop because I have
6 to let the pain ease away.

7 Q. And how often does that happen?

8 A. Lately, about a month, like, you know, it varies.
9 It varies. Sometimes it could be twice a week.
10 Sometimes it could be once a month. It varies.

11 Q. Are you able to put your full weight on that toe?

12 A. Yes, sir.

13 Q. Do you know if there is any triggers that make it
14 hurt or doesn't make it hurt?

15 A. No, sir.

16 Q. No warning?

17 A. No warning at all.

18 Q. When it comes at work and you have to stop work,
19 how long do you stop?

20 A. Five, ten minutes.

21 Q. Okay. Go ahead and put it back on. Do you need
22 to see it any closer?

23 MR. JOHNSON: No.

24 MR. KEENAN: Okay.

25 BY MR. KEENAN:

1 Q. Now, other than what you've described about your
2 foot, okay, do you have, today, in 2015, almost October,
3 do you have any other pain, physical pain, as a result of
4 the electrocution?

5 A. No, sir. Just my toe.

6 Q. Okay. Well, what I would like to do now, you've
7 described everything concerning physical pain that you
8 have attributable to the events back in '08, true?

9 A. Yes, sir.

10 Q. Okay. Well, now, let's move on to the second
11 category that the law recognizes, and that is mental
12 anguish, pain and suffering, anxiety, depression.

13 A. Yes, sir.

14 Q. Do you have any of that?

15 A. Yes, sir.

16 Q. All right. Well, then, in your own words, tell
17 the Court how your life has changed since the 23rd of
18 April 2008.

19 A. Well, I have this -- I cries, for no reason.
20 Looking at that tent, I cries. It hurts me. April 23rd,
21 it hurts me. Like, just now, looking at the wires when
22 me and my wife driving, that bothers me.

23 Q. How does it bother you?

24 A. Because it was -- I'm checking to make sure I
25 don't see nothing low, you know? I just -- I get -- my

1 moods, I'm just sad, just sad.

2 Q. Well, now, is the trigger that you talked about,
3 looking at this tent, that's obvious, but if you see
4 another tent --

5 A. I get sad. I don't even want to look at that
6 tent.

7 Q. You get sad for the tents, you get sad for the
8 electrical lines?

9 A. I know it don't have nothing to do with my
10 situation, but if it's lightning outside --

11 Q. Lightning?

12 A. Lightning.

13 Q. What do you think is going happen, John?

14 A. I don't know, if someone get killed. It happened.
15 I don't know. I'm scared. I get depressed. I get
16 scared. Like I said, I cry, at work, I just -- I could
17 be having a good day, and all of a sudden I am crying. I
18 have to go to the Porta-John just to hid my face.

19 Q. So when you're out at the job -- you want to take
20 a second? Hold on. Take a sip of water. Sometimes that
21 helps.

22 So it's been since '08. What happens at work that
23 triggers it?

24 A. Sometimes it just happens. Sometimes I just start
25 crying at work, or if somebody's cutting something and

1 you see sparks, all kind of stuff.

2 Q. So you head to the porta-potty?

3 A. I go to the porta-potty and start crying. I'm
4 crying on my way to the porta-potty.

5 Q. How long do you stay in the porta-potty?

6 A. Ten, fifteen minutes. They ask me what I'm doing.
7 I say I had to use the bathroom. I don't really feel
8 like I'm a man no more because I cry so much.

9 Q. Now -- and I need to ask you this now, before you
10 were electrocuted, did you cry a lot?

11 A. I didn't even cry at my father's funeral, but now
12 I just cry.

13 Q. Well, now, you know there's tools. You can reach
14 out for some tools. So what tools does John Robinson
15 have that sometimes work, sometimes don't work?

16 A. Well, I thank God for my wife.

17 Q. Well, let's hold her for a minute. Does the book
18 that you took your oath on --

19 A. The Bible, yes.

20 Q. Does that give you comfort?

21 A. Yes.

22 Q. So you feel this mood coming on, feel the tears
23 coming, what do you do with the Bible?

24 A. I read it. Or if I'm at work, I'll go in the
25 Porta-John and go on my phone.

1 Q. On your phone?

2 A. Yes, and pull up a verse or something.

3 Q. Is there any particular verse that John Robinson
4 goes to that is sort of the one that always works for
5 you?

6 A. Psalms 23.

7 Q. That's a good one. Does that comfort you? Does
8 that tell you you're protected?

9 A. Yes.

10 Q. And how long have you been married to that woman
11 back there that smiles when you come in the room?

12 A. I would say about six years now.

13 Q. Be careful. We men get in trouble when we don't
14 remember.

15 A. April 24th -- oh June 24th.

16 Q. Did he get that right, Mama? How does she help
17 you cope?

18 A. A lot of ways. She just hold me, pray with me.
19 She read scriptures to me and just telling me to keep
20 trusting in God.

21 Q. And she holds you?

22 A. All the time.

23 Q. When you cry?

24 A. Like a baby. That's not right.

25 Q. Well, how does it make you feel when you cry?

1 A. Like a baby. I feel like I'm the man of the
2 house. I don't need up into my wife's arm, crying like a
3 baby.

4 Q. Old school men. Tough?

5 A. Yeah. That's how I was raised.

6 Q. Now, John, is it getting any better? Are you
7 crying any less? Are you going into the porta-potty any
8 less?

9 A. No, no. This is what I have to deal with. This
10 is what I've had to deal with.

11 MR. KEENAN: I know you've waited some time.
12 That's all the questions I have. Your witness.

13 THE COURT: Well, let's take a five-minute
14 break right now. We're going to take a break. You can
15 go out and use the rest room, but you can't talk to
16 anybody, okay?

17 THE WITNESS: Okay.

18 THE COURT: All right.

19 (Recess taken.)

20 THE COURT: All right. Be seated. Are you
21 ready for your cross?

22 MR. JOHNSON: Yes, sir.

23 CROSS-EXAMINATION

24 BY MR. JOHNSON:

25 Q. Mr. Robinson?

1 A. Yes, sir.

2 Q. I want to get something straight from the facts as
3 we go forward. Did you testify that you were in the
4 hospital four or five days?

5 A. Approximately, yes, sir.

6 Q. I want to show you a document that has an
7 admission with a discharge date on it from the medical
8 university. You were taken to MUSC?

9 A. Yes, sir.

10 Q. Look here and see if that refreshes your
11 recollection.

12 A. Two days.

13 Q. Two days?

14 A. Okay.

15 Q. So you were admitted on April 23rd, 2008 around
16 4:00 or 5:00 in the afternoon?

17 A. Yes.

18 Q. And you were discharged on 4/25/08?

19 A. Okay.

20 Q. And did the accident happen on a Friday?

21 A. I don't even remember what day it was, sir. I
22 really -- I know the date, but the day of --

23 Q. You don't know. Okay.

24 When you were in the hospital and released from
25 the hospital, you are released to the custody of the law

1 enforcement individual?

2 A. Yes, sir, yes, sir.

3 Q. And taken to jail.

4 A. Yes, sir.

5 Q. And you said you were in court on Monday, dealing
6 with the child support issue.

7 A. I think it was Monday, yes, sir.

8 Q. Who did you owe child support to?

9 A. My daughter.

10 Q. And how old was your daughter at this time?

11 A. Twenty-three.

12 Q. So how much child support did you owe her?

13 A. Probably about 2,000.

14 Q. What was your child support obligation?

15 A. What do you mean?

16 Q. How much did you have to pay a week or a month?

17 A. A month, 125.

18 Q. 125 a month?

19 A. Yes.

20 Q. And did it go until she was 18 or did you have to
21 pay --

22 A. It went until she was 18.

23 Q. So you were still behind at this time by \$2,000?

24 A. I was playing catch-up.

25 Q. Now, you were -- at MUSC, basically, what they did

1 for you was give you some pain medication and dress your
2 burn marks.

3 A. Yes.

4 Q. You had a spot on your chest, you had this spot on
5 your left toe or right toe?

6 A. It was the left big toe.

7 Q. And then when they released you, you weren't then
8 hospitalized again anything related to this accident,
9 were you?

10 A. No, sir.

11 Q. This was a work-related accident, wasn't it?

12 A. Yes, sir. I was at work.

13 Q. And after you were released from the hospital,
14 were you seen by an ordinary surgeon?

15 A. Yes.

16 Q. He released you to return to work, did he not?

17 A. Yes.

18 Q. You were also seen by a psychiatrist, I believe,
19 Dr. Dyana Lowndes-Rosen?

20 A. Yes.

21 Q. And you saw her a couple of times?

22 A. Yes.

23 Q. And she released you to return to work.

24 A. Yes.

25 Q. Now, you've not had any medical treatment or any

1 treatment for any emotional problem since she released
2 you, correct?

3 A. Correct.

4 Q. You haven't gone to the doctor to determine why
5 you supposedly get pain in your big toe, have you?

6 A. No.

7 Q. You haven't been to any doctor because you cry or
8 feel like you cry too much?

9 A. No.

10 Q. And there's no medical record that would reflect
11 that you had a problem that caused you emotional -- that
12 you have an emotional problem that caused you to cry, is
13 there?

14 A. No record, no.

15 Q. Before this accident, you had a drug and alcohol
16 problem, did you?

17 A. I did.

18 Q. You had been hospitalized once for depression?

19 A. Yes.

20 Q. You had worked a whole series of jobs and done
21 work as a day laborer?

22 A. Yes.

23 Q. You were not married to this lady at the time of
24 the accident, were you?

25 A. No, sir.

1 Q. Once you married her, you have done much to get
2 your life straightened out, haven't you?

3 A. No, once I started going to church.

4 Q. To church?

5 A. Yes, sir.

6 Q. With her?

7 A. No. That's where I met her, at church. Yes.

8 Q. And she's helped you, hasn't she?

9 A. I say God first, but she's there for me.

10 Q. Now, you had marijuana in your system at the time
11 this accident occurred, didn't you?

12 A. Yes, I did.

13 Q. When did you last smoke marijuana?

14 A. It was the first part of the month of April.

15 Q. Had you smoked marijuana the day of the accident?

16 A. No, sir.

17 Q. The day before the accident?

18 A. No, sir.

19 Q. Did you smoke marijuana after the accident?

20 A. No, sir.

21 Q. Can you tell me the number of the times and the
22 dates that you saw Dr. Rosen?

23 A. I can't tell you that, sir.

24 Q. Can you tell me the date and time you went to see
25 the orthopedic surgeon?

1 A. No, sir.

2 Q. Where are you working now?

3 A. I'm working for a temp service, Hard Hat
4 Construction. I'm an electrician helper.

5 Q. After the accident, where did you go back to work?

6 A. Temp service.

7 Q. And have you done temp service work ever since, or
8 have you had periods where you've been employed directly
9 with the employer, some employer? You got it written
10 down?

11 A. No. I got something, you know, for my little work
12 history, like, from work, from '08 to now.

13 Q. Oh, good.

14 A. Like a little resume there.

15 MR. JOHNSON: I'd like to mark this. Have
16 you seen it?

17 MR. KEENAN: Uh-huh.

18 (Defendant's Exhibit No. 6 was marked for
19 identification and admitted into evidence.)

20 BY MR. JOHNSON:

21 Q. Looking at Defendant's Exhibit No. 6, is this a
22 record of where you've worked from the time to the
23 present?

24 A. Well, not from the present. I just got from '08
25 to 2013.

1 Q. Oh, okay. Why did you stop it there?

2 A. Well, this was done --

3 Q. This was done for another purpose?

4 A. Yeah, and I so happened to have found it at the
5 house.

6 Q. Good. But you've been gainfully employed?

7 A. I've been working, yes, sir.

8 Q. Since the time -- since you were released from the
9 doctors' care?

10 A. I've been working.

11 Q. In 2008, you've been working and being productive,
12 haven't you?

13 A. I've been doing my best.

14 Q. I want you to describe for me the movement of the
15 tent by you. The tent, as I understand it, was behind
16 the barn to start with.

17 A. I can't remember exactly where it was sitting at
18 when it happened, but I know we had to move it back,
19 like, two or three feet.

20 Q. Did you move it some distance initially?

21 A. Yes, approximately, like, 20 feet, 20 yards,
22 something like that there.

23 Q. And then you set it down.

24 A. Yes.

25 Q. And then why did you move it again?

1 A. Yes, and then from there --

2 Q. Did you stop a second time?

3 A. Yes, sir.

4 Q. And then after you stopped a second time, what
5 happened?

6 A. That's when they wanted us to move it a couple of
7 feet.

8 Q. And do you know what direction they wanted it
9 moved in?

10 A. No, sir.

11 Q. And when you moved it, picked it up then, that's
12 when the accident occurred?

13 A. Like the third pickup, short steps.

14 Q. You've never seen this photograph and what's shown
15 in this photograph, have you?

16 A. I've never seen it until today.

17 Q. All right. This shows the tent being tied down on
18 the corners, and do you know if the tent was in the same
19 place it was at when the accident occurred or whether
20 it's somewhere else?

21 A. I don't know, sir.

22 Q. No way for you to know that?

23 A. I don't remember none of that right now. I'm
24 sorry.

25 Q. Is the burns you received on your toe and your

1 chest?

2 A. Yes, sir.

3 Q. They were classified as second degree burns,
4 weren't they?

5 A. Yes, sir.

6 Q. You didn't have any third degree burns, did you?

7 A. No, sir.

8 Q. After the doctors had released you, you haven't
9 had any problems with any body part, have you?

10 A. Well, just my toe.

11 Q. Your toe?

12 A. That's it.

13 Q. In other words, your hands, your arms, your knees,
14 your feet, your hips, all those were working fine?

15 A. Yes.

16 Q. And there have been many good things in your life
17 that have made life a pleasure since this accident?

18 A. Yes, sir.

19 Q. Haven't they?

20 A. Yes, sir.

21 Q. You've married a fine woman?

22 A. I love her to death.

23 Q. You're involved in your church?

24 A. Yes.

25 Q. You and she enjoy travel and vacations?

1 A. Yes, we do.

2 Q. Trip taking?

3 A. Yes, sir.

4 Q. And there are many, many happy days in John
5 Robinson's life.

6 A. Yes, sir.

7 Q. Do you know of anyone at Berkeley who was there
8 that could have done anything to prevent the accident?

9 A. I don't know if Berkeley was there, sir.

10 Q. You don't know whether they were there or not.

11 A. No, sir.

12 Q. You don't know whether they had notice that y'all
13 were putting up tents or did not have notice?

14 A. I didn't know nothing about that, sir.

15 MR. JOHNSON: Let me check -- I may be
16 through.

17 Thank you.

18 MR. KEENAN: John, I don't have anything.

19 THE COURT: All right. You may step down.

20 MR. SMITH: Before we call our next witness,
21 I would like to address the motion we had made previously
22 regarding submission of the deposition from the
23 DNA tester of --

24 THE COURT: Let me ask you this: What is
25 your basis for denying these two girls from testifying,

1 the children of Mr. Fortney? You got a probate court
2 order that says they're the heirs, they're the children.
3 What's your basis for disputing that.

4 MR. JOHNSON: Well, in a wrongful death case,
5 always, as part of what I do, identify the beneficiaries.

6 THE COURT: And that's been done.

7 MR. JOHNSON: I then try to figure out
8 whether they are beneficiaries or not. Here, neither of
9 the girls --

10 THE COURT: Probate court has done that for
11 you.

12 MR. JOHNSON: Actually, I don't think they
13 did, Your Honor. There is a consent order, and --

14 THE COURT: Well, they're -- the sole heirs
15 of the decedent are Gina Fortney and Emma Fortney, so
16 what do you mean you don't think they are? That's been
17 settled. It says they're the sole heirs.

18 MR. JOHNSON: Judge, I don't think that order
19 would be res judicata or collateral estoppel.

20 THE COURT: Why?

21 MR. JOHNSON: Because it's a consent order.
22 It wasn't litigated. It's a consent.

23 THE COURT: Signed by a probate court judge.

24 MR. JOHNSON: They normally sign consent
25 orders, just like you do.

1 THE COURT: They still have the effect of
2 being an order.

3 MR. JOHNSON: It is an order, but it isn't
4 binding on us because we weren't a party.

5 THE COURT: Well, I disagree with you.
6 You've made your record. They can testify.

7 MR. JOHNSON: I understand, Your Honor.

8 (Court's Exhibit No. 1 was marked for
9 identification.)

10 THE COURT: All right?

11 MR. SMITH: Your Honor, could I proffer the
12 deposition of the DNA tester?

13 THE COURT: Yeah, you can. I mean, I'm
14 ruling that they are the heirs of law as a result of the
15 probate court order of Judge Kornahrens signed August the
16 6th, 2008, filed August the 8th, 2008: In the matter of
17 John William Fortney, Junior in the Probate Court of
18 Berkeley County, 2008-DS-08-264.

19 MR. JOHNSON: Your Honor, could I make this
20 one further point just for the record?

21 THE COURT: Sure.

22 MR. JOHNSON: I know you've ruled. I think
23 we found out that neither had a birth certificate showing
24 the name of their father.

25 THE COURT: That's not unusual.

1 MR. JOHNSON: Wasn't saying it is.

2 THE COURT: It's res judicata, as far as I'm
3 concerned. I don't know how to get around it, and to say
4 that it's a consent order and therefore not binding on
5 anybody is, well -- I don't get that every day.

6 MR. JOHNSON: Could I pull up the elements of
7 res judicata? Because once there is a litigation where
8 there is a determination --

9 THE COURT: It was litigated, but they
10 reached a consent on it.

11 MR. JOHNSON: But it wasn't any finding in a
12 proceeding. It is --

13 THE COURT: It was in that proceeding.

14 MR. JOHNSON: Well, you've ruled. I won't
15 argue anymore.

16 THE COURT: I mean, just because it was a
17 consent order, I don't understand how that's not
18 considered an order of the Court that people don't have
19 to follow.

20 I mean, if I sign an order that has come in
21 with a consent, I get people all the time that say, Hold
22 them in contempt of Court because they didn't follow that
23 order and it was consented to, you know?

24 It's a unique position that you're taking,
25 that you're not bound by it just because it was a consent

1 order? Is that the sole basis? Because it was an order,
2 and it was in the probate court, which has jurisdiction
3 to make that determination.

4 MR. JOHNSON: Your Honor, I believe in the
5 probate court, if you're going to have some hearing or
6 whatever, you have to give notice to all interested
7 parties, and if you don't give notice to all interested
8 parties, you know, what the Court does doesn't bind the
9 interested parties who have received no notice because
10 they didn't have the right to participate, or the notice
11 to participate.

12 There's nothing, I believe, in the probate
13 court file that my client was given any notice of that
14 hearing, or had a right to participate in it. If they
15 had, then I would agree 100 percent they were stuck with
16 whatever the outcome was, but there is something about
17 due process that says you got to have notice and a right
18 to participate.

19 THE COURT: Well, even if you had been
20 given -- I'm not sure if the probate court would have
21 even let a potential -- you wouldn't even have the basis
22 of being a creditor at that point, but a defendant in a
23 claim that the estate would have against somebody else,
24 that those parties would be allowed to come in and
25 participate, to challenge paternity. Maybe it would.

1 I'm not that familiar with how probate court works. I've
2 never had that issue come up, that I'm aware of.

3 I didn't ever do that when I was practicing
4 law, I never had that, so you might be right and I might
5 be wrong, but that's what we have appellate courts for,
6 so --

7 MR. SMITH: And, Judge, I'll proffer the
8 deposition as Exhibit 65.

9 (Plaintiff's Exhibit No. 65 was marked for
10 identification and admitted into evidence.)

11 THE COURT: All right.

12 MR. JOHNSON: Your Honor, I know you been
13 kind to let me argue, and I want to get it right, and I
14 know you do too. Res judicata has three essential
15 elements: The judgment must be final, valid and on the
16 merit. The parties to the subsequent action must be
17 identical to those in the first. And that's in a South
18 Carolina decision which would say to me there's been
19 adjudication on the merits. We have different parties.

20 THE COURT: Well, on the issue of who his
21 heirs are, I think it's binding on everybody. I can't
22 imagine that I could open up a proceeding and you
23 challenge that and I can come back seven years later and
24 tell the probate court, You know what? I disagree that
25 there are other heirs.

1 MR. JOHNSON: Assume for the minute there
2 were two parties to that action and there were ten
3 children, none of whom got notice.

4 THE COURT: There was a contested hearing.
5 There was -- originally somebody else was appointed
6 interim personal representative and then somebody else
7 challenged that, but as to that issue, it was contested.

8 It's just I don't think Berkeley Electric
9 Co-op, in somebody whose estate was going to sue, had
10 standing to probably challenge it in the first place.

11 MR. JOHNSON: Well, if we didn't have the
12 right to challenge it in the first place, it can't be --
13 I mean, we have to have a right to challenge it, don't
14 we? If we disagree --

15 THE COURT: I don't know that you do. That's
16 what I'm saying. I don't know that you do. In probate
17 court, you didn't have the right, but if you did, it's
18 long since passed, but you don't have the right to open
19 it now because seven years ago the probate court ruled
20 that Gina Fortney and Emma Fortney are the sole heirs of
21 John William Fortney Junior, and that is binding on this
22 Court and therefore on y'all.

23 That's the way I'm ruling. I may be wrong,
24 but we'll just roll with it. It's not a interlocutory
25 appeal, I'm not sure, so we won't have to hold up today

1 while you run to Columbia to file that.

2 So are we ready with your next witness?

3 MR. KEENAN: We sure are, Judge. Gina
4 Fortney.

5 GINA FORTNEY,
6 having been first duly sworn,
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. KEENAN:

10 Q. Gina, are you the daughter of the deceased, John
11 Fortney?

12 A. Yes, I am.

13 Q. And do you have any other siblings?

14 A. I do.

15 Q. And her name?

16 A. Emma Fortney.

17 Q. She's outside?

18 A. She is.

19 Q. You prefer to go first.

20 A. Yes, sir.

21 Q. So you could be in the courtroom for her.

22 A. Yes, sir.

23 Q. All right. And you're the older?

24 A. Yes, sir.

25 Q. Now, let me tell you where we're going. As the

1 beneficiary, we need to talk about things like the loss
2 of your father, loss of the companionship, any mental
3 suffering that you've had, any grief you've had or any
4 sorrow that you've had. Okay?

5 A. Okay.

6 Q. Are you prepared to do that?

7 A. Yes, sir.

8 Q. You will admit that there were times when you were
9 in the same household with Emma and times you weren't,
10 and then who was your caregiver and then who was her
11 caregiver can be a bit confusing, can't it?

12 A. Yes, sir.

13 Q. Can you help us out with that?

14 A. Sure. Where would you like me to start?

15 Q. Well, I'll tell you what. You need to start in
16 July of 1991. What is that date?

17 A. July '91? That's when I was born.

18 Q. When you were born?

19 A. Yes.

20 Q. That's where we'll start.

21 A. Okay.

22 Q. And we're going to do a timeline. We're going to
23 move pretty fast, but we want to make sure we got all
24 those elements we talked about, and you're the only one
25 that knows, okay?

1 A. Yes, sir.

2 Q. All right. Now, when you were born, where were
3 you born?

4 A. I was born in Las Vegas, Nevada.

5 Q. Who is your mama?

6 A. Julie Winterroth.

7 Q. And your daddy?

8 A. John Fortney.

9 Q. And you, on the birth certificate, are a Fortney?

10 A. Yes, sir.

11 Q. And that's never changed?

12 A. No, sir.

13 Q. Has it ever changed in your mind that you somehow
14 or another ever became something other than a Fortney?

15 A. No, sir.

16 Q. So we've got Julie and John in Las Vegas, but John
17 was not there when you were of an age where you could
18 know who people were?

19 A. No, sir.

20 Q. He wasn't?

21 A. No, sir.

22 Q. Now, do you know -- so at a point in time when you
23 developed as a child to knowing who Julie, your mom was,
24 and who John, your father was, he wasn't in the
25 household.

1 A. No, sir.

2 Q. Okay. Anybody else in that household?

3 A. Well, that gets a little complicated.

4 Q. I'm not talking cats and dogs.

5 A. I lived with my grandparents very often.

6 Q. Okay.

7 A. There were times when I lived with my aunts.

8 Q. Hold it right there.

9 A. Okay.

10 Q. Let's jump ahead some 15 years.

11 A. Okay.

12 Q. Almost at the end of 15 years, had you seen your
13 father yet in your life; that is, seen him like you're
14 seeing me right now?

15 A. I saw my father for the first time in June of '07.

16 Q. The year before he died?

17 A. The year before he died.

18 Q. Okay. Now, so we're going to put up June of '07,
19 sees John, the first time. Now, between July of '91
20 until almost your 16th birthday, did you pretty well live
21 with Julie, your mother?

22 A. Yes, sir.

23 Q. But she died?

24 A. Who?

25 Q. She died, your mother?

1 A. No. My mother did not die.

2 Q. Where did she go?

3 A. What do you mean?

4 Q. You were in Las Vegas, and then where did you go?

5 You don't have to exact with all these things, but you
6 moved around quite a bit?

7 A. Yes, sir. I think we came to Tennessee first.

8 Q. Okay.

9 A. And then we bounced between Tennessee and South
10 Carolina. We moved to Florida one time.

11 Q. Okay. Tennessee, South Carolina, and Florida.
12 All with Julie?

13 A. Yes.

14 Q. Your mom?

15 A. Yes.

16 Q. Tell the judge, please, was it the T-shirt or the
17 sweatshirt when you were small?

18 A. It was a T-shirt.

19 Q. Okay. And what did it say?

20 A. It had -- like, it was like a train card and it
21 had, these -- it had circus animals.

22 Q. And where did you get it? Take your time, now.
23 We're not in a hurry.

24 A. I'm sorry.

25 Q. No, you're not sorry. Don't be sorry.

1 A. My mother had told me that my father had bought it
2 for me when I was a baby.

3 Q. You believe her?

4 A. Oh, yeah.

5 Q. So that was a gift from your father, John.

6 A. Yes.

7 MR. JOHNSON: I'm going to strike as hearsay.

8 THE COURT: Overruled.

9 BY MR. KEENAN:

10 Q. Now, how long did you wear that T-shirt with the
11 circus animals on it given to you by your dad? How long
12 did you wear that thing?

13 A. Until the time I was five.

14 Q. Every night?

15 A. Every night to bed. It was my favorite shirt.

16 Q. Did you grow out of it?

17 A. I did, probably about the time that I was four.

18 Q. Okay. Now, you outgrew it, but you still put it
19 on up until the time you were five. Only you can answer
20 this.

21 A. Yes, sir.

22 Q. What did it mean to you and why did you wear it?

23 MR. JOHNSON: Your Honor, I object. We're
24 dealing with the damages that are by statute in a
25 wrongful death case. This T-shirt thing that occurred

1 years before can't be relevant to whatever damages she
2 suffered or claims to have suffered.

3 THE COURT: Where are you headed with this?

4 MR. KEENAN: I need to establish and the law
5 requires me to establish what relationship they had
6 before it ended so the Court will at least know how to
7 compare what she now doesn't have.

8 MR. JOHNSON: Your Honor, I don't believe the
9 law requires it or allows damages for wrongful death are
10 very well-known. They're intangible damages.

11 MR. KEENAN: Your Honor, there's sorrow --

12 THE COURT: Overruled. Go ahead.

13 BY MR. KEENAN:

14 Q. Why did you wear it?

15 A. Because it was special to me.

16 Q. Now, during this 15 years that you had never laid
17 eyes on your dad, what was your hope?

18 A. That I would get the chance to lay my eyes on him.

19 Q. Were you angry at him sometimes. Well, bring us
20 forward. We're getting close to lunch, but we don't want
21 to speed things up.

22 Tell the Court the circumstances that brought
23 about the first time seeing John shortly before his
24 death. What happened?

25 A. I decided it was time for me to know my dad, and I

1 had contacted one of my father's sisters first, and she
2 put me in contact with one of the other sisters who put
3 me in contact with another sister who my dad was living
4 with in Florida.

5 And when I spoke with my Aunt Kelly, which is the
6 sister that he was living with, she gave me his phone
7 number. And I had his phone number for a few days, and I
8 waited --

9 Q. May I ask you this first?

10 A. Okay.

11 Q. When did you first know -- because you hadn't seen
12 you father up to this time, when did you first know you
13 had a sister?

14 A. When I was 13, 13; yes, sir.

15 Q. But you hadn't seen her?

16 A. No, sir.

17 Q. Okay. All right. Take us then -- did you get the
18 number?

19 A. I got the number.

20 Q. How long did it take you to get the courage to
21 call him?

22 A. About a week.

23 Q. And then what did you do?

24 A. I hit the send button one day. I made the phone
25 call, and he answered it.

1 Q. And then what happened?

2 A. I --

3 Q. Take your time.

4 A. That's okay. I told him who I was, and I
5 didn't -- I decided to call him John, and, you know, I
6 told him that my name was Gina and that I was his
7 daughter. And he laughed, and he said, I know who you
8 are, and he told me that he --

9 MR. JOHNSON: Objection. Hearsay.

10 THE COURT: Overruled.

11 THE WITNESS: He didn't think he would ever
12 get that phone call from me.

13 BY MR. KEENAN:

14 Q. Did y'all arrange a time to meet?

15 A. Not at first.

16 Q. Okay. How did it come about that you were
17 meeting? Now, by the way, tell the Court where you were
18 living at the time. In South Carolina?

19 A. I was living in Ladson, South Carolina, yes, sir.

20 Q. And your dad was in Jacksonville?

21 A. Yes, sir.

22 Q. Okay. And then there came a time when you decided
23 to meet?

24 A. Yes, sir.

25 Q. Okay. Now, if my math is correct, you're getting

1 pretty close to that 16th birthday.

2 A. Yes, sir.

3 Q. All right. And what did you do?

4 A. What did I do what?

5 Q. You met him?

6 A. Yes, sir.

7 Q. And how did that go?

8 A. It went pretty well.

9 Q. Was it what you thought?

10 A. It was a little awkward at first.

11 Q. Okay.

12 A. Almost like sitting in a room with a stranger, but
13 it was nice.

14 Q. What was nice about it?

15 A. My dad was a really fun guy and told really
16 inappropriate jokes all the time and things that just
17 weren't appropriate for my little sister, to be
18 completely honest.

19 Q. Be honest. That's what we want.

20 A. But it was funny. It was interesting. It was
21 everything that I had wanted.

22 Q. Everything you wanted?

23 A. Yes.

24 Q. Let's figure out -- we obviously know the April
25 2008 date of death for your father.

1 A. Yes, sir.

2 Q. When did you first connect, that is, being in the
3 same room?

4 A. With my father?

5 Q. Uh-huh?

6 A. It was Father's Day weekend.

7 Q. Of what year?

8 A. Of 2007.

9 Q. All right. Help me. What month is Father's Day?

10 A. That's June.

11 Q. June of '07?

12 A. Yes, sir.

13 Q. And so you first met in June of '07. You see John
14 for the first time?

15 A. Yes, sir.

16 Q. And then we know about April 2008.

17 A. Yes, sir.

18 Q. Let than a year.

19 A. Yes, sir.

20 Q. Tell the Court about that less than a year, from
21 April of '07 until John's death; June of '07 to his death
22 in April. How often did you see him? What did you do,
23 and what did it mean to you?

24 A. I saw him every day for about three months. We
25 would go to the park together. We would play football

1 and oversized Frisbees. Sometimes we would just stay
2 home and play video games. Dad would find ways to get on
3 our nerves.

4 Q. Did he ever speak poorly to you ever other than
5 these bad jokes he should not have been telling?

6 A. No, sir.

7 Q. Did he ever scream at you?

8 A. No, sir.

9 Q. Did he ever spank you?

10 A. No, sir.

11 Q. Did he ever discipline you in any way?

12 A. No, sir.

13 Q. Is there one particular time during this period
14 that you were frequently seeing him that stands out as
15 telling you that the wait was worth it?

16 MR. JOHNSON: I'm sorry. Could you ask that
17 last part? I didn't hear it.

18 BY MR. KEENAN:

19 Q. I don't know if I can. I think I said was there a
20 particular time, place, event where it said to her that
21 the wait was worth it.

22 MR. JOHNSON: Oh, okay.

23 BY MR. KEENAN:

24 Q. Got it? Did you understand the question?

25 A. I don't think that I do. I think that I think

1 every day that I have with my dad was special to me. I
2 can't remember a time or a place where something
3 extraordinarily special was happening, but all the time I
4 had him was special. I'm sorry.

5 Q. Don't be sorry. Tell us about your birthday, your
6 16th birthday, with your father.

7 A. With my father? It wasn't -- it wasn't anything
8 special. It wasn't a big birthday party. It wasn't a
9 big shebang, but we had a bunch of friends come over,
10 and, you know, we all hung out around the house and
11 laughed and we had a huge cake fight and --

12 Q. Somebody pushed cake in your face?

13 A. Somebody did.

14 Q. Who was the somebody? Who was it?

15 A. It was my dad.

16 Q. Okay. Gina, let me cut this short. Let me get
17 you a couple more questions and then we'll -- are you
18 okay? All right. Where were you when you found out that
19 your dad died?

20 A. I was at my -- I was living with my sister at the
21 time.

22 Q. Emma?

23 A. No, my sister Lacey.

24 Q. Your sister Lacey. And you knew you were never
25 going to see him again?

1 A. Yes, sir.

2 Q. Okay. Now, at 16, during that time that you're
3 seeing him that you've described, what were your hopes
4 about the role that your father would have in your life?
5 What were you looking forward to?

6 MR. JOHNSON: Your Honor, I object. That's
7 not an element of damage under the law.

8 THE COURT: Overruled.

9 BY MR. KEENAN:

10 Q. Gina, what were you looking forward to?

11 A. That is a -- that's a hard question to answer. I
12 think I was just looking forward to him being there. I
13 can't specify a role that I wanted him to play, because I
14 didn't know what it was like to have a father, so I
15 didn't know what the role was to play.

16 Q. Okay. Well, now, I should have mentioned this
17 earlier. You're a mother?

18 A. I am.

19 Q. You have two children?

20 A. I do.

21 Q. What are their names and how old are they are?

22 A. Riley and Ryder, and they are six and three. My
23 daughter is the oldest.

24 Q. And are you married?

25 A. I am not.

1 Q. You're not married.

2 A. No, sir.

3 Q. Do you ever think about the role that John would
4 play as a grandfather?

5 A. I do.

6 MR. JOHNSON: Objection, Your Honor. Not an
7 element of damage.

8 THE COURT: Overruled. Loss of society and
9 companionship.

10 MR. KEENAN: Thank you, Your Honor.

11 BY MR. KEENAN:

12 Q. What role would you want him to have?

13 A. I really think my dad would have made a great
14 granddad. I think that he would really adore my son
15 because he never had any, and I think that he would
16 really enjoy my daughter because she is so smart. I
17 really think he would enjoy those things.

18 Q. Now, are you familiar with texting?

19 A. I am.

20 Q. Are you a texter?

21 A. I am.

22 Q. Are you a Twitterer?

23 A. No.

24 Q. What is the other one, Instagrammer?

25 A. Not really.

1 Q. Well, I want to show you what's been marked as
2 Plaintiff's Exhibit 49 from a Motorola phone dated April
3 the 18th, 19th, 20th, 21st, 23rd -- five days before John
4 passed. Okay? Is this your cellphone, or one you're
5 familiar with?

6 A. The number or --

7 Q. Yeah, yes. It is?

8 A. The number is.

9 Q. And you're familiar with it?

10 A. Yes, sir.

11 Q. And can you take a look at the first of 49 and
12 verify you have personal knowledge of that and that is
13 yours.

14 A. It actually wasn't mine. It was actually my
15 mother's phone.

16 Q. Okay. Well that -- and it's 49, Your Honor. It
17 is 49.

18 A. Yes.

19 Q. What kind of reaction was your mother having with
20 your growing closer with John, your dad?

21 A. What kind of reaction was my mother having?

22 MR. JOHNSON: Objection, Your Honor. Her
23 mother, whether her reaction was good or bad, isn't
24 relevant to the loss suffered.

25 MR. KEENAN: Your Honor, it has everything to

1 do with her access to this cellphone.

2 THE COURT: Relationships are complicated.
3 This goes to loss of companion and deprivation of loss of
4 society, so I'll let it in.

5 BY MR. KEENAN:

6 Q. So this was your mama's cellphone that you used?

7 A. Yes.

8 Q. Was she happy about your father entering your life
9 again, or for the first time?

10 A. She was happy for me at first.

11 Q. At first.

12 A. At first.

13 Q. Did that change?

14 A. It did.

15 Q. How?

16 A. There was a --

17 Q. Would you rather not talk about this?

18 A. It's okay.

19 Q. Are you sure?

20 A. It's okay. There was a big fight between my
21 parents, and then my mother wasn't so happy about my
22 relationship with my father anymore.

23 Q. But you got access to the phone.

24 A. I did.

25 Q. And let me show you the second page. Your Honor,

1 it's the next page down.

2 Is that message from you or from your dad? Take
3 your time, and this is right at the end.

4 A. The text message was from my dad.

5 Q. Right before his death.

6 A. Yes, sir.

7 Q. And read into the record. It will be marked as an
8 exhibit and moved. What does it say?

9 A. It says, Your dumb dad loves you, kid.

10 MR. KEENAN: That's all I'm going to ask you
11 about. Is that okay?

12 THE WITNESS: That's fine.

13 MR. KEENAN: Okay. Your witness.

14 CROSS-EXAMINATION

15 BY MR. JOHNSON:

16 Q. You tell me when you're ready.

17 A. I'm ready.

18 Q. Okay. What happened, this being the big fight,
19 was about a month or so before your father's death, he
20 beat your mother fairly severely and got arrested and
21 charged with the crime, correct?

22 A. I think it was a little -- it was more than a
23 month, but yes, sir, that's what happened.

24 Q. And your father was a big man, wasn't he?

25 A. He was.

1 Q. I'm going to show you these pictures and see if
2 you can identify who is in these pictures. Do you
3 recognize this?

4 A. That's my father.

5 MR. JOHNSON: And I would offer these into
6 evidence.

7 MR. SMITH: Inmate data sheet?

8 MR. JOHNSON: It's coming in.

9 MR. SMITH: Why?

10 MR. JOHNSON: Your Honor, we would offer
11 these three documents into evidence.

12 THE COURT: What are they?

13 MR. JOHNSON: Pictures. There's an inmate
14 data sheet with two pictures on it, two pictures of
15 Mr. Fortney.

16 THE COURT: Do you think you can get them in
17 through her?

18 MR. JOHNSON: Yes.

19 THE COURT: How? What's the basis?

20 MR. JOHNSON: She's testified she recognized
21 her father's picture.

22 THE COURT: Go ahead.

23 BY MR. JOHNSON:

24 Q. Now, your mother, I'm going to show you some
25 photographs and ask if you recognize these photographs as

1 showing pictures of your mother after the altercation.

2 A. I do recognize her.

3 Q. And do those photographs show some of the facial
4 injuries she suffered as a result of being beaten by your
5 father?

6 A. Yes, sir. Yes, sir.

7 MR. JOHNSON: Offer these --

8 MR. SMITH: Pope, could I see those? Were
9 all these provided to us?

10 MR. JOHNSON: In the solicitor's file. Any
11 objection?

12 MR. SMITH: Do your thing, Pope.

13 (Defendant's Exhibit Nos. 7, 8, and 9 were
14 marked for identification and admitted into evidence.)

15 BY MR. JOHNSON:

16 Q. Your mother, what size lady is she? How tall is
17 she?

18 A. She's about five-five.

19 Q. And what does she weigh?

20 A. I would say about 230.

21 Q. And your father, you said, is how tall, was how
22 tall?

23 A. He was about six -- in the six foot area
24 somewhere. I don't know his exact height.

25 Q. And his weight?

- 1 A. I would say in the 250 area.
- 2 Q. All right. Now, who was your father living with
- 3 at the time of the fight?
- 4 A. He was living with my mother and me.
- 5 Q. And how long did y'all live there together?
- 6 A. It was only, like I said, for about three months.
- 7 Q. And is that the only time you lived with your
- 8 father?
- 9 A. Yes, sir, as far as I know.
- 10 Q. And had you met your sister, or your half-sister,
- 11 Emma, during this time frame?
- 12 A. Yes, sir.
- 13 Q. Now, you have another half-sister too, don't you?
- 14 A. I do.
- 15 Q. What is her last name?
- 16 A. Lacey Winterroth.
- 17 Q. She's the oldest of the three of you, correct?
- 18 A. Lacey is my half-sister on my mother's side.
- 19 Q. Do you have a half-sister on your father's side?
- 20 A. I do.
- 21 Q. What's her name?
- 22 A. Misty Brunmeier.
- 23 Q. And is she older or younger than you?
- 24 A. She's older.
- 25 Q. Did your father give up his parental rights to

1 that child?

2 A. He did.

3 MR. JOHNSON: No other questions, Your Honor.

4 THE COURT: Redirect?

5 MR. KEENAN: Gina -- May it please the Court:

6 REDIRECT EXAMINATION

7 BY MR. KEENAN:

8 Q. Gina, you were living with your mother and father
9 when the fight occurred?

10 A. I was.

11 Q. Do you know what it was about?

12 A. No, sir.

13 Q. All right. Now, do you excuse your dad from that?

14 A. Absolutely not.

15 Q. Absolutely not?

16 A. No, sir.

17 Q. All right. Now, what role, if any, from your
18 vantage point did your mother play in provoking or
19 aggravating or in any way having an influence on that?

20 A. I wasn't there that night, so I can't say for
21 sure.

22 Q. All right. What about the past? Had you ever
23 seen your mother provoke, aggravate?

24 A. Domestically violent? I'm sorry. I didn't mean
25 to cut you off.

1 Q. You have?

2 A. I have, yes, sir.

3 Q. Do you excuse her from provoking and aggravating?

4 A. Absolutely not.

5 Q. All right. Now, think about this, please, because

6 this is my last question. You know that about your dad?

7 A. I knew about him abusing my mother? Is that

8 what --

9 Q. Yes.

10 A. Yes, sir.

11 Q. Why would you want him in your kids' lives? Why

12 would you want him in your life? Why?

13 A. Because people do really stupid things and people

14 make really bad choices, but my dad didn't hurt me the

15 same way my mother never hurt me, and I still love my

16 mother. That doesn't mean that his actions were

17 acceptable. It doesn't mean that what he did was okay,

18 but what he did wasn't unforgiveable.

19 Q. All right. Now, you are graduating from school

20 pretty soon, aren't you?

21 A. I am.

22 Q. You're going to be a pharmacist some day?

23 A. No.

24 Q. What are you going to be?

25 A. I'm not sure.

1 Q. Forensic pathologist, maybe?

2 A. Maybe.

3 Q. Maybe a lawyer?

4 A. Maybe a lawyer.

5 MR. KEENAN: Thank you. That's all the
6 questions I have, Your Honor.

7 THE COURT: Recross?

8 MR. JOHNSON: Nothing further, Your Honor.

9 THE COURT: Nothing? All right. You may
10 step down.

11 MR. KEENAN: Your Honor, our witness -- I
12 would not want to break. Could we go to lunch now and
13 then --

14 THE COURT: Okay. Well, let's come back --
15 let's see. Let's do 1:15. I got to run a short errand,
16 but I should be back by 1:00, but just to be safe, 1:15.
17 Okay?

18 (Recess taken.)

19 A F T E R N O O N S E S S I O N

20 THE COURT: Okay. Got your next witness
21 ready?

22 MR. KEENAN: Yes, Your Honor. The last live
23 witness will be Emma.

24 THE COURT: All right.

25 EMMA FORTNEY,

1 having been first duly sworn,
2 was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. KEENAN:

5 Q. And, Emma, can I get a glass of water for her?
6 Okay. We hope not to have you here too long. Is that
7 okay with you?

8 A. Yes.

9 Q. What name is on your birth certificate?

10 A. Emma, my mother's name, Kinlaw Lewis, and, of
11 course, mine.

12 Q. And what is your name?

13 A. Emma Fortney.

14 Q. So Fortney is on your birth certificate?

15 A. Yes.

16 Q. Like from day one?

17 A. Correct.

18 Q. Okay. Now, I'm going to use this same me up here
19 that we've got -- you know this person here, Gina, don't
20 you?

21 A. Yes. That is my sister.

22 Q. Your sister. Okay. And it's two Ms; is that
23 correct?

24 A. Correct.

25 Q. E-m-m-a. Okay. Now, do you see where on your

1 sister's -- we call these things timelines so we can see
2 what happened first, what happened second. Okay? And
3 your date of birth would be April --

4 A. 1997.

5 Q. Okay. How old does that make you?

6 A. Eighteen today.

7 Q. Not today, but that's not your birthday?

8 A. No, today's not my birthday.

9 Q. You got to settle down a little bit. It can be
10 your birthday if you want it to be.

11 Now, you see here, we have your sister not meeting
12 your father for about 15 years. Are you okay?

13 A. Yeah.

14 Q. What do you think?

15 A. I'm just nervous.

16 Q. I'll tell you, we got a bunch of stuff for you.
17 See that water? All you got to do is take a sip, and
18 then you got a Kleenex, but the best thing is to just to
19 take a breath and hold your hands, okay? Good for you.
20 At any time that you want me to stop, I will, okay?
21 Deal?

22 A. Deal.

23 Q. Okay. Where was I?

24 I was where your sister had not seen your father
25 for her first 15 years of life. Now, that's not true of

1 you?

2 A. No.

3 Q. Where were you born?

4 A. In Las Vegas.

5 Q. All right. And when you were born, Gina was not
6 around?

7 A. No.

8 Q. Not at all?

9 A. Huh-uh.

10 Q. When did you first find out you had a sister, when
11 you had a Gina in your life?

12 A. It was not until after my mom had passed away and
13 my dad and I moved to Florida and he got reconnected with
14 Gina, and that's when he told me. He actually put me on
15 the phone with her, and so that's how I found out who she
16 was.

17 Q. Good. Now, this timeline moves forward from the
18 date of your birth until, of course, maybe today, but at
19 ten, ten years -- which would have been what, 2007; is
20 that right?

21 A. Yes.

22 Q. Your mom, and what was her name?

23 A. Kim.

24 Q. Kim, and John your father, were living together
25 during this time; is that right?

1 A. Yes.

2 Q. With you in the house?

3 A. Yes.

4 Q. Every day, right? Now, your mom passed?

5 A. She did, in 2006.

6 Q. And what were the circumstances? And you don't
7 have to give us a lot of details.

8 A. She was sick. She had breast cancer.

9 Q. And do you know what the word remission means when
10 it comes and goes?

11 A. Yes. For a period of time she was in remission.

12 Q. She had a couple where she was okay?

13 A. And then she relapsed.

14 Q. Relapsed and then it finally got her.

15 A. Yes.

16 Q. And how old were you?

17 A. When she finally --

18 Q. When she finally passed?

19 A. I was nine.

20 Q. Nine. Okay. But John was still in your life.

21 A. Yes.

22 Q. Can you give the Court about how long it was that
23 your mom suffered under the cancer, when it started, when
24 it went me remission, back and forth? How long did it
25 last?

1 A. About four years.

2 Q. Four years.

3 A. And she had been in remission for a year when they
4 found it was back, the last time.

5 Q. All in Las Vegas?

6 A. Yes.

7 Q. All with John in your life?

8 A. Yes.

9 Q. Did you see him helping her?

10 A. All the time.

11 Q. All the time?

12 A. Yes. My dad was --

13 Q. Was what?

14 A. The caretaker.

15 Q. The caretaker. All right. And so we come to you
16 and your dad. What did you call him, by the way?

17 A. Dad, daddy.

18 Q. And where did you and daddy go, after your mom
19 passed?

20 A. We moved to Florida, about two months after.

21 Q. Pretty quick.

22 A. Yeah, definitely.

23 Q. Okay. And at ten, did you know what was going on?
24 Did you know you lost your mother and you were going
25 across the country with your dad?

1 A. I mean, I knew the plan. I definitely -- I mean,
2 I knew what took my mother and how she died and I
3 understood that. I mean, I didn't understand why we were
4 picking up and moving away from Las Vegas where I had
5 lived my entire life, but I knew we were.

6 Q. And you were going to what state?

7 A. Florida.

8 Q. And were you going to a particular family member
9 in Florida?

10 A. My dad's sister Kelly, my Aunt Kelly.

11 Q. And there is a lot of kinfolk in Florida, right?
12 Linda?

13 A. Yes.

14 Q. Right? Linda is actually -- you're actually
15 living with --

16 A. My Aunt Linda.

17 Q. Y'all got a close relationship?

18 A. Definitely.

19 Q. Can you tell the Court, from the time -- I used my
20 finger so you don't have to worry about it, if you don't
21 have to. From the time your mom died until John was
22 taken away in April of '08, how many months?

23 A. Thirteen? 13 plus four -- 15 months then, from
24 December to April?

25 Q. 2006 in December?

1 A. Yes.

2 Q. Until -- because we had up there '07, but it's '06
3 then?

4 A. Yes.

5 Q. Okay.

6 A. When my mom passed.

7 Q. And two months later, you moved to Florida, and,
8 not too long after, John died?

9 A. Right.

10 Q. Right? And we think that period in Florida was
11 about 14 months, 15 months?

12 A. I lived in Florida for -- not that full time.

13 Q. Okay.

14 A. We moved to Florida with my Aunt Kelly. We stayed
15 there for probably about six months, and then we moved to
16 South Carolina with Gina and her mom, Julie.

17 Q. Under the same roof?

18 A. Yes.

19 Q. How long did y'all stay there?

20 A. Until the time of his death, so -- so --

21 Q. So how long would it have been that you would have
22 had John in your life and Gina in your life in the same
23 room, in the same house, a couple months?

24 A. Probably, like, four, around there, yeah.

25 Q. How would you categorize the relationship you had

1 with your father?

2 A. A lot of things come to mind, but, I mean --

3 Q. Take your time. We're in no hurry. We've waited
4 a long time. Don't be sorry.

5 A. A loving relationship.

6 Q. A loving relationship? Okay. What else?

7 A. Playful.

8 Q. We heard something about inappropriate jokes; is
9 that true?

10 A. Yes.

11 Q. Okay. What else?

12 A. He did father-like things. I don't know how to
13 explain that relationship, but, I mean, he was my dad.

14 Q. All right. Have you heard the terms, Emma, a
15 promise keeper or a promise breaker?

16 A. Uh-huh.

17 Q. Was your dad a promise breaker?

18 A. Absolutely not.

19 Q. So tell us, what was he?

20 A. I mean, if my dad told me that we were going to
21 get slushies after school, we were going to then. If he
22 was going to take my friends and me somewhere, then we
23 would -- I mean, that's what happened. It wasn't just
24 something that he told me. I could count on him to do
25 that.

1 Q. And he did it?

2 A. Yes.

3 Q. But in the end, there was something pretty big
4 that he promised. Tell the judge.

5 A. That --

6 MR. JOHNSON: Your Honor, that would be
7 hearsay.

8 THE COURT: Hold on. Go ahead with.

9 THE WITNESS: That he was -- that we were
10 going to be a family again. That we would be living
11 together again soon.

12 BY MR. KEENAN:

13 Q. But your father had to get some stuff in order.

14 A. Right.

15 Q. Some things we're not proud of, right?

16 A. Correct.

17 Q. So he wasn't able to fulfill that promise, because
18 he died. Okay. Then where did you go?

19 A. Then I moved in with Gina's Aunt Karen.

20 Q. And that was in -- forgive me. Is that
21 Jacksonville? Where is that?

22 A. That's still in South Carolina, for a short time
23 after.

24 Q. And then when is it that you went to Linda's in
25 Jacksonville?

1 A. Well, I lived with my sister for a short amount of
2 time, and then I went out -- I came to Florida for the
3 summer and I ended up staying with my Aunt Linda.

4 Q. And right now, you're in high school?

5 A. I'm in my first year of college.

6 Q. First year. You graduated from school.

7 A. Yes.

8 Q. Not a GED. You graduated.

9 A. Yes.

10 Q. You were a cheerleader?

11 A. I was.

12 Q. All right. And tell the judge, what is your
13 career path? If we're to take this line out to see Emma
14 Fortney graduate --

15 MR. JOHNSON: Your Honor, I object. It would
16 be speculative and it's irrelevant to the claim.

17 MR. KEENAN: What's her future life without
18 her father, Your Honor?

19 THE COURT: Overruled. Go ahead.

20 BY MR. KEENAN:

21 Q. Emma, what are you going to be when you graduate?

22 A. I want to go to pharmacy school and get a
23 PhD eventually and hopefully work as a pharmacist
24 somewhere, eventually.

25 Q. Okay. Let me show you some things. I asked you

1 to go through some photographs. Do you remember that?
2 Do you remember that? Okay. Well, I'll tell you what,
3 if you just -- I'm not going to hurt you. You just stand
4 right by me. You're not afraid of me, are you?

5 A. No.

6 Q. Now, if you would, if you would, could you tell
7 the circumstances because the judge has seen some
8 pictures, but he hasn't seen these.

9 A. Okay.

10 Q. What is this picture here?

11 A. So that's when my dad and I were living at my Aunt
12 Kelly's, and he was actually getting ready to go to work
13 that day. It was before I had met Gina, and my cousin
14 Haley and I were, like, playing in the kitchen, but you
15 can't really see, but I have a monkey on my shirt. We
16 were just taking pictures.

17 Q. And what is this? Are you a fisherman?

18 A. Well, not really, but I tried.

19 Q. Where are you?

20 A. This is me right here.

21 Q. Oh, my goodness, really.

22 A. I think my dad was actually taking this picture.

23 Q. And what body of water is that?

24 A. We were in Daytona.

25 Q. Okay. More water. Where is that?

1 A. That is in Daytona again, at the beach.

2 Q. Where are you?

3 A. That's my dad holding me.

4 Q. Okay. You got a phone?

5 A. Yes.

6 Q. Your phone?

7 A. This was my phone, yes. Well, this was my dad's
8 phone, but --

9 Q. Your dad's phone?

10 A. Yes.

11 Q. How did you get it?

12 A. Well, I think Gina actually had it.

13 Q. And then gave it to you. How did you get the
14 ability to text on here? Some of these were written by
15 you, correct?

16 A. Okay. So for a short period of time, I was using
17 Gina's Aunt Karen's phone to text my dad back and forth,
18 and then I eventually did get my own phone.

19 Q. So whoever's phone it was, you've looked through
20 all these, true?

21 A. Yes.

22 Q. And you have personal knowledge of all of them?

23 A. Yes.

24 Q. And -- okay. You were involved in these
25 discussions. Okay. Now, can you read, if you will, 35.

1 A. Dad, I love you. I can't talk to you. You're
2 dead. I miss you. I don't think you are, but it's true.
3 I miss you.

4 Q. You're dead. What were you talking to him that
5 way for? Was this a joke?

6 A. Well, I wish it was, but --

7 Q. So this was sent after he died?

8 A. Yes.

9 Q. You said, Dad, I love you, but I can't talk to you
10 because you're dead. I miss you. I don't think you are
11 dead, but it's true. I miss you so.

12 How old were you when you sent this?

13 A. I would have been ten, or -- yeah, just turned
14 ten.

15 Q. Okay. We're going to go through these quick, so
16 just keep taking deep breaths, all right?

17 A. Okay.

18 Q. And this one.

19 A. Dad, where are you and are you dead? That's my
20 signature, but it says love.

21 Q. And he was dead.

22 A. Yes.

23 Q. Why did you send this?

24 A. I guess it was just kind of unreal. Like -- I
25 don't know. I wish there was a response.

1 Q. You knew there would not be?

2 A. No.

3 Q. You knew?

4 A. Right.

5 Q. But is this giving you comfort? Is it making you
6 understand or --

7 A. I mean, I mean, I don't really remember where my
8 head was at.

9 Q. Once again, if you could --

10 A. Don't think I was mad at you. My phone would not
11 go on. I know you are dead, but I can't get over it. I
12 miss you so.

13 Love you too, so much more than you think, and
14 that was from my dad.

15 Q. From your dad? Okay. Now, what's the
16 significance of this when he says love you so much, more
17 than you think?

18 A. I used to love getting those text messages from
19 him.

20 Q. How often did you?

21 A. Daily.

22 Q. Daily? Really?

23 A. Often.

24 Q. And this one?

25 A. Good night, my treasure. Call me in the morning.

1 Love you. I really -- I hope you really know I'm
2 sending, and then --

3 Q. Okay. Stubby fingers?

4 A. I'm sending you, Gina, Karen, and Steve money
5 tomorrow. You are the king. Call me. I will make the
6 time.

7 Q. And the treasure was referring to you?

8 A. Yes.

9 Q. You were his treasure?

10 A. He had a lot of nicknames for me like that.

11 Q. Okay. Now, is that you or is that him sending
12 you --

13 A. That's him sending it to me, telling me good
14 morning.

15 Q. It's short. Was that significant?

16 A. Yes. I mean, he was thinking about me.

17 Q. That's what I meant:

18 Emma, your picture is my phone's wallpaper. Thank
19 you. How did your ball game go?

20 Did you already know that, that you were his
21 wallpaper?

22 A. Yeah.

23 Q. Okay.

24 A. Daddy loves you.

25 Q. That's it?

1 A. Uh-huh. Emma, daddy loves you. Dad thinks you
2 are the best. I don't know why he talked in third
3 person, but --

4 Q. Even today you're smiling when you read these.

5 A. It's bittersweet. Dad loves you. You got to go
6 to sleep. Call me in the morning. Love you so much than
7 I know how to say.

8 Q. But he did say. He told you all the time. Just
9 about two more.

10 A. I love you, Junior.

11 Q. To Emma?

12 A. Love you again.

13 Q. And, Emma, can you help me with that?

14 A. Emma, love you.

15 Q. You can have a seat.

16 Emma, you told me there are times when you're
17 really happy. Remember telling me that?

18 A. Absolutely.

19 Q. But you feel really, really guilty when you're
20 feeling happy.

21 A. Sometimes.

22 Q. Why are you feeling guilty, girl?

23 MR. JOHNSON: Objection. Relevance.

24 MR. KEENAN: Your Honor, it has every bearing
25 on her life forward without her dad.

1 MR. JOHNSON: Guilt isn't a damage that can
2 be recovered under the wrongful death statute.

3 MR. KEENAN: This is mental anguish. This is
4 loss of companionship. This defines who this man was in
5 her life.

6 THE COURT: Overruled. Go ahead.

7 BY MR. KEENAN:

8 Q. Why do you feel guilty?

9 A. I mean, maybe not guilt so much, but if he were
10 here to see it, it would be --

11 Q. Take your time.

12 A. It would be easier for me to be happy if he could
13 see it too, like me graduating or --

14 Q. Okay. Now, last question. I want you to be
15 really honest about this, all right? Why has it been
16 said of you that you're like the ticking time bomb? I'm
17 serious. Why do they say that?

18 MR. JOHNSON: Could you repeat the question?
19 I couldn't hear you.

20 MR. KEENAN: Whoa do some people say she's a
21 ticking time bomb.

22 MR. JOHNSON: Objection. Relevance.

23 THE COURT: I'm not really sure what that
24 means.

25 MR. KEENAN: I think you'll hear it, Judge.

1 THE COURT: Go ahead.

2 THE WITNESS: Probably because I don't
3 necessarily express to people how I feel. I just keep
4 that to myself. Some people probably expect me to be
5 angry or upset.

6 BY MR. KEENAN:

7 Q. About your dad not being around?

8 A. Yeah, yes.

9 Q. But you keep it in?

10 A. Yes.

11 Q. Don't express it.

12 A. Huh-uh. A few people, like my Aunt Linda, but
13 it's not something that I want to talk about with friends
14 or --

15 Q. But, Emma, he's been gone a long time now. Do you
16 still feel that way?

17 A. Yeah. Yes, I mean, I like to talk about memories
18 of him, but not how I feel about him not being here.

19 Q. But you have those feelings.

20 A. Yes. Every day.

21 Q. Every day? But you don't want to tell other
22 people.

23 A. (Shakes head.)

24 MR. KEENAN: Your witness.

25 CROSS-EXAMINATION

1 BY MR. JOHNSON:

2 Q. Emma, could you tell me -- I think counsel started
3 but didn't finish. You were born in Las Vegas?

4 A. Correct.

5 Q. And were you living with your parents, your mother
6 and father --

7 A. Yes.

8 Q. -- then? And you left Las Vegas when? I mean,
9 how old were you when you moved away from Las Vegas?

10 A. I was nine.

11 Q. And where did you go?

12 A. To Jacksonville, Florida, to live with my Aunt
13 Kelly.

14 Q. The period you were in Las Vegas, were you moving
15 frequently?

16 A. With my mom and dad, yes. We did move around a
17 bit.

18 Q. Did you live with my other family members during
19 any of that time?

20 A. For about a year, when I was six years old, I
21 moved in with my grandma Susan and Aunt Kim when my mom
22 first got sick.

23 Q. I seem to remember you told me in your deposition
24 you went to a number of elementary schools.

25 A. I did, yes.

1 Q. And why was that?

2 A. Just because we moved houses.

3 Q. And when you moved from Las Vegas to Florida, who
4 did you live with in Florida?

5 A. My dad and my Aunt Kelly.

6 Q. During the time you lived in Las Vegas, was your
7 father in the household the entire time?

8 A. He was.

9 Q. When you got to Florida, did he live with you
10 while you were there or did he move out at some point?

11 A. No. When we were in Florida, he was with me the
12 entire time.

13 Q. Then where did you move after Florida?

14 A. We came to South Carolina.

15 Q. And where did you live then?

16 A. With my sister Gina, and her mom, Julie.

17 Q. And how long did y'all live together there?

18 A. For a few months.

19 Q. And did there come a point in time when your
20 father didn't live there with Julie?

21 A. There was a time that I did not live with him, and
22 I lived with Gina's Aunt Karen.

23 Q. What time period of time was that?

24 A. I can't be specific, because I don't really
25 remember, but it was for about six months.

1 Q. And why did you move out of your father's house
2 where he was living to live with --

3 A. To live with my Aunt Karen?

4 Q. Yes.

5 A. Because she -- because my dad was unable to take
6 care of me at that time.

7 Q. Why was he unable to take care of you at that
8 time?

9 A. Because he did go to jail for a short period of
10 time.

11 Q. And what did he go to jail for?

12 A. A dispute with my sister's mom.

13 Q. And was this dispute physical?

14 A. It was.

15 Q. And Julie got some serious injuries, didn't she?

16 A. I believe so.

17 Q. In fact, he broke her jaw.

18 A. I remember being told that, yes.

19 Q. And you had seen him being physically aggressive
20 or abusive toward women before, hadn't you?

21 A. That was mostly from me, yes.

22 Q. You saw him being physically abusive to your
23 mother?

24 A. Seldomly.

25 Q. Emma, is your -- is it true that your father had a

1 bad temper?

2 A. Yes.

3 Q. And how many months did you live separate from him
4 before his death?

5 A. For about six.

6 Q. Six months?

7 REDIRECT EXAMINATION

8 BY MR. KEENAN:

9 Q. Emma, what Mr. Johnson just went over, been to
10 jail, hit your mother, hit Gina's mother, you knew that?

11 A. I definitely know now.

12 Q. Okay. And does that affect in any way what you
13 told the Court about this relationship with your father
14 and what you wanted it to be in the future?

15 A. Not at all.

16 Q. Not at all?

17 MR. KEENAN: Thank you.

18 THE COURT: Is that it?

19 MR. JOHNSON: Nothing further.

20 MR. SMITH: Your Honor, if we can just put
21 the photographs and text messages into evidence that were
22 reviewed.

23 THE COURT: All right.

24 MR. SMITH: And there was also one from Gina
25 that would be 64. It's already on the court reporter's

1 desk. I'm sorry, 49.

2 MR. WILLIAMS: Kevin, are those all one
3 number?

4 MR. SMITH: Different numbers, it's 30
5 through 60. Let's just say 30 through 60 because 49 is
6 in there.

7 (Plaintiff's Exhibit Nos. 30 through 60 were
8 marked for identification and admitted into evidence.)

9 THE COURT: All right. Do you have any other
10 witnesses you're going to call?

11 MR. SMITH: Your Honor, in response to the
12 testimony that you've heard through some of the expert
13 witnesses in this case regarding the testimony of Alex
14 Clayson, several portions of his testimony were read
15 regarding warning the guys or this and that.

16 Some of that was admitted, some of that was
17 stricken, but it's out there, at least I think through
18 one of the expert's deposition -- expert testimony. We
19 would like the opportunity to read some additional
20 portions from Mr. Clayson's deposition.

21 THE COURT: Have you told them which sections
22 yesterday?

23 MR. SMITH: We can, very briefly. It's
24 probably two sentences.

25 THE COURT: All right. Show him. See if he

1 has any objection.

2 MR. JOHNSON: Your Honor, I object to it.
3 The rule allows for the use of a deposition at trial
4 under just certain limited circumstances, which aren't
5 present here. Unless they've tried to subpoena him and
6 bring him here and cannot get him here, I mean -- let me
7 cite you the rule.

8 THE COURT: Refresh my memory. Who is Mr.
9 Clayson?

10 MR. SMITH: He was the foreman on the job who
11 had one of the poles, and we were not on notice that any
12 portions of his deposition testimony were going to be
13 read through the back door of some of these expert
14 witnesses, and it came out.

15 Mr. Johnson had subpoenaed Mr. Clayson to be
16 here, but he released him from that subpoena. You had
17 asked Mr. Johnson --

18 MR. JOHNSON: I haven't released him.

19 MR. SMITH: You told the Court you originally
20 had him subpoenaed but you released him.

21 THE COURT: He was talking about somebody
22 else.

23 MR. JOHNSON: It was Richardson.

24 MR. SMITH: Okay. Anyway, we were not on
25 notice that any of that stuff was going to be read, and I

1 think, Your Honor, you have a very incomplete picture of
2 what his testimony is at that point. You have the thing
3 he said --

4 THE COURT: I don't remember. What did he
5 say that was --

6 MR. SMITH: This was the fellow that said
7 when they're walking the tent, Hey, guys, watch out for
8 that line.

9 He has some other testimony about he was one
10 of the guys holding the tent itself. He has some
11 testimony about the actual line itself. It's very brief,
12 but you only have a picture from this point, and you
13 certainly don't have a picture from that point, and we
14 would just like to give you the full picture, Your Honor.

15 THE COURT: He was one of the people holding
16 the tent?

17 MR. SMITH: Yes, sir.

18 THE COURT: And he didn't get electrocuted?

19 MR. SMITH: He did. He survived.

20 THE COURT: So what is it that you want to
21 put in there? What does it say?

22 MR. SMITH: It says when they actually moved
23 the tent the last time that he didn't see it. Of course
24 he didn't see it. He never would have made the move had
25 he seen it, and, at this point, Your Honor, you have an

1 incomplete picture because all you have is him saying,
2 Hey, guys, watch out for that line. Be careful.

3 So that begs the question, how could you have
4 hit it? The obvious answer is that at last move, that
5 last time, I didn't see it, and I think that's necessary
6 for Your Honor to get a complete picture of what his
7 story would be.

8 MR. JOHNSON: Your Honor, I think I asked
9 every time, I want you to assume the following facts, and
10 I'll ask you a question.

11 Regardless, Rule 32 says when a witness's
12 deposition can be used for any purpose, that's when the
13 witness is dead, if the witness is at a greater distance
14 than 100 miles, that a witness is unable to attend and
15 testify because of age, et cetera, and that the party
16 offering the deposition has made -- has been unable to
17 procure attendance by subpoena.

18 MR. SMITH: You left out E, Pope, discretion,
19 circumstances. The judge -- part E, you read A through
20 B. You skipped E: Upon application of such exceptional
21 circumstances exist to make it desirable. Exceptional
22 circumstances are that we didn't know it was going to be
23 read. The judge is getting an incomplete picture.

24 We would like to have the judge have the
25 whole picture, and, Your Honor, as you said initially,

1 you're performing a couple of roles here in keeping us
2 straight, but we're also receiving information, and we
3 believe that you have the ability to look at what you
4 need to look at, disregard what you don't need to look
5 at, but I think it's just misleading for Your Honor not
6 to see the full picture for this fellow.

7 But, either way, we'll leave it at your
8 discretion to consider what you like.

9 MR. JOHNSON: Kevin, you have not allowed me
10 to get to three -- excuse me, E. It says upon
11 application and notice. Your Honor, I'm happy for them
12 to subpoena him and bring him tomorrow.

13 THE COURT: Well, I think 34(e) allows the
14 application to be in court during the trial as
15 circumstances apply, and, you know, all things
16 considered, in the manner that it came up in, through
17 hearsay on a question to an expert, that under the rules
18 of completeness, I'll allow it.

19 MR. JOHNSON: Your Honor, are we entitled to
20 designate other portions?

21 THE COURT: Sure.

22 MR. JOHNSON: Okay. We'll do it.

23 THE COURT: All right.

24 MR. GOULD: Page 69, line 15.

25 Question: Okay. Now, when the tent was put

1 down the first time and then moved toward the line as a
2 result of Mr. Richardson saying, quote, move towards me,
3 end quote?

4 Answer: It was both Mr. Richardson and Beth
5 Donehue.

6 Question: And Beth Donehue, were you moving
7 the tent closer to the line?

8 Answer: In retrospect, yes, we were, at the
9 time. It was -- I didn't feel as though we were moving
10 the tent closer to the line.

11 Question: Well --

12 Answer: Had I known we were moving the tent
13 closer to the line at that time, I wouldn't have moved
14 it.

15 THE COURT: Anything else? Was there
16 anything else you wanted read in?

17 MR. JOHNSON: Your Honor, I would like to,
18 but can I do it tomorrow?

19 THE COURT: Sure.

20 All right. Do you have anything else?

21 MR. SMITH: We'll make the decision to rest
22 until we see what Mr. Johnson does to see if we need to
23 respond, Your Honor. But he can move forward with his
24 case, but we don't want to be precluded from responding
25 to whatever --

1 THE COURT: Well, you got to rest. I mean,
2 if you want to put something else in, I guess you'll have
3 the right to reply, but we can't just, like, quasi rest.

4 MR. SMITH: Can we say kinda?

5 THE COURT: You can either rest or call a
6 witness.

7 MR. SMITH: Your Honor, if we'll have the
8 opportunity to move to reply, the plaintiff rests at this
9 time.

10 (Plaintiff's Exhibit No. 62 was marked for
11 identification.)

12 THE COURT: All right. Do you have any
13 motions you want to ask, or make?

14 MR. SMITH: Plaintiff does, Your Honor.

15 THE COURT: Mr. Johnson?

16 MR. JOHNSON: No, Your Honor.

17 THE COURT: He's usually first, but what
18 would you like to say, Mr. Johnson?

19 MR. JOHNSON: I wanted to say we have no
20 motions at this time.

21 THE COURT: All right. What are your
22 motions?

23 MR. SMITH: The plaintiffs make a motion for
24 directed verdict on the issues of liability and
25 comparative negligence. It's our position at this time

1 that the evidence is overwhelming and susceptible to only
2 one reasonable inference, and that is that Berkeley
3 Electric was negligent, that they were grossly negligent,
4 and that their negligence was the sole proximate cause of
5 the injuries and death in this case.

6 So we would ask Your Honor for a directed
7 verdict on those issues.

8 THE COURT: Mr. Johnson?

9 MR. JOHNSON: Your Honor, I'm entitled to
10 offer evidence to counter those arguments, and so --

11 THE COURT: Well, I'm not usually used to a
12 plaintiff making a directed verdict motion. It's not
13 unheard of, but on the whole, there is still in evidence
14 this question of whether or not there are third party
15 actions that were the proximate cause as opposed to
16 Berkeley Electric's, even assuming that there is a
17 standard of care that was deviated from, which
18 proximately caused his injuries.

19 I'm not prepared at this point to say that
20 there are no genuine issues of material fact, so your
21 motions are denied.

22 Anything else before we move to the defense
23 calling their first witness?

24 MR. SMITH: No, sir.

25 MR. JOHNSON: I call Eric Jackson.

1 THE COURT: I'll tell you what: You're going
2 to call somebody by telephone, or do the video camera
3 thing?

4 MR. JOHNSON: I do, yeah.

5 THE COURT: All right. Let's take a couple
6 minutes break, but you're going to have a live witness
7 first or is this Eric Jackson --

8 MR. JOHNSON: He's right here.

9 THE COURT: Okay. And what is he going to
10 testify about?

11 MR. JOHNSON: He's a code expert.

12 THE COURT: So he might take a little while.

13 MR. JOHNSON: Exactly.

14 THE COURT: All right. Let's take ten
15 minutes and we'll come back and do that.

16 (Recess taken.)

17 ERIC JACKSON,
18 having been first duly sworn,
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. JOHNSON:

22 Q. Mr. Jackson, how old are you?

23 A. Fifty-seven.

24 Q. Were you retained to offer expert testimony in the
25 case by Berkeley Electric?

1 A. Yes, sir.

2 Q. What is your area of expertise?

3 A. I'm an electrical engineer. My education, I
4 graduated from LSU in 1981. My field of study,
5 concentrated study, was power and control systems, which
6 has to do with the generation, transmission,
7 distribution, and utilization and control of electric
8 power.

9 Been in the consulting engineering business most
10 of my life and -- my professional engineering career has
11 been any a series of professional engineering firms
12 starting with Barbee Engineers in 1980 as a senior at
13 LSU, and I moved through different firms throughout the
14 years. Currently I have a firm that I'm shareholder of,
15 Brooks, Jackson & Little.

16 Q. And what do you do primarily in your work with
17 Brooks, Jackson --

18 A. And Little.

19 Q. And Little?

20 A. We're consulting in forensic engineering firms.
21 The vast majority of my work currently is forensic
22 engineering, investigative work.

23 Q. Have you testified in any number of states in the
24 United States?

25 A. Yes. I've probably testified in, I don't know,

1 15, 20 venues over the years, state and federal.

2 Q. Have you been qualified to give expert testimony
3 in connection with those cases?

4 A. Yes. I've been qualified generally as an
5 electrical engineer. I've been qualified as an expert in
6 application and interpretation of the National Electric
7 Safety Code as well as the maintenance, operation of
8 electric utility studies, design, maintenance, and
9 operation.

10 MR. JOHNSON: We would offer Mr. Jackson as
11 an expert witness as an electrical engineer and with
12 expertise in the interpretation of the National Electric
13 Safety Code, interpretation and application of the code.

14 THE COURT: Do you wish to voir dire or
15 challenge?

16 MR. SMITH: No, sir.

17 THE COURT: All right. I'll qualify him as
18 an expert, despite the fact that he went to LSU.

19 BY MR. JOHNSON:

20 Q. Tell the judge what you reviewed in order to be in
21 a position to give expert testimony.

22 A. Well, I think initially I made a couple of site
23 visits to the accident site, reviewed photographs taken
24 by the police. I've looked at OSHA reports, looked at
25 photographs taken by the electric cooperative; I've read

1 depositions. I read a variety of discovery material that
2 has been passed along to me by you.

3 Q. Were you the person who identified the damage to
4 the line?

5 A. Yes.

6 Q. Mr. Jackson, do you have an opinion based on what
7 you've done -- do you have an opinion to a reasonable
8 degree of engineering certainty as to what was the
9 proximate cause of the electrical accident in this case?

10 MR. SMITH: Your Honor, I object. Proximate
11 cause is a legal conclusion.

12 THE COURT: No, negligence is a legal
13 conclusion. Proximate cause is an element, just like
14 standard of care is an element, so he can answer the
15 question.

16 BY MR. JOHNSON:

17 Q. Do you recall --

18 A. Yeah. In my opinion, the proximate cause would be
19 carelessness of the tent crew, in particular the foreman,
20 in allowing the tent to be carried into a power line.

21 Q. And did you identify any regulation that was
22 violated by what they did?

23 A. Yes. It would fall under OSHA law. Under OSHA
24 law, you're not supposed to allow -- there's two
25 different types of workers. You're either qualified

1 workers or nonqualified workers. Nonqualified workers
2 are the ones that don't have expertise and electrical
3 training to know how to protect themselves, and those
4 workers are to maintain a ten-foot distance from the
5 lines as a means to protect them from harm.

6 Q. Let me ask you this: If those four men moving the
7 tent had complied with the OSHA ten-foot rule, would you
8 have an accident here?

9 A. No.

10 Q. If the event coordinators who were directing the
11 crew and telling them to move the tent failed, did you
12 have an opinion as to whether they violated the ten-foot
13 rule?

14 A. Well, they weren't workers. They were event
15 coordinators. I think you're talking about people who
16 were just pointing fingers, put it here?

17 Q. Yeah.

18 A. They were in a supervisor position, so that might
19 be falling under what they call a multi-employer
20 environment, because they were in a supervisory position.

21 Q. My question is, do you have an opinion as to
22 whether they too violated the ten-foot rule by directing
23 the tent -- the men on the tent where to go?

24 A. I would say yes.

25 Q. Now, I want to ask you a little about OSHA

1 regulations.

2 Do OSHA regulations deal with trying to provide a
3 safe work area?

4 A. Correct. That's -- the overarching problem is
5 that the rules apply to both the employers and employees,
6 but for employees, they're required to provide proper
7 training, proper protection, proper supervision.

8 Q. Were any of those violation regulations violated
9 by the men in moving the tent?

10 A. Well, yes and no. The way I read the record and
11 OSHA report, the supervisor at first recognized the
12 presence of the line, warned his workers of the line, and
13 then later on failed to track the work away from the
14 line.

15 Q. Should a site be surveyed under OSHA -- should a
16 site be surveyed and the hazards or potential hazards
17 identified?

18 A. Correct. That's typically referred to as a
19 tailboard meeting or a tailgate meeting where the survey
20 is done, any potential hazards identified are expressed,
21 and a mechanism to avoid those hazards is discussed.

22 Q. If hazards are identified, what should be done in
23 terms of workers and training of the workers?

24 A. Well, that information needs to be passed along to
25 them, and then, of course, anybody in a supervisor role

1 needs to make sure the safe hazards are avoided.

2 Q. You're familiar with the National Electric Safety
3 Code, of course?

4 A. Yes, sir.

5 Q. And the OSHA regulations? How do they relate to
6 one another in connection with construction or putting up
7 tents in this case?

8 A. Well, the National Electric Safety Code, is, as it
9 implies, it's a national consensus standard for the safe
10 operation of electric utility lines. When we look to the
11 code for guidance on how to construct lines, there are
12 defined land used below the lines.

13 When you look at construction lines, there is no
14 defined line use for that and the reason being is that on
15 construction sites, there can be any number of mechanical
16 mechanisms to extend a person's reach, anything from
17 tents to extension ladders to paint rollers to dump
18 trucks, to gutter work, rain gutter work.

19 All those things extend your reach, so there is no
20 way you could ever define a design parameter for a
21 distribution line that would be adequate for providing
22 safety. So you go back to the OSHA, and it prevails in
23 that sense, that if you maintain ten foot away, then the
24 vertical clearance and the land use, normal land use,
25 beneath the line is not relevant.

1 Q. I want to hand you your file. Are there any
2 interpretations that support your opinion?

3 A. Yes. One of them is, just as background, there
4 are code committees that operate on the development and
5 the revision of various area of the code and if a user,
6 for instance, an engineer, if I have a situation that I
7 don't think the code directly addresses, I can posit an
8 interpretation request to the committee and get a formal
9 answer, and I collect these things.

10 In the second collection of the National Electric
11 Safety Code interpretations, which are 1991 and 1993
12 inclusive, there is an interpretation, and on this
13 IR-450, and it's asking about the interpretation of the
14 clearances in Rule 323, and in that it states that --

15 MR. SMITH: Your Honor, I'm not sure what
16 this is. I don't think I've ever been provided a copy of
17 it, and I would say this is hearsay.

18 MR. JOHNSON: You have been provided it.

19 MR. SMITH: Could I see it?

20 THE WITNESS: Sure.

21 MR. SMITH: Your Honor, I would equate this
22 to reading annotations of the law to a jury. I don't
23 believe those types of things are admissible.

24 THE COURT: What is this?

25 MR. JOHNSON: It's an interpretation of the

1 National Electric Safety Code.

2 THE COURT: Whose interpretation?

3 MR. JOHNSON: The committee, the
4 sub-committee, or committee? Which committee?

5 Your Honor, we put in CFR, which is a
6 regulation. This is no different than that, and even if
7 it's hearsay, an expert can rely upon it.

8 MR. SMITH: We've not put in any annotations
9 of the CFR, just the text itself.

10 THE COURT: Is this published by a government
11 agency?

12 THE WITNESS: It's by the National Electric
13 Safety Code committee, Your Honor, which is the standard.

14 MR. SMITH: No.

15 THE COURT: Who comprises that committee?

16 THE WITNESS: It's a large group of a
17 combination of engineers, electricians, various people
18 that have an interest in the electric utility industry,
19 and the National Electric Safety Code is revised every
20 three or four years. It's a public forum for
21 modification. If you saw something in the code you
22 didn't like or understand, you could make a written
23 suggestion for change.

24 These code committees review it, either
25 accept it in part, reject it in all, or accept the entire

1 thing. They're also responsible for the interpretation
2 of specific requests for situations that utility
3 personnel or engineers may encounter in a field that
4 don't seem directly applicable to the code as written or
5 the code as they understand it.

6 MR. SMITH: Your Honor, I guess my
7 interpretation of that, these are opinions by third
8 parties that are not here, aren't going to be here, and
9 we don't know what information they considered.

10 We don't know what the discussions were that
11 were made. We don't know who was invited to participate.
12 We don't know if any of that happened, but, either way,
13 these are opinions by people we just don't know about,
14 don't know anything about.

15 MR. JOHNSON: Your Honor, I think you told me
16 when I made similar objections that goes to the weight
17 and it would be a great thing to cross-examine him on,
18 not its admissibility.

19 THE COURT: Well, you can't cart blanche rely
20 on that, but I would think he's qualified as an expert.
21 He's testifying as to the basis of his opinion, and if he
22 relied on this for the basis of his opinion, then he can
23 cite it under 703.

24 MR. JOHNSON: Thank you, Your Honor.
25 BY MR. JOHNSON:

1 Q. Mr. Jackson, did you rely upon this rule, part two
2 of safety rules of installation and maintenance of
3 overhead electric supply and communication lines --

4 A. Yes.

5 Q. -- to form your opinion?

6 A. It's discussed in the National Electric Safety
7 Code handbook as well.

8 Q. And do you have a copy of that?

9 A. I do.

10 MR. JOHNSON: We would offer both of these
11 documents into evidence.

12 MR. SMITH: Your Honor, I've got an
13 objection. This was not provided to me in discovery. It
14 wasn't listed as an exhibit to the trial, and I don't
15 know what's going on here.

16 What we have is their an exhibit list, and
17 this ain't on here. This is the same exhibit list I
18 believe the Court reporter is holding. We prepared all
19 these in advance, and --

20 MR. JOHNSON: Your Honor, I e-mailed it to
21 him, told him I was going to be using them, and I don't
22 have my exhibit book or list with me here. It's in my
23 truck, but I'm willing to go get it and see.

24 MR. SMITH: If it wasn't provided as a
25 discovery response, I'm going to object to that. I think

1 Pope's already answered that question.

2 THE COURT: Well, his exhibit list and
3 whether or not he provided to you during discovery are
4 two different things. So the fact he didn't put it on
5 his exhibit list does not preclude him from offering it
6 if he provided it to you during discovery.

7 MR. SMITH: He did not.

8 THE COURT: He says he provided it to you
9 during discovery. I don't know if it's on this witness
10 list or not. These things are kind of cryptic in their
11 description.

12 MR. SMITH: I don't have a request for
13 production or a response to our request for production
14 where those documents are attached to.

15 THE COURT: Well, for the sake of moving
16 along, I'm going to conditionally admit it for right now,
17 and then if we can't find it later on, then we'll revisit
18 the issue, if he didn't provide it to you.

19 MR. SMITH: Can I have it in my hands, Pope?

20 MR. JOHNSON: Sure.

21 THE COURT: And, again, under 703, the
22 document itself doesn't necessarily have to be admissible
23 if he relied on it in forming his opinion, so -- even
24 though he might not otherwise been able to get it in, he
25 could still use it for the basis of his testimony, as

1 long as they provided it to you ahead of time and today
2 isn't the first time you ever got it.

3 MR. SMITH: Your Honor, if Pope says he sent
4 it to me, I'm not going to --

5 THE COURT: He can run out to his truck
6 tonight and bring it back tomorrow. We're not going to
7 stop and make him run out to his truck right now.

8 I said we'll just conditionally allow him to
9 cross-examine the witness, or examine the witness, based
10 on it. If it becomes a problem, I'll instruct myself to
11 disregard it.

12 BY MR. JOHNSON:

13 Q. Look at Exhibit No. 11 and tell the Court what
14 that is and what role it played in you forming your
15 opinions.

16 A. Well, it's an excerpt from the second interim
17 collection of the National Electric Safety Code
18 interpretations, 1991 to 1993 inclusive. It's an
19 interpretation as it relates to part two, safety rules
20 for the installation and maintenance of overhead electric
21 and supply and communication lines, which is at Rule 232,
22 and it's a request about an interpretation of the
23 category where a highway or bridge construction site
24 would fall, if any, where there is cranes, forklifts,
25 dump trucks, and other equipment of similar height

1 normally used.

2 And the interpretation is where it bridges the gap
3 between OSHA regulations and the code, and it refers back
4 to previous interpretation number 159 where it says that
5 clearance of equipment from energized conductors at
6 construction sites is covered by OSHA regulations. Both
7 OSHA and NESC recognize that only the operator/employer
8 can know and control the expected use of construction
9 equipment.

10 Q. I want to show you what is Exhibit 12 and ask you
11 to tell us what that is and whether it was a basis for
12 your opinion. You can answer.

13 A. Defendant's Exhibit 12 is excerpts from the
14 National Electric Safety Code handbook, fifth edition,
15 authored by Allen Clapp, and this handbook is
16 periodically revised by Mr. Clapp and addresses things
17 such as interpretations that have come out.

18 It sort of kind of puts it all in one place, both
19 interpretations, and, as the code is revised, any new
20 rules in the code or changes in the code and how and why
21 the code committee made the decision to change it and
22 what the change is.

23 In that, he discusses that same principle where it
24 says, The operators or erectors of apparatus have a
25 capability of contacting power lines or utility lines

1 have responsibility to take special care to avoid
2 damaging or otherwise interrupting the service of utility
3 installations or other facilities in the vicinity of
4 their work or operations.

5 It goes on to say, Under OSHA, employees required
6 to inspect job sites for power lines and determine, by
7 observation or otherwise, if there are power lines,
8 exposed or concealed, in the work area before beginning
9 any construction work, and identifies that as 29 CFR
10 1926.416 subpart (a), and if power lines are found,
11 employees must be told where the lines are located,
12 whether exposed or concealed, how to avoid the lines, and
13 the consequences of not avoiding those lines.

14 Q. And do those two exhibits, are they the basis for
15 your opinion that the National Electric Safety Code --
16 that this was a construction site subject to OSHA
17 regulations?

18 A. Well, yes. As a matter of fact, the employee was
19 cited by OSHA for these types of infractions for the OSHA
20 rules.

21 Q. Do you have an opinion to a reasonable degree of
22 engineering certainty as to whether the Berkeley
23 inspection program complied with the regulations of the
24 National Electric Safety Code?

25 A. Yes, they did.

1 Q. And tell us, what is the basis for that opinion?

2 A. Well, when you want to find out, you know, how a
3 system is supposed to be designed, maintained and
4 inspected, you look first to Rule 214, and that rule
5 says, Lines and equipment shall be basically installed or
6 constructed in accordance with the rule.

7 So, obviously, to start off with the correct
8 design, well, there's a lot of different rules, strength
9 requirements, you know, separation between conductors,
10 but we're talking about a vertical clearance requirement
11 here, so I'll limit my discussion to that.

12 So if you want to know how to design a line in
13 accordance with Rule 214, you look to Rule 232, and Rule
14 232 had to do with vertical clearance requirements, and
15 so some lines have to be taller than other lines.

16 For instance, if a line is going to be crossing
17 over railroad tracks, it has a specific vertical
18 clearance required for that because the height of
19 locomotives are known, so there is a component to height
20 of the vehicle with safety factor and then electrical
21 arcing component, so they build, you know, a total
22 distance.

23 Then you have areas such as spaces and ways
24 accessible to pedestrians only, where you're expecting no
25 one but humans walking around. Obviously, that line

1 doesn't have to be as tall as one over railroads. Then
2 there's various categories, so when you want to design
3 the line in accordance with Rule 214, you go to Rule 232,
4 and you define the land use beneath the line, and that
5 establishes what that will be for the initial design and
6 installation of the line.

7 Then you look at it from the standpoint, back to
8 Rule 214, it says, you know, Lines and equipment shall be
9 inspected as experience has shown is necessary, so there
10 has to be a periodic inspection of those lines to be able
11 to comply with Rule 230(i), because Rule 230(i) says the
12 utility has an obligation to make an effort to keep the
13 clearance proper.

14 The only way you can keep the clearance proper is
15 going to back to Rule 214 where you inspect your lines as
16 experience has shown to be necessary. Then Rule 214 says
17 you have two choices: If you find a line that is known
18 to have a defect and the code uses the term defect, it
19 means it's broken. Something is wrong with it. In that
20 case, it would be -- it could be a cross-arm that's
21 broken off and now the line's sagging.

22 Well, if it poses an immediate hazard to life or
23 property, then the code expects you to de energize the
24 line or otherwise isolate it, insulate it, and make it
25 safe. If it's a minor defect, an example I might get is

1 you may note that guy-wires a lot of times have the big
2 yellow markers on them so they're very visible.

3 Those sometimes will get torn off by a bush hog or
4 something. Well, the code requires you to have those
5 markers, but if one is not there, it doesn't pose
6 imminent danger, like a property. So the code says in
7 that case, you record it, you record the defect, and you
8 come back and fix it at a reasonable time.

9 So that is the basic process of using the rules of
10 the code to build it properly and maintain it properly.

11 Q. If you were to assume that Berkeley's inspection
12 program is pole inspection on an every eight-year cycle,
13 plus having its employees and line personnel look at the
14 lines as they drive around the service area, and you
15 assume that is the inspection program, do you have an
16 opinion to a reasonable degree of engineering certainty
17 as to whether that program complies with the requirements
18 of the National Electric Safety Code?

19 A. It does, and it's also a very common method of
20 performing those inspections as it relates to other
21 utilities around the country, in my experience.

22 MR. SMITH: Could you restate what you asked
23 him to assume?

24 MR. JOHNSON: I asked him to assume --

25 BY MR. JOHNSON:

1 Q. Do you have an opinion as to whether -- based on
2 your looking at the facts, whether there is any evidence
3 of any violation of the National Electric Safety Code by
4 Berkeley Electric in connection with the line in
5 question?

6 A. No, because while there was a clearance defect
7 here, Berkeley Electric was not made aware of it. They
8 were inspecting their lines as the code requires, and
9 there is no clairvoyance required to know when something
10 happens to your line, but when you become aware of a
11 defect, the code requires you to make it right.

12 So they were complying with the National Electric
13 Safety Code as it requires them to inspect and maintain
14 the system.

15 Q. Do you have an opinion to a reasonable degree of
16 engineering certainty as to whether the line was properly
17 constructed in the first place and had the proper
18 clearances at the time of construction?

19 A. I believe it was, for a couple reasons, and that
20 is a 35-foot pole is a fairly standard construction. The
21 electric utility standard of the industry, so to speak,
22 for pole to pole barrel depth is 10 percent of the total
23 length plus 2 feet. For a 35-foot pole, 10 percent would
24 be three-and-a-half feet, plus two, that would be
25 five-and-a-half feet. For single phase construction,

1 when you have a pin insulator on the very top of the pole
2 to support the conductor, that adds six inches in round
3 numbers, so you're right at 30 feet above grade for the
4 attachment height.

5 If you were trying to achieve a 20-foot clearance,
6 that would give you 6 foot of sag to utilize. If it was
7 an 18 and a half foot, you would be at 7 and a half feet
8 of sag. So it's a very common arrangement to use that
9 arrangement for maintaining proper clearance.

10 Q. Have you interviewed any Berkeley Electric
11 employees who were involved in the construction of the
12 line to start with or answering a service call outage?

13 A. Yes.

14 Q. Who did you interview?

15 A. I have spoken with Isaiah --

16 Q. Ward?

17 A. -- Ward. He was at the site when I made my
18 initial inspection. I believe he brought a bucket truck,
19 and I spoke to him then, and I spoke with him again today
20 just to review, you know, what their practices are, how
21 they visually understand the condition in their lines,
22 and, when you build a line, how taut it should be to
23 maintain clearance.

24 Q. And what did you learn from your interview with
25 him?

1 MR. SMITH: Your Honor, I object. This is
2 otherwise inadmissible hearsay contained within the
3 expert's file. These were discussions that were not
4 disclosed to us. We had no idea of this before trial,
5 and this is -- this is the kind of hearsay that the
6 expert rule says -- the rule on experts says Your Honor
7 has some discretion in.

8 I mean, everything that an expert relies on
9 doesn't come in. The Court still has some gatekeeping
10 function. This is the kind of thing that I would contend
11 the Courts intend to keep out.

12 MR. JOHNSON: Your Honor, they deposed
13 Mr. Jackson -- let me ask you this.

14 MR. SMITH: Hold on. He just said he spoke
15 to him. I didn't depose him ten minutes ago.

16 MR. JOHNSON: He said he talked to him at the
17 time he made his original inspection, and he talked to
18 him today just to reaffirm what he had learned
19 previously.

20 MR. SMITH: If that is part of his file,
21 right, and part of what he is relying on, it wasn't
22 disclosed.

23 THE COURT: Did y'all take his deposition?

24 MR. SMITH: We took his deposition, Your
25 Honor.

1 THE COURT: Was he asked then if he had
2 talked to any Berkeley Electric Co-op employees?

3 MR. SMITH: We asked him what all did you do?

4 THE COURT: And did he deny that he had
5 talked to anybody at that point?

6 MR. SMITH: He did not tell us he had talked
7 to anyone, except for Pope, and he told us the
8 depositions he read, the documents he reviewed, all of
9 that. We asked him what did he do, what information did
10 he receive.

11 THE COURT: Mr. Johnson, if, after they took
12 his deposition, he talked to somebody and he used that
13 discussion for a basis of his opinion, don't you have a
14 duty to supplement your disclosure to the other side,
15 that he's got a new basis for his opinion?

16 MR. JOHNSON: Yes, sir.

17 THE COURT: And it doesn't sound like that
18 happened, did it?

19 MR. JOHNSON: Your Honor, I would have to
20 reread his deposition testimony.

21 THE COURT: Well, then, that might be a point
22 we need to stop on then, because if these discussions
23 that he had with Berkeley Electric Co-op employees all
24 took place after he was deposed, then I think, in
25 fairness, they had the right to know that and to know

1 about it before today, that he had done further studies
2 and had based his opinions upon those discussions.

3 MR. JOHNSON: So you want to stop?

4 THE COURT: I guess we should while you go
5 look that up. All right? We'll take five minutes.

6 (Recess taken.)

7 THE COURT: All right. What did you find
8 out?

9 MR. JOHNSON: I found out that -- I found out
10 in the first deposition that they took of Mr. Jackson,
11 that's what was asked for. I asked counsel did he have
12 other information, and he wouldn't share it with me.
13 I've also found out --

14 THE COURT: Okay. Tell me what he's supposed
15 to do, which is come up with some new stuff, and let you
16 know. It doesn't sound like he got asked about talking
17 to Berkeley Electric employees at his first deposition.

18 MR. JOHNSON: That's right. And I also found
19 our discovery response where we listed and identified
20 Isaiah Ward, what he was going to talk about.

21 THE COURT: Isaiah Ward, that's the guy he
22 talked to.

23 MR. JOHNSON: Correct.

24 THE COURT: But nowhere have you gotten to
25 where he said he talked to Isaiah Ward, correct?

1 MR. JOHNSON: Correct.

2 THE COURT: Or are you getting there?

3 MR. JOHNSON: And then I found an affidavit
4 that was filed by Isaiah Ward that told him exactly what
5 he was going to say, the thing -- the line was built
6 correctly.

7 THE COURT: And this has to do with
8 instructions -- weren't you asking him about inspections?

9 MR. JOHNSON: I was asking his opinion as to
10 whether the line was built properly in the first place,
11 and he was offering testimony -- in the process of
12 offering testimony that he had spoken to Isaiah Ward
13 previously, that he spoke to him today just to verify
14 what he understood, and that Isaiah -- he was going to
15 say Isaiah's report was the basis for his opinion.

16 Your Honor, it seems to me that we had the
17 plaintiff identifying new opinions a week before the
18 trial, two weeks before the trial, and you said you would
19 give me the right to respond to it separately, get
20 another witness, get another expert. I'm not trying to
21 sandbag anybody.

22 THE COURT: Well, I'm just looking at this
23 affidavit of Isaiah Ward who he said he talked to. I
24 don't see where Isaiah Ward is saying anything new that
25 you didn't already know about.

1 MR. SMITH: Your Honor, I'm not objecting to
2 the opinion itself, it's just -- and more is this
3 conversation he just had with Isaiah Ward. I mean, I
4 heard that, and, you know, this will be the first time
5 any of us hear about this conversation he just had with
6 Isaiah Ward.

7 You know, I asked questions back then
8 about -- you know, he told me early on -- how did you
9 come to these opinions? Well, to be honest with you,
10 Pope, how did you figure out the line was built properly?

11 Well, that's what Pope said.

12 And then I asked another one: Well, how did
13 you -- do you have an opinion it was maintained properly?

14 And he goes through the code and all these
15 kind of things, and of course he says he'll supplement
16 with what he says. And then we took his deposition --
17 yeah, the second time we took his deposition, several
18 years later, I asked, is there anything else that you've
19 done since the last deposition? Let me get the date so
20 we can be accurate.

21 He says, Other than the site survey, the
22 inspection?

23 What have you done since then?

24 Yesterday afternoon I gained some documents
25 from Berkeley Electric on their stringing procedures.

1 Is that the one John Hall did?

2 Yes, that's it.

3 And he says he got a better copy of something
4 else.

5 So if the conversation with Isaiah Ward took
6 place in between the two depositions, that's a big
7 problem, and the second conversation with Isaiah Ward
8 just happened out here, I just think, as a matter of
9 practice, we just strike that.

10 Isaiah Ward is available. He's an employee
11 of Berkeley Electric. His testimony is available, and,
12 listen, I'm not saying this is a new opinion, and, to be
13 honest, I could care less if it's a new opinion. I'm not
14 going to object to that. All I'm concerned about is
15 improper hearsay coming in.

16 THE COURT: Well, you know, if he's coming up
17 with new matter, then I see why it would make a
18 difference. If it's nothing new that he's saying that
19 Isaiah Ward said, then no harm, no foul.

20 MR. SMITH: Well, I don't know what Isaiah
21 Ward just told him outside, or whenever he spoke. That's
22 the point: I don't know. I would like to know it before
23 it's brought into open court.

24 THE COURT: Well, you know, I can't do one of
25 those in limine discussions and not be here, so let's

1 just move along, and, if we need to strike, we'll strike.
2 Okay?

3 BY MR. JOHNSON:

4 Q. Mr. Jackson, remember I was asking your opinion as
5 to whether the line was built properly in the first
6 instance? And you said you spoke to Isaiah Ward and that
7 was one of the things that affected your opinion.

8 A. Yes.

9 Q. Could you tell me what you learned from Mr. Ward
10 that caused you to reach the conclusion you did?

11 A. Well, I stated previously the use of 35-foot poles
12 is a fairly common distribution practice, and with that,
13 you can easily maintain clearance requirements. When you
14 have excessive sag as, again, in this particular case,
15 that would be readily visible and would not be something
16 a lineman installing who is very experienced would do and
17 leave the job site that way.

18 THE COURT: Are you saying it would be
19 readily visible or not?

20 THE WITNESS: Yes, yes, sir. The amount of
21 sag that was in the conductor at the time of the accident
22 versus the amount of sag, a lesser amount of sag, that
23 would be present when you string it in the normal
24 fashion.

25 BY MR. JOHNSON:

1 Q. Do you know or have an opinion as to what actually
2 caused the change in the sag?

3 A. The only thing that I can surmise is when I was
4 inspecting the line, I noticed both phase and neutral
5 conductors both about mid-span showed mechanical
6 distortion and damage, which would be totally
7 inconsistent, in my experience, of how a conductor would
8 come off the wheel, spool, when you're stringing a line,
9 when you're putting up a new wire, so it was suggested to
10 me the line was affected by something. What that
11 something was, I have no idea.

12 Q. I want to ask you about these purported safety
13 rules. Read number one, and let me know when you're
14 finished. Can you see?

15 A. Yes, sir. Number one: A power company must
16 construct and maintain its power lines at least 18.5 feet
17 high above farmlands with animals to prevent injury to
18 people or death by electrocution.

19 Q. Do you find that in the code, National Electric
20 Safety Code?

21 A. No. You'll find an 18 and a half vertical
22 clearance requirement, but you won't find that language.

23 Q. And, number two, would you read it.

24 A. Number two: A power company must inspect their
25 power lines to ensure that they are at code height to

1 prevent injury to people or death by electrocution.

2 Q. Do you find that language in the National Electric
3 Safety Code?

4 A. No. As I said before, Rule 214 includes
5 inspections and tests are to be performed as experience
6 has shown to be necessary.

7 Q. Thank you.

8 MR. JOHNSON: Answer any questions they may
9 have.

10 CROSS-EXAMINATION

11 BY MR. SMITH:

12 Q. Good afternoon, Mr. Jackson.

13 A. How are you?

14 Q. Good. We've seen you a couple times over the
15 years, right?

16 A. Yes, sir.

17 Q. We took your deposition back in December of 2011.
18 Wasn't that, like, Christmas Eve or New Year's Eve or
19 something?

20 A. I don't know. Y'all were talking about two
21 depositions, and I just realized that today, there were
22 two depositions in this case.

23 Q. And then you came back to my office for the second
24 one. You are down in Jacksonville, aren't you?

25 A. Yes.

1 Q. I think the second one was taken October 25th,
2 2013.

3 A. Okay.

4 Q. A couple years apart. Does that ring a bell?

5 A. Well, now that I saw, yeah. I just didn't have
6 the second one in my file, and I had just forgotten about
7 it.

8 Q. Is it true that 85 percent of the work -- well, a
9 vast majority of the work you do is consulting on cases
10 like this, right?

11 A. Could be like this. It could be more
12 investigative. It could be cases that involve a fire,
13 but yes, electrocution, when there are high voltage, low
14 voltage, yes.

15 Q. And 85 percent of the time is what you would
16 estimate would be the number of times you're hired by
17 power supply companies, such as Berkeley Electric?

18 A. I use that as a round number. I think I've said
19 85 to 90. It ebbs and flows from year to year.

20 Q. Anywhere from 85 to 90 percent?

21 A. Yes. It varies.

22 Q. So very, very rarely do you ever work for
23 plaintiffs in litigation?

24 A. That's true. I mean, I just answer the phone.
25 It's how the phone rings.

1 Q. And what you do is begin by gathering the
2 evidence?

3 A. Generally, yes. It depends on what stage of the
4 case it's in. If it's an ongoing case, there may be a
5 lot of discovery documents. Otherwise, there just might
6 be a site inspection to gather evidence.

7 Q. But it's important to gather that evidence because
8 you need to know what has gone on at the point you're
9 hired to work on the case; is that true?

10 A. Well, it's a process, yeah. It's a process, so
11 you don't necessarily get it all at once.

12 Q. And you need the information for what's been done
13 so far so you can tell Berkeley Electric or another power
14 supply company whether or not you're going to agree to
15 work on this file; is that fair to say?

16 A. No, not necessarily. I mean, I've been hired
17 before and given bad news on cases.

18 Q. Okay. Is it fair to say before you give Berkeley
19 Electric or any power supply company any opinions you're
20 going to have all the information on what's been done
21 before you give that opinion?

22 A. Well, a final opinion, sure, but there's times
23 when you have information coming in and you say, This
24 looks like this is the case. It looks like that. This
25 would be my opinion given these facts, so, yeah, it's a

1 process.

2 Q. Mr. Jackson, about a week ago, I think, we
3 received a -- hold on a minute. A week ago, maybe two,
4 we received a pretrial filing from the defendants in this
5 case.

6 Mr. Jackson, assume for the question we received
7 pretrial filing not long ago that said there may be some
8 question as to whether or not the site was a construction
9 zone. Right? That was a couple weeks ago, if you'll
10 assume that for me.

11 A. Okay.

12 Q. What is your testimony today? Was the site at
13 Thornhill Farms Healing Ministry on April 23rd, 2008, was
14 it a construction zone?

15 A. I would consider it a -- they're erecting tents
16 which are portable buildings. I would consider that
17 construction, in my opinion.

18 Q. And that's just your opinion, right?

19 A. Well, it was -- they were cited as a construction
20 zone, operating those kind of activities, you know, with
21 the ten-foot rule, so I would -- I think the OSHA people
22 agree with me on that.

23 Q. The construction zone leeway appears where?

24 A. I'm sorry. I'm not following you on that.

25 Q. So the term construction zone is not anywhere in

1 the National Electric Safety Code itself, right? The
2 1993 code is what we're concerned about. It's not in
3 there?

4 A. That's correct. When I said it's in Rule 232,
5 when you're looking for a clearance for a construction
6 site, you won't find it. A land use of that nature is
7 not included in the code.

8 Q. So is it your testimony that the height
9 requirements of the National Electric Safety Code applied
10 on every other day since 1993, and even through today,
11 but they just didn't apply that one day, on April 23rd,
12 2008? Is that what you're saying?

13 A. No, no. You're missing the point. I'm sorry.
14 What I'm saying is the National Electric Safety Code
15 clearance requirements exist all the time.

16 Q. Okay. Are they --

17 A. Defects can exist and still be code compliant,
18 because you're inspecting something that has happened to
19 the line. They are not clairvoyant. They can't be
20 looking at all their lines all the time, so the point
21 being when you're looking at an accident -- and I'll give
22 you an example. The clearance of a line is not relevant
23 to a construction site because the extended reach that
24 you can have on any kind of construction activity is such
25 that -- I have cases all the time where it's code

1 compliant and there's still an accident because the
2 extended reach is far beyond what the clearance is.

3 So I'm not saying it doesn't apply, I'm saying it
4 doesn't apply to the proximate cause of the accident.
5 You look to OSHA first --

6 Q. Okay.

7 A. -- for how and why the contact occurred.

8 Q. So the height requirements of the National
9 Electric Safety Code were still in place on April 23rd,
10 2008; is that true?

11 A. Yes.

12 Q. Okay. And Mr. Johnson, I think, went through an
13 exercise with Mr. Dagenhart -- you know Mr. Dagenhart,
14 right?

15 A. I do.

16 Q. Mr. Johnson went through an exercise with
17 Mr. Dagenhart about the term violation versus defect.

18 A. Correct.

19 Q. And I believe that in the language of the National
20 Electric Safety Code, what we would refer to as you
21 violated this section or violated that section, the
22 National Electric Safety Code terms those as defects,
23 right?

24 A. Well, no. They're not one and the same. The
25 distinction, or the difference, I would say, is this, is

1 that the code sets forth what an electric utility is
2 supposed to do.

3 For instance, in July 214, lines and equipment
4 should be designed and constructed in accordance with the
5 rule. If you just blatantly ignore that and don't design
6 that, you could call it a violation because you didn't
7 follow the rules. But if you design it properly,
8 something happens to that line which creates a defect,
9 you don't know about it as the operating utility, you're
10 inspecting your lines, you're doing everything -- what
11 the code requires and you have a defect, but you don't
12 have a violation.

13 Q. So the height requirements existed the day of the
14 electrocution, true?

15 A. Yes. 239 says you have an obligation to maintain
16 the clearances as specified.

17 Q. And that day of the electrocution, the line was
18 below that height requirement, true?

19 A. Yes, it was.

20 Q. All right.

21 A. It was a defect, a clearance defect in that line.

22 Q. That was my question. So the day of the
23 electrocution, there was a defect in the line, and the
24 defect was it was lower than what the height requirements
25 of the National Electric Safety Code were.

1 A. True.

2 Q. Thank you.

3 THE COURT: In your opinion, how high was it
4 supposed to have been on that day?

5 THE WITNESS: Well -- and we went through
6 this in my deposition as to whether or not there is
7 spaces and ways to pedestrians only. If it's not that,
8 it would be 14 something, but if it's pasture land, it
9 would be 18 and a half, under the '93 code.

10 THE COURT: But regardless of whether it was
11 pasture land or just people only, there was still a
12 defect, in your opinion, just a violation, because
13 Berkeley Electric Co-op wasn't made aware of it.

14 THE WITNESS: Right. If we're using the
15 pasture land, the 18 and a half foot basic clearance --

16 THE COURT: It was less than that.

17 THE WITNESS: Several measurements, they
18 varied, you know, from six inches up to something else.
19 I've forgotten what they were, depends on who measured it
20 and how, but yes, sir, Your Honor, it was below that 18
21 and a half clearance requirement.

22 THE COURT: Okay.

23 BY MR. SMITH:

24 Q. How much line did the original crew -- and we're
25 going to talk about your opinion if it was constructed

1 properly, all right?

2 We asked you about this before, and when I asked
3 you the first time, you said the source of information
4 was, Pope told me it was constructed properly.

5 And I imagine did you some more research after
6 that, right?

7 A. Well, I think he told me that, and I believe all
8 that came from Isaiah and talking to the employees as to
9 what the process was.

10 Q. All right. So what I want to know is your opinion
11 that it was constructed properly. I want to talk about
12 the source of the information of that opinion. Number
13 one source, and the very first way you heard that, was
14 from Mr. Johnson; is that true?

15 A. In terms of hearing, yes, but I did know what size
16 poles they were and amount of sag that you would normally
17 have.

18 Q. And the second source of information was from a
19 fellow by the name of Isaiah Ward, true?

20 A. Correct. He describes how many years he's been
21 doing this, the fact that he uses 35-foot poles on a
22 frequent basis, and the methodology employed for
23 stringing the line.

24 Q. Wouldn't you agree with me the big part of the
25 equation was to figure out whether it was constructed

1 properly, meaning if it was constructed to the correct
2 height, is how much line did you use? Wouldn't you have
3 to know that?

4 A. Well, there's an initial amount of line, and you
5 have to know the separation between the tacit points and
6 you have to know if it's been struck and stretched.
7 There is three factors there.

8 Q. Just answer my question here. To know that a line
9 was constructed at a particular height, and they're
10 claiming what? Did they know how high it was built?

11 A. What they shoot for is 24 feet.

12 Q. You don't know what it was actually built at, do
13 you?

14 A. No one does.

15 Q. You only know what they shoot for; is that fair to
16 say?

17 A. -Yes.

18 Q. And that's the only information you can tell me
19 with regards that the line was constructed properly, is
20 you've been made aware what they shoot for; is that
21 correct?

22 A. Well, yes, and knowing, again, what I described
23 before, if you got 30-foot attachment heights, you have
24 six foot of sag to play with, so that's achievable.
25 That's what they do, and a lineman, when he's pulling

1 that in, how taut it was, if you've been doing it a long
2 time, you'll have a feel for it. You'll know, and
3 they're, of course, eyeballing it from a bucket truck.

4 Q. Right. But that's all you got, is the basis for
5 that opinion. You know what they shoot for, right?

6 A. Well, that, and I guess the other thing is we know
7 that in terms of anyone being out there, I think this was
8 recently put out as a -- there was some kind of
9 maintenance sheet that was produced to me where on
10 12/15/2003 that riser conduit had to be repaired, so
11 there was line personnel out there then and would have
12 put eyeballs on the line, and as far as I know, they
13 didn't report it being low at that point in time, so it
14 would suggest it was built properly.

15 Q. So in order to rely on that, you need to know that
16 when the linemen go out there to Thornhill Farms, they're
17 inspecting the lines each time they're out there. That's
18 what gives you the basis for looking at that record and
19 saying it must have been fine then, right?

20 A. It depends on what you mean by inspected. Someone
21 who does this day in and day out, they have a sense they
22 can look at a line and tell if it's sagging excessively,
23 so I don't know if you call it inspection. I don't know
24 what you refer to as inspection. They laid eyes on it if
25 they're out there. They patrol it. They walk by it.

1 Q. And to believe that, you have to believe that when
2 they're going out there, they're actually doing that.
3 Rather than just doing the job they've been assigned to
4 do, repair the conduit riser, fix a street lamp pole, you
5 have to assume that they are looking at the power line?

6 A. I would agree with that.

7 Q. And are you aware that Isaiah -- Rico Harrell was
8 with us here in court earlier, and we went through the
9 last two times of the people who went out to the Healing
10 Farm Ministries. You still got that maintenance record?
11 One of those times was August 20th, 2007, right, Rico
12 Harrell?

13 A. I don't know Rico Harrell.

14 Q. All right.

15 A. What was his work there?

16 Q. And the other time, I believe, was in February
17 2007. Would it surprise you to know I asked Rico Harrell
18 if he inspected these power lines for clearance when he
19 went out there and he said no? Further, he has informed
20 me he has never, ever inspected these power lines at all
21 the times he's ever been out there, wouldn't that tell
22 you that maybe that's not being done all the time?

23 A. Well, I don't know Rico Harrell. I didn't see a
24 deposition by Rico Harrell, so I'll take you at your
25 word. I don't know where Rico Harrell was at the same

1 spot on the property where this riser conduit and that
2 damaged span was.

3 Q. In February, he was on the exact pole that is
4 holding up this exact line.

5 A. Okay.

6 Q. And you testified that he did not inspect the line
7 that day, in February of 2007. Does that tell you that
8 these linemen might not be doing what you think they're
9 doing on these maintenance records?

10 A. It certainly sounds like Rico Harrell may not be.

11 Q. Is that a major violation of a power company
12 employee, to not do the inspection? Pope asked you to
13 assume their inspection plan is they got pole inspectors,
14 and their personnel are expected to patrol the lines, to
15 look at these lines. He admitted he didn't do it. He
16 didn't do it the last two times he was out there,
17 including the last time anyone was out there from
18 Berkeley Electric.

19 MR. JOHNSON: Your Honor, I object. The
20 hypothetical is he given is not based on fact.

21 THE COURT: It's more of an argument than a
22 question. Maybe you can rephrase it.

23 MR. SMITH: Yes, sir. It's a bad question.
24 I'm sorry.

25 BY MR. SMITH: