

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000419
Circuit Court Case No. 2013-CP-10-03251

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

**RECORD ON APPEAL
VOLUME II
PAGES 445-893**

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² Plaintiff's Exhibit 7 consists only of Bates No. 302; Defendant's Exhibit 1 consists of Bates Nos. 302-303.

³ Plaintiff's Exhibit 8 consists only of Bates No. RMC 96; Defendant's Exhibit 2 consists of Bates Nos. RMC 93 and 96.

⁴ Certain pages, i.e., entire pages, of this exhibit were redacted at trial. The entirely redacted pages are omitted from this record.

⁵ As noted above, the three (3) depositions transcripts which comprise Court's Exhibit 1 are grouped with the other transcripts in this record.

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1 (WHEREUPON, a bench conference was held.)

2 THE COURT: Madam Forelady, ladies and gentlemen
3 of the jury, I've got to take up another matter.
4 Please go to the jury room. Don't discuss this amongst
5 yourselves?

6 (WHEREUPON, the jury leaves the courtroom at
7 approximately 11:07 a.m.)

8 THE COURT: All right. We had a bench conference.
9 At the bench conference, you wanted to go into some
10 emails, I believe, from the ARB Administrator at Daniel
11 Island to Mr. Thomas about the repair of the silt
12 fence; is that correct?

13 MR. GRUENLOH: Yes, Your Honor.

14 THE COURT: Mr. Hines has made an objection to
15 that; is that correct, Mr. Hines?

16 MR. HINES: Your Honor, I have made an objection
17 to that.

18 THE COURT: Pardon?

19 MR. HINES: Yes, sir, I have.

20 THE COURT: What is your objection?

21 MR. HINES: My objection is this is not
22 impeachment because it is demonstratively false. This
23 -- what is going to happen, is Mr. Gruenloh is going to
24 show him an email. It is going to say from the ARB on
25 June 13th, saying, hey, Jeff, the silt fence needs

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1 fixing.

2 However -- and this is very important, Your
3 Honor. In this case, we were produced documents by the
4 plaintiff, which were represented on the record as an
5 officer of the court in Mr. Thomas' deposition, as
6 having been taken on June 8th, which shows this fence
7 was repaired the next day. It is not impeachment and
8 fundamentally unjust to come into the court and say,
9 he's lying, when the person asking the questions is --
10 if not being less than truthful, is certainly mistaken.
11 That's dead wrong. And I can prove it. I can show you
12 the cites to the deposition. I can show you the
13 pictures.

14 THE COURT: What's in the deposition?

15 MR. HINES: The deposition is -- he's taking Mr.
16 Thomas' deposition. He says Mr. Thomas, here's some
17 pictures I'll represent to you were taken on July (sic)
18 the 8th, the day after. Here they are. They show the
19 fence is fixed. He's getting ready to go tell the jury
20 --

21 THE COURT: Where are the pictures?

22 MR. HINES: They are right here.

23 THE COURT: Have they been admitted into evidence?

24 MR. HINES: Well, no, Your Honor, because I don't
25 think these subsequent remedial measures makes any

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1 difference. But these guys are trying to make him out
2 to be a liar of it, and pathological -- I'll bring them
3 right to you.

4 The only reason I got them is because they came
5 from the plaintiff, and they got -- it was actually
6 represented to Mr. Connelly -- Your Honor, if you'll
7 look through these pictures, what you'll notice is they
8 have a Bates label from the plaintiff, and they depict
9 that place with the grass growing just like it was --

10 THE COURT: Let me see.

11 MR. HINES: That fence is up.

12 THE COURT: You don't have to explain it to me. I
13 can look at it.

14 (PAUSE.)

15 MR. HINES: Your Honor, I have more to say about
16 that if I can --

17 THE COURT: I can't listen to you and look at
18 these at the same time. Okay. Come on up here. You
19 don't have to run.

20 MR. HINES: I don't want to try your patience, but
21 this is an extremely --

22 THE COURT: You're not trying my patience. I'm
23 just trying to teach you something. Okay.

24 MR. HINES: Yes, sir.

25 THE COURT: All right. When were these pictures

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1 taken?

2 MR. HINES: They were produced by counsel.

3 MR. GRUENLOH: Nobody has any idea, Your Honor.
4 The responses to these in the deposition -- at least to
5 my recollection, Your Honor, because there are a lot of
6 depositions where -- I don't know when these pictures
7 were taken. And if that's what his objection is, he
8 can get up and he can rehabilitate the witness if he
9 believes that he can authenticate the date of those
10 pictures --

11 THE COURT: Well, my -- my problem --

12 MR. HINES: This is Mr. Gruenloh at deposition,
13 "These pictures were taken the following day after the
14 accident, June 8, 2011". He's an officer of the court,
15 he can't say that at the deposition -- and come call
16 him a liar in front of the jury -- and now tell you I
17 don't know when the pictures were taken. That's his
18 words. He has said that --

19 MR. GRUENLOH: And then when we went and took Cori
20 Smith's deposition, Your Honor -- because this is the
21 first deposition we took in this case. When we go and
22 take Cori Smith's deposition, who is the person who I
23 understand had taken the photographs, she said, I don't
24 have any idea what those are. And I'll represent to
25 you --

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1 MR. HINES: So --

2 THE COURT: Don't interrupt each other. Now, let
3 me -- I have tried to be nice. I've asked you not to
4 interrupt. I've repeatedly asked you that. I'm not
5 going to ask you anymore.

6 MR. HINES: Yes, Your Honor.

7 THE COURT: Do you understand?

8 MR. HINES: I do, Your Honor.

9 THE COURT: If you continue to interrupt, I'm
10 going to sanction you for contempt; do you understand?

11 MR. HINES: I do, Your Honor.

12 THE COURT: I'm not going to tolerate it any
13 longer. I've been very nice about it. I've asked you.
14 I've pled with you to quit interrupting me and the
15 other counsel. I'm not going to tolerate it anymore;
16 do you understand?

17 MR. HINES: I understand, Your Honor.

18 THE COURT: Okay. Please proceed.

19 MR. GRUENLOH: There's nobody that I'm aware of
20 that can authenticate these photos. And I don't
21 know -- I do not know where these photos came from.

22 As I understood it at the time that I took these
23 -- this deposition, they were all part of the same
24 pack. But what happened later, Your Honor, after this
25 deposition is we took the deposition of Cori Smith.

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1 And they know this. And we said, all right, there's a
2 group of photos here. And I want to know which one you
3 know anything about. And those photos he's got right
4 there in his hand, she said, I do not recognize these.
5 And then the questions continued on. Do you know who
6 took them? She said no.

7 Through the course of these depositions, no one
8 has ever said that they have any idea what these photos
9 are. All right. And so what he wants to do -- and,
10 frankly, I don't know where they came from. I don't
11 know what date they were taken on. And so, as I
12 understand his objection, he believes that I ought not
13 be able to show --

14 THE COURT: I think his objection is, you're
15 trying -- you are trying to show liability based upon
16 correction of the site. That's his objection the way I
17 understand it; correct?

18 MR. HINES: That's one of them, Your Honor, yes.

19 THE COURT: That's one of them. Okay.

20 MR. GRUENLOH: Well, I think his objection that --

21 THE COURT: His objection to this is, that you
22 acknowledged that the pictures were taken on the day --
23 on the 8th. Okay. But now you're saying you don't
24 know. Do you know who took the pictures?

25 MR. HINES: I do know who took them.

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1 THE COURT: Who took them?

2 MR. HINES: Either Mr. Connelly or someone on his
3 behalf, and this is why: I'm handing you, for the
4 record, this is all the pictures, what's been marked
5 as --

6 THE COURT: I didn't ask you that -- do you know
7 who took the pictures?

8 MR. HINES: Mr. Gruenloh said they were taken.
9 These pictures, they were taken by plaintiff's husband.
10 Now, he just told you, oh, we don't know where they
11 came from because Cori Smith didn't recognize them.
12 Well, Cori Smith didn't take them. The ones she didn't
13 recognize were the ones that were taken by plaintiff's
14 husband. And that's why, if you look at the emails,
15 Your Honor, it doesn't say anything in those emails
16 about cleaning up the site. Mr. Connelly knows this
17 site has been cleaned up if they take --

18 COURT REPORTER: Your Honor, if he could slow
19 down.

20 MR. HINES: Well, Your Honor, I'm telling you,
21 this is wrong, fundamentally wrong. That's why I got
22 agitated because it's wrong. I mean, if we're being
23 held to the fire by counsel --

24 THE COURT: I know who -- in the deposition, you
25 said who took them -- does anybody know who took them?

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1 MR. HINES: I believe Mr. Connelly is in the
2 courtroom and knows who took them. Maybe we can put
3 him up and ask him.

4 THE COURT: I don't know.

5 MR. GRUENLOH: Your Honor --

6 THE COURT: Do you know who took the pictures?

7 MR. GRUENLOH: No idea, no earthly idea and --

8 THE COURT: Go ask Mr. Connelly if he had taken
9 the pictures, please, sir. Just calm down.

10 (PAUSE.)

11 THE COURT: Yes, sir.

12 MR. GRUENLOH: He doesn't know.

13 THE COURT: He doesn't know. All right. Come on
14 around.

15 All right. Let me -- regardless of who took the
16 pictures -- okay -- I've allowed you to go into
17 impeachment because he said he didn't know the
18 condition of the site on the 7th and the 8th. And I
19 allowed it. Okay. He made an objection, he didn't
20 make it on that basis.

21 But in the Court's opinion, you're getting very
22 far afield on the impeachment issue, and getting into
23 trying to convince this jury because he cleaned it up,
24 that's liability, and that's not. That's not allowed.
25 I think you're getting very far afield on that issue by

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1 going into these emails on when the ARB sent him
2 notice.

3 Now, also he said he didn't repair it. He said
4 he got it off the sidewalk, put rocks on it, so it
5 wouldn't blow, so he didn't say he was repairing it.
6 So I just got a real problem with the impeachment where
7 you're going at this point in time. I'll be glad to
8 hear you, and give you an opportunity to change my
9 mind. I just want you to know how I'm thinking.

10 And primarily I based it upon what he said. He
11 said he went out there either the afternoon of the
12 8th -- or excuse me -- the afternoon of the 7th, or the
13 next morning. Got the plastic off the sidewalk, put
14 rocks on it, so it wouldn't blow. That's not repairing
15 the site. And you're trying to impeach him because he
16 said he repaired it. He didn't say he repaired it.
17 And that's where I'm coming from; do you understand?

18 MR. GRUENLOH: Yes, sir.

19 THE COURT: Now, tell me how I'm wrong.

20 MR. GRUENLOH: I -- I can rephrase my question.

21 THE COURT: I mean, tell me how I'm wrong.

22 MR. GRUENLOH: Well, first of all, it's not to go
23 to show negligence, Your Honor. It's simply
24 impeachment, simply impeachment.

25 THE COURT: Well, that's what my point is.

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1 MR. GRUENLOH: I understand.

2 THE COURT: I understand you're trying to impeach
3 him. I don't see where the impeachment is because he
4 didn't say he repaired it -- not that I have heard.

5 MR. GRUENLOH: And what -- I can clear that up,
6 Your Honor, very simply.

7 MR. HOLMES: This case right here, which is
8 included in our South Carolina Rules of Evidence, I
9 believe, it is Eargle vs. Sumter Lighting Company, 110
10 SC 516, a 1918 case. And relevant quotes, "subsequent
11 remedial measures are generally admissible to prove
12 negligence. Although subsequent repairs are
13 inadmissible to show negligence, these measures may be
14 admissible for other purposes, specifically subsequent
15 alterations may be admissible to show the defective
16 condition existed at the time alleged". By putting
17 that first email into evidence, what we're doing is
18 we're showing the condition existed at the time and
19 continued to exist. It's further proof of its
20 existence.

21 THE COURT: You've already done that. Now you
22 want to go from the 8th to the 12th or the 14th.
23 That's my problem.

24 MR. GRUENLOH: And I think I can fix that very
25 easily, Your Honor.

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1 THE COURT: Well, let's listen to the testimony
2 now. Anything you want to add based on what I said?

3 MR. HINES: This is what I want to add, Your
4 Honor, two things. We just had a pretty big
5 hullabaloo -- and, again, I apologize, about requests
6 to admit. And what these lawyers said and what we
7 labored under for years, for goodness sakes, hardly can
8 do anything without the requests to admit. And here,
9 this is an officer of the court asking the same witness
10 who he's now going to impeach in front of these jurors
11 -- and by the way, you would think a silt fence was a
12 nuclear weapon according to the testimony. The
13 question, but here -- these pictures that I just handed
14 to you --

15 THE COURT: You've already told me that three
16 times. Why are you telling me again?

17 MR. HINES: How can he now tell you --

18 THE COURT: You've told me that three times. Tell
19 me something different. I heard you all three times.

20 MR. HINES: Mr. Connelly is in the courtroom, Your
21 Honor. May we call him and ask him under oath who took
22 these pictures? Or ask him if he can tell us who where
23 we might find out? This is important. And one last
24 thing, Your Honor, the pictures themselves --

25 THE COURT: I just told him I'm not going to let

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1 him do what he wants to do. Why are you arguing about
2 that? Didn't I just tell him I'm not going to allow
3 him to do it?

4 MR. HINES: I will sit down.

5 THE COURT: Why are you standing here arguing with
6 me?

7 MR. HINES: I guess I get myself --

8 THE COURT: You've got to learn when the Judge is
9 going your way, shut up and sit down. That's one thing
10 you didn't learn, young man.

11 All right. Let me see if you can change my mind
12 with this witness.

13 MR. GRUENLOH: Thank you, Your Honor. Do you want
14 to do it in camera?

15 THE COURT: Yes, sir.

16 BY MR. GRUENLOH:

17 Q. Mr. Thomas, did you, upon being contacted by
18 Mr. Connelly, go out and have this fence -- not only
19 did you do what you told us that you did in terms of
20 putting the -- pulling it off the sidewalk and putting
21 a rock on it, did you also have it fixed appropriately
22 and have it put back up?

23 A. Standard operating procedure for me in this
24 instance is to do that. My recollection is -- and as I
25 said in my testimony, the ARB hits us with fines very

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1 frequently -- or tries to hit us with fines frequently
2 if our sites are in disrepair. Okay.

3 We get a warning. We get about 24 to 48 hours
4 to fix it, and then you'll get a fine. It also
5 reflects poorly on my company if my sites are not
6 looking good. So, yes, to answer your question, we
7 call today the subcontractor who normally fixes these
8 silt fences, and had them go out and put the silt fence
9 back in place.

10 Q. What date was that done by?

11 A. I don't know.

12 Q. Was it done by June 13th?

13 A. I don't know.

14 Q. Was it done by July?

15 A. I would certainly believe it was done within
16 two to three days unless there was some extenuating
17 circumstances, such as rain, heavy downpours,
18 unavailable labor, that sort of thing.

19 MR. GRUENLOH: And, Your Honor, I believe that
20 this is the crux of where I was going, and perhaps I
21 misphrased my question, and didn't lay the foundation
22 for the impeachment as well as I should have. But he's
23 just said that I -- barring extreme circumstances, I
24 would have gone out within a few days and repaired this
25 fence, and put it back up.

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1 And yet here we have a June 13, 2011, email from
2 the Daniel Island ARB saying the fence is down. And
3 then, Your Honor, I'm sorry, we have an email on July
4 28th saying the fence is down.

5 THE COURT: I understand. But the issue is how
6 was the fence on June the 6th. I understand you want
7 to use it for impeachment purposes. I'm going to grant
8 his motion. I'm not going to allow you to go into it
9 because I think you're trying to use the impeachment
10 argument to get around to convince this jury he's
11 liable because he had them repair it. Okay. I've
12 already allowed it one time, I'm not going to allow it
13 again. I'm going to grant his motion; do you
14 understand?

15 MR. GRUENLOH: Thank you, Your Honor.

16 THE COURT: Mr. Hines, come up here. I want to
17 tell you something.

18 (WHEREUPON, a bench conference was held.)

19 MR. GRUENLOH: Your Honor, can you give me just a
20 moment.

21 THE COURT: Do you need to take a break? We'll be
22 happy to take a break.

23 MR. GRUENLOH: No, I want to finish this witness.

24 THE COURT: Okay. All right.

25 MR. BROWN: Do you mind -- may I slip to the

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1 restroom I mean --

2 THE COURT: We'll take a five minute break.

3 MR. BROWN: I mean, we don't have to do that.

4 THE COURT: All right. We'll take a 10 minute
5 break. You can refocus. Okay.

6 (WHEREUPON, a brief recess was taken.)

7 THE COURT: Bring us the jury please.

8 THE BAILIFF: All the jurors are present, Your
9 Honor.

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 11:35 a.m.)

12 THE COURT: Thank you very much. Please proceed.

13 MR. GRUENLOH: Thank you, Your Honor. Pat, can
14 you pull up RMC 96?

15 BY MR. GRUENLOH:

16 Q. Sir, we were talking about this, and we had
17 gone back and forth before the break about how you said
18 you cleaned this up immediately the next day, and yet
19 you had no recollection of what it looked like; do you
20 remember those questions?

21 A. Yes, I do.

22 Q. Okay. When you say that you went and picked
23 it up -- I don't want to misquote your words -- when
24 you say that the next day, you went out and you picked
25 it up, and you took it out of the sidewalk and put a

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1 rock on it so it wouldn't blow back into the sidewalk?

2 A. Yes. I think I said I put something on it. I
3 don't think it was a rock.

4 Q. Okay. Whatever you put on it, so it didn't
5 blow back into the sidewalk; right?

6 A. Correct.

7 Q. When you were there doing that, did you take
8 any photos of it?

9 A. I don't believe so, I mean.

10 Q. So, is there some reason why didn't take any
11 photos of what the site looked like that day?

12 A. I -- I don't know why I didn't.

13 Q. I mean, if we looked through this phone book
14 that your attorneys produced, there's no photos of what
15 it looked like the next day, is there?

16 A. No, not that I can recall.

17 Q. You've been warned by Daniel Island before
18 about having your construction debris on the sidewalks,
19 hadn't you? Before June 6, 2011?

20 A. That I do not know or cannot recall.

21 Q. Bear with me just one second.

22 (PAUSE.)

23 Q. Had you been warned by Daniel Island that you
24 needed to get your silt fences maintained because they
25 were on the sidewalk?

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1 A. I can't tell you if I had been warned in that
2 exact wording. I've been warned about a handful of
3 things over the years. I've built on that island for
4 19 years now, and you'll get warnings from the Daniel
5 Island ARB when subcontractors or others do things to
6 the site that are outside of the guidelines.

7 Q. Let me show you, sir -- let me show you, sir,
8 a March 17, 2011 email from the Daniel Island Property
9 Owners Association. And it says at the top "REDACT
10 Street job"; do you see that?

11 A. I do.

12 Q. Okay. And it's from Dorothy Thaxton (ph) at
13 the Daniel Island Community.org, and she's the lady
14 that was sort of the police out there; right?

15 A. Yes.

16 Q. And she writes to you on March 17, 2011, three
17 months before the accident, "Jeff, I was down in REDACT
18 Park, and the majority of the site fence is down, and
19 there is no construction entrance on the job site.
20 Please repair or fix as soon as possible?" Is that
21 what she said on that date?

22 A. That is what she said.

23 Q. Do you remember our earlier discussion where
24 you kind of blamed the -- your subs a little bit in
25 your deposition, and you said, look, they don't do it

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1 when I'm around; do you remember that?

2 A. Yes.

3 Q. All right. And that email says that you
4 didn't have a construction entrance on your site,
5 doesn't it?

6 A. It does say there's no construction entrance.
7 Her definition of a construction entrance could mean
8 that the rock needs to be down. I don't know what that
9 definition is. And depending on what phase of
10 construction we are at at this point, would determine a
11 lot of why the silt fence is down, and there isn't
12 necessarily a construction entrance. But, yes, this is
13 a typical find -- not find -- a typical notification
14 that we need to work on some aspect of the site.

15 Q. You don't have any specific recollection -- at
16 least when I took your deposition, you didn't have any
17 specific recollection of fixing the fence between March
18 and June of 2011, that's what you told me in your
19 deposition; isn't it, sir?

20 A. I'm not -- not being disrespectful laughing,
21 but for me to try to remember whether or not, if I have
22 three or four jobs going on, that I've fixed the silt
23 fence at **REDACTED** Street between March 17, 2011, and
24 June 6, 2011. I'm not going to remember that. I will
25 tell you this though, once I got this notification on

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1 March 17th, we repaired the silt fence, or would have
2 been fined.

3 Q. Okay. Well, this email is to Jeff Thomas at
4 Winsorsouth.com; right?

5 A. Correct.

6 Q. And that's your email and you received that
7 email; correct?

8 A. Correct.

9 Q. And it does indicate that there is no
10 construction evidence -- excuse me -- no construction
11 entrance; correct?

12 A. Correct.

13 Q. And it does indicate that the majority of the
14 fence is down; correct?

15 A. Correct.

16 Q. All right. So before June 6, 2011, you were
17 very much aware that you were having problems with your
18 fences out there coming down; weren't you, sir?

19 A. I've known for 19 years building on Daniel
20 Island that silt fences can come down randomly.

21 Q. And in this case, on REDACTED Street, you
22 were aware long before June 6, 2011, when the silt
23 fence was in that condition, you were aware long before
24 that, that your fences could come down; weren't you,
25 sir?

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1 A. Yes, just as on every other job, my fences can
2 come down.

3 Q. Here's -- here's my question to you about
4 this -- this warning that you received from Daniel
5 Island. And I understand you have no memory of doing
6 any repair from when you received this to June, but
7 you're going to testify to the jury today that now you
8 believe that you've done it; right? I mean, let's be
9 honest, you're going to testify to the jury that now
10 you believe sometime between March and June, you fixed
11 the fence; isn't that right, sir?

12 A. I had to have fixed the fence.

13 Q. Okay. And that's what you're going to testify
14 today to; right?

15 A. Yes, but where is the contradiction?

16 Q. Well, what I'm wondering is, when we asked for
17 all the materials --

18 A. Yes.

19 Q. -- related to this site in this lawsuit, and
20 we got this phone book, do you know whether this March
21 17, 2011, letter indicating that you didn't have a
22 construction entrance and that the majority of silt
23 fence was down -- do you know if this was produced
24 anywhere in here, in these documents, that you all
25 provided to us in discovery?

1 A. I have no idea.

2 Q. Well, I'm going to get a chance to ask you
3 some questions later on after your counsel does. And
4 if you have a moment over lunch or break, I don't want
5 to give you assignments, but feel free to look through
6 it. And I'm sure your counsel will point out to you if
7 this is in that record. All right. You don't know
8 whether or not this warning, three months before the
9 accident indicating that your fence was down, was
10 produced or not; do you?

11 A. I do not.

12 Q. Thank you for answering my questions.

13 A. Thank you.

14 MR. HINES: Your Honor, I don't have any questions
15 for Jeff right now, but I would like to reserve our
16 right to call him in our case.

17 THE COURT: All right. Mr. Thomas, you may step
18 down. Thank you very much. You can call your next
19 witness, please.

20 MR. GRUENLOH: Thank you, Your Honor. The
21 plaintiff calls Christina Connelly to the stand.

22 CHRISTINA CONNELLY, after
23 having been duly sworn, testified as follows:

24 THE CLERK: Please be seated. Once seated, please
25 state your first and last name, spelling your last name

CHRISTINA CONNELLY -- DIRECT

1 loudly and clearly into the microphone.

2 THE WITNESS: Christina Connelly. C-o-n-n-e-l-l-y.

3 **DIRECT EXAMINATION BY MR. GRUENLOH:**

4 Q. How are you this morning?

5 A. I'm good.

6 Q. Can you please, even though you just said your
7 name, can you please introduce yourself to the jury?

8 A. Hi, I'm Christina. Rosemary is my mom.

9 Q. Christina, I want to ask you some questions
10 today about -- just your recollection of the events.
11 And let me ask you first, we've heard a lot about June
12 6, 2011. And on that date, June 6, 2011, were you
13 home?

14 A. I was not. I came home a day or two later. I
15 had been home for summer from Clemson, and I think I
16 was away at a friend's house or something, but I
17 remember seeing my mom a day or two after the accident.

18 Q. When you came home a day or two after the
19 accident, was there anybody else that was home? Your
20 dad? Your sister, et cetera?

21 A. No.

22 Q. Who -- who was there when you came home on
23 June the 8th?

24 A. Just my mom.

25 Q. And where was your sister and your dad?

CHRISTINA CONNELLY -- DIRECT

1 A. My sister, Mary, she went to school in
2 Chicago, so they usually stayed later into the summer,
3 so she was there. And then my dad must have been out
4 of town for business or visiting family, but he was not
5 present at the house.

6 Q. What did you -- after the accident, June 6,
7 2011 accident, was that -- well, when did you first see
8 your mom after the accident? Can you put a date on it
9 for us? .

10 A. Yeah, a day or two later, so I guess the 7th
11 or 8th is the first time I saw her. I had heard of the
12 accident just because I talk to my family daily, but
13 that was the first time I saw her.

14 Q. Did you take any photos of your mom?

15 A. I did.

16 Q. Hold on one second. Did you take this photo?

17 A. Yes.

18 Q. And tell the jury when you took this photo.

19 A. It would have been when I first saw her, so I
20 guess, like we said, the 8th, Wednesday the 8th.

21 Q. To the best of your recollection, is this what
22 your mom looked like when you first saw her on June
23 8th, 2011?

24 A. Yes.

25 Q. Okay. That week, tell the ladies and

CHRISTINA CONNELLY -- DIRECT

1 gentlemen what you sort of observed in your mom; how
2 was she doing?

3 A. Like I said, I came home two days later and I
4 didn't realize how serious the fall was until I saw
5 her. But, you know, she was just kind of laying in bed
6 swollen. She was cut, as you can see. You know, she
7 was out of it, I guess you could say, dizzy, just kind
8 of laying in bed.

9 Q. Was that like your mom?

10 A. No.

11 Q. Did -- so why did you take this photo?

12 A. Like I said, both my sister and dad were out
13 of town, so I think I took it just to send it to them,
14 you know, to show them what happened to my mom.

15 Q. That -- as the week went along, did -- did
16 your mom get any better?

17 A. No, not that I noticed. I mean, she still was
18 swollen, cut, and out of it.

19 Q. What did -- what did she -- did she seek any
20 treatment that you're aware of?

21 A. She did -- you know, this is three years ago,
22 four years ago for me, too, now. But she -- I guess
23 she did, just from today, that she went to Funcik the
24 day of the accident, but I -- I wasn't aware of that.
25 But later that week, she went to Nason because she was

CHRISTINA CONNELLY -- DIRECT

1 still feeling, I guess, just strange in her head, I
2 guess she was saying -- but I do remember taking her
3 there.

4 Q. When did your dad get home?

5 A. Sometime later that week, sometime after me,
6 because like I said, I took the pictures solely just to
7 show my sister and my dad what had happened.

8 Q. On June the 8th, was your dad home?

9 A. Most likely not. I took the pictures that
10 day, no.

11 Q. All right. Now, do you remember taking her to
12 Nason?

13 A. Uh-huh.

14 Q. As time went on after the accident, did you
15 notice any changes in your mom?

16 A. Yeah, for sure. Are you referring to the time
17 up to this point?

18 Q. Yeah. Why don't you just tell us generally
19 what changes that you saw in your mom from the time of
20 the accident that weren't there prior to the accident.

21 A. Well, definitely that summer, because it
22 happened early in the summer, and I go back to school
23 usually early August, so I was living at home. You
24 know, just that summer kind of continued, that she just
25 was kind of like lethargic, not as much energy as she

CHRISTINA CONNELLY -- DIRECT

1 normally has.

2 And then I went back to school early August. I
3 was aware she was getting surgery sometime in August,
4 but I didn't see her until a couple of months after
5 that when I came home for -- the Thanksgiving,
6 Christmas holidays. And she still looked very swollen
7 and uncomfortable, but I knew she had gotten the
8 surgery in that -- you know, in that area of her face.

9 Q. Let me -- let me stop you there just for a
10 second -- and I'm sorry to interrupt you. But when --
11 so you go back to school in August?

12 A. Yes.

13 Q. All right. And then you come back sometime
14 around Christmastime?

15 A. Yes.

16 Q. How was your mom when you come back around
17 Christmastime?

18 A. Like I said, she still looked really swollen.
19 And, you know, she just had surgery, but she was
20 clearer, you know. She obviously still didn't have as
21 much energy. She had just gone through a surgery, but
22 didn't seem as like out there as maybe she had that
23 summer.

24 Q. Okay. Have you -- have you ever known her to
25 be out there before?

CHRISTINA CONNELLY -- DIRECT

1 A. No.

2 Q. All right. So you go back to school. And
3 when is the next time that you come home after
4 Christmas?

5 A. It would be the following summer, that summer.

6 Q. Like can you put a month on it? You guys get
7 off May -- get off June?

8 A. May, June, I guess, 2012 at that point.

9 Q. All right. What -- can you tell the jury, if
10 you noticed anything unusual about your mom when you
11 came home in May of 2012?

12 A. Yes. So again, I was living at home that
13 summer. And I remember -- like I said, my dad travels
14 a bit for work, and my sister usually is in school
15 later into the summers. But I remember -- so my mom
16 and I would be home alone together. But I remember the
17 frig smelling really bad. And my mom is usually really
18 good at taking care of that stuff in the house. So I
19 was like, Mom, what's going on in the frig. And she
20 had no idea what I was talking about.

21 Q. Was the smell obvious to you when you walked
22 by?

23 A. Yeah.

24 Q. Did -- so did you have a conversation with her
25 at that point, about what's going on?

CHRISTINA CONNELLY -- DIRECT

1 A. I think I asked her, you know, there's
2 something spoiled in there. What do you think it is.
3 And she didn't know what I was referring to. She
4 didn't -- she's like what -- what's wrong, you know.
5 And I was like something smells bad. She's like I
6 don't smell it. So, yeah, I just said, okay, that's
7 strange. I was like, I hope you clean out the frig,
8 but you know it's a little weird that you don't notice
9 this smell.

10 Q. Did y'all rush immediately to the hospital as
11 a result of that conversation?

12 A. No. We just -- you know, she just -- I was
13 like, Mom, it's a little strange that you don't smell
14 this, but okay. I'll help you clean the frig. And
15 like I said, she had surgery I knew in August -- you
16 know of the previous year, so her doctors -- I guess I
17 told her because she told me, you know, it's normal
18 that after surgery like this, it takes a little while
19 for your -- you know, to fully heal or to settle down
20 or -- you know, whatever -- whatever the case. So I
21 just kind of -- was just like, okay. That's fine.

22 Q. When did you go back to school?

23 A. Again in early August.

24 Q. And when did you come back home?

25 A. Again, the holidays. Thanksgiving, Christmas

1 holidays.

2 Q. When you came home again and saw your mom, at
3 the holidays, had that condition that you've just
4 described, the sort of inability to smell, had that
5 improved?

6 A. Not that I noticed. We went Christmas
7 shopping, I guess, it was over Thanksgiving, around
8 Christmas. And I know she -- we went to look at
9 perfumes, my sister, my mom and I. And she had
10 troubles just with if it smelt good, if she liked it.
11 If -- you know, my sister would like one. And it just
12 was strange because it was just like, pick one that you
13 like. And she just -- she really couldn't smell them.
14 So at that point, I do remember saying to her, you
15 know, I know your surgery, it's been over a year. This
16 is strange that you're having trouble smelling strong
17 smells like this, and you know.

18 Q. Before the accident, had you ever known your
19 mom to have any physical problems?

20 A. No.

21 Q. Before the accident -- let me ask you -- who
22 was the cook and who kept the household at your
23 family's house?

24 A. My mom.

25 Q. Is she still the cook?

CHRISTINA CONNELLY -- DIRECT

1 A. Not as much.

2 Q. Is -- have you ever known her -- have you ever
3 seen -- have you ever observed since the date of the
4 accident, June 6, 2011, have you seen her been able to
5 smell a rose or smell the grass or anything like that?

6 MR. BROWN: Objection, Your Honor, calls for
7 speculation.

8 THE COURT: You can't see someone, tell whether
9 they can smell.

10 MR. GRUENLOH: I can rephrase the question.

11 THE COURT: I'll sustain the objection.

12 BY MR. GRUENLOH:

13 Q. Did you and your mom ever have a conversation
14 at any point in time between June 6, 2011, to today --
15 as you sit here in the courtroom -- where she said
16 anything to the effect of doesn't that smell nice?

17 A. No.

18 MR. BROWN: Objection, Your Honor. Hearsay.

19 THE COURT: Overrule. Go ahead.

20 BY MR. GRUENLOH:

21 Q. What was your answer?

22 A. No.

23 Q. The same question: Did you ever have any
24 conversation with your mom from June 6, 2011, to today,
25 where she said, I smell the flowers, I smell the grass,

1 I smell any of that?

2 A. No.

3 MR. BROWN: The same objection Your Honor.

4 THE COURT: The same objection -- overruled.

5 BY MR. GRUENLOH:

6 Q. Did your mom ever have any problem to your
7 knowledge -- to your knowledge, ma'am, had your mom
8 ever had any problem with her sense of smell before
9 June 6, 2011?

10 A. No.

11 MR. GRUENLOH: Thank you.

12 THE COURT: Cross examination.

13 MR. BROWN: Yes, sir, Your Honor. Thank you. May
14 it please the court.

15 **CROSS EXAMINATION BY MR. BROWN:**

16 Q. Let me just call you Ms. Connelly. I'll try
17 to -- if I say Mrs. -- I apologize.

18 A. Okay.

19 Q. I'm used to referring to your mother. How are
20 you today?

21 A. I'm good.

22 Q. And I'm Steve Brown. We met before at your
23 deposition. And I have just a few questions for you.

24 A. Okay.

25 Q. As I understand it when you -- when you --

1 during this June 6th time period, June 6th through 7th,
2 8th, you were off at friend's house, so you weren't
3 with your mom; right?

4 A. Yes.

5 Q. You had been home prior to that, though,
6 because Clemson lets out sometime in early May; right?

7 A. Yes.

8 Q. Okay. And so you had been at home, and then
9 you went off on a trip with some friends?

10 (Phone ringing in courtroom.)

11 MR. BROWN: I specifically cut it off. I beg the
12 court's --

13 THE COURT: It's not a nice ring. How about
14 turning it off.

15 (PAUSE.)

16 MR. BROWN: Your Honor, it must have flipped from
17 that to that. I apologize.

18 THE COURT: Okay. Have you turned it off because
19 I really don't want to take it.

20 (PAUSE.)

21 BY MR. BROWN:

22 Q. I apologize.

23 A. No problem.

24 Q. And so you came back that summer, and she had
25 had the accident, and you said she was out of it for

1 the summer?

2 A. Yes.

3 Q. That's how you described it?

4 A. Yes.

5 Q. Now, do you know whether as a result of the
6 accident, that she was put on any pain medication
7 during that time period?

8 A. I don't.

9 Q. Okay. And did you -- during that time period,
10 did she still engage in some family activities and
11 things of that nature?

12 A. Over that summer?

13 Q. Yes, ma'am.

14 A. I'm sure she did. You know, we all lived in
15 the house together. It would be hard to avoid us.

16 Q. It would be hard what? I'm sorry.

17 A. To avoid us.

18 Q. Okay. And do you recall if y'all traveled any
19 that summer trip? A trip to Chicago or...?

20 A. To my recollection -- I don't remember if we
21 traveled.

22 Q. Okay. So then go back to Clemson in early
23 August of that year; right?

24 A. Yes.

25 Q. So you're going into your sophomore year?

1 A. Yes.

2 Q. You finished your freshman year, you're headed
3 up to your sophomore year?

4 A. Yes.

5 Q. And you -- we move forward all the way back,
6 she has her surgery right after you leave?

7 A. Yes.

8 Q. Okay. You're at Clemson, and you come home
9 for Thanksgiving and Christmas?

10 A. Yes.

11 Q. And there's nothing going on at that time
12 because you -- you see she's swollen, but it's still
13 fairly close to the surgery?

14 A. Yes.

15 Q. Four months out; right?

16 A. Uh-huh.

17 Q. August, September, October, November,
18 December, so four to five months out; right?

19 A. Yes.

20 Q. Okay. And then you go back to Clemson and you
21 do your work to take the exams, and you come back home
22 for the Summer of 2012?

23 A. Yes.

24 Q. And you have this refrigerator incident that
25 you testified about?

1 A. Yes.

2 Q. Okay. And when did that take place, was it
3 fairly soon after you got home?

4 A. It must have been -- it must have been.
5 Because my sister, I remember her not being there, so
6 I'm assuming she was still in school in Chicago and
7 they usually let out mid to end of June.

8 Q. Okay. So you think it would have been
9 before -- your sister's name is Mary?

10 A. Mary.

11 Q. Okay. I'll just call her Mary to keep some --
12 so Mary wouldn't have been home yet. And was your dad
13 home when that incident took place with the
14 refrigerator?

15 A. Not that I recall, no.

16 Q. Okay. And had he -- was it fairly soon to you
17 coming home, do you think -- I know you're not exactly
18 sure?

19 A. Yeah, I would imagine, yeah, a month or so.

20 Q. And -- and that was the incident that you
21 noticed, and you said that there was something that
22 smelled strong in the refrigerator?

23 A. Yes.

24 Q. And -- but ultimately, you cleaned it out and
25 there were no other refrigerator incidents that summer;

1 correct?

2 A. Not that I recall, but -- you know, she --
3 like I said, she had surgery a year before. So I think
4 anything that seemed out of the norm -- to me, I just
5 said, oh, she had surgery the year before. You know, I
6 just attributed it to that.

7 Q. But you have, at some point, your sister,
8 Mary, is coming home; right?

9 A. Yes.

10 Q. And your dad is home?

11 A. Yes.

12 Q. And no one came to you with what's going on,
13 we're having this constant refrigerator smell where mom
14 can't tell what's going on with the refrigerator?

15 A. They didn't come to me, no.

16 Q. Okay. And to your knowledge, did they go to
17 your mom?

18 A. They may have, I --

19 Q. You don't know?

20 A. I have no idea.

21 Q. Okay. And, in fact, going back to the -- that
22 question about whether there was any medication being
23 taken right after the accident, you said by Christmas
24 holidays 2011, your mother seemed much more clear
25 headed, things of that nature; right?

1 A. Yeah.

2 Q. Okay. I forgot to ask this, and I do
3 apologize. When you -- the day -- when you came home
4 and took those pictures of your mother in bed?

5 A. Yes.

6 Q. And you said she was out of it -- I think you
7 wrote down, she was -- she was in bed, she rested. She
8 was very out of it. Did she do anything -- was she
9 able to read; things of that nature?

10 A. No, not that I remember.

11 MR. BROWN: Okay. Would you pull up those photos
12 that were taken Ms. Carlson. I don't know the exhibit
13 number, but if we can get them flipped the right way.
14 Bear with us. We are all technologically challenged.

15 BY MR. BROWN:

16 Q. Is that a picture you took of your mother?

17 A. Yes.

18 Q. And that's been marked, I think, as
19 Defendant's Exhibit No. 7?

20 A. Okay.

21 Q. Are you able to see it okay?

22 A. Yes.

23 Q. And does it appear that she's been laying in
24 bed reading a book?

25 A. Yeah, I see a book.

1 Q. Okay. And you drove her to Nason on that
2 Friday; right?

3 A. Yes.

4 Q. Okay. And did you go back and meet with the
5 doctors or anything of that nature with her?

6 A. No.

7 Q. Okay.

8 A. Those places take so long, I just kind of
9 dropped her off.

10 Q. And were you provided any instructions there
11 from any of the doctors about not allowing her to
12 drive, things of that nature?

13 A. I didn't speak to any doctors.

14 Q. Okay. And then so you described the
15 refrigerator incident as "just a little weird" -- that
16 was your words with plaintiff's counsel; right?

17 A. Yes.

18 Q. Did you discuss it with your father?

19 A. The refrigerator incident?

20 Q. Yes.

21 A. I did not. You know, I discussed it with my
22 mom. And we had the conversation that she said I had
23 surgery under a year ago. So I just said, okay, I'll
24 attribute it to that.

25 Q. Okay. And would it be fair to say you didn't

1 think a whole lot about it?

2 A. Yeah. That would be fair to say.

3 Q. Okay. And, again, that's the only incident
4 you can remember; right?

5 A. From that summer.

6 Q. Okay. And so it wasn't like you came home and
7 you walked into the house, and the refrigerator was --
8 excuse my words because I'm using words from another
9 witness -- "smelled to high hell"?

10 A. Not that I recall, but like I said after the
11 first incident, I just attributed everything to the
12 surgery. So I just remember the first time because
13 that was the strangest time.

14 Q. Did you work during that summer or did you
15 just have fun with your friends?

16 A. I did work.

17 Q. Okay. Where did you work?

18 A. I'm sorry. It's hard to get the summers
19 straight sometimes. I did work. I worked in an
20 orthodontist's office.

21 Q. Okay. So you weren't around the house during
22 the day, but were at night?

23 A. It was strange hours.

24 Q. Okay.

25 A. So it just was kind of random.

1 Q. Okay. All right. And you go back to school.
2 And as I understand, you come home for the holidays in
3 2012; correct?

4 A. Yes.

5 Q. And you go shopping with your mom and she
6 wants to buy perfume as gifts for people?

7 A. Yes.

8 Q. Does she wear perfume herself?

9 A. She always has.

10 Q. What's her brand? What's her -- every woman I
11 know has a fragrance. What's her fragrance?

12 A. I wouldn't know it.

13 Q. You don't know?

14 A. No. I don't know it.

15 Q. Okay. And where were y'all shopping? Was it
16 a perfume -- at a makeup store; do you recall which one
17 it was?

18 A. Yes. It was downtown. It's called Cost Bar.

19 Q. Okay. Because of my wife, I know where you're
20 speaking of. And you said she was having trouble
21 smelling?

22 A. Yeah. My sister was with me also.

23 Q. Mary was with you?

24 A. Yes.

25 Q. And she would say, do you think like -- Mary

1 would like this? She would offer you a cologne or
2 perfume, and say, do you think Mary would like this;
3 right?

4 A. She just kept asking questions about how it
5 smelled, or just different things -- I said, just smell
6 it yourself, you know.

7 Q. But she never said there, "I can't smell"?

8 A. No. I don't think she realized she couldn't
9 smell. I don't think she was -- I think she kept
10 asking us because she couldn't. But I don't think in
11 her head, she was like, I can't smell this. I just --

12 Q. You're speculating here, you don't know. She
13 never said, "I can't smell"?

14 A. No --

15 Q. Help me with this perfume.

16 A. Yeah.

17 Q. Because I'm not smelling anything?

18 A. No. She never said those exact words.

19 Q. And you would agree perfume is something you
20 can either smell it or you can't; right?

21 A. Yes.

22 Q. Okay. And then after that, you go back to
23 Clemson?

24 A. Yes, after the holidays.

25 Q. And then I don't believe you offered any other

1 testimony past that point -- past the incident.

2 A. No, I just told --

3 Q. -- anything related to the smelling?

4 A. No, I just told her she should get it checked
5 out because it had been --

6 Q. And did you tell your father about the perfume
7 incident?

8 A. I'm sure I did, because at that point, I was
9 concerned it had been more than a year after the
10 surgery.

11 Q. Okay. And I'm not trying to be inappropriate
12 or sound grumpy, or anything -- but are you -- you say,
13 "I'm sure I did", do you specifically remember or are
14 you speculating?

15 A. I don't specifically remember, but I do
16 specifically remember telling my mom she should
17 contact, you know, a doctor or a medical someone that
18 could help her.

19 Q. And do you know whether she did at that time?

20 A. At that time, no, I went back to school in,
21 you know, late December, early January.

22 Q. And you and your mom are very close, aren't
23 you?

24 A. Yes.

25 Q. Okay. And y'all talk and text several times a

1 day every day?

2 A. Yes.

3 Q. Okay. Even when you are at school?

4 A. Yes.

5 Q. Okay. Now, just a few more questions. You
6 are -- I think you said you are no longer living at
7 home; right?

8 A. No, I'm not.

9 Q. You're living at where, 78 Legare now?

10 A. Yes, downtown.

11 Q. And do you work part-time for your father?

12 A. Yes.

13 Q. With regard to your mother, during this time
14 period, the Summer of 2012, would y'all go out to eat a
15 fair amount?

16 A. Yes. It's something my mom, my sister, and I
17 like to do.

18 Q. Is it something y'all still like to do?

19 A. Yeah. We like to go out and socialize and,
20 you know.

21 Q. And where are some of the places y'all go?
22 That y'all like to go?

23 A. We change. It -- you know, it's about getting
24 out of the house, I guess.

25 Q. Uh-huh. I'm just asking for a few of the

1 places y'all like to go?

2 A. I mean, I could say the places I like to go.
3 I like Basil.

4 Q. Okay.

5 A. I like Poes.

6 Q. And does your mom enjoy Basil to the best of
7 your knowledge?

8 A. She enjoys going out to eat with us. You
9 know, I never specifically asked her how much she
10 enjoys the food, but I do know her -- you know, she
11 orders differently. It's not as big of an event for
12 her as it used to be.

13 Q. She orders more spicey foods now; correct?

14 A. I would say things with -- yeah.

15 Q. Okay. And your mom is a generally happy
16 person in your opinion?

17 A. Yes.

18 Q. And when y'all -- your mom is still able to go
19 running; right?

20 A. Yes.

21 Q. And she does push-outs and put-outs -- I'm
22 sorry -- push-ups and works out -- works out and things
23 of that nature; correct?

24 A. Yes.

25 Q. Okay. And from what you observed and see, we

1 know your mom is here today because she's brought this
2 suit over, among other things, the smelling issues. Do
3 you -- when you were noticing all this, and when you
4 gave a deposition, you said it was a decrease sense of
5 smell; right?

6 A. Yes.

7 Q. That was your word -- not a complete loss of
8 smell?

9 A. Well, to my knowledge from what I had saw, she
10 obviously was having trouble with her smell.

11 Q. Okay. But she -- has she -- she did not ever
12 tell you I cannot smell?

13 A. Not until after she saw the doctors.

14 Q. When she saw the doctors?

15 A. Because like I said, I suggested for her to go
16 to a doctor sometime Christmas holiday -- I think we
17 said 2012. And I know she saw like -- like we also
18 said, I talked to her very frequently. I know she saw
19 a doctor at some point after that. She went to an ENT.

20 Q. So it was after she saw a doctor to complain
21 about the lack of sense of smell, that for the first
22 time, she ever told you I lack a sense of smell?

23 A. Well, she -- once I told her, she started
24 noticing things, too. But the first time she told me
25 definitely, I do not have a sense of smell, I think was

1 after the doctors told her definitely.

2 Q. Okay. That's what I was asking. Beg your
3 indulgence one moment. Ms. Connelly, I think you have
4 answered -- Ms. Connelly, you've answered all my
5 questions, and I thank you so much for your time.

6 A. Okay. Thank you.

7 THE COURT: Any redirect?

8 MR. GRUENLOH: Nothing further for this witness,
9 Your Honor.

10 THE COURT: Okay. Ms. Connelly, you may step
11 down. Thank you very much.

12 THE WITNESS: Thank you.

13 MR. GRUENLOH: Your Honor, may I approach?

14 THE COURT: Yes, sir.

15 (WHEREUPON, a bench conference was held.)

16 THE COURT: All right, sir. I understand you are
17 offering Plaintiff's Exhibit No. 8; is that correct?

18 MR. GRUENLOH: We are, Your Honor, which has been
19 pared down to RMC 96.

20 THE COURT: All right. Is that -- any objection
21 to that particular picture?

22 MR. BROWN: No, sir, Your Honor.

23 THE COURT: All right. Plaintiff's Exhibit No. 8
24 admitted without objection.

25 (Plaintiff's Exhibit No. 8 admitted into

1 evidence.)

2 THE COURT: Do you have any further witnesses?

3 MR. GRUENLOH: We do not, Your Honor. The
4 plaintiff rests.

5 THE COURT: Okay. Thank you so very much. All
6 right. Madam Forelady, ladies and gentlemen of the
7 jury, I have to hear certain motions at this time. And
8 so what I'm going to do is go ahead and take a lunch
9 break. It's probably going to take us 10 or 15 minutes
10 to hear those motions, so be back in the jury room at
11 2:00, and we'll continue at that time.

12 Please don't discuss the case amongst yourselves
13 or with anyone else. I'll see you at 2:00.

14 (WHEREUPON, the jury leaves the courtroom at
15 approximately 12:15 p.m.)

16 THE COURT: All right, sir. Any motions from the
17 plaintiff?

18 MR. GRUENLOH: I do not, Your Honor.

19 THE COURT: I'm sorry?

20 MR. GRUENLOH: No, Your Honor.

21 THE COURT: All right. Any motions from the
22 defendant?

23 MR. HINES: Your Honor, I have a -- a -- the
24 defense moves for a directed verdict as to the entirety
25 of the plaintiff's case. But as -- as -- depending

1 upon the court's ruling on that, we'd move also -- if
2 the court has -- would deny that, we would move on
3 punitives. But I have prepared a memo, a very short
4 memo on that motion. I would like to hand it up.

5 THE COURT: I'll be glad to receive it. All
6 right, sir.

7 (PAUSE.)

8 THE COURT: You gave me two copies of this. I'll
9 give you one copy back. I don't need both of them.

10 MR. HINES: I apologize, Your Honor. It should
11 only be like three pages. It must have got stuck
12 together.

13 THE COURT: All right. I'll mark your -- your
14 motion and your memo pursuant to the directed verdict
15 motion as Court's Exhibit -- whatever the next Court's
16 Exhibit is.

17 MR. HINES: Thank you.

18 (WHEREUPON, Court's Exhibit No. 9 marked and
19 made a part of the record.)

20 THE COURT: I'll be glad to -- I've read it. I'll
21 be glad to hear you verbally on anything you want to
22 expound upon on your motion.

23 MR. HINES: Your Honor, that motion -- unless the
24 court needs to hear anything more from me on it, that
25 sets it.

1 THE COURT: Okay.

2 MR. HINES: And the only other thing -- and, Your
3 Honor, I'm sure you'll appreciate brevity -- the only
4 other thing I would mention is that we do -- assuming
5 that the court denies this motion, which is for the,
6 you know, whole case as to punitive damages, we would
7 move for a directed verdict at this time. There's no
8 evidence -- certainly no clear and convincing evidence
9 of recklessness, willful, wanton conduct to merit it.
10 And, furthermore, Your Honor, as to any negligence per
11 se, the allegation that it is.

12 But one of the problems I've had in this case,
13 Your Honor, is trying to figure out what -- what I
14 think the legal framework is. And last night, up until
15 about 1:00 in the morning, I believe this is what it
16 is. And I will say this: It basically says -- we were
17 talking yesterday a little bit off the record about
18 what the deal is with the sidewalk, and I think it's
19 this: I think you do have a duty to not create a --

20 THE COURT: I'm sorry -- what?

21 MR. HINES: I think a -- a -- a contractor on land
22 adjacent to a sidewalk, even if it's a public sidewalk,
23 I think does have a duty not to create a hazard. I
24 think that's a premises liability duty.

25 South Carolina applies the restatement, which

1 has a known and obvious exception. And I haven't seen
2 any evidence in this case -- I mean, essentially the
3 whole -- a great piece of evidence that the plaintiff
4 lacks the most is that picture 96. It's not because it
5 doesn't look bad, it's because it looks bad. I mean, I
6 can't imagine it being argued that's not a known and
7 obvious danger, which was a fact appreciated by the
8 witnesses.

9 The plaintiff's counsel said in his opening,
10 that they saw it. They tried to jog around it. But,
11 you know, it was down from the stakes. Ms. Connelly
12 said it was down from the stakes and unsecured. And it
13 doesn't take anybody, an expert in construction to know
14 that something -- as plaintiff's counsel says, like a
15 hefty bag in the wind. It might blow out at you.

16 And it's a sidewalk, which she is approaching
17 with a clear advantage point from -- if you're on a ten
18 minute mile, I can do the math. It's six miles an
19 hour. It is not exactly like it was an emergency or
20 anything that couldn't be flat out stopped, walked
21 passed, walked out in the road. There's no testimony
22 to that.

23 So, Your Honor, candidly, you know, we've been
24 litigating this for two years. I know we've put a lot
25 of time into this, but that's because it's tough to get

1 a summary judgment in State court. I know that. It's
2 very difficult for his Honor, and judges like him, to
3 try to process things at a summary judgment. And I
4 know I rambled on because you don't -- you come into a
5 case cold. But you're not cold now. The plaintiff put
6 up -- you got here Monday. And here we are, Thursday,
7 the plaintiff put up their case. They can't make it.
8 It's time to go home.

9 THE COURT: Okay. Thank you very much. Yes, sir.

10 MR. GRUENLOH: Your Honor --

11 THE COURT: Yes, sir. Have you had an opportunity
12 to look at his memo?

13 MR. GRUENLOH: Briefly.

14 THE COURT: Okay. Do you need more time to look
15 at it?

16 MR. GRUENLOH: I don't believe so.

17 THE COURT: Okay.

18 MR. GRUENLOH: Because I believe it's a pretty
19 simple question. And you may recall that we were up
20 here at the bench, first as to his issue that this is
21 premises liability.

22 THE COURT: Right. I think that was on the
23 sidewalk issue, when we were talking about charges --

24 MR. GRUENLOH: Right. We went back and we looked
25 at that case. And we think frankly that Your Honor has

1 it right. And I mean -- it's not premises liability,
2 because Mr. Thomas and his construction company doesn't
3 own the public sidewalk. As Your Honor discussed with
4 us yesterday, we believe this is simple negligence
5 principles. All right.

6 He admitted that he had a responsibility, not
7 just to construct the fence, but to maintain it.
8 That's clear on the record. And the photo, and all the
9 testimony in evidence that's gone in, has created a
10 clear question of fact, not to mention the warnings and
11 his knowledge that it could come down and had come down
12 before -- have created a clear question of fact for
13 this jury as to the issue of whether or not Mr. Thomas
14 and Winsor Custom Homes failed in that duty.

15 If Your Honor believes that premises liability
16 is somehow persuasive -- well, we've also plead
17 negligence. And it's not one or the other. We believe
18 that under negligence, we've certainly met the burden
19 as it relates to whether or not this goes back to the
20 jury on that issue.

21 Just a couple of other things. We understand
22 from -- again, from our conversations yesterday, where
23 the court is coming from on negligence per se.

24 THE COURT: First of all, let me -- taking the
25 evidence most favorable to the non-moving party, I deny

1 his motion as to a directed verdict on the negligence
2 charge. Let me hear you on negligence per se and the
3 punitive.

4 MR. GRUENLOH: On negligence per se, Your Honor,
5 quite frankly we've been unable to find a case that
6 says Daniel Island ARB Guidelines constitute -- are
7 sufficient to form a basis of negligence per se --

8 THE COURT: Well, my problem is trying to say a
9 Homeowners Architectural Review committee is negligent,
10 per se, is number one they change from homeowners to
11 homeowners. There is no standard there.

12 And number two, I just don't think, even if you
13 did say that was -- the statute that would -- the
14 violation would approach the negligence per se, I don't
15 think she is the type of person that this particular
16 incident was designed to protect, i.e, the silt fence
17 from debris and, I guess, erosion. I -- that's my
18 difficulty with it.

19 MR. GRUENLOH: And not to waste the court's time,
20 Your Honor, I might argue differently as to whether or
21 not she is the person that it is designed to protect
22 given the purpose that the defendants have indicated,
23 but --

24 THE COURT: I mean -- I guess my real problem is
25 if the courts allows a homeowner's association to put

1 out some guidelines, and in every homeowner's
2 association in the State of South Carolina, there is
3 going to be all kind of different standards out there.

4 MR. GRUENLOH: I understand that, Your Honor.

5 THE COURT: And that's my real problem with it
6 is -- I don't think negligence per se is designed for
7 that type of situation. Right here in Charleston
8 County, you probably have a hundred different
9 standards.

10 MR. GRUENLOH: I'm not going to say anything
11 further on negligence per se --

12 THE COURT: All right. The motion is granted on
13 negligence per se. All right. Let me you hear you on
14 punitive.

15 MR. GRUENLOH: On punitive damages, Winsor has
16 admitted the following in this case, that they were
17 aware that the barrier could get up into the air. They
18 were aware that they had -- even though they didn't
19 tell us in discovery, they were aware that the barrier
20 had come down before at the site. When they were
21 presented with evidence that someone had been hurt,
22 they denied it.

23 And as the court heard ad nauseam, because we
24 argued this issue -- not only did they deny it, but
25 then they said even though we are not responsible, we

1 went and cleaned it up the next day. There's no
2 evidence of that. In fact, the evidence is the
3 contrary.

4 And what I'm arguing to Your Honor, as you can
5 see -- and I'm not going to argue the law because the
6 court is well aware of the law -- but reckless
7 indifference. All right. They did not even ask
8 whether or not Ms. Connelly was okay. Instead what
9 they did -- I get that, Your Honor --

10 THE COURT: That's -- I understand that's probably
11 rude and crude, but that doesn't go to the standard of
12 punitive, I don't believe.

13 MR. GRUENLOH: Instead what they did, even though
14 they had knowledge that the things came up and down,
15 and that they knew that they had a problem out there --
16 I would say that it's analogous to this, Your Honor:
17 If I'm driving down the road tonight in a 35 mile per
18 hour zone, and I get into an accident because I'm going
19 40 miles per hour, that's negligence.

20 If I'm driving down that 35 mile an hour zone,
21 and I have a degree of knowledge that what I may do is
22 injure another person -- okay -- because I'm going
23 through a school zone for example, that extra bit of
24 degree of knowledge is what brings us from negligence
25 to recklessness. And, of course, the court knows that.

1 I'm not lecturing you on that. But we have that degree
2 of knowledge here.

3 THE COURT: Where do you have that in this case?
4 I mean, that's my problem, is where do you have
5 reckless conduct or willful intentional conduct in this
6 case?

7 MR. GRUENLOH: We -- we have it because Winsor was
8 aware that these things came down. And if they --
9 here's -- here's -- there would be two different
10 arguments. If the evidence was, I had never seen this
11 come down before. I didn't know that my barriers could
12 come down. Yeah, this one looks like it's down, but
13 that's the first time that it's ever happened, then we
14 would be in here in a whole different ballgame because
15 we be would be arguing to Your Honor that, you know, we
16 got some kind of constructive notice or something like.
17 That's not what happened. That's not what the evidence
18 is.

19 The evidence is that the subs that he hired and
20 he was responsible for -- remember, Your Honor, the
21 buck stops here. Those folks are the ones who knocked
22 it down. And they knocked it down in March. And if
23 they're going to come in and talk, and say that, you
24 know, that he brought it up -- and, you know, you heard
25 him from the witness stand say, yeah, that's exactly

1 what I'm going to say, that we brought it back up,
2 that's that degree of knowledge. It got knocked down,
3 and he went and put it back up, you know. And he knows
4 that that's happening. That is the school zone sign.

5 And then not only did he blow through the school
6 zone sign -- because you heard all the testimony about
7 whether you were there or -- but, you know, and I
8 understand Your Honor's ruling on this, but I just
9 can't help but say it, he says that I fixed it
10 immediately, and he says that I didn't know anything
11 about the condition that existed there at the time.
12 And yet in the next breath, he says that he -- so that
13 he can sit and talk about the lawyer letter that he
14 got, he says that he goes out there and he pulls it
15 back across so that it doesn't go back. And he puts a
16 rock on it. All right. If that's not reckless
17 indifference to the health of Ms. Connelly, or any
18 other passerby, if that's not evidence of it, if that's
19 not that school zone sign, I frankly don't know what it
20 is.

21 THE COURT: Okay.

22 MR. GRUENLOH: So there's my argument on punitive
23 damages.

24 THE COURT: Thank you very much. Let me hear you
25 on punitive.

1 MR. BROWN: Your Honor, as I understand it, the --
2 clear and convincing evidence has to be of actions that
3 led to her accident. And what he's talking about are
4 things that were way out before, or things that
5 happened after. What about the day of this accident,
6 June 6th? Where is there any evidence in this case of
7 a willful indifference on that day? They were out
8 there early in the morning running. They admitted it
9 was windy. That they saw it moving, and that they went
10 ahead and decided to go on by it.

11 Judge, these things come down. If he had -- if
12 he had -- they are trying to make this sort of like the
13 Ford Pinto, that Ford knew it would come down and -- I
14 mean, knew their gas tanks would explode, so we're just
15 not going to do anything about it. That's not the
16 evidence in this case. The evidence in this case has
17 to be about the day of the accident, and that he
18 willfully was somehow indifferent to their rights at
19 that time. There is no evidence of that, Your Honor.
20 There is none.

21 THE COURT: All right. That's fine. I appreciate
22 your argument. I will keep it under advisement. And
23 if I do allow punitive, it will be bifurcated anyhow.
24 It's not going to affect your case under the negligence
25 issue.

1 MR. BROWN: Thank you.

2 THE COURT: In any manner whatsoever, so I'm going
3 to take it under advisement. I'll listen to the
4 defense's case and I'll rule at that time -- or before
5 that time. Whenever I make up my mind, I'll rule.
6 Okay.

7 MR. GRUENLOH: Thank you, Your Honor.

8 THE COURT: Thank y'all very much. We'll adjourn
9 until 2:00, and we'll be ready -- how many witnesses
10 are you going to have?

11 MR. HINES: Your Honor, one, maybe two.

12 MR. BROWN: Two.

13 THE COURT: I'm sorry.

14 MR. HINES: Mr. Thomas --

15 THE COURT: You got the doctor --

16 MR. HINES: -- and the doctor. The most we have
17 is two.

18 THE COURT: Okay. All right. We'll see you at
19 2:00. Thank you very much.

20 (WHEREUPON, a lunch break was taken.)

21 THE COURT: Anything from the plaintiff before we
22 bring the jury?

23 MR. GRUENLOH: No, Your Honor.

24 THE COURT: Anything from the defendant?

25 MR. BROWN: No, sir, Your Honor.

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1 THE COURT: Bring us the jury please, sir.

2 MR. BROWN: Your Honor, while we're waiting for
3 the jury, are you going to need a proposed verdict form
4 from us or do you have your standard --

5 THE COURT: Have what now?

6 MR. BROWN: A verdict form. Do you need one from
7 us or do you have a standard?

8 (PAUSE.)

9 (DISCUSSION OFF-RECORD.)

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 2:08 p.m.)

12 THE BAILIFF: All jurors are present and seated,
13 Your Honor.

14 THE COURT: Okay. Thank you very much. Call your
15 first witness please.

16 MR. HINES: Your Honor, the defense calls Dr.
17 Rodney Schlosser.

18 DR. RODNEY SCHLOSSER,
19 after having been duly sworn, testified as follows:

20 THE CLERK: Please be seated. Once seated, please
21 state your full name, spelling your last name loudly
22 and clearly into the microphone.

23 THE WITNESS: Rodney J. Schlosser.
24 S-c-h-l-o-s-s-e-r.

25 DIRECT EXAMINATION BY MR. HINES:

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1 Q. Thank you, Dr. Schlosser. We've all been here
2 a long time by now, and heard a whole lot of stuff
3 about noses. So let's go ahead and cut to the chase as
4 best we can. You told us who you are. Let me know,
5 what do you do?

6 A. So I'm a rhinologist. I'm an ear, nose, and
7 throat doctor. I specialize just in doing things in
8 the nose, the sinuses, the skull base area.

9 Q. Let's just get a little bit about your
10 education, you can start with college and take me on
11 through.

12 A. Okay. I went to the U.S. Military Academy at
13 West Point, graduated in the top one percent of my
14 class. I then served active duty in the Army in the Corp of
15 Engineers for four years. After that, I got out of the
16 Army, and went to medical school at the Mayo Clinic. I
17 then did my ear, nose, and throat residency at the
18 University of Virginia. And that was followed by a
19 fellowship, which is an extra year of subspeciality
20 training in rhinology and sinus surgery, and I did that
21 at the University of Pennsylvania. And then I have
22 been at MUSC since 2002, where I'm the Director of
23 Rhinology and Sinus Surgery.

24 Q. You mentioned rhinology, and you know we've
25 heard some -- some other testimony or seen some

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1 documents in this case about ENT, and I think that
2 means -- well, those letters can refer otolaryngology,
3 or you might be -- what's the word?

4 A. Otolaryngology, or ENT is ear, nose, and
5 throat. That's our specialty.

6 Q. And so explain this, are you an ENT?

7 A. I am an ENT, but then I did the additional
8 training in -- just in rhinology. So unlike a general
9 ENT, who does a variety of things like tubes and
10 tonsils, and thyroids and other things, the only thing
11 I do is the nose. So I'm subspecialized. That's the
12 extra year of training. And that's the only thing I do
13 at the Medical University.

14 Q. So you might just be an N?

15 A. Just an N. That's it. Just this area.

16 Q. Got you. Now, and you are at MUSC. Now, tell
17 us is there anything -- what do you do at MUSC on a
18 day-to-day basis?

19 A. So the bulk of my time is spent taking care of
20 patients, so I have a clinic and I do surgery. I see
21 patients referred, really from all over the southeast
22 primarily, but also from around the country. We have
23 some patients coming out. I just spoke with this week
24 to a gentlemen from Arizona, who's flying out to see
25 me. I'm taking care of an ENT doctor's wife from

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1 Missouri, who's coming out next month for surgery. So
2 the bulk of my practice is doing -- taking care of
3 patients with nose and sinus issues that can range from
4 sinusitis to tumors in the nose, to -- you know,
5 olfactory problems.

6 We also have an active research problem. We are
7 one of probably five in the country that's doing active
8 clinical research in olfaction. That deals right now
9 with sinusitis, because that's the most common cause of
10 olfactory loss, especially reversible or treatable
11 causes. So we're looking at -- at that aspect of
12 sinusitis and olfaction, and how that's tied together
13 as well.

14 So that research -- a lot of it is clinical.
15 Some of it is basic science, kind of looking at
16 immunology and other things, but clinically as well.

17 Q. So are you spending most of your time in
18 courtrooms testifying for somebody?

19 A. No.

20 Q. And are you -- is your opinion for sale?

21 A. It is not.

22 Q. Now, you're obviously being paid to be here
23 today?

24 A. Correct.

25 Q. And are you being paid to say what I want you

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1 to say?

2 A. No. My -- this is less than ten percent of my
3 annual income. I actually prefer not to know which
4 side the attorneys are on when they contact me. I've
5 worked for both plaintiff and defense. I've given
6 plenty of opinions where I've told the attorneys not to
7 pursue a case, because that's -- my opinion is what my
8 opinion is. My -- I get reimbursed for my time because
9 I'm actually on vacation right now, taking time away
10 from my clinical practice. But I do not get paid to
11 render an opinion. I get paid for my time to review
12 cases.

13 Q. Speaking of your time and what you might
14 review, let's talk a little bit about what you did
15 review. You know, before we do that, have you ever
16 treated Mrs. Connelly, the plaintiff in this case?

17 A. I have not.

18 Q. Have you seen her before today at all?

19 A. No.

20 Q. All right. Well, how is it that you would be
21 in a position to know anything in the world about
22 what's going on with Ms. Connelly?

23 A. Well, I reviewed the medical records
24 extensively from Dr. Funcik, the folks at Charleston
25 ENT, Nason as well. So I have reviewed all of those

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1 records.

2 Q. So your -- what about anything else, did you
3 review anything else that would have a bearing on what
4 your opinion is?

5 A. I've reviewed depositions that I've been given
6 in the case, but I really -- there's no other clinical
7 medical information that I need to render my opinion or
8 anything else that would impact on my opinion.

9 Q. Just to make sure, have you or have you not
10 reviewed two depositions from Dr. Funcik?

11 A. Yes.

12 Q. A deposition from Dr. Ghegan?

13 A. Yes.

14 Q. The plaintiff's deposition?

15 A. Yes.

16 Q. Have you seen photographs of the plaintiff's
17 injuries?

18 A. I have.

19 Q. So did you take all that information that you
20 had and figure out a way to say what I want you to say?

21 A. I did not.

22 Q. What did you do with it?

23 A. I developed my own opinion.

24 Q. Okay. One thing I wanted to ask you about.
25 that -- what does it mean in a -- in a note from a

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1 doctor, that something is clinically significant or
2 relevant?

3 A. Those are the things that are -- obviously, we
4 can't document every single thing that goes on during
5 an exam or discussion with a patient, so the clinically
6 significant or relevant items are those things that we
7 record that are important to the care of that patient
8 for the problem that they're coming to us for.

9 Q. And so why -- why -- if at all, would that be
10 important that a doctor's note, in terms of something
11 you've reviewed and you're relying upon, are you --
12 well, let me ask you this: Are you being critical of
13 any of Ms. Connelly's treating physicians in this case?

14 A. No.

15 Q. In fact, is the quality of their work
16 something that is important to you?

17 A. Well, that's what I'm relying upon for my
18 opinion, are they -- is their documentation and their
19 notes.

20 Q. And through what you've told us what you've
21 done, have you had -- have you been able to formulate
22 any opinion related to this case?

23 A. I have.

24 Q. Okay. And do you hold that opinion to a
25 reasonable degree of medical certainty?

1 A. I do.

2 MR. HINES: Your Honor, at this time I would ask
3 that Dr. Schlosser be qualified as an expert in this
4 case in the field of ENT medicine, subspecializing in
5 rhinology, and that he be allowed to testify about the
6 causation issue in this case.

7 THE COURT: Do you want to cross him on his
8 qualifications or do you stipulate?

9 MR. GRUENLOH: Just a few questions, Your Honor.

10 THE COURT: Okay. Just for a brief moment.

11 BY MR. GRUENLOH:

12 Q. Let me make sure that I understand, Doctor.
13 And my name is Mike Gruenloh. You and I met when I
14 took your deposition?

15 A. Yes.

16 Q. When you saw Rosemary Connelly in the
17 courtroom today, that's the first time that you ever
18 saw her; right?

19 A. The first that I'm aware of. I saw the
20 pictures, but I think it's the first time I have seen
21 her in person.

22 Q. When you say you saw the pictures, I want to
23 talk to you just for a second about the things that you
24 saw -- you talked about the things that were provided
25 to you. And if we can sort of narrow that down to the

1 things you were provided before you reached your
2 opinion in this case, that is before your deposition;
3 are you with me?

4 A. Yeah.

5 Q. All right. Do you remember in Rosemary
6 Connelly's deposition, you told me -- excuse me -- in
7 your deposition, you told me that you don't even know
8 that Rosemary had been deposed in this case?

9 A. I recall that.

10 Q. All right. And you were able to reach an
11 opinion without ever examining Rosemary; right?

12 A. Correct.

13 Q. You never looked in her nose?

14 A. That's correct. I relied upon the ENTs that
15 did look in her nose and their notes.

16 Q. You weren't here in the courtroom when those
17 ENTs testified; correct?

18 A. I was not.

19 Q. And you've not spoken with those ENTs?

20 A. I have not.

21 Q. And you've not examined Rosemary Connelly?

22 A. I have not.

23 Q. And you've not requested to examine Rosemary
24 Connelly?

25 A. There's nothing that I would find on exam

1 that's not already been documented. I have all the
2 information I need from a medical standpoint.

3 Q. So in other words -- and you didn't read her
4 deposition, the 200 pages or so --

5 THE COURT: Cross is just as to his
6 qualifications. You can cross on his opinion later.
7 Do you have any objection to him being qualified as
8 offered by --

9 MR. GRUENLOH: I do, Your Honor. He hasn't done
10 any examination of her.

11 THE COURT: Well, that's fine. But that goes to
12 weight and sufficiency -- do you think he's qualified
13 as to what they've offered him for? I believe ENT and
14 what was the other?

15 MR. HINES: Well, he subspecializes in rhinology,
16 Your Honor, but ultimately to be able to offer an
17 opinion --

18 THE COURT: The question is: Do you agree he's
19 qualified to testify about -- as that expert?

20 MR. GRUENLOH: I don't, Your Honor. I object to
21 it.

22 THE COURT: All right. Then let's go into his
23 qualifications. You're going into the weight and
24 sufficiency of his opinion. And that's not what I'm
25 allowing you to do at this time. The rules allow you

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1 to go into his qualifications if you don't agree he's
2 qualified. Okay?

3 MR. GRUENLOH: Understood, Your Honor.

4 THE COURT: Not what happened in this particular
5 case.

6 MR. GRUENLOH: And in that -- in that case, I
7 think what I'll do is I'll take it up on cross
8 examination. Thank you, Your Honor.

9 THE COURT: All right. The Courts finds that he's
10 qualified as offered by the defense. Please proceed.

11 MR. HINES: Thank you, Your Honor.

12 BY MR. HINES:

13 Q. Dr. Schlosser, about this notion of when you
14 reached your opinion in this case, did you reach any
15 opinion in this case written in stone?

16 A. No.

17 Q. So, I mean if you've got some more information
18 that was relevant in this case, would you thoughtfully
19 consider that?

20 A. Absolutely.

21 Q. And it could essentially change your opinion?

22 A. It could.

23 Q. So, I mean, even on cross examination, for
24 instance, perhaps plaintiff's counsel brings something
25 to your attention that makes you think, doggone it,

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1 yeah, I'm rethinking this?

2 A. Absolutely.

3 Q. So when you get information after you were
4 deposed, what did you do with it?

5 A. I considered it, and said does this change my
6 opinion of the case or not, and then it didn't.

7 Q. Okay. So, you know -- one other thing I want
8 to mention to you -- well, let's make this clear. You
9 are board certified -- are you board certified?

10 A. Yes.

11 Q. Now, you know, just quick on this topic -- if
12 you were going around selling opinions to lawyers in
13 cases, is that something that would be helpful to the
14 rest of your practice, the rest of your professional
15 life?

16 A. No.

17 Q. Why not?

18 A. That has no impact on my medical career.

19 Q. Are you doing any research, seeking any grant
20 funding or things like that?

21 A. Not from the legal system.

22 Q. Yeah, but you are -- are you doing it from
23 outside the legal system?

24 A. Absolutely. We have grants from N.I.H, the
25 National Institute of Health from the federal

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1 government.

2 Q. Do you think it would be easy to get those
3 grants if you were somebody out selling those opinions?

4 A. I think that would decrease my credibility.

5 Q. Okay. And speaking of, again, the doctors
6 that treated Ms. Connelly in this case, Dr. Ghegan and
7 Dozier, for instance -- are you familiar with them in
8 the profession?

9 A. Yes. They did residency under me at MUSC.

10 Q. And what does that mean?

11 A. That I trained them.

12 Q. Now, Doctor, let me go ahead and try my best
13 to cut to the chase -- what's your opinion in this
14 case?

15 A. I don't think we can say with a reasonable
16 degree of certainty that her olfactory loss is
17 traumatic.

18 Q. Why is that?

19 A. Well, when I look at traumatic olfactory loss,
20 there are a few things that you want to consider. So
21 the first is what is the severity of the injury of the
22 accident when something happened. So the patients that
23 I see with traumatic olfactory loss are, let's say,
24 they -- they are in very severe trauma cases. So they
25 come in, and they have facial fractures, sinus

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1 fractures, skull fractures, usually they have bleeding
2 inter-cranially in the brain. They're often in a coma
3 and in I.C.U. A lot of times, you know, if it's a car
4 accident, maybe they broke their spine. They have a
5 liver laceration, so the injuries are extremely severe
6 in the vast majority of cases.

7 So as I look at what -- what kind of injuries
8 did Ms. Connelly suffer, she had a nasal fracture,
9 which was non-displaced and minimally displaced,
10 meaning maybe it's out of place a millimeter or two.
11 And we see nasal fractures -- it's the most commonly
12 fractured bone in the body, so we see that every week.
13 And we see much more severe nasal fractures than what's
14 described.

15 We see them pushed all the way over on the side
16 of the face, severely displaced. Comminuted, meaning
17 they're all cracked and in pieces, coming through the
18 skin. And those patients, I can't recall one that just
19 with a nasal fracture, has had olfactory loss. So she
20 had a very mild nasal fracture, and none of the other
21 associated injuries. And so that's kind of one thing
22 that seemed odd to me, and didn't quite make sense.

23 The issue has been brought up of, well, did she
24 have a concussion at Nason. And so as doctors, to
25 diagnose a concussion, really that's based on what the

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1 patient tells us. So you have to say, okay, you know,
2 you hit your head. What did you experience? And so
3 there really isn't a test or a scan that -- that is
4 available, that I'm aware of, that describes a
5 concussion other than, you know, my boys played
6 football for their high school team, and they have to
7 take the concussion test, which is kind of like a
8 little computer thing.

9 And Dr. Funcik, his deposition and testimony has
10 been that he didn't think she had a brain injury or a
11 head injury, or he would have sent her to -- you know,
12 get an image, an M.R. or C.T. scan. So to me the --
13 the degree of injuries and the minimally displaced
14 nasal fracture didn't quite make sense with almost
15 every traumatic olfactory loss patient that I see who
16 suffers trauma like this.

17 Then the second thing that -- that didn't really
18 make sense to me, is that nearly all of these
19 patients -- when you have a traumatic olfactory loss, I
20 think it's probably been discussed, it's a sheering
21 injury. And so it's kind of like patients who are in a
22 -- get a spinal cord injury and get paralysis in a car
23 accident. It's a complete loss of function. It occurs
24 immediately. And it's right there from that time and
25 that day, and the patients know it. It's kind of like

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1 if you're in an accident, and you go blind, complete
2 loss of the sensation, like olfaction, hearing, vision,
3 we would all know. This isn't something that's slowly
4 progressive like -- oh, now, I need my reading glasses
5 and it's happened over the last few years. It's
6 something -- it's bam. This is the day that it
7 happened.

8 And if we look at the notes from -- from
9 Charleston ENT, and even Dr. Funcik the -- most of them
10 say she started to notice it six months ago. And that
11 doesn't really make sense with complete and sudden loss
12 of function, which is what her smell test showed was
13 anosmia. And that would be the history that someone
14 would give me if it was traumatic. And it's not
15 something that you don't notice for a year and a half,
16 and then it kind of gradually comes on. And so
17 that's -- that's the other thing that didn't make sense
18 to me.

19 Q. I want to be clear when you say that, are
20 you -- are you in any way talking about a credibility
21 issue?

22 A. No. I'm just saying that it's -- in my mind,
23 these are the things that didn't add up with a
24 traumatic olfactory loss, is the -- you know, very mild
25 injuries with a non-displaced to minimally displaced

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1 nasal fracture. And then the fact that there were
2 multiple notes that kind of described this roughly one
3 year latency period, where there was no documentation
4 of any loss of olfaction by any health care provider.
5 And -- and even when she saw Charleston ENT, they said,
6 well, she thinks it started six months ago, or noticed
7 it six months ago, that's something you would notice
8 right away. You would notice it from day one if you
9 can't taste and smell.

10 Q. And when you are saying that it's -- well,
11 that's clinical documentation?

12 A. Well, if the patient come in to me even -- if
13 they come in to me two or three years later, they're
14 not going to say I noticed it six months ago. They're
15 going to say, I noticed it on, bam, in June in 2011,
16 when I hit my face. I lost my olfaction. And it's
17 been gone ever since then. And that's what they're to
18 going say. And they might say, well, I thought it
19 would come back. But that's going to be the day that
20 they noticed the complete loss of that function in --
21 in a vast majority of traumatic olfactory loss.

22 Q. And is -- is there anything -- as far as I
23 asked why, you gave an explanation in a couple of
24 questions back -- do you have any more to add on that
25 question of why? Because if not, I've just got a

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1 couple of more questions I'll ask you--

2 A. Well, you know, I -- if you want me to go into
3 it now, I was just going to say -- if you wonder if
4 that doesn't quite make sense for the trauma to cause
5 her olfactory loss, you know, for me, as a doctor, now
6 I have to say, well, what other reasons can cause her
7 olfactory loss. And if -- the things that -- the
8 reasons we see people, when they lose their sense of
9 smell, one of the top ones is a virus. Just a simple
10 cold can happen or a sinus infection. Those are
11 extremely common.

12 Unfortunately, one of the most common is we call
13 idiopathic is kind of -- we don't understand. We don't
14 have a good explanation. The patient just says I lost
15 my sense of smell. And there's no inciting trauma or
16 infection, or anything like that. And then also
17 allergies are a cause of anosmia. So all of those
18 things could have played a role as well.

19 I think surgical -- you know, Dr. Funcik did
20 surgery. I'm not saying that he caused it, but that's
21 also on my differential. Because any time you operate
22 on somebody's nose, you can cause them to lose their
23 sense of olfaction.

24 Q. Would you explain what a differential means?

25 A. Differential just means a patient comes in

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1 with loss of olfaction in this case. My differential
2 is, what are the various reasons that could have caused
3 her to lose her sense of smell? And so there's virus.
4 There's the idiopathic. We don't really know. There's
5 no definable cause. There's allergies. There's
6 trauma. There's surgery. And those are probably the
7 top ones. I mean, there are some others that are less
8 common, but that's -- that's the list you come up with
9 for -- to try to explain what's going on.

10 Q. Doctor, the jury has heard maybe some --
11 something about these -- well, has heard plenty about
12 these olfactory nerve filaments or, you know,
13 cribriform plate. And we know they're real small. But
14 is there anything that can be done to see -- like
15 actually to just take -- take a picture of them, say,
16 hey, they're damaged or they're not?

17 A. In a case like this, there's not. Sometimes
18 if we are taking a tumor out, we can see them. But in
19 a case like this, no.

20 Q. So can you definitively diagnose it or -- or
21 prove it, or is it --

22 A. The only way to prove the loss of olfaction is
23 with the -- the SIT 40 test that she took.

24 Q. And -- and proving the loss and proving the
25 cause of the loss, are they the same thing?

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1 A. No, they are two different things.

2 Q. Now, I want to ask you about air bags and
3 shell shock veterans. Now, I heard those things
4 mentioned -- I think the jury has -- is -- if -- you
5 based your review of Ms. Connelly's -- the materials
6 that you have, is this like an air bag case?

7 A. Two completely different mechanisms of injury.
8 Because the air bag is designed to protect us from
9 smashing our faces up and getting nasal fractures and
10 other things like this. Falling on the sidewalk, there
11 is no air bag. So if you fall on a hard surface like
12 this, or you suffer trauma -- let's say, we see
13 somebody who gets hit with a baseball bat, those are
14 the types of injuries that -- olfactory injuries that
15 are accompanied by skeletal injuries like a severe
16 nasal fracture, sinus fractures, skull fractures, those
17 types of things, because there is no air bag. So it's
18 a completely different type of injury.

19 Q. How about those -- how about the shell shocked
20 Veterans?

21 A. Well, we're actually doing some research into
22 veterans, and the olfactory loss, so there are a
23 variety of things in our deployed veterans that can
24 cause olfactory loss. The shell shock, in and of
25 itself, is a pervasive injury. So it's kind of like a

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1 whiplash or an air bag injury. There's not a hard
2 surface that they're hitting. There's also some things
3 we are interested in exploring, you know, burn pits,
4 diesel exhaust over there. A lot of -- you know, the
5 oil wells that got put on fire, so there -- there are a
6 whole variety of things that we're actually
7 investigating at the V.A. in what causes our veterans
8 to lose some of their olfaction.

9 Q. So yes or no?

10 A. Completely different. Completely different,
11 yeah.

12 Q. One -- the last little thing. I figure -- I
13 mean, there's been some suggestion about how -- maybe
14 how easy it is to have a traumatic loss of olfaction.
15 I guess you guys can see -- are y'all seeing cases like
16 this all the time?

17 A. No. It's -- it's fairly uncommon to -- to see
18 traumatic olfactory loss. Oftentimes patients, when
19 they suffer that degree of trauma, they die because
20 they -- if they're in an accident with that degree of
21 injury, they don't survive.

22 Q. What about this business of concussion -- I
23 mean, I watch football. And I'm -- you know, though
24 guys are banging heads all the time out there -- I
25 figured, can any of them smell any more?

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1 A. I'm not aware of anybody who -- nobody has
2 presented to me with olfactory loss due to concussion.

3 MR. HINES: Well, thank you, Dr. Schlosser. If
4 you would, please answer any questions Mr. Gruenloh
5 has.

6 THE COURT: Cross examination.

7 MR. GRUENLOH: Thank you, Your Honor.

8 **CROSS EXAMINATION BY MR. GRUENLOH:**

9 Q. Can you see that board, Doctor?

10 A. I can.

11 Q. Okay. Forgive me for taking a second to set
12 up.

13 A. No problem.

14 Q. You and I met -- I'm looking for the date --
15 the first time at your deposition about a month or so
16 ago; do you remember that?

17 A. Yes.

18 Q. All right. And I asked you a whole bunch of
19 questions, and I promise you I'm going to try to pair
20 that down from today. Let me ask you first about this
21 idea -- Mr. Hines asked you if you're selling your
22 opinion. And to put -- to step into this courtroom,
23 you charge \$7500; is that right?

24 A. Correct.

25 Q. And if God forbid, we go over tonight and we

1 have to finish with you tomorrow, then if you put your
2 foot into the courtroom again tomorrow, it's another
3 \$7500; correct?

4 A. That's the contract.

5 Q. As a matter of fact, even if you don't walk
6 into the courtroom, if you block it off on your
7 schedule, you charge \$7500; is that right?

8 A. That's correct. I have to block the operating
9 room schedule, clinic schedule. I'm on vacation right
10 now.

11 Q. And you advertise your services as the nose
12 expert for all of South Carolina on a service called
13 Second M.D.; is that right?

14 A. I don't know exactly how it's advertised, but
15 I -- I do participate in Second M.D., yes.

16 Q. Do you recall that -- at least you told me,
17 that you consider yourself the nose expert for all of
18 South Carolina?

19 A. That's probably true.

20 Q. But as you and Mr. Hines just talked about,
21 you know Dr. Ghegan?

22 A. Yes.

23 Q. You trained with him; correct?

24 A. No, I trained him.

25 Q. And you know Dr. Dozier?

1 A. I trained him as well.

2 Q. And you think that they're both outstanding?

3 A. They're good -- they're good guys, yeah.

4 Q. And you told me in your deposition that you
5 don't have any doubts about their ability to diagnose
6 anosmia?

7 A. No.

8 Q. And you don't have any doubts about their
9 ability to diagnose the cause of anosmia?

10 A. No. They have a different opinion, is what I
11 understand from Dr. Ghegan, but I mean -- I trust their
12 ability as physicians and -- and I rely upon their good
13 exam and their -- and their notes to render my opinion.

14 Q. Well, you did agree with me at your
15 deposition, that they've got more information on Ms.
16 Connelly than you; right?

17 A. They have more information, but I don't know
18 if it's clinically relevant. Because there are no
19 other clinical facts that I really need, that I
20 think -- that I can even consider that would change my
21 opinion. They might know -- you brought up the color
22 of her eyes, but that doesn't matter to her olfactory
23 loss --

24 Q. Well --

25 A. -- or what she was wearing that day.

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1 Q. How about this: Let's talk about something
2 that may be clinically significant, maybe it's not to
3 you. When I took your deposition, do you remember you
4 had in your office that black -- or that plastic skull?

5 A. Yes.

6 Q. And do you remember when I asked you to place
7 an "X" on it or -- we didn't want you to mess up your
8 skull, but I said could you place an "X" on it and tell
9 me exactly where she made impact with the concrete that
10 day. And do you recall, sir, that you were unable to
11 do that?

12 A. Yes.

13 Q. In other words, you had already formed your
14 opinion in this case on that date, because you told me
15 on that date that it was your opinion that Rosemary
16 Connelly's sense of smell -- you said that it wasn't --
17 you didn't think that it was from the trauma, and you
18 gave me a whole list of things that it might be from;
19 right?

20 A. Correct.

21 Q. And then I asked you about that list. And I
22 want to talk about those a little bit today.

23 A. Okay.

24 Q. But I asked you about that list. And you said
25 that none of them were the definitive cause; do you

1 recall that?

2 A. There's no way to know exactly what the cause
3 of her anosmia is --

4 Q. You --

5 A. -- from -- from any of those.

6 Q. Just -- just to be clear. You're not
7 disputing, first of all, that she has anosmia; are you?

8 A. I'm not.

9 Q. All right. You agree, as you sit in this
10 courtroom, that she has anosmia?

11 A. Her SIT 40 score reflects anosmia, yes; 13 out
12 of 40 is anosmia.

13 Q. And 13 out of 40 also indicates that she's not
14 faking it; right?

15 A. That's the indication, yes.

16 Q. All right. You said that you don't make a
17 living -- or I don't know what you said -- you said you
18 don't like testifying. You don't do a whole bunch of
19 it. I've got a list here of a whole bunch of cases
20 that you've served in some capacity, either as an
21 expert witness or a consultant. And you provided this
22 to your counsel and your counsel provided this to me;
23 is that correct?

24 A. Correct.

25 Q. And you make about \$50,000 a year consulting

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1 on legal medical issues; correct?

2 A. That's all consulting. And so "medical legal"
3 is a fraction of that. Much of my consulting is also
4 done -- we teach courses where we have practitioners
5 from all over the country fly to MUSC. And I teach
6 them how to do sinus surgery and how to take care of
7 sinus patients. And I get paid for teaching that by --
8 by a company, because we use their equipment to teach
9 the practitioners how to do surgery. So that's also
10 consulting.

11 We also carry out clinical trials on new medical
12 devices and new medical techniques to try to help our
13 sinus patients. And so I get paid for being basically
14 like a think tank for those companies, so that's all
15 consultant.

16 Q. And we had this discussion at your
17 deposition -- you are very well written, and you have a
18 very impressive resume, but you've not written on the
19 subject of trauma causing anosmia; is that correct?

20 A. Correct.

21 Q. As a matter of fact, I think you told me that
22 the crux of your research, and the only thing that
23 you've really written on, is something called Chronic
24 Sinusitis; do you recall that?

25 A. Correct.

1 Q. And you are not telling this jury that
2 Rosemary Connelly has chronic sinusitis; are you?

3 A. No.

4 Q. But that's what you've written on for the most
5 part -- that's the only thing that you've written on as
6 it relates to sinus infections causing the disruption
7 of the sense of smell, you would agree with me on that?

8 A. Correct. But I take care of patients with
9 olfactory loss from all causes during my clinical
10 practice. But as far as research and writing articles,
11 it's on chronic sinusitis with olfactory loss.

12 Q. So we know you've never examined her, we know
13 you've never spoken with her; correct?

14 A. Correct.

15 Q. You didn't know where the impact was on her
16 head? You couldn't place that "X" on the skull; right?

17 A. Correct.

18 Q. And it wasn't really important to you how hard
19 she hit her head; correct?

20 A. Well, the objective evidence of the -- I guess
21 the strength or the magnitude of the impact is in the
22 fact that she didn't even have a significantly
23 displaced nasal fracture. So the easiest bone in the
24 body to fracture wasn't really even moved
25 significantly. And so that's -- that's from the C.T.

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1 scan and that's from Dr. Funcik's notes that I base
2 that.

3 Q. You didn't look at the C.T. scan; did you?

4 A. I read the report from the radiologist.

5 Q. But didn't look at the actual film; right?

6 A. I did not look at the actual film.

7 Q. Were you here in the courtroom when Dr. Funcik
8 testified about how he had to put that instrument up
9 and get all the bones back in the right place?

10 A. I was not here when he testified.

11 Q. And you weren't there when he opened up her
12 nose, and looked at -- and saw what the bones looked
13 like, were you?

14 A. I was not there.

15 Q. So, you didn't see the film of it and were
16 also not there when Dr. Funcik actually saw for himself
17 what the bones looked like?

18 A. Correct.

19 MR. GRUENLOH: Okay. Your Honor, can I have
20 permission to unseal his original deposition?

21 THE COURT: Yes, sir.

22 BY MR. GRUENLOH:

23 Q. Now, sir, I asked you a moment ago if it was
24 true that you testified to me that it wasn't important
25 how hard Rosemary Connelly hit her head. And I'm going

1 to ask you to turn to page 60 of your deposition.

2 A. Thank you.

3 Q. And you may recall -- we were talking about
4 when we had this conversation, about whether or not it
5 was important to listen to what your patient had to say
6 to you, because you've not had an opportunity to talk
7 to Ms. Connelly like her doctors have; right?

8 A. Correct.

9 Q. And you hadn't read her deposition -- at least
10 at that time -- you may have read it since then. But
11 haven't read those 200 pages or so of what she said
12 about the accident; right?

13 A. Correct.

14 Q. All right. Read along with me, our question
15 and answer on page 60, beginning at line 12.

16 MR. GRUENLOH: Can you blow that up for us, Pat,
17 beginning -- line 12, down to essentially the bottom of
18 the page. Thank you.

19 BY MR. GRUENLOH:

20 Q. Okay. And my question to you on that date,
21 sir, was one -- "When one of your patients, for
22 example, gives you their perceptions of how hard
23 something was or gives you some qualitative
24 information, is that important to you?" And your
25 answer was: "The patient's perception of how hard they

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1 hit their head or face is usually not relevant, because
2 we know the mechanism of injury in the case. She was
3 jogging. She fell on the sidewalk. If she said I hit
4 it hard or I hit it soft, that's not going to change my
5 opinion on her injuries, or how we need to treat them
6 or what they caused". Was that your answer on that
7 day?

8 A. Yes.

9 Q. So it wasn't important for you to know what
10 Rosemary Connelly said about how hard she hit her head?

11 A. That's correct. It's not -- again, it's not
12 the patient's perception. Because patients have the
13 same injuries all the time. And some people say, oh, I
14 hit it really hard. And, no, it wasn't that bad, or it
15 doesn't hurt that much, or somebody might have
16 excruciating pain. So what I want to see is, well,
17 what does the C.T. show. You know, if you fell on your
18 nose, and you fell really hard, you should have
19 displaced nasal fractures and other injuries, maybe a
20 sinus fracture, a skull fracture if you hit it really
21 hard. She didn't have that. So what she says is her
22 own perception, but that doesn't really jive with, you
23 know -- what I really want to see, is what does the
24 C.T. show, is the bone really moved.

25 Q. You're not suggesting that when Charleston ENT

1 worked up Rosemary Connelly, saw her, examined her, did
2 the various tests and things on her in order to reach
3 all of those doctors' opinion that the cause of her
4 anosmia was the fall, you're not aware that they did
5 anything wrong, are you? You're not saying to the jury
6 that they didn't -- they missed something, are you?

7 A. No.

8 Q. Now, another thing you didn't know when I took
9 your deposition -- I wonder if this is clinically
10 significant -- you didn't know how big the swelling was
11 on her head; do you recall that?

12 A. Yes.

13 Q. And we had this back and forth. And I said,
14 "Well, did you know that it was massive?" And you
15 said, "Well, I need you to show me the document." And
16 I did it, and it said "massive"; do you remember that?

17 A. Have you got it?

18 Q. All right. By the way, Dr. Ghegan, Dr.
19 Dozier, you never spoke with them about Rosemary
20 Connelly, did you?

21 A. I have not.

22 Q. We were talking before about their being --
23 well, you were talking before about there being no
24 definitive test, and how hard it is to prove; do you
25 recall that?

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1 A. Hard it is to prove what?

2 Q. Hard to prove what the cause of the anosmia
3 is?

4 A. Oh, correct.

5 Q. Now, you've offered opinions in cases before
6 that the trauma, the blow to the head, was the cause of
7 the anosmia; is that correct?

8 A. I have.

9 Q. All right. And I think that what you said to
10 me is essentially the reason why that's different --
11 the reason why you were able to do that in those cases,
12 but you can't do that for Rosemary, is because you
13 didn't believe she had a significant impact?

14 A. So the case where I testified that it was
15 traumatic olfactory loss, was a patient riding a
16 bicycle, and a motor vehicle had hit her. She
17 fractured her skull. She was in the I.C.U. for over a
18 month; had a liver laceration, I believe. And then
19 survived. And from the day she had the accident, she
20 said I lost my olfaction. So that's traumatic
21 olfactory loss that I'm used to taking care of
22 evaluating.

23 Q. Real quick on the issue of timing, you weren't
24 here in the courtroom when Rosemary Connelly testified
25 that her loss -- that her smell has been gone ever

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1 since the day of the accident? You weren't here when
2 that happened?

3 A. I was not here, but I would wonder why that
4 didn't get relayed into the notes to Charleston ENT.
5 And, also, why Dr. Funcik didn't note it until 2013.

6 Q. Well -- and you also, as we discussed, you
7 didn't think that it was important enough to read her
8 deposition on that subject? For example, you didn't
9 know when I took your deposition, that that's the same
10 thing that Rosemary has testified to before; do you
11 remember that?

12 A. I've read her deposition. I don't know
13 exactly what point you are trying to make.

14 Q. Well, let's move along. Essentially what you
15 did is a record review; fair?

16 A. Correct.

17 Q. So you agree she has anosmia?

18 A. Yes.

19 Q. You also agree that it's permanent --

20 A. Yes.

21 Q. -- is that correct?

22 A. Yes.

23 Q. It's not coming back; correct?

24 A. That's correct.

25 Q. And you said to me that it's not surprising

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1 that somebody with a 13 out of 40 would also be having
2 issues with their sense of taste; do you recall that?

3 A. Yes.

4 Q. Tell the jury why that is.

5 A. So the taste buds that we have on our tongue
6 are really sweet, sour, bitter, and salty. Other
7 things that we're able to discern, like say a cherry
8 Gatorade from a grape Gatorade are based on our sense
9 of smell. So our sense of smell is really what gives
10 us kind of the fine tuning as far as our taste buds go.

11 Q. Would it be fair to say so you -- you agree
12 she has anosmia. You agree that it's permanent. You
13 agree that it's affected her sense of smell. Would it
14 be fair to say that the only disagreement that we have
15 is as to the cause of her anosmia?

16 A. I think that would be accurate.

17 Q. And you've been hired by Winsor Custom Homes,
18 right? You understand they're being sued in this
19 courtroom because we allege that they were the cause of
20 it? Just to be clear.

21 A. Correct.

22 Q. Okay. Let' see if we can do it this way.
23 First of all, before I cover this up, you would agree
24 with me, sir, that impact to the head can, in fact,
25 cause anosmia?

1 A. Yes.

2 Q. All right. You testified about the other
3 case, and I asked you if you had given an opinion on
4 that, that it was caused by trauma. And you said,
5 yeah, but that person was a bag of bones, or something
6 like that. You don't have -- you don't -- a minor blow
7 to the head can cause anosmia; can't it?

8 A. It would be very unusual. Usually it's
9 related to --

10 Q. Here's my question, sir. Can a minor blow to
11 the head cause anosmia?

12 A. It's possible, but it's -- it's -- in the
13 cases of traumatic anosmia that I've seen, it's related
14 to the severity of the injury. And so if you're
15 falling on a sidewalk, and -- am I allowed to point --
16 or do anything with the diagrams -- usually if you have
17 --

18 Q. I think that thing works if you want to use
19 that screen.

20 A. If I could touch it -- if you have a blow to
21 the front of the head, or the face right there, you're
22 usually -- I mean, your nasal bones are right there.
23 You should displace -- the most fragile bone in the
24 human body, I would think, would be displaced if there
25 was significant trauma to cause olfactory loss. And

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1 that's my experience clinically as well.

2 Q. Could you please turn to page 138 of your
3 deposition.

4 MR. GRUENLOH: And, Pat, if you could please go to
5 line 13 through line 22 -- lines 13 through 22.

6 BY MR. GRUENLOH:

7 Q. Okay. All right. It says at line 13 of page
8 138 -- are you there, Dr. Schlosser?

9 A. I'm there, but the computer is not.

10 Q. But the computer is not?

11 MR. GRUENLOH: It's page 138, line 13.

12 BY MR. GRUENLOH:

13 Q. Okay. There we go. It says, and this is my
14 question, "Though complete loss of smell or anosmia
15 following a head injury was expected more likely the
16 more severe the head injury, it could also result from
17 even a minor blow to the head, ie, one not associated
18 with the loss of consciousness?" Do you see that, sir?

19 A. I do.

20 Q. And your response was what?

21 A. I said, "I think that it could occur from a
22 minor blow."

23 Q. And that's what you said when you were under
24 oath that day; correct?

25 A. It could. It's less likely though.

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1 Q. And do you recall you didn't know that
2 Rosemary Connelly had a concussion when you and I were
3 having a discussion at your deposition?

4 A. Correct.

5 Q. I had to go through the records and show it to
6 you; do you remember that?

7 A. I do.

8 Q. And saving us some time in having to go
9 through that Nason record, do you remember that she
10 complained of headaches, dizziness, nausea?

11 A. I do.

12 Q. All right. And do you remember that I asked
13 you if those were consistent with the diagnosis of a
14 concussion?

15 A. Yes.

16 Q. And are they?

17 A. They are.

18 Q. And then there was an M.D. that had signed
19 that record -- I believe his name was Schwartzberg?

20 A. Yes.

21 Q. And you don't take any issue with a doctor at
22 Nason being able to diagnose a concussion? I mean,
23 they're qualified to do that, aren't they?

24 A. Yeah. The diagnosis of concussion is based
25 purely on what the patient tells us. And in this case,

1 it's what she experienced four days prior. Dr. Funcik
2 didn't note any of those. And, if fact, said if he
3 thought she had a severe head injury, he would have
4 imaged her, and sent her to the E.R. So it's possible
5 she had a concussion. But in the world of traumatic
6 olfactory loss, I've never seen a patient that had only
7 a concussion without more severe injuries and have --
8 have an olfactory loss.

9 Q. When I spoke with you at your deposition, you
10 didn't know how deep the abrasions on her head were; is
11 that correct?

12 A. Correct.

13 Q. And when I spoke with you -- you at her
14 deposition, you couldn't tell us what the force of the
15 impact was; do you recall that?

16 A. Yes.

17 Q. But without reading her deposition or knowing
18 any of those things, you told me that it's your opinion
19 that the force of the blow, when Rosemary fell and hit
20 face first on the concrete, was less than a whiplash;
21 do you remember that?

22 A. I don't remember saying it was less than a
23 whiplash. It's kind of hard to correlate the two,
24 because a whiplash is not a blow from a hard concrete
25 surface. So it's -- it's a different mechanism of

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1 injury again. It's kind of like the air bag.

2 Q. Do you still have your deposition in front of
3 you?

4 A. I do.

5 Q. All right. Let's go to page 45, and let's
6 start at line 12 through 18. My question was, "You
7 believe with the information that's currently in your
8 possession, you believe that the force of impact that
9 Rosemary Connelly suffered, when she fell on the
10 sidewalk, was less than -- for example, the impact
11 suffered or the force she suffered, I should say, in
12 the whiplash example that you gave me earlier" -- and
13 what was your response?

14 A. "Yes."

15 Q. All right. So even though you didn't know the
16 force of the impact, even though you couldn't put an
17 "X" on the skull where she fell, even though you didn't
18 think it was important what her perceptions of the fall
19 were, you were able to testify on that date without any
20 of that information, that you believed that the force
21 of the fall and the impact was less than a whiplash?

22 A. Because the force of the fall on the sidewalk
23 was not enough to displace the most fragile bone in the
24 human body.

25 Q. Did -- was information shared with you from

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1 any of these attorneys that this was less than a
2 whiplash?

3 A. No.

4 Q. You did agree with me, though, that once we
5 pointed you to the concussion and the documentation of
6 it, that that was evidence of a severe impact; do you
7 recall that?

8 A. I don't recall exactly those words.

9 Q. All right. Let's go back to your -- your
10 deposition, take a look at page 51, lines 11 through
11 18. Okay. My question at line 11 -- are you there,
12 Doctor?

13 A. Yes.

14 Q. All right. Would you agree with me -- I'm not
15 talking about Rosemary right now, but just in
16 general -- would you agree with me that the diagnosis
17 of a concussion is indicative that there's been a
18 pretty significant impact" -- and what was your
19 response?

20 A. I said, "If a doctor diagnosed a concussion,
21 that's indicative of a more severe impact. I don't
22 know how you want me to quantify it other than that."

23 Q. Okay. You used the word "severe"; right?

24 A. I used the word "more severe than if the
25 patient doesn't have a concussion". If you have a

1 concussion, it's more severe than not having a
2 concussion.

3 Q. Let's talk about a concussion for a second.

4 A. Okay.

5 Q. When we talked about the mechanics of how this
6 can happen -- I'm sorry -- folks, I'm trying to do this
7 in such a way not to block anybody. We talked about
8 the mechanics of how traumatic anosmia can happen with
9 Dr. Funcik and Dr. Ghegan, but I want to make sure
10 there's no disagreement on this point.

11 You would agree with me that what we're talking
12 about here, the danger is acceleration and deceleration
13 of the brain? That is, when you have an impact up
14 here, the brain is moving forward very quick, and then
15 it stops in a second; right?

16 A. Yes.

17 Q. Okay. And that's kind of the same modus
18 operandi in an air bag situation, is the acceleration
19 and deceleration of the brain; correct?

20 A. Yes, correct.

21 Q. And that air bag situation that we talked
22 about, that doesn't even need to -- I mean, you
23 certainly don't need to have a face that's all broken
24 up in that situation; right?

25 A. Correct. Because you hit the air bag, so it

1 prevents you from having soft tissue and skeletal
2 injuries.

3 Q. It's -- in that situation, it's just a
4 function of the brain's acceleration and then rapid
5 deceleration?

6 A. Correct.

7 Q. Okay. And so tell me if you agree with this,
8 Doctor, you agree that if a person is falling and their
9 brain is going forward, that's acceleration; right?

10 A. Correct.

11 Q. All right. And if they go from zero to 60 and
12 then 60 to zero when they hit the concrete, that's
13 deceleration; isn't it?

14 A. At -- of course, when you hit the sidewalk,
15 you decelerate.

16 Q. And what can happen in a situation like that,
17 is the brain inside the casing can move forward because
18 we got this little space; right?

19 A. Correct.

20 Q. And it can move forward, and you can have a
21 sheer injury?

22 A. Correct.

23 Q. Correct?

24 A. Yes.

25 Q. And oftentimes when the brain moves forward --

1 well, most of the time when the brain moves forward
2 like that, when you had an acceleration and
3 deceleration, you have a concussion; is that correct?

4 A. I don't know how frequently that occurs.

5 Q. But generally -- that generally accompanies
6 that type of situation -- you would agree with me;
7 right?

8 A. A concussion is usually a blow to the head,
9 which is going to be some type of
10 acceleration/deceleration.

11 Q. So we have no disagreement on that, do we,
12 sir?

13 A. No.

14 Q. I was going to use my -- my pad here and write
15 out all the things that you said that it might be, but
16 let me see if I can do it like this.

17 A. Okay.

18 Q. You gave me a list, and you told me, well, I
19 don't know which one it is. And then I asked you if
20 you could give me a list, and tell me which one was
21 more likely than not; do you recall that?

22 A. I do.

23 Q. All right. And I believe that you told me
24 that your number one leading cause in this case is "I
25 don't know"?

1 A. It's an uncertain cause. That's the -- we see
2 that very frequently in anosmia unfortunately.

3 Q. Okay. The number two cause, I believe, that
4 you gave me, it was either viral or allergic -- do you
5 remember which one?

6 A. Typically it would be viral.

7 Q. Okay.

8 A. It's more common than allergy.

9 Q. The next one that you gave me, then, was
10 viral -- and that's when we're talking about sinusitis;
11 right?

12 A. Acute, which is different than chronic.

13 Q. Got it. And then the next one was allergies?

14 A. Yep.

15 Q. And then I think you listed the trauma -- the
16 trauma came in fourth?

17 A. Correct.

18 Q. And then Dr. Funcik's surgery came in fifth?

19 A. Correct.

20 Q. Okay. Let's put "I don't know" to the side
21 for a second.

22 A. Okay.

23 Q. Let's deal with numbers two and three, the
24 viral infection. You weren't here in the courtroom
25 when Dr. Funcik, who treated her and looked in her

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1 nose, nor were you in the courtroom when Dr. Ghegan,
2 who treat her and looked in her nose, said to this jury
3 that there was no evidence that any viral infection
4 with her sinuses had caused her anosmia; were you?

5 A. Well, I wasn't here when they testified, but
6 Dr. Ghegan's notes said possible viral as an
7 etiology -- in his clinic note.

8 Q. All right. And you also saw in his clinic
9 notes that he said I think most likely what has caused
10 her anosmia is the fall; do you recall that?

11 A. I would ask him why it didn't -- why she
12 didn't begin to notice it until six months before she
13 saw him, which was about a year or a year and a half
14 after the accident. So that's what I would ask Dr.
15 Ghegan.

16 Q. And --

17 A. Because that doesn't make sense with a
18 traumatic olfactory loss.

19 Q. Well, let me to ask you to assume something;
20 okay?

21 A. Okay.

22 Q. Let me ask you to assume that that question
23 has already been answered for these ladies and
24 gentlemen, so that we don't have to go through it
25 again.

1 A. Okay.

2 Q. All right. Does that remove a little bit of
3 your pause -- your sense of pause as it relates to your
4 unwillingness to say that the trauma is the more likely
5 cause of her anosmia in this case?

6 A. So there's a good explanation for why Dr.
7 Ghegan, Dr. Hester, Dr. Dozier, and Dr. Funcik all
8 reported that the -- her noticing the olfactory loss
9 was -- had -- had a one year lapse from the accident?

10 Q. Well, I can say to you that -- I can say to
11 that I certainly believe that there was, and I heard
12 them up on the video screen say that that gave them no
13 sense of pause, and that it made perfect sense to them.
14 And I can also tell you that in this courtroom, both
15 Rosemary Connelly, and her daughter; Cori Smith, who
16 you haven't had the opportunity to met -- to meet,
17 essentially all the witnesses -- all right -- except
18 for Mr. Thomas, have testified that she never had a
19 sense of smell before the -- excuse me -- after the
20 accident, and that that was continuous?

21 A. Then I would ask --

22 Q. Hold on. Let me finish.

23 A. Okay.

24 Q. And that instead, Doctor, it was a matter of
25 Rosemary not noticing that she had a sense of smell.

1 So going back to my question, what I want you to do is
2 I want you to assume that the jury has already heard
3 some pretty good testimony on that. And let me just
4 ask you so we don't belabor this point -- you weren't
5 here for any of that; were you?

6 A. I was not here. I would just ask why the
7 documentation was the way that it was for all of the
8 physicians then. So relying upon them --

9 THE COURT: Doctor, don't ask questions. Answer
10 questions; okay?

11 A. That's my --

12 THE COURT: Don't ask questions, you answer
13 questions, please, sir.

14 BY MR. GRUENLOH:

15 Q. Okay. So we had the viral infection, the
16 allergies -- you weren't here in the courtroom when Dr.
17 Ghegan and Dr. Funcik testified that they didn't see
18 any evidence in her record that her allergies had
19 caused her anosmia either, were you?

20 A. I did not see their deposition -- or
21 testimony.

22 Q. Now that you know that she -- that Rosemary
23 had a frontal blow to the head, and a rapid
24 acceleration/deceleration accident, that she suffered a
25 concussion, the abrasions right here on the top of the

1 olfactory nerves, that her treating physicians have all
2 indicated that the trauma is the cause of the anosmia,
3 are you willing to at least move it up one section,
4 because I think you had us down at four -- can you put
5 us up to at least three?

6 A. No.

7 Q. Okay.

8 A. And if I can clarify, the abrasions were not
9 over the olfactory nerves. As your anatomy diagram
10 nicely shows, they were over the nasal bones and the
11 frontal bones.

12 Q. When I was -- you've seen a lot of patients
13 who have had olfactory disturbances?

14 A. Yes.

15 Q. I asked you, in your deposition, if you had
16 experience with how that -- how that impacted the
17 quality of those people's lives; do you recall that?

18 A. Yes.

19 Q. And I think that your words were "that it had
20 a major impact on the quality of their lives"?

21 A. Yes.

22 Q. Do you recall that?

23 A. Yes.

24 Q. Can you tell the jury, just some of your
25 experiences and what you meant by that?

1 A. So losing the ability to taste largely -- it's
2 one of the pleasures of life. And so people don't
3 realize it a lot of times because you have it, but it
4 does -- we've done studies looking at quality of life
5 in patients with sinusitis, who lose their olfaction,
6 and their quality of life is -- is less than patients
7 who are able to have -- maybe they have infections, but
8 they still retain their sense of smell.

9 Q. If there's a fire and Rosemary can't smell the
10 smoke, you agree that that's a problem?

11 A. Yes.

12 Q. You agree that that's a safety concern?

13 A. Yes.

14 Q. If Rosemary should be so blessed with
15 grandchildren, and she can't smell her children -- she
16 can't smell the smell of a baby, you agree with her --
17 you agree that that's a problem?

18 A. That would affect her quality of life. It's
19 not a life threatening problem, like the smoke, but
20 that's a quality of life issue.

21 Q. All right.

22 MR. GRUENLOH: Thanks, Doctor, for answering my
23 questions.

24 THE WITNESS: Thank you.

25 THE COURT: Redirect?

1 MR. HINES: Thank you, Your Honor. May it please
2 the court.

3 **REDIRECT EXAMINATION BY MR. HINES:**

4 Q. Doctor, just a very little bit -- you were
5 asked if you were here in the courtroom during those
6 depositions of the doctors that we heard. They were on
7 that TV right behind you. Did -- but they weren't
8 taken -- they were taken last week. Did you have the
9 transcripts of those depositions sent to you?

10 A. I did.

11 Q. All right.

12 MR. GRUENLOH: Your Honor, can I take up a small
13 matter of law?

14 THE COURT: Yes, sir.

15 MR. GRUENLOH: Just approach?

16 THE COURT: Yes.

17 (WHEREUPON, a bench conference was held.)

18 MR. GRUENLOH: Thank you, Your Honor.

19 BY MR. HINES:

20 Q. Dr. Schlosser, after the questions and points
21 made to you a little while ago on cross examination by
22 Mr. Gruenloh, are your opinions in this case still the
23 same?

24 A. Yes, they are.

25 Q. Do you still hold them to a reasonable degree

1 of medical certainty in the field?

2 A. I do.

3 MR. HINES: Thank you.

4 THE COURT: All right, sir. Any recross?

5 MR. GRUENLOH: Nothing further, Your Honor.

6 THE COURT: Okay. Doctor, you may step down. You
7 may be excused. Thank you so very much. Would y'all
8 mind taking down the billboard before --

9 MR. GRUENLOH: Sorry, Your Honor.

10 THE COURT: Call your next witness.

11 MR. HINES: Your Honor, the defense rests.

12 THE COURT: Okay. Let me see the attorneys up
13 here just a minute while before I excuse the jury.

14 (WHEREUPON, a bench conference was held.)

15 THE COURT: Madam Forelady, ladies and gentlemen
16 of the jury, at this time I'm going to have to hear
17 some motions again. And so what we're going to do is
18 just take an afternoon break at this time, and smoke if
19 you need to go smoke. Let the bailiffs know. If you
20 need anything else, please let the bailiffs know.
21 Please don't discuss the case amongst yourselves, and
22 I'll get you back probably in about 20 minutes.

23 (WHEREUPON, the jury leaves the courtroom at
24 approximately 3:08 p.m.)

25 THE COURT: All right. We'll take about a 15 or

1 20 minute break, and I'll let you decide if you're
2 going to have any reply.

3 MR. GRUENLOH: Before we do that, could I take up
4 one quick legal issue?

5 THE COURT: Yes, sir.

6 MR. GRUENLOH: First of all, Your Honor, I have
7 conferred with my team, and we are not going to reply.
8 There's no reply. We would move for a directed verdict
9 on the issue of negligence. The only testimony in the
10 record from Mr. Thomas is that -- it was down. He
11 can't dispute that it was down. There's nobody that's
12 came in here and made any record whatsoever that that
13 fence was not down. He's testified that he had a
14 responsibility to maintain the fence. It's laying on
15 the ground. There's been no testimony whatsoever that
16 that was not the case that day.

17 If you recall the testimony where I said you
18 can't say that you remember what it looked like that
19 day? You can't say what you -- what it looked like the
20 day after. And then I showed him the warning where --
21 excuse me -- in March, I showed him the picture. And
22 he saw that it was drooping and it was coming detached
23 from the stakes. And I asked him, can you say that you
24 fixed that or have any recollection of fixing that at
25 any time, and he said "no, I can't". There is no

1 evidence that this defendant did anything since March
2 of 2011. There's no evidence to contradict that he
3 allowed this to steadily degrade.

4 And what I said to the ladies and gentlemen of
5 the jury in my opening, is you can't construct it and
6 forget about it. And that's exactly what this record
7 reeks. There's no evidence to dispute maintenance.

8 THE COURT: All right. Let me hear from the
9 defendant.

10 MR. BROWN: This is not a steadily degrading case,
11 Your Honor --

12 THE COURT: I'm sorry, what?

13 MR. BROWN: This case has nothing to do with
14 steadily degrading. He put that in his trial brief.
15 And then when there were issues raised about it in the
16 court by Your Honor, he pursued a whole different case.
17 He didn't maintain it at the time of the accident --

18 THE COURT: Well, that's beside the point. He can
19 do that. That's his --

20 MR. BROWN: Okay.

21 THE COURT: -- strategy. Address the issue of
22 whether or not you've proven --

23 MR. BROWN: I don't have a burden of proof.

24 THE COURT: Address the factual issue that he's
25 raised. Okay. That's what I want to hear.

1 MR. BROWN: The factual issue was he was asked
2 about the -- this March issue on the steady
3 degrading -- that's what -- the horse he's riding. And
4 he -- my client testified he couldn't tell you the
5 exact date that he would have had it fixed. That was
6 his testimony --

7 THE COURT: Well, tell me if I misquote it. I
8 remember your client testifying that when he got the
9 email from Mrs Connelly's husband, it was 5:30 in
10 afternoon. He either went out that afternoon or went
11 out the next morning. And he moved the plastic off the
12 sidewalk and secured it. He couldn't remember what he
13 secured it with, whether it was rock or whatever, but
14 he secured it. He also testified he didn't remember
15 when it was actually put up again. Okay?

16 MR. BROWN: Okay. We are talking after the fact
17 --

18 THE COURT: So can you tell me -- tell me where
19 there's any testimony that that fence was not lying in
20 the sidewalk on the day in question? And why doesn't
21 he have a duty maintain that fence properly?

22 MR. BROWN: His duty is in the -- his agreement
23 with the ARB, and what their requirements are with --
24 the --

25 THE COURT: I'm not worried about the ARB, his

1 duties here in the court --

2 MR. BROWN: Your Honor, the evidence -- there's no
3 evidence -- the only evidence is that during a wind
4 storm, this thing was down that morning at 9:00 in the
5 morning. Where is the evidence that he should have had
6 to have known about that? He has the duty to maintain
7 it, but does he have the duty to sit there 24 hours a
8 day to make sure it doesn't come down? And plus I want
9 to point out to Your Honor --

10 THE COURT: And the only other evidence we have,
11 he got a letter from the Architect Review Board -- I
12 don't remember the date --

13 MR. BROWN: Back in March -- months before.

14 THE COURT: A couple of months before. That's the
15 only evidence I recall. I don't know of anything --
16 he's never testified that he saw the fence that day,
17 that it was up or it wasn't up. There's been no
18 testimony from your side about the condition of the
19 fence on the day in question, is my point, other than
20 what the plaintiff has said. So what facts have you
21 presented to the Court to show that that fence is not,
22 as the plaintiff and Mrs. Smith testified to? That's
23 my question.

24 MR. BROWN: Your Honor, we -- I think they have to
25 say that it was in an unsafe condition, and we had

1 notice of it.

2 THE COURT: Well, they did.

3 MR. BROWN: And that we had notice of it. I'm
4 sorry -- I don't mean to sound disrespectful, but what
5 is the evidence of notice, Your Honor?

6 THE COURT: What's the notice have to do with?

7 MR. BROWN: It's a premises case.

8 THE COURT: It's not -- it's not a premises case.
9 I'm not saying it's a premises case. I don't think
10 it's a premises case.

11 MR. BROWN: Okay. Your Honor --

12 THE COURT: So tell me what evidence you -- you
13 have produced to the jury, not the court, but to the
14 jury that the fence was not as Mrs. Smith and the
15 plaintiff testified?

16 MR. BROWN: I think the evidence is his testimony
17 that if there's a problem on that fence, if he's
18 notified of it, he gets it fixed. That's standard
19 operating procedure. There's no testimony, when he was
20 cross examined extensively by Mr. Gruenloh, that he had
21 received any notice that it was down prior to that.
22 There was testimony that Daniel Island's ARB constantly
23 patrolled -- and let him know in a heartbeat --

24 THE COURT: As I said before, I'm not arguing with
25 notice. You're arguing notice. What testimony do you

1 have from the defendant that said that fence was in
2 proper -- was not as the plaintiff and her witness said
3 it was, is my question to you. Where is that testimony
4 from your standpoint is my question?

5 MR. BROWN: We don't have a burden to prove that,
6 Your Honor.

7 THE COURT: You've got to create a factual
8 dispute.

9 MR. BROWN: There's a factual dispute in this
10 case.

11 THE COURT: What's the factual dispute as to the
12 fence?

13 MR. BROWN: When did the fence come down? When
14 did it come down?

15 THE COURT: Well, according to the only testimony
16 I've heard, it was down the day she ran by.

17 MR. BROWN: So what if it had come down one minute
18 before that, they got there, there was a gusty wind,
19 what if it came down then? You're asking for
20 speculation on this and allowing speculation.

21 Furthermore, Judge, remember on that fence, they
22 testified -- Ms. Smith specifically said that the fence
23 was down, but it was not like this picture. Her
24 testimony, from her deposition that she was impeached
25 on, it was nowhere like this.

1 THE COURT: Okay. Anything else you want to tell
2 me?

3 MR. BROWN: It's a disputed issue of fact. It's
4 not our burden. And I understand Your Honor's ruling
5 on the premises, so I'm not arguing with that. But to
6 accept that -- to accept your argument, and my personal
7 opinion, would be respectfully res ipsa, and that
8 every -- every duty to maintain the store, the Piggly
9 Wiggly case -- or Bilo I guess now -- you wouldn't have
10 to prove notice.

11 THE COURT: Okay. All right. All right. I'm
12 going to think about it during the break and I'll rule.
13 Let me hear you -- do you have any other motions?

14 MR. GRUENLOH: Your Honor, just -- are you done
15 hearing on that last one?

16 THE COURT: Yeah, I'm done hearing -- unless you
17 want to say something in rebuttal very briefly, I'll be
18 glad to hear you. I'll give you that opportunity.

19 MR. GRUENLOH: Oh, I meant on our motion --

20 THE COURT: If you want to say some rebuttal on
21 what he said -- it's your motion. I'll be glad to hear
22 you.

23 MR. GRUENLOH: I -- I do. And, Your Honor, just
24 to be very clear -- and I'm not going to belabor it.
25 But the testimony and evidence was that March of 2011,

1 three months before this accident occurred, the fence
2 was starting to droop. He testified that he was aware
3 that his own subcontractors drug stuff over the top of
4 it.

5 He testified that he had no recollection of ever
6 fixing it between March and June. He testified that he
7 couldn't say whether it was in that condition on June
8 6th. He testified -- which we have the photo of June
9 7th, he testified that he couldn't say whether or not
10 it was in that condition on June the 7th.

11 We have uncontroverted testimony, all the way
12 through, that shows that the fence was down, and he's
13 got a duty to maintain it.

14 THE COURT: Okay. All right. I'm going to think
15 about that for a while. Does the defense have -- do
16 you want to renew your motions from --

17 MR. BROWN: Absolutely, Your Honor. We would like
18 to renew all of our motions --

19 THE COURT: Do you want to go through them again?
20 The only one left is the punitive. I'll grant that.
21 I'm going to strike punitive.

22 MR. BROWN: Thank you. And, Your Honor, we --

23 THE COURT: The only thing left is a directed
24 verdict motion that you made at the end of the
25 plaintiff's case; do you renew that?

1 MR. BROWN: Absolutely, Your Honor.

2 THE COURT: Anything you want add to it for the
3 record?

4 MR. BROWN: I think it stands as it is. We would
5 add a directed verdict on -- no, it stands as it is.

6 THE COURT: All right. Taking the evidence most
7 favorable to the nonmoving party, the directed verdict
8 motion on behalf of the defendant is denied.

9 I'm going to think about the plaintiff's motion.
10 We'll take about a 15, 20 minute break. Let me see the
11 lawyers up here just a second.

12 (WHEREUPON, a bench conference was held.)

13 THE COURT: Bring us the jury if you would,
14 please.

15 (WHEREUPON, the jury enters the courtroom at
16 approximately 3:25.)

17 THE BAILIFF: All jurors are present, Your Honor.

18 THE COURT: Thank you very much. Madam Forelady,
19 ladies and gentlemen of the jury. Does the plaintiff
20 have any reply testimony?

21 MR. GRUENLOH: We do not. The plaintiff rests.

22 THE COURT: All right. Ladies and gentlemen of
23 the jury, that concludes all the evidence. The only
24 thing left would be closing arguments from the
25 attorneys and the -- the charge from the court. And at

1 that time, y'all can begin your deliberations. And
2 it's now 3:30. That process is going to take longer
3 than -- well, I guess, let me back up. I'm going to
4 let you get out of here so you can get ahead of the
5 traffic, because the last three days, you've been
6 jammed up in it. Okay. So we're going to stop now,
7 and you get ahead of traffic, go home. Be back in the
8 morning at 9:30, and we'll complete the case at that
9 time.

10 Please don't discuss the case amongst
11 yourselves. See you in the morning at 9:30. Thank you
12 very much for being on time today.

13 (PAUSE.)

14 (WHEREUPON, the jury leaves the courtroom at
15 approximately 3:28 p.m.)

16 THE COURT: All right. We're -- we're going to
17 take a short restroom break and then finish up this
18 informal charge conference, and then go from there.
19 And then we'll break and y'all can go get yourself
20 ready for tomorrow.

21 (WHEREUPON, a brief recess was taken.)

22 THE COURT: Please be seated. Based upon the
23 plaintiff's request for a directed verdict as to
24 liability -- okay -- as far as a complete liability is
25 concerned, that is denied.

1 However, based upon the testimony that the court
2 has heard, I'm going to grant a partial liability as to
3 duty and breach of duty. The jury is going to have to
4 decide whether the fall itself was the proximate cause
5 of her injuries. And that's going to still be
6 available to the defendants. And I think that's very
7 much in dispute, highly contested in the case.

8 But as far as the duty to maintain the fence,
9 and the breach of that duty, I've heard no testimony
10 that would contradict what was said by the plaintiff
11 and her witness, and the pictures show. So I'm going
12 to direct a partial directed verdict as to duty and
13 breach of duty. And I will amend the charge to say
14 that and amend the verdict form to say that. The issue
15 of causation as to damages is still an issue. That's
16 my ruling based upon the plaintiff's argument for
17 directed verdict.

18 Now, have y'all looked at -- come up here and
19 let's finish this informal charge real quick.

20 (WHEREUPON, Court's Exhibits Nos. 10, 11 & 12
21 marked and made a party of the record.

22 (WHEREUPON, a bench conference was held and the
23 trial was concluded for the day.)

24
25

1 * * * FRIDAY, AUGUST 28, 2015 * * *

2
3 THE COURT: Please be seated. Are we
4 electronically challenged or we got it fixed?

5 MR. GRUENLOH: We got it fixed and we are
6 electronically challenged.

7 THE COURT: Okay. Everybody is ready to go.

8 MR. GRUENLOH: We have one matter -- I think I
9 know the Court's ruling on this, but we neglected to
10 move into the March 17, 2011, warning, and I would like
11 to move that into evidence. It was presented to the
12 jury -- it was presented to Mr. Thomas --

13 THE COURT: Which one is it now? What exhibit?

14 MR. GRUENLOH: I have a copy for Your Honor.

15 THE COURT: Any objection?

16 MR. BROWN: Yes, sir, Your Honor. It wasn't
17 premarked. It wasn't agreed to. It wasn't move in.
18 The case is closed.

19 THE COURT: I mean, I don't -- I'm not going to
20 reopen it. Okay.

21 MR. GRUENLOH: Okay.

22 THE COURT: I'm not going to reopen the case.
23 Everybody has rested and --

24 MR. GRUENLOH: No problem with me publishing it to
25 the jury?

1 THE COURT: Oh, you can publish it. I mean, I
2 don't have any problem with you reading it. But I'm
3 not going to send it back to the jury as evidence.
4 Okay.

5 MR. GRUENLOH: May I simply hand them a copy of
6 it?

7 THE COURT: No. No. You can read it to them.
8 You can publish it by reading it to them -- okay -- if
9 you so choose.

10 MR. GRUENLOH: Understood, Your Honor.

11 THE COURT: But I'm not going to admit it into
12 evidence because the evidence is basically closed
13 unless y'all have something y'all want to introduce.

14 MR. BROWN: No. No, sir. But I would object to
15 him being able to publish something that's not --

16 THE COURT: He can -- he can publish. They
17 testified to it. There's already testimony.

18 MR. BROWN: Limited portions of it, Your Honor.

19 THE COURT: Pardon?

20 MR. BROWN: I object because only limited portions
21 of it were testified to. He read one little part of it
22 -- a limited part with our client. That's why I
23 object.

24 MR. GRUENLOH: That's -- that's incorrect, Your
25 Honor. And the part that I read was this first top

1 email. And that's the only part that we'll publish to
2 the jury.

3 THE COURT: "I was just down at REDACT Park and
4 the majority of the site fence is down, and there is no
5 construction entrance on the job site. Please repair
6 and fix as soon as possible." I think that's what you
7 read to your client, and that's what he can publish
8 because it's already been published with testimony.
9 Okay? That's not any different than saying, you know,
10 Joe Blow said tomorrow is Sunday; or a witness said
11 this or a witness said that. It's not any different
12 than that.

13 MR. BROWN: I just respectfully note it and move
14 on, Your Honor.

15 THE COURT: I understand.

16 MR. BROWN: Okay.

17 THE COURT: I mean, do you disagree that's what
18 was said in testimony, that first part that I just
19 read?

20 MR. BROWN: I don't believe it was said in exactly
21 that way, Your Honor. I remember him taking it and
22 being more precise in terms of what he was asking, but
23 you know -- I --

24 THE COURT: Anything else you want to put on the
25 record?

1 MR. BROWN: No, sir, absolutely.

2 THE COURT: I'm not trying to cut you off.

3 MR. BROWN: No, sir. And I know you're not. I'm
4 -- I'm -- you've allowed me to say what I need to say,
5 so I'm going to sit down.

6 THE COURT: Okay. Thank you very much.

7 MR. GRUENLOH: We're ready to close, Your Honor.

8 THE COURT: All right. Is the defense ready to
9 close?

10 MR. HINES: Yes, Your Honor.

11 THE COURT: All right. Bring us the jury, please.
12 I think the law clerk gave you the verdict form; right?

13 MR. BROWN: Yes, sir. We have no objection.

14 (WHEREUPON, the jury enters the courtroom at
15 approximately 9:55 a.m.)

16 THE BAILIFF: All jurors are present, Your Honor.

17 THE COURT: Thank you very much. Closing
18 arguments.

19 MR. GRUENLOH: Thank you, Your Honor. Good
20 morning, ladies and gentlemen.

21 JURORS: Good morning.

22 MR. GRUENLOH: As I lay awake in bed last night
23 and this morning, there's one thing that kept going
24 through my head over and over again. Dear Lord, don't
25 let me mess this up. We've -- we've had so much

1 testimony and so much evidence in front of you, and now
2 it's my job to sort of summarize it, and give y'all our
3 arguments.

4 I want to start by thanking you because it's --
5 we have watched some long videos. You heard some long
6 cross examinations. It's been a long week for
7 everybody in here. On behalf of Mrs. Conelly, her
8 family, on behalf of me, Patrick, Brian, thank you so
9 much for your service.

10 I told you when I gave my opening statement that
11 the burden of proof is ours. And Judge Nicholson will
12 explain to you the law. And he'll tell you what
13 that -- the burden of proof that we have, as I told to
14 you in opening, is the preponderance of the evidence.
15 And I gave the example, imagine I'm a scale. And I put
16 50 pages over here on the left side for the plaintiff,
17 and I put 50 pages over here on the right side, the
18 defendant. And just imagine that they're perfectly
19 equal. And then I put a single page on my left hand,
20 and the scales tip ever so slightly. That's 51
21 percent. That's our burden of proof, the preponderance
22 of the evidence in this case.

23 And I told you in my opening statements, that we
24 believed by the end of this week -- well, I told you,
25 you probably could stand up and talk about this stuff

1 yourselves. And you'd probably have -- and probably
2 met a friend, and probably have learned a lot more
3 about some things than you ever wanted to know. But I
4 also told you that it is going to be a lot more obvious
5 to you than just 51 percent.

6 And I believe, ladies and gentlemen, certainly
7 after the defendants closed yesterday, after bringing a
8 single witness, I believe it's more obvious than ever
9 that we have proven that Winsor Custom Homes was
10 negligent. As a matter of fact, folks, we had some
11 legal arguments yesterday. And as Judge Nicholson will
12 instruct you, some of the question that you have to
13 answer have been decided in favor of the plaintiff by
14 the court as a result of the evidence that came in.

15 And the first thing that's already been decided
16 in our favor, so that you don't have to answer, is
17 whether or not Winsor Custom Homes had a duty, a
18 responsibility to maintain that black plastic barrier
19 fence we've been talking about all week. You have seen
20 the pictures of it. And I told you folks in my
21 statements what they can't do, is they can't just put
22 it up and forget it. And that's pretty much what the
23 testimony and evidence have shown that they did. We
24 will go through that.

25 The Judge has already decided for you ladies and

1 gentlemen, that they had a duty to maintain it. The
2 Judge has already decided for you ladies and gentlemen
3 that they failed in that. You don't have to answer
4 that question. You don't have to answer the question
5 of whether or not they were negligent in that regard.
6 The Judge has determined that they have failed in that
7 responsibility.

8 You saw the photos. I'm going to show them to
9 you again today. It was down. It was laying on the
10 ground. What they did, ladies and gentlemen, is they
11 put it up, and then they forgot about it.

12 Okay. So what's left? Well, I talked to you
13 about it in my opening statement. And in Mr. Hines'
14 opening statement, he said we don't take issue with the
15 fact that she fell over the tarp. We don't take issue
16 that she fell and she broke her nose. She got some
17 scrapes and, you know, she hurt her back.

18 What we take issue with, Mr. Hines said to you,
19 is whether or not that fall -- when she hit her head on
20 the concrete, whether that caused her permanent loss of
21 sense -- the permanent loss of her sense of smell, and
22 the permanent loss of her sense of taste. You've heard
23 that she can still taste some things, and you've heard
24 from the doctors that that sort of makes sense, because
25 nobody is saying that she bit her tongue off. Nobody

1 is saying that there's anything wrong with her taste
2 buds on her tongue. But as we all know, when that
3 steak or that Bar-B-Q, or whatever it is that you like
4 to eat, comes out, and you put that first bite in your
5 mouth, that smell is so much a part of it. All right.
6 She doesn't have that anymore.

7 That's really the only question, ladies and
8 gentlemen, that I believe that you've got to answer.
9 Because there hasn't been too much other testimony on
10 anything else. Now, they're going to get up and talk
11 to you about whose fault this is. And you may recall I
12 asked Mr. Thomas some very pointed, blunt questions.
13 When he got on the stand, I didn't ask him where he
14 lived. I didn't ask him how many kids he had. We
15 didn't talk for a long time about that, because there
16 was something that I was burning to know. And I asked
17 him if this was his responsibility, if he took any
18 responsibility for it. You remember what he said?

19 I asked him if -- even though he wouldn't take
20 responsibility, if he was here in the courtroom while
21 his lawyers pointed the finger at Rosemary Connelly,
22 and said this is her fault because she shouldn't have
23 been jogging on the street. I asked him that question,
24 because Cori Smith got up there, and Mr. Brown talked
25 to her for a long time on cross examination. You may

1 remember, she said, I'm pretty sure that barrier was
2 down the week before. And he came back, and he came
3 back, and he came back. Then I had to come back and
4 show her the rest of the testimony, where she had said
5 that in her deposition.

6 Well, what do we know that now? We know, ladies
7 and gentlemen -- can you pull up the March 17th
8 warning, Pat -- and just blow up that top portion.
9 What we know about that now -- even though we asked for
10 everything that they had on the case, this is what they
11 gave us, folks. This big stack of paper here. This
12 wasn't in it.

13 This warning that Mr. Thomas got to his personal
14 email from Daniel Island ARB in March of 2011, that
15 said and I quote, "Jeff, I was just down in Symthe Park
16 and the majority of the fence site is down, and there
17 is no construction entrance on the job site. Please
18 repair, fix as soon as possible. Thank you". All
19 right. That wasn't in there.

20 So I want you to keep in mind, when you remember
21 Cori Smith's testimony, and how they came back and kept
22 on asking her that over and over again, whether it
23 really was her memory that it was down or not. Oh,
24 yeah, it was down because he constructed it and he
25 forgot about it.

1 Mr. Thomas, the owner of Winsor Construction,
2 was very well aware that he had a problem out at that
3 site. Let me talk to you about responsibility and
4 blame, and you folks know the difference between those
5 two words.

6 The Judge has already told you -- or will tell
7 you, that it was Winsor Custom Homes' responsibility,
8 their duty to make sure that the fence -- pull up RMC
9 96 -- can you folks see this one over here -- I knew
10 you were going to do that to me, Pat.

11 You folks have seen that photo over and over and
12 over again in this trial. And the fence was laying in
13 the sidewalk, partially in the sidewalk. All right.
14 That's what it looked like on June 6, 2011. The photo
15 was taken on the next day, June 7, 2011. And you heard
16 Mr. Thomas testify that he had no memory of it, even
17 though he said that he was out there on a daily basis,
18 he just couldn't remember. Well, he would have had to
19 go like this every day (indicating) ladies and
20 gentlemen -- just like that.

21 And yet, even though the Judge will tell you it
22 was Winsor's responsibility to make sure that that
23 didn't happen, they still want to point the finger at
24 other people. And I had Mr. Holmes, from my office
25 here, every time they were pointing the finger

1 somewhere else, I had him write that down, so that I
2 could make sure I could remember every single one. And
3 they blamed Rosemary, and they blamed Cori, and they
4 blamed the subcontractors. They even blamed the wind.
5 The wind wouldn't have been an issue if it hadn't been
6 70 percent down, if they hadn't constructed it, and
7 then just forgotten about it.

8 You heard from Rosemary and Cori about their run
9 that day. And nobody came and said that's not what
10 happened. There were workers at the site. You didn't
11 hear from them. They were under Winsor's control.
12 They didn't bring any witnesses in. The only witness
13 you heard from about the accident were Cori and
14 Rosemary. And they told you exactly how the accident
15 happened.

16 And they told you as they were approaching, they
17 don't believe that they were talking. They certainly
18 didn't have headphones on, not that there's anything
19 wrong with that. They weren't looking at their iPhones
20 or anything like that.

21 And as a matter of fact, when they saw the fence
22 was down a little bit, they did what most of us would
23 do. If it's over here, just sort of jog over to the
24 left a little bit. And, unfortunately, the wind caught
25 it a little bit, and it caught Rosemary's foot. And

1 the accident happened. You all heard that.

2 It's up to you to decide whether or not they
3 bare any blame in this accident. And, you know,
4 flippity flop, fluttering, you know, flopping -- I
5 mean, we heard all sorts of adjectives. I think Cori
6 put it best. She said, as we came upon it, it was
7 moving a little bit, just like the grass was moving a
8 little bit. It was fluttering. It wasn't up and down
9 in the air like a bag.

10 That is the whole reason for us arguing about
11 all those silly adjectives. And you folks are probably
12 like, you've got to be kidding me. Are we really going
13 to spend time on this? Is because they want you to
14 believe that the thing was going whoof (indicated).
15 There's been no testimony and evidence about that.
16 That's all part and parcel of them taking the finger
17 like this, and going right at somebody else. I was
18 always taught when you point the finger at somebody
19 else, look and see where you your thumb is pointing.
20 It's pointing right back at you.

21 Now, Rosemary was an experienced runner. Cori
22 was an experienced runner. Nobody was -- there's been
23 no testimony that she was just dog tired by the time
24 that she got there. There's been no testimony of any
25 sort.

1 Let's talk about Winsor, though, for a second.
2 What we know about Winsor is they had 20 years of
3 experience constructing homes. They had constructed
4 over 80 homes on Daniel Island, and that's just a
5 fraction of the number of homes that they construct
6 around the low country. They are very familiar with
7 the Daniel Island Guidelines, which require them not
8 just to construct it and forget about it, but to
9 maintain it.

10 In our office, we refer to this as the St.
11 Patricks Day warning. St. Patrick's Day is an
12 important holiday for some of us in our office. It's
13 actually -- it's pretty important to me because it
14 happens to be my wedding anniversary. But on this St.
15 Patrick's Day, they got this warning three months
16 before this accident happened. And so the other thing
17 I want you to remember about Winsor, in addition to all
18 their experience, is they knew.

19 They also knew that if it became detached from
20 their stakes -- and I asked Mr. Thomas this -- I hope
21 y'all remember, that it could become airborne. And do
22 you remember when I was asking questions of him about,
23 well, could you anticipate that this would happen? I'm
24 not sure I ever got an answer on that. I'll leave it
25 up to you folks as whether I ever got an answer on

1 that. But then when it came time for me to say, well,
2 should Rosemary and Cori have anticipated that this
3 could happen. He said, yeah, I think that they should.
4 All right.

5 Now, I just want you to think about the
6 difference between his experience, Winsor's experience,
7 and Winsor's knowledge of this situation as compared to
8 this woman's. This accident was completely
9 preventable. What could have happened on June 6, 2011,
10 what should have happened on June 6, 2011, is Rosemary
11 and Cori should have finished their run. They should
12 have gone back to Cori's house. They should have had a
13 cup of coffee. Cori's child should not have seen
14 Rosemary gushing from her head. Rosemary shouldn't of
15 had to get herself to the doctor, and she ought to be
16 able to smell the grass and the flowers when she walks
17 to the courthouse. And she ought to be able to taste
18 her food. She ought to be able to smell her coffee
19 when she comes -- when she wakes up in the morning.
20 That's not the path that we took, though.

21 Let's talk about the medicine. I've shown you
22 this board all week. And nobody disagreed with this.
23 There's only one thing that Dr. Schlosser disagreed
24 with us on, and that is what the cause of Rosemary's
25 loss of sense of taste and smell is. All right. And I

1 told you in opening statements that they were going to
2 bring in a doctor, an expert who they had hired, to
3 come in and give you an opinion, and what his opinion
4 would be.

5 And then Mr. Hines got up behind me, he said,
6 well, just wait, ladies and gentlemen, and see if
7 that's what the testimony and evidence shows. Do you
8 remember when I asked Dr. Schlosser, I said, what's the
9 leading cause? I know you say that you don't know in
10 general, but what's the leading cause of what you think
11 Rosemary's anosmia -- her permanent loss of taste and
12 smell is? And he said idiopathic. And you all
13 learned, if you didn't know this before, that
14 idiopathic means "I don't know".

15 All right. Then he said, well, I think it might
16 have been something related to a viral sinus infection.
17 Did you folks see any records he had put up in front of
18 you? Did you folks see that on the -- the three hour
19 cross examination of Dr. Funcik, or the cross
20 examination of Dr. Ghegan, or the direct examination of
21 Dr. Schlosser. Did you see any evidence that there was
22 some sinus viral infection going on in Rosemary's nose
23 that was such a problem? I didn't see it.

24 And when we asked every witness in this court
25 that we brought, including the doctors that examined

1 her, including the doctors that have followed her for
2 years now, if they saw any evidence that some infection
3 in her sinuses was the cause? They said no. We didn't
4 see that. When I asked them if they saw any evidence
5 that the allergies that she was having were causing a
6 permanent loss of sense of smell? They said no. The
7 only person whose made that suggestion is Dr.
8 Schlosser, but they didn't show you any evidence of
9 that.

10 The only evidence of -- you know, I like to see
11 the one, two, three, four, here's how it happened, you
12 know. I don't like to see one, four. They are missing
13 the two and the three. Do you get what I'm saying
14 folks? This is the mechanics of how this happened and
15 everybody in the courtroom agreed that this is what
16 happened, except for Dr. Schlosser. Dr. Schlosser says
17 this can happen, but I don't think this -- this is what
18 happened.

19 And he said I don't think that this is what
20 happened because I don't think that she had a
21 significant enough fall, a significant enough impact.
22 Remember when I asked him on cross examination, isn't
23 it true, sir, that you don't know what the force of
24 impact was? He said, I don't know. I said, isn't it
25 true, sir, that when I was in your office, and we took

1 that skull and I put it in front of you -- and he had
2 reached his opinion at this point, ladies and
3 gentlemen. The case has been going on for a long time.
4 He had reached his opinion. And I said, take a look at
5 this skull, and tell me exactly where she hit her head.
6 He said, I don't know.

7 I said, did you know that she had a concussion?
8 I didn't know that. That wasn't important. Do you
9 know what else wasn't important to him? It wasn't
10 important enough before he had reached an opinion in
11 this case, to examine her. He never asked to examine
12 her.

13 It wasn't important enough to Dr. Schlosser to
14 speak with her, or even to read the two hundred pages
15 or so of testimony that she gave in this lawsuit, where
16 she was asked all sorts of questions by Mr. Hines. How
17 did it feel when it fell? What about your sense of
18 smell? When did it -- did it ever come back? Did you
19 ever feel it again? What about this timing issue that
20 Mr. Hines is going to get up and talk to you about, and
21 that they have been talking to you about ad nauseam all
22 week? What about that?

23 Dr. Schlosser admitted that when you have a blow
24 to the head, you don't even have to have a blow to the
25 head. He knows about the airbag cases. But when you

1 have a blow to the head, what can happen is you have a
2 rapid acceleration -- and I told you folks this in
3 opening statements, because I had already taken his
4 deposition. I knew what he was going to say. When you
5 have a rapid acceleration, and then when you hit the
6 pavement, it's a rapid deceleration. Zero to 60 and
7 then 60 to zero, just like that.

8 And what happens is the brain moves forward in
9 the skull casing. These nerves are so fragile and so
10 small -- so small that you can't see them with a C.T.
11 scan or anything else. If we could have seen them with
12 a C.T. scan, folks, we wouldn't be here today. We
13 would have taken a picture of it. We would have showed
14 it to them, and we wouldn't be here today.

15 This is what happens, ladies and gentlemen. And
16 the doctors that followed Rosemary, that looked into
17 her nose, that examined her, they told her that that's
18 what happened to her before this lawsuit was filed.
19 When they were sitting in their offices with her, they
20 said to Rosemary, you've got a permanent loss of sense
21 of smell. You've got a permanent loss of sense of
22 taste, or at least greatly diminished. It's not coming
23 back. There's no treatment. And this is what
24 happened. The only one, as I said, that doesn't
25 believe that this is what happened, is Dr. Schlosser.

1 Dr. Schlosser got paid \$7500 to walk inside the
2 courtroom yesterday. If he was here today, he would
3 have gotten paid another \$7500. I asked him, as I
4 cross examined him before you ladies and gentlemen, are
5 you willing to at least move it up from the bottom, the
6 trauma? The blow that she had to the head with the
7 concussion that you didn't know about? And he said no,
8 because that was his opinion.

9 All right. Dr. Schlosser agreed with us that
10 there's -- that Rosemary Connelly has a permanent loss
11 of her sense of taste and her sense of smell. There's
12 no dispute of that. All right. That's not one of the
13 things that you ladies and gentlemen have to decide.

14 He agreed with us that there's no treatment and
15 he agreed with us that it was a major -- he's seen
16 people who have smell disturbances. He agreed with us
17 that this is a major impact on people's lives. All
18 right. We've got five senses. Rosemary's got three.

19 When -- if there was any doubt left in your mind
20 about what caused her loss of sense of smell, whether
21 it was the trauma, or something else that they vaguely
22 suggested, do you remember Dr. Funcik when -- this
23 wasn't my question that elicited this response -- when
24 Mr. Hines asked him, continued to ask him on this
25 subject, he said there's no doubt in my mind that there

1 are three causes of this, her loss of sense of smell.
2 And they are trauma, trauma, and trauma. That's what
3 Dr. Funcik, who was number one in his class said, board
4 certified ENT.

5 When we asked Dr. Ghegan, who was number one in
6 his class -- and, folks, we didn't go out and find
7 these people -- we just got kind of lucky that she had
8 really good doctors. He said the same thing. He said
9 the trauma is what caused it.

10 Don't -- look, this is a decision that I had to
11 make to bring these folks by video, the doctors -- to
12 bring these doctors by video tape. We knew that we had
13 this court date this week. And we were told that they
14 had surgeries, that they had to see patients. And it
15 was vital to us that you hear their testimony.

16 So last week, we went and we took those
17 videotapes just as if we were in a courtroom. All
18 right. And that's why, you know, it took a while at
19 the beginning because we had to have some legal
20 arguments on whether or not you folks could get to hear
21 all of it.

22 And so I -- the only reason I bring this up is
23 because I don't want you to hold it against Rosemary
24 that I wasn't able to get these doctors here live. All
25 right. I didn't go out and hire these people. And so

1 that's what we had to do to accommodate them.

2 I'm not saying that there's anything wrong.
3 Lawyers sometimes have to go out and hire somebody to
4 give an opinion in the case. I'm not saying that
5 there's anything wrong with that in and of itself, I'm
6 just saying we didn't have to. Because the doctors
7 that she saw said what they said. They knew what they
8 knew.

9 Okay. You're going to be shown a jury verdict
10 form at the end of this case -- and, Pat, can you pull
11 that up. And we'll just go through this real quick.
12 And I'm going to come back to you and talk to you about
13 this. Because after Mr. Hines talks to you, I get to
14 come back to you and talk to you one more time. And I
15 promise I'll be as brief as I can. I know been it's
16 been long.

17 But the jury verdict form that goes back to you
18 says, number one, do you find that the defendant's
19 breach of duty proximately caused the plaintiff's
20 injuries. All right. The injuries that we've been
21 talking about this week, I told you at the beginning we
22 weren't going to spend a bunch of time on the back
23 injury, even though you saw what was noted in Dr.
24 Schlosser's reports. She didn't have any back issues,
25 even when she was going through labor. This was the

1 first time that she had any issues with her back, and
2 she's still not come all the way back from it. I don't
3 want to dwell on that. We're not here to talk about
4 back injuries, but they've done nothing -- absolutely
5 nothing -- to dispute that.

6 And as Mr. Hines said to you in his opening
7 statement, we're not disputing that she had a broken
8 nose, and that was -- that happened when she fell over
9 the fence. So you're going to go back to the jury
10 room. And when you begin your deliberations, you're
11 going to have exhibit number 4 which sets out --
12 Rosemary has got a summary page on top of it -- and
13 sets out Rosemary's medical bills. All right. And
14 those are the medical bills. We've taken out anything
15 that's not related directly to the accident.

16 And I would submit to you, ladies and gentlemen,
17 that there's been no evidence -- as a matter of fact in
18 the opening, I believe there was an admission. But
19 there's been no evidence that you ought not to award
20 those things to Rosemary Connelly to begin with. Okay.

21 So that first question is, do you find that the
22 defendant's breach of duty proximately caused the
23 plaintiff's injuries. The injuries that we're
24 primarily talking about -- aside from those things that
25 I just talked too long about, are the loss of sense of

1 smell and the permanent loss of sense of taste. All
2 right.

3 And we would suggest to you, folks, the Judge
4 will tell you what proximate cause means. That it's
5 going to be pretty obvious to you that you ought to put
6 an "X" next to yes. Go to the next one, Pat.

7 Do you find that the plaintiff was negligent?
8 Okay. And if you find that -- we'll go on to the next
9 one -- but if you find that the plaintiff was
10 negligent, what percentage? How much was she
11 negligent? Do you think that it was her
12 responsibility, her fault for falling that day? That's
13 something that you ladies and gentlemen will decide
14 back in the room. That's why I talked to you about the
15 difference between responsibility and blame.

16 What's the next one? There's the percentage --
17 go to the next one. All right. If you answered yes to
18 question number one, please state the total amount of
19 damages, if any, sustained by the plaintiff due to the
20 defendant's negligence.

21 Now, this is the part of the trial where the
22 lawyer usually gets up and writes a number with a whole
23 bunch of zeros on it. And I've seen it happened before
24 in Court and I've seen people go (indicated). And I'm
25 not going to do that for you, folks. Because I told

1 you at the beginning, that you were the fact finders.

2 I tried my best to respect your intelligence.

3 I've tried to move quickly. I'm not going to tell you
4 what I believe the number is. But I've got some things
5 for you to think about, because I've been thinking
6 about this for a long time. All right.

7 Advertisement in the newspaper. We will pay you
8 for the rest of your life an hourly rate to never smell
9 anything ever again. Food and drinks will be
10 flavorless. You won't know whether you're burning a
11 meal or something may have gone rotten. Everything
12 that ever smelled good to you, will be merely a memory.
13 This may cause a loss of appetite. It will have a
14 major impact on your quality of life, and it could put
15 you in danger. You must work all day, every day,
16 including holidays and weekends. And once you take
17 this job, you won't be able to quit until you die. So
18 that's the advertisement for a job.

19 And I want you folks to imagine that you're
20 reading that advertisement. And I want you to think
21 about, what's the hourly rate that you would be willing
22 to accept for such a job.

23 The reason that I titled this Major Impact on
24 Quality of Life is because that's what their expert
25 witness agreed with us on. Okay. So if you don't want

1 to take -- don't just know this, and you don't want to
2 take Rosemary's word for it, you don't want to take her
3 daughter's word for it, if you don't want take Cori's
4 word for it, if you don't want to take Dr. Funcik's
5 word for it, and if you don't want to take Dr. Ghegan's
6 word for it, take Dr. Schlosser's word for it. That
7 this -- this experience has a major impact on the
8 quality of life.

9 And the Judge will read to you at the end --
10 well, shortly, that Rosemary's life expectancy --
11 because we have tables that set that sort of thing
12 out -- is 24.08 years. Let me give you some more math.
13 We did a quick calculation. And that amounts to 8,795
14 days. And if you do the math again, that amounts to --
15 if you take out eight hours for sleep every night,
16 because that's what the ad said, 114,627 hours.

17 Now, if I've learned anything about Rosemary,
18 I've learned she's a pretty tough cookie. And I think
19 that she's probably got more than that. But that's
20 what we're going with because that's what the tables
21 tell us. Now, back to the ad.

22 What would you ladies and gentlemen take that
23 job for? Would you take it for \$3 an hour, never to
24 smell again, not enjoy any of your food? If you took
25 it for \$3 an hour -- I did some math again, good Lord,

1 I hope this math is right, \$421,881. So if you took
2 that job for the rest of your life, and you were in a
3 situation like Rosemary, for \$3 an hour, what you would
4 be paid is \$421,881. If you think to yourself, like I
5 am quite frankly, that I would never in a million years
6 take such a job for \$3 an hour.

7 Let me give you another one. If you could take
8 that job for \$5 an hour, that number is \$703,135. And
9 if you take that job for \$7 an hour, because five isn't
10 enough, that number is \$984,389.

11 Now, it's my job -- the way I see it -- some
12 lawyers see it differently. It's not my job to tell
13 you what you think, or what to do. It's my job to try
14 to bring the truth to you, to try to bring the facts
15 and the evidence to you, so that you can make these
16 determinations. I'm not going to tell you which one of
17 those is appropriate, but another way that you can
18 think about this to what extent have we proven our
19 case? Remember, have we just proven our case, was it
20 just 51 percent or is -- all of the sheets of paper
21 over here? Folks, when you go back and begin your
22 deliberations, it's up to you to decide what the facts
23 and evidence are. We think it's pretty obvious. Thank
24 you so much for listening to me. Mr. Hines is going to
25 get up now, listen to him very closely. I'll be

1 speaking with you again in just a moment.

2 THE COURT: Mr. Hines.

3 MR. HINES: Thank you, Your Honor. May it please
4 the court?

5 THE COURT: Yes, sir.

6 MR. HINES: Can everyone hear me -- I'll move it
7 just so I can see. Ladies and gentlemen, I'm not going
8 to lie to you. I told you when we came in here to
9 start this case that we don't disagree about
10 everything. And I figure I'll start telling you
11 something that I don't think anybody disagrees with --
12 which is that if my voice is heard on another video
13 deposition again, it would be too soon.

14 I know that it's been a long week. I believe we
15 did deep dive on some smelling and some tasting. But
16 the reason we did that is because the job that Mr.
17 Gruenloh just described to you was accepted by the
18 plaintiff in this case for over a year without her
19 knowing she was working it. That's why we had to get
20 into all that.

21 Now, let me just get into saying to you that I
22 know, again, it was tedious and trying at times. If
23 there's anything that I've done, or anything that my
24 partner over there at counsel's table did to offend
25 you, to annoy you, I ask that you please don't hold it

1 against our client.

2 Let's go ahead and get right to it. You know, I
3 spent a long time talking to these witnesses. I hope
4 you would remember, if you would, try to balance that
5 out. I didn't spend a lot of time in front of you
6 during the opening. The reason I didn't spend a lot of
7 time in front of you during the opening, is because
8 ultimately it doesn't make much difference about what I
9 think about any of this stuff.

10 In the opening, they say the lawyer is going to
11 tell you what the evidence is going to show. It makes
12 you wonder kind of like -- well, why -- why not just go
13 ahead and let me see the evidence, you know. The
14 reason I asked you to mention -- or to listen and pay
15 close attention to what Mr. Gruenloh had to say,
16 because certainly he has every right to get up and say
17 it. But when a lawyer stands up and tells you what the
18 evidence is going to show, anyone watching just wants
19 to see if all that comes true.

20 And I'm not here to tell you what the evidence
21 is. I'm not here to tell you what to think or how to
22 decide the case. I'm just here to ask you to consider
23 certain things that you do, and to remind you that even
24 though the Judge is going to charge you the law that
25 applies -- and certainly, you have to apply the law,

1 that's the obligation, but your common sense doesn't
2 have to stay outside. Your common sense doesn't have
3 to stay outside. Just like I told you at that job,
4 that didn't sound like a good job at all, did it? Who
5 would work for that.

6 And at least when I asked those doctors -- I
7 mean, the point is, I told you at the start of this
8 trial, we are not here to be unsympathetic to anybody.
9 We're not here to be disrespectful to anybody. We
10 might have asked a lot of questions, but I don't think
11 we asked in a nasty way. We just needed to get the
12 information; give you the information.

13 Now, to contrast that with the way Mr. Thomas
14 was examined yesterday, I'll leave to it for you to
15 decide whether that was necessary or appropriate at
16 that time. If you need information, ask for it. You
17 don't have to force it out of somebody, put them on
18 their heels, just on account you've done this before
19 and they haven't. You're just standing up and they're
20 sitting down.

21 You know, we are trying to get information.
22 This is law and order. Lord knows, I have been
23 unsophisticated in trying to present this stuff to you,
24 swinging around with a yard stick and who knows what
25 else. But if this was supposed to be entertaining, you

1 all would have been a lot happier to get that juror
2 summons in the mail, but it's supposed to be -- it's
3 supposed to be about trying to figure out what
4 happened. And to do that, you are perfectly equipped,
5 every one of you, but what you need to do is use your
6 common sense, your good judgment.

7 Now, Ms. Sanford, if you would put up photo 196.
8 It's kind of funny that plaintiff's counsel just
9 mentioned -- I was always taught, when you point the
10 finger at somebody, and that the thumb is pointing out
11 -- but when you point a finger at somebody, you've got
12 three pointing right back at you. I guess you all were
13 taught sort of the same thing.

14 But what's interesting is I want you to use your
15 common sense about this, that's the table that where
16 the plaintiff sits. The Plaintiff brings the lawsuit.
17 You guys know that. That's the table that the
18 defendant sits. The defendant has claims made against
19 him. The defendant gets to come to court at the
20 plaintiff's invitation, not the other way around. It's
21 been interesting to hear that what's happening in this
22 case is we've been pointing the finger. It's us doing
23 that, the defendant. You wouldn't think the defendant
24 would just come into court and say -- I mean, how much
25 do you want, you know.

1 And I get it. Again, it's not about being
2 disrespectful. It's not about being insincere or
3 indecent to somebody. You know, we asked Ms. Connelly
4 a lot of questions, but we weren't doing it over lunch.
5 She's -- she sued us. And she's certainly entitled to
6 do that. Anybody is entitled to do that if they have a
7 claim, but you have got to be able to defend yourself
8 too.

9 Now, let's talk about it. You heard about this
10 March 17th warning. March 17th, the St. Patrick's Day
11 warning. That's a nice way to remember that. You can
12 also remember that June 6th was D Day. Okay. That's
13 another historic day. Between March 17th and June
14 6th -- there's a little bit of time there, right?

15 Another thing you heard about was, gosh, look at
16 that stack of paper over there from these guys. Can
17 you believe that they gave that to us? Let me ask you
18 this, if we didn't give it to them, where did it come
19 from? Do you think maybe the A.R.B. keeps emailing us
20 what they send. Do you think maybe during the course
21 of lawsuits you try to get information from somebody
22 like the A.R.B., and do you think maybe if the A.R.B.
23 had something in there that said something to the words
24 like, I don't know, did we actually fine the guy for
25 it, and it was closer in time of the accident? Maybe?

1 Then that could have been shown to you instead of the
2 St. Patrick's Day email. Just keep in mind, you know,
3 Jeff Thomas doesn't just want to keep this site clean,
4 just to keep his site clean. The A.R.B. on Daniel
5 Island -- you have the Daniel Island Construction
6 Architectural Review Board Guidelines -- those aren't
7 the kind of folks that just sort of don't nitpick.
8 That's what they do. So if he's not keeping the site
9 clean, they're going to fine him. If they had a record
10 of a fine, I can assure you, you would have seen it.

11 Now, listen, all that's beside the point. Let
12 not me chase that rabbit any further, because nobody is
13 saying that's what the fence is supposed to look like.
14 The problem is -- the problem is for you to use your
15 common sense. Let's hold on a second. Hold on a
16 second. How is it this case -- this is almost -- that
17 the plaintiff has sued the defendant, yet the plaintiff
18 says the defendant is pointing the finger at her.

19 The plaintiff says look at this terrible site
20 with the fence all the way down in the way. But at the
21 same time says, well, I didn't have any responsibility
22 to this. I have a problem with that. Again, nobody is
23 not sorry that this happened, but we are here in court
24 talking about who legally is responsible for it.

25 Now, for the plaintiff to just say look at this

1 terrible site. The plaintiff says, you know, you
2 mentioned -- all right, it was -- it was down, but I
3 don't know, was it nighttime? Was it raining? Was
4 there an emergency situation? Was there some sort of
5 limitation on the view to see it? But it's been
6 admitted, no, no, no, that's -- that's the fence at the
7 time of the accident. I'm coming along in the
8 direction -- said as we're coming toward you and I, and
9 I see it. The wind is blowing. There's some sort of
10 movement. I don't think, by the way, that there was
11 any sort of wild attempt to mischaracterize any
12 movement. I think that plaintiff's counsel, in his
13 opening statement, he told you that it was like a Hefty
14 bag. You know, we've all seen garbage bags blowing
15 around. But the point is, it doesn't matter. It's
16 what's been admitted. That's what it looked like. I
17 saw it. It was moving. I tried to move around it and
18 I didn't get around it.

19 Again, nobody is picking on anybody here. But
20 it's an interesting thing for you to consider that the
21 defense table is having to defend against allegations
22 that we're the ones putting somebody on trial. And,
23 again, I'm not telling you what the evidence is. I'm
24 not telling you how to think. I couldn't even do it.

25 The reason you're here is because you know as

1 much as anybody here needs to know about how to resolve
2 this case. You are just independent in the sense that
3 you don't know any of the parties. You don't have a
4 dog in the fight. You're independent. You've got your
5 own brain. You can use that. Just because somebody
6 tells you something, you don't have to believe it. You
7 don't have to be swayed by lawyers. Look at me, all
8 I'm going to ask you to do is go back there, let us
9 know what you think. Let us know what you think is
10 justice in this case.

11 The other thing about this case, let's talk
12 about causation. The fence, it shouldn't have been
13 down. But, again, the admission is, yeah, the fence
14 shouldn't have been down, but I knew it shouldn't have
15 been down. The testimony was up -- yeah, those things
16 are supposed to -- the -- the plastic is supposed to be
17 taut and secure. I knew that it wasn't taut and
18 secure. And I'm running along. And I can see it. I
19 run about a 10 minute mile. I won't do as much math as
20 Mr. Gruenloh did, but that's about a six mile an hour
21 pace, you know. I knew it wasn't secure.

22 And -- and by the way, that fencing there is
23 not, you know, it's not particularly high-tech. You
24 know, as far as the way things -- the way it affects
25 things. I don't think you ever heard anybody say only

1 someone -- well, you actually did hear something about
2 it. There was this knowledge of the -- the safety.
3 Again, of some sort of hazard. It's almost like an
4 exceptional degree that existed. I don't think
5 anybody -- you know, there was no construction expert
6 for the plaintiff to testify that this was somehow a
7 hazard that wouldn't be obvious to an ordinary person.
8 So in any event, but -- but the testimony was, as I saw
9 it, I saw it moving. I knew it was windy. I tried to
10 move around it.

11 Now, at that point, what would happen if the
12 wind wasn't blowing? According to the testimony, there
13 would be no harm, no foul; right? Because I think what
14 ultimately gets me is that when you have a recognition
15 of a hazard or risk, an effort to move around it, but
16 that -- it wasn't Jeff Thomas that then came out and
17 moved it some more, it was the wind. So I mean the
18 plaintiff's counsel sort of belittled the idea that the
19 wind played a role in it. But I suggest to you that
20 it's something for you to consider.

21 Now, let me move through this a little bit
22 quicker. I mean, that's -- that's the front end issue
23 of liability. You heard a whole lot about dangers in
24 the the case. And you were absolutely told correctly
25 by plaintiff's counsel, that we don't dispute that she

1 hurt herself. Lords knows, she hurt herself. She had
2 to have surgery. Nobody wants to have surgery. But
3 these are some of the things to consider.

4 Now, I'm not going to go in -- again, the reason
5 we have been here all week is on account of smelling.
6 But keep in mind the first time that -- well, let me
7 start with this: You heard a lot of testimony about
8 blood from Ms. Smith. She had taken her clothing off
9 to help stop the blood. The blood is gushing. And
10 this is a scene that, apparently, is quite upsetting to
11 a young child, but that is a picture of the blood.
12 Again, I'm not trying to be nasty with anybody.

13 But it's like Dr. Funcik said, he testified it
14 was something a little different when we had the video.
15 You know, and thing about this is, you know, nobody
16 here -- by the way, is picking on any of these doctors.
17 I mean, Dr. Schlosser -- and I'm not even going to say
18 much about him other than these two things.

19 Members of the jury, to the -- it's a little
20 ironic for the plaintiff to say to a defendant, you are
21 the one pointing the finger at him. But I hope you
22 know, the plaintiff's counsel, he hadn't talked a whole
23 lot about responsibility until Dr. Schlosser said that
24 injury would be significant if you had it. He said,
25 yeah, well, you know, he started -- right about then

1 Dr. Schlosser started making a whole lot of sense. So,
2 just keep in mind what is going on. You guys -- I
3 mean, I would submit to you, you evaluate what Dr.
4 Schlosser said when he sat there and he told me who he
5 was, and why he was here, and what he did to get here.

6 And he relied upon -- I'm not criticizing these
7 doctors, but he relied upon their good words. And it's
8 been suggested, I think he said to you, I don't have
9 all the information that the doctors had, but do you
10 understand what I mean -- I don't really worry about
11 the eye color. But when doctors see patients, what
12 they put in their notes is what is clinically
13 significant, stuff that other doctors might not see.
14 If it was important what their eye color was, it would
15 be in there. Anyways, he had all that.

16 He read them all. He came in here, and he told
17 you what he had to say, he's paid to do it. Because
18 his skills are not all that common. His knowledge is
19 not all that common. His time is valuable, but his
20 opinion is not for sale. You can take it, you can
21 leave it.

22 Now, one of the doctors, one of them -- Dr.
23 Schlosser told you right there that he thinks that Dr.
24 Ghegan is a fantastic doctor. He trained him. Nothing
25 he said -- you know, about Dr. Funcik. Now, the

1 plaintiff said something about, hey guys, you know, we
2 could have gone out and found somebody to say this, but
3 we got lucky. These doctors were steadfast in their
4 opinions. I'm just suggesting to you that -- the
5 question wasn't exactly, really what they said, because
6 we don't try cases for sound bites.

7 I wondered if plaintiff's counsel would mention
8 to you trauma, trauma, trauma. Now, there were
9 probably 30 lines of the transcript before that -- when
10 he did a little hemming and hawing and said, yeah, I
11 know. Well, you know, it's weird and -- but, you know,
12 I thought about it some more, and I did speak with
13 plaintiff's counsel for a little while before the
14 deposition started, and I'm feeling a little bit more
15 confident. That's fine. That's -- you know, nobody
16 picking on him.

17 But, you know, this notion that the treating
18 physicians follow this condition for years and years --
19 well, Dr. Ghegan, he didn't know there was any
20 litigation going on, or possibly going on. He did what
21 he does. He treats patients. And he treated Mrs.
22 Connelly, and he treated Mrs. Connelly on April 4,
23 2013, not before, not after. He spent about 10, 15
24 minutes with her. So let's just at least make sure
25 you're seeing clearly, you know, the evidence.

1 Because I'm not -- I hope that you don't think
2 I'm trying to put any more on it, to take any more off
3 of it. I'm just suggesting, you know, let's shoot
4 straight. That's why we're here. That's what we -- we
5 spent a week, you know. I'm sure you guys are ready to
6 go home. So just let me -- if you'll indulge me a
7 couple of more minutes and see if anything -- this is
8 so interesting to me that I can't just let it go.

9 You know, Dr. Funcik said, on the damages
10 part -- the first deposition said, gosh, you know, when
11 you think about the timing, he just had a hard time
12 making it add up. You know, and that's -- that's what
13 -- that's what it's time to do now, it's time to add it
14 up. Add up the evidence, you know -- it's not any
15 emotion to it. It's just sit there and, you know, you
16 figure that's where to do the math on the evidence.

17 And in this case, let me just say plaintiff's
18 counsel walked you through the verdict form a little
19 bit. Let me give you a couple thoughts that I want you
20 remember, is that number one, figure out if Winsor is
21 responsible. And then you've also got to consider
22 whether or not there's any responsibility of Mrs.
23 Connelly. But there are two different issues of
24 causation; there's only one end. You have the cause of
25 fall itself, then you have got to determine the smell

1 part of that. And I don't think any question the taste
2 is associated with it.

3 So again, ladies and gentlemen, I hope that my
4 efforts in putting forth as much evidence as I have
5 given to you, I hope it made sense. There is -- I'm
6 not telling you what the evidence is. That is what the
7 evidence is. And I'm not telling you how to handle it,
8 how to do it. I'm suggesting to you some things that I
9 think might be of interest, and to fairly consider it,
10 but I ask you -- you are going to have this case and
11 you're going to decide it. And I thank you for being
12 here. I thank you for bearing with me.

13 Please, you know, just -- I would urge you to
14 take a good look at it, take a good look at things
15 about damages. Nobody is saying that it's not
16 important to smell and taste. That's why we have some
17 information here from Ms. Connelly's Facebook account.
18 We're certainly not going to try to pry in anybody's
19 business, suggesting to you that -- that that might be
20 of interest in determining the kind of impact this
21 might have -- it's had on her life.

22 The other thing I might suggest to you is,
23 again, going back to maybe some ironies about the
24 plaintiffs saying the defendants -- the plaintiff's
25 lawyer, like in the defense lawyer, at least in some

1 part was -- not in all parts, but the idea that
2 basically you are told this is really a terrible thing
3 that happened, but they didn't really know what
4 happened for about a year after that. The point I'm
5 trying to make is, nobody wants to lose their sense of
6 smell or senses, or how we experience the world around
7 us, to smell them, you know, as we get -- we go through
8 life. And that's why, perhaps, we would suggest to you
9 that it makes it harder to add up the notion that that
10 wasn't recognized.

11 In any event, when you do add it up, please keep
12 things in perspective. Please know how important it is
13 what you're doing. Please know that we know how
14 important it is what you're doing and we thank you.

15 THE COURT: Yes, sir.

16 MR. GRUENLOH: Just a couple of points on this.
17 Another thing that came out on the witness stand from
18 Dr. Schlosser, I talked to you about how we had asked
19 to examine Rosemary -- he hasn't examined Rosemary. He
20 didn't read her deposition before he reached his
21 opinion.

22 Do you remember the part of his deposition that
23 I had to show to him, where I said, well, why doesn't
24 it matter to you what Rosemary said about these things.
25 And he used a very important term phrase, he said,

1 because the perception of the patient is not important.
2 When you go back to your -- to the jury room, and
3 you're deliberating, I want you to roll that around in
4 your mind. And I want you to think about what that
5 means, when a doctors say to you, that the perception
6 of the patient, in terms of how hard they fell, what
7 they did to themselves, what they've experienced, is
8 not important.

9 We're still talking about blame, responsibility
10 and blame. The judge is going to tell you that the
11 fence, and the fact that it was down -- well, that's
12 these people's responsibility, that's Winsor's
13 responsibility. And yet they're still here talking to
14 you about Rosemary Connelly's Facebook page. All
15 right.

16 Because what they want you to think about back
17 there is that what Rosemary ought to have done, is she
18 ought to have gone home, crawled up into a ball, laid
19 in the corner, never gone and socialized again. Let
20 her daughters go out and eat. She should have stayed
21 at home. She should have never gone to the ocean
22 again. She should have just stayed home and given up.
23 That's not who this is.

24 Let's talk about some of the things -- instead
25 of blaming, let's talk about responsibility. Pat, can

1 you bring up that first quote -- this is -- we were
2 able to get a rough transcript of the testimony that
3 Mr. Thomas gave right from the stand yesterday. We got
4 it last night. We poured through it. And we found
5 some interesting things that he said. And I said, "All
6 right. So before June 6, 2011, you were very much
7 aware that you were having problems with your fences
8 out there coming down, weren't you, sir?" And his
9 response to us was "I've known for 19 years, building
10 on Daniel Island, that silt fences can come down
11 randomly". Go to the next quote, Pat.

12 "And you also told me at your deposition that
13 you knew that this material was the type of material
14 that could get airborne if a gust of wind came
15 through?" and his response was "Yes". He knew that.
16 He been warned before.

17 What else did Mr. Thomas say? He said -- "Is it
18 Ms. Smith's fault -- was it their fault because they
19 should have anticipated that this fence could trip
20 them? Is that what you're saying to these folks? That
21 it was their fault?" "I guess if you want a yes or no,
22 the answer" -- "I guess if you want a yes or no, the
23 answer is yes." So I gave -- he was given an
24 opportunity, ladies and gentlemen, on June 7th, 2011,
25 when he was first contacted about this, and he said,

1 somebody fell -- somebody told them that somebody fell
2 down and hurt themselves, and he was given an
3 opportunity at that point to say, I hope she is okay.
4 Is there anything that I can do. I know that this has
5 been going on because I got this warning. I know that
6 this is a problem. That's not what he said.

7 What he said -- what he did is denied it. He
8 didn't accept responsibility. We gave him another
9 opportunity in his deposition in 2014. And then right
10 here, we gave him another opportunity in front of you,
11 ladies and gentlemen. And here was the question. I
12 said, "All I want to know, I don't want to talk about
13 philosophy or anything like that, I just want to know
14 the answer to a very simple question" -- go to the next
15 one, Pat. There we go. "You understand, sir, I just
16 want to know right now whether or not you are telling
17 the ladies and gentlemen of the jury, because you've
18 already said that you have no responsibility for this,
19 what I want to know is if you were telling these folks,
20 under oath, that you believe that Rosemary Connelly and
21 Cori Smith have responsibility for this accident
22 because they should have anticipated it?" "I'm not
23 always a believer in direct responsibility." Mr.
24 Thomas, the corporate representative and owner of
25 Winsor Custom Homes, is not a believer in

1 responsibility. Bring up the next one, Pat. Do we
2 have another one? That's all. Okay.

3 What they did, ladies and gentlemen, when they
4 were given an opportunity to accept responsibility,
5 they hid the truth. That's why that warning that we
6 showed you, that's why it's so significant that it
7 wasn't in this phone book that was produced to us. And
8 he's absolutely right, we got that document pursuant to
9 a subpoena. And we had to go out and we had to find it
10 and look for it. And thank goodness that we did,
11 because they didn't produce it.

12 Pat, do we have a quote on the medicine. I just
13 want to do one of these -- it's getting towards lunch.
14 I wonder if you remember Dr. Funcik. And he said, you
15 know, this is kind of like a murder thing, where
16 there's one person with a gun and that's it.

17 Well, isn't that an analogy that Dr. Funcik
18 used? The person that's been shot? The person that's
19 gotten that blow to the head? That's Rosemary. And
20 the gun is that concrete that she hit first. Trauma,
21 trauma, trauma. That's the only cause of this.

22 Okay. Let me talk to you briefly just about
23 these numbers, because you are going to be asked, if
24 you agree with us, what this type of thing is worth.
25 And, again, I'm not going to tell you any particular

1 number, but I also want you to think about this. We
2 are getting towards the end of summer, thank goodness.
3 I guess about the beginning of October, we all start to
4 go outside again, the heat starts to go away. And
5 something very important, at least to me, happens at
6 that time. And that's you start to smell, the smell of
7 wood smoke. And when autumn comes around every year,
8 and I smell the wood smoke, that makes me think about
9 Thanksgiving. And I start to get happy.

10 And when Thanksgiving comes, and I walk into my
11 parents' house, I smell the turkey. That brings up
12 memories. When Christmas comes, you smell the
13 Christmas tree. That brings up memories. When spring
14 comes, you smell the flowers. Thank you very much,
15 ladies and gentlemen.

16 THE COURT: Madam Forelady, and members of the
17 jury, we've been in the courtroom about an hour -- an
18 hour and a half, an hour and 45 minutes, if anybody
19 needs to take a short break, the charge will probably
20 take about 20 or 25 minutes for me to read. Do you
21 need to take a short break? I'll be happy to do that.
22 If you do not, please indicate your desires. Anybody
23 need to take a short break? You need take a short
24 break? All right. We'll take about a 10 minute break.
25 And when we come back, I'll charge you on the law.

1 Please don't discuss the case amongst yourselves.

2 (WHEREUPON, the jury leaves the courtroom at
3 approximately 10:59 a.m.)

4 THE COURT: All right. We'll take about a 10
5 minute break.

6 (WHEREUPON, a brief recess was taken.)

7 THE COURT: Please be seated. We got everybody --
8 bring us the jury, please.

9 (WHEREUPON, the jury entered the courtroom at
10 approximately 11:13 a.m.)

11 THE BAILIFF: All the jurors are present, Your
12 Honor.

13 THE COURT: Thank you very much. Madam Forelady,
14 and ladies and gentlemen of the jury, I will give you a
15 copy of these instructions in written form. During
16 your deliberations, you may refer to the instructions
17 to guide your decision making. You must consider the
18 instructions as a whole, and not follow some and ignore
19 others. Madam Forelady, please return the instructions
20 to the court after you have reached a verdict.

21 Under our Constitution and Code of Laws, only
22 you, the jury, can make findings of facts in this case.
23 I am not permitted to indicate to you how I may feel
24 about the testimony and evidence which has been
25 presented. Throughout this trial, it's been my

1 intention to be fair and impartial towards each of the
2 parties involved. To determine the facts in this case,
3 you will have to evaluate the credibility and
4 believability of each witness. Some of the things you
5 may consider as you decide whether or not to believe a
6 witness' testimony about a particular matter include:
7 The manner and appearance of the witness who testified.
8 Was he or she straight forward or hesitant in
9 answering? Was the testimony of a witness consistent
10 or inconsistent? How did the witness come to know the
11 facts as he or she testified to? Is there some reason
12 the witness would want to give testimony which would
13 help or hurt one side or the other? In other words,
14 was the witness bias or prejudice? Was the testimony
15 of a witness strengthened or weakened by other
16 testimony or evidence?

17 You can believe as much or as little of each
18 witness' testimony as you think proper. Of course, you
19 do not determine the truth by merely counting the
20 number of witnesses that is presented by each side.
21 Throughout the process, you have but one objective, to
22 seek the truth regardless of its source.

23 The same Constitution and laws which designate
24 and make you the finders of fact, also make me the sole
25 instructor of the law. The attorneys are not the

1 instructors of the law. Do not not make your decision
2 based upon what you think the law should be, or what
3 you have heard it is, only base your decision on what
4 the law is as I instruct it to you.

5 You've heard me refer to the parties in this
6 action as the plaintiff and the defendant. The
7 plaintiff is the person who brought the action by
8 filing and serving a Summons and Complaint. The
9 defendant is the person against whom the action was
10 brought.

11 Since the plaintiff has brought the action, the
12 plaintiff has the burden of proving it. I will explain
13 to you, in just a moment, both the plaintiff and the
14 defendant are entitled to a fair and impartial trial.
15 It would be improper for you to decide this case based
16 upon sympathy, passion, prejudice, emotion, or any
17 other consideration not in evidence in this case. Your
18 job is to fairly and impartially decide this case based
19 on the evidence presented and the law as I give you in
20 these instructions.

21 The evidence in which you are to consider -- to
22 decide what the facts consists of include: The sworn
23 testimony of a witness, both on direct and cross
24 examination, regardless of who called the witness. The
25 exhibits that have been received into evidence, and any

1 facts which the lawyers have agreed. And sworn
2 testimony in this case would include the video
3 depositions.

4 Certain things are not evidence. And you may
5 not consider them in deciding what the facts are. I
6 will list them for you. Opening statements by lawyers
7 are not evidence. The lawyers are not witnesses. What
8 they've said in their opening statements and closing
9 arguments, and other times, is intended to help you
10 interpret the evidence, but it is not evidence. If the
11 facts, as you remember them, differ from the way the
12 lawyers have stated them, your memory controls.

13 Questions and objections by lawyers are not
14 evidence. The attorneys have a duty to their client to
15 object when they believe a question is improper under
16 the rules of evidence. You should not be influenced by
17 the objection, or by the court's ruling on the
18 objection. Testimony that has been excluded or
19 stricken, which you have been instructed to disregard,
20 is not evidence and may not be considered. Anything
21 you may have seen or heard when the court was not in
22 session is not evidence. You decide the case solely on
23 the evidence received at trial.

24 There's two types of evidence generally
25 presented during the trial, direct evidence and

1 circumstantial evidence. Direct evidence is testimony
2 of a person who claims to have actual knowledge of a
3 fact such as an eyewitness. Circumstantial evidence is
4 proof of a chain of facts and circumstances indicating
5 the existence of a fact. The existence of a fact
6 cannot be based on speculation, surmise or conjecture.
7 The law makes absolutely no distinction between the
8 weight or value to be given to either direct or
9 circumstantial evidence, nor is there a greater degree
10 required of circumstantial evidence than direct
11 evidence. You should weigh all the evidence in the
12 case to determine the facts in the case.

13 You have to evaluate the credibility, which
14 means the believability of each witness, on a contested
15 factual issue. You have some direct evidence and
16 circumstantial evidence.

17 Madam Forelady, members of the jury, the
18 plaintiff has the burden of proving the claims in this
19 case. The plaintiff must meet this burden by proving
20 the claims by the greater weight or the preponderance
21 of the evidence. What I mean by the greater weight of
22 the evidence can be illustrated by imagining a set of
23 scales. When the case begins, the scales are even.
24 After all of the evidence has been presented, if the
25 scales remain even, or if they tip even slightly in

1 favor of the defendant, then the plaintiff has failed
2 to meet the burden of proof and your verdict will be
3 for the defendant.

4 On the other hand, if the scales should tip even
5 slightly in favor of the plaintiff, and the plaintiff
6 has met the burden of proof, your verdict should be for
7 the plaintiff on the plaintiff's claims.

8 Of course there's no way to weigh evidence
9 except through the exercise of your good common sense
10 and judgment. It's entirely a mental process. The
11 evidence you should give the most weight to is that
12 which convinces you of its truth regardless from whom
13 or what source it comes.

14 Testimony has been presented to you by
15 deposition. A deposition is a written document, a
16 video containing sworn testimony, given by witnesses
17 outside the court in the presence of lawyers where each
18 party may ask questions of the witness. The testimony
19 is entitled to the same consideration and is to be
20 judged as to the credibility and the weight by you in
21 the same way as if the witness were present and gave
22 the testimony. It is then for you, the jury, to
23 determine the effect, value, weight, and truth of the
24 testimony given in the deposition.

25 You've heard the testimony of several witnesses

1 who have special knowledge, skill, experience,
2 training, or education in a particular profession, who
3 have given their opinions as experts as to matters in
4 which they are skilled. In determining the weight to
5 be given such opinions, you should consider the
6 qualifications and credibility of the experts, and the
7 reason given for each of their opinions. You're not
8 bound by these opinions. Give each of the opinions the
9 weight, if any, to which you deem it is entitled.

10 In reaching your verdict, you should not
11 consider whether any party in this case was or was not
12 covered by insurance. As you may know, some plaintiffs
13 are covered and some are not, and some have various
14 forms of partial coverage. The same is true for the
15 defendants. The law does not allow the parties to
16 present any evidence about insurance or lack of
17 insurance, or amount of insurance. And there is no way
18 that you, as a juror, can accurately determine whether
19 any party in this case has insurance coverage; or if
20 they have it, how much insurance they do have.

21 Medical insurance policies or some other
22 insurance policies have subrogation clauses.
23 Subrogation means when an insured receives money from a
24 third party, the insured must reimburse the insurance
25 company previously paid. More importantly, insurance

1 or lack of insurance has no bearing on whether the
2 defendant was or was not negligent, or on how much
3 damage, if any, the plaintiff has suffered.

4 As a matter of law, I have found that the
5 plaintiff has met the burden of proving the defendant's
6 duty and breach, the first two of the four elements of
7 negligence. Therefore, the defendant owed the
8 plaintiff a duty and breached that duty.

9 However you, the jury, are charged with the
10 responsibility to determine whether the plaintiff has
11 proven the remaining two elements of negligence,
12 proximate cause and damages. The plaintiff would not
13 be entitled to a verdict unless you further find that
14 the defendant's negligence was the proximate cause of
15 the plaintiff's injuries.

16 The law defines proximate cause of an injury to
17 be something that produces a nature chain of events,
18 which in the end, brings about the injury. In other
19 words, proximate cause is direct cause without which
20 the jury would not have occurred. The plaintiff must
21 prove by preponderance of the evidence that the damage
22 was proximately caused by the defendant's breach of
23 duty.

24 As a defense to the plaintiff's negligence
25 claim, the defendant contends that the plaintiff was --

1 excuse me -- that the plaintiff was herself negligent,
2 and that such negligence was the legal cause of her own
3 injury. The defendant, by this defense, in essence
4 says this: I was not negligent. But even if the jury
5 should find that I was negligent or at fault, the
6 plaintiff was more negligent or at fault than I was.
7 In other words, the occurrence which caused the
8 plaintiff's injury required the fault of each of us for
9 the action to have happened, but the plaintiff was more
10 negligent than I was. This is an affirmative defense,
11 and the burden of proving that claim is upon the
12 defendant, who must satisfy the preponderance of the
13 evidence that the plaintiff was also negligent, and
14 that such negligence was the proximate cause of the
15 plaintiff's own injury or damage.

16 Even if you, the jury, find that the plaintiff
17 was negligent in this case, the plaintiff may still
18 recover as long as her negligence was not greater than
19 50 percent. The amount of the plaintiff's recovery
20 shall be reduced in proportion to the amount of her
21 negligence. If you find that plaintiff's negligence to
22 be greater than 50 percent, then the plaintiff shall
23 not recover. You're not permitted to make any
24 reduction of the plaintiff's total damages based on the
25 percentage of negligence attributed to any party.

1 After your verdict is returned, the Court will
2 address any matters related to reduction, which may be
3 appropriate as a matter of law. Again, you determine
4 only the total amount of plaintiff's damages, if any,
5 and enter the verdict -- the figure on the verdict
6 form, the Court will reduce the total amount of damages
7 you award plaintiff by the percentage of plaintiff's
8 own negligence, if any.

9 To state a negligent cause of action, the law
10 requires the plaintiff to prove four essential
11 elements, or the defendant to prove in comparative
12 negligence four essential elements. One, that the
13 defendant owed a duty of due care to the plaintiff, or
14 that the plaintiff owed a duty of due care to the
15 defendant. That the defendant breached this duty.
16 That the plaintiff was injured. And the defendant's
17 breach of her duty of due care proximately caused the
18 plaintiff's injury. Later in this instruction, I will
19 explain to what you what is meant by proximate cause.

20 Negligence means that a person did not use the
21 same amount of care that a person of ordinary reason or
22 prudence would exercise in the same circumstances. The
23 word careless means the same thing. A duty to use due
24 care is created by the laws of this State. A duty to
25 use due care requires a person to perform his or her

1 conduct to a standard which is adequate to protect
2 others from reasonable harm.

3 It is possible that the law will impose upon the
4 defendant two, or even more duties, to use due care. A
5 negligent person breaches duty to use due care when he
6 or she fails to use the same amount of care that a
7 person of ordinary reason and prudence would have
8 exercised in the same circumstances. In other words, a
9 person's conduct is negligent when he or she has done
10 something that a reasonable person would not have done
11 in the same circumstances -- situation or
12 circumstances, or has failed to do something that a
13 reasonable person would have done in the same
14 situation. It's even possible that a negligent person
15 has done both. Therefore, you must compare the
16 defendant's and the plaintiff's conduct with the way a
17 person of ordinary reason and prudence would have acted
18 or not have acted in the same circumstances.

19 The law defines proximate cause of an -- of an
20 injury to be something that produces a natural chain of
21 events, which in the end, brings about the injury. In
22 other words, proximate cause is direct cause without
23 which the injury would not have occurred. Proximate
24 cause requires proof of both causation and fact, and
25 legal cause.

1 Causation and fact is proven by establishing the
2 injury would not have occurred but for the defendant's
3 negligence. Legal cause is proven by establishing
4 foreseeability. It is not necessary that the defendant
5 intended to contemplate an injury which occurred. It
6 is sufficient that the defendant knew, or should have
7 known, his conduct would cause some injury to somebody.
8 The defendant's negligence does not have to be the sole
9 proximate cause of the plaintiff's injury, instead the
10 plaintiff must prove that the defendant's negligence
11 was at least one of the proximate causes of the injury.

12 If you decide that the plaintiff has met the
13 burden of proving proximate cause, your next step would
14 be to decide how much money the defendant should be
15 required to pay. Actual damages are to compensate the
16 plaintiff for the plaintiff's injury or loss, and to
17 put the plaintiff as near as possible in the same
18 position that the plaintiff was in before the incident
19 occurred. In other words, actual damages would be the
20 actual loss and expenses which the plaintiff has
21 suffered because of defendant's negligence.

22 Further -- I further charge you that in this
23 case, the plaintiff may recover only for the necessary
24 and reasonable expenses caused by the injuries
25 sustained in the accident. In determining the amount

1 of compensation for a person's injury, it's proper to
2 consider past and present aspects of the injury. This
3 would include the following: Out of pocket expenses,
4 medical bills or expenses; future damages resulting
5 from permanent injury; disfigurement; psychological
6 trauma; mental anguish; mental distress; apprehension;
7 anxiety; pain and suffering; emotional injury; loss of
8 enjoyment of life.

9 The plaintiff must prove that expenses caused by
10 the injury were necessary and reasonable. Actual
11 damages not be -- it's not -- excuse me -- actual
12 damages need not be proven to a mathematical certainty
13 or be based on evidence of a precise amount of damages
14 the plaintiff has suffered. Instead the evidence must
15 allow you to determine what amount of damage is fair,
16 just and reasonable.

17 The plaintiff is never entitled to recover
18 conjecture, or speculative damages. However, if you
19 find that she is entitled to a verdict for actual
20 damages, your verdict should include an amount to cover
21 any damage that the evidence shows would be reasonable,
22 certain to incur in the future. These future damages
23 must, of course, be a result of the defendant's
24 negligence. Also, any future damages that you award
25 must be reduced to a present day value.

1 Pain and suffering is a material element of
2 damage in which a recovery must be used. I charge you
3 that the law does not prescribe any definite standard
4 by which to compensate the defendant for pain and
5 suffering. You, and you alone, have the authority to
6 determine the amount, if any, to be allowed for pain
7 and suffering. The law requires that when making an
8 award for pain and suffering, the jury shall exercise
9 its authority for common, reasonable judgment. And
10 that damage, if any, shall be just and reasonable in
11 the light of testimony and evidence presented in the
12 trial.

13 Additionally, you are instructed that mental
14 suffering, apprehension, shock, fright, emotional
15 upset, humiliation and anxiety, past, present, or
16 expected in the future, can be properly considered as
17 an element of damages. The exact amount of damage for
18 mental suffering cannot be exactly measured.

19 In South Carolina, a loss of enjoyment of life
20 is a compensable element of damage separate and apart
21 from pain and suffering. Damage for the loss of
22 enjoyment of life compensates for the limitation
23 resulting from the defendant's negligence on the
24 injured person's ability to participate in, and derive
25 pleasure from the normal activities of daily life, or

1 for the individual's inability to pursue her talents,
2 recreational interests, hobbies, or advocations. The
3 award or loss of enjoyment of life compensates the
4 defendant (ph), not only for the knowledge that one can
5 no longer enjoy all the life pursuits, also for the
6 actual loss of the ability to engage in these
7 activities.

8 If you find the plaintiff was permanently
9 injured as a result of the defendant's actions, you
10 must then decide how, if at all, the injury will affect
11 the rest of the plaintiff's life. A person's life
12 expectancy is determined by the life expectancy which
13 is part of the laws of this State. The life expectancy
14 tables is only an estimate of the probable average
15 remaining length of the life of all persons in our
16 state of a given age.

17 The plaintiff is a 60 year old female with a
18 life expectancy, according to the life expectancy
19 table, of 24.0 years, or 84.08 years total. This fact
20 is to be considered by you, along with any other facts
21 and circumstances, bearing on the plaintiff's life
22 expectancy, including occupational habits and health at
23 the time of the injury in determining the amount of
24 damage to be awarded to the plaintiff.

25 I charge you that the mere fact that an accident

1 has happened, standing alone, cannot be -- permit you
2 to draw any inference that such an action has been
3 caused by anyone's negligence, fault or breach, other
4 than a fact that a person received an injury or is
5 damaged, or the fact that an action occurs is
6 insufficient to prove negligence.

7 You've been selected as fair and impartial
8 jurors, sworn to impartiality to try and determine the
9 facts in the case, and you must comply with your oath
10 to do so, and no one would have a right to criticize
11 your verdict. You will be fully discharged of your
12 duties as jurors. You should decide this case
13 according to the testimony that you have heard from the
14 sworn witnesses, along with other evidence introduced.
15 I charge you, as jurors, you must decide the issue and
16 must proceed without bias and prejudice to any party.

17 You cannot allow yourselves to be governed by
18 sympathy, by prejudice, by passion, by public opinion,
19 or any other arbitrary factor. Both the plaintiff and
20 defendant have a right to expect that each of you will
21 carefully and impartially consider all of the evidence
22 in the case, that you follow the law as I have
23 explained it to you.

24 Now, Madam Forelady, I have prepared a verdict
25 form. At the top, it has the name of the case with the

1 case number. Question number one: "Do you unanimously
2 find that the defendant's breach of duty proximately
3 caused the plaintiff's injury? Yes or no. If yes, go
4 to question two. If no, stop."

5 Question number two: "Do you unanimously find
6 that the plaintiff was negligent? Yes or no. If yes,
7 go to question three. And if no, go to question four."

8 Question three: "If you answer yes to number
9 one and yes to question number two, and answer this
10 question, taking the combined negligence that
11 proximately caused the plaintiff's injury as a whole,
12 what percentage of that negligence is attributed to the
13 plaintiff, and what percentage is attributed to the
14 defendant." And I have a place for plaintiff's
15 percentage and defendant's percentage. "The negligence
16 percent must total 100 percent."

17 "If the plaintiff's percentage of the combined
18 negligence is less than the defendant's percentage, go
19 to question number four. If plaintiff's percentage of
20 the combined negligence is greater than the defendant's
21 percentage, then stop."

22 Question number four: "If you answer yes to
23 question number one, please state the total amount of
24 damages, in any, sustained by the plaintiff due to the
25 defendant's negligence. If you answer -- if you answer

1 question number three, do not reduce this amount by any
2 percentage from that question."

3 There's a place for the forelady to sign it,
4 date it, Charleston, South Carolina.

5 I will tell you, your verdict has to be
6 unanimous. I would tell you to respect each other's
7 opinions. Review the evidence. Discuss it. It's a
8 selective reasoning process on all 12 of your parts.
9 And as I said previously, the verdict has to be
10 unanimous.

11 Madam Forelady, ladies and gentlemen, I'm going
12 to ask you to go to the jury room. I don't want you to
13 begin your deliberations until the bailiff brings you
14 the charge that I just read to you, and the verdict
15 form. The verdict form being the front page of the
16 charge book, and all the exhibits that have been
17 admitted into evidence. I have to take up my charge
18 with the lawyers, so I may bring you back and tell you
19 something that I messed up on, or tell you something I
20 left out. I don't know. I've got to take it up with
21 the lawyers. So don't begin your deliberations until
22 the bailiff brings you that, and directs you to begin
23 your deliberations.

24 The two alternates, y'all just keep your seats
25 while the 12 jurors going to the jury room. Madam

1 Forelady, if you'll take the jury members to the jury
2 room.

3 (WHEREUPON, the jury leaves the courtroom at
4 approximately 11:34 a.m.)

5 THE COURT: All right. Exceptions to the charge
6 from the plaintiff?

7 MR. GRUENLOH: None, Your Honor.

8 THE COURT: Any from the defendant?

9 MR. BROWN: Exception as to the insurance charge,
10 Your Honor.

11 THE COURT: Yes, sir.

12 MR. BROWN: And just making sure Your Honor gave
13 us permission to mark as a court's exhibit the proposed
14 charges we presented --

15 THE COURT: I haven't marked them yet, I don't
16 believe.

17 MR. BROWN: No, sir. And you gave them to me so I
18 could not lose them, and I left them on my desk. They
19 are coming back right now.

20 THE COURT: Okay.

21 MR. BROWN: So at the appropriate time --

22 THE COURT: That's fine. I think they were
23 charges in relation to premise liability, right?

24 MR. BROWN: Yes, sir. And I would say this on the
25 record, just to preserve myself, and not belabor it --

1 to the extent that anybody could consider these charges
2 inconsistent, I just got them in --

3 THE COURT: All right. Bring them up and I'll
4 mark them as a court's exhibit -- I don't know what
5 number -- what number? Number 13.

6 MR. BROWN: Number 13, Your Honor.

7 THE COURT: I think one and two -- charge
8 requests, number one and number two, is that right?

9 MR. BROWN: I can put those numbers on them right
10 here.

11 THE COURT: Yeah, so we -- if you don't mind.
12 Defense request number one and defense request number
13 two, which the court denied.

14 MR. BROWN: Two, three and three, Your Honor.
15 Thank you, Your Honor.

16 THE COURT: All right. It's request of charge
17 number one, which is about the sidewalk, the court
18 denies that. Jury charge number two, which is premise
19 liability theory, the Courts denies that. Charge
20 number three, is known of obvious dangers in premise
21 liability case, the courts denies that. And we'll mark
22 them as court's exhibit number what?

23 COURT REPORTER: Thirteen, Your Honor.

24 THE COURT: Thirteen. Okay. No. 13. All right.

25 (WHEREUPON, Court's Exhibit No. 13 was marked

1 and made a part of the record.)

2 THE COURT: All right. Would the plaintiff and
3 defendant please come up, and make sure all the
4 exhibits are present. Make sure there's nothing going
5 back that hasn't been admitted into evidence. Put on
6 the record that all exhibits are present, and we'll let
7 the bailiff take the exhibits back and begin their
8 deliberations.

9 (PAUSE.)

10 THE COURT: All right. For the record, is all the
11 defendant's exhibits present?

12 MR. BROWN: Yes, Your Honor.

13 THE COURT: The plaintiff, all the exhibits
14 present?

15 MR. GRUENLOH: Yes, Your Honor.

16 THE COURT: All right.

17 (WHEREUPON, the court was in recess for the jury
18 to begin deliberations at 11:42 a.m.)

19 (After a recess, the court reconvened.)

20 THE COURT: Is the plaintiff ready to bring the
21 jury?

22 MR. GRUENLOH: We are, Your Honor.

23 THE COURT: Is the defense ready?

24 MR. HINES: Yes, Your Honor.

25 THE COURT: All right. Thank you. Bring us the

1 jury, please.

2 (WHEREUPON, the jury enters the courtroom at
3 approximately 1:04 p.m.)

4 THE BAILIFF: All jurors are present, Your Honor.

5 THE COURT: Thank you very much. Madam Forelady,
6 I understand you have reached a verdict; is that
7 correct?

8 MADAM FORELADY: Yes.

9 THE COURT: Would you mind handing the charge book
10 and the verdict form to the bailiff, please, ma'am?
11 Thank you very much.

12 (PAUSE.)

13 THE COURT: Publish the verdict, please.

14 THE CLERK: Yes, sir. In the Court of Common
15 Pleas, State of South Carolina, County of Charleston,
16 Rosemary Connelly, Plaintiff, vs. Winsor Custom Homes
17 L.L.C, Defendant. Case number 2013-CP-10-3251.

18 "Do you unanimously find that the defendant's
19 breach of duty proximately caused the plaintiff's
20 injuries? Yes."

21 "Do you unanimously find that the plaintiff was
22 negligent? Yes."

23 "Taking the combined negligence that proximately
24 caused the plaintiff's injury as a whole, what
25 percentage of that negligence is attributed to the

1 plaintiff, and what percentage is attributed to the
2 defendant? Plaintiff 35 percent; Defendant 65
3 percent."

4 "If you stated yes to question number one,
5 please state the defendant's total amount of damages,
6 if any, sustained by the plaintiff due to the
7 defendant's negligence. If you answered yes to
8 question three, do not reduce the amount by any
9 percentage of that question. The amount: \$500,000."
10 Dated August 28, 2015, Charleston, South Carolina.
11 Signed the foreperson.

12 THE COURT: Any -- do you want the jury polled?

13 MR. BROWN: No, sir, Your Honor.

14 THE COURT: Pardon?

15 MR. BROWN: No.

16 THE COURT: You do not -- does the plaintiff want
17 the jury polled?

18 MR. GRUENLOH: May we have an opportunity --

19 THE COURT: Pardon?

20 MR. GRUENLOH: I don't how Your Honor does that,
21 may we have an opportunity to speak with them
22 afterwards?

23 THE COURT: No.

24 MR. GRUENLOH: Okay. Then --

25 THE COURT: Do you want to poll the jury is my

1 question?

2 MR. GRUENLOH: No, Your Honor.

3 THE COURT: All right. Thank you very much. All
4 right. If my math is correct, the jury returned a
5 verdict of \$500,000, with 35 percent fault to the
6 plaintiff. And that comes to -- if my math is correct,
7 \$175,000, take that off of \$500,000, I'll enter a
8 judgment in the amount of \$325,000 if my math is
9 correct. I will check it before I enter the short form
10 for judgments. Okay.

11 MR. BROWN: Yes, sir.

12 THE COURT: All right. I will give you ten days
13 to make any motions that you so choose. Okay?

14 MR. BROWN: Thank you, Your Honor. We appreciate
15 that.

16 THE COURT: I'll give you ten days. Thank y'all
17 so very much.

18 MR. GRUENLOH: Thank you, Your Honor.

19 THE COURT: Madam Forelady, ladies and gentlemen
20 of the jury, if y'all will head to the jury room.
21 Thank you so very much for your service this week.
22 Okay.

23 (WHEREUPON, the jury leaves the courtroom at
24 1:08 p.m.)

25 THE COURT: Thank you. I enjoyed working with all

1 of you this week.

2 (WHEREUPON, the trial was concluded.)

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END OF TRANSCRIPT

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CERTIFICATE OF REPORTER

I, SHARON D. JONES, CERTIFIED COURT REPORTER, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS
HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE
CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
COMMON PLEAS FOR CHARLESTON COUNTY, SOUTH CAROLINA ON
THE 24TH, 25TH, 26TH, 27TH, and 28th OF AUGUST, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

5/23/16

Sharon D. JONES

SHARON D. JONES,
CERTIFIED COURT REPORTER

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF CHARLESTON	)	2013-CP-10-03251
-----	)	
ROSEMARY CONNELLY,	)	
PLAINTIFF	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
WINSOR CUSTOM HOMES, LLC,	)	
DEFENDANT	)	
-----	)	

NOVEMBER 12, 2015
CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR.

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

WILLIAM M. GRUENLOH, ESQUIRE
PATRICK A. CHISUM, ESQUIRE
BRIAN R. HOLMES, ESQUIRE
ATTORNEYS FOR PLAINTIFF

RUSSELL G. HINES, ESQUIRE
STEPHEN L. BROWN, ESQUIRE
ATTORNEYS FOR DEFENDANT

SHARON VIZER,
CIRCUIT COURT REPORTER

I N D E X

Motions	3

* * * November 12, 2015 * * *

THE COURT: All right. Rosemary Connelly vs. Winsor Custom Homes. All right. We've got several motions, right? Which one do y'all want to hear first?

MR. BROWN: I believe we have a consent on one, Your Honor.

THE COURT: Pardon?

MR. BROWN: Your Honor, by consent, there's a motion to allow a deposit of funds with the courts.

THE COURT: Y'all have agreed on that?

MR. BROWN: Yes, sir. And we have a proposed order.

THE COURT: As far as -- you've ask the court to set the interest, but y'all can agree on -- I mean, that's a mathematical process.

MR. BROWN: We sent them our calculations to determine if they were --

MR. GRUENLOH: I used my calculator.

THE COURT: All right.

MR. BROWN: So if I may hand that up, we'll have the funds to Mrs. Armstrong today.

THE COURT: Okay. What -- what's the amount?

MR. BROWN: \$325 plus, plus five grand right now...

1 (WHEREUPON, a bench conference was held.)

2 THE COURT: All right. What's the -- what's the
3 next motion? Here, do you want your paperwork back?
4 What's the next motion.

5 MR. BROWN: Just the post trial motions.

6 THE COURT: New trial, absolute new trial, Nisi
7 remittitur. That's the only thing left?

8 MR. GRUENLOH: We had one more, Your Honor, and I
9 think we got an agreement on that.

10 THE COURT: What's that?

11 MR. GRUENLOH: That's the -- they want to be paid
12 their expert's fees. And we've agreed that I'm going
13 to pay half and they're going to pay half, so you don't
14 have to deal with it.

15 THE COURT: So it's going to be half and half?

16 MR. GRUENLOH: Yes, sir.

17 THE COURT: Okay. Y'all have agreed on that? Do
18 you want to do a consent order?

19 MR. GRUENLOH: I don't think we need a consent
20 order. I think we can just place it on the record, but
21 if --

22 MR. HINES: No, Your Honor. We're happy with --
23 just the agreement we've struck and --

24 THE COURT: So on the motion where you ask the
25 plaintiff to pay -- is it the plaintiff's motion -- or

1 defense motion?

2 MR. GRUENLOH: Defense.

3 THE COURT: Pardon?

4 MR. GRUENLOH: The defense's motion for us to pay
5 half of their expert's deposition fees.

6 THE COURT: They asked for 100 percent --

7 MR. GRUENLOH: Well, they asked for 100 --

8 THE COURT: But y'all agreed to pay half; is that
9 correct?

10 MR. GRUENLOH: Yes, Your Honor.

11 THE COURT: How much was the fee?

12 MR. HINES: \$2,000, Your Honor.

13 THE COURT: Okay. So you're going to pay a
14 thousand and you're going to pay a thousand?

15 MR. HINES: Yes, Your Honor.

16 MR. GRUENLOH: Correct.

17 THE COURT: That's the agreement as to the motion
18 on requiring them to pay all of it?

19 MR. GRUENLOH: That's the complete agreement.

20 THE COURT: All right. So the only thing that
21 leaves then is the new trial Nisi or the new trial --
22 excuse me -- new trial Nisi, remittitur, or new trial
23 absolute; is that correct?

24 MR. HINES: Your Honor, it's the motion that's --
25 it's entitled Defendant's Post Trial Motions. If you

1 have a copy of it --

2 THE COURT: That's what I said, JNOV, new trial
3 absolute, new trial Nisi remittitur; is that right?

4 MR. HINES: That's correct, Your Honor.

5 THE COURT: Okay. Which one do you want to do
6 first?

7 MR. HINES: I'll take up, if it please the Court,
8 the JNOV, Your Honor.

9 THE COURT: Okay.

10 MR. HINES: And, Your Honor, I do -- I intended to
11 keep my argument brief. My effort here is not to
12 replot a lot of ground that's already been addressed in
13 the written motion. But I would like to just highlight
14 certain things.

15 Beginning with the JNOV, our argument -- and I
16 want to make clear where we're coming from. In
17 plaintiff's own memo, in opposition to that motion on
18 page 22, the plaintiff states that she withdrew her
19 proposed jury charges to premises liability, chose to
20 proceed strictly on general negligence principles. And
21 it goes on to say the plaintiff elected not to proceed
22 under premises liability theory.

23 And I start with that point, Your Honor, to make
24 clear that the plaintiff presented one claim that went
25 to the jury, which was not a premises liability claim.

1 It was a -- described as ordinary negligence,
2 sounding -- not under a premises theory, and it had to
3 do with a supposed duty to maintain the silt fence.

4 And our first argument with JNOV, Your Honor, is
5 that there was no duty to maintain a silt fence. That
6 in determining the existence of a legal duty of care,
7 what you have to do is you have to look to the
8 relationship between the plaintiff and defendant.

9 And in this case, the relationship between the
10 plaintiff and the defendant didn't spring from the
11 fence. It was the sidewalk. And the point they try to
12 make in the --

13 THE COURT: It didn't spring from what now?

14 MR. HINES: From the fence. The silt fence. This
15 is a case, Your Honor, where the Plaintiff --

16 THE COURT: I remember the case.

17 MR. HINES: And the fence is a requirement of a
18 builder by the Daniel Island ARB. It goes all the way
19 around the perimeter of the property. It's for
20 sediment control.

21 THE COURT: This is basically the same argument
22 you made at trial, isn't it?

23 MR. HINES: Your Honor, I believe it is.

24 THE COURT: I mean, this is just basically --
25 you're just regurgitating the motion you made at trial,

1 if I remember correctly; aren't you?

2 MR. HINES: Your Honor, yes, sir. But it
3 certainly is entirely consistent with the position that
4 we've stated at trial.

5 THE COURT: All right. Well, is there anything
6 new that you can add now that you weren't adding at
7 trial?

8 MR. HINES: Your Honor, I assume the court is --

9 THE COURT: I'm sorry -- what?

10 MR. HINES: I assume that you're well aware of
11 what we -- there's nothing I intend to add new now
12 that's not contained in the written motion, Your Honor.

13 THE COURT: Okay.

14 MR. HINES: I mean, I'm just trying to clarify the
15 point that -- the relationship between these two
16 parties is --

17 THE COURT: I mean, she was just a member of the
18 public running down the sidewalk?

19 MR. HINES: Correct, Your Honor. And if a duty
20 was owed, it was a duty under a premises law theory --
21 a premises liability theory, of a duty to not create a
22 hazard on the sidewalk.

23 And the point I'm trying to make, Your Honor, is
24 that this case, the plaintiff abandoned and dismissed
25 the premises liability theory. And --

1 THE COURT: Well, if I remember correctly, she
2 wasn't on the premises.

3 MR. HINES: She --

4 THE COURT: She was on the public sidewalk.

5 MR. HINES: Correct, Your Honor.

6 THE COURT: Isn't that correct? She wasn't even
7 on the premises, she was on the public sidewalk?

8 MR. HINES: Adjacent to the premises --

9 THE COURT: Right. She wasn't on the premises,
10 she was on the sidewalk; is that correct or not?

11 MR. HINES: No, that is -- that is correct, Your
12 Honor.

13 THE COURT: Okay. All right.

14 MR. HINES: But the accident happened on the
15 sidewalk --

16 THE COURT: Right. And the plastic was right
17 adjacent to the sidewalk, right next to the sidewalk;
18 correct?

19 MR. HINES: The plaintiff -- and it's indicated in
20 our Exhibit C to this motion. It's R.M.C. 96, is the
21 Bates label. The document -- there's a picture -- a
22 photograph that shows the fence in the condition that
23 the plaintiff claimed, of course, it was at the time of
24 the accident, which shows it was off the sticks along
25 the sidewalk -- on the sidewalk.

1 THE COURT: Okay. I'll read -- I'll read your
2 memo -- motion. I haven't read it. But on what basis
3 do you think it should be premises liability since she
4 was on the public sidewalk?

5 MR. HINES: Your Honor, I guess -- and I'm -- the
6 --

7 THE COURT: Was it -- it actually didn't happen on
8 property -- now I'll concede the fact that the plastic
9 was on the property and it blew out into the public
10 adjoining the property. But most of your premise
11 liability cases arise on the property itself except
12 maybe for your fallen tree -- tree cases.

13 MR. HINES: Your Honor, my -- my reading follows
14 like this: We cite to the court a case in our brief --

15 THE COURT: All right. Where are you reading from
16 in your memo?

17 MR. HINES: On page eight.

18 THE COURT: Page eight?

19 MR. HINES: Yes, Your Honor.

20 THE COURT: Okay. Where are you reading from?

21 MR. HINES: In the -- it's the paragraph that
22 begins "none of this" --

23 THE COURT: What?

24 MR. HINES: It's a paragraph that begins "none of
25 this is to say" on page eight.

1 THE COURT: Okay. The second paragraph. All
2 right. Go ahead.

3 MR. HINES: The case of Lane vs. Gilbert
4 Construction -- and I'll just cite it into the
5 parenthetical, but on the premises liability theory,
6 contractual, such as Windsor Custom Homes, it generally
7 equates to an invitor and has the same duties that a
8 property owner would have to invitees. So,
9 essentially, that proposition is equating the
10 contractor as -- as the property -- now, if you combine
11 that with the next cite, which is a case called Shaw
12 vs. City of Charleston. It says the general rule is
13 that an abutting landowner does not owe a duty of care
14 with respect to the safety of the sidewalk. There is
15 an exception to this rule, where the landowner creates
16 an unsafe condition on the sidewalk.

17 And the point I'm trying to make, Your Honor, is
18 that, yes, this didn't happen -- this happened on the
19 sidewalk. It didn't happen on the property itself. It
20 happened on the sidewalk. But under these principles,
21 there is a duty -- and my position is, it would be the
22 only duty under which a claim can be made against our
23 client -- was a premises law duty, that had to do with
24 not creating an unsafe condition on the sidewalk.

25 And I go back -- and I know this is a fairly

1 technical point, Your Honor, but I think it's
2 dispositive in this case -- is that the duty this case
3 went to the jury on, was this notion that there was a
4 duty to maintain the silt fence. And as between the
5 plaintiff and the defendant, there was no such duty,
6 Your Honor. Because the duty of care derives from the
7 relationship between these parties. And the duty to
8 maintain a silt fence was not a duty that the plaintiff
9 could complain about unless that silt fence, which the
10 -- the plaintiff had no issue and could take no issue
11 with the silt fence, other than as respect to the
12 safety of the sidewalk.

13 So it -- it was an incorrect legal -- legally
14 incorrect, respectfully, to say that there was a duty
15 that this defendant had to maintain the silt fence.
16 What the duty was, it was a premises law, was to not
17 create an unsafe condition on the sidewalk.

18 And, Your Honor, we -- I realize it's well --
19 perhaps, a fairly nuance point, and that's why I wanted
20 to provide to the court some detail here with our
21 argument. But I'm suggesting, Your Honor, that it is
22 simply incorrect that this -- that our client had a
23 duty to maintain the sidewalk -- excuse me -- a duty to
24 maintain the fence that the plaintiff could complain
25 about.

1 The plaintiff, of course, wasn't the ARB. The
2 ARB required the fence. The ARB went around the entire
3 premises -- for instance, I'll make this point.
4 Imagine that the fence was down on every side, the
5 backside. It was down on the left side. It was down
6 on the right side, but it was a beautiful fence, not
7 bothering the sidewalk at all in front of their house.
8 Well, the duty to maintain the fence would have been
9 breached because it was down on three sides.

10 Of course, the plaintiff had nothing to do with
11 it because the plaintiff -- that -- that issue, that
12 duty, that maintenance issue had no relationship to the
13 plaintiff, because the plaintiff is just a user of the
14 sidewalk. So it overstates the duty in respect to the
15 relationship between a contractor and a user of the
16 sidewalk to say that the contractor had a duty to
17 maintain the fence.

18 As to the plaintiff, the only duty was to not
19 create an unsafe condition --

20 THE COURT: Well, I mean, that's like telling the
21 highway department don't maintain a stop sign. There's
22 no duty to the motorist that -- that runs through a
23 downed stop sign and gets killed. I'm not sure I
24 follow your argument there. There's all kind of tort
25 cases out there. I'm not sure I'm following your logic

1 in that you say there's no duty.

2 This -- this contractor put the fence up, if I
3 remember -- if I remember correctly. And he was
4 obligated to maintain it, not the architectural review
5 committee. But it was his job to maintain it.

6 From what I remember, it was hanging down and
7 some wind blew and she tripped on it. Okay. The wind
8 blew it out in her path and her foot got caught on it
9 when she tried to move around to the left of it, and
10 she tripped and fell.

11 . Now, you're telling me that the contractor had
12 no duty to maintain that fence properly?

13 MR. HINES: Your Honor, I'm telling you that that
14 plaintiff, that is not the nature of the duty.

15 THE COURT: Oh, okay.

16 MR. HINES: The nature of the duty was to not
17 create an unsafe condition on the sidewalk. And that's
18 a premises law concept. And that -- that claim was
19 abandoned by the plaintiff in the case. So there is no
20 claim left for the plaintiff to prevail upon.

21 Your Honor -- Your Honor, again, I mean --

22 THE COURT: I'm sorry. What?

23 MR. HINES: Our argument on that point is set
24 forth in our brief. I'll move -- unless you have
25 further questions, I'll move on to the next point which

1 is --

2 THE COURT: Okay. Y'all want to make an argument
3 on that before we move to the next point?

4 MR. CHISUM: Yes, Your Honor. And, again, I
5 believe you've indicated that you have not had --

6 THE COURT: Now, what was in your complaint? I
7 don't remember. What -- what cause of action did you
8 allege?

9 MR. CHISUM: We alleged negligence, Your Honor.

10 THE COURT: You alleged negligence?

11 MR. CHISUM: Negligence --

12 THE COURT: And --

13 MR. CHISUM: Negligence per se, which you already
14 ruled on in a directed verdict at the trial. Just
15 negligence, I believe.

16 THE COURT: Do you allege any premises liability?

17 MR. CHISUM: No, Your Honor. And to -- to rebut
18 that point, it's our assertion that --

19 THE COURT: I don't have the complaint in front of
20 me. She's pulling it up. Your complaint just alleged
21 negligence; right?

22 MR. CHISUM: Yes, Your Honor. That is my
23 understanding.

24 THE COURT: Anything else?

25 MR. GRUENLOH: Your Honor, I'd have to go back and

1 look at the complaint, to see whether the complaint has
2 any premises liability --

3 THE COURT: I don't have any recollection. Mr.
4 Hines, do you know? What did he allege in the
5 complaint is what I'm asking?

6 MR. HINES: Your Honor, I just can't rely on my
7 memory in that regard. It's a shame I didn't bring the
8 complaint with me, but I --

9 THE COURT: So my question to you, if he didn't
10 allege premises liability, and apparently there was no
11 motion for the -- the court to amend the pleadings to
12 conform to the evidence, how did premises liability
13 ever come up --

14 MR. HINES: Your Honor --

15 THE COURT: -- is my question to you -- nor did
16 either party make -- if I remember correctly, neither
17 party made a motion to conform the pleadings to the
18 evidence that came out at trial if I remember
19 correctly. So if he didn't allege premises liability,
20 what are you sitting there arguing about premises
21 liability for if it was never alleged and nobody made a
22 motion to conform the evidence for simple negligence
23 and premises liability? I'm just throwing it -- I
24 don't know what the complaint says, but we're getting
25 ready to find out.

1 MR. HINES: Your Honor, the point -- I understand
2 your confusion, I believe --

3 THE COURT: What -- you got a complaint. You got
4 an answer. That's your -- your complaint is your cause
5 of action; right? And if, in fact, he's correct when
6 he says that you have negligence, how do you convert
7 that to premises liability? Either somebody, during
8 the trial or at some point in time, has got to make a
9 motion to amend -- or before it goes to the jury,
10 you're going to have to make a motion to conform your
11 pleadings to meet with the evidence that's been
12 presented in trial; right? And to my knowledge,
13 neither party ever made that motion.

14 MR. HINES: Your Honor, my point by premises
15 liability is not --

16 THE COURT: How do you get to that point? My
17 question -- you may be right on your argument. I'm not
18 trying to argue with you about your premises liability
19 theory. But how do you get to even make that argument
20 procedurally is my question to you?

21 MR. HINES: Your Honor, I would absolutely --

22 THE COURT: Base it on now, not at trial.

23 MR. HINES: Your Honor, I agree with you that it's
24 not necessary for me now to argue that they cannot
25 prevail on premises liability, because they conceded

1 that that's not a claim they -- they were presenting to
2 the jury to attempt to prevail upon.

3 The reason I'm speaking about premises liability
4 is to make clear the distinction between the duty -- if
5 there was any duty, it would be under premises
6 liability, which is a claim that they do not have.

7 THE COURT: But so what?

8 MR. HINES: That means they have no viable claim.
9 Because the only cognizable claim that they can have
10 based upon the relationship between the defendant and
11 plaintiff, would be one founded upon premises law
12 liability duty, and they don't have a premises law
13 liability claim, which means they are without claim --
14 at least without a claim that can be successful.

15 MR. CHISUM: Your Honor, if I may? To clarify our
16 assertion on the existence of a duty, we assert that
17 there is a common law duty of due care that it -- it
18 includes the duty of a general person to avoid damage
19 or injury to a foreseeable plaintiff. And there's
20 plenty of case law out there that sets forth the key
21 inquiry in determining whether or not liability should
22 impose and a duty exists. It is not privity, but
23 instead it is foreseeability.

24 Throughout the course of trial, not to
25 re-litigate the whole thing, but ample evidence was set

1 forth through their own client's admissions, Mr.
2 Jeffrey Thomas, on the stand that he was solely
3 responsible for constructing a fence. He was solely
4 responsible for maintaining the fence. He had been
5 warned numerous times that the fence had come down. He
6 had been told that he didn't have a construction
7 entrance.

8 He admitted to the fact this his subcontractors
9 regularly used the fence as a short cut, causing it to
10 come down over and over again. And he was not able to
11 contradict the fact that the fence was 70 percent down
12 on the date of June 6, 2011, when the accident took
13 place.

14 In light of all the evidence that was set forth
15 at trial, it's clear that this type of injury was
16 foreseeable due to the condition of the fence, and
17 Jeffrey Thomas' failure to maintain that fence.
18 Therefore, a duty does exist to our client.

19 THE COURT: Okay. I understand all that. Mr.
20 Hines, I don't mean to be picking on you, but I just
21 want to make sure I understand. I don't know how you
22 can bring that up now on a JNOV, unless you made the
23 motion at trial, say, hey, judge, we think the proper
24 cause of action should be a premises liability cause of
25 action, and we want a jury charge to that effect.

1 Now, to come in and argue that JNOV, without
2 having done that, I'm not sure how you get to that
3 point. And I'm just talking about procedure. Now, I'm
4 not -- whether you are right or wrong -- and you may be
5 right on premises liability. I don't know. But at
6 this point in time, I just don't see how I can -- it's
7 sort of like you see all the time, you're raising this
8 issue the first time on appeal and the court is not
9 going to let you do that. That's my point to you.

10 MR. HINES: I appreciate that, Your Honor. And I
11 want to make clear --

12 THE COURT: About tell me if I'm wrong because I
13 don't remember it all. It was a long -- when was it?
14 When did y'all try this case?

15 MR. HINES: It was in August --

16 THE COURT: When?

17 MR. HINES: The end of August, Your Honor.

18 THE COURT: I've probably tried, what, 20 cases
19 since then. I don't remember all the gory details
20 about --

21 MR. HINES: In that regard, Your Honor, I'm going
22 to do my best from my memory, but as I think -- I
23 believe we all agree -- the record will show what it
24 shows in --

25 THE COURT: Right.

1 MR. HINES: -- terms of what we argued. And we'll
2 all -- you know, it will be what it was.

3 THE COURT: I mean, you may have done it, I just
4 don't remember.

5 MR. HINES: My recollection is that we did do
6 that, Your Honor, most respectfully. And you might
7 recall -- I know we made these court's exhibits --
8 certain jury charges that we -- that we asked his honor
9 to give. And, for instance, one of them -- and part of
10 my argument today is about the restatement second of
11 torts --

12 THE COURT: Well, what difference does it make
13 from the factual finding of the court whether it was
14 premises liability or common law negligence duty as far
15 as the findings of the jury factually?

16 MR. HINES: Because, Your Honor, if the duty is
17 only cognizable under a premises law liability claim --

18 THE COURT: But it still says unsafe conditions.
19 And either way, the jury could have found an unsafe
20 condition.

21 MR. HINES: Not -- no, Your Honor, they couldn't.
22 Because the jury can only rule upon what is submitted
23 to it. And no unsafe condition claim -- the premises
24 liability claim wasn't there for the jury to --

25 THE COURT: Well, I understand that. They never

1 alleged it.

2 MR. HINES: So that can't --

3 THE COURT: I just never heard defense counsel
4 come into court and argue -- argue the plaintiff went
5 to trial on the wrong cause of action, therefore, the
6 court should set it aside.

7 MR. HINES: Your Honor, we are saying that the
8 only cause of action the plaintiff proceeded on is one
9 in which the plaintiff can't prevail on.

10 THE COURT: Tell me procedurally how you get to
11 that point?

12 MR. HINES: Well --

13 THE COURT: At this point, raising that issue.

14 MR. HINES: I do --

15 THE COURT: Do you think you raised it at trial?
16 And he may have, I don't remember.

17 MR. HINES: Your Honor, I do believe we raised it
18 at trial, both --

19 THE COURT: Mr. Brown, do you remember?

20 MR. BROWN: I believe we did, Your Honor.

21 THE COURT: How did you raise it?

22 MR. BROWN: I believe we raised it at directed
23 verdict. We discussed this issue at length. And if
24 Your Honor may remember, we were in a reversed
25 courtroom. They had a proposed charge. And we were

1 going through that. Then you were just looking through
2 them. And then there was a charge that you said -- I'm
3 not going to have anything to do with this. And it was
4 the very charge that argued the point that Mr. Hines is
5 trying to espoused here today. So we did say that they
6 had procedurally a wrong cause of action.

7 But I'm like Mr. Hines, the record will speak
8 for -- what was spoke -- I don't want to tell you
9 something, I don't want to misrepresent something and
10 say, I said -- I'm like you.

11 Our theory, from the beginning that we prepared
12 for this case from day one -- Mr. Hines is one heck of
13 a lot smarter than me, but is -- they were suing on the
14 wrong cause of action. That -- so we hit -- we hit --
15 I believe you'll find, in the record, it was attempted
16 to be preserved. It was certainly attempted to be
17 preserved with the jury verdict -- I mean, the jury
18 charges that were given to Your Honor.

19 And Your Honor just sat up there said, no, no.
20 I'm not trying this case like a premises liability
21 case. That was -- that was -- that was your quote.

22 THE COURT: Well, the reason is he didn't allege
23 it in the complaint. You got to go back to the
24 complaint.

25 MR. CHISUM: Your Honor, we did bring alternative

1 jury instructions to be prepared in case something did
2 happen and we needed to address the premises liability
3 theory. But I believe it is within our rights to
4 proceed under alternative theories of liability. We
5 pled negligence. We wanted to proceed under general
6 negligence, and that's what we did, as opposed to the
7 defense --

8 THE COURT: I guess -- I guess my problem is, I
9 don't know how the defense can force the plaintiff to
10 pick what the -- what he wants to proceed on.

11 Now, tell me this: Why do you think there's no
12 general liability? You -- you keep saying there's no
13 relationship between the contractor and the lady
14 running down the street, i.e., Ms. Connelly?

15 MR. HINES: Your Honor, I'm saying --

16 THE COURT: Pardon?

17 MR. HINES: Your Honor, I'm saying that the only
18 relationship there could be is as someone running down
19 the street, making use of the sidewalk, abutting
20 property the contractor was working on --

21 THE COURT: Well, what --

22 MR. HINES: -- and that's premises law --

23 THE COURT: I mean, what if the contractor had
24 just taken a shovel and stuck it out in front of her,
25 she tripped and messed up her nose on that. Now, that

1 would probably be intentioned, but I mean so what?
2 Under your argument, he had no -- he had no obligation,
3 no duty to protect anybody coming down that sidewalk.
4 And I just don't buy that argument.

5 MR. HINES: Your Honor, my argument is -- is there
6 would be a duty to protect her. That's a duty under
7 premises law, that says we cannot create a hazardous
8 condition on a sidewalk. And I'm making a distinction
9 between a duty to not create a hazardous condition,
10 whether that's my meaning of a fence being down or --

11 THE COURT: How does -- how is that to JNOV?

12 MR. HINES: Because that duty that I'm speaking of
13 corresponds only to a premises liability --

14 THE COURT: Here's what it boils down to, you're
15 just making a position that there is no common law duty
16 under this fact scenario. Okay. I don't think it's
17 reversible. I don't you're entitled to a new trial
18 because you think it's premises liability.

19 But I think you can make your argument that
20 there's no duty between the contractor and Ms. Connelly
21 under common law.

22 MR. HINES: And we have argued that, Your Honor.

23 THE COURT: And I think that's -- in my opinion, I
24 think at this point in time, that's the only argument
25 you can make. I don't think you can ram premises

1 liability down the court's throat or their throat
2 because they never asked for it.

3 MR. HINES: And, Your Honor, to be clear, I'm not
4 trying to make the premises liability case for them,
5 I'm securing the knowledge that they don't have a
6 premises liability case. Because they've told the
7 court, we don't have a premises liability case. I'm
8 just drawing the distinction between the nature of the
9 duty, if there is one, and it being exclusively the
10 domain of premises liability, which means they're out
11 in the cold on a non-premises liability --

12 THE COURT: All right. Let's go to the new trial
13 absolute.

14 MR. HINES: Your Honor, okay -- and, of course,
15 we'll rely on our brief. Because I know it's 30 pages
16 long and so I'm not here to go through it page by page.
17 Because we get into some other points on this JNOV,
18 such as -- if I can briefly mention -- regardless --
19 one of the things that we asked the court to charge in
20 this case, was the law of open or obvious -- or known
21 or obvious dangers that is -- well, it was set forth in
22 the restatement second torts section 343A, which South
23 Carolina adopted, in a case called Callendar vs.
24 Charleston Donut Company, I believe. We cited it in
25 our brief.

1 The point of that is to say that under
2 restatement section 343A, that open or known -- rather
3 known or obvious conditions -- rather than me relying
4 on memory, let me flip to my notes. "A possessor of
5 land is not liable to his invitees for physical harm
6 caused" --

7 THE COURT: Where are you reading from?

8 MR. HINES: I'm reading from restatement section
9 343A.

10 THE COURT: Is it in your brief?

11 MR. HINES: Yes, sir, Your Honor, it is.

12 THE COURT: What page?

13 MR. HINES: It is on page 10.

14 THE COURT: Page 10?

15 MR. HINES: Yes, Your Honor.

16 THE COURT: All right. Page 10, section 343A --
17 is that what you're talking about?

18 MR. HINES: Yes, Your Honor.

19 THE COURT: Restatement of torts?

20 MR. HINES: And I want to make this point here
21 also clear, because this sort of has two different
22 aspects. One, of course, we've argued that -- most
23 respectfully, that we were entitled to -- to this
24 charge being given, so I'm arguing --

25 THE COURT: There again, you're arguing about

1 premises liability, and that wasn't a cause of action.

2 MR. HINES: And --

3 THE COURT: So how can that be -- how can I
4 possibly charge a restatement issue on premises
5 liability, when premises liability wasn't a cause of
6 action presented to the Court or the jury?

7 MR. HINES: Your Honor, at this point, I want to
8 make clear -- this is a good opportunity for me to do
9 it. Our position is that this charge was appropriate
10 whether or not this was a premises liability case.

11 THE COURT: Why?

12 MR. HINES: Because section 343A provides that the
13 "possessor of land is not liable to his invitees for
14 physical harm caused to them by" -- and here's the
15 important part -- "by any activity or condition on the
16 land whose danger is known or obvious to them, and
17 proceeds on" -- but I want to focus on this notion of
18 activity or condition.

19 The activity of maintaining or not maintaining a
20 fence, or the condition in which it is in on account of
21 it being maintained or not maintained, is within the
22 embrace of -- of the -- that section. It would be
23 applicable. And our position is that -- it is
24 applicable to be dispositive of this case. Meaning if
25 it applies, then we should win because it wasn't known

1 or obvious, or at least it applies. And it was
2 something that the jury should have been charged to
3 determine whether it was known or obvious.

4 Because if you will recall, Your Honor, this was
5 a case where the -- the plaintiff did have to do a bit
6 of -- and I say this respectfully -- but a bit of
7 talking out of both sides of one's mouth, to say,
8 ladies and gentlemen, here is this picture -- which is
9 provided as Exhibit C to our motion -- here is this
10 picture of this fence, boy, isn't it a train wreck.
11 You see it all down, all over the sidewalk. Boy, it
12 looked terrible.

13 But at the same -- on the other hand saying,
14 now, yes, it looked that bad and the plaintiff had a
15 clear advantage point, and was approaching it, running
16 pretty slowly. And actually admitted in the testimony
17 that she was aware that it was down, and saw that it
18 was fluttering some in the breeze. And tried to get
19 around it, but just couldn't quite get around it
20 because the wind blew. The point, Your Honor, is it
21 falls right into the teeth of the idea that it's known
22 or obvious condition --

23 THE COURT: I mean that's -- isn't it -- what
24 percentage did they they find her liable, 30 -- 30
25 percent?

1 MR. CHISUM: Thirty-five percent.

2 THE COURT: Thirty-five percent, that's why they
3 found her 35 percent liable on your comparative
4 negligence. So what's that argument about?

5 MR. HINES: Well, two fold --

6 THE COURT: I mean, they found her 35 percent
7 negligent, what else you want?

8 MR. HINES: But this case -- if this applies, Your
9 Honor, our argument is that it does -- that -- that
10 there is -- the recovery is zero. Because this is a
11 possessor of land is not liable -- not liable. So I
12 would agree with Your Honor, that the jury has
13 indicated that it was known or obvious --

14 THE COURT: You said -- her testimony wasn't
15 credible because of the testimony, but the jury
16 apparently believed what you said. And they said she's
17 35 percent responsible also. So I don't know why you
18 are making an argument on credibility issues --

19 MR. HINES: Well, I'm certainly not arguing --
20 when I said both sides of the mouth, I wasn't referring
21 --

22 THE COURT: You said both sides of the mouth, that
23 means to me that's telling a lie.

24 MR. HINES: No, sir. Thank you for letting me
25 correct that. I meant that there was a -- sort of a

1 disconnect logically in the idea of -- of criticizing
2 very strongly the defendant for the condition of this,
3 but yet them trying to walk away from the
4 responsibility that the plaintiff, herself, would bear
5 for a known or obvious condition. I wasn't suggesting
6 dishonesty --

7 THE COURT: That goes to your comparative, I
8 think. But that's neither here nor there. Go ahead.

9 MR. HINES: And the problem is, Your Honor, this
10 doesn't leave room for that comparative -- what it says
11 is --

12 THE COURT: You're the one that raised the defense
13 of comparative. They didn't.

14 MR. HINES: And we also raised this defense, Your
15 Honor --

16 THE COURT: Pardon?

17 MR. HINES: We -- we also raised this -- this
18 defense and asked for this charge. I want to make it
19 clear that our position is both as to JNOV and charge
20 on --

21 THE COURT: Okay.

22 MR. HINES: -- is that we would want -- you know,
23 regardless of the theory of liability, that this
24 applied to the cause of -- it applies to activities or
25 conditions, and that goes to the maintenance -- if

1 maintenance is, indeed, a duty that is rightfully --

2 THE COURT: Okay.

3 MR. HINES: -- imposed upon us. Now, as I
4 continue on, Your Honor -- and, again, you know, I'm
5 not going to just -- you've been very indulgent, which
6 I appreciate. I'm trying to skip through, because I
7 know you have the written materials that are a part of
8 your record for review.

9 And this -- I'll mention this briefly. We go so
10 far to -- also to argue that even if section 343A has
11 no applicability here, that the only reasonable view of
12 the evidence in this case would require a finding of at
13 least 51 percent part on the part of the plaintiff.
14 Now, of course, the argument --

15 THE COURT: You just said -- it's premises
16 liability, you don't have comparative.

17 MR. HINES: Your Honor, I'm -- I'm arguing that
18 this -- now, I've moved on to an alternative position.

19 THE COURT: Oh, okay. All right. Well, tell me
20 the alternative.

21 MR. HINES: And -- but my argument is that if --
22 if you're -- if section 343A is not applicable, and
23 we're just looking at comparative, then the evidence
24 here -- even though the jury found 35 percent -- and I
25 understand. I know - I know that we're talking about,

1 you know, if it goes to the jury, it goes -- that's
2 what I expect the -- you know, the counter argument is,
3 hey, that's a jury question. And the jury says what
4 they said.

5 And I would agree that in most cases, you have a
6 jury question. However, in this case, the evidence --
7 the admitted evidence of the plaintiff having seen
8 this, the picture that they've shown with the fence
9 material being down; having seen it; having an
10 awareness of it; having a means -- enough awareness
11 to -- to admit trying to avoid it, yet still running
12 into it --

13 THE COURT: She didn't say she ran into it. She
14 said the wind blew it, and she tripped on it.

15 MR. HINES: Your Honor --

16 THE COURT: If I remember correctly, what she
17 said -- she didn't say she ran into it. She tried to
18 move to the left, and a gust of wind blew the loose
19 plastic, and she caught her foot and she fell.

20 MR. HINES: Your Honor, thank you for that
21 correction. That was a bit -- my language, and I
22 didn't intend it to be that loose, it's still having --
23 becoming involved with it. I think you're absolutely
24 correct. I don't mean to suggest that she just plowed
25 directly into it. But she -- she was unable to avoid

1 the hazard that she appreciated and -- acknowledged and
2 appreciated.

3 Now, I'm suggesting to his honor, that although
4 I understand -- and usually a question of evaluation of
5 her conduct is one that's left to a jury. In this
6 case, the only reasonable view based upon the evidence
7 in the record, is that she bore 51 percent or greater
8 in fault here, and she should be accountable. And that
9 argument is made in our brief, so I'll continue on.

10 THE COURT: Okay. All right.

11 MR. HINES: Your Honor, as far as a new trial --

12 MR. CHISUM: Your Honor, may we respond to that?

13 THE COURT: Pardon?

14 MR. CHISUM: May we respond briefly?

15 THE COURT: Have you got anything else to tell me
16 on a new trial?

17 MR. HINES: Your Honor, I can, but I don't want to
18 impede --

19 THE COURT: Anything you want to tell me on a new
20 trial?

21 MR. HINES: Yes, sir. I do have a few --

22 THE COURT: Pardon?

23 MR. HINES: Yes, Your Honor, I do have a few --

24 THE COURT: Finish your new trial motion, then
25 I'll listen to them on your new trial motion.

1 MR. CHISUM: Well, we were looking to respond on:
2 that portion to the JNOV, because that was the end of
3 the JNOV motion before we move on to the next.

4 THE COURT: I thought we had already finished the
5 JNOV motion. We're talking about the new trial.

6 MR. CHISUM: No, Your Honor.

7 THE COURT: Am I misunderstanding you, Mr. Hines?
8 Are you still hammering the JNOV?

9 MR. HINES: Your Honor, I know we have given you a
10 lot of materials. And, yes, the answer is yes, that
11 last point was a JNOV point because my -- my --
12 position being --

13 THE COURT: Essentially, you think she should have
14 been found 51 percent liable?

15 MR. HINES: Yes, sir, I --

16 THE COURT: Therefore, a judgment notwithstanding
17 the verdict, is that what you're telling me?

18 MR. HINES: Yes, Your Honor.

19 THE COURT: All right. I'll be glad to hear you
20 on the JNOV.

21 MR. CHISUM: Yes, Your Honor. Just three small
22 points. I know that the court is very familiar with
23 the standard for a motion for JNOV. It should be
24 viewed in the light most favorable to the nonmoving
25 party, and the jury's verdict is entitled to

1 substantial deference.

2 On two small points regarding the restatement,
3 first and foremost, it very clearly states that those
4 provisions apply to a possessor of land and an invitee.
5 We never alleged that Rosemary Connelly was an invitee.
6 In fact, she was just a member of the general public,
7 jogging by the property. So it's completely
8 inapplicable.

9 And, second, I think you said it better than I
10 ever could, the comparative negligence is a jury
11 question. And, obviously, the fact that the jury came
12 back with a 35 percent ruling which, in my opinion, may
13 even have been a little high, shows that they took
14 defense counsel's arguments seriously, and they
15 afforded the evidence provided at trial its due weight.
16 Thank you.

17 THE COURT: Let's move on to new trial.

18 MR. HINES: The new trial begins on page 14, Your
19 Honor.

20 THE COURT: All right -- the alternative -- you
21 don't like the -- you like that alternative better than
22 the first one, huh?

23 MR. HINES: Well, I like the JNOV --

24 THE COURT: Or less than the first one --

25 MR. HINES: The JNOV is what we like the best,

1 Your Honor. So now we're stepping down to the -- to
2 the next tier. If I may just very briefly what counsel
3 mentioned about that section, 343A. I would note
4 that -- again, we believe it's applicable and is --
5 it's a misapprehension of that to -- to seize upon the
6 word "invitee". As we know under the premises law, the
7 body of that -- an invitee would receive the highest
8 duty of care.

9 And our position is certainly it's -- it's fine
10 with us if the plaintiff doesn't want to categorize Ms.
11 Connelly -- categorize her as an invitee. The point is
12 even -- it doesn't mean -- it's no indication that that
13 is inapplicable to argue that we, the plaintiffs, say
14 she's not an invitee. Because that's simply saying
15 that even under the highest standard you owe someone,
16 which is invitee status, this is the law -- so if she
17 occupies the lesser status of licensee, she really --
18 there would be no liability in trespassing -- surely
19 there would be no liability.

20 In any event, the new trial absolute -- Your
21 Honor, we get in here to a number of different things.
22 But the verdict, we take the position, this was
23 shockingly high in light of the evidence that was
24 presented. Evidence that was presented of the actual
25 medical damages in the case were something south of

1 \$15,000. So you have about \$485,000 of non-pecuniary
2 loss and -- non-pecuniary damages rather.

3 And you have testimony here where the plaintiff
4 didn't recognize that she had this condition for a year
5 or so. I mean, you have had evidence on that. It's
6 general and ballpark. And it seems to -- well, both
7 the cut in the face of the mechanism of the injury that
8 was alleged, which was this idea of a permanent and
9 immediate sheering of olfactory nerve filaments at the
10 time of the fall with the idea --

11 THE COURT: I mean, that's what she said she
12 didn't know for a year.

13 MR. HINES: That she couldn't smell.

14 THE COURT: She -- she -- she kept thinking her
15 smell would -- smelling odors would come back until she
16 -- until the doctor made that diagnosis of what she
17 said --

18 MR. HINES: Your Honor --

19 THE COURT: I know she sort of -- I don't -- I
20 don't remember exactly what she said, so I shouldn't
21 say that. I'll withdraw that. Go ahead.

22 MR. HINES: What I believe the record will show is
23 those records, when she went to the doctor and said, I
24 just noticed my issue with this at such and such a
25 date. For instance, she goes to see -- the fall

1 happened on June 6, 2011. The first treatment that she
2 sought for the smell condition was April 4th -- 3rd or
3 4th of 2013.

4 THE COURT: But didn't she say she didn't think
5 she -- she understood she wasn't smelling anything, but
6 she didn't think it was permanent until that medical
7 diagnosis severed the nerve endings?

8 MR. HINES: The point is --

9 THE COURT: Is that what she said or not? I don't
10 exactly remember.

11 MR. HINES: Respectfully, Your Honor, I believe
12 that it's not. What the record indicated was that --
13 what she told the doctor is -- now granted, it's two
14 years after the fact. She says, doctor, I'm not -- I
15 haven't been able to smell for the last six months.
16 She didn't say, doctor, I haven't been able to smell
17 since June of 2011. She said, I've had -- I've had
18 this issue that I've noticed for the last six months,
19 meaning six months before --

20 THE COURT: But she also attributed some of it to
21 the swelling and stuff, that she wasn't -- she thought
22 that was part of her problem, was her nose was swelling
23 and congestion. She couldn't smell.

24 MR. HINES: She -- she gets into that, and I
25 guess -- Your Honor, I want to make sure that I'm being

1 clear on two points --

2 THE COURT: But that was just sort of a factual
3 dispute between you and the plaintiff?

4 MR. HINES: Your Honor, on that point -- well, I
5 understand. I'm just trying to make a point that for a
6 person to come into the court and -- and claim such
7 large damages, it's inconsistent with the idea of not
8 even being able to know that the injury has been
9 sustained for a year in -- in terms of the actual --
10 the amount. And I guess that's the point. Perhaps
11 I've said it --

12 THE COURT: Well, you don't think that would go
13 towards the 35 percent also?

14 MR. HINES: Your Honor, as I understand it --

15 THE COURT: I don't know why the jury gave her 35
16 percent, but that may play into it. I don't know.

17 MR. HINES: I don't really -- my understanding is
18 that the jury is to determine damages, and then to
19 determine fault. And that they really -- are not
20 overlapping. The damages that she sustained would be
21 her damages. Now, her fault is based upon her conduct
22 which -- so my point is, I'm -- you know, I'm -- I
23 don't believe that there's any need -- that my motion
24 is asking for any second guessing of the jury in this
25 regard, at least in terms of how it determined damages

1 and it's -- it's percentage of fault.

2 I'm suggesting that the damage determination,
3 based upon the evidence, was shockingly high. I'm also
4 suggesting -- of course, we get into your powers as the
5 13th juror also, to grant a new trial on the facts,
6 meaning that you -- well, as I'm sure the court is well
7 aware, as to what your authority is to simply disagree
8 with the factual conclusions.

9 I also note at this time, that the evidence of
10 insurance is also -- sort of hangs in the air in this
11 case. The --

12 THE COURT: What was the insurance mentioned? Was
13 it medical insurance?

14 MR. HINES: Your Honor, it was worst than that.

15 THE COURT: I don't remember what it is -- I
16 remember something about insurance, but I don't know
17 what was said or what transpired.

18 MR. HINES: The first mentioned insurance -- and
19 this is certainly the most significant to us -- is that
20 when I was examining the plaintiff, I asked her a
21 question -- and we don't have the record, but I believe
22 this is an accurate paraphrase -- was that if her
23 husband made a legal claim against -- arising out of
24 this, the day after the accident, or you know -- there
25 was correspondence to that fact.

1 And the plaintiff's response was something along
2 the lines of, oh, I don't think that's what he was
3 doing. I think he was just checking to make sure
4 everybody had insurance. And, of course, that's when
5 we indicated to the Court that we had a matter of law
6 to take up, and the jury was excused --

7 THE COURT: I think I offered to give a curative
8 charge and you turned it down; right?

9 MR. HINES: On the -- on the -- yes, sir.
10 Respectfully on the basis that -- that it would be
11 impossible to cure that. That's too --

12 THE COURT: Now, you're trying to use that for a
13 new trial, huh? Because you requested not to give a
14 curative charge.

15 MR. HINES: No, Your Honor. I said that a
16 curative -- it could not be cured. It was incurable.
17 So, therefore, that's why -- the only thing that --

18 THE COURT: That may be, but you're still entitled
19 to get it. And I offered, and you turned it down. I
20 don't know how you can come register a complaint at
21 this point in time.

22 MR. HINES: Well, Your Honor, I -- that's probably
23 one of those things where our record will say what it
24 says about how that transpired. My -- my point on
25 that, that I would make is that -- well, again, the

1 jury instruction couldn't cure --

2 THE COURT: I don't remember, did we give a
3 curative instruction?

4 MR. HINES: Ultimately there was a curative
5 instruction given --

6 THE COURT: Didn't I offer to give a curative
7 instruction on the insurance?

8 MR. HINES: Over our objection, yes, sir. There
9 was one and it --

10 MR. BROWN: And then in the charge.

11 MR. HINES: There was a jury charge also --

12 THE COURT: A jury charge on the insurance which
13 was, in my opinion, -- a curative instruction that you
14 didn't want --

15 MR. HINES: Yes, Your Honor.

16 MR. BROWN: We objected on that as well, Your
17 Honor.

18 THE COURT: Right. I mean, it's sort of -- I
19 mean, so you want your cake and eat it, too. You want
20 to make a motion for a new trial and mention insurance,
21 but you don't want the court to give a curative charge.
22 You can't have it both ways.

23 MR. HINES: Your Honor, I -- well, I think our
24 record will speak for itself on this. This is
25 absolutely, with the upmost respect to His Honor, I'll

1 point to -- and simply say that if we believed the
2 situation we found ourselves in, was that we had to
3 decline the court's offer of a curative instruction on
4 the basis that the instruction couldn't cure it.
5 Because it was the type of an unring-able bell that
6 they couldn't be -- couldn't fix. And the only -- the
7 only -- the only avenue was a mistrial. And that's --
8 that was the position that we had taken, and we do
9 take. And I guess --

10 THE COURT: Well, the court's only alternative at
11 the time was to give a curative instruction or a new
12 trial. And I gave a curative instruction, if I
13 remember correctly --

14 MR. HINES: There was a curative instruction
15 ultimately given.

16 THE COURT: All right.

17 MR. HINES: And perhaps, you know, I don't need to
18 go any further into this than what's stated in our
19 brief. And you'll see it.

20 I -- I would note that the plaintiff makes -- if
21 you'll indulge me just briefly. The -- in the brief --
22 responsive brief that we received from the plaintiff,
23 they indicated there was a case, it's called Keller vs.
24 Pearce, Angel -- Keller, Pearce, Young, Angel. And the
25 only thing I -- if the court is considering this later,

1 I want to make this point.

2 The plaintiff cites that case for the
3 proposition that the plaintiff in that case -- that
4 Keller case injected the -- the issue of insurance into
5 those proceedings. And I want to make clear that
6 that's not what happened.

7 That was a case where the Kellers -- the Keller
8 brothers were riding in a car. There was Raymond
9 Keller and there was Benjamin Keller. Raymond was
10 driving. It was his vehicle. And Benjamin was a
11 passenger. They get in a car accident. Those cases
12 are tried together by consent of the parties against
13 the defendant.

14 Now, the results of that, of course -- this is
15 back in '60s and I know this was quite a lot of money
16 back then -- Raymond Keller, the brother, the driver,
17 he got a verdict for \$1,500. His brother, Benjamin, he
18 got a verdict for a thousand.

19 Now, the defendant only took an appeal of
20 Benjamin's case. He didn't appeal Raymond's case.
21 Raymond was the one that had mentioned insurance while
22 he was on the stand. And, Your Honor, again, I say
23 this respectfully, I -- if the court is the -- I would
24 suggest that there's a misapprehension that's reflected
25 in the plaintiff's brief that is suggesting that it was

1 okay for a plaintiff to make this statement about.
2 injecting insurance. Because the point we try to make
3 is, there's another case -- I realize the court doesn't
4 have the benefit of the record. But my -- to the best
5 of my recollection, the court cited a case Brazeale vs.
6 Piedmont Manufacturing at the time, and concluded that
7 there was an inadvertent mention of insurance. And we
8 do take issue with it being inadvertent. And that's --
9 that's set forth in our brief.

10 THE COURT: Well, you asked the question. You
11 asked her, why did she write the letter, and she told
12 you.

13 MR. HINES: Your Honor, she did not write the
14 letter.

15 THE COURT: Well, why her husband wrote the letter
16 and she told you.

17 MR. HINES: Your Honor, I asked --

18 THE COURT: Wasn't that the substance of your
19 question? Why did your husband write the letter, and
20 she told you.

21 MR. HINES: Your Honor, the question, I believe,
22 was -- was -- was not very complicated. It was -- did
23 he make a claim -- the day after the accident -- and
24 the letter is a part of your materials, Your Honor.
25 This letter does not mention a word about insurance,

1 not one word. What does it say?

2 It says "my client" -- it doesn't say anything.
3 about his wife, it says my client fell on the sidewalk
4 in front of this construction site due to the dangerous
5 conditions, which as of this morning still exists.
6 Your company --

7 THE COURT: You didn't ask her why she wrote the
8 letter -- or he wrote the letter?

9 MR. HINES: Your Honor, my --

10 THE COURT: I don't remember the actual question
11 you asked her.

12 MR. HINES: And I realize that makes it difficult
13 probably for all of us because we don't have the
14 transcript. But I -- to the very best of my
15 recollection, Your Honor, my question was did your
16 husband make a claim, you know, with this
17 correspondence the day after.

18 The evidence, Your Honor, I certainly was happy
19 for the jury to hear -- which is Mr. Connelly wasn't
20 even there. He was in Chicago we learned from the
21 other evidence. And, you know, he's making a claim
22 about my client. There's nothing about his wife --
23 he's talking about conditions that he's not even able
24 to see there.

25 The point is, they get probably more into my

1 strategy than anything else, and I don't want to
2 divulge it. But the point is, I certainly did not ask
3 the question about anything that would lead her to
4 insurance. If you looked at the -- the materials that
5 have been provided to you by the plaintiff, he doesn't
6 even mention Mr. Connelly--

7 THE COURT: Well, he was just trying to show that
8 that he was a husband -- a husband/wife relationship.

9 MR. HINES: Well and -- and somebody's making a
10 claim. Again, which is -- again, that might get into
11 issues of trial strategy, which really is beside my
12 point.

13 My point is there was nothing about that, that
14 in any way called for the plaintiff, herself, to say,
15 oh, we were just making sure they all have insurance.
16 Because this letter doesn't say anything about
17 insurance. In fact, it doesn't -- I mean, it
18 specifically says, I would -- it says "please have your
19 attorney call me. Should I not hear from you, I would
20 assume you prefer to go forward in filing a complaint
21 at law". You know, it doesn't -- it doesn't say
22 anything about insurance. It just says, hey, I'm suing
23 somebody as a claim.

24 That's the only point I was making, you know.
25 Whether or not that's a good strategy, bad strategy, or

1 indifferent, I know what it isn't, is it's not any sort
2 of open door to start talking about insurance.

3 And when you combine that, you know, with --
4 with the verdict, I -- that was issued in this case,
5 you know -- well, we believe it's appropriate to raise
6 it now. And, of course, we raised it before, and
7 that's -- that's that.

8 But I do want to make the point -- that twofold
9 point, which is these materials, this letter and some
10 follow-up e-mails. It cannot possibly be construed
11 reasonably to say that they -- that I, with my
12 question, asked for something about insurance. They
13 just can't.

14 The other thing about that is the way that the
15 case the plaintiffs relied upon, I would urge Your
16 Honor -- and I'll be happy to provide the case to
17 you -- I regret not having it at the moment. But I
18 want to be clear, in that case -- that Keller case, the
19 plaintiff that injected insurance in that case was not
20 a party to the appeal. For whatever reason, the Keller
21 court made a pretty big deal of this, in finding there
22 was no prejudice in any of that.

23 It said, I don't know why you did this,
24 defendant, but you only appealed one brother's verdict,
25 not the other. These cases were tried against the same

1 -- they were tried together, the same trial. It's the
2 same mention of insurance and you're only challenging
3 one verdict and not the other. How can you say there
4 was prejudice when -- when you just agreed to be
5 satisfied with it.

6 So the point is that case is not at all helpful
7 to the plaintiff. And, respectfully, there was a
8 misapprehension, I believe, in the brief. Because when
9 I get back to the Brazaele case that His Honor cited,
10 what it says is -- it looks to whose responsibility --
11 responsible for -- for injecting insurance.

12 And the difference is in Brazeale, the court
13 said, well, it was a witness. Not one of the
14 litigants, but a witness that does it inadvertently.
15 You know, there's no real culpability of a party to the
16 case. But that's not what we have. We have a
17 plaintiff.

18 And what Brazaele says is -- of course, in cases
19 of this kind, if the plaintiff should bring out in an
20 examination of the witnesses, that defendant carried
21 insurance, our decisions are to be affected and a
22 mistrial should be ordered.

23 So, Your Honor, it's just -- it's a very unfair
24 situation for the plaintiff to be able to inject this
25 notion -- and the plaintiff might say, oh, she didn't

1 say you had insurance. Well, I mean, that's a really
2 cold comfort to a defendant trying to get a fair trial.
3 Okay.

4 I mean, sure she -- she wasn't handing out death
5 pages -- all right -- but there was no question that
6 that was planting a significant seed in the -- in the
7 brain of every one of the jurors, oh, yeah, insurance.
8 And so that's -- that's not -- that's just not the way
9 cases get tried. I mean, it's -- everyone knows that's
10 out of bounds.

11 So I've really said, I guess, all that I know --
12 it's in our brief, Your Honor. I wanted to make those
13 points. The way they cited that case most
14 respectfully, it just doesn't -- it's, in my opinion,
15 not entirely consistent with that case --

16 THE COURT: Anything on a new trial?

17 MR. HINES: Your Honor, I guess I would also
18 mention that we've asked the court to reconsider,
19 alter, or amend -- or, of course, a new trial. That's
20 the reason -- the granting of partial directed verdict
21 to plaintiff on the issue of liability. Again, I mean,
22 I'll just mention, I want to make sure the court
23 understands that we -- we do believe there was -- an
24 improper shifting of burden in that case.

25 The plaintiff has made -- in their brief,

1 something along the lines of, oh, well, you only
2 brought the one witness, and we didn't rebut, you know,
3 various evidentiary points. Well, you know, it's not
4 our claim to make, Your Honor. And we just want to be
5 clear about that.

6 And the idea, even if you have a situation where
7 the contractor says, yes, I admit that that was my silt
8 fence, that I installed it. Yes, it had to be
9 maintained according to the ARB. And, yes, it was
10 down, according to this picture that you guys had --
11 have and said it was down in the testimony -- said it
12 was down at the time of the accident, it still relies
13 upon an improper inference. And to say that there was
14 any negligence there, because South Carolina doesn't
15 follow *res ipsa loquitur*, you know, you can't just say
16 the things speaks for itself.

17 And respectfully, Your Honor, I just would want
18 to make that point that, you know, again -- all the
19 stuff that I mentioned about that not being the proper
20 duty analysis anyways, but also regardless either if it
21 is the proper analysis of a duty, there was no -- the
22 jury shouldn't have been able to consider whether it
23 was breached, whether there was any evidence of a
24 breach. And it wasn't something that was properly
25 directed against us as a matter of law.

1 And, Your Honor, one -- one last -- the last
2 thing is, and you've been incredibly indulgent. And I
3 appreciate it -- is we also made a motion for a new
4 trial Nisi remittitur.

5 THE COURT: We'll get to that. Let me hear you on
6 a new trial.

7 MR. BROWN: While he's doing that, is it possible
8 for me to get that order and go downstairs because I
9 know it will take me a minute to process.

10 MR. HINES: I was going to send it to you.

11 (Pause. Discussion off-record.)

12 THE COURT: All right. Let me hear you on the new
13 trial issue.

14 MR. CHISUM: Thank you, Your Honor. First and
15 foremost, I just want to make a general comment on the
16 defense's arguments up to this point. The plaintiff
17 provided a wealth of evidence at trial. And in the
18 plaintiff's honest opinion, what's happening in this
19 situation is that we are standing in front of the
20 Court, and we're mincing words about our recollection
21 of what came out at trial.

22 The fact of the matter is that the jury was
23 provided with all relevant information about the facts
24 pertaining to this case. They were able to give proper
25 weight to all of those facts. They went back and they

1 made a determination. And it came out the way it did.
2 And there's no reason to go back in these motions and
3 try to mince the words and recollections of how things
4 have gone so far. The jury had all of the information.
5 What we're doing right now is nothing new.

6 So in light of that, I'm going to try to be a
7 little bit briefer than the defense counsel. I'd like
8 to move on to the issue of the insurance. And first
9 and foremost, I'd like to provide Your Honor with a
10 copy of the email correspondence and the letter that
11 was attached originally as Defense's Exhibit 1, but
12 then was withdrawn before trial. It's the actual
13 letter in question regarding this whole insurance
14 issue. So may I approach?

15 THE COURT: Was that in evidence at trial?

16 MR. CHISUM: The email -- or the letter itself
17 was, but we can clarify the issue as to insurance with
18 the email that was attached --

19 THE COURT: I'm not going to look at it if it
20 wasn't admitted at trial without their consent.

21 MR. HINES: Your Honor, I think I can address
22 that.

23 THE COURT: I mean, if it wasn't admitted at
24 trial, I'm not going to look at it pursuant to the
25 motion for new trial, unless they give me consent to

1 look at it.

2 MR. HINES: Your Honor, I think -- let me make
3 sure if Mr. Brown will listen to me -- it wasn't in
4 evidence at trial. I believe all those things were
5 marked as a court's exhibits. Because there's been
6 this notion that we --

7 THE COURT: You mean -- are you talking about the
8 emails marked as court's exhibits?

9 MR. HINES: The letter and the emails --

10 THE COURT: Well, if it was, I'd be happy to look
11 at it. I've already seen it? I don't remember --

12 MR. HINES: It was provided to you.

13 THE COURT: All right.

14 MR. HINES: It wasn't in evidence -- we've got it.
15 Thank you.

16 MR. CHISUM: Your Honor, I'd like to direct your
17 attention to page two, which what -- this is an email
18 correspondence from Mr. Bill Connelly, who's Rosemary
19 Connelly's husband, contacting Winsor Custom Homes.

20 And if I can direct you to the highlighted
21 portions -- what he asks is please put me in contact
22 with the owners and their insurance company, or I will
23 speak with their attorney. That's a rough paraphrase.

24 THE COURT: That's what it said in the email, but
25 the letter didn't mention insurance.

1 MR. CHISUM: That's correct. But the problem with
2 that issue, Your Honor, is that Ms. Connelly was privy
3 to what her husband does to a degree. She was privy to
4 that email and she was privy to the letter. She didn't
5 exactly recall whether the mention of insurance was in
6 the letter, whether it was in the email, what have you.
7 But in the initial correspondence between Mr. Connelly
8 and Winsor Custom Homes, he did, in fact, make a
9 reference to insurance. He did inquire about whether
10 there was insurance or not --

11 THE COURT: Well, what does that have to do with
12 her response and whether her response was appropriate,
13 or whether they're entitled to a new trial because she
14 inadvertently -- and was it inadvertent to bring out
15 the insurance issue?

16 MR. CHISUM: Well, Your Honor --

17 THE COURT: That email doesn't have anything to do
18 with it.

19 MR. CHISUM: Well, Your Honor, our assertion is
20 that's the reason why she mistakenly responded when
21 baited to comment on the letter. When she was asked
22 about what Mr. Connelly was doing, contacting Winsor
23 Custom Homes, was he filing a claim? She said, I don't
24 know. I think that he was asking if there was
25 insurance.

1 And I'd like to draw a fine distinction there
2 with the cases that were cited. If Your Honor
3 remembers, you actually provided authority for both
4 Brazaele and for Keller. I actually --

5 THE COURT: I don't remember, but go ahead.

6 MR. CHISUM: I asked your clerk, and she provided
7 me with the citations during the trial. So I can say
8 with certainty you cited both of those cases as
9 authority.

10 THE COURT: She says we did.

11 MR. CHISUM: I'm sorry?

12 THE COURT: The law clerk says we did.

13 MR. CHISUM: Okay. Great. Well, I just wanted to
14 draw a fine point here where it actually says that, of
15 course, in cases of this kind, the plaintiff should
16 bring out on examination of the witness that the
17 defendant carried indemnity insurance. And this is on
18 the defense's own brief, on page 21. To draw a
19 distinction of actually carrying liability insurance,
20 that's not at all what happened here, Your Honor.

21 She never made a comment whatsoever on whether
22 Winsor Custom Homes had liability insurance. She
23 simply stated that her husband asked if they did. It's
24 not a bell that can't be unrung. It's not some
25 horrible thing that's prejudiced the entire trial. She

1 gave her honest opinion, when prompted, that her
2 husband asked if they had liability insurance.

3 And I believe from my own recollection -- I can
4 clarify a few things. Upon that mentioning, the
5 defense immediately moved for a mistrial. That's when
6 they declined to accept the curative instruction.

7 The curative instruction came later when the
8 defense shot up during Dr. Funcik's video deposition at
9 the mention of the health insurance. As we're both
10 familiar with -- Rule 411 prevents liability insurance
11 evidence, but nothing about health insurance.

12 And, furthermore, the defense was provided with
13 a list of evidence to the videos on August 24th, prior
14 to the videos being played. They had no objection.
15 They were present at -- they were at that deposition.
16 They knew all the context and they knew the health
17 insurance was mentioned.

18 So that second motion for a mistrial -- further,
19 by the defense, injected the issue in. And at that
20 point, that was when the court stepped forward and made
21 a curative instruction on its own volition.

22 It is our -- our stance that, in fact, Ms.
23 Connelly knew of the entirety of the circumstances to a
24 degree, and she inadvertently mentioned it.

25 THE COURT: What was the question; do you

1 remember?

2 MR. CHISUM: I believe the question was, was your
3 husband -- excuse me -- was your husband trying to file
4 a lawsuit, or trying to file a claim? And she said,
5 no, I do not believe so. I think he was just trying to
6 find out if there was insurance.

7 THE COURT: Okay.

8 MR. CHISUM: And I agree with Your Honor's initial
9 ruling, that that's merely inadvertent.

10 Another argument the defense makes is, well, is
11 that for some reason because Rosemary Connelly was
12 married to a trial attorney, that she had a Masters
13 Degree, she carried some sort of unnatural
14 sophistication so she should have known that the
15 mention of insurance was wrong.

16 I don't know about you, Your Honor, but I'm
17 married to a nonlawyer. And when I speak law to her,
18 it's like speaking Greek.

19 THE COURT: What?

20 MR. CHISUM: Ms. Connelly is no more qualified
21 than anyone else to understand law, because she's
22 received no special legal training.

23 And the defense raises in their brief the
24 argument that she is sophisticated because she's
25 married to a trial lawyer, and she has a Masters

1 Degree. That's not true. She's not privy to knowledge
2 about the rules of evidence. It was merely inadvertent
3 at that point.

4 Would you like me to move on to the other
5 topics?

6 THE COURT: Which one?

7 MR. CHISUM: He also mentioned -- defense counsel
8 also mentioned the partial directed verdict, with the
9 alleged improper shift. I just wanted to --

10 THE COURT: What did we do at directed verdict? I
11 don't remember.

12 MR. CHISUM: I'm sorry?

13 THE COURT: What happened at directed verdict?

14 MR. CHISUM: He moved for a directed verdict at
15 the end of the case in chief, and we were granted the
16 first two elements of common law negligence, which was
17 the existence of the duty and --

18 THE COURT: Based upon his testimony?

19 MR. CHISUM: Yes, Your Honor. And we did that in
20 light of the facts that -- I won't bore you with them
21 again. They're in the -- they're in the brief and I
22 already raised many of them to you. But the fact is
23 that we provided a wealth of credible information
24 regarding the causation of this accident.

25 The defense counsel failed to provide anything

1 to rebut that. In fact, they didn't even bring their
2 own client back in their case in chief. They only
3 brought their expert witness, Dr. Schlosser. Jeffrey
4 Thomas was only examined directly by us, with a short
5 cross examination by Mr. Hines. That would have been
6 the defense's only opportunity to rebut some of these
7 factual issues pertaining to Ms. Smith, to Ms.
8 Connelly, to her daughter.

9 And, again, I would just like to raise the issue
10 that what it feels like is defense counsel is trying,
11 again, to rehash the issues, and retry the case on
12 paper which is inappropriate. The jury received all
13 the evidence. The jury heard what it heard, assigned
14 the proper weight, and made a determination.

15 THE COURT: All right. Let me hear you on the
16 remittitur. Number one, what do you want me to reduce
17 it to? What's the range you're requesting.

18 MR. HINES: Your Honor, that strikes me as --

19 THE COURT: Pardon?

20 MR. HINES: That strikes me as a loaded question.

21 THE COURT: Well, I think you're obligated under
22 the rules -- under the cases and the rules on the
23 remittitur, if you file a nisi remittitur, to give me a
24 range that you've requested -- so that's my first
25 question to you, what range are you asking for the

1 court to reduce it to?

2 MR. HINES: Well, Your Honor, I don't think it
3 comes as any surprise --

4 THE COURT: Pardon?

5 MR. HINES: It wouldn't be any surprise or any
6 secret in the courtroom, if I am to be suggesting a
7 range, it's certainly going to be a low range.

8 THE COURT: Well, I'm asking you, what is your
9 range?

10 MR. HINES: But, Your Honor, I have to
11 respectfully say that I don't know that -- Your Honor,
12 I find myself a bit puzzled because I don't know that
13 it is for me to say what the range is.

14 And let me just say this: I -- our position is
15 the number is too -- the number is too high in light of
16 the evidence. Before, of course, this is the way --
17 the range that we structured, this motion -- before you
18 ever get here, of course, the JNOV is our -- is our
19 primary, you know, requested relief.

20 And then we go down to new trial absolute, so I
21 mean -- sort of assuming arguendo, and without waiving
22 our points all the way along the line, then that's
23 where you get to -- assuming we're going to lose those
24 motions, and without waiving our arguments, the thing I
25 want to be clear about this -- even to suggest a range

1 is by no means to suggest that we've sort of abandoned
2 our arguments that there should be no judgment against
3 us at all. There should be no -- there should be a
4 JNOV, at least a new trial absolute.

5 But, you know, I think the best I can do now is
6 to respectfully decline to give a specific range, Your
7 Honor. I believe that when it comes down to a
8 remittitur, the issue is that His Honor or Her Honor,
9 whatever the judge is hearing -- considering the
10 matter -- would examine the evidence that was given.
11 And if the Court is in agreement that the judgment was
12 unduly or the damages were unduly high, or liberal,
13 then the court would reduce that to an appropriate
14 amount.

15 And I do believe that it is entrusted to the
16 court's discretion. I don't know that I'm -- it's my
17 place to specifically identify a range. What I have
18 identified is the --

19 THE COURT: Well, then move on if you don't think
20 that. Move on and tell me why you think I'm supposed
21 to give a remittitur.

22 MR. HINES: And I think that's -- that's what I
23 can do, Your Honor, is to tell you the reason why the
24 \$500,000 damages amount was high. And, again, I'm
25 looking at the damages amount. I don't believe the

1 comparative default assessment is different -- so if --
2 you know, is a different determination.

3 But the jury determined this was \$500,000. And,
4 of course, elsewhere in our brief for a new trial
5 absolute -- and the distinction, I guess, I'll make
6 here is that my understanding of the law is, is that if
7 the Court finds that the verdict is so high as to be
8 shocking, then its only option would be to grant a new
9 trial absolute.

10 If the court was to find that, yes, the verdict
11 is liberal, but not shocking, that's where you get into
12 the territory of remittitur. And so understanding that
13 there's -- where we've argued along the way, and argued
14 for JNOV and also for a new trial absolute, where we
15 argued remittitur, we really are advancing the same
16 points that we made in our argument that it was
17 shocking. It's just a matter of degree. That is the
18 point I'm trying to make.

19 Again, you have a situation where the plaintiff
20 is claiming these large damages, but yet have a
21 situation where she wasn't sure for a period of about a
22 year, didn't notice this issue was -- with her loss of
23 smell for a year, give or take. It's inconsistent with
24 the notion that this had a terrible impact upon her
25 life not to be aware of it.

1 During his closing argument, plaintiff's counsel
2 explained to the jury his -- his view that -- imagine,
3 you are working at a job every day for the rest of your
4 life, and you are going to be -- what would you pay to
5 work a job of not having your sense of smell, not
6 having a sense of taste.

7 Well, Your Honor, you know the point that I
8 would make is if the plaintiff essentially said, well,
9 she worked the job for a year and didn't know she was
10 working it. And if you have someone that comes into
11 court who doesn't have an arm anymore, well, they know
12 it's gone. If you have somebody that comes into court
13 who's been blinded, well there's no -- there's no --
14 just the very notion of a latency period in determining
15 the injury of -- of the diminished sense -- or senses
16 is -- cuts against such a large valuation by a jury.

17 You have a situation also where her daughter
18 testified that she's still a happy person. She still
19 goes out to eat regularly. Her friend, Cory Smith,
20 says she used to tease her about, you know, the issue
21 with her loss of smell. And how -- talking about
22 smelling flowers while they're running.

23 But, Your Honor, we've gone through them in our
24 brief. But, you know, the essence of our motion here
25 is that the award was simply -- it's unduly liberal,

1 it's just too high based upon the evidence. And, again
2 that's -- that's only a bridge that the court needs to
3 cross. And if it's already crossed those bridges, and
4 ruled against us on those motions that we -- we have
5 advanced ahead in light of this motion for a new trial
6 Nisi remittitur.

7 THE COURT: Yes, sir.

8 MR. CHISUM: Your Honor, in response, it seems
9 likes we bled a little bit back to that motion for a
10 new trial. So I just want to clarify a piece of case
11 law.

12 What Mr. Hines is speaking about granting a new
13 trial, a quote from -- let's see -- it's a Vinson v.
14 Hartly, it says that "The jury's determination of
15 damages is entitled to substantial deference. The
16 trial judge must grant a new trial and a new trial
17 absolute if the amount of the verdict is excessive so
18 as to shock the conscience of the court and" -- not
19 "or", but "and" --

20 THE COURT: New trial -- that doesn't go to the
21 remittitur. Okay.

22 MR. CHISUM: I understand.

23 THE COURT: All right. We've already got past the
24 new trial issue.

25 MR. CHISUM: Sure. Not a problem, Your Honor.

1 THE COURT: Let me hear you on the remittitur.

2 MR. CHISUM: Moving forward, Your Honor, what we
3 would argue in response to that, is that the actual
4 amount of the medical bills, of the \$13,000 range that
5 defense counsel keeps bringing up --

6 THE COURT: How much were the medical bills?

7 MR. CHISUM: It was approximately \$13,000, Your
8 Honor. I believe that's correct, between 13 and
9 \$14,000. And, Your Honor, the reason for those low
10 actual medical costs is because this is a permanent,
11 untreatable condition.

12 She went and saw numerous doctors regarding it,
13 and those bills got as high as they possibly could.
14 But the fact of the matter is, that every single doctor
15 she saw regarding it said, well, there's nothing we can
16 do for you. It's hard to get medical bills when
17 doctors won't see you because they can't treat you.

18 And, in fact, what we have here, Your Honor, is
19 a situation where Ms. Connelly has virtually lost the
20 entire -- one of her five senses, has a significant --
21 I think I remember the figure being 80 percent
22 impairment to one of her other senses, which is her
23 sense of taste. And we have the defense's own witness,
24 their own expert, Dr. Scholsser, who stated during
25 trial that the loss of the sense of smell and taste has

1 an immense impact on the quality of life.

2 I believe the defense counsel brought up
3 Mr. Gruenloh's closing argument, which we did provide a
4 range. That range was given to us using the statutory
5 life expectancy table, which is how we came up with the
6 24.08 years. We didn't just grab that number out of
7 mid air. And what we tried to do was condense that
8 figure into a bite size type of analogy that the jury
9 could understand clearly, and to aid them in making
10 their determination.

11 If Your Honor would remember, the range that we
12 came up with by throwing out various values, \$3 an
13 hour, \$4 an hour, \$7 an hour, excluding eight hours for
14 sleep, we did all our Math. We came out to \$421,881 on
15 the low end, and \$984,389 on the hide high end. The
16 finding of \$500,000 is on the low --

17 THE COURT: Hold on a second.

18 (PAUSE.)

19 THE COURT: All right. Go ahead.

20 MR. CHISUM: Your Honor, what I'd say is the jury
21 returning a verdict of \$500,000 in light of that range
22 that we gave, indicates that they came in on the low to
23 conservative end on the range that we proposed. When
24 you compound that with the comparative negligence --
25 which let's be honest, whether or not they take it into

1 account, they know what it's for. That bumps that
2 figure down to \$325,000, and we're actually a hundred
3 grand below even the lowest range that we provided. If
4 anything, it would be our contention that this verdict
5 was actually unduly conservative in light of the
6 evidence.

7 In -- in plaintiff's -- I'm sorry -- in
8 defense's brief, they draw the distinction between
9 being unable to notice that you lost a sense of smell
10 or a sense of taste, and they adjust those out, as to
11 what it would be like if you lost your sense of sight,
12 your sense of touch, your sense of hearing. And
13 admittedly, those are more noticeable senses. Every
14 single one of the doctors did attribute that, and does
15 agree on that.

16 But the fact of the matter is that even Dr.
17 Schlosser, himself, stated that losing your senses of
18 smell and taste for 24 years is a significant amount of
19 time, and it has a significant effect on a person's
20 quality of life.

21 Trying to limit this strictly to the amount of
22 actual medical bills is completely inappropriate.
23 Because Rosemary Connelly is not going to be able to
24 taste food, smell her grandchildren's hair, enjoy
25 Christmas, anything for the remainder of her life

1 because this is permanent.

2 Also, I'd just like to make one last point that
3 defense counsel does make some good arguments, but
4 those all could have been raised during his closing and
5 presented to the jury. Again, it's trying to retry
6 this case on paper.

7 In fact, the verdict was conservative,
8 appropriate, and we would stand by it and ask that you
9 not disturb it.

10 THE COURT: Okay. Thank you very much. Yes, sir.

11 MR. HINES: Your Honor, I guess I just would
12 highlight and offer my word of thank you to opposing
13 counsel for -- for acknowledging that I've made good
14 arguments. And, Your Honor, I guess I also want to say
15 that I think that's all the more reason, when there's
16 acknowledgment that those arguments are good arguments,
17 I think that's pretty telling that they may call for
18 relief. Furthermore, the arguments --

19 THE COURT: He's just trying to be nice to you.

20 MR. HINES: Well, I'm going to the next point of
21 this, Your Honor, which is to say that it's incorrect
22 to say that these arguments are improperly made at this
23 juncture. What we're doing is procedurally raising
24 legal issues that are appropriately raised at this
25 time. And the suggestion that we are retrying it on

1 paper is -- well, it's inaccurate.

2 And what we've done is we made appropriate post
3 trial motions. We argued those motions based upon the
4 law, based upon the evidence. And, anyways, so the
5 point is to the extent that's something concerning to
6 the Court, certainly I'm prepared to address and the
7 procedural propriety of what we've done.

8 But I also mention, just to be clear, I don't
9 understand the plaintiff having any pending motion for
10 -- for any relief. It's like, for instance, when they
11 argued -- mentioned I believe -- it's offhand that if
12 anything, you know, we think that the award is low or
13 well -- certainly I'm prepared to argue that that's not
14 the case.

15 But my understanding is that's not raised. And
16 I would argue also it's not proper to raise it at this
17 juncture in any way. So I make that point just for the
18 record. I assume it's -- well, it's a moot point.
19 Because I don't think they have any motions before the
20 court.

21 THE COURT: Okay. Thank you very much.

22 MR. GRUENLOH: Your Honor, may I just say one
23 thing with respect to that -- we've not asked the court
24 for any -- because there were 12 people that sat in the
25 jury box, and heard everything, all the witnesses, all

1 the testimony, and they decided what it's worth to the
2 lose two of your senses for 24 years. And we've heard
3 absolutely nothing, and there's nothing in their brief
4 that suggests that ought to be disturbed.

5 THE COURT: Okay. All right. As far as the JNOV,
6 that is denied. Okay. I will -- let me read about
7 your new trial absolute, and your new trial Nisi
8 remittitur, and I will give you a decision after I've
9 had an opportunity at least read the defendant's motion
10 and the plaintiff's memorandum. And I believe the
11 defendant's memorandum. Okay.

12 MR. HINES: Thank you, Your Honor.

13 THE COURT: Thank you very much.

14 MR. BROWN: Thank you, Your Honor.

15 MR. GRUENLOH: Thank you, Your Honor.

16

17 (Whereupon, the hearing adjourned.)

18

19

20

21

22

23

24

25

CERTIFICATE

I, SHARON D. JONES, CERTIFIED COURT REPORTER, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS
HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE
CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
COMMON PLEAS FOR CHARLESTON COUNTY, SOUTH CAROLINA ON
THE 12TH OF NOVEMBER, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

8.27.16

Sharon D. Jones

SHARON D. JONES,
CERTIFIED COURT REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

ROSEMARY CONNELLY,

Plaintiff,

vs.

CASE NO. 2013-CP-10-3251

WINSOR CUSTOM HOMES, LLC, THE DANIEL
ISLAND COMPANY, INC., CLARKE DESIGN GROUP,
LLC, KAREN A. NELSON & JOHN W. EDELEN,

Defendants.

DEPOSITION OF: THOMAS FUNCIK, M.D.

DATE: MAY 21, 2015

TIME: 3:21 PM

LOCATION: Coastal Facial Plastic Surgery
2671 Brickside Lane
Mount Pleasant, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: Laura J. Bash, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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19 (INDEX AT REAR OF TRANSCRIPT)
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21
22
23
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(DFT. EXHS. 1 through 9, premarked.)

STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * *

THOMAS FUNCIK, M.D.,

being first duly sworn, testified as follows:

EXAMINATION

BY MR. HINES:

Q. Dr. Funcik, again for our record -- I know we met just a moment ago off the record, but I'll reintroduce myself and say, I'm Russ Hines. I'm with the law firm Young, Clement, Rivers in Charleston. And our firm represents a defendant in this lawsuit called Winsor Custom Homes.

And I thank you very much at the outset for your time and for giving this deposition today. My assumption it's very low on the list of things most anyone, particularly doctors, like to do. But

1 in any event, thank you for that. I'm going to try
2 to make it as quick as possible.

3 So let me start out with a few basic
4 preliminaries, which is -- the first one is, is
5 have you ever given a deposition before?

6 A. Yeah.

7 Q. Many times?

8 A. Like, probably 10 or 15 or something
9 like that.

10 Do I need a microphone?

11 Q. No, sir.

12 So 10 or 15 -- just ballpark is what
13 I'm talking about.

14 A. Yes.

15 Q. In general, has that been typically as
16 a treating physician or someone who was involved in
17 a lawsuit? Or what's -- what is the reason you've
18 been deposed before?

19 A. I mean, one time I was for my divorce.
20 One time I was because I was embezzled. And
21 everything else is for this. I don't -- like, it's
22 always for an injury -- pretty much always for an
23 injury -- really, an injury of a patient I'm
24 treating. Certainly, that's the overwhelming
25 lion's share of it.

1 Q. Sure. Has it ever been as a -- I want
2 to distinguish between being an expert as a
3 physician who treats a patient and an expert who
4 doesn't treat a patient, but is retained for the
5 purposes of a lawsuit to offer opinions.

6 A. No, I have never done that,
7 truthfully -- I mean, just to be completely
8 truthful. But a couple of times, I mean, I
9 have -- I have had a few, like, people who are,
10 like, patients and attorneys -- never anybody in
11 this case, because her husband's an
12 attorney -- but, like, had them call me and, you
13 know, sort of off the record ask, like, if a
14 certain case was malpractice in plastic -- you
15 know, was this an ordinary complication or was
16 this -- I have had informal phone conversations
17 like that, but I have never been a hired guy to go
18 out...

19 Q. In those instances you wouldn't have
20 been deposed, it was just a --

21 A. Right.

22 Q. -- just very informal something, and
23 brief, it sounds like --

24 A. Right.

25 Q. -- it sounds like. And I don't need to

1 get into any of that further, I just -- I'll say at
2 the outset, even though it sounds like you're very
3 familiar with this procedure, let me just give you
4 a couple of basic rules, which are -- of course,
5 I'm going to try, and it may be even more difficult
6 today than it is other days for me to ask questions
7 that make sense, given that I'm asking them to a
8 medical professional and I'm not at all a medical
9 professional. But regardless, my effort is to ask
10 you questions that we both understand so we can
11 effectively communicate in this deposition.

12 I want to encourage you, if you have a
13 question about my question, it doesn't make sense,
14 if you would simply like me to repeat it or restate
15 it, I would encourage you to do that. And direct
16 questions like that to me as opposed to
17 Ms. Connelly's counsel, for instance. And
18 likewise, if Ms. Connelly's counsel is asking you
19 questions, direct your questions to her counsel.

20 Does that make sense? Just direct it
21 to the person asking questions.

22 A. Gotcha.

23 Q. Of course, I don't expect this to take
24 all that long, but if for any reason you would like
25 to take a break during this deposition, please let

1 me know, feel free to do it. We'll accommodate any
2 request in that regard.

3 And as long as that makes sense, let me
4 get into just your -- we're here today in regard to
5 a patient of yours named Rosemary Connelly. Are
6 you familiar with Ms. Connelly?

7 A. Yes, I am.

8 Q. Ms. Connelly is a plaintiff in a
9 lawsuit, and defendant -- and the remaining
10 defendant in the lawsuit is our firm's client,
11 Winsor Custom Homes. Generally, I'll represent to
12 you that it relates to an accident that occurred on
13 or about, but I believe it was on June 6, 2011,
14 when Ms. Connelly was jogging and fell and -- well
15 thereafter, actually, I believe, came to your
16 office to seek some treatment. With that bit of
17 introduction, let me hand to you, if I may, what
18 I've marked as our Exhibit 1.

19 I know you have your notes, and if you
20 need to refer to them out of your file or your
21 chart, please do so.

22 MR. HINES: Mike, this is Exhibit 1.

23 MR. GRUENLOH: Thank you.

24 THE WITNESS: Can you give me a minute
25 to review this before we go on with this so I'm not

1 trying to do two things at one time?

2 MR. HINES: Yes, sir.

3 BY MR. HINES:

4 Q. Will you just identify generally what
5 Defendants' Exhibit 1 that you have there, what
6 Exhibit 1 what is?

7 A. This is a clinic note that I dictated
8 that traditionally describes what transpired when
9 she presented to my office and I talked to her and
10 examined her nose.

11 Q. So let me ask you generally about how a
12 note like this is generated or comes to be. I know
13 it's -- the question really is simple, and perhaps
14 for me, as it seems, but you mentioned that you
15 dictated the note.

16 Is the procedure for a note like this,
17 a patient will come to your office, you conduct
18 your visit, the patient leaves, and then soon
19 thereafter, I mean, you essentially -- as soon as
20 you can thereafter, you dictate something like this
21 and someone else transcribes it?

22 A. Yeah. But let me, like, clue you in on
23 that. I love my job. I work really hard. I work
24 a lot of hours. I work every day. I don't take a
25 lot of vacations and stuff like that. And my

1 priority is patient care. And it's -- to me,
2 taking care of patients is a greater priority than
3 dictating. And if we walk back to my office right
4 now and take a picture, there's a box of charts on
5 the floor -- a box of charts. So sometimes, I get
6 in arrears.

7 I don't specifically recall -- so in
8 other words, it's not a perfect world and I don't
9 always do my dictation within 12 hours of seeing
10 them. I have no recollection whether this was
11 dictated, you know, super contemporaneously or some
12 time later. I doubt that would have impacted my,
13 you know, my recollection or the content of it. So
14 I don't want to -- like, if what you're getting at
15 is maybe I dictated this, you know, a month later
16 or week later or something. And it's not the norm,
17 but it happens occasionally.

18 Q. Oh, sure. And let me make sure I'm
19 making myself clear. I don't want to -- I'm not
20 questioning -- I'm just talking about general
21 procedures.

22 It sounds like what you're telling me
23 is, is that's dictated after the visit, and it's
24 dictated at some time which is reasonably soon
25 enough in time that you're able to accurately

1 reflect the nature of the visit and, you know, the
2 pertinent clinical aspect of the visit.

3 I'm not --

4 A. Well put. I was listening carefully
5 and it was well put.

6 Q. Thank you. I wasn't trying to suggest
7 anything.

8 A. Believe me, there is a lot of good,
9 busy doctors that have been in a little trouble
10 with the medical records committee a time or two.
11 It doesn't mean they're, like, sloppy doctors.

12 Q. Oh, no. And I appreciate your
13 clarification. You're probably just being
14 conscientious. And I was absentmindedly not aware
15 of the possible interpretation, but anyway.

16 So of course, the specifics of this
17 note -- the first thing that it says on here, this
18 is the note from June 6, 2011: Rosemary fell while
19 jogging today.

20 Can you tell me, is there any other
21 information about the accident that you recall that
22 may not be reflected in the note?

23 And let me append that enough to say
24 I'm not asking this by way of any sort of criticism
25 of the note itself. I'm saying, do you happen to

1 remember something that wouldn't necessarily be
2 clinically significant, but just a detail of the
3 accident that -- anything she might have said about
4 how she fell or anything to describe the accident?

5 A. You know, I really -- I can't give you
6 much information there, because -- because -- I
7 mean, here's the way these things come up. The
8 nasal bone is the most commonly fractured bone on
9 the body. I can't count, I can't estimate how many
10 nasal fractures I have seen. And I also used to
11 work before -- while I was doing my ENT residency,
12 I worked in, like, 24 different emergency rooms,
13 you know, so I would see trauma. And when you're a
14 emergency room physician, it's your job to make
15 sure that they don't have intercranial hemorrhage
16 and a broken neck. You know, miss some kind of
17 diagnosis that, if missed, would be a big deal.

18 And what typically happens is I'm here
19 all day and I'm really busy all day, but then if
20 anybody, especially a patient or somebody I know or
21 somebody's little kid, whatever, insurance, no
22 insurance, somebody breaks their nose, we bring
23 them in, you know, we take care of them. It's like
24 the only humane thing to do, you know.

25 And so -- and whenever I'm

1 seeing -- like, I mean, I don't recall her saying
2 anything about some guy left his sawhorse on the
3 curb. You know, it's not -- that's never my focus,
4 at all, as far as, like, who's at fault or
5 whatever. Even if it is -- like, if I'm seeing
6 somebody I, like, know it's litigation or even
7 referred to --

8 What happens, like somebody gets in a
9 car accident, they go the ER, they go to a lawyer,
10 they come to me. I usually try to sort of
11 disassociate myself from who's at fault or -- do
12 you know what I mean?

13 She looked pretty good to me. You
14 know, I said -- you know, I gave her the usual
15 concussion precautions and stuff like that. I'm
16 sure I didn't document that. But from working in
17 an ER, I know how to handle a case of head trauma,
18 and I wanted to feel reasonably comfortable that
19 the trauma was, you know, not intracranial or
20 cervical fracture. So I probably didn't really pay
21 that much attention. Because it doesn't matter
22 whether I operate or not, or whether I fix it or
23 not or whatever, I don't usually focus on that that
24 much.

25 I honestly, after you asked me that

1 question, I tried to put myself back there, and I
2 don't remember anything eventful about --

3 You know, it's not the first jogger
4 that's broken a nose, or first kid in college that
5 got drunk and -- you know, there's always some kind
6 of story and...

7 Q. No, I think I understand you.

8 A. I don't mean to read too much into all
9 your questions. I'm trying to give a comprehensive
10 and super duper, honest answer.

11 Q. And I appreciate that. And I won't
12 belabor the point of trying to explain any more
13 than this, than to say, I believe I understand
14 exactly what you're telling me is that the, sort
15 of, whodunit, if you'll recall, or the exact how,
16 is -- well, is pretty much immaterial from a
17 clinical perspective -- I mean, beyond the fact
18 that you know there is this injury, I'm now
19 providing care and treatment and -- you know,
20 you're moving on past, kind of, the things we
21 lawyers get mired in. And I understand that.

22 A. Yeah.

23 Q. The reason I was asking, and I think
24 you answered the question, no, which is, is there
25 anything, other specifics, than Rosemary fell while

1 jogging today?

2 Beyond that statement, it doesn't sound
3 like you can offer any other detail about that
4 fall.

5 A. I really can't.

6 Q. And so unless you can, I'll just -- I
7 think I understand your answer.

8 I'll move on.

9 A. Yeah.

10 Q. But then the next thing you note, you
11 note, no loss of consciousness or other injury.

12 What I want to ask you about is, is
13 just, can you explain to me why that is clinically
14 significant, that that's noted in the report?

15 A. Goes back to that -- you know, I did,
16 like, five minutes review of her chart and I saw
17 she skinned her knee and stuff like that. You
18 know, she didn't come in on crutches, she didn't
19 come in hobbling on one leg. I don't know if she
20 had crutches. She wasn't in, like, a knee
21 immobilizer or anything.

22 And she's a pretty bright, intelligent
23 person. The standard line of questioning when
24 somebody comes in is you look at their general
25 mental status and stuff and you say, how you doing;

1 did you hurt anything else? You know, because, you
2 know, that's how doctors that practice bad medicine
3 rightfully get sued, is if they don't ask, you
4 know, if anything else hurts.

5 And in terms of the loss of
6 consciousness, pretty much the standard of care is,
7 is if you're working in an emergency room and the
8 patient has a loss of consciousness, i.e., there's
9 specific parts of the event where they black out
10 and don't recall things, then I would have sent her
11 to get an MRI of her brain. Because that's the
12 only way to really tell if she has intracranial
13 hemorrhage.

14 So, you know, if I was to restate that,
15 I would say she had recollection of the events or
16 something, she denied loss of consciousness, as do
17 witnesses, and there's no other injuries that were
18 significant enough for her to consider and for me
19 to refer her to further treatment or treat myself.
20 That's kind of what I meant by that sentence.

21 Q. Thank you. Continuing on. It notes
22 that she has abrasions -- I'm skipping a sentence
23 or two. But if for one reason or another I ask you
24 a question, if I've skipped something that's -- in
25 terms of sentences, that's pertinent to you,

1 certainly let me know that, because I may do it
2 unintentionally.

3 Where I'm reading now is, is "she has
4 abrasions at all these areas and fairly massive
5 swelling of the right nasal dorsum."

6 If you could explain to me what that
7 means, the "massive swelling of the right nasal
8 dorsum."

9 A. If your nose is normal and it's not
10 swelling, you can look at the nose, especially if
11 you're an experienced facial plastic surgeon, and
12 kind of see the -- some of the specifics of the
13 bony anatomy; whether the bones are symmetrical;
14 whether there's, you know, a hump or a scooped out
15 dorsum and stuff; see some of those delicacies.
16 And if you touch the nose, the skin has a
17 predictable consistent -- you know, pattern of
18 thickness where it's a little thicker in the upper
19 part, and a little thinner in the middle part, and
20 a little thicker down here. You know, depending on
21 sex, race and age, stuff like that.

22 But her nose, instead of just being
23 kind of a thin layer of uniform thickness of skin
24 on top of the bone, had just a bulge that had a
25 firm consistency, kind of, like, you know, a balsa

1 wood kind of a thing, which you would typically see
2 after an impact of the nose.

3 Q. The next thing is, she had -- by the
4 way, I'm not going sentence by sentence.

5 A. Have you ever seen two guys that are
6 more apologetic? He's apologized for every
7 question, I'm apologizing for every answer. It's
8 all right. I like you, okay. Let's just get
9 through this. You can ask me anything, I don't
10 mind. And you're not offending me. I mean, if you
11 do -- you haven't so far, at all -- if you do, I'll
12 let you know.

13 Q. Thank you.

14 A. Let's do this.

15 Q. It's not, at all, my intention. I
16 realize I'm now causing the problem I was hoping to
17 avoid, I'm belaboring --

18 She had epistaxis, if I'm pronouncing
19 it right?

20 A. Nasal bleeding. She comes in -- and I
21 don't remember, but I have never seen a nasal
22 fracture that didn't have dried blood around there.
23 It doesn't mean she was actively bleeding. But
24 when you examine the nose, you've got to look on
25 the outside and you have to look on the inside.

1 And maybe you're getting to that thing. Because
2 what can happen is, is if you get a collection of
3 blood underneath the skin that lines the septum,
4 the central part of the nose, there's a collection
5 of blood in there and you don't recognize it and
6 treat it, the septum will just die from lack of
7 flow of oxygenated blood and you'll wind up with,
8 like, a boxer deformity, like a complete saddle.
9 And so you have to look inside. When you do, you
10 always see dried blood in there.

11 Q. Speaking of that, it sounds like the
12 condition -- when you mention a boxer, you can
13 have -- I guess, the septum could die, I think is
14 what you were indicating.

15 That did not happen here?

16 A. Correct.

17 Q. And that leads me to my next question,
18 which is: There is no septal hematoma, no active
19 bleeding in the nose.

20 Is that sort of along what we were just
21 discussing here?

22 A. Yes.

23 Q. Further down it indicates that the bony
24 pyramid is essentially stable.

25 Could you explain what the bony pyramid

1 refers to?

2 A. So, you know, I was thinking before I
3 came in here -- sitting right behind you is a
4 plastic skull. It's fake. Okay? But would that
5 be -- he looks scared -- in the drawer. So, like,
6 if I was -- if this was video -- I wish I was being
7 videotaped. Would that mess -- if I refer to that
8 a little bit, would that potentially mess -- it
9 would certainly enhance your understanding today,
10 but I don't know if it's going to make the
11 deposition --

12 Q. From the standpoint of using that in a
13 deposition, it might be -- on those points, it
14 certainly could make it a little more difficult.

15 A. I'm going to try to do it without it.

16 Q. That being said, if we need this for my
17 own benefit, I might, you know, go with it. Again,
18 I'm not asking for, well, incredible detail.

19 A. The bony pyramid, if you take your
20 thumb and finger and you grab the tip of your nose,
21 it wiggles back and forth. Okay? And that's the
22 cartilaginous. The nose is shaped like a pyramid.
23 You see what I'm talking about?

24 But if you reach up a little higher
25 you'll feel what we call the bony pyramid which is

1 kind of shaped like a pyramid, and these bones on
2 the side, that you're used to feeling.

3 And if a person -- there's a lot of
4 different degrees of types of fractures. You know,
5 open, comminuted, displaced, nondisplaced. Man, if
6 somebody gets in a hundred-mile-an-hour car
7 accident, gets hit with a crowbar by a big guy,
8 then this bony pyramid here, when you put your
9 fingers on it, it's like a loosey-goosey bag of
10 bones and it just wobbles back and forth. It could
11 be open, bones could be sticking out. That would
12 be an open, comminuted thing. More commonly with
13 nasal fractures, especially like ones I see here,
14 because I'm not like in a tertiary care trauma
15 center.

16 More commonly, after a fracture, if you
17 push on those bones, you can tell that they're
18 swollen and there may be a little bit of movement
19 of the bones. But when those bones break,
20 sometimes it's kind of like a hardboiled Easter
21 egg. If you have a hardboiled Easter egg, there's
22 the hard shell which is quite brittle and would
23 easily fragment. But lining an egg is that little
24 membrane that sort of stabilizes the structure. So
25 if you took that Easter egg and knocked it on the

1 table a couple of times, it would still be pretty
2 much shaped like an egg. But if you inspected it
3 closely or if you pushed on it, those little
4 fragments would kind of break. So that's the kind
5 of fracture this was, where there was cracks in the
6 bone, little separations in the bone. But all the
7 bones were pretty much in the same neighborhood or
8 location that they were, and the fracture was not
9 so extensive that -- was not so extensive that when
10 you push on it, it would be just, like, a cave-in.

11 Q. And therefore -- well, in layman's
12 terms, I guess that's -- am I correct in
13 understanding that's a good thing, on the whole? I
14 mean, it's obviously better for the essentially
15 stable bony pyramid than to have one that --

16 A. I mean, it sort of is and isn't. Yeah.
17 I mean, yeah, I would rather get punched by a man
18 than hit by a crowbar. I would rather not get
19 either.

20 The thing about it -- the thing about
21 it is, once it's fractured -- like if you have
22 somebody that has fractured their wrist three times
23 or something, you can have the best hand guy in
24 Charleston set it, and his wrist looks a little
25 funny, because there's this bone scar and callous

1 formation that occurs.

2 And once the nose is fractured, the
3 same kind of sequelae can transpire, in the sense
4 that they can -- if you get kicked in the shin real
5 hard, your shin doesn't break in two pieces, but
6 there's some, momentarily, little displacement,
7 tearing microfractures, that occur. So then you
8 have for, like, a month or two, you have a little
9 goose egg on your shin. And if you play college
10 soccer and that happens five times, some of that
11 can demineralize, so your shin's going to be kind
12 of irregular.

13 And it's the same thing with nasal
14 fractures. If you're a pretty gal and you've got
15 thin skin, you like your nose, you're not real
16 happy if you've got a bone scar. You know, so it's
17 not like -- just because it's non-displaced and not
18 open and stuff like that, doesn't make it good.

19 Q. Oh, no. And I guess meant -- that's
20 what I meant.

21 A. So it can have some morbidity
22 associated with it.

23 Q. I realize that question was
24 probably -- well, not a great one.

25 Because good, relative to if you can

1 have a stable bone pyramid versus an unstable one,
2 you prefer the stable bony pyramid. Is that
3 correct?

4 A. True.

5 Q. On this note, I mean, is it accurate to
6 characterize this, at least at this particular
7 time -- and I'm looking at the last paragraph,
8 where it says "it is unlikely, but possible, that
9 she may need open reduction of a nasal fracture. I
10 asked her to avoid any coagulants, avoid any heavy
11 nose-blowing, and use Afrin or oral decongestants
12 for her nasal obstruction. Wound care for her
13 abrasions was covered in detail."

14 Is it accurate to say when she left
15 your office after this visit that you weren't
16 recommending that she, you know, go have, you know,
17 go to the emergency room or seek other treatment,
18 it was -- she was in a condition where she could
19 come back in a week and then you could examine
20 further?

21 A. Yeah. I mean -- I mean, you know, when
22 a patient comes in, they have been subject to
23 trauma -- like, if you had a bone fracture today,
24 it's, like, an upsetting, like, whoa, what does
25 this mean, like, what's going to happen now? You

1 know, it's -- and -- and you don't have a crystal
2 ball.

3 If the fracture was just grossly
4 unstable and wobbling back and forth, then you
5 might as well tell the patient, hey, you're going
6 to need surgery. Okay? But then there is a lot of
7 other cases where you -- both you and the patient
8 are not really in the position to decide whether to
9 proceed with surgery.

10 I mean, you can live to be a hundred
11 with a pretty crooked nose and it'd just be stuffy
12 on one side; that's one choice. If, you know,
13 you're against the idea of surgery. Or you can be,
14 you know, kind of a Hollywood actress and you're
15 going to not get as many \$20 million movies if you
16 don't fix it. You know what I mean? So if
17 Jennifer Aniston had this fracture, you would fix
18 it, you know, you would definitely do something.

19 But other people -- you want to give
20 the patient -- patient participates in the
21 decision-making process about whether to do surgery
22 or not. And I can give them better guidance -- no
23 surgeon can make that assessment very accurately
24 when there's a lot of that soft tissue swelling
25 present.

1 The customary way of handling something
2 like this is to let some of that soft tissue
3 swelling go down and then ascertain the difference.
4 Because it can -- because as the swelling goes down
5 over the next few months and stuff, the fracture
6 can either become less evident or more evident.
7 The distortion of the symmetry of the bridge of the
8 nose can become better or worse. And
9 only-time-will-tell kind of thing.

10 So it's not -- it's not proper to make
11 that call.

12 Q. Sure.

13 A. Whenever possible, I try to avoid the
14 surgery. Some guys, like -- if you want to fill
15 your schedule, well, every fracture you could
16 justify taking them to the OR. But a lot of times
17 if the patient let's it settle down, we can do
18 some, like, postoperative manipulations by, like,
19 pushing on the bones, the way braces push on teeth,
20 or the way a leg extender can extend the bone.
21 There are some conservative ways of handling some
22 nasal fractures. It's simply dialogue with the
23 patient to decide what is best for them.

24 Q. Again, I think I understand exactly
25 what you're saying. I think my

1 question -- just -- hopefully will be clear. It
2 was really just more -- makes sense to me as a
3 layman, for sure, that in the immediate aftermath
4 of an event like this, there's going to be things
5 that no doctor could -- just as you mentioned, I
6 think, you need to sort of let, I guess,
7 inflammation die down, whatever it may be, so you
8 can see what is going on in there; and with your
9 patient, plan whatever care is needed or wanted.

10 I guess I'm talking about just more of
11 like from an emergency room type need for immediate
12 trauma care. It seemed to me that she didn't leave
13 your office on that day needing any more care for,
14 you know, like a concussion or for bleeding that
15 wouldn't stop or for things of that nature.

16 Am I right about that?

17 MR. GRUENLOH: Object to the form.

18 THE WITNESS: Right.

19 BY MR. HINES:

20 Q. Okay. Let me give you what I have
21 marked as Exhibit 2. For some reason --

22 MR. HINES: By the way, do you have
23 this?

24 MR. GRUENLOH: I'm sure I can find it.

25 MR. HINES: I had a hard time finding

1 my copy.

2 This can be off the record.

3 (Off-the-record discussion.)

4 BY MR. HINES:

5 Q. Dr. Funcik, do you have in front of you
6 now, the exhibit that's been marked as Exhibit 2?

7 A. Yes, I do.

8 Q. It's a note that's again just
9 like -- it's correct to call it a note, by the way?
10 Am I using the right terminology?

11 A. Yes. It says "patient note" on the
12 top.

13 Q. That's a clue. It says -- it indicates
14 6/blank/11? Meaning it doesn't specifically say
15 what day in June 2011. I think, and it's not
16 important enough to me to go ask you to look
17 through your chart or anything, I think it's
18 probably from 6/14, which is about a week after the
19 accident.

20 And the reason I say that is I can just
21 show you this form here that was completed on 6/14,
22 in someone's handwriting. I assume it's someone,
23 an assistant or support staff that you have. The
24 bottom line -- well, I think it's about a week
25 after the accident. And it looks like, the very

1 first sentence, it indicates "Rosemary comes back
2 for reevaluation."

3 A. Okay. So, you know, I understand that
4 in a perfect world the exact day of that visit
5 would be stated there.

6 Q. Sure. I'm not getting at that.

7 A. It's not. It's blank. So the
8 bottom -- what do you want me to answer? I am
9 answering what?

10 Q. My question is really -- I made it way
11 too complicated.

12 It looks like, to me, that note is
13 reflective on this, it took place on June 14th of
14 '11.

15 A. Right. And in my handwriting, I wrote
16 June 13th. So it's within a day or two.

17 Q. Only point I'm trying to make is, is
18 this approximately a week after the accident, her
19 first visit for your reevaluation?

20 A. I agree.

21 Q. It says on there: With respect to her
22 nasal fracture, it seems to be progressing nicely.

23 Can you just explain to me what that
24 means?

25 A. Well, meaning that the skin is growing

1 back where the top layer of the skin was broken
2 off. Some of the soft tissue swelling that we
3 talked about above the bone of the bony pyramid has
4 diminished. As it diminished, it hasn't unveiled
5 any radical displacement of the bone.

6 And what I usually do at that point,
7 like, I wrote "as expected, there is some
8 tenderness and swelling in the right paranasal
9 area."

10 You know, when most nose job docs, you
11 know, guys, physicians who do a lot of rhinoplasty,
12 we usually don't mess with CAT scans and x-rays and
13 stuff like that if it's just a nasal fracture.
14 What we do is, is we examine that area by
15 inspection and palpation. And you can't
16 really -- you don't have x-ray vision, you can't
17 really see through the skin to ascertain the status
18 of the bone.

19 And the most clinically useful
20 way -- in most cases, the most clinically useful
21 way of assessing the status of the bone is just to
22 grab the nose and push on it, you know, to see
23 where it's most tender and see how much it moves.

24 Even an intact nose like this
25 (indicating), you can push hard and get a little

1 bit of a wiggle out of it. But sometimes you hear
2 a little crack or you see the patient withdraw and
3 stuff, and you assess it like that.

4 Q. So that would be the way that you would
5 examine a patient right there in your office.

6 It looks like, in this case, you also
7 did have the benefit of some imaging that was done
8 through Nason Medical Center?

9 A. Right.

10 Q. And the result of that, correct me if
11 I'm wrong, is that the imaging indicated that she
12 had a nondisplaced or minimally displaced nasal
13 fracture?

14 A. Correct.

15 Q. Correct?

16 A. Correct.

17 Q. And as I continue on down the page, it
18 looks like that that left her some options. There
19 was what seems to be called a conservative option
20 versus a surgical intervention.

21 Is that correct?

22 A. Uh-huh.

23 Q. And there's this line here that says:
24 If she were my wife, because it is minimally
25 displaced, I would allow it to just simply heal for

1 about six weeks and then perform some b.i.d.
2 digital massage to try to make it as smooth as
3 possible.

4 Do you see that there?

5 A. Yes.

6 Q. Am I right that b.i.d. means twice a
7 day?

8 A. Correct.

9 Q. And digital massages would
10 mean -- would it mean hand, with someone's hand?

11 A. Correct.

12 Q. Would that be massages performed by --

13 A. By her. The patient.

14 Q. -- the patient?

15 And, well, let me -- I can tell you the
16 way -- my interpretation, or when I say, if she
17 were my wife, it seems to me that as -- well, some
18 indication there that you would have a preference
19 for that conservative course. That's not to say
20 that the surgical intervention was out of bounds,
21 but that's obviously the options y'all discussed.

22 But can you explain to me, one, if I'm
23 right, there's a preference expressed there for the
24 conservative treatment, and why that is?

25 A. Well, the conservative treatment is

1 because it just costs the patient less money. You
2 know, really the way I've practiced forever, for
3 20 years, I've never treated a patient -- what I
4 wouldn't do if they were -- you know what I mean?
5 I just really care about my patients and I always
6 try to do what's right for them.

7 Sometimes I'll put that in
8 there -- sometimes I'll explain that to the
9 patients that -- in case I don't get a vibe that
10 the patient is really comfortable with me,
11 sometimes I'll express that to the patient.
12 Sometimes I'll -- if there's judgment, and
13 sometimes it also -- the reason I'll put that in
14 there, sometimes, is because in any case -- like,
15 let's say a year later I treat someone I managed
16 conservatively and it's a little bit crooked and
17 they're mad at me. I want to document the
18 fact that, like I just said, I treat patients like
19 my family. I consider my patients my family.

20 So I put that in there so that if it
21 ever gets called into question, like she says, my
22 nose is crooked and if you would have fixed it then
23 doctor so-and-so, who is this nincompoop competitor
24 down the street, a new plastic surgeon, says, you
25 fractured it and you didn't set it?

1 Do you see?

2 I try to do it, like, the least -- you
3 know, because you can have an accident on the way
4 to the surgery center, and if you have good
5 insurance, it costs you your deductible and stuff.
6 And so, you know, you try -- I make my living doing
7 surgery, but I try to avoid surgery, when it's
8 reasonable to do so.

9 Q. And I'm not trying to seize upon -- the
10 way I understand "if she were my wife," is just
11 another way of saying, considering the options that
12 are available and thinking about them as I would
13 think about them for someone that's, you know,
14 important to me, that I care about, whether it's
15 any patient or my wife, whom I would care about,
16 because I do all of them -- I'm really getting to
17 just the idea of what seemed to be a preference of,
18 you know, to some degree or another, of the
19 conservative option and why that is a clinical
20 matter or your judgment was -- had some appeal.

21 So am I correct that, at least in this
22 note, you were indicating that the conservative
23 option was appealing to you?

24 A. Correct.

25 Q. And I guess --

1 A. At that time, I guess is -- if this
2 answers your question. I mean, my hope for her
3 would be that since it had been approved -- and
4 first of all, I don't have a crystal ball. I
5 didn't know how it would settle. My hope for her
6 was she would come back in in six weeks and both of
7 us would say, holy mackerel, it looks so good, you
8 don't need anything; oh, man this looks great.
9 That's kind of what -- you know, that's why we left
10 that option on the table. That's what we were
11 probably both hoping for.

12 Q. Go to the next one. This is Exhibit 3,
13 Dr. Funcik.

14 Dr. Funcik this is the next exhibit,
15 Defendants' Exhibit 3. It's another note. This
16 one is the -- well, I believe it's, sequentially,
17 the next time that you would have seen
18 Ms. Connelly, and it's from July 12, 2011.

19 We both looking at the same thing?

20 A. Correct. And could we do that thing
21 again here, where I read this note and push the
22 pause button for a second?

23 Q. Certainly.

24 A. Okay. I think we're good to go. I
25 read it quickly.

1 Q. This one, it looks like to me -- maybe
2 another way to go about this is to ask you whether
3 I'm correctly interpreting this or not.

4 It indicates "she returns today -- and
5 I'm reading the second paragraph -- reporting she
6 notices swelling and prominence on the right side
7 where the fracture occurred, along with some
8 intermittent nasal bleeding and some nasal
9 obstruction on the right side. Examination reveals
10 this to be consistent with a previous history of
11 trauma. She has some soft tissue and" -- well --

12 A. Subperiosteal. Underneath the coating,
13 the leathery, waxy coating that is glued down to
14 the bone, that has blood vessels and nerves in it.

15 If your dog has a bone, it feels like a
16 rock, you know, just like wood and rock or
17 something. Whereas you cut down on a ham bone, you
18 don't get down to that bone, you run into this
19 waxy, white membrane. That's called periosteum,
20 around the bone. That's what periosteum is.

21 Q. Thank you.

22 A. It can tear, it can swell. It can,
23 like, hemorrhage and have edema underneath it and
24 stuff.

25 Q. Thank you for that. I needed some

1 help. In addition to not knowing what it meant, I
2 certainly needed help with the pronunciation.

3 It continues: Swelling, as well as
4 some palpable bony deformities of the upper dorsum.

5 And then it continues in the assessment
6 and recommendation part, where it says: I would
7 recommend proceeding with open reduction of nasal
8 fracture.

9 And it seems like, at this point,
10 obviously, that, you know, as your recommendation
11 states, that your recommendation is to go ahead and
12 proceed with the open reduction.

13 Can you explain to me why, at this
14 point, that -- why that became your recommendation?

15 A. Honestly, I mean, because -- let me see
16 if I can get this right.

17 First of all, I want to say that at
18 this point -- so she had the nasal fracture, I see
19 her right away, because she's all -- actually
20 upset. And I see her a week later, it settles down
21 and I sort of explain to her the options about just
22 watching it versus waiting a year and fixing it
23 versus fixing it right away, versus waiting six
24 weeks. All of those are reasonable, you
25 know -- those are all acceptable options available

1 to the patient.

2 But the gist of it, like if a patient
3 like this comes in, I don't say, oh, my God, you
4 must fix this, you're an ugly -- because your nose
5 is crooked. You know what I mean? At this point,
6 you know, come in, how you doing? She
7 probably -- I don't specifically recall this, but
8 she probably said something along the line of,
9 well, it's still a little sore and it looks a
10 little crooked.

11 Unequivocally, when you have this
12 magnitude of nasal trauma, you can see, you know,
13 an irregularity there. And, you know, she's a
14 pretty gal and she could live to be a hundred. But
15 the main impetus -- I don't twist peoples arms to
16 do surgery. But the main impetus, when she said,
17 hey, not only is it sore, but it's crooked, it
18 sticks out and it bothers me. I felt it and I felt
19 some structural irregularity in the bone. And so
20 it was, like, it's her call, it was her inclination
21 to go ahead and proceed.

22 And I don't remember, like, anything
23 about, like -- like, I don't even -- like I said, I
24 sort of disassociate myself with whether there's
25 litigation or anything like that, if that's where

1 we're going with that. I shouldn't be putting
2 thoughts into your mind. But, like, litigation --
3 if her own daughter accidentally elbowed her, I
4 would have done the same, you know.

5 Q. Is it accurate to say that, you know,
6 what -- that's good enough. I'll leave it alone.
7 I'll stop that question in the middle of it and
8 move on to the next note.

9 This one is marked as Exhibit 4, and
10 it's from August 9th of 2011. If you'd like a
11 moment to take a look at it, please do.

12 A. I'm ready when you are.

13 Q. Let me clarify we're looking at the
14 same thing. It's the note from August 9, 2011,
15 marked as Defendant's 4.

16 We're both looking at that?

17 A. Yes.

18 Q. Thank you. This one is: Ms. Connelly
19 is in for a preoperative visit. It recites that
20 she fractured her nose a short time ago.

21 And then it reads: In addition to
22 reducing the fracture, she wants to have some
23 refinements. We plan to take -- we plan to take
24 the hump down, narrow her tip, and elevate the
25 nasal tip.

1 And about that, I wanted to ask you. I
2 mean, am I correct in understanding that there are
3 some -- there was a surgical intervention -- let me
4 just use term "surgery," that was to be performed
5 in terms of the open reduction of the nasal bone or
6 the nasal fracture that was needed because of
7 trauma?

8 And then there appears to be, in terms
9 of refinements, am I correct in understanding that
10 refinements would be not necessitated by the trauma
11 of the fall, but something that could also be done
12 at the same time, because you're already operating
13 in that area of the body?

14 A. Correct.

15 Q. Okay. So really what I'm trying to
16 make sure of when we're talking about refinements,
17 that doesn't -- those wouldn't have anything to do
18 with the fall?

19 A. Correct.

20 Q. Dr. Funcik, let me hand you now what
21 I've marked as Exhibit 6.

22 A. If we're not going back to these, can I
23 give you these back? You want me to hold on to
24 these, 1 through 4?

25 Q. Hold on to them, just in case. If it's

1 causing you an issue, I'll hold on to them.

2 THE WITNESS: Can we take a break?

3 MR. HINES: Sure.

4 (A recess transpired.)

5 BY MR. HINES:

6 Q. Thank you. This one -- we are now on
7 Exhibit 6?

8 A. Exhibit 6.

9 Q. Thank you. This is the
10 August 24th, 2011, operative report for
11 Ms. Connelly. Is that right?

12 A. Correct.

13 Q. Thank you. You note in here the
14 preoperative diagnosis is the same as the
15 postoperative diagnosis. Correct?

16 A. Correct.

17 Q. I assume, just as a quick aside,
18 that -- well, many times, limited as you are in
19 your ability to see things before you
20 operate -- I'm not talking about Ms. Connelly, but
21 in some other case you might -- once you have the
22 opportunity to actually be performing surgery, you
23 might see something that wasn't capable of being
24 seen before and, therefore, you could have a
25 difference between those?

1 A. That's true.

2 Q. But in this case, you know, what you
3 expected to find was -- well, is it correct to say
4 what you expected to find is what you found?

5 Would you say there was no change
6 postoperative?

7 A. Yeah. Like, no significant change
8 worthy of changing that little
9 thing -- description.

10 Q. And thank you. Well -- let me ask you
11 this. This is -- and I was just asking you about
12 refinements, and now here's where I want to make
13 sure I understand the distinction between a
14 procedure that was needed because of trauma from
15 the fall and something that was not needed because
16 of trauma from the fall.

17 Understanding that it seems to make
18 sense that if you're having a surgical procedure in
19 the same area where you may have some reason or
20 another to want refinement or something unrelated,
21 makes sense that it can -- could all be done at the
22 same time.

23 But what I want to try to do is to
24 separate what's related to the fall and what's not.
25 And so could you go through the diagnosis here,

1 which is nasal fracture, external nasal deformity,
2 nasal obstruction secondary to nasal septal
3 deviation and bilateral inferior turbinate
4 hypertrophy, and tell me --

5 A. Sort of, translate that into lay terms?

6 Q. I'm looking, if I can, to get two
7 categories. The trauma related, and something that
8 was -- could -- I don't know if the word "elective"
9 is correct. But something that was not
10 necessitated or needed because of the fall.

11 A. Okay. So among that diagnosis, I would
12 separate, like, in columns. Number one would be
13 nasal fracture. That was entirely due to the fall.
14 Number two would be external nasal deformity. And
15 that would be a combined thing, in the sense that
16 the nasal fracture, you know, contributed to some
17 bulging and unesthetic asymmetry of the dorsum.
18 But she also kind of had a preexisting hump there.
19 So the external nasal deformity was -- would be in
20 the category of both.

21 Now the next category, says: Nasal
22 obstruction secondary to nasal septal deviation.
23 That would also be both.

24 In theory, a nasal septum is perfectly
25 straight, like the top of a grand piano. Nobody's

1 septum is like that. Everybody's septum has a
2 little bit of natural curvature, secondary to
3 development or trauma, you know, childhood trauma,
4 whatever, that septum can become progressively more
5 deviated. And when there is a fracture, that does
6 put some tension on the septum as well and it can
7 be exacerbated. And then even at six weeks,
8 whatever she is, a couple months out, you would
9 still expect a little bit of swelling.

10 So, you know, she probably had some
11 preexisting septal deformity to some extent, but
12 the fracture did not help it. There's no way that
13 breaking -- you know, if you got a nose that's a
14 little bit crooked, unless you're one in a million,
15 luckiest guy in the world, it's going to make it a
16 little worse.

17 And then the turbinate hypertrophy,
18 that's a different deal. I would call that, like,
19 preexisting. I didn't define that, but I can if
20 you want me to. It just -- that was developmental.
21 That had nothing to do with the trauma.

22 Q. Let me just ask you about the septal
23 deviation, make sure I understand it. You're not
24 measuring a change in the septum from, you know,
25 basically from like a baseline before the accident

1 and a baseline after, or are you?

2 A. Not. I mean, it's just not -- well,
3 you know, I'll say for clarity, honestly, like,
4 nobody's septum is straight. You know, very few
5 people say, oh, my nose breathes perfect, I never
6 have trouble breathing, I never snore, I never have
7 to sneeze when I'm putting on an old sweater or
8 mowing the lawn, you know, even without a cold.

9 But I can't recall any idea that she
10 ever complained about her nasal fracture. But most
11 of the thing -- I trained in ear, nose, and throat
12 before I trained in facial plastic surgery. And
13 it's pretty common for somebody to come in and want
14 their nasal hump removed, for cosmetic rhinoplasty,
15 because they have a nasal hump or tip. And when I
16 look in there, their septum is somewhat crooked.
17 So by all means, we take advantage, just like we
18 did, and combine that opportunity. And I'll
19 straighten this, I'll do a good ENT job on her
20 septum. And you know -- and I never had occasion
21 to properly examine her septum, even before.

22 And to really properly examine a
23 septum, you'd have to shrink up the mucosa by
24 putting Afrin in there and let it wait. And I
25 usually don't bother doing that before I do nasal

1 surgery, because I know no matter how crooked the
2 septum is, I know I can fix it, so I don't want to
3 put the patient through that thing of having to
4 wait 15 minutes with Afrin in there and look inside
5 and stuff like that and do that comprehensive exam.

6 In the OR we use a combination of
7 cocaine and lidocaine to intensely vasoconstrict so
8 I can see everything. You know, like, I can
9 stretch your nose open, I can see in there. Like
10 if you're doing colonoscopy, you can see things you
11 can't see if you don't sedate the person.

12 Q. Can you tell me if I'm understanding
13 this right? What I understand from that is that
14 when you're already performing an open reduction,
15 you know, with respect to that nasal fracture, when
16 you're in there doing that if you notice septal
17 deviation, that it only makes sense -- obviously,
18 with the patient's informed consent -- I mean, it
19 would only make sense to address that issue
20 surgically while you're right there and you're able
21 to view the area and perform, you know, a surgical
22 intervention on the functional septoplasty, I
23 guess, sort of what it's called here?

24 A. Uh-huh.

25 Q. I'm sorry. Is that a yes or no?

1 You want me to ask a better question?

2 A. Yeah. I lost you.

3 Q. That's fair enough. You're talking to
4 somebody -- you know, this is analytical -- or
5 intellectual equivalent, and certainly with no
6 disrespect to your expertise, like a knife at a
7 gunfight. Thank you for bearing with me. Okay?

8 A. It is. In all honesty, people -- you
9 know, everybody has got a nose, but people don't
10 know what's going on there.

11 Q. What I'm really -- but I think what I'm
12 really most interested in getting at is, is are you
13 able to say, you know, how her septum changed on
14 account of the accident?

15 A. Well -- okay. I'm -- probably not that
16 much. Okay? Probably not that much. And what I
17 mean by that is, is so the nose, the structure of
18 the nose, the bony part of the nose, it's like an
19 A-framed house. And then the upper part, the inner
20 part, you have like a center support wall and then
21 these two sloping roofs. Okay? Like an A-framed,
22 you know, ski chalet. And in a devastating nasal
23 fracture, from a baseball bat, then all of that
24 bone that encompasses the roof, which is the bony
25 pyramid we were talking about, as well as the

1 center support wall, can be greatly comminuted,
2 broken up into pieces and pushed out of position.

3 Okay?

4 But in this case, her fracture was on
5 the more exposed, superficial, leading edge of
6 bone, the bony pyramid where your eyeglasses rest,
7 that's where the bulk of the fracture, the bulk of
8 the cracks in her bone were limited to. And so I
9 would probably say that the bulk of the septal
10 deviation was probably, mostly attributable to,
11 like, congenital, stuff like that.

12 In other words, her septum, you know,
13 to the best of my knowledge or the best I can say,
14 was not, like, whacked way out of place when she
15 fell.

16 Q. And just briefly to continue on that
17 point. Am I correct in understanding that -- it
18 just sounds like -- you're not saying that -- let's
19 say that she didn't fall at all, that she didn't
20 have that issue. You're not saying that she would
21 have needed -- it sounds like -- you're not saying
22 that the fall required her to have functional
23 septoplasty?

24 Maybe I can try again.

25 A. Can I try something? I'm trying to

1 help. I really don't have a dog in this fight, you
2 know what I mean? But can I say -- if this answers
3 what you're getting at. I bet you 10 bucks -- you
4 know, I can't swear on it, but I bet you 10 bucks
5 that if -- if she hadn't fallen, she probably
6 wouldn't have a septoplasty at this time.

7 Q. Okay.

8 A. Does that answer?

9 Q. I think that's -- for now, I think
10 I'm -- I can move on.

11 Let me see where I am at or missed.

12 Oh. Also, let me ask you about this surgical
13 procedure. I have not seen anything to indicate
14 anything out of the ordinary, so -- but just
15 basically what I'm saying is, is let me know if I'm
16 wrong.

17 It seems that this would be what you
18 would call a successful surgery and no -- you know,
19 without any complication of note.

20 Am I right about that?

21 A. Correct.

22 Q. And so the outcome was -- well, it was
23 a good surgical outcome. Is that correct?

24 A. Correct.

25 Q. And I'm not sure that I see when the

1 next time -- can you look at your chart,

2 Dr. Funcik, and let me know --

3 A. Yeah. We put a cast on the nose. And
4 so I always see them -- you know, it's almost
5 always on day 7 when we take the cast off. I have
6 to take the cast off myself. It could be day 6, it
7 could be day 8 or something like that, but it's
8 almost always day 7. Yeah, 8/31.

9 Is that a trick question or something?

10 Q. It wasn't intended to be. What I want
11 to know -- so the next time you saw her, after the
12 surgery, was 8/31 of 2011?

13 A. Correct.

14 Q. Am I correct in understanding that at
15 that time, essentially, it was -- it was not a
16 noteworthy --

17 A. Postoperative visit.

18 Q. -- postoperative visit? You saw what
19 you expected, and again, as we just talked about,
20 there was no noteworthy complication or problem
21 with the surgery. And then so --

22 Is that all correct?

23 A. Correct.

24 Q. And going forward from 8/31, can you
25 tell me when is the next time you saw --

1 A. As would be typical, I wrote a note
2 which is really close to two weeks, or right at two
3 weeks. I said: Progress, swollen as expected.

4 And then -- I keep going?

5 Q. Was that the next note, was that
6 September?

7 A. 9/20. Uh-huh. "Quite swollen, but no
8 problems. Please recheck one month."

9 What goes on with any nose job, if you
10 do just a no-fracture, normal skin, whatever, if
11 you just do a nose job, like one of you guys, it
12 takes almost a year to make a nose in your mom's
13 uterus, it takes a year to remake one.

14 And if you do just a normal nose job,
15 if you were to take a picture once a month for
16 12 months after that nose job, you could shuffle
17 that -- those 12 pictures up and easily, like, put
18 the first 9 months in order. Because, you know, a
19 myriad of things; there is so many layers of soft
20 tissue swelling, fibrosis, the cartilage settles in
21 more, the bone heals, some of the periosteum
22 swelling goes down, some extra calcium might get
23 deposited here or there.

24 And when a person has relatively
25 thicker skin on their nose, like she does -- it

1 always takes longer if a person has, like, super
2 thick skin. And so I have had to do a lot of
3 hand-holding.

4 What typically happens is, is the
5 bandage comes off and they are so gleeful to get
6 the bandage off and the fact that it pretty much
7 looks like a nose, they love me. And then at six
8 weeks, they sleep on the left side and their
9 girlfriend says, I don't see much difference, and
10 it's a little bit irregular and stuff. And they
11 start worrying. And I tell them about this before.
12 I tell them about -- I just go through it with
13 them. So really, that all looks kind of, you know,
14 straightforward and routine, those visits that we
15 just reviewed.

16 Q. Thank you. I'm skipping over, at least
17 for the time being, maybe entirely, but what I had
18 already marked before. In the interest of time, I
19 marked a number of exhibits. Sometimes I do it
20 just going along. In any event, that's the reason
21 why I'm bypassing 7, and giving you 8.

22 And Dr. Funcik --

23 A. Can I read it?

24 Q. Of course. Yes, sir.

25 A. Ready when you are.

1 Q. Looking at Exhibit 8, patient note from
2 May 8, 2013?

3 A. Correct.

4 Q. This one -- well, where I want to pick
5 up is the second sentence, she mentioned that she
6 has had hyposmia since her injury.

7 What is hyposmia?

8 A. Diminished acuity of the sense of
9 smell.

10 Q. Let me ask you this -- you can
11 certainly refer to your chart if you need to do it.
12 But is this the first time that she has mentioned
13 to you an issue with her sense of smell?

14 A. It probably was. Because, you know,
15 when, you know, when somebody presents with a
16 nasal -- like they have a cold, they have got a
17 sinus infection, they have got a nasal fracture,
18 they've got other distracting symptoms, so
19 they -- no one has ever, ever come to me in a
20 thousand nasal fractures and said, you know, I
21 can't tell -- smell the difference between a
22 cabernet or merlot or between a lemon and
23 butterscotch. You know what I mean? Because
24 you're kind of stuffy and stuff.

25 A lot of times people, after

1 septoplasty or rhinoplasty, will complain of
2 dysosmia, which is an unpleasant smell. Because we
3 put some sutures in there that are called catgut
4 sutures, and they're actually made of sheep
5 intestine. And so as that decomposes and some
6 bacteria develop around there, they'll complain of
7 a bad sense of smell or a scent of a bad smell and
8 stuff like that.

9 And I mean, it's really -- I can't -- I
10 can't -- I'm not saying I can't say it's never
11 happened, but I can't think of a case where
12 anybody's, like, even mentioned after a nose job or
13 whatever and said I can't smell or something. That
14 would be -- that would be sort of an
15 attention-getter, you know? So she brought it up,
16 I suppose that's why I put it in there.

17 Q. And that's what -- I think -- just to
18 make sure I've got this right. Because what I'm
19 trying to identify, and obviously, as this note
20 mentions, that she's seeing ENTs, so it's not like
21 you're the only doctor she's seeing.

22 You're outside -- you are a ENT, double
23 board-certified. But you're referring to another
24 practice that she's seeing. Correct?

25 A. Correct.

1 Q. And so -- but just in terms of her
2 care/treatment with you, I mean, to the best of
3 your knowledge, this visit would have been the
4 first time she mentioned her -- any issue with her
5 sense of smell?

6 A. To me?

7 Q. To you. Yes, sir.

8 A. Yeah.

9 Q. And by that, I mean, of course --

10 A. Correct.

11 Q. Thank you.

12 And to include broadly, I mean anyone
13 in your office, like a nurse or someone like
14 that -- what I mean is, is I guess I mean to say,
15 there's no -- I'm not aware of any record where she
16 sought treatment or any -- brought to your
17 attention any condition involving her
18 smell -- sense of smell, prior to this date.

19 A. In my office?

20 Q. Yes, sir.

21 A. That's true.

22 Q. Now, it's noted on here: When I saw
23 her, it was a couple days after her injury and she
24 denied loss of consciousness.

25 Can you tell me why that, well, was of

1 significance to you, in terms of why it was
2 something you noted?

3 A. You know, when I -- that's a difficult
4 question for me to answer, because when I -- you
5 know, when we read this note -- you know, these
6 notes -- typically, you know, I'll sit there every
7 four days and I'll have a marathon dictation
8 session. And I have got a stack there and it's
9 7:30 and I haven't had dinner, you know, so I crank
10 through it. And then when I sign these, I
11 don't -- I don't, you know, read every word like I
12 would have if I was sending out a business letter
13 or something like that, or reading a pertinent part
14 of a contract or something like that.

15 Q. And let me just --

16 A. So I don't -- I don't know why I put
17 that in there. I mean, it seems true. I think
18 it's consistent with what I said.

19 Q. And Doctor, I don't mean to interrupt
20 you --

21 A. But I certainly didn't, like, put in
22 there -- you know.

23 Q. I don't mean to interrupt you. I
24 just -- I do want to make it clear. Please don't
25 think my question implies in any way critical of

1 you. I'll tell you candidly, that's not my point.

2 I guess maybe a better way of saying it
3 is, is there a clinical significance there, that
4 you're aware of, to that note?

5 A. Not any great clinical significance.
6 Maybe what I was getting at, you know -- I mean, I
7 would have to really, like -- like, I don't know if
8 conjecture is the right word, but I would have to
9 kind of, like, think about, like, what I was
10 thinking.

11 Q. Sure.

12 A. And I guess if I could say anything
13 there, it would be, like, holy crap, if she has
14 hyposmia then maybe her injury was significant
15 enough to shear her olfactory fibers. It takes a
16 pretty good -- it can happen from a fall without,
17 you know -- but that's a pretty good bang.

18 I mean, maybe that's kind of
19 what -- you know, maybe that's what propelled me to
20 say that at that time. But I honestly cannot say
21 with a lot of specificity, other than that, you
22 know.

23 Honestly, when I read through it the
24 first time, I went over it and I said, the only
25 thing I can think of is, holy mackerel, she banged

1 herself pretty good. That's probably what I was
2 thinking.

3 Q. And if I continue on down the page,
4 there's a part where it says: Using an artificial
5 skull as a teaching aid, I explained to Rosemary
6 the anatomy of the cribriform plate and explained
7 how a frontal injury may sometimes result in some
8 disruption in some of the branches of the olfactory
9 nerve.

10 A. Okay.

11 Q. So on that point, candidly, you may
12 have done a nice job of getting, really, to my
13 point, which is, am I correct in understanding that
14 you're not offering an expert opinion that any
15 issue with her loss of smell was caused by the
16 fall?

17 MR. GRUENLOH: Object to the form.

18 THE WITNESS: How about -- how about
19 repeating that?

20 BY MR. HINES:

21 Q. Sure. Let me ask it like this. In a
22 lawsuit -- you obviously treated Ms. Connelly. In
23 the course of a lawsuit, if an expert witness is
24 going to take the witness stand and offer an expert
25 opinion as to -- as to something, then I'm not

1 sure -- are you familiar with, like, the standard
2 for medical expert testimony?

3 You know, I'll tell you -- for
4 instance, if you would ask a doctor -- you may have
5 been asked this in a deposition before, or not.

6 But Doctor, can you say, to a
7 reasonable degree of medical certainty, in your
8 profession, that -- maybe let me say it like this.

9 You used the word "conjecture" a little
10 while ago. You are saying, maybe that's why I
11 mentioned that. Other than just, sort of, that,
12 you know, conjecture, but just sort of speculating
13 about a possible relationship between the fall and,
14 you know, frontal injury that you note there -- I
15 mean, I don't understand you going any farther than
16 that, and saying, this is an expert opinion that I
17 would give to a court and a jury to evaluate.

18 MR. GRUENLOH: Object to the form.

19 THE WITNESS: All right. I might
20 try -- I might try to go on record of saying
21 something, just to the best of my ability, like, to
22 shed some light or truth on this, you know.

23 Like I said, I don't have a dog in this
24 fight, really.

25 I mean, hyposmia or anosmia, lack of

1 smell or loss of smell, it occurs, it's just not
2 that common. You know? I have seen a
3 hundred-thousand nasal fractures, sort of, back in
4 the day, you know, treating -- cut out a hundred
5 voice boxes for cancer, treated ten thousand skin
6 cancers, things like that. But I don't think
7 anybody -- you know, unless you're at some tertiary
8 care center that has treated 500 cases of
9 anosmia -- it just doesn't occur. People don't
10 have tons of experience with it. It's just not
11 that common. It's less common than a melanoma. So
12 somebody has like a whole -- say in this case,
13 we'll do this test and we'll show you'll have a
14 70 percent recovery. It's hard to measure. It's
15 subjective and stuff like that.

16 And, you know, I passed my boards in
17 ENT first time and stuff. But I remember when I
18 was at the Medical University, in the ENT clinic,
19 we had an anosmia test, which, you know, may be
20 coffee versus vanilla. And then you have some
21 ammonia in there. And if a guy is malingerer, he
22 says, I can't smell the ammonia. Because the
23 ammonia is a different nerve, because it is a
24 sensory nerve instead of an olfactory nerve, you
25 know.

1 And I read a consult note from
2 Tom Dozier, he's a guy with Charleston ENT. So I'm
3 not in that practice, but I have operating
4 privileges there. I know those guys. The guy who
5 runs it, Ed McNellis, was my junior resident. And
6 Tom Dozier rotated here when he was an ENT resident
7 and stuff.

8 And I have no question of his integrity
9 and stuff. And he's a sharp guy and stuff. And I
10 saw now he has some kind of kit to test. Well, we
11 had a little cigar box that had a little bit of
12 coffee in there that was probably in there for
13 20 years. That's is what we had at MUSC to do
14 anosmia. And now he has some kind of 10-step
15 thing. I was kind of like, wow.

16 So evidently, over the years, they have
17 come up with a more -- you know, this test that he
18 had was more modern and sophisticated and
19 comprehensive. That wasn't available to me when I
20 did that training. And honestly, I have never had
21 occasion to have to test somebody, you know, for
22 that for 20 years.

23 But -- and so he is -- I have -- I
24 don't even want to go on whether she has anosmia or
25 hyposmia. I don't even want to go on

1 whether -- you know, what I mean? I'm not set up
2 to test that. I don't have a lot of experience
3 with the stuff. I kind of understand the principle
4 of the test, you know. And honestly, in my
5 practice, in my experience, the more common cause
6 of anosmia or hyposmia would be if you were doing
7 sinus surgery and you were way up in the nose and
8 they had polyps and their anatomy was distorted by
9 previous surgeries and stuff. If you go up too
10 far, if you crunch that bone -- this happened to my
11 fellow resident -- if you crunch that bone, you can
12 cause disruption of some of those fibers and then
13 you have a brain fluid leak, you know, associated
14 with that. Okay.

15 But the mechanism of hyposmia from a
16 frontal lobe is you have the sudden deceleration of
17 the head when you bang your head on the front and
18 the brain keeps going. There's these delicate
19 little nerve fibers that go through this little
20 cheese grater, and those fibers aren't as strong
21 because they're small, and then some of those
22 shear. So I would have to defer to Tom.

23 And what I can say is, is if she does
24 have a hyposmia or anosmia, it's not, like, from
25 her rhinoplasty or not from, you know, a tumor. I

1 saw they did an MRI to rule out tumor and stuff.

2 The only thing I can possibly think
3 that her hyposmia can possibly be due to is this
4 event. I didn't witness the event. You know,
5 maybe her husband hit her. I don't know what
6 happened. Maybe she was drunk and she fell off of
7 a -- you know? I didn't have any reason to doubt,
8 you know, what she said or -- I don't know if there
9 was a sawhorse at a curb. But I just --

10 If Tom Dozier, his test says she has
11 hyposmia, I believe she has it. And if -- and the
12 only thing -- only scenario I can come up with is
13 that it came from the fall.

14 BY MR. HINES:

15 Q. Let me see -- I can appreciate that.
16 Let me try to break this down a little bit.

17 A. I don't know if that helped or hurt. I
18 was trying to help.

19 Q. It helped me understand where you're
20 coming from. Really what I want, I'm trying to get
21 at is, is Ms. Connelly, in this case, among the
22 things that she's claiming, she specifically -- I'm
23 not talking about the broken nose or, you know,
24 pain of that -- I'm saying, specifically, she's
25 indicated that the fall caused her to lose, either

1 to a significant degree or entirely, her sense of
2 smell. And there is also a diminished sense of
3 taste. She's -- her contention is that those were
4 caused by this fall.

5 And what I want to -- if a medical
6 doctor is going to take the witness stand in this
7 case, you know, and swear to a jury that I have,
8 based upon, you know, my examination of all the of
9 the relevant matters and, you know, I'm prepared to
10 offer an opinion, to a reasonable degree of medical
11 certainty, the sense of smell and taste issues that
12 she's complaining of were most probably, caused by
13 the fall.

14 I mean, honestly what I'm hoping to do
15 is to short circuit my questions to you is, is for
16 you to agree you're not prepared to offer that
17 testimony. If you are, then I need to ask you some
18 more questions about how that is.

19 But I'm not talking about, like, an
20 opinion that would be sort of informal. I mean one
21 that is formal, that you intend to be presenting to
22 a jury to decide. Because it sounded to me as if
23 you would be -- you would be simply deferring to
24 other ENTs, like Dr. Dozier or Hester, to offer an
25 opinion on that.

1 MR. GRUENLOH: Object to the form.

2 BY MR. HINES:

3 Q. What I mean to say -- I'll add this to
4 it, too. I'm trying to get to the point that you
5 will be offering an opinion, one way or the
6 another, not saying it was caused by, not saying it
7 wasn't caused by; that's something I'm not
8 intending to address with expert testimony.

9 And I'm talking specifically about the
10 relationship between the claimed loss of smell and
11 taste, and the fall.

12 MR. GRUENLOH: Object to the form.

13 THE WITNESS: Is it valid that it could
14 kind of make sense that while you have a hard time
15 pronouncing periosteum and cribriform plate, that I
16 might have in following that question --

17 BY MR. HINES:

18 Q. Of course, it is.

19 A. -- being just a literal guy?

20 And so I'm going to try to, like, state
21 what's, like, in my heart and in my mind on this.

22 Q. Sure.

23 A. I really don't doubt just -- and now
24 I'm speaking also like -- I am not a specialist in
25 anosmia or hyposmia. I just am not. I just told

1 you I haven't done one of those smell tests for
2 20 years; that the smell test we had 20 years ago
3 was primitive compared to what is going on now and
4 stuff. And so I am not qualified to say whether
5 she has anosmia or hyposmia.

6 But, you know, I did tutor people on
7 the cranial nerves, and I got highest honors in
8 head and neck anatomy. I am board-certified in
9 ENT. I do operate on a lot of noses, more than
10 any -- I have a more close attachment to it than a
11 hundred other specialties, such as cardiology,
12 urology, gynecology. I'm not a nincompoop when it
13 comes to that.

14 And in this whole scenario, if she
15 does -- and I'm just not even -- I have no idea
16 whether she has anosmia or hyposmia or not. But if
17 she does, I just can't imagine that the scenario
18 that is described of her falling on the front of
19 her face is a -- I can say from my knowledge of
20 anatomy and experiences as an ENT that -- even if
21 it does mean we have to stay here all night, you
22 asking me questions, if that's what it takes,
23 that's what it takes.

24 The mechanism of injury is compatible.
25 It's -- pretty much if you want to get anosmia, you

1 bang your head on the front of the -- either stick
2 something up there, like a tumor or gauze, or you
3 bang your head forward. And I believe -- I mean, I
4 can say with -- like, I'm very comfortable with
5 saying that she banged her head forward. And
6 there's nothing else in this, not her surgery or
7 any surgery I have done, or anything else that
8 could, like, remotely -- I really don't -- I don't,
9 personally, feel any doubt that if she has anosmia,
10 that it came from this injury. I really don't
11 doubt -- like, there's no reason to doubt that.

12 Q. Let me ask you about some reasons to
13 doubt it. And again, I think I understand where
14 you're coming from, so let me just mention a couple
15 things to you.

16 Have you treated Ms. Connelly for the
17 loss of smell and taste issues she talked about?

18 A. No.

19 Q. So that's not been part of your
20 treatment, at all?

21 A. No. And the reason it wasn't is
22 because, you know, I get a lot of As on noses, and
23 I get Bs. When are you going to get a B? It's
24 when somebody has kind of a thick nose -- you know,
25 I inherit Ds. Nose jobs is like the hardest

1 cosmetic -- I'm not ashamed I got a B. But the
2 nose has been traumatized by surgery or by injury.
3 She has thick skin, she's older and stuff like
4 that, you know. So, you know, we got a B.

5 Her nose looks better and stuff like
6 that. But -- and I always hope that my patients
7 breathe better, you know, after my -- but if they
8 continue to have signs of nasal obstruction or
9 complaint of nasal obstruction or complaints of
10 hyposmia or anosmia, then I would refer them to one
11 of my well-established ENT colleagues, who on a
12 regular daily basis can do allergy tests and
13 vasoconstriction of the nose and stick a telescope
14 up there and examine.

15 I'm limited in my examination to what I
16 can see with just a speculum and a headlight.
17 Because to do my job of nose jobs and nasal
18 fractures, I don't need that more extensive
19 diagnostic thing. I don't have a CAT scan on
20 premises like they do at Charleston ENT and stuff
21 like that. So just a natural course of my practice
22 is to defer a workup or a treatment of those
23 concerns to an ENT colleague. And that happens
24 sometimes, not just in this case.

25 Q. One of the things I also want to

1 mention about deferring. For instance, are you
2 aware of something called a UPSIT 40?

3 A. That doesn't even sound vaguely
4 familiar.

5 Q. Smell identification test 40?

6 A. No. You know, it sounds familiar, but
7 no.

8 Q. Again, this isn't -- again, my point is
9 not about being critical. It's really about trying
10 to figure out who would be -- well, in an
11 appropriate position or, you know -- for instance,
12 if Dr. Dozier -- okay.

13 If Dr. Dozier was not able to offer an
14 opinion connecting the fall to the smell and taste
15 issues she complains of. Would you still say,
16 gosh, you know, even though Dr. Dozier can't go
17 there, I'm willing to do it, I can say that I think
18 they're related?

19 MR. GRUENLOH: Object to the form.

20 BY MR. HINES:

21 Q. Or would you defer to Dr. Dozier?

22 A. I totally defer to Dr. Dozer as far as
23 whether she has anosmia or hyposmia or not.

24 But -- but if you were giving a
25 board -- if you were at a board exam for new, young

1 ENTs -- let me try and say this. I am trying to
2 help this -- like, I'm not trying to, you
3 know -- okay.

4 So, like, if you were giving -- when
5 doctors are in training, they come up with a list
6 of possible diseases that contribute to the
7 symptoms. You're on morning rounds at the
8 emergency room, patient comes in with a headache,
9 and an all-star medical student will say, in an
10 average American emergency room, the most common
11 cause of headaches is tension headaches; second to
12 that is migraine; third to that is drug-seeking
13 behavior; but also included in the list of possible
14 diagnoses is brain tumor, intracranial hemorrhage,
15 amoeba infection of the brain, meningitis. You
16 know, you come up with a broad differential.

17 And if you were sitting with an ENT
18 doctor and giving him his boards, say a patient
19 presents with anosmia or hyposmia, what are the
20 common causes? You know, one obscure potential
21 cause is the person is crazy and seeking mental
22 attention and stuffed a tampon up their nose. You
23 know, I mean, that would cause hyposmia or anosmia.
24 But the differential diagnosis, the list of
25 problems, is either mechanical obstruction from a

1 tumor or a polyp or trauma.

2 I mean, if you got hyposmia, that's
3 what causes it. If they have ruled out -- I didn't
4 see the MRI, I didn't read the report, but they did
5 the right thing by looking at the MRI. If they
6 don't see any physical obstruction up there, then I
7 cannot come up with any other explanation for it
8 other than the trauma.

9 Q. And again, I'm not picking on you in
10 any way. I want to make sure I understand it.

11 Obviously, you haven't seen the
12 imaging. Correct?

13 A. Right.

14 Q. So wouldn't you agree, there are
15 some -- it's not like you collected all of the data
16 that you would want to have if you were rendering
17 an opinion.

18 I mean, do you have all the data
19 that -- I understand what you're saying, in terms
20 of you're thinking about it.

21 MR. GRUENLOH: Object to the form.

22 THE WITNESS: The first thing you said,
23 like, you know, I agree with that. I
24 haven't -- because I really didn't think that I was
25 going to be asked -- I didn't know what I was going

1 to be asked about. Honestly, I thought maybe you
2 wanted to get assurance from me that, like, my nose
3 job didn't fracture her cribriform plate or that
4 my, you know -- which it didn't. That's
5 farfetched.

6 I didn't know that we were going to go
7 there. I guess I kind of figured -- I mean, I kind
8 of know Tom Dozier. I just went to his son's
9 funeral. But we have never discussed this case.
10 Or, you know, hey, Tom, what do you think of
11 Rosemary's nose? Or anything like that. I just
12 always just -- you know, from the moment I
13 suspected or thought there might be some
14 litigation, if she had asked me, like, what should
15 I do, I want to see somebody, what do I do, because
16 I can't -- like, what I'd say, you need to go see
17 an ENT. I would probably go to Charleston ENT or
18 MUSC or something. That's probably what I would
19 have said.

20 BY MR. HINES:

21 Q. But you didn't refer her there?

22 A. No.

23 Q. And she sought that treatment on her
24 own?

25 A. As far as I know. Yes.

1 Q. I haven't marked this yet. Let me show
2 you this. If you don't mind me stepping around.
3 This is -- I think we can all look at it together.
4 The Bates number is RMC 80. You see where it says,
5 April? It's Charleston ENT, is the letterhead.
6 Refers to Ms. Connelly. The date is
7 April 26, 2013. And this note -- by the way, I
8 flipped to the next page, which is RMC 81, is
9 Dr. Hester. It looks like, from what I can tell,
10 she's seen at least three different doctors there.
11 Drs. Hester, Ghegan and Dozier.

12 In any event, she says: Eight months
13 ago she began to notice that she did not have a
14 good sense of taste or smell.

15 Now, I'm just going to try to do
16 ballpark math here. This is April. Would you
17 agree April 26th of 2013, that's pretty close to
18 four months into the year 2013. If we take four
19 months from, you know, the last four months of
20 2012, to give us -- going back in time
21 eight months, doesn't that give us approximately
22 August of 2012?

23 A. Let me refresh. I think you're getting
24 at a question of dates and stuff and I want to look
25 at these.

1 Q. You can certainly take -- you're
2 welcome to review any of your materials.

3 A. So that we're all on the same page. So
4 I saw her in June 2011, soon after the injury, the
5 date of injury. And then in August 2011, about two
6 months-and-a-half months later is when she had her
7 surgery. Now -- and she says she had a fall on
8 6/03. So that's not exactly alike, but we're in
9 the same neighborhood.

10 So June and July we did the fracture.
11 She says four months. When we start trying to pin
12 these dates down -- doctors aren't as good as
13 landlords and banks at calculating dates of
14 interest and stuff. So this is April 2013. And
15 this says eight months ago, she began -- she did
16 not have a good sense of smell. So if you back up
17 from April 2013, you're going back to -- that would
18 be July, like -- be August 2012.

19 So this says that her -- according to
20 this her, like, sense and smell started showing up
21 about a year after the rhinoplasty.

22 Is that what I'm getting? Am I reading
23 those dates right?

24 Q. I believe that that's, yeah, correctly
25 stated in terms of the dates. The accident, it

1 was -- you know, it was in June of 2011. Surgical
2 procedure in August of '11, and then if
3 you -- based upon the note that I've showed you
4 there from Charleston ENT, it would seem to
5 indicate that it was -- this issue of smell and
6 taste was noticed in August of 2012, approximately
7 a year after the surgery.

8 And the point of me making
9 that -- pointing that out is to say, Doctor, does
10 that give you -- well, does that give you pause in
11 offering an opinion about the relationship between
12 the fall and the smell and taste issue?

13 A. Yes. Yeah. I mean, now, that's a
14 limited number of -- you know, I didn't ask her
15 about the history or the smell, or did you have,
16 you know. But yeah, it doesn't -- to me, that
17 doesn't really add up, the idea that -- again, no
18 one, not me, not Dr. Dozier, not the chairman of
19 ENT nor anybody in that 24-man world class ENT
20 program they have there has treated 50 anosmia
21 cases. Because most people, when they have this
22 degree of trauma, they have other injuries or
23 something.

24 But it -- I mean, it can occur. But in
25 the totality of this, like, the only thing that I

1 can think of that would -- if she has -- if we
2 accept the fact that she as anosmia or hyposmia,
3 would be this frontal injury. I mean, it kind of
4 makes sense to me. But it doesn't make sense that
5 it would, like, spontaneously show up 12 months
6 later. I don't know.

7 You have to do your digging with
8 Rosemary and this doctor and try to clarify those
9 dates. That does give me pause.

10 Q. And with that -- in light of that,
11 Doctor -- really -- again, I'm trying to go back to
12 the piano. If we play this thing all the way out,
13 in terms of what we're involved in in litigation,
14 is that there's going to be a trial. And, you
15 know, one of the issues that will be litigated is
16 whether or not there's a relationship between the
17 claims of loss of smell and taste and the fall.
18 And if a jury was to agree, you know, Ms. Connelly
19 certainly would ask for them to award, you know,
20 her a lot of money against my client.

21 And the point is, are you in a position
22 to go and offer a medical expert opinion to a jury,
23 you know, that my client -- you know, let's just
24 assume my client, for the sake of this question,
25 assume my client is responsible for her fall, and

1 that also my client's responsible for the smell and
2 taste issue Ms. Connelly has.

3 MR. GRUENLOH: Objection to the form.

4 THE WITNESS: Well, like --

5 BY MR. HINES:

6 Q. By the way, I mean, one way or another.
7 I'm not asking you to offer -- I'm saying, if
8 you're simply not prepared to offer testimony on
9 that, whether or not this relates?

10 A. So --

11 MR. GRUENLOH: Let me object to the
12 form. Asked and answered.

13 Go ahead.

14 THE WITNESS: You know, this new
15 revelation to me is that, you know, like I said,
16 like my focus -- I don't have a dog in this fight.
17 My main focus is to take care of the patient. You
18 know what I mean? And if I were, you know, if the
19 president of the United States called me up and
20 said, you have to find out whether her -- here's
21 your job, Tom, you know, you have to find out
22 whether -- your country needs you to find out
23 whether this was -- then given the information that
24 I just learned, first thing I would do is I would
25 go to Mary and go to that doctor and I would say,

1 hey -- or Mary, this thing says that you first
2 noticed it about a year after the nose job. Is
3 that true?

4 You see what I'm saying?

5 And then I would have a hard time -- if
6 she says, yes, that's true, it wasn't until
7 your -- I had perfect smell, I was in my garden, I
8 love my perfume, nobody ever did anything. Then
9 all the sudden, just like a year later, then I
10 would have a hard -- I would just say, gee, I don't
11 know what caused it, you know.

12 But if it predated that or something,
13 like, you know, oh, no, that's not true. You see
14 what I'm saying? That's not written in the Bible.
15 You know what I mean? That's not on the Ten
16 Commandments. But if Rosemary says, yeah, like, I
17 had perfect smell for -- once the swelling went
18 down in my nose, I had perfect smell. And all the
19 sudden, a year later -- then I would have a hard
20 time saying that.

21 But if Rosemary were to say, you know,
22 her word against -- you know, I would have to
23 do -- I would have to, like, hire a team of
24 investigators and lie detectors and stuff to go
25 there.

1 BY MR. HINES:

2 Q. Is it inaccurate to say that, just
3 based upon -- as you sit here today -- I mean,
4 again, I'm just saying -- isn't what you're telling
5 me, as you sit here today, you're not capable of
6 offering --

7 A. I don't have enough information -- I
8 don't have enough information.

9 Q. To offer an in-court opinion as to any
10 relationship, you know, in terms of a medical
11 expert opinion, saying yes or no, there's a
12 relationship?

13 MR. GRUENLOH: Object to the form.
14 Asked and answered.

15 THE WITNESS: I'm not ready to go into
16 court with my hand on a Bible and say, in my expert
17 opinion, having looked at all the facts that I feel
18 I need to avail myself to -- I don't want to do
19 this either, you know -- I don't have enough facts
20 to avail myself to. Nor do I foresee myself being
21 in a position of that.

22 Because what I would do is, I would
23 review the clinical literature over the past few
24 years of, you know, anosmia, and how to do a smell
25 test and stuff like that. In order to do that, I

1 would -- I feel like I could get there, because
2 it's close to my background and experience and
3 stuff.

4 But I'm not in that position right now,
5 to say for sure whether -- whatever jargon you
6 would put, like most probable cause, that I'm an
7 expert, that it was caused by this.

8 I can tell you it wasn't caused by her
9 nose job.

10 BY MR. HINES:

11 Q. Sure. As far as anything else, you've
12 not been asked to do any -- am I correct in
13 understanding that you don't anticipate any
14 additional treatment with Ms. Connelly, for smell
15 or taste issues?

16 A. That's correct.

17 Q. Well, Dr. Funcik, I think with that, I
18 think I can thank you again and for, you know, for
19 the last time.

20 A. I'm just trying to help you. I mean,
21 you guys want to go home, so does she. And I was
22 just trying -- you know, a lot of times it's pretty
23 obvious, pretty transparent what you guys are
24 getting at. You know what I mean?

25 I don't get it, man.

1 MR. GRUENLOH: Can I -- I have got a
2 few questions.

3 MR. HINES: I'll pass the baton over to
4 Mike. Thank you, again.

5 I may have, kind of, followup after he
6 goes, but I'll let him have the floor.

7 EXAMINATION

8 BY MR. GRUENLOH:

9 Q. Seems to me that there may be a bit of
10 misunderstanding on that last record and I want to
11 make sure we have got this straight.

12 Mr. Hines has put before you a record
13 that suggests that Rosemary noticed her sense of
14 smell has been lost about a year after the
15 rhinoplasty. Right?

16 A. That's the way I interpreted that
17 cursory reading of the highlighted parts of that
18 clinic note from that other doctor. I don't know.

19 Q. And I know that you have not had a
20 chance to review her testimony in this case and --

21 A. And I hope I don't have to.

22 Q. I know that.

23 A. I don't want to.

24 Q. I know you've not had a chance -- not
25 had a chance to talk to her about this. But what I

1 want you to do, sir --

2 A. Because I trust -- because I heard that
3 she was seeing Charleston ENT and there's
4 like -- I'm not aware of anybody at Charleston ENT
5 that I wouldn't trust. It's a pretty good group.
6 They don't got any bad eggs around.

7 And then Dozier, I know -- I mean, I
8 know him pretty -- you know, takes care of a lot of
9 my patients, I hear good things about him. Boy, I
10 have no reason to doubt his ethics.

11 Q. Let's do it this way. You talked about
12 doing a nose job and how you could take a picture
13 every month of the nose, after the nose job, and
14 they would be -- you could shuffle them up and you
15 would be able to tell what the first nine months
16 were. Right?

17 A. Right.

18 Q. Why is that?

19 A. Swelling.

20 Q. If someone can't smell, can't inhale in
21 their nose, through their nose, because there is
22 swelling and congestion is -- is that -- does that
23 makes sense that they wouldn't be able to notice
24 whether or not they had lost their sense of smell,
25 if they can't breathe in?

1 MR. HINES: Object to the form.

2 THE WITNESS: You know -- you
3 know -- boy, oh boy, that's, like, a clever
4 question. That's, like, freaking clever. But to
5 be honest with you --

6 BY MR. GRUENLOH:

7 Q. I mean, doesn't it stand to reason if
8 you can't inhale, you can't smell?

9 MR. HINES: Object to the form.

10 THE WITNESS: What do they call
11 those -- here again, I'm just going to do this
12 honest. Okay. Like if someone made a living where
13 those Somalia guys or whatever -- Somalia or
14 whatever. So if someone was a Somalia or a guy who
15 picks cocoa beans for Nestles or whatever, where
16 his sense of smell was like his thing, I could kind
17 of see how -- because I have had people who are
18 Broadway singers worry about the nose job changing
19 their voice. You know, someone like a gourmet, you
20 know, relying on their voice or their sense of
21 smell, that messing with their digestive tract
22 might impact that.

23 But from all my time of doing nose
24 jobs, I have had tons of women fret about how their
25 nose looks at 3 months, and then be happy at 12.

1 Because a lot of the exterior swelling goes down.
2 But I've never had somebody come in and say, I
3 really -- but there is -- darn right, you're right
4 that there is some intranasal swelling.

5 Because if I do a skin cancer on
6 patients, on the outside -- I don't violate the
7 inside nosing. But if I do a big flap on the
8 outside, in these older people whose septum has
9 even got more crooked and their heart and lung
10 deficiency is diminished, they'll complain of more
11 snoring and stuff like this, so there is that
12 phenomenon. But I have never had somebody --

13 So I do have patients come in and say
14 that swelling on the outside of the nose bothers me
15 because of the way it looks. But I have never had
16 somebody come to me at three months and say, I'm
17 really worried because my smell is bad and I've had
18 this -- I've never had to say to somebody, man,
19 your sense of smell is down and that's because of
20 intranasal swelling and it will go away in a year.
21 You know, I don't see that as a clinically common
22 occurrence, that intranasal swelling.

23 BY MR. GRUENLOH:

24 Q. If she had swelling for -- as a result
25 of the surgery or as a result of just regular

1 congestion, would you agree with me that if she
2 can't inhale through her nose, she can't smell?

3 MR. HINES: Object to the form.

4 THE WITNESS: Like, I have a hard time,
5 because if you can't -- to me, if you can't inhale
6 through the nose, that means there's a clothes pin
7 on your nose, and yeah, you can't smell.

8 BY MR. GRUENLOH:

9 Q. Uh-huh.

10 A. But --

11 Q. Because Doctor, what we're getting to
12 here is, is there's been some suggestion, I think,
13 that she had a sense of smell at some point after
14 the trauma and that it somehow came back and then
15 went away at some point. And that's not what the
16 facts in this record suggests.

17 And my question to you is, you said
18 earlier that, heck, if I found out that she had
19 this accident and then the sense of smell came back
20 and then it went away, then I couldn't testify as
21 to the cause of it, because that would really
22 confuse me. And there's no suggestion on the
23 record of that.

24 What we're talking about here is the
25 time when she first documented her noticing her

1 loss of sense of smell to you and to another
2 doctor. All right? So you understand.

3 And what I want to know is, first of
4 all, and I think you've said this, is there
5 anything else that you've seen in Rosemary's record
6 or anything else that you're aware of in this
7 record that you see as a possible cause of her loss
8 of sense of smell, other than the trauma?

9 A. No.

10 MR. HINES: Object to the form.

11 THE WITNESS: That's what I said
12 earlier, until I read the highlighted note.

13 BY MR. GRUENLOH:

14 Q. Yeah. And do you hold that opinion to
15 a reasonable degree of medical certainty, that
16 there is no -- nothing else that you have seen in
17 her record or are aware of with respect to
18 Ms. Connelly that is a possible cause of her
19 anosmia, other than the trauma?

20 MR. HINES: Object to the form.

21 THE WITNESS: Now, you know, my guess,
22 not being a lawyer, that there's a definition of
23 reasonable degree of medical certainty, and I'm not
24 familiar with it.

25 BY MR. GRUENLOH:

1 Q. More probably than not.

2 A. But holy mommy, I can't conjure
3 anything else up that would cause her...

4 Q. Okay. And you said earlier, when
5 Mr. Hines showed you that record that gave you
6 pause, does it take away some of that pause for you
7 to know that she never had a sense of smell after
8 the date of the trauma?

9 MR. HINES: Object to the form.

10 THE WITNESS: Well, if I had some kind
11 of a, like, a -- well -- well, if I had, like, a
12 lie detector test, or Rosemary was, like, my
13 daughter, who I know who, like, would never lie to
14 me or whatever; and if I knew she, like, hit her
15 head and the next day she couldn't smell at all,
16 goodness gracious, then why would we even debate
17 whether that was the cause? It would be silly to
18 just conjure up anything else.

19 I really wasn't -- you know, I
20 wasn't -- I didn't do the smell test. I didn't
21 really give -- through this whole thing I -- I -- I
22 wasn't, you know, planning on or, like, commenting
23 on...

24 BY MR. GRUENLOH:

25 Q. Sure. And there's other folks, you

1 know, Dr. Dozier and others that will certainly
2 give opinions in this case. But you have given an
3 opinion and I want to make sure I understand what
4 that opinion is.

5 MR. HINES: Object to the form.

6 THE WITNESS: Okay. So I'll try to say
7 it in my own words --

8 BY MR. GRUENLOH:

9 Q. Yes, please.

10 A. -- and you guys can fight over it.

11 Q. That sounds good.

12 A. Okay. Dear God, please let me say this
13 the right -- okay.

14 This is -- you know, if somebody -- if
15 you're seeking the truth, okay, there are some
16 cases where the truth is very straightforward; did
17 you take the money out of the cash register or not?
18 You know what I mean? That is just like -- in that
19 case, if there's controversy, it's sort of easier
20 to hone in on that. You know?

21 But the sense of smell, no matter how
22 many experts and how many doctors and how much we
23 study and stuff like that, is a very subjective
24 thing. It's not real, you know, quantifiable.
25 It's not as easily measured as whether the

1 videotape shows Larry or Suzie, you know. Those
2 cases are straightforward. This is just an
3 inherently ambiguous case.

4 And in some medical cases, sometimes
5 you can find, like, an obvious -- you know, if you
6 find the right expert and stuff like that. Like,
7 if you're talking to me about a bad nose job or a
8 bad facial fracture or a bad facelift or a cut
9 nerve, then -- then it seems, sort of, seamless.
10 This doesn't seem to be that kind of -- this
11 doesn't seem to be that kind of case, you know.

12 It's a subjective thing. It's
13 difficult to measure. It's never crossed my mind
14 that she was, like, malingering or anything like
15 that. And once I heard that Dozier said she had
16 anosmia, once I heard that she had -- that he said
17 she had anosmia, I believed it. Or hyposmia, then
18 I believed it. I had no reason to doubt
19 Tom Dozier's opinion. Okay?

20 And then during this whole case, I've
21 never considered that -- I just -- I automatically
22 assumed -- with my knowledge and experience, I
23 automatically assumed it was related -- if she had
24 hyposmia, that it was due to that.

25 I don't know her that well. I can

1 image a scenario where someone would fake hyposmia
2 to try to get a million bucks. Do you know what I
3 mean? I don't suspect her of that. I've never
4 pegged her as that kind of person. I couldn't
5 imagine the scenario.

6 But if she has hyposmia, I can't
7 conceive of anything else that could have possibly
8 caused it, other than the frontal trauma, enough to
9 break a nose. That's how you --

10 If I wanted to give you hyposmia, if I
11 just -- like, if my daughter's life was depending
12 on you having hyposmia, I would bash you as hard as
13 I could right there. Or kick you in front of the
14 head and cause a blow (indicating). That's the
15 best way. Or I could stick a screwdriver up your
16 nose and rotor root the top of your nasal cavity.
17 Those are the only two ways I know how to give
18 somebody hyposmia.

19 BY MR. GRUENLOH:

20 Q. And just so the record is clear, you
21 said one of the ways, aside from the screwdriver
22 method, that you could give me hyposmia is to hit
23 me. And you put, sort of, your palm right between
24 my eyes on my forehead.

25 Is that right?

1 A. Right.

2 Q. And why is that a significant place?

3 MR. HINES: Object to the form.

4 THE WITNESS: Because it would be the
5 reverse of a sudden -- you know, sudden
6 acceleration. It would be the opposite of a sudden
7 deceleration. If somebody were to fall forward,
8 their head and their brain and their cerebral
9 spinal fluid and their cribriform plate and
10 olfactory nerves would all be traveling forward.
11 And if all the sudden they stopped, there would be
12 a tendency for -- there's a little bit of clearance
13 inside the skull, between the brain and the front
14 of the inside of the bony skull, filled with fluid.
15 And if the brain keeps going forward, it puts a
16 shearing force against the olfactory nerves,
17 against the cribriform plate, and causes hyposmia.
18 It kills those nerves. And those nerves are, like,
19 central nervous tissue. And the brain, spinal
20 fluid, stuff like that, that doesn't resurrect.

21 BY MR. GRUENLOH:

22 Q. And those olfactory nerves that you're
23 talking about, where are those located?

24 A. At the very top of the nasal cavity, at
25 the bottom of the floor of the cranial vault.

1 Q. So kind of, like, right between your
2 eyes?

3 A. Yeah.

4 Q. Do you know if that's a permanent
5 condition?

6 MR. HINES: Object to the form.

7 BY MR. GRUENLOH:

8 Q. Is her sense of smell coming back? Do
9 you have any idea?

10 A. You know, there may be one literature
11 paper -- you know, people in academics will write
12 on anything. And I haven't done a Medline search.
13 You know, called the Med U library and just say, is
14 there a search on long-term followup of hyposmia
15 and anosmia to see what their sense of
16 smell -- what their serial tests are over a period
17 of years?

18 Wouldn't be surprised if there was an
19 article addressing that long-term thing, but
20 wouldn't be surprised if there wasn't. You know,
21 because nobody has that big of series of it. It's
22 easier to publish a paper like that if you have a
23 common thing, like nasal fracture, jaw fractures,
24 basal cell cancers of the ear, ear sticking out on
25 little boys. It's easy if there are a lot of

1 patients around in the community.

2 Q. This suggestion that the anosmia may
3 have been caused by something other than the trauma
4 and the fall, like your surgery, for example.

5 When you did your surgery, did you get
6 anywhere close to those olfactory nerves between
7 her eyes?

8 A. Well, I mean, you know, in a -- did I
9 get anywhere close? Well, I wouldn't stick -- my
10 instruments were, like, that far away (indicating).
11 I wouldn't stick my hands that far from a -- from a
12 alligator or, you know, M80 going off, in that
13 sense. But on the other hand, when the -- the
14 reason that ENT is a specialty, the reason that
15 it's specialized, we operate right around the brain
16 fluid, we operate right around the nerve that gives
17 you your vision, we operate right around -- you
18 know, so as an ENT you're used to going right to
19 the edge of blinding somebody or killing -- you
20 know what I mean? So it's a scenario that we feel
21 like that's our job that we have to -- want to go
22 there.

23 But there's -- you know, my osteotome
24 didn't slip or anything. I know that.

25 Q. Let me show you the CT scan report.

1 And as you're a board-certified ENT, can you tell
2 me, does that CT scan suggest to you that there's
3 any obstruction in the nasal passageway which would
4 be causing the anosmia?

5 A. Can you give me a chance to read it?

6 Q. Yes. Absolutely.

7 A. So before I have comments on this,
8 okay, what I would like to say is, you know, more
9 than 20 years ago -- 25 years ago, sinus imaging
10 and surgery was primitive. We would just use plain
11 old x-rays, which didn't show a lot of detail. And
12 we would go in through the nose with a headlight on
13 and do our operation.

14 Around the time when I was a resident
15 at MUSC, that was really the dawn of the area where
16 CAT scan imaging, such as this imaging, were
17 becoming commonplace, and not only done at Harvard
18 on brain tumors and stuff. So everybody who had
19 sinus issues had that.

20 And then there was also the time in the
21 development of sinus endoscopy where we had video
22 cameras attached to fiber optics. So I did a ton
23 of sinus surgery. You know, I did a lot of it, a
24 lot of sinus surgery. So there was a time when I
25 was really well versed in that, and, you know, I

1 looked at a couple hundred CAT scan reports and
2 stuff like that and got pretty good at reading them
3 myself. And I still, sometimes for facial trauma,
4 I'll go back and I'll look at stuff. So I can pick
5 up common abnormalities and I'm pretty facile with
6 that. It's like if you haven't ridden a bike for
7 10 years, you have no qualms about getting on a
8 bicycle, you know.

9 And this looks like a remarkably
10 unremarkable CAT scan report.

11 Q. It shows no obstruction, in other
12 words?

13 MR. HINES: Object to the form.

14 THE WITNESS: Correct.

15 BY MR. GRUENLOH:

16 Q. All right. You were talking earlier
17 about, sort of, the differential diagnosis of
18 anosmia. And going down, and the first one you
19 look at maybe explores there's an obstruction.
20 Right?

21 A. Right.

22 Q. And then the second one you look at is,
23 well, maybe the nerves have been severed.

24 And so the CT scan shows us that
25 there's no obstruction. Right?

1 A. Right. And then beyond that -- and,
2 you know -- but beyond that you go for something
3 like, you know, MS or something. You know, I'm
4 having a hard time coming up with -- you know, I
5 wasn't prepared to sit for my boards again.

6 Q. Is the fact that there was no nasal
7 obstruction upon the CT scan consistent with your
8 opinion that her anosmia was most likely caused by
9 the trauma?

10 MR. HINES: Object to the form.

11 THE WITNESS: Yes.

12 BY MR. GRUENLOH:

13 Q. I wanted to show you one other -- this
14 is a smell test that was done. And I'm most
15 interested in the note that's on the side. Let me
16 show this to Russ real quick. It's rude for me not
17 to.

18 MR. GRUENLOH: See that note there, on
19 the side? That's the part I want to direct him to.

20 BY MR. GRUENLOH:

21 Q. We were just talking about this idea of
22 when Ms. Connelly noticed and when she reported the
23 anosmia or diminished sense of smell to you and to
24 others. And I want you to take a look at that note
25 on the top right-hand corner. And remember we were

1 talking about the idea that if you can't -- if you
2 can't inhale through your nose, it's going to be
3 real hard to smell. Right?

4 A. Uh-huh.

5 Q. Is that yes?

6 A. Yes.

7 Q. Okay. And does that note up there at
8 the top indicate that she's been having congestion
9 ever since the accident?

10 A. I haven't -- well, since you have been
11 talking, I haven't fully read it, so I'm going to
12 read it.

13 I guess what I'm looking at here is a
14 fax from Charleston ENT. And it's a standard test
15 panel completed on Mary, and the date of it is
16 January 2015, is when it was faxed.

17 Last office visit 6 -- June 2014. I
18 can't really see where it says what date this is.

19 But the note says: Patient complains
20 of constant congestion which started after she
21 broke her nose three years ago. She has tried
22 peppermint oil with no relief. EC and IT were
23 discussed -- I don't know what that is. She will
24 follow-up with Dr. Dozier on 7/30 to review AT and
25 discuss treatment plan. MRT.

1 But, you know, the way I take this
2 thing, written by the tech, probably Myra Taylor
3 wrote it, is that she has constant congestion which
4 started after she broke her nose three years ago.

5 We talked about how this anosmia is so,
6 like, subjective. So is nasal obstruction. You
7 know, if a -- if a man were to design a nose, he
8 would put two pipes there, you know. And our nose
9 is the opposite of that.

10 You know, we have done casts of the
11 inside of cadaver noses and stuff and the way that
12 air passes through the nasal passages. It's a
13 complex flow pattern with venturis and stuff like
14 that, and I doubt we'll ever completely unravel
15 that.

16 And there are a lot of times when -- as
17 you see a patient, whether it's before or after a
18 nose job, or just as an ENT resident or ENT doctor,
19 sometimes what you see when you examine a nose
20 doesn't always correlate with the patient's
21 subjective report. You can have a fairly open
22 nasal passage and the patient can still have some
23 sense of obstruction, complaining of some
24 obstruction.

25 Q. Got it.

1 MR. GRUENLOH: Russ, I have got this
2 April 4th ENT report.

3 MR. HINES: Sure.

4 BY MR. GRUENLOH:

5 Q. Take a look at that. That's an
6 April 4th, 2013 report from Dr. -- would you fill
7 in the blank?

8 A. Mark Ghegan.

9 Q. And that's over at Charleston ENT,
10 right?

11 A. Yes.

12 Q. All right. Let me -- I'm going to read
13 a sentence of recommendation here. It says: We
14 discussed that I think, most likely, her decreased
15 sense of smell and subsequent decreased taste are
16 as a result of the trauma a couple of years ago.

17 Do you see that?

18 A. Yes, I do.

19 Q. Do you agree with Dr. Ghegan's opinion?

20 MR. HINES: Object to form.

21 THE WITNESS: Do I agree -- I'm not
22 ready to answer -- I don't have the information I
23 need to answer that. I think Ghegan is a good doc.
24 I would let him, you know, a friend, my office
25 staff, you know, if they had a nasal -- ENT

1 concern, I would be happy to have my office staff
2 go see him. So I have no reason to doubt that.

3 But I not only have not even read this
4 note, I don't know whether he -- you know -- how
5 much information he had available. Whether he did
6 the smell test or not. You know what I mean?

7 Q. Sure.

8 A. For him to say that -- I have no reason
9 to doubt Mark Ghegan. But for him to say that he
10 had to do a comprehensive history, physical exam.
11 I don't feel comfortable answering that.

12 Q. Understood. You haven't done the full
13 workup that he has done?

14 MR. HINES: Object to the form.

15 THE WITNESS: Right.

16 BY MR. GRUENLOH:

17 Q. All right. So where we leave things
18 with you, essentially, is that you're unaware of
19 any other possible cause of the anosmia, other than
20 the fall. Correct?

21 A. I'm very comfortable with saying that.

22 MR. HINES: Objection.

23 MR. GRUENLOH: Those are the questions
24 I have for you.

25 FURTHER EXAMINATION

1 BY MR. HINES:

2 Q. Just a little follow-up, Doctor. I'm
3 so sorry.

4 I have something I can direct you to.
5 I'll show you -- this is for his benefit, RMC
6 production 160.

7 This is Charleston ENT, Dr. Funcik,
8 just so I can direct you to it. And the date of
9 this is June 26, 2014. You're more than welcome to
10 read everything on here, but really what I want to
11 ask you about is where it -- it notes radiographs.
12 I think even Mr. Gruenloh was just talking about an
13 imaging CT scan. Is that correct?

14 A. Correct?

15 Q. "A CT scan of the sinuses was performed
16 which shows clear paranasal sinuses with no
17 evidence of intranasal masses or obvious skull base
18 fractures."

19 But the next sentence reads: She does
20 have significant inferior turbinate hypertrophy on
21 the scan.

22 It continues: Assessment: One,
23 anosmia. And -- dys -- dysgeusia?

24 A. Unpleasant taste. Taste disturbance.

25 Q. "Two: No evidence of sinusitis on CT

1 scan. Three: Nasal obstruction, facial pressure
2 and dental pain."

3 It continues with a plan. "I have
4 discussed with the patient that I think she may
5 have developed some allergies. I would like to try
6 her on --

7 A. Antibiotic, maybe?

8 Q. -- and like to get her set up for
9 allergy skin test. Based upon results, we'll make
10 some recommendations. I am thinking that her
11 turbinate hypertrophy is so severe that she may
12 have drying of the normal nasal secretions leading
13 to the foul odor, and that perhaps the spray will
14 change the bacteria review of her nasal cavity and
15 hopefully alleviate these symptoms."

16 You also saw her after treatment?

17 A. Right.

18 Q. Can I ask you about this idea that
19 you're unaware of any other possible cause -- I
20 mean, tell me about, in particular, this inferior
21 turbinate hypertrophy. I mean, couldn't that
22 relate to her sense of smell?

23 A. Yes. Inferior turbinate -- if someone
24 had massive inferior turbinate hypertrophy, it
25 would diminish the sense of smell. When you have a

1 bad cold, and the cold virus is infecting your
2 turbinate, they swell up and they engorge with
3 blood, like an erect penis. Same vacuoles of blood
4 and stuff. And when that is engorged by your
5 body's inflammatory response to the cold virus and
6 then you lay flat on the bed, and you put your
7 turbinates at the same blood level as your heart,
8 all the sudden, you notice that, literally, one of
9 your nasal passages completely closed. Yeah,
10 you're not going to smell at that point.

11 If I were to -- if I were to perform a
12 smell test today, I would examine the patient's
13 nose first to make sure that the turbinates were
14 not grossly engorged while performing that test.
15 But if the turbinates were moderate or average
16 size, then I doubt that a mild degree of turbinate
17 hypertrophy would question --

18 The question to me seems to be, you
19 know, if someone went in to have a smell test when
20 they had a cold, it wouldn't probably be the same
21 result as if one went in when they had normal nasal
22 baseline breathing.

23 Q. So thank you for that.

24 A. That would be a better question for the
25 person who performed the smell test, Dr. Dozier, or

1 one of his staff.

2 Q. So going back --

3 A. That's part of their protocol, that
4 they -- you know, do you have a cold? Then get
5 over your cold, come back next week.

6 Q. Doctor, but for the fact that I know
7 you are getting thrown a lot of stuff your way, so
8 thank you are for bearing with us. And because
9 you're very kindly working with us.

10 But going back to this CT scan, it's
11 RMC production 165. I think Mr. Gruenloh asked you
12 some questions about.

13 Does it say there, Item Number 2:
14 Inferior turbinates are severely hypertrophic
15 bilaterally?

16 A. It does.

17 Q. Does that give you a reason to
18 reevaluate?

19 I think earlier you were asked, doesn't
20 CT scan show that there's no obstruction? And
21 maybe that's -- seems to me that maybe that answer
22 is there -- there is something going on there, in
23 the form of that turbinate hypertrophy, that is an
24 obstruction.

25 Am I correct about that?

1 A. Could be. But, you know, I want to go
2 on record now, saying that -- when a doctor
3 is -- the first thing when you do -- when you treat
4 a patient, is you don't go down to x-ray and read a
5 CAT scan report. You don't go to the lab and see
6 what the anosmia test -- first thing you do, is you
7 take a patient history, and then you do a physical
8 examination, and then you go to the laboratory
9 reports. You know, you don't order a CAT scan when
10 somebody calls with a headache. You call them and
11 say, tell me about your headaches and stuff.

12 And I haven't seen, taken a
13 history -- a thorough history of her smell, of her
14 anosmia. You see what I'm saying? We've talked
15 about it, we've mentioned it, and I didn't say -- I
16 didn't go through a standard history of what things
17 can you smell, what things can't you smell, when
18 did it occur, are there in any associated symptoms,
19 what's the duration of this, what's the -- how
20 severe is your sense of smell? Are there
21 associated symptoms, like a flash of light that
22 occurred? Those would be the historical things,
23 and I just haven't done that with this patient.

24 And so -- so, you know, and after you
25 do your history and your physical examination and

1 then you do your laboratory tests and like that,
2 that's when you come up with a active diagnosis and
3 a plan. It's standard medical school 101. You
4 know, history, physical, exam, assessment and plan.
5 And I haven't done the first step on that.

6 And I apologize if I didn't come
7 prepared for this. If I had known I was going to
8 be getting into all this stuff, perhaps I would
9 have brought Mary back in. You know what I mean?

10 I'm not in the position, at this time,
11 to review all -- she's seen a myriad of other
12 doctors, there's a lot of providers in here and
13 stuff like that. What I would have to do is bring
14 her back in and start with a history.

15 You can get in trouble in medicine if
16 you don't follow -- there's a reason why that long
17 established tradition is.

18 MR. HINES: Doctor, I don't mean to cut
19 you off.

20 I don't have any more questions.

21 MR. GRUENLOH: I have got a couple.

22 FURTHER EXAMINATION

23 BY MR. GRUENLOH:

24 Q. You said you haven't done the first
25 step and --

1 A. In its entirety.

2 Q. Understood. Understood.

3 And you understand that Ms. Connelly
4 went to Charleston ENT. You know Dr. Dozier, over
5 there.

6 Is he a good doctor?

7 A. Yes.

8 Q. You know Dr. Ghegan, over there?

9 A. Yes.

10 Q. He a good doctor?

11 A. Yes.

12 Q. Do you know Dr. Hester, over there?

13 A. No. But I'm not aware of any bad...

14 Q. Do you know if he's a bad doctor?

15 A. No, I don't think he's a bad doctor.

16 Q. Would you expect them to go through
17 that first step, and take that history, when they
18 are assessing her anosmia.

19 A. Yes.

20 Q. All right. Because you know those
21 folks, you know their credentials and you know
22 they're good doctors and you know doctors have to
23 do this all the time, because you're
24 multidisciplinary.

25 Would you be able to rely upon what

1 they have done, in terms of taking that history and
2 doing that work?

3 MR. HINES: Object to the form.

4 THE WITNESS: Yes.

5 BY MR. GRUENLOH:

6 Q. And essentially, you said that to us
7 earlier, when you said, look, I'm not here to say
8 whether she has anosmia or not, I'm relying on
9 others to do that. Right?

10 A. Correct.

11 Q. And essentially what you said to us
12 is -- and we can go back and look at the testimony,
13 I don't mean to put words in your mouth -- but if
14 she does have anosmia, I'm not aware of any other
15 cause that is possible, aside from the trauma.
16 Correct?

17 MR. HINES: Object to the form.

18 THE WITNESS: That's correct.

19 BY MR. GRUENLOH:

20 Q. All right. Now, Mr. Hines talked about
21 this inferior turbinate hypertrophy that was on the
22 scan. Is that a temporary condition? Do the
23 turbinates go up and do the turbinates go down?

24 A. It's a combination of both of those.
25 The turbinate itself is a slender -- if we looked

1 at your turbinates, it would look like it was made
2 of pink mucosa, and it would be a little
3 torpedo-shaped thing about the size of a marijuana
4 joint. Okay. But what it consists of is a little
5 bony skeleton that's quite frail and delicate, for
6 the most part, like an -- almost an eggshell that
7 forms the basic structure of it. The outer coating
8 is some mucosa, some pink mucosa. But in between
9 these is a lot of blood vessels that have the
10 capacity to engorge and shrink and swell.

11 On the surface of it is also allergy
12 cells, mass cells, which are these little blueberry
13 looking cells that hold a bunch of histamine. And
14 a normal turbinate is sort of proportionally sized
15 to the contours of the nasal passage, so that
16 there's a, you know, narrow, but -- narrow, but
17 regular volume and thickness of air passage.

18 But what can happen is the bone can be
19 a little bit enlarged, the mucosa itself can have
20 edema in it, those bloody vacuoles can be -- and it
21 comes and goes.

22 There is a thing call the nasal cycle,
23 which -- the reason we have two nostrils, probably,
24 is because the nose itself is self-cleansing. It's
25 lined by mucosa that looks really smooth, but under

1 a microscope it has these little hair cells or
2 cilia that beat from the front of the nose to the
3 back of the nose. Such that if you take a crystal
4 of saccharin, which is a lot sweeter than sugar,
5 and put it inside the nose, if everything is
6 functioning normally, all the sudden, 30 minutes
7 later, you taste sweet at the back of the throat.

8 And so that can only -- if you shine a
9 flashlight in a dead pig's nose, it's all pink, and
10 that is because there is this constant flow of
11 mucus that is cleansing out the nose. And what
12 happens is, is if one nasal passage starts to dry
13 out, then automatically that turbinate will engorge
14 and obstruct that side; simultaneously, the other
15 side will lose it's blood and open up. And this
16 nasal cycle happens all day long.

17 If we're driving and talking and our
18 head's above our heart, we're not aware of that.
19 But if that turbinate swells because of an
20 overreaction to pollen or if it swells because you
21 have a cold virus that is infecting it or sinus
22 infection that is infecting it, or if you stand on
23 your head or if you lay flat, or if the turbinates
24 themselves have enlarged over time or if the bone
25 inside has become hypertrophic, then all of those

1 things can cause it to be obstructed.

2 I mean, it's interesting because
3 it -- and this is a question for Dozier, so I don't
4 even think this should be -- I should be quoted on
5 this.

6 But like, if she's got -- if a person
7 complains that they can't smell and their
8 turbinates are so giant, then you can trim them
9 easily. And I don't know why -- that would be a
10 question for those guys. Like, there is this sort
11 of conflicting data about how big her turbinates
12 are. And how big your turbinates are is equivalent
13 to how big your penis is. If you're in cold water,
14 it's small; if you're room temperature, it's
15 average; if you're highly aroused, it's larger.
16 And this was -- do you see what I'm saying? It's a
17 snapshot in time. I'm sorry. But I can't think of
18 a more anatomical analogy. I don't mean to be
19 crude.

20 Q. I think you have answered my question,
21 and I'm going to stay away from the penis analogy,
22 because I don't think I'll do it as well as you.
23 But let me make sure, and let's not beat around the
24 bush.

25 We're talking about a loss of sense of

1 smell that Rosemary's complaining of here. And
2 essentially a loss -- it's been close to four years
3 since she smelled anything, reportedly. Okay?

4 And what I want to find out is whether
5 these turbinates that go up and go down, can become
6 engorged and then go back to their normal state,
7 whether that is something that could cause a
8 permanent loss of sense of smell?

9 MR. HINES: Object to the form.

10 THE WITNESS: I can't -- an
11 inconceivable scenario, unless the turbinate
12 hypertrophy was so large and so constant that the
13 patient would come in and, you know, snore
14 incredibly, be a mouth breather, sort of
15 incompatible with things like conversation. You
16 know, if your turbinates are hypertrophy
17 (indicating) --

18 BY MR. GRUENLOH:

19 Q. Right.

20 A. -- you wouldn't be having much fun in
21 life.

22 Q. And we talked about --

23 A. And what's sort of an odd thing with me
24 is if her turbinates are so big and she's
25 complaining, why don't they trim her turbinate? Or

1 the other thing, it's just a matter to just put a
2 bunch of Afrin in her nose and shrink those babies
3 down and then the turbinates, you know, would be
4 open, and then test her smell.

5 Q. And that was any next question for
6 you --

7 A. I don't think that Dozier is, like,
8 dumb enough to, like, do a smell test when the
9 turbinates were obstructing. Which is something
10 that you can tell just by an examination. Would be
11 like doing a smell test with a nose plug on.

12 Q. Just the fact --

13 A. So I can't imagine Dozier being dumb
14 enough to do a smell test when her turbinates were
15 markedly engorged.

16 Q. And I want to make sure. Just the fact
17 that the record says she had inferior turbinate
18 hypertrophy, that doesn't mean that it was so
19 severe that her nose was closed up and that she
20 couldn't smell, does it?

21 A. Correct.

22 Q. All right. And you would expect that
23 Dr. Dozier would know well enough not to do a smell
24 test, if that were the fact. Correct?

25 A. I would expect that.

1 Q. In other words, if there was an
2 obstruction, you do the smell test on a different
3 day?

4 A. Yeah.

5 Q. All right. And we were talking about
6 Dr. Ghegan's -- and I showed it to you, his
7 statement in his medical record where he said, more
8 likely than not, I believe that the cause of the
9 anosmia is the trauma that she suffered. And I
10 asked you if you agreed with it.

11 And I'm wondering if -- would you
12 expect Dr. Ghegan, if this was just a matter of the
13 turbinates needing to be snipped -- I mean, that
14 would be pretty high on the differential diagnosis
15 list, wouldn't it?

16 A. Very common. They perform hundreds and
17 hundreds of turbinoplasties a year over there.

18 Q. So last question. In terms of the
19 other possible causes, this inferior turbinate
20 hypertrophy is not one of the possible causes of
21 permanent anosmia, is it, sir?

22 A. Correct.

23 Q. All right. Those are all the questions
24 I have.

25 MR. HINES: Just want to make sure,

1 real quickly, Doctor.

2 FURTHER EXAMINATION

3 BY MR. HINES:

4 Q. This is -- again, showing you this CT
5 scan. This, that I'm seeing here, it's
6 inferior -- the inferior turbinates, which is RMC
7 production 165, are severely hypertrophic
8 bilaterally.

9 Do you see that, Doctor?

10 A. Uh-huh.

11 Q. Does bilaterally mean on both sides?

12 A. It does.

13 Q. And is "severely," a clinically
14 significant term?

15 A. Yes.

16 Q. So what I want to ask you now -- and
17 again, you're being -- a lot of things are
18 being -- would you agree that for most of this
19 deposition we have been putting things in front of
20 you, in terms of your opinions, that haven't been
21 part of your treatment of Mrs. Connelly?

22 A. Correct.

23 Q. I mean, this is all just -- like, hey,
24 Doctor, you're very smart and you obviously have
25 medical training, so let's just shoot the breeze

1 about -- putting these records in your face,
2 basically, and asking you to respond.

3 A. And the reason I'm answering is because
4 I'm, like, just -- sincerely -- I mean, like, you
5 guys know some of this stuff, but I know you have
6 learned some things that will hopefully let you
7 each argue for the truth of this thing. Not
8 because I'm expecting this -- you know.

9 Q. I just want to talk to you -- and thank
10 you, Doctor, I really do appreciate it. And I want
11 to be sympathetic to the position that you're in.

12 But Mr. Gruenloh was asking you about,
13 you know, other possible causes. This CT scan,
14 which again, you didn't order -- I mean, you saw it
15 the first time today. Right?

16 It says: Inferior turbinates are
17 severely hypertrophic bilaterally.

18 On its face, could not severely
19 hypertrophic inferior turbinates bilaterally, isn't
20 that another potential cause for even permanent
21 damage, if indeed, they are severe? Or permanent
22 loss of smell?

23 A. You know, Abe Lincoln once said -- he
24 was around when photographs were first invented.
25 And so photographs were new, a big deal, you know.

1 And he had the wisdom to say, there's no such thing
2 as a bad picture, that's just the way your face
3 looks sometimes. And a CAT scan is -- it takes a
4 few minutes to do, but it's just, like, the status
5 of her turbinate at that time.

6 I have looked in her nose, you know.
7 When they come in for like a -- I have looked in
8 her nose a number of times after -- when they come
9 in after their surgery and stuff like that, as I
10 follow her up, I looked inside her nose. And I
11 have seen, you know, hypertropic turbinates before
12 and stuff. And sometimes you look in there with a
13 speculum and you'll see very, very big turbinates.
14 And mucosa, instead of being pink, will be all,
15 kind of, purply and bluish in color, because of
16 stagnation and histamine and edema and stuff that.
17 And they looked markedly abnormal.

18 And, you know, you show a medical
19 student and they would say, whoa, that looks kind
20 of stunning. And I have never looked in her nose
21 and seen turbinates that are so big that there's no
22 way she could smell obnoxious odor or anything.
23 They weren't, you know, that remarkable.

24 And so I'm having a little hard time in
25 the real world situation -- I'm having a little

1 hard time. I look in her nose, turbinates don't
2 look impressively massive. And I'm having a little
3 hard time reconciling what I see with what I saw
4 with my own eyes when I looked at her turbinates,
5 you know, four or five times over the years,
6 reconciling it with what that CAT scan shows right
7 there. It's that picture thing, you know.

8 Q. Sure. And have you looked at
9 her -- for instance, let's go back to that date.
10 Well, understanding you've looked at her turbinates
11 before, is that something you have looked at
12 recently?

13 A. No.

14 Q. Is that something you have looked at in
15 the last two years?

16 A. Probably not. I could pick up my
17 record and I could give you a best guesstimate of
18 when I looked inside her nose.

19 Q. If you don't mind trying to do that.

20 A. On 7/31 -- from a careful but quick
21 review of my chart, it looks like on 7/31/13, I
22 said, with respect to her nasal obstruction, her
23 septum is straight, but she does potentially have a
24 little bit of turbinate hypertrophy. And I would
25 not expect that degree -- lot's of

1 patients -- where I would use that terminology, I
2 would not expect those patients to complain of
3 diminished smell.

4 Q. What would -- was the basis for your
5 use of that terminology be?

6 Was it imaging or was it another
7 record, or was it your examination?

8 A. My examination.

9 Q. Okay. Oh. Am I right in understanding
10 that there's no imaging of any -- is there any
11 evidence of nerve damage that's visible with
12 imaging, like CT scan or some other thing?

13 A. You know, there are specialists in head
14 and neck neuroradiology that would be best equipped
15 to, you know, say whether somebody's -- you know,
16 China is working on an imaging system for the
17 olfactory nerves.

18 These nerves are so tiny that the
19 resolution of the imaging systems that I'm aware,
20 these would tend not to show -- be unremarkable
21 radiograph. If those nerves were sheared by
22 trauma, I wouldn't expect it to show on any current
23 imaging techniques.

24 Q. Does the force of the impact, in terms
25 of the trauma, does that have a relationship to the

1 likelihood of whether or not there could be an
2 olfactory nerve damage?

3 A. Yeah. Force, direction, timing,
4 momentum.

5 Q. Is it significant? Meaning, less force
6 would be less likely to damage nerves?

7 A. Right.

8 Q. Is it significant -- in that light, I
9 notice that in your record, we looked at it and we
10 can again if you need to. The one from May of
11 2013, the one where you noted that Ms. Connelly
12 mentioned the issue with her loss of sense of
13 smell. And I think the next sentence soon
14 thereafter, indicated that you didn't note
15 previously, in the accident, that she had lost
16 consciousness.

17 Is that perhaps -- is there -- does it
18 make sense that that would be something you would
19 note, in terms of trying to think about how nerve
20 damage could have occurred? For instance,
21 evaluated force?

22 A. I guess I would say it's -- if two
23 people -- you know, Ceteris paribus, isn't that all
24 things being equal? Ceteris paribus is two people
25 have frontal impact and one lost consciousness and

1 one didn't. And if I had to place a Vegas bet on
2 it, who would have anosmia, I would bet on the one
3 who had the loss of consciousness. But I wouldn't
4 bet my house that the one who didn't have a loss of
5 consciousness would not have anosmia.

6 You know, honestly, just before -- no
7 one has a series of a thousand cases of traumatic
8 anosmia. Because a lot of times, you know, from
9 that magnitude of injury you can have, like, other
10 injuries, or you just live with it and go on. It's
11 not something that can be fixed. So once you
12 realize -- it's a permanent injury. Once you
13 realize it can't be fixed, then why keep going to
14 the doctor? You know, we haven't invented
15 something that can repair that kind of central
16 nervous tissue. And I don't see anything on the
17 horizon.

18 So it's not something you see a lot in
19 either your training or private practice, or even
20 in an academic practice. Once it's done, it's
21 done.

22 But I want to say -- came in here, I
23 have a little scrub tech, she's like 24 or
24 something like that, and she asked me about this.
25 And I mentioned that I had a patient, you know,

1 that had loss of smell from a fall. And she just
2 happened to mention -- this is so not here nor
3 there, but happened to mention, oh, yeah, I have a
4 girlfriend who fell and can't smell anymore. I
5 mean, it happens. It's a real phenomenon.

6 Q. Okay.

7 MR. HINES: I don't have any more, at
8 least for now, Doctor. Depending on what Mike
9 might have.

10 MR. GRUENLOH: You know, really just
11 one question.

12 FURTHER EXAMINATION

13 BY MR. GRUENLOH:

14 Q. You said before you walked in here, you
15 mentioned to somebody that you were giving a
16 deposition about somebody who had a loss of sense
17 of smell because they fell. Right?

18 A. Right.

19 Q. Is that what you believe?

20 MR. HINES: Object to the form.

21 THE WITNESS: Is that -- that happened
22 before I came in here?

23 BY MR. GRUENLOH:

24 Q. No.

25 A. That --

1 Q. That Rosemary Connelly lost her sense
2 of smell because she fell.

3 MR. HINES: Object to the form.

4 THE WITNESS: Yes.

5 MR. GRUENLOH: Okay.

6 THE WITNESS: Sorry, dude.

7 (Off-the-record discussion.)

8 FURTHER EXAMINATION

9 BY MR. HINES:

10 Q. Just lastly, on the question that
11 Mr. Gruenloh asked you. You mentioned a
12 conversation prior to your deposition with someone
13 in your office. I mean, I assume that that
14 conversation wasn't -- your mindset in that
15 conversation wasn't -- you know, you have given
16 sworn opinion testimony for a jury to evaluate.

17 My point is, is -- I mean, was it not
18 an informal conversation?

19 A. Yes.

20 Q. It was?

21 A. It was informal.

22 Q. And I think the last question that
23 Mr. Gruenloh asked you is, hey, is that what you
24 believe, that the fall caused her this issue with
25 smell and taste?

1 We spent a lot of time before that
2 talking about -- is it fair for me to say we spent
3 a lot of time before that, talking about
4 limitations or issues that -- you know, limitations
5 on your ability to offer that opinion?

6 A. And when I answered that question,
7 because I kind of want this to end, I answered it
8 kind of like in a -- like, OJ criminal trial versus
9 the OJ civil trial. And I answered it kind of on a
10 civil trial basis. You see what --

11 MR. GRUENLOH: More likely than not.

12 THE WITNESS: I'm not ready to -- you
13 know.

14 MR. GRUENLOH: I'm sorry.

15 THE WITNESS: I answered on a civil
16 trial basis, is the way I answered that question.

17 BY MR. HINES:

18 Q. So you're saying you weren't ready to
19 what? I'm sorry.

20 You said, I'm not ready to --

21 A. To -- like I said, to go back to the
22 scenario, I wasn't -- if the president called me up
23 and said, for the sake of our country's future, I
24 need you to find out whether -- I would have to do
25 a lot more work and research and talk to Tom Dozier

1 and talk to her. And I would repeat the smell
2 test. And I would look at her turbinates before
3 the smell test.

4 Q. If it was really important, there's a
5 number of things you would need to do before you're
6 prepared to offer that opinion?

7 A. Right.

8 Q. Okay.

9 MR. HINES: That's all the questions I
10 have.

11 (The deposition concluded at 6:03 p.m.)
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1 CERTIFICATE OF REPORTER

2
3 I, Laura J. Bash, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby
6 certify that the foregoing transcript, is a true,
7 accurate, and complete record.

8 I further certify that I am neither
9 related to nor counsel for any party to the
10 cause pending or interested in the events
11 thereof.

12 Witness my hand, I have hereunto
13 affixed my official seal this 31st day of May,
14 2015, at Charleston, Charleston County, South
15 Carolina.

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23
24

Laura J. Bash, RPR
My Commission expires
October 2015
25

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO: 2013-CP-10-3251

ROSEMARY CONNELLY,
Plaintiff,

vs.

WINSOR CUSTOM HOMES, LLC, THE
DANIEL ISLAND COMPANY, INC.,
CLARKE DESIGN GROUP, LLC, KAREN
A. NELSON & JOHN W. EDELEN,

Defendants.

VIDEOTAPED DEPOSITION OF THOMAS FUNCIK, M.D.

DATE TAKEN: Wednesday, August 19, 2015
TIME BEGAN: 4:46 p.m.
TIME ENDED: 9:09 p.m.
LOCATION: Coastal Facial Plastic Surgery
2671 Brickside Lane
Mount Pleasant, South Carolina 29466

REPORTED BY: Elaine L. Grove-DeFreitas, RPR

1 APPEARANCES:

2

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7 On Behalf of the Plaintiff

8

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12 Email: rhines@ycrlaw.com

..... On Behalf of Winsor Custom Homes, LLC

13

14

15 ALSO PRESENT: Len Harris, CLVS

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1 - - -

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4 Testimony of: THOMAS FUNCIK, MD

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2 THE VIDEOGRAPHER: We are now on the record.

6 This video deposition is being held in Mount
7 Pleasant, South Carolina, in the matter of Rosemary
8 Connelly vs. Winsor Custom Homes, LLC, The Daniel
9 Island Company, Incorporated, Clarke Design Group,
0 LLC, Karen A. Nelson, and John W. Edelen, for the
1 Court of Common Pleas, State of South Carolina,
2 County of Charleston. Case number is
3 2013-CP-10-3251. The deponent is Dr. Thomas Funcik.

16 MR. HINES: This is Russ Hines for the
17 defendant, Winsor Custom Homes.

20 THE VIDEOGRAPHER: The court reporter is
21 Elaine Grove and will now swear in the witness.

22 THE COURT REPORTER: Do you solemnly swear that
23 the testimony you're about to give will be the truth
24 and nothing but the truth, so help you God?

1 THE WITNESS: I do.

2 THOMAS FUNCIK, MD, called as a witness by the
3 Plaintiff, having been first duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. GRUENLOH:

7 Q. Hello, Dr. Funcik. Mike Gruenloh. As you
8 know, I represent Rosemary Connelly in this case. How
9 are you doing today?

10 A. Doing well.

11 Q. Good. You and I had an opportunity to meet
12 when your deposition in this case was taken a few months
13 back, and we're going to be asking you some of the same
14 things today.

15 First of all, I just want to make sure, you
16 understand, sir, that you're here today to give
17 testimony as if you were in court at a trial before a
18 jury? That's why we've got this video camera here to
19 sort of make it so that you don't have to come into
20 court next week.

21 A. Thank you.

22 Q. Is that your understanding?

23 A. Yes.

24 Q. Okay. Very good.

1 You understand that you're under oath and we're
2 here to talk about Rosemary Connelly today; correct?

3 A. Yes.

4 Q. Okay. Tell the jury briefly what you do for a
5 living.

6 A. I'm a facial plastic surgeon.

7 Q. Okay. And we're in your office today. Can you
8 tell the jury what your office address is?

9 A. 2671 Brickside Lane, Mount Pleasant, South
10 Carolina 29464.

11 Q. And, of course, part of the reason that we're
12 here to talk to you is because you've had the
13 opportunity to treat Rosemary Connelly in the past;
14 correct?

15 A. Correct.

16 Q. And it appears from your records that your
17 treatment of her went -- we don't need an exact date,
18 but, you know, I saw as far back as 2005, for example,
19 you were treating Rosemary Connelly; correct?

20 A. Correct. That sounds reasonable.

21 Q. All right. And you also treated her in June of
22 2011 when she came into your office after suffering a
23 trauma where she fell; correct?

24 A. Correct.

1 Q. All right. Before we talk about that, I just
2 want to talk a little bit about you and your
3 qualifications. Can you start by telling the jury just
4 a little bit about your education? Where did you go to
5 school?

6 A. I did my premedical science at Duke University.
7 I earned an MD with honors from the University of North
8 Carolina Chapel Hill. I did an internship and residency
9 at the Medical University of South Carolina and became
10 board certified in ENT, which is also known as
11 otolaryngology, head and neck surgery. And then I did a
12 fellowship in facial -- exclusively facial plastic
13 surgery.

14 And I've been in practice for very close to 20
15 years now. I'm in solo private practice and have been
16 for 20 years. I'm an assistant professor at the Medical
17 University of South Carolina.

18 Q. How did you do in school?

19 A. They let me out. I did pretty good. I did
20 pretty well. The last two years in med school, I was
21 number one in my class, and, you know, I got my first
22 choice of residency and fellowship and published some
23 research and stuff. I did pretty good.

24 Q. Did you do some work in the ER before you came

1 to private practice?

2 A. During my residency, I had three kids in med
3 school, and Hugo took everything we had. And we weren't
4 allowed to moonlight, but because I did good on my
5 boards and stuff, they allowed me and I worked over
6 2,000 hours in, like, 24 different ERs during that time.

7 Q. When you worked in the ER -- by the way, about
8 how long was that?

9 A. How long was?

10 Q. You said -- how many hours did you work in the
11 ER?

12 A. Over 2,000. That's, like, a year's work.

13 Q. In the course of your work in the ER, were you
14 seeing trauma patients?

15 A. Yes.

16 Q. Did you see trauma patients who had suffered
17 traumatic injuries to their face, head, and nose?

18 A. Yes, of course I did see quite a bit of that,
19 or a fair amount of that, in my emergency room work, but
20 as far as my experience with facial trauma, for fully
21 one-third of the time that we were in -- that I was in
22 residency, our department handled a third of all the
23 facial trauma coming into MUSC. Everything from motor
24 vehicle accidents to, you know, industrial accidents,

1 sports injuries and stuff like that. And then I
2 continued to treat some facial trauma. Not as much as I
3 used to as my practice had matured. A lot of the
4 younger guys tend to hang out more at ERs, but -- does
5 that -- that's about my --

6 Q. It does. Are you -- can you tell us, are you
7 familiar with the mechanism of how a trauma to the head
8 can cause what's called anosmia?

9 A. The sense of smell --

10 MR. HINES: Let me make an objection just
11 because -- well, at least preserve my right to make
12 an objection, Mike. I know that we're doing this
13 for use at trial.

14 MR. GRUENLOH: Sure.

15 MR. HINES: That's the type of question that
16 gets into his, you know, expert -- the suitability
17 of him to offer expert opinions in the case, I
18 believe. At least if I can just preserve that and
19 we can agree to take up that issue in front of the,
20 you know, the court at whatever appropriate time.

21 I'm happy for him to continue to answer the
22 question so his answer will be given, and, for that
23 matter, I'm happy, if you'd like to have a better
24 deposition, you know, for presentation to the extent

1 that, you know -- well, that it's able to be
2 presented to the jury, if you'd like to ask that
3 question again so it can be cleaner, I mean, you
4 know --

5 MR. GRUENLOH: Sure. And it was more of a
6 foundational question, Russ, so let me see if I can
7 do a little bit better job.

8 BY MR. GRUENLOH:

9 Q. Have you had occasion to study up through the
10 course of your education, training, and experience on
11 the mechanism of how anosmia, the loss of the sense of
12 smell, can be caused by a trauma to the head?

13 A. I mean, as I said, I'm board certified in
14 otolaryngology, head and neck surgery, which is ENT, and
15 there really isn't any other specialty that would have
16 any more training or expertise in managing a case or
17 diagnosing a case of anosmia.

18 Q. And does that include situations where the
19 anosmia may have been caused by a trauma versus some
20 other issues?

21 A. Regardless of the cause.

22 Q. All right. Very good.

23 You have had occasion, as we talked about when
24 we began, to examine Rosemary Connelly over the years;

1 correct?

2 A. Correct.

3 Q. All right. And can you tell the jury, have you
4 had occasion to examine her nose?

5 A. Yes.

6 Q. Any idea how many times you've looked in her
7 nose over the years?

8 A. At least 15.

9 Q. All right. And when we say "looked in her
10 nose," would it be fair to say that you did that for the
11 purpose of physical examination, the type of examination
12 that a doctor does for a patient?

13 A. Different than that. You know, if someone came
14 in for a sports physical, unless they had a specific
15 nasal complaint, a reasonably comprehensive family
16 physician or something probably wouldn't -- would either
17 do a very, very cursory exam of the nose or would
18 perhaps, even, not even look in the nose if it was just
19 a healthy third-year basketball player, whereas at the
20 time of what she presented for her nasal trauma -- I
21 probably never looked in her nose before she presented
22 with the nasal trauma, but I certainly carefully
23 examined her nose that day to make sure that there
24 wasn't a pocket of blood or some serious problems that

1 can occur in nasal fracture.

2 And then I examined her in preparation for the
3 surgery, and then I examined her during the surgery, and
4 then I examined her after the surgery as well.

5 Q. Great.

6 (Plaintiff's Exhibit No. 1 was marked for
7 identification.)

8 And just to make sure that we're clear, I have
9 what's in front of you marked as Exhibit No. 1, and what
10 that is, Doctor, is -- are the records of your treatment
11 of Rosemary Connelly from the time of the accident until
12 the present day.

13 And, if you could, take a look -- take a moment
14 to look at Exhibit No. 1 and just tell me if you
15 recognize those records as your records of her
16 treatment.

17 A. I'm scanning through them quickly, and
18 everything looks to be in order.

19 Q. Okay. Very good.

20 Have you followed Rosemary Connelly from the
21 time -- in terms of her progress and her treatment --
22 from the time that she fell on June 6, 2011, after which
23 she came into your office, to the present day?

24 A. I mean, at her last visit -- I've seen her

1 multiple times since her surgery.

2 Q. Very good.

3 MR. GRUENLOH: With that, we would offer
4 Dr. Funcik as an expert in the issues of ear, nose,
5 and throat medicine.

6 MR. HINES: And I need to, just for the record,
7 preserve an objection to the extent of Dr. Funcik's
8 qualifications. Obviously he's -- what I want to
9 make clear about this, it's not that -- well, the
10 issue that I want to make sure that I'm preserved
11 on, Mike, is the issue of the smell and the taste,
12 you know, the issue, not about whether Dr. Funcik is
13 a, you know, a qualified facial plastic surgeon/ENT.
14 I'm certainly not questioning that.

15 I'm talking about the issue of the smell and
16 taste. And so I don't know that that's specifically
17 a part of the description you used in his expert
18 qualifications, but to the extent that could fall
19 within that, you know, the testimony as to the smell
20 and taste issue and any causation related to this
21 fall, I need to object to that.

22 And just for the purposes of moving our
23 deposition along today, if you will, you know, agree
24 that I'm preserved to argue the legal point of that

1 issue and, furthermore, to -- when it's my turn for
2 some cross-examination, to get into some of this
3 voir dire, voir dire-type questions, that I can do
4 that then.

5 MR. GRUENLOH: I can certainly agree that your
6 objection is preserved. I would just say for the
7 record that we questioned the doctor extensively on
8 the subject of what caused and what his opinion is
9 on what caused the anosmia at his deposition, and we
10 certainly intend to get into that today. I
11 understand your objection and I think that you
12 preserved it, but these are matters that are well
13 within his expertise. He's followed her treatment.
14 There may be nobody better qualified to talk about
15 exactly what Rosemary Connelly has gone through and
16 the cause of it.

17 So that's the argument that I would make to the
18 court in a nutshell, and I certainly don't think
19 that we need to have a longer go-around now during
20 the cross-examination. I mean, please feel free to
21 question him on his qualifications and, you know,
22 whatever else you feel you need to do to preserve
23 the record. Is that fair?

24 MR. HINES: Yeah, and -- well, another thing

1 is, we got into a lot of this, speaking of
2 the discovery deposition, I mean, that's obviously
3 his sworn testimony, and, you know, it certainly
4 bears upon his opinions on the smell and taste
5 issue. I mean, if you're agreeable, I mean, I don't
6 know why -- maybe it doesn't matter, but it makes it
7 easier on me. I mean, a lot of the things that I
8 would want to ask him about and points that I'd like
9 to make are already in that form of deposition
10 testimony. I mean, if that's available to me, and I
11 think that it would be, you know, I'd like to for, I
12 don't know, the sake of my peace of mind, to make
13 sure that I'm not -- we don't have a disagreement.

14 I mean, if we're arguing the point of his
15 ability to testify on smell and taste, I would
16 intend to be able to say to the court, you know, we
17 took his deposition and then we did this for use at
18 trial, this is what his sworn deposition was on
19 these various points. I mean, you know what I'm
20 saying? So I assume you wouldn't have a problem
21 with me using that in support of my argument.

22 MR. GRUENLOH: I expect, based upon your
23 objection, we'll have an argument for the court on,
24 you know, how far he can go with his opinion, and

1 you've preserved it.

2 MR. HINES: Okay. Thank you, Mike.

3 MR. GRUENLOH: Okay.

4 THE WITNESS: Can I say something?

5 MR. GRUENLOH: It's -- I tell you what. Let's
6 go off the record.

7 THE VIDEOGRAPHER: The time is four fifty --
8 the time is 5:00 p.m. We are off the record.

9 (Recess from 5:00 p.m. until 5:02 p.m.)

10 THE VIDEOGRAPHER: We are back on the record.
11 The time is 5:02 p.m.

12 BY MR. GRUENLOH:

13 Q. Doctor, right before we went off the record,
14 you said, "Can I say something," and I don't want the
15 jury to think that we kept everything from them. Tell
16 us what you said.

17 A. I guess there's some concerns from both
18 attorneys about my education, training, background,
19 knowledge, practices, that associates to this patient's
20 loss of smell. I -- my practice is primarily focused on
21 facial plastic surgery. So if a patient woke up with a
22 sudden loss of smell in the morning, I probably would
23 not be the first doctor in Charleston that they would
24 see for that concern.

1 But the reality is that the -- you know, the
2 mechanism of anosmia, the pathophysiology, the basis of
3 a loss of sense of smell, the basis of the anatomy, that
4 really hasn't changed in the last 20 years. This is
5 relatively straightforward. If a person has a loss of
6 sense of smell, then it's a relatively straightforward
7 thing that the first cranial nerve is damaged.

8 And I feel as qualified as I was the day I
9 finished my residency and as qualified as any other
10 otolaryngologist in the country, really, unless they had
11 a specific sense of smell -- which not even a medical
12 university has -- unless they had specific disorder of
13 sense of smell, because there's very few treatment
14 modalities for it. It's basically a nontreatable
15 condition. There's no surgical procedure or medication,
16 so there really hasn't been a lot of advances and
17 changes since I was in the thrust of my general ENT
18 training.

19 Q. All right. Tell the jury, do you feel
20 qualified to give an opinion on, first of all, the
21 mechanism of how anosmia may be caused as a result of a
22 traumatic blow to the head?

23 A. Yes, I do, as well as other causes.

24 Q. All right. And knowing Rosemary as you do,

1 with your experience treating her and your knowledge of
2 her chart and your examinations of her, do you feel
3 qualified to offer an opinion on the cause of her
4 anosmia?

5 A. I do.

6 Q. All right. We'll get to that. I want to go
7 through some of your records a little bit first. Okay?

8 Okay. Do you recall, first of all -- and by
9 the way, we've got Exhibit No. 1 in front of you, which
10 is essentially your entire chart, again, just excepting
11 the portions of your treatment before the accident.

12 Do you recall that on June the 6th, 2011,
13 Ms. Connelly came to see you shortly after she was in an
14 accident?

15 A. Yes.

16 Q. And did she tell you that she fell?

17 A. Yes.

18 Q. Okay. Do you understand that she fell on a
19 concrete sidewalk?

20 MR. HINES: Object. Objection to the leading.

21 A. Truthfully, I don't recall specifically, you
22 know, what the terrain was.

23 Q. Okay. Tell us what you remember or what your
24 note reflects in terms of what Rosemary came to you for.

1 A. You know, I kind of knew that Mary was active,
2 and she lives on Sullivan's Island and I live on Isle of
3 Palms, and I almost seem to remember that there was some
4 construction, because I had occasion to drive by that
5 area a couple times a week, but I don't remember any of
6 the specifics about whether it was asphalt or concrete
7 or anything like that.

8 But she just came in and she said she was
9 jogging and she fell, and she fell on her face. And
10 there was nothing, you know, debatable or questionable
11 or anything about her history. It happened. I've
12 treated other people who were jogging, bicycling, and
13 fell.

14 Q. I'm looking at your record that's dated June
15 the 6th, 2011, and if you look at the first paragraph
16 there, it looks like you indicated she has abrasions at
17 all of these areas, referring to her right nose, nasal
18 tip, and cheek, and fairly massive swelling of the right
19 nasal dorsum.

20 Do you see where I'm reading from?

21 A. Yes.

22 Q. First of all, tell the jury where the nasal
23 dorsum is, and if you could just sort of point.

24 A. The nasal -- the right nasal dorsum is the

1 bridge of the nose right here.

2 Q. Okay. And what do you mean by "massive
3 swelling"?

4 A. By "massive swelling," I guess what I meant was
5 that not only was there some, you know, subtle aesthetic
6 distortion, but that the expansion of that area
7 was rather noteworthy, that it was prominent and
8 impressive of an indication of a significant nasal blow.

9 (Plaintiff's Exhibit No. 2 was marked for
10 identification.)

11 (Plaintiff's Exhibit No. 3 was marked for
12 identification.)

13 BY MR. GRUENLOH:

14 Q. Let's take a moment to -- you have what's -- in
15 front of you what's been marked, I believe it's Exhibit
16 No. 2. It's the photo. It may be marked as No. 3.

17 A. Three.

18 Q. Okay. I'll represent to you, Doctor, that that
19 photo was taken about two days after the accident. My
20 question for you, is that roughly what you observed with
21 respect to Rosemary when she came into your office on
22 June the 6th, 2011?

23 A. Yes.

24 Q. Okay. Okay.

1 A. She didn't have a Dr. Seuss shirt on, though.

2 Q. She went to see you instead of an ER doctor.

3 And am I correct that you did have a preexisting sort of
4 relationship with her?

5 A. Yes.

6 Q. Were you able to fit her in right away when she
7 came in to see you?

8 A. You know -- yes, which is our norm. If -- even
9 if the patient's not a patient, when a patient has a
10 nasal fracture, it's a big emergency to them and an
11 emergency we pretty much universally accept, promptly,
12 the patient. Even though there's not typically anything
13 that needs to be done emergently, we -- it's our
14 practice to bring them right in.

15 Q. Did you -- do you have an understanding that
16 the abrasions that are shown, the two, one on her
17 forehead and one right at the dorsum on Ms. Connelly's
18 head, are essentially the point of contact where she hit
19 the sidewalk?

20 A. It would be -- appear to be very consistent
21 with that.

22 Q. Okay. Let me ask you: When Rosemary came in,
23 did you do any examination of the abrasions that she had
24 on her knee or her shoulder?

1 A. If I did, it was probably only very cursory.

2 Q. Would it be fair to say that when she came in
3 to see you that day that your primary concern was with
4 the appearance and the future appearance of the nose,
5 since that's kind of what you're in the business of?

6 A. I mean, ultimately that was my responsibility,
7 but when you see a patient who's a victim of trauma,
8 whether or not you have years of experience working in
9 an emergency room where you have to document that all
10 the -- you're responsible for all the body systems, I
11 probably used my judgment and experience to assess that
12 this was her chief morbidity in this area, and -- but
13 I'm sure I went through a line of questioning about, you
14 know, loss of consciousness, any other injuries you're
15 concerned about, et cetera.

16 Q. Okay. Let me ask you to turn back to your
17 June 6, 2011, note. You say in the second paragraph:
18 "She has very impressive soft tissue swelling. She
19 permitted reasonable pressure on palpation, and the bony
20 pyramid is essentially stable."

21 You go on to say: "However, due to the massive
22 sub" -- can you pronounce that word for me, Doctor?"

23 A. Subperiosteal.

24 Q. -- "subperiosteal swelling, it is impossible to

1 perfectly ascertain the appearance of the position of
2 the nasal pyramid."

3 Is it accurate that you really couldn't do too
4 much for her that day because the swelling was too big?

5 A. Yes.

6 Q. And is that the reason why you said that you
7 wanted to evaluate her in a week?

8 A. Yes.

9 Q. All right. Very good.

10 A. Which is a rather customary way of managing an
11 acute nasal fracture.

12 Q. So she comes in, it looks like, about a week
13 later, if you page forward in your chart, and you see
14 RMC 51. It actually says 6, and then there's a blank,
15 11, and what we've done is we've sort of paired that up
16 with the pages in front of it, which say that today's
17 date was June 14, 2011.

18 So first let me ask you, from looking at your
19 chart, can you tell that, in fact, she did come back to
20 see you on June 14, 2011?

21 A. It seems quite reasonable. I dictate, you
22 know, different days at different times, and if I don't
23 specify or I mumble when I'm doing my dictation,
24 sometimes those dates get omitted or misrepresented. So

1 it's correct.

2 Q. Okay. And what I want to ask you about before
3 we get to that record is, actually, she went to Nason
4 before she saw you, and it looks like your chart has a
5 medical record request release, and then you've got some
6 Nason -- or at least one Nason medical record in there,
7 if you page forward a couple pages. That begins,
8 Doctor, on RMC 52, 53.

9 A. Okay.

10 Q. All right. And do you see that the Nason
11 medical records regarding Rosemary Connelly's treatment
12 there on June the 10th, 2011, are, in fact, a part of
13 your chart?

14 A. Correct.

15 Q. All right. And have you had an occasion to
16 review that as part of your chart?

17 A. To be honest with you, before anything is
18 placed in the chart, it's supposed to -- our official
19 office policy and my regular policy is it's supposed to
20 have my initials on it, and I don't see my initials on
21 it. This is five years ago. I don't specifically
22 remember.

23 Q. Okay. No question it's a part of your chart?

24 A. But I think it's quite -- I can say that it's

1 profoundly uncommon for something like this to come to
2 my office and not have me at least make a cursory exam,
3 a cursory review of, for example, the diagnosis,
4 assessment, and plan.

5 Q. Okay. I just want to ask you a couple of quick
6 things about this Nason medical record. First, do you
7 see at the top -- and we're on RMC 54. Do you see down
8 at the bottom?

9 A. Yes.

10 Q. All right. It says the name of the patient is
11 Rosemary Connelly. Do you see that?

12 A. At the very bottom?

13 Q. At the very top of RMC 54.

14 A. Okay. Yes. Okay.

15 Q. And it has the date of her visit listed as
16 June 10, 2011?

17 A. Okay.

18 Q. And what does it list for the visit type at the
19 top there?

20 A. Urgent care.

21 Q. All right. And under chief complaints or
22 concerns, it indicates that: "Patient states that she
23 has a severe headache, facial pain, accompanied with
24 dizziness and nausea following trauma Monday morning."

1 And I just wanted to ask you about that in
2 reference to, if you turn to the next page, do you see
3 where it says "assessment/plan"?

4 A. Yes.

5 Q. All right. And there's kind of a list of the
6 assessments that the doctor made of Rosemary at Nason on
7 that date; right?

8 A. Right.

9 Q. Let me ask you first, in your experience, is a
10 doctor over at Nason qualified to diagnose somebody with
11 a concussion?

12 A. To my knowledge, at least at that time, all of
13 the doctors working at Nason were board certified
14 emergency physicians. I know that that's what I've
15 heard in their advertisement.

16 Q. Okay. Do you see, under assessment/plan, the
17 first issue there says "pain in joint right knee"? You
18 with me?

19 A. Yes.

20 Q. Then it goes on to say "right knee contusion."
21 Good so far?

22 A. Yep.

23 Q. Underneath that, it says "headache"; right?

24 A. Uh-huh.

1 Q. It says "fracture of the right nasal bone."

2 Do you see that?

3 A. Correct.

4 Q. And then it says "concussion"? Do you see
5 that?

6 A. Okay. Uh-huh.

7 Q. All right. So my question, sir, is, severe
8 headache, facial pain accompanied with dizziness and
9 nausea following a head trauma, are those things all
10 consistent with a diagnosis of a concussion?

11 A. Yes.

12 Q. All right. Do you understand that Ms. Connelly
13 actually had some imaging done and that's how they
14 know -- at Nason -- and that's how they know that she
15 had a fractured nasal bone?

16 A. Yes.

17 Q. Okay. So I'm sorry that we had to do that
18 quick bit of work, but back to your record.

19 On June the 14th, 2011, and that is RMC 51 on
20 the bottom, you note on your record, if you look at the
21 second paragraph, that she has tenderness and swelling;
22 correct?

23 A. Where?

24 Q. The second paragraph.

1 A. Okay.

2 Q. It says: "As expected, there's some tenderness
3 and swelling." Do you see that?

4 A. Okay. Yes.

5 Q. All right. And it says: "Our suspicion that
6 there is a nondisplaced or minimally displaced nasal
7 fracture has been confirmed."

8 And then you go on to talk about Rosemary
9 actually going to Nason and so forth and getting that
10 imaging. Do you see where I'm at?

11 A. Yes.

12 Q. All right. So my question to you, sir, is: On
13 this date, June 14, 2011, were you aware that Rosemary
14 had, in fact, fractured her nose?

15 A. Yes.

16 Q. Okay. Okay. I want to talk to you briefly
17 about your next record here. I'm going to sort of page
18 ahead. And it looks like the next time that you saw
19 Rosemary was on July 12, 2011. And I'm paging all the
20 way to RMC 40 on the bottom. Do you see that? And,
21 unfortunately, the Bates numbers are a little bit out of
22 order because we tried to put them in chronological
23 order.

24 A. Did you say RMC 40?

1 Q. Yes, sir.

2 A. Okay.

3 Q. All right.

4 A. The patient information sheet?

5 Q. The patient information sheet.

6 A. Okay.

7 Q. And, actually, why don't we go one page
8 farther. And, again, that's RMC 50, because these are
9 in chronological order.

10 A. Okay.

11 Q. And does it appear that you saw Rosemary
12 Connelly on July the 12th, 2011?

13 A. Yes.

14 Q. All right. It indicates here at the end of the
15 first paragraph, you note: "From the first time I saw
16 her, we felt that it would be possible that she may need
17 an open reduction of the nasal fracture."

18 And I'm just wondering, can you tell us why
19 that was?

20 A. Why I said that it might be possible for her to
21 have an open reduction of the nasal fracture?

22 Q. Why you suspected that she may have to have one
23 from the time that you saw her.

24 A. Okay.

1 MR. HINES: Objection to the leading.

2 A. If --

3 Q. Let me just make sure, because I don't -- I
4 won't have any opportunity to go back and fix this.

5 I essentially want to know, Doctor, why you
6 wrote what you wrote there, that last sentence of the
7 first paragraph.

8 A. Okay. Yeah. I thought that's what you were
9 asking. If -- it might seem like bone is bone and
10 fracture is fracture. Not necessarily the case. If the
11 middle of my forearm bone is broken and angulated
12 90 degrees, then that fracture needs to be reduced, or
13 put back into place and casted, or treated, or plated,
14 or grafted. When most people think of a fracture,
15 that's probably what comes to mind.

16 A nasal fracture is a little bit different. A
17 nasal fracture can be anywhere from just a couple small
18 cracks into these delicate bones, to multiple small
19 cracks, to radically displaced crack, which could cause
20 either a functional -- cause nasal obstruction or cause
21 a cosmetic deformity.

22 And unlike long bone fractures where it's
23 rapidly ascertainable whether or not a reduction and
24 surgery is indicated based on the initial presentation,

1 physical exam, initial x-rays, a majority of the time,
2 when there's a nasal fracture, it's common to allow a
3 little bit of time to pass to see if the bones settle
4 more into their normal position as the soft tissue
5 swelling surrounding the fracture subsides. And so
6 that's the normal way of handling it.

7 So when I initially saw her, I handled it on a
8 routine basis, which is to say that she may need some
9 reduction at some later time, but we weren't ready to
10 schedule the operating room and start precertifying her
11 insurance company.

12 Q. Would it be fair to say that from the first
13 time that you saw her, you were unable to make that
14 determination, in part, at least, because of the massive
15 swelling that you noted?

16 MR. HINES: Objection.

17 A. Right. Right.

18 Q. All right. Okay. And, again, here in this
19 record, so about a little bit more than a month after
20 the surgery, she again -- you again note that she's got
21 some pretty significant swelling; correct?

22 A. Correct.

23 Q. Okay. And you go on to note that your
24 examination reveals that that is consistent with her

1 prior history of trauma?

2 A. Correct.

3 Q. Okay. Let me ask you, when Rosemary is coming
4 in, are -- you're actually doing a physical examination
5 of her; right? I mean, you're looking at her nose;
6 correct?

7 A. Correct.

8 Q. All right. Okay. Under assessment and
9 recommendation -- oh, I'm sorry. I wanted to ask you
10 before we went on, that last paragraph before you go on
11 to your assessment and recommendation, you say: "She
12 has some soft tissue and subperiosteal swelling, as well
13 as some palpable bony deformities of the upper dorsum."

14 And I wanted to ask you about those palpable
15 bony deformities of the upper dorsum. Can you tell me a
16 little bit about that?

17 A. People envision bones as being, you know,
18 perfectly smooth like a bowling ball or like this
19 instrument here, when, in reality, if you push real hard
20 across your shin or something like that, you'll
21 recognize that bones have a little bit of irregularity
22 to them. The bone itself is mineralized cartilage, so
23 it seems kind of like a rock.

24 In a living person, the bone is covered with a

1 tissue called periosteum, which is a fibrous, inelastic,
2 dense tissue that contains nerves and blood vessels, and
3 it's more or less almost glued down. If your dog has a
4 bone in the backyard, all the periosteum is gone. It
5 seems like a rock. If you cut down on a Christmas ham,
6 you don't get to that bone. You get to this white, waxy
7 material.

8 And when there's a fracture, what happens is
9 there's cracks in the mineralized, solid part of the
10 bone, but there's typically also tears and bleeding,
11 pockets of blood, pockets of swelling in the periosteum.
12 And that's part of the healing process.

13 If we had just left her nose alone, it would
14 have healed, but it would have been crooked. Those --
15 the body's attempt is just to restabilize the bone and
16 make it about half as strong as normal bone.

17 And so when I palpated her, I felt lumps and
18 bumps. That's what was consisted of bony deformities
19 and subperiosteal swelling, swelling under this bone
20 coating, and lumps and bumps caused by the fragments of
21 the bones being out of their original alignment.

22 Q. And you indicated that that was consistent with
23 her history of trauma; correct?

24 A. Correct.

1 Q. All right. Does that essentially mean that
2 those issues that you saw, the massive swelling and the
3 bony deformities, those were the result of the trauma?

4 A. Yes.

5 MR. HINES: Objection. I've got -- just for
6 the record, I hate to be a pest about it, but, you
7 know, if we were dealing with a trial situation, I'd
8 have to harp on -- and I guess this is essentially a
9 trial situation -- argumentative questioning
10 and leading questioning.

11 MR. GRUENLOH: Okay. So I will try to do
12 better.

13 MR. HINES: Yeah. Listen, I'm -- listen, I'm
14 not at all -- I may not be right. You know what I'm
15 saying? I'm just saying that I've got to try to
16 preserve those things, is all.

17 MR. GRUENLOH: I get it. All right.

18 BY MR. GRUENLOH:

19 Q. Okay. Then you give your assessment and
20 recommendation. And can you just tell the jury
21 essentially what your recommendation for Rosemary was at
22 that point, one month out from the fall?

23 A. My assessment was that she had a nasal fracture
24 and that, based on the persistence of some of the

1 irregularities, I felt like it was in her best interest
2 to go ahead and try and realign the bones or perform
3 what we call a reduction of the nasal fracture.

4 Q. When we get to your August 24th surgical note,
5 I'm going to ask you to sort of describe that procedure,
6 so we won't do it now. I want to just go through
7 these notes up to the point where you did the surgery.

8 Let me ask you, at the end of the first
9 paragraph, under assessment and recommendation, you say:
10 "This procedure may take up to a year to completely
11 settle down."

12 Can you tell us what you meant by that?

13 A. It takes almost a year to make a nose in the
14 uterus. It takes almost a year to recover from just
15 about any bony or cutaneous injury. If you make an
16 incision on somebody's leg to cut out a little growth,
17 and you take a picture of that incision once a month for
18 a year, you could probably shuffle those 12 pictures up
19 and easily put the first nine or 10 months in order.

20 And particularly with a nasal procedure,
21 rhinoplasty, reduction of a fracture, that's a -- an
22 area that is seen by the patient every time they comb
23 their hair, every time they use the restroom, every time
24 they brush their teeth, and a little bit of a deformity

1 there tends to be noteworthy.

2 So whenever we're about to begin a -- embark
3 upon a nasal surgery case, an external nasal surgery
4 case, you always forewarn the patient, because we're all
5 impatient, especially patients, and if at three months
6 one side is a little bit more swollen than the other
7 because you had to do a little more work, that's really
8 pretty normal, but it's hard for patients to swallow
9 that pill, and so it's kind of universal in this field
10 to emphasize.

11 It's also rather widely accepted that you would
12 not consider, if you do a rhinoplasty, say, to
13 straighten a longstanding crooked nose, and it works
14 somewhat successful but it still is a little bit crooked
15 and you feel like you may need to go back and do a
16 second procedure, it's also the customary norm to wait
17 an entire year before doing another intervention.

18 Q. Did you inform your patient, Ms. Connelly, that
19 it would take a year to settle down?

20 A. Yes.

21 Q. Let's jump ahead to your August 24, 2011,
22 office note, which is about, I guess, two and a half
23 months or so after the fall when she initially came into
24 your office; correct?

1 A. Correct.

2 Q. Tell us what you did for Ms. Connelly on that
3 date.

4 A. In medical terms, an open reduction of nasal
5 fracture, functional septoplasty, bilateral inferior
6 turbinioplasty, and open rhinoplasty.

7 Q. For the benefit of our court reporter, could
8 you give us that list one more time?

9 A. Oh. The same lingo?

10 Q. Yes, same lingo, just a little bit slower, if
11 you would.

12 A. Open reduction of nasal fracture, functional
13 septoplasty, bilateral inferior turbinioplasty, open
14 rhinoplasty. Sorry.

15 Q. Now, if you could sort of walk us through from
16 the time that she comes in, the anesthesia, and all the
17 rest of it, and just sort of give us, as best as you're
18 able, a laymen's understanding of what you do in the
19 surgery.

20 A. All those procedures?

21 Q. All those procedures. And -- well, let's start
22 with the -- what you did to fix the nasal fracture.

23 A. Okay. What I did to fix the nasal fracture is
24 I used probably this actual instrument right here called

1 an Neivert, N-e-i-v-e-r-t, osteotome, and in a
2 simplistic way, I created a little tunnel, a pathway for
3 the egress of blood, and then I -- this part is sharp
4 and this part has a guard here that guides it, and I --
5 I'm going on the inside of the nose through an incision.
6 I place this right at a precise location on that nasal
7 bone, and then my assistant -- I hold it and I direct it
8 and I can control the angle, and then my assistant takes
9 this right here and taps on it, and kind of a millimeter
10 or two by a millimeter or two we make an incision in
11 that bone in order to mobilize it.

12 Once -- the nasal bones are -- they're somewhat
13 strong. It would be hard to break them with your
14 finger, but it's the most commonly broken bone on the
15 face. And there's a certain pitch or tone that you can
16 appreciate when it's going through there, and all that
17 bone is kind of a consistent density, and then once you
18 reach the top of the end of the nasal bone, then you run
19 into this bone right here.

20 Now, everybody knows somebody who's had a nasal
21 fracture, but I only know one person in my medical
22 career who had a fracture of that bone and lived to tell
23 about it, because I think God thought that our brains
24 were pretty important, and so this bone right here is of

1 quite strong integrity, and so when you -- when this
2 instrument, the Neivert osteotome, reaches up to that
3 hard density bone up there, you hear a rather sudden and
4 abrupt change of pitch. It's more of a dull thud
5 instead of a crack, crack, crack, crack, crack, and
6 that's when you know you're done, and that's when you do
7 the snap maneuver.

8 Then you do the same thing on the other side.
9 And at that point these nasal bones are widely mobile
10 and you can mold them with your fingers and put them
11 wherever you want them, and then you use this -- you
12 make a cast. The cast is made up of a hard piece of
13 plastic, like a little -- half the size of a business
14 card. You dip it in boiling water and it becomes kind
15 of gooey, loose, and then you let it cool, and when the
16 timing is right, you apply it to there, and you use your
17 finger and your thumb as precisely as you can to put the
18 bones where you think they would look and function best.

19 Q. Is the patient under anesthesia when you do all
20 this?

21 A. Yes.

22 Q. Is the patient prescribed pain medication after
23 this procedure?

24 A. Almost universally, yes.

1 Q. Okay. Is this a procedure that causes the
2 patient to have a bit of pain after the procedure?

3 A. Yes.

4 Q. All right. Let me ask you -- and I think that
5 the best way to do this --

6 MR. GRUENLOH: Let's go off the record for just
7 a moment.

8 THE VIDEOGRAPHER: The time is 5:32 p.m. We
9 are off the record.

10 (Discussion off the record.)

11 THE VIDEOGRAPHER: We are back on the record.

12 The time is 5:33 p.m.

13 BY MR. GRUENLOH:

14 Q. All right, Doctor. We're back on the record.

15 If you would, and it's about, let's see, about
16 10 pages from the back, there's a document at the bottom
17 Bates stamped RMC 37, which appears to be the bill that
18 you issued to Ms. Connelly on September 22, 2011.

19 Are you there?

20 A. Yes.

21 Q. All right. I think that probably this bill is
22 the best way that we can do this. You -- when you did
23 the surgery, do you recall that you did some things that
24 weren't necessarily related to the trauma?

1 A. Correct.

2 Q. All right. Can you tell the jury what those
3 were? If there -- I don't know if there was more than
4 one or --

5 A. We did several things beyond -- the procedure
6 that I just described was the open reduction of the
7 nasal fracture.

8 Q. Okay. And on your bill that we're looking at
9 here, that's the first item; right?

10 A. Right.

11 Q. Is that -- let me do it this way: Was that the
12 result of the trauma?

13 A. Correct.

14 Q. Okay. Now, let's skip turbinectomy. Let's go
15 down to rhinoplasty.

16 A. Okay.

17 Q. Was the rhinoplasty that you did in any part a
18 result of the trauma?

19 A. No.

20 Q. Okay. Was that essentially -- well, tell us
21 what it was.

22 A. The purpose of that was, and she was a pretty
23 gal to begin with, but she had some broadness of her
24 nasal tip and bit of a hump, and so a common procedure

1 done is to shave that hump down and narrow the tip, try
2 to make it a little more aesthetic, and that's a
3 simplified version of a rhinoplasty.

4 Q. Why did you all do it on this day, on the same
5 day?

6 A. If -- I mean, because if she was ever going to
7 do a rhinoplasty, it would be the only time to do it.
8 You've already got her asleep in your operating room.
9 It saves on anesthesia time and stuff. It's really not
10 that uncommon a thing. I mean, where a person will have
11 a nose, and it's a reasonably satisfactory nose, but
12 it's a little bit big, it's a little bit bulbous, it's a
13 little bit long, and they've pondered or considered the
14 possibility of rhinoplasty at various intervals in their
15 life; now all of a sudden they have a trauma. Well, the
16 problem is, if you've got a sizable nose but now it's
17 crooked and it's got a scar on it, then all of a sudden
18 your nose might put you over the threshold where you
19 want to do something about it.

20 And so it's really not that uncommon an
21 occurrence for somebody who previously was a borderline
22 candidate for a rhinoplasty to decide to go ahead and
23 proceed with it.

24 Q. Got it.

1 A. That's kind of the way this came about.

2 Q. And the functional turbinectomy, can you tell
3 us what that is?

4 A. Is this exhibit available yet or --

5 Q. We have in front of you a cutout of the human
6 skull, and let me -- if you're going to use that, Doc,
7 let me ask you: Is that an accurate depiction of the
8 anatomy as it relates to the human skull and then the
9 olfactory, sort of, structures within?

10 A. It's reasonably accurate. I mean, this is
11 meant to be an educational tool, and so --

12 Q. If you could sort of -- if you're going to
13 refer to it, sort of spin it towards the camera.

14 A. (Indicating.)

15 Q. There we go.

16 A. So I would say that certainly this would be
17 very suitable for explaining to medical students and
18 patients and juries what the function is.

19 But somebody that's a tutor of head and neck
20 anatomy, there's no substitute for having a live -- you
21 know, a live specimen in an anatomy lab or something,
22 but it's as good a model as I think you can make.

23 Q. Okay. Very good. You were going to show us
24 the turbinates, I guess?

1 A. Yeah. So this is a patient. You're looking at
2 the patient's right side of their head. They've been
3 MRI'd, or cadaver sawed in half, and -- or a little bit
4 more than in half, because the nasal septum, the wall
5 between the two halves of the noses, has been removed,
6 and so what you're looking at here is, on the patient's
7 right side, the sidewall of their nose. So this little
8 defect here is supposed to be their nostril. This is
9 where their finger would come if they were picking their
10 nose. The septum's gone.

11 And then you'll see these three ridges here.
12 These are called turbinates, and they affect -- they
13 warm and humidify the air as the patient breathes. They
14 cleanse the air of particulate matter. Allergens.
15 They're the things that get infected when you have a
16 cold. They swell up in response to allergies.

17 And officially there's three turbinates.
18 Really, the clinically -- most clinically significant
19 ones are the middle one and the inferior one, inferior
20 meaning bottom. And this bottom turbinate, it's about
21 the size of a little -- like a -- not that I've ever
22 seen one -- but about half a marijuana joint or
23 something. A little torpedo. And on the inside of it
24 there's some bone, and on the outside of it there is

1 some mucosa, but underneath the mucosa is some sizable
2 blood vessels that can greatly expand and greatly
3 contract like when a penis becomes erect. It can go
4 from a relatively small soft size to very, very large.

5 And the purpose of them -- one of the purposes
6 of them is, if one side of the nose dries out and so
7 that natural cleansing conveyor belt of mucus that's
8 flowing all the time dries out, then that turbinate will
9 swell up and engorge with blood and close off that side.
10 Simultaneously, the other side will open up. That's
11 called the nasal cycle. And that's going on day and
12 night when we're walking around and taking depositions
13 and driving our car.

14 Now, if that gets infected with a cold virus
15 and you lay flat so that your turbinates are the same
16 level as your heart, then those engorge with blood, and
17 that's what's responsible for a person not being able to
18 breathe all of a sudden. One nostril is virtually
19 completely clogged when you lay down and you've got a
20 cold and you're not driving and talking.

21 And that can be -- those can enlarge. They can
22 be congenitally enlarged. They can enlarge with time.
23 They can enlarge due to allergies. If the septum is
24 deflected, it might move the septum and narrow that

1 airway by coming closer to one turbinate and farther
2 from the opposing side.

3 So it's not that uncommon when I do a -- even
4 if it's just a cosmetic rhinoplasty, to trim a little
5 bit of that. We have a little more than we need,
6 especially in a humid environment like the low country
7 of Charleston.

8 And so I removed a little bit of that turbinate
9 on Mary. That's the turbinoplasty. I left her middle
10 turbinates alone, and then up here is where the
11 olfactory nerve -- this is the brain. This is called
12 the cribriform plate. It's a really, really thin -- do
13 you mind if I briefly go over the anatomy now, or --

14 Q. You know, I've got -- we've got a board, and
15 I'd like to -- if you wouldn't mind, let me just ask you
16 a couple more questions about the procedure before we
17 get to that. Is that okay?

18 A. Yes. I mean, you know where we're headed
19 better than I do, so --

20 Q. All right. Well, I just wanted to ask you a
21 little bit more about this turbinate issue. What did
22 you do to her turbinates.

23 A. I trimmed them. There's more to it than that,
24 but I made them -- I removed a portion of them.

1 Q. Can -- what does the word "hypertrophic" mean
2 in relation to turbinates?

3 A. Bigger than it should be.

4 Q. Okay. In your experience, can hypertrophic
5 turbinates cause a permanent loss of your sense of
6 smell?

7 A. No.

8 Q. Okay. Do you have any opinion as to whether
9 Rosemary Connelly's --

10 A. Well, let me just -- I want to give -- because
11 we're -- you know, because, I guess, the issue of the
12 day is what's causing her sense of -- her loss of sense
13 of smell, the only -- it's hard to imagine a scenario.
14 The only way that turbinate hypertrophy could cause a
15 permanent loss of sense of smell is if the turbinates
16 were massively enlarged and the mucosa had degenerated,
17 had polyps on them, and so forth, so that the person was
18 essentially a nasal cripple and was devoid of air flow
19 through either side of their nose and somehow just
20 managed to keep living like that and lived in a fourth
21 world country or something where there was no medicine.

22 You know, it's an outlandish situation to think
23 a permanent loss of smell from either trimming the
24 turbinates or turbinate hypertrophy.

1 Q. And let me just follow up on that and make sure
2 I understand. Based upon your knowledge of Rosemary,
3 your examinations of her, your following her over the
4 years, do you have any opinion as to whether Rosemary
5 Connelly's turbinates could have caused her permanent
6 anosmia?

7 A. They just didn't -- her turbinates had nothing
8 to do with it.

9 Q. Okay. How did -- well, I think that we've sort
10 of gone through your -- the whole bill that you sent
11 through. Let me ask you, sir, going back to that bill,
12 as it relates to the open reduction of nasal fracture,
13 was that a medically necessary procedure as a result of
14 the trauma?

15 A. Yes.

16 Q. Where it says underneath -- at the bottom,
17 where it says "private surgical suite and anesthesia
18 service and supplies," were those charges that were
19 medically necessary as a result of the trauma?

20 A. Yes.

21 Q. Okay.

22 A. Although, technically, like, if you do a case
23 like this at the hospital -- like, I charged 1,800
24 bucks, that's sort of a ridiculous bargain. If this was

1 done at a hospital, that bill would be way over \$10,000.

2 You know, I wouldn't be surprised if it was twice that.

3 But what they typically do nowadays at a
4 hospital is they will allocate some of the time to the
5 functional part and then make the patient responsible
6 for paying the aesthetic part. There's no business
7 reason for me to do that here.

8 Q. Got it.

9 A. So some of that is related to the cosmetic
10 rhinoplasty, not the entire \$1,800.

11 Q. Going back to the August 24th operative note
12 that you have, you note that she had nasal obstruction
13 secondary to nasal septal deviation?

14 A. Correct.

15 Q. And we talked a little bit about this at
16 your deposition. Can you say how much Rosemary's septum
17 moved as a result of the trauma?

18 A. I would probably say that -- I mean, that's
19 sort of a difficult medical question, but I would
20 probably say that the bulk of the septal deformity was
21 probably a combination of congenital -- that the bulk of
22 the septal deflection, the crookedness of her septum,
23 was to a substantial extent preexisting at the time of
24 her fracture.

1 Q. Well, was there -- do you believe that there's
2 some part of it --

3 A. Yeah, but there was all -- but there definitely
4 was some part of it that was attributable to
5 the fracture.

6 Q. Can you kind of explain for us what the septum
7 is?

8 A. The septum is a -- basically a wall between the
9 two nostrils. There's no connection between this
10 nostril and this nostril until you get all the way back
11 to the back of the throat, called the nasopharynx.
12 Behind that little uvula that hangs down, you can't
13 really see it, but there's two holes that correspond to
14 the two nostrils in the back, and between there and the
15 front, if everything's normal, there's not a perforation
16 of the septum, then there's no connection between those
17 two sides.

18 Q. All right. And it looks like the surgery that
19 you did was, in part, to take care of that issue;
20 correct?

21 MR. HINES: Objection.

22 A. Of the crooked septum?

23 Q. Yes, sir.

24 A. Correct.

1 Q. All right. Tell us, how did the surgery go?
2 Was it a success?

3 A. Yes.

4 Q. Do you have any opinion as to whether or not
5 your surgery caused any disturbance of Rosemary
6 Connelly's sense of smell?

7 A. Well, I'm getting -- like, real specifically,
8 I'm 111 percent certain that I didn't cause any
9 permanent anosmia. The only way I would have
10 possibly -- this procedure could have possibly
11 contributed to her anosmia would be just with some
12 transient swelling, which would create a decreased sense
13 of smell, but you couldn't -- you would -- in order to
14 damage -- using this instrument the way I described, in
15 order for this instrument, or my rhinoplasty, to have
16 damaged her sense of smell, the only way that could have
17 happened is if I some -- the purpose of this little
18 guard here is to keep it on track and in a safe
19 position, and if I was trying to -- if my agenda was to
20 try to destroy someone's sense of smell, what I would
21 have to do is, after I did that osteotomy, I would have
22 to take this instrument out, and then I would have to
23 redirect it and go way the heck up to the top of her
24 nose, and then I would have to perforate that cribriform

1 plate on one side, and then come to the other side, and
2 then perforate that cribriform plate on the other side.

3 In doing so, I couldn't really be 100 percent
4 confident that I destroyed all of those filaments to
5 give her a lack of sense of smell, and also in doing so,
6 indirectly you would cause a leak of her cerebral spinal
7 fluid. There are -- sometimes people have polyps or
8 benign or malignant tumors up in that area, and when a
9 person has had a lot of chronic sinusitis issues, fungal
10 sinusitis, repeated sinus infections requiring drainage,
11 there can be some distortion of the anatomy.

12 And the kind of procedures that Dr. Schlosser,
13 Dr. Ghegan, Dr. Dozier do on a regular basis,
14 inadvertently, if the person practices for 20 years,
15 sooner or later they might actually get in trouble, and
16 there have been cases at the Medical University while I
17 was there -- thank God it never happened to me, but it
18 could have -- where people have accidentally damaged
19 that area with other instruments, grabbers and crunches,
20 that go in like a bulldozer trying to remove polyps,
21 where people have caused a cerebral spinal fluid leak
22 where the brain fluid will be dripping, dripping,
23 dripping into the nose. Thank God that never happened
24 to me.

1 But even in those cases, I would imagine that
2 some of those olfactory nerve fibers would be preserved,
3 and even if there was enough of a hole to cause the
4 brain fluid to leak out, there would still be sort of a
5 sense of smell once that situation was repaired.

6 Q. And let me just ask you before we leave the
7 subject, Doctor, can you testify with a reasonable
8 degree of medical certainty that more likely than not
9 your surgery did not cause Rosemary Connelly's anosmia?

10 A. My surgery did not cause her anosmia --

11 Q. Okay.

12 A. -- in any way, shape -- her permanent anosmia
13 in any way, shape, or form.

14 Q. If we go -- let's see -- to RMC 46, and it's,
15 looks like, a number of your notes. It's after the
16 surgery.

17 A. Gotcha.

18 Q. Okay. And do you see -- I'm interested
19 primarily in the notes that occur after the 8/24/11 date
20 on the right-hand side. Do you see that, where it
21 says --

22 A. Yes.

23 Q. Just for the jury's sake, on 8/24/11, you see
24 on the right-hand side, can you tell us what that says

1 next to that?

2 A. "Open NSR," which means open nasal septal
3 reconstruction.

4 Q. All right. And that's what you did for
5 Rosemary Connelly on August the 24th; correct?

6 A. Correct.

7 Q. Okay. And then the next note is August 31st,
8 2011. Was that the next time that you saw her?

9 A. Yes.

10 Q. Okay. And then again on September 8, 2011, can
11 you read that, what that note says?

12 A. "Progress. Swollen as expected."

13 Q. Okay. Would you expect a fair amount of
14 swelling as a result of the procedure that you performed
15 on her nose?

16 A. Yes. After every surgery, there's swelling.
17 Rhinoplasty is no exception. In her case, there's
18 probably two reasons why the swelling might be a little
19 bit protracted and greater than average. One is
20 because, if a person has paper-thin skin on their
21 nose -- there's wide variations in the thickness of
22 native skin, and if the skin's a little bit thick, then
23 the swelling takes time to go down.

24 Her nasal skin is a little bit thicker than

1 average. Nothing stunning, but it is a little bit
2 thicker than average.

3 And then the other thing is, a rhinoplasty is a
4 trauma. You know, if you take a hammer and chisel to
5 the bone, and stitches, and knives, and so forth, it's
6 traumatic, but when you do a rhinoplasty in the
7 aftermath of a nasal fracture, you would anticipate that
8 there would probably be more swelling than if there was
9 a singular insult to the nose.

10 Like a combination punch with a fighter. You
11 get his head going this way and it's going the other
12 way, the other way, that's a lot worse than two separate
13 punches, the combination punch.

14 And when you do surgery sequentially in rapid
15 succession like that, sometimes the swelling is more
16 intense, bleeding is more intense, and the swelling is
17 more protracted.

18 Q. Is that part of the reason why you told
19 Rosemary Connelly that it would take about a year for
20 her nose to settle down?

21 MR. HINES: Objection to the leading.

22 A. I tell everybody that. It just does.

23 Q. Let me ask you: Is part of the reason that you
24 inform your patients who undergo this procedure that it

1 takes a year for their nose to settle down due to the
2 swelling that they would expect?

3 MR. HINES: I'll still object to the leading.

4 Q. You can answer.

5 A. Yes.

6 Q. Okay. Were there any complications to your
7 surgery?

8 A. Not that I can recall.

9 Q. All right. Let's sort of jump ahead. And
10 maybe we should have done this earlier. But you recall
11 when we took your deposition we didn't yet have a record
12 verifying the anosmia. And, if you would, turn to
13 what's been marked as Exhibit No. 2, which are the
14 Charleston ENT records. Do you have those in front of
15 you?

16 A. I do.

17 Q. Okay. Let's turn to the back of those records.
18 And, first of all, you're aware that Rosemary Connelly
19 has been seen and followed by Dr. Ghegan, Dozier, and
20 Hester at Charleston ENT, are you not?

21 A. I mean, I knew she was seen by Dozier. I knew
22 she was seen by them, but I didn't specifically know it
23 was Ghegan and this other fellow that I'm not even
24 familiar with.