

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

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SC Court of Appeals

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

**RECORD ON APPEAL
VOLUME IV**

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1 already ruled on, we'd renew our positions as to those.

2 I don't have anything further, Your Honor. Thank you.

3 THE COURT: Okay.

4 MR. HOLLER: Judge, very briefly. Again, we've -- we've
5 discussed this on the record and off the record a lot, but I
6 think that argument is a *res ipsa loquitur*. That the speak --
7 the thing speaks for itself unless you can prove otherwise.

8 Mr. Padget -- if you would accept Mr. Padget's argument,
9 the fact there is water on the floor means that Tuomey accepts
10 the burden of proving that it's not one of their employees
11 that put it on the floor. That's *res ipsa* and that's not the
12 law of South Carolina.

13 We do not have the burden of proof. The plaintiff does.
14 And in this case there are no facts that support on July the
15 6th, 2011 that a Tuomey employee put water on the floor. Only
16 speculation and conjecture and guessing.

17 THE COURT: Okay.

18 MR. PADGET: Judge, I meant to point out a couple
19 decisions. I actually emailed them to your clerk this
20 morning. I hope -- I do hope you received the email.

21 There's a case. It's from the 60s. It talks about this
22 intersection of *res ipsa* and circumstantial evidence, and the
23 case I sent over is the *Cheney v. Burgess* case, 143 S.E.2d
24 521.

25 And the Court says while our decisions uniformly state

1 that so-called doctrine of *res ipsa loquitur* does not apply in
2 this state, they have an equal uniformity to recognize that
3 negligence may be proved by circumstantial evidence, as well
4 as direct evidence.

5 And in determining the sufficiency of circumstantial
6 evidence, the facts and the circumstances shown are to be
7 reckoned with in light of the ordinary experience and such
8 conclusions deduced therefrom as common sense dictates.

9 Where circumstantial evidence is relied upon to establish
10 liability, the plaintiff must show the circumstances as would
11 justify the inference that his injuries were due to the
12 negligent act of the defendant and not leave the question, as
13 Mr. Holler points out, to mere conjecture or speculation.

14 That's the most law that we've been given about this line
15 that you've been asked to draw in this case, but again, there
16 are facts. They were the only people there. They're the only
17 ones with access to the water.

18 The testimony is there was water. It looked like ice
19 melted and the only people who mess with ice at that location
20 are Tuomey employees. We think that's a reasonable inference
21 supported by circumstantial evidence that's got to get to this
22 jury to -- to -- for them to decide.

23 We believe the defense's position is that there must be
24 evidence of someone holding the gun in the murder case. They
25 must have seen them spill the water. They must have seen them

1 do that. That's not the standard in a criminal case. You
2 don't have to have seen the murder being committed.

3 They are saying direct evidence is the only evidence that
4 the Court can consider without it being conjecture or
5 speculation. I'm not a criminal lawyer, but I'm sure that
6 Your Honor has sat through dozens and dozens of criminal
7 trials where there is not an ounce of direct evidence that has
8 been put up in support of someone's guilt, and I would just
9 remind the Court that those -- the standard in those cases is
10 vastly higher than the standard in this case.

11 And so if those cases can get to a jury about the guilt
12 of a criminal defendant when there's only circumstantial
13 evidence of the guilt, in this civil case, Dr. Myat's case
14 where he was grievously injured, should get to that same jury.

15 THE COURT: Okay. Thank you.

16 MR. HOLLER: Final comment, Judge, and I -- just to
17 protect the record. I'm certainly not trying to belabor the
18 point.

19 Viewing the light -- the evidence in the light most
20 favorable to the plaintiff, there is no evidence that the
21 exclusive water/ice access is locked behind a door. Every --
22 in fact, every patient -- there's testimony that every patient
23 has a cooler full of ice and water in their room which is
24 available to them and their sitters and their family members.

25 So there's no exclusive -- exclusiveness to water or ice

1 to Tuomey employees. And that's certainly not a reasonable
2 way to view the evidence at the -- at the directed verdict
3 stage.

4 THE COURT: Okay. As far as your motion on directed
5 verdict as far as the doctor being a licensee versus an
6 invitee, I think that's a factual issue. There's enough facts
7 in this record that the jury could determine whether he is, in
8 fact, a licensee. So at this stage, I'm going to deny your
9 motion.

10 And, of course, constructive notice has been taken care
11 of.

12 Now, the directed verdict on whether the fact that a
13 Tuomey employee placed the hazard there -- and it's a close
14 issue in this case and I've been struggling with this for the
15 last couple of days. And y'all have brought out some very
16 good points.

17 And at this point, I'm going to deny your motion, but I'm
18 still -- you know, I'm still struggling with it and will think
19 about it and I will revisit this at a JNOV setting after the
20 verdict in this situation. And it may be after I've heard
21 your arguments and they've put all the other issues up and
22 I've read these cases again, I'll be in a position to
23 determine whether the fact -- you know, the posture of this
24 case and whether there is sufficient evidence.

25 And -- you know -- and it doesn't have to be direct

1 evidence. Circumstantial evidence certainly under our law is
2 sufficient to prove a case. And whether this evidence -- you
3 know, whether there is sufficient facts to have circumstantial
4 evidence is a close call.

5 At this point, I'm going to respectfully deny your motion
6 and we will proceed and we will revisit this at the end of the
7 verdict.

8 MR. HOLLER: Judge, as we enter the defendant's
9 presentation of the evidence, I'd like to address a matter we
10 talked about briefly in chambers. Assuming that there is a
11 finding that the plaintiff is -- I'm sorry -- that the
12 defendant is negligent and that negligence, if there's
13 comparative negligence, exceeds that of the plaintiff and
14 there is a verdict, Tuomey would be requesting and asking for
15 an offset for medical bills paid on behalf of Dr. Myat.

16 I don't know if that fact would be in dispute by the
17 plaintiff and obviously what we -- what I want to do is make
18 sure that if I need to offer that proof during my case in
19 chief, I will. I think it's more appropriate to be handled
20 after a verdict and the findings by the Court, but if Dr. Myat
21 believes that he has a right to a jury trial on that issue, I
22 want to have that resolved before we rest our case.

23 THE COURT: Okay. What's your position on that, Mr.
24 Padget?

25 MR. PADGET: Judge, we have -- we had no -- there's no

1 dispute that Tuomey did pay certain medical expenses on behalf
2 of Dr. Myat. There's not a dispute about that.

3 Our position is an offset should only be offset against
4 something that is claimed. We have not ever claimed -- the
5 jury will have no evidence that we are claiming medical
6 expenses because we have put no medical expenses into
7 evidence. Obviously, we did that on purpose because they have
8 been paid.

9 If -- if they want to insist on an offset, I would insist
10 that the jury have to know what the numbers were so that I can
11 add them to my damages chart. If David wants to seek an
12 offset for them, we certainly have the right to at least have
13 the jury consider those amounts beforehand.

14 If we haven't -- since we haven't considered those
15 amounts, you know, it would be my preference that because
16 we're not seeking that damage they cannot get credit for what
17 they've paid because we're not asking for it. The judge isn't
18 even going to charge from the charges we put up. We're going
19 to strike through all those categories that we're not seeking,
20 which would include medical expenses. So that's our position.

21 THE COURT: And there has been no testimony from the
22 plaintiff that he is, in fact, out of any medical expenses.
23 My recollection of damages was basically whatever pain and
24 suffering he's going through and his lost wages.

25 MR. HOLLER: Judge, my question is merely this. Do we

1 need testimony during the defense's case as to those expenses?
2 I don't think it's a jury issue. I think the matter of offset
3 is a question for the Court.

4 THE COURT: Okay.

5 MR. HOLLER: But to the extent that Dr. Myat claims
6 that's something that the jury needs to consider, I need to
7 know whether I offer that testimony in front of the jury.

8 THE COURT: And on that particular issue, Mr. Padget,
9 what is your position? Are you claiming that -- that the jury
10 needs to consider this or is this something that the Court
11 could consider?

12 MR. PADGET: I think -- because the jury's verdict will
13 not be based on it. So what they're seeking offset for is
14 something the jury hasn't considered. The notion of offset is
15 always that the jury considers it but doesn't know a certain
16 amount of it has been paid.

17 THE COURT: Right.

18 MR. PADGET: And so, therefore, you get credit for it.
19 Here, if they're going to seek offset, I would -- I suppose
20 there's a number on it and we could probably even agree to
21 what that number is. That if we want to interject that into
22 evidence so as to seek offset of it, then we could probably
23 agree to that number by stipulation, but I think the plaintiff
24 gets to decide what damages we're seeking. That's sort of
25 always been our providence and our role and, because of it,

1 because we aren't seeking that damage, I don't -- I just don't
2 legally think there's a right to offset for it.

3 THE COURT: Okay.

4 MR. HOLLER: And, Judge, we've talked -- we've talked
5 about trying not to replot the ground. I'm simply trying to
6 make sure we have a record clean so that if we ask you to make
7 a decision and you make a decision and some court decides
8 somewhere that the decision was wrong, we don't have to come
9 back and do this all again.

10 THE COURT: Right. Okay.

11 MR. HOLLER: I have now given them a statement of
12 approximately 101,000 and some change in terms of bills that
13 were paid by Tuomey. I just want to address this. We intend
14 to call one witness unless we need testimony about this.

15 THE COURT: Okay.

16 MR. PADGET: And I view it as the defendant's election.
17 If they elect to put up the evidence for everybody to
18 consider, then they can certainly take up after the right of
19 offset with the Court. I'm not saying they're entitled to it.
20 I'm saying if they put up the evidence, they could then take
21 it up with the Court as appropriate. I think that's certainly
22 a jury question.

23 If -- if they elect not to put any evidence of the
24 medical expenses into the record, then I don't think they can
25 take up an issue of offset for something that isn't claimed as

1 damages and is paid.

2 So we view it -- I view it largely as the defendant's
3 election of whether they're going to put up that evidence or
4 not. I mean they have to prove it. I'm not saying they have
5 to put it up in front of -- I guess I am saying they have to
6 put up in front of the jury because if the jury doesn't
7 consider it, it's not a basis of their award -- in all the
8 offset cases I know about it has to be -- the jury has to
9 consider the total damages and here, you know, we're not
10 seeking --

11 THE COURT: And I'm not --

12 MR. PADGET: -- that as an element of total damages.

13 THE COURT: Normally, when you deal with offset, the
14 medical expenses are one of the damages the plaintiff is
15 seeking and, therefore, you're entitled to an offset, in fact,
16 if you paid those damages. But here, they're not seeking
17 that. There's been no evidence of medical expenses in
18 anything he's claimed. So how would an offset even apply?

19 MR. HOLLER: Judge, because these are bills that we paid
20 on the plaintiff's behalf from -- without any input. There's
21 no -- the plaintiff has no --

22 THE COURT: I understand, but he's not asking for those
23 to be repaid.

24 MR. HOLLER: We still take the position we're entitled to
25 the offset. That it would be part of the cap.

1 THE COURT: Now --

2 MR. HOLLER: Again, the plaintiff --

3 THE COURT: I understand that.

4 MR. HOLLER: -- proves his damages. It's not our
5 responsibility to prove his damages. I'm simply saying to the
6 extent that it's a factual question or potentially a factual
7 question, it is not my intent to put up damages for the
8 plaintiff. It is my intent to pursue offset for what has
9 actually been paid.

10 THE COURT: Well, the cap is what's created an unusual
11 situation in this. If there was no cap, you know, and he's
12 not asking for medical expenses, then are you entitled to any
13 offset?

14 MR. HOLLER: Yes, sir.

15 THE COURT: The fact that there is a cap, do you get to
16 count that offset against the cap?

17 MR. HOLLER: That's the question I seek to preserve.

18 THE COURT: Okay.

19 MR. PADGET: I actually read the cap statute last night,
20 Judge, 38-56-180. As I recall it, it says in no action for
21 damages, you know, and I think -- I think when you -- shall
22 certain things not happen. And in this case, this is the
23 action for damages. David says -- David's client says the cap
24 applies, but we haven't sought any of those damages in the
25 action.

1 And I'm not sure they get to redefine what damages can or
2 cannot be sought by the plaintiff under the charitable
3 statute. So that's our position.

4 THE COURT: Okay.

5 MR. HOLLER: I'm still left with do I need to offer
6 evidence, whether it's to the Court or to the jury. I do not
7 think this is a matter for the jury, quite frankly.

8 THE COURT: And I don't either since this hasn't -- since
9 they have not asked for it from the jury. I think clearly
10 it's going to be a matter for the Court to determine based on
11 the outcome of this case and any verdict, whether you get --
12 whether you get to count that against the -- the cap.

13 MR. PADGET: And the way the *Smalls* case works -- that's
14 the governmental immunity case. The offset is applied on top.
15 So if you get a million-dollar verdict and they get 100,000 on
16 offset, it offsets it at nine. Then if the cap applies, it's
17 three. It does not apply from the 300 number and that's black
18 letter.

19 MR. HOLLER: Well, whether it's black letter law, I think
20 I just want to preserve the issue.

21 THE COURT: Okay. Well, that's something we can argue
22 and I --

23 MR. PADGET: And it could be completely irrelevant
24 depending on whatever the amounts come to.

25 THE COURT: Right. So I -- you know --

1 MR. HOLLER: My question is this. In my case to the
2 Court at least -- and I can certainly take it up after the --

3 THE COURT: Okay.

4 MR. HOLLER: -- verdict.

5 THE COURT: And I think it probably should be before
6 because if you -- if you start bringing in evidence about
7 medical bills and offset and they haven't asked for that at
8 all, then how are they going to respond to that? They're
9 going to have to turn around and put up evidence of medical
10 bills. So I think it needs to be an -- and you preserved it.
11 It's on the record, but I think it needs to be an issue after
12 the verdict of how to deal with that.

13 MR. HOLLER: For the purposes of during the defendant's
14 case in chief, can we offer or proffer \$101,973.38 in expenses
15 that were paid on behalf of Dr. Myat from Tuomey?

16 THE COURT: Yeah. Do you have any objection to that?

17 MR. PADGET: Your Honor, in fact, we'll stipulate that
18 they paid those amounts on behalf of Dr. Myat. They don't
19 need to call a witness to put it up in front of the Court.

20 THE COURT: Okay.

21 MR. HOLLER: Thank you, Judge.

22 THE COURT: All right.

23 MR. HOLLER: With that being said, we would have one
24 witness and would intend to rest after that.

25 THE COURT: Okay. So anything before I bring the jury

1 in?

2 MR. PADGET: Let me put one -- one caveat to the -- to
3 the stipulation. Those expenses as I understand were incurred
4 and waived. They were not paid.

5 MR. HOLLER: They were paid because the people who
6 provided the services still have children and they still have
7 to eat. So yes, they were paid.

8 MR. PADGET: Well, there's a difference between saying,
9 well, here's what our hospital bill is --

10 THE COURT: Yeah.

11 MR. PADGET: -- without any discounts and without any
12 discussion --

13 THE COURT: Sure.

14 MR. PADGET: -- of reasonability whatsoever and we're
15 waiving that number or what they actually get paid. Did they
16 write a check for them or is this what the charges would have
17 been? These were the charges that were incurred?

18 THE COURT: Right.

19 MR. HOLLER: This is what they wrote a check for.
20 There's no -- there's no -- there's no negotiated lower
21 amount. Tuomey doesn't do that with themselves.

22 THE COURT: So they actually wrote -- to my understanding
23 you paid your radiologist and all these people, but they
24 actually wrote a check for the bed to Tuomey? I mean I just
25 -- I've gotten a lot of hospital bills. I got one not long

1 ago for a one night stay for the bed was \$19,000. So there
2 was a check written to the bed?

3 MR. HOLLER: The Tuomey bills themselves would be for the
4 Tuomey Hospital, the entity. Of course, for example, Dr. Cucé
5 was a separate legal entity. His bills were paid. For the
6 hospital bed, they are charged and then written off.

7 THE COURT: So they weren't actually written a check?

8 MR. HOLLER: Well, they didn't write a check to
9 themselves in that one entity of the hospital itself.
10 However, if those bills are presented to any -- in any legal
11 setting as I understand it, it's what they're charging. It's
12 not what a negotiated amount would be. Of course, they didn't
13 negotiate a lower amount for themselves. For them, it's just
14 a loss.

15 THE COURT: Okay.

16 MR. HOLLER: So -- but -- and we'll -- we'll make this a
17 Court's exhibit if necessary and, again, I'm just trying to
18 make sure we have our bases covered here.

19 THE COURT: Okay.

20 MR. HOLLER: We can revisit that at the time, but it
21 clearly shows what Tuomey themselves provided versus what they
22 paid to an independent corporation under the Tuomey umbrella.

23 THE COURT: Okay.

24 MR. PADGET: And, Judge, all I'm seeking to preserve
25 under the stipulation is that we're reserving the right to

1 challenge the reasonableness of any of those charges. In
2 other words, if any of them are the gross amount billed by the
3 hospital for services and that number is ten times what they
4 get from Medicare or three or four or five times what they get
5 from Blue Cross Shield. You know, Dr. Myat had health
6 insurance. He could -- if these bills had been ultimately
7 submitted to him, he could have submitted to health insurance
8 to have them paid.

9 And what I'm trying to get at is we're not necessarily
10 agreeing to -- on this part at this stage in stipulation to an
11 offset of every dollar they claim they had -- they wrote off
12 as part of -- as part of this incident.

13 THE COURT: Okay. And we can have a separate hearing on
14 that if it becomes an issue.

15 MR. HOLLER: If necessary. Thank you, Judge.

16 THE COURT: Okay. Anything else??

17 MR. HOLLER: My witness is not here, Judge. Can I take a
18 moment to step outside?

19 THE COURT: Yeah. That would be good because I -- this
20 jury -- I'm sure this jury is -- they've set back there for an
21 hour and a half.

22 MR. PADGET: Tell them we started at nine though, like we
23 said.

24 THE COURT: Yeah. I don't know how sympathetic they are
25 toward that. They would probably say, well, why didn't you

1 tell us to come in at eleven then?

2 THE CLERK: That's right.

3 THE COURT: And I don't -- you know, I don't necessarily
4 disagree with it.

5 THE CLERK: Juror Number 32, David Finney, is the
6 foreperson.

7 THE COURT: Okay.

8 THE CLERK: 32.

9 THE COURT: Have him sit there in that chair.

10 (WHEREUPON, there was a pause in the proceedings.)

11 THE COURT: We've got one other problem. Since it's
12 eleven o'clock and normally when we -- when we argue and
13 charge, I give the case to the jury and they go deliberate.
14 It's going to end up right in the middle of lunch.

15 So the question is do we figure out a way to send them
16 to lunch in the middle of this or I have to call and get
17 lunch, and that's a whole 'nother complicated issue. But I
18 don't know how long your witness is going to take and how long
19 you think --

20 MR. HOLLER: I don't think she'll be long and Mr. Padget
21 said he'd buy lunch from Hamptons.

22 MR. PADGET: As long as I get an offset.

23 THE COURT: So if she's going to be down by --

24 MR. PADGET: I'd order lunch, Judge, if it were up to me
25 and the budget is in such a way that that can be done.

1 THE COURT: I understand that. So we're in a situation I
2 need to almost start doing that now because -- well, if we do
3 argue and charge, it's going to -- it could be 1:30 before we
4 give it to them. How long do you think your -- twelve -- it's
5 probably going to take me 20 or 30 minutes. How long is it
6 going to take y'all?

7 MR. HOLLER: Thirty or less.

8 THE COURT: All right. So if it's 30 each, that's an
9 hour and a half. So if we get it to them by twelve, it's
10 going to be 1:30 before they actually get it. And then we've
11 got a lunch issue.

12 THE CLERK: Send them to lunch at twelve and come back at
13 one to argue and charge.

14 THE COURT: I mean that's one option we have is as soon
15 as we finish the case send them to lunch and bring them back
16 in an hour and then argue and charge. Now, it can take some
17 of them -- it can take them an hour to get lunch, but that
18 means they may get to go to lunch at 12:30 -- I mean 11:30,
19 and bring them back at 12:30. And then that way we don't have
20 a break. We just go straight through argue and charge and go.
21 What do y'all want to do?

22 MR. PADGET: I'm good either way.

23 MR. HOLLER: I hate to be like my teenagers, Judge, but
24 whatever you want to do.

25 THE COURT: Okay. And I may just do that simply because

1 getting lunch here and waiting on it and then not letting them
2 eat and be sitting in here and argue and charge and they don't
3 get to eat until 1:30 or two o'clock. I may just send them
4 for an hour or an hour and 15 minutes and then come back and
5 do it this afternoon and give it to them because I'm sure
6 they're aggravated enough as it is.

7 Okay. So we'll do this one witness and I'll send them to
8 lunch, as short a lunch as I can get by with, and then we'll
9 end up with it. Okay?

10 THE CLERK: Got it.

11 THE COURT: All right. So are we ready to bring them in?

12 THE BAILIFF: Are you ready for them, Judge?

13 THE COURT: Yes, sir.

14 (WHEREUPON, the jury entered the courtroom at 11:05 a.m.)

15 THE BAILIFF: Your Honor, we have all the jurors present.

16 THE COURT: Thank you, sir. Ladies and gentlemen, I know
17 y'all don't think I got a clock and I'm sorry. We've had some
18 complicated legal issues that I've been dealing with and we
19 started at nine o'clock and I never know long it's going to
20 last. I should've told y'all to come back at eleven, but I --
21 you know, invariably this happens all the time and I
22 apologize.

23 If you'll pay close attention, we've got I think one more
24 witness in this case and then we'll be able to do the closing
25 arguments and the charge. Mr. Holler?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 MR. HOLLER: Your Honor, we'd call Mrs. Marilyn Wilson.

2 THE COURT: Okay.

3 THE CLERK: Place your left hand on the Bible. Raise
4 your right hand. State your name, please.

5 THE WITNESS: Marilyn Wilson.

6 THE CLERK: Do you solemnly swear or affirm your
7 testimony to the Court shall be the truth, the whole truth,
8 nothing but the truth, so help you God?

9 THE WITNESS: Yes.

10 THE CLERK: Thank you. Have a seat up here, please.
11 Please state your full name and spell your last name for the
12 record. Pull up close to the mic and speak a little louder,
13 please.

14 THE WITNESS: Marilyn Wilson, W-i-l-s-o-n.

15 MARILYN WILSON, being first duly
16 sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. HOLLER:

19 Q: Ms. Wilson, how are you?

20 A: Fine.

21 Q: In July of 2011, did you work for Tuomey?

22 A: Yes, sir.

23 Q: Okay. What was your -- what was your title at Tuomey?

24 A: Nurse assistant.

25 Q: Okay. Or nursing -- we've heard nursing tech?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 A: Nursing tech.
2 Q: Okay. How long did you work for Tuomey?
3 A: Nine years. It was about nine.
4 Q: And when did you stop working for Tuomey?
5 A: Two years ago.
6 Q: Okay. And why did you stop?
7 A: My knee. I've got a bad knee.
8 Q: Okay. And what do you do now?
9 A: Private sitter. I work in a nursing home. I sit with
10 folks.
11 Q: And you can do that with your knee?
12 A: Uh-huh.
13 Q: Yes?
14 A: Yes, sir.
15 Q: Okay. If you would, just please say yes or no. When you
16 nod your head -- but we have a court reporter.
17 A: Okay.
18 Q: And do you do anything else other than work as a sitter?
19 A: I go to school.
20 Q: And what are you going to school with?
21 A: Gerontology.
22 Q: And help us. What is gerontology?
23 A: It deals with the elderly and death and dying.
24 Q: And will that training help you find another job working
25 with older people?

MARILYN WILSON - DIRECT BY MR. HOLLER

- 1 A: Yes, sir.
- 2 Q: And that's what you want to -- that's what you want to
3 do?
- 4 A: Yes, sir.
- 5 Q: Would that be a job that requires a higher skill set than
6 you currently have?
- 7 A: Yes, sir.
- 8 Q: Okay. And when will you finish your program?
- 9 A: Probably a year and a half.
- 10 Q: Okay. Wonderful. Take me back to July of 2011. You
11 worked as a nursing tech at Tuomey?
- 12 A: Yes, sir.
- 13 Q: And you worked on the floor during the night of July the
14 5th and morning of July the 6th, 2011?
- 15 A: Yes, sir.
- 16 Q: And you're familiar with Dr. Myat?
- 17 A: Yes, sir.
- 18 Q: Okay. And you're familiar with his -- when he was found
19 on the floor after his fall?
- 20 A: Yes, sir.
- 21 Q: Okay. Let me first ask you some questions about some
22 issues that have arisen with this jury, and that has to do
23 with what you do as a nursing tech or what you did in July of
24 2011.
- 25 (WHEREUPON, Plaintiff's Exhibit Number 1 was placed on

MARILYN WILSON - DIRECT BY MR. HOLLER

1 the screen.)

2 Q: On that monitor up above my head, there's a very poor
3 diagram for our purposes, but I'm sure it's good for an
4 architect. Can you look at this carefully? Does this appear
5 to be roughly a layout of 3 North?

6 A: It's not on here.

7 Q: It's not on your screen?

8 A: No, sir.

9 MR. HOLLER: It disappeared from every other screen, Mr.
10 Bradley.

11 THE WITNESS: There it is.

12 THE COURT: Okay.

13 MR. HOLLER: Thank you, Mr. Bradley.

14 BY MR. HOLLER:

15 Q: Okay. Let me see if I can help you become oriented with
16 this. So we've looked at it some here and make sure that
17 you're oriented with us. Do you see the red dot that's on
18 there?

19 A: Yes, sir.

20 Q: This red dot would be roughly the area where the visitor
21 elevators are?

22 A: Okay.

23 Q: And someone coming off the visitor elevators would come
24 and walk down the hallway and would be walking past patient
25 rooms?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 MR. HOLLER: And, Judge, I apologize for the leading, but
2 I just want to try to set the stage here.

3 THE COURT: Okay. I mean that's fine until he objects.

4 MR. HOLLER: Okay.

5 BY MR. HOLLER:

6 Q: Are you following me?

7 A: Yes, sir.

8 Q: Someone walking down the hallway?

9 A: Yes, sir.

10 Q: The patient elevator would be over -- I'm sorry. The
11 employee elevator would be over here? And then someone would
12 come out and walk down the hallway here? Does this make
13 sense?

14 A: Yes, sir.

15 Q: Okay. Do you see there's a red box that's been drawn in
16 the center right here? This would be a nursing station?

17 A: Yes, sir.

18 Q: Okay. On the nursing station, what would be kept on this
19 end of the nursing station?

20 A: That's the patient charts.

21 Q: Okay. It's a rack where all the patient charts are kept?

22 A: Yes, sir.

23 Q: And what's on this end of the nursing station?

24 A: That's where when the doctors already looked at it -- I
25 don't know what you call it, but they put the charts right

MARILYN WILSON - DIRECT BY MR. HOLLER

1 there for orders.

2 Q: Charts with open orders?

3 A: Yes.

4 Q: And that alerts everyone that there's something to be
5 done by the nurses?

6 A: Uh-huh.

7 Q: Yes?

8 A: Yes, sir.

9 Q: Okay. Have you ever testified before?

10 A: No, sir.

11 Q: Okay. Let me ask you what this little room is right
12 here?

13 A: That's the kitchen.

14 Q: Okay. And I'm going to try to make that a little bigger
15 and my drawing may be terrible, but my drawing on that -- does
16 that approximate -- approximate the small room with the sink
17 and the refrigerator and the icemaker?

18 A: Yes, sir.

19 Q: Okay. And what's in this small room here?

20 A: That's where the nurses go for the -- what you call it?
21 Well, the nurses go in there. We don't go in there.

22 Q: Okay.

23 A: But that's where they get stuff to draw blood from --
24 blood draws.

25 Q: And it's another -- it's another small room that's

MARILYN WILSON - DIRECT BY MR. HOLLER

1 accessible from the area beside the nursing station?

2 A: Yes, sir.

3 Q: Okay. When you perform your duties -- in this case, it
4 was a seven p.m. to a seven a.m. shift. Would that be your
5 hours?

6 A: Yes, sir.

7 Q: Are there times during your seven p.m. to seven a.m.
8 shift where you sit around and read magazines or watch TV or
9 just kind of hang out?

10 A: Not read magazines. We're not supposed to read on the
11 floor.

12 Q: Okay.

13 A: But I mean we have a break room that we go on break.

14 Q: When you're not on break, are you moving during your
15 shift?

16 A: Yes, sir.

17 Q: And you have things to do?

18 A: Yes, sir.

19 Q: Are most of the things you do documented?

20 A: Not all of them. Just the vital -- the vital signs are
21 documented.

22 Q: When you take vitals of a patient, where do you document
23 the signs or where did you in 2011?

24 A: In the computer.

25 Q: Okay. You don't document them in the patient room?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 A: No, sir.

2 Q: You come back to the computer?

3 A: Uh-huh.

4 Q: Yes?

5 A: Yes, sir.

6 Q: Okay. Let me ask you in particular about the process of
7 giving patients a small Styrofoam cooler with -- with ice and
8 water. Tell me how that is accomplished?

9 A: We got a cart that we takes to the kitchen. Everybody is
10 different. I take my cart to the kitchen and sometime I
11 usually take my cups in the kitchen, set them on the sink, and
12 fill it with ice. I don't use the water because by the time I
13 get off, it'll be a meltdown to water. So I only use ice.

14 If I don't use the cup, we've got the patient bags, the
15 patient belonging bags, and we double bag that and I take them
16 to the machine. Where the ice comes down, we put it under
17 there. So when the ice goes, it goes in the bag. And when
18 we're finished, we just drawstring it. And then we put it on
19 the cart, which has got a towel on it, and we keep it, you
20 know, tied up.

21 Q: Okay. During that process, do you drop ice?

22 A: No, sir.

23 Q: Do you train -- in 2011, had you trained other nurse
24 techs?

25 A: Yes, sir.

MARILYN WILSON - DIRECT BY MR. HOLLER

1 Q: How many?

2 A: All that come to the night shift on our floor at night.
3 I trained all of them.

4 Q: So any techs that worked on the night shift, you would
5 have trained them?

6 A: Yes, sir.

7 Q: In 2011?

8 A: Yes, sir.

9 (WHEREUPON, Defendant's Exhibit Number 1 was placed on
10 the screen.)

11 Q: Okay. What is this picture of? These are marked as
12 defendant's exhibits, but what is this particular picture --
13 pitcher -- picture?

14 A: The kitchen.

15 Q: Okay. This is what you -- what we referred to as the
16 patient kitchen?

17 A: Patient kitchen.

18 Q: And what is in this room?

19 A: The ice machine and then we have the little -- you can't
20 see it, but the cabinet with the snacks in it.

21 Q: So if a patient or a sitter requests some crackers or
22 something to put on their stomach --

23 A: We would have to get it.

24 Q: Okay. And it comes from this room?

25 A: Yes, sir.

MARILYN WILSON - DIRECT BY MR. HOLLER

1 Q: Okay. In 2011, was there a keypad lock on this door?

2 A: Yes, sir.

3 Q: Okay. In 2011, what was the general practice for that
4 door?

5 A: You have to have the code to get in.

6 Q: Okay. But was the door always kept closed?

7 A: It was supposed to kept -- stay closed.

8 Q: All right. Was there a sign on there that says keep it
9 closed --

10 A: Yes.

11 Q: -- in 2011?

12 A: Yes, sir.

13 (WHEREUPON, Defendant's Exhibit Number 3 was placed on
14 the screen, followed by Defendant's Exhibit Number 4.)

15 Q: Okay. This picture -- is this an accurate depiction of
16 what the floor in the patient kitchen would look like?

17 A: Yes, sir.

18 Q: Okay. Can you describe in this picture and maybe the
19 next where you would put the cart when you described your
20 process of both how you did it and how you trained other nurse
21 techs to put ice from the machine into the cups?

22 A: You can bring it right beside the door or you can bring
23 it in. You can bring it inside or you can put it right beside
24 the door.

25 Q: Okay. And what is the practice that you used yourself?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 A: I'd usually bring mine inside.

2 Q: So you'd bring it inside the door --

3 A: Yes.

4 Q: -- that we can see?

5 A: Right inside the door.

6 Q: Okay.

7 A: But not where -- you know, a nurse can get by. If the
8 nurse is at the desk right there, she can't walk by.

9 (WHEREUPON, Plaintiff's Exhibit Number 1 was placed on
10 the screen.)

11 Q: So if we look at the floor plan, you're indicating that
12 you would pull the cart into the kitchen with you and the ice
13 machine?

14 A: Not all the way in. Halfway in.

15 Q: But it would leave a sufficient amount of room?

16 A: Yes, sir.

17 Q: For someone to walk by the nurses station?

18 A: Yes, sir.

19 Q: Okay. Are there other acceptable practices that were
20 used in 2011, both that you may have used or have taught
21 others CNAs?

22 A: Yes, sir. We can pull it right at the end of the hall
23 before you turn to come into the kitchen. You can park it
24 right there.

25 Q: Okay. And would that be the same transferring of the

MARILYN WILSON - DIRECT BY MR. HOLLER

1 cups or is that using the double plastic bag process?

2 A: Using the double bag.

3 Q: Okay. If in transferring ice from the ice machine to the
4 cart in any fashion caused ice to fall, where would that ice
5 fall?

6 A: If I'm bringing it from the bag?

7 Q: Let's talk about both processes. If you -- if you're
8 filling cups, where would the ice fall if it -- if it were to
9 fall?

10 A: It would fall on the ice machine to the bottom.

11 Q: Tell me if there's a picture here that would help you --

12 A: Yes, sir.

13 Q: -- find where it would fall?

14 A: Go back. The machine.

15 (WHEREUPON, Defendant's Exhibit Number 1 was placed on
16 the screen.)

17 A: You see the ice machine? It's at the bottom right there.
18 Yeah, right there. It would fall right in there.

19 Q: There's a drain?

20 A: Yes.

21 Q: Okay. So if ice falls as it's coming out of the machine,
22 it falls into a drain system?

23 A: Yes, sir.

24 Q: Okay. If ice were to fall from the cup after it's
25 removed from under the ice dispenser, where would it fall?

MARILYN WILSON - DIRECT BY MR. HOLLER

1 A: I guess it would fall on the floor.

2 (WHEREUPON, Defendant's Exhibit Number 3 was placed on
3 the screen.)

4 Q: Down here?

5 A: Yes.

6 Q: Where you see the red dot?

7 A: Yes.

8 Q: Okay. If you use the other method of using a double
9 plastic bag, a double plastic bag to grab ice, where would ice
10 spill if it -- if there's a possibility during that process?

11 A: Well, when we use the bag, it wouldn't be able to spill
12 because where the ice come out the little chute, we put the
13 bag under it. So it wouldn't be able to spill because it's
14 going in the bag. And once you let the little lever from
15 behind stop, you just close it. So it wouldn't be able to
16 fall out of the bag.

17 (WHEREUPON, Defendant's Exhibit Number 6 was placed on
18 the screen.)

19 Q: Okay. Is this the service cart that you used?

20 A: Yes, sir.

21 Q: And you described that there was a lip on the service
22 cart?

23 A: Yes.

24 (WHEREUPON, Defendant's Exhibit Number 7 was placed on
25 the screen.)

MARILYN WILSON - DIRECT BY MR. HOLLER

1 Q: Is that the lip right there?

2 A: Yes, sir.

3 Q: Prior to -- you saw Dr. Myat while he was on the floor?

4 A: Yes, sir.

5 Q: Prior to him falling, had you seen him on the floor?

6 A: Yes, sir.

7 Q: Okay. He was up there working?

8 A: Yes, sir.

9 Q: Do you know how long he had been there?

10 A: No, sir.

11 Q: Okay. How did you become aware that he had fallen?

12 A: I was in a patient room and I heard a scream. I thought

13 it was one of the patients because we have some that scream.

14 And I came around the corner and I saw him on the floor.

15 (WHEREUPON, Plaintiff's Exhibit Number 1 was placed on

16 the screen.)

17 Q: Okay. Can you show me on the diagram what corner you

18 came around? Would this be the corner?

19 A: Yes, sir.

20 Q: Okay. So you came around this corner?

21 A: Uh-huh. Yes, sir.

22 Q: And then came to Dr. Myat?

23 A: Yes, sir.

24 Q: All right. And let's see if I can find a photograph that
25 may help you.

MARILYN WILSON - DIRECT BY MR. HOLLER

1 (WHEREUPON, Defendant's Exhibit Number 2 was placed on
2 the screen.)

3 Q: In this photograph, can you tell me where you found Dr.
4 Myat?

5 A: Right here by the -- by the desk.

6 Q: Okay. Tell me which way to move. Left or right?

7 A: Left.

8 Q: Okay. Tell me when to stop.

9 A: Right there.

10 Q: You found Dr. Myat right here?

11 A: Yes, sir.

12 Q: Okay. And when you got to Dr. Myat, tell me how he was
13 positioned?

14 A: He was sitting up, but his leg was out and I saw
15 something about his bone -- about his knee.

16 Q: Okay. And a nurse was coming at the same time and I
17 asked her what happened and she said he must've fell. And I
18 said are you all right, Dr. Myat, and he said no. And I said
19 what happened and he said I slipped in some water.

20 Q: Okay.

21 A: So I looked around and I did saw a spot of water, but it
22 was about the size of a penny, and a cart was -- a cart was on
23 the side. So I reached and got a towel and wiped that little
24 spot up.

25 (WHEREUPON, Defendant's Exhibit Number 8 was placed on

MARILYN WILSON - DIRECT BY MR. HOLLER

1 the screen.)

2 Q: This is -- this is a view down the hallway from 346.

3 A: Okay. Now, you see right there?

4 Q: I'm sorry. My fingers are --

5 A: Right there, with the wheels on it. That's where --

6 Q: Right here?

7 A: Yeah. Our cart was right there. That's a little alcove

8 where we keep our carts and we keep towels and sheets and

9 stuff like that on it.

10 Q: So --

11 A: But I reached right there and got a towel and the water

12 spot was -- that wall right there with that little wood part

13 on it -- a little bit closer, a little bit over. A little bit

14 over more. Out this way.

15 Q: I'm sorry.

16 A: Yeah. The water spot was somewhere up in there.

17 Q: And describe the water spot again? Was it more than one?

18 A: I just -- I just saw that one little spot. I looked and

19 that's all I saw, that one little spot, and it was, like --

20 like I say, it was about the size of a penny. It was one

21 little spot and I just get the towel and just did like that.

22 Q: What was the distance from that spot of water to Dr. Myat

23 where he was positioned on the floor?

24 A: He was right there at the end of the nursing station. It

25 was about that far I guess.

MARILYN WILSON - DIRECT BY MR. HOLLER

1 Q: Can you quantify? I see your hands, but we have a court
2 reporter.

3 A: Oh.

4 Q: She's looking at me instead of you. Feet? Yards?

5 A: I'm not good with feets and yards.

6 Q: Okay. Length of your arm?

7 A: Yes. About the length of my arm.

8 Q: How tall are you?

9 A: About 5'3".

10 Q: Okay. Did you see any other water on the floor on July
11 the 6th, 2011?

12 A: No, sir.

13 Q: Okay. In your experience working with the people, the
14 two techs and -- the one other tech and four nurses up there,
15 would any person there put water on the floor and walk away
16 from it?

17 A: No, sir.

18 Q: Do you know how this water got on the floor?

19 A: No, sir.

20 Q: Did you put it on the floor?

21 A: No, sir.

22 Q: Do you know of any -- have you had any experience or do
23 you believe that any Tuomey employee would see this water on
24 the floor and not do something about it?

25 A: No, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 MR. HOLLER: Court's indulgence. Thank you, Ms. Wilson.
2 Please answer any questions that these gentlemen may have for
3 you.

4 CROSS-EXAMINATION

5 BY MR. PADGET:

6 Q: Good morning, Ms. Wilson.

7 A: Good morning.

8 Q: My name is Bill Padget. I represent Dr. Myat in this
9 case. We've never met before; so I wanted to introduce
10 myself. Good morning to you.

11 A: Good morning.

12 Q: You were employed by Tuomey back in July of 2011 when
13 this incident with Dr. Myat occurred?

14 A: Yes, sir.

15 Q: You're no longer employed by Tuomey?

16 A: No, sir.

17 Q: You've moved on?

18 A: Yes, sir.

19 Q: I understand you have some troubles with your knee by
20 your testimony earlier. You were not trying to compare your
21 knee injury in any way to the knee injury Dr. Myat suffered,
22 were you?

23 A: No. No, sir.

24 Q: Okay. Have you had surgery on your knee?

25 A: Not yet.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: Okay. You haven't been through a rehab process or
2 anything like that?

3 A: No, sir.

4 Q: Okay. My wife's a nurse. She tells me that nurses and
5 nurse techs on the floor when they're working, they're moving.
6 They're moving. They're walking about the unit. They wear
7 tennis shoes. They're moving from place to place getting
8 things done. Is that a fair description?

9 A: Yes, sir.

10 Q: So when you're walking from a patient room back to the
11 nurses station to get a -- get a chart or get a piece of
12 equipment that you need, often you're moving at a pretty brisk
13 pace, aren't you?

14 A: Not really. Not fast.

15 Q: Not fast?

16 A: No.

17 Q: Y'all don't --

18 A: No. We're techs. We're not nurses.

19 Q: Okay.

20 A: We --

21 Q: But you've observed the nurses --

22 A: Nurses go faster running, not the techs.

23 Q: Okay. I gotcha.

24 A: Because we're so busy we've got, like, many people there
25 we have to get through; so not too fast.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: Okay. I gotcha. But the nurses, the RNs that are doing
2 some other clinical patient care -- they're often moving
3 pretty quickly about the unit? Is that a fair description?

4 A: Yeah, somewhat.

5 Q: Okay. But they can be?

6 A: Huh?

7 Q: They can be?

8 A: Yes, sir.

9 Q: They may not always be, but they -- if they're working,
10 they can?

11 A: Yeah, they can be.

12 Q: The hospital answered some written questions for us in
13 this case and they told us -- they gave us a list of the
14 people that were on duty that night. I'm going to read it to
15 you if I could. They have listed a Carrie Burgess. Did you
16 know Ms. Burgess?

17 A: Yes, sir.

18 Q: She's an RN?

19 A: Yes, sir.

20 Q: So she's one that provided patient care?

21 A: Yes, sir.

22 Q: Right? A Jackie -- forgive my name -- Colclough?

23 A: Colclough.

24 Q: Colclough. She's an RN as well?

25 A: Yes, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: Tanisha Holloman? An RN?

2 A: Yes, sir.

3 Q: Did you know Ms. Holloman?

4 A: Yes, sir.

5 Q: A William Whitehouse?

6 A: Yes, sir.

7 Q: Who was here today? Barbara Jackson, who was a CNA. Did
8 you know Ms. Jackson?

9 A: Yes, sir.

10 Q: Yourself, Marilyn Wilson. You're a CNA?

11 A: Yes.

12 Q: Yiesha Wells, a student tech. Did you know Ms. Wells?

13 A: Yes. She's a nurse now.

14 Q: Okay. And she was working there that night as a student
15 tech? She was not yet a certified nursing assistant? She was
16 working to get her certification; is that correct?

17 A: Yes.

18 Q: And there's also a listing of a Chanita Nelson, CT.

19 What's a CT?

20 A: Clinical tech. She comes in to draw blood.

21 Q: Okay. All right. So there were nine people including
22 yourself there that night who were either a nurse, nurse
23 techs, or this CT, and you were all employed by Tuomey;
24 correct?

25 A: Yes, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: The -- the employees that are typically tasked with
2 getting the ice out of the machine and with filling the bags
3 or the cups and moving those about the unit -- was that
4 typically done by the nurse -- nurse techs?

5 A: Yes, sir.

6 Q: The CNAs like -- like yourself and Ms. Jackson, and I
7 presume this night with the help of Ms. Wells, the student
8 tech?

9 A: Yes, sir.

10 Q: Let's talk routine for a second. We've been told that on
11 the unit around -- sometime -- not exactly, but sometime
12 around four a.m. the techs will start to prepare to get water
13 and ice from the patient kitchen and move it about to the
14 patients. Is that consistent with your experience?

15 A: Yes, sir.

16 Q: And so that would occur every morning?

17 A: Yes, sir.

18 Q: Including this morning --

19 A: Yes, sir.

20 Q: -- that's in question?

21 A: Yes, sir.

22 Q: Do you have any recollection if it was you or Ms. Jackson
23 or Ms. Wells who was actually doing the ice preparation that
24 morning?

25 A: Well, we all do it.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: You all do it? All three of you?

2 A: Yes. We all have our patients. We fill ice for our own
3 patients.

4 Q: Okay. So it's not --

5 A: So she did it, I did it, and Yiesha did it too.

6 Q: Oh, I see. I see. So it's not just one person --

7 A: No.

8 Q: -- taking this task every morning?

9 A: No, sir.

10 Q: It happens on this morning at least three times?

11 A: Yes.

12 Q: Okay. And that all occurs at that area with that cart at
13 that patient kitchen right next to the nurses station?

14 A: Yes, sir.

15 Q: Every morning?

16 A: Yes, sir.

17 Q: You made mention earlier -- I know this is not a
18 Styrofoam cup, but a cup nonetheless. The Styrofoam cups you
19 use -- were they smaller Styrofoam cups or the big sort of
20 picnic-style Styrofoam cups? Which -- what size were they?

21 A: It's bigger than that.

22 Q: Bigger than this one?

23 A: Yes, sir.

24 Q: Okay. Fair enough. When you fill those with ice, you
25 said you filled them with ice in the patient kitchen and that

MARILYN WILSON - CROSS BY MR. PADGET

1 -- but you didn't use any water.

2 A: No, we don't --

3 Q: You just filled up with ice?

4 A: We don't fill the cups.

5 Q: Okay, I thought you said at some point you --

6 A: We fill the pitchers.

7 Q: -- fill the cups?

8 A: No. We fill the pitchers.

9 Q: Okay.

10 A: Yeah. We don't fill the cups. We fill the pitcher up
11 with ice.

12 Q: I gotcha. And what did you do with the cups? What do
13 you put in them?

14 A: The cups would be already in the room. We just fill the
15 pitcher with ice.

16 Q: I see. Okay. So when you fill the pitcher, you said you
17 just fill the pitcher with ice?

18 A: Yes.

19 Q: And no water?

20 A: I don't do water.

21 Q: That was your preference?

22 A: Yeah. I don't do water.

23 Q: Okay.

24 A: I just do ice because it will melt by the time I leave
25 and they'll have water in it by the time I leave for the next

MARILYN WILSON - CROSS BY MR. PADGET

1 shift.

2 Q: I gotcha. So when you're filling these pitchers sometime
3 around or after four o'clock in the morning as usual,
4 preparing for the next to shift to come, the pitchers -- you
5 put them somewhere where this ice melts. Where is that?

6 A: In the patient room.

7 Q: In the patients' rooms?

8 A: Yes, sir.

9 Q: Okay. Are they ever left on the carts while you're
10 moving -- preparing the other pitchers?

11 A: If -- sometimes when we do it at night, we put them on
12 the cart. As we go into each room, they'll be on the cart
13 then.

14 Q: Okay. And so there's ice in those pitchers on the cart
15 near the nurses station in some -- somewhere? Whether that's
16 --

17 A: By the patient door.

18 Q: Or by the patient door?

19 A: It's by the patient door.

20 Q: But when you're preparing it, it's by the nurses station?

21 A: Yes.

22 Q: Okay. Now, when you prepare the ice in the pitchers on
23 the cart, it's around the nurses station for a period of time.
24 At some point when you're doing your work, you would take the
25 cart, move it away from there to wherever your patients were,

MARILYN WILSON - CROSS BY MR. PADGET

1 and then you'd -- right?

2 A: Repeat that.

3 Q: Sure. You'll prepare the ice into the pitchers?

4 A: Yes.

5 Q: Get the pitchers on the cart and then you move the cart
6 out to where it is ultimately going to be delivered to in the
7 patient rooms; right?

8 A: Yes, sir.

9 Q: Okay. So you might -- when you come out of the nurses
10 station on this side -- and I'm referring to the side where

11 Dr. Myat fell. If you came out of that way, you might go
12 left, you might go right, just depending on where you're
13 going?

14 A: Yes, sir.

15 Q: Okay. But those carts and that ice are moved all about
16 the unit by -- at least on this morning, by three different
17 Tuomey employees; correct?

18 A: Yes, sir.

19 Q: You said you put the cart halfway into the patient
20 kitchen and halfway out, presumably because the whole thing
21 won't fit inside the kitchen?

22 A: Uh-huh.

23 Q: Is that correct?

24 A: Yes, sir.

25 Q: Thank you. Nurses are coming and going. They're at the

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1 nurses station back and forth getting charts, computers, and
2 so forth. Have you ever had occasion where the nurses may
3 have collided with the cart?

4 A: No. Because I try to do it when they're in the rooms.

5 Q: Okay. But you don't always do it while they're in the
6 room. I presume at some point they came back and that's why
7 you keep it in the door --

8 A: Yes.

9 Q: -- so they would have room to get by?

10 A: Uh-huh.

11 Q: Is that accurate?

12 A: Yes, sir.

13 Q: On the floor -- and we've seen the picture a lot. So I'm
14 just going -- we're just going to talk for a second. On the
15 floor in this area, are there any other -- are there any water
16 fountains in the corridor near where Dr. Myat fell?

17 A: No, sir.

18 Q: I know it's been some time since you've been up there; so
19 I apologize if that's not a fair question. If you don't
20 remember, that's okay. Are there any other -- is there a
21 bathroom right there by the nurses station or any other source
22 of water nearby right adjacent to the nurses station other
23 than the patient kitchen?

24 A: No, sir.

25 Q: Do nurses ever have drinks at the nurses station, in your

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1 observation?

2 A: Yes. Uh-huh. Yes, sir.

3 Q: Yes?

4 A: Yes, sir.

5 Q: Sure. And did -- did nurse techs -- did you have drinks
6 that you'd occasionally keep at the nurses station?

7 A: No. But we don't usually sit at the nurses station. We
8 have a little room that we go in and sit.

9 Q: Okay. So typically the techs didn't sit in the chairs
10 there at the nurses station?

11 A: We might sit in the chair sometime, but we don't bring
12 drinks up there.

13 Q: Okay. But the nurses might?

14 A: Yes, sir.

15 Q: Do you know whether or not that was in violation of
16 Tuomey policies?

17 A: I don't know.

18 Q: Okay. I know -- you know Mr. Whitehouse?

19 A: Yes, sir.

20 Q: He was an RN. He provided clinical patient care on the
21 floor?

22 A: Yes, sir.

23 Q: I understand from him sometimes he served as the charge
24 nurse?

25 A: Yes, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: So he -- in a sense, on some evenings he would have been
2 the nursing supervisor on the floor as the charge nurse?

3 A: The charge nurse. Yes, sir.

4 Q: Right. And I understand there's different titles and
5 this and that, but he would've been in charge of the -- of the
6 nursing on the unit on a particular night?

7 A: Yes, sir.

8 Q: When he was charge nurse?

9 A: Yes, sir.

10 Q: And so he would have been in a sense your supervisor of
11 sorts? He would have been the first person you came to with a
12 problem that night?

13 A: Yes, sir.

14 Q: Okay. He -- he's worked at Tuomey a number of years.

15 How long had you been at Tuomey in 2011?

16 A: I think about nine years.

17 Q: Nine years?

18 A: Yes, sir.

19 Q: And do you know how long he had been there?

20 A: No. No, I don't.

21 Q: Okay. You said there was a cart nearby that you grabbed
22 a towel from to clean up the penny-sized spot of water that
23 you observed?

24 A: Yes, sir.

25 Q: Is that right? That cart was situated near the wall next

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1 to the nurses situation I think as you described it?

2 A: Yes. It's a little -- it's a little alcove where we keep
3 the carts.

4 Q: Okay.

5 A: And one of the carts was right there.

6 Q: And so that's a different cart than the cart that you
7 move water on?

8 A: It's the same cart.

9 Q: It's the same cart?

10 A: It's the same cart.

11 Q: So when you wiped up the spill, you said you just reached
12 over and grabbed a towel?

13 A: A towel.

14 Q: Okay. So the cart that you move water on was within an
15 arm's length of the spot of water that you observed?

16 A: Yes, sir.

17 Q: Okay. Do you know if there was water on it at the time?

18 A: On the cart?

19 Q: Yes.

20 A: No, sir. The patients would've done had all their water.

21 Q: This was at 5:30 or so? Do you know what time Dr. Myat
22 fell?

23 A: No, I don't know the time.

24 Q: You don't -- you don't know whether or not the patients
25 would've had their water or not then, do you?

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1 AL Oh, yes. They would have had their water then because I
2 had already finished my rounds.

3 Q: You'd finished your rounds?

4 A: We'd done finished that.

5 Q: Do you know if the other techs who were working had
6 finished their rounds?

7 A: I think they did. I'm not sure.

8 Q: Fair enough. You think they did, but you don't know if
9 they did?

10 A: I'm not sure.

11 Q: Have you ever dropped a piece of ice in preparation of
12 this process moving ice from the -- and I don't mean this day
13 in particular. I'm just referring to ever. It was quite the
14 process you described. To your knowledge, have you in your
15 preparation of the pitchers and the bag of ice and moving the
16 ice about the unit -- have you ever dropped a piece of ice
17 doing that?

18 A: Not that I remember.

19 Q: Not that you remember?

20 A: No.

21 Q: You're not saying that's impossible though, are you?

22 A: No, it's not impossible.

23 Q: If you're preparing a lot of ice for a lot of people,
24 moving it throughout a busy unit --

25 A: Yes, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: -- it would be easy to do, drop a piece of ice?

2 A: Yeah, if you -- if you're doing it the wrong way, but
3 like I say, the way I'm filling the bag, I couldn't drop it.

4 Q: That nurse -- student nurse -- she was -- Ms. Wells --
5 she was in training, wasn't she?

6 A: Yes, sir.

7 Q: You were describing that the technicians -- the nurse
8 techs don't often sit at the nurses station. That usually
9 it's the nurses that do that. So is it fair to say that the
10 techs -- unless you're doing some work, you guys don't -- do
11 you hang out at the nurses station much?

12 A: We sit to the nurses station sometimes.

13 Q: Okay.

14 A: We might sit down for a minute or so, but not hang out at
15 the nurses station.

16 Q: Policies of Tuomey. The policies were if you saw a
17 spill, clean it up immediately; right?

18 A: Yes, sir.

19 Q: Don't call housekeeping and wait on them to get there?

20 A: No.

21 Q: There's also some other policies it looks like. Did
22 Tuomey have a policy about allowing visitors and patients to
23 hang out around the nurses station?

24 A: No, sir.

25 Q: No, sir, there was no policy or, no, they weren't

MARILYN WILSON - CROSS BY MR. PADGET

1 allowed?

2 A: Oh, no. I don't know the policy --

3 Q: Okay.

4 A: -- about that.

5 Q: You're not certain about that?

6 A: No, sir.

7 MR. PADGET: I pushed the wrong button.

8 Q: Okay. This is Exhibit 3. It's already in evidence, Ms.

9 Wilson. Do you have it up on your screen?

10 A: Yes, sir.

11 Q: Do you see this purple sign there beside the -- beside
12 the patient kitchen door?

13 A: Yes, sir.

14 Q: And it reads no patients or visitors allowed around or
15 through the nurses station. Do you see that?

16 A: Yes, sir.

17 Q: And what would be the purpose of not allowing patients
18 and visitors around the nurses station?

19 A: Because any patient can -- I mean any visitor can walk up
20 and pull up a chart or anything. They say that, but I don't
21 see -- a family came through and one person walked through and
22 I had to stop them and tell them you're not allowed to walk
23 through.

24 Q: But y'all would do that? If visitors or patients came
25 through that area, you would direct them that they're not

MARILYN WILSON - CROSS BY MR. PADGET

1 supposed to be there?

2 A: Yes, sir.

3 Q: Okay. And you could -- you could point to a sign and
4 tell them you're not supposed to be here?

5 A: Yes, sir.

6 Q: Y'all stay on the outer part of the corridor?

7 A: Yes, sir.

8 Q: And that's what you did?

9 A: Yes, sir.

10 Q: Dr. Myat -- he fell -- you described it sort of --
11 looking at one photo, sort of on the left side on that one
12 side of the nurses station where you used the pointer. When
13 Dr. Myat fell and you cleaned up the amount of water that you
14 saw, do you know -- did you know if Dr. Myat when he fell if
15 perhaps he was sitting on other water? Do you know one way or
16 the other?

17 A: No, sir.

18 Q: Okay. There's no way you would have been able to know
19 that?

20 A: No, sir.

21 Q: So you're not saying that the size of the water that Dr.
22 Myat slipped on was this small amount? That's all you saw
23 afterwards?

24 A: That's all I saw.

25 Q: Okay. You don't know what it was when he actually fell?

MARILYN WILSON - CROSS BY MR. PADGET

1 A: No, sir.

2 Q: The -- there was a corrections officer who was guarding
3 an inmate on the floor that night named Kathy Sapp. Did you
4 have any discussions with Ms. Sapp on the floor that night?

5 A: No, sir. And she was on the same side of the hall.

6 Well, I worked the opposite side of the hall that night. So I
7 wouldn't have.

8 Q: Okay. Fair enough. But you didn't have any discussions
9 with her about the size of the water?

10 A: No, sir.

11 Q: That was on the floor?

12 A: No, sir.

13 Q: Okay. The -- did you observe any visitors or patients or
14 anybody in the area next to where the doctors pull or put the
15 charts back where the orders are where Dr. Myat fell? Did you
16 observe any patients or visitors in that location in the
17 minutes or hours before Dr. Myat's fall?

18 A: No, sir.

19 MR. PADGET: That's all the questions I have. I'm sorry.
20 I lied, Judge. I have one more question.

21 THE COURT: Okay.

22 BY MR. PADGET:

23 Q: The code -- there's a code to get into the patient
24 kitchen?

25 A: Yes, sir.

MARILYN WILSON - CROSS BY MR. PADGET

1 Q: See, there's a little -- punch a couple buttons and you
2 can get inside?

3 A: Yes, sir.

4 Q: That's not something that's given out to visitors or --

5 A: No, sir.

6 Q: -- patients?

7 A: No, sir.

8 Q: In fact, that's not something that's even given out to
9 the doctors, is it?

10 A: No, sir.

11 MR. PADGET: All right. Thank you, Ms. Wilson.

12 THE WITNESS: You're welcome.

13 MR. HOLLER: Ms. Wilson, a few more questions. Let's see
14 if I can get over here without unplugging myself.

15 REDIRECT EXAMINATION

16 BY MR. HOLLER:

17 Q: You were asked about water sources. Were there outdoor
18 sinks -- are there sinks in the hallway outside the rooms of
19 these two corner rooms?

20 A: Yes, sir.

21 Q: Okay. And that's because those are airborne infection or
22 potential airborne infection patient rooms?

23 A: Yes, sir.

24 Q: And someone would come out of the room and wash their
25 hands both, you know, coming and going?

MARILYN WILSON - REDIRECT BY MR. HOLLER

1 A: Yes, sir.

2 Q: Okay. So there's a water source in the hallway?

3 A: Yes, sir.

4 Q: And it would be routine for a nurse, a doctor or a nurse
5 tech who went in to see a patient with a potential airborne
6 infection to wash their hands at that sink?

7 A: Yes, sir.

8 Q: Okay. So if you're talking about potential water
9 sources, which you were asked about, if a doctor, for example,
10 had just gone into -- is it 319? What's the room numbers for
11 the corners, do you remember?

12 A: No, it's not 319. It's 36? 37?

13 Q: That's fine. It's the corner rooms?

14 A: Yes, sir.

15 Q: That they would wash their hands and walk out potentially
16 with wet hands?

17 MR. PADGET: Your Honor, I'm going to object --

18 A: We have --

19 MR. PADGET: -- to the leading at this point.

20 THE COURT: Okay. How about don't lead her?

21 MR. HOLLER: Okay.

22 BY MR. HOLLER:

23 Q: That's a water -- I'm sorry. Let's go back to the
24 question about water sources. That is a water source right
25 outside those two corner rooms?

MARILYN WILSON - REDIRECT BY MR. HOLLER

1 A: Yes, sir.

2 Q: In the hallway? You were asked about the people who were
3 up there that night. Is each patient encouraged to have
4 someone with them at all times?

5 MR. PADGET: Your Honor, same objection. It's leading.

6 THE COURT: I'll allow that question. I'm not sure
7 that's -- go ahead.

8 BY MR. HOLLER:

9 A: Are you saying are each patient allowed to have --

10 Q: Encouraged.

11 A: Encouraged to have a family member with them?

12 Q: Yes.

13 A: I don't know.

14 Q: In your experience, do they frequently have family
15 members with them?

16 A: Yes, sir. Yes, sir.

17 Q: Sitters?

18 A: Sitters.

19 Q: Okay. People -- and you may not know their relationship,
20 but do patients have people who spend the night with them?

21 A: Yes, sir.

22 Q: Okay. Do you provide services to those people as well?

23 A: Not to the sitters.

24 Q: If the sitter -- if a -- okay. Not a sitter. If someone
25 with a patient says I'm thirsty, would you get them water or

MARILYN WILSON - REDIRECT BY MR. HOLLER

1 ice?

2 A: Yes, sir.

3 Q: Okay. Is there other traffic through the area other than
4 Tuomey employees during your seven p.m. to seven a.m. shift?

5 A: Well, we have the guy that does the laundry. He comes
6 around in the morning.

7 Q: Other than employees?

8 A: Oh, no, sir.

9 Q: Could there be patients from other floors walking
10 through?

11 A: Oh, yes, sir. We have patients that walks around.

12 Q: Okay.

13 A: And then family -- some family members comes out and walk
14 around too.

15 Q: Okay. And this happens throughout your work seven p.m.
16 to seven a.m. shift?

17 A: Yes, sir.

18 Q: Okay. Is part of your job duties as a nurse tech to see
19 that every patient has access to ice water if they want it?

20 A: Yes, sir.

21 Q: So in addition to the bathroom and the sink in the room,
22 they have a pitcher of water?

23 A: Yes, sir.

24 Q: Are there tops on the pitchers?

25 A: Yes, sir.

MARILYN WILSON - REDIRECT BY MR. HOLLER

1 Q: Do those tops seal?

2 A: Yes. They've got a little click on it when you close the
3 top.

4 Q: So in case it falls over, it won't spill?

5 A: I don't know about that.

6 Q: Okay. But it's to help keep the water in the cooler --
7 in the pitcher?

8 A: Yes, sir.

9 Q: Okay. Based upon your experience -- you said that there
10 was water within an arm's-length of the cart. Based upon your
11 experience of not only moving the carts, filling the pitchers
12 with water and ice -- ice, I'm sorry -- and moving them around
13 and distributing them to the patients, is the spot where you
14 saw the dime-sized water reasonably related to where those
15 carts would be moved during the performance of your services?

16 A: No, sir. No, sir.

17 MR. HOLLER: Thank you, Ms. Wilson.

18 MR. PADGET: Very briefly, Judge.

19 THE COURT: Okay.

20 RE CROSS-EXAMINATION

21 BY MR. PADGET:

22 Q: Ms. Wilson, if a patient or one of their family members
23 asked for a cup of water or some water, you'd be the one to go
24 get it though, wouldn't you?

25 A: Me or one of the other techs.

MARILYN WILSON - RECROSS BY MR. PADGET

1 Q: Okay.

2 A: Or the nurses.

3 Q: Sure. One of the other employees at Tuomey?

4 A: Yes, sir.

5 Q: You don't tell them the ice machine is down the hall, go
6 help yourself?

7 A: No, sir.

8 Q: On this day and this time where this particular cart was
9 located, the one that was used to move water about the unit
10 earlier, it was within an arm's-length of where you were when
11 you saw Dr. Myat on the floor and where you cleaned up that
12 spill of water?

13 A: Yes, sir.

14 MR. PADGET: That's all I've got, Judge. Thank you.

15 THE COURT: You can step down.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Yes, ma'am. Watch your step.

18 MR. HOLLER: The defense rests.

19 THE COURT: Okay. Ladies and gentlemen, the next part of
20 this trial deals with the closing arguments of the attorneys
21 and me charging you on the law, and that normally takes around
22 an hour and a half, which is going to mess up your lunch if
23 you don't go now.

24 So what we're going to probably do is just break for
25 lunch and ask you to come back at 1:15. Will that give y'all

1 enough time to eat? That's about an hour and 15 to 20
2 minutes.

3 So if you'll come straight back to the jury room at 1:15
4 and get back, we're going to have the closing arguments in
5 this case. Well, I say that. I assume you're not going to --
6 are you going to offer any other testimony?

7 MR. PADGET: No rebuttal, Your Honor.

8 THE COURT: Okay. Then -- and then we'll give you this
9 case to decide. You have a nice lunch and I remind you not to
10 talk about it yet. I'll see you at 1:15.

11 (WHEREUPON, the jury exited the courtroom at 11:52 a.m.)

12 THE COURT: Okay. I'll see y'all at 1:15.

13 MR. HOLLER: Judge, if I could just for the record very
14 briefly? Two or three sentences?

15 THE COURT: Sure.

16 MR. HOLLER: We just renew our motion for a directed
17 verdict at the conclusion of all of the evidence now that
18 there's no reply and, again, for the same reason we would ask
19 for a directed verdict on the issue of a Tuomey employee left
20 the water on the floor.

21 THE COURT: Okay.

22 MR. PADGET: Judge, I -- I've got to -- I assume at this
23 point we've presented all the facts. The defense has
24 presented all the facts in support of this defense and is not
25 calling any other witnesses.

1 THE COURT: Okay. That's my understanding.

2 MR. PADGET: Okay. They've rested. We would seek a
3 directed verdict on the charitable immunities cap on the
4 grounds -- or the Charitable Immunities Act, not the cap, on
5 the grounds that the defendant has failed to set forth and
6 offer any evidence to the Court or otherwise that the
7 defendant, Tuomey Healthcare, is in fact an entity that
8 qualifies for the protections of the charitable cap in that
9 the tax status of the entity has to be offered under the
10 definitional section of the statute, either as a 501(c)(3) or
11 a 501(d) entity in order to be entitled to the protections.
12 No such fact has been put forth before the Court establishing
13 the factual basis of that statutory defense.

14 Further, obviously we -- as I mentioned earlier, we have
15 questions about the tax status in light of other -- other
16 facts and circumstances that Tuomey has been involved in and
17 whether or not they retain that particular tax status and,
18 therefore, maintain the protection of the Charitable
19 Immunities Act.

20 So for those reasons that there are no factual basis been
21 put forth in support of those defenses, we'd ask for a
22 directed verdict as to the application of the charitable
23 immunity statute.

24 THE COURT: Okay.

25 MR. HOLLER: Judge, we would take the position that's not

1 a jury issue. It's not a question of fact to be determined.
2 The charitable status is determined by the IRS and it's not a
3 dispute that this jury would decide.

4 MR. PADGET: It may be a fact the Court will decide.

5 MR. HOLLER: We can certainly offer testimony to you.

6 MR. PADGET: You've rested.

7 MR. HOLLER: You're the one who imposes the cap and
8 you're the one who would decide if the IRS recognizes Tuomey
9 Hospital as a charitable organization.

10 THE COURT: Okay.

11 MR. PADGET: I understand that, Your Honor. That's why I
12 would've expected it would have been done prior to them
13 resting.

14 MR. HOLLER: Well --

15 MR. PADGET: In the other cases I've done involving
16 charitable caps, they either ask the plaintiffs to stipulate
17 or call a witness out of the presence of, of course, the jury
18 to establish those facts, and here that was not done. So we'd
19 ask for a directed verdict.

20 MR. HOLLER: And again, Judge, I can establish those
21 facts to you, not as an issue that is before this jury.

22 THE COURT: Okay. All right. I'll think about those
23 over lunch and see y'all at 1:15.

24 MR. HOLLER: Thank you, Judge.

25 MR. PADGET: Thank you, Judge.

1 (WHEREUPON, there was a break in the proceedings from
2 11:56 a.m. to 1:14 p.m.)

3 THE COURT: They tell me all the jury is here. Is
4 everybody ready to go?

5 MR. HOLLER: Judge, prior to the jury returning, for the
6 purposes that it may be necessary, I would move to reopen the
7 defense case. Judge, I have present in the courtroom -- in
8 fact, she's been here all week -- the agent for service of
9 process for Tuomey Corporation. It is a non- -- a 501(c)(3)
10 corporation recognized in that status by the IRS and also by
11 the South Carolina Secretary of State. I have documentation
12 to that effect, and it has been for many, many years.

13 Judge, I would also -- I think the more appropriate way
14 to handle it would be to take judicial notice of their status.
15 There was a discussion at the summary judgment hearing about
16 what Mr. Padget's observations as an observer about litigation
17 with the IRS -- with the federal government over the -- the
18 billing practices or contracts with the physicians. That
19 litigation has no status on a 501(c)(3) status whatsoever.

20 THE COURT: Okay. What's your position?

21 MR. PADGET: Judge, I'm happy to take it up. All his
22 paperwork is hearsay, first of all. That's the first thing.
23 You know that. I know that.

24 The second thing is anybody who can testify to it is a
25 witness that has not been named in discovery in a case that's

1 been pending for four years, which we also find to be
2 problematic.

3 Lastly -- well, I shouldn't say lastly unless I mean
4 lastly. I don't think judicial notice is appropriate. I
5 looked up some cases last night on this issue -- not this
6 precise issue, but on whether it's proper or not proper to
7 take judicial notice of a fact.

8 And it's governed under the rules -- I think it's in the
9 200 series of rules of evidence, but two cases spoke to me,
10 *Marvin v. Bay*, 732 S.E.2d 667 and *Bowers v. Bowers*, and in the
11 *Bowers* case -- this is 561 S.E.2d 610, 2012, Court of Appeals.

12 That case was a domestic case, but the big issue was
13 judicial notice of property values in the area, and the trial
14 judge took notice that property values had increased in the
15 area. My particular comment on it was that the Court of
16 Appeals said it was highly improper for the trial court to
17 take judicial notice of a fact that was hotly contested in the
18 case.

19 And in this case, we strongly contest that Tuomey's
20 status is appropriate under the charitable statute. I also
21 have my tax lawyer. I'm not a tax lawyer. Taxes are bad. I
22 try to stay away from them, but I have a tax attorney at my
23 firm. He did some research on this and the tax -- the tax
24 code issues about revocation of the charitable -- charitable
25 status or tax-exempt status -- it can be revoked for 501(d)

1 and for 501(c)(3) charitable organizations in a number of
2 circumstances, and the IRS, of course, makes that
3 determination.

4 It can be revoked in circumstances where, one, key
5 employees are paid too much money. And one of those
6 circumstances is, of course, that's an issue in the Fourth
7 Circuit case with Tuomey, which has been upheld, that they
8 paid those doctors too much money.

9 Now, the IRS makes the tax status determination. The tax
10 court cases -- there are two that make clear -- I can give you
11 the cites. I've never even looked at a tax court case before,
12 but it makes clear that the status, if it is revoked, is
13 retroactive to the date that the wrongful event took place.
14 Here, long ago.

15 So even if the IRS hasn't made a determination about
16 that, if -- if you read the Fourth Circuit opinion, which is
17 something we think you could probably take judicial notice of,
18 a Court could reasonably conclude based on that that they
19 could lose that charitable status.

20 I only bring this all up because these are just contested
21 issues. Of course, then we'd like the opportunity to examine
22 witnesses about -- who haven't been named and who haven't
23 testified in the case. And given where we are in the
24 proceedings, we think that defense, asserting it at this hour,
25 has been waived and the -- maybe I'm new at this, but, you

1 know, I don't -- I don't recall ever being allowed the
2 opportunity to reopen my case when I failed to prove a fact
3 that's key to my claim.

4 MR. HOLLER: Judge, he reopened his case at the end of
5 plaintiff's case because he failed to get a ruling on the
6 evidence in Dr. Cucé's deposition. So he shouldn't --

7 MR. PADGET: I didn't rest yesterday.

8 MR. HOLLER: He did rest.

9 MR. PADGET: I didn't rest. I said I wasn't calling any
10 witnesses. That's different. But --

11 MR. HOLLER: We can look at the record, Judge.

12 MR. PADGET: And I didn't even assert it. He wanted to
13 put that evidence in, not me. So, Your Honor, for those
14 reasons we think it would be inappropriate to consider that
15 stuff.

16 THE COURT: Okay. Well, either way, y'all both agree
17 that it's not a question for the jury; right?

18 MR. HOLLER: Yes, sir.

19 MR. PADGET: We agree with that, Your Honor.

20 THE COURT: So I propose that we at least do closing
21 arguments and charge, and then that particular issue -- we can
22 -- you know, I'll decide whether I'll allow you to reopen it.
23 If we do, we'll deal with whatever is appropriate and have a
24 ruling as to whether, in fact, Tuomey is, you know, a
25 charitable entity.

1 MR. PADGET: As a practical matter, Your Honor, we
2 certainly understand that. We just want to preserve our
3 objections on the status where we're at.

4 THE COURT: I understand that. And --

5 MR. PADGET: As a practical matter, it may not make a
6 difference.

7 THE COURT: Right. And so I propose we at least finish
8 and let the jury be doing their work and then we can work on
9 that while we're waiting on a verdict or at the end we'll set
10 it up for some other time because that may become an important
11 issue in this case. Okay?

12 So are we ready for the jury?

13 MR. HOLLER: Yes, sir.

14 MR. PADGET: I've just got to plug in one little device,
15 Judge, and I'm ready.

16 THE COURT: Okay.

17 MR. HOLLER: Judge, I need to object to anything that's
18 going to be shown that's not already into evidence.

19 MR. PADGET: I don't believe I've got -- there is a
20 photograph of a football field to illustrate the preponderance
21 of the evidence standard, and the scales of justice, which I
22 don't -- it's just demonstrative. It's nothing that's
23 obviously in evidence. It's just simply what that is. I
24 don't think other than that there's -- there's nothing in the
25 PowerPoint that's not in evidence.

1 THE COURT: Okay. You have any objection to that?

2 MR. HOLLER: No, sir.

3 THE COURT: Okay. All right. Are we ready for the jury
4 now?

5 MR. PADGET: We're ready, Your Honor.

6 THE COURT: All right. If you'll bring me the jury.

7 (WHEREUPON, the jury entered the courtroom at 1:22 p.m.)

8 THE BAILIFF: Your Honor, all of the jurors are present
9 in the courtroom.

10 THE COURT: Thank you, sir. Mr. Padget?

11 MR. PADGET: May it please the Court.

12 THE COURT: Yes, sir.

13 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

14 MR. PADGET: Good afternoon, ladies and gentlemen.

15 THE JURY: Good afternoon.

16 MR. PADGET: On Monday when you came to court here and
17 took your oaths to serve as jurors, you were not alone. You
18 may have felt that you weren't alone. All across the country,
19 in New York, Florida, California, jurors all over, sometimes
20 kicking and screaming, had to go to the courthouse and had to
21 take the oath and serve as jurors.

22 It's an important function. It's important to the
23 country and it's important to Dr. Myat that you hear his case
24 fairly, as we know you will.

25 What is this case about? I told you at the beginning

1 that this case was about a hospital that created a danger for
2 one of its own. That's exactly what we've shown you. And
3 we're going to talk about why.

4 There's really two big issues you're being asked to
5 determine in the case, and the first one is is the hospital
6 legally responsible for what happened to Dr. Myat? That's the
7 first question.

8 And the second question that you're asked to determine
9 is, if they are legally responsible, what damages -- what
10 damages, what injuries, what dollars has Dr. Myat lost as a
11 result of it? Those are the two big questions.

12 The judge in a little while when we're done giving our
13 closing arguments, myself and Mr. Holler on behalf of his
14 client -- when we are done, the judge is going to charge you
15 or tell you what the law is for these kinds of cases.
16 Premises liability cases.

17 And one of the things he's going to tell you -- and
18 listen to whatever the judge says is obviously what you want
19 to listen to. If I misstate anything, I'm not trying to from
20 what he says, but I think I got it pretty close.

21 What the judge is going to tell you in a premises
22 liability case is the plaintiff, that's Dr. Myat, must show
23 that the unsafe condition was caused by an agent or employee
24 of the defendant. To simplify, what does that mean?

25 In a case like this, creation of the danger equals legal

1 responsibility. And what evidence and how do you hear the
2 evidence that's been presented in the case? This is a civil
3 case. This is not a criminal case. Nobody is going to jail.
4 Nobody's been accused of any crimes. It is a civil case
5 between two parties.

6 And in a civil case, the burden of proof is not what it
7 is like we hear on TV in a criminal case, beyond a reasonable
8 doubt or beyond all reasonable doubt. Sometimes you hear
9 that. That's a much higher burden because if you're going to
10 take away someone's freedom, then you should have to submit
11 evidence sufficient that no juror has a reasonable doubt about
12 what occurred.

13 This case is not a criminal case. It's a civil case.
14 And here, the civil case just says the burden of proof is the
15 preponderance of the evidence, the greater weight of the
16 evidence. It's lesser. It's a lesser standard than the
17 criminal standard.

18 Now, what does it mean? It simply means that as a whole
19 the evidence shows that the fact sought to be proved is more
20 likely true than not true. There's a number of examples that
21 are illustrative of the burden of proof.

22 The judge will charge you that the scales of justice --
23 they sit -- they sit exactly equal as the case begins and then
24 as the evidence is presented, each side presents their case.
25 In a civil case like this one, if those scales tip even just

1 so slightly, then you have to find in favor of that party.

2 And we think we have more than proven -- and we'll talk
3 about some of the evidence here in a minute. We've more than
4 proven that those scales have tipped just slightly.

5 I like a football analogy. I'm excited about football
6 season coming. I think it's better than the scales of
7 justice.

8 And in a -- if it's a football game, my side does not
9 have to score a touchdown. We don't even have to kick a field
10 goal. We don't have to score a point. All we have to do is
11 move that ball past the 50-yard line. That's a good example
12 of the preponderance of the evidence standard that we ask you
13 to consider when you weigh the evidence in the case.

14 And what evidence should you weigh? There's a couple of
15 kinds of evidence the judge will tell you about. There's
16 direct evidence and there's circumstantial evidence.

17 Direct evidence is the easier evidence to weigh.
18 Somebody gets up and says I did this or I saw this... Direct
19 evidence in this case -- you have Dr. Cucé testifying that he
20 did surgery on Dr. Myat, that he did a particular kind of
21 surgery. Ms. Sapp -- she saw water. She saw the water on the
22 floor. That's the kind of direct evidence you can consider.

23 But there's also circumstantial evidence and in this case
24 circumstantial evidence is critically important we believe for
25 you to consider. There's a definition that circumstantial

1 evidence is proof of a chain of facts and circumstances
2 indicating the existence of another fact. That's what
3 circumstantial evidence is.

4 A good example in a criminal case, you didn't see them
5 shoot anybody, but when you came around the corner, there --
6 there was a gun in the hand and there had been a shot. You
7 didn't see anybody shoot anybody, but you can infer it from
8 the facts. There's some very strong inferences you can make
9 from the facts in this case.

10 (WHEREUPON, Plaintiff's Exhibit Number 1 was placed on
11 the screen.)

12 MR. PADGET: The dreaded diagram is back up. Let's talk
13 about what goes on around that nurses station. Here, I've
14 used the nurses station. It's in yellow. The red X is the
15 site of Dr. Myat's fall per nearly every witness in this case.
16 And the two blue arrows are where the carts -- the carts we've
17 talked about where the ice is moved and stored with those
18 carts. Those are the areas where that occurs.

19 What else occurs at this location? This is where the
20 nurses do their charting. This is where the doctors turn in
21 their orders, but primarily this space is occupied by
22 employees of the hospital. There's really no dispute about
23 that in this case from any of the witnesses that we heard.
24 This is where employees of the hospital work.

25 There's a kitchen. That's the little blue square.

1 That's the ice machine right below it. That's the kitchen.
2 That's where they get ice and water from to distribute to the
3 patients. There's nothing wrong with that.

4 But in this case, now there's evidence. Ms. Marilyn
5 Wilson testified on the day in question she said no less than
6 three, two techs and one nurse tech in training, got ice out
7 of that machine and moved it with the cart and moved it past
8 those locations right in the area where the fall occurred.

9 Also, Ms. Wilson also testified that the same carts that
10 are used to do all that were within an arm-length of where the
11 spill occurred at the time that it occurred. Within an arm-
12 length.

13 (WHEREUPON, Plaintiff's Exhibit Number 2 was placed on
14 the screen.)

15 MR. PADGET: This area, according to -- this is a view of
16 the hallway and, again, the red X depicts the location of the
17 fall per where Ms. Sapp has described it and everybody else.
18 You've seen this picture enough, but this one -- this one
19 contains more information that's been right in front of us all
20 along. I didn't really see it until this morning. That sign.
21 No patients or visitors are allowed around or through the
22 nurses station.

23 What did Ms. Wilson tell us about that? She told us that
24 we enforce that policy. We tell people if they come through
25 or around that area we're working around here. We've got a

1 lot going on. Please -- please, you know, please walk this
2 way or stay away. Stay near the rooms. If you need us, call
3 us, of course.

4 Other people aren't permitted to even be in the area
5 where this occurred. Visitors hours stopped at nine p.m. the
6 night before. Visitors aren't even allowed to be on the floor
7 per their policy. They say loved ones and caregivers are
8 allowed to be there.

9 Think about it. At 5:30 in the morning? It's five
10 o'clock in the morning. How much or how often do you think
11 visitors and caregivers are wandering the hallways at 5:30 in
12 the morning on the med/surg floor? People are waking up.
13 They might not even be awake yet. At 5:30 in the morning, the
14 staff at Tuomey -- they're getting geared back up and doing
15 ice and water and getting it back out to people. They are
16 starting that day.

17 So we'd ask when you evaluate this circumstantial
18 evidence about what occurred in that area on this day that we
19 use -- of course, use our common sense in evaluating what
20 happened.

21 What do we say? What does Dr. Myat say that keys to
22 Tuomey's legal responsibility here? The water was right next
23 to the nurses station. No doubt about it. In a location
24 where Tuomey staff prepare water and ice to take to patients.
25 And every morning around four a.m., including this morning per

1 Ms. Wilson, they prepare those carts with ice and water in
2 that particular location.

3 No visitors hours are permitted, both from a whole floor
4 standpoint and visitors are not permitted in the area around
5 the nurses station. There is no evidence of any visitors or
6 third parties in this area at the time. Every witness who was
7 asked had no recollection of any other visitors or any third
8 parties being up around that nurses desk on this day.

9 And don't you know, if they did, they would have been
10 testifying there was an incident that day of some kind. A
11 prisoner came up that day and did something. Or there was a
12 spill. There was a lot of prison guards around that day or
13 there were lots of caregivers that were thirsty that day. Not
14 a single person testified to any of those things.

15 The only evidence of people there all worked at the
16 hospital. They may say there were other doctors around, but
17 the only evidence is Dr. Myat was the only doctor around. Dr.
18 Myat said he didn't spill any water that day at the nurses
19 station.

20 I think this one is important. There's no other nearby
21 sources of water. The nearest water Mr. Holler pointed out in
22 Ms. Marilyn's cross-examination is 40 feet -- 50 feet down the
23 hallway where those other hand washing stations are outside of
24 the contamination -- the highly contagious rooms. Forty or 50
25 feet down the hallway. Whereas, the ice machine and the water

1 and the carts where they store the water were right beside the
2 area where the fall occurred.

3 And there was no other environmental sources of water.

4 There was not a roof leak. They didn't testify that there is
5 weird condensation that occurs on the floor or anything.

6 There's no other sources of water.

7 The only reasonable inference is that the water came from
8 a person. Which person? From the evidence we've heard, the
9 only persons around are the same people that are there every
10 day doing the job they do every day at that particular
11 location.

12 And then everybody agrees and we should all know that
13 water on the floor is a dangerous condition because in a
14 moment, in a second, just like a car running a stoplight, in a
15 second someone's life can change because of water on the
16 floor. It seems innocuous until somebody falls. In this
17 case, when Dr. Myat fell, he fell hard. And just like when a
18 car ran that stoplight and hit the other car, somebody's life
19 changed. Dr. Myat's life changed. Let's talk about that.

20 Let's talk about Ms. Sapp for a quick second. You're not
21 -- you're being asked to evaluate the testimony of the
22 witnesses, but also the credibility of the witnesses, if you
23 believe them. Do you believe what they say? Do they have a
24 reason to say something? Are they interested in the case?

25 Ms. Sapp is a corrections officer on the job that day --

1 on duty that day. She did not know Dr. Myat. She doesn't
2 work for the hospital. As we say, she has no dog in this
3 fight.

4 And what did she see? She saw the fall and she saw the
5 water, a whole lot more water than the hospital witnesses
6 described. She's got no reason to say anything other than
7 what she saw. That's it. And she did say to you her and her
8 other officer who was working with her were not the cause of
9 the spill on the floor that day. Eliminate them off the list.

10 She said unprompted at the beginning -- it was quick. It
11 was hard to catch, but she said it. She said in that area it
12 was like -- the water she observed was like ice had melted.
13 That was her observation, unprompted by anybody. That's what
14 she remembers. That's credible.

15 She saw no one else around except for staff members in
16 scrubs. No third parties. Nobody else. And she and her
17 fellow officer didn't cause the spill. We talked about it.
18 She's the independent witness.

19 She did say Dr. Myat went down hard. He grabbed his knee
20 and he was hurt bad. You could tell right away. She said to
21 you that Dr. Myat said he slipped on water right then. That's
22 what Dr. Myat felt. That's what he said.

23 Nurse Whitehouse, William Whitehouse. Navy vet, Air
24 Force veteran, works at Tuomey, worked with Dr. Myat. He said
25 the unit usually has four nurses and two techs. It looked

1 like there were a few more nurses and one extra tech on duty
2 this particular day, but that was what was usually there.

3 Dr. Myat, he said, was the only doctor around. Nobody
4 else was around that morning. No recollection of other
5 visitors or third parties. Visitors hours were limited. His
6 routine -- the routine of filling ice and water occurred every
7 morning, including this day. And it's the only source of
8 water around. It's the source exclusively accessed by Tuomey
9 staff. No other environmental causes of the water nearby.
10 Water on the floor is a dangerous condition.

11 And then he said at the end -- he said -- he sort of in
12 many ways was asked what you're being asked to evaluate.
13 What's the likelihood of Tuomey employees causing that water?
14 Do you remember what he said? He said between Tuomey staff
15 and third parties, it was more likely caused by Tuomey staff.
16 He knows. He's there every day. He sees it. He knows that
17 it's likely they caused that spill and that is preponderance
18 of the evidence. We'll talk about that more.

19 Mary Yates. She's a safety officer. She had some real
20 straightforward stuff to say. Tuomey policy is to clean up
21 spills. There's no dispute about that. Tuomey policy
22 prohibits nurses from having drinks at the nurses station, but
23 yet she sees nurses having drinks at the nurses station all
24 the time. Of course, the purpose of the policy is probably to
25 keep those computers from getting destroyed and charts from

1 getting destroyed and everything else, but also to keep spills
2 off the floor. Water on the floor is a dangerous condition.
3 She said it.

4 Dr. Myat said a lot about himself in a good way and about
5 his injuries and damages, and we'll talk about that more in a
6 minute, but as it relates to the legal responsibility of the
7 hospital, he says what the nurses did too. They prepared
8 water there every day at the time and he didn't cause a spill
9 and he didn't remember anybody else being there.

10 Marilyn Wilson testified today. Again, she too had no
11 recollection of anybody else being there. There were three
12 different times that those carts with water came and went from
13 that particular room that morning, that very morning in the
14 minutes before this fall occurred. And that cart was just an
15 arm's length away at the time the fall -- she responded to the
16 fall nearby.

17 The fall -- it was a bad one, heard around the unit. It
18 was a hard fall. You heard the descriptions of Dr. Myat's
19 knee being contorted and out of position. As a football fan,
20 all I could think about was Marcus Lattimore when his knee
21 turned the way it did that awful way. The ER was summoned and
22 they came to assist him. Let's talk about Dr. Myat's injury.

23 Dr. Cucé. We heard from him via video testimony
24 yesterday. He works for Tuomey. He works for Tuomey. So his
25 testimony you should strongly consider because when he's

1 testifying for Dr. Myat, he worked for Tuomey at the time, the
2 folks being sued for this injury.

3 What did Dr. Cucé tell us? Well, we learned during the
4 course of the case about the normal anatomy of the knee and
5 about what happened to Dr. Myat's and how he had the left knee
6 injury that's depicted here in this -- in this illustration.
7 And not only did he fracture his patella, the kneecap, he had
8 the displaced fracture fragment, that piece Dr. Cucé said I
9 couldn't save it. I had to take it out and I had to reattach
10 that whole tendon, shortening the whole length of his leg,
11 likely resulting in the loss of range of motion that Dr. Myat
12 had later. And he also had the displaced -- the tears of the
13 connective tissue on either side, as depicted in this.

14 Here's the photograph you've seen of Dr. Myat's knee
15 during the surgery, during that patella repair. It looks
16 eerily similar to the MediVisual, the illustration, that shows
17 the nature of the surgery that Dr. Cucé had to perform, the
18 drilling into the tissue, the suturing of the tissues, removal
19 of the patella fracture fragment, and this was a very serious
20 injury. It's a life-changing injury. This is just showing
21 you how it occurred.

22 The -- Dr. Myat's rehabilitation did not go as all had
23 hoped, as it often doesn't. He treated for a year with his
24 doctors trying to get better. He went to physical therapy for
25 seven months until they discharged him. He did everything

1 that his doctors asked of him. He did everything his doctors
2 told him to do, but even after doing all that, his recovery
3 did not go well.

4 He has a 29 percent impairment rating of his lower
5 extremities. You see he walks with a limp. I don't think
6 that's seriously in dispute. He walks with a limp and he
7 can't walk very long. Just coming in and out of the courtroom
8 tires him out and he's unable to do what he did before. He
9 can't walk around the hospital. He can't walk in and out of
10 the clinic. He can't get in and out of his car. He can't go
11 do those things that he's required to do to keep his patients
12 safe.

13 He tried to do that. He wanted to do it. Of course, he
14 wanted to do it. But he realized that it wasn't just his
15 burden of carrying the pain, that he's distracted by that
16 pain, that that presents a danger to those patients. He was
17 not going to get better and he made the decision, a tough
18 decision for him, that he had to stop practicing medicine.

19 Mr. Holler asked a number of questions about a particular
20 form that Dr. Cucé filled out in May of 2012 and suggested
21 that Dr. Myat did not follow the direction of the doctor in
22 completing additional therapy, in pursuing additional
23 therapeutic treatment for his leg so he can go back to work.
24 I want to read that for a second. This is the exact
25 testimony.

1 So on May 11, 2012, Win Myat may have benefited and
2 improved if he had more physical therapy. Dr. Cucé says okay.
3 The question is is that your opinion that day; correct? Dr.
4 Cucé says, well, I mean obviously he had been involved in
5 therapy and, you know, I was just making the person who read
6 this report understand he's been in physical therapy whether,
7 you know, he wasn't at MMI, maximum medical improvement, at
8 this point.

9 He told you he was not suggesting that Dr. Myat in May of
10 2012 needed to go back to physical therapy, that he needed to
11 do further things. In fact, when he was asked those specific
12 questions -- I asked Dr. Cucé, do you believe there was
13 anything else that you or anyone else in the medical community
14 could do to him to further his rehabilitation? Answer: No.

15 Did Dr. Myat undergo all the physical therapy sessions
16 that you ordered him to go to? To my knowledge, yes.

17 He never said, despite any suggestion to the contrary,
18 that Dr. Myat should go back and do other therapy. He said
19 we've done all we can do. It's as good as it's going to get
20 and, in fact, we're not recommending any further surgery
21 because it could get worse. That's what he said.

22 The defense may argue no one took Dr. Myat out of work.
23 Think about this. This is Palmetto Infectious Disease. The
24 CEO and the janitor are the same person. Dr. Myat. He's his
25 boss. He's his guy. There was no person to take the note to.

1 Take this note to your employer. He is his employer. So the
2 fact that Dr. Cucé didn't take him out of work makes sense.
3 He knows him. He's his colleague. He doesn't have to write
4 that note. There was no note to write. They had a
5 conversation. If you can't go back to work, you can't go back
6 to work. That was it. No one had to. No one had to write
7 that note.

8 Think about Dr. Myat when you're evaluating whether or
9 not he wanted to get back to work. Think about where he's
10 come from. He was born in Burma in Southeast Asia, lived
11 there until he was 18, and came to the United States. He
12 literally won the lottery to come here. He got to come here
13 and worked his way up. He worked jobs. He cleaned bathrooms.
14 He cleaned parking lots. He worked two, sometimes three, jobs
15 in order to get where he was.

16 He went to New York because he couldn't save any money in
17 Florida. He worked all the time. And then at the end of the
18 month, he'd have a few dollars left. He said I've got to make
19 -- I've got to make some more money. I'll never be able to go
20 to school like this.

21 He goes to New York. Continues working, works his way
22 through college, through medical school, through a residency
23 training program, and through a fellowship program. That is a
24 ten- or twelve-year process and he did it. He worked his way
25 through it.

1 Then he came here to Sumter and he didn't take one job
2 where he made a lot of money. He could've just done his
3 private practice and had a lot more free time. Instead, he
4 took two other jobs. One, because he wanted to help a
5 hospital be a safer place for patients and give the knowledge
6 that he had about these infectious diseases to the hospital to
7 make it safer for all of us and, two, he decided to spend his
8 time treating HIV patients at the clinic because he knew he
9 could help them.

10 That's the type of person Dr. Myat was. He could have
11 taken the other \$400,000 he made a year and spent those hours
12 at the golf course. He could've done those things, but he
13 chose to keep working because he likes to work and he likes to
14 work. He likes to help people. Any suggestion to the
15 contrary is absurd. There's no evidence to the contrary.
16 Every witness who testified -- they all said he was a hard-
17 working. They all said he was a good doctor. Any suggestion
18 to the contrary is without any foundation.

19 He tried to go back to work and we'll talk about it. He
20 realized he couldn't. He couldn't examine his patients
21 properly and he realized one day he was talking gibberish to
22 one of his patients and they looked at him, I'm sure
23 concerned, and Dr. Myat knew at that point he couldn't safely
24 prescribe the many regimens of drugs that he's responsible for
25 getting to people to make sure they get better because if he

1 misses one, somebody could get hurt, and he knew he couldn't
2 bear that responsibility any further carrying that pain.

3 Dr. Cucé we've -- I'm pretty sure we've talked about.
4 This is what's in the record. This is what he wrote on his
5 last visit. You'll see it. It is Exhibit 18, all of Dr.
6 Cucé's notes from his -- from his treatment. This is June of
7 2012 and this is what he writes in June.

8 At this time, he's a year out from his injury and
9 unfortunately Dr. Myat has had less than optimal result from
10 his injury. It is my medical opinion that he will have
11 difficulty in continuing his medical practice as an infectious
12 disease specialist due to the fact that he is not as mobile as
13 once before and does not have any endurance and strength to
14 the extremity.

15 This was in June of 2012, a Tuomey doctor's opinion about
16 Dr. Myat's ability to work long before a lawsuit, long before
17 we contemplated coming to court. It was in the privacy of his
18 office that Dr. Cucé dictated this note about his opinions and
19 findings. No reason for him -- no reason for him to say -- in
20 that moment to say anything but the truth, and it's in black-
21 and-white.

22 The impact on Dr. Myat in this case has been devastating.
23 He worked for a dozen years to get where he was and all that
24 was lost in a moment. It was a devastating physical impact.
25 His knee was destroyed and remains in that shape to this day.

1 An emotional impact because all Dr. Myat wanted to do was
2 spend time with his family and practice medicine. That's what
3 he liked to do, and much of that has been taken from him.

4 And then lastly, it's had a devastating financial impact
5 for him and his family. Dr. Myat is a doctor with a lot of
6 training. He trained all over the world. He was working
7 three jobs. As you might imagine, he was making a lot of
8 money. He worked hard and he made a lot of money, and now he
9 can't and that's had a devastating -- devastating financial
10 impact.

11 Dr. Myat's calculation of what he estimates -- here it
12 is. It's in evidence. You'll get a chance to take a close
13 look at it. He simply took from his tax returns the income
14 he'd reported and paid taxes on to our federal government the
15 amounts of money that he made from each of the jobs, and then
16 in the bottom column he lessed out his expenses of his
17 practice because he had to pay some money for various
18 expenses.

19 Of course, this leaves his net, his net income he's made
20 over the last few years. And then he averaged it and took a
21 three-year average, including the year he only worked a
22 partial year. It's a conservative estimate and he was making
23 in those three years prior on average \$47,000 a month, and
24 over the 38 months since then if you add that all up, Dr. Myat
25 has lost nearly \$1.8 million in net -- net income.

1 That doesn't take into account, of course, the growth his
2 practice was experiencing. It doesn't take into account next
3 year. It doesn't take into account the year after when
4 there's no evidence here that anytime soon Dr. Myat is going
5 to go back to work. He's looked for jobs that can accommodate
6 his disability and they simply aren't there.

7 In addition to the economic losses, as with any person in
8 a case like this, it's more than the economics. He's got
9 permanent impairment to his leg. He's got to deal with that
10 every day. Every time he takes a step, he's got to deal with
11 that impairment and will. It's permanent for the rest of his
12 life. That's caused him mental anguish, the ability not to
13 walk, not to do the things he didn't love before.

14 He hurt. During this thing and every day when he takes a
15 step, he hurts, some days more than others he said. Some days
16 are better; some days are worse. But he hurts and he hurts
17 today and he's going to hurt tomorrow. It's permanent and
18 there's no dispute about that.

19 Each of these elements are damages and the judge will
20 charge you as to these elements of damages. They are each
21 separate and distinct recoverable elements that you can
22 properly consider when evaluating Dr. Myat's losses.

23 And we put it to your good judgment. It's hard to put a
24 number on those type of things. I don't know how to do that.
25 It's hard to know, but that's what you're tasked with in this

1 case when you evaluate damages is assign some numbers to each
2 of -- each of those particular elements.

3 Ladies and gentlemen, we'll get a chance to talk again
4 further in just a moment for my final closing after you hear
5 from Mr. Holler, but on behalf of Dr. Myat, I do want to thank
6 you for your service the past couple of days. It was our goal
7 to deliver the information to you in this case in an efficient
8 and fair way so that you can make a fair decision for Dr. Myat
9 in this case. Thank you.

10 THE COURT: Mr. Holler?

11 MR. HOLLER: May it please the Court.

12 THE COURT: Yes, sir.

13 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

14 MR. HOLLER: On behalf of Tuomey and its employees --
15 Tuomey doesn't have any arms and legs, but on behalf of the
16 employees of Tuomey, I want to thank you for the attention
17 that you've paid. This is an important trial for them as
18 well.

19 You've heard from several Tuomey employees. They are the
20 arms and legs. They are the people who have been alleged to
21 have done something wrong or negligently here. You've paid
22 attention and I appreciate that.

23 During your deliberations, the twelve of you are
24 collectively smarter -- I wish it could be 13, but the twelve
25 of you are collectively smarter than any one person. And if

1 you go back and you ask the hard questions of every witness
2 and every person and you try to figure out what the truth is
3 -- Mr. Padget's analogy is moving the ball across the 50-yard
4 line. I think the truth is a little bit higher burden than
5 that. You have to decide what happened on July the 6th, 2011,
6 and we'll talk about that a little bit more.

7 But if you ask those hard questions of everybody, you
8 collectively will reach a verdict that speaks the truth, and
9 we appreciate your service in that regard. The twelve of you
10 again are collectively more smarter than I am and I will not
11 stand here and tell you how you should view or accept the
12 evidence.

13 I would like to suggest to you maybe ask some questions
14 that you can ask during your deliberations that you might find
15 some benefit of. Okay? There are some difficult questions in
16 terms of what actually happened here and maybe why you don't
17 have certain information that you would like to have or that
18 we would like to have.

19 July the 11th -- I'm sorry. July the 6th, 2011, Dr. Myat
20 has absolutely no recollection of where he was before this
21 happened. We know from Kathy Sapp, the correctional officer,
22 that he was seen at the far end of the hallway, which
23 presupposes that he had already walked down past this area
24 where he was.

25 One of the issues you'll consider in addition to the

1 negligence -- alleged negligence of a Tuomey employee by
2 putting the water on the floor -- unnamed, and we've provided
3 years and years ago the names of every single person who was
4 up there. We've brought to you the two Tuomey employees who
5 know something, who knew anything at all, and they've
6 testified here. All of that information was available to all
7 parties and I told you in the beginning we'd bring all
8 relevant and admissible evidence to you so you could make the
9 best decision possible.

10 But we know that Dr. Myat would have walked through this
11 very same area. The issue that you also consider in addition
12 to negligence is an issue called comparative negligence. It's
13 complicated and the charge that Judge Cothran will give you is
14 fairly long, but it essentially is this.

15 You cannot ask others to take more care for you than you
16 take for yourself, in a nutshell. That's not the words of the
17 charge. You, of course, follow the charge Judge Cothran gives
18 you, but it means when you walk down a hallway, you have to
19 look and see what's plainly visible in front of you and not
20 step in it, trip over it, whatever may happen. You can't ask
21 someone else who may pass through that area before you -- you
22 can't ask them to have a higher duty of care to find it than
23 you yourself do. Okay? That just makes sense. You can't
24 hold Mr. Whitehouse -- you can't hold Marilyn Wilson to a
25 higher standard than you yourself are held to.

1 One of the issues that we're asking that you consider
2 during your deliberations is what was Dr. Myat's status in the
3 hospital. The judge will charge you, for example, when you
4 walk in a grocery store, when you walk into a department
5 store, when you walk into a shopping mall, you've been invited
6 to come there, and the term we use legally is an invitee. And
7 there are certain duties that the business owner owes to you
8 when you walk through the door.

9 Our position is we believe the evidence was and you can
10 find that Dr. Myat was a licensee. A licensee is a social
11 guest, someone who comes to your house as a friend. You're
12 not making money off of them.

13 Additionally, if you come to a place so you can make
14 money for yourself, as opposed to the property owner making
15 money off of you, if you go to a site where you make money,
16 where it's your office, you are a licensee, and it's a lower
17 duty that the landowner owes to you.

18 A guest, a family member comes walking down the hallway,
19 that is an invitee of Tuomey. We are rendering services to
20 their family member, to who they work for. We have invited
21 them on the premises. We asked them to sit with their family
22 members overnight. We asked them to visit during the day. We
23 asked for sitters to stay with them as well as part of the
24 patient care team. So they are invitees.

25 Dr. Myat, on the other hand, is a licensee. He is there

1 to make \$400,000 a year. He's there to make him money, not
2 Tuomey.

3 What do we know exactly about what happened? Dr. Myat
4 doesn't know if he tripped, if he slipped. He doesn't know if
5 he was walking. He doesn't know if he fell forward, if he
6 fell backward.

7 As Marilyn Wilson described to you, a few drops of water,
8 one drop of water several feet away, arm's-length or three
9 feet away, could well have been completely unrelated to his
10 fall. He never saw water. Dr. Myat never saw water.

11 She took a towel and cleaned it up. She describes it --
12 it's been described to you on the chart -- we'll look at it.
13 We'll look at it, if necessary, but I think you've seen the
14 chart enough.

15 Mr. Padget would want to put that cart over on the other
16 side of the nursing station. There's two sides where you can
17 walk beside the nursing station. There was no testimony by
18 anybody that the cart with water or pitchers of ice on it was
19 ever on the far side of the nursing station, just the
20 opposite. It stayed over by the kitchen and then it was
21 distributed to the rooms.

22 Water sources -- water sources are everywhere. Every
23 patient has a pitcher of ice in their room pretty much at all
24 times. If they want more, they ask for it and they get it.
25 Water sources are everywhere.

1 Dr. Myat walked through this area one or more times,
2 maybe three or four. If the water is there, he has a duty to
3 see it and observe it, to have it cleaned up, and certainly to
4 avoid it.

5 William Whitehouse told you that he remembers
6 specifically talking to Dr. Myat about a patient moments
7 before he went into the room with the inmate. He said he was
8 sitting across the nursing station. He went into the -- into
9 the closet behind him to pick up his materials. He walked
10 back around the other side, which would be the opposite
11 hallway to get supplies to draw blood. He then walked around
12 and walked through the immediate area, the immediate area
13 where Dr. Myat was found later, and went in and was doing a
14 blood draw when he heard that someone had fallen.

15 I submit to you that when Dr. Myat walked through the
16 area the first time, he didn't see water because it wasn't
17 there. And when William Whitehouse walked around and went
18 around the far side and walked through the very same area
19 where Dr. Myat was, the water wasn't there. And something
20 happened in the interim is the reasonable determination and we
21 just don't know. We've brought you the best evidence we have.
22 We don't know how the water got there.

23 The judge will tell you that in reaching a verdict that
24 speaks the truth you cannot guess, you cannot speculate, you
25 can't play the odds. That's not fair. You have to find

1 facts.

2 And what William Whitehouse's guess is, maybe it's a
3 nurse, maybe it's not. That guess is not a fact in which you
4 can find a Tuomey employee put the water on the floor. You
5 would be saying Marilyn Wilson. You would be saying William
6 Whitehouse put that water on the floor. That's the only issue
7 for you.

8 There's no evidence and it's not an issue before you
9 whether it was there for a very long time. We all agree it
10 wasn't. It was there for a very short period of time, that
11 time between when Dr. Myat walked through and came back to the
12 nursing station. I'm sorry. When Nurse Whitehouse walked
13 through and went in to draw blood on the inmate, Dr. Myat
14 walked down the hallway, and then Kathy Sapp saw him walking
15 back.

16 Kathy Sapp. Unfortunately, this is the evidence that we
17 have. This is what people remembered. She doesn't remember
18 whether he fell forward. She doesn't remember whether he fell
19 backwards. She doesn't remember whether he landed on his
20 head, his behind, his knees. She doesn't remember anything
21 about the fall.

22 Dr. Myat would tell one of his colleagues, Dr. McCullough
23 -- that's also in the medical records. We talked about it
24 several times with several witnesses. That he fell and landed
25 on his coccyx and that he fell and landed on his knee.

1 During your deliberations, I think it's reasonable if you
2 try to figure out would a trip -- a trip be a more likely way
3 that someone would fall on their knee, not related to water
4 but a trip, as opposed to a slip which would send you onto
5 your coccyx.

6 Judge Cothran told you this isn't like TV. Sometimes in
7 Perry Mason -- I think every time in Perry Mason someone would
8 stand up in the back of the courtroom and they were confess
9 and then we'd have all the evidence and it would all line up
10 and be beautiful, but this is real life. This is a very
11 important case not only for Dr. Myat, but it's also a very
12 important case for Tuomey. Tuomey's employees have been
13 accused of putting this water on the floor and I submit to you
14 if you deliberate and find a verdict that speaks the truth,
15 you'll say there's no evidence that a Tuomey employee did
16 this.

17 On the issue of damages, you likewise have less
18 information than I would say is optimal. Marcus Lattimore was
19 an example that was given to you during the plaintiff's
20 closing argument. Marcus Lattimore suffered a bad knee
21 injury. Then Marcus had surgery, came back and played
22 football again at the University of South Carolina. Okay?
23 I'm familiar with those. I've had not one like his, but a bad
24 one.

25 Marcus Lattimore suffered a significant nasty second knee

1 injury where his leg flopped around. Horrific. And he was
2 drafted by a professional football team. He made the team.
3 They paid him money and then he chose, because he had the rest
4 of his life ahead of him, not to play such a dangerous sport.
5 I'll have grandkids. I need to play with them, roll on the
6 floor. I'm 21 years old. I'm not going to do this dangerous
7 thing called professional football.

8 So I ask you -- in May of 2012, Dr. Cucé clearly said he
9 would benefit from work hardening. Dr. Cucé, did he ever go
10 to work hardening? No. Dr. Cucé, did he ever go to
11 occupational therapy? No. Did he ever go to adaptive work
12 training to learn how to do his job?

13 Dr. Cucé gave you an example of a morbidly obese doctor
14 who was so fat he couldn't move to go into a patient room. So
15 as Dr. Cucé said, they circled patients around him. They
16 adapted to the limitations. You can ask in your deliberations
17 would that not be reasonable here?

18 There are doctors in Myrtle Beach, there are doctors in
19 New York, places that Dr. Myat also owns homes. Are there not
20 physicians and a second opinion? If you can return Marcus
21 Lattimore after two significant knee injuries to being a
22 professional football player, why can't Dr. Myat, with all his
23 education, find a job that he can do?

24 On behalf of the men and women that make up Tuomey -- and
25 that's really what we are. We're people who have arms and

1 legs and we provide services to patients. I trust that you'll
2 deliberate fairly for the plaintiff and the defendant and
3 return a verdict for the defendant that Tuomey -- we did not
4 cause water to be on the floor on July the 6th, 2011. Thank
5 you.

6 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

7 MR. PADGET: The legal issue here, the judge will tell
8 you, is did Tuomey employees create the spill on the floor.
9 That's the legal issue.

10 The judge won't charge you that Dr. Myat had a duty
11 walking down the hall for the second time. The judge won't
12 charge you that this puddle on the floor that Dr. Myat --
13 because he stepped in it, that he is now responsible for his
14 injuries. He'll charge you the law of comparative negligence,
15 that he had a fault in that.

16 No witness testified that Dr. Myat saw this water before
17 he fell. That's what comparative negligence is. Oops, I see
18 it. I stepped anyway and I caused my own fall. There's no
19 testimony on comparative negligence. Zero evidence on
20 comparative negligence.

21 As far as Dr. Myat's legal status, you're going to hear a
22 charge about whether or not he's an invitee or a licensee.
23 Legal issues.

24 An invitee is really quite simple. If you enter the
25 property with the express stated or implied permission of the

1 property owner, you are an invitee. If you had permission to
2 be there, you're an invitee.

3 He had privileges at the hospital. They knew he was
4 there. They'd invited him there to come treat patients so he
5 could write orders so they can charge patients for the orders
6 that he writes. There's no doubt about that. He's an invitee
7 in the eyes of the law and I trust you'll find that.

8 Mr. Holler just told you that there were water sources
9 everywhere, but what the witnesses told you is that there were
10 none nearby the area of the fall. The patients had water in
11 their rooms. There's no testimony a patient came out to that
12 nurses station. There's no testimony that patients were
13 walking around that night with cups in there hands spilling
14 water all over the place.

15 There is zero testimony about that. There's no direct
16 evidence. There's no circumstantial evidence. There's just
17 no evidence. There's nothing there to indicate that a patient
18 caused that spill. Not a single piece of evidence to suggest
19 that.

20 Mr. Holler suggested that to find against Tuomey you
21 must find against Nurse Whitehouse and Ms. Wilson. There were
22 a list -- we read it earlier. Ms. Burgess, Carrie Burgess, we
23 haven't heard from. Jackie Colclough, we haven't heard from.
24 Tanisha Holloman, we haven't heard from. Barbara Jackson,
25 another tech that we had not heard from. Yiesha Wells, a

1 student tech nurse there that night who is now a nurse at
2 Tuomey as well. And Ms. Nelson, the lady who draws blood.

3 It could've been any one of them, but it's not our burden
4 to prove exactly who. It's only our burden to prove that it
5 was a Tuomey employee. Who else was there? Who else was
6 there? Two corrections officers, one of which who said it was
7 down the hall and we didn't do it. Dr. Myat, who says I
8 didn't spill water there.

9 And the only other people there are those people listed,
10 Tuomey employees. Everybody else has been crossed off. They
11 are the only ones left and, ladies and gentlemen, that's
12 preponderance of the evidence.

13 Marcus Lattimore suffered a grievous knee injury and he's
14 no longer in the pros. That's the end of his story. He made
15 a decision that he couldn't play football. That's a decision
16 he made and now he's making \$20,000 a year working at the
17 University of South Carolina instead of \$7 million a year
18 carrying a football in the NFL.

19 Dr. Myat, very similar. He made a lot of money before
20 and he's no longer in the big leagues. He cannot practice
21 medicine. He suffered a grievous injury.

22 And we've heard the testimony from these doctors, the
23 Tuomey doctors, about the nature of that injury. That it was
24 permanent. That it was serious. That it required surgery.
25 That he could not recover well and that he cannot walk because

1 of it. He has limited range of motion. If you cannot bend
2 your knee, you can't walk properly. It's hard to get in the
3 car. You can't go up and down stairs. You can't do all those
4 things.

5 Mr. Holler says, well, why don't we just bring the
6 patients to him? That's a great idea, Tuomey. Bring the
7 patients to him. Have you heard from a single witness who
8 said we offered to bring the patients to Dr. Myat? Because
9 he's an infectious disease doctor, he has patients in the
10 emergency department, the obstetrical ward, and all over the
11 hospital. They can't just be hustled down to the infectious
12 disease doctor.

13 And nobody at Tuomey said that they could do that for
14 him. The hospital not taking care of its own. That's what
15 this case is about.

16 Mr. Holler suggested it was a trip rather than slipping
17 on the water. What evidence is there that there's a trip?
18 What evidence is there the cause of his fall was anything
19 other than water on the floor? That's what everybody saw.
20 That's what everybody said. That's what everybody came and
21 testified to.

22 Now, even though all the other witnesses say otherwise,
23 Mr. Holler suggests instead there was no water. This was a
24 trip, even though everyone saw water on the floor. No one has
25 disputed that except him.

1 I already read it earlier. I don't intend to read it
2 again. I think you heard it the first time. I read the exact
3 words Dr. Cucé testified to -- Dr. Cucé -- about whether or
4 not he intended in May of 2012 to send him back to therapy by
5 checking those boxes, and he said that's not -- no, no, no. I
6 checked the box to indicate to whoever was reading this form
7 that he'd been in therapy. Those were the words out of his
8 mouth, not he needed more therapy. He never said that.
9 Nobody has ever said that.

10 And it's somewhat ironic that Tuomey's lawyer now
11 suggests we can't fix you, you need to go see better doctors
12 at different places at other hospitals because our doctors,
13 who are employed by us, haven't told you the whole story.
14 They never told you that. There's ways to fix Dr. Myat. He
15 needs to go do it even though our doctors -- well, they don't
16 know it and didn't suggest it. It's a terrible irony. They
17 shouldn't get away with it.

18 I told you at the beginning this case was about a
19 hospital that created a danger for one of its own and we have
20 proven that by the preponderance of the evidence, but this
21 case is also about a hospital that would not accept and
22 refuses to accept responsibility for the water its people
23 spilled on the floor that day.

24 This is the one time, the one chance, the only claim.
25 This is it today now this afternoon. Today is the only day

1 that Tuomey can be held accountable for it. You are the only
2 twelve people who have the power to hold them accountable for
3 it.

4 We'd ask you after four years, after proving that there
5 was in fact water on the floor, after proving that it is now
6 the likelihood that they created it, that they be held
7 accountable for what they did that day because in that moment
8 -- in that moment everything that Dr. Myat had worked for in
9 twelve years, just like a car running a stoplight hit the said
10 of the car, it was lost in a flash because water was on the
11 floor.

12 And why? Because someone who is on that list I just read
13 to you -- one of those people, one of those Tuomey employees
14 spilled water on the floor that day and they failed to follow
15 a basic safety rule that's the policy of the hospital and that
16 all of our parents and grandparents taught us since we were
17 little children. If you make a mess, if you cause a spill,
18 you clean it up. And if you do, you will be safe, I will be
19 safe, and we all will be safe. They refused to follow that
20 basic safety principle.

21 The defense would have you believe that, rather than it's
22 one of us in the area where we always are where no one else is
23 permitted, where we're the only ones allowed to access the
24 water source, where we tell other people to stay away when
25 they come near, the defense would have you believe in

1 violation of all those policies and rules, customs, and then
2 the fact that no one else was around, it was a person no one
3 saw in a place they were not allowed to be, who accessed the
4 water source that was nearby that they cannot access, spilled
5 water on the floor, and left, all in front of what have been
6 and would have been in plain sight of anybody at the nurses
7 desk. Don't you think they would have brought somebody in to
8 testify had that occurred? It was the phantom water spiller
9 as opposed to the people tasked with carrying the water.

10 We just ask that you not leave your common sense at home.
11 I know you won't. I know you brought it with you. They want
12 you to box it up, drop it in a package in the bottom of the
13 ocean, and never consider it again by offering this phantom
14 person as the scapegoat for what happened.

15 And the defense really wants you to ignore Nurse
16 Whitehouse's testimony because he said in all likelihood --
17 knowing what we know, in all likelihood it was a Tuomey
18 employee. That's a devastating admission.

19 That, despite what Mr. Holler says, is a window into the
20 truth. They said it. They admitted it right here in front of
21 us. In all likelihood, it was a Tuomey employee that did it.
22 That's what he said.

23 That equals a preponderance of the evidence, that lesser
24 standard, the civil standard, the standard you're going to
25 swear to uphold when you consider this evidence. We've gotten

1 the ball past the 50-yard line. We've shown you on this stand
2 today and earlier what the truth is, and the truth is that Dr.
3 Myat was seriously and grievously injured because somebody at
4 Tuomey failed to follow that basic safety rule of cleaning up
5 their mess.

6 And there's no dispute that Dr. Myat has lost
7 professionally, emotionally. He's lost -- and you'll have to
8 consider these damages in these categories. In past lost
9 wages, he's lost nearly \$1.8 million. There's no evidence
10 he's going back to work next year. He's going to lose a half
11 million dollars next year.

12 MR. HOLLER: Judge, outside of reply.

13 THE COURT: I'm sorry?

14 MR. HOLLER: That's not proper reply.

15 MR. PADGET: He commented on the damages, Your Honor.
16 I'm just talking about the damages.

17 THE COURT: All right. Go ahead.

18 MR. PADGET: I'm almost finished. He's lost a million
19 eight in past wages, another half million dollars next year
20 and the year after. He's got this pain and suffering, the
21 other non-economic components that he's lost.

22 Ladies and gentlemen of the jury, Dr. Myat is here and
23 he's asking you to fairly compensate him in whatever measure
24 you believe is appropriate. We believe a fair number is \$2.5
25 million. That's what we think is fair. You may think another

1 number is fair. That is wholly your decision and we'll
2 respect it, whatever it is.

3 But we'd ask you to fairly compensate Dr. Myat for what
4 he's been through. It has truly been a privilege to represent
5 him in this case in the search for the truth for four years
6 and we would submit to you the truth came to you on the stand.
7 They told you what occurred. All you've got to do now is have
8 the courage to tell Tuomey to do what's right and protect one
9 of your own. Thank you.

10 THE COURT: Ladies and gentlemen, this is probably going
11 to take me 15 to 20 minutes to charge you the law, but any of
12 y'all need a break before I start? Okay. Madam Court
13 Reporter, are you okay?

14 THE COURT REPORTER: Yes, sir.

15 CHARGE ON THE LAW

16 THE COURT: Ladies and gentlemen, I'll remind you that
17 during this trial you and I have certain duties to perform.
18 As the trial judge, it is my responsibility to rule upon the
19 admissibility of the evidence that you hear and to preside
20 over this trial. And so anything that I have ordered stricken
21 from the record, you're not to consider that in your
22 deliberations whatsoever.

23 In addition, I have the duty to charge you on the law in
24 this case. And if you have some idea as to what you think the
25 law is or what the law ought to be and it differs from what I

1 now tell you the law is, then you're to disregard your ideas
2 and accept the law as I give it to you.

3 And just as I am the sole and exclusive judge of the law,
4 you are the sole and exclusive judge of the facts in this
5 case. So if I have said anything or done anything throughout
6 this trial that you think I have an opinion about the fact --
7 about the facts, you're to disregard that because I'm not
8 allowed to have an opinion about the facts. That is solely up
9 to you in determining what the true facts are in this case.

10 Now, the burden of proof in this case is by a
11 preponderance of the evidence. A preponderance of the
12 evidence simply means the greater weight of the evidence. It
13 is evidence which taken as a whole shows that a fact sought to
14 be proven is more likely true than not.

15 This can be illustrated by imagining a set of scales.
16 When the case begins, the scales are even. And after all the
17 evidence has been presented, if the scales remain even or tip
18 even slightly in favor the defendant, the plaintiff has failed
19 to meet their burden of proof and would not be entitled to
20 recover in this case.

21 If on the other hand, the scales have tipped even
22 slightly in favor of the plaintiff, the plaintiff would have
23 met their burden of proof and should -- and you should return
24 a verdict for the plaintiff.

25 A preponderance of the evidence is determined -- is not

1 determined by the number of witnesses. Instead, it must be
2 determined by the greater weight of all the evidence.

3 Now, there are two types of evidence that are generally
4 presented during a trial, direct evidence and circumstantial
5 evidence. Direct evidence is the testimony of a person who
6 claims to have actual knowledge of a fact, such as an
7 eyewitness. It is evidence which immediately establishes the
8 main fact to be proved.

9 Circumstantial evidence is proof of a -- of a chain of
10 facts and circumstances indicating the existence of a fact.
11 It is evidence which immediately establishes collateral fact
12 from which the main fact may be inferred.

13 Circumstantial evidence is based on inference and not on
14 personal knowledge or observation. It is proof that does not
15 actually establish a fact in question, but asserts or
16 describes something else that you may either -- either
17 reasonably infer the truth of the fact or at least reasonably
18 infer an increase in the probability that the fact is true.

19 For circumstantial evidence to be sufficient to warrant a
20 finding of a fact, the circumstances must lead to that fact
21 with reasonable certainty. The fact and circumstances should
22 be considered in light of ordinary experience and common
23 sense.

24 The existence of a fact cannot be based on speculation,
25 surmise or conjecture. The law makes absolutely no

1 distinction between the weight or value to be -- to be given
2 to either direct or circumstantial evidence, nor does it
3 require a greater degree of certainty required of
4 circumstantial evidence than that of direct evidence.

5 Now, necessarily you must determine the credibility of
6 the witnesses who have testified in this case. Credibility
7 simply means believability. It becomes your duty as jurors to
8 evaluate the evidence and determine which evidence convinces
9 you of its truth.

10 In determining the believability of a witness that has
11 testified in this case, you may believe one witness over
12 several witnesses or several witnesses over one witness. You
13 may believe a part of the testimony of a witness and reject
14 the remaining part of the testimony of that same witness. You
15 may believe the testimony of a witness in its entirety or
16 reject the testimony of a witness -- testimony in its
17 entirety.

18 You may consider whether the witness has an interest in
19 the result of the trial, whether the witness is prejudiced
20 either for the plaintiff or the defendant, the opportunity for
21 the witness to have seen the matters and things about which
22 the witness may testify, and the way the witness acts on the
23 witness stand.

24 Now, the rules of evidence don't ordinarily permit a
25 witness to testify to opinions or conclusions. An exception

1 to this rule exists for witnesses that we call expert
2 witnesses. A witness who by education and experience has
3 become an expert in some art, science or profession may give
4 an opinion as to the subject the witness claims to be an
5 expert in and may give you the reasons for that opinion.

6 You should consider any expert opinion given by a witness
7 like any other evidence and give it the weight you think it
8 deserves. If you decide that the expert opinion is not based
9 on sufficient education and experience or if you decide that
10 the reasons given in support of the opinion are not sound or
11 that the opinion is outweighed by other evidence, you may
12 disregard the opinion in its entirety.

13 An expert witness's testimony is to be given no greater
14 weight than that of any other witness simply because the
15 witness is an expert. And you do not have to accept an
16 expert's opinion, even though it is uncontradicted.

17 In our court, there is no distinction made between a
18 corporation and an individual. A corporation is a person in
19 the eyes of the law and a corporation is entitled to the same
20 fair and impartial consideration to justice and by the same
21 legal status as an individual. And the size or wealth of a
22 corporation may not be considered by you in determining
23 whether or not the corporation is liable to the plaintiff.

24 Now, the plaintiff claims that an unsafe condition on the
25 defendant's premises injured the plaintiff and, in order to

1 recover damages for this injury, the plaintiff must first
2 prove by a preponderance or greater weight of the evidence
3 that the unsafe condition existed on the defendant's premises.
4 Next, the plaintiff must show that the unsafe condition was
5 caused by an agent or employee of the defendant.

6 The defendant does not have to insure its customer's
7 safety, but owes the customer a duty of ordinary care in
8 keeping the premises in a reasonably safe condition.

9 Now, an invitee is a person who enters the property of
10 another at the express or implied invitation of the company.
11 The defendant owes an invitee or business visitor the duty to
12 exercise reasonable and ordinary care for the invitee's
13 safety. This degree of care must be appropriate -- I'm sorry.
14 It must be proportionate with the particular circumstances
15 involved, including the age and the capacity of the invitee.
16 The defendant has the duty not to injure an invitee by
17 unreasonably dangerous conditions.

18 The defendant has a duty to warn an invitee of hidden
19 dangers of which the defendant knows or should have known.
20 And the owner of a property does not owe a duty to warn others
21 of open and obvious conditions on that property.

22 To recover damages for injuries caused by dangerous or
23 defective conditions on the hospital's premises, the plaintiff
24 must show that the injury was caused by a specific act of the
25 defendant which created the dangerous condition. Where the

1 plaintiff alleges a foreign substance caused the fall, the
2 plaintiff must demonstrate that the substance was placed there
3 by the defendant or its agent.

4 A licensee is a person who enters the premises of another
5 with the owner's consent. A social guest is a licensee. The
6 defendant has a duty to use reasonable care to discover the
7 licensee and avoid injury to the licensee in carrying out the
8 activities on the premises.

9 Now, finally, the plaintiff must prove that the
10 defendant's negligence caused the plaintiff's injuries. A
11 proximate cause is something that produces a natural chain of
12 events which in the end brings about the injury. It is the
13 direct cause of the injury.

14 To prove that the defendant's negligence proximately
15 caused the plaintiff's injury, the plaintiff must first prove
16 causation in fact. This is proved by showing that the injury
17 would not have occurred but for the defendant's negligence.

18 The plaintiff must also prove legal cause. Legal cause
19 is proof by showing that the injury was foreseeable. This
20 means that the injury occurred as a natural and probable
21 consequence of the defendant's negligence. The plaintiff must
22 prove that some injury from the defendant's negligence was
23 foreseeable, but does not have to prove that the particular
24 injury that occurred was foreseeable. However, the defendant
25 cannot be held responsible for things that could not be

1 expected to happen.

2 Proximate cause does not mean the only cause. The
3 defendant's acts can be a proximate cause of the plaintiff's
4 injury if it was at least one of the direct concurring causes
5 of the injury.

6 It is not required that the exact manner in which the
7 injury occurred was foreseeable. It is enough if there is a
8 reasonable general range of greater than ordinary danger of
9 injury and that the injury suffered by the plaintiff was
10 within this range.

11 Now, if you decide that the plaintiff is entitled to a
12 verdict, your next step would be to decide how much money the
13 defendant should be required to pay. Actual damages are to
14 compensate the plaintiff for the plaintiff's injury or loss
15 and to put the plaintiff as near as possible in the same
16 position that the plaintiff was in before the incident
17 occurred. In other words, actual damages would be the actual
18 loss and expenses which the plaintiff has suffered because of
19 the defendant's negligence.

20 Pain and suffering compensates the plaintiff for physical
21 discomfort and emotional response to sensation of pain caused
22 by the injury itself. There is no definite standard by which
23 to compensate the plaintiff for pain and suffering. You have
24 the authority to determine the amount, if any, to be allowed
25 for pain and suffering using calm and reasonable judgment to

1 ensure that the damages are just and reasonable in light of
2 the testimony and evidence presented in this case.

3 Now, loss of enjoyment of life compensates the plaintiff
4 for the limitations on the plaintiff's abilities to
5 participate in and to derive pleasures from the normal
6 activities of daily life.

7 Now, the -- let me go over this now. One of the
8 plaintiffs -- I'm sorry. When one of the plaintiffs is
9 injured by the negligent act of another, the injury -- the
10 injured person itself -- I'm sorry -- self is entitled to be
11 fully compensated for all injuries directly and proximately
12 resulting from any acts or omissions by the defendant.

13 In determining the amount of compensation for injuries
14 suffered by the plaintiff as a result of the defendant's
15 negligence, it is proper for you to consider an award of past,
16 present, and future damages for loss of income, loss of
17 impairment or earning capacity, out-of-pocket expenses, any
18 future damages resulting from permanent injuries,
19 disfigurement, loss of family services, deprivation of normal
20 life expectancy, acceleration of life -- I'm sorry --
21 alteration of lifestyle, psychological trauma, mental anguish,
22 mental distress, apprehension, anxiety, emotional injury,
23 psychological injury, depression, sexual dysfunction, pain and
24 suffering, the loss of enjoyment of life. The plaintiff bears
25 the burden of proving these elements to you by a preponderance

1 of the evidence.

2 The existence or amount of damages cannot be left to
3 conjecture, guess or speculation. However, proof of amount of
4 loss with absolute or mathematical certainty is not required.
5 Damages must be susceptible to ascertainment to a reasonable
6 degree of certainty.

7 Now, the defendant claimed that the plaintiff's own
8 negligence proximately caused the plaintiff's injuries. If
9 you find that the defendant was negligent, you must then
10 decide whether the plaintiff was negligent. The defendant
11 must prove by a preponderance or greater weight of the
12 evidence that the plaintiff breached a duty of care which
13 proximately caused the plaintiff's injuries. The same law
14 which I've told you you're to use in deciding whether the
15 defendant was negligent should be used in deciding whether the
16 plaintiff was negligent.

17 If you find that the negligence of both the plaintiff and
18 the defendant proximately caused the plaintiff's injury, you
19 must then decide how much of the negligence of the plaintiff
20 contributed to the plaintiff's injury and how much the
21 defendant's negligence contributed to the plaintiff's injury.
22 In deciding the percentages of negligence of the plaintiff and
23 the defendant, you may consider, among other things, the
24 following factors:

25 Whether each party's conduct was only inadvertent or

1 whether it was engaged in with an awareness of the danger
2 involved;

3 The magnitude of the risk created by each party's
4 conduct, including the number of persons endangered and the
5 possibility of the severity of the injury;

6 The significance of the goal that each party was trying
7 to reach and the need to achieve the goal in that manner.

8 Each party's capabilities and ability -- and abilities to
9 realize and eliminate the risk involved;

10 The particular circumstances confronting each party at
11 the time the conduct occurred, such as the existence of an
12 emergency requiring a quick decision;

13 The relative closeness of the casual relationship of the
14 negligent conduct of the defendant and the harm that the
15 plaintiff --- and the harm to the plaintiff;

16 Whether the conduct of either party involved a violation
17 of safety statute or regulation.

18 And I'll give you, Mr. Foreman, a special verdict form.
19 Here you go. And this -- and this verdict form basically
20 spells out what you're to do.

21 And the first question on this verdict form:

22 Was the defendant negligent? And your option is yes or
23 no. If you check yes, you'll go to question two. If you
24 check no, then you'll stop your deliberations right there.

25 The next question:

1 Was the defendant's negligence a proximate cause of the
2 plaintiff's injuries? If your answer to that -- your
3 unanimous answer of all twelve of you to that -- if you check
4 yes, you will go to question three. If you check no, you'll
5 stop right there.

6 Question three was:

7 Was the plaintiff negligent? If you -- if you check yes,
8 you'll go to four. If you check no, you'll go to question
9 seven.

10 Was the plaintiff's negligence a proximate cause of the
11 plaintiff's injury? If you check yes, you'll go to question
12 five. If you check no, you'll go to question seven.

13 Question five is:

14 Using the common -- the combined negligence that
15 proximately caused the plaintiff's injury as 100 percent, what
16 percentage of the negligence is contributed to the plaintiff
17 and what percentage is attributed to the defendant? The
18 percentages must add up to a hundred percent. It is not
19 necessary for each -- well, we don't have but one defendant to
20 be assigned percentage of negligence.

21 And it is perfectly acceptable for the defendant to be
22 assigned zero percentage. And you will write those
23 percentages down, if you -- if you reach that point, and total
24 them up.

25 Once you've decided the percentage of negligence

1 attributed to the plaintiff and what percentage is attributed
2 to the defendant, you'll go to question six.

3 Was the plaintiff's negligence greater than 50 percent?
4 If you say yes, you stop right there. If you say no, you go
5 to question seven.

6 Question seven is:

7 Please state the amount of damages, if any, sustained by
8 the plaintiff. And it tells you do not reduce the plaintiff's
9 total damages based on the percentage of negligence that
10 you've given by any party.

11 After you've answered this question, I will compute those
12 damages. So once you reach that amount, you will simply knock
13 on the door and we will bring you back out and receive the
14 verdict.

15 Now, your verdict must be unanimous, which means all
16 twelve of you must decide. And if at any time during the
17 deliberations one of you get up and leave or one of you go to
18 the restroom or somewhere else, you've got to stop your
19 deliberations. You can only talk about the case when all
20 twelve of you are present.

21 And like I said, it must be unanimous verdict. All
22 twelve of you must decide. And once you've reached that
23 verdict, you'll follow this verdict form and we will finish.
24 You know, you'll sign it and knock on the door and we'll bring
25 you back out and receive the verdict.

1 I have to go over with these attorneys to be sure that I
2 have covered everything. If I have left something out that I
3 was supposed to charge you on, I'll bring you back out and
4 give you that additional charge.

5 If I've covered everything, I will send the verdict form,
6 along with the evidence, to the jury room. Once you receive
7 the verdict form and the evidence in this case, that will be
8 your indication to begin your deliberations. Knock on the
9 door when you've reached a verdict.

10 So at this time -- which one is my alternate? Which one
11 are you are the alternate?

12 THE CLERK: Mr. Sharp.

13 THE COURT: Okay. You need to stay with me because the
14 only reason I needed you is if somebody got sick. It looks
15 like everybody's going to make it. So if you'll stay with me
16 and the rest of you will go to the jury room, I'll either get
17 you back out or I'll send the stuff in.

18 (WHEREUPON, the jury exited the courtroom at 2:40 p.m.)

19 THE COURT: Any exceptions or objections on behalf of the
20 plaintiff?

21 MR. PADGET: Can I have just a moment, Your Honor?

22 THE COURT: Okay.

23 (WHEREUPON, there was a pause in the proceedings.)

24 THE COURT: The -- one of the problems I've got is the
25 verdict form that we've printed. It's got punitive damages on

1 it and I don't -- do you want me to strike it out or go
2 reprint it? The only problem is Judge James' secretary is
3 gone unless I can go find maybe somebody in the clerk's
4 office. Either I've got to hand strike it out -- because it
5 is, in fact, on this verdict form.

6 THE CLERK: Judge, I can carry it to Sharon and she can
7 print it.

8 THE COURT: Okay.

9 THE CLERK: Or you can just email it.

10 THE COURT: We need an email address. We really need
11 just the last page.

12 MR. HOLLER: Judge, on the verdict form, I think maybe
13 question 1-A -- you read question one -- may be determined the
14 status of Dr. Myat as a licensee or an invitee. The standard
15 is similar, but not exactly the same.

16 THE COURT: I mean why does the jury have to -- I
17 understand that, but they --

18 MR. HOLLER: And they --

19 THE COURT: How is that going to affect the verdict
20 whether he's a licensee or an invitee? I mean we gave them
21 that in -- either one --

22 MR. HOLLER: In light of the fact that you directed a
23 verdict on knew or should have known the water was on the
24 floor, I think that's where the standard is significantly
25 different. I think there's a lesser standard for a licensee.

1 But clearly the law under a licensee is we are to take no act
2 to injure the licensee. So I'm not sure that there's a
3 different standard as to directly harming the occupant of the
4 property.

5 THE COURT: I understand that and --

6 MR. PADGET: The Court has already --

7 THE COURT: -- I charged that, but if I put that on the
8 verdict form and they check he was an invitee or licensee,
9 what difference does that have with the bottom line? How does
10 that change the verdict?

11 MR. HOLLER: Well, it depends on the standard in which
12 they judge Tuomey. Again, it has to do with duty to discover
13 and, again, since you directed a verdict on the constructive
14 notice, I'm not sure it makes a difference.

15 THE COURT: Right. I mean -- I don't know that it does
16 either and if I put it on the form, I've got to give the --
17 what are they supposed to do with it? Once they check that,
18 if they check he's an invitee or licensee and they go on down
19 and don't find comparative negligence or do find comparative
20 negligence, how is that going to change the bottom line?

21 MR. HOLLER: With the omission of constructive notice as
22 an issue for the jury, I'm not sure it does.

23 THE COURT: So -- okay.

24 MR. HOLLER: Judge, I would ask this. In terms of
25 licensee, you did -- on our request for charge number three,

1 you cited the first sentence, which is in your proposed
2 charges, but the second sentence in our request for charge
3 three was not charged.

4 THE COURT: Okay. And I thought -- I thought we cleared
5 that up back in chambers, but maybe I missed it. Let me see
6 if I can find my -- I don't know what I did with the charge.
7 What is the second sentence? Because I took your charge
8 apart, which may have been a mistake. Which one was it?

9 MR. HOLLER: Number three.

10 THE COURT: Okay. Okay. And I did -- and I was looking
11 for that and I couldn't find it. I mean I can bring them out
12 and charge that, but I mean I don't know how that's going to
13 be an issue because it's the same thing, you know,
14 constructive.

15 MR. PADGET: It's the same legal standard then depending
16 on which one you decide the two are. As you know, Your Honor,
17 as a matter of law, we think he's an invitee, but the -- I'm
18 not sure it changes in this case where there's not a
19 constructive notice issue. I don't think it changes the
20 actual duty, whichever one you are.

21 THE COURT: Right. I mean does it change the actual
22 duty? I mean what -- and that was one of the reasons for an
23 invitee and a licensee was no constructive notice and that's
24 not an issue.

25 MR. HOLLER: I do think the duty is different for

1 constructive notice. I'm not sure there's a difference in the
2 duty on harming the person on the premises.

3 THE COURT: All right.

4 MR. PADGET: You can't create a danger even for
5 trespassers.

6 THE COURT: Right. You can't. You can't create a danger
7 for anybody. If I bring them back out now, they're going to
8 wonder what the world does that have to do that with it. I
9 can bring them back and read them that one sentence, but I
10 don't know that -- I don't think it applies now the way this
11 case is, but I can't figure out how it would apply, how they
12 would --

13 MR. PADGET: Judge, the one issue I've got is the -- our
14 discussion yesterday at the bench that there is no Workers
15 Comp claim or coverage, either a charge directly as to that or
16 as to the collateral source rule in general. I think in light
17 of all the discussion yesterday and that cross-examination,
18 there's a risk particular in this case of confusion of those
19 issues. I know yesterday when we discussed it --

20 THE COURT: And I know we got it confused and when it
21 actually came out, it didn't appear to me that there was ever
22 a claim that this -- that there was Workers Comp in this. He
23 was using an analogy of the Workers Comp claim and a
24 disability. And I'm looking at it in that one sentence and
25 then I looked at the whole -- I mean I can come back -- but I

1 don't think anybody's told or at least claimed that he's had
2 some other action pending. You said this is it.

3 MR. PADGET: I did.

4 THE COURT: And I don't think they got that impression at
5 that time. If you'll --

6 MR. PADGET: Judge, I've just --

7 THE COURT: -- we'll get it --

8 MR. PADGET: I've just got to preserve --

9 THE COURT: Okay.

10 MR. PADGET: -- preserve that particular issue for the
11 record. The issue that we think he's an invitee is a matter
12 of law for the record and I have to mention too in the -- in
13 the defendant's answer they expressly admitted he was an
14 invitee, even in the amended answer which was just filed last
15 week. I'm just suggesting that as a matter of law we think he
16 is. Because the legal standard in a creation of the duty case
17 is the same, I'm not sure it makes a huge difference, but I've
18 got to note that.

19 THE COURT: And I understand that and normally if we let
20 both parts go to the jury, if both of them were an issue in
21 this case, it would be. I just can't -- y'all may know more
22 on it than I do, but I don't understand how -- when notice is
23 not on the table anymore, the whole issue is whether the
24 defendant created the hazard and that the standard is the
25 same. If Tuomey created the hazard, the hazard is the same

1 for invitee and a licensee, isn't it?

2 MR. HOLLER: I believe so.

3 MR. PADGET: I think so too.

4 THE COURT: So I don't know that it's an issue at all.
5 Either the jury finds that Tuomey created it or they didn't.

6 MR. HOLLER: We would withdraw our request for that
7 charge.

8 THE COURT: Okay. And you want me --

9 MR. PADGET: I haven't seen the verdict form before,
10 Judge.

11 THE COURT: Again, I'm sorry. It was kind of -- it was a
12 standard one in the book and we just had to clean up the
13 numbers. The problem is -- did you get it reprinted already?

14 THE CLERK: No, Judge.

15 THE COURT: The problem is that it had punitive damages
16 on it and I didn't catch that until I was reading it and
17 there's no punitive damages issue in this case. Can -- and
18 while we -- while y'all are looking at that, I'm going to deal
19 with my alternate. Okay? Is there any reason I need to keep
20 him in the courthouse?

21 MR. HOLLER: No, sir.

22 MR. PADGET: Absolutely not.

23 THE COURT: There you are. Thank you. And you sat all
24 week and you haven't got to decide this case. I appreciate
25 you being willing to serve.

1 JUROR NUMBER 114: Absolutely.

2 THE COURT: You're free to go and now you can talk about
3 it to anybody you want to.

4 JUROR NUMBER 114: Okay.

5 THE CLERK: We appreciate it.

6 MR. PADGET: Thank you.

7 MR. HOLLER: Thank you, sir.

8 THE COURT: Okay.

9 (WHEREUPON, there was a pause in the proceedings.)

10 THE COURT: Now, the other thing that I have some
11 concerns about in the evidence is the tax returns. Are there
12 social security numbers on those tax returns?

13 MR. PADGET: I'm sure they are.

14 THE COURT: You probably should --

15 MR. PADGET: I should have redacted those for certain.

16 THE COURT: -- have redacted that. I don't know what
17 they'll do in this jury room, but you need to look at that.

18 MR. PADGET: I bet he's got good credit too.

19 THE COURT: So, you know, with identity issues that there
20 are in this country, that's not something that ought to be in
21 the record that the jury can see or the general public because
22 it will be in the clerk's file and then the general public may
23 have access to it.

24 MR. PADGET: David, with your permission, I'll redact
25 those numbers.

1 MR. HOLLER: Yes.

2 THE COURT: I assume -- any other changes on the verdict
3 form other than removing punitive damages?

4 MR. HOLLER: I haven't seen it, Judge.

5 THE COURT: I'm sorry. Somebody show it to him, please.

6 MR. PADGET: Judge, for the record, I've got to note an
7 objection as to the comparative charge in general and the --
8 and the comparative verdict on the form. I just -- I didn't
9 recall any evidence in support of the fact that Dr. Myat saw
10 anything prior to his fall or that any other witness described
11 that he would've seen anything prior to his fall. For those
12 reasons, we think the comparative issues are inappropriate on
13 the form and in the charge.

14 THE COURT: Okay. And I'll respectfully -- you know,
15 whether he should have or not, I'm not -- I don't see that as
16 an issue at all in this case, but I guess there is a Catch-22
17 because if they argue that the water was there and he didn't
18 see it but they did, they had a duty to clean it up.

19 You know, I guess you could argue that many times that
20 may come into play in a grocery store setting where a customer
21 sees somebody spill something or drop it and then saw somebody
22 fall on it and whether they, in fact, notified -- you know,
23 like I say, they should have seen that bag of rice busted on
24 the floor. That's not the case here.

25 Anything -- so if there's nothing else, if y'all will get

1 the evidence together. I assume you're good with it; right?
2 The verdict form? Other than your objections that you've
3 already noted? Do you want to look at it?

4 MR. HOLLER: It's fine with me with the removal of
5 punitive damages, Judge.

6 THE COURT: Okay. So we're going to remove that and
7 print it.

8 (WHEREUPON, there was a pause in the proceedings as the
9 evidence was checked.)

10 MR. HOLLER: I'd like to make this a Court's exhibit.
11 This is the -- the offset issue.

12 THE COURT: Okay.

13 (WHEREUPON, the offset information was marked as Court's
14 Exhibit Number 3.)

15 THE COURT: Are we ready to give this stuff to the jury
16 yet?

17 MR. HOLLER: He's still redacting, Judge. I believe all
18 the other exhibits are accounted for.

19 (WHEREUPON, there was a pause in the proceedings.)

20 THE COURT: Are we done now?

21 MR. PADGET: I think so.

22 THE COURT: All right. Send it in and tell them to
23 start. Tell them to knock on the door when they get a
24 verdict.

25 (WHEREUPON, the jury deliberations began at 3:03 p.m.)

1 THE COURT: Do we need to have anything else on the
2 record right now? Do we need to take a break or what?

3 MR. HOLLER: Judge, just as a matter of housekeeping, I'd
4 like to open up the defense case for purposes of testimony and
5 self-authenticating documents on the status of Tuomey as a
6 501(c)(3) corporation.

7 THE COURT: Okay.

8 MR. PADGET: Your Honor, we'd just oppose reopening the
9 evidence with the understanding that all evidence and so forth
10 has been submitted earlier. These are new documents, none of
11 which I have seen before from this case to date and we believe
12 which contain hearsay statements obviously about a legal
13 defense asserted by Tuomey Hospital. For all those reasons,
14 we oppose.

15 THE COURT: Okay. All right. Before I grant your
16 motion, we'll take a break and I'm going to go research. Have
17 you got any issues -- any law on any of these issues? Either
18 one of you? You know, it's kind of -- I need to go read the
19 statute.

20 MR. HOLLER: Judge, we would -- this would be more of an
21 observation than a legal case or position. The IRS alone
22 determines the status as a not-for-profit corporation. This
23 Court, even a jury if there was some way you could submit that
24 issue to a jury, would have no power to take away that
25 standard from the corporation.

1 THE COURT: I understand that. I'm not arguing with
2 that. The question is whether you present documents to show
3 that, in fact -- in fact, whether Tuomey has such a position,
4 had it back then, and whether it still has it.

5 MR. HOLLER: And I can answer those. I can answer those
6 questions.

7 THE COURT: Okay. And as far as the hearsay is concerned
8 --

9 MR. HOLLER: I can answer that question as well.

10 THE COURT: I mean the documents themselves would
11 probably come in under one of the exceptions to hearsay rule I
12 assume.

13 MR. HOLLER: Yes, sir.

14 THE COURT: But the biggest thing I guess at this point
15 is you provide the other side copies of what you've got.
16 We'll take a break and we'll come back and figure out where we
17 are and rule on it.

18 Are either one of you aware of this situation ever coming
19 up before -- in court before? Has there been any -- you know,
20 most of the cases I've had dealing with this have always been
21 government entities and it's not an issue.

22 MR. PADGET: Right.

23 THE COURT: This is the first case I have that is outside
24 of that that's under this particular statute. I don't know
25 what's normal protocol on how it's presented and whether it's

1 ever become an issue before. But if y'all know it has and
2 it's got some cases or any kind of precedent, I'd like to look
3 at it.

4 MR. PADGET: I don't know of any cases, Judge, that are
5 precedent. All I can tell you is the practice in my
6 experience when I sue hospitals that are charitable entities,
7 they file a motion for summary judgment as to that status,
8 usually with an affidavit and identify a witness. And before
9 they do that, they usually call you and say will you stipulate
10 to our tax status so we don't have to go through this dance.

11 I have heard of -- there was a case in Columbia in
12 Richland County against Palmetto Health where the issue was a
13 -- Palmetto Health acquired one of the physician's practices
14 at some point in time and so the big issue was whether or not
15 they were actually under the umbrella of the charitable
16 entity.

17 THE COURT: Right.

18 MR. PADGET: And that issue was litigated. That
19 particular issue was litigated, of course, during the case,
20 throughout the case, and the case ultimately settled on the
21 doorsteps of the courthouse. That's the only time I know of
22 the issue being litigated and that's when the parties -- both
23 parties had full and fair opportunity to discover facts and
24 fight about those issues, Your Honor.

25 I remind the Court in this case, while we have had some

1 discussions previously about it, the defense wasn't asserted
2 until last Friday or so whenever -- last Monday when the
3 answer was amended and I was expecting a call or a list of a
4 new witness, of new documents provided to prove the tax status
5 and, again, we didn't receive any.

6 And the last thing -- I expected a witness to be called
7 to get up on the stand to say I work for Tuomey and we're a
8 501(d) or a 501(c)(3) charitable organization. Our tax status
9 is X, Y or Z as of today's date, and we'd get to cross-examine
10 them on any of those issues, particularly as it relates to the
11 Fourth Circuit opinion and whether or not -- and again, I know
12 it's something this Court hasn't typically decided, but if
13 South Carolina courts were to conclude applying federal law,
14 which they are fully capable of doing and doing often, that
15 that tax status has been altered in some way or if that tax
16 status is -- because what usually happens is it's ten years
17 before anybody ever makes a change to the tax status.

18 Well, you know, our position is we don't have to wait the
19 ten years until the IRS catches up with what's going on these
20 days and the case law in tax court is it's retroactive. So we
21 think we have the ability and opportunity at least to
22 challenge those statuses -- that status at this stage.

23 So that's all the guidance I can give Your Honor about
24 what I know about it.

25 THE COURT: So it becomes -- I guess you're alleging

1 because of Tuomey's trouble with the federal government that
2 their tax status may be in jeopardy?

3 MR. PADGET: That's correct.

4 THE COURT: And maybe that is unique to Tuomey and
5 whether that's true or not, I don't know. But it -- but the
6 question is is that something that needs to be litigated? I
7 mean is it -- is it in any filings in the federal court or
8 anything from the Justice Department trying to pull Tuomey's
9 tax status? Are you aware of any?

10 MR. PADGET: I'm not aware of any, Your Honor.

11 THE COURT: Does the documentation today, in fact, do
12 have it?

13 MR. PADGET: My understanding of the process is that at
14 some point if there's an issue, the taxpayer -- again, I'm not
15 a tax lawyer, but I talked to one in my office about it in
16 detail. He says they're required under the tax code and
17 regulations to self-report these issues at some point in time.
18 I have no idea.

19 Obviously, those are some of the questions we'd ask
20 people in cross-examination about have any reports been made
21 to the IRS about the findings in the Fourth Circuit case,
22 which is not -- David would know better than I do. I'm not
23 certain if it's a final decision yet or the time for appeal
24 hasn't yet run.

25 (WHEREUPON, the clerk entered the courtroom.)

1 THE COURT: You don't have anything from the jury? I
2 mean you walked in like you might have a verdict or something.

3 THE CLERK: I'm sorry, Judge. I apologize. I didn't
4 know y'all were --

5 THE COURT: That's okay.

6 THE CLERK: I'm taking care of business.

7 THE COURT: Okay. We'll take a break. I'll go think
8 about it and do some research on it and come back and figure
9 out the best way to handle that. Okay. We'll be at ease.

10 (WHEREUPON, there was a break in the proceedings from
11 3:11 p.m. until 4:03 p.m.)

12 THE COURT: Okay. Are we ready for the jury?

13 MR. PADGET: Yes, Your Honor.

14 MR. HOLLER: Yes, sir.

15 THE COURT: Bring me the jury.

16 (WHEREUPON, the jury entered the courtroom at 4:04 p.m.)

17 THE BAILIFF: We have all the jurors present in the
18 courtroom.

19 THE COURT: Okay. Ladies -- ladies and gentleman, I got
20 a question from you and the first question -- what was the
21 plaintiff -- or was the plaintiff an invitee or licensee by
22 law? That is a question of fact that you must determine and I
23 can't tell you that.

24 Now, I can charge you again on the differences. I can
25 recharge you on them. Do the two of you want me to do that?

1 THE FOREPERSON: Yes, sir.

2 THE COURT: Okay. An invitee is a person who enters the
3 property of another at the express or implied invitation of
4 the owners. The defendant owes an invitee or business visitor
5 the duty to exercise reasonable or ordinary care for the
6 invitee's safety.

7 This degree of care must be proportionate with the
8 particular circumstances involved, including the age and the
9 capacity of the invitee. The defendant has a duty not to
10 injure an invitee by unreasonable danger or dangerous conduct.

11 Now, a licensee is a person who enters the premises of
12 another with the owner's consent. A social guest is a
13 licensee. The defendant has the duty to use reasonable care
14 to discover that the -- discover the licensee and to avoid
15 injuring the licensee in carrying on activities on the
16 premises. A license -- a licensee's presence on the property
17 is for the primary benefit of the licensee and not the owner.

18 Now, the plaintiff claims that unsafe conditions -- there
19 were unsafe conditions on the defendant's premises that
20 injured the plaintiff. In order to recover damages for this
21 injury, the plaintiff must first prove by a preponderance or
22 greater weight of the evidence that there was an unsafe
23 condition that existed on the premises and next the plaintiff
24 must show that the unsafe condition was caused by an agent or
25 employee of the defendant. Okay?

1 And if y'all have any further questions about those two
2 distinctions, if you'll go write them down -- and I can -- I
3 can only answer questions of law. I can recharge you on the
4 law. I can explain to you what the law is.

5 I can't answer questions about the facts. You've heard
6 all of the evidence in this case and so you've got to
7 determine those based on the facts presented before you.
8 Okay?

9 All right. Hold on just a minute before you leave. Let
10 me see y'all real quick?

11 (WHEREUPON, a bench conference was held in the presence
12 of the jury but out of the hearing of the jury off the
13 record.)

14 THE COURT: Okay. Y'all can -- I just wanted to check
15 with the lawyers to make sure I have covered everything with
16 you that we discussed. We'll be waiting to hear from y'all.
17 Thank you so much.

18 (WHEREUPON, the jury exited the courtroom at 4:07 p.m.)

19 (WHEREUPON, the jury note was marked as Court's Exhibit
20 Number 4.)

21 THE COURT: Okay. All right. We'll be in recess.

22 MR. HOLLER: Judge, may I take up -- can we take up the
23 matter of the charitable status?

24 THE COURT: Yes.

25 MR. HOLLER: It won't take but a few minutes I don't

1 think.

2 THE COURT: Okay.

3 MR. HOLLER: We would move to reopen the defendant's case
4 for the purposes of establishing charitable status.

5 THE COURT: And what's your position?

6 MR. PADGET: The same position I articulated earlier,
7 Your Honor. I'd be happy to rearticulate it, but --

8 THE COURT: No. And that's where we were. And, quite
9 frankly, we're doing some research on that and so I probably
10 -- hang on a minute and let me figure out what the standard
11 is. And maybe y'all know. Is the standard my discretion or
12 is the standard my discretion as long as it's not prejudicial
13 to the other side?

14 MR. PADGET: Part two is what my research reveals, Your
15 Honor.

16 THE COURT: Okay.

17 MR. PADGET: Shockingly, it is an abuse of discretion
18 standard, no doubt about that --

19 THE COURT: Right.

20 MR. PADGET: -- from what we saw. But the case law that
21 we saw -- it sort of goes back to is it prejudicial to the
22 other side. In the cases where it was allowed was, for
23 example, where the prosecution intended to offer the drugs in
24 a criminal case into evidence, simply neglected to during the
25 trial, but everybody knew about them.

1 And then they asked permission in court to reopen,
2 introduce the drugs to establish they are, in fact, the awful
3 stuff that they said they were, and the Court permitted that
4 to be done. There, you know, there was evidence that they
5 knew about it, they had the evidence -- the same evidence that
6 they gave to the defendant presumably years ago.

7 Our position is here this is new evidence from new people
8 with new facts that we have not seen, new documents that we
9 have not seen before. And, quite frankly, if we're going to
10 have a litigated hearing on this thing about the tax status of
11 that, I mean you're talking about an expert inquiry. Both
12 sides are going to hire experts and talk about what the tax
13 status is or is not or what it should or should not be in
14 light of the Fourth Circuit appeal. The facts that go to it
15 are what reporting requirements have been had. The letter I
16 was handed, the hearsay that it is, says that, you know,
17 you're exempt. However, any change in your purposes,
18 character or method of operation must be reported to us so we
19 may we consider the effect of the change on your exempt
20 status.

21 That's consistent with what my research revealed is that
22 there is a self-reporting requirement. So we get into what
23 they've told the IRS and when. There's a whole can of worms
24 here is what I'm getting into.

25 THE COURT: Okay.

1 MR. HOLLER: It's a straw man, Judge. This is no --
2 there's no issue. The entire case as we've presented it in
3 the motion to amend and the answer relates back to the
4 original answer. This is a charitable hospital. It's never
5 been an issue. That's creating a straw man to say there's
6 something there when there's not.

7 We are simply trying to take a recognition, if it
8 requires reopening the case or simply you taking judicial
9 notice based upon public records which are exceptions to
10 hearsay.

11 THE COURT: And -- and I was looking, you know, at the
12 public records doctrine and I saw a document from the
13 Secretary of State that I guess you could argue and you could
14 say it was public record. Now, the other document from the
15 IRS -- I don't know if that is public record. I mean in that
16 it's --

17 MR. HOLLER: The state of South Carolina recognizes
18 Tuomey as a not-for-profit corporation.

19 THE COURT: Right.

20 MR. HOLLER: And that's the status.

21 THE COURT: I saw that with the Secretary of State's
22 documentation and I -- I assume that you can authenticate that
23 document and I don't know that he questions, you know, once
24 it's authenticated then it comes in under the rules is my
25 understanding.

1 MR. PADGET: Judge, it sort of gets back just to the
2 fundamental purpose of what the cases said about judicial
3 notice and otherwise.

4 You know, the best example I could come up with -- it's
5 not great, but it's an example, is if we come to trial and,
6 you know, a week before trial we say, you know, we have \$17
7 million in future lost wages and by the way here's my expert
8 witness on my \$17 million in lost wages, which, by the way, we
9 would have claimed in this case at the last minute, and here's
10 my economist who by the way I forgot to call during my case
11 and forgot to put up that fact. I realize it now. I'd like
12 to reopen my case to put up my \$17 million in damages.

13 I have a strong feeling how the Court would rule in that
14 circumstance. I mean I think it light of everything, fairness
15 dictates -- fairness dictates all of that. That's what we're
16 dealing with here in this charitable defense is that our
17 damages are here and if they prove the factual basis for this
18 defense, the law protects them way down as to here. So when
19 you evaluate the prejudice, we just ask the Court to consider
20 that.

21 THE COURT: Okay. You know, in one of the cases that
22 happened is that when they made that motion, you know, I think
23 the case was in Horry County or whatever where they didn't
24 allow the charitable defense because they didn't raise it
25 until after the verdict.

1 MR. HOLLER: Judge, the motion in this case was made
2 moments after we completed our case.

3 THE COURT: I understand that.

4 MR. HOLLER: Moments.

5 THE COURT: I understand that and that's a huge -- you
6 know, most of the times in my practice when that's happened, I
7 allowed parties, the plaintiff or defendant, to reopen because
8 it was made, you know, versus once the other party has done
9 their case and then allowed one side to reopen and I usually
10 don't and once I give it to the jury I don't let them. It's
11 too late then. But you did make the motion immediately from
12 the end of your case and that's -- and in most situations I
13 allow for either side to reopen their case to do that. You
14 know -- go ahead.

15 MR. PADGET: My one thought on that, Your Honor, is just
16 that -- and I don't take issue with the timing of the motion
17 to reopen. It's what are we putting up with the motion to
18 reopen I think is what the Court should be considering.

19 In the cases where it's something everybody's known about
20 for a long time and it's not new documents, it's not new
21 evidence, it's not new witnesses, the courts have been much
22 more lenient. Where it is new facts, new documents,
23 presumably that have to come in through new witnesses, that's
24 where, as here, we're claiming the prejudice when you've got a
25 four-year-old case. The scheduling order said discovery was

1 going to be done February of this year and literally as the
2 jury goes out we're being handed documents to say our damages
3 can be cut into ten percent of what they were. That's as much
4 prejudice as I can come up with for a plaintiff, Your Honor.

5 MR. HOLLER: Judge --

6 THE COURT: Go ahead.

7 MR. HOLLER: Paragraph two of the complaint. Tuomey is
8 an eleemosynary corporation. We apologize if we surprised
9 anyone.

10 THE COURT: I understand the question. I think this is
11 the question. It's for the Court to decide and not the jury.
12 I mean -- and I'm not opposed to having this hearing if you
13 need more time to exchange documents and research in a week or
14 two from now. I mean this -- based on whatever this verdict
15 does and whatever else happens, it's going to have huge
16 implications.

17 MR. HOLLER: I understand, Judge, but what the argument
18 is being put to you as we came in here with a fierce battle
19 over whether or not Tuomey was a not-for-profit corporation
20 and in paragraph two of their complaint they admitted it.

21 THE COURT: I understand. I mean I don't disagree with
22 it. They --

23 MR. HOLLER: The question --

24 MR. PADGET: The charitable statute goes to taxable
25 status, not whether or not you're charitable. One could be

1 charitable and not tax-exempt. There's a huge distinction.

2 MR. HOLLER: What?

3 MR. PADGET: Yes. One could be charitable, a church
4 could be charitable and not tax-exempt, not to claim the
5 status. The statute says tax status under 501(c)(3) or
6 501(d).

7 THE COURT: Well --

8 MR. PADGET: That's the key.

9 THE COURT: And we're working on that right now. Let me
10 -- and I'm looking at all options. So I'll let y'all know in
11 a little while. You know, I understand. I'm not ready to
12 rule on those motions right now. Let me go finish reading the
13 statute and reading all this other stuff and I'll let you know
14 sometime this afternoon. Okay? We'll be in recess until
15 then.

16 (WHEREUPON, there was a break in the proceedings from
17 4:16 p.m. until 4:57 p.m.)

18 THE COURT: Okay. I understand we have a verdict and one
19 thing I probably need to do -- Mr. Holler moved at the end of
20 his case right after he had rested to allow him to reopen the
21 case, you know, after your motion to -- to put in evidence of
22 the tax-exempt status and the eleemosynary existence of the
23 corporation. From my understanding, he had a witness
24 available, he had documents available, and he could've
25 presented it and it was immediately after. So I'm going to

1 allow him to reopen on that issue.

2 The fact -- the fact that it's not a question for the
3 jury, we will have that hearing and we don't have to have it
4 today. If y'all need more time to prepare documents, we can
5 have that hearing to determine whether, in fact, Tuomey is
6 entitled to the tax-exempt status.

7 In my understanding, you know, under the public record
8 doctrine, hearsay is admissible as long as they are, in fact,
9 public records and you can prove that they are public records.
10 Okay?

11 MR. HOLLER: Judge, I would only add that the complaint
12 alleged we were a non-profit. We admitted in the answer.

13 THE COURT: I understand. But it wasn't stipulated to
14 technically and then that was an issue, but I would at least
15 clear that up before we get a verdict and then we will -- we
16 will deal with that. You know, it may depend on what your
17 verdict is as to whether it's moot or not, but if it becomes
18 an issue, then we can litigate that issue at some other time
19 if you want to. I mean I understand notice and that you need
20 more prep time.

21 MR. PADGET: And, Your Honor, I would just, depending on
22 what happens, just we can discuss status-wise what, if any,
23 discovery would need to be pursued on those issues and all
24 that stuff as far as timing goes.

25 THE COURT: Okay.

1 MR. PADGET: If it becomes an issue.

2 THE COURT: Okay. All right. Anything else before I
3 bring the jury in?

4 MR. HOLLER: No, sir.

5 THE COURT: All right. Bring me the jury.

6 THE BAILIFF: All right, sir.

7 (WHEREUPON, the jury entered the courtroom at 4:59 p.m.)

8 THE BAILIFF: Your Honor, all the jurors are present in
9 the courtroom.

10 THE COURT: Okay. Mr. Foreman, have you reached a
11 verdict?

12 THE FOREPERSON: Yes, sir.

13 THE COURT: Is it unanimous?

14 THE FOREPERSON: Yes, sir.

15 THE COURT: Okay. If you'd pass it up, please, sir?

16 (WHEREUPON, the verdict was passed to the clerk and then
17 to the Court.)

18 THE COURT: Okay. You may publish the verdict.

19 VERDICT

20 THE CLERK: For the State of South Carolina, County of
21 Sumter, in the Court of Common Pleas, Docket Number 2012-CP-
22 43-2030, Win Myat, plaintiff, versus Tuomey, defendant.

23 Question number one. Was the defendant negligent? Yes.

24 Question number two. Was the defendant's negligence a
25 proximate cause of plaintiff's injuries? Yes.

1 Question number three. Was the plaintiff's negligent --
2 was the plaintiff negligent? No.

3 Actual damages for the plaintiff, 2,000 -- I mean
4 2,500,000. Signed David Fanning, dated September the 2nd,
5 2015, foreperson.

6 Ladies and gentlemen of the jury, is this your verdict?
7 So say you all by raising your right hand, please.

8 (WHEREUPON, the jurors complied.)

9 THE CLERK: Thank you.

10 THE COURT: Anything before I release the jury?

11 MR. PADGET: Nothing from the plaintiff, Your Honor.

12 THE COURT: From the defense?

13 MR. HOLLER: No, sir.

14 THE COURT: Okay. Ladies and gentlemen, I want to thank
15 you for your service this week. This -- I won't need you any
16 longer this week; so you'll be free to go and you don't have
17 to do this again for three years. If you need an excuse for
18 work, the clerk's office will provide you that.

19 THE CLERK: They're right outside the door, Judge.

20 THE COURT: Okay. And they're going to mail you a huge
21 check for your services this week. We can't come close to
22 paying you what you're worth. If we could, you couldn't pay
23 your property taxes.

24 But I appreciate you being here. I've been telling you
25 all week you can't talk about this case. Now you can talk

1 about it with anybody you want to. You can go home and tell
2 your family what you've done. If you don't want to talk about
3 it, you don't have to.

4 Thank you for your service. You have a nice week.

5 (WHEREUPON, the jury was released at 5:03 p.m.)

6 THE COURT: Okay. Is there anything for me to decide?

7 MR. HOLLER: Judge, we would move for judgment
8 notwithstanding the verdict for the reasons argued in our
9 motion for summary judgment, as well as the directed verdict
10 stage. This jury was allowed to speculate and use conjecture
11 as to some unknown no-evidence employee of Tuomey put water on
12 the floor.

13 THE COURT: Okay.

14 MR. HOLLER: Taken in light of the question of is it more
15 probable than not that it was a Tuomey employee and, again,
16 that is speculative and improper.

17 THE COURT: Okay. Anything else further from the
18 plaintiff?

19 MR. PADGET: Judge, the one thing I'll point out that I
20 think changed, as can happen in a trial, is the evidence from
21 this morning that we knew about to this afternoon that we knew
22 about changed when Ms. Wilson was called. So I'm not going to
23 reargue all the points from before, of course, where we're at,
24 but she testified as to a number of facts I know the Court had
25 concern about whether or not they even moved the ice that

1 morning, and the testimony was three different people moved
2 ice in that location that morning. And she also testified it
3 was her and two other Tuomey employees, one of which who was a
4 student nurse technician. That's one piece of evidence.

5 The other piece of evidence that came out through her was
6 that they enforce that policy, that they keep visitors and
7 patients away from the precise area where this fall occurred,
8 and she also did not have any memory of any visitors or third
9 parties in that area.

10 There were a couple other reasons, Judge. Those are the
11 main ones that stood out in my mind, but there was additional
12 evidence that the Court heard and the Court took and that the
13 jury took today that, as close a call as it was earlier, I
14 frankly think it got a little better for the plaintiff today,
15 and I just ask the Court to consider that when you evaluate
16 all the other arguments we've made.

17 The fact that the very cart that was used to move the
18 water was literally an arm's length away from the location of
19 Dr. Myat's fall, the location of the water, the great circle
20 of the world of conjecture Mr. Holler keeps focusing on has
21 been narrowed down to literally an arm's-length of distance,
22 and that fact and the fact that there were no other people, no
23 other evidence of any other people around other than those
24 Tuomey employees that I've discussed with Ms. Wilson today,
25 who knew all the employees of Tuomey were in that area.

1 That water was spilled by somebody. There was no other
2 source. There's no other environmental source and the
3 reasonable inference that comes from that is that it was a
4 Tuomey employee and we think this rises above conjecture and
5 speculation. We'd ask the Court to give deference to the
6 jury's verdict, whose province it is to make these close
7 calls.

8 THE COURT: Okay.

9 (WHEREUPON, there was a pause in the proceedings.)

10 THE COURT: And this is a close case and the posture
11 probably is a little different this afternoon than it was this
12 morning. Let me think about it and I'll let you all know
13 something in the next day or two.

14 MR. HOLLER: Judge, if I may, I believe that Rule 50(b),
15 motion for a directed verdict, goes to the standard of the
16 evidence as it was at the time of directed verdict, not as a
17 totality. And of course, if a -- that may be different in a
18 criminal case.

19 THE COURT: Right.

20 MR. HOLLER: In the alternative, we would move for a new
21 trial based upon the allowance of William Whitehouse to guess
22 and testify more probably than not that it was a Tuomey
23 employee. Again, that that was not a question that elicited a
24 fact. It was pure speculation.

25 So we would ask for the new trial in the alternative

1 based upon the erroneous admission of that evidence.

2 THE COURT: Okay.

3 MR. PADGET: Your Honor, I'll deal with JNOV first. My
4 understanding of the standard is that it's at this stage now.
5 It considers the evidence submitted in the other party's case.
6 That's the standard we're at now under Rule 50(b).

7 THE COURT: Well, you know, I think under *In re:*
8 *McCracken*, only those grounds raised in the directed verdict
9 motion may be raised in the JNOV motion. That's a 2001 case.

10 MR. PADGET: Sure. And I -- it's the same grounds.

11 THE COURT: Right.

12 MR. PADGET: I agree it's the same grounds, but --

13 THE COURT: Well -- well --

14 MR. PADGET: -- he -- I think he has to -- I'm sorry,
15 Your Honor.

16 THE COURT: I'm sorry. Go ahead.

17 MR. PADGET: I just don't think it's proper to ask the
18 Court to then ignore the testimony that was taken into
19 evidence and then considered by the jury at the JNOV stage,
20 which includes Ms. Wilson's testimony. It's -- the directed
21 verdict was denied at that stage with the Court's leave, of
22 course, to take it up now.

23 THE COURT: Right.

24 MR. PADGET: But the JNOV standard which the Court has
25 taken up -- it's my understanding that you have taken it up

1 subject to the evidence put forth in the defense's trial -- in
2 the defense's case.

3 And then I'll next comment on Nurse Whitehouse. Your
4 Honor made a ruling on this. The ruling allowed him to
5 testify to it, that it was proper under Rule 701. It's proper
6 under the case that we cited with the machine operator, the
7 log skidder, testimony of the layperson.

8 And the trial court has given great deference about the
9 propriety of those evidentiary admissions and the Court deemed
10 it proper for admission. It meets all the three prongs of the
11 test. That he had personal knowledge of which upon to base
12 that lay opinion. He had personal knowledge to base that on,
13 the ongoing operation of the unit and everything else. We
14 think it was entirely proper under 701. And at this stage if
15 the Court feels it wants to further elucidate on what 701
16 means, that seems proper, but nothing has changed from the
17 Court's prior ruling.

18 THE COURT: Okay. Anything else you want to put on the
19 record?

20 MR. HOLLER: Only -- only for all other motions, Judge,
21 we would ask for ten days to submit them in writing.

22 THE COURT: Okay.

23 MR. HOLLER: There's things that have to be done before
24 other motions.

25 THE COURT: And we've got this issue, you know, to also

1 deal with based upon my ruling of the eleemosynary status. So
2 I'll give you ten days to file anything and then I will let
3 y'all know.

4 THE COURT: Thank you, judge.

5 MR. PADGET: And, Judge, I'm fine with that. I would ask
6 as part of that because we've been no opportunity to do any
7 discovery at all on those tax-exempt status issues that we
8 just may take up at some point, once those motions are filed,
9 perhaps a brief status conference.

10 THE COURT: Sure.

11 MR. PADGET: And it may be that we decide we don't want
12 to do any discovery or anything and, of course, we'd tell the
13 Court, but if we do, it's not fair to Dr. Myat not to have
14 that opportunity. And if we need to enter a brief scheduling
15 suggestion to get that all finished, I'm sure we can do that
16 by agreement.

17 THE COURT: Okay. All right. We'll do that and I'll let
18 y'all know.

19 MR. PADGET: Thank you, Your Honor.

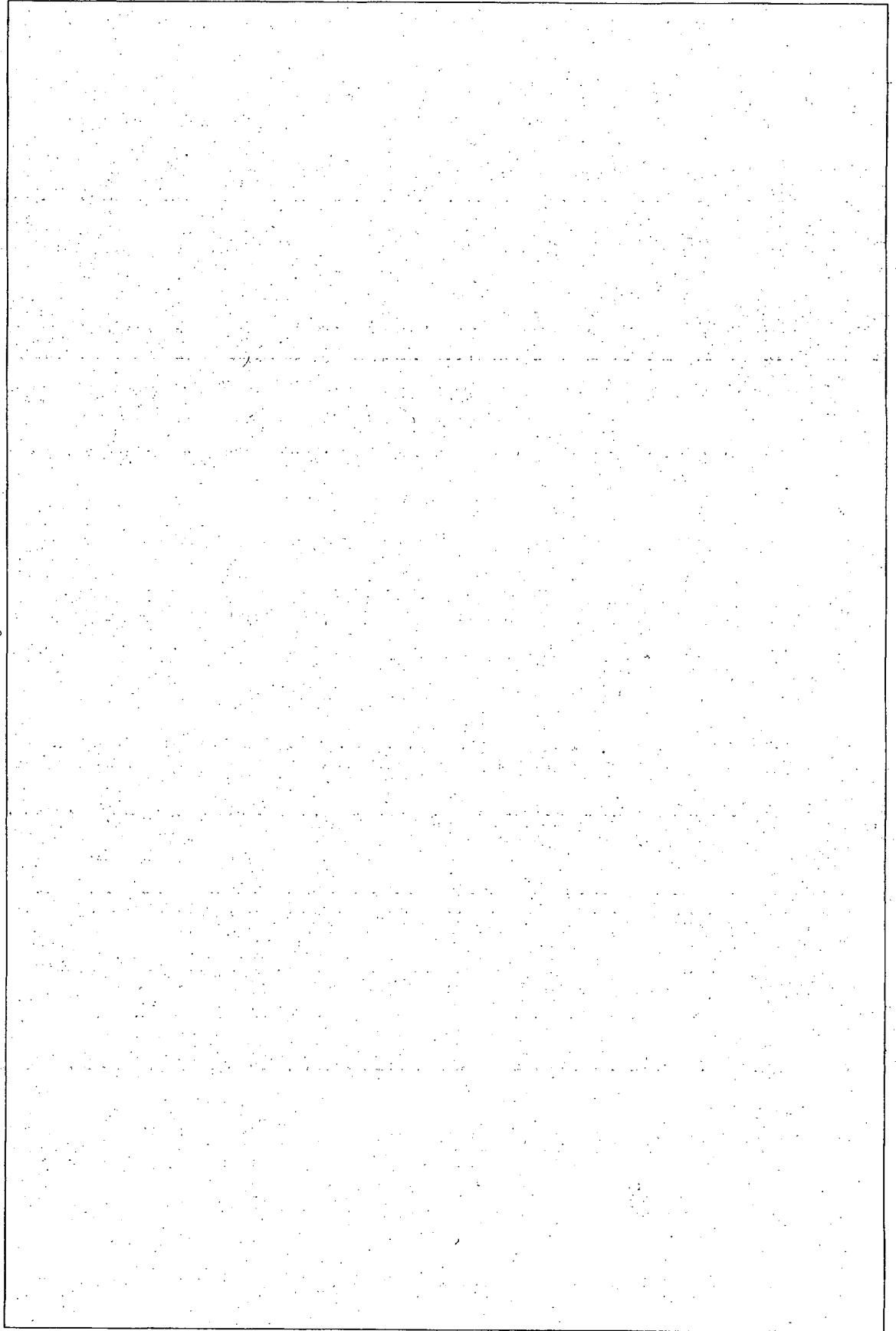
20 THE COURT: Thank y'all. And I -- you know, y'all both
21 did an excellent job and I appreciate y'all's hard work in
22 this trial. Y'all did a great job. Y'all were civil to each
23 other and to the Court and I appreciate it.

24 MR. PADGET: Thank you, Judge. It's been a pleasure.

25 THE COURT: Okay.

1 MR. HOLLER: Thank you, Your Honor.
2 (WHEREUPON, the proceedings ended at 5:30 p.m.)
3
4 --- END REQUESTED TRANSCRIPT ---
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- 579 -

Sumter County Judicial Center RANDOM STRIKE SHEET

JUDGE NAME : R. Ferrell Cothran Jr.

TRIAL TYPE : Civil

FILE ID : 2012-CP-43-2030

COURTROOM CTR1

DESCRIPTION : 2012-CP-43-2030 Myat vs Tuomey

Sorted by: Random Nbr

Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1 Cogdell, Darrell	23	B	M	()	()	()	1
2 Brand, Ethel Heyward	14	B	F	()	()	()	2
3 Buckner, Joey R	17	W	M	()	()	()	3
4 Hensley, William A	44	W	M	(✓)	()	()	
5 Odom, Suzanne W	92	W	F	(✓)	()	()	
6 Wilson, Derica D	143	B	F	()	()	()	4
7 Mcleod, Treginald	76	B	M	()	()	()	5
8 Nelson, Travis O	88	B	M	()	()	()	6
9 Hartley, William H Jr.	43	W	M	(✓)	()	()	
10 Witherspoon, Willie J	150	B	M	()	(✓)	()	
11 Hudson, Karen M	48	Indian? Asian?	F	()	()	()	7
12 Marshall, Fred G	67	W	M	()	()	()	8
13 Harry-Singleton, Randolyn	42	B	F	()	(✓)	()	
14 Parks, Jonnie	96	B	F	()	()	()	9
15 Motes, Lauren M	86	W	F	()	()	()	10
16 Thompson, Tammy M	124	B	F	()	()	()	11
17 Hall, Jay A	41	W	M	(✓)	()	()	
18 Fanning, David W	32	W	M	()	()	()	12
19 Wilson, Lance O	146	B	M	()	(✓)	()	
20 Moses, Mary L	85	B	F	()	(✓)	()	
21 Pringle, Melvin	105	B	M	()	(✓)	()	
22 Dennis, Patricia A	29	W	F	(✓)	()	()	
Shirar, Paul G	114	W	M	()	()	()	alt.

579

1 State of South Carolina)
2) Certificate
3 County of Florence)
4

5 I, the undersigned, Krystal J. Smith, Notary Public and
6 Official Court Reporter for the Twelfth Judicial Circuit of
7 the State of South Carolina, do hereby certify that the
8 foregoing pages, numbered 1 through 579 constitute a true,
9 accurate, and complete Transcript of Record of all the
10 proceedings had and evidence introduced in the hearing of the
11 above captioned case, relative to appeal, in the Court of
12 Common Pleas for Sumter County, South Carolina, on August 31st
13 through September 2nd of 2015.

14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.
16

17 Krystal J. Smith

18 Court Reporter
19

20 Florence, South Carolina

21 July 9, 2016
22
23
24
25

State of South Carolina)
County of Sumter)
Win Myat,)
 Plaintiff,)
-vs-)
Tuomey Healthcare Systems,)
 Defendant.)

March 8, 2016
Manning, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge

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1 MARCH 8, 2016

2 THE COURT: Okay. Who wants to go first?

3 MR. HOLLER: Judge Cothran, I imagine that I would be the
4 party who would go first at this point in time.

5 THE COURT: Right.

6 MR. HOLLER: Obviously, we have already made these
7 motions, but I'll certainly repeat them herein and then I
8 guess I would offer -- well, we'll cover that when I get to
9 it.

10 First, we would ask for judicial notice that Tuomey as of
11 July 6th, 2011, the date of injury in this case, was in fact
12 recognized and is a tax-exempt organization under 501(c)(3) as
13 determined by the IRS. The two statutes, 170 and 20 are
14 consistent and we're simply asking the Court to take judicial
15 notice under 201 in the case law in South Carolina of the tax-
16 exempt status.

17 Tom Moran, who was deposed as a 30(b)(6) representative
18 of Tuomey, is here and present. Judge, as an officer of the
19 court, I mean I'll certainly follow what direction the Court
20 gives us, but Mr. Moran is under oath as virtue of being an
21 officer. I can certainly offer brief testimony from him and
22 subject him to cross-examination by Dr. Myat and his counsel,
23 but essentially he's going to testify that he was tax counsel
24 for Tuomey, that he is familiar -- again, I don't know if
25 that's the proper inquiry for determining (c)(3) status, but I

1 guess for the purposes of making a record he would testify or
2 state, as he did it in his discovery deposition, that as of
3 the date of the injury and as of today, Tuomey is a (c)(3)
4 status under the IRS rules.

5 THE COURT: All right.

6 MR. HOLLER: And that there's been no indication that it
7 would be challenged. So I certainly don't want to waste
8 anyone's time in offering testimony and subjecting to cross-
9 examination. I would also point out that --

10 THE COURT: Well, you know, I think clearly that's the --
11 and my understanding at the trial was that that determination,
12 you know, would have to be made whether they were, in fact,
13 entitled -- whether Tuomey is entitled to, you know, the cap
14 under South Carolina statute. The question was whether they
15 were a 501(c)(3).

16 And since we agreed and it's my understanding that that
17 was not a question for the jury to determine, that was a
18 question for the Court to determine after, you know, the jury
19 had reached their verdict, because it depended on -- you know,
20 if it was a defense verdict, that would not have been an
21 issue. If it was a plaintiff's verdict and it exceeded the
22 cap, then it would be an issue as to whether, in fact, they
23 were entitled to the cap.

24 So the existence at the time of the incident whether
25 Tuomey was a 501(c)(3) and therefore came under, you know, 33

1 --

2 MR. HOLLER: 56.

3 THE COURT: Right.

4 MR. HOLLER: 170.

5 THE COURT: 170.

6 MR. HOLLER: And 180.

7 THE COURT: 180, I think, as well. But in my
8 understanding to make that determination -- you know, I've had
9 situations where some corporations may have been charitable
10 and have tried to attempt to file their paperwork with the
11 Secretary of State to be a charitable organization and they
12 had not gone through the IRS yet and they had not gotten the
13 501(c)(3) and may not be entitled to the cap.

14 But the question here is whether, in fact, Tuomey had
15 done that. At the time of the incident, the IRS had
16 recognized them as a 501(c)(3) status and still recognize them
17 because if they had lost that, then at least it would have
18 been an argument that it was retroactive.

19 So I think -- and I'm not really sure I can take judicial
20 notice of a fact. There's got to be -- there's a recent case
21 the Court took judicial notice and the Supreme Court said, no,
22 that's an issue that's got to be a factual basis. So unless
23 we'll start it or it's stipulated, I think we need some
24 testimony at the time that there was a 501(c)(3) status at
25 Tuomey and still is. Okay?

1 MR. HOLLER: Thank you, Judge.

2 THE COURT: Do you -- do you disagree with that?

3 MR. PADGET: I agree with some and I disagree with some
4 other points as what Your Honor has stated. As an initial
5 matter, I absolutely -- we fundamentally believe that
6 testimony is required to prove the affirmative defense.

7 Our Court has said -- our Court of Appeals has said that
8 this defense, the charitable defense, is a Rule 8 affirmative
9 defense under the Rules of Procedure. It has to be pled, it
10 has to be proven, and the only way it can be proven is through
11 testimony.

12 The Court has permitted, at least preliminarily subject
13 to our motions of reconsideration which I suppose we can deal
14 with later, but this to be reopened. So we absolutely believe
15 testimony is necessary in order to prove that up and the
16 plaintiff does not stipulate to any measure that Tuomey is
17 qualified or meets any of the factual predicate necessary to
18 prove the protections of the -- of these two particular
19 statutes at issue.

20 The one thing I do disagree with, Judge, which sounds
21 like you believe a hearing or testimony is required, is the
22 timing. The defendant has taken the position routinely and
23 repeatedly that the key timing is as of the date of the
24 incident, which was back in 2011. I don't remember what the
25 particular date was.

1 This statute -- the two statutes, 56-170 and 180, make no
2 mention of the date upon which that determination should be
3 made. And we would submit to you that the operative language
4 in the statute is not date of injury, but it focuses on two
5 functions. It focuses on an action and it focuses on a
6 judgment. And we believe and we submit that the -- the
7 factual predicate necessary to prove this defense must be made
8 when the defendant is asking for the protection of the Court
9 and the protection of the statute when the judgment is to be
10 entered.

11 And by way of example, in this case a hypothetical. If
12 Dr. Myat was injured back in 2011 and in 2012 the IRS revoked
13 Tuomey's tax status and this case went to trial in 2015, as it
14 did, and a verdict is entered, at that point in time I don't
15 think there would be a big dispute under this statute that
16 they're not entitled to the protections of the code if the IRS
17 had already revoked the tax status.

18 So -- and the converse is also true. That if they were
19 not a charitable entity at the time of the incident, but some
20 major event occurred that gave rise to this huge continued
21 liability and then they thereafter sought the charitable
22 protections of -- of -- of state laws and the federal laws, a
23 Court can't -- or an entity can't go out and seek the
24 protections of the charitable statute after the fact. The
25 point being this is in derogation of the common law.

1 In 1981 when Justice Ness declared that charitable
2 immunity is no more, under the common law any charitable
3 entity when hauled into court was subject to the full amount
4 of any judgment that could be levied in South Carolina. And
5 this statute passed three years later in '84 and derogation of
6 the common law has to be strictly construed. It is a
7 statutory protection that otherwise is not there. Otherwise,
8 entities are not entitled to benefit from it. And here, the
9 statute does not focus on date of the injury; it focuses on
10 judgment.

11 And so we would submit -- and for the purposes of today's
12 factual inquiry, I just wanted to make these arguments that
13 because I think the testimony is going to be -- we've had the
14 opportunity to take Mr. Moran's deposition as a 30(b)(6)
15 witness for Tuomey. I think he's going to testify that the
16 IRS has not taken any action.

17 Now, the factual predicate about maybe why the IRS hasn't
18 taken any action and whether or not they are, in fact,
19 behaving like a charitable entity, we contend the Court has
20 got to look into today or as part of making its determination,
21 and I just did not want to waive any of that as part of this
22 part of the hearing.

23 THE COURT: Okay. Now, Mr. Holler, what is your position
24 as far as -- is it the date of the incident or is it when the
25 action is filed and the judgment is entered as to whether

1 you're entitled to the 501(c)(3)?

2 MR. HOLLER: Judge, I think for the purposes of our
3 hearing today those dates are irrelevant. Today, as well in
4 July of 2011, Tuomey is a (c)(3) exempt organization under IRS
5 rules.

6 THE COURT: Okay.

7 MR. HOLLER: So I'll be happy to take a position. I
8 think -- I do agree that it would open up a potential question
9 if the exempt status were challenged or changed, and I would
10 point out under the IRS rules -- we certainly briefed this
11 and, Judge, I don't want to spend a whole lot of time talking
12 about IRS rules if you don't want to hear it, but essentially
13 under -- under the IRS rules, the treasury rules, it's a pay
14 to play. If the IRS does not believe that you're entitled to
15 (c)(3) status, they give you notice and then you're required
16 to pay the tax. If you do not pay the tax, you cannot
17 litigate and challenge that determination. So --

18 THE COURT: And, you know, that's one of the issues that
19 I had in this. You know, I don't think the Court has the
20 authority to change it. The IRS is the only one that can pull
21 it and, if the IRS pulls your status, you have the right to
22 litigate that in court to see whether it was proper or
23 improper, and I think that's done in federal court.

24 MR. PADGET: I understand this is --

25 THE COURT: My understanding is I can only determine

1 whether, in fact, it existed either at the time of the
2 incident or at the time of the action or the time of the
3 judgment whether the five -- you know, whether they had
4 applied properly, whether there was a 501(c)(3) at the time.

5 For argument's sake, assuming that they had it the whole
6 time, that seems to be the only determination I have. I can't
7 find where any state court has ever changed that. I mean how
8 do I -- if I determine, well, Tuomey doesn't have a 501(c)(3)
9 tax-exempt, the implications of that are huge. I mean
10 everybody's donated. Everything Tuomey's done since then,
11 does that change all that? I mean how do I have the authority
12 to do that?

13 MR. PADGET: Sure. Your Honor, I'm happy to comment on
14 that. First of all, no matter what the Court rules in this
15 case, no matter what the Court of Appeals rules in this case,
16 no matter what the Supreme Court of South Carolina may
17 ultimately rule in this case if it's appealed, makes any
18 difference whatsoever about Tuomey's tax status with the IRS.
19 It doesn't. The only thing it affects is whether or not
20 they're entitled to the protections of these statutes, these
21 state statutes under state law.

22 We do not -- we do not contend that you have the
23 authority or any court in South Carolina has the authority to
24 actually revoke their true tax status under federal law.
25 That's not what this Court does. That's not what these courts

1 are for.

2 However, what we're saying -- our position is is that
3 under 33-56-170, what the legislature did in rewriting that
4 statute in such a way to take out that operative language, as
5 the Court -- the Court has mentioned it before in our status
6 conferences that the two statutes governing and defining what
7 charitable organizations are are different and the cap statute
8 is different. It's written differently and it has different
9 meaning.

10 Under the general definition section, as Your Honor is
11 well aware, it defers to the IRS about tax-exempt
12 determinations, but here under 33-56-170, what it does -- and
13 I think, Your Honor, we've got to back up and look at the
14 historic picture of how this statute came to be and give it
15 the effect the legislature intended.

16 As Your Honor well knows, for a hundred years before
17 1981, trial courts in this state were tasked with determining
18 when a charitable entity was sued in a tort case whether or
19 not they truly were charitable. That was an affirmative
20 defense that had to be pled; it had to be proven.

21 And according to the Eisenberg case, as cited in our
22 brief, in the 1950s the Court there, the Supreme Court of
23 South Carolina, said very clearly that it wasn't -- whatever
24 the articles of incorporation said didn't make it so. It's
25 the character and mode of the actual operations that

1 determines whether or not they're a charitable entity.

2 So for a hundred years South Carolina trial courts were
3 tasked with determining were entities behaving in a charitable
4 manner for the purposes of getting the -- this was outright
5 immunity. It wasn't a cap. This was no money whatsoever.

6 In '81, Justice Ness said no more. It's an antiquated
7 doctrine. It doesn't have any place anymore in South Carolina
8 law and got rid of it with the stroke of a pen to support his
9 brother on the Supreme Court and it was gone. And for three
10 years it was gone and then the legislature got involved and
11 passed this statute.

12 And the first definition, as we said, says we defer to
13 the IRS, but when it came to the cap, it doesn't mention the
14 IRS determination at all. In fact, it's omitted. It instead
15 incorporates -- which is exempt from taxation pursuant to
16 Section 501(c)(3) of Title 26 of the United States Code as
17 amended.

18 And what we would submit to you that means, Your Honor,
19 is that if you want charitable protections after 1984 when
20 this was passed, you have to operate in accordance with
21 501(c)(3). It's not just get the designation. You have to
22 follow the rules. To get the benefit, you have to follow the
23 rules under federal law.

24 And we're not asking you to make a federal law
25 determination. The statute itself requires the Court to look

1 at federal law to see whether or not they qualify or still
2 qualify because what the defense argues and they have all
3 along is if -- that tax-exempt status is a get out of jail
4 free card. If we have filed certain paperwork with the IRS
5 and the IRS hasn't got wind of anything we've done, as long as
6 I still have that card that says the IRS said 25 years ago I'm
7 tax-exempt, my liability is limited.

8 And I sat around in my office the past couple of weeks
9 thinking about it. If that's what the law really is, I could
10 start Bill's Charities for Widows and Orphans. I could go out
11 and collect all this money. I can file my paperwork with the
12 IRS and get it because the statistics that govern an
13 accounting office that show 80 percent of the applications
14 aren't even reviewed. They're just stamped and here you go
15 and off you go. And unless somebody comes to us and says
16 you're being really awful or you come to us under a self-
17 reporting system to tell us that you've been bad, you get your
18 card.

19 So Bill can go out, kill, maim, do awful things all over
20 South Carolina, solicit money under false pretenses, get drunk
21 and drive a car, kill people, and do all that, and as long as
22 I -- we go to trial and then show up and I say, Your Honor,
23 I've got the card. I'm good. Here's my \$300,000 I've
24 solicited under false pretenses and off you go.

25 That is not the law. It can't be the law and it

1 shouldn't be the law.

2 So, Your Honor, what we submit is under 33-56-170, the
3 legislature preserved the historic role of the trial court to
4 make that determination of whether or not a charitable entity
5 is actually charitable and following the rules, which were
6 clearly set out as the federal law sets out, which is --
7 that's a -- it's a complicated statute, but then there's all
8 the case law interpreting it too. But if you're following the
9 rules of charitable organizations, you get the benefit and
10 that money you solicit is protected. But if you don't follow
11 the rules, you don't in derogation of the common law.

12 That's what we think it means, Your Honor. And we would
13 submit that's the evidentiary burden that they've got to prove
14 here today and Mr. Moran can testify about a lot of those
15 topics and the Court can make a determination.

16 THE COURT: Okay. And that's an interesting argument,
17 but do you know whether that has ever been made or determined
18 by a South Carolina court?

19 MR. PADGET: No, Your Honor. There's no case that says
20 what 33-56-170 means.

21 THE COURT: And I --

22 MR. PADGET: I stipulate to that. We'd all be in a much
23 better spot if there was a case out there telling us.

24 THE COURT: I was -- you know, I was hoping you had found
25 one, but we have not been able to -- that would clarify that

1 point and I understand that argument because, if you were
2 right, in every court in every charitable issue, that issue
3 would be litigated. In every one I've ever tried, we've never
4 litigated that issue and it was -- it was there or it wasn't
5 there and you got a verdict and either the cap applied or it
6 didn't apply. And if that was something that needed to be
7 proven, at least in your argument --

8 MR. PADGET: In many cases the parties stipulate to it,
9 Your Honor, and in other cases I have stipulated to the tax
10 status, but I will say in those cases the defendant had not
11 been under investigation by the Department of Justice, they
12 had not been found to be guilty of federal frauds, and levied
13 \$237 million judgment against them. So needless to say here,
14 we looked a lot closer at the statute and the history than we
15 did in a lot of average cases. But in other cases, we've
16 haven't.

17 But I will say this. In those cases, defense counsel has
18 always come to us and asked will you stipulate to this. And
19 if they do not, they bring witnesses to trial to put up
20 testimony about it. Obviously, that's why we're here today.

21 THE COURT: Okay. Thank you. All right. Mr. Holler?

22 MR. HOLLER: Judge, as a matter of housekeeping, we've
23 submitted a confidentiality order that would protect -- excuse
24 me -- Mr. Moran's 30(b)(6) testimony, as well as documents --

25 THE COURT: Okay.

1 MR. HOLLEER: -- that were produced. May I hand that up?

2 MR. PADGET: And, Judge, we agree. It's a standard

3 District Court confidentiality order. My understanding of it

4 it says we use it for litigation purposes only and it only

5 relates to the testimony regarding Tuomey's operations --

6 THE COURT: Okay.

7 MR. PADGET: -- at the deposition. Obviously, it doesn't

8 relate to anything else.

9 THE COURT: All right.

10 MR. PADGET: And I have treated it as such yesterday when

11 we filed our documents online. I did not file the -- the --

12 the deposition.

13 THE COURT: Has this been filed online?

14 MR. HOLLER: Because it's not signed, Judge, no, sir.

15 THE COURT: But they won't --

16 MR. HOLLER: If you give it to me, we will file it.

17 THE COURT: Okay. But once I sign it, I think it could

18 cause a huge problem with the clerk's office. That's -- I

19 just had one earlier. If I submit them now, they have me

20 filing it and they don't want me to sign it. When you sign

21 it, they go crazy. You know --

22 MR. HOLLER: Judge, with your assurances that you will

23 sign it, we will do what is necessary.

24 THE COURT: I'll be glad to sign it, but I tell you they

25 probably won't let you file it. You have to set -- we have to

1 do it electronically. And if y'all both agree to stipulate,
2 I'll certainly sign it. I'm just telling you me signing this
3 and you going to try to file it --

4 MR. HOLLER: Judge, we will work with Ms. Roberts and we
5 will see that it is properly entered.

6 THE COURT: Well, it's going to be filed in Sumter.

7 MR. HOLLER: I'm sorry. You're right.

8 THE COURT: And which may make things even more
9 complicated.

10 MR. HOLLER: No. Well, we'll work that out.

11 THE COURT: Okay.

12 MR. PADGET: Judge, we've been operating as if we were
13 subject to it --

14 THE COURT: I just -- I just want y'all to be aware of
15 that. I don't -- you know. I'm sorry.

16 MR. PADGET: I'm sorry, Your Honor. Both sides have been
17 operating as if we are subject to it since we agreed to it --

18 THE COURT: Right.

19 MR. PADGET: -- months ago. And it's -- again, it only
20 relates to the 30(b)(6) testimony and some of the documents
21 that are attached to that about their current operations and
22 financial status and so forth. And it says we can use it for
23 any purposes for this proceeding, but needless to say, I'm not
24 releasing that to the *Sumter Item* next week.

25 THE COURT: Okay. Thank you.

TOM MORAN - DIRECT BY MR. HOLLER

1 MR. HOLLER: Judge, we would call Tom Moran --

2 THE COURT: All right.

3 MR. HOLLER: -- as a witness.

4 THE COURT: If you would, come around please, sir, and
5 place your hand on that Bible. Do you solemnly swear the
6 testimony you give will be the truth, the whole truth, and
7 nothing but the truth, so help you God?

8 THE WITNESS: Yes, sir.

9 THE COURT: Thank you. Have a seat and I can probably
10 hear you. I don't know. You may want to turn on that
11 microphone.

12 MR. HOLLER: Okay.

13 TOM MORAN, being first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. HOLLER:

17 Q: Mr. Moran, please state your full name.

18 A: Thomas F. Moran.

19 Q: Okay. How are you employed?

20 A: I'm a partner with Nelson Mullins Law Firm.

21 MR. PADGET: I don't mean to interrupt, David, and I'm
22 sorry. Can I pass these -- this brief up to you? You've got
23 yours. I just want to make sure I get it to the judge and to
24 -- and to his clerk before I forget. I'm sorry to interrupt
25 you.

TOM MORAN - DIRECT BY MR. HOLLER

1 This is just a full -- the full record that we had filed
2 yesterday. And I've been known to forget things.

3 THE COURT: You filed that electronically?

4 MR. PADGET: We filed everything but exhibit A and
5 Exhibit A's 1 through 10, which are subject to this
6 confidentiality agreement.

7 THE COURT: Okay.

8 MR. PADGET: So we're giving it to you today in camera.

9 THE COURT: Okay. Gotcha.

10 MR. PADGET: Again, my apologies, David.

11 BY MR. HOLLER:

12 Q: Mr. Moran, tell us please about your training and
13 education to become an attorney and what your special --
14 specialization is?

15 A: Sure. I went to Clemson undergrad and graduated in 1983.
16 I went to the University of South Carolina School of Law and
17 right after that I got a Master of Law in Taxation from New
18 York University, which is the leading university in the world
19 for tax degrees. And I came back and have worked for Nelson
20 Mullins Law Firm in Columbia and Myrtle Beach and Charleston
21 since.

22 Q: Does the South Carolina Bar recognize you as a
23 specialist?

24 A: It does. I'm a certified tax specialist and I have been
25 my -- virtually my entire career. I think I got it my first

TOM MORAN - DIRECT BY MR. HOLLER

1 year.

2 Q: Okay. And have you represented Tuomey Hospital?

3 A: I have. My entire practice is representation of
4 501(c)(3) hospitals and tax-exempt hospitals, tax-exempt
5 entities, and I represent -- have represented Tuomey Hospital
6 since November of 2013.

7 Q: Are you familiar with the reporting requirements for
8 501(c)(3) organizations?

9 A: I'm familiar with both what's required to -- for Tuomey
10 to do operationally to maintain its 501(c)(3) status, as well
11 as what's required to file to the United States to the
12 Internal Revenue Service under a Form 990 to maintain the tax-
13 exempt status.

14 Q: And as a certified tax specialist, is it your
15 responsibility to give tax advice to (c)(3) corporations to
16 maintain -- meet and maintain those standards of the IRS?

17 A: It is much of what I do in my practice, yes.

18 Q: Okay. And you provided those services to Tuomey?

19 A: I did.

20 Q: And how long --

21 A: And I do.

22 Q: I'm sorry. How long did you provide those services to
23 Tuomey?

24 A: I started providing them in November of 2013. I continue
25 to provide them to this day.

TOM MORAN - DIRECT BY MR. HOLLER

1 Q: Okay. Thank you. I'm going to read to you two
2 definitions from the South Carolina statutes and then ask you
3 a straightforward question for each.

4 The first is in 33-56-20. It reads a charitable
5 organization means a person, which of course Tuomey is an
6 entity -- a person determined by the IRS service to be a tax-
7 exempt organization pursuant to section 501(c)(3) of the
8 Internal Revenue Code. As of July of 2011, did Tuomey meet
9 that definition?

10 A: Yes.

11 Q: Okay. As of today, does Tuomey meet that definition?

12 A: Yes.

13 Q: Are you -- as tax counsel, would you anticipate you would
14 be aware if the IRS had taken steps to challenge that status?

15 A: Yes.

16 Q: Are you aware of any such challenge?

17 A: No.

18 Q: Okay. Under the IRS rules, who can challenge Tuomey's
19 501(c)(3) status?

20 A: Only the Internal Revenue Service.

21 Q: Okay. How would the Internal Revenue Service go about
22 challenging any organization's (c)(3) status?

23 A: Typically, it would be pursuant to -- it could be one of
24 two procedures, one of which you talked about earlier, which
25 is it could decide after a review that a 501(c)(3) was not

TOM MORAN - DIRECT BY MR. HOLLER

1 acting in accordance -- or a tax-exempt organization was not
2 acting in accordance with 501(c)(3), in which case it would
3 revoke the tax-exempt status, require the organization to file
4 tax. And if the organization doesn't challenge that in
5 Federal District Court, that ruling is binding.

6 None of that has happened to Tuomey. It could also do it
7 administratively pursuant to an audit and through an
8 administrative law judge.

9 Q: Okay.

10 A: And in the US Tax Court.

11 Q: How does the mechanism of revocation occur through the
12 IRS?

13 A: The -- the IRS makes the determination internally that it
14 -- revocation is appropriate. The taxpayer has the right to
15 --- or the tax-exempt organization has the right to challenge
16 that in federal court.

17 Q: I mentioned earlier a pay or play-type provision.
18 Explain that please to the Court?

19 A: It could -- it could pay the tax or some portion of the
20 tax and sue in the District Court -- in Federal District Court
21 or when it -- actually before it gets the bill or when it gets
22 the bill, it could -- it could go directly into the Federal
23 Tax Court. It just depends on which forum the tax-exempt
24 entity would want.

25 Q: And if the challenged charitable organization does not

TOM MORAN - DIRECT BY MR. HOLLER

1 pay the tax, are they entitled to litigate the issue?

2 A: If they do not pay the tax, they -- it's my understanding
3 they're not entitled to litigate the issue unless they
4 previously have filed a petition with the Federal Tax Court.

5 Q: Do third parties have standing to challenge (c)(3)
6 status?

7 A: No.

8 Q: Okay. Let me read another definition in South Carolina
9 Code Section 33-56-170. Charitable organization means any
10 organization, institution, association, society or corporation
11 which is exempt from taxation pursuant to 501(c)(3) of the
12 United States Code. In July of 2011, did Tuomey meet that
13 definition?

14 A: Yes. It met that definition in every way.

15 Q: As of today, does Tuomey meet the definition of 33-56-
16 170?

17 A: Yes. As of today, it meets that definition in every way.

18 Q: And I asked a series of questions about being aware of a
19 challenge. Are you aware of any such challenge under that
20 definition --

21 A: No.

22 Q: -- to Tuomey's (c)(3) status?

23 A: No.

24 Q: Okay. What reporting requirements are upon Tuomey on an
25 annual or a periodic basis?

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- 1 A: That's to file a 990.
- 2 Q: Okay. Has Tuomey complied with that?
- 3 A: Yes.
- 4 Q: Okay. You produced to me, which was produced to Dr.
- 5 Myat's counsel, four 990s, the most recent four 990 filings?
- 6 A: Yes.
- 7 Q: Okay. Did your office help prepare those filings?
- 8 A: We were involved in some aspects of the preparation, but
- 9 an accounting firm, Dixon Hughes, prepared those.
- 10 Q: Okay.
- 11 A: We would correspond with them on certain, again, issues
- 12 that might arise during that process.
- 13 Q: Okay. So the accountants prepare the 990s?
- 14 A: Correct.
- 15 Q: And you render legal advice as to whether or not the 990s
- 16 are appropriate in form?
- 17 A: Yes.
- 18 Q: And content?
- 19 A: Yes.
- 20 Q: Okay. But Dixon Hughes, the accountant, of course, in
- 21 terms of the substance that is in the 990s?
- 22 A: Correct.
- 23 Q: Okay. The last 990 that has been filed is a 2013?
- 24 A: Correct.
- 25 Q: Explain please to the Court why 2014 and 2015 have yet to

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1 be filed?

2 A: Well, the -- the 2013 -- Tuomey is on the fiscal year for
3 a 501(c)(3) organization. So the 2013 year started September
4 30, 2013, and ended -- I'm sorry. It started October 1, 2013,
5 and ended September 30, 2014. So the return is not -- the
6 2013 return is not actually due until 2015, several months
7 after the end of the fiscal year, which is in October of 2014.
8 So that is why the 2013 return is the last filed return. The
9 2014 return for fiscal year end September 30, 2015, will be
10 filed shortly.

11 Q: Okay. But it's not yet due?

12 A: I don't -- it is not yet due. It will be filed timely.
13 It's got -- they've received extensions as they typically do
14 -- as most of them typically do.

15 Q: Okay. When you sat for a 30(b)(6) deposition, the four
16 990s that have been produced, I believe the two odd years, '11
17 and '13, were missing certain information; is that correct?

18 A: Correct. They were missing the financial statements.

19 Q: The audit report attached for the year?

20 A: Correct.

21 Q: And that, of course, is under the name of Dixon Hughes?

22 A: Correct.

23 Q: Okay. We have -- those 990s from '11 and '13 -- 2011 and
24 2013 have since been supplemented?

25 A: Correct.

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1 Q: And do those 990s report the existence and the status of
2 the -- what I will call the Drakeford or false claims
3 litigation?

4 A: Correct.

5 Q: Okay.

6 MR. PADGET: Your Honor, just if I might interject? We
7 attached the two that were supplemented as Exhibits F and G to
8 our brief in full. So we have the ones from the deposition
9 that are earlier on and then the ones David supplemented later
10 are attached as F and G in what we've provided.

11 THE COURT: Okay.

12 MR. HOLLER: That's correct, Your Honor.

13 MR. PADGET: That's actually what we cite many times in
14 our brief is the supplemented versions.

15 THE COURT: Okay. Go ahead.

16 THE WITNESS: That's correct.

17 BY MR. HOLLER:

18 Q: Mr. Moran, let me cover this very briefly. Tuomey, the
19 corporate entity, no longer operates a hospital as of today?

20 A: As of January 1st of this year.

21 Q: Okay. And essentially that corporation is now winding up
22 its business affairs? Is that a fair statement?

23 A: Correct.

24 Q: Okay. And that the assets within the -- Tuomey, the
25 hospital, the campus, the facilities, the contracts with

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1 employees, those were all sold to Palmetto Tuomey and Palmetto
2 Health as an entity?

3 A: In large measure.

4 Q: Okay. And while there are certainly details to that --
5 that merger transaction, however you would describe it, that
6 is the status of Tuomey as we sit here today, March 8th, 2016?

7 A: Correct.

8 MR. HOLLER: Court's indulgence, please. Mr. Moran,
9 please answer any questions Mr. Padget may have.

10 MR. PADGET: One second.

11 CROSS-EXAMINATION

12 BY MR. PADGET:

13 Q: Mr. Moran, may I call you Tom?

14 A: Sure.

15 Q: I called you Tom when we met before and when we met at
16 your deposition. So -- and, Tom, just to -- just to be clear,
17 you gave testimony as a 30(b)(6) designee on behalf of Tuomey?
18 I don't remember the exact date, but around about a month ago?

19 A: Correct.

20 Q: Is that correct?

21 A: Yes.

22 Q: And you testified truthfully and accurately on behalf of
23 Tuomey at that time?

24 A: Yes.

25 Q: And that -- that deposition or that -- we've submitted

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1 that deposition transcript to Judge Cothran as Exhibit A of
2 part of our filings. The testimony you gave at that time was
3 true and accurate?

4 A: Well, I think we supplemented it a little bit.

5 Q: Sure.

6 A: I wasn't sure about several parts about that, the
7 financial statements and the auditor's report that we later
8 supplemented after that date, too.

9 MR. PADGET: And, Your Honor, just as a matter of
10 housekeeping, since he's testified here today, I just wanted
11 to move into evidence the deposition testimony that he gave
12 for the Court's consideration for the purposes of the opinion
13 motion.

14 THE COURT: Okay.

15 MR. HOLLER: No objection.

16 THE COURT: All right. It's in. Are you stating on the
17 record that you want to put it in?

18 MR. PADGET: Sure, Your Honor. It's the deposition
19 transcript of the 30(b)(6) of Tuomey, which occurred. It has
20 been submitted to the Court now in camera pursuant to the
21 confidentiality order as Exhibit A to our brief and filings,
22 and it includes sub-exhibits 1 through 10 at that deposition.

23 THE COURT: Okay.

24 MR. PADGET: And I'm happy -- I intend to point out some
25 of the highlights, Your Honor, today so the Court doesn't have

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1 to go through and read all that, but for the purposes of the
2 record I wanted to make sure the entirety of that testimony
3 was in the record. David, you don't have an objection?

4 MR. HOLLER: No objection.

5 THE COURT: Tell me a little bit about it. If you do do
6 that, the confidentiality issue -- is there anything in that
7 record that comes under the confidentiality order? If it's in
8 the record, how is it going to -- and if this is filed
9 electronically, how are we going to keep it confidential?

10 MR. PADGET: Sure. The court rules require me to submit
11 it to Your Honor in camera just to you.

12 THE COURT: All right.

13 MR. PADGET: Which we've done and which we've now covered
14 by the record, which I will retain copies of and Mr. Holler
15 will retain copies of so that in the event of an appeal, for
16 example, we will be able to supplement that record on appeal
17 with that information, but it's not for public consumption
18 with a few clicks of a mouse.

19 THE COURT: So you don't have to put it in the record or
20 it's going to go back to the clerk's office.

21 MR. PADGET: I'm sorry, Your Honor. You can --

22 THE COURT: I mean I understand I have to look at it, but
23 if that -- normally, you submit it to me, but if you move it
24 into evidence and the court reporter documents it in the file
25 with the clerk, then it's going to be public. Right?

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1 MR. PADGET: Right, Your Honor. Well, I have -- I have
2 to make it part of the record for the --

3 THE COURT: Right.

4 MR. PADGET: -- purposes of the case to use it, but we --
5 the parties have agreed pursuant to that order not to file it
6 publicly as part --

7 THE COURT: Okay.

8 THE PADGET: -- of the record. It's essentially under
9 seal by order.

10 THE COURT: Okay.

11 MR. PADGET: But the clerk's office can have it. I think
12 simply an instruction from Your Honor to say put this as a
13 Court's exhibit in the file would be sufficient.

14 MR. HOLLER: Judge, I do believe it would be under seal.

15 THE COURT: Okay.

16 MR. HOLLER: Again, we're not concerned about
17 ramifications in this case, but there's -- there is other
18 potential litigation --

19 THE COURT: Right.

20 MR. HOLLER: -- that doesn't have anything to do with
21 this.

22 THE COURT: Okay. All right. I just wanted to be sure
23 that was correct because -- because of this e-filing, I'm not
24 really sure that the clerks know how to put something under
25 seal in e-filing because it seems, you know, everything that

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1 I've been doing lately I can't seem to get filed or, you know,
2 they don't necessarily understand when questions come up and
3 how are we supposed to deal with it, but as long as at least I
4 understand as far as this is concerned and I can keep
5 everything going into the record. I'm just not sure -- and
6 your record is protected. I don't know how the clerks are
7 going to deal with it, but okay.

8 MR. PADGET: Sure. I think for our purposes you have it,
9 I have it, David has it, and to the extent there's ever an
10 appeal in this case, now that it's been entered and moved into
11 evidence before the Court, we can use that in a record on
12 appeal going -- going forward, but again it's not for public
13 consumption.

14 THE COURT: Okay. Thank you.

15 MR. HOLLER: Thank you.

16 THE COURT: I just wanted to be sure I had that straight.

17 (WHEREUPON, the deposition transcript was marked as a
18 Court's exhibit.)

19 BY MR. PADGET:

20 Q: Tom, just some more questions about that. What's the
21 current status of Tuomey? I understand it's winding down its
22 affairs?

23 A: Correct.

24 Q: And that's the entity for which this case was tried and a
25 verdict of \$2.5 million rendered back in early September of

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1 last year?

2 A: That's my understanding.

3 Q: So that entity that's currently operating the hospital is
4 -- is a completely different entity than the entity for which
5 this putative judgment could be entered against?

6 A: Correct. As of January 1st, Palmetto Health Tuomey took
7 over the operations of Tuomey Hospital or what was previously
8 known as Tuomey Hospital.

9 Q: How many employees are currently working for the Tuomey
10 entity, if any?

11 A: For the -- for Tuomey? What --

12 Q: What you're referring to --

13 A: What you're referring to as old Tuomey Hospital?

14 Q: Old Tuomey. Fair enough.

15 A: There are no employees. They have a board and they have
16 folks that -- independent contractors that are helping wind up
17 its affairs.

18 Q: Okay. And what -- if you would, just describe for me the
19 independent contractors that are winding up the affairs.

20 Obviously, your firm is assisting in that?

21 A: Yes.

22 Q: All right.

23 A: My firm, and we contract with and get the shared services
24 of so many ex-old Tuomey employees, now Palmetto Health Tuomey
25 employees, to provide assistance.

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1 Q: As far as like going through records and stuff like that?

2 A: Sure. Right.

3 Q: Okay. Are any -- any employees or contractors or

4 anything currently providing any medical services?

5 A: No. Not on behalf of old Tuomey.

6 Q: Okay. All right. So to be clear, the old Tuomey entity

7 is no longer providing any medical services to anybody in

8 Sumter?

9 A: Correct. As of January 1st.

10 Q: And clearly it's not operating the hospital that was

11 formerly known as Tuomey? That is now being operated by

12 Palmetto Health Tuomey, a separate and distinct legal entity?

13 A: Correct. As of January 1st.

14 Q: And the only operations currently of old Tuomey are

15 simply the winding down of those affairs?

16 A: Yes. That process started, again, on January 1st, 2016.

17 Q: And the entity is not doing anything else other than

18 winding down affairs?

19 A: Winding down affairs is a broad category, but yes. It is

20 not providing medical services. It is not doing the

21 activities that old Tuomey used to do.

22 Q: Sure. And it's not participating in any community health

23 programs or running free clinic or doing anything like that?

24 It is just simply winding down its affairs to close out its

25 business?

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1 A: Well, if -- if you're asking whether it's charitable or
2 not, yes, it's still charitable. It has charitable
3 beneficiaries and otherwise qualifies as a tax-exempt
4 organization even as it's winding down its affairs.

5 Q: The charitable beneficiaries -- I mean as in -- I know
6 people may give money to that, but is it -- it's not providing
7 medical services to anybody else?

8 A: Well, when you look at what it's required to do to
9 maintain its tax-exempt status, what it has to do is to wind
10 up its affairs, and then one of the big things that a tax-
11 exempt organization has to do is to promise that -- and they
12 have to promise this up front and it has to be in the articles
13 of incorporation with the Attorney General. It has to approve
14 any deviation from this. So what it says is upon dissolution,
15 winding up its -- after you wind up your affairs and you
16 dissolve, in order to be nonprofit and to be tax-exempt, you
17 have to distribute all of your assets to another tax-exempt
18 organization.

19 Q: To a charitable entity?

20 A: To a charitable entity or the state. So Tuomey is
21 involved actually in that process now that it originally
22 envisioned back in 1922 to capture all of its assets that are
23 remaining, pay off any of its creditors that are remaining.
24 You can imagine for 100-year-old institution that takes some
25 time. And then it will gather those and it will pay those,

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1 whatever is left over, to another tax-exempt organization.

2 Q: Has old Tuomey selected the new tax-exempt organization
3 for its remainder to benefit?

4 A: It will be -- in some cases, it will be Palmetto Health
5 Tuomey. In other cases, it will be the residuary, whatever is
6 left, would be the Tuomey Foundation.

7 Q: The Tuomey foundation? Okay.

8 A: Which is a separate 501(c)(3) organization which raises
9 money for healthcare in Sumter, Lee, and Clarendon counties.

10 Q: The 501 -- 26 United States Code 501(c)(3) is a specific
11 statute within the United States Code; correct?

12 A: Correct.

13 Q: And there is a body of case law that has been developed
14 pursuant to the actual language in the code. There's been
15 numerous decisions across the country about what those words
16 in that statute mean; correct?

17 A: Correct.

18 Q: And that body of law is something that tax professionals
19 and those -- I get to say the word expertise with you.

20 Regular lawyers can't get to say that, but tax experts who
21 practice in this field -- there are -- there is given meaning
22 and knowledge about what those rules are about what 501(c)(3)
23 means?

24 A: Yes.

25 Q: Yes. And one of the core principles of 501(c)(3) is that

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1 none of the income essentially of the charitable organization
2 can inure -- that's a funny word, but inure to the benefit of
3 management or insiders or key employees of the organization;
4 isn't that right?

5 A: It's insiders.

6 Q: Insiders? And IRS publications say that it's not just
7 management. Any employee or key employee of that
8 organization, that revenue should not inure to their benefit;
9 correct?

10 A: The definition I think of insiders that is the most
11 widely accepted would be one who has the ability to
12 substantially influence the board of the organization
13 personally. A person who can influence the board of the
14 organization.

15 Q: As part of your tax practice, you routinely, I would
16 imagine, reference IRS publications?

17 A: Reference?

18 Q: Yes.

19 A: You mean review?

20 Q: Review them, look at them. And IRS publications are
21 statements, guidelines set forth by the Internal Revenue
22 Service, to give clarification about what the meaning of the
23 governing laws are?

24 A: About what the Internal Revenue Service position may be
25 on issues that are in front of it, and they issue many of

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1 these.

2 Q: Sure. And in the publication IRS 4421, it gives some
3 guidance regarding 501(c)(3) and it states -- and tell me if
4 you disagree with this principle -- no part of an
5 organization's net earnings may inure to the benefit of an
6 insider. An insider is a person who has a personal or private
7 interest in the activities of the organization, such as an
8 officer, director or a key employee. That's the IRS's
9 position about the meaning of 501(c)(3) and inurement, isn't
10 it?

11 A: That is -- look, I think the IRS has many positions
12 depending upon what the case is and what might be an insider.
13 That must be what that particular publication says.

14 Q: And also one of the core principles of 501(c)(3) under
15 the tax code is that the charitable organization claiming the
16 exempt status under 501(c)(3) must have some true community
17 benefit; correct?

18 A: It depends on the circumstance and it depends on the year
19 that you're talking about in determining when and where
20 community benefit became important. It's an ever-changing --

21 Q: Sure.

22 A: -- concept, but it is important.

23 Q: But currently?

24 A: It's currently a community benefit is a manner in which
25 you can show charitable status. It's not the only one.

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1 Q: And the way that 501(c)(3) organizations tell the IRS
2 what their stated purpose is is through their initial
3 applications, which in Tuomey's -- old Tuomey's case was done
4 in the 1920s, a long time ago. Let me ask -- let's ask the
5 first part of the question first, which is that the manner in
6 which 501(c)(3) organizations claiming those -- those
7 protections under 501(c)(3) and those tax-exempt statuses --
8 the way they do it is from their initial application and their
9 annual 990 filings?

10 A: Well, the way they obtain tax-exempt status is through
11 Form 1023, which is their initial filing.

12 Q: Right. And then they tell the IRS this in their annual
13 filings. Our stated purpose is X or Y; correct?

14 A: The -- well, I'd want to look at the 990s to see if it
15 states so. Hand me the 990 in this case, if you don't mind.

16 Q: I'll be glad to.

17 A: The 990 has a whole lot of purposes. It --

18 Q: It's a long form?

19 A: Right. So it's got many, many, many, many, many, many
20 different purposes.

21 MR. PADGET: Your Honor, may I approach?

22 THE COURT: Yes, sir.

23 BY MR. PADGET:

24 A: So please tell me what you're referencing and I'll tell
25 you it's purpose.

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1 Q: Sure. All right. I'm just -- this is the 2013 Tuomey
2 990.

3 A: Okay.

4 Q: And I'm looking at part three where it says the statement
5 of mission and then in part four -- what is that? -- 4-A,
6 where it describes the mission of the charitable organization.

7 A: Right.

8 Q: Could you read those out loud for us, please?

9 A: In section one of part three, which is the statement of
10 program service accomplishments, it says briefly -- briefly
11 describe the organization's mission. And the return says the
12 mission of the Tuomey Healthcare System is to promote good
13 health and well-being and provide excellent healthcare for
14 everyone in Sumter and in the surrounding counties.

15 And then in section 4-A -- and I'd have to go back and
16 look at the form to see the specific question because it
17 doesn't appear to have them here, but it says Tuomey
18 Healthcare's 301-bed acute care facility located in Sumter,
19 South Carolina. Tuomey was established as a nonprofit acute
20 hospital to advance or support the provisions of healthcare
21 services within Sumter County. Tuomey's main objective is the
22 promotion of health for all residents of Sumter and its
23 outlying areas.

24 The promotion of health has been established as a
25 charitable purpose under Internal Revenue Code Section

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1 501(c)(3) under revenue ruling 69-545, which is the similar
2 revenue ruling that sets forth -- it does set forth the
3 factors the Internal Revenue Service has considered when it
4 determined whether a nonprofit hospital qualified for tax-
5 exempt status.

6 And under that 69-545, it's widely cited for the
7 proposition that the provision of healthcare in and of itself
8 is a charitable activity that otherwise is considered to be an
9 activity which qualifies as a tax-exempt activity.

10 Q: Tuomey no longer operates a 301-bed acute care facility
11 located in Sumter, South Carolina, though, does it?

12 A: As of January 1, 2016, Tuomey has been winding up its
13 affairs. It did until December 31st.

14 Q: As of today, it's not?

15 A: Correct.

16 Q: As I understand your testimony from before -- I'm sort of
17 jumping around here a little, Tom.

18 A: That's all right.

19 Q: But as I understand your testimony from before, your
20 testimony was that Dr. Myat has no standing, no opportunity to
21 come before a court and adjudicate the tax status as it
22 relates to the IRS's determination. Is that what you
23 testified to earlier?

24 A: I don't know that I said specifically Dr. Myat.

25 Q: Sure.

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1 A: I think I said the Internal Revenue Service is the party
2 that determines --

3 Q: Sure.

4 A: -- whether or not an entity is tax-exempt.

5 Q: And you said -- I recall right after that you said that
6 no third party has standing -- legal standing to come in and
7 challenge that?

8 A: If you've got the deposition, I'll tell you whether I
9 said it.

10 Q: It's okay. I'm just referring to today.

11 A: I would -- the only party that has the ability to revoke
12 tax-exempt status is the Internal Revenue Code.

13 Q: Okay. Now, no matter what this Court does, if they rule
14 that Tuomey is entitled -- not entitled to the protections of
15 33-56-170 and 180 or if this Court rules that it is, in fact,
16 entitled to the protections of those statutes, it's not going
17 to affect the IRS's determination of the actual tax status in
18 any way, is it?

19 A: I don't know that.

20 Q: Okay. Well, you just said that the only court and the
21 only one who could challenge it was the secretary of the
22 treasury and you can challenge it in federal court if you pay
23 to play, and the only person who can do that was Tuomey?

24 A: Correct.

25 Q: All right. So that's the only time that the actual tax

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1 status for the purposes of determining whether or not the
2 organization pays any income tax -- that's the only proceeding
3 in which that can be done; correct?

4 A: Correct.

5 Q: All right. So this proceeding today is not to determine
6 whether or not Tuomey pays any taxes, but whether or not it's
7 entitled to the protections of the state statute 33-56-170 and
8 180; correct?

9 A: I don't know that to be the case.

10 Q: Okay. But in your tax expertise, you don't deal with 33-
11 56-170 and 180 ever I presume?

12 A: I've dealt with it.

13 Q: All right. But you don't litigate cases about whether or
14 not --

15 A: No. No, I don't litigate -- I've never --

16 Q: Sure.

17 A: -- given testimony on the stand before regarding this.

18 Q: Regarding this specific statute?

19 A: But I've looked at the --

20 Q: I gotcha.

21 A: -- issue.

22 Q: It's not your position that a state court judge in South
23 Carolina interpreting a South Carolina statute in this blue
24 codebook and whether or not it applies -- you're not saying
25 that this Court does not have authority to make that

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1 determination, are you?

2 A: There was a lot of double negatives in there. Can you --

3 Q: All right.

4 A: -- restate that?

5 Q: I did ask you a lot of double negatives. You're not
6 saying that this Court doesn't have the authority --

7 A: I'm not saying this Court doesn't have the authority.

8 Q: Are you -- let me ask it this way. Are you saying this
9 Court has no authority to interpret a state statute?

10 A: Am I saying -- no.

11 Q: In March of 2010 in the Drakeford case -- and you were
12 designated to be the 30(b)(6) representative to testify about
13 certain of the Drakeford cases and what occurred.

14 A: What was the date again? I'm sorry.

15 Q: Sure. In March of 2010 --

16 A: Yes, sir.

17 Q: The first jury verdict in that case. That case was tried
18 before Judge Perry in Federal District Court, wasn't it?

19 A: Correct.

20 Q: And the jury issued a verdict in that case. They were
21 given two questions. Did Tuomey violate the Stark law? Yes
22 or no. Did Tuomey violate the False Claims Act? Yes or no.
23 And in that 2010 decision or verdict, the jury found that
24 Tuomey had violated the Stark law by way of that first special
25 interrogatory, didn't it?

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1 A: Yes.

2 Q: And the Stark law is the anti-fraud laws -- I'm sorry.
3 The anti-kickback laws that were passed?

4 A: No. Nothing to do with that kickback.

5 Q: It was improper relationships?

6 A: So let me explain because you used this in your brief and
7 it's completely incorrect and really shouldn't be there. So
8 the Stark is a strict liability statute. Stark is one of the
9 most complicated statutes and it's got numerous provisions in
10 it, and either you meet Stark or you don't meet Stark. It's
11 not an intent-based statute.

12 The anti-kickback statute is a fraud-based statute and it
13 does require intent and scienter. Stark has no scienter
14 requirement at all. It is --

15 Q: Right.

16 A: -- bright line. So to refer to Stark as a fraud -- as a
17 fraud-based statute or as you did in the brief as an anti-
18 kickback statute is -- is completely inapplicable.

19 Q: If Judge Seymour called the Stark laws the anti-kickback
20 statute, she would've been incorrect in her opinion?

21 A: Correct. You are correct. If she said that, that would
22 have been incorrect.

23 Q: And if she called the False Claims Act the anti-fraud
24 laws passed by Congress, she would have been incorrect?

25 A: No. The False Claims Act is something completely

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1 different than Stark. The False Claims Act is an intent-based
2 statute. It's a fraud-based statute. If you violate Stark
3 but you don't violate False Claims, they -- there is no -- the
4 -- the hospital has won. In fact, that is what the jury found
5 that the hospital won the first case because there were no --
6 the government cannot recover.

7 Q: Here's my question, Tom. It really related to the
8 verdict and what the laws are. This Court and Judge Seymour
9 can null the term, but the 2010 -- March 2010 jury verdict
10 that Tuomey violated the Stark laws -- was that disclosed to
11 the IRS in its 2010 990 filing?

12 A: The trial and the relevant portions of the trial were
13 disclosed. The reason why the Stark -- the jury finding under
14 the Stark verdict was not disclosed was Judge Perry granted a
15 JNOV. He threw out the Stark verdict.

16 Q: That was appealed though, wasn't it?

17 A: It was appealed by both sides.

18 Q: Correct.

19 A: And that was disclosed.

20 Q: But the jury nonetheless had ruled against Tuomey on the
21 Stark law violation?

22 A: Well, no. It did, but you have to understand that a
23 Stark violation without a False Claims violation leads to no
24 damages. So Tuomey won the case.

25 Q: Well, a judgment for \$44 million was entered by Judge

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1 Perry?

2 A: Because of the JNOV, not because of what the jury did.

3 Q: Right. But he entered the judgment because the jury
4 found it had violated the Stark law?

5 A: No. He entered the judgment on common-law claims.

6 Q: Right. But the basis of the wrongful payment was because
7 of the violation of the Stark law?

8 A: No. No. Absolutely not. The jury found -- the jury --
9 he nullified that. He said, I reverse that. I reverse the
10 jury's entire finding. There was no Stark law violation once
11 Judge Perry said there's a JNOV.

12 Q: All right.

13 A: I'm entering common-law remedies. That is what Tuomey
14 appealed. The government appealed.

15 Q: Cross-appealed.

16 A: They cross-appealed the Stark violation. The Fourth
17 Circuit said --

18 Q: It was ultimately reversed.

19 A: -- new trial for everybody.

20 Q: Sure. It was ultimately reversed and went to a second
21 trial.

22 A: But all of that was disclosed by Tuomey in 2010.

23 Q: The verdict on the Stark law claims was not disclosed by
24 Tuomey in the 2010, 2011 or 2012 990 filings, was it?

25 A: No. Let me tell you what was disclosed, which was the

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1 relevant portion because --

2 Q: Who deemed it relevant?

3 A: Judge Perry did.

4 Q: No. In the 990 filings.

5 A: So let me -- Judge Perry did. Judge Perry nullified the
6 jury verdict and said, no, I'm entering a JNOV. That's what
7 we reported. We reported Judge Perry's findings. The jury's
8 findings were irrelevant as it relates to that.

9 Q: It wrote in a 990 filing -- Tuomey did -- in 2012 that
10 subsequent to the jury verdict in favor of the system, which
11 was previously defined as Tuomey. That's what it disclosed to
12 the IRS. That it was, in fact, the prevailing party in that
13 jury trial.

14 A: It was.

15 Q: And that is not true, is it?

16 A: Well, let me explain it to you again because I'm not
17 apparently explaining it well. When the jury found -- finds a
18 Stark violation but finds no scienter, no False Claims
19 violation, damages are zero.

20 So according to the jury, Tuomey wins. Judge Perry
21 reverses that verdict and enters a JNOV under common-law
22 claims. That is what was appealed. All of that was
23 disclosed. So Tuomey was the prevailing party under the jury
24 verdict. It was not the prevailing party under Judge Perry's
25 order that was appealed and thrown out. So that is what

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1 happened in the 2010 trial.

2 MR. PADGET: Your Honor, may I approach?

3 THE COURT: Yes.

4 BY MR. PADGET:

5 Q: Tom, I'm coming up here and I'm handing you what's
6 Exhibit 8 to the 30(b)(6) deposition. This is Judge Seymour's
7 opinion from 2013.

8 A: Correct.

9 Q: And on page -- you can read the whole thing, but on page
10 6 of her opinion, she explains what Judge Perry did.

11 A: Okay.

12 Q: And she says that Judge -- here, I'll read the whole
13 thing. On July 2010, Tuomey appealed Judge Perry's order and
14 found that the United States was entitled to judgment on
15 Counts 4 and 5 and imposed a judgment of 44 million --

16 A: That's the common-law claims.

17 Q: All right. Let's -- let's see what Judge Seymour said
18 about that.

19 A: Okay.

20 Q: Tuomey argued its seventh amendment rights were violated
21 when Judge Perry based his judgment with respect to Counts 4
22 and 5 on the jury's interrogatory answer regarding the Stark
23 law.

24 A: Correct.

25 Q: That's what Judge Seymour said had occurred; correct?

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1 A: Yes.

2 Q: So the \$44 million judgment was based upon violation of
3 the Stark law according --

4 A: No.

5 Q: -- to federal judges who tried the case?

6 A: It was based upon Counts 4 and 5, which were common-law
7 claims.

8 Q: And in determining what was relevant, it was Tuomey and
9 its agents in making that determination in providing those 990
10 filings to the IRS?

11 A: Tuomey and its agents set forth that in a litigation
12 footnote for all sorts of purposes, public disclosure
13 purposes, bond purposes, as well as tax return purposes.

14 Q: Sure. The only manner in which Tuomey has communicated
15 with the IRS in the last four to five years has been through
16 its 990 filings; isn't that correct?

17 A: Yes. That would be common. That's what all --

18 Q: Sure.

19 A: -- tax-exempt organizations do.

20 Q: But they haven't -- there hasn't been ongoing
21 correspondence or letter writing back and forth between Tuomey
22 and the IRS regarding any of these issues over the past few
23 years?

24 A: Correct.

25 Q: There's just been --

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1 A: The IRS has taken no interest in this.

2 Q: The 990 filings are the only information that Tuomey has
3 provided to the IRS about the status of its operations?

4 A: That's correct. That's not to say that this jury verdict
5 was not otherwise public information or that other parties may
6 have been given information.

7 Q: Do you have any knowledge about that?

8 A: No.

9 Q: Okay. -

10 A: No, I do have knowledge that it's public information and

11 --

12 Q: Sure.

13 A: -- widely publicized as the biggest healthcare case in
14 the country in the last ten years.

15 Q: But you're not here testifying the IRS knows something or
16 doesn't know something?

17 A: I'd be surprised if they didn't.

18 Q: But you don't know what they know --

19 A: I don't.

20 Q: -- or don't know?

21 A: No, I don't know.

22 Q: What we do know is what Tuomey provided --

23 A: I would -- I would strongly suspect many IRS agents know.

24 Q: What you do know is what Tuomey told the IRS in its 990
25 filings?

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1 A: I do know Tuomey disclosed what happened at each trial in
2 its 990 filings to the Internal Revenue Service, even though
3 it's not under any duty to do so.

4 Q: To date -- to date, as of today, Tuomey has not disclosed
5 to the IRS that the Fourth Circuit has, in fact, affirmed
6 Judge Seymour's decision leveling judgment against Tuomey, the
7 old Tuomey, for \$237 million. That has not been disclosed to
8 the IRS in 990 filings?

9 A: Of course not. It is to be disclosed in the 990 filing
10 that is due for the period in which the Fourth Circuit ruling
11 became final, which just occurred this past --

12 Q: July.

13 A: July 2nd, but actually that's incorrect because the case
14 was settled as of January the 1st. So the Fourth -- the Fourth
15 Circuit opinion was issued July 2nd, but tolling and agreements
16 -- and agreements with the government related to the extension
17 for a --

18 Q: Petition for cert.

19 A: -- en banc hearing in front of the entire Fourth Circuit
20 didn't run until deep into the fall, October or November.

21 Q: Well, we agree the Fourth Circuit issued its opinion?

22 A: Right. But it wasn't final.

23 Q: But they issued an opinion?

24 A: They issued an opinion on July the 2nd, but again, that's
25 during a time period -- Tuomey would have no opportunity

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1 because its 990 isn't due.

2 Q: And the --

3 A: But if you -- if you'd like, there is a litigation
4 footnote that discloses all of this to -- that -- that -- that
5 we prepared months ago that will be disclosed in its 990 when
6 it's filed.

7 Q: When it's filed, but to date, today, the finality of that
8 litigation has not been disclosed to the IRS?

9 A: No. Of course, it would not be and should not be. It
10 would be inappropriate to do that.

11 Q: And in the last 990 filing, which I believe was 2013 --
12 that's the last one that was filed?

13 A: The 990 filed for fiscal year ending 2014 was filed
14 properly and timely in 2015.

15 Q: Okay. The last --

16 A: It's fiscal year 2013 --

17 Q: Gotcha.

18 A: -- which ends September 30th, 2014, is filed in 2015.

19 Q: So if it says on its face 2013 990 filing, it's sort of
20 for the subsequent fiscal year?

21 A: Correct.

22 Q: All right.

23 A: It is the -- it is the previous year.

24 Q: So the --

25 A: It's not an old return.

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1 Q: I gotcha.

2 A: It's just --

3 Q: So the one labeled 2013 990 submitted to the Court,
4 that's the last 990 filing that's been had with the IRS?

5 A: That's right. That's the most recent filing. In the --
6 in other words, there's not another one due yet.

7 Q: And in that one, it still says -- which was at the time
8 that the litigation is still ongoing and it's been appealed to
9 the Fourth Circuit and hasn't been finalized?

10 A: Let me -- I'll read it. It's got pretty detailed
11 language. I think it's on page 25.

12 Q: I've got to get the supplemental one.

13 A: Sure.

14 Q: That's -- that one doesn't have the financial statement.

15 A: No. Dave's got one over there. It's in those folders
16 there.

17 Q: I got it. I'm making reference to what's been submitted
18 as --

19 A: It's there.

20 Q: -- Exhibit G, which is the 2013 990 filing plus the
21 audited financial statement.

22 A: Okay.

23 Q: Can we agree that that disclosure is made on page 25 of
24 Exhibit G?

25 A: Right. Well --

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1 Q: My question is simply this, Tom. And feel free to
2 explain whatever you need to explain, but the -- this
3 disclosure -- the last disclosure to the IRS about the status
4 of that suit was that the case was on appeal to the Fourth
5 Circuit?

6 A: All right. It says the system is a defendant in a P-10
7 lawsuit filed by a physician on its medical staff against
8 United States government. The government subsequently
9 intervened in the suit. The government contends certain part-
10 time employment contracts between the system and the
11 physicians on the medical staff that were in effect from 2005
12 to 2010 violated the so-called Stark law and thus resulted in
13 the system filing claims for reimbursement from Medicare in
14 violation of False Claims Act.

15 In the first trial in the matter in 2010, the jury
16 tendered a verdict that the system violated the Stark law, but
17 did not violate the False Claims Act. Subsequent to that jury
18 verdict, the District Court granted the judgment and a new
19 trial on the False Claims Act. The District Court also
20 awarded the judgment in equitable claims of \$44 million.
21 Prejudgment interest of \$4 million. Post-judgment interest of
22 \$5,000.

23 The system appealed this judgment. As required, put
24 \$49.3 million in escrow. In 2012, the United States Court of
25 Appeals vacated the trial court's judgment and the

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1 government's equitable claims, and the money paid by the
2 system in escrow was refunded to the system.

3 Pursuant to the District Court's prior order, a second
4 trial on the government's false claims was held in 2013. On
5 May 8th, 2013, the jury found the system violated the Stark law
6 and the False Claims Act.

7 It continues on. The District Court denied the system's
8 post-trial motions on October 2nd. The District Court entered
9 judgment. The District Court also awarded the government
10 post-judgment interest.

11 Thereafter on October 15th, the system entered into an
12 escrow agreement to afford the parties an opportunity to
13 explore settlement. The government forbore -- forbearanced
14 its collection efforts for a period of time until the parties
15 attempted to settle and thereafter until 14 days the system's
16 motion to stay with the District Court for 14 days after
17 denial of the system's motion for supersedeas bond with the
18 Fourth Circuit and the District Court denied the motion to
19 stay.

20 Despite extensive negotiations, the parties were unable
21 to reach a settlement. The system then filed a motion to stay
22 the judgment with the District Court and required the District
23 Court to stay enforcement of the \$50 million in escrow
24 fulfilling the bond requirement. The government opposed the
25 bond requirement motion in District Court and required the

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1 system to post the \$50 million supersedeas bond. Blah, blah,
2 blah. And it finishes on about the bond and the escrow.

3 It says unable to fulfill the following requirement
4 without substantially jeopardizing its ability to operate in
5 default on its outstanding bonds. The system appealed the
6 District Court's order to the Fourth Circuit. Its motion to
7 stay the judgment before the -- in its motion to stay, the
8 system requested -- and again it talks about the bonds that
9 were in there.

10 On June 3rd, 2014, the Fourth Circuit remanded the issue
11 to District Court for the bonding issue. On July 14th, 2014,
12 the District Court heard argument for what the bond should be.
13 And then it talks about the bond some more.

14 On March 18th, 2014, final appellate briefs were submitted
15 by each party to the Fourth Circuit. The Fourth Circuit heard
16 oral argument from the parties on October 31st, 2014.
17 Presently, the parties are awaiting the issuance of an
18 opinion.

19 And that's as of the date that this return was filed,
20 which would have been in early 2015. And so that was true
21 because obviously until June of -- or July of 2015, it hadn't
22 heard from the Fourth Circuit or it would have disclosed it
23 here.

24 So the parties are awaiting the issuance of an opinion
25 from the Fourth Circuit pending this appeal. At the time,

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1 management and the system's counsel predict the result pending
2 appeal accordingly -- or cannot predict the results pending
3 appeal. That's it.

4 Q: That's what it read. It's in the record certainly. My
5 question is the last disclosure said it was still on appeal
6 and hadn't been finalized?

7 A: Correct.

8 Q: All right. Judge Seymour wrote in her order that the
9 government alleged that -- I quote -- the composition --
10 compensation packages paid physicians 31 percent above and
11 beyond their total net collections as independent contractors
12 and thus in excess of the fair market value for their
13 services. She wrote that in her opinion about the nature of
14 the claims made by the government?

15 A: That was an allegation made in the complaint by the
16 government.

17 Q: And the government -- the case went to trial?

18 A: The case went to trial.

19 Q: And the government prevailed at trial?

20 A: Not necessarily.

21 Q: We're talking about the 2013 --

22 A: Right. Not necessarily on that claim, but yeah.

23 Q: And then Judge Seymour based her decision based upon the
24 exact amount of claims that the jury determined that had been
25 paid in violation of the Stark laws, didn't she?

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1 A: Right. But that had nothing to do with that allegation.

2 Q: So your testimony is on behalf of Tuomey that the verdict
3 and the ultimate judgment of \$237 million had nothing to do
4 with the allegation that they paid their physicians in excess
5 of the fair market value?

6 A: No. I took -- let me -- I don't know what led the jury
7 to believe that the -- that Tuomey violated Stark. It
8 could've been one of many things. It wasn't necessarily that
9 allegation. In fact, if my memory serves me, the government
10 really didn't argue that to any great degree in its closing
11 argument.

12 The jury's main -- the government's main argument that
13 the jury violated -- I'm sorry -- that Tuomey violated Stark
14 was that payment scheme and the purpose of the related scheme
15 was to pay the physicians according to the volume or value of
16 their referrals, and that's what violated Stark. But there's
17 any one of a number of -- of matters that could have or facts
18 that the government alleged there was Stark violation, any one
19 of which would lead to the jury -- could lead a jury to
20 conclude that it -- that Tuomey violated Stark. Fair market
21 value for its payment of its physicians was only one.

22 Now, second, I thought your question was is that what led
23 to the \$237 million and that -- that's incorrect. The \$237
24 million judgment was not based on their contracts. It's a
25 calculation based upon the number of Medicare claims that were

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1 made by any physician who touched a patient during the time
2 that there was a contractual relationship between Tuomey and
3 the doctors.

4 Q: Sure. My question related to the basis, but Judge
5 Seymour wrote on May 8th, 2013, the jury returned a verdict
6 finding that Tuomey had violated the Stark law. That Tuomey
7 had violated the False Claims Act and that 21,730 claims were
8 submitted in violation of the False Claims Act and that the
9 value of the -- value of the claims submitted in violation of
10 the False Claims Act equals \$39,313,065?

11 A: Right. But it's a false connection to connect the -- one
12 of the dozens of allegations that the doctors were paid in
13 excess of fair market value in which both parties presented
14 significant testimony on and thereto that is what the Stark
15 violation was. It could have been many things, other sections
16 of Stark that were violated, including volume or value of
17 referrals.

18 Q: But it all had to do with improper relationships of
19 compensation with physicians?

20 A: No.

21 Q: Nothing? You're telling me none of it had to do with --

22 A: It had to do with many different things. When you call
23 them improper, it -- Stark, again, is a strict liability
24 statute that has elements, one of which is a written
25 agreement, another of which is the payment scheme cannot vary

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1 with the volume or value of the referrals.

2 And what the government argued was in this context where
3 they had part-time agreements with surgeons who came into the
4 hospital to perform services, those agreements led to hospital
5 charges on a one-to-one ratio. That was their argument that
6 led to a violation of Stark ultimately that they spent most of
7 their time on.

8 Q: Tom, let's be clear. You're -- you're Tuomey's lawyer;
9 right?

10 A: Yes. One of them.

11 Q: One of Tuomey's lawyers; right? And Tuomey's lawyers
12 took various positions about the Stark laws during this --
13 during this trial; correct?

14 A: Various positions? Well, I think they were consistent
15 positions.

16 Q: Sure. And ultimately, they lost? They lost huge? It
17 shut down the hospital as it currently stood; correct?

18 A: No. It didn't shut down the hospital.

19 Q: They had to sell off or pay the judgments, 200 and some
20 million dollars?

21 A: I don't think it's fair to say that it shut down the
22 hospital. Tuomey is a vibrant hospital. It is a -- a -- in
23 my view, not at all any different than it was before any of
24 this happened.

25 Q: Well, the entity that operates it no longer operates it

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1 and that was due in large part to a \$237 million obligation to
2 the federal government, wasn't it?

3 A: Yes. That is true.

4 Q: Tom, you would agree that the best source of information
5 available to this Court, at least today, regarding the
6 Drakeford litigation would be those opinions and orders of
7 Judge Seymour and of the Fourth Circuit which have been
8 submitted to the Court?

9 A: No, not necessarily.

10 Q: Well, they would detail the basis of those orders and
11 judgments though, wouldn't they? The written orders?

12 A: They are the written orders.

13 Q: Sure.

14 A: I don't know if it's -- it depends on what the Court is
15 looking for to determine if that's the best source --

16 Q: All right.

17 A: -- of information from the case.

18 Q: Tom, I just want to go through a couple of specifics in
19 some 990s with you. I'll turn to the -- this is the 2010 990
20 filing. All right? And in that one, there is a schedule J to
21 the 990 filings and that has to do with officers, directors,
22 trustees, key employees, and highest compensated employees,
23 disclosure of that information to the IRS; correct?

24 A: Correct.

25 Q: And in the 2010, Mr. Cox, the CEO -- his salary was

TOM MORAN - CROSS BY MR. PADGET

1 \$840,622, which was comprised of -- that was a total of all
2 payments made to him under various compensation packages?

3 A: Incorrect. What was paid to him was \$538,000. That was
4 his monthly paycheck. Other reportable compensation -- these
5 are nontaxable benefits in the form of all benefits, both
6 retirement benefits, health insurance, the value of every
7 single thing that he received.

8 Q: I gotcha.

9 A: And these hospital systems typically have huge health
10 system benefits and the manner in which they account for that.
11 So that's probably a pretty good chunk of change here. Here's
12 the nontaxable benefits and then you have to total all of
13 those up.

14 Q: All right. So when you total all those, with
15 compensation and benefits, it comes to annually 840,622?

16 A: Correct.

17 Q: All right. That was 2010. Let's go to 2011. This is
18 the 2011 990 Schedule J for Mr. Cox and 541 is the base
19 compensation which you referred to. Bonus and another
20 incentive compensation, \$161,003.

21 A: See, often times, the management gets some level of a
22 bonus depending upon performance of the organization.
23 Apparently in the previous year he didn't, but it looks like
24 he did in this case, if I'm familiar with this. So it would
25 say if certain targets were met regarding quality and safety,

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1 as well as revenues and financial liability, then a portion of
2 those earnings. So that's where that bonus came into effect.
3 The base salary is roughly this. The same. Probably a cost-
4 of-living increase. But apparently the bonus kicked in that
5 year and all the other benefits are probably roughly the same.

6 Q: Okay. And so then the total compensation to then -- and
7 this is '11 or the '11 filing I should say -- \$1,011,073;
8 correct? That's from that?

9 A: That is the total of all of those columns. So that's
10 your base column plus bonus plus taxable benefits or benefits
11 that will ultimately be taxable that don't show up in the
12 standard W-2 that, you know, the normal --

13 Q: I understand.

14 A: -- employee gets. And then the nontaxable benefits again
15 where, if you're a member of a health plan, those are things
16 you have to value.

17 Q: Right. And I'm learning this --

18 A: Right.

19 Q: -- as part of a law firm.

20 A: That's right. That's right. So your -- your K-1 would
21 largely have some of the same stuff on it.

22 Q: This includes your healthcare.

23 A: It doesn't feel like -- if you're making a million bucks,
24 it doesn't feel like you're making a million bucks.

25 Q: I don't know. The -- but going back to this column two,

TOM MORAN - CROSS BY MR. PADGET

1 \$167,003. You said that was bonus and incentives and that was
2 in large part based upon performance of the organization?

3 A: And the way I can tell that is is that all of the
4 managers got, you know, some similar amounts. So they were on
5 a group bonus plan. For instance, Greg Martin, who is the
6 CEO, got, you know, roughly half of that. Gene Dickerson
7 about the same thing as Greg. He's the -- one of the high-
8 ranking officials or administrators. And then the next two
9 down, three down, got roughly a third of that.

10 Q: All right. Let's continue on to '12.

11 A: Each one of these plans, by the way, were reviewed by
12 third parties and reviewed independently by the board
13 independent of these folks for fair market value.

14 Q: I gotcha. So going -- let's go now to the 2012 filing.
15 Tuomey's Schedule J for Mr. Cox, 549,500 is the base. Bonus
16 and incentives, 173,050?

17 A: That's similar. Something must've happened to the
18 benefits that year. I don't know what it is. What year is
19 this?

20 Q: This is -- this is the 2012 filing.

21 A: Okay.

22 Q: All right.

23 A: It's just a little bit less and I don't know why.

24 Q: Yeah, a little less, 991,462 total compensation.

25 A: Something must've happened to the value of one of the

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1 benefits.

2 Q: Okay. And the last one, which we had out earlier -- I
3 must have handed it to you.

4 A: I don't know what I did with it.

5 Q: Schedule J, 2013.

6 A: I just can't remember what part that's in though. I have
7 it marked in mine.

8 Q: I have it marked in mine too.

9 A: That's right.

10 MR. HOLLER: Page 24.

11 THE WITNESS: I think that's correct.

12 MR. HOLLER: Base stamp 88.

13 THE WITNESS: Thank you. Okay.

14 BY MR. PADGET:

15 Q: All right. So now 2013 filing. Mr. Cox, in this one,
16 base pay 549,500; right?

17 A: Right.

18 Q: No bonuses that year. Other compensation, which I think
19 is explained later, is part of the severance, 912,979?

20 A: Right. That's -- so he puts his own money aside I think
21 in a 457 plan, which if it's in the year of severance it would
22 all come flooding out even though it had been reported as
23 nontaxable benefits in previous years. So it would be like
24 you having \$900,000 in your 401(k) and getting it all at once.

25 Q: I see. And so the total amount of compensation or total

TOM MORAN - CROSS BY MR. PADGET

1 of all columns that year --

2 A: Right.

3 Q: -- is \$1,485,190 to Mr. Cox?

4 A: Correct.

5 Q: In this 2013 990 filing, it would be -- it's for fiscal
6 -- help me with the fiscal year thing. What year are we
7 talking about?

8 A: So this is -- this was filed for the fiscal year ending
9 September 30th, 2014. So Jay was terminated I believe roughly
10 in the first part of this fiscal year or he resigned, whatever
11 it was.

12 Q: Sure. That would have been right around the time of the
13 2013 verdict?

14 A: The 2013 verdict was in May. So that was probably --
15 this was in October.

16 Q: So it would have been later?

17 A: Uh-huh.

18 Q: Okay. Currently, old Tuomey, as we have defined it, is
19 no longer operating the hospital. It's winding up its
20 affairs. As part of the winding up of its affairs, I
21 understand from your testimony that it has set aside a
22 contingent liability fund to pay certain creditors?

23 A: Correct. Claimants.

24 Q: Right. And the amount of that fund was \$2.2 million?

25 A: I think that's right.

TOM MORAN - CROSS BY MR. PADGET

1 Q: And in this case, there's roughly \$300,000 in insurance
2 coverage and \$200,000 in -- or \$2.2 million in contingent
3 liability?

4 A: I don't know what the insurance coverage is.

5 Q: All right. And that money is in a contingent liability
6 fund to address claims like this one?

7 A: No. To the extent that it's covered by insurance, it
8 wouldn't be.

9 Q: Sure. To the -- sure. But to the extent any -- if any
10 claim exceeds the insurance proceeds, there are funds set
11 aside currently, presumably in escrow somewhere, to cover
12 certain liabilities?

13 A: Yes.

14 Q: Including this one?

15 A: Right.

16 Q: So any adverse -- potential adverse effect of a judgment,
17 this one or from another creditor or otherwise, will have
18 absolutely no impact on the ongoing operations of the hospital
19 in Sumter?

20 A: Say that one more time.

21 Q: Sure. The potential impact of any adverse judgment or
22 other major creditor's claim against the old Tuomey entity,
23 like this one -- it won't impact the ongoing operations of the
24 hospital in Sumter in any way, will it?

25 A: No.

TOM MORAN - REDIRECT BY MR. HOLLER

1 Q: All right.

2 MR. PADGET: Your Honor, I don't have any further
3 questions for this witness.

4 THE COURT: Okay. Anything in reply?

5 MR. HOLLER: Very briefly, Judge.

6 REDIRECT EXAMINATION

7 BY MR. HOLLER:

8 Q: Mr. Moran, I certainly don't want to retry the Drakeford
9 case, but let me ask you about a couple of things that were --
10 were never in dispute. It was never in dispute that the
11 services that Tuomey provided during that window, that five-
12 year window, were actually given to the citizens of Sumter
13 County?

14 A: Correct. The -- the 990 goes into great detail about the
15 level of charity care that's provided by Tuomey. That was
16 never at all at issue, but it's normally what the IRS would
17 focus on.

18 Q: And I guess my question is a little simpler than that.
19 There was never a challenge that people from the Sumter area
20 and surrounding communities came to Tuomey for services and
21 those services were provided?

22 A: Nobody is turned away at Tuomey.

23 Q: But no --

24 A: Correct. There has never been any challenge.

25 Q: The government never said in the Drakeford litigation --

TOM MORAN - REDIRECT BY MR. HOLLER

1 A: Correct.

2 Q: -- you didn't do the work?

3 A: Correct.

4 Q: And they never said that Tuomey, if you did the work,
5 wasn't entitled to be paid for the work that was done?

6 A: Correct.

7 Q: Rather, technically if you didn't comply with these laws,
8 you were not entitled to bill and then be compensated for the
9 work that was done?

10 A: Correct.

11 MR. PADGET: Judge, I would just object to leading. I
12 understand we're at a judicial hearing.

13 THE COURT: Okay.

14 MR. HOLLER: Okay.

15 BY MR. HOLLER:

16 Q: Now, help me with some numbers. As I understand it and
17 if you are familiar with these, roughly in a year, a fiscal
18 year, Tuomey bills out some eight hundred plus million dollars
19 for fees for services rendered?

20 A: That's gross charges.

21 Q: But they only collect about 200 million?

22 A: Correct. That's net revenues.

23 Q: So 600 million is rendered for services that Tuomey will
24 never be re-compensated for or compensated for?

25 A: Right.

TOM MORAN - REDIRECT BY MR. HOLLER

1 Q: And that's a charitable purpose under the IRS rulings?

2 A: That -- the IRS wouldn't necessarily consider that to be
3 a charitable purpose in and of itself. What the IRS looks at
4 is the level of services to the healthcare in general and then
5 the healthcare that's provided on a -- without regard to the
6 ability to pay.

7 Q: And that was my next question. Throughout this time
8 period, is it fair to say that Tuomey treated all people who
9 had a need, a medical need, regardless of ability to pay?

10 A: Tuomey provided tens of millions of dollars of
11 uncompensated care.

12 Q: And that was never challenged at any time, including the
13 Drakeford litigation?

14 A: Correct.

15 Q: As a tax specialist, the argument that I hear is that
16 Tuomey is not worthy of (c)(3) status. Are you aware of any
17 state or federal court ever addressing worthiness in this
18 context, other than a -- than a disallowance brought by the
19 IRS or the taxpayers challenge?

20 A: Never.

21 Q: Okay.

22 MR. HOLLER: No further questions.

23 THE COURT: Anything further?

24 MR. PADGET: Very briefly, Your Honor.

25 RECROSS-EXAMINATION

TOM MORAN - RECROSS BY MR. PADGET

1 BY MR. PADGET:

2 Q: Tuomey is required under federal law to treat emergency
3 patients and title laws require it, don't they?

4 A: Tuomey is required to follow entitlement.

5 Q: Yeah. So they can't turn patients away in the emergency
6 department without violating federal law; correct?

7 A: It depends. There are certain patients you can turn
8 away.

9 Q: I'm going to hand you -- again, this is Exhibit G, 2013
10 990, and there's a particular line that's part of an
11 explanation in part three. I believe that's line 9 regarding
12 Tuomey's practices. First of all, when a patient comes in to
13 Tuomey, they are required to sign an assignment and guarantee
14 of payments; correct? Assuming they're capable of it?

15 A: Well, here's the way I think it works. If you otherwise
16 -- I think you have to fill out a financial disclosure and if
17 you fall within the charitable guidelines under that financial
18 disclosure, you're considered to be a -- well, there's two
19 different types. There is a sliding-scale where you may only
20 have to pay a portion and then if you get to a certain point
21 in the poverty guideline where you -- where you have to pay
22 zero.

23 So you still have to be billed because, you know, there
24 are circumstances where Medicare and Medicaid may come into
25 play or may come into play later or other potential third-

TOM MORAN - RECROSS BY MR. PADGET

1 party payers, government payers and that sort of thing. But
2 yes, you do have to fill out a financial --

3 Q: Sure.

4 A: -- disclosure and in part that's used to determine
5 whether or not you are a -- quote/unquote -- charitable
6 patient.

7 Q: But as part of the mountain of paperwork we all dread
8 when we go to the hospital for any reason, one of those forms
9 is an assignment and guarantee of payment by a patient; right?

10 A: I don't know that in this case.

11 Q: Okay. That's fine.

12 A: I don't know.

13 Q: Thereafter, Tuomey provides some degree of medical
14 services, presumably whatever is required, and afterwards in
15 this description it tells us the way Tuomey deals with the
16 debts. Read it for us, please?

17 A: All self-pay patients are informed about our financial
18 assistance program and are given the opportunity to complete
19 the application. Otherwise, prior to the procedure, attempts
20 are made to collect a portion of the cost of the procedure
21 based upon a good faith estimate. After procedure, hospital
22 will send out one statement with the amount owed by the
23 patient.

24 After this statement, the account is then turned over to
25 an in-house collections department. They call the patient and

TOM MORAN - RECROSS BY MR. PADGET

1 discuss payment terms in the program. And if the patient is a
2 third-party payer after 120 days, the account is then turned
3 over to a third-party collector. The collector will then call
4 and send statements in an attempt to collect the funds. After
5 120 days of placement, if there is no activity, the account
6 will be returned.

7 Q: And the account written off eventually?

8 A: Right.

9 Q: All right.

10 A: So what that applies to typically would be folks that had
11 any third-party payer where you had high deductibles or any
12 deductible, as well as co-pays where they weren't paid, but
13 probably 90 percent of what you're dealing with there is
14 trying to get those co-pays in. You can't let them get too
15 old. You've got to --

16 Q: Sure.

17 A: -- remind people that they're out there. Not everybody
18 can pay co-pays. They have to pay them over time. So that's
19 really the system that's designed to allow them to set that up
20 over time.

21 Q: It's a collection system?

22 A: Right.

23 Q: It's very similar to any collection system for any
24 organization?

25 A: But it doesn't apply to charitable organizations or the

TOM MORAN - RECROSS BY MR. PADGET

1 portions that is charitable. For instance, you could be a
2 Medicaid patient. You still have a co-pay, but if you're a
3 charitable patient, you don't pay the co-pay. They don't --
4 they don't turn that over to the collection agency. If you're
5 a Medicaid patient and you otherwise don't qualify for
6 whatever reason, then your co-pay would get turned over.
7 Q: I'm just talking about self-pay patients. If you have a
8 third-party payer, it's going to be different?
9 A: It's all -- it's all though. The self-pay patients are
10 just self-pay patients.
11 Q: Right.
12 A: Your self-pay -- your self-pay for your deductible, your
13 self-pay for your --
14 Q: Right.
15 A: For your co-pay. And you might be self-pay for the whole
16 thing. Ninety-five percent of self-pays are charitable if
17 they have nothing. Right? They probably don't have any money
18 unless you're a sobbing billionaire or something.
19 Q: But only after collection efforts are made; right?
20 A: No. If you are charitable, no collection efforts are
21 made.
22 Q: If you fill out the financial assistance forms, but for
23 your average self-pay patient, if they do not complete the
24 financial assistance forms, they sign the assignment of
25 benefits. It goes to internal collections in the hospital.

TOM MORAN - RECROSS BY MR. PADGET

1 If they don't get paid then, then it goes to external
2 collections for 120-day period?

3 A: For any self-pay patient that has not chosen to become
4 charitable if they could, yes, that in theory could happen.

5 Q: All right.

6 MR. PADGET: No more questions, Your Honor.

7 MR. HOLLER: Last question.

8 REDIRECT EXAMINATION

9 BY MR. HOLLER:

10 Q: No one ever gets sued for not paying their bill at
11 Tuomey? No legal action is ever brought against a Tuomey
12 patient, is it?

13 A: I'm not aware of any.

14 MR. HOLLER: Okay. Thank you. No further questions.

15 THE COURT: I have questions.

16 THE WITNESS: Okay.

17 THE COURT: Assuming when you file this, the IRS for
18 whatever reason looks at Drakeford cases and decides to pull
19 the eleemosynary status of Tuomey, what consequences, if any,
20 would that have on the current hospital?

21 THE WITNESS: Well --

22 THE COURT: I was just wondering that.

23 THE WITNESS: Consequences on the current hospital?

24 Assuming they would do so for the Drakeford litigation? And
25 putting aside that there is no case law to otherwise indicate

TOM MORAN - DIRECT BY THE COURT

1 that their -- that they would intend to do so?

2 THE COURT: Right.

3 THE WITNESS: In other words, if they were to decide to
4 do something, they would have whole other remedies called
5 excess benefit transactions that they would -- they would
6 pursue before they would -- they wouldn't pull the -- pull the
7 tax-exempt status.

8 THE COURT: All right.

9 THE WITNESS: There is another thing. So what would that
10 have? Well, it could --

11 THE COURT: With tax-exempt status of old Tuomey, we're
12 not affecting new Tuomey, would it?

13 THE WITNESS: No. The tax-exempt status of old Tuomey --
14 it depends. So here's what happens. So you -- I don't know
15 because I don't know how that would affect state and county
16 taxes that might have to be paid. That's why I answered the
17 question. I'm not -- I'm not sure of the far-reaching --

18 THE COURT: That's not property taxes.

19 THE WITNESS: Well, but see the problem is is that the
20 property is sold free and clear and then all of a sudden new
21 Tuomey has a \$10 million property tax judgment because the
22 tax-exempt status was revoked. Does that make sense? And
23 they would owe.

24 So it would affect some of the assets of new Tuomey in
25 that sense. Sales tax same way. It would levy that on the

TOM MORAN - DIRECT BY THE COURT

1 property that anything that would otherwise be considered --
2 there's lots of benefits in being tax-exempt status above and
3 beyond just a federal tax exemption. In theory, donors who
4 gave money -- there's probably been -- there's an average of
5 \$2 to \$5 million a year given. They would disallow those
6 donations. Everybody would have to refile their tax returns.
7 That sort of thing.

8 THE COURT: Okay.

9 THE WITNESS: So it would be a mess.

10 THE COURT: Okay. All right.

11 THE WITNESS: I hope that answered your question.

12 THE COURT: Thank you.

13 (WHEREUPON, the witness stepped down.)

14 THE COURT: Do you need a break?

15 MR. HOLLER: Yes, sir.

16 THE COURT: Okay. We'll take a five-minute break or
17 however long.

18 MR. HOLLER: Thank you.

19 (WHEREUPON, there was a break in the proceedings.)

20 THE COURT: Okay. As far as testimony is concerned, any
21 more testimony or anything else I need to know?

22 MR. HOLLER: No, sir. That would conclude the
23 defendant's case.

24 THE COURT: Okay. You all briefed the other issues, you
25 know, it seems to me very well. So is there anything else

DR. WIN MYAT - DIRECT BY MR. PADGET

1 y'all need to add to these briefs or anything else I need to
2 know to make a decision on all the other issues? You've been
3 working, Mr. Padgett.

4 MR. PADGET: Judge, we just have to -- actually, we're
5 going to call Dr. Myat for one point, one very limited point,
6 about the operations while he was an employee --

7 THE COURT: Okay.

8 MR. PADGET: -- for the hospital.

9 THE COURT: All right.

10 MR. PADGET: We'd call Dr. Win Myat.

11 THE COURT: If you would, place your left hand on that
12 Bible, please, sir. Do you solemnly swear -- raise your
13 right. Do you solemnly swear the testimony you will give is
14 the truth, the whole truth, and nothing but the truth, so help
15 you God?

16 THE PLAINTIFF: Yes, sir.

17 THE COURT: Thank you. Just watch your step as you get
18 in that chair.

19 DR. WIN MYAT, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. PADGET:

23 Q: Dr. Myat, good morning.

24 A: Good morning.

25 Q: A couple of quick questions. How long did you work at

DR. WIN MYAT - DIRECT BY MR. PADGET

1 Tuomey hospital? What years?

2 A: I started out around 2008, March or April, until the
3 accident. Oh, no. Nine months after the accident. That's
4 2012, April.

5 Q: Okay. So roughly how many years did you work there?

6 A: About four, four and a half maybe.

7 Q: Okay. Doctor, in your experience in those four and a
8 half years working at Tuomey hospital, would the hospital
9 operations have been able to be conducted without physicians?
10 Could the hospital work without doctors?

11 A: Well, a hospital's operation is mostly based on nurses,
12 physicians, and without physicians, the nurses, including the
13 nurses in the OR, they can't do -- they can't operate a
14 hospital without nurses and physicians.

15 Q: I know it's obvious, Doctor, but would you describe
16 physicians at hospitals as a key employee of -- of that
17 operation?

18 A: Yes, they are key employees.

19 MR. PADGET: That's all the questions I have, Your Honor.

20 THE COURT: Do you have any cross?

21 CROSS-EXAMINATION

22 BY MR. HOLLER:

23 Q: Dr. Myat, you were only -- your only time as a doctor was
24 a short period of time in Florence?

25 A: Yes, sir.

DR. WIN MYAT - CROSS BY MR. HOLLER

1 Q: You practiced in Florence?

2 A: Yes, sir. About nine -- twelve months -- nine to twelve
3 months.

4 Q: And then most of your professional career was in Sumter
5 as a physician?

6 A: Yes, sir. But generally if you are -- if you are a
7 residency and fellowship, that's five years more.

8 Q: Correct. You were in training?

9 A: Yes.

10 Q: But since you've been out of training, it was about a
11 year or less in Florence and the rest was at Tuomey?

12 A: Yes, sir.

13 Q: And have you ever heard of such stories in the past when
14 doctors used to run hospitals, when every decision was made by
15 a doctor?

16 A: Well, it depends on your personality. I never assumed
17 myself as a single-handed guy. Always a team player. That's
18 my personality. So I don't believe it those.

19 Q: The people who ran McLeod and who ran Tuomey for the most
20 part were not medical doctors, were they?

21 A: Most hospitals I know, the CEOs are usually nonmedical
22 personnel, but a big part of it is CMO's are usually -- I mean
23 CMO by definition are medical doctors. They are part of the C
24 suite [phonetic].

25 Q: They're trained in healthcare, but they're not medical

DR. WIN MYAT - CROSS BY MR. HOLLER

1 providers?

2 A: They are medical providers, C suites. Dr. Dickerson is.

3 Q: Well, Dr. Dickerson, of course, he's Chief of Staff.

4 A: Yes, sir.

5 Q: Right.

6 A: Actually, he's a C. He belongs to one of those C suites
7 people.

8 Q: But the top two people at Tuomey, for example, were not
9 medical doctors? Greg Martin --

10 A: The CEO and CIO, yes.

11 Q: Correct.

12 A: Not the CMO.

13 Q: Right. Right. They have health -- they have health
14 graduate degrees and one was actually a minister, wasn't he?
15 Greg Martin?

16 A: I don't know his background.

17 Q: Okay. Fair enough.

18 A: Yes, sir.

19 Q: Would you agree or disagree with the statement that as
20 medicine has progressed over the last 50 years, doctors have
21 had less and less to say in the administration of medical
22 care?

23 A: It depends on, again, who you talk to and how they
24 perceive healthcare, yes.

25 Q: Your -- I'm sorry. Go ahead.

DR. WINMYAT - CROSS BY MR. HOLLER

1 A: Because nowadays if you want to be your own and you want
2 to make your own decisions, with the Affordable Healthcare Act
3 and so on and so forth, it gets -- it gets more complicated.
4 Let me just stop there.

5 Q: It does. It does. So you would agree with that
6 statement that doctors have less say -- less and less say
7 about the administration of healthcare as time goes by?

8 A: We do -- actually, we do have say in administration. If
9 we don't like it, we could move to a different hospital. We
10 could always move.

11 Q: You have the power to move, but you don't have the power
12 to change the administration?

13 A: Power to change the administration? No. The
14 administration has their own duty and we have our own duty.

15 Q: Okay. The contract that's already in evidence, your
16 contract with hospital -- with the hospital, Tuomey, as the
17 infectious disease specialist identifies Tuomey as a 501(c)(3)
18 entity, does it not?

19 A: I would need to see the contract. I don't know the exact
20 details. If it's in there, it's there.

21 Q: Thank you.

22 MR. HOLLER: No further questions.

23 THE COURT: Okay. Anything further?

24 REDIRECT EXAMINATION

25 BY MR. PADGET:

DR. WIN MYAT - REDIRECT BY MR. PADGET

1 Q: That provision under your contract, Doctor, which is
2 attached as part of Exhibit E to plaintiff's filings --

3 MR. PADGET: If I may approach, Your Honor?

4 THE COURT: Yes.

5 BY MR. PADGET:

6 Q: That portion of your contract in Exhibit E that Mr.
7 Holler was referring to is in this section; right? Section
8 6.13 for indemnification; is that right?

9 A: I don't see the 501(c)(3) here.

10 Q: Sure. Do you see any mention of 501(c)(3) in your
11 contract?

12 A: I don't see that.

13 Q: It doesn't. And indemnification -- this has to do with
14 your responsibility to the hospital in the event a third-party
15 sues you or the responsibility from the hospital to you in the
16 event a third-party sues the hospital; isn't that right? Is
17 that correct?

18 A: If that's what it means.

19 Q: If that's what indemnification is.

20 A: Okay. I'm not a lawyer, but I --

21 Q: I understand.

22 A: -- if it means that, that's what it means.

23 Q: It doesn't have anything to do for when you bring a case
24 against the hospital, does it?

25 A: I --

DR. WIN MYAT - REDIRECT BY MR. PADGET

1 Q: If that's what indemnification means?

2 A: Yes.

3 Q: All right.

4 MR. PADGET: No more questions, Judge.

5 THE COURT: You can step down. Thank you, sir. Watch
6 your step.

7 THE PLAINTIFF: Thank you, sir.

8 THE COURT: Okay. Anything else from either side?

9 MR. PADGET: Nothing from the plaintiff, Your Honor.

10 THE COURT: All right. I will let y'all know quickly
11 about the order.

12 MR. PADGET: Your Honor, if Your Honor doesn't want to
13 conduct any argument --

14 THE COURT: I'll be glad to hear argument if you want --
15 if y'all want to make arguments. If y'all want to give me
16 anything today outside of these briefs, I'll be glad to hear
17 anything. I have your briefs you submitted and it seems both
18 sides have a couple issues. I'll be glad to listen to
19 anything else y'all think is important that I need.

20 MR. PADGET: Your Honor, I'd like to make a few arguments
21 briefly --

22 THE COURT: Okay.

23 MR. PADGET: -- for the -- for the purposes of our
24 record.

25 THE COURT: Sure.

1 MR. PADGET: This is our opportunity. Also, Your Honor,
2 before I forget, in addition to obviously this motion -- post-
3 trial motion that David has brought before the Court, there
4 are two other motions that are technically pending. They are
5 our two motions to reconsider. I bring this up just to give a
6 copy of each of those briefs --

7 THE COURT: Okay.

8 MR. PADGET: -- to the Court and to opposing counsel. If
9 I may approach, Your Honor?

10 THE COURT: Certainly.

11 MR. PADGET: There is our motion to reconsider your grant
12 of leave to amend the answer, which the Court did just prior
13 to trial, and it's our motion to reconsider the reopening of
14 the evidence that gave rise to the hearing thus far today.

15 Those motions have not yet been ruled upon. I simply
16 bring them up for the Court to reconsider, if at all, and that
17 when the Court issues an order one way or the other, it
18 certainly makes the next step, if there is any next step in
19 this case, easier when all of those motions are resolved in
20 the same order.

21 THE COURT: And I -- and I plan to address all those in
22 the same order.

23 MR. PADGET: Very good, Your Honor.

24 THE COURT: I am hoping to leave nothing that has not
25 been decided that y'all can't take up if necessary.

1 MR. PADGET: Certainly. Your Honor, just about why we're
2 here today, the 501(c)(3) issue, the charitable status issue.
3 Again, I won't -- I won't belabor this because I sort of made
4 part of this argument earlier, but this is -- this is the
5 Court deciding about the application of a state statute. It's
6 in our blue book. The state trial court about the amount of
7 the judgment.

8 Federal law does not cap judgments against charitable
9 organizations. It doesn't at all, period, anywhere. The only
10 protections, if any, that Tuomey is qualified for is under the
11 state statute.

12 Now, I bring that to the Court's attention just to say
13 that Tuomey has -- has argued that this Court doesn't have the
14 authority to make the decision, number one, which clearly it
15 does. But two, there are not far-reaching ramifications for
16 donors or taxes or anything else. The IRS determination is
17 wholly independent about what this Court does.

18 And the IRS may give some deference to the Court's
19 decision and they may not give some deference to the Court's
20 decision or they may never even look at it, which is the
21 greatest likelihood in light of what the government accounting
22 office does about the rate of actual investigations done on
23 501(c)(3) entities.

24 But much has changed --

25 MR. HOLLER: Judge, I'm sorry. I've got to object to

1 that. I think he's arguing something that's not in evidence
2 and I know this is a bench hearing, but we've had things
3 proffered out here and built upon and built upon which are not
4 in evidence.

5 THE COURT: I understand and I --

6 MR. PADGET: I'm just arguing, Judge.

7 THE COURT: I'll sustain the objection. Go ahead.

8 MR. PADGET: Just argument. Much has trialed since the
9 trial -- much has changed since the trial in this case last
10 September. As Your Honor now knows, the hospital has been
11 purchased. The hospital and all of his assets and all of its
12 operations are now being conducted by another entity, Palmetto
13 Health Tuomey, and they are operating the hospital as is. And
14 there is a contingent liability fund set aside to deal with
15 creditors in general, including Dr. Myat's claim.

16 There are -- as we see it, Judge, there are four options
17 before the Court, and it always seems to me that judges like
18 to know what their options are and what the effects of
19 potential rulings could be.

20 Option one. Obviously, the option that Dr. Myat prefers
21 is to enter full judgment of this \$2.5 million verdict, ruling
22 that the substantive entity's conduct, that is Tuomey's
23 conduct in Drakeford and the way they've conducted their
24 operations and paid their CEOs and overpaid their physicians,
25 as we believe was conclusively determined by the federal

1 courts in Drakeford, does not permit it to clothe itself with
2 the protection of the Charitable Immunities Act.

3 I bring this up that option one has no ramifications for
4 that hospital any longer. It has no ramifications for the
5 community of Sumter. It has no ramifications for counsel or
6 otherwise in this case. It simply rules on the substance that
7 that entity, which is winding down, is not entitled to that
8 statutory protection. It won't have much of a perspective
9 effect because, again, the entity is winding down and going
10 away.

11 The next option to the Court pursuant to one of our
12 motions to reconsider is to rule that this defense was not
13 properly pled or was properly proven by way of the motions to
14 reconsider. And of course, that option, if it would, would
15 allow the Court to enter a judgment for \$2.5 million dollars.
16 That the defense wasn't pled or proven, but that certainly
17 option does have ramifications and they have ramifications of
18 counsel or otherwise I'm certainly mindful of.

19 The other option is to cap this judgment at \$300,000,
20 ruling that South Carolina Code 33-56-180 caps it and that, as
21 the defense has argued, there's unqualified immunity,
22 unqualified and unlimited immunity. The liability is capped
23 at \$300,000, irregardless of any conduct, irregardless of
24 whether or not any activities have been ongoing that have been
25 found to be illegal or fraudulent, and irregardless of whether

1 or not that -- those activities have been properly disclosed
2 to the IRS in the case.

3 And that would permit this entity to hide behind a 25-
4 year-old classification. In evidence, the last letters from
5 the IRS were in the early '90s regarding the IRS status. The
6 last affirmative communication from the IRS about its tax-
7 exempt status was in I believe -- I'm sorry. It was in 1998
8 and it's in there as part of I believe Exhibit A-7 to that
9 deposition. But it's a 25-year-old determination and it gives
10 no deference to what's occurred in the meantime.

11 And then the last option, of course, which we oppose, is
12 to grant a J -- grant a JNOV in the face of a mountain of
13 evidence regarding their liability, as properly chosen or
14 properly submitted to the jury, and we think literally there
15 was a mountain of evidence given by the six witnesses who
16 testified that allowed the jury to reasonably conclude, as
17 they did, that the hospital created that dangerous condition.

18 I gave the example earlier of Bill's charity. It could
19 do whatever it wants as long as it has that tax-exempt status
20 and the IRS hasn't done anything else, and that, Your Honor --
21 I won't go through the example anymore again, but that example
22 -- the point of it is just to show that this Court has the
23 power to look behind the curtains. It's not just the IRS's
24 decision. It's there and that is what the language of our
25 Charitable Funds Act -- that choice of different language from

1 the governing section, the other definition about a charitable
2 organization, it does give deference to the IRS, and the
3 operative section which gives no deference to the IRS, but
4 simply where the legislature chose to incorporate those core
5 and fundamental rules of 26 USC 501(c)(3) and they're pretty
6 basic principles.

7 We contend that you've got the benefits and any revenue
8 cannot inure to the benefit of an individual or to a key
9 employee. It must operate for a community benefit and it
10 cannot operate in violation of public policy, all of which we
11 contend the Drakeford case establishes.

12 And the other examination that we have establishes is
13 that they have violated many of those provisions, the
14 inurement provisions, paying key employees too much money,
15 which Drakeford proves. That violates federal public policy
16 for the -- the Stark laws, which Judge Seymour calls anti-
17 kickback laws, and the False Claims Act laws, which Judge
18 Seymour calls the anti-fraud laws, which have been deemed to
19 be violated by Tuomey by its actions over the last decade or
20 so.

21 The -- the language of the statute confirms the
22 historical role of the trial court. We cited some cases in
23 our brief, Judge. This is nothing new. It's new lately, but
24 it's not new over the last hundred years of trial courts
25 looking at charitable entities having to prove that defense,

1 and trial courts making the decision whether or not they're
2 charitable. And if you look at most of the cases, you'll find
3 most of the time the judges historically came down on the side
4 of no immunity, very, very harsh, harsh, harsh application of
5 the rule.

6 The -- this statute, as with all, must be strictly
7 construed in derogation of the common law. As Justice Ness
8 put it in '81, it was an antiquated doctrine and got rid of
9 charitable immunity. It was that backdrop of which the
10 legislature passed this statute. And to the extent the
11 statute can be construed to -- strictly not to limit
12 liability, that's the rule of construction in this case
13 because it is in derogation of common law.

14 And the choice that the legislature did in making that
15 particular section -- just like in the motor truck case, the
16 Hughes case, the Court of Appeals said a motor truck is
17 different than a truck. When I read that, I thought, wow,
18 that's a big -- that's a big distinction, but that's the way
19 courts construe statutes. They are in derogation of the
20 common law and it has to have some meaning, these words that
21 are given, and the words that it gave in Section 170 are that
22 we're incorporating the rules under 501(c)(3) and that's what
23 this Court can look and decide.

24 Here, once you get past the idea that you can't look past
25 the IRS's determination, what you find is an entity that

1 violated some major federal laws and it's been -- we've all
2 read about it in the papers. I don't want to beat it too much
3 here, but we know what Tuomey did. It's detailed in those
4 court orders by the judges who tried those cases. We know
5 what they did. We know what the judges said they did and we
6 know that it in many -- in many respects is the reason that a
7 different entity is now operating that hospital today.

8 Public policy. Those findings in Drakeford are binding
9 on Tuomey pursuant to the doctrine of collateral estoppel,
10 issue preclusion. There's no doubt about that. The case law
11 is clear and we cited it in our brief.

12 They have overpaid their physicians per the Drakeford
13 case according to Judge Seymour's order, which pursuant to the
14 501(c)(3) rules disqualifies them in their status. They paid
15 their CEO \$1.46 million in compensation and benefits in the
16 2013 filing, based in large part on its productivity and
17 severance, which in light of what was going on at the hospital
18 at that time, I ask the Court to consider are bonuses
19 warranted when you're under investigation by the Department of
20 Justice for illegal contracts with physicians? That's the
21 same thing that's happening while the CEO is getting paid
22 hundreds and hundreds of thousands of dollars in bonuses and
23 ultimately being paid a million dollars -- a million five as
24 part of his severance package. Is that inurement as 501(c)(3)
25 called it? We would submit that it is.

1 And then there's the failure to disclose Drakeford
2 completely improperly to the IRS. It made a lot of discussion
3 and that's a lot of flowery language in those Dixon Hughes
4 financial statements to the IRS about the status, but they
5 never told them that the jury ruled against them in the first
6 case. And that stood like that for three or four years and
7 now most recently in 2013 with that 2013 filing, they have
8 finally disclosed it, but they say the whole thing is on
9 appeal and that's -- that's what they've told the IRS.

10 I don't know what the IRS knows. There's been no
11 testimony about it here today about what they know or don't
12 know or what agents do know or don't know. We know what
13 Tuomey told them and it's written in that paperwork and they
14 didn't tell them everything and we think that the unclean
15 hands doctrine in and of itself would prevent the operation of
16 this cap.

17 And we don't believe that any longer the hospital meets
18 the community benefit test. Today, there are no people
19 working for benefit today, the day they're asking for
20 protection from this judgment. There's not a single person
21 that was revealed on cross-examination that was working to
22 benefit that hospital in Sumter or the health benefits of
23 people in Sumter. That's not happening anymore.

24 The whole purpose of charitable immunity is to protect
25 the charitable purposes and the assets of the charitable

1 operation. That operation is no more. It is winding down and
2 the community benefit test is no longer met and that's
3 confirmed by the testimony of Mr. Moran on the stand here
4 today.

5 Your Honor, we believe in light of all this, in light of
6 the four choices -- I'm not going to drone on too much about
7 the evidence as far as the JNOV. It's all submitted in our
8 brief and it's extensive. We believe there is ample evidence
9 there to support the scintilla of evidence requirement for a
10 jury to consider in meeting that preponderance of the evidence
11 standard.

12 But here, Your Honor, we believe the only -- the only
13 choice is clear and that is that this Court must not permit
14 this defendant to benefit the statutory charitable protections
15 due to its own misconduct. Not because it wasn't pled, not
16 because it wasn't tried, but because of its own misconduct,
17 honor the jury's verdict in this case.

18 Enter the \$2.5 million verdict in favor of Dr. Myat to
19 compensate him for what the jury deemed to be his very serious
20 and life-changing injuries and the millions of dollars of
21 damages that nobody here can dispute he suffered. He has.
22 That money is sitting in a contingency fund for an entity
23 that's winding down and it won't affect anything over in
24 Sumter. That's an important point for a judge.

25 If we don't honor the jury's verdict, what's -- what's

1 the point of having a trial? What's the point of picking
2 those twelve people? What's the point of having the six
3 people testify? What's the point of making the arguments,
4 charging the jury, and getting a verdict?

5 We must give meaning to our seventh amendment. Our U.S.
6 Constitution gives us the right to a jury trial and our
7 specific South Carolina Constitution that we operate that
8 creates this court as a court of general jurisdiction, and
9 Article 1, Section 14, says we in South Carolina will preserve
10 a right to a jury trial inviolate. Above all else, inviolate.
11 We will preserve it.

12 And here, the jury said he's entitled to \$2.5 million
13 from this hospital. That's what they said. If we don't give
14 deference to the jury's verdict, what is the point of trying
15 cases?

16 Your Honor, we thank you for your opportunity to come and
17 argue before you today. If you have any questions, we're
18 happy to address them. We appreciate your patience in
19 allowing this post-trial discovery period and setting this up
20 today. Thank you.

21 THE COURT: Thank you, sir.

22 MR. HOLLER: Judge Cothran, we, of course, briefed this
23 in a number of different filings, but I'll be very, very
24 brief.

25 First, I would address, Judge, that in this case there

1 was no issue submitted to the jury about knew or should have
2 known. Okay? That the water was on the floor long enough
3 that it should've been discovered. The only issue that went
4 to the jury was whether or not a Tuomey employee put the water
5 on the floor. There was no testimony to that.

6 Over objection, Nurse Whitehouse was allowed -- or even
7 in the deposition where his deposition was taken, an objection
8 is made to the form of the question, but he was asked whether
9 or not it was more likely an employee versus a visitor who
10 perhaps put the water on the floor. That is speculative and
11 when we talk about deference to a jury verdict, juries cannot
12 be allowed to speculate and guess, and that we submit is
13 exactly what happened here and that Tuomey is entitled to a
14 direction of verdict.

15 Certainly when it -- when damages are large, juries can
16 be sympathetic. That is the purpose of the laws and the rules
17 that we follow so that juries don't nullify or reach verdicts
18 that aren't supported by the evidence or supported by the
19 facts.

20 Likewise, a plea to Your Honor, to the Court, for
21 nullification, to ignore rules and to look to things that are
22 not relevant to the statute or the legislature when enacting
23 those rules is also inappropriate.

24 On the issue of Tuomey's 501(c)(3) status, the two
25 definitions that are given by the Charitable Immunities or

1 Solicitation of Charitable Funds Act, Tuomey meets both of
2 those definitions. The triggering for 33-56-180 is the
3 definition of 170, which is a charitable organization means
4 any organization which is exempt from taxation.

5 I submit the legislature picked that language, choosing
6 the federal law because the executive branch alone, the
7 Department of the Treasury alone, determines whether an entity
8 is tax-exempt. That is a clear, fair, and bright line test
9 that for many, many, many years, since the abolition of
10 common-law immunity, the legislature chose so that there would
11 not be ancillary litigation on this very topic that we have
12 here.

13 So as every -- because the legislature chose that -- use
14 hospitals as an example or either governmental or not-for-
15 profit or charitable. In every case where those defendants
16 are lawsuits, are we going to have ancillary litigation over
17 whether or not that entity is deserving, worthy or otherwise
18 by some, you know, common-law basis entitled or not entitled
19 to the charitable status? I submit the legislature picked
20 501(c)(3) because it's clear. It's a bright line and it
21 avoids ancillary litigation.

22 We believe it's been met in this case. First, we believe
23 that the directed verdict and the JNOV should be granted based
24 upon a lack of evidence that a Tuomey employee placed the
25 water on the floor. And secondly, if the verdict is not

1 vacated, that the protections of 33-56-180 should be imposed,
2 the statutory cap for charitable organizations. And then
3 finally, we would ask that we be granted a new trial if those
4 first two motions are not granted. Thank you, Judge.

5 THE COURT: Thank you. All right. Mr. Padget?

6 MR. PADGET: Very briefly, Your Honor. With regard to
7 JNOV, Judge, on page 31 of our brief -- and I'm sure Your
8 Honor has seen it. We have detailed 15 major facts that were
9 brought up at the trial that we believe support the jury's
10 conclusion in this case.

11 And as Your Honor properly charged the jury, as David
12 mentioned, this was not a notice case. It never was. It
13 always was a creation of the danger case and we believe you
14 told the jury that with your charges. We believe they
15 listened and we believe they applied that evidence there
16 regarding the liability to that and they had specific
17 questions about those things.

18 And then as they -- as they went through the
19 deliberations, this mountain of evidence was there, and we
20 believe to characterize it as speculation is a fundamental
21 mischaracterization of indirect evidence, circumstantial
22 evidence, of which is just as strong as direct evidence in the
23 eyes of the law.

24 And because of that, we don't believe we have to have a
25 person actually standing over the body saying I saw him shoot

1 him. As long as I got the smoke and the gun and I heard the
2 scream and then I came in the room and they were standing over
3 the body, that's circumstantial evidence in this case.

4 It was sufficient to warrant the denial of the JNOV and
5 for all the reasons that we previously articulated with regard
6 to 501(c)(3) we don't believe that a -- a 501(c)(3) entity can
7 get protection if you follow the rules. If you follow the
8 rules, a 501(c)(3) will -- as Mr. Moran testified to, they are
9 well-known rules in the tax law community. If you follow
10 them, you get the benefit. If you don't follow the rules, you
11 don't get the benefit of the state statute. That's what we're
12 asking you, Judge, to do. Thank you.

13 THE COURT: Thank you. Thank y'all.

14 MR. HOLLER: Thank you, Judge.

15 (WHEREUPON, the proceedings ended.)

16
17 --- END REQUESTED TRANSCRIPT ---
18
19
20
21
22
23
24
25

1 State of South Carolina)
2) Certificate
3 County of Florence)
4

5 I, the undersigned, Krystal J. Smith, Notary Public and
6 Official Court Reporter for the Twelfth Judicial Circuit of
7 the State of South Carolina, do hereby certify that I
8 transcribed the proceedings in the captioned case that were
9 reported by Melissa Singletary, Circuit Court Reporter for the
10 State of South Carolina, to the best of the ability, and the
11 foregoing pages, numbered 1 through 100 constitute a true,
12 accurate, and complete Transcript of Record of all the
13 proceedings had and evidence introduced in the hearing of the
14 above captioned case, relative to appeal, in the Court of
15 Common Pleas for Sumter County, South Carolina, held in
16 Manning, South Carolina, on the 8th day of March, 2016.

17 I do further certify that I am neither of kin, counsel,
18 nor interest to any party hereto.

19
20 Krystal J. Smith

21 Court Reporter

22
23 Florence, South Carolina
24 August 2, 2016
25

This Certified Transcript Has Been Provided For: William R. Padget, Esquire

FOR ADDITIONAL COPIES: Please contact the Court Reporter: Krystal Smith at krsmith@sccourts.org.

Note: Rules of Civil Procedure (Rule 80, Stenographic Report of Transcript as Evidence) requires copies of transcripts that will be offered in evidence to be certified. All copies provided by the court reporter are certified copies, signed in blue ink and designated as a certified copy.

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$.75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO:

KRYSTAL J. SMITH, COURT REPORTER
12TH CIRCUIT AT LARGE
P.O. BOX 13563
FLORENCE SC 29504

STATE OF SOUTH CAROLINA

RECORDED

COUNTY OF SUMTER. 2015 AUG 21 PM 4:14

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-43-2030

Win Myat,

JANIS L. JEFFREY
CLERK OF COURT
SUMTER COUNTY, S.C.

-vs-

Tuomey,

Defendant.

AFFIDAVIT OF
DAVID C. HOLLER

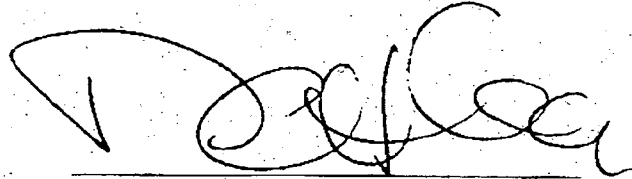
Personally appearing before me, David C. Holler, who first being duly sworn, deposes and says:

1. I am the attorney of record for Tuomey and filed an Answer on January 16, 2013. I did not plead *South Carolina Code* § 33-56-180 in the initial answer. At the time the Answer was drafted, I was focused on a factual inquiry into whether Plaintiff was a statutory employee under Workers' Compensation law. I was aware Tuomey was a charitable entity and that the statute should be pled as an affirmative defense. I simply failed to include such a defense in the Answer. Liability is disputed in this case.
2. The case was filed by attorney Robert B. (Sam) Phillips. Sam and I had numerous conversations about the \$300,000 statutory limitation of Plaintiff's claim during our initial conversation as well as during conversations leading up to Plaintiff's discovery deposition.
3. The case initially appeared on the ADR roster with a mediation deadline of August 29, 2013. Sam Phillips and I agreed to place the case on a scheduling order with discovery deadlines. The statutory cap were discussed during these exchanges.
4. On April 17, 2014, I filed a motion for summary judgment for Tuomey.
5. On May 9, 2014, I took Plaintiff's discovery deposition. Although this case is a slip and fall, it is hardly an ordinary case. Plaintiff is a medical doctor who is claiming nearly \$2 million in lost wages. At the conclusion of his discovery deposition, Sam Phillips and I discussed this case for nearly two (2) hours. We discussed the statutory cap of \$300,000 and the fact that no physician has taken Plaintiff out of work. We discussed that regardless of the outcome of this case, Plaintiff would have only a limited recovery that would not cover his losses. We extensively discussed the need for further medical or psychiatric intervention in an attempt to return Plaintiff to work. We agreed that this was an extraordinarily unusual case.

6. On June 22, 2014, the case was placed on the docket pursuant to the scheduling order. At some point in time, Bill Padget contacted me indicating that Sam Phillips had left his law firm. Bill asked that the case be continued based upon his recent involvement. I agreed. During our initial conversation, and during several subsequent conversations, the statutory cap of \$300,000 was discussed.
7. The motion for summary judgment came up on the roster on July 28, 2014, and September 9, 2014 and I consented to Plaintiff's request for a continuance on each occasion. A new scheduling order was put into place.
8. On September 10, 2014, Tuomey's discovery responses identified the liability insurance carrier and policy numbers "with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the South Carolina Solicitation of Charitable Funds Act (Section 33-56-180)".
9. Under the second scheduling order, the discovery deadline ended on February 1, 2015.
10. On February 18, 2015, the case was mediated by Richard Hinson. The statutory cap was discussed extensively and Plaintiff's opening demand was the statutory cap of \$300,000. The case was not settled.
11. On Friday August 21, 2015, I reviewed the Answer in preparation for trial and immediately realized that I had failed to assert the statutory cap for charitable entities. I immediately called Plaintiff's counsel and asked for his consent to amend the answer. Bill Padget indicated that he was aware that the defense had not been pled but was not in a position to consent.
12. I immediately thereafter placed a conference call to the trial judge and Bill Padget indicating that I would be moving to amend the answer. The trial judge was advised generally of our respective positions regarding the motion to amend and how it may effect the trial of the case set for August 24, 2015. During this conversation with the trial judge, Bill Padget indicated that he was not aware that the statutory cap of \$300,000 had not been pled until sometime after the mediation held on February 18, 2015.
13. At the time the answer was drafted, I was aware that the charitable immunity statute was an affirmative defense and should have been pled. I have no idea how this error happened. When I reviewed the Answer on August 21, 2015, I immediately understood that a scrivener's error had occurred.
14. At all times during my discussions with Plaintiff's counsel, it has been stated and understood that Tuomey was entitled to the statutory cap for charitable entities. At no time has anyone challenged my statements that the statutory cap would apply. In the absence of such a challenge, I did not have any reason to review the Answer prior to my trial preparations.

15. Upon information and belief, Plaintiff knew the statutory cap of \$300,000 applied to his personal injury claim from the time suit was filed through the time of mediation which occurred on February 18, 2015.

Further your Affiant saith not.



David C. Holler

Sworn to before me this the 21st
day of August, 2015.

Julie S. Mumay (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 6/30/18

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

United States of America, ex. rel.,
Michael K. Drakeford, M.D.,

Plaintiff,

v.

Tuomey d/b/a Tuomey Healthcare
System, Inc.,

Defendant.

Civil Action No. 3:05-2858-MJP

Jury Verdict Form

A. Regarding the Stark Law:

1. We, the jury, find that Tuomey:

X

Violated the Stark Law

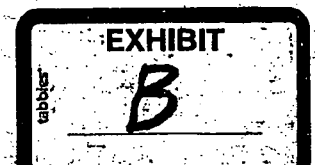
OR

Did not violate the Stark Law

REDACTED

Signed, Foreperson

March 29, 2010



B. Regarding False Claims Act:

1. We, the jury, find that Tuomey:

OR Violated the False Claims Act
 X Did not violate the False Claims Act

2. If Tuomey violated the False Claims Act, the total damages under the False Claims Act, if any:

_____ dollars

(\$ _____).

3. If Tuomey violated the False Claims Act, how many false claims were submitted by Tuomey, if any:

REDACTED

Signed, Foreperson

March 29, 2010

End of Jury Verdict Form

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
 Gunnar Palm, Jr. and Patricia Palm,	)	 Civil Action No. 2014-CP-43-00643
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<u>ORDER</u>
Atlantic Pools and Water Features, Inc.,	)	
	)	
Defendant.	)	
	)	

Hearing Date: January 6, 2016
Plaintiffs' Attorney: Charles A. Krawczyk, Esquire
Defendant's Attorney: Jay T. Thompson, Esquire

This matter is before the Court on the following motions filed by Plaintiffs Gunnar Palm, Jr. and Patricia Palm and by Defendant Atlantic Pools and Water Features, Inc.:

- (1) Plaintiffs' Motion to Amend the Complaint, filed on or around August 29, 2014;
- (2) Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCF, filed on or around September 17, 2014, which incorporated both Plaintiffs' prior Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCF, filed on or around August 29, 2014, and Plaintiffs' prior Motion to Amend the Complaint, filed on or around August 29, 2014; and
- (3) Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike, filed on or around February 23, 2015.

The Court has considered all written materials submitted by the parties and the arguments of counsel presented at the January 6, 2016 hearing. For the reasons set forth below, Plaintiffs' Amended and Renewed Motion for Reconsideration, including the prior incorporated motions, is hereby DENIED. Plaintiffs' Motion to Amend the Complaint is hereby GRANTED only as to the claim for gross negligence and is DENIED as to all other causes of action. Defendant's

Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is hereby DENIED as to the claim for gross negligence and is GRANTED as to all other causes of action. Plaintiffs are granted leave to file a Second Amended Complaint, which may include only a cause of action for gross negligence.

PROCEDURAL HISTORY

This is an alleged construction defect case involving a swimming pool constructed in the summer of 2005 at Plaintiffs' residence in Sumter County, South Carolina. Plaintiffs filed their original Complaint on April 3, 2014, alleging causes of action for breach of contract, negligence, promissory estoppel, breach of express warranty, and breach of implied warranty of workmanlike service. Defendant filed a motion to dismiss the original Complaint on June 2, 2014, and the Court held a hearing on the motion to dismiss on July 29, 2014.

On August 20, 2014, the Court notified the parties by email that the Court had decided to grant Defendant's motion to dismiss the original Complaint. The same email requested that Defendant's counsel submit a proposed order, which was submitted on August 21, 2014.

Before the Court issued a formal order on the motion to dismiss the original Complaint, Plaintiffs had a substitution of legal counsel. On August 29, 2014, Plaintiffs' new counsel filed two motions: (1) a Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP,¹ and (2) a Motion to Amend the Complaint.² The Motion to Amend the Complaint included a proposed First Amended Complaint.

On September 10, 2014, the Court issued a written order dismissing all of Plaintiffs' claims with prejudice under Rule 12(b)(6), SCRCP, and the Statute of Repose, S.C. Code

¹ Through no fault of Plaintiffs' new counsel, the Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP was filed before the Court issued an Order and, therefore, was premature.

² The Motion to Amend the Complaint is one of the three motions currently before the Court in this Order.

Ann. § 15-3-640 ("Statute of Repose"). The Court held that Plaintiffs' claims were time-barred under the Statute of Repose because Plaintiffs waited more than nine years to assert them. The Court's September 10, 2014 Order is hereby expressly incorporated herein by reference.

On or around September 17, 2014, Plaintiffs' counsel filed an Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP.³ The Amended and Renewed Motion was based on the same grounds as the prior Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP and the prior Motion to Amend the Complaint, and it incorporated both prior motions, including the proposed First Amended Complaint.

On January 4, 2015, after consideration of all materials submitted to the Court, including the proposed First Amended Complaint, the Court informed counsel for all parties in an email from the undersigned circuit judge's law clerk that:

Judge Cothran has decided to allow an Amended Complaint to include gross negligence. However, the previous order is still in effect to the extent that summary judgment still applies to all other causes of action presented by the plaintiff in their earlier pleadings.

See Exhibit A.

On or around January 30, 2015, Plaintiffs' counsel filed a First Amended Complaint identical to the proposed First Amended Complaint that had been submitted to the Court and considered prior to the January 4, 2015 email. It included causes of action for negligence, gross negligence, breach of contract, negligent supervision, negligence *per se*, breach of express warranty, implied warranty of workmanlike service, unfair and deceptive trade practices and negligent misrepresentation.

³ The Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP is the second of the three motions currently before the Court in this Order.

On February 23, 2015, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike.⁴

ANALYSIS

1. Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRPC

Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRPC asks the Court to reconsider and amend the September 10, 2014 Order, which dismissed with prejudice all causes of action in Plaintiffs' original Complaint under Rule 12(b)(6), SCRPC, and the Statute of Repose, S.C. Code Ann. § 15-3-640.

Plaintiffs' claims are barred by the eight-year Statute of Repose set forth in S.C. Code Ann. § 15-3-640, which provides:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement.

Id. The eight-year provision of § 15-3-640 applies to all construction claims where substantial completion occurred after July 1, 2005.

All legal authorities and arguments that Plaintiffs have asserted in support of this motion, both in their written materials supporting the motion and at the January 6, 2016 hearing, were briefed, argued, considered by the Court, and ruled upon more than a year ago, in the September 10, 2014 Order. This includes, but is not limited to, Plaintiffs' arguments regarding the application of the Statute of Repose, substantial completion of the project, and equitable tolling. Specifically, Plaintiffs have made no allegation that substantial completion of the swimming pool occurred prior to July 1, 2005, when the eight-year Statute of Repose took effect. Plaintiffs

⁴ The Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is the third of the three motions currently before the Court in this Order.

did not assert any new legal theories or arguments and did not identify any previously unconsidered statute, case law, or other legal precedent in support of their motion for reconsideration.

Rather, the primary argument asserted in Plaintiffs' written materials and at the January 6, 2016 hearing was that Plaintiffs' prior legal counsel did a poor job in the pleadings, briefing, and argument of Plaintiffs' claims and, therefore, that Plaintiffs should be allowed a second chance rather than being penalized for the shortcomings of their prior counsel. *See, e.g.*, Pls.' Return to Def.'s Opp. to Pls.' Mot. to Reconsider and Mot. to Amend p. 3 ¶ 3 (9/8/2014) ("Plaintiffs' original Complaint ostensibly failed, not because of legal or factual infirmity, but because it was poorly pled. Allegations establishing equitable estoppels and tolling, gross negligence and liability for contractor negligence beyond the terms of the contract were missing or poorly plead."). However, Plaintiffs cited no legal authority for this premise, and the Court is not aware of any legal authority or any equitable principle supporting the idea that plaintiffs in a civil suit should be entitled to a second bite at the apple simply because they are not satisfied with the performance of their own legal counsel.

Therefore, because Plaintiffs have asserted no legal basis for reconsideration of the dismissal of the causes of action set forth in the original Complaint, Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP is DENIED.

2. Plaintiffs' Motion to Amend the Complaint

a. Motion Denied as to All Causes of Action Previously Asserted in Original Complaint

The Court's September 10, 2014 Order dismissed with prejudice Plaintiffs' causes of action for breach of contract, negligence, promissory estoppel, breach of express warranty, and

breach of implied warranty of workmanlike service under Rule 12(b)(6), SCRCP, and the Statute of Repose, S.C. Code Ann. § 15-3-640.

Plaintiffs' Motion to Amend the Complaint seeks to re-assert many of the same causes of action that were previously dismissed with prejudice, specifically breach of contract, negligence, negligence supervision, negligence *per se*, negligent misrepresentation,⁵ breach of express warranty, and breach of implied warranty of workmanlike service. That is, the motion asks the Court to reverse the September 10, 2014 Order that dismissed these causes of action with prejudice. However, as set forth above, Plaintiffs' request to reconsider the September 10, 2014 Order under Rule 59 is denied, so these causes of action remain dismissed with prejudice under the September 10, 2014 Order.

b. Motion Denied as to Proposed Claim Under South Carolina Unfair Trade Practices Act

Plaintiffs' Motion to Amend the Complaint also seeks to include a claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 *et seq.*, based on the factual allegations set forth in the proposed First Amended Complaint.

For the reasons set forth in the September 10, 2014 Order, the proposed claim for unfair and deceptive trade practices, if allowed, would be subject to dismissal under the Statute of Repose. The eight-year Statute of Repose applies to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property where substantial completion occurred after July 1, 2005. There is no allegation that substantial completion of the pool occurred before July 1, 2005, so the eight-year provision applies to Plaintiffs' claims. The facts alleged and the inferences reasonably deducible from the pleadings show that Plaintiffs' claims

⁵ Negligent supervision, negligence *per se*, and negligent misrepresentation are variations of the previously dismissed negligence claim for purposes of the current motions and are subject to the same principles under the Statute of Repose.

were first asserted more than eight years after substantial completion of the pool. There is no allegation of facts that would support a claim for equitable tolling.

Therefore, the Court finds that it would be futile to allow the proposed claim for unfair and deceptive trade practices, and the Motion to Amend the Complaint is denied as to this cause of action. *See Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 482, 191 S.E. 337, 338 (1937) (affirming denial of leave to amend complaint because claims in proposed amended complaint would be barred by statute of limitations).

c. Motion Granted as to Proposed Claim for Gross Negligence

Plaintiffs' Motion to Amend the Complaint also seeks to include a claim for gross negligence based on the factual allegations set forth in the proposed First Amended Complaint. In support of the gross negligence claim, Plaintiffs cite the statutory exception of S.C. Code Ann. § 15-3-670(A), which provides that the Statute of Repose is:

not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

The Court agrees with Plaintiffs' argument regarding the application of this statute. Under § 15-3-670(A), the Court finds that a well-pled claim for gross negligence survives dismissal under the Statute of Repose and a Rule 12(b)(6) motion to dismiss. Therefore, Plaintiffs are hereby granted leave to file a Second Amended Complaint that includes only a claim for gross negligence.

3. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike

Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike asks the Court to dismiss the First Amended Complaint that Plaintiffs filed on or around January 30, 2015, on the basis that Plaintiffs' claims have already been briefed, argued, considered by the court, and ruled upon in the September 10, 2014 Order.

Under Rule 12(b)(6), the Court must dismiss a plaintiff's claims when the pleadings fail to state facts sufficient to constitute a cause of action as a matter of law. *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004); *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (citations omitted) (holding the court must dismiss a plaintiff's complaint under Rule 12(b)(6) if the facts alleged and the inferences reasonably deducible from the pleadings would not entitle a party to relief under any theory of the case).

As set forth above, the Court has previously considered Plaintiffs' legal authorities and arguments and concluded that Plaintiffs' claims are barred by the Statute of Repose, with the exception of the gross negligence claim. The eight-year Statute of Repose applies to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property where substantial completion occurred after July 1, 2005. There is no allegation that substantial completion of the pool occurred before July 1, 2005, so the eight-year provision applies to Plaintiffs' claims. The facts alleged and the inferences reasonably deducible from the pleadings show that Plaintiffs' claims were first asserted more than eight years after substantial completion of the pool. There is no allegation of facts that would support a claim for equitable tolling.

Therefore, Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is as to all claims in the First Amended Complaint other than gross negligence. Defendant's motion is denied as to the gross negligence claim.

CONCLUSION

For the forgoing reasons, Plaintiffs' Amended and Renewed Motion for Reconsideration, including the prior incorporated motion, is hereby DENIED. Plaintiffs' Motion to Amend the Complaint is hereby GRANTED only as to the claim for gross negligence and is DENIED as to all other causes of action. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is hereby DENIED as to the claim for gross negligence and is GRANTED as to all other causes of action. Plaintiffs are granted leave to file a Second Amended Complaint, which may include only a cause of action for gross negligence.

IT IS SO ORDERED.

The Honorable R. Ferrell Cothran, Jr.
South Carolina Circuit Judge

Manning, South Carolina

_____, 2016



Sumter Common Pleas

Case Caption: Gunnar Palm Jr , plaintiff, et al VS Atlantic Pools And Water Features, Inc.

Case Number: 2014CP4300643

Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

Electronically signed on 2016-04-12 13:22:53 page 10 of 10

ELECTRONICALLY FILED - 2016 Apr 12 1:30 PM - SUMTER - COMMON PLEAS - CASE#2014CP4300643

STATE OF SOUTH CAROLINA,
COUNTY OF SUMTER.

)
) IN THE COURT OF COMMON PLEAS
) DOCKET NO. 2012-CP-43-2030

Win Myat,

Plaintiff,

-vs-

Tuomey,

Defendant.

)
)
)
)
) **DEFENDANT'S ANSWERS**
) **TO INTERROGATORIES**
)
)
)
)

TO: WILLIAM R. PADGET, ESQUIRE, ATTORNEY FOR PLAINTIFF:

Defendant, answering the Interrogatories of the Plaintiff, would respectfully show:

1. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER:

Coverage for Tuomey and its employees is provided by Continental Insurance Company through policy numbers HAZ 2047957237-9 and HMU 2066246439-7 with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the South Carolina Solicitation of Charitable Funds Act (Section 33-56-180, S.C. Code Ann.)

2. Set forth the names and addresses of all parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

Carrie Burgess
855 Orlando Circle
Sumter, SC 29154
(No longer employed by Tuomey)

Marilyn Wilson, CNA

Laurie Lingefelt
745 Breezy Bay
Sumter, SC 29150

Manager of 3 South at time of accident - she was not present at time of fall

No longer employed by Tuomey

Ms. Lingefelt completed an occurrence report for which Defendant claims peer review privilege.

Upon information and belief, none of these current or former employees of Tuomey witnessed the fall, but may have been present on the floor at the time of the fall.

3. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

See answer to #2 above.

4. Set forth a list of any and all nurses, doctors, physicians's assistants, nurses aids, technicians, guards, janitorial staff, or other personnel-employees of Defendant that were scheduled and working at section 3 South of Tuomey Hospital at 129 N. Washington Street in Sumter, South Carolina on July 6, 2011. For each such person, list their name, address, telephone number, whether they are currently employed by Defendant, and the shift and times they were in section 3 South of Tuomey Hospital on July 6, 2011.

ANSWER:

As Dr. Myat fell around 5:30 a.m. on July 6, 2013, the staff that would have been working at that time would have been assigned on the July 5, 2011, 7 p.m. shift. Listed below are all 3 South staff that was on duty at the time of Dr. Myat's fall:

Nursing on 3 South:

Carrie Burgess, RN - 7p-7a - now retired

Jackie Colclough, RN - 7p-7a - no longer working at Tuomey

Tanisha Holloman, RN - 7p-7a - no long working at Tuomey

William Whitehouse, RN 7p-7a

Barbara Jackson, CNA 7p-7a

Marilyn Wilson, CNA - 7p-7a

Yiesha Wells, student tech - 7p-7a (now RN on 5 South)

Chanita Nelson, CT - 0500

Housekeeping:

Janet Awosanya - 3-11 - Supervisor

Sandra Bowman - 11-7 - worked wherever needed

Eddie Burgess - 6:30-3:30 a.m. - floors - waxing and buffing

Joseph Conyers - 10:30-7:15 a.m. - floors - waxing and buffing

Anna Fernandez - 3-11 - worked wherever needed - no longer working at Tuomey

Johnny Martin - 3-11 - floors and trash

Security: no specific location assignment - worked all over the campus

James Compton - 5:30 pm-6:00 am - no longer working at Tuomey

Robert Dial - 6p-6a

Paul Foreman - 6p-6a - no longer working at Tuomey

Frances Gibson - 5:30p-6a

Wilbur Lowder - 5:30p-6a - no longer working at Tuomey

Kevin Robinson - 5:30pm-2am

5. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendant that relate to the claim or defense in the case.

ANSWER:

An occurrence report was prepared for which Defendant claims peer review privilege. Defendant reserves the right to supplement this response prior to trial.

6. Set forth and describe in detail any and all policies and procedures for the janitorial staff, nursing staff, or any other personnel/employee of Tuomey Hospital as it relates to their duties to observe and maintain the hospital floor for obstructions and/or other hazards.

ANSWER:

EVS Quality Assurance Program: Corridors. No nursing policy on floor maintenance.

7. Set forth a list of photographs, plats, or sketches which describe in detail the light fixtures present and those that were turned on in the nurses' station at the time of the injury.

ANSWER:

Lighting plan for 3 South.

8. Set forth and describe in detail any and all policies and procedures for Tuomey Hospital lighting, specifically the lighting in the nurses' stations and hallways. Include any and all schedules for daytime vs. night-time lighting.

ANSWER:

There is no policy for lighting in the hallways day or night.

9. Set forth and describe in detail any and all policies and procedures for Tuomey Hospital nurses, physician's assistants, technicians, and any other employee as it relates to filling and delivering pitchers of ice water to the patients during each Tuomey Hospital shift.

ANSWER:

There is no specific policy for filling water pitchers. Patient Care Manual policies 5.1 - Morning Care and 5.2 Evening Care.

10. Set forth and describe in detail the visiting hours and visitors' policy for Tuomey Hospital.

ANSWER:

Administration Policy #17.00 - Visitation Regulations.

11. Set forth and describe in detail any and all warning signs, displays, placards, etc. located in section 3 South of Tuomey Hospital nursing stations, hallways, and janitor closets on or before July 6, 2011. Please include the location of each sign and its contents.

ANSWER:

There is no signage in the nursing station related to the floors. There is a yellow "Caution Wet Floor" sign that is available to the staff in the Housekeeping closet if needed.

12. Set forth and describe in detail any and all warning signs, displays, placards, etc., located in section 3 South of Tuomey Hospital nursing stations, hallways, and janitor closets on or after July 7, 2011. Please include the location of each sign and its contents.

ANSWER:

There is no signage in the nursing station related to the floors. There is a yellow "Caution Wet Floor" sign that is available to the staff in the Housekeeping closet if needed.

13. List the names and addresses of any expert witnesses whom the Defendant proposes to use as a witness at the trial of the case.

ANSWER:

None at this time. Defendant reserves the right to call any and all medical providers who have rendered treatment to the plaintiff either before or after the date of this slip and fall accident.

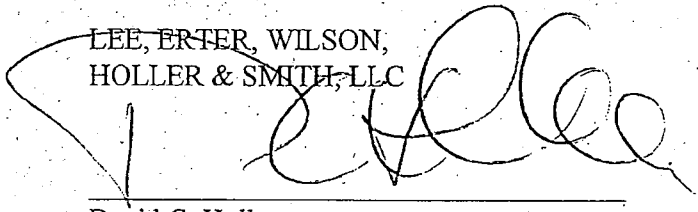
14. For each expert witness whom you propose to use as a witness at the trial of the case, state:

- a. The qualifications of the proposed expert;
- b. the subject matter on which the expert is expected to testify;
- c. the substance of the facts and/or opinions to which the expert is expected to testify;
- d. a summary of the grounds for each opinion; and
- e. identify any documents or reports the expert has prepared for this case.

ANSWER: None at this time.

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, LLC



David C. Holler
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
803-778-2471
davidholler@leeandmoise.com
ATTORNEY FOR DEFENDANT

September 16, 2014.

STATE OF SOUTH CAROLINA,

COUNTY OF SUMTER.

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-43-2030

Win Myat,

Plaintiff,

-vs-

Tuomey,

Defendant.

**DEFENDANT'S SUPPLEMENTAL
ANSWERS TO INTERROGATORIES**

TO: WILLIAM R. PADGET, ESQUIRE, ATTORNEY FOR PLAINTIFF:

Defendant, supplementing its answers to Plaintiff's Interrogatories, would respectfully show:

2. Set forth the names and addresses of all parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Carrie Burgess
855 Orlando Circle
Sumter, SC 29154
(No longer employed by Tuomey)

Marilyn Wilson, CNA
19 Dollard Drive
Sumter, SC 29150
(No longer employed by Tuomey)

Laurie Lingefelt
745 Breezy Bay
Sumter, SC 29150
Manager of 3 South at time of accident - she was not present at time of fall
No longer employed by Tuomey
Ms. Lingefelt completed an occurrence report for which Defendant claims peer review privilege.

Upon information and belief, none of these former employees of Tuomey witnessed the fall, but may have been present on the floor at the time of the fall.

Mary Yates, Safety Officer
Tuomey Regional Medical Center

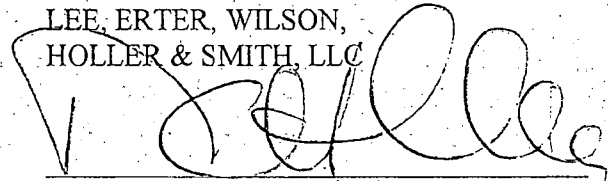
Mary Yates completed a Fall Investigation Report, a copy of which is attached.

Correctional Officer Kathy Sapp
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Officer Sapp was identified in the Fall Investigation Report completed by Tuomey Safety Officer Mary Yates as a witness to the fall.

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, LLC



David C. Holler
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
803-778-2471
davidholler@leeandmoise.com
ATTORNEY FOR DEFENDANT

October 2, 2014

Memo

To: Pete Flanagan, AD
From: Mary Yates, Safety
Date: July 7, 2011
Re: 3 South - Fall Investigation

Fall Injury:**Finding:**

On Wednesday morning July 6, 2011 at approximately 5:30am, as Dr. Myat attempted to leave the Nursing Station he slipped on a wet floor surface and fractured his knee which resulted in him having to undergo surgery to repair the damaged knee.

On Thursday morning I questioned several on the unit and they stated that they were busy and did not see the actual incident and could only attest to the fact that Dr. Myat did incur an injury from a fall.

Upon further investigation, an eye witness (Correctional Officer Kathy Sapp) stated that Dr. Myat fell as a result of a small amount of liquid on the floor. She stated that she was standing outside of an inmate's room looking toward the Nursing Station when watched Dr. Myat slipped on what appeared to be some type of liquid (water) as he was about to leave the Nurses Station. She stated that an employee used a towel to clean up the spill.

Recommendations:

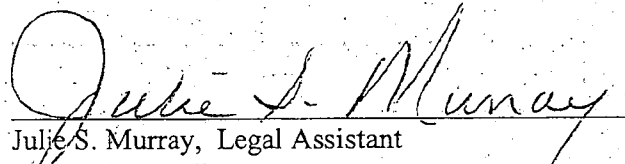
1. Ensure spills are cleaned up immediately to avoid injury...do not wait for EVS staff to respond.
2. Request that Don Hale performs a wet floor testing on some of the newly installed flooring to get an idea of the slip resistance scale.
3. Ensure the Computer / workstation is clean – no food or drink.

Mary Yates, CHSP
Safety Officer

CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing *Supplemental Answers to Plaintiff's Interrogatories* was deposited in the United States mail, with first class postage affixed thereto, addressed as follows:

William R. Padget, Esquire
Finkel Law Firm, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, SC 29202


Julie S. Murray, Legal Assistant
to David C. Holler

October 2, 2014.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
2012-CP-43-2030

Dr. Win Myat,)
Plaintiff,)
vs.)
Tuomey Healthcare System,) DEPOSITION OF
Defendant,) DR. WIN MYAT

Deposition of DR. WIN MYAT, taken by
Doris Tompkins Brown, Certified Verbatim Reporter
and Notary Public in and for the State of South
Carolina, commencing at 10:07 A.M. on April 9,
2014, at the offices of Lee, Erter, Wilson, Holler
and Smith, 126 North Main Street, Sumter, South
Carolina.

APPEARANCES

ON BEHALF OF PLAINTIFF: Robert B. (Sam) Phillips
Finkel Law Firm, LLC
Post Office Box 1799
Columbia, South Carolina

FOR THE DEFENDANT: David C. Holler
Lee, Erter, Wilson,
Holler and Smith
Post Office Box 580
Sumter, South Carolina

Doris Tompkins Brown

COPY

Certified Verbatim Reporter
Post Office Box 853
Sumter, South Carolina 29151

COPY

(803) 499-7434

(Also Present: Macaulay W. Smith and Debbie Mixon, Tuomey
Healthcare System and Sandra Axson, PHTS)

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* * * * *

Denial Letter with physical requirements	Def. Ex. 1

(COURT REPORTER'S NOTE: --- INDICATES INTERRUPTION,
INCOMPLETE PHRASE, TRAILING OFF, INCOMPLETE SENTENCE)

1 The deposition of Dr. Win Myat is being taken pursuant
2 to Notice and in accordance with the South Carolina Rules
3 of Civil Procedure and Amendments as adopted by the Supreme
4 Court which shall control the taking of said deposition and
5 its use thereof.

6 Counsel, with the specific consent of the witness,
7 does not waive the reading and signing of the deposition
8 prior to the time it is filed with the Court.

9 (Dr. Win Myat, having been duly sworn, testifies as
10 follows:)

11 EXAMINATION BY MR. HOLLER:

12 Q. Dr. Myat, my name is David Holler. I introduced
13 myself earlier.

14 A. Yes, sir.

15 Q. I'm here to ask you some questions about a lawsuit you
16 brought against Tuomey; okay?

17 A. Okay.

18 Q. English is your second language; correct?

19 A. That's correct.

20 Q. All right. Do you feel comfortable in the English
21 language?

22 A. Yes, sir.

23 Q. Okay. It's very important if I ask you a word that
24 you don't understand, will you let me know you do not
25 understand?

**DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM**

1 A. I certainly will.

2 Q. Okay. Can I assume that if you respond to my
3 questions, that you understood what I meant when I
4 asked it?

5 A. Yes, sir.

6 Q. Okay. Anybody in the room will tell you after ten
7 minutes with me, I don't ask big worded questions.
8 I'm not that smart, but I do want to try to move
9 through some stuff.

10 A. Yes, sir.

11 Q. A lot of it's going to be very simple and routine for
12 you, but it's information that's important; okay?

13 A. Okay.

14 Q. Have you ever given a deposition before?

15 A. Once.

16 Q. And that was for -- regarding the care of a patient?

17 A. Yes, sir, for Tuomey Hospital I give it for.

18 Q. It had to do with one of your patient's care?

19 A. One of my patients, yeah.

20 Q. Okay. This is a little different, but the rules are --
21 are similar. First, if you and I talk at the same
22 time, this woman is going to get mad at somebody,
23 probably me instead of you; okay?

24 A. Okay.

25 Q. So, if you'll be patient with me and let me finish the

1 question before you answer.

2 A. Yes, sir.

3 Q. Okay. Also, if you'll answer with a "yes" or a "no"
4 rather than a nod of the head or a hand motion.

5 A. Yes.

6 Q. Okay. Also, if you need clarification of a question,
7 you need to have it rephrased or explained better,
8 please ask me to do that rather than anybody else in
9 the room; okay?

10 A. I will.

11 Q. All right. Under our Rules of Procedure, any
12 communication that you have with your attorney is
13 privileged; it's protected. Nobody can ask you about
14 it; all right?

15 A. Yes, sir.

16 Q. The only exception is from the time you start your
17 deposition to the time that you end your deposition;
18 okay?

19 A. Yes, sir.

20 Q. If you have communications with your attorney during
21 that time period, you -- which you can have -- they're
22 just not privileged communications. I'm telling you
23 now if you would like to take a break and speak with
24 Sam and discuss in private whatever you would like to
25 discuss with him, you have my permission to do so;

**DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM**

1 okay?

2 A. Okay, I don't need to ask ---

3 Q. That's fine. That's fine.

4 A. Thank you.

5 Q. We're not going to be here long, but I want you to be
6 comfortable, and that includes speaking with your
7 attorney.

8 A. Okay.

9 Q. If you need to go to a restroom or step outside and
10 get some fresh air or move around, you let me know;
11 okay?

12 A. I will.

13 Q. All right. What is your full name?

14 A. Win Myat.

15 Q. What is your date of birth?

16 A. 2/2/72.

17 Q. And where are you from?

18 A. I'm from -- I was born in Burma, B-U-R-M-A, Burma.

19 Q. Okay. And you -- I've spent most of my life in South
20 Carolina, almost within a rock's throw.

21 A. Okay.

22 Q. Okay. So, help me a little bit. Tell me -- tell me
23 where you've grown up.

24 A. Oh, I -- where I grow up?

25 Q. Just -- you were born in Burma?

**DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM**

1 A. Yes, sir. I came to America when I was eighteen (18).

2 Q. Okay. Super. And where were you before, Burma?

3 A. Burma.

4 Q. Okay. And did you finish school in Burma?

5 A. I finished high school in Burma.

6 Q. Okay. Super. And what brought you to the United
7 States?

8 A. I won a Green Card lottery.

9 Q. Okay. Is that based upon academics performance?

10 A. No, sir, it's based upon just pure -- you put in the
11 lottery, you send your name, address, date of birth to
12 a P.O. Box in Washington, D.C. Other third world
13 countries, every year, the United States Government
14 hands out about -- a certain number of Green Cards,
15 and then the -- the machine randomly picks it, and my
16 name was one of them.

17 Q. Wow. So, that's almost like the Education Lottery in
18 South Carolina? I don't know what the odds would be
19 for the -- the Burma lottery, but ---

20 A. A lot of people send in their names.

21 Q. Good.

22 MR. PHILLIPS: It's more like the
23 Powerball.

24 Q. Powerball. Congratulations.

25 A. Thank you.

1 Q. And where did you come -- what does that entail, just
2 getting a Green Card by itself?

3 A. That's -- that's about it. It -- you -- you come --
4 once you have won, the U.S. Embassy will send you a
5 letter stating that you have won, and you can legally
6 go to America and live there permanently.

7 Q. But you still -- you still have to ---

8 A. You have to have -- well, that's about it. You have
9 to have your own sponsor; you have to -- everything
10 else is up to you.

11 Q. Okay. And you find somebody, either our family or
12 someone ---

13 A. I found a friend.

14 Q. Okay.

15 A. And I came over.

16 Q. Okay. Is that -- was that a U.S. citizen who was your
17 friend?

18 A. Yes, sir. My -- the person who sponsored me was a
19 friend of the family.

20 Q. Super. Who -- who is that person?

21 A. He's a physician in Tampa, Florida. Now, he -- he
22 passed already. He passed away.

23 Q. Sorry to hear that. So, where did you come when you
24 came to the United States first?

25 A. Tampa, Florida.

1 Q. And you stayed with your sponsor?

2 A. Just three, four days. Three, four days, and then we
3 have a Burmese religious monastery, like a church
4 where you can just go get shelter since I don't have
5 family/family per se, blood family, relatives.

6 Q. Right.

7 A. So, I somehow got a-hold of a Buddhist monastery and
8 I went there.

9 Q. Good.

10 A. And I stayed there for two or three weeks.

11 Q. And then from there, where?

12 A. Then a fellow family who lives in Gainesville said,
13 "Why don't you come over to Gainesville," and he --
14 he's a closer family friend; so, the Buddhist monk
15 told me, "Do you want to go?" I said, "Well, you
16 know, yeah, sure." So, I took the Greyhound bus and
17 went to Gainesville.

18 Q. Good. So, you have -- is this a friend that you knew
19 from Burma or just ---

20 A. My parents' friend.

21 Q. Parents' friend. Good.

22 A. From college.

23 Q. So, you've got a few dollars in your pocket and now
24 you're at a friend's house?

25 A. Yes.

1 Q. What did you do from there? What was the game plan?

2 A. I was there. I worked at Burger King and I worked at
3 Pick & Save at that time, like, Wal-Mart, Pick & Save
4 in Florida. And I was -- then I was staying at a --
5 after a couple weeks, I got a place I share with the
6 University of Florida, Gainesville college students.
7 And then I was working three jobs.

8 Q. Were you going to school?

9 A. No, I was just -- I, you know, I shared -- I shared a
10 room with them. And after that, the -- I was working
11 three jobs. At the end of the month, I don't really
12 -- I was making Three Dollars and Eighty Cents
13 (\$3.80). At the end of the month, after working three
14 jobs, I don't really have any money left; so, I asked
15 my family friend, "What do you -- I mean, I be working
16 a lot and I can't save any money. My goal is, I want
17 to go to medical school here. I just finished high
18 school back home." So, he said, "If you really want
19 to make more money, you've got to go to New York."
20 So, I took the Greyhound bus, and I went to New York.

21 Q. Not knowing anybody, just said -- let's go?

22 A. I went to another Buddhist monastery in New York.

23 Q. Super. And then from there, you were able to ---

24 A. Well, I -- I worked many, many jobs. And finally, I
25 went to community college and then college.

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

- 1 Q. Which community college?
- 2 A. I went to -- I went to LaGuardia Community College.
- 3 Q. And that was undergraduate studies?
- 4 A. I got my Associate Degree from there, first.
- 5 Q. Okay. And then from there to where?
- 6 A. Then I went to a state university in New York, Stony
- 7 Brook, where I got my Bachelor in Biochemistry.
- 8 Q. Super. And then medical school?
- 9 A. And then I went to medical school in Caribbean.
- 10 Q. And you graduated from medical school when?
- 11 A. 2001.
- 12 Q. Pretty much put your way through school, everything
- 13 after high school?
- 14 A. Yes, sir.
- 15 Q. Okay. Super. And the name of your medical school?
- 16 A. It's called Ross University.
- 17 Q. You said that was 2001?
- 18 A. Yes, sir. From '98 to 2001.
- 19 Q. And from -- after graduating from Ross University with
- 20 a Medical Degree, where did you go?
- 21 A. Then I would have to do a residency, and I did it at
- 22 New York Methodist Hospital.
- 23 Q. Was your match -- and again, I'm -- I apologize, Dr.
- 24 Myat, I ask a lot of questions because I'm dumb.
- 25 A. No, no, sir.

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 Q. I know a little bit.

2 A. It is ---

3 Q. Your match was infectious disease or do you go do
4 internal medicine first?

5 A. No. Internal medicine, you've got to match through
6 that first, but being a graduate from Dominica, they
7 could pick you as a pre-match; they could offer you a
8 pre-match position and -- if they like you.

9 Q. That's -- that's for residency or ---

10 A. Residency.

11 Q. Okay.

12 A. Residency. So, they offered me a pre-match position.
13 That way, I don't have to go through the match
14 process, which cost a lot more money; you've got to
15 travel all over the country.

16 Q. Got you. And then you did your residency where?
17 Ross?

18 A. No, New York Methodist Hospital, internal medicine,
19 from 2002 until 2005. And I -- that's the internal
20 medicine residency.

21 Q. When you -- when you started internal medicine, did
22 you know infectious disease is where you would end up
23 or was that just kind of ---

24 A. When you do the training in internal medicine, you
25 have to go through a lot of medical subspecialty.---

1 Q. One of those, of course, is ---

2 A. One of those ---

3 Q. -- infectious disease?

4 A. -- is infectious disease, and I happened to like it a
5 lot.

6 Q. Okay. But, it was your chosen?

7 A. Yes, sir.

8 Q. The area you like the most?

9 A. Yes, sir.

10 Q. Okay. And is there -- is there a special residency or
11 training program for ---

12 A. It's a fellowship.

13 Q. Fellowship?

14 A. Yes, sir.

15 Q. And where was that?

16 A. State university of New York, Syracuse. Upstate.

17 Q. Now, Burma where you grew up, is that -- is that cold
18 or hot or ---

19 A. It's very tropical, sir.

20 Q. Very tropical. So, New York's quite a contrast in
21 temperatures?

22 A. That's correct.

23 Q. All right. How long is the fellowship for ---

24 A. Two years. From 2005 until 2007.

25 Q. Okay. If I was seven years old and you were going to

1 explain to me what an infectious disease doctor does,
2 how would you explain to me what you do when you go to
3 work?

4 A. An infectious disease physician deals with a very
5 broad spectrum of infections including from bacterial,
6 viral, fungus to esoteric diseases, like,
7 tuberculosis, malaria, Chagas Disease and things like
8 that.

9 Q. Okay.

10 A. And nowadays in America is mostly bacteria infections
11 that is very common.

12 Q. All right. And do you -- how do you assess, I mean,
13 do you spend your day with patients? Do you spend
14 your day looking at lab results; do you do a
15 combination? If your seven year old said, -- Daddy,
16 what do you do all day long?

17 A. I have to see the patient. I have to -- you have to
18 first look at the -- mostly, it's thinking; you're a
19 thinker. You look at the data, you look at the
20 patient, and then you make decisions. But they are
21 including laboratory imaging studies.

22 Q. And how many -- I'm just trying to get -- my father
23 was an orthopaedist, you know, broken bones. You look
24 at a film and you see a bone that's got a crack in it.

25 A. Yes.

1 Q. Easy stuff.

2 A. Yes.

3 Q. Infectious disease is a little bit more complicated,
4 isn't it?

5 A. Well, it's a different field.

6 Q. I'm just trying to get a sense. Do you see a bunch of
7 patients a day? I mean, do you -- do you -- like, a
8 general practitioner may see twenty-five (25) people
9 in a day.

10 A. It -- it -- it depends. My job, I -- I'm self-
11 employed. I was self-employed. And I usually got
12 referrals from other physicians who either needed my
13 services or someone that trusts my judgment.

14 Q. Okay. So, a patient -- are all of your patients in
15 the hospital?

16 A. Infectious disease physicians, a majority of our cases
17 are in the hospital, but we do a little bit of
18 outpatient HIV. HIV is part of infectious diseases ---

19 Q. Okay. So, chronic ---

20 A. -- spectrum. Yes.

21 Q. -- people who have chronic long-term infection issues
22 ---

23 A. Yes, sir.

24 Q. -- may be seen in an outpatient practice?

25 A. Yes, sir.

1 Q. But with the exception of -- and tuberculosis or TB

2 ---

3 A. It's inpatient, usually.

4 Q. Okay.

5 A. Yes, sir. I mean, acute tuberculosis which is
6 certainly a public health risk, they need to be taken
7 and get treated for a certain time.

8 Q. Because they are infectious?

9 A. Yes, sir. Once they're deemed noninfectious, then we
10 send them out.

11 Q. Okay. So, the majority of the patients that you would
12 see would already be in a hospital setting?

13 A. Yes, sir.

14 Q. And they would already have a primary attending
15 physician?

16 A. That's correct.

17 Q. Either a hospitalist or ---

18 A. Other physicians.

19 Q. Other physicians?

20 A. Orthopaedists or what-have you.

21 Q. So, you most commonly would be called in when they
22 were already with a physician who was primarily in
23 charge?

24 A. Yes, sir.

25 Q. Okay.

1 A. As a matter of fact, I have never admitted anybody
2 under my name.

3 Q. Before July 6th, 2011, did you work exclusively at
4 Tuomey Hospital?

5 A. Before 2007?

6 Q. I'm sorry. Before July 6th, 2011, the date of this
7 fall.

8 A. Oh, when I finished my fellowship, I went to Florence.
9 That was my very first practice I joined.

10 Q. And what was the name of that practice?

11 A. Carolina Healthcare. That's a group practice.

12 Q. And that group practice encompasses what types of
13 specialists?

14 A. They have podiatrists. They have endocrinologists.
15 Rheumatologists. Hematologists. And infectious
16 disease.

17 Q. Okay. A broad spectrum of ---

18 A. Yes.

19 Q. Okay. And how long did you work there?

20 A. I worked there from July -- I finished residency in
21 June. I started working on -- I started working there
22 in July until March of 2008. It's about six -- nine
23 months. Nine months.

24 Q. And then from Carolina Healthcare, you came to Tuomey?

25 A. And then I came to Tuomey.

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1 Q. When you say Tuomey, you're private practice, but you
2 would have relocated your practice to Sumter?

3 A. I was in private practice. Well, I was private
4 practice but group private practice.

5 Q. Okay. In Florence?

6 A. Yes, sir. I want to do my own.

7 Q. Okay. And when you were with Carolina Healthcare,
8 were you consulting patients in both hospitals ---

9 A. Yes, sir.

10 Q. -- in Florence?

11 A. Yes, sir.

12 Q. And that's -- let me -- and I know you -- you know the
13 answer before I finish the question. Let me finish
14 just for her sake.

15 A. Yes.

16 Q. You were -- you were treating patients who were both
17 at Carolinas Hospital as well as McLeod?

18 A. Yes, sir.

19 Q. Okay. And when you left, you still had privileges
20 with those hospitals?

21 A. Yes, sir, I -- I didn't have -- this is voluntary. I
22 told them I want to have my own private practice ---

23 Q. Okay.

24 A. -- rather than working with a group.

25 Q. And that -- that prompted you to come to Sumter?

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1 A. That's correct.

2 Q. Okay. What is the name of your -- what was the name
3 of your private practice?

4 A. It's Palmetto Infectious Diseases.

5 Q. Did you have an office?

6 A. I use my home as a home office.

7 Q. Where did you see outpatient patients?

8 A. I rarely see outpatient infections. Once in a while.

9 Very -- a patient may be really, really -- well, every

10 patient that may have a very difficult time finding a

11 physician and I may -- I make exceptions and I see

12 them at my HIV clinic for non-HIV infections.

13 Q. Okay. Where is your HIV clinic?

14 A. Sumter Family Health Center. I was an employee there.

15 Q. In other words, you -- you assisted the Sumter Family

16 Health Clinic in their HIV clinic?

17 A. That's correct. I run the clinic.

18 Q. And did you have a Contract with them?

19 A. That's correct.

20 Q. And that was just a component of what your private
21 practice was?

22 A. Well, I was their employee; so, I got a 1040.

23 Q. Okay. And for the rest of your patients, how would
24 you bill for your professional services?

25 A. I use a billing service from Columbia.

1 Q. Do you remember the name of the billing service?

2 A. Yes, sir. Resource One Medical Billing, in Columbia.

3 Q. Did Resource One Medical Billing do your billing for
4 you up until the time that you ---

5 A. That's correct.

6 Q. -- ended your practice?

7 A. Yes.

8 Q. Were there any -- for your private practice, not for
9 the Sumter Family Health Clinic, but did you have any
10 other employees, part-time or full-time, that helped
11 you?

12 A. No, sir.

13 Q. It was just you?

14 A. Yes.

15 Q. And you would give the description of your
16 professional services to Resource One and they would
17 bill it for you?

18 A. That's correct.

19 Q. And they handled collections as well?

20 A. Yes, sir.

21 Q. Okay.

22 A. They just -- they collect all that -- all the --
23 whatever the reimbursements and so on and so forth,
24 they deposited it in my checking account.

25 Q. Okay. Who did your taxes? Or your accounting I

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1 should say.

2 A. MacEwen. Wilson MacEwen here.

3 Q. Wilson MacEwen?

4 A. Yes, sir. At least for the past four years, five
5 years. Four years if I remember correctly.

6 Q. Has anybody else helped you with your accounting since
7 you've been in Sumter other than Wilson MacEwen?

8 A. When I -- when I was in Florence -- the year I came
9 here, I might have -- I think I used Gamecock

10 Insurance. They have an accountant there, I mean, not
11 accountant; it's one of the gentlemen ---

12 Q. Bookkeeper?

13 A. Yeah, he does -- he did it for us. It was about five
14 years ago, six years ago. One time. And the next
15 year we went to MacEwen.

16 Q. Okay. This accident was in July of 2011?

17 A. That's correct.

18 Q. Do you remember approximately what your income was for
19 2010?

20 A. 2010, I was making about \$610,000.00 to \$620,000.00.

21 Q. That's Thousand Dollars; right?

22 A. That's correct.

23 Q. Okay. How about -- and again, the numbers are there.

24 I'm just kind of asking you generally. For the three
25 or four years before that, was your income generally

1 the same?

2 A. No. I was building my practice up, sir..

3 Q. So, it was ---

4 A. It was going up this way, yes, sir.. I started out --
5 when I first started out, I didn't even have patients
6 to begin with. And then I -- then I started building
7 my own practice up.

8 Q. So, did your standard of living change from when you
9 were working at Burger King?

10 A. I -- lots.

11 Q. I think when I first got out of college, I had more
12 disposable income than when I had children, actually,
13 but that's a -- a different topic. I'm going to ask
14 you some questions about connections and family. This
15 is just in the case there has to be jury selection.
16 I understand your wife is also a physician?

17 A. That's correct.

18 Q. Okay. Where is your wife from? Where did she grow
19 up?

20 A. Same. Burma.

21 Q. Okay. So, you knew her from Burma before you left?

22 A. No, sir, I met her here in New York.

23 Q. Okay. Super. And she is also a doctor?

24 A. That's correct.

25 Q. What type of doctor?

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1 A. She's a family physician.

2 Q. And she was -- was all of her post high school
3 training in the United States?

4 A. That's correct.

5 Q. Or and I ---

6 A. She actually did high school here.

7 Q. Did she?

8 A. Yes. She came here a year or two earlier than me.
9 She came with her family.

10 Q. Super. She came with her family?

11 A. Yes, sir.

12 Q. Okay. And do you have any other family members that
13 have come from Burma?

14 A. When I came, I came by myself, sir.

15 Q. I understand. Have any since come?

16 A. Since then -- since then, I brought my -- pretty much,
17 I brought my parents here.

18 Q. Okay. What's their names?

19 A. My father is H-T-E-I-N.

20 Q. Thank you.

21 A. E. H-T-E-I-N.

22 Q. H-T ---

23 A. E-I-N.

24 Q. Okay.

25 A. Last name is Win, W-I-N.

1 Q. Okay.

2 A. I. I. Not Y.

3 Q. I'm sorry.

4 A. W-I-N.

5 Q. I'm sorry.

6 A. That's his name. My mother is T-I-N-T-I-N A-Y-E.

7 That's correct. Tintin is the first name. Aye is the
8 last name.

9 Q. Okay.

10 A. And not Win. We have -- we don't have last name
11 system.

12 Q. Thank you. I'm sorry.

13 A. No, that's fine.

14 Q. I'm very ignorant to your culture.

15 A. No, that's okay. It's just one of those countries.

16 Q. Do either your mother or father work?

17 A. Not in United States.

18 Q. When did they come?

19 A. My mom came about -- oh, boy, -- eleven years ago,
20 maybe.

21 Q. Where would you have been in your training?

22 A. Oh, God. I was in -- I was in medical school, I
23 think, at that time.

24 Q. And there's a lot of schooling there. That was your

25 ---

1 A. Yes, sir.

2 Q. -- primary medical school, after undergraduate, but
3 before ---

4 A. Primary medical school.

5 Q. Primary medical school?

6 A. Yes. Right.

7 Q. And again, I'm asking because I'm ignorant and I
8 apologize if I sound dumb.

9 A. Yes, sir.

10 Q. And I don't mean to say something that's not polite.
11 How did your mother get to come from Burma? Can she
12 come because of your ---

13 A. Yes. Yes.

14 Q. -- citizenship, your Green Card?

15 A. Yes, sir. After five years in United States -- when
16 I first came, I was given a Green Card which is
17 permanent residency.

18 Q. Right.

19 A. After five years, you are allowed to apply for
20 naturalized citizenship status.

21 Q. Right.

22 A. Provided that you have no legal problems, and then I
23 became a citizen.

24 Q. Congratulations. Okay.

25 A. And after that, you can apply for your parents to come

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1 here which takes about one to three years. So, I
2 applied for my parents and they came.

3 Q. Okay. And your mother came first?

4 A. First, and then my daddy was working still then, and
5 then he came three, four years later.

6 Q. How old is your mother now?

7 A. Both of them are seventy-one (71), I think, sir.

8 Q. And I'm sorry. You said your father came how much
9 later than your mother?

10 A. About three, four years later.

11 Q. Did they both get permission to come?

12 A. They both came with permanent residency; now, they are
13 both citizens, naturalized citizens.

14 Q. Super. Did they -- do they both get -- I guess -- I'm
15 saying the word permission; maybe that's not right.
16 Could they both legally come at the same time?

17 A. They could have. My dad -- my daddy was working then.

18 Q. So, he chose to stay and work?

19 A. Yes, sir.

20 Q. And then he came later?

21 A. Yes.

22 Q. Super. Did any other family members come over?

23 A. My brother's here now. My brother.

24 Q. What is his name?

25 A. My brother is K-Y-A-W.

1 Q. W?

2 A. That's the first name. Last name is H-E-I-N.

3 Q. Okay.

4 A. And he's in -- he is here in South Carolina.

5 Q. Super.

6 A. And my other brother is also here.. K-Y-I Z-I-N.

7 That's the first name. K-Y-I is first name. Z-I-N is
8 last name. He is in Sacramento. And my sister also
9 is here now.

10 Q. Okay.

11 A. My sister is T-H-A-N-D-A-R. No, all together. D-A-R.
12 That's the first name. Last name is N-Y-U-N-T. U-N-
13 T. That's correct.

14 Q. Okay. We're going to have a quiz on this.

15 A. She is in San Francisco.

16 Q. Okay. What's the language of Burma?

17 A. Burmese.

18 Q. Burmese. Does Burmese use the alphabet as we have or
19 is there a translation from Burmese to ---

20 A. It's a part of Sanskrit.

21 Q. Okay. So, you have to learn it -- a transitional
22 language?

23 A. Yes, sir.

24 Q. To -- to get to ---

25 A. English, yeah, English is very difficult for us

1 because it's totally different.

2 Q. Burmese is not real simple for us either.

3 A. I'm still struggling with it.

4 Q. Okay. Your brother that lives here in South Carolina

5 ---

6 A. Yes, sir. Myrtle Beach.

7 Q. He's in Myrtle Beach. What does he do?

8 A. He's a hospitalist.

9 Q. And did he likewise apply for citizenship or ---

10 A. He's a naturalized citizen, yes, sir.

11 Q. Okay. Did it start with a Green Card first ---

12 A. Yes, sir.

13 Q. -- and then ---

14 A. Yes, sir.

15 Q. -- the naturalization process?

16 A. Yes, sir.

17 Q. That's true for everybody?

18 A. No. My brother, he was -- he applied for political
19 asylum.

20 Q. Okay. Meaning, ---

21 A. Political asylum. Meaning ---

22 Q. He was -- he was -- they were going to punish him ---

23 A. Yes, sir.

24 Q. -- for his political beliefs?

25 A. Yes, sir.

1 Q. Okay.

2 A. He had a -- well, I don't know if I can -- we have a
3 family friend that's -- that's a very close family
4 friend -- my mom's college roommate for seven years in
5 college; she later married one of the most powerful
6 Generals in Burma, and then we had different political
7 beliefs. That's why my mama retired. She quit --
8 after forty some years of service, she quit, and she
9 came first because she couldn't take it any more. But
10 my daddy, just to support the family, he stayed behind
11 and worked for five more years, three, four more years
12 and came here later.

13 Q. And we have what's called political correctness. You
14 can say things -- people will fuss at you, but it's
15 not like they'll put you in jail. So, Burma is a
16 little different than that?

17 A. They -- they will -- they will fire everybody in your
18 family and your generation and previous generation and
19 next generation. They make sure that you don't leave
20 the country.

21 Q. Okay.

22 A. Yes, sir.

23 Q. So, you always have to be careful what you say about
24 political leaders?

25 A. That's correct.

1 Q. Okay. Did our mother seek political asylum as well or

2 ---

3 A. No. My mama came on a Green Card, ---

4 Q. Okay.

5 A. -- permanent residence.

6 Q. And your brother who is a hospitalist in Myrtle Beach,
7 he -- he sought political asylum?

8 A. Yes, sir.

9 Q. Was it something that he had done or potentially what
10 he'd done or ---

11 A. That is a family ---

12 Q. Because of your mother ---

13 A. -- family affiliations.

14 Q. Okay. Because of your mother's ---

15 A. Because of my mama -- my mother, the whole family.

16 It's the -- the whole family is well known to be -- to
17 the General's family, yes, sir.

18 Q. Okay. And the General I'm assuming is quite close
19 with the people who are in charge?

20 A. He was in charge.

21 Q. Was in charge. Okay.

22 A. He was in charge of the country.

23 Q. Okay. All right. And your brother who is in
24 Sacramento?

25 A. Yes, sir.

1 Q. What does he do?

2 A. He's a hospitalist.

3 Q. I'm sorry. So, both brothers are hospitalists?

4 A. That's correct.

5 Q. Okay. And your sister?

6 A. Yes, sir. San Francisco.

7 Q. What does she do?

8 A. She's a family physician.

9 Q. Nobody works at Burger King?

10 A. They never worked places that I worked. When they
11 came here, my brothers, they were already doctors when
12 they came.

13 Q. Okay.

14 A. Yes, sir.

15 Q. Your brothers were medically trained where?

16 A. In Burma.

17 Q. Okay. And your sister, where was she medically
18 trained?

19 A. She was trained in Caribbean.

20 Q. Okay. And that -- is that Ross or somewhere else?

21 A. That's a -- it's called Saba, S-A-B-A, Saba. It's a
22 medical university, in the Dutch Netherlands.

23 Q. Okay. Super. Do you have any other family that's in
24 the United States?

25 A. That's it. I mean, my family. I'm -- my wife's

1 family. That'll be a bunch.

2 Q. She's brought some -- how did your wife come over?

3 A. My wife came through the family petition process. Her
4 uncle ---

5 Q. With you?

6 A. No, sir. My wife's ---

7 Q. Oh. She came with her family; is that right?

8 A. Yes, sir. Her uncle has been here for many, many
9 years, and he petitioned for my wife's mother. My
10 wife's mother got permanent residency through his --
11 through her brother.

12 Q. Okay.

13 A. Usually, it takes about thirty (30) years if you want
14 to go through legal immigration. It takes thirty (30)
15 years for siblings petitioning. Two to five years for
16 parents.

17 Q. Okay. So, you really lucked out with the lottery?

18 A. Yes, sir.

19 Q. Because, I mean, your mother could have been granted
20 political asylum, but it was very helpful that you won
21 the lottery?

22 A. They would have never come here. Nobody would have
23 ever come here because we don't have anybody here
24 immediate ---

25 Q. To start the process?

1 A. To start the process.

2 Q. To bring your family here. Okay. Super. Do you have
3 any children?

4 A. No, sir.

5 Q. This is your only marriage?

6 A. That's correct.

7 Q. Okay. Are you a member of any civic groups or
8 organizations in Sumter?

9 A. I -- civic group, I mean, I belong to -- belong to the
10 Medical Society, South Carolina Infectious Disease
11 Society and Infectious Disease Society of America.
12 Not -- I mean, that's all I belong to.

13 Q. Are you a member of any churches, temples?

14 A. I'm a Buddhist.

15 Q. Okay.

16 A. But I was born Buddhist.

17 Q. Is there -- is there a -- do Buddhists go to a temple?

18 A. Yes, sir.

19 Q. And is there a Buddhist temple that you go to?

20 A. We have a Buddhist monastery in town, but it's a Thai
21 Buddhist monastery.

22 Q. Okay. How similar or dissimilar is that?

23 A. Well, it's -- I guess it's close, but it's not exactly
24 the same.

25 Q. And where is that located?

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1 A. It's in Dalzell. Yeah, my parents have been there
2 many times, but I -- I don't.

3 Q. You're not a regular member?

4 A. No, sir.

5 Q. You never held ---

6 A. I've never been there.

7 Q. Oh, okay.

8 A. Never been there.

9 Q. Okay. Not a member of any other groups or
10 organizations ---

11 A. No.

12 Q. -- that meet regularly with other people from Sumter
13 County?

14 A. No.

15 Q. Okay. Tell me what you do on a typical day. Since,
16 I mean, let's come since you've had this injury and
17 you've not been able to work, tell me what you do on
18 a normal day.

19 A. I get up at 6:00 with my wife. We have breakfast
20 together, and she goes to work. I stay home. She
21 comes home at 6:30, 7:00. We have dinner, we watch TV
22 and that's it.

23 Q. She comes home at 7:00 p.m.?

24 A. Yes, sir.

25 Q. 6:30 or 7:00 at night?

- 1 A. Yes, sir.
- 2 Q. And she -- she works at the Family Health Center?
- 3 A. Yes, sir, in the Manning ---
- 4 Q. I'm sorry. Manning Family Health?
- 5 A. It's -- it's called Hope Health. Hope Health.
- 6 Q. How long has she worked there?
- 7 A. She's -- she's been there at least a year. She was
- 8 working in Sumter before.
- 9 Q. Where did she work before that?
- 10 A. Sumter Medical Associates.
- 11 Q. And was that part of the hospital? She worked for the
- 12 hospital?
- 13 A. No, sir, just private.
- 14 Q. Who is -- who is ---
- 15 A. It's a 1099 job.
- 16 Q. Who else was in that practice with her?
- 17 A. Dr. Suchinda. She -- every time Dr. -- well, she does
- 18 work for Dr. Lilivivat.
- 19 Q. Okay.
- 20 A. Who goes out of town quite often.
- 21 Q. Goes to where?
- 22 A. For conferences and all that. That's Dr. Lilivivat.
- 23 Q. Okay.
- 24 A. And she fills in for her.
- 25 Q. Okay. Goes out of town?

1 A. Yes, sir. For conferences and teachings and things.

2 Q. Super. So, she does loco tenens for Dr. ---

3 A. Yes, that's correct.

4 Q. Okay. Lilivivat. That was just filling in from time
5 to time or did she work there also ---

6 A. She also works there sometimes for medical patients.

7 Dr. Lilivivat's an endocrinologist.

8 Q. Uh-huh (affirmative response).

9 A. So, she was filling in for endocrinology patients, but
10 at times, they would ask her just to see medical
11 patients.

12 Q. Okay. And how long did she work for Sumter Medical
13 Associates?

14 A. Well, off and on for I'd have to guess probably two
15 years. Before that, she was working at Florence.

16 When I -- when I -- when we both came to Florence, she
17 worked at the same Hope Health.

18 Q. Okay. In Manning?

19 A. At Florence that time.

20 Q. It was the Florence -- the Florence version of Hope
21 Health?

22 A. That's correct.

23 Q. And I think you told me, but what is your wife's
24 specialty?

25 A. Family practice.

1 Q. That's right. You did tell me that. Okay. Back to --
2 I apologize for digressing about your wife's work.
3 What do you do from 6:00 a.m. in the morning until
4 6:30 at night during the day?

5 A. I sit on a chair and watch TV sometimes. That's about
6 it.

7 Q. Any -- any routines, any hobbies?

8 A. I used to fish a lot, but not any more.

9 Q. Are you able to do any exercise that doesn't involve
10 your injured body parts?

11 A. I've -- no exercise.

12 Q. Okay. Is there any -- are you able to do any chores
13 around the house?

14 A. Regular chores -- anything that involves bending my
15 knees, my left knee as well as progressive ambulation,
16 that gives me a problem with worsening pain. So, and
17 also given my limitations, you know, certain things,
18 like, taking the trash bin out on the days that they
19 pick up trash, I can't push it that way. You know, I
20 can't help them with the yard work any more because I
21 can't stoop, I can't kneel.

22 Q. Can you -- can you stand without difficulty?

23 A. Can I stand -- when I -- when my knee is not acting
24 up, I could stand, yes, sir.

25 Q. Okay. Are you able -- are there things at home that

1 you can do, like, fold laundry, wash dishes?

2 A. I do sometimes wash dishes when I, -- you know, my
3 knee is healthy, I help them out.

4 Q. Okay. Are there any chores that are generally yours
5 to do as opposed to your wife's to do when she's
6 working, you know, during the day?

7 A. Oh. Well, normally, my wife does.

8 Q. That includes ---

9 A. Cooking. I never -- I never cook ever since I was in
10 -- in college, I never cook. But I would -- I could
11 boil a noodle and I would just always eat noodles in
12 college.

13 Q. I guess they didn't make you cook at Burger King?

14 A. No, sir. I was just washing bathrooms there. And --
15 and yard work, I -- it's -- now, I can't do it; so,
16 somebody else does it.

17 Q. Did you used to do the yard work?

18 A. I help them out, yes, sir.

19 Q. Well, let me ask this question a different way. Does
20 anybody come into your home and help take care of the
21 home? Vacuuming, sweeping, dusting?

22 A. No, my -- my sister-in-law helps some with the yard
23 work and everything because she lives with us. My
24 sister-in-law.

25 Q. Okay. That's your -- that's your brother's wife that

1 works in Myrtle Beach?

2 A. No, sir.

3 Q. No.

4 A. That's my wife's sister who works here in -- who used
5 to work at Tuomey and now works in Manning, Clarendon
6 Hospital. You haven't asked me that.

7 Q. What's her name?

8 A. Her name is Grace Lieng.

9 Q. How do I spell the last name?

10 A. L-I-E-N-G.

11 Q. And how -- what is her training?

12 A. She's a physician. Hospitalist.

13 Q. Okay. And there are no -- are there any children that
14 are living in your house?

15 A. No, sir.

16 Q. What's the address where you live?

17 A. 620 Mattison Avenue, M-A-T-T-I-S-O-N, Mattison Avenue,
18 Sumter.

19 Q. Have you lived at that address since you came to
20 Sumter?

21 A. Yes, sir.

22 Q. Okay. So, tell me who all lives at that address with
23 you.

24 A. Myself ---

25 Q. You and your wife?

1 A. My -- my wife, my sister-in-law.

2 Q. Just the three of you?

3 A. That's correct.

4 Q. And that's her sister?

5 A. Yes, sir.

6 Q. Okay. And for the three of you, no one else comes in
7 and helps with any of the chores of maintaining the
8 household?

9 A. No. No.

10 Q. And -- and I'm sorry if I -- are there any
11 responsibilities in the house that you take care of in
12 terms of normally taking care of the house?

13 A. No.

14 Q. Okay.

15 A. Like, my particular household chores, no, I don't.

16 Q. Okay. Your wife does the laundry?

17 A. She does the laundry.

18 Q. Who does vacuuming and sweeping?

19 A. My sister-in-law.

20 Q. Okay. How about cleaning of the kitchen and dishes
21 and stuff?

22 A. They share that.

23 Q. So, your wife and your sister-in-law?

24 A. Sister-in-law, whoever is free. My ---

25 Q. How about cooking, they do all the -- who does the

1 cooking?

2 A. They share that. My wife sometimes does it. My
3 sister-in-law sometimes does it.

4 Q. Okay.

5 A. My -- if I may, my sister-in-law works one week on,
6 one week off in her hospitalist job; so, she's usually
7 off every other week.

8 Q. And what are her hours while she is working?

9 A. They're 7:00 to 7:00.

10 Q. So, she's on call twelve (12) hours a day ---

11 A. Yes, sir.

12 Q. -- for a week?

13 A. Yes.

14 Q. And then she's off for a week?

15 A. Yes.

16 Q. Okay. Given the -- the limitations are with your left
17 leg; correct?

18 A. Yes.

19 Q. Is there any other body part that's affected?

20 A. When I stopped working, it was affecting my right hip
21 and right knee as well because of progressive
22 ambulation, and I was compensating on the right side.
23 So, right knee and right hip.

24 Q. Okay. Because of your inability to use your left leg
25 normally, you were -- you were doing things

1 differently or -- or as you said compensating with
2 your right knee and hip?

3 A. Yes.

4 Q. How far do you think you can walk without discomfort?

5 A. Maybe about five, ten minutes.

6 Q. Can you walk at a normal pace?

7 A. No. No normal pace. Not a pace like I used to, no,
8 sir.

9 Q. How about standing, how long can you stand?

10 A. My knee, if it's not acting up, I'll say probably --
11 I'll say ten, fifteen minutes. Ten minutes.

12 Q. Do you have difficulty getting up and sitting down?

13 A. Yes.

14 Q. And is that -- how many times can you do that before
15 it causes you more than ordinary discomfort?

16 A. Can you repeat that question?

17 Q. Sure. You said standing up and sitting down causes
18 you discomfort?

19 A. Yes.

20 Q. Which you say that's your baseline, that's your
21 normal. Okay. How many times can you sit up and or
22 stand up and sit down in a row before it causes you
23 more than your ordinary discomfort? In other words,
24 this is bad as compared to what it normally feels like
25 to do it?

1 A. I sit on a couch that has the -- the -- a leg prop;
2 so, I -- that is my comfortable position. So, after
3 breakfast, I sit on the couch pretty much the whole
4 day. But I do go to bathroom a couple times a day.
5 That's my normal -- two, three times.

6 Q. What do you watch on television?

7 A. Whatever is on the regular eight channels.

8 Q. Educational? Are there any shows that you normally
9 watch?

10 A. ETV mostly. I watch ETV.

11 Q. Do you have cable?

12 A. No.

13 Q. Do you have a satellite box?

14 A. No.

15 Q. You just watch normal over the air ---

16 A. Air channels.

17 Q. Over the air channels?

18 A. Yes.

19 Q. Do you ever rent movies?

20 A. No.

21 Q. Do you have a computer at the house?

22 A. Sure. Yes. If we want to watch movies, we hook it
23 up, HGMI and computer to the TV.

24 Q. Are you able to -- to get any Burmese programming?

25 A. No, I don't watch Burmese movies any more.

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 Q. But you can get Internet -- do you have Internet
2 access?

3 A. Yes.

4 Q. Who is your Internet access through?

5 A. Time Warner.

6 Q. Okay. Are there any normal activities that you engage
7 in on the computer?

8 A. I mean, I surf.

9 Q. Okay. How much time a day do you think you spend?

10 A. Pay bills. Well, I watch TV. I surf the Net,
11 Internet. I mean, I don't know how much time.

12 Q. And you mentioned one of the chores of operating a
13 household is paying bills?

14 A. Yes.

15 Q. Are you able to do that?

16 A. Oh, I pay bills.

17 Q. Okay. Are you the primary person in your family that
18 pays the bills?

19 A. Yes.

20 Q. Okay.

21 A. I pay bills.

22 Q. And by paying bills, it's more than just saying --
23 here's money; you have to balance what goes into the
24 checking account and what comes out?

25 A. (Witness shakes head affirmatively).

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 Q. Is that -- you're nodding yes. You keep up with the
2 checkbook?

3 A. Yes.

4 Q. Okay.

5 A. I keep up with checkbook.

6 Q. So, we talked about chores?

7 A. Yes, sir.

8 Q. Folding -- folding socks is a chore, but also taking
9 care of the checkbook, balancing the checkbook, ---

10 A. That's correct.

11 Q. -- making sure that your numbers are the same as the
12 bank's?

13 A. That's correct. I do take care of that.

14 Q. That would be one of your chores?

15 A. Yes.

16 Q. You agree with that?

17 A. If you say, yes.

18 Q. Okay. Well, I mean, if you describe it another way,
19 ---

20 A. Oh, no, no, no. I -- that's a chore, yes. I --
21 that's my responsibility.

22 Q. Are there any other chores that you do? Do you keep
23 up with, for example, with medical bills? Do you keep
24 up with other business paperwork?

25 A. We don't have any medical bills.

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TUOMEY HEALTHCARE SYSTEM

1 Q. Okay.

2 A. Besides my accident, which has been long done with
3 bills.

4 Q. Do you help with your wife and your sister-in-law's
5 accounting?

6 A. No.

7 Q. All right. I believe you said your wife is paid a
8 1099?

9 A. From Dr. -- from Dr. Lillivivat's, yes.

10 Q. Yes. And now she's with Hope Health?

11 A. Now, she's with Hope Health. Now, 1040.

12 Q. 1040?

13 A. Yes, sir.

14 Q. Okay. And you don't help her with that?

15 A. No. She gets -- this is just -- she gets a check,
16 direct deposit.

17 Q. Okay.

18 A. Goes into the bank account.

19 Q. Okay. And do you do your taxes jointly?

20 A. Yes.

21 Q. Okay. And is there anything that -- do you ever go
22 out shopping?

23 A. Not for food.

24 Q. Okay. Do you go out shopping for anything?

25 A. (Shakes head negatively).

**DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM**

1 Q. You're shaking your head no. For her sake, just tell
2 me "no".

3 A. No.

4 Q. Okay. Can you drive a car?

5 A. Yes, I can.

6 Q. Can you drive a car safely?

7 A. Yes.

8 Q. Are there limits on how far you can drive?

9 A. No.

10 Q. In other words, your leg doesn't prevent you from
11 driving to Florida?

12 A. As long as I have that -- it straightened out to a
13 certain degree that's comfortable to me.

14 Q. Meaning that your leg is neither bent too much nor too
15 straight?

16 A. Too straight is okay. Too bent is not okay.

17 Q. Okay. Is there anything else that you routinely do on
18 a day?

19 A. Watch TV. Not that I can think of.

20 Q. Do you have -- do you correspond with anybody on your
21 computer? Do you keep up with people? Do you have a
22 Facebook page?

23 A. I hardly go on the Facebook.

24 Q. Okay. And I -- I ---

25 A. Yes, sir.

1 Q. I don't have a Facebook page.

2 A. Yes, sir.

3 Q. I don't know what it is.

4 A. I don't post anything. I don't -- I don't -- I
5 sometimes go on it -- just sometimes we have family
6 members in different countries, they go -- they have
7 only access to Facebook; so, you know, death in the
8 family, so on and so forth. For that reason, I look
9 up Facebook.

10 Q. It's a way to communicate with them?

11 A. Yes, sir.

12 Q. All right. Is -- people in Burma, are they limited in
13 what they can access on the Internet?

14 A. That's correct.

15 Q. Okay. Can you go out and buy clothes for yourself?
16 Physically, are you capable of going to the store,
17 trying on clothes and buying them?

18 A. Let me answer that in such a way that I could drive to
19 the handicap parking close to J.C. Penney per se, and
20 I -- I walk in and pick up a trouser and come back in
21 -- come back out; if my knee is not acting up for a
22 few minutes, yes, I could do that. But you -- can I
23 go -- you ask me to walk through the entire mall,
24 something like that, I can't do that.

25 Q. Okay. July 6th, 2011, that's the date that I have

1 that the fall happened. What were your, Dr. Myat,
2 your typical work hours? When were you normally at
3 work versus at home?

4 A. Before the fall.

5 Q. Yes, sir.

6 A. I start around 3:00 in the morning and then I start
7 seeing patients, and I finish around -- I have to
8 finish by 7:30 because I start work at 8:00 at Family
9 Health Center. Then 8:00 to 12:00, sometimes 1:00,

10 1:30, at Family Health Center. After that, we have
11 things that I have to do for the hospital
12 epidemiology; I come back to the hospital and
13 sometimes it asks for -- they ask me to see patients
14 urgently that they think the patient is critical, and
15 I come back and see the patient within one or two
16 hours frame. So, sometimes, it will take me all the
17 way out to like 5:00, 6:00 in the evening, and then I
18 go home.

19 Q. And start again at 3:00?

20 A. Yes, sir.

21 Q. So, you basically, from 3:00 a.m. to somewhere around
22 7:30, you would do your rounds?

23 A. I try to finish my rounds.

24 Q. Right. Patients ---

25 A. I am not always finished.

- 1 Q. Patients that you already had a relationship with?
- 2 A. Not -- new patients as well. I see new patients in
- 3 the morning as well.
- 4 Q. Okay. And then 8:00 until about noon to 1:30, you
- 5 would see patients in the Family Health Center?
- 6 A. That's correct.
- 7 Q. And then you would come back and take care of your
- 8 business as the Director of the Infectious Disease ---
- 9 A. That's correct.
- 10 Q. -- Department as well as to see any urgent patients?
- 11 A. Yes, sir.
- 12 Q. Okay. And then around 5:30 or so, you would finish
- 13 your day ---
- 14 A. And call it a day and go home.
- 15 Q. Okay. Do you remember what day of the week this was?
- 16 A. When I fell?
- 17 Q. Yes, sir.
- 18 A. No, I don't.
- 19 Q. Was it -- is a weekend slower than week days?
- 20 A. I do not have clinics on weekends.
- 21 Q. Fair enough. Do you remember if this was a day when
- 22 you had clinic?
- 23 A. I don't.
- 24 Q. All right. Do you remember approximately what time
- 25 this happened?

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TUOMEY HEALTHCARE SYSTEM

1 A. I don't. But it was early morning, but I don't
2 remember the exact time.

3 Q. When did the nursing -- the nurses' shift there change
4 shifts?

5 A. It's my understanding that it's about 7:00 to 7:00,
6 they change shift.

7 Q. Okay. Do you know if this was before or after the
8 shift change?

9 A. It was a night shift when I fell.

10 Q. Okay. So, the night nurses were there? The 7:00 p.m.
11 to 7:00 a.m. staff?

12 A. That's correct.

13 Q. Okay. And where did you fall? What floor; what area?

14 A. Three South. Three South.

15 Q. And what is -- I apologize for being ignorant. What
16 is that area called?

17 A. It's a medical floor where they also admit dialysis
18 patients as well.

19 Q. Do you remember anybody who was up there around the
20 time that you fell? Any nurses, any nursing
21 assistants, any -- anybody?

22 A. The night shift crew on Three South that night, I --
23 I remember names of the nurses.

24 Q. Okay. What names are those? That's what I'm looking
25 for.

1 A. Ms. Carrie was one of them. Well, you know, certain
2 -- certain Nursing Stations, certain nurses work there
3 all the time. Sometime they have flex nurses; so, I
4 -- as far as I can remember, Ms. Carrie was there.
5 Mr. Whitehouse was there. He was a male RN. Who else
6 was there -- Ms. Tanisha, T-A, Tanisha. I think she
7 was there as well, but I can't be a hundred percent
8 certain.

9 Q. Who, if anybody, was in the immediate area where you
10 fell?

11 A. I don't ---

12 Q. Was anybody even close enough to see you when you
13 fell? If you know.

14 A. I don't think -- I don't know. I don't know.

15 Q. You don't have a recollection of anybody being there
16 in sight when you fell?

17 A. I don't recall.

18 Q. Okay. Tell me what happened. How did you fall?

19 A. How did I fall -- I don't really remember what
20 happened. I fell so -- I fell so hard I don't
21 remember the -- the moments preceding to that fall.

22 Q. Did you hit your head?

23 A. I don't recall.

24 Q. After the -- after the fall, did you have bumps,
25 bruises or abrasions on your head?

1 A. Not on the head. I -- not on the head, no.

2 Q. To your knowledge, did you suffer a head injury?

3 A. No.

4 Q. Okay.

5 A. Not to -- no.

6 Q. What were you doing prior to falling?

7 A. I was there on the floor. The ---

8 Q. We have two types of floors here. We have a medical
9 floor and then we have a floor we walk on; so, let me

10 make sure I know which floor you're talking about.

11 A. Oh, the -- on the Nursing Station, on the medical
12 floor that night.

13 Q. Okay.

14 A. I was there to see patients.

15 Q. Okay. And right before you fell, what were you doing?
16 What was your body doing?

17 A. As I mentioned, I don't exactly remember what
18 happened, you know, the moments before, but I was
19 seeing patients that night.

20 Q. Okay. Were you standing; were you walking? What's
21 the last thing you remember before you fell?

22 A. I don't recall now.

23 Q. Do you remember looking at the chart of a patient?

24 Not a particular patient, but just looking at medical
25 records?

1 A. Generally, when you go to a medical floor, before you
2 see a patient, you would look at the chart first. And
3 then you would look at a computer and check the data,
4 and then you go see a patient.

5 Q. Okay. Do you recall on this particular day, had you
6 already seen a patient?

7 A. Had I already seen a patient?

8 Q. Uh-huh (affirmative response).

9 A. Any patient -- I don't recall.

10 Q. You don't know if you had seen a patient yet or not?

11 A. No. I -- I don't want to guess. I don't recall.

12 Yeah, it's been three years. I don't recall if I
13 already saw a patient before on that medical floor.

14 Q. Okay. Do you know if you had patients to see that you
15 were unable to see after you fell? Are you following
16 me?

17 A. No, I don't. Can you repeat the question?

18 Q. Okay. You said you had to go in and see patients,
19 some that you had already seen previously and you were
20 following them and their care; right?

21 A. Some of them were follow-up patients.

22 Q. Right. And some might have been new patients that you
23 were asked to come in and evaluate?

24 A. That's correct.

25 Q. Okay. So, you had a list of patients that you ---

1 A. That's correct.

2 Q. -- needed to see either that morning or some time

3 later that day?

4 A. That's correct.

5 Q. After you fell, do you know if you had patients you

6 still needed to see, work that you had not yet
7 completed?

8 A. After I fell, my -- I still have to see a lot of
9 patients that I know.

10 Q. So, you still had patients to see?

11 A. My list is still pretty much. How many more left, I
12 don't know, but I still have patients to see. Not --
13 not on that floor or another floor. I don't know
14 which floor, but when I had my list, my list was still
15 there.

16 Q. Still had ---

17 A. So, I haven't -- I haven't jotted down -- seen, seen,
18 seen or cross them out.

19 Q. When you -- when you would see patients back on July
20 6, 2011, what did you carry with you?

21 A. When I see patients, you ---

22 Q. I mean, when you walk into the hospital, what do you
23 have with you? If anything. Do you carry -- do you
24 carry ---

25 A. You have a stethoscope on.

1 Q. Okay.

2 A. You have a white coat on. You have a pen. That's it.

3 Q. All right. You don't carry a computer?

4 A. No.

5 Q. No books?

6 A. (Shakes head negatively).

7 Q. And you're shaking your head no?

8 A. No. No.

9 Q. Okay.

10 A. No.

11 Q. You're doing fine. When you looked at a patient's
12 chart back in 2011, did you look at a paper chart, a
13 computer chart or a combination of the two?

14 A. You have to look at both.

15 Q. Okay.

16 A. You always have to look at both.

17 Q. Do you ever have to carry the paper chart around?

18 A. When you see a patient, you go to the Nursing Station
19 and go to the chart rack, you pick up the chart -- you
20 look at the chart rack. You look at the chart, and
21 then after that, you go on computer, and you look at
22 the data. And then after that -- I'm just in routine
23 procedure -- and then you leave the chart, you see the
24 patient; you come back, you write your notes, and then
25 you put it on the rack, and you tell the nurse if

1 there's anything needs to be done and then you leave.

2 That's the routine procedure.

3 Q. That's why I'm trying to get an idea of what -- what
4 was happening or what your routine would be.

5 A. Yes, sir. That's what I usually do.

6 Q. You go to the -- when you go to where the charts are
7 on the Nursing Station, do you look at the chart there
8 or do you take the chart somewhere else?

9 A. No, I look at the chart in the Nursing Station.

10 Q. Do you have to move it or carry it anywhere?

11 A. When you are done seeing a patient, then you take the
12 chart, you put it on the order rack -- that is, if you
13 write any orders.

14 Q. Okay.

15 A. And you tell the nurse.

16 Q. So you -- I guess what I'm asking you is, do you ever
17 have to carry a paper chart, one or more paper charts,
18 any distance in the course of your duties?

19 A. Did I ever have to?

20 Q. Yes.

21 A. When I -- when I'm done with my charts, I carry it
22 back to the rack. Yeah. I drop it in the rack.

23 Q. Do you pull one -- do you pull charts one at a time?

24 A. Sometimes, I carry two.

25 Q. Okay. And that's what I'm asking. For example, if

1 this is the -- if this is a medical chart, ---

2 A. Okay.

3 Q. -- would this be a big chart, a little chart, a normal
4 size chart?

5 A. It depends. Fair enough. Usually, it's not that
6 thick.

7 Q. Okay. Fair enough. So, you may get one or two charts
8 and go ---

9 A. If it's thick, I won't carry two.

10 Q. Okay. This is before the fall; correct?

11 A. Yes.

12 Q. All right. When you fell, do you remember if you had
13 anything in your hands? Did you have a chart in your
14 hands; did you have anything else in your hands?

15 A. I don't recall.

16 Q. You don't recall whether or not you had a chart?

17 A. That's correct.

18 Q. Okay. So, you may have and you may not have?

19 A. That's correct. I don't know.

20 Q. Okay. What, if anything, do you remember -- you said
21 you don't remember what you were doing before the
22 fall. Tell me what your first memory is after the
23 fall.

24 A. I fell so hard and after I realized I fell, then I
25 tried to get up, and my knee was structurally bent and

1 I couldn't get up.

2 Q. Your first recollection -- you're on the ground. Tell
3 me how you're on the ground. Are you laying down? We
4 call that supine. Is that ---

5 A. I don't -- I don't recall.

6 Q. You don't remember. Were you on your bottom?

7 A. I don't remember. I -- all I remember was, when I
8 realized I fell, my knee was bent, and then a lot of
9 nurses come over, came over.

10 Q. Okay. What is your first recollection of what
11 position your body was in?

12 A. I don't -- I don't recall. I -- I'm sure -- well, no,
13 I -- nurses who were there would have seen it, how I
14 fell, but I don't recall.

15 Q. They would have seen how ----

16 A. If they were around. I don't know if they were. If
17 they were around.

18 Q. I asked you earlier if you were aware of anybody who
19 would have been within sight of you when you fell, ---

20 A. No.

21 Q. -- and you said you didn't know of anybody?

22 A. No, I don't recall.

23 Q. Okay. That's still the case?

24 A. That's still the case.

25 Q. And when you say nurses, we're also including

1 employees of Tuomey who might not have been nurses?

2 A. When I fell, after I fell, because it was -- it was,
3 you know, a noise; so, a nurse came over; I don't know
4 where they were; they came over as far as I remember,
5 and then they tried to help me.

6 Q. What was the noise when you fell?

7 A. So, ---

8 Q. I'm sorry. What was the noise when you fell? Did you
9 yell; did you hit something when you fell?

10 A. The fall -- the sound of the fall.

11 Q. Okay. Do you know if you hit a wall? Did you hit a
12 counter?

13 A. I don't recall.

14 Q. You don't know what body part of yours hit the ground
15 first?

16 A. No.

17 Q. And when you first became aware after the fall, you
18 don't know whether you were seated on your bottom,
19 laying on your back?

20 A. I don't know.

21 Q. Were you standing?

22 A. After I fell?

23 Q. Your first recollection after the fall, were you
24 standing up or were you in some other position?

25 A. I don't know. But I -- I knew my knee was bent.

1 That's all I remember. Then I was like -- oh, no,
2 because I knew if the knee is bent, it's going to be
3 months before I go back to work.

4 Q. Was your leg extended out in front of you?

5 A. I don't know.

6 Q. You don't know?

7 A. No.

8 Q. Do you remember seeing it?

9 A. I don't remember. The only thing I remember was my
10 knee was bent.

11 Q. What, if anything, do you remember about the floor
12 where you fell?

13 A. I don't remember -- if you're asking the exact
14 location, I don't remember the exact location where I
15 fell.

16 Q. What do you -- what, if anything, do you remember
17 about the condition of the floor?

18 A. I don't remember.

19 Q. What -- was there water on the floor? Was there debris
20 on the floor; were there fish on the floor? Do you
21 remember anything about the floor?

22 A. I don't remember.

23 Q. Was there anything unusual about the floor that you
24 remember?

25 A. (Shakes head negatively).

1 Q. No?

2 A. No.

3 Q. You're shaking your head no?

4 A. No.

5 Q. Okay. She's getting ready to shoot me. Okay. You're
6 doing good. I just need you to say yes or no. Okay.

7 After the fall, was there any part of your body wet or
8 did you have mud on you? Did you, you know, ---

9 A. After the fall ---

10 Q. Was there anything unusual about your body as a result
11 of being on the floor?

12 A. All I remember was, after the fall, a lot of people
13 came over, put me on a stretcher, and I was in severe
14 pain.

15 Q. Okay.

16 A. That I remember. And then they took me to ER, and in
17 between, what happened, I don't remember. The next
18 thing I know I was in a lot of pain in ER and they
19 gave me pain medicine, I think. Yeah.

20 Q. Okay. Either before or after your fall, have you ever
21 hurt or do you know anything about the condition of
22 the fall -- of the floor that may have caused you to
23 fall?

24 A. Have I noticed anything on the floor before I fell?

25 Q. Before or after.

1 A. No, I don't.

2 Q. Okay. Are you aware of any defects in the floor where
3 you fell?

4 A. I was not.

5 Q. You don't know whether you slipped or you tripped?

6 A. I don't know.

7 Q. You know the difference, don't you? A slip is, your
8 foot slides. A trip is where something catches your
9 toe.

10 A. Slip or trip -- if I would have -- I don't think I hit
11 anything, but I -- I don't ---

12 Q. In other words, you don't think your foot caught on
13 anything?

14 A. No, I don't think so.

15 Q. Have you ever heard or do you know of anything that
16 may have been wrong with that floor either in the way
17 that it was made or any substance that may have been
18 on it?

19 A. On that floor?

20 Q. Yes.

21 A. As in the usual?

22 Q. Yes.

23 A. Well, that particular floor has, you know, in the
24 morning time, the nurses prepare pitchers of water and
25 they put them, the nurses, in the patients' room when

1 they need them, and they usually prepare them around
2 the Nursing Station, And then they get the water,
3 they get the ice from -- each Nursing Station has a
4 place where they get the ice from and water from.

5 Q. Uh-huh (affirmative response).

6 A. And that particular floor, if I remember correctly,
7 they get their water from there -- they get the ice
8 from the ice machine and water there next to that
9 area; they have a sink there, and they have a patient
10 -- I don't know, it's how you call that -- dinner
11 table from the patient's room, a little roll-away
12 thing. They usually put them on a cart or, usually,
13 they use a cart and they put them on it and then at
14 times, you will see water on the floor, which I've
15 seen it before and ---

16 Q. Prior to your fall?

17 A. Prior to my fall. Not that particular night. I'm
18 talking about in general.

19 Q. Right.

20 A. In general.

21 Q. So, on occasions before July the 6th, 2011, you had
22 seen water that was on the floor ---

23 A. Yes, sir.

24 Q. -- which you assumed had been from the nursing
25 assistants filling pitchers for patients. Correct?

1 A. That's correct.

2 Q. All right. On those prior occasions before July 6th,
3 2011, it was easy for you to see the water on the
4 floor?

5 A. When they are preparing them, then you pay more
6 attention, but you see them.

7 Q. But if you look, you can see the water on the floor?

8 A. Not always. Not always. Even -- not always.

9 Q. Have you ever complained to any of the nursing
10 assistants or to a Tuomey staff about water being on
11 the floor after they fill these pitchers?

12 A. If there is water here or if there is water there or
13 if there's water in a patient's room when we are
14 making rounds, you know, if you -- if the physician
15 sees it, the physician will tell the nursing staff ---

16 Q. Uh-huh (affirmative response).

17 A. -- and I'm -- most physicians definitely will, and I'm
18 sure I must have. I don't know exactly when or what
19 time.

20 Q. Certainly, if it's in the -- if it puts a patient in
21 peril?

22 A. Yes.

23 Q. But this area is where the nurses spend their time and
24 where physicians come as well -- nurses and nursing
25 assistants; correct?

1 A. I don't understand what you're saying.

2 Q. You mentioned earlier that if you saw water in a
3 patient's room or in the hallway ---

4 A. Or in the hallway or their particular area. If a
5 physician sees it, they would certainly let the nurses
6 know, and I have done that before. Is it on that
7 particular Nursing Station or a different Nursing
8 Station, I don't remember.

9 Q. Okay. And how often would you say prior to July the
10 6th, 2011, that you would see water on the floor as a
11 result of the nurses filling pitchers with ice and
12 water? Does it happen once a month, once a week,
13 once a year? Tell me the frequency this would happen.

14 A. I don't know. But I've seen them before.

15 Q. Once? Twice?

16 A. Oh, definitely more than once.

17 Q. More than twice?

18 A. I don't know.

19 Q. How long have you worked at Tuomey when this happened?

20 A. For about four years.

21 Q. Four years. So, you know at least one time in four
22 years around -- is it this particular Station where
23 the nurses and assistants have been filling pitchers
24 with ice and water that you saw water on the floor?

25 A. Yes.

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1 Q. Not at any other sink or Nursing Station anywhere else
2 in the hospital; just at this one station?

3 A. Wherever they prepare water on any Nursing Station,
4 there's a chance that you could have water on the
5 floor. If that's the question you're asking me.

6 Q. It is.

7 A. If I've seen water on other floors as well -- yes.

8 Q. Okay. Well, you've told me you know you've seen
9 water around an area where they fill the pitchers on
10 at least one occasion?

11 A. Yes, sir.

12 Q. And you weren't sure about two?

13 A. On that particular floor. On that particular floor.

14 Q. On -- on the third floor?

15 A. Yes.

16 Q. Third Medical?

17 A. Yes, sir.

18 Q. How many Nurses Stations are there where you see
19 patients? In other words, how many areas in the
20 hospital are just like this area where a sink is used
21 to fill pitchers with ice and water?

22 A. I see patients all over the hospital.

23 Q. And there are how many Stations?

24 A. I don't know -- ten Stations, twelve Stations; I don't
25 know.

1 Q. Okay. Other than this particular Station on Three --
2 on the Medical Three, have you seen water around other
3 areas?

4 A. Yes.

5 Q. In the four years that you've worked at the hospital?

6 A. Yes.

7 Q. How many times?

8 A. I don't remember exact times, but I ---

9 Q. Once? Twice?

10 A. Oh, more than that.

11 Q. Four or five?

12 A. I don't know.

13 Q. And does that span the entire four years or was that
14 more recent to the one at the time when you fell?

15 A. The entire four years I've seen -- I mean, I've seen
16 -- because I -- the hours that I work are usually the
17 time they prepare the water pitchers.

18 Q. And that's between 3:00 a.m. and 7:30?

19 A. Around. I would say around 5:00 -- 3:00 -- it
20 depends; sometimes, they start early, yes. Or
21 sometimes, they would just ask you for water, and they
22 would bring it to the patient's room.

23 Q. Okay. At this particular Nursing Station where you
24 fell, how many times had you seen water on the floor
25 there in the four years that you've seen patients at

1 Tuomey?

2 A. More than once. More than once.

3 Q. Okay. When I asked you before, you said you could
4 remember once, but now it's more than once?

5 A. No, I said definitely once, but I don't know how many
6 times more.

7 Q. Okay. Would you say two or three or four?

8 A. I say I don't remember.

9 Q. So, it would -- would not be more than three or four?

10 A. I don't know.

11 Q. Okay. What, if anything, makes -- do you believe
12 there was water on the floor when you fell?

13 A. I believe there was water on the floor.

14 Q. And how do you arrive at that conclusion?

15 A. Because I -- I believe I -- my fall was caused by the
16 water, the liquid spill.

17 Q. I'm with you, but how do you arrive at that
18 conclusion? Do you know what anecdotal evidence is?

19 A. No. When I fell ---

20 Q. Yes.

21 A. -- okay, I -- when I fell, I believe I slipped on the
22 liquid.

23 Q. And how -- tell me what you -- what makes you believe
24 you slipped on a liquid.

25 A. Well, when you fall -- when you slip on a liquid, you

1 know; everyone knows.

2 Q. You told me you didn't remember your fall?

3 A. I don't remember exactly the moments preceding to
4 that, but when I fell, I believe I slipped on water.

5 Q. Okay. And -- and you arrive at that because of what;
6 because at some time over the last four years, you had
7 seen water in that area before?

8 A. No, sir. Because I -- I felt I -- I slipped on the
9 water, liquid.

10 Q. Okay. You felt the liquid under your foot?

11 A. Yes.

12 Q. But you had a shoe on?

13 A. I had my shoe on.

14 Q. So, it felt like there was liquid under your shoe?

15 A. Yes, sir.

16 Q. As opposed to feeling the liquid?

17 A. Correct.

18 Q. Do you agree with that?

19 A. I felt there was some liquid under me.

20 Q. Did you ever see the liquid?

21 A. I don't remember. I don't recall.

22 Q. So, you don't remember what you were doing before you
23 fell; correct?

24 A. (Nods head affirmatively).

25 Q. I need you to say yes.

1 A. Yes.

2 Q. Okay. You have no idea what position you were in
3 after you fell?

4 A. Correct.

5 Q. You don't remember -- your first recollection, you
6 can't tell me whether you were laying down, sitting
7 down, whether you had fallen forward or fallen
8 backwards; correct?

9 A. Correct.

10 Q. But now, you tell me that you do know for certain that
11 you slipped?

12 A. I believe I ---

13 MR. PHILLIPS: Object to the form.

14 Please go ahead.

15 Q. Okay. Tell me more about this slip. What do you
16 remember?

17 A. I believe I slipped on the -- some sort of liquid.

18 Q. Okay.

19 A. On the floor and that ultimately caused the fall.

20 Q. All right.

21 A. And that's all I remember.

22 Q. How did your foot slide?

23 A. I don't recall.

24 Q. You don't know whether it went forward or backwards?

25 A. No.

1 Q. You don't know whether your foot went sideways, left
2 or right?

3 A. I don't recall.

4 Q. Which foot?

5 A. I don't -- I don't know.

6 Q. You don't know if one foot slipped or two feet
7 slipped?

8 A. No, sir.

9 Q. You don't remember if there was anything in your
10 hands?

11 A. No.

12 Q. You don't remember if there was anything in front of
13 you?

14 A. I do not believe I caught on anything, any object.

15 Q. And you don't know what hit when you went down?

16 A. What it -- you mean the objects in between?

17 Q. What part of your body struck the floor?

18 A. Oh, I don't know. I don't.

19 Q. What type of shoes were you wearing?

20 A. Regular work shoes.

21 Q. Did you have a cell phone with you?

22 A. I do. I -- I usually carry my purse -- I mean, not
23 purse -- I mean a pouch on the belt, and I usually
24 carry a cell phone there over here. (Witness
25 indicates). Usually.

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1 Q. What would you have had with you July 6th, 2011?

2 A. I usually carry both this way (witness indicates).

3 Q. Okay. Tell me what's in your -- one side you've got
4 a cell phone?

5 A. On the -- on the ---

6 Q. Right side.

7 A. -- on the belt clip. That's correct.

8 Q. On the right side on your belt clip?

9 A. Yes.

10 Q. Tell me what's on Superman's belt. Right side, I've
11 got a phone. What's on the left side?

12 A. Wallet pouch.

13 Q. Wallet?

14 A. Wallet pouch. Yeah.

15 Q. Okay. As opposed to a wallet that goes in your back
16 pocket?

17 A. That's correct.

18 Q. Okay. Do you know if you were on your cell phone when
19 you fell?

20 A. No, I wasn't on a cell phone. I don't -- I don't
21 recall. But I mean, I would have ---

22 Q. You could have been, you could not have been; you
23 might have been, you might not have been?

24 A. No, I wasn't on cell phone.

25 Q. You know you weren't on your cell phone? No question

1 you weren't on the cell phone; is that what you told
2 me?

3 A. I don't think I was on the cell phone.

4 Q. Any reason for you to be in your wallet?

5 A. On the cell phone here?

6 Q. No. You said you had your cell phone on the right
7 side; you have got your wallet on the left?

8 A. Yes. Any reason ---

9 Q. For you to have been working with your wallet?

10 A. With my wallet, no. Why would I -- I mean, at that
11 hours, I don't need the wallet, the use of wallet; I
12 had my -- my Driver License there.

13 Q. Okay.

14 A. And the same thing with the cell phone.

15 Q. And you don't know whether you had a chart in your
16 hands or not?

17 A. No, I don't recall.

18 Q. You might have had a chart, you might not have had a
19 chart?

20 A. I don't recall.

21 Q. And you don't know whether you -- where you were
22 going? You don't know if you were going to see a
23 patient, going to get another chart ---

24 A. Oh, yeah, I don't recall.

25 Q. Have you ever been diagnosed with having a memory

1 condition?

2 A. No.

3 Q. Something that would -- would mean your memory was not
4 as good as an otherwise healthy and normal person?

5 A. No.

6 Q. Okay. Have you -- have you suffered any psychological
7 trauma as a result of this injury that could be
8 preventing you from remembering these things?

9 A. Not that I was diagnosed with.

10 Q. It's been three years?

11 A. That's correct.

12 Q. You mentioned that it's been quite a while. Was your
13 memory of what happened on July 6th, 2011 once better
14 than it is today? In other words, if we had asked you
15 on July 8th what happened, could you have told us more
16 than you're telling us today? Could you remember
17 more?

18 A. Probably not. As I said, I fell so hard, and I really
19 don't remember.

20 Q. So, you -- you think your recollection is as good now
21 as it was immediately after the accident?

22 A. That wouldn't be correct. People do forget over time.
23 Your memory won't be as good as three years ago, no.
24 A certain particular memory won't be as good as three
25 years ago if you're trying to recall it. Generally

1 speaking.

2 Q. It depends on the memory, doesn't it?

3 MR. PHILLIPS: Please answer verbally.

4 I saw you ---

5 Q. There are certainly some things in your life that
6 you're not going to forget.

7 A. I would say my -- three years ago and now, I would --
8 I would say pretty much I still wouldn't recall.

9 Q. You wouldn't have remembered a whole lot more three
10 years ago?

11 A. A whole lot more, that's correct.

12 Q. Than you do right now?

13 A. That's correct.

14 Q. Okay. I just want to be real clear. You don't
15 remember if it was your left foot or your right foot
16 that slipped?

17 A. I don't.

18 Q. And you don't know whether it was liquid soap or water
19 that you slipped on?

20 A. I don't.

21 Q. Could have been a fish?

22 MR. PHILLIPS: Object to form.

23 A. Fish, you would have felt something.

24 Q. Could have been a piece of paper?

25 A. No.

- 1 Q. Why not?
- 2 A. As I mentioned before, I felt that that was fluid,
3 some sort of liquid.
- 4 Q. Okay. Could have been soup?
- 5 A. Could be.
- 6 Q. Could have been blood?
- 7 A. A liquid, any sort of liquid.
- 8 Q. Blood?
- 9 A. Any sort of liquid could be possible.
- 10 Q. Urine?
- 11 A. Could be.
- 12 Q. Medicine? IV fluid?
- 13 A. Any liquid ---
- 14 Q. Okay.
- 15 A. -- is possible.
- 16 Q. So, it didn't have to be water?
- 17 A. Liquid, any liquid would.
- 18 Q. So, when you say water, you're -- you're guessing it's
19 water?
- 20 A. Because I felt that was water.
- 21 Q. And your senses distinguish between water and some
22 other liquid?
- 23 A. To some extent.
- 24 Q. They do?
- 25 A. If you feel -- if you -- if you fall on liquid, water,

1 and if you fall on a whole lot of soupy material, you
2 would feel a slight difference.

3 Q. Based on viscosity?

4 A. You would just feel it. You would feel -- you would
5 -- if you just step on a bowl of Progresso soup
6 spilled on the floor, it would be different from you
7 stepping on just watery, liquid type.

8 Q. How about saline or any other of the liquid, clear
9 liquid substances that might be ---

10 A. Could, too.

11 Q. -- in a hospital?

12 A. That could, too.

13 Q. Okay. Tell me, how long do you think the water was
14 there?

15 A. I don't know.

16 Q. Do you believe an employee of Tuomey knew the
17 substance was there that you say you slipped in?

18 A. I don't know.

19 Q. Is there any way an employee of Tuomey could have
20 known the water was there?

21 A. I don't know.

22 MR. HOLLER: Can we take a quick break?

23 (OFF THE RECORD).

24 EXAMINATION BY MR. HOLLER CONTINUED:

25 Q. Dr. Myat, you've already told me a little bit about

1 this. You said after you fell, the nurses helped you
2 get on a stretcher and you went down to the Emergency
3 Department?

4 A. Yes, sir.

5 Q. Okay. And from the Emergency Department, they
6 determined and just -- just tell me generally -- I'm
7 not a doctor as you know -- what was wrong with your
8 leg.

9 A. I was -- they took an X-ray and I knew something was
10 broken, but I don't know what was broken and I was in
11 a lot of pain.

12 Q. Uh-huh (affirmative response).

13 A. So, they did an X-ray and later they came back and
14 told me the patella was broken.

15 Q. Meaning kneecap?

16 A. Kneecap, yes, sir.

17 Q. Okay.

18 A. Kneecap. And also, the -- the tendon that connects
19 the patella and the tibia also ruptured.

20 Q. Okay. And who -- obviously, no one in the Emergency
21 Department does that type of work. Who did the work
22 for you? Who worked on your knee?

23 A. Oh. Dr. Cuce'.

24 Q. Okay. Did he see you while you were there? I mean,
25 did you get out of the Emergency Department and then

1 go see Dr. Cuce' later?

2 A. I -- can I -- if I have to guess, he came by when I
3 was in ER, but that's all blurred. I think he came by
4 when I was in ER.

5 Q. You think you saw Dr. Cuce' while you were in the ---

6 A. ER.

7 Q. Okay.

8 A. I think he came by.

9 Q. Did he do surgery that day?

10 A. Yes, sir.

11 Q. Okay. And where did you go -- how long were you in
12 the hospital after the surgery or did you get to go
13 home?

14 A. The next day I went home.

15 Q. Okay.

16 A. One day.

17 Q. And then from where -- what was your -- did you go to
18 rehab after that?

19 A. I -- I was in a cast after the surgery.

20 Q. Okay.

21 A. And then I -- and then about -- up until like four,
22 six weeks, and then -- four to six weeks at that time,
23 the therapy begins.

24 Q. Once you came out of the cast, or did you do therapy
25 while you were in the cast?

1 A. I was at home. The therapist came to home.

2 Q. Home Health?

3 A. Yes, sir. Home Health, yes, sir.

4 Q. What were they helping you do; just teaching you how
5 to ambulate and move around with the cast?

6 A. Yes.

7 Q. Okay. Now, that's -- I'm looking at some of the Home
8 Health records. They were teaching you how to get
9 into and out of bed?

10 A. Yes, sir. Because it was -- it was difficult because
11 of this (witness indicates leg). You know, you can't

12 ---

13 Q. You had a straight leg cast on?

14 A. Yes.

15 Q. Okay. Which means from your -- from your upper thigh
16 down to your ankle, toes?

17 A. Oh, not to -- not to toes I don't think. It's here.
18 Just the knee area here. (Witness indicates).

19 Q. Didn't cover your foot?

20 A. I don't think so. I don't -- no.

21 Q. Okay. And how did you progress while you were in the
22 cast? Did your leg get better, the pain level?

23 A. The pain was -- I was taking pain medicine.

24 Q. What types of pain medicine?

25 A. It was -- at that time, I don't remember, but I was

1 taking pain medicine.

2 Q. Was it a narcotic?

3 A. My body doesn't agree well with the scheduled pain
4 medicine.

5 Q. Okay.

6 A. So, I get vomiting and so on and so forth; so, I ---

7 Q. Okay.

8 A. -- either Tylenol, plain, or something like that.

9 Q. When you -- you know, of course, the difference
10 between an allergy and someone who just doesn't like
11 the medicine?

12 A. No, this is -- I had a reaction to that.

13 Q. Okay. And your reaction is?

14 A. Nausea, vomiting.

15 Q. Anything else?

16 A. And I just don't feel right.

17 Q. Okay. And it doesn't give you any pain relief, or
18 does it?

19 A. Oh, it will give you pain relief; just, you don't feel
20 good.

21 Q. Right.

22 A. You don't feel good.

23 Q. It looks like you followed up with Dr. Cuce' ---

24 A. Yes, sir.

25 Q. -- a number of weeks after the surgery?

1 A. Yes, sir.

2 Q. Then he put you in physical therapy?

3 A. Yes.

4 Q. Were you satisfied with the physical therapy?

5 A. Yes, sir.

6 Q. Do you think you got good care?

7 A. They were very good people, yes, sir.

8 Q. Okay. How was your -- what was your pain level while
9 you were going through physical therapy?

10 A. Controlled at times. Sometimes, you know, you have
11 some pain.

12 Q. Okay. Let me -- let me ask that two different ways.
13 When you were going to physical therapy, when you went
14 into physical therapy, was your leg in pain?

15 A. Oh, when I go to therapy, I take pain medicine before
16 I go.

17 Q. Okay.

18 A. Yes, sir.

19 Q. With the -- you were saying "nonnarcotic" you recall?

20 A. Yes, sir.

21 Q. So, with nonnarcotic pain medication going into your
22 therapy, you know, while you're, you know, out of your
23 cast, prior to beginning your therapy, were you in
24 pain?

25 A. Prior ---

1 Q. This is my question. Yes.

2 A. Prior to therapy, maybe one to two, three to four.

3 It's not ten or nine.

4 Q. Okay. Did the therapy cause you pain to your leg?

5 A. Oh, yeah.

6 Q. Okay. And that's what ---

7 A. You have pain in therapy, yes, sir.

8 Q. Okay. That's what I'm trying to get a baseline for is

9 -- is ---

10 A. Therapy cause definitely pain.

11 Q. Okay. Tell me how you progressed through the physical

12 therapy. It looks like you -- at some point in time,

13 you got up to where you were okay to -- you were

14 ambulating without pain at least at some point in

15 time?

16 A. I got better at times and let me elaborate a little

17 bit on that. I -- after the original surgery, you go

18 through therapy for a few weeks and then see how it

19 goes. Usually, they get better and you can handle

20 more. And I -- when I first started with therapist,

21 you know, the expectations were high, and after a few

22 weeks, I wasn't able to bend my knees. I was doing

23 about 40, 45, what it ---

24 Q. Pounds -- oh, 40, 45 degrees?

25 A. First -- yes, sir. 45 degrees ---

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1 Q. Okay.

2 A. -- with the therapist forcing you, and some -- some
3 people are pain intolerant. I -- if I have to guess,
4 probably the therapist thought that I was probably a
5 little pain intolerant, meaning, I don't do things
6 probably because of pain, and I don't know what
7 happened. They had a communication between the
8 therapist and the orthopaedist.

9 Q. Dr. Cuce'?

10 A. Dr. Cuce'. And when I went back and talked with Dr.
11 Cuce', Dr. Cuce' finally decided that let's go for a
12 second -- second surgery, meaning, do it under
13 anesthesia, bend it under anesthesia. (Witness
14 indicates).

15 Q. And -- and you're making a motion with your hands.
16 They put you on your stomach and then bend your leg
17 back?

18 A. I don't -- I mean, I was out, sir. I don't remember.

19 Q. Not during the surgery; I'm talking about the physical
20 therapy.

21 A. Oh, in the physical therapy -- no, I -- I would be
22 lying on a bed, sitting, you know, and then they would
23 just try and bend it.

24 Q. Okay. But the second surgery that Dr. Cuce' performed
25 was to help you with your range of motion?

1 A. Yes, that's correct because it wasn't bending the way
2 it's expected.

3 Q. Okay. And what -- where in your knee did the bending
4 cause pain?

5 A. All over.

6 Q. The whole leg?

7 A. No, sir, the knee area.

8 Q. Okay.

9 A. The knee area.

10 Q. You mentioned that there was an injury to the tendon
11 that held the patella?

12 A. The whole knee area.

13 Q. Okay. And that's -- the pain was in the knee area?

14 A. The whole knee.

15 Q. Okay. Was -- tell me how the second surgery -- how
16 did you do after the second surgery?

17 A. So, we went for a second surgery. They call it
18 manipulation under anesthesia. And I was -- they, you
19 know, they gave me anesthesia and I was out, and when
20 I came back, then he -- later, I was told that there
21 was, you know, a problem during the procedure that
22 they couldn't do the whole thing. I said, "What --
23 what happened?" So, I'm not an orthopedist, but ---

24 Q. Neither am I.

25 A. -- my understanding is, you're supposed to be -- when

1 you bend the knees this way, that's a hundred
2 and thirty-five (135) degrees, about.

3 Q. Full range of motion?

4 A. Yes, sir. And I -- my -- what they were doing at the
5 therapist, I was going 45, 50-ish; so, they weren't
6 really satisfied with the outcome, the therapist, and
7 they did it. And when they did it under anesthesia at
8 one hundred (100), and then I was told the incision
9 broke open.

10 Q. The what broke open?

11 A. The surgical site started breaking down. The surgical
12 area started opening up.

13 Q. And how -- how many weeks after the initial surgery
14 would that have been?

15 A. That was October 24th if I'm not mistaken. The first
16 one is July 6.

17 Q. So, it's the skin that was pulling apart that made
18 them stop the range of motion?

19 A. When you have the surgery here in the knee, I guess
20 when they sutured up whatever that was, the surgical
21 scar and the incision area, when you -- when you bend
22 it all the way here with anesthesia, if there's no
23 problem, it will bend provided that you don't -- you
24 didn't do it before because of the pain. If you're
25 just pain intolerant so you won't bend it, but with

1 anesthesia, if you can bend it, you're out; so, they
2 could bend it all the way. But with -- my surgery
3 was, when he reached to a hundred (100) degrees, and
4 then the wound surgical site starts opening up -- the
5 incision breaks open in the top. That's the -- that's
6 the time he realized that this is maximum one hundred
7 (100) degrees, because even with the anesthesia when
8 you're out, he could only pull it a hundred (100)
9 degrees. Because the more he pulls it, the surgical
10 site's going to open again, and he's got to do all
11 over again.

12 Q. Did Dr. Cuce' -- did he indicate to you whether that
13 surgery was successful or not successful?

14 A. Was success or not success, he didn't tell me
15 anything.

16 Q. Okay.

17 A. But he did tell me he had -- they have to stop at a
18 hundred (100) degrees.

19 Q. Then you returned to physical therapy?

20 A. That's correct, sir.

21 Q. Tell me how you progressed with physical therapy after
22 the second surgery.

23 A. After that, we know the maximum is a hundred (100)
24 degrees. So we try; we do it, we do it, we do it, and
25 at one point, I could go in -- Dr. Cuce' said, "Just

1 keep going," and at one point, my therapist told me,
2 "don't come back no more." I said, "Well, my
3 orthopaedist didn't discharge me." And he said, "I'll
4 talk to Dr. Cuce' and just don't come back. You are
5 -- physically to him, it's maximum." So, he said,
6 "I'll talk to Dr. Cuce'." I, you know, he's from
7 Tuomey; I'm, -- you know, I know the gentleman's a
8 very nice therapist.

9 Q. What's his name?

10 A. I said, "I trust" -- oh, Lord. Mr. Mallone, I think.
11 John Mallone.

12 Q. Phillip Mallery?

13 A. Mallone, I think. John Mallone.

14 Q. Okay.

15 A. Therapist. He said he would talk to Dr. Cuce'. And
16 the next time I saw Dr. Cuce', I said -- he said,
17 "How's the therapy?" I said, "You know, we -- we're
18 done." You know, I'm sure they communicated, and he
19 said, "Fine".

20 Q. Did you go to any more therapy after that?

21 A. No more, sir.

22 Q. So, you've been to Tuomey Physical Therapy?

23 A. Yes, sir.

24 Q. Have you also -- okay. Looks like you went through
25 therapy through December 14th, 2011. Does that sound

1 approximately ---

2 A. That's approximately right, ---

3 Q. -- right?

4 A. -- yes, sir.

5 Q. Did Dr. Cuce' give you any exercises to use at home or
6 any other devices?

7 A. Yes, sir.

8 Q. And --

9 A. We have a Dynasplint, kind of an automated machine; we
10 just do -- we tried that.

11 Q. Did that help?

12 A. Well, to some extent. Yeah.

13 Q. Do you still use that?

14 A. Oh, no, it's just for a few months. Yes, sir.

15 Q. Okay. Has he given you any exercises or stretching to
16 do?

17 A. Exercise or stretching, as tolerated. That's all.

18 Q. Did Dr. Cuce' give you any of those to do?

19 A. A particular exercise, no.

20 Q. Okay.

21 A. No.

22 Q. He didn't give you any stretching exercises to do?

23 A. No, sir.

24 Q. Were you evaluated by Lowe's Physical Therapy?

25 A. That's correct.

1 Q. That's in Florence?

2 A. That's correct.

3 Q. What was -- who sent you there?

4 A. Dr. Cuce'.

5 Q. What was the purpose of that evaluation?

6 A. The -- what's this -- what is this score for that?

7 What's the name? Can I -- may I take a look at this?

8 Q. Sure.

9 A. That is for impairment ratings. Impairment ratings.

10 Q. And was it a Functional Capacity Evaluation?

11 A. I -- I -- I think so. My understanding is, it was
12 just for impairment rating. Yeah.

13 Q. What is your understanding of what an impairment
14 rating is?

15 A. I -- I'm not an expert on that.

16 Q. Okay.

17 A. No, sir. Just -- I don't -- you know, I don't have my
18 own -- all of my HIV patients, I don't have patients
19 that I deal with impairment ratings on, and so, I
20 don't know. I don't have a lot of knowledge of that.

21 Q. It looks like you also saw Dr. Warrick, Todd Warrick?

22 A. That's correct.

23 Q. What was the purpose of -- did Dr. Cuce' send you to
24 Dr. Warrick?

25 A. No, sir. Well, yes and no. Because I saw Mr. Lowe

1 for the impairment rating. Mr. Lowe thought that
2 maybe the knee pain may be a complex Regional Pain
3 Syndrome/Reflex Sympathetic Dystrophy.

4 Q. Okay.

5 A. Further, he wants me to be evaluated, and for that,
6 Dr. Cuce' sent me to Dr. Warrick.

7 Q. From your medical training, do you know what that is,
8 RSD?

9 A. No, sir. We from -- we don't -- that's one thing I
10 don't usually deal with; it's out of my scope. I deal
11 with infections.

12 Q. Okay. How did your visit with Dr. Warrick go?

13 A. Dr. Warrick, when I saw him, he ruled it out. He said
14 that's not, in his opinion, Reflex Sympathetic
15 Dystrophy, but he thinks that's abnormal central
16 nervous system nerve signaling secondary to a
17 nociceptive/neuropathic pain.

18 Q. Break that down for me. Help me. Go back to that
19 seven year old again; you've got to help me.

20 A. It's -- my understanding -- I'm not an expert on that
21 field, but my understanding is, after an injury to a
22 certain tissue area, your nerves, nerve endings, get
23 injured, and when they reorganize or redevelop, I
24 guess, there's a certain signal sent to the central
25 nervous system and which certain trauma, surgery and

1 things can cause abnormal signals sending to the
2 central nervous system causing neuropathic pain.

3 Q. Okay. Meaning, the nerve continues to sound the fire
4 alarm even though there's not a fire?

5 A. They don't talk right. In other words.

6 Q. Okay. Is that what you think you have?

7 A. That's his -- that's Dr. Warrick's opinion.

8 Q. Okay. And what, if anything, can you do to treat
9 that?

10 A. Pain medicine.

11 Q. What type?

12 A. May I look at it?

13 Q. Sure.

14 A. I'm looking at Dr. Warrick's notes. Can I read it?

15 Q. You can either read it or just read it to yourself and
16 then tell me what it says. Either way.

17 A. He says, "At this point I think topical treatment is
18 the best initial step. I ordered him a topical mixed
19 combination ointment to apply three times daily. I
20 will consider a low dose tricyclic agent such as
21 Nortriptyline or Desipramine to reduce central
22 sensitization and return to clinic as needed.
23 Continue care with Dr. Cuce'."

24 Q. Okay. Whatever that is you just read, did you do
25 that?

1 A. Well, that's his opinion. I -- I'm a patient; so,
2 yes, sir.

3 Q. And that's what I'm asking. Did you follow through
4 with what he instructed you to do?

5 A. Yes, sir. Yes, sir. I went back to Dr. Cuce'.

6 Q. Okay. Now, in terms of the topical agents ---

7 A. Yes, sir.

8 Q. -- and the medicines that he talked about ---

9 A. We tried that.

10 Q. Did it help?

11 A. Yes and no. When you -- I have -- what I have is just
12 a chronic pain, progressive pain worsened by
13 progressive ambulation; so, a certain way I move,
14 certain things, you know, it's just pain. That means
15 you apply with lotion and you may be okay for certain
16 period of time, but it's not healed.

17 Q. The -- the note you just read from, Dr. Warrick said
18 return ---

19 A. As needed.

20 Q. -- as needed to him?

21 A. Yes.

22 Q. Otherwise follow-up with ---

23 A. Dr. Cuce'.

24 Q. -- Dr. Cuce'. Have you ever returned to see Dr.
25 Warrick?

1 A. No. No.

2 Q. You saw Dr. Warrick on -- and you've got some records
3 in front of you, your medical records, May 22nd, 2012.
4 It looks like you saw Dr. Cuce' in June of 2012?

5 A. Yes.

6 Q. And then it looks like I've got a note where you saw
7 Dr. Cuce' November 1st, 2013. So, some eighteen (18)
8 months later?

9 A. November 1st, 2013, I -- I don't think so. Dr. Cuce'
10 is out of town already.

11 Q. I'm sorry. Maybe you didn't see Dr. Cuce'. Did you
12 see somebody else at Sumter Orthopaedics?

13 A. Yes, sir. November 1st, I saw Dr. Stroebel.

14 Q. Okay.

15 A. I saw Dr. Stroebel.

16 Q. And what -- what -- why did you go back to see Dr.
17 Stroebel?

18 A. Oh. Dr. Cuce', my understanding, left town.

19 Q. This is true.

20 A. So, I had a problem with my knee; I needed to see an
21 orthopaedist just in case something goes wrong. So,
22 I call office; I say, "I need an orthopaedist, I need
23 an appointment just to make sure I have an
24 orthopaedist in case I have a problem to go see."

25 Because before Dr. Cuce' left, he said, "This is it;"

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1 you know, just come back as needed to Dr. Cuce'. So,
2 that's why I made an appointment and saw Dr. Stroebe.

3 Q. When you went back on November 1st, 2013, did you go
4 back to reestablish your relationship with an
5 orthopaedist or did something change in your condition
6 which required you to go back and see the
7 orthopaedist?

8 A. Reestablish.

9 Q. Okay.

10 A. Reestablish.

11 Q. In other words, you didn't have an episode of greater
12 than usual pain that precipitated you going back and
13 seeing the doctor?

14 A. No.

15 Q. Okay. As a result of this fall on July 6, 2011, have
16 you seen any other medical providers other than Sumter
17 Orthopaedics, Dr. Todd Warrick, Lowe's Therapy and
18 Tuomey Physical Therapy and, of course, Tuomey
19 Hospital?

20 A. Nobody else.

21 Q. Do you feel like the condition or the condition of
22 your left leg as a result of this fall on July 6,
23 2011, do you feel like you've been fully evaluated?
24 In other words, do you feel like there's further
25 evaluation that could be helpful to you?

1 A. Helpful, I do not know. Further procedures, there's
2 always further procedures. Whether or not that's
3 going to make me better or worse, I -- I wasn't
4 recommended by Dr. Cuce', and I wasn't recommended by
5 Dr. Stroebel. When I saw him, Dr. Stroebel told me
6 the same thing, "I don't recommend anything further.
7 Come back when you need it -- when you need it as
8 needed".

9 Q. Okay.

10 A. "As needed. No need for a follow-up appointment".

11 Q. Okay. Meaning, if something gets worse or your
12 condition changes?

13 A. Yes, sir.

14 Q. Okay. And I know you have told me what their opinion
15 is. Do you feel like there's a -- there's a further
16 evaluation, like, at a teaching hospital or ---

17 A. I trust their opinion.

18 Q. Okay. Do you feel like -- is there any additional
19 treatment that you feel may be helpful?

20 A. In my orthopaedist's, two of them's opinion, they
21 don't recommend any further, and I'm -- this is what
22 I follow.

23 Q. Tell me, Dr. Myat, about your progression back to
24 work. There was -- you had the fall. Tell me what
25 period of time were you unable to work at all after

1 your initial fall and surgery.

2 A. After the fall. About two weeks or two months, I
3 can't -- I couldn't work. Soon as I got the
4 clearance, the green light from Dr. Cuce' to try, he
5 said, "You can go back and try." I tried with the
6 scooter. Which one first -- I don't know.
7 Wheelchair. Wheelchair first. And my wife pushed me
8 around the hospital. I mean, I work every day; so, I
9 try and then ---

10 Q. Did you go back full-time, part-time, just kind of
11 walk me through the progression how much work you were
12 doing.

13 A. Oh, when you go back, you don't have patients because
14 I -- when you start back, your patient count is zero.
15 So, I don't know if you call it full-time or part-
16 time, but really no patients. Then you have to
17 reaccumulate slowly. And after the wheelchair, I
18 tried out with the -- the hospital helped me with the
19 scooter. I got a scooter and then a walker and then
20 a four-prong cane and then a one-prong cane, and then
21 on my own, slowly, I tried. I tried.

22 Q. Was there a period of time when you could go with
23 either a one-prong cane or no walking aid?

24 A. I was on my own eventually at that time.

25 Q. Did you ever build your practice back up to a full

1 practice?

2 A. Close to, yes, sir.

3 Q. Okay. And what happened where you could no longer go
4 forward in that -- in that condition?

5 A. What happened? You mean why did I -- I don't
6 understand.

7 Q. You said you progressed to the point where you could
8 ambulate without a cane?

9 A. Yes, sir.

10 Q. And you had almost a full load of practice?

11 A. I was still doing it with pain, but I slowly tried to
12 be on my own.

13 Q. Yes, sir.

14 A. And what happened afterwards was, the more I used my
15 left knee with progressive pain, the more I would
16 depend on the right side as well, and then, you know,
17 you keep taking pain medicine, and I work, and from
18 left knee pain to right knee pain and right hip pain
19 and, you know, sometimes the right back pain, I mean,
20 lower back pain; so, I kept working with pain medicine
21 and up to a point until I couldn't do it any more.

22 Q. When you say pain medication, we're still talking
23 about nonnarcotic pain ---

24 A. I was taking non-narcotics.

25 Q. Okay.

1 A. Motrin. Tylenol. Alternating.

2 Q. Were you ever -- did you ever have your right knee and
3 right hip evaluated by a medical provider?

4 A. Every time I see Dr. Cuce', I tell him, and he would
5 look at it. Not up to a point that X-rays were done
6 or anything like that, but physically examine, yes,
7 sir.

8 Q. Okay. So, you think that you -- you are comfortable
9 that you did have your right hip and right knee
10 evaluated by Dr. Cuce'?

11 A. Yes. But if I don't use -- if I don't walk a lot,
12 meaning, if I don't use a lot of compensation of the
13 right side, I'm okay on the right side. The pain
14 won't be -- it won't be pain if I don't walk.

15 Q. And at some point in time, you decided to stop
16 working?

17 A. The pain progressively worsened up to a point that it
18 impairs my clinical judgment and concentration. At
19 one point, I was seeing a patient, and I was talking
20 out of my head in the clinic.

21 Q. Because of the pain, not the medication?

22 A. Because of the pain.

23 Q. Okay.

24 A. And then I realized and I caught it, and I was like,
25 you know, in front of a patient and I said -- what am

1 I doing. And that's -- I went back to Dr. Cuce', and
2 I said, "Dr. Cuce, I have a problem with concentration
3 and clinical judgment."

4 Q. Did you ever try to reduce your level of ambulation
5 and continue to -- and continue to treat patients?

6 A. Later -- later days, my work load wasn't very bad.

7 Q. It was or was not very bad?

8 A. Was not.

9 Q. Okay.

10 A. Uh-huh (affirmative response).

11 Q. Here's -- Dr. Myat, you have explained to me that
12 you've kind of worked up from a wheelchair to a
13 scooter to a four-prong cane ---

14 A. Yes, sir.

15 Q. -- to a one-prong cane; right?

16 A. Yes, sir.

17 Q. Okay. I guess what I'm asking you is, did you ever
18 try to take the progression backwards -- go back to a
19 cane?

20 A. No, sir.

21 Q. Go back to a scooter, go back to a wheelchair?

22 A. No, sir.

23 Q. You never tried that?

24 A. No.

25 Q. Do you know if that would work?

1 A. I know that I have a problem with the ambulation
2 related pain.

3 Q. I understand that.

4 A. And I know that there are certain settings in a
5 hospital where you have a patient's bed set up in a
6 certain way and you have to do certain -- you have to
7 be in a certain position to see certain patients for
8 certain infections that will require ambulation,
9 bending and so on of the left knee, and my condition
10 is not permitting me to do that.

11 Q. Okay. Can an infectious disease physician in a
12 practice such as yours practice medicine without the
13 ability to ambulate?

14 A. You -- if I can get a -- if I can get a job, like,
15 insurance; they have jobs with the insurance company,
16 calling physicians, you know, -- hey, admission is not
17 meeting a criteria, and this and that. I don't know
18 what they call it. Ms. -- Ms. Debbie might know what
19 the insurance companies calling -- hey, the admission
20 -- insurance -- the physician who work for the
21 insurance companies, like, -- if I can get that kind
22 of job, stay at home without having to go anywhere, it
23 might. But I tried.

24 Q. Well, let me say, back to the type of infectious
25 disease physician that you were prior to July 6, 2011,

1 okay, doing what you were doing. I'm just asking you,
2 okay. Piano player, you can't do it if you don't have
3 hands. Right? I could be a physicist, though ---

4 A. Yes, sir.

5 Q. -- if I don't have hands?

6 A. Yes, sir.

7 Q. Right? Steven Hawking.

8 A. Yes, sir.

9 Q. Can't move any -- can't even move his lips. Right?

10 A. I understand.

11 Q. He's wealthy and famous. Okay. That's what I'm --

12 I'm just asking, the practice that you had prior to
13 July the 6th, 2011, can you -- can a physician do that
14 without being able to ambulate?

15 A. I don't think so. For the reasons that I explained to
16 you. If I do -- if I'm an infectious disease
17 physician, I have to see the infections myself because
18 if I don't see an infection, somebody may tell you
19 it's a little boil but what's really involved is the
20 whole tissue being eaten.

21 Q. I get that. I mean, I understand that you have to --
22 you have to physically ---

23 A. I have to see it, feel it, ---

24 Q. Right.

25 A. -- and look at it.

1 Q. And you do not believe that there are modifications
2 for a nonambulatory infectious disease physician to be
3 able to do the job?

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

5 Q. And that ---

6 A. An infectious disease physician needs to see an
7 infection personally.

8 Q. Okay.

9 A. Physically.

10 Q. And other than, as you are progressing from a
11 wheelchair to ambulating without aid, you have not
12 tried to go back to a wheelchair or a scooter or any
13 other type of ambulatory device to see if you could
14 still perform services as an infectious disease
15 physician?

16 A. No, I did not.

17 Q. Okay. Would you agree you have a specialized
18 knowledge? Medical doctor, infectious disease ---

19 A. I have ---

20 Q. -- internal medicine?

21 A. Yes, sir, I'm double-boarded.

22 Q. Okay. That puts you in a smaller subset of labor
23 force. Agree?

24 A. Yes, sir.

25 Q. Okay. What, if anything, have you done to try to find

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1 work that you could do, given your limitations?

2 A. Did I look for employment; is that what you're asking
3 me?

4 Q. Sure.

5 A. I have. I have looked for the physician employment
6 agencies like Healthcare -- I mean, Hospital -- HCA,
7 Hospital Corporation of America and national physician
8 job employment agencies. I have sent an e-mail. I
9 have records of it. And also, something called

10 Jackson & Coker also is a national physician
11 employment agency. I have -- two different recruiters
12 I, you know, I e-mailed them.

13 Q. Jackson & Coker?

14 A. Jackson & Coker. HCA is only one time. And I have
15 records if you want. And -- and also, I interviewed
16 at VA with the Chief of Staff there, with the Division
17 Chief in Geriatrics there for a job, but that job
18 requires kneeling and stooping. So, they didn't --
19 they didn't fill the job; the job is still open. And
20 also, I applied for another VA job, a clinic job in
21 Sumter, and I -- through the VA system since my
22 records are already on the VA, and within two weeks --
23 within two weeks, I got an e-mail from the Division
24 Head; he said, "Dr. Myat, I'd like to talk to you. I
25 want to meet with you," and this and that; "let's make

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1 an appointment." You know, I e-mailed them back. I
2 said, you know, "Everything is good. I just want to
3 let you know I have physical limitation," this and
4 that. I haven't heard anything back for six weeks or
5 so, and the next thing I heard was last week, and they
6 said the position's been filled by internal candidate.

7 Q. Okay.

8 A. I never heard back from him. And also, I have a
9 friend who is a chief pharmacy officer at Ascension
10 Health System, and being in his position, he knows a
11 lot of people there. And he was trying to help me
12 find an insurance related stay home, if I qualify. I
13 don't really know how it will work, but I say, "I will
14 be very interested," I sent him CVs and everything.
15 He sent me e-mails again after him requesting his
16 friends for a couple times. He said, "Win, I'm trying
17 my best; here are your, you know, proof," but he
18 hasn't heard back from them; I haven't heard back from
19 them.

20 Q. Have you documented all of your attempts to find
21 employment?

22 A. Yes, sir. Yes, sir.

23 Q. And you have those records?

24 A. Yes, sir.

25 Q. Have you provided those to Sam?

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1 A. I have it.

2 (OFF THE RECORD)

3 EXAMINATION BY MR. HOLLER CONTINUED:

4 Q. Dr. Myat, you've been kind enough to provide us with
5 some documentation, which we've not seen before today,
6 but basically, this is -- it appears to be at least
7 some paper evidence of your efforts to acquire
8 employment?

9 A. Yes, sir.

10 Q. Okay. You indicated to me earlier that you have --
11 had spoken to a number of different agencies?

12 A. Yes.

13 Q. Let me see if I can ---

14 A. Yes, sir.

15 Q. You said you spoke to HCA or Health Care of America?

16 A. Yeah. This ---

17 Q. This is different. I understand that. I'm trying --
18 I'm trying to just kind of ---

19 A. HCA is one of them, sir.

20 Q. One of them. Okay.

21 A. One of them. And you will see the e-mail, and this is
22 -- if I may take a look here, I think ---

23 MR. PHILLIPS: HCA.

24 A. Yeah. That's this -- Mr. Fleshman. This is HCA.

25 This is one for HCA. I sent an e-mail. Never heard

1 back from her. This is Ms. Lori from Jackson & Coker.
2 Mr. LaWare from Jackson & Coker. Two of them. That's
3 Jackson & Coker. They are all well known nationwide
4 employment agencies.

5 Q. Okay. So, it would be fair to say that this set of
6 documents, and we'll make this an Exhibit to your
7 deposition, but this encompasses all of the efforts
8 you've made to find employment as either internal
9 medicine or ---

10 A. Yes.

11 Q. -- infectious disease physician?

12 A. All of that, yes, sir.

13 Q. Okay.

14 A. Or -- or even the insurance related work.

15 Q. Also includes efforts to find ---

16 A. Stay home ---

17 Q. -- where you would be making phone calls ---

18 A. Yes, sir.

19 Q. -- and not seeing patients physically?

20 A. Yes, sir.

21 Q. But still using your training ---

22 A. Yes, sir.

23 Q. -- in internal medicine ---

24 A. Yes, sir.

25 Q. -- and infectious disease?

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1 A. Yes, sir.

2 Q. Okay. I take it you've never been offered a position?

3 A. (Shakes head negatively).

4 Q. That's a no? You're shaking your head.

5 A. No. Oh, no, sir. No. Sorry.

6 Q. You've never been told that you would have the
7 position but for your physical limitations?

8 A. The VA told me, "I didn't choose anybody because I
9 certainly can't do the jobs that's required of me."

10 That's -- they didn't choose anybody. That's one VA.

11 Q. This first page says, "Denial letter with physical
12 requirements." What does that mean?

13 A. Oh, that's -- this is the physical requirement job.
14 This -- this one. This one is the physical
15 requirement. -- That's the one I had an interview with.
16 The second job, I interviewed with Chief of Staff at
17 the VA at Dorn as well as Division Head and I thought
18 it went well, and they said I can't because of
19 physical problems.

20 Q. They needed you to see patients in a ---

21 A. Kneeling, stooping ---

22 Q. -- in a clinical setting?

23 A. In a -- and this one, the first one, the very first
24 job is the one I think they have a -- I have all this
25 correspondence with the Chief of the Division e-mailed

1 me quickly, and then I haven't heard from them for
2 about six, seven weeks, and then just I think last
3 week, I got that reply back from the VA; it came from
4 Dorn, that they filled it out.

5 Q. What is the -- what is the geographical limitations of
6 where you would accept employment?

7 A. Well, I live here, sir. My wife works here. My
8 sister-in-law works here.

9 Q. And I won't -- I won't speak for everybody in the
10 United States, but in South Carolina at least, we all
11 like to have a little short drive to work, but in New
12 York, for example, sometimes, people travel for hours
13 on the train or drive very long distances to go to
14 where they work. You're familiar with that?

15 A. Yes, sir.

16 Q. Okay. That's not uncommon for people to commute
17 distances ---

18 A. Yes, sir.

19 Q. -- for employment?

20 A. I understand.

21 Q. And in the medical profession, that's not unusual
22 either, is it?

23 A. Not in Sumter.

24 Q. Well, anywhere. Loco tenens, you may -- you may
25 travel quite some distance to work for a period of

1 time?

2 A. That -- that would -- loco tenens would do it; that
3 would require traveling; that's right.

4 Q. If we went over to our Emergency Department right now
5 and asked all the physicians where they lived, ---

6 A. Yes, sir.

7 Q. -- probably not many of them are in Sumter, are they?

8 A. Well, within a commutable distance.

9 Q. Which could be Charleston, Savannah, Florence?

10 A. Not Charleston. Probably Orangeburg.

11 Q. Okay. But -- but they're -- they're willing to
12 travel?

13 A. Yes, sir. Some.

14 Q. As an incident of their employment?

15 A. Yes, sir.

16 Q. Okay. Is there some geographical area that you --
17 you're capable and willing to travel?

18 A. If it's within reasonable distance, sure.

19 Q. Okay. Did you put any -- in your look for employment,
20 did you put any geographical restrictions ---

21 A. With the national job search agency, like, Jackson &
22 Coker and HCA Hospital -- Hospital Care America, I
23 didn't even tell them where. They just go -- they
24 didn't even reply. I didn't even tell them Sumter or
25 South Carolina. I ---

1 Q. And did you e-mail them or was this a phone call?

2 A. Oh, that's an e-mail. That's an e-mail. I e-mailed
3 them.

4 Q. But there's not a phone call that preceded the e-mail?

5 A. No.

6 Q. You haven't had somebody and physically gone and sat
7 down in front of a recruiter and said -- find me a
8 job?

9 A. A physical recruiter?

10 Q. Yes.

11 A. No. But with the VA, yeah, I had an interview.

12 Q. After you had applied?

13 A. After I had applied, yes, sir.

14 Q. Okay. Have you explored any jobs outside of the
15 medical profession?

16 A. No.

17 Q. Okay. Have you applied for Social Security
18 Disability?

19 A. I have.

20 Q. Okay. Where does your -- has there been -- have you
21 been put on Disability?

22 A. It's been denied.

23 Q. Okay. As a result of that process, were you
24 evaluated? Did someone physically evaluate you? A
25 doctor?

1 A. No.

2 Q. They never sent you to anybody?

3 A. No. I'm waiting for the -- what they call it -- I've
4 been denied twice. I -- the Administrative Law Judge,
5 I'm waiting for that point.

6 Q. To go speak with the ALJ?

7 A. Yes, sir. But I've been denied twice by the office.

8 Q. Are you being assisted in that process with an
9 attorney?

10 A. Yes, sir.

11 Q. Who is that?

12 A. Robertson Wendt from Charleston.

13 Q. Robertson ---

14 A. Wendt.

15 Q. -- Wendt.

16 A. W-E-N-D-T, yeah, Wendt.

17 Q. Are you on private Disability?

18 A. Yes, sir.

19 Q. And that's through what company?

20 A. Met Life.

21 Q. Did you -- did you have to go through any evaluation
22 process ---

23 A. No, sir.

24 Q. -- to go on Disability for ---

25 A. No, sir.

1 Q. Okay. How long -- your Disability policy, what
2 benefits do you get from it?

3 A. My understanding is, it's good until sixty-five (65).

4 Q. Okay. And what amount?

5 A. Eight Thousand Dollars (\$8,000.00).

6 Q. A month?

7 A. A month, yes.

8 Q. And they've not required you -- they don't ever
9 require you to update them medically?

10 A. Oh, I've got to fill out forms. Progress reports
11 monthly. You just fill -- anything change, no.

12 Q. Okay. Does that Disability policy require you to look
13 for employment?

14 A. No.

15 Q. Okay. Other than your wife's employment, do you have
16 any other income?

17 A. No.

18 Q. You don't have any -- do you have any investments?

19 A. I have -- I have stocks. IRA's.

20 Q. Okay. You have a retirement account, or you have an
21 investment account that's after tax dollars?

22 A. I have a retirement account.

23 Q. Okay.

24 A. And I have a regular account.

25 Q. Okay. What -- what is in your retirement account?

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 How much is in your retirement account?

2 A. My IRA account is \$300,000.00. \$330,000.00 or
3 \$340,000.00. I don't remember exact numbers.

4 Q. And what institution holds that account?

5 A. Scott Trade.

6 Q. And your investment account?

7 A. \$220,000.00. Approximately.

8 Q. And what -- what institutions holds that account?

9 A. Scott Trade.

10 Q. You own your home?

11 A. (Witness shakes head affirmatively).

12 Q. That's a yes?

13 A. Yes, sir.

14 Q. Okay. Do you have any other financial assets? I'm
15 not counting cars, but ---

16 A. Yeah. You're talking about a condo?

17 Q. A condo, other real property -- other real property.

18 A. We have a -- we have a condo at Myrtle Beach.

19 Q. Where is it at Myrtle Beach?

20 A. It's called Camelot. Camelot. Camelot. Which is not
21 for rental. We just -- we ---

22 Q. Personal use?

23 A. -- it's for personal use. And my wife -- it's under
24 my wife's name, because I guess that we're married;

25 so, I don't know if it's mine or my wife or ---

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 Q. If you try to divorce her, it's hers.

2 A. Okay. Then I won't divorce her.

3 Q. Good idea.

4 A. There's also another rental condo. Yeah. That's a
5 rental.

6 Q. Also at Camelot?

7 A. No. It's called Monterey Bay. Monterey Bay.

8 Q. So, you have a condominium at Camelot?

9 A. Yes, sir.

10 Q. And you have a condominium rental at Monterey Bay ---

11 A. Yes, sir.

12 Q. -- that you rent out?

13 A. Yes, sir.

14 Q. Okay.

15 A. Rent out.

16 Q. Camelot is -- is it mortgaged?

17 A. No, sir.

18 Q. What's the approximate value? And I understand that
19 changes.

20 A. Oh, we -- we paid \$99,000.00. \$99,000.00. It's still
21 the same. Maybe less \$10,000.00, less.

22 Q. And Monterey Bay?

23 A. The same thing, about \$100,000.00, we pay. The same
24 thing.

25 Q. Is there a mortgage on Monterey Bay?

1 A. No, sir. Oh, we have one co-op in New York. Co-op
2 apartment.

3 Q. Is that rented out?

4 A. No.

5 Q. You maintain it ---

6 A. No.

7 Q. -- for when you're in New York?

8 A. My -- my wife's, the whole family is in New York. We
9 lived in New York nine years before we came here.

10 Q. So, when you moved out, they moved in?

11 A. No, it's just there.

12 Q. Okay. But it's used?

13 A. No, sir. It's just locked.

14 Q. Okay. So, you have an apartment in New York ---

15 A. Yes, sir. Yes, sir.

16 Q. -- that no one currently lives in?

17 A. No.

18 Q. You don't rent it out?

19 A. No, sir.

20 Q. And the approximate value of that?

21 A. \$250,000.00.

22 Q. Do you own any other real property?

23 A. That's it.

24 Q. Do you have any other sources of income? You told me
25 about the private Disability.

1 A. Yes. My wife's income.

2 Q. Your wife's income, of course?

3 A. Right.

4 Q. You don't receive any assistance from family, friends,
5 anybody?

6 A. No. Not yet.

7 Q. We talked about your typical day, and you said now you
8 do -- you -- you told me what you do on your typical
9 day. What do you do for pain relief?

10 A. I take pain medicine, just alternating between
11 Tylenol, Motrin.

12 Q. Okay. And tell -- let's go back over the last month.
13 Tell me how much you typically take.

14 A. It depends. It depends. If Tylenol, if I take it on
15 a bad day, I will take it three -- three times a day.
16 With probably in between breaks, I take a Motrin.

17 Q. Okay. And give me the dosages.

18 A. 500 milligrams Tylenol, three times a day. Motrin,
19 800 milligrams.

20 Q. On a bad day, you think you take three 500 milligrams
21 of ---

22 A. Plus one Motrin.

23 Q. Okay. And those, of course, are spaced out
24 alternately?

25 A. Yes, sir.

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

1 Q. And on a good day?

2 A. On a good day, I may take one or two Tylenol. They
3 certainly cause liver problems if you take a lot of
4 Tylenol; so, I don't want to try -- I try not to take
5 a whole lot.

6 Q. Is there anything else you do for pain relief? Any
7 other medication?

8 A. No medication. But if I don't use it a lot, then it
9 doesn't pain a lot except there are certain situations

10 I may have pain from not moving, from other than
11 ambulation.

12 Q. You may have pain from other than ambulation?

13 A. Yes.

14 Q. And describe that to me.

15 A. When you sleep, you're trying to sleep in the fetal
16 position; that's how I always sleep. But now, I can't
17 bend anything. When you bend in your sleep, your body
18 is trying to bend. In the morning, before you know
19 it, you're pretty much halfway finished but, you know,
20 you realize that you -- you did what you did last
21 night in the morning because this is what happened.

22 So, it's not from ambulation; it's from just -- also,
23 going to the bathroom when you sit on the commode, you
24 have to sit in a certain position, your knee at a
25 certain degrees to sit down, but, you know, when I

1 have -- when I move in a certain position, it hurts.

2 Q. What is your -- do you have a range of motion that
3 does not cause you pain with your left leg?

4 A. Range of motion does not cause me pain. If I -- 40 to
5 45 is very comfortable position for me. Generally,
6 I'm comfortable 40 to 45.

7 Q. Okay.

8 A. Because the more pain I've got, the more I don't use
9 it. The more difficult it is for me to bend.

10 Q. So, you can move your leg between zero and 45 degrees
11 without discomfort?

12 A. If I don't have any other problems.

13 Q. Okay. Not weight-bearing; just move it -- it's the
14 ambulating that causes you the pain?

15 A. Ambulation -- I mean, sometimes, I may just move
16 certain positions and it hurts, but not all the time.
17 Not all the time. Sometimes, I can barely go to
18 bathroom from my bedroom.

19 Q. What is your -- what is your -- the limit of your
20 range of motion with pain?

21 A. With pain?

22 Q. Yes, sir.

23 A. Well, as I said, it depends on what kind of pain. If
24 I'm having a really bad pain, I can barely walk to the
25 bathroom. Just five, ten feet.

1 Q. If you wanted to demonstrate your range of motion for
2 you knee, how far do you think you can take it? How
3 far could you bend your leg back?

4 A. Oh, you're talking about bending?

5 Q. Yes. Degrees.

6 A. Bending.

7 Q. Range of motion.

8 A. Actively without passively pulling?

9 Q. Not using your hands, yes.

10 A. Yes. Actively, probably -- I could probably do 60-ish
11 range. If -- now, if I don't have pain that day.

12 Q. Can you stoop at all?

13 A. I've never done it since the surgery. I told Dr.
14 Cuce' I can't do it because it's just this side is
15 extremely sensitive, and at times, different touches
16 can cause pain; so, I don't do that.

17 Q. And I apologize. I did not realize until we started
18 this deposition that it was set upstairs. Can you get
19 up stairs without great difficulty or does that cause
20 you problems?

21 A. Well, when I have pain, it would be very difficult.
22 When I have, you know, mild to moderate pain, it may
23 take me a while, but I can do it. I need to get
24 rails. I can't just -- when you walk up, you need to
25 bend your knees up to at least 90 degrees or so. I'm

1 not an expert on that. But when you walk up, you will
2 see it yourself and you'll see that. I never realized
3 it before. So, the fact that I can't bend to a
4 certain degrees, I just can't -- I'll just go walk
5 sideways and up. I'll get up, but it's not ---

6 Q. So, it's not -- you cannot climb stairs without
7 significant assistance from the railing, even on a
8 good day?

9 A. On a good day, if I have two rails, I could get up,
10 but it may take me a while.

11 Q. And that -- that's really what I'm asking you. You --
12 for example, you couldn't go up -- on a good day, when
13 your pain level is low, you couldn't go up any flight
14 of stairs without using a handrail?

15 A. No, I can't. I need handrails, definitely.

16 Q. Okay.

17 A. Yes. Yes.

18 Q. How is your left hip and knee doing now that you are
19 not working?

20 A. Left hip?

21 Q. I'm sorry. Right hip and right knee.

22 A. It's good. It's no pain. I haven't had pain for a
23 while.

24 Q. Okay. And you said the reason you stopped working,
25 one of the reasons or, as you described it to me, was

1 not only the pain in your left knee, but your problems
2 with your lower back and your ---

3 A. And concentration and judgment and all that.

4 Q. Has that pain in your right hip, lower back and knee
5 abated? Has it gone away?

6 A. Yes, sir.

7 Q. All right. That's not -- it does not continue to be
8 a significant source of pain?

9 A. No, sir.

10 MR. HOLLER: Can we take a quick break?

11 MR. PHILLIPS: Sure.

12 MR. HOLLER: I think I'm about done.

13 (OFF THE RECORD)

14 MR. HOLLER: We're done. Thank you.

15 DR. MYAT: Thank you.

16 MR. PHILLIPS: Can I walk him to his
17 car and come back?

18 MR. HOLLER: Sure.

19 (THERE BEING NO FURTHER QUESTIONS, THE DEPOSITION WAS
20 CONCLUDED AT 1:12 P.M.).
21

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER) CERTIFICATE

I, Doris Tompkins Brown, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, certify that I did take the deposition of Dr. Win Myat, commencing at 3:40 P.M. on April 9, 2014, at the offices of Lee, Erter, Wilson, Holler and Smith, 126 North Main Street, Sumter, South Carolina; that the witness was duly sworn and cautioned to tell the truth; that the foregoing pages constitute a true and accurate transcript of the testimony given at that time and place.

I hereby certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 5th day of May, 2014.

Doris Tompkins Brown, CVR
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: 5-02-2015

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER) CERTIFICATE

PERSONALLY appeared before me, Win Myat,
M. D., who, after being duly sworn, deposes and says:
That he is the deponent in the foregoing deposition;
that he has read the testimony given at the time and place
indicated therein, and that the same is a true and accurate
transcript of the testimony given at that time and place
except for the _____ changes and/or corrections made on the
attached Errata Sheet.

WIN MYAT, M. D.

Sworn to before me this the _____
day of _____, 2014

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: _____

DR. WIN MYAT VS.
TUOMEY HEALTHCARE SYSTEM

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page or a sheet of stationery. The edges of the paper are slightly irregular, suggesting it might be from a bound volume. There is no handwriting or other markings on the page.

DATED: _____

WIN MYAT, M.D.

DENIAL LETTER with physical requirements

JOB SEARCH 1

DEPARTMENT OF VETERANS AFFAIRS

VHA COLUMBIA SC VAMC

DEPARTMENT OF VETERANS AFFAIRS

6439 GARNERS FERRY ROAD

COLUMBIA SC 29209

Dear WIN MYAT,

— This refers to the application you recently submitted to this office for the position below:

Position Title: Physician (Community Based Care Service)

Pay Plan: VM

Series/Grade:

0602-00

Vacancy ID: 1023091

Announcement Number: OE-14-TMH-1023091

Hiring Office: Community Based Care Services

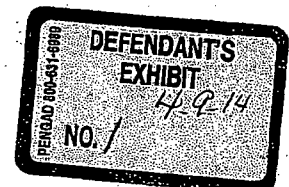
Results regarding your recent referral to the Hiring Official are as follows:

Referral Type: Former employees eligible for reinstatement and current employees eligible for transfer without competition

Appointment Type: Excepted Service Permanent

Specialty / Grade: 0602 - 00

Promotion Potential:



Locations:

Sumter, SC

Another candidate was selected for this position.

Audit Code:

NS

Code Definition:

Not Selected

Code Explanation:

The selecting office has indicated that you were not selected for the position.

Thank you for your interest in Federal employment. You are encouraged to visit www.usajobs.gov to view additional Federal

employment opportunities and information.

PLEASE DO NOT RESPOND TO THIS EMAIL MESSAGE. IT IS
AUTOMATICALLY GENERATED.

For additional information, please refer to the vacancy announcement for this
position.

JOB SEARCH 2

DEPARTMENT OF VETERANS AFFAIRS

VHA COLUMBIA SC VAMC

DEPARTMENT OF VETERANS AFFAIRS

6439 GARNERS FERRY ROAD

COLUMBIA SC 29209

Dear WIN MYAT,

This refers to the application you recently submitted to this office for the position below:

Position Title: Physician - HBPC Team

Pay Plan: VM

Series/Grade:

0602-00

Vacancy ID: 952826

Announcement Number: OE-13-SPH-952826

Hiring Office: GEC

Results regarding your recent referral to the Hiring Official are as follows:

Referral Type: Former employees eligible for reinstatement and current employees eligible for transfer without competition

Appointment Type: Excepted Service Permanent

Specialty / Grade: 0602 - 00

Promotion Potential:

Locations:

Sumter, SC

Another candidate was selected for this position.

Audit Code:

NS

Code Definition:

Not Selected

Code Explanation:

The selecting office has indicated that you were not selected for the position.

Thank you for your interest in Federal employment. You are encouraged to visit www.usajobs.gov to view additional Federal

employment opportunities and information.

PLEASE DO NOT RESPOND TO THIS EMAIL MESSAGE. IT IS
AUTOMATICALLY GENERATED.

For additional information, please refer to the vacancy announcement for this position.

KEY REQUIREMENTS

- Must pass pre-employment examination.
- Designated and/or Random Drug Testing required.
- Background and/or Security Investigation required.

DUTIES:

[Back to top](#)

The WJB Dorn VAMC is currently accepting applications for a Home Based Primary Care (HBPC) Team Physician to serve the Florence, Sumter, and Orangeburg Outpatient Clinics.

The Florence/Sumter/Orangeburg HBPC Team Physician is the physician who provides leadership to the HBPC teams and is responsible for the overall medical care delivered by the HBPC teams. The physician is administratively aligned in the Geriatrics and

JOB SEARCH 3

win myat

7/30/13

To: ljannings@jacksonandcoker.com



dear ms. lori,

dear ms. lori,

i am a board-certified ID/IM with active SC license, used to have NY license but expired
i am currently on disability (last worked on may 3rd '2012) 2' to injury to left knee cap
fracture, and am unable to ambulate effectively (can't walk more than 15 minutes or so,
can't bend my left knee 2' to constant knee pain from injury)
however, i'd be very much interested in a position that can accommodate my disability: a
desk job kind of employment for a physician would be really nice.
thanks in advance

regards,
win myat, md

Date: Mon, 29 Jul 2013 00:57:21 -0400

Subject: Openings in New York Call Lori Jannings for more information 866-628-0131

From: ljannings@reply.jacksoncoker.com

To: winmyat@hotmail.com

Openings in New York Call Lori Jannings for more information 866-628-0131

Hello Dr. Myat,

We have several openings available in New York! Please call or email me today and I
will be happy to assist you with lining up your schedule!

Hospitalist opening in Buffalo

Requires Board Certification in Internal Medicine or Family Medicine with a lot of
Hospitalist experience

- 7am-7am coverage in a Medical Evaluation and Observation Unit
- No codes, no procedures
- 24 hours, flexible scheduling, could be one day on, two off, etc.
- To start as soon in September, for at least 3 months

Hospitalist need for VAMC located near Corning, NY

Extended Care Service. The physician assumes all primary medical responsibility for their assigned HBPC patients; determines medical management in collaboration with mid-level providers. The position will require significant amounts of driving between Florence, Sumter, and Orangeburg to conduct patient visits in their homes and attending weekly interdisciplinary team meetings. When not in the program office, the incumbent is available for consultation by the HBPC staff and patients in a timely manner by telephone. The incumbent serves as preceptor, supervisor, and collaborator for advanced practice nurses and/or physician assistants. In facilities with academic affiliations, the incumbent is encouraged to have a faculty appointment and be involved in academic activities.

Incumbent will be physically assigned to either Florence or Sumter and will be decided based on the applicant selected.

PHYSICAL REQUIREMENTS: Position requires moderate lifting (15-44 pounds); straight pulling (4 hours); pushing (4 hours); reaching above shoulder; use of fingers; both hands required; walking (2 hours); standing (7 hours); kneeling (1 hours); repeating bending (4 hours) both legs required; near vision correctable at 13" to 16" to Jaeger 1 to 4; far vision correctable in one eye to 20/50 and to 20/100 in the other; ability to distinguish basic colors; hearing (aid permitted); mental and emotional stability.

QUALIFICATIONS REQUIRED:

[Back to top](#)

In order to qualify for this position you must meet the following:

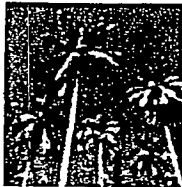
Basic Requirements: Citizen. Must be a US citizen. Must be proficient in written and spoken English. Have a degree of doctor of medicine or an equivalent degree resulting from a course of education in medicine or osteopathic medicine. Hold a current, full and unrestricted license to practice medicine or surgery in a State, Territory, or Commonwealth of the United States, or in the District of Columbia.

Reference: VA Regulations, specifically VA Handbook 5005, Part II, Appendix G-2 Physician Qualification Standard. This can be found in the local Human Resources Office

JOB SEARCH 4

win myat
7/30/13

To: wlaware@jacksonandcoker.com



dear mr. laware,

i am a board certified ID/IM with active SC license, used to have NY license but expired
i am currently on disability(last worked on may 3rd '2012) 2' to injury to left knee cap
fracture, and am unable to ambulate effectively(can't walk more than 15 minutes or so,
can't bend my left knee 2' to constant knee pain from injury)
however, i'd be very much interested in a position that can accomodate my disability: a
desk job kind of employment for a physician would be really nice.
thanks in advance

regards,
win myat, md

Date: Mon, 29 Jul 2013 19:20:37 -0400
Subject: Multiple Openings in Great New York Areas - Call Today
From: wlaware@reply.jacksoncoker.com
To: winmyat@hotmail.com

Multiple Openings in Great New York Areas - Call Today

Hello Dr. Myat,

I hope all is well. I wanted to touch base with you and let you know about a few Locum
Tenen opportunities that I am working on in the NY area. Below is a detailed list of the
positions I am currently working on. If you are interested in opportunities in other states
please reach out to me and I will let you know what we have available.

Please see details below:

- Requires Board Certification or Eligibility in Internal or Family Medicine with hospitalist experience

- M-F, daytime hours, no call
- Discharges, rounding, updating record
- VA experience a plus, but not required
- BLS and ACLS certifications
- Any state License
- Starting in later August/Sept for 6 months with possible extension

****NEW - Hospitalist opening in the Albany area**

- Requires Board Certification in Internal or Family Medicine with hospitalist experience

- 12 hour shifts, Both Days and Nights
- No Procedures
- Clear background to assure expedited privileges
- Starting in August with possible ongoing needs

In Addition, we have a couple of clinical openings:

Outpatient clinical need in Sullivan County

- Requires Board Certification in Internal Medicine
- Will be daytime hours, M-F
- Limited shared call for consults
- Starting in August, for at least one month

Disability Exams in Manhattan:

- Must be Board Certified in Family or Internal Medicine Physician
- Coverage needed Tuesdays and Thursdays, other days possible
- To start in later August, could be ongoing
- Requires NY License
- Will be mostly disability exams – so some disability experience required

For more information please contact Lori Jannings at 866.628.0131 or ljannings@jacksoncoker.com. I look forward to hearing from you!

Jackson & Coker

Phone 800.272.2707

Visit us: www.jacksoncoker.com

Email us: connect@jacksoncoker.com

If you no longer wish to receive email from Jackson & Coker, simply use this link:

[Opt-Out](#)

Hospitalist

- BC/BE – IM/FP
- 24hr Shifts
- Admits only

Hospitalist (x4) *HOT*

- BC/BE – IM/FP
- Days or Nights
- Yes Codes/No Procedures

Hospitalist – Any State License

- BC/BE – IM/FP
- M-F Daytime Hours
- No Call
- Prior VA exp is a HUGE Bonus

Internal Medicine Outpatient

- BC/BE – IM
- 9-5
- Adults Only
- 15-20 ppd
- Bread and Butter Outpatient

Internal Medicine Outpatient

- BC/BE – IM/FP
- M-F 9-5
- 18-20 ppd
- Locum to Perm

Family Practice Outpatient

- BC/BE – FP
- M-F 8-5
- 25 ppd
- Call Involved

Refer colleagues and get a referral bonus!

At this time, please forward a copy of your curriculum vitae and your particulars for immediate consideration. Your curriculum vitae will never be released without your verbal approval. As we strive to provide exceptional service to you, we will keep you informed on a regular basis as to how your search is progressing.

Please contact Will LaWare at wlaware@jacksoncoker.com and 855.220.3659

Visit us at AAFP booth 2517 in San Diego, September 24-28!

Jackson & Coker

Phone 800.272.2707

Visit us: www.jacksoncoker.com

Email us: connect@jacksoncoker.com

If you no longer wish to receive email from Jackson & Coker, simply use this link: [Opt-Out](#)

JOB SEARCH 6

win myat

11/04/13

Documents

To: guharoyr@ummhc.org



Outlook Active View

1 attachment (33.4 KB)



cvwinDECEMBER2013.doc

View online

Download as zip

good morning, Dr. Guharoy

thanks so much again for your kind help
attached is my CV
take care

win

win myat

12/18/13

To: Guharoy, Roy



thank you, sir

win

From: Roy.Guharoy@ascension.org
To: winmyat@hotmail.com
Subject: Fwd: Win Myat
Date: Wed, 18 Dec 2013 21:02:31 +0000

I have reached out to her and keeping my fingers crossed.

Roy

Begin forwarded message:

From: "Boillot, Sandra" <Sandra.Boillot@ascensionhealth.org>
Date: December 18, 2013 at 11:50:12 AM PST
To: "Guharoy, Roy" <Roy.Guharoy@ascension.org>
Subject: RE: Win Myat

Hi Roy,

I'm not surprised that he hasn't heard from them yet. Year-end is incredibly busy time for insurance carriers (and risk management departments too!) I will be seeing ProAssurance contacts at a strategy meeting on January 7 and will bring up again then.

Thanks and happy holidays to you as well.

Sandy

——Original Message——

From: Guharoy, Roy

Sent: Wednesday, December 18, 2013 1:37 PM

To: Boillot, Sandra

Subject: Win Myat

Hi Sandra:

Good afternoon. Hope you are ready for the holidays.

I am reaching out to you for your help. I spoke to Dr. Myat and he did not hear anything from them yet.

Any help will be great.

Happy Holidays to you and your family.

Roy

RECEIVED

MAY 18 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

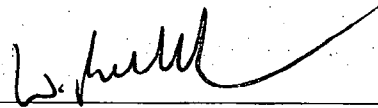
Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that the Record on Appeal is in compliance with the Order of May 1, 2008 Amendments to the South Carolina Appellant Court Rules.



William R. Padget (S.C. Bar No. 72579)

Francis "Brink" Hinson (S.C. Bar No. 74917)

FINKEL LAW FIRM LLC

1201 Main Street, Suite 1800

Post Office Box 1799

Columbia, SC 29202

(803) 765-2935

Attorneys for Appellant Win Myat

May 11th, 2017