

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

2009-146906
2007-CP-42-09988R

Carolina Convenience Stores,
Inc., Harry Lancaster Jr., as
Power of Attorney for Harry
Lancaster Sr., and Willard Oil
Company, Inc,

Petitioners,

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JUL 18 2012
S.C. COURT OF APPEALS

v.

City of Spartanburg, SC

Respondent.

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JUL 19 2012

APPENDIX

S.C. Supreme Court

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

Carolina Convenience Stores,
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Lancaster Sr., and Willard Oil
Company, Inc,

Appellants,

v.

City of Spartanburg, SC

Respondent.

RECORD ON APPEAL

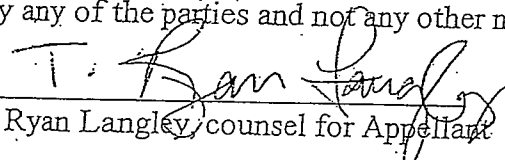
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T. Ryan Langley, counsel for Appellant, certifies by signing below that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


T. Ryan Langley, counsel for Appellant

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

MP & Saroj Patel, Willard Oil
Company, Inc., Harry "Skipper"
Lancaster,

Plaintiffs,

v.

City of Spartanburg,

Defendant.

C/A #: 07-CP-42-09988R

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ORDER GRANTING SUMMARY
JUDGMENT AS TO INVERSE
CONDEMNATION AND DENYING
SUMMARY JUDGMENT AS TO
NEGLIGENCE

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SPARTANBURG COUNTY

This matter came before the Court upon the motion of the Defendant for summary judgment as to all claims. The Defendant was represented by David L. Morrison. The Plaintiff was represented by Ryan Langley and Charles J. Hodge.

The Complaint in this action alleges two causes of action, (1) inverse condemnation and (2) negligence. Following the arguments of counsel and based upon the record, the Court grants summary judgment as to the inverse condemnation claim and denies summary judgment as to the negligence claim.

This action arises out of a hostage incident that occurred on July 19, 2004. Saroj Patel was taken hostage inside a convenience store by Jimmy Johnson. A standoff with police ensued. Ultimately, the police used a bulldozer to breach the store to affect the rescue of Saroj Patel and capture of Jimmy Johnson. During that process, the police action caused damage to the property and other economic loss resulting in this litigation.

Plaintiff claims that the damage or destruction to the property constitutes an inverse condemnation pursuant to Article I Section 13 of the South Carolina Constitution, commonly

referred to as the "just compensation" clause. There are two classes of takings; (1) where state law authorizes a permanent physical occupation of property; and (2) where state law so regulates property that it has lost all economic value. *Byrd v. City of Hartsville*, 620 S.E.2d 76 (2005); *Denene, Inc. v. City of Charleston*, 596 S.E.2d 917 (2004).

The City of Spartanburg has not taken the Plaintiff's property by a permanent physical occupation of the property. Plaintiffs still have title and possession of the property. The property was damaged by police activity but no taking occurred. Additionally, there has been no "public use" of the property. In fact, there was no "use" of the property at all by the City of Spartanburg. The City did not use the property to capture the suspect. The property simply happened to be the situs of the activity. Further, the activities of the police do not result from any regulation of the property by the City. The Constitution has no application to the facts of this case.

A taking is an exercise of the power of eminent domain. However, the City of Spartanburg did not exercise the power of eminent domain during this hostage situation. Instead, the City exercised its police power. South Carolina has long recognized that police power is to be distinguished from the power of eminent domain. A detriment to private property which results from the legitimate exercise of the police power does not constitute the taking of property for public use. *Richards v. City of Columbia*, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 91 S.E.2d 280 (1956). Without the exercise of the power of eminent domain there can be no taking.

The majority rule from other states is that no taking occurs from damage to private property by police exercising law enforcement functions. See, *Customer Company v. City of Sacramento*, 895 P.2d 900 (Cal. 1995). The Court finds the rationale of the California

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Court persuasive and well reasoned. Law enforcement officers must be permitted to respond to public emergencies without fear of constitutional liability mandated upon them for their decisions that might endanger private property. In this instance, law enforcement had the life of Ms. Patel at stake. The specter of constitutional liability would require the law enforcement officers to make a financial decision at the same time they are making their decision as to how to best save the hostage. They would be required to evaluate the potential cost to determine if perhaps they should not wait longer thereby imperiling the life of the victim due to the potential financial cost to the municipality. Such a result might deter law enforcement officials from acting swiftly and effectively to protect the public safety during emergency situations.

For the reasons stated above, the Court holds that there was no inverse condemnation and grants summary judgment as a matter of law to the Defendant on that claim.

The Defendant also moves for summary judgment as to the negligence claim. At this stage of the proceeding, the Court finds that factual issues preclude summary judgment. Consequently, the Court denies the Defendant's motion for summary judgment as to the negligence claim.

AND IT IS SO ORDERED


Justice E. C. Burnett, III

November 30, 2009

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CLERK OF COURT
SPARTANBURG COUNTY
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MARC KITCHENS

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

MP & Saroj Patel, Willard Oil Company,
Inc., Harry "Skipper" Lancaster,

Plaintiff,

v.

City of Spartanburg,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. NO. 2005- CP-42-1424

AMENDED COMPLAINT

The Plaintiffs complaining of the Defendants would respectfully show unto the court as follows:

1. That the Plaintiffs MP & Saroj Patel ("Patel") are citizens and residents of the County of Spartanburg, State of South Carolina and at all times herein mentioned were the owners and operators of Carolina Convenience Store, Inc. d/b/a Fast Point Food Store located on Hwy. 221/South Church Street within the city limits of Spartanburg.
2. That the Plaintiff Willard Oil Company, Inc. is a corporation organized existing and operating under the laws of the State of South Carolina. At all times herein mentioned Willard Oil Company, Inc. leased the building described in paragraph 1 to the Patels'.
3. That the Plaintiff Harry "Skipper" Lancaster ("Lancaster") is a citizen and resident of the County of Spartanburg, State of South Carolina. At all times herein mentioned was the owner of the premises which contained the convenience store described in paragraph 1. Lancaster leased the premises to Willard Oil Company, Inc.
4. That Defendant, City of Spartanburg is a political subdivision of the State of South Carolina. That at all times herein mentioned the City of Spartanburg's police officers were acting in the scope of and course of their employment and are subject to South Carolina Tort Claims Act.

FOR A FIRST CAUSE OF ACTION
NEGLIGENCE, GROSS NEGLIGENCE, RECKLESSNESS, WILLFULNESS,
WANTONNESS

5. That on or about July 19, 2004, an individual named Jimmy Johnson held the convenience store up possessing a loaded firearm. That the Plaintiff Saroj Patel was held hostage at the premises for more than thirteen hours.
6. The City of Spartanburg, responded to situation by deploying its police officers as well as its SWAT team and began communication with Jimmy Johnson. Johnson appeared at the front door of the premises in plain view with an exposed firearm early in the hostage negotiations.
7. That no action was taken by the City of Spartanburg at that time to apprehend Johnson.
8. That as a direct and proximate result of the city police's failure to properly apprehend Johnson at that point in time, the hostage stand off continued for several many hours.
9. That at approximately 8:30 p.m., the Defendant, by and through its employees, rammed a front end loader into the right wall of the premises in an unsuccessful attempt to end the hostage situation.
10. That the City of Spartanburg rammed the front end loader into the building for a second time and following this assault on the building, Johnson was apprehended by being shot in the shoulder. Ms. Saroj Patel fled to safety.
11. That as a direct and proximate result of the city ramming the premises owned by Lancaster, leased by Willard Oil Company, Inc., and operated by Patel, the Defendant caused serious structural damage to the building. The building is uninhabitable resulting in loss of income for all three Plaintiffs, property damage to Harry Lancaster and in addition Saroj Patel has suffered enormous mental anguish and emotional distress.
12. That the Defendant by and through its police officers were negligent, grossly negligent,

reckless, willful and/or wanton in their actions/ inactions on the actions/inactions with regard to the hostage incident. In particular, the Defendants failed to exercise a reasonable degree of care and skill ordinarily employed under similar circumstances by governmental entities who care for, protect and serve individuals in similar situations and it failed to exercise the degree of care and skill which the Defendants professes to possess in conducting its actions and it failed to use reasonable care and diligence in its treatment of the Plaintiffs Patels, Willard Oil Company, Inc., and Lancaster in one or more of the following particulars to wit:

- A. In failing to apprehend the suspect Johnson when he brandished a firearm in plain view;
- B. In violating procedures pertaining to hostage taking;
- C. In damaging a building through the use of a front end loader when such damage would have been avoided had Defendant acted in a timely manner; and
- D. In failing to apprehend the subject Johnson by other means apart from substantially damaging the business.

13. That by means and of in consequence of the aforesaid negligence, gross negligence, careless, recklessness and/or wantonness of the Defendant in one or more of the following particulars alleged above and as a direct and proximate result thereof, your Plaintiffs, Patels, Willard Oil Company, Inc., and Lancaster have sustained damages to include but not limited to:

AS TO MP PATEL:

- A. Loss of business income.

AS TO SAROJ PATEL:

- A. Loss of business income and severe emotional distress and mental anguish.

AS TO WILLARD OIL COMPANY, INC.:

- A. Loss of income of the lease of the rental property to the Patels.

AS TO LANCASTER:

- A. In loss of income from lease to Willard Oil Company, Inc. and damage to the property.

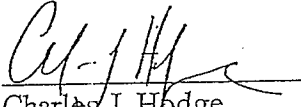
FOR A SECOND CAUSE OF ACTION
INVERSE CONDEMNATION

14. The foregoing allegations are incorporated below as if fully restated herein.
15. In pursuing the course of action outlined above, Defendants effected an affirmative, positive and/or aggressive permanent taking of Plaintiffs property for public use.
16. Defendants have failed to provide just compensation for this taking to Plaintiffs in violation of Article I, section 13 of the South Carolina Constitution and South Carolina statutory and common law.

WHEREFORE, the Plaintiffs pray judgment against the Defendants as follows:

- a. For actual damages in an amount found to be fair and equitable within the discretion of the fact finder;
- b. For the costs and disbursement of this action; and
- c. And for such other and further relief as this court may deem just and proper.

HODGE LAW, PC


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Date: 2/20, 2008
Spartanburg, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

MP & Saroj Patel, Willard Oil)
Company, Inc., Harry "Skipper")
Lancaster,)

C/A #: 05-CP-42-1424
C/A #: 07-CP-42-~~09988R~~
63388A

Plaintiffs,)

ANSWER TO AMENDED COMPLAINT
(Jury Trial Demanded)

v.)

City of Spartanburg,)

Defendant.)
_____)

The Defendant City of Spartanburg amends its answer to the Amended Complaint of the
Plaintiffs as follows:

FOR A FIRST DEFENSE

1. The Summons and Complaint fails to state facts sufficient to state a cause of action.

FOR A SECOND DEFENSE

2. The Defendant denies each and every allegation of the Plaintiffs Complaint not hereinafter specifically admitted.

3. As to Paragraph 1 of the Complaint, the Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same and, therefore, denies same and demands strict proof thereof.

4. As to Paragraph 2 of the Complaint, the Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same and, therefore, denies same and demands strict proof thereof.

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MARC KITCHENS

5. As to Paragraph 3 of the Complaint, the Defendant lacks sufficient information upon which to form a belief as to the truth and veracity of same and, therefore, denies same and demands strict proof thereof.

6. As to Paragraph 4 of the Complaint, the Defendant admits that the City of Spartanburg is a political subdivision of the State of South Carolina. The Defendant further admits that the City of Spartanburg's Police Officers were acting within the course and scope of their employment at all times referenced in the Complaint.

7. As to Paragraph 5 of the Complaint, the Defendant admits only that on or about July 19, 2004 the Plaintiff Saroj Patel was held hostage at the convenience store for an extended period of time by a gunman.

8. As to Paragraph 6 of the Complaint, the Defendant admits only that the City of Spartanburg Police Department responded to the situation by deploying police officers and its SWAT team. Other law enforcement agencies also responded to the situation. The City did attempt communication with the gunman. The remaining allegations of Paragraph 6 are denied.

9. As to Paragraph 7 of the Complaint, the Defendant denies same.

10. As to Paragraph 8 of the Complaint, the Defendant denies same.

11. As to both Paragraphs 9 and 10 of the Complaint, the Defendant admits only that

the City did end the hostage situation utilizing a front-end loader so that the gunman could be secured and the hostage freed without injury to the hostage.

12. As to Paragraph 11 of the Complaint, the Defendant admits that the building did sustain damage. The remaining allegations of Paragraph 11 are denied.

13. As to Paragraph 12 of the Complaint, the Defendant denies same.

14. As to Paragraph 13 of the Complaint, the Defendant denies same.

15. As to Paragraph #14 of the Plaintiff's Complaint, the Defendant re-alleges and reiterates each paragraph and affirmative defense set forth herein.

16. Paragraphs #15 and #16 of the Plaintiff's Complaint is denied.

FOR A THIRD DEFENSE

17. This Defendant is immune from suit pursuant to the South Carolina Tort Claims Act.

FOR A FOURTH DEFENSE

18. The Defendant, upon information and belief, alleges that any injuries or damages allegedly suffered by the Plaintiff, without admitting same to be true, were due to and caused entirely by the negligence of the Plaintiff or the Plaintiff's negligence which is more than the Defendant's negligence, and that such is a complete bar to the Plaintiff's recovery herein. Further, the Defendant, upon information and belief, alleges that if the Plaintiff's negligence was less than the Defendant's negligence, that such negligence should be compared to that negligence of the Defendant; so as to apportion the relative fault as to each party.

FOR A FIFTH DEFENSE

19. At all times referenced in the Complaint, this Defendant's employees were acting in good faith, without bad faith or malice and were exercising discretion in the course and performance of their duties, and therefore this Defendant is entitled to good faith immunity from suit.

FOR A SIXTH DEFENSE

20. This Defendant is entitled to sovereign immunity.

FOR A SEVENTH DEFENSE

21. This Defendant is entitled to sovereign immunity for any amount above the statutory caps as set forth in the South Carolina Tort Claims Act.

FOR AN EIGHTH DEFENSE

22. The actions of law enforcement were a valid exercise of the police power of the State of South Carolina and the City of Spartanburg and are not actionable, therefore this action must be dismissed.

FOR A NINTH DEFENSE

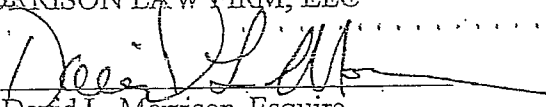
23. This Defendant is entitled to immunity pursuant to the South Carolina Tort Claims Act, including but not limited to §15-78-60(1)(2)(3)(4)(5)(6) and (20).

FOR A TENTH DEFENSE

24. The Plaintiffs have failed to mitigate their damages, with such failure to mitigate barring their Complaint in whole or in part.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiff, the Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

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ATTORNEY FOR THE DEFENDANT

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March 23, 2009

IN THE COURT OF COMMON PLEAS.

CIVIL ACTION NO.: 05-CP-42-1424

**NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT**

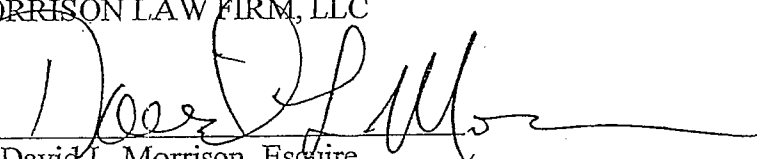
Defendant.

1. This Defendant is immune from suit for the method of providing law enforcement protection.
2. This Defendant is immune from suit for exercising professional judgment or discretion.
3. Plaintiffs have failed to state facts sufficient to state a claim for negligence and that the acts of the Defendant were intentional acts rather than careless or accidental acts.
4. Defendant is entitled to summary judgment as to the inverse condemnation claim on the grounds that the actions of the Defendant were a valid exercise of police powers.

5. Defendant is entitled to summary judgment as to the inverse condemnation claim on the grounds that the Defendant was faced with an emergency situation and validly exercised its police powers under the circumstances.
6. Defendant is entitled to summary judgment as to the inverse condemnation claim as the Defendant validly exercised its powers to protect life over property.
7. Defendant is entitled to summary judgment as to the inverse condemnation claim as matter of law.
8. Defendant is entitled to summary judgment as to the negligence claim as a matter of law.

Said Motion is based upon the pleadings filed in this case, the depositions of Major Doug Horton, Colonel Jennifer Kindall, Chief Anthony Fisher, Sergeant Phillip Moore, Master Patrol Officer Brian Stokes, Lieutenant Art Littlejohn, rules of Court, and such other matters as may be properly presented to the Court at the time of the hearing.

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Columbia, South Carolina

April 23, 2009

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

MP & Saroj Patel, Willard Oil)
 Company, Inc., Harry "Skipper")
 Lancaster,)

C/A #: 05-CP-42-1424
 C/A #: 07-CP-42-09988R

Plaintiffs,)

**MEMORANDUM IN SUPPORT OF
 DEFENDANTS MOTION FOR SUMMARY
 JUDGMENT**

v.)

City of Spartanburg,)

Defendant.)
 _____)

This memorandum is filed in support of the Defendant's Motion for Summary Judgment. The Plaintiff brings two claims resulting from a hostage situation inside a convenience store in Spartanburg. During that emergency situation, the City of Spartanburg police rescued Plaintiff Saroj Patel and saved her life. In doing so they damaged the store and its contents but saved the life of the hostage. Saroj Patel is the wife of the owner of the convenience store and co-Plaintiff, MP Patel. All actions were undertaken by City officials acting within the course and scope of their employment. The facts of this incident are not in dispute. The legal responsibilities resulting from this exercise of law enforcement authority to enforce the criminal laws of the State of South Carolina and to save the life of the hostage are in dispute. The Plaintiff contends that the police must respond civilly and pay for damages to the building that occurred during the hostage incident. The City asserts that this was a valid exercise of police power during an emergency situation in a successful attempt to save life over property and therefore there is no liability. Plaintiff brings two claims in an attempt establish civil liability: (1) negligence and (2) inverse condemnation. Those claims are individually addressed below.

UNDISPUTED FACTUAL BACKGROUND

Shortly after 8am on July 19, 2004, Major Doug Horton of the City of Spartanburg Public Safety Department was on his way to work on an otherwise unremarkable morning. On his police radio he heard a routine traffic stop by Officer Clark for an expired tag. After the initial stop, Major Horton next heard that the suspect was fleeing on foot and had a gun in his hand. Major Horton was on North Church Street passing Regional Medical Center heading into town. He heard on the radio that an armed suspect ran into a convenience store. He immediately proceeded to the scene. (Horton Depo. @ 9) At that point, they knew nothing about the suspect. They did not know why he ran. They did not know who he was. They did not know why he had the gun. They did not know what he was capable of doing. They knew nothing of his criminal history.

After arriving there, Major Horton immediately set up a perimeter as it was morning rush hour. (Horton Depo. @ 24, 26) He learned that there was one hostage in the store. His initial strategy was to get the suspect to talk with them and come out and surrender. (Horton Depo. @ 24) During the first hour and while they were negotiating, they called in a command post. (Horton Depo. @ 26) The command post was a Winnebago converted for law enforcement use complete with computers and a telescoping video camera. (Horton Depo. @ 28)

Shortly after arrival, the Public Safety Department made contact with the suspect, one Jimmy Johnson. (Horton Depo. @ 27) They gathered intelligence. They learned his criminal history. He had a drug history and a violent crime history. (Horton Depo. @ 29) He had a gun in his possession. Consequently, they believed he was a potentially great threat to the hostage, themselves and to the public at large. They alerted the tactical team to be on standby.

Upon arrival at the scene, Major Horton was initially concerned with the safety of everyone around since they had an armed suspect in the building. As safety is paramount, Major Horton started cutting off traffic and re-routing it - getting everyone away from the building. (Horton Depo. @ 26) He began calling in resources in order to maintain the perimeter and to establish contact with the suspect. He wanted to establish contact in order to talk the suspect out without endangering the lives of the suspect, the hostage, the officers or the public.

Major Horton notified the Sheriff's Department and asked for assistance. He notified the highway patrol. (Horton Depo. @ 25) After establishing the perimeter, he wanted to establish contact and begin negotiations. He also intended to begin controlling the environment for the suspect, standard procedure in police hostage situations. As the first hour passes, they realize negotiations have not been promising. He calls in additional resources so they can stay as long as needed. (Horton Depo. @ 32)

The convenience store was a cinder block building. It had one entrance - the front door. There were no side windows or doors and no rear windows or doors. (Horton Depo. @ 40). Shortly after the incident began, the suspect had Ms. Patel tape cardboard over the windows so that sight into the building was obscured. (Horton Depo. @ 45).

Early on the police took control of the environment. They cut power to the building. (Horton Depo. @ 31). The idea is to make it an undesirable environment for the suspect. It was a hot summer day. They also brought in mental health professionals to assist in evaluating Johnson as negotiations proceeded. They notified SLED and the FBI. Both SLED and the FBI responded to the scene. The FBI sent a trained hostage negotiator to the scene. Spartanburg had their own trained hostage negotiator on scene as well. The South Carolina Department of Probation Parole and Pardon Services was also on the scene to provide background information

on Johnson. The United States Department of Alcohol, Tobacco and Firearms (ATF) also responded to the scene.

As the day progressed, the police considered all available alternatives for getting inside the building. Through his law enforcement training, Major Horton believed that the front door or any front window was a fatal funnel. If an officer went through that door, he would be a silhouette thereby placing himself in peril. (Horton Depo. @ 33) How to get officers inside without endangering the officers or citizens became of paramount importance as negotiations continued.

With the use of the telescoping camera, they searched the roof for any means of entrance. They contacted the Fire Department to see if any fire plans were on file. (Horton Depo. @ 34) They learned that the building had a drop down ceiling which effectively eliminated any possibility of entrance through the roof. They introduced tear gas into the building through the duct work. (Horton Depo. @ 35) By 9am the tactical team was on the scene and was staged on the left side of the building monitoring the front of the building.

There was extensive discussion about getting an officer inside the building. The negotiations continued during that process. There were discussions regarding using shape charges and explosive devices to blow a hole in the wall. (Horton Depo. @ 55) However they were also concerned about the 8500 gallons of gasoline in front of the building. (Horton Depo. @ 55) The goal was always to resolve the situation with the least amount of force or the least reasonable amount of force to affect the arrest of the suspect. During the negotiations, Johnson repeatedly stated that he was not going back to jail. He said that he was going out in a blaze of glory. (Horton Depo. @ 46) He said that he would kill his hostage.

Colonel Jennifer Kendall was in charge of the negotiations. During the day she periodically came out to brief Major Horton on the status of negotiations. Johnson went through several mood swings through the day. (Horton Depo. @ 51) By 11am he said he was going to end this. At noon there was a shot heard inside the building. Later in the afternoon Johnson fired five shots through the door, across the gas pumps, at the police. (Horton Depo. @ 58) At approximately 6:24 p.m. gas (pepper spray) was introduced into the building again in an attempt to force Johnson out. (Horton Depo. @ 59) At 6:28 p.m., two shots were heard inside the building and another at 6:31 p.m.. (Horton Depo. @ 52) From negotiations, police believed that Ms. Patel was still alive and had not been shot.

At one point, Ms. Patel came to the door to retrieve a cell phone. There was discussion about grabbing her and pulling her away when she did that. However, any such attempt would endanger her and would endanger the officers involved. They did not know where Johnson was inside the building. They did not know how close he was to her. They did know that he had fired shots and had threatened to kill Ms. Patel. Mr. Patel was at the scene begging the officers to get his wife out. (Horton Depo. @ 62) The mental health professionals on the scene were monitoring the negotiations. As the day progressed the reports from mental health were that Johnson was doing progressively worse. (Horton Depo. @ 67)

During the last hour and fifteen minutes, command staff, Colonel Jennifer Kindall, Director Tony Fisher and Major Horton, were making key decisions. The mental health professional was telling them that Johnson may make good on his promise to kill Ms. Patel and that they needed to do something quickly. The FBI hostage negotiator, who had been monitoring negotiations throughout the day, also believed that Johnson was about to "crack" and that they needed to do something quickly. (Kindall Depo. @ 21) The consensus of those involved in the

negotiations were that the negotiations had failed and they needed to act quickly in order to save the life of Ms. Patel. (Kindall Depo. @ 21). They believed that he was drinking beer and snorting cocaine. They were discussing ideas with SLED and the FBI. They discussed alternatives for breaching the building. They had no SWAT vehicle with a ram on it as some jurisdictions have. Major Horton recommended using a bulldozer to create a breach in the building to allow entrance. He discussed that with Director Tony Fisher. After considering all available alternatives, they made the decision to utilize the bulldozer to create a breach in the building. (Horton Depo. @ 68) They created a diversion at the front door with the robot while they gained the element of surprise by breaching the left rear corner of the building with the bulldozer. They believed they were avoiding the fatal funnel of the front door by this dynamic entry. (Horton Depo. @ 69)

When the left corner of the building was breached, the rapid deployment team entered the building. There was immediate gunfire. Johnson fled with Ms. Patel across the building to the walk in coolers. (Horton Depo. @ 71) No one could see through the cooler doors as they were covered with condensation. Vision was also obscured by the drinks in the doors as well. The officers were inside the building taking fire but can't return fire because they do not know the location of Ms. Patel. Major Horton then brought the bulldozer operator around to the front of the building to create another entry at the right front corner - where they believed Johnson and Ms. Patel were located. (Horton Depo. @ 73) They breached the building at that front corner revealing Johnson and Ms. Patel. Johnson had his left arm around Ms. Patel's neck as they appeared to be struggling for the gun. Brian Stokes, a sharpshooter located across the street, had a clear unobstructed view from his vantage point. He took one shot, hitting Johnson in the right shoulder. Ms. Patel fled to freedom and safety. Johnson was arrested, transported to the hospital

and is now serving a sentence with the South Carolina Department of Corrections. The plan to breach the building in order to save Ms. Patel was successful.

**THESE DEFENDANTS ARE NOT LIABLE TO THE PLAINTIFF IN INVERSE
CONDEMNATION**

The Plaintiffs contend in their second cause of action that the City is liable for inverse condemnation. Under South Carolina law any analysis of inverse condemnation begins with Article I, Section 13 of the South Carolina Constitution which reads in relevant part as follows:

(A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

There are two main categories of takings: (1) where state law authorizes a permanent physical occupation of property; and (2) where state law so regulates property that it has lost all economic value. *Denene, Inc. v. City of Charleston*, 596 S.E.2d 917 (2004). For a regulatory taking, a plaintiff must show an affirmative act and a taking. *Byrd v. City of Hartsville*, 620 S.E.2d 76 (2005). The plaintiff does not appear to claim a regulatory taking in this instance. The typical inverse condemnation case involves a permanent physical appropriation of property to the government for its use. Here, there is no physical appropriation of the property and there certainly is no "use" by the City of Spartanburg of the property.

A fair reading of the Constitution reveals that this provision was intended to compensate property owners for the exercise of the powers of eminent domain. See, *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okl. 1997). No South Carolina cases require police officers to pay private landowners for property damage occurring during police operations. To do so would

require the police to pay for damage to every property every time police entered by force to arrest or search a premises. South Carolina law has never been stretched to such an extent.

To the contrary, South Carolina has long recognized that police power is to be distinguished from the power of eminent domain. A detriment to private property which results from the legitimate exercise of the police power does not constitute the taking of property for public use. *Richards v. City of Columbia*, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 91 S.E.2d 280 (1956). The police power of the government is difficult to define but from its very nature it

... must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights.

City Council of Charleston v. Warner, 17 S.E. 33 (1893).

The Court has also defined the police power in this way:

It cannot be doubted, however, that the origins of this (police) power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption upon which constitutions rest; for the state, whether we regard it as an association of individuals, or as a moral organism must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with the power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality.... It has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society. (citations omitted)

State ex rel. George v. City Council of Aiken, 20 S.E. 221 (SC 1894).

In that case, the Court went on to say that the police power may best be described by the Latin phrase *Salus populi suprema lex*, which translates to "The safety of the people is the Supreme Law."

South Carolina has long held that private property may be regulated pursuant to the police power, even if it results in some loss of profit to the landowner, for the benefit and general welfare of the public. *Arnold v. City of Spartanburg*, 23 S.E.2d 735 (1943). In *Arnold*, the Court found that a municipality may regulate any business which might injuriously affect the public health, morals, safety or comfort. In the exercise of its police power a municipality might exclude particular occupations from parts of the city. The Court found no merit in the contention that the enforcement of the regulation would result in financial loss to the businesses. The Court said that "in this State the law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, that it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one." *Arnold* @ 741.

Additionally a fair reading of the Constitution leads to but one conclusion – the drafters did not intend for police damage or destruction to private property to be a taking. The just compensation clause requires that private property cannot be taken without just compensation being "*first made*". It would be impossible for a municipality to prepay for damage to private property caused by police operations to protect the public and enforce the criminal laws. Compensation for such police action was not contemplated by the drafters of Article I Section 13 of the South Carolina Constitution. See, *Brutsche v. City of Kent*, 193 P.2d 110, 120 (Wash. 2008).

There has been no physical appropriation of Plaintiffs' property by the City of Spartanburg. Plaintiffs still have title and possession of the property. The property was

damaged by police activity but no taking occurred. Additionally, there has been no "public use" of the property. In fact, there was no "use" of the property at all by the City of Spartanburg. The City did not use the property to capture the suspect. The property simply happened to be the situs of the activity. The Constitution has no application to the facts of this case.

Other states have considered the very issue presented in this case. In *Customer Company v. City of Sacramento*, 895 P.2d 900 (Cal. 1995), a convenience store owner brought an action in inverse condemnation and tort against the City to recover for damage to his store and its contents caused by efforts of police to apprehend a suspect who had taken refuge in his store. Note that the allegations of that case are similar to the issues at hand with one exception: the Spartanburg police also had to deal with a hostage whose life was at stake as well. In *Customer*, the suspect was thought to be armed and dangerous. He took refuge in the convenience store and refused to surrender. During the course of attempting to apprehend the suspect, the police fired tear gas into the store causing extensive damage. The issue as framed by the Court was the exact issue we face here:

"The issue we address is whether the owner of the store may bring an action for inverse condemnation against the public entities that employed the law enforcement officers, on the theory that the damage caused by the officers constituted a taking or damaging of private property for public use within the meaning of the "just compensation" clause of the California Constitution.

Customer Corporation @ 901.

The *Customer* Court concluded that an action for inverse condemnation does not lie to recover damages caused by law enforcement officers to enforce the criminal laws. Instead, the Court found that the public entities could be held liable, if at all, only in an action at tort. The Court noted that the concept of "just compensation" has been extended from the traditional eminent domain context to damaging of private property by regulation or by public improvement

projects, it has never been extended to apply to damage to property caused by law enforcement officers enforcing the criminal laws nor any other public employees acting within the course and scope of their employment. *Customer @ 905-07*

While the police power most routinely acts in the area of regulation, the doctrine also applies in emergency situations where the government must act to avoid impending peril. For instance, in *United States v. Caltex, Inc.* 344 U.S. 149, (1952), compensation was denied for an oil terminal facility in Manila that the United States Army destroyed in order to prevent the Japanese from gaining a valuable logistic weapon when they invaded. The United States Court of Claims has further elaborated that:

It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in time of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. (Citations omitted).

National Bd. of Young Men's Christian Ass'n v. U.S., 396 F.2d 467 (Ct.Cl. 1968).

Indeed, the California Supreme Court has held:

Unquestionably, under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation In such cases calling for immediate action the emergency constitutes full justification for the measure taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.

House v. L.A. County Flood Control Dist., 153 P.2d 950 (Cal. 1944).

The clear majority rule across the United States is that no action lies in inverse condemnation for destruction or damage to private property caused by police actions in attempting to enforce the criminal laws. The Florida Court of Appeals considered a similar case

in 2003. *In Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate Number TPCLDP217477 v. City of St. Petersburg*, 864 So.2d 1145 (Fla.App. 2003), the police executed a search warrant at an apartment. They threw "flash-bang" grenades into the apartment before entering. However, unknown to the police officers, the apartment had insulating foam installed on the walls and ceilings to muffle sounds of a recording studio. The grenades started a fire in the foam that destroyed the entire apartment. The innocent owner of the apartment lived in another state and rented the apartment out. She brought suit against the City for her losses claiming inverse condemnation in addition to other claims. The Court held that the destruction of her property occurred as a result of lawful action by law enforcement activities by employees acting within the course and scope of their employment. Consequently, under both the federal and state just compensation clauses, any damage resulting from these activities did not constitute a taking. Any damages were recoverable, if at all, only under state tort law.

The Supreme Court of Iowa has held that actions of police officers in damaging a residence when making forcible entry in order to execute an arrest warrant was the result of a reasonable exercise of police power rather than the power of eminent domain so that no cause of action for inverse condemnation lies. *Kelley v. Story County Sheriff*, 611 N.W.2d 475 (2000).

The Supreme Court of Washington held that damage done to property by law enforcement officers using a battering ram to gain entry in order to execute a search warrant did not constitute a taking as there was no permanent physical occupation of the property. Further, they held that the gathering and preservation of evidence of police officers is a police power function, necessary for the safety and general welfare of society. *Brutsche v. City of Kent*, 193 P.3d 110 (Wash. 2008).

Additionally, the Washington Court has also held that no inverse condemnation claim existed when the execution of a criminal search warrant and preservation order rendered Plaintiff's home uninhabitable. The Court held that a police power function that takes or damages public property is not for the public "use", but instead is to conserve the safety, morals, health and general welfare of the public. Therefore no inverse condemnation claim exists. *Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003).

No action for inverse condemnation lies when police officers executing a search and arrest warrant use smoke grenades, tear gas and percussion and flash grenades in a rented residence. The use of those items ultimately caused a fire that destroyed the residence. *Patel v. U.S.*, 823 F.Supp. 696, 699 (N.D.Cal. 1993). However, a takings analysis was inappropriate.

The Indiana Court of Appeals has held that no action for inverse condemnation lies when police fired tear gas into the Plaintiff's home, thereby damaging the home, to capture a felony suspect who had taken refuge inside the home. *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind.Ct.App. 1984). The Indiana Court reasoned that the conduct was in the nature of a tort and the only remedy, if any, was in tort.

The Oklahoma Supreme Court in *Sullivan, supra*, found that a fair reading of the just compensation clause indicates that it is designed to require compensation for the exercise of the power of eminent domain, not the exercise of the police powers. The Court analyzed situations involving incidental or consequential property damage caused by police operations. They determined that in each of those situations, the police intended to execute a warrant or undertake other police activity. There was never any intent to exercise the power of eminent domain nor any intent to take the private property and convert it to public use. For those reasons, the Court

found no taking when the damage occurred by during the exercise of the police power. *Sullivan*, 902 P.2d @ 224-25.

The Georgia Court of Appeals held that when a volunteer's motor vehicle was damaged while he assisted law enforcement officers in searching for a weapon involved in a crime that no action for inverse condemnation existed. In *Bray v. Houston County*, 348 S.E.2d 709 (Ga.App. 1986), the Court reasoned that there as no "taking" of Plaintiff's property and even if there was, the taking was pursuant to the police power rather than the power of eminent domain.

The Georgia Court of Appeals earlier considered a similar case where a private pond was drained by police when they were searching for a body. *McCoy v. Sanders*, 148 S.E.2d 902 (1966). The draining of the pond damaged the Plaintiff's fish and damaged the pond. Again, the Court found no inverse condemnation. The Court noted that the action was taken pursuant to the police power. The Court noted that police power extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interest. Interestingly, the Georgia Court cited *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 for the proposition that:

The power of eminent domain is that sovereign power to take property for a public use or purpose, and this cannot even be done without just and adequate compensation. On the other hand, the police power is that power by which the Government may destroy or regulate the use of property in order to promote the health, morals and safety of the community, and the police power may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property.

Adams @ 666.

Like Georgia, South Carolina has also cited the *Adams* opinion for the same explanation of the difference between the power of eminent domain and the police power. See, *Edens v. City*

of *Columbia*, 91 S.E.2d 280, 283 (1956). Consequently, it appears that the South Carolina Supreme Court would reach the same result as the Georgia court as both states interpret the police power in the same manner.

Law enforcement officers must be permitted to respond to public emergencies without fear of constitutional liability mandated upon them for their decisions that might endanger private property. In this instance, law enforcement had the life of Ms. Patel at stake and had information that she would likely be killed if they did not act quickly. The spectre of constitutional liability would require the law enforcement officers to make a financial decision at the same time they are making their decision as to how to best save the hostage. They would be required to evaluate the potential cost to determine if perhaps they should not wait longer thereby imperiling the life of the victim due to the potential financial cost to the municipality. Such a result might deter law enforcement officials from acting swiftly and effectively to protect the public safety during emergency situations. Life should always be protected above property! South Carolina values life over property. South Carolina Courts have never sanctioned such a result.

Allowing recovery for damage to property in inverse condemnation under these circumstances would also give rise to an unacceptable anomaly. A plaintiff could recover for property damage to their building and the contents. However, had Ms. Patel been injured by falling blocks when the bulldozer struck the building, she would not be entitled to recovery for the very same police action! Allowing recovery for property damage but not for personal injury or even death clearly makes no sense and was not a result intended by the drafters of our Constitution.

Law enforcement activities to protect the public during emergency situations is not at all similar to a taking of property by eminent domain. Forcibly knocking a locked door open or firing a weapon should not automatically give rise to an inverse condemnation action for recovery of property damage. Every time a police officer fires a weapon in the line of duty, some potential property damage and personal injury is conceivable. Mandating liability in inverse condemnation for such property damage (but not personal injury) has never been required or allowed under South Carolina law.

Plaintiff may contend that fairness dictates that an innocent property owner should be compensated by the government for his loss caused by their police actions. While that argument may appear "fair", inverse condemnation is not the appropriate vehicle or cause of action to accomplish that result. Inverse condemnation does not render a "fair" result. Under that theory, a property owner whose property had been damaged or destroyed could potentially recover in inverse condemnation. The innocent person inside the store who suffered personal injuries could not recover. Additionally the property owner could recover his attorney's fees. The injured victim inside could not recover attorneys fees even if they could recover under the South Carolina Tort Claims Act. There is no rational basis for distinguishing between damaged property and an injured person for their right to recovery. Indeed, there is no difference between their ability to recover. They are both entitled to recovery if they have a claim under the South Carolina Tort Claims Act. That is the appropriate remedy, if any.

The "just compensation" clause does not afford Plaintiffs a remedy under these circumstances. There has been no taking of property by eminent domain. There has been no physical appropriation of the Plaintiffs' property. There has been no taking for public "use". There has been no "use" at all of the Plaintiffs' property by the City of Spartanburg. Any

damage to the Plaintiffs' property was the result of lawful police actions undertaken pursuant to the police power of the State of South Carolina and the City of Spartanburg. Those actions were undertaken in order to protect the public safety and welfare. Indeed, those actions were undertaken in order to immediately protect the life of Ms. Patel. The City police were heroes not villains. There was no exercise of the power of eminent domain. There is no claim for inverse condemnation. The City of Spartanburg is entitled to summary judgment as a matter of law as to the inverse condemnation claim.

THE CITY IS IMMUNE FROM SUIT FOR CLAIMS OF NEGLIGENCE

The Plaintiff contends that the City was negligent in its handling of the hostage situation. Specifically, the Plaintiff alleges that the City was negligent in four particulars: (1) In failing to apprehend Johnson when he brandished a firearm in plain view; (2) In violating procedures pertaining to hostage taking; (3) In damaging a building through the use of a front end loader when such damage would have been avoided had Defendant acted in a timely manner; and (4) In failing to apprehend the subject Johnson by other means apart from substantially damaging the business.

Plaintiffs' claims are nothing more than Monday morning quarterbacking. Now that Ms. Patel is safe from harm, the Plaintiffs contend that the police should have chosen some other method by which to affect her safe rescue. The South Carolina Tort Claims Act disposes of this issue however. These Defendants are immune from suit under the TCA.

The South Carolina Tort Claims Act is the sole and exclusive remedy for actions in tort against the government. S.C. Code Ann. 15-78-20. The Act retains immunity for government entities in certain situations. S.C. Code Ann. 15-78-60. Pursuant to 15-78-60(6) a governmental entity is immune from suit for "civil disobedience, riot, insurrection, or rebellion or the failure to

provide *the method of providing police of fire protection.*"¹ (Emphasis added). The Court of Appeals has interpreted this provision in the law enforcement setting. In *Huggins v. Metts*, 640 S.E. 2d 465 (Ct.App. 2007), the personal representative of the estate of an individual shot by police brought a claim against the Sheriff for that shooting. The facts of that case are similar to the facts here.

The Sheriff's department responded to a call stating deceased was threatening to burn down homes and commit suicide. They did not find deceased at his home but they did find him in the woods behind his residence. When they approached him they discovered that he was armed with two large butcher knives. They ordered him to drop the knives but he refused. He stated that they were going to have to kill him.

The police brought in a negotiator to attempt to deal with the deceased. Unfortunately, he would not speak with him. When the police radioed for a taser to subdue the deceased, he said that they were not going to tase him. He began walking toward his home. The police stepped between him and the residence. They continued to demand that he drop the knives. He continued to refuse and continued to advance on the police. He was warned that if he came any closer they would shoot. He continued to advance. The officer shot once, and the deceased continued to advance. The other officers then opened fire. The deceased died from the gunshot wounds. The Plaintiff filed suit alleging negligence in the time frame leading up to the shooting.

The Court of Appeals held that the claim involved "the manner in which the police decided to provide police protection." *Huggins* @ 467. They then held that:

¹ The Court of Appeals has previously held that there is a scrivener's error in this statute. The conjunctive "or" was inadvertently omitted. The statute should read as the governmental entity is not liable for the failure to provide *or* the method of providing police or fire protection. *Wells v. City of Lynchburg*, 501 S.E.2d 746, 750 (Ct.App. 1998).

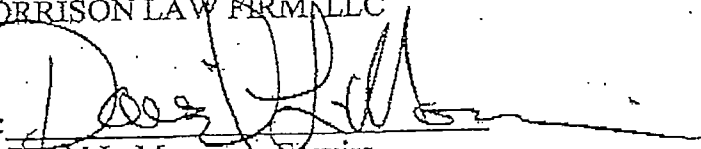
Because the Act specifically exempts the Police from liability concerning the methods which they choose to utilize to provide police protection, we need not address Huggins's other claims. Even were we to accept all of Huggins's assertions as true, it would not remove the immunity which the legislature has bestowed on the Police in this situation.

Huggins @ 467.

Based upon that immunity, the Court affirmed the grant of summary judgment to the Police. This case is no different. Plaintiff is challenging the method by which the Police chose to provide police protection. They claim that the Police should have acted more quickly and apprehended Johnson earlier. They claim that the Police should not have used a bulldozer to rescue the Plaintiff. They claim that the Police should have used some other method by which to make entry into the building and rescue the hostage. All of the Plaintiff's challenges are to the method by which the Police chose to handle this situation. The City of Spartanburg is absolutely immune from suit for those allegations.

For the reasons stated above, these Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' claim of inverse condemnation and as to Plaintiffs' claim for negligence.

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November 1, 2009

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

MP & Saroj Patel, Willard Oil
Company, Inc., Harry "Skipper" Lancaster,

Plaintiff,

vs.

City of Spartanburg

Defendant.

IN THE COURT OF COMMON
PLEAS
(JURY TRIAL REQUESTED)

MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT
CA No. 2007 CP-42-03388R

I. INTRODUCTION

The above-referenced Plaintiff's have brought two claims against the City of Spartanburg; one claim for negligence in the actions of the police officers and another for inverse condemnation for destruction of Plaintiffs property without just compensation. There are a number of jury issues on both claims and thus this matter is inappropriate for summary judgment.

II. FACTS

On or about July 19, 2004, an individual named Jimmy Johnson used a loaded firearm to hold up the Fast Point Food Store (hereinafter "the convenience store") located on Hwy. 221/South Church Street within the city limits of Spartanburg. The convenience store was owned by Plaintiff Lancaster and operated by Plaintiffs MP and Saroj Patel, under a lease held by Plaintiff Willard Oil.

The City of Spartanburg, responded to the situation by deploying its police officers as well as its SWAT team and began communication with Jimmy Johnson. Very early in the situation, an Officer Moore had an opportunity to speak to Mr. Johnson inside the door to the store.¹ Officer Moore has testified that Mrs. Patel was behind the

¹ Moore Dep. at 32:8-9.

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counter,² Mr. Johnson was positioned between Mrs. Patel and himself, and at that time Johnson was not using Mrs. Patel as a shield.³ Officer Moore testified that he was aware that Mr. Johnson had a gun,⁴ but at that time Mr. Johnson was holding a cell phone, using both hands to dial.⁵ Mr. Johnson told Officer Moore, "It ends today. Somebody has to die."⁶ Moore was facing Mr. Johnson and wearing his bulletproof vest, but decided not to draw his weapon because he was fearful that it might endanger his own life.⁷ Officer Moore backed out of the building⁸ and a thirteen-hour standoff ensued.

During the standoff at approximately 8:30 p.m, the officers decided to ram heavy construction equipment similar to a bull dozer (hereinafter the "dozer") into the right wall of the premises even though the officers were unaware of Mrs. Patel's location in the building.⁹ Multiple witnesses for the defense have testified that they have never, in their vast respective law enforcement experiences, even heard of the use of a dozer to breach a building.¹⁰ Defendant's expert even agreed that he knew of no law enforcement training with the use of a bulldozer in the history of the world¹¹ and, more specifically, knew of no training the Spartanburg City Police had ever done in the use of motorized breach.¹²

Despite the novelty of their approach and lack of training, the officers admitted that they failed to consult any engineer about how the building would respond to being

² Moore Dep. at 33:2-4.

³ Moore Dep. at 33:2-7.

⁴ Moore Dep. at 33:18-25.

⁵ Moore Dep. at 36:6-7.

⁶ Moore Dep. at 32:20-21.

⁷ Moore Dep. at 36:22-24.

⁸ Moore Dep. at 38:7-9.

⁹ See, e.g., Fisher Dep. at 54:4-6.

¹⁰ Colonel Kindall Dep. at 53:15-25; Major Horton Dep. at 74:16-18; Jack Ryan Dep. at 38:7-11.

¹¹ Ryan Dep. 51:12-17.

¹² Ryan Dep. 51:22-25.

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struck by the loader.¹³ The officers stated that they did not have time to consult an engineer,¹⁴ but in fact they had multiple opportunities to do so. According to Major Horton, they were looking for a way to enter the building from the beginning¹⁵ and considered using a piece of heavy equipment¹⁶ several hours before they actually initiated the breach. This left substantial time to consult an engineer. Furthermore, Major Horton stated that they did not have a bulldozer on site and had to make arrangements to obtain one, as well as an operator.¹⁷ Thus, in addition to the hours between the first thought of using the dozer and its implementation, there was time available while the officers waited for the dozer and operator to arrive. These time periods offered Defendant ample opportunity to contact a structural engineer, yet the officers did not contact any engineer.¹⁸

The officers were unsuccessful in getting to Mrs. Patel after the initial breach. About twenty-five minutes after the first ramming, the officers then rammed the dozer into the building for a second time. Even though the officers knew Mrs. Patel was in the cooler part of the store, they decided to ram the store at the very location of the cooler.¹⁹ Major Horton has acknowledged that he gave consideration to the fact that penetrating the cooler could have harmed Mrs. Patel,²⁰ but Director Fisher stated he did not give that consideration and he "wanted a hole" and "wanted it then."²¹ Thus, there was an order

¹³ Kindall Dep. at 57:4-6.

¹⁴ Id.

¹⁵ Horton Dep. at 34:4.

¹⁶ Horton Dep. at 68:9-11.

¹⁷ Horton Dep. at 68:23-25.

¹⁸ Fisher Dep. at 59: 8-11.

¹⁹ Horton Dep. at 72:2-4; Kindall Dep. at 69:20-23.

²⁰ Horton Dep. at 73:12-15.

²¹ Fisher Dep. 59:14-20; p. 60: 7-10.

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issued for the bulldozer to penetrate the front right corner, directly into the cooler.²² Major Horton has testified, "We knew we might kill the hostage taker, but we were in a dynamic entry, committed to resolving this thing, whatever it took, and we took a chance...."²³ By the grace of God, the hostage taker and the hostage were not killed, but Plaintiffs' building and business were left demolished.

III. SUMMARY JUDGMENT LAW

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.²⁴ In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.²⁵ "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."²⁶ It is only necessary for the nonmoving party to submit "a mere scintilla of evidence in order to withstand a motion for summary judgment."²⁷

²² Horton Dep. at 73:5-8.

²³ Horton Dep. at 76:4-7 [add deposition pages].

²⁴ Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRPC.

²⁵ Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

²⁶ Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).

²⁷ Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sheriff's Dep't, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).

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"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."²⁸ Moreover, even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.²⁹ Finally, "summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues."³⁰

IV. PLAINTIFF'S GROSS NEGLIGENCE CLAIMS

Law enforcement officers owe a duty not to act in a grossly negligent manner during police pursuits.³¹ Gross negligence is defined as "the failure to exercise slight care."³² It has also been defined as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."³³ Gross negligence "is a relative term, and means the absence of care that is necessary under the circumstances."³⁴ Gross negligence is ordinarily a mixed question of law and fact.³⁵ In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.³⁶

²⁸ Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).

²⁹ Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Hamilton v. Miller, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990).

³⁰ Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

³¹ Clark v. S.C. Dept. of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005).

³² Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999).

³³ Id.

³⁴ Id.

³⁵ Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 144, 638 S.E.2d 650 (2006) (citations omitted) (concluding whether Department acted in a grossly negligent manner was a factual issue for a jury).

³⁶ Id.

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IV.A. Viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, there is an issue of fact as to whether Officer Moore acted in a grossly negligent manner in failing to engage Johnson early in the standoff

As noted above, Officer Moore has testified that he made a conscious decision not to draw his weapon because he was fearful that it might endanger his own life.³⁷

Plaintiff's expert, John O'Leary, who had a substantial law enforcement career himself and has served as a legal consultant for several law enforcement agencies, testified that Officer Moore not only had the authority, but had a duty to take down Mr. Johnson when he entered the building.³⁸ O'Leary said this was particularly the case because there was no immediate threat to Mrs. Patel at that time.³⁹ Additionally, Moore's superior officer Major Horton, stated that in the situation that Officer Moore encountered, it would not have been inappropriate for Moore to have drawn his weapon and apprehend Mr. Johnson.⁴⁰ As noted above, gross negligence is the "conscious failure to do something which it is incumbent upon one to do." In this case, Plaintiff's expert has testified Moore had a duty to take the perpetrator down at that initial stage.⁴¹ Viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, Plaintiff's expert has testified that Officer Moore was grossly negligent for failing to take the perpetrator down. Conversely, Defendant's expert Jack Ryan has testified that Officer Moore's actions were consistent with generally accepted practices.⁴² Therefore, summary judgment is inappropriate as there is an issue of fact as to whether Officer Moore acted in a grossly negligent manner in failing to engage Johnson early in the standoff.

³⁷ Moore Dep. at 36:22-24; Moore Dep. at 38:7-9.

³⁸ O'Leary Dep. p. 92.

³⁹ O'Leary Dep. at 92:16.

⁴⁰ Horton Dep. at 22:9-18.

⁴¹ O'Leary Dep. p. 92.

⁴² Ryan Dep. p. 53:5-11.

IV.B. Viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, there is an issue of fact as to whether ramming the store with a bull-dozer was grossly negligent given the officers had no training, did not consult with an engineer, and had no idea where Mrs. Patel was in the building

As noted above, the police "took a chance"⁴³ and rammed the building with the bulldozer even though they knew they might kill the hostage-taker. If they knew the bulldozer might kill the hostage-taker then they knew it might kill the hostage, yet they went ahead "whatever it took." As noted above, multiple witnesses for the defense have testified that they have never, in their vast respective law enforcement experiences, even heard of the use of a dozer to breach a building⁴⁴ and Defendant's expert even agreed that he knew of no law enforcement training with the use of a bulldozer in the history of the world⁴⁵ and, more specifically, knew of no training the Spartanburg City Police had ever done in the use of motorized breach.⁴⁶

Taking this risk in the absence of any training, without any knowledge about the structure of the building, and with full knowledge that the bulldozer could kill the hostage certainly could be construed as failure to exercise slight care, particularly when viewing all facts in the light most favorable to the Plaintiff. Plaintiff's expert agrees and has testified: it was reckless and unreasonable not to consider the engineering and structure of the building;⁴⁷ there was excessive force used on the entry;⁴⁸ and the entry caused an unreasonable risk of harm to the hostage and the officers.⁴⁹

⁴³ Horton Dep. at 76:4-7 [add deposition pages].

⁴⁴ Colonel Kindall Dep. at 53:15-25; Major Horton Dep. at 74:16-18; Jack Ryan Dep. at 38:7-11.

⁴⁵ Ryan Dep. 51:12-17.

⁴⁶ Ryan Dep. 51:22-25.

⁴⁷ O'Leary Dep. p. 44.

⁴⁸ *Id.* at p. 60.

⁴⁹ *Id.* at p. 70, 120.

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Again, conversely, Defendant's expert contends that the use of the dozer was "not only a good idea, [but] it was a great idea."⁵⁰ Thus, viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, there is an issue of fact as to whether ramming the store with a bull-dozer was grossly negligent given the officers had no training, did not consult with an engineer, and had no idea where Mrs. Patel was in the building.

IV.C. Viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, there is an issue of fact as to whether ramming the store a second time twenty-five minutes later was grossly negligent

As noted above, the officers decided to ram the store a second time, again without knowledge of Ms. Patel's location,⁵¹ at the portion of the building near the cooler.⁵² Major Horton has acknowledged that he gave consideration to the fact that penetrating the cooler could have harmed Mrs. Patel,⁵³ but Director Fisher stated he did not give that consideration and he "wanted a hole" and "wanted it then."⁵⁴ He was only concerned with ensuring that they had access to the cooler.⁵⁵ Thus, there was an order issued for the bulldozer to penetrate the front right corner, directly into the cooler.⁵⁶

As noted previously, Defendant's expert has opined that the use of the dozer was a "great idea" and conversely, Plaintiffs' expert has stated that using the dozer was reckless and unreasonably dangerous. Additionally, Plaintiffs' expert has stated that the delay between the first and second ramming was reckless, particularly given the

⁵⁰ Ryan Dep. 55:19-21.

⁵¹ See, e.g., Fisher Dep. at 54:4-6.

⁵² Horton Dep. at 72:2-4; Kindall Dep. at 69:20-23.

⁵³ Horton Dep. at 73:12-15.

⁵⁴ Fisher Dep. 59:14-20; p. 60: 7-10.

⁵⁵ Fisher Dep. at 60:10-11.

⁵⁶ Horton Dep. at 73:5-8.

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minute delay between the two actions.⁵⁷ Specifically, Mr. O'Leary stated that this delay defeats the purpose of the first breach because the tactical surprise is lost.⁵⁸ Thus, O'Leary concludes that this was reckless because it put the hostage and the officer's lives at risk.⁵⁹ Thus, viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, there is an issue of fact as to whether ramming the store a second time twenty-five minutes later was grossly negligent.

V. PLAINTIFFS' INVERSE CONDEMNATION CLAIMS

The South Carolina Constitution states: "private property shall not be taken . . . for public use without just compensation being first made for the property."⁶⁰ "Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves."⁶¹

To protect these rights, South Carolina courts have recognized a cause of action for inverse condemnation. "Inverse condemnation is . . . a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures."⁶² "An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property."⁶³ "To prevail in an action for inverse condemnation, 'a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged

⁵⁷ O'Leary Dep. at 44-45, 67.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ S.C. Constitution, Art. I, Sec. 17.

⁶¹ Hardin v. South Carolina Dep't of Transp., 641 S.E.2d 437, 441, 371 S.C. 598 (2007).

⁶² Kiriakides v. Sch. Dist. of Greenville, 675 S.E.2d 439, 442 (2009).

⁶³ Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).

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damage to the plaintiff's property."⁶⁴ "[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to the jury"⁶⁵ Particularly important in the damages calculation is the "economic impact on the claimant[s], especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations"⁶⁶

There is no dispute that Defendant used a bulldozer to tear down Plaintiffs' building and business.⁶⁷ There is also no dispute that this was an affirmative, aggressive, and positive act by the City of Spartanburg.⁶⁸

As to the damages done to the Plaintiffs, Steve Griffin, a certified appraiser with substantial experience in valuing real estate, has been deposed. Mr. Griffin stated that as of March 2007, the property was worth approximately \$256,000 less without the building and business on the property.⁶⁹ Mr. Griffin said that one component of this difference was the amount of money generated by the business on that property.⁷⁰

Additionally, Dr. Charles Alford, an expert economist, testified as to the economic losses of each Plaintiff.⁷¹

Finally, there is no dispute that Defendant has failed to compensate any Plaintiff for any element of loss.

Therefore, viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiffs, each of the elements of the cause of action for inverse

⁶⁴ Quail Hill, LLC v. County of Richland, 665 S.E.2d 194, 197 (Ct. App. 2008).

⁶⁵ Kiriakides, 675 S.E.2d at 442.

⁶⁶ Id.

⁶⁷ Fisher Dep., p. 54 and p. 56.

⁶⁸ Affidavit of O'Leary; Ryan Depo. p. 87, lines 4-11.

⁶⁹ Griffin Dep., p. 47, lines 2-24.

⁷⁰ Id.

⁷¹ Alford Dep., p. 7-72.

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condemnation under South Carolina law are established and the matter should be submitted to the jury for a determination of compensation owed.

VI. RESPONSES TO DEFENDANT'S ARGUMENTS

Defendant's initial motion for summary judgment included contentions that were not addressed in its memorandum. Plaintiff assumes that Defendant has abandoned these contentions and only addresses the arguments from Defendant's memorandum. The arguments in the memorandum are that the Defendant is not liable for inverse condemnation and that it is immune from suit for the method of providing law enforcement.

VI.A. Viewing all Inferences and Conclusions Therefrom in the Light Most Favorable to the Plaintiff, Defendant Fails to meet its Burden of Proving Immunity for the Method of Providing Law Enforcement

"The burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense."⁷² Law enforcement officers owe a duty not to act in a grossly negligent manner during police pursuits.⁷³

Defendants cite to Huggins v. Metts⁷⁴ as support for their contention that Defendants are immune for their actions because they involve the method of providing law enforcement protection. First, Huggins is inapposite to the case at bar because there was no allegation of gross negligence in that case and no proof that the police did something never done in the history of the world of law enforcement, without any training whatsoever.⁷⁵

⁷² Clark, 362 S.C. 377, 608 S.E.2d 573.

⁷³ Clark v. S.C. Dept. of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005).

⁷⁴ Huggins v. Metts, 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2007)

⁷⁵ Id. at 624, 640 S.E.2d at 466.

Second, virtually every action taken by any law enforcement officer plausibly contemplates some “method” of implementing that action. To read Huggins as broadly as Defendants suggest would obviate the entire Tort Claims Act and decades of precedent to the contrary, including South Carolina Supreme Court jurisprudence holding law enforcement liable for gross negligence.

In this case, viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiff, Defendants fail to meet their burden because the case they cite is inapposite to the case at bar and substantial evidence exists to show Defendant’s acted in a grossly negligent manner.

VI.B. Viewing all Inferences and Conclusions Therefrom in the Light Most Favorable to the Plaintiff, Defendant Fails to Articulate Any South Carolina Law Precluding Plaintiff’s Claim for Inverse Condemnation

Defendant goes to great lengths citing case law outside South Carolina against Plaintiff’s claim for inverse condemnation, even citing cases from Oklahoma and Washington as authority on what constitutes a “fair reading” of the South Carolina Constitution.⁷⁶ Yet, Defendant fails to address Kiriakides v. Sch. Dist. of Greenville,⁷⁷ the South Carolina Supreme Court case from 2009 directly addressing the elements of the cause of action. Perhaps this is because the language of Kiriakides is broad, allowing inverse condemnation action under just this set of facts; specifically stating: “Inverse condemnation is . . . a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures.”⁷⁸ Because Plaintiffs have met the elements of

⁷⁶ Defendant’s Memorandum p. 7, 8.

⁷⁷ Kiriakides v. Sch. Dist. of Greenville, 675 S.E.2d 439, 442 (2009).

⁷⁸ Kiriakides v. Sch. Dist. of Greenville, 675 S.E.2d 439, 442 (2009) (In fairness, the facts of Kiriakides are distinct from the case at bar, but Plaintiffs find it telling that Defendant’s lengthy analysis of inverse

inverse condemnation as outlined above, summary judgment is inappropriate on the inverse condemnation cause of action.

VI.C. Viewing all Inferences and Conclusions Therefrom in the Light Most Favorable to the Plaintiff, Defendant's actions were not a valid exercise of police powers

The Defendant spends a great deal of its memorandum discussing the government's police power, but fails to cite a single South Carolina case articulating that the police themselves have the police power. This is because, though it is a bit counterintuitive, South Carolina courts have not recognized the ability of the police themselves to exercise the "police power." The "police power," has actually had nothing to do with the police historically, but rather has been a *legislative* power to *regulate* property by statute or ordinance.⁷⁹ This case does not involve the regulation of property by Defendant City of Spartanburg, therefore the concept of police power is inapplicable.

Even assuming the Defendant City of Spartanburg did have the police power; it was not properly exercised pursuant to the limitations on that power because no compensation was paid to Plaintiff's for their property. Again, the South Carolina Constitution states: "private property shall not be taken . . . for public use without just compensation being first made for the property."⁸⁰ Accordingly, "the exercise of municipality's police powers will not be allowed to violate . . . the State Constitution."

condemnation law, citing cases from the 1800's and all over the country, excludes a case decided just this year in Defendant's home state.).

⁷⁹ Carter v. South Carolina Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992), on reh'g, (Mar. 29, 1993) ("a governmental body may, pursuant to its police powers, *regulate* the use of property to prevent serious public harm") (emphasis added); Henderson v. City of Greenwood, 172 S.C. 16, 24, 172 S.E. 689 (1934) ("the *Legislature* may pass laws of a salutary nature under the general police power and . . . a like power may be delegated to municipalities, but even the legislative Acts and, equally so, the municipal ordinances must not go counter to constitutional provisions") (emphasis added).

⁸⁰ S.C. Constitution, Art. I, Sec. 13(A).

which provides that private property shall not be taken for public use without just compensation.”⁸¹ “Any suggestion that most takings of property are not compensable merely because they have safety as a purpose would be untenable.”⁸² “Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government’s action serves.”⁸³ “[C]onstitutional powers can never transcend constitutional rights and . . . the police power of a municipal corporation is subject to the limitations imposed by the Constitution.”⁸⁴

The South Carolina Court of Appeals applied this conceptual framework in Gray v. South Carolina Dep’t of Highways & Pub. Transp. In that case, the court upheld the trial court’s denial of directed verdict and submission to the jury of a scenario involving the closing of an intersection at which the plaintiff’s service station was located.⁸⁵ The Court held that even though the intersection closing had safety as a purpose, the Highway Department would not be permitted to violate the South Carolina Constitution in the name of this purpose by taking Plaintiff’s property without just compensation. In Gray, the compensation was made after the closing of the intersection upon order from the Supreme Court. Thus, Defendant’s interpretation of the South Carolina Constitution to require payment be “first made” prior to any taking⁸⁶ is incorrect.

While it is true that South Carolina courts occasionally consider law from our neighbors in North Carolina and Georgia, Defendant only cites to two such cases, they are both substantially distinct from the case at bar.

⁸¹ Gray, 311 S.C. at 147.

⁸² Id.

⁸³ Hardin v. South Carolina Dep’t of Transp., 641 S.E.2d 437, 441, 371 S.C. 598 (2007)

⁸⁴ J.C. James v. The City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

⁸⁵ Id.

⁸⁶ Defendant’s Memorandum p. 9.

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The first case cited is Bray v. Houston County,⁸⁷ a 1986 case in which the Plaintiff voluntarily provided his property to the police and expressly consented to the police use of that property. In that case the court held that because the Plaintiff made no allegation that his property had been wrongfully and forcibly taken from him, there was no case for the constitutional prohibition against taking without just and adequate compensation.⁸⁸ Of course, in this case no Plaintiff volunteered or expressly consented to the police destroying Plaintiffs' business and property. Thus, Bray is inapposite to this case.

The second case cited is McCoy v. Sanders,⁸⁹ a 1956 case heard before Georgia had a tort claims act. McCoy is equally inapplicable because in that case the Plaintiff had a remedy under Georgia law for compensation for the damage done, but failed to properly pursue that remedy.⁹⁰ In this case, Plaintiff does not have an alternative remedy, therefore McCoy is inapposite.

In the case at bar there is no dispute that the City of Spartanburg has paid no compensation to Plaintiff's for the destruction of Plaintiff's property and business. Even assuming the City of Spartanburg has "police power" authority, it cannot exercise this authority in violation of the Constitution of our state. This contention is supported not only by the cases cited above, but by the opinion of Plaintiff's expert, who has stated that the action taken was not a valid exercise of the police power in this specific circumstance.⁹¹

⁸⁷ Bray v. Houston County, 180 Ga. App. 166, 348 S.E.2d 709 (Ga. App. 1986).

⁸⁸ Id. at 167-168.

⁸⁹ McCoy v. Sanders, 113 Ga. App. 565, 148 S.E.2d 902 (1966)

⁹⁰ Id. at 571, fn 1.

⁹¹ Affidavit of John O'Leary.

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Thus, viewing all inferences and conclusions therefrom in the light most favorable to the Plaintiff, Defendant's actions were not a valid exercise of police powers and the issue should be submitted to the jury.

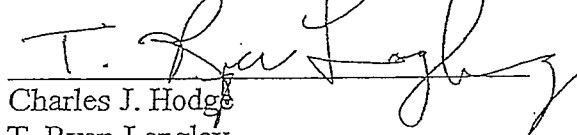
V. CONCLUSION

As articulated specifically in the lengthy set of facts above, viewing all inferences and the conclusions therefrom in the light most favorable to the Plaintiffs, there are numerous genuine issues of material fact in this case that preclude summary judgment.

Summarily, viewing this evidence and all ambiguities, conclusions, and inferences therefrom in the Plaintiff's favor, there exists far more than the scintilla of evidence of genuine issues of material fact required to overcome a motion for summary judgment. Thus, the Plaintiff respectfully requests that the drastic remedy of summary judgment be denied on its claims of gross negligence and inverse condemnation.

Respectfully Submitted by:

HODGE LAW FIRM



Charles J. Hodge

T. Ryan Langley

Attorneys for the Plaintiffs

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Spartanburg, SC 29304

(864) 585-3873

Dated: _____, 2009
Spartanburg, South Carolina

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07-CP-42-3388R

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November 16th, 2009
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

CHARLES J. HODGE and T. RYAN LANGLEY
ESQ.
Attorneys for the Plaintiffs

DAVID L. MORRISON
ESQ.
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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P R O C E E D I N G S

THE COURT: All right. We're on the record in the case of MP and Saroj -- did I say that right, Saroj?

MR. HODGE: Saroj is just fine, Your Honor

THE COURT: Saroj Patel, Willard Oil Company, and Harry "Skipper" Lancaster, plaintiffs, against the City of Spartanburg. I am -- I have a motion to amend the complaint before me at this time.

Mr. Hodge, do you wish to put that motion on the record?

MR. HODGE: Your Honor, I'll let Mr. Langley handle that.

THE COURT: Mr. Langley, yes, sir.

MR. LANGLEY: Yes, sir, Your Honor.

THE COURT: You may proceed.

MR. LANGLEY: First of all, I want to put on the record that we take exception to Justice Burnett's ruling on the summary judgment issues as relates to, to inverse condemnation. We don't have an order on that yet. But based on the hearing, we understand that that cause of action has been dismissed at the summary judgment level.

THE COURT: That's my understanding as well.

MR. LANGLEY: And I want to take exception to that ruling.

Skipper Lancaster - Direct examination
By Mr. Hodge

1 convenience store?

2 A Well, frankly, Mr. Hodge, I didn't have 250,000 plus.
3 dollars to build another one with.

4 Q Have you gotten any income from that property since
5 then?

6 A Not a dime.

7 Q But you got something from the City, didn't you,
8 Skipper?

9 A I've gotten a lot of things from the City.

10 Q Let's talk about one in particular. This would be
11 Plaintiff's Exhibit 14. Tell us what that is.

12 MR. MORRISON: Renewing my objection, Your Honor.

13 THE COURT: Objection is noted. The ruling would be
14 the same. I've ruled it admissible.

15 You may proceed, Mr. Hodge.

16 A This is where they're referring to the property 806
17 South Church Street. said that it is in violation of
18 maintenance commercial building ordinance of Spartanburg.
19 The ordinance requires vacant structures to be secured and
20 maintained in an acceptable condition, repaired, or
21 demolished. The intent of this ordinance is to prevent
22 buildings from becoming unsightly and, more importantly,
23 from becoming a collapse hazard endangering the lives of
24 citizens or public safety personnel. Imagine that. The
25 building at this location sustained structural damage, has

Skipper Lancaster - Direct examination
By Mr. Hodge

1 been affected by a fire event, and continue to remain in
2 disrepair.

3 Section 5-447 of the maintenance commercial buildings
4 ordinance requires buildings that have been damaged by fire,
5 decay, or other cause to the extent of 50 percent of its
6 value to be demolished and removed from the property within
7 30 days of notice or within a reasonable time as determined
8 by the code official.

9 At this time I would offer the following options and
10 time line for this project. Within 15 days provide written
11 correspondents indicating your intent to either demolish or
12 repair the structure. Within 30 days obtain permits from
13 the city building department to initiate demolition or
14 repairs by licensed contractor. Within 90 days complete all
15 repairs and or demolition.

16 If you choose to maintain or repair the building, then
17 we can, we can provide it further direction on the minimum
18 items that must be accomplished. Should you have any
19 questions or need further clarification, please feel free to
20 contact me at 569-2449 or by email at
21 mjulazadeh@cityofspartanburg.org. Building official Buddy
22 Bush may be reached at 596-2111 or by email at
23 bbush@cityofspartanburg.org.

24 We are more than willing to discuss specific items
25 related to the property or make minor adjustments to the

Skipper Lancaster - Direct examination
By Mr. Hodge

1 requested time frame. We look forward to working with you
2 in maintaining a safe community.

3 Q Well, what was your understanding of what they were
4 asking you to do?

5 A Well, they were asking me to tear the building down or
6 to rebuild it.

7 Q Did you tear the building down in the first place?

8 A No, I think they did a pretty good job of that for me
9 except they just didn't finish the job.

10 Q Did they pay you for it?

11 A No, they wanted me to pay them.

12 Q They wanted you to pay them?

13 A Yeah.

14 Q And they tore it down?

15 A Yeah.

16 Q What's your reaction to that?

17 A Didn't set too well with me. Not only did they want me
18 to pay for it, they wanted me to pay \$25,000.

19 MR. MORRISON: Your Honor, objection.

20 Q Don't talk about the amount.

21 THE COURT: Just -- sir?

22 MR. MORRISON: Objection. Relevance.

23 May we approach?

24 THE COURT: You may.

25 (Whereupon, a bench conference was held out of the

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2005-CP-42-1424

MP AND SAROJ PATEL, *
WILLARD OIL CO., INC., *
AND HARRY "SKIPPER" *
LANCASTER, *

PLAINTIFFS, *

VERSUS *

CITY OF SPARTANBURG, *

DEFENDANT. *

DEPOSITION OF PHILLIP MOORE

PURSUANT TO NOTICE AND/OR AGREEMENT, THE

DEPOSITION OF PHILLIP MOORE WAS CALLED BY THE

PLAINTIFFS ON THE 24TH DAY OF OCTOBER, 2006, COMMENCING
AT THE HOUR OF 2:07 P.M., AT THE LAW OFFICES OF HODGE

LAW FIRM, 229 MAGNOLIA STREET, SPARTANBURG, SOUTH

CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

JILL S. BISHOP

VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE

SPARTANBURG, S.C. 29301-6515

864-574-1313

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MARC KITCHENS

CT REPORTER: JILL BISHOP
DIXY MOORE TURNER ASSOCIATES

1 PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
2 DEPOSITIONS, THE WITHIN DEPOSITION WAS TAKEN BY THE
3 ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE
4 STATE OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES
5 AT THE LAW OFFICES OF HODGE LAW FIRM, SPARTANBURG,
6 SOUTH CAROLINA.

7 * * * * * * * * * * * *

8 STIPULATIONS:

9 IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
10 AS FOLLOWS:

- 11 1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
12 SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
13 2. THE READING AND SIGNING OF THE DEPOSITION
14 TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
15 PARTIES.

16 * * * * * * * * * * * *

17 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
18 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
19 MATTER HEREIN:

20 * * * * * * * * * * * *

21 PHILLIP MOORE,

22 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

23 EXAMINATION BY MR. HODGE:

24 Q. YOUR FULL NAME, PLEASE, SIR.

25 A. PHILLIP THOMAS MOORE.

1 Q. OKAY. BY THAT TIME, YOU HAD BEEN ON THE FORCE FOR A
2 WHILE?

3 A. YES, SIR, I STARTED IN 1995.

4 Q. WOULD IT BE FAIR TO SAY THAT SWAT TRAINING IS SOME
5 TYPE OF ADVANCED POLICE TRAINING?

6 A. YES, SIR.

7 Q. IN OTHER WORDS, A ROOKIE WOULD NOT NECESSARILY GO
8 THROUGH THAT?

9 A. NO, SIR. THAT WOULD BE UNUSUAL.

10 Q. OKAY. ALL RIGHT. SO, IN '94, YOU BECAME A FULL-
11 TIME OFFICER WITH ----

12 A. 1995.

13 Q. '95? OKAY. WITH SPARTANBURG CITY POLICE ---

14 A. MAY 26TH.

15 Q. ALL RIGHT. AND JUST DESCRIBE-FOR ME THE PROGRESSION
16 FROM 1995 UP UNTIL THE PRESENT TIME IN YOUR VARIOUS
17 POSITIONS.

18 A. I STARTED OUT AS A PUBLIC SAFETY OFFICER IN 1995 ON
19 MAY 26TH. I ATTENDED THE SOUTH CAROLINA CRIMINAL
20 JUSTICE ACADEMY. I GRADUATED FROM THE CRIMINAL
21 JUSTICE ACADEMY ---

22 Q. IN '95?

23 A. YES, SIR. I WAS A PATROL OFFICER UNTIL THEY
24 INSTITUTED A NEW RANK STRUCTURE WHERE IF YOU WERE AT
25 THE DEPARTMENT FOR TWO YEARS, YOU BECAME A SENIOR

1 PATROL OFFICER AND THEN YOU HAD TO PASS A TEST TO
2 BECOME A MASTER PATROL OFFICER, WHICH I DID. THEN,
3 IN 2000, I BECAME A SERGEANT.

4 Q. OKAY. AND YOU'VE BEEN A SERGEANT EVER SINCE?

5 A. EVER SINCE.

6 Q. SO, YOU WERE A SERGEANT WHEN THE PATEL MATTER WAS
7 GOING ON?

8 A. YES, SIR.

9 Q. HAVE YOUR DUTIES AS SERGEANT CHANGED?

10 A. NO, SIR.

11 Q. WERE THEY THE SAME THEN AS THEY ARE NOW?

12 A. YES, SIR.

13 Q. WHAT ARE YOUR DUTIES AS A SERGEANT?

14 A. I'M A UNIFORM PATROL SERGEANT. I'M A SERGEANT ON
15 THE SHIFT, SUPERVISOR.

16 Q. OKAY. GIVE ME A BREAKDOWN OF THAT. JUST ASSUME I'M
17 NOT FAMILIAR WITH IT AT ALL. WHAT IS THE TYPICAL
18 DAY?

19 A. A TYPICAL DAY WOULD BE COME TO WORK, ORGANIZE A
20 ROSTER OF OFFICERS IN DIFFERENT AREAS IN THE CITY,
21 CONDUCT A ROLL CALL IN WHICH INFORMATION IS GIVEN TO
22 THE OFFICERS ON WHO MAY BE WANTED, KEEP CHECKS FOR
23 RESIDENCES OR BUSINESSES IN THE AREA, BE ON THE LOOK
24 OUT FOR DIFFERENT VEHICLES OR STOLEN VEHICLES, THAT
25 TYPE OF INFORMATION. WE WOULD CONDUCT A ROLL CALL

1 Q. ACTUALLY, THE WINDOW WAS CLEAR AT THAT TIME?

2 A. IT WAS CLEAR AT THAT TIME.

3 Q. SO, DID YOU ACTUALLY SEE THE SUSPECT YOURSELF IN
4 THAT GLASS?

5 A. YES, I WAS RIGHT HERE AT THE DOOR.

6 Q. RIGHT AT THE DOOR?

7 A. MM-HMM (AFFIRMATIVE RESPONSE).

8 Q. DID YOU EVER OPEN THE DOOR?

9 A. YES.

10 Q. AND DID YOU SEE THE SUSPECT?

11 A. YES, HE WAS BEHIND THE COUNTER.

12 Q. ALL RIGHT. DID YOU SAY ANYTHING TO HIM?

13 A. SURE.

14 Q. WHAT DID YOU SAY?

15 A. I SAID, "HOW ABOUT COME ON OUT AND LET'S TALK ABOUT
16 WHAT'S GOING ON?" I WAS TRYING TO GET HIM TO COME
17 OUT.

18 Q. AND WHAT DID HE SAY?

19 A. HE SAID, "NO, I'M NOT COMING OUT." WELL, I'VE GOT
20 IT RIGHT HERE WHAT HE SAID. HE SAID, "IT ENDS
21 TODAY. SOMEBODY HAS TO DIE." HE WAS IRRATIONAL

22 Q. ALL RIGHT. "I ARRIVED ON THE SCENE AND OFFICER D.
23 HEARST WAS TALKING TO THE SUSPECT THROUGH THE FRONT
24 LEFT GLASS." DID OFFICER D. HEARST EVER OPEN THAT

25 DOOR AND TALK TO THE SUSPECT?

FILED
NOV - 3 - 1965
HARD KITCHENS
OFFICE OF COUNTY
CLERK

1 A. I'M NOT SURE. I DON'T THINK SO.

2 Q. OKAY. "I OPENED THE FRONT DOOR TO SPEAK WITH THE
3 SUSPECT AND I SAW AN ASIAN FEMALE CLERK BEHIND THE
4 COUNTER. THE SUSPECT WAS BETWEEN ME AND HER." IN
5 OTHER WORDS, HE WASN'T USING HER AS A SHIELD, AT
6 THAT POINT IN TIME. IS THAT RIGHT?

7 A. NOT AT THAT POINT, RIGHT.

8 Q. DID YOU HAVE A CLEAR SHOT AT HIM?

9 A. NO, SIR. THERE WAS LOTTERY MACHINES, LOTTERY
10 TICKETS, AND THE CIGARETTES THING. I DON'T KNOW
11 WHAT YOU CALL IT, THE HOLDER WAS -- I ONLY SAW ABOUT
12 THIS MUCH OF HIS BODY, YOU KNOW, BETWEEN THE LOTTERY
13 MACHINE TICKETS AND THE CIGARETTES.

14 Q. AT THAT POINT IN TIME, WOULD YOU HAVE BEEN JUSTIFIED
15 IN USING DEADLY FORCE?

16 A. I DON'T BELIEVE I WOULD.

17 Q. AND WHY NOT?

18 A. BECAUSE I DIDN'T SEE A GUN.

19 Q. HAD YOU BEEN TOLD HE HAD A GUN?

20 A. I HAD BEEN TOLD HE HAD A GUN.

21 Q. DID HE SAY HE HAD A GUN?

22 A. NO.

23 Q. BUT IN YOUR STATEMENT, YOU SAY THE SUSPECT WAS ARMED
24 WITH A PISTOL?

25 A. FROM WHAT CLARK HAD SAID ON THE RADIO.

FILED
2009 NOV - 3 AM 10:43
MARC KITCHENS
COURT

1 Q. OKAY. "I TRIED TO REASON WITH THE SUSPECT, BUT HE
2 WOULD SAY, 'IT ENDS TODAY. SOMEBODY HAS TO DIE.'
3 OFFICER HEARST YELLED, 'HE HAS THE GUN. HE HAS THE
4 GUN.' "

5 A. I COULDN'T SEE IT.

6 Q. ALL RIGHT.

7 A. HE WAS LOOKING FROM THIS ANGLE AND I WAS OVER HERE.
8 HE WAS LOOKING THROUGH THIS WINDOW.

9 Q. AND SO, OFFICER HEARST HAD A CLEAR VIEW OF THE
10 SUSPECT WITH THE GUN. IS THAT RIGHT? YOU NEED TO
11 ANSWER "YES" OR "NO."

12 A. YES. EXCUSE ME. I'M SORRY.

13 Q. WOULD HE HAVE BEEN JUSTIFIED, AT THAT POINT IN TIME,
14 IN USING DEADLY FORCE?

15 A. NO.

16 Q. WHY NOT?

17 A. HE WASN'T PRESENTING IT OR POINTING IT OR ---

18 Q. WELL, HE SAID HE HAD THIS GUN. HE SAID ---

19 A. HE HAD IT. HE HAD IT THE WHOLE TIME.

20 Q. HE SAID, "SOMEBODY HAS TO DIE TODAY." WHAT MORE
21 DOES IT TAKE TO BE JUSTIFIED IN USING DEADLY FORCE?

22 A. OPPORTUNITY TO USE THE WEAPON..

23 Q. OKAY. AND TELL ME WHAT THAT MEANS.

24 A. THAT MEANS PULLING IT OUT AND PRESENTING IT,
25 POINTING IT IN A MANNER THREATENING SOMEONE'S LIFE.

1 Q. AT THAT POINT IN TIME, WAS THAT EARLY ON? WAS THAT
2 IN THE 8:00 TO 9:00 A.M. RANGE?

3 A. YES, SIR. THAT WAS RIGHT WHEN I GOT THERE.

4 Q. THAT WAS BEFORE THE AIR CONDITIONING HAD BEEN CUT
5 OFF?

6 A. YES, SIR. EVERYTHING WAS STILL ON.

7 Q. ALL RIGHT. WHEN OFFICER HEARST YELLED, "HE HAS THE
8 GUN," WHAT DO YOU DO?

9 A. I CALLED FOR THE TACTICAL TEAM, BECAUSE AT THAT
10 POINT, I REALIZED THAT I WASN'T MAKING ANY RAPPORT
11 WITH THIS SUBJECT. I WASN'T GETTING HIS ATTENTION.
12 HE WAS NOT -- I WAS MAKING HIM UPSET.

13 Q. YOU FELT THAT YOUR PRESENCE WAS ESCALATING THE
14 SITUATION?

15 A. YES, SIR.

16 Q. SO, DID YOU BACK OUT OF THE DOORWAY?

17 A. YES, SIR, I DID. I BACKED OUT BACK HERE.

18 Q. WAS ANYBODY BESIDE YOU?

19 A. YES, SIR. OFFICER SMITH, LESLIE SMITH WAS THERE.
20 DAVID HEARST WAS THERE. BY THIS TIME, TIM SEAVER
21 HAD ARRIVED. HE'S ANOTHER SERGEANT.

22 Q. WAS THE OPPORTUNITY PRESENTED TO INSERT SOMEONE AT
23 THAT POINT IN TIME?

24 A. NO, SIR. I DIDN'T FEEL COMFORTABLE DOING THAT.

25 Q. DO YOU MAKE THAT CALL ON THE SCENE AT THAT

1 PARTICULAR POINT IN TIME?

2 A. SURE.

3 Q. AND WHY DIDN'T YOU FEEL COMFORTABLE?

4 A. THIS SUBJECT DIDN'T HAVE THE WEAPON OUT WHERE I
5 COULD SEE IT. I DON'T KNOW WHERE IT WAS, EITHER IN
6 HIS WAISTBAND OR HIS POCKET. HE HAD A CELL PHONE IN
7 HIS HAND AND HE HAD BOTH HANDS DIALING A CELL PHONE.

8 Q. HE HAD BOTH HANDS DIALING A CELL ---

9 A. HE HAD BOTH HANDS DIALING A CELL PHONE. I'M LOOKING
10 AT HIM BETWEEN THE CIGARETTES AND THE LOTTERY
11 TICKETS OR THE LOTTERY MACHINE, AND HE HAD BOTH
12 HANDS. I COULD SEE BOTH HANDS DIALING A CELL PHONE.

13 HE MAY MOVE A HAND DOWN AND BACK UP AND THAT'S WHEN
14 HEARST SAID, "HE'S GOT THE GUN. HE'S GOT THE GUN."

15 Q. BUT YOU SAW HIM HAVE BOTH HANDS AWAY FROM ANY GUN AT
16 SOME POINT IN TIME?

17 A. YES, SIR, DIALING ---

18 Q. WHY DIDN'T YOU JUST WALK RIGHT UP WITH YOUR GUN
19 DRAWN RIGHT TO HIM?

20 A. BECAUSE I HAVE KIDS AND A WIFE AND FAMILY AND
21 DIDN'T FEEL THAT THAT WAS GOING TO BE THE THING TO
22 DO AT THE TIME. I WOULD PUT MS. PATEL'S LIFE IN
23 DANGER AND I WOULD PUT MY LIFE IN DANGER AND I PUT
24 MR. JOHNSON'S LIFE IN DANGER.

25 Q. BUT AT THAT POINT IN TIME, JOHNSON IS FACING YOU.

FILED
U.S. DISTRICT COURT
MARC
2009 NOV -3 PM 10:43

1 A. NO.

2 Q. THERE'S JUST ONE ENTRANCE?

3 A. TWO DOORS.

4 Q. THAT'S THE ONLY WAY TO GET IN AND OUT?

5 A. YES, SIR.

6 Q. ALL RIGHT. LET'S GO BACK TO YOUR STATEMENT, IF WE
7 COULD. YOU BACK OUT WHEN YOU HEARD ABOUT THE GUN
8 AND THAT'S WHEN YOU CALLED THE TACTICAL
9 NEUTRALIZATION TEAM. IS THAT THE SWAT TEAM?

10 A. YES, SIR.

11 Q. YOU NOTIFIED THE COLONEL AND SHE WAS EN ROUTE. WHO
12 WOULD THAT BE?

13 A. THAT WOULD BE JENNIFER KENDALL.

14 Q. AND SERGEANT TIM SUBER WAS ON THE SCENE AND SO HE
15 KIND OF TOOK OVER YOUR DUTIES, AT THAT POINT, AND
16 YOU WENT BACK TO THE POLICE STATION TO CHANGE INTO
17 YOUR TACTICAL OUTFIT?

18 A. YES, SIR.

19 Q. AND WHEN YOU REFER TO OVER THE NEXT 11 TO 12 HOURS,
20 YOU WERE ON THE INNER PERIMETER ---

21 A. RIGHT.

22 Q. WHAT DOES THAT MEAN?

23 A. THE INNER PERIMETER WOULD BE THE IMMEDIATE PERIMETER
24 AROUND THE BUILDING, EITHER, YOU KNOW, ON THEIR
25 PROPERTY. THERE WAS A CAR OUT HERE AND I WAS AT THE

FILED
2009 NOV -3 AM 10:43
MARCI KNOCHENS

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2005-CP-42-1424

MP AND SAROJ PATEL, ... *
WILLARD OIL CO., INC., ... *
AND HARRY "SKIPPER" *
LANCASTER, ... *

PLAINTIFFS, ... *

VERSUS *

CITY OF SPARTANBURG, ... *

DEFENDANT. *

COPY

DEPOSITION OF ANTHONY TONY FISHER

PURSUANT TO NOTICE AND/OR AGREEMENT, THE

DEPOSITION OF ANTHONY TONY FISHER WAS CALLED BY THE

PLAINTIFFS ON THE 22ND DAY OF MARCH, 2007,

COMMENCING AT THE HOUR OF 10:05 A.M., AT THE LAW

OFFICES OF HODGE LAW FIRM, 229 MAGNOLIA STREET,

SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS

FOLLOWS:

JILL S. BISHOP
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

FILED
2009 NOV -3 AM 10:43
MARC KITCHENS

1 PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
2 DEPOSITIONS, THE WITHIN DEPOSITION WAS TAKEN BY THE
3 ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE
4 STATE OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES
5 AT THE LAW OFFICES OF HODGE LAW FIRM, SPARTANBURG,
6 SOUTH CAROLINA.

7 * * * * *

8 STIPULATIONS:

9 IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
10 AS FOLLOWS:

- 11 1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
12 SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
13 2. THE READING AND SIGNING OF THE DEPOSITION
14 TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
15 PARTIES.

16 * * * * *

17 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
18 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
19 MATTER HEREIN:

20 * * * * *

21 ANTHONY TONY FISHER,

22 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

23 EXAMINATION BY MR. HODGE:

24 Q. DIRECTOR FISHER, I'M CHARLIE HODGE. WE'VE MET
25 BEFORE IN THE PAST. I'M GOING TO ASK YOU SOME

1 QUESTIONS TODAY. THESE QUESTIONS ARE NOT MEANT TO
2 HARASS OR INTIMIDATE YOU, SO IF I ASK YOU A QUESTION
3 WHICH YOU'VE GOT A PROBLEM WITH OR DON'T UNDERSTAND
4 THE PHRASING, PLEASE POINT IT OUT TO ME. IS THAT
5 AGREEABLE?

6 A. THAT'S AGREEABLE.

7 Q. WILL YOU ALSO AGREE TO BE TRUTHFUL AND FORTHRIGHT
8 WITH ME, AND NOT EVASIVE IN YOUR ANSWERS?

9 A. YES.

10 Q. NOW, IS YOUR PROPER TITLE DIRECTOR FISHER OR ---

11 A. DIRECTOR OF PUBLIC SAFETY FOR THE CITY OF
12 SPARTANBURG.

13 Q. ALL RIGHT. WHEN YOUR OFFICERS ADDRESS YOU, HOW DO
14 THEY ADDRESS YOU?

15 A. MR. FISHER OR DIRECTOR.

16 Q. I JUST WANT TO MAKE SURE THAT I SHOW THE PROPER
17 RESECT.

18 A. SURE.

19 Q. I'M GOING TO ASK YOU A LITTLE BIT ABOUT YOUR FAMILY
20 BACKGROUND. THIS IS FOR JURY PURPOSES.

21 A. OKAY.

22 Q. AND THEN WE'LL GET INTO THE SUBSTANCE OF THE CASE.
23 WHERE DO YOU LIVE NOW?

24 A. 1 DUBLIN COURT, SPARTANBURG, 29301.

25 Q. ARE YOU MARRIED?

1 Q. YOU TELL ME. WHEN YOU USE THE TERM "RESPOND," IN
2 TERMS OF ---

3 A. I THINK YOU'RE ASKING ME THAT REGARDING S.W.A.T. AND
4 NOT THE ENTIRE OPERATION.

5 Q. WELL, LET'S BIFURCATE IT, THEN.

6 A. FOR THE WHOLE OPERATION?

7 Q. YES.

8 A. ONCE THE CALL HAS BEEN MADE AND THE DETERMINATION
9 HAS BEEN MADE THAT THERE MAY BE A HOSTAGE BARRICADE
10 SITUATION, THEN A WHOLE LOT OF OTHER THINGS BEGIN TO
11 HAPPEN. SUPERVISORS ARE NOTIFIED, ADDITIONAL
12 OFFICERS RESPOND, THE LEADERSHIP BEGIN AND OFFICERS
13 BEGIN TO TALK TO THE INITIAL OFFICER TO DETERMINE
14 WHAT, IF ANYTHING, THAT HE SAW, WHAT HAPPENED, HOW
15 DID WE WIND UP IN THE SITUATION THAT WE WERE IN, HIS
16 LAST CONTACT WITH THE HOSTAGE TAKER, HIS OPINIONS,
17 DETERMINE INTELLIGENCE AS BEST WE CAN, HOW MANY
18 PEOPLE ARE INVOLVED AS HOSTAGE TAKERS, HOW MANY
19 PEOPLE ARE INVOLVED AS VICTIMS. IF WE'RE IN A
20 SITUATION WHERE WE CAN SECURE THE PREMISES, THEN AT
21 THAT POINT, IF WE DETERMINE THAT EVERYTHING IS
22 CONTAINED, STABILIZED, OR SECURED, THEN WE BEGIN TO
23 LOOK AT OTHER RESOURCES THAT ARE NECESSARY, COMMAND,
24 ABILITY TO CONTACT AND TALK TO THE HOSTAGE TAKER OR
25 TAKERS, NOTIFYING THE S.W.A.T. TEAM, MAKING SURE

1 THAT THEIR LEADERSHIP IS ON THE GROUND AND WE HAVE
2 THE APPROPRIATE NUMBERS TO CONDUCT THE OPERATION.
3 AND NEGOTIATORS HAVE TO BE IDENTIFIED, HAVE TO
4 RESPOND, SET UP CONTACT. ATTEMPT TO GET A VISUAL ON
5 ALL SIDES OF THE LOCATION, WINDOWS, DOORS, ANY OTHER
6 POTENTIAL EXITS, AND IF ALL OF THE ABOVE HAS
7 OCCURRED, THEN AT THAT POINT, OUR APPROACH IS
8 THROUGH THE NEGOTIATORS TO BEGIN TO TALK WITH THE
9 HOSTAGE TAKER AND DETERMINE WHAT IT IS THAT THEY
10 WANT. THIS WAS A SPONTANEOUS SITUATION AND NOT ONE
11 THAT WAS PLANNED, BASED ON THE INFORMATION THAT WE
12 RECEIVED FROM THE OFFICER, AND THEY TEND TO BE
13 DIFFERENT BECAUSE THE HOSTAGE TAKER LARGELY HAS NOT
14 PLANNED OUT WHAT THEY ARE GOING TO DO OR WHAT THEY
15 WANT. SO, GENERALLY, THEY ARE FAIRLY FRANTIC AND
16 THE INTENT OF THE NEGOTIATORS IS TO CALM THEM DOWN
17 AND TO CREATE A RELATIONSHIP. AND THAT'S WHAT
18 OCCURRED.

19 Q. WHAT YOU JUST DESCRIBED IS THE, FALLS UNDER THE
20 OVERALL HEADING OF RESPOND TO THE ENTIRE SITUATION;
21 IS THAT CORRECT?

22 A. YES.

23 Q. ALL RIGHT. SAVE LIVES, ANY SUB-CRITERIA UNDER THAT
24 BROAD HEADING?

25 A. WELL, I THINK THAT THE WHOLE ASSEMBLAGE IN RESPONSE

1 IS STABILIZATION AND SECURITY AND CONTAINMENT IS TO
2 KNOW WHERE FOLKS ARE. THE HOSTAGE TAKER, THE
3 HOSTAGES, HOW MANY, AND TO THE EXTENT AT THE TIME
4 THAT WE BEGAN NEGOTIATIONS THAT THEY'RE OKAY. AND
5 THAT'S WHAT WE WERE DEALING WITH.

6 Q. WHY IS IT IMPORTANT TO KNOW WHERE THE FOLKS ARE?

7 A. IT'S IMPORTANT TO KNOW WHERE THEY ARE IF WE CAN
8 DETERMINE THAT. EARLY ON, AT DIFFERENT TIMES, WE
9 WERE UNABLE TO DETERMINE WHERE THEY WERE BECAUSE WE
10 WERE OUTSIDE AND THEY WERE IN. AND EARLY ON,
11 COMMUNICATIONS WERE WITH A CELL PHONE AND BASED ON
12 THAT, WE JUST DIDN'T KNOW WHERE THEY WERE IN THE
13 STORE.

14 Q. MY QUESTION TO YOU IS WHY IS IT IMPORTANT TO KNOW
15 WHERE FOLKS ARE.

16 A. IT'S IMPORTANT TO KNOW WHERE THEY ARE IN CASE WE
17 MAKE A DECISION FOR AN OPERATION, GETTING THINGS TO
18 THEM, SAFETY FOR THE EXTERNAL FOLKS AND SAFETY FOR
19 THE HOSTAGE INTERNALLY.

20 Q. SO, IT WOULD BE IMPORTANT TO KNOW WHERE THEY ARE IN
21 THE EVENT THAT YOU WERE GOING TO BREACH THE
22 BUILDING; IS THAT CORRECT?

23 A. IF POSSIBLE, YES.

24 Q. AND THAT'S FOR SAFETY PURPOSES?

25 A. IF POSSIBLE, YES.

1 Q. BECAUSE YOU CAN FORESEE THAT THEY COULD BE INJURED
2 DURING A BREACH AND THAT'S WHY YOU WOULD WANT TO
3 KNOW WHERE THEY ARE?

4 A. POTENTIALLY.

5 Q. ANYTHING, ANY CRITERIA UNDER THE BROAD HEADING END
6 THE SITUATION SUCCESSFULLY WITHOUT HAVING TO FIRE A
7 SHOT?

8 A. IS THERE ANYTHING UNDER THE BROAD HEADING OF THAT?

9 Q. RIGHT.

10 A. I THINK THAT REALLY CONSUMES ITSELF IN THE ABILITY
11 TO NEGOTIATE EFFECTIVELY AND SUCCESSFULLY AND TO
12 TAKE AS MUCH TIME AS NECESSARY TO ATTEMPT A
13 SUCCESSFUL NEGOTIATION.

14 Q. IS THAT IT?

15 A. YES.

16 Q. NOW, HAVE YOU EVER DEALT WITH A HOSTAGE BARRICADE
17 SITUATION?

18 A. YES.

19 Q. HOW MANY TIMES?

20 A. I CAN THINK OF TWO, PROBABLY MORE. WE'RE LOOKING AT
21 37 YEARS, BUT THE MOST FAMOUS ONE THAT I WAS
22 INVOLVED IN, AND I'M TRYING TO THINK OF THE YEAR.
23 PROBABLY AROUND '77 OR '78, IBM OFFICE COMPLEX IN
24 BETHESDA, MARYLAND, A YOUNG MAN HAD TAKEN OVER THE
25 BUILDING, KILLED A COUPLE OF EMPLOYEES, HELD SOME

1 WHO ARE YOU BRIEFED BY?

2 A. COLONEL KENDALL.

3 Q. WHAT ARE YOU TOLD?

4 A. THAT APPROXIMATELY 8:00, OFFICER CLARK HAD ATTEMPTED
5 TO STOP THIS VEHICLE FOR A TAG VIOLATION. HE
6 APPROACHED IT. AS I RECALL, A GUY GOT OUT. HE
7 OBSERVED A GUN AND RAN. HE BEGAN A CHASE. THE GUY
8 RAN INSIDE OF THE CONVENIENCE STORE. HE HAD SOME
9 CONTACT. THE OFFICERS BACKED OUT, NOTIFIED THE REST
10 OF THE AGENCY, AND THE APPROPRIATE UNITS HAD
11 RESPONDED. CONTACT HAD BEEN MADE. CONTAINMENT HAD
12 BEEN ESTABLISHED. NEGOTIATORS WERE IN PLACE. ROADS
13 HAD BEEN BLOCKED. S.W.A.T. WAS ON THE SCENE. AND
14 THAT'S ABOUT WHERE THEY WERE.

15 Q. ALL RIGHT.

16 A. SHOTS HAD BEEN FIRED, AT THAT POINT. I THINK
17 INITIALLY HE HAD FIRED A SHOT OR TWO.

18 Q. ALL RIGHT. NOW, YOU MENTIONED IN THAT DESCRIPTION
19 THAT SOME CONTACT HAD BEEN MADE WITH THE SUSPECT AND
20 THE OFFICER BACKED OUT OF THE CONVENIENCE STORE. IS
21 THAT WHAT I HEARD YOU SAY?

22 A. YES.

23 Q. WHAT WAS THE CONTACT?

24 A. HE HAD OBSERVED HIM IN THE STORE, AS I UNDERSTOOD
25 IT, WITH A GUN. AND RATHER THAN GO INSIDE TO

1 CONFRONT, HE HAD BACKED OUT.

2 Q. HAVE YOU READ THAT OFFICER'S DEPOSITION?

3 A. NO.

4 Q. HAVE YOU PREPPED IN ANY WAY FOR THIS DEPOSITION?

5 A. WE'VE MET AND HAD DISCUSSIONS ABOUT WHAT YOU MAY ASK
6 ME.

7 Q. YOU DON'T HAVE TO TALK ABOUT WHAT YOUR LAWYER TOLD
8 YOU. I'M MORE INTERESTED IN ANY MATERIALS THAT YOU
9 MIGHT HAVE REVIEWED.

10 A. PERSONALLY REVIEWED?

11 Q. OR HAD SOMEONE REVIEW AND GIVE YOU A SYNOPSIS OR
12 ANYTHING LIKE THAT.

13 A. WELL, MY ATTORNEY WENT OVER ---

14 Q. AGAIN, DON'T TALK ABOUT WHAT YOUR ATTORNEY WENT
15 OVER.

16 A. OKAY. WELL ---

17 Q. LET'S PUT IT THIS WAY: DID YOU DO ANYTHING OUTSIDE
18 OF MR. MORRISON?

19 A. I LOOKED OVER SOME TIME LOGS OF WHEN THINGS PERHAPS
20 WOULD HAVE OCCURRED. I TALKED WITH THE COLONEL AND
21 THE MAJOR, BRIEFLY.

22 Q. DOUG HORTON, YOU'RE TALKING ABOUT?

23 A. YES.

24 Q. DID THEY TELL YOU ABOUT THEIR WONDERFUL EXPERIENCE
25 AT A DEPOSITION?

1 Q. AND THEN, HE BACKED OUT?

2 A. YES.

3 Q. DID YOU READ WHERE JOHNSON'S HANDS WERE, ACCORDING
4 TO THAT OFFICER?

5 A. NO.

6 Q. WELL, IF THE PERPETRATOR'S HANDS, BOTH HANDS WERE IN
7 PLAIN VIEW AND THERE WAS NO GUN IN THEM, BUT RATHER
8 A TELEPHONE, WOULD IT BE APPROPRIATE FOR THAT
9 OFFICER TO FORCE AN ARREST AT THAT POINT IN TIME?

10 A. THE OFFICER HIMSELF HAS A RIGHT TO USE HIS OWN
11 DISCRETION IN TERMS OF WHAT THE POTENTIAL DANGER MAY
12 BE IN FRONT OF HIM. I'M SURE AT SOME POINT WE MAY
13 HAVE DISCUSSED THE INITIAL INCIDENT. WHEN I WAS
14 INITIALLY BRIEFED ON THE SCENE, THAT WAS NOT A PART
15 OF THE BRIEFING, OTHER THAN THE FACT THAT HE HAD
16 INITIALLY WALKED IN AND SAW HIM AND RETREATED. IN
17 MY OPINION, IT CERTAINLY COULD HAVE BEEN A SITUATION
18 THAT HE FELT UNCOMFORTABLE WITH AND THEREFORE
19 APPROPRIATELY TO RETREAT.

20 Q. WELL, I CAN'T IMAGINE EVER BEING COMFORTABLE IN THIS
21 SITUATION, BUT WOULD IT BE APPROPRIATE FOR THAT
22 OFFICER TO FORCE AN ARREST AT THAT POINT IN TIME, A
23 KNOWN PERPETRATOR, HOSTAGE TAKER, WENT IN WITH A
24 GUN, HANDS ARE VISIBLE, NO GUN, AND THE OFFICER IS
25 WITHIN FEET OF HIM. WOULD IT NOT BE APPROPRIATE TO

1 FORCE AN ARREST AT THAT POINT IN TIME?

2 A. YOU KNOW, TO MONDAY MORNING QUARTERBACK THAT
3 SITUATION, CLEARLY, ANOTHER OFFICER MAY HANDLE IT
4 DIFFERENT. FOR THAT PARTICULAR TIME AND MOMENT, I
5 THINK THE OFFICER HAD -- THERE WAS NOTHING THAT I
6 COULD SAY THAT WAS INAPPROPRIATE ABOUT THE WAY HE
7 HANDLED THAT.

8 Q. SO, YOU'RE THERE ABOUT 10:30 OR 11:00 IN THE
9 MORNING, AND YOU GET THIS BRIEFING THAT YOU
10 DESCRIBED. TELL ME WHAT ACTIONS YOU TOOK OVER THE
11 COURSE OF THE DAY.

12 A. ONCE WE WENT THROUGH ALL OF THE PROCESSES IN TERMS
13 OF WHO WAS THERE, I THINK THE FIRST DECISION I MADE
14 -- THERE WAS A REQUEST FOR ADDITIONAL S.W.A.T.
15 MEMBERS AND BASED ON SOME OUT OF TOWN TRAINING, OUR
16 NUMBERS WERE LIMITED. WE HAD SEVERAL S.W.A.T.
17 MEMBERS WHO WERE ATTENDING A CONFERENCE AND THEY
18 ASKED COULD WE USE THE COUNTY DETENTION CENTER
19 S.W.A.T. TEAM WHOM THEY HAD TRAINED PREVIOUSLY WITH.
20 I STATED THAT APPROPRIATE, AND I'M NOT SO SURE THAT
21 I TALKED TO LARRY POWERS OR WHO. I COULD HAVE
22 DIRECTED SOMEONE. THEY AGREED TO THE REQUEST AND
23 BEGAN TO RESPOND. THE NEXT ISSUE WAS THE PHONE THAT
24 WAS IN THE STORE -- WELL, LET ME GET IT IN SEQUENCE
25 BECAUSE A LOT HAPPENED AT THE SAME TIME. I CLEARED

1 TO TURN OFF THE POWER AND I'M SURE THAT THAT HAD
2 OCCURRED.

3 Q. WHY DID YOU MAKE THAT DECISION?

4 A. I THINK IT WAS IMPORTANT TO LIMIT ANY DEGREE OF
5 COMFORT THAT HE MAY HAVE TO REMAIN, TO THE EXTENT
6 THAT THE ENVIRONMENT WOULD BE SOMEWHAT UNCOMFORTABLE
7 POTENTIALLY COULD HASTEN HIS CONSIDERATION TO EXIT
8 PEACEFULLY. SECONDLY, THAT THAT WOULD PRECLUDE ANY
9 ACCESS TO A TELEVISION OR POTENTIAL RADIO OR ANY
10 OTHER ELECTRIC EQUIPMENT THAT HE WOULD HAVE TO
11 COMMUNICATE OTHERWISE OR TO HEAR OR KNOW WHAT WAS
12 GOING ON IN THE OUTSIDE WORLD, WHICH IS AN IMPORTANT
13 MANEUVER.

14 Q. OF COURSE, IT WAS JULY AND IT WAS HOT THAT DAY,
15 WASN'T IT?

16 A. YES.

17 Q. OKAY.

18 A. THAT WAS APPROVED. TRIED TO DETERMINE IF THERE WAS
19 A TELEPHONE TO THE BUILDING AND I THINK THEY TOLD ME
20 THAT THERE WAS NOT ONE. CELL PHONES WERE USED. AND
21 I THINK ABOUT RIGHT AT THE SAME TIME, SOMEBODY SAID
22 THAT THE CELL PHONE THAT THEY WERE USING WAS GONE
23 OUT. THEN, WE MADE THE DETERMINATION TO LOCATE ONE
24 OF OUR CELL PHONES. I THINK WE WOUND UP USING JONI
25 PHILLIPS' CELL PHONE.

- 1 Q. IS THAT AN OFFICER?
- 2 A. SHE'S A VICTIM'S ADVOCATE. AND I THINK WE GOT THAT
- 3 TO HER, GOT THAT TO THEM BUT WE DIDN'T USE A ROBOT
- 4 THEN. I THINK THAT SHORTLY AFTER THAT, WE HAD
- 5 CALLED FOR A ROBOT FROM S.L.E.D. IT WAS EN ROUTE.
- 6 Q. SO, YOU EVENTUALLY GOT THIS CELL PHONE ---
- 7 A. TO THEM.
- 8 Q. TO THEM. WERE YOU IN THE EARLY AFTERNOON, MID
- 9 AFTERNOON?
- 10 A. I GUESS THAT WAS PROBABLY AROUND NOON, 1:00-ISH.
- 11 Q. DID YOU HAVE ANY DISCUSSIONS DIRECTLY WITH JOHNSON?
- 12 A. DID I?
- 13 Q. YES.
- 14 A. NO.
- 15 Q. WHAT OCCURRED AFTER THAT?
- 16 A. WELL, I THINK THE NEGOTIATIONS WERE CONTINUING. WE
- 17 WERE TRYING TO MAKE SOME ASSESSMENTS AS TO WHO MAY
- 18 HAVE HAD AN INFLUENCE IN HIS LIFE, IF THEY HAD
- 19 ASSETS TO TALK TO HIM, WOULD THEY BE AN INFLUENCE.
- 20 Q. LIKE HIS MOTHER?
- 21 A. I DON'T THINK SHE TALKED TO HIM. THE GIRLFRIEND
- 22 WHOSE CAR HE WAS DRIVING WAS GIVEN AN OPPORTUNITY TO
- 23 TALK WITH HIM. I THINK ONE OF OUR CHAPLAINS TALKED
- 24 WITH HIM.
- 25 Q. WHO WAS IT WHO WENT TO THE FRONT DOOR?

1 A. EARLY ON, THAT WAS THE MOTHER. NO, THE MOTHER DID
2 NOT TALK TO HIM UNDER OUR SUPERVISION.

3 Q. WHEN THE GIRLFRIEND TALKED TO HIM, DID YOU ALL PREP
4 HER ON WHAT TO SAY?

5 A. WE WERE THERE MONITORING AND I THINK THE NEGOTIATORS
6 DID SOME COACHING WHILE SHE WAS TALKING TO HIM.

7 Q. WHAT WAS THE ESSENCE, TO TRY TO GET HIM TO COME OUT
8 AND THAT KIND OF THING?

9 A. YES, OR LET THE HOSTAGE GO.

10 Q. WHY DIDN'T YOU HAVE HIS MOTHER TALK TO HIM?

11 A. AT THAT POINT, SHE HAD CONVINCED US THAT HE HAD
12 RECENTLY GOT OUT OF PRISON, THAT THIS WAS HIS DAY TO
13 DIE, AND HE WANTED TO DIE, AND THAT HIS INTENT WAS
14 GOING TO MAKE THAT HAPPEN.

15 Q. NOW, YOU SAY THE MOTHER CONVINCED YOU OF THAT?

16 A. ABSOLUTELY.

17 Q. YOU TALKED WITH HER DIRECTLY?

18 A. I TALKED WITH HER DIRECTLY.

19 Q. WELL, HOW WOULD SHE KNOW THAT?

20 A. APPARENTLY, BASED ON THEIR RELATIONSHIP AND SHE HAD
21 TALKED TO HIM AT SOME POINT DURING THAT MORNING
22 WHILE HE WAS INSIDE.

23 Q. HOW DID SHE TALK TO HIM?

24 A. THE CELL PHONE.

25 Q. OH, HE HAD THE CELL PHONE. WAS THAT THE ONE THAT

1 WENT OUT?

2 A. I FORGET WHICH ONE IT WAS, BUT SHE HAD TALKED TO HIM
3 I THINK ON A COUPLE OF OCCASIONS, AND BASED ON HER
4 RESOLVE, BASED ON TALKING TO HIM AND HIS LIFE AND
5 HIS LIFE IN PRISON, SHE WAS CONVINCED THAT HE WAS
6 GOING TO DIE. AND THAT WAS NOT SOMEONE THAT WE
7 WANTED TALKING TO HIM.

8 Q. SO, THE GIRLFRIEND TALKS TO HIM SOMETIME IN THE
9 AFTERNOON?

10 A. YES.

11 Q. OBVIOUSLY, IT DOESN'T WORK.

12 A. NO.

13 Q. IS HIS ANXIETY HEIGHTENED OR IS IT SOMEWHAT CALMED
14 WHEN SHE'S TALKING TO HIM?

15 A. I THINK HE WAS FAIRLY CALM. I THINK THEY HAD A
16 REASONABLY GOOD CONVERSATION.

17 Q. AND WHAT WERE YOUR IMPRESSIONS, AT THAT POINT?

18 A. THERE WAS A LOT OF HOPE THAT, YOU KNOW, HE MIGHT
19 ULTIMATELY DECIDE, OKAY, TO LET HER GO.

20 Q. ALL RIGHT. WHAT HAPPENS AFTER THAT?

21 A. WE DETERMINE THAT THE CELL PHONE THAT WE HAD SENT
22 WAS NOT JUST BEING USED TO TALK WITH US, THAT HE WAS
23 MAKING OTHER CALLS AND CALLING OTHER PEOPLE, AND
24 THAT WAS NOT HEALTHY FOR THE NEGOTIATION. WE DID
25 NOT HAVE A THROW PHONE, AS WE CALL IT IN THE

1 BUSINESS, WHICH YOU CAN ONLY COMMUNICATE WITH THE
2 POLICE. I THINK BY THAT TIME, WE HAD CALLED --
3 WELL, THERE WAS AN F.B.I., BRIAN BRYAN ON THE SCENE.

4 Q. BRIAN BRYAN?

5 A. BRIAN BRYAN.

6 Q. THE SAME NAME, FIRST AND LAST?

7 A. YES.

8 Q. OKAY.

9 A. HE'S AN F.B.I. AGENT HERE. AND HE WAS THERE AS A
10 RESOURCE AND WE SAID THAT WE REALLY NEED A THROW
11 PHONE. WE'VE GOT A PROBLEM. HE'S USING THE CELL
12 PHONE ANY WAY THAT HE WANTS TO USE IT AND THAT'S NOT
13 AN IDEAL SITUATION. WE LOCATED ONE IN GREENVILLE TO
14 TALK ---

15 Q. I'M SORRY TO INTERRUPT YOU, BUT JUST SO I UNDERSTAND
16 THIS, THE REASON IT'S NOT AN IDEAL SITUATION IS
17 BECAUSE IF THEY ARE ABLE TO COMMUNICATE WITH THE
18 OUTSIDE WORLD, THEN IT CAN BE A GRANDSTANDING TYPE
19 SITUATION FOR THE ---

20 A. WE WERE NOT CONTROLLING THE DIALOGUE.

21 Q. AND CONTROL IS A BIG ISSUE IN THESE THINGS?

22 A. ABSOLUTELY.

23 Q. GO AHEAD. I'M SORRY.

24 A. SO, PAUL JACOBS HAD ONE AND HE WAS A NEGOTIATOR,
25 TRAINED F.B.I. NEGOTIATOR AND HE WAS COMING FROM

1 GREENVILLE.

2 Q. OKAY.

3 A. WITH THE APPROPRIATE EQUIPMENT. WE NOTIFIED NEXTEL
4 TO CUT OFF THE TELEPHONE THAT HE HAD IN WITH HIM, SO
5 HE COULD NO LONGER USE THAT.

6 Q. AND THAT WAS THE PHONE THAT YOU ALL HAD SUPPLIED
7 FROM JONI PHILLIPS?

8 A. RIGHT.

9 Q. SO, THEY CUT THAT OFF?

10 A. MM-HMM (AFFIRMATIVE RESPONSE).

11 Q. DID HE GET AGGRAVATED WHEN THAT HAPPENED?

12 A. I DON'T RECALL. THE NEGOTIATORS WERE ASSIGNED TO A
13 ROOM OFF FROM THE MAIN DRAG. THERE ARE OTHER PEOPLE
14 IN THIS PORTION OF THE COMMAND POST. I WAS IN THIS
15 SECTION AND OUT OF THAT SECTION.

16 Q. WHEN YOU TALK ABOUT THE COMMAND POST, IS THIS LIKE A
17 MOBILE TRAILER?

18 A. YES.

19 Q. ALL RIGHT.

20 A. SO, I DID NOT SPEND MY ENTIRE TIME IN THE ROOM WITH
21 THE NEGOTIATORS. THEY APPROPRIATELY INFORMED ME OF
22 THINGS ALONG THE WAY. I THINK WHEN PAUL JACOBS GOT
23 THERE WITH THE THROW PHONE, I THINK THE SECOND ROBOT
24 HAD CAME, WHICH WAS A LITTLE LARGER, A LITTLE MORE
25 COMPLICATED, AND WE USED THAT TO DELIVER THE THROW

1 PHONE. AND THAT PROVIDED HIM ACCESS ONLY TO THE
2 NEGOTIATORS.

3 Q. WHAT TIME ARE WE TALKING ABOUT NOW?

4 A. PROBABLY SOMEWHERE AROUND 3:00 OR SO OR A LITTLE
5 LATER.

6 Q. HAD HE FIRED ANY SHOTS BY THEN? I KNOW YOU TOLD ME
7 ABOUT ONE SHOT, BUT ---

8 A. YES, I THINK ON TWO OCCASIONS.

9 Q. SO, THE SECOND FIRING HAD OCCURRED BY THAT TIME?

10 A. YES.

11 Q. WERE YOU ALL ABLE TO DETERMINE WHERE IN THE BUILDING
12 THE SHOTS HAD COME FROM?

13 A. NO.

14 Q. IS THERE ANY WAY TO DETERMINE THAT?

15 A. NO.

16 Q. DID THEY GO THROUGH THE GLASS WINDOW OR THE DOOR?

17 A. THERE WERE HOLES. THE ONLY PERSON THAT WAS IN THE
18 DIRECT LINE OF FIRE FROM THE WINDOWS WOULD HAVE BEEN
19 BRIAN STOKES, WHO WAS THE SHARP SHOOTER WHO WAS IN
20 PLACE. AND I'M NOT SO SURE WHETHER HE HEARD OR TO
21 WHAT EXTENT THE BULLETS WERE AN ISSUE WITH HIM.

22 Q. SO, THE ROBOT DELIVERS THE THROW PHONE?

23 A. YES.

24 Q. AND THEN, HOW IS IT RETRIEVED?

25 A. ULTIMATELY, SHE'S ON HER KNEES AND SHE REACHES OUT

1 THE DOOR AND RETRIEVES IT.

2 Q. AT THAT POINT, DO YOU ALL HAVE AN IDEA WHERE THE
3 SUSPECT IS, THE HOSTAGE TAKER?

4 A. NO. THE ONLY PERSON WHO HAD ACCESS MAYBE, THE TWO
5 WINDOWS IN FRONT OF THE STORE AND THE DOORS IDEALLY
6 WERE NOT LEFT. THERE WERE THINGS THAT WERE POSTED
7 ON THEM. THERE WAS NOT A CLEAR VISION THROUGH THOSE
8 WINDOWS INTO THE STORE. BASED ON THE FACT THAT HE
9 HAD A GUN, HAD FIRED A SHOT, THERE WAS NO WAY THAT
10 WE COULD, OTHER THAN WHERE BRIAN WAS, ACTUALLY LOOK
11 IN AND SEE MOVEMENT. BRIAN COULD SEE MOVEMENT
12 PERIODICALLY.

13 Q. DID YOUR ROBOT HAVE A CAMERA?

14 A. YES.

15 Q. WHY NOT SEND THE ROBOT UP TO THE DOOR?

16 A. IT COULD GO TO THE DOOR, BUT IT COULDN'T SEE -- I
17 THINK AS YOU GO IN THE DOOR, THERE'S THIS AISLE HERE
18 AND THEN THE DISPLAYS ARE DIAGONAL AND THEN THERE'S
19 A BAR HERE AND THEN THERE'S THE CASHIER. SO, IF
20 YOU'RE LOOKING THROUGH THE DOOR, THERE'S A LIMITED
21 LINE OF VISION THAT PROBABLY IS PRETTY -- I'M NOT SO
22 SURE HOW MUCH TIME THEY SPENT IN THAT SMALL
23 CORRIDOR.

24 Q. WELL, WAS THE ROBOT WITHDRAWN AFTER THE PHONE
25 DELIVERY WAS MADE?

- 1 A. YES, IT WAS SUBSEQUENTLY SENT BACK, BUT YES.
- 2 Q. SENT BACK FOR WHAT?
- 3 A. A DISTRACTION.
- 4 Q. WAS IT EVER SENT JUST TO PARK IN FRONT OF THE DOOR
- 5 AND TAKE A LOOK WITH THE CAMERA?
- 6 A. AT THE TIME THE PHONE WAS DELIVERED ---
- 7 Q. BUT ---
- 8 A. WE WERE UNABLE TO SEE ANYTHING OF SIGNIFICANCE.
- 9 Q. IT WAS WITHDRAWN RIGHT AFTERWARDS, WASN'T IT?
- 10 A. YES.
- 11 Q. ALL RIGHT. SO, HE GETS THE PHONE AND YOU ALL START
- 12 TALKING BACK WITH HIM, OR THE NEGOTIATORS START
- 13 TALKING BACK?
- 14 A. YES.
- 15 Q. AND HOW DID YOU DESCRIBE HIS DEMEANOR AT THAT POINT?
- 16 A. WELL, I WOULD GO IN PERIODICALLY AND, YOU KNOW, TALK
- 17 WITH THE NEGOTIATORS AND PAUL JACOBS WAS THERE BY
- 18 THEN, AND HOW IS IT GOING? YOU KNOW, HE'S
- 19 IRRITATED, YOU KNOW. HE'S CONTINUING TO USE A GREAT
- 20 DEAL OF PROFANITY AND HE'S NOT GOING BACK TO JAIL.
- 21 BASICALLY, THE STANDARD THAT HE HAD USED OFF AND ON
- 22 THROUGHOUT THE DAY, QUITE FRANKLY. AND THEN, I
- 23 WOULD GO BACK OUT AND ENSURE THAT, YOU KNOW,
- 24 EVERYTHING ELSE WAS IN PLACE FOR THE MOST PART.
- 25 Q. DO YOU HAVE ANY CRITICISMS OF MS. PATEL'S CONDUCT

1 DURING THIS EVENT?

2 A. NO, UNDERSTANDING THOSE KIND OF HOSTAGE SITUATIONS
3 AND STOCKHOLM SYNDROME, WHERE THE HOSTAGE TAKES ON A
4 RELATIONSHIP WITH THE HOSTAGE TAKER AND BEGINS TO
5 SAY THINGS THAT ARE A LITTLE UNUSUAL OR
6 UNREASONABLE, WE ARE AWARE OF THAT, AND I THINK SOME
7 OF THAT TOOK PLACE. BUT THERE WAS NOTHING THAT SHE
8 SAID OR DID THAT I THOUGHT WAS UNUSUAL FOR A PERSON
9 IN HER POSITION.

10 Q. NOW, STOCKHOLM SYNDROME IS KIND OF LIKE THIS PATTY
11 HEARST SYNDROME?

12 A. YES.

13 Q. SAME SORT OF THING, YOU IDENTIFY WITH YOUR CAPTORS,
14 ET CETERA?

15 A. YES.

16 Q. TELL ME IN WHAT RESPECT YOU THINK SHE EXHIBITED
17 SYMPTOMS OF STOCKHOLM OR PATTY HEARST SYNDROME.

18 A. I THINK AT ONE POINT DURING THE NEGOTIATIONS, SHE
19 WAS SAYING THAT "HE'S OKAY, I DON'T THINK HE'S GOING
20 TO HURT ME." THOSE WERE THE KINDS OF THINGS THAT I
21 THINK SHE WAS COMMUNICATING BACK TO US.

22 Q. DO YOU THINK THAT COULD HAVE BEEN STATED IN ORDER TO
23 TRY TO CALM HIM DOWN?

24 A. POTENTIALLY.

25 Q. WHICH WOULD BE PRETTY GOOD THINKING, UNDER THE

1 CIRCUMSTANCES, WOULDN'T IT?

2 A. PERHAPS.

3 Q. IN FACT, IF YOU HAD AN IDEAL HOSTAGE AND YOU'RE
4 DEALING WITH THIS SITUATION, YOU WOULD WANT A
5 HOSTAGE TO TRY TO CALM DOWN A PERPETRATOR, WOULDN'T
6 YOU?

7 A. YES, IF THEY HAD THAT ABILITY, SURE.

8 Q. YES.

9 A. I MEAN, THERE IS A LOT OF LITERATURE OUT THERE WITH
10 THESE INCREDIBLE BEHAVIOR THINGS THAT HOSTAGES HAVE
11 DONE TO ULTIMATELY SURVIVE BEING TAKEN HOSTAGE.

12 Q. ALL RIGHT. TAKE IT THROUGH TO THE END FOR ME, IF
13 YOU WOULD. WE'VE GOTTEN TO ALMOST LATE AFTERNOON.

14 A. RIGHT.

15 Q. HE'S GOT THIS PHONE.

16 A. BY THIS TIME, DAVID RUSHTON IS ON THE SCENE, WHO IS
17 A MENTAL HEALTH PROFESSIONAL. PAUL JACOBS,
18 LIEUTENANT LAMB, SERGEANT TAYLOR WERE ALL
19 NEGOTIATING AND MONITORING NEGOTIATIONS. I FELT WE
20 HAD AN EXTRAORDINARY TEAM OF PEOPLE WHO WERE
21 ASSESSING AND MAKING DETERMINATIONS OF THE
22 DISCUSSIONS. THEN, SOMEWHERE AROUND 6:00, I THINK
23 THAT THERE WERE SOME ADDITIONAL SHOTS FIRED. I
24 CONSULTED THEM AND SAID, YOU KNOW, WHAT IS HIS
25 BEHAVIORS? IS THERE ANYTHING THAT YOU WANT OR

1 WHATEVER? THEY SAID, "NO, HE'S JUST AGITATED, YOU
2 KNOW. HE'S NOT COMING OUT. HE'S GOING TO KILL HER
3 OR WHATEVER," SOMETHING SIMILAR TO THAT. AND I
4 AGREED FOR THEM TO ATTEMPT TO PUT PEPPER SPRAY INTO
5 THE VENT, ANOTHER ATTEMPT TO DO SOMETHING THAT MAY
6 BE SUCCESSFUL, SHORT OF LETHAL FORCE, AND ---

7 Q. ALL RIGHT. NOW, TALK TO ME ABOUT THIS PEPPER SPRAY.
8 WHO CAME UP WITH THAT?

9 A. I THINK THERE WAS KIND OF A DISCUSSION OF ALL OF US,
10 THE COLONEL, THE MAJOR, LIEUTENANT LITTLEJOHN, YOU
11 KNOW, WHAT'S THE NEXT STEP? YOU KNOW, PEPPER SPRAY,
12 WOULD IT BE STRONG ENOUGH WITH THE HEAT TO IRRITATE
13 THEM ENOUGH TO SAY OKAY? SO, WE MADE THE ATTEMPT
14 AND I WENT BACK INTO THE NEGOTIATION ROOM AND THE
15 LANGUAGE, I GUESS, WAS PROBABLY AT A POINT THAT IT
16 WAS AS BAD AS IT HAD BEEN ALL DAY. AND ---

17 Q. THIS IS AFTER THE INTRODUCTION OF THE PEPPER SPRAY
18 OR BEFORE?

19 A. YES.

20 Q. OKAY.

21 A. I MEAN, HE HAD BEEN REALLY BAD AT PERIODS OF TIME
22 THROUGHOUT THE DAY, AND AGAIN, HE WAS AT THAT POINT.

23 Q. IS IT FAIR TO SAY THAT THE INTRODUCTION OF THE
24 PEPPER SPRAY ESCALATED THE SITUATION?

25 A. I THINK IT WAS AN IRRITANT, BUT I MEAN, I DON'T

1 THINK IT IRRITATED HIM ANY MORE THAN HE WAS AT OTHER
2 POINTS DURING THE DAY.

3 Q. THE INTRODUCTION OF THE PEPPER SPRAY, DID YOU
4 DISCUSS THAT?

5 A. WITH HIM?

6 Q. NO, YOU WERE TALKING ABOUT WHEN YOU ALL DECIDED TO
7 MAKE THE CALL.

8 A. YES, SURE.

9 Q. HOW DID YOU DISCUSS YOU WERE GOING TO INTRODUCE IT?

10 A. WE'RE NOT GETTING ANY MOVEMENT FROM HIM. HE'S VERY
11 AGITATED.

12 Q. I UNDERSTAND. I DIDN'T PHRASE MY QUESTION VERY
13 WELL. I KNOW THAT YOU MADE THE DECISION.

14 A. OKAY.

15 Q. BUT THE PHYSICAL INTRODUCTION OF IT, HOW DID THAT
16 OCCUR?

17 A. IT WAS PUMPED IN. I DON'T KNOW THE EXACT
18 INSTRUMENT.

19 Q. THE POWER WAS STILL OFF, WASN'T IT?

20 A. YES.

21 Q. SO, THERE WAS NO ACTIVE VENTILATION VIA AN AIR
22 CONDITIONER TO CIRCULATE IT. SO, WAS YOUR CONCERN
23 THAT IT MIGHT NOT BE EFFECTIVE JUST BECAUSE YOU'RE
24 USING AN OUTSIDE PUMPING SOURCE?

25 A. OUR OPTIONS WERE LIMITED. THIS WAS A NON-LETHAL

1 ATTEMPT TO HOPEFULLY GET POSITIVE MOVEMENT, THAT IT
2 WOULD BE AN IRRITANT TO THAT POINT, THAT I CAN'T
3 STAY IN HERE ANYMORE. I NEED TO GET OUT OF HERE.
4 THAT WAS THE INTENT.

5 Q. DID YOU ALL TALK WITH ANY HEAT AND AIR CONDITIONING
6 PEOPLE, ANY ---

7 A. NO.

8 Q. ANY PERSONS FAMILIAR WITH, YOU KNOW, THE ENGINEERING
9 ASPECTS OF HOW TO MAKE THIS AN EFFECTIVE MOVE?

10 A. NO.

11 Q. SO, THE PEPPER SPRAY COMES IN. HE'S REALLY AT A
12 HEIGHTENED SENSE OF ANXIETY. YOU SENSE IT THROUGH
13 WHAT YOU'RE HEARING; IS THAT CORRECT?

14 A. YES.

15 Q. THEN, WHAT?

16 A. I CALLED OUT LAMB AND I SAID, "DO YOU THINK YOU'RE
17 MAKING ANY PROGRESS?" HE SAID, "NO, HE'S JUST
18 REPEATING HIMSELF. HE SAYS HE'S GOING TO KILL HER
19 AND HE'S GOING TO DIE AND HE'S NOT GOING BACK TO
20 JAIL AND PROFANITY-LADEN." I SAID, "DO YOU THINK
21 HE'S GOING TO CHANGE?" HE SAID, "NO, I DON'T THINK
22 SO." THEN, I TALKED TO TAYLOR INDIVIDUALLY AND THEN
23 I CALLED OUT PAUL JACOBS AND SAID, "BASED ON YOUR
24 EXPERIENCE AND YOUR NEGOTIATING EXPERIENCE, ARE WE
25 MAKING ANY HEADWAY? DO YOU THINK WE'RE GOING TO BE

1 SUCCESSIONAL IN THE NEGOTIATIONS?" HE SAID, "NO, I
2 DON'T THINK SO." AND THEN, DAVID RUSHTON, WHO WAS
3 THE MENTAL HEALTH PERSON, I SAID, "BASED ON YOUR
4 TRAINING AND KNOWLEDGE, WHAT DO YOU THINK?" AND HE
5 SAID, "NO." AFTER THE CONSULTATION WITH EACH OF
6 THEM, I THINK MAJOR HORTON AND KENDALL AND I THINK
7 LITTLEJOHN AND I SAID THAT -- WELL, FIRST, I HAVE TO
8 DEAL WITH ME. I GOT THE BEST ADVICE THAT I THINK
9 THAT'S POSSIBLE. HE IS CONTINUING TO MAKE THESE
10 DECLARATIONS OF DEATH OF HIMSELF AND OF HER. WE CAN
11 SIT OUT HERE LONGER AND HE COULD KILL HER. IF HE
12 KILLED HER AND WE HAD DONE NOTHING, I COULD NOT LIVE
13 WITH THAT. THAT WAS NOT A PLAUSIBLE SOLUTION. ON
14 THE OTHER HAND, IF WE TOOK ACTION TO SAVE HER AND
15 SHE DIED, TRAGIC, BUT I COULD LIVE WITH. MAKING
16 THAT PERSONAL DETERMINATION, I THEN CONSULTED MAJOR
17 HORTON, COLONEL KENDALL, AND SAID, YOU KNOW, WE'VE
18 GOT TO MOVE. WE'VE GOT TO FIND A WAY INTO THE
19 BUILDING. WE'VE GOT TO GO GET HER. HE'S NOT GOING
20 TO GIVE HER UP. AND THERE WERE NO OTHER ENTRIES,
21 OTHER THAN THE DOORS, AND THE GAS PUMPS LIMITED ANY
22 MANEUVERABILITY TO GET THROUGH THE FRONT DOOR. THAT
23 WASN'T AN OPTION. WE NEEDED TO MAKE A HOLE AND DOUG
24 SAID; "WELL, MAYBE A FRONT END LOADER." AND I SAID,
25 "THAT'S AN OPTION. WOULD THAT WORK FOR US?" A

1 TRACTOR WITH A RAM OR SOMETHING, WE WERE GOING
2 THROUGH WHAT WAS AVAILABLE. AND HE SAID, "I THINK I
3 CAN GET A FRONT END LOADER." I SAID, "CAN YOU MAKE
4 IT HAPPEN?" HE SAID YES AND HE GOT ON THE LINE AND
5 FOUND THE APPROPRIATE PEOPLE WITH PUBLIC WORKS AND
6 THE FRONT END LOADER SHOWED UP. PRIOR TO IT SHOWING
7 UP, I MET WITH LITTLEJOHN AND I SAID TO HIM THAT,
8 "I'M GOING TO ASK YOU TO GO IN THE BUILDING, AND YOU
9 AND YOUR PEOPLE ARE PROBABLY GOING TO RECEIVE SOME
10 FIRE. ARE YOU READY? DO YOU THINK YOU GUYS CAN DO
11 IT?" AND HE SAID, "YES, BUT I'M GOING TO GO TALK TO
12 THEM." SO, HE LEFT AND STARTED TALKING TO THEM, AND
13 AFTER HE TALKED TO THEM, HE CAME BACK AND SAID,
14 "EVERYBODY, WE'RE READY TO GO." THEN, I WENT AND
15 TALKED TO THEM AND SHOOK THEIR HANDS AND TOLD THEM
16 HOW MUCH WE APPRECIATE WHAT THEY WERE DOING. AND
17 THE BULLDOZER CAME. WE DECIDED WE WERE GOING TO
18 TAKE OUT THE CORNER. IT HIT. I THINK IT HIT A
19 SECOND TIME AND OPENED IT UP ENOUGH FOR US TO INSERT
20 FLASH BANGS AND FOR THE S.W.A.T. MEMBERS TO ENTER.
21 THE DUST FROM THE FLASH BANGS MADE VISIBILITY VERY
22 DIFFICULT, AND ONCE THEY WERE IN, THEY DID, IN FACT,
23 RECEIVE GUN FIRE. AND I COULD TELL BY A COUPLE OF
24 TRANSMISSIONS THAT THEY WERE IN A VERY DIFFICULT
25 SITUATION. THERE WAS A TELEPHONE CALL FROM A YOUNG

1 MAN AND SOMEHOW I ANSWERED IT IN THE COMMAND POST.
2 AND HE SAID, "WELL, YOU KNOW, YOU CAN GO TO THIS
3 OTHER SIDE OF THE STORE. I USED TO WORK THERE, AND
4 IF YOU KNOCK A HOLE IN THERE, YOU CAN GET TO WHERE
5 THEY ARE." AND I SAID, "WELL, WHO ARE YOU?" AND HE
6 TOLD ME AND I SAID, "HOW DO YOU KNOW WHAT WE'RE
7 DOING?" AND HE SAID, "I'M WATCHING IT ON
8 TELEVISION." AND I SAID, "OKAY, COME DOWN." HE
9 CAME DOWN AND WE DETERMINED THAT IF WE BREACHED THE
10 OTHER SIDE OF THE BUILDING, IT WOULD OPEN UP ACCESS
11 TO THE COOLER AREA. IN THE MEANTIME, THE MAJOR WAS
12 CONSULTING WITH AND TALKING TO LITTLEJOHN TO
13 DETERMINE WHETHER THAT WAS AN OPTION FOR S.W.A.T.
14 FINALLY, THEY AGREED THAT, YES, WE NEEDED TO HIT IT
15 AND THE FRONT END LOADER WAS BROUGHT AROUND TO THE
16 SIDE. HE MADE ONE GOOD CLEAN HIT AND BACKED OUT AND
17 EXPOSED THEM TO THE OUTSIDE WHERE WE COULD SEE.
18 THERE WAS A SHOT FIRED AND I THINK IT WAS A SHOT
19 FIRED BY JOHNSON AND THEN THE SECOND SHOT -- EARLY
20 IN THE EVENING, AND I THINK IT PROBABLY WAS AROUND
21 3:00 OR 4:00, I HAD ALREADY GIVEN BRIAN STOKES THE
22 AUTHORITY TO FIRE IF HE HAD A SHOT. SO, HE HAD THAT
23 CLEARANCE EARLIER. AND WHEN HE HAD ACCESS TO BOTH
24 OF THEM AND HE DECIDED THAT HE HAD A SHOT, IT WAS
25 HIS TOTAL DISCRETION TO PULL THE TRIGGER AND THAT'S

1 WHAT HE DID.

2 Q. AND IT WAS PRETTY MUCH OVER WITH THEN.

3 A. YES.

4 Q. YOU WENT IN AND MS. PATEL RAN OUT AND YOU ALL
5 SUBDUED THE PERPETRATOR?

6 A. YES.

7 Q. NOW, I WANT TO GO BACK A LITTLE BIT AND ASK YOU A
8 FEW QUESTIONS. YOU STATED EARLIER THAT THE FRONT
9 DOOR WAS NOT AN OPTION. TELL ME WHY THE FRONT DOOR
10 WAS NOT AN OPTION.

11 A. WE WOULD HAVE TO BRING IN TOOLS TO HIT AND POP THAT
12 DOOR FAIRLY QUICKLY AND GET BACK, AND IF IT WAS A
13 VEHICLE, THERE AS NOT ENOUGH ROOM BETWEEN THE GAS
14 PUMPS AND THE BUILDING TO DO THAT. PLUS, WE THOUGHT
15 THAT THERE WAS A GREATER DEGREE OF EXPOSURE IN OUR
16 PREPARATION IF THAT WAS THE ENTRY WE CHOSE TO TAKE.

17 Q. THE BULLDOZER THAT WAS USED, ARE YOU AWARE THAT
18 THOSE THINGS CAN PIVOT?

19 A. YES.

20 Q. WHY NOT JUST BRING THE BULLDOZER OVER THERE AND
21 PIVOT IT IN TO THE FRONT DOOR?

22 A. I STILL HAD A CONCERN ABOUT THE GAS PUMPS AND THE
23 MANEUVERABILITY OF EVERYTHING. PLUS, IF THAT WAS
24 THE CASE, THAT HE MAY HAVE SOME MOMENTS TO
25 CONTEMPLATE OUR NEXT MOVEMENT AND THE SHOCK OF

1 CREATING A BREACH IN ANOTHER PART OF THE BUILDING
2 THAT HE WOULD NOT HAVE DREAMED OF WOULD PROBABLY BE
3 MORE OF A SHOCK AND DISORIENTATION FOR HIM RATHER
4 THAN THE FRONT DOOR.

5 Q. WAS IT DARK INSIDE THE BUILDING?

6 A. IT WAS HAZY. THERE WAS SUNLIGHT, BUT IT WAS HAZY,
7 IN TERMS OF BEING ABLE TO SEE.

8 Q. WAS CONSIDERATION EVER GIVEN TO RESTORING POWER AND
9 SUDDENLY TURNING ON THE LIGHTS SO THAT WHEN THE
10 POWER WAS PLUGGED IN AND THE LIGHTS COME ON AND YOU
11 GET AN ILLUMINATION WHERE THE HOSTAGE IS AND WHERE
12 JOHNSON IS?

13 A. I THINK THERE WAS SUFFICIENT DAYLIGHT GIVING A LINE
14 OF VISION. YOU KNOW, WE COULD SEE IN. IT WASN'T
15 LIKE IT WAS JUST COMPLETELY DARK. YOU HAVE THE
16 GLASS DOORS AND YOU HAD TWO WINDOWS ON EACH SIDE OF
17 THEM AND IT WAS CERTAINLY MORE THAN A SUFFICIENT
18 AMOUNT OF LIGHT THAT IT WOULD HAVE GIVEN YOU AT
19 LEAST SILHOUETTES OF ANY KIND OF MOVEMENT. SO,
20 MAYBE A GREATER DEGREE OF VISIBILITY, BUT I'M NOT SO
21 SURE THEY WOULD HAVE ADDED MUCH IN TERMS OF THEIR
22 MOVEMENT. I'M NOT SO SURE HOW TACTICAL HIS
23 MOVEMENTS WERE INSIDE, EITHER.

24 Q. WAS ANY CONSIDERATION EVER GIVEN TO RESTORING POWER
25 FOR A BRIEF PERIOD TO ---

1 A. I NEVER DISCUSSED IT.

2 Q. WERE SHIELDS AVAILABLE ON THE SCENE?

3 A. PARDON ME?

4 Q. SHIELDS, HANDHELD ---

5 A. THE SHIELDS THAT WE HAD IN OUR STOCK WERE THERE AND

6 AVAILABLE.

7 Q. WAS CONSIDERATION GIVEN TO CARRYING THE SHIELDS AND

8 WALKING THROUGH THE FRONT DOOR?

9 A. NO.

10 Q. WHY NOT?

11 A. I THOUGHT IT WOULD HAVE BEEN TOO MUCH EXPOSURE TO

12 OUR MEN.

13 Q. NOW, DID YOU CONSULT ANY TYPE OF STRUCTURAL

14 ENGINEER, MAYBE THE CITY HAS A STRUCTURAL ENGINEER

15 OR ANY OUTSIDE ENGINEER AS TO THE RAMIFICATIONS OF

16 BREACHING THE BUILDING? AND IF YOU'RE FACING THE

17 BUILDING, THE INITIAL BREACH IS ON THE REAR LEFT

18 CORNER; IS THAT CORRECT?

19 A. MM-HMM (AFFIRMATIVE RESPONSE).

20 Q. YOU NEED TO ANSWER "YES" OR "NO."

21 A. YES.

22 Q. SO, DID YOU TALK TO A STRUCTURAL ENGINEER OR ANY

23 OUTSIDE PERSON ABOUT THE RAMIFICATIONS OF BREACHING

24 A BUILDING AT THAT POINT?

25 A. NO.

1 Q. DO YOU OR ANYBODY INVOLVED IN THE DECISION PROCESS
2 HAVE ANY EXPERTISE IN STRUCTURAL ENGINEERING?

3 A. I DON'T.

4 Q. BEFORE YOU ORDERED THE BREACH, DID YOU KNOW WHERE
5 THE HOSTAGE WAS?

6 A. NO.

7 Q. DID YOU GIVE CONSIDERATION THAT THE ACTUAL BREACH
8 ITSELF COULD KILL MS. PATEL?

9 A. AS WE HAD DISCUSSED THE BREACH, I FELT CONFIDENT
10 THAT THE KIND OF BREACH THAT WE WOULD CONDUCT WOULD
11 NOT. THE CORNER LIMITED OPEN SPACE AND THEY WOULD
12 LITERALLY HAVE TO BE IN THAT CORNER TO HAVE BEEN
13 SERIOUSLY INJURED BY THE BREACH.

14 Q. WELL, AS FAR AS YOU KNEW, WHERE THE OFFICER IN THAT
15 EARLY MORNING HAD COME IN AND OBSERVED THE
16 PERPETRATOR AND OBSERVED MS. PATEL, MS. PATEL WAS IN
17 THAT CORNER, WASN'T SHE?

18 A. SHE WAS IN THE CASHIER AREA TOWARD THE FRONT, AS I
19 RECALL, AND THERE IS SOME FOOTAGE FROM THE COUNTER
20 AREA BACK TO FACING THE BUILDING, THAT LEFT REAR
21 CORNER.

22 Q. MS. PATEL WAS CLOSER TO THE LEFT REAR CORNER THAN
23 THE HOSTAGE TAKER AT THE TIME THAT THE POLICE
24 OFFICER ENTERED THE BUILDING. ISN'T THAT RIGHT?

25 A. I KNOW SHE WAS SUBSEQUENT TO THAT BASED ON THE

1 CONSIDERATION OF MINE.

2 Q. WHAT DID YOU HAVE THE BULLDOZER OPERATOR OUTFITTED
3 IN?

4 A. HE HAD ON A BULLETPROOF VEST AND REGULAR CLOTHES.

5 Q. AND OF COURSE, HE HAD THE ARM. WHAT DO WE CALL THIS
6 THING THAT STICKS OUT?

7 A. THE BUCKET?

8 Q. YES, LET'S CALL IT THE BUCKET. HE'S GOT THIS BUCKET
9 THAT'S PRETTY LARGE, ISN'T IT?

10 A. YES.

11 Q. IT COULD BE USED AS A SHIELD, COULDN'T IT?

12 A. SURE.

13 Q. DID YOU KNOW HOW MANY BULLETS JOHNSON HAD?

14 A. NO.

15 Q. DID ANYBODY?

16 A. I THINK ULTIMATELY WE WERE ABLE TO FIND OUT.

17 Q. I'M TALKING ABOUT BEFORE THE

18 A. NO.

19 Q. PROCESS ENDED. WERE YOU COUNTING BULLETS?

20 A. YES.

21 Q. HOW MANY SHOTS, I SHOULD SAY?

22 A. YES, I THINK WE WERE UP TO -- I FORGET THE NUMBER.

23 Q. OKAY. THIS BULLDOZER HAS TO HIT THIS CORNER TWICE.

24 THE FIRST HIT COMES. HOW LONG BEFORE THE SECOND

25 HIT?

FILED
CLERK OF COURT
2009 NOV -3 AM 10:46
MARC KITCHENS

1 THE BUILDING?

2 A. THE REAR LEFT?

3 Q. YES.

4 A. YES.

5 Q. ALL RIGHT. THEN, THE FRONT RIGHT WAS GOING TO BE
6 BREACHED?

7 A. YES.

8 Q. PRIOR TO YOUR MAKING THAT DECISION, DID YOU CONSULT
9 ANY STRUCTURAL ENGINEER ABOUT WHAT MIGHT HAPPEN TO
10 THE BUILDING IF YOU BREACHED IT AT THAT POINT?

11 A. NO.

12 Q. WAS ANY CONSIDERATION GIVEN TO HEY, IF WE DO THIS
13 THE BUILDING MIGHT FALL DOWN?

14 A. WE MADE A DETERMINATION THAT WE WERE GOING TO SAVE
15 THAT LADY. THE SUBSEQUENT ABILITY OF THAT BUILDING
16 FALLING, IN MY OPINION, WAS REMOTE. WE NEEDED
17 HOLE AND WE NEEDED IT THEN. I DID NOT THINK OF IT,
18 DID NOT CONSULT ANYONE. THAT WAS NOT AN ISSUE. I
19 WANTED A HOLE AND I WANTED EXPOSURE AND I WANTED IT
20 THEN.

21 Q. AND TO MAKE A HOLE, THIS DOZER WOULD HAVE TO
22 PENETRATE THAT BUILDING, WOULDN'T IT?

23 A. IT DID.

24 Q. IT DID PENETRATE, DIDN'T IT?

25 A. IT MADE THE HOLE.

FILED
2011 NOV -3 AM 10:14
CLERK OF COURT
JANICE K. CHAMBERS

1 Q. NOW, WHEN YOU ORDERED THAT DOZER TO PENETRATE THAT
2 BUILDING ON THE FRONT RIGHT CORNER, DID YOU KNOW
3 WHERE MS. PATEL WAS?

4 A. OTHER THAN IN THE COOLER AND THAT WE WERE GOING TO
5 EXPOSE THE COOLER AREA AND HAVE ACCESS TO IT, THAT'S
6 ALL WE KNEW.

7 Q. DID YOU GIVE CONSIDERATION TO THE FACT THAT THE VERY
8 PENETRATION, THE ACT OF PENETRATION MIGHT KILL MS.
9 PATEL?

10 A. NO, WE WANTED TO ENSURE THAT WE HAD ACCESS TO GET TO
11 HER AND TO GET TO HIM AND TO SAVE HER.

12 Q. DO YOU UNDERSTAND HOW SHE GOT TO THE COOLER?

13 A. AS I RECALL, SHE WAS DRUG IN BY HIM.

14 Q. DO YOU KNOW WHAT WOULD HAVE HAPPENED TO MS. PATEL IF
15 SHE HAD STAYED IN THE LOCATION WHERE SHE WAS BEFORE
16 HE TOOK HER INTO THE COOLER?

17 A. I HAVE NOT HAD ANY CONFIRMATION AS TO WHERE SHE WAS
18 BEFORE THAT.

19 Q. DO YOU AGREE WITH ME THAT THE SECOND BREACH OF THIS
20 BUILDING CAUSED SUBSTANTIAL DAMAGE TO THE BUILDING?

21 A. I DON'T KNOW HOW SUBSTANTIAL. I KNOW THAT IT OPENED
22 A HOLE AND GAVE US ACCESS. I NEVER WENT BACK OR WAS
23 INVOLVED IN ANY SUBSEQUENT ASSESSMENT OF THE LEVEL
24 OF DAMAGE THAT WAS CAUSED.

25 Q. DO YOU TAKE ISSUE WITH THE FACT THAT THIS BUILDING

FILED
2009 NOV 3 AM 10:44
MARCO KITCHENS

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

CASE NO. 05-CP-42-1424

MP AND SAROJ PATEL, *
WILLARD OIL COMPANY, INC., *
AND HARRY "SKIPPER" *
LANCASTER, *

PLAINTIFFS, *

VS. *

CITY OF SPARTANBURG, *

DEFENDANT. *

COPY

DEPOSITION OF JENNIFER KINDALL

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION
OF JENNIFER KINDALL WAS CALLED BY THE PLAINTIFFS ON
THURSDAY, THE 1ST DAY OF MARCH, 2007, COMMENCING AT THE
HOUR OF 2:08 P.M., AT THE HODGE LAW FIRM, 229 MAGNOLIA
STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL
AS FOLLOWS:

CHRISTIAN N. SIMPSON, REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

2009 NOV -3 AM 10:43
MARC KITCHENS

FILED

1 PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
2 DEPOSITIONS, THE WITHIN DEPOSITION WAS TAKEN BY THE
3 ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE STATE
4 OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES AT THE HODGE
5 LAW FIRM, SPARTANBURG, SOUTH CAROLINA.

6 * * * * *

7 STIPULATIONS:

8 IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
9 AS FOLLOWS:

- 10 1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
11 SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
12 2. THE READING AND SIGNING OF THE DEPOSITION
13 TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
14 PARTIES.

15 * * * * *

16 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
17 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
18 MATTER HEREIN:

19 JENNIFER KINDALL,

20 BEING FIRST DULY SWORN, TESTIFIED UNDER OATH AS FOLLOWS:

21 EXAMINATION BY MR. HODGE:

22 Q. WHAT IS YOUR FULL NAME?

23 A. JENNIFER KINDALL.

24 Q. WHAT IS THE PROPER TITLE FOR YOUR POSITION?

25 A. COLONEL, EMPLOYEE SERVICES.

1 INTERESTED IN IT FOR A WHILE, AND MADE A DECISION TO
2 JOIN THE DEPARTMENT.

3 Q. WERE YOU WHAT THEY CALL A PUBLIC SAFETY OFFICER?

4 A. YES.

5 Q. WHEN YOU STARTED, DID YOU HAVE DUAL RESPONSIBILITIES
6 FOR FIRE-FIGHTING AS WELL AS POLICING?

7 A. YES.

8 Q. IS THAT THE WAY IT STILL IS?

9 A. NO, IT CHANGED IN JULY OF LAST YEAR. WE'RE STILL A
10 PUBLIC SAFETY DEPARTMENT WITH POLICE AND FIRE-
11 FIGHTING RESPONSIBILITIES, BUT THE OFFICERS NO
12 LONGER HAVE FIRE-FIGHTING RESPONSIBILITIES.

13 Q. SO HOW LONG DID YOU DO PUBLIC SAFETY OFFICER DUTIES?

14 A. I WORKED AS A PATROL OFFICER PROBABLY THREE YEARS,
15 THEN TRANSFERRED TO NARCOTICS. FROM NARCOTICS,
16 CRIME PREVENTION. FROM CRIME PREVENTION TO
17 INVESTIGATIONS. FROM INVESTIGATIONS, COURT LIAISON,
18 GENERAL SESSIONS COURT LIAISON, RECORDS SUPERVISOR.

19 Q. AT THE TIME SAME?

20 A. UH-HUH (AFFIRMATIVE). AT THAT TIME I WAS A
21 SERGEANT. FROM THERE, TRANSFERRED TO INTERNAL
22 AFFAIRS. WAS PROMOTED TO LIEUTENANT IN INTERNAL
23 AFFAIRS, AND TRANSFERRED FROM INTERNAL AFFAIRS BACK
24 TO INVESTIGATIONS AS AN INVESTIGATIVE LIEUTENANT.
25 WAS PROMOTED TO CAPTAIN, AND THEN TRANSFERRED TO THE

1 PATROL DIVISION. AND FROM THERE, WAS APPOINTED AS
2 THE COLONEL OF POLICE SERVICES.

3 Q. ALL THAT OCCURRED IN, I GUESS IT'S BEEN, 20 YEARS
4 NOW?

5 A. YES.

6 Q. WHAT DID YOU DO IN NARCOTICS?

7 A. WAS A NARCOTICS INVESTIGATOR RESPONSIBLE FOR
8 CONDUCTING INVESTIGATIONS IN THE CITY, AS WELL AS
9 WORKING WITH OTHER AGENCIES THROUGHOUT THE STATE.

10 Q. DO YOU DO ANY UNDERCOVER WORK?

11 A. YES.

12 Q. WHAT DID YOU DO IN CRIME PREVENTION?

13 A. CRIME PREVENTION, RESPONSIBLE FOR EDUCATION AND
14 PREVENTION. WENT INTO SCHOOLS, ELEMENTARY SCHOOLS
15 AND TAUGHT PROGRAMS THERE, AS WELL AS PRESENTATIONS
16 IN THE COMMUNITY THAT WOULD ENABLE INDIVIDUALS TO
17 BETTER PREPARE THEMSELVES TO LESSEN THE CHANCES OF
18 THEM BECOMING VICTIMS OF CRIMES.

19 Q. INVESTIGATIONS. WHAT WERE YOUR DUTIES THERE WHEN
20 YOU FIRST WENT?

21 A. INITIALLY, WHEN I FIRST WENT TO INVESTIGATIONS,
22 RESPONSIBLE FOR INVESTIGATION CASES INVOLVING
23 JUVENILES.

24 Q. AND THAT COULD COVER THE ENTIRE GAMUT OF CRIMES?

25 A. WHERE THEY WERE EITHER VICTIMS AND/OR SUSPECTS, YES.

1 A. NO.

2 Q. TELL ME WHAT YOUR DUTIES ARE AS COLONEL IN THE
3 POLICE SERVICE.

4 A. I AM ACTUALLY RESPONSIBLE FOR OVERSEEING DAY-TO-DAY
5 OPERATIONS, THE LAW ENFORCEMENT SERVICES, WHICH
6 MEANS COORDINATING ACTIVITIES WITH THE CAPTAINS --
7 ONE RESPONSIBLE FOR INVESTIGATIVE SERVICES, ONE FOR
8 UNIFORM PATROL, TRAFFIC, DOWNTOWN UNIT, AND ALSO
9 SUPERVISION OF OUR NARCOTICS UNIT.

10 Q. HOW ABOUT INVESTIGATIONS?

11 A. THE INVESTIGATIVE CAPTAIN REPORTS TO ME, YES.

12 Q. SO EVERY DIVISION REALLY REPORTS TO YOU --

13 A. YES.

14 Q. -- IN SOME CAPACITY?

15 A. YES.

16 Q. HAVE YOU EVER TAKEN A COURSE WITH REGARDS TO SWAT
17 OPERATIONS?

18 A. IT'S BEEN A PART OF SEVERAL OF THE TRAININGS THAT
19 I'VE ATTENDED. OF COURSE, SPECIFICALLY DESIGNED FOR
20 SWAT TRAINING, NO.

21 Q. HAVE YOU EVER, PRIOR TO JULY OF 2004, HANDLED A
22 HOSTAGE SITUATION?

23 A. WHAT DO YOU MEAN, HANDLED?

24 Q. I MEAN MADE DECISIONS, CRITICAL DECISIONS OR KEY
25 DECISIONS WITH REGARDS TO WHAT WAS GOING ON IN A

1 HOSTAGE SITUATION.

2 A. PRIOR TO 2004, I REALLY DON'T RECALL THERE BEING
3 VERY MANY HOSTAGE SITUATIONS THAT WE HAVE DEALT
4 WITH. WE'VE HAD A FEW SITUATIONS WHERE THE INITIAL
5 RESPONDING OFFICERS THOUGHT PERHAPS THEY WOULD HAVE
6 HAD A BARRICADED SITUATION; BUT THOSE ACTUALLY
7 RESOLVED THEMSELVES. AND SO WE HAVE HAD VERY FEW
8 SITUATIONS SUCH AS JULY, 2004, OR HAVEN'T HAD ANY
9 SUCH AS JULY, 2004.

10 Q. SO IT WOULD BE FAIR TO SAY THAT PRIOR TO JULY OF
11 2004, YOU NEVER HAD A SITUATION LIKE THE PATEL
12 SITUATION?

13 A. THAT'S CORRECT.

14 Q. DID YOU HAVE A POOL OF REFERENCES OR RESOURCES THAT
15 YOU HAD ACCESS TO OUTSIDE THE DEPARTMENT TO HANDLE
16 OR TO CONSULT WITH REGARDING A HOSTAGE SITUATION?

17 A. WHAT KIND OF REFERENCES OR RESOURCES?

18 Q. FBI, SHERIFF'S OFFICE, SLED, COUNTER-TERRORISM
19 FORCE. I MEAN ANY OF THOSE AGENCIES.

20 A. YES.

21 Q. DID YOU UTILIZE ANY OF THOSE AGENCIES WITH REGARD TO
22 THE EVENTS OF JULY 19TH, 2004?

23 A. YES.

24 Q. WHICH ONE?

25 A. THE FBI RESPONDED, SPARTANBURG COUNTY DETENTION

1 FACILITY, SPARTANBURG COUNTY SHERIFF'S OFFICE,
2 PROBATION AND PAROLE, AND ALCOHOL, TOBACCO, AND
3 FIREARMS RESPONDED.

4 Q. IN WHAT CAPACITY DID YOU USE THE FBI?

5 A. WE UTILIZED THEIR HOSTAGE NEGOTIATOR.

6 Q. AND WHO WAS HE?

7 A. I DON'T RECALL HIS FULL NAME. HIS FIRST NAME MAY
8 HAVE BEEN PAUL, BUT I REALLY DON'T RECALL HIS FULL
9 NAME.

10 Q. IN WHAT WAY DID YOU USE THIS PAUL?

11 A. HE CAME IN AND MONITORED THE NEGOTIATIONS, OFFERED
12 ADVICE. HE WAS A PART OF THE NEGOTIATION TEAM.

13 Q. WHEN THIS NEGOTIATION WAS GOING ON, WERE YOU
14 PRESENT?

15 A. FOR PARTS OF IT, YES. MOST OF IT, YES.

16 Q. AT ANY TIME DID THIS HOSTAGE NEGOTIATOR FOR THE FBI
17 SAY, "LISTEN, YOU'VE GOT TO MAKE A MOVE? THIS GUY'S
18 GETTING READY TO CRACK;" OR SOMETHING TO THAT
19 EFFECT? I'M NOT TRYING TO PUT WORDS IN YOUR MOUTH.
20 I JUST WANT YOU TO UNDERSTAND THE QUESTION I'M
21 TRYING TO ASK..

22 A. YES.

23 Q. HE DID?

24 A. YES.

25 Q. WHEN DID HE SAY THAT?

1 A. TOWARDS THE END.

2 Q. WHAT DID HE SAY?

3 A. WORDS SIMILAR TO WHAT YOU JUST USED.

4 Q. WHAT DID HE BASE THAT ON?

5 A. BASED ON THE Demeanor OF THE SUSPECT.

6 Q. Demeanor IN WHAT CAPACITY? WAS HE ABLE TO EYEBALL
7 HIM?

8 A. NO, IT WAS BASED ON THE VERBAL COMMUNICATIONS WITH
9 HIM.

10 Q. TELL ME EXACTLY WHAT YOU RECALL THIS FELLOW TOLD YOU
11 TOWARD THE END.

12 A. THE FBI NEGOTIATOR?

13 Q. YES.

14 A. I CAN'T TELL YOU EXACTLY WHAT HE TOLD ME. THE
15 DISCUSSION WAS -- AND ALSO INCLUDED IN THE
16 DISCUSSION WAS, AN INDIVIDUAL FROM MENTAL HEALTH.
17 AND THE CONSENSUS OF THOSE IN THE ROOM THAT WERE A
18 PART OF THE NEGOTIATION TEAM, WAS THAT THE
19 COMMUNICATIONS WERE FAILING, HAD DIMINISHED
20 SIGNIFICANTLY. THE SUSPECT WAS MAKING INCREASING
21 THREATS TO KILL THE VICTIM, AND HAD FIRED SEVERAL
22 SHOTS. AND BASED ON THAT INFORMATION, THE CONSENSUS
23 WAS THAT THE NEGOTIATIONS WERE FAILING AND WE WERE
24 AT A POINT WHERE WE NEEDED TO DO SOMETHING IN TERMS
25 OF TRYING TO MAKE AN EFFORT TO BREACH THE BUILDING,

1 GET INTO THE BUILDING.

2 Q. YOU MENTIONED SOMEONE FROM MENTAL HEALTH. DO YOU
3 KNOW WHO THAT WAS?

4 A. I DON'T REMEMBER HIS NAME. IT SHOULD BE IN THE
5 FILES.

6 Q. WAS HE LIKE A PSYCHOLOGIST OR PSYCHIATRIST OR
7 SOMETHING?

8 A. I'M NOT SURE EXACTLY WHAT HIS POSITION WAS, BUT HE
9 WAS A COUNSELOR FROM MENTAL HEALTH.

10 Q. DO YOU KNOW IF THAT INDIVIDUAL HAD ANY EXPERIENCE
11 WITH REGARDS TO HOSTAGE SITUATIONS, OR EVALUATING
12 PROFILES, OR SOMETHING OF THAT NATURE?

13 A. I WOULD ASSUME THAT HE HAD EXPERIENCE BASED ON
14 DEALING WITH PERSONS WHO MIGHT BE IN MENTAL
15 DISTRESS, OR BEING DISTRESSED. SPECIFICALLY WHAT
16 HIS TRAINING WAS, I DON'T KNOW.

17 Q. IN WHAT CAPACITY DID YOU CONSULT THE SHERIFF'S
18 OFFICE?

19 A. THE SHERIFF'S OFFICE RESPONDED TO ASSIST WITH
20 PERIMETER AND SECURITY. AND I THINK PERHAPS SOMEONE
21 FROM THEIR BOMB UNIT MAY HAVE RESPONDED AS WELL.

22 Q. DID THEY PLAY ANY ROLE IN THE DECISION MAKING
23 PROCESS THAT ULTIMATELY OCCURRED?

24 A. NO.

25 Q. BY THE WAY, DID THAT FBI FELLOW PREPARE A REPORT?

1 A. I WOULD ASSUME HE DID. IF HE DID, IT WOULD BE IN
2 THE FILE.

3 Q. I DON'T RECALL SEEING AN FBI REPORT IN THE FILE.

4 A. I DON'T RECALL READING IT. I HAVE NOT HAVE READ IT.
5 I DON'T KNOW.

6 Q. PROBATION AND PAROLE. WHAT ROLE DID THEY PLAY?

7 A. THEY WERE BROUGHT IN TO PROVIDE INTELLIGENCE IN
8 TERMS OF THE SUSPECT'S BACKGROUND.

9 Q. DID THEY PLAY ANY ROLE IN THE ULTIMATE DECISION
10 MAKING?

11 A. NO.

12 Q. ATF?

13 A. THEY WERE BROUGHT IN AS A RESOURCE, AND TO MONITOR
14 THE SITUATION, AND TO PROVIDE ANY RESOURCES THAT WE
15 MIGHT NEED FROM THEM.

16 Q. DID THEY PLAY ANY ROLE IN THE DECISION MAKING?

17 A. IN THE FINAL DECISION?

18 Q. YES, MA'AM.

19 A. NO.

20 Q. WHO WAS INVOLVED IN THE FINAL DECISION MAKING?

21 A. ULTIMATELY, THE FINAL DECISION, THE PERSON
22 RESPONSIBLE FOR THE FINAL DECISIONS ULTIMATELY WOULD
23 BE DIRECTOR FISHER. BUT HE MADE THAT DECISION IN
24 CONSULTATION WITH THE EXECUTIVE STAFF.

25 Q. WHICH WOULD BE YOU?

1 A. MYSELF, MAJOR HORTON, AND CAPTAIN HARDY WAS PRESENT
2 AS WELL.

3 Q. WHEN DID YOU FIRST GET NOTIFIED ABOUT THIS
4 SITUATION?

5 A. PROBABLY ABOUT 7:50 IN THE MORNING, A.M.

6 Q. 7:50 A.M. YOU GET CONTACTED. WHAT ARE YOU TOLD?

7 A. ACTUALLY, I HEARD THE TRANSMISSION ON THE RADIO. I
8 WAS IN MY VEHICLE EN ROUTE TO WORK AND HEARD THE
9 CALL ON THE RADIO.

10 Q. AND YOU LIVE UP NEAR BOILING SPRINGS?

11 A. UH-HUH (AFFIRMATIVE).

12 Q. SO WHAT DID YOU DO?

13 A. ONCE I HEARD THE TRANSMISSION THAT THE SUSPECT HAD
14 RAN INTO THE STORE AND THAT POTENTIALLY HAD A
15 HOSTAGE SITUATION, I RESPONDED TO THE SCENE.

16 Q. SO YOU DIDN'T EVEN GO TO CITY HALL?

17 A. NO.

18 Q. YOU JUST WENT STRAIGHT OVER THERE. WHEN YOU GOT
19 THERE, ABOUT WHAT TIME WAS IT?

20 A. I HEARD THE CALL AT 7:50. IT PROBABLY TOOK ME ABOUT
21 FIVE MINUTES TO GET THERE.

22 Q. SO CLOSE TO EIGHT O'CLOCK, EIGHT A.M.?

23 A. YES.

24 Q. WHEN YOU GET THERE, WHAT DO YOU OBSERVE?

25 A. WHEN I GET THERE, I SEE A NUMBER OF OFFICERS AROUND

1 THE STORE. THERE'S SEVERAL CITIZENS WHO HAVE
2 GATHERED IN AN ADJACENT PARKING LOT. SOME ARE
3 GETTING INTO THEIR VEHICLES, PREPARING TO LEAVE.

4 Q. WHO INITIALLY BRIEFS YOU ON THE SITUATION?

5 A. AS I WAS EN ROUTE, I ALSO GOT A CALL FROM SERGEANT
6 PHIL MOORE, WHO WAS AN ON-DUTY SERGEANT. AND I
7 ADVISED HIM THAT I WAS EN ROUTE. ONCE I GOT THERE,
8 I TALKED TO SERGEANT MOORE, TALKED WITH SERGEANT
9 SUBER, WHO WAS ALSO ON THE SCENE, PATROL SUPERVISOR.

10 Q. DID YOU TALK TO THE OFFICERS WHO WERE INVOLVED IN
11 THE INITIAL APPREHENSION OF THE SUSPECT?

12 A. THE INITIAL TRAFFIC STOP?

13 Q. CORRECT.

14 A. YES.

15 Q. WHO WERE THEY?

16 A. THAT WAS OFFICER CLARK.

17 Q. ANYBODY ELSE?

18 A. OFFICER HURST RESPONDED AS BACK-UP FOR HIM. AND,
19 YES, I DID SPEAK WITH THEM.

20 Q. BY THE TIME YOU GOT THERE, HAD ONE OF THESE FELLOWS
21 TOLD YOU THAT THEY WENT AND ACTUALLY OPENED THE
22 DOOR?

23 A. YES.

24 Q. WHO WAS THAT?

25 A. IF I RECALL CORRECTLY, IT WAS SERGEANT MOORE.

1 Q. YES, MA'AM.

2 A. YES.

3 Q. HAD COMMUNICATION BEEN ESTABLISHED WITH THE SUSPECT
4 PRIOR TO HIM ARRIVING?

5 A. YES.

6 Q. AND HOW WAS THAT DONE?

7 A. INITIALLY THE OFFICERS THAT SPOKE WITH THE SUSPECT
8 INITIALLY DID ON THE PHONE FROM THE STORE. AND THEN
9 THE SUSPECT TALKED ON WHAT WE WERE TOLD WAS THE
10 VICTIM'S CELL PHONE.

11 Q. DID YOU EVER DO ANY OF THE TALKING?

12 A. TO THE SUSPECT?

13 Q. YES.

14 A. NO.

15 Q. YOU HEARD WHATEVER DISCUSSIONS WERE GOING ON?

16 A. YES.

17 Q. WHAT WERE YOU HEARING? WHAT WERE THEY SAYING?

18 A. HE MADE THREATS TO --

19 Q. NOW THIS IS BEFORE THE HOSTAGE NEGOTIATOR GETS
20 THERE. I'M TRYING TO GET IT SEQUENTIALLY.

21 A. OKAY. HE MADE THREATS TO KILL OFFICERS. HE MADE
22 THREATS THAT HE WAS GOING TO DIE. HE MADE THREATS
23 TO HARM THE VICTIM. THEN HE RECANED ON THE THREATS
24 TO HARM THE VICTIM. SO IT WAS A REPETITION OF THAT.

25 Q. DID YOU ALL RECORD THOSE TRANSMISSIONS?

- 1 A. YES, WE DID.
- 2 Q. DO YOU STILL HAVE THOSE RECORDATIONS?
- 3 A. I WOULD ASSUME SO, YES.
- 4 Q. WERE THEY EVER PRINTED UP IN A TRANSCRIPT FORM?
- 5 A. FROM THE NEGOTIATIONS?
- 6 Q. YES.
- 7 A. NO.
- 8 Q. BUT YOU'VE STILL GOT THE TAPES?
- 9 A. YES.
- 10 Q. SO THIS BACK AND FORTH GOES ON, AND YOU STILL
- 11 HAVEN'T PLANNED ANY COURSE OF ACTION, ANY AGGRESSIVE
- 12 MOVES TOWARDS HIM BEFORE THE HOSTAGE NEGOTIATOR GETS
- 13 THERE; IS THAT RIGHT?
- 14 A. NO.
- 15 Q. HAD THE MENTAL HEALTH COUNSELOR GOTTEN THERE BY THAT
- 16 TIME?
- 17 A. I BELIEVE THE MENTAL HEALTH COUNSELOR ARRIVED PRIOR
- 18 TO THE FBI NEGOTIATOR.
- 19 Q. DID THE FBI NEGOTIATOR BEGIN DIRECT TALKS WITH THE
- 20 SUSPECT?
- 21 A. HE DID NOT SPEAK DIRECTLY WITH HIM, NO.
- 22 Q. STILL THE SAME PEOPLE WERE DOING THE SAME
- 23 COMMUNICATIONS TO THE SUSPECT?
- 24 A. RIGHT.
- 25 Q. AND WHO WERE THOSE PEOPLE AGAIN?

1 A. SERGEANT STEVE LAMB. I MEAN, I'M SORRY, LIEUTENANT
2 STEVE LAMB AND SERGEANT CHRIS TAYLOR.

3 Q. LAMB AND TAYLOR?

4 A. YES.

5 Q. HOW DID THEY GET THIS GREAT ASSIGNMENT?

6 A. THEY'RE SPECIAL.

7 Q. ARE THEY TRAINED IN IT?

8 A. ACTUALLY THEY ARE, YES. SERGEANT CHRIS TAYLOR IS
9 ASSIGNED AS A HOSTAGE NEGOTIATOR AND HAS RECEIVED
10 TRAINING. LIEUTENANT LAMB IS SERGEANT TAYLOR'S
11 IMMEDIATE SUPERVISOR. SO HE ASSISTED.

12 Q. TAYLOR IS THE ONLY ONE WHO IS TRAINED?

13 A. NO, THERE ARE FOUR OR FIVE OTHER PEOPLE IN THE
14 DEPARTMENT WHO ARE TRAINED AND CERTIFIED AS
15 NEGOTIATORS.

16 Q. THE ONLY ONE ON THE SCENE THAT DAY WOULD HAVE BEEN
17 SERGEANT TAYLOR?

18 A. THAT'S ACTUALLY CERTIFIED, YES.

19 Q. HOW DO YOU GET TO BE CERTIFIED TO BE A TRAINED
20 NEGOTIATOR?

21 A. GO THROUGH A NUMBER OF TRAININGS AND PRACTICAL
22 EXERCISES, AND SUCCESSFUL COMPLETION OF THOSE
23 COURSES. MEETING THE REQUIREMENTS OF THE COURSES
24 RECEIVES A CERTIFICATION.

25 Q. DID SERGEANT CHRIS TAYLOR AT ANY TIME TELL YOU THIS

1 A. SUBSTANTIALLY --

2 Q. LATE AFTERNOON?

3 A. -- BEFORE THAT. LATE MORNING, EARLY AFTERNOON.

4 Q. LET'S KIND OF SHIFT. IT WAS A FRONT-END LOADER
5 EVENTUALLY THAT BREACHED THE BUILDING; IS THAT
6 RIGHT?

7 A. CORRECT.

8 Q. WHO CAME UP WITH THAT IDEA?

9 A. ACTUALLY, MAJOR HORTON.

10 Q. HAVE YOU EVER TAKEN A SEMINAR, BEEN INSTRUCTED,
11 BECOME FAMILIAR WITH THE PROTOCOL, ANYTHING OF THAT
12 NATURE THAT REFERENCED BREACHING A BUILDING WITH A
13 FRONT-END LOADER?

14 A. NO, I HAVEN'T.

15 Q. HAS THAT EVER OCCURRED IN YOUR 20-YEAR HISTORY IN
16 LAW ENFORCEMENT?

17 A. NOT THAT I'M AWARE OF, NO.

18 Q. DO YOU KNOW OF IT EVER HAVING OCCURRED IN THE
19 HISTORY OF THE CITY, OF THE POLICE DEPARTMENT OF
20 SPARTANBURG?

21 A. NOT TO MY KNOWLEDGE, NO.

22 Q. DO YOU KNOW OF ANY AGENCY IN SOUTH CAROLINA THAT HAS
23 EVER UTILIZED THE TECHNIQUE OF TAKING A FRONT-END
24 LOADER AND BREACHING A BUILDING?

25 A. NO, I DO NOT.

2009 NOV 3 PM 10:43
MARC JONES

1 Q. SO HORTON COMES UP WITH THIS IDEA, AND TELL ME WHAT
2 HE SAYS.

3 A. I WAS INSIDE THE COMMAND POST, AND I WAS MADE AWARE
4 THAT HE HAD THIS IDEA. WE DISCUSSED IT -- MYSELF,
5 THE DIRECTOR -- AND DECIDED TO PROCEED WITH IT. AND
6 QUITE FRANKLY, AT THAT POINT WE WERE SEARCHING FOR
7 SOME WAY TO GET THOSE OFFICERS, THE TACTICAL
8 OFFICERS INSIDE THAT BUILDING AND GAIN ACCESS TO MR.
9 JOHNSON.

10 Q. AT THE TIME THAT THIS OCCURRED, WERE YOU AWARE THAT
11 HE HAD A HANDGUN?

12 A. YES.

13 Q. DID YOU THINK THAT HE HAD ANY OTHER WEAPON?

14 A. WE WEREN'T AWARE OF WHAT HE HAD IN HIS POSSESSION.

15 Q. BASED ON THE SHOTS THAT WERE FIRED, WAS THERE ANY
16 INDICATION THERE WAS MORE THAN ONE WEAPON?

17 A. I DON'T KNOW HOW MANY WEAPONS HE HAD.

18 Q. IS THERE A DEVICE THAT FUNCTIONS AS A SHIELD THAT IS
19 BULLET-PROOF? IN OTHER WORDS, AN OFFICER OR
20 OFFICERS CAN HOLD IT, AND THEY CAN HOLD IT IN FRONT
21 OF THEM AND BULLETS COME IN, AND IT JUST KIND OF
22 RICOCHETS OFF?

23 A. YES, I THINK THE TACTICAL OFFICERS REFERENCE THAT IN
24 THEIR STATEMENTS.

25 Q. IF AN OFFICER IS IN FULL TACTICAL GEAR, THAT WOULD

1 INCLUDE A BULLET-PROOF HELMET; IS THAT RIGHT?

2 A. YES.

3 Q. A BULLET-PROOF VEST?

4 A. BULLET RESISTANT, YES.

5 Q. BULLET RESISTANT VEST, AND THESE SHIELDS WERE
6 AVAILABLE.

7 A. YES.

8 Q. WAS THERE DISCUSSION ABOUT GOING IN THE BUILDING
9 THROUGH THE FRONT DOOR WITH THE SHIELDS IN FRONT OF
10 THEM?

11 A. THERE WAS A DISCUSSION ABOUT IT, BUT WE RECOGNIZED
12 IN DOING THAT WE WERE NOT AWARE PRECISELY WHERE MR.
13 JOHNSON WAS LOCATED. AND TO DO SO POTENTIALLY WOULD
14 EXPOSE THOSE OFFICERS TO GREATER RISK.

15 Q. SO THE THINKING WAS THAT YOU WOULD BREACH THIS
16 BUILDING WITH A FRONT-END LOADER; IS THAT RIGHT?

17 A. YES.

18 Q. WHAT DID YOU THINK WAS GOING TO HAPPEN WHEN YOU ALL
19 TORE THIS BUILDING DOWN WITH THIS FRONT-END LOADER?

20 A. THAT THE TACTICAL OFFICERS WOULD BE ABLE TO GAIN
21 ENTRY TO THE BUILDING.

22 Q. WERE THEY?

23 A. YES.

24 Q. FROM THE VERY FIRST?

25 A. TO GAIN ENTRY, YES.

1 Q. SO IS IT YOUR TESTIMONY THAT THE BREACH, THE INITIAL
2 BREACH OF THE BUILDING BY THE FRONT-END LOADER WAS
3 SUCCESSFUL?

4 A. IT WAS SUCCESSFUL, IF YOUR QUESTION WAS WERE THEY
5 ABLE TO GET IN THE BUILDING. IT WAS NOT SUCCESSFUL
6 FROM THE STANDPOINT THAT THEY WERE NOT ABLE TO
7 ACCESS MR. JOHNSON WITH THE FIRST BREACH. BUT THEY
8 WERE ABLE TO GATHER SOME ADDITIONAL INTELLIGENCE IN
9 TERMS OF WHERE HE WAS IN THE STORE.

10 Q. THE LOCATION OF THE INITIAL BREACH, WHERE WAS THAT
11 AT?

12 A. IT WAS ON THE BACK OF THE BUILDING.

13 Q. YOU'RE SURE ABOUT THAT?

14 A. YES.

15 Q. DID YOU SEE IT HAPPEN?

16 A. YES.

17 Q. TELL ME WHAT YOU SAW.

18 A. I SAW THE FRONT-END LOADER COLLIDE WITH THE BUILDING
19 AND TOOK A PART OF THE WALL OUT.

20 Q. WAS IT A CORNER OF THE BUILDING, OR WAS IT IN THE
21 MIDDLE OF THE BACK OF THE BUILDING? HOW WOULD YOU
22 DESCRIBE IT?

23 A. IF I RECALL CORRECTLY, IT WAS ON THE BACK RIGHT
24 SIDE. IT WAS ON THE BACK OF THE BUILDING.

25 Q. DID YOU HAVE ANY ENGINEERING CONSULTANTS THERE

1 PRESENT TO TELL YOU WHAT MIGHT HAPPEN IF YOU
2 BREACHED THE BUILDING AT THE POINT THAT YOU BREACHED
3 IT?

4 A. NO, BECAUSE IF I RECALL CORRECTLY, WE DIDN'T HAVE
5 TIME TO WAIT FOR ANY TO GET THERE, OR TO CONSULT
6 WITH THEM.

7 Q. IS THE FIRST DUTY IN THIS SITUATION TO PROTECT THE
8 HOSTAGE?

9 A. OUR FIRST DUTY IN ALL SITUATIONS IS TO PRESERVE
10 LIFE.

11 Q. WOULD THE LIFE OF THE HOSTAGE BE AT THE TOP OF THE
12 LIST?

13 A. ABSOLUTELY.

14 Q. WHEN YOU BREACHED THIS BUILDING WITH THIS FRONT-END
15 LOADER, DID YOU HAVE ANY IDEA WHERE THE HOSTAGE WAS?

16 A. BASED ON THE INTELLIGENCE THAT WE HAD GATHERED FROM
17 OFFICER STOKES, WE DID NOT FEEL THAT THE HOSTAGE WAS
18 IN THE AREA WHERE THE BREACH WAS CONDUCTED.

19 Q. OFFICER STOKES? WHO IS HE? BRIAN, YOU'RE TALKING
20 ABOUT?

21 A. YES.

22 Q. HE SAID HE COULDN'T SEE THE SUSPECT; ISN'T THAT
23 RIGHT? DID I MISREAD THAT? I'LL LOOK AT IT AGAIN.
24 AND BY THE WAY, WE'LL ATTACH THIS AS EXHIBIT 1 TO
25 HER DEPOSITION, THE THREE-PAGE STATEMENT.

1 (EXHIBIT NO. 1 MARKED [STOKES STATEMENT]; ATTACHED)

2 EXAMINATION RESUMED BY MR. HODGE:

3 Q. "I HAD NOT SEEN THE SUBJECT THROUGH A WINDOW AT ALL
4 UNTIL THE LEFT REAR WALL WAS BREACHED BY A
5 BULLDOZER. AT THAT TIME I OBSERVED THE SUBJECT TURN
6 TOWARDS THE RIGHT REAR OF THE STORE, DRAGGING THE
7 VICTIM. THIS WAS OBSERVED THROUGH THE WINDOW TO THE
8 RIGHT OF THE DOOR AS I RELATED THIS INFO TO THE
9 ENTRY TEAM. I COULDN'T SEE THE SUBJECT ANYMORE."
10 DOES THAT SOUND TO YOU LIKE OFFICER STOKES DIDN'T
11 KNOW WHERE THE SUSPECT WAS? AND OFFICER STOKES DOES
12 NOT SAY THAT HE WAS LOOKING AT THE VICTIM UNTIL THE
13 BUILDING WAS BREACHED. SO MY QUESTION TO YOU IS,
14 WHEN YOU BREACHED THIS BUILDING, DID YOU KNOW WHERE
15 MS. PATEL WAS?

16 A. PRECISELY WHERE SHE WAS?

17 Q. YES.

18 A. NO, WE DID NOT.

19 Q. CAN YOU NOT SEE HOW TEARING INTO A BUILDING, NUMBER
20 ONE, MIGHT CAUSE THE BUILDING TO COLLAPSE? COULD
21 YOU SEE THAT?

22 A. POTENTIALLY IT COULD, BUT IN THIS SITUATION IT DID
23 NOT.

24 Q. NUMBER TWO, THAT THE VERY ACTION OF A PENETRATION BY
25 A PIECE OF MACHINERY, IF THE VICTIM WAS IN CLOSE

1 A. AT THE FRONT, ON THE SIDE.

2 Q. ON THE SIDE? WHICH SIDE?

3 A. ON THE LEFT SIDE.

4 Q. AS YOU'RE FACING --

5 A. IF YOU'RE FROM THE BACK.

6 Q. IF YOU'RE FROM THE BACK, OKAY. SO IF YOU'RE FACING
7 IT, IT'S ON THE RIGHT SIDE?

8 A. IT'S ON THE RIGHT, YES.

9 Q. THAT'S THE COOLER SIDE, ISN'T IT?

10 A. YES.

11 Q. WELL, WHERE WAS THE SUSPECT? BEFORE YOU BREACHED,
12 DID YOU KNOW WHERE THE SUSPECT WAS?

13 A. WE BELIEVED HE WAS INSIDE THE COOLER.

14 Q. WHERE INSIDE THE COOLER?

15 A. DON'T KNOW WHERE.

16 Q. HOW ABOUT MS. PATEL?

17 A. WE DID NOT KNOW PRECISELY WHERE SHE WAS.

18 Q. YOU HAD NO IDEA WHERE SHE WAS?

19 A. THAT'S CORRECT.

20 Q. AND YOU ALL SEND A FRONT-END LOADER INTO THE COOLER
21 AREA, WHICH IS A WHOLE LOT SMALLER THAN THE BIG OLD
22 CONVENIENCE STORE; ISN'T THAT RIGHT?

23 A. CORRECT.

24 Q. WELL, AT THAT POINT YOU HAD JUST MADE THE DECISION

25 THIS GUY'S GOING TO BE TAKEN OUT; ISN'T THAT RIGHT?

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2005-CP-42-1424

MP AND SAROJ PATEL,
WILLARD OIL CO., INC.,
AND HARRY "SKIPPER"
LANCASTER,

PLAINTIFFS,

VERSUS

CITY OF SPARTANBURG,

DEFENDANT.

COPY

DEPOSITION OF DOUG HORTON

PURSUANT TO NOTICE AND/OR AGREEMENT, THE
DEPOSITION OF DOUG HORTON WAS CALLED BY THE
PLAINTIFFS ON THE 24TH DAY OF OCTOBER, 2006,
COMMENCING AT THE HOUR OF 3:42 P.M., AT THE LAW
OFFICES OF HODGE LAW FIRM, 229 MAGNOLIA STREET,
SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS
FOLLOWS:

JILL S. BISHOP
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

2009 NOV -3 AM 10:43
MAILED
FILED
CLERK OF COURT
JILL S. BISHOP

1 PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
2 DEPOSITIONS; THE WITHIN DEPOSITION WAS TAKEN BY THE
3 ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE
4 STATE OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES
5 AT THE LAW OFFICES OF HODGE LAW FIRM, SPARTANBURG,
6 SOUTH CAROLINA.

7 * * * * * * * * * * * *

8 STIPULATIONS:

9 IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
10 AS FOLLOWS:

- 11 1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
12 SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
13 2. THE READING AND SIGNING OF THE DEPOSITION
14 TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
15 PARTIES.

16 * * * * * * * * * * * *

17 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
18 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
19 MATTER HEREIN:

20 * * * * * * * * * * * *

21 DOUG HORTON,

22 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

23 EXAMINATION BY MR. HODGE:

24 Q. YOU'RE DOUG HORTON?

25 A. YES, SIR, I AM.

1 Q. YOU'RE A MAJOR IN THE SPARTANBURG CITY POLICE
2 DEPARTMENT?

3 A. YES, SIR, I AM.

4 Q. NOW, WE'VE KNOWN EACH OTHER FOR MANY YEARS.

5 A. YES, SIR.

6 Q. SO, I MAY SLIP INTO CALLING YOU DOUG AND YOU CALLING
7 ME CHARLIE.

8 A. OH, I'M NOT OFFENDED.

9 Q. IS THAT OKAY?

10 A. I'M NOT OFFENDED AT ALL.

11 Q. GIVE ME YOUR BACKGROUND AND EDUCATION.

12 A. SPARTANBURG CITY SCHOOLS, GRADUATE OF SPARTANBURG
13 METHODIST COLLEGE CRIMINAL JUSTICE PROGRAM, GRADUATE
14 OF SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY, GRADUATE
15 OF THE FBI NATIONAL ACADEMY IN QUANTICO. THAT'S THE
16 FORMAL, I GUESS. I'VE GOT SOME ADDITIONAL COLLEGE
17 HOURS, BUT I DON'T HAVE A FOUR-YEAR DEGREE.

18 Q. YOU STARTED AS A PATROL OFFICER?

19 A. I STARTED AS A POLICE CADET IN 1971 UNDER THE MODEL
20 CITIES PROGRAM.

21 Q. TRACK ME THROUGH HOW YOU ENDED UP AS A MAJOR.

22 A. OKAY. I STARTED OUT AS A POLICE CADET IN THE MODEL
23 CITIES PROGRAM. I TRANSFERRED INTO COMMUNICATIONS
24 AND DISPATCHED FROM LATE '72 UNTIL 1976. W.C. BAYNE
25 CONVINCED ME TO COME ON AS A SWORN OFFICER IN 1976

1 AS A PATROLMAN. I WALKED THE BEAT IN DOWNTOWN
2 SPARTANBURG WHEN WE HAD BEAT PATROL, IN THE PROWL
3 CAR OR IN THE PATROL ZONE FOR A NUMBER OF YEARS. I
4 GOT A LOT OF OPPORTUNITIES FOR TRAINING. WAS
5 PROMOTED TO THE TRAINING COORDINATOR FOR THE AGENCY
6 AND ACTUALLY STARTED THE TRAINING ASPECT OF THE
7 PUBLIC SAFETY DEPARTMENT. AT THAT TIME, IT WAS A
8 POLICE DEPARTMENT. WE WERE NOT A PUBLIC SAFETY
9 DEPARTMENT. WE DIDN'T BECOME PUBLIC SAFETY UNTIL
10 1983.

11 Q. DOES PUBLIC SAFETY INTEGRATE THE FIRE DEPARTMENT?

12 A. IT DID, THAT'S CORRECT. PROMOTED TO SERGEANT,
13 WORKED IN TRAFFIC, TOOK BACK OVER THE TRAINING
14 RESPONSIBILITIES, WAS PROMOTED TO LIEUTENANT. WENT
15 TO THE FBI NATIONAL ACADEMY IN QUANTICO IN 1990,
16 PROMOTED TO CAPTAIN UPON COMPLETION OF THAT
17 TRAINING. TONY FISHER BECAME THE DIRECTOR OF PUBLIC
18 SAFETY IN AUGUST OF 1995 AND I WAS APPOINTED MAJOR
19 UNDER HIS ADMINISTRATION SHORTLY AFTER HE CAME IN
20 1995.

21 Q. AND THAT'S THE POSITION THAT YOU OCCUPY NOW?

22 A. THAT'S CORRECT, SIR.

23 Q. AND WHERE DOES MAJOR SIT, WITH REGARD TO THE
24 HIERARCHY?

25 A. WELL, YOU HAVE THE DIRECTOR OF PUBLIC SAFETY, THE

1 COLONEL OF POLICE SERVICES, AND THEN THE MAJOR OF
2 TECHNICAL SUPPORT SERVICES.

3 Q. IS THAT WHAT YOU ARE?

4 A. THAT'S CORRECT.

5 Q. WHO IS ABOVE YOU?

6 A. TONY FISHER IS ACTUALLY WHO I ACTUALLY ANSWER
7 DIRECTLY TO.

8 Q. WHO IS THE COLONEL?

9 A. JENNIFER KENDALL.

10 Q. DOES SHE OCCUPY A SUPERIOR POSITION OR YOU ALL ---

11 A. THAT'S CORRECT. WELL, THE PUBLIC SAFETY DEPARTMENT
12 IS DIVIDED UP INTO THREE DIVISIONS. OBVIOUSLY, A
13 COLONEL IS A HIGHER RANK. IT'S VERY SIMILAR TO
14 MILITARY. IT'S DIVIDED UP INTO THREE DIVISIONS:
15 LAW ENFORCEMENT, SUPPORT AND TECHNICAL SERVICES
16 WHICH IS WHAT I DO, AND THEN FIRE SUPPRESSION, WHICH
17 WE HAVE A FIRE COMMANDER FOR THAT POSITION. SO,
18 TECHNICALLY, YES, SIR, I DO ANSWER TO THE COLONEL OF
19 POLICE SERVICES IN THE ABSENCE OF THE DIRECTOR.

20 Q. BUT YOU REALLY HAVE DIFFERENT RESPONSIBILITIES?

21 A. THAT'S CORRECT, SIR.

22 Q. NOW, DO YOU HAVE THE SWAT TEAM AS PART OF YOUR
23 RESPONSIBILITIES?

24 A. NO, SIR, I DO NOT.

25 Q. WHO HAS THAT?

1 A. IT'S UNDER POLICE SERVICES.

2 Q. WHICH IS?

3 A. COLONEL KENDALL.

4 Q. WHAT ROLE DID YOU PLAY ON JULY 19, 2004, WITH REGARD
5 TO THIS HOSTAGE SITUATION?

6 A. I WAS THE OPERATIONAL COMMANDER.

7 Q. ALL RIGHT. HOW DID YOU GET TO BE THE OPERATIONAL
8 COMMANDER?

9 A. WELL, IT'S KIND OF THE ROLE, WITH THE BACKGROUND
10 THAT I HAVE IN TACTICAL TRAINING, I ACTUALLY
11 FORMULATED THE FIRST TACTICAL TEAM THAT THE CITY OF
12 SPARTANBURG HAD AND I HAVE A STRONG BACKGROUND IN
13 SWAT OPERATIONS AND TRAINING AND THAT ASPECT. THE
14 COLONEL TOOK OVER THE NEGOTIATIONS SIDE OF THE
15 OPERATION AND I TOOK OVER THE OPERATIONS SIDE. AND
16 MUCH OF WHAT I DO IN TECHNICAL SUPPORT SERVICES IS
17 THAT. I SUPPORT -- I'M ABLE TO GET EQUIPMENT,
18 SUPPLIES, COORDINATION BETWEEN OTHER AGENCIES, IS
19 WHAT I DO ON A DAILY BASIS.

20 Q. SO, IN THIS SITUATION, WAS IT YOU THAT COORDINATED
21 THE S.L.E.D. INVOLVEMENT, SOME SPARTANBURG COUNTY
22 SHERIFF'S DEPARTMENT?

23 A. THAT IS CORRECT.

24 Q. ALL RIGHT. WHEN DID YOU FIRST HEAR ABOUT THIS
25 EVENT?

1 A. I WAS ON MY WAY TO WORK. I WAS ON NORTH CHURCH
2 STREET, PASSING THE REGIONAL MEDICAL CENTER COMING
3 INTO TOWN. I HEARD THE ACTIVITY ON THE RADIO AND
4 WHERE THEY SAID THAT WE HAD AN ARMED SUSPECT RUN
5 INTO THE STORE AT CHURCH AND CRESCENT. I HEARD IT
6 ON THE RADIO, ON THE POLICE RADIO WAS THE FIRST
7 INITIATION THAT I HEARD.

8 Q. WERE YOU ACTUALLY ON THE JOB AT THAT POINT IN TIME
9 OR WERE YOU GOING TO THE JOB?

10 A. WELL, AS A POLICE OFFICER, YOU'RE ALWAYS ON THE JOB,
11 SO I MEAN, IT WASN'T AN OFF DUTY SITUATION. I WAS
12 ACTUALLY RESPONDING TO MY OFFICE TO BEGIN MY DAY
13 BECAUSE MOST OF MY WORK NOW IS ADMINISTRATIVE.

14 Q. RIGHT. SO, DID YOU JUST DRIVE STRAIGHT DOWN THERE
15 TO THE SCENE?

16 A. I DID, SIR.

17 Q. AND WHEN YOU GOT TO THE SCENE, WHAT DID YOU OBSERVE?

18 A. WELL, WHEN WE FIRST GOT THERE, WE HAD A SITUATION
19 WHERE WE HAD A KNOWN ARMED SUSPECT IN THE BUILDING.
20 WE IMMEDIATELY BEGAN TO SET UP A PERIMETER FOR THE
21 SAFETY OF THE PUBLIC. OBVIOUSLY, IT WAS VERY EARLY
22 IN THE MORNING, A LOT OF TRAFFIC ON THE STREET, BOTH
23 ON CRESCENT AND CHURCH STREET, AS WELL AS BOMAR ON
24 THE ADJACENT INTERSECTION. SO, THERE WAS A LOT OF
25 ACTIVITIES THAT WE WERE TRYING TO COORDINATE WHEN I

1 FIRST ARRIVED.

2 Q. WHEN YOU FIRST ARRIVED, WHO WAS THERE FROM THE CITY?

3 A. THERE WERE A NUMBER OF OFFICERS THERE. I DON'T
4 RECALL EXACTLY EVERYONE THAT WAS THERE. THERE WAS
5 LIEUTENANT STEVE LAMB OF CRIMINAL INVESTIGATIONS.
6 THERE WERE SEVERAL MARKED CARS THAT HAD RESPONDED
7 DURING THE FOOT PURSUIT THAT WERE ALREADY THERE IN
8 THE AREA.

9 Q. WAS THIS SUSPECT CONSIDERED ARMED AND DANGEROUS?

10 A. WITHOUT QUESTION. ANYBODY THAT'S ARMED IS
11 DANGEROUS.

12 Q. DOES THAT PUT THEM INTO A DIFFERENT CATEGORY IN
13 TERMS OF WHAT TYPE OF FORCE YOU COULD USE AGAINST
14 THEM?

15 A. ANYTIME THERE'S AN ARMED INDIVIDUAL, YES, SIR, IT
16 CHANGES THE CATEGORY.

17 Q. WHAT CATEGORY WAS IT?

18 A. WELL, HE HADN'T COMMITTED ANY CRIME IN OUR PRESENCE,
19 TO OUR KNOWLEDGE, OTHER THAN THE TRAFFIC OFFENSE OF
20 WHICH HE WAS BEING STOPPED FOR. SO, AT THAT TIME,
21 YOU DON'T HAVE THE INTELLIGENCE TO KNOW THE
22 BACKGROUND. THE PRESENTATION OF A WEAPON AND A FOOT
23 PURSUIT OBVIOUSLY PUTS HIM IN A TOTALLY DIFFERENT
24 PERSPECTIVE. YOU KNOW, HE'S NOT YET DECLARED A
25 FLEEING FELON, BUT HE'S POSING A THREAT TO THE

1 SOMETHING TO STOP HIM.

2 A. THERE'S A GREAT DEAL OF -- I MEAN, YOU'RE ASKING ME
3 TO THINK IN A HYPOTHETICAL SITUATION. I'VE BEEN IN
4 THOSE SITUATIONS, AND OBVIOUSLY WE'RE IN THE
5 BUSINESS OF SAVING LIVES AND NOT TAKING LIVES.
6 THERE'S A GREAT DEAL OF SCRUTINY AND MONDAY MORNING
7 QUARTERBACKING AND YOU'RE ASKING ME WHAT WOULD I DO
8 IN THAT SITUATION. YOU'RE ASKING ME TO SPECULATE ON
9 SOMETHING THAT ---

10 Q. WELL, NOT REALLY. WHAT I'M ASKING YOU IS IF THE
11 OFFICER HAD USED HIS WEAPON AND STOPPED THIS SUSPECT
12 BEFORE HE RAN INTO THIS STORE, UNDER THE FACTS OF
13 THE SUSPECT BRANDISHING A WEAPON, GETTING READY TO
14 GO INTO A PUBLIC PLACE, WOULD THAT SHOOTING BE
15 JUSTIFIED?

16 A. I DON'T KNOW THAT.

17 Q. AND HOW WOULD YOU MAKE THE DETERMINATION? I MEAN

18 ---

19 A. WITH THE FACTS THAT I HAVE OF THE CASE, I THINK IT
20 WOULD BE QUESTIONABLE WHETHER IT WOULD BE JUSTIFIED.

21 Q. AND THE FACTS AS YOU UNDERSTOOD THEM WERE?

22 A. WE HAD A SUSPECT THAT WAS STOPPED FOR A TRAFFIC
23 CHARGE WHO, DURING THE FOOT PURSUIT, PRESENTED A
24 WEAPON IN SOME FORM OR FASHION. HE FLED FROM THE
25 OFFICERS, AND AS HE FLED, HE RAN INTO A BUILDING.

1 Q. SO, YOU GET ON THE SCENE. IS IT SOMETIME BETWEEN
2 8:00 AND 9:00 IN THE MORNING?

3 A. YES, SIR, THAT'S CORRECT.

4 Q. BY THE WAY, DOUG, I'M GOING TO NEED TO ASK YOU A
5 LITTLE BIT ABOUT YOUR FAMILY BACKGROUND FOR JURY
6 PURPOSES.

7 A. SURE.

8 Q. WHO ARE YOU MARRIED TO?

9 A. JANET HORTON.

10 Q. AND HER MAIDEN NAME?

11 A. ANTHONY, JANET ANTHONY.

12 Q. IS SHE FROM THE SPARTANBURG AREA?

13 A. SHE IS, SIR.

14 Q. AND YOU'RE FROM THE SPARTANBURG AREA?

15 A. I AM, SIR.

16 Q. DO YOU HAVE BROTHERS AND SISTERS?

17 A. YES, SIR, I HAVE TWO BROTHERS AND TWO SISTERS. ONE
18 OF MY SISTERS IS DECEASED, BUT MY OLDEST SISTER
19 STILL LIVES HERE IN SPARTANBURG.

20 Q. WHAT ARE YOUR SISTERS' NAMES, INCLUDING THE ONE
21 THAT'S DECEASED?

22 A. BARBARA FAY LONG, WHO LIVED IN CHAPIN AT HER DEATH.
23 HER HUSBAND IS DR. GERALD LONG. HE'S A CHIROPRACTOR
24 IN CHAPIN. HE WAS A SCHOOL TEACHER IN BOILING
25 SPRINGS. VONNIE RAFF IS MY OLDEST SISTER WHO LIVES

1 ACADEMY IN SOUTH CAROLINA.

2 Q. DID YOU EVER DEAL WITH HOSTAGE TAKING?

3 A. SURE.

4 Q. IN WHAT RESPECT?

5 A. WELL, I'VE BEEN TRAINED IN IT. I'VE TAKEN SOME
6 PRELIMINARY COURSES IN NEGOTIATION AND I'VE TAKEN
7 SWAT TRAINING, OBVIOUSLY. SO, THOSE ARE TOUCHED ON
8 AT DIFFERENT SCHOOLS AND DIFFERENT TRAINING THAT YOU
9 GO INTO.

10 Q. HAVE YOU EVER BEEN IN CHARGE OF THE SWAT TEAM?

11 A. YES, SIR, I HAVE.

12 Q. NOW, IN SERGEANT MOORE'S DEPOSITION, HE TALKED ABOUT
13 BUILDING ENTRY, STEALTH OR DYNAMIC.

14 A. THAT'S CORRECT.

15 Q. WHAT DOES THAT MEAN TO YOU?

16 A. WELL, DYNAMIC IS OBVIOUSLY YOU'RE WORKING WITH AN
17 ELEMENT OF SURPRISE. YOU DON'T CARE IF ANYBODY
18 KNOWS THAT YOU'RE THERE. AND OBVIOUSLY, STEALTH IS
19 JUST THE OPPOSITE. STEALTH ENTRY IS WHEN YOU WANT
20 TO DO IT AS QUIETLY AND AS SECRETIVELY AS POSSIBLE
21 AND MAKE NO ONE AWARE OF WHAT YOU'RE DOING.

22 Q. IN THIS SITUATION, SERGEANT MOORE TALKED ABOUT A
23 COMMAND POST.

24 A. THAT'S CORRECT.

25 Q. WHO WAS IN THE COMMAND POST DURING THIS JULY 19,

1 '04, INCIDENT?

2 A. WELL, IT CHANGED AND VARIED THROUGH THE DAY. I WAS
3 THERE THROUGHOUT THE ENTIRE DAY. COLONEL KENDALL
4 WAS THERE THROUGHOUT THE DAY. DIRECTOR FISHER WAS
5 THERE. MR. PATEL CAME UP WITH US IN THE COMMAND
6 POST SOME. WE HAD THE CHAPLAIN THERE AT SOME POINT
7 IN TIME. WE HAD THE SPARTANBURG MENTAL HEALTH COME
8 AND ASSIST US WITH NEGOTIATIONS. THE FBI, S.L.E.D,
9 SPARTANBURG COUNTY SHERIFF'S DEPARTMENT, I MEAN,
10 THERE WERE -- AS THE DAY PROGRESSES, THERE'S A
11 MULTITUDE OF DIFFERENT AGENCIES THAT WORKED IN AND
12 OUT OF THE COMMAND POST.

13 Q. WHO WERE THE DECISION MAKERS?

14 A. THAT WOULD HAVE BEEN TONY FISHER, JENNIFER KENDALL,
15 AND I.

16 Q. DID YOU ALL AUTHORIZE THE USE OF THIS BULLDOZER?

17 A. YES, SIR, WE DID.

18 Q. WHO CAME TO THAT DECISION?

19 A. TONY FISHER MADE THE FINAL DECISION.

20 Q. ALL RIGHT.

21 BY MR. HODGE:

22 LET'S GO OFF THE RECORD.

23 (OFF THE RECORD)

24 EXAMINATION RESUMED BY MR. HODGE:

25 Q. DOUG, WE WERE -- I GOT SOME BACKGROUND INFORMATION

1 A. NO, SIR, WE DID NOT.

2 Q. WERE YOU IN A POSITION WHERE YOU COULD HAVE USED A
3 GUN AT THAT POINT IN TIME AND SHOT THE SUSPECT?

4 A. THERE'S A LOT OF UNKNOWN'S THERE BEFORE WE WOULD -- I
5 MEAN, WE WOULD NOT HAVE JUST INVARIABLY SHOT THROUGH
6 A WINDOW OR A DOOR. YOU'VE GOT TO TAKE INTO
7 CONSIDERATION WHAT THE GLASS DOES. THE DOOR ALSO
8 HAD METAL MESH ACROSS IT. I'M VERY FAMILIAR WITH
9 THAT BUILDING. I POLICED THAT AREA OF THE CITY MANY
10 YEARS AGO WHEN HAROLD SHERBERT RAN AN AMERICAN
11 STATION DOWN THERE. THE BUILDING IS BASICALLY A
12 BUNKER. I MEAN, IT USED TO HAVE TWO BATHROOMS ON
13 THE BACK CORNER THAT YOU WENT TO FROM THE OUTSIDE.
14 I MEAN, YOU KNOW, THE TYPICAL AMERICAN SERVICE
15 STATION, TWO BAYS THAT YOU DROVE INTO, A CAR WASH
16 BAY AND AN OIL CHANGE BAY. SO, THERE'S NO EXTERIOR
17 DOORS WHEN THIS BUILDING WAS MODIFIED. SO, YOU'VE
18 GOT THE TWO DOORS. THE WINDOWS TO THE RIGHT ARE ALL
19 BLOCKED BY VENDING MACHINES. THE ONE TO THE LEFT IS
20 WHERE THE CASHIER STANDS AND IS THE ONLY AREA THAT
21 YOU CAN ACTUALLY SEE INTO THE BUILDING.

22 (OFF THE RECORD)

23 EXAMINATION RESUMED BY MR. HODGE:

24 Q. YOU GET TO THE SCENE AND TELL ME WHAT YOU SEE AND
25 WHAT YOU DO.

1 A. FIRST GET THERE, THE FIRST THING WE'RE DOING IS WE
2 KNOW WE'VE GOT AN ARMED SUSPECT IN THE BUILDING.
3 SO, THE SAFETY OF EVERYBODY AROUND, AS WELL AS THE
4 SAFETY IS PARAMOUNT TO US, AS WELL AS THE OFFICERS.
5 SO, WE START IMMEDIATELY CUTTING OFF TRAFFIC AND
6 REROUTING TRAFFIC, GETTING IT AWAY FROM THE
7 BUILDING, NOT LETTING ANYBODY COME INTO THE PARKING
8 LOT. I MEAN, ALL OF THOSE THINGS ARE IMPORTANT TO
9 US AS WE CONTROL THAT ENVIRONMENT AROUND THAT STORE.

10 Q. OKAY.

11 A. IT'S PRETTY CHAOTIC THE FIRST FEW MINUTES WHEN
12 SOMETHING LIKE THAT HAPPENS. WE KNOW WE'VE GOT AN
13 ARMED SUSPECT. WE KNOW WE'VE GOT A VICTIM. WE'VE
14 GOT SOMEBODY BEING HELD AGAINST THEIR WILL. SO,
15 THERE'S A LOT GOING THROUGH YOUR MIND AS ALL OF THIS
16 TAKES PLACE, OBVIOUSLY.

17 Q. WHO DO YOU CALL IN, IF ANYBODY?

18 A. WE JUST STARTED CALLING IN RESOURCES, AT THAT TIME,
19 HOPING THAT WE WOULD RESOLVE IT FAIRLY QUICKLY, BUT
20 WE WANTED TO BE SURE WE HAD THE NECESSARY RESOURCES
21 TO MAINTAIN THE PERIMETER, TO KEEP PEOPLE FROM
22 GETTING INTO IT OR ANYBODY FROM GOING OUT OF IT.
23 SO, INITIALLY, THE STRATEGY IS WE'RE GOING TO
24 ESTABLISH SOME KIND OF COMMUNICATION WITH THIS GUY,
25 GET HIM TO COME OUT, SURRENDER TO US, AND WE WANT IT

1 SAFE AS HE DOES THAT. WE'RE NOT IN THE BUSINESS OF
2 TAKING LIVES, NOR ARE WE IN THE BUSINESS OF GIVING
3 LIVES UP. SO, WE DON'T WANT ANY OF OUR PEOPLE TO BE
4 KILLED OR INJURED, NOR DO WE WANT ANY CITIZEN, NOR
5 DO WE WANT A SUSPECT. I MEAN, TAKING A HUMAN LIFE
6 IS -- THAT'S WHAT WE'RE ALL ABOUT, IS SAVING LIVES.

7 Q. ALL RIGHT. SO, THAT IS DIRECTLY UNDER YOUR
8 DEPARTMENT, RESOURCES, I THINK YOU MENTIONED THAT TO
9 ME EARLIER.

10 A. SURE.

11 Q. WHAT RESOURCES DID YOU CALL IN?

12 A. WELL, WE CALLED ON DUTY PEOPLE JUST TO GET THE
13 PERIMETER -- I MEAN, WE CALLED AND GOT ADDITIONAL
14 LAW ENFORCEMENT. WE CALLED FOR THE SHERIFF'S
15 DEPARTMENT TO ASSIST. THE CITY LIMITS ARE
16 RELATIVELY CLOSE IF YOU CONTINUE ON SOUTH CHURCH AS
17 YOU GO UNDER THE UNDERPASS A COUPLE OF HUNDRED FEET
18 AND THEN YOU'RE IN THE COUNTY. SO, WE GOT -- WE
19 DON'T EVEN WANT PEOPLE COMING UP CHURCH STREET, SO
20 WE'RE TRYING TO FIGURE OUT A WAY TO ALTER THE -- AND
21 YOU'RE LOOKING AT 8:00 RUSH HOUR TRAFFIC. SO,
22 THERE'S A LOT OF TRAFFIC COMING IN FROM ROEBUCK,
23 WOODRUFF AREA. SO, WE'RE GETTING THE SHERIFF'S
24 DEPARTMENT, NOTIFY THE HIGHWAY PATROL AND ASKED FOR
25 THEIR ASSISTANCE, WHICH IS DIFFICULT TO GET MANY

1 TIMES. SO, THE SHERIFF'S DEPARTMENT ACTUALLY JUMPED
2 IN THERE AND HELPED US WITH THE TRAFFIC SITUATION.

3 Q. ALL RIGHT. DID YOU CALL IN SWAT OR ---

4 A. NOT INITIALLY. NOT INITIALLY, WE DID NOT.

5 Q. TELL ME WHAT YOU DID THAT FIRST HOUR OR TWO.

6 A. WELL, THAT FIRST HOUR, ONCE THE COLONEL AND I GOT
7 OUR HEADS TOGETHER, AND OF COURSE, WHAT YOU DO IS
8 TRY TO ISOLATE AND SECURE THE AREA AND CONTROL THE
9 ENVIRONMENT AND TIME IS CERTAINLY ON OUR SIDE. SO,
10 WE WANT TO ESTABLISH COMMUNICATIONS OR SOME TYPE OF
11 NEGOTIATION, NUMBER ONE. AND THEN, NUMBER TWO IS WE
12 START CONTROLLING THE ENVIRONMENT. WE GO AHEAD AND
13 SET UP OUR PERIMETER. WE CALL IN A COMMAND POST
14 AFTER THE FIRST HOUR WHEN WE SEE THAT WE'RE NOT --
15 WE'RE STILL NEGOTIATING, BUT WE DON'T APPEAR TO BE
16 GETTING ANYWHERE OR BEING VERY SUCCESSFUL WITH IT.
17 SO, WE SET UP THAT THING WHERE WE SET UP OUR
18 RESOURCES WHERE WE CAN STAY AS LONG AS WE NEED TO.
19 WE CAN START DOING SHIFT WORK. WE CAN BRING PEOPLE
20 IN AND OUT. WE START LINING UP NEGOTIATIONS,
21 NEGOTIATORS, ADDITIONAL EQUIPMENT, GET ADDITIONAL
22 RESOURCES. WE START LOOKING FOR THINGS LIKE
23 PREPARING FOOD FOR THE EMPLOYEES, ROTATING PEOPLE IN
24 AND OUT SO THAT YOU DON'T WEAR PEOPLE DOWN. AND OF
25 COURSE, AFTER WE DETERMINED THAT YES, WE'RE GOING TO

1 BE HERE, WE WENT AHEAD AND CALLED AND ACTIVATED THE
2 TACTICAL NEUTRALIZATION TEAM AND PUT THEM ON ALERT.

3 Q. WHO IS "WE"?

4 A. THE COLONEL AND I. THE COLONEL AND I WERE, AT THAT
5 TIME, MAKING THE CALLS ON EVERYTHING. WE WERE DOING
6 IT TOGETHER.

7 Q. IN THE FIRST HOUR OR TWO, WHO WAS DOING THE
8 NEGOTIATING?

9 A.. CHRIS TAYLOR WAS ALREADY INVOLVED IN IT. LIEUTENANT
10 STEVE LAMB WAS ALREADY INVOLVED IN THE NEGOTIATIONS.
11 THEY WERE ALREADY TALKING TO HIM. I MEAN, JUST AS
12 SOON AS WE COULD MAKE CONTACT VIA THE CELL PHONE.

13 Q. HOW DID HE GET THE CELL PHONE?

14 A. HE ACTUALLY HAD A CELL PHONE, ORIGINALLY. NOW, WE
15 GOT HIM SOME CELL PHONES DURING THE DAY. WE
16 ACTUALLY HAD THE ROBOT CARRY HIM A COUPLE DOWN THERE
17 ONCE WE GOT THE ROBOT IN PLACE, BUT THAT WAS LATER
18 ON IN THE DAY. OBVIOUSLY, THAT WASN'T EARLY IN THE
19 MORNING, NO, SIR.

20 Q. DID YOU VISUALLY SEE THE SUSPECT?

21 A. NO, SIR, I NEVER SAW HIM. NO, SIR, I DID NOT.

22 Q. WERE YOU IN A POSITION TO SEE HIM OR WERE YOU IN
23 ANOTHER AREA?

24 A. I WAS STANDING AT THE END OF THE COMMAND POST ON
25 SEAY STREET, WHICH IS THE FIRST STREET ON THE NORTH

1 SIDE OF THE STORE. WE SET UP THE COMMAND POST, USED
2 THE TIRE COMPANY THERE AS THE BARRIER BETWEEN US AND
3 THE OTHER STORE AND SET THE COMMAND POST UP.

4 Q. IS THAT, LIKE, A MOBILE HOME OR SOMETHING?

5 A. YES, IT'S A WINNEBAGO THAT'S BEEN CONVERTED TO A LAW
6 ENFORCEMENT COMMAND POST.

7 Q. IT'S A CITY-OWNED ---

8 A. WE BOUGHT IT -- THE CITY BOUGHT IT USING LOCAL LAW
9 BLOCK MONEY BACK IN THE LATE '90S. IT'S COMPUTER --
10 IT'S FULL OF COMPUTERS, FULL OF EQUIPMENT. IT'S GOT
11 A TELESCOPING VIDEO CAMERA SYSTEM. SO, WE ACTUALLY
12 RAN THE CAMERA UP WHERE WE COULD WATCH WHAT WAS
13 GOING ON, TRAINED IT ON THE FRONT DOOR OF THE
14 BUILDING. ANY ACTIVITY, WE COULD SEE ALL OF IT AND
15 YOU NEVER HAD TO COMPROMISE YOUR SAFETY. I STOOD
16 OUT AT THE END OF THE COMMAND POST AND COULD HAVE A
17 VISUAL OF THE FRONT OF THE BUILDING PROBABLY THE
18 MAJORITY OF THAT DAY.

19 Q. DID YOU SET UP ANY SNIPERS OR WAS THAT AFTER THE
20 SWAT TEAM ---

21 A. THE SWAT TEAM ACTUALLY COMES BEFORE WE ACTIVATE THE
22 SNIPER. WE DO A BRIEF AND WE TELL THEM ALL THE
23 INTELLIGENCE. WE'RE TRYING TO FIND OUT ALL WE CAN
24 ABOUT THIS INDIVIDUAL, TOO. WHO IS HE, WHAT'S HE
25 DONE, WHY IS HE CONFRONTATIONAL, HAS HE HAD A BAD

1 EXPERIENCE WITH THE FAMILY. ALL OF THOSE THINGS ARE
2 VERY IMPORTANT, AND THE NEGOTIATOR, IN HIS PROCESS,
3 IS TRYING TO OBTAIN THAT SAME INFORMATION, BUT WE'RE
4 LOOKING TO OTHER SOURCES. WE'RE LOOKING TO FAMILY
5 MEMBERS. WE'RE LOOKING TO GIRLFRIENDS, BOYFRIENDS,
6 WHERE HE'S BEEN ALL NIGHT. WE TRY TO TRACE IT BACK
7 TO DEVELOP SOME INTELLIGENCE TO UNDERSTAND WHAT IS
8 GOING ON WITH THIS INDIVIDUAL.

9 Q. DID YOU FIND OUT THAT THIS FELLOW HAD A HISTORY OF
10 KIDNAPPING?

11 A. WE FOUND OUT QUITE A BIT ABOUT HIM, YES, SIR. WE
12 HAD A CRIMINAL RECORD ON HIM AND ---

13 Q. HOW SOON DID YOU FIND THAT OUT?

14 A. IT WAS PROBABLY -- IT WAS CERTAINLY WITHIN THE FIRST
15 HOUR, FIRST HOUR AND A HALF. WE'VE GOT THAT INTEL
16 THAT'S COMING IN. WE'RE GETTING IT PRETTY FAST.

17 Q. OKAY.

18 A. WE'VE GOT A LOT OF PEOPLE WORKING ON IT. EVERYBODY
19 THAT'S WORKING NOT ON THE SCENE. WE'VE GOT ALL THE
20 CRIMINAL INVESTIGATORS ACTIVATED. THEY'RE WORKING
21 COMPUTERS, THEY'RE LOOKING AT CRIMINAL OFFENSES,
22 THEY'RE LOOKING AT CRIMINAL HISTORIES, SEEING WHAT
23 THEY CAN FIND OUT ABOUT THIS INDIVIDUAL'S PAST.

24 Q. SO, WHEN YOU FOUND OUT ABOUT THIS GUY AND YOU KNEW
25 HIS HISTORY, HOW WOULD YOU CLASSIFY HIM?

1 A. THAT HE WAS POTENTIALLY A GREAT THREAT NOT ONLY TO
2 THE LADY THAT HE HAD WITH HIM, BUT TO ANYBODY ELSE
3 THAT HAD THE OPPORTUNITY. HE HAD A DRUG HISTORY.
4 HE HAD A VIOLENT CRIME HISTORY. HE'S ONE OF THOSE
5 UNDESIRABLE CITIZENS THAT WE SOMETIMES HAVE TO COME
6 IN CONTACT WITH.

7 Q. AND DID YOU HAVE THAT INFORMATION BY THE TIME HE
8 STARTED COMING TO THE DOOR?

9 A. WHEN HE STARTED COMING TO THE DOOR?

10 Q. YES.

11 A. YES, WE HAD THAT INFORMATION, SURE.

12 Q. SO, WHY WASN'T HE TAKEN OUT THEN?

13 A. ANYTIME THAT THE OFFICER FELT LIKE HE HAD -- ONCE
14 THE SNIPER WAS IN PLACE, HE WAS GIVEN THE AUTHORITY
15 TO TAKE THE SHOT IF HE FELT LIKE HE HAD A SHOT AND
16 WOULD NOT ENDANGER ANYBODY ELSE OTHER THAN THE
17 SUSPECT. THE SNIPER'S RESPONSIBILITY, FIRST OF ALL,
18 IS INTELLIGENCE. THAT'S WHAT YOU USE A SNIPER FOR.
19 WE'RE NOT IN THE EXECUTION BUSINESS. WE'RE NOT
20 ABOUT KILLING PEOPLE. KILLING IS A LAST RESORT.
21 THAT'S THE LAST THING THAT WE WANT TO DO, IS TO TAKE
22 A PERSON'S LIFE, REGARDLESS OF WHAT THEY DO.
23 THEY'RE STILL A HUMAN BEING AND WE STILL DON'T WANT
24 TO TAKE THAT LIFE. SO, THAT SNIPER'S RESPONSIBILITY
25 IS INTELLIGENCE. HE'S LOOKING FOR MOVEMENT. YOU'VE

1 GOT TO REALIZE THAT WE CUT THE POWER TO THE
2 BUILDING, SO THERE'S NO LIGHT IN THE BUILDING.
3 THERE'S VERY LIMITED LIGHTS, NATURAL LIGHT ---

4 Q. WHEN WAS THE DECISION MADE TO CUT THE POWER TO THE
5 BUILDING?

6 A. RIGHT OFF THE BAT. AS SOON AS I GOT SOMEBODY THERE
7 THAT COULD PULL THE POWER, WE HAD THE POWER OFF.

8 Q. WHY DID YOU MAKE THAT DECISION?

9 A. ONE OF THE FIRST THINGS THEY TEACH YOU IN TACTICAL
10 IS THAT YOU CONTROL THE ENVIRONMENT. SO, ONE OF THE
11 THINGS THAT YOU DO IS YOU TAKE POWER AWAY AND YOU
12 TAKE AWAY WATER, YOU TAKE AWAY ALL THOSE LIFE
13 CONVENIENCES, BECAUSE OBVIOUSLY, ONE OF THE THINGS
14 THAT YOU WANT TO DO IS MAKE THE ENVIRONMENT AS LEAST
15 DESIRABLE AS POSSIBLE. IT CONTRIBUTES TO THAT
16 INDIVIDUAL AND YOU HAVE TO WEIGH IT AS THE DAY GOES
17 ON. BUT THE IDEA IS TO MAKE IT AN UNDESIRABLE
18 ENVIRONMENT, DARKNESS. HE DOESN'T CONTROL -- HE
19 LOSES TOTAL CONTROL OF EVERYTHING. THE IDEA IS FOR
20 US TO CONTROL IT.

21 Q. AND IT WAS JULY OF '04, SO IT WAS PRETTY HOT THAT
22 DAY OUT THERE?

23 A. IT WAS VERY HOT, YES, SIR.

24 Q. IS THERE EVER A CONSIDERATION THAT CREATING SUCH AN
25 ENVIRONMENT MIGHT ESCALATE THE SITUATION?

1 A. AND THAT'S SOMETHING YOU HAVE TO CONSTANTLY WEIGH
2 AND THAT'S WHY YOU GET THE MENTAL HEALTH PEOPLE
3 INVOLVED. WE OBVIOUSLY DON'T HAVE THE EXPERTISE AND
4 TRAINING OF DOCTORS AND MENTAL HEALTH SPECIALISTS.
5 SO, ONE OF THE THINGS THAT WE DO WHEN WE GET INTO A
6 NEGOTIATION SITUATION IS GET A MENTAL HEALTH PERSON
7 INVOLVED WHO IS ABLE TO ANALYZE MOOD SWINGS, TONES
8 OF VOICE, RESPONSES BASED ON QUESTIONS, MAYBE EVEN
9 ASK THEM STRUCTURED QUESTIONS THAT THEY WOULD GIVE
10 US TO ASK TO SEE WHAT KIND OF RESPONSE. SO, THAT'S
11 WHAT YOU HAVE TO DO IN ORDER TO BE SUCCESSFUL IN THE
12 NEGOTIATIONS.

13 Q. WHAT MENTAL HEALTH PROFESSIONAL DID YOU ALL ENLIST?

14 A. WELL, WE ACTUALLY CALLED SPARTANBURG MENTAL HEALTH
15 AND I SENT A MARKED PATROL CAR TO PICK UP ONE OF THE
16 PEOPLE FROM MENTAL HEALTH, AND I DON'T HAVE HIS NAME
17 IN FRONT OF ME, BUT I'M SURE IT'S IN THE RECORDS, A
18 GENTLEMAN WHO ACTUALLY CAME AND STAYED WITH US
19 THROUGHOUT THE EVENING.

20 Q. DID THAT PERSON HAVE EXPERIENCE IN HOSTAGE
21 NEGOTIATIONS?

22 A. I DON'T KNOW THAT. I DON'T KNOW THAT. MOST OF THEM
23 DO NOT. MOST MENTAL HEALTH PEOPLE THAT ARE INVOLVED
24 IN SITUATIONS LIKE THAT DON'T HAVE PRIOR EXPERIENCE
25 AND WE DON'T LOOK FOR THEM TO BE NEGOTIATORS. THEY

1 DON'T GET INVOLVED IN THE ACTUAL DISCUSSION WITH
2 THAT INDIVIDUAL. WHAT WE USE THEM FOR IS A RESOURCE
3 FOR US TO ANALYZE THAT PERSON AND WHAT HAVE YOU.

4 Q. WHAT DID YOU LEARN THROUGH THE USE OF THE MENTAL
5 HEALTH PROFESSIONALS?

6 A. I DON'T KNOW. I WAS NOT IN THAT -- I WAS IN THE
7 OPERATIONS SIDE. I'M ON THE OUTSIDE, HE'S ON THE
8 INSIDE OF THE COMMAND POST IN THE NEGOTIATION ROOM
9 WITH COLONEL KENDALL WITH THE NEGOTIATORS. I'M ON
10 THE OUTSIDE TAKING CARE OF OPERATIONS. SO, I DON'T
11 KNOW. I DON'T KNOW THAT.

12 Q. SO, WHAT HAPPENS? JUST TAKE ME THROUGH THE REST OF
13 YOUR DAY.

14 A. WE LOOK AT ALL ALTERNATIVES. THERE'S SOMETHING THAT
15 YOU LEARN VERY EARLY IN SURVIVAL IN LAW ENFORCEMENT
16 THAT'S CALLED A FATAL FUNNEL. THE FATAL FUNNEL IS
17 THAT AREA INSIDE OF THE DOOR, INSIDE OF THE WINDOW
18 WHERE YOU BECOME A SILHOUETTE. WHENEVER A POLICE
19 OFFICER GOES INTO A BUILDING, IF I WALK INTO THAT
20 DOOR, I'VE GOT THE RESPONSIBILITY FOR EVERYTHING IN
21 THIS ROOM. BUT IF YOU'VE GOT AN ARMED SUSPECT IN
22 THIS ROOM, HE TRAINS ALL OF HIS ENERGIES AND ALL OF
23 HIS ATTENTION TO THAT DOOR BECAUSE THAT'S HIS ONLY
24 THREAT. SO, ANYTIME THAT YOU GO INTO, WHETHER OR
25 NOT IT'S A SITUATION LIKE THIS OR ANY OTHER TIME

1 THAT A POLICE OFFICER WALKS INTO A BUILDING, HE
2 PLACES HIMSELF IN PERIL SIMPLY BY WALKING THROUGH
3 THAT DOOR WHERE YOU BECOME A SILHOUETTE. SO, WE
4 WERE LOOKING FOR A WAY TO GET INTO THAT BUILDING
5 FROM THE VERY FIRST THING. HOW CAN WE GET IN TO
6 THIS SUSPECT WITHOUT ENDANGERING OUR PEOPLE OR
7 ENDANGERING OUR CITIZENS AND THAT BECOMES PARAMOUNT.
8 WE LOOKED AT WAYS TO INTRODUCE GAS INTO THAT
9 BUILDING. AS I TOLD YOU EARLIER, I HAD A VERY GOOD
10 KNOWLEDGE -- I ARRESTED HAROLD SHERBERT MANY TIMES
11 OUT OF THAT SERVICE STATION WHENEVER HE WOULD BE
12 DOWN THERE IN THE MIDDLE OF THE NIGHT DRUNK OR WHAT
13 HAVE YOU, GOT HIM OUT OF HIS BATHROOM. SO, I WAS
14 VERY, VERY KNOWLEDGEABLE OF HOW THAT BUILDING WAS
15 CONSTRUCTED. BUT WE CALLED THE FIRE DEPARTMENT TO
16 SEE IF THERE WERE ANY PRE-FIRE PLANS THAT HAD --
17 BECAUSE WHEN THEY DO PRE-FIRE FIRE PLANS, THEY DO
18 SKETCHES OF THE INTERIOR AND THE EXTERIOR OF THE
19 BUILDING AND THE ROOF. THEY GAVE ME THE
20 INTELLIGENCE THAT THEY WERE SURE THAT THERE WAS A
21 FALSE CEILING IN THAT BUILDING, WHICH I ALREADY KNEW
22 BECAUSE, AS I SAID. WE WENT IN THE COMMAND POST.
23 WE USED THE TELESCOPING CAMERA AND WE SEARCHED EVERY
24 SQUARE INCH WITH A TELEPHOTO LENS OF THE ROOF OF
25 THAT BUILDING TO SEE IF THERE WERE ANY PORTALS OR

1 ACCESS FROM THE ROOF, REALIZING THAT MAYBE AS FAR AS
2 WE COULD GET WOULD BE DOWN TO A FALSE CEILING IF
3 THERE WAS A HATCH OR SOME TYPE OF DUCT WORK THERE.
4 OBVIOUSLY, WE DIDN'T FIND ONE. WE INTRODUCED GAS
5 INTO THE BUILDING THROUGH THE DUCT WORK. THERE'S A
6 HEATING AND AIR CONDITIONING SYSTEM ON THE MIDDLE OF
7 THE BACK OF THE BUILDING. WE ACTUALLY TOOK THE
8 PANELS OFF OF IT AND INTRODUCED GAS IN THERE.
9 AGAIN, THE THING YOU POINTED OUT A WHILE AGO,
10 SOMETIMES THAT ESCALATES AND YOU HAVE TO BE CAREFUL
11 AS YOU INTRODUCE THE DIFFERENT TYPES OF GAS IN
12 THERE. YOU'VE ALSO GOT TO BE CONCERNED ABOUT YOUR
13 VICTIM BECAUSE IT DOES THE SAME THING TO A VICTIM
14 THAT IT DOES TO THE SUBJECT.

15 Q. I APPRECIATE YOUR ANSWERS, BUT I'D LIKE YOU TO KIND
16 OF TELL ME SPECIFICALLY, YOU KNOW, TAKING IT FROM
17 TOP TO BOTTOM. THE GAS WASN'T UNTIL TOWARDS THE
18 END, WAS IT?

19 A. NO, SIR. THERE WAS GAS INTRODUCED -- WE INTRODUCED
20 OC SPRAY EARLY ON INTO THE INCIDENT.

21 Q. MAYBE IF WE CHECK THE ---

22 A. WE CONTINUED TO INTRODUCE GAS ---

23 Q. HOLD ON JUST A SECOND. WE'VE INTRODUCED TO SERGEANT
24 MOORE'S DEPOSITION PLAINTIFF'S EXHIBIT SEVEN. IF
25 YOU WOULD LOOK IN THE TOP RIGHT, BEGINNING ON PAGE

1 SEVEN, DO YOU SEE WHERE IT SAYS OPERATIONS SUMMARY
2 DEBRIEFING?

3 A. YES, SIR.

4 Q. IS THIS A PRETTY GOOD OUTLINE OF WHAT'S GOING ON
5 DURING THE DAY?

6 A. THIS IS AN OUTLINE OF WHAT'S GOING ON WITH TACTICAL.

7 Q. WITH TACTICAL?

8 A. THAT'S CORRECT. TACTICAL SETS UP THEIR OWN
9 STENOGRAPHER, RECORDER, IF YOU WILL, WHO KEEPS A LOG
10 FOR TACTICAL.

11 Q. NOW, DO YOU HAVE A SIMILAR DOCUMENT FOR OPERATIONS?

12 A. NO, SIR, I DO NOT.

13 Q. WOULD THIS DOCUMENT BE HELPFUL IN TRACKING SOME
14 OPERATIONS?

15 A. SURE IT WOULD.

16 Q. OKAY.

17 A. AND SOME OF THIS STUFF, I PROBABLY EVEN DIRECTED.

18 Q. ALL RIGHT.

19 A. I MEAN, THEY WOULD SAY, "WE NEED TO DO THIS," AND I
20 WOULD SAY, "DO IT."

21 Q. WHY DON'T WE GO DOWN BY TIME FRAMES. 8:08, TACTICAL
22 PAGED OUT. WHAT DOES THAT MEAN?

23 A. THEY WERE -- WE HAVE A PAGING SYSTEM WHERE WE
24 ACTUALLY SEND OUT A PAGE AND IT NOTIFIES ALL OF THEM
25 SIMULTANEOUSLY TO REPORT TO CITY HALL.

1 Q. NOW, 8:54, ART LITTLEJOHN IS THE HEAD OF SWAT, ISN'T
2 HE?

3 A. THAT'S CORRECT.

4 Q. AND HE BRIEFED THE TACTICAL -- WHAT IS THAT, TNT?

5 A. TACTICAL NEUTRALIZATION TEAM. WE DON'T CALL OURS
6 SWAT. SWAT IS INFLAMMATORY BY THE WORD "SWAT."
7 PEOPLE WILL THINK IMMEDIATELY COPS ON T.V.

8 Q. YES. SO, WHEN TNT IS USED, THAT'S EQUIVALENT TO A
9 SWAT TEAM?

10 A. THAT'S CORRECT, YES, SIR.

11 Q. SO, BY 8:54, YOU KNEW THAT HE HAD A HISTORY OF
12 VIOLENCE AND HAD COMMITTED ARMED ROBBERY?

13 A. THAT'S CORRECT.

14 Q. 9:02, DEPLOYED TO THE INCIDENT LOCATION. DOES THAT
15 MEAN THE TNT?

16 A. THAT'S CORRECT. THEY WENT, OBVIOUSLY, TO THE FUEL
17 PUMPS BETWEEN 145 BROAD STREET AND REPORTED TO THE
18 SCENE.

19 Q. 9:16, THEY'RE ON THE SCENE.

20 A. CORRECT.

21 Q. AND THEN, AT 9:32, THOMAS HEYDE ---

22 A. THOMAS HEYDE.

23 Q. HEYDE?

24 A. YES, SIR.

25 Q. KENNY COLLINS AND JIMMY FUQUA, ARE THEY MEMBERS OF

1 THE TNT?

2 A. THAT'S CORRECT. WELL, THEY WERE AT THAT TIME. ALL
3 THREE OF THEM ARE NO LONGER EMPLOYEES.

4 Q. NOW, LET'S KIND OF ACCLIMATE OURSELVES TO WHEN WE
5 SAY CRESCENT AVENUE SIDE, CAN WE SEE IN ANY OF THESE
6 PICTURES THE CRESCENT AVENUE SIDE?

7 A. HAVE YOU GOT A SHOT OF THE FRONT OF THE BUILDING? I
8 CAN TELL YOU. YES, THEY WERE STAGED -- THE TACTICAL
9 TEAM WAS ACTUALLY STAGED ---

10 Q. NOW, I DON'T WANT YOU TO WRITE ON IT, BUT JUST ---

11 A. I'M NOT GOING TO WRITE ON IT. I'M JUST GOING TO
12 POINT TO IT. THEY WERE ACTUALLY STAGED ON THIS
13 CORNER. THIS WOULD BE THE CRESCENT ---

14 Q. THE CORNER YOU'RE POINTING TO IS THE LEFT FRONT
15 CORNER OF THE BUILDING AS YOU'RE FACING IT?

16 A. THAT IS CORRECT. THAT IS THE CRESCENT AVENUE SIDE
17 OF THE BUILDING.

18 Q. ALL RIGHT. ARE THEY IN THE PARKING LOT OF THE STORE
19 ITSELF?

20 A. THAT'S CORRECT. THERE'S A TACTICAL MANEUVER CALLED
21 STACKING. AND WHEN YOU STACK, EACH INDIVIDUAL
22 OFFICER HAS A RESPONSIBILITY -- YOU'VE GOT A POINT
23 PERSON. YOU GET THE THIRD PERSON BACK IS ALWAYS
24 RESPONSIBLE FOR THE SECURITY OF THE TEAM. AND THEN
25 YOU'VE GOT A REAR SAFETY, BUT THERE WOULD BE FIVE

1 PEOPLE IN THE STACK WHO HAVE A RESPONSIBILITY.
2 THEY'RE THERE FOR RAPID DEPLOYMENT. IF AND WHEN THE
3 SITUATION HAD CHANGED WHERE THEY COULD HAVE DONE
4 SOMETHING, THEY WERE RIGHT THERE AS CLOSE AS THEY
5 COULD GET TO THAT DOOR WITHOUT BEING DETECTED. THE
6 PROBLEM WAS, OBVIOUSLY, THE WINDOW RIGHT BESIDE THE
7 DOOR, WHICH WAS THE ONLY WINDOW THAT WAS UNCOVERED
8 INITIALLY.

9 Q. SO, YOU'RE LOOKING FOR SORT OF A BLIND CORNER, LIKE
10 YOU KNOW, YOU'RE DRIVING IN A CAR AND THERE'S A
11 BLIND SPOT IN THE MIRROR?

12 A. SURE.

13 Q. YOU ALL WERE LOOKING FOR THAT BLIND SPOT?

14 A. THAT'S CORRECT, YES, SIR.

15 Q. ALL RIGHT. NOW, THERE WAS A COOLER ON THE BACK OF
16 THIS BUILDING. IS THAT RIGHT?

17 A. A COOLER?

18 Q. YES.

19 A. NO, THERE WAS -- ON THE OUTSIDE OF THE BUILDING,
20 THERE WAS A HEATING AND AIR CONDITIONING ---

21 Q. NOT ON THE OUTSIDE. I'M TALKING ABOUT THE INSIDE.
22 LET ME SHOW YOU ANOTHER EXHIBIT THAT'S GOT A LAYOUT
23 OF THE BUILDING.

24 A. HERE?

25 Q. YES. OKAY. MY UNDERSTANDING IS THE FIRST BREACH

1 OCCURRED WHERE THIS BATHROOM IS?

2 A. THAT'S CORRECT.

3 Q. THE SECOND ONE WAS WHERE THIS COOLER IS?

4 A. RIGHT OVER HERE IN THIS CORNER, THAT'S CORRECT.

5 Q. SO, ONE CORNER AND THE OTHER CORNER?

6 A. THAT'S CORRECT.

7 Q. WAS THERE AN INVESTIGATION ABOUT WHETHER YOU COULD
8 INSERT SOMEONE INTO THE BUILDING BEFORE HAVING TO
9 BREACH IT?

10 A. YES, SIR. THERE WAS EXTENSIVE DISCUSSION.

11 Q. TELL ME ABOUT THAT.

12 A. WELL, OBVIOUSLY, WE WANTED TO GET INTO THAT BUILDING
13 IN A STEALTH MODE, IF POSSIBLE. WE COULD GO IN AND
14 DEAL WITH THE SUSPECT. YOU'VE GOT THE PROBLEM ON
15 THE RIGHT-HAND SIDE OF THE DOOR WHERE THERE'S TWO
16 WINDOWS THAT ARE BLOCKED BY COOLER MACHINES.
17 INSIDE, THERE'S COOLER MACHINES ON THE INSIDE OF THE
18 BUILDING. YOU'VE GOT TWO DOORS SIDE BY SIDE AND
19 THEN YOU HAVE ONE WINDOW AT THE CASHIER. THOSE ARE
20 THE ONLY OPENINGS IN THAT BUILDING. SO, BECAUSE OF
21 THAT, YOU'VE GOT TWO DOORS RIGHT BESIDE A WINDOW,
22 WHICH IS THE ONLY AREA OF RESPONSIBILITY THAT THIS
23 SUSPECT HAS GOT TO PAY ATTENTION TO. HE DOESN'T
24 HAVE TO WORRY ABOUT ANY OF THIS OTHER PERIMETER
25 BECAUSE THERE'S NO OTHER WAY IN THAT BUILDING. AND

1 OBVIOUSLY, AS I'VE SAID BEFORE, WE'RE NOT IN THE
2 BUSINESS OF SACRIFICING LIFE FOR LIFE. SO, IF YOU
3 COMMIT A POLICE OFFICER TO THIS WINDOW OR TO THIS
4 DOOR, BASICALLY, YOU'RE SAYING, "I'M WILLING TO
5 SACRIFICE YOU," BECAUSE THE SUSPECT, WE KNOW HE'S
6 ARMED. HE'S GOT THE CAPABILITIES AND WE DON'T PUT
7 AN OFFICER IN THAT SITUATION IF WE CAN HELP IT.
8 THAT'S WHY WE USE THE BLIND CORNER AS A STAGING
9 AREA.

10 Q. DID THEY HAVE A SHIELD?

11 A. DID HE HAVE A SHIELD?

12 Q. NO, DID THE POLICE OFFICERS HAVE A SHIELD?

13 A. YES, SIR, THEY DO, A BALLISTICS SHIELD.

14 Q. AND HOW BIG IS THAT THING?

15 A. IT'S PROBABLY ABOUT 18 BY 36, MAYBE 20 BY 36. IT'S
16 SMALL ENOUGH FOR ONE PERSON TO CROUCH DOWN BEHIND.

17 Q. IS IT SMALL ENOUGH TO WHERE IT COULD GO THROUGH THE
18 DOORS?

19 A. SURE.

20 Q. YOU COULD OPEN THE DOOR AND HAVE THAT SHIELD IN
21 FRONT? IS THAT RIGHT?

22 A. THAT'S TRUE.

23 Q. WERE YOU ALL AWARE OF ANY OTHER WEAPONS THAT THAT
24 INDIVIDUAL HAD, APART FROM THE GUN?

25 A. NO, SIR.

1 Q. LOOKING BACK AT THIS DOCUMENT, RUBBER MATS WERE
2 RETRIEVED FROM THE LAUNDROMAT TO BE USED TO COVER
3 GLASS IN DYNAMIC ENTRY. WERE YOU ALL THINKING ABOUT
4 CRASHING THROUGH THE WINDOW OR SOMETHING?

5 A. CORRECT.

6 Q. AS EARLY AS 9:35?

7 A. WELL, YOU START PLANNING EARLY ON. I MEAN,
8 OBVIOUSLY, AS LONG AS YOU'VE GOT COMMUNICATIONS WITH
9 A HOSTAGE TAKER, YOUR GOAL, OBVIOUSLY, IS TO RESOLVE
10 IT WITHOUT USING ANY TYPE OF FORCE WHATSOEVER, OR
11 THE LEAST AMOUNT OF FORCE OR THE LEAST REASONABLE
12 AMOUNT OF FORCE TO EFFECT THE ARREST. THAT'S YOUR
13 GOAL AND OBJECTIVE. IT'S NOT TO HARM ANYONE OR TO
14 DO ANYBODY HARM, POLICE, PUBLIC OR SUSPECT. SO,
15 YES, I MEAN, YOU GO INTO THESE SITUATIONS ALWAYS
16 ANTICIPATING THE WORST. SO, YOU'RE PLANNING
17 CONSTANTLY.

18 Q. NOW, YOU TOLD ME THAT THE SNIPER'S ROLE IS TO GAIN
19 INTELLIGENCE?

20 A. PRIMARY GOAL.

21 Q. DO SNIPERS NECESSARILY HAVE TO SHOOT TO KILL?

22 A. THEY'RE TRAINED TO ALLEVIATE THE IMMEDIATE THREAT
23 AND DANGER.

24 Q. ARE YOUR SNIPERS GOOD ENOUGH WHERE THEY COULD HIT
25 SOMEBODY IN THE ARM?

1 A. THEY'RE TRAINED TO ALLEVIATE THE IMMEDIATE THREAT OF
2 DANGER. WE DON'T GET INTO TO PINPOINT WHERE, YOU
3 KNOW. YOU SURGICALLY REMOVE A PERSON FROM THE
4 SCENE. THAT'S HIS JOB, SO THAT HE DOESN'T HURT
5 ANYBODY ELSE, THAT ONE PERSON.

6 Q. WHO WAS YOUR SNIPER?

7 A. BRIAN STOKES.

8 Q. WHEN WAS BRIAN STOKES GIVEN THE GO AHEAD TO TAKE THE
9 SHOT?

10 A. I DON'T KNOW THE EXACT TIME. I CAN GET IT FOR YOU,
11 BUT I DON'T KNOW THE EXACT TIME. IT WAS EARLY IN
12 THE DAY.

13 Q. WAS IT BEFORE NOON TIME?

14 A. PROBABLY CLOSE TO NOON TIME.

15 Q. OKAY. ALL RIGHT.

16 A. AS THE MOOD SWINGS ON THIS GUY, YOU KNOW, WE WOULD
17 CHANGE THE LEVEL, BUT I CAN GET YOU THAT
18 INFORMATION.

19 Q. 9:57, LEWIS MOORE REPORTS THAT CHEMICAL MUNITIONS ON
20 HAND ARE CALCULATED AS LESS THAN LETHAL?

21 A. THAT'S CORRECT.

22 Q. WHAT DOES THAT MEAN?

23 A. WELL, ANYTIME YOU INTRODUCE CHEMICALS INTO A
24 CONFINED SPACE, YOU HAVE TO BE CONCERNED ABOUT THE
25 CONCENTRATION THAT YOU PUT IN THERE AND HE WAS -- HE

1 WAS THE GAS MAN OR THE CHEMICAL MUNITIONS PERSON.
2 AND BASED ON THE SQUARE FOOTAGE OF THE BUILDING, YOU
3 FIGURE OUT IF -- THERE'S A FORMULA TO FIGURE OUT THE
4 AREA BECAUSE YOU CAN DISPLACE SO MUCH OF THE OXYGEN
5 IN THAT BUILDING WITH GAS THAT YOU COULD ACTUALLY
6 KILL THE PEOPLE INSIDE WITH THE CHEMICALS. SO,
7 THERE'S FORMULAS AND THERE'S LIABILITY FOR US IN
8 THAT, AS WELL, THAT WHEN WE START TO INTRODUCE GAS,
9 WE'VE GOT TO KNOW HOW MUCH CAN WE PUT IN THERE
10 WITHOUT TAKING AWAY OR DEPLETING THE OXYGEN TO THE
11 POINT OF DEATH.

12 Q. WHAT KIND OF GAS ARE WE TALKING ABOUT?

13 A. WELL, MOST ANY GAS THAT YOU USE, WE USED OC,
14 OLEORESIN CAPSICUM. THAT'S THE OIL OF PEPPERS
15 THAT'S WHAT MOST POLICE OFFICERS CARRY ON THEIR BELT
16 ---

17 Q. PEPPER SPRAY?

18 A. PEPPER SPRAY. IT'S A REAL HIGH INTENSITY PEPPER
19 SPRAY. WE ALSO HAVE CS AND CN, AND THEN WE HAVE
20 SMOKE, TEAR GAS ---

21 Q. TEAR GAS IS CS AND CN?

22 A. AND THEN, YOU'VE GOT JUST SMOKE. USUALLY, SMOKE IS
23 USED AS DIVERSION. IT'S NOT USED AS ANYTHING TO DO
24 ANYTHING, BUT THE THING ABOUT OC SPRAY OR PEPPER
25 SPRAY, TO USE THE LAYMAN'S TERM, IS IT'S AN IRRITANT

1 THAT DOESN'T APPEAR TO HAVE ANY SERIOUS SIDE
2 EFFECTS. AND WE USE THAT FROM A SAFETY STANDPOINT
3 FOR FEAR OF DOING SOMETHING TO THE VICTIM.

4 Q. "10:13, UPDATE BRIEF GIVEN. SUBJECT IS HAVING
5 HOSTAGE TAPE CARDBOARD OVER THE WINDOWS. WHEN GIVEN
6 OPPORTUNITY, HOSTAGE REFUSED TO LEAVE." DO YOU KNOW
7 WHAT THAT'S ABOUT?

8 A. NO, SIR, I DO NOT. I DO KNOW THAT THEY COVERED THE
9 WINDOWS. I DID WATCH THE WINDOWS BECOME COVERED,
10 BUT I DON'T KNOW ABOUT THE OTHER THING.

11 Q. DO YOU KNOW OF ANY OPPORTUNITY THAT MS. PATEL EVER
12 HAD TO LEAVE WITHOUT ENDANGERING HERSELF?

13 A. I DON'T KNOW OF ANY, NO, SIR. I DO NOT.

14 Q. HAS ANYBODY TOLD YOU THAT SHE HAD THE OPPORTUNITY?

15 A. NO, SIR, THEY HAVE NOT.

16 Q. YOU WERE ON THAT SCENE THE WHOLE TIME, WEREN'T YOU?

17 A. I WAS.

18 Q. WERE YOU OUTSIDE PRETTY MUCH THE WHOLE TIME?

19 A. I WAS.

20 Q. AND YOU NEVER SAW ANY OPPORTUNITY FOR HER TO LEAVE
21 THE PREMISES, DID YOU?

22 A. IT WOULD BE A SITUATION, JUST LIKE THE POLICE
23 OFFICER, IF SHE WAS TRYING TO ESCAPE, SHE HAD TO PUT
24 HERSELF IN THAT SAME PORTAL THAT WE WERE NOT WILLING
25 TO COMMIT OURSELVES TO. SO, SHE WOULD BECOME AN

1 IDEAL TARGET. SO, I DON'T KNOW OF AN OPPORTUNITY
2 THAT SHE HAD, PERSONALLY.

3 Q. "10:13, AGAIN, SUBJECT HAS MADE COMMENTS ABOUT NOT
4 GOING BACK TO JAIL AND GOING OUT IN A BLAZE OF
5 GLORY." IS THAT SIGNIFICANT TO YOU, IN TERMS OF
6 THIS INDIVIDUAL'S ---

7 A. SURE, IT IS. STATE OF MIND.

8 Q. WOULD YOU THINK THAT BY THAT TIME, THE SNIPER HAD
9 BEEN GIVEN THE GO AHEAD TO FIRE A SHOT?

10 A. PROBABLY NOT. WE WERE PROBABLY STILL -- WE'VE STILL
11 GOT ACTIVE COMMUNICATIONS AND TIME IS STILL ON OUR
12 SIDE. JUST BECAUSE HE'S MAKING THREATS, HE'S NOT
13 DONE ANYTHING OVERTLY AT THAT POINT IN TIME. WE'RE
14 STILL NOT -- WE'RE TRYING TO SAVE LIVES, ALL LIVES.

15 Q. 10:29, I'M SKIPPING OVER SOME OF THESE BECAUSE THEY
16 MAY NOT BE PARTICULARLY RELEVANT. IF WE SKIP OVER
17 ONE THAT YOU WOULD LIKE TO COMMENT ON, THOUGH, IN
18 THE CONTEXT OF OUR DISCUSSION, LET ME KNOW. AT
19 10:21, THEY PULL THE METER. DOES THAT MEAN THAT'S
20 WHEN THEY CUT THE POWER?

21 A. THAT'S CORRECT.

22 Q. SO, "10:35, THREATS RECEIVED FROM SUBJECT." DO YOU
23 KNOW WHAT THOSE THREATS ARE?

24 A. NO, SIR, I DO NOT.

25 Q. THE TNT UNITS WERE DEPLOYED ON THE SOUTHWEST CORNER

1 OF THE BUILDING?

2 A. THAT'S CORRECT.

3 Q. ARE THERE MORE THAN -- I MEAN, IT SAYS UNITS, SO ---

4 A. WELL, THERE'S TWO TEAMS. WE DEPLOYED EVERY
5 INDIVIDUAL. NORMALLY, IF WE DO A HIGH RISK WARRANT,
6 WE'LL ONLY DEPLOY ONE TEAM. ON A SITUATION LIKE
7 THIS, THERE ARE SEVERAL THINGS THAT WE'RE ALREADY
8 SEEING. NUMBER ONE, IT'S HOT AS BLUE BLAZES OUT
9 THERE. THESE GUYS WEAR, AS YOU'VE SEEN, A LOT OF
10 EQUIPMENT. THEY WEAR HIGH, REAL HEAVY BALLISTIC
11 VESTS THAT WEIGH 20 SOME ODD POUNDS. THEY CARRY A
12 LOT OF EQUIPMENT ON THEIR PERSON. SO, WE KNEW WE
13 HAD TO HAVE A REST AND RECOVERY AREA. SO, WE'RE
14 ALREADY SETTING UP AND WE'RE DOING THINGS LIKE
15 SENDING AFTER CANDY BARS AND COLD DRINKS, QUICK
16 ENERGY, GIVE THEM THE OPPORTUNITY -- THEY WOULD STAY
17 THERE ON A READY, STACKING MODE FOR A PERIOD OF
18 TIME. THEN, WE'D PULL THAT GROUP BACK AND MOVE
19 ANOTHER GROUP UP, LET THEM PULL THEIR GEAR OFF, COOL
20 DOWN A LITTLE BIT, DRINK SOME COLD WATER, TOWELS,
21 WHATEVER IS NECESSARY, GET A LITTLE ENERGY. BY THE
22 TIME THE OTHER GROUP WAS BECOMING OVERHEATED, WE
23 WOULD BE ABLE TO PULL THEM BACK, MOVE THE NEXT ONE
24 IN.

25 Q. SO, THAT'S WHY YOU HAD TO HAVE MORE THAN ONE TEAM?

- 1 A. THAT'S CORRECT.
- 2 Q. NOW, THE EQUIPMENT THAT YOU JUST DESCRIBED, DOES IT
- 3 INCLUDE HEAD GEAR AND A MASK?
- 4 A. IT INCLUDES A HELMET. IT DOES NOT DO A MASK. MOST
- 5 TACTICAL TEAMS DON'T USE MASKS. BALLISTICS MASKS, I
- 6 ASSUME, IS WHAT YOU'RE TALKING ABOUT; IS THAT
- 7 CORRECT?
- 8 Q. SOMETHING TO PROTECT THE INDIVIDUAL FROM A FRONTAL
- 9 SHOT.
- 10 A. MOST TACTICAL TEAMS DO NOT USE THAT BECAUSE IT
- 11 AFFECTS THE PERIPHERAL VISION AND CREATES A HAZARD
- 12 FOR THEM, BUT WE DON'T HAVE ANY OF THOSE.
- 13 Q. WAS THERE ANY DISCUSSION OR VOLUNTEER BY A TNT
- 14 MEMBER TO CARRY THAT SHIELD AND JUST WALK THROUGH
- 15 THE FRONT DOOR?
- 16 A. NO, SIR.
- 17 Q. DID YOU ALL EVER CONSIDER THAT?
- 18 A. YES, SIR, WE DID.
- 19 Q. WHY WAS THAT REJECTED?
- 20 A. BASICALLY, WHAT YOU'RE ASKING US TO DO IS TO
- 21 ESCALATE THE SITUATION, WHENEVER YOU DO THAT. AS
- 22 LONG AS WE'VE GOT COMMUNICATIONS, ONGOING
- 23 COMMUNICATION WITH THIS INDIVIDUAL, THERE'S NO NEED
- 24 FOR US TO ESCALATE ANYTHING. OUR JOB IS TO DE-
- 25 ESCALATE IT AND KEEP IT AS CALM AND QUIET AND

1 PEACEFUL AS WE CAN. SO, WE'RE NOT DOING ANYTHING TO
2 ESCALATE. OUR GOAL IS STILL TO WAIT HIM OUT.
3 SOONER OR LATER, HE'S GOING TO GET TIRED OR WE EVEN
4 DISCUSSED THE FACT THAT THERE WAS A LOT OF ALCOHOL
5 IN THIS BUILDING. MAYBE HE WOULD GET HOT AND START
6 DRINKING BEER AND PASS OUT.

7 Q. HAD YOU ALL STARTED DEPLOYING THE GAS BY THIS TIME?

8 A. YES, THERE WAS SOME GAS ALREADY -- THERE HAD BEEN
9 SOME GAS PUT IN, SOME OC SPRAY IN THE AIR
10 CONDITIONING DUCT.

11 Q. BUT IT DIDN'T HAVE ANY EFFECT?

12 A. NOT INITIALLY. AND WE THINK THAT IT WAS BECAUSE WE
13 DIDN'T HAVE ENOUGH CONCENTRATION. WE ACTUALLY HAD
14 TO GET SOME MORE GAS IN. WE BORROWED GAS FROM THE
15 COUNTY DETENTION.

16 Q. ALL RIGHT. YOU'RE GETTING THREATS FROM THE SUBJECT
17 AT 10:35. LITTLEJOHN SAYS DON'T ENGAGE THE SUBJECT
18 UNLESS HE BREAKS THE PERIMETER OF TACTICAL.

19 A. THAT'S CORRECT.

20 Q. AND THE PERIMETER OF TACTICAL ---

21 A. IS THE INNER PERIMETER.

22 Q. ALL RIGHT. WHERE YOU DESCRIBED TO ME EARLIER ---

23 A. WHICH IS INSIDE -- THERE ARE SEVERAL PERIMETERS IN
24 AN INCIDENT. THE INNERMOST PERIMETER IS CONTROLLED
25 BY THE TACTICAL TEAM. THEY CONTROL EVERYTHING

1 WITHIN THAT AREA. THEN, YOU'VE GOT AN OUTER
2 PERIMETER WHICH IS A SAFETY BUFFER ZONE BETWEEN THE
3 TACTICAL AND THE PUBLIC. SO, WHAT LITTLEJOHN
4 BASICALLY WAS DOING WAS GIVING THE COMMAND THAT
5 TACTICAL IS TAKING CARE OF BUSINESS ON THE INSIDE.
6 IF HE BREAKS OUTSIDE OF THAT PERIMETER THAT TACTICAL
7 HAS SET UP, IT AUTHORIZES THE UNIFORM OFFICER. IT'S
8 A VERY SYMMETRICAL ORGANIZED PROCESS, BECAUSE YOU
9 HAVE TO BE CONCERNED ABOUT CROSS FIRE. YOU HAVE TO
10 BE CONCERNED ABOUT SAFETY, FRIENDLY FIRE, IF YOU
11 WILL.

12 Q. IF HE HAD GOTTEN THROUGH THE FRONT DOOR, JUST WALKED
13 THROUGH THE FRONT DOOR, WOULD THAT BE BREAKING THE
14 INNER TACTICAL PERIMETER?

15 A. NO, SIR. NO, SIR. TACTICAL IS STILL -- THEY'RE
16 STILL WITHIN THAT INNER PERIMETER.

17 Q. ALL RIGHT. "10:58, MAJOR HORTON ADVISED NO
18 PERIMETER OR UNIT ENGAGEMENT."

19 A. RIGHT.

20 Q. AND WHAT ARE YOU DOING THAT FOR AT THAT PARTICULAR
21 TIME?

22 A. IT'S THE COMMAND STAFF JUST TELLING THE OFFICERS ON
23 THE OUTSIDE PERIMETER THAT THEY'VE GOT NO AUTHORITY
24 TO DO ANYTHING ON THE INSIDE PERIMETER. THEY CAN'T
25 ENGAGE ANYBODY INSIDE THAT PERIMETER. AGAIN, YOU'RE

1 CONCERNED ABOUT FRIENDLY FIRE. WE'VE GOT A LARGE
2 GROUP OF OFFICERS IN THAT INNER PERIMETER, SO WE
3 DON'T WANT THE FRIENDLY FIRE THING.

4 Q. "LITTLEJOHN ASKS FOR ASSISTANCE FROM DETENTION
5 CENTER SWAT." IS THAT BECAUSE YOU'RE HAVING TO
6 RELIEVE THESE MEN?

7 A. THAT'S CORRECT.

8 Q. "AT 11:06, HE SAYS HE'S GOT TO END THIS." IS THAT
9 AN ESCALATION OF THIS SITUATION?

10 A. YES, AS THE DAY WENT ON, THE COLONEL WOULD COME BACK
11 OUT. SHE WOULD COME OUT AND BRIEF ME PERIODICALLY
12 AND HE WAS IN THESE MOOD SWINGS.

13 Q. "HOSTAGE HOLDS A SIGN TO WINDOW BUSINESS PHONE DIED.
14 THEY NEED A PHONE AND A PHONE WAS DELIVERED TO THE
15 FRONT DOOR"?

16 A. RIGHT.

17 Q. WAS THAT BY ROBOT OR BY ---

18 A. THE INITIAL PHONE THAT WE DID WAS ACTUALLY DONE
19 WHERE THEY TOOK A STICK AND PUSHED IT OUT IN FRONT
20 OF THE DOOR. THEY LAID DOWN ON THE GROUND IN FRONT
21 OF THE BUILDING AND PUSHED IT OUT IN FRONT OF THE
22 DOOR.

23 Q. "11:58, THE HOSTAGE, MS. PATEL, IS ASKING THAT POWER
24 BE RESTORED." IT SAYS, "REFUSING TO RETRIEVE THE
25 PHONE." IS THAT ---

1 A. THE PHONE WAS LAYING OUT IN FRONT OF THE DOOR.

2 Q. DO YOU KNOW WHY THE PHONE WAS NOT RETRIEVED?

3 A. NO, SIR, I DON'T.

4 Q. DID YOU ALL EVER RESTORE POWER?

5 A. NO, SIR.

6 Q. BY 12:11, THERE WAS A QUESTIONABLE SHOT HEARD FROM
7 INSIDE THE BUILDING?

8 A. THAT'S CORRECT.

9 Q. DID YOU HEAR IT?

10 A. YES, SIR, WE DID.

11 Q. DID YOU THINK IT WAS A SHOT?

12 A. YES, SIR.

13 Q. THE DOOR WAS OPEN AT 12:14.

14 A. CORRECT.

15 Q. NOW, WHEN THE DOOR WAS OPEN, DID THE SNIPER SEE THE
16 SUSPECT?

17 A. NO, SIR, HE DID NOT.

18 Q. DID ANY OFFICER SEE THE SUSPECT?

19 A. NO, SIR, WE DID NOT.

20 Q. WELL, WHEN THE DOOR OPENED, WAS THERE ANY THOUGHT TO
21 GRABBING MS. PATEL AND PULLING HER OUT OF HARM'S
22 WAY?

23 A. WELL, THERE'S ALWAYS THAT THOUGHT, IF SHE HAD COME
24 OUT THE DOOR FAR ENOUGH, THAT WOULD HAVE BEEN AN
25 OPPORTUNITY, BUT THE OFFICERS ARE SO FAR AWAY, THAT

1 YOU'VE GOT SEVERAL SECONDS THERE TO MOVE FROM THE
2 CORNER OF THE BUILDING OVER TO THE DOORWAY AND
3 YOU'VE GOT TO HAVE -- MS. PATEL HAS GOT TO BE --
4 THERE HAS GOT TO BE SOME COMMUNICATION WITH HER SO
5 SHE KNOWS WHAT'S GOING ON, TOO. SO, YOU'RE TAKING A
6 CHANCE OF GETTING YOUR HOSTAGE KILLED OR SACRIFICING
7 AN OFFICER.

8 Q. DID YOU EVER SEE MS. PATEL DO ANYTHING INAPPROPRIATE
9 DURING THIS PROCESS?

10 A. DID I? NO, SIR.

11 Q. WOULD YOU HAVE BEEN IN THE BEST POSITION TO SEE IF
12 SHE HAD DONE ANYTHING INAPPROPRIATE?

13 A. PROBABLY THE SNIPER WAS THE BEST PERSON TO SEE
14 EVERYTHING BECAUSE HE WAS DIRECTLY ACROSS FROM THE
15 BUILDING. I'M LOOKING AT IT FROM AN ANGLE, BUT I
16 SEE THE FRONT OF THE BUILDING.

17 Q. DID HE FILE A REPORT?

18 A. WITH THE SWAT, YES, SIR, HE WOULD HAVE DONE A
19 REPORT.

20 Q. BRIAN STOKES WOULD?

21 A. YES, HE SHOULD HAVE A SUPPLEMENTAL REPORT.

22 Q. DID YOU TALK WITH BRIAN STOKES?

23 A. HAVE I TALKED WITH HIM?

24 Q. YES.

25 A. SURE.

1 Q. DID HE SAY THAT SHE DID ANYTHING INAPPROPRIATE?
2 A. OH, HE NEVER SUGGESTED THAT TO ME, NO, SIR.
3 Q. THE REST OF THAT PAGE JUST LOOKS LIKE TO ME THAT
4 THEY'RE OUTLINING WHO WAS POSITIONED WHERE. IS THAT
5 A FAIR STATEMENT?
6 A. YES, SIR.
7 Q. NOW, THERE'S A PRETTY GOOD GAP BETWEEN 13:46 AND
8 16:30, ABOUT THREE HOURS. IS THAT RIGHT?
9 A. MM-HMM (AFFIRMATIVE RESPONSE). WELL, NO, YOU'RE
10 TALKING ABOUT BETWEEN 16:30 AND 17:47?
11 Q. 13:46 AND 16:30.
12 A. YES, ABOUT THREE HOURS, TWO AND A HALF HOURS.
13 Q. I'M JUST CURIOUS WHY THERE'S THAT BIG GAP IN TERMS
14 OF DOCUMENTING. IS IT JUST DOWN TIME?
15 A. NO, PROBABLY JUST ROTATING BACK AND FORTH. THEY'RE
16 STILL DOING NEGOTIATIONS.
17 Q. SO, ANOTHER PHONE IS SENT BY THE S.L.E.D. ROBOT?
18 A. THAT'S CORRECT.
19 Q. AND THAT'S ABOUT 5:40 IN THE AFTERNOON?
20 A. YES, SIR.
21 Q. IS THAT THE FIRST TIME THAT A ROBOT IS USED, THAT
22 YOU REMEMBER?
23 A. WE ALREADY HAD THE ROBOT DOWN THERE GETTING INTEL.
24 WE WOULD SEND IT DOWN. HE DIDN'T WANT THE ROBOT.
25 THAT IRRITATED HIM WHEN THE ROBOT WENT DOWN THERE.

1 Q. THE ROBOT HAS A CAMERA?

2 A. YES, SIR, IT DOES.

3 Q. WERE YOU ALL GETTING INTEL FROM THE ---

4 A. WE WERE TRYING, YES. WE COULDN'T SEE ANYTHING
5 BECAUSE OF THE REFLECTION OF THE GLASS AND THE METAL
6 GRID OVER THE DOOR. IT'S GOT, LIKE, DIAMOND WIRE
7 OVER THE DOOR.

8 Q. WAS ANY DISCUSSION HELD DURING THIS TIME ABOUT GOING
9 INTO THE BUILDING, BREACHING THE BUILDING IN SOME
10 FASHION, OTHER THAN CRASHING THROUGH IT WITH A
11 BULLDOZER?

12 A. YES, SIR.

13 Q. WHAT WAS GOING ON?

14 A. WE TALKED ABOUT USING A BREACHING DEVICE THAT'S
15 ATTACHED TO THE ROBOT WHERE YOU WOULD BLOW THE DOOR
16 -- YOU CARRY IT UP AND PUT IT ON THE DOOR LOCK AND
17 IT WOULD BLOW THE DOOR OPEN. THE ISSUE BECAME
18 NOBODY KNOWS WHAT HAPPENS TO THE SHRAPNEL. CAN'T
19 GUARANTEE THE SAFETY OF THE SUSPECT OR THE VICTIM.
20 IF YOU BLOW IT OUT, YOU'RE BLOWING IT INTO THAT
21 BUILDING, SO YOU DON'T KNOW WHAT HAPPENS. IT WAS
22 DISCUSSED USING SHAPE CHARGES AND EXPLOSIVE DEVICES
23 TO BLOW A HOLE IN THE BACK WALL. OBVIOUSLY, WE'VE
24 GOT 8,500 GALLONS OF GASOLINE THAT WE'RE CONCERNED
25 ABOUT IN THE FRONT OF THE BUILDING. BUT YES, I

1 THINK, PERSONALLY, I THINK WE EXHAUSTED EVERY . . . ANY
2 IDEA THAT ANYBODY HAD, WE TRIED TO FIGURE OUT A WAY
3 TO MAKE IT WORK, EVERY IDEA.

4 Q. WHAT WAS THE HELICOPTER; HOW WAS THE HELICOPTER
5 INTERFERING WITH THE ROBOT?

6 A. WHAT HAPPENED IS THE FIRST ROBOT WE HAVE IS OPERATED
7 BY MICROWAVE. AND OBVIOUSLY, THE NEWS CHOPPER IS
8 DOING THE SAME THING. PLUS, THEY'RE SITTING IN ONE
9 PLACE UP THERE, WATCHING WHAT'S GOING ON WITH THE
10 CAMERA. SO, YOU GET THAT FLOP, FLOP, FLOP, FLOP,
11 FLOP WITH THE PROPELLERS AS THEY GO AROUND. WELL,
12 ALL YOUR TACTICAL PEOPLE HAVE GOT THROAT MIKES AND
13 THEY'VE GOT EARPIECES IN, SO IT DESTROYS ALL YOUR
14 COMMUNICATIONS BECAUSE THEY'LL ONLY GET 300 OR 400
15 FEET UP AND THEY'LL GET JUST FAR ENOUGH AWAY AND YOU
16 GET EVERY BIT OF THAT. SO, IT AFFECTS
17 COMMUNICATION. SO, WE REQUESTED SEVERAL TIMES FOR
18 THE FEDERAL AVIATION ADMINISTRATION TO GIVE US A
19 FREE AIR SPACE AND I THINK FINALLY AFTER CHANNEL
20 FOUR INTERFERED AND IT WAS REALLY ESCALATING AT THAT
21 TIME, I TALKED TO THEM PERSONALLY AT F.A.A. AND THEY
22 CLEARED OUR AIR SPACE. THEY WERE GONE IN JUST A
23 MATTER OF MINUTES.

24 Q. "OFFICER COMMITTED TO PATROL UNIT IN NORTHEAST
25 CORNER." WHAT DOES THAT MEAN?

1 A. WELL, IN THE PARKING LOT IN THE INITIAL THING, WE
2 ACTUALLY HAD A PATROL CAR THAT WAS SITTING IN THE
3 PARKING LOT THAT WAS THERE THROUGHOUT THE DAY. AND
4 WE TRIED TO KEEP SOMEONE AT THAT PATROL. WE HAD THE
5 BLOCK OF THE ENGINE THAT IT WAS SO POSITIONED SO WE
6 HAD THE BLOCK OF THE ENGINE AND WHAT HAVE YOU
7 BETWEEN THE SUSPECT AND THE POLICE OFFICER. WE KEPT
8 AN OFFICER THERE THROUGHOUT THE DAY. AND THIS IS
9 WHEN TACTICAL ACTUALLY DEPLOYED SOMEONE INTO THAT
10 POSITION. THERE WERE OFFICERS THERE THROUGHOUT THE
11 DAY.

12 Q. ALL RIGHT. "18:06, UNITS ORDERED TO STAND READY."

13 A. CORRECT.

14 Q. AND WHAT IS THAT TELLING YOU?

15 A. BASICALLY, WHAT I'M GIVING IS A COMMAND TO BE SURE
16 -- HE'S TELLING US SOMETHING OR I'M GETTING
17 INFORMATION FROM THE COLONEL THAT HE'S EITHER
18 THREATENING OR HE SAYS HE'S COMING OUT OR HE'S DOING
19 SOMETHING. SO, THROUGHOUT THE DAY, I WOULD BE
20 TELLING THEM, WHEN WE WOULD GET INTELLIGENCE, I
21 WOULD GO ON THE RADIO AND TELL ALL THE UNITS ON THE
22 SCENE -- WE HAD A DEDICATED RADIO FREQUENCY GOING ON
23 AT STAND READY THAT WE'RE ANTICIPATING SOMETHING'S
24 ABOUT TO HAPPEN. IT JUST PUTS THE OFFICERS ON
25 ALERT, IS ALL THAT MEANS, WHEN WE TELL THEM TO STAND

1 READY.

2 Q. AND THEN, FIVE SHOTS FIRED FROM INSIDE THE BUILDING
3 TOWARDS THE OFFICERS?

4 A. ACROSS THE STREET, THEY ACTUALLY -- THEY CAME
5 THROUGH THE DOOR AND THE OFFICERS ACROSS THE STREET
6 WERE VERY AWARE THAT THE ROUNDS WERE COMING ACROSS
7 THEM. NOW, WHETHER OR NOT HE WAS AIMING AT THEM AND
8 SHOOTING AT THEM, YOU'LL HAVE TO ASK HIM THAT. I
9 DON'T KNOW. HE JUST SHOT THROUGH THE DOOR AND THE
10 BULLETS WENT ACROSS THE STREET WHERE WE HAD THE
11 SNIPER AND THE DEPLOYMENT OF OFFICERS.

12 Q. DID THE SNIPER COMMENT TO YOU ABOUT SEEING HIM FIRE
13 THE WEAPON?

14 A. NO, HE DID NOT. HE TOLD ME THAT HE FIRED, BUT HE
15 DIDN'T COMMENT TO ME. THE BUILDING IS BLACKED OUT.
16 I MEAN, YOU'RE LOOKING INTO A BUILDING THAT'S DARK.
17 SO, YOU KNOW, THERE'S NOT A LOT YOU CAN SEE IN A
18 DARK BUILDING.

19 Q. WELL, WHY DIDN'T YOU ALL TURN THE LIGHTS BACK ON SO
20 YOU COULD SEE THIS GUY?

21 A. BECAUSE THAT'S PART OF THE PROCESS, IS IF YOU GO TO
22 ANY TRAINING IN HOSTAGE NEGOTIATIONS OR ANY TYPE OF
23 BARRICADED SUSPECT, IF YOU'VE EVER WATCHED A MOVIE,
24 THEY FOLLOW THEM VERY CLOSELY, AS WELL. YOU CONTROL
25 THAT ENVIRONMENT. THAT'S PART OF THE PSYCHOLOGICAL

1 IMPACT, BEING SUCCESSFULLY COMPLETING ---

2 Q. I APPRECIATE THE CONCEPT OF CONTROLLING THE
3 ENVIRONMENT, BUT TURNING ON THE LIGHTS IS
4 CONTROLLING THE ENVIRONMENT SO YOU CAN SEE ---

5 A. ONLY IF IT'S ADVANTAGEOUS TO US.

6 Q. DID YOU EVER RESTORE POWER OR TURN ON THE LIGHTS?

7 A. NO, SIR, WE DID NOT.

8 Q. ALL RIGHT. "18:24, GAS RELEASED." NOW, THAT'S THE
9 FIRST MENTION I SAW OF GAS RELEASED.

10 A. WE'VE ALREADY USED GAS BEFORE THAT.

11 Q. ALL RIGHT. WHAT KIND OF GAS IS THIS THAT YOU
12 RELEASE AT 18:24?

13 A. THAT'S OC AGAIN, AND WHAT WE DID IS WE ACTUALLY GOT
14 SOME BIG CANISTERS FROM THE COUNTY DETENTION AND
15 INTRODUCED A LARGER QUANTITY OF GAS. WE WERE USING
16 SMALL CANISTERS AND WE WENT TO A VERY LARGE
17 CANISTER, A CROWD CONTROL CANISTER.

18 Q. YOU HAD ALREADY CHECKED OUT THAT IT WOULDN'T BE A
19 LETHAL DOSE?

20 A. THAT'S CORRECT, YES, SIR. ANYTIME BEFORE WE DEPLOY
21 GAS, WE KNOW WHAT -- WE DON'T PUT TOO MUCH.

22 Q. ALL RIGHT. "TWO SHOTS YOU HEARD FIRED INSIDE AT
23 18:28. 18:31, ANOTHER SHOT FIRED INSIDE." SINCE IT
24 WAS BLACKED OUT, DID YOU ALL KNOW WHETHER MS. PATEL
25 HAD BEEN SHOT OR NOT?

1 A. THEY WERE ABLE TO DETERMINE THAT. THEY WOULD TALK
2 ABOUT IT ON THE PHONE AND THE HOSTAGE NEGOTIATORS
3 WERE TELLING US, WE WERE TOLD THAT SHE WAS NOT, AND
4 THEY ALSO HEARD MS. PATEL IN THE BACKGROUND.

5 Q. DID YOU ALL DETERMINE WHERE THESE SHOTS WERE BEING
6 FIRED TO OR IN WHAT DIRECTION?

7 A. AT THAT TIME, WE DID NOT KNOW, NO, SIR.

8 Q. 18:33, THE ROBOT WAS USED TO ATTEMPT TO REESTABLISH
9 COMMUNICATIONS?

10 A. THAT'S CORRECT. WE SENT A ROBOT DOWN THERE AND
11 THERE'S ALSO A TWO-WAY COMMUNICATION CENTER ON THE
12 ROBOT. THE ROBOT GOES DOWN THERE AND BEATS ON THE
13 DOOR AND TRIES TO TALK TO HIM THROUGH THE DOOR, ASKS
14 HIM TO COME OUT, CHALLENGING HIM. OF COURSE, HE GOT
15 VERY IRRITATED.

16 Q. BUT IT LOOKS LIKE YOU DELIVERED A PHONE?

17 A. WE DID.

18 Q. WITH THE ROBOT?

19 A. WE CARRIED ANOTHER PHONE DOWN THERE WITH THE ROBOT.

20 Q. SO, HOW DID ---

21 A. AND THIS PHONE -- I'M NOT POSITIVE, BUT THIS TIME,
22 WE HAD THE FBI ON THE SCENE WITH A HOSTAGE
23 NEGOTIATION PHONE. IT'S A HARD WIRED PHONE INSTEAD
24 OF A CELL PHONE, WHICH IS THE IDEAL SITUATION. WE
25 JUST DIDN'T HAVE -- WE IMPROVISED BECAUSE WE DIDN'T

1 HAVE ONE.

2 Q. I'M NOT FAMILIAR WITH WHAT YOU JUST DESCRIBED.

3 A. OKAY. WE USED CELL PHONES, WHICH IS NOT THE IDEAL
4 SITUATION.

5 Q. OKAY.

6 A. THEY HAVE A PHONE THAT'S DESIGNED FOR HOSTAGE
7 NEGOTIATION. THAT'S ALL IT'S FOR. IT'S A TWO-WAY
8 PHONE THAT'S HARD-WIRED. SO, YOU PULL A WIRE ALONG
9 WITH A BOX DOWN AND IT'S SOMETIMES CALLED A THROW
10 PHONE. YOU DELIVER THAT TO YOUR HOSTAGE TAKER AND
11 YOUR HOSTAGE. IT'S GOT A LOT OF EXTRA FEATURES ON
12 IT. DEPENDING ON HOW LATE A MODEL IT IS, SOME OF
13 THEM ACTUALLY HAVE VIDEO IN THEM WHERE THERE ARE
14 CAMERAS AND YOU CAN SEE. THEY HAVE LISTENING
15 DEVICES, EVEN IF THE PHONE IS HUNG UP. YOU COULD
16 STILL HEAR AND THOSE KIND OF THINGS. SO, WE HAD --
17 THE FBI GOT US ONE OF THOSE PHONES AND SO WE
18 ACTUALLY DEPLOYED. ON THE OTHER END IN THE COMMAND
19 POST, IT HAS AN ATTACHED RECORDING DEVICE SO THAT
20 WE'RE NOT HAVING TO RECORD OFF OF A RECORDER AS YOU
21 USE HERE IN A DEPOSITION. WE'RE ACTUALLY RECORDING
22 OFF OF THAT HARD WIRE, WHICH IMPROVES THE QUALITY OF
23 THE TAPE AND YOU CAN HEAR WHAT'S GOING ON BETTER.
24 SO, IT'S A HOSTAGE NEGOTIATION PHONE OR A THROW
25 PHONE.

1 Q. DID THAT PHONE ACTUALLY GET DELIVERED?
2 A. YES, SIR.
3 Q. AND THE SUSPECT GOT THE PHONE?
4 A. YES, SIR.
5 Q. HOW DID HE GET IT?
6 A. CAME TO THE DOOR, OR ACTUALLY, MS. PATEL CAME TO THE
7 DOOR AND PULLED IT IN.
8 Q. MS. PATEL CAME TO THE DOOR?
9 A. MS. PATEL DID ALL THE ACCESS TO THE DOOR, YES, SIR.
10 Q. AGAIN, WAS THERE CONSIDERATION GIVEN TO PULLING HER
11 OUT OF THE WAY? DID YOU ALL HAVE A DISCUSSION ABOUT
12 THAT?
13 A. YES, SIR, WE DID.
14 Q. WHY DIDN'T IT TAKE PLACE?
15 A. WELL, BECAUSE YOU'RE ENDANGERING HER AND YOU'RE
16 ENDANGERING THE POLICE OFFICERS AND YOU'RE
17 CONTINUING -- IT'S ESCALATING. HE'S SHOOTING NOW.
18 HE'S BECOME MORE AGGRESSIVE. HE'S SUGGESTED THAT HE
19 WANTS TO DIE AND IT CONTINUES TO BUILD. WE'RE
20 GETTING INTEL FROM THE MENTAL HEALTH PEOPLE THAT
21 IT'S ESCALATING. MS. PATEL IS BEGGING US FOR HELP.
22 MR. PATEL IS ASKING US TO GET HIS WIFE OUT. THERE
23 WERE A LOT OF THINGS GOING ON AT THAT TIME, AND
24 RUNNING UP AND SNATCHING SOMEBODY OUT OF THE
25 BUILDING IS NOT THE -- I MEAN, I WISH IT WAS THAT

1 EASY. IF IT HAD BEEN, I WOULD HAVE DONE IT.

2 Q. GOING BACK TO THE LIGHTING SITUATION, I'M HAVING
3 TROUBLE UNDERSTANDING WHY YOU ALL WOULD NOT GET THE
4 LIGHTS BACK ON SO YOU COULD SEE AND BE ABLE TO
5 EITHER TAKE A SHOT OR IDENTIFY THE LOCATION.

6 A. WELL, FIRST OF ALL, WE'RE NOT TRYING TO KILL
7 ANYBODY, MR. HODGE. I'VE TOLD YOU THAT THROUGHOUT
8 THE DEPOSITION.

9 Q. YES, SIR.

10 A. WE'RE NOT IN THE BUSINESS OF EXECUTING PEOPLE.

11 Q. I UNDERSTAND THAT.

12 A. AND WE DON'T WANT TO KILL ANYBODY AND WE'RE NOT
13 PLANNING ON KILLING ANYBODY. THAT'S OUR LAST
14 RESORT, IS TO TAKE A HUMAN LIFE, THE ABSOLUTE LAST
15 THING WE'RE GOING TO DO.

16 Q. I APPRECIATE THAT.

17 A. SO, WE'RE GOING TO DO EVERYTHING THAT'S HUMANLY
18 POSSIBLE WITHIN THE MINDS THAT GAVE US TO RESOLVE
19 THIS THING WITHOUT HURTING ANYBODY, KILLING ANYBODY,
20 OR ENDANGERING ANYBODY MORE THAN WE HAVE TO. SO,
21 THAT'S OUR OBJECTIVE AND OUR GOAL, FROM THE VERY
22 FIRST TIME WE GET THERE AND IT BECOMES ESCALATED TO
23 A POINT TO A BARRICADED SUSPECT WITH A HOSTAGE,
24 UNTIL WE LOAD HIM IN THAT AMBULANCE, OUR GOAL NEVER
25 CHANGED.

1 Q. I APPRECIATE ALL OF THAT AND I HEARD THAT THE FIRST
2 TIME.

3 A. OKAY. BUT YOU KEEP ASKING ME, SO I'M NOT SURE.

4 Q. WELL, I'M ASKING YOU ABOUT TURNING ON THE LIGHTS,
5 NOT NECESSARILY TO KILL SOMEBODY, BUT TO IDENTIFY
6 LOCATION.

7 A. AND WHY WOULD WE IDENTIFY THE LOCATION? SO WE CAN
8 SHOOT HIM, IS WHAT YOU SAID.

9 Q. THAT'S NOT WHAT I SAID. THAT'S WHAT YOU'RE SAYING.

10 A. NO, SIR. THAT'S WHAT YOU SAID.

11 Q. I'M ASKING YOU ---

12 A. NO, SIR. THAT'S NOT THE APPROPRIATE THING FOR US TO
13 DO IN THE SITUATION, TURN THE LIGHTS ON, BASED ON
14 THE INFORMATION, THE INTELLIGENCE, AND THE TRAINING
15 THAT WE HAD.

16 Q. ALL RIGHT. TELL ME WHY IT'S NOT APPROPRIATE.

17 A. BECAUSE WE WANT TO CONTROL THAT IN DARKNESS. IT
18 IMPEDES HIS ABILITY AS MUCH AS IT DOES OURS. AS WE
19 COME IN THE HOURS OF DARKNESS, WE HAD DUKE POWER ON
20 THE SCENE. WE WERE GOING TO CONTROL ALL THE
21 LIGHTING IN THAT NEIGHBORHOOD. WE WERE SHUTTING
22 POWER DOWN. WE WERE CLOSING OUT WHOLE GRIDS. DUKE
23 POWER WAS STANDING BESIDE ME, AND I TOLD THEM AS IT
24 GREW DARKER, WE NEEDED TOTAL DARKNESS. THEY SAID
25 NOT A PROBLEM, WE'LL DO IT. THE ONLY ISSUE IS

1 STREETLIGHTS. I SAID, "I'VE GOT TO HAVE THE
2 STREETLIGHTS OUT, TOO." AND LET ME EXPLAIN TO YOU
3 WHAT DUKE POWER TOLD ME TO DO. HAVE YOU GOT
4 SOMEBODY THAT CAN SHOOT A .22 RIFLE? I SAID, "YES,
5 SIR." HE SAID, "WELL, YOU GET YOU A .22 RIFLE DOWN
6 HERE AND RIGHT ON THE TOP OF EVERY ONE OF THOSE
7 STREETLIGHT IS A PHOTO CELL. YOU HAVE YOUR MARKSMAN
8 WITH THAT .22 JUST SHOOT THOSE OFF THE TOP OF THOSE
9 STREETLIGHT. IF THEY CAN'T HIT THAT, JUST TELL THEM
10 TO SHOOT THE STREETLIGHT OUT BECAUSE IT AIN'T NO BIG
11 DEAL. WE'RE GOING TO HELP YOU GET IT -- WE'RE GOING
12 TO HELP YOU CONTROL THIS LIGHT ENVIRONMENT." SO,
13 IT'S IMPORTANT TO US, IF THERE'S ANY LIGHTS, WE WANT
14 THE LIGHTS. ONCE IT GOT DARK, WE COULD TAKE VERY
15 BRIGHT LIGHTS AND WE COULD ACTUALLY BLIND HIM OR
16 WHOEVER IS IN THAT BUILDING, AND WE CAN HIDE BEHIND
17 THOSE LIGHTS. HE'S IN DARKNESS LOOKING INTO
18 DAYLIGHT, WHICH OBVIOUSLY HE'S GOT SOME ADVANTAGES
19 THERE OVER US. BUT WE'RE CONTROLLING THAT
20 ENVIRONMENT. IT'S IMPORTANT IN THAT NEGOTIATION
21 FROM A PSYCHOLOGICAL STANDPOINT TO CONTROL THAT
22 ENVIRONMENT THAT HE'S IN. IT'S UNCOMFORTABLE. IT'S
23 ALREADY GETTING HOT. MS. PATEL IS ASKING US TO CUT
24 IT BACK ON BECAUSE IT'S HOT. WE REALIZED THAT.
25 THERE'S NO VENTILATION IN THAT BUILDING. THAT

1 BUILDING IS BASICALLY SEALED UP.

2 Q. DID YOU ALL HAVE NIGHT VISION CAPABILITY?

3 A. WE DO.

4 Q. DID YOU HAVE IT AT THAT TIME ON THE SCENE?

5 A. SURE, WE DID.

6 Q. YOU MENTIONED TO ME ABOUT THE REFLECTION ON THE
7 DOORS, I GUESS?

8 A. CORRECT.

9 Q. IF YOU HAD NIGHT VISION, LET'S SAY IT GOT DARK
10 ENOUGH. WOULD YOU BE ABLE TO SEE IN THERE OR WOULD
11 THE REFLECTION HAVE THE SAME EFFECT?

12 A. PROBABLY NOT. NIGHT VISION ONLY WORKS IN TOTAL
13 DARKNESS. EVEN THIRD GENERATION NIGHT VISION IS NOT
14 NEARLY AS GOOD AS YOU WOULD LIKE FOR IT TO BE.
15 INFRARED IS PROBABLY BETTER THAN NIGHT VISION, BUT
16 WE DO HAVE THE CAPABILITIES OF THE INFRARED, AS WELL
17 AS THE NIGHT VISION THIRD GENERATION. SO, IT'S GOT
18 TO BE REAL, REAL DARK AND WE WOULD HAVE TRIED THAT
19 IF IT HAD WENT INTO DARKNESS. SEE, WE NEVER WENT
20 INTO TOTAL DARKNESS. IT NEVER HAPPENED DURING THE
21 EVENT.

22 Q. ALL RIGHT. WE SEE THAT THE PHONE IS DELIVERED AT
23 18:43.

24 A. YES, SIR.

25 Q. AND THEN, WE'VE GOT ABOUT AN HOUR AND 15 MINUTE

1 PERIOD BEFORE THE ENTRY TEAM IS DEPLOYED.

2 A. YES, SIR.

3 Q. ARE KEY DECISIONS BEING MADE IN THAT HOUR AND 15
4 MINUTE PERIOD?

5 A. THEY ARE, SIR.

6 Q. ALL RIGHT. TELL ME WHO IS MAKING THEM AND WHAT'S
7 GOING ON DURING THAT PERIOD.

8 A. COMMAND STAFF, I WANT TO SAY COMMAND STAFF, DIRECTOR
9 FISHER, COLONEL KENDALL, MYSELF AND ART LITTLEJOHN
10 ARE IN CONSTANT COMMUNICATION DURING THIS TIME.
11 IT'S ESCALATING. HE'S ALREADY SHOOTING. THE
12 HOSTAGE NEGOTIATORS ARE PASSING INTEL OUT TO US.
13 THE FBI NEGOTIATORS ARE ON THE SCENE NOW. WE'VE GOT
14 THE MENTAL HEALTH PROFESSIONAL THERE TELLING US THAT
15 THINGS ARE GOING BAD ON US, THAT YOU'RE GOING TO
16 HAVE TO DO SOMETHING AND WE'RE LOOKING FOR
17 ALTERNATIVES AND WE'RE LOOKING FOR WAYS TO END THIS
18 SITUATION.

19 Q. OKAY.

20 A. SO, THE DECISIONS, WE'RE FIGURING OUT WHAT OUR
21 ALTERNATIVES ARE, WHAT CAN WE DO. WE'RE TALKING TO
22 S.L.E.D. WE'RE TALKING TO ANYBODY THAT'S GOT ANY
23 IDEAS. WE'RE RUNNING THEM BETWEEN EACH OTHER,
24 TRYING TO FIGURE IT OUT.

25 Q. DID YOU ALL HAVE ANY STRUCTURAL ENGINEERS ON THE

1 SITE?

2 A. NO, SIR, WE DID NOT.

3 Q. SO, TELL ME HOW THE DECISION WAS MADE TO BREACH THIS
4 BUILDING WITH A DOZER?

5 A. WELL, I KNOW OF SEVERAL INSTANCES ACROSS THE COUNTRY
6 WHERE BUILDINGS HAD BEEN BREACHED AND WE LOOKED FOR
7 ALL ALTERNATIVES TO BREACH THE BUILDING. OBVIOUSLY,
8 WE DIDN'T HAVE A SWAT VEHICLE WITH A RAM ON IT OR
9 THOSE KIND OF THINGS, AND I MADE THE SUGGESTION THAT
10 WE USE A BULLDOZER TO MAKE A HOLE IN THE BACK WALL
11 OF THAT BUILDING. I MADE THAT AS AN ALTERNATIVE
12 THAT AFTERNOON AS THINGS CONTINUED TO ESCALATE AND
13 GO DOWN. IT WAS AN IDEA THAT MAYBE THAT WOULD WORK
14 TO GET US INSIDE THAT BUILDING. IT KIND OF WENT
15 AWAY AND THEN AS THINGS ESCALATED AGAIN, MR. FISHER
16 CAME BACK TO ME AGAIN AND SAYS, "CAN WE DO THAT?"
17 AND I SAID, "YES, SIR, WE CAN." HE SAID, "WELL, WHO
18 WOULD DRIVE THE BULLDOZER?" I SAID, "I'LL DRIVE THE
19 BULLDOZER." HE WENT BACK INTO THE HOSTAGE
20 NEGOTIATION AREA AND HE CAME BACK OUT AND I DON'T
21 KNOW. YOU'LL HAVE TO TALK TO HIM. HE CAME BACK AND
22 SAID, "MAKE IT HAPPEN," AND I DID.

23 Q. ALL RIGHT. DID YOU ALL HAVE A DOZER ON SITE BY THAT
24 TIME?

25 A. NO, SIR, WE DID NOT.

1 Q. DID YOU DRIVE THE DOZER?

2 A. NO, SIR, I DID NOT.

3 Q. WHO ENDED UP DRIVING IT?

4 A. RANDY BENSON, CITY EMPLOYEE THAT WAS ASSIGNED TO IT.
5 HE VOLUNTEERED TO DO IT.

6 Q. DID YOU DRESS HIM UP IN ---

7 A. I DID.

8 Q. A SWAT OUTFIT AND ALL OF THAT?

9 A. I DID. I PACKED THE INSIDE OF THAT CAB WITH BULLET
10 RESISTANT VESTS AND I TOOK MY BULLETPROOF VEST OFF
11 AND PUT IT ON HIM AND PUT A HELMET ON HIM AND SAID A
12 LITTLE PRAYER WITH HIM.

13 Q. WHY DID YOU COME TO A DETERMINATION THAT IT WOULD BE
14 SAFER TO DO IT THAT WAY THAN TO GO THROUGH THE DOOR?

15 A. WELL, I THINK WHAT I JUST TOLD YOU. THERE'S A LOT
16 OF THINGS. NUMBER ONE, A LOT OF PEOPLE, WE WENT TO
17 GREAT LENGTHS TO GET THAT BULLDOZER ON THE GROUND
18 WITHOUT A LOT OF KNOWLEDGE. IT WAS A SURPRISE TO A
19 LOT OF PEOPLE, INCLUDING THE NEWS MEDIA WHEN WE
20 DEPLOYED THAT DOZER. YOU'VE GOT THE ELEMENT OF
21 SURPRISE. WE'RE NOT COMMITTING ANYBODY TO THAT
22 FATAL FUNNEL AT THE FRONT DOOR. WE'RE CREATING A
23 DIVERSION AT THE FRONT DOOR USING A ROBOT, WHICH
24 DOESN'T ENDANGER A HUMAN BEING. HE'S OUT THERE
25 BEATING ON THE DOOR WITH A ROBOT. WE SIMULTANEOUSLY

1 HIT THAT BACK WALL AND WE'VE GOT A RAPID DEPLOYMENT
2 TEAM READY TO GO IN THAT OPENING AS SOON AS WE DO.
3 EARLY IN THE DAY, WE, BASED ON CONVERSATIONS -- AND
4 I KNEW THE BATHROOM WAS IN THAT BACK CORNER. THAT'S
5 WHERE IT'S BEEN EVER SINCE THAT BUILDING WAS BUILT,
6 THAT JIMMY JOHNSON, THE SUSPECT, HAD BEEN BACK IN
7 THAT FAR CORNER. AND ONE OF THE THINGS THAT WE HAD
8 CALCULATED WAS THAT WE WOULD ENDANGER MS. PATEL, WE
9 MIGHT ENDANGER -- WE WOULD ENDANGER JIMMY JOHNSON
10 AND MAYBE IF SHE WAS UP FURTHER TOWARDS THE FRONT OF
11 THE BUILDING, MAYBE SOMETHING WOULD FALL ON HIM AND
12 INCAPACITATE HIM. SO, THERE WERE A LOT OF THINGS
13 TAKEN INTO CONSIDERATION BEFORE WE ACTUALLY DEPLOYED
14 THAT DOZER TO BREACH THAT BUILDING.

15 Q. ALL RIGHT. LET'S TALK ABOUT THE PARTICULAR
16 LOCATION.

17 A. OKAY.

18 Q. MY INFORMATION IS THAT THE FIRST BREACH WAS
19 ATTEMPTED AT THIS BATHROOM IN THIS CORNER.

20 A. IT WAS COMPLETED. IT WASN'T ATTEMPTED. IT WAS
21 ACTUALLY COMPLETED.

22 Q. ALL RIGHT. AND WOULD THAT BE PLAINTIFF'S EXHIBIT
23 FOUR, DO YOU SEE WHERE THE FIRST BREACH OCCURRED?

24 A. YES, SIR, THAT'S CORRECT.

25 Q. I'M SHOWING YOU PLAINTIFF'S EXHIBIT SIX, AS WELL.

1 A. YES, SIR, THAT'S CORRECT.

2 Q. ALL RIGHT. SO, THE FIRST BREACH OCCURS AT THIS
3 BATHROOM. THE TEAMS GET IN?

4 A. YES, SIR.

5 Q. WHAT HAPPENS THEN?

6 A. THERE WAS AN EXCHANGE OF GUNFIRE. THERE ARE AISLES,
7 THAT THEY'RE WORKING DOWN AISLES. THEY'RE WORKING
8 IN THE SAME ENVIRONMENT THAT HE'S BEEN WORKING IN.
9 IT'S DARK. HE RETREATS AND GOES INTO THE COOLER,
10 WHICH IS ON THE NORTH END OF THE BUILDING.

11 Q. BACK HERE, ALL RIGHT.

12 A. WE CAME IN THIS CORNER.

13 Q. PLAINTIFF'S EXHIBIT THREE, DO YOU SEE WHERE IT SAYS
14 "CASH REGISTER"?

15 A. CORRECT.

16 Q. THEY'RE STILL BEHIND IN THIS AREA?

17 A. WHO?

18 Q. THE SUSPECT.

19 A. WE DON'T KNOW THAT.

20 Q. YOU CAN'T TELL WHERE THE FIRE IS COMING FROM?

21 A. OH, THE FIRE IS COMING FROM THIS END OF THE
22 BUILDING.

23 Q. SO, JOHNSON IS BACK NEAR THE COOLER AREA WHEN THE
24 FIRST BREACH IS MADE?

25 A. THAT'S CORRECT. AS FAR AS I KNOW, YES, SIR, THAT'S

1 THE INFORMATION THAT I WAS GIVEN.

2 Q. AFTER THAT FIRST BREACH IS MADE, THEY GO INTO THE
3 COOLER?

4 A. THAT'S CORRECT.

5 Q. BUT YOU'VE GOT PEOPLE ALL IN HERE BY THEN. IS THAT
6 RIGHT?

7 A. THAT'S CORRECT.

8 Q. IS GAS AN ISSUE?

9 A. SURE, IT IS.

10 Q. IS GAS GOING INTO THIS COOLER AREA, AS WELL?

11 A. PROBABLY NOT AS DOMINANT IN THE COOLER BECAUSE THE
12 COOLER IS A SEALED THING, ALTHOUGH THEY DID SHOOT A
13 DOOR OUT. WE DIDN'T, BUT JOHNSON SHOT A DOOR OUT.

14 Q. NOW, THIS CORNER IS TAKEN OUT STRUCTURALLY, CORRECT?

15 A. THAT'S CORRECT.

16 Q. ALL RIGHT. WHAT HAPPENS AFTER THAT INITIAL BREACH?

17 A. ONCE WE'RE INSIDE THE BUILDING, LITTLEJOHN AND I ARE
18 ON COMMUNICATION WITH EACH OTHER AND WE KNOW THERE
19 IS GUNSHOTS AND THEN HIS RADIO DIES. SO, I'M ON THE
20 NEXTEL NOW, TRYING TO GET HIM BACK ON THE NEXTEL.
21 WE FINALLY ESTABLISH COMMUNICATION AND HE'S GOT ON A
22 GAS MASK. COMMUNICATIONS ARE MUFFLED AND WE KNOW
23 THAT HE'S BACK UP IN THE RIGHT FRONT CORNER OF THE
24 BUILDING THEN. WE HAD COMMITTED TO THE POINT THAT
25 WE HAD TO FINISH WHATEVER WE STARTED. SO, ONCE WE

1 MADE THAT COMMITMENT, WE WENT AHEAD -- I GOT THE
2 DOZER OPERATOR AND TOLD HIM WHAT I NEEDED TO HAPPEN
3 HERE AND BROUGHT HIM AROUND AND HE TOOK THE FRONT
4 CORNER OF THE BUILDING OUT.

5 Q. ALL RIGHT. SO, YOU TELL THE DOZER OPERATOR TO GO
6 BACK AROUND AND HIT THE RIGHT FRONT CORNER OF THE
7 BUILDING?

8 A. THAT'S CORRECT.

9 Q. AND WHEN YOU TELL HIM TO DO THAT, DO YOU KNOW WHERE
10 IN THIS COOLER MS. PATEL IS?

11 A. NO, I DO NOT.

12 Q. DID YOU GIVE CONSIDERATION TO THE FACT THAT THE VERY
13 ACT OF PENETRATING THIS COOLER COULD HAVE HARMED THE
14 HOSTAGE?

15 A. YES, SIR, I DID, SIR. IT WEIGHED VERY HEAVILY ON MY
16 HEART AND ON MY MIND AND IT STILL DOES.

17 Q. WELL, WHAT ABOUT HITTING THE CORNER OF THE BUILDING
18 WHEN THE OPPOSITE CORNER OF THE BUILDING HAD ALREADY
19 BEEN TAKEN OUT? DID IT CONCERN YOU THAT THE
20 BUILDING MIGHT COLLAPSE?

21 A. YES, SIR, IT DID. AND I PUT THE OFFICERS INSIDE ON
22 NOTICE. I DON'T KNOW WHAT'S GOING TO HAPPEN WHEN WE
23 HIT THE CORNER OF THIS BUILDING.

24 Q. NOW, WE HAD DISCUSSED EARLIER -- I KNOW ABOUT YOUR
25 TUNNEL OF -- WHAT DID YOU CALL IT? TUNNEL OF ---

- 1 A. THE FATAL FUNNEL?
- 2 Q. THE FATAL FUNNEL, EXCUSE ME. BUT WE HAD ALSO
- 3 DISCUSSED JUST BLOWING THE DOOR OFF.
- 4 A. CORRECT.
- 5 Q. WHICH WOULDN'T HAVE POSED A DANGER TO YOUR PEOPLE,
- 6 BUT I THINK YOU WERE CONCERNED ABOUT THE DANGER IT
- 7 POSED TO THE HOSTAGE.
- 8 A. THAT'S CORRECT.
- 9 Q. YOU THINK IT WOULD HAVE BEEN SAFER TO DO THIS IN THE
- 10 FASHION YOU DID THAN JUST BLOWING OFF THE DOOR?
- 11 A. I DID WHAT I THOUGHT WAS APPROPRIATE AT THE TIME,
- 12 BASED ON THE FACTS AND THE INFORMATION THAT I HAD.
- 13 YOU'RE ASKING ME TO SECOND GUESS SOMETHING. IF THIS
- 14 SAME SITUATION HAPPENED AGAIN TOMORROW, I WOULDN'T
- 15 DO ANYTHING ANY DIFFERENT THAN THE WAY I DID IT.
- 16 Q. HAD YOU EVER BEEN RESPONSIBLE FOR ORDERING A BREACH
- 17 OF A BUILDING IN THIS FASHION?
- 18 A. NO, SIR, I HAVE NOT.
- 19 Q. HAVE YOU EVER HEARD ABOUT IT BEING DONE ANYWHERE IN
- 20 SOUTH CAROLINA?
- 21 A. WITH A BULLDOZER?
- 22 Q. YES.
- 23 A. NO, SIR.
- 24 Q. DO YOU KNOW OF ANYBODY WHO HAS EVER DONE IT WITH A
- 25 BULLDOZER IN THE WORLD?

1 A. DO I?

2 Q. YES.

3 A. NO, SIR, I DON'T.

4 Q. OKAY.

5 A. IT WOULD HAVE BEEN VERY, VERY NICE IF WE HAD THE
6 RESOURCES TO BUY A VERY EXPENSIVE PIECE OF EQUIPMENT
7 THAT'S USED TO BREACH A BUILDING, BUT WE DON'T HAVE
8 THOSE RESOURCES, SO WE IMPROVISED.

9 Q. NOW, YOU MENTIONED TO ME THAT ONCE YOU BREACHED FROM
10 THE BATHROOM, YOU WERE COMMITTED.

11 A. ABSOLUTELY.

12 Q. ALL RIGHT. WHY DID YOU HAVE TO BREACH -- WHY DID
13 YOU FEEL LIKE YOU HAD TO MAKE THAT SECOND BREACH?

14 A. BECAUSE WE WERE COMMITTED. WE HAD A SITUATION OF
15 ONCE YOU START THAT DYNAMIC ENTRY, YOU CAN'T GO IN,
16 BUST THE DOOR OFF THE HINGES, AND THEN SAY, "OOPS,
17 WAIT JUST A MINUTE. WE'LL BE BACK IN A MINUTE," AND
18 GO BACK OUT AND START OVER. WHEN YOU USE A DYNAMIC
19 ENTRY, WHICH THIS IS A VERY DYNAMIC ENTRY, ONCE YOU
20 MAKE THAT COMMITMENT, YOU SECURE THAT WHOLE BUILDING
21 BEFORE YOU STOP. WE'RE IN A SITUATION WHERE WE'RE
22 TAKING FIRE INSIDE THE BUILDING. THE OTHER
23 OPPORTUNITY IS TWO THINGS. YOU'VE GOT AN AVENUE OR
24 ESCAPE FOR THE SUSPECT, AS WELL AS FOR THE -- IF IT
25 GOES RIGHT, AND IT'S AN IF. IT'S A CALCULATED IF OF

1 WHAT'S GOING TO HAPPEN AND WE REALIZED THAT AND WE
2 ACCEPTED THAT RESPONSIBILITY AND LIABILITY WHEN WE
3 MADE THE DECISION TO TAKE THAT FRONT CORNER OFF, WE
4 KNEW WE MIGHT KILL THE SUSPECT. WE KNEW WE MIGHT
5 KILL THE HOSTAGE TAKER, BUT WE WERE IN A DYNAMIC
6 ENTRY, COMMITTED TO RESOLVING THIS THING, WHATEVER
7 IT TOOK, AND WE TOOK THE CHANCE, WHATEVER IT TOOK
8 AND WE TOOK THE CHANCE AND ULTIMATELY, THERE WAS TEN
9 SECONDS OF EITHER BEING A HERO OR HAVING THE WORST
10 DESIGNED PLAN IN THE WORLD. WE ENDED UP WITHOUT THE
11 HOSTAGE TAKER BEING KILLED. WE ENDED UP WITHOUT THE
12 HOSTAGE BEING INJURED AND I DIDN'T CARRY ANY POLICE
13 OFFICERS TO GREENLAWN CEMETERY. IT WAS A SUCCESS.
14 I AM SORRY IT DESTROYED A BUILDING, BUT I'M NOT IN
15 THE BUILDING SAVING BUSINESS. I'M IN THE LIFE
16 SAVING BUSINESS.

17 Q. WELL, I APPRECIATE THAT, AND I DON'T THINK ANYBODY
18 IS QUESTIONING THAT YOU'RE IN THE LIFE SAVING
19 BUSINESS.

20 A. RIGHT.

21 Q. BUT WHAT WE'RE DOING IS WE'RE HAVING A DISCUSSION
22 ABOUT ALTERNATIVES, OKAY?

23 A. OKAY.

24 Q. NOW, ONCE YOU STARTED THE DYNAMIC ---

25 A. CORRECT.

1 Q. AS YOU DISCUSSED, AND THE HOSTAGE AND THE SUSPECT
2 ARE BEHIND THIS COOLER, WHAT ABOUT STOPPING RIGHT AT
3 THAT POINT, RIGHT THERE, ESTABLISHING YOUR PEOPLE,
4 HAVING GUNS TRAINED ON THE COOLER. WHY WASN'T THAT
5 AN ALTERNATIVE AT THAT TIME, IN YOUR MIND?

6 A. BECAUSE WE HAD COMMITTED TO RESOLVING THIS, WHATEVER
7 IT TOOK, AND WE MADE THAT -- ONCE WE WENT IN THAT
8 BUILDING, WE TOOK THE BUILDING, WHATEVER IT TOOK.

9 Q. I GUESS WHAT I'M ASKING, DOUG, IS WHY WAS IT AN ALL
10 OR NOTHING SITUATION AT THIS POINT IN TIME BEFORE
11 YOU MADE THE SECOND BREACH?

12 A. BECAUSE IT HAD ESCALATED TO THE POINT WHERE WE WERE
13 SURE WE WERE GOING TO LOSE THE HOSTAGE, MORE THAN
14 LIKELY, BASED ON HIS COMMENTS, WHAT HE WAS ALLEGING,
15 WHAT HE WAS THREATENING. WE MADE THE COMMITMENT TO
16 TAKE IT AND WE FOLLOWED THROUGH WITH IT. AND I MADE
17 THE DECISION TO DO THE SECOND BREACH.

18 Q. WHEN YOU MADE THIS FIRST BREACH, DID YOU HAVE PEOPLE
19 THEN COME THROUGH THE FRONT DOOR?

20 A. WE DID. WE ACTUALLY BROUGHT A TEAM IN HERE AND AS
21 SOON AS THEY SECURED, ONE OF THE INSIDE MEMBERS WENT
22 OVER THERE, OPENED THE DOOR, AND LET THE SECOND TEAM
23 IN. WE ACTUALLY HAD TWO TEAMS IN THE BUILDING. AND
24 WE HAD A RESCUE TEAM STAGED HERE. AS SOON AS WE
25 WERE ABLE TO GET THE HOSTAGE OUT, WE HAD A RESCUE

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2005-CP-42-03388R

MP AND SAROJ PATEL, WILLARD *
OIL COMPANY, INC., AND HARRY*
"SKIPPER" LANCASTER, *

, PLAINTIFFS, *

VERSUS *

CITY OF SPARTANBURG, *

DEFENDANT. *

TELEPHONE DEPOSITION OF JOHN "JACK" JOSEPH RYAN

PURSUANT TO NOTICE AND/OR AGREEMENT, THE
DEPOSITION OF JOHN "JACK" JOSEPH RYAN WAS CALLED BY THE
PLAINTIFF ON THE 1ST DAY OF MAY, 2009, COMMENCING
AT THE HOUR OF 10:14 A.M., AT THE HODGE LAW FIRM, 229
MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA,
ATTENDED BY COUNSEL AS FOLLOWS:

DIXY MOORE TURNER

CERTIFIED VERBATIM REPORTER

DIXY MOORE TURNER ASSOC. INC.

836. SHORES BROOK DRIVE

SPARTANBURG, S.C. 29301-6515

864-574-1313

FILED
2009 NOV -3 AM 10:43
MARC KITCHENS

CT REPORTER: DIXY MOORE TURNER
DIXY MOORE TURNER ASSOCIATES, INC.

1 ALL RIGHT. I'M GOING TO TAKE A MOMENT AND GET
2 A COFFEE.
3 BY MR. HODGE:
4 SURE.

5 (OFF THE RECORD)

6 EXAMINATION RESUMED BY MR. HODGE:

7 Q. WE WERE DISCUSSING THE USE OF THE ARMORED PERSONNEL
8 CARRIER BY LAPD. HAS YOUR RESEARCH UNCOVERED WHERE
9 IN THE HISTORY OF LAW ENFORCEMENT A BULLDOZER HAS
10 BEEN UTILIZED TO BREACH A BUILDING?

11 A. I DON'T KNOW OF A CASE WITH A BULLDOZER. I DON'T
12 KNOW IF IT EXISTS OUT THERE. BUT, YOU KNOW, POLICE
13 TEND TO USE WHAT'S AVAILABLE WHEN THEY DON'T HAVE
14 THAT PARTICULAR RESOURCE AVAILABLE. SO IT DOESN'T
15 SURPRISE ME THAT THEY USED A BULLDOZER. BUT NO, I
16 DON'T KNOW, AND HAVE NEVER DONE A RESEARCH TO FIND

17 OUT IF SOMEBODY ELSE HAS USED A BULLDOZER.

18 Q. I WANT TO GO BACK TO THE LAPD CASE. THE BREACH OF
19 THE BANK OF AMERICA BUILDING.

20 A. NO, IT WASN'T THE BANK OF AMERICA BUILDING. THEY
21 WERE BREACHING OTHER BUILDINGS IN SEARCH OF
22 MEAN, THERE'S ALL KINDS OF VIDEO THAT I PROBABLY
23 COULD FIND SOME FOR YOU.

24 Q. OKAY, FINE. GIVEN THE WAY YOU'VE SAID IT, IT SOUNDS
25 LIKE YOU'RE PRETTY FAMILIAR WITH THAT AND YOU'VE

FILED
CLERK OF COURT
2009 NOV -3 AM 10:18
MARC RICHENS

1 SPECIFIC WE MAKE IT, I HAVE NOT. I MEAN, I HAVE NOT
2 SEEN ANOTHER AGENCY THAT USED A BULLDOZER. HAVE I
3 SEEN AND HEARD OF OTHER AGENTS USING MOTORIZED
4 MACHINERY? YES. I WAS IN BELMONT COUNTY, OHIO, A
5 COUPLE OF WEEKS AGO AND THEY'VE GOT A MACHINE RIGHT
6 OUTSIDE, AND I DID NOT ASK ANYBODY WHEN THE LAST
7 TIME THEY USED IT OR IF THEY'RE USING IT FOR
8 BREACHING, BUT IT APPEARED TO BE EQUIPPED FOR
9 BREACHING. SO IT'S NOT UNUSUAL FOR LAW ENFORCEMENT
10 TO HAVE THIS EQUIPMENT. USUALLY THEY'RE USING
11 MACHINERY THAT IS SURPLUS FROM THE MILITARY.

12 Q. DO YOU KNOW OF ANY HISTORICAL APPLICATION OF
13 TRAINING WITH USE OF A BULLDOZER THAT - - -

14 A. I DON'T.

15 Q. - - - HAS BEEN USED BY ANY LAW ENFORCEMENT AGENCY
16 THE HISTORY OF THE WORLD?

17 A. THE HISTORY OF THE WORLD. I DON'T. BUT AGAIN, I
18 THINK, YOU KNOW, THE TRAINING, OTHER THAN THE
19 OPERATION, YOU KNOW, HOW YOU WORK THE INSTRUMENTS,
20 WOULD PROBABLY BE SIMILAR TO THESE OTHER MOTORIZED
21 APPLICATIONS.

22 Q. DO YOU KNOW OF ANY TRAINING THE SPARTANBURG CITY
23 POLICE DEPARTMENT HAS EVER DONE IN ITS HISTORY WITH
24 REGARDS TO THE USE OF MOTORIZED BREACH?

25 A. NO.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 NOV -3 AM 10:44
MARC KITCHENS

DEPOSITION OF JOHN RYAN
5/1/2009

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1 I THINK THE MAJOR THERE WOULD BE THE ONE THAT WOULD

2 PROBABLY HAVE SAID ONE WAY OR THE OTHER, BUT I DON'T

3 RECALL HIM SAYING THAT.

4 Q. CAN WE AGREE THAT THE BREACHING OF THE BUILDING

5 CONSTITUTED AFFIRMATIVE CONDUCT BY THE POLICE

6 OFFICERS?

7 A. OF COURSE.

8 Q. ALL RIGHT. CAN WE AGREE THAT THEY TOOK OVER THAT

9 BUILDING?

10 A. YEAH. I MEAN, IT WAS INTENTIONAL CONDUCT.

11 ABSOLUTELY.

12 Q. OKAY. WHAT TRAINING DID THE OPERATOR OF THE

13 BULLDOZER HAVE WITH REGARD TO BREACHING A BUILDING?

14 A. WELL, AGAIN, I DON'T KNOW IF HE HAD ANY TRAINING IN

15 TAKING A BUILDING. MANY CITIES TAKE BUILDINGS DOWN.

16 I DON'T RECALL THAT HE HAD ANY OF TAKING BUILDINGS

17 DOWN OR BREACHING A BUILDING FOR PURPOSES OF A SWAT

18 OPERATION. I DON'T THINK HE WOULD HAVE ANY TRAINING

19 ON THAT. WHAT HE HAD TRAINING IN WAS THE ABILITY TO

20 OPERATE THE BULLDOZER.

21 Q. DID THE POLICE OFFICERS -- WERE THEY BEHIND THE

22 BULLDOZER AS IT MADE THE BREACH?

23 A. I BELIEVE THEY WERE, YOU KNOW, SOMEWHERE RIGHT IN

24 THAT VICINITY AND THEN THEY WENT IN. I REALIZED

25 THEY, YOU KNOW, PUT ALL KINDS OF VESTS AND

MP & Saroj Patel, Willard Oil Co., Inc.,
and Harry "Skipper" Lancaster,
Employee/Claimants,
vs.
City of Spartanburg,
Employer/Carrier,

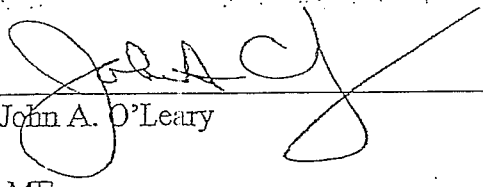
FILED
CLERK OF COURT
2009 NOV -3 AM 10:46
MARC KITCHENS

1. After reviewing all the facts surrounding the use of the front-end loader to enter the Claimants' premises, such action on behalf of law enforcement was an affirmative, aggressive, and a positive act by the government and caused Claimants extreme/unreasonable damage to their property depriving the Claimants of business expectations and use.

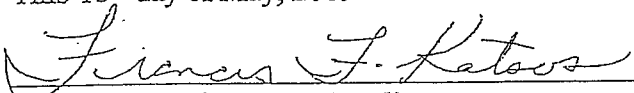
3. The use of a front-end loader in this instance was not a valid or legitimate exercise of police power (regulatory power) and was not a Constitutional exercise of such power. Further, that the use of the front-end loader in striking the opposite

corners of the structure in question, exceeded the level of reasonableness as set forth in the Constitutions of the State of South Carolina and the United States.

Further, the Affiant sayeth naught.


John A. O'Leary

SWORN TO AND SUBSCRIBED BEFORE ME
This 15th day of May, 2009


Notary Public for South Carolina
My Commission Expires: 3-14-11

FILED
CLERK OF COURT
2009 NOV -3 AM 10:47
MARC KITCHENS

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2005-CP-42-1424

MP AND SAROJ PATEL,
WILLARD OIL CO., INC.,
AND HARRY "SKIPPER"
LANCASTER,

PLAINTIFFS,

VERSUS

CITY OF SPARTANBURG,

DEFENDANT.

DEPOSITION OF STEVE GRIFFIN

PURSUANT TO NOTICE AND/OR AGREEMENT, THE
DEPOSITION OF STEVE GRIFFIN WAS CALLED BY THE DEFENDANT
ON THE 7TH DAY OF MAY, 2009, COMMENCING AT THE HOUR OF
12:16 p.m., AT THE LAW OFFICES OF HODGE LAW FIRM, 229
MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED

BY COUNSEL AS FOLLOWS:

JILL S. BISHOP
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

FILED
CLERK OF COURT
2009 NOV -3 AM 10:17
MARC KITOEN

PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
DEPOSITIONS, THE WITHIN DEPOSITION WAS TAKEN BY THE
ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE
STATE OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES
AT THE LAW OFFICES OF HODGE LAW FIRM, SPARTANBURG,
SOUTH CAROLINA.

* * * * *

STIPULATIONS:

IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
AS FOLLOWS:

1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
2. THE READING AND SIGNING OF THE DEPOSITION
TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
PARTIES.

* * * * *

THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
MATTER HEREIN:

* * * * *

STEVE GRIFFIN,

BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

EXAMINATION BY MR. MORRISON:

Q. WOULD YOU PLEASE STATE YOUR FULL NAME, PLEASE, SIR?

A. STEPHEN RANDALL GRIFFIN.

1 A. ONCE I MADE THE CORRECTIONS, 312, OR \$312,500.

2 Q. \$312,500 AS OF MARCH 1, '07? AND IT HAD A RESIDUAL
3 VALUE AS IS OF APPROXIMATELY \$56,000 WITH THE
4 BUILDING REMOVED?

5 A. CORRECT.

6 Q. AND THE DIFFERENCE BETWEEN THOSE, THE VALUE OF THE
7 PROPERTY WITH THE BUILDING THERE VERSUS THE VALUE OF
8 THE PROPERTY WITHOUT THE BUILDING THERE IS
9 APPROXIMATELY \$256,000 AS OF MARCH 1, '07?

10 A. MM-HMM (AFFIRMATIVE RESPONSE). AS AN ONGOING
11 CONVENIENCE STORE.

12 Q. AND THE VALUE OF \$312,000 TAKES INTO ACCOUNT THE
13 FACT THAT THE BUILDING, THE PROPERTY EARNS A PROFIT,
14 A YEARLY PROFIT BECAUSE THAT'S HOW YOU CALCULATE IT.
15 THAT'S ONE OF THE WAYS YOU CALCULATE IT.

16 A. MM-HMM (AFFIRMATIVE RESPONSE).

17 Q. IT TAKES INTO ACCOUNT THE PROPERTY WOULD HAVE EARNED
18 A PROFIT IN 2006 AND 2005.

19 A. YES.

20 Q. IN FACT, THE VALUE OF THE PROPERTY HAS BEEN GOING UP
21 OVER TIME, PARTLY AS A RESULT OF THAT.

22 A. A RESULT OF?

23 Q. THE FACT THAT THE PROPERTY CAN EARN A PROFIT ---

24 A. YES.

25 Q. AND THEIR PROFITS ARE GOING UP OVER TIME.

FILED
2009 NOV - 3 AM 10:47
MARC KITCHENS

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2005-CP-42-1424

MP AND SAROJ PATEL, *
WILLARD OIL CO., INC., *
AND HARRY "SKIPPER" *
LANCASTER, *

PLAINTIFFS, *

VERSUS *

CITY OF SPARTANBURG, *

DEFENDANT. *

DEPOSITION OF CHARLES L. ALFORD, PH.D.

PURSUANT TO NOTICE AND/OR AGREEMENT, THE
DEPOSITION OF CHARLES L. ALFORD, PH.D. WAS CALLED BY
THE DEFENDANT ON THE 7TH DAY OF MAY, 2009,
COMMENCING AT THE HOUR OF 10:01 A.M., AT THE LAW
OFFICES OF HODGE LAW FIRM, 229 MAGNOLIA STREET,
SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS
FOLLOWS:

JILL S. BISHOP
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

1 PURSUANT TO NOTICE AND/OR AGREEMENT TO TAKE
2 DEPOSITIONS, THE WITHIN DEPOSITION WAS TAKEN BY THE
3 ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE
4 STATE OF SOUTH CAROLINA, BY CONSENT OF ALL PARTIES
5 AT THE LAW OFFICES OF HODGE LAW FIRM, SPARTANBURG,
6 SOUTH CAROLINA.

7 * * * * * * * * * * * *

8 STIPULATIONS:

9 IT IS AGREED BY AND BETWEEN COUNSEL FOR THE PARTIES
10 AS FOLLOWS:

- 11 1. THE DEPOSITION IS BEING TAKEN PURSUANT TO THE
12 SOUTH CAROLINA RULES OF CIVIL PROCEDURE.
13 2. THE READING AND SIGNING OF THE DEPOSITION
14 TRANSCRIPT ARE WAIVED BY THE WITNESS AND THE
15 PARTIES.

16 * * * * * * * * * * * *

17 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
18 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
19 MATTER HEREIN:

20 * * * * * * * * * * * *

21 CHARLES L. ALFORD,

22 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:
23 EXAMINATION BY MR. MORRISON:

24 Q. MR. ALFORD, MY NAME IS DAVID MORRISON. I AM HERE TO
25 TAKE YOUR DEPOSITION IN THE CASE THAT THE PATELS AND

1 STORE, INC.

2 Q. DOES THAT PLAY ANY ROLE IN THE FORMULATION OF YOUR

3 OPINIONS?

4 A. NO, SIR, IT DID NOT.

5 Q. OKAY. IS THIS YOUR ENTIRE FILE?

6 A. YES, SIR.

7 Q. COULD I TAKE A LOOK AT IT?

8 A. SURE.

9 Q. ALL RIGHT. FOR US TO DISCUSS THESE AND GO THROUGH

10 THEM, YOU'VE CALCULATED THE DAMAGES FOR THE

11 DIFFERENT PLAINTIFFS. SO, LET'S GO THROUGH THEM ONE

12 AT A TIME. WHICH WOULD BE THE EASIEST TO GO THROUGH

13 FIRST?

14 A. I BELIEVE THE PATELS.

15 Q. OKAY. LET'S GO THROUGH THE DAMAGE TO THE PATELS

16 FIRST, THEN.

17 A. OKAY.

18 Q. IF YOU DON'T MIND, LET ME JUST LOOK FOR JUST A

19 MINUTE AT THE PROFIT AND LOSS.

20 A. SURE.

21 Q. I HAVE THE BALANCE SHEET, BUT I DIDN'T HAVE THE

22 PROFIT AND LOSS. ALL RIGHT. THE PROFIT AND LOSS

23 STATEMENT THAT YOU HAVE IS FOR THE YEAR JANUARY TO

24 DECEMBER OF 2004, CORRECT?

25 A. YES, SIR.

1 Q. AND IT SHOWS GROSS INCOME OF \$479,562.13, CORRECT?

2 A. THAT'S CORRECT.

3 Q. AND IT SHOWS COSTS OF GOODS SOLD, WHICH IS PART OF
4 THE GROSS EXPENSE, BUT NOT -- A SUBSTANTIAL PART OF
5 THE GROSS EXPENSE, BUT NOT ALL OF IT. THE COST OF
6 THE INVENTORY, \$420,451.10, CORRECT?

7 A. THAT'S CORRECT.

8 Q. ALL RIGHT. AND THEN, IT SHOWS OTHER EXPENSES OF
9 \$44,151.44, CORRECT?

10 A. YES, SIR.

11 Q. FOR A TOTAL NET ORDINARY INCOME OF \$14,959.59,
12 CORRECT?

13 A. THAT'S CORRECT.

14 Q. AND INCLUDED IN THOSE OTHER EXPENSES, THERE'S
15 NOTHING INCLUDED IN THE OTHER EXPENSES THAT I SEE.
16 CORRECT ME IF I'M WRONG -- FOR -- I'M SORRY. HERE
17 IT IS. PAYROLL EXPENSES, \$13,198.30 ---

18 A. THAT'S RIGHT.

19 Q. --- WAS THE PAYROLL EXPENSE FOR THE YEAR?

20 A. YES.

21 Q. OKAY. SO, IT SHOWS A TOTAL INCOME OF \$14,959.59
22 BEFORE EXTRAORDINARY LOSSES, WHICH IS WHAT WE'RE
23 HERE ABOUT, CORRECT?

24 A. YES, SIR, THAT'S CORRECT.

25 Q. ALL RIGHT. THE OTHER EXPENSES THAT YOU SHOW ON

1 HERE, ABNORMAL LOSS OF EQUIPMENT AND ABNORMAL LOSS
2 OF INVENTORY, THOSE ARE AS A RESULT OF THIS INCIDENT
3 THAT WE'RE HERE ABOUT, CORRECT?

4 A. WELL, I KNOW THE ABNORMAL LOSS OF EQUIPMENT AND
5 INVENTORY ARE. I DON'T KNOW WHAT THE OTHER INCOME
6 IS, AND I DON'T KNOW WHAT THE OTHER EXPENSES
7 IDENTIFIED ARE.

8 Q. OKAY. IS IT -- DO YOU UNDERSTAND THAT THIS CASE IS,
9 ARISES OUT OF A HOSTAGE INCIDENT IN JULY OF 2004?

10 A. YES, I DO.

11 Q. OKAY. DO YOU UNDERSTAND THAT AS A RESULT OF THAT
12 HOSTAGE INCIDENT, THE BUILDING WAS DAMAGED?

13 A. YES.

14 Q. AND THE BUSINESS CEASED TO OPERATE AS OF JULY 2004?

15 A. YES, SIR.

16 Q. SO, IN THE PROFIT AND LOSS FOR 2004, THEY HAVE AN
17 ABNORMAL LOSS OF INVENTORY, BUT YOU DON'T KNOW WHAT
18 THAT'S ATTRIBUTABLE TO?

19 A. I UNDERSTAND IT'S ATTRIBUTABLE TO HAVING HAD THE
20 INVENTORY DESTROYED. I DON'T KNOW.

21 Q. FROM THIS INCIDENT?

22 A. YES.

23 Q. AND THE ABNORMAL LOSS OF EQUIPMENT, DO YOU KNOW WHAT
24 THAT'S ATTRIBUTABLE TO?

25 A. SAME THING.

1 Q. OKAY. SO, THOSE ARE ONE-TIME LOSSES?
2 A. YES.
3 Q. NOT CONTINUING LOSSES?
4 A. YES..
5 Q. AND DO YOU UNDERSTAND THAT THIS BUSINESS HAD BEGUN
6 OPERATION IN 2003?
7 A. I DON'T RECALL THAT.
8 Q. WERE YOU PROVIDED ANY PROFIT AND LOSS FOR ANY YEAR
9 PRIOR TO 2004?
10 A. I HAVE A TAX RETURN FOR 2003.
11 Q. OKAY.
12 A. I DON'T KNOW IF THAT TAX RETURN IS LIMITED TO THIS
13 FACILITY OR INCLUDES OTHERS.
14 Q. LET'S ASSUME, FOR A MOMENT, THE TAX RETURN IS
15 LIMITED TO THIS FACILITY. THE TAX RETURN FOR 2003
16 SHOWS A GROSS RECEIPTS OF \$173,000. IS THAT
17 CORRECT?
18 A. THAT'S CORRECT.
19 Q. AND IT SHOWS EXPENSES AND THEN ORDINARY INCOME SHOWS
20 TOTAL INCOME AFTER EXPENSES OF \$7,444?
21 A. THAT'S CORRECT.
22 Q. OKAY. BUT YOU WEREN'T PROVIDED WITH ANY PROFIT AND
23 LOSS STATEMENT OR ANY BALANCE SHEET FROM 2003?
24 A. NOT A QUICKBOOKS. THIS SCHEDULE 1120S, IS, OF
25 COURSE, A P AND L STATEMENT, BUT I DO NOT HAVE A

1 QUICKBOOKS PRINT-OUT.

2 Q. OKAY. SO, OTHER THAN THE TAX RETURN, YOU WEREN'T
3 PROVIDED WITH ANY INFORMATION ABOUT '03?

4 A. THAT'S CORRECT. I'M JUST LOOKING IN THE APPRAISAL,
5 BECAUSE THE APPRAISER, WHOSE REPORT WAS FUNDAMENTAL
6 TO MY REPORT, MAY HAVE LOOKED IN 2003. I DO NOT
7 RECALL, AS I'M SITTING HERE NOW.

8 Q. OKAY.

9 A. HE INCLUDED THE '04 P AND L.

10 Q. OKAY.

11 A. AND 12-31-04 BALANCE SHEET. I DO NOT SEE AN '03
12 STATEMENT.

13 Q. OKAY. WHAT IN THE APPRAISER'S REPORT WAS IMPORTANT
14 TO YOUR OPINION?

15 A. WITH REGARD TO THE PATELS, HIS COMPUTATION OF
16 AVERAGE MONTHLY OPERATING INCOME IN '04 PRIOR TO
17 RENT EXPENSE, AND HIS ESTIMATE OF WHAT THAT INCOME
18 WOULD HAVE INCREASED TO IN '07, THE YEAR OF HIS
19 APPRAISAL. I USED THAT. CONSISTENT WITH HIS
20 ANALYSIS, I USED THE SAME DISCOUNT RATE THAT HE HAD
21 USED, WHICH WAS 14 AND A HALF PERCENT. I BELIEVE
22 THAT'S IT.

23 Q. DID YOU USE -- YOU FOLLOWED HIS LEAD AND USED A
24 DISCOUNT RATE OF 14 AND A HALF PERCENT?

25 A. YES.

1 Q. WHEN YOU TYPICALLY DO AN ECONOMIC ANALYSIS FOR
2 SOMEONE AND YOU ARE DISCOUNTING NUMBERS BACK TO
3 PRESENT VALUE, WHAT DISCOUNT RATE DO YOU TYPICALLY
4 USE?

5 A. DEPENDS ON THE ANALYSIS. IF IT IS -- IF IT'S LOST
6 WAGES, SOMEONE IS EMPLOYED BY SOMEONE, BY AN
7 EMPLOYER IN A TYPICAL SITUATION, I'LL USE AFTER TAX
8 YIELDS ON TREASURY ISSUES. TREASURY ISSUES NOW ARE
9 YIELDING ANYWHERE FROM AROUND ONE PERCENT TO FOUR
10 AND A HALF PERCENT.

11 Q. TELL ME WHAT YOUR, BOTTOM LINE, YOUR ANALYSIS FOR
12 THE PATELS' FINANCIAL LOSS IS.

13 A. SURE.

14 Q. AND WHAT IT'S MADE UP OF.

15 A. I. ESTIMATE THE PATELS' LOSS AT \$316,818, BUT THAT IS
16 IN PRESENT VALUE DOLLARS AS OF JULY 1, 2007. I USED
17 THAT AS AN ESTIMATED RESOLUTION DATE WHEN I DID THE
18 ANALYSIS. AND IN JUNE OF 2007, THAT NUMBER WOULD
19 INCREASE, OF COURSE, BECAUSE THERE WOULD BE LESS
20 DISCOUNTING. THAT LOSS WAS COMPRISED OF LOST NET
21 OPERATING INCOME THROUGH THE ESTIMATED DATE OF
22 RESOLUTION OF \$97,620. THE ABNORMAL LOSS OF
23 INVENTORY REPORTED ON THEIR P AND L OF \$34,500. THE
24 ABNORMAL LOSS OF EQUIPMENT REPORTED ON THEIR P AND L
25 OF \$76,821. AND THE PRESENT VALUE OF THEIR

1 PROJECTED FUTURE LOSSES, WHICH REPRESENTS, IN FACT,
2 THE VALUE OF THEIR FUTURE LEASE HOLD RIGHTS OF
3 \$107,877. THE SUM OF THOSE IS THE \$316,818.

4 Q. ALL RIGHT. THE LOSS OF INVENTORY YOU JUST TOOK
5 SIMPLY FROM THE PROFIT AND LOSS?

6 A. YES, SIR.

7 Q. DON'T KNOW THE BASIS FOR THAT?

8 A. I DO NOT.

9 Q. DON'T KNOW IF IT'S CORRECT OR INCORRECT?

10 A. THAT'S CORRECT.

11 Q. THE ABNORMAL LOSS OF EQUIPMENT, YOU DID THE SAME
12 THING?

13 A. EXACTLY.

14 Q. SO, YOU TOOK THAT FROM THE P AND L?

15 A. YES.

16 Q. DON'T KNOW WHETHER IT'S CORRECT OR NOT?

17 A. THAT'S CORRECT.

18 Q. DON'T KNOW IF THAT'S THE INITIAL COST OF EQUIPMENT
19 OR IF THAT'S THE REPLACEMENT COST OF EQUIPMENT, OR
20 IF THAT'S THE DEPRECIATED COST OF EQUIPMENT?

21 A. NO, I DO NOT KNOW.

22 Q. OKAY. THAT WOULD CERTAINLY BE A FACTOR TO CONSIDER
23 IF YOU WERE PRESENTED WITH THAT INFORMATION?

24 A. YES.

25 Q. THE LOSS OF NET OPERATING INCOME, \$97,620, HOW DID

- 1 YOU DERIVE THAT?
- 2 A. IF YOU LOOK AT THIS SPREADSHEET THAT WAS INCLUDED IN
- 3 MY NOTES TAB ---
- 4 Q. RIGHT, RIGHT.
- 5 A. IT SHOWS THE COMPUTATION OF THE LOST INCOME TO THE
- 6 PATELS. THE TIME PERIODS ARE IDENTIFIED AS MONTHLY.
- 7 THE OPERATING INCOME BEFORE RENT EXPENSE WAS
- 8 IDENTIFIED BY THE APPRAISER IN 2004 DOLLARS, AND
- 9 ALSO IN 2007 DOLLARS.
- 10 Q. SO, WERE YOU JUST REPEATING HIS NUMBERS?
- 11 A. YES.
- 12 Q. YOU DIDN'T DO CALCULATIONS YOURSELF? YOU'RE JUST
- 13 ACCEPTING HIS NUMBERS?
- 14 A. YES, HE COMPUTED WHAT THE AVERAGE -- THAT'S HOW HE
- 15 APPRAISED THE PROPERTY. I ---
- 16 Q. ALL RIGHT.
- 17 A. I COMPUTED THE INTERPOLATED VALUES BETWEEN 2004 AND
- 18 2007, USING THE RATE OF GROWTH THAT IS IMPLIED BY
- 19 HIS ESTIMATE OF 2007 OPERATING INCOME.
- 20 Q. AND WHAT RATE OF GROWTH WAS THAT?
- 21 A. IT WAS A TOTAL INCREASE OF 6.8% OVER A THREE-YEAR
- 22 PERIOD.
- 23 Q. NOW, YOU ARE PLUGGING IN HIS NUMBERS TO COME UP WITH
- 24 \$97,620 IN LOSS OF OPERATING INCOME. IS THAT -- IS
- 25 OPERATING INCOME THE SAME THING AS PROFIT?

1 A. YES.

2 Q. ALL RIGHT. THROUGH THE PERIOD OF ---

3 A. WELL, LET ME TAKE IT BACK..

4 Q. OKAY.

5 A. IT'S THE SAME THING AS INCOME FROM OPERATIONS. IT
6 WOULD NOT INCLUDE EXTRAORDINARY SOURCES OF INCOME OR
7 EXTRAORDINARY EXPENSES THAT ACTUALLY ---

8 Q. IT WOULD ---

9 A. --- AREN'T RELATED TO THE OPERATION.

10 Q. IT WOULD INCLUDE WHAT WE WOULD TYPICALLY SEE ON A
11 PROFIT AND LOSS, IS WHAT WE DO TYPICALLY SEE ON THE
12 PROFIT AND LOSS HERE ABSENT THE EXTRAORDINARY
13 EXPENSE FROM THIS INCIDENT?

14 A. GENERALLY, YES.

15 Q. AND THE PROFIT AND LOSS THAT WE DO HAVE HERE, CAN
16 YOU TURN BACK TO THE PROFIT AND LOSS STATEMENT? IT
17 SHOWS A PROFIT OF \$14,959 IN THE YEAR '04.

18 A. THAT'S CORRECT.

19 Q. AND I BELIEVE THE TAX RETURNS SHOWED A PROFIT OF
20 \$7,444 IN THE YEAR '03?

21 A. THAT'S CORRECT.

22 Q. DO YOU KNOW WHAT PORTION OF '03 THAT COVERS? WAS
23 THIS BUSINESS IN EXISTENCE THE ENTIRE YEAR OF '03?

24 A. I THINK THEY WERE INCORPORATED SOMETIME IN MAY. IT
25 WILL SHOW ON THE TAX RETURN.

- 1 Q. I BELIEVE THE TAX RETURN SHOWS MAY 6, '03.
- 2 A. YES.
- 3 Q. OKAY. IF YOU WERE DETERMINING THE PROFIT, EXPECTED
- 4 PROFIT FOR THIS BUSINESS FROM '04 FORWARD, HOW WOULD
- 5 YOU GO ABOUT DOING IT?
- 6 A. I WOULD TRY TO COMPUTE WHAT THEIR AVERAGE OPERATING
- 7 INCOME WAS IN THE MONTHS OF OPERATION IN '04.
- 8 Q. OKAY. AND FROM THAT, CARRY IT FORWARD WITH SOME
- 9 INCREASE OR SOME DECREASE? HOW WOULD YOU DETERMINE
- 10 ---
- 11 A. I WOULD, YES.
- 12 Q. HOW WOULD YOU DETERMINE THAT?
- 13 A. I WOULD NORMALLY TIE IT TO C.P.I. IN THIS CASE, I
- 14 DID NOT PROJECT ANY INCREASE BECAUSE THAT WOULD HAVE
- 15 BEEN INCONSISTENT WITH THE APPRAISAL OF THE VALUES
- 16 IN THE REAL ESTATE APPRAISAL.
- 17 Q. BUT HE HAD PROJECTED AN INCREASE AND YOU WERE USING
- 18 HIS NUMBERS.
- 19 A. HE ONLY PROJECTED AN INCREASE FROM '04 TO '07. HE
- 20 DID NOT REFERENCE ANY PROJECTED INCREASES
- 21 THEREAFTER..
- 22 Q. OKAY.
- 23 A. YOU'LL SEE IN MY SPREADSHEET THAT I HAVE A REFERENCE
- 24 TO I-N-F R-A-T-E, INFLATION RATE ---
- 25 Q. UH-HUH.

1 A. BUT I DID NOT USE ONE.

2 Q. HOW MANY NEW BUSINESSES FAIL?

3 A. HOW MANY?

4 Q. YEAH.

5 A. A LOT OF THEM.

6 Q. WAS THIS A FAIRLY NEW BUSINESS?

7 A. YES.

8 Q. IS THERE ANY WAY, AT THIS POINT, IN THE OPERATION OF
9 A NEW BUSINESS TO PREDICT THE FUTURE HEALTH OF THE
10 BUSINESS?

11 A. NOT -- NOT VERY WELL.

12 Q. IF THE -- DOES THE PAYROLL EXPENSE OF \$13,198, DOES
13 THAT SEEM ON THE LOW SIDE TO YOU?

14 A. NO. NO, THEY WERE OPERATING IT AS AN S-CORPORATION,
15 SO THEY WERE PROBABLY WORKING THE COMPANY
16 THEMSELVES.

17 Q. OKAY. SO, IF THEY WERE PAYING SOMEONE ELSE TO RUN
18 THE BUSINESS, THEN THE PAYROLL EXPENSE YOU WOULD
19 EXPECT WOULD BE HIGHER, WOULDN'T YOU?

20 A. YES.

21 Q. BECAUSE DO YOU KNOW THE HOURS THEY RAN THE BUSINESS?

22 A. NO.

23 Q. IT WAS A CONVENIENCE STORE?

24 A. YES.

25 Q. TYPICALLY, THEY WERE GOING FROM EARLY MORNING TO

1 LATE NIGHT?

2 A. MOST DO, YES.

3 Q. SOME RUN 24 HOURS.

4 A. SOME DO.

5 Q. DO YOU KNOW WHETHER THIS ONE DID?

6 A. NO, I DON'T.

7 Q. DO YOU KNOW THE HOURS THIS ONE RAN?

8 A. NO, I DON'T.

9 Q. DO YOU KNOW HOW MANY HOURS THAT \$13,000 ACCOUNTS
10 FOR?

11 A. NO, I DON'T.

12 Q. SO, IF THAT \$13,000 IS LOW BECAUSE THE OWNERS OF THE
13 BUSINESS WERE RUNNING THE BUSINESS, THEN THE ACTUAL
14 PROFIT WOULD BE SOMEWHAT OVERSTATED.

15 BY MR. LANGLEY:

16 OBJECT TO THE FORM.

17 BY THE WITNESS:

18 NO.

19 EXAMINATION RESUMED BY MR. MORRISON:

20 Q. WOULD IT NOT?

21 A. NO. THE OWNERS ARE NOT OBLIGATED TO PAY THEMSELVES.
22 IT'S AN S-CORPORATION. EVEN IF IT WERE A C-
23 CORPORATION, THEY WOULDN'T BE OBLIGATED TO PAY
24 THEMSELVES. THE ---

25 Q. ALL RIGHT. NOT OVERSTATED, SOMEWHAT MISLEADING.

1 BY MR. LANGLEY:

2 SAME OBJECTION.

3 BY THE WITNESS:

4 NO, I DON'T -- I DON'T AGREE WITH THAT, EITHER.

5 THEY ---

6 EXAMINATION RESUMED BY MR. MORRISON:

7 Q. OKAY. WELL, IF THEY WERE PAYING SOMEONE TO RUN THE
8 BUSINESS ---

9 BY MR. LANGLEY:

10 LET HIM FINISH. DAVID, LET HIM FINISH HIS

11 STATEMENT.

12 BY THE WITNESS:

13 WELL ---

14 EXAMINATION RESUMED BY MR. MORRISON:

15 Q. DID YOU HAVE MORE TO SAY?

16 A. YES, SIR.

17 Q. OKAY. GO AHEAD.

18 A. I THINK THE MEASURE IS THE INCOME THEY COULD
19 GENERATE OPERATING THAT BUSINESS. NOW, WHETHER THEY
20 WERE PAYING THEMSELVES A SALARY, OR WHETHER THEY
21 WERE ENJOYING THE INCOME AS BUSINESS PROFIT, IT
22 REALLY DIDN'T MATTER. NOW, IF THEY WERE SIMPLY
23 ENTREPRENEURS AND THEY REALLY WEREN'T INTERESTED IN
24 RUNNING THE BUSINESS. THEY JUST MADE AN INVESTMENT
25 TO HAVE SOMEBODY ELSE RUN IT, THEN, YOU KNOW, I

1 WOULD -- THAT -- I WOULD AGREE WITH YOU. BUT I
2 DON'T AGREE WITH YOU THAT EITHER THE OPERATING
3 INCOME IS OVERSTATED OR THAT THE INCOME TO THEM IS
4 NECESSARILY OVERSTATED.

5 Q. ALL RIGHT. WELL, LET ME REPHRASE MY QUESTION. FOR
6 AN OUTSIDER LOOKING IN, IF YOU'RE LOOKING AT THE
7 VIABILITY OF THE BUSINESS, IF THE PAYROLL IS
8 UNDERSTATED, THEN THE INCOME WILL APPEAR OVERSTATED.

9 BY MR. LANGLEY:

10 OBJECT TO THE FORM.

11 BY THE WITNESS:

12 IN ANY BUSINESS, IF ANY OPERATING EXPENSE IS
13 UNDERSTATED, THEN PROFIT WILL BE OVERSTATED.

14 EXAMINATION RESUMED BY MR. MORRISON:

15 Q. AND THAT COULD BE MISLEADING AS TO THE VIABILITY OF
16 THE BUSINESS, IF THE PROFIT IS OVERSTATED?

17 A. IT COULD BE. I MEAN, IF YOU'RE SUGGESTING TO ME
18 THAT THE PATELS HAD A -- HAD AN INCENTIVE TO
19 OVERSTATE THEIR PROFITS ---

20 Q. NO, NO.

21 A. AND THEREFORE PAY MORE INCOME TAXES, THEY MIGHT BE
22 THE FIRST ONES IN THE LAST 200 YEARS.

23 Q. BUT ACTUALLY, THIS DOESN'T AFFECT THEIR INCOME TAXES
24 BECAUSE THEY'RE GOING TO PAY TAXES, WHETHER IT'S
25 THROUGH -- PERSONALLY, THROUGH THE PAYROLL, THROUGH

1 PAYING THEMSELVES, OR THROUGH THE BUSINESS, PROFIT
2 TO THE BUSINESS. THEY'RE GOING TO PAY TAX ONE WAY
3 OR THE OTHER, AREN'T THEY?

4 BY MR. LANGLEY:

5 OBJECT TO THE FORM.

6 BY THE WITNESS:

7 THEY WILL, BUT WHAT YOU'VE BEEN SAYING IS IF
8 THE PAYROLL IS UNDERSTATED, PROFIT WILL BE
9 OVERSTATED, AND I DON'T AGREE WITH YOU ABOUT THAT.

10 EXAMINATION RESUMED BY MR. MORRISON:

11 Q. I'M TALKING ABOUT THEN LOOKING AT THE VIABILITY OF
12 THE BUSINESS, WHETHER THE BUSINESS, AS A WHOLE, IS A
13 VIABLE BUSINESS AS A PROFITABLE BUSINESS VENTURE, IF
14 THEY DON'T PAY ANY PAYROLL, THEN IT'S GOING TO LOOK
15 MORE PROFITABLE, ISN'T IT?

16 A. THE PROFIT AT THE END WILL BE GREATER. THE TOTAL
17 INCOME TO THEM, AS YOU JUST SAID ---

18 Q. WILL BE THE SAME?

19 A. YES.

20 Q. NOW, I'M ASKING YOU ABOUT ---

21 A. THE VIABILITY OF THE BUSINESS, IT HAS TO BE
22 UNDERSTOOD FROM THEIR VIEWPOINT. THEY MADE THE
23 DECISION TO OPERATE THAT BUSINESS.

24 Q. AND WHETHER IT'S WORTH CONTINUING IN THE FUTURE
25 DEPENDS ON HOW MUCH MONEY THEY CAN MAKE OUT OF IT,

1 IF ANY.

2 A. SURE, EXCEPT THEY WERE OBLIGATED WITH SOME
3 CONTINUING LEASE PAYMENTS. YOU KNOW, THEY HAD MADE
4 AN INVESTMENT OF CAPITAL AND OF THEIR LABOR. AND

5 ---

6 Q. AND THEY'RE PAID FOR THEIR LABOR?

7 A. I'M SORRY?

8 Q. AND THEY'RE PAID FOR THEIR LABOR?

9 A. BUT THEY INVESTED IT. YOU'RE INVESTING YOUR LABOR
10 TODAY. YOU'LL BE PAID FOR IT. I'LL BE PAID FOR
11 MINE, BUT IT'S STILL AN INVESTMENT OF OUR TIME.

12 Q. CORRECT. WHAT DO YOU CHARGE FOR YOUR SERVICES?

13 A. \$280 AN HOUR.

14 Q. AND DO YOU HAVE A C.V.?

15 A. I DO. I DON'T HAVE IT WITH ME.

16 Q. CAN YOU SEND ME ONE?

17 A. SURE.

18 Q. OKAY. I'LL HAVE TO GET YOU A BUSINESS CARD FROM MY
19 CAR.

20 A. THAT'S OKAY.

21 Q. I DON'T HAVE BUT ONE WITH ME. OR I MIGHT.

22 A. I THINK -- I THINK WE'RE PARKED NEXT TO EACH OTHER,
23 SO.

24 Q. OKAY. ACTUALLY, I DO HAVE ONE WITH ME.

25 A. OKAY.

1 Q. IT'S GOT MY EMAIL ON THE BOTTOM, IF YOU WANT TO
2 EMAIL ME ONE, OR A FAX NUMBER, EITHER ONE. ALL
3 RIGHT. SO, YOUR SPREADSHEET, THEN, WHERE WAS YOUR
4 SPREADSHEET? SO, YOUR SPREADSHEET, THEN, SHOWS JULY
5 '04 AN INCOME OF \$1,476.71? IS THAT CORRECT?

6 A. THAT'S CORRECT.

7 Q. AND THEN, IT SHOWS INCOME FOR AUGUST OF \$2,614.83.
8 IT SHOWS THAT NUMBER THROUGH THE REST OF THE YEAR.
9 IS THAT CORRECT?

10 A. YES, SIR.

11 Q. WHY THE DIFFERENCE BETWEEN JULY AND AUGUST?

12 A. JULY IS PART YEAR. SEE, HERE IT SAYS PRO-RATED. I
13 MEAN, I'M SORRY. JULY IS PART, PARTIAL MONTH.

14 Q. OKAY. AND \$2,614.83 THROUGH THE REST OF 2004?

15 A. YES, SIR.

16 Q. FOR 2005, IT SHOWS AN INCOME OF ESTIMATED PREDICTED
17 INCOME OF \$2,699.41?

18 A. YES, SIR.

19 Q. AND IT SHOWS THAT THROUGH THE ENTIRE YEAR OF '05,
20 CORRECT?

21 A. THAT'S CORRECT.

22 Q. FOR '06, IT SHOWS AN ESTIMATED INCOME OF \$2,785.87?

23 A. YES, SIR.

24 Q. IT SHOWS THAT THROUGH THE ENTIRE YEAR?

25 A. THAT'S CORRECT.

1 Q. AND FOR '07, IT SHOWS \$2,874.24, AND IT SHOWS THAT
2 THROUGH PART OF THE REST OF THE YEAR. AND THEN, IT
3 SHOWS AN INCREASE IN RENT?

4 A. THAT'S RIGHT.

5 Q. AND THE END PROFIT FOR JULY THROUGH THE REST OF THE
6 YEAR GOES DOWN TO \$2,474.24?

7 A. YES.

8 Q. NOW, THAT ASSUMES THAT THE PATELS ARE THERE AND
9 WORKING THE BUSINESS THROUGH THAT PERIOD OF TIME, AS
10 WELL, DOES IT NOT?

11 A. YES.

12 Q. DO YOU KNOW WHAT THE PATELS HAVE BEEN DOING SINCE
13 JULY OF '04?

14 A. I DO NOT.

15 Q. DO YOU KNOW WHETHER THEY'VE BEEN WORKING ELSEWHERE
16 AND EARNING AN INCOME?

17 A. I DO NOT.

18 Q. DO YOU KNOW WHETHER THEY'VE BEEN ABLE TO MITIGATE
19 THEIR LOSS IN ANY WAY?

20 A. NO, I DON'T.

21 Q. DO YOU KNOW WHETHER FOLLOWING JULY OF '04, MRS.
22 PATEL WAS IN GOOD ENOUGH HEALTH TO WORK ANYWHERE?

23 A. I DO NOT.

24 Q. DO YOU KNOW WHETHER SHE EVER WENT BACK TO WORK?

25 A. NO.

1 Q. DO YOU KNOW WHETHER THIS HOSTAGE INCIDENT CAUSED HER
2 SUCH FRIGHT THAT SHE MIGHT NOT WANT TO RETURN TO
3 WORK?

4 A. NO.

5 Q. WOULD THOSE BE FACTORS THAT WOULD BE RELEVANT IN
6 DETERMINING AN ECONOMIC LOSS?

7 A. I THINK THOSE MIGHT BE FACTORS IN ALLOCATING THE
8 LOSSES AMONG THE PLAINTIFFS.

9 Q. AND IF THEY WERE ABLE TO WORK ELSEWHERE AND MITIGATE
10 THEIR LOSS, THAT WOULD CERTAINLY BE A FACTOR IN
11 DETERMINING THEIR ECONOMIC LOSS, WOULD IT NOT?

12 A. IT CERTAINLY MIGHT.

13 Q. BECAUSE THEY MAY NOT HAVE LOST MONEY. THEY MAY HAVE
14 MADE MORE MONEY THAN THEY WOULD HAVE, OTHERWISE?

15 A. THEY MAY HAVE.

16 Q. THEY MAY HAVE MADE LESS?

17 A. THAT'S CORRECT.

18 Q. YOU DON'T KNOW THAT?

19 A. THAT'S EXACTLY RIGHT.

20 Q. DON'T KNOW WHAT MR. PATEL HAS BEEN DOING SINCE JULY
21 OF '04?

22 A. THAT'S CORRECT.

23 Q. DON'T KNOW WHAT MRS. PATEL HAS BEEN DOING SINCE JULY
24 OF '04?

25 A. THAT'S RIGHT.

1 Q. YOU HAVEN'T BEEN PROVIDED WITH TAX RETURNS FOR THEM?

2 A. HAVE NOT.

3 Q. SINCE -- FOR '03 OR '04, OTHER THAN FOR THE
4 BUSINESS?

5 A. THAT'S CORRECT.

6 Q. HAVEN'T BEEN PROVIDED WITH TAX RETURNS FOR THEM FOR
7 '05, '06, '07, OR '08?

8 A. THAT'S RIGHT.

9 Q. NOR WITH ANY OTHER STATEMENTS OF INCOME FOR THEM?

10 A. THAT'S RIGHT.

11 Q. THROUGH TODAY?

12 A. THAT'S RIGHT.

13 Q. IS IT YOUR UNDERSTANDING THAT THEY WERE RUNNING THE
14 BUSINESS, THIS BUSINESS?

15 BY MR. LANGLEY:

16 OBJECT TO THE FORM.

17 BY THE WITNESS:

18 I BELIEVE SO. YOU JUST INDICATED THAT SHE MAY
19 HAVE SUFFERED SOME PSYCHOLOGICAL DAMAGE AS A RESULT
20 OF THE HOSTAGE INCIDENT, SO I ASSUME SHE WAS IN
21 THERE.

22 EXAMINATION RESUMED BY MR. MORRISON:

23 Q. IS IT YOUR UNDERSTANDING THAT SHE WAS THE HOSTAGE?

24 BY MR. LANGLEY:

25 OBJECT TO THE FORM.

1 BY THE WITNESS:

2 I DON'T RECALL. I ACTUALLY SAW IT ON T.V.,
3 JUST BECAUSE WE HAPPENED TO BE WATCHING TELEVISION
4 AT THE TIME, BUT I -- I CAN'T TELL YOU THAT IT WAS
5 HER.

6 EXAMINATION RESUMED BY MR. MORRISON:

7 Q. OKAY. IF SHE WAS THE HOSTAGE, THEN THAT WOULD
8 CERTAINLY BE SOME EVIDENCE THAT SHE WAS WORKING AND
9 RUNNING THE BUSINESS?

10 A. IT WOULD BE CLEAR EVIDENCE THAT SHE WAS THERE AT THE
11 TIME.

12 Q. AND IF SHE WAS THE ONLY ONE THERE AT THE TIME, THAT
13 WOULD BE SOME EVIDENCE THAT SHE WAS WORKING IN THE
14 BUSINESS, WOULDN'T IT?

15 A. IT WOULD CERTAINLY SUGGEST IT, YEAH.

16 Q. AND IF, AS A RESULT OF BEING TAKEN HOSTAGE AND HELD
17 HOSTAGE AT GUNPOINT FOR 13 HOURS, IF SHE CHOSE NOT
18 TO GO BACK TO WORK, THAT WOULD CERTAINLY RESULT IN
19 SOME LOSS OF INCOME FOR HER.

20 A. YES.

21 Q. THE -- IT WOULD ALSO MAKE A DIFFERENCE IN THE
22 ALLOCATION OF THAT LOSS OF INCOME, WOULD IT NOT?

23 A. ALLOCATION AMONG DEFENDANTS OR ALLOCATION AMONG
24 PLAINTIFFS?

25 Q. ALLOCATION AMONG EVERYONE.

1 A. I CAN'T REALLY SPEAK TO THE DEFENDANTS. IF THEY --
2 IF THEY WERE TO HAVE DECIDED TO NOT CONTINUE WITH
3 THAT OPERATION, THEN -- AND IF THE BUILDING WERE
4 SUBSEQUENTLY DESTROYED AND ITS VALUE WAS DIMINISHED,
5 THEN I THINK THAT YOU WOULD PROBABLY SEE A GREATER
6 LOSS TO THE OTHER TWO PLAINTIFFS, ONE OF WHOM WAS A
7 -- WAS, HAD A LEASE, SUB-LEASE ARRANGEMENT.

8 Q. WELL, LET'S TALK ABOUT THE PATELS FOR A MINUTE.
9 WE'LL GET TO THE OTHERS IN A MINUTE.

10 A. WELL, I DON'T BELIEVE -- YOU JUST ASKED ME ABOUT THE
11 ALLOCATION.

12 Q. UH-HUH.

13 A. I MEAN, EITHER I CAN ANSWER THAT OR NOT. IF YOU ASK
14 ME ABOUT THE ALLOCATION, I HAVE TO TALK ABOUT ALL OF
15 THEM.

16 Q. LET ME MAKE MY QUESTION A LITTLE MORE CLEAR.

17 A. OKAY.

18 Q. I'M TALKING ABOUT ALLOCATION OF THE PATELS' DAMAGES
19 RIGHT NOW, AS TO WHERE THE DAMAGES COME FROM. AS
20 FAR AS WHERE THEY COME FROM, IF SHE CHOOSES NOT TO
21 WORK AGAIN BECAUSE OF HER FRIGHT OF THE HOSTAGE
22 SITUATION AND HER FRIGHT THAT THAT MAY HAPPEN AGAIN,
23 THAT CERTAINLY DOESN'T BECOME THE CITY OF
24 SPARTANBURG'S FAULT, CORRECT?

25 BY MR. LANGLEY:

1 OBJECT TO THE FORM.

2 BY THE WITNESS:

3 NOW YOU'RE ASKING ME A LEGAL OPINION, AND I'M
4 JUST NOT WILLING TO VENTURE THERE.

5 EXAMINATION RESUMED BY MR. MORRISON:

6 Q. YOU DON'T THINK THAT'S A FACTUAL OPINION?

7 A. I THINK IT'S A -- I THINK IT'S A FACTOR THAT Y'ALL
8 WILL BE ARGUING. IT'S NOT A FACTOR FOR ME TO
9 CONSIDER.

10 Q. OKAY. SO, THEN, YOU AREN'T SAYING, THEN, THAT THE
11 ECONOMIC LOSS SHE HAS SUFFERED IS THE FAULT OF THE
12 CITY OF SPARTANBURG?

13 A. NO, I DON'T HAVE ANY OPINION WITH REGARD TO
14 LIABILITY.

15 Q. OKAY.

16 A. I KNOW WHAT THE CITY OF SPARTANBURG ORDERED TO BE
17 DONE, BUT Y'ALL ARE GOING TO ARGUE ABOUT WHETHER,
18 YOU KNOW, THE CITY OF SPARTANBURG ORDERING THE
19 EQUIPMENT TO RAM THAT BUILDING MAKES IT LIABLE.

20 Q. I UNDERSTAND. DID YOU WATCH THIS INCIDENT
21 THROUGHOUT THE DAY?

22 A. NO, WE WERE -- WE WERE HOME AND JUST HAPPENED TO SEE
23 IT ON T.V.

24 Q. DID YOU SEE IT WHILE IT WAS ONGOING, OR AFTER IT WAS
25 OVER?

1 A. I DON'T EVEN REMEMBER THAT.

2 Q. OKAY. YOU HAVE IN HERE AS AN ELEMENT OF DAMAGE,
3 PRESENT VALUE OF LOST LEASE HOLD RIGHTS. WHAT IS
4 THAT?

5 A. IT'S REALLY THE PRESENT VALUE OF THEIR PROFITS AFTER
6 THE PROJECTED RESOLUTION DATE. I MEAN, THEY HAD
7 SOME LEASE HOLD RIGHTS, AND THAT'S HOW YOU WOULD
8 MEASURE IT, THE TOTAL VALUE OF THAT PROPERTY, THE
9 TOTAL DIMINUTION AND THE VALUE OF THAT PROPERTY
10 CANNOT BE ASSIGNED TO THE OWNER OF THE PROPERTY
11 BECAUSE THEY HAD SOME LEASE HOLD RIGHTS, AS DID THE
12 PERSON THAT THEY WERE LEASING FROM. IS THEIR
13 ECONOMIC LOSS, THE PATELS' ECONOMIC LOSS FROM THE
14 BUSINESS THEIR LOST PROFITS PLUS THE LOSS OF
15 INVENTORY PLUS THE LOSS OF EQUIPMENT?

16 A. YES.

17 Q. WHAT ELSE WOULD THEY LOSE, OTHER THAN THE INVENTORY,
18 EQUIPMENT, AND PROFIT?

19 A. WELL, NOW YOU JUST ASKED ME IF THEIR TOTAL LOSS WAS
20 COMPRISED OF THOSE THREE, AND I SAID YES. SO, I
21 CAN'T TELL YOU THERE'S ANYTHING ELSE THEY HAVE LOST.

22 Q. ALL RIGHT. SO, IS THE LEASE HOLD RIGHTS, THEN, IS
23 THAT FUTURE PROFIT AFTER YOUR ESTIMATED TRIAL DATE?

24 A. YEAH, IN PRESENT VALUE DOLLARS, RIGHT, THROUGH ---

25 Q. SO, THAT'S JUST CARRYING THOSE NUMBERS ON FORWARD?

1 A. THROUGH THE END OF THEIR FINAL OPTION ON THE LEASE,
2 YES.

3 Q. SO, THAT'S SIMPLY CARRYING THE PROFIT, MONTHLY
4 PROFIT NUMBERS FORWARD PAST YOUR ORIGINAL ESTIMATED
5 TRIAL DATE?

6 A. SURE.

7 Q. OKAY. AND YOU ARE USING 14 AND A HALF PERCENT AS A
8 DISCOUNT FACTOR TO DISCOUNT IT BACK TO PRESENT
9 VALUE?

10 A. YES, SIR.

11 Q. IF YOU USED 13%, WOULD THE NUMBER BE HIGHER OR
12 LOWER?

13 A. HIGHER.

14 Q. IF YOU USED 15%, WOULD THE NUMBER BE HIGHER OR
15 LOWER?

16 A. LOWER.

17 Q. AND DO YOU RECALL HOW LONG THE LEASE PERIOD WAS?

18 A. THROUGH JUNE 30TH OF 2012.

19 Q. WAS THAT THE LEASE PERIOD, OR WAS THAT WITH OPTIONS?

20 A. WITH OPTIONS.

21 Q. DO YOU RECALL HOW LONG THE OBLIGATED LEASE PERIOD
22 WAS?

23 A. THROUGH JUNE 30, 2007.

24 Q. AND THEN, THEY HAD YEARLY OPTIONS AFTER THAT?

25 A. HAD AN OPTION TO RENEW FOR AN ADDITIONAL FIVE YEARS.

1 Q. OKAY. HAVE YOU ---

2 A. BUT I'M TAKING THAT FROM THE ORIGINAL LEASE THAT WAS
3 SIGNED EARLIER. SO, I DO NOT KNOW -- ALL I KNOW IS
4 THE TERMS DURING THE RENEWAL PERIOD. I DON'T KNOW
5 AS I SIT HERE NOW WHETHER THE OPTIONS WERE ANNUAL OR
6 FOR AN ENTIRE FIVE-YEAR PERIOD.

7 Q. DID YOU EVER CALCULATE THE PRESENT VALUE OF LOST
8 LEASE HOLD RIGHTS THROUGH JUNE 30, 2007, THE
9 EXPIRATION OF THE LEASE?

10 A. WELL ---

11 Q. WITHOUT OPTIONS.

12 A. NO, BUT IT IS CERTAINLY VERY EASY TO DO FROM THE
13 SPREADSHEET THAT I'VE SHOWN YOU.

14 Q. OKAY. DID YOUR CALCULATIONS FOR YEARS THREE, FOUR,
15 FIVE OF INCOME SHOW ANY EXPENSE FOR REPLACEMENT OF
16 EQUIPMENT?

17 A. NO, BECAUSE THE COST OF REPLACING THE EQUIPMENT IS
18 AN EXTRAORDINARY COST THAT WAS INCLUDED AS A
19 SEPARATE ELEMENT OF DAMAGE.

20 Q. OKAY. BUT THERE'S NOTHING INCLUDED FOR YEARS THREE,
21 FOUR, AND FIVE FOR ANY EXTRAORDINARY EXPENSE, ANY
22 REPLACEMENT OF EQUIPMENT, ANY REPLACEMENT OF
23 ANYTHING LIKE THAT. IT'S JUST COST OF GOODS SOLD
24 AND ---

25 A. NO, WELL, IT'S ALL OPERATING EXPENSES AS WERE

1 IDENTIFIED BY THE REAL ESTATE APPRAISER ---

2 Q. TYPICAL OPERATING EXPENSES?

3 A. YES, SURE.

4 Q. OKAY. BUT IF A FREEZER WENT OUT AND YOU NEEDED TO
5 HAVE A FREEZER REPLACED, THAT KIND OF EXPENSE IS
6 INCLUDED IN HERE?

7 A. OH, YEAH. I MEAN, HE WOULD HAVE USED ORDINARY
8 OPERATING EXPENSES, AND I BELIEVE THOSE WOULD BE --
9 THAT WOULD BE AN ORDINARY OPERATING EXPENSE. I
10 THOUGHT YOU WERE TALKING ABOUT THE REPLACEMENT OF
11 EQUIPMENT THAT WAS LOST DUE TO THE EVENT.

12 Q. NO, NO. I'M NOT TALKING ABOUT THAT. THIS WAS A NEW
13 BUSINESS?

14 A. YES.

15 Q. SO, IN ITS FIRST YEAR OF OPERATION, YOU WOULDN'T
16 EXPECT TO HAVE ANY REPLACEMENT OF EQUIPMENT BECAUSE
17 ALL THE EQUIPMENT IS NEW, CORRECT?

18 A. NO, BUT YOU WOULD EXPECT TO HAVE DEPRECIATION.

19 Q. OKAY. AND IS THE DEPRECIATION INCLUDED IN FUTURE
20 YEARS' EXPENSES?

21 A. TO THE EXTENT THAT THE APPRAISER DID IT, I USED
22 THAT.

23 Q. SO, DOES THE PROFIT AND LOSS SHOW ANY DEPRECIATION
24 EXPENSE?

25 A. I DON'T THINK SO, BECAUSE THE BALANCE SHEET DOESN'T

1 EVEN SHOW EQUIPMENT.

2 Q. OKAY. AND THE TAX RETURNS SHOWS NO DEPRECIATION
3 EXPENSE.

4 A. THAT'S CORRECT.

5 Q. SO, THEN, THE CALCULATIONS UPON WHICH THOSE PROFIT
6 AND LOSS WAS CALCULATED SHOWED NO EXPENSE FOR FUTURE
7 REPLACEMENT OR REPAIR OF EQUIPMENT.

8 BY MR. LANGLEY:

9 OBJECT TO THE FORM.

10 EXAMINATION RESUMED BY MR. MORRISON:

11 Q. IS THAT CORRECT?

12 A. THE 2004 TAX RETURN SHOWS A MINOR AMOUNT OF
13 DEPRECIATION. 2003 DOES NOT SHOW ANY.

14 Q. WHAT DOES 2004 SHOW?

15 A. \$53.

16 Q. OKAY. THE -- DO YOU KNOW AS WE SIT HERE TODAY
17 WHETHER THE FUTURE PROFITS THAT YOU HAVE CALCULATED
18 TAKE INTO ACCOUNT ANY FUTURE EXPENSE FOR REPAIR OR
19 REPLACEMENT OF EQUIPMENT?

20 A. NO, I DIDN'T CALCULATE THE FUTURE PROFITS.

21 Q. YOU JUST ACCEPTED ----

22 A. THE FUTURE MONTHLY PROFITS. THOSE WERE CALCULATED
23 BY THE REAL ESTATE APPRAISER.

24 Q. WOULD FUTURE REPAIR AND REPLACEMENT OF EQUIPMENT BE
25 SOMETHING FAIR TO CONSIDER IN DETERMINING A

1 COMPANY'S FUTURE PROFITS?

2 A. ORDINARY REPLACEMENT. YEAH, ORDINARY USING UP OF
3 EQUIPMENT THROUGH ECONOMIC DEPRECIATION.

4 Q. AND ORDINARY MAINTENANCE OF EQUIPMENT?

5 A. SURE.

6 Q. OKAY. THOSE WOULD BE FAIR TO CONSIDER?

7 A. OF COURSE.

8 Q. DO YOU KNOW WHETHER THEY WERE CONSIDERED?

9 A. NO, THE APPRAISER WILL HAVE TO ANSWER THAT QUESTION.

10 Q. SO, YOU DON'T KNOW FROM HIS APPRAISAL WHETHER HE
11 CONSIDERED THAT OR NOT?

12 A. I DON'T RECALL.

13 Q. DOES THE APPRAISAL REFLECT WHETHER HE CONSIDERED
14 THAT OR NOT?

15 A. THAT'S WHY I SAID I DIDN'T RECALL. HE SAID HE
16 ANNUALIZED THE INCOME EXPENSE FIGURES FROM JANUARY
17 1, '04, TO JULY 19, '04. THEN, ADD FIVE PERCENT
18 BECAUSE MAY THROUGH OCTOBER TYPICALLY BRING IN HIGH
19 SALES REVENUE. THAT IS -- THAT IS HOW HE IDENTIFIED
20 IT.

21 Q. YOU'RE LOOKING AT PAGE 30 OF HIS REPORT?

22 A. YES, I AM.

23 Q. AND THE INCOME EXPENSE FIGURES FOR '04 WOULD BE
24 WHAT'S REFLECTED ON PAGE 31, THE P AND L?

25 A. HE'LL HAVE TO ANSWER THAT QUESTION.

1 Q. IS PAGE 31 THE PROFIT AND LOSS?

2 A. OH, HIS PAGE 31?

3 Q. YES.

4 A. I ASSUME SO, YES.

5 Q. DO YOU SEE ANY OTHER, OTHER THAN PAGE 31 AND 32, DO
6 YOU SEE ANY OTHER PROFIT AND LOSS FIGURES FROM WHICH
7 HE COULD HAVE DERIVED THAT INFORMATION?

8 A. NO, BUT HE'S GOING TO HAVE TO ANSWER THAT QUESTION.
9 HE INDICATES ---

10 Q. BUT YOU DON'T ---

11 A. --- THAT HE'S EVALUATED SOME OTHER OPERATING
12 RESULTS, BUT YOU KNOW, I'M NOT GOING TO DEFEND HIS
13 COMPUTATION OF THE AVERAGE MONTHLY INCOME.

14 Q. BUT YOU RELIED UPON IT?

15 A. OF COURSE I RELIED ON IT.

16 Q. AND YOU CERTAINLY ---

17 A. I RELY -- I RELY ON THE LEASE, BUT I'M NOT GOING TO
18 DEFEND IT.

19 Q. I UNDERSTAND, BUT IN ORDER TO RELY UPON IT, YOU
20 CERTAINLY WANT TO MAKE SURE IT'S RELIABLE, DO YOU
21 NOT?

22 A. NO. I THINK THAT THE FINDER OF FACT IS GOING TO
23 HAVE TO DECIDE WHETHER IT'S RELIABLE.

24 Q. SO, YOU CAN'T SAY WHETHER HIS COMPUTATIONS ARE
25 RELIABLE?

1 BY MR. LANGLEY:

2 OBJECT TO THE FORM.

3 BY THE WITNESS:

4 WELL, I'M NOT AN EXPERT IN REAL ESTATE. I'M
5 NOT GOING TO TELL YOU THAT HIS APPRAISAL OF THAT
6 PROPERTY IS RELIABLE.

7 EXAMINATION RESUMED BY MR. MORRISON:

8 Q. AND YOU'RE NOT GOING TO TELL ME THAT HIS ---

9 A. AND HIS APPRAISAL DEPENDS ON THE INCOME APPROACH.

10 I'M NOT GOING TO VENTURE THERE ---

11 Q. I'M NOT ASKING YOU TO.

12 A. OR ELSE I'M CASTING MYSELF AS A REAL ESTATE EXPERT.

13 Q. I'M NOT ASKING YOU TO GET INTO THE REAL ESTATE. I'M
14 ASKING YOU ABOUT THE PROFIT AND LOSS FOR THE RUNNING
15 OF THE BUSINESS TO THE PATELS. AND YOU CANNOT
16 VENTURE TO SAY WHETHER HIS ESTIMATION OF FUTURE
17 PROFITS IS RELIABLE, CORRECT?

18 A. I RELIED UPON IT. I'M GETTING INTO A LITTLE BIT OF
19 SEMANTICS WITH YOU HERE. I'M TELLING YOU ---

20 Q. I UNDERSTAND YOU RELIED ON IT.

21 A. I'M TELLING YOU I AM NOT GOING TO DEFEND IT. I'M
22 NOT GOING TO SAY IT'S RIGHT. I'M NOT GOING TO SAY
23 IT'S CORRECT. I PRESUME HE'S GOING TO TESTIFY TO
24 THAT ---

25 Q. OKAY.

1 A. --- AND SOMEBODY'S GOING TO HAVE TO DECIDE WHETHER
2 IT'S RIGHT OR NOT.

3 Q. OKAY. SO, YOU JUST ---

4 A. IF IT'S NOT RIGHT, MY NUMBERS OUGHT TO BE ADJUSTED.

5 Q. SO, YOU JUST TOOK IT AS IS?

6 A. EXACTLY.

7 Q. WITHOUT ANY, ANY EXAMINATION AS TO ITS RELIABILITY?

8 A. EXACTLY, YES.

9 Q. SO, YOU CAN'T TESTIFY ONE WAY OR THE OTHER AS TO ITS
10 RELIABILITY?

11 A. THAT'S EXACTLY RIGHT.

12 Q. OKAY. DID WE HAVE AVAILABLE IN THE '03 TAX RETURN,
13 SALES NUMBERS FOR THE MONTH OF MAY THROUGH OCTOBER?

14 A. NOT MONTHLY, BUT WE HAD THE AGGREGATE FOR THAT YEAR
15 PERIOD, YEAH.

16 Q. OKAY. AND WOULD YOU EXPECT THAT THE PATELS WOULD
17 HAVE THE BACK UP MONTHLY TO PROVIDE TO SOMEONE IF
18 REQUESTED?

19 A. I WOULD -- ORDINARILY, I WOULD EXPECT SO.

20 Q. OKAY.

21 A. I DON'T KNOW WHERE THEY KEPT THEIR RECORDS, IF THEY
22 KEPT THEM AT THE STORE. MAYBE IT'S PROBLEMATIC. I
23 JUST DON'T KNOW.

24 Q. OKAY. DO YOU KNOW WHETHER THOSE RECORDS WOULD
25 SUPPORT THE CONCLUSION THAT MAY THROUGH OCTOBER

1 WOULD BRING IN MORE MONEY, SO WE SHOULD ADD FIVE
2 PERCENT?

3 A. NO. THAT WAS A START UP BUSINESS IN MAY. I WOULD
4 NOT EXPECT IT TO, AND PROBABLY, IF THE TABLES WERE
5 TURNED, YOU WOULD BE SITTING HERE, ASKING ME WHY
6 WOULD I USE THE FIRST EIGHT MONTHS OF OPERATION OF
7 BUSINESS AS A BASIS FOR PROJECTING THE INCOME. YOU
8 KNOW, I DON'T KNOW. IT WAS A START UP BUSINESS AT
9 THAT TIME. I DON'T KNOW HOW LONG IT TOOK THEM TO
10 CRANK UP.

11 Q. OKAY. IS IT MORE DIFFICULT TO EVALUATE FUTURE
12 PROFITS FOR A START UP BUSINESS THAN IT IS FOR AN
13 ONGOING OPERATION?

14 A. YES.

15 Q. AND IN DETERMINING FINANCIAL LOSS TO THE PATELS,
16 WOULDN'T YOU NEED TO KNOW WHAT THEY'VE DONE TO
17 REPLACE THIS INCOME, OR WHAT THEY'VE BEEN DOING
18 SINCE '04 TO DETERMINE WHETHER THERE WAS A FINANCIAL
19 LOSS?

20 A. IF MITIGATION IS TO BE CONSIDERED, YES, AND I DON'T
21 KNOW THE ANSWER TO THAT QUESTION. IF THIS WERE AN
22 INJURY CASE, I'D SAY ABSOLUTELY, BECAUSE IT'S NOT,
23 BECAUSE IT'S ALLEGED THAT A GOVERNMENT ENTITY, YOU
24 KNOW, REDUCED THE VALUE OF A PROPERTY AND THEREFORE,
25 THAT VALUE HAS TO BE ALLOCATED AMONG PEOPLE. I

1 DON'T KNOW HOW ELSE TO SAY IT. IF IT WERE JUST AN
2 INJURY CASE, ABSOLUTELY.

3 Q. AND IF YOU'RE EVALUATING THE FINANCIAL DAMAGE TO THE
4 PATELS, THEN YOU WOULD NEED TO KNOW WHAT OTHER
5 SOURCES OF INCOME THEY'VE HAD SINCE 2004?

6 A. ~~IF, IF MITIGATION SHOULD BE CONSIDERED,~~ THAT'S ALL I
7 KNOW HOW TO SAY IT. I'M NOT DENYING THAT. THIS IS
8 A BIT OF AN UNUSUAL CASE, I THINK. IF THEIR
9 MITIGATION SHOULD BE CONSIDERED, THEN IT SHOULD BE
10 CONSIDERED. I DON'T HAVE ANY ---

11 Q. WELL, IF ---

12 A. --- ANY ARGUMENT WITH THAT.

13 Q. WELL, IF THE ISSUE IS THEIR FINANCIAL STATUS SINCE
14 2004, THEN YOU WOULD HAVE TO CONSIDER THEIR
15 FINANCIAL STATUS BOTH FROM THE DAMAGE HERE AND FROM
16 WHATEVER INCOME THEY'VE HAD ELSEWHERE?

17 A. IF -- YES, BUT I'M STILL GOING TO QUALIFY THAT BY
18 SAYING IF, IN THIS TYPE OF CASE, THE COURT SPECIFIES
19 THAT MITIGATION OUGHT TO BE CONSIDERED, I'VE GOT NO
20 ARGUMENT WITH YOU ABOUT THAT WHATSOEVER.

21 Q. OKAY. BUT WE DON'T HAVE ANY INFORMATION ABOUT THAT,
22 THOUGH, DO WE?

23 A I DO NOT, NO.

24 Q. OKAY. DO YOU KNOW WHETHER MR. PATEL WORKS AT A
25 MOTEL?

1 A. NO.

2 Q. OR HAS PURCHASED A MOTEL OR OWNS A MOTEL?

3 A. NO.

4 (OFF THE RECORD)

5 EXAMINATION RESUMED BY MR. MORRISON:

6 Q. HAVE YOU CALCULATED WHAT THE PERSON RUNNING THE
7 STORE, BASED UPON THE NUMBER OF HOURS THE STORE WAS
8 OPEN DURING THE COURSE OF A YEAR OR THE COURSE OF A
9 PARTIAL YEAR, WAS EARNING, BASED UPON WHAT THEY WERE
10 PAID?

11 A. NO, I DON'T THINK THAT CALCULATION WOULD BE
12 MEANINGFUL UNLESS YOU ASSUMED THAT THE PAYROLL
13 REFLECTED PAYMENT TO PEOPLE WHO WERE THERE ALL HOURS
14 OF THE TIME THAT IT WAS OPEN.

15 Q. THAT WOULD BE IF YOU KNEW THE NUMBER OF HOURS, THE
16 HOURS OF OPERATION, IF YOU KNEW THE HOURS OF
17 OPERATION OF THE STORE, THAT WOULD BE A PRETTY EASY
18 CALCULATION TO MAKE, WOULD IT NOT?

19 A. IF YOU KNEW THE HOURS OF OPERATION OF THE STORE AND
20 THE NUMBER OF HOURS THAT PEOPLE THAT WERE PAID WAGES
21 WERE THERE, YES, BUT ---

22 Q. WELL, THERE WOULD HAVE TO BE SOMEONE THERE DURING
23 THE HOURS OF OPERATION OF THE STORE?

24 A. YEAH, BUT THEY DON'T HAVE TO BE REFLECTED IN THE
25 WAGES, IF IT WERE MRS. PATEL, FOR EXAMPLE.

1 Q. SO, THE \$13,000 PAYROLL EXPENSE COULD HAVE BEEN TO
2 PAY OTHERS, OTHER THAN MRS. PATEL, FOR RUNNING THE
3 BUSINESS, OR OTHER THAN MR. OR MRS. PATEL FOR
4 RUNNING THE BUSINESS FOR CERTAIN HOURS?

5 A. I ASSUME THAT IT PROBABLY WAS.

6 Q. OKAY. SO, THEN, THE INCOME TO THE PATELS FROM
7 RUNNING THE BUSINESS IS WHAT WOULD BE REFLECTED IN
8 THE PROFIT AND LOSS STATEMENT?

9 A. YES.

10 Q. AND IF THE PATELS WERE RUNNING THE BUSINESS THE
11 MAJORITY OF THE TIME, THAT WOULD EQUATE TO A PRETTY
12 LOW HOURLY WAGE, WOULD IT NOT?

13 BY MR. LANGLEY:

14 OBJECT TO THE FORM.

15 BY THE WITNESS:

16 PROBABLY SO, YES.

17 EXAMINATION RESUMED BY MR. MORRISON:

18 Q. THAT WOULD CERTAINLY INFLUENCE THEIR DECISION ON
19 RENEWAL OF THE LEASE WHEN THAT TIME CAME, WOULD IT
20 NOT?

21 BY MR. LANGLEY:

22 OBJECT TO THE FORM.

23 BY THE WITNESS:

24 YES, IT CERTAINLY COULD.

25 EXAMINATION RESUMED BY MR. MORRISON:

- 1 Q. BUT YOU HAVEN'T MADE ANY OF THOSE CALCULATIONS ---
- 2 A. I HAVE NOT.
- 3 Q. --- BECAUSE YOU DON'T KNOW WHAT THE HOURS OF THE
- 4 STORE WERE?
- 5 A. THAT'S RIGHT.
- 6 Q. DON'T KNOW HOW MANY HOURS OTHER PEOPLE WORKED AT THE
- 7 STORE?
- 8 A. THAT'S RIGHT.
- 9 Q. DON'T KNOW HOW MANY HOURS MR. AND MRS. PATEL WORKED
- 10 AT THE STORE?
- 11 A. THAT'S CORRECT.
- 12 Q. AND THE \$107,877 THAT YOU HAVE LISTED AS PRESENT
- 13 VALUE OF LOST LEASE HOLD RIGHTS GOING THROUGH TO
- 14 2012, THAT INCLUDES FUTURE INCOME ALL THE WAY
- 15 THROUGH 2012, DOES IT NOT?
- 16 A. YES.
- 17 Q. OKAY. AND IF YOU WERE TO RECALCULATE WITH A NEW
- 18 TRIAL DATE, THEN THE LOSS OF NET OPERATING INCOME
- 19 WOULD INCREASE, BUT THE PRESENT VALUE OF LOST LEASE
- 20 HOLD RIGHTS WOULD DECREASE, CORRECT?
- 21 A. THAT'S CORRECT.
- 22 Q. WOULD THE INCREASE AND DECREASE BE IN COMPARABLE
- 23 AMOUNTS?
- 24 A. THE INCREASE WOULD BE GREATER, BECAUSE YOU'RE
- 25 REDUCING ---

- 1 Q. YOUR DECREASE HAS BEEN ---
2 A. --- THE PRESENT VALUE ---
3 Q. --- HAS BEEN DISCOUNTED BACK ---
4 A. --- AT A LATER DATE.
5 Q. --- TO PRESENT VALUE. AND YOU'VE NEVER CALCULATED
6 IT THROUGH, SIMPLY THROUGH THE ORIGINAL EXPIRATION
7 OF THE LEASE?
8 A. THAT'S CORRECT, BUT BECAUSE I HAVE SHOWN A
9 COMPUTATION MONTH BY MONTH, IT'S JUST A MATTER OF
10 ADDING UP NUMBERS. THE CALCULATIONS ARE ALREADY
11 THERE.
12 Q. OKAY. SO, TO MAKE THAT DETERMINATION, YOU WOULD
13 JUST TAKE YOUR SPREADSHEET AND ADD UP THE NUMBERS
14 THROUGH THE END OF THE ORIGINAL EXPIRATION DATE OF
15 THE LEASE, WHICH I FORGET AT THE MOMENT.
16 A. I THINK IT WAS '07, BUT I'M NOT ---
17 Q. SOMETIME IN '07.
18 A. BUT I'M NOT SURE ---
19 Q. I FORGET THE EXACT MONTH.
20 A. --- MYSELF, YEAH.
21 Q. SO, YOU JUST ADD UP THE NUMBERS THROUGH THAT DATE IN
22 '07?
23 A. YES. BUT OF COURSE, THAT WOULD BE GENERALLY CLOSE
24 TO THE 97,620 REFLECTED ON PAGE TWO OF MY REPORT,
25 BECAUSE THAT'S THROUGH JULY 1, '07.

- 1 Q. OKAY. ALL RIGHT. LET'S TALK ABOUT DAMAGES TO
2 WILLARD OIL COMPANY. WILLARD OIL COMPANY'S DAMAGES
3 ARE LIMITED TO THE PROFIT THEY WERE MAKING ON THE
4 SUB-LEASE?
- 5 A. YES, SIR.
- 6 Q. OKAY. AND FOR THE PERIOD OF AUGUST THROUGH DECEMBER
7 OF '04, THEIR LEASE EXPENSE WAS \$3,500 AND THEIR
8 SUB-LEASE WAS \$6,000?
- 9 A. YES, SIR.
- 10 Q. FOR A TOTAL PROFIT OF \$2,500 FOR THAT SIX MONTHS,
11 FIVE MONTHS OF '04?
- 12 A. YES, SIR.
- 13 Q. FOR '05, THEIR SUB-LEASE INCOME WAS \$14,400, AND
14 THEIR LEASE EXPENSE WAS \$8,400?
- 15 A. THAT'S CORRECT.
- 16 Q. OKAY. - AND YOU SIMPLY ADDED UP THE NUMBERS THROUGH
17 THE EXPIRATION OF ALL OPTIONS TO THE LEASE?
- 18 A. WELL, I -- YES, I'M SORRY. YES.
- 19 Q. OKAY. IF YOU ---
- 20 A. THE ONLY DIFFERENCE IS THAT POST 7-1-07, I REDUCED
21 THE PRESENT VALUE. THAT'S THE ONLY DIFFERENCE
22 BETWEEN WHAT YOU JUST SAID AND WHAT I ACTUALLY DID.
- 23 Q. OKAY. IF WE -- IF IT WERE LIMITED TO -- THROUGH THE
24 END DATE OF THE ORIGINAL LEASE, 6-30-07 ---
- 25 A. YES.

- 1 Q. THEN, WE WOULD SIMPLY ADD UP THE NET LEASE INCOME
2 COLUMN ON PAGE FOUR OF YOUR REPORT, THOSE FIRST FOUR
3 NUMBERS?
- 4 A. THAT'S CORRECT.
- 5 Q. TO HAVE A TOTAL OF \$17,500?
- 6 A. THAT'S RIGHT.
- 7 Q. ALL RIGHT. AND THE DAMAGES TO HARRY LANCASTER ARE
8 THE DAMAGES TO THE VALUE OF THE PROPERTY ITSELF,
9 WHICH IS WHAT THE APPRAISER WILL TESTIFY TO,
10 CORRECT?
- 11 A. NOT EXACTLY.
- 12 Q. OKAY.
- 13 A. BECAUSE HE DIDN'T HAVE THE RIGHT TO USE THAT
14 PROPERTY UNTIL THE MIDDLE OF 2012.
- 15 Q. OR ---
- 16 A. IF YOU ---
- 17 Q. OR THE MIDDLE OF 2007?
- 18 A. YEAH. YEAH, I MEAN ---
- 19 Q. DEPENDING ON THE OPTIONS?
- 20 A. YEAH, THAT'S THE WHOLE POINT. I MEAN, HE ---
- 21 Q. OKAY.
- 22 A. THAT'S WHAT I MEANT BY AN ALLOCATION OF DAMAGES. IF
23 HE HAD THE RIGHT TO USE THE PROPERTY BEGINNING IN
24 THE MIDDLE OF '07, HIS LOSS WOULD BE GREATER IF YOU
25 ASSUME THAT. IF HE DIDN'T HAVE THAT RIGHT UNTIL THE

1 MIDDLE OF 2012, HIS LOSS WOULD BE AS I'VE COMPUTED
2 THERE.

3 Q. WELL, IF HE DIDN'T HAVE IT UNTIL THE MIDDLE OF 2012,
4 HE WOULD HAVE THE RENTAL INCOME STILL COMING IN.

5 A. YES.

6 Q. IF HE HAD THE RIGHT TO USE THE PROPERTY IN THE
7 MIDDLE OF '07, HE WOULD NO LONGER HAVE THE RENTAL
8 INCOME COMING IN?

9 A. THAT'S WHY YOU HAVE TO -- THAT'S WHY YOU HAVE TO, TO
10 MAKE A SEPARATE COMPUTATION.

11 Q. AND YOUR ELEMENTS OF DAMAGES ON PAGE FIVE OF YOUR
12 REPORT, THE PRESENT VALUE OF LOST LEASE INCOME FROM
13 ESTIMATED TRIAL DATE UNTIL THE END OF LEASE RIGHTS,
14 THAT GOES THROUGH 2012.

15 A. YES, IT DOES.

16 Q. IN ORDER TO DETERMINE THE LOST LEASE INCOME THROUGH
17 THE END OF THE ORIGINAL LEASE, WE WOULD SIMPLY ADD
18 UP THE NUMBERS AGAIN, THE NUMBERS WE COULD GET FROM
19 THE LEASE EXPENSE, FIRST FOUR NUMBERS IN THE SECOND
20 COLUMN ON PAGE FOUR.

21 BY MR. LANGLEY:

22 OBJECT TO THE FORM.

23 BY THE WITNESS:

24 YES, ALSO THE FIRST FOUR NUMBERS IN THE TABLE
25 AT THE BOTTOM OF PAGE FIVE.

1 EXAMINATION RESUMED BY MR. MORRISON:

2 Q. OKAY. WE WOULD SIMPLY ADD THOSE NUMBERS UP?

3 A. SURE.

4 Q. DO YOU KNOW WHO OWNED THE PROPERTY?

5 A. THE LEASE AGREEMENT IS BETWEEN HARRY LANCASTER AND
6 WILLARD OIL COMPANY. I'VE IDENTIFIED MR. LANCASTER
7 AS THE PROPERTY OWNER.

8 Q. DO YOU KNOW IF THAT'S CORRECT OR NOT?

9 A. UNTIL YOU ASKED ME THAT QUESTION, I PRESUMED IT'S
10 CORRECT. IF IT'S NOT, IT'S NOT. THE APPRAISAL SAYS
11 THE GRANTEE IN THE MOST RECENT SALES HISTORY WAS
12 HARRY LANCASTER, HIS HEIRS, AND ASSIGNEDS.

13 BY MR. LANGLEY:

14 THERE'S A DEED IN HERE, DAVID, ATTACHED TO THE
15 APPRAISAL.

16 BY MR. MORRISON:

17 OKAY.

18 BY MR. LANGLEY:

19 I'M NOT SURE HOW TO TELL YOU WHAT PAGE IT'S ON,

20 BUT ---

21 BY MR. MORRISON:

22 OKAY.

23 BY MR. LANGLEY:

24 --- ABOUT THAT FAR FROM THE BACK, JUST BEFORE
25 THE LEASES.

EXAMINATION RESUMED BY MR. MORRISON:

Q. THE DEEDS YOU WERE JUST REFERRING TO IN THE ---

A. I ACTUALLY WASN'T REFERRING TO A DEED, JUST A
REFERENCE IN THE APPRAISAL REPORT.

Q. OKAY. THE DEED IN THE APPRAISAL REPORT IS DATED
1955?

A. YEAH, THAT'S -- I MEAN, THAT'S WHAT -- AGAIN ---

Q. THAT WOULD BE ---

A. I WAS NOT LOOKING AT THE DATE, BUT 1955 WAS THE DATE
MENTIONED, YES.

Q. OKAY. SO, WOULD YOU BELIEVE THAT'S THE DEED TO
HARRY LANCASTER, SR.?

A. I DON'T -- I DON'T KNOW. YOU MEAN AS OPPOSED TO THE
CURRENT HARRY LANCASTER THAT'S A PLAINTIFF? I'VE
GOT NO IDEA HOW OLD MR. LANCASTER IS.

Q. OKAY.

A. IF THERE WAS A HARRY LANCASTER, SR., I SUPPOSE THAT
THE CURRENT PLAINTIFF IS ONE OF HIS HEIRS AND/OR
SONS.

Q. MR. LANCASTER'S DAMAGES INCLUDE AS ONE ELEMENT OF
DAMAGE LOST RENTAL INCOME, CORRECT?

A. YES, SIR.

Q. WHETHER IT'S THROUGH '07 OR 2012?

A. THAT'S RIGHT.

Q. ALL RIGHT. IF WE GO THROUGH '07, THROUGH JULY OF

1 '07 OR JUNE OF '07, THEN THOSE LOST RENTAL INCOME OF
2 \$24,500?

3 A. YES.

4 Q. ALL RIGHT. AND IF THAT IS THE DATE -- AND BEAR WITH
5 ME. LET'S USE THAT AS THE DATE FOR THE MOMENT. IF
6 THAT'S THE DATE, JUNE 30, '07, THEN HE HAS THAT LOST
7 RENTAL INCOME AND WHAT OTHER DAMAGE?

8 A. THE TERMINAL VALUE OF THE REAL ESTATE AT 7-1-12.

9 Q. ALL RIGHT.

10 A. LESS THE PRESENT VALUE OF THE EQUIPMENT LOSS
11 ASSIGNED TO THE PATELS.

12 Q. WHAT IS THE TERMINAL VALUE OF THE REAL ESTATE?

13 A. AT 7-1-07, IT WOULD HAVE BEEN \$320,320.

14 Q. AND WHERE DOES THAT NUMBER COME FROM?

15 A. PAGE SIX OF MY REPORT SHOWS THE COMPUTATION. SEE
16 WHERE IT SAYS CAPITALIZED VALUE OF 7-1-12?

17 Q. YES.

18 A. WELL, IF HE -- IF THE LEASE HAD NOT BEEN RENEWED BY
19 THE PATELS AND IF THE LEASE HAD NOT BEEN RENEWED BY
20 THE WILLARD OIL COMPANY, THEN THAT CAPITALIZED VALUE
21 SHOWN AT 7-1-12 WOULD HAVE BEEN THE VALUE OF 7-1-07.
22 THERE WOULD NOT BE ANY FURTHER REDUCTION OF PRESENT
23 VALUE. THE 320,320 WOULD HAVE BEEN THE CAPITALIZED
24 VALUE OF THAT LAND AT THE TIME THAT THE LEASES WERE
25 NOT RENEWED.

1 Q. ALL RIGHT. AND ARE YOU JUST GIVING FINANCIAL LOSS

2 ---

3 A. YES.

4 Q. SO, YOUR OPINION WITH REGARD TO DAMAGE TO MR.
5 LANCASTER IS LIMITED TO FINANCIAL LOSS TO MR.
6 LANCASTER?

7 A. YES, I THINK -- YES, I'M NOT SURE WHAT OTHER KIND OF
8 LOSS YOU MIGHT BE TALKING ABOUT.

9 Q. AND THE FINANCIAL LOSS OF \$162,763, I'M NOT SURE
10 WHERE THAT COMES FROM.

11 A. OKAY.

12 Q. WHERE DOES THAT COME FROM?

13 A. THAT IS PRESENT VALUE OF THE CAPITALIZED VALUE OF
14 HIS LAND, OF THAT PROPERTY AS OF THE END OF ALL THE
15 LEASE PERIOD, INCLUDING OPTIONS.

16 Q. OKAY.

17 A. THAT'S \$320,320. NOW, BUT THAT IS -- THAT WAS TO BE
18 INCURRED FIVE YEARS FROM MY COMPUTATION LAST MADE AT
19 TRIAL DATE.

20 Q. OKAY.

21 A. SO, YOU HAVE TO REDUCE THAT BY 14 AND A HALF
22 PERCENT, COMPOUNDED ANNUALLY.

23 Q. OKAY.

24 A. THAT REDUCES IT DOWN TO 162,763.

25 Q. SO, THAT'S THE PRESENT VALUE OF THE \$320,000?

- 1 A. THAT'S CORRECT.
- 2 Q. ALL RIGHT. IF WE USE THE END OF THE ORIGINAL LEASE
- 3 AS THE CORRECT DATE ---
- 4 A. YES.
- 5 Q. THEN, MR. LANCASTER'S FINANCIAL DAMAGE ---
- 6 A. WOULD BE ---
- 7 Q. --- WOULD BE \$24,500?
- 8 A.. NO. IT WOULD BE \$24,500 PLUS \$320,320 MINUS
- 9 \$76,821.
- 10 Q. ALL RIGHT. EXPLAIN WHY PLUS \$320,320?
- 11 A. WELL, HE'S LOST THE VALUE OF THAT PROPERTY.
- 12 Q. OKAY.
- 13 A. OKAY?
- 14 Q. OKAY.
- 15 A. YOU HAVE TO VALUE THAT PROPERTY SOME WAY.
- 16 Q. RIGHT.
- 17 A. THE REAL ESTATE PERSON HAS APPRAISED IT BASED ON
- 18 INCOME. HIS APPRAISAL OF INCOME REDUCING FOR A FIVE
- 19 PERCENT REDUCTION FROM VACANCY AND COLLECTION LOSS
- 20 WHEN WE DON'T KNOW WHO THE LESSEES MIGHT BE, IS
- 21 \$46,446. IF YOU DIVIDE THAT BY HIS CAP RATE OF
- 22 .145, YOU GET THE CAPITALIZED VALUE OF THE FUTURE
- 23 INCOME THAT LAND COULD GENERATE, THAT PROPERTY COULD
- 24 GENERATE. IT'S A REAL --- IT'S REALLY NOT A
- 25 COMPLICATED COMPUTATION. EITHER THAT VALUE WOULD BE

1 AVAILABLE TO HIM AT 7-1-2012 WHEN ALL THE LEASE
2 OPTIONS WOULD HAVE EXPIRED ---

3 Q. UH-HUH.

4 A. IN WHICH CASE YOU'VE GOT TO REDUCE IT BACK TO TRIAL
5 DATE, WHICH I ASSUMED, I REMEMBER IN THIS REPORT WAS
6 7-1-07.

7 Q. RIGHT.

8 A. OR IT WOULD HAVE BEEN AVAILABLE TO HIM AT 7-1-07, IN
9 WHICH CASE THERE'S NO REDUCTION OF PRESENT VALUE.

10 Q. SO, YOU ARE, THEN, IN DETERMINING THAT HIS FINANCIAL
11 LOSS, IF 7-1-07 IS THE MAGIC DATE, IS \$24,500 PLUS
12 320 MINUS THE EQUIPMENT, YOU ARE ASSUMING THAT HE
13 CAN, IN THE FUTURE, HAVE A NET OPERATING INCOME OF
14 \$48,891. YOU'RE DISCOUNTING THAT BY FIVE PERCENT
15 FOR VACANCY AND UNCOLLECTIBLE EXPENSES, TO \$46,446?

16 A. YES.

17 Q. THE FIVE PERCENT COMES FROM THE APPRAISER?

18 A. AS DOES THE 48,891.

19 Q. AND THE CAPITALIZATION RATE COMES FROM THE
20 APPRAISER.

21 A. YES.

22 Q. IF THE CAPITALIZATION RATE WERE 13%, WOULD THE
23 NUMBER BE HIGHER OR LOWER?

24 A. HIGHER.

25 Q. IF THE CAPITALIZATION RATE WERE 15%, THE NUMBER

1 WOULD BE LOWER?

2 A. YES.

3 Q. SO, YOU'RE DIVIDING \$46,000 BY 14 AND A HALF
4 PERCENT?

5 A. THAT'S CORRECT.

6 Q. IS ANOTHER WAY OF LOOKING AT IT TO SAY THAT IF 7-1-
7 07 IS THE MAGIC DATE, THAT MR. LANCASTER HAS LOST
8 THE \$24,500 PLUS THE VALUE OF THE PROPERTY, OR THE..
9 DIFFERENCE IN THE VALUE OF THE PROPERTY?

10 A. YES.

11 Q. BEFORE AND AFTER?

12 A. YES. OF COURSE ---

13 Q. AND THIS IS A METHOD OF DETERMINING THE VALUE OF
14 PROPERTY BASED UPON THE INCOME APPROACH?

15 A. THAT'S RIGHT, BASED ON WHAT THE APPRAISER DID. NOW,
16 THAT DOESN'T ACCOUNT FOR ANY FOREGONE OPPORTUNITY TO
17 GENERATE INCOME ON THAT LOSS THAT WAS INCURRED AS OF
18 2007, WHICH I GUESS IN LEGAL PARLANCE WOULD BE SOME
19 SORT OF ASSESSMENT OF PRE-TRIAL INTEREST. IT
20 DOESN'T CONSIDER THE FACT THAT IF THIS HAD BEEN
21 AVAILABLE TO HIM IN '07, THEN HE COULD HAVE DONE
22 SOMETHING WITH THOSE FUNDS. BUT OF COURSE, THAT
23 PROBLEM IS OBIATED IF YOU ASSUME THAT THE PATELS
24 WOULD HAVE CONTINUED TO LEASE UNTIL 2012.

25 Q. HAS THE PROPERTY BEEN AVAILABLE TO HIM SINCE '07?

1 CERTAINLY NOT IN THE SAME CONDITION IT WAS BEFORE,
2 BUT HAS ---

3 A. RIGHT.

4 Q. --- THE PROPERTY ITSELF BEEN AVAILABLE TO HIM SINCE
5 '07?

6 A. AS FAR AS I KNOW, YES.

7 Q. HAS IT BEEN AVAILABLE SINCE '04? AND AGAIN,
8 CERTAINLY NOT IN THE SAME CONDITION AS BEFORE, BUT
9 THE PROPERTY HAS BEEN AVAILABLE.

10 A. AS FAR AS I KNOW, YES. I DON'T KNOW IF THERE WAS A
11 PERIOD OF TIME WHEN IT WAS NOT AVAILABLE.

12 Q. OKAY. DO YOU KNOW WHAT EFFORTS HE'S MADE, IF ANY,
13 TO DO ANYTHING WITH THE PROPERTY?

14 A. NO.

15 Q. DO YOU KNOW IF HE'S OFFERED THE PROPERTY FOR SALE?

16 A. I DON'T KNOW.

17 Q. DO YOU KNOW IF HE'S HAD OFFERS ON THE PROPERTY?

18 A. NO, I DON'T KNOW.

19 Q. IF HE'S HAD OFFERS ON THE PROPERTY, WOULD YOU --
20 WOULD A WAY TO VALUE THE PROPERTY -- HOW WOULD YOU
21 VALUE THE PROPERTY IN ITS CURRENT CONDITION?

22 A. I WOULDN'T DARE VALUE IT. I'M NOT A REAL ESTATE
23 EXPERT.

24 Q. ALL RIGHT. WOULD THE INCOME APPROACH BE THE CORRECT
25 APPROACH IN ITS CURRENT CONDITION WITHOUT THE

1 BUILDING?

2 BY MR. LANGLEY:

3 OBJECT TO THE FORM.

4 BY THE WITNESS:

5 I'M NOT GOING TO -- I'M NOT GOING TO OPINE WHAT
6 WOULD BE THE CORRECT APPROACH.

7 EXAMINATION RESUMED BY MR. MORRISON:

8 Q. IT CERTAINLY CAN'T, AS IS NOW, CAN'T BRING IN THE
9 SAME INCOME AS IT COULD BACK IN 2003, CORRECT?

10 A. I ASSUME THAT'S TRUE, BUT I'M NOT ---

11 Q. OKAY.

12 A. --- GOING TO OFFER AN OPINION AS TO HOW IT OUGHT TO
13 BE APPRAISED.

14 Q. WELL, IF IT WERE YOUR PROPERTY, YOU WOULD EXPECT
15 SOMEONE TO VALUE IT BASED UPON THE INCOME APPROACH
16 WITH THE BUILDING STILL STANDING?

17 BY MR. LANGLEY:

18 OBJECT TO THE FORM.

19 EXAMINATION RESUMED BY MR. MORRISON:

20 Q. FOR USE FOR PRESENT PURPOSES TODAY?

21 A. NO, IF IT WERE MY PROPERTY AND I ASKED SOMEONE TO
22 APPRAISE IT, I WOULD DEPEND ON THEM AS THE EXPERT TO
23 APPRAISE IT.

24 Q. AND THE ECONOMY HAS CERTAINLY CHANGED IN THE PAST
25 YEAR OR SO, HASN'T IT?

1 A. YES.

2 Q. ESPECIALLY WITH REGARD TO PROPERTY AND PROPERTY
3 VALUES?

4 A. WELL, NOT ESPECIALLY IN THAT REGARD. THOSE HAVE
5 BEEN CHANGED, BUT ABOUT ---

6 Q. WELL, CERTAINLY, THAT'S ONE AREA THAT HAS BEEN ---
7 BY MR. LANGLEY:

8 DAVID, LET HIM FINISH.

9 EXAMINATION RESUMED BY MR. MORRISON:

10 Q. I'M SORRY. WERE YOU FINISHED?

11 A. WELL, I THINK WE WERE AGREEING PROPERTY VALUES HAVE
12 BEEN CHANGED, BUT MANY THINGS HAVE BEEN CHANGED.

13 Q. OKAY. CERTAINLY, PROPERTY VALUES HAVE BEEN
14 SUBSTANTIALLY AFFECTED BY THE DOWNTURN IN THE
15 ECONOMY?

16 A. SURE, BUT IT'S ALSO WORTH NOTING THAT I DID NOT
17 PROJECT ANY INCREASE IN PROPERTY VALUE BASED ON
18 PROJECTED INCREASES IN INCOME THAT THAT PROPERTY
19 COULD GENERATE AFTER 2007.

20 Q. SO, ANY WAY YOU SLICE IT, YOUR EVALUATION OF LOSS TO
21 MR. LANCASTER IS DETERMINING, IN SOME FORM OR
22 ANOTHER, LOSS OF INCOME.

23 A. YES, SIR.

24 Q. PAST AND FUTURE?

25 A. YES, SIR.

1 Q. AND THAT LOSS OF INCOME, THEN, WOULD BE BASED UPON
2 THE PROPERTY NOT BEING ABLE TO BE USED NOW FOR THE
3 PURPOSE IT WAS USED BEFORE BECAUSE OF DAMAGE TO THE
4 PROPERTY?

5 A. YES.

6 Q. AND WHATEVER THE TRIAL DATE -- LET'S GO OFF THE
7 RECORD FOR A SECOND.

8 (OFF THE RECORD)

9 EXAMINATION RESUMED BY MR. MORRISON:

10 Q. I'M CONFUSED ABOUT ONE THING, AND I WANT TO TRY TO
11 CLEAR IT UP. CERTAINLY, IN APPRAISING A LOSS TO A
12 PROPERTY, ONE METHOD OF DETERMINING THE LOSS IS
13 TALKING ABOUT LOSS OF FUTURE INCOME. A SECOND
14 METHOD OF DETERMINING IT IS LOSS OF THE VALUE OF THE
15 PROPERTY AS IT EXISTS, SELLING VALUE OF THE PROPERTY
16 BEFORE AND AFTER, CORRECT?

17 A. YES.

18 Q. OKAY. IN THIS CASE, WHATEVER THE TRIAL DATE IS,
19 LET'S SAY THE TRIAL DATE IS TODAY AND THERE WAS AN
20 AWARD OF MONEY DAMAGES FOR THE DIFFERENCE IN THE
21 VALUE OF THE PROPERTY BEFORE AND AFTER, BUT AT THAT
22 POINT, LOST PROFITS WOULD BE IRRELEVANT. FUTURE
23 LOST PROFITS WOULD BE IRRELEVANT FROM THAT POINT
24 FORWARD, CORRECT?

25 A. YEAH, IF THE PRE-MEASURE INCLUDED THE PROPERTY AS

1 IMPROVED AND THE INCOME THAT IT COULD GENERATE,
2 YEAH.

3 Q. ALL RIGHT. I'M NOT SURE I UNDERSTOOD YOUR ANSWER.

4 A. WELL, WELL, I MEAN, IF YOU SAY WE WOULD HAVE AN
5 APPRAISAL AS THE PROPERTY WAS AND AN APPRAISAL AS IT
6 IS NOW, IF THE APPRAISAL AS THE PROPERTY WAS
7 INCLUDED THE IMPROVEMENTS, THE BUILDING, THE INCOME
8 THERE FROM, THEN YOU SHOULDN'T DOUBLE COUNT IT. YOU
9 SHOULDN'T SAY, WELL, HE'S LOST THE INCOME FROM THIS
10 PROPERTY PLUS HE'S LOST THE VALUE OF THE PROPERTY,
11 BECAUSE THE VALUE OF THE PROPERTY IS TIED TO THE
12 INCOME. SO, YOU SHOULDN'T DO IT BOTH WAYS.

13 Q. OKAY. SO, YOU CAN MEASURE DAMAGE IN THE DIFFERENCE
14 IN THE VALUE OF THE PROPERTY BEFORE AND AFTER THE
15 EVENTS?

16 A. YEAH. YEAH, I THINK A COMPLICATING FACTOR ---

17 Q. RIGHT.

18 A. OR A COUPLE OF COMPLICATING FACTORS ARE THAT THE
19 PROPERTY WAS ALREADY UNDER LEASE OBLIGATION AND
20 THERE'S GOING TO BE SOME DISCUSSION OBVIOUSLY AS TO
21 HOW LONG THAT LEASE WOULD HAVE CONTINUED.

22 Q. OKAY.

23 A. BUT HE WAS OBLIGATED TO LEASE IT THROUGH 2012 IF THE
24 LESSEE -- NOT NECESSARILY THE PATELS. I MEAN, EVEN
25 IF -- EVEN IF THE PERSON HE WAS LEASING TO, WILLARD

1 OIL COMPANY, IF THEY ELECTED TO CONTINUE THAT, HE
2 WAS OBLIGATED TO DO IT. SO, THERE'S THAT
3 COMPLICATING FACTOR. THERE'S ALSO A COMPLICATING
4 FACTOR AS DURING THE PERIOD THAT THERE WOULD HAVE
5 BEEN A LEASE, THERE WOULD BE NO DISCOUNT FOR
6 VACANCY, YOU KNOW, THAT FIVE PERCENT DISCOUNT. THAT
7 WOULDN'T BE THERE. AND DURING THE PERIOD OF LEASE,
8 YOU HAVE TO LOOK AT LEASE INCOME AND NOT TOTAL
9 INCOME POTENTIAL FROM THE PROPERTY. THAT'S A LONG-
10 WINDED WAY OF ANSWERING YOU, BUT I THINK YOU HAVE TO
11 CONSIDER ALL OF THOSE THINGS.

12 Q. WAS THERE A VACANCY AND UNCOLLECTIBLE REDUCTION IN
13 THE CALCULATIONS FOR WILLARD OIL?

14 A. NO, THERE WAS NOT, BECAUSE IT WAS -- IT WAS NOT
15 VACANT ---

16 Q. AT THE TIME.

17 A. --- TO WILLARD OIL. IF WILLARD OIL SIMPLY HAD IT
18 AND WAS LOOKING FOR SOMEONE TO LEASE IT TO, YOU
19 MIGHT APPLY THAT, BUT THEY ---

20 Q. WAS THERE -- WAS THERE NOT THE POSSIBILITY ---

21 BY MR. LANGLEY:

22 HOLD ON A SECOND, DAVID.

23 BY THE WITNESS:

24 BUT THEY HAD LEASED IT AND ACTUALLY HAD IT
25 UNDER CONTRACT TO SUBLET.

EXAMINATION RESUMED BY MR. MORRISON:

Q. OKAY. WAS THERE NOT THE POSSIBILITY THAT AS OF JULY 1, 2007, WILLARD OIL MAY HAVE SOME VACANCY?

A. YES, YES.

Q. SO, IN CALCULATING ---

A. IT COULD HAVE BEEN, YES.

Q. IN CALCULATING FUTURE LOST PROFITS FOR WILLARD OIL, SHOULD THERE NOT BE SOME DISCOUNT FOR VACANCY AND UNCOLLECTIBLE?

A. THERE COULD BE, BUT IF YOU DID THAT, THEN YOU WOULD HAVE TO ADJUST THE COMPUTATIONS ON THE PATEL LOSSES, BECAUSE THOSE PRESUME FULL PAYMENT OF LEASE OBLIGATIONS. THAT'S WHY, AGAIN, THE WHOLE ISSUE OF ALLOCATION, I THINK, IS GOING TO BE AN IMPORTANT ISSUE AND THAT DEPENDS ON WHAT THE FINDER OF FACT DECIDES WITH REGARD TO HOW LONG THEY THINK THE PATELS WOULD HAVE LEASED IT.

Q. AND IF THE PATELS WERE OBLIGATED TO LEASE IT THROUGH JUNE OF '07, HAD AN OPTION AFTERWARDS, BUT WERE NOT OBLIGATED AFTERWARDS, IF WE USE THAT AS THE MAGIC DATE ---

A. YEAH.

Q. THEN, YOU WOULD HAVE TO INCLUDE SOME OCCUPANCY, POTENTIALLY, YOU WOULD HAVE TO INCLUDE SOME FACTOR FOR SOME POTENTIAL OCCUPANCY FOR WILLARD OIL AND

1 FUTURE LOST PROFITS AFTER JULY 1, '07.

2 A. I DON'T THINK SO. I'D HAVE TO REVISIT THE LEASE,
3 BUT IF HIS WAS AN OPTION, AS WELL, THEN IF HE CAN'T
4 SUBLET IT, HE JUST ---

5 Q. HE'S GOT SOME ---

6 A. --- DOESN'T EXERCISE HIS OWN LEASE, RIGHT? SO ---

7 Q. THEN, YOU TAKE IT BACK AND ALLOCATE IT BACK, THEN,
8 TO LANCASTER, BECAUSE THERE'S SOME ---

9 A. THAT'S RIGHT, AND YOU ASSUME THAT HIS LOSS WAS THAT
10 320 AND NOT THE 160.

11 Q. AND YOU HAVE TO INCLUDE SOME ADJUSTMENT IN THERE FOR
12 OCCUPANCY AND FOR UNCOLLECTIBLE RENTS?

13 A. BUT THAT'S ALREADY IN THERE. THAT'S ALREADY IN
14 THERE.

15 Q. ALL RIGHT. GOING BACK, I GOT OFF TRACK A LITTLE
16 BIT, BUT GOING BACK, I THINK WE'RE SAYING THE SAME
17 THING, BUT I WANT TO BE SURE WE'RE SAYING THE SAME
18 THING. AM I CORRECT THAT YOU CAN CALCULATE THE
19 DAMAGE TO PROPERTY EITHER BY THE INCOME APPROACH,
20 WHICH IS TAKING INTO ACCOUNT FUTURE INCOME AND
21 DISCOUNTING BACK TO PRESENT VALUE, OR BY THE
22 DIFFERENCE IN THE VALUE BEFORE AND AFTER THE EVENT?

23 A. YES.

24 Q. OKAY. AND YOU COULD CALCULATE LOST PROFIT UP UNTIL
25 COMPENSATION IS MADE, AND ONCE COMPENSATION IS MADE

1 FOR THE DIFFERENCE BEFORE AND AFTER, THEN LOST
2 PROFIT IS NO LONGER A FACTOR?

3 A. I AGREE, YES.

4 Q. IS THAT CORRECT?

5 A. YES, YES.

6 Q. AND IT WOULD BE IMPROPER TO INCLUDE LOST PROFIT
7 AFTER A TRIAL DATE IF COMPENSATION WERE SOUGHT FOR
8 THE DIFFERENCE OF THE VALUE BEFORE AND AFTER AT THE
9 TRIAL?

10 A. YES.

11 Q. OKAY. SO, BOTTOM LINE, YOU CAN'T INCLUDE BOTH THE
12 320 NUMBER AND THE LOST -- AND THE DIFFERENCE OF THE
13 VALUE OF THE PROPERTY BEFORE AND AFTER?

14 A. NO, THAT WOULD BE DOUBLE DIPPING. CAN'T DO THAT.

15 Q. IF LANCASTER WAS ENTITLED TO RENT FROM WILLARD IN
16 THE AMOUNT OF \$9,600 PER YEAR FOR '08, '09, 2010,
17 2011, AND HALF THAT AMOUNT FOR HALF OF 2012, PLUS
18 LOST RENT FOR A PORTION OF '04 AFTER THIS EVENT,
19 '05, '06, AND '07, SO TOTAL LOST RENT TO LANCASTER
20 WOULD BE \$72,500, WOULD IT NOT?

21 A. YES, SIR.

22 Q. AND I'M CONFUSED HOW WE COME UP WITH A CAPITALIZED
23 VALUE OF THE FUTURE INCOME THROUGH 2012 AT 320,000,
24 BECAUSE IN ACTUALITY, HAD THE LEASE PLAYED OUT, THEY
25 WOULD HAVE BROUGHT IN THE \$72,500, CORRECT?

- 1 A. THAT'S THE INCOME THROUGH 2012. THAT IGNORES THE
2 TERMINAL VALUE OF THE PROPERTY. AT THE END OF THAT
3 LEASE, HE WOULD HAVE ---
- 4 Q. OKAY.
- 5 A. --- STILL HAD INCOME-PRODUCING PROPERTY.
- 6 Q. SO, IN ORDER TO COME TO THE 320, ARE YOU THEN SIMPLY
7 SAYING THAT THE PROPERTY WOULD BE BRINGING IN
8 APPROXIMATELY \$46,000 PER YEAR AFTER 2012?
- 9 A. YES, THAT'S WHAT -- THAT'S WHAT THE APPRAISER HAS
10 IDENTIFIED AS THE BASIS FOR VALUING PROPERTY.
- 11 Q. THAT'S QUITE A JUMP FOR \$9,600 IN 2012, ISN'T IT?
- 12 A. YES.
- 13 Q. SO, IS THE APPRAISER ASSUMING, THEN, THAT THE
14 PROPERTY WOULD BE LEASABLE FOR \$46,000 A YEAR FROM
15 2012 FORWARD?
- 16 A. YOU'LL HAVE TO ASK THE APPRAISER THAT. HE'S SIMPLY
17 SAYING THERE IS THE VALUE OF THE PROPERTY. THERE'S
18 THE INCOME PRODUCING POTENTIAL OF THE PROPERTY AT
19 THAT TIME..
- 20 Q. OF \$46,000?
- 21 A. YES.
- 22 Q. FROM 2012 FORWARD?
- 23 A. YES.
- 24 Q. WHEN IT'S PRODUCING \$9,600 IN 2012?
- 25 A. YES.

1 Q. AND THAT TAKES IT FOREVER?

2 A. YEAH, THAT'S THE WAY PROPERTY IS VALUED.

3 Q. SO, THIS WOULD THEN ASSUME THAT THERE IS NEVER ANY
4 INCOME PRODUCED BY THIS PROPERTY AGAIN IN ORDER TO
5 RECOVER DAMAGES IN THIS LAWSUIT FOR THE LOST PROFIT
6 OR INCOME PRODUCED FROM THIS PROPERTY FOREVER?

7 A. I THINK THAT'S CORRECT, YES. YOU'LL HAVE TO ASK THE
8 APPRAISER TO CLARIFY THAT.

9 Q. IF THERE HAS BEEN AN OFFER TO PURCHASE THE PROPERTY,
10 WOULD THAT BE RELEVANT?

11 A. NOT TO ME. IT MIGHT BE TO THE APPRAISER. I'M NOT
12 GOING TO VENTURE AS TO WHETHER OFFERS MIGHT
13 REPRESENT, YOU KNOW, FAIR MARKET VALUE. IF I WERE
14 YOU, I WOULD ASK THE APPRAISER THAT. I JUST DON'T
15 HAVE AN ANSWER.

16 Q. AND I APOLOGIZE. I HAVEN'T RUN INTO YOU BEFORE.
17 ARE YOU RETAINED AS AN ECONOMIST TO RUN THE NUMBERS?

18 A. YES, SIR.

19 Q. OKAY. HAVE YOU BEEN RETAINED BY MR. HODGE BEFORE?

20 A. YES.

21 Q. HOW MANY TIMES?

22 A. ROUGHLY 20.

23 Q. AND IF WE USE 2012 AS THE MAGIC NUMBER, THEN YOUR
24 ESTIMATION OF LOSS TO ALL PLAINTIFFS IS \$514,000?

25 A. WELL, IF THE -- IF THE TRIAL DATE HAD BEEN JULY 1,

1 '07, IT WOULD HAVE BEEN. IT'S GOING TO BE A LITTLE
2 BIT HIGHER THAN THAT AS OF TRIAL DATE, IF TRIAL
3 OCCURS DURING A COUPLE OF WEEKS. BUT YOU KNOW, THAT
4 ARITHMETIC CAN BE DONE QUICKLY.

5 Q. APPROXIMATELY HOW MUCH HIGHER?

6 A. REALLY ROUGHLY, IF WE'RE DISCOUNTING 14 AND A HALF
7 PERCENT A YEAR, IT COULD BE 20% HIGHER.

8 BY MR. LANGLEY:

9 DID YOU SAY FOUR OR 14? I COULDN'T UNDERSTAND
10 YOU.

11 BY THE WITNESS:

12 IF WE'RE DISCOUNTING 14 AND A HALF PERCENT A
13 YEAR AND IT'S BEEN A COUPLE OF YEARS.

14 EXAMINATION RESUMED BY MR. MORRISON:

15 Q. NOW, WHEN YOU SAY DISCOUNT, WHAT IS A DISCOUNT RATE?

16 A. IT'S A ---

17 Q. OR A DISCOUNT FACTOR?

18 A. WELL, NORMALLY, THE DISCOUNT RATE REFLECTS THE
19 OPPORTUNITY OF EARNING MONEY NOW TO REPLACE FUTURE
20 LOSSES. IT'S A WAY OF EXPRESSING FUTURE DOLLARS IN
21 TODAY'S VALUES. IN AN ANALYSIS LIKE THIS, THE
22 DISCOUNT RATE IS RISK ADJUSTED TO REPRESENT RISK OF
23 OPERATING A BUSINESS. IF THE -- IF THE APPRAISER
24 HAD NOT USED THE RISK ADJUSTED RATE, HE'D BE USING A
25 RATE OF PROBABLY TWO AND A HALF TO FIVE PERCENT

1 RIGHT NOW.

2 Q. DO YOU KNOW WHERE HE CAME UP WITH THE RISK ADJUSTED
3 RATE?

4 A. I THINK HE HAD SOME DISCUSSION ABOUT THAT, BUT OTHER
5 THAN JUST REPEATING WHAT HE SAID, I DON'T REALLY
6 HAVE AN OPINION ABOUT IT. JUST FROM MY OBSERVATIONS
7 IN COMMERCIAL DISCOUNT RATES ON PROPERTY ARE
8 PROBABLY IN THE EIGHT TO TEN PERCENT RIGHT NOW, SO
9 HE HAD TO ASSUME SOME ADDITIONAL ASSESSMENT FOR
10 RISK.

11 Q. FOR THE BUSINESS SIDE?

12 A. YES.

13 Q. AND IF WE -- IF 7-1-07 BECOMES THE MAGIC DATE, THEN
14 THE TOTAL DAMAGES FOR ALL PLAINTIFFS BECOMES
15 \$250,941 PLUS SOME ADJUSTMENT FOR THE CHANGE IN THE
16 TRIAL DATE. IS THAT CORRECT?

17 BY MR. LANGLEY:

18 OBJECT TO THE FORM.

19 BY THE WITNESS:

20 NOW, ASK ME THAT AGAIN.

21 EXAMINATION RESUMED BY MR. MORRISON:

22 Q. IF THE MAGIC DATE IS 7-1-2007 ---

23 A. YEAH.

24 Q. THEN, THE TOTAL DAMAGES FOR ALL PLAINTIFFS BECOMES
25 \$250,941 PLUS SOME ADJUSTMENT FOR THE CHANGE IN

1 TRIAL DATE?

2 BY MR. LANGLEY:

3 SAME OBJECTION.

4 BY THE WITNESS:

5 NO, I DON'T KNOW WHERE YOU'RE GETTING THE

6 \$250,941.

7 EXAMINATION RESUMED BY MR. MORRISON:

8 Q. LOSS THROUGH ---

9 A. OH.

10 Q. --- 7-1-2007.

11 A. NO. NO, THAT'S NOT -- THAT'S THE TOTAL LOSS, BUT
12 THAT EXCLUDES ANY RESIDUAL VALUE OF THE LAND. YOU
13 SEE, WHAT'S GOING TO HAPPEN, IT'S GOING TO BE PRETTY
14 CLOSE. I HAVEN'T DONE IT BOTH WAYS, BUT IT'S GOING
15 TO BE PRETTY CLOSE. IF YOU ASSUME THAT THE CUT-OFF
16 FOR THE LEASE WAS THE MIDDLE OF '07 ---

17 Q. RIGHT.

18 A. WHAT'S GOING TO HAPPEN IS THAT THE PATELS' LOSS IS
19 GOING TO BE LESS.

20 Q. RIGHT.

21 A. WILLARD OIL COMPANY'S LOSS IS GOING TO BE LESS. AND
22 THE OWNER OF THE PROPERTY'S LOSS IS GOING TO BE
23 GREATER, AND THEY'RE NOT GOING TO PERFECTLY OFFSET,
24 BUT THE ISSUE IS GOING TO BE ALLOCATION. I MEAN, ..
25 THESE PLAINTIFFS DON'T HAVE MUTUAL INTEREST IN THIS

1 LAWSUIT IN THE EXTENT THAT IF ONE IS -- IF ONE LOSS
2 GOES UP, THE OTHER ONE GOES DOWN.

3 Q. ALL RIGHT. HELP ME THINK THROUGH THIS A MINUTE.

4 A. ALL RIGHT.

5 Q. LET'S TALK ABOUT LANCASTER FOR A MINUTE.

6 A. ALL RIGHT. AND LOOK AT, ON THE FIRST PAGE OF MY
7 RESULT, LOOK AT 120,822 FOR HARRY LANCASTER, PRESENT
8 VALUE OF LOSS AFTER 7-1-07.

9 Q. CORRECT.

10 A. OKAY? NOW, WHERE DOES THAT COME FROM? IF YOU GO TO
11 PAGE FIVE OF MY REPORT ---

12 Q. OKAY.

13 A. IT'S \$34,880. THAT'S RENT.

14 Q. OKAY.

15 A. POST TRIAL, POST WHAT I HAD ASSUMED TO BE TRIAL.

16 Q. OKAY.

17 A. PLUS 162,763 MINUS 76,821. THOSE THREE NUMBERS
18 YIELD THAT 120,822. HOWEVER, IF WE ASSUME LEASES
19 WOULD HAVE ENDED IN THE MIDDLE OF '07 ---

20 Q. UH-HUH.

21 A. THE 167,763 APPEARING ON PAGE FIVE GOES TO 320,320.
22 34,880 GOES AWAY. THE 76,821 REMAINS THERE. THE
23 NEGATIVE 76,821 REMAINS THERE.

24 Q. AND THE TERMINAL VALUE GOES FROM 162 TO 320 BECAUSE
25 NOW HE HAS THE RIGHT TO LEASE THE PROPERTY AS OF 7-

1 1-07 AND HE'S SUPPOSEDLY LEASING IT, AT THAT POINT,
2 AT \$46,000 A YEAR INSTEAD OF \$9,000 A YEAR?

3 A. WELL, HE HAD -- HE HAS AN OPPORTUNITY OF GENERATING
4 THAT KIND OF INCOME. IT'S NOT NECESSARILY THAT HE'S
5 GOING TO LEASE IT. I MEAN, THAT'S THE INCOME
6 POTENTIAL OF THE PROPERTY WHICH HE OWNS.

7 Q. OKAY. SO, THE PROPERTY WAS UNDER-PERFORMING?

8 BY MR. LANGLEY:

9 OBJECT TO THE FORM.

10 BY THE WITNESS:

11 NOW, I DON'T HAVE AN OPINION ABOUT THAT.

12 EXAMINATION RESUMED BY MR. MORRISON:

13 Q. WELL, IF THE INCOME, IF THE INCOME POTENTIAL OF THE
14 PROPERTY WAS \$46,000, THE PROPERTY WAS ONLY BRINGING
15 IN \$9,600 -- WELL, ACTUALLY, AT THE TIME OF THIS
16 INCIDENT, THE PROPERTY WAS ONLY BRINGING IN \$6,000
17 PER YEAR, CORRECT?

18 A. IT WAS BRINGING IN THAT MUCH TO ---

19 Q. I'M SORRY. THAT'S PART OF ---

20 A. WELL, 80 ---

21 Q. THAT'S A PARTIAL YEAR. BRINGING IN \$8,400 PER YEAR?

22 A. THAT'S WHAT IT'S BRINGING IN TO HIM, NOT WHAT IT'S
23 GENERATING FOR THE PATELS' ADDITIONAL INCOME. AND
24 IT WAS GENERATING SOME SPREAD ON THE LEASE INCOME TO
25 WILLARD OIL COMPANY.

1 Q. SO, BALLPARKING THE TOTAL VALUE OF PRESENT LOSS FOR
2 ALL PLAINTIFFS THROUGH 2012, WE'RE LOOKING IN THE
3 NEIGHBORHOOD OF \$600,000?

4 A. I THINK SO, YEAH.

5 Q. AND IT'S ---

6 A. I PRESUME THAT PLAINTIFF'S COUNSEL IS GOING TO ASK
7 ME TO COMPUTE THAT, BUT THEY HAVEN'T, AT THIS POINT.

8 Q. HAVE WE COVERED ALL OF YOUR OPINIONS?

9 A. YES, SIR.

10 Q. HAVE WE COVERED EVERYTHING YOU LOOKED AT IN
11 FORMULATING YOUR OPINIONS?

12 A. YES, SIR.

13 Q. CAN I GET YOU TO MAKE ME A COPY OF WHAT YOU HAVE IN
14 THIS NOTEBOOK?

15 A. SURE.

16 Q. I'LL CERTAINLY REIMBURSE YOU FOR THE COPY COSTS, BUT

17 ---

18 A. I'LL HAVE LEGAL EAGLE PICK IT UP AND THEY'LL MAIL IT
19 STRAIGHT TO YOU. THEY'LL CALL YOU AND SEE IF YOU'LL
20 PAY THEM DIRECTLY.

21 Q. THAT WILL WORK. THAT WILL WORK.

22 BY MR. MORRISON:

23 THANK YOU, SIR. THAT'S ALL THE QUESTIONS I
24 HAVE.

25 BY THE WITNESS:

1 SURE.

2 EXAMINATION BY MR. LANGLEY:

3 Q. JUST A FEW QUICK QUESTIONS. DR. ALFORD, YOU
4 MENTIONED THAT THE DISCOUNT RATE WAS RISK ADJUSTED.
5 IF YOU DIDN'T USE THE RISK ADJUSTED RATE, I THINK
6 YOU SAID A NON-RISK ADJUSTED RATE WOULD BE TWO AND A
7 HALF TO FIVE PERCENT. IS THAT RIGHT?

8 A. YES.

9 Q. IF YOU USED THAT TWO AND A HALF TO FIVE PERCENT,
10 WOULD -- AS THE DISCOUNT RATE AND AS THE
11 CAPITALIZATION RATE, WOULD THE DAMAGES COMPUTATION
12 TO THE PLAINTIFFS INCREASE SUBSTANTIALLY?

13 A. YES.

14 Q. AND DO YOU HAVE A BALLPARK FIGURE OF LET'S SAY FIVE
15 PERCENT AT THE TOP END OF THE NON-RISK ADJUSTED
16 RATE? DO YOU HAVE A BALLPARK FIGURE OF WHAT THE
17 PLAINTIFF'S DAMAGES WOULD BE IF YOU USED THAT FIVE
18 PERCENT CAPITALIZATION RATE?

19 A. NO.

20 Q. WOULD IT BE IN EXCESS OF A MILLION DOLLARS?

21 A. MOST LIKELY, BUT YOU KNOW, WITHOUT MAKING THE
22 COMPUTATION, I WOULDN'T BE COMFORTABLE SAYING.

23 Q. OKAY. AND THE LOSS TO MR. LANCASTER THAT YOU
24 COMPUTED, THAT WAS A -- WAS THAT A LOSS OF VALUE TO
25 MR. LANCASTER?

~~THE STATE OF SOUTH CAROLINA~~

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

Carolina Convenience Stores,
Inc., Harry Lancaster Jr., as
Power of Attorney for Harry
Lancaster Sr., and Willard Oil
Company, Inc,

Appellants,

v.

City of Spartanburg, SC

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I did serve on this date a copy of **RECORD ON APPEAL** in the above-mentioned matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

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Dated: 5/12, 2010
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

City of Spartanburg, SC,

Respondent,

v.

Carolina Convenience Stores,
Inc., and Harry Lancaster Jr.,
as Power of Attorney for
Harry Lancaster Sr., and
Willard Oil Company, Inc,

Appellants.

FINAL INITIAL BRIEF OF APPELLANT

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Dated: 5/25, 2010
Spartanburg, South Carolina

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(B) STATEMENT OF ISSUES ON APPEAL

The only issue on appeal to this court is whether summary judgment should have been granted on Appellants' inverse condemnation claims.

(C) STATEMENT OF THE CASE

This action was initially commenced on May 10, 2005. It was an action against the City of Spartanburg following destruction of Appellants property by the City of Spartanburg on July 19, 2004. On November 3, 2009 the Court of Common Pleas in Spartanburg, South Carolina heard oral argument after Respondent moved for summary judgment. Judge E.C. Burnett, III granted the motion for summary judgment on Appellants' claims of inverse condemnation and denied the motion on Appellants' claim for negligence. A trial was held on the negligence issue the week of November 16, 2009, and the jury returned a verdict for Respondent on that issue. At the outset of the trial, Respondent preserved its objection to Judge Burnett's ruling. On November 30, 2009, Judge Burnett issued a summary judgment order and that is the order that is appealed from. The notice of appeal was served on December 29, 2009.

(D) ARGUMENT

(D) I. Introduction

Appellants allege summary judgment was improperly granted in favor of the City of Spartanburg on Appellants' inverse condemnation claims because the City of Spartanburg destroyed Plaintiffs property without just compensation. Viewing all inferences and the conclusions therefrom in the light most favorable to the Appellants, summary judgment should not have been granted on Appellants claims for inverse condemnation.

(D) II. Facts

On July 19, 2004, an individual named Jimmy Johnson used a loaded firearm to hold up the Fast Point Food Store (hereinafter "the convenience store") located on Hwy. 221/South Church Street within the city limits of Spartanburg. The convenience store was owned by Plaintiff Lancaster and operated by Plaintiffs MP and Saroj Patel, under a lease held by Plaintiff Willard Oil.

The City of Spartanburg, responded to the situation by deploying its police officers as well as its SWAT team and began communication with Jimmy Johnson. Very early in the situation, an Officer Moore had an opportunity to speak to Mr. Johnson inside the door to the store.¹ Officer Moore has testified that Mrs. Patel was behind the counter,² Mr. Johnson was positioned between Mrs. Patel and himself, and at that time Johnson was not using Mrs. Patel as a shield.³ Officer Moore testified that he was aware that Mr. Johnson had a gun,⁴ but at that time Mr. Johnson was holding a cell phone, using both hands to dial.⁵ Mr. Johnson told Officer Moore, "It ends today. Somebody has to die."⁶ Moore was facing Mr. Johnson and wearing his bulletproof vest, but decided not to draw his weapon because he was fearful that it might endanger his own life.⁷ Officer Moore backed out of the building⁸ and a thirteen-hour standoff ensued.

During the standoff at approximately 8:30 p.m, the officers decided to ram heavy construction equipment similar to a bull dozer (hereinafter the "dozer") into the right wall

¹ Phillip Moore Dep. at 32:8-9; R. p. 59, lines 8-9.

² Moore Dep. at 33:2-4; R. p. 60, lines 2-4.

³ Moore Dep. at 33:2-7; R. p. 60, lines 2-7.

⁴ Moore Dep. at 33:18-25; R. p. 60, lines 18-25.

⁵ Moore Dep. at 36:6-7; R. p. 63, lines 6-7.

⁶ Moore Dep. at 32:20-21; R. p. 59, lines 20-21.

⁷ Moore Dep. at 36:22-24; R. p. 63, lines 22-24.

⁸ Moore Dep. at 38:7-9; R. p. 64, lines 7-9.

of the premises even though the officers were unaware of Mrs. Patel's location in the building.⁹ Multiple witnesses for the defense have testified that they have never, in their vast respective law enforcement experiences, even heard of the use of a dozer to breach a building.¹⁰ Defendant's expert even agreed that he knew of no law enforcement training with the use of a bulldozer in the history of the world¹¹ and, more specifically, knew of no training the Spartanburg City Police had ever done in the use of motorized breach.¹²

Despite the novelty of their approach and lack of training, the officers admitted that they failed to consult any engineer about how the building would respond to being struck by the loader.¹³ The officers stated that they did not have time to consult an engineer,¹⁴ but in fact they had multiple opportunities to do so. According to Major Horton, they were looking for a way to enter the building from the beginning¹⁵ and considered using a piece of heavy equipment¹⁶ several hours before they actually initiated the breach. This left substantial time to consult an engineer. Furthermore, Major Horton stated that they did not have a bulldozer on site and had to make arrangements to obtain one, as well as an operator.¹⁷ Thus, in addition to the hours between the first thought of using the dozer and its implementation, there was time available while the officers waited for the dozer and operator to arrive. These time periods offered Defendant ample

⁹ See, e.g., Fisher Dep. at 54:4-6; R. p. 96, lines 4-6.

¹⁰ Colonel Kindall Dep. at 53:15-25; R. p. 115, lines 15-25. Major Horton Dep. at 74:16-18; R. p. 187, lines 16-18. Jack Ryan Dep. at 38:7-11; R. p. 192, lines 7-11.

¹¹ Ryan Dep. 51:12-17; R. p. 193, lines 12-17.

¹² Ryan Dep. 51:22-25; R. p. 193, lines 22-25.

¹³ Kindall Dep. at 57:4-6; R. p. 119, lines 4-6.

¹⁴ Id.

¹⁵ Horton Dep. at 34:4-5; R. p. 147, lines 4-5.

¹⁶ Horton Dep. at 68:9-11; R. p. 181, lines 9-11.

¹⁷ Horton Dep. at 68:23-25; R. p. 181, lines 23-25.

opportunity to contact a structural engineer, yet the officers did not contact any engineer.¹⁸

The officers were unsuccessful in getting to Mrs. Patel after the initial breach. About twenty-five minutes after the first ramming, the officers then rammed the dozer into the building for a second time. Even though the officers knew Mrs. Patel was in the cooler part of the store, they decided to ram the store at the very location of the cooler.¹⁹ Major Horton has acknowledged that he gave consideration to the fact that penetrating the cooler could have harmed Mrs. Patel,²⁰ but Director Fisher stated he did not give that consideration and he “wanted a hole” and “wanted it then.”²¹ Thus, there was an order issued for the bulldozer to penetrate the front right corner, directly into the cooler.²² Major Horton has testified, “We knew we might kill the hostage taker, but we were in a dynamic entry, committed to resolving this thing, whatever it took, and we took a chance....”²³ By the grace of God, the hostage taker and the hostage were not killed, but Plaintiffs’ building and business were left demolished.

(D). III. Summary Judgment Law

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.²⁴ In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably

¹⁸ Fisher Dep. at 59: 8-11; R. p. 98, lines 8-11.

¹⁹ Horton Dep. at 72:2-4; R. p. 185, lines 2-4. Kindall Dep. at 69:20-23; R. p. 121, lines 20-23.

²⁰ Horton Dep. at 73:12-15; R. p. 186, lines 12-15.

²¹ Fisher Dep. 59:14-20; R. p. 98, lines 14-20. Fisher Dep. p. 60: 7-10; R. p. 99, lines 7-10.

²² Horton Dep. at 73:5-8; R. p. 186, lines 5-8.

²³ Horton Dep. at 76:4-7; R. p. 189, lines 4-7.

²⁴ Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRPC.

drawn from the evidence must be viewed in the light most favorable to the nonmoving party.²⁵ “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.”²⁶ It is only necessary for the nonmoving party to submit “a mere scintilla of evidence in order to withstand a motion for summary judgment.”²⁷

“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”²⁸ Moreover, even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.²⁹ Finally, “summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.”³⁰

(D)IV. Appellants have met the Elements of Inverse Condemnation

The South Carolina Constitution states: “private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.”³¹ “Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government’s action serves.”³²

²⁵ Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

²⁶ Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep’t of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).

²⁷ Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sheriff’s Dep’t, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).

²⁸ Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).

²⁹ Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Hamilton v. Miller, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990).

³⁰ Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep’t of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

³¹ S.C. Constitution, Art. I, Sec. 13.

³² Hardin v. South Carolina Dep’t of Transp., 641 S.E.2d 437, 441, 371 S.C. 598 (2007).

To protect these rights, South Carolina courts have recognized a cause of action for inverse condemnation. "Inverse condemnation is . . . a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures."³³ "An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property."³⁴ "To prevail in an action for inverse condemnation, 'a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the plaintiff's property.'³⁵ Particularly important in the damages calculation is the "economic impact on the claimant[s], especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations"³⁶

There is no dispute that Defendant used a bulldozer to tear down Appellants' building and business.³⁷ There is also no dispute that this was an affirmative, aggressive, and positive act by the City of Spartanburg.³⁸

As to the damages, Steve Griffin, a certified appraiser with substantial experience in valuing real estate, was deposed. Mr. Griffin stated that as of March 2007, the property was worth approximately \$256,000 less without the building and business on the property.³⁹ Mr. Griffin said that one component of this difference was the amount of money generated by the business on that property.⁴⁰ Additionally, Dr. Charles Alford, an

³³ Kiriakides v. Sch. Dist. of Greenville, 675 S.E.2d 439, 442 (2009).

³⁴ Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).

³⁵ Ouail Hill, LLC v. County of Richland, 665 S.E.2d 194, 197 (Ct. App. 2008).

³⁶ Id.

³⁷ Fisher Dep., p. 54 and p. 56; R. p. 96 and p. 97.

³⁸ Affidavit of O'Leary; R. p. 195-196. Ryan Dep. p. 87, lines 4-11; R. p. 194, lines 4-11.

³⁹ Griffin Dep., p. 47, lines 2-24; R. p. 199, lines 2-24.

⁴⁰ Id.

expert economist, testified as to the economic losses of each Appellant.⁴¹ In fact, the City has billed Appellant Lancaster for demolition costs pertaining to the property.⁴² Finally, there is no dispute that Defendant has failed to compensate any Appellant for any element of loss.

Therefore, viewing all inferences and the conclusions therefrom in the light most favorable to the Appellants, each of the elements of the cause of action for inverse condemnation under South Carolina law were established and the matter should have been submitted to the jury for a determination of compensation owed.

(D).V Errors of Law in the Summary Judgment Order

In the Order granting summary judgment on the inverse condemnation claim (hereinafter the "Order") the Court held that there was not a "taking" because: 1) the City of Spartanburg had not permanently physically occupied Appellants property and there was no "public use"; and 2) any deprivation of Appellants' property by the City that might be construed as a taking was authorized by the "police power".⁴³

The South Carolina Supreme Court specifically removed any element of "permanence" in the very case cited by the Order because permanence "conflicts with the principle that the government must compensate for even a temporary taking."⁴⁴ Accordingly, it is an error of law to deny Appellants' inverse condemnation claims on the grounds that there was not permanent physical occupation by the City of Spartanburg.

As to the "public use" of Appellants' property, the government physically occupied and ultimately destroyed the property to apprehend or kill a hostage-taker.

⁴¹ Alford Dep., p. 7-72; R. p. 200-267.

⁴² Trial Transcript p. 162-164; R. p. 52-54.

⁴³ Order Granting Summary Judgment as to Inverse Condemnation and Denying Summary Judgment as to Negligence, p.2; R. p. 3.

⁴⁴ Byrd, 365 S.C. at 657, 620 S.E.2d 76.

"Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves."⁴⁵ Accordingly, it was an error of law to deny Appellants' inverse condemnation claim on the grounds that there was no "use" of the property by the City of Spartanburg.

As to the police power argument, "constitutional powers can never transcend constitutional rights and . . . the police power of a municipal corporation is subject to the limitations imposed by the Constitution."⁴⁶ Specifically, "the exercise of a municipality's police powers will not be allowed to violate . . . the State Constitution which provides that private property shall not be taken for public use without just compensation."⁴⁷ "Any suggestion that most takings of property are not compensable merely because they have safety as a purpose would be untenable."⁴⁸

In the case at bar there is no dispute that the City of Spartanburg has paid no compensation to Plaintiff's for the destruction of Plaintiff's property and business. Even assuming the City of Spartanburg has "police power" authority, it cannot exercise this authority in violation of the Constitution of our state. This contention was supported not only by the cases cited above, but by the opinion of Appellants' expert, who has stated that the action taken was not a valid exercise of the police power in this specific circumstance.⁴⁹ Thus, it was an error of law to deny Appellants' inverse condemnation claim on the grounds Respondent was exercising the police power.⁵⁰

⁴⁵ Hardin, 641 S.E.2d at 441, 371 S.C. 598.

⁴⁶ J.C. James v. The City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

⁴⁷ Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 147, 427 S.E.2d 899 (Ct. App. 1992), on reh'g, (Mar. 29, 1993).

⁴⁸ Id.

⁴⁹ Affidavit of John O'Leary; R. p. 195-196.

⁵⁰ In fact, the "police power," has actually had nothing to do with the police historically, but rather has been a *legislative* power to *regulate* property by statute or ordinance. This case does not involve the regulation of property by Defendant City of Spartanburg, therefore the concept of police power is inapplicable. Carter

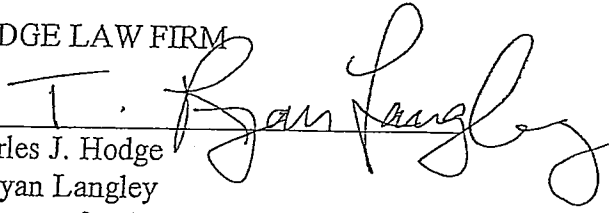
Thus, viewing all inferences and conclusions therefrom in the light most favorable to the Appellants, Respondent's actions constituted a taking and the issue of compensation should have been submitted to the jury.

(E). CONCLUSION

As articulated specifically in the lengthy set of facts above, viewing all inferences and the conclusions therefrom in the light most favorable to the Appellants, Appellants met the elements of a claim for inverse condemnation. Thus, Appellants respectfully request that this Court overturn the Order granting summary judgment and remand Appellants inverse condemnation claim for a determination of damages owed.

Respectfully Submitted by:

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v. South Carolina Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992), on reh'g, (Mar. 29, 1993) ("a governmental body may, pursuant to its police powers, *regulate* the use of property to prevent serious public harm") (emphasis added); Henderson v. City of Greenwood, 172 S.C. 16, 24, 172 S.E. 689 (1934) ("the Legislature may pass laws of a salutary nature under the general police power and . . . a like power may be delegated to municipalities, but even the legislative Acts and, equally so, the municipal ordinances must not go counter to constitutional provisions") (emphasis added).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E. C. Burnett, III, Circuit Court Judge

C/A #: 07-CP-42-09988R

Carolina Convenience Stores, Inc.,
Harry Lancaster, Jr., as Power of
Attorney for Harry Lancaster, Sr.
and Willard Oil Company, Inc.,

Appellants,

v.

City of Spartanburg, SC,

Respondent.

BRIEF OF RESPONDENT

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June 22, 2010

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STATEMENT OF ISSUES ON APPEAL

In this negligence/inverse condemnation claim, the issue on appeal is whether the trial court (Justice E.C. Burnett, III) properly granted summary judgment on the inverse condemnation claim prior to trial.

STATEMENT OF THE CASE

This action was initially filed as a negligence case on May 10, 2005. After being stricken pursuant to SCRCP 40 (j), the action was restored. In winter 2009, the Appellant amended to include a claim for inverse condemnation. In summer 2009, the Respondent filed a summary judgment motion as to both claims. The Respondent's motion for summary judgment was heard by the Spartanburg County Court of Common Pleas, Judge E. C. Burnett, III, approximately two weeks prior to trial, on November 3, 2009. At that hearing, summary judgment was granted on the record as to the inverse condemnation claim. A formal order was to be entered at a later date. The Court denied summary judgment as to the negligence claim.

The negligence claim was tried before a jury the week of November 16, 2009. After a four day trial, the jury returned a verdict in favor of the City/Respondent finding no negligence in their handling of this hostage incident.

On November 30, 2009, Judge E. C. Burnett, III issued his formal Order granting summary judgment as to the inverse condemnation claim. The Appellant timely appealed from the issuance of that Order.

At the trial of the case, the Court allowed a substitution of parties and that substitution affects the caption of the case on appeal. Carolina Convenience Stores, Inc. was substituted as the proper plaintiff in place of M. P. Patel and Saroj Patel. The Patels were part owners of the

convenience store and Ms. Patel was the hostage. Harry Lancaster, Jr. as Power of Attorney for Harry Lancaster, Sr. was substituted as the proper party plaintiff in place of Harry "Skipper" Lancaster.

ARGUMENT

I. Background.

This case does not involve a traditional inverse condemnation. Instead, this case involves a hostage situation involving the City of Spartanburg Public Safety Department and the City's handling of that hostage situation. Ultimately, the police were presented with a thirteen hour standoff, at the end of which they were informed that the hostage's life was in immediate danger, and she would likely be killed if they did not rescue her immediately. The hostage negotiator, the FBI negotiator and the mental health specialist all agreed that the felon was becoming more irrational and was likely to soon make good on his threat to kill the hostage. The police had considered many avenues of rescue in the event it became necessary. Having prepared for just that scenario during the thirteen hours, the police took the only avenue they believed appropriate. They created an opening into the building through the use of a bulldozer so they could get to the hostage and save her life. After creating a second opening into the building, the police were successful in apprehending the felon and saving the hostage.

The Appellants are the owner of the building, Harry Lancaster, the convenience store Carolina Convenience Stores, Inc., owned in part by M. P. Patel and his wife Saraj Patel (the hostage), the middleman lessor of the building and the oil company supplying oil to the convenience store, Willard Oil Co. Inc. They all claim property damage and/or lost profits from the damage to the structure itself. They alleged negligence and inverse condemnation. The Court granted summary judgment as to the inverse condemnation claim and allowed the case to

go forward as to the negligence claim. The Appellants appeal the granting of summary judgment as to the inverse condemnation claim. Subsequently, a jury found in favor of Respondents on the negligence claim. The Appellants have not appealed that verdict.

III. Facts before the Court at Summary Judgment.

Shortly after 8am on July 19, 2004, Major Doug Horton of the City of Spartanburg Public Safety Department was on his way to work on an otherwise unremarkable morning. (Horton Depo. @ 9; R. p. 128) On his police radio he heard a routine traffic stop by Officer Clark for an expired tag. (Id.) After the initial stop, Major Horton next heard that the suspect was fleeing on foot and had a gun in his hand. (Id.) Major Horton was on North Church Street passing Regional Medical Center heading into town. (Id.) He heard on the radio that an armed suspect ran into a convenience store. (Id.) He immediately proceeded to the scene. (Id.) At that point, they knew nothing about the suspect. They did not know why he ran. (Horton Depo. @ 21; SR. p. 7) They did not know who he was. They did not know why he had the gun. They did not know what he was capable of doing. They knew nothing of his criminal history. (Id.)

After arriving there, Major Horton immediately set up a perimeter as it was morning rush hour. (Horton Depo. @ 9, 24, 26; R. p. 128, 137, 139) He learned that there was one hostage in the store. (Horton Depo. @ 24; R. p. 137) His initial strategy was to get the suspect to talk with them and come out and surrender. (Id.) During the first hour and while they were negotiating, they called in a command post. (Horton Depo. @ 26; R. p. 139) The command post was a Winnebago converted for law enforcement use complete with computers and a telescoping video camera. (Horton Depo. @ 28; R. p. 141)

Shortly after arrival, the Public Safety Department made contact with the suspect, one Jimmy Johnson. (Horton Depo. @ 27; R. p. 140) They gathered intelligence. (Horton Depo. @

28-29; R. p. 141-142) They learned his criminal history. (Horton Depo. @ 29; R. p. 142) He had a drug history and a violent crime history. (Horton Depo. @ 29-30; R. p. 142-143) He had a gun in his possession. (Horton Depo. @ 9; R. p. 128) Consequently, they believed he was a potentially great threat to the hostage, themselves and to the public at large. (Horton Depo. @ 30; R. p. 143) They alerted the tactical team to be on alert. (Horton Depo. @ 27; R. p. 140)

Upon arrival at the scene, Major Horton was initially concerned with the safety of everyone around since they had an armed suspect in the building. (Horton Depo. @ 9; R. p. 128) As safety is paramount, Major Horton starting cutting off traffic and re-routing it – getting everyone away from the building. (Horton Depo. @ 24, 26; R. p. 137, 139) He began calling in resources in order to maintain the perimeter and to establish contact with the suspect. (Horton Depo. @ 24-25; R. p. 137-138) He wanted to establish contact in order to talk the suspect out without endangering the lives of the suspect, the hostage, the officers or the public. (Horton Depo. @ 25; R. p. 138)

Major Horton notified the Sheriff's Department and asked for assistance. (Id.) He notified the highway patrol. (Id.) After establishing the perimeter, he wanted to establish contact and begin negotiations. (Horton Depo. @ 26; R. p. 139) He also intended to begin controlling the environment for the suspect, standard procedure in police hostage situations. (Id.) As the first hour passes, they realize negotiations have not been promising. He calls in additional resources so they can stay as long as needed. (Horton Depo. @ 32; R. p. 145)

The convenience store was a cinder block building. (Horton Depo. @ 23; R. p. 136) It had one entrance – the front door. (Horton Depo. @ 40; R. p. 153) There were no side windows or doors and no rear windows or doors. (Id.) Shortly after the incident began, the suspect had

Ms. Patel tape cardboard over the windows so that sight into the building was obscured. (Horton Depo. @ 45; R. p. 158).

Early on the police took control of the environment. (Horton Depo. @ 31; R. p. 144) They cut power to the building. (Id.) The idea is to make it an undesirable environment for the suspect. (Id.) It was a hot summer day. (Id.) They also brought in mental health professionals to assist in evaluating Johnson as negotiations proceeded. (Horton Depo. @ 32-33; R. p. 145-146) They notified SLED and the FBI. (Horton Depo. @ 19; R. p. 135) Both SLED and the FBI responded to the scene. (Id.) The FBI sent a trained hostage negotiator to the scene. (Kindall Depo. @ 20; R. p. 106) Spartanburg had their own trained hostage negotiator on scene as well. (Kindall Depo. @ 37-38; R. p. 113-114) The South Carolina Department of Probation Parole and Pardon Services was also on the scene to provide background information on Johnson. (Kindall Depo. @ 19-20, 23; R. p. 105-106, 109) The United States Department of Alcohol, Tobacco and Firearms (ATF) also responded to the scene. (Kindall Depo. @ 19-20; R. p. 105-106)

As the day progressed, the police considered all available alternatives for getting inside the building. (Horton Depo. @ 33; R. p. 146) Through his law enforcement training, Major Horton believed that the front door or any front window was a fatal funnel. (Id.) If an officer went through that door, he would be a silhouette thereby placing himself in peril. (Horton Depo. @ 33-34; R. p. 146-147) How to get officers inside without endangering the officers or citizens became of paramount importance as negotiations continued. (Horton Depo. @ 34; R. p. 147)

With the use of the telescoping camera, they searched the roof for any means of entrance. (Horton Depo. @ 34-35; R. p. 147-148) They contacted the Fire Department to see if any fire plans were on file. (Horton Depo. @ 34; R. p. 147) They learned that the building had a drop

down ceiling which effectively eliminated any possibility of entrance through the roof. (Id.) They introduced tear gas into the building through the duct work. (Horton Depo. @ 35; R. p. 148) By 9am the tactical team was on the scene and was staged on the left side of the building monitoring the front of the building. (Horton Depo. @ 37-38; R. p. 150-151)

There was extensive discussion about getting an officer inside the building. (Horton Depo. @ 40; R. p. 153) The negotiations continued during that process. There were discussions regarding using shape charges and explosive devices to blow a hole in the wall. (Horton Depo. @ 55; R. p. 168) However they were also concerned about the 8500 gallons of gasoline in front of the building. (Horton Depo. @ 55; R. p. 168) The goal was always to resolve the situation with the least amount of force or the least reasonable amount of force to affect the arrest of the suspect. (Horton Depo. @ 42; R. p. 155) During the negotiations, Johnson repeatedly stated that he was not going back to jail. (Horton Depo. @ 46) He said that he was going out in a blaze of glory. (Id.) He said that he would kill his hostage. (Kindall Depo. @ 21; R. p. 107)

Colonel Jennifer Kendall was in charge of the negotiations. (Horton Depo. @ 8; R. p. 127) During the day she periodically came out to brief Major Horton on the status of negotiations. (Horton Depo. @ 51; R. p. 164) Johnson went through several mood swings through the day. (Id.) By 11am he said he was going to end this. (Id.) At noon there was a shot heard inside the building. (Horton Depo. @ 52; R. p. 165) Later in the afternoon Johnson fired five shots through the door, across the gas pumps, at the police. (Horton Depo. @ 58; R. p. 171) At approximately 6:24 p.m. gas (pepper spray) was introduced into the building again in an attempt to force Johnson out. (Horton Depo. @ 59; R. p. 172) At 6:28 p.m., two shots were heard inside the building and another at 6:31 p.m.. (Horton Depo. @ 52; R. p. 165) From

negotiations, police believed that Ms. Patel was still alive and had not been shot. (Horton Depo. @ 59-60; R. p. 172-173)

At one point, Ms. Patel came to the door to retrieve a cell phone. (Horton Depo. @ 52, 62; R. p. 165, 175) There was discussion about grabbing her and pulling her away when she did that. (Horton Depo. @ 53, 62; R. p. 166, 175) However, any such attempt would endanger her and would endanger the officers involved. (Id.) They did not know where Johnson was inside the building. (Horton Depo. @ 52; R. p. 165) They did not know how close he was to her. They did know that he had fired shots and had threatened to kill Ms. Patel. (Kindall Depo. @ 21; R. p. 107) Mr. Patel was at the scene begging the officers to get his wife out. (Horton Depo. @ 62; R. p. 175) The mental health professionals on the scene were monitoring the negotiations. (Id.) As the day progressed the reports from mental health were that Johnson was doing progressively worse. (Horton Depo. @ 67; R. p. 180)

During the last hour and fifteen minutes, command staff, Colonel Jennifer Kindall, Director Tony Fisher and Major Horton, were making key decisions. (Horton Depo. @ 67; R. p. 180) (Kindall Depo. @ 23-24; R. p. 109-110) The mental health professional was telling them that Johnson may make good on his promise to kill Ms. Patel and that they needed to do something quickly. (Kindall Depo. @ 21-22; R. p. 107-108) The FBI hostage negotiator, who had been monitoring negotiations throughout the day, believed that they needed to do something quickly. (Kindall Depo. @ 21-22; R. p. 107-108) The consensus of those involved in the negotiations were that the negotiations had failed and they needed to act quickly in order to save the life of Ms. Patel. (Kindall Depo. @ 21; R. p. 107). They believed that he was drinking beer. (Kindall Depo. @ 40-41; SR. p. 3-4). They were discussing ideas with SLED and the FBI. (Horton Depo. @ 67; R. p. 180) They discussed alternatives for breaching the building. (Horton

Depo. @ 68; R. p. 181) They had no SWAT vehicle with a ram on it as some jurisdictions have. (Id.) Major Horton recommended using a bulldozer to create a breach in the building to allow entrance. (Id.) He discussed that with Director Tony Fisher. (Id.) After considering all available alternatives, they made the decision to utilize the bulldozer to create a breach in the building. (Horton Depo. @ 68; R. p. 181) They created a diversion at the front door with the robot while they gained the element of surprise by breaching the left rear corner of the building with the bulldozer. (Horton Depo. @ 69-70; R. p. 182-183) They believed they were avoiding the fatal funnel of the front door by this dynamic entry. (Horton Depo. @ 69; R. p. 182)

When the left corner of the building was breached, the rapid deployment team entered the building. (Horton Depo. @ 71; R. p. 184) There was immediate gunfire. (Id.); (Littlejohn Depo. @ 33; SR. p. 10) Johnson fled with Ms. Patel across the building to the walk in coolers. (Horton Depo. @ 71; R. p. 184) No one could see through the cooler doors as they were covered with condensation. Vision was also obscured by the drinks in the doors as well. The officers were inside the building taking fire but can't return fire because they do not know the location of Ms. Patel. Major Horton then brought the bulldozer operator around to the front of the building to create another entry at the right front corner – where they believed Johnson and Ms. Patel were located. (Horton Depo. @ 73; R. p. 186) They breached the building at that front corner revealing Johnson and Ms. Patel. Johnson had his left arm around Ms. Patel's neck as they appeared to be struggling for the gun. Brian Stokes, a sharpshooter located across the street, had a clear unobstructed view from his vantage point. (Littlejohn Depo. @ 40; SR. p. 11); (Fisher Depo. @ 50-51; R. p. 92-93) He took one shot, hitting Johnson in the right shoulder. (Fisher Depo. @ 50-51; R. p. 92-93) Ms. Patel fled to freedom and safety. (Fisher Depo. @ 51; R. p. 93) Johnson was arrested, transported to the hospital and is now serving a sentence with the

South Carolina Department of Corrections. The plan to breach the building in order to save Ms. Patel was successful.

III. The Respondent is not liable in inverse condemnation.

The Appellants contend in their second cause of action that the City is liable for inverse condemnation. Under South Carolina law any analysis of inverse condemnation begins with Article I, Section 13 of the South Carolina Constitution which reads in relevant part as follows:

(A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

There are two main categories of takings: (1) where state law authorizes a permanent physical occupation of property; and (2) where state law so regulates property that it has lost all economic value. *Denene, Inc. v. City of Charleston*, 596 S.E.2d 917 (2004). For a regulatory taking, a plaintiff must show an affirmative act and a taking. *Byrd v. City of Hartsville*, 620 S.E.2d 76 (2005). The Appellant does not appear to claim a regulatory taking in this instance. *Byrd* also removes the permanence requirement from the takings analysis since it conflicts with the principle the government must compensate for even a temporary taking. Here, Appellants appear to argue a permanent taking of property through destruction of property. They certainly do not argue any appropriation of property. The typical inverse condemnation case involves a permanent physical appropriation of property to the government for its use. Here, there is no physical appropriation of the property and there certainly is no "use" by the City of Spartanburg of the property.

A fair reading of the Constitution reveals that the Just Compensation provision was intended to compensate property owners for the exercise of the powers of eminent domain. *See*,

Sullivant v. City of Oklahoma City, 940 P.2d 220 (Okla. 1997). No South Carolina cases require police officers to pay private landowners for property damage occurring during police operations. To do so would require the police to pay for damage to every property every time police entered by force to arrest or search a premises. South Carolina law has never been stretched to such an extent.

To the contrary, South Carolina has long recognized that police power is to be distinguished from the power of eminent domain. A detriment to private property which results from the legitimate exercise of the police power does not constitute the taking of property for public use. *Richards v. City of Columbia*, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 91 S.E.2d 280 (1956). The police power of the government is difficult to define but from its very nature it

... must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights.

City Council of Charleston v. Warner, 17 S.E. 33 (1893).

The Court has also defined the police power in this way:

It cannot be doubted, however, that the origins of this (police) power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption upon which constitutions rest; for the state, whether we regard it as an association of individuals, or as a moral organism must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with the power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality.... It has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society. (citations omitted)

State ex rel. George v. City Council of Aiken, 20 S.E. 221 (SC 1894).

In that case, the Court went on to say that the police power may best be described by the Latin phrase *Salus populi suprema lex*, which translates to “The safety of the people is the Supreme Law.”

South Carolina has long held that private property may be regulated pursuant to the police power, even if it results in some loss of profit to the landowner, for the benefit and general welfare of the public. *Arnold v. City of Spartanburg*, 23 S.E.2d 735 (1943). In *Arnold*, the Court found that a municipality may regulate any business which might injuriously affect the public health, morals, safety or comfort. In the exercise of its police power a municipality might exclude particular occupations from parts of the city. The Court found no merit in the contention that the enforcement of the regulation would result in financial loss to the businesses. The Court said that “in this State the law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, that it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one.” *Arnold* @ 741.

Additionally a fair reading of the Constitution leads to but one conclusion – the drafters did not intend for police damage or destruction to private property to be a taking. The just compensation clause requires that private property cannot be taken without just compensation being “*first made*”. It would be impossible for a municipality to prepay for damage to private property caused by police operations to protect the public and enforce the criminal laws. Compensation for such police action was not contemplated by the drafters of Article I Section 13 of the South Carolina Constitution. See, *Brutsche v. City of Kent*, 193 P.2d 110, 120 (Wash. 2008).

There has been no physical appropriation of Appellants' property by the City of Spartanburg. Appellants still have title and possession of the property. The property was damaged by police response to criminal activity but no taking occurred. Additionally, there has been no "public use" of the property. In fact, there was no "use" of the property at all by the City of Spartanburg. The City did not use the property to capture the suspect. The property simply happened to be the situs of the activity. The Just Compensation clause of the Constitution has no application to the facts of this case.

Other states have considered the very issue presented in this case. In *Customer Company v. City of Sacramento*, 895 P.2d 900 (Cal. 1995), a convenience store owner brought an action in inverse condemnation and tort against the City to recover for damage to his store and its contents caused by efforts of police to apprehend a suspect who had taken refuge in his store. Note that the allegations of that case are similar to the issues at hand with one exception: the Spartanburg police also had to deal with a hostage whose life was at stake as well. In *Customer*, the suspect was thought to be armed and dangerous. He took refuge in the convenience store and refused to surrender. During the course of attempting to apprehend the suspect, the police fired tear gas into the store causing extensive damage. The issue as framed by the Court was the exact issue we face here:

"The issue we address is whether the owner of the store may bring an action for inverse condemnation against the public entities that employed the law enforcement officers, on the theory that the damage caused by the officers constituted a taking or damaging of private property for public use within the meaning of the "just compensation" clause of the California Constitution.

Customer Corporation @ 901.

The *Customer* Court concluded that an action for inverse condemnation does not lie to recover damages caused by law enforcement officers to enforce the criminal laws. Instead, the

Court found that the public entities could be held liable, if at all, only in an action at tort. The Court noted that the concept of "just compensation" has been extended from the traditional eminent domain context to damaging of private property by regulation or by public improvement projects, it has never been extended to apply to damage to property caused by law enforcement officers enforcing the criminal laws nor any other public employees acting within the course and scope of their employment. *Customer @ 905-07.*

While the police power most routinely acts in the area of regulation, the doctrine also applies in emergency situations where the government must act to avoid impending peril. For instance, in *United States v. Caltex, Inc.* 344 U.S. 149, (1952), compensation was denied for an oil terminal facility in Manila that the United States Army destroyed in order to prevent the Japanese from gaining a valuable logistic weapon when they invaded. The United States Court of Claims has further elaborated that:

It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in time of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. (Citations omitted).

National Bd. of Young Men's Christian Ass'n v. U.S., 396 F.2d 467 (Ct.Cl. 1968).

Indeed, the California Supreme Court has held:

Unquestionably, under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation In such cases calling for immediate action the emergency constitutes full justification for the measure taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.

House v. L.A. County Flood Control Dist., 153 P.2d 950 (Cal. 1944).

The clear majority rule across the United States is that no action lies in inverse condemnation for destruction or damage to private property caused by police actions in attempting to enforce the criminal laws. The Florida Court of Appeals considered a similar case in 2003. *In Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate Number TPCLDP217477 v. City of St. Petersburg*, 864 So.2d 1145 (Fla.App. 2003), the police executed a search warrant at an apartment. They threw "flash-bang" grenades into the apartment before entering. However, unknown to the police officers, the apartment had insulating foam installed on the walls and ceilings to muffle sounds of a recording studio. The grenades started a fire in the foam that destroyed the entire apartment. The innocent owner of the apartment lived in another state and rented the apartment out. She brought suit against the City for her losses claiming inverse condemnation in addition to other claims. The Court held that the destruction of her property occurred as a result of lawful action by law enforcement activities by employees acting within the course and scope of their employment. Consequently, under both the federal and state just compensation clauses, any damage resulting from these activities did not constitute a taking. Any damages were recoverable, if at all, only under state tort law.

The Supreme Court of Iowa has held that actions of police officers in damaging a residence when making forcible entry in order to execute an arrest warrant was the result of a reasonable exercise of police power rather than the power of eminent domain so that no cause of action for inverse condemnation lies. *Kelley v. Story County Sheriff*, 611 N.W.2d 475 (2000).

The Supreme Court of Washington held that damage done to property by law enforcement officers using a battering ram to gain entry in order to execute a search warrant did not constitute a taking as there was no permanent physical occupation of the property. Further, they held that the gathering and preservation of evidence of police officers is a police power

function, necessary for the safety and general welfare of society. *Brutsche v. City of Kent*, 193 P.3d 110 (Wash. 2008).

Additionally, the Washington Court has also held that no inverse condemnation claim existed when the execution of a criminal search warrant and preservation order rendered Plaintiff's home uninhabitable. The Court held that a police power function that takes or damages public property is not for the public "use", but instead is to conserve the safety, morals, health and general welfare of the public. Therefore no inverse condemnation claim exists. *Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003).

No action for inverse condemnation lies when police officers executing a search and arrest warrant use smoke grenades, tear gas and percussion and flash grenades in a rented residence. The use of those items ultimately caused a fire that destroyed the residence. *Patel v. U.S.*, 823 F.Supp. 696, 699 (N.D.Cal. 1993). However, a takings analysis was inappropriate.

The Indiana Court of Appeals has held that no action for inverse condemnation lies when police fired tear gas into the Plaintiff's home, thereby damaging the home, to capture a felony suspect who had taken refuge inside the home. *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind.Ct.App. 1984). The Indiana Court reasoned that the conduct was in the nature of a tort and the only remedy, if any, was in tort.

The Oklahoma Supreme Court in *Sullivant, supra*, found that a fair reading of the just compensation clause indicates that it is designed to require compensation for the exercise of the power of eminent domain, not the exercise of the police powers. The Court analyzed situations involving incidental or consequential property damage caused by police operations. They determined that in each of those situations, the police intended to execute a warrant or undertake other police activity. There was never any intent to exercise the power of eminent domain nor

any intent to take the private property and convert it to public use. For those reasons, the Court found no taking when the damage occurred by during the exercise of the police power. *Sullivan*, 902. P.2d @ 224-25.

The Georgia Court of Appeals held that when a volunteer's motor vehicle was damaged while he assisted law enforcement officers in searching for a weapon involved in a crime that no action for inverse condemnation existed. In *Bray v. Houston County*, 348 S.E.2d 709 (Ga.App. 1986), the Court reasoned that there as no "taking" of Plaintiff's property and even if there was, the taking was pursuant to the police power rather than the power of eminent domain.

The Georgia Court of Appeals earlier considered a similar case where a private pond was drained by police when they were searching for a body. *McCoy v. Sanders*, 148 S.E.2d 902 (1966). The draining of the pond damaged the Plaintiff's fish and damaged the pond. Again, the Court found no inverse condemnation. The Court noted that the action was taken pursuant to the police power. The Court noted that police power extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interest. Interestingly, the Georgia Court cited *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 for the proposition that:

The power of eminent domain is that sovereign power to take property for a public use or purpose, and this cannot even be done without just and adequate compensation. On the other hand, the police power is that power by which the Government may destroy or regulate the use of property in order to promote the health, morals and safety of the community, and the police power may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property.

Adams @ 666.

Like Georgia, South Carolina has also cited the *Adams* opinion for the same explanation of the difference between the power of eminent domain and the police power. See, *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). That difference applies in *McCoy* just as it applies in this case. Both cases involve the exercise of police powers. Both involve the general health and welfare of the public. One involves the search for a decedent. This case involves the protection of a living person who is being held hostage. In both situations, the police power "may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property."

Law enforcement officers must be permitted to respond to public emergencies without fear of constitutional liability mandated upon them for their decisions that might endanger private property. In this instance, law enforcement had the life of Ms. Patel at stake and had information that she would likely be killed if they did not act quickly. The spectre of constitutional liability would require the law enforcement officers to make a financial decision at the same time they are making their decision as to how to best save the hostage. They would be required to evaluate the potential cost to determine if their perhaps they should not wait longer thereby imperiling the life of the victim due to the potential financial cost to the municipality. Such a result might deter law enforcement officials from acting swiftly and effectively to protect the public safety during emergency situations. Life should always be protected above property! South Carolina values life over property. South Carolina Courts have never sanctioned such a result.

Allowing recovery for damage to property in inverse condemnation under these circumstances would also give rise to an unacceptable anomaly. A plaintiff could recover for property damage to their building and the contents. However, had Ms. Patel been injured by

falling blocks when the bulldozer struck the building, she would not be entitled to recovery for the very same police action! Allowing recovery for property damage but not for personal injury or even death clearly makes no sense and was not a result intended by the drafters of our Constitution.

Law enforcement activities to protect the public during emergency situations is not at all similar to a taking of property by eminent domain. Forcibly knocking a locked door open or firing a weapon should not automatically give rise to an inverse condemnation action for recovery of property damage. Every time a police officer fires a weapon in the line of duty, some potential property damage and personal injury is conceivable. Mandating liability in inverse condemnation for such property damage (but not personal injury) has never been required or allowed under South Carolina law.

Some may contend that fairness dictates that an innocent property owner should be compensated by the government for his loss caused by police actions. While that argument may appear "fair", inverse condemnation is not the appropriate vehicle or cause of action to accomplish that result. Inverse condemnation does not render a "fair" result. Under that theory, a property owner whose property had been damaged or destroyed could potentially recover in inverse condemnation. The innocent person inside the store who suffered personal injuries could not recover. Additionally the property owner could recover his attorney's fees. The injured victim inside could not recover attorneys fees even if they could recover under the South Carolina Tort Claims Act. There is no rational basis for distinguishing between damaged property and in injured person for their right to recovery. Indeed, there is no difference between their ability to recover. They are both entitled to recover if they have a claim under the South Carolina Tort Claims Act. That is the appropriate remedy, if any.

The "Just Compensation" clause does not afford Appellants a remedy under these circumstances. There has been no taking of property by eminent domain. There has been no physical appropriation of the Appellants' property. There has been no taking for public "use". There has been no "use" at all of the Appellants' property by the City of Spartanburg. Any damage to the Appellants' property was the result of lawful police actions undertaken pursuant to the police power of the State of South Carolina and the City of Spartanburg. Those actions were undertaken in order to protect the public safety and welfare. Indeed, those actions were undertaken in order to immediately protect the life of Ms. Patel. The City police were heroes not villains. There was no exercise of the power of eminent domain. There is no claim for inverse condemnation. The Respondent is entitled to have the grant of summary judgment affirmed.

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ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina

June 22, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

Carolina Convenience Stores,
Inc., Harry Lancaster, Jr., as
Power of Attorney for Harry
Lancaster, Sr., and Willard Oil
Company, Inc.,

Appellants,

v.

City of Spartanburg, SC

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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David L. Morrison, counsel for Respondent, certifies by signing below that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other materials.

David L. Morrison, Counsel for Respondent

1 A. NO, SIR, HE DIDN'T.

2 Q. WELL, LET'S ASSUME THAT'S THE CASE. OKAY. YOU KNOW
3 THE GUY HAS COME IN WITH A GUN. YOU'VE GOT THE DOOR
4 OPEN. YOU HAVE ACCESS TO YOUR WEAPON AND THIS
5 ALLEGED SUSPECT IS ON THE TELEPHONE. WOULD IT NOT
6 BE PROPER TO DRAW YOUR GUN AND WALK STRAIGHT TO THE
7 SUSPECT AND TELL HIM TO COME OUT FROM BEHIND THE
8 COUNTER?

9 A. AGAIN, YOU'RE ASKING ME TO SPECULATE. YOU KNOW, IF
10 YOU'VE NEVER BEEN IN THAT SITUATION, IT'S HARD TO
11 EXPLAIN. I'VE BEEN IN THAT SITUATION AND IT DOESN'T
12 ALWAYS HAPPEN LIKE YOU THINK IT SHOULD. I MEAN,
13 YOU'VE GOT A LOT OF UNKNOWN VARIABLES THERE. YOU
14 DON'T KNOW WHAT THE SUBJECT HAS DONE. YOU DON'T
15 HAVE ANY IDEA WHY HE RAN. YOU DON'T KNOW THAT HE --
16 YOU DON'T KNOW ANYTHING ABOUT HIS CRIMINAL
17 BACKGROUND. AND A TRAFFIC STOP IS PROBABLY ONE OF
18 THE MORE DANGEROUS THINGS THAT A POLICE OFFICER DOES
19 BECAUSE HE'S STOPPING SOMEBODY AND HE HAS NO
20 KNOWLEDGE ABOUT THE PERSON HE'S ABOUT TO STOP, WHAT
21 HE'S DONE. AND WHEN SOMEONE FLEES, THERE'S ALWAYS
22 THAT, "WELL, WHAT DID HE DO?" I MEAN, IT'S LIKE IF
23 YOU CUT ON A BLUE LIGHT AND A CAR, AS SOON AS YOU
24 CUT THE BLUE LIGHTS ON, THAT CAR RUNS FROM YOU, DOES
25 THAT JUSTIFY YOU RAMMING THAT CAR AND ATTEMPTING TO

1 TRIED TO GET HIM TO GIVE HIMSELF UP AND LET HER
2 LEAVE." MS. PATEL, RATHER. "AND THAT HE REFUSED TO
3 LET MS. PATEL LEAVE, AND HE BECAME MORE AGGRESSIVE
4 IN HIS TONE AND ACTIONS. HE STARTED THREATENING MS.
5 PATEL'S LIFE AND OTHERS. HE STATED THAT HE HAD A
6 TRICK FOR US IF WE TRIED TO STORM THE DOOR. I KEPT
7 TELLING MR. JOHNSON THAT WE DIDN'T WANT ANYONE TO
8 GET HURT, INCLUDING HIMSELF. HE ASKED FOR EVERYONE
9 TO LEAVE, AND JUST LET HIM GO. THEN HE ASKED TO
10 TRADE MS. PATEL FOR HIS MOTHER AND GIRLFRIEND. HE
11 STATED THAT HE DRANK SOME BUDS AND THAT HE WAS
12 FEELING GOOD. HE STARTED SCREAMING PROFANITY AND
13 STATING IF ANYONE SHOT ANY MORE GAS INTO THE STORE,
14 HE'D KILL MS. PATEL OR ANYONE ELSE THAT CAME IN THE
15 STORE. HE STATED WE'D HAVE TO KILL HIM." IS THAT
16 WHEN IT WAS STARTING TO GET TOWARDS THE END?

17 A. YES.

18 Q. ABOUT WHAT TIME OF DAY IS THIS?

19 A. THAT WAS PROBABLY SEVEN P.M.

20 Q. SEVEN P.M. SO HE'D BEEN IN THIS JULY 19TH DAY, HOT
21 DAY, AND HE'D BEEN IN THIS STORE WITH NO AIR
22 CONDITIONING SINCE ELEVEN O'CLOCK OR SOMEWHERE
23 AROUND THERE?

24 A. CORRECT.

25 Q. HE'S BEEN DRINKING BEER, RIGHT?

1 A. BASED ON HIS STATEMENT, YES.

2 Q. AND YOUR OFFICERS WERE ABLE TO TALK HIM THROUGH OR
3 PASS THE DEADLINES THAT HE'D SET; ISN'T THAT RIGHT?

4 A. YES.

5 Q. AT SOME TIME DURING THIS LATE AFTERNOON, GAS WAS
6 SHOT INTO THE STORE, WASN'T IT?

7 A. YES.

8 Q. ABOUT WHAT TIME?

9 A. ACTUALLY PRIOR TO LATE AFTERNOON GAS HAD BEEN
10 INTRODUCED INTO THE STORE. AND AS THE DAY
11 PROGRESSED, PROBABLY AROUND SIX, 6:30.

12 Q. SO YOU ALL PUT MORE GAS IN THE STORE?

13 A. UH-HUH (AFFIRMATIVE).

14 Q. IS THAT CORRECT?

15 A. YES.

16 Q. AND AFTER YOU DID THAT IS WHEN HE SAID IF ANYBODY
17 SHOT ANY MORE GAS IN THE STORE, HE'S GOING TO KILL
18 MS. PATEL; ISN'T THAT RIGHT?

19 A. IS YOUR QUESTION DID WE PUT MORE AFTER HE MADE THAT
20 STATEMENT?

21 Q. NO. HE MADE THAT STATEMENT AFTER YOU PUT MORE GAS,
22 DIDN'T HE, MA'AM?

23 A. YES.

24 Q. AND WHAT YOUR ACTIONS DID WAS ESCALATE THE SITUATION
25 AT THAT POINT IN TIME.

1 Q. ALL RIGHT. SO, YOU WENT TO THE DOORS OF THE STORE
2 AND SUMMONED THE COUNTY DETENTION TEAM TO ENTER AND
3 TAKE THE THIRD ROW. WAS THE DOOR LOCKED?

4 A. I DON'T REMEMBER.

5 Q. OKAY. "WE ALL BEGAN TO ADVANCE TOWARDS THE COOLERS
6 AT THE SAME TIME USING TACTICAL SHIELDS. WE MADE IT
7 ABOUT HALFWAY TO THE COOLERS AND THE SUBJECT FIRED A
8 ROUND DOWN THE FIRST ROW TOWARDS COLLINS, MOORE,
9 FUQUA, FOSTER, AND MYSELF. AT THAT TIME, I
10 REQUESTED FOR LEWIS MOORE TO FIRE A FLASH BANG FROM
11 A SHOTGUN TO BREAK THE GLASS AT THE TOP OF THE
12 COOLER DOOR." WE'VE GOT SOME PICTURES OF THE
13 INSIDE.

14 (COURT REPORTER MARKS PLAINTIFF'S EXHIBIT NUMBER TWO,
15 PHOTOGRAPHS, ATTACHED.)

16 EXAMINATION RESUMED BY MR. HODGE:

17 Q. THIS IS PLAINTIFF'S TWO TO YOUR DEPOSITION. AS YOU
18 LOOK AT PLAINTIFF'S TWO, THERE ARE SEVERAL PICTURES
19 ON THERE, BUT ONE OF THEM SHOWS A CENTER AISLE WITH
20 THE COOLER DOORS. CAN YOU TELL ME WHICH YOU WERE
21 REFERRING TO WHEN YOU SAY, "FIRE A FLASH BANG FROM
22 THE SHOTGUN TO BREAK THE GLASS AT THE TOP OF THE
23 COOLER DOOR"?

24 A. THIS ONE HERE.

25 Q. ALL RIGHT. AS WE LOOK AT PLAINTIFF'S EXHIBIT TWO TO

1 WE AGREED TO TAKE THE FRONT SIDE OF THE BUILDING OUT
2 IN ORDER TO GET TO THE COOLER. THE BULLDOZER THEN
3 BEGAN TAKING OUT THE FRONT SIDE OF THE COOLER AND
4 THE BUILDING. WE CONTINUED TO ORDER THE SUSPECT
5 OUT, BUT HE REFUSED. THE SUSPECT SHOT AT US AGAIN.
6 WE ENTERED THE COOLER AND THE SUSPECT BEGAN RUNNING
7 OUT OF THE OPENING. THE SUSPECT WAS SHOT FROM
8 ACROSS THE STREET BY OUR SNIPER AND THE VICTIM WAS
9 ABLE TO BREAK FREE. WE THEN APPROACHED THE SUBJECT,
10 HANDCUFFED HIM, AND FREED HIM FROM THE DAMAGED
11 BUILDING. THERE WERE NO SHOTS FIRED BY THIS
12 OFFICER. ALSO, THERE WAS NO EVIDENCE OF CONTRABAND
13 RECOVERED BY THIS OFFICER." THAT WAS THE END OF
14 YOUR REPORT?
15 A. CORRECT.
16 Q. NOW, THERE'S A PICTURE IN ONE OF THESE. PLAINTIFF'S
17 EXHIBIT FIVE, DO YOU SEE THAT HANDGUN IN THERE?
18 A. YES.
19 Q. IS THAT THE HANDGUN THAT THIS SUSPECT HAD?
20 A. SINCE IT'S THERE, I WOULD ASSUME, YES.
21 Q. DO YOU KNOW WHAT KIND OF HANDGUN THAT IS?
22 A. IT'S A REVOLVER.
23 Q. A REVOLVER?
24 A. YES.
25 Q. WAS THERE ANY EVIDENCE THAT THIS SUSPECT HAD MORE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

City of Spartanburg, SC,

Respondent,

v.

Carolina Convenience Stores,
Inc., and Harry Lancaster Jr.,
as Power of Attorney for
Harry Lancaster Sr., and
Willard Oil Company, Inc,

Appellants.

FINAL REPLY BRIEF OF APPELLANT

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Dated: 5/25, 2010
Spartanburg, South Carolina

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(A) ARGUMENTS IN REPLY

(A)(1) Introduction

This case is about the Constitutional protections citizens have against being forced to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Appellant's property was destroyed by the police in an attempt to provide the benefit of safety to the public. Because the benefit was provided to the public, the public is constitutionally required to bear the cost of the benefit. To require Appellant's alone to bear these costs is inequitable and in violation of the South Carolina and U.S. Constitutions.

However, Respondent's brief attempts to convince this Court otherwise by taking a narrow view of takings jurisprudence, ignoring the most recent South Carolina Supreme Court case analyzing the cause of action for inverse condemnation, and giving undue weight to the decisions of a select few other states instead of analyzing the issue pursuant to the framework applicable in South Carolina. Under that framework, the City of Spartanburg's physical invasion and destruction of Appellants' property is an unconstitutional deprivation of Appellants' property rights for which compensation must be paid pursuant to an action for inverse condemnation.

(A)(2) The Elements of Inverse Condemnation are met and the City of Spartanburg's Deliberate Destruction of Appellants' Property is a Compensable Taking

In its Brief, Respondent goes to great lengths citing case law outside South Carolina against Appellant's claim for inverse condemnation, even citing cases from states with Constitutional provisions far different from South Carolinas as authority on

what constitutes a “fair reading” of the South Carolina Constitution.¹ Yet, Respondent fails to address Kiriakides v. Sch. Dist. of Greenville,² the South Carolina Supreme Court case from 2009 that delineates the elements of the inverse condemnation cause of action and the framework under which cases of this type are to be analyzed. Justice Beatty, for the Court in Kiriakides, wrote: “Inverse condemnation is . . . a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures.”³ The analysis of whether a taking has occurred is governed by the case of Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).⁴ In Penn Central the Court noted that the Fifth Amendment “bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵ The Court acknowledged that this depends on the particular circumstances of each case and that “there is no ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”⁶ However, the Court did identify several factors that have particular significance: “The economic impact of the regulation on the claimant” and “the extent to which the regulation has interfered with distinct investment-backed expectations.”⁷ Importantly, the Court stated: “A ‘taking’

¹ Defendant’s Initial Brief p. 11.

² Kiriakides v. Sch. Dist. of Greenville, 382 S.C. 8, 675 S.E.2d 439, 442 (2009).

³ Id.

⁴ Kiriakides, 382 S.C. 8, 14-15, 675 S.E.2d 439, 442 (2009); Byrd v. The City of Hartsville, 365 S.C. 650, 658, 620 S.E.2d 76, 80 (2005) (It should be noted that neither of these cases dealt with the precise issue here, but rather with regulatory takings. However, Penn Central is still applicable for analyzing whether a taking has occurred..).

⁵ Penn Central, 438 U.S. at 123.

⁶ Id. at 124

⁷ Id.

may more readily be found when the interference with property can be characterized as a physical invasion by government.”⁸

In this regard, the U.S. Supreme Court has found a compensable taking when the government acts for the benefit of the public to the detriment of a private property right.⁹ This is because “[t]he Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”¹⁰

In this case, the question is: who should properly bear the burden of the City of Spartanburg tearing down Appellant’s gas station to provide the benefit of safety to the public. The City of Spartanburg says that, despite the fact that the entire public received a benefit, the burden of the lost value of the property destroyed should fall entirely upon Appellants. This is precisely the sort of discrimination that the Fifth Amendment prohibits. Appellants are being loaded up on to bear more than their just share of the burdens of government and being asked to surrender their investment-backed expectations for a public benefit when other members of the public are not. Under these circumstances, just compensation is owed to Appellants.

Because the facts of the case at bar meet the elements of inverse condemnation under Kiriakides and Penn Central and because the trial court failed to perform the proper ad hoc factual inquiry, it was inappropriate to grant summary judgment on this claim.

⁸ Id. at 124 (citing U.S. v. Causby, 328 U.S. 256 (1946)).

⁹ Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1014-1015 (1992); Causby, 328 U.S. 256 (holding that direct overflights above the claimant’s land, that destroyed the present use of the land as a chicken farm, constituted a “taking”).

¹⁰ Penn Central at 147-148 (Rehnquist Dissent) (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)); accord Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

(A)(3) The City of Spartanburg did not Act Pursuant to the Police Power, but even if it had, Constitutional Rights Transcend the "Police Power"

A great deal of Respondent's Brief argues that Appellants should not be compensated for the destruction of their property by the City of Spartanburg because the City's action was pursuant to the police power. This argument ignores the long-held tenet of South Carolina Constitutional law that "[C]onstitutional powers can never transcend constitutional rights and . . . the police power of a municipal corporation is subject to the limitations imposed by the Constitution."¹¹

Even if the actions taken by the City of Spartanburg can be characterized as taken pursuant to the police power, the requirement of compensation is not eliminated simply because the government purports to act under the police power. On the contrary, as the United States Supreme Court has pointed out, the power of government to take with compensation for a "public use" is "*coterminous* with the scope of a sovereign's police powers."¹² The high court reemphasized that "[i]f ... the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"¹³

It is elementary that the "police power" is not the power of the police, but the power of the government to regulate the *use* of property in a manner detrimental to the public.¹⁴ In other words, a property owner has no right to use its property in a noxious

¹¹ J.C. James v. The City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

¹² Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) (emphasis added).

¹³ Lucas, 505 U.S. at 1014-1015 (citations omitted).

¹⁴ Carter v. South Carolina Coastal Council, 281 S.C. 201, 204, 314 S.E. 327, 329 (1984); South Carolina State Hwy. Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977); Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955) ("Regulations and restrictions upon the manner in which a property owner may use his property when necessary for the general welfare are properly a part of the police power.").

way and any governmental regulation that precludes this noxious use is not a taking. However, where an individual is deprived of the use of his harmless property, or it is damaged for the public good, that is not an exercise of the police power but rather the exercise of inverse condemnation or imminent domain.¹⁵ Accordingly, Respondent's citation to Richards v. the City of Columbia,¹⁶ Edens v. City of Columbia,¹⁷ for the position that the legitimate, constitutional exercise of the police power to restrict harmful use by the owner does not constitute a taking, while true, does not advance the ball in this case because this case has nothing to do with the property *owners* noxious use of his property. Rather, this is a case in which innocent property owners' distinct, investment-backed property rights were destroyed to benefit the public; a case of inverse condemnation requiring compensation.¹⁸

(A)(4) Other Authorities

A number of other states have ruled on the issue at bar, but the law is far from settled. In fact, the Supreme Courts of Texas and Minnesota and the Superior Court of New Jersey have ruled in favor of Appellant's position. Specifically, the Minnesota

¹⁵1 John Lewis, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 6, at 14-15 (2d ed.1900) ("The landowner " is ... bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this ... duty which pertains to the police power of the State so far as the exercise of that power affects private property." Ernst Freund, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 511, at 546-47 (1904) ("[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful...."); John F. Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 141, at 212 (4th ed. 1890) ("This power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner...."). See also, J.C. James, 227 S.C. 565, 88 S.E.2d 661; Chick Springs Water Co. v. State Highway Department, 159 S.C. 481, 157 S.E. 842 (1931); Milhous v. State Hwy. Dep't., 194 S.C. 33, 8 S.E.2d 852 (1940).

¹⁶ Richards, 227 S.C. at 553-554, 88 S.E.2d at 690 (finding that there was no requirement for compensation to be paid to "individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.") (emphasis added).

¹⁷ Edens, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956) ("just compensation is made in the case of the exercise of eminent domain, but none for loss by the property owner which results from constitutional exercise of the police power.") (emphasis added).

¹⁸S.C. Const. Art. I, § 13 (A) ("private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.").

Supreme Court held in a case with facts markedly similar to those at bar that its constitution mandated that compensation be paid for a taking of property by the government.¹⁹ In Wegner, the Minneapolis Police Department severely damaged a house while attempting to apprehend an armed suspect. Article I, section 13, of the Minnesota Constitution provides: "Private property shall not be taken, destroyed or damaged for public use without justification, first paid or secured." The Minnesota court viewed this provision with the following rationale:

This provision "imposes a condition on the exercise of the state's inherent supremacy over private rights." This type of constitutional inhibition "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²⁰

In Wegner, the city made exactly the same argument as is made in the present case, where Appellants are denied compensation. The city of Minneapolis contended that there was not a taking for public use because the actions of the police constituted a legitimate exercise of the police power. To this argument the court answered:

The police power in its nature is indefinable. However, simply labeling the actions of the police as an exercise of the police power "cannot justify the disregard of the constitutional inhibition."

....
Consequently, the issue in this case is not the reasonableness of the use of chemical munitions to extricate the barricaded suspect but rather whether the exercise of the city's admittedly legitimate police power resulted in a "taking."²¹

The Minnesota Supreme court held that where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, the municipality must compensate the innocent party for the resulting damages because it is

¹⁹ Wegner v. Milwaukee Mutual Insurance Co., 479 N.W.2d 38, 42 (1992).

²⁰ Id. at 40 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

²¹ Id. (citations omitted).

not fair to allocate the entire risk of loss to an innocent property owner for the good of the public.

The Texas Supreme Court agrees with the rationale of the Minnesota Supreme Court and has held that compensation is provided under the Texas Constitution.²² In Steele, the owners of a house sought compensation after their house was set ablaze by police officers in an effort to capture fugitives hiding in the house.²³ The Texas court rejected the assertion that destroying the property "for the safety of the public" was a proper exercise of the police power and instead mandated just compensation.²⁴ The court recalled that uncompensated governmental taking of property was unlawful even before the Magna Carta and held that innocent third parties are entitled by the Constitution to compensation for their property again because "the prohibition against uncompensated takings 'was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"²⁵

Likewise, the Superior Court in New Jersey held that the damage to property caused by police executing a search warrant constituted a "taking" under the United States and New Jersey Constitutions that entitled the property owner to just compensation in the amount of the damages.²⁶ The court reasoned that because the damage was incurred for the public good, the public should bear the cost and concluded that an innocent third party should be justly compensated for his loss.²⁷

²² See, Steele v. City of Houston, 603 S.W.2d 786 (1980).

²³ Id. at 789.

²⁴ Id. at 793.

²⁵ Id. at 789 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960); Y.M.C.A. v. United States, 395 U.S. 85, 89 (1969)).

²⁶ Wallace v. City of Atlantic City, 257 N.J.Super. 404, 410, 608 A.2d 480, 483(1992).

²⁷ Id.

Though it cites to other cases (many of which are inapposite to the case at bar)²⁸, Respondent's brief essentially parrots the opinion of the California Supreme Court in Customer Co. v. City of Sacramento, 10 Cal. 4th 468, 895 P.2d 900 (1995). In Customer, the court interpreted a constitutional takings provision distinct from the South Carolina takings provision, and narrowly ruled 4-3 that an inverse condemnation cause of action could not be brought to recover damage caused by tear gas used by the police at Customer's business. There are several key distinctions between the Customer case and the case at bar. First, the California in Customer the Plaintiff conceded that the authorities acted reasonably.²⁹ Of course, Appellants Initial Brief in this case argues just the opposite; namely, that Respondent's use of a bulldozer to tear down a building for the first time in the history of law enforcement is patently unreasonable. Second, the laws of California are substantially different from the laws of South Carolina in regard to victims assistance. In the penultimate paragraph of the majority opinion the court in Customer explained that the California legislature had enacted authorizing legislation for

²⁸ The following is a brief summary of why the cases cited by Respondent are inapposite or distinguishable: U.S. v. Caltex, 344 U.S. 149, 155-156 (1952) (was dealing with a wartime loss, which is obviously distinct and the Court specifically said: "in wartime many losses *must be attributed solely to the fortunes of war, and not to the sovereign.*" (italics added.)); National Bd. Of Young Men's Christian Ass'n v. U.S., 396 F.2d 467 (1968) (Appellant was unable to locate this case, but it is inapposite because it was decided prior to Penn Central, and did not implement the test outlined therein.); Certain Interested Underwriters at Lloyd's London Subscribing to Certificate Number TPCLDP217477 v. City of St. Petersburg, 29 Fla. L. Weekly D80, 864 So.2d 1145, 1149 (2003) (This case dealt with the unintended, incidental consequence of fire caused by flashbangs, which Plaintiff admitted was lawful. The case at bar is distinct because it was the intent of the City of Spartanburg to destroy Appellant's building using a method Appellant argues was unreasonable because it had never been done before in the history of law enforcement.); Brutsche v. the City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008) (Case is distinct because it involved police execution of a search warrant and court based its ruling in part on this distinction citing U.S. Supreme Court law holding that the 5th Amendment does not require that the government pay for evidence.); Patel v. City of San Jose, 823 F.Supp. 696, 698 (N.D. Cal. 1993) (Case is distinct because case involved service of search warrant, failed to perform Penn Central analysis, and involved facts in which Plaintiff conceded that action of police was legitimate.); Indiana State Police v. May, 469 N.E.2d 1183 (Ct. App. 1984) (Case is substantially distinct because sole issue on appeal was whether the state was immune from liability under the tort claims act. By further contrast, in Indiana state would also be immune if police trooper killed a third party while in a pursuit.); Bray v. Houston County, 180 Ga. App. 166, 168 348 S.E.2d 709 (1986) (Case is inapposite because Plaintiff voluntarily provided his property to the police and expressly consented to the police use of that property. The court held that because the Plaintiff made no allegation that his property had been wrongfully and forcibly taken from him, there was no case for the constitutional prohibition against taking without just and adequate compensation); McCoy v. Sanders, 113 Ga. App. 565, 571 (fn. 1) (1966) (Case is inapplicable because the plaintiff had a remedy under Georgia law for compensation for damage under these exact circumstances, but failed to properly pursue that remedy. This remedy is not available in South Carolina.).

²⁹ Customer Co., 10 Cal. 4th at 404 (Baxter, dissent).

reimbursement programs designed to compensate innocent residents for damage to their property caused by the police.³⁰ Of course, South Carolina has no such fund from which Appellants could seek reimbursement.³¹

Respondent also misrepresents the holding in House v. L.A. County Flood Control Dist. The court in House did not hold at all as Respondent claims but actually held that Plaintiff's claim for inverse condemnation was proper and that the police power was limited.³² The court explained that the police power is "not without restriction in relation to the taking of damaging of property. When it passes beyond proper bounds in *its invasion of property rights*, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation."³³ The court performed a lengthy analysis of property rights and the police power and explained: "It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen."³⁴ "This accords with the general object of the constitutional guaranties in protection of property rights"³⁵ This is a far cry from the holding for which Respondent cites the case.

Respondent similarly submits an overly broad reading of Kelley v. Story County Sheriff, which excludes key analysis from that case. Specifically, the Iowa Supreme Court in Kelley cited the balancing test in Penn Central and explained:

³⁰ Customer Co., 10 Cal. 4th at 393.

³¹ The South Carolina Victims Assistance Fund provides up to \$15,000 (\$25,000 under extraordinary circumstances) in recovery but only when a crime directly resulted in physical or psychic trauma to the victim. S.C. Code §§ 16-3-1170, 1180.

³² House v. L.A. County Flood Control Dist., 25 Cal.2d 384, 392, 153 P.2d 950 (1944) (the language cited by Respondent is dicta).

³³ House, 25 Cal.2d at 388, 153 P.2d 950 (emphasis added).

³⁴ House, 25 Cal.2d at 391, 153 P.2d 950.

³⁵ Id.

The exercise of police power may, in some situations, amount to a taking of private property if it deprives a property owner of the substantial use and enjoyment of one's property. The point at which police power becomes so oppressive that it results in a taking is determined on a case-by-case basis. This ad hoc approach applies a balancing test that is essentially one of reasonableness Factors to be considered in applying the test include: "(1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action."³⁶

The court held, over a vigorous dissent, that the Plaintiff had failed to establish a taking under those circumstances because Plaintiff did not allege that the amount of force used was unreasonable and because the economic impact on the Plaintiff (repair of two broken doors) was not substantial.³⁷ Accordingly, were the court in Kelley to analyze the facts of the case at bar it may well have reached just the opposite result given that Appellants investment-backed property rights were substantially affected and there are specific allegations of unreasonable force.

Finally, Respondent's reliance on Sullivant v. The City of Oklahoma City is inappropriate because of the vast distinctions between the Oklahoma Constitution and South Carolina Constitution and because Sullivant failed to apply the Penn Central analysis.³⁸ Specifically, the takings clause of the Oklahoma Constitution is substantially longer than South Carolina's and reads as follows:

Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. Provided however, in no case shall the owner be required to make any payments should the benefits be judged to exceed damages. The

³⁶ Kelley v. Story County Sheriff, 611 N.W. 2d 475, 480 (Iowa 2000) (citations omitted).

³⁷ Id. at 481

³⁸ Sullivant v. The City of Oklahoma City, 940 P.2d 220 (1997).

commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into the court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of the property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for private or public use, the determination of the character of the use shall be a judicial question.³⁹

This distinction is important because the Sullivan court found that the full context of this provision showed that it related to condemnation proceedings.⁴⁰ Because the South Carolina takings clause is distinct and because Sullivan failed to apply the analysis from Penn Central as required in South Carolina by Kiriakides, Sullivan should not be relied upon in South Carolina.

(A)(5) Reply to Miscellaneous Arguments by Respondent

Respondent argues that law enforcement should not have to consider private property rights as that might deter swift action. This is certainly a legitimate consideration, but given the cost-spreading purposes of the just compensation clause as outlined above, some means must be found to confine any “emergency” exception within narrow and appropriate bounds. The means is the balancing test of Penn Central and an analysis of the character of the governmental action, economic impact on the Plaintiff, and the extent to which investment-backed expectations are affected. Under this analysis,

³⁹ Id. at 224.

⁴⁰ Id.

it may not be that every minor, incidental injury to a door jamb or broken window requires compensation, but where, as here, innocent third parties have their entire business destroyed by an invasion never employed previously in the history of law enforcement, the balance requires compensation to Appellants.

Respondent next argues that allowing recovery for property (including attorney fees) and not personal injury is an "unacceptable anomaly." There is no doubt, however, that for profound historical reasons, the South Carolina and U.S. Constitutions are peculiarly concerned with the power and temptation of unchecked government to require the uncompensated sacrifice of private property for the common benefit. The availability of attorney fees in inverse condemnation actions merely confirms that when the state, having imposed such a sacrifice, fails to satisfy its constitutional obligation of compensation, the fees incurred in obtaining the payment due should not fall upon the innocent owners. Respondent's argument also ignores the fact that the South Carolina Victims Assistance fund provides for recovery of losses occasioned by personal injury but not for property loss;⁴¹ an "anomaly" that strengthens Appellants' argument that the inverse condemnation cause of action is intended to cover the property damage at issue in the case at bar.

Finally, Respondent argues that the just compensation clause does not afford a remedy under these circumstances and that there has been no taking for public use of Appellants' property. As noted above, the just compensation clause ensures that when government exercises its power to take or damage private property for public benefit, the adversely affected owner will not absorb alone a cost which the benefitted community

⁴¹ The South Carolina Victims Assistance Fund provides up to \$15,000 (\$25,000 under extraordinary circumstances) in recovery but only when a crime directly resulted in physical or psychic trauma to the victim. S.C. Code §§ 16-3-1170, 1180.

should share. As such, the function of the 5th Amendment is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴² When a deliberate law enforcement action physically invades, destroys, or damages unoffending property, a “public use” has arisen by every logical measure. The damage is inflicted on behalf of the whole community, by its representatives, for a public purpose. The public thereby “use[s]” and enjoys the damaged property. Compensation is owed to the Appellants under these circumstances because the Constitution requires the benefitted society at large to bear the burden of this benefit.

B. CONCLUSION

In the case at bar there is no dispute that the City of Spartanburg has paid no compensation to Appellants for the deliberate destruction of their property and business for the purpose of capturing a public enemy. This destruction was not done to eliminate some noxious *use* of the property by the property owners and therefore not undertaken pursuant to the “police power” as conventionally defined. Even assuming the City of Spartanburg exercised “police power” authority, it cannot exercise this authority in violation of the U.S. and South Carolina Constitutions, which prevent the state from requiring a small group to bear more than their just share of the burdens of government. Accordingly, when a small group surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to them.

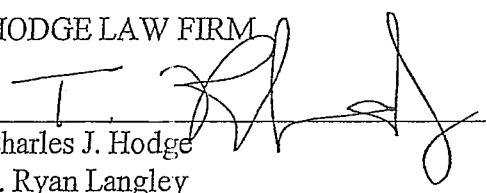
⁴² Penn Central, 438 U.S. at 123.

Logic, equitable principles, and constitutional law support compensating Appellants for their substantial investment-backed property loss, taken through deliberate government acts for the benefit of the public. However Respondents would apparently abandon this sensible outcome to reach the absurd unconstitutional conclusion that the property owners, even though they were innocent of any wrongdoing, should bear the entire cost of their business being bulldozed to the ground for the public good of law enforcement.

Summarily, viewing this evidence and all ambiguities, conclusions, and inferences therefrom in the Appellants' favor, the drastic remedy of summary judgment on Appellants inverse condemnation claim was improper. Therefore, Appellants respectfully submit that this matter be declared a taking and remanded for a hearing on the amount of just compensation owed to Appellants.

Respectfully Submitted by:

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Dated: 5/05, 2010
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina Convenience Stores,
Inc., Harry Lancaster, Jr., as
Power of Attorney for Harry
Lancaster, Sr., and Oil
Company, Inc., Appellants,

v.

City of Spartanburg, SC, Respondent.

Appeal From Spartanburg County
E. C. Burnett, III, Acting Circuit Court Judge

Opinion No. 4970
Heard February 14, 2012 – Filed May 9, 2012

AFFIRMED

Charles J. Hodge and Timothy Ryan Langley, of
Spartanburg, for Appellants.

David Leon Morrison, of Columbia, for Respondent.

WILLIAMS, J.: Carolina Convenience Stores, Inc., Harry Lancaster, Jr., and Willard Oil Company, Inc. (collectively, CCS) appeal the circuit court's grant of summary judgment in favor of the City of Spartanburg (the City) on CCS's inverse condemnation claim against the City. We affirm.

FACTS/PROCEDURAL HISTORY

This appeal stems from a hostage incident that occurred at CCS on July 19, 2004. Because CCS filed suit against the City based on its actions during this incident, we briefly recite the facts as background to the instant action.

On July 19, 2004, Jimmy Johnson (Johnson) fled from police after being stopped for an expired license plate. Johnson, who was armed, entered CCS and took Mrs. Saroj Patel (Mrs. Patel), a CCS employee, hostage. City police were dispatched to CCS. Major Doug Horton (Major Horton) of the City Public Safety Department was the first to arrive on the scene. Major Horton testified the initial plan was to try to talk to Johnson and encourage him to surrender. These negotiations proved unsuccessful. The police then cut off the building's power as well as introduced tear gas and pepper spray through the duct work. Despite the police's efforts over the course of the day to force Johnson to surrender, Johnson was unwilling to surrender.

The ability of police to see the interior of CCS was obscured because Johnson had taped cardboard over the windows that morning. In addition, CCS had only one front entrance, and the building contained no other windows or doors. Major Horton stated the lack of other viable entries and the presence of approximately 8,500 gallons of gasoline inside gas tanks in front of the building prompted the police to utilize a bulldozer to breach the walls of the cinder block building. Major Horton testified the police decided to use this strategy only after negotiation efforts proved futile, and they had exhausted all other less invasive remedies.

After a twelve-hour standoff, the police attempted to breach the left corner of the building with a bulldozer. At this point, Johnson, who was with Mrs. Patel in the main area of CCS, began shooting at the police. Johnson

then fled with Mrs. Patel into the store's walk-in cooler. Because the police's vision was obstructed, the police decided to use the bulldozer to breach the right front corner of the building where they believed Johnson and Mrs. Patel were located. With the demolition of the wall, Johnson and Mrs. Patel were visible, and a sharpshooter shot Johnson in the right shoulder as he and Mrs. Patel were struggling for Johnson's gun. Johnson held Mrs. Patel hostage in CCS for more than thirteen hours before the standoff ended. Mrs. Patel was unharmed, and Johnson was arrested.

During that process, the police's actions caused structural damage and other economic loss to CCS. As a result, CCS filed suit against the City alleging inverse condemnation and negligence. The City filed a motion for summary judgment on both causes of action, and the circuit court held a hearing on the City's motion on November 3, 2009. The circuit court orally granted the City's motion for the inverse condemnation claim and denied the City's motion for the negligence claim. The negligence claim was then tried before a jury the week of November 16, 2009, and after a four-day trial, the jury returned a verdict in favor of the City. The circuit court issued a formal order on November 30, 2009, granting summary judgment on CCS's inverse condemnation claim and holding the damage to the property did not constitute a "taking" that would entitle CCS to compensation under an inverse condemnation theory. This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). "Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Id. To determine whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id.

LAW/ANALYSIS

CCS contends the circuit court erred in granting the City's motion for summary judgment on CCS's inverse condemnation claim. We disagree.

The South Carolina Constitution provides, "[e]xcept as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13(A). In an inverse condemnation action, a private property owner seeks to establish that a government entity has taken his or her property. Hilton Head Auto., LLC v. S.C. Dep't of Transp., 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011). Inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 604, 641 S.E.2d 437, 443 (2007).

In this case, CCS claims the City's use of a bulldozer to tear down CCS's building was an affirmative, aggressive act that constituted a physical taking of CCS's property, thereby entitling CCS to just compensation. We find the City's actions do not constitute a taking as contemplated under our Constitution or South Carolina case law.

First, the City did not physically appropriate the property for public use. See Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011) (holding the elements of an action for inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct amounts to a taking; and (3) the taking is for a public use). CCS maintained title to and possession of the property at all relevant times, and while the City's actions caused damage to CCS's property, no physical appropriation occurred. Moreover, the fact that the crane and the City's

ensuing actions occurred on CCS's property is insufficient to show the City appropriated the property for public use.

We find the City's actions in this instance are more properly categorized as a legitimate exercise of its police power. Police power, "[a]lthough not clearly defined . . . is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights." City Council of Charleston v. Werner, 38 S.C. 488, 495, 17 S.E. 33, 35 (1893). A detriment to private property that results from a legitimate exercise of police power does not constitute a taking of private property for public use. See Richards v. City of Columbia, 227 S.C. 538, 547-48, 88 S.E.2d 683, 687 (1955) (finding city's ordinance that caused financial loss to property owners was a legitimate exercise of police power as distinguished from a taking of their property for public use); see also Edens v. City of Columbia, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956) (holding eminent domain and police powers are not the same; just compensation must be made in government's exercise of eminent domain but not for loss of property from exercise of police power); Arnold v. City of Spartanburg, 201 S.C. 523, 538, 23 S.E.2d 735, 741 (1943) ("[T]he law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, [] it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one."). Under these facts, we find an inverse condemnation claim was not the proper avenue of recourse for any damage caused by the City's actions.

We find support for this conclusion from other states as well. In a factually similar case, the California Supreme Court found a convenience store owner could not bring an inverse condemnation against the City of Sacramento for property damage caused by its police officers in an effort to apprehend a fleeing suspect who had taken refuge in the convenience store. Customer Co. v. City of Sacramento, 895 P.2d 900, 901 (Cal. 1995). The court concluded the convenience store could not bring an inverse

condemnation action to recover damages caused by the police's firing of tear gas into the store. Id. The court stated,

Although the requirement of 'just compensation' has been extended, in limited circumstances—beyond its traditional context involving the taking or damaging of private property in connection with public improvement projects—to encompass government regulations that constitute the functional equivalent of an exercise of eminent domain, [it] . . . never has been applied to require a public entity to compensate a property owner for property damage resulting from the efforts of law enforcement officers to enforce the criminal laws.

Id. at 905-06.

The California Supreme Court noted the public policy implications from its decision as well. The court went on to hold,

In the same manner, law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action. This court never has sanctioned an action for inverse condemnation seeking recovery for incidental damage to private property caused by law enforcement officers in the course of efforts to enforce the criminal law. Permitting [the plaintiff] to bring an action for inverse condemnation under the circumstances of the present case would constitute a significant, unprecedented, and unwarranted expansion of the scope of the just compensation requirement and might well deter law enforcement officers from

acting swiftly and effectively to protect public safety
in emergency situations.

Id. at 910-11. Moreover, the majority of states considering this issue have determined a property owner cannot bring an inverse condemnation action against the government for destruction or damage to private property caused by police actions in attempting to enforce criminal laws. See e.g., Certain Interested Underwriters at Lloyd's London Subscribing to Certificate No. TPCLDP217477 v. City of St. Petersburg, 864 So.2d 1145, 1148 (Fla. Dist. Ct. App. 2003) (finding damage to apartment caused by police's use of "flash-bang" grenades in executing a search warrant did not constitute a taking under just compensation clause and any recovery for damages was only available under state tort law); McCoy v. Sanders, 148 S.E.2d 902, 905-06 (Ga. 1966) (holding damage to private property caused during a search for a missing person was a legitimate exercise of police power, thereby precluding inverse condemnation claim); Indiana State Police v. May, 469 N.E.2d 1183, 1184 (Ind. Ct. App. 1984) (finding the only remedy for damage caused to private property after tear gas was fired into home to capture a suspect was under state tort law, not as an action for inverse condemnation); Kelley v. Story Cnty. Sheriff, 611 N.W.2d 475, 482 (Iowa 2000) (holding damage to residence when executing an arrest warrant was the result of a reasonable exercise of police power rather than eminent domain so that no viable cause of action for inverse condemnation existed); Sullivant v. City of Oklahoma City, 940 P.2d 220, 226 (Okla. 1997) (holding situations involving police action that caused incidental or consequential property damage were properly classified as an exercise of police power as opposed to eminent domain because intent was to execute a warrant or undertake other police activity, not to take private property and convert it to public use); Brutsche v. City of Kent, 193 P.3d 110, 121 (Wash. 2008) (holding the use of a battering ram to gain entry to execute a search warrant did not constitute a taking).

Because CCS failed to demonstrate any facts or evidence that would entitle them to relief under an inverse condemnation theory, we hold the

circuit court properly granted the City's motion for summary judgment on CCS's inverse condemnation claim.¹

CONCLUSION

Based on the foregoing, the circuit court's grant of summary judgment on CCS's inverse condemnation claim is

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.

¹ We also note the just compensation clause of the Constitution requires "just compensation be[] first made for the property." S.C. Const. art. I, § 13(A) (emphasis added). A plain reading demonstrates the drafters intended any governmental taking of a person's property under the eminent domain power to be one where the government pays for its use of the private property prior to taking it for public use. We do not believe the drafters intended to compensate private property owners for property damage under this clause for police action taken to protect the public and enforce criminal laws.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

RECEIVED

MAY 23 2012

SC Court of Appeals

Carolina Convenience Stores,
Inc., Harry Lancaster Jr., as
Power of Attorney for Harry
Lancaster Sr., and Willard Oil
Company, Inc,

Appellants,

v.

City of Spartanburg, SC

Respondent.

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants' request that this Court grant rehearing in *Carolina Convenience Stores, Inc., et al. v. City of Spartanburg, SC*, Op. No. 4970 (S.C. Ct. App. Filed May 9, 2012).

This Court's opinion affirmed the Circuit Court's decision, which granted summary judgment to Respondent. In reaching this decision, the Court may have overlooked or misapprehended three points:

I. The Court may have Overlooked or Misapprehended that the Elements of Inverse Condemnation were met and the City of Spartanburg's Deliberate Destruction of Appellants' Property was a Physical Appropriation for Public Use

The Decision held that the City of Spartanburg (hereinafter "City") did not physically appropriate the property for public use. Slip op. at 3. The Decision acknowledged that the City purposely used a bulldozer to breach (destroy) the building owned by Harry Lancaster, Jr. (hereinafter "Lancaster") yet ignored South Carolina jurisprudence establishing that "[g]enerally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves."¹

The Decision also failed to perform a proper analysis of the factors to be considered when determining whether a taking is deemed a public use. The proper analysis is under the factors in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).² In Penn Central, the U.S. Supreme Court noted that the Fifth Amendment "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³ The Court acknowledged that this depends on the particular circumstances of each case and that "there is no 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."⁴ Two factors have particular significance: "The economic impact of the regulation on the claimant" and "the

¹ Hardin v. South Carolina Dep't of Transp., 641 S.E.2d 437, 441, 371 S.C. 598 (2007).

² Kiriakides, 382 S.C. 8, 14-15, 675 S.E.2d 439, 442 (2009); Byrd v. The City of Hartsville, 365 S.C. 650, 658, 620 S.E.2d 76, 80 (2005) (It should be noted that neither of these cases dealt with the precise issue here, but rather with regulatory takings. However, Penn Central is still applicable for analyzing whether a taking for public use has occurred.).

³ Penn Central, 438 U.S. at 123.

⁴ Id. at 124

extent to which the regulation has interfered with distinct investment-backed expectations.”⁵ Importantly, “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.”⁶

In an analogous case out of South Carolina, the U.S. Supreme Court found a compensable taking when the government acted for the benefit of the public to the detriment of a private property right.⁷ The Court noted that “[t]he Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”⁸ In the case at bar, the Decision failed to properly consider that the City of Spartanburg should bear the burden for tearing down Appellant’s gas station ostensibly to provide the benefit of safety to the public. The Decision concluded that, despite the fact that the entire public received a benefit; the burden of the lost value of the property destroyed should fall entirely upon Appellants. This is precisely the sort of discrimination that the Fifth Amendment prohibits. Appellants are being loaded up on to bear more than their just share of the burdens of government and being asked to surrender their investment-backed expectations for a public benefit when other members of the public are not. Under these circumstances, this is a public use for which the just compensation clause protects against government overreach. As such, the function of the 5th Amendment is “to bar Government from

⁵ *Id.*

⁶ *Id.* at 124 (citing U.S. v. Causby, 328 U.S. 256 (1946)).

⁷ Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1014-1015 (1992); Causby, 328 U.S. 256 (holding that direct overflights above the claimant’s land, that destroyed the present use of the land as a chicken farm, constituted a taking for public use).

⁸ Penn Central at 147-148 (Rehnquist Dissent) (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)); accord Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁹ When a deliberate law enforcement action physically invades, destroys, or damages unoffending property, a “public use” has arisen by every logical measure. The damage is inflicted on behalf of the whole community, by its representatives, for a public purpose. The public thereby “use[s]” and enjoys the damaged property. Compensation is owed to the Appellants under these circumstances because the Constitution requires the benefitted society at large to bear the burden of this benefit.

Because the facts of the case at bar meet the elements of inverse condemnation under Kiriakides and Penn Central and because the trial court failed to perform the proper ad hoc factual inquiry, it was inappropriate for the Decision to affirm the grant of summary judgment on this claim.

II. The Court may have Overlooked or Misapprehended that the the City of Spartanburg did not Act Pursuant to the Police Power, but even if it had, Constitutional Rights Transcend the “Police Power”

The Decision improperly concluded that the actions of the City of Spartanburg were pursuant to the police power. Slip op. at 4. This conclusion ignores the long-held tenet of South Carolina Constitutional law that “[C]onstitutional powers can never transcend constitutional rights and . . . the police power of a municipal corporation is subject to the limitations imposed by the Constitution.”¹⁰

Even if the actions taken by the City of Spartanburg can be characterized as taken pursuant to the police power,¹¹ the requirement of compensation is not eliminated simply

⁹ Penn Central, 438 U.S. at 123.

¹⁰ J.C. James v. The City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

¹¹ It is elementary that the “police power” is not the power of the police, but the power of the government to regulate the *use* of property in a manner detrimental to the public. Carter v. South Carolina Coastal

because the government purports to act under the police power. On the contrary, as the United States Supreme Court has instructed, the power of government to take with compensation for a "public use" is coextensive "with the scope of a sovereign's police powers,"¹² meaning that compensation must still be provided even under the exercise of the police power. The high court reemphasized that "[i]f ... the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"¹³

While a property owner has no right to use the property in a noxious way, where an individual has his property damaged for the public good that is not an exercise of the police power but rather the exercise of inverse condemnation or eminent domain.¹⁴ Accordingly, the Decision's citation to Richards v. the City of Columbia,¹⁵ and Edens v. City of Columbia,¹⁶ for the proposition that the legitimate, constitutional exercise of the

Council, 281 S.C. 201, 204, 314 S.E. 327, 329 (1984); South Carolina State Hwy. Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977); Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955) ("Regulations and restrictions upon the manner in which a property owner may use his property when necessary for the general welfare are properly a part of the police power.").

¹² Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984).

¹³ Lucas, 505 U.S. at 1014-1015 (citations omitted).

¹⁴ John Lewis, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 6, at 14-15 (2d ed.1900) ("The landowner "is ... bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this ... duty which pertains to the police power of the State so far as the exercise of that power affects private property."); Ernst Freund, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 511, at 546-47 (1904) ("[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful...."); John F. Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 141, at 212 (4th ed. 1890) ("This [police] power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner...."). See also, J.C. James, 227 S.C. 565, 88 S.E.2d 661; Chick Springs Water Co. v. State Highway Department, 159 S.C. 481, 157 S.E. 842 (1931); Milhous v. State Hwy. Dep't., 194 S.C. 33, 8 S.E.2d 852 (1940).

¹⁵ Richards, 227 S.C. at 553-554, 88 S.E.2d at 690 (finding that there was no requirement for compensation to be paid to "individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.") (emphasis added).

¹⁶ Edens, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956) ("just compensation is made in the case of the exercise of eminent domain, but none for loss by the property owner which results from constitutional exercise of the police power.") (emphasis added).

police power to restrict harmful use by the owner does not constitute a taking, is improper in this case because there is no issue of the *property owners'* noxious use of the property. Rather, this is a case in which *innocent property owners'* distinct, investment-backed property rights were destroyed to benefit the public; a case of inverse condemnation requiring compensation regardless of the label put on the destruction.¹⁷

III. The Court may have Overlooked or Misapprehended Other Authorities Supporting Appellant's Position or Important Distinctions in the Authorities Cited

A. The Customer Case

The Decision cites repeatedly to the holding of the California Supreme Court in Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 895 P.2d 900 (1995), yet ignores the fundamental differences between Customer and the case at bar. Slip op. at 5. In Customer, the court interpreted a constitutional takings provision distinct from the South Carolina takings provision, and narrowly ruled 4-3 that an inverse condemnation cause of action could not be brought to recover *incidental* damage caused by tear gas used by the police at Customer's business.¹⁸ In the case at bar the damage was not incidental but intentionally caused by the City! Compensation for such intentional destruction of private property by the government must be paid pursuant to the South Carolina and U.S. Constitutions.

There are several other key distinctions between the Customer case and the case at bar. First, in Customer the Plaintiff conceded that the authorities acted reasonably,¹⁹ which is the opposite of Appellant's argument that the City's use of a bulldozer to tear

¹⁷S.C. Const. Art. I, § 13 (A) ("private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.").

¹⁸Customer, at 384-384, 895 P.2d at 910-911.

¹⁹Customer Co., 10 Cal. 4th at 404 (Baxter, dissent).

down Appellant's building is unreasonable and unprecedented. Second, the laws of California are substantially different from the laws of South Carolina in regard to victims' assistance. In the penultimate paragraph of the majority opinion, the court in Customer explained that the part of its decision was based on California legislation that provided reimbursement programs to compensate innocent residents for damage to their property caused by the police.²⁰ Of course, South Carolina has no such fund from which Appellants can seek reimbursement.²¹ Accordingly, such heavy reliance on Customer in the Decision was improper and a rehearing should be provided.

B. Other Cases Cited

The Decision also cited other cases that are distinct. Slip op. at 6. Certain Interested Underwriters at Lloyd's London Subscribing to Certificate Number TPCLDP217477 v. City of St. Petersburg, 29 Fla. L. Weekly D80, 864 So.2d 1145, 1149 (2003), like Customer, also dealt with unintended, incidental consequences that Plaintiff admitted were from lawful action. Again, the case at bar is distinct because City of Spartanburg intentionally destroyed Appellant's building using a method Appellant argues was unreasonable because it had never been done before in the history of law enforcement.

McCoy v. Sanders, 113 Ga. App. 565, 571 (fn. 1) (1966) is inapplicable because the plaintiff had a remedy under Georgia law for compensation for damage under these exact circumstances, but failed to properly pursue that remedy. That remedy is not available in South Carolina.

²⁰ Customer Co., 10 Cal. 4th at 393.

²¹ The South Carolina Victims Assistance Fund provides up to \$15,000 (\$25,000 under extraordinary circumstances) in recovery but only when a crime directly resulted in physical or psychic trauma to the victim. S.C. Code §§ 16-3-1170, 1180.

Indiana State Police v. May, 469 N.E.2d 1183 (Ct. App. 1984) is substantially distinct because the sole issue on appeal was whether the state was immune from liability under the tort claims act. By further contrast to South Carolina, the government in Indiana has immunity if a state trooper kills a third party while in a pursuit.

The Decision's citation to Kelley v. Story County Sheriff excludes key analysis from that case. Specifically, the Iowa Supreme Court in Kelley cited the balancing test in Penn Central and explained:

The exercise of police power may, in some situations, amount to a taking of private property if it deprives a property owner of the substantial use and enjoyment of one's property. The point at which police power becomes so oppressive that it results in a taking is determined on a case-by-case basis. This ad hoc approach applies a balancing test that is essentially one of reasonableness Factors to be considered in applying the test include: "(1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action."²²

The court held, over a vigorous dissent, that the Plaintiff had failed to establish a taking under those circumstances because Plaintiff did not allege that the amount of force used was unreasonable and because the economic impact on the Plaintiff (repair of two broken doors) was not substantial.²³ The Court in Kelley, however, specifically stated: "exercise of police power may, in some situations, amount to a taking of private property if it deprives a property owner of the substantial use and enjoyment of one's property."²⁴ Accordingly, under the framework outlined in Kelley, there is a taking in the case at bar because Appellants investment-backed property rights were substantially affected by the unreasonable force used by the City of Spartanburg.

²² Kelley v. Story County Sheriff, 611 N.W. 2d 475, 480 (Iowa 2000) (citations omitted).

²³ Id. at 481

²⁴ Id. at 480.

Similarly, the Decision's reliance on Sullivan v. The City of Oklahoma City is inappropriate because of the vast distinctions between the Oklahoma Constitution and South Carolina Constitution and because Sullivan failed to apply the Penn Central analysis.²⁵ Specifically, the takings clause of the Oklahoma Constitution is substantially longer than South Carolina's and reads as follows:

Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. Provided however, in no case shall the owner be required to make any payments should the benefits be judged to exceed damages. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into the court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of the property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for private or public use, the determination of the character of the use shall be a judicial question.²⁶

This distinction is important because the Sullivan court found that the full context of this provision showed that it related to condemnation proceedings.²⁷ Because the South Carolina takings clause is distinct and because Sullivan failed to apply the analysis from

²⁵ Sullivan v. The City of Oklahoma City, 940 P.2d 220 (1997).

²⁶ Id. at 224.

²⁷ Id.

Penn Central as required in South Carolina by Kiriakides, Sullivant should not be relied upon in South Carolina.

Finally, the case of Brutsche v. the City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008) is distinct because it involved the execution of a search warrant to obtain evidence and the court based its ruling partly on the doctrine that the government is not obligated to pay for evidence.

C. Similar Cases Ignored by Decision

A number of other states have ruled on the issue at bar in favor of the position advocated by Appellant, but the Decision ignored these cases. Specifically, the Supreme Courts of Texas and Minnesota and the Superior Court of New Jersey have all ruled in favor of Appellant's position in cases with facts similar to those at bar.

In a markedly similar case, the Minnesota Supreme Court held that the constitution mandated that compensation be paid for a taking of property by the government where the Minneapolis Police Department severely damaged a house while attempting to apprehend an armed suspect.²⁸ The Minnesota constitution's takings provision is nearly identical to South Carolina's and provides: "Private property shall not be taken, destroyed or damaged for public use without justification, first paid or secured."²⁹ The Minnesota court viewed this provision with the following rationale:

This provision "imposes a condition on the exercise of the state's inherent supremacy over private rights." This type of constitutional inhibition "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁰

²⁸ Wegner v. Milwaukee Mutual Insurance Co., 479 N.W.2d 38, 42 (1992)

²⁹ Minn. Const., Art. I, Sec. 13. Notably, the Minnesota constitution also includes the "first paid" language the Decision relied on in footnote 1 to buttress its opinion.

³⁰ Id. at 40 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

In Wegner, the court rejected exactly the same argument made by the City of Spartanburg regarding the purported legitimate exercise of the police power. To this argument the court answered:

The police power in its nature is indefinable. However, simply labeling the actions of the police as an exercise of the police power "cannot justify the disregard of the constitutional inhibition."

....
Consequently, the issue in this case is not the reasonableness of the use of chemical munitions to extricate the barricaded suspect but rather whether the exercise of the city's admittedly legitimate police power resulted in a "taking."³¹

The Minnesota Supreme court held that where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, the municipality must compensate the innocent party for the resulting damages because it is not fair to allocate the entire risk of loss to an innocent property owner for the good of the public.

The Texas Supreme Court has agreed with the rationale of the Minnesota Supreme Court and has held that compensation is provided under the Texas Constitution in another similar case.³² In Steele, the owners of a house sought compensation after their house was set ablaze by police officers in an effort to capture fugitives hiding in the house.³³ The Texas court rejected the assertion that destroying the property "for the safety of the public" was a proper exercise of the police power and instead mandated just compensation.³⁴ The court recalled that uncompensated governmental taking of property was unlawful even before the Magna Carta and held that innocent third parties are entitled by the Constitution to compensation for their property again because "the

³¹ Id. (citations omitted).

³² See, Steele v. City of Houston, 603 S.W.2d 786 (1980).

³³ Id. at 789.

³⁴ Id. at 793.

prohibition against uncompensated takings 'was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"³⁵

Likewise, the Superior Court in New Jersey has held that the damage to property caused by police executing a search warrant constituted a "taking" under the United States and New Jersey Constitutions that entitled the property owner to just compensation.³⁶ The court reasoned that because the damage was incurred for the public good, the public should bear the cost, and the innocent third party should be justly compensated for his loss.³⁷

Again, the Decision ignored these holdings and ignored the prohibition against uncompensated takings that bar the government from forcing some people to bear alone public burdens which, in all fairness and justice, should be borne by the public as a whole.

CONCLUSION

In the case at bar there is no dispute that the City of Spartanburg has paid no compensation to Appellants for the deliberate destruction of their property and business for the purpose of capturing a public enemy. This destruction was not done to eliminate some noxious use of the property by the property owners and therefore not undertaken pursuant to the "police power" as conventionally defined. Even assuming the City of Spartanburg exercised "police power" authority, it is not permitted to exercise this

³⁵ Id. at 789 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960); Y.M.C.A. v. United States, 395 U.S. 85, 89 (1969)).

³⁶ Wallace v. City of Atlantic City, 257 N.J.Super. 404, 410, 608 A.2d 480, 483(1992).

³⁷ Id.

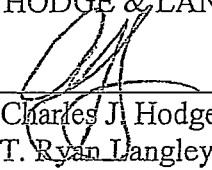
authority in violation of the U.S. and South Carolina Constitutions, which prevent the state from requiring a small group to bear more than their just share of the burdens of government. Accordingly, per our constitutional protections, when a small group surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent must be returned to them.

Logic, equitable principles, and constitutional law support compensating Appellants for their substantial investment-backed property loss, taken through deliberate government acts for the benefit of the public. The Decision, however, abandons this sensible outcome to reach the unconstitutional conclusion that the property owners, even though they were innocent of any wrongdoing, should bear the entire cost of their business being bulldozed to the ground for the public good of law enforcement.

Summarily, viewing this evidence and all ambiguities, conclusions, and inferences therefrom in the Appellants' favor, the drastic remedy of summary judgment on Appellants inverse condemnation claim was improper. Therefore, Appellants respectfully submit that this matter is appropriate for rehearing.

Respectfully Submitted by:

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Dated: 5/22, 2012
Spartanburg, South Carolina

The South Carolina Court of Appeals

Carolina Convenience Stores, Inc., Harry Lancaster, Jr.,
as Power of Attorney for Harry Lancaster, Sr. and Oil
Company, Inc., Appellants,

v.

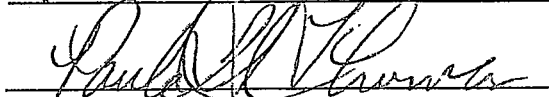
City of Spartanburg, SC, Respondent.

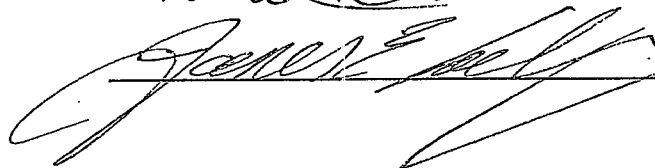
Appellate Case No. 2009-146906

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J. Williams

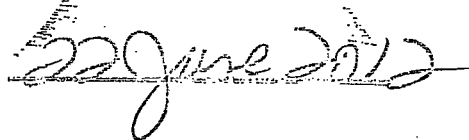
 J. Thomas

 J. Lockemy

Columbia, South Carolina

cc:

David Leon Morrison
Timothy Ryan Langley
Charles J. Hodge

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

Case No. 2007-CP-42-09988R

Carolina Convenience Stores,
Inc., and Harry Lancaster Jr.,
as Power of Attorney for
Harry Lancaster Sr., and
Willard Oil Company, Inc

Appellants,

v.

City of Spartanburg, SC

Respondent.

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SC COURT OF APPEALS

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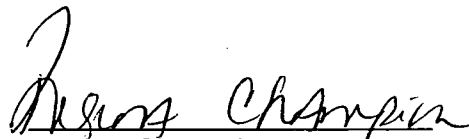
JUL 19 2012

CERTIFICATE OF SERVICE

S.C. Supreme Court

I hereby certify that I have on this 16th day of July, 2012, served the enclosed **Appendix** upon all counsel of record for Respondent by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Mr. David Morrison
Attorney at Law
7453 Irmo Dr., Suite B
Columbia, SC 29212
Fax: 803-661-6289


Regina Champion

Dated: July 16, 2012
Spartanburg, South Carolina