

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2012-212109

Susan Anne Bell Lynch,

Appellant/Respondent

v.

Carolina Self Storage Centers, Inc.,

Respondent/Appellant.

RECORD ON APPEAL

VOLUME I

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SC Court of Appeals

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Purche
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010CP-21-2170Susan Anne Bell LynchCarolina Self Storage Centers
Inc, d/b/a Monster Storage

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Attorneys have 10 days to file post trial motions

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
<u>Susan Anne Bell Lynch</u>	<u>Carolina Self Storage Centers Inc, d/b/a Monster Storage</u>	\$ <u>123,034.21</u>
		\$
		\$

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

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

Circuit Court Judge

Judge Code

Date

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE)

CASE NO.: 2010-CP-21-2170

Susan Anne Bell Lynch,)

Plaintiff,)

vs.)

VERDICT

Carolina Self Storage Centers,)

Inc., d/b/a Monster Storage,)

Defendant.)

1. Was the Defendant negligent?

☒ YES - Go to Question 2

☐ NO - Stop deliberations

2. Was the Defendant's negligence a proximate cause of the Plaintiff's injuries?

☒ YES - Go to Question 3

☐ NO - Stop deliberations

3. Was the Plaintiff negligent?

☒ YES - Go to Question 4

☐ NO - Go to Question 7

4. Was the Plaintiff's negligence a proximate cause of the Plaintiff's injuries?

☒ YES - Go to Question 5

☐ NO - Go to Question 7

5. Using the combined negligence that proximately caused the Plaintiff's injuries as one hundred percent (100%), what percentage of that negligence is attributable to the Plaintiff and what percentage is attributable to the Defendant? [The percentage must add up to 100%. It is not necessary for the Plaintiff or the Defendant to be assigned a percentage of negligence. It is perfectly acceptable for the Plaintiff or the Defendant to be assigned a zero percentage (0%).]

Plaintiff 50 %

Defendant 50 %

Total 100 %

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CLERK OF COURT
FLORIDA COUNTY

6. Was the Plaintiff's negligence greater than fifty percent (50%)?

 YES - Stop deliberations

✓ NO - Go to Question 7

7. Please state the amount of damages, if any, sustained by the Plaintiff. [Do not reduce the Plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the Defendant is responsible based on the percentage of the Defendant's negligence which you have decided proximately caused the Plaintiff's injuries. You are to determine only the total amount of the Plaintiff's damages and enter that amount below.]

\$ 246,068.42 Actual Damages

(If you find for the Plaintiff an award of Actual Damages, you may then consider whether to award the Plaintiff Punitive Damages on the next page.)

8. Do you find that the Plaintiff has established by clear and convincing evidence that the Defendant's actions were reckless, willful and/or wanton?

_____ Yes (go to question 9)

1 No (stop your deliberations, sign and date the verdict form.)

9. We the Jury, unanimously find the Plaintiff is entitled to **Punitive Damages** in the amount of:

_____ (\$.00)

(Please sign and date the verdict from)

3-8-12

DATE

Dah Lee

FOREPERSON

(Please let the Bailiff know when you have completed this form)

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CLERK OF DISTRICT COURT
COUNTY OF OKLAHOMA
NORFOLK, VIRGINIA

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COUNTY OF OKLAHOMA
NORFOLK, VIRGINIA

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE)
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.
Susan Anne Bell Lynch, C/A No.: 2010-CP-21-2170

Plaintiff,

v.

Carolina Self Storage Centers, Inc.,

Defendant.

ORDER

FILED
2012 MAY 18 PM 4:11
CONNIE REEL-SHEARIN
CLERK OF COURT
FLORENCE COUNTY, S.C.

The above-captioned action came before this Court on April 20, 2012, for a hearing upon the parties' post-trial motions. Both parties timely filed motions with the Court following the jury trial of this case on March 5-8, 2012. For the reasons that follow, the Court respectfully **DENIES** all motions filed by the parties.

Plaintiff's Motion for New Trial Absolute

Plaintiff has moved for a new trial absolute on the basis of two affidavits, one of which is from the jury foreperson. Plaintiff alleges that the jury's verdict was tainted by improper influences and/or bias and should be set aside. Defendant urges the Court to disregard the juror's affidavit as incompetent evidence and further argues that Plaintiff has failed to carry her substantial burden of showing that the verdict resulted from the denial of fundamental fairness or juror misconduct. The Court agrees.

"As a general rule, juror testimony may not be the basis for impeaching a jury verdict." *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). In *Hunter*, the South Carolina Supreme Court held that juror testimony is competent to point out inappropriate, extraneous influences upon the jury as well as internal misconduct that implicates a litigant's right to due process or "fundamental fairness." 320 S.C. at 88, 463 S.E. 2d at 316. It held that allegations of racial

prejudice by members of a jury involve principles of fundamental fairness, so that juror testimony as to such matters is considered competent. *Id.* No such allegation of racial prejudice has been raised by Plaintiff in this case, other than a gratuitous reference to the race of three jurors in the juror's affidavit filed with her motion.

In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), the South Carolina Supreme Court held that juror testimony regarding allegations of premature deliberations was competent to ensure fundamental fairness. This opinion carved out a second exception to the rule regarding the incompetency of juror testimony as to internal misconduct; although the Court noted that in the absence of proof of prejudice, the Court would not grant a new trial solely because the jury engaged in premature deliberations. *Id.* at 814. No such allegation of premature deliberations has been raised by Plaintiff in the case at bar.

In *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 719 (Ct. App. 2000), a juror's testimony that she was treated harshly by the other jurors during deliberations, to include screaming at her and insulting her, did not implicate due process concerns. The Court commented:

[W]e emphasize that the exception to the general rule against review of internal jury deliberations carved out in *Hunter* is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness. A jury verdict which is based upon racial discrimination fits within this definition. But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

The nature of the jury process can be intimidating to those who dislike confrontation and debate. It is all the more difficult in a criminal case, where jurors are most likely to feel the weight of their decision. In the setting of a confined deliberation room, it is understandable that some jurors become very sensitive to the outward manifestations of anger or animosity exhibited by other jurors who do not share the same point of view. Needless to say, not every juror is well versed in the art of gentle persuasion.

Id. at 720.

The distinction between allegations of internal misconduct versus external misconduct for the purposes of determining whether juror testimony is competent under Rule 606(b), *SCRE* was further reinforced in *State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005), in which the Court of Appeals upheld a trial court's decision not to receive sworn juror testimony concerning alleged internal juror misconduct. Writing for the Court, Judge Anderson reasoned that allegations that jurors viewed the defendant in a negative light because he elected not to testify on his own behalf did not present due process concerns amounting to the denial of fundamental fairness. *Id.* at 868-69.

The South Carolina Supreme Court echoed the reasoning in *Zeigler* with its opinion in *Shumpert v. State*, 378 S.C.62, 661 S.E.2d 369 (2008). In *Shumpert*, a trial court's decision to deny admission of a jury's affidavit containing allegations that several jurors had remarked during the deliberations that the defendant would have testified if he had been innocent was affirmed. The Court found that the affidavit offered nothing more than speculation as to the effect of these remarks upon the jury's deliberations, observing that "[t]he generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence." *Id.* at 68. The Court then advised trial courts to "exercise[e] a degree of caution before entertaining such evidence in an attack on a jury's verdict." *Id.* at 69. In reaching its decision, the Court found wisdom in the following language from *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915):

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might vindicate the finding. Jurors would be harassed and beset by the defeated party¹ in an effort to secure from them evidence of facts which might establish

¹ Defendant is making no allegation that Plaintiff has engaged in any harassment of any member of the jury in this case.

misconduct . . . [and] the result would be to make what was intended to be a private deliberation the constant subject of public investigation [T]he argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.

Rule 606(b) of the *South Carolina Rules of Evidence*, as interpreted by the appellate courts of this state, mandates that the Court deem the juror's affidavit inadmissible and deny Plaintiff's motion for a new trial to the extent that it depends upon the affidavit to supply its foundation. The affidavit does not give rise to allegations of external misconduct. The jury did not receive evidence or influence from sources outside of the record. Rather, the affidavit indicates that different jurors had varying impressions of the litigants and the evidence. *Compare State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845, 848-49 (Ct. App. 2004) (information supplied by juror during deliberations, whether incorrect or not, that is merely based upon juror's personal experience is not an external influence on jury). This is not evidence of external misconduct, nor does it fall within the narrow exceptions to the rule of inadmissibility of testimony regarding internal juror misconduct.

Even if the Court were to consider the juror's affidavit, Plaintiff's motion would still be denied. The thrust of Plaintiff's argument is that she was denied an opportunity to exercise a peremptory strike because a juror failed to respond truthfully during *voir dire*. The juror affidavit indicates that another juror did not like Plaintiff or her counsel. That juror is unnamed in the affidavit, and no reasons are given for the juror's dislike of Plaintiff or her counsel. Nicholas Lewis' affidavit indicates that one juror was once in a domestic case in which

Plaintiff's counsel, or at least his firm, represented the juror's husband. The affidavit does not say how long ago the representation occurred, the result of the litigation or anything else about the case.

South Carolina has a line of cases dealing with jurors who failed to reveal information during *voir dire*. A review of that line of cases, along with the record of the *voir dire* procedure in the present case, leads to the inescapable conclusion that Plaintiff has failed to present the Court with proof of juror misconduct or resulting prejudice.

Our courts have developed a two-part test to determine whether a juror's failure to disclose a potential bias warrants granting a new trial. See *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375 (2004). First, the court must determine if the juror concealed information during *voir dire*. If so, the court must then determine if the concealed information would have been a material factor in the use of a litigant's peremptory strikes. *Sparkman*, 596 S.E.2d at 496. The determination of whether concealment was intentional or unintentional is described as follows:

[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Woods, 550 S.E.2d at 284. In *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (2004), the Court of Appeals held that a juror's failure to reveal a relationship with the victim of the crime that was the subject of the trial was unintentional because the juror did not fail to respond to the *voir dire* questions truthfully. The trial court had asked if jurors were close personal friends or

business associates of the potential witnesses, and the information supplied by the appellant revealed, at most, a remote connection between the juror and the victim's family.

The Court's review of the transcript from the *voir dire* procedure in the present case does not reveal a question posed to the jury that should have elicited a response concerning a potential juror's participation in domestic litigation where her ex-spouse was represented by Plaintiff's counsel or his firm at some point in the past. Hence, there was no intentional concealment. Compare *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004) and *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (juror's failure to disclose alleged relationship was not intentional where question that would have elicited information concerning relationship with witness was not asked). That conclusion ends the Court's inquiry into the matter, as there can be no inference of bias from an innocent failure to disclose information. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282, 589 (2001).

Even if it did not, Plaintiff has failed to provide the Court with evidence of prejudice. The two affidavits filed in support of Plaintiff's motion do not provide an evidentiary basis for a conclusion that the juror mentioned in Lewis' affidavit is the same juror mentioned in the juror affidavit as disliking Plaintiff's counsel. Furthermore, even assuming that the juror mentioned in the juror affidavit was biased against Plaintiff's counsel for some reason outside the evidentiary record, it would appear that she was successfully persuaded to overcome that bias, as the jury found for Plaintiff and gave her a substantial verdict.

As her fallback position, Plaintiff urges the Court to conduct an evidentiary hearing to which all of the jurors in the case are summoned to provide testimony on the allegations she raises. The Court finds that acceding to this request would undermine the public policy reasons for which Rule 606(b), SCRE exists. If a litigant seeks to impeach a jury's verdict, it is

incumbent upon that litigant to come forward with competent evidence that demonstrates either a denial of fundamental unfairness or the existence of an improper external influence upon the jury's deliberations. A party's failure to do so by way of affidavit should not be cured by the Court by the convening of a hearing at which jurors are subjected to cross-examination. This practice would indeed be "replete with dangerous consequences," as the United States Supreme Court observed in the *McDonald* case cited above.

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

Plaintiff's Motion for New Trial Nisi Additur

A trial court may grant a new trial *nisi additur* whenever it finds the amount of the verdict to be merely inadequate. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct.App.2003). "While the granting of such a motion rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages." *Id.* To this end, the trial court must offer compelling reasons for invading the jury's province by granting a motion for additur. *Id.* "The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 472 (Ct. App. 2006)

Plaintiff has moved for a new trial *nisi additur* on the grounds that the jury in this case limited its damages award (which was reduced 50% by the Court in response to the jury's finding that Plaintiff bore 50% of the fault for the accident) to the precise amount of the medical expenses that Plaintiff admitted into evidence. Plaintiff argues that this verdict does not take into account Plaintiff's pain and suffering or any other intangible element of her alleged damages. Plaintiff cites the case of *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) as support for her position. *Waring* is similar to this case in that the jury in *Waring* also awarded

the Plaintiff the precise amount of her medical bills, but the similarities stop there. The Court finds that the case before it is more akin to the more recent case of *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2007), which also involved a verdict that equaled the Plaintiff's medical bills.

In *Waring*, the Plaintiff had a pre-existing condition that the defense argued was the source of her pain and suffering, despite all evidence in the record indicating that the accident aggravated her pre-existing condition. In *Todd*, the element of causation was not only contested in arguments to the jury, there was evidence in the record from which the jury could conclude that the accident was not the proximate cause of all of her medical treatment. In the present case, there was testimony that the Plaintiff suffered a fall following the initial injury and that the fall caused the Plaintiff to rupture her Achilles tendon. There was also evidence that during her recovery from the surgery to repair her Achilles tendon, she got her wound wet, which could have given rise to the infections that followed. The jury could have reasonably concluded that the treatment that the Plaintiff underwent following these events did not result from the original injury. The Court is therefore disinclined to disturb the jury's verdict, as it cannot find compelling reasons to do so in the record before it.

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

Defendant's Motion for Judgment Notwithstanding the Verdict

Defendant has moved for judgment notwithstanding the verdict pursuant to Rule 50, *SCRPC* upon the same grounds that formed the basis for its motions for directed verdict during the trial: (1) that the evidence fails to give rise to a particular duty owed by Defendant to Plaintiff such that the doctrine of primary implied assumption of the risk applies; (2) that even if a duty exists, there was no evidence of breach; and (3) that even if there was a particular duty that was

breached by Defendant, the evidence gives rise to but one reasonable inference—that Plaintiff's negligence exceeded Defendant's negligence as a matter of law. The Court remains convinced that Defendant owed a duty to Plaintiff and that the two other issues were matters for the jury to decide.

Defendant's motion for judgment notwithstanding the verdict is therefore **DENIED**.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'D. Craig Brown', is written over a horizontal line.

The Honorable D. Craig Brown
Presiding Judge for the 12th Judicial Circuit

Florence, South Carolina.

May 18, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE CIRCUIT COURT FOR THE
TWELFTH JUDICIAL CIRCUIT

FILED

Susan Anne Bell Lynch

2010 JUL 26 PM 4:22

CIVIL ACTIONS COVER SHEET

vs.

Plaintiff(s) Carolina Self Storage Centers, Inc.
C.C.P. & G.S.
FLORENCE COUNTY, SC

10-CP-21-2170

Carolina Self Storage Centers, Inc.

Defendant(s)

(Please Print)

Submitted By: Kevin Barth
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Florence, SC 29503

SC Bar #: 0559
Telephone #: 843-662-6301
Fax #: 843-664-8384
Other:
E-mail: kbarth@hbbh.net

NOTE: The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in Complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (Proof of ADR/Exemption attached)

NATURE OF ACTION (Check One Box Below)

- Contracts
☐ Construction (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20__-CP-_____
☐ Notice/File Med Mal (230)
☐ Other Malpractice (299)

- Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☒ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
Settlement Payment Rights
Application (760)
☐ Other (799)

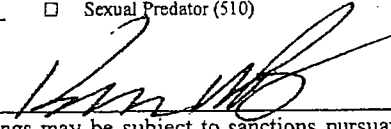
- Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture - Petition (840)
☐ Forfeiture - Consent Order (850)
☐ Other (899)

- Appeals
☐ Arbitration (900)
☐ Magistrate - Civil (910)
☐ Magistrate - Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Workers' Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)

- ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in
Out-of-County Action (660)

- ☐ Sexual Predator (510)

Submitting Party Signature: 

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.
SCCA/234 (11/09)

CERTIFIED: A TRUE COPY



CLERK OF COURT C.P. & G.S.
Date: NOV 26 2010 FLORENCE COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

2010 JUL 26 PM 4:22

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

CASE NO. 10-CP-21-2170

Susan Anne Bell Lynch)

Plaintiff,)

vs.)

SUMMONS

Carolina Self Storage)

Centers, Inc.,)

Defendant.)

TO DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Amended Complaint on the subscriber at 205 N. Irby Street, Florence, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Amended Complaint within the time aforesaid, judgement by default will be rendered against you for the relief demanded in the Amended Complaint.

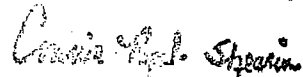


KEVIN M. BARTH
ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 107
FLORENCE, SOUTH CAROLINA 29503
(843) 662-6301

Florence, South Carolina

July 26, 2010

CERTIFIED A TRUE COPY



CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Record on Appeal
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FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

2010 JUL 26 PM 4:22

Susan Anne Bell Lynch
FLORENCE COUNTY, SC

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO. 10-CP-21-2170

Plaintiff,

vs.

Carolina Self Storage
Centers, Inc.,

Defendant.

COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiff, complaining of the Defendant herein, would respectfully allege and show unto this Honorable Court as follows:

1. The Plaintiff is a citizen and resident of the County of Florence, State of South Carolina.

2. Upon information and belief, the Defendant, Carolina Self Storage Centers, Inc. is a corporation organized and existing under the laws of the State of South Carolina and who owns property, transacts business and employs agents and employees in Florence County, State of South Carolina.

3. That on or about July 31, 2008, the Plaintiff, was present at Defendant's business as an invitee for lawful and legitimate business purposes, more particularly, visiting her storage unit. As the Plaintiff herein was entering a storage unit, the Plaintiff opened the door to the warehouse and was attempting to remove certain items from the warehouse when the door quickly closed and violently struck Plaintiff's ankle, leg and foot with the door.

4. That the Plaintiff through no fault of her own, was severely and deeply cut on her ankle, causing her Achilles Tendon to become lacerated, along with further injuries outlined below.

5. The Defendant, by and through its agents, employees and/or servants, either knew or should have known that the door was

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FLORENCE COUNTY, S.C.

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not operating properly and that it had a sharp edge on the bottom, all of which would be hazardous to the storage unit's invitees, including the Plaintiff, Susan Lynch.

6. The Defendant, through its duly authorized agents, employees and/or servants, acting within the course and scope of their employment, was negligent, willful, wanton, careless and grossly negligent in one or more of the following particulars:

42
MB
A. In failing and neglecting to maintain the doors, entryways and surrounding areas in a condition that was safe for invitees, such as the Plaintiff, Susan Lynch, properly and lawfully within the premises;

B. In permitting and allowing a dangerous condition to be placed in a position to intrude upon the entryways in which the Plaintiff, Susan Lynch, was walking, rendering same dangerous and unsafe;

C. In failing to erect or post warning signs or otherwise give notice to the Plaintiff, Susan Lynch, of the inherently dangerous condition in her path;

D. In failing and neglecting to inspect and properly maintain the door, the closing mechanism and the surrounding area;

E. In failing to warn invitees, including Plaintiff, of the inherently dangerous chemical poisons and pesticides used on the doors and in the public walkways and public areas;

F. In failing to properly supervise the employees, agents and/or servants of the Defendant in the installment and maintenance of the doors in the storage units;

G. In failing to remove the hazardous condition from the area after the Defendant knew or should have known of its presence and its dangerousness;

H. In signaling the Plaintiff, Susan Lynch, to walk through an area that was not safe for foot traffic, including the Plaintiff;

I. In failing to place a safety guard on the bottom of the door, which would have and should have covered the sharp door bottom which ultimately caused Plaintiff's

injuries;

J. In allowing a condition to remain on the premises when same was not in compliance with the applicable codes and regulations.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff, Susan Lynch.

43 MB 7. That as a direct and proximate cause of the negligence, willfulness, wantonness and recklessness and gross negligence on the part of the Defendant, the Plaintiff, Susan Lynch, was severely and deeply cut; that Plaintiff was greatly and severely injured in and about her leg, ankle, foot and other parts of her body; that Plaintiff was rendered sick, sore, disabled, bruised and shocked thereby and continues so to be; that all of such injuries have caused Plaintiff extreme and excruciating pain continuously to this date and the Plaintiff will suffer such pain in the future; that as a direct and proximate result of the negligence as aforementioned, the Plaintiff suffered severe lacerations, bruises and contusions, surgeries and infections, and great pain and suffering.

8. That as a direct and proximate cause of said negligence, willfulness, wantonness, recklessness and gross negligence on the part of the Defendant the Plaintiff, Susan Lynch:

A. Was confined to the care and treatment of skilled practitioners of the healing arts and nurses;

B. Is presently being treated by such persons and will continue to receive treatment from them in the future;

C. Has expended large sums of money for such treatment and will be obligated to expend even more money in the future for such care and treatment;

D. Was hindered and prevented and in the future will be hindered and prevented from transacting and attending to Plaintiff's necessary and lawful affairs since the date of the accident and lost and was deprived of gains, profits, salaries, pleasures, advantages and earning capacity and ability which Plaintiff would have otherwise derived and acquired had it not been for the accident;

E. Was in the past, at present and will in the future, be put to great expense for medicine, drugs and medical attention;

F. Has expended large sums of money in the past and present for transportation to and from the doctor's office and will continue to have such expenses in the future and has been permanently impaired as a result of the accident.

84
9. That as a direct and proximate result of the foregoing acts by the Defendant herein, Plaintiff, Susan Lynch, has suffered actual damages and is demanding a judgment against the Defendant in a sum sufficient to compensate her for those damages.

10. Plaintiff, Susan Lynch, is also informed and believes that she is entitled to punitive damages as a direct result of the Defendant's grossly negligent, wilful and wanton conduct.

WHEREFORE, the Plaintiff respectfully prays for judgment against the Defendant for actual damages, for punitive damages, and for the costs of this action.



KEVIN M. BARTH
ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 107
FLORENCE, SOUTH CAROLINA 29503
(843) 662-6301

Florence, South Carolina

July 26, 2010

Jury Trial Demanded.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Susan Anne Bell Lynch,	)	C/A No.: 10-CP-21-2170
	)	
Plaintiff,	)	
	)	ANSWER AND COUNTERCLAIM
v.	)	(Jury Trial Demanded)
	)	
Carolina Self Storage Centers, Inc.	)	
	)	
Defendant.	)	
	)	

Defendant Carolina Self Storage Centers, Inc., by and through its undersigned attorneys, hereby answers the allegations of the plaintiff's complaint as follows:

FOR A FIRST DEFENSE

1. Defendant denies each and every allegation of the plaintiff's complaint not specifically admitted, qualified or explained herein.
2. Defendant admits the allegations contained in paragraph one (1) of the plaintiff's complaint upon information and belief.
3. Defendant admits the allegations contained in paragraph two (2) of the plaintiff's complaint.
4. Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph three (3) of the plaintiff's complaint. By way of further answer to the allegations of said paragraph, defendant admits or affirmatively alleges that the plaintiff was, at all times relevant to the allegations of the plaintiff's complaint, defendant's lessee pursuant to a rental agreement dated May 21, 2008, a true and correct copy of which is attached hereto and incorporated herein by reference as Exhibit A.

5. Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph four (4) of the plaintiff's complaint.

6. Defendant denies the allegations contained in paragraph five (5) of the plaintiff's complaint.

7. Defendant denies the allegations contained in paragraph six (6) of the plaintiff's complaint, including subparagraphs A through J.

8. Defendant denies the allegations contained in paragraph seven (7) of the plaintiff's complaint.

9. Defendant denies the allegations contained in paragraph eight (8) of the plaintiff's complaint, including subparagraphs A through F.

10. Defendant denies the allegations contained in paragraphs nine (9) and ten (10) of the plaintiff's complaint.

FOR A SECOND DEFENSE

11. The negligence, recklessness, willfulness and wantonness of the plaintiff, combining and concurring with the defendant, if any, and the same is denied, was a direct and proximate cause of the plaintiff's injuries and damages and without which the same would not have occurred, and was greater in proportion to that of the defendant, if any, and same is denied, and, therefore, the plaintiff may not recover from the defendant for any of his alleged injuries or damages complained of in the complaint. The defendant, therefore, expressly pleads the contributory and comparative negligence, recklessness, willfulness and wantonness of the plaintiff as a bar to any recovery against the defendant.

As an alternative, the defendant is entitled to a reduction of damages based upon the percentage of the plaintiff's negligence, recklessness, willfulness and wantonness.

FOR A THIRD DEFENSE

12. An award of punitive damages permitted to be made by the jury with consideration by the jury of the wealth of the defendant in the jury's discretionary determination of the amount of the award violates the defendant's right to equal protection of the law and due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution.

FOR A FOURTH DEFENSE

13. An award of punitive damages permitted to be made by the jury with consideration by the jury of a compensatory purpose of such damages to vindicate a private right of the plaintiff in the jury's discretionary determination of the amount of the award lacks a sufficiently definite or meaningful standard and applies an improper standard in violation of the defendant's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution.

FOR A FIFTH DEFENSE

14. Plaintiff's claim for punitive damages violates Article I, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A SIXTH DEFENSE

15. By entering into the rental agreement that is attached hereto as Exhibit A, plaintiff expressly assumed the risk of any injuries and damages that she is now claiming from defendant.

FOR A SEVENTH DEFENSE

16. By entering into the rental agreement attached hereto as Exhibit A, plaintiff agreed to waive any and all claims she might otherwise have been able to make for personal injuries or damages with respect to the premises described in the plaintiff's complaint.

FOR AN EIGHTH DEFENSE

17. Plaintiff's agreement to hold the defendant harmless from all claims for personal injuries or damages to the plaintiff arising from the plaintiff's presence upon defendant's premises was a material inducement to the defendant's entry into the rental agreement attached hereto as Exhibit A. Defendant relied upon plaintiff's promise to hold defendant harmless from such claims for injuries and damages as plaintiff is currently making within the context of this lawsuit. Plaintiff should therefore be deemed barred from making such claims by the operation of the doctrine of estoppel.

FOR A NINTH DEFENSE AND BY WAY OF A COUNTERCLAIM

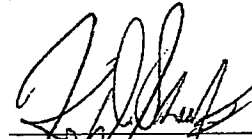
18. Plaintiff entered into a valid rental agreement on May 21, 2008, a true and correct copy of which is attached hereto as Exhibit A, by which Defendant leased certain space on premises owned by Defendant to Plaintiff.

19. Defendant has complied with all material terms of the agreement attached hereto as Exhibit A.

20. Under the express terms of the agreement attached hereto as Exhibit A, Plaintiff agreed to indemnify Defendant from all claims for personal injuries to herself arising from her use of the space leased to Plaintiff.

21. Defendant has been forced to incur costs to defend itself in this litigation, including attorney's fees, and hereby seeks the recovery of such costs and fees from Plaintiff pursuant to Plaintiff's express agreement to indemnify Defendant from claims such as the one made by Plaintiff against Defendant in this litigation.

WHEREFORE, having fully and completely answered the allegations of the plaintiff's complaint, defendant prays that it be dismissed, for its costs and attorney's fees in defending this matter, that the costs of this action be taxed against the plaintiff, and for such other and further relief as this Court may deem just and proper.



Kirby D. Shealy III
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
3710 Landmark Drive, Suite 400
Columbia, South Carolina 29202
(803) 799-9091
Our File No.: 7603.308
Attorneys for Defendant

August 20, 2010.

RENTAL Carolina Self Storage
AGREEMENT 2201 Second Loop Road
Florence, SC 29501
843-669-6500

NAME: Sue B Lynch 217KD
LEGAL ADDRESS: 607 Rosewood Drive Florence SC 29501

Alternate Billing Address (If Different Than Above):
BILLING ADDRESS: Florence SC

Occupant attests that all the personal property stored is free and clear of all liens and secured interest except the following:

Description	Lien holder of Secured Party	Address	Amount

This agreement, made and entered into this day of May 21, 2008, by and between Carolina Self Storage Centers, Inc. known as the Owner and the Occupant named above whose last known address is listed above. For the consideration provided for in this agreement, the Owner agrees to let the Occupant use and occupy a space in the self-service storage facility, known as Carolina Self Storage Centers, Inc. located in the City of Florence, State of South Carolina, and more particularly as described as follows: Space # 217KD. The space is to be occupied and used for the purposes specified in this agreement and subject to the conditions set forth, for a period of one (1) month beginning on the date of this agreement and continuing month to month until terminated.

"Space", as used in this Agreement, means that part of the self-service storage facility as described above. The Occupant agrees to pay the Owner, as payment for the use of the space and improvements on the space, the monthly sum of \$173.00. Monthly installments are payable in advance on or before the 1st of each month, in the amount of \$173.00, and a like amount of each month after that, until the termination of this agreement.

ALL SPACES ARE RENTED ON A MONTH TO MONTH BASIS. THERE ARE NO PARTIAL OR PRO-RATED MONTHLY RENTALS EXCEPT FOR THE FIRST MONTH'S RENT.

- 1. DEFINITIONS:** The word "Occupant" means the person entitled to the use of the storage space at this self-service storage facility under this rental agreement. The word "Owner" means the Owner, operator, and/or lessor of this self-service storage facility, its agent, or any other person authorized by him/her to manage the facility or to receive rent from an Occupant under this rental agreement.
- 2. RENT, LATE CHARGES AND OTHER FEES:**
 - A. Paying your rent timely is your responsibility. We Do Not Send Reminder Notices. Upon request, Owner will send a monthly statement and Occupant will be charged a \$1.00 monthly fee for this service.
 - B. A late payment of more than five (5) days will result in a late charge of \$5.00 & OWNER WILL OVERLOCK OCCUPANT'S UNIT.
 - C. After fifteen (15) days past due an additional late fee of \$10.00 will be charged.
 - D. After thirty (30) days past due an additional late fee of \$10.00 will be charged.
 - E. After fifty-one (51) days Owner will send 1st notice of Lien and assess an additional \$20.00 certified letter fee.
 - F. After sixty-five (65) days Owner will send a second notice of Lien and assess an additional \$75.00 certified letter and inventory fee.
 - G. Failure to pay delinquent rent and/or late charges, as set out above, will cause Occupant to be additionally financially responsible for the following charges: lock out, advertising, moving and sale charges, and any other reasonable expenses incurred as a result of non-payment.
 - H. A \$30.00 bad check administrative charge will be incurred on all returned checks and Occupant's space will be overlocked until check and charges are paid.
 - I. Owner reserves the right to refuse acceptance of payment by check made either in person or by mail.
 - J. All partial payments shall first be applied to late fees and any other fees or charges before being applied to the rent.
- 3. STORAGE AND USE:** The space named in this Agreement is to be used by the Occupant solely for the purpose of storing personal property belonging to the Occupant. **THE OCCUPANT AGREES NOT TO STORE ANY EXPLOSIVES OR ANY HIGHLY INFLAMMABLE GOODS, OPEN FOOD, LIVING ANIMALS, or any other goods in the space which would cause danger to the space.**
 - A. The Occupant agrees that the property will not be used for any unlawful purposes and the Occupant agrees not to commit waste, nor alter, nor affix signs on the space, and will keep the space in good condition during the term of this agreement. If Occupant damages or makes alterations to the space in any manner, Occupant agrees to bear all cost.
 - B. Occupant further agrees not to operate any type of business venture from this space and further agrees not to use the premises as a machine, welding, finishing, or repair shop or a garage to repair or restore motor vehicles without the express permission of the Owner in writing.
- 4. RENEWAL & TERMINATION:** Provided Occupant is not in default, this rental agreement automatically shall be renewed from month to month upon the same terms and conditions, unless Occupant gives owner written notice five (5) days prior to vacating the space. All leases expire on the last day of the month. **THERE ARE NO PRORATED RENT REFUNDS.** Owner has the sole and exclusive right to terminate Occupant's right to possession of the unit and/or terminate this agreement for any reason by giving Occupant fifteen (15) days written notice.
- 5. LOCKS:** At the time of renting, Occupant shall provide, at Occupant's own expense, a lock for the space which Occupant, in Occupant's sole discretion, deems sufficient to secure the unit. When lock-out occurs because of default after 50 days and thereafter Occupant cures such default, Occupant must replace with another lock at Occupant's own expense immediately after default is cured. If Occupant does not provide a lock for the storage space, Owner will place a lock on said storage space and charge Occupant accordingly. If Occupant has two locks on the unit and becomes delinquent, Owner reserves the right to remove one of the locks in order to place Owner's overlock.
- 6. PARKING:** Parking is provided for loading and unloading purposes only. Occupant will be charged for any vehicles left unlawfully.
- 7. RULES AND REGULATIONS:** Occupant hereby agrees to abide by any and all rules and regulations of this self-storage facility.
- 8. INSURANCE: OWNER DOES NOT PROVIDE ANY TYPE OF INSURANCE WHICH WOULD PROTECT THE OCCUPANT'S PERSONAL PROPERTY FROM LOSS BY FIRE, THEFT, OR ANY OTHER TYPE OF CASUALTY LOSS. IT IS THE OCCUPANT'S RESPONSIBILITY TO OBTAIN SUCH INSURANCE, IF DESIRED.** Occupant agrees that the carrier of such insurance shall not be subrogated to any claim of Occupant against the owner, its agents, or employees.
- 9. LEGAL ADDRESS:** This rental agreement recites the Occupant's legal address or last known address and this address will remain the Occupant's legal address for purposes of notification until the Occupant advises the Owner in writing promptly of any actual change of address. Such notice of change of address should be sent to the Owner and contain the date the change becomes effective, give unit number, complete new address, zip code, and new phone number, if applicable, and be signed by Occupant, and acknowledged by Owner. Such notice shall be sent to Owner by certified mail, return receipt requested (for acknowledged purposes).
- 10. PROTECTION OF STORED MATERIAL:** Occupant hereby agrees that the Owner shall not be responsible for the loss of or damage to any property stored in the facility.

DEFENDANT'S
EXHIBIT

A

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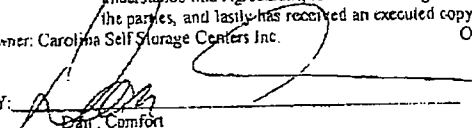
necessary, without notice to Occupant. However, this provision shall not impose any obligation on Owner to make alterations or repairs.

14. **DEFAULT BY OCCUPANT - OWNER'S RIGHTS:** If any monthly installment is not paid by the fifteenth (15th) day following the due date, or if a check given in payment is dishonored, Occupant is considered to be in default.
- A. **UPON DEFAULT BY THE OCCUPANT THE OWNER HAS A LIEN ON ALL PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE FOR RENT, LABOR OR OTHER CHARGES IN RELATION TO THE PERSONAL PROPERTY, AND FOR ITS PRESERVATION OR EXPENSES REASONABLY INCURRED IN ITS SALE OR OTHER DISPOSITION PURSUANT TO THIS AGREEMENT. PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE WILL BE SOLD OR OTHERWISE DISPOSED OF IF NO PAYMENT HAS BEEN RECEIVED FOR A CONTINUOUS FIFTY (50) DAY PERIOD AFTER DEFAULT. IF ANY MONTHLY INSTALLMENT IS NOT MADE BY THE FIFTEENTH DAY FOLLOWING THE DUE DATE OF PAYMENT, OR IF ANY CHECK GIVEN IN PAYMENT IS DISHONORED, THE OCCUPANT IS IN DEFAULT FROM DATE PAYMENT WAS DUE.**
- B. For purposes of Owner's lien: "personal property" means movable property, not affixed to land and includes, but is not limited to, goods, merchandise, and household items; "last known address" means that address provided by the Occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address. The Owner's lien attaches as of the date the Occupant is considered in default.
- C. Occupant understands and agrees that if any rent payment is not received timely by Owner, Owner shall have the right to charge a late fee and to put an additional lock on said storage facility and hold all of the goods contained therein, without liability for any damages or losses occurring to Occupant, until said rent and/or other charges are paid or until the passage of fifty (50) days or more and the mailing of a certified letter (return receipt requested) to the Occupant at the address furnished Owner, at which time Occupant does hereby authorize and empower Owner to open said storage space, inventory and remove all goods stored therein and sell or otherwise dispose of said goods, according to the Code of Laws of South Carolina, 39-20-45, without liability to the Occupant or any person claiming under or through the Occupant, in order to satisfy the indebtedness of the Occupant to the Owner (and further, to make the unit available for rent, thereby minimizing further losses to the Owner). The Owner shall be free of any and all liability to the Occupant or anyone claiming through or under the Occupant, for selling goods and/or striving to get an amount for said goods exceeding the storage charges and other costs due the Owner from the Occupant.
15. **NOTICES:** For purposes of satisfying the obligations of the Owner as to notice of delinquency, removal, and disposal of goods, etc., as stated in Paragraph 14, the Occupant designates his/her correct mailing address as shown on page one (1) hereof unless it has been changed as provided in paragraph 9. The Occupant understands and agrees that if Owner receives back from the U.S. Postal Service a certified letter which has not been claimed or has been refused by the Occupant, the obligation of notifying occupant is at an end.
16. **AFTER DEFAULT HAS OCCURRED AND SALE HELD:** In the discretion of the Owner, after notifying Occupant of any financial losses sustained by Owner after applying the proceeds of the sale to the Occupant's account, financial loss information may be turned over to the Credit Bureau/collection agency for reporting and/or collection.
17. **BAILMENT NOT CREATED:** Occupant acknowledges that no bailment or deposit of goods for safekeeping is intended or created by this agreement. Owner exercises neither care, custody, nor control over Occupant's stored property. Because the value of the property stored may be difficult or impossible to ascertain, Occupant agrees that the aggregate value of all personal property stored does not exceed, nor will be deemed to exceed, \$5,000. Occupant may store property worth substantially less than \$5,000 and nothing contained in this agreement shall be evidence or omission that the aggregate value of the property stored is, or is expected to be, at or near \$5,000. It is specifically understood and agreed that Owner need not be concerned with the kind, quantity, or value of property stored by Occupant pursuant to this agreement. Occupant acknowledges that the premises are not suitable for the storage of heirlooms or other precious or irreplaceable property such as objects for which no immediate market exist and objects that are claimed to have special or emotional value to Occupant. Occupant waives any claim for sentimental attachment or for Occupant's emotional attachment to the property that is placed in the storage space. Owner and Occupant waive their respective rights to a jury trial.
18. **ABANDONMENT:** In the absence of written notice to the Owner to the contrary, if all property is removed from the space and/or the Occupant is otherwise in default under the terms hereof or if the Occupant has removed his lock from the space, the Occupant shall be deemed to have abandoned the space.
19. **ATTORNEY FEES:** Occupant will be responsible for the payment of the Owner's reasonable attorney fees, if the Owner retains an attorney for the enforcement of any provisions of this agreement.
20. **OCCUPANT'S TRASH:** OCCUPANT IS RESPONSIBLE FOR HIS/HER OWN TRASH. ANYTHING OCCUPANT BRINGS INTO HIS/HER UNIT MUST GO WITH OCCUPANT. OWNER DOES NOT HAVE TRASH COLLECTION FACILITIES TO DISPOSE OF STORAGE UNIT CONTENTS. IF OCCUPANT LEAVES GARBAGE, REFUSE, OR ANYTHING WHATSOEVER IN THE STORAGE UNIT OR ON STORAGE FACILITY GROUNDS, OWNER SHALL CHARGE OCCUPANT THE COST OF REMOVAL AND DISPOSAL TO PUT THE STORAGE UNIT OR GROUNDS IN THE SAME CONDITION AS ORIGINALLY RECEIVED BY OCCUPANT.
21. **MODIFICATIONS:** All terms of this agreement are subject to change upon Thirty (30) days prior written notice to Occupant. If changed, the Occupant may terminate this agreement on the effective date of the change by giving Owner five (5) days prior written notice to terminate after receiving notice of the change. If the Occupant does not give such notice, the change shall be effective and applied to his occupancy.
22. **OCCUPANT'S ACKNOWLEDGMENT OF UNDERSTANDING:** The Occupant, by his/her signature below, hereby acknowledges reading and fully understands this Agreement; further he/she agrees with the terms and conditions contained herein, that this Agreement represents the entire agreement between the parties, and lastly has received an executed copy of this Agreement.

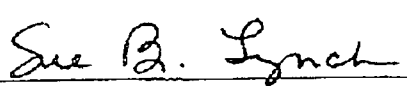
Owner: Carolina Self Storage Centers Inc.

Occupant:

BY:


Dan Comfort

X


Sue B. Lynch

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STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Susan Annie Bell Lynch,

Plaintiff,

v.

Carolina Self Storage Centers, Inc.,

Defendant.

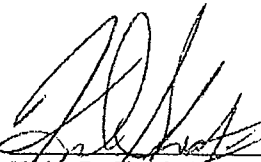
IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-21-2170

**NOTICE OF TAKING TELEPHONE
DEPOSITION OF DAN COMFORT**

TO: KEVIN M. BARTH, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through its undersigned counsel, will take or cause be taken before a Notary Public or some other person authorized by law to administer oaths the telephone deposition upon oral examination of **Dan Comfort** commencing at **8:00 a.m.** on the **2nd day of March 2012**, and continuing from day to day until completion, at Burlington Self Storage, 35 Ray Avenue, Burlington, Massachusetts. Said deposition is to be taken and used pursuant to Rule 30, *South Carolina Rules of Civil Procedure*. You are invited to attend and take such part as shall be fitting and proper.



Kirby D. Shealy III
ELLIS, LAWHORNE & SIMS, P.A.
Post Office Box 2285
1501 Main Street, 5th Floor
Columbia, South Carolina 29202
(803) 254-4190 Fax (803) 779-4749
Our File No.: 434-00008
Attorneys for Defendant

March 1, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS

Susan Anne Bell Lynch

v.

Carolina Self Storage Centers, Inc.,

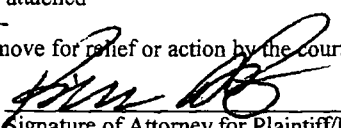
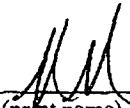
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CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

CASE NO.

10 - CP -21-2170

MOTION INFORMATION FORM
AND COVER SHEET

<u>name, S.C. Bar no. and address of Plaintiff's attorney</u> Kevin M. Barth #0559 P.O. Box 107 Florence, SC 29503 telephone: 843-662-6301 fax: 843-664-8384 e-mail: other:		<u>name, S.C. Bar no. and address of Defendant's attorney</u> Kirby D. Shealy telephone: fax: e-mail: other:	
☐ MOTION HEARING REQUESTED (attach written Motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion for Protective Order</u> Estimated Time Needed: _____ Court Reporter Needed: YES / NO			
SECTION II: Motion Type			
☒ Written motion attached ☒ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for Plaintiff/Defendant <u>March 1, 2012</u> Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		Judge: _____ Code: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by:  (print name) <u>MB</u>		<u>DATE FILED</u>	
☐ MOTION FEE COLLECTED: <u>\$25</u> ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) TWELFTH JUDICIAL CIRCUIT
CASE NO. 10-CP-21-2170

Susan Anne Bell Lynch
Plaintiff,

vs.

Carolina Self Storage
Centers, Inc.,
Defendant.

MOTION FOR PROTECTIVE ORDER
PURSUANT TO SCRCF, RULE 26(c)

TO: KIRBY D. SHEALY, ATTORNEY FOR DEFENDANT AND DEFENDANT,
CAROLINA SELF STORAGE CENTERS, INC. :

HAB
YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through
its undersigned attorney, will move before the Court of Common
Pleas for the Twelfth Judicial Circuit, for a Protective Order
prohibiting the taking of the oral/telephone deposition of Dan
Comfort currently set for Friday, March 2, 2012 at 8:00 A.M..

YOU WILL FURTHER TAKE NOTICE, that in the event said
deposition is taken, that the Plaintiff, by and through its
undersigned attorney, will also move for an Order excluding the use
of that deposition at the trial of this case which is set for trial
on Monday, March 5, 2012.

The bases for these Motions are as follows:

- The request for the taking of this deposition was made by
counsel for Defendant at approximately 7:00 P.M. on February
28, 2012.
- The Notice of Deposition (by telephone) with proposed
Deposition Exhibits were received by the undersigned by email
this morning, March 1, 2012.

- #2
MB
- Plaintiff has not been given 10 days notice as required by SCRCF, Rule 30(b)(1).
 - Plaintiff has not agreed to allow the deposition to occur by telephone, said consent being required by SCRCF, Rule (b)(7).
 - This witness was the manager of Defendant's storage facility at the time of the accident, and was the only employee of Defendant who had interactions with the Plaintiff at the time the unit was rented until after her accident, which is the subject of this action. Defendant listed this person as a witness in their responses to discovery, but simply listed him as "Dan Comfort, New Jersey". No contact information has ever been provided for this witness, so no discovery deposition could be scheduled.
 - Defendant should not be allowed to take a deposition (particularly by telephone), 3 days prior to the time of trial, then attempt to introduce the transcript into evidence because the witness "lives more than 100 miles from the place of trial", or that the witness cannot be compelled to attend the trial by subpoena, as provided for in SCRCF, Rule 32(a)(2).
 - Plaintiff further contends that the deposition should not be allowed because Plaintiff either has to participate in the deposition, and take a chance on a Court determining that Plaintiff has waived any objection, or refusing to participate and take a chance that this critical witnesses' deposition would be allowed at trial with no cross examination by Plaintiff's counsel.
 - Plaintiff contends that witnesses' testimony should only be

allowed at trial, in person as is generally required by SCRCP,
Rule 43(a).

#3
Pursuant to S.C.R.C.P., Rule 11 (a), the undersigned hereby
certifies that, prior to the filing of this motion, he has
communicated orally or in writing with opposing counsel and has
attempted in good faith to resolve the matters contained herein,
to no avail.



KEVIN M. BARTH
ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 107
FLORENCE, SOUTH CAROLINA 29503
(843) 662-6301

Florence, South Carolina
March 1, 2012

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS

Susan Anne Bell Lynch

CASE NO.

v.

10-CP-21-2170

Carolina Self Storage Centers, Inc.,

MOTION INFORMATION FORM
AND COVER SHEET

<u>name, S.C. Bar no. and address of Plaintiff's attorney</u> Kevin M. Barth #0559 P.O. Box 107 Florence, SC 29503 telephone: 843-662-6301 fax: 843-664-8384 e-mail: other:		<u>name, S.C. Bar no. and address of Defendant's attorney</u> Kirby D. Shealy telephone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written Motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Post Trial Motions</u>		Court Reporter Needed: YES / NO	
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for Plaintiff/Defendant		Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		Judge _____ Code: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: <u>AA S</u> (print name)		DATE FILED <u>3/14/12</u>	
☐ MOTION FEE COLLECTED: ☐ CONTESTED - AMOUNT DUE		CERTIFIED: A TRUE COPY <u>Court Clerk</u> CLERK OF COURT C.P. SC 21/233 (1/2003) FLORENCE COUNTY, S.C.	

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Susan Anne Bell Lynch,

Plaintiff,

vs.

Carolina Self Storage
Centers, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

CASE NO. 10-CP-21-217D

PLAINTIFF'S POST TRIAL MOTIONS

TO: CAROLINA SELF STORAGE CENTERS, INC., THE DEFENDANTS ABOVE
NAMED AND THEIR ATTORNEY, KIRBY D. SHEALY, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff, by and through her undersigned attorney, hereby moves before the Honorable D. Craig Brown, Judge for the Court of Common Pleas for the Twelfth Judicial Circuit, Florence County, pursuant to S.C.R.C.P., Rule 59, for a New Trial Nisi Additur.

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi." Waring v. Johnson, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). "While the trial court may not impose its will on a party by substituting its judgment for that of the jury, the court may give the party an option in the way of additur or, in the alternative, a new trial. The consideration of a motion for a new trial nisi additur requires the court to consider the adequacy of the verdict in light of the evidence presented. A new trial nisi additur may be ordered when the verdict is merely insufficient based on the evidence." Id. at 257, 533 S.E.2d at 911.

"Although the court may amend a verdict, the amendment must be accompanied with an option of a new trial nisi to the party against whom the amendment militates. . . . The court may grant or refuse a new trial or, in a proper case, may grant a new trial nisi, but

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Craig Brown
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

should do one thing or the other." Vinson v. Hartley, 324 S.C. 389, 407, 477 S.E.2d 715, 724 (Ct. App. 1996).

The trial court in Waring granted a new trial nisi additur in the amount of \$40,000 and the court of appeals found that amount to not be excessive. The court found that the "jury failed to consider [plaintiff's] pain and suffering in reaching its verdict." Id. at 260, 533 S.E.2d at 912. Additionally, the defendant claimed that the jury's verdict was intended to represent only a portion of plaintiff's medical expenses, plus pain and suffering. The court found that "argument patently untenable. The jury's award of exactly the amount of [plaintiff's] medical expenses, to the penny, is an attempt to reimburse her for those very expenses." Id. Lastly, the court found that the amount the trial court awarded for pain and suffering (\$40,000) was not excessive, "[g]iven the pain [plaintiff] has and will suffer, and the lifestyle she has lost. . ." Id. at 260-61, 533 S.E.2d at 913.

In the case at bar, Plaintiff introduced into evidence medical bills and expenses incurred as a result of the accident in question totaling the sum of \$246,068.42. The jury's verdict for "actual damages, if any, sustained by the Plaintiff" was for the exact same amount-\$246,068.82. Plaintiff also testified as to the pain and suffering she endured as a result of the accident and subsequent surgeries, as well as significant permanent scarring to her ankle and leg. These elements of actual damages were not contested by the Defendant (the issue of proximate cause as it relates to the accident was disputed by the Defendant).

The jury's verdict clearly indicates that all of the medical bills and expenses incurred by the Plaintiff are the direct and proximate result of the Defendant's negligence and the accident dated July 31, 2008, since the amount submitted and the amount awarded to her are exactly the same. The jury's award of only the related medical expenses clearly did not take into account the Plaintiff's alteration of lifestyle, psychological trauma, mental

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anguish, mental distress, apprehension, anxiety, emotional injury, psychological injury; depression, pain and suffering or loss of enjoyment of life. The Court's charge to the jury required that the jury award the Plaintiff for ALL elements of actual damages related to the accident. Clearly, the Plaintiff has suffered these damages and would be entitled to some amount to compensate her for those damages. The jury's verdict did not do so.

As a result, Plaintiff is informed and believes that the Court should grant a New Trial *Nisi Additur* to the Plaintiff in a just and appropriate amount to compensate her for all of her actual damages.

YOU WILL PLEASE TAKE FURTHER NOTICE THAT, in the event that Plaintiff's request for a New Trial *Nisi Additur* is denied, Plaintiff, by and through her undersigned attorney, hereby moves in the alternative before the Honorable D. Craig Brown, Judge for the Court of Common Pleas for the Twelfth Judicial Circuit, Florence County, pursuant to S.C.R.C.P., Rule 59, for a New Trial Absolute.

Plaintiff is informed and believes that she is entitled to a new trial absolute in that the verdict rendered is so grossly inadequate as to be the result of passion, caprice, prejudice, or some other influence outside the evidence presented at trial, as well as improper internal juror misconduct.

"If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

Plaintiff supports her request for a new trial absolute based upon the Affidavit of jury forelady, Dale Cole (whose Affidavit is attached hereto and incorporated herein by reference). The

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Affidavit clearly supports the fact that improper information was utilized by the jury in reaching a verdict in this case.

Specifically, juror, Newell, referenced the amount of money that Plaintiff allegedly had in her bank account, presumably to convey to the remaining jurors that Plaintiff did not need the money she was asking for. Juror, Carter, referenced her intense dislike for Plaintiff's counsel and clearly indicated that because of those feelings, Plaintiff nor Plaintiff's counsel were going to receive a fair and impartial decision by her. Upon hearing of this juror's comments, the undersigned checked our firm's records and, upon information and belief, this juror was the adverse party in domestic litigation in which we represented her husband.

The Court, in its voir dire, on the first day of the term of Court clearly asked each juror to disclose any reason the juror could not be fair and impartial, and to disclose if any juror had any "business or personal relationship" with counsel for each side or their law firms. Clearly, juror, Carter, had a past business relationship with Plaintiff's counsel or his firm that affected her ability to be fair and impartial in this trial.

"A litigant's right to an impartial jury is a fundamental principle of our legal system." Burke v. AnMed Health, 393 S.C. 48, 52, 710 S.E.2d 84, 86 (Ct. App. 2011) (citing S.C. Code Ann. § 14-7-1050 (2008); Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 446, 682 S.E.2d 489, 492 (2009)). If the jury improperly considered outside, extraneous influences when deciding this case, then the Plaintiff is entitled to a new trial. Even if the Court finds that the extraneous influences did not prejudice the Plaintiff, this Court should find that the allegations of internal misconduct violated principles of fundamental fairness.

Plaintiff is informed and believes that she is entitled to a new trial absolute solely based upon the Affidavit submitted herewith. However, in the event the Court wishes to delve further

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into the improper information discussed during the jury's deliberations, Plaintiff would request the scheduling of a hearing at which time the jurors would be required to give testimony under oath concerning said deliberations.

Testimony by jurors, upon information and belief, is proper under Rule 606(b), SCRE. This rule controls the court's inquiry into the validity of a verdict or indictment and provides as follows:

[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ***except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.*** Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b), SCRE (emphasis added).

"Traditionally, a juror's testimony was not admissible to prove either his own misconduct or the misconduct of other jurors. However, Rule 606(b), SCRE altered this common law rule, and now, juror testimony regarding external prejudicial information or improper outside influence is allowed." State v. Galbreath, 359 S.C. 398, 405, 597 S.E.2d 845, 848 (2004). "The rule was further altered by State v. Hunter, which dealt with allegations of racial prejudice by the jury. Hunter carved out an exception to the rule against juror testimony regarding internal jury deliberations, holding that juror testimony is competent in cases involving internal misconduct where necessary to ensure fundamental fairness." Id. (citing State v. Hunter, 320 S.C. 85, 88, 463

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S.E.2d 314, 316 (1995) (finding "[w]hen an extraneous influence is alleged, juror testimony can normally be used. If the alleged misconduct is internal, courts are more strict. Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness."))

Here, the information being complained of was information that should have been disclosed during voir dire. Specifically, if a juror knows a Plaintiff well enough to have personal information such as one's banking records, that relationship should be disclosed to the Court and would likely disqualify that juror for cause. The same would be true of a juror who, for whatever reason not associated with the pending litigation, felt strongly enough about a party or her counsel to voice those personal feelings to the remaining jurors during deliberations. This juror, too, would have likely been excused for cause, or at a minimum, would have been stricken by the Plaintiff.

"Through the judge, parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Id. (citing Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986); State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991)).

The Court held that "intentional concealment occurs when the

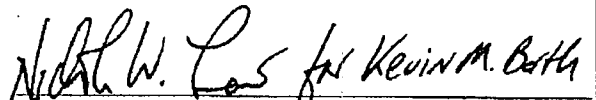
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question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Woods, 345 S.C. at 588, 550 S.E.2d at 284.

"The test pronounced in Thompson v. O'Rourke, makes clear that where a juror's response to voir dire amounts to an intentional concealment, *the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges*. Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred." O'Rourke, 288 S.C. at 14, 339 S.E.2d at 506.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests an Order granting her a new trial *nisi additur* in an appropriate and just amount, or in the alternative, a new trial absolute.


KEVIN M. BARTH BY NICHOLAS W. LEWIS
ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 107
FLORENCE, SOUTH CAROLINA 29503
(843) 662-6301

Florence, South Carolina

March 14, 2012

#7

Dale Cole
636 Olanta Hwy.
Effingham, SC 29541
843-319-5060

3/14/12

To Whom This May Concern:

I was the forelady juror in the trial of Ms. Sue Lynch. I did not know we had such bias jurors until we went into deliberating. Everyone started speaking the way they felt. One of the jurors stated she could not stand Kevin Barth and Ms. Sue Lynch was getting nothing. I told her she could not punish her for not likening Mr. Barth. She said she did not care we would sit there until doomsdays she wasn't going to get anything and it would end up in a hung trial and she still would not get anything. I do not have time to watch court TV like the other jurors. If I had known a hung jury would have gotten her a new trial, I would not have gone with 50/50 on that case. I stated that Ms. Lynch has one of the worst injuries, she can never get over, and the pain she has cannot go away by taking a shoe off like us. The Jurors had no compassion whatsoever for her. We had three black jurors; they were against Ms Lynch also. One of the black jurors spoke up and said, it was all Ms. Lynch's fault because she got her foot wet and could have prevented the infections. I spoke up and told her I'm very independent like Ms. Lynch. I do not like to ask anyone for help either. She said well she could have asked her friend which is a doctor's wife to feed the dogs. They had a problem with Ms. Lynch because her friend is a doctor's wife and she could afford to live beside a doctor when she was married. The statement was made she must have money. I ask the black juror, what if this were you? All the jurors got mad except one spoke up and said I could not say that because that was putting feeling into it. After that another juror spoke up and said she has a large bank account she doesn't need the money. Another juror spoke up and said, "How do you know?" Does she bank with you? The lady that worked at the bank replied no. At that point she had already placed the thought into the juror's head. I brought out the lies the defendant's side was caught in. They were not concern about the lies. The only thing they were concerned about was Ms. Lynch not getting anything. The Juror that did not like Mr. Barth had full control of all the jurors except two of us. I feel Ms. Lynch needs a new trial. The jurors were very much bias.

Sincerely,

Dale Cole

Dale Cole

Sworn to and subscribed before
me this 14th day of March, 2012

Lynne L. Warren
Notary in and for South Carolina
My Commission Expires: 5-27-18

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) TWELFTH JUDICIAL CIRCUIT
) CASE NO. 10-CP-21-2170

Susan Anne Bell Lynch,

Plaintiff,

vs.

Carolina Self Storage
Centers, Inc.,

Defendant.

AFFIDAVIT OF
NICHOLAS W. LEWIS

PERSONALLY APPEARED BEFORE ME, Nicholas W. Lewis,
Esquire, who being first duly sworn deposes and says as follows:

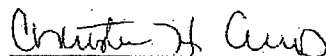
1. I am a partner in the law firm of Ballenger, Barth,
Hoefler & Lewis, LLP.

2. Upon hearing of Juror Carter's intense dislike for
Plaintiff's counsel and his firm, I checked our firm's records and
am informed and believe this juror was the adverse party in
domestic litigation in which our firm represented her husband.

FURTHER DEPONENT SAITH NOT!

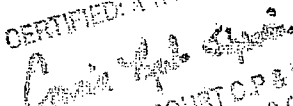

NICHOLAS W. LEWIS

Sworn to before me this 14
day of March, 2012



Notary for the State of South Carolina
My Commission Expires: 3/10/2019

FILED
2012 MAR 14 PM 2:26
CLERK OF COURT
FLORENCE COUNTY, S.C.

CERTIFIED: A TRUE COPY

CLERK OF COURT CP & GS
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Susan Anne Bell Lynch,
☐ Plaintiff

Carolina Self Storage Centers, Inc.
☒ Defendant.

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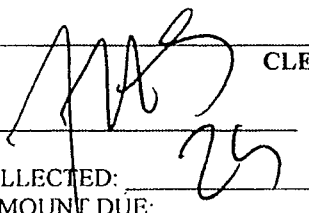
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v. CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-21-2170

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Kevin M. Barth Bar No Address: Ballenger, Barth & Hoefer, LLP, P. O. Box 107, Florence, SC 29503 phone: fax: e-mail: other:		Defendant's Attorney: Kirby D. Shealy, Bar No 11556 Address: PO Box 2285 (29202) 1501 Main Street, Fifth Floor, Columbia, SC 29201 phone: 803-254-4190 fax: 803-779-4749 e-mail: kshealy@ellislawhome.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Judgment Notwithstanding the Verdict Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
March 19, 2012 Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE	
		CODE: Date:	
CLERK'S VERIFICATION			
Collected by: 		Date Filed: 3/19/12	
☐ MOTION FEE COLLECTED: ☐ CONTESTED - AMOUNT DUE:			

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

Susan Anne Bell Lynch,)

Plaintiff,)

v.)

Carolina Self Storage Centers, Inc.,)

Defendant.)

IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-21-2170

**DEFENDANT'S MOTION FOR
JUDGMENT NOTWITHSTANDING
THE VERDICT**

FILED
2012 MAR 19 PM 2:25
CLERK OF COURT
FLORENCE COUNTY, S.C.

TO: KEVIN M. BARTH, ESQUIRE, ATTORNEY FOR PLAINTIFF AND THE
HONORABLE D. CRAIG BROWN, PRESIDING JUDGE:

Defendant Carolina Self Storage Centers, Inc., by and through its undersigned attorneys and in accordance with Rule 50 of the *South Carolina Rules of Civil Procedure*, hereby moves for judgment notwithstanding the verdict on the following grounds.

First, Defendant submits that the evidence introduced in the trial fails to give rise to a particular duty owed by the defendant to warn Plaintiff or to take measures to render Defendant's premises free from the particular risk encountered by the Plaintiff in this case. Defendant asserts that the only reasonable inference to be derived from the evidence is that Plaintiff encountered a risk that is inherent in the use of doors as a means of entering and exiting a building, such that the doctrine of primary implied assumption of the risk applies to this case. *See Cole v. Boy Scouts of America*, 2011 WL 6029885 (S.C. Sup. Ct. December 5, 2011); *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998); *Rudzinski v. BB*, 2010 WL 2723105 (D.S.C. July 9, 2010). Therefore, the scope of the duty owed by merchants to their invitees did not extend to the particular risk that led to Plaintiff's injury. *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010).

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Record on Appeal
CLERK OF COURT
FLORENCE COUNTY, S.C.

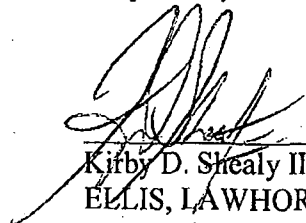
Second, even if the evidence gave rise to a reasonable inference that the scope of the duty owed by Defendant to Plaintiff extended to the particular risk encountered by Plaintiff in this case, there was no evidence that Defendant breached that duty because: (1) Plaintiff acknowledged her awareness of the door's characteristics; (2) the risk was open and obvious to any user of the door; and (3) there was no evidence that Plaintiff was distracted at the time she encountered the particular risk that gave rise to her injury. Nor was there any evidence that Defendant should have anticipated that Plaintiff would encounter the risk that gave rise to her injury despite her knowledge of the risk and despite its open and obvious nature. *See Peterson v. Porter*, 389 S.C. 148, 697 S.E.2d 656 (Ct. App. 2010); *Larimore v. Carolina Power & Light*, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000); *compare Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009); *Callender v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991).

Third, even if there was evidence giving rise to a particular duty to the Plaintiff and evidence of the breach of that duty, the Court should have directed a verdict in Defendant's favor because the only reasonable inference to be drawn from the evidence was that Plaintiff's negligence exceeded any negligence on the part of Defendant as a matter of law. "[A] plaintiff may only recover damages if his own negligence is not greater than that of the defendant." *Snively v. AMISUB of S.C., Inc.*, 379 S.C. 386, 665 S.E.2d 222, 226 (Ct. App. 2008) (quoting *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000)). Generally, the issue of comparative negligence is for the jury, and the court will only "determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is the plaintiff's negligence exceeded fifty percent." *Id.* "Under South Carolina jurisprudence, where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of

the defendant is simply not enough for a case to go to the jury.” *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196, 207 (Ct. App. 2008); *Lydia v. Horton*, 355 S.C. 36, 37, 583 S.E.2d 750, 751 (2003); *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000); *Moore v. Barony House Restaurant*, 382 S.C. 35, 674 S.E.2d 500 (Ct. App. 2009); *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 634 S.E.2d 62 (Ct. App. 2006); *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996). In this case, there was no dispute about how the accident happened or about the plaintiff’s knowledge of the door’s characteristics. The evidence of Plaintiff’s negligence was uncontradicted and overwhelming, as compared with any negligence on the part of Defendant.¹

For these reasons, Defendant respectfully requests that it be granted judgment notwithstanding the verdict.

Respectfully submitted,



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March 19, 2012.

¹ Defendant continues to maintain that the evidence does not give rise to a particular duty flowing from Defendant to Plaintiff whose scope extends to the particular risk encountered by Plaintiff.

1 MARCH 5, 2012

2 (WHEREAS this matter was scheduled for a trial, the
3 plaintiff appears along with her counsel of record and
4 the defendant appears through counsel of record. The
5 trial begins at 10:57 a.m.)

6 THE COURT: All right, Mr. Barth, are you ready to
7 proceed?

8 MR. BARTH: Yes, sir, Your Honor, we are.

9 THE COURT: Mr. Shealy, you ready to proceed?

10 MR. SHEALY: Yes, Your Honor.

11 THE COURT: All right, ladies and gentlemen, the first
12 case that's up for trial this week is the case of Susan Anne
13 Bell Lynch, the plaintiff in this case, versus Carolina Self
14 Storage. Susan Anne Bell Lynch, the plaintiff, versus
15 Carolina Self Storage Centers, which is doing business as
16 Monster Storage. Okay, Monster Storage over on Second Loop.

17 Ladies and gentlemen, this is a -- what's called a
18 premises liability case. Ms. Lynch had leased a storage
19 building over there and was injured on the premises of
20 Carolina Self Storage and as a result of those injuries she
21 has brought a lawsuit against Carolina Self Storage, now doing
22 business as Monster Storage.

23 Ms. Lynch is the plaintiff in this case. Ms. Lynch is
24 the plaintiff in this case. Therefore, she bears the burden
25 of proving her case by a preponderance of the evidence. That

1 is a legal term, which I'm sure that most of you out there
2 have never heard of and I'll explain it to you later in this
3 process, but Ms. Lynch has brought this case or her lawyer on
4 her behalf has brought this case and she being the plaintiff
5 bears the burden of proving her case by a preponderance of the
6 evidence.

7 And before we select a jury in this case, there are
8 several questions that I need to ask of you, several questions
9 that I need to ask of you. Please listen very carefully to my
10 questions.

11 The first question being: Is there any member of the jury
12 panel related by blood, connected by marriage or have a close
13 personal, social or business relationship with Ms. Susan Anne
14 Bell Lynch or Carolina Self Storage Center, which does
15 business now as Monster Storage? If so, please stand.

16 (Whereupon, no one stands.)

17 THE COURT: Mr. Barth, at this time I'm going to ask that
18 you stand and introduce yourself, followed by you, Mr. Shealy.

19 MR. BARTH: May it please the Court. My name is Kevin
20 Barth. I practice law here in Florence with Mallory Barth,
21 who is seated here with me, Mike Ballenger, Guy Ballenger,
22 Rick Hoefer and Nick Lewis.

23 THE COURT: All right, Mr. Shealy?

24 MR. SHEALY: May it please the Court. My name is Kirby
25 Shealy. I am from Columbia. I currently practice law with the

1 firm of Ellis, Lawhorne & Sims. I think there are about 27
2 lawyers in that firm. I previously practiced with the firm of
3 Baker, Ravenel & Bender.

4 THE COURT: All right. Is there any member of the jury
5 panel related by blood, connected by marriage or have a close
6 personal or social relationship with any of the attorneys
7 involved in this case. If so, please stand.

8 (Whereupon, two members of the jury panel stand.)

9 THE COURT: All right. Does any member of the jury panel

10 ---

11 DEPUTY: Judge.

12 THE COURT: I'm sorry. Yes, sir, your name and number?

13 JUROR: 104, Timothy Thompson, and Mr. Barth was my
14 divorce attorney.

15 THE COURT: All right, Mr. Thompson. I'm going to set
16 you aside for the trial of this case. All right?

17 JUROR: Okay.

18 THE COURT: Thank you, sir.

19 MR. BARTH: Your Honor, might we approach just one
20 second?

21 THE COURT: Yes, sir.

22 MR. BARTH: If you don't mind.

23 (Whereupon, a bench conference is held in the presence of
24 the jury panel but out of the hearing of the jury panel.)

25 MR. BARTH: He didn't -- I haven't been his attorney in

1 years and years. I was his attorney years ago. I just didn't
2 know if you thought he said I am right now.

3 THE COURT: All right.

4 MR. BARTH: If it doesn't matter, it doesn't matter.
5 That's fine.

6 THE COURT: That's fine. I understand.

7 MR. BARTH: Okay.

8 THE COURT: I mean I'm not going to let him serve.

9 MR. BARTH: Okay.

10 THE COURT: I mean that puts him in a bad situation ---
11 MR. BARTH: That's fine.

12 THE COURT: --- if he were to get put on the jury. He
13 may or may not have been happy with you.

14 MR. BARTH: Well, that's true.

15 THE COURT: Okay?

16 MR. BARTH: Yeah, thank you.

17 THE COURT: That's why.

18 MR. SHEALY: Thank you, Judge.

19 (Whereupon, the bench conference ends.)

20 THE COURT: Yes, sir, your name and number?

21 JUROR: Joseph Warren, I believe 109.

22 THE COURT: Yes, sir?

23 JUROR: Many years ago, I was -- attended school with
24 Mike Ballenger, who I believe is the attorney that is a
25 partner.

1 THE COURT: Right, yes, sir. Do you have a -- have any
2 -- engage in any social activities ---

3 JUROR: No.

4 THE COURT: --- with Mr. Ballenger or anybody in that
5 firm?

6 JUROR: I do not.

7 THE COURT: Would that affect your ability to be fair and
8 impartial to both the plaintiff and the defense in this case?

9 JUROR: Not at all.

10 THE COURT: Thank you, sir, you may be seated. All
11 right, let me ask this question. Does any member of the jury
12 panel have any type of business relationship, other than those
13 who have already responded, with the law firms of Ballenger,
14 Barth & Hoefer, Baker, Ravenel & Bender, or Ellis Lawhorne &
15 Sims? If so, please stand.

16 (Whereupon, one member of the jury panel stands.)

17 THE COURT: Yes, sir, your name and number?

18 JUROR: Jerry Burns, number 15.

19 THE COURT: Which -- which firm, sir?

20 JUROR: Ballenger.

21 THE COURT: Do they currently represent you in something?

22 JUROR: No. My -- My wife had a lawsuit against Mr.
23 Ballenger years ago.

24 THE COURT: Okay. Would that affect your ability to be
25 fair and impartial to both the plaintiff and the defense in

1 this case?

2 JUROR: No, sir.

3 THE COURT: All right. Thank you, sir. All right,
4 listen carefully. This is a list of potential witnesses in
5 this case. I've already mentioned Ms. Lynch, who is the
6 plaintiff. Dr. Al Dawson, Dr. Gerald Conner, Dr. Kevin Shea,
7 Jay Wallace, Glenda Painter, Dan Comfort, Roger Blubaugh, L.G.
8 "Skip" Lewis, Kristopher Seluga, I think. Is that correct?

9 MR. BARTH: Yes, sir.

10 THE COURT: All right. Is there any member of the jury
11 panel connected by blood, have a close personal or social
12 relationship or business relationship with any of those
13 individuals? If so, please stand.

14 (Whereupon, no one stands.)

15 THE COURT: All right. Has any member of the jury panel
16 ever been a plaintiff or a defendant in a lawsuit? If so,
17 please stand.

18 (Whereupon, no one stands.)

19 THE COURT: Has any member of the jury panel ever made a
20 claim against another person or business seeking money
21 damages? If so, please stand.

22 (Whereupon, no one stands.)

23 THE COURT: All right. Is any member of the jury panel a
24 current or former member of Central United Methodist Church?
25 If so, please stand.

1 (Whereupon, no one stands.)

2 THE COURT: Has any member of the jury panel ever been
3 employed by or been a -- ever been employed by Copyrite,
4 Logowear, Porter's Gift Shop, Carolina Self Storage or Monster
5 Self Storage? If so, please stand.

6 (Whereupon, one member of the jury panel stands.)

7 THE COURT: Yes, ma'am, your name and number?

8 JUROR: Meagan Gaddy, 37.

9 THE COURT: And with whom were you employed?

10 JUROR: Copyrite and -- just Copyrite.

11 THE COURT: And when was that?

12 JUROR: About six weeks ago.

13 THE COURT: Can the lawyers approach a minute, please?

14 Thank you, ma'am, you may be seated.

15 (Whereupon, a bench conference is held in the presence of
16 the jury panel but out of the hearing of the jury panel.)

17 THE COURT: Is that an issue? What does Copyrite have to
18 do with this case?

19 MR. BARTH: It doesn't. One of -- I think that's where
20 one of Ms. Lynch's sons works, but I don't think it's got
21 anything ---

22 THE COURT: Is he testifying?

23 MR. BARTH: No, no. It's fine.

24 MR. SHEALY: That's not an issue.

25 THE COURT: Do y'all want me to inquire any farther?

1 MR. BARTH: No.

2 MR. SHEALY: That's fine.

3 (Whereupon, the bench conference ends.)

4 THE COURT: Thank you, ma'am. Has any member of the jury
5 panel ever had a dispute with a self-storage facility? If so,
6 please stand.

7 (Whereupon, no one stands.)

8 THE COURT: All right. Does any member of the jury panel
9 or your immediate family work for a self-storage facility or
10 own your own business and that business is a self-storage
11 facility or similar type facility? If so, please stand.

12 (Whereupon, one member of the jury panel stands.)

13 THE COURT: All right. Your name and number again, just
14 for the record?

15 JUROR: Meagan Gaddy, 37.

16 THE COURT: And with whom do you work now?

17 JUROR: Diesel Specialists, but it's also a storage
18 facility, rental place.

19 THE COURT: Okay. Thank you, ma'am, you may be seated.

20 JUROR: You're welcome.

21 THE COURT: All right. Is any member of the jury panel
22 an engineer or designer? If so, what do you generally design
23 or engineer? If so, please stand.

24 (Whereupon, one member of the jury panel stands.)

25 THE COURT: Yes, sir, your name and number?

1 JUROR: 109.

2 THE COURT: (To clerk out of the hearing of the jury
3 panel) What's his name again?

4 THE CLERK: (Out of the hearing of the jury panel) Mr.
5 Warren.

6 THE COURT: Mr. Warren, what do you -- what do you
7 design?

8 JUROR: I'm manager of a research and development process
9 group at ESAB Welding and Cutting.

10 THE COURT: Okay. Thank you, sir, you may be seated.

11 JUROR: Okay.

12 THE COURT: All right. Has any member of the jury panel
13 read or heard anything about this particular claim filed by
14 Ms. Lynch that would affect your ability to be fair and
15 impartial to both the plaintiff and the defense in this case?
16 If so, please stand.

17 (Whereupon, no one stands.)

18 THE COURT: All right. Is there any member of the jury
19 panel that knows of any reason whatsoever why they should not
20 sit on a jury in this case with particular emphasis being
21 placed upon your ability to be fair and impartial to both the
22 plaintiff and the defense? If so, please stand.

23 (Whereupon, no one stands.)

24 THE COURT: All right. Mr. Barth, any further questions?

25 MR. BARTH: No, sir.

1 THE COURT: Mr. Shealy?

2 MR. SHEALY: No, Your Honor.

3 THE COURT: All right. Madam Clerk, if you'll get us a
4 list.

5 MR. BARTH: Might we approach the bench ---

6 THE COURT: Yes, sir.

7 MR. BARTH: --- one second before the list is drawn, Your
8 Honor?

9 (Whereupon, a bench conference is held in the presence of
10 the jury panel but out of the hearing of the jury panel.)

11 MR. BARTH: I probably need to move on the record to
12 strike whoever that was that said his wife sued Mike. I mean
13 I don't think that's true because he's never been sued, but
14 there is no way in the world that he ought to serve if he ---

15 MR. SHEALY: I wonder if he means that he had a suit that
16 he was on the other side of or something?

17 MR. BARTH: Yeah.

18 MR. SHEALY: I bet he -- I mean you know how people don't
19 ---

20 MR. BARTH: Yeah, that could be.

21 THE COURT: What was it? I think he ---

22 MR. BARTH: He said he -- he said it might have been a
23 lawsuit Mike handled where the guy -- his wife was on the
24 other side, but it's the same issue with the one I was
25 involved in, but this guy said my wife sued Mike Ballenger.

1 THE COURT: Yeah.

2 MR. BARTH: And I don't know if she had a claim against
3 him or whatever she said.

4 THE COURT: What was his number?

5 THE CLERK: 15, Jerry Burns.

6 MR. BARTH: Yeah.

7 THE COURT: Yeah.

8 MR. BARTH: That's him. I don't -- I have no clue who he
9 is.

10 THE COURT: I'm going to set him aside on this case. You
11 got any problem with that?

12 MR. SHEALY: I don't.

13 THE COURT: All right.

14 MR. BARTH: Okay. Thanks.

15 (Whereupon, the bench conference ends.)

16 THE COURT: Thank you.

17 MR. BARTH: Thank you, Judge.

18 THE COURT: All right, ladies and gentlemen, what's going
19 on right now is a list, which will not include all of y'all's
20 names on it, a list is being generated by the clerk. That
21 list can't be generated until I go through those questions
22 with you to determine whether or not you're going to serve on
23 this particular jury. But a list is being generated of names
24 of those individuals that could or may be selected to serve on
25 the jury in this particular case. Please be patient with us

1 while the computer does that. I would greatly appreciate your
2 patience on that, okay? Mr. Barth, how long are you going to
3 need to look at the jury list?

4 MR. BARTH: Your Honor, maybe ten minutes.

5 THE COURT: Mr. Shealy?

6 MR. SHEALY: That should be sufficient.

7 THE COURT: Okay. All right, ladies and gentlemen, once
8 the list is generated, the lawyers are given a few minutes to
9 review the list to determine what strikes they may use and I
10 say strikes, individuals that they may choose not to serve on
11 this particular jury. So I'm going to give them about ten
12 minutes to do that and then we'll move forward with striking
13 the jury in this case. Ladies and gentlemen, we're going to
14 stand at ease for about ten minutes. If you need to step back
15 out, you can do so, but be back in here at 11:27, please.

16 (Whereupon, there is a break in the proceedings from
17 11:18 a.m. until 11:28 a.m.)

18 THE COURT: Mr. Barth, are you ready to proceed?

19 MR. BARTH: Yes, sir, Your Honor.

20 THE COURT: Mr. Shealy?

21 MR. SHEALY: Yes, Your Honor.

22 THE COURT: All right, Madame Clerk?

23 THE CLERK: The plaintiff strikes first using marginal
24 numbers.

25 MR. BARTH: The plaintiff would strike 23.

1 THE CLERK: Numbers 1 through 20.

2 THE COURT: One through 20.

3 MR. BARTH: Oh, we're doing -- oh, you got me again, my
4 fault. All right, thank you. How about 19?

5 (Margie Williamson, a white female.)

6 THE CLERK: The plaintiff 19.

7 MR. SHEALY: The defendant strikes number 2.

8 (Edward Gilyard, a black male.)

9 THE CLERK: The defendant 2.

10 MR. BARTH: The plaintiff 14.

11 (Jacquelynn Zedalis, a white female.)

12 THE CLERK: The plaintiff 14.

13 MR. SHEALY: The defendant strikes number 5.

14 (Johnny Gordon, Jr., a white male.)

15 THE CLERK: The defendant 5.

16 MR. BARTH: Twenty, please.

17 (Sandra Brown, a white female.)

18 THE CLERK: The plaintiff 20.

19 MR. SHEALY: The defendant strikes number 9.

20 (Terrance Epps, a black male.)

21 THE CLERK: The defendant 9.

22 MR. BARTH: Seventeen.

23 (Douglas Caulder, a white male.)

24 THE CLERK: The plaintiff 17.

25 MR. SHEALY: The defendant strikes number 6.

1 (Delores Cooper, a black female.)
2 THE CLERK: The defendant 6. For your first alternate,
3 21 through 23, plaintiff strikes first.
4 MR. BARTH: Twenty-three.
5 (Kendra Ferguson, a black female.)
6 THE CLERK: The defendant strikes 21.
7 (Kecia Robinson, a black female.)
8 THE CLERK: The defendant 21. Second alternate, one
9 strike each.
10 MR. BARTH: Twenty-two.
11 THE COURT: Twenty-four through 26.
12 THE CLERK: Twenty-four through 26.
13 MR. BARTH: I don't have a 24 through 26. Oh, hold on.
14 THE CLERK: Yes, you do.
15 MR. BARTH: Twenty-four.
16 (Jerry White, a white male.)
17 THE CLERK: The plaintiff 24.
18 MR. SHEALY: The defendant strikes number 26.
19 (Patrick Schoolcraft, a white male.)
20 THE CLERK: The defendant 26. Gentlemen, if you would,
21 please check your strikes. The plaintiff struck numbers 14,
22 17, 19, 20, number 23 for the first alternate, 24 for the
23 second alternate.
24 MR. BARTH: Correct.
25 THE CLERK: The defendant struck numbers 2, 5, 6, 9, 21

1 for the first alternate, and 26 for the second alternate.

2 MR. SHEALY: That is correct.

3 THE COURT: Are there any matters of law that we need to

4 take up with regards to jury selection from the plaintiff?

5 MR. BARTH: No, sir, Your Honor. Thank you.

6 THE COURT: From the defense?

7 MR. SHEALY: No, Your Honor.

8 THE COURT: All right, Madame Clerk.

9 THE CLERK: As I call your name, if you would, please

10 come forward and have a seat in the jury box. Emily Anderson.

11 (Whereupon, a white female comes forward.)

12 THE CLERK: Dale Cole.

13 (Whereupon, a white female comes forward.)

14 THE CLERK: Brenna Doyle.

15 (Whereupon, a white female comes forward.)

16 THE CLERK: Teresa Huggins.

17 (Whereupon, a white female comes forward.)

18 THE CLERK: Mary Alice Dewitt.

19 (Whereupon, a white female comes forward.)

20 THE CLERK: Susan Dutton.

21 (Whereupon, a white female comes forward.)

22 THE CLERK: Mary Peterson.

23 (Whereupon, a black female comes forward.)

24 THE CLERK: Misty Newell.

25 (Whereupon, a white female comes forward.)

1 THE CLERK: Brenda McClam.
2 (Whereupon, a black female comes forward.)
3 THE CLERK: Eunice Davis.
4 (Whereupon, no one comes forward.)
5 THE CLERK: Dwight Davis.
6 (Whereupon, a white male comes forward.)
7 THE CLERK: Isla Carter.
8 (Whereupon, a white female comes forward.)
9 THE COURT: Somebody didn't come forward.
10 THE CLERK: It was Eunice Davis.
11 THE COURT: Call her name again.
12 THE CLERK: Eunice Davis.
13 (Whereupon, a black female comes forward.)
14 THE CLERK: Franklin Alexander.
15 (Whereupon, a black male comes forward.)
16 THE CLERK: Joseph Warren.
17 (Whereupon, a white male comes forward.)
18 THE COURT: Can the lawyers approach for just a second?
19 (Whereupon, a bench conference is held off the record.)
20 THE COURT: All right, ladies and gentlemen, you all have
21 been selected as jurors, fair and impartial jurors, in this
22 case. What we're going -- What I'm going to do right now is I
23 am going to excuse you until two thirty this afternoon. There
24 are some matters that we have to take up outside of your
25 presence. I'm going to give you a nice long lunch, okay,

1 of paper will have a phone number on it that you need to call
2 this afternoon after six o'clock. Call that number after six
3 o'clock. There will be a recording on there that will give
4 you instructions as to what you are to do with regards to --
5 with regards to tomorrow. Okay?

6 Please call that number back tonight after six. If you
7 can't call at six, you know, right after six, it is a
8 recording so you can call throughout the night, okay, to get
9 your instructions. So you all are free to leave at this time.
10 Please call that number tonight after six. Thank you.

11 (Whereupon, the jury panel leaves the courtroom at 11:39
12 a.m.)

13 THE COURT: All right. There are some pre-trial matters
14 that we need to take up. I'm going to thank each of the
15 lawyers again for providing me with a copy or a pre-trial
16 brief pursuant to my request. You all sent those to me last
17 week or the week before I believe, but I did have an
18 opportunity to review all of what you all submitted to me.

19 In reviewing plaintiff's pre-trial brief, he had
20 indicated -- Mr. Barth, you had indicated in your pre-trial
21 brief that there were no motions in limine. Is that correct?

22 MR. BARTH: Your Honor, there are no motions in limine.
23 The only thing from our point of view at this particular
24 point, Your Honor, would deal with the subpoena that was
25 served on the defendant for the production of certain

1 financial information. There's no issue with the service of
2 the subpoena, but Mr. Shealy told me that they were objecting
3 to the production of that documentation and just at some point
4 we'll need to deal with it. I -- I would preferably do it
5 prior to trial so that I can scan it in and get it on the
6 board in the event that it is deemed admissible by Your Honor.

7 THE COURT: Well, let me ask this question, Mr. Shealy,
8 and I certainly understand your point of view and your
9 objection to this. At what point, if at all, did you intend
10 to provide it to Mr. Barth?

11 MR. SHEALY: Your Honor, we have the information with us
12 in the courtroom. The -- The way I've seen this handled
13 before to avoid getting the jury confused ---

14 THE COURT: Right.

15 MR. SHEALY: --- is have the information -- I can
16 certainly turn the information over to Mr. Barth, if that's
17 the Court's ruling that we need to do that, but have it given
18 to the jury in a sealed envelope with instructions that they
19 are not to consider it unless and until they get to a point in
20 their consideration -- deliberations where they're considering
21 the possibility of awarding punitive damages.

22 THE COURT: Punitive damages. Mr. Barth?

23 MR. BARTH: I understand their position, but regardless
24 of that, we're entitled to see it. I mean I think we are
25 entitled.

1 THE COURT: I think this is what I'm going to do. I'm
2 going to order that you give it to Mr. Barth at this time so
3 that he can begin to review that information to prepare for
4 whatever he intends to put up with regards to punitive damages
5 if we get to that point. You know, I may at the conclusion of
6 plaintiff's case determine that I don't believe punitive
7 damages is an issue here and, Mr. Barth, I'm going to order
8 that it be retained in your possession and those of your
9 staff.

10 MR. BARTH: Yes, sir.

11 THE COURT: That a protective order, so to speak, be on
12 those documents until the Court makes a ruling as to whether
13 or not punitive damages is even an issue in this case. If
14 those documents provided to you by Mr. Shealy, if the Court
15 determines that punitive damages is not an issue, then those
16 documents are to be returned to Mr. Shealy and any and all
17 copies of such documents by you all are to be destroyed. All
18 right?

19 MR. BARTH: Yes, sir.

20 MR. SHEALY: Thank you, Your Honor.

21 MR. BARTH: Thank you.

22 THE COURT: All right, next matter? I think, Mr. Shealy,
23 you had some motions in limine that you specifically wanted to
24 address.

25 MR. SHEALY: Yes, Your Honor, and I'll kind of bounce

1 around a little bit. From looking at at least one of the
2 witness -- the exhibit list Mr. Barth provided, it appears to
3 me that he intends to elicit testimony and introduce exhibits
4 that concern the termination of Ms. Lynch's lease some year or
5 more after -- actually more than a year after the incident
6 occurred.

7 THE COURT: Okay.

8 MR. SHEALY: And we see no legal relevance to really any
9 of the interactions between these parties after the -- the --
10 the incident occurred. I think there is going to be some
11 testimony that I don't plan to object to about her report of
12 having had the injury and a couple of interactions within the
13 first week or two that I will not object to, but after that
14 there really -- there's really no relevance whatsoever to --
15 to any of their interaction later.

16 THE COURT: Well, go ahead, Mr. Barth. I mean you're not
17 objecting to some, but you are objecting to others. I mean I
18 need to know specifically so I can make a determination as to
19 what you're objecting to so I can rule on it.

20 MR. SHEALY: Very well, Your Honor. Mr. Barth has
21 identified -- Well, and I have in my pre-trial used the number
22 -- numbers from an earlier exhibit list, but the exhibit list
23 that I was given yesterday has a number ten, the lease
24 termination letter. We would object to that coming in or even
25 any testimony about the lease being terminated.

1 MR. BARTH: Your Honor, the -- I have -- We did re-number
2 some of the exhibits as we were putting them into the computer
3 system. I have one for you and for your clerk, if that would
4 be easier ---

5 THE COURT: Yeah, can I see that, please?

6 MR. BARTH: --- with the new numbers on it, Your Honor.

7 THE COURT: Thank you.

8 MR. BARTH: If Your Honor will notice, the ones that do
9 not have number on them on the second page, Your Honor, have
10 not -- That's the ones that were on your other -- your first
11 list.

12 MR. SHEALY: Right.

13 MR. BARTH: Only the ones with the numbers are what we
14 intend on submitting at this point, Your Honor, with two
15 exceptions. I'm sorry.

16 THE COURT: All right. Mr. Shealy, what -- which one was
17 it again?

18 MR. SHEALY: Well, as a starting point, it was number
19 ten, the lease termination letter notifying Ms. Lynch that her
20 lease was being terminated.

21 MR. BARTH: And in conjunction with -- with that, Your
22 Honor, two of the unnumbered ones on the back page ---

23 THE COURT: Yes, sir.

24 MR. BARTH: The unit vacating checklist and the e-mail
25 regarding our expert's inspection of the premises, we do

1 anticipate offering those for introduction through the
2 defendant's store property manager.

3 THE COURT: All right.

4 MR. BARTH: We didn't give them a number yet.

5 THE COURT: All right. How about do this for me first,
6 Mr. Barth. How about address his objection to the lease
7 termination letter. I need to see the letter first.

8 MR. BARTH: Yes, sir, I've got it. That's a copy, Your
9 Honor.

10 THE COURT: Thank you. All right, it's my understanding
11 and Mr. Shealy, in his pre-trial brief, which is number 7 on
12 page 5 of his pre-trial brief, and if I misstate something,
13 please correct me, but number 7 on page 5 of his pre-trial
14 brief references this as far as what he is objecting to. He
15 is objecting on the grounds of relevance and even if it is
16 relevant, he's stated it's unfair and prejudicial to his
17 client. What says plaintiff in response?

18 MR. BARTH: Well, I -- First of all, it is relevant.
19 It's relevant to a lot of issues. Obviously, it's relevant to
20 punitive damages, if it gets to that point. The relevance of
21 these documents though, Your Honor, will become apparent as we
22 go through the testimony, particularly this afternoon when we
23 read in the deposition of a witness that was produced last
24 Tuesday by the defendant, who testified that after he took
25 photographs of my client's injuries in conjunction with the

1 investigation of all of this, he was told by Mr. Wallace, who
2 is seated at defense table, the president of the company, to
3 get rid of the evidence. That will come in this afternoon.
4 This is one long continuous course of conduct to either
5 stonewall her right to investigate the claim and have access
6 to the property, etcetera.

7 You're going to find that the relevance of it is, Your
8 Honor, that is actually the eviction happened to coincide to
9 the day of the day our expert went out there to conduct his
10 investigation, after making us make a motion to inspect the
11 premises, which we did, and then it was arranged through their
12 counsel. Our expert is out there one day, she's evicted that
13 day. It goes right hand in hand with destroying the
14 photographs, keeping her off of the property, and you'll hear
15 some other evidence as we go along about what they did and
16 didn't do, Your Honor, in order to prevent her from being able
17 to prove part of her claim and I think that is absolutely
18 relevant.

19 THE COURT: Mr. Shealy?

20 MR. SHEALY: Your Honor, if it pleases the Court, the
21 legal definition of relevance is does this make some fact in
22 issue more or less likely to be true and the fact that she was
23 evicted after this incident occurred has zero bearing on
24 whether or not the incident occurred as a result of some
25 negligence on the part of the defendant. Your Honor, the

1 plaintiff was provided access to have the expert do his
2 investigation.

3 The -- What we learned in the course of discovery is that
4 the plaintiff had been on the property with Mr. Barth taking a
5 videotape without our being there when she was still a tenant.
6 That -- And we had no knowledge of -- of that going on. Mr.
7 Barth and I, he asked if I -- if he and I could go back out
8 there so he could take photographs within the last two and a
9 half months and that request was accommodated.

10 There's been no effort to keep her off the property and
11 so -- and the photographs, which we have an objection to that
12 aspect of Dan Comfort's deposition, the photographs that
13 there's testimony about have to do with -- There are two
14 photographs of the plaintiff's ankle and we're not contending
15 that she was not hurt. They are photo -- There will be
16 photographs introduced into evidence without objection of the
17 plaintiff's ankle at various stages of recovery from the
18 injuries she sustained.

19 So again, there -- there's just no basis for this
20 evidence to come in and it -- I mean if Mr. Barth is using it
21 or attempting to use it to build a case with punitive damages,
22 then we have a Rule 403 -- I mean it sort of undergirds why
23 we're citing Rule 403 as our secondary basis for challenging
24 the admissibility of the evidence.

25 MR. BARTH: Your Honor, it is particularly relevant on

1 the issue of credibility of the defendant's witnesses because
2 you're going to hear a whole lot of stuff over the course of
3 the next few days, which is what the jury to size up who is
4 telling the truth, who isn't telling the truth, what was done
5 and what was said, and their attempts to hide bits and pieces
6 of it is exactly what a jury can and can't consider when
7 deciding whether these witnesses are credible or they're not
8 credible and I mean it -- That goes right to the heart of it.

9 At a minimum, Your Honor, I would withhold or hold in
10 abeyance any ruling on that until it's submitted because you
11 will see over the course of the next couple of days there are
12 a number of issues that come in that significantly impact the
13 credibility of the some of the defense witnesses and the way
14 things have been handled, all of which are relevant.

15 THE COURT: All right. What I'm going to do with regards
16 to that -- I mean the Court does, based upon what I know right
17 now, does have some questions with regards to the relevance of
18 it. All right? I do have some questions with regards to the
19 relevance of it, but I am going to withhold my ruling upon the
20 admissibility of it depending upon how I guess plaintiff
21 intends to introduce it. All right?

22 MR. SHEALY: May it please the Court, Your Honor?

23 THE COURT: Yes, sir.

24 MR. SHEALY: We would have the same arguments with
25 respect to the Intent to Vacate Notice dated May 31, 2010.

1 THE COURT: Intent to Vacate Notice?

2 MR. SHEALY: Yes, Your Honor. In fact ---

3 THE COURT: Can I see that? I need to see that.

4 MR. SHEALY: Yes, sir.

5 THE COURT: Thank you. All right, any argument on that?

6 MR. BARTH: Yes, sir, and one additional argument on

7 that, Your Honor. As Your Honor knows from looking at the

8 pleadings, I mean there is a issue -- There are issues about

9 contract, breach of contract, what the contract requires, this

10 that and the other, and you'll hear a fair bit of testimony

11 over what people have to do to comply with the contract and at

12 the end there are certain things they have to do to comply

13 with the contract when they're moving out and their own

14 manager is going to testify today as to my client was a model

15 tenant, compliant, did everything she was supposed to whenever

16 she was asked to do certain things.

17 The defendant has filed a counterclaim for breach of

18 contract. This certainly is relevant on whether or not my

19 client has complied with all the requirements of the various

20 contracts that we're dealing with. I mean it's relevant on

21 that, if -- if not on anything else, and we certainly don't

22 concede the other, Your Honor.

23 THE COURT: Mr. Shealy, are you seeking -- You got a

24 breach of contract counterclaim?

25 MR. SHEALY: Your Honor, yes, because the lease contains

1 a waiver disclaimer paragraph in it, in which it says quite
2 plainly that the defendant is not responsible for any personal
3 injury that the plaintiff incurs and if there is any, if she
4 brings a claim, then we would be entitled to attorney's fees.

5 THE COURT: Is that the basis of the -- Is that all the
6 basis that the counterclaim is?

7 MR. BARTH: That's the basis of the counterclaim is the
8 counterclaim for breach of contract and indemnification. They
9 want all their attorney's fees and expert fees, etcetera, back
10 under the terms of that.

11 THE COURT: How does this, Mr. Barth, address that issue,
12 if that's all the counterclaim is?

13 MR. BARTH: Because one of the things -- Again, one of
14 the issues is breach of contract.

15 THE COURT: I mean the breach of contract is not that she
16 vacated improperly or that she didn't follow through with what
17 the contract required her to do to vacate.

18 MR. BARTH: I understand that, but I don't think we're
19 prohibited in -- I don't think it would be fair to allow the
20 jury to hear, well, she complied with some things, she didn't
21 do others. I mean the testimony is she did every single thing
22 they asked her every single time.

23 THE COURT: Okay.

24 MR. BARTH: And I think we're entitled to do that. It
25 goes to my client's credibility. It goes to their

1 credibility.

2 THE COURT: All right, anything else, Mr. Shealy, on
3 that?

4 MR. SHEALY: Your Honor, I would just note that this
5 involves her moving out of one unit before she leases a second
6 unit. I mean she entered into a new lease for a different --
7 a smaller sized unit. This is all nearly two years after this
8 accident occurred. None of this has anything to do with
9 whether the accident occurred or whether there was a breach of
10 the contract by bringing this -- this claim.

11 THE COURT: All right. I'm going -- All right. I'm
12 going to withhold my ruling on that at this time right now as
13 well. Next matter?

14 MR. SHEALY: Your Honor, the same applies to the Intent
15 to Vacate Notice dated May 31, 2010, the same exact arguments
16 on that.

17 MR. BARTH: I think those ---

18 THE COURT: That's what we just dealt with.

19 MR. SHEALY: I'm sorry.

20 MR. BARTH: That's the two we just argued on.

21 MR. SHEALY: We were arguing both the Intent to Vacate
22 Notice ---

23 MR. BARTH: Right.

24 MR. SHEALY: --- and the Unit Vacating Checklist?

25 MR. BARTH: Right and the -- They're actually on that

1 same issue, Your Honor. There are going to be four exhibits.
2 Two are not numbered because it depends on whether I put up
3 their manager or they put up their manager.

4 THE COURT: All right. All right, so number ten on your
5 exhibit list, number eleven on your exhibit list, I'll
6 withhold ruling on that. On page two, the Unit Vacating List
7 dated 2/28/11 ---

8 MR. BARTH: And related to that would be the Expert
9 Inspection of the Premises E-mail, Your Honor.

10 MR. SHEALY: That -- That I have not even addressed at
11 all.

12 THE COURT: No, that has not been addressed yet.

13 MR. BARTH: I was just -- I was just pointing out, Your
14 Honor, those four things are sort of dealt with ---

15 THE COURT: Together?

16 MR. BARTH: --- together. Yes, sir.

17 MR. SHEALY: The -- The e-mail is an e-mail from Jay
18 Wallace to the manager of the Florence location saying that
19 the plaintiff had set up the deposition -- I mean -- I'm
20 sorry, set up the inspection with his expert. We need to make
21 a date for this. Please call me ASAP. That is all it is and
22 again, we see no relevance whatsoever to an e-mail after the
23 lawsuit has been filed in which making a date for the
24 inspection to take place is the subject.

25 THE COURT: Mr. Barth?

1 MR. BARTH: And ordinarily, it wouldn't be. I mean
2 ordinarily none of that. I mean it wouldn't make any
3 difference, but as Your Honor will see as we get into the
4 trial on some of the credibility issues and on the punitive
5 damage issues, the timing between our expert's visit and her
6 eviction all in the same day, there are going to be questions
7 about what was and wasn't done at that inspection where --
8 where Mr. Wallace was standing right there with us and there's
9 going to be a lot of testimony about all of that.

10 Ordinarily, lining it up would not be that big a deal and
11 if they'll stipulate that they evicted her the day we were all
12 out there together, I don't need that exhibit. That's the
13 only thing I needed out of that exhibit was the date because
14 it's going to boil down to what Your Honor does with the
15 eviction notice whether that e-mail -- you know, whether that
16 e-mail has any place or not. It probably wouldn't make any
17 difference if the eviction stuff comes in, other than as to
18 Mr. Wallace's knowledge that it was going to take place, Mr.
19 Wallace's position when he was there, and what was and wasn't
20 said or done.

21 So he -- I don't know if he's going to claim -- You know,
22 I don't know what he's going to claim. So it -- it may be
23 relevant on more than one front, but if the eviction comes in,
24 it's certainly relevant because that's what triggers the
25 eviction.

1 THE COURT: All right.

2 MR. BARTH: And that's what their store manager is going
3 to say.

4 THE COURT: Mr. Shealy, anything else?

5 MR. SHEALY: No, Your Honor, other than to say I think
6 that my client should always have the right to control who
7 comes on its premises and when and none of that has any
8 relevance to the issues in this case and our objection to
9 these exhibits really encompasses any testimony concerning the
10 matters that the exhibits represent as well.

11 THE COURT: All right, okay. Well, can I see the e-mail?

12 MR. BARTH: Sure. There you go, Your Honor.

13 THE COURT: Thank you. All right, anything else with
14 regards to that matter, Mr. Shealy or Mr. Barth?

15 MR. SHEALY: No, Your Honor.

16 MR. BARTH: No, sir.

17 THE COURT: All right, next matter?

18 MR. SHEALY: Your Honor, I think we have resolved the
19 issue about the photos of the scene that we produced.

20 THE COURT: Okay.

21 MR. SHEALY: Mr. Barth indicates he's removed any -- any
22 characterization of those photographs from the way that they
23 were transmitted. Your Honor, there's a letter from Sue Lynch
24 to Carolina Storage after this happened that is -- is hearsay.
25 I'm primarily concerned with the fact that what is reported in

1 there is what another witness, Dr. Dawson, said. So it's the
2 hearsay within the letter. I don't have an objection to the
3 letter coming in if it can be redacted to remove what another
4 witness says.

5 THE COURT: Mr. Barth?

6 MR. BARTH: Number one, Your Honor, and he is referring
7 to exhibit number seven, Your Honor. If Your Honor needs to
8 see that, I'll be glad to hand it up, but it comes in on a lot
9 of issues, one being ---

10 THE COURT: I want to see the letter.

11 MR. BARTH: Oh, yes, yes, sir. It's two pages, Your
12 Honor. As I said, that would be plaintiff's number seven.

13 THE COURT: Yes, sir. I'll be happy to hear from you,
14 Mr. Barth.

15 MR. BARTH: It is, Your Honor, an exception to the
16 hearsay rule when something comes in under state of mind for
17 issues such as notice or issues. She put them on notice of
18 the claim. It's going ---

19 THE COURT: When was it written?

20 MR. BARTH: Well, you're going to find, Your Honor,
21 that's it written in August of 2008 within a couple of weeks
22 of the -- within a couple of weeks of the accident itself.
23 Mr. Dan Comfort, who was the store manager at the time and
24 whose deposition was taken early Friday morning, you'll see
25 that with one of the other exhibits, which are their internal

1 computer notes, that the first time Mr. Comfort spoke to my
2 client after the injury, she was given an incident report to
3 fill out and bring back in regard to the incident. Within a
4 couple of weeks later, she comes back and says I've lost the
5 incident report, can you give me another one, and he says no,
6 the incident report we have doesn't apply to your situation.

7 As a result of that, my client prepares this letter and
8 sends it in, her version of the incident report, since they
9 wouldn't give her another form to fill out and that's what it
10 comes in -- it comes in as. I mean it's ---

11 THE COURT: I mean if they cross examine her with regards
12 to the inconsistencies saying she didn't do so, then I
13 certainly believe they opened the door at that point for you
14 to get the letter in.

15 MR. BARTH: Our position is, Your Honor, it comes in
16 because it is my client's direct response and it's going to be
17 her testimony that they gave her an incident report to fill
18 out and turn back in to the company in accordance with their
19 company policy. She loses it because she goes into the
20 hospital for one or two of her surgeries. She gets back out,
21 she needs another one, and they say nope, the one we have
22 doesn't apply, I can't help you, plus we're not liable anyway
23 because of the lease agreement itself, sorry.

24 She types that up as her version of what happened, sends
25 it to the defendant. They acknowledge receiving it. They put

1 it in the file and they send it to Mr. Wallace. That's the
2 progression of how things happened.

3 The testimony is coming in through their store manager
4 about these computer notes and his testimony -- You know, his
5 testimony relates directly to the letter. It's not being --
6 Whether it comes in for the truth of the matter of what's
7 asserted in there doesn't really matter, plus we've got Dr. Al
8 Dawson, who is going to come in and confirm the contents of
9 that letter anyway.

10 So Your Honor could certainly allow the letter in and
11 instruct the jury that it comes in for certain purposes and
12 not for other purposes and that's -- that's what it is. I
13 mean I certainly would object to bits and pieces of it coming
14 in with stuff whited out and redacted out looking like there's
15 something they're not supposed to see when we want it in
16 exactly like she sent it in and it wouldn't be an issue if
17 they had given her an incident report because whatever she put
18 in the incident report would have come in. It would have been
19 a part of their file, which is exactly what this is. This is
20 a part of their lease. This is a part of their business file.

21 THE COURT: All right, anything else, Mr. Shealy?

22 MR. SHEALY: No, Your Honor. I don't think that the
23 argument has addressed this is indeed hearsay under the rule
24 and it contains hearsay within hearsay as well. So it just --
25 It really shouldn't come into evidence for any purpose.

1 MR. BARTH: And our position, Your Honor, is that if it's
2 not being submitted for the truth of the matters asserted
3 therein, it's not hearsay by definition.

4 THE COURT: Well, I'm going to exclude the letter at this
5 time. I don't -- I think it is inadmissible hearsay. Now I'm
6 not saying they don't -- they can't open the door for it to
7 come in. They may very well open the door for it to come in,
8 but I'm not going to allow that in at this time. Okay?

9 MR. BARTH: At this time, Your Honor?

10 THE COURT: At this time.

11 MR. BARTH: All right. May we ---

12 THE COURT: Now ---

13 MR. BARTH: May we re-address it this afternoon after we
14 read the deposition of their store manager back in?

15 THE COURT: Yeah, you can re-address it. I mean that's
16 my ruling right now. Pre-trial, it's not coming in, but that
17 could change depending upon what develops here.

18 MR. BARTH: Okay.

19 MR. SHEALY: Thank you, Your Honor.

20 MR. BARTH: The whole statement -- You've ruled the whole
21 statement or just ---

22 THE COURT: The whole statement is not coming in.

23 MR. BARTH: All right.

24 THE COURT: Okay?

25 MR. BARTH: Yes, sir.

1 THE COURT: All right, next matter?

2 MR. SHEALY: Your Honor, the -- the plaintiff has listed
3 on number two on the trial exhibits the entire lease file
4 documents and I -- I mean this has some of the very things
5 that we've just talked about in it, as well as lots of other
6 things dealing with whether rent was paid and receipts, none
7 of which has any relevance. Again, I just need to object to
8 the -- to the whole thing and have the plaintiff put in what's
9 actually relevant to the issues between the parties.

10 MR. BARTH: What he's going to find, Your Honor, that is
11 what I called it in my exhibit list. These are actually
12 simply the lease initiation documents that she signed at the
13 time she rented it. He did -- Kirby did send me in the last
14 month or so an entire file that's got receipts and all sorts
15 of other stuff in it, but that's just her -- That's just the
16 documents she signed when she initially rented the unit and I
17 can call it something else if -- if that would be easier.

18 THE COURT: All right, which is referenced as exhibit
19 number two on here?

20 MR. BARTH: Yes, sir.

21 MR. SHEALY: Your Honor, and I don't have an issue if
22 that's what this is.

23 MR. BARTH: That's what it is.

24 MR. SHEALY: I had worried myself about the -- about the
25 customer sign-up form because it has the plaintiff's Social

1 Security number on it and driver's license number and I have
2 concerns about that being introduced.

3 THE COURT: All right. I'm going to reference that as
4 lease initiation file documents.

5 MR. BARTH: Yes, sir.

6 THE COURT: It will be marked as Exhibit Number 2.

7 MR. BARTH: Yes, sir.

8 THE COURT: Without objection, right, Mr. Shealy?

9 MR. SHEALY: That is correct, Your Honor.

10 THE COURT: All right.

11 MR. SHEALY: Your Honor, then it appears that the
12 plaintiff wants to introduce separately the lease, which is
13 already in Exhibit Number 2 and then introduce it again as
14 Exhibit Number 6 with the highlighted -- with the paragraph
15 highlighted and to me that's -- Per rule 403, that's just --
16 We just need one version of the lease in evidence.

17 MR. BARTH: Ordinarily, he'd be absolutely correct, Your
18 Honor. The reason that highlighted one is being placed in is
19 ---

20 THE COURT: Because of the counterclaim.

21 MR. BARTH: Well, actually not even that, Your Honor.
22 What you're going to find from the defendant's computer notes
23 and Mr. Comfort, whose deposition we're going to deal with
24 this afternoon, what the testimony is, is that when my client
25 came in, reported the injury, the photos were taken, she was

1 given the incident report. That Mr. Comfort then sat down and
2 highlighted paragraph eleven and my client's name at the top
3 so that the next time she came in to discuss the matter, it
4 would be given to her and obviously it was and I -- I think
5 we're certainly entitled to put that in.

6 I mean that's what they did to call her attention to the
7 fact that we're not liable and here's why and I've highlighted
8 it for you and that's what they're going to say. I mean my
9 client is going to say that's how she got it. Their store
10 manager is going to say he did it and that's how she got it
11 and it's certainly relevant.

12 THE COURT: Mr. Shealy?

13 MR. SHEALY: Your Honor, the exhibit is already in, will
14 be already into evidence or is coming into evidence anyway.
15 The testimony that a paragraph is highlighted does not mean
16 then that we put another version of the same exhibit into
17 evidence. I think that could be done with demonstrative aids
18 or anything else, but it doesn't seem to me that it aids the
19 jury in any way to give them multiple versions of the same
20 exhibit.

21 THE COURT: Well, I'm going to allow one copy to go in.
22 Mr. Barth, when she's -- I mean I'll let you proceed how, but
23 if -- you know, if you want to through your direct examination
24 of her allow her to highlight what was shown to her or
25 highlighted by them or -- I mean you're not putting in the

1 exact one that Mr. Comfort highlighted, are you?

2 MR. BARTH: We're putting in the one he gave her.

3 THE COURT: I mean it doesn't matter if he highlighted it
4 then or if she highlights it now in front of the jury as long
5 as through testimony they're made -- the jury is made aware of
6 that. Does it not?

7 MR. BARTH: I think it makes a big difference, Your
8 Honor, because it goes in tandem with the notes they keep in
9 the file and the notes that are coming in says, "I highlighted
10 paragraph eleven for her," and I think the jury is entitled to
11 see what he did. I mean that's -- that's the evidence that's
12 coming in today through their own business records and our
13 position is that you're going to see --

14 As we go along, Your Honor, in the computer notes that
15 they produced for us as part of -- part of Ms. Lynch's file,
16 you're going to see that there are some documents referenced
17 in there that have disappeared. There's some that were
18 produced. There's some that were given to us and I think the
19 jury is entitled to see all of it. I mean actually the one
20 they originally gave us didn't even have my client's signature
21 on it because it wasn't signed at the same time.

22 You're going to go through a lot of iterations of the
23 very same thing and I think it's just -- I think it's
24 appropriate for the jury to see exactly how it went from the
25 injury to the first visit to the second visit. This is how

1 she came to that. They highlighted the indemnification
2 portion, they highlighted the waiver and release, and here we
3 are.

4 THE COURT: All right, anything else on that issue?

5 MR. SHEALY: No, Your Honor.

6 THE COURT: Mr. Barth?

7 MR. BARTH: Not pre-trial.

8 THE COURT: All right. This is what I'm going to do on
9 that. I'm going to allow you -- I'm not going to -- I
10 understand, Mr. Shealy, your objection to this. It's coming
11 in. If I -- And based upon what Mr. Barth here has said, he
12 -- his argument is that it affects to some degree the method
13 and manner that he intends to put his case up so I'm going to
14 allow it. I certainly understand, but I don't think it's
15 prejudicial to your client in the manner in which he's asking
16 it to be put in. It's already in so I'm going to allow it.
17 All right, next matter?

18 MR. SHEALY: Thank you, Your Honor. Next is exhibit
19 that's denominated number nine on the plaintiff's exhibit list
20 called Sue's videotape.

21 THE COURT: Yes.

22 MR. SHEALY: Your Honor, this -- this is the videotape I
23 referenced earlier that was produced to us in -- in discovery.
24 It was taken on my client's premises. No representative of my
25 client was present when it was taken. There -- There's an

1 audio component on which the plaintiff's characterizations of
2 what is depicted are -- are audible, as well as Mr. Barth's
3 characterizations of what is depicted.

4 MR. BARTH: We're not going to play the audio.

5 THE COURT: Well, that's my ruling. That was going to be
6 my ruling. I'm going to allow the videotape without audio.

7 MR. SHEALY: Thank you.

8 THE COURT: All right, easy enough.

9 MR. SHEALY: Thank you, Your Honor.

10 THE COURT: Next matter?

11 MR. SHEALY: Your Honor, this is not listed and I just am
12 bringing it up just out of an abundance of caution. There was
13 in an earlier version of the exhibits from the plaintiff what
14 was called defendant's online storage web page and I don't
15 know whether the plaintiff still intends to use that, but
16 again, we would make a Rule 403 objection because it's -- it's
17 probative value is totally outweighed by any danger of
18 prejudice.

19 THE COURT: Mr. Barth?

20 MR. BARTH: I don't plan on introducing it into evidence.
21 I do plan on cross examining Mr. Wallace, the president of the
22 company, regarding some of the material they've put out there.
23 It will be demonstrative.

24 THE COURT: All right.

25 MR. BARTH: I'll put it -- If Your Honor allows it to go

1 up on the screen like you would a learned treatise to be read
2 in, but not introduced into evidence, that is probably the way
3 I intend to do it, but obviously, that depends on whether Mr.
4 Wallace testifies and if he does, what he says. I just listed
5 it so they would know exactly everything we were looking at.

6 THE COURT: Okay.

7 MR. BARTH: But that's what ---

8 THE COURT: Well, I'll reserve my ruling on that issue.

9 MR. BARTH: Okay.

10 MR. SHEALY: All right, Your Honor, the -- It could come
11 up. The plaintiff testified in her deposition that at one
12 point Dan Comfort, our managing manager there at the Florence
13 store, told her that he'd been instructed not to speak to her.
14 This is -- I don't know whether this is before or after the
15 litigation had been initiated, but it is well after the
16 incident has occurred and whether or not a party has been
17 instructed not to speak to her specifically to avoid any
18 chance of admissions or anything else happening is, again, not
19 relevant to any issue in the case. We just ask that no such
20 testimony be elicited.

21 THE COURT: Mr. Barth?

22 MR. BARTH: Your Honor, at this point I don't know, but
23 time wise, a lot of it is going to depend on who says what and
24 how it's said. I mean because there is evidence coming in
25 that Mr. Wallace instructed his store manager to get rid of

1 some of the evidence. Now if part of that instruction was
2 don't talk to her, we obviously don't know that and my lady
3 can't say that, but ---

4 THE COURT: Well, based upon what I'm hearing right now,
5 I'm not going to allow that testimony unless it -- You've got
6 some moving parts here. I understand that, but certainly
7 they're entitled to instruct ---

8 MR. BARTH: Sure.

9 THE COURT: --- their employees not to talk with somebody
10 involved in a lawsuit. I mean -- So again, that's one of
11 those issues that may have some moving parts that -- But right
12 now that's my ruling. That's not coming in.

13 MR. SHEALY: Thank you, Your Honor. We would also move
14 to exclude any testimony concerning the plaintiff's concern
15 that her health insurance limits may be breached over the
16 course of her lifetime.

17 MR. BARTH: That's not coming in.

18 THE COURT: No, sir, it's not. Thank you very much.

19 MR. BARTH: We're not saying anything about health
20 insurance. There was some conversation about part of her
21 damages I think in the discovery being she's got a million
22 dollar lifetime benefit. That -- We're not going anywhere
23 near any of that.

24 THE COURT: I think all of us probably got somewhere --
25 We got a cut-off somewhere, but yeah, that's not coming in.

1 Yes, sir, anything else, Mr. Shealy?

2 MR. SHEALY: Your Honor, there is, well, two other things
3 concerning the plaintiff's expert. The plaintiff's expert we
4 believe will make reference to the International Building Code
5 as giving rise to or giving support to his opinion that the --
6 that the building or that this was an unsafe condition. Based
7 upon his deposition testimony, in which he was not able to
8 pinpoint a particular part of the Building Code that had been
9 violated by this situation, he made some general reference to
10 the Life Safety provisions in the -- in the Building Code. We
11 just would request that he not be allowed to use the Building
12 Code as the basis for or as the grounds for his opinion that
13 this was an unsafe condition because in his own testimony he
14 says that there are no provisions in the -- in the Building
15 Code that are violated by this.

16 THE COURT: Mr. Barth?

17 MR. BARTH: Our position is he can use anything he wants
18 to if it's something that's reasonably relied on in the
19 industry as part of his basis, whether it -- you know, whether
20 it even comes into evidence or not. That's -- I mean our
21 position is if Mr. Shealy wants to get into that, that sounds
22 like how you cross examine an expert, not whether it comes in
23 or not. He's entitled to tell the jury each and every thing
24 he believes is a basis to support his expert opinion and then
25 if Mr. Shealy wants to cross examine him and knock pieces out,

1 he has the right to do that.

2 THE COURT: Mr. Shealy, what says you in response to
3 that? Why is that not an issue of cross examination which
4 goes to the weight and credibility as opposed to the
5 admissibility?

6 MR. SHEALY: Well, I'll certainly be prepared to do that
7 if that's the Court's ruling, but because the -- the expert is
8 trying to cloak himself with the authority of the
9 International Building Code while at the same time saying that
10 there are no provisions that are actually violated here ---

11 THE COURT: Okay and I understand you've -- you've
12 addressed that issue. Why does that not go to your cross
13 examination as opposed to the admissibility of that testimony?

14 MR. SHEALY: Well, we just -- It's -- Again, a Rule 403
15 analysis, if he says there's nothing that -- that is violated
16 by the Building Code, but then still says the Building Code
17 provides the support for his opinion ---

18 THE COURT: Then he better be able to -- to specify as to
19 what is the basis of -- of his opinion based upon that code.
20 All right?

21 MR. SHEALY: Yes, sir, I understand.

22 THE COURT: And the other issue, you know, also and I'm
23 just as you bring that up and -- or I bring it up in the cross
24 examination, I'm referring back to your pre-trial brief
25 regarding the issue of him not being licensed in South

1 Carolina.

2 MR. SHEALY: Yes, Your Honor.

3 THE COURT: So while we're talking about Mr. Seluga, I
4 think his name is, let's go ahead and deal with that issue, if
5 it is, in fact, still an issue.

6 MR. SHEALY: I believe it is still an issue that we -- As
7 we read the case law of *J.T. Baggerly v. CSX Transportation*
8 and then *Fields v. J. Haynes Waters Builders, Inc.*, it appears
9 that the Court has said that the not holding a South Carolina
10 engineering license is not a *per se* disqualifier, but it does
11 go to the -- the witness's credibility, is proper subject for
12 cross examination, and is a proper subject for a jury
13 instruction.

14 THE COURT: Well, I'm going -- I'm going to give them a
15 jury instruction that essentially says -- I mean just because
16 they're an expert, just because there's nobody that testifies
17 on the other side in opposition to it, I mean they're not to
18 give -- I mean they can use that testimony however they see
19 fit, but I'm not going to give them a specific charge
20 concerning the fact that he's not a licensed South Carolina
21 engineer, that that has anything to do with his credibility.
22 I don't think -- I read that case yesterday. I don't think
23 that case stands for that proposition because he's testifying
24 to a jury. He's not, you know, here rendering engineering
25 services, so to speak.

1 MR. SHEALY: Well, and Your Honor, that was the
2 progression. I mean as I read *J.T. Baggerly*, it -- the
3 earlier case, it seemed that that, you know, that wasn't even
4 allowed to be talked about, but then the later case, that
5 *Fields* case, the Court seems to go back and say, well, it is
6 proper subject for cross examination and it is something that
7 goes to -- that can be considered in -- if the jury -- in the
8 course of determining whether the witness is qualified to
9 render his opinion and so the *Fields* case particularly seems
10 to give rise to support for that it's proper subject for cross
11 examination on the issue of qualification and that it gives
12 rise to a jury instruction that is specific to that issue.

13 THE COURT: Mr. Barth?

14 MR. BARTH: I disagree. He can cross examine him on
15 anything he wants. I think it specific -- I don't think the
16 case stands for that proposition to start with.

17 THE COURT: Well, okay, hold on just a second.

18 MR. BARTH: I think Your Honor's general charge about
19 expert witnesses covers it. Anything directed at one
20 particular witness would be more in the line of charge on the
21 facts anyway.

22 THE COURT: Well, this charge that you submitted, Mr.
23 Shealy -- I mean I'll go back and look at this case, this
24 *Fields* case. I'll go back and look at that *Fields* case. All
25 right, anything else with regards to Mr. Seluga?

1 MR. SHEALY: Yes, Your Honor. There -- We anticipate
2 that the expert may testify regarding the availability of
3 alternative door closer mechanisms and I note that in -- that
4 the plaintiff seeks to introduce Mr. Seluga's complete report
5 and the -- and number fourteen is the Norton 1600
6 instructions. I'm not sure what -- what that encompasses, but
7 this is not a products liability case and the test to be
8 applied is not -- This is not a negligent design case, whether
9 or not there was a feasible alternative design available.
10 That's not the sphere we're operating in.

11 The sphere is was the condition unreasonably dangerous
12 and was it a latent condition. This is a premises liability
13 case. So whether or not there are door closers that can be
14 locked open is -- is totally not relevant to the legal issues
15 in the case. If they are relevant, then the testimony is --
16 any probative value is outweighed by its -- the danger of
17 prejudice to my client to be excluded under Rule 403.

18 THE COURT: Mr. Barth?

19 MR. BARTH: May it please the Court, Your Honor. I
20 assume -- I assume the arguments were being made sort of in
21 line with *Nelson v. Piggly Wiggly*, where you have a parking
22 lot bumper that could have been made safer. We've got a ton
23 of arguments we can make, Your Honor, on a lot of those
24 issues, but -- and we certainly can, but what you're going to
25 find in this particular case, Your Honor, is that whether we

1 have an expert or not, the issue for the jury to determine in
2 this particular case, taking into account the particular use
3 of this door for what they use it for, the jury absolutely has
4 the right to hear that there are other things available
5 because the way they had it set up and the set of
6 circumstances they put in place caused exactly the kind of
7 accident we have here.

8 THE COURT: Well, the way they had it set up, I think
9 aren't you referring to the speed in which the door closed?

10 MR. BARTH: We're talking about a lot of things. We're
11 talking about speed with which the door closed, we're talking
12 about whether or not it can be locked open or are you forced
13 to prop it open, and combine those in particular with the
14 height that this particular door was being four or five inches
15 off the ground. The combination of all of those things makes
16 this particular door for this particular use an unreasonably
17 dangerous condition.

18 THE COURT: Well, I'm not -- I'm sorry, Mr. Barth.

19 MR. BARTH: I was going to say he's entitled to testify
20 about all of that because it goes to foreseeability, it goes
21 to the issue of duty to discover, duty to warn, duty to fix,
22 all of those things and the jury is entitled to hear all of
23 that. I mean we could -- We could go ahead and argue the
24 *Nelson* stuff if you want. There are some serious distinctions
25 between what he's talking about, products liability, safer

1 design, safer alternatives, than it is in this case. I'd be
2 glad to address them.

3 THE COURT: Well, I mean I looked at that yesterday and I
4 looked at that *Piggly Wiggly* case you're talking about. If
5 you've got some other cases you want me to look at, you need
6 to get them to me by close of business today to deal with that
7 issue. Okay?

8 MR. BARTH: Okay.

9 THE COURT: I mean or at least so that I'll have an
10 opportunity to look at some additional case law. I mean my
11 initial impression in this is that his report is not
12 admissible. His report is not admissible in its entirety.

13 MR. BARTH: That our expert's not?

14 THE COURT: His report is not. It addresses these issues
15 about what they could have done and what they should have
16 done. It boils down to me in my -- in what I've reviewed and
17 what y'all have submitted to me, is whether or not this
18 closing mechanism on this door was an unsafe condition that
19 caused your client's injury.

20 MR. BARTH: Not just the closing mechanism.

21 THE COURT: Well, not -- Well, the bottom of the door
22 that cut her foot, right?

23 MR. BARTH: Yes, sir.

24 THE COURT: And tell me what else?

25 MR. BARTH: And their method of operation make -- And

1 here's the distinction, Your Honor, and I guess we better
2 address it because that's the meat of our case. If Your Honor
3 throws all of that out, then we might as well go home at this
4 point, but the bottom line is, in the *Nelson* case, what the
5 Court talked about the entire time was, yes, there are safer
6 alternatives.

7 THE COURT: Right.

8 MR. BARTH: But this isn't a situation -- *Nelson* wasn't a
9 situation where the accident or injury occurred in the
10 ordinary course of business. Okay? It was a car in a parking
11 lot ---

12 THE COURT: Right.

13 MR. BARTH: --- at a grocery store.

14 THE COURT: Right.

15 MR. BARTH: Here what we're talking about is the only
16 course of business. The only time people come in and out of
17 this door is to move something. This is their business. It's
18 not outside of the course, whether they put bumpers in their
19 garage -- you know, in their parking lot would relate more to
20 *Nelson*, but what you're talking about is something that is
21 foreseeable. Not only is it foreseeable here, but it is
22 mandated here because what they do for a living is provide a
23 place for people to move things.

24 THE COURT: Right.

25 MR. BARTH: And in this particular case in their course

1 of business, they make you move it. You've got to go in and
2 out, but they don't give you a way to do that and it's up to
3 the jury to decide if what they're making these people do is
4 safe or not. You're going to hear from their store manager,
5 yep, people have to come and prop them open all the time.

6 THE COURT: Right, I read that in Ms. Painter's
7 deposition.

8 MR. BARTH: Right. I mean and that's what you're talking
9 about. The whole package in this case, the speed of the
10 closer, you can't open -- you can't lock it open unless you
11 prop it open with some foreign object, and the sharpness of
12 the bottom, the height of the door, the whole entire package
13 for this particular purpose, is it an unreasonably dangerous
14 condition? There is a lot of information that's going to come
15 in that I'm going to ask their expert about and some of the --
16 some of the documents he gave us or referenced at his
17 deposition, his engineer's deposition.

18 Their position is real simple: It complies with the code,
19 it's all right. Anything on top of that is your problem. In
20 certain circumstances, they may or may not be right.

21 THE COURT: Yeah.

22 MR. BARTH: But it's no different. I mean I can still be
23 negligent and not be guilty of speeding.

24 THE COURT: Right.

25 MR. BARTH: And that -- And what we have here, if it were

1 any other kind of business other than a moving and storage
2 business, I could understand where they're coming from, but
3 the meat of our case is this is exactly why you are paid money
4 and then for your -- the way you have designed, developed, and
5 instruct people to go through makes them do exactly what they
6 do, knowing it's an accident waiting to happen. That is a
7 heck of a lot different than a grandmother losing control of a
8 car and jumping a curb bumper.

9 THE COURT: Right.

10 MR. BARTH: Because if this -- If *Nelson* had been an
11 accident that dealt with coming in and out of a door with a
12 bunch of bags of groceries, it would have been a completely
13 different story and that -- that is one of the key
14 distinctions because getting run over in a parking lot is not
15 -- is not really in the ordinary course of the grocery store's
16 business.

17 THE COURT: Right.

18 MR. BARTH: This, there is no other reason to come in and
19 out of that door that way other than to move stuff in and out
20 and that's what we're going to talk about with some of the web
21 pages, you know, what it is we provide you. We provide you
22 with a safe place to keep your stuff. We provide you with a
23 safe place to get in and out, and you're going to hear some
24 depositions today and Ms. Painter tomorrow where they say, I
25 mean, yeah, it's a hassle the way we do it, but that's how

1 they have to do it. You know, they have to bring something to
2 prop it open and we've got material that hopefully will come
3 into evidence through their expert that says when you are
4 looking at these packages, you have to look at the particular
5 use of this particular door.

6 And the recognized treatise that Mr. Lewis, their expert,
7 references talks about that and one of the things you have to
8 consider, take into account, and deal with is the probability
9 that someone will abuse it and -- and that apparently is a
10 technical term, but one of the things -- two of the things
11 that they talk about in the way of abuse is trying to open and
12 close the door with a body part or having to prop it open and
13 then pick it up and move out of the way.

14 Those are things you have to take into account and here
15 my expert is going to tell you they didn't take it into
16 account because there were all these things that could have
17 and should have been done to make this particular door to move
18 things in and out of safer. I mean that's the meat of the
19 case. I mean if that doesn't come in like that, I don't know
20 what we can argue because is it foreseeable that someone will
21 get hurt at that door doing exactly what my client was doing
22 when they are the ones that forced her to do it that way.

23 THE COURT: All right. Mr. Shealy?

24 MR. SHEALY: Your Honor, the -- Again, this is not -- The
25 arguments that are being raised here still don't completely

1 address the -- What we're talking about is the availability of
2 alternatives. The -- He can introduce testimony all he wants
3 without -- that this was unsafe without getting into the
4 availability of alternative kinds of door closing mechanisms.

5 It's also important for the Court to understand that this
6 is not a situation where because the plaintiff had to prop the
7 door open and whatever she used, you know, moved and the door
8 hit her. It's not that kind of situation where the door
9 pulled on the -- the -- the -- object so much that -- that,
10 you know, it broke free and hit her and she wasn't expecting
11 it. She knew what was going on. She picked up the object she
12 had used to prop it, prop it open. She knew it was closing
13 and she just caught it with her foot instead of some other
14 part of her body or -- or instead of getting out of the way
15 and just letting the door slam.

16 Nothing -- Nothing about that is -- gives rise to, you
17 know, this -- this whole notion that we should have
18 anticipated, you know, things happening that wouldn't be
19 expected by the user. This is an expected reaction to when
20 you pick up the object that you've used to close the door.

21 THE COURT: Mr. Barth is simply saying that you -- Based
22 upon what I gather from his argument was and my review of the
23 information that y'all submitted to me is that the standard
24 practice over there was for them to go in and out of this door
25 to get to their, quote unquote, particular storage unit and

1 you all knew that people go in and out of this door. I mean
2 that's y'all's -- That's what you do is set up a place for
3 this.

4 MR. SHEALY: Sure.

5 THE COURT: And based upon y'all knowing that, you know
6 people move various objects in and out of that door without
7 that door remaining open and that because it doesn't remain
8 open or have this alternative closing mechanism, whatever you
9 want to refer to it, that that creates an un-- you know, an
10 unsafe condition, which resulted in his client's injury. Is
11 that right, Mr. Barth?

12 MR. BARTH: Yes, sir, and here's how you fix it. I mean
13 because their duty under the law is to fix it if they found it
14 and all we're doing is telling the jury how you fix it.

15 THE COURT: All right, anything else on that, Mr. Shealy?
16 I'm going think about that as far as what I'm going to do. My
17 initial impression was to not allow it, but based upon what
18 I've heard here today, that changed. That somewhat changed --
19 changes my thought process on it.

20 MR. SHEALY: All right, just two other points to make.
21 This is a climate controlled building.

22 THE COURT: Right.

23 MR. SHEALY: And we have an obligation under contract
24 with all of the tenants in that building to do what we can to
25 keep that building under climate control and a hassle does not

1 equal an unsafe condition. There's nothing in the law that
2 says it's inconvenient, therefore, unsafe and that's what the
3 -- That's the logic being used here is it's ---

4 THE COURT: I mean that sounds like a good argument to
5 the jury to me.

6 MR. SHEALY: Well, but, Your Honor, it's this Court's
7 duty to or job to determine whether a legal duty exists or not
8 and so the arguments ---

9 THE COURT: You're right.

10 MR. SHEALY: --- I make have to do with whether or not we
11 have a duty to fix or prevent the very thing that happened
12 here.

13 THE COURT: Your client's duty certainly doesn't extend
14 to making everything accident free or injury free. I
15 understand. You're right. All right, anything else on that,
16 Mr. Barth or Mr. Shealy?

17 MR. SHEALY: No, Your Honor.

18 MR. BARTH: No, sir.

19 THE COURT: All right, what else?

20 MR. SHEALY: I may have reached the end of the line. I
21 think I have.

22 THE COURT: Mr. Barth?

23 MR. BARTH: I think Your Honor dealt with my pre-trial
24 issue with the production of the financial documents, Your
25 Honor.

1 THE COURT: Anything we need to address with regards to
2 this exculpatory or disclaimer and indemnity clause?

3 MR. BARTH: If Your Honor wishes to argue that now, I'd
4 be more than glad to.

5 THE COURT: Well, I mean I anticipate that he's going to
6 want to address it in his opening argument or ---

7 MR. BARTH: I certainly ---

8 THE COURT: I mean I don't know of any other time. It's
9 kind of like staring at the elephant in the room. You know,
10 let's deal with it.

11 MR. BARTH: We have a lot of positions on it, Your Honor,
12 and we briefed it, but very, very simply, we don't think -- We
13 know very well it's going to be -- It's in an easy contract.
14 We know very well it's buried in the contract. We know from
15 some of the deposition stuff that there is -- there is some
16 conversation about things in the lease that are pointed out by
17 the defendant, but this ain't one of them.

18 THE COURT: That refers to important provisions or
19 something?

20 MR. BARTH: Important provisions, yes, sir, and that's
21 the important information sheet. We're going to talk about it
22 and put it into evidence. It doesn't deal anything with it
23 and the defense position is that they don't have a duty to
24 explain it to them, but it's up to the jury to decide whether
25 this is a take it or leave it contract and whether it's

1 unconscionable and whether it should be enforced in this
2 position.

3 THE COURT: That's your position?

4 MR. BARTH: And that is even if -- Well, first of all, we
5 don't think it's -- We don't it's enforceable as a matter of
6 law. I mean because there -- We've got a lot of positions,
7 but one of them is if you read just an outline of the terms of
8 the agreement itself, Your Honor, it says that this agreement
9 applies to the place referenced above. The place referenced
10 above is Unit Number 917. It doesn't say a single thing about
11 anything to do with the common areas. Our position is the
12 lease doesn't even apply to things that happen in the common
13 area. That's the release, the indemnification, the
14 counterclaim, all of the above.

15 And on that basis alone, because there's going to be no
16 dispute whatsoever what the lease says. You know, from that
17 standpoint, we don't even think the lease applies and then the
18 case law in South Carolina is it is not -- You know, the Court
19 can throw it out as a matter of law because it's not valid to
20 absolve one from their own negligence unless it clearly and
21 specifically states that.

22 THE COURT: All right, anything else, Mr. Barth?

23 MR. BARTH: Well, I think we briefed it all, Your Honor.
24 I'd be glad ---

25 THE COURT: You did.

1 MR. BARTH: But I mean that -- That's pretty well where
2 we're coming from and to be honest with you, I do -- I do
3 think it's a matter of law for Your Honor to deal with.

4 THE COURT: Mr. Shealy?

5 MR. SHEALY: Well, Your Honor, if the position they're
6 taking is that it's unconscionable, I think that the
7 determination of unconscionability is something for this Court
8 to take up. Whether it's an adhesion contract or not is not
9 determinative. The test is whether is it an adhesion contract
10 and there is actually some testimony that there are provisions
11 of the contract that can be negotiated.

12 THE COURT: Well, and I saw that and Ms. Painter
13 testified to that in her deposition, but that was not one of
14 the issues that she testified to that could be negotiated.

15 MR. SHEALY: Well, Your Honor, but she said I don't know
16 because it's never come up. That's -- That was her testimony
17 was no one has ever asked so she doesn't know. That's a
18 different thing from no, I have ---

19 THE COURT: I understand. Miss Francis?

20 MR. SHEALY: And, Your Honor ---

21 THE COURT: Go ahead.

22 MR. SHEALY: Unconscionability is the absence of
23 meaningful choice on the part of one party due to one-sided
24 contract provisions together with terms that are so oppressive
25 that no reasonable person would make them and no fair and

1 honest person would accept them. Well, we've got case law
2 upholding exculpatory contracts in this state.

3 THE COURT: What cases?

4 MR. SHEALY: The *McCune* case, *Huckaby v. Confederate*
5 *Motor Speedway, South Carolina Electric & Gas v. Combustion*
6 *Engineering*. These cases do uphold adhesion contracts that
7 they're not -- that they don't violate public policy. They
8 will not be upheld if they are overbroad or ambiguous and the
9 provision that Mr. Barth mentions I don't see. I mean the end
10 of paragraph 11 of a 22 paragraph, two page document says the
11 owner shall not have or incur any liability for personal
12 injury to the occupant, the occupant's agents or employees, or
13 any business invitee, or any member of the public visiting the
14 occupant, end of story, end of ---

15 THE COURT: He says it's overly broad. Tell me why it's
16 not.

17 MR. SHEALY: Well, Your Honor, we're saying we're not
18 liable to you for personal injury.

19 THE COURT: Well, he's also saying that you can't hold
20 yourself or not be subject to liability for your own alleged
21 negligence. Why -- Why are you in this situation? If he
22 proves his case, if he proves his case, he's got to prove his
23 case.

24 MR. SHEALY: Well, Your Honor, where this has come up is
25 where you've got a -- a race track where there are multiple

1 people on the -- on the race track. Some of them are agents
2 of the owner of the race track, some of them are third
3 parties, and so the question becomes, okay, how broad. You
4 know, if it's caused by this person or that person, how broad
5 is the disclaimer? Here, we're just saying the owner is not
6 liable to you while you're on this property.

7 THE COURT: And you ---

8 MR. SHEALY: For personal injury.

9 THE COURT: Okay.

10 MR. SHEALY: And just like in the *McCune* case or the
11 paintball case.

12 THE COURT: That's a -- Now, that's a totally different
13 case now. The *McCune* case, and I read the *McCune* case
14 yesterday, dealt with an individual that signed a release and
15 that release specifically held them harmless and indemnified
16 them I believe from their own negligence and in that
17 particular case, an individual was provided with a face mask,
18 with a face mask. The face mask didn't fit them properly.
19 The face mask got caught on a branch, pulled the face mask up,
20 and this individual was shot in the eye with one of the
21 paintballs and in that particular case, the Court upheld the
22 exculpatory clause because the exculpatory clause
23 specifically, specifically said that you're not going to hold
24 us responsible for any of our own negligence except gross
25 negligence. How is that like this case right here?

1 MR. SHEALY: Well, Your Honor, the contracts are
2 different, the activity is different.

3 THE COURT: It is.

4 MR. SHEALY: But nonetheless, I mean *McCune* is a case in
5 a -- in a string of cases in South Carolina that uphold such
6 contracts if they are not ambiguous and if they are not overly
7 broad.

8 THE COURT: Well, why is it not overly broad here?
9 That's what I want to know.

10 MR. SHEALY: Your Honor, as opposed to a paintball -- I
11 mean this gets argued that's so different because that's an
12 apparently dangerous activity. Well, this is a self-storage
13 facility where the purpose for being there is to rent a space
14 that you can come and go to as you please and, under the right
15 set of circumstances, 24 hours a day.

16 THE COURT: Right.

17 MR. SHEALY: So the intent is to leave the tenant alone
18 and not -- not be breathing over their shoulder. If -- If
19 that's the arrangement that we have and that's why we're
20 holding ourselves out into the public, then we've got no way
21 of knowing what you're doing when you're on our property 24
22 hours a day and we can't be held responsible because that's
23 not the arrangement we got that we follow you around and make
24 sure that, you know, you're not doing something you shouldn't
25 be doing on our property.

1 So it's -- We don't have any liability while you're here.
2 You enter this property at your own risk. That is the import
3 of that sentence.

4 THE COURT: Okay. Anything else, Mr. Shealy?

5 MR. SHEALY: No, Your Honor.

6 THE COURT: Mr. Barth, anything else?

7 MR. BARTH: Other than what we briefed, it's overly
8 broad. It does not specifically refer to their own
9 negligence. I mean the cases we're talking about are
10 paintballs and race tracks. This is not an inherently
11 dangerous condition, not to mention the fact that the release
12 and indemnification they're talking about is not bold, not
13 pointed out, and buried at the bottom of a 22 paragraph
14 contract.

15 They didn't mind -- They didn't mind bolding the rent and
16 when it's due and what happens if you leave trash in your
17 building, but this supposed release of everything including me
18 walking in and shooting you on the property being released is
19 buried in the fine print and that's exactly what -- what our
20 courts talk about not being enforceable.

21 (Whereupon, there is a pause in the proceedings.)

22 THE COURT: All right, in this case, this *McCune v.*
23 *Myrtle Beach Indoor Shooting*, which was referenced by defense
24 counsel, in that particular case the exculpatory clause was
25 upheld and the Court in the *McCune* case said that the

1 exculpatory clause specifically stated that patron assumed the
2 risks whether known or unknown and that she released the
3 playground from liability even from injuries sustained because
4 of playground's own negligence. Release did not contravene
5 public policy, release was neither ambiguous nor overbroad,
6 and release did not preclude recovery for a cause of action
7 involving gross negligence.

8 The release in this *McCune* case explicitly and
9 unambiguously, and I'm quoting the case itself, limited the
10 range's liability, and reading in part the release, it says,
11 "I knowingly and freely assume all such risks both known and
12 unknown even if arising from the negligence of those persons
13 released from liability below and assume full responsibility
14 for my participation and I, for myself and on behalf of my
15 heirs, hereby release and hold harmless the American Paintball
16 League, APL, the APL certified member, with respect to any and
17 all injury, disability, death or loss or damage to personal
18 property whether caused by the negligence of the releasees or
19 otherwise except that which is the result of gross
20 negligence."

21 Final paragraph: "I have read this release of liability
22 and assumption of risk agreement, freely sign it, voluntarily
23 without any inducement."

24 And the *McCune* case distinguishes itself from the *Fisher*
25 case, *Fisher* being 355 S.C. 290. The *Fisher* case did not

1 clearly inform Fisher he would be waiving all claims due to
2 the owner's negligence. The defendant in the *Fisher* case
3 relied upon a, quote unquote, catch-all phrase in seeking
4 protection from liability against the plaintiff, the *McCune*
5 case, being 364 S.C. 242.

6 The disclaimer and indemnity clause in this particular
7 case before the Court today in this *Lynch v. Carolina Self*
8 *Storage* is entitled under paragraph 11 "Disclaimer and
9 Indemnity," paragraph 11, which is in bold caps and
10 underlined, "Disclaimer and Indemnity." It is a nine line
11 paragraph whereupon probably one-fifth of the way into line
12 seven, it represents the owner, being Carolina Self Storage,
13 shall not have or incur any liability for personal injury to
14 the occupant, the occupant's agents or employees, or any
15 business invitee or any member of the public visiting the
16 occupant.

17 The next sentence, which is the final sentence of this
18 paragraph, relates to the indemnity issue. The occupant --
19 And it reads, "the occupant agrees to hold the owner harmless
20 from any such claim for damages or personal injury and agrees
21 to indemnify the owner for any and all such claims or losses,
22 including attorney's fees incurred by the owner."

23 Under South Carolina law in the *Fisher v. Stevens* case,
24 the Court states that such provisions, exculpatory provisions,
25 tend to induce a want of care. They are not favored by the

1 law and will be strictly construed against the party relying
2 thereon. An exculpatory agreement will be held to contravene
3 public policy if it is so broad that it would absolve the
4 defendant from any injury to the plaintiff for any -- for any
5 reason.

6 This Court does find that the exculpatory clause relied
7 upon by the defendant in this case is overly broad because it
8 does attempt to absolve the defendant from any injury to the
9 plaintiff for any reason.

10 In the *Federal Pacific Electric v. Carolina Production*
11 *Enterprise*, 298 S.C. 23, citing *South Carolina Electric & Gas*
12 *v. Combustion Engineering*, 283 S.C. 182, for the proposition
13 that the Court will not construe an exculpatory clause to
14 exempt a party from liability for its own negligence in the
15 absence of explicit language clearly indicating that such was
16 the party's intention, this disclaimer and indemnification
17 agreement relied upon by the defendant in this case does not
18 explicitly and clearly indicate that it is their intentions to
19 exempt itself from liability to anybody, to the plaintiff in
20 this particular case or any other potential plaintiff, for its
21 own negligence.

22 In the *South Carolina Electric & Gas* case, it goes on to
23 say that an exculpatory clause will never be construed to
24 exempt a party from liability for its own negligence in the
25 absence of explicit language clearly indicating that such was

1 the intent of the parties.

2 Therefore, based upon my reading of the law, my review of
3 the exculpatory or disclaimer and indemnification clause
4 relied upon by the plaintiff, the Court believes that such is
5 overly broad and would not be enforceable. All right,
6 anything else with regards to that matter, Mr. Barth?

7 MR. BARTH: No, sir.

8 THE COURT: Mr. Shealy?

9 MR. SHEALY: No, Your Honor.

10 THE COURT: All right, anything else before we break for
11 lunch?

12 MR. BARTH: Just for clarification, Your Honor has ruled
13 as a matter of law the disclaimer and indemnity are gone?

14 THE COURT: Yes, sir.

15 MR. BARTH: So don't need to mention that in the opening
16 or anything else?

17 THE COURT: Well, and that goes into my next issue. Is
18 this contract or lease agreement -- First of all, to protect
19 Mr. Shealy in case I'm wrong, certainly I want a copy of this
20 marked as an exhibit for the Court for the record.

21 MR. BARTH: A copy of the lease?

22 THE COURT: Yeah, I mean I'll -- And with regards to the
23 lease going back to the jury, I think that that particular
24 provision in the contract needs to be redacted. I think it
25 could lead to confusion on the part of the jury and have them

1 make a decision based upon something that I've ruled as a
2 matter of law is unenforceable.

3 MR. SHEALY: I'm just wondering if the lease even needs
4 to go at all, given your ruling. I mean I'm interpreting your
5 ruling as you've ruled -- granted summary judgment ---

6 THE COURT: Exactly.

7 MR. SHEALY: --- on that issue, on that affirmative
8 defense of the defendant.

9 THE COURT: Right.

10 MR. BARTH: And the counterclaim I presume.

11 THE COURT: Right.

12 MR. SHEALY: And as to the counterclaim?

13 THE COURT: Yes, sir.

14 MR. SHEALY: Okay. As long as we can introduce the lease
15 as a Court's Exhibit so that it remains a part of the record,
16 then I ---

17 THE COURT: I'll let y'all make the decision. If y'all
18 want it in, I want that paragraph redacted because I don't
19 think it's something that the jury needs to look at or
20 consider in their deliberations because I think it could lead
21 to confusion on their part when the Court has ruled as a
22 matter of law that it is overly broad and non-enforceable. So
23 I'll let you all make the decision. If you want it in, then
24 it needs to be redacted. If you don't want it in, then
25 certainly let's make it an exhibit to the Court. In case I'm

1 wrong, then the Court of Appeals or the Supreme Court can
2 certainly have it to look at to tell me if I'm wrong on that.
3 Okay?

4 MR. BARTH: Yes, sir.

5 MR. SHEALY: We can talk because I ---

6 THE COURT: Y'all can talk over lunch about that.

7 MR. SHEALY: Does that render some ---

8 MR. BARTH: Some other exhibits we're going to have to go
9 back and redact.

10 MR. SHEALY: Or even not introduce them. I don't know.

11 MR. BARTH: We might need a touch more.

12 THE COURT: Well ---

13 MR. BARTH: But ---

14 THE COURT: We're going to start back at two thirty.
15 That gives you about an hour and 25 minutes. I've got to be
16 back in here at two o'clock for another hearing on another
17 matter so I'm going to break for right now. Mr. Jepertinger,
18 can you approach? Hold on just a second.

19 (Whereupon, a bench conference is held off the record.)

20 THE COURT: All right, we'll stand at ease until two
21 o'clock.

22 MR. BARTH: Thank you, Your Honor.

23 MR. SHEALY: Thank you, Your Honor.

24 (Whereupon, the lease is marked as Court's Exhibit Number
25 1 and there is a break in the proceedings from 1:05 p.m.

1 until 2:05 p.m. When the proceedings resume, the jury is
2 not yet present.)

3 THE COURT: I wanted to come back, if it's okay with you
4 all, on some matters that I told you I was going to withhold
5 my ruling on.

6 MR. BARTH: Yes, sir.

7 THE COURT: Specifically, exhibit number 10, the lease
8 termination letter, the Intent to Vacate Notice, I am not
9 going to allow those. I just don't think that that advances
10 the football, so to speak, in the trial of this case as to
11 whether or not the defendant was negligent. Okay? So I'm not
12 going to allow those.

13 With regards to number 13, which is Mr. Seluga's complete
14 report, I'm not going to allow the report in. All right?
15 Now, what I will allow -- what I will allow Mr. Barth to
16 question him about and you cross examine him about is this
17 issue on the alternative door closing mechanism.

18 MR. BARTH: You will or ---

19 THE COURT: I'm going to allow you to ask him that
20 because I think that based upon what has been argued here goes
21 to their issue of negligence and I think would in turn go to
22 the gross negligence and/or punitive damages issue. Okay?
23 But I'm not going to allow his report in. I don't think
24 that's admissible. I'm not going to allow that in.

25 MR. BARTH: Your Honor, on that issue, part of the report

1 is a bunch of photos he took and I did want to ---

2 THE COURT: He can -- Well, yeah, if you want to ask him
3 about photos and that kind of stuff.

4 MR. BARTH: Okay.

5 THE COURT: Or unless y'all can agree on it. Y'all may
6 be able to agree on those photos.

7 MR. BARTH: Okay.

8 THE COURT: You know, now, certainly if Mr. Shealy gets
9 up there and starts banging him about not doing a report and
10 all of this stuff, that may -- that may be a whole another
11 ball of wax, so to speak.

12 MR. SHEALY: Right. I won't do that and I mean I won't
13 have any objection to his identifying the photographs that he
14 took.

15 THE COURT: Well, I mean I don't know. Are you asking
16 that those photographs be admitted?

17 MR. BARTH: Yes, sir.

18 THE COURT: Okay. That ---

19 MR. SHEALY: And I have no objection to that.

20 THE COURT: Okay and I don't know. I don't recall. It
21 seems like in my review of those photos, there was some
22 writing or something on the bottom maybe and it may have just
23 been a picture. Let me look at them real quick.

24 MR. BARTH: I think his photos, Your Honor, just have
25 like Figure 1, picture of the door, Figure 2.

1 THE COURT: Well, no, it does have like Figure 7, Figure
2 8, re-enactment. You know, there's language on the bottom of
3 these photographs and that may be something.

4 MR. BARTH: I don't know that that's -- Those aren't the
5 ones that Mr. Shealy and I were -- were talking about ---

6 THE COURT: Okay. Well, there's several ---

7 MR. BARTH: --- taking all the writing off of because
8 he's going to be here to testify.

9 THE COURT: Okay. There's several photographs. Y'all
10 just get together and what you can agree on, fine. If you
11 can't, then I'll ---

12 MR. BARTH: Okay.

13 THE COURT: --- make a decision accordingly.

14 MR. BARTH: That would probably knock out number 14,
15 which is the door closing instruction sheet.

16 THE COURT: Right.

17 MR. BARTH: That was just part of the -- That was just
18 part of his ---

19 THE COURT: And he certainly I think can testify with
20 regards to him relying upon that ---

21 MR. BARTH: Okay.

22 THE COURT: --- in his whatever opinion he renders.

23 MR. BARTH: Okay.

24 THE COURT: But I'm not going to allow those instructions
25 to come in.

1 MR. BARTH: Okay and then the next one, Your Honor, he's
2 going to play a couple of videos. They're about ten seconds
3 each.

4 THE COURT: Any objection to that?

5 MR. BARTH: He -- Kirby says he's not sure he's seen them
6 yet and we'll -- I mean that's not until tomorrow. I'll get
7 that.

8 THE COURT: Okay.

9 MR. SHEALY: I watched him make them. I mean I was
10 there.

11 MR. BARTH: Yeah, right.

12 MR. SHEALY: But I just ---

13 THE COURT: You don't know whether or not he went back
14 and added some language to it.

15 MR. BARTH: He put his subtitles in, you know, that we
16 went in and added later.

17 (Laughter.)

18 THE COURT: All right and I think that that clarifies all
19 my rulings. Is there anything that I've left hanging out
20 there? The Unit Vacating Checklist?

21 MR. BARTH: Yes, sir, that and that one would go -- I'm
22 sure would go along with the other ---

23 THE COURT: I just don't see the relevance of that. I
24 mean I looked. Unless you can convince me otherwise, I mean
25 does that go hand in hand with their telling her to get out?

1 MR. BARTH: The ---

2 THE COURT: Or her complying with her contractual
3 obligations and doing what she was supposed to do? Have it
4 clean swept, etcetera, when she vacated?

5 MR. BARTH: Well, the Unit Vacating Checklist, Judge,
6 goes along with their manager's testimony of what a nice,
7 compliant tenant she was. She did everything she was supposed
8 to.

9 THE COURT: Well, now, if he gets up here and says the
10 opposite, you know, we got -- They've got some problems on
11 those issues. You understand what I'm saying, Mr. Shealy?

12 MR. SHEALY: Yes, Your Honor.

13 THE COURT: If he gets up here and says she wasn't doing
14 and I think, you know, she -- he -- Your client could open the
15 door to that stuff being revisited.

16 MR. BARTH: All right and if -- Just for the record, Your
17 Honor, on those particular eviction documents, I just would
18 like the record to reflect that our position is that they
19 should come in on the issue of punitive damages should we get
20 to that point.

21 THE COURT: Well, certainly and, you know, if you want to
22 make them an exhibit, just like I did with Mr. Shealy, if I'm
23 wrong on the issue of ruling as a matter of law that that
24 clause or that disclaimer and indemnification was overly
25 broad. If I'm wrong, I certainly want the record protected

1 for both of you gentlemen. I want it protected for both of
2 you. Okay? So if you feel -- I mean I would encourage you to
3 have those marked as Court exhibits.

4 MR. BARTH: Okay.

5 THE COURT: So that issue is protected so if it does go
6 up on appeal, the Court's got whatever it needs to look at to
7 determine whether or not I made an error. Okay?

8 MR. BARTH: Yes, sir, one other thing. I don't mean to
9 aggravate you.

10 THE COURT: You're okay.

11 MR. BARTH: I'm trying not to ---

12 THE COURT: You're not.

13 MR. BARTH: --- be disjointed because we -- We really did
14 work hard to get it all in order, but the deposition we're
15 reading this afternoon, Your Honor, is their store manager.

16 THE COURT: Ms. Painter?

17 MR. BARTH: No, sir. This is going to be Dan Comfort.

18 THE COURT: Okay.

19 MR. BARTH: This is the one that you'll probably hear a
20 fair bit about him miraculously appearing last week after
21 three years, but we're going to read it in. But a lot of it
22 -- The deposition is only 40 pages long, but a lot of it is
23 now not relevant based on Your Honor's ruling on the
24 indemnification. So I would assume before we do that, Kirby
25 and I probably want to go through and his direct, a lot of it

1 was getting, you know, to lay the foundation and get the lease
2 in and the addendum in and we want to take all that out, but I
3 just hated to bounce the jury in and out. But when we do,
4 that's why.

5 THE COURT: Well, I mean do y'all need some more time to
6 do that right now?

7 MR. BARTH: That would be great because I need to go
8 ahead and mark exhibits that we've agreed to.

9 THE COURT: Okay, y'all go ahead and do that.

10 MR. BARTH: And proffer the ones we don't.

11 MR. SHEALY: When you're ready to show me what you want
12 to put in ---

13 MR. BARTH: Okay, I'm ready.

14 THE COURT: How much time do y'all need do you think?

15 MR. BARTH: Fifteen to 20 minutes, Judge.

16 THE COURT: Okay.

17 MR. BARTH: It may be less.

18 THE COURT: Well, I mean here's the other thing. If we
19 need to, you know, we can allow y'all to go ahead and start,
20 do your openings, put your client on the stand. Isn't that
21 who you intended to call first?

22 MR. BARTH: Yes, sir.

23 THE COURT: And by that time I mean you're going to be --
24 Once I give them the opening charge, opening arguments, we're
25 going to be pushing probably five o'clock.

1 MR. BARTH: And that -- that might work, too, just to
2 read the depositions tomorrow.

3 THE COURT: Okay. So that would give you at least this
4 evening to ---

5 MR. BARTH: Okay.

6 THE COURT: --- to do that.

7 MR. BARTH: Okay.

8 THE COURT: I mean y'all can work on it now, but we'll
9 see where we are once we start. Okay?

10 MR. BARTH: Okay.

11 (Whereupon, there is a break in the proceedings from 2:14
12 p.m. until 2:30 p.m. During the break, counsel for the
13 plaintiff pre-marked Plaintiff's Exhibits Number 1
14 through 14.)

15 THE COURT: Mr. Barth, are you ready now?

16 MR. BARTH: Yes, sir, Your Honor.

17 THE COURT: Mr. Shealy, are you ready?

18 MR. SHEALY: Yes, Your Honor.

19 THE COURT: All right, anything before we bring the jury
20 in?

21 MR. BARTH: No, sir.

22 THE COURT: Mr. Shealy:

23 MR. SHEALY: No, Your Honor.

24 THE COURT: Any questions about what my rulings are as
25 far as keeping your opening statements within those

1 parameters, gentlemen? Mr. Barth? Mr. Shealy?

2 MR. BARTH: No questions, Your Honor.

3 THE COURT: All right.

4 MR. BARTH: Does Your Honor wish us to -- The ones that
5 have been agreed on, do you want us to still go through them
6 with the -- with the witness or give them to you in a list and
7 tell you have and haven't agreed on?

8 THE COURT: Let me ask this question. Are they admitted
9 subject to the proper foundation being laid or are you already
10 stipulating to their admission?

11 MR. SHEALY: Your Honor, I always like for the witness to
12 identify them.

13 THE COURT: Okay.

14 MR. SHEALY: So there will be no objection subject to
15 them being identified.

16 THE COURT: Okay. Mr. Barth?

17 MR. BARTH: No problems.

18 THE COURT: I'm trying to find you around this screen
19 here. All right, bring us the jury, please, ma'am.

20 (Whereupon, the jury enters the courtroom at 2:32 p.m.)

21 THE COURT: All right, Mr. Alexander?

22 JUROR: Yes, sir.

23 THE COURT: And Mr. Warren, I need you all in these two
24 final chairs down here. Ms. Dale Cole, I need you seated
25 right here where this young lady is.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Lynch, I'm going to go ahead and tell you, when these lawyers
2 are asking you questions, if it warrants a yes or no response,
3 give me a verbal yes or no response as opposed to an uh-huh or
4 an uh-uh, okay? It's a lot easier for my court reporter to
5 take down yes or no. Okay? Mr. Barth, you're recognized,
6 sir.

7 MR. BARTH: May it please the Court, Your Honor.

8 THE COURT: Yes, sir.

9 SUSAN ANNE BELL LYNCH, being first
10 duly sworn, testifies as follows:

11 DIRECT EXAMINATION

12 BY MR. BARTH:

13 Q: Ms. Lynch, would you give us your full name, please?

14 A: Susan Anne Bell Lynch.

15 Q: All right and, Ms. Lynch, everybody's got to hear you so
16 I'm back here at the back. You've got to make sure to speak
17 up, okay?

18 THE COURT: Tap that mic and see if it's on.

19 PLAINTIFF: Okay, that's fine.

20 MR. BARTH: It's on?

21 THE COURT: No, it's not.

22 MR. BARTH: It's not?

23 THE COURT: I don't think so. Is there a button on the
24 front of it?

25 PLAINTIFF: There's a button back here.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 MR. BARTH: All right, that's okay. Just talk like you
2 would have to students who weren't listening in the back.

3 THE COURT: Thank you.

4 PLAINTIFF: Now it's on.

5 Q: There we go, all right. Where do you live?

6 A: I presently live at 918 Lorraine Avenue in Florence.

7 Q: All right and how long have you lived in Florence?

8 A: I've lived in Florence thirty-two years.

9 Q: Are you married?

10 A: No, I'm divorced.

11 Q: Who were you married to?

12 A: I was married to Wayne Lynch.

13 Q: All right and y'all have how many children?

14 A: We have two children.

15 Q: Okay. Do you have grandchildren?

16 A: Yes, I do.

17 Q: How many?

18 A: I have five.

19 Q: Now, for your work, work career, what kind of work did
20 you do?

21 A: I was a school teacher for thirty-six years.

22 Q: Where did you teach?

23 A: I taught at Byrnes Academy and I taught at Florence
24 Darlington Tech.

25 Q: Okay. How much -- How long did you teach at Tech?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: I taught at Tech thirty-two years.

2 Q: Okay and can you tell us what you taught over there?

3 A: I taught accounting.

4 Q: And you retired when?

5 A: I retired in June 2008.

6 Q: Okay and this accident happened in July 2008?

7 A: Yes, sir.

8 Q: All right. Now, back in -- upon your retirement, where
9 were you -- Where did you decide you were going to work?

10 Where were you working?

11 A: Prior to my retirement?

12 Q: No, when you retired. What were you going to do?

13 A: Well, I wasn't sure what I was going to do. I would have
14 to do something, but I didn't know what. But I was offered a
15 job at a gift shop.

16 Q: Okay. Porter's?

17 A: Porter's Gift Shop.

18 Q: All right and that was going to be part-time?

19 A: Part -- part-time, yes.

20 Q: Okay. Now, after you and your husband separated, where
21 did you go to live?

22 A: My son had a pool house, my oldest son had a pool house
23 behind his house and he offered me the opportunity to live
24 there.

25 Q: Okay.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: Until we could get things straight.

2 Q: Okay. So in the -- in the spring of 2008, is that where
3 you were living?

4 A: Yes, sir. I moved in March of 2008.

5 Q: Into the pool house?

6 A: Let me back up, I'm sorry. March 2007 I moved into the
7 pool house.

8 Q: Okay. Did anybody live there with you?

9 A: No, by myself.

10 Q: Okay. Now, tell us why you were looking for a storage
11 unit?

12 A: Well, we had gone to court a lot about the divorce and
13 the separation issues and he was piece-mealing giving me a
14 piano one time and a table another time and a picture another
15 time and so I needed someplace to keep it. The pool house had
16 a bathroom and a bedroom so I couldn't keep things there.

17 Q: All right and did you start looking for a storage unit?

18 A: Yes, I did.

19 Q: Where did you look?

20 A: I looked at Carolina Storage, but before I looked there,
21 there's a storage unit two doors down from them and I looked
22 at theirs as well.

23 Q: Okay and can you tell me what -- what was the difference?
24 Why did you pick this one?

25 A: Well, there was a security code to get into this one so

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 it had a gated perimeter. The impressive part was that I was
2 assured they had security cameras so they would know who was
3 going in and who was going out and what was going on in the
4 units.

5 Q: And when you were talking to the people at Carolina Self
6 Storage, did they take and show you one of the units?

7 A: Yes, they did.

8 Q: All right and how did you like that?

9 A: Well, that's what I was looking for, something that was
10 heated and air conditioned.

11 Q: Okay. Was the surveillance issue a big one to you?

12 A: No. I just presumed when he told me they had security
13 cameras that they had film in the cameras.

14 Q: All right and were you looking for one that was heated
15 and cooled or were you looking for a regular one?

16 A: I was looking for a heated and cooled because of the
17 sensitivity of the piano.

18 Q: Particularly for the piano?

19 A: Yeah and I had upholstered furniture that I didn't want
20 to mildew.

21 Q: Okay and they showed you one and you rented it?

22 A: Absolutely.

23 (Whereupon, the screen in the middle of the courtroom is
24 turned on to show photographs to the jury and to the
25 witness.)

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right. Now, you might not be able to see it from
2 there. Do you see that, Ms. Lynch?

3 A: Yes, I do.

4 Q: All right and I'm going to show you what's been
5 previously marked as Plaintiff's Exhibit Number 1 and see if
6 you can identify this front picture for me.

7 A: Yes. That -- Actually, that's my car.

8 Q: Okay.

9 A: And that's where it was parked and that's the door that I
10 had to go through to get to my unit, which was in the middle
11 of the building. So you open the door, go down a hallway,
12 turn to the left, and then I had a unit that had similar to
13 the doors that are on the outside. The doors and units that
14 have the outside doors are not heated and air conditioned.

15 Q: Yeah.

16 A: Some of them.

17 Q: These doors on the outside?

18 A: Some that you could open that way.

19 Q: All right and when you told ---

20 MR. SHEALY: Your Honor, may we approach just -- just
21 real briefly?

22 (Whereupon, a bench conference is held out of the hearing
23 of the jury.)

24 MR. SHEALY: Just in case something comes up, if he could
25 wait until she's identified before he publishes.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 MR. BARTH: Oh, yeah, okay.

2 MR. SHEALY: That's just ---

3 MR. BARTH: This was just one that wasn't objected to.

4 MR. SHEALY: Okay.

5 THE COURT: Okay.

6 MR. BARTH: That's no problem.

7 MR. SHEALY: Okay.

8 THE COURT: All right.

9 (Whereupon, the bench conference ends.)

10 Q: All right. Now, you mentioned these on the outside.

11 They have the roll up doors and that's what yours has on the
12 inside?

13 A: On the inside of that building.

14 Q: All right.

15 A: Yes.

16 Q: Now, can you tell us how you would have gotten to your
17 unit from here?

18 A: Yes, sir. I would have pulled the D door toward me ---

19 Q: Okay.

20 A: --- to open.

21 Q: All right.

22 A: And then I went inside.

23 Q: All right. Be sure you don't trail off. We've got to
24 hear you, okay?

25 A: I'm sorry.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: That's all right. All right now, do these pictures
2 accurately represent the -- the part of the property we're
3 talking about?

4 A: Yes, they do.

5 Q: All right. Look at the other pages right there and see
6 if you can identify those. Do you see those?

7 A: Yes, sir.

8 Q: All right. Can you identify all of those?

9 A: The second page has the hitch on the door.

10 Q: The closer?

11 A: The closer on the door.

12 Q: Okay.

13 A: And you can see that there's no way to adjust it.

14 Q: All right, the next one?

15 A: The next one is another picture of the D door and it
16 shows a little better how much distance there was from the
17 road to the door.

18 Q: Okay, the next one?

19 A: Do you mean this one?

20 Q: Yes.

21 A: Which way?

22 Q: That way. Is that the side of the door?

23 A: Yes, it is the side of the door.

24 Q: All right.

25 MR. BARTH: Your Honor, I'd move to introduce Plaintiff's

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Exhibit Number 1.

2 THE COURT: Any objection?

3 MR. SHEALY: No, Your Honor.

4 THE COURT: Without objection, Plaintiff's Exhibit Number
5 1 is admitted into evidence. Mr. Barth, for the record, how
6 about state how many pages that is, please, sir.

7 MR. BARTH: It's four pages, Your Honor.

8 THE COURT: Thank you.

9 MR. BARTH: Thanks.

10 (Whereupon, Plaintiff's Exhibit Number 1, four pages of
11 color photographs, is admitted into evidence.)

12 Q: All right. Now, before we go through those pictures, Ms.
13 Lynch, when you decided to rent a unit from Carolina Self
14 Storage, did they give you some documents to take a look at?

15 A: Yes, sir.

16 Q: All right. Now, I want you to take a look at what has
17 been marked Plaintiff's Exhibit Number 2 and just in general
18 tell us what this package of documents is.

19 MR. SHEALY: Your Honor, objection. I would take this up
20 just real briefly.

21 (Whereupon, a bench conference is held out of the hearing
22 of the jury.)

23 MR. SHEALY: Kevin and I talked about this.

24 THE COURT: Yeah.

25 MR. SHEALY: This is -- We don't -- I don't think any of

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1 this stuff is relevant anymore. This is everything but the
2 lease.

3 MR. BARTH: Well, that ---

4 THE COURT: I'm going to let him do it. I mean he's just
5 establishing the fact that she had a rental agreement.

6 MR. BARTH: Right and what ---

7 THE COURT: And you can stipulate to it as to he's
8 putting up his case.

9 MR. SHEALY: Sure.

10 THE COURT: It doesn't prejudice you or your client at
11 any stage.

12 MR. BARTH: I'm going to go through a couple of them and
13 just say, what is it, is that your signature. It's not the
14 lease.

15 THE COURT: Okay. Your objection is noted, but
16 overruled.

17 MR. SHEALY: Okay.

18 (Whereupon, the bench conference ends.)

19 Q: Ms. Lynch, tell us what that is, what that package is,
20 please?

21 A: It is the papers that they gave me as I was preparing to
22 rent the unit.

23 Q: All right and do you remember who you spoke with the day
24 you signed in?

25 A: Yes, Dan Comfort was the manager.

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1 Q: Dan Comfort, all right. Now, that's the package?

2 A: Yes.

3 Q: All right.

4 MR. BARTH: I'd move to introduce that, Your Honor. That
5 would be Exhibit Number 2.

6 THE COURT: Mr. Shealy?

7 MR. SHEALY: Subject to the objection on record, Your
8 Honor.

9 THE COURT: All right. Objection overruled, admitted
10 into evidence over defense counsel's objection.

11 MR. BARTH: All right.

12 THE COURT: Plaintiff's Exhibit 2.

13 MR. BARTH: Thank you, Your Honor. I'm sorry.

14 (Whereupon, Plaintiff's Exhibit Number 2, the lease
15 initiation documents package, is admitted into evidence.)

16 Q: Take a look at Plaintiff's Exhibit Number 2, if you
17 would. What's the first sheet in there?

18 A: The first sheet is providing information on whether I was
19 employed, where I lived, children or people that would have --
20 that I would give authorized use to, which I had my children
21 listed, and ---

22 Q: And who filled -- who filled that out?

23 A: I did.

24 Q: All right and does that have your signature at the
25 bottom?

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1 A: Not my signature.

2 Q: But your handwriting?

3 A: But it is my printing, yes.

4 Q: All right.

5 A: My signature is not on this sheet.

6 Q: Okay. Look at the next document and tell us what it is,
7 please?

8 A: Acceptance and Waiver of Truck Usage.

9 Q: Okay. You didn't need to use their truck?

10 A: No, I did not.

11 Q: All right and did you sign that document as well?

12 A: Well, this is unsigned.

13 Q: All right. Did they show it to you and you waived it?

14 A: Yes. They did show it to me, yes.

15 Q: All right, what's next?

16 A: How I would be making payments, whether I was going to
17 pay by credit card, whether it was going to be the check with
18 an automatic draft.

19 Q: Okay and did they explain that to you?

20 A: Yes, they did.

21 Q: All right and you filled it out and signed it and did
22 what -- whatever you were supposed to do?

23 A: Yes.

24 Q: All right. What's the next one?

25 A: The next one is about insurance.

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1 Q: Okay.

2 A: If I wanted to get insurance.

3 Q: On your stuff?

4 A: On my stuff.

5 Q: All right and you declined that?

6 A: I declined that.

7 Q: All right and the next one?

8 A: Authorization to hold the keys.

9 Q: Okay and did you understand what that was?

10 A: Yes. I was issued three keys and they were keeping one
11 and I had the other two.

12 Q: All right. Now, when you decided you were going to rent
13 the unit, he handed you those things, you signed up
14 everything. How soon after that did you start moving stuff?

15 A: Probably within a week.

16 Q: Within a week?

17 A: Mm-hmm.

18 Q: All right and at the time you were given and read and
19 signed these documents, was there anything shown to you or
20 told to you about which door to use to get where you needed to
21 be?

22 A: Dan Comfort showed me the unit.

23 Q: Okay.

24 A: 917. He took me to the door that I would be going in and
25 out.

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1 Q: All right. Was there any discussion between you and Mr.
2 Comfort about how to use the door, what to do, what not to do,
3 anything like that?
4 A: No, sir.
5 Q: Was there any conversation about it whatsoever?
6 A: No, sir.
7 Q: All right. Now, you said you started to move about a
8 week later?
9 A: About a week later after I signed the contract.
10 Q: All right. Tell the jury when you pull off of Second
11 Loop, how do you get where you were going?
12 A: If you're passing Roger's ---
13 Q: Mm-hmm.
14 A: --- it's on the opposite side of the street going towards
15 CVS and so you've got to pull -- You've got to turn right, but
16 you've got to get into the left lane to push a code in.
17 Q: Okay and you enter the code, the gate swings open, and
18 then where do you go?
19 A: And then this particular building is at the very back of
20 where all the units are. So if you were to drive down Second
21 Loop, you wouldn't see this building. You can't see it from
22 the street.
23 Q: Okay. Are there any behind it or is it the very back
24 one? Do you know?
25 A: It's the very last building.

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1 Q: Now, when you get where you're going, where we're looking
2 at a picture of the door right here, where do you park in
3 relation to the door?

4 A: In front of the door.

5 Q: In front of the door?

6 A: There was a picture of my car.

7 Q: That's what I'm going to show you right now, Plaintiff's
8 Exhibit Number 3. Do you recognize that?

9 A: Yes. That's Dan Comfort's golf cart.

10 Q: All right and when you moved -- parked to move things in
11 and out of this unit, where in relation to this picture would
12 you be parked?

13 A: A little bit more forward than he was.

14 Q: Okay.

15 MR. BARTH: Your Honor, I'd move to introduce Plaintiff's
16 Number 3.

17 MR. SHEALY: No objection, Your Honor.

18 THE COURT: Without objection, Plaintiff's Exhibit Number
19 3 admitted. All right.

20 (Whereupon, Plaintiff's Exhibit Number 3, a color
21 photograph, is admitted into evidence.)

22 Q: Now, if we can get that up on -- up on the screen, you
23 park your car I guess like it is right there and move your
24 stuff in, right?

25 A: Yes, sir.

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1 Q: All right. Is it flat?

2 A: The door?

3 Q: Yes, ma'am.

4 A: The door is not flat on the ground.

5 Q: Okay and ---

6 A: The building is built up.

7 Q: It's built up and what do you have to do to get in and
8 out of it?

9 A: You have to step up to go in, you have to step down to go
10 out.

11 Q: All right. At that particular door, do you know if there
12 are any cameras or any surveillance equipment?

13 A: No. Mr. Comfort said that the buildings had security
14 cameras.

15 Q: Okay. Now, when you start to move things in and out, how
16 did you -- How did you hold the door open to get the stuff in
17 and out?

18 A: Obviously, to move the piano in I couldn't do that so my
19 sons helped me with that and I held the door ---

20 Q: All right.

21 A: --- for them to get in.

22 Q: All right.

23 A: If I was taking small things, like a lamp or a rug,
24 depending on how heavy it was or how many items I had, whether
25 I propped the door open because I would have something in my

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1 hand and I couldn't open the door.

2 Q: All right and you say you propped the door open. Exactly
3 how did you do that?

4 A: The door would swing up against where the green garage
5 doors appear. So it would go flat to the building.

6 Q: All right and you've talked about swinging the door open.
7 What is that we're looking at?

8 A: That's the -- That's the top of the door that allows it
9 to open and close.

10 Q: All right and as far as pushing the door open, can you
11 push it back any farther than that to hold it open?

12 A: No. It appears to be against the building there.

13 Q: All right and how does that compare with how you would do
14 it?

15 A: I would have it completely open.

16 Q: Okay, like that?

17 A: Like that.

18 Q: All right and what would you use to prop the door open?

19 A: Different items, small pieces of furniture. I had an
20 oriental rug that I pushed up against the door one time.
21 Items that would hold it so that it wouldn't slam.

22 Q: Okay. At any point, did Mr. Comfort come tell you, you
23 can't do it that way?

24 A: No, sir.

25 Q: All right. Any idea how many times you would have had to

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1 move things into the unit prior to the accident we're going to
2 talk about?

3 A: Maybe eight, ten times.

4 Q: Okay. Was there any way as far as you could see to lock
5 the door open other than to prop it open with a piece of
6 furniture?

7 A: The door would not stay open if it wasn't propped.

8 Q: Okay, all right. Now, when you would move the item, what
9 would happen?

10 A: The door would close.

11 Q: Okay. Now, the day of your accident, we know that it was
12 July 31st of 2008, right?

13 A: Exactly.

14 Q: Prior to that day, had you had the occasion to start
15 moving things out of the unit?

16 A: No, sir.

17 Q: All right. All the times you've described so far would
18 have been putting things in the unit?

19 A: That is correct.

20 Q: All right. Tell us why you were there that day?

21 A: I had bought a house in February of 2008 and I rented it
22 to the people that I bought it from until their house was
23 ready and so this was moving day. I was there to get things
24 from my storage unit that I could carry out like lamps and
25 tables, rugs, pictures, because my sons were out of town and

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1 they could help me when they came back in town.

2 Q: All right and you didn't have anybody with you that day?

3 A: No, I did not.

4 Q: All right. Tell us where you parked your car?

5 A: Right where they see the white cart.

6 Q: Okay and when you went in the first time to go to your
7 unit, did you have anything in your hands?

8 A: The first thing I did was prop the door.

9 Q: Okay and what did you prop it open with?

10 A: With a small table.

11 Q: All right. Did that seem to work?

12 A: Yes.

13 Q: It held it?

14 A: Yes.

15 Q: All right. Do you remember what day of the week it was,
16 by the way?

17 A: Yes.

18 Q: What day of the week was it?

19 A: It was a Thursday.

20 Q: And about what time of day?

21 A: It was in the morning about nine, nine thirty.

22 Q: All right and take us through what happened?

23 A: I went into the building into my storage unit and pulled
24 one of the small tables to hold the door so that I could move
25 other small objects out and with the door open, I proceeded to

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1 go in, go out. I loaded up the back of my car as much as I
2 could.

3 Q: Okay. Do you know how many trips you would have had to
4 make? If you don't, that's fine.

5 A: No, I don't.

6 Q: All right. What was the last thing you were going to
7 move?

8 A: The small table that was holding the door.

9 Q: Okay. Do you remember about how long it took you to move
10 all your stuff?

11 A: Maybe thirty, forty-five minutes.

12 Q: All right.

13 A: Because they were small items, things that I could
14 handle.

15 Q: Okay and during the entire time that you were moving your
16 things, was the door propped open?

17 A: Yes, it was.

18 Q: Okay. Did the table seem to still hold?

19 A: Yes, it was holding.

20 Q: All right. Tell us exactly what happened as you walked
21 to the car the last time?

22 A: The last trip from the inside, I loaded my car and then I
23 turned back around to get the table.

24 Q: Okay.

25 A: I picked up the table and made a turn to put it in my car

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1 and I could feel the door closing fast. So I put my foot back
2 instinctively, like you would a screen door, so it wouldn't
3 knock me over. This is a metal door and it is heavy.

4 (Witness coughs.)

5 Excuse me. So I put my foot back to catch the door so
6 that I could get out of the way before it closed.

7 Q: All right and did that work?

8 A: No, it did not.

9 Q: All right. If you would, and I hate to make you do it,
10 can you stand up and show the jury where it hit you? When the
11 door came shut, where would it have hit you physically?

12 (Whereupon, the witness stands and demonstrates.)

13 A: Because it's above the ground, it hit me on the top of my
14 ankle right here.

15 Q: It hit you on the top of your ankle?

16 A: As I put my foot back like this.

17 Q: Okay. All right, your right ankle?

18 A: My right ankle.

19 Q: All right. What happened next? You can sit back down in
20 the chair.

21 (Whereupon, the witness complies.)

22 Q: It hit you on the ankle and then what?

23 A: I dropped the table and I said, "Oh," and I couldn't see
24 the injury because of where it was, but there was a lot of
25 blood. So I had been to Sam's before I came there and I knew

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1 I had some paper towels in my car so I hopped to the car and
2 got a roll of paper towels.

3 Q: Where was the table?

4 A: Where was the table?

5 Q: Mm-hmm.

6 A: Out on the ground. I wasn't worried about the table
7 right then.

8 Q: Okay, all right.

9 A: I really don't know -- I don't even know what I was going
10 to say.

11 Q: Well, you went -- You got in your car?

12 A: I got -- no. I wrapped my -- I got in the car to get the
13 paper towels ---

14 Q: Okay.

15 A: --- and wrapped my foot and then I went back to get the
16 table because the door had closed and I went back to get the
17 table to put it in the back of my car.

18 Q: And how did you do that?

19 A: That was tricky because I was hopping on one foot.

20 Q: Okay.

21 A: But I got the table into the car and then I got into the
22 car.

23 Q: As you get back into the car, tell us how your ankle was
24 doing?

25 A: It had bled through the paper towels and it was bleeding

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1 in my car. It was a trail of where I had been.

2 Q: All right. I assume you left the storage unit at that
3 point?

4 A: It was time to leave, yes, sir.

5 Q: All right and where did you go?

6 A: I went to my new house.

7 Q: Okay and that was on ---

8 A: Lorraine Avenue.

9 Q: Lorraine. How far is that from the storage unit?

10 A: Maybe a mile and a half, two miles.

11 Q: All right. From the time you left the storage unit until
12 you got to your house a couple of miles away, how was -- how
13 was the towel holding your ankle?

14 A: It wasn't. It had bled through again.

15 Q: Okay. Now, when you arrived at the Lorraine home, what
16 did you do at that point?

17 A: I had a friend that was waiting there for Cable Vision
18 and telephone and all of the hook-ups. The people were
19 supposed to come that morning and I had ---

20 Q: Who was it?

21 A: Pardon?

22 Q: Who was it?

23 A: Carol Dawson.

24 Q: All right, Dr. Dawson's wife?

25 A: Yes.

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1 Q: All right.

2 A: We're friends and I asked her if she maybe had a band-aid
3 in her car because I didn't have anything in the house. Then
4 she said, well, yes, well, let me clean it. Let's clean it up
5 and see what's happened.

6 Q: All right. How'd she -- How did she do that?

7 A: We stood at the kitchen sink.

8 Q: All right.

9 A: And she cleaned it up.

10 Q: And how were you doing at that point?

11 A: I was in pain. I didn't know what I had done, but it was
12 bleeding a lot.

13 Q: All right. Tell us what happened next?

14 A: She said one band-aid wasn't going to do.

15 Q: All right and your response?

16 A: Do you have two band-aids?

17 Q: All right and what happened next?

18 A: She said, no, that's not what I'm saying. I'm saying
19 that we need -- I need to take you either to the emergency
20 room or to her husband's office for him to stitch it up.

21 Q: Okay, he's an orthopedic surgeon?

22 A: He's an orthopedic surgeon.

23 Q: All right and did you agree to do that?

24 A: Yes, I did.

25 Q: All right. Where did y'all go next?

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1 A: We went to Al's -- Dr. Dawson's office through the back
2 door.

3 Q: All right, tell me this. When -- When Ms. Dawson wrapped
4 it, how did she do that?

5 A: Well, we took the paper towels off ---

6 Q: Okay.

7 A: --- and she -- she cleaned it off with some more paper
8 towels and then I had brought in a bunch of towels and linens
9 earlier that morning so she got a towel and folded it in half
10 and wrapped it with a towel.

11 Q: All right and when you got to Dr. Dawson's office, how
12 did the towel do?

13 A: It was bloody.

14 Q: All right. Tell us what Dr. Dawson did for you?

15 A: He had me go in the back room and I laid on my stomach.
16 Again, I've not seen the wound and he cleaned it up and then
17 he had me -- I had an x-ray taken right there in his office
18 and then he stitched the wound up.

19 Q: All right. How long were you at his office? Any idea?

20 A: I'm not sure, maybe two hours.

21 Q: All right. Were you given any kind of medications at
22 all?

23 A: Yes. He gave me some pain medicine and he numbed my foot
24 so that he could stitch it up.

25 Q: All right and did the pain medication help at all?

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1 A: Not really.

2 Q: Okay. How about the stitching up? How did that go?

3 A: For that day, it worked.

4 Q: All right. Now, as you left Dr. Dawson's office, who
5 were you with?

6 A: I was with Carol Dawson.

7 Q: And where was she taking you?

8 A: She took me back to the house and followed me back to the
9 pool house to make sure I could drive.

10 Q: Okay. Back to your son's pool house?

11 A: That's correct.

12 Q: All right. Tell us how you got along at that point?

13 A: My foot was propped up and I was in for the duration.

14 Q: All right. Now, what was your understanding of what you
15 could and couldn't do at that point?

16 A: He told me that I had torn, he wasn't sure how much, the
17 Achilles tendon and that he had fixed the exterior, but the
18 next couple of days would say what -- how bad the injury was
19 to the Achilles tendon.

20 Q: What were you supposed to do and not do?

21 A: I was not supposed to go out and party. I was supposed
22 to go home and have a relatively easy weekend.

23 Q: Okay.

24 A: He said try and keep your foot up as much as you can.

25 Q: All right and were you to come back and see Dr. Dawson?

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1 A: Yes. This was on a Thursday that he was going out of
2 town so I was to come back Monday morning.

3 Q: All right. So you knew that already?

4 A: Yes.

5 Q: All right. Tell me how you did Thursday?

6 A: I took my pain medicine.

7 Q: Okay. Did you go out of the house?

8 A: No.

9 Q: How about Friday?

10 A: Friday, I did go out of the house.

11 Q: All right. Where did you go on Friday?

12 A: Well, I had to pay my rent at the storage unit.

13 Q: Okay, Carolina?

14 A: Carolina Storage, mm-hmm.

15 Q: All right.

16 A: So Carol came back and picked me up so that I wouldn't
17 have to drive and took me so that I could pay the rent.

18 Q: Okay and do you remember about what time of day that was?

19 A: Before lunch, ten or eleven.

20 Q: All right. Do you remember who you spoke to at Carolina
21 Storage?

22 A: Dan Comfort.

23 Q: All right and can you tell us about that conversation?

24 A: Yes. As I went in to pay the rent, I said something
25 happened yesterday and I think you need to be aware of it and

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1 he said, oh, my goodness. So I explained to him what had
2 happened, what the doctor had said. He said why didn't you
3 stop on the way out and I said I was bleeding and I really
4 wasn't thinking about stopping and talking to anybody about
5 it. I was trying to see what I could do to get the bleeding
6 stopped.

7 Q: All right and did he take any pictures?

8 A: Yes. He made me stand a certain way and he took two
9 pictures that he said he was turning in to the corporate
10 office.

11 Q: All right.

12 A: And ---

13 Q: Okay, go ahead.

14 A: And he gave me an incident report to fill out.

15 Q: Okay. Did he tell you what to do with the incident
16 report?

17 A: To fill it out and return it to them.

18 Q: All right and that would have been August the 1st, the day
19 following the accident?

20 A: That was Friday.

21 Q: All right. Did Mr. Comfort ever show you any of the
22 pictures that he took?

23 A: No, he did not.

24 Q: Did he ever give you any copies of them?

25 A: No, he did not.

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1 Q: Do you know where they went?

2 A: No, I do not.

3 Q: All right. Now, it says that you -- You said he gave you
4 an incident report?

5 A: That's right.

6 Q: Did you take it with you?

7 A: Yes, I did.

8 Q: All right. Now, what happened to that? Did you fill it
9 out?

10 A: I lost it. I really don't know because I was home that
11 weekend. I had surgery on Monday. My children moved me into
12 my house from the pool house to the house. I have no idea
13 where that piece of paper is.

14 Q: Okay. You lost it?

15 A: It's gone.

16 Q: All right. So it did not get filled out, did it?

17 A: No, it did not.

18 Q: Okay. Now, tell us about that Friday. Did you get out
19 of the house to do anything other than go pay your storage
20 rent?

21 A: No, that was all I did.

22 Q: All right.

23 A: And then Carol brought me back to the pool house.

24 Q: Okay. How did you get along that day?

25 A: With some more pain pills.

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1 Q: Okay. Were you using any kind of crutches, wheelchair,
2 anything like that?

3 A: I had one crutch.

4 Q: Okay and were you using that?

5 A: Well, yes, but I really wasn't moving around except to
6 get up and go to the bathroom.

7 Q: Now, tell us about Saturday. How were you doing that
8 day?

9 A: Can we back up to Friday?

10 Q: Sure.

11 A: My sons were out of town and I had told them I would feed
12 their dogs. So I did get in the car Friday night.

13 Q: Okay.

14 A: And my son where the pool house was, I fed his dog. Then
15 I got in the car and drove a half a mile to my other son's
16 house to feed his dog that was in the back yard.

17 Q: Okay. Was there anybody else that could have done that
18 for you?

19 A: Maybe, probably.

20 Q: Okay. Why did you do that?

21 A: Because they asked me to do it.

22 Q: Okay.

23 A: I mean when they -- Well, that was what we did. When
24 they went out of town, I would take care of the dogs.

25 Q: All right and did you go to your son's house?

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1 A: Yes, I did.

2 Q: All right. Did -- Tell us how you did?

3 A: I did fine. I hopped up the steps, I opened the door,
4 went in, fed his dog, hopped on one foot down the steps, got
5 back in the car.

6 Q: Okay and then went home?

7 A: And went home, went home to the pool house.

8 Q: All right. Were you to do that again on Saturday?

9 A: Yes, I was.

10 Q: All right. Tell us what happened that day?

11 A: I fed the dog that lives near the pool house and when I
12 got in my car, it had been raining. I waited until there was
13 a break in the rain and then I went to my younger son's house
14 to feed his dog. It started raining again and so I tried to
15 get up the steps like I did the night before.

16 Q: All right. Tell us exactly how you did that, Ms. Lynch?

17 A: I put the crutch down.

18 Q: Okay.

19 A: And I held on to the side railing and hopped up on my
20 left foot, not putting my right foot down.

21 Q: All right. Were you putting any weight at all on your
22 right foot?

23 A: No, not at that time.

24 Q: All right. Tell us what happened?

25 A: So I managed the first step and then somewhere in-between

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1 the first step and the second step, I fell.

2 Q: All right and what happened?

3 A: I heard, "Pop, pop."

4 Q: And what did you think had happened?

5 A: I thought I had popped the stitches. At this point, I'm
6 on my bottom ---

7 Q: You'd fallen?

8 A: --- in the rain.

9 Q: All right. After you heard the pop, pop and had gotten
10 up off the ground, how did you get back to the car?

11 A: I crawled up the stairs then because I still had to feed
12 the dog.

13 Q: Okay.

14 A: I crawled through the house. My crutch, I left it on the
15 steps, and fed the dog and then I hopped down the steps,
16 picked up my crutch, and hopped to the car.

17 Q: All right and went back home?

18 A: Oh, you bet.

19 Q: All right. Now, tell us how you were doing that day
20 after you got back home?

21 A: Well, after I -- after I got back home, I called one of
22 my best friend's who's a nurse and I asked her if she could
23 come to the house, to the pool house, because it was bleeding
24 through the bandage and I had heard a pop, pop and I thought
25 maybe I had popped some of the stitches. She said she'd be

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 right over.

2 Q: Did she come over?

3 A: She came right over.

4 Q: All right. Now, at that point, tell us what was hurting?

5 A: At that point, my -- my foot was still hurting.

6 Q: Okay.

7 A: But just my foot on that Saturday night.

8 Q: All right. Now, what did -- When your friend came over,
9 what is it she did for you that evening?

10 A: She put -- She -- I had pulled two stitches out and she
11 put sterile strips over it to hold it, but she also told me I
12 had to call Dr. Dawson right then.

13 Q: All right and that was Saturday?

14 A: That was Saturday night.

15 Q: All right. Did you call Dr. Dawson?

16 A: Yes, I did.

17 Q: All right and without -- without telling us what he said,
18 what was your plan from that point forward? What was it you
19 were supposed to do?

20 A: Be sure and be at his office at nine o'clock in the
21 morning and don't feed the dogs anymore.

22 Q: All right and did you comply with both of those requests?

23 A: Absolutely.

24 Q: All right. Tell me how you got along Sunday before going
25 to see Dr. Dawson?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: Sunday when I woke up, not only was my foot hurting, but
2 the calf of my leg was just throbbing like a headache or
3 earache.

4 Q: Okay.

5 A: I couldn't figure out what that was about so I called my
6 friend, Nurse Claire, again and she came over and she said she
7 didn't know for sure, but I probably had completely severed
8 the Achilles tendon and it had rolled up into my calf ---

9 Q: Okay.

10 A: --- like a yo-yo.

11 Q: All right and Sunday I assume you took some pain meds?

12 A: Oh, yes, sir.

13 Q: Did you stay off of it?

14 A: Oh, yes, sir.

15 Q: All right and did you talk to Dr. Dawson at all on that
16 Sunday?

17 A: No.

18 Q: Okay. Were you at his office on Monday morning?

19 A: Yes, I was.

20 Q: All right and tell us about that. How did you get there?

21 A: His wife came and picked me up and took me to his office.

22 Q: Dr. Dawson's wife?

23 A: Dr. Dawson's wife came and picked me up.

24 Q: All right and do you remember about what time that was?

25 A: He told me to be there before nine o'clock.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right and y'all did, I presume?

2 A: We were.

3 Q: All right. Tell me what was going to happen at that
4 point. You went to see Dr. Dawson. What was the plan right
5 then?

6 A: He was to check it to see if I had worse flexibility than
7 I had on Thursday and I was in hopes that he'd put the
8 stitches back in.

9 Q: All right. As far as flexibility of your foot goes,
10 could you move it?

11 A: I could move it, but I couldn't walk on it.

12 Q: You couldn't walk on it?

13 A: No.

14 Q: All right. Did Dr. Dawson put the stitches back in?

15 A: Yes, he did.

16 Q: All right and where did he send you?

17 A: He told me that he was putting me in the hospital that
18 day ---

19 Q: Okay.

20 A: --- which was Monday, because he could see that I had
21 some cellulitus.

22 MR. SHEALY: Your Honor, I'm going to object to the
23 hearsay.

24 MR. BARTH: No problem, Your Honor.

25 THE COURT: Objection sustained.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: He sent me to the hospital that day.

2 Q: Where did he send you?

3 A: To Carolinas Hospital.

4 Q: All right and what was going to be done for you at the
5 hospital?

6 A: The surgery was scheduled for first thing Tuesday morning
7 and he was going to give me I.V. antibiotics by I.V.

8 Q: All right. Did you go check in the hospital?

9 A: Yes, I did.

10 Q: All right and that day, tell us what they did for you in
11 the hospital?

12 A: They hooked me up to an I.V. and -- and there I sat.

13 Q: Okay, until the ---

14 A: Layed on the bed.

15 Q: All right. Until the next day?

16 A: Until the next day.

17 Q: How was your ankle doing at that point?

18 A: I was getting scared and everything hurt.

19 Q: Okay, all right. Tell us about the surgery. It was
20 going to be done the next day?

21 A: It was to be done on Tuesday morning.

22 Q: All right. Now, when you woke up on Tuesday morning,
23 what time of day did they do the surgery? How long after you
24 woke up was it? Do you remember?

25 A: I think they took me down like at seven thirty that

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 morning.

2 Q: Okay. Tell me what the last thing is you remember before

3 they put you to sleep that morning?

4 A: The last thing I was thinking or feeling?

5 Q: Both.

6 A: Well, I was feeling a lot of pain and I was supposed to

7 go on a trip the next weekend and I was wondering if I had

8 just blown that that I'd paid for six months before.

9 Q: All right and then they did the surgery. What's the

10 first thing you remember when you woke up?

11 A: I was crying as they pushed me back to my room.

12 Q: Okay. Do you have any clue why you were crying?

13 A: Yes, I do.

14 Q: Why?

15 A: They told me I would not be going to Cozumel that

16 weekend.

17 Q: All right. You'd blown the trip?

18 A: I'd blown the trip.

19 Q: All right. Now, after the surgery, what did they do for

20 you?

21 A: I remained in the hospital for two more days and then

22 they were -- It was in a cast after the surgery.

23 Q: Okay.

24 A: And then I was transferred by ambulance to Cedar Tower

25 for rehab.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: Okay. What were they going to do for you at Cedar Tower?

2 A: Teach me how to get along on one foot, how to get in and
3 out of the shower, how to get to the toilet, how to stand and
4 wash my hands on one foot.

5 Q: You were taken there by ambulance?

6 A: By ambulance from Carolinas to Cedar Tower.

7 Q: All right. Do you remember how long you were in the
8 hospital at Cedar Tower?

9 A: A week and a half.

10 Q: All right. Now, what were they doing for you during that
11 week and a half?

12 A: I had physical therapy twice a day.

13 Q: Can you tell the jury what -- how that was and what they
14 were doing for you?

15 A: Yes. I was in a wheelchair and I would go down to
16 physical therapy in a wheelchair and they were trying to show
17 me how to get in and out of the shower on one foot. They were
18 showing me how to get in and out of the wheelchair on one
19 foot. They also were having me do exercises so that my thigh
20 -- the muscles would remain tight in my thigh on the right
21 leg.

22 Q: How many times a day were you doing the therapy?

23 A: Twice.

24 Q: Twice a day?

25 A: Twice a day.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

- 1 Q: Do you remember about how long it would last?
- 2 A: Two hours in the morning and two hours in the afternoon.
- 3 Q: How was that?
- 4 A: Painful.
- 5 Q: Were you getting better?
- 6 A: I don't know.
- 7 Q: Were you learning how to get in and out of the ---
- 8 A: I was learning how to get in and out and forward, but,
- 9 no.
- 10 Q: Were you taking any medicine during the time you were at
- 11 Cedar Tower?
- 12 A: Oh, yes.
- 13 Q: What kind of medicines were you taking?
- 14 A: The pain medicines.
- 15 Q: All right and ---
- 16 A: Muscle relaxers.
- 17 Q: Did they seem to be helping at all?
- 18 A: Maybe.
- 19 Q: Okay. Now, some of the documents that Carolina Storage
- 20 had provided to us through this litigation says that you
- 21 called up to their office on August the 8th, which would have
- 22 been about eight or nine days after the accident. Do you
- 23 remember anything about that call?
- 24 A: Yes. I called to talk to Dan Comfort to tell him I had
- 25 no clue where the incident report was and I hadn't forgotten

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 about it, but that I was in the hospital, had surgery, and had
2 been moved to rehab.

3 Q: Okay. Now, after you got out of the hospital, where did
4 you go?

5 A: The rehab?

6 Q: Yes, ma'am.

7 A: To my house, 918 Lorraine.

8 Q: All right and do you remember at what point Dr. Dawson
9 was going to take the stitches out?

10 A: No, I don't.

11 Q: Do you remember how long they stayed in by any chance?

12 A: Well, he told me that I had to be in a cast for three to
13 six months.

14 Q: Three to six months?

15 A: Yes.

16 Q: All right. Now, the company's records show that you were
17 back up -- You went to their office on August the 18th. Do you
18 remember that, you and your daughter-in-law?

19 MR. SHEALY: Your Honor, I would object to relevance.

20 THE COURT: Can y'all approach for a minute?

21 MR. BARTH: Sure.

22 (Whereupon, a bench conference is held out of the hearing
23 of the jury.)

24 THE COURT: I mean you obviously know what the response
25 is. I don't, to determine whether or not any of it is

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 relevant.

2 MR. BARTH: She's going to say that she went back up
3 there and asked for another copy of the incident report
4 because she lost it and he said they don't have anything that
5 applies and that's what prompted her to write the statement
6 that she wrote which I'm going to once again attempt to
7 introduce with the double hearsay taken out. I'll show you.

8 THE COURT: Okay.

9 MR. BARTH: Just -- And I can go get it, Your Honor, and
10 show you exactly what I -- what I propose because I do think I
11 have to proffer it for the record.

12 THE COURT: Do you want to proffer it in front of the
13 jury?

14 MR. BARTH: Well, I'd like to get it in.

15 THE COURT: Well, I ain't letting it in.

16 MR. BARTH: No matter what?

17 (Whereupon, the bench conference ends.)

18 THE COURT: Ladies and gentlemen, I'm going to have to
19 ask you to step to the jury room for just a second. Do not
20 discuss the case. I'll get you back out here as soon as I
21 can, okay?

22 (Whereupon, the jury leaves the courtroom at 3:59 p.m.)

23 THE COURT: All right. Go ahead and proffer whatever
24 you're going to proffer, Mr. Barth.

25 MR. BARTH: Thank you, Your Honor.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

DIRECT EXAMINATION PROFFER

1
2 BY MR. BARTH:

3 Q: Ms. Lynch, when you went back up there on the 18th, did
4 you take the incident report with you?

5 A: No, I did not.

6 Q: All right and did you have any conversation with Mr.
7 Comfort, their manager, about an incident report.

8 A: Yes.

9 Q: And what did you tell him?

10 A: I told him that somewhere in the move the incident report
11 was lost, that I had lost it and could I have another one.

12 Q: Okay and his response?

13 A: No.

14 Q: Okay and as a result of that, what did you do?

15 A: I wrote a letter to whom it may concern as to the
16 incident.

17 Q: Is that Plaintiff's Exhibit Number 4?

18 A: Yes.

19 Q: All right.

20 A: This is it.

21 MR. BARTH: If Your Honor please, what I would propose,
22 counsel's objection on one front was that it was hearsay
23 within hearsay and my presumption was he was referring to the
24 comments that she attributed to Dr. Al Dawson about nicking or
25 tearing the Achilles tendon, which we propose to take out and

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1 introduce it that way. Our position is it's relevant on a
2 number of fronts really.

3 THE COURT: Mr. Shealy?

4 MR. SHEALY: Your Honor, that cures the hearsay within
5 hearsay, but it still is her statement of, you know, her prior
6 statement that's out of court. It would be one thing if I
7 were seeking to introduce it as to impeach her, but I don't
8 think a party can introduce its own prior consistent
9 statement.

10 THE COURT: Let me ask this question. Did she write this
11 letter pursuant to Mr. Comfort telling her to write it or
12 asking her to write it? She did it of her own volition, at
13 least that's what I've heard here.

14 MR. BARTH: Let me -- Let me look at their -- at their
15 computer notes, Your Honor, to be absolutely positive and I
16 can ask her the question, Your Honor, but a subsequent exhibit
17 that we're going to have to redact and put into evidence, the
18 defendant's computer notes, "requested the incident report as
19 she lost the one I gave her on 8/1. I told her we don't have
20 a specific form to the circumstances of her injury."

21 And then we've got to take out the part about any
22 paragraph eleven indemnification. "She stated she would fill
23 out a description of the injury on personal paper and bring a
24 copy to us. I took a picture of her casted ankle and put it
25 in her file." I mean it's reflected in their notes and this

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 is exactly what she did in ---

2 THE COURT: Well, I'll allow you to ask her about it and
3 ask her what she told them, but I think -- I don't think it's
4 admissible. I don't think it's admissible under the rules,
5 under Rule 801, Rule 801, I don't think it's admissible. I
6 mean it's ---

7 MR. BARTH: Well, I would -- I guess I'll proffer it at
8 this point since the jury is out. I'll mark it. It's been
9 marked Number 4 for identification only.

10 THE COURT: Okay.

11 (Whereupon, Plaintiff's Exhibit Number 4, the written
12 statement, is marked for identification only.)

13 THE COURT: All right. I think under Rule 801(d),
14 801(d), it says a statement is not hearsay if, and it talks
15 about prior statements by witnesses and under 801(a), it
16 defines statement, which is oral or written, oral or written.

17 "The declarant testifies at trial or hearing and is
18 subject to cross examination concerning the statement." If
19 you stop there, it's not hearsay, and then it goes on to say,
20 "and the statement is inconsistent with declarant's
21 testimony." Her testimony here I assume is consistent with
22 what that letter says.

23 "Or consistent with declarant's testimony and is offered
24 to rebut an express or implied charge against the declarant of
25 recent fabrication or improper influence or motive."

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 MR. BARTH: And our position. ---

2 THE COURT: That's not the case it is right now, at least
3 that hasn't been thrown out there yet that they're claiming
4 that this is recent fabrication and that statement was written
5 beforehand. They're not claiming that so I don't think it
6 falls within those. I think it's hearsay. I think it's
7 clearly hearsay under the rules.

8 I may be wrong, but I think -- I think it is, Mr. Barth,
9 and therefore, I am going to exclude it. But certainly, if
10 I'm wrong, please -- I think you've already had it marked as
11 an exhibit and certainly, if I'm wrong, I want it in the
12 record to make sure it's protected for you. Okay?

13 MR. BARTH: Yes, sir. I just note and I'm certainly not
14 arguing with Your Honor, just note. I mean our position is it
15 would come in under, number one, state of mind, my client's
16 description of her state of mind and extent of her injuries,
17 and number two, notice to the defendant, and number three, it
18 supports exactly -- It supports exactly the evidence that will
19 be coming in from the defendant themselves that he wouldn't
20 give her another incident report so she had to do her own.

21 THE COURT: Right and I don't think -- I certainly --
22 Your objection is certainly noted. I think -- I mean I don't
23 think that's a contested issue by them. Is it, Mr. Shealy?

24 MR. SHEALY: Your Honor, it's not contested that she had
25 the -- that she suffered the injury.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 THE COURT: But she's testified that she was given an
2 incident report, that she lost the incident report, that
3 another one was not provided to her or would not be provided
4 to her. You're not going to contest that, are you? That is
5 my question.

6 MR. SHEALY: No, I am not.

7 THE COURT: If you do contest it, then I think you're
8 opening the door possibly for it to come in.

9 MR. SHEALY: I agree.

10 THE COURT: Okay?

11 MR. SHEALY: Yes, sir. Yes, sir.

12 THE COURT: All right, anything else, Mr. Barth, before I
13 bring the jury back out?

14 MR. BARTH: Now, I don't want to run afoul of Your
15 Honor's ruling, but can I ask her was she given -- She asked
16 for another incident report and was she given one?

17 THE COURT: Absolutely, you can ask her that. Any
18 objection to that, Mr. Shealy?

19 MR. SHEALY: No, Your Honor.

20 THE COURT: And absolutely, you can ask her that.

21 MR. BARTH: Okay.

22 THE COURT: Okay?

23 MR. BARTH: Okay.

24 THE COURT: All right, bring us the jury, please, ma'am.

25 BAILIFF: Yes, sir.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 (Whereupon, the jury enters the courtroom at 4:06 p.m.)

2 THE COURT: Can the lawyers approach for just a second
3 while they're coming out so I don't have to stop her?

4 (Whereupon, a bench conference is held out of the hearing
5 of the jury.)

6 THE COURT: I think that she can certainly testify that
7 she wrote them a letter and what she told them in the letter.

8 MR. BARTH: Okay.

9 THE COURT: And you can cross examine her on that. There
10 ain't no question you can do that.

11 MR. BARTH: Okay.

12 THE COURT: Okay?

13 MR. SHEALY: Mm-hmm.

14 THE COURT: I've got to agree with you.

15 MR. BARTH: Huh?

16 THE COURT: I agree.

17 MR. BARTH: Okay.

18 THE COURT: Absolutely, you can do that.

19 (Whereupon, the bench conference ends.)

20 THE COURT: Mr. Barth?

21 BAILIFF: There's one more.

22 THE COURT: Hold on, I'm sorry. I hope I gave everybody
23 enough time to go to the rest room, but if I didn't, we'll
24 maybe be getting out of here shortly. Okay? Mr. Barth,
25 you're recognized. You may continue, sir.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 MR. BARTH: May it please the Court.

2 THE COURT: Yes, sir.

3 CONTINUED DIRECT EXAMINATION

4 BY MR. BARTH:

5 Q: You were back on the 18th of August in the office?

6 A: That is correct.

7 Q: All right and who did you speak with from Carolina Self
8 Storage?

9 A: Dan Comfort.

10 Q: All right and why were you back up there?

11 A: They -- I'd received a call that they were changing the
12 keys, that my lock that they had given me originally was not
13 the right lock all of a sudden and it had been the right lock
14 since May and this was in August and so he wanted me to come
15 back up there to get the new keys and to hand him the old
16 keys.

17 Q: All right and did you do that?

18 A: Yes, I did.

19 Q: All right. Was there any conversation about an incident
20 report?

21 A: Yes. He asked me if I had the incident report.

22 Q: That he had given you previously?

23 A: That he had given me previously.

24 Q: What did you tell him?

25 A: I told him that in the move I had no clue where it was.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right and what did you ask him? Did you ask him for
2 another one?

3 A: Yes. I asked him for another incident report.

4 Q: All right and what was his response?

5 A: No, we don't have any that would fit this situation.

6 Q: All right and as a result of that, what did you do?

7 A: I said then, well, in lieu of the incident report, I
8 would just do a summary of what's happened since July 31st and
9 he said that will be fine ---

10 Q: All right.

11 A: --- to submit it.

12 Q: Did you do that?

13 A: Yes, I did.

14 Q: Did you submit that to him?

15 A: Yes, I did.

16 Q: All right. How did you get it to them?

17 A: Mailed it.

18 Q: All right. Now, on that occasion you went on the 18th,
19 were there any pictures taken or only that one time?

20 A: At this point, I was in a cast. I don't -- I really
21 don't remember whether he took pictures of the cast or not.

22 Q: All right and was that pretty much all the dealings you
23 had with Mr. Comfort?

24 A: Yes. We just exchanged the keys and exchanged the
25 conversation about the incident report.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right. Now, the next couple of weeks, you're home in
2 a cast. How are you getting along?

3 A: Getting pretty stir crazy in a wheelchair.

4 Q: Were you able to get around at all?

5 A: Around in a wheelchair.

6 Q: Okay. Did you walk at all?

7 A: No, I did not walk.

8 Q: All right. How about crutches?

9 A: No. I was not on the crutches at that point. It was
10 totally the wheelchair and the door had to be taken off for me
11 to get into the bathroom because it wasn't big enough for the
12 wheelchair. I had to jump and hobble from the wheelchair to
13 the toilet.

14 Q: All right. Now, did you have home health coming to see
15 you at that point?

16 A: Not at that point, but I did have Comfort Keepers.

17 Q: Okay, Comfort Keepers?

18 A: Yes.

19 Q: Who are they?

20 A: Comfort Keepers are like adult babysitters.

21 Q: Okay.

22 A: Because I had a lot of doctor's appointments and places
23 and I couldn't drive, it was my right foot. So my children
24 had hired Comfort Keepers to come and stay with me from seven
25 in the morning until five thirty at night so they could take

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 me to the doctor's office or the hospital or wherever I needed
2 to go. They could go to the grocery store for me, etcetera.

3 Q: And were you getting any kind of therapy at that point?

4 A: Yes. Then they started coming to the house for home
5 therapy.

6 Q: All right and what were they doing for you?

7 A: Again trying to make sure that I was using muscles in my
8 upper leg.

9 Q: How often were you going through that therapy?

10 A: They came to the house and they would come four days a
11 week.

12 Q: For four days a week?

13 A: Yes.

14 Q: All right and did you do all right with that?

15 A: I did all right with that.

16 Q: How long did they come for therapy?

17 A: Until the next time that I went into the hospital.

18 Q: Okay. Now, Dr. Dawson's notes look like you went back to
19 him in early September. You were at his office?

20 A: That's correct.

21 Q: Can you tell the jury what was going on that caused you
22 to go back to him at that point?

23 A: Yes. I had noticed an odor. I was -- My foot was in a
24 cast and I asked him if he could please show me how to wash my
25 toes because I obviously didn't know how to do it. I was

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 trying to do it two and three times a day and there was an
2 odor and I wasn't doing something correctly.

3 Q: And did your condition, your ankle, seem to be getting
4 any better or any worse?

5 A: It wasn't getting any better as far as pain.

6 Q: All right and when you washed it two and three times a
7 day, did the odor get any better?

8 A: No. I would just be able to wash my toes.

9 Q: Okay. What did Dr. Dawson show you how to do, if
10 anything?

11 A: He took the -- He said, well, let's take the cast off and
12 see what's going on.

13 Q: All right and when he did that, what happened?

14 A: It was awful.

15 Q: Tell -- Tell us what you mean by that. What was the
16 condition of your wound?

17 A: It was obviously infected and where he had sewn it up and
18 across, as far as like this, it had all come apart.

19 Q: Okay and when he did that, took the cast off, saw the
20 condition of your wound, where did he send you?

21 A: He told me that he would go ---

22 MR. SHEALY: Your Honor, objection.

23 THE COURT: Objection sustained.

24 Q: Did you have a conversation with Dr. Dawson at that
25 point?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: Yes, I did.

2 Q: All right. Was he going to help you from that point on
3 or was someone else?

4 A: He wanted me to see a plastic surgeon.

5 Q: All right and did you agree to do that?

6 A: Absolutely, yes.

7 Q: Who did he refer you to?

8 A: Gerald Conner.

9 Q: And did you know Dr. Conner?

10 A: No, I did not.

11 Q: And did you see him on September the 3rd of '08?

12 A: Yes.

13 Q: All right.

14 A: I made an appointment for that afternoon.

15 Q: All right. At Dr. Conner's office?

16 A: At Dr. Conner's office.

17 Q: Now, don't get into what he said, but tell me about that
18 visit. What did he do for you?

19 A: He -- I don't know how to say this without saying what he
20 said. He could possibly put a skin, it's a man-made skin,
21 over it to see if it would take because the gap was getting
22 very large.

23 Q: The wound was getting bigger?

24 A: The wound was getting larger and to put the skin over it,
25 it would protect it so it wouldn't stay infected.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right. Now, at that point, did you go home or did
2 you go in the hospital?

3 A: At that point, I went home because he scheduled me for
4 the next day.

5 Q: All right. What was going to happen the next day?

6 A: Out-patient surgery.

7 Q: Okay.

8 A: And he was going to apply this man-made skin, Integra.

9 Q: All right. Did you go to the hospital?

10 A: Yes, I did.

11 Q: Where did you go?

12 A: To McLeod.

13 Q: Okay and Dr. Conner did the surgery on you?

14 A: Yes, he did.

15 Q: All right. How long did you stay in the hospital?

16 A: It was out-patient.

17 Q: Okay.

18 A: So just until late that afternoon.

19 Q: Were you put to sleep for the procedure?

20 A: Yes, I was.

21 Q: When you woke up, tell me how you felt?

22 A: I don't remember. I just don't remember.

23 Q: All right. He sent you home?

24 A: He came out to the room and gave my son a prescription
25 for an antibiotic.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right.

2 A: But before they would release me, I had to use the
3 bathroom. So that was another hour and he came back to the
4 room as we were leaving.

5 Q: All right. Did you fill that prescription, the first one
6 he gave you?

7 A: No, because we had not left the hospital.

8 Q: All right. What happened to that first prescription?

9 A: He took it back.

10 Q: All right and replaced it with what?

11 A: Another prescription.

12 Q: For what kind of medicine?

13 A: For a stronger antibiotic.

14 Q: All right and is that the one you were to take?

15 A: That was the one I was to take based on the culture he
16 took during the surgery.

17 Q: All right. Now, when he released you to go home, what
18 were your physical restrictions?

19 A: The same as they were with Dr. Dawson, not to -- not to
20 stand on my foot, but keep it up as much as possible so it
21 wouldn't swell.

22 Q: All right. Could you walk? Could you drive?

23 A: No, I couldn't drive and I couldn't walk.

24 Q: Housework? Yard work?

25 A: No.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: Now, how did you get along over the next few days?

2 A: Well, the same as I had been. I think I was to go back
3 to see him three days later.

4 Q: Okay and did you do that?

5 A: Yes, I did.

6 Q: And what was the condition of your wound at that point?

7 A: My wound had rejected the Integra.

8 Q: All right and what was done for you then? Were you back
9 in the hospital?

10 A: Yes, I was.

11 Q: And for what procedure that time?

12 A: He was going to try something else to get the infection
13 out so that possibly the Integra would work, but he said that
14 it had rejected the Integra.

15 MR. SHEALY: Your Honor, objection, hearsay.

16 Q: You had conversations with him?

17 THE COURT: Objection sustained. Go ahead, Mr. Barth.

18 Q: Did you have conversations with Dr. Conner?

19 A: Yes, I did.

20 Q: All right and were recommendations made for you?

21 A: Yes, they were.

22 Q: Did you agree to do what -- what was recommended?

23 A: Yes, I did.

24 Q: All right. Tell me the next procedure that happened?

25 What did he do for you then?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: The next -- The next procedure was to go back into the
2 hospital.

3 Q: Okay. Did you do that?

4 A: Yes, I did.

5 Q: All right and what procedures were -- were performed that
6 time?

7 A: He did a special surgery to go on the inside of my ankle.
8 He said it wasn't getting -- The injury was not getting enough
9 blood.

10 Q: All right.

11 A: And there was an artery he could go to, to feed it more
12 blood.

13 Q: All right and were you agreeable with doing that?

14 A: Yes.

15 Q: All right and did the doctor do the procedure for you?

16 A: Yes, he did.

17 Q: And were you referred to any other doctor at that point?

18 A: At that point, Dr. Conner brought in Dr. Shea.

19 Q: Okay. Did you know Dr. Shea?

20 A: No, I did not.

21 Q: Do you know what kind of doctor he is?

22 A: Yes.

23 Q: What kind?

24 A: He's in infectious disease.

25 Q: All right and were you agreeable with seeing him?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: Yes.

2 Q: All right. In general, tell us what Dr. Shea did for
3 you?

4 A: Well, he came in and looked at it and recommended yet
5 another medicine for me to go on.

6 Q: Okay and did you take the new one that was recommended?

7 A: Yes, I did.

8 Q: And what kind of medicine was it?

9 A: It was another antibiotic because I remained on the pain
10 medicine.

11 Q: Okay.

12 A: But it was a stronger antibiotic.

13 Q: Was there any point in time from the injury until this
14 that you were off of the pain medication?

15 A: No.

16 Q: All right and do you remember how long you were in the
17 hospital that time?

18 A: No, I don't exactly.

19 Q: Okay. The procedure that we just talked about, was that
20 -- Were you put to sleep for that one?

21 A: Yes, I was.

22 Q: And how did you get along after that?

23 A: I was -- It wasn't a day surgery. I was in the hospital.
24 I was admitted to the hospital.

25 Q: Okay. Do you remember how long you stayed?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: No, I do not exactly.

2 Q: The records show that you were -- You were back a few
3 days later for another surgery. Who were you seeing?

4 A: Dr. Conner.

5 Q: The plastic surgeon?

6 A: The plastic surgeon.

7 Q: And what was he going to do for you this time?

8 A: He said that nothing would ---

9 MR. SHEALY: Your Honor, objection.

10 Q: Just tell us what he was going to do for you. It's hard
11 to not say what he says. What ---

12 A: I'm trying.

13 Q: What kind of surgery did you agree to?

14 A: He wanted me to go to the hyperbaric ---

15 Q: Okay.

16 A: --- chamber.

17 Q: All right. What is the hyperbaric chamber?

18 A: It's where divers go if they've gone down too deep, but
19 it has pure oxygen.

20 Q: Okay. Was that something that was going to be done in
21 the hospital?

22 A: Yes, it was done twice a day.

23 Q: All right. Tell the jury how that -- how you did that?
24 What is it they were doing to you?

25 A: I -- They would wheel me down. It was on the first floor

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 and we had to get into this like long tube, like a rocket, and
2 then they would pressurize it and I was breathing nothing but
3 pure oxygen and that's all that was in there, hoping that that
4 would help the infection as well and we did that twice a day.

5 Q: For how long?

6 A: For a week.

7 Q: Okay. Did that seem to help any?

8 A: Yes.

9 Q: All right and once you underwent that, was Dr. Conner
10 involved again?

11 A: Yes, he was.

12 Q: All right and what was the next surgery to be?

13 A: It was a skin graft.

14 Q: Okay. Did you agree to that?

15 A: Yes, I did.

16 Q: All right. Tell -- Tell the jury about the skin graft?

17 A: Well, the wound had gaped open so wide so even for them
18 to stitch it together, it wasn't going to stay. So he was
19 going to take skin from my body and put it on my body so that
20 my body wouldn't reject it.

21 Q: And did they get skin from another body part?

22 A: My body part?

23 Q: Yes.

24 A: Yes.

25 Q: I don't mean to embarrass you, but where did they take it

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 from?

2 A: My butt.

3 Q: All right and can you tell us about that wound?

4 A: That was yet another wound.

5 Q: Okay. Was that stitched up?

6 A: That was stitched up as well.

7 Q: From that skin graft forward, how was your ankle doing?

8 A: About the same.

9 Q: Okay. In your eyes, did it seem to be getting any
10 better?

11 A: No. I was still on the same medicines.

12 Q: Okay and the pain level, how did ---

13 A: Pretty high.

14 Q: Okay. Now, how about your new wound? How did it do?

15 A: It didn't want to heal overnight.

16 Q: Okay, all right. Now, at that point, what were your
17 physical limitations?

18 A: At that point, sitting became difficult.

19 Q: Okay.

20 A: So I was laying in the bed most of the time with my foot
21 up.

22 Q: Were you able to get out?

23 A: To go to the rest room.

24 Q: Okay. Other than that?

25 A: No.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: Okay. Now, you were back in the hospital again?

2 A: Yes, I was.

3 Q: And can you tell the jury what that was for?

4 A: That was to close the wound even more ---

5 Q: Okay.

6 A: --- because it seemed to be responding to the skin graft
7 and so it was to pull the skin together even more.

8 Q: All right. Was that in-patient?

9 A: Yes, it was.

10 Q: All right and how -- How did that go?

11 A: Same as the others.

12 Q: Okay. Do you remember how long you were in the hospital
13 that time?

14 A: No, I don't, but it's at that time that they put the PICC
15 line in.

16 Q: All right and that's what I wanted to ask you about.
17 What is a PICC line?

18 A: A PICC line is a small piece of tubing that they thread
19 through your arm through your veins directly to your heart.

20 Q: All right and was that something that was done in the
21 hospital or out?

22 A: Yes, it was.

23 Q: It was in the hospital?

24 A: It was in the hospital.

25 Q: All right. Can you tell the jury where they inserted the

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 PICC line?

2 A: In my arm, in my right arm.

3 Q: In your right arm? Now, once they inserted it into your
4 arm, what did they do with it?

5 A: Well, then it goes inside your body and it goes directly
6 to your heart.

7 Q: Okay. Were you given any kind of pain medication for any
8 of that?

9 A: No, because I was already on pain medicine.

10 Q: All right.

11 A: I guess they felt like that would do.

12 Q: All right. Tell the jury how the PICC line being
13 inserted was?

14 A: Real uncomfortable because every time you'd move your
15 arm, you could feel the cord, too. So now, I can't sit on my
16 right buttocks and now I'm having trouble moving my right arm
17 and my right ankle is gone.

18 Q: Okay. For that period of time, were you getting out of
19 the house at all?

20 A: No, I was not.

21 Q: All right and did you have any home health? After they
22 put the PICC line in, did you have any healthcare providers
23 that had to come in your house?

24 A: Yes, after the PICC line. When they released me from the
25 hospital after the PICC line was put in, home health had to

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 come every morning to feed the medicine into the tube.

2 Q: All right and how long did they do that? Do you
3 remember?

4 A: Maybe a month.

5 Q: All right and they came every day?

6 A: Every day, seven days a week.

7 Q: Okay and the PICC line stayed in about how long?

8 A: I'm not sure, but he told me that I couldn't go places.

9 Like I couldn't go to a wedding or I couldn't go out to eat as
10 long as I had the PICC line in because I was opening myself up
11 for more infection as this was directly to my heart.

12 Q: Okay. So how long was it that you were actually
13 homebound?

14 A: I want to say forever, but a long time.

15 Q: Okay.

16 A: Because it was after the first of the year before the
17 PICC line was taken out.

18 Q: All right and your accident was in the summer of '08?

19 A: Yes.

20 Q: All right. When you were home for that long -- for that
21 period of time, what kind of -- What were you doing?

22 A: I was reading books and I was watching TV and I was doing
23 needlepoint Christmas pillows.

24 Q: Okay. Now, at some point as all this is going on, you
25 started to develop mental health issues, didn't you?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

- 1 A: Because I wanted to get outside.
- 2 Q: All right. Were you put on another medicine?
- 3 A: I was already on an antidepressant from the divorce.
- 4 Q: All right.
- 5 A: But they upped the antidepressant.
- 6 Q: Okay. Did that seem to help any?
- 7 A: Yes, I think so.
- 8 Q: All right. Now, as you became more mobile, what did your
- 9 children do for you?
- 10 A: Oh, well, they would offer to take me out ---
- 11 Q: Okay.
- 12 A: --- to eat at their house or, you know, to go out to eat,
- 13 bring the grandchildren over. My older son would bring his
- 14 children over every Sunday and eat. They would bring dinner
- 15 and we would eat together.
- 16 Q: Did that seem to help?
- 17 A: That helped a lot.
- 18 Q: Now, do you remember about when your last surgery was?
- 19 A: I think it was in November.
- 20 Q: Of '08?
- 21 A: Of '08.
- 22 Q: And what did they do for you that time?
- 23 A: That's when they tried the Integra one last time.
- 24 Q: All right.
- 25 A: On top of the skin graft on top of the wound.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: That would have made how many surgeries?

2 A: In total, five.

3 Q: Five surgeries?

4 A: Five surgeries since the 1st of August.

5 Q: Did the last one seem to take?

6 A: The last one took.

7 Q: All right. Since the -- Since '08 when you had that
8 fifth surgery, have you had any kind of medical procedures
9 that you -- on your ankle?

10 A: No medical procedures.

11 Q: All right. How have you gotten along?

12 A: Pretty well. I can't do some of the things I used to be
13 able to do, but it is what it is.

14 Q: All right. Tell us about that. How has it impacted your
15 life?

16 A: Well, I like to dance, shag dance, line dance, and I can
17 do that maybe one time, maybe two, and I'll pay for it dearly
18 the next day with muscle spasms. I have young grandchildren.
19 I can -- The two-year-old took off across the yard. I can't
20 run to go get him and I'm living on a street so I can't -- I
21 can't run. I know I'm 63 years old, but I sure would like to
22 wear another pair of high heels in my lifetime.

23 Q: Can you wear high heels?

24 A: Oh, no.

25 Q: What kind of shoes do you have to wear?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: I wear flats.

2 Q: Why is that?

3 A: Because it pulls too much on that tendon.

4 Q: Okay.

5 A: I'm not talking about stiletto and those kind of heels,
6 just, you know, heels.

7 Q: Okay.

8 A: Just a feminine heel.

9 Q: Now, do you have any -- any kind of weakness at all in
10 the ankle or how is that doing?

11 A: Yes. It is -- It is weaker and on days when it's rained,
12 you know, it aches.

13 Q: Okay. About how often do you have a problem with your
14 ankle either hurting or tightening up or anything like that?

15 A: The weather. The weather will determine it or a physical
16 activity, if I try and run or if I try and dance too much.

17 Q: Now, we are three, nearly four years out and does it seem
18 to be getting any better?

19 A: No, it is not.

20 Q: Okay. Is it getting any worse?

21 A: No, it's not, but I can't wear heels.

22 Q: Okay.

23 A: I can't run.

24 Q: All right. So it kind of is what it is?

25 A: It is what it is.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Q: All right. Now, the surgeries that you had, did it leave
2 any kind of scar?

3 A: Yes, it did..

4 Q: Are you -- Is there a way you can show that to the judge
5 and the jury?

6 A: I'd be glad to. Are you going to turn around?

7 Q: Yeah, I don't want to see it. I'll -- Yeah.

8 MR. BARTH: What would be the easiest way, Your Honor?

9 THE COURT: Well, the easiest thing for her would be to
10 come down here.

11 MR. BARTH: Okay.

12 THE COURT: Allow those on the front jury -- front of the
13 jury to see and then after those on the front have seen -- Or
14 well, at the same time that she's showing the front of the
15 jury, those on the back can stand up and look. Okay?

16 MR. BARTH: Okay.

17 THE COURT: Come on out this way some, Ms. Lynch.

18 MR. BARTH: Come out this way.

19 THE COURT: So they can see.

20 MR. BARTH: Okay, all right.

21 (Whereupon, the witness complies.)

22 MR. BARTH: Can y'all see that?

23 FOREPERSON: No, turn it.

24 PLAINTIFF: This way?

25 FOREPERSON: Turn this way.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 WITNESS: The skin graft was here. This is what came off
2 on the bottom.

3 THE COURT: Can y'all see on the back left side? Okay.

4 WITNESS: The initial stitches were across here. This is
5 because the Achilles tendon rolled up into my calf. So he had
6 to fish up into my calf to get the Achilles tendon to pull it
7 down. So for a year, I couldn't wear shoes with backs on
8 them. Can you see it?

9 THE COURT: Let me see.

10 WITNESS: Do you want to see it?

11 THE COURT: Yeah.

12 MR. BARTH: All right, let's see if you can do that.

13 Q: Is that about how it is?

14 A: What?

15 Q: Is that about how it is?

16 A: That's how it is.

17 Q: Okay. Now ---

18 THE COURT: Hold on a minute. Come on back around and
19 have a seat, ma'am.

20 (Whereupon, the witness complies.)

21 THE COURT: All right, Mr. Barth.

22 MR. BARTH: May it please the Court, Your Honor.

23 Q: Ms. Lynch, how about look at Plaintiff's Exhibit Number
24 5, if you wouldn't mind. Do you know what that is?

25 A: This is the tally of the expenses, doctors, Comfort

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Keepers, rehab, the hospital, anesthesia.

2 Q: Is there anything in that package that is not related to
3 the accident injuries and the subsequent treatment?

4 A: No, this is the tally.

5 Q: All right.

6 MR. BARTH: I'd move to introduce it, Your Honor.

7 THE COURT: Any objection?

8 MR. SHEALY: No objection, Your Honor.

9 THE COURT: Without objection, Plaintiff's Exhibit Number
10 5 is admitted into evidence.

11 (Whereupon, Plaintiff's Exhibit Number 5, a list of
12 medical and other expenses, is admitted into evidence.)

13 Q: Can you -- If you would, Ms. Lynch, tell -- Look at this
14 document?

15 A: Yes.

16 Q: This is the tally?

17 A: The tally is down at the very bottom of the page.

18 Q: All right and the actual bills for the surgeries and the
19 bills that are listed, are those -- Are those in the package
20 behind it?

21 A: Yes, they are. They're listed as they're listed here.

22 Q: Okay.

23 A: How it was billed.

24 Q: All right and the total of your medical bills and
25 expenses as a result of this accident are what?

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 A: \$246,068.42.

2 Q: All right. All right, Ms. Lynch, if you would, answer
3 any questions that -- that Kirby might have for you. Okay?

4 A: I will.

5 THE COURT: All right, ladies and gentlemen, what we're
6 going to do, we've been going about two hours, two hours. I
7 know we took a short break, but I know everybody from what I
8 was told did not get to go to the rest room. We're going to
9 take a bathroom break at this time and then we'll resume the
10 trial of this case.

11 I'm not sure -- Does anybody -- If you do, if anybody on
12 the jury -- We're not going to stop at five. We're going to
13 finish with the testimony of Ms. Lynch today. Does anybody
14 need to make a telephone call? Okay, I've got one juror, two
15 jurors, three, four jurors. Can the lawyers approach just a
16 second? Do each of those four that raised their hands, do
17 y'all have cell phones here? Okay.

18 (Whereupon, a bench conference is held out of the hearing
19 of the jury.)

20 THE COURT: I'm going to let them pull those four out of
21 the jury room.

22 MR. BARTH: Okay.

23 THE COURT: And let them call who they need to call. Any
24 objection to that?

25 MR. SHEALY: No, sir.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 MR. BARTH: No, sir.

2 THE COURT: Okay.

3 (Whereupon, the bench conference ends.)

4 THE COURT: All right. What I'm going to do is I'm going
5 to ask that you all step to the jury room. I'm going to ask
6 that, Mr. Propst, if you would, come over this way and, Miss
7 Francis, if one of you all would pull those four out or
8 whoever may need to make a call into this other jury room back
9 here. Give them their phones and allow them to make a
10 telephone call and if we do that, I certainly don't want
11 anybody worried about you or concerned about you, wondering
12 where you might be, but allow them to make those phone calls
13 in your presence, in your presence. Mr. Propst, if you'd come
14 around to the door while she gets those individuals out to
15 make those telephone calls and I'll get you out of here as
16 soon as I can, but I want to finish the testimony of Ms. Lynch
17 today and then we'll break for the balance of today.

18 Now, while you're back in the jury room, again, my
19 instructions remain the same. Do not discuss the case until
20 you are instructed to do so. Everybody else remain seated
21 while the jury exits the courtroom.

22 (Whereupon, the jury leaves the courtroom.)

23 THE COURT: Ms. Lynch, hold on a minute. I'm going to
24 allow you to step down. You're not allowed to discuss your
25 testimony at all with anybody, okay? You may step down.

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 (Whereupon, the witness complies.)

2 THE COURT: All right. We'll stand at ease for a few
3 minutes.

4 THE CLERK: Can we use the rest room?

5 THE COURT: Absolutely, yes, ma'am.

6 (Whereupon, there is a break in the proceedings from 4:32
7 p.m. until 4:43 p.m.)

8 THE COURT: All right, Mr. Barth, the plaintiff is --
9 Please be seated, I'm sorry. Mr. Barth, are you ready to
10 proceed?

11 MR. BARTH: Yes, sir. I -- I think it's cross.

12 THE COURT: It is, but I'm just asking ---

13 MR. BARTH: Yes, sir, I'm sorry.

14 THE COURT: --- you if you were ready before I bring them
15 back out.

16 MR. BARTH: That's fine. I'm ready.

17 THE COURT: Mr. Shealy, are you ready to proceed?

18 MR. SHEALY: Yes, Your Honor.

19 THE COURT: All right. Please bring us the jury. Ma'am,
20 I'll advise you and remind you that you're still under oath,
21 okay?

22 WITNESS: Okay.

23 MR. BARTH: Can we approach ---

24 THE COURT: Yes, sir.

25 MR. BARTH: --- for one second while they're coming in,

DIRECT EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. BARTH

1 Your Honor?

2 (Whereupon, a bench conference is held out of the hearing
3 of the jury as the jury enters the courtroom at 4:43
4 p.m.)

5 MR. BARTH: Exhibits 7 and 8 are the ones we were simply
6 -- They're marked for ID and Your Honor sustained the
7 objection, but I just didn't want to not put them in the file
8 in the record. Those are the -- Those are ---

9 THE COURT: Right, those.

10 MR. BARTH: Right.

11 THE COURT: Okay.

12 MR. BARTH: And I didn't know if you wanted me to do that
13 while they were out or how you wanted to do it.

14 THE COURT: We can do that after we cut the jury loose
15 for the day. Okay?

16 MR. BARTH: Okay.

17 (Whereupon, the bench conference ends.)

18 THE COURT: All right, Mr. Shealy, you're recognized for
19 cross examination.

20 MR. SHEALY: May it please the Court.

21 CROSS EXAMINATION

22 BY MR. SHEALY:

23 Q: Good afternoon.

24 A: Good afternoon.

25 THE COURT: But I need you to speak up, Mr. Shealy.

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 MR. SHEALY: Yes, Your Honor.

2 Q: Ms. Lynch, if you have any difficulty hearing me, please
3 let me know.

4 A: I will.

5 Q: You are -- You are a retired teacher, correct?

6 A: That is correct.

7 Q: You taught accounting at Florence Darlington Tech?

8 A: That is correct.

9 Q: And I think you have a Master's degree?

10 A: I do.

11 Q: Okay, all right. You entered into the lease with the
12 defendant on May 21st, 2008. Is that right?

13 A: That's right.

14 Q: And you knew you were leasing a self-storage unit?

15 A: Yes.

16 Q: And you knew that the unit that you were leasing was
17 climate controlled because that's what you wanted?

18 A: That's what I requested.

19 Q: All right. You could have chosen a unit in a non-climate
20 controlled building, correct?

21 A: Correct.

22 Q: Okay, but you were concerned about making sure your
23 furniture was in a climate controlled environment?

24 A: Correct.

25 Q: All right. Now, prior to the day of the accident, you

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 had been in and out of the storage unit I think you said eight
2 or ten times?

3 A: Maybe.

4 Q: All right.

5 A: Mm-hmm.

6 Q: And you'd always used that same door D?

7 A: Right.

8 Q: On those prior occasions, you had had people go there
9 with you to help you, correct?

10 A: For the most part, yes.

11 Q: All right and the door, door D, had operated the same way
12 on all of those occasions, correct?

13 A: Well, we would hold it open as two people would move
14 furniture in and out, like the piano.

15 Q: But it had a door closer that -- that you had to hold it
16 open against, correct?

17 A: Right. I had to hold it open.

18 Q: All right. So all right, the day that the accident
19 happened, there was nobody there with you, right?

20 A: That is correct.

21 Q: Okay. So you drive in past the motorized gate and down
22 to the back of the facility, correct?

23 A: Correct.

24 Q: Okay and you'd been there about thirty minutes when the
25 accident happened?

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 A: Thirty, forty-five minutes.

2 Q: Okay. So you were on your way out?

3 A: Yes. I had loaded everything in the car but the table
4 that was holding the door.

5 Q: Okay. All right and so you came out for the last time
6 after I guess locking -- You'd locked your bay?

7 A: Right.

8 Q: And you came out with anything in your hands, right?

9 A: No. I came out with something in my hand the last time.

10 Q: Okay and then did you put that in your car?

11 A: I put that in my car.

12 Q: All right and then you don't have anything in your hands?

13 A: Then I don't have anything.

14 Q: All right and you went to pick up the small table that
15 you had used to prop open the door?

16 A: Correct.

17 Q: Okay and this -- this happens as you're turning around
18 and picking up your right foot?

19 A: I -- I was facing the door to pick up the table because
20 it was up against the wall and the door.

21 Q: Right.

22 A: And I turned to walk off and I can feel the door is
23 closing quickly behind me.

24 Q: Okay. So where you are, if the door is up against the --
25 the wall, are you facing the wall when you pick up the table?

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 A: Yes.

2 Q: All right and then you turn to your left to where your
3 car is?

4 A: Correct.

5 Q: And you pick up your right foot with your intention for
6 the door to hit the sole of your foot, right?

7 A: Correct.

8 Q: Okay. You just didn't pick it up far enough and the
9 bottom of the door hit your heel?

10 A: Correct.

11 Q: Okay.

12 A: Because it wasn't level.

13 Q: Right and you were aware of that, correct?

14 A: Correct.

15 Q: Now, after you left, you've described that in detail that
16 you had to get the paper towels and you left and it was Carol
17 Dawson who was waiting at your new house. Isn't that right?

18 A: That's correct.

19 Q: Okay and she and -- and Dr. Dawson had lived next door to
20 you I think for thirty years or so?

21 A: Exactly.

22 Q: Okay and y'all are old friends?

23 A: We were. We were social friends. Carol and I were good
24 friends.

25 Q: Okay.

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 A: Yes.

2 Q: And so she took you to see Dr. Dawson when she saw your

3 ---

4 A: Right.

5 Q: --- your -- your ankle?

6 A: Correct.

7 Q: And I think you call him "Big Al". Is that right?

8 A: That's right.

9 Q: Okay, all right and so Dr. Dawson stitched up your heel
10 and told you to stay off of it for the weekend, right?

11 A: As much as I could.

12 Q: Okay.

13 A: To try.

14 Q: And he told you to keep the bandage dry, didn't he?

15 A: No. He told me that if it bled through to change the
16 dressing.

17 Q: Okay. Do you remember my taking your deposition in the
18 case?

19 A: Yes.

20 Q: Okay and I took your deposition back on December 8th of
21 2010, over a year ago, right?

22 A: Right.

23 Q: Okay.

24 MR. SHEALY: Your Honor, may I approach the witness?

25 THE COURT: Yes, sir.

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 MR. SHEALY: All right. Does the Court want to open,
2 unseal, the original or do you want me to do it?

3 THE COURT: It doesn't matter. Go ahead.

4 MR. SHEALY: Okay.

5 Q: Ms. Lynch, I'm going to hand you the original of your
6 deposition.

7 A: Okay.

8 Q: This is testimony that you gave I guess in Mr. Barth's
9 office when I was asking you questions in December of 2010,
10 right?

11 A: Correct.

12 Q: Okay and if you'll turn with me to page 62, tell me when
13 you get there.

14 A: I'm on 62.

15 Q: Okay and if you'll look at line 24 toward the bottom of
16 the page and the question that was posed to you then by me
17 was: "In his initial instructions to you on August 31, had he
18 told you to keep the bandage dry?" Your answer then was:
19 "Yes." Is that right?

20 A: That's correct.

21 Q: Okay and then the next question was: "Were you able to do
22 that?" and your answer was: "Yes, I was."

23 A: Correct.

24 Q: Okay. Now, these instructions that he gave you were
25 because he was going out of town for the weekend, right?

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 A: That's correct.

2 Q: All right. So you went -- You left Dr. Dawson's office
3 and you went home, right?

4 A: Yes.

5 Q: Okay and you were getting ready to move into your new
6 house, but were still -- still living in the pool house at
7 that time?

8 A: Yes.

9 Q: Okay. All of this, the stuff that you were taking out of
10 the storage unit was in anticipation of moving into your new
11 house?

12 A: Yes.

13 Q: Okay, all right. So you're at the pool house for the
14 weekend and this is when you feed the dog, right?

15 A: Right.

16 Q: Okay.

17 A: Dogs.

18 Q: Dogs, you fed the dogs at the house where the pool house
19 is?

20 A: At the pool house.

21 Q: And then at the son's house that lives a half a mile
22 away?

23 A: Correct.

24 Q: All right and you did that Friday night?

25 A: Mm-hmm.

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 Q: And then Saturday, you did it in the rain, correct?

2 A: No. It had been raining I believe is what I said. It
3 had been raining and stopped and that's when I left to go feed
4 the dogs.

5 Q: Okay and the -- the steps were wet, correct?

6 A: Well, yes, it had been raining.

7 Q: Okay and so you put the crutch down so that you could hop
8 up the -- the wet stairs. Is that right?

9 A: Correct.

10 Q: Okay and that's when you slipped and fell and heard the
11 pop in your -- in your leg?

12 A: Correct.

13 Q: Okay and -- and this is something you told your son in
14 advance of this weekend that you would do for him, but it's
15 something that you could have gotten somebody else to do,
16 correct?

17 A: Yes, I could.

18 Q: Now, and when you returned to the pool house, the bandage
19 was bleeding through, correct?

20 A: Correct.

21 Q: All right. Now, had you noticed it bleeding at any point
22 from the time you left Dr. Dawson's office Thursday night
23 after the accident until this point, which is I believe
24 Saturday night?

25 A: No, I don't think so.

CROSS EXAMINATION OF SUSAN ANNE BELL LYNCH BY MR. SHEALY

1 Q: Okay. You hadn't even needed to change the bandage at
2 that point, had you?

3 A: Correct. It was dry.

4 Q: All right and after the fall, not only was there bleeding
5 coming through the bandage, but it was also soaking wet,
6 right?

7 A: By the time I got back to the pool house.

8 Q: It was soaking wet because when you fell, you got the
9 bandage on the ground that was wet?

10 A: Apparently.

11 Q: Okay and this is -- This occurs in those initial two days
12 after -- after the initial cut when Dr. Dawson had told you to
13 stay off of your foot as much as you could?

14 A: To try and stay off of it. This happened on the third
15 day, third night.

16 Q: Ms. Lynch, thank you. I have no further questions for
17 you.

18 THE COURT: Mr. Barth?

19 MR. BARTH: No redirect.

20 THE COURT: All right, ma'am, you may step down.

21 WITNESS: What about this?

22 THE COURT: Just leave it right there.

23 WITNESS: Okay.

24 (Whereupon, the witness leaves the witness stand at 4:53
25 p.m.)

1 THE COURT: Can the lawyers approach for just a minute
2 for scheduling purposes?

3 (Whereupon, a bench conference is held out of the hearing
4 of the jury.)

5 THE COURT: That was brief. That wasn't as long as I
6 thought.

7 MR. BARTH: That's the quickest thirty minutes I ever
8 heard.

9 MR. SHEALY: I'm sorry.

10 THE COURT: What time do y'all want to start?

11 MR. BARTH: Whenever you say.

12 THE COURT: All right. Are there any matters that we
13 need to take up pre-trial in the morning?

14 MR. BARTH: I mean not really that I know of. Kirby and I
15 have to redact out a part of that deposition we're going to
16 deal with based on Your Honor's ruling because a lot of it
17 dealt with the lease and all of that.

18 (Whereupon, the clerk interrupts about another matter out
19 of the hearing of the court reporter.)

20 THE COURT: Well, that ain't going to last thirty
21 minutes.

22 MR. BARTH: Any other pre-trial stuff? I can't think of
23 any.

24 MR. SHEALY: I can't. No, I can't think of much right
25 this second.

1 THE COURT: Let's say nine thirty. Just ---

2 MR. SHEALY: Okay.

3 MR. BARTH: Okay.

4 (Whereupon, the bench conference ends.)

5 THE COURT: All right, ladies and gentlemen, I probably
6 allowed you to make a phone call when you may not have needed
7 to make a phone call, but just to be on the safe side. Let me
8 go ahead and tell you, we typically, you know, operate and
9 start court at about nine thirty in the morning and we
10 typically go until about five o'clock. However, there are
11 occasions that we go beyond that depending upon where we may
12 be in the -- in the course of a trial. Okay? I can't tell
13 you specifically from day to day when we're -- when we're
14 going to stop. But we try to stop right around five o'clock,
15 but it may be occasion to go further.

16 Now, what we are going to do right now is we are going to
17 stop for the remainder of today. I'm going to ask that you be
18 back in your jury room tomorrow morning at nine thirty, at
19 nine thirty, and we'll resume the trial of this case at that
20 time. During your overnight break, do not discuss the case
21 with anyone, anyone. Do not discuss the case until you are
22 instructed to do so. If anybody tries to talk to you about
23 it, you let me know and the Court will handle it accordingly.
24 Okay, but do not discuss the case with anybody until you are
25 instructed to do so.

1 Anything further from the plaintiff before I release the
2 jury for the balance of the evening?

3 MR. BARTH: No, sir.

4 THE COURT: From the defense?

5 MR. SHEALY: No, Your Honor.

6 THE COURT: All right. You all may leave. Everybody
7 else remain seated while the jury leaves the courtroom.

8 (Whereupon, the jury leaves the courtroom at 4:54 p.m.)

9 THE COURT: All right, Mr. Barth, it's my understanding
10 you had a couple documents that I had ruled that I was not
11 going to allow in that you wanted to address before we broke
12 for the balance of today. I'd be happy to hear from you at
13 this time, sir.

14 MR. BARTH: May it please the Court, Your Honor.

15 THE COURT: Yes, sir.

16 MR. BARTH: The documents that Your Honor had excluded
17 had been marked Plaintiff's Exhibits Number 7 and 8. Those
18 are the Lease Termination Notice and Intent to Vacate notice
19 that was sent to the plaintiff.

20 THE COURT: Okay.

21 MR. BARTH: And we -- We would submit those and Your
22 Honor has already ruled on the fact that they're not
23 admissible.

24 THE COURT: Okay. Well, the Court makes a finding and I
25 don't believe based upon what I've heard it is relevant and

1 that's why I'm not -- not going to allow it in. In addition
2 to the relevance issue -- That's the main issue. I just don't
3 believe that it's relevant to whether or not they were
4 negligent in this particular case. Therefore, that's why I'm
5 excluding it. Okay?

6 MR. BARTH: And I -- And the only thing we'd like to note
7 and I think I did it earlier, Your Honor, is that we -- The
8 relevance issue, I understand on the issue of negligence, but
9 we certainly think it's admissible and relevant on the issue
10 of punitive damages should we get to that point.

11 THE COURT: Okay. Objection so noted, so noted for that
12 issue, Mr. Barth.

13 MR. BARTH: Thank you, Your Honor.

14 (Whereupon, Plaintiff's Exhibits Number 7 and 8, the
15 Lease Termination Notice and Intent to Vacate, are marked
16 for ID only.)

17 THE COURT: Thank you. All right, anything else from the
18 plaintiff's counsel before we break for the balance of today?

19 MR. BARTH: No, sir.

20 THE COURT: Mr. Shealy?

21 MR. SHEALY: No, Your Honor.

22 THE COURT: I would ask that the lawyers and court
23 personnel be back here at nine o'clock ready to go. I've
24 asked the jury to be back here at nine thirty. I don't like
25 to -- Mr. Barth has tried cases with me before. Mr. Shealy, I

1 don't know that you have. I don't like to make a jury wait.
2 I don't like to make them sit back there. I don't think it's
3 fair to them. So that's why I like to deal with these pre-
4 trial matters as quickly as possible so they don't have to sit
5 back there and wait. Okay?

6 All right. I will see you all at nine o'clock in the
7 morning. Thank you.

8 MR. BARTH: Thank you, Your Honor.

9 MR. SHEALY: Thank you, Your Honor.

10 (Whereupon, the trial ended for the day at 4:56 p.m.)
11

12 --- CONTINUED IN VOLUME TWO ---
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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE NO. 2010-CP-21-2170
	)	
SUSAN ANNE BELL LYNCH,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	(VOLUME TWO - DAY TWO)
	)	
CAROLINA SELF STORAGE, INC.,	)	
	)	
Defendant.	)	
	)	

March 5-8, 2012
Florence, South Carolina

B E F O R E:

THE HONORABLE D. CRAIG BROWN, Judge; and a jury

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

KEVIN BARTH, Esquire
MALLORY BARTH, Esquire
Attorneys for the Plaintiff

KIRBY SHEALY, III, Esquire
Attorney for the Defendant

KRYSTAL J. SMITH
Official Court Reporter

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25 MARCH 6, 2012

1 (Whereupon, the trial resumes at 9:04 a.m. The jury is
2 not yet present.)

3 MR. BARTH: Good morning, Your Honor.

4 THE COURT: Will you tell Mr. Propst to hold those -- any
5 jurors that come in, hold them out there, please.

6 THE CLERK: All right.

7 THE COURT: Is that door closed?

8 THE CLERK: Yes.

9 THE COURT: All right. Are there any matters that we
10 need to take up before we resume the trial of this case this
11 morning?

12 MR. SHEALY: Your Honor, Mr. Barth sent me a redacted
13 version of Mr. Comfort's deposition ---

14 THE COURT: Okay.

15 MR. SHEALY: --- last night. I do have a couple of
16 objections to a couple of portions of that. I have not gone
17 over these with Mr. Barth, but we can. It's just a couple of
18 -- couple of places. If -- Perhaps if the Court would like to
19 have us to hand up a copy of the ---

20 THE COURT: If y'all want me to make a ruling on it, I
21 need to see it.

22 MR. SHEALY: All right. I'll hand you the version that
23 Mr. Barth provided me this morning.

24 THE COURT: Okay, thank you.

25 MR. BARTH: And, Your Honor, there is an exhibit to the

1 deposition that was introduced by Mr. Shealy at the
2 deposition. In light of Your Honor's ruling on the
3 indemnification paragraph, we have taken out the computer note
4 references to those paragraphs and that's the remaining
5 computer notes in the defendant's computer.

6 THE COURT: Okay.

7 MR. BARTH: Our -- What we anticipate doing this morning
8 -- I'm sorry it's kind of small. I can blow it up over here
9 so you can see it a little easier.

10 THE COURT: All right. We'll see if these glasses work.

11 MR. BARTH: All right. What we anticipate doing, Your
12 Honor, is reading in everything in the deposition other than
13 what we scratched out as being irrelevant and we intend on
14 introducing as our exhibit the computer notes as redacted.

15 (Whereupon, there is a pause in the proceedings for
16 review of the documents provided.)

17 THE COURT: All right, let's address first this computer
18 entry. You -- Have you seen this?

19 MR. SHEALY: I have, Your Honor.

20 THE COURT: What he's redacted on it?

21 MR. SHEALY: I have.

22 THE COURT: And what's your objection, if any, to it?

23 MR. SHEALY: I do object to it coming in as redacted. It
24 has the potential to cause confusion to the jury. I don't
25 believe, as I've indicated with respect to other potential

1 exhibits, that any of the dealings with the plaintiff after
2 the facts are relevant. There -- There's material on there
3 about late fees charged to her, things like that. None of
4 that is relevant and then with the redactions that, in
5 addition to relevance, we have a Rule 403 problem of the
6 potential to cause confusion.

7 THE COURT: Tell me specifically, Mr. Shealy, what you
8 believe will cause -- cause confusion in here.

9 MR. SHEALY: Well, the fact that it's redacted makes it
10 chopped up a bit and makes -- and raises the question
11 potentially in the jury's mind what has been removed.

12 THE COURT: Well, I mean I'm going to instruct the jury.
13 You've been trying cases long enough. You all -- You know
14 that every jury walks out of there wondering, having
15 unanswered questions. Every jury does and I tell the jury and
16 you tell the jury and I'm sure Mr. Barth will tell the jury at
17 some point in there in your closing arguments that you can
18 only, only consider the facts as you've heard from this
19 witness stand along with any evidence that's been presented.

20 It seems like in every wreck case, a jury wants a copy of
21 the accident report. I had one last week that, you know,
22 wanted an actual copy of the deposition transcript back in the
23 jury room. So I mean they always want something else. So I
24 just want to know specifically what you believe will confuse
25 -- I mean you've indicated that it being chopped up, that

1 would possibly confuse them and be concerned about what was
2 there, so to speak, but what was taken out?

3 MR. SHEALY: Right and ---

4 THE COURT: You know, I can cure that by simply telling
5 them, if you want me to bring it to their attention, by simply
6 saying, you know, some of this has been redacted by order of
7 the Court, I've made a ruling that it's not admissible and
8 you're not to consider it in any way, shape or form in your
9 deliberations as to whether or not the plaintiff has proven
10 its case that your client was negligent.

11 MR. SHEALY: Well, Your Honor, it's that -- It's that
12 potential for confusion combined with the fact that its
13 probative value is slight in my view ---

14 THE COURT: Well, I ---

15 MR. SHEALY: --- combined with the fact that we're
16 talking about contact after the fact that doesn't advance the
17 ball, as Your Honor has said, about whether or not my client
18 was negligent or not. It is ---

19 THE COURT: You're right. I don't disagree with you on
20 that part. All right, anything else on this, Mr. Shealy?

21 MR. SHEALY: Not as to that exhibit, Your Honor.

22 THE COURT: Mr. Barth, if you can step around this ---

23 MR. BARTH: Yes, sir.

24 THE COURT: --- obstacle.

25 MR. BARTH: Yes, sir.

1 THE COURT: I'll be happy to hear from you.

2 MR. BARTH: Your Honor, first of all, I would note that
3 this is their exhibit introduced by their lawyer at their
4 deposition and we're going to probably get to that point next
5 about the deposition itself, but it is a business record from
6 the defendant's corporate computers.

7 THE COURT: Well, he -- I want you to focus. He says
8 it's not relevant.

9 MR. BARTH: Okay.

10 THE COURT: It deals beyond the scope of whether or not
11 his client was negligent. Please address that for me.

12 MR. BARTH: It addresses the issue of damages, on number
13 one, because Mr. Shealy yesterday made a big point with my
14 client in front of the jury, the inference being she wasn't
15 really hurt on the day of the accident; she hurt herself two
16 days later when she fell. That's the only documentary
17 evidence that we have where they verify that the day following
18 the accident, they had in their possession photographs of my
19 client's injury and damages that this witness is going to
20 testify at the deposition he was told to get rid of by the
21 president of the company and it can't be any more relevant
22 than that on two issues: one, the intentional destruction of
23 evidence in a -- in a case where they have notice of a pending
24 claim, and number two, it is the best evidence we would have
25 of her condition the morning after the accident had the

1 defendant not destroyed it according to the witness.

2 I mean it doesn't get any more relevant than that on the
3 issue of our client's damages, as well as on the issue of
4 punitive damages. I mean the trial is not bifurcated, Your
5 Honor, and we ---

6 THE COURT: You're right.

7 MR. BARTH: You know, we -- I -- If Your Honor wants to
8 strike anything or not allow it on certain issues as it goes
9 to the jury, but the only confusion it can cause is -- is
10 where pictures are because we're going to talk a lot about
11 that over the next course -- you know, the next couple of
12 days.

13 Relevance, it's relevant on every single issue: their
14 notice of the claim, my client's injuries, my client's
15 continued communication with them, their photographs a week or
16 two later that this witness is going to say all of the
17 photographs were taken out of the file at the direction of the
18 president of the company.

19 I'm not sure I've ever had any more relevant evidence on
20 the issue of damages and destruction of evidence than this and
21 this is the only piece of evidence we have in writing that
22 verifies what this witness is going to say and the deposition
23 describes it, the deposition talks about the computer notes.
24 He gets into it actually at the questioning of the defendant's
25 lawyer.

1 THE COURT: All right, anything else, Mr. Barth?

2 MR. BARTH: Not on that issue, Your Honor.

3 THE COURT: Mr. Shealy, anything else?

4 MR. SHEALY: Your Honor, you know, notice of the claim is
5 not an issue, is not an element of any -- of any kind in -- in
6 this lawsuit. The fact that the plaintiff cut her -- cut her
7 ankle is not contested in this lawsuit. The continuing -- I
8 think the continuing relationships between the parties is not
9 an issue in this lawsuit. There are lots of things that this
10 is relevant to that aren't issues in this lawsuit and, Your
11 Honor, we just believe it's not relevant and it's not -- and
12 it -- If it has any probative value, it is far outweighed by
13 the danger of unfair prejudice.

14 MR. BARTH: I'll concede it's prejudicial to him. I mean
15 that's an admission that -- That's an admission that they had
16 evidence in their possession that this witness is getting
17 ready to say he was instructed to get rid of. I mean it
18 doesn't go to the heart of the case any more than that.

19 THE COURT: Well, let me ask you this, Mr. Barth. If I
20 recall, yesterday your client testified that photographs were
21 taken. Is that correct she testified to that?

22 MR. BARTH: Yes, sir, and our position is this is
23 documentary evidence that we're allowed to introduce from the
24 defendant's file that corroborates my client's testimony,
25 which goes directly to her credibility and which will in time

1 directly affect the credibility of the evidence the defendant
2 presents. I mean it's one thing for this witness to say that,
3 it's a whole another one for the defendant to have it in their
4 file, particularly when we get to the next issue we're
5 probably going to have to argue about this morning and I --
6 and I just simply say, Your Honor, that, respectfully, I think
7 we're entitled to put in everything, whether it's under the
8 Business Records Act, etcetera, or an admission against
9 interest by a managing agent of the defendant, all of that.
10 I'm not limited to verbal testimony. I can put in testimony,
11 verbal testimony to be corroborated by written ---

12 THE COURT: By written.

13 MR. BARTH: --- testimony and that's what this is.

14 THE COURT: All right, anything else, Mr. Barth, on this
15 issue or Mr. Shealy?

16 MR. BARTH: Not on that issue, Your Honor.

17 THE COURT: Mr. Shealy?

18 MR. SHEALY: Your Honor, just as Your Honor is well
19 aware, business records is just an exception to the hearsay
20 rule. It doesn't have anything to do with relevance. That's
21 not a -- And ---

22 THE COURT: All right. I'm going to take a look at this
23 a little more closely before I make a ruling on that. All
24 right, what else with regards to the deposition?

25 MR. SHEALY: Your Honor ---

1 THE COURT: The same issues?

2 MR. SHEALY: Actually ---

3 MR. BARTH: I'm not sure.

4 MR. SHEALY: No. No, Your Honor. The -- The -- I'm not
5 seeking to -- Well, if Your Honor will, turn to page 15.

6 THE COURT: All right, what line?

7 MR. SHEALY: Line 23 through page 16, line 7.

8 THE COURT: Through line 7?

9 MR. SHEALY: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. SHEALY: All right, Your Honor. Our objections are
12 that is un -- inadmissible character evidence that's not
13 admissible under Rule 608. It's also not relevant and again,
14 if it is relevant, if it has any probative value, it's
15 outweighed by the fact that it's -- it has -- There's just no
16 need for it to be in the -- in the record.

17 THE COURT: All right, Mr. Barth?

18 MR. BARTH: Clearly, it's relevant, Your Honor. It goes
19 to the course of dealings between this particular person
20 that's getting ready to testify about destroying evidence and
21 my client is just the opposite. She did exactly what he said,
22 including asking him to take the -- I mean including
23 cooperating with him to take pictures. I mean their -- The
24 whole focus of their defense, in addition to being it was her
25 fault, I'll give them that.

1 THE COURT: Right.

2 MR. BARTH: I mean that's -- That's part of it, but the
3 rest of it is she's not telling the truth about her injury.
4 She didn't hurt it that bad on the first day; she hurt it on
5 the second day. Her credibility is an issue, absolutely it is
6 and they've put it there and I don't know why we can't get
7 into the fact that she was always nice, polite and respectful.

8 I mean when we get to the point in the trial, Your Honor,
9 where -- where I'm going to ask the Court to be allowed to
10 publish portions of their discovery responses, I mean almost
11 every single one talks about the alleged incident, the alleged
12 incident. I don't know if their claim is it didn't happen or
13 it didn't happen when it did or it didn't happen how it
14 happened.

15 I don't know. I know what they told me in their
16 discovery answers and it insinuates that my client might not
17 have been straightforward either about how the accident
18 happened or the extent of her injuries or how she was hurt and
19 they dealt with her over the next two or three weeks and they
20 talked to her and now -- and now, the evidence is gone.

21 It's clearly relevant and Mr. Shealy's own question put
22 her -- her credibility on the hook and into evidence. It
23 doesn't have to be credibility only on the accident. It can
24 be credibility on extent of damages.

25 THE COURT: Well, I want you to address this for me, Mr.

1 Barth, under ---

2 MR. BARTH: Yes, sir.

3 THE COURT: --- Rule 608, which he's referenced here. It
4 says: "The credibility of a witness may be attacked or
5 supported by evidence in the form of opinion or reputation,
6 but subject to these limitations. The evidence may refer only
7 to character for truthfulness or untruthfulness and evidence
8 of truthful character is admissible only after the character
9 of the witness for truthfulness has been attacked by opinion
10 or reputation evidence or otherwise."

11 MR. BARTH: It says that character and traits are not --
12 Let me ---

13 THE COURT: How does what she says on page 15 through 16
14 in her cooperation directly relate to truthfulness or
15 untruthfulness character of her? I mean they -- In Mr.
16 Shealy's opening remarks ---

17 MR. BARTH: Mm-hmm.

18 THE COURT: He says Ms. Lynch is a nice lady.

19 MR. BARTH: Mm-hmm.

20 THE COURT: You're not to make your decision in this case
21 based upon how nice she is or whether or not you like somebody
22 or dislike somebody.

23 MR. BARTH: Okay.

24 THE COURT: Okay. I mean he -- He acknowledges that in
25 his opening statement.

1 MR. BARTH: Okay.

2 THE COURT: My question to you is what he's objected to
3 here on page 15 and 16 runs afoul of the rule on character for
4 truthfulness because these questions and responses relate in
5 no way to her character for truthfulness or untruthfulness.

6 MR. BARTH: Well, they -- what they do relate to, Your
7 Honor, is ---

8 THE COURT: That she's a nice lady and that she did what
9 she was supposed to do. The breach of contract claim is gone.
10 The breach of contract claim is gone.

11 MR. BARTH: Right.

12 THE COURT: If that were there, I think you certainly get
13 it in. I don't think there's any question about that because
14 they're saying she breached a contract. As a matter of law,
15 I've ruled that that is gone.

16 MR. BARTH: Okay.

17 THE COURT: That that's gone. So with ---

18 MR. BARTH: I ---

19 THE COURT: I'm sorry, go ahead.

20 MR. BARTH: I would just say, Your Honor, and I want the
21 record to be perfectly clear, I think their entire course of
22 dealing with my client, even in the face of the fact that she
23 is polite and respectful and cooperative, goes to the issue of
24 punitive damages. My client comes up there, she reports the
25 accident, she does what she's supposed to do, and the way that

1 the defendant responds to all of that is the boss says destroy
2 the evidence.

3 THE COURT: All right. If I ---

4 MR. BARTH: That goes to the course of the conduct
5 between the parties, which I believe absolutely is relevant on
6 the issue of punitive damages, Judge, if nothing else.

7 THE COURT: Okay, all right.

8 MR. BARTH: I mean she comes up there and does what she's
9 supposed to and he doesn't have a cross word to say about her
10 and then the company says destroy the photos. It is -- What
11 I'm trying to do is paint the entire picture of what happened
12 from day one until last week when we found the -- when they
13 found the witness the week before trial and they deposed him
14 and this is what the witness said, the person that they have
15 known where he was for two years and produced last week and
16 I'm going to spend a good bit of today talking about that very
17 thing, and how she dealt with them and how they responded I
18 think is absolutely relevant, if nothing else, on the issue of
19 punitive damages.

20 THE COURT: All right. I'm going to look at this a
21 little more closely along with this document, this notes
22 history. What's the next matter? Anything else?

23 MR. SHEALY: Yes, Your Honor, page 16 starting at line 15
24 through page 18, line 11.

25 THE COURT: Give me those pages again. I'm sorry.

1 MR. SHEALY: Yes, sir, page 16, line 15, through page 18,
2 line 11.

3 THE COURT: Through 18?

4 MR. SHEALY: Yes, Your Honor.

5 THE COURT: Fifteen -- Excuse me, page 16, line 15.

6 MR. SHEALY: Through page 18, line 11.

7 THE COURT: All right, they've struck through on page 17,
8 lines 16 through 24. Is that right, Mr. Barth?

9 MR. BARTH: Yes, sir.

10 THE COURT: Okay.

11 MR. BARTH: That was just us arguing over whether --
12 whether things come in or not and I didn't figure we need to
13 read that to the jury.

14 THE COURT: All right. What's your argument on that, Mr.
15 Shealy? Relevance? You noted that as your objection in here.

16 MR. SHEALY: It is. It's relevance plus Rule 403, Your
17 Honor, and again, Mr. Barth's already indicated what -- why
18 this is valuable to him is -- is this notion that we hid this
19 fellow and -- and then he's found. That's not -- Whether that
20 is true or not, and I'm not saying that it is because it
21 isn't, the fact is there was no prejudice to the plaintiff.

22 The testimony has been gotten and it raises an unfair
23 inference at this stage that we, you know, have somehow hidden
24 this witness when I did take the guy's deposition and elicited
25 the testimony about photographs that I'm not going to object

1 to this witness testifying that he took photographs because
2 that is relevant I think to what -- That's something that the
3 plaintiff has a right to -- to talk about. It does -- It's
4 documentary evidence of the plaintiff's injury, but to add
5 this to it, because we had incomplete or poor contact
6 information for this fellow, raises I think unfairly this
7 notion that we've hidden the witness when there has been no
8 prejudice to the plaintiff.

9 The testimony has been gotten from the witness in time
10 before trial and so the probative value of being able to say
11 they had your contact information all along, if that has any
12 probative value, is outweighed by this danger of unfair
13 prejudice to us making it appear that we've hidden the witness
14 that we deposed and -- and brought out the testimony prior to
15 trial. I just -- To me, that's the central purpose of Rule
16 403 is for the Court to keep out unfair inferences when
17 there's been no prejudice to the plaintiff whatsoever about
18 the fact that we took this witness's deposition on Friday. We
19 took one of the plaintiff's depositions for use at this trial
20 last Tuesday. This is what happens. The jury doesn't know
21 that, but that's just what happens in litigation.

22 MR. BARTH: Your Honor, there are discovery rules that
23 require parties to supplement their information. I'm entitled
24 to publish to the jury the information that was provided to me
25 in discovery. We're not talking about a treating physician.

1 THE COURT: But if that -- And I don't -- Well, go ahead.
2 I'm sorry.

3 MR. BARTH: We're talking about a witness, one of the
4 only two that really had any dealings with the plaintiff
5 throughout all of this, was the one that saw her from day one,
6 the one -- When Mr. Shealy says there's no prejudice, the only
7 reason that that -- I mean using the deposition is because we
8 got noticed of it last Thursday, we had to go to a hearing
9 Thursday afternoon ---

10 THE COURT: Right.

11 MR. BARTH: --- in front of Judge Nettles and he denied
12 the motion for protective order and said you can do it
13 tomorrow morning at eight o'clock, but I'll let you take two
14 depositions back to back. The only -- I mean what they're
15 talking about now and the reason I'm using it is because this
16 witness that miraculously appeared the week before trial
17 didn't say what they expected and instead said they knew where
18 it was all along, they had my information, they even called me
19 once because they couldn't find some paperwork on a deal I had
20 done, and oh, by the way, the boss said get rid of the
21 evidence.

22 Now there is absolutely no way under the sun that that
23 kind of discovery issue -- And I'm not blaming it on Mr.
24 Shealy. I told Judge Nettles that. There is no way under the
25 sun when one of the issues is the credibility of the parties,

1 particularly some of the defendant's stuff, that I can't get
2 in to evidence what this witness says about his contact
3 information. He hasn't moved the entire time. He told the
4 next manager where the photos were. They've been in control
5 of the premises until they sold it last Thursday.

6 THE COURT: Well, here's the concern that I have and Mr.
7 Shealy points -- Well, each party has a continuing obligation
8 and responsibility to supplement discovery. You hit on that.
9 When somebody does not comply with the discovery rules, that
10 is an issue for the Court to handle. I don't think that's an
11 issue to inflame the jury about or attempt in punitive issues
12 for the jury to make a decision on. If they're not or you're
13 not complying with discovery, that's an issue for me to
14 handle.

15 MR. BARTH: Okay.

16 THE COURT: Or any other judge that may be presiding over
17 it. Do you disagree with that?

18 MR. BARTH: With how you handle it and the sanctions that
19 are appropriate ---

20 THE COURT: Right.

21 MR. BARTH: --- it is for Your Honor.

22 THE COURT: Right.

23 MR. BARTH: The inference that Mr. Shealy is worried
24 about that they have somehow hidden material information and
25 hidden a material witness does go to the jury because in

1 certain circumstances when that happens, Your Honor, if we
2 hadn't have gotten lucky enough for him to miraculously appear
3 last week, we would have been arguing over whether or not we
4 were entitled to a charge of the adverse inference charge for
5 a witness who possibly they had control over, etcetera,
6 etcetera.

7 It just so happened that they found him and deposed him
8 and it just so happened that the fact that they gave us
9 incorrect information which kept us from locating that witness
10 until they produced him last week, that's exactly the kind of
11 information the jury is entitled to see because they have to
12 decide whether it was intentional. They have to decide
13 whether the defendant was trying to hide information, photos,
14 and witnesses.

15 That -- The discovery issue, Your Honor, and how to
16 handle it is for the Court. That is a sanction under the
17 discovery rules. This is not a discovery issue that I'm
18 talking about.

19 This is an issue of whether or not the defendant
20 intentionally misled the plaintiff and plaintiff's counsel as
21 to the location of evidence, the existence of evidence,
22 etcetera, because what I intend on producing, Your Honor, and
23 publishing to the jury is -- I would be asking the Court's
24 permission to do so this morning -- their May 10th, 2011,
25 standard interrogatories about names and addresses of the

1 witness, Dan Comfort, and that's who we're talking about.

2 New Jersey. Now, Dan Comfort, in his deposition, is
3 going to tell you, "I never lived in New Jersey. They had my
4 phone number and address. They knew how to find me all
5 along." And the first we hear about anything different was
6 when Mr. Shealy told me Tuesday we were going to take this
7 deposition and I was served with a Notice of Deposition on
8 Thursday.

9 That is the only way that we had any method to
10 communicate with this witness and find out what he did or
11 didn't know and that was, according to this witness, in the
12 dominion and control of the corporate defendant themselves and
13 for them to produce it the week before trial, I am -- I am
14 absolutely confident the jury is entitled to hear that.

15 If we were flipping it and the issue was whether this
16 miraculously produced witness was going to testify, it would
17 be for Your Honor to decide whether to exclude it or not, but
18 what has happened is it backfired on the defendant and what
19 they found, instead of blistering the plaintiff with something
20 we didn't know about, instead said the defendant told him to
21 get rid of the evidence and it's the reverse of the issue Your
22 Honor generally has to deal with and this is a situation they
23 created and for them to take advantage of it and keep it from
24 the jury, Your Honor, is -- I think it's clearly inappropriate
25 because it is clearly relevant.

1 THE COURT: Okay, all right. I'm going to stand down.
2 If y'all will let the jury in -- Are there any other issues
3 that we need to take up other than this on this deposition and
4 these notes?

5 MR. SHEALY: Your Honor ---

6 THE COURT: Hold on a second. Go ahead and let the jury
7 come in, please, ma'am. It's after nine thirty.

8 MR. SHEALY: Your Honor, this is something I'll confirm
9 with Mr. Barth on.

10 THE COURT: All right. I'm going to stand down for a
11 minute.

12 (Whereupon, the jurors in the hall are allowed through
13 the courtroom to go to the jury room and there is a break
14 in the proceedings from 9:36 a.m. until 10:06 a.m. When
15 the proceedings resume, the jury is not yet present in
16 the courtroom.)

17 THE COURT: All right, with regards to the notes and
18 history document, I'm going to allow that to come in. The
19 only thing, on the August 8, 2008, entry, the second line, it
20 starts a new sentence "Will" and the remainder of that
21 sentence, which goes on to the third line, is redacted.
22 "Will" needs to be redacted out of there as well. Do you see
23 what I'm talking about, Mr. Barth?

24 MR. BARTH: Yes, sir. That one -- That one word?

25 THE COURT: Yes, sir. I mean because it starts a new

1 sentence and you can then tell that the rest is redacted. All
2 right, with regards to the deposition testimony, page 15, line
3 23 through line -- excuse me, through page 16, line 7, I am
4 not going to allow. I think that runs afoul of Rule 608 and
5 therefore, I am not going to allow that.

6 MR. BARTH: How far down, Your Honor? I'm sorry.

7 THE COURT: Line 16 -- Excuse me, page 16, line 7,
8 through line 7. Page 15, line 23 through page 16, line 7.
9 All right, page 16, line 15, I think that's what it was. Is
10 that right, Mr. Shealy?

11 MR. SHEALY: That's correct, Your Honor.

12 THE COURT: Line 15 on page 16 through page 18, line 11
13 or 12 or 11, I am not going to allow. I believe, like I said
14 previously, that if there is a failure on the part of a party
15 to not comply with the continuing responsibility of discovery,
16 that is an issue for the Court to decide, not an issue to go
17 before the jury for them to potentially be inflamed about.

18 I certainly understand, Mr. Barth, and respect your
19 position on it. I certainly understand and respect your
20 position on that. However, I think that that has the
21 potential --

22 The issue in this case, the issue in this case, is
23 whether or not the defendant was negligent by virtue of the
24 door closing mechanism and the door in and of itself which
25 struck Ms. Lynch on this particular day. Those are the issues

1 and with regards to the punitive damages side of it, whether
2 or not they complied with manufacturing suggestions on how to
3 -- the speed at which this door should close and whether or
4 not they knew or should have known about these alternatives
5 that I'm going to allow in and should have used those as
6 opposed to what they did when they knew people used this door,
7 propped it open with a chair, a table, a brick, a cinder block
8 or whatever. Those are the issues that I believe -- the Court
9 believe goes to the jury on the punitive damages side of
10 things and the issues with regards --

11 Certainly the issue of the photographs being -- You're
12 entitled and I'm going to give you a spoliation charge on
13 that. I think you're entitled to that, but that's my ruling
14 on that. Anything further?

15 MR. BARTH: Yes, sir, Your Honor. With that ruling in
16 mind, I guess I need to proffer the entire deposition for the
17 record.

18 THE COURT: Why don't you just make it -- Just give them
19 the -- or have it marked as an exhibit?

20 MR. BARTH: I will do that.

21 THE COURT: That way, you don't have to read the entire
22 thing. Okay?

23 MR. BARTH: And I would also like the record to reflect,
24 Your Honor, that one of the reasons that we're attempting to
25 put in that particular evidence that they knew where the

1 witness was and didn't disclose it is because I do -- We think
2 it is relevant that the defendant has attempted and we allege
3 intentionally to prevent us from preparing and proving our
4 case through witnesses that aren't produced and through
5 documents that are destroyed.

6 I think that's relevant. I think that is critical to
7 whether or not we can sustain our burden of proof and I just
8 want the record to be clear we think we're entitled to put all
9 of that in.

10 THE COURT: I understand and ---

11 MR. BARTH: And particularly when what we're asking to do
12 is simply put in the deposition that defendant noticed and
13 defendant took.

14 THE COURT: Well, your objection -- And, Mr. Barth, as
15 you well know, I have the utmost respect for you, but I just
16 think that that -- I think my ruling that I made there is
17 correct in this situation. But if I'm not, I certainly want
18 that deposition transcript in so that if I'm wrong, then I can
19 be corrected on that. Okay? All right.

20 MR. BARTH: And we would proffer that. I'm not sure what
21 exhibit that would be.

22 COURT REPORTER: Fifteen.

23 THE COURT: Fifteen.

24 MR. BARTH: Number 15?

25 THE COURT: Yes, sir, ID only, 15.

1 (Whereupon, the deposition transcript is marked as
2 Plaintiff's Exhibit Number 15 for ID only.)

3 MR. BARTH: And then the computer notes as submitted,
4 that would be 16?

5 THE COURT: The computer notes are coming in.

6 MR. BARTH: Right. I was just trying to get my numbers
7 straight, Your Honor, so we can get them up on the screen.

8 THE COURT: Is that right?

9 COURT REPORTER: Yes.

10 THE COURT: Yes, sir.

11 MR. BARTH: Okay. On a related note -- I'm sorry. Do
12 you have any more objections?

13 MR. SHEALY: I do not.

14 MR. BARTH: On two related notes, Your Honor, we would
15 request the right to publish to the jury the discovery
16 responses they gave us with Mr. Comfort's contact information
17 on it, as well as the standard request for a list of
18 photographs in possession to which they didn't list these
19 photographs.

20 We propose to publish to the jury as well, Your Honor,
21 their supplemental answers to discovery dated January 24th,
22 2012, where they supplemented their answers to provide us with
23 a copy of the entire lease file from my client and we would
24 propose to introduce either into evidence as an exhibit or
25 simply publish to the jury the notice of taking deposition

1 dated March the 1st, as well as having Your Honor tell the jury
2 or instruct the jury as to the publication of discovery and
3 the manner and time and place of taking the depositions.

4 It's going to seem out of order if all we do is stand up
5 and read it like that without some explanation as to how it
6 happened and in conjunction with that, I propose to tell them
7 it was by notice dated March the 1st and the deposition took
8 place under court order March the 2nd, last Friday.

9 THE COURT: Mr. Shealy?

10 MR. SHEALY: Your Honor, I would just object. All of
11 that is irrelevant. I -- The -- Just because -- There's
12 nothing in the rules that says that discovery responses are
13 admissible because they came from the defendant. They have to
14 be relevant and the timing of all of this stuff, none of it is
15 relevant. We would just -- We would object to -- to any of
16 that stuff coming in for the reasons that we've given with
17 respect to some of the testimony that you will see.

18 MR. BARTH: We -- We certainly -- Your Honor, in light of
19 the deposition testimony that Your Honor just read in ruling
20 on that, under Rule 33 I'm entitled to publish their discovery
21 responses to the jury no matter what they are and the
22 discovery responses that were given to us in May of 2011 said
23 "Dan Comfort, New Jersey." That is the extent of what they
24 provided.

25 Their list of photographs didn't reference the

1 photographs that Mr. Comfort took even though their computer
2 notes did and I think I'm entitled to tell the jury that.
3 That is absolutely relevant. That is evidence that the
4 defendant had within their dominion and control and failed to
5 disclose and that is relevant evidence on my client's
6 condition, which goes to her -- goes to the extent of her
7 damages.

8 And in conjunction with that, I do think -- Your Honor, I
9 think it's the way it's generally done, that Your Honor
10 instructs them as to what the depositions are and how they
11 were taken and this one was taken pursuant to notice on the 1st
12 before trial. I mean I would propose that Your Honor do that
13 when you say on the 1st it was by court order because I
14 certainly didn't agree to it and preserved my objection at
15 that point, but we did it and here we are. But I would
16 propose that Your Honor at least -- at least put us in a
17 position where we could present that to the jury.

18 THE COURT: The date that he was deposed?

19 MR. BARTH: And the date we were noticed.

20 THE COURT: Mr. Shealy?

21 MR. SHEALY: Your Honor, the date of the notice, the date
22 of the deposition -- The date of the deposition can be -- is
23 -- I think routinely comes in, but the date of the notice,
24 whether it was by court order or not, none of that is relevant
25 and, Your Honor, Rule 33(d) says that interrogatories may be

1 published subject to they be used to the extent permitted by
2 the Rules of Evidence.

3 The Rules of Evidence continue to govern what we're doing
4 here and I mean all -- Everything that we've described about
5 relevance, about Rule 403, applies to all of this stuff. It
6 does not make a fact in issue any more or less likely whether
7 the deposition was taken by court order or not. That is never
8 admitted into evidence. The machinations of -- of the
9 litigation process and the discovery process aren't just --
10 That's what we do to get ready to put the story in front of
11 the jury.

12 THE COURT: Can you spell that word you just said for my
13 court reporter? Say that again. The machinations?

14 MR. SHEALY: Yes, Your Honor.

15 THE COURT: Okay. Did you get that, Madam Court
16 Reporter?

17 (Whereupon, laughter.)

18 THE COURT: All right.

19 MR. BARTH: Well, I do think the discovery responses are
20 relevant, particularly in light of the fact that Your Honor
21 just told us that you're inclined to provide us with a
22 spoliation charge. I mean if I ---

23 THE COURT: Well, I mean and that's -- And it's noted in
24 here in these notes that I'm going to allow in that he took
25 photographs. They are acknowledging -- Defense counsel is

1 acknowledging that photographs were taken. Is that right, Mr.
2 Shealy?

3 MR. SHEALY: That's our understanding that photographs
4 were taken.

5 THE COURT: And you're allowing that to be published
6 through his deposition that photographs were taken?

7 MR. SHEALY: That's correct, Your Honor.

8 THE COURT: All right. Give me those -- those matters
9 again, Mr. Barth, what you wanted to publish to the jury. The
10 responses to interrogatories and requests to produce ---

11 MR. BARTH: Yes, sir.

12 THE COURT: --- in May?

13 MR. BARTH: Yes, sir, and -- and I'll be glad to hand up
14 -- It's my own copy, but what we propose is their May 10,
15 2011, answers to our interrogatories. We propose to read the
16 names of Dan Comfort and Glenda Painter with the contact
17 information that was given to us. Dan Comfort's information
18 was New Jersey. Glenda Painter's contact information was the
19 defendant's work. That was the -- the location of the
20 facility. We propose to read the question about set forth a
21 list of photographs, plats, sketches, etcetera, and the answer
22 is: Copies of eleven photographs of the scene of the alleged
23 incident.

24 We also propose, Your Honor, and you probably have to
25 read this one, question 20, "Identify any person who has

1 talked with, observed or recorded the plaintiff in any fashion
2 from the time of the incident up through the present."

3 There was a long objection to that answer and then it
4 says: "Subject to the objection and without waiving it,
5 defendant's counsel has taken plaintiff's deposition and both
6 he and Jay Wallace were present with the plaintiff at the
7 inspection of the facility on January the 26th, 2011. The
8 defendant is also informed and believes that plaintiff has had
9 personal interaction with Dan Comfort and Shanda Painter since
10 the incident alleged in the complaint."

11 The relevance of that -- The relevance of that, Your
12 Honor, is -- And they were dated May the 9th, 2011, served on
13 May the 10th. The relevance of that is the fact that by their
14 own computer notes that Your Honor has now let into evidence,
15 Roger Blubaugh has been talking to her and entering notes and
16 they don't even list him as somebody that's had any
17 interaction or comment -- any contact with my client and those
18 are the kinds of discrepancies that I think go to the heart of
19 the matter.

20 THE COURT: Well, I think that Mister -- Was it Blubaugh
21 or Blumball?

22 MR. BARTH: Blubaugh. I don't know how you spell it, but
23 I think it's -- Let me see.

24 MR. SHEALY: It's B-L-A-U-G-H.

25 MR. BARTH: Okay.

1 MR. SHEALY: I'm sorry. B-L-U-B-A-U-G-H.

2 THE COURT: I'm going to leave -- This goes to my
3 previous ruling. I think these are potential discovery
4 violations that are something that the Court should make a
5 decision on, if in fact those discovery rules have been
6 violated. I'm not going to allow the publication of those to
7 the jury. I don't think it's relevant and therefore, I'm not
8 going to allow it. However, I would ask that Mr. Barth make a
9 copy of those, whatever he referred to in those responses, for
10 the record ---

11 MR. BARTH: I'll do that.

12 THE COURT: --- as identification -- for identification
13 purposes.

14 MR. BARTH: That would be Plaintiff's Exhibit Number 17?

15 THE COURT: Yes, sir.

16 MR. BARTH: For identification only?

17 (Whereupon, the discovery responses are marked
18 Plaintiff's Exhibit Number 17 for ID only.)

19 MR. SHEALY: Your Honor, the copy of Mr. Comfort's
20 deposition that I handed up?

21 THE COURT: Yes, sir.

22 MR. SHEALY: Could I ---

23 THE COURT: It's right here.

24 MR. SHEALY: Could I get it back just so I can follow
25 along when it's read in?

1 (Whereupon, the deposition copy is returned to counsel.)

2 MR. SHEALY: Thank you, Your Honor.

3 MR. BARTH: Your Honor, how will we -- How are we
4 instructed to deal with the -- the deposition itself? It's
5 kind of ---

6 THE COURT: Well, I mean I can instruct the jury that,
7 you know, depositions -- Under the rules, depositions are
8 allowed when a witness is unavailable. This witness is
9 unavailable to appear here in court and depositions are taken
10 by -- with lawyers present. The defendant is under oath or a
11 party is under oath just like they are in this courtroom and
12 they can use -- I guess use the deposition under the rules or
13 use the deposition in any way that they see fit. I mean they
14 still judge the credibility just like they would in any other
15 witness. I mean I can -- Let's see.

16 And this is the standard charge, Mr. Barth. "A
17 deposition is testimony taken under oath before trial and
18 preserved in writing or by mechanical means such as audio or
19 video tape recording. Deposition testimony may be used by any
20 party for the purpose of contradicting or impeaching the
21 testimony of another party or in certain situations under our
22 rules may be used when a witness is unavailable to appear in
23 court. You are to determine the weight to be given to such
24 deposition testimony and decide the force, effect, and truth
25 of such testimony."

1 And that's the deposition charge and I can give them that
2 charge. I'm sorry I kind of just -- I can give them that
3 charge prior to the deposition being published. I've done --
4 I do that sometimes if the lawyers ask that I do that or I do
5 it in my closing charge, you know, when I charge them on the
6 law.

7 MR. BARTH: All right.

8 THE COURT: But if you so desire for me to do it prior to
9 it being published, I'll be happy to do that.

10 MR. BARTH: Okay. That would be fine, Your Honor, and I
11 also need to, I guess since Your Honor wasn't the judge who
12 heard all of this last week, go ahead and object. The
13 telephone deposition is a problem and here's why I think I
14 ought to be able to explain the facts and circumstances around
15 it.

16 I'm not arguing with Your Honor. I understand that I
17 can't and that's coming out of the deposition, but the -- Had
18 it been disclosed in a timely fashion, had we been aware of
19 who he was in a timely fashion, we could have made
20 arrangements to comply with the rule that says live testimony
21 is preferable to telephone. Telephone is basically either by
22 agreement or court order. It's not by agreement. It was done
23 by court order.

24 THE COURT: Right.

25 MR. BARTH: Without any question. Had we been provided

1 with that information in a timely fashion, this would have
2 been a video deposition for the jury to see and hear him and
3 evaluate his testimony as they would and I just want the
4 record to be -- to be clear that's why it's coming in like it
5 is as an additional sustaining ground for letting it all in
6 because -- Well, I put it on the record.

7 THE COURT: Mr. Shealy?

8 MR. SHEALY: Your Honor, all of this was dealt with last
9 week with Judge Nettles.

10 MR. BARTH: It was. I just wanted to make sure it was in
11 this record so it's all together.

12 THE COURT: I mean I can't change the order of another
13 Circuit Court judge, but your -- Are you asking me to make
14 some other ruling, Mr. Barth?

15 MR. BARTH: No, sir. I'm just -- I'm just making sure
16 that the record is all together and all clear, that I haven't
17 waived any objections to anything, that I haven't ---

18 THE COURT: Was it -- And let me ask and I guess it
19 doesn't matter at this point since it was court ordered last
20 week. I mean was it -- Was a continuance requested so you
21 could take his video deposition?

22 MR. BARTH: No, sir. No, sir.

23 THE COURT: Because I know this trial had been set as a
24 day certain for ---

25 MR. BARTH: Yes, sir. We did not request a continuance.

1 What we requested at that point was ---

2 THE COURT: Was that it be excluded?

3 MR. BARTH: That the deposition not be allowed to go
4 forward. Now, lucky for me the judge overruled me and now we
5 know what happened to the photos, but I just want to put -- I
6 just want it all in the record so that they can't claim I
7 waived anything by now presenting this as my deposition.

8 THE COURT: Right and do you desire for me to give the
9 jury this charge before the deposition is published that I
10 asked about or do you want me to -- or is your desire that I
11 wait until the end?

12 MR. BARTH: You can wait, Your Honor. Do you want me to
13 -- Do you want me to ---

14 THE COURT: I mean it's going to be in my charge
15 regardless, but if you want me to go ahead and explain -- I'm
16 going to go ahead and explain to them because they may not --
17 They may have some questions. Y'all have already referred to
18 depositions. I'm going to go ahead and give them that
19 standard charge and we'll -- and it will also be in my closing
20 charge.

21 MR. BARTH: And are we allowed to tell them that the
22 deposition was March the 2nd?

23 THE COURT: Mr. Shealy?

24 MR. SHEALY: I think that's fine. I think that's
25 actually ---

1 MR. BARTH: That's not in the deposition.

2 MR. SHEALY: Okay.

3 MR. BARTH: It's on the cover.

4 MR. SHEALY: I think having the date of the deposition is
5 fine.

6 THE COURT: All right, anything else before we bring the
7 jury out, Mr. Barth?

8 MR. BARTH: No, sir. I think I understand it.

9 THE COURT: Mr. Shealy?

10 MR. SHEALY: No, Your Honor.

11 THE COURT: All right. Well, I'm going to give everybody
12 -- We've been in here for a while. I'm going to give you
13 about five minutes to go to the bathroom and then we'll resume
14 the trial of this case.

15 (Whereupon, there is a break in the proceedings from
16 10:31 a.m. until 10:37 a.m.)

17 THE COURT: All right, is plaintiff's counsel ready to
18 proceed?

19 MR. BARTH: Give me one second. Let me turn the screen
20 off, Your Honor.

21 THE COURT: Okay. How -- Are y'all going to publish it?
22 How are y'all going to do it? Are you going to have somebody
23 come around and read or are you going ---

24 MR. BARTH: We'll get Mallory to be Dan Comfort and Kirby
25 will ready his questions and I'll read mine and when he goes

1 to put the exhibit in with -- It's already been marked and
2 I'll hand it up to Your Honor, but when we get to that point
3 ---

4 THE COURT: Okay.

5 MR. BARTH: --- I'll put it up on the screen.

6 THE COURT: Well, do you -- Why don't you hold it and if
7 you want to publish it to them ---

8 MR. BARTH: Okay.

9 THE COURT: --- you can do it at that stage.

10 MR. BARTH: Do you want to do it, Kirby? So I -- When
11 you call the jury in, I'll -- I'll say that we're going to
12 present ---

13 THE COURT: I'll tell them that.

14 MR. BARTH: Okay. It's my witness.

15 THE COURT: Right and then I'll give them my spiel on
16 deposition testimony and then I'll recognize -- Are you going
17 to start reading it?

18 MR. SHEALY: I am and just -- I don't want to make any
19 mistakes. So you want -- I can probably do it from here. Can
20 you look ---

21 MR. BARTH: Okay.

22 MR. SHEALY: Can you look over my shoulder?

23 MR. BARTH: All right.

24 MR. SHEALY: Okay.

25 MR. BARTH: I will read right behind you.

1 MR. SHEALY: Okay.

2 THE COURT: All right, anything else before we bring the
3 jury, Mr. Barth?

4 MR. BARTH: No, sir.

5 THE COURT: Mr. Shealy?

6 MR. SHEALY: No, Your Honor.

7 THE COURT: All right. Ma'am?

8 BAILIFF: Everybody is standing.

9 THE COURT: Oh, I'm sorry. Be seated.

10 BAILIFF: Okay, you ready?

11 THE COURT: I apologize. Thank you, Miss Francis.

12 BAILIFF: Are you ready for the jury?

13 THE COURT: Yes, ma'am.

14 (Whereupon, the jury enters the courtroom at 10:39 a.m.)

15 THE COURT: Madam Forelady, ladies and gentlemen of the
16 jury, I hope you all are doing well this morning. I apologize
17 for you having been back there as long as you have, but there
18 were some matters that we needed to take up outside of your
19 presence and I apologize for that. I do hope that you had an
20 opportunity to talk some and get to know each other a little
21 bit better and over this period of this trial, I hope that you
22 build some friendship.

23 What we are going to do now is evidence or testimony is
24 going to be presented by virtue of a deposition. A
25 deposition, ladies and gentlemen, is testimony taken under

1 oath before trial and preserved in writing or by mechanical
2 means such as video or audio tape recording. Deposition
3 testimony may be used by any party for the purpose of
4 contradicting or impeaching the testimony of another party or
5 in certain situations under our rules of procedure, it may be
6 used when a witness is unavailable to appear in court. You,
7 ladies and gentlemen, are to determine the weight to be given
8 to such deposition testimony and decide the force, effect, and
9 truth of such testimony.

10 The first -- Mr. Barth, I'm going to recognize you at
11 this time.

12 MR. BARTH: May it please the Court, Your Honor.

13 THE COURT: Yes, sir.

14 MR. BARTH: The plaintiff would call as our next witness
15 Mr. Dan Comfort by deposition and ---

16 THE COURT: Okay.

17 MR. BARTH: --- Mallory Barth will -- She'll be Dan
18 Comfort for this morning.

19 THE COURT: All right, Ms. Barth, if you'll come around
20 and take the stand, please, ma'am. Mr. Shealy, I'm going to
21 recognize you.

22 MR. SHEALY: All right, Ms. Barth, I'm going to start ---

23 THE COURT: Mr. Barth, could you and Mr. Shealy come over
24 for just a second, please?

25 (Whereupon, a bench conference is held out of the hearing

1 of the jury.)

2 THE COURT: Do you need me to tell the jury anything
3 else? I mean it's kind of awkward because he's starting the
4 questioning as far as it being your witness?

5 MR. BARTH: Well, I mean I'd like you to. I'd like you
6 to say, you know, this was ---

7 MR. SHEALY: This was a deposition I took.

8 MR. BARTH: It was a deposition he took last, you know,
9 March the 2nd.

10 (Whereupon, the bench conference ends.)

11 THE COURT: All right, ladies and gentlemen, even though
12 Mr. Shealy is doing the questioning here, Mr. Shealy took the
13 deposition, but Mr. Barth is calling Dan Comfort as his
14 witness and as his witness in his case. Okay and the reason
15 Mr. Shealy is reading the deposition is because it starts out
16 with Mr. Shealy asking the questions because he noticed the
17 deposition. Okay and that deposition was taken on March the
18 2nd I believe.

19 MR. BARTH: Yes, sir.

20 THE COURT: Of this year.

21 MR. SHEALY: That is correct, Your Honor.

22 THE COURT: Of this year. All right, Mr. Shealy.

23 MR. SHEALY: Ms. Barth, starting on page 4, line 11.

24 (Whereupon, the deposition is read into evidence with
25 Mallory Barth reading as Dan Comfort and counsel each

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 reading as themselves.)

2 DAN COMFORT, being first duly
3 sworn and testifying through his deposition, testifies as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SHEALY:

7 Q: Mr. Comfort, my name is Kirby Shealy. I'm a lawyer from
8 Columbia, South Carolina, and I represent Carolina Self
9 Storage, Inc., in a lawsuit brought against it by Ms. Sue
10 Lynch. I'm here today to take your deposition actually
11 sitting in my office in Columbia. Where are you as we are
12 taking this deposition?

13 A: I'm at office -- at my office at 35 A Avenue, Burlington,
14 Massachusetts.

15 Q: And are you currently residing in Massachusetts?

16 A: Yes, sir.

17 Q: And how long have you lived there?

18 A: Since September 2010.

19 Q: And what do you do for a living, Mr. Comfort?

20 A: I manage this self-storage facility.

21 Q: Okay and the self-storage facility that you manage, does
22 it have any relationship at all to Carolina Self Storage,
23 Incorporated?

24 A: No, sir.

25 Q: All right. At one time, were you employed by Carolina

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 Self Storage, Incorporated?

2 A: Yes, sir.

3 Q: And for what ^o period of time were you employed?

4 A: From August 2001 to August 2010.

5 Q: And at some point, did you work at the facility owned by
6 Carolina Self Storage that is located at 2201 Second Loop Road
7 in Florence, South Carolina?

8 A: Yes, sir, all of that time.

9 Q: All right and what was your position with the company?

10 A: I was the manager.

11 Q: And what job duties did being a manager entail?

12 A: Well, it entailed overseeing every aspect of everything
13 that went on in the facility, everything from moving a tenant
14 in to ensuring that the property was kept clean and safe.

15 Q: All right, sir, and do you recall a tenant by the name of
16 Sue Lynch?

17 A: Yes, sir.

18 Q: Do you recall her coming to the facility on Second Loop
19 Road in May of 2008 to rent a storage unit?

20 A: Yes, sir.

21 MR. SHEALY: All right and then if you'll move with me to
22 page 8, line 17.

23 Q: Okay and do you know what kind of rental unit or self-
24 storage unit Ms. Lynch rented from Carolina Self Storage?

25 A: Yeah. She rented a climate controlled unit.

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 Q: Okay and prior to her renting that unit, did you show it
2 to her?

3 A: Yes, sir.

4 Q: Okay. You actually walked to that unit on -- there on
5 the premises?

6 A: We drove. That's right, on a golf cart, yes, sir.

7 Q: Okay and now, the facility on Second Loop Road, there's
8 sort of a main office at that facility?

9 A: Yes, sir.

10 Q: And where is it located on the property?

11 A: It is -- Where's her unit located?

12 Q: No, where's the office located?

13 A: Oh, the office is located on the street level at 2201.

14 Q: All right and then are the rental units, are they located
15 behind the office?

16 A: Yes, sir.

17 Q: All right. Now, the unit that she rented, Unit Number --
18 Is it Unit Number 917?

19 A: Yes.

20 Q: Where is it located relative to where the office is?

21 A: It is in Phase -- the Phase Number Three. One, two,
22 three. I believe it's Phase Number Three way down back.

23 Q: Okay.

24 A: The best I can put it.

25 Q: Is it visible from the office itself?

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 A: No, sir.

2 Q: All right, okay. Let me -- Let me have the court
3 reporter show you an exhibit which has been marked and I ask
4 if you can identify that.

5 A: Okay. Yes, I'm looking at it now.

6 Q: Okay. What is that document?

7 A: This is -- These are notes that are taken of anything,
8 you know, of any nature a tenant would have, like any
9 complaints or any issue, any late fees or any concerns we were
10 required to put in these notes history. It's a -- It's an
11 accurate description of the tenant's concerns or -- or
12 anything actually.

13 Q: Okay, all right. Are those notes taken in the normal
14 course of business at Carolina Self Storage?

15 A: Yes.

16 Q: Okay and are they stored on some sort of computer system?

17 A: They're right in with her account on the system, that's
18 right.

19 Q: All right and it -- it appears that they're in -- in date
20 order from bottom to top. Is that right?

21 A: Yes.

22 Q: Okay and the earliest entry is on the bottom and the
23 latest entry is on the top?

24 A: Yes.

25 Q: Okay and are all the notes that are listed there, were

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 they entered by you or were they entered by other people?

2 A: Some of them were entered by Roger Blubaugh. That was --
3 Roger was my assistant at the time.

4 Q: Okay and are some of the notes entered by you as well?

5 A: Yes, sir.

6 Q: Okay. There appear to be notes that begin *D.C.* Would
7 that be your initials?

8 A: Yes, sir.

9 Q: And then the notes that begin *R.B.*, would that be Roger
10 Blubaugh's?

11 A: Yes, sir.

12 Q: Okay, but with respect to either one of you, these notes
13 would have been taken to memorialize some interaction with a
14 tenant on the date described?

15 A: Correct.

16 Q: Okay. Looking at a note that appears to be dated August
17 2 of 2008?

18 A: Yes.

19 Q: And was that a note that you entered into the system?

20 A: Yes, sir, I did.

21 Q: Okay and just sort of while I'm looking at this, some of
22 these notes have twelve a.m. beside them.

23 A: That's not correct.

24 Q: What's -- Were they entered at midnight?

25 A: No, sir. That ---

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 Q: Okay.

2 A: That's a computer glitch.

3 Q: Okay, but the note that is entered on August 2, that's a
4 note that you entered in the system?

5 A: It is.

6 Q: Okay and it documents what?

7 A: It documents that she came by yesterday, which was -- of
8 course, would have been August 1st, to make payment and said
9 she suffered a laceration of her right ankle and I took the
10 pictures. She requested that I take pictures and I took them
11 and I also -- Let's see. The door, she described to me that
12 the door was being held open and the box moved causing the
13 door to close on her right ankle. She did not report it to us
14 until today. She went -- She was bleeding.

15 This isn't in the notes, but I remember she said she
16 didn't come by because I asked her why she didn't come by.
17 She said she was bleeding. She needed to get to the emergency
18 room right away, which is why she came by the following day.
19 She was treated and sutured and the wound was sutured and at
20 that time, I gave her an incident report to fill out and bring
21 back to us.

22 Q: Okay and did she ever bring that incident report back?

23 A: She misplaced it somehow.

24 Q: Okay. Did you ever get it? Did you ever get it back?

25 A: I don't recall ever getting it back, sir.

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 Q: Okay. The wit -- I'm sorry. The pictures that you took
2 of her ankle, can you just describe what they depicted?

3 A: They depicted the actual bandaged area from a front view
4 and a side view, but it was casted at the time so all I -- I
5 obviously couldn't see the wound itself.

6 Q: Okay. Now, generally speaking, does this facility have
7 security cameras mounted in various places?

8 A: Yes, sir.

9 Q: All right. In the area where Ms. Lynch had this
10 accident, are there security cameras in that area?

11 A: There are, but they were not working.

12 Q: All right and so it -- Was there -- Were you able to ever
13 find any video of that incident actually happening?

14 A: No, not at all.

15 Q: And I mean for what period of time had they not been
16 working when this incident occurred?

17 A: Actually, they had not been working for at least two
18 years.

19 Q: Okay and are you aware that any person witnessed the
20 actual incident that -- where Ms. Lynch was injured?

21 A: No. To my knowledge, she was alone.

22 Q: Okay. Now there's another note. Going back to the
23 exhibit, I see a note on August 8.. That note was not entered
24 by you, correct?

25 A: Correct.

DIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 Q: Okay and -- But that appears to memorialize some sort of
2 interaction between Roger Blubaugh and Ms. Lynch, correct?

3 A: Yes.

4 Q: Okay and she was in the hospital at that particular
5 point?

6 A: I believe so.

7 Q: All right and then on August 18, there's another note and
8 was that note entered by you?

9 A: Yes.

10 Q: And she -- What does that note indicate to you about that
11 interaction?

12 A: Right. The lock that was placed into her unit was an
13 incorrect lock because it was the type of lock that was -- We
14 were unable to over-lock in the event of a late status. So I
15 replaced the lock and asked her to come by and pick up the
16 keys to the new lock. We gave her a new lock free. Let's
17 see, requested an incident report form. She lost the first
18 one. I told you -- Or I told her -- Are we referring to the
19 note on 8/18?

20 Q: Yes, sir.

21 A: Yeah, okay. Her daughter came by to pick up the keys to
22 the new lock which I installed and I requested the incident
23 report form because she lost the one I gave her on 8/1 and I
24 told her I do not have a form specific to the circumstances of
25 her injury. She has stated that she would fill out a

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 description of her injury on personal paper and bring a copy
2 to us. I took a picture of casted ankle and put it in her
3 file.

4 Q: Okay and, Mr. Comfort, do you remember having any other
5 interactions with Ms. Lynch with respect to her injury?

6 A: Not at all, sir. Just she would come by monthly to make
7 her payments.

8 Q: Okay. Mr. Comfort, I have no further questions for you.
9 Please answer any questions that Mr. Barth may have for you.

10 A: Thank you.

11 CROSS EXAMINATION

12 BY MR. BARTH:

13 Q: Mr. Comfort, you and I just met a few minutes ago by
14 telephone. I'm Kevin Barth and I represent Sue Lynch in this
15 matter.

16 MR. BARTH: Your answer was, "Yes, sir."

17 A: Yes, sir.

18 MR. BARTH: All right, page 16, line 8.

19 Q: As a matter of fact, when she was hurt on that Friday,
20 she even came up there injured to pay the rent to make sure it
21 was on time, didn't she?

22 A: Well, August 1, she had intended to do that, but that was
23 the date of her injury. She immediately drove off the
24 property to the emergency room. She came in the following day
25 and then we -- That whole interaction took place.

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 MR. BARTH: If you would, move to page 18. Page 18, line
2 14. Are you with me?
3 MS. BARTH: Mm-hmm.
4 MR. BARTH: Okay.
5 Q: When Ms. Lynch came in to initially rent the unit, she
6 talked to you, didn't she?
7 A: Yes, sir.
8 Q: Do you have any idea how long that entire process took?
9 A: I would guesstimate twelve to fifteen minutes.
10 Q: All right. Do you have any recollection of the specifics
11 of that interaction?
12 A: Just one, sir. She was a school teacher.
13 Q: But nothing about what was talked about, what wasn't
14 talked about or anything like that?
15 A: No, sir.
16 Q: Okay and she signed what she was supposed to and from
17 then on, she was your tenant, right?
18 A: Yes, correct.
19 Q: Now, I just want to ask you a few questions about her
20 accident.
21 A: Sure.
22 Q: As you show in your notes of August the 2nd, she came up
23 there and told you about it, right?
24 A: Yes, sir.
25 Q: And that was the first you had heard?

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 A: . That is the first I became aware, aware of it exactly.

2 Q: All right and you knew which door she was talking about,
3 didn't you?

4 A: I certainly did.

5 Q: Did you ever have any issues with that door before?

6 A: Never did. It was a new building, new door.

7 Q: All right and she told you what had happened, you typed
8 it in and you actually took a picture, didn't you?

9 A: Yes, sir. I took two pictures.

10 Q: You took two pictures and at that point, you put them in
11 Ms. Lynch's file, right?

12 A: In her file, that's exactly right.

13 Q: Okay. Every tenant for their unit, they have a separate
14 file with their paperwork on it?

15 A: Correct.

16 Q: And then they have these computer notes in case there's
17 something that needs to be documented, right?

18 A: Correct.

19 Q: All right. So you took these two pictures on that
20 occasion and put those in her file and actually gave her an
21 incident report to fill out, didn't you?

22 A: Yes, sir.

23 Q: And that would have been a form from your -- a form that
24 your employer, Carolina Storage, made up for certain kinds of
25 incidents?

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 A: Right.

2 Q: And you gave her one to fill out and she was supposed to
3 bring it back to you?

4 A: As I recall, I did and she misplaced it.

5 Q: In the notes that's next, Roger Blubaugh ---

6 A: Yeah.

7 Q: Looks like about six days later.

8 A: Right.

9 Q: She needed another one. She lost the one you gave her?

10 A: Yes.

11 MR. BARTH: Page 21, line 8.

12 Q: Now, let's -- August the 18th, she came back in and she
13 had actually lost that incident report, right?

14 A: Yes.

15 Q: And she asked you for another one, but you told her that
16 time you really didn't have one that applied to this incident,
17 didn't you?

18 A: That's exactly right.

19 Q: All right and what you meant by that is there was an
20 incident report, but because it was a personal injury you
21 didn't think the incident report applied because Carolina
22 Storage wasn't liable, right?

23 A: I don't know how to answer that, Attorney. I would say
24 that the specific nature of her injuries, there were no entry
25 places on the form for that.

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 Q: Is there a place on the form for how something happened?

2 A: Yes, I believe there is.

3 Q: All right.

4 A: The nature of the incident.

5 Q: And did you ask her to fill that out because certainly
6 that would have applied, wouldn't it?

7 A: Yeah. Well, I believe that was on the first form which
8 got misplaced.

9 Q: Okay. On the 18th again, it references that you took a
10 picture of her ankle?

11 A: Yes.

12 Q: And you did, didn't you?

13 A: I took two pictures, right.

14 Q: All right and so we have a total of four pictures taken,
15 then, correct?

16 A: No, no, no. Two pictures, one from the front and one
17 from the side.

18 Q: They're in her file?

19 A: Yeah.

20 Q: They were both put in her file?

21 A: Yes, sir.

22 Q: Now, let me ask you this. When she came in on the 2nd and
23 reported the injury to you originally ---

24 A: Yeah.

25 Q: --- told you where it happened and you knew where it

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 happened, did you go out there and look?

2 A: Yes, I went right down there and looked.

3 Q: Was there blood down there like she described?

4 A: There was a little bit of blood, not a lot.

5 Q: All right. Did anybody take any pictures of that?

6 A: No, sir, I did not.

7 Q: Do you know who cleaned it up?

8 A: I believe it just stayed there. I don't recall washing
9 it off or anything. There was barely any blood there at all.

10 Q: Okay.

11 A: Just a drop or two.

12 Q: All right. Now, do you know if the pictures you took, do
13 you know if they were ultimately either scanned in or loaded
14 on the Carolina's computer system?

15 A: They were not. I -- But I'm -- They could very well be
16 in the documents somewhere, but the actual pictures that I
17 printed out I was told by Jay Wallace to get rid of them.

18 Q: All right and he told you to get rid of them, didn't he,
19 after knowing about this claim?

20 A: Yes, sir.

21 Q: All right and you knew that wasn't right, didn't you, Mr.
22 Comfort?

23 A: Yes, I did. So I took them out of her file and -- and I
24 placed them in a drawer in the lunch room, in the back room.

25 Q: All right, at their office?

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 A: Yes.

2 Q: Still on Carolina facility, right?

3 A: Yes, sir.

4 Q: All right and do you know where they are now?

5 A: I have no idea.

6 Q: Did you tell anybody with Carolina Storage where you had
7 put the pictures?

8 A: Glenda Painter.

9 Q: So she knew you had taken them out of the file and I
10 don't want to use the word hidden, but you took them out of
11 the file and put them somewhere else because you knew very
12 well they shouldn't be destroyed, didn't you?

13 A: Yes, I did.

14 Q: All right and do you know -- Do you know whether Ms.
15 Painter did anything with them?

16 A: No, sir, I don't.

17 Q: Do you know if anything was done with them before you
18 left in August?

19 A: They -- When I left, they were still there.

20 Q: Still there?

21 A: Yeah.

22 Q: All right and you haven't had any conversation with Ms.
23 Painter or Mr. Wallace about any of this since you retired and
24 left, have you?

25 A: That's correct. I did not.

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 Q: All right, just a couple of other questions.

2 A: Sure.

3 Q: Mr. Comfort, when people rent places and they rent units
4 in the controlled environment in the heated and cooled
5 portion, they have to prop the door open to move their stuff
6 in and out, don't they?

7 A: That's correct.

8 Q: And you know they do that, don't you?

9 A: Yes, sir.

10 Q: In fact, sometimes you guys even tell them they're going
11 to have to prop it open, don't you?

12 A: Yes.

13 Q: Do you tell them be careful, look out?

14 A: Most.

15 Q: The door -- The door closes fast?

16 A: Most definitely.

17 Q: You definitely tell them that?

18 A: Yes.

19 Q: So you know it's an issue, don't you?

20 A: Yes.

21 Q: Because you know that the door swings shut and it can
22 hurt people?

23 A: That's right.

24 Q: And so you make sure they know that?

25 A: That's right.

CROSS EXAMINATION OF DAN COMFORT BY MR. BARTH

1 Q: And when you see people blocking it open, do you stop
2 them?

3 A: No. I tell them to make sure they don't open it all the
4 way and destroy the closer up top and to be sure that the
5 weight is sufficient to keep the door open.

6 Q: But again, as you told me earlier, you don't remember
7 having any of that conversation with Ms. Lynch, do you?

8 A: No, but I probably did. I usually, you know, would tell
9 anybody that.

10 Q: But specifically as far as she's concerned, you don't
11 recollect that, do you?

12 A: I don't recall that.

13 Q: And that's certainly ---

14 A: No, I do not.

15 Q: And that's certainly not in any of your notes?

16 A: No.

17 Q: And it's not on -- in the computer notes?

18 A: No.

19 Q: Who had access to these computer notes? The whole
20 company?

21 A: Right, yes, sir.

22 Q: All right. Do you remember about when Jay Wallace told
23 you to destroy the pictures?

24 A: Not too long after he became aware and I certainly made a
25 phone call as soon as, you know, right after the incident

REDIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 happened.

2 Q: Okay. You made a phone call to him?

3 A: To him at the corporate office or wherever he was at the
4 time, yes.

5 Q: And you told him about the accident and that she was
6 injured?

7 A: Yes.

8 Q: And all of that?

9 A: Yeah.

10 Q: And you told him you had taken pictures?

11 A: Yes, sir.

12 Q: And his sole response was to destroy them?

13 A: Well, get rid of them was the exact wording.

14 Q: Get rid of them?

15 A: Yeah.

16 Q: Very good, Mr. Comfort. Thank you. I don't have any
17 other questions.

18 A: Thank you.

19 REDIRECT EXAMINATION

20 BY MR. SHEALY:

21 Q: Mr. Comfort, just briefly. The door where this occurred,
22 had you ever had any problems with this door up to this point?

23 A: No, sir, not at all.

24 Q: All right and after this occurred, did anybody at
25 Carolina Self Storage ask you to make any modifications to

REDIRECT EXAMINATION OF DAN COMFORT BY MR. SHEALY

1 that door whatsoever?

2 A: No, sir.

3 Q: All right. I have no further questions. Thank you.

4 A: Thank you.

5 MR. BARTH: That would conclude the deposition, Your
6 Honor.

7 THE COURT: Okay, all right. You may step down.

8 (Whereupon, Ms. Barth leaves the witness stand and
9 returns to the counsel table.)

10 MR. BARTH: Your Honor?

11 THE COURT: All right.

12 MR. BARTH: I'm sorry.

13 THE COURT: That's all right.

14 MR. BARTH: We'd call Kris Seluga to the witness stand.

15 THE COURT: All right.

16 MR. BARTH: May I publish Exhibit Number 16 to the jury,
17 Your Honor?

18 THE COURT: Yes, sir.

19 (Whereupon, Plaintiff's Exhibit Number 16, the computer
20 notes history, is published to the jury. It is admitted
21 into evidence by consent.)

22 THE COURT: Sir, if you'd come around. Place your left
23 hand on the Bible and raise your right hand to be sworn.
24 State your full name for the record.

25 WITNESS: Kristopher Joseph Seluga.

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 THE CLERK: Raise your right hand. Do you swear the
2 testimony you give in this case will be the truth, the whole
3 truth and nothing but the truth, so help you God?

4 WITNESS: I do.

5 THE CLERK: Be seated and state your name for the record.

6 WITNESS: Kristopher Seluga.

7 KRISTOPHER SELUGA, being first duly
8 sworn, testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. BARTH:

11 Q: And where do you live?

12 A: I live in Milford, Connecticut.

13 Q: If you would, tell the jury what your occupation is and a
14 little bit about your work experience.

15 A: I'm a forensic engineer. I work at a company called
16 Technology Associates, whose main office is in Stamford,
17 Connecticut, and basically our work involves consulting as
18 engineers on litigation related matters, investigating
19 accidents and, when necessary, providing testimony.

20 Q: All right. Now, when you say you -- you provide
21 testimony and do certain things involved in that, tell the
22 jury what you're talking about and what is it you do?

23 A: For example, if there is an accident and someone is
24 either pursuing a lawsuit or being sued by someone as a result
25 of the accident, they'll often call us to investigate the

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 accident, see if there's any sort of technical issues that we
2 can -- or technical questions that we can answer as to what
3 happened or what should have happened or how something should
4 have been designed or built or how someone received a certain
5 injury and then at that point, if -- If advised to proceed
6 with the case, we'll usually prepare a report and then if the
7 case proceeds to trial, then one of us will testify at trial.

8 Q: All right. Now, as far as being hired to -- to perform
9 these kinds of investigations and write reports, do you have
10 any idea or any information how much you would have been hired
11 by the person that was injured as opposed to the person who is
12 being sued for it?

13 A: Yes.

14 Q: Can you tell us what that breakdown would be?

15 A: It varies from year to year, but on average how our work
16 -- my company's work is about sixty percent for the injured
17 parties' attorney and the rest of it, forty percent of the
18 time, for the defendant's attorney.

19 Q: All right, for the company that's being sued?

20 A: The company or individual or whoever the defendant is.

21 Q: All right. Now, I assume you're paid for this work?

22 A: Yes.

23 Q: And can you tell us how you charge and how you're paid?

24 A: My company bills each of the engineers out at an hourly
25 rate. My hourly rate is \$290 per hour for case work and \$350

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 per hour for court time.

2 Q: All right.

3 A: For testimony time.

4 Q: All right and you were hired to come in and conduct an
5 investigation in this case, weren't you?

6 A: Yes, by you.

7 Q: All right. We're talking about the accident back in July
8 of 2008 that was Ms. Lynch was involved in?

9 A: Correct.

10 Q: All right and we'll get into what you have done on this
11 particular case, but have you billed us at the same rate?

12 A: The rate I just described, yes.

13 Q: The 290 out of court and 350 in court?

14 A: Correct.

15 Q: All right and you flew into Florence when?

16 A: Last night.

17 Q: And be flying out today?

18 A: That's right.

19 Q: All right. Does your compensation vary at all depending
20 on the outcome of this case, who wins or who loses?

21 A: No. In fact, I've already been paid for my time here in
22 advance.

23 Q: All right and roughly speaking, for the investigation,
24 for flying down here to do what you did the first time and
25 back down here, how much have you charged us and been paid?

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 A: My company has billed total, including expense, travel
2 expenses and all my time to include today and traveling back
3 home, approximately \$19,000.

4 Q: All right and is there anything extra in it for you if
5 the plaintiff wins as opposed to the defendant?

6 A: No.

7 Q: All right. Now, tell the jury, if you would, what
8 degrees you hold?

9 A: I have a bachelor's degree in mechanical engineering from
10 MIT and also a master's degree of science from MIT.

11 Q: All right. Tell us a little bit what mechanical
12 engineering is?

13 A: Mechanical engineering is the application of scientific
14 principles to understanding and designing mechanical systems,
15 machinery, anything that can be described by the -- the
16 equations of physics.

17 Q: All right and how long have you been licensed?

18 A: I'm licensed in Connecticut as a professional engineer
19 and that's I think since about 2005.

20 Q: Okay and your license is current?

21 A: Yes.

22 Q: All right. Now, you told me you graduated from what
23 school?

24 A: MIT.

25 Q: Where is that?

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 A: Massachusetts. It's the Massachusetts Institute of
2 Technology.

3 Q: All right and when did you graduate from MIT?

4 A: My bachelor's I received in 2000 and my master's in 2001.

5 Q: Now, can you tell us if you belong to any professional
6 societies or groups or organizations?

7 A: Yes, I do. For example, the Human Factors and Ergonomics
8 Society, the Society of Automotive Engineers, the NAPARS
9 National Association of Professional Accident
10 Reconstructionists and -- and excuse me, the ITE, the
11 Transportation Engineering Associates Society.

12 Q: All right. Now, the National Association of Professional
13 Accident Reconstruction Specialists, how long have you been a
14 member of that group?

15 A: I think that's also since about 2005 or 2006.

16 Q: All right and you are still currently a member in good
17 standing?

18 A: Yes.

19 Q: All right. Now, have you published any -- any works for
20 mechanical engineering? Have you published any journals,
21 articles, books?

22 A: Yes. Probably since I started working at Technology
23 Associates, I've published about ten papers, mostly peer
24 review journals on different engineering topics that are
25 related to some of the work I have done.

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 Q: All right and you said peer review. Tell me what that
2 means?

3 A: In scientific publishing when you say something is peer
4 reviewed, what it means is that when you submit your
5 manuscript to the journal to be published, your peers, some
6 other scientific engineers or whoever is qualified to talk
7 about that subject and are knowledgeable on the subject will
8 review the paper and they will sometimes offer comments as to
9 whether or not they think there should be some editing done
10 and then they will also give the journal a recommendation as
11 to whether or not they think it's suitable for publication.

12 Q: All right and you've had about ten of those already?

13 A: About ten.

14 Q: All right. Now, in addition to the mechanical
15 engineering you told us about, you -- you also mentioned that
16 you have experience in accident reconstruction. Is that
17 right?

18 A: Yes.

19 Q: Tell -- Tell the jury what accident reconstruction is?

20 A: Sometimes, when people refer to accident reconstruction,
21 they are limiting it to the investigation of traffic
22 accidents, but actually it -- It can also mean the
23 investigation of any type of accident and it's the
24 investigation through the principles of engineering and
25 physics and applying the engineering and physics knowledge to

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 the accident to determine the answers to certain questions.

2 Q: All right. Now, can you tell us what your experience
3 would be in accident reconstruction?

4 A: Well, I've been doing accident reconstruction of various
5 types of accidents, including some involving door accidents,
6 since my work began at Technology Associates back in 2001.

7 Q: Any idea how many accidents you would have reconstructed
8 in your day?

9 A: Hundreds.

10 Q: Okay. Now, do you -- Do you attend classes for that or
11 do you continue -- have continuing education? How does that
12 work?

13 A: It's basically the application of the knowledge that I
14 gathered when I obtained my degrees and also through some work
15 experience while I was a student and through training on the
16 job.

17 Q: Have you received any awards or recognitions in your
18 work?

19 A: Well, yes. When I was at MIT as a graduate student, I
20 received a Martin Fellowship.

21 Q: What is that?

22 A: That was a -- basically a scholarship to pay for my
23 master's degree tuition.

24 Q: Is that merit based?

25 A: Yes, it is.

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 Q: All right and any other awards or recognitions?

2 A: Yes. While I was at MIT, I was also allowed into two
3 engineering honor societies that would be applicable to my
4 field. I tested into one. I can't remember the requirements
5 of the other.

6 Q: Okay. Two organizations that are involved in your field
7 of work?

8 A: Yeah. One is a general engineering honor society and the
9 other one is specific to mechanical engineering. I was
10 accepted into those.

11 Q: Okay and are they merit based as well?

12 A: Yes, they are.

13 Q: All right. Now, in general, tell us how you go about
14 your work as an accident reconstructionist?

15 A: Well, if I've been asked to investigate an accident,
16 typically what I'll do is I will review whatever materials are
17 available to me, such as deposition testimony, photographs,
18 accident reports, that sort of information. If it's necessary
19 and if it's available, I will often travel to the site of the
20 accident or inspect the equipment that was involved in the
21 accident. After that, I'll typically do whatever sort of
22 engineering analysis I deem is required and then if I'm asked
23 to, I'll prepare a report and, if necessary, come and testify
24 at trial.

25 Q: Do you have any idea how many states you would have

DIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 worked in as an accident reconstructionist?

2 A: Probably about a dozen.

3 Q: About a dozen? All right and have you and I ever had a
4 case together?

5 A: Not before this one.

6 Q: All right. Have you ever had a case with my firm or any
7 lawyer in it?

8 A: No, other than this one.

9 Q: Other than this one? All right.

10 MR. BARTH: Your Honor, at this point, I would submit
11 Kris Seluga as an expert in mechanical engineering and
12 accident reconstructionist.

13 THE COURT: Mr. Shealy?

14 MR. SHEALY: Your Honor, may I cross examine as to
15 qualifications?

16 THE COURT: Yes, sir.

17 MR. SHEALY: And, Your Honor, may we approach briefly?

18 (Whereupon, a bench conference is held out of the hearing
19 of the jury.)

20 MR. SHEALY: Before I do that, can the -- can the notes
21 history be collected back from the jury? They're -- They're
22 looking at it now and I'd rather that they not have something
23 distracting them.

24 THE COURT: I'm going to let them finish looking at it.

25 MR. SHEALY: Okay.

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 THE COURT: And when they finish looking at it, I'll
2 collect it.

3 MR. SHEALY: Okay.

4 MR. BARTH: Okay.

5 THE COURT: I mean if you want to wait on your cross
6 examination, do you want to do that?

7 MR. SHEALY: Well, I wanted to go ahead and do it now,
8 but I mean I'm happy to wait until they have finished looking
9 at it before I start.

10 THE COURT: Okay.

11 (Whereupon, the bench conference ends.)

12 THE COURT: Ladies and gentlemen, before Mr. Shealy does
13 any cross examination as to the witness's qualifications, I'm
14 going to allow the jury to complete their review of the
15 document that they are currently looking at and then we'll
16 resume.

17 (Whereupon, there is a pause in the proceedings.)

18 THE COURT: All right, Mr. Shealy.

19 MR. SHEALY: May it please the Court.

20 THE COURT: (To Foreperson) Go ahead and hand that to the
21 bailiff, please. Thank you.

22 VOIR DIRE CROSS EXAMINATION

23 BY MR. SHEALY:

24 Q: Mr. Seluga, you're affiliated with -- Your firm is called
25 Technology Associates, LLC?

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: Yes.

2 Q: And your firm has offices in Connecticut, New York,
3 Florida, and California, right?

4 A: Yes.

5 Q: And you all perform what is known as forensic engineering
6 services?

7 A: Yes.

8 Q: You're basically a professional expert witness. Is that
9 right?

10 A: Well, I wouldn't say that. Most of the time, I don't end
11 up testifying, but a professional forensic engineer, yes.

12 Q: But you market your services to lawyers and other folks
13 who are working on claims arising out of some product or
14 structure made by people, correct?

15 A: Typically, yes.

16 Q: Okay.

17 A: Sometimes it could be something else, like a traffic
18 accident.

19 Q: And you market those services on the internet via a web
20 site and expert directories and legal journals, correct?

21 A: The company does, yes.

22 Q: And as I understand, you're a licensed professional
23 engineer licensed in the State of Connecticut?

24 A: Yes.

25 Q: You have no such license in South Carolina, correct?

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: That's correct.

2 Q: All right. Let's see if you agree with me about what I
3 understand to be the scope of an engineer's abilities and work
4 to be. I understand that the practice of engineering involves
5 consultation, investigation, evaluation, design and design
6 coordination for the development and use of land and water,
7 structures, utilities, buildings, machines, equipment,
8 processes, industrial products, consumer products,
9 communications, mechanical, electrical, hydraulic, pneumatic
10 or thermal in nature. Would you agree with me that
11 engineering encompasses all of those things?

12 A: It can, yes.

13 Q: Okay. All right and because you're not licensed in South
14 Carolina, you're not able to engage in any of those activities
15 here, correct?

16 A: My understanding is that the -- to be hired to perform
17 something like creating a design or signing off on a drawing,
18 you would need the license here, but to do an investigation
19 and testify, my understanding is it's not required.

20 Q: Well, you're here just to give your opinion as it relates
21 to this case, correct?

22 A: Correct.

23 Q: All right. Now, are you aware that the General Assembly
24 of South Carolina defines the practice ---

25 MR. BARTH: I object and ---

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 THE COURT: Can the lawyers approach?

2 (Whereupon, a bench conference is held out of the hearing
3 of the jury.)

4 MR. BARTH: He doesn't have to be a licensed South
5 Carolina engineer to testify under *Baggerly*.

6 THE COURT: Do what?

7 MR. BARTH: I said he doesn't have to be a licensed
8 engineer to testify as an expert witness under the cases we
9 talked about yesterday.

10 MR. SHEALY: It's not *per se* disqualifying him. It's
11 something he can take ---

12 (Whereupon, the bench conference ends.)

13 THE COURT: Ladies and gentlemen, I'm going to ask you to
14 step to the jury room for just a minute. I'll get you -- Do
15 not discuss the case. I'll get you back out here as soon as I
16 can.

17 (Whereupon, the jury leaves the courtroom at 11:18 a.m.)

18 THE COURT: Mr. Barth, I'll be happy to hear from you.

19 MR. BARTH: I object to the question and the line of
20 questions, Your Honor. He's not required to be a licensed
21 engineer in the State of South Carolina to testify as an
22 expert witness. He can certainly be cross examined if that's
23 what he wants to do during cross examination.

24 This is voir dire strictly on his qualifications as -- as
25 an expert in mechanical engineering and accident

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 reconstruction and how the legislature defines whatever it is
2 he was going to ask isn't relevant to that.

3 THE COURT: All right, Mr. Shealy?

4 MR. SHEALY: May it please the Court, Your Honor. Under
5 the case of *Fields v. J. Haynes Waters Builders*, the Supreme
6 Court has said that ---

7 THE COURT: Go ahead.

8 MR. SHEALY: --- that the failure to hold a license is
9 not a *per se* disqualifier. However, it is something to be
10 considered in the whole matrix of what -- of what either the
11 trial judge -- well, what the trial judge should consider on
12 the issue of whether someone is qualified. This is not the
13 only issue that I am cross examining him on, but I believe I
14 have the right to ask the question under *Fields*.

15 THE COURT: Well, you're not going into the law. That's
16 the Court's responsibility. For him -- For you to ask him to
17 interpret the law, that is outside of your parameter and his
18 parameter and you're not going to go into what the statute
19 says. That's for me to make a determination on as to whether
20 or not it applies and whether or not I charge that jury on
21 that particular statute. Understood?

22 MR. SHEALY: Yes, Your Honor.

23 THE COURT: Bear with me just a minute. Did not the
24 *Fields* case deal specifically with a home inspector who was
25 actually going out to a home and doing work for the purpose of

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 -- and general contracting in this state? Is that not what
2 this case dealt with?

3 MR. SHEALY: Your Honor, the home inspectors have the
4 same sort of statutory requirements as -- as I recall as
5 engineers and in *Fields*, the Court revisited its *Baggerly*
6 decision at head notes 4, 5 and 6 and it says:

7 In this case, the trial court appears to only have
8 considered the fact that Flaherty did not have the
9 required license from the State of South Carolina. In
10 our view, the trial court cannot have such a solitary
11 focus. Although lack of licensing and violations of ---
12 THE COURT: What page are you reading from?

13 MR. SHEALY: Your Honor, it's page -- I don't know which
14 cite, but it's star page 556 at head notes 4, 5 and 6.

15 THE COURT: Go ahead. I'm sorry. I didn't mean to
16 interrupt. I just wanted to be in the -- at least in the time
17 zone, so to speak, that you are reading from.

18 MR. SHEALY: Yes, Your Honor. Again, going back to that
19 paragraph:

20 While *Baggerly* makes it clear that non-compliance with
21 licensing requirements or with the statutory law in
22 specialized areas should not require, *a fortiori*, a trial
23 court to refuse to qualify a witness as an expert,
24 *Baggerly* does not stand for the proposition that a trial
25 court should not consider these factors when judging a

1 purported expert's qualifications.

2 Now, and if you go further down, Your Honor, in the case,
3 head note 16 says:

4 The Fields argue that the trial court erred in charging
5 the jury regarding the licensing requirements for home
6 inspectors and general contractors. We disagree.

7 One of the Builder's primary strategies at trial was
8 to attack the Fields' experts, their qualifications, and
9 the contractors that the Fields used to repair their
10 home. The trial court ultimately charged the jury
11 regarding several licensing requirements applicable to
12 home inspectors, general contractors, and subcontractors
13 in South Carolina. These statutes dealt specifically
14 with statutory requirements for a home inspection report
15 identifying a construction defect in a home, the
16 statutory prohibition of a person who identifies a defect
17 in a home inspection from performing repair work on the
18 home, and the use and supervision of unlicensed specialty
19 subcontractors.

20 Of course, it was completely reasonable for the
21 Builder to attack the Fields' experts by raising
22 questions regarding their compliance with the statutory
23 and regulatory law. Thus, it was proper for the trial
24 court to charge the jury as to the statutory law in these
25 areas. That a witness has been qualified as an expert

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 does not mean that the witness's credibility and the
2 accuracy of his conclusions are beyond reproach. If the
3 statutory law provides a rubric by which an expert's
4 credibility may be judged, it is proper for the jury to
5 use the statutes to make credibility determinations.

6 It's on that basis, Your Honor, that I just want to ask
7 him if he's aware that the statutes say that -- define the
8 practice of engineering to include providing expert testimony,
9 whether he's aware of that.

10 THE COURT: Mr. Barth?

11 MR. BARTH: Your Honor, it's Your Honor's duty, as you
12 know, to charge. That case deals with charging the jury.
13 It's the ---

14 THE COURT: Well, does that case -- And let me ask this.
15 Does that case -- I mean are they -- And I'll go back and read
16 it. I will take a break and I'll go read the case again, but
17 does that case not deal with individuals that specifically did
18 repair work on the house and it's required that they be
19 licensed to perform that work? He's doing an evaluation and
20 investigation and a determination as to whether or not this
21 door closing mechanism was, in fact, operating in the correct
22 manner that it was supposed to operate. Right or wrong?

23 MR. SHEALY: Well, I agree with you that that's what he's
24 doing in this case.

25 THE COURT: Then how about what I asked about with

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 regards to these experts in the *Fields* case. I mean is that
2 not what they did? Did they not go out there and actually do
3 repair work and inspections pursuant to all of that within
4 their purview, so to speak?

5 MR. SHEALY: Or outside of their purview. I can't truly
6 say. It's the fact that the -- because I have not read the
7 underlying trial transcript or anything. I've read what the
8 opinion says and the opinion makes reference back to *Baggerly*,
9 which is specific to -- to engineers, frankly.

10 THE COURT: Well, what you've done or what you're trying
11 to do and what the Court perceives you're trying to do here
12 with this witness through your cross examination is that he's
13 illegally testifying in this court and that's not proper. I
14 make that determination, not that jury, not you, not Mr. Barth
15 or anybody else and if I make an error on that, the Court of
16 Appeals or the Supreme Court will let me know, but by
17 inference I'm not going to allow you to infer to this jury
18 that he's coming in here and testifying illegally.

19 MR. SHEALY: Very well, Your Honor.

20 THE COURT: I mean the *Fields* case did not overrule the
21 *Baggerly* case, did it?

22 MR. SHEALY: Well, no, sir, but it did explain the scope
23 of *Baggerly*.

24 THE COURT: Well, it explained the scope, but I think the
25 *Fields* case is in a different context from the standpoint of

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 these individuals going out there and actually doing work, not
2 doing an inspection and coming in and testifying as to what
3 their findings were. Is that right or wrong?

4 MR. SHEALY: Well, Your Honor, respectfully, I believe
5 that what *Fields* says is that it explains *Baggerly* to mean
6 that while the lack of a South Carolina license is not a *per*
7 *se* disqualifier, that doesn't mean that you can't go into it
8 and that it should be ---

9 THE COURT: I mean you can cross examine him as to
10 whether or not he's licensed in this state. I'm not
11 prohibiting you from doing that. I'm not prohibiting you from
12 doing that and if -- if I came across as that, I apologize for
13 that. That's not what I'm trying to prohibit you from doing.
14 You're certainly entitled to ask him whether or not he's a
15 licensed engineer in this state. Any objection to that, Mr.
16 Barth?

17 MR. BARTH: No, sir. I think he's entitled to that, but
18 Your Honor is correct that he can't attempt to infer to the
19 jury that he's somehow breaking the law because he's clearly
20 in compliance.

21 THE COURT: So I mean if you want me to stand down and
22 read -- re-read this *Fields* case, I'd be happy to. I mean if
23 ---

24 MR. SHEALY: Your Honor, I -- You have made your ruling
25 crystal clear to me and I'm happy to go -- go on.

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 THE COURT: All right, anything else, Mr. Barth?

2 MR. BARTH: May I ask Mr. Shealy one thing?

3 (Whereupon, a conference is held off the record between
4 counsel.)

5 THE COURT: Well, Mr. Barth, let me ask you this.

6 MR. BARTH: Yes, sir.

7 THE COURT: Because I want -- And maybe it's my place to
8 ask you this and maybe it's not, but I'm going to ask you.
9 The beginning of his question ---

10 MR. BARTH: Yes, sir.

11 THE COURT: --- dealt with whether or not Mr. Seluga was
12 aware that statute -- South Carolina Code statute section so-
13 and-so says and that's when you objected.

14 MR. BARTH: Yes, sir.

15 THE COURT: Is there any kind of charge that you desire
16 me to give to the jury concerning that?

17 MR. BARTH: Well, yes, sir. I mean that's what I was
18 going to do next is ask for some kind of curative instruction
19 at least to tell them -- to tell the jury that Your Honor --
20 You make the call as to whether -- I mean there -- there's no
21 allegation that he's broken the law in here.

22 THE COURT: Well, I make the call as to whether or not
23 he's qualified as an expert in whatever field, mechanical and
24 accident engineering. I determine whether or not he is, in
25 fact, qualified to testify about those issues. It is for the

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 jury to give it, his testimony, whatever weight they deem is
2 appropriate, period.

3 MR. BARTH: I agree with all of that. I do think ---

4 THE COURT: And I would -- And what I'm going to do is
5 tell the jury that I am striking the question which was begun
6 by Mr. Shealy and that they are not to consider in any way,
7 shape or form that question in their deliberations and then
8 further instruct them with regards to the Court's role in
9 making that determination as to whether or not he's qualified
10 to testify and for them to give it whatever weight they deem
11 as appropriate and necessary.

12 MR. BARTH: Yes, sir.

13 MR. SHEALY: May it please the Court, Your Honor?

14 THE COURT: Yes, sir.

15 MR. SHEALY: As far as my memory is concerned, as far as
16 I got into the question, because Mr. Barth was very quick to
17 see where I was going, was: "Are you aware that the General
18 Assembly of South Carolina defines" and I think that's what
19 all ---

20 THE COURT: Well, and let me say this, too. Again, if
21 you want to proffer this testimony to make sure that you're
22 protected in case I'm wrong, I'll allow you to do that.

23 MR. SHEALY: If Your Honor would and -- and the only
24 reason I'm bringing it up is it's just two -- It's just the
25 end of that question and one other question, but I have

VOIR DIRE CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 additional cross as to qualifications.

2 THE COURT: Okay.

3 MR. SHEALY: So the timing of your -- of your
4 instruction, I just -- I'm questioning if -- I don't know
5 whether you want to give that at this point or at the end of
6 the -- I've got three or four more questions. Well, it's a
7 little bit longer than that about what he's published and in
8 what areas.

9 THE COURT: Mr. Barth?

10 MR. BARTH: Your Honor, I still think when you make a
11 motion^d to strike, you have to tell the jury at that point they
12 are to disregard.

13 THE COURT: Yeah, I'm going to tell them when they come
14 back out and then I'm going to recognize you to continue your
15 voir dire cross examination. Okay? Now, if you want to
16 question him now outside of the presence of the jury so that
17 that's in the record in case I'm wrong ---

18 MR. SHEALY: Thank you, Your Honor.

19 THE COURT: --- please go ahead and do so.

20 PROFFER: VOIR DIRE CROSS EXAMINATION

21 BY MR. SHEALY:

22 Q: Mr. Seluga, are you aware that the General Assembly of
23 South Carolina defines the practice of engineering to include
24 providing expert technical testimony as you are doing now?

25 A: I read that last night for the first time.

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1 Q: Okay.

2 MR. SHEALY: All right, in fact, that will be -- I don't
3 have to ask another question about that.

4 THE COURT: Well, I mean I want you to make sure the
5 record is protected for you. If you want to ask him anything
6 else, please do so.

7 MR. SHEALY: No, Your Honor. I -- The -- I'm not happy
8 with my own question.

9 THE COURT: All right.

10 MR. SHEALY: I'm happy with that being proffered.

11 THE COURT: All right. Let's take about five minutes and
12 we'll get the jury back in here.

13 (Whereupon, there is a break in the proceedings from
14 11:33 a.m. until 11:38 a.m.)

15 THE COURT: Anything else before we bring the jury back
16 in, Mr. Barth?

17 MR. BARTH: No, Your Honor.

18 THE COURT: Mr. Shealy?

19 MR. SHEALY: No, Your Honor.

20 THE COURT: Thank you. Okay, bring us the jury, please,
21 ma'am.

22 (Whereupon, the jury enters the courtroom at 11:38 a.m.)

23 THE COURT: All right, ladies and gentlemen, prior to you
24 exiting the courtroom, Mr. Barth objected to a question that
25 Mr. Shealy began to ask and the Court sustained that

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1 objection. Therefore, the Court is -- And he's asked that the
2 question be stricken. The Court has sustained the objection
3 and the Court is ordering that that be stricken from the
4 record and that means that you're not to consider it in any
5 way in your deliberations.

6 It is the Court's determination as to whether or not Mr.
7 Seluga is qualified to testify as an expert in here and you,
8 as a jury, are to give such testimony the weight that you deem
9 appropriate, that you deem appropriate. Mr. Shealy, you're
10 recognized to continue. Anything further, Mr. Barth?

11 MR. BARTH: No, Your Honor.

12 THE COURT: Anything, Mr. Shealy, with regards to that
13 issue?

14 MR. SHEALY: No, Your Honor.

15 THE COURT: All right. You may continue. Thank you.

16 CONTINUED VOIR DIRE CROSS EXAMINATION

17 BY MR. SHEALY:

18 Q: Mr. Seluga, you mentioned that you had published some
19 articles, but have you ever published any articles or studies
20 or books or any other materials concerning door closing
21 mechanisms?

22 A: No.

23 Q: But you have published several articles about golf cart
24 safety though, haven't you?

25 A: Yes, I have.

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1 Q: Okay. I think *A Parametric Study of Golf Cart and*
2 *Personal Transport Vehicle Braking Stability* is the -- is the
3 name of one of your articles?
4 A: Yes, it is.
5 Q: And *Analysis and Prevention of Child Ejections from Golf*
6 *Carts and Personal Transport Vehicles* is another one?
7 A: Yes.
8 Q: All right. You've also written a few articles about
9 stepladders, right?
10 A: Yes.
11 Q: *Stepladders: Why They're Not Safe*, a presentation you
12 gave, correct?
13 A: Yes, it is.
14 Q: And *Analysis and Testing of a Hidden Stepladder Hazard;*
15 *Excessive Twist Flexibility* is another one?
16 A: Another paper, yes.
17 Q: Okay. All right and you've written at least one article
18 to explain to lawyers how to get the most out of a
19 professional expert witness, right? *Optimizing Your Use of*
20 *Motor Vehicle Accident Experts*.
21 A: Yeah, that was a -- an article in a lawyers' journal. It
22 wouldn't be considered a peer reviewed technical paper.
23 Q: Okay. Now, I understand that on your firm's web site,
24 you mention door and gate cases as the kind of cases that you
25 have experience dealing with. Is that right?

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1 A: One of them, yes.

2 Q: But I also understand that you've never offered testimony
3 in court before on a case involving a door or a gate closer.
4 Is that right?

5 A: No, that's not true.

6 Q: Well, is -- Do you remember my taking your deposition in
7 this case in November?

8 A: Yes.

9 Q: All right. Did you tell me then that you'd never offered
10 testimony in court before ---

11 MR. BARTH: I object, Your Honor, unless he's going to
12 refer to a specific part.

13 THE COURT: If you'll show him whatever you're referring
14 to, Mr. Shealy.

15 MR SHEALY: All right.

16 THE COURT: Mr. Shealy, can you approach? Mr. Barth, can
17 you approach?

18 (Whereupon, a bench conference is held out of the hearing
19 of the jury.)

20 THE COURT: I don't want to limit you to what you're
21 doing right now, but it seems to me that you're getting off
22 base a little on the qualifications and getting into the cross
23 examination as it related to the credibility. Stay on line
24 with regards to dealing with ---

25 MR. SHEALY: Yes, sir.

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1 THE COURT: --- dealing with his qualifications. Okay?

2 And then you can do whatever you want to do on the cross.

3 MR. SHEALY: Yes, Your Honor.

4 THE COURT: Okay.

5 (Whereupon, the bench conference ends.)

6 Q: Mr. Seluga, this is the original of your deposition that
7 was taken November 3rd, 2011, at -- in Stamford, Connecticut,
8 and I'm looking at the question and I'm wondering. All right,
9 this case involves a non-motorized door closer, correct?

10 A: Yes, that's right.

11 Q: All right. Have you ever given testimony in court about
12 a non-motorized door closer?

13 A: No.

14 Q: All right.

15 MR. SHEALY: No further questions. Your Honor, we'd move
16 to disqualify based upon lack of experience as to this
17 particular kind of situation.

18 THE COURT: Mr. Barth, anything further?

19 MR. BARTH: No, sir, Your Honor. We'd submit him as an
20 expert in mechanical engineering and accident reconstruction
21 based upon ---

22 THE COURT: All right, ladies and gentlemen, the
23 plaintiff's counsel has proffered the testimony of this
24 witness and has asked the Court to qualify him in the field of
25 mechanical engineering and accident reconstruction. The Court

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1 is going to grant plaintiff's request that he be qualified and
2 let me give you this instruction.

3 Normally, ladies and gentlemen, a person cannot give
4 opinion testimony. Normally, when a person testifies, they
5 must testify as to what they either saw, heard or sensed by
6 smell or something of that nature. However, there is an
7 exception. There is an exception when someone is qualified
8 because of education or experience. They are permitted to
9 give their opinion in certain areas if the Court qualifies
10 them that way.

11 This witness will be qualified as a mechanical engineer
12 in the area of mechanical engineering and accident
13 reconstruction to give opinion testimony in that area. That
14 does not mean, ladies and gentlemen, that you must accept the
15 opinion, but it is evidence for you to use in any way that you
16 see fit. Mr. Barth?

17 MR. BARTH: May it please the Court, Your Honor.

18 THE COURT: Yes, sir.

19 CONTINUED DIRECT EXAMINATION

20 BY MR. BARTH:

21 Q: Mr. Seluga, we'll kind of get right to it. You were
22 hired to assist us in this case in looking at this door and
23 its condition, right?

24 A: Yes.

25 Q: All right. If you would, tell us in general what you

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1 reviewed and then we'll look at the video in just a second.

2 A: I reviewed Ms. Lynch's depositions and also some video
3 that was taken of the door. I also reviewed the depositions
4 of two Carolina Storage employees: the one we just heard, Mr.
5 Comfort, and also a Ms. Painter.

6 Q: And when did -- When did you see those depositions?

7 A: Very recently. I read them this weekend.

8 Q: All right.

9 A: They were only just recently provided and then I also
10 reviewed some of the literature that's put out by the Norton
11 Door Closer Company, the company that made this particular
12 door closer, and I also reviewed some standards that apply to
13 doors, door closers, and building codes.

14 Q: All right and based upon that, are you ready to talk
15 about this case?

16 A: Well, based upon that and also, of course, my inspection
17 of the door back in January of last year.

18 Q: All right. Now, you were provided with a video. You
19 just mentioned that a minute ago?

20 A: Yes. Your office provided me with a video when I was
21 retained I believe.

22 Q: All right and was that video taken in your presence or
23 outside of your presence?

24 A: No, that was -- I was not present for that video when it
25 was taken.

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1 Q: All right. Did you take that video into account in
2 reaching your conclusions?

3 A: Yes, I did.

4 MR. BARTH: Your Honor, this -- The video would be -- The
5 video would be Plaintiff's Number 6, Your Honor.

6 THE COURT: All right.

7 MR. BARTH: And we'd propose to play that for the jury at
8 this point. We've got a copy on the laptop, but we've got the
9 original which has been marked.

10 THE COURT: And that's without objection?

11 MR. BARTH: I understand it's without objection.

12 THE COURT: Is that -- Any objection, Mr. Shealy?

13 MR. SHEALY: I -- As I understand the video to be, I do
14 not have any objection.

15 THE COURT: Okay.

16 (Whereupon, Plaintiff's Exhibit Number 6, the video, is
17 admitted into evidence.)

18 THE COURT: Are you going to play it over here?

19 MR. BARTH: I'm going to play it on the screen, Your
20 Honor.

21 THE COURT: Okay. I thought you were giving it to my
22 court reporter to play. I was going to say.

23 MR. BARTH: We'll go ahead and take care of it, Judge.

24 (Whereupon, there is a pause in the questioning as the
25 video is played on the screen. NOT TRANSCRIBED/NO SOUND)

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1 Q: Mr. Seluga, is that the video you had available to you?

2 A: Yes, it is.

3 Q: All right. Now, you mentioned you had Ms. Lynch's
4 deposition available to you and you reviewed that?

5 A: Yes, I did.

6 Q: Tell us what you learned from reviewing her deposition
7 that would be relevant to your investigation in this case?

8 A: Well, I learned that obviously she had a storage rental
9 here at this Carolina facilities center, that she had been
10 there on prior occasions to move objects in and out of her
11 storage unit, but that on prior occasions she had had someone
12 there to assist her. And then on the day of the accident, she
13 traveled there by herself to remove some items that she was
14 able to carry by herself and that in order to do that, she
15 propped that door with the letter *D* as in David printed on it,
16 propped that door open with a desk that she had taken out of
17 her storage unit so that she could move the other objects in
18 and out and that when she was done with that after about she
19 said thirty minutes that she removed the table and turned to
20 put it in her car, which was parked next to the door, and that
21 as she did that, the door began to close with her back to the
22 door and she placed her right foot behind her to keep the door
23 from hitting her. She was trying to walk to her car.

24 Q: All right. As far as the door that we're talking about,
25 we've seen some pictures and we're going to show some more in

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1 a minute, but can you describe it for us?

2 A: Well, the door itself is made of sheet metal so it's thin
3 pieces of metal folded around some sort of core and the door
4 is about four feet wide, a little less than seven feet tall.

5 Q: All right. Now, in your investigation when you came down
6 to South Carolina, did you take some pictures that you would
7 be referencing in your testimony today?

8 A: Yes.

9 (Whereupon, a stack of photos is handed to the witness.)

10 Q: Is that what is shown in Plaintiff's Exhibit Number 9?

11 A: Yes. These aren't all the pictures I took, but they are
12 some of them.

13 Q: All right.

14 MR. BARTH: Your Honor, I'd move to introduce Plaintiff's
15 Exhibit Number 9.

16 THE COURT: Any objection?

17 MR. SHEALY: No objection.

18 THE COURT: Without objection, Plaintiff's Exhibit Number
19 9 admitted into evidence.

20 (Whereupon, Plaintiff's Exhibit Number 9, a color photo,
21 is admitted into evidence.)

22 Q: All right. Now, this would be the front two pictures
23 that you have taken. If you would, tell us what we're looking
24 at here?

25 A: In the top one, which is called Figure 1 ---

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1 Q: Okay.

2 A: We're standing in the parking lot next to the building
3 and we're looking straight at the door where the incident
4 occurred and those -- I can't tell if they're greenish looking
5 or silver-ish looking doors. Those are roll-up doors on
6 either side and the car is placed in the position Ms. Lynch
7 told me at the inspection approximately where her car was when
8 the accident occurred.

9 Q: This is a close-up?

10 A: Exactly.

11 Q: All right and photo number 3 in that exhibit, if you
12 would -- Let me ask you this before we get to even that. Tell
13 us about the height of the door above the ground?

14 A: The threshold of the door is about two and a half or
15 three inches above the pavement where the pavement meets the
16 building. So that means when you go into this building as you
17 open the door, you have to actually step up onto the threshold
18 or through the door and because of the slope of the pavement
19 away from the building, the ground is actually lower farther
20 away from the building than right next to it. So that means
21 that when the door is open, the middle and outer edge of the
22 door would actually be more than two or three inches above the
23 ground, actually as much as almost five inches above the
24 ground in some places.

25 Q: All right and we'll have a picture of that that we'll get

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1 to in a minute, correct?

2 A: Yes. There is one in there.

3 Q: All right. Tell us what we're looking at in Figure 3,
4 please?

5 A: There we're just looking at the top of the door and the
6 doorway with the door closer with the door in a partially open
7 position.

8 Q: All right and the bottom picture, which would be Figure
9 4?

10 A: That's a close-up of one side of the door closer that has
11 two of the adjustment valves on it.

12 Q: And the top one says "sweep valve adjustment screw" and
13 the bottom says "latch valve adjustment screw." We'll be
14 talking about that at some point this morning?

15 A: Correct.

16 Q: All right and did you take that picture?

17 A: Yes.

18 Q: All right. I asked you a minute ago about the height of
19 the door and how it related to that and this would be Figure 7
20 in your exhibit. Tell us what we're looking at right there,
21 please?

22 A: That's a picture of the same door with the door in an
23 open position and then a tape measure showing the distance
24 from the ground to the bottom edge of the door. It's just a
25 little bit under five inches.

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1 Q: All right and aside from measuring the height like that
2 and taking pictures of the door, did you do anything else?

3 A: Yeah. Well, I also took a similar picture of Ms. Lynch's
4 ankle and then a picture of her foot actually next to the door
5 to see if the injury lined up with the bottom edge of the
6 door.

7 Q: All right and that -- Tell us what we're looking at right
8 here?

9 A: That's Ms. Lynch standing in front of the door with the
10 door open. Somebody's holding it open behind her you can't
11 see and I'm looking to see where the bottom of the door lines
12 up compared to her heel.

13 Q: And how does it?

14 A: It lines up with the scarring on her heel.

15 Q: All right. Top photo is Figure 9 I think. Tell us what
16 we're looking at there?

17 A: That shows the back of her heel where the scarring is and
18 you can see that's in the same range as the height of the door
19 above the ground. Again, that five inches is the maximum and
20 in some places depending on where you're standing or how far
21 open the door is, it could be a little bit less than that.

22 Q: All right. Now, did you have the opportunity to take a
23 look at the bottom of the door?

24 A: Yes, I did.

25 Q: All right and did you evaluate the sharpness of that edge

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1 that would come into contact with Ms. Lynch's ankle?

2 A: Yes.

3 Q: All right. Tell us what we're looking at. First of all,
4 how did you do that?

5 A: Well, first I visually inspected it and I saw that it was
6 a bare sheet metal edge. In other words, the sheet metal just
7 ended and there was no sort of guard or other material
8 covering it and the picture right there shows that I was
9 measuring the thickness of the sheet metal and it was about
10 one-tenth of an inch thick and it had a non-beveled edge,
11 meaning that it was very close to a right angle as opposed to
12 being smoothed out. And then after I did that, I did some
13 testing with a -- a sharpness test device that's used for a
14 particular Underwriter's Laboratories sharpness test.

15 Q: All right and that -- Well, let me -- Tell me what that
16 is, please?

17 A: That is called a caliper. It's just a device that is
18 used to measure thicknesses.

19 Q: All right. Is that any high tech device or -- or not?

20 A: No, not very. You can pick it up at your local hardware
21 store.

22 Q: All right. Now, you said you did a sharp edge test?

23 A: Yes.

24 Q: And you used what kind of instrument?

25 A: It's a tester that's built for the Underwriter's

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1 Laboratories' sharpness -- edge sharpness test, which is a --
2 Underwriter's Laboratories does testing on products to
3 determine whether or not they are safe and one of the tests
4 that they have determines whether or not edges of products are
5 -- constitute a cutting hazard for being too sharp.

6 Q: And can you tell us how you -- I mean how you use that?

7 A: Well, first I applied a small load, which was about a
8 pound and a half, to the tester and the tester actually is
9 made up of a little red plastic cylinder with a special set of
10 layers of tape on top of it and the layers allow you to see if
11 the object is sharp enough to cut through and expose the foam
12 underneath. So I applied those test caps to the bottom edge
13 of the door for different amounts of pressure to see how much
14 pressure was necessary to cause the test cap to cut, which
15 would indicate that at that level of force that edge
16 constitutes a cutting hazard.

17 Q: All right and did you take a picture of that as well?

18 A: I don't know that I did.

19 Q: Would you look at Figure 11?

20 A: That's just showing the bottom edge of the door, but it
21 doesn't show the test apparatus itself.

22 Q: Okay, that shows the bottom of the door?

23 A: Yes.

24 Q: And is that the condition you found the bottom of the
25 door in the day you were there?

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1 A: Yes, it is.

2 MR. BARTH: We'd move to introduce that, Your Honor.

3 THE COURT: Any objection?

4 MR. SHEALY: No objection.

5 THE COURT: Without objection, Exhibit Number?

6 COURT REPORTER: Eighteen.

7 THE COURT: Eighteen.

8 (Whereupon, Plaintiff's Exhibit Number 18, a color photo,
9 is admitted into evidence.)

10 Q: All right. You told us how -- how the machine works?

11 A: Yes.

12 Q: All right and tell us what your findings were in this
13 case?

14 A: When I applied a small force kind of like up to ten
15 pounds, anything up to and including ten pounds was not enough
16 to cause a cut on the test cap.

17 Q: Ten pounds of what?

18 A: Ten pounds of force. So it would be like if you put the
19 door upside down and put a ten pound weight on it, that amount
20 of force.

21 Q: All right and at ten pounds?

22 A: At ten pounds, it did not cut the test strip.

23 Q: All right and did you do it another way?

24 A: Yeah, then I -- I did another test with a new test cap at
25 a force of approximately fifteen pounds.

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1 Q: And what was the result of that?

2 A: At that point, it cut through the test cap.

3 Q: All right and so what does that tell us?

4 A: That indicates that that particular edge, if you were to
5 apply a fifteen pound force, in other words if it were to
6 contact your skin with a force of at least fifteen pounds,
7 that it would cut -- excuse me, constitute a cutting hazard,
8 meaning it could cut your skin.

9 Q: All right and did you perform any tests to determine how
10 much force that door would have generated when it hit Ms.
11 Lynch's ankle?

12 A: Yes, I did.

13 Q: All right. Tell us what you did and what you found?

14 A: I have a tool that measures force. It's a digital, hand-
15 held force meter and it allows you to measure the maximum
16 force from the time I turn it on to the time I reset it and so
17 what I did was I opened the door fully the way Ms. Lynch
18 described to me at the inspection that she initially had it
19 before she moved the table and then held the force gauge at
20 various positions near the angle of the door where she
21 believes it made contact with her foot and then I recorded
22 what the peak force was between the door and the force gauge
23 for those different angles and the angles were from like zero
24 to about 135 degrees, which would mean it was half of the way,
25 meaning half closed, and I also did it from fully open to

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1 about 90 degrees, which means all the way open to half closed.

2 Q: All right. You opened it various ways and let it shut?

3 A: It was always open fully, but then I let it shut to
4 different degrees before I stopped its motion with the force
5 gauge.

6 Q: All right. Why did you do that? Why did you stop it at
7 different spots?

8 A: To get a sense of whether or not there was any variation
9 to see if those two different positions gave different
10 readings.

11 Q: All right and were you able to tell how much force the
12 door generated when it would have come into contact with Ms.
13 Lynch's ankle?

14 A: Yes.

15 Q: All right. Tell us what -- what you found or I guess the
16 range since you did it a few ways? Tell us what you found?

17 A: I repeated it and it was some variation, but the range
18 was generally from about fourteen pounds to I think upwards of
19 about 26 or 27 pounds.

20 Q: All right and based on your testing it, it would take
21 about what amount of force to be a cutting hazard?

22 A: Well, ten is not enough, fifteen is enough, so the
23 threshold is somewhere in-between ten and fifteen.

24 Q: All right and so the conclusions that you reached on that
25 issue would be what?

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1 A: That based on the force and the sharpness test, that if
2 the door closed from fully open to those positions I
3 discussed, the combination of the -- the force of the door
4 hitting someone's foot and the sharpness of the bottom edge
5 would be enough to cause a cut.

6 Q: Okay. Did you have the opportunity during your
7 investigation to determine how Ms. Lynch was injured?

8 A: Yes.

9 Q: How's that?

10 A: I reviewed all of the documents in view of my findings
11 and came to an opinion.

12 Q: All right and the opinion on the injury itself, how did
13 that occur?

14 A: By looking at the alignment of her scarring with the
15 bottom of the door, comparing her description of the accident
16 to what I observed in my inspection and what I found with my
17 testing, and also comparing the tests of how much force was
18 necessary to cause a cutting hazard and how much force was
19 actually available.

20 Q: All right and did you make a determination about the
21 amount of force the door would have hit her at?

22 A: Yes.

23 Q: And that would be what?

24 A: That would be that range I talked about from fourteen
25 pounds to about twenty-six pounds.

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1 Q: All right. Now, let's go back and talk about the closer
2 for just a couple of minutes. What are we looking at right
3 here?

4 A: Two different views of the door closer on top of the
5 door.

6 Q: All right. What kind of door closer is this?

7 A: This is a Norton brand door closer, Model 1601.

8 Q: Okay. Can you tell the jury just in general how it
9 works? I mean more than the fact that it closes the ---

10 A: Sure.

11 Q: --- door.

12 WITNESS: Judge, may I use a laser pointer, if that's
13 okay?

14 THE COURT: Yes, sir. Do you have one?

15 WITNESS: Yes, I do.

16 Q: Which one of these two pictures, the top or the bottom,
17 do you want to deal with?

18 A: I think first the top one.

19 Q: All right. I'll make it a little bigger for you.

20 A: So this rectangular part here is called the closer body.

21 Q: Okay. Be sure and speak up a little bit, okay?

22 A: Okay.

23 Q: It's hard to hear in here.

24 A: This part here is called the closer body and these are
25 the closer arms and the way the mechanism works is that inside

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1 the closer body here there is a piston and a spring and
2 essentially what happens is when you open the door, the spring
3 gets compressed and stores energy and then when you let go of
4 the door, the spring returns to its initial position and in
5 doing so, there's a rack and pinion type of bearing that
6 causes the motion of the piston inside the body to -- to
7 relate to the rotation of this arm that's connected to the
8 closer body.

9 So when you -- If you were to take this off the door, for
10 example, if you tried to move this, you'd be compressing the
11 spring and it would let you move it and rotate it, but then if
12 you let it go, it would move back into its original position
13 and if you just had those components, the door would just snap
14 closed. So the other thing that the closer body has inside it
15 is a series of hydraulic passages and hydraulic fluid in
16 valves. So if we looked at the next picture below that one,
17 you can control the resistance of the hydraulic fluid moving
18 by tightening or loosening certain valves.

19 Q: All right. Now, tell us in layman's terms what that
20 means when you're talking about that.

21 A: Yes, sir.

22 Q: Because I don't understand the technical end of it. What
23 are you talking about?

24 A: Well, in order for the piston to move inside the door
25 closer, which allows the door to actually close, the fluid --

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1 There's an oil inside and the fluid actually has to move from
2 one part of the closer to another and it's not just free to
3 move around. It has to pass through very specific passages
4 that are narrow and that are regulated by these valves. So
5 when you turn these screws here, you're opening or closing
6 openings that allow the oil to move back and forth.

7 Q: So what does that do?

8 A: So if you close the valves, you're making it harder for
9 the oil to move through these little spaces and it makes the
10 door move more slowly because the spring is providing force
11 that closes the door and the oil is slowing it down.

12 And there's two different valves on this side because
13 there's two different phases of the door closing speed. One
14 is called the speed -- excuse me, the sweep speed, which is
15 the speed at which the door closes from the time it's
16 completely open to the time it's very close to the latch,
17 about ten degrees, and then that last ten degrees is
18 controlled by a separate valve that's called a latch valve.

19 Q: All right. Now, tell us -- Tell us the difference
20 between the two? What is the latch speed?

21 A: The latch speed is just the speed at the very end and you
22 can make this door go very slowly and then speed up at the end
23 or you can make it go very fast and then slow down at the end
24 depending on how -- well, what kind of latching power you
25 have. In other words, you want to make sure that the door, if

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1 it has a lock for example, actually closes and clicks closed.

2 So that's why you might want to adjust the sweep speed

3 independently of the latch speed.

4 Q: All right and -- and to do that when you talk about

5 changing the speed, speeding up how it closes, etcetera, how

6 exactly do you do that?

7 A: All you have to do is take an Allen wrench and stick it

8 in one of those two cap screws. This one controls the sweep

9 speed and this one controls the latch speed and they're -- I

10 don't know if you can tell on this picture, but they're

11 marked. One has an S on it and one has an L on it for sweep

12 and latch and if you tighten the screw by turning it

13 clockwise, that closes the valve and makes things move more

14 slowly and if you loosen the screw and turn it to the left, it

15 will make it move faster.

16 Q: And you make all these adjustments by turning those two

17 screws?

18 A: Those two screws, yes.

19 Q: Okay. Now, did you attempt to measure the closing speed

20 of this particular door when you were down here looking at it?

21 A: I did.

22 Q: Tell me how you did that?

23 A: I took a video of the door opening from a known position,

24 which was basically all the way open, until it reached its

25 fully closed position and then later on, I looked at the video

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- 1 and measured the times off of that.
- 2 Q: All right. Now, do you remember who was there that day?
- 3 A: Yes.
- 4 Q: And who was it?
- 5 A: You were there. The defense attorney was there.
- 6 Q: Okay.
- 7 A: And also a representative of the defendant.
- 8 Q: Okay, a representative of?
- 9 A: The defendant.
- 10 Q: All right and when you went to make these adjustments and
- 11 do your measurements, what were your instructions when you
- 12 were finished?
- 13 A: I was told to put it back the way I found it.
- 14 Q: And did you do that?
- 15 A: Yes.
- 16 Q: Any doubt in your mind about that?
- 17 A: No, I'm sure I did that.
- 18 Q: All right and who watched you do that?
- 19 A: Everyone who was present. Oh, and Ms. Lynch was there,
- 20 too.
- 21 Q: Okay. Now, you indicate you took some videos?
- 22 A: Yes.
- 23 Q: Tell us what we're looking at. What's the difference?
- 24 A: I'm sorry. I don't understand.
- 25 Q: All right. You've got two videos on here. What were you

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1 trying to show the jury? We're going to play them in just a
2 second.

3 A: Oh, these two videos, one of them shows the door closing
4 the way I found it, in other words before I touched anything.
5 I just let it close to see how long it took. And then another
6 video shows it after I tightened the sweep valve and I
7 tightened it one full revolution.

8 Q: All right. You turned the screw one time all the way
9 around?

10 A: Yes, 360 degrees, one time around.

11 Q: All right.

12 MR. BARTH: Your Honor, we'd move to introduce
13 Plaintiff's Number 10.

14 THE COURT: Any objection?

15 MR. SHEALY: No, Your Honor.

16 (Whereupon, Plaintiff's Exhibit Number 10, a DVD
17 containing the two videos, is admitted into evidence.

18 NOT TRANSCRIBED)

19 Q: Mr. Seluga, if you would, I'm sorry, would you tell us
20 what we're looking at?

21 A: This is a video of the door closing from this fully open
22 position, which is about 170 degrees, to fully closed.

23 Q: All right and part of that video was obviously audio?

24 A: There is audio, yes.

25 Q: All right and who took that video?

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1 A: I did.

2 Q: All right. Now, that was which way? As you found it or
3 as you changed it?

4 A: That was as I found it.

5 Q: All right. Now, from the -- from the time the door is
6 fully open until it comes all the way closed the way you found
7 it, how long is that?

8 A: Well, on the day I found it, it was a windy day ---

9 Q: Okay.

10 A: --- and the wind was tending to blow the door closed. So
11 I tried to do the test when there were lulls in the wind, but
12 it caused some variation. The longest times were about five
13 seconds and the shortest times were close to three seconds.

14 Q: All right and what do you attribute the difference to?

15 A: There's some natural variation in the door and probably
16 some of it was from the wind. So the faster times were
17 probably a result of the wind blowing it closed.

18 Q: All right. Now, you provided us with a -- with a second
19 video, right?

20 A: Yes.

21 Q: All right. Before we put it up there, tell us the
22 difference between the first and the second one?

23 A: In the second video, the only difference is that I
24 rotated the sweep speed adjustment valve screw one full
25 rotation.

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1 Q: All right. This is the first one.

2 (Whereupon, there is a pause in the questioning as the
3 first video is played.)

4 Q: Okay and this is ---

5 (Whereupon, there is a pause as the second video is
6 played.)

7 Q: Those two different videos, the difference was turning
8 the screw?

9 A: Yes.

10 Q: All right. Now, this particular closer, are there some
11 recommendations by the manufacturer as to -- as to how the
12 door ought to shut?

13 A: Yes. There's an instruction manual for installing it and
14 it has some recommendations for closing times.

15 Q: All right and what's the range?

16 A: It recommends for closing from 90 degrees open to
17 perpendicular to the building until it's all the way closed
18 that it take between three and seven seconds.

19 Q: All right and this particular door as you found it closed
20 in how many seconds?

21 A: Well, I measured the closing speed from it being fully
22 opened and I did some calculations to determine what it would
23 have been from 90 degrees open and those calculations showed
24 me that it would have been about three seconds.

25 Q: About three seconds?

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1 A: Yes.

2 Q: All right, the minimum they recommend?

3 A: Yes.

4 Q: All right. Now, as it relates to the sharpness of the
5 bottom of the door, okay?

6 A: Okay.

7 Q: Tell me in terms of speed what difference that makes to
8 the bottom of the door? Does that make sense?

9 A: Well, it's not just the speed to the sharpness, it's the
10 height of that edge. The fact is that this door is not your
11 typical application because the bottom of the door is so far
12 above the walking surface and so for that reason, you have to
13 consider that when you're setting the closing speed.

14 Q: All right and you said it was about three seconds, which
15 is within the -- which is the minimum recommended by the
16 manufacturer?

17 A: Yes.

18 Q: All right. Now, what's wrong with having it set that way
19 for this door in this place?

20 A: Well, like I said, in this particular case, there's a
21 cutting hazard that we know the bottom of the door is raised
22 up off of the ground so it has the potential to hit an
23 unguarded part of someone's body. If this were, you know, a
24 typical door and the bottom of the door were a half inch off
25 the ground, it wouldn't really be a problem because you

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1 couldn't cut. You just wouldn't be able to get to a sensitive
2 part of the foot even if you didn't have any shoes on at all.
3 But in this case, this metal edge is roughly say five inches
4 above the ground so it has the potential to contact the back
5 of someone's heel.

6 So for that reason, you have to be conscientious of the
7 fact that it does pose this hazard and the closing speed of
8 the door is going to affect two things. It's going to affect
9 the likelihood that it's going to hit somebody in the first
10 place and also, it's going to affect the speed at which it's
11 going to hit someone and for that reason, based on the
12 measurements I took, the three second closing time as I found
13 it was too fast because it created a situation where you have
14 this kind of injury.

15 Q: All right. Now, in fact, the way you found it you
16 indicated was about three seconds to close?

17 A: From 90 degrees, it would be about three seconds.

18 Q: All right and when you slowed it down, how figure wise
19 did that change it? How long did it take to close from that
20 same spot?

21 A: It -- Well, again, I did a calculation. I did a
22 measurement from the fully open position and that increased
23 the closing time to I think about the maximum of eight seconds
24 while as before it was five and then I did a calculation for
25 what it would be from 90 degrees and it changed that from

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1 about three seconds to something like five seconds.

2 Q: All right. Now, the two that you did, can you adjust it
3 more?

4 A: Yes. Actually, according to the ANSI standard, the
5 American National Standards Institute, the standard for the
6 design and manufacture of these types of door closers, they
7 actually have to be capable of being tightened to the point
8 where the closing time is at least sixty seconds. So given
9 the fact that the door closer was appropriately sized for this
10 particular door, it should have been capable of giving that to
11 something like sixty seconds.

12 Q: So by the turning the screw, you can make it take as long
13 as sixty seconds to come to a close?

14 A: Yes.

15 Q: All right, with this closer?

16 A: Yes.

17 Q: All right. Now, the difference in the speeds you
18 indicated had a difference in the impact force that it would
19 have hit Ms. Lynch's ankle, right?

20 A: Yes.

21 Q: All right. Tell us at the speed you found it, in your
22 opinion, what speed would the door have hit her ankle?

23 A: The speed? Well, the average speed was ---

24 Q: When I say impact, I guess the force you were talking
25 about when you were talking about pounds?

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1 A: Okay. Yeah, the force was when I measured it as I found
2 it was between say fourteen and twenty-six pounds.

3 Q: Okay and the cutting hazard you found at fifteen pounds?

4 A: Yes.

5 Q: All right. If the door had slowed down as you showed --
6 as you showed one rotation, the speed, in your opinion, would
7 have been what when it hit Ms. Lynch's ankle?

8 A: Well, the speed is reduced just for the adjustment I made
9 by almost one-half. It's almost -- It almost takes twice as
10 long to close.

11 Q: All right and assume she didn't get out of the way, it
12 would have hit her with what impact force? You said at the
13 first speed it was fourteen to twenty-six pounds. At the
14 slower speed, it would have been what?

15 A: Well, I redid that measurement with the force gauge after
16 I adjusted the sweep valve and the force instead of being
17 fourteen pounds or higher was between six and eight pounds.

18 Q: And was that sufficient, in your opinion, to cut
19 someone's ankle?

20 A: No. It was below that ten pound threshold that I
21 determined with my sharpness tester.

22 Q: If -- In your opinion, Mr. Seluga, if the door had been
23 adjusted from where you found it to where you put it in this
24 video, do you have an opinion to a reasonable degree of
25 certainty as to whether Ms. Lynch's injury would have

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1 occurred?

2 A: Yes.

3 Q: All right. What is that opinion?

4 A: That it would not have occurred because the force of the
5 door hitting her leg wouldn't have been sufficient to cause a
6 cut and also, the fact that -- the fact that it would be less
7 likely to hit her leg in the first place if it closed slower.

8 Q: All right. Now, have you sat down and reviewed the door,
9 etcetera, and reached some conclusions as to how this door
10 should have been handled as opposed to how it was?

11 A: Yes.

12 Q: All right. Can you tell us what your opinions are?

13 A: Well, considering -- Well, I already talked about the
14 fact that it has this sharp edge and the sharp edge is above
15 the ground that presents this cutting hazard and also
16 considering the fact that it is a storage facility where you
17 expect people to be moving objects in and out and they're
18 going to have to keep the door open while they do that, those
19 conditions require that the door be set to close more slowly
20 than it was and, in fact, better than that would have been to
21 even provide some means for delaying its close or keeping it
22 open.

23 Q: All right. Keeping it open means what?

24 A: Well, for example, Norton door closers are sold with a
25 hold open feature, not all of them, but it's an option.

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1 Q: And that means what?

2 A: That means there's a little spring loaded detent, it's
3 like a ball that pops into a little hole somewhere on the
4 mechanism and you can push the door to the open position and
5 lock it there just like you would lock your screen door with a
6 -- with a sliding lock, but this just pops into place and
7 holds it open.

8 Q: All right. Now, you understand that this particular unit
9 is heated and cooled?

10 A: Mm-hmm.

11 Q: Do you understand that?

12 A: Yes.

13 Q: And locking the door open like you describe is going to
14 let that out?

15 A: Yes.

16 Q: All right. Tell me why it would be reasonable and the
17 right thing to do for them to allow you to lock it open?

18 A: Well, the fact is that there was this problem that the
19 customers had and that Mr. Comfort even in his deposition
20 acknowledged he knew about that the customers had to get
21 objects through this door and in order to do that, they had to
22 prop it open.

23 Q: Okay.

24 A: So rather than leaving it up to the customers to solve
25 this problem however they saw fit by trying to figure out how

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1 to prop it open, it would have been better to provide a safer
2 alternative.

3 Q: And those safer alternatives would be to slow it down or
4 the ability to lock it open?

5 A: Or one other option that's available.

6 Q: What is that?

7 A: There's also a standard -- excuse me, not standard, an
8 optional feature on these door closers which is called a
9 delayed closing action.

10 Q: And what is that?

11 A: That has a third stage. So the normal condition of the
12 door is that it has two speeds, the sweep speed and the latch
13 speed. If you buy a door closer with this delayed closing
14 feature, it has a third function to it where if you open it
15 past I believe it's 70 degrees, you have a third valve that
16 you can use to control how quickly it moves from fully open to
17 70 degrees and then the sweep speed will take over from there
18 until it gets to the latch. So you can actually delay the
19 closing by several minutes with this feature.

20 Q: All right. Now, are you familiar with various building
21 codes and things such as that? You mentioned ANSI. What is
22 that?

23 A: Well, ANSI is the American National Standards Institute.
24 It's an organization that publishes all sorts of design and
25 safety standards, a lot of them having to do with products.

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1 Q: Did you review that book to determine whether it applied
2 to this situation?

3 A: Well, I looked at the ANSI 156.4 standard, which is for
4 the design and manufacturing and testing of door closers.

5 Q: All right. Is there anything in there about how sharp
6 the bottom of a door can be?

7 A: No. That standard doesn't even deal with the doors. It
8 just deals with the door closers.

9 Q: It just deals with ---

10 A: The door closer.

11 Q: --- the door closer? Were you able to find any -- any
12 codes that dealt with the bottom of the door? How sharp it
13 can be? How sharp it can't be? Anything such as that?

14 A: There's no codes that I could find that have a specific
15 requirement for the sharpness of the bottom edge of the door.
16 The one hollow metal doors standard I did look at doesn't
17 specify that. You can make it as sharp as you want. It could
18 have a razor blade on the bottom if you want and it wouldn't
19 violate that standard.

20 Q: And were you able to take a look at the code in regard to
21 the closing speed?

22 A: Yes.

23 Q: And are there any rules on how fast a door can close?

24 A: Well, the ANSI standard requires that the door closers be
25 capable of closing and the longest time has to be at least

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1 sixty seconds.

2 Q: How about actually closing? If I want my door to close
3 from start to finish in one second or two seconds, does that
4 violate any of the codes?

5 A: Only if it creates something that is considered a
6 hazardous situation, but there's no specific requirements for
7 the time, closing time.

8 Q: All right. In your opinion, Mr. Seluga, the door as you
9 found it and the way it was set up, speed, weight, sharpness,
10 height off the ground, etcetera, in your opinion, did that
11 present a safety hazard to the users?

12 A: Yes, it did.

13 Q: All right and tell us exactly what conditions you believe
14 contributed to making that door a safety hazard?

15 A: It was the combination of the height of the edge above
16 the ground, the sharpness of that edge, the fact that it
17 wasn't guarded in any way, and the speed with which -- the
18 speed and then as a result of that, the force with which the
19 door closed and the lack of any means of delaying or keeping
20 open -- delaying the door's closing or keeping it open.

21 Q: And if Carolina Storage had eliminated any of those
22 things that you just mentioned, in your opinion, would the
23 hazard still be there?

24 A: If they had -- If they had at least guarded the edge or
25 slowed down the closing speed, that would have eliminated the

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1 hazard. If they had created a hold open or delayed closing
2 feature, that would have mitigated it, but it wouldn't have
3 completely eliminated it.

4 Q: All right and in your opinion, Mr. Seluga, what should
5 Carolina Storage have done in this situation to remedy the
6 hazardous situation as you found it?

7 A: In my opinion, they should have done one of those things.
8 They should have either eliminated the hazard by -- by
9 guarding or somehow eliminating that sharp edge or reducing
10 the closing speed of the door and they also should have
11 provided some sort of means for people to keep the door open
12 or to delay the closing of the door so that the customers
13 wouldn't be left to their own to figure out how to prop it
14 open.

15 Q: Thank you. If you would, answer any questions Mr. Shealy
16 might have for you.

17 THE COURT: Mr. Shealy, cross examination.

18 CROSS EXAMINATION

19 BY MR. SHEALY:

20 Q: Mr. Seluga, you formed your opinions in this case after
21 reviewing -- first reviewing some information that Mr. Barth
22 provided you and -- and then doing some tests at my client's
23 place of business, correct?

24 A: Yes.

25 Q: All right and Mr. Barth first got you involved in the

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1 case in May 2010, nearly two years after the accident. Is
2 that right?

3 A: Yes.

4 Q: All right. Now, one of the things that he provided you I
5 think is the -- is the first video that the jury looked at was
6 a video he shot himself at some point after the accident,
7 right?

8 A: Correct.

9 Q: All right and we saw that Ms. Lynch is in it herself,
10 correct?

11 A: Yes.

12 Q: All right. You don't know for sure when it was shot, but
13 the date stamp on the video was October 28th, 2009. Is that
14 right?

15 A: That sounds right.

16 Q: I think maybe Mr. Barth's hand or arm appears in the
17 video, but we saw Ms. Lynch in the video, correct?

18 A: Yes.

19 Q: Okay and to your knowledge, no representative of the
20 defendant was present when that video was shot. You didn't
21 see anybody there in that -- from -- from the defendant in
22 that video, correct?

23 A: Not that I know of.

24 Q: All right. Were you given any indication by Mr. Barth as
25 to whether he, Ms. Lynch or anyone else had modified the door

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1 closer mechanism at any point after the accident?

2 A: He represented to me that -- that all indications were
3 that it hadn't been modified.

4 Q: Okay and you were told that the defendant had represented
5 that it had not made any changes to the mechanism, right?

6 A: Yes.

7 Q: All right and you understand that the defendant's
8 facility is open to all of its tenants and that multiple
9 people have access to this particular building through the
10 very door where the accident occurred, right?

11 A: Yes.

12 Q: All right. So you performed your tests, right? You --
13 You went and came to Florence in January, January 26th of 2011,
14 and performed some tests there at the site, correct?

15 A: Yes, I did.

16 Q: All right and as I understand it, you performed three
17 sets of tests: one to determine how long it would take the
18 door to close from various open positions, the second to
19 determine how much force was generated by the door as it
20 closed, and the third to measure the sharpness of the leading
21 edge of the -- of the bottom of the door. Is that right?

22 A: Yes.

23 Q: Okay and as you mentioned, that was a cold, very windy
24 day, correct?

25 A: Yes, it was.

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1 Q: All right and in fact, on the day of your test, the wind
2 was blowing between fourteen and twenty-five miles an hour
3 with gusts up to thirty-two miles per hour, correct?

4 A: That sounds like the weather data I obtained for Florence
5 airport on the day and time of my inspection.

6 Q: Okay. You obtained that weather information because the
7 -- the wind was significant on that day, correct?

8 A: Yes, it was.

9 Q: All right. Did those conditions being cold and windy
10 compare well with the conditions on the day of the accident as
11 you understand?

12 A: Well, it was windier on the day of the inspection than on
13 the day of accident, that's correct for certain.

14 Q: All right. In fact, you later learned that on the day of
15 the accident -- You found some weather data for that day. It
16 was between 80 and 84 degrees and the wind was ten miles an
17 hour, right?

18 A: Yes.

19 Q: Okay. So on the day you perform your tests, you know
20 that it is two and a half years after the accident, Ms. Lynch
21 and her attorney both have unrestricted, unsupervised access
22 to the door closer at some point in the intervening time, as
23 well as the place has been open to any number of my client's
24 tenants during that intervening time, and the weather
25 conditions were completely different than on the day of the

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1 accident, and despite all those variables, you're willing to
2 opine that the door closer was unsafe on the day of the
3 accident, correct?

4 A: Also, considering the other video that shows it before my
5 inspection on a day where it wasn't windy.

6 Q: Well, you weren't there on the day that the video was
7 shot, were you?

8 A: No, I wasn't.

9 Q: All right and you don't know for sure whether it was
10 windy that day or not, do you?

11 A: Well, I do. I can see in the video that Ms. Lynch's hair
12 isn't blowing around like it would be if it were very windy
13 and I also have weather data for that day.

14 Q: Okay and you're saying that day because of the date stamp
15 that was on the video?

16 A: Yes.

17 Q: Okay. So, all right, let me make sure that I understand
18 the basis for the opinion or opinions you've given today. One
19 of the primary things that you measured was how long it would
20 take the door to close from various open positions, right?

21 A: From the fully open position.

22 Q: That's right. You timed it from the fully open position
23 and then you extrapolated what it would be from -- from other
24 positions. Is that right?

25 A: Yes.

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1 Q: All right and you used the video shot by Mr. Barth, as
2 well as the video you shot yourself, to make those time
3 calculations, correct?

4 A: Yes, I did.

5 Q: And on either occasion did you calibrate the camera to
6 make sure that it was not slowing down or speeding up what
7 occurred in real time, did you?

8 A: I'm not even sure how you would calibrate a camera. I
9 know my camera is -- I used it before for those sorts of
10 measurements and it's always been accurate.

11 Q: You just -- It's always been accurate?

12 A: I've compared it to other time measurements, for example
13 a stop watch or accelerometer, and it's time agrees with the
14 time on the video and also you have the fact that there's
15 sound on the video and if the playback time were distorted,
16 the sound would be distorted.

17 Q: All right, but you didn't calibrate it and cross check it
18 with a stop watch on the day that you performed your tests,
19 correct?

20 A: Not on that day.

21 Q: And you couldn't do it on the earlier day because you
22 weren't there?

23 A: True.

24 Q: All right. So despite all those issues, despite the fact
25 that the wind conditions were pretty -- pretty extreme,

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1 frankly, on the day that you performed your tests, you were
2 unable to say that the door closed too fast to meet the
3 applicable standard, correct?

4 A: I'm not sure which standard you're talking about. Most
5 of the standards don't specify the speed.

6 Q: All right. Well, the American's With Disabilities Act
7 has some guidelines that say a door cannot close any faster
8 than x, correct?

9 A: Yes.

10 Q: All right.

11 MR. BARTH: I object on the ground of relevance, Your
12 Honor, as the ADA doesn't even apply ---

13 THE COURT: All right.

14 MR. BARTH: --- to this.

15 THE COURT: It's cross examination. I'm going to allow
16 it right now.

17 MR. BARTH: All right, thank you.

18 THE COURT: Go ahead.

19 Q: All right and you could not determine even with the wind
20 blowing the door shut that the door did not meet that
21 standard, correct?

22 A: Probably with the wind blowing it shut it -- it wouldn't
23 have met it because the calculations show it.

24 Q: Even with the wind blowing or taking into consideration
25 the wind blowing, you're saying ---

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: No. If you take into consideration the wind blowing,
2 that is very close. It's too close for me to tell because the
3 standard requires three seconds and it could be a fraction of
4 a second more or less.

5 Q: All right. So in other words, as I understand it,
6 there's not a statute or regulation or an industry standard or
7 any other bright line rule, the manufacturer's recommendations
8 that the door closer as it was presented to you as you found
9 it violated, is there?

10 A: With respect to the closing time, no. There's no
11 specification that ---

12 Q: Okay.

13 A: --- that is violated.

14 Q: All right and you've opined that you believe the door
15 closer is unsafe because the applicable building code contains
16 I think you termed it a catch-all provision that says
17 buildings should be constructed and maintained in a condition
18 that is not unsafe. Then the building violates the building
19 code, is that -- Is that your ---

20 A: Well, yes, the ---

21 Q: --- conclusion?

22 A: The 2000, year 2000, International Building Code was
23 adopted by South Carolina as the building code and that code
24 does require -- Because the code can't specify every little
25 thing that might be inside the building, it has one section

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 that says all equipment and I forget the exact wording, but I
2 know it uses the word equipment. The facilities of a building
3 have to be maintained in a safe condition and that if they're
4 not safe that they have to be fixed.

5 Q: All right. So it has that provision, but it has tons of
6 other rules as to what aspects of the building have to be, the
7 way things have to be constructed, how high things have to be,
8 various things like that, correct?

9 A: Yes.

10 Q: Okay.

11 A: All sorts of specifications.

12 Q: And none of those you found to be violated. You just say
13 that it's violated because of this catch-all provision that a
14 building should be maintained in a safe condition, right?

15 A: Yes.

16 Q: All right, but isn't that sort of a classic case of
17 logical boot strapping? Aren't you personally supplying the
18 condition that allows you to reach the answer to your own
19 question: Does the building violate the building code? I
20 believe it is unsafe, therefore, because I believe it is
21 unsafe, it violates the building code. Isn't that what we're
22 doing here?

23 A: Well, that's what that section is for because like I
24 said, they don't cover everything, but the door could have a
25 razor sharp edge and could close in one-tenth of a second and

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 it still wouldn't violate any other part of that building
2 code.

3 Q: All right. Well, we'll talk about that a little bit
4 more, but basically because it has that section, that allows
5 you to have this opinion that it violated the building code
6 because you believe it's unsafe, right?

7 A: Yes.

8 Q: Okay. Now, am I right that the door closer bears a date
9 code on it that lets you know it was manufactured in 2005?

10 A: I looked at that again and it was -- I thought it was the
11 letter C, and after looking at Mister -- What was his name?
12 Daniel Comfort's deposition, it's possible that that was not
13 the letter C, but the letter G and depending on which of those
14 it is, the stamp would be either 2001 or 2005.

15 Q: All right and do you know for sure when the building was
16 constructed?

17 A: I only know what I read in his deposition.

18 Q: Okay. Do you know when the closer was installed on the
19 building?

20 A: No.

21 Q: Do you know who installed the door closer on the
22 building?

23 A: No.

24 Q: Is it your understanding that my client built the
25 building?

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: I -- I don't know.

2 Q: Well, do you understand that my client contracted with
3 some firm to build the building and install the door closer on
4 the door?

5 A: I think that's what I'd assumed, but I don't have any
6 information on that.

7 Q: All right and -- and you mentioned that Norton
8 manufactured the door closer, right?

9 A: Yes.

10 Q: All right and is it your understanding that Norton is the
11 predominant provider of door closer mechanisms for commercial
12 applications in the United States?

13 A: It seems to be.

14 Q: Okay. Do you further understand that this particular
15 door closer is quite commonplace in buildings that for one
16 reason or another need to make sure that the doors remain
17 closed?

18 A: Yes.

19 Q: And you're aware that there is an industry standard, I
20 think you mentioned it, for how to construct one of these door
21 closers, right?

22 A: Yes. That's the ANSI standard I mentioned.

23 Q: All right and you mentioned your investigation led you to
24 conclude that the closer was constructed in compliance with
25 that industry standard, right?

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: Yes. I see no reason to believe it wasn't.

2 Q: And then you've talked about the two screws that can
3 adjust the closing speed and the latch speed, right?

4 A: The sweep speed and the latch speed.

5 Q: Okay. They -- They manipulate how fast the door closes,
6 correct?

7 A: Yes.

8 Q: And they operate within a defined range, correct?

9 A: Yes.

10 Q: There's an outside limit and an inside limit to the
11 adjustments you can make of those screws, correct?

12 A: Yes.

13 Q: And you reviewed the materials that Norton published
14 about the closers, right?

15 A: Yes.

16 Q: And Norton recommended that range of speeds that you
17 mentioned in your earlier testimony, right?

18 A: Yes, it does.

19 Q: And this -- The closing speed that -- that you found was
20 within, although towards the lower end, but within the
21 recommended speed, correct?

22 A: It was very close to it, yes.

23 Q: Okay, as tested. I mean you're not able to say to a
24 reasonable degree of engineering certainty that the door
25 closing speed fell outside of that range, right?

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: That's correct.

2 Q: All right. Let me -- I want to ask you about the tests
3 that you performed on the force of the door as it closed. All
4 right, you mentioned that you had a force meter I think in
5 your hands when you did that?

6 A: Yes, I did.

7 Q: Okay. So it's designed to measure the force of an object
8 that hits a little -- a little knob on the top of the device?

9 A: That's one way to use it.

10 Q: Okay, but it's designed to be struck by a moving object.
11 Is that right?

12 A: That's one of the applications.

13 Q: Okay. I guess you could use it and strike a moving
14 object with it, couldn't you?

15 A: You could.

16 Q: All right. I mean strike a stationary object with it?

17 A: You could.

18 Q: And that would measure force, too?

19 A: Yes.

20 Q: Okay. So, but you held the device in your hand when
21 you're out there performing your tests, correct?

22 A: Yes. I held it in I think both hands and sort of braced
23 it against some part of my body.

24 Q: Well, I mean because you have it in your hand, in theory
25 you could manipulate the results it gave you, couldn't you?

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: You could.

2 Q: Okay. Unless that device is mounted to a stationary
3 object when it's struck, it's subject to being moved by the
4 operator and that would affect the results it gave you, right?

5 A: I'm sorry. I didn't follow that question.

6 Q: Okay. Because you're holding -- You're holding it in
7 your hand and it -- it's subject to being moved by you as
8 you're doing your test. That is -- That could potentially
9 manipulate the results that you get with the -- the machine?

10 A: It could if you moved it, yes.

11 Q: Okay. So if you wanted it to record less force, you'd
12 move away from that object as it's coming toward you, right?

13 A: Yeah, you could do that.

14 Q: All right and if you wanted to record more force, you'd
15 go toward the object as it's coming towards you, right?

16 A: You could do that.

17 Q: All right. That's just kind of common sense, right?

18 A: Well, to some extent. For example, the lower force, if
19 you're going to stop the door, eventually you're going --
20 you're going to measure some minimum force no matter how much
21 you try to cushion it because the door closer actually exerts
22 a certain pressure.

23 Q: Well, sure, but I mean what I'm saying is if you're
24 moving away, that's -- that's going to register a lower force
25 than if the object is completely stationary when the moving

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 object hits it, right?

2 A: Up to some point. Eventually, you're not going to get it
3 any lower than that.

4 Q: Okay and on the same lines, if the wind is blowing harder
5 during one run than the next run, then you're probably going
6 to get different results. You mentioned that, right?

7 A: You could, yes.

8 Q: There's no real way to cancel out the influence of the
9 wind on the test as you're doing it there in the field really,
10 is there?

11 A: Only to attempt to run the test when there's not as much
12 wind.

13 Q: Okay. So even though your results are subject to that
14 kind of variation, that kind of manipulation, you're
15 comfortable with the integrity of the data that you gathered,
16 were you not?

17 A: Yes.

18 Q: Okay. All right and with respect to that -- your test of
19 the force of the door closing, you're not aware of any
20 statutory or regulatory or industry standard that controls how
21 much force is generated by a door when it closes, are you?

22 A: Well, there are standards for the -- the force required
23 to open and close a door. That doesn't have to do with
24 hitting something. That has to do with the door closer being
25 able to do its job.

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 Q: Right. In other words, but the amount of force that is
2 generated by the door as it's closing, that's not regulated by
3 any -- any regulation or industry standard or anything like
4 that?

5 A: Well, there's two different things. There's the -- the
6 static force that the door closer exerts on the door. So if
7 -- if you open the door up to a certain point, just to hold it
8 in that position you have to exert a force on it to counteract
9 the door closer. Those forces are specified in the standards
10 such as the ANSI standards.

11 Q: All right. Any of those apply though to what we're
12 talking about?

13 A: No. Those are different because we're talking about an
14 impact.

15 Q: All right and so -- But the -- The industry does say that
16 it's got to exert enough force to close the door, correct?

17 A: Yes.

18 Q: Okay.

19 A: And not too much that you can't open it.

20 Q: All right. Now, let's talk about the sharpness of the
21 bottom edge. All right, you mentioned that Underwriter's
22 Laboratories is a group that has published the only standard
23 that exists for sharpness in consumer products. Is that
24 right?

25 A: That's the only one that I know of.

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 Q: Okay and the door meets that standard, doesn't it?

2 A: Yes, because the standard requires only a one and a half
3 pound force during testing.

4 Q: Okay, but they're the industry standard for sharpness,
5 correct?

6 A: Yes.

7 Q: All right. Now, going back to what you talked about
8 about the -- about the cutting hazard and the picture that you
9 were shown with Ms. Lynch's heel sort of next to the door. Do
10 you recall that picture?

11 A: Yes.

12 Q: Okay, but don't you recall in the deposition that you
13 reviewed that she cut herself when she lifted her foot off the
14 ground? Is that right?

15 A: I don't remember that.

16 Q: Okay, you don't? Fair enough. If Ms. Lynch had been --
17 had had her heel flat to the ground and her leg and the back
18 of her was in line with the back of her heel, there wouldn't
19 have been a cutting hazard because the -- the door would have
20 hit her whole body at the same time, correct?

21 A: Well, it depends on the precise position, but sure. If
22 there's some part of her that's behind her heel, it's not
23 going to hit her heel first.

24 Q: Right. So if -- If she has moved forward and lifted her
25 heel up, she has taken away the other parts of her body that

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 will stop the door and so the first thing that hits is her
2 heel at an angle so that it can scrape -- so the bottom of the
3 door can scrape across the back of her heel, right?

4 A: Well, I think the way she described it, she was actually
5 putting her foot back, but yes, if her foot is the farthest
6 back, then the door can hit it.

7 Q: Okay. Now, you'd agree with me that no product or place
8 of business can be rendered perfectly safe, wouldn't you?
9 Wouldn't you agree with that?

10 A: It depends on how you define it, but I think, in general,
11 you're right. I think it's totally free from the possibility
12 of injury.

13 Q: All right and you'd agree with me that just because it is
14 possible to make something safer, that doesn't mean -- that
15 does not mean that it is negligent to leave it as it is?

16 MR. BARTH: I object, Your Honor.

17 THE COURT: Objection sustained.

18 Q: Mr. Seluga, one of the conclusions you reached was that
19 my client was negligent for failing to provide a means of
20 preventing or delaying the closing of the door for purposes of
21 moving items into or out of the storage facility. Is that
22 right?

23 A: Yes, that's right.

24 Q: Okay and you believe it was necessary for the defendant
25 to furnish some means of doing that to make the door safe?

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: That was one of the ways to make it safe, yes.

2 Q: Okay. There were several other things that you mentioned
3 could have been done, but that's one -- one way you -- that
4 could have been used to make it safe?

5 A: Yeah. That would have eliminated the cutting hazard, but
6 it would have made the likelihood of somebody actually being
7 struck by the door much less.

8 Q: Now, you're aware this is a self-storage facility, right?

9 A: Yes, I am.

10 Q: Okay and you'd agree with me that people rent self-
11 storage facilities so they can keep their stuff in a place
12 that allows them the freedom to come and go as they choose?

13 A: I -- I presume that's what a lot of people do, yes.

14 Q: Okay. Well, in the -- in looking at this, you mentioned
15 that you -- you had to be fully aware of the circumstances
16 that what is the premises being used for in determining
17 whether or not the particular application is safe. Isn't that
18 right?

19 A: That is one of the considerations.

20 Q: Okay, all right. So if people rent one of these places
21 so they can come and go as they please, they're not looking
22 for a place where you have to make an appointment to have
23 someone stand over them while they put their stuff in the --
24 in their space or take it out, correct?

25 A: I mean you're asking me what other people are thinking.

CROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 I'd presume that's correct, but I don't know.

2 Q: All right. In this facility, you know there are units
3 that are climate controlled and some that are not, right?

4 A: Yes.

5 Q: Would you agree that one of the considerations that --
6 that the builder or designer or whatever of this kind of
7 facility needs to take into consideration is the -- the
8 landowner or business person's obligations to try to maintain
9 the climate inside that building, correct?

10 A: Absolutely correct.

11 Q: Okay and that's why there's a door closer on this door to
12 -- to keep the door closed and keep the conditioned air in,
13 correct?

14 A: I don't know why they put it on. I presume that was one
15 of the reasons they decided to put one on.

16 Q: All right. Well, does that make sense to you though?

17 A: Yes. That's -- That's one way to keep the door closed.

18 Q: Okay. So if my client were to provide some means of
19 holding that door open, the locking mechanism that you
20 mentioned earlier, isn't that promoting behavior that could
21 have a negative impact on all kinds of other people's stuff
22 inside that building if that door were left locked open?

23 A: Well, it's promoting the behavior that they encourage to
24 prop the door open. It's just giving them a different way to
25 do it.

REDIRECT EXAMINATION OF KRISTOPHER SELUGA BY MR. BARTH

1 Q: Well, but if you prop things open with things that you
2 bring and then things -- the things presumably you're going to
3 take away with you, right?

4 A: Yes.

5 Q: Okay and when you take them away, the door will be shut?

6 A: Yes.

7 Q: So a balance has to be struck, doesn't it?

8 A: Yes.

9 Q: Okay. Thank you, Mr. Seluga.

10 MR. SHEALY: I have no further questions.

11 THE COURT: Mr. Barth, any further questions?

12 MR. BARTH: Just a couple, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. BARTH:

15 Q: You listened to Mr. Shealy's questions. Even after all
16 of those, do any of your opinions change?

17 A: None at all.

18 Q: All right. This door in this spot at that speed and that
19 height and for the purpose of moving things in and out, what
20 is your opinion as to whether or not this door is unreasonably
21 dangerous?

22 A: That the combination of all those conditions made it
23 unreasonably dangerous.

24 Q: All right and they could have eliminated or mitigated
25 that or lessened the possibility of an injury by doing what?

RECROSS EXAMINATION OF KRISTOPHER SELUGA BY MR. SHEALY

1 A: They could have eliminated the sharp edge or guarded the
2 sharp edge by putting something over it to protect people from
3 it. They could have slowed down the sweep speed of the door
4 so that you don't have to hold it open, but maybe it takes ten
5 seconds to close instead of five or they could have provided
6 one of these other options like the hold open option or the
7 delayed closing option.

8 MR. BARTH: That's all I have, Your Honor.

9 THE COURT: Mr. Shealy, anything further?

10 MR. SHEALY: Brief recross, Your Honor.

11 THE COURT: Keep it within what he dealt with on cross.

12 MR. SHEALY: Yes, Your Honor.

13 THE COURT: Oh, excuse me, on redirect.

14 RECROSS EXAMINATION

15 BY MR. SHEALY:

16 Q: You mentioned the height of the door as one of the
17 combinations of factors. There's nothing about that that
18 violates the building code though, is there?

19 A: In and of itself, no.

20 MR. SHEALY: No further questions.

21 THE COURT: Thank you, sir. You may step down. Can the
22 lawyers approach, please?

23 (Whereupon, the witness stays on the stand and a bench
24 conference is held out of the hearing of the jury.)

25 THE COURT: I'm going to let the jury go to lunch and

PROFFERED TESTIMONY OF KRISTOPHER SELUGA BY MR. BARTH

1 have them back here at two thirty. I have a hearing at two
2 o'clock.

3 (Whereupon, there is a brief discussion between the Court
4 and the clerk off the record.)

5 THE COURT: So that's what I'm going to do right now.

6 MR. BARTH: And I do want -- Let me ask you, can I ask
7 Kirby one thing before Your Honor does that, before the
8 witness steps -- gets out of pocket?

9 THE COURT: Hold on a minute, Mr. Seluga.

10 MR. BARTH: I need to -- I want to proffer the report for
11 the record. You'd excluded it, but do I need to authenticate
12 it through him and then not ---

13 THE COURT: Okay, okay. I mean you don't -- You don't
14 have to. Well, I mean I'm going to cut you some -- If you
15 want to do that, I'll allow you to do that, but I mean I just
16 want -- I mean because if I'm wrong, they'll have it like I
17 said.

18 MR. BARTH: No, no, that's fine.

19 THE COURT: I want you certainly protected in any way. I
20 don't want the Court of Appeals to say you didn't preserve it.

21 MR. BARTH: Thanks.

22 (Whereupon, the bench conference ends.)

23 THE COURT: All right, ladies and gentlemen. You stay
24 right there for a minute, Mr. Seluga. Ladies and gentlemen,
25 we have reached a stopping point right now where I am going to

PROFFERED TESTIMONY OF KRISTOPHER SELUGA BY MR. BARTH

1 excuse you for lunch right now. It is almost one o'clock.
2 I'm going to ask that you be back in your jury room at two
3 thirty, at two thirty, and we'll resume the trial of this case
4 at that time.

5 Please do not discuss the case. I've told you that and
6 you're going to get tired of me telling you that, but do not
7 discuss the case. Do not do any independent investigation of
8 your own. You're to decide this case based solely upon the
9 evidence and testimony that's presented in this courtroom and
10 nowhere else.

11 Please be back in your jury room at two thirty and we'll
12 resume the trial of this case at that time. Everybody else
13 remain seated while the jury exits the courtroom.

14 (Whereupon, the jury leaves the courtroom at 12:56 p.m.)

15 THE COURT: All right, it was brought to the Court's
16 attention at sidebar when we were discussing scheduling issues
17 Mr. Barth wanted to proffer or have it marked for
18 identification purposes the report prepared by Mr. Seluga.
19 I'll allow you, Mr. Barth, to do whatever you feel is
20 necessary to make sure that's done correctly.. Okay?

21 MR. BARTH: Thank you, Your Honor.

22 PROFFERED TESTIMONY OF MR. SELUGA RE: REPORT

23 BY MR. BARTH:

24 Q: Mr. Seluga, let me show you a document, please. Do you
25 recognize that document?

PROFFERED TESTIMONY OF KRISTOPHER SELUGA BY MR. BARTH

1 A: Yes.

2 Q: And is that your report in regard to your investigation
3 in this case with the attachments?

4 A: Yes, it is.

5 Q: All right. Does it truly and accurately reflect your
6 opinions in this matter?

7 A: Yes.

8 MR. BARTH: I'd move to introduce -- Well, ID only, Your
9 Honor.

10 THE COURT: Is -- Anything, Mr. Shealy?

11 MR. SHEALY: No, Your Honor. I just -- I had one item
12 myself to protect myself on the record, too. It was my
13 intention after the conclusion of my voir dire on
14 qualifications to base my objection on the lack of a South
15 Carolina license and the lack of experience, the combination
16 of the two. I was not able to make that -- that objection as
17 I had intended in front of the jury given Your Honor's ruling,
18 but I just wanted the record to reflect what my intention had
19 been.

20 THE COURT: Well, and I think the facts -- Based upon the
21 law, I think the fact that he's not licensed in South Carolina
22 that that goes to his credibility and not the admissibility of
23 his testimony. I mean I think it goes to the weight,
24 Admissibility -- or credibility, not the admissibility, but
25 your objection is so noted for the record. Anything on that,

1 Mr. Barth?

2 MR. BARTH: No, sir.

3 THE COURT: All right, sir, you may step down. Mr.
4 Barth, are you requesting he be relieved under his obligations
5 of subpoena?

6 MR. BARTH: Yes, sir.

7 THE COURT: Any objection?

8 MR. SHEALY: I do not, Your Honor.

9 THE COURT: What exhibit was this report?

10 MR. BARTH: Your Honor, we didn't give it a number yet.

11 COURT REPORTER: Nineteen.

12 THE COURT: Nineteen.

13 MR. BARTH: Nineteen?

14 THE COURT: Exhibit 19 for identification purposes only
15 and that's being admitted for identification purposes only
16 subject to or pursuant to my ruling of not allowing the report
17 to come in as evidence. All right, we'll stand at ease until
18 two thirty.

19 MR. BARTH: Thank you, Your Honor.

20 MR. SHEALY: Thank you, Your Honor.

21 (Whereupon, the witness leaves the stand at 12:58 p.m.
22 and Plaintiff's Exhibit Number 19, Mr. Seluga's report,
23 is marked for identification only. There is a break in
24 the proceedings from 12:58 p.m. until 2:38 p.m.)

25 THE COURT: Have we got all the jurors?

1 BAILIFF: Yes, sir.

2 THE COURT: Anything from plaintiff's counsel before we
3 bring the jury in?

4 MR. BARTH: I just need to mark two exhibits, Your Honor.

5 THE COURT: Okay.

6 MR. BARTH: For ID only.

7 THE COURT: Are those the ones we kept out?

8 MR. BARTH: Right, that's the ones.

9 THE COURT: Okay.

10 MR. BARTH: The first one, Judge, will be the expert
11 witness ---

12 THE COURT: Okay.

13 MR. BARTH: --- e-mail and the second one will be the
14 Unit Vacating Checklist.

15 (Whereupon, Plaintiff's Exhibit Number 20, the expert
16 witness e-mail, and Plaintiff's Exhibit Number 21, the
17 Unit Vacating Checklist, are marked for ID only.)

18 THE COURT: All right, anything else, Mr. Barth, before I
19 bring the jury out?

20 MR. BARTH: No, sir.

21 THE COURT: Anything else from the defense counsel?

22 MR. SHEALY: No, Your Honor.

23 THE COURT: All right, bring us the jury, please, ma'am.

24 (Whereupon, the jury enters the courtroom at 2:39 p.m.)

25 THE COURT: Madam Forelady, ladies and gentlemen of the

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 jury, I hope you had a nice lunch and ready to proceed this
2 afternoon. Mr. Barth, you're recognized, sir. Please call
3 your next witness.

4 MR. BARTH: Thank you, Your Honor, may it please the
5 Court. We'd call Glenda Painter.

6 THE CLERK: If you would, go up to the witness stand,
7 place your left hand on the Bible, and raise your right hand
8 to be sworn. Place your left hand on the Bible, raise your
9 right hand. Do you swear the testimony you give in this case
10 will be the truth, the whole truth, and nothing but the truth,
11 so help you God?

12 WITNESS: Yes, ma'am.

13 THE CLERK: Be seated and state your name for the record.

14 WITNESS: It's Glenda Painter.

15 MR. BARTH: May it please the Court, Your Honor.

16 THE COURT: Sir?

17 MR. BARTH: May it please the Court?

18 THE COURT: Yes, sir. I'm sorry. Go ahead.

19 GLENDA PAINTER, being first duly
20 sworn, testifies as follows:

21 DIRECT EXAMINATION

22 BY MR. BARTH:

23 Q: Would you give us your full name, please, ma'am?

24 A: Glenda Bryan Painter.

25 Q: And you live in Sumter?

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: Yes, sir.

2 Q: All right. Until last week, you were the lot manager for
3 Carolina Storage? Property manager or whatever they call it?

4 A: Yes, sir.

5 Q: Here in Florence?

6 A: Yes, sir.

7 Q: For how many years?

8 A: A little over a year.

9 Q: All right and prior to that, you worked at the Sumter
10 location, didn't you?

11 A: Yes, sir.

12 Q: And they're generally set up pretty much the same, aren't
13 they?

14 A: Yes, sir.

15 Q: And what you did in Sumter you had to do in Florence?

16 A: Yes, sir.

17 Q: Kind of oversee everything?

18 A: Yes, sir.

19 Q: All right. Now, how many locations do you guys have?

20 A: I think twelve. When I was employed, twelve.

21 Q: All right and you're not employed there any longer?

22 A: No, sir.

23 Q: As of when?

24 A: The 25th.

25 Q: So last week?

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: Yes, sir.

2 Q: Okay. Now, if I understand it correctly, you've got two
3 kinds of units: the regular ones with the roll-up doors and,
4 then you have the heated and cooled ones, right?

5 A: Yes, sir.

6 Q: All right and you drive up to the regular ones, roll the
7 door open, and put your stuff in it; the other ones you handle
8 the way we've talked about in this case, right?

9 A: Right. You carry it down the hallway to your unit.

10 Q: You carry it down the hallway, all right. Now, these
11 particular doors, you're familiar with them, the one we're
12 talking about, aren't you?

13 A: Yes, sir.

14 Q: You can't prop it open, can you? You can't lock it open?

15 A: No, you cannot lock it open.

16 Q: All right and it doesn't really have any delay feature,
17 does it?

18 A: Not to my knowledge.

19 Q: Okay. As soon as you let go of it, it starts closing?

20 A: Yes, sir.

21 Q: All right. Now, just so -- And I don't want to be too
22 boring or basic, but the handle opens how? You can't just
23 pull on the door and have it open, can you?

24 A: Yeah. I mean ---

25 Q: You don't have to turn the lock?

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: Yeah. You probably do have to turn the lock on the door
2 now that I think about it. Sometimes, they don't close all
3 the way so it's hard to say, you know. It's half and half
4 whether you have to turn the handle or not.

5 Q: Okay. Well, the way it's designed though is you'd have
6 to pull the latch down and pull the door open?

7 A: Yes, sir.

8 Q: All right. If you are coming in like that, you'd have to
9 put your item down, drop the latch, push the door open, pick
10 your item up, and get in before it shuts, right? Isn't that
11 kind of how it works?

12 A: Kind of, yeah, or you just hold it in one hand and pull
13 it with the other one.

14 Q: Okay or if it's a big box, you can't do that, can you?

15 A: No.

16 Q: All right. Now, you know why people are at Carolina
17 Storage, don't you?

18 A: Yes, sir.

19 Q: All right. They're there to store their things?

20 A: Yes, sir.

21 Q: They move their stuff in and they move their stuff out?

22 A: Yep.

23 Q: No real reason to be coming in and out of these doors
24 empty-handed, is there? For the most part?

25 A: Well, if they're moving out, they would be coming in

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 empty-handed.

2 Q: All right, the first time?

3 A: Yeah.

4 Q: All the rest of the times, they'd have something in their
5 hands until the last one?

6 A: I think about half the time they'd have something in
7 their hands.

8 Q: All right. Now, if somebody is moving an item out, okay,
9 like Ms. Lynch was doing that day coming down the hall, if the
10 door is not propped open, how would she do that?

11 A: I'm trying to ---

12 Q: What would be her choices?

13 A: Again, like I said, most of the time -- half the time
14 they don't close all the way. You just back out of it.

15 Q: Okay. You'd have to ---

16 A: That's the way I would have done it.

17 Q: Okay. You'd have to back out. You'd have to push the
18 door open backwards with whatever your item is?

19 A: Yeah.

20 Q: Okay and then you'd push it open. I guess you'd step
21 down here?

22 A: Mm-hmm.

23 Q: Still with your behind pushed up against the door, right?

24 A: Yeah.

25 Q: All right and then exactly how would you swing the door

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 open?

2 A: It would -- I mean you would just walk away. I mean I've
3 moved stuff out of those units and you just back out of it and
4 walk away from the door.

5 Q: Back all the way out?

6 A: Yeah.

7 Q: All right. So ---

8 A: Or you go sideways.

9 Q: All right and if the door is latched, you put your item
10 down, latch it, pick your item up, put your behind up against
11 the door, back all the way out, down the steps, and with your
12 behind push the door open far enough so that, hopefully.

13 you're quick enough to get out before it slams on you, right?
14 Isn't that pretty much how it works?

15 A: Yeah, I've never had an issue.

16 Q: Okay, but that's pretty much how it works, isn't it?
17 Yes?

18 A: Yes, sir, or you could -- Another option you could do is,
19 depending on what you have, I've braced it against the wall
20 and reached my hand out.

21 Q: You ---

22 A: Braced the package against the wall or whatever you have
23 ---

24 Q: Oh.

25 A: --- in your hand against the wall and -- and you take

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 your arm and you push the door open so it opens out and you
2 walk out.

3 Q: Okay. You balance it between you and the frame?

4 A: Mm-hmm.

5 Q: And then you back out and still push the door open with
6 your bottom?

7 A: Well, you could do that with your arm.

8 Q: You could do that with your arm?

9 A: Mm-hmm.

10 Q: But the object would be to swing it far enough wide --
11 far enough open that you can grab your box again and get out
12 of the way before it slams on you, right?

13 A: Mm-hmm, yes, sir.

14 Q: All right. That doesn't seem like an accident waiting to
15 happen to you?

16 A: No, because ---

17 MR. SHEALY: Objection, argumentative.

18 THE COURT: I'll allow it. Go ahead. Overruled.

19 A: No ---

20 THE COURT: Rephrase your question, Mr. Barth.

21 Q: Isn't that kind of complicated just to keep from having
22 the door slam on you?

23 A: I guess because I've done it sometimes, I don't think
24 nothing of it.

25 Q: Okay.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: I've never had an issue.

2 Q: And their only other option, other than doing what we
3 just described, would be to prop it open, right?

4 A: Yes, sir.

5 Q: And that means you take one of your items, push the door
6 open, and you lay the item out on it?

7 A: Yes, sir.

8 Q: All right and make sure it's heavy enough not to close,
9 right?

10 A: Yes, sir.

11 Q: All right. No matter how you cut it that way, when you
12 pick up the very last item and the door is swung open, you
13 have to pick your item up and you turn and as you're doing
14 that, the door starts to close on you, doesn't it?

15 A: Yes, sir.

16 Q: And it has to be right on you because you've just picked
17 the item up from the bottom of the door, right?

18 A: Depending on the direction you picked it up.

19 Q: Well, you can't pick it up backwards, can you?

20 A: Well, if you pick it up from the side, if you propped it
21 up on the -- If the door is here, you prop your item here, you
22 can pull it toward you. The door falls in front of you.

23 Q: Okay, pull the item out quick and let the door swing
24 shut?

25 A: Mm-hmm.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Q: All right and that would be your suggestion as to how you
2 do this?

3 A: Well, that's one way you could do it depending on the
4 item.

5 Q: All right.

6 A: I mean not all items would be moved that easily.

7 Q: Now, and if somebody has to do that over and over and
8 over, they would have to do that each and every time they come
9 in and out?

10 A: Can you repeat that question?

11 Q: Yeah, I mean you either have to go through what we've
12 talked about every single time you move an item in or out or
13 you prop it open, right?

14 A: Right.

15 Q: That's your only two choices?

16 A: Right.

17 Q: And you guys know people prop these doors open with
18 stuff, don't you?

19 A: Yes, sir.

20 Q: And you know. I mean some even bring cinder blocks to
21 block them open, don't they?

22 A: I've seen that happen, yes, sir.

23 Q: Okay and if they're doing that, you don't go tell them
24 you can't do that, do you?

25 A: No, sir.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Q: You don't tell them move that and shut the door, you're
2 letting all my A/C out, do you?

3 A: No, I do tell them. We do tell them to, you know, be
4 sure to take their block or to, you know ---

5 Q: Okay and it's not against the rules to block it open, is
6 it?

7 A: No, sir.

8 Q: All right. Now, if you aren't quick enough to get out of
9 the way, if you're doing what ---

10 MR. BARTH: May I approach the witness?

11 Q: If you're not quick enough and you're turning to where
12 that white car is where Ms. Lynch's car was, isn't any
13 question about it if the door shuts, it hits you about your
14 heel or ankle, doesn't it? This door.

15 A: I really couldn't answer that one.

16 Q: Okay, but as you described what somebody has to do when
17 they're picking their piece of furniture up, if their car is
18 right here, this is exactly how the facts would set up,
19 wouldn't they? The door would shut as you're walking toward
20 your car to put the things in it, right?

21 A: It would shut, yeah.

22 Q: All right and y'all know it works like that, right?

23 A: I mean I've never had anyone complain about it I mean.

24 Q: Why not give them a way to prop it open? You know
25 they're moving stuff in and out. Why not lock it open?

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: Because the odds are that they prop it open and leave it
2 that way.

3 Q: Okay.

4 A: Because I've pulled people's cinder blocks and you don't
5 know how long they've been gone.

6 Q: Okay.

7 A: And we're closed on Sunday so if they did it Saturday
8 after closing, that's 48 hours that it would be standing wide
9 open.

10 Q: If you had a delay on the door, no matter when somebody
11 came in or out, if you -- if they they walked out, it would
12 shut by itself, wouldn't it?

13 A: Yeah.

14 Q: Okay. Y'all don't have that on any of these doors?

15 A: No, sir.

16 Q: Now, let me just ask you a couple other questions.

17 During the process of this litigation, okay, have you gone to
18 pull Ms. Lynch's file? Y'all keep a file, don't you?

19 A: Yes, sir.

20 Q: All right. Every renter has got a file and whatever has
21 to do with that person or that unit is kept in the file, isn't
22 it?

23 A: Yes, sir.

24 Q: All right and if there's some kind of dispute, you can
25 pull the file out and you can see what's in it. You can go on

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 the computer and you can look at your computer notes, right?

2 A: Yes, sir.

3 Q: All right and you had to do some of that and go look at
4 the file and pull it because of all this, didn't you?

5 A: Yes, sir.

6 Q: All right. Did you go look and see if there was any
7 surveillance videos of this accident?

8 A: No, sir.

9 Q: Okay. Did you pull the file?

10 A: Yes, sir.

11 Q: All right and who did you give it to?

12 A: I scanned it and e-mailed it to Jay Wallace, the ---

13 Q: Okay. Who is Jay Wallace?

14 A: He's the president of operations.

15 Q: Okay and that's Mr. Wallace sitting right there?

16 A: Yes, sir.

17 Q: All right and you scanned it and you e-mailed it all to
18 him?

19 A: Mm-hmm.

20 Q: Did you scan in everything that was in it?

21 A: Yes, sir.

22 Q: All right. Are there any other documents that you didn't
23 scan in and e-mail?

24 A: No, sir. I just scanned the whole file.

25 Q: All right and what cameras did you look at to see if

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 there were any surveillance videos?

2 A: I didn't look at any because I do not have that ability
3 personally to access them.

4 Q: Who does?

5 A: As far as I know, Jay Wallace.

6 Q: Okay. He can access y'all's Florence surveillance videos
7 from wherever he is?

8 A: Not to my knowledge.

9 Q: Okay, but -- Oh, he would have to come to Florence ---

10 A: Right.

11 Q: --- and look at them?

12 A: As far as I understand it, the design of it was that he
13 could access them.

14 Q: Okay and you can't as the lot manager?

15 A: No, sir.

16 Q: All right. At any point, were you asked to sit down and
17 look through some of these videos and see if there was any
18 surveillance?

19 A: No, sir.

20 Q: All right. Now, you have computer notes, don't you?

21 A: Yes, sir.

22 Q: All right and that's what this is, isn't it?

23 A: Yes, sir.

24 Q: Okay and whenever something happens on a file that needs
25 to be documented, whoever it is dealing with the person types

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 it into the computer?

2 A: Yes, sir.

3 Q: All right. When you pulled the file to e-mail it to Mr.
4 Wallace, did you pull up this document?

5 A: No, sir.

6 Q: Okay. Who ---

7 A: Not that I remember.

8 Q: All right. Who would have had this document?

9 A: It would have been in the computer.

10 Q: Okay and who would have been responsible for pulling it
11 up and providing it to everybody?

12 A: As far as employees?

13 Q: Yes.

14 A: Or to ---

15 Q: Mm-hmm, to us, the lawyers.

16 A: To y'all, yeah, that's what I -- That's what I wanted to
17 make sure.

18 Q: Yeah.

19 A: I would assume corporate.

20 Q: Mr. Wallace again?

21 A: Yes, sir.

22 Q: All right. Had you seen this document before?

23 A: I've seen the notes.

24 Q: Okay. You've seen the notes?

25 A: Yes, sir.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Q: All right and you've looked at this ---

2 A: I've just never actually printed them out that I
3 remember.

4 Q: You -- I'm sorry?

5 A: I just don't actually remember seeing it printed out.

6 Q: Okay. You're familiar with them though, aren't you?

7 A: Yes, sir.

8 Q: All right and you've seen that one that says August the
9 2nd? Actually, it's August the 1st because it's a computer
10 issue, right? You've seen that one, haven't you?

11 A: Yes, sir.

12 Q: All right and it talks a little bit about the accident
13 and then it talks about pictures being taken, right?

14 A: Yes, sir.

15 Q: Okay. You see that, don't you?

16 A: I don't see it from here, no.

17 Q: Well, do you want to get up and look at it? It says
18 pictures taken.

19 A: Okay. Yes, sir.

20 Q: Do you see that?

21 A: Yes, sir.

22 Q: And you've seen that before, haven't you?

23 A: Yes, sir.

24 Q: All right and then you look again on the 18th I think and
25 it talks about I took a picture of her casted ankle and put it

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 in her file, right?

2 A: Yes, sir.

3 Q: When that would be done, it would be put in her hard
4 file?

5 A: I would assume so.

6 Q: All right and when you pulled this particular file or you
7 scanned it in to send it to Mr. Wallace, where are the photos?

8 A: I don't know.

9 Q: Were they in the file?

10 A: I looked for them and did not see any---

11 Q: Okay.

12 A: --- in the file.

13 Q: I'm sorry?

14 A: I did not see any in the file because when I read the
15 notes, I remember when I was scanning it to him thinking where
16 are the photos.

17 Q: Okay and where -- Where did you look for the photos?
18 Just the file?

19 A: Yes, sir. Well, Dan had another area he kept photos in
20 ---

21 Q: Okay.

22 A: --- of odd things ---

23 Q: Okay.

24 A: --- and I looked through there just in case they were
25 there, too.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Q: Where was that? Was that the drawer in the lunch room?

2 A: Yeah. It's in a file cabinet in -- in the lunch room.

3 Q: And who's got access to that?

4 A: I would.

5 Q: You would?

6 A: And any employee would, any employee walking through the

7 door would.

8 Q: Would have access to that?

9 A: Yes, sir.

10 Q: Okay and why would client's information like these photos

11 that are supposed to be placed in the file, that were placed

12 in the file, why would they not be in the file and be in some

13 lunch room drawer?

14 A: It's not really a lunch room.

15 Q: What is it?

16 A: It is -- It's where all the customer files are.

17 Q: Okay.

18 A: And Dan had photos all through this one drawer. He had

19 pictures of trees being cut down and he had pictures of water

20 damage and he had -- It just -- And I just put them all in one

21 area ---

22 Q: Okay.

23 A: --- because they were scattered throughout and -- But I

24 even looked through those and did not see any pictures that

25 would go with that.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Q: All right. You knew Mr. Comfort said he took them out of
2 the file and put them wherever those were in that lunch room
3 drawer, right? Break room drawer?

4 A: I heard that earlier today, yes.

5 Q: You heard that?

6 A: Mm-hmm.

7 Q: And you heard -- You heard him say that Jay Wallace said
8 get rid of them?

9 A: Yes, sir.

10 Q: Okay. Did you know anything about that?

11 A: Not that I recall.

12 Q: All right. You don't know anything about it or you just
13 don't recall him telling you?

14 A: If he told me, I don't remember it.

15 Q: Okay. He says he put them in the drawer because he
16 didn't want to destroy them and instead, he took them out of
17 the file like Mr. Wallace wanted and then told you where they
18 were. Is that true?

19 A: He could have.

20 Q: Okay. Do you remember whether he did or he didn't?

21 A: I can't honestly say whether I remember whether he did or
22 didn't.

23 Q: Okay. Have you seen the photographs?

24 A: I do believe I did see them ---

25 Q: Okay. Tell me ---

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: --- because when ---

2 Q: Go ahead. I'm sorry.

3 A: When I went looking for those photos ---

4 Q: Mm-hmm.

5 A: --- I remembered -- I thought I remembered seeing them.

6 When I couldn't find them, I figured I was probably

7 remembering incorrectly, but where they are, I don't know

8 because I did go looking where I would have put them after I

9 tried to straighten up that file -- that file cabinet Dan had.

10 Q: When did you do that? When did you try to straighten all
11 that up?

12 A: He left in August. It had to have been somewhere -- It

13 was on time permitting and it was anywhere between when he

14 left in August, September to ---

15 Q: 2010?

16 A: Yes, it was.

17 Q: Okay.

18 A: And it took almost as long as -- I know I finished it up

19 somewhere -- September, October, September.

20 Q: Okay.

21 A: Because like I said, it was time permitting. It was not

22 a major thing. It was -- Everything was taken out of that

23 drawer, stuck into boxes, and then I put them back into a -- a

24 different drawer.

25 Q: You wouldn't have thrown anything out, would you?

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 A: No, sir.

2 Q: I mean especially something like pictures of an injury or
3 something?

4 A: No. I would have put them with all the other stray, odd
5 pictures that ---

6 Q: All right.

7 A: --- Dan had.

8 Q: Okay and you think you might have seen them and you're
9 just not sure?

10 A: Yes, sir. I mean I just -- Even at when I went to look
11 for them and couldn't find them, I was like, well, did I just
12 remember someone talk -- Dan talking about them and I didn't
13 and -- or did I actually see them.

14 Q: Well, what's the answer? Do you remember Dan talking
15 about them or ---

16 A: I really can't. I've been wracking my brain. I can't
17 honestly say, yes, I remember him talking about it or, no, I
18 do not.

19 Q: Is there any place else those pictures could have been?

20 A: No, no. Let me think. That's the only places I've found
21 pictures was in that one drawer that Dan had a lot of stuff in
22 or they would have been in the file.

23 Q: All right. Have you looked anywhere else to try and find
24 these photos?

25 A: No, because I wouldn't have. There's just no other place

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 I could think to look.

2 Q: Okay. Three and a half years later, you still don't know
3 where they are?

4 A: How long?

5 Q: Well, '08 and this is 2012.

6 A: I wasn't even in Florence in '08.

7 Q: All right, but you were there in 2010, 2011?

8 A: Right, into 2010 and 2011 to the first of 2012.

9 Q: All the way up until last week?

10 A: Right.

11 Q: You certainly knew about this lawsuit, didn't you?

12 A: Yes, sir.

13 Q: You knew this was going on and you needed to look for
14 information. You knew that, didn't you?

15 A: Only what I was told, so to pull it.

16 Q: Okay and did you look anywhere else for any of this
17 information?

18 A: I mean I -- The original file ---

19 Q: Mm-hmm.

20 A: --- I pulled from the move out folders, the files. The
21 -- The file -- Because she had two files. She had one for the
22 original unit and she transferred to a second unit.

23 Q: Okay.

24 A: So that was two files and both of them by the time -- By
25 the time I left, there was -- They both were in the move outs.

DIRECT EXAMINATION OF GLENDA PAINTER BY MR. BARTH

1 Those were both pulled, scanned, sent to Jay Wallace. I read
2 the notes. I saw where there was pictures, looked for them in
3 all the obvious places, every place I could think they would
4 be around there, and assumed that either they had already been
5 sent forward or they'd been taken care of or ---

6 Q: Taken care of, that's the issue. Where -- Taken care of
7 -- Did Mr. Wallace get rid of them?

8 A: I don't know.

9 Q: Okay. Well, did you -- You knew Dan Comfort's number
10 when he moved up north, didn't you?

11 A: Yes, sir.

12 Q: All right. You called him about some paperwork sometimes
13 on something completely unrelated?

14 A: I called him right after he moved and then I called him
15 one other time to ask him if he could remember something.

16 Q: Okay. Did you bother calling him to find out where the
17 photos were?

18 A: No.

19 Q: Okay. Did Mr. Wallace ever tell you to take care of
20 anything else? Take care of any documents, any paperwork, any
21 pictures, any anything that has anything to do ---

22 A: Define take care of.

23 Q: Ma'am?

24 A: Define take care of.

25 Q: I don't know. I thought that was -- You just said that.

CROSS EXAMINATION OF GLENDA PAINTER BY MR. SHEALY

1 A: No. I gathered what the two files ---

2 Q: Mm-hmm.

3 A: And I scanned them for him. I looked for the pictures
4 and when I -- When I couldn't find them, I assumed that either
5 he already had them or ---

6 Q: Mr. Wallace?

7 A: Or corporate or that if they had been -- something else
8 had happened to them. Just didn't worry about it too much.

9 Q: Okay. Did Mr. Comfort tell you Wallace wanted somebody
10 to get rid of those pictures?

11 A: Not that I recall.

12 Q: Not that you recall? Thank you.

13 A: Okay.

14 THE COURT: Mr. Shealy.

15 MR. SHEALY: Briefly, Your Honor.

16 CROSS EXAMINATION

17 BY MR. SHEALY:

18 Q: Ms. Painter, you worked for the company for how long?

19 A: Five years.

20 Q: And you started working in the Florence location in -- in
21 what year?

22 A: 2010.

23 Q: All right. So you weren't there when the accident that's
24 the subject of this lawsuit occurred, correct?

25 A: No, sir.

CROSS EXAMINATION OF GLENDA PAINTER BY MR. SHEALY

1 Q: And you worked with Dan Comfort for about four weeks?

2 A: I managed Broad Street, the store in Sumter, and helped
3 with the Florence one. I started that in June, July. It was
4 about three to four months that I was managing both stores,
5 basically trying to manage both stores.

6 Q: Three or four months?

7 A: Yes.

8 Q: Okay, all right. So there -- But you weren't at the
9 Florence location all of that time, correct?

10 A: No, sir.

11 Q: Okay. All right and then you moved to Florence full-
12 time?

13 A: Right. That was end of August, first of September when
14 Dan quit.

15 Q: I see. Okay and you've talked to Dan a couple of times
16 since then?

17 A: Twice, yes, sir.

18 Q: Okay and where do you work now?

19 A: I work for Palmetto GBA.

20 Q: Where?

21 A: In Columbia.

22 Q: What do you do for Palmetto GBA?

23 A: I'm an Accounting II clerk.

24 Q: Okay and so did you leave the company last week to take
25 that job?

CROSS EXAMINATION OF GLENDA PAINTER BY MR. SHEALY

1 A: Yes, sir.

2 Q: Okay. Ms. Painter, I have no further questions.

3 THE COURT: Mr. Barth?

4 MR. BARTH: Nothing else. Thank you, Judge.

5 THE COURT: Ma'am, you may step down. Thank you.

6 (Whereupon, the witness leaves the witness stand at 3:04
7 p.m.)

8 THE COURT: Call your next witness.

9 MR. BARTH: Dr. Al Dawson, Your Honor.

10 THE CLERK: If you would, place your left hand on the
11 Bible and raise your right hand to be sworn.

12 THE COURT: Place your left hand on the Bible, please,
13 sir, your left hand and raise your right hand.

14 WITNESS: I don't hear real good. I've got a hearing aid
15 in. I'm sorry.

16 THE CLERK: Left hand on the Bible and raise your right
17 hand.

18 WITNESS: All right.

19 THE COURT: That's okay.

20 THE CLERK: Do you swear the testimony you give in this
21 case will be the truth, the whole truth, and nothing but the
22 truth, so help you God?

23 WITNESS: Yes, ma'am.

24 THE CLERK: Be seated and state your full name for the
25 record.

DIRECT EXAMINATION OF DR. AL DAWSON BY MR. BARTH

1 DR. AL DAWSON, being first duly
2 sworn, testifies as follows:

3 DIRECT EXAMINATION

4 BY MR. BARTH:

5 Q: Can you give us your full name, Doctor?

6 A: Yeah, Alfred G. Dawson.

7 Q: All right and what do you do for a living?

8 A: I'm an orthopedic surgeon.

9 Q: Can you give us a little bit about your education and
10 background?

11 A: Yeah. I went to high school here in Florence. I went to
12 the Citadel and the Medical University of South Carolina and
13 did about five years of surgical training at the Medical
14 College in Georgia and finished up in New York City at
15 Columbia University.

16 Q: All right and you have been in private practice here in
17 Florence?

18 A: Since July of 1980.

19 Q: All right. Have you -- Have you been in the practice of
20 orthopedic surgery since 1980?

21 A: That's correct.

22 Q: Do you have any idea how many surgeries you would have
23 done in your day?

24 A: A good, good many.

25 Q: All right and does your practice have any area of

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1 emphasis at all?

2 A: I do basically general orthopedics. I do a fair amount
3 of shoulders and knees and things.

4 Q: Okay. Are you licensed in South Carolina?

5 A: Yes, sir.

6 Q: Are you board eligible or board certified?

7 A: Yes, sir.

8 Q: In what area?

9 A: Orthopedic surgery.

10 Q: All right and how long have you been board certified?

11 A: The early '80s.

12 Q: Since the early '80s? All right.

13 MR. BARTH: Your Honor, I -- we'd submit this witness as
14 an expert on -- in the field of orthopedic surgery.

15 MR. SHEALY: No objection, Your Honor.

16 THE COURT: All right, ladies and gentlemen, I previously
17 gave you a charge on expert testimony. Dr. Dawson has been
18 qualified as an expert in the field of orthopedic surgery or
19 orthopedics to give opinion testimony. That does not mean you
20 must accept the opinion, but it is evidence for you to use in
21 any way that you see fit. Mr. Barth?

22 MR. BARTH: Thank you, Your Honor, may it please the
23 Court.

24 Q: Dr. Dawson, you know Sue Lynch, don't you?

25 A: That's correct.

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1 Q: All right. I believe you and your wife used to live next
2 door to Ms. Lynch and -- and her ex-husband?

3 A: That's correct.

4 Q: All right and your wife and she are friends?

5 A: That's correct.

6 Q: In talking about the injury we're going to discuss today,
7 how did you first come into contact with her? How did you
8 find out about this injury?

9 A: She was brought to my office for me to see.

10 Q: All right and your wife brought her?

11 A: That's correct. She was with her, yes, sir.

12 Q: Okay. If you would, you keep records on everything you
13 do?

14 A: That's correct.

15 Q: All right and did you have a record of that first visit?

16 A: That's correct. I brought it.

17 Q: All right. Dr. Dawson, I'm going to show you Plaintiff's
18 Exhibit Number 11. It's a package of documents. Are those
19 your records from your treatment of Ms. Lynch?

20 A: They appear to be copies of my records.

21 Q: All right. Are they true and correct copies?

22 A: Yes, sir.

23 Q: All right. Let's stick this back together.

24 MR. BARTH: Your Honor, I'd move to introduce Plaintiff's
25 Number 11.

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1 MR. SHEALY: Briefly, Your Honor.

2 (Whereupon, there is a pause in the proceedings as
3 counsel confer regarding the exhibit.)

4 MR. SHEALY: No objection, Your Honor.

5 THE COURT: Without objection. What's that exhibit
6 number again?

7 MR. BARTH: It's Number 11, Your Honor.

8 THE COURT: Number 11 without objection.

9 (Whereupon, Plaintiff's Exhibit Number 11, the medical
10 records from Dr. Dawson, are admitted into evidence.)

11 Q: Dr. Dawson, your records indicate you saw her on July the
12 31st, 2008?

13 A: Yes, sir.

14 Q: Can you tell us about that visit?

15 A: She came to my office. She had a -- a laceration or a
16 cut on the back of her heel and we cleaned it up and we washed
17 it out and put some loose sutures in it.

18 Q: All right. If you would, describe that injury for us?

19 A: It was a -- what we call a jagged injury, a jagged cut,
20 more like a Z versus a straight line.

21 Q: Okay and was that of any particular significance in how
22 you treat it?

23 A: It means that we had a skin problem from the time of the
24 injury.

25 Q: Tell me -- Tell me what you mean by that, Doctor?

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1 A: Well, basically, your skin is what keeps all of us alive
2 and keeps us from dying of infection. This is why when you
3 have burns, a lot of people die. So once her skin was open
4 and it was jagged there, at that point, she was the beginning
5 stage of poor wound healing and -- and germ contamination.

6 Q: As far as that part of your body is concerned, your ankle
7 and all of that, how is that to -- to treat and heal?

8 A: It's actually one of the worst places on your whole body
9 to cut yourself because there are a few places in the body
10 where you have very little blood on the bottom side. Like if
11 you cut your face or your scalp or something, they heal
12 rapidly because they have blood supply.

13 Q: And that's not the case with the ankle?

14 A: It's right on top of one of the biggest tendons that
15 everybody can feel on the back of their ankle, the Achilles
16 tendon.

17 Q: All right and how does that affect the healing process?

18 A: Well, there's very poor blood supply coming through or
19 through that tendon to help skin heal.

20 Q: All right. On that first visit and you said it's a
21 jagged wound and you had to clean it out, cleaning it out
22 would mean what and why would you do that?

23 A: We washed it and after we put some numbing medicine in,
24 then we had some sterile saline type fluid we washed it out
25 with.

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1 Q: Okay. Why do you do that?

2 A: To try to cut down on the amount of germ contamination.

3 Q: I'm looking at your -- the notes from the very first one.
4 It's on your front page and your notes indicate, Dr. Dawson, a
5 five centimeter laceration down the Achilles tendon. Was the
6 tendon involved in the injury?

7 A: Yes, sir.

8 Q: And tell us how?

9 A: There's a covering on the top of the tendon called the
10 peritenon. It was basically like a scrape so you could see
11 the tendon and you could see the tendon had been abraded, that
12 there was an injury that went to the tendon basically.

13 Q: All right and how would that affect the strength of that
14 tendon or one's ankle?

15 A: You know, once you cut the skin -- even the skin a little
16 bit, you cut the strength some and then -- and then bumping
17 the tendon, you've cut the blood supply and it's weakened it.

18 Q: Diagnosis was cellulitis. What is that?

19 A: That means an inflammation that's already occurring.
20 When you look at the wound and it's already starting to be
21 red, fluid, it's an inflammation already going on. It's a
22 little bit of bleeding also.

23 Q: All right and the evidence in the record is this was a
24 Thursday afternoon. Where were you going? You were going out
25 of town?

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1 A: We were going somewhere.

2 Q: All right and tell us how you sutured it up and if you
3 needed her to come back and see you?

4 A: Basically, on a wound or any tendon injury, we try to get
5 skin to cover the tendon or exposed bone or whatever so you
6 don't get more germs coming in. So -- So what we do, we do
7 somewhat of a loose closure, which will stop further
8 contamination, and it's somewhat loose so it'll -- so blood
9 can get in there and fluid and pressure because a lot of
10 injuries you have a -- a sac of fluid develop that has a high
11 pressure and blood can't get in there to make it heal.

12 Q: Okay.

13 A: So it wasn't meant as a tight, firm closure.

14 Q: Okay.

15 A: It was meant as -- to make a medium so it would start to
16 heal and be watched closely.

17 Q: From what you saw on that first day, did -- did you
18 expect to have to see her again and do something else?

19 A: I was worried at day one about a skin problem just
20 because of where it was.

21 Q: All right and I noticed you prescribed Keflex. What is
22 that?

23 A: That's an antibiotic, a very common antibiotic similar to
24 penicillin family.

25 Q: Okay. Do you remember if you gave her any instructions

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1 as to her activities, what she could and couldn't do?

2 A: No. I basically told her we needed to protect the wound
3 and we talked to her about using crutches.

4 Q: Okay.

5 A: And elevate it some and things of that sort.

6 Q: All right. Now, you heard from her over the weekend,
7 didn't you?

8 A: Yes, I got a phone call.

9 Q: All right and tell me what you were called about that?

10 A: That she was feeding a dog and had a mishap on some
11 stairs.

12 Q: All right and did you ask her to come see you on that
13 Monday?

14 A: I certainly did.

15 Q: All right. Tell us about the visit on Monday?

16 A: Well, we examined her wound. It had the appearance that
17 it had probably been injured again.

18 Q: Okay.

19 A: Or scraped again and at this time, her muscle function
20 wasn't good. She had good, strong function of pushing her
21 heel down, which is what the Achilles tendon does. It pushes
22 your foot down when it contracts ---

23 Q: Right.

24 A: --- and it comes up and I noticed that that wasn't very
25 strong at that time. I figured she had popped the tendon and

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1 I thought it was probably time to go to the operating room to
2 try to know more exactly what we're dealing with and more
3 definitively fix it.

4 Q: All right and, if you would, take a -- Take a look at
5 your records from that Monday and tell -- Pain palpated at the
6 muscle tendon junction. What does that mean?

7 A: These tendons often rupture with a weaker point and one
8 of the weaker points is where the muscle connects to the
9 tendon and it's painful in that area.

10 Q: All right. The injury you saw her and saw her for the
11 first visit, how did that relate to the -- to what you saw on
12 that Monday?

13 A: It was the same. It was the same area.

14 Q: Okay.

15 A: And it was much worsening though of a prior problem.

16 Q: A worsening of what you saw the first time? All right.
17 At what point did you figure out that the Achilles tendon was
18 ---

19 A: As soon as I examined her.

20 Q: Okay and did you decide to do surgery on her at that
21 point?

22 A: Yes. I said we're going to have to go to the operating
23 room and explore it.

24 Q: All right. What type of surgery were you going to do?

25 A: We were going to, you know, open it up again, wash it

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1 out, clean it out again, and repair whatever amount of the
2 tendon was torn.

3 Q: Is that done in-patient or out-patient?

4 A: That's done as an in-patient surgery.

5 Q: All right and I assume general anesthesia? You're put to
6 sleep?

7 A: Yes, sir.

8 Q: All right. If you would, Dr. Dawson, look at your
9 operative notes and the discharge summary and I want to ask
10 you a couple of questions about that.

11 A: Okay. I've got the operative note.

12 Q: You've got the operative note?

13 A: Yes, sir.

14 Q: All right. The procedure is what?

15 A: It's a right -- It's an Achilles tendon repair.

16 Q: All right. If you would, now tell us what condition you
17 found her in as you got into the surgery?

18 A: Basically, we opened the wound up and the tendon was
19 completely torn.

20 Q: All right. Did she ---

21 A: The big tendon.

22 Q: And so when you say it was torn, how do you deal with
23 that? It says a complete rupture of the tendon and then it
24 says retraction of the tendon was visualized. What does that
25 mean?

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1 A: That is pretty common. The muscle is still attached and
2 it completely separates where the pull of your own muscle
3 separates the ends like a rope really.

4 Q: Like a rope?

5 A: Mm-hmm, this particular area is.

6 Q: All right and what do you do? What do you do to fix
7 that?

8 A: Basically, you put in sutures. That's like a popped rope
9 or something. You suture back with a number of smaller
10 sutures and you pull the tendon together to give it a chance
11 to heal.

12 Q: Okay. Was that a procedure that was easy to do?

13 A: I don't think that's fair. It actually can be quite
14 difficult.

15 Q: Tell us how it was with Ms. Lynch?

16 A: She was -- I mean it was -- It's sort of like -- a little
17 bit like sewing spaghetti that's been cooked so it's not
18 always real easy. It doesn't -- It's not a clean cut.

19 Q: All right. When you went in and saw what you saw, were
20 you able to repair the tendon?

21 A: We felt we got a good repair.

22 Q: All right and how about the sutures that you closed it
23 with? How different was it than what you did the first time?

24 A: Well, it was still the same worry of -- You know, she'd
25 lost some skin at the initial injury and again, it wasn't a

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1 super tight closure. It was enough to allow some fluid to get
2 out so it didn't get a pressure compartment, but enough to
3 close it and cover the tendon.

4 Q: All right and do you remember how long she stayed in the
5 hospital by any chance?

6 A: I think like two or three days.

7 Q: All right.

8 A: 8/4 to 8/7 is what the record says.

9 Q: It talks about antibiotics being used. What was that
10 for?

11 A: You know, we -- We gave her antibiotics from initial
12 injury and at the time of the surgery to try to decrease the
13 amount of infection.

14 Q: Okay. The tendon had retracted up into the sleeve of the
15 calf. What does that mean?

16 A: That means I had to do surgery where you had to pull the
17 tendon back down.

18 Q: Okay. It was up into the calf?

19 A: That's correct.

20 Q: All right and then it talks about what you did. Tell me
21 what happened next, if you would, and you may want to look at
22 your discharge summary. It might be a little easier.

23 A: You mean as in next in the hospital?

24 Q: Yes, sir.

25 A: Basically, we sent her home about two or three days

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1 later.

2 Q: All right. Did you tell her anything about what her
3 activities could and couldn't be at that point?

4 A: We told her it was pretty important to use the crutches,
5 be non-weight bearing, don't have another fall, and just how
6 important it was with the care and then to slow down.

7 Q: Okay. It says with the amount of small area of skin loss
8 she had, probably a fifty percent chance she may have a late
9 infection. Tell us what you were concerned about at that
10 point?

11 A: It's the same concern I had at day one that this is just
12 the type of injury that would very commonly go on to have skin
13 problems just because of where they are. They don't have good
14 blood and on this particular record, I put it at least fifty
15 percent because that's not going to be the end of the story.

16 Q: And if it wasn't the end of the story when you say go
17 back in and open it and remove it, what is it you expected to
18 have to do?

19 A: You know, if -- if more skin dies or gets infected, more
20 surgery has to be done to remove the dead tissue or infected
21 tissue and then make some attempt to get the skin over it.

22 Q: All right. Now, did you -- Do you remember if you sent
23 her to rehab at all?

24 A: I think she did go to rehab.

25 Q: Now, there is some information in here that she had some

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1 compliance problems. She came in and didn't have crutches.

2 Was that important to you?

3 A: Yes, sir.

4 Q: All right. Tell me why?

5 A: At which particular time?

6 Q: Well, on that -- your discharge summary, it says that she
7 was having some compliance problems. She came in and -- and
8 didn't use crutches.

9 A: I was making sure she understood what we meant by -- or I
10 was trying to explain to her what we meant by using crutches,
11 being non-weight bearing, meaning your foot is off the floor,
12 things of that sort.

13 Q: All right. Now, for an ankle injury, it says you did a
14 CT scan of her head. Can you tell us why you did that,
15 Doctor?

16 A: I've known Ms. Lynch a long time and she wasn't talking
17 normally or what I appeared to see wasn't, you know,
18 understanding what I was trying to say.

19 Q: And so you had a CT scan?

20 A: I've seen before where people sometimes will fall and
21 hurt themselves, bump their head and have a head injury or
22 concussion or something like that. I just wanted to make sure
23 I wasn't totally missing something that she might have going
24 on mentally.

25 Q: All right and it came out okay?

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1 A: It came out as negative, yes.

2 Q: All right. Tell us when you next saw her, if you don't
3 mind?

4 A: When we brought -- We discharged her on 8/7 and we
5 brought her back to my office on 8/14/08.

6 Q: All right. So 8/7, she would have been in the hospital
7 August 5th, 6th and 7th?

8 A: Yes, sir.

9 Q: All right and you saw her again one week later?

10 A: Yes, sir.

11 Q: Tell us how she was doing?

12 A: We removed her cast and doing about like I would expect
13 the wound to be doing a week post period -- post-surgery. It
14 had a little bit of fluid coming out of it, but it looked like
15 it was healing at that particular point.

16 Q: Okay and then it says a small amount of serous drainage
17 at the incision point. What are you talking about there?

18 A: That's where we -- I mentioned earlier we don't try to
19 make the wound extremely tight. It's just a certain amount of
20 tissue fluid that is under a little extra pressure and it'll
21 work its way out.

22 Q: Okay and is that what you wanted to see or expected to
23 see?

24 A: It's what I expected to see.

25 Q: All right and your notes indicate actually that you saw

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1 her again the next day. What is that about?

2 A: And actually my brother saw her the next day.

3 Q: Okay.

4 A: I think she'd actually been on some blood thinners
5 earlier. Anyway, it had a little bit of -- She noticed a
6 little bit of blood, as I understand from the record, or
7 discoloration on the cast and she was concerned about it.

8 Q: All right and you as a physician, is that a concern for
9 you or ---

10 A: Well, these are water based casts and a very small amount
11 of -- like a half a teaspoon of coffee can look like a big ---

12 Q: Okay.

13 A: Because it wicks out.

14 Q: All right and your notes indicate you saw her when after
15 that? August the 18th?

16 A: That's correct.

17 Q: And, if you would, your note is the patient has been non-
18 compliant. What does that mean?

19 A: I was hoping the cast would come back looking somewhat
20 protected and it didn't. It looked like a lot had been going
21 on.

22 Q: All right and did that affect the -- the healing process
23 or what you saw?

24 A: I was worried about it. I don't know for sure. I mean
25 it's a certain amount of conjecture of how much it did or

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1 didn't.

2 Q: All right and it says she'll finish her Bactrim and then
3 discontinue it. Bactrim is what?

4 A: That's another antibiotic.

5 Q: That's another antibiotic and had she been on an
6 antibiotic from the beginning?

7 A: Yes, sir.

8 Q: All right and it says you wrote a prescription for home
9 health rehab. Is ---

10 A: That's correct.

11 Q: Did you do that?

12 A: That's correct. That's correct.

13 Q: What were you -- What did you need them to do for Ms.
14 Lynch?

15 A: Hopefully, they would help her with things like house
16 cleaning, bathing, certain activities that she might have in
17 the house.

18 Q: All right and at that point on the 18th, what did you tell
19 her about her activity level?

20 A: I could have told her, you know, she still needed to
21 protect it, elevate it, use her crutches.

22 Q: All right. Was she -- Was she allowed to get around on
23 crutches? Could she ---

24 A: I mean I knew she was a household ambulator and I think
25 she lived by herself.

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- 1 Q: Okay.
- 2 A: She had to do a certain amount just to live.
- 3 Q: From the physician's standpoint, was that okay?
- 4 A: I'm thinking that's probably what she had to do.
- 5 Q: All right. You saw her again, according to your records,
- 6 it looks like September the 3rd, which would have been a couple
- 7 of weeks later?
- 8 A: Yes, sir.
- 9 Q: If you would, tell us about that visit?
- 10 A: That she was in it in a wheelchair. She had a wet cast
- 11 and she says she got the cast wet from taking a shower.
- 12 Q: All right.
- 13 A: So we removed her cast.
- 14 Q: All right. Some of the skin edges had died. Tell us
- 15 what you're describing there?
- 16 A: Some of the edges of the skin had turned black.
- 17 Q: All right and can -- Do you have an opinion to a
- 18 reasonable degree of certainty what was causing that?
- 19 A: I mean the original injury, but some further swelling.
- 20 Q: Okay.
- 21 A: Blocking the blood supply.
- 22 Q: All right and it says ---
- 23 A: It's possibly a new infection. I really wasn't quite
- 24 sure whether it was vascular or infection going on.
- 25 Q: All right. It says the area of the missing skin appears

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1 to be getting bigger and there is an odor present. What's the
2 issue with that?

3 A: Something is not -- I mean bacteria is probably growing.
4 If you smell an odor, bacteria is growing in the wet cast or
5 around the wound and it means it's not a clean situation.
6 You've got a good chance it's not a totally clean situation.

7 Q: All right and what did you recommend at that point?

8 A: We talked at that point about seeing a plastic surgeon,
9 which they have certain repairs and ways of making sure skin
10 covers a certain area.

11 Q: Okay and was that -- The skin dying off, was that a
12 concern of yours as a physician?

13 A: Yeah, a big concern, the same one I had at day one. I
14 mean it was just that area.

15 Q: All right. You referred her to Dr. Conner.

16 A: That's right.

17 Q: Who is that?

18 A: He's a plastic surgeon.

19 Q: All right, here in Florence?

20 A: Yes, sir.

21 Q: All right and from that point on when you referred her
22 over to Dr. Conner, did he kind of take it from there?

23 A: Yes, pretty much from that day.

24 Q: All right. Now, do you have an opinion? Just -- Just
25 boiling it all down, do you have an opinion to a reasonable

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1 degree of certainty as to what the cause was of her condition?

2 A: I mean the history I have is that she had a laceration on
3 the back of her heel from a problem in a storage unit, the
4 back of the door as I understand.

5 Q: All right.

6 A: Or the bottom of the door.

7 Q: And you haven't had a real occasion to see her about any
8 of these injuries since then, correct?

9 A: Not in the office, that's correct.

10 Q: All right. Dr. Dawson, answer any questions Mr. Shealy
11 might have for you.

12 THE COURT: Mr. Shealy, cross examination.

13 MR. SHEALY: Thank you. May it please the Court.

14 THE COURT: Yes, sir.

15 CROSS EXAMINATION

16 BY MR. SHEALY:

17 Q: Dr. Dawson, you and Ms. Lynch, y'all were neighbors for
18 about thirty years. Is that right?

19 A: Mm-hmm, yeah. I'm not quite really sure how long ago she
20 moved out, but that's a bit close.

21 Q: Okay and -- and your wife and Ms. Lynch are good friends?

22 A: That's correct.

23 Q: And your wife brought her to your office on the afternoon
24 that ---

25 A: You know, she -- my wife was in the office that

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1 afternoon. How she got there, what cars, all that kind of
2 stuff, you know. I started to ask my wife yesterday and I
3 decided no, I'd just see what -- I'm not trying to make -- I
4 know my wife was there and Ms. Lynch was there.

5 Q: Yes, sir. Yes, sir. All right, but this occurred on
6 July 31st of 2008, correct?

7 A: Yes, sir.

8 Q: All right and as I understand it, you don't have an
9 independent recollection of your treatment of Ms. Lynch due to
10 the passage of time and the fact that you see so many
11 patients. Isn't that correct?

12 A: That's pretty -- pretty much it.

13 Q: Any testimony you've given today or that you will give
14 today is based upon the medical records that you've been --
15 that you've had in front of you the whole time, right?

16 A: Most of it.

17 Q: Okay and is it your common practice to report the
18 information the patient gives you at or about the time you see
19 the patient?

20 A: Yes. It's taken down by -- I have an assistant with me
21 that takes it actually down in shorthand.

22 Q: Okay and do you record your impressions and findings that
23 you make after examining a patient?

24 A: My medical assistant takes those down in shorthand and
25 she has for me typed up a note somewhere, maybe the same day

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1 or sometimes two weeks later.

2 Q: Okay.

3 A: But a typed up note is made.

4 Q: Now, going back to your -- your initial note for the
5 first -- the one that says new complaint on the date of the
6 accident, July 31st of 2008, you mention a five centimeter
7 laceration down the Achilles tendon there, but your note
8 doesn't -- doesn't make any mention of any damage to the
9 tendon itself, does it?

10 A: It does not.

11 Q: Okay and as I understand, she had not at that point
12 ruptured the tendon, right?

13 A: That's right.

14 Q: Okay and if we go to your operative report the day that
15 you did the repair, have you got that in front of you?

16 A: Yes, sir.

17 Q: I guess we learn there a little bit more about this
18 initial visit because you -- you go back in time to say that
19 she was -- The initial entry was on Thursday afternoon, right?

20 A: That's what I -- I mean that's what is written in the
21 record.

22 Q: Right and you talk about washing the leg up and numbing
23 it and then you say we firmly palpated the Achilles tendon to
24 be intact and we discharged the patient on antibiotics and
25 crutches. Is that what it says?

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1 A: That's correct.

2 Q: Okay. Palpate means to press upon, right?

3 A: That's correct.

4 Q: So you pressed firmly on the tendon to make sure it was
5 still intact, right?

6 A: That's correct.

7 Q: Okay. Now, the next note though going back, your next
8 office note is that August 4th office note?

9 A: Yes, sir.

10 Q: Okay and this is where -- This is that Monday after the
11 weekend passes where Ms. Lynch reported that she'd fallen down
12 her stairs on Saturday. She said she was going to feed her
13 dog and states she heard a pop when she fell. Is that what
14 you were recording that you had heard from her over the
15 weekend, right?

16 A: Yes, sir.

17 Q: Okay. Now, as part of your instructions to her on July
18 31st, hadn't you told her to try to stay off that foot?

19 A: Yes, sir.

20 Q: Okay and then when you examined her on August 4th, wasn't
21 the wound actually still closed by the stitches you'd put in
22 on the 31st?

23 A: The skin had not fully separated.

24 Q: Okay, okay. All right, but at that point, because of the
25 symptoms she was describing, the fact that she said she heard

CROSS EXAMINATION OF DR. AL DAWSON BY MR. SHEALY

1 a pop, you felt like she had ruptured the -- the tendon when
2 she fell that Saturday night, right?

3 A: Yes, sir.

4 Q: Okay. So there's no choice at that point but to admit
5 her to surgery to reattach the tendon?

6 A: That's correct.

7 Q: Okay. Now -- Oh, and then going back to the operation,
8 so we go to the operation and you actually have to -- You
9 actually have to surgically reopen the wound, don't you?

10 A: Yeah, I removed the sutures that we put in, you know,
11 earlier to do the surgery.

12 Q: Okay. It says ---

13 A: And I think we extended it some.

14 Q: It says one suture had come loose and the other was still
15 intact. The wound was still connected. Do you see that in
16 your ---

17 A: That's correct.

18 Q: Okay. You said I told the patient that I had never heard
19 anybody being able to hear a suture pop and told her it was
20 highly likely she had a ruptured Achilles tendon.

21 A: Right.

22 Q: All right and then again, if you go to the -- the bottom
23 paragraph on that page, you said the skin closure was still
24 pretty much intact. It took surgery to actually open the
25 wound, right?

CROSS EXAMINATION OF DR. AL DAWSON BY MR. SHEALY

1 A: That's correct.

2 Q: Okay. There was no active drainage, no area of pus
3 identified.

4 A: That's correct.

5 Q: And pus is a sign that the body is fighting infection,
6 isn't it?

7 A: That's correct.

8 Q: All right and then if you look at your discharge summary
9 after you let her out of the hospital, you report there that
10 she had some compliance problems pre-injury in that I had
11 asked her after she cut her leg to use crutches and I told her
12 to do it over the phone on Saturday. Do you see that toward
13 the bottom of the paragraph?

14 A: Yes, sir.

15 Q: Okay and then the next sentence: She walked in my office
16 Monday still not using crutches and she did not seem to
17 understand the importance.

18 A: Are you reading that on my discharge summary?

19 Q: Yes, sir. It's right before you mention that you did a
20 CT scan of her head.

21 A: That's correct.

22 Q: Okay and compliance, you mean there that you -- you had
23 given her instructions and you were expecting her to comply
24 with your instructions. Is that correct?

25 A: That's correct.

CROSS EXAMINATION OF DR. AL DAWSON BY MR. SHEALY

1 Q: Okay and I'm sure you told her to keep the wound dry,
2 correct?

3 A: Protected.

4 Q: To include keeping it from getting wet?

5 A: I don't know if I specifically told her don't get it wet,
6 but I almost assume it would be common sense that you would --
7 You've got an open wound and you don't stick it in the kitchen
8 sink or ---

9 Q: Okay.

10 A: --- swimming pool. I'm not saying that I specifically
11 noted make sure to keep this dry, but I said protected and be
12 non-weight bearing and things of that sort.

13 Q: And I imagine you told her though after you put the cast
14 on to keep the cast dry?

15 A: I would have to take it that's correct.

16 Q: Okay and one of the reasons, as you mentioned, was to cut
17 down on the risk of infection because it's a much greater
18 likelihood of infection in a wet cast that's holding all that
19 moisture on the wound, right?

20 A: We'd rather the wound be dry.

21 Q: Okay. All right, but when Ms. Lynch reported to you on
22 September the 3rd, 2008, she'd gotten the cast wet in the
23 shower, right?

24 A: I think so.

25 Q: And it's during that visit that you noticed the wound is.

REDIRECT EXAMINATION OF DR. AL DAWSON BY MR. BARTH

1 getting worse, correct?

2 A: That's correct.

3 Q: And up till that time, every -- the wound had been
4 getting better and progressing as ---

5 A: It was protecting as expected of that.

6 Q: Thank you very much, Doctor.

7 MR. SHEALY: No further questions.

8 THE COURT: Mr. Barth, any redirect?

9 MR. BARTH: Just a couple, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. BARTH:

12 Q: The infection you treated her for, as we get into it, did
13 any of that result from the bandage being wet?

14 A: I don't know.

15 Q: All right and was there any point in time from the very
16 beginning when you weren't concerned about or dealing with an
17 infection of this wound?

18 A: I was worried about the skin and the skin dying from day
19 one under the skin itself.

20 Q: And is that ultimately what happened?

21 A: I think that's what became the major problem.

22 Q: Okay, thank you.

23 A: Thank you.

24 MR. SHEALY: Will you permit brief recross?

25 THE COURT: Yes, sir.

RECROSS EXAMINATION OF DR. AL DAWSON BY MR. SHEALY

RECROSS EXAMINATION

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BY MR. SHEALY:

Q: Doctor, you actually -- Talking about the infection, you actually took what you called a culture ---

A: Yes.

Q: --- before the surgery, correct?

A: Yes, sir.

Q: And that's where you're checking to see whether there's active infection going on?

A: It's a way of measuring the amount of infection that may be present, that's correct.

Q: All right and that -- that came back negative at that point?

A: That culture came back negative somewhat to my surprise.

Q: Thank you.

A: And I was glad it did.

Q: Thank you.

THE COURT: Sir, you may step down. Thank you.

WITNESS: Thank you, Your Honor.

(Whereupon, the witness leaves the stand at 3:36 p.m.)

THE COURT: Mr. Barth, are you asking he be excused?

MR. BARTH: Yes, sir, Your Honor.

THE COURT: Any objection, Mr. Shealy?

MR. SHEALY: No, Your Honor.

THE COURT: Dr. Dawson, you're excused. You may leave

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 WITNESS: I do.

2 THE CLERK: Please be seated and state your name for the
3 record.

4 WITNESS: Jay Wallace.

5 MR. BARTH: May it please the Court, Your Honor.

6 JAY WALLACE, being first duly sworn,
7 testifies as follows:

8 DIRECT EXAMINATION

9 BY MR. BARTH:

10 Q: Mr. Wallace, where do you live?

11 A: Charleston.

12 Q: All right and is that where you're from?

13 A: Originally, no.

14 Q: You work with Carolina Self Storage Centers. Is that
15 right?

16 A: That's correct.

17 Q: All right and your position is what?

18 A: President.

19 Q: The president of the company?

20 A: I am.

21 Q: All right and as president of the company, you oversee
22 the entire operation?

23 A: I do.

24 Q: All right. I mean from the smallest detail to the
25 biggest picture? I mean that's your responsibility, isn't it?

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: That is my responsibility.

2 Q: And how many different lots do you guys have?

3 A: About seventeen different locations.

4 Q: About seventeen different locations and -- and how many
5 in South Carolina?

6 A: All but two.

7 Q: So fifteen in South Carolina and then the others are
8 where?

9 A: In Georgia.

10 Q: In Georgia?

11 A: Yeah.

12 Q: All right and you run all of them?

13 A: I oversee all of them.

14 Q: All right and each one has a -- has a property manager on
15 site?

16 A: More or less, yes.

17 Q: More or less? Okay and how long have you been the
18 president of this company?

19 A: I've been with the company for eight years, but I've not
20 been the president for all of that.

21 Q: Okay. Were you the president in 2008?

22 A: I may have been the VP at that point.

23 Q: Okay. Still managing though the day to day kind of
24 operations and overseeing the operations of the company?

25 A: Not the day to day, but I am responsible for the .

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 properties, yeah.

2 Q: Okay. We heard yesterday from Ms. Painter that a lot of
3 the information is centralized, the computer system, the video
4 stuff. You have access to all of that from where you are?

5 A: I mean the computer systems are -- They're cloud based
6 and the DVRs, the video is located at the store.

7 Q: It's located at the store?

8 A: Yes.

9 Q: All right. Can any of the employees access any of that
10 or do you have to do that?

11 A: At different locations, different people have different
12 access.

13 Q: Tell me about Florence?

14 A: That location has a DVR that you have to bring a monitor
15 down to.

16 Q: Okay. Could Glenda have done it if she wanted to or
17 would you have to do it?

18 A: If it was something that someone had asked to see the
19 video, it could have been done.

20 Q: All right. Now, you guys' storage facility, you market
21 yourselves really as focusing on two different groups of
22 consumers, don't you? One being commercial and you talk about
23 all the things you offer businesses who want to use the
24 facilities, right?

25 A: A lot of those same services are used by residential

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 people.

2 Q: All right and I believe some of the information you guys
3 put out to the public is we specialize in residential
4 customers, right?

5 A: That is pretty accurate, yes.

6 Q: Okay and y'all do, don't you?

7 A: Absolutely.

8 Q: And you have a ton of people that are just -- I mean
9 they're like you and me. They're going to move their stuff in
10 and they're going to move their stuff out?

11 A: We try to keep it as simple as possible.

12 Q: All right and part of what you tout to the public is the
13 fact that as a residential customer, you know they're
14 concerned with safety, right?

15 A: Yes.

16 Q: All right and you tell them and in your material you show
17 them that these facilities, including Florence, they're I
18 think y'all call it state of the art, don't you?

19 A: They are.

20 Q: All right and even tell them that virtually every spot in
21 the whole place is monitored?

22 A: I don't believe we make that representation.

23 Q: Okay. You even tell them that the aisles are monitored,
24 right?

25 A: A lot of the aisles are monitored. There are cameras on

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 the property, yes.

2 (Whereupon, counsel shows a web page on the screen to the
3 witness.)

4 Q: Your web page?

5 A: The old one, yes.

6 Q: Okay. Video surveillance monitors the system, right?

7 All activity on the prop -- on the property is monitored and
8 recorded for your security, right?

9 A: That is correct.

10 Q: All right.

11 A: It does say that.

12 Q: Even nearly have every aisle and most hallways monitored
13 by cameras. Is that what you tell them?

14 A: That would be nearly every, it would be most.

15 Q: Nearly. All right. Did the one Ms. Lynch get hurt in
16 happen to have any of those security features?

17 A: She was in the driveway and there was a camera there,
18 yes.

19 Q: There was a camera there?

20 A: There was.

21 Q: Was it working?

22 A: To my know -- To my knowledge, it was.

23 Q: To your knowledge it was?

24 A: Yes.

25 Q: All right.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: There's a DVR in that building.

2 Q: Okay and you tell them that one thing you guys make sure
3 of is that your property is the safest it can be for them,
4 don't you?

5 A: Absolutely.

6 Q: Because you know -- I mean that's important, isn't it?

7 A: Yes.

8 Q: To make sure your people are safe, to make sure the
9 conditions are safe, and make sure their stuff is safe?

10 A: Yeah. We have thousands of customers that use these
11 properties every day.

12 Q: Okay and that's how you want it?

13 A: Absolutely.

14 Q: You guys make a ton of money off the fact that thousands
15 of customers use them, right?

16 A: I don't know about a ton of money, but yeah.

17 Q: All right. Now, let me ask you a little bit about the
18 Florence location. The accident happened in July of '08. Dan
19 Comfort was the property manager?

20 A: Yes.

21 Q: All right and he had been there for a period of time?

22 A: Quite a while.

23 Q: All right. He ran the day to day kind of stuff. He was
24 there. He was your on-site manager, right?

25 A: Absolutely.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. How long -- Do you remember how long he had
2 been with the company?

3 A: Since '01. I think he opened that store.

4 Q: In '01?

5 A: Mm-hmm.

6 Q: Okay and do you know about when the building Ms. Lynch
7 was hurt in about when that was built?

8 A: Roughly 2006 or 2007, somewhere in that ballpark.

9 Q: It's one of the newer ones?

10 A: It is, yeah.

11 Q: All right and when you talk about state of the art, that
12 ought to be the status of the art, shouldn't it? That's the
13 newest one you got.

14 A: Not the newest one, but it is close to it, yes.

15 Q: All right. How many heated and cooled buildings do y'all
16 have on that lot?

17 A: I believe two.

18 Q: Two? Hers and one other?

19 A: Yes.

20 Q: All right. Are they both designed and done the same way?

21 A: More or less, yes.

22 Q: All right. Now, do you remember when Mr. Comfort called
23 you and told you that Ms. Lynch had been hurt on your
24 property?

25 A: I recall several conversations about that.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: Okay. Well, do you remember him calling you the morning
2 after this accident, the day she reported it to him?

3 A: I recall being informed about it in -- in general terms,
4 yes.

5 Q: Okay.

6 A: But this was four years ago.

7 Q: All right and he told you someone had been hurt. Do you
8 remember that?

9 A: Absolutely.

10 Q: All right and I assume he told you generally how she had
11 been hurt and where she had been hurt?

12 A: Correct.

13 Q: All right and he certainly told you that he had
14 documented all that in her file including the fact that he
15 took pictures of her. Did he tell you that?

16 A: I believe so, yes.

17 Q: All right and your computer notes that you can see from
18 your office, I -- Did you pull them up then?

19 A: I ---

20 Q: Just to see what was in her file?

21 A: I think I probably did. I can't be specifically certain.
22 I probably may have told him to make those notes.

23 Q: Okay. You told him to document everything because that's
24 y'all's company policy?

25 A: Absolutely, yes.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right and the notes that you would have seen said she
2 was hurt on this day, here's how it happened, here's her
3 injuries, and I took photos, right?

4 A: Yes.

5 Q: All right. What happened to the photos? Did you tell
6 him to get rid of them?

7 A: Absolutely not.

8 Q: All right. You remember him calling you about it, you
9 remember seeing the computer notes, and you knew photos were
10 taken, right?

11 A: Yes.

12 Q: All right and did you look at the rest of the notes from
13 the next visit and then the next visit that says two or three
14 weeks later more photos were taken? You knew that, didn't
15 you?

16 A: I've read those notes since the incident, yes.

17 Q: Okay and that's y'all's -- I mean that's y'all's notes,
18 isn't it?

19 A: Yeah.

20 Q: When pictures are taken, they would be put in her file,
21 right?

22 A: Yeah.

23 Q: Would they be scanned in and sent down to you to put with
24 the rest of the stuff?

25 A: It depends on the situation. Dan has a lot of photos and

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 stuff at the office, as do most of the store managers.

2 Q: Okay and did you tell him what to do with the
3 photographs?

4 A: I do not believe so.

5 Q: All right. Did you tell him what not to do with the
6 photographs?

7 A: I don't recall specifically having a conversation about
8 the photographs with him.

9 Q: All right. When somebody has an injury like this and you
10 tell them to document it and make sure stuff is in the file,
11 where are they supposed to put the stuff? Where do they put
12 the photographs? Where do they put their notes?

13 A: Typically, the digital camera. That stuff is on the
14 computer, on a flash drive. It could be in the file itself.
15 Certain stores have active locations where all of the stuff is
16 on the property, but the photographs are -- People are in the
17 building so people are damaging things, that kind of thing.

18 Q: All right. When you saw on the computer notes that
19 photos had been taken, do you remember whether they were
20 downloaded and sent to you?

21 A: I don't believe they were.

22 Q: You don't believe they were?

23 A: Dan -- Dan's computer skills actually ---

24 Q: He's an old guy like me, right? Right?

25 A: We did get him up to speed, but it took a while.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. So he took the photos and we know from Glenda
2 now that the file got scanned in, digitized and sent down to
3 you, right?

4 A: That I do believe, yes.

5 Q: Did you ask Glenda or anybody else to do that with your
6 photos?

7 A: I think we did. The request was everything on the
8 property that related to this, send it up to us so we could
9 forward it to y'all.

10 Q: Okay. Now, just to make sure we understand, you -- Do
11 you remember talking to him about the photos or you don't?

12 A: I remember speaking about the incident. I know I've read
13 the computer notes since then, but about the photos, if we
14 talked about the photos, the comment was put all of it in a
15 file. If we need it later, it'll be there.

16 Q: Okay.

17 A: That's a standard response.

18 Q: Absolutely deny under oath telling him to get rid of
19 anything?

20 A: I have no recollection of telling him to get rid of those
21 photos.

22 Q: You denying it or you just don't remember?

23 A: I almost certainly would not have done that.

24 Q: Because you knew they'd be important, didn't you? I mean
25 photos like that, that's pretty dog-gone important, isn't it?

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: They didn't pertain to the actual incident. They are
2 important, but they didn't actually show -- It wasn't the
3 actual incident. It was, you know, a day later.

4 Q: Did you tell Dan to get on whatever it is, get on the DVR
5 and find the video surveillance?

6 A: I don't think I did because I don't think he would have
7 been able to do that.

8 Q: Okay and who did you send up to do that for you?

9 A: I did not send anyone.

10 Q: All right. Did you do anything to determine if there was
11 video surveillance of this particular accident?

12 A: We were not asked to do that.

13 Q: You weren't asked to do that?

14 A: That is correct.

15 Q: At any point?

16 A: The video lasts for fifteen to thirty days and at that
17 point, no.

18 Q: Okay. Fifteen to thirty days was certainly enough time
19 for them to report the accident, report this lady's injuries
20 to you, enough for you to say put everything in the file so
21 we'll have it for later, right?

22 A: That is correct.

23 Q: All right, but you didn't bother doing that for the video
24 that would have shown us exactly what happened and how it
25 happened, right?

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: We did not do that, no.

2 Q: All right. Now, you mentioned earlier that you were told
3 to get everything together and send it all up to us as the
4 lawsuit is going on?

5 A: Several years later, yes.

6 Q: All right. It was filed maybe in 2010 or 2011. Does
7 that sound about familiar to you?

8 A: About that, yes.

9 Q: All right and you -- and you were told to get everything
10 together you have, right?

11 A: Yes.

12 Q: All right and I assume you called, what, Glenda Painter?

13 A: It would have been Glenda or Dan at that point.

14 Q: All right. Wherever it was, you said send me everything
15 you have?

16 A: That is correct.

17 Q: All right and they did?

18 A: That is correct.

19 Q: All right. You got a file, you looked at it, you saw
20 what was in it?

21 A: At that point, it was forwarded on to the attorney.

22 Q: Okay. Did you look at it to see that the photos were not
23 there?

24 A: I don't believe so.

25 Q: All right. Did you bother -- Did Glenda or Dan tell you,

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 hey, boss, there's some photos now that are referenced in the
2 notes of this lady's injuries and they're not in the file? Do
3 you remember anything like that?

4 A: I don't believe we had that conversation.

5 Q: Did you ever tell Glenda to go look for the pictures
6 after Dan Painter [sic.] was gone?

7 A: No.

8 Q: All right. You don't think those pictures are important,
9 particularly when you guys say she wasn't that hurt that bad
10 on the first day and she caused all her injuries herself three
11 days later?

12 MR. SHEALY: Your Honor, objection, argumentative.

13 THE COURT: Rephrase your question.

14 MR. BARTH: Yes, sir.

15 Q: Your position -- Your company's position throughout all
16 of this, in addition to the fact that the accident is not your
17 fault, right?

18 MR. SHEALY: Objection, argumentative.

19 THE COURT: I'll allow it. Go ahead. Objection
20 overruled.

21 Q: The other thing we have been hearing about for two days
22 is the fact that your contention is she wasn't hurt that bad
23 on Thursday, that all these problems arose from the slip and
24 fall on Saturday. Do you know that?

25 A: Yes..

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. Now, don't you think pictures that your
2 company took of my client's injury on the day after the
3 accident, the day before the slip, would be important for the
4 jury?

5 MR. SHEALY: Objection, asked and answered.

6 MR. BARTH: I don't think he's answered it.

7 THE COURT: Go ahead. I'll allow it.

8 A: It may well have been important, yes.

9 Q: All right. Tell the jury then what you and your company
10 and your managers did to try and find this evidence that y'all
11 knew existed according to your own notes?

12 A: The sites that I have no access to the files were asked
13 to gather all evidence and submit it to our attorneys.

14 Q: And specifically, what did you do to find the pictures
15 when you realized they were not in the file?

16 A: Specifically, I asked them to find all the evidence, all
17 the documentation, computer notes, everything that we've seen
18 throughout the entire trial.

19 Q: At what point did you realize that you didn't turn over
20 or have in your hand the photos of my client's injuries the
21 day after the accident or two weeks after the accident?

22 A: At some point, before it got to where it is now, somebody
23 mentioned that.

24 Q: At any point during all of this, have you bothered to
25 call Dan Comfort and ask him where he put them?

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: I have not.

2 Q: Okay. You knew how to get him if you wanted to call him
3 and ask him, didn't you?

4 A: Probably, yes.

5 Q: All right. Now, let's skip over a little bit to the day
6 Mr. Seluga was out there, Kris Seluga who testified yesterday.
7 Do you remember that?

8 A: I do.

9 Q: All right and you were there, weren't you?

10 A: I was.

11 Q: All right and you watched from the time we got there
12 until the time we left, you -- you and your lawyer were there?

13 A: If that's what you mean, I was there, yes.

14 Q: All right and you were there when he took the pictures,
15 you were there when he opened the door, and you were there
16 when he wanted to adjust the door, weren't you?

17 A: I was.

18 Q: All right and when he wanted to adjust the door to do
19 some different testing, your instructions were you can do
20 that, but you put it back just like you found it, wasn't it?

21 A: They were set to factory defaults. We've never adjusted
22 any of the doors.

23 Q: I understand, but your instruction to Kris Seluga was put
24 it back like you found it, right?

25 A: Yes.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right and when Mr. Seluga did what he did, did the
2 investigation, turned the screw, slowed the door down, and
3 then finished, he put it back like he said he put it back,
4 right? You watched the whole thing, didn't you?

5 A: I did.

6 Q: At any point did you say, Mr. Seluga, you didn't fix that
7 right, you adjusted it wrong, you didn't leave it like you
8 found it or anything like that?

9 A: I don't believe so.

10 Q: All right and the reason you didn't is because you knew
11 that he put it back exactly like he found it because if not,
12 you would have stopped him, wouldn't you?

13 A: Probably, yes.

14 Q: Yeah, I mean that's why you were there, right?

15 A: I was there because I was asked to be there. I didn't
16 want to be.

17 Q: Oh, okay.

18 A: Okay.

19 Q: It was cold.

20 A: It was.

21 Q: All right. Now, Mr. Seluga wanted to -- We were looking
22 at the bottom, too, weren't we? How sharp the bottom of the
23 door was?

24 A: Yes.

25 Q: All right and he was having trouble getting a good photo

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 and he wanted to take the door off, didn't he, and get a
2 picture of it?

3 A: He did.

4 Q: And you said no?

5 A: I did.

6 Q: All right and we complied with that, right?

7 A: You did.

8 Q: It wouldn't have been hard to do, pop two -- pop three
9 pins out, lay it down, and then put the pins back in.. That's
10 all you have to do to get a door off, isn't it?

11 A: Those doors are set up by the factory.

12 Q: Okay. So you don't know how to get it off?

13 A: We can get it off, but putting it back on like the
14 factory did it would be difficult.

15 Q: Okay, but you wouldn't let him, right?

16 A: It wasn't my decision at that point.

17 Q: Okay. Now, from the date of this accident until right
18 now, to your knowledge has anything been changed or modified
19 or altered with the door or the closer?

20 A: No.

21 Q: All right and we heard some of the questions yesterday.
22 Are you contending that -- that Ms. Lynch adjusted it on that
23 day she was taking the video?

24 A: I don't make any assertions either way.

25 Q: Okay, but for sure, you guys haven't done anything to it,

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 right?

2 A: Not to my knowledge.

3 Q: All right and so as far as you know and as far as you've
4 told us, the way it was found when Kris Seluga got there would
5 have been exactly the same as the way it was on the date of
6 the accident because you haven't changed anything?

7 A: I have absolutely no way of saying that. There are
8 hundreds of people going through that very door every single
9 year. Those doors are all over my company. There's hundreds
10 of them and they're all set the same way from the same
11 manufacturer and the closers are the same as you find at even
12 this building.

13 Q: They're the same as in this building?

14 A: They may well be.

15 Q: All right. Why don't we talk about that? I mean people
16 that come in and out of this building virtually always have
17 empty hands, don't they? They're coming to court, they're
18 going to court, they're coming to pay a bill, they're getting
19 their taxes receipt, right? You came in and ---

20 A: There's a lot of stuff in this courtroom that y'all
21 brought in.

22 Q: All right. We brought stuff in, but you came empty-
23 handed, didn't you?

24 A: No, I didn't.

25 Q: All right. Even these doors have a button to open them

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 by themselves so when your hands are full, you can come
2 through them, don't they?

3 A: I don't believe they do.

4 Q: You don't believe they do?

5 A: Some may.

6 Q: Okay. How hard would it have been to leave these people
7 a way to lock the door open?

8 A: It wouldn't have been difficult, but it would have been
9 expensive or other ways. But it wasn't the idea.

10 Q: It would have been expensive?

11 A: It may have been.

12 Q: Okay, but you knew you were putting your customers in a
13 position of having to do what Glenda described yesterday,
14 didn't you?

15 A: I don't know.

16 Q: Well, you heard her. You put your butt up against the
17 door, you push it open, you walk out, you pick your item up,
18 and in some cases I think she said even sometimes she had to
19 balance it against the door frame, right?

20 A: Those are common ways to use a door, yes.

21 Q: All right. Well, the way you use your door in your
22 facility is a whole lot different than the way everybody else
23 uses them that aren't storage facilities, right? You'd give
24 me that, won't you?

25 A: I don't think I would give you that, no.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. Well, you anticipate and understand that
2 virtually everybody coming in and out almost every single time
3 has got something, if not something big, in their hands,
4 right?

5 A: It is a regular occurrence, yes.

6 Q: All right. Well, that's what they pay you for, right?

7 A: Absolutely.

8 Q: Then why not give them a way to leave it open so that
9 they don't have to maneuver all these different ways?

10 A: Because then all the heating and air would -- They would
11 leave it open permanently and then ---

12 Q: Okay. Did you hear Mr. Seluga say that same unit you
13 bought has a feature where all you have to do is turn the
14 screw and it doubles or more the time it takes to close, which
15 means it gives your patrons and customers twice the time at
16 least to get out of the way?

17 A: I did not have that knowledge until I heard him say that.

18 Q: Okay and did you know that one of the door closers you
19 could have put on there has what we call a delay feature?

20 A: I did not know that either.

21 Q: You didn't know that either?

22 A: No.

23 Q: All right. How about a hold open feature where you can
24 click it, lock the arm, and then the door stays open?

25 A: I had not heard that either. These doors are standard.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: Okay. Now, the problem with the air conditioning is
2 you're going to lose money if the door stayed open, right?

3 A: Not really.

4 Q: Okay.

5 A: The problem is that people's goods inside, they would be
6 damaged.

7 Q: Okay.

8 A: That is a problem.

9 Q: If the door stays open?

10 A: Right. Our duty is to protect the goods. That's what
11 we're offering them.

12 Q: Okay. How about protecting the patrons?

13 A: Absolutely.

14 Q: All right. Now, the delay feature would solve that,
15 wouldn't it? You buy the one that stays open thirty, forty
16 seconds and surely I'm out of the way by then. That solves
17 your problem of leaving the door open, doesn't it?

18 A: No, it doesn't.

19 Q: Why not?

20 A: Because people are going in and out of the door and they
21 prop it for hours at a time.

22 Q: Okay. That's what I'm saying. If you're just giving
23 them a delay feature so that it stays open twenty or thirty
24 seconds before it starts to close, that would get them out of
25 the way, it's safe for them, and then that would shut the door

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 automatically so their goods are protected and you don't lose
2 the air conditioning. Isn't that ---

3 A: That's not ---

4 Q: Wouldn't that help everybody?

5 A: That's not the function of stopping the door open.

6 Q: I don't understand.

7 A: People stop it open so they can take things in and out
8 over a period of time, not thirty seconds, but an hour.

9 Q: Okay and you think it's better for your stuff that they
10 have to swing it open every single time they come in and out?

11 A: They don't. Most prop it open.

12 Q: Okay and y'all know that, don't you?

13 A: It's a common practice.

14 Q: Okay. Let me ask you a couple of questions just about
15 your company in general. Are you familiar with the finances
16 of your company?

17 A: I am.

18 Q: All right and you know what they make and you know what
19 they spend?

20 A: I do.

21 Q: All right and was that the same in 2008? The same now,
22 you knew all that back then?

23 A: Yes.

24 Q: All right. So if I'm going to ask anybody about the
25 financial situation of your company, you'd be the man to ask,

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 wouldn't you?

2 A: One of them, yes.

3 Q: All right. I want to show you a document and see if,
4 number one, you can identify it and, number two, if it's true
5 and correct.

6 MR. SHEALY: Your Honor, I'm going to object, object to
7 the line of questioning and the basis of relevance of this
8 coming in.

9 THE COURT: All right, objection so noted for the record,
10 but overruled at this time.

11 Q: Mr. Wallace, take a look at that for me, please. Do you
12 know what that is?

13 A: It is our balance sheet.

14 Q: All right and is that a true and correct accounting of
15 your balance sheet as of December 31, '08, the year this
16 accident took place?

17 A: I believe so, yes.

18 Q: All right and the second, is there an income statement on
19 there, too, or no?

20 A: There is a profit and loss statement.

21 Q: All right and that tells us how much you made and how
22 much you spent the year of this accident, doesn't it?

23 A: That is correct.

24 Q: All right.

25 MR. BARTH: Your Honor, I'd move to introduce that. I'm

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 not sure what exhibit number it would be.

2 THE COURT: All right. Subject to your same objection,
3 which has been overruled, but your objection is so noted for
4 the record.

5 MR. SHEALY: Thank you, Your Honor.

6 (Whereupon, Plaintiff's Exhibit Number 22, the balance
7 sheet/profit and loss statement of the defendant, is
8 admitted into evidence.)

9 COURT REPORTER: Twenty-two.

10 MR. BARTH: Twenty-two? Can I steal that back from you
11 one second? Thanks.

12 Q: I'm going to show you Plaintiff's Exhibit Number 2. At
13 the top -- 22.

14 THE COURT: Twenty-two.

15 MR. BARTH: Is it up?

16 (Whereupon, counsel confers with technical assistant.)

17 Q: Okay, can you see the screen at all?

18 A: I can.

19 Q: All right. Is what the jury is looking at on this screen
20 the same thing you're looking at?

21 A: Essentially, yes.

22 Q: All right. Just in ---

23 A: From what I can see.

24 Q: In general, tell me what we're looking at?

25 A: All kinds of stuff.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. What is a balance sheet?

2 A: The balance sheet shows our assets and our liabilities.

3 Q: All right and is that what this document does?

4 A: That particular document is our assets.

5 Q: All right. So this page right here would tell us what
6 y'all have, right?

7 A: Yes.

8 Q: Okay. The next page would tell us really in the top
9 current assets. That's liquid? That's money? Is that what
10 that is?

11 A: Depending on how you define it. Some of this isn't cash,
12 some of this is locked up by the banks.

13 Q: What is that figure of six hundred and something
14 thousand?

15 A: There's about 1.1 million tied up in non-liquid assets
16 that's shown on -- shown on their assets.

17 Q: All right. Fixed assets, that would be property y'all
18 own, right?

19 A: Yes.

20 Q: Okay and -- and can you tell us what that figure is?

21 A: Twenty-two million.

22 Q: Is that 22 million or 27 million?

23 A: It's 22 on my page.

24 Q: That's a two, okay, all right. Now, other assets and all
25 that, so the stuff your company owned as of the date of this

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 accident, the year of the accident, would have been about 29.8
2 million dollars?

3 A: Not really. You've got a lot of liabilities on the next
4 page.

5 Q: All right. We're going to talk about that, but the stuff
6 you own that comprises the first two pages, that totals 29.7
7 or eight million, right?

8 A: I got 23 on my page.

9 Q: Well, you might be right because I can't see. Are you
10 looking at '08?

11 A: Yes, sir.

12 Q: Okay, all right.

13 MR. BARTH: You've got '11 up there. Sorry. You've got
14 the wrong one up there, Christy. Yep, that's why the figures
15 don't match. I'm showing you the next one. All right, back
16 to where I should have been, my fault.

17 Q: Current assets, first stuff about 1.3 million, property
18 and stuff about 22 million, for a total of about 23 point --
19 almost 23.8 million, right?

20 A: Close to that.

21 Q: Okay. Now, let's go to the next page. That tells us
22 what you owe -- what your company owes, right?

23 A: Yes.

24 Q: Okay.

25 A: Part of it.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. Now, if we take what you own and we subtract
2 what you owe, the difference would be the net worth of
3 Carolina Self Storage, wouldn't it?

4 A: Yes.

5 Q: All right and as of December the 31st of 2008, what's that
6 figure?

7 A: With the total?

8 Q: Yeah, your equity, your net worth?

9 A: Total equity is 5.7.

10 Q: Five point -- Well, almost 5.8 million dollars?

11 A: Close to it.

12 Q: All right and that would have been the net worth or the
13 equity your company had the year of this accident, right?

14 A: The majority of that is non-liquid, yes.

15 Q: I understand. All right, now I want to show you another
16 document that you -- you provided for us. Look at this one.
17 If you would, tell me what that document is?

18 A: This was our P&L.

19 Q: Profit and loss?

20 A: Yes.

21 Q: Okay. It tells you how much you made that year, how much
22 you lost that year?

23 A: Yes.

24 Q: All right and that's part of 22?

25 A: Yes.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. Then I won't introduce it again. We'll go
2 ahead and put it back up. Are you familiar with the figures
3 on that, Mr. Wallace?

4 A: I was more familiar back in '08, but yes.

5 Q: All right. Well, it's still true though, isn't it? I
6 mean it's still accurate and you know how to look at it and
7 tell us the information, don't you?

8 A: It's all pretty much the same thing.

9 Q: Okay. Without going through all of the details, tell us
10 what your company made that year in profit?

11 A: Eight hundred thousand.

12 Q: I'm sorry?

13 A: Eight hundred thousand.

14 Q: Eight hundred thousand? All right and that was -- That
15 was Carolina Self Storage's profit for the year -- just the
16 year 2008?

17 A: The bottom line, yes.

18 Q: The bottom line? Okay. Well, that's what is left over
19 after all your bills are paid, right?

20 A: A lot of bills.

21 Q: I understand. Now, do you do -- Do you get involved in
22 the -- the buying of equipment for your business, whether it's
23 a computer or a fence or stuff like that?

24 A: Yes and no.

25 Q: Okay.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 A: The construction side, no. The computer side, yes.

2 Q: All right. Who makes the decisions on the construction?

3 I'm sorry. Who makes the -- Who makes the decision on

4 construction stuff?

5 A: I've got a construction supervisor that does most of the
6 detail work and ---

7 Q: All right.

8 A: --- some parts of the building, the decisions are made by
9 the building -- actually who we buy it from.

10 Q: All right. Do you know how much it would have cost you
11 to buy the additional feature to hold your door open?

12 A: I've never been -- even had a conversation with anybody
13 about even purchasing. I didn't know they even existed until
14 today.

15 Q: Until today?

16 A: Well, until the last couple of days.

17 Q: Well, you certainly knew back when your lawyer took his
18 deposition months and months ago. You knew that, didn't you?
19 Didn't you read it?

20 A: I -- I may have. I don't actually think -- Most of the
21 stuff was done at the last minute.

22 Q: Okay and the closer, what's the most it can cost? Five
23 hundred dollars? Three hundred dollars?

24 A: Something like that.

25 Q: Right? And how many are on the heated and cooled units

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 in Florence?

2 A: One per door.

3 Q: Sir?

4 A: One per door.

5 Q: How many doors on the two buildings?

6 A: Fifteen or twenty.

7 Q: Okay. I'm not really good with the math, but you made
8 \$800,000 a year so certainly you could afford to spend a few
9 thousand dollars and fix these, couldn't you?

10 A: It's possible.

11 Q: But y'all didn't?

12 A: No, we didn't.

13 Q: All right. Take a look at the next document I want to
14 show you. This is another one that you provided. This would
15 be the exact same information from 2011, wouldn't it?

16 A: It would be, yes.

17 Q: It would be the balance sheet portion of it, correct?

18 A: Yes.

19 Q: All right.

20 MR. BARTH: I'd move to introduce it, Your Honor.

21 THE COURT: Subject to defense counsel's prior objection,
22 which is being overruled. Subject -- Objection so noted for
23 the record, Mr. Shealy.

24 (Whereupon, Plaintiff's Exhibit Number 23, the 2011

25 Balance Sheet for Carolina Self Storage, is admitted into

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 evidence.)

2 Q: Mr. Wallace, I want to show you Plaintiff's Exhibit 23.

3 Is that what we're looking at now?

4 A: Yes.

5 Q: That's the balance sheet as of what, six weeks ago?

6 Eight weeks ago?

7 A: Yes.

8 Q: Okay. That's the most current one you have, isn't it?

9 A: Yes, for last year.

10 Q: For last year? Okay. Now, the net worth of your company
11 in '08 was about 5.8 million dollars?

12 A: Yes.

13 Q: All right. Take a look at I guess it's page three of
14 this one and three years later -- Three years later, how are
15 you guys doing?

16 A: Doing better.

17 Q: Doing better? About what, three and a half million
18 better than you were doing in '08?

19 A: Yes.

20 Q: So as we sit here today, the net equity you have in your
21 company would be somewhere above nine million dollars?

22 A: Yes.

23 Q: After '08, when you knew about this accident and during
24 the three years that y'all made -- y'all made over a million
25 bucks a year, have you gone back to figure out how much it

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 would cost you to fix any of this?

2 MR. SHEALY: Your Honor, objection.

3 THE COURT: Objection sustained. Yes, you may approach.

4 (Whereupon, a bench conference is held out of the hearing
5 of the jury.)

6 THE COURT: Why can't he answer that question?

7 MR. SHEALY: But no, he asked him in the abstract. He's
8 now asked about about subsequent remedial measures.

9 MR. BARTH: No, I'm not. One of the factors ---

10 THE COURT: He's not asking him. That's what I initially
11 looked at and that's why I sustained the objection. He's not
12 asking about subsequent remedial measures. I think it would
13 be okay if he did.

14 MR. SHEALY: He's just asking if he looked at what it
15 would cost.

16 MR. BARTH: And I'm asking -- And the duration of the
17 conduct is one of the -- one of the issues and one of the
18 factors in an award of punitive damages. It's to this day he
19 hasn't fixed any of it.

20 THE COURT: All of that's already out there. I mean as
21 far as these other -- Well, I think it's all out there that if
22 there are these other devices that they put out, whether it's
23 a delay or a stop or what. I'm going to let him ask that.

24 MR. SHEALY: Yes, Your Honor.

25 THE COURT: All right.

DIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 (Whereupon, the bench conference ends.)

2 THE COURT: I'm going to allow you to ask that question,
3 Mr. Barth. I'm going to overrule my previous ruling.

4 MR. BARTH: Thank you, Your Honor.

5 THE COURT: Subject to Mr. Shealy's objection.

6 MR. BARTH: Thank you.

7 Q: In the three years, three and half years, since this
8 accident where your company has made all this money, have you
9 gone back to see how much it would have been to fix all of
10 this?

11 A: No.

12 Q: You still haven't done it to this very day, have you?

13 A: No, we haven't.

14 Q: The last document I handed you, I think that's your
15 income, your profit and loss for 2011. Did I hand you that
16 already?

17 A: It is.

18 Q: True and correct?

19 A: It looks accurate.

20 Q: All right. May I look one second?

21 MR. BARTH: Your Honor, I'd move to introduce this.

22 THE COURT: Subject to Mr. Shealy's previous objection,
23 I'll allow it to be marked as Exhibit 23.

24 MR. BARTH: Thank you.

25 THE COURT: Twenty-four, I'm sorry.

CROSS EXAMINATION OF JAY WALLACE BY MR. SHEALY

1 MR. BARTH: Twenty-four, Your Honor.

2 (Whereupon, Plaintiff's Exhibit Number 24, the 2011
3 Profit and Loss Statement for Carolina Self Storage, is
4 admitted into evidence.)

5 Q: Take a look at 24 for me, please. How did your company
6 do this year, Mr. Wallace?

7 A: It did better.

8 Q: All right. What -- You made almost -- Well, you made
9 over a million and a half dollars, didn't you?

10 A: We did.

11 Q: Still haven't fixed the problem?

12 A: We have not changed anything, no.

13 Q: Okay. Okay, I don't have any other questions, thanks.

14 THE COURT: Mr. Shealy?

15 MR. SHEALY: Thank you, Your Honor.

16 CROSS EXAMINATION

17 BY MR. SHEALY:

18 Q: Mr. Wallace, you mentioned that you have about seventeen
19 locations?

20 A: We do.

21 Q: And are all the locations about the same size as
22 Florence?

23 A: No.

24 Q: Various sizes?

25 A: Yes.

CROSS EXAMINATION OF JAY WALLACE BY MR. SHEALY

1 Q: Do you have any idea how many doors like the one we're
2 talking about here you have in your whole company?

3 A: Probably a hundred or more.

4 Q: Okay and do you have any idea how many customers you've
5 got in your whole company?

6 A: At any given time, there's 6,000 and over the course of a
7 year, ten to 15,000 people will have gone on our properties.

8 Q: Okay and how many other reports of an injury like this
9 have you ever had with this door?

10 A: Zero to my knowledge.

11 Q: And the -- Did you all build this building yourselves?

12 A: No.

13 Q: Did you manufacture this door yourselves?

14 A: No.

15 Q: Who did that for you?

16 A: Another company.

17 Q: What's the name of that company?

18 A: Express Building Systems, who created the building, put
19 all the stuff in it, made the selections on all the different
20 materials, and then another company did the installation.

21 Q: All right and do those companies specialize in the
22 construction of self-storage facilities?

23 A: Absolutely.

24 Q: And do they do that construction nationwide?

25 A: They do.

REDIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: And so it's your understanding that doors like this exist
2 in self-storage facilities throughout the United States?

3 A: Extremely common.

4 Q: Okay, same design, same kind of door closer, all of that?

5 A: Same everything.

6 Q: Okay and so you just chose to use them because they are
7 in the business of building self-storage facilities?

8 A: I chose that company, yes.

9 Q: All right and you mentioned that you hadn't had any other
10 reports of an injury with -- with a door like this. Does that
11 include even after Ms. Lynch's accident?

12 A: Yes.

13 Q: Okay, no further questions. Thank you, Mr. Wallace.

14 MR. BARTH: May it please the Court.

15 THE COURT: Yes, sir.

16 REDIRECT EXAMINATION

17 BY MR. BARTH:

18 Q: This particular door, you heard our expert, he talked
19 about in addition to the kind of door you used and the speed
20 you have it closing, it's complicated by the fact that at some
21 point about where it hit her it would have been about five
22 inches off the ground, right?

23 A: Yes.

24 Q: You heard that, didn't you?

25 A: I did.

REDIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 Q: All right. You're going to tell the jury in all your
2 places how many other doors are five inches off the ground and
3 set up the exact same facts as the ones that unfortunately
4 were set up here?

5 A: Quite a number of them.

6 Q: How many and where?

7 A: Savannah, Statesboro, some of the ones in Sumter.

8 Q: Five inches?

9 A: The one in some are higher.

10 Q: Some are higher?

11 A: Yes.

12 Q: Okay. How do you know that when you just got finished
13 telling us you let the contractors do the building and you
14 just kind of oversee everything? You know that or are you
15 guessing that?

16 A: I've been on the properties. I know it.

17 Q: And how many doors have you measured to see if they are
18 like this one?

19 A: I haven't measured any, but I know how high they are.

20 Q: Actually ---

21 A: I know I have to step up into them.

22 Q: I'm sorry?

23 A: I have to step up into the building.

24 Q: You have to step up into the building? Okay. Well,
25 higher wouldn't even be a problem, would it? It wouldn't hit

REDIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 you in the Achilles ankle, would it? It would hit you on the
2 back of your leg?

3 A: It would have hit you on the back of the leg if you were
4 to do -- to stand in the way of it, yes.

5 Q: And are you telling us under oath that there are a bunch
6 of these doors set up just like this one?

7 A: To the best of my knowledge.

8 Q: How many people come in and out of your heating and
9 cooled units in a day average?

10 A: I would guess company-wide, a hundred, two hundred every
11 day.

12 Q: Into the heating and cooled units?

13 A: Yes. We've got a lot of buildings like that.

14 Q: Virtually all of them come with their hands full?

15 A: Yes.

16 Q: All right. Now, the bottom line is you guys played the
17 odds, didn't you?

18 A: I ---

19 Q: You can save a little air conditioning, you can leave the
20 doors like they are and sooner or later somebody is going to
21 get hurt just like she did in this case, aren't they?

22 MR. SHEALY: Your Honor, objection, argumentative.

23 THE COURT: I'll sustain the objection.

24 Q: No matter what the situation, even after we got into all
25 this, it would have taken very little money compared to what

REDIRECT EXAMINATION OF JAY WALLACE BY MR. BARTH

1 y'all have to put a new closer on, right?

2 A: It may have, yes.

3 Q: And to slow the doors down by turning that knob wouldn't
4 have cost y'all a nickel anywhere except for maybe the money
5 you pay the guy that turns the screw a hundred times, right?

6 A: Yes.

7 Q: Didn't even bother doing that?

8 A: We did not do that.

9 Q: All right. Okay, thank you, Mr. Wallace.

10 THE COURT: Mr. Shealy?

11 MR. SHEALY: No questions, Your Honor.

12 THE COURT: All right, sir, you may step down. Thank
13 you. Mr. Barth?

14 (Whereupon, the witness leaves the stand at 10:21 a.m.)

15 MR. BARTH: If Your Honor please, the plaintiff would
16 rest.

17 THE COURT: All right, ladies and gentlemen, the
18 plaintiff has presented its case and now, at this time, there
19 are some legal matters that we need to take up outside of your
20 presence. I'm going to ask that you step to the jury room
21 while we take up these matters and I will get you back out
22 here as quickly as I can. Do not discuss the case. Thank
23 you.

24 (Whereupon, the jury exits the courtroom at 10:22 a.m.)

25 THE COURT: All right, Mr. Shealy, have you got any

1 motions?

2 MR. SHEALY: I do, Your Honor. I have a directed verdict
3 motion to make on several different grounds and I'll handle it
4 however Your Honor wants. I can go element by element and we
5 can argue that or I can just go all the way through.

6 THE COURT: I'll let you do it however you feel most
7 comfortable doing it, Mr. Shealy.

8 MR. SHEALY: Yes, Your Honor. Your Honor, first we would
9 move for a directed verdict on the grounds that there is no
10 duty to guard against this particular injury that's imposed
11 upon my client. The way that our courts talk about this is
12 this falls into the category of primary implied assumption of
13 the risk and that is discussed at length in the case of
14 *Davenport v. Cotton Hope Plantation Horizontal Property*
15 *Regime*, in which the Supreme Court says that this is not an
16 affirmative defense, but is part of the initial negligence
17 analysis to determine whether or not a duty exists because
18 there are some risks that are inherent in any particular
19 activity.

20 And so, Your Honor, looking at *Davenport* and then looking
21 at the *Nelson v. Piggly Wiggly* case that we've talked about
22 and what we're saying here is not that the -- we didn't owe a
23 duty of care to Ms. Lynch because we do owe a duty of care.
24 There's no question about that a merchant owes a duty of care.
25 That's well established in the law and -- But just as the

1 Court said in *Nelson*, the question is not whether we owed a
2 duty of care, but whether the scope of the acknowledged duty
3 of reasonable care extends to the particular risk that led to
4 her injury. The plaintiff must identify a duty that the
5 defendant has to protect her from particular harm to merit
6 consideration of her claim by a jury.

7 Your Honor, we're talking about a doorway and there are
8 doorways in every building in every state in this country with
9 door closers on them and doors can pinch you, can smash your
10 fingers, can do all kinds of things to you. They are
11 inherently -- There's risks associated with those. I'd be
12 willing to say that probably everyone in this courtroom as at
13 one point or another caught themselves in some form or fashion
14 upon a doorway. It's just part of the inherent risks of going
15 in and out and living in modern America.

16 And so there has been no identified duty that is imposed
17 by any statute or regulation, any industry standard that has
18 been identified that creates a special or particularized duty
19 that we are to either warn or fix this doorway. This doorway
20 is as standard a doorway as we will find in the United States.
21 How it is set up does not violate the building code. The
22 sharpness of the edge does not violate the only standard known
23 to the plaintiff's expert to apply for sharpness of objects
24 that are sold in the stream of commerce.

25 There is nothing about the door closer and the way it is

1 set up that is outside the manufacturer's recommendations or
2 -- or that it violates any other standard, regulation, code,
3 law, anything and so there -- There being no duty to fix
4 because nothing is broken or warn because this is the kind of
5 risk that they're required -- that no warning is required
6 because it's the kind of thing that all of us experience every
7 day of our lives, we believe that we should be entitled to
8 summary judge -- to a directed verdict on that basis. That's
9 ground number one.

10 THE COURT: Mr. Barth, do you want to respond to that?

11 MR. BARTH: Very, very briefly.

12 THE COURT: Why don't we do it like that so you don't
13 have to try to respond to every ground after he's finished?
14 I'll let you respond and then I'll go back to him on ---

15 MR. BARTH: Okay. At this point, Your Honor, all I would
16 say to that one is there is a duty to determine whether or not
17 there are unreasonably dangerous conditions. The big deal in
18 *Nelson* was that the -- that the dangerous condition plaintiff
19 alleged wasn't incident to their business. Did somebody get
20 run over in the parking lot of a grocery store? You noticed
21 they didn't say there's no duty in certain circumstances to
22 the shoppers who are shopping and that's what we have here.
23 They set this up to move furniture. That is their business.

24 That is exactly what they talk about in *Nelson* and the
25 reason they found no duty in *Nelson* is because they said it

1 wasn't legally foreseeable because it wasn't incident to the
2 business they're operating in. Ours is just the opposite and
3 according to our expert, there's evidence in the record that
4 says it's an unreasonably dangerous condition. Their own
5 witness has said we know how they're using it, we know what
6 they're doing and the rest of it, that's for the jury to
7 decide.

8 The same with the assumption of the risk. I mean he --
9 he might very well convince the jury he's right on the facts,
10 but as far as the law goes, there's evidence in the record
11 sufficient to deny their motion, Your Honor.

12 MR. SHEALY: Your Honor, may I briefly respond?

13 THE COURT: Yeah, hold on just a second. Yes, sir?

14 MR. SHEALY: Your Honor, with great respect to Mr. Barth,
15 there -- there are separate holdings in *Nelson* and as we are
16 well aware, the elements of duty and -- and for -- and breach
17 are separate. Foreseeability has to do -- is an inquiry into
18 the element of breach, not an inquiry into the element of duty
19 and both of those elements are discussed in *Nelson*.

20 I am focusing upon the absence of a duty and I want to
21 reiterate that assumption of the risk in the sense of a
22 affirmative defense is not what we're saying here. We are
23 saying primary implied assumption of the risk as defined in
24 *Davenport* means that there are risks inherent in certain
25 activities that require no -- or that impose no duty upon the

1 owner of land or the other participants in those activities.

2 Your Honor, this is discussed in lots of cases. I would
3 point Your Honor to *Cole v. Boy Scouts of America*, to
4 *Rudzinski v. BB*, a case from the United States District Court
5 for the District of South Carolina, that discuss that there
6 are inherent risks in certain activities. This comes up a lot
7 with sports ---

8 THE COURT: Mm-hmm.

9 MR. SHEALY: --- because there are certain risks inherent
10 with sports, but it can -- It's not limited to -- to sports
11 activities or being a -- a spectator at some sort of event.
12 There are risks inherent in all kinds of activities that
13 impose no duty upon some other person to warn against because
14 they're part of what we walk around understanding.

15 That -- That's what the policy is underlying this -- this
16 rule and so, most respectfully, *Nelson* -- the part of *Nelson*
17 that I'm focusing on is not the part that talks about
18 foreseeability. It talks about the fact that there are
19 certain risks that we're not -- that we as a landowner do not
20 need to warn other people about or -- or fix because there's
21 no way to -- There's no way to make a door free from some
22 danger.

23 It's a moving object that then closes into a closed space
24 and there are things about that that are dangerous. They
25 pinch, they're sharp, they have corners, all of those things

1 about doors are dangerous. They catch our clothing, they
2 catch our feet, they smash our fingers, they're doors. And
3 so, Your Honor, because there is no duty, this case should not
4 go to the jury.

5 THE COURT: All right, Mr. Barth, since I let him respond
6 to you, I'm going to let you respond one more time in response
7 to his argument on the duty issue. Then we're moving to the
8 next -- Then we're moving to the next issue, Mr. Shealy.

9 MR. BARTH: I don't need to respond anymore, Your Honor.
10 Your Honor understands that.

11 THE COURT: All right.

12 MR. BARTH: You know, Nelson very likely the facts are
13 completely different, completely different. One injury was
14 inside the course of their business, one is outside, and that
15 is a big distinction on both duty and on foreseeability and
16 the bottom line is not whether he's right or wrong, the bottom
17 line is, is it a jury question. Have we put in enough
18 evidence on every single bit of it to get to the jury? Our
19 expert says clearly they have a duty and it was breached.

20 THE COURT: All right. How many more points do you have,
21 Mr. Shealy?

22 MR. SHEALY: Several.

23 THE COURT: All right.

24 MR. SHEALY: I'd be happy to take a break if Your Honor
25 would prefer.

1 THE COURT: No, go ahead.

2 MR. SHEALY: Your Honor, the next element of this cause
3 of action is breach. There's been no evidence of breach. The
4 law in this state is that reasonable care on the part of a
5 business owner does not ordinarily require precautions or even
6 warning against dangers which are known to a visitor or so
7 obvious to him that he may be expected to discover.

8 The evidence -- There is no dispute that the plaintiff
9 knew that there was a difference in level, knew that there was
10 a door closer, knew everything about the characteristics of
11 this door. It's not that it behaved differently on this
12 particular day than she was used to. She knew of its
13 behavior.

14 Now, there's a -- Our courts have recognized an exception
15 to that rule in situations where we should anticipate that the
16 person will encounter the defect despite its obviousness and
17 that has come up in the cases of the *Callandar* versus a
18 doughnut shop case with the missing barstool.

19 THE COURT: Right.

20 MR. SHEALY: And the -- My case, *Hancock v. Midsouth*
21 *Management*, the last time that this issue was addressed if I
22 can -- if I remember correctly, by our Appellate Courts, but,
23 Your Honor, here's where there is -- This case is different
24 from those. The evidence is clear that we have -- No one has
25 said that we were aware of a problem created by this door,

1 that we were aware that this door had the potential to cause
2 an injury to the ankle. This is the only time that has
3 occurred and we have plenty of evidence that this -- that
4 there have been perhaps hundreds of thousands of cycles of
5 opening doors like this within my client's company itself and
6 this is the only occasion before or since and that's ---

7 *Midsouth -- Hancock v. Midsouth Management*, there was
8 evidence in the record from a former employee and from the
9 daughter of the plaintiff saying -- The former employee said,
10 yeah, there were potholes all over that parking lot and I told
11 management that my car was bottoming out and all kind of
12 problems were happening. We don't have that here. We have
13 zero evidence of a -- of prior knowledge of some problem or
14 risk associated with this door.

15 And what we do have is abundant evidence that is
16 uncontradicted in the record that the plaintiff knew, that all
17 of us know because it's the kind of thing that all of us deal
18 with every day, that it's an automatic -- It's a door that
19 closes automatically. She raised her foot because she knew it
20 was closing. So it's an open and obvious -- If it's -- If
21 it's a defect, if it's unreasonably dangerous, it's open and
22 obvious even to the plaintiff ---

23 THE COURT: Well, you ---

24 MR. SHEALY: --- by her own testimony.

25 THE COURT: The door closing, open and obvious. The

1 sharpness of the door, open and obvious?

2 MR. SHEALY: Yes, Your Honor. Your Honor, doors are --
3 As I said, doors, they pinch people, they -- they smash
4 people's fingers. There's nothing about the sharpness of the
5 door, according to their own expert, that is outside of normal
6 experience. The door -- The sharpness of the door passes the
7 test, the only test that the expert knows of for sharpness.
8 It's open and obvious.

9 THE COURT: Mr. Barth?

10 MR. BARTH: May it please the Court.

11 THE COURT: Yes, sir.

12 MR. BARTH: The doughnut case he's talking about also
13 points out that an owner may be required to warn an invitee or
14 take other reasonable steps to protect them if the property
15 owner has reason to expect that the invitee's attention may be
16 distracted so that that person won't discover what's obvious
17 or will fail to protect themselves against it.

18 There is plenty of evidence in this record that they knew
19 exactly -- Everybody coming through is distracted. Every
20 single person coming through there with something in their
21 hands is distracted away from the door, the bottom, the
22 condition. That's for the jury to decide if how she handled
23 it was reasonable. At this point, at the directed verdict
24 stage, Your Honor, there's evidence in the record that, you
25 know, that they know very well these people are being

1 distracted because they set up the situation to distract them.

2 And to -- to answer one of your other questions, Your
3 Honor, there is absolutely no way under the sun that the
4 bottom condition of the door is open and obvious and that's
5 even more true in the light of Mr. Wallace's testimony that
6 the people that made it put it in and they don't take them
7 off. We couldn't even get a picture of it so how in the world
8 is a patron supposed to get up under there and figure out what
9 condition it's in?

10 THE COURT: All right, Mr. Shealy?

11 MR. SHEALY: Briefly, Your Honor. It would be one thing
12 if there were evidence of distraction. The evidence is
13 uncontradicted that the plaintiff wasn't distracted. She
14 knew. She knew the door was closing.

15 If -- If this were a situation where the plaintiff were
16 surprised or encountered something she was not expecting, that
17 is what the whole law of premises liability for invitees
18 concerns, latent defects that are not discoverable by the
19 exercise of ordinary care or reasonable diligence by the
20 person on the premises. This was known to the plaintiff by
21 her own admission. This was known to the plaintiff by the way
22 she described what she did as the door was being closed. As
23 the door was closing, she knew it was closing so she lifted
24 her foot up and it's because she did that that she got cut.

25 So, Your Honor, it would be one thing if we had an issue

1 of fact. These facts are uncontradicted. They all come from
2 the plaintiff. There is no issue of fact here to give rise to
3 this case going to the jury for the jury to decide was the
4 plaintiff distracted. Well, no, she wasn't. She -- She said
5 it with her own mouth that she wasn't distracted. Was she
6 aware? Of course, she was aware. She said it herself and we
7 have -- There's nothing on the other side to contradict it.

8 So, Your Honor, for that reason, stand alone reason not
9 for this case to go to the jury if you would grant a directed
10 verdict.

11 THE COURT: Mr. Barth, anything?

12 MR. BARTH: Every day, people agree on how an accident
13 happened. Just because the facts aren't in dispute doesn't
14 mean the issue they have to decide is not in dispute. I mean
15 all the time the plaintiff said, yep, he ran the red light.
16 The defendant said, yep, I ran the red light. There ain't no
17 question about how it happened. Then you get into all the
18 rest of it, what, how, you know, all of the other issues that
19 the jury has to decide. That's just one less they have to
20 decide that we all agree on how it happened. That doesn't
21 mean the big issues are not disputed because they are.

22 THE COURT: All right, next point, Mr. Shealy?

23 MR. SHEALY: May it please the Court.

24 THE COURT: Yes, sir.

25 MR. SHEALY: And I'll just be brief about this particular

1 one. Your Honor, we believe that the evidence in this case is
2 susceptible to a finding by this Court that the plaintiff's
3 injury was due to her own negligence exceeding any negligence,
4 if any such negligence exists, on the part of the defendant as
5 a matter of law and there are plenty of cases where that has
6 occurred where the Court has ruled as a matter of law that the
7 plaintiff's conduct was the majority reason -- The plaintiff
8 bore the majority of the fault for the accident as a matter of
9 law.

10 And because the facts are not in dispute and
11 interestingly, I mean Mr. Barth is advancing to this Court
12 that the facts are not in dispute. Well, that's why we have a
13 fact finder. If the facts are not in dispute and there is no
14 breach or no duty, I mean whether or not there is a duty is a
15 legal question and always has been. If there's no facts in
16 dispute about whether or not we breached a duty, then we --
17 then absolutely this Court must rule as a matter of law.

18 MR. BARTH: I didn't say the facts weren't in dispute as
19 to the -- they said as to how the accident happened we all may
20 agree on and it may be in dispute. That has absolutely
21 nothing to do with their duty in this case to deal with an
22 unreasonable condition and proximate cause, that's always for
23 the jury to decide if this injury was directly and proximately
24 related to the accident that occurred. It's going to be on
25 two fronts and the jury is going to have to decide both of

1 them. One, did all of this happen because it's her own fault,
2 and two, how much of the injury was proximately caused by the
3 door and how much was it caused by what happened on that
4 Saturday. I mean that is a classic jury question.

5 THE COURT: All right, next issue, Mr. Shealy?

6 MR. SHEALY: Finally, Your Honor, we would move at this
7 time to strike the prayer for punitive damages. For the
8 plaintiff to recover punitive damages, there has to be clear
9 and convincing evidence of reckless, willful and wanton
10 behavior, which is defined by -- has been defined by our
11 courts as the absence of slight care.

12 The evidence in this record is uncontradicted that this
13 is the only occasion of hundreds of thousands of instances of
14 people going in and out of doors, even within this own company
15 -- that this company of this kind of injury occurring. The
16 plaintiff brought up the duration of the conduct. Had we been
17 aware that there was a risk of this particular injury
18 occurring and had done nothing about it prior to this
19 incident, then you might have an absence of slight care to go
20 before this jury.

21 What the plaintiff has done and they've done a masterful
22 job of it and I will tip my hat to them, is to turn what might
23 be a -- a customer's hassle into the notion that we have
24 created a dangerous situation. The customer has -- is hassled
25 by the fact that they need to prop the door open, but propping

1 the door open isn't the problem. It's not the fact that --
2 It's not that the door had to be propped open and that the --
3 the box moved or anything like that.

4 According to what happened, the plaintiff picked up what
5 she had propped the -- the door open with and it's picking up
6 her foot that causes the problem, knowing that the door is
7 closing. Whether it had been propped open or whether she had
8 swung it open herself and stood there in the doorway and
9 decided to catch it, but instead of moving it out of the way,
10 it doesn't matter whether we were propping the door open or
11 not. We were in the way of the door as it was closing.
12 That's what the plaintiff was doing.

13 Zero to do with propping open the door and that itself
14 isn't the creation of an unreasonably dangerous condition and
15 showing the absence of slight care, not at all. There's no
16 evidence that we violated a building code, a standard of any
17 kind that would be evidence of such conduct on our part.

18 We have -- We employed a builder that builds this kind of
19 building all over the United States and this is a standard
20 door in such buildings throughout the United States. How does
21 that equate to the absence of slight care?

22 Based on this record, we would ask that the Court strike
23 the prayer for punitive damages and an instruction that the
24 jury is not to give any consideration whatsoever to the
25 financial information that they have received with respect to

1 my client's business.

2 THE COURT: Mr. Barth?

3 MR. BARTH: May it please the Court, Your Honor. The
4 issue of -- I guess I'll address the punitives at this point,
5 Your Honor. I don't think we've missed proximate cause.
6 Maybe we did, but punitive damages ---

7 THE COURT: You did. I want you to address punitives,
8 please, sir.

9 MR. BARTH: All right. Even in your own charge, Your
10 Honor, and the one that we all use talks about punitive
11 damages will even be allowed when the defendant doesn't
12 realize he is invading the plaintiff's rights so long as the
13 act is committed in such a manner that a person of ordinary
14 prudence would conclude it was done in a reckless disregard
15 for the rights of others. Recklessness is a conscious
16 indifference to the rights of the plaintiff or a reckless
17 disregard for the rights of the plaintiff. It is an awareness
18 of wrongful conduct and a continuation to act regardless of
19 the conduct -- consequences, I'm sorry.

20 That's the charge. There are two pages of cites for that
21 proposition, Your Honor, and the bottom line in this whole
22 case, actual and punitive damages, is the defendant forcing
23 somebody to do what they did in reckless disregard for
24 plaintiff's rights. That's -- There is plenty of evidence in
25 the record, Your Honor, that they knew it was going on, they

1 knew how it was going on, they -- You know, they know it's --
2 They know it's an issue, but all they did is try to explain
3 it. That does not mean it isn't a reckless disregard for
4 plaintiff's rights and that's what we have to prove to get
5 punitive damages to the jury.

6 THE COURT: Okay. All right, anything else, Mr. Shealy?

7 MR. SHEALY: No, Your Honor.

8 THE COURT: You sure?

9 MR. SHEALY: I am.

10 THE COURT: Mr. Barth, anything else?

11 MR. BARTH: No, sir.

12 THE COURT: All right. All right, we'll stand down for a
13 few minutes. How many witnesses do you have, Mr. Shealy,
14 provided I don't ---

15 MR. SHEALY: One that I am ---

16 THE COURT: Still not -- Expert still not here?

17 MR. SHEALY: He does not appear in the courtroom, but I
18 will check and see what the progress is.

19 THE COURT: Okay, thank you.

20 (Whereupon, there is a break in the proceedings from
21 10:48 a.m. until 11:09 a.m.)

22 THE COURT: All right. In considering Mr. Shealy's
23 motion and arguments for directed verdict, when there is only
24 one reasonable inference to be deduced from the evidence, it
25 becomes a matter of law which would entitle the moving party

1 to a directed verdict. Mr. Shealy very succinctly made his
2 argument on this motion, very good argument on directed
3 verdict motion.

4 The issue in citing this *Nelson v. Piggly Wiggly* case,
5 which I've scanned, 390 S.C. 382, I did look. I've got the
6 *Davenport* case, but in looking at the *Nelson v. Piggly Wiggly*
7 case, I believe that if you look at each individual alleged
8 act by the plaintiff against the defendant --

9 Mr. Barth, I don't like this thing. I can't see you.

10 MR. BARTH: I'll sit right here, Judge.

11 THE COURT: It's like I'm having to bob my head around to
12 even look for you.

13 But if you look -- If you look at each independent
14 alleged act, I think you'd be looking at it in a vacuum, so to
15 speak, but if you look at all of them, all of the alleged acts
16 together of the door, your argument about is something that we
17 come in or we deal with every day. You're exactly right.
18 They do create hazards, so to speak, whether they're pinching
19 hazards or whatever, but it's not something -- A door that's
20 raised five inches off the ground creates a different type of
21 situation. I think it creates a different type of situation.

22 I do find as a -- as a matter of law that there is a duty
23 there, that there is a duty there because this situation is
24 unlike your typical door situation. They are in the business.
25 This storage facility is in the business of providing a

1 service, so to speak, to their patrons wherein they have
2 individuals come in and out of this door and come in and out
3 of this door on a regular basis and I am going to deny your
4 motion for a directed verdict as it relates to the duty issue.

5 On the foreseeability issue and the proximate cause
6 issue, I believe those are jury issues, jury questions. I'm
7 going to deny your motion with regards to directed verdict on
8 that.

9 With regards to your punitive damages motion, I'll be
10 frank with both of you. It is something that I'm struggling
11 with and I've been thinking about it since Monday, since
12 Monday. I am going to reserve my ruling on the punitive
13 damages issue at this time and make a ruling on that before --
14 I'm going to reserve my ruling on that right now.

15 All right? Mr. Barth, anything?

16 MR. BARTH: Nothing, Your Honor.

17 THE COURT: Mr. Shealy?

18 MR. SHEALY: No, Your Honor.

19 THE COURT: All right, is your expert here?

20 MR. SHEALY: He is.

21 THE COURT: Do you need a minute to talk with him?

22 MR. SHEALY: Just a moment, yes, sir.

23 THE COURT: Mr. Barth?

24 MR. BARTH: Yes, sir?

25 (Whereupon, a bench conference is held off the record and

1 there is a pause in the proceedings.)

2 THE COURT: All right, anything else before we bring the
3 jury back, Mr. Barth?

4 MR. BARTH: No, sir.

5 THE COURT: Mr. Shealy?

6 MR. SHEALY: No, Your Honor.

7 THE COURT: All right, go ahead and bring us the jury,
8 please.

9 (Whereupon, the jury enters the courtroom at 11:17 a.m.)

10 THE COURT: All right, Madam Forelady, ladies and
11 gentlemen of the jury, I apologize for keeping you back there
12 as long as I did. I told you -- I think I told you. I
13 typically tell jurors that I'm not going to send you back
14 there and keep you back there any longer than is absolutely
15 necessary.

16 One thing that I've learned not to do is tell a jury how
17 long they're going to be back there because I never know how
18 long you're going to be back there, but I can promise you as
19 long as you're serving on a jury in a courtroom with me, I
20 will not send you back there and leave you back there more
21 than is absolutely necessary. But there are times that I've
22 told you that we do have to send you back there so that we can
23 deal with matters, legal issues.

24 At this time, we are now going to continue the trial of
25 this case and, Mr. Shealy, you're recognized, sir.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 MR. SHEALY: May it please the Court. At this time, we
2 would call Skip Lewis to the stand.

3 THE COURT: All right. Sir, if you would, come around,
4 please.

5 THE CLERK: If you would, place your left hand on the
6 Bible and raise your right hand. Do you swear the testimony
7 you give in this case will be the truth, the whole truth, and
8 nothing but the truth, so help you God?

9 WITNESS: I do.

10 THE CLERK: Please be seated and state your name for the
11 record.

12 SKIP LEWIS, being first duly sworn,
13 testifies as follows:

14 DIRECT EXAMINATION

15 BY MR. SHEALY:

16 Q: Mr. Lewis, could you state your full name for the record?

17 A: My name is L.G. Lewis, Jr..

18 Q: And you go by Skip?

19 A: I do.

20 Q: All right. Where do you live?

21 A: I live in West Union, South Carolina.

22 Q: All right. Is that up in the upper part of the state?

23 A: It is. It's about twelve miles from Clemson.

24 Q: Okay and did you drive down here this morning?

25 A: I did.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: All right. Mr. Lewis, what do you do for a living?

2 A: I'm a professional engineer and I have a consulting
3 engineering practice in Greenville, South Carolina.

4 Q: And what's the name of your consulting engineering
5 practice?

6 A: H2L Consulting Engineers.

7 Q: Okay. How many -- How many folks are involved in that --
8 in that practice?

9 A: We have about 21 employees.

10 Q: How many of those are engineers?

11 A: I -- It's either seven or eight of us that -- that are
12 licensed professional engineers.

13 Q: All right and you're licensed by the State of South
14 Carolina?

15 A: I am.

16 Q: I heard that engineers have different areas of specialty,
17 electrical, mechanical. What -- Do you have a specialty?

18 A: Well, my -- my area of study was civil engineering with
19 an emphasis on structural systems, structural design. My
20 practice areas have involved not only civil and structural
21 engineering, but project management, contract negotiations,
22 working with clients in various capacities to have their -- do
23 the planning and the design and construction administration
24 services associated with whatever the building project may be.

25 Q: All right and are you licensed by the State of South

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Carolina?

2 A: I am.

3 Q: Does -- Does South Carolina license folks just as an
4 engineer in general or do you have some sort of specialty kind
5 of license?

6 A: The license is a professional engineering license. The
7 Codes of Professional Conduct would require that you practice
8 within your areas of competency. There are also like sub-
9 files within the licensing office that allow them at least to
10 know what specialty area you may have taken your P.E.
11 examination in.

12 Q: Okay. Where did you get your education, Mr. Lewis?

13 A: Clemson University.

14 Q: And what degree or degrees do you hold from Clemson?

15 A: Well, I earned the Bachelor of Science in civil
16 engineering degree in 1966 and then the Master of Science in
17 civil engineering degree in 1967.

18 Q: And have you always practiced engineering in the State of
19 South Carolina?

20 A: Yes. Well, I've had projects in many other states, but
21 my -- my -- my office has always been in South Carolina.

22 Q: All right and have you been practicing continuously as an
23 engineer in South Carolina since I guess the late 60's?

24 A: Well, I've always been doing engineering since I
25 graduated from Clemson. I went -- I worked for the first five

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 years for the Navy Department and then I in '71 went into
2 private practice of engineering and have been working in my
3 Greenville offices since 1971.

4 Q: All right and the -- the areas that H2L operates in or
5 that sort of areas that it focuses on in terms of the services
6 it provides to -- to clients, can you describe those?

7 A: Yes. There are predominantly three areas and I'll start
8 with the small ones and then get into the other ones. We have
9 a practice area that specializes in computer services for
10 primarily small businesses. It's called Network Management.
11 We work with hardware and software systems with clients that
12 could not for whatever reason either afford or elect not to
13 employ their own technology staff.

14 And then we have a general practice of engineering that
15 is preparing plans and specifications for commercial and
16 institutional and industrial projects that those typically
17 involve the site planning, the building design, and
18 administering the construction phases of the -- of the
19 facilities.

20 And then the third practice area is related to the area
21 of forensics where you go in and you basically do building --
22 existing building assessments, troubled buildings primarily
23 that have either had a failure of one sort or another or are
24 in some type of dispute with respect to the -- to the building
25 itself.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: All right.

2 A: And that is the practice areas of H2L.

3 Q: And of those three practices, practice areas, where do
4 you concentrate most of your time?

5 A: Well, most of my direct or billable time these days are
6 -- is associated with the forensic side of H2L and then I also
7 spend some amount of time in the general practice area and a
8 fair amount of time also in the corporate management
9 responsibilities that -- that I have with H2L.

10 Q: All right.

11 MR. SHEALY: Your Honor, at this time, I would tender Mr.
12 Lewis as an expert in the area ---

13 Q: Would it be fair to call it forensic engineering?

14 A: It would be.

15 Q: Okay.

16 MR. SHEALY: In that area, Your Honor.

17 THE COURT: Mr. Barth?

18 MR. BARTH: No objection.

19 THE COURT: Ladies and gentlemen, I previously gave you a
20 charge on expert testimony. This expert has been proffered as
21 an expert in the field of forensic engineering. That does not
22 mean that you must accept the opinion, but it is evidence for
23 you to use, ladies and gentlemen, in any way that you see fit.
24 Mr. Shealy?

25 MR. SHEALY: Thank you, Your Honor.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: Mr. Lewis, do you know approximately when I asked you to
2 get involved in this case?

3 A: Yes.

4 Q: When was that?

5 A: It was around March of 2011.

6 Q: All right and what did I ask you to do?

7 A: Well, you -- You'd indicated to me that there had been an
8 injury of some sort on the site of the -- the storage facility
9 and you asked me at that time to review the available
10 materials, to visit the property, and inspect or investigate
11 the property to determine whether or not there were any
12 violations of building codes that are codes of the State of
13 South Carolina that for design and construction purposes are
14 intended to establish a -- a -- level of acceptable and safe
15 construction.

16 Q: And at any point did I ask you what I wanted your opinion
17 to be?

18 A: No. I would hope you know better than that.

19 Q: Yes, sir. All right and I hired you to do this, correct?

20 A: You engaged my services to evaluate the facilities, yes.

21 Q: And what did you charge me to -- to do what you -- what
22 you've done?

23 A: My standard hourly rate, which I think at the time was
24 \$275 an hour.

25 Q: All right, sir, and -- and you mentioned this generally,

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 but do you remember what materials you did review in the
2 course of performing the work I asked you to do?

3 A: I think I remember the materials. I don't necessarily
4 remember them in chronological order, but of the materials
5 that I reviewed, the -- the paper documents would include the
6 deposition testimony of the plaintiff in this case. It would
7 include the deposition testimony of the plaintiff's expert
8 witness in this case. It also included an expert report and
9 an affidavit that had been prepared by the plaintiff's expert
10 witness and then I reviewed building codes over a period of
11 time, meaning from about the early 1980's through the current
12 day building codes.

13 I reviewed various standards. I reviewed the -- the
14 manufacturing standard for the door closers as you probably
15 heard people talking about that was installed on the -- on the
16 door of this facility and I reviewed the manufacturing
17 standards for the door itself, the hollow metal door that is
18 installed at this facility.

19 Q: All right and did you -- Did you actually travel to the
20 site and visit it yourself?

21 A: I did.

22 Q: And approximately when did you do that?

23 A: I believe it was in sometime in -- It was in the summer
24 of 2011. I believe sometime around July.

25 Q: All right, of 2011?

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 A: Yes.

2 Q: Okay and what did -- What did you do during that -- that
3 visit?

4 A: Well, I photographed the conditions that were there. I
5 made physical measurements of the door, of the door openings,
6 of the distance from the asphalt pavement to the door
7 threshold. I measured the distances from the asphalt pavement
8 to the bottom of the door leaf itself. I operated the door to
9 develop an understanding of the door operations and the door
10 actions, particularly in the -- in the context in which the
11 plaintiff described the -- the injuries and the activities in
12 her deposition testimony.

13 I actually walked from the entrance to the building back
14 to the storage area that had been rented by the plaintiff. I
15 think those -- I looked at the door closer to get information
16 and photographs and data on the door closer itself and I think
17 that was principally what -- what I did at the site. I got
18 enough information to allow me to assess the condition of the
19 door against the -- the codes, the building codes that would
20 be applicable for the design and construction of the -- of the
21 warehouse.

22 Q: And at the time that you did your inspection, is it your
23 understanding that Mr. Seluga, the expert hired by the
24 plaintiff, had already been to the site and conducted --
25 conducted some tests?

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 A: Yes. I believe I was aware of that.

2 Q: Did you conduct any tests like the ones he conducted in
3 the course of your inspection?

4 A: Well, in terms of the, you know, the closing forces and
5 closing speed, those types of tests, I did not perform. I saw
6 no value in -- at least for my purposes, in doing those types
7 of tests two and a half years after the -- the incident had
8 occurred.

9 Q: All right and were there any other considerations in your
10 mind about whether or not that would have been of value to you
11 after Mr. Seluga had done his tests?

12 A: Well, I mean I was aware that Mr. Seluga in the -- in the
13 context of his investigations changed the settings on the --
14 on the adjusting screws that affected travel speed and closing
15 forces and things like that. So I mean I think it's just been
16 in my mind there have been just too many things that had
17 occurred between the time of the injury and two and a half
18 years later to put any reliance on -- on the tests, on those
19 types of tests anyways.

20 Q: All right. After doing all this work, did you form or
21 did you reach any conclusions?

22 A: I did.

23 Q: And are those conclusions in the form of opinions you
24 hold as a -- as an expert in the field of engineering?

25 A: They are.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: And do you hold those opinions to a reasonable degree of
2 certainty for a practicing engineer in South Carolina?

3 A: I do.

4 Q: Okay. What are those opinions? What -- What did you
5 determine?

6 A: Well, I prepared a report, which of course speaks for
7 itself, but my recollection of the content of the report,
8 number one, was I found no violation of the building codes in
9 any of the conditions that I inspected at the -- at the site
10 and based on the conditions that I inspected and the materials
11 that I researched, the standards for the assembly or the
12 operations of the door closers, the standards for construction
13 of the hollow metal doors, in reviewing all of the standards
14 and considering good design practices, practices that I employ
15 every day in the -- in the field of my practice as a
16 professional engineer, it was my opinion that the building
17 itself, entry and exit conditions of the building were
18 certainly in reasonably safe condition.

19 Q: All right. Talking about the building codes and
20 standards, I want to talk about those in -- in a little bit
21 more detail. Is there a particular building code that applies
22 in -- in South Carolina or in Florence County?

23 A: Yes.

24 Q: What is that building code?

25 A: Well, prior to the year 2000, the building -- It would

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 have been the Commercial Building Code and the -- Prior to the
2 -- to the year 2000, the code was referred to as the Standard
3 Building Code published by the Southern Building Code Congress
4 out of Birmingham, Alabama, and is adopted by -- up until 2000
5 by the various counties and municipalities. So it would have
6 been the Standard Building Code.

7 After the year 2000 and -- and subsequent to state
8 legislation that basically brought all counties and
9 municipalities under a -- a common code in terms of the code
10 itself and the timing of the adoption of the codes, the code
11 is referred to as the International Building Code, the IBC,
12 and it's -- and it's published by the International Codes
13 Council of which the old Southern Standard Building Code is
14 the dominant group within that counsel.

15 Q: All right and so this building code, I mean what is it?
16 Is it a book? Is it a -- What is it?

17 A: It is. It -- The building code is a book and it is -- It
18 is reissued or republished every three years and updated with
19 each publication and generally, it's typically bound in a
20 three ring binder. You can also get it on computer disk and
21 have electronic versions, but the -- the codes that most of us
22 work with are actually in book form on paper so that we can
23 highlight them and mark on them and do things that we need to
24 do with them as we work with and interpret and apply the
25 building codes.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: And the -- You mentioned the International Codes Council.
2 What kind of an organization is that?

3 A: Well, interestingly, it's headquartered in Birmingham.

4 Q: Mm-hmm.

5 A: And as I said, it's kind of an outgrowth of the old
6 Southern Building Code Congress. The membership of the
7 council is the predominantly the building officials, but it is
8 also -- There are some professional members that hold
9 membership in the International Codes Council and there are a
10 number of manufacturing representatives that are members of
11 the International Codes Council, but the major decisions
12 basically are determined by the representative building
13 officials from the various jurisdictions of the United States.

14 Q: And what are the aspects of building and structures that
15 are regulated by or that their standards have been developed
16 for in the International Building Code?

17 A: Well, the building code itself deals with what most of us
18 refer to as the built environment, meaning buildings, whether
19 it's warehouses or schools or hospitals or courthouses such as
20 this. The commercial code basically applies to all building
21 construction with the exception of single family residences
22 and -- and townhouses.

23 Q: All right and I mean are there provisions in the building
24 code that deal with entryways and walls and roofs? I mean I
25 don't get it. How ---

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 A: Yes, I understand that. Well, yes. The building code
2 kind of starting at the top and working our way down, the
3 building code covers elements for the design and construction
4 of the roofs, of the exterior walls, of the interior walls, of
5 the floors, of the electrical and lighting systems,
6 communication systems, fire protection systems, mechanical air
7 conditioning systems, the structural skeleton that supports
8 the buildings, and the foundations, the either pile
9 foundations or spread footings, but the various foundations
10 that transfer all of the building loads into -- into the earth
11 in one manner or another.

12 Q: What about entryways?

13 A: It addresses entryways, the requirements, like safety
14 requirements for both entering and exiting the building with
15 the exit criteria being the most stringent because of the
16 evacuation requirements that one would need in the event of a
17 fire or some other building hazard.

18 Q: All right and you anticipated though my next question.
19 To what extent, if any, is safety of the public an element
20 that is considered when the building codes are established?

21 A: That is the primary element. The primary purpose of the
22 building code is for the public's health and safety aspect.

23 Q: Okay. Now, and this International Building Code, you
24 said was adopted sort of as the building standard in South
25 Carolina in 2000?

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 A: In South Carolina, the state legislature adopted a law
2 that established the International Building Code as the
3 prevailing code in South Carolina for building construction.

4 Q: All right. Now, you mentioned some other industry
5 standards and things that you reviewed in the course of your
6 investigation and starting with the door itself, you mentioned
7 something to do with hollow metal doors.

8 A: Right.

9 Q: Is there -- Are there industry standards for the
10 construction of hollow metal doors?

11 A: Yes.

12 Q: And who issues those industry standards?

13 A: The -- The standard that was applicable to the hollow
14 metal doors is a standard that was developed by ANSI, the
15 American National Standards Institute.

16 Q: All right. Well, ANSI, is -- is that a governmental
17 organization?

18 A: It would have governmental representatives. The
19 organization itself, although I believe funded in part by the
20 government, I guess you'd call it a quasi-governmental
21 organization, but it -- Again, it's predominantly private
22 sector interests that -- that work with the development of the
23 public code.

24 Q: All right and you said the American National Standards
25 Institute. Does it focus just on buildings or what kind of

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 standards does it establish?

2 A: Those standards are extremely variable and -- But for at
3 least for -- For purposes of my investigations on this
4 building, I selected their standard that addresses the
5 fabrication and manufacturing requirements for the application
6 of hollow metal doors and door installations only because
7 those did exist at the -- at the Carolina Self Storage
8 facility.

9 Q: But do they also issue standards for all kinds of
10 consumer products and things?

11 A: Yes.

12 Q: All right.

13 A: Everything from -- I think everything from fabrics
14 through toys through tools, equipment, and it's a plethora of
15 standards that are published ---

16 Q: And to what ---

17 A: --- by ANSI. Excuse me.

18 Q: To what extent are -- is safety, human safety, a
19 component of the standards that are developed by that
20 organization?

21 A: That is a major component, but the other component is
22 workability, the -- you know, the providing the assurance that
23 it's going to function not only safely, but function in the
24 manner in which it is intended to function at the end of the
25 day when the assembly and fabrication processes are complete.

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 Q: All right and is it -- Are there ANSI standards for the
2 -- the door closer at issue in this case?

3 A: I haven't found -- There are standards, but I don't -- At
4 least the standards that I found were not published by ANSI.
5 They were published by another entity, another standards
6 organization that kind of specializes on building hardware,
7 which the door closer would fall into that category.

8 Q: What's the -- What -- What is that organization?

9 A: The parent organization I think was the National
10 Association of Architectural Metal Manufacturers and -- and
11 within that there is a subset of Building Hardware
12 Manufacturers, BHM.

13 Q: I guess there's a standard or an association for
14 everything?

15 A: There is. I mean it's -- Yeah, there are a lot of
16 associations out there.

17 Q: All right. So you looked at all of those things,
18 correct?

19 A: I did.

20 Q: And -- and again, the conclusion you reached was what
21 with respect to this door and door assembly and its compliance
22 with safety?

23 A: While I was onsite, I examined the door, particularly
24 along the bottom edge of the door where the -- where the
25 plaintiff actually cut her ankle on that -- that bottom edge

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 and I checked that edge against -- Well, I checked the door as
2 a whole against the standard, but particularly the bottom
3 edge, the configuration of the bottom edge, the -- the gauge,
4 the thickness of the metal that was used for the fabrication
5 of the door, the welding parameters, all of those I checked
6 against the standards of the published standards and found
7 that the door assembly itself complied with the manufacturers'
8 standards.

9 Q: Okay and just in your -- in your common experience, I
10 mean you said you operated the door, correct?

11 A: I did.

12 Q: And I know that was just on the day that you were there,
13 but did the -- Did the door -- Did the speed of the door
14 closing, to what extent did that differ from your common
15 experience just walking around as a person?

16 A: I saw no particular difference at all.

17 Q: Okay. Did you reach any other conclusions?

18 A: Well, of course, I already articulated some, but in terms
19 of the door, I concluded the door was fabricated consistent
20 with the standards. The same thing with the research that I
21 did on the door closer against the -- the standards that were
22 published for the Norton door closer itself. I concluded that
23 the door closer mechanism complied with the manufacturers'
24 standard for the door closers.

25 Q: All right and how about the -- the height of the door

DIRECT EXAMINATION OF SKIP LEWIS BY MR. SHEALY

1 above the -- the asphalt? Is there -- Is there a standard in
2 one of the -- issued by one of these organizations you've
3 mentioned that deals with that?

4 A: Well, the closest standard that you would come to that
5 would be -- The answer basically is no with a caveat. The
6 building code does have standards or requirements for the
7 height of a step and that's like six and a half to seven
8 inches. There are some -- And that's maximum. As you enter
9 and exit a building, it can be anywhere from an at grade entry
10 to -- up to what would be the height of the code maximum
11 height for the riser in a set of stairs or steps. Again, well
12 within the parameters that I found existing at the building
13 site.

14 Q: So there's nothing unusual about having to step up into a
15 building when you're walking across the ground?

16 A: No, there's nothing unusual at all about stepping up into
17 a building.

18 Q: Now, what about the slope of the -- of the parking lot
19 even? Does it slope towards the building or away from the
20 building?

21 A: It would slope -- It would and it does slope away from
22 the building and obviously, that is so that when rain falls --
23 among other things, when rain falls on the pavement, it drains
24 away from the building as opposed to towards the building.

25 Q: Okay. So anything -- Does anything about that violate

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 any -- any building code or anything?

2 A: No. In fact, it complies. The building code actually
3 requires the grade to be sloped away from the building within
4 basically the first ten feet.

5 Q: Okay. Anything about the door -- Anything else about the
6 door hardware that is non-standard or outside of the codes
7 that you -- that you looked at?

8 A: I found the door and the door hardware to be consistent
9 with design standards and construction standards that you will
10 find on any type of facility of this nature.

11 Q: All right. Anything else I have left out?

12 A: I don't think so.

13 Q: All right. Thank you, Mr. Lewis. Please answer any
14 questions that Mr. Barth may have.

15 THE COURT: Mr. Barth, cross examination.

16 MR. BARTH: May it please the Court, Your Honor.

17 CROSS EXAMINATION

18 BY MR. BARTH:

19 Q: Mr. Lewis, I do have a few questions for you. The code
20 you're talking about and what you have done in regard to this
21 case, the code tells you how to build something, right?

22 A: Well, it tells you how to design and to build.

23 Q: How to design it, how to build it, and how to make it,
24 right?

25 A: Yes.

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 Q: All right. Now, are you telling the jury just because
2 something is designed like it's supposed to be and installed
3 and screwed in like it's supposed to be that it can't be
4 unsafe because of the way it's being used?

5 A: Well, I guess I would have to answer that this way.

6 Q: Okay.

7 A: The -- The building and the doors and all were being used
8 for their intended purposes. In other words, it is a storage
9 building and the doors were being used to access and egress
10 from the storage area and the building code addresses those
11 types of considerations.

12 The building code by its very nature has established a
13 standard which says if you design it in accordance with the
14 code, if you build it in accordance with the design in
15 compliance with the code, and the building is used as it is
16 intended to be used, then yes, it is considered to be, in my
17 judgment of the codes and the application of the codes, a
18 reasonably safe building. After all, that is the purpose of
19 the codes.

20 So to answer your question, I would say if it was
21 designed and built in accordance with the codes, then I
22 consider that to be a -- a -- a building that is under the
23 measure that has been established for design professionals and
24 construction professionals and for use by the public at large
25 to be a reasonably safe facility.

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 Q: All right. So the answer is pretty straightforward. If
2 it complies with the rules on how to build it, how to design
3 it, and how to install it, it's safe in your opinion and
4 that's the whole ---

5 A: I said it is considered to be safe.

6 Q: All right. Well, that's my question. You're the expert,
7 right? Can it still be unsafe and comply with the code? This
8 building ---

9 A: The building -- The building would be considered safe.
10 It's not to say that through some misuse or some unanticipated
11 action that there could not be a hazard of some kind that
12 would exist. There are hazards that exist everywhere we go
13 and in everything we do and -- and so I want to be clear in
14 that regard, but by every measure that has been established
15 for good design, good construction practice, the -- the
16 building as I found the building satisfied those requirements.

17 Q: So we can understand, that -- that is the entire
18 assumption that you have operated under in your investigation,
19 right?

20 A: I'm not sure if I could say that, but ---

21 Q: What you were asked to do, I think what you told us is
22 you came in to do what you call codes assessments?

23 A: Well, I was asked to do a building assessment, which
24 basically relates to the -- to the codes.

25 Q: Okay and so this particular door, you checked on which

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 door should have been used based on the manufacturers' specs
2 and you checked on which closer should have been used, right?

3 A: Well ---

4 Q: Right?

5 A: Well, I checked on the closer that was used against the
6 standard and I found that the type of closer that was used,
7 again, was a -- a closer mechanism that satisfied the
8 requirements of the code.

9 Q: The code doesn't say a thing about the bottom, does it?

10 A: I'm sorry. It doesn't say a thing about what?

11 Q: The sharpness of it. Does it say anything about that?

12 A: The manufacturing standards for the -- for the door
13 itself do.

14 Q: All right. Well, I'm talking -- The codes you're talking
15 about, these building and all of this, does it tell you how
16 sharp the bottom of the door can be?

17 A: No. I don't believe the code will tell me that.

18 Q: Will it tell you how fast or how slow a door can be
19 opened or closed depending on how it's used?

20 A: The code itself will not tell you that.

21 Q: Okay.

22 A: The standards will provide that information.

23 Q: The standards being the manufacturer of the door closer?

24 A: Yes.

25 Q: All right. So just to make sure, we're not talking about

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 some government regulation of that, we're talking about the
2 people who sell it to you telling you how to use it, right?

3 A: You're talking about the people who sell it. You're
4 talking about manufacturing standards that have been published
5 by the manufacturers' industry ---

6 Q: Okay.

7 A: --- but who are reviewed and approved by the code -- code
8 bodies themselves.

9 Q: Okay. Let me back up just a little bit, Mr. Lewis. You
10 were qualified earlier as a forensic engineer and forensic
11 just means you help lawyers and testify in court, right?

12 A: No, sir. That's not -- It -- It does mean that we
13 frequently appear in court. Forensics is the study of
14 problematic conditions, problematic buildings.

15 Q: Okay.

16 A: Unfortunately, a lot of problematic buildings end up in
17 dispute, not unlike what we're doing here today, but -- but
18 that is a significant part of the work that a forensic
19 engineer does. But there is much work that we do as forensic
20 engineers that never involves lawyers or never involves
21 testimony in court ---

22 Q: All right.

23 A: --- or arbitration.

24 Q: Would it be fair to say though that what you're doing now
25 and most of what you do is dealing with companies that have

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 been sued because of problems and their lawyers? That is
2 mostly what you do right now, isn't it?

3 A: That -- That is the bulk -- That would comprise more than
4 fifty percent of -- of the engagements that I am involved
5 with, yes.

6 Q: And I believe you told me at your deposition it would
7 probably comprise about ninety, ninety-five percent of the
8 work you do right now, right?

9 A: No. I think what I told you was that about ninety
10 percent of the work that I do is in the area of forensics.

11 Q: Okay. All right and that --

12 A: Generally.

13 Q: That's helping lawyers and companies with problems,
14 right?

15 A: Well, I'd like to say it's helping owners. It's helping
16 insurance companies. It's helping lawyers. It's helping
17 parties resolve disputes among themselves.

18 Q: Okay. Now, you provided me with your resume earlier,
19 didn't you? Does that look like the resume you gave me?

20 A: It does.

21 Q: All right. If you would -- If you wouldn't mind, is that
22 a true and correct copy of the one you gave us?

23 A: Well, I don't remember what I gave you, but it does
24 appear to be a true and correct copy of my resume.

25 MR. BARTH: I'd move to introduce it, Your Honor.

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 THE COURT: Mr. Shealy?

2 MR. SHEALY: I think it's cumulative, but no objection.

3 THE COURT: Without objection. Twenty?

4 MR. BARTH: Twenty-five, Your Honor.

5 THE COURT: Twenty-five, thank you.

6 (Whereupon, Plaintiff's Exhibit Number 25, the resume of
7 the expert witness, is admitted into evidence.)

8 Q: If you wouldn't mind, Mr. Lewis, look at page four of
9 your resume. We've got it up on the screen and you have a
10 place on your resume for references?

11 A: Yes.

12 Q: People to be called to find out how you do what you do,
13 right? That's what a reference is.

14 A: Well, I would -- Yes.

15 Q: All right.

16 A: I would say that's correct.

17 Q: All right. Every single one on this list is a law firm,
18 right?

19 A: It is.

20 Q: No engineers? No engineers, right?

21 A: Not on this -- Not on this list, no.

22 Q: All right and every one of these with the possible
23 exception of one of the lawyers in the Bellamy [sp.] firm is a
24 defense lawyer. Would that be fair? Or is a defense firm.

25 A: I can't tell you that. I mean I don't know that.

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 Q: You don't?

2 A: But I would say that in the majority, but not all of the
3 case that I've been involved with in these law firms, it's
4 been on the defense side.

5 Q: All right and you gave us another page and you listed a
6 bunch more references on there, didn't you?

7 A: That's right.

8 Q: All right, all law firms again?

9 A: Right. This -- This is my resume that goes to law firms.

10 Q: Okay, because you market yourself to law firms. I'll
11 come help you. I'll come help defend your client. That's
12 what you do, right?

13 A: No. I have never marketed my services to a law firm.

14 Q: Okay, okay. I'm going to show you one other document, if
15 you don't mind. Is this the only case you've got with Mr.
16 Shealy and his law firm?

17 A: This is the only case that I have with Mr. Shealy. It is
18 not the only case that I have with the Baker Ravenel Law Firm.

19 Q: Okay, his law -- his former law firm, right?

20 A: He's no longer there.

21 Q: Okay. Take a look at this and tell me if you recognize
22 that document for me?

23 A: I do recognize this document.

24 Q: All right. What is that?

25 A: This is a response to a request that you made of me

CROSS EXAMINATION OF SKIP LEWIS BY MR. BARTH

1 during my deposition and asking us to go back and look over
2 the recent period of time and the cases that we have either
3 had or currently have with the Baker Ravenel Bender Law Firm.

4 Q: That's Mr. Shealy's firm, as well as Mr. Shealy and this
5 is what you provided me, right?

6 A: I -- I think we flagged the cases that were engagements
7 by Mr. Shealy, two of which were completed, one of which is
8 active.

9 Q: Okay.

10 MR. BARTH: I'd move to introduce it, Your Honor.

11 MR. SHEALY: No objection.

12 THE COURT: Without objection, Plaintiff's Exhibit 26.

13 MR. BARTH: Yes, sir.

14 (Whereupon, Plaintiff's Exhibit Number 26, the list of
15 cases, is admitted into evidence.)

16 Q: The list that the jury is looking at right now, that is
17 how many times this particular law firm has hired you to
18 assist them in defending clients, isn't it?

19 A: Over the past four years, yes.

20 Q: Yeah, over the past four. That's just four years, isn't
21 it? We didn't go past that, did we?

22 A: 2008 through 2011.

23 Q: All right and we see that the highlighted ones, for the
24 jury, the three highlighted are actually three that you had
25 going on with this particular lawyer, right?