

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24-01236

Jennifer Harmon Scott Appellant,

v.

Allen L. Fortner and Jason C. Griffin,.....Respondents.

RECORD ON APPEAL

Jon E. Newlon, Bar #15617
McCravy, Newlon & Sturkie Law Firm, P.A.
1629 ByPass 72 NE
Greenwood, S.C. 29649
864-388-9100
jnewlon@mccravylaw.com
Attorney for Appellant

Jack D. Griffeth
Ross B. Plyler
P.O. Box 5819
Greenville, S.C. 29606
864-282-9105
Attorneys for Respondents

RECEIVED

JUN 18 2013

SC Court of Appeals

INDEX

Orders:

Order of Feb. 25, 2011, Consent to Amend	1
Order of Dec. 19, 2011, Consent to Amend	2-4
Order of Nov. 21, 2012, Order Denying Post Trial Motions	5-11
Order of May 20, 2013, Order Amending Caption	12
Order of Nov. 21, 2012, Order Denying Post Trial Motions (corrected)	13-19

Pleadings:

Summons and Complaint of Sep. 10, 2010	20-23
Answer of Dec. 16, 2010	24-27
Amended Summons and Complaint of Mar. 9, 2011	28-30
Answer to Amended Summons and Complaint of Mar. 24, 2011	31-36
Second Amended Summons and Complaint of Dec. 13, 2011	37-44
Answer to Second Amended Summons and Complaint of Feb. 15, 2012 ...	45-50
Appellant's Post Trial Motion and Memo	51-60
Respondents' Memo. in Opposition to Appellant's Post Trial Motions	61-65
Notice of Appeal	66-74

Transcript of Testimony	75-332

Plaintiff's Exhibits:

1-5	333-337
7-11	338-343

Defendants' Exhibits

3-7	344-348

Court's Exhibit's:

Court's Exhibit 1, Depositions of Dr. Fuller (redacted) and Dr. Ergle ...	349-446
Court's Exhibit 4, Jury Question	447

Verdict Form	448

Certificate of Counsel	449

Order of February 25, 2011, Consent to Amend

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Scott,

Plaintiff,

vs.

Allen Lee Fortner,

Defendant.

CONSENT ORDER

10 - CP - 24 - 01236

RECEIVED

JUN 18 2013

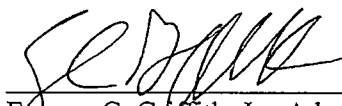
SC Court of Appeals

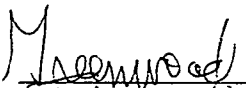
The above-captioned matter is now pending before this Court. The parties, pursuant to Rule 15, SCRCP and in the interest of justice, have agreed to the amendment of this lawsuit in order to name the proper defendant.

I find that this amendment is proper and in the interest of justice and should be granted according to the proposed Amended Summons and Complaint attached hereto.

WHEREFORE, IT IS ORDERED that Plaintiff be permitted to amend the Summons and Complaint to name Allen Lee Fortner as the proper Defendant.

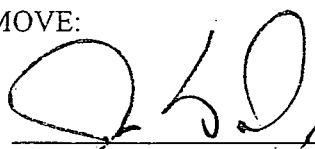
IT IS SO ORDERED.


Eugene C. Griffith, Jr., Administrative Judge
Eighth Judicial Circuit


S.C.
Feb 25, 2011

I SO MOVE:

BY:


Jon E. Newlon, Esq.
Attorney for Plaintiffs

WE CONSENT:

BY:


Thomas E. Hite, III
Attorney for Defendant

Order of December 19, 2011, Consent to Amend

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Scott,

Plaintiff,

vs.

Allen Lee Fortner,

Defendant.

CONSENT ORDER

10 - CP - 24 - 01236

2011 DEC 19 PM 12 14

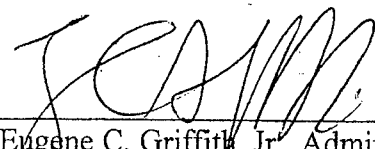
FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

The above-captioned matter is now pending before this Court. The parties, pursuant to Rule 15, SCRCP and in the interest of justice, have agreed to the amendment of this lawsuit in order to allow plaintiff (1) to amend allegations so as to comport with information gathered in discovery and (2) to amend the summons and complaint to add another party, Jason Chad Griffin.

I find this amendment is proper and in the interest of justice and should be granted according to the proposed Second Amended Summons and Complaint attached hereto.

WHEREFORE, IT IS ORDERED that Plaintiff be permitted to amend the Amended Summons and Complaint to add Jason Chad Griffin as an additional defendant.

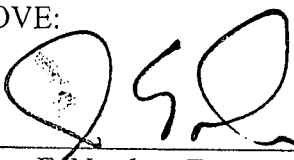
IT IS SO ORDERED.


Eugene C. Griffith, Jr., Administrative Judge
Eighth Judicial Circuit


S.C.
December 19, 2011

I SO MOVE:

BY:


Jon E. Newlon, Esq.
Attorney for Plaintiffs

FILED
NEWBERRY COUNTY
JACKIE S. BOWERS
CLERK OF COURT
2011 DEC 19 AM 11 33
VOID

WE CONSENT:

BY:

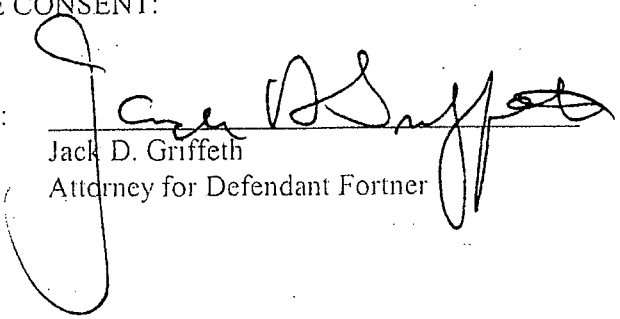


Thomas E. Hite, III
Attorney for Defendant Fortner

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2011 DEC 19 PM 12 14

WE CONSENT:

BY:


Jack D. Griffeth
Attorney for Defendant Fortner

2011 DEC 19 PM 12 14

FILED 004000
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
Order of November 21, 2012, Order Denying Post Trial Motions

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

Jennifer Scott Harmon,

Plaintiff,

vs.

Allen L. Fortner and Jason C. Griffin,

Defendants.

THE COURT OF COMMON PLEAS

Civil Action No. ²⁰¹⁰2012-CP-24-01236

ORDER DENYING POST-TRIAL
MOTIONS

THIS MATTER IS BEFORE THE COURT on Plaintiff's motions for Judgment Notwithstanding the Verdict (JNOV), New Trial Absolute, and New Trial Pursuant to the Thirteenth Juror Doctrine. I find as follows:

STATEMENT OF THE CASE

Plaintiff Jennifer Scott Harmon (Plaintiff) alleged that Defendants Allen Fortner and Jason Griffin (Defendants) were negligent in causing a ladder to fall and strike her in the face, causing injuries and damage. (Pl.'s 2nd Am. Compl. ¶ 4). Defendants denied any negligence on their part, asserted that Plaintiff was contributorily negligent, and denied they caused Plaintiff's injuries. (Defs.' Answer). This case was tried before a jury on October 3rd and 4th, 2012. Plaintiff was represented by Jon E. Newlon. Defendants were represented by Jack Griffeth and Ross Plyler. At the close of Plaintiff's case in chief, Defendants moved for a directed verdict on the grounds that Plaintiff had not established Defendants' actions proximately caused her injuries. Plaintiff moved for a directed verdict on the question of liability because Defendants

had admitted to causing the ladder to fall. Plaintiff also moved to strike Defendants' comparative negligence defense on the same grounds. The court declined to direct a verdict, stating that both parties had presented sufficient evidence on the issues of breach of a duty, proximate cause, and comparative negligence to submit the questions to the jury. The court submitted the case to the jury late in the afternoon of October 4th. Shortly thereafter, the jury submitted a question to the court asking "If we answer no to #1, are we done?" (Ct.'s Ex. #4). The jury was referring to the first question on the verdict form, which asked "Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendants' negligence proximately caused her injuries?" The court reinstructed the jury on directions for completing the verdict form and informed them that the time of day should not factor into their deliberations. The jury resumed deliberations for approximately fifteen (15) minutes, and then returned a defense verdict on the grounds that Plaintiff had not met her burden of proving Defendants were negligent and that such negligence proximately caused her injuries.

FACTS PRESENTED AT TRIAL

Plaintiff rented a house from Defendant Fortner. As part of the lease agreement, Fortner performed routine maintenance and repairs to the house. On the date of Plaintiff's injury, Defendants were at the house to repair a broken water heater. Defendants had to access a circuit breaker panel in the laundry room as part of the repairs. Plaintiff had recently repainted the kitchen, and had borrowed a ladder from a friend to complete the job. When the ladder was no longer in use Plaintiff placed it against the wall in the laundry room in front of the circuit breaker panel. When Defendant Griffin went to access the circuit breaker panel, his arm brushed against the ladder. The ladder fell and struck Plaintiff, who was in the laundry room, in the arm and face, causing a cut on her nose.

At trial, Plaintiff and her doctors testified that Plaintiff suffered from complications from the impact, including: headaches, facial pain, neuralgia, and post-concussive syndrome. Plaintiff presented expert testimony that the ladder could have struck her with fifteen (15) to twenty-two (22) pounds of force. Defendants presented evidence that Plaintiff suffered no complications from the impact and that she had prior medical problems that were not exacerbated by the accident.

LAW/ANALYSIS

I. Standard of Review

In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The court may grant a motion for JNOV only if no reasonable jury could have reached the challenged verdict. Id. at 300, 536 S.E.2d at 419 (citing Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992)). The court will not overturn the jury verdict if any evidence exists that sustains the factual findings implicit in its decision. Id. (citing Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999)).

The court may grant a new trial absolute where the jury verdict was "against the greater weight of the evidence presented at trial." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 114, 512 S.E.2d 510, 519 (Ct. App. 1998). Under the thirteenth juror doctrine, the court may grant a new trial if, in the opinion of the court, the verdict is "unsupported by the evidence" or "inconsistent and reflects the jury's confusion." Vinson v. Hartley, 324 S.C. 389, 403-04, 477 S.E.2d 715, 722 (Ct. App. 1996) (citations omitted). The trial judge exercises his discretion to grant a new trial based on his view of the facts, the evidence, the witnesses, the trial

circumstances, and the verdict. Id. at 404, 477 S.E.2d at 723 (citing Fallon v. Rucks, 217 S.C. 180, 60 S.E.2d 88 (1950)). However, disturbance of a jury's verdict is not to be lightly invoked simply because a party has unsuccessfully tried its case. Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967) ("It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.").

II. The Question Of Liability Was Properly Submitted To The Jury.

Plaintiff argues that JNOV is appropriate on two grounds.¹ First, she argues that no reasonable jury could have found Defendant's not liable when Defendant Griffin admitted to brushing against the ladder before it fell. Second, she argues that the issue of comparative fault was improperly submitted to the jury. Essentially, Plaintiff wants the court to impose liability on Defendants as a matter of law, and to order a new trial on solely the issue of damages. Because the question of Defendants' (and Plaintiff's) liability is one for the jury, the court disagrees.

In a cause of action for negligence, the plaintiff must establish three factors: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." Vinson, 324 S.C. at 399, 477 S.E.2d at 720. In the present case, the Plaintiff established as a matter of law that Defendant's owed her a duty to use reasonable care while they were in her home performing repairs to her water heater. However, both Plaintiff and Defendants submitted conflicting evidence on the issues of breach and proximate cause.

The breach of a duty of due care is a question of fact for the jury. Singletary v. S.C. Dept. of Educ., 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994) (citing Cantrell v. Green, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990)). Plaintiff argues that a breach of duty was established

¹ Plaintiff's grounds for her Motion for a New Trial mirror her grounds for JNOV. Therefore, the court will consider the new trial motion and JNOV together. See Marsh v. S.C. Dept. of Highways & Pub. Transp., 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989).

because Defendant Griffin testified to brushing the ladder and causing it to fall.² However, Defendants presented evidence that Griffin acted reasonably and with due care in reaching for the circuit breaker panel. Whether Griffin acted with due care inherently revolves around the credibility of his and Plaintiff's testimony. Because credibility determinations are best left to the factfinders, the court properly submitted the breach of duty issue to the jury. See Tisdale v. Kerr McGee Chem. Corp., 266 S.C. 64, 67-68, 221 S.E.2d 531, 533 (1976) ("The credibility of the testimony of witnesses is, of course, a function of the jury, not the court, and it is the jury that decides what weight is to be given." (citations omitted)).

Likewise, proximate cause is for the jury to determine. Vinson, 324 S.C. at 402, 477 S.E.2d at 721 ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." (citations omitted)). The plaintiff argued to the jury that the uncontroverted evidence she suffered a cut to her nose establishes causation between the impact and her headaches, facial pain, neuralgia, and post-concussive syndrome. However, "proximate cause requires proof beyond just the act or omission in question and concerns whether it is the 'but for' cause of the plaintiff's injuries and whether the harm was foreseeable." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012) (citing Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)). Even if the jury did assume that Griffin acted negligently when accessing the circuit breaker panel, it may not have attributed Plaintiff's headaches, facial pain, neuralgia, and post-concussive syndrome to that negligence. Defendants presented evidence that Plaintiff suffered

² Plaintiff seems to be arguing, to some extent, that Defendants are negligent simply because the ladder fell. However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. See Watson v. Ford Motor Co., 389 S.C. 434, 452, 699 S.E.2d 169, 179 (2010) (a plaintiff may not rely solely on the fact that an accident occurred to prove negligence).

from these conditions and symptoms prior to being struck with the ladder. Although Plaintiff presented expert testimony as to the force of the impact, Defendants argued that the only immediate consequence was a small scratch. The jury was entitled to believe that the only injury proximately caused by the falling ladder was a scratch, and not headaches, facial pain, neuralgia, and post-concussive syndrome.³ The jury was free to decide what evidence it believed, and the court properly left the proximate cause issue to the jury. Because the questions of breach and proximate cause were properly submitted to the jury, this court will not overturn the verdict.

Plaintiff next argues that the issue of comparative negligence was improperly submitted to the jury. A plaintiff's comparative negligence "presents a question of fact for the jury, at least where conflicting inferences may be drawn." Berberich v. Jack, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) (citing Hurd v. Williamsburg Cnty., 363 S.C. 421, 611 S.E.2d 488 (2005)). Here, Defendants presented evidence that Plaintiff placed the ladder against the wall, and that her positioning of the ladder contributed to it falling and striking her. Thus, the issue of Plaintiff's fault in causing the ladder to fall should have been submitted to the jury.⁴ Because the issues of liability were properly before the jury, this court will not grant a JNOV or a new trial absolute.

III. The Jury's Verdict Is Not Unsupported By The Evidence Nor The Product Of Jury Confusion

Plaintiff finally argues that the court should exercise its discretion as a thirteenth juror because the verdict represents a disregard for the preponderance of the evidence. For the reasons outlined above, the court is not convinced the jury's verdict is unsupported by the evidence

³ No evidence was presented concerning the valuation of damages for the scratch to Plaintiff's nose. As such, the court must conclude that the jury, if it even reached the causation issue, only considered whether the impact was the proximate cause for the headaches, facial pain, neuralgia, and post-concussive syndrome.

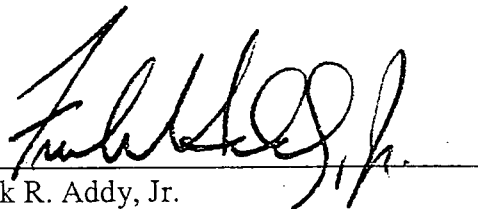
⁴ Even if this issue was not properly before the jury, it did not affect the outcome in this case. The jury concluded that Defendants were not negligent in causing the ladder to fall. It is axiomatic that for the jury to even consider the plaintiff's comparative fault, it must first conclude there was fault on the part of the defendant.

presented. Because the evidence was conflicting and relied primarily on a determination of the credibility of witnesses, the court will defer to the discretion of the jury. Plaintiff's main point of contention is that the short deliberations indicate the jury did not properly consider the law and the facts of the case. However, the brevity of jury deliberations is not grounds to grant a new trial. See Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (overview of the "spate of juridical writings" limiting the discretion to overturn a jury verdict based on the length of deliberations). Giving due deference to the role of juries in our system of justice, this court is hesitant to set aside a jury's verdict absent more compelling circumstances.

CONCLUSION

WHEREFORE, Plaintiff Jennifer Scott Harmon's motions for Judgment Notwithstanding the Verdict, for a New Trial Absolute, and for New Trial Pursuant to the Thirteenth Juror Doctrine are respectfully **DENIED**.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

November 21, 2012
Greenwood, South Carolina

Order of May 20, 2013, Order Amending Caption

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
Jennifer Harmon Scott,)
)
Plaintiff,)
)
vs.)
)
Allen L. Fortner and Jason C. Griffin,)
)
Defendants.)
)
)
)

THE COURT OF COMMON PLEAS
Civil Action No. 2010-CP-24-01236

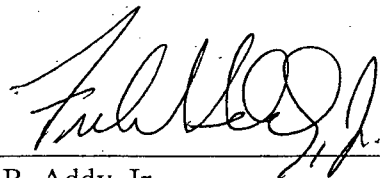
ORDER AMENDING CAPTION

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2013 MAY 21 10:10

THIS MATTER IS BEFORE THE COURT on Plaintiff's motion to correct the caption of the court's Order Denying Post-Trial Motions, dated November 21, 2012, and filed November 26, 2012. That caption incorrectly reflected Plaintiff's name as Jennifer Scott Harmon and the case number as 2012-CP-24-01236. The court has received a copy of the Court of Appeals' order granting this court jurisdiction pursuant to Rule 60(a), SCRCP, to amend the prior order.

THEREFORE, IT IS ORDERED THAT the caption of the court's November 21, 2012, order be amended to change Plaintiff's name to Jennifer Harmon Scott and the case number to 2010-CP-24-01236. The caption of this order reflects the proper caption. The Clerk of Court may amend the order's caption accordingly.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

May 20, 2013
Greenwood, South Carolina

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

Order of Nov. 21, 2012, Order Denying Post Trial Motions (corrected)

STATE OF SOUTH CAROLINA

THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD

Civil Action No. ²⁰¹⁰2012-CP-24-01236

^{Harmon Scott}
Jennifer Scott-Harmon,

Plaintiff,

vs.

Allen L. Fortner and Jason C. Griffin,

Defendants.

ORDER DENYING POST-TRIAL
MOTIONS

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

THIS MATTER IS BEFORE THE COURT on Plaintiff's motions for Judgment Notwithstanding the Verdict (JNOV), New Trial Absolute, and New Trial Pursuant to the Thirteenth Juror Doctrine. I find as follows:

STATEMENT OF THE CASE

Plaintiff Jennifer Scott Harmon (Plaintiff) alleged that Defendants Allen Fortner and Jason Griffin (Defendants) were negligent in causing a ladder to fall and strike her in the face, causing injuries and damage. (Pl.'s 2nd Am. Compl. ¶ 4). Defendants denied any negligence on their part, asserted that Plaintiff was contributorily negligent, and denied they caused Plaintiff's injuries. (Defs.' Answer). This case was tried before a jury on October 3rd and 4th, 2012. Plaintiff was represented by Jon E. Newlon. Defendants were represented by Jack Griffeth and Ross Plyler. At the close of Plaintiff's case in chief, Defendants moved for a directed verdict on the grounds that Plaintiff had not established Defendants' actions proximately caused her injuries. Plaintiff moved for a directed verdict on the question of liability because Defendants

ATTEST A TRUE COPY

Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

1
013

had admitted to causing the ladder to fall. Plaintiff also moved to strike Defendants' comparative negligence defense on the same grounds. The court declined to direct a verdict, stating that both parties had presented sufficient evidence on the issues of breach of a duty, proximate cause, and comparative negligence to submit the questions to the jury. The court submitted the case to the jury late in the afternoon of October 4th. Shortly thereafter, the jury submitted a question to the court asking "If we answer no to #1, are we done?" (Ct.'s Ex. #4). The jury was referring to the first question on the verdict form, which asked "Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendants' negligence proximately caused her injuries?" The court reinstructed the jury on directions for completing the verdict form and informed them that the time of day should not factor into their deliberations. The jury resumed deliberations for approximately fifteen (15) minutes, and then returned a defense verdict on the grounds that Plaintiff had not met her burden of proving Defendants were negligent and that such negligence proximately caused her injuries.

FACTS PRESENTED AT TRIAL

Plaintiff rented a house from Defendant Fortner. As part of the lease agreement, Fortner performed routine maintenance and repairs to the house. On the date of Plaintiff's injury, Defendants were at the house to repair a broken water heater. Defendants had to access a circuit breaker panel in the laundry room as part of the repairs. Plaintiff had recently repainted the kitchen, and had borrowed a ladder from a friend to complete the job. When the ladder was no longer in use Plaintiff placed it against the wall in the laundry room in front of the circuit breaker panel. When Defendant Griffin went to access the circuit breaker panel, his arm brushed against the ladder. The ladder fell and struck Plaintiff, who was in the laundry room, in the arm and face, causing a cut on her nose.

At trial, Plaintiff and her doctors testified that Plaintiff suffered from complications from the impact, including: headaches, facial pain, neuralgia, and post-concussive syndrome. Plaintiff presented expert testimony that the ladder could have struck her with fifteen (15) to twenty-two (22) pounds of force. Defendants presented evidence that Plaintiff suffered no complications from the impact and that she had prior medical problems that were not exacerbated by the accident.

LAW/ANALYSIS

I. Standard of Review

In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The court may grant a motion for JNOV only if no reasonable jury could have reached the challenged verdict. Id. at 300, 536 S.E.2d at 419 (citing Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992)). The court will not overturn the jury verdict if any evidence exists that sustains the factual findings implicit in its decision. Id. (citing Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999)).

The court may grant a new trial absolute where the jury verdict was "against the greater weight of the evidence presented at trial." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 114, 512 S.E.2d 510, 519 (Ct. App. 1998). Under the thirteenth juror doctrine, the court may grant a new trial if, in the opinion of the court, the verdict is "unsupported by the evidence" or "inconsistent and reflects the jury's confusion." Vinson v. Hartley, 324 S.C. 389, 403-04, 477 S.E.2d 715, 722 (Ct. App. 1996) (citations omitted). The trial judge exercises his discretion to grant a new trial based on his view of the facts, the evidence, the witnesses, the trial

circumstances, and the verdict. Id. at 404, 477 S.E.2d at 723 (citing Fallon v. Rucks, 217 S.C. 180, 60 S.E.2d 88 (1950)). However, disturbance of a jury's verdict is not to be lightly invoked simply because a party has unsuccessfully tried its case. Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967) ("It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.").

II. The Question Of Liability Was Properly Submitted To The Jury.

Plaintiff argues that JNOV is appropriate on two grounds.¹ First, she argues that no reasonable jury could have found Defendant's not liable when Defendant Griffin admitted to brushing against the ladder before it fell. Second, she argues that the issue of comparative fault was improperly submitted to the jury. Essentially, Plaintiff wants the court to impose liability on Defendants as a matter of law, and to order a new trial on solely the issue of damages. Because the question of Defendants' (and Plaintiff's) liability is one for the jury, the court disagrees.

In a cause of action for negligence, the plaintiff must establish three factors: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." Vinson, 324 S.C. at 399, 477 S.E.2d at 720. In the present case, the Plaintiff established as a matter of law that Defendant's owed her a duty to use reasonable care while they were in her home performing repairs to her water heater. However, both Plaintiff and Defendants submitted conflicting evidence on the issues of breach and proximate cause.

The breach of a duty of due care is a question of fact for the jury. Singletary v. S.C. Dept. of Educ., 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994) (citing Cantrell v. Green, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990)). Plaintiff argues that a breach of duty was established

¹ Plaintiff's grounds for her Motion for a New Trial mirror her grounds for JNOV. Therefore, the court will consider the new trial motion and JNOV together. See Marsh v. S.C. Dept. of Highways & Pub. Transp., 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989).

because Defendant Griffin testified to brushing the ladder and causing it to fall.² However, Defendants presented evidence that Griffin acted reasonably and with due care in reaching for the circuit breaker panel. Whether Griffin acted with due care inherently revolves around the credibility of his and Plaintiff's testimony. Because credibility determinations are best left to the factfinders, the court properly submitted the breach of duty issue to the jury. See Tisdale v. Kerr McGee Chem. Corp., 266 S.C. 64, 67-68, 221 S.E.2d 531, 533 (1976) ("The credibility of the testimony of witnesses is, of course, a function of the jury, not the court, and it is the jury that decides what weight is to be given." (citations omitted)).

Likewise, proximate cause is for the jury to determine. Vinson, 324 S.C. at 402, 477 S.E.2d at 721 ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." (citations omitted)). The plaintiff argued to the jury that the uncontroverted evidence she suffered a cut to her nose establishes causation between the impact and her headaches, facial pain, neuralgia, and post-concussive syndrome. However, "proximate cause requires proof beyond just the act or omission in question and concerns whether it is the 'but for' cause of the plaintiff's injuries and whether the harm was foreseeable." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012) (citing Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)). Even if the jury did assume that Griffin acted negligently when accessing the circuit breaker panel, it may not have attributed Plaintiff's headaches, facial pain, neuralgia, and post-concussive syndrome to that negligence. Defendants presented evidence that Plaintiff suffered

² Plaintiff seems to be arguing, to some extent, that Defendants are negligent simply because the ladder fell. However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. See Watson v. Ford Motor Co., 389 S.C. 434, 452, 699 S.E.2d 169, 179 (2010) (a plaintiff may not rely solely on the fact that an accident occurred to prove negligence).

from these conditions and symptoms prior to being struck with the ladder. Although Plaintiff presented expert testimony as to the force of the impact, Defendants argued that the only immediate consequence was a small scratch. The jury was entitled to believe that the only injury proximately caused by the falling ladder was a scratch, and not headaches, facial pain, neuralgia, and post-concussive syndrome.³ The jury was free to decide what evidence it believed, and the court properly left the proximate cause issue to the jury. Because the questions of breach and proximate cause were properly submitted to the jury, this court will not overturn the verdict.

Plaintiff next argues that the issue of comparative negligence was improperly submitted to the jury. A plaintiff's comparative negligence "presents a question of fact for the jury, at least where conflicting inferences may be drawn." Berberich v. Jack, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) (citing Hurd v. Williamsburg Cnty., 363 S.C. 421, 611 S.E.2d 488 (2005)). Here, Defendants presented evidence that Plaintiff placed the ladder against the wall, and that her positioning of the ladder contributed to it falling and striking her. Thus, the issue of Plaintiff's fault in causing the ladder to fall should have been submitted to the jury.⁴ Because the issues of liability were properly before the jury, this court will not grant a JNOV or a new trial absolute.

III. The Jury's Verdict Is Not Unsupported By The Evidence Nor The Product Of Jury Confusion

Plaintiff finally argues that the court should exercise its discretion as a thirteenth juror because the verdict represents a disregard for the preponderance of the evidence. For the reasons outlined above, the court is not convinced the jury's verdict is unsupported by the evidence

³ No evidence was presented concerning the valuation of damages for the scratch to Plaintiff's nose. As such, the court must conclude that the jury, if it even reached the causation issue, only considered whether the impact was the proximate cause for the headaches, facial pain, neuralgia, and post-concussive syndrome.

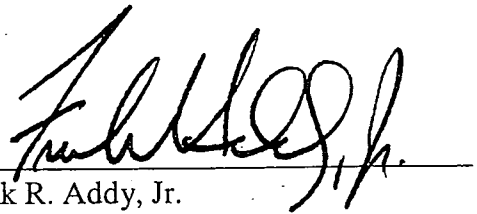
⁴ Even if this issue was not properly before the jury, it did not affect the outcome in this case. The jury concluded that Defendants were not negligent in causing the ladder to fall. It is axiomatic that for the jury to even consider the plaintiff's comparative fault, it must first conclude there was fault on the part of the defendant.

presented. Because the evidence was conflicting and relied primarily on a determination of the credibility of witnesses, the court will defer to the discretion of the jury. Plaintiff's main point of contention is that the short deliberations indicate the jury did not properly consider the law and the facts of the case. However, the brevity of jury deliberations is not grounds to grant a new trial. See Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (overview of the "spate of juridical writings" limiting the discretion to overturn a jury verdict based on the length of deliberations). Giving due deference to the role of juries in our system of justice, this court is hesitant to set aside a jury's verdict absent more compelling circumstances.

CONCLUSION

WHEREFORE, Plaintiff Jennifer Scott Harmon's motions for Judgment Notwithstanding the Verdict, for a New Trial Absolute, and for New Trial Pursuant to the Thirteenth Juror Doctrine are respectfully **DENIED**.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

November 21, 2012
Greenwood, South Carolina

Summons and Complaint of September 10, 2010

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Harmon Scott,

Plaintiff,

vs.

Fortner Builders, LLC,

Defendant.

SUMMONS

10 - CP - 24 - 01236

(JURY TRIAL DEMANDED)

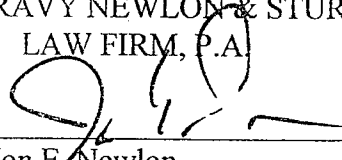
2010 SEP 21 PM 4 58

FILED
8TH JUDICIAL
GREENWOOD, SC

TO: THE DEFENDANT:

THIS SUMMONS requires you to answer the attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 Bypass 72 NE, Greenwood, South Carolina 29649, within THIRTY (30) DAYS after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

McCRAVY NEWLON & STURKIE
LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
September 10, 2010

4. Defendant, through its agents and/or employees were negligent and reckless for having actual knowledge of the dangerous condition and then:

- a. failing to note the area where the hose was being pulled through the house;
- b. failing to warn Plaintiff of the dangerous conditions; and
- c. failing to properly and adequately supervise the maintenance and clean up of dangerous conditions;
- d. failing to properly monitor and/or inspect the area in question for the maintenance and clean up of dangerous conditions; and
- e. in otherwise failing to use due care in keeping the hose and ladder in a reasonable and safe location.

All of which were the direct and proximate cause of the injuries and damages suffered by Plaintiff, said acts being in violation of the laws of South Carolina.

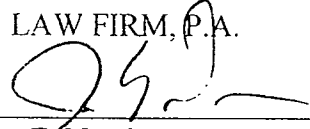
5. As a direct and proximate result of the Defendant's negligence, gross negligence and recklessness, Plaintiff sustained acute personal injuries including, but not limited to, her head and face. Plaintiff has been seen and treated by medical doctors and continues to be treated for the injuries. Plaintiff has incurred and will incur expenses for medical care and treatment. Plaintiff has endured and will endure pain and suffering, mental anguish, loss of enjoyment of life as well as other damages.

6. Based on the above, Plaintiff is informed and believes she is entitled to judgment for actual damages and punitive damages.

WHEREFORE, Plaintiff prays for the following:

- a. That after review of the circumstances surrounding this case, the Court will allow the Plaintiffs a trial by jury in this case; and
- b. Judgment for negligence as well as an award of actual damages and punitive damages, for cost of this action, and for such other and further relief as this Court may deem just, equitable and proper.

McCRAVY NEWLON & STURKIE
LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
September 10, 2010

Answer of December 16, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	
Jennifer Harmon Scott,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ANSWER
	)	
Fortner Builders, LLC,	)	C/A No.: 2010-CP-24-01236
	)	
Defendant.	)	
	)	

TO: JON E. NEWLON, ESQUIRE, AS ATTORNEY FOR THE PLAINTIFF:

The Defendant, subject to and reserving any motions to strike or dismiss,
responding to the Plaintiff's Complaint would show:

FOR A FIRST DEFENSE

1. All allegations of the Complaint not herein after specifically admitted or explained are denied.
2. Paragraph One of Plaintiff's Complaint is admitted.
3. Paragraphs Two – Six of Plaintiff's Complaint are denied.

FOR A SECOND DEFENSE

4. The Defendant incorporates the previous allegations of its Answer to the extent not consistent herewith.
5. Any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were a proximate result of one or more independent, efficient and intervening causes which the Defendant affirmatively pleads as a complete bar to this action.

FOR A THIRD DEFENSE

6. The Defendant incorporates the previous allegations of its Answer to the extent not inconsistent herewith.

7. The Defendant alleges that this incident and the Plaintiff's resulting injuries and damages, if any, were caused solely by the negligent, grossly negligent, reckless, willful, and wanton conduct on the part of the Plaintiff in one or more of the following particulars:

- a. In failing to keep the ladder in a safe place; and
- b. In failing to control her own property; and
- c. In failing to properly maintain the premises free from any hazards; and
- d. In failing to keep a proper look out of her surroundings; and
- e. In such and further particulars as shall be shown at trial.

8. The Defendant alleges that this negligent, grossly negligent, reckless, willful and wanton conduct on the part of the Plaintiff in the particulars set forth above operated as a sole proximate cause of the incident and the Plaintiff's alleged injuries and damages. As such, the Plaintiff's cause of action against the Defendant is barred.

FOR A FOURTH DEFENSE

9. The Defendant incorporates the previous allegations of its Answer to the extent not inconsistent herewith.

10. That even assuming the Defendant was negligent, grossly negligent, carless, willful, wanton and reckless in any respect and that such conduct operated as proximate cause of the accident and the Plaintiff's resulting injuries and damages, if any, all of which is expressly denied and admitted solely for the purpose for this defense, the

Defendant alleges that the Plaintiff's negligent, grossly negligent, reckless, willful and wanton conduct in the particulars set forth herein and above contributed to more than 50% to cause the accident and the Plaintiff's resulting injuries and damages, if any. As such, the Plaintiff's cause of action is barred.

FOR A FIFTH DEFENSE

11. The Defendant incorporates the previous allegations of its Answer to the extent not inconsistent herewith.

12. The Defendant alleges that even if it was careless, negligent, grossly negligent, willful, wanton or reckless, in any respect, which is expressly denied and admitted solely for the purpose of this defense, and even if such conduct on its part operated as a greater than 50% cause of the accident and the Plaintiff's resulting injuries and damages, if any, which is also expressly denied and admitted solely for the purpose of this defense and no other, the Defendant is entitled to a determination as to the percentage which the Plaintiff's negligent, grossly negligent, reckless, willful and wanton conduct contributed to this accident and to a reduction of any amount awarded to them by an amount equal to the percentage of Plaintiff's negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A SIXTH DEFENSE

13. The Defendant incorporates the previous allegations of its Answer to the extent not inconsistent herewith.

14. The Defendant alleges that the named Defendant is not the proper party.

15. The Defendant alleges that the Defendant above named was not responsible for the acts of another and that the Defendant was not even in the same room as the Plaintiff and could not have been responsible for the actions alleged in the

Plaintiff's Complaint.

Wherefore, having fully responded to the Plaintiff's Complaint, the Defendant prays that the Plaintiff's Complaint be dismissed and for such other and further relief as the Court may deem just and proper.

HITE & STONE

BY: 

Thomas E. Hite, III
100 East Pickens Street
P. O. Box 805
Abbeville, SC 29620
T3@hiteandstone.com
(864) 366-5400 Telephone
(864) 366-2638 Facsimile
Attorney for the Plaintiff

Abbeville, South Carolina
December 16th, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Plaintiff,

AMENDED SUMMONS

10 - CP - 24 - 01236

(JURY TRIAL DEMANDED)

Defendant.

TO: THE DEFENDANT:

THIS SUMMONS requires you to answer the attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 Bypass 72 NE, Greenwood, South Carolina 29649, within THIRTY (30) DAYS after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

McCRAY NEWLON & STURKIE
LAW FIRM, P.A.

BY:

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
March 1, 2011

029

- a. backing when not watching where he was going;
- b. bumping into a properly placed ladder and causing it to fall; and
- c. failing to act as a reasonably prudent person would under the same or similar circumstances.

All of which were the direct and proximate cause of the injuries and damages suffered by Plaintiff, said acts being in violation of the laws of South Carolina.

5. As a direct and proximate result of the Defendant's negligence, gross negligence and recklessness, Plaintiff sustained acute personal injuries including, but not limited to, her forearm, head and face. Plaintiff has been seen and treated by medical doctors and continues to be treated for the injuries. Plaintiff has incurred and will incur expenses for medical care and treatment. Plaintiff has endured and will endure pain and suffering, mental anguish, loss of enjoyment of life as well as other damages.

6. Based on the above, Plaintiff believes she is entitled to judgment for actual damages and punitive damages.

WHEREFORE, Plaintiff prays for a jury trial as well as judgment for negligence as well as an award of actual damages and punitive damages, for cost of this action, and for such other and further relief as this Court may deem just, equitable and proper.

McCRAVY NEWLON & STURKIE
LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
March 9, 2011

<u>Answer to Amended Summons and Complaint of March 24, 2011</u>	
STATE OF SOUTH CAROLINA	)
	)
COUNTY OF GREENWOOD	)
	)
Jennifer Scott,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Allen Lee Fortner,	)
	)
Defendant.	)
	)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

C/A No. 2010-CP-24-01236

**ANSWER TO
AMENDED COMPLAINT**

Defendant Allen Lee Fortner answering Plaintiff's Amended Complaint would respectfully show to the Court as follows:

FOR A FIRST DEFENSE

I.

Each and every allegation contained in Plaintiff's Amended Complaint not hereinafter admitted, modified, or explained is denied.

II.

Defendant admits paragraphs 1 and 2 of the Amended Complaint.

III.

As to paragraph 3, Defendant admits he is the owner of a house located at 107 Allis Avenue in Greenwood County, South Carolina. Defendant admits he rented the subject property to Plaintiff Scott. Defendant further admits Plaintiff contacted him and asked him to repair the water heater, to which he agreed. Defendant denies each and every other allegation contained in paragraph 3 and demands strict proof thereof.

IV.

As to paragraph 4, Defendant admits he arrived to the property on January 8, 2009, to repair the water heater. Each and every other allegation contained in paragraph 4 is specifically denied and Defendant demands strict proof thereof.

V.

Answering paragraph 5 (mistakenly numbered as paragraph 4), Defendant specifically denies each and every allegation contained therein, including the allegations set forth in subparts a-c, and demands strict proof thereof.

VI.

Defendant denies each and every allegation contained in paragraph 6 (mistakenly numbered as paragraph 5) and demands strict proof thereof.

VII.

As to paragraph 7 (mistakenly numbered as paragraph 6), Defendant denies each and every allegation contained therein and demands strict proof thereof.

FOR A SECOND DEFENSE

VIII.

This Defendant realleges and incorporates by reference all allegations in his first defense that are not inconsistent.

IX.

The Plaintiff's Amended Complaint fails to set forth sufficient facts to constitute a cause of action for which relief can be granted, and therefore, this Defendant moves for dismissal pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

X.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

XI.

Any injuries sustained by the Plaintiff were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons as a proximate cause of injuries as alleged, if any, and therefore, this Defendant should not be liable to the Plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

XII.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

XIII.

Any injuries or damages sustained by the Plaintiff were due to and caused and occasioned by Plaintiff's own negligence, gross negligence, recklessness, willfulness, and wantonness which was the direct and proximate cause of Plaintiff's alleged injuries or damages, if any, and without which the same would not have occurred, and therefore, due to Plaintiff's sole negligence, gross negligence, recklessness, willfulness, and wantonness, Plaintiff's claims are barred.

FOR A FIFTH DEFENSE

XIV.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

XV.

Any injuries sustained by the Plaintiff were due to and caused by the sole negligence of third persons over whom this Defendant had no control, and therefore, this Defendant should not be liable to the Plaintiff in any sum whatsoever.

FOR A SIXTH DEFENSE

XVI.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

XVII.

Even if this Defendant was negligent or reckless, as a proximate cause of any injury or damage allegedly sustained by Plaintiff, which is expressly denied, Plaintiff also was negligent and reckless, and said conduct on the part of Plaintiff constituted greater than fifty (50%) percent of the proximate cause of any injury or damage allegedly sustained by Plaintiff. Consequently, Plaintiff's claims against this Defendant should be barred.

XVIII.

Even if this Defendant were negligent or reckless as a proximate cause of Plaintiff's injuries or damages, which is expressly denied, and even if said conduct constituted greater than fifty (50%) percent of the proximate cause of said injuries and damages, which is also expressly denied, this Defendant is entitled to a determination of the percentage of negligence or recklessness on the part of Plaintiff which contributed as a proximate cause of her injuries, and to an offset from any jury verdict or judgment by an amount equal to that percentage of negligence or recklessness.

XIX.

The Plaintiff was negligent, grossly negligent, willful and wanton in the following particulars:

- a. in negligently and carelessly placing the ladder, resulting in its instability;
- b. if not placing the ladder, in failing to notice the instability of the ladder and in failing to move it to a more stable position and location;
- c. in failing to keep the ladder in a safe place;
- d. in failing to look out for her own safety; and/or
- e. in failing to exercise the degree of care and caution which a reasonable and prudent person would have exercised under the conditions then and there existing.

All of which are in violation of the statutory and common laws of the State of South Carolina, and all of which combined or concurred to constitute greater than fifty (50%) percent of the proximate cause of any injury or damage allegedly sustained by Plaintiff.

FOR A SEVENTH DEFENSE

XX.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

XXI.

Plaintiff either knew or should have known of any alleged deficiencies in the subject property and accepted the same with such knowledge. As a result, Plaintiff's recovery should be barred.

FOR AN EIGHTH DEFENSE

XXII.

This Defendant realleges and incorporates by reference all allegations in his previous defenses that are not inconsistent.

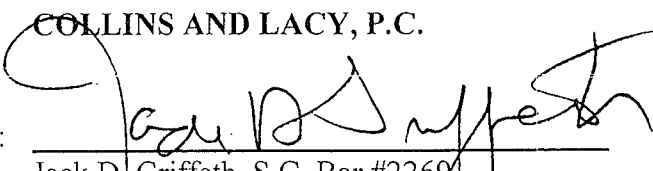
XXIII.

Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

WHEREFORE, having fully answered, Defendant prays the Plaintiff's Amended Complaint be dismissed with costs and for such other relief as the Court may deem just and proper.

Respectfully submitted,

COLLINS AND LACY, P.C.

By: 

Jack D. Griffeth, S.C. Bar #2269
Anne Marie Hempy, S.C. Bar #74871
37 Villa Road, Suite 500 (29606)
Post Office Box 5819
Greenville, South Carolina 29615
Telephone: 864-282-9100
Telefax: 864-282-9101
E-Mail: jgriffeth@collinsandlacy.com
E-Mail: ahempy@collinsandlacy.com

**ATTORNEYS FOR DEFENDANT
ALLEN LEE FORTNER**

Greenville, South Carolina

March 24, 2011

Second Amended Summons and Complaint of December 13, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Scott,

Plaintiff,

VS.

Allen Lee Fortner and Jason Chad Griffin,

Defendant.

**SECOND
AMENDED SUMMONS**

10 - CP - 24 - 01236

(JURY TRIAL DEMANDED)

FILED COMPTON, MISSISSIPPI
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
011 DEC 08 PM 12:15
NEED

TO: THE DEFENDANTS:

THIS SUMMONS requires you to answer the attached Complaint and to serve a copy of your Answer on Plaintiffs' attorneys at their office, 1629 Bypass 72 NE, Greenwood, South Carolina 29649, within THIRTY (30) DAYS after service of this Summons, excluding the date of service, and if you fail to answer the Complaint within this time, judgment by default will be rendered against you for relief demanded in the Complaint.

McCRAVY NEWLON & STURKIE
LAW FIRM, P.A.

BY:

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
Oct. 13, 2011

FILED
NEWBERRY COUNTY
2011 DEC 19 AM 11:33
JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Scott,

Plaintiff,

vs.

Allen Lee Fortner and Jason Chad Griffin,

Defendants.

AMENDED COMPLAINT

10 - CP - 24 - 01236-

(JURY TRIAL DEMANDED)

FILED
NEWBERRY COUNTY
EIGHTH JUDICIAL CIRCUIT
GREENWOOD, SC
2019 DEC 19 PM 12:15
JACK S. BOWERS
CLERK OF COURT

Plaintiff, complaining of Defendants, would respectfully allege and show Court

JURISDICTIONAL ALLEGATIONS

1. Plaintiff is a citizen and resident of Greenwood County, S.C.
2. Defendant Fortner and Defendant Griffin are citizens and residents of Greenwood County, S.C.

**FOR A FIRST CAUSE OF ACTION AS TO DEFENDANT FORTNER
[Vicarious Negligence]**

3. Prior to January 8, 2009, Defendant Fortner was the owner of a house located at 107 Allis Avenue, in Greenwood County, South Carolina, and rented said property to Plaintiff Scott. Defendant Fortner was the landlord and Plaintiff Scott had lawful possession of Defendant Fortner's property at all times relevant. While Plaintiff was in possession of said property, a water heater malfunctioned. Plaintiff notified Defendant Fortner of the malfunctioned water heater. On January 8, 2009, Defendant Fortner came to the subject property to repair the water heater.

4. For several years prior to January 8, 2009, Defendant Griffin worked as an employee for Defendant Fortner's business, Fortner Builders. In addition, Defendant Fortner would periodically asked for and received assistance from Defendant Griffin in order to make

repairs at Defendant Fortner's rental properties. During these times, Defendant Griffin consented to act on Defendant Fortner's behalf and subject to his control and directions.

5. At all times relevant in this case, Defendant Griffin was acting as Defendant Fortner's agent and/or servant and, therefore, Defendant Fortner is vicariously liable for Defendant Griffin's negligent acts of commission or omission.

6. On January 8, 2009, Defendant Fortner asked for and received assistance from Defendant Griffin in order to repair a water heater at Defendant Fortner's rental property occupied by Plaintiff, his tenant. During the time Defendants were working to repair the water heater, Defendant Fortner was in charge of the repair of the water heater. Further, Defendant Griffin consented to and acted on Defendant Fortner's behalf and was subject to his control and directions. Defendant Fortner directed Defendant Griffin to accomplish a number of tasks during the repair of the water heater. As Defendant Griffin was working for Defendant Fortner, Defendant Griffin was acting as Defendant Fortner's agent and/or within the scope of that servitude, voluntary or otherwise.

7. In the late afternoon of the same day, Defendants arrived at Plaintiff's residence to repair the water heater. Defendant Fortner informed Plaintiff that he and Defendant Griffin were there to repair the water heater and that Defendant Griffin was there to assist. However, neither Defendant Fortner nor Defendant Griffin informed Plaintiff what they would be doing, what they would be touching and where they would be moving in the house. Further, Defendant Fortner and Defendant Griffin walked through the laundry room and observed the ladder out of the way and leaning against the wall in a safe and nondangerous condition.

8. At one point during the repair of the water heater, Defendant Fortner positioned himself in the kitchen next to the water heater and instructed Defendant Griffin to go turn on the circuit breaker for the water heater which was in the laundry room out of Defendant Fortner's vision and reach. Between the circuit breaker panel and the doorway to the laundry room, a folding ladder was leaning against the wall.

9. Before Defendant Griffin complied with Defendant Fortner's request to turn on the circuit breaker, Defendant Griffin observed that the ladder was more upright than normal, thereby recognizing potential danger but failing to correct the ladder's position or warn Plaintiff before he reached behind the ladder.

10. Plaintiff was standing facing a dryer and was in the process of removing clothes from that drying. Her back was to Defendant Griffin, the ladder and the circuit breaker. Thereafter, Defendant Griffin, while standing in the doorway between the kitchen and the laundry room, reached with his right arm between the wall and the ladder and beyond the ladder to turn on the circuit breaker. As he did this, Defendant Griffin's right arm pushed the ladder over and caused it to fall away from the wall and towards Plaintiff. As the ladder was falling, Plaintiff turn around. Defendant Griffin observed the ladder strike Plaintiff in the face. Defendant Griffin admittedly stated, "I didn't mean to bump the ladder and hit you with it."

11. Immediately following this incident, both Defendants Fortner and Griffin observed blood on a tissue Plaintiff used to cover the wound on the bridge of her nose.

12. As a result, Plaintiff sustained personal injury and other damages.

13. Defendant Fortner, by and through the acts and omissions of his agent and/or

servant, was negligent, grossly negligent and reckless for:

- a. Failing to inform Plaintiff of the ladder's upright position;
- b. Failing to correct the ladder's upright position before reaching for the circuit breaker;
- c. Failing to stabilize the ladder before reaching for the circuit breaker;
- d. Reaching between the ladder and the wall knowing the ladder was in a more upright position;
- e. For failing to reach around the ladder to turn on the circuit breaker;
- f. For causing the ladder fall; and
- g. For failing to act as a reasonably prudent person would under the same or similar circumstances.

All of which were the direct and proximate cause of the injuries and damages suffered by Plaintiff, said acts being in violation of the laws of South Carolina.

14. As a direct and proximate result of the Defendant Fortner's negligence, gross negligence and recklessness, Plaintiff sustained acute personal injuries including, but not limited to, her forearm, head and face. Plaintiff has been seen and treated by medical doctors and continues to be treated for the injuries to include headaches. Plaintiff has incurred and will incur expenses for medical care and treatment. Plaintiff has endured and will endure pain and suffering, mental anguish, loss of enjoyment of life as well as other damages.

15. Based on the above, Plaintiff believes she is entitled to judgment for actual damages and punitive damages against Defendant Fortner.

**FOR A SECOND CAUSE OF ACTION AS TO BOTH DEFENDANTS
[Individual or Joint and Several or Combined Negligence]**

16. Plaintiff incorporates all prior allegations as if fully stated herein but only to the extent they are consistent with the Second Cause of Action herewith.

17. On January 8, 2009, Defendant Griffin assisted Defendant Fortner with the repair of a water heater at Defendant Fortner's rental property occupied by Plaintiff, his

tenant. After the Defendants arrived at Plaintiff's residence to repair the water heater, Defendant Fortner informed Plaintiff that he and Defendant Griffin were there to repair the water heater and that Defendant Griffin was there to assist. However, neither Defendant Fortner nor Defendant Griffin informed Plaintiff what they would be doing, what they would be touching and where they would be moving in the house. Further, both Defendant Fortner and Defendant Griffin walked through the laundry room and observed the ladder out of the way and leaning against the wall in a safe and nondangerous condition.

18. At one point during the repair of the water heater, Defendant Fortner positioned himself in the kitchen next to the water heater and instructed Defendant Griffin to go turn on the circuit breaker for the water heater which was in the laundry room out of Defendant Fortner's vision and reach. Between the circuit breaker panel and the doorway to the laundry room, a folding ladder was leaning against the wall.

19. Before Defendant Griffin complied with Defendant Fortner's request to turn on the circuit breaker, both Defendants previously observed that the ladder was more upright than normal, thereby recognizing potential danger but failing to correct the ladder's position or warn Plaintiff before working in the vicinity of the ladder.

20. Defendant Griffin observed Plaintiff was standing facing a dryer with her back to him, the ladder and the circuit breaker. Thereafter, Defendant Griffin stood in the doorway between the kitchen and the laundry room and reached with his right arm between the wall and the ladder and beyond the ladder to turn on the circuit breaker. As he did this, Defendant Griffin's right arm pushed the ladder over and caused it to fall away from the wall and towards Plaintiff. As the ladder was falling, Plaintiff turn around. Defendant Griffin

observed the ladder strike Plaintiff in the face. Defendant Griffin admittedly stated, "I didn't mean to bump the ladder and hit you with it."

21. Immediately following this incident, both Defendants observed blood on a tissue Plaintiff used to cover the wound on the bridge of her nose.

22. As a result, Plaintiff sustained personal injury and other damages.

23. Defendants, either individually or jointly and severally or in combination, were negligent, grossly negligent and reckless for:

- a. Failing to inform Plaintiff of the ladder's upright position;
- b. Failing to correct the ladder's upright position before reaching for the circuit breaker;
- c. Failing to stabilize the ladder before reaching for the circuit breaker;
- d. Reaching between the ladder and the wall knowing the ladder was in a more upright position;
- e. For failing to reach around the ladder to turn on the circuit breaker;
- f. For causing the ladder fall; and
- g. For failing to act as a reasonably prudent person would under the same or similar circumstances.

All of which were the direct and proximate cause of the injuries and damages suffered by Plaintiff, said acts being in violation of the laws of South Carolina.

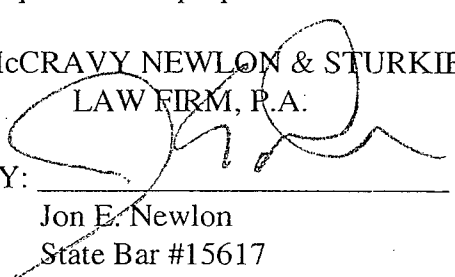
24. As a direct and proximate result of Defendants' negligence, gross negligence and recklessness, Plaintiff sustained acute personal injuries including, but not limited to, her forearm, head and face. Plaintiff has been seen and treated by medical doctors and continues to be treated for the injuries to include headaches. Plaintiff has incurred and will incur expenses for medical care and treatment. Plaintiff has endured and will endure pain and suffering, mental anguish, loss of enjoyment of life as well as other damages.

25. Based on the above, Plaintiff believes she is entitled to judgment for actual

damages and punitive damages against Defendants, either individually or jointly or severally or in combination

WHEREFORE, Plaintiff prays for a jury trial, for judgment for negligence as stated herein, for actual damages and punitive damages, for cost of this action, and for such other and further relief as this Court may deem just, equitable and proper.

McCRAVY NEWLON & STURKIE
LAW FIRM, P.A.

BY: 

Jon E. Newlon
State Bar #15617

Attorney for the Plaintiff
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)

Greenwood, South Carolina
Dec 13, 2011

Answer to Second Amended Summons and Complaint of February 15, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
Jennifer Scott,	)	C/A No. 2010-CP-24-01236
	)	
Plaintiff,	)	
	)	
vs.	)	ANSWER TO SECOND
	)	AMENDED COMPLAINT
Allen Lee Fortner and Jason Chad Griffin,	)	
	)	
Defendants.	)	
_____	)	

Defendants Allen Lee Fortner and Jason Chad Griffin answering Plaintiff's Second Amended Complaint would respectfully show to the Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained in Plaintiff's Second Amended Complaint not hereinafter admitted, modified, or explained is denied.

FOR A SECOND DEFENSE

2. Defendants reallege and incorporate by reference all allegations in their first defense that are not inconsistent.

3. Defendants admit Paragraphs 1 and 2 of the Complaint.

FOR A THIRD DEFENSE

4. Defendants reallege and incorporate by reference all allegations in their previous defenses that are not inconsistent.

5. As to Paragraph 3 of the Complaint, Defendant Fortner admits that prior to January 8, 2009, he was the owner of a house, which is the subject of this lawsuit, located at 107 Allis Avenue, Ninety Six, South Carolina, and he rented the subject property to Plaintiff Scott. It

is admitted that Fortner was the landlord, Scott had lawful possession of the property at all relevant times, that Defendant was contacted by the Plaintiff and asked to repair the water heater. to which he agreed, and on January 8, 2009, the Defendants came to the subject property and repaired the water heater. Defendants deny each and every other allegation contained in Paragraph 3 and demand proof thereof.

6. As to Paragraph 4, the Defendants admit that Defendant Griffin had worked as an employee for Defendant Fortner in one of his businesses, that Griffin was a friend of Fortner and, from time to time, Griffin would assist Fortner in requested activities. Specifically, on this date, Fortner asked Griffin to accompany him to help repair the water heater, Griffin did so, and acted on Defendant's behalf and according to his directions. Defendants deny each and every other allegation contained in Paragraph 4 of the Complaint inconsistent herewith.

7. As to Paragraph 5, the Defendants admit that at all times relevant to the repair of the water heater, Griffin was acting as Fortner's agent. The remainder of Paragraph 5 states a legal conclusion, which requires no response. The Defendants deny each and every other allegation contained in Paragraph 5 inconsistent with the foregoing.

8. As to Paragraph 6 of the Complaint, while repairing the water heater, which consisted of draining the water heater, replacing the elements, and refilling the water heater, it was necessary to turn off the power to the water heater. At Fortner's request, Griffin then turned off the power breaker to the water heater and after the water heater was repaired, Griffin, at Fortner's request, turned the breaker back on. Defendants deny all other allegations contained in Paragraph 6 inconsistent therewith.

9. As to Paragraph 7, the Defendants arrived at the residence where the Plaintiff lived in the late afternoon of January 8, 2009, and proceeded, in the manner heretofore described.

to repair the water heater. The electric breaker to turn the power on and off to the water heater was located on a wall in the laundry room across from the water heater and Griffin had no difficulty turning the breaker off. When Griffin turned the breaker back on, his arm brushed up against a ladder, which had been placed in front of the breaker box in an unstable position, causing the ladder to fall and strike the Plaintiff, first on the arms, and then to scratch her on the bridge of her nose. The Defendants are informed and believe that the ladder was placed in an unstable and unsafe position in said fashion, either by Plaintiff or someone acting under her control. Defendants deny each and every other allegation contained in Paragraph 7 inconsistent with the foregoing.

10. As to Paragraph 8, the Defendants reallege all of the allegations contained in the foregoing paragraph in response to Paragraph 7 of the Complaint and deny each and every other allegation contained in Paragraph 8 inconsistent with the foregoing.

11. As to Paragraph 10 of the Complaint, the Defendants reallege the answers given to Paragraphs 6, 7, 8 and 9 of the Complaint and deny each and every allegation contained in Paragraph 10 inconsistent therewith.

12. As to Paragraph 11, Defendants aver that they each observed a single drop of blood on a tissue that Plaintiff used to cover the minor scratch on the bridge of her nose. Defendants deny each and every other allegation contained in Paragraph 11 inconsistent therewith.

13. Defendants deny Paragraphs 12, 13, 14 and 15 of the Complaint.

FOR A FOURTH DEFENSE

14. Defendants reallege and incorporate by reference all allegations in their previous defenses that are not inconsistent.

15. As to Paragraphs 16, 17, 18, 19, 20, 21, 22, 24 and 25, Defendants reallege and re-aver all of the items stated in this Answer and deny each and every allegation contained in these paragraphs inconsistent therewith.

FOR A FIFTH DEFENSE

16. Defendants reallege and incorporate by reference all allegations in their previous defenses that are not inconsistent.

17. Even if these Defendants were negligent, reckless, willful or wanton as the proximate cause of any injury or damage allegedly sustained by the Plaintiff, which is denied, Plaintiff was also negligent, willful, reckless and wanton, and the said conduct on the part of the Plaintiff constituted greater than fifty percent (50%) of the proximate cause of any injury or damage allegedly sustained by the Plaintiff and consequent claims should be barred.

18. Even if these Defendants were negligent, reckless, willful or wanton as the proximate cause of Plaintiff's injuries, which is denied, even if said conduct constitutes greater than fifty percent (50%) of the proximate cause of said injuries or damages, which is denied, these Defendants are entitled to a determination of the percentage of negligence and recklessness on the part of the Plaintiff that contributed as proximate cause to her injuries and to an offset from any jury verdict or judgment by an amount equal to that percentage of negligence or recklessness or gross negligence.

19. Plaintiff was grossly negligent, willful, reckless or wanton in the following particulars:

- a. In placing, or in permitting to be placed, a ladder blocking the circuit breaker controlling the electricity to the water heater;

- b. In placing, or in permitting to be placed, a ladder in an unsafe or unstable position, which allowed it to fall when being touched by Defendant Griffin;
- c. In failing to look out for her own safety;
- d. In failing to exercise the degree and care of caution, which are reasonable, and that a prudent person would have exercised under the conditions then and there existing;
- e. In failing to warn the Defendants of the precarious placement of the ladder; and
- f. In failing to move the ladder from an unsafe position.

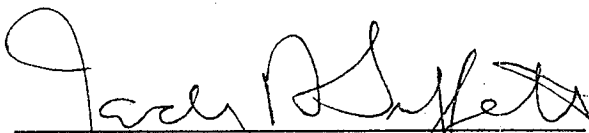
All of which are in violation of the statutory and common laws of the State of South Carolina and all of which combined or concurred to constitute greater than fifty (50%) percent of the proximate cause of any injury or damage allegedly sustained by Plaintiff.

WHEREFORE, having fully answered, Defendants pray the Plaintiff's Second Amended Complaint be dismissed, with costs, and for such other relief as the Court and Jury may deem just and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

Jack D. Griffeth, S.C. Bar No. 02169

Ross B. Plyler, S.C. Bar No. 71688

37 Villa Road, Suite 500 (29615)

Post Office Box 5819

Greenville, South Carolina 29606

Telephone: 864.282.9100

Telefax: 864.282.9101

E-Mail: jgriffeth@collinsandlacy.com

E-Mail: rplyler@collinsandlacy.com

ATTORNEYS FOR DEFENDANTS

Greenville, South Carolina

February 15, 2012

Appellant's Post Trial Motion and Memorandum

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Harmon Scott,

Plaintiff,

vs.

Allen Lee Fortner and Jason Chad Griffin,

Defendants.

POST TRIAL MOTIONS

2010-CP-24-01236

FILED OCT 15 PM 1 41
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

Plaintiff, through her undersigned attorney, hereby moves for Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial (13th Juror Doctrine). This motion is made on the following grounds.

Facts Proven by a Preponderance of the Evidence

At trial, it was established by collective testimony that:

1. Brissy's ladder had been setting in the laundry room for about 2 weeks without incident. (Scott).
2. Regardless of which way Brissy's ladder was setting against the wall, it would take about the same force to push it over center and make it fall. (Dr. Slimmer).
3. Defendants were at Scott's home between 30-50 minutes. (Fortner).
4. Defendants traversed the laundry room many times, saw how the ladder was placed, did not reposition the ladder if they believed it was not properly set against the wall and never said anything to Scott about the ladder. (Fortner, Griffin)
5. Defendants were aware the ladder was leaning over the circuit breaker panel. (Fortner, Griffin).
6. Defendants did not observe anything Scott did or did not do to cause or

contribute to the ladder falling down. (Fortner, Griffin).

7. Defendants did not observe anything unsafe or dangerous about the way the ladder was placed against the wall. (Fortner, Griffin)

8. Defendants did not ask for nor receive any assistance from Scott. (Fortner, Griffin)

9. Defendants did not advise Scott that they would be accessing the circuit breaker panel. (Fortner, Griffin)

10. Scott did not give any indication that she knew what steps were necessary to repair the water heater. Defendants did not tell Scott where they would go, what they would do and what they would move in order to repair the water heater. (Fortner, Griffin).

11. Most important, Defendant Griffin testified that Scott could not anticipate he would be reaching for the circuit breaker in the manner that he did. (Griffin).

12. When reaching for the circuit breaker, Defendant Griffin recognized ladder was more upright than he would expect, but he reached for the circuit breaker anyway. (Griffin).

13. Defendant Griffin caused the ladder to fall when he reached between the wall and the ladder to turn on the circuit breaker. (Fortner, Griffin). Scott had her back to Defendant Griffin when he caused the ladder to fall. (Griffin)

14. Defendant Griffin saw the ladder hit Scott in the face. (Griffin).

15. Defendants both witnessed a wound to Scott's nose and blood collected on a tissue Scott held to her wound on her nose. (Fortner, Griffin).

16. There was ample contemporaneous testimony of the existence of an injury

following this incident. (Dr. Graham, Conyers, Scott). Most important, nobody testified that there was not a wound and there was no blood and no visible signs of immediate injury.

17. The ladder, just when falling from a pure vertical position, could cause up to 28 lbs of force. (Dr. Slimmer). More important, this force would actually be more because Defendant Griffin caused additional force when he caused it to fall. (Dr. Slimmer).

18. Scott moved for directed verdict as to Defendant's comparative fault defense and Defendants' duty, breach of duty and causation of some damages at the close of all the evidence, but was denied. The trial court found the Defendants had a duty.

19. At 4:15 pm, the jury was given all evidence and asked to begin deliberations. In addition, the jury was given a verdict form that permitted comparative fault analysis. The first question was "Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendant's negligence proximately caused her injuries?" (Verdict Form)

20. At 4:27 pm, the jury presented a question – "If we answer "no" to question 1, are we done." (Court's Exhibit).

21. At 4:35 pm, the trial court instructed the jury the answer to the question was yes but he informed them that they were in control of deliberations and could continue to deliberate or break until the following day, Friday morning. The jury returned to deliberate.

22. At 4:44 pm, the jury returned a verdict answering the first question "no." (Verdict Form).

Judgment Notwithstanding the Verdict as to Defendants' Liability

Because Scott showed by a preponderance of the evidence that Defendants had a duty,¹ Defendants breached that duty and Defendants caused some damages,² no reasonable jury could find Defendants were not liable and Plaintiff was entitled to a directed verdict as to Defendants' Liability.

A. Law:

When a evidence at trial only presents only questions of law, the judge my direct a verdict. Rule 50(a), SCRPC. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Rule 50(b), SCRPC.

A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. Rule 50(b), SCRPC. A motion for a new trial may be pled in addition to or in the alternative of the motion for judgment notwithstanding the verdict. Id.

The trial court may either grant a new trial or direct the entry of judgment as if the requested verdict had been directed. Id.

The trial court, when considering a motion for directed verdict, must consider the evidence in a light most favorable to the nonmoving party. Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, ___, 493 S.E.2d 503, 504-505 (Ct. App. 1997).

B. Argument:

Based on the testimony presented at trial, Plaintiff presented a preponderance of evidence that Defendants had a duty, breached that duty and caused Scott some damages. Defendants did not

¹ Existence of a duty is a question of law for the trial court. The trial court ruled there was evidence of Defendants' duty when denying Defendants' directed verdict motion.

² Plaintiff only had to prove some damages, not all damages claimed, in order for proximate cause of some damages to be proven.

produce any evidence to the contrary.

First, even the trial court denied Defendant's motion for directed verdict as to duty and foreseeability of Defendants' breach of that duty. The Defendants' (landlord and agent) were repairing a water heater in Scott's home. The entire operation was within Defendants' collective knowledge and control and without Scott participating, advising or being informed of where Defendants would go and what they would do. Clearly, Defendants had a duty to avoid knocking over Scott's personal objects during the process of the repair of the water heater. A person who undertakes to perform an act must use due care, even a landlord. See e.g., McQuillien v. Dobbs, 262 S.C.386, 204 S.E.2d 732 (1974) (landlord must use due care if he undertakes to do work on leased premises); see also The South Carolina Law of Torts, 3rd Edition, pg. 126, fn 526.

Second, Defendants breached that duty and proximately caused the ladder to fall. Without question, Defendants admitted Defendant Griffin knocked over the ladder. In doing so, Defendants' failed to use due care when working on the leased premises. Remember, Defendant Griffin knew how the ladder was position, recognized it was more upright than normal for him and he still reached between the wall and the ladder, even when he recognized he could have reached from another angle and avoid knocking the ladder over.

Third, Defendant Griffin's direct lack of exercise of due care constituted the "cause-in-fact" or "but for" cause of the ladder's fall. See e.g., Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753 (1977) (negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided). Remember, regardless of how the ladder was placed, the same amount of force would have caused the ladder to fall over. Also, prior to the incident, the ladder sat there for 2 weeks and there was no evidence that it had fallen on its own. Further, the ladder was in place for up to 50 minutes while the Defendants were working around the ladder and walking by the ladder and not only did it stay in position, but the Defendants specifically testified they did not observe anything unsafe or dangerous about the way the ladder was placed against the wall. When evaluating a breach of duty, it is not necessary for the

Defendants to have contemplated that by reaching for the circuit breaker either of them could knock the ladder over and hit Scott. See Young v. Tide Craft, Inc., 270 S.C. 453, 462-463, 242 S.E.2d 671, ____ (1978) (It is not necessary for a defendant to have contemplated the particular event or injury). Clearly, Defendants breached their duty not to expose Scott to unreasonable harm while repairing the water heater on the leased premises and proximately caused the ladder to fall.

Third, Defendants proximately caused some damages. The uncontroverted testimony by both Scott and the Defendants was that the ladder struck her face, that there was a visible wound and that there was visible blood. Further, Dr. Graham and Conyers testified to objective manifestations of injury that were temporally proximate to the time of the incident. With clear evidence of duty, breach of duty and proximate cause of some damages, Scott was entitled to a directed verdict on Defendants' liability. See Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 304, 504 S.E.2d 347, ____ (Ct. App. 1998) (We recognize that a jury is not required to believe testimony when reasonable persons could disagree as to facts, but it is not permitted to disbelieve testimony unless there is good reason for questioning the credibility of the witnesses."). Under the facts of Scott's case, the proof did not fail and there was no reasonable basis for questioning the testimony of the very Defendants who admitted to some injury, i.e., immediate wound to Scott's nose and blood on a tissue when wiping the area hit by the ladder. Therefore, Scott was entitled to an award of damages in some amount as a matter of law, with the amount being left solely to the jury's determination.

C. Relief:

Scott prays for an order from the trial court that either grants a new trial or enters judgment for liability in favor of Scott and leaving the issue of damages for the jury in a new trial.

Judgment Notwithstanding the Verdict as to Comparative Fault Defense

Because Defendants failed to show by a preponderance of the evidence that Plaintiff had a duty, Plaintiff breached that duty and Plaintiff proximately caused her own damages, no reasonable jury could find Plaintiff was comparatively at fault and the issue should never have been submitted to the jury for consideration.

A. Law:

When an evidence at trial only presents questions of law, the judge may direct a verdict. Rule 50(a), SCRCP. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Rule 50(b), SCRCP.

A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. Rule 50(b), SCRCP. A motion for a new trial may be pled in addition to or in the alternative of the motion for judgment notwithstanding the verdict. Id.

The trial court may either grant a new trial or direct the entry of judgment as if the requested verdict had been directed. Id.

The trial court, when considering a motion for directed verdict, must consider the evidence in a light most favorable to the nonmoving party. Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, ___, 493 S.E.2d 503, 504-505 (Ct. App. 1997).

B. Argument:

The only evidence Defendants presented on the issue of Plaintiff's alleged comparative fault was the undisputed fact that she placed the ladder (in a more upright position than Defendant Griffin expected) in the laundry room. Nothing else. Because Plaintiff was not engaged in the operation to repair the water heater nor advised as to what steps would be taken to repair the water heater, there was no evidence that she had an expectation or could reasonably foresee that she knew Defendants would access the circuit breaker panel. Further, the Defendants observed the ladder numerous times over a 50 minute period and said nothing to her about the position of the ladder and even testified that they did not see anything dangerous about the ladder before it was knocked over by Defendant Griffin.

One does not always owe a duty of care to others. See e.g., Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). When assessing risk to determine if a duty exists, if a risk

is remote or conjectural, it is unfair and inefficient to expect that risk to be considered. See e.g., Snipes v. Piggily Wiggily St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977).

When weighing evidence by a preponderance, a mere possibility in the sense of a greater than zero percent likelihood of an event is inadequate because such a showing does not rise above "mere speculation and conjecture." Carter v. Anderson Mem'l Hosp., 284 S.C.229, 233, 325 S.E.2d 78, ____ (Ct. App. 1985).

Defendants' assertion that Scott's placement of the ladder was a possible cause does not satisfy Defendants' burden of proof and the issue of comparative fault should not be submitted to the jury for consideration. See e.g., Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845 (1968).

Defendants only purported evidence of comparative fault was the fact that Scott placed the ladder. Defendants testified the ladder did not present a danger. Defendants testified Scott did nothing to cause or contribute to the ladder's falling. Defendants testified that Defendant Griffin was the "but for" and legal cause of the ladder falling. Defendant Griffin testified that he was aware of the ladder's position against the wall before he reached to turn on the circuit breaker. The Defendants presented NO evidence that the manner in which Scott placed the ladder against the wall was improper nor that the manner in which Scott placed the ladder against the wall caused it to fall.

Allowing the jury to entertain a comparative fault defense improperly permitted the jury to consider what was only "possible." "Reasonable probability" is the standard and Defendants did not present any evidence, to a reasonable probability, that Scott's placement of the ladder caused it to fall. Again, as Dr. Slimmer testified, in order for the ladder to fall, it would require an external force and that force would be about the same regardless of which side of the ladder was placed against the wall.

C. Relief:

Scott prays for an order from the trial court that either grants a new trial or enters a directed verdict regarding Defendants' comparative fault defense and leave the issue of damages for the jury in a new trial.

Motion for a New Trial

According to the foregoing, because the jury was improperly permitted to consider whether Defendants were liable and improperly permitted to consider whether Scott was comparatively at fault, Scott is entitled to a new trial.

Scott prays for an order granting a new trial absolute or on special condition that Scott has established liability and the jury is only to consider the amount of damages and Defendants did not establish comparative fault, thereby removing this issue from the jury's consideration.

Motion for a New Trial (13th Juror Doctrine)

Because the jury's verdict represents an absolute disregard for the preponderance of relevant material evidence presented by Scott, the trial court should grant Scott a new trial in order to see that proper justice is done.

A. Law:

Under the Thirteenth Juror Doctrine, a trial judge may grant a new trial if the judge believes that a new trial is necessitated on the basis of the facts in the case. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722-723 (Ct. App. 1996).

In ruling on a new trial motion as the thirteenth juror, the trial judge may weigh the evidence and rely on his view of the circumstances. It is not necessary to justify the ruling with factual findings. Sorin Equipment Co., Inc. v. The Firm, Inc., 323 S.C. 359, ___, 474 S.E.2d 819, 822 (Ct. App. 1996).

B. Argument:

Clearly, given the strength of Scott's testimony and admissions of fault by Defendants and admissions of some damage by Defendants, a new trial is necessitated in order to do justice in this case. At the very least, the trial court should have directed a verdict as to Defendants' liability, the jury should only have considered the extent of Scott's damages and the jury may or may not have been able to consider comparative fault. It is Scott's position that Defendants did not show a reasonable probability of fault or proximate cause of damages on the part of Scott.

In addition, the nature of the jury's question at 4:27 pm and the turn around time for the verdict indicate the jurors were not properly considering the law and the facts of the case and were anxious to leave without properly discharging their duty.

Given the evidence, Scott should have been, at the very least, granted a directed verdict as to Defendants' liability, thereby preventing the juror from finding no negligence by Defendants in the face of all Defendants' admissions and ensuring that the juror properly considered Scott's damages (with or without consideration for comparative fault).

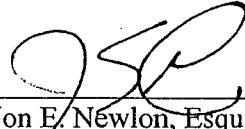
Justice was not done in this case.

C. Relief:

Scott prays for an order from the trial court that grants a new trial under the Thirteenth Juror Doctrine in order to see that justice is done in the facts of this case.

Respectfully submitted,

McCRAVY, NEWLON & STURKIE
LAW FIRM, P.A.

BY: 

Jon E. Newlon, Esquire
State Bar # 15617

Attorney for Plaintiff
1629 Bypass 72 NE
Greenwood, S.C. 29649
864-388-9100, 9104 (fax)

October 15, 2012
Greenwood, S.C.

<u>Respondents' Memorandum in Opposition to Appellant's Post Trial Motions</u>	
STATE OF SOUTH CAROLINA	)
COUNTY OF GREENWOOD	)
Jennifer Harmon Scott,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Allen Lee Fortner and Jason Chad Griffin,	)
	)
Defendants.	)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

C/A No. 2010-CP-24-01236

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S POST-TRIAL MOTIONS**

COME NOW the Defendants Allen Lee Fortner and Jason Chad Griffin ("Defendants") in opposition to Jennifer Harmon Scott's ("Plaintiff") post-trial motions for judgment notwithstanding the verdict (JNOV), new trial absolute, and new trial pursuant to the 13th juror doctrine. Because of clear evidence to support the jury's verdict for the Defendants, the Court should deny Plaintiff's motions and not disturb the jury's verdict.

I. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

"In reviewing a motion for judgment notwithstanding the verdict, the trial court must view the evidence and its inferences in the light most favorable to the non-moving party. The jury's verdict must be upheld if there is *any* evidence to sustain the factual findings implicit in the verdict." Sorin Equipment Co., Inc. v. The Firm, Inc., 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1997)(emphasis added). "The trial court *must* deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, 'a motion for JNOV may be granted *only* if *no reasonable jury* could have reached the challenged verdict.'" RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P., 732 S.E.2d 166, 171 (2012).

In this case, the jury's verdict was that Plaintiff failed to meet her burden that Defendants were negligent or that any negligence was the proximate cause of her injuries. At trial, there was clear evidence presented that Defendants' acts or omissions failed to constitute negligence. While the Court found as a matter of law that Defendants owed Plaintiff some duty, whether that duty was breached was an issue for the jury to determine. There is evidence to support the jury's verdict that Defendants were not negligent and that they acted in a reasonable and prudent manner.

Further, there was evidence that Defendants' acts or omissions could not have been the proximate cause of the multitude of Plaintiff's claimed injuries or damages. First, both Defendants testified that any visible injury amounted to a "scratch" on Plaintiff's nose. Plaintiff confirmed that the scratch was treated with a Band-Aid. Second, the testimony of the multiple doctors and records from the emergency room confirmed a small laceration on the nose. However, while the falling ladder may have been the proximate cause of a small scratch, there is a large disconnect between a small scratch and the Plaintiff's alleged injuries and damages. The Plaintiff claimed related injuries of neuralgia, facial pain, migraine headaches, and post-concussive syndrome. In reconciling this disconnect, it was completely reasonable for the jury to consider the objective evidence, testimony from doctors, evidence of diagnostic testing, and their own common sense and discount Plaintiff's own testimony to find that Defendants' actions were not the proximate cause of Plaintiff's claimed injuries and damages.

The jury is entitled to either believe or not believe any witness and can consider a witness' credibility. Clearly, the jury did not believe Plaintiff's claimed injuries were causally related. Further, the jury did not have to believe Dr. David Slimmer's testimony that the falling ladder produced twenty-eight pounds of force. Last, the jury did not believe that over \$17,000.00 in medical bills were causally related. The jury is entitled to believe certain witnesses over others and assess

credibility, and evidence supports their verdict. While it is uncontradicted that Plaintiff suffered a scratch on her nose, "the fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation. If there is anything tending to create distrust in [her] truthfulness, the question must be left to the jury." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1992).

Plaintiff also argues that the court should grant a JNOV on the issue of comparative negligence and that the jury should have never had a comparative negligence charge. First, Plaintiff had a chance to object to the Court's comparative negligence charge and made no objection. Second, the issue of comparative negligence is moot because the jury did not even consider it. On the jury form (which was approved without objection by Plaintiff), Comparative negligence was to be considered only if the jury had found negligence and proximate cause on the part of Defendants. By answering "no" to the first question¹ and finding for Defendants, the jury did not even have to consider comparative negligence. Nevertheless, Plaintiff concedes that there was some evidence of comparative negligence presented (that Plaintiff placed the ladder into position) and the existence of any evidence is sufficient to deny Plaintiff's motion for JNOV.

II. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR NEW TRIAL ABSOLUTE AND NEW TRIAL UNDER THE 13TH JUROR DOCTRINE

Plaintiff argues that the "jury was improperly permitted to consider whether Defendants were liable," that the jury disregarded the preponderance of the evidence, and that essentially Plaintiff should have received a trial solely on damages. The court should only grant a new trial absolute "if the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice,

¹ Question #1 on the Verdict Form created by the Court and approved without objection by counsel for Plaintiff and

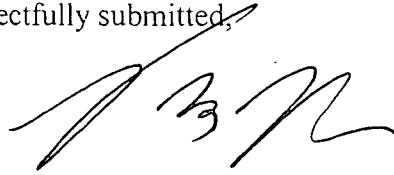
prejudice, or some other influence outside the evidence.” Sorin Equipment Co., Inc., 323 S.C. at 363; 474 S.E. 2d at 822. Plaintiff has offered no evidence that the jury was so influenced, and as stated above, there is evidence in the case to support their verdict.

Plaintiff also argues the Court should grant a new trial under the 13th juror doctrine which allows the Court to do so “if the judge believes the verdict is unsupported by the evidence” or if the verdict is “inconsistent and reflects the jury’s confusion.” Id. As stated above, the evidence in the record supported the jury’s verdict that the Defendants’ actions were not the proximate cause of Plaintiff’s claimed injuries or damages. Second, Plaintiff also argues that the jury’s brief deliberations must be evidence that they failed to properly consider the facts and law and were too anxious to leave. In answering the jury’s question, The Court instructed them they had plenty of time to deliberate and that the Court was “on their schedule.” The jury’s verdict reflected their belief that Plaintiff did not meet her burden as to negligence and proximate cause, so they did not have to address comparative negligence or damages. There is simply no evidence that the jury failed to consider the evidence or discharge their duty responsibly. The Court should deny Plaintiff’s motions and allow the jury’s verdict to stand.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Defendant read: “Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendants’ negligence proximately caused her injuries?” The jury checked the box “no.”

Respectfully submitted,



By: _____

Jack D. Griffeth, S.C. Bar No. 02269

Ross B. Plyler, S.C. Bar No. 71688

37 Villa Road, Suite 500 (29615)

Post Office Box 5819

Greenville, South Carolina 29606

Telephone: 864.282.9100

Telefax: 864.282.9101

E-Mail: jgriffeth@collinsandlacy.com

E-Mail: rplyler@collinsandlacy.com

ATTORNEYS FOR DEFENDANTS

Greenville, South Carolina

October 23, 2012

Notice of Appeal

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24-01236

Jennifer Harmon Scott.....Appellant,

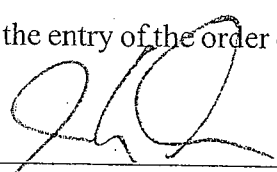
v.

Allen Lee Fortner and Jason Chad Griffin.....Respondents.

NOTICE OF APPEAL

Appellant appeals the order of the Honorable Frank R. Addy, Jr., dated November 21, 2012. Appellant received written notice of the entry of the order on November 22, 2012.

December 7, 2012



Jon E. Newlon
McCravy, Newlon & Sturkie Law Firm, P.A.
1629 Bypass 72 NE
Greenwood, S.C. 29649
864-388-9100
jnewlon@mccravylaw.com
Attorney for Appellant

Other Counsels of Record:

Jack D. Griffeth
Ross B. Plyler
P.O. Box 5819
Greenville, S.C. 29606
864-282-9105
Attorneys for Respondents

EXHIBIT 1

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

2012 NOV 26 PM 9:22
STATE OF SOUTH CAROLINA

) THE COURT OF COMMON PLEAS

)
)
COUNTY OF GREENWOOD

)
)
)
Civil Action No. 2010-CP-24-01236

)
)
)
Jennifer Scott Harmon,

)
)
)
Plaintiff,

)
)
)
vs.

)
)
)
Allen L. Fortner and Jason C. Griffin,

)
)
)
Defendants.
)
)
)

)
)
)
ORDER DENYING POST-TRIAL
MOTIONS

THIS MATTER IS BEFORE THE COURT on Plaintiff's motions for Judgment Notwithstanding the Verdict (JNOV), New Trial Absolute, and New Trial Pursuant to the Thirteenth Juror Doctrine. I find as follows:

STATEMENT OF THE CASE

Plaintiff Jennifer Scott Harmon (Plaintiff) alleged that Defendants Allen Fortner and Jason Griffin (Defendants) were negligent in causing a ladder to fall and strike her in the face, causing injuries and damage. (Pl.'s 2nd Am. Compl. ¶ 4). Defendants denied any negligence on their part, asserted that Plaintiff was contributorily negligent, and denied they caused Plaintiff's injuries. (Defs.' Answer). This case was tried before a jury on October 3rd and 4th, 2012. Plaintiff was represented by Jon E. Newlon. Defendants were represented by Jack Griffeth and Ross Plyler. At the close of Plaintiff's case in chief, Defendants moved for a directed verdict on the grounds that Plaintiff had not established Defendants' actions proximately caused her injuries. Plaintiff moved for a directed verdict on the question of liability because Defendants

1008M

had admitted to causing the ladder to fall. Plaintiff also moved to strike Defendants' comparative negligence defense on the same grounds. The court declined to direct a verdict, stating that both parties had presented sufficient evidence on the issues of breach of a duty, proximate cause, and comparative negligence to submit the questions to the jury. The court submitted the case to the jury late in the afternoon of October 4th. Shortly thereafter, the jury submitted a question to the court asking "If we answer no to #1, are we done?" (Ct.'s Ex. #4). The jury was referring to the first question on the verdict form, which asked "Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendants' negligence proximately caused her injuries?" The court reinstructed the jury on directions for completing the verdict form and informed them that the time of day should not factor into their deliberations. The jury resumed deliberations for approximately fifteen (15) minutes, and then returned a defense verdict on the grounds that Plaintiff had not met her burden of proving Defendants were negligent and that such negligence proximately caused her injuries.

FACTS PRESENTED AT TRIAL

Plaintiff rented a house from Defendant Fortner. As part of the lease agreement, Fortner performed routine maintenance and repairs to the house. On the date of Plaintiff's injury, Defendants were at the house to repair a broken water heater. Defendants had to access a circuit breaker panel in the laundry room as part of the repairs. Plaintiff had recently repainted the kitchen, and had borrowed a ladder from a friend to complete the job. When the ladder was no longer in use Plaintiff placed it against the wall in the laundry room in front of the circuit breaker panel. When Defendant Griffin went to access the circuit breaker panel, his arm brushed against the ladder. The ladder fell and struck Plaintiff, who was in the laundry room, in the arm and face, causing a cut on her nose.

At trial, Plaintiff and her doctors testified that Plaintiff suffered from complications from the impact, including: headaches, facial pain, neuralgia, and post-concussive syndrome. Plaintiff presented expert testimony that the ladder could have struck her with fifteen (15) to twenty-two (22) pounds of force. Defendants presented evidence that Plaintiff suffered no complications from the impact and that she had prior medical problems that were not exacerbated by the accident.

LAW/ANALYSIS

I. Standard of Review

In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The court may grant a motion for JNOV only if no reasonable jury could have reached the challenged verdict. Id. at 300, 536 S.E.2d at 419 (citing Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992)). The court will not overturn the jury verdict if any evidence exists that sustains the factual findings implicit in its decision. Id. (citing Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999)).

The court may grant a new trial absolute where the jury verdict was "against the greater weight of the evidence presented at trial." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 114, 512 S.E.2d 510, 519 (Ct. App. 1998). Under the thirteenth juror doctrine, the court may grant a new trial if, in the opinion of the court, the verdict is "unsupported by the evidence" or "inconsistent and reflects the jury's confusion." Vinson v. Hartley, 324 S.C. 389, 403-04, 477 S.E.2d 715, 722 (Ct. App. 1996) (citations omitted). The trial judge exercises his discretion to grant a new trial based on his view of the facts, the evidence, the witnesses, the trial

circumstances, and the verdict. Id. at 404, 477 S.E.2d at 723 (citing Fallon v. Rucks, 217 S.C. 180, 60 S.E.2d 88 (1950)). However, disturbance of a jury's verdict is not to be lightly invoked simply because a party has unsuccessfully tried its case. Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967) ("It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.").

II. The Question Of Liability Was Properly Submitted To The Jury.

Plaintiff argues that JNOV is appropriate on two grounds.¹ First, she argues that no reasonable jury could have found Defendant's not liable when Defendant Griffin admitted to brushing against the ladder before it fell. Second, she argues that the issue of comparative fault was improperly submitted to the jury. Essentially, Plaintiff wants the court to impose liability on Defendants as a matter of law, and to order a new trial on solely the issue of damages. Because the question of Defendants' (and Plaintiff's) liability is one for the jury, the court disagrees.

In a cause of action for negligence, the plaintiff must establish three factors: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." Vinson, 324 S.C. at 399, 477 S.E.2d at 720. In the present case, the Plaintiff established as a matter of law that Defendant's owed her a duty to use reasonable care while they were in her home performing repairs to her water heater. However, both Plaintiff and Defendants submitted conflicting evidence on the issues of breach and proximate cause.

The breach of a duty of due care is a question of fact for the jury. Singletary v. S.C. Dept. of Educ., 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994) (citing Cantrell v. Green, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990)). Plaintiff argues that a breach of duty was established

¹ Plaintiff's grounds for her Motion for a New Trial mirror her grounds for JNOV. Therefore, the court will consider the new trial motion and JNOV together. See Marsh v. S.C. Dept. of Highways & Pub. Transp., 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989).

because Defendant Griffin testified to brushing the ladder and causing it to fall.² However, Defendants presented evidence that Griffin acted reasonably and with due care in reaching for the circuit breaker panel. Whether Griffin acted with due care inherently revolves around the credibility of his and Plaintiff's testimony. Because credibility determinations are best left to the factfinders, the court properly submitted the breach of duty issue to the jury. See Tisdale v. Kerr McGee Chem. Corp., 266 S.C. 64, 67-68, 221 S.E.2d 531, 533 (1976) ("The credibility of the testimony of witnesses is, of course, a function of the jury, not the court, and it is the jury that decides what weight is to be given." (citations omitted)).

Likewise, proximate cause is for the jury to determine. Vinson, 324 S.C. at 402, 477 S.E.2d at 721 ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." (citations omitted)). The plaintiff argued to the jury that the uncontroverted evidence she suffered a cut to her nose establishes causation between the impact and her headaches, facial pain, neuralgia, and post-concussive syndrome. However, "proximate cause requires proof beyond just the act or omission in question and concerns whether it is the 'but for' cause of the plaintiff's injuries and whether the harm was foreseeable." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012) (citing Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)). Even if the jury did assume that Griffin acted negligently when accessing the circuit breaker panel, it may not have attributed Plaintiff's headaches, facial pain, neuralgia, and post-concussive syndrome to that negligence. Defendants presented evidence that Plaintiff suffered

² Plaintiff seems to be arguing, to some extent, that Defendants are negligent simply because the ladder fell. However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. See Watson v. Ford Motor Co., 389 S.C. 434, 452, 699 S.E.2d 169, 179 (2010) (a plaintiff may not rely solely on the fact that an accident occurred to prove negligence).

from these conditions and symptoms prior to being struck with the ladder. Although Plaintiff presented expert testimony as to the force of the impact, Defendants argued that the only immediate consequence was a small scratch. The jury was entitled to believe that the only injury proximately caused by the falling ladder was a scratch, and not headaches; facial pain, neuralgia, and post-concussive syndrome.³ The jury was free to decide what evidence it believed, and the court properly left the proximate cause issue to the jury. Because the questions of breach and proximate cause were properly submitted to the jury, this court will not overturn the verdict.

Plaintiff next argues that the issue of comparative negligence was improperly submitted to the jury. A plaintiff's comparative negligence "presents a question of fact for the jury, at least where conflicting inferences may be drawn." Berberich v. Jack, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) (citing Hurd v. Williamsburg Cnty., 363 S.C. 421, 611 S.E.2d 488 (2005)). Here, Defendants presented evidence that Plaintiff placed the ladder against the wall, and that her positioning of the ladder contributed to it falling and striking her. Thus, the issue of Plaintiff's fault in causing the ladder to fall should have been submitted to the jury.⁴ Because the issues of liability were properly before the jury, this court will not grant a JNOV or a new trial absolute.

III. The Jury's Verdict Is Not Unsupported By The Evidence Nor The Product Of Jury Confusion

Plaintiff finally argues that the court should exercise its discretion as a thirteenth juror because the verdict represents a disregard for the preponderance of the evidence. For the reasons outlined above, the court is not convinced the jury's verdict is unsupported by the evidence

³ No evidence was presented concerning the valuation of damages for the scratch to Plaintiff's nose. As such, the court must conclude that the jury, if it even reached the causation issue, only considered whether the impact was the proximate cause for the headaches, facial pain, neuralgia, and post-concussive syndrome.

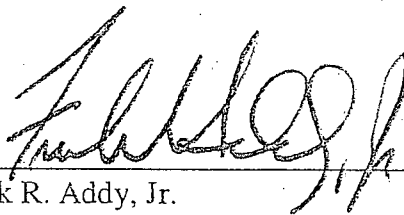
⁴ Even if this issue was not properly before the jury, it did not affect the outcome in this case. The jury concluded that Defendants were not negligent in causing the ladder to fall. It is axiomatic that for the jury to even consider the plaintiff's comparative fault, it must first conclude there was fault on the part of the defendant.

presented. Because the evidence was conflicting and relied primarily on a determination of the credibility of witnesses, the court will defer to the discretion of the jury. Plaintiff's main point of contention is that the short deliberations indicate the jury did not properly consider the law and the facts of the case. However, the brevity of jury deliberations is not grounds to grant a new trial. See Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (overview of the "spate of juridical writings" limiting the discretion to overturn a jury verdict based on the length of deliberations). Giving due deference to the role of juries in our system of justice, this court is hesitant to set aside a jury's verdict absent more compelling circumstances.

CONCLUSION

WHEREFORE, Plaintiff Jennifer Scott Harmon's motions for Judgment Notwithstanding the Verdict, for a New Trial Absolute, and for New Trial Pursuant to the Thirteenth Juror Doctrine are respectfully DENIED.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

November 21, 2012
Greenwood, South Carolina

Transcript of Testimony

State of South Carolina)
) Court of Common Pleas
County of Greenwood) 2010-CP-24-1236

Jennifer Harmon Scott)
vs.) Transcript of Record
)
Allen Lee Fortner and Jason)
Chad Griffin)
DEFENDANT)

October 3, 2012
Greenwood, South Carolina

B E F O R E:

Honorable Frank R. Addy, Jr., Judge

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

Jon E. Newlon, Esq.
Attorney for the Plaintiff

Jack D. Griffeth, Esq.
Ross B. Plyler, Esq.
Attorneys for the Defendants

Joy E. Holston
Official Court Reporter

I N D E X O F W I T N E S S E S

(IC) - Denotes In Camera
(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defendant's Witness

(PW) Allen Fortner

Direct Examination by Mr. Newlon:	23
Cross-examination by Mr. Plyler:	32
Redirect examination by Mr. Newlon:	43

(PW) Chad Griffin

Direct examination by Mr. Newlon:	44
Cross-examination by Mr. Plyler:	50
Redirect examination by Mr. Newlon:	59

(PW) Jimmy Brissey

Direct examination by Mr. Newlon:	60

(PW) Jennifer Scott

Direct examination by Mr. Newlon:	63
Cross-examination by Mr. Griffeth:	82
Redirect examination by Mr. Newlon:	108

(PW) Kathy Conyers

Direct examination by Mr. Newlon:	115
Cross-examination by Mr. Plyler:	122
Redirect examination by Mr. Newlon:	126

1	<u>(PW) Michelle Leggett</u>	
2	Direct examination by Mr. Newlon:	127
3	Cross-examination by Mr. Plyler:	132
4	Redirect examination by Mr. Newlon:	142
5		
6	<u>(PW) John Harmon</u>	
7	Direct examination by Mr. Newlon:	148
8		
9	<u>(PW) David S. Slimmer</u>	
10	Direct examination by Mr. Newlon:	157
11	Cross-examination by Mr. Griffeth:	179
12	Redirect examination by Mr. Newlon:	181
13	Direct examination by the Court:	182
14	Cross-examination by Mr. Newlon:	182
15		
16	<u>(PW) Video of Dr. Sean D. Fuller</u>	
17	Video played:	194
18		
19	<u>(PW) Richard Graham</u>	
20	Direct examination by Mr. Newlon:	194
21	Cross-examination by Mr. Plyler:	201
22	Redirect examination by Mr. Newlon:	209
23		
24	<u>(PW) Video of Dr. John Eargle</u>	
25	Video played:	215

1	Jury charge:	231
2	Verdict of the Jury:	253
3	Certificate of Reporter:	258
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

E X H I B I T SPlaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Photo		X	25
2	Photo		X	25
3	Photo		X	25
4	Photo		X	25
5	Photo		X	65
6	Ladder	X		65
7	Diagram		X	67
8	Photo		X	69
9	Photo		X	69
10	Photo		X	74
11	Medical Bill		X	80
12	Medical Bill		X	109
13	Medical Bill		X	109
14	Medical Records		X	187

EXHIBITSDefendant's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Brochure		X	84
2	Brochure		X	84
3	Poster		X	88
4	Poster		X	88
5	Poster		X	88
6	Poster		X	103
7	Poster		X	103
8	Transcript-Piedmont Tech		X	135
9	Medical Records		X	188

Court's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Transcript	X		157
2	Dr. Sean Fuller's Video	X		215
3	Dr. John Eargle's Video	X		215
4	Jury Note	X		252

1 (Whereupon, a jury was drawn October 1st, 2012 at
2 approximately 12:10 p.m.)

3 October 3, 2012

4 THE COURT: I believe that we are on the record now.
5 The case is 10-CP-24-1236, Jennifer Scott versus Fortner
6 and Griffin, is that correct?

7 MR. NEWLON: Yes, sir.

8 MR. GRIFFETH: Yes sir, Your Honor.

9 THE COURT: Very good. I think that the jury is
10 probably here by now. I am getting an indication that
11 they are. Anything before we bring them out at this
12 point?

13 MR. NEWLON: Yes, Your Honor. I don't know if you
14 had a chance to look at those deposition excerpts or not.
15 I don't know when you want to address this, we can address
16 this later on. For planning purposes, I am going to try
17 to get all the lay testimony done today. And I should
18 have maybe an expert, Dr. Slimmer with all the medical
19 testimony tomorrow. Dr., the ER Doctor, Dr. Graham from
20 the hospital, because of his schedule, I worked it out
21 with the hospital and he will be here at 11:00 tomorrow
22 morning. So I will work the other testimony around him so
23 I can get him in and get him out because he is actually
24 working in the ER. So that is my plans as far as trying
25 to get the case, get the testimony in from the plaintiff's

1 perspective. The parties have stipulated, the records
2 custodian is not required, preserving objections to
3 relevance and prejudice.

4 THE COURT: Wait, state that last statement.

5 MR. NEWLON: The parties have agreed, we don't need
6 records custodians. And I am not sure if this is in
7 response to the stipulation I made in interrogatories or
8 not. But I did make the stipulation that my client will
9 not make a claim for mental anguish and psychological
10 injury. And the reason behind that originally was because
11 there was a suicide attempt at some point in the course of
12 her treatment. I did get an email, I believe, and Mr.
13 Griffeth can correct me that he was not going to bring
14 that up unless I brought that up. I don't know if he made
15 that decision based on my stipulation or not. I was going
16 to ask him this morning if that was because of that or he
17 just wasn't going to go into it.

18 MR. GRIFFETH: Your Honor, we are not, had nothing to
19 do with Jon's stipulation. We are not going to get into
20 that. That is just something that doesn't need to be part
21 of this case and we consented as to one of the objections.
22 I think in Dr. Fuller's deposition was for him to strike
23 that when he presents that, however he wants to do. We
24 have no intention of getting into that.

25 MR. NEWLON: My intent there was to avoid the

1 introduction of the suicide attempt. Given that that is
2 the case I would simply like to amend, if I may, I am not
3 going to claim the psychological injury but for purposes
4 of mental anguish I would like to at least have a charge
5 to the jury on that if Jack doesn't have an objection to
6 that.

7 THE COURT: All right. We may be getting a little
8 ahead of ourselves. I was under the impression that we
9 weren't going forward on the mental anguish cause of
10 action.

11 MR. NEWLON: I wrote that in the interrogatories. I
12 was prepared to stipulate to that today at trial but then
13 I got this email about not going into the suicide attempt
14 and I thought the basis, the track into this suicide
15 attempt would be because we are claiming psychological
16 injury or mental anguish. But before I had an opportunity
17 to stand up before the Court and make the stipulations for
18 trial I got this email. And what I am saying is is that I
19 did that for the purpose of eliminating a track going into
20 the suicide attempt. Since the suicide attempt is not
21 coming in, that email came before, I am not going to make
22 a claim for psychological injury.

23 THE COURT: Right. So you are not making a claim for
24 mental anguish.

25 MR. NEWLON: What I would like to charge the jury and

1 I would like to make that claim but if Jack objects to it
2 then I will leave it out.

3 THE COURT: Any objection?

4 MR. GRIFFETH: Your Honor, I would have to object to
5 that, my understanding all along was that Jon was not
6 going to make a claim for mental anguish, psychological
7 injury.

8 MR. NEWLON: Okay.

9 MR. GRIFFETH: At one point and time he said he
10 wasn't going to claim it, depression and any of that other
11 kind of stuff. Although I think that those issues may in
12 fact incidentally are ancillary, you know, be touched upon
13 in other aspects, Your Honor, I would use as a mental
14 anguish case. We are relying on Jon's representation he
15 wasn't going there.

16 MR. NEWLON: That's fine. Then I would stipulate
17 that we would not make a claim specifically for mental
18 anguish and psychological injury and exclude those with
19 regard to damages. Actual damages, those will be excluded
20 from the charge.

21 THE COURT: All right.

22 MR. NEWLON: I also have, I was going to present a
23 motion in limine on the suicide attempt but that is not
24 necessary. However, there is a reference to, in
25 questioning this lady, about 19, now probably about 20

1 years ago was involved in a car accident and she suffered
2 a concussion in that accident. Okay. Now we have medical
3 records in her case that go back a certain distance, the
4 ones that I have I have seen go back to '02 which would
5 be, bear with me, which would be about seven years before
6 this accident. So there is thirteen years of medical
7 records that we don't have and in viewing her medical
8 records, while there are complaints of periodic headaches
9 a lot of it coincidentally with sinus problems and maybe
10 blood pressure problems there is nothing in the record for
11 that period of time having to do with chronic problems
12 resulting from an accident that happened or concussion she
13 may have experienced almost 20 years ago. And the defense
14 in this case, obviously in questioning the doctors and her
15 somehow want to create a preexisting condition that has
16 run all that time and now she suffers from that when there
17 is no clinical correlation of that. There is absolutely
18 nothing anywhere in her medical records between 20 years
19 ago that we have and the records we have up to the date of
20 this accident that she was experiencing chronic headaches
21 from a concussion that she experienced 20 years ago.
22 There is no temporal proximity, there is no clinical
23 correlation, we don't have the records, we have no idea
24 the gravity of the accident, we have no idea what the
25 clinical diagnosis was at the time. And I would object to

1 the use or reference of that accident in this particular
2 case without there being a proper foundation both
3 clinically and temporally with regard to a concussion that
4 she may or may not of had 20 years ago.

5 THE COURT: Mr. Griffeth.

6 MR. GRIFFETH: I am sorry, Your Honor, very briefly.
7 Mr. Newlon, this is the point. The point is that she
8 claims some concussion or post-concussion syndrome as a
9 result of our accident. In a letter that she wrote to Dr.
10 Fuller before she saw him in May of '09 following this
11 January of '09 she graphically describes, I had a
12 concussion and I know what a concussion is because I was
13 involved in a motor vehicle accident a number of years
14 ago. She didn't say when. And she says, and I know what
15 a concussion feels like. Now the question, Your Honor, is
16 not, you know, she is claiming, not the doctors claiming,
17 it has nothing to do with the medical places, she is
18 claiming that she knows what a concussion is and we are
19 entitled to question her on that point and ask to, whether
20 or not there was a concussion that was diagnosed. One of
21 the key elements here was, was the concussion diagnosed
22 when she first went to the hospital the day after this
23 accident. And I think that if she knew as she represented
24 to Dr. Fuller that she had had a concussion before, a
25 severe one, she would have reported it to the ER when she

1 went the day after this accident. So it is relevant, Your
2 Honor, to what she knew and how she felt and whether or
3 not it was reported. So it don't make any difference, she
4 says she had one. She is the one who reported, whatever
5 the basis of that, whatever the diagnosis of that is not
6 important. She says she knew what one was because she had
7 had a major one and we intend to cross-examine her on that
8 point. We think that is fair and right.

9 MR. NEWLON: Well, if he is going to rely on her
10 testimony, she gets up on the stand and says, yes, I had
11 that concussion, it was severe years ago but I got no
12 treatment for it for 12 years and I did not go to a doctor
13 for it of 7 years of records. Then right then and there
14 there is no relevance.

15 THE COURT: Well, he is saying that it is relevant
16 because your client basically said that she knows what a
17 concussion feels like because she had one 20 years ago. I
18 don't know if this is going to rise to the level of a
19 preexisting condition or not. That is going to be
20 dependent upon the testimony that we take tomorrow from
21 the medical experts and from the doctors and what comes
22 out on the record and what comes out on cross. For
23 purposes of going forward today I will allow the defense
24 to explore that, I do think it is relevant. At the same
25 time, Mr. Newlon, you will be at liberty to explain that

1 she is not suffering from any of the ill affects of that
2 concussion for 7, 10, 15, whatever the case may be, years.
3 I mean, I understand your position but I don't know that,
4 I don't know that I necessarily will be charging the jury
5 on a preexisting condition. Y'all are more familiar with
6 the depositions and the videos than I am. Do you
7 anticipate, Mr. Griffeth, requesting a charge on
8 preexisting condition on this case?

9 MR. GRIFFETH: Not on the matter of concussion, Your
10 Honor. There will be some preexisting conditions that we
11 believe we can show on preexisting, some of the claims
12 that she has made. But as far as concussion comes in, it
13 has to do chiefly, Your Honor, and Mr. Newlon knows this,
14 with what happened at her initial ER visit, whether or not
15 she was diagnosed with a concussion, whether or not she
16 reported a concussion, there are going to be witnesses who
17 say that she had this concussion. But our argument I
18 think is fair game, Your Honor, the absence of any report
19 of a concussion in her first medical report indicates that
20 she didn't tell them. It is more impeachment, Your Honor,
21 than it is for preexisting medical condition.

22 THE COURT: Let's see where the testimony goes, I
23 will reserve judgment on that but you will be at liberty
24 to cross-examine her on it because she brought it up
25 apparently at the initial medical visit. And of course

1 you will have some latitude on redirect or on direct to
2 address that, Mr. Newlon.

3 MR. GRIFFETH: Thank you, Your Honor.

4 THE COURT: Let's go ahead and have the jury out if
5 we could.

6 (Whereupon, the jury came into open court at
7 approximately 9:55 a.m.)

8 THE COURT: Ladies and gentlemen of the jury, we are
9 about to begin the case of Ms. Jennifer Harmon versus
10 Allen Lee Fortner and Jason Chad Griffin, case
11 10-CP-24-1236. And before we begin the case I need to
12 appoint a foreperson and Mr. Dorroh, I am going to appoint
13 you the foreperson of the jury. When you come back out
14 you will sit where the gentleman in the black shirt is
15 sitting. You are the alternate, Ms. Smith, if you will
16 stay in that seat throughout the course of the trial. The
17 rest of you can feel free to move about as you want to.
18 If anyone is having difficulty hearing anything that is
19 being said simply raise your hand and I will ask the
20 lawyers to speak up. Ladies and gentlemen, as part of
21 your role as jurors it is going to be necessary for you to
22 take an oath to try this case. If you would stand and
23 raise your right hand so the clerk can administer that
24 oath to you.

25 (Whereupon, the jury was sworn at approximately 9:57

1 a.m.)

2 THE COURT: Let the record reflect that all twelve
3 jurors did in fact take the oath. Ladies and gentlemen,
4 for those of you who were on the previous trial that we
5 began on Monday, I am going to apologize ahead of time
6 because what I say now in these introductory remarks are
7 going to be a repeat on what you heard on Monday. Again,
8 ladies and gentlemen, we are here about the case, case
9 number 10-CP-24-1236, Jennifer Harmon Scott, plaintiff,
10 versus Allen Lee Fortner and Jason Chad Griffin,
11 defendants. And before we begin this trial I want to
12 explain to you of course this trial is probably going to
13 be a little different from anything that you may have come
14 to expect from reading about trials or books or watching
15 them on TV. From what we see in the popular media and the
16 popular culture many people get impressions that trials
17 move along at lightening speed and they are filled with
18 intense drama and riveting circumstances and plot lines.
19 And sometimes that is true, ladies and gentlemen, it is
20 always pleasant when that is true but more often than not
21 trials take a long time. And their reason for that is
22 what we are engaged in here today and tomorrow constitutes
23 a search for the truth and sometimes looking for the truth
24 and finding the truth takes more time than the hour that
25 they portray on television. So I will tell you that in

1 all likelihood this is not going to be like TV. I will
2 ask during the course of the trial that you pay close
3 attention to the witnesses, that you pay close attention
4 to the Court and to the attorneys and I will tell you that
5 I have worked with these lawyers before and they are
6 exceptional professionals. They are sworn to uphold the
7 integrity of this Court and this process and I am sure
8 that they will be ethical and prompt and diligent in their
9 dealings with us here today as we proceed through this
10 trial. Now, ladies and gentlemen, what I now say to you
11 is intended to serve as an introduction to the trial of
12 this case and these remarks are not to be taken as a
13 charge on the law that applies. I will instruct you on
14 the law that applies at the conclusion of this trial
15 before you retire to deliberate your verdict. You have
16 been selected as fair and impartial jurors whose purpose
17 it is is to find and determine the facts in this case.
18 You are the sole judges of the facts in this case. So if
19 at any time I make any comments concerning the facts on
20 this case you must disregard those comments because the
21 law simply does not allow me to have any opinion
22 concerning the facts of any particular case tried by a
23 trial jury. That is solely your province to determine.
24 You are to determine these facts from the testimony you
25 hear and from the other evidence which is presented

1 throughout the course of the trial. You shouldn't be
2 influenced by any opinions or statements you may have
3 heard outside of this courtroom and it is especially
4 important that you perform your duty in determining the
5 facts in this case diligently and conscientiously because
6 ordinarily there is no way to correct an erroneous
7 determination of facts by a trial jury. Now when you have
8 complied with your oath to impartially determine the facts
9 of this case you will have fulfilled your duty as jurors
10 and no one will have the right to criticize your verdict
11 whatever it may be. Ladies and gentlemen, on the other
12 hand and with equal emphasis the same law that makes you
13 the judge of the facts of a case makes me the Judge of the
14 law of a case. You must accept and apply the law even
15 though you may disagree with it and you can't disagree
16 with me about what the law is just as I cannot comment on
17 or have any opinion as to what the facts ultimately are.
18 Your job is to take the law as I give it to you, apply it
19 to the facts as you find them to be and thus render a true
20 and just verdict under the oath that you have just taken.
21 Now, ladies and gentlemen, until I advise you to begin
22 your deliberations please don't discuss this case with
23 anyone including friends, family members, your fellow
24 jurors, you can't talk about the case at all with anyone
25 until the case is concluded and you have received my

1 charge on the law and I tell you that you can start
2 talking about the case. It is very important that you not
3 engage in any sort of independent research about this
4 case. If you need information on this case I assure you
5 it will be presented throughout the course of this trial.
6 So don't take it upon yourself to perform any sort of
7 internet search, don't google the people's names, and the
8 reason for this, ladies and gentlemen, is very simple. As
9 you are probably aware there is a lot of stuff out there
10 on line, a lot of stuff out there on the internet which
11 just isn't true. And the rules of evidence and the rules
12 of court are designed to give you the best possible
13 evidence. Media, the internet, online stuff, that is not
14 subject to the same sort of instructions that we have
15 concerning the rules of evidence so that information is
16 not as trustworthy as what you hear in court. It would
17 also be a violation of your oath as jurors if you were to
18 undertake any sort of internet search. So again please
19 don't do that. Now, ladies and gentlemen, I have
20 instructed the lawyers and the parties involved in this
21 case not to have any contact with you throughout the
22 course of the trial so if you happen to see anyone coming
23 or going from the court house and they don't say hi to
24 you, they don't say hello to you, they don't acknowledge
25 you, understand they are not being rude. They are simply

1 following my instructions not to have anything to do with
2 you while the case is going on. Now, ladies and
3 gentlemen, in a moment the lawyers will make their opening
4 statements. I will instruct you that what the lawyers say
5 during their opening statements is of course not evidence
6 in this case. It is simply their contention as to what
7 will be proven or what will not be proven during the
8 course of this trial. Even though it is not evidence you
9 should certainly pay attention to the lawyers and what
10 they say to you because it is basically, their opening
11 statements will be the roadmap that they intend to offer
12 you to take you through the trial of this case. Now from
13 time to time during the trial, ladies and gentlemen, you
14 may hear one of the lawyers say something like, Your
15 Honor, can we approach the bench or Your Honor, we have an
16 objection we need to take up. Sometimes I might find it
17 necessary therefore to let you leave the courtroom so that
18 I can take up an issue of law with the lawyers. I will
19 tell you the reason I am asking you to leave the courtroom
20 is that sometimes in ruling on an issue of law it is
21 necessary for me to comment on what facts have been
22 introduced into the record or what hasn't been introduced
23 into the record. And I don't want any comment that I make
24 concerning a ruling on the law to affect what you
25 ultimately find the facts to be. So I ask that you step

1 out of the courtroom for a few moments while I take up
2 that issue of law with the lawyers. Again, I can't tell
3 you what the facts are in this case, that is for y'all to
4 determine. That is the reason I might ask you to leave
5 periodically throughout the course of the trial. During
6 those breaks when I am taking up an issue of law please
7 don't speculate on what it is that we are talking about
8 out here because you could very well be wrong. I assure
9 you the evidence that you get through this witness stand,
10 the exhibits that are introduced will be sufficient for
11 you to reach a verdict. Now, ladies and gentlemen, by
12 necessity in determining what the true facts in this case
13 are you must decide whether or not the testimony of
14 witnesses is believable or not. It will be my
15 responsibility to rule as a matter of law whether certain
16 testimony is admissible or not. Once the testimony is
17 admitted, whether or not you believe it is solely for you
18 to determine. In deciding whether to believe a witness,
19 ladies and gentlemen, you have the right to consider
20 whether the witness has an interest in the result of the
21 trial, whether the witness is prejudice towards either the
22 plaintiff or the defendant, the opportunity for the
23 witness to have seen the matters and things about which
24 the witness testifies. You have the right to consider the
25 way the witness acts on the witness stand. In short you

1 have the right to consider anything that is in the record
2 in this case that will help you evaluate the testimony of
3 the witnesses. That means it is important that you pay
4 attention to the witnesses, observe them, listen to them,
5 pay close attention to the attorneys and the Court and try
6 to keep your thoughts from wondering while the trial is
7 going on. Therefore at the end of the trial if you have
8 done everything I have asked you to do you will be in a
9 good position to render a true and just verdict based upon
10 the facts that you find them to be. Now, in order to
11 preserve everyone's rights I will give the lawyers an
12 opportunity to object to anything that I have said to you
13 during these opening remarks and then we will begin the
14 trial. Any objection from the plaintiff?

15 MR. NEWLON: No, sir.

16 MR. GRIFFETH: Nothing from the defense, Your Honor.

17 THE COURT: We will now begin the trial. Mr. Newlon,
18 you are recognized, sir.

19 MR. NEWLON: Can we approach just one second?

20 THE COURT: Please.

21 (Whereupon, a bench conference was held in the
22 presence of the jury but out of the hearing of the
23 jury.)

24 (Whereupon, the opening statements from Mr. Newlon
25 and Mr. Griffeth were presented to the jury.)

1 THE COURT: Ladies and gentlemen, we will take a
2 short break at this time. Do not discuss the case. When
3 we come back, Mr. Dorroh, sit in this side chair over
4 here. I forgot to tell you that your vote will count no
5 more or no less than any other juror's vote. Your job is
6 to make sure that everyone has a fair say once you start
7 deliberating the case, you are kind of the first among
8 equals as far as the jury is concerned. We will be at
9 ease for about ten minutes and then we will proceed.
10 Thank you.

11 (Whereupon, the jury was excused from open court for
12 a break.)

13 THE COURT: Let's have the jury back, please.

14 (Whereupon, the jury came into open court at
15 approximately 10:55 a.m.)

16 THE COURT: Let the record reflect that the jury is
17 back and seated. Mr. Newlon, if you will call your first
18 witness, please, sir.

19 MR. NEWLON: The plaintiff calls Mr. Fortner to the
20 stand in examination of Rule 611.

21 THE COURT: Please be sworn, please, sir.

22 ALLEN LEE FORTNER, being
23 first duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 By Mr. Newlon:

1 Q State your full name for the record, please.

2 A Allen Lee Fortner.

3 Q And, Mr. Fortner, you have rented 107 Allison Drive
4 to Ms. Scott?

5 A Alice Avenue, yes sir.

6 Q Alice Avenue, I am sorry, I keep wanting to say that.
7 May I approach, Your Honor?

8 THE COURT: Please.

9 Q Let me hand you what I am going to mark as
10 plaintiff's exhibit number 1, is that a picture of the
11 house number?

12 A Yes sir, it looks like it.

13 Q Okay. Let me hand you what is marked as plaintiff's
14 2. Is that the water heater you were working on in the
15 kitchen?

16 A Yes, sir.

17 Q Let me hand you what is marked as plaintiff's exhibit
18 3. Is that a photograph of the inside of that house?

19 A Yes, sir.

20 Q Is that you standing there in the dark shirt?

21 A Yes, sir.

22 Q Is that Chad over there to the right by the doorjamb?

23 A Yes, sir.

24 Q And is that looking into the laundry room?

25 A No, we are actually standing in the laundry room

1 looking into the kitchen.

2 Q Got you, that is what I mean. You were standing in
3 the laundry room?

4 A Yes.

5 Q Thank you very much. Let me hand you plaintiff's
6 exhibit 4. And there is someone standing to the left of
7 that photograph. Do you recognize who that might be?

8 (Whereupon, Plaintiff's Exhibit 1, 2, 3 and 4 were
9 admitted into evidence.)

10 A Chad Griffin.

11 Q Okay. Is that looking from the laundry room into the
12 dining area?

13 A Into the kitchen.

14 Q Into the kitchen area?

15 A Yes.

16 Q On the wall there, is that the circuit breakers that
17 would have controlled the water heater?

18 A Right, yes sir.

19 Q And from your recollection was that ladder, at that
20 time, placed between the clothes rack and the doorjamb
21 over the top of the circuit breakers?

22 A Yes, sir.

23 Q And I have a picture of it just for purposes of the
24 record, the ladder, of a ladder and if you look at the
25 photograph and you look at the yellow plastic portion and

1 if you look at that ladder back there against the wall, it
2 looks like it has a little chip or something. Is that the
3 same ladder as best you can tell?

4 A Are these two the same?

5 Q Yes, sir.

6 A They are made by the same company but are they the
7 same ladders, I don't, I couldn't answer that.

8 Q Okay. Can you tell me whether or not that picture or
9 that ladder or a combination appear to be the same ladder
10 that was in the laundry room that day?

11 A Does it appear to be, yes sir.

12 Q Now for purposes of this house, I don't want to say
13 it wrong again, 107 Alice Avenue?

14 A Right, yes sir.

15 Q You are the landlord, correct?

16 A Yes, sir.

17 Q And to some extent as far as the major repairs, you
18 took responsibility for that, correct?

19 A Yes, sir.

20 Q And on this particular day you responded to a request
21 by Ms. Scott to repair the water heater?

22 A Yes, sir.

23 Q You asked Chad Griffin to assist you, correct?

24 A Yes, sir.

25 Q And during that time Chad was acting at your

1 direction?

2 A Yes, sir.

3 Q At your request?

4 A Yes, sir.

5 Q Now isn't it true that prior to you working on the
6 water heater, while you all were working on the water
7 heater that you all had traversed, gone through the
8 laundry room a number of times?

9 A Yes, sir.

10 Q And both of you, but you can testify for yourself,
11 you saw that ladder sitting there in the laundry room
12 leaning against the wall, correct?

13 A Yes, sir.

14 Q And at no time in observing that ladder during that
15 time did you ever mention to Ms. Scott or Mr. Griffin that
16 the ladder was in an unsafe position or it was unstable,
17 correct?

18 MR. PLYLER: Objection, Your Honor, he is leading the
19 witness.

20 MR. NEWLON: Your Honor, it is under 611.

21 THE COURT: It is under 611. I will allow it, go
22 ahead.

23 Q Isn't it true that at no time in your observing that
24 ladder did you ever indicate to Ms. Scott or Mr. Griffin
25 that it was unsafe or unstable as it was leaning against

- 1 the wall?
- 2 A No, sir.
- 3 Q That is true, you did not.
- 4 A That is true, I did not.
- 5 Q And at one point you sent Chad to flip the circuit
- 6 breaker?
- 7 A Yes, sir.
- 8 Q And Chad went into the laundry room to flip the
- 9 circuit breaker?
- 10 A Yes, sir.
- 11 Q And then you heard a commotion?
- 12 A Yes, sir.
- 13 Q And that you did not see how the ladder fell,
- 14 correct?
- 15 A Correct.
- 16 Q And you did not see the ladder, if it hit or how it
- 17 hit Ms. Scott, correct?
- 18 A Correct.
- 19 Q Do you agree with me that you are good friends with
- 20 Chad Griffin, right?
- 21 A Yes, sir.
- 22 Q And you also agree with me that Chad admitted to you
- 23 that he bumped the ladder?
- 24 A Yes, sir.
- 25 Q And that right after this incident you noticed a

1 scratch on Jennifer's nose, correct?

2 A Yes, sir.

3 Q And that you heard her scream?

4 A Called my name.

5 Q Say again?

6 A Called my name, yes sir.

7 Q She called your name?

8 A Yes, sir.

9 Q Screamed out your name?

10 A Called, I would say not really scream but called my

11 name, yes sir.

12 MR. NEWLON: If I may approach the witness, Your

13 Honor.

14 THE COURT: Please.

15 MR. NEWLON: Can I break the seal?

16 THE COURT: Yes.

17 Q What I am going to do, Mr. Fortner, if you will look,

18 this is a deposition that I took of you in the past. The

19 pages are in the upper right hand corner and the lines are

20 along there and I will reference it that way to you.

21 Okay.

22 A Okay.

23 Q I want you to go to page 19. Start on line 1. I

24 asked, did he indicate whether or not she was bleeding.

25 What did he say, Chad Griffin.

- 1 A What did Chad say?
- 2 Q Yes.
- 3 A That would be number 2?
- 4 Q Yes.
- 5 A Said, he said he didn't see no blood.
- 6 Q Did he indicate whether or not she said anything.
- 7 And what was your response?
- 8 A Yeah, I heard her scream.
- 9 Q So in fact you did hear her scream, right?
- 10 A Scream, holler, yeah, calling my name.
- 11 Q And in fact following this incident you saw blood on
- 12 her nose too, true?
- 13 A Yes, sir.
- 14 Q And that you had seen Ms. Scott on numerous occasions
- 15 or at least on several occasions after this incident and
- 16 at least the next couple of weeks, correct?
- 17 A Yes, sir.
- 18 Q And then based on your observations it took a couple
- 19 of weeks for her scratch to heal?
- 20 A Yes, sir.
- 21 Q And she told you she was having headaches?
- 22 A Yes, sir.
- 23 Q And as a tenant she paid her rent on time?
- 24 A Yes sir, as far as I can remember.
- 25 Q She left the house better than most people leave your

1 rentals, correct?

2 A Yes, sir.

3 Q And based on your observations of this incident, how
4 this thing happened, you didn't observe Jennifer do
5 anything to cause or contribute to the ladder falling
6 down, correct?

7 A Correct.

8 Q And you did not observe anything unsafe or dangerous
9 about the ladder while you were there or how it was
10 placed, correct?

11 A I just saw it propped up against the wall, leaning
12 against the wall.

13 Q Let's go to page 25. Start on line 1. Go ahead and
14 read what you said starting on line 1.

15 A On number 1. It was standing up right against the
16 wall. I mean that is about all I can tell you about that.

17 Q Was it leaning against the wall?

18 A It was propped just about straight up against the
19 wall, leaning on the wall.

20 Q Did you notice anything unsafe or dangerous about it?

21 A No, sir.

22 Q So you didn't notice anything unsafe or dangerous
23 about it, correct?

24 A No sir, it was just leaning, propped up against the
25 wall.

1 Q Okay. And in the process of you repairing the water
2 heater you sought no assistance from Jennifer, correct?

3 A Right, correct.

4 Q That is all I have. Thank you.

5 THE COURT: Mr. Plyler.

6 CROSS-EXAMINATION

7 By Mr. Plyler:

8 Q Good morning, Mr. Fortner.

9 A Good morning.

10 Q Where do you live now?

11 A Where do I live now, in Ninety-Six.

12 Q How long have you lived in Ninety-Six?

13 A All of my life, 40 years.

14 Q 40 years?

15 A Yes, sir.

16 Q How old are you?

17 A 40.

18 Q Are you married?

19 A Yes, sir.

20 Q What is your wife's name?

21 A Angie Fortner.

22 Q Is she from the area?

23 A Yes, sir.

24 Q How long has she lived in the area?

25 A All of her life.

- 1 Q And how old is she?
- 2 A You are asking a million dollar question, 35, 36.
- 3 Q She is not here so we are not worried about her
- 4 getting offended by my question.
- 5 A Right.
- 6 Q Do you go to church?
- 7 A Yes, sir.
- 8 Q Where do you go to church?
- 9 A Siloam Baptist Church.
- 10 Q Are you in business?
- 11 A Yes, sir.
- 12 Q What kind of business are you in?
- 13 A We are in car, auto sales and general contractor.
- 14 Q What is the name of your business?
- 15 A Fortner Motor and Fortner Builders.
- 16 Q And what exactly do you guys do?
- 17 A We sell cars and we are general contractors, build
- 18 mostly buildings.
- 19 Q Chad Griffin here, he works for Fortner Builders?
- 20 A Right, yes sir.
- 21 Q What does Chad normally do for you, in his work at
- 22 Fortner Builders?
- 23 A He more or less oversees the jobs, the construction
- 24 part of it.
- 25 Q How long has he been with you, do you know?

1 A What, ten, I am going to say somewhere around ten
2 years or so.

3 Q How long have you known him?

4 A All of my life, we went to school together and was
5 raised together.

6 Q All the way up through school?

7 A Right, yes sir.

8 Q And started working together?

9 A Yes, sir.

10 Q Now I think you told Mr. Newlon a little while ago
11 that you owned some rental houses in the area?

12 A Yes, sir.

13 Q And you do most of the work on these rental houses
14 yourself, right?

15 A Yes, sir.

16 Q They each require a certain amount of maintenance and
17 upkeep and everything from painting to major repairs?

18 A Right, yes sir.

19 Q You do most of that stuff yourself?

20 A Yes, sir.

21 Q Chad helps you?

22 A Yes, sir.

23 Q The plaintiff's counsel showed you a picture of one
24 particular house, 107 Alice Avenue. And this particular
25 house you rented to the plaintiff in the case?

1 A Yes, sir.

2 Q How long had you owned this house at Alice Avenue
3 before you rented it to the plaintiff?

4 A Let me see, I think I bought that house in about '92
5 or '94.

6 Q And do you own it any more?

7 A No, sir.

8 Q Tell me about this house. Now we seen a few pictures
9 of it. The kitchen, the laundry room, the address number
10 on the top of the door. Tell me about the house, what
11 does it look like, how many bedrooms does it have?

12 A Two bedrooms, one bath, kitchen, living room and then
13 a small utility room on the back.

14 Q Is the utility room the same you talked about the
15 laundry room?

16 A Laundry room, yes sir.

17 Q Do you have any idea how high the ceilings are in
18 that house?

19 A They are a little under ten feet, the utility room is
20 approximately about nine foot and three inches or so.

21 Q Is that height, is the ceiling in the laundry room
22 different from the ceiling height of the rest of the
23 house?

24 A Yes, the rest of the house is probably more closer to
25 ten feet.

1 Q Do you have any idea whether that was, the laundry
2 room was added on sometime after the house was built?

3 A Yes sir, they was added on.

4 Q And you told us today that you rented the house to
5 the plaintiff. Do you remember how long she had been in
6 the house before this particular accident we are talking
7 about?

8 A I am going to say a couple of moneths, the exact date
9 I really don't remember.

10 Q I believe you told the ladies and gentlemen that the
11 rent got paid?

12 A Yes, sir.

13 Q There weren't any wild parties or anything like that?

14 A Right, yes sir.

15 Q She was a good tenant?

16 A Yes, sir.

17 Q The date of this particular accident, January 8th of
18 2009, you told us a little while ago that you got called
19 to the house that day?

20 A Yes, sir.

21 Q And the specific reason you got called was what?

22 A To fix the hot water heater.

23 Q And you showed us a picture, you identified a picture
24 of the hot water heater. I can't remember which exhibit
25 that was but that is one of those things that, kind of a

1 lowboy that it sits underneath the cabinet, underneath the
2 countertop?

3 A Yes, sir.

4 Q And you took Chad Griffin there with you. Why did
5 you take Chad with you that day?

6 A In case the hot water heater had a hole in it and
7 then, or if it was something we had to tear out I would
8 have needed some extra help or extra hand.

9 Q Tell me about, when you go out or when you went to
10 repair the hot water heater, tell me about the process,
11 tell me what you guys went through once you got to the
12 house that day?

13 A Normally when you go to check a hot water heater the
14 first thing you do is check the power if it is not putting
15 out the hot water. So if it has power then you have one
16 or two things that could be wrong with it. It could have
17 a burnt out element or it could have a burnt thermostat.
18 So the first thing we do was go in there and pull the
19 panel off the hot water heater, check to see if it had
20 power. It had power. So I got Chad to flip the breaker
21 off. He flips the breaker off and we figured that the
22 elements are burned out so we have to go outside to get a
23 hose pipe, drag in through the backdoor and hook to the
24 hot water heater, unhook the hose pipe, pull it back out
25 the door, change the elements. Then fill it back up with

1 water and then once it gets filled back up with water you
2 flip the breaker on and check and make sure it is working.
3 And that is basically the routine.

4 Q About how long does this little process take?

5 A I would say fifteen to thirty minutes give or take if
6 nothing goes wrong, everything goes smooth. Sometimes it
7 could take up to close to an hour.

8 Q Do you remember how long it took in this particular
9 case when you got to the plaintiff's rental house?

10 A I would say probably thirty to forty minutes.

11 Q And the whole time that you and Mr. Griffin were
12 there the plaintiff was around the house?

13 A Right, yes sir, she was walking around.

14 Q She wasn't helping you or anything, she was just kind
15 of around doing her own thing?

16 A Right, yes sir.

17 Q Now, we talked a little bit, when you were talking to
18 plaintiff's counsel about the ladder and you said that
19 that ladder that is behind the ladies and gentlemen of the
20 jury, you are pretty sure, it looks like it but you can't
21 be positive that is the ladder?

22 A Right, yes sir.

23 Q But you don't have any reason to dispute, that is
24 approximately what it looked like. You said this ladder
25 was in the laundry room, in the utility room, right?

1 A Yes, sir.

2 Q And that is the space of the house that was added on
3 to the house after the fact, sometime later?

4 A Yes.

5 Q And you saw a photograph of the ladder and you said
6 it was sitting against the wall generally in the same
7 position as it sits right there against that wall?

8 A Yes, sir.

9 Q And the feet or the points of the ladder will be in
10 the same position on that wall as they were on the wall of
11 the laundry room in the plaintiff's rental house?

12 A Yes, sir.

13 Q You guys didn't bring this ladder in with you, did
14 you?

15 A No, sir.

16 Q It was there when you got there?

17 A Yes, sir.

18 Q Was the ladder necessary to do any work on the hot
19 water heater?

20 A No, sir.

21 Q Did you use the ladder at all while you were there?

22 A No, sir.

23 Q Are you familiar with those type of ladders?

24 A Yes, sir.

25 Q What is a ladder like, what is a ladder made of?

- 1 A Fiberglass, plastic and aluminum.
- 2 Q Tell me what part of it is fiberglass?
- 3 A That would be the blue part, the legs.
- 4 Q The blue, the sides?
- 5 A Right, the blue to sides, the legs.
- 6 Q What part of the ladder is metal?
- 7 A The runners or the steps.
- 8 Q You are talking about these things?
- 9 A Right, aluminum.
- 10 Q The fiberglass, the aluminum here. You said the last
- 11 element is plastic?
- 12 A Plastic.
- 13 Q What part of this ladder is plastic?
- 14 A That would be the yellow top cap.
- 15 Q Yellow top here?
- 16 A Right, yes sir.
- 17 Q You told us and the ladies and gentlemen earlier that
- 18 you didn't see this ladder fall?
- 19 A Yes, sir.
- 20 Q That is right, you didn't see it?
- 21 A Right, I didn't see it fall.
- 22 Q So you don't know how it fell and you don't know how
- 23 it hit the plaintiff?
- 24 A Right, I don't have no idea.
- 25 Q And we know that you heard her yell, scream or call

1 out, something and you went to see what happened?

2 A Yes, sir.

3 Q What did you notice about the plaintiff when you
4 first saw her?

5 A She was in the bathroom standing in front of the
6 mirror and sink in front of her and she had a piece of
7 toilet paper stuck on the bridge of her nose. And I told
8 her, I asked her to take it off to look at it. And she
9 pulled it off and she looked all right to me. She had a
10 small scratch right on the bridge of her nose. A little
11 bit of blood, that was on the piece of toilet paper. She
12 had no runny eyes or black eyes or bleeding from the nose.
13 And I told her it was just a small scratch there, that she
14 would be all right.

15 Q That is the first time you saw the plaintiff after
16 this accident happened?

17 A Right, yes sir.

18 Q Was she, did she complain about anything to you, did
19 she say anything to you?

20 A At the time, when we was in the bathroom?

21 Q Yes.

22 A I really can't remember.

23 Q How was she acting?

24 A She was a little upset. Then we talked for a little
25 bit and then she got calmed down and then we went back and

- 1 finished doing what we was doing and we left the house.
- 2 Q How much longer did it take you to finish the job?
- 3 A I am going to say five or so minutes after that.
- 4 Q You guys were about finished up by the time this
- 5 happened?
- 6 A Right, yes sir.
- 7 Q And you didn't have to replace the whole hot water
- 8 heater?
- 9 A Right, just elements.
- 10 Q Just the element?
- 11 A Yes, sir.
- 12 Q And you say you were there at the house, 107 Alice
- 13 Avenue for about ten more minutes?
- 14 A Yes, five to ten more minutes, yes sir.
- 15 Q Did you, you didn't take her to the hospital?
- 16 A No sir, she looked fine.
- 17 Q You didn't take her to the doctor?
- 18 A No, sir.
- 19 Q Did you ever see her after this particular day?
- 20 A Yes, sir. It was probably a week or two later I had
- 21 to go by and pick the rent check up. I saw her then, I
- 22 think we talked on the front porch for a second or two.
- 23 Q A brief conversation?
- 24 A Yes sir, right, a brief conversation.
- 25 Q Is that the only time you remember seeing her

1 afterwards?

2 A Yes sir, I think so.

3 Q And in that brief conversation did you get a good
4 look at her, at the bridge of her nose there?

5 A Yes, sir.

6 Q What did it look like at that point?

7 A Had a small scab on it.

8 Q That is all I have, thank you.

9 THE COURT: Redirect.

10 REDIRECT EXAMINATION

11 By Mr. Newlon:

12 Q Mr. Fortner, just so I understand, you saw a scratch,
13 you saw blood on the tissue that came from her nose and
14 you saw a scab two weeks later, is that correct?

15 A A week or two, whatever it was, yes sir.

16 Q And during that, I believe in your prior testimony in
17 your deposition, you said two weeks, be that as it may, if
18 within that two week period or whenever you saw her next
19 you didn't see her in between at all?

20 A Not that I can remember I didn't.

21 Q So as far as what other manifestations of injury or
22 anything like that there may have been you didn't witness
23 it for those two weeks, correct?

24 A Right, yes sir.

25 Q And what was your total time at the house from the

1 time you showed up to the time you left, finished?

2 A I would say probably thirty to no more than fifty
3 minutes.

4 Q Between thirty to fifty minutes?

5 A Right, yes sir.

6 Q Thank you, I have no further questions.

7 THE COURT: Thank you, sir, you may step down. Call
8 your next witness, please.

9 MR. NEWLON: Call Mr. Griffin to the stand and again
10 examination under Rule 611.

11 CHAD GRIFFIN, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 By Mr. Newlon:

15 Q Please state your full name.

16 A Jason Chad Griffin.

17 Q Okay. Mr. Griffin, do you remember the date of this
18 incident?

19 A Sir?

20 Q Do you remember the day of this incident, the day or
21 date?

22 A January the 9th, I do not remember the day of the
23 week, no sir.

24 Q On that day you were helping out Mr. Fortner?

25 A Yes.

1 Q Okay. He has already testified, I don't want to go
2 through all of the circumstances, you were helping him fix
3 the water heater?

4 A Yes, sir.

5 Q And he basically was asking for your assistance,
6 instructing you how to help?

7 A Yes, sir.

8 Q At one point he asked you to go turn off the circuit
9 breaker?

10 A Yes, sir.

11 Q Looking at plaintiff's exhibit 4, that has been
12 identified as a photograph of a wall in the laundry room
13 and there are circuit breakers on the wall. Are those the
14 circuit breakers you went to touch?

15 A Yes, sir.

16 Q On the day of this incident was there a ladder akin
17 to that ladder over there leaning against the wall over
18 the top of the circuit breakers?

19 A Yes, sir.

20 Q You reached between the ladder and the wall to flip
21 the circuit breaker?

22 A Yes, sir.

23 Q With your right arm?

24 A Yes, sir.

25 Q In fact on that day, and I think Mr. Fortner has

1 indicated that y'all were there for about thirty to fifty
2 minutes, somewhere in that ballpark?

3 A Yes, sir.

4 Q You had gone through that ladder a number of times, I
5 mean the laundry room a number of times, correct?

6 A Yes, sir.

7 Q And you had seen that ladder on the wall, right?

8 A Yes, sir.

9 Q And you never said anything to Jennifer about the
10 ladder being precariously positioned or it was unsafe or
11 anything, correct?

12 A No, sir.

13 Q And in fact you didn't even recognize that it was
14 precariously placed or unsafe, isn't that true?

15 A No, sir.

16 Q That is not true, you didn't observe that it being
17 precariously placed or unsafe as it was leaning against
18 the wall?

19 A I mean I didn't pay that much attention.

20 Q Well, at one point it fell and separated from the
21 wall so we don't know where, you know, after that you
22 wouldn't be able to tell how it was placed or whatever?

23 A No, sir.

24 Q But during that time you were there, that thirty to
25 fifty minutes, you didn't see it or observe it in such a

1 way that you would say, oh, Ms. Fortner, I mean, Ms.

2 Scott, you need to move that ladder, it is precariously
3 positioned.

4 A No, sir.

5 Q Now, given the fact that the ladder has steps and it
6 is open like that isn't it true that if you were going to
7 throw that circuit breaker switch you could have actually
8 reached between the rails of the ladder over the top of
9 the step and actually flip that circuit breaker, couldn't
10 you? In other words, you didn't have to reach between the
11 wall and the ladder to flip that circuit breaker, you
12 could have done it from the front of the ladder, correct?

13 A I do not remember that, sir.

14 Q Well, I am just looking at the physics of it.

15 A Yes, sir.

16 Q It is not on a solid wall, correct?

17 A True.

18 Q And if that is leaning against the wall, as I sit
19 there, if there is a circuit breaker panel you could as a
20 practical matter reach from this side right here and throw
21 a circuit breaker, couldn't you?

22 A You could if the step wasn't in the way.

23 Q And in the process of throwing the circuit breaker
24 you made contact with the ladder causing it to fall,
25 correct?

1 A Yes, sir.

2 Q And you actually saw the ladder hit Ms. Scott in the
3 face, correct?

4 A When I turned around I got my hands on the ladder
5 about the time it hit her. So, yes, I was looking at her
6 when it made contact with her, yes sir.

7 Q You saw it hit her face?

8 A I knew it hit her, she had her hands up, I mean I
9 knew it hit her around her head.

10 MR. NEWLON: Your Honor, may I approach the witness?

11 THE COURT: Yes.

12 MR. NEWLON: And open the deposition?

13 THE COURT: Yes.

14 Q As I pointed out to Mr. Fortner, this is a copy of
15 the deposition, the page numbers is the upper right and
16 the line numbers are down along here. I will reference
17 page number and line number.

18 A Okay.

19 Q I took your deposition, what is the date of that
20 deposition on the front page?

21 A You are asking me?

22 Q Yes, sir.

23 A August 5th of 2011.

24 Q And you took an oath to tell the truth back then,
25 correct?

1 A Yes, sir.

2 Q I want you to flip to page 6 for me. And I asked you
3 questions in that deposition, you understood my questions,
4 correct?

5 A Yes, sir.

6 Q I said, on line 5, I said, did you actually see it
7 hit Ms. Scott in the face. And what is your answer?

8 A Yes.

9 Q Okay. And in fact you observed blood coming from her
10 face, correct?

11 A At that time, no sir.

12 Q Okay. When did you observe the blood?

13 A When she came in the kitchen she had a piece of paper
14 towel on her nose after her and Al had left the bathroom.

15 Q Okay. You would agree with me and that giving the
16 circumstances, well, first of all Ms. Scott was not
17 involved in the repair of the water heater, correct?

18 A No, sir.

19 Q She didn't assist you guys in any way?

20 A No, sir.

21 Q So you would agree with me that she had no idea that
22 you were going to reach for a circuit breaker at some
23 point, correct?

24 A No, sir.

25 Q In fact, at the time you reached for the circuit

1 breaker from the side instead from the front you
2 recognized that it was a little more straight up than it
3 should have been but you reached for the circuit breaker
4 anyway, correct?

5 A Yes, sir.

6 Q You would agree with me that Ms. Scott did not do
7 anything to cause or contribute to the fall of that
8 ladder?

9 A No, sir.

10 Q I mean you are agreeing, correct. We are doing a
11 double negative here, I want to make sure the record is
12 correct. You would agree with me, would you agree with me
13 that Ms. Scott didn't do anything to cause or contribute
14 to the fall of that ladder?

15 A Yes, sir.

16 Q And you, in fact, at that time when this happened
17 admitted to her that you knocked the ladder over, correct?

18 A Yes, sir.

19 Q Thank you very much. That is all the questions that
20 I have.

21 THE COURT: Mr. Plyler.

22 CROSS-EXAMINATION

23 By Mr. Plyler:

24 Q Mr. Griffin, you were at this house on 107 Alice
25 Avenue to do a job that day, right?

1 A Yes, sir.

2 Q And the job you did was to repair the hot water
3 heater that the plaintiff had called Fortner to come fix?

4 A To assist, yes sir.

5 Q He asked you to come help?

6 A Yes, sir.

7 Q Where do you live?

8 A In Ninety-Six.

9 Q How long have you lived in Ninety-Six?

10 A Forty years.

11 Q Pretty much all of your life?

12 A Yes, sir.

13 Q You have known Mr. Fortner, I guess, all of your
14 life?

15 A Yes, sir.

16 Q He has known you and you have known him?

17 A Yes, sir?

18 Q How long have you worked with Mr. Fortner?

19 A Between ten and eleven years.

20 Q And are you employed by, you are employed by Fortner
21 Builders?

22 A Fortner Builders, yes sir.

23 Q What is a typical day for you like working for
24 Fortner Builders?

25 A We build pole buildings. It can be a number of

1 things. We could either be doing grading with equipment,
2 putting poles in the ground, cementing them in, putting a
3 roof on, putting metal on the side. It is numerous things
4 but it is the same thing over and over.

5 Q And do you also assist in some routine maintenance on
6 these rental houses around, around the area?

7 A We didn't, it had been a while. But if they needed a
8 replacement window put in or something like that we would,
9 on the job we would go do something like that. But as far
10 as a lot of maintenance we didn't do a whole bunch.

11 Q But you were used to, kind of the way or the course
12 of your usual duties you would go by one of these houses
13 and fix something or repair something as needed?

14 A Yes, sir.

15 Q You heard Mr. Fortner describe the process of
16 repairing the hot water heater. I don't want to go
17 through all of that again for the ladies and gentlemen,
18 but you agree with the basic process of what it typically
19 takes, what you had to do that day?

20 A Yes, sir.

21 Q And he said that you guys were there between thirty
22 minutes and about fifty minutes, does that sound right to
23 you?

24 A Yes, sir.

25 Q No doubt that the plaintiff was at the house the

1 whole time that you guys were there doing the repair?

2 A Yes sir, she was there.

3 Q And the ladder, you got no reason to think that is
4 not the ladder that was in the laundry room or utility
5 room at the time?

6 A Sir?

7 Q The ladder that is sitting behind the ladies and
8 gentlemen here, you got no reason to believe that is not
9 the ladder that was in the laundry room or the utility
10 room when this accident occurred, right?

11 A I have no reason to believe that it is not, I mean it
12 is similar.

13 Q What is the ladder made of. Well, first of all, are
14 you familiar with that type of ladder?

15 A Yes sir, we have those.

16 Q You have those in your own work?

17 A Yes, sir.

18 Q But you didn't bring that ladder with you?

19 A No, sir.

20 Q Was that ladder needed for the repair of the hot
21 water heater?

22 A No, sir.

23 Q And it wasn't your ladder?

24 A No, sir.

25 Q It was there when you got there?

- 1 A Yes, sir.
- 2 Q And you moved around it, in the course of being there
- 3 repairing this thing, you had passed by this thing as you
- 4 were working in the house?
- 5 A Numerous time, yes sir.
- 6 Q What is that ladder made of?
- 7 A It is fiberglass, aluminum and plastic.
- 8 Q What are the elements of that, the fiberglass is
- 9 what. What part of it is fiberglass?
- 10 A The legs, the side part, the legs.
- 11 Q What part of it is metal?
- 12 A The rungs or the steps.
- 13 Q What part of it is plastic?
- 14 A The top cap, the very top of it.
- 15 Q The yellow part?
- 16 A The yellow part, yes sir.
- 17 Q Now do you remember what position that ladder was in?
- 18 A In that similar position.
- 19 Q Similar as it is sitting right there on that wall?
- 20 A Yes, sir.
- 21 Q Just like it was sitting on the wall in the laundry
- 22 room?
- 23 A Yes, sir.
- 24 Q You told the ladies and gentlemen a little while ago
- 25 that you, there is no doubt, it is clear that you bumped

1 this ladder?

2 A Yes, sir.

3 Q When you bumped it you were reaching behind there to
4 flip back on the breaker, because you guys had cut the
5 electricity off when you were working on this thing?

6 A Yes, sir.

7 Q At this point you were finished with the job?

8 A Yes, sir.

9 Q And you were cutting the breaker back on?

10 A Back on, yes sir.

11 Q To restart it, figure out and make sure everything
12 worked?

13 A Yes, sir.

14 Q And y'all had replaced the heating element in this
15 thing?

16 A Yes, sir.

17 Q And you had to drag the hose in and drain it, the
18 hose was in there to fill it back up?

19 A No sir, you drain it with a hose and I went back
20 outside, you have to turn the water off in the box outside
21 with a T-handle or a pair of pliers. And I went back
22 outside to turn the water on and it fills the water heater
23 back up itself.

24 Q And you had done that before you reached in to turn
25 the power back on?

1 A Yes, sir. We filled the water up.

2 Q Now you were standing right there, did you see this
3 thing fall, this ladder?

4 A I caught it out of the corner of my eye. I flipped
5 the breaker on and pulled my hand out and went to take a
6 step back into the kitchen and I caught it out of the
7 corner of my eye falling. And I turned around and seen it
8 falling and seen Ms. Harmon standing there and I said,
9 look out. I was reaching for the ladder to try to catch
10 it before it got to her.

11 Q Did you actually put your hands on this ladder?

12 A As soon as it got to her, yes sir, I did.

13 Q And you called to her to look out?

14 A Yes, sir.

15 Q Did you see where it hit the plaintiff?

16 A I seen it hit around her head.

17 Q Do you know what part of that ladder hit around her
18 head?

19 A The very top of it, the yellow plastic part.

20 Q The yellow part?

21 A Yes.

22 Q And that is made of plastic?

23 A Yes, sir.

24 Q And you were standing right there with your hands on
25 that ladder looking at her?

- 1 A Yes, reaching for the ladder, yes sir.
- 2 Q Mr. Griffin, after this ladder hit, did you notice
- 3 any physical injury about her?
- 4 A No sir, when it hit her she went straight to the
- 5 bathroom.
- 6 Q She went straight to the bathroom?
- 7 A Yes, sir.
- 8 Q When is the next time you saw her?
- 9 A In the kitchen.
- 10 Q She had come out of the bathroom into the kitchen?
- 11 A Yes, sir.
- 12 Q What was she doing there in the kitchen?
- 13 A Her and I were talking and she had come in there, you
- 14 know, visibly upset, holding toilet paper on her nose and
- 15 her and I were talking.
- 16 Q Did you see, you said she was holding a paper to her
- 17 nose, a tissue or toilet paper?
- 18 A Yes, tissue or toilet paper, yes.
- 19 Q Did you see anything on the tissue?
- 20 A Just one little spot of blood.
- 21 Q Did she, do you remember anything that she said?
- 22 A I do not remember.
- 23 Q Do you remember anything she was complaining of
- 24 specifically right then in the kitchen?
- 25 A No, sir.

1 Q You said for a while or at first she was upset. Do
2 you remember how she was acting after she came back into
3 the kitchen and was talking to you and Mr. Fortner?

4 A She had calmed down a little and you know after that
5 she calmed down a good bit. And, you know, like I said
6 the last time I seen her she was still getting ready for
7 work or whatever she was doing.

8 Q You mean the last time you saw her that particular
9 day, the day of the accident?

10 A Yes, sir.

11 Q And tell me about that. You said you saw her getting
12 ready for work, getting ready, doing something. What was
13 she doing?

14 A When I went back out the backdoor to make sure
15 everything was cleaned up and put back in its proper place
16 and the backdoor was shut I seen her putting on her makeup
17 right there beside the laundry room, I guess that is her
18 bedroom.

19 Q You weren't there for very long after this ladder
20 fell?

21 A No sir, not long at all.

22 Q You guys were just about finished with your work?

23 A Yes, sir.

24 Q Okay. She was getting ready to go somewhere but she
25 wasn't going anywhere with you, right?

1 A No, sir.

2 Q You guys didn't take her to the hospital?

3 A No, sir.

4 Q You didn't take her to the doctor?

5 A No, sir.

6 Q She didn't ask you to take her anywhere?

7 A No, sir.

8 Q You guys, you and Mr. Fortner finished up your work
9 and you left?

10 A Yes, sir.

11 Q That is all I have. Thank you.

12 REDIRECT EXAMINATION

13 By Mr. Newlon:

14 Q Mr. Griffin, you observed the ladder when I asked
15 you, not when your attorney was asking you, you observed
16 the ladder hit her in the face, correct?

17 A Around the head area, yes, and around the face.

18 Q When I took your deposition a year ago you told me
19 you saw it hit her in the face, correct?

20 A Yes.

21 Q I just want to get that cleared up. And then,
22 subsequent to that, within minutes you saw, observed her
23 in the bathroom?

24 A No, sir.

25 Q You observed her in the kitchen, excuse me, observed

1 her in the kitchen, she had a tissue on the bridge of her
2 nose?

3 A Yes, sir.

4 Q Pulled it away?

5 A She pulled it away and looked at it and I seen it had
6 a little blood on it.

7 Q Right. And did you observe anything with regard to
8 her nose. Did you take the time to look to see if there
9 was a cut?

10 A Yes sir, I mean I looked and it was a little small, a
11 little scratch across the top of her nose.

12 Q Scratch?

13 A Scratch, a little nick, I mean it wasn't a cut.

14 Q Okay. I will accept that. Thank you.

15 THE COURT: Thank you, sir, you can step down. Call
16 your next witness, please.

17 MR. NEWLON: Call Jimmy Brissey to the stand.

18 MR. GRIFFETH: May we approach?

19 THE COURT: Sure, come on up.

20 (Whereupon, a bench conference was held in the
21 presence of the jury but out of the hearing of the
22 jury.)

23 JIMMY BRISSEY, being
24 first duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 By Mr. Newlon:
2 Q State your name for the record.
3 A Jimmy Brissey.
4 Q And, Mr. Brissey, you know Ms. Fortner, I keep
5 wanting to say Ms. Fortner, I am sorry, you know Ms.
6 Scott?
7 A Yes, sir.
8 Q There is a ladder leaning against the wall over there
9 and you are free to step down and go take a look at it if
10 you want. Did that ladder at one time belong to you?
11 A I don't need to look, I don't need to go down, that
12 ladder is mine.
13 Q And did you loan it to Ms. Scott at some point a
14 couple of years ago?
15 A I did.
16 Q Thank you. That is all I have.
17 MR. GRIFFETH: No questions.
18 THE COURT: You may step down. Any problem excusing
19 this witness?
20 MR. NEWLON: No, Your Honor.
21 MR. GRIFFETH: None, Your Honor.
22 THE COURT: You are free to go.
23 MR. NEWLON: Your Honor, can we approach?
24 THE COURT: Please.
25

1 (Whereupon, a bench conference was held in the
2 presence of the jury but out of the hearing of the
3 jury.)

4 THE COURT: Ladies and gentlemen, we are going to
5 take a brief break. The next witness may take a little
6 while. We will take about five minutes, don't talk about
7 the case.

8 (Whereupon, the jury was excused from open court for
9 a break.)

10 THE COURT: We will take five or ten minutes.

11 (Whereupon, a short break was taken.)

12 THE COURT: Let's bring the jury back out, please.

13 (Whereupon, the jury came into open court at
14 approximately 12:05 p.m.)

15 MR. NEWLON: Your Honor, can we approach, please.

16 THE COURT: Sure, come on up.

17 (Whereupon, a bench conference was held in the
18 presence of the jury but out of the hearing of the
19 jury.)

20 THE COURT: Ladies and gentlemen, we are still in the
21 plaintiff's case-in-chief. Mr. Newlon, if you will call
22 your next witness, please.

23 MR. NEWLON: Call Jennifer Scott to the stand.

24 JENNIFER SCOTT, being
25 first duly sworn, testified as follows:

DIRECT EXAMINATION

2 By Mr. Newlon:

3 Q State your name for the record, please.

4 A Jennifer Scott.

5 Q Ms. Scott, where do you live?

6 A 130 Davis Avenue, Greenwood.

7 Q And do you have any family?

8 A Yes, I have a husband and children.

9 Q Do you currently work?

10 A Yes. I am a massage therapist.

11 Q Okay. And how long have you been working as a
12 massage therapist?

13 A Two years.

14 Q And what are the type of things you enjoy doing
15 typically, activities?

16 A Sewing, quilting. My mother and I do a lot of
17 quilting.

18 Q Do you do a lot of do it yourself kind of stuff?

19 A Yes.

20 Q Let's talk about, getting to this incident. Back in
21 January of 2009 where were you living?

22 A I was living in Ninety-Six on Alice Avenue.

23 Q There has been a specific, I believe it is
24 plaintiff's exhibit 1. Is that the house number and part
25 of the house where you lived at the time?

- 1 A Yes, sir.
- 2 Q I am going to roll through these real quick. Is this
- 3 the water heater?
- 4 A Yes, sir.
- 5 Q The one that Mr. Fortner and Griffin were working on?
- 6 A Yes, sir.
- 7 Q And looking at exhibit 3, is that looking into the
- 8 laundry room from the kitchen area?
- 9 A Yes sir, that is my kitchen.
- 10 Q And looking at exhibit 4, is that the wall to the
- 11 laundry room?
- 12 A Yes.
- 13 Q One of the walls?
- 14 A Yes.
- 15 Q And looking at that photograph, do you see a circuit
- 16 breaker?
- 17 A Yes.
- 18 Q On the day of this incident was there anything
- 19 against the wall?
- 20 A The ladder.
- 21 Q Over the top of the circuit breaker?
- 22 A Yes.
- 23 Q And immediately to the right there there is a rack
- 24 and what is that?
- 25 A That is my clothes rack.

1 Q You keep that in the laundry at the time?

2 A Yes.

3 Q Was it there on the day of this incident?

4 A Yes.

5 Q Let me hand you what is marked as plaintiff's exhibit

6 5. Do you recall whether or not, looking at that exhibit

7 or the ladder against the wall, is that the ladder that

8 was in the laundry room that day?

9 A Yes.

10 MR. NEWLON: And, Your Honor, for the purposes of
11 this case I think I am going to mark that ladder as
12 exhibit 6 for the plaintiff, Your Honor.

13 THE COURT: That is fine. Let's just not receive it
14 into evidence if it is okay. That way the clerk doesn't
15 have to worry about keeping track of it. The ladder will
16 be 6 for ID.

17 (Whereupon, Plaintiff's Exhibit 5 was admitted into
18 evidence.)

19 (Whereupon, Plaintiff's Exhibit 6 was marked for
20 identification only.)

21 Q Do you remember what day it was, what day of the
22 month it was when Mr. Fortner and Mr. Griffin came to work
23 on your water heater?

24 A It was a Thursday, January the 8th, 2009.

25 Q Now at that time you were renting?

1 A Yes, I was renting from Mr. Fortner.

2 Q Just in general, the layout of the house, do you
3 remember the layout of the house in particular the laundry
4 room relevant to the kitchen?

5 A Yes.

6 Q And where the water tank was?

7 A Yes.

8 Q Okay. Would you be able to kind of draw generally
9 where that is?

10 A Yes.

11 Q Do you have a pen, I have one. Would you do me a
12 favor and just for the benefit of the jury give me a
13 drawing that will show them where the laundry room was in
14 relation to the kitchen, the water tank, your washer and
15 dryer, circuit breaker, ladder, that kind of stuff,
16 clothes rack.

17 A (Witness draws a diagram.) Is that good?

18 Q Okay. Would you do me a favor and put initials JS
19 where you were standing at the time the incident occurred,
20 where the ladder actually made contact with you?

21 A (Witness draws on diagram.)

22 Q Okay. And what you have drawn on here, is this
23 approximate relationship?

24 A This is just an approximate.

25 Q Fair enough. Mark that as plaintiff's 7. Right

1 before this happened, what was the circumstances, what was
2 going on in your house?

3 (Whereupon, Plaintiff's: Exhibit 7 was admitted into
4 evidence.)

5 A Mr. Fortner and Mr. Griffin were there fixing the hot
6 water heater and I was doing some chores in the house,
7 doing some laundry while they were doing the repairs.

8 Q Did you assist them in any way?

9 A No.

10 Q Now the ladder that was in the laundry room. Was
11 that your ladder or did you borrow it?

12 A I borrowed it.

13 Q From who?

14 A Mr. Brissey.

15 Q And were you the one that placed it in the laundry
16 room?

17 A Yes.

18 Q And can you explain to the jury how you placed the
19 ladder and why?

20 A I placed it in the laundry room up against the wall
21 so that it would stay. The floor was kind of bowed in
22 there because it is an old porch that was converted to a
23 laundry room. And I just sat it up there so it wouldn't
24 slide so it was safe.

25 Q The way the ladder was that we have as exhibit 6 up

1 against the wall, is that how it was oriented?

2 A Yes.

3 Q And as I look and if you can't see it, I would ask
4 that you be allowed to step down and look. The way the
5 feet are, I want to know if that is the way the feet of
6 the ladder were on this day.

7 THE COURT: You probably need to step down to see
8 that. Go ahead.

9 (Whereupon, witness approaches ladder.)

10 A Yes, that is the way I had it.

11 Q Thank you. You can take your seat. Is there any
12 particular reason why you placed it in that manner?

13 A When I placed the ladder against the wall I had to
14 wedge it so it wouldn't slide on that unlevelled floor.

15 Q All right. And did it slide at any time?

16 A Yeah, when I turned it around the other way, it
17 wouldn't stay.

18 Q Once you had it set like this did it ever slide at
19 any time?

20 A No.

21 Q Ever have any problems with it?

22 A No.

23 Q Ever fall over?

24 A No.

25 Q By the way, before this incident happened how long

1 had it been leaning against that wall?

2 A More than two weeks.

3 Q Had it ever moved at any time?

4 A No.

5 Q Let me ask you this. Were you ever able to, as far
6 as how the feet of the ladder, the distance of the wall.
7 Were you ever able to determine about how far the feet of
8 the ladder were from the wall?

9 A Yes, we did determine kind of how far it was away
10 from the wall.

11 Q How did you do that?

12 A The rack that it was sitting next to I made sure that
13 the bottom of that ladder didn't come out beyond that so
14 that I wouldn't trip over it.

15 Q Did you ever trip over it?

16 A No.

17 Q I am going to hand you what I marked as plaintiff's
18 exhibit 8 and 9. Do you recognize these photographs?

19 (Whereupon, Plaintiff's Exhibit 8 and 9 were admitted
20 into evidence.)

21 A Yes.

22 Q Why were these photographs taken?

23 A So that we could measure the distance of the legs,
24 the bottom of the rack so that you can see how the rack,
25 toward the bottom of the rack, how wide it is.

1 Q So, if you put your clothing rack against the wall
2 how far would the foot of the rack extend?

3 A From the wall, yes.

4 Q How far?

5 A Sixteen inches.

6 Q About?

7 A About, yeah.

8 Q All right. So here we have the ladder that is in the
9 room. Did you ever see, did you ever witness the ladder
10 actually being moved and fall, what caused it to fall?

11 A No, my back was turned.

12 Q Your back is turned. What were you facing?

13 A The dryer.

14 Q Why?

15 A Because I was putting clothes in the dryer, from the
16 washer into the dryer.

17 Q Okay. And so there you are, you are putting clothes
18 from the washer into the dryer, your back turned to the
19 ladder, circuit breaker, what is the next thing to happen?

20 A I shut the door to the dryer, turned around and a
21 ladder is coming at my face.

22 Q And then what happened?

23 A I put my arms up to try to block it, the ladder
24 brushes against my arm and hits me in the face.

25 Q Just for the record, the witness has indicated left

1 arm, brushed against your left arm?

2 A Yes, sir.

3 Q Thank you. All right, and it hit you in the face.

4 So now it has hit you in the face. Now what?

5 A Mr. Chad Griffin picks the ladder up off of me and
6 apologizes and then he tells me that I am bleeding and,
7 you know, I am freaking out and seeing stars and then I go
8 to the bathroom and start wiping at me face and looking at
9 myself.

10 Q Now you are in the bathroom. What were you looking
11 at yourself, what did you see?

12 A I had a cut on my nose, going like this looking at
13 how deep it is and I am freaking out. And blood is coming
14 out and I am trying to wipe it off and of course I am
15 upset and I am in pain.

16 Q What was hurting?

17 A My face, my nose, my eyes.

18 Q So here you are now, this has happened. You are
19 having pain in your face, nose and eyes and what happened
20 after that?

21 A Mr. Fortner comes in to take a look at me and he
22 says, oh, it is a scratch. You are going to be okay. And
23 so I am beginning to calm down because I am trusting him.
24 And so they finished the job and they leave and I am just
25 sitting there.

1 Q What did you do in that interim after this happened
2 and before they left as far as activities?

3 A Really I didn't do much of anything other than I am
4 trying to stop the bleeding.

5 Q Were you able to stop the bleeding?

6 A Pretty much. I got the bleeding to stop and I put a
7 bandaid on my nose.

8 Q And so now they left, you have got a bandaid on your
9 nose, the bleeding stopped. What did you do after that?

10 A Being worried about myself I drove to my friend's
11 house.

12 Q What is your friend's name?

13 A Kathy Conyers.

14 Q Okay. So you got to your friend's house and what
15 happened?

16 A Discussed with her what had happened and we decided
17 that I should stay there with her and her watch over me
18 and see what was going to happen.

19 Q Were there any concerns that you had at that time?

20 A Yeah, because after a while my mouth started to swell
21 up. I had a hard time talking. And the pain started to
22 get a lot worse. I got a little bit of confusion so she
23 decided we would just stay awake and, you know, because I
24 knew I had to go to work the next day.

25 Q So how long did you stay there with her?

1 A I believe I stayed the night but I am not sure. I
2 don't remember if I stayed the night or if I went home
3 that night.

4 Q So this, so now let's move through the night. During
5 that night did you experience any problems sleeping?

6 A Yes.

7 Q Why?

8 A Because my face hurt so bad that I couldn't roll
9 around, I couldn't lay down. Every time I laid down it
10 hurt so I didn't sleep very well.

11 Q So eventually what did you do the next day?

12 A The next day I had a very important meeting at work
13 and so I had to be there. Went to work, suffered through
14 the day, went to this meeting and as soon as that meeting
15 was over I left and called my father and he met me and we
16 went to the hospital.

17 Q Okay. And which hospital did you go to?

18 A Self Regional.

19 Q Let me backtrack just a second. I want to hand you
20 what I have marked as plaintiff's exhibit 10. Is that you
21 in that photograph?

22 A Yes, sir.

23 Q Can you do me a favor and put a circle around where
24 this ladder contacted your nose?

25 A (Witness draws on diagram.)

1 Q By the way, about how long, looking at that
2 photograph is there any kind of mark or anything indicated
3 in the circle?

4 A Yes, that is the scar.

5 (Whereupon, Plaintiff's Exhibit 10 was admitted into
6 evidence.)

7 Q Okay. So you went to the emergency room. You
8 indicated that you had pain complaints?

9 A Yes.

10 Q When you went to the doctor did you tell them what
11 your problems were?

12 A Yes, I was having facial pain.

13 Q By the way, did you fill out yourself, did you fill
14 out any medical records on that visit?

15 A No, I didn't fill out any forms on my own.

16 Q You didn't write any of the records or anything?

17 A No.

18 Q And then after that visit did you seek any further
19 treatment?

20 A Yes.

21 Q Where did you go?

22 A I went to see Dr. Fuller in Irmo Family Practice.

23 Q All right. Did you go back to Self Regional?

24 A Yes.

25 Q Do you remember about how long after the first visit

- 1 at Self Regional you went?
- 2 A It was a couple of weeks later.
- 3 Q What was your problem then?
- 4 A The same thing. My face and my head was hurting very
- 5 bad.
- 6 Q Were you having headaches?
- 7 A Yes.
- 8 Q Facial pain?
- 9 A Yes.
- 10 Q So and then it appears that you actually went back to
- 11 Self Regional again?
- 12 A Yes.
- 13 Q Why did you go back?
- 14 A The same thing.
- 15 Q And now you are talking about seeing Dr. Fuller?
- 16 A Yes.
- 17 Q Why did you go see Dr. Fuller?
- 18 A Because the hospital, they just kept talk--
- 19 Q I don't think you understand my question. What
- 20 physical conditions were you suffering from that would
- 21 lead you to see Dr. Fuller?
- 22 A The facial pain.
- 23 Q Anything else? Were you experiencing headaches?
- 24 A Yes.
- 25 Q Okay. Headaches and facial pain?

1 A Yes.

2 Q And you saw Dr. Fuller, after seeing Dr. Fuller did
3 you go see anybody else for your headaches or your facial
4 pain?

5 A Yes. Dr. Fuller referred me to a neurologist and
6 referred me also, well, the neurologist referred me to the
7 pain center.

8 Q Did you go there?

9 A Yes.

10 Q And what were they treating you for basically?

11 A They did a nerve block at the pain center. I had
12 injections put into my eyebrow to do a nerve block for the
13 neuralgia because that is what the neurologist diagnosed
14 me with, I have neuralgia through here on my right side of
15 my face.

16 Q And then after going through those nerve blocks with
17 the neurologist, whoever the pain management guy, was did
18 you see anybody else for this case?

19 A Yes. I also saw Dr. Ergle.

20 Q Why did you see Dr. Ergle?

21 A Because the pain in my head and in my face just kept
22 increasing and I needed more help so I saw Dr. Ergle and
23 he referred me to Dr. Sida?

24 Q And Dr. Sida would be a neurologist too?

25 A Yes.

1 Q So you saw Dr. Ergle, Dr. Sida for follow-up on your
2 facial pain?

3 A Right and headaches.

4 Q And headaches. All right. And you were treated with
5 them for a period of time?

6 A Yes.

7 Q And you had diagnostic studies taken?

8 A Correct.

9 Q After seeing Dr. Ergle and Dr. Sida did you treat
10 with anybody else on this case?

11 A I haven't treated with anyone else after that.

12 Q It appears your last visit would have been sometime
13 in October or November of 2011, does that appear correct?

14 A Correct.

15 Q How tall are you?

16 A Five, two.

17 Q Have you ever measured the distance from the floor to
18 the bridge of your nose?

19 A Yes.

20 Q How far is it?

21 A About four, nine.

22 Q Based on your observations of the events on that day
23 of this incident are you able to testify as to what caused
24 the ladder to fall?

25 A Can you repeat the question.

1 Q Based on your observations at the time of the
2 incident, what was said to you by Mr. Griffin and or Mr.
3 Fortner at the time, do you know what actually caused the
4 ladder to fall over?

5 A Yes. From what was told to me it was Mr. Griffin
6 putting his arm behind the ladder and bumping it is what
7 caused the ladder to fall.

8 Q Did you do anything to cause it to fall over?

9 A No, I was nowhere near the ladder.

10 Q Following the conclusion of treatment in October,
11 November of 2011 how were you doing after that?

12 A I still experienced a lot of headaches and a lot of
13 pain. I do have a lot of things I can't do, a lot of
14 restrictions.

15 Q Like what?

16 A I can no longer drive long distances, I can no longer
17 focus on a computer screen for long periods, I have had to
18 change my career.

19 Q Let's back up and talk about that for a second. You
20 had a career at the time of this accident, your career was
21 with what company?

22 A I was a licensed insurance agent for nine years.

23 Q And you changed your vocation to what?

24 A A massage therapist.

25 Q When did you start your training for massage therapy?

1 A August of 2009.

2 Q That would have been about five months after this
3 incident?

4 A Yes.

5 Q Did that require going to school and attending
6 classes?

7 A Yes.

8 Q Were you able to do that?

9 A I got through it. I had a lot of help, I had a lot
10 of support.

11 Q Who was one of your teachers?

12 A Michelle Leggett.

13 Q And did she, she actually taught you massage therapy?

14 A Yes, she is an instructor at Piedmont Tech.

15 Q Did she do anything else for you while you were
16 there?

17 A Oh yeah, she did a lot of massage therapy for me and
18 on me. She helped me with migraines and the headaches and
19 the pain.

20 Q You were able to complete the program?

21 A Yes.

22 Q Would you characterize yourself as a good student?

23 A Average.

24 Q Did you lose any time from work?

25 A Yes.

1 Q And about how many days did you miss?

2 A I think we calculated I lost about three or four
3 days.

4 Q Do you remember about how much in loss wages you had
5 as a result of that?

6 A Somewhere between two and three-hundred dollars.

7 Q I am going to hand you what I marked as plaintiff's
8 exhibit 11. And do you recognize that document?

9 A Yes.

10 Q What is it?

11 A It is a list of all of the expenses of medical bills.

12 Q What kind of expenses. It is a list of what?

13 A It is a list of the medical bills and expenses that
14 have occurred.

15 (Whereupon, Plaintiff's Exhibit 11 was admitted into
16 evidence.)

17 Q All right, let's look at them, Self Regional
18 Healthcare. Did you go to the hospital?

19 A Yes.

20 Q At least a couple of times?

21 A Yes.

22 Q And you saw the emergency physicians?

23 A Yes.

24 Q Was there some type of radiology test done?

25 A Correct, yes there was.

- 1 Q And then Dr. King with Centa, who is he?
- 2 A He is the EMT that I saw.
- 3 Q Carolina Pain Management, was that the blocks?
- 4 A Yeah, for the nerve blocks.
- 5 Q Dr. Ergle at Piedmont Health Group?
- 6 A Correct.
- 7 Q Was that Dr. Ergle and Dr. Sida?
- 8 A Correct.
- 9 Q And Dr. Pursey in Columbia Neurological?
- 10 A Yes, that was the first neurologist that I saw.
- 11 Q And these are all the people that you saw?
- 12 A Yes.
- 13 Q And what are your total medical bills?
- 14 A \$17,345.76.
- 15 Q So based on the ladder striking you in the face is
- 16 what you have testified to what injuries do you believe
- 17 you sustained?
- 18 A I believe that I have permanent neuralgia, a
- 19 permanent nerve damage in my face and that it causes me
- 20 pain and through here.
- 21 Q It causes facial pain?
- 22 A Yes.
- 23 Q Do you also experience headaches?
- 24 A Yes, it causes headaches a lot. Without medication
- 25 that I take on a daily basis those headaches do not go

1 away.

2 Q In your lifetime before this incident had you had
3 headaches before?

4 A Well, I have had a headache. But there is a
5 difference between just having a headache and this kind of
6 pain. This kind of pain is debilitating. You can just
7 have a headache and be walking around. This takes away my
8 concentration, my ability to think, my ability to walk a
9 straight line, my ability to drive. It is just, you know,
10 debilitation.

11 Q You say debilitating, but you were still able to
12 complete a course of study and become a massage therapist,
13 correct?

14 A With help. I had a lot of help and I did a lot of
15 self medicating.

16 Q That is all I have. Please answer any questions Mr.
17 Griffeth has.

18 CROSS-EXAMINATION

19 By Mr. Griffeth:

20 Q Ms. Scott, you really are being modest about your
21 career, aren't you, when you say you were an average
22 student. You were better than an average student.

23 A Average, I made A's, B's, C's.

24 Q Is this you?

25 A Yes.

1 Q Okay. You did so well and so quickly at Piedmont
2 Tech that the cover story on the Summer 2/12 volume III
3 issue I is about you, isn't that right?

4 A Yes.

5 Q And you were the star student there, weren't you?

6 A I wouldn't say that I am a star.

7 Q Star enough for them to put you on the cover though,
8 right.

9 A Actually they just happened to call and ask me if I
10 would do that for them. I am not a star, there was a lot
11 of people who they could have chose for that.

12 Q And then they put you in their brochure, careers
13 start here, Piedmont Technical College and you and someone
14 from mechanitronic's technician and an operation's
15 manager also featured. Isn't that correct?

16 A Actually that particular document I have never even
17 seen before.

18 Q They didn't get your permission to do that?

19 A No.

20 Q So they were proud enough of you without even having
21 to ask you, they put it in their booklet.

22 MR. NEWLON: Objection, Your Honor, calls for
23 speculation.

24 THE COURT: Sustained.

25 MR. GRIFFETH: That is fine, Your Honor, I will

1 withdraw that one.

2 THE COURT: That's all right.

3 Q Okay. I mark those as 1 and 2, please.

4 (Whereupon, Defendant's Exhibit 1 and 2 were admitted
5 into evidence.)

6 Q So in short nothing that happened in reference to
7 this ladder has hindered you from becoming a successful
8 massage therapist, has it, Ms. Scott?

9 A I am sorry?

10 Q Nothing that happened to you with this ladder has
11 caused you to or hindered you in any way from becoming a
12 successful massage therapist?

13 A Well, I do have to persevere and I do have to push.

14 Q As a matter of fact if you read those articles, if
15 you look in there you achieved your goal of owning your
16 own massage therapy business in five months as opposed to
17 five years, isn't that right?

18 A Yes.

19 Q Let me and I had these blown up. When you went to
20 Piedmont Tech you had to apply, didn't you?

21 A Yes.

22 Q This is for your benefit and the benefit of the jury
23 your application, third page of which bears your signature
24 at the bottom. Do you recognize that?

25 A Yes.

- 1 Q Do you recognize the first page?
- 2 A That is my handwriting.
- 3 Q You filled it out?
- 4 A Yes.
- 5 Q And when you filled it out, current medications,
- 6 Cymbalta, Synthroid, Amatiza and Klonopin?
- 7 A Yes.
- 8 Q Medical conditions for example and you put chronic
- 9 IBS?
- 10 A Yes.
- 11 Q Dysfunctional thyroid, that is what the Synthroid is
- 12 for, isn't that right?
- 13 A Yes.
- 14 Q Depression?
- 15 A Yes.
- 16 Q And some anxiety?
- 17 A Yes.
- 18 Q Your writing?
- 19 A Yes.
- 20 Q Okay. Now, you also had to get, you have testified
- 21 today that you have been and this was August the 21st of
- 22 '09, correct?
- 23 A Correct.
- 24 Q And you had to apply there in order to get into
- 25 massage therapy school. And you also filled out page

1 three, the page that you signed which is right here?

2 A Yes.

3 Q Okay. Mental attitude, functions safety effectively
4 and commonly under stressful situations. Are you okay
5 with that. You told them you could maintain composure
6 while managing multiple tasks. You could prioritize
7 multiple tasks, display actions and attitudes contingent
8 with ethical profession, you could talk, you can
9 communicate, read, hear, manipulate, walk, lift up to
10 fifty pounds, stoop, adjust, kneel, reach, motor skills
11 and dexterity, small and large equipment. There wasn't
12 anything that you couldn't do, was there?

13 A That is what I put.

14 Q You told the truth on that, didn't you?

15 A Yes.

16 Q And when you filled out the conditions that you had
17 there is nothing listed here about facial pain or
18 headaches or nose problems or any difficulty whatsoever or
19 any of those kinds of difficulties, none of those were
20 listed down there, are they?

21 A Well, I probably should have put them there but for
22 some reason I just didn't.

23 Q So when it is convenient for you to allege facial
24 pain you do and when it is not you don't. Is that what
25 you are telling the jury, Ms. Scott?

1 A No.

2 Q Well, you also had to have a form, you said you went
3 to see Dr. Fuller and we are going to get to him in a
4 minute. You went to Dr. Fuller, if you will look at this
5 middle sheet you see Dr. Sean Fuller's signature down
6 there, don't you?

7 A Yes, sir.

8 Q Okay. He filled this out, didn't he?

9 A I am trying to make sure, I am sorry. Here. Yes
10 sir, he did fill that out.

11 Q And you submitted it with your other two pages that
12 you filled out?

13 A Yes, sir.

14 Q Nose, throat, mouth, neck, breast, lung,
15 cardiovascular normal, no problem?

16 A That is what the doctor put. But like I said, if
17 that is what the doctor put I don't have any control over
18 what he puts.

19 Q You have seen him beginning in May of '09 and you
20 seen him through July of '09. And if I am looking at this
21 he says you got the same drugs that are listed down here
22 but he basically says there is nothing wrong with you,
23 doesn't he. Isn't that what that says?

24 A That is what it says. But as I said, I don't have
25 control over what a doctor puts on a document, I didn't

1 write that.

2 Q So the answer to my question is yes, that is what it
3 says?

4 A That is what it says.

5 Q So by August 21 of '09 Dr. Fuller didn't think you
6 had any of these problems that you have described today,
7 did he?

8 MR. NEWLON: Your Honor, objection, the record speaks
9 for itself. He is asking her to speculate on what the
10 doctor thought at the time.

11 THE COURT: Which doctor is this that we are talking
12 about?

13 MR. GRIFFETH: Dr. Fuller.

14 MR. NEWLON: He will testify on his own.

15 THE COURT: Let's ask him those questions.

16 MR. GRIFFETH: All right, sir. He has already been
17 asked and he will testify. This will be exhibit 3, 4 and
18 5.

19 (Whereupon, Defendant's Exhibit 3, 4 and 5 were
20 admitted into evidence.)

21 Q Ms. Scott, before I proceed along with your medical
22 treatment, I want to go back and talk about some of that.
23 Mr. Newlon hired Professor Slimmer at Lander to do some
24 studies about the ladder fall. You are aware of that?

25 A Yes, sir.

1 Q When did you talk to Professor Slimmer?

2 A I don't remember the date. I do remember talking
3 with him but I don't remember when it was. I am sorry.

4 Q Would it have been in August or September of this
5 year?

6 A Like in just a couple of weeks ago?

7 Q A couple of months ago, within the last three months?

8 A I would say it was early summer.

9 Q Early summer. Do you remember what you told him?

10 A Just the, I don't think I really told him anything
11 because he didn't want me to tell him anything about the
12 case really. He just wanted to get the measurements from
13 my nose to the floor and how far I was from the wall. I
14 didn't discuss the case with him at all.

15 Q He took measurements from your nose to the floor and
16 when you say you measured the distance away from the floor
17 he asked you about that. Did he ask you about these
18 pictures that Mr. Newlon has put into evidence, the
19 clothes rack picture?

20 A Yes.

21 Q And that?

22 A Yes.

23 Q And that was first done sometime early this summer to
24 the best of your recollection?

25 A Correct.

1 Q Are you aware that he had already run tests and
2 experiments at Mr. Newlon's request before he talked to
3 you?

4 A Yes, he did tell me that.

5 Q And by the way, this picture of you, of the scar,
6 when was that taken?

7 A I don't remember when that was taken either. I do
8 remember it being taken but I don't remember when it was.

9 Q Within a week after the ladder bumped you on the
10 nose?

11 A Oh, no, no, no, no. That was taken probably a year
12 or so after.

13 Q But you don't know for sure, you don't know for sure
14 when it was taken?

15 A I am not sure.

16 Q Who took it, who took that picture?

17 A I believe Mr. Newlon took the picture.

18 Q To the best of your recollection Mr. Newlon took the
19 picture?

20 A Yes.

21 Q You do recall telling Professor Slimmer though that
22 the ladder was turned with the steps toward the wall?

23 A I am sorry?

24 Q You do recall telling Professor Slimmer that the
25 ladder was turned with the steps toward the wall?

- 1 A Steps toward the wall, yes.
- 2 Q There is no question that you put the ladder with the
- 3 steps, you placed the ladder in front of the box for the
- 4 switches, you put it there and it had been there you say a
- 5 couple of weeks?
- 6 A Yes.
- 7 Q Maybe as long as a month?
- 8 A Yes.
- 9 Q You put it there?
- 10 A Yes, sir.
- 11 Q Brissey didn't put it there?
- 12 A No.
- 13 Q Nobody else put it there, you put it there?
- 14 A No, I did, yes.
- 15 Q Now, the date that the ladder bumped you on the nose
- 16 was January the 8th of 2009?
- 17 A Correct.
- 18 Q Now before that you had had a number of medical
- 19 problems. In fact including headaches, had you not?
- 20 A Not that I recall.
- 21 Q You had been treated by a number of doctors prior to
- 22 that incident for headaches or conditions dealing with
- 23 headaches, isn't that true?
- 24 A Not that I recall.
- 25 Q Let me, on March the 18th of '03 Dr. Shanbhag who had

1 been treating you for several years for blood pressure, on
2 the date of that visit has you complaining of headaches,
3 is that correct?

4 MR. NEWLON: Your Honor, we need to take up a matter
5 outside the presence of the jury.

6 THE COURT: Y'all approach real quick. Counsel
7 approach.

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

11 MR. NEWLON: I just want to preserve the record based
12 on the discussion that we had. It is my understanding
13 that this line of questioning is relevant.

14 THE COURT: Correct, I will make the record at a
15 later point and time about what we discussed at sidebar.
16 You can continue, please.

17 Q Ms. Scott, but you do recall being treated by Dr.
18 Shanbhag for blood pressure and the headaches associated
19 with that?

20 A Yes. But I do not have, I am not currently being
21 treated for high blood pressure.

22 Q You were treated a long time by the Saluda Family
23 Practice?

24 A Yes.

25 Q Like from '03 to '08?

1 A Yes.

2 Q Isn't that correct?

3 A Yes.

4 Q Okay. On December the 4th of '04 they treated you
5 with headaches, with visual disturbance.

6 MR. NEWLON: Your Honor, I renew the objection and I
7 know we waived authenticity but now I am going to
8 interpose hearsay, lack of foundation. And no one here to
9 testify to those records.

10 THE COURT: Overruled. He can question her about
11 these records. Again, when did she allegedly see these,
12 counselor.

13 MR. GRIFFETH: The Saluda Family Practice record is
14 December the 4th of '04. I am going to give her date and
15 give her the condition on each one of these, Your Honor,
16 and all of these are covered again in the depositions of
17 Dr. Ergle and of Dr. Fuller which will be presented later.

18 THE COURT: Very good. You can.

19 MR. NEWLON: And I would just interpose a running
20 objection so I don't have to keep interrupting.

21 THE COURT: I understand. Your objection is noted,
22 you have a running objection, you do not have to continue
23 to object, Mr. Newlon. And you may ask the question.

24 Q Ms. Scott, let me go through these. In the medical
25 records, they are all coming in and the jury will have

1 access to those. And both the doctors were questioned
2 about them. So let me try to proceed through these as
3 quick as we can in terms of complaints about headaches
4 before the ladder incident for lack of a better term.

5 Again, December the 4th of 2004 with Saluda Family
6 Practice, headaches with visual disturbances.

7 A I don't remember that, I don't remember.

8 Q If I showed you the record would that help you
9 remember?

10 A Probably not, I don't recall.

11 Q You were treated for chronic sinus condition by
12 Saluda Family Practice with visits on 8/26/04, 10/2/06,
13 12/13/06, 1/21/07 and 6/27, isn't that correct. Do you
14 recall being treated for chronic sinusitis?

15 A I remember being treated for a lot of colds.

16 Q Associated with those were headaches?

17 A Sometimes when you have a lot of sinus problems you
18 get a little bit of a headache.

19 Q And you had been treated as well for, in the past by
20 the Saluda Family Practice for depression and you listed
21 that on the form, they had treated you for that, is that
22 correct, Ms. Scott? Is it correct, Ms. Scott, that Saluda
23 Family Practice had treated you for depression?

24 A That is correct.

25 Q Thank you.

1 A But I don't think that that is part of this case.

2 Q That will be for the jury to decide.

3 THE COURT: Hold on one second. Since Mr. Newlon has
4 a continuing objection to this we are getting into areas,
5 how is depression relevant to the injuries that she has
6 sustained. He has got a continuing objection. I am going
7 to acknowledge that at this point and time. Explain to me
8 how that is relevant to anything in this particular case.

9 MR. GRIFFETH: Again, Your Honor, the depositions of
10 Dr. Ergle and Dr. Fuller will address those issues and
11 headaches that may have been associated with depression.

12 THE COURT: I am assuming that you are representing
13 to me that there will be a causal link established between
14 the headaches, the depression and something by Dr. Ergle.
15 When were you treated for depression by Saluda, when was
16 it, Ma'am.

17 A I don't remember the year. I am sorry, I don't
18 remember the year.

19 MR. NEWLON: Your Honor, if I may.

20 THE COURT: Mr. Newlon, please.

21 MR. NEWLON: Attach onto my running objection. There
22 is a note, there is notations and mention of that in the
23 records. There is no where in these records where it
24 links depression to the injury. I don't know what the
25 doctors have to testify to, I can't say that. I would say

1 let the doctors testify. I think the question is improper
2 to ask her because she hasn't claimed depression as an
3 element of her damages.

4 THE COURT: Here is how we are going to leave it.
5 She will be subject to recall. At this point and time
6 there is no need to further discuss the issue of
7 depression. We will see what the doctors testify to
8 tomorrow if there is a causal link or something to that
9 effect. You may recall her, if there is not a causal
10 link, Mr. Newlon, please remind me to instruct this jury
11 to disregard any certain testimony concerning depression
12 or depression symptoms. Go ahead, please.

13 MR. GRIFFETH: Thank you, Your Honor.

14 Q Let's go, if we might, to the event, Ms. Scott, of
15 January the 8th of '09. Do you remember when I took your
16 deposition on August the 5th of 2011?

17 A Yes, sir.

18 Q Do you remember that day pretty well?

19 A Yes, yes.

20 Q And on that day you indicated to me that Mr. Griffin
21 was pulling a hose through the laundry room and he bumped
22 the ladder?

23 A Yeah, I remember that.

24 Q Okay. Are you telling me that that is not how this
25 accident happened?

1 A I think that that was probably like one of the last
2 things I remember because of being hit in the head and
3 being so confused. Later on is when I found out what had
4 really happened with Mr. Griffin putting his arm behind
5 the ladder and bumping it. I think that being hit in the
6 head and just being so confused that that was just the
7 last thing I remembered.

8 Q And so in your deposition you were wrong when you
9 told me you saw him pulling the hose and then he hit it
10 with his elbow. You were just wrong about that?

11 A Yes, that's correct.

12 Q And in fact you were also wrong about telling me what
13 the ladder was like?

14 A Yes. I just don't, I am not an expert on ladders and
15 I thought, I just didn't know what kind of ladder it was.

16 Q When I asked you what kind of ladder hit you in your
17 deposition you told me it was a ten foot aluminum ladder,
18 didn't you?

19 A Yes, I did.

20 Q And a ten foot aluminum ladder wouldn't stand up in a
21 nine foot three laundry room, would it?

22 A No.

23 Q And you indicated to me that you had blocked it with
24 your arms and it hit your left arm and that the leg of the
25 ladder hit you on the nose. Is that correct?

- 1 A Yes.
- 2 Q So we are right about that so far. Now you told me,
3 if I recall in your deposition, that you don't remember if
4 you were wearing your glasses or not that day?
- 5 A Correct.
- 6 Q But your glasses weren't broken?
- 7 A No.
- 8 Q If you were wearing them they weren't broken?
- 9 A Right.
- 10 Q And your nose wasn't broken?
- 11 A Well, according to some we are not really sure on
12 that. I am not quite sure on that.
- 13 Q Do you think that your nose was broken other than the
14 cut, I am talking about the cut or the laceration?
- 15 A You are talking about the skin. You are talking
16 about the skin broken, yes, the skin was broken.
- 17 Q The skin was broken but your nose wasn't broken?
- 18 A It is deviated but broken, no.
- 19 Q And you believe that this ladder hitting you on the
20 nose caused you a deviated septum?
- 21 A Yes.
- 22 Q But there is no medical proof of that, is there?
- 23 A We are not claiming a deviated septum on this case.
- 24 Q You are not claiming the deviated septum as far as
25 this case. Okay. Now you said that blood, in your

1 deposition as I understand it, you said blood was running
2 down your face?

3 A Yes, it was.

4 Q Are you sure now that Mr. Fortner and Mr. Griffin are
5 not right that there was one little drop of blood?

6 A I am positive that there was blood running down my
7 face. I know because I went to the bathroom and I saw it
8 running down my nose.

9 Q But it only took one bandaid to cover the wound when
10 you got the bleeding stopped?

11 A Yes.

12 Q And in fact between that time and the time some
13 twenty-four hours later when you finally went to Self you
14 only used two other bandaids, isn't that true?

15 A Yes. I did have to change the bandaid a few times.

16 Q Exactly twice according to your deposition because
17 you took a shower?

18 A Correct.

19 Q So three bandaids total, correct?

20 A Yes sir, that is correct.

21 Q Then you went to Kathy's house for the night?

22 A Correct.

23 Q You stayed with her all night, you think?

24 A Yes, I think so, I am not sure.

25 Q Was this before or after you went to Self?

1 A Before.

2 Q Before you went to Self. And you drove yourself to
3 Kathy's?

4 A I drove myself to Kathy's house.

5 Q No trouble driving at that point?

6 A Lord knows how I got there. I think the Lord was
7 driving.

8 Q You got to her house safely?

9 A Yes, sir.

10 Q Now, you thought you might have had a concussion that
11 night, you thought about that?

12 A Yes, we thought about it.

13 Q You had had a concussion before?

14 A I might have.

15 Q Ms. Scott, I am going to show you the letter you
16 wrote to Dr. Fuller about that major concussion you had
17 and how you knew what a concussion was. So I am going to
18 ask you one more time.

19 MR. NEWLON: Your Honor, I am going to go ahead and
20 put on the record objection as to relevance and prejudiced
21 and it is an incident that happened twenty years before
22 this.

23 THE COURT: It goes to its weight and admissibility,
24 go ahead.

25 Q You had had a major concussion years before?

1 A That is what I was told.

2 Q And you told that to Dr. Fuller in a letter before
3 you first saw him, didn't you?

4 A Yes, I did.

5 Q Now, and you described your symptoms and you went to
6 the ER on the following day and the only thing you took,
7 if I recall from your deposition, on the night before you
8 went to the ER was some Tylenol? In fact your testimony
9 was, I took some Tylenol maybe.

10 A Yes, sir.

11 Q Is that correct?

12 A Yes.

13 Q Thank you. Now, let me show you if I might. I had
14 these blown up too, just so we are clear about it. These
15 are the ER records from when you went to the emergency
16 room at Self on January the 9th and they did three
17 different CAT scans, isn't that correct?

18 A That's correct.

19 Q All of which were negative. Isn't that correct?

20 A That is what the document says.

21 Q Okay. You don't believe, you don't remember then
22 doing the CT's and giving you the report?

23 A Some of it I remember and some of it I don't, I was
24 in too much pain.

25 Q Okay. And you reported facial pain and they

1 acknowledged a contusion and facial pain. Is that
2 correct?

3 A That is what this document states.

4 Q Right there where it says concussion, that is not
5 circled, highlighted, checked or anything, is it?

6 A No, it is not.

7 Q And it does indicate that it had been twenty-four
8 hours when you or was twenty-four hours ago that you had
9 had the laceration to your nose?

10 A That is correct, that is what the document states.

11 Q The other record from the emergency room indicates
12 LAC, laceration on nose. And that is the cut that you had
13 right there, is that correct?

14 A That is what the document states.

15 Q That LOC, loss of consciousness, no. That is what
16 the document says, doesn't it, Ms. Scott?

17 A Yes.

18 Q So, the fact of the matter is, Ms. Scott, there is
19 nothing in the Self Memorial records of the first visit
20 you had to the ER that in any way indicates that you were
21 diagnosed with a concussion, is there?

22 A That is what the document states.

23 Q So the answer to my question is, no, there is nothing
24 in the records that indicate you were diagnosed with a
25 concussion?

1 A I don't know what and I don't have control over what
2 they have put in those documents. I only know what I felt
3 when I was at that hospital. I know the pain I felt, I
4 know what I complained of, I know the facial pain, I know
5 the headache. That is all that I can tell you. I don't
6 have control of what the doctor puts on a piece of paper.

7 Q You know though if you go to the hospital or you go
8 to the doctor and you make a complaint they are going to
9 write that down, aren't they?

10 MR. NEWLON: Your Honor, calls for speculation, what
11 a doctor is going to write after a patient goes and sees
12 them.

13 MR. GRIFFETH: I think it is general knowledge, Your
14 Honor, if you go to the doctor they are going to write
15 down whatever you tell them.

16 THE COURT: Sustained. You can ask her though what
17 she reported to the doctor or what she recalls reporting
18 to the doctor and that is fair game.

19 MR. GRIFFETH: Thank you. That is all I have on
20 that. If you can mark these as whatever the next number
21 is, 6 and 7.

22 (Whereupon, Defendant's Exhibit 6 and 7 were admitted
23 into evidence.)

24 Q And the Self Memorial folks sent you home that night
25 with some medication, is that right, Ms. Scott?

- 1 A Yes, sir.
- 2 Q Now, there were no, you had another two visits to the
- 3 ER at Self?
- 4 A Correct.
- 5 Q And then you get over and see Dr. Fuller beginning on
- 6 May the 6th of '09, does that ring a bell to you?
- 7 A Yes, that rings a bell.
- 8 Q Okay. He is the one that you sent this four-page
- 9 report to.
- 10 A Yes, sir.
- 11 Q Thought if I typed a note to Dr. Fuller it would help
- 12 him see all that is going on. And you again described,
- 13 that is where you talk about, among other things you talk
- 14 about the concussion that you had years ago, correct?
- 15 A Yes.
- 16 Q Okay. Thank you. Then you saw Dr. Fuller only three
- 17 times. You saw Dr. Fuller in Irmo only three times?
- 18 A That sounds about right.
- 19 Q I had it down here you saw him on May 6th, May the
- 20 20th and July the 2nd.
- 21 A Yes, that sounds about right.
- 22 Q Last time he saw you he treated you for poison ivy?
- 23 A Yes.
- 24 Q The second time he treated you, the middle time was
- 25 primarily for the thyroid, wasn't it?

1 A Yes, I believe so.

2 Q Now, then you don't see Dr. Ergle, that is May of
3 '09, then Dr. Fuller writes this report for you in August
4 of '09 for Piedmont Tech and then you don't see Dr. Ergle
5 until November the 3rd of 2010?

6 A Yes.

7 Q No medical treatment between those two times, between
8 Fuller and Ergle?

9 A Yes, sir.

10 Q Okay. And you see Dr. Ergle November 3rd of 2010,
11 December of 2010, February the 16th of 2011, October the
12 22nd of 2011 and November the 10th, 9th of 2011. Five
13 times total you saw Dr. Ergle?

14 A Correct.

15 Q And he mainly treated you all of those times for your
16 thyroid problem?

17 A Yes.

18 Q He didn't treat you for any, he did not mainly treat
19 you for anything involving a bump on the nose by the
20 ladder?

21 A Yes.

22 Q Thank you. And neither Dr. Ergle nor Dr. Fuller have
23 ever diagnosed you with these problems as having been
24 sustained by a concussion, isn't that correct?

25 A Repeat the question, please.

1 Q Neither Dr. Ergle nor Dr. Fuller indicate that a
2 finding of concussion was the cause of your facial pain?

3 A I am not a doctor so I really would rather have them
4 say that.

5 Q So you don't know the answer to that question?

6 A I don't really know the answer to that question.

7 Q Now, over the course of time and in addition to the
8 headaches that you have you complained actually of some
9 migraine headaches, haven't you, in your course of
10 treatment with Dr. Fuller and Dr. Ergle?

11 A Yes.

12 Q And Dr. Ergle told you, did he not, that migraine
13 headaches are not trauma induced?

14 A No, he never told me that.

15 Q Did he indicate to you that he thought you had a
16 cardiovascular problem that was the cause of whatever
17 migraine like symptoms you had. Do you recall that?

18 A No.

19 Q Well, again, their depositions will come in later.
20 Dr. Ergle also treated you as did Saluda Family Practice
21 for chronic sinus congestion, didn't he?

22 A Yes.

23 Q Now, when you went to see Dr. King and the Centa
24 Medical Group, that was the ENT. Do you remember seeing,
25 Mr. Newlon asked you about your medical bills?

1 A Yes.

2 Q And he asked you about Dr. King and the Centa Medical
3 Group and he said that was the ENT?

4 A Yes.

5 Q Do you remember that visit?

6 A Yes.

7 Q And that was for an evaluation of whether or not you
8 had a deviated septum?

9 A Yes.

10 Q But you are not claiming deviated septum as a part of
11 this lawsuit?

12 A I am not sure.

13 Q I am sorry, I was real clear that a little while ago
14 you told me you weren't claiming that as part of this
15 lawsuit.

16 A I am a little confused now.

17 Q If you are not claiming deviated septum then that
18 bill of \$321.00 dollars ought to come out of the total,
19 shouldn't it, Ms. Scott, don't you think?

20 MR. NEWLON: What bill are you talking about?

21 MR. GRIFFETH: I am talking about the Carolina,
22 excuse me, Dr. King and Centa Medical Group.

23 Q If that was for something that you are not claiming
24 in this lawsuit that ought to come out of your medical
25 totals, shouldn't it?

1 A I would suppose so.

2 Q Thank you.

3 MR. GRIFFETH: One moment, Your Honor. Your Honor,
4 that is all the questions I have for Ms. Scott.

5 THE COURT: Brief redirect, Mr. Newlon or is this
6 going to take a while?

7 MR. NEWLON: No sir, it shouldn't take a while.

8 THE COURT: Go right ahead.

9 REDIRECT EXAMINATION

10 By Mr. Newlon:

11 Q I will go in reverse order. With regard to the bill
12 of Centa Medical Group did Mr. Griffeth bother to show you
13 the record that referenced those bills?

14 A No.

15 Q Would it help to refresh your recollection if you had
16 a chance to see the records that reflect those bills?

17 A Yes.

18 Q Okay. I am going to have these marked. I am going
19 to hand you what I marked as plaintiff's 12 and 13, there
20 are two bills from the Centa Medical Group. If you add
21 the charges up, just for the benefit of the jury, if you
22 add that charge and that charge what does that amount to?

23 A Can I use your pen?

24 Q Sure.

25 A \$329.00, no, \$321.00.

1 Q And the first bill, what is the date of it?

2 A 6/24/09.

3 Q No, the actual service date.

4 A 6/17/09.

5 Q Okay. And looking at the Centa Medical Group record
6 for June 17, 2009 does that refresh our recollection about
7 your complaints?

8 (Whereupon, Plaintiff's Exhibit 12 and 13 were
9 admitted into evidence.)

10 A Facial pain.

11 Q Is that something you claimed in this case?

12 A Yes.

13 Q Thank you. What is the date of the other bill?

14 A 8/3/09.

15 Q I hand you a record dated August 3, did you say
16 August 3, 09?

17 A Yes.

18 Q What does that talk about, what were your complaints
19 then?

20 A Good lord, I can't read it.

21 Q You can't read it. Does that talk about your
22 septoplasty?

23 A It talks about septoplasty.

24 Q That has to do with the deviated septum?

25 A Yes.

1 Q And you are not claiming that in this case?

2 A No.

3 Q So as far as your medical bills go this would not be
4 related to your case?

5 A Correct.

6 Q August 3 of '09?

7 A Correct.

8 Q But the other one would?

9 A Yes.

10 Q Thank you. And the bill for this septoplasty was
11 what, how much?

12 A \$89.00 dollars.

13 Q Would you be willing to correct your claim of medical
14 bills to reduce it by \$89.00 dollars?

15 A Yes, sir.

16 Q All right. You were asked a question earlier about
17 some headaches before the accident. And actually Mr.
18 Griffeth made reference to a record, did he show you the
19 reference?

20 A No, sir.

21 Q Looking at the record of December 4th of 2004 what
22 did you tell the doctor?

23 A It says that I stated that I was at work recently and
24 felt that my blood pressure was very high, that I went to
25 a clinic near work and in fact my blood pressure was high

1 and then I had some visual disturbances at the time and
2 that it resolved after I started on some Atenolol.

3 Q It resolved?

4 A It resolved.

5 Q I assume you know your body, was there a difference
6 between the type of headaches you might experience
7 associated with blood pressure back then before it was
8 controlled by Atenolol and what happened in this case?

9 A Yes, they are a totally different kind of headache.

10 Q Mr. Griffeth also suggested that because you had
11 sinusitis you experienced headaches, do you remember that?

12 A Yes.

13 Q Do you remember going to see Saluda Family Medicine?

14 A Yes.

15 Q About the sinusitis?

16 A Yes.

17 Q Let me show you a record dated October 2nd of 2006,
18 does it note on there that you suffer from sinusitis?

19 A Yes.

20 Q Does it mark there that you were also having
21 headaches anywhere? In other words did they circle
22 headache?

23 A No.

24 Q Thank you. Based on what you experienced in this
25 case do you know the difference between a sinus headache

1 and the type of facial pain that you received in this
2 case?

3 A Absolutely.

4 Q The jury is going to get to see this anyway but the
5 picture that is in this brochure that Mr. Griffeth showed
6 you, is that the same picture that is in the article?

7 A Yes.

8 Q This is a brochure?

9 A Yes.

10 Q This is a magazine?

11 A Yes.

12 Q Is there more information in the magazine than there
13 is in the brochure as far as relative to you, information
14 about your situation?

15 A No.

16 Q Well, you look at it. Look at it right here under
17 Jennifer Scott, how much is written there?

18 A Very little.

19 Q How much is written on this article?

20 A Just a little bit, not very much.

21 Q All in the blue?

22 A Yes, just what is in the blue.

23 Q Okay. While we are looking at this thing. There is
24 two things I want you to do for me. Number one, I want
25 you to look anywhere in this document where it says that

1 you are the star of the program?

2 A No, it doesn't say that I am a star of a program.

3 Q Does it say anywhere in this business on Jennifer
4 Scott, does it say anywhere that you are a star of the
5 program?

6 A No.

7 Q Do they ever anywhere in that document tell, explain
8 why they chose you?

9 A No, it doesn't.

10 Q I want you to look at this paragraph, Mr. Griffeth
11 pointed out in this article. I want you to read this
12 portion right here where it says, she began. Read that
13 for me, please.

14 A She began the program with several health issues of
15 her own. But she has overcome many of those issues
16 through the skills she has learned.

17 Q At any time in this course of this litigation have
18 you had an opportunity to look at some of your medical
19 records?

20 A Just a few of them.

21 Q Did you ever see the term, concussion, in any of your
22 records?

23 A I have seen the post-concussion syndrome.

24 Q Is that something when you walked into the doctors
25 and you raise your hand and say, hey, I am having a

1 post-concussion syndrome?

2 A No, I don't think clinically that I could even define
3 what it is.

4 Q I just want to make sure, I was looking at something
5 when Mr. Griffeth was asking you some question. You
6 actually went to Self Regional three times?

7 A Yes.

8 Q And the last time being in March of '09?

9 A Yes.

10 Q When you went to Dr. Fuller in May of '09 did you
11 tell him about your headache problem?

12 A Yes.

13 Q Did he refer you anywhere?

14 A Yes, he referred me to a Dr. Pursey who was a
15 neurologist and he referred me to Dr. King and then Dr.
16 Pursey referred me to the pain management center.

17 Q So they were managing your neurological deficit?

18 A Yes.

19 Q That is all the questions I have.

20 THE COURT: Thank you very much, Ma'am, you can step
21 down. Ladies and gentlemen, we are well past our usual
22 breaking time for lunch. If you happen to go to lunch
23 with one of your fellow jurors obviously don't discuss the
24 case. You are free to go to lunch with one or more of
25 your fellow jurors but just don't talk about the case.

1 Ditto if you go to lunch with a friend or family member
2 while we are on break. If you could be back in the jury
3 room around 2:30. Have a great lunch.

4 (Whereupon, the jury was excused from open court for
5 a lunch break.)

6 THE COURT: We are at ease.

7 (Whereupon, a lunch break was taken.)

8 THE COURT: Let's bring our jury in.

9 (Whereupon, the jury came into open court at
10 approximately 2:38 p.m.)

11 THE COURT: Hope you had a great lunch. We are still
12 in the plaintiff's case-in-chief. Mr. Newlon, call your
13 next witness, please.

14 MR. NEWLON: The plaintiff calls Ms. Kathy Conyers to
15 the stand.

16 KATHY CONYERS, being
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 By Mr. Newlon:

20 Q State your full name for the record, please.

21 A Kathy Conyers.

22 Q Is that Conyers with a C?

23 A Yes. And Kathy with a K.

24 Q Where do you currently live?

25 A In Greenwood, South Carolina.

- 1 Q And how long have you lived in Greenwood?
- 2 A About 24 years.
- 3 Q What do you do for a living?
- 4 A I am a material handler.
- 5 Q A what?
- 6 A A material handler.
- 7 Q How long have you been doing that? Have you been
- 8 doing that the whole time?
- 9 A Yes.
- 10 Q Have you ever been married?
- 11 A I am married now.
- 12 Q Do you have children?
- 13 A I have two boys.
- 14 Q Raised them?
- 15 A Yes.
- 16 Q We are here today on behalf the parties in my case,
- 17 Ms. Scott. Did you know Ms. Scott before an incident that
- 18 involved a ladder back on January of 2009?
- 19 A Yes, I did.
- 20 Q And just for the benefit of the jury, how often did
- 21 you see her or communicate with her prior to that?
- 22 A Pretty much every day, three or four times, five
- 23 times a week, sometimes every day, just according to what
- 24 we were doing.
- 25 Q Did you live near her at the time?

1 A Well, we went to church together and we were real
2 close friends. And she was in the process of moving and I
3 was helping her.

4 Q And after this ladder incident did you continue to
5 see her, socialize with her?

6 A Yes.

7 Q And how often would you see her in a given month?

8 A About the same.

9 Q About the same. Are y'all still friends?

10 A Yes.

11 Q Now let me ask you this. Prior to this incident
12 which occurred in January of 2009 do you have any, based
13 on your repeated exposure to her, do you have any
14 recollection of her making chronic complaints of headaches
15 or facial pain?

16 A No.

17 Q None at all?

18 A No.

19 Q Migraines?

20 A No.

21 Q The accident, following this particular accident
22 which according to what we know happened the afternoon of
23 January 8th of 2009, did you see her that day?

24 A The day it happened?

25 Q Yes, in the afternoon or the evening?

1 A Yes.

2 Q How did y'all get together, how did that happen, do
3 you remember?

4 A She came over to the, she came over to the house and
5 said her ladder, she had been hit across the nose by a
6 ladder and it was a mark here and then she was kind of
7 black under the eyes. And she was kind of acting kind of
8 woozy and I asked her was she okay. And she said that she
9 thought she was okay. And I said well you night need to
10 go lay down. So she went in and layed down on my couch.

11 Q Other than being woozy and were there any other
12 observations about her behavior, appearance a concern?

13 A I was worried about her because I really didn't want
14 her to drive home. I told her, like I said, I told her to
15 go lay down because she didn't look right. She wasn't
16 acting quite right.

17 Q Then, so how long did she stay with you?

18 A She stayed a couple of hours and then she said she
19 felt like she could go home. I was still a little worried
20 about her. I told her I didn't know but after she got up
21 I said call me when you get, I said you need to go spend
22 the night with your mama. And I am pretty sure she went.
23 I called and that is where she was at.

24 Q So to your knowledge she spent the night with her
25 mama?

1 A To my knowledge she went to spend the night at her
2 mother's house.

3 Q Did she call back and let you know she made it okay?

4 A I called her and, yes, she made it.

5 Q Since this particular incident and based on your
6 observations and interaction with her, have you seen a
7 change in her physical complaints?

8 A Yes. She was complaining with headaches, migraines,
9 just not feeling well at all. There was times she
10 wouldn't come to church. I would check on her and she
11 said, you know, it was because of her migraines. A lot of
12 things she wasn't being able to do because of those.

13 Q Did you ever followup with her to find out whether
14 she got checked out or went to the hospital?

15 A Yes, she had went to the hospital and she, you know,
16 as far as I know they, you know, didn't see anything. But
17 I didn't see any of the Xrays so I don't know. From what
18 she told me she did go to the hospital.

19 Q You don't have any personal knowledge of the extent
20 of her treatment, who all she went to see or anything, do
21 you?

22 A I just know that every time I turn around she was
23 saying she had to go to a doctor for this reason or that
24 and I know she went to the emergency room several times
25 after that with different related things of having

1 headaches, not feeling well.

2 Q At some point in this case, back in August, I am not
3 exactly sure what the year was. Maybe it was this year, I
4 think it was last year but in August did you fill out an
5 affidavit?

6 A Yes.

7 Q Do you remember everything you put in the affidavit?

8 A Pretty much, not everything but pretty much what I
9 put in there.

10 Q To the extent you can't remember would it refresh
11 your recollection if you had a chance to look at it?

12 A Yes.

13 MR. NEWLON: Can I approach, Your Honor?

14 THE COURT: Please.

15 Q Is this an affidavit that is in your handwriting?

16 A Yes.

17 Q And on the second page where it says signature, is
18 that your signature?

19 A Yes, it is.

20 Q You can go ahead and take a moment if you would like
21 to review it. I want to ask you a couple of questions.

22 A Okay.

23 Q Did you see her a couple of days after she went to
24 the hospital?

25 A Yes.

1 Q And how did she present or how did she appear to you
2 at that time?

3 A She still was acting kind of strange, having
4 headaches and I asked her, I said did they check you for a
5 concussion. And I think that she said no.

6 Q And what I am looking at, not quite half way down,
7 first page of the affidavit. You say the day after the
8 incident I and after going to the hospital she came by
9 your house for a visit?

10 A Yes.

11 Q And what did she look like when she came to see you
12 that day?

13 A She had swelling around the eyes and she was, had a
14 mark across her nose right here.

15 Q Was it dark?

16 A Dark circles under her eyes.

17 Q Did you encourage her to stay with anyone else that
18 night as well?

19 A I told her she was welcome to stay at my house but
20 she said she thought she would rather go to her mom's
21 because I have a small home and she would have to sleep on
22 my couch. So I told her, you know, to make sure she did
23 because I didn't want her to be by herself because if she
24 had a concussion I would rather her to be with someone
25 because she lived alone.

1 Q Thank you very much.

2 THE COURT: Mr. Plyler.

3 CROSS-EXAMINATION

4 By Mr. Plyler:

5 Q Hello, Ms. Conyers.

6 A Hey.

7 Q You met the plaintiff at church, right?

8 A Yes.

9 Q And you said that you had known her for about two
10 years before this accident happened?

11 A Right.

12 Q And you saw her just about every day, I think you
13 said before, before this accident?

14 A Yes.

15 Q You helped her fix up her house?

16 A Yes, I did.

17 Q This is the house at 107 Alice Avenue in Ninety-Six?

18 A Yes, it is.

19 Q So you are pretty familiar with the house?

20 A Yes.

21 Q You indicated to the ladies and gentlemen just a
22 second ago and in your affidavit that she appeared fine to
23 you before the accident with the ladder?

24 A Yes.

25 Q And you never been to any doctors appointments with

1 the plaintiff?

2 A No.

3 Q You never reviewed any medical records, have you?

4 A No.

5 Q She came to your house the day after the accident,
6 right?

7 A I believe, I really haven't recollected but I am
8 thinking, yes, that it was the day after.

9 Q And it was after she went to the hospital, it was
10 after she went to the emergency room rather?

11 A Right.

12 Q You are sure about that?

13 A I am pretty sure.

14 Q Well, that is what you said in your affidavit?

15 A Yes.

16 Q Right?

17 A Right.

18 Q You have it there still in front of you?

19 A Yes, I do.

20 Q You said that when she came to your house she had
21 swelling underneath her eyes?

22 A Yes.

23 Q Swelling in her nose?

24 A Well, I say she had a mark across her nose and she
25 had, her eyes were swollen under, around her eyes and

1 nose. Well, I guess eyes and nose would be right in here,
2 yes.

3 Q You said you saw how dark it looked around her eyes?

4 A Right.

5 Q She had a headache?

6 A Yes.

7 Q She appeared unbalanced?

8 A Yes.

9 Q Confused?

10 A Yes.

11 Q This was after she got back from the emergency room
12 on January 9th of 2009?

13 A Yes.

14 Q She drove herself to your house, right?

15 A Yes.

16 Q And she left your house and she drove herself from
17 your house?

18 A Yes, she did.

19 Q You said she spent the night that night with her mom
20 as far as you know?

21 A Yes.

22 Q And you let her drive from your house even though you
23 said just a minute ago that she was woozy?

24 A Yes.

25 Q That she was unbalanced?

- 1 A Yes.
- 2 Q That she was confused?
- 3 A Yes.
- 4 Q You still see the plaintiff from time to time?
- 5 A Yes.
- 6 Q You say she still complains to you of headaches on
7 occasion?
- 8 A Yes.
- 9 Q You don't see her anywhere near the amount that you
10 used to see her before this accident?
- 11 A No, because she got married.
- 12 Q You say you still visit her on occasion, right?
- 13 A Yes.
- 14 Q Did you know she had enrolled in Piedmont Technical
15 College in the massage therapy program in August of 2009?
- 16 A Yes, I did.
- 17 Q So you saw her between the accident and that date?
- 18 A Yes.
- 19 Q You still consider yourself pretty good friends with
20 the plaintiff?
- 21 A Yes.
- 22 Q In fact she asked you to be here today for her,
23 right?
- 24 A Yes.
- 25 Q The affidavit that you have, did you give that to

1 John Newlon's office?

2 A Yes.

3 Q They asked you for that?

4 A Yes.

5 Q That is all I have.

6 REDIRECT EXAMINATION

7 By Mr. Newlon:

8 Q You were sworn standing right here to tell the truth,
9 is that what you have done?

10 A Yes.

11 Q And in your affidavit, is that the truth?

12 A Yes, as far as I can recollect, yes.

13 Q And when you filled out your affidavit did I ask you
14 to tell the truth?

15 A Yes.

16 Q Did you receive a subpoena to appear today?

17 A Yes, I did.

18 Q So whether you wanted to come or not you had to come
19 because of the subpoena?

20 A Yes, I did. Because if I hadn't I wouldn't be here.

21 Q You got that subpoena from me?

22 A Yes, you did. Yes, I did.

23 Q Thank you.

24 THE COURT: Thank you. You can step down. No
25 objection in excusing this witness from the defense?

1 MR. PLYLER: No, sir.

2 THE COURT: Call your next witness, Mr. Newlon.

3 MR. NEWLON: The plaintiff calls Michelle Leggett to
4 the stand.

5 MICHELLE LEGGETT, being
6 first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 By Mr. Newlon:

9 Q State your full name for the record, please.

10 A Michelle Ann Marie Leggett.

11 Q Where do you live?

12 A Anderson, South Carolina.

13 Q And what do you do for a living?

14 A I am a certified massage therapist, director and
15 instructor of the massage therapy program for Piedmont
16 Technical College.

17 Q How long have you been doing that?

18 A About seven years now.

19 Q Do you know Ms. Scott?

20 A Yes, I do.

21 Q Did she go through the program at Piedmont Tech?

22 A Yes.

23 Q Were you one of her professors, did you instruct her
24 in any way?

25 A Yes. I was her instructor.

1 Q Let's get a little bit about your background here,
2 for the benefit of the jury, your education and training
3 and your experience. Go ahead and tell the jury.

4 A I am retired U.S. Navy enlisted service member E8. I
5 have a Bachelor's in Health Services and I have a
6 certification in message therapy with emphasis in
7 neuromuscular therapy. And I run the program over at
8 Piedmont Technical College for message therapy.

9 Q Do you have a license to do that in the State of
10 South Carolina?

11 A Yes, sir.

12 Q Has your license ever been revoked for any reason?

13 A No.

14 Q Just for the benefit of the jury, she went through
15 that program, what is massage therapy exactly, what do you
16 do?

17 A It is the manipulation of soft tissue and the
18 rehabilitation of the mind and body.

19 Q And you have indicated that Ms. Scott at one time was
20 one of your students, what type of student was she?

21 A A zealous student, one that was passionate about
22 completing the course to the best of her ability.

23 Q And how was her performance as a student?

24 A Outstanding.

25 Q And about from when to when was she a student at

1 Piedmont Tech?

2 A From 2009 to 2010, it is approximately a one-year
3 program.

4 Q Would that have been from August to May or something
5 like that?

6 A August to August generally.

7 Q During that time when she was your student did you
8 have an opportunity to speak and observe her on numerous
9 occasions?

10 A Yes, I did.

11 Q And by the way, was the first time you ever really
12 had any dealings with her was in August of 2009 when she
13 came to the program?

14 A Yes. I don't really see anybody until they come into
15 play as an actual student.

16 Q You didn't know her before then?

17 A No.

18 Q So in that setting when she is coming to class and
19 everything did she ever verbalize any physical complaints
20 to you?

21 A She did have some physical complaints. Her body
22 mechanics indicated postural deformations and some pain
23 within her face, neuralgia which is known as a nerve pain
24 which I tried to help her with.

25 Q When you say you tried to help her with, how did you

1 try to help her with it?

2 A I used techniques, some gliding strokes that are
3 typical of sweetish massage, I used neuromuscular which is
4 my forte and some myofascial relief, fascia is just
5 connective tissue to the muscle.

6 Q And this treatment that you did did you charge for
7 it, or was it pro bono?

8 A It is pro bono, I am not allowed to charge on state
9 property.

10 Q I understand. Do you know about from when to when
11 you were doing this for her?

12 A It was during the time that she was a student and
13 then also during the time that she was, she did adjunct
14 for me.

15 Q And so that adjunct would have extended beyond the
16 August of 2010?

17 A That's correct. And I can only get an adjunct in the
18 spring semester and it can carrying on into the summer.

19 Q So you actually gave her massage therapy for her,
20 what you call neuralgia?

21 A Correct.

22 Q How did she respond?

23 A I could alleviate some of the inflammation and pain
24 through circulation but it didn't get rid of the problem.

25 Q Let me ask you this. Despite the neuralgia she had

1 expressed or what you interpreted as neuralgia based on
2 her complaints and your massage therapy, how did she
3 function as a student. Was she able to function as a
4 student?

5 A Yes, she did function quite well, not everybody is
6 built like she is. Some people manage their pain poorly,
7 she managed hers well and still her passion goal were her
8 directives. So she navigated through the pain.

9 Q Was there ever a time when you might have treated her
10 for other things like sinusitis or anything like that that
11 you recall?

12 A Periodically depending on the season but for the most
13 part it wasn't related to anything like she had an
14 allergic reaction to anything. It was this continuous
15 neuralgia which is indicative of something a little deeper
16 than a sinus infection from the environment.

17 Q Have you ever heard of the term, and I am not sure I
18 am pronouncing it right, trigeminal nerve?

19 A Trigeminal nerve, it is one of the cranial nerves.
20 It is the fifth cranial nerve in the human body, it is a
21 facial nerve.

22 Q Was that in the area where she was complaining?

23 A It would be.

24 Q Thank you. Do you go by Doctor?

25 A No, I am a message therapist.

1 Q Thank you and answer any questions defense counsel
2 may have.

3 THE COURT: Mr. Plyler.

4 CROSS-EXAMINATION

5 By Mr. Plyler:

6 Q Hello, Ms. Leggett.

7 A Hello.

8 Q How are you doing today?

9 A Great, thank you, sir.

10 Q You are the director and the instructor at the
11 message therapy program at Piedmont Tech?

12 A Correct.

13 Q And you are the only instructor in that message
14 therapy program?

15 A Yes, sir.

16 Q And everybody who goes in there and works in that
17 program takes classes from you?

18 A Yes, sir.

19 Q And only you?

20 A There are some preliminary courses that can be
21 conjunctive to the course which, such as anatomy and
22 physiology. So there is another instructor but in the
23 overall I run an operational clinic.

24 Q And there are certain prerequisites to your, to your
25 program, right?

1 A Yes, sir.

2 Q And those are classes they have got to take, it might
3 be an english, it might be a psychology, it might be some
4 other kind of class that they have to get before they can
5 enroll in your program and begin, you know, the extensive
6 message therapy program, right?

7 A If they are screened by registration they have to
8 take an entrance test and if they are found to be faulty
9 or weak then they are encouraged or told they must take
10 certain courses prior to entering into the program.

11 Q You can't even enter into your program without those,
12 right?

13 A Yes, sir.

14 Q You certainly can't graduate without those, right?

15 A Yes, sir.

16 Q The massage program at Piedmont Tech, I think you
17 told me it was three semesters long?

18 A Yes, sir.

19 Q August, it goes from August to August?

20 A Yes, sir.

21 Q Three or four classes each semester?

22 A Yes, sir.

23 Q 500 credit hours in order to get this certification?

24 A It is, actually when you look at clock hours it is
25 about 960 hours total but the program itself is a 39

1 credit hour program.

2 Q 960 hours in class or in a clinic or in a program
3 with you?

4 A Correct, cumulative.

5 Q And you told the ladies and gentlemen that the
6 plaintiffs, Ms. Scott, was in your program?

7 A Yes, sir.

8 Q Started in August of 2009 and she graduated on time
9 in August of 2010?

10 A Yes.

11 Q You told us a minute ago that she was an outstanding
12 student?

13 A Yes.

14 Q In fact she graduated from your program in August of
15 2010 with honors?

16 A Yes.

17 Q As you told me in your deposition, the top of the
18 class?

19 A Yes.

20 Q Her grades with you were A's and B's?

21 A Correct.

22 Q In fact, Ms. Leggett, I will show you a document that
23 you have seen before and I will ask you just to identify
24 it for the ladies and gentlemen of the jury.

25

1 (Whereupon, Defendant's Exhibit 8 was admitted into
2 evidence.)

3 A It is a transcript, school transcript not certified
4 to be true copy but a transcript.

5 Q I understand it doesn't have the seal that the
6 registor's office may actually put on it.

7 A Right.

8 Q But you told me in your deposition that this looks
9 like the transcript that you would get and this appears to
10 be the plaintiff's transcript?

11 A Yes, sir.

12 Q Do you need a minute to review the classes?

13 A No.

14 Q Does this look like all the classes that she took
15 with you?

16 A Yes, it does.

17 Q Cardiopulmonary resuscitation, basic; analytical and
18 physical concepts, introduction to massage, principles of
19 massage, massage clinical and that is just in the Fall of
20 2009, right?

21 A Correct.

22 Q Cardiopulmonary resuscitation again, principles of
23 massage, II; pathology for massage clinical, clinical
24 application of massage, that is in the Spring.

25 A Right.

1 Q Massage business application, principles of massage,
2 III; clinical application of massage, II; and massage
3 therapy seminar in the Summer of 2010, right?

4 A Correct.

5 Q She made all A's and B's?

6 A As indicated on the transcript.

7 Q With a final GPA of 3.70?

8 A Also as indicated.

9 Q Do you have any reason to believe that the numbers,
10 the figures on here are not correct?

11 A No.

12 Q You told me in your deposition, you told us today
13 that you were with her for about 900 hours?

14 A Right.

15 Q That you instructed her on all of these courses
16 except the prerequisites that you told me about?

17 A Yes, the anatomy, physiology and biology 109, that is
18 on the transcript, CPR I am part of.

19 Q And you have a real clear recollection of the
20 plaintiff as a student?

21 A Yes.

22 Q In fact you told us earlier that she was zealous in
23 her studies?

24 A Very zealous.

25 Q You told me in your deposition that she was a dynamic

1 student?

2 A Yes.

3 Q That she was a great student?

4 A Yes.

5 Q That she was engaged in class?

6 A Yes.

7 Q That she was very interactive?

8 A Yes.

9 Q That she was social?

10 A Yes.

11 Q That she had quick memory?

12 A Yes.

13 Q That she had critical thinking skills?

14 A Yes.

15 Q And she picked up very quickly on all the different
16 subjects and all of the different, you say modalities and
17 treatments that you went through with her, she picked it
18 up like that.

19 A She did and if she didn't get it she came to me and
20 we discussed it.

21 Q In fact she did so well in your program that you had,
22 that Piedmont Tech gives you the option of having an
23 adjunct, an adjunct instructor, somebody that comes in and
24 helps you to do clinical's, to help with the other
25 students in the program after they graduate.

1 MR. NEWLON: Your Honor, relevance are getting a
2 little far field. I am not sure there is going to be any
3 testimony linking a person's aptitude to their ability to
4 handle pain from a blow to a ladder. How she performed in
5 school really has no relevance in this case.

6 THE COURT: I am going to allow it, we are on cross
7 and it is quite evident that this witness thinks a great
8 deal of your client. So you can continue.

9 Q I will move on quickly, Your Honor. In the spring
10 and summer terms you get to pick one adjunct and you
11 picked the plaintiff, Ms. Scott?

12 A Yes, I did.

13 Q And you have a lot of say who gets selected obviously
14 because they work with you every day?

15 A That's correct.

16 Q They help you in the clinical's and they stand in for
17 students and in the clinical program?

18 A They get to serve for eight hours in a week and I
19 choose which part of those timeframes that they are going
20 to manage the class under my supervision.

21 Q And they actually help you teach the class?

22 A Yes, sir.

23 Q You have seen this particular form, right?

24 A Yes, we have it in our handbooks.

25 Q This is what every student fills out before they come

1 and before you see them the first day of class?

2 A No. That goes in a handbook and that is something
3 they have to pursue through so they can meet the
4 requirements as indicated. On the top of this form you
5 have different letters indicating what their functionality
6 is suppose to be and that includes massage, search tech,
7 respiratory, et cetera.

8 Q This column here, we will read this. This MAS here,
9 that stands for massage, right?

10 A Yes, it does.

11 Q So if we went down the column and if the jury does
12 this later on and looks down the column and the key up
13 here shows these different skills. And O means you might
14 occasionally practice those skills?

15 A Correct.

16 Q F means you have to frequently have those skills?

17 A Correct.

18 Q And C means you have to constantly have those skills?

19 A Correct.

20 Q And this is accurate portrayal of the physical and
21 mental requirements in your program?

22 A Yes, sir.

23 Q One of them is to maintain composure while managing
24 multiple tasks simultaneously, that is a constant in your
25 program. Would you agree?

1 A Yes.

2 Q At the bottom of the form you see the plaintiff's
3 signature, right?

4 A Yes, sir.

5 Q And it is signed August the 21st of 2009?

6 A Yes.

7 Q Did she ever have any trouble with any of these
8 things as far as you knew in your classes?

9 A As I said before Ms. Scott was able to manage through
10 any difficulty because she was driven, not everybody is
11 built that way.

12 Q But she managed very well?

13 A She was also medicated heavily.

14 Q But the answer to my question, she managed very well,
15 she did all of those things?

16 A Yes.

17 Q You told the ladies and gentlemen early that
18 periodically you would perform massages on the plaintiff?

19 A Yes.

20 Q About 33 times I think you said in your deposition?

21 A In the deposition that is what I said.

22 Q And you told the ladies and gentlemen when
23 plaintiff's counsel was asking you some questions about
24 inflammation that you noticed in her face, around her
25 nose, talked about nerves, right?

1 A That would be an objective where you are observing,
2 subjective is when they tell you what is going on with
3 them, the pain that they feel.

4 Q You don't have any opinion on what caused that
5 inflammation, do you?

6 A I would not know. The only thing as far as what I
7 was witnessing was objective based on her subjective
8 information and through palpation I could feel tension
9 within her face in those regions around the nasal complex
10 and orbital ridge.

11 Q As far as what caused those things that you observed,
12 any opinion on what caused that would be outside of your
13 scope, right?

14 A The cause would be again subjective on her part. I
15 am not allowed to diagnose anything, massage therapist are
16 not allowed to do that, it is out of our scope of
17 practice. We can only say that something looks like a
18 specific pathological condition or situation based on our
19 experience and understanding of anatomy and physiology and
20 patho.

21 Q But you don't diagnose any problems?

22 A No, sir.

23 Q You can't testify today about the cause of any
24 inflammation or pain because you hadn't diagnosed it?

25 A I am not allowed to, no, you are correct.

1 Q You told us a minute ago that it appeared sometimes
2 she had sinusitis, a sinus infection, right?

3 A That is correct.

4 Q A sinus infection as you know can sometimes cause
5 inflammation?

6 A Yes.

7 Q Around the nose?

8 A And eyes.

9 Q And face?

10 A Yes, mucous membrane.

11 Q Mucous membrane are located behind the face, correct?

12 A Eyes, nose, mouth.

13 MR. PLYLER: We admit the transcript.

14 MR. NEWLON: I just object to relevance, I have
15 already objected to the line of testimony.

16 THE COURT: You object to the transcript based on
17 relevance.

18 MR. NEWLON: Yes.

19 THE COURT: Overruled.

20 Q That is all the questions that I have.

21 THE COURT: Redirect.

22 REDIRECT EXAMINATION

23 By Mr. Newlon:

24 Q Clinically, based on your education, training and
25 experience, can you distinguish between those problems

1 that might be trigeminal, did I say that right?

2 A Trigeminal.

3 Q Trigeminal versus inflammation due to sinusitis?

4 A Yes, I can.

5 Q Okay. And the complaints that you responded to her
6 for?

7 A Were for neuralgia.

8 Q Which is a trigeminal?

9 A Well neuralgia is nerve pain in general. Trigeminal
10 neuralgia is specific in the fact that it involves the
11 cranial nerve and that particular cranial nerve is
12 notorious if, for example, if the situation was something
13 that exasperated the condition within her face, that
14 trigeminal nerve can send shooting pains into the face,
15 around the eyes and is overall quite painful, can come and
16 go, you can have shooting, stinging or all of it at the
17 same time and sometimes it can last for hours, it can last
18 for days. And if somebody is in that kind of condition
19 they are generally seeking medical attention for pain
20 management and she was on Neurontin.

21 Q Okay. And I don't mean to be disrespectful to the
22 massage therapy training program or the profession but in
23 your experience in schooling, I believe you got a
24 Bachelor's Degree?

25 A Yes, health services management in health care

1 administration.

2 Q Comparatively speaking to become a massage therapist
3 of the concepts that need to be grasped and work to be
4 done, it is something that is very difficult to do for the
5 average person?

6 A Yes.

7 Q Thank you.

8 THE COURT: You may step down. No objection to
9 excusing Ms. Leggett.

10 MR. PLYLER: No, sir.

11 THE COURT: You are free to go. Ladies and
12 gentlemen, we will take a break for about ten minutes or
13 so. Don't talk about the case. I will see you in a few
14 minutes.

15 (Whereupon, the jury was excused from open court for
16 a break.)

17 (Whereupon, a short break was taken.)

18 THE COURT: Let's have the jury back out please.

19 MR. NEWLON: Your Honor, before they come out.

20 THE COURT: Hold on one second.

21 MR. NEWLON: Mr. Harmon is going to testify, I don't
22 anticipate that it will take that long. Dr. Slimmer is
23 suppose to be here at 4:00. I did have someone subpoenaed
24 to come here today, records custodian from Saluda and she
25 was supposed to have already been here and she is not

1 here. But I did file and submit a Rule 32 on that with
2 excerpts to be read. And if I can fit it in today I would
3 like to fit it in or I can chase her down and try to get
4 her to show up in the morning. All she is is a records
5 custodian and she basically went over historical records
6 from Saluda Family Practice before this incident happened.
7 I have got a copy of the actual service I did on her by
8 personal service so that is satisfied. So under Rule
9 32(d) I would like the Court to consider allowing me to
10 read her, portions of her deposition subject to any
11 portions that are relevant that Mr. Griffeth might want to
12 add.

13 THE COURT: Any problem with that, gentlemen?

14 MR. PLYLER: Judge, we don't really know what the
15 purpose of the records custodian is. As you know, we
16 stipulated to the admissibility of all of the medical
17 records, they are all coming in and they are all being
18 used in the questioning so far. I don't know what the
19 purpose of the records custodian is so we would object
20 reading any testimony.

21 MR. NEWLON: I don't know what the purpose, this
22 particular body of records specifically touches directly
23 on the allegations that this lady might have had a
24 preexisting headache problem due to blood pressure and
25 sinusitis. And I went over those records and it will

1 refute an argument that she had some kind of preexisting
2 problem with headaches for these reasons and somehow they
3 carried over into this incident.

4 MR. PLYLER: Judge, she can't testify as to the
5 essence of the record. All she can come in and say is,
6 yes, these were kept in the normal course of our practice.
7 These are the records, we provided them. And that is all
8 she can say. And we have already stipulated that the
9 records are what they are. But I think plaintiff's
10 counsel is trying to bring her in here to go outside the
11 scope of what she can normally, you know, competent to
12 testify to, going into what the records mean or what they
13 say or don't say. She can only say these are the records,
14 and these were provided. And, Your Honor, we stipulated
15 to that.

16 MR. NEWLON: Actually, she is not a records custodian
17 but one of the nurses in the practice and I did not ask
18 for any opinions. All I asked was, are these records kept
19 in the ordinary course and I asked her statistical
20 information about how many times that you come in and
21 complained of headaches, how many times did she come in
22 because of sinusitis, how many total visits. It was
23 actually more of a statistical exercise to show that this
24 lady didn't have a chronic problem with headaches due to
25 blood pressure or sinusitis.

1 THE COURT: Did y'all depose this person?

2 MR. PLYLER: Judge, we did depose her. And on page
3 four of her deposition she says she is a receptionist and
4 a medical records custodian. There wasn't anything about
5 being a nurse or being able to provide any kind of medical
6 opinion. You know, this is a round about way, it is just
7 not permitted. We object to her coming in, well she is
8 not coming in but we object.

9 THE COURT: Let's see if she shows up. Assuming she
10 doesn't show what is your position, Mr. Newlon, what do
11 you want to do.

12 MR. NEWLON: I didn't ask her any opinions, there
13 were no opinions asked. All I asked for was, what do the
14 records say. When this lady came in and made complaints,
15 what were her complaints. In other words, it was a record
16 of what she told the doctors, no opinions.

17 MR. PLYLER: If he wants to get that in in closing,
18 if he wants to go through the records and say, well, it is
19 either, no mention of headaches here, no mention of
20 whatever here. Your Honor, that is permissible in cross
21 but not in this circumstance.

22 MR. NEWLON: If they want to admit the records in
23 toto from the deposition and I can talk about them ad
24 nauseam in closing and be able to use them to show the
25 jury that is fine.

1 THE COURT: Well, it sounds like we are in agreement.
2 Let's have the jury out.

3 (Whereupon, the jury came into open court at
4 approximately 3:40 p.m.)

5 THE COURT: The record should reflect the jury is
6 back and seated. Mr. Newlon, please call your next
7 witness.

8 MR. NEWLON: The plaintiff calls John Harmon to the
9 stand.

10 JOHN HARMON, being
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 By Mr. Newlon:

14 Q State your name for the record, please.

15 A John Harmon.

16 Q The lady sitting to my left, Jennifer Scott, is that
17 your daughter?

18 A Yes, that is my daughter.

19 Q There was an incident involving a ladder back in
20 January of 2009, do you have some knowledge information
21 about that?

22 A I know that my daughter was injured at home when
23 somebody hit her with a ladder, how that happened I don't
24 know, I wasn't there.

25 Q So you are aware of the incident then?

1 A I am aware of the incident.

2 Q Prior to that incident where were you living, in
3 Ninety-Six, in Greenwood?

4 A I lived on County Farm Road, Greenwood.

5 Q And how often would you typically see your daughter
6 on a given month or week prior to this incident?

7 A Every other day, every two days, something like that,
8 normal.

9 Q Prior to this particular incident did she have, make
10 any chronic complaints of pain to you, something going on
11 that is just constant, nagging her?

12 A No, I think she is pretty normal. I think she had
13 high blood pressure, she was pretty normal. She was a
14 normal person before this injury that she had.

15 Q All right. So this accident, this incident happened
16 according to the evidence we have was the 8th of January
17 of 2009. She went to the hospital the following day, the
18 9th of January of 2009. Did you accompany her to the
19 hospital?

20 A I don't recall whether I did. I know I took her to
21 the emergency room sometime after this happened for some
22 kind of pain blockage, treatments that they gave her.

23 Q Did you have any recollection of ever taking her to
24 Self Regional Heath Care after this incident?

25 A No, I don't recall whether I did or not.

1 Q Where did you take her, what is your recollection?

2 A Well, I took her to the emergency room a couple of
3 times, maybe three times. And they gave her, it seemed to
4 me they were treating her for a migraine or something,
5 gave her shots.

6 Q Hang on a second. I think you and I are confused or
7 one of us is. You just said emergency room and I said
8 Self Regional Heath Care. Did you take her to the
9 emergency room following this ladder incident at any time?

10 A After the incident, yes. That is what I am telling
11 you. I took her at least two times, maybe three times.

12 Q Okay. And what led you to take her to the hospital,
13 what was going on?

14 A Well, she was crying, more like screaming with
15 headache pain. She said her face was hurting her bad. So
16 we went to the emergency room.

17 Q Did you drive her?

18 A Yes, I did.

19 Q Now, other than the emergency room did you accompany
20 her at any other time to any other doctor for treatment
21 for headaches or facial pain?

22 A One of the doctor's that she was seeing fixed her up
23 with a doctor down in Lexington. I don't remember his
24 name and he, I took her down there twice. And he gave her
25 shots in her eyes for pain, just to block the pain so she

1 could have some relief.

2 Q Okay. At some point, you are aware that when this
3 accident happened your daughter, she was working as an
4 insurance agent for somebody?

5 A Yes.

6 Q Okay. And she eventually stopped that to go back to
7 school to be a massage therapist?

8 A Yes.

9 Q You are aware of that?

10 A Yes.

11 Q When she was a full time student, when she was a
12 student with massage therapy was she working anywhere to
13 your knowledge?

14 A I don't think she had a job.

15 Q During this time that she was a massage therapist did
16 she ever rely on you for monetary assistance?

17 A Yes, I paid her rent.

18 Q Did you help her out with her medical bills?

19 A Some, I paid some copay, give her some money.

20 Q Your observations of her today how is she today?

21 A Well, she is taking a lot of medicine, an awful lot
22 of medicine. And she had to go to Dr. Sida's office one
23 time, stay in a dark room all day and they gave her what
24 they call an infusion treatment. I don't know what that
25 is or just how much it helped but I don't think it cured

1 it, you know.

2 Q Thank you very much. I don't have any more questions
3 for you. Answer any questions that defense counsel may
4 have.

5 MR. GRIFFETH: We have no questions.

6 THE COURT: Mr. Harmon, thank you for coming. You
7 are free to stay. We will take another break, we are
8 running ahead of schedule, that is a good thing. Go back
9 there and don't talk about the case. See you in a minute.
10 Thanks.

11 (Whereupon, the jury was excused from open court for
12 a break.)

13 MR. NEWLON: Your Honor, I have a matter we can take
14 up.

15 THE COURT: You said you had one matter that we can
16 go ahead and take up?

17 MR. NEWLON: Yes, sir.

18 THE COURT: Go ahead.

19 MR. NEWLON: In the examination of Mr. Harmon, of
20 course, inadvertently he mentioned the word, copay, and I
21 kind of let it go by.

22 THE COURT: I missed it.

23 MR. NEWLON: I caught it and I am sure somebody else
24 did. But my point is that I didn't elicit that from him,
25 he just mentioned it. I want to make sure that, I did not

1 open the door to start talking about whether or not this
2 lady had health insurance at the time of this particular
3 circumstance. It wasn't something that I actually asked
4 him to testify to. He just mentioned it in passing.

5 THE COURT: I don't think the door was opened unless
6 y'all think it is. I actually didn't even hear it.

7 MR. GRIFFETH: No, sir. I heard it but we don't
8 intend to go into that. Number one, if the jury doesn't
9 already assume she has got some sort of insurance, she is
10 working for an insurance agency.

11 THE COURT: That can cut both ways, gentlemen, I am
12 not sure we want to go down that road.

13 MR. GRIFFETH: No sir, we have no intention of going
14 down that road.

15 THE COURT: Y'all want to go ahead while we are
16 waiting for the next witness and we can talk about the
17 deposition transcripts that, I believe Dr.'s Ergle and
18 Fuller. My clerk and I have both reviewed the objections
19 that were interposed and the transcript.

20 MR. NEWLON: Your Honor, I withdrew objection, Sean
21 Fuller's transcript, page 28, lack of foundation.

22 THE COURT: That was going to be overruled anyway.
23 Any other that you want to beat me on the punch on?

24 MR. NEWLON: No, sir. I had, some of it had to do
25 with prior concussion over twenty years ago, illusions to

1 that. And what was the other thing. We have already
2 talked about that. Some of this illuded to that. If you
3 want to speak to it I can speak very quickly to each one
4 of them. Even if you have already made up your mind I can
5 just at least put something on the record.

6 THE COURT: Let's do it this way. Let me tell you
7 which way I am going on this and then y'all can argue the
8 ones that you feel the most passionate about but I have
9 reviewed the objections that were raised at the time the
10 depositions were taken. And the ones that cause me, quite
11 honestly, the portions of the transcript that cause me the
12 most concern, the objections that I am looking or feel are
13 valid would be the, on the Fuller transcript the objection
14 to pages 19, lines 11 through page 25, 11 through 25 where
15 we are talking about depression and similarly the, well
16 the suicide attempt issue on the Fuller transcript, page
17 41 through 42, lines 16 through 12 respectfully. I don't
18 know that we are going to need to go into that. If
19 someone can help me, the depression portion, Mr. Griffeth
20 that you were talking about earlier when the plaintiff was
21 on the stand, I looked through that and the testimony of
22 the physician, correct me if I am wrong, seems to indicate
23 that there is no causal relationship between any of the
24 symptoms that the plaintiff experienced as a result of any
25 depressive episodes in this particular incident. I don't

1 see where there is any sort of causal leak and Dr. Fuller
2 seemed rather insistent that we don't even have an overlap
3 of symptomology. Would I be accurate.

4 MR. GRIFFETH: Your Honor, you may very well be
5 accurate in that regard. Let me add since that since Your
6 Honor has made it clear at least in trial today that they
7 are not claiming depression as an element of their damages
8 and we ought to just keep that out. So I have no
9 objection to keeping out the transcript line 19, 11
10 through 25.

11 THE COURT: As far as the other objections and I can
12 go down, I am inclined to allow the other testimony in
13 either because, either I do find, I know there is some
14 foundational objections. I don't think that a lack of
15 foundation is so fatal to those questions that it
16 precludes the questions, of responses from being presented
17 to the jury. And a lot of the objections that relate to
18 her physical condition and things of that nature, for
19 example, Dr. Fuller where the doctor was asked about the
20 thyroid, insomnia. We have had testimony that this injury
21 that she sustained by the ladder caused her insomnia, the
22 pain was bad, it was causing her to roll over. That is a
23 fair question. Her physical health is an issue by very
24 definition. Are there any of these that y'all feel so
25 darn strongly about that you really want to push this.

1 MR. GRIFFETH: Your Honor, no. Let me preface by
2 saying that I grew up trying cases in front of the late
3 Frank Eppes whose standard response was, let it all in for
4 whatever it is worth. And frankly, Your Honor, I believe
5 Your Honor is correct. We did conceive the suicide and
6 that is out and the depression one, since it is not being
7 pursued as a damage and I can live with the rest of it.

8 THE COURT: Mr. Newlon, are we all right?

9 MR. NEWLON: Yes.

10 THE COURT: If you can have your people redact the
11 portions. I haven't seen the video so you know how to
12 clean it up. I trust it will be done.

13 MR. NEWLON: Yes, sir.

14 THE COURT: We will just wait until, which doctor is
15 coming today?

16 MR. NEWLON: The Professor Slimmer.

17 THE COURT: Oh, the professor.

18 MR. NEWLON: He said ten minutes.

19 THE COURT: We will be at ease for a few minutes,
20 gentlemen. And just so the record is clear, I am going to
21 go ahead and introduce these transcripts into the record
22 as Court's 1 as well as my notes on them and your
23 objections just so there is a record of all of this. This
24 will be Court's 1.

25

1 (Whereupon, Court's Exhibit 1 was marked for
2 identification only.)

3 THE COURT: I would like to have that back when the
4 video is played and follow along with the transcript if
5 that is all right otherwise hang on to it.

6 MR. GRIFFETH: Your Honor, while we are on the
7 record, Mr. Newlon was planning on reading Dr. Fuller's
8 deposition because he could not put his hands on a video.
9 I have loaned Jon my copy of the video disk, the only one
10 that I have got on his promises that he will return it to
11 me in the morning. I want the record to reflect that.

12 THE COURT: Very good.

13 (Whereupon, a short break was taken.)

14 THE COURT: Let's have the jury out, please.

15 (Whereupon, the jury came into open court at
16 approximately 4:15 p.m.)

17 THE COURT: Let the record reflect the jury is
18 present. Mr. Newlon, call your next witness.

19 MR. NEWLON: The plaintiff calls Dr. David Slimmer.

20 DIRECT EXAMINATION

21 By Mr. Newlon:

22 Q State your name for the record, please.

23 A My name is David Allen Slimmer.

24 Q Where do you do for a living, Mr. Slimmer?

25 A I am currently the Dean of the College of Science and

1 Mathematics at Lander University and my training for that
2 is I am a physicist.

3 Q For the benefit of the jury can you go through a
4 little bit of your education and training and I think I
5 said Mr., I apologize, it is actually Doctor.

6 A That is all right, no offense taken. I received a
7 Bachelor's Degree in Mathematics and Physics from
8 Newlonsburg College in Allentown, Pennsylvania. I went on
9 for a Master's Degree in Physics from Lehigh University in
10 Bethlehem, Pennsylvania. And then I received my PhD from
11 Lehigh University from Bethlehem, Pennsylvania as well. I
12 taught for a year up in Pennsylvania and then I have been
13 with Lander ever since.

14 Q With regard to the study of physics or the
15 application of physics is that something you do in your
16 field, not only in your acting field but as a teacher?

17 A It is both, yes. My own personal research has been
18 involved in physics, different aspects of different areas
19 of physics and then for my teaching responsibilities I
20 have taught different levels of physics as well from the
21 introductory to the calculus based and specialty courses.

22 Q You were asked in this particular case to analyze
23 from properties dealing with a ladder that is back there
24 against the wall. Based on your education, training and
25 experience and your practice of physics would you be able

1 to give an opinion regarding some of those properties and
2 observations you made?

3 A Yes, I would to some extent.

4 MR. GRIFFETH: May it please the Court, Your Honor.
5 Pardon the objection, I would at this point, Your Honor,
6 under Rule 702 like to voir dire the Professor regarding
7 his test of, his decision in form of liability.

8 MR. NEWLON: Can I come up, before I offer him up for
9 voir dire can I go ahead and go through some of his
10 background and finish that?

11 THE COURT: Please, go right ahead.

12 Q In this particular case what were you hired to do?

13 A What I was asked to do was to take a look at the
14 ladder and to measure and then compute what force the
15 ladder would have if it fell from a particular point, on
16 to a particular point, with what force it would have an
17 impact.

18 Q And were you able to use that particular ladder to
19 determine as far as its dimensions and forces that may
20 apply, you were able to use that ladder to do that?

21 A Yes sir, I used that ladder, that particular ladder
22 to make my measurements.

23 Q And what I call the receiving measurements or the
24 other measurements you used were the forces accepted, did
25 you have measurements to use for that?

1 A I am sorry, I don't understand.

2 Q Well, the force plate or whatever.

3 A Yes, to make my measurements I used a piece of
4 equipment that we have in our physics lab.

5 Q And were you given information with regard to Ms.
6 Scott's height and, I will call bridge height, the height
7 of the bridge of her nose from the floor to be able to use
8 that and make calculations?

9 A I was given that information and then on a second
10 occasion I measured that information myself.

11 Q Did you have an opportunity to speak with Ms. Scott
12 to get a better understanding of the mechanics of the
13 incident itself?

14 A Yes, I did.

15 Q And with regard to your analysis did you rely on your
16 materials or some of your publication materials in coming
17 to a conclusion or opinion?

18 A I didn't rely necessarily on any publications. I
19 used equipment that we had as well as a data program that
20 we had to calculate that force, to measure it. And then I
21 made rough approximations for the ladder falling and used
22 some physics equations to work out what it would be as
23 well.

24 Q In these equations that you are talking about, are
25 these routinely accepted equations in the field of

1 physics?

2 A In the world of physics, yes. Some of the torques
3 equals moments times the acceleration.

4 Q And were there any other materials that you might
5 have been provided or used in these circumstances?

6 A Just the measurements.

7 Q And in fact did you bring a file with you today?

8 A I did bring a copy of some of my data, yes.

9 Q When you say data, the results?

10 A The results of my test, yes.

11 Q Given your education and training and the equipment
12 that you had and the information that you gathered from
13 Ms. Scott were you able to effectively make, render
14 opinions regarding what you were asked to do?

15 A As to how much force the ladder would of had, yes.

16 Q I will present Dr. Slimmer for voir dire.

17 MR. GRIFFETH: Thank you.

18 VOIR DIRE CROSS-EXAMINATION

19 By Mr. Griffeth:

20 Q Mr. Slimmer, we met when I took your deposition and
21 let me ask you just a few questions. You are the Dean of
22 math and science which means you are in charge of biology,
23 math, computer science and nursing?

24 A And physical science.

25 Q And physical science, I am sorry.

1 A Which is chemistry and environmental science.

2 Q Right. And it is my understanding is you have only
3 testified as an expert one time before today?

4 A Prior to this occasion.

5 Q And that was for Mr. Newlon in a case back some time
6 ago regarding an automobile wreck?

7 A That is correct, back in May.

8 Q Back in May of this year. Okay. And you of course
9 were not there on January the 8th of '09 to see this
10 ladder fall?

11 A No, I was not.

12 Q Or to see with what force it struck the plaintiff on
13 the nose?

14 A No, I was not.

15 Q Okay.

16 MR. NEWLON: I am just going to object to the form of
17 the question, the use of the term, force.

18 THE COURT: Overruled.

19 Q You were contacted by Mr. Newlon to make these tests
20 I think about Christmastime, that is what you told me in
21 your deposition?

22 A I believe so, yes. Sometime in that ballpark.

23 Q And the testing ended up being run in May, May the
24 20th and the 21st?

25 A In that ballpark, sure.

1 Q And you talked to Mr. Newlon three times?

2 A Prior to the test?

3 Q Prior to the test.

4 A About that, yes.

5 Q You had the letter and the photo and the measurements
6 that were provided to you by Mr. Newlon?

7 A That is correct.

8 Q And I have here the experiments were run on May the
9 20th and the 21st of 2012, on page 30 of your deposition.
10 I can get it if you want it.

11 A Okay. I can look that up to be sure.

12 THE COURT: Y'all don't talk at one time.

13 MR. GRIFFETH: Professor, let me finish my questions
14 and I will try to let you finish your answer so that we
15 don't talk over one another. Let me slow down a little
16 bit.

17 Q Now these are though, Professor, the first
18 experiments you ever done with a ladder?

19 A That is correct.

20 Q You did a series of trial experiments letting the
21 ladder fall from a vertical position onto what you called
22 a vernier force plate?

23 A That is correct.

24 Q Which was interfaced with a computer?

25 A That is correct.

1 Q You did five experiments but you didn't have any
2 confidence in those five results so you redid them?

3 A No, I don't think that is true. I had confidence in
4 the five results. I ran two set of tests because the, I
5 was given the information that the individual put their
6 hand up so I went from a basis of a free fall from a
7 standing position and then a free fall from where the hand
8 extent would have been. So I did run ten tests but it was
9 under two different sets of conditions.

10 Q Two sets of conditions and your wife and son helped
11 you do those?

12 A That is correct.

13 Q And the first trial experiments you said whether the
14 ladder was flat or whether it was up on its points would
15 make no difference to your consideration?

16 A I am not sure I understand what you mean. Whether
17 the ladder was flat against the wall or flat--

18 Q Whether it was flat on its bottom or whether or not
19 it is up on its points. And you said you thought it would
20 make no difference to your findings?

21 A That is correct because it was coming from free fall,
22 it was coming from all but balanced spot.

23 Q And the computer that you used to record or
24 photograph the computer results, you didn't photograph
25 those results?

- 1 A I did not.
- 2 Q You don't have those with you?
- 3 A I do not have those with me. I have them on that
- 4 computer.
- 5 Q You didn't bring the computer with you?
- 6 A I did not bring the computer with me.
- 7 Q You didn't have it at your deposition?
- 8 A I did not.
- 9 Q You wish you had of made photographs, don't you?
- 10 A I am not sure why I would have but I mean I am not
- 11 opposed to having that, no.
- 12 Q Did you tell me in your deposition that you wish you
- 13 had?
- 14 A I might have said I wish I had it because you were
- 15 asking about how I did it, yes.
- 16 Q And you also indicated that frankly you didn't have
- 17 the computer set exactly where you would have ideally
- 18 liked it and you didn't have your equipment set so as to
- 19 give a reliable number as to what the force was when you
- 20 first done them. Isn't that correct?
- 21 A I said I did not calibrate it to the fullest extent,
- 22 that is correct.
- 23 Q You didn't video these experiments?
- 24 A I did not.
- 25 Q And all of your assumptions, in the first time that

1 the top metal step of the ladder bumped the plaintiff's
2 nose?

3 A That is correct.

4 Q You find out it wasn't right?

5 A That is correct.

6 Q All right. You assume that the base of the ladder
7 was 17 inches away from the base of the floor?

8 A That is correct.

9 Q You did not know and don't know what the angle was
10 that the ladder was leaned against the wall, do you?

11 A I could compute it but I don't know it off, right
12 now.

13 Q And you didn't compute it?

14 A I did not.

15 Q For these test you didn't compute it?

16 A Because it did not have any relevance.

17 Q To the test you were doing?

18 A To the test I was doing, that is correct.

19 Q Which was a straight vertical fall onto this vernier
20 plate that measured something on the computer?

21 A That is correct.

22 Q Now, after the first five trials you ran three more
23 trials?

24 A I ran the trials again with the idea of the ladder
25 coming from the full extent of the hand, yes.

1 Q And you said that there was a ten percent margin of
2 error?

3 A That was my estimation, yes.

4 Q Your estimation, you had no calculation of what the
5 margin of error was, did you?

6 A That is correct.

7 Q All of this was done and you testified in the
8 deposition with me and I asked you all of those questions
9 concerning experiments that you had done. And frankly at
10 that time you could not tell me with certainty how many
11 pounds of force had hit Ms. Scott with the ladder on
12 October, on January the 8th of 2009, could you?

13 A I could not and I don't think anybody could.

14 Q You can't do that, can you?

15 A You can not.

16 Q First of all, just to be technical about it. First
17 of all, force is measured in newtons, not pounds and you
18 have to convert that to pounds?

19 A You can convert that to pounds.

20 Q There was no graft converting newtons to pounds in
21 your first set of experiments?

22 A It is a simple calculation to convert it.

23 Q You put it in your second report at the top of the
24 page, didn't you?

25 A I probably did, yes.

1 Q Now, and you would agree with me that the folks who
2 were there then on January the 8th of 2009 would be in a
3 better position to estimate or give testimony regarding
4 the actual amount of force that hit Ms. Scott when the
5 ladder fell on here nose?

6 A I don't think that is true, no. I think the folks
7 that were there would have a better idea as to where the
8 ladder was, maybe what distance it was from the wall but I
9 don't think a visual look is going to confirm what a force
10 would be.

11 Q Exactly, lay witnesses could tell exactly how many
12 pounds of force?

13 A That is correct.

14 Q So when I took your deposition and you hadn't talked
15 to Ms. Scott, then you decided you needed to talk to her
16 and make your measurements yourself.

17 A That is correct.

18 Q And you reran your experiments?

19 A That is correct.

20 Q And you did all the same things that you did when you
21 ran the first ones?

22 A With some small variations.

23 Q With some small variations. One thing you learned
24 was you had assumed that the ladder was turned with the
25 steps out and she told you the steps were turned in toward

1 the wall?

2 A That is correct.

3 Q That meant that the legs would separate. Or you
4 found in the second set that the legs might separate?

5 A They might, they could separate, that is correct.

6 Q And you don't know whether they did or not?

7 A I do not know.

8 Q That is why you ran two sets of experiments, the
9 second time?

10 A That is correct.

11 Q What else was different about those, what other
12 information did you have that was different when you ran
13 the second set. One of those was that the steps were
14 turned toward the ladder. And the second one was that she
15 was hit by the side of the ladder, not the step or rung of
16 the ladder as you had assumed in the first set. Isn't
17 that correct?

18 A Partially correct. What I did in the original test
19 is I used the very stop step as the point of impact.
20 After talking with Ms. Scott what I used is the way the
21 ladder is looking right now the very top metal bar and I
22 went one quarter of the length to the lefthand side
23 because she said it was towards the left that hit her when
24 it came down, with as towards the side so I did not use
25 the blue portion of the ladder, I used the silver or the

1 chrome portion of the ladder for my point of impact.

2 Q Now, you had not, until after your deposition, you
3 had not met with Ms. Scott to get any of this information?

4 A I did not.

5 Q We are relying on the information Mr. Newlon had
6 given you. And in the end you offered, according to your
7 report, you have, to obtain the numbers below I then ran
8 the experiment two different ways. First putting the
9 brackets on the sides in an appropriate position. I
10 allowed for the support side to separate and catch the
11 floor. Then using the side brackets to hold the two
12 sections together I reexamined without sections separated.
13 Because I can't say for sure which way was appropriate for
14 when the ladder fell, I offer both for consideration.
15 That is the finding of the report.

16 A That is correct.

17 Q In short you still can't testify and I believe you
18 said today that no one could testify as to what force hit
19 Ms. Scott on the nose when the ladder fell?

20 A To get the exact number, no, I don't think anybody
21 could.

22 Q Thank you.

23 MR. GRIFFETH: Your Honor, I don't believe that
24 Professor Slimmer qualifies to give testimony that would
25 be reliable to aid the jury under 702, Rule 702 or the

1 Council decision. I have that and I have the Council
2 decision if you need both of those I will be happy to hand
3 them up.

4 THE COURT: I am very familiar with Council and are
5 you basing your assertion, you are basing your assertion
6 basically on two grounds because Council is separate from
7 the Rule 702. Are you saying that he is not qualified as
8 an expert in physics to describe the impact of a falling
9 object on the bridge of the plaintiff's nose. Are you
10 saying that he is not qualified to do that or are you
11 saying that physics is inherently untrustworthy.

12 MR. GRIFFETH: I am saying, number one, that he is
13 qualified to run those experiments but his experiments
14 were faulty, the computer data was not proved, it was not
15 preserved. He did not have the right information the
16 first time. The second time he ran them he did all of
17 those things, he made several assumptions about vertical
18 fall and put the ladder up, he didn't have angles. He
19 made all of those same mistakes the second time around and
20 the second time around when he ran them, when he got some
21 more accurate information about the way the steps were
22 turned and what part of the ladder hit Ms. Scott. What I
23 am saying, Your Honor, is that his, he is qualified to
24 make those measurements but he has clearly said he can't
25 tell you without, with any certainty what force the ladder

1 struck Ms. Scott. And as a result, Your Honor, that
2 testimony is not helpful to the jury. All he has done in
3 his second set of data is to give you some wide ranges of
4 some experiments that he ran again with faulty data and he
5 had never done, never done this before. It is simply not
6 reliable, Your Honor, for purposes of being helpful or
7 useful to the jury to try to determine the injury that Ms.
8 Scott received or the consequences thereof.

9 THE COURT: Well, I am looking at Council and Council
10 requires several things. First the evidence would have to
11 assist the jury. The analysis performed would be subject
12 to peer review, this sounds like high school physics. I
13 mean I am trying to focus in. Mr. Newlon, I assume that
14 the, that you are going to elicit from this witness
15 testimony that the amount of newton's which impacted your
16 client was within a range of X and Y and that would be
17 comparable to A and then give a common example. Is that
18 the manner in which the testimony is going to be elicited.

19 MR. NEWLON: A 25 pound bag of concrete.

20 THE COURT: All right.

21 MR. NEWLON: And if I may, Your Honor, I can respond
22 but I would not rather do it in the presence of the jury.

23 THE COURT: I do think that Council has been met, the
24 requirements of Council has been met. It would be useful
25 for this jury to have a appreciation of course, it did

1 strike the plaintiff especially since the, as we progress
2 thus far it would be appear that there has been at least
3 some implication by the defendant that this was not a very
4 bad accident that happened. So I think that the amount of
5 force that would have hit her is certainly relevant or may
6 been hurt. The rest goes to the weight, the objections
7 that you have, Mr. Griffeth, to his inability to say the
8 exact amount of force or exact amount of pounds per square
9 inch or whatever would be used, the complaint that he
10 can't say with specificity that there is a temperament
11 margin of error by definition, the fact that there is a
12 margin of error does not mean that it is necessarily fatal
13 to the testimony. So I do think he is qualified under
14 702, I don't know that there is any dispute about that as
15 a physicist. He is certainly qualified to give this
16 testimony, he is qualified to do the calculations. The
17 fact that he went back after making additional or having
18 additional discussions with the plaintiff and then reran
19 the test to refine his theory I think if anything that is
20 encouraging as opposed to discouraging. He can testify.
21 Council is satisfied.

22 MR. GRIFFETH: Thank you, Your Honor, if you can have
23 on the record note a running objection as to his testimony
24 so I don't have to hop up and down.

25 THE COURT: That is very good, you have a running

1 objection. But clearly this type of testimony is within
2 what Council was under 702. Mr. Newlon, you want him
3 qualified in the field of physics?

4 MR. NEWLON: Yes, sir.

5 THE COURT: Ladies and gentlemen, the Court has ruled
6 that Dr. Slimmer is qualified in the field of physics, he
7 is qualified as an expert in that particular field. And
8 normally witnesses are not able or not permitted under the
9 rules to give opinion testimony. An exception of this
10 rule exists for individuals who were qualified as experts
11 in certain fields or areas of education. Due to his
12 training, his expertise the Court has found that Mr.
13 Slimmer is qualified in the field of physics therefore he
14 may give his opinion in this particular area. That does
15 not mean you have to accept his opinion but it is evidence
16 for you to use in whatever weight you deem is appropriate.
17 Continue, Mr. Newlon.

18 CONTINUE DIRECT EXAMINATION

19 By Mr. Newlon:

20 Q Dr. Slimmer, before we get started in your analysis
21 what assumptions did you make, if any, in the course of
22 your analysis?

23 A Probably the biggest assumption is I made the
24 assumption that the ladder was in a vertical position or
25 balanced as much as it possibly could be vertically.

1 Q You mean you started the test purely upright?

2 A That is correct.

3 Q You did not do the test by leaning against the wall
4 and pushing it off?

5 A That is correct.

6 Q I want to make sure, you are a physicist and I am a
7 lay person. Okay. What other assumptions did you make?

8 A I made the assumption that it hit the bridge of her
9 nose, I made the assumption that I hit, as I said, about a
10 quarter or a quarter of the distance from the lefthand
11 side over on that rung. I made the assumption there was
12 no air blowing in the room. I made the assumption that
13 she didn't dodge forwards towards it or anything like
14 that.

15 Q Any other assumptions that you think are significant
16 to your analysis?

17 A Nothing that comes to mind. Now, but I do have to
18 say the justification for the vertical standing is because
19 my analysis was looking at the minimum value to it. Its
20 definitely not an extreme, if anything it is the lower end
21 of it. Because if it was pushed away from the wall it
22 would already have a velocity as it was coming or speed as
23 it was coming over.

24 Q It is my understanding, correct me if I am wrong, in
25 doing this you just let it go and it falls on its own

1 inertia?

2 A That is correct.

3 Q But if someone reached behind here and pushed it off
4 it would have more inertia?

5 A It could very well have more inertia, most likely it
6 would.

7 Q When did your measurements, there is going to be,
8 just based on pure physics, it would be less than it would
9 be if you started from--

10 A If I was pushed from the wall.

11 Q Okay. So can you tell the jury exactly and I am
12 talking about the test that you ran based on the
13 discussion that you had with the plaintiff, taking actual
14 measurements, putting the ladder in the right position as
15 it fell. What did you determine, how did you figure it
16 out and what did you determine?

17 A What I did is I used the measurements from Ms. Scott,
18 I used the values that were given to me as to where the
19 ladder was, the distance from the wall. I put the ladder
20 in that vertical position, I had somebody hold it, that is
21 where my son and my wife came into play as I needed
22 assistance with it. And I had them release the ladder
23 from rest to fall onto what we call the force plate which
24 is what measures the force on impact. That measurement is
25 shot to the computer which was sitting right there and on

1 that computer what it grafts is the force as a function of
2 time. So what I am reporting is the average force of that
3 impact. It is not the lowest value, it is not the highest
4 value, it is the average force.

5 Q That is what your equipment measures?

6 A That is what my equipment measures. It measures the
7 force as a function of time and then what I computed was
8 the average force.

9 Q Did you run the test more than once?

10 A I did. I ran it five times.

11 Q And in those five times did you, how were your
12 results, consistent, inconsistent?

13 A They were fairly consistent. After the second round,
14 after getting the information as to which way the ladder
15 was because I was mistaken the first time. The
16 measurements ran, I had the lowest value of the five
17 measurements, I had a lowest value of 68.9 newtons which
18 would convert to 15.5 pounds all the way up to 98.7
19 newtons which converted to 22.2 pounds. So I am
20 confident, I don't think you can come out with an exact
21 number because there are several small factors or
22 variations that would play in there. But my average for
23 those five runs are fairly consistent particularly if you
24 throw out the high end and the low end came out to be 19.3
25 pounds or 85.9 newtons. And that was with the ladder,

1 that was allowing the legs to separate.

2 Q What was it when the legs did not separate?

3 A When the legs did not separate it went up as high,
4 the average of the five tests was 28.7 pounds and 127.7
5 newtons.

6 Q I am sorry, you said 20 what?

7 A 28.7 pounds was the average. And that range ran from
8 25.6 up to 31.9, the five variations. So, again, in terms
9 of five data points I don't find that to be a huge
10 deviation.

11 Q Based on your analysis, assuming that the legs did
12 not separate, there has been no testimony that when it
13 fell then the average pounds would be 28.7 but that would
14 be from a pure vertical ladder falling on its own inertia?

15 A That is correct.

16 Q And that number actually would go up or down with
17 someone forcing it over center?

18 A It can only go up, it could not go down, it is the
19 minimum.

20 Q In regards to your analysis, based on the numbers you
21 used and the date that you used did you take a
22 conservative or liberal approach to this analysis?

23 A I took a conservative approach by looking for the
24 minimums. As a scientist I don't like to experiment
25 around and play with the wide ranges so I always look at

1 the minimum.

2 Q Did you discover anything else, any other findings of
3 significance in your analysis other than the average
4 pounds exerted from a ladder, free fall from pure vertical
5 with or without extension of the legs?

6 A No, not that comes to mind.

7 Q You are not an engineer, correct?

8 A I am not an engineer.

9 Q Or biomechanical type person?

10 A That is correct.

11 Q And you don't do accident reconstruction?

12 A I do not.

13 Q But you do know physics?

14 A I do know physics.

15 Q Thank you.

16 THE COURT: Mr. Griffeth.

17 CROSS-EXAMINATION

18 By Mr. Griffeth:

19 Q Professor Slimmer, let me followup with just two or
20 three questions on that regard. All you are testifying to
21 here today is that the ladder, you are disregarding your
22 first set of stuff?

23 A I am disregarding that completely, yes.

24 Q Because you didn't have the right info?

25 A That is correct.

1 Q The second set you were given two choices here. Legs
2 apart, legs together?

3 A That is correct.

4 Q Now, and all you were measuring is a vertical fall
5 onto the vernier plate?

6 A The vernier, that is correct.

7 Q To measure the amount of force?

8 A That is correct.

9 Q Doesn't take into consideration how the force may
10 have slowed if Ms. Scott had put up her arms?

11 A In my conversation with her she informed me that she
12 put up her left hand and the ladder brushed by her left
13 hand as it came down.

14 Q Would it make a difference to you if her testimony
15 today in court were that she put her arms up and brushed
16 her left arm?

17 A If it only brushed it it would not make a difference.
18 It doesn't matter what went up, it is where it hit.

19 Q It doesn't make any difference or your calculations
20 do not take into consideration whether or not, as
21 testimony was given here today, Mr. Griffin reached for
22 the ladder and grabbed it and about the time it hit Ms.
23 Scott?

24 A I did not consider that, no.

25 Q All you are doing is considering a ladder falling

1 against a vernier plate based on those assumptions that
2 you had made?

3 A That is correct.

4 Q You still can't say how hard that ladder bumped Ms.
5 Scott on the nose?

6 A I cannot say because there is no way of anybody
7 saying that, in my opinion.

8 Q Now, Mr. Newlon hired you to give this physics
9 opinion and what did he pay you, Doctor, for your
10 testimony?

11 A He actually has not paid me yet but we have agreed to
12 an amount of \$500.00 dollars.

13 Q Even when you had to run the second set?

14 A That's correct.

15 Q Thank you, I have no further questions.

16 REDIRECT EXAMINATION

17 By Mr. Newlon:

18 Q When you said exact, the reason you can't make an
19 exact is because your test was not from the, against the
20 wall, it was from pure vertical?

21 A It was from pure vertical, in addition there could be
22 tons of different things that could happen. If there was
23 wind blowing at the time, it could be that the ladder
24 struck at a slightly different spot, within percentages it
25 is in there.

1 Q Thank you.

2 MR. GRIFFETH: Nothing further, Your Honor.

3 THE COURT: One quick question by the Court. You had
4 mentioned earlier that the equipment that you had used,
5 that you did not calibrate it, as you put it, "to the
6 fullest extent possible." What do you mean by that?

7 A When you turn on the equipment, when we use it, and
8 we use it on a regular basis. When you turn on the
9 equipment you can calibrate it and I did do that, you can
10 calibrate by saying I have nothing on there and it
11 baselines it zero. And then you put a weight on there of
12 a known mass and then you say this is what I have on there
13 and it calibrates that end. To fully calibrate it what I
14 could have done and maybe should have done would to be run
15 several known masses just to make sure it is in there.

16 THE COURT: Okay. Followup based on my question, Mr.
17 Newlon.

18 By Mr. Newlon:

19 Q Did that, your failure or whatever you want to call
20 decision not to calibrate it, is that in your opinion
21 invalidate your numbers?

22 A In my opinion, no. In my opinion it is a small
23 percentage if anything.

24 MR. GRIFFETH: Your Honor, let me just simply state
25 for the record. I think that that obviously indicates

1 along with those other errors the unreliability. We renew
2 our motion to strike Professor Slimmer's testimony, it is
3 unreliable under Council.

4 THE COURT: I understand. The reason I asked the
5 question was precisely that I wanted that issue cleared up
6 for purposes of Council and if anything his testimony here
7 that he did calibrate it with a known mass as opposed,
8 certainly not the fullest extent possible but it was
9 sufficient for purposes of these experiments. So your
10 objection is noted and overruled. Thank you very much.

11 MR. GRIFFETH: Thank you, Your Honor.

12 THE COURT: No objection to excusing this Professor?

13 MR. GRIFFETH: No objection to releasing Professor
14 Slimmer.

15 THE COURT: Thank you very much for coming. Have a
16 good day. Do you have another quick witness this evening,
17 Mr. Newlon?

18 MR. NEWLON: No, sir.

19 THE COURT: Ladies and gentlemen, we are going to go
20 ahead and break a little bit early. I am going to ask
21 that you be back in the jury room tomorrow morning at
22 9:30. We will have coffee back there and some munchies
23 and something else. There will be something to eat. My
24 suggestion would be go ahead and grab breakfast before you
25 come in. Now, I am well aware your husband, your wife,

1 your significant other, your kids know that you have jury
2 duty this week. And I am sure curious about what kind of
3 case you have been selected on. When I say the thirteen
4 of you have been picked as fair and impartial people I
5 want to make sure that that fairness and impartiality is
6 maintained throughout the trial. So please don't discuss
7 anything about this case with your spouse, significant
8 other, whoever it is you share a roof with. Don't talk to
9 them about it because it would be improper for your
10 opinion to be influenced by something that they might
11 inadvertently innocently say to you tonight. Don't talk
12 about this case. See you in the morning at 9:30.

13 (Whereupon, the jury was excused from open court for
14 the day.)

15 (Whereupon, the trial will resume the next morning at
16 9:30 a.m.)

17 October 4, 2012

18 THE COURT: If we may let's go back on the record.
19 Mr. Newlon, you have had an opportunity to fix the video
20 and everything is okay.

21 MR. NEWLON: One of them is perfectly fine. I had
22 software that works with that one. The other one I could
23 not. I had to do the old method and turning down the
24 volume, fast forward, skip those two objections. Before
25 we get to the depositions, a couple of house keeping

1 matters real quick. In the Amanda Strickland deposition,
2 the records custodian, I move to have those records into
3 evidence. I just want to make sure having moved those
4 records into evidence, I want to go ahead and mark them in
5 this case and have them admitted so that I can discuss
6 them in the closing of this case. Otherwise I am going to
7 send the sheriff out after Amanda Strickland and have her
8 come in here and talk about them.

9 THE COURT: No objection?

10 MR. PLYLER: No objection, Your Honor. And actually
11 we have got the same, while we are talking about records.
12 We want to go ahead and move in all the records, a whole
13 pack of records that we intend to discuss at closing.
14 Actually we have a copy for Mr. Newlon.

15 MR. NEWLON: Some of these records are going to have
16 prejudicial information, maybe discussing depression,
17 suicide, that kind of stuff. They are going to have to be
18 very careful about reading through them, redacting all of
19 that before they submit them into evidence otherwise I
20 need to look at every single record and make sure it
21 doesn't have any of that in there.

22 THE COURT: Which records are you talking about, Mr.
23 Plyer.

24 MR. PLYLER: Your Honor, we took out any of the
25 records with any reference of suicide.

1 MR. NEWLON: And depression.

2 MR. PLYLER: We would like to put in Self Regional
3 records from January 9th of 2009, January the 15th of
4 2009, March 26th of 2009 and November 4th of 2011. We
5 would like to put in the entire body of records from
6 Saluda Family Practice. We would like to put in the
7 entire body of records for Dr. Fuller from Irmo Family
8 Practice. We would like to put in the entire file of Dr.
9 Ergle at Piedmont Health who will testify. That is what
10 we have got, Your Honor, we would like to move into
11 evidence.

12 THE COURT: You say you have already redacted any
13 reference to suicide and depression out of those?

14 MR. GRIFFETH: Your Honor, I am not entirely clear
15 that all records for depression are in there. I don't
16 think there is anything prejudicial about that. They are
17 not claiming it as we know and she mentioned it on her,
18 fill-that-in on her application. Your Honor, I don't
19 believe that the records have been totally redacted as to
20 depression. But I don't think there is anything that
21 prejudicial, that point since it is not being claimed.
22 And we are not going to argue about it and not going to
23 claim it and not going to refer to those records. We have
24 just got them all together from those practices so that it
25 would all be there for submission.

1 THE COURT: All right. Let's deal with it this way
2 then. Mr. Newlon, the records you are referencing if you
3 will go ahead and mark those. Have they already been
4 marked?

5 MR. NEWLON: To Amanda Strickland's deposition is one
6 I can mark as 14.

7 THE COURT: Plaintiff's 14 will be in evidence
8 without objection.

9 (Whereupon, Plaintiff's Exhibit 14 was admitted into
10 evidence.)

11 THE COURT: And I will give you an opportunity. I
12 notice Mr. Plyer is holding a stack of records, it is
13 probably about four inches in height total. I will give
14 you a chance to give those a cursory review and if there
15 is anything objected to in the material in there we can
16 deal with that at a later point and time. But certainly
17 there doesn't seem to be any objection to the records that
18 you are proposing to introduce into evidence at this point
19 and time, Mr. Plyer, let's just see if there is anything.

20 MR. NEWLON: I want to look at these and make sure
21 there is nothing in there too.

22 THE COURT: That is fine.

23 MR. PLYLER: Judge, these are moved into evidence?

24 THE COURT: Correct and I am going to allow him to
25 take a look at them. They will be in evidence but there

1 might be some stuff in there that we need to talk about
2 later but they will be in evidence.

3 MR. GRIFFETH: That is defendant's?

4 COURT REPORTER: Number 9.

5 (Whereupon, Defendant's Exhibit 9 was admitted into
6 evidence.)

7 THE COURT: Now going forward I understand we have
8 two video depositions. First of all I usually explain to
9 the jurors that these depositions are taken under oath and
10 that they can rely upon what is said and the video
11 depositions the same way as if the individual appeared
12 here in court. That is usually the way I explain it to
13 them. Secondly, I hope to have this case to the jury
14 sometime this morning or early afternoon. Just so y'all
15 are aware, my secretary reminded me of a speaking
16 engagement I have this evening around 5:00 or 5:30. I am
17 hopeful we will receive a verdict at that point, by then.
18 If we don't we will just have to see where we go. It is a
19 college class that I have to speak to but it has been on
20 my calendar for about three months. We will see where we
21 are.

22 MR. NEWLON: Judge, I want to make sure I am clear.
23 During the examination of Ms. Scott the bill was corrected
24 to remove an \$89.00 dollar charge during the period she
25 was being seen for septoplasty.

1 THE COURT: Right.

2 MR. NEWLON: And I have amended that. I can handle
3 it one of three ways. Certainly I can simply argue to the
4 jury, I would have rather done the math for them. I can
5 simply put her on the stand and say, is this your
6 corrected plaintiff's--

7 THE COURT: Let's do this. You already have the
8 exhibit in evidence. If there is no objection from the
9 defense why don't you amend that exhibit that you have
10 already introduced with the medical bills and subtract the
11 eighty odd dollars that everybody agrees.

12 MR. NEWLON: I will just simply clip it to the
13 existing amendment and let her notate that it is two
14 pages.

15 THE COURT: Either way that is fine.

16 MR. GRIFFETH: Either way, Your Honor, we have no
17 objection. There is no need to recall her as a witness.

18 THE COURT: All right.

19 MR. NEWLON: I have never had this happen before. We
20 have got a video deposition, you can hear the lawyers, it
21 is very hard to hear him even with the microphone. If you
22 are not watching the video and not lipreading you may not
23 understand what he is saying. The quality of the video is
24 poor. My goal in this trial is to provide accurate
25 information to this jury. I don't want them to miss

1 anything and I am sure the defense doesn't want them to
2 miss a response that he made in cross-examination. What I
3 want to do is play it for the Court and I am inclined to
4 have someone actually read the deposition so I can get the
5 responses clearly read to the jury as opposed to having
6 them strained to try to understand what this guy is
7 saying. I am going to play it for the Court and let you
8 hear it. And then we can talk about it.

9 THE COURT: Go ahead.

10 MR. NEWLON: I have done everything I can. I have
11 turned the volume all the way up. I have got my speaker
12 system all the way up.

13 (Whereupon, a video was played for the Court.)

14 THE COURT: Pause it there for a second. Can y'all
15 cut off the air. If the air is not running I think we
16 will be able to hear.

17 (Whereupon, continued to play video for the Court.)

18 MR. NEWLON: In my estimation I think the value of
19 the deposition is better served by reading the deposition
20 so the answers can be clearly heard. And I don't think
21 there is any requirement for plaintiff to play a video
22 when they take the video and I would prefer as a plaintiff
23 in this case for my client to actually read the
24 deposition. If the defense at some time wants to play the
25 video that is fine. I don't think there is anything that

1 requires the party to play a video. When they take a
2 video of a deposition they can certainly put in the actual
3 transcript and read it in without playing the video.

4 THE COURT: It is your case. If you want to do it
5 that way I think you have got the video working so that
6 you can now hear the response of the doctor. I am not
7 going to suggest how you try the case. If you want to
8 simply read the deposition that is perfectly fine with me.

9 MR. NEWLON: What I hate to do is we start the
10 deposition. And although we, as a group, can lipread and
11 may be able to discern some of what he is saying. If it
12 becomes apparent in watching the jury that they are having
13 a hard time hearing then at that point I will stop it and
14 ask that the record be read. Is that fair enough?

15 THE COURT: We will handle it that way.

16 MR. NEWLON: And I would also like to ask the jury if
17 they have a hard time hearing it to let the Court know so
18 that we can read it to them.

19 THE COURT: Fair enough. Going forward if we
20 experience this problem again, Mr. Newlon, let me suggest
21 that you simply, some people are visual learners and some
22 people are book learners and it is hard to tell who is
23 who. Maybe in the future if you get a deposition and
24 redact the portions and then make twelve copies or
25 thirteen copies for all the jurors and pass them out that

1 way it is easy for the jury to actually follow along with
2 the video. Let's have the jury out. I will explain to
3 them there is poor audio quality at times on the video and
4 if they are having difficulty let us know. Let's have
5 them.

6 (Whereupon, the jury came into open court at
7 approximately 9:55 a.m.)

8 THE COURT: Ladies and gentlemen, let the record
9 reflect the jury is back and seated. Ladies and
10 gentlemen, welcome back. I apologize for keeping you back
11 there for 25 minutes. I know you were all here on time.
12 We were experiencing some technical difficulties. What we
13 are going to do now is, we are going to play for you two
14 video depositions of Dr.'s Fuller and Ergle, treating
15 physicians for the plaintiff. Now the first video
16 deposition is a little bit, at times it might be a little
17 bit hard to hear. And what we were doing out here was
18 trying to make it so it was more audible to you folks in
19 the jury box here. And I think we have it so you should
20 be able to hear the testimony of the doctor. You can hear
21 the lawyers loud and clear but the doctor is somewhat soft
22 spoken and at first it was hard to hear his answers. I
23 think we have it so you can hear it fine. If you have
24 difficulty hearing what the doctor is saying or the
25 responses to his questions just give me an indication and

1 if some of you need to move around to get closer to the
2 speaker or a better view of the screen out there please
3 feel free to do so. And I suggest that you focus your
4 attention to the doctor because sometimes it is easier to
5 see what he is, it is easier to hear what he is saying if
6 you see his face and his mouth moving. But if you have
7 trouble hearing just let me know and we will either read
8 the deposition to you or try and work with the video
9 again. Now, I will tell you, ladies and gentlemen of the
10 jury, a video deposition, a deposition is a discovery
11 tool. A video deposition is basically sworn testimony
12 given. The lawyers are present for both sides and the
13 witness is present and they ask the witness questions just
14 as if the witness was here at the witness stand. So you
15 can take this as sworn testimony, the witness is under
16 oath and the lawyers are given an opportunity to ask the
17 witness any questions that they might want to ask the
18 witness. So again this is exactly the same and it has
19 exactly the same evidentiary value as any other witnesses
20 testimony even though this doctor was deposed by a video
21 and Dr. Ergle was deposed by a video. With that, Mr.
22 Newlon, this is the video of Dr. Fuller, is that correct,
23 at Saluda Family Practice?

24 MR. NEWLON: Yes, sir.

25 THE COURT: You can proceed, please.

1 (Whereupon, the video deposition of Dr. Sean D.
2 Fuller was played for the jury starting at 9:53 a.m.
3 and ended at 11:05 a.m.)

4 THE COURT: Is that the conclusion of the first
5 video?

6 MR. NEWLON: Yes, sir.

7 THE COURT: Ladies and gentlemen, y'all might need a
8 break. We will take a break for about ten minutes. Don't
9 discuss the case.

10 (Whereupon, the jury was excused from open court for
11 a break.)

12 THE COURT: We will be in recess for a few minutes.

13 (Whereupon, a short break was taken.)

14 THE COURT: Let's have the jury back out, please.

15 (Whereupon, the jury came into open court at
16 approximately 11:20 p.m.)

17 THE COURT: The record should reflect the jury is
18 back and seated. Ladies and gentlemen, we are not going
19 to do the next video. We have one more video to see but
20 we have one more live witness to see. Mr. Newlon, call
21 your next witness, please.

22 MR. NEWLON: The plaintiff calls Dr. Richard Graham.

23 RICHARD GRAHAM, being
24 first duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 By Mr. Newlon:

2 Q State your full name for the record.

3 A It is Dr. Richard Barto Graham.

4 Q And would you please, for the benefit of the jury, go
5 through your education, training and experience and tell
6 them where you currently work.

7 A I will be happy to. I was an EMT for three years,
8 went through med school at East Carolina Medical Center in
9 Greenville, North Carolina for four years, three years of
10 training in Charlotte at Carolina's Medical Center for
11 Emergency Medicine training and then I have been here for
12 six years, Board Certified in Emergency Medicine at Self
13 Regional Hospital.

14 Q And as part of your practice did you at some point
15 and time, before that, have you had an opportunity to
16 review the emergency room records at Self Regional
17 Hospital from January 9th to January 15th or 16th and
18 March the 26th of 2009?

19 A Yes sir, just briefly reviewed the, January 9 and
20 3/26 visit and I have reviewed my own chart previously as
21 well today.

22 Q And one of those visits was Ms. Jennifer Harmon Scott
23 a patient of yours?

24 A Yes, sir.

25 Q And to the extent that I ask you any questions and

1 ask your opinion would you be able to rely not only on
2 your record that you produced on January 15th or whatever
3 but also the other records from Self Regional?

4 A Yes, sir.

5 Q Looking at the first visit, what were her complaints
6 or how did she present?

7 A It looks like she was seen by Dr. Bill Mellow,
8 (phonetic), on the 9th complaining of twenty-four hours
9 previously being hit in the head and the face by a direct
10 blow from a ladder. She says she was not knocked out and
11 that is all is documented as far as complaints.

12 Q Any where else does it mention observations of,
13 objective clinical findings of an injury?

14 A Yes, sir. As far as the physical exam goes she was
15 noted to have a laceration on her nose that was considered
16 twenty-four hours old. And a contusion on her, it looks
17 like the posterior part of her neck in this location here.
18 And then the rest of her physical examination at that time
19 appeared to be normal.

20 Q And then when she came to you, subsequent to that,
21 the second visit how did she present, what were her
22 complaints?

23 A When I saw her she was complaining of a headache,
24 status post being hit by the ladder, the previous time,
25 the previous visit like seven days later. She was

1 complaining of continued pain, had problems with vision,
2 sensitivity to light, nausea, vomiting and generalized
3 weakness. Her complaints of headache were exasperated by
4 light, noise, movement or positioning change.

5 Q And then again she came back in March, I believe the
6 26th and essentially how did she present, what were her
7 complaints?

8 A At that visit she was seen by Mr. Rob Porter, one of
9 the PAC'S as well as Dr. Curry, was a cosigning physician.
10 She was complaining of a headache since January, I guess,
11 it doesn't document exactly what date. Said that she had
12 been hit in the head by a ladder at home and was
13 complaining of pain, described it similar to previous
14 headaches. No other complaints, or review of systems.
15 Scratched through, no fevers, chills, sweating, problems
16 with vision, sensitivity to light, no preceding symptoms
17 that caused it. As far as visual disturbance or scotoma
18 which is seeing spots or seeing lights. No nausea, no
19 confusion, no anxiety, depression, fainting, no sore
20 throat, difficulty swallowing, no sinus pain, no chest
21 pain, cough, all the questions were negative and that is
22 it.

23 Q Clinical assessment aside, opinion aside, looking at
24 these three visits, two in January and one in March, the
25 complaint she made, were they consistent with headache,

1 post-concussive?

2 A Definitely consistent with a headache. Based on her
3 history of saying that they started after being hit in the
4 head we consider it, after head trauma or concussion is
5 what she was initially diagnosed with. So, yes, it could
6 be considered a post-concussive headache.

7 Q And we have the benefit of the ladder here today.
8 Looking at the ladder and everything, from an etiology
9 standpoint, is a blow from a ladder falling over and
10 hitting the nose, is that consistent with the type of
11 complaints she made?

12 A Potentially.

13 Q Can such a blow like that to the nose, can that cause
14 headaches post-concussive?

15 MR. PLYLER: Objection, Your Honor, calls for
16 speculation, beyond the Doctor's scope.

17 MR. NEWLON: I think it is well within the scope,
18 Your Honor.

19 THE COURT: Overruled, go ahead.

20 A I would have to say potentially, I can't say yes or
21 no.

22 Q All right. I would offer Dr. Graham as an expert in
23 emergency room medicine subject to voir dire by the
24 defense.

25 MR. PLYLER: No objection to him being an expert in

1 emergency medicine.

2 THE COURT: Again, ladies and gentlemen, normally an
3 expert can't give or a witness can't give opinion
4 testimony. An exception for this rule exists for someone
5 who is qualified because of training or expertise. And in
6 this case the parties have stipulated that Dr. Graham is an
7 expert in the field of emergency room medicine therefore
8 he can give his opinion in that area. That does not mean
9 you have to accept it but it is evidence that you can use
10 in any way you deem is appropriate. Go head, Mr. Newlon.

11 Q Dr. Graham, asking your opinion to a reasonable
12 degree of medical certainty, based on your review of the
13 records, personal observations you made of Ms. Scott in
14 January, do you have an opinion of whether or not she most
15 probably sustained an injury as a result of being hit in
16 the face with a ladder?

17 A Based on her complaint, I do have to take it at face
18 value and the fact that she did have an injury on her face
19 on the first visit, it would be consistent.

20 Q You have both objective and subjective findings or
21 observations that could be made to sustain that opinion?

22 A Yes sir, based on history and physical.

23 Q Okay. Let me ask you this. In your clinical
24 experience does someone have to experience loss of
25 consciousness to have a concussion or ultimately develop

1 post-concussive syndrome?

2 A I can't speak for post-concussive syndrome. That is
3 one of the diagnosis we do not make in an emergency room.
4 In regards to concussion you do not have to have a loss of
5 consciousness to cause a concussion. There are variable
6 degrees of concussions. There is actually a staging from
7 the American Neurological Association in regards to
8 concussions and how you treat them post-concussion. And
9 you do not have to have a loss of consciousness to cause a
10 concussion or be diagnosed of one.

11 Q And looking at the records, if I understand you
12 correct, she experienced the headache post-concussive?

13 A Right, after being hit in the head, being diagnosed
14 with concussion. She is complaining of a headache, yes.

15 Q Now she had a number of diagnostic test in this
16 situation. I believe Xrays, CT scans and I think she even
17 had an MRI in November but you don't have a record of.
18 Can some have these battery of tests and come back
19 negative and still have post-concussive situation. I know
20 you are not opining on syndrome but can you have
21 post-concussive syndrome with negative testing?

22 A As far as for a concussion, can you have normal test,
23 yes. In fact based on, again the diagnosis of concussion
24 it is deemed to have normal CAT scan, normal laboratory
25 examination, no other finding such as a bleed or a

1 contusion or bruising of the brain or skull fracture to be
2 diagnosed with concussion. So, yes.

3 Q But in this case we have a laceration to this lady's
4 snout, right?

5 A Yes, sir.

6 Q No further questions.

7 THE COURT: Mr. Plyler.

8 CROSS-EXAMINATION

9 By Mr. Plyler:

10 Q You saw the plaintiff, Ms. Scott, one time, January
11 the 15th of 2009?

12 A Yes, sir.

13 Q When she went to Self Memorial on January the 9th of
14 2009 you didn't see her?

15 A No, sir.

16 Q When she went to Self Memorial Emergency room on
17 March 26th of 2009 you didn't see her?

18 A No, sir.

19 Q You saw her one time?

20 A Yes, sir.

21 Q This was one week after the alleged incident we are
22 talking about today?

23 A Yes sir, seven days.

24 Q At that visit and I know you have got your records up
25 there and Mr. Newlon provided you with them. This

1 probably duplicates but just so we are on the same page.

2 That is a record from your visit, right?

3 A Yes, sir.

4 Q We are good. Okay. January the 15th of 2009 she
5 told you she was still having headaches?

6 A Yes, sir.

7 Q She was having nausea, she was having problems with
8 her vision, she was having sensitivity to light. And that
9 that headache was exasperated and that means it was made
10 worse, right?

11 A Yes, sir.

12 Q Made worse by light?

13 A Yes.

14 Q It was exasperated by noise?

15 A Yes sir, it is.

16 Q And it was exasperated by movement?

17 A Yes, sir.

18 Q Doctor, these are all symptoms of a migraine
19 headache, right?

20 A That's correct.

21 Q In fact when you leave the emergency room sometimes
22 you send the patient home with some paperwork?

23 A Yes, sir.

24 Q If you will flip and it is probably in your packet
25 too to what is marked at the bottom right hand corner with

1 a number, 120097?

2 A Okay.

3 Q And I know the ladies and gentlemen of the jury will
4 have these documents if they want to review them later.
5 We have admitted those into evidence. But you are looking
6 at the same thing, we are on the same page?

7 A Yes sir, we are.

8 Q This is the instructions you sent home with Jennifer
9 Scott?

10 A Yes, sir.

11 Q And at the top of the page it is entitled self care
12 for headaches. First line reads, most headaches aren't
13 serious and can be relieved with self care. And this is
14 how to do it.

15 A Yes, sir.

16 Q The third line says, headaches can be a sign of
17 another health problem like eye trouble or high blood
18 pressure?

19 A Yes, sir.

20 Q The very bottom right hand corner of this document,
21 you give the plaintiff the signs of a migraine headache?

22 A Yes, sir.

23 Q One of those signs is throbbing pain, one or both
24 sides of your head?

25 A Yes, sir.

1 Q Pain in your head?

2 A Yes, sir.

3 Q The other sign of a migraine headache is nausea or
4 vomiting?

5 A Yes.

6 Q The other sign, the third sign of a migraine headache
7 is extreme sensitivity to light?

8 A Yes, sir.

9 Q Sound and smells. Fourth one is bright spots,
10 flashes or other visual changes?

11 A Yes, sir. The same thing as scotoma as well as seen
12 earlier, yes sir.

13 Q I'm sorry?

14 A Scotoma. Earlier when I was doing the review of my
15 charts, said that she was complaining of scotoma, that was
16 the bright lights or flashes.

17 Q And the fifth sign of a migraine is pain or nausea?

18 A Yes, sir.

19 Q And you were getting a little bit ahead of me,
20 Doctor, but all of those signs of a migraine she showed up
21 with you and told you about those on January the 15th of
22 2009?

23 A Yes, sir.

24 Q She told you she was having pain in her head?

25 A Yes, sir.

1 Q She told you she was having nausea, vomiting?

2 A Yes, sir.

3 Q She told you she was having sensitivity to light?

4 A Yes, sir.

5 Q She told you she was having pain or nausea and you
6 have got it here, so severe that you can't continue daily
7 activities?

8 A Yes, sir.

9 Q That is how she presented to you on January the 15th
10 of 2009?

11 A Yes, sir.

12 Q Going back to the second page, it is labeled 120084.
13 This is the second page of your assessment and this is
14 your handwriting, right, Doctor?

15 A It is, yes sir.

16 MR. NEWLON: Your Honor, I just want to get a copy of
17 the records I have to him since he is giving reference to.

18 Q And, Doctor, your signature down at the bottom of
19 that page, right?

20 A Yes, sir.

21 Q And in this page you describe your physical exam of
22 her that day?

23 A Yes, sir.

24 Q At the very top of the page you checked the box for
25 no facial swelling?

1 A Yes, sir.

2 Q You also indicated right beside that in your own
3 writing, the physical examination, you say she was not
4 very cooperative?

5 A Yes, sir.

6 Q Do you remember what that was about?

7 A No sir, I apologize, I don't remember this case more
8 than reading from it.

9 Q This was a long time ago?

10 A Yes, sir.

11 Q How many patients do you see every week in the
12 emergency room at Self Memorial?

13 A On average I see about five to six thousand patients
14 a year.

15 Q On the, skimming down toward that column you also
16 examined neurological, psychological?

17 A Yes, sir.

18 Q And you checked some boxes on that column?

19 A Yes, sir.

20 Q You checked the box that she was alert?

21 A Yes, sir.

22 Q You checked the box she was oriented times three?

23 A Yes, sir.

24 Q And oriented times three means she oriented as a
25 person?

- 1 A Yes, sir.
- 2 Q Place?
- 3 A Yes, sir.
- 4 Q And time?
- 5 A Yes, sir.
- 6 Q And you also checked the box here that she has normal
- 7 speech?
- 8 A Yes, sir.
- 9 Q Checked the box that she has mood and affect normal?
- 10 A Yes, sir.
- 11 Q That means she is acting okay?
- 12 A Yes, sir.
- 13 Q After the physical examination you did of the
- 14 plaintiff that day you did a CT?
- 15 A Yes, sir.
- 16 Q A CT of her head and I have got that for you. I
- 17 think you have got it.
- 18 A Yes, sir.
- 19 Q It is page 120098, Doctor, if you need to look at it.
- 20 A Yes, sir.
- 21 Q But this is a CT of her head without contrast?
- 22 A Yes, sir.
- 23 Q This is where you go through a machine and they take
- 24 an image of the patient's head?
- 25 A Yes, sir.

1 Q You did this because she was complaining of headaches
2 and migraine type?

3 A Yes, sir. I did this in this case because I just
4 wanted to insure that she had not developed some kind of
5 delayed hemorrhage or bleed. It is more common in
6 patients who are older or on blood thinners. But because
7 of her head we made sure she was not having any life
8 threatening injury or illness so a CAT scan was done for
9 that purpose.

10 Q And, Doctor, when you did this CT you were looking
11 for hemorrhages and you found no hemorrhages?

12 A That's correct. It was unremarkable.

13 Q You found no fluid collection?

14 A That's correct.

15 Q In your impression here, or the impression of the
16 test, that it was an unremarkable exam?

17 A That's correct.

18 Q Meaning normal looking head?

19 A Yes, sir.

20 Q Back to the first page, the page here with your
21 notes.

22 A Yes, sir.

23 Q Actually the second page of your notes, excuse me.
24 You have got circled under the clinical impression,
25 headache, possibly post-concussion?

1 A Yes, sir.

2 Q Possible?

3 A Yes, sir.

4 Q All you can say for sure is that she had a headache.

5 A That's correct. What I am stating here is I am
6 circling headache as a diagnosis. I wrote
7 post-concussive, very specifically just to state that she
8 made have had a concussion, it may have led to the
9 headache and more importantly is a note for when she
10 follows up with these clinical's, I referred here to look
11 into it. So it is more of an identifier for the next
12 physician to evaluate for that. We do not make diagnosis
13 in the emergency room of post-concussive syndrome and so
14 it is for followup purposes.

15 Q You never diagnosed her with post-concussive
16 syndrome?

17 A That's correct.

18 Q That is all I have.

19 REDIRECT EXAMINATION

20 By Mr. Newlon:

21 Q Mr. Plyler pointed out that you only saw her one
22 time.

23 A Yes, sir.

24 Q In your practice as a medical doctor do you take
25 opportunity to review records sometimes when you have

1 patients, maybe historical records, is that a common
2 practice?

3 A Yes, sir. Sometimes when I see a patient I will look
4 back to the records and occasionally look back to see if
5 there is anything from the standpoint of diabetes, high
6 blood pressure, et cetera. Yes, sir.

7 Q To get a history?

8 A Yes, sir. If they can provide it, yes sir.

9 Q And that can help you formulate diagnosis, prognosis,
10 how to treat them?

11 A Yes, sir.

12 Q Okay. And so in this particular case the fact that
13 you saw her once but reviewed these records were you still
14 able to give an opinion in this case?

15 A Yes, sir.

16 Q Much talk about migraine and the clinical findings
17 consistent with the migraine?

18 A Yes, sir.

19 Q Based on your prior testimony though we actually have
20 an objective clinical finding of an injury to a lady's
21 nose, correct?

22 A Yes, sir.

23 Q And it was seen as a laceration?

24 A Yes, sir.

25 Q And it was also seen by you on the 15th which was a

1 week later, correct?

2 A Yes, sir.

3 Q Let me ask you this. Do migraines come around from
4 or can they occur from direct blow trauma like that?

5 A Yes, sir.

6 Q And I may have misheard but I thought, did you say
7 that she, under examination by Mr. Plyer that she was
8 uncooperative when she came to your visit?

9 A That is what my chart says, yes sir, it says she is
10 keeping her eyes closed and not very cooperative and
11 teary.

12 Q Can someone be clinically, in your experience in the
13 emergency room, can someone be uncooperative because they
14 are experiencing pain?

15 A Yes, sir.

16 Q Or they may be frustrated because of their
17 circumstances?

18 A Yes, sir.

19 Q Okay. So the fact that she was uncooperative would
20 hinder you in any way your ability to treat her?

21 A No, sir.

22 Q Does it affect your opinion today?

23 A No, sir.

24 Q In fact if you look at the nurse's note, I believe it
25 is the initial systems assessment for the 9th, do you have

- 1 that, your record up there that he gave you?
- 2 A Yes, sir. Is it this page here.
- 3 Q This is the second page, the initial assessment.
- 4 A Yes, sir.
- 5 Q Look at the right side of the page, halfway down it
- 6 looks like, I am not sure what that stands for, PAYCH and
- 7 then in that box it says eye contact, effect. Right here.
- 8 A Yes, sir.
- 9 Q Is there a box in there for the nurse to evaluate her
- 10 behavior?
- 11 A Yes, sir.
- 12 Q And what was her behavior like?
- 13 A It says, the only thing that is checked, it says, eye
- 14 contact, yes. And there is a note that says, do you
- 15 expect this patient is suicidal and it says, no.
- 16 Q Under behavior, right there, under the word behavior,
- 17 the box, what is checked?
- 18 A Nothing is checked on this one.
- 19 Q Are you looking at the right one. I am sorry, I was
- 20 looking at the wrong record. Looking at January 9th, I
- 21 apologize, January 9th. Did she, was she cooperative on
- 22 the 9th?
- 23 A Yes sir, it says affect was normal and she was
- 24 cooperative.
- 25 Q Did the nurse on the 15th mark her as being

1 uncooperative?

2 A No, sir.

3 Q I apologize, too many records. In any of these
4 visits there has been, was questioning about how blood
5 pressure can cause headaches. In any of these records do
6 you see any abnormal blood pressure for this lady? I
7 believe I saw 145/95.

8 A This chart here, blood pressure, 148/98, that is
9 elevated.

10 Q Okay. Is that problematic or is it clinically
11 accepted, is that a problematic reading?

12 A From the standpoint of?

13 Q Abnormal and high blood pressure?

14 A It is an abnormally high blood pressure, is it
15 considered one of those acutely dangerous zones per say.
16 In other words would I give emergency lowering blood
17 pressure medicine, no.

18 Q What types of things can cause someone with blood
19 pressure to go up?

20 A Most commonly is benign essential hypertension. In
21 other words, blood pressure that you are either born with
22 or you gain weight and you have high blood pressure from
23 that. Acutely going up, stress, pain, discomfort, trauma,
24 injury.

25 Q So from a clinical standpoint elevated blood pressure

1 on this day could be attributed to her clinical symptoms?

2 A Potentially.

3 Q That is all I have got, thank you.

4 THE COURT: Thank you for coming, no objection for
5 excusing the doctor.

6 MR. GRIFFETH: No objection, Your Honor.

7 THE COURT: Take care and thank you for coming. You
8 are free to go. Ladies and gentlemen, we will take a
9 break. Don't talk about the case and we will be back in
10 about five minutes. When we come back we will watch a
11 video and then we will break for lunch.

12 (Whereupon, the jury was excused from open court for
13 a break.)

14 THE COURT: We will take five minutes.

15 (Whereupon, a short break was taken.)

16 THE COURT: Bring the jury in, please.

17 (Whereupon, the jury came into open court at
18 approximately 11:56 a.m.)

19 THE COURT: Ladies and gentlemen, we are about to see
20 the video deposition of Dr. John Ergle. Again this is
21 sworn testimony, you can regard this the same way, view it
22 the same way, consider it the same way as if Dr. Ergle was
23 actually here in court testifying live. It is sworn, all
24 of the lawyers were present. At this point, Mr. Newlon,
25 the record is yours.

1 (Whereupon, the video deposition of Dr. John Ergle
2 was played for the jury starting at 11:57 a.m. and
3 ended at 12:33 p.m.)

4 THE COURT: All right, Mr. Newlon, if you will call
5 your next witness, please.

6 MR. NEWLON: Your Honor, at this time the plaintiff
7 has presented all of its testimony and we would rest. The
8 only thing that I would like to do, for purposes of
9 videos, we have premarked for the record as Court's
10 exhibits, a couple of the videos. But we have talked,
11 discussed about what would be removed.

12 THE COURT: Very good. No objection as receiving
13 those as Court's exhibits?

14 MR. GRIFFETH: No, Your Honor.

15 (Whereupon, Court's exhibits 2 and 3 were marked for
16 identification only.)

17 THE COURT: Very good, ladies and gentlemen, we have
18 reached the point where we have received all the evidence
19 that we are going to receive in the plaintiff's
20 case-in-chief. Because it is about 12:30 I am going to go
21 ahead and let y'all take your lunch break. Please be back
22 in the jury room around 1:30. That will give you an hour
23 for lunch. There are some matters that I need to take up
24 with the attorneys in the interim. Be back in the jury
25 room at 1:30 and we should be in the position to proceed

1 with the trial at that time. Don't discuss the case with
2 anyone. Have a great lunch.

3 (Whereupon, the jury was excused from open court for
4 a lunch break.)

5 THE COURT: The record should reflect that the jury
6 is out. Gentlemen, I think when we left off yesterday you
7 were not, I will take your motions in a second but you are
8 not anticipating presenting any evidence at this point?

9 MR. GRIFFETH: Your Honor, the defense has no further
10 evidence to produce in this case.

11 THE COURT: Let me go ahead and hear from you on your
12 motions then, Mr. Plyler.

13 MR. PLYLER: Your Honor, the defense at this time
14 would move for a directed verdict in this case. Your
15 Honor, there has been no evidence presented in this case
16 as to duty and a breach of that duty. What we have
17 evidence of in this case is an accident, a freak accident
18 that could not have been foreseen, could not have been
19 anticipated and is not a breach of any kind of duty.
20 Critically, other than duty and breach, the plaintiffs
21 have to establish some evidence of foreseeability or
22 proximate cause. And according to Young versus Tide Craft
23 case, a similar case of proximate cause in South Carolina
24 says, the touchstone of proximate cause is foreseeability.
25 Foreseeability of some injury from an act or omission is a

1 prerequisite to its being a proximate cause of the injury
2 for which recovery is sought. The case goes on to say,
3 liability cannot rest on a mere possibility. The actor,
4 the defendant, cannot be charged with that which is
5 unpredictable or that which could not be expected to
6 happen. Your Honor, we have got testimony in this case
7 that Mr. Fortner and Mr. Griffin were working about this
8 house, they had interacted with the ladder numerous times
9 before this. And at one point he bumped the ladder and it
10 fell, this series of improbable events led this ladder to
11 the plaintiff's nose. This was not a foreseeable
12 incident, this is not anything they could have prevented.
13 This is not anything that they could have foreseen.
14 Without foreseeability there is no evidence of proximate
15 cause, Your Honor, and that is the strongest ground that
16 we have for a directed verdict for the defendant in this
17 case. The plaintiff has not met their burden, they have
18 not produced any evidence of that effect. And, Your
19 Honor, we would move for a, that you direct a verdict on
20 those grounds.

21 THE COURT: You want to speak to that, Mr. Newlon?

22 MR. NEWLON: Just very briefly. Number one, this is
23 the first time I have ever heard the theory of freak
24 accident. I think that what they are trying to or akin to
25 is act of God and that is not applicable in any case where

1 there is some scintilla of negligence on the part of the
2 party. So that wouldn't even apply in this particular
3 case. As to duty, the duty is of ordinary care and it was
4 a generalized duty, maybe not necessarily defined like
5 duties in statute, maybe we don't have a statute to point
6 to. But certainly exercise the duty not to present harm
7 to a particular person and in their own home. With regard
8 to foreseeability, I think Mr. Plyer is a little off the
9 boat there. It is not whether or not it is foreseeable
10 that they would knock the ladder over reaching the circuit
11 breaker. Foreseeability has to do with the fact that if
12 they did not exercise ordinary care and knocked the ladder
13 over is foreseeable, that the injury would be what
14 occurred, that knocking a ladder over, somebody be in the
15 way they could get hurt. This is not a freak accident.
16 These gentlemen were experienced in the nature of the type
17 of work that they did in fixing homes, probably used
18 ladders on numerous occasions. And in subsequent
19 litigation has offered up that it was precariously perched
20 based on their situation and now they are going to turn
21 around and say that it wasn't precariously perched. And
22 that they were not aware of that when they were trying to
23 say that is the way it was when it happened. And I will
24 tell you in Mr. Griffin's testimony is very telling on
25 that about the circumstances of his reaching to the

1 circuit breakers. So I would ask the Court to
2 respectfully to deny that motion.

3 THE COURT: At this stage of the proceedings, I think
4 you mentioned scintilla, that obviously we need a little
5 more evidence than a scintilla at these stages. I do find
6 however the plaintiff has demonstrated competent evidence
7 in which a jury, sufficient competent evidence from which
8 the jury may reasonably conclude that the defendants in
9 this case acted negligently. As far as the issue of duty,
10 that is a matter of law for the Court and it is this
11 Court's finding that because they were in the plaintiff's
12 home which she was renting from one of the defendant's,
13 they were preparing a item that was in the home. I do
14 find that the defendants owe a duty to plaintiff as her
15 landlords undertaking to repair certain aspects of the
16 house, the water heater in this case, that they had a duty
17 to do that in a non-negligent fashion and a duty not to
18 endanger the plaintiff or to harm her. I think that is
19 pretty clear. So for those reasons I would deny your
20 motions respectfully, Mr. Plyler. Mr. Newlon, do y'all
21 have anything else?

22 MR. NEWLON: In the same thing, Your Honor, looking
23 at the evidence in this particular case the plaintiff
24 would move for a directed verdict as to comparative fault
25 on the part of my client. There has been an absolute

1 admission by the defendants that the legal, of course we
2 have the duty, we have the breach of duty. The question
3 is is did they proximately cause or did she do something
4 to cause that. And they have clearly stated in their own
5 testimony that they did not, that they, were the legal
6 cause, but for cause of the ladder actually falling over.
7 That once that occurred it really didn't matter what
8 circumstances the ladder was in. By analogy, if I park my
9 car on the street backwards and more than eighteen inches
10 from the curb and somebody comes along and smacks it does
11 that mean I am comparatively at fault because I am beyond
12 eighteen inches and violate some statute. And the answer
13 to that would be clearly no. Because the, but for, cause
14 in this case is so strong that to try to argue that
15 because she turned the ladder in a different manner than
16 what they would expect it to be does not constitute a
17 breach of the duty and certainly not the proximate cause
18 of this accident. As Dr. Slimmer opined that the ladder
19 itself in that position on the wall is not unstable and
20 that it would take, not a significant force but I can't
21 remember the term he used, a good measure of force to
22 cause it to go over center and cause it to fall. They
23 made the decision to reach between the ladder and the
24 wall. I would also point out that that ladder had been
25 sitting there now for more than two days and it sat in her

1 house for two weeks in that position and didn't move until
2 it was actually touched by Mr. Griffin. So I would argue
3 that in this particular case not only do we have a duty
4 and a breach of duty by the defendants without any
5 comparative fault on the part of the plaintiff but we
6 actually have a case of liability. This should be a case
7 where the issue to the jury is not whether or not Ms.
8 Scott did anything comparatively to cause this to happen
9 but we have actual testimony from not only them, from
10 their own mouths, but from the doctors that saw her and
11 the records that she actually sustained a physical
12 observable injury that doesn't even require an expert, a
13 laceration to the nose. And under the law in South
14 Carolina understand that proximate cause is normally a
15 matter for the jury but there are exceptions to that and I
16 don't have that wreck case on hand but there is actually a
17 case on point where the Supreme Court said that in certain
18 circumstances that is taken out of the province of the
19 jury and it becomes a matter of law particularly in
20 circumstances where you have a breach of duty and you have
21 an observable obvious injury like we have in this
22 particular case. Now, I suspect that the defense is going
23 to say, well, she is the one that placed it there and
24 because she placed it there and nobody else placed it
25 there that that somehow creates a duty, a breach of duty

1 and makes her comparatively at fault in this case. I go
2 back to my analogy, you can't create a breach of duty and
3 causation by the way you park your car when someone comes
4 along and hits it broadside in that manner. We have a
5 case clearly here where the defendants caused that ladder
6 to fall, it doesn't matter how that ladder was propped up
7 and if they are asserting now that it was precariously
8 perched then that would be something that they had known
9 at the time and they failed to warn her about it and tell
10 her about it. Again, Your Honor, I would ask that the
11 Judge direct a verdict on the issue of liability in this
12 case given the facts that we have an obvious injury even
13 though it may not be a serious injury, it is some measure
14 of injury that has clearly been established not only by
15 the plaintiff but out of the defendants mouths.

16 THE COURT: All right. Well, Mr. Newlon, I
17 appreciate your position, what has been presented by way
18 of testimony is that basically the ladder and we are
19 dealing with a ladder and it is open and it forms somewhat
20 of a capital A when the ladder is fully opened. On the
21 bottom on the ladder are two plastic shoes for the ladder,
22 they are in an angle, the ladder is fully open and those
23 shoes should rest firmly on the floor. When it is closed
24 you are going to have a slight angle. I would believe
25 that in all likelihood the reason that the ladder was

1 there for several days without incident, prior to the
2 defendants arrival, is that the plaintiff never tried to
3 access her breaker box. And that is probably why it was
4 no major concern to her. I do think that there is
5 evidence that would warrant a comparative negligence
6 charge in this particular case. Obviously this is not the
7 strongest case of comparative negligence but the plaintiff
8 did place the ladder in the house. There is some evidence
9 from which a jury might reasonably conclude that the way
10 it was positioned may have been more susceptible to
11 falling then if it had been placed with the shoes firmly
12 on the floor. It doesn't take a physics professor to tell
13 us that obviously that is more stable. The shoes are
14 firmly on the floor, that is a lot more stable of a
15 situation than if just the very tip of the shoes are on
16 the floor. That is more precarious because the center of
17 gravity, it would be easier for it to tip over. I do
18 remember enough physics to remember that. Your car
19 analogy somewhat misplaced, I would agree with you if you
20 are parked illegally but certainly if you were in a no
21 parking zone where the area was narrow, the road was
22 narrow and somebody perhaps had enough room to get by you
23 but it was still, you were still crowding the lane of
24 traffic there could be some comparable negligence on your
25 part. I think that is kind of what we have got here.

1 MR. NEWLON: And, Your Honor, for the record. This
2 record that we have here today is completely devoid of any
3 testimony that the positioning of the feet themselves
4 created a negligence circumstance. It has been testified
5 that that is the way it appeared. But there has been no
6 testimony, certainly not even from Dr. Slimmer, that the
7 way those feet are positioned that it presents a danger.
8 And the Court is now saying that, the Court is now opining
9 and justifying this that, you are saying that in the
10 Court's opinion the way it sets is precariously perched.
11 There has been no testimony to that.

12 THE COURT: The jury is allowed to draw upon their
13 common experience in evaluating this case. In all candor,
14 Mr. Newlon, any comparative negligence in my mind on your
15 client's part is fairly minimal. But it is not my
16 decision to make, it is ultimately a jury's issue. Y'all
17 want to speak to that, gentlemen?

18 MR. GRIFFETH: Your Honor, I believe you articulated
19 exactly the point and Mr. Griffin's testimony was, he
20 thought it was sitting too far upright. Slimmer did not
21 opine, Your Honor, one way or the other about that. He
22 did not testify precisely as to what Mr. Newlon had said.
23 I believe it is a jury issue, what is sauce for the goose
24 is sauce for the gander. It is a jury issue, it ought to
25 be submitted to the jury and let them decide.

1 THE COURT: My recollection, what Professor Slimmer
2 testified to was that essentially the force, the newtons
3 that were, that would impact the plaintiff would be the
4 same regardless of the way the ladder is positioned. It
5 is vertical and it starts at falling, the force is going
6 to be the same because the massive ladder is the same when
7 it is in a vertical and it starts falling. I appreciate
8 your position.

9 MR. NEWLON: We also opine that the same amount of
10 force regardless of how the feet is positioned is to get
11 it on center, for the record.

12 THE COURT: Correct. Gentlemen, I have looked at
13 your request to charge, and Mr. Newlon, you were asking
14 for a charge on master servant. I really wasn't thinking
15 about going there because I don't know that the defendants
16 are asserting that the servant in this case was out
17 operating outside the scope of the master. So I was kind
18 of treating them collectively.

19 MR. NEWLON: I did that a long time ago. And I think
20 that was actually before Mr. Griffeth sent me a letter or
21 something.

22 MR. GRIFFETH: Answer in request to admit.

23 MR. NEWLON: Answer in request to admit. So that has
24 been established and the purposes, I am not looking to
25 that.

1 THE COURT: Very good. The verdict form incorporates
2 a comparative negligence charge. I have added a
3 preexisting injury charge because there is some evidence
4 that the symptoms were similar, it becomes a jury call on
5 that. So I do have the preexisting injury charge that I
6 have added. I have reviewed the defendants request to
7 charge. And unless you feel strongly about it you can let
8 me know after lunch but I kind of prefer to the
9 comparative negligence charge that I worked up. The only
10 portion of that comparative negligence charge that is
11 stock that I did not include was the seventh element of
12 comparative negligence that deals with violation of the
13 safety regulation of statute and I don't think there has
14 been any testimony of such things. So I just left that
15 out. So if y'all want to take a look at that. Do you
16 have any other thoughts or have you had an opportunity to
17 look at what I have prepared..

18 MR. GRIFFETH: Your Honor, what you have prepared is
19 fine. I think, in all candor, what you have on
20 comparative negligence is adequate. We have no objection
21 to that. We did also submit a request specifically on
22 foreseeability of the Tide Craft case.

23 THE COURT: I didn't cover proximate cause.

24 MR. GRIFFETH: I don't believe, Your Honor, you
25 covered foreseeability to the extent that we had

1 requested.

2 THE COURT: I will take a second to look at that over
3 lunch and I will let you know. Anything else.

4 MR. NEWLON: No, sir. I just very quickly, since
5 y'all are talking about that. I was looking at the
6 verdict form. I don't have a problem with the verdict
7 form. The only thing is on part three, we, the jury find
8 the plaintiff, I would leave out of the plaintiff's
9 damages and of her damages because that is not really part
10 of the consideration, it is just percentage of fault. And
11 then the damages comes in on four.

12 THE COURT: Okay.

13 MR. NEWLON: Other than that, Your Honor, I am fine
14 with the charges.

15 THE COURT: I will take a look at defendant's request
16 to charge number two on the proximate cause issue and
17 perhaps tweak mine a little bit.

18 MR. GRIFFETH: Thank you, Your Honor.

19 THE COURT: See y'all shortly.

20 (Whereupon, a lunch break was taken.)

21 THE COURT: Let's go back on the record. I have had
22 an opportunity to review the defendants request to charge
23 number two concerning proximate cause. Mr. Newlon, do you
24 have any position concerning their request to charge?
25 While you are finding that, Mr. Newlon, my concerns, Mr.

1 Plyler, is not so much that the charge doesn't represent a
2 accurate statement of the law, there are certain portions
3 that I am concerned might be a bit confusing. The first
4 sentence of the second paragraph, the touchtone of
5 proximate cause in South Carolina's foreseeability, yes
6 and no. I mean proximate cause is really, you have cause
7 in fact and you have a question of whether the injury is
8 foreseeable, your typical cause type of a situation. We
9 really don't have a cause graph, kind of problem in this,
10 that seems to be what this charge was aimed at. I mean it
11 is reasonable to assume if one inadvertently and again we
12 are talking about inadvertence in this particular case at
13 the most. The defendants inadvertently knocked over a
14 ladder, certainly didn't mean to harm anybody, certainly
15 are not at people. The question is if somebody knocks
16 over a ladder and someone is standing close by is there a
17 likelihood that that ladder might hit. That is kind of
18 what I am saying. And I touch on foreseeability in the
19 instructions that y'all have had a chance to review. You
20 have a take on this?

21 MR. NEWLON: I do. As I said, I think I responded to
22 it on the motion for directed verdict. I think there is a
23 infusion going beyond what we normally see or understand
24 as foreseeability as it relates to what is foreseeable as
25 an injury or what is foreseeable as the consequences of an

1 act. What we are getting into in this particular charge
2 is whether or not the act itself, the act of reaching for
3 a circuit breaker and knocking the ladder over was
4 foreseeable to knock the ladder over and that is what they
5 are trying to get to in this particular charge. They are
6 getting close to it. They are going beyond what is, what
7 I understand is the law on foreseeability which has to do
8 after you had committed an act those consequences which
9 are foreseeable which would flow from that act, that is
10 the test of foreseeability, how far do you reach as to the
11 consequences. I see this is going well beyond that in
12 trying to say, well gosh, it is not foreseeable that he
13 was going to knock the ladder over. That is not the law.

14 THE COURT: I am more comfortable with the charge
15 that I have already got. If y'all feel strongly about
16 this then certainly, if you feel like I don't adequately
17 cover it, I have given you my proposed charge and
18 certainly if the jury ends up with a question about this I
19 will make reference perhaps to your request to charge.
20 But I think that the pattern instructions deal with the
21 proximate cause issues, the two aspects of that. I think
22 that deals with that so that is where I am. I am going to
23 bring the jury out. Bring them out.

24 (Whereupon, the jury came into open court at
25 approximately 2:50 p.m.)

1 MR. NEWLON: Your Honor, can we approach?

2 THE COURT: Sure, come on up.

3 (Whereupon, a bench conference was held in the
4 presence of the jury but out of the hearing of the
5 jury.)

6 THE COURT: All right, ladies and gentlemen, we are
7 continuing with the trial of the case of Scott versus
8 Fortner and Griffin. At this point, Mr. Griffeth, it is
9 your case.

10 MR. GRIFFETH: Your Honor, the defense rest.

11 THE COURT: Ladies and gentlemen, we have reached
12 that portion of the trial where we have received all the
13 evidence that we are going to receive in this particular
14 case. We will now proceed with the closing argument or
15 closing summation of the attorneys. I will remind you of
16 what I told you before you heard their openings. Even
17 though an attorney's argument is not evidence in this case
18 certainly you should pay attention to what they argue to
19 you because their argument will be what they contend has
20 been proven or has not been proven in this particular
21 case. If at any time the lawyers, and I expect that they
22 will, but if at any time the lawyers make reference to a
23 fact or testimony or something that is in the record in
24 this case, if what they say to you the facts are differs
25 from what your recollection of the facts are you should go

1 with your recollection because y'all are the judges of the
2 facts. So if the lawyer says that on Wednesday it was
3 raining and your recollection was that on Wednesday the
4 sky was blue, clear and it wasn't a problem in the world
5 go with your recollection as opposed to what the lawyers
6 tell you what the facts are. Do you understand what I am
7 saying. With that the way we will proceed is Mr. Newlon
8 will open, and then Mr. Griffeth will have an opportunity
9 to argue on behalf of the defendant and then we will hear
10 from Mr. Newlon one more time. With that, Mr. Newlon, you
11 are recognized, sir.

12 (Whereupon, closing arguments by Mr. Newlon and Mr.
13 Griffeth were heard by the jury.)

14 THE COURT: Now, ladies and gentlemen, it becomes my
15 obligation to instruct you on the law that applies in this
16 particular case. And I am going to be very candid with
17 you, this is not fascinating stuff, what I am about to
18 read to you. And in all honesty I have always found it a
19 little bit unreasonable that Judges give the instructions
20 in the traditional way that they have done it. When I
21 started practicing law twenty years ago the Judge would
22 just sit up here and read ten or fifteen pages of
23 instructions to a jury and it was expected that the jury
24 would simply absorb all of this and be able to simply go
25 back into the jury room and apply it. So having thought

1 that is unreasonable I have changed how I do things and
2 you will have a copy of these instructions to refer to in
3 the jury room during the course of your deliberations. So
4 if at any time you need to refer to these instructions
5 feel free to do so. Obviously don't follow simply part of
6 the instructions and ignore the other. Consider the
7 instructions as a whole and of course when you are done
8 return these to me or to the bailiff once you have
9 completed your deliberations. Additionally, if you have
10 any questions or you need to ask me any questions about
11 any of the instructions that I give you now or the
12 instructions that I give to you in written form simply
13 send a note to the bailiff and I will bring you back out
14 here and try and explain better what I am talking about.

15 Now, ladies and gentlemen, I remind you that during
16 this trial you and I have certain duties to perform. As
17 the trial Judge it is my responsibility to rule over the
18 admissibility of the evidence and preside over the trial
19 of this case. Understand that you are to consider only
20 the evidence before you. So if there was any testimony
21 ordered stricken from the record during this trial you
22 should disregard that testimony because you are to
23 consider only the testimony which has been presented from
24 this witness stand through the video depositions or any
25 other exhibits which have been made a part of the record

1 in this case. Now, I have the additional duty to charge
2 you the law applicable to this case and it is your duty as
3 jurors to accept and apply the law as I now state it to
4 you. If you think you have any idea as to what the law is
5 or what the law should be and that disagrees with what I
6 now tell you the law is you must forget that idea that you
7 have because you are sworn to accept and apply the law
8 exactly as I now state it to you. In every case tried in
9 this court before a jury the jury becomes the sole and
10 exclusive judges of the facts. A trial Judge cannot
11 comment on or make any statement about the facts in a
12 case. Since you are the sole judges of the facts please
13 don't think from anything that I have said or done during
14 the course of this trial that I have any opinion about the
15 facts in this case. Ladies and gentlemen, the law does
16 not allow me to have an opinion so I have no opinion
17 concerning the facts in this case. That is solely for the
18 twelve of you to determine.

19 The burden of proof in this case, ladies and
20 gentlemen, is by a preponderance of the evidence. A
21 preponderance of the evidence simply means the greater
22 weight of the evidence. It is evidence which, as a whole,
23 shows that a fact sought to be proved is more likely true
24 than not true. This can be illustrated by imagining a set
25 of scales. At the beginning of the trial the scales are

1 even. If after all of the evidence has been presented if
2 the scales remain even or if they tip ever so slightly in
3 favor of the defendant then the plaintiff has failed to
4 meet her burden of proof and would not be entitled to
5 recover. If on the other hand the scales tip even
6 slightly in favor of the plaintiff the plaintiff will have
7 met her burden of proof and you should return a verdict
8 for her. The preponderance of the evidence is of course
9 not determined by the number of witnesses. Instead it
10 must be based or determined by the greater weight of all
11 of the evidence presented.

12 Now typically, ladies and gentlemen, there are two
13 types of evidence presented during a trial, direct
14 evidence and circumstantial evidence. Direct evidence is
15 the testimony of a person who claims to have actual
16 knowledge of a fact, such as an eyewitness. It is
17 evidence which immediately establishes the main fact to be
18 proven. Circumstantial evidence however is proof of a
19 chain of facts and circumstances indicating the existence
20 of a fact. It is evidence which immediately establishes
21 collateral facts from which the main fact may be inferred.
22 Circumstantial evidence is based on inference and not on
23 personal knowledge or observation. It is proof that does
24 not actually establish the fact in question but that
25 asserts or describes something else from which the main

1 fact either reasonably, from which you may either
2 reasonably infer the truth of the fact or at least
3 reasonably infer an increase in the probability that the
4 fact is true. For circumstantial evidence to be
5 sufficient to warrant the finding of the fact the
6 circumstances must lead to that fact with reasonable
7 certainty. The facts and circumstances should be
8 considered in light of ordinary experience and common
9 sense, ladies and gentlemen. The existence of a fact
10 cannot be based on speculation, conjecture or surmise.
11 The law makes absolutely no distinction between the weight
12 or value to be given to either direct or circumstantial
13 evidence nor is a greater degree of certainty required of
14 circumstantial evidence than of direct evidence.

15 Now, ladies and gentlemen, necessarily you must
16 determine the credibility of witnesses who have testified
17 in this case. And again, credibility simply means
18 believability. It becomes your duty as jurors to evaluate
19 the evidence and determine which evidence convinces you of
20 it's truth. In determining the believability of witnesses
21 who have testified in this case of course you have the
22 right to believe one witness over several witnesses or
23 several witnesses over one witness. You may believe a
24 part of the testimony of a witness and reject the
25 remaining part of the testimony of that same witness. You

1 may believe the testimony of a witness in its entirety or
2 reject the testimony of that same witness in its entirety.
3 You may consider whether the witness has an interest in
4 the subject matter of the litigation, whether the witness
5 is prejudiced toward either the plaintiff or the
6 defendant, the opportunity for the witness to have seen
7 the matters and things about which the witness may testify
8 and the way the witness acts on the witness stand.

9 Now, ladies and gentlemen, as I said prior to the
10 qualification or testimony of some of the expert
11 witnesses, normally the rules of evidence don't permit
12 witnesses to testify to opinions or conclusions. But an
13 exception to this rule exists for witnesses who were
14 expert witnesses in some particular field by virtue of
15 their education or experience. These people, these expert
16 witnesses may give an opinion as to the subject that the
17 witness claims to be an expert in and may also give the
18 reasons for that opinion. You should consider any expert
19 opinion given in this case by a witness and like any other
20 evidence give it the weight you think it deserves. If you
21 decide that an expert witness' opinion is not based on
22 sufficient education and experience or if you decide that
23 the reasons given in support of the opinion are not sound
24 or that the opinion is outweighed by other evidence you
25 may disregard the opinion entirely. An expert witness'

1 testimony is to be given no greater weight than that of
2 any other witness simply because the witness is an expert.
3 And you do not have to accept an expert's opinion even
4 though it is uncontradicted.

5 Now, ladies and gentlemen, in this case the plaintiff
6 claims that the defendants were negligent and should
7 compensate the plaintiff for her injuries, the injuries
8 that she suffered as a result of the defendants
9 negligence. In order to prove that the defendants were
10 negligent the plaintiff must prove by a preponderance or a
11 greater weight of the evidence the following things.
12 First, the plaintiff must prove by a preponderance of the
13 evidence that the defendant owed the plaintiff a duty of
14 care. This is a question of law, ladies and gentlemen,
15 and I have concluded that the defendants did in fact owe
16 the plaintiff such a duty. You must then decide the
17 remaining questions. The first of these is whether the
18 plaintiff has proven by a preponderance or a greater
19 weight of the evidence that the defendant breached a duty
20 of care by negligent act or omission. Negligence means
21 that a person has done something that a reasonable person
22 would not have done or has failed to do something that a
23 reasonable person would have done in the same situation.
24 The plaintiff must also prove by a preponderance or
25 greater weight of the evidence that she suffered damages

1 as a result of the defendants breach of duty. Finally the
2 plaintiff must prove by a preponderance of the evidence
3 that the damages were proximately caused by the defendants
4 breach of duty. I instruct you that proximate cause is
5 something that produces a natural chain of events which in
6 the end brings about the injury, it is the direct cause of
7 the injury. To prove that the defendants negligence
8 proximately caused the plaintiff's injury the plaintiff
9 must first prove causation in fact. This is proven by
10 showing that the injury would not have occurred but for
11 the defendants negligence. The plaintiff must also prove
12 legal cause. Legal cause is proven by showing that the
13 injury was foreseeable. This means that the injury
14 occurred as a natural and probable consequence of the
15 defendants negligence. The plaintiff must prove that some
16 injury from the defendants negligence was foreseeable but
17 the plaintiff does not have to prove that the particular
18 injury that occurred was foreseeable. However the
19 defendant cannot be held responsible for things which
20 could not be expected to happen. Proximate cause does not
21 mean the only cause. The defendants act can be a
22 proximate cause of the plaintiffs injury if it was at
23 least one of the direct, concurring causes of that injury.

24 Now in this case, ladies and gentlemen, the defendant
25 claims that the plaintiff's own negligence proximately

1 caused the plaintiff's injury. If you find that the
2 defendant was negligent or the defendants were negligent
3 you must then decide whether the plaintiff was negligent.
4 The defendant must prove by a preponderance or a greater
5 weight of the evidence that the plaintiff breached a duty
6 of care which proximately caused the plaintiff's injury.
7 The same law which I have told you to use in deciding
8 whether the defendant was negligent should be used in
9 deciding whether the plaintiff was negligent. If you find
10 that the negligence of both the plaintiffs and the
11 defendant, I am sorry, both the plaintiff and the
12 defendants proximately caused the plaintiff's injury you
13 must then decide how much negligence of the plaintiff
14 contributed to the plaintiff's injuries and how much the
15 defendants negligence contributed to the plaintiff's
16 injuries. In deciding the percentage of negligence of the
17 plaintiff and the defendant you may consider among other
18 things the following factors. First, whether each party's
19 conduct was only inadvertent or whether it was engaged in
20 with an awareness of the danger involved. Second, the
21 magnitude of the risk created by each party's conduct
22 including the number of persons endangered and the
23 possible severity of the injury. Third, the significance
24 of the goal that each party was trying to reach and the
25 need to achieve the goal in that manner. Forth, each

1 party's capabilities and abilities to realize and
2 eliminate the risk involved. Fifth, the particular
3 circumstances confronting each party at the time the
4 conduct occurred such as the existence of an emergency
5 requiring a quick decision. Sixth, the relative closeness
6 of the causal relationship of the negligent conduct of the
7 defendants and the harm to the plaintiff.

8 I will give you written instructions on a specific
9 verdict form which I have worked here, worked up here, Mr.
10 Foreman. The form will have spaces for you to write your
11 decision about the percentages of negligence, if any, of
12 both parties which proximately caused the plaintiff's
13 injuries. Question number one on the verdict form
14 basically asks you to decide whether the defendants were
15 negligent and if so whether the defendants negligence was
16 the proximate cause of the plaintiff's injuries. Question
17 two asks the same question about the negligence of the
18 plaintiff. Question three asked you to decide the
19 percentages of each party's negligence which proximately
20 caused the plaintiff's injuries. Of course, the
21 percentages have to add up to one-hundred percent. So
22 however you apply or if you do apply comparative
23 negligence in this case just make sure that those
24 percentages add up to one-hundred percent. The form is
25 pretty self-explanatory. Now, ladies and gentlemen, if

1 the plaintiff's negligence was greater than the defendants
2 negligence then the plaintiff would not be entitled to any
3 damages whatsoever and your verdict would be for the
4 defendant in this particular case. If however you find
5 that the plaintiff's negligence was equal to or less than
6 the defendants negligence you would answer the forth
7 question which ask you to determine the total amount of
8 damages suffered by the plaintiff. Now please don't
9 reduce the amount of plaintiff's damages that you write in
10 on question number four based upon the percentage of
11 negligence that you find in question number three. After
12 you answer the questions I will compute the amount of
13 damages for which the defendant is responsible based on
14 the percentages of the defendants negligence which you
15 decide proximately caused the plaintiff's injuries. You
16 are to determine only the total amount of the plaintiff's
17 damages in question number four and enter that figure on
18 the verdict form.

19 Now concerning damages, ladies and gentlemen, if you
20 decide that the plaintiff is entitled to a verdict your
21 next step would be to decide how much money the defendant
22 should be, the defendants should be required to pay.
23 Actual damages are to compensate the plaintiff for the
24 plaintiff's injuries or loss and to put her as near as
25 possible in the same position that she was in before the

1 incident occurred. In other words, actual damages would
2 be the actual losses and expenses which the plaintiff has
3 suffered because of the defendants negligence. I instruct
4 you that pain and suffering compensates the plaintiff for
5 the physical discomfort and emotional response to the
6 sensation of pain caused by the injury itself. There is
7 no definite standard by which to compensate the plaintiff
8 for pain and suffering. You have the authority to
9 determine the amount, if any, to be allowed for pain and
10 suffering using calm and reasonable judgment to ensure
11 that the damages are just and reasonable in light of the
12 testimony and the evidence presented in the case. Another
13 element of damages is the loss of enjoyment of life which
14 compensates the plaintiff for limitations on her ability
15 to participate in and derive pleasure from the normal
16 activities of daily living. The plaintiff must prove that
17 the expenses caused by the injury were necessary and
18 reasonable. Actual damages for a plaintiff who has been
19 physically injured include pain and suffering, both past
20 and future, as well as mental anguish, impairment of
21 health or physical condition and disfigurement. The
22 plaintiff may also claim lost wages due to absence from
23 work and reduced earning ability for the future. In
24 determining the amount of compensation for personal
25 injuries it is proper to consider past and present aspects

1 of the injury. This would include physical and mental
2 pain and suffering, expenses incurred for necessary
3 medical treatment, loss of time and income which resulted
4 from the impairment of the ability to work and earn a
5 livelihood, the loss of enjoyment of life suffered as a
6 result of the injury, and any other losses which are
7 reflected by the character of the injury. The injured
8 party may recover for those future damages that are
9 reasonably sure to result from the injuries. The
10 principle underlying compensation for future damages is
11 that only one action can be brought and therefore only one
12 recovery had. It is proper to include in the estimate of
13 future damages compensation for loss of capacity for work
14 or attention to the party, the plaintiff's ordinary
15 business, future medical expenses and pain and suffering
16 which will with reasonable certainty result.

17 Now, Mr. Foreman and ladies and gentlemen of the
18 jury, all twelve of you have to agree on this verdict. In
19 South Carolina we do not have majority verdicts, I hope we
20 never have majority verdicts. Your verdict cannot be
21 based on sympathy, passion, prejudice, emotion or any
22 other consideration which is not in evidence in this case.
23 Please remember that you have been selected as twelve fair
24 and impartial jurors, that means you have no friends to
25 reward, you have no enemies to punish in this particular

1 case. Mr. Foreman, when the jury agrees on the verdict
2 you would simply sign your name as foreperson down here
3 and knock on the jury door letting the bailiff know that
4 you have finished your deliberations. At that point and
5 time we will receive you back into the courtroom. Now,
6 ladies and gentlemen, I know that in this case we have a
7 ladder that has been marked for identification. If you
8 need to see the ladder, I really don't know if the jury
9 room ceiling is high enough in there for it to be propped
10 against the wall in there like it is out here. And I know
11 that that jury room is somewhat tight and cluttered. So
12 if you need to see that just let the bailiff know and we
13 will get some people to bring it in there to you. But if
14 I leave that thing in there the whole time I am concerned
15 it is going to be too cluttered for y'all. At any time
16 that you want to see it or look at it let us know and we
17 will bring it in here. Okay. Additionally some of the
18 exhibits, you may notice that some of the exhibits have
19 areas that have been whited out or marked through so that
20 you can't read that. The reason for that, ladies and
21 gentlemen, is some of the exhibits contain material that
22 was just totally irrelevant to any issue in this case and
23 the lawyers and myself agreed that it was irrelevant so we
24 simply marked that through so that it is not in there.
25 Don't speculate as to what is underneath that whiteout on

1 those exhibits because it is simply irrelevant to anything
2 that you need to consider today. I am going to ask that
3 you return to the jury room for a few moments. Madam
4 Alternate, if you will go with them one last time. I need
5 to take up some matters with the lawyers out here and make
6 sure I have told you everything that they feel like I need
7 to tell you. If I have told you everything or I am
8 satisfied that I have told you everything that I need to
9 tell you your cue to begin deliberations will be the
10 bailiff will bring in these instructions, all of the
11 exhibits and he will ask that the alternate step out. So
12 that will be your cue to begin. Otherwise if I need to
13 instruct you on something else I will bring you back out
14 here and give you those instructions. So with that don't
15 start talking yet about the case. Go on back there and I
16 hope to have this case to you in the next five minutes.

17 (Whereupon, the jury was excused from open court.)

18 THE COURT: All right, exceptions to the charge from
19 the plaintiff?

20 MR. NEWLON: None, Your Honor.

21 THE COURT: The defense?

22 MR. GRIFFETH: Your Honor, we have two matters and
23 maybe I didn't hear you clearly. But did Your Honor
24 charge the jury on preexisting condition?

25 THE COURT: I better had.

1 MR. GRIFFETH: If you did, Your Honor, I missed it.

2 THE COURT: I included it in the, I did not.

3 MR. GRIFFETH: Your Honor, we would request the
4 charge on preexisting conditions as we did before and
5 while we are at it, Your Honor, you indicated about the
6 ladder. Was the ladder made an exhibit?

7 THE COURT: The ladder was made an exhibit for ID, we
8 didn't introduce it into evidence. I simply said that so
9 that the Clerk of Court doesn't have to take possession of
10 it once the trial is over with. But I think we agreed
11 that it can go back there.

12 MR. NEWLON: I marked it as exhibit 6, I did not mark
13 it as ID purposes.

14 COURT REPORTER: Yes, it is for ID.

15 MR. NEWLON: You marked it as ID.

16 THE COURT: She marked it as ID, yes.

17 MR. NEWLON: If they want to see it they should look
18 at it.

19 THE COURT: Thank you for bringing that to my
20 attention. I don't know what happened. I think I must
21 have just had an old version of the charges that I was
22 reading off of. But I was sure that I had printed out the
23 newest version. I am not sure what happened. Bring them
24 back out.

25 (Whereupon, the jury came into open court at

1 approximately 4:00 p.m.)

2 THE COURT: I apologize for bringing y'all back here
3 and ladies and gentlemen, this is the first time I have
4 actually made this mistake. There is a first time for
5 everything and I forgot to instruct you on something that
6 was in my original charge to you, that I am sure I had
7 instructed you on. But fortunately one of the lawyers
8 brought this to my attention. What I now am going to
9 discuss with you is this law that concerns preexisting
10 injuries. And again, these instructions are to be taken
11 in concert with the instructions I just gave you a moment
12 ago. Okay. So you are to place no additional emphasis on
13 this, any more or any less than you would the other
14 instructions. But I did forget to instruct you as to
15 this.

16 Ladies and gentlemen, the defendant claims that the
17 plaintiff had a preexisting injury or condition prior to
18 the date that she claims that the defendants injured her.
19 If you find that the plaintiff received an injury as a
20 result of the negligence of the defendants and she is
21 entitled to recover for that injury, the fact that the
22 plaintiff had a preexisting injury or condition would not
23 prevent the plaintiff from recovering. The defendant is
24 responsible for all ill effects which, considering the
25 plaintiff's condition of health when the plaintiff was

1 injured, naturally and necessarily follow the injury. The
2 defendant takes the plaintiff as the plaintiff is found
3 whether the plaintiff is in perfect health, in poor
4 health, or somewhere in between. A defendants liability
5 is in no way lessened or affected because of the fact that
6 the injury would not have resulted or would not have been
7 as serious or severe had the plaintiff been in good
8 health, or that the injuries were aggravated and rendered
9 more difficult to cure by reason of the fact that the
10 plaintiff was not in good health. In other words, if the
11 presence of a preexisting injury or condition aggravates
12 and prolongs the injury and increases the damages, the
13 plaintiff should be compensated for the increased or added
14 damages. A person with a preexisting injury or condition
15 is not, however, entitled to any compensation for the
16 preexisting injury or condition. In addition, if the
17 problems are the result of the natural progression of the
18 worsening of a preexisting injury or condition then the
19 plaintiff would not be entitled to be compensated for
20 those problems. Now, ladies and gentlemen, I think that
21 sufficiently charges you on the law that applies in this
22 particular case. Again, all thirteen of you go back
23 there, don't talk about the case yet. I intend to have
24 this case to you momentarily. With that I will see you in
25 a second.

1 (Whereupon, the jury was excused from open court.)

2 THE COURT: The jury is out, exceptions or additions
3 from the plaintiff?

4 MR. NEWLON: None, Your Honor.

5 THE COURT: From the defense?

6 MR. GRIFFETH: None from the defendants.

7 THE COURT: Gentlemen, if you would, just make sure
8 all of the exhibits that were introduced are all together
9 over there and we will soon send them back there to the
10 jury.

11 (Whereupon, attorneys and court reporter go over
12 exhibits.)

13 (Whereupon, the alternate juror was excused from the
14 trial of the case.)

15 THE COURT: 4:05 sending to the jury.

16 (Whereupon, the jury started deliberations at
17 approximately 4:05 p.m.)

18 THE COURT: I received communication from the jury,
19 the question that is being asked is, "If we are done, I am
20 sorry, if we answered no to number one, are we done?" The
21 first question on the jury form is whether the plaintiff
22 has proven her case of negligence and proximate cause for
23 her injuries, et cetera. What I am inclined to do is
24 bring the jury out and tell them that, yes, if you
25 conclude that the plaintiff has failed to meet her burden

1 of proving that they were neglected, the defendants
2 negligence proximately caused her injuries then you would
3 circle no and the Foreperson should sign his name and the
4 case would be over with. At the same time I will tell
5 them that I realize it is 4:25 and that certainly if, what
6 concerns we, are we done part of that question. If they
7 are anxious to get out of here because they have an
8 engagement at 5:00 I am inclined to tell them that, you
9 know, certainly, it would be a violation of their oath as
10 jurors to simply return a defense verdict simply to be
11 getting out of here. If they need to be somewhere this
12 afternoon or this evening and they want to resume in the
13 morning they are free to do that. How long they
14 deliberate is entitled up to them and that is kind of what
15 I intend to tell them. And I think protects everybody.
16 The answer to the question is yes, however, if you are
17 simply looking at getting out of here we can break for the
18 evening if you have somewhere to be and resume tomorrow
19 morning.

20 MR. NEWLON: Does the verdict form say if you answer
21 no to the first question deliberate no further?

22 THE COURT: It did not and that might be why he asked
23 the question. They have gone back there and simply
24 concluded that, with all due respect, the plaintiff failed
25 to meet her burden and they just don't know what to do.

1 But at the same time, are we done, what part that
2 indicates that maybe they are just anxious to get out of
3 here. And if that is the case I want to ensure them that
4 they can go home for the evening if they want to, it is
5 their decision. Let me have the jury out here, please,
6 sir.

7 (Whereupon, the jury came into open court at
8 approximately 4:27 p.m.)

9 THE COURT: Let the record reflect that the jury is
10 back and seated. Mr. Foreman, I have received your
11 communication that asked, if we answer no to number one
12 are we done. The short answer to this question is, yes.
13 If you find that the plaintiff has failed to meet her
14 burden of proof, that the defendants were negligent, that
15 their negligence proximately caused her injuries. If the
16 answer to question number one is no and all twelve of you
17 agree, then, yes. You would simply circle no on the form,
18 sign your name and let the bailiff know. Now, ladies and
19 gentlemen, I realize that it is late in the day and I want
20 to assure you that, of course, a lot of work has been put
21 into this case by all concerned. And if you have any
22 concerns about getting home and that is the worry that we
23 want to finish quick and be done with this case because we
24 have got some place to be at 5:00 or 5:30 and you need to
25 take the evening to think about this case. Understand at

1 this point in the trial y'all decide when we break, y'all
2 decide when you are done. So if you want to break for the
3 evening and come back tomorrow morning and resume
4 deliberations that is perfectly fine. But if you, if all
5 twelve of you reach a verdict in the next five minutes,
6 five hours, whatever the case may be, sometime tomorrow
7 morning we are not operating on your time schedule. Do
8 you understand what I am saying. So if you all agree that
9 the plaintiff has failed to meet her burden of proof and
10 your answer to question number one is no, then, yes, we
11 are done. That is where we are. At the same time if you
12 all have places to be and you need to go somewhere tonight
13 tell me, we will break and we can resume tomorrow morning.
14 It is your call at this point and time. With that if you
15 will continue your deliberations. Thank you very much.
16 Please mark this as Court's exhibit 4.

17 (Whereupon, Court's Exhibit 4 was marked for
18 identification only.)

19 (Whereupon, the jury continued deliberations at
20 approximately 4:30 p.m.)

21 THE COURT: We will go back on the record. Mr.
22 Willingham informs me that the jury has reached a verdict.
23 Anything before we bring the jury back in from the
24 plaintiff?

25 MR. NEWLON: Nothing, Your Honor.

1 THE COURT: From the defense?

2 MR. GRIFFETH: Nothing, Your Honor.

3 THE COURT: Let's have the jury, please.

4 (Whereupon, the jury came into open court at
5 approximately 4:46 p.m.)

6 THE COURT: Mr. Dorroh, I am told that the jury has
7 reached a verdict, is that correct, sir?

8 MR. FOREMAN: That's correct.

9 THE COURT: And all twelve of y'all agree on the
10 verdict?

11 MR. FOREMAN: Yes, sir.

12 THE COURT: If you will hand the form to Mr.
13 Willingham for me, please.

14 (Whereupon, the bailiff hands the verdict form to the
15 Court.)

16 THE COURT: Madam Clerk, if you will publish.

17 MADAM CLERK: The State of South Carolina, the County
18 of Greenwood, the Court of Common Pleas. Civil action
19 number 2010-CP-24-1236. Jennifer Harmon Scott versus
20 Allen Lee Fortner and Jason Chad Griffin. Did the
21 plaintiff meet the burden of proving that the defendants
22 were negligent and that the defendants negligence
23 proximately caused her injuries. No. Signed Foreman,
24 Griffin Dorroh, October 4th of 2012.

25 THE COURT: Ladies and gentlemen, if this is your

1 verdict if you would indicate by raising your right hand,
2 please.

3 (Whereupon, all jurors raised their hands.)

4 THE COURT: Let the record reflect that all twelve
5 jurors did in fact raise their right hands. Ladies and
6 gentlemen of the jury, I want to thank you for your
7 service here this week. Two of you I owe a particular
8 debt of gratitude because your lucky number came up twice.
9 So I am doubling thankful to you. One thing I did forget,
10 one individual I did forget to introduce during the course
11 of these proceedings this week is my very able law clerk,
12 he is the gentleman that has been sitting next to me
13 throughout the trial, his name is Josh Thomas, he is from
14 Hodges and he just started working with me a couple of
15 months back. So even Judges need their own lawyer and he
16 is mine. I will tell you that you will get a letter from
17 me thanking you for your jury service this week and the
18 primary purpose of that letter is to solicit feedback from
19 you on what your experience was like, what you liked, what
20 you have not liked, whether the coffee was too hot, too
21 weak, that is probably not possible because Mr. Willingham
22 brews the best coffee of any bailiff that I know of. But
23 anything that you liked or did not like tell me about it
24 because this system is your court system, it does not
25 belong to me, it does not belong to the State of South

1 Carolina, it belongs to the people of South Carolina. So
2 if there was something that you didn't like let me know,
3 if there was something you liked let me know. Feel free
4 to give me feedback, you will have my phone number, my
5 email address, however you want to communicate with me I
6 am all ears. They say the Court is the only place that
7 the State can compel you to come to and that is probably
8 true. It is the only place that you can be forced to come
9 and I realized that we forced you to come here this week.
10 I can't tell you how important it is though to service a
11 jury and to give the kind of dedication to a case and the
12 kind of attention to a case that you twelve individuals
13 gave over these last two days. So I want to thank you.
14 If this is your first time serving on a jury I hope you
15 had a pleasant experience. Now that you know what it is
16 like maybe the next time you see some sippet on a news
17 program that complains about jury who deliberated thirteen
18 weeks or forced me. One thing I didn't forget during of
19 three weeks or three days to reach a verdict and the
20 newscaster caster is critical of that jury or their
21 decision or the Judge's decision maybe you will have an
22 appreciation of what we actually go through and how
23 sometimes it is hard to reach a decision. I will tell you
24 you do get paid for your jury service. They are in the
25 mail to you. And if you need a work excuse we can get

1 that for you. You get a three year exception for jury
2 service. If you get summoned for jury duty again in
3 common pleas court or general sessions court you have got
4 a three year exception for 2012, 2013 and 2014. Thank you
5 for your service and hard work. Feel free to leave
6 through the back door.

7 (Whereupon, the jury was excused from open court.)

8 THE COURT: The jury is out, I typically afford ten
9 days for any posttrial motions, don't know if there are
10 going to be any, don't know if you intend to file any, Mr.
11 Newlon.

12 MR. NEWLON: Yes, sir. There will be a JNOV, motion
13 for a new trial, motion for a new trial on the thirteenth
14 juror doctrine and I may think of something else in the
15 meantime.

16 THE COURT: Just have those to me within the next ten
17 days. If there is no objection because I am going to be
18 out of town a great deal in other circuits. I would
19 prefer to be able to decide any posttrial motions based
20 simply on the motions themselves but at the same time you
21 feel strongly that you want a hearing we can probably
22 accommodate that some time in November or December.

23 MR. NEWLON: I have no problems submitting them on
24 written motion.

25 THE COURT: Very good, ten days after you get his

1 send me yours.

2 MR. GRIFFETH: Yes sir, Your Honor.

3 THE COURT: Everyone, it has been a pleasure to meet
4 y'all, thank you very much for working with me this week
5 and I hope y'all have a great week and wonderful weekend.
6 Take care.

7 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

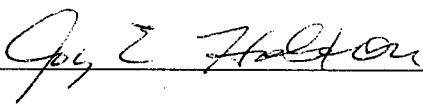
1 CERTIFICATE OF REPORTER
2
3

4 State of South Carolina)
5 County of Newberry)
6
7

8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Greenwood, South
14 Carolina on the 3rd day of October, 2012.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17

18 February 21, 2013
19
20

21 
22 Joy E. Holston, Court Reporter

23 My Commission expires: March 13, 2016
24
25

Plaintiff's Exhibit 1

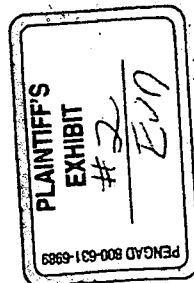
PLAINTIFF'S
EXHIBIT

1

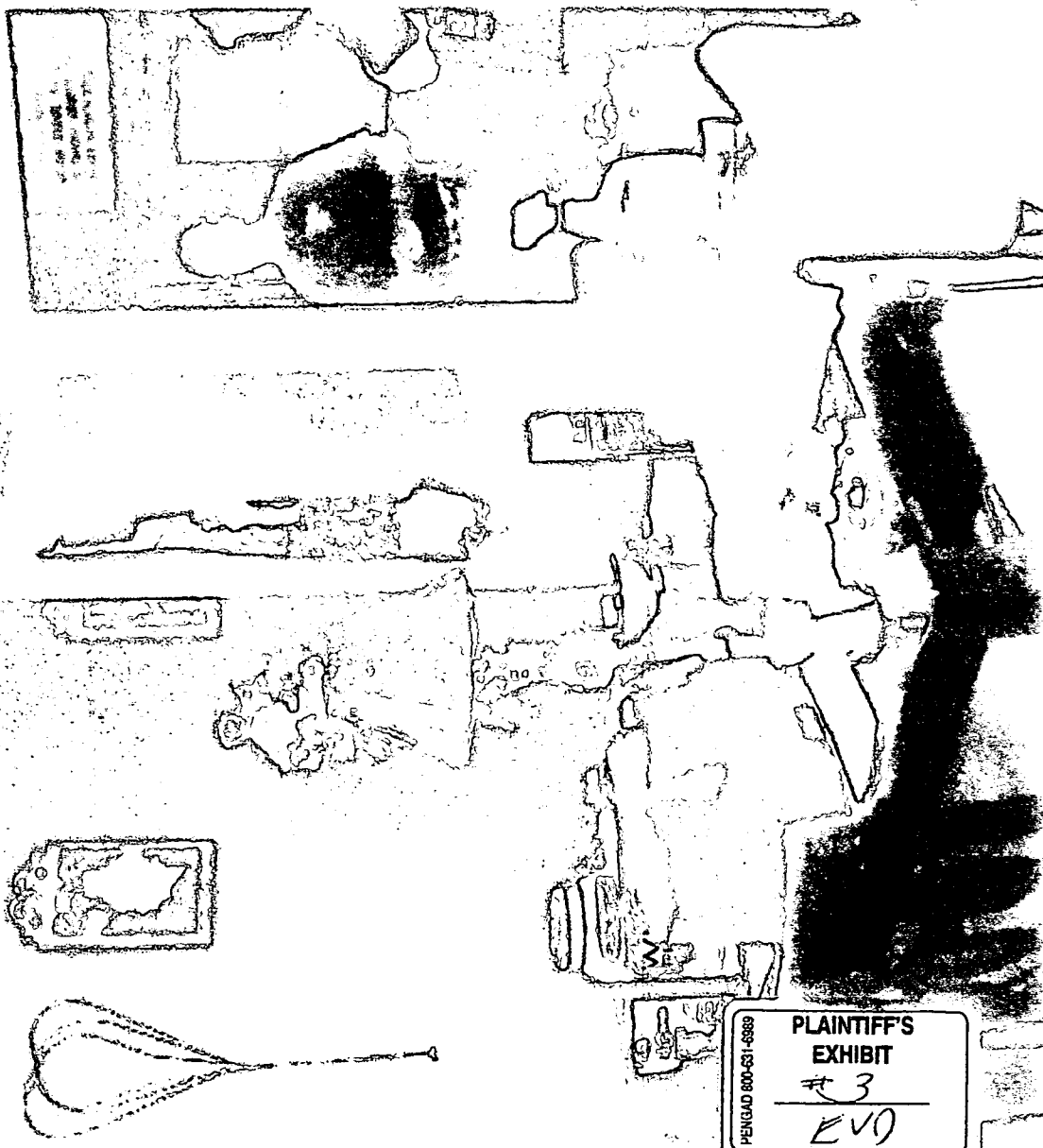
END

PENGAD 800-631-6989

Plaintiff's Exhibit 2



Plaintiff's Exhibit 3



PENGAD 800-631-6969
PLAINTIFF'S
EXHIBIT
3
EVO

Plaintiff's Exhibit 4

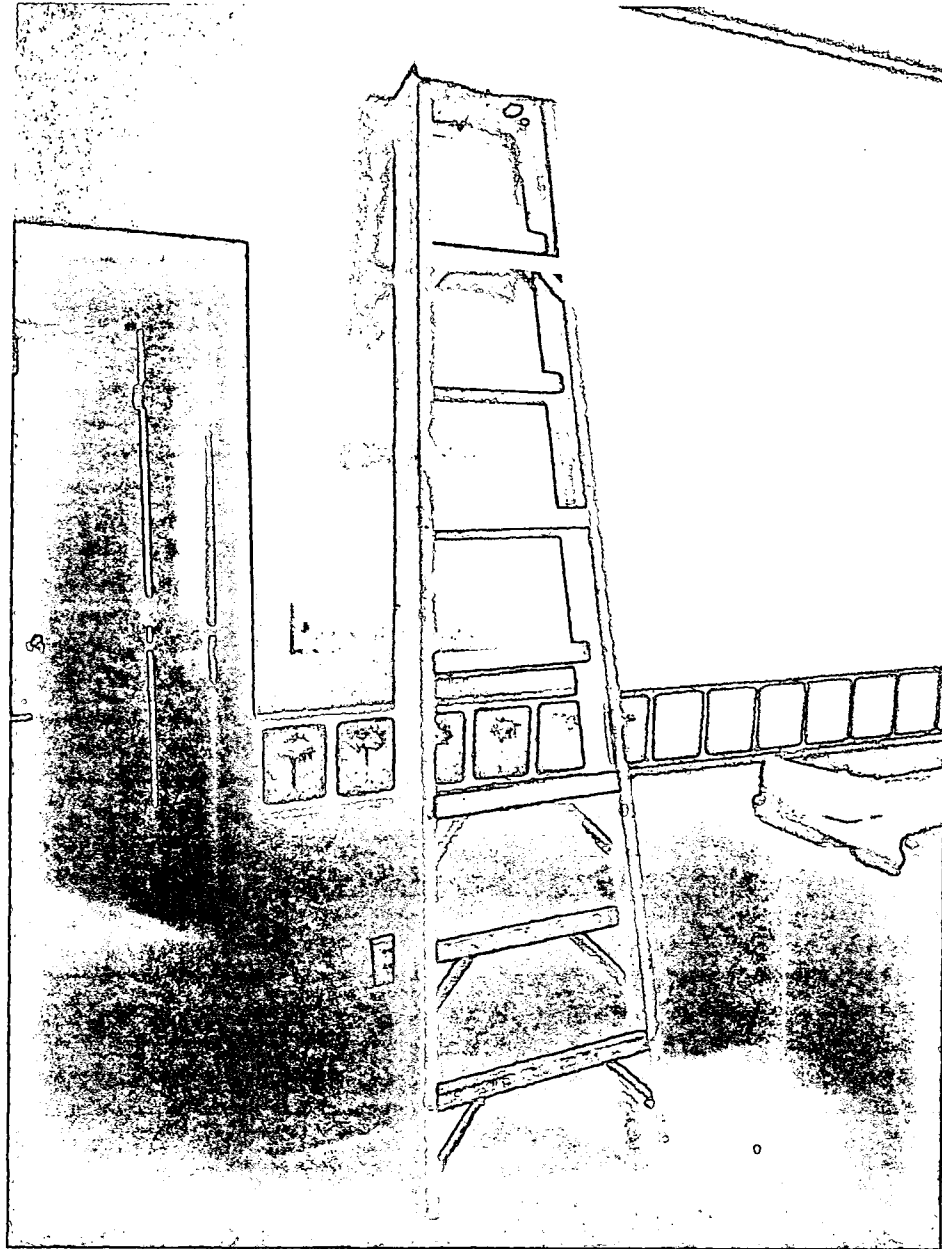
PENCAD 800-631-6389

PLAINTIFF'S
EXHIBIT

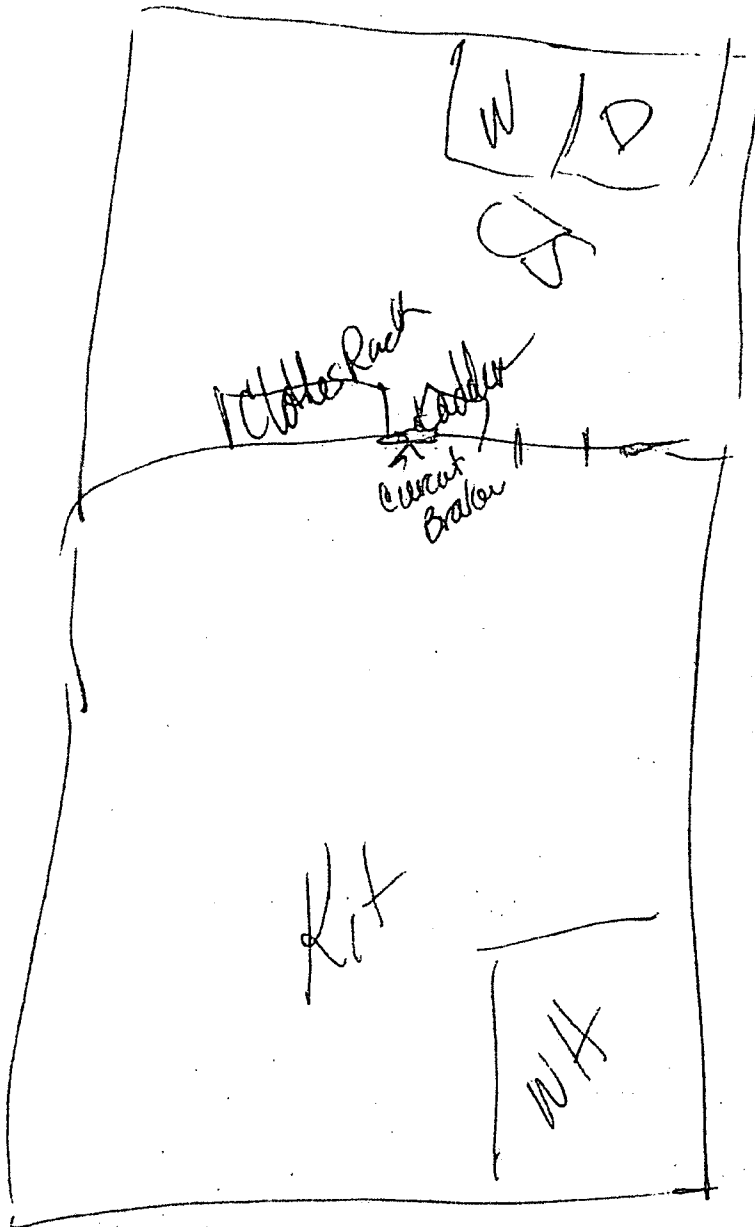
#4

EVD

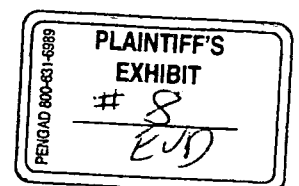
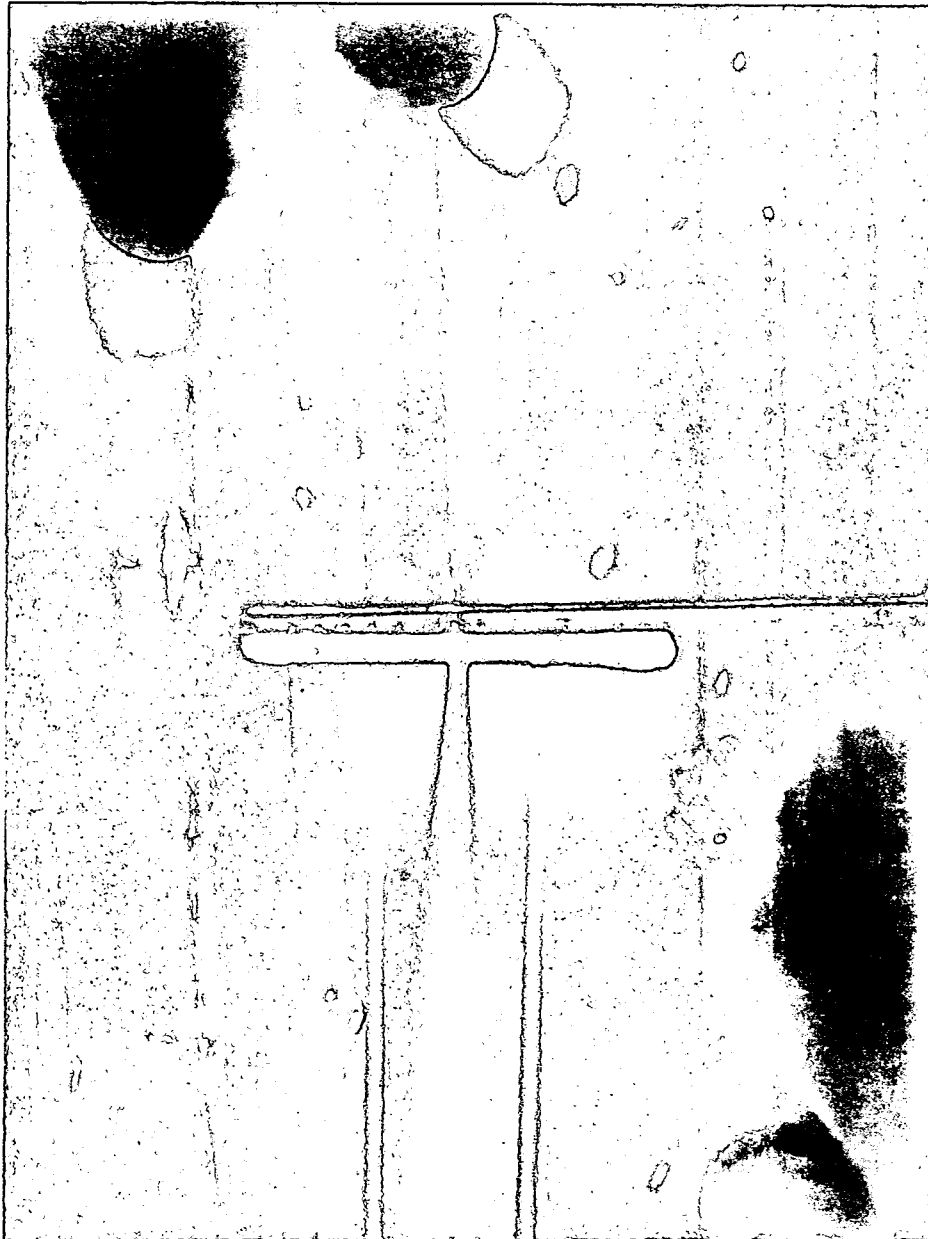
Plaintiff's Exhibit 5



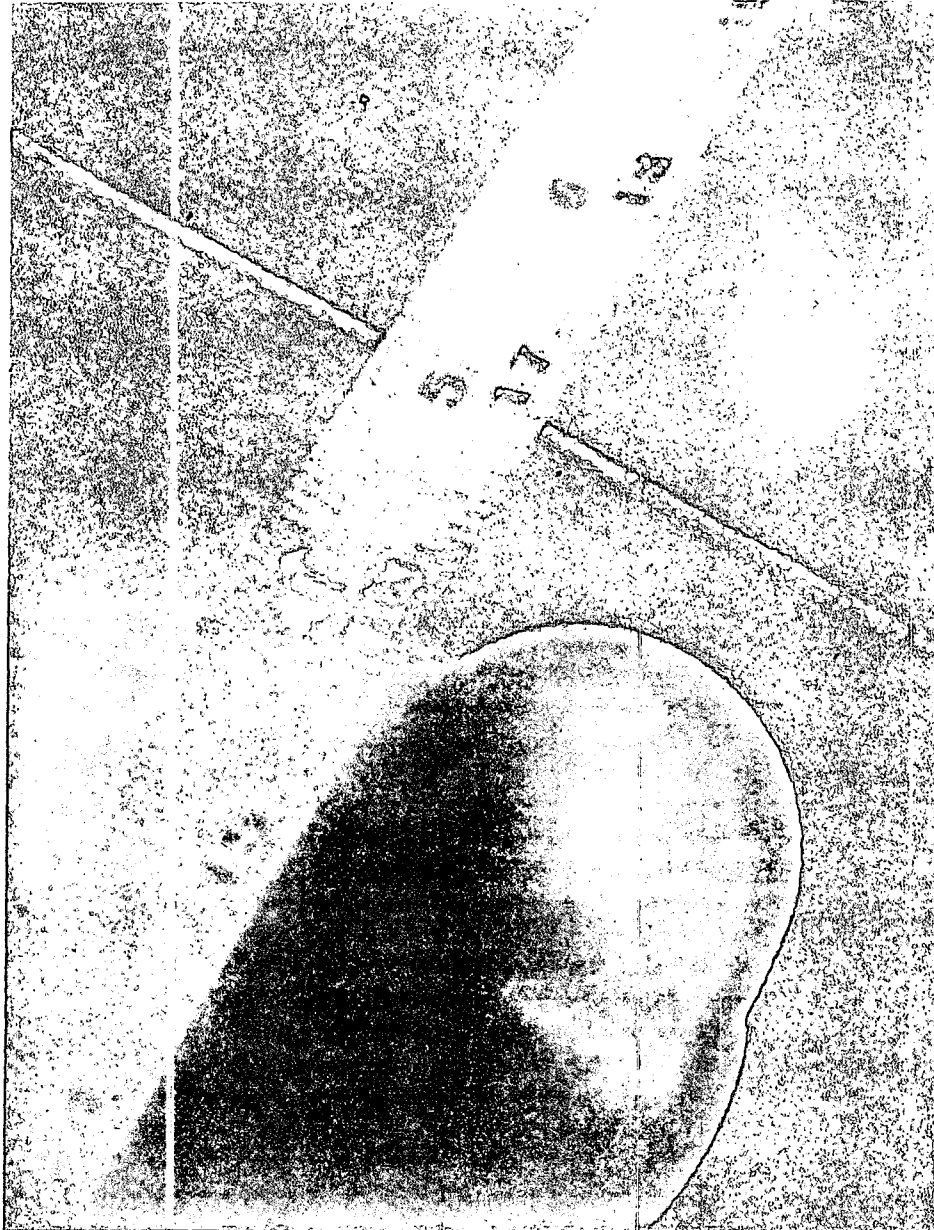
Plaintiff's Exhibit 7



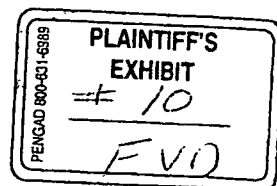
Plaintiff's Exhibit 8



Plaintiff's Exhibit 9



Plaintiff's Exhibit 10



2 PAGES

Plaintiff's Exhibit 11

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) EIGHTH JUDICIAL CIRCUIT

Jennifer Harmon Scott,)

Plaintiff,)

vs.)

Allen Lee Fortner and Jason Chad Griffin,)

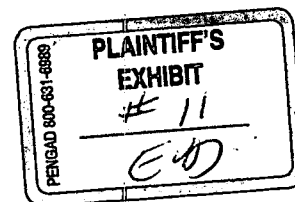
Defendants.)

PLAINTIFF'S MEDICAL BILLS

2010-CP-24-01236

Plaintiff respectfully submits the following:

Self Regional Healthcare	\$11,285.76
Self Regional ER Physicians	\$958.00
Upper Savannah Radiology Associates	\$741.00
Dr. King and Centa Medical Group	\$321.00
Carolina Center for Pain Management	\$633.00
Dr. Ergle and Piedmont Health Group	\$3,207.00
Dr. Pusey and Columbia Neurological	<u>\$200.00</u>
TOTAL	\$17,345.76



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
Jennifer Harmon Scott,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF'S MEDICAL BILLS
vs.	)	
	)	2010-CP-24-01236
Allen Lee Fortner and Jason Chad Griffin,	)	
	)	
Defendants.	)	
	)	

Plaintiff respectfully submits the following:

Self Regional Healthcare	\$11,285.76	
Self Regional ER Physicians	\$958.00	
Upper Savannah Radiology Associates	\$741.00	
Dr. King and Centa Medical Group	~~\$321.00~~	232.00
Carolina Center for Pain Management	\$633.00	
Dr. Ergle and Piedmont Health Group	\$3,207.00	
Dr. Pusey and Columbia Neurological	<u>\$200.00</u>	
TOTAL	~~\$17,345.76~~	17,256.76

Defendant's Exhibit 3

PIEDMONT TECHNICAL COLLEGE
620 Emerald Road P.O. Box 1467
Greenwood, SC 29648-1467

Student Health Form

Program of Study: Massage Therapy PTC ID: P00209486 Date: 8-21-09

STUDENT INFORMATION

Name: Jennifer J Harmon
First MI Maiden Last
Date of Birth: 2 12 66
Month Day Year
Address: 106 Barkwood Dr apt 101B Greenwood SC 29649
Street City State Zip
Phone: 864-323-6428 803-405-7260 harmon.jennifer@
Home Work Cell Email Rocketmail.com
Emergency contact: Tim Scott Fianca
Name Relationship
106 Barkwood DR 803-507-6023
Address Grad 29649 Home Phone Additional Phone

Declaration

I hereby certify that all information is correct. I understand that false information may be cause for dismissal from the program.

I understand it is my responsibility to report any changes in my health status to the Program Director and/or Instructor.

I understand that this information:

- Is confidential
- Must be completed in its entirety and submitted for admission to a nursing or health science program

I give permission for this information to be shared, upon request by the official representative of my program of study, with appropriate college and/or clinical agencies for the purpose of enhancement of my educational and/or clinical experience.

Student Signature Jennifer Harmon Date 8-21-09

PHYSICAL ASSESSMENT

SECTION I

To be completed by student: (May attach additional sheets for full explanation.)

1. Current Medications(s) Cymbalta, Synthroid, Amitiza, Klonopin
2. Allergies (medications, food, other) Codine
3. Medical Conditions (for example, seizures, diabetes, infectious disease.
Chronic IBS, dysfunctional thyroid (hyper), depression, Anxiety

SECTION II

Nursing and Health Science Requirements

Required immunizations are listed on page one of this packet, and must be submitted on a DHEC Immunization Form or letterhead from the Healthcare Practitioner's office.

To ensure that students are able to meet the physical and mental demands of working as a nurse, students are required to have a physical exam within 1 year prior to program entry. This examination must include hearing and vision screening by a Healthcare practitioner *before* entering a health science or nursing program.

Physical examination to be completed by Healthcare Provider

Please include information concerning this student's potential participation in patient care.

Nose		Abdomen	
Throat		Hernia	
Mouth		Nervous System	
Neck	nl	Skin	
Breasts		Orthopedic	nl
Lungs		Psychological	
Cardiovascular		Other	
Eyes Vision Right 20/20		Ears nl	Corrective hearing:
Left 20/20 Both 20/20	Corrected	Yes No	

Comments: _____

Significant changes in health status over last 12 months? no yes
(Explain) _____

Current health status: Medications: Keon - not endocrine to work up.
Cymbalta 60mg qd, Amitiza 24mg BID,
Klonopin 0.5mg BID, Synthroid 88mcg qd, Adipex 37.5mg

Health science and nursing students are required to perform functions that utilize sensory and psychomotor abilities. All nursing and health science programs require physical agility and strength sufficient to move from room to room, lift and position patients, maneuver in small places, and perform clinical services. Students must also be able to perform gross and fine motor abilities sufficient to provide safe and effective patient care. Additionally, auditory, visual, and tactile acuity is required sufficient to assess health status and perform effective patient care. Specific requirements by program are listed on the following page.

Based upon my examination and interview of the above named individual there does not appear to be any health condition, physically or emotionally, that would prevent this individual from participating in a clinical setting.

Physician/Nurse Practitioner Signature _____

Date 8/21/09

Print Name Sam D. Full

Address: 470 Birch Ln.

License # 20144

Phone: 797-2673

Revised 6/2009

Defendant's Exhibit 5

O = Occasionally (1 - 33%) F = Frequently (34 - 66%) C = Constantly (67 - 100%)

Physical Stamina Required (Description)	RES RAD	MAS	ADN PN PCT	CVT	MED	PHB	PHM	VET	SUR
Lift - up to 50 lbs to assist moving patients, supplies, equipment.	F	F	F	F	F	O	O	F	F
Lift - up to 200 lb when moving patients.	O	O	F	F	O	O	O	C	F
Scoop - adjust equipment.	F	F	F	F	F	F	C	C	F
Kneel - manipulate equipment, perform CPR, plug in electrical equipment.	O	F	O	O	O	O	O	F	O
Reach - overhead lights, equipment, cabinets, attach oxygen to outlets, stocking.	C	C	C	C	F	O	C	C	C
Motor skills, manual dexterity - small and large equipment for storing, moving, apply sterile gloves, take BP, operate computers, perform CPR, utilize syringes, tubes, catheters, set up and maintain sterile field.	C	C	C	C	C	C	C	C	C
Stand for prolonged periods of time (to deliver therapy, check equipment and patient, perform surgical procedures).	C	C	C	C	C	C	C	C	C
Feel - palpate pulses, perform physical exams, feel arteries or veins for puncture, assess skin temperature.	C	O	C	F	C	C	O	F	F
Push/Pull large wheeled equipment, i.e. mechanical ventilators, wheelchairs, patients, x-ray, equipment, EKG machines, and office equipment.	C	C	C	F	O	O	O	O	F
Walk for extended periods of time.	C	O	C	O	C	C	C	C	O
Manipulate - knobs, dials associated with diagnostic or therapeutic devices; small instruments, syringes.	C	C	C	C	C	C	C	C	C
Hear - verbal directions, alarms, telephone; hear through a stethoscope for heart sounds, lung sounds, and blood pressure.	C	C	C	C	C	C	C	C	C
See - patient conditions such as skin color, work of breathing; read small print and calibration on equipment; perceive color.	C	C	C	C	C	C	C	C	C
Talk - communicate goals and procedures to patients in English.	C	C	C	C	C	C	C	C	C
Read - typed, handwritten, computer information in English.	C	C	C	C	C	C	C	C	C
Write - communicate pertinent information (patient assessment, outcome assessments) in English.	C	C	C	C	C	C	C	C	C
Mental Attitude									
Function safely, effectively and calmly under stressful situations.	C	C	C	C	C	F	F	C	C
Maintain composure while managing multiple tasks simultaneously.	C	C	C	C	C	C	C	C	C
Prioritize multiple tasks.	C	C	C	C	C	C	C	C	C
Social skills necessary to interact with patients, families, co-workers - of the same or different cultures; respectful, polite, discrete; able to work as a team.	C	C	C	C	C	C	C	C	C
Maintain personal hygiene consistent with close contact during direct patient care.	C	C	C	C	C	C	C	C	C
Display actions, attitudes consistent with ethical standards of the profession.	C	C	C	C	C	C	C	C	C
Exposure to bloodborne pathogens - Hepatitis, HIV.	F	O	C	F	F	F	C	O	F

RES - Respiratory Care; RAD - Radiologic Technology; MAS - Massage Therapy; ADN - Associate Degree Nursing; PN - Practical Nursing; PCT - Patient Care Technology; CVT - Cardiovascular Technology; MED - Medical Assisting; PHB - Phlebotomy; PHM - Pharmacy; VET - Veterinary Technology; SUR - Surgical Technology

I have read the above requirements. I understand that, in order to be successful in my Massage Therapy program, I must be able to comply with these physical and mental requirements.

Jennifer Harmon

(Print Name) Jennifer Harmon

(Student Signature) 8-21-09 (Date)

Defendant's Exhibit 6

DATE: 11/9/04 TIME: 8:00 ROOM: 2 EMS Arrival

HISTORIAN: patient spouse paramedics

HX / EXAM LIMITED BY:

HPI 4240

chief complaint: Injury to:
head face mouth / lip / chin / nose neck

time course:
still present better pain intermittent / lasting
gone now worse / persistent since

occurred:
just prior to arrival where: home school
today neighbor's city park
yesterday 24 hrs work street
days PTA

context:
fell direct blow incised wound stab wound burn

B4. Lacer

LOC? no dazed yes duration:
IF YES remembers: injury coming to hospital

ROS vomiting headache neck pain

PAST HX negative IBS

Meds: none / see nurses note

Allergies: NKDA / see nurses note Cuties

Nursing Assessment Reviewed ☒ Vitals Reviewed ☒ Tetanus Immun. ☒ UTI

PHYSICAL EXAM 145795-79-18

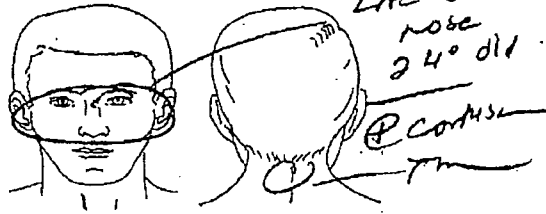
General Appearance c-collar (PTA / in ED) / backboard 991

no acute distress mild / moderate / severe distress

alert anxious / lethargic

IV

HEAD



NECK
non-tender see diagram
painless ROM vertebral point-tenderness

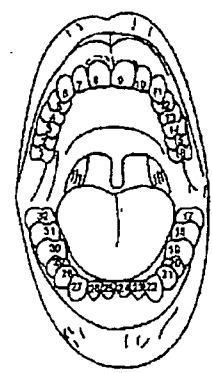
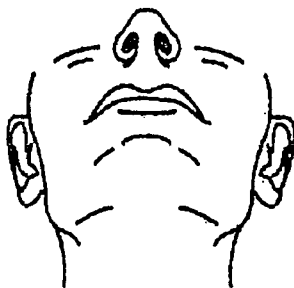
Addressograph

HARRISON, JENNIFER J
HARRISON, JENNIFER J
MISCELLANEOUS, MISC
F 02/12/1456 000293228
SURGERY

03 Facial or Head Injury (4)

EYES
☒ lids / conjunctivae periorbital hematoma
☒ normal subconjunctival hemorrhage
☒ PERRL foreign body
☒ EOMI corneal abrasion
hyphema
retinal detachment
unequal pupils
R pupil mm L pupil mm

ENT
☒ normal external exam hemotympanum
pharynx nml nasal septal hematoma
no injury to teeth TM obscured by wax
lips or gums clotted nasal blood
dental injury
dental malocclusion



T=Tenderness PtT=Point Tenderness S=Swelling E=Echymosis B=Burn
C=Contusion Lac=Laceration A=Abrasion M=Muscle spasm
PW=puncture wound (Ø=without m=mild mod=moderate sv=severe)
Example: Tsv = Tenderness on palpation (severe)

© 1996 - 2004 T-System, Inc.

Circle or check affirmatives, backlash (V) negatives.

EMERGENCY PHYSICIAN RECORD

Emergency Care Center

SELF REGIONAL

HEALTHCARE



IECTS600

08-04 / t-sheet / Page 1 of 2

Defendant's Exhibit 7

non tender

Other ☐ See separate report

ct Leno Neg
 ct C Spine Neg
 ct Ahmed Bous Neg

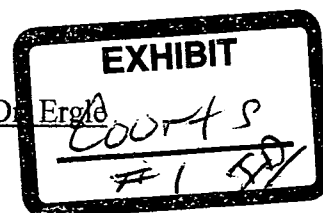
normal

HA JN, JENNIFER
MISCELLANEOUS, MISC
F 771-7184 000202.
SUBJECT -

X _____ MD

08-04 / t-sheet / Page 2 of 2

348



Scott v. Fortner and Griffin

Objections in Deposition Transcripts

John Ertle, M.D.

△ 1	Objection by Mr. Griffeth	Tr. 12:4-19	Defective Foundation (Outside Expertise)
Π 1	Objection by Mr. Newlon	Tr. 22:1 – 23:18	Cross Examination (Wide Latitude)
Π 2	Objection by Mr. Newlon	Tr. 26:3-20	Foundation
△ 2	Objection by Mr. Griffeth	Tr. 32:20 – 33:7	Foundation
△ 3	Objection by Mr. Griffeth	Tr. 34:10-19	Unresponsive to Cross

Sean D. Fuller, M.D.

Π 3	Objection by Mr. Newlon	Tr. 14:18 – 15:10	Relevance
Π 4	Objection by Mr. Newlon	Tr. 16:23 – 17:10	Relevance
Π 5	~~Objection by Mr. Newlon~~	~~Tr. 19:11-25~~	~~Re: Depression~~ <i>Sustained</i>
Π 6	Objection by Mr. Newlon	Tr. 23:19 – 24:18	1 st Severe Concussion
Π 7	Objection by Mr. Newlon	Tr. 28:17 – 29:1	Lack of Foundation <i>w/ Dr. New</i>
Π 8	Objection by Mr. Newlon	Tr. 32:12 – 33:7	Look at Records
Π 9	Objection by Mr. Newlon	Tr. 33:16-22	Spectulation (Never Went to Doctor Referral)
	~~*Objection by Mr. Newlon~~	~~Tr. 41:16 – 42:12~~	~~Relevance (Suicide Attempt)~~ <i>Sustained</i>
Π 10	Objection by Mr. Newlon	Tr. 42:21 – 43:1	Speculation



Southern Reporting, Inc.

Transcript of the
Deposition of

Sean D. Fuller, M.D.

2/6/2012

Scott vs. Fortner
2010-CP-24-01236

COPY

Southern Reporting, Inc.

Phone: 803.749.8100

Fax: 803.749.9991

Email: Depos@southernreporting.net

1 State of South Carolina)
2 County of Greenwood)
3) 2010-CP-24-01236
4 Jennifer Harmon Scott,)
5 Plaintiff,)
6 vs.) Deposition
7 Allen Lee Fortner,) of
8 Defendant.) Sean D. Fuller, M.D.
9)
10)

11 Deposition of Sean D. Fuller, M.D., taken before
12 Olivia Michelle Crocker, a notary public in and for the
13 State of South Carolina, commencing at the hour of 4:24
14 p.m., Monday, February 6, 2012, at the office of Irmo
15 Family Practice, 190 Parkridge Drive, Suite 220,
16 Columbia, South Carolina.

17
18
19 Reported by
20 Olivia Michelle Crocker
21
22
23
24
25

351

APPEARANCES

For the Plaintiff:

Jon Newlon, Esq.
McCravy, Newlon & Sturkie Law Firm, PA
1629 Bypass 72 NE
Greenwood, South Carolina 29649

For the Defendant:

Ross B. Plyler, Esq.
Collins & Lacy Attorneys at Law
37 Villa Road, Suite 500
Greenville, South Carolina 29615

Also Present:

Kayce Tackett,
Jennifer Scott,
Brooks Oswald, Videographer

INDEX

Stipulations:	4
Examination by Mr. Newlon:	4
Examination by Mr. Plyler:	12
Reexamination by Mr. Newlon:	46
Reexamination by Mr. Plyler:	57

*Court Reporter's Note: During the course of this deposition, objections were made on the written record but off the video record. Such objections are noted appropriately.

1

EXHIBITS

2 Plaintiff's Exhibit No. 1, Letter from University
3 Specialty Clinics Diabetes & Endocrinology Center, dated
8/21/09; 2 pages. 47

4 Plaintiff's Exhibit No. 2, document from Carolinas
5 Center For Advanced Management Of Pain, dated 7/7/09; 3
pages. 50

6 Plaintiff's Exhibit No. 3, "Patient Follow-Up Letter",
7 dated 4/16/09; 1 page. 53

8 Plaintiff's Exhibit No. 4, "Patient Call Back", dated
4/13/09; 1 page. 53

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

353

1 STIPULATIONS

2 It is stipulated by and between counsel for
3 the respective parties that all objections are
4 reserved until the time of trial, except as to
5 the form of the questions.

6 This deposition is being taken pursuant to the
7 South Carolina Rules of Civil Procedure.

8 - - - -

9 The reading and signing of this deposition is
10 waived by the deponent and counsel for the
11 respective parties.

12 Whereupon,

13 Sean D. Fuller, M.D., being duly sworn and
14 cautioned to speak the truth, the whole truth,
15 and nothing but the truth, testified as
16 follows:

17 EXAMINATION

18 BY MR. NEWLON:

19 Q Can you state your name for the record?

20 A Sean D. Fuller.

21 Q Okay. And are you associated with any practice?

22 A Irmo Family Practice.

23 Q Okay. And how long have you been with Irmo Family
24 Practice?

25 A It's approximately 354 13 to 14 years now.

1 Q Okay. Jennifer Harmon Scott, has she ever been a
2 patient of yours?

3 A Yes, she has.

4 Q Okay. For the benefit of the jury, before we get
5 started on the examination, I'd just like to go a
6 little bit through your background so that we can
7 understand your education and training. Can you
8 tell the jury your -- about your education and
9 training which led you to become a doctor?

10 A After completing high school, I went through four
11 years of college, four years of medical school here
12 at the University of South Carolina, and then four
13 years -- or three years of family practice
14 residency. I am board-certified in family
15 practice.

16 Q Okay. And so you hold a license in family
17 practice?

18 A Yes, I do.

19 Q Okay. Have you ever testified at any time under
20 any circumstances as a -- as a board-certified
21 practitioner in family medicine?

22 A I have.

23 Q Okay. A little bit about this case: Did you --
24 when Jennifer Scott Harmon came to see you, did you
25 maintain a chart for her? 355

1 A Yes, I did.

2 Q Okay. And have you had an opportunity to review
3 that chart for your examination today?

4 A Yes, I have.

5 Q Okay. And in the past have you been provided with
6 medical records from other facilities and treating
7 physicians regarding Jennifer Harmon Scott?

8 A Yes, I have.

9 Q Okay. If you had any opinions today, would you
10 rely on your records, as well as the records you've
11 been provided?

12 A Yes, I will.

13 Q Okay. A little bit about Ms. Scott: What is your
14 understanding -- or the first day she came to you
15 or presented to you, what was your understanding of
16 the nature of her complaints?

17 A At that point when she first came to me, we had --
18 we had discussed that she had had a -- a fairly
19 large work ladder, I think aluminum in nature, had
20 fallen across the room and had hit her squarely in
21 the nose.

22 Q Okay.

23 A And --

24 Q And --

25 A -- she was having sequela from that.

1 Q Okay. And when you say "sequela," that's a nice
2 doctor term. What does that mean exactly?

3 A Just some problems, such as headaches and memory
4 loss and some circumstances that occurred that she
5 believed was related to the ladder hitting her.

6 Q Okay. In your review of the medical records, was
7 there any physical signs of injury to her face or
8 her nose?

9 A The day that I first saw her, there was no leftover
10 physical damage for me to actually visualize on
11 that visit, if memory serves me. Yes. This is
12 several months after the actual incident.

13 Q Okay. With regard to her initial visit to the
14 emergency room, do you recall whether she had any
15 physical signs of injury?

16 A From what I recall reviewing those ER records,
17 there was a small facial laceration right near the
18 -- the nose area.

19 Q Okay. All right. And were there ever -- to your
20 knowledge, were there ever any objective clinical
21 testing done on her based on her complaints of
22 headaches, as you've testified to?

23 A She had certainly already had a CAT scan done, as
24 well as several visits to the emergency room also
25 that had some neurologic examination done with

1 them, per the ER doctor.

2 Q Okay. In the CAT scan, did it show any significant
3 trauma or anything like that?

4 A It did not.

5 Q Okay. So other than headaches at the time she came
6 to see you, was she making any other complaints
7 that was associated with this ladder incident, to
8 your knowledge?

9 A There was definitely memory loss that she was
10 complaining of. The term "postconcussive syndrome"
11 did come up as one of the diagnoses that she had
12 really -- received from one of her emergency room
13 visits.

14 Q What -- now, you said "postconcussive syndrome."
15 Essentially, in the simplest terms for the jury,
16 what is a postconcussive syndrome or --

17 A Postconcussive syndrome is an injury that's
18 occurred with some type of a head trauma. There's
19 usually leftover memory deficits, headaches that
20 develop that are not able to be shown up as damage
21 on a CT scan or an MRI scan. So then it usually
22 becomes referred to as postconcussive syndrome.
23 It's a diagnosis that comes up as a diagnosis of
24 exclusion. Nothing else has been found, yet there
25 seems to be some leftover medical issues after the

1 head injury.

2 Q Okay. So someone who -- if I understand it, if --
3 if you got a negative CT scan, that's something
4 that indicates -- it could indicate postconcussive
5 syndrome?

6 A Uh-huh.

7 Q Is that a yes?

8 A That's a yes. That is yes.

9 Q Yes. Okay. All right. And in your -- now, how
10 many times did you actually see her?
11 Approximately.

12 A I saw her on the first day of 5/19 -- or 5/6 -- I'm
13 sorry -- '09 was our first visit, and there was a
14 follow-up visit on 5/20, so that'd be twice. 7/2 -
15 - three times. Looks like three visits that we'd
16 had together.

17 Q Okay. Did you -- in those three visits, do you --
18 do you -- did you have a adequate opportunity to
19 speak with her and talk about her medical issues?

20 A Not only during those visits, but she had written
21 down a lot of her symptoms ahead of time and had
22 given me a good, thorough note beforehand that I was
23 able to -- to go through also. But, yes, we had a
24 good amount of time, particularly the first visit.
25 I think, probably 359 40/45 minutes during that visit

1 to just sit and talk and hear about what had
2 happened.

3 Q Okay. All right. Doctor, at this time I'd simply
4 offer you as an expert in family practice medicine.

5 MR. PLYLER: No objection.

6 Q Doctor, based on your examination -- evaluation of
7 Ms. Scott, your review of the medical records that
8 you've been provided in her case, do you have an
9 opinion to a reasonable degree of medical certainty
10 what injuries, if anything, she sustained by being
11 struck in the nose by a ladder back in January of
12 2009?

13 A I believe the emergency room doctor's initial
14 thought, after the negative CT came back, of
15 postconcussive syndrome certainly fits the -- fits
16 the situation, as her CT was negative and there was
17 a significant amount of trauma from the -- the type
18 of ladder and the extent of the fall that it
19 produced on her. Certainly, memory loss is going
20 to be related to that. And her chronic headaches
21 are going to be related to that also.

22 Q Is that your opinion to a reasonable degree of
23 medical certainty?

24 A Yes, it is.

25 Q Okay. Have you had patients in the past that have

1 suffered from postconcussive syndrome?

2 A Yes, I have.

3 Q What type of -- of recovery rates do you typically
4 see in your clinical experience?

5 A Of the -- the few that I've had, there's been close
6 to 100 percent recovery, but the problem lies in
7 that the recovery can be months, can be days, can
8 be months, can be upwards of even past a year on
9 these times for recovery from this.

10 Q Well, she came to see you in May, as I understand
11 it --

12 A Correct.

13 Q -- correct? What you told me --

14 A 5/6/09, I think, is our --

15 Q Okay.

16 A -- first note.

17 Q And her incident, according to the information we
18 have, was in January, about four months before
19 that.

20 A Correct.

21 Q Would it -- and, then, the last time she saw you
22 was in -- I think you said it was in July.

23 A July of -- July 2nd of '09.

24 Q Okay. Based on your clinical experience, would it
25 be unusual for her to be experiencing

1 postconcussive syndrome for six months?

2 A No. That's not unusual at all. That's typically
3 what -- what we would typically see with a
4 situation like that. At least six months.

5 Q Okay. And with regard to her treatment that you
6 reviewed in the records, was the treatment -- in
7 your opinion, was it reasonable and necessary?

8 A Yes, it was.

9 Q Okay.

10 MR. NEWLON: Doctor, I have no further
11 questions. Answer any questions that defense
12 counsel may have for you.

13 EXAMINATION

14 BY MR. PLYLER:

15 Q Dr. Fuller --

16 MR. NEWLON: Before you get started, let's go
17 off the record just a second.

18 (Off the record from 4:34 p.m. until
19 4:37 p.m.)

20 THE EXAMINATION BY MR. PLYLER CONTINUES.

21 Q Dr. Fuller, you saw this -- Jennifer Harmon three
22 times --

23 A Yes.

24 Q -- right?

25 A Yes.

1 Q And -- and you never saw her prior to this -- this
2 ladder incident that occurred in January 2009,
3 right?

4 A No, I did not.

5 Q And -- and your -- your office is here in Irmo --

6 A Yes, it is.

7 Q -- is where we're sitting today, right?

8 A Yes, it is.

9 Q You -- you don't have an office in Greenwood, do
10 you, Doctor?

11 A No, I do not.

12 Q The first visit that you saw the plaintiff is May
13 6th, 2009, right?

14 A Correct.

15 Q I'm going to give you that stack, Doctor, just to
16 make things go a little bit quicker. That visit is
17 noted on -- wait. Wait. Yeah. That visit is
18 noted on -- on pages 50009 and 50010, you'll see
19 this.

20 A Yes, it is.

21 Q Now, if a -- if -- if a doctor refers a particular
22 patient to you, you -- you -- you -- you typically
23 write that down in a record, as far as where this
24 patient came from, right?

25 A Correct.

363

1 Q And you didn't write anything down in this
2 particular case, right?

3 A No, I did not.

4 Q And there's -- you don't really have a record of
5 any doctor ever referring Ms. Harmon to you.

6 A No, I don't.

7 Q But on -- on May 6th, when you first saw her, you
8 did a complete physical. And you've said that --
9 that -- and when you say "complete physical," you
10 look them over from head to toe and discuss any
11 issues that they may have, right?

12 A Yes.

13 Q On this particular record, I -- when you first
14 examined her on May 6th, 2009, you at least note on
15 the record a issue of -- of -- of constipation,
16 irritable bowel syndrome, depression, and the post
17 --

18 THE VIDEOGRAPHER: We are going off the record
19 at 4:39 p.m.

20 MR. NEWLON: I'm going to enter objection as
21 to relevance, as to any conditions that have
22 no clinical or temporal correlation or expert
23 testimony connecting him in any way to this
24 particular case, with specificity, a mention
25 of depression, ³⁶⁴ which is specifically been

1 excluded as a claim in this case in
2 interrogatories, and a mention of any other
3 condition which may be prejudicial to this
4 woman's case. It has nothing to do with the
5 injuries she has claimed for which she was
6 treated, which was a head injury documented as
7 postconcussive syndrome.

8 THE VIDEOGRAPHER: All right. Stand by. We
9 are going back on the video record at 4:40
10 p.m.

11 Q The -- the exact issues that you note on your
12 record, Doctor, are -- are -- are constipation,
13 irritable bowel syndrome, depression, and
14 postconcussion syndrome.

15 A I have "IBS, depression, complete physical and
16 postconcussive syndrome" as her complaints on page
17 50010.

18 Q And any complaints of headaches, your treatment was
19 to refer her to a neurologist, Dr. Pusey?

20 A Correct.

21 Q Now, the second visit was on May -- is on the next
22 page there -- May 20th of 2009. And the purpose of
23 this visit was to follow up on a prescription that
24 you wrote her for Cymbalta and also to follow up on
25 a thyroid issue that ³⁶⁵you found doing some routine

1 blood work of the plaintiff; is that right?

2 A Correct.

3 Q And the Cymbalta was -- the Cymbalta was -- was not
4 prescribed for headaches, right?

5 A No, it wasn't.

6 Q It was prescribed for depression.

7 A Yes, it was.

8 Q And the -- and the thyroid was because of the blood
9 test you ran, and she had some elevated levels that
10 -- that you were concerned about, right?

11 A They were actually not elevated. They were
12 actually low.

13 Q An abnormal thyroid?

14 A Abnormal.

15 Q Can we -- and it was an abnormal thyroid reading on
16 the blood test, right, Doctor?

17 A That is correct.

18 Q And this -- this record also notes -- it shows some
19 insomnia?

20 A Yes, it does.

21 Q But this was a issue she had before the incident of
22 January 9th -- January 2009, right?

23 THE VIDEOGRAPHER: We're going off the record
24 at 4:42 p.m.

25 MR. NEWLON: ³⁶⁶I'll go ahead and just enter a

1 running objection, as stated before, as to any
2 conditions that have no temporal proximity to
3 this particular case, nor clinical correlation
4 nor foundation by a doctor and with -- in
5 particular, with reference to any conditions
6 that preexisted the date of this incident that
7 have nothing to do with the injuries claimed
8 in this case.

9 THE VIDEOGRAPHER: We are going back on the
10 record -- video record at 4:42 p.m.

11 Q Doctor, I said that the assessment here showed
12 "insomnia," and I asked you that -- that she did
13 have this condition before the incident of January
14 2009, right?

15 A I don't see that I've put that down in the initial
16 note that insomnia was going on before then, so I'm
17 -- I'm unsure whether that's developed between the
18 two notes or not. On the first one of 5/6/09, I
19 don't have insomnia that I'm seeing anywhere in the
20 record. But on the 5/20/09, that was made mention,
21 so I'm not sure whether it was existing prior to
22 5/6/09 or whether it started in between these two.

23 Q But the assessment also notes depression. And she
24 had this before the accident, correct?

25 A The depression -- ³⁶⁷once again, I'm going to have to

1 refer just back to my notes here. On the 5/6/09, I
2 don't know that she was being treated for
3 depression prior to me having seen her. We
4 actually started the Cymbalta on the 5/6/09 visit,
5 so she had been having some symptoms before my
6 visit of 5/6/09. I don't know if she was having
7 depression prior to the 1/7/09 accident.

8 Q Let me -- let me refer you -- let -- let's talk
9 about, first, the insomnia. And you said you
10 weren't sure if you -- if she had this condition
11 before the accident. And -- and it would be hard
12 for you, Doctor, because you didn't see her before
13 this accident, right?

14 A Correct.

15 Q Let -- if you'll skip forward a few pages to a
16 record that's marked 50040. And this is a record
17 from Saluda Family Practice. And it's dated
18 November 6th, 2007. You'll see in the -- what's
19 marked the "A&P," that Item No. 4 shows "insomnia"
20 --

21 A Correct.

22 Q -- and that she -- that the doctor at Saluda River
23 changed her prescription from Lexapro to Prozac.
24 It's Dr. Sawyer, right?

25 A Correct.

368

1 Q And I know you didn't have that record when you --
2 when you -- when you -- when you saw, but it's
3 clear that she had some issues with insomnia prior
4 to the time you saw her and then also prior to the
5 -- the incident of January 2009.

6 A Certainly, based on this record, I would agree.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25

p.m.

369

1 Q Doctor, the fact that she had taken Lexapro and
2 Prozac in at least November 2007 indicates to --
3 should -- it indicates to you that she had suffered
4 from some depression prior to when you saw her; is
5 that correct?

6 A That's correct.

7 Q Now, your assessment -- back to your assessment of
8 May 20th, 2009, you do mention some headaches, but
9 you had already referred her to -- to Dr. Pusey,
10 the neurologist, for -- for this particular issue,
11 right?

12 A Yes, I had.

13 Q The only objective finding that you're dealing with
14 at this particular -- this particular visit is that
15 abnormal thyroid report?

16 A Correct.

17 Q And you had ordered a sonograph, which showed the -
18 - the thyroid had a left node with a mass on it and
19 nodules on the right node of the thyroid?

20 A Correct.

21 Q And these issues are clearly not related to any
22 incident with a ladder or any -- any laceration to
23 Ms. Harmon Scott's nose?

24 A Correct.

25 Q And for the thyroid issues, you'd referred her on

1 to the endocrinologist, Dr. Lin?

2 A Yes, I did.

3 Q You mentioned in the -- earlier today that -- that
4 the plaintiff had written you a letter that
5 detailed some of her -- some of her medical history
6 and that you found that very helpful in -- as you
7 began to treat her?

8 A Yes, I did.

9 Q And in this -- in this letter she also mentioned --
10 in -- she mentioned that she had -- had been
11 diagnosed in the past with high blood pressure?

12 A Yes, she did.

13 Q And high blood -- high blood pressure can cause
14 headaches, right?

15 A It can.

16 Q Let me show -- let me -- turn to -- a few pages to
17 a record that's numbered 50050, a record from
18 December 4th, 2004, about five years prior to our
19 incident with the ladder. This is another record
20 from -- from -- from Saluda Family Practice. Are
21 you with me there, Doctor, on --

22 A I've got a couple out of place here. You said
23 50050, correct? I've got a 40. I got -- I'm
24 sorry. I've got it here. Just got a couple of
25 pages out of place. 371 (Reads softly to himself.)

1 Q The record of December 4th, 2004, in the first
2 paragraph, second -- third sentence, it says that
3 "she," meaning the plaintiff, "complains of
4 headaches and some visual disturbances at the
5 time."

6 A Correct. It does.

7 Q That sounds like a migraine headache, doesn't it,
8 Doctor?

9 A (Read softly to himself.) That could certainly fit
10 -- fit a diagnosis of migraine at that time.

11 Q But, regardless, it's a headache, right?

12 A Correct.

13 Q The -- the record goes on to say that -- that "this
14 headache resolved after she was started on
15 atenolol, 25 milligrams. And she states she has
16 felt much better since and can tell that her BP" --
17 which is blood pressure -- "has been better
18 controlled." Now, atenolol, what -- that's a --
19 that's a blood pressure medicine, right?

20 A Atenolol is a beta blocker for blood pressure.

21 Q Now, and it's clear that this -- at this particular
22 time, this particular drug was effective in
23 treating her headaches.

24 A It seems to have been.

25 Q Well, when she comes to you, she's not taking any

372

1 medicine for high blood pressure, is she?

2 A The first visit I don't show -- she's on some
3 medicine for pain and that -- that's all I see
4 listed per her.

5 Q And even on the letter that she wrote you,
6 particularly page -- what's been marked page 50008,
7 in the second paragraph she says, "I used to take
8 high blood pressure medicine," which certainly
9 implies that she wasn't taking it at the time,
10 right?

11 A Correct.

12 Q She also -- and while we're talking about the
13 letter that -- that she wrote to you in describing
14 her medical condition and what was -- what was
15 bothering her, she says that it was a -- that --
16 she -- she makes some reference that this was not
17 her first severe concussion.

18 A She does.

19 THE VIDEOGRAPHER: We are going off the record
20 at 4:52 p.m.

21 MR. NEWLON: Counsel's making reference to a
22 concussive episode that happened 19 years
23 prior to this particular incident, which has
24 no temporal proximity, nor does it have any
25 clinical correlation to her current symptoms.

1 A evaluation -- or a examination of her family
2 doctor, Saluda Family Medicine, recently
3 showed that she had absolutely no record of
4 chronic headaches or chronic problems by way
5 of postconcussive syndrome was not a
6 diagnosis. Therefore, there is no clinical
7 correlation. In the absence of any medical
8 testimony connecting that 19-year-old
9 postconcussive episode to the -- this case or
10 the treatment in this particular case, the
11 plaintiff would move to have all that
12 questioning stricken as not being relevant.
13 And even if there is a scintilla of relevance,
14 it's prejudice and require the defense to
15 provide a clinical correlation, as well as
16 expert testimony to make that leap of faith.
17 THE VIDEOGRAPHER: Stand by. We are going
18 back on the video record at 4:53 p.m.

19 Q She makes some reference in that letter, Doctor,
20 and also in -- I -- I believe you had some specific
21 memory of speaking with her about that she had had
22 a -- a severe concussion in the past.

23 A (Reads softly to himself.) She does definitely
24 make reference to a -- a previous concussion from a
25 car accident.

1 Q In fact, in the first page of that letter, she
2 says, "The first time was a car accident. And I
3 went home, fell asleep, and woke up with a
4 temporary speech disorder and lots of memory loss."

5 A Yes. It does say that.

6 Q And that's consistent with what she recounted to
7 you during your physical examination, right?

8 A Yes, it is.

9 Q If you have a -- a concussion where you wake up
10 with temporary speech disorder and memory loss,
11 that's a pretty severe concussion, right?

12 A I would concur.

13 Q In your -- in the -- in the letter, she also
14 mentions having some struggles with anxiety, right?

15 A On page 5006, there is some talk. "I also
16 experience what I call 'meltdowns' of what lead on
17 to anxiety attacks."

18 Q The -- did she indicate -- or she didn't really
19 indicate to you when these -- when these episodes
20 started, did she?

21 A (Reads softly to himself.) She makes a reference
22 to empty-nest syndrome when her youngest went to
23 college and then goes on to say, "Now I just get
24 sad because I'm alone and have no one to share my
25 life with. And that's what leads then into the

1 anxiety attacks and meltdowns."

2 Q The -- it's -- it's clear this depression and
3 anxiety was -- that -- that -- that the plaintiff
4 struggled with these issues well before the January
5 2009 incident, right?

6 A I think so.

7 Q Well, let's look at -- turn a few pages forward to
8 what I've marked as 50048. This is, again, a
9 record from Saluda Family Medicine from September
10 30th, 2006. And let me just -- I'll draw your
11 attention, for the interest of time, down to the
12 diagnosis at the very bottom -- or bottom third of
13 the -- of the record there. Items No. 3 and 4 are
14 a diagnosis of anxiety and depression, right?

15 A Yes.

16 Q So clearly she had the -- she struggled with these
17 issues at least to back in 2006.

18 A Correct.

19 Q Also mentions "HTN," which is hypertension, right?

20 A Correct.

21 Q Same thing as high blood pressure?

22 A Yes, it is.

23 Q In the letter she also says on page -- the first
24 page of the letter -- that's 50005 -- that her

25 brain was bruised from the blow to the face. And

1 she's talking about the ladder incident there,
2 right?

3 A (Reads softly to himself.) Okay. "I was told that
4 I had postconcussion syndrome and that my brain was
5 bruised from the blow to the face." Correct.

6 Q Now, there's no -- this information comes from the
7 plaintiff, from the patient herself, right?

8 A This is in her words, correct.

9 Q Okay. There's no record of a brain bruise or
10 anything like that, that you ever reviewed?

11 A There's -- there's nothing in the ER notes that I -
12 - that I saw using those words "brain bruising."

13 Q Okay. So we know that prior to January 2009, from
14 your discussions with her, from your review of the
15 records, that she had high blood pressure, hyper --
16 right?

17 A Correct.

18 Q Hypertension?

19 A Correct.

20 Q Depression?

21 A Correct.

22 Q Headaches?

23 A Correct.

24 Q Insomnia?

25 A Correct.

377

1 Q And a severe concussion?

2 A Correct.

3 Q You had a chance to review the emergency room
4 records from January 9th, 2009?

5 A I did.

6 Q But you didn't have these records when you first
7 treated Ms. Harmon, right, Doctor?

8 A No, I did not.

9 Q The -- I've included these records for you. They
10 start at 120057. I know you've since seen these
11 records. But let me ask you a few things about
12 them. First of all, the emergency room doctors
13 confirmed that -- that the plaintiff did not have a
14 loss of consciousness at all from this incident
15 with the ladder, right?

16 A "Contusion" --

17 THE VIDEOGRAPHER: We are going off the record
18 at 4:58 p.m.

19 MR. NEWLON: Just enter an objection as to
20 hearsay, lack of foundation. He's certainly
21 able to rely on hearsay formulate opinions,
22 but to actually go back and review the
23 individual records will require authentication
24 and also proper foundation.

378

25 THE VIDEOGRAPHER: Stand by. We are going

1 back on the video record at 4:59 p.m.

2 A I don't see anything in the record that -- that
3 lists a loss of consciousness at any point on any
4 of these.

5 Q Let me refer you to the -- the page that's marked
6 120061, record from the emergency room.

7 A All righty.

8 Q Do you see there in the middle of the page, Doctor,
9 it's noted that there's been no loss of
10 consciousness?

11 A Correct.

12 Q And that fits with what she told you when you saw
13 her?

14 A That does.

15 Q There's -- but in this emergency room record, you
16 told me that there's no mention of the word
17 "concussion." The doctor specifically lists
18 "contusion," which is a -- a -- a -- a laceration
19 or a scratch or a -- a -- where -- where -- where -
20 - where blood -- where you see blood, right?

21 A Correct.

22 Q The -- the emergency room doctors mention a
23 laceration on the nose 2 to 4 millimeters in -- in
24 length. But he doesn't use the -- no -- nowhere in
25 the word -- is the word "concussion" used anywhere

1 in this emergency room record, right?

2 A No.

3 Q At the emergency room, they did a -- they did a few
4 tests, right?

5 A Correct.

6 Q And I know you've seen those since, and I've given
7 them to you. They start at 120064. But the first
8 test they did is they did a CT of the plaintiff's
9 face, of the facial bones without contrast.

10 A Correct.

11 Q And that test showed that the nasal bones were
12 normal and that no -- no bones -- no bones were
13 broken in the face, right?

14 A Correct.

15 Q That the facial bones were intact?

16 A Correct.

17 Q On that same day in the emergency room, they did a
18 CT scan of the plaintiff's head. That's your next
19 page, 120065. In this test, Doctor, again it --
20 it's -- it's a -- an unremarkable test, right?

21 A Correct.

22 Q And unremarkable -- and -- and to specifically say,
23 "The ventricles are normal. There's no swelling or
24 fluid building up in here, and no hemorrhages
25 seen."

1 A Correct.

2 Q All in all, a normal head?

3 A Correct.

4 Q They also do a CT scan of the spine -- that's our
5 next page -- the same day, January 9th, 2009,
6 right?

7 A Correct.

8 Q And this is -- they call it "an unremarkable exam,"
9 meaning a normal looking spine, right?

10 A Correct.

11 Q And are you aware that they also did, in June of
12 that year, June 30th of 2009, an MRI of her head?
13 And I've given that to -- you've got to skip ahead
14 a little bit. It's 50147.

15 A (Reads softly to himself.)

16 MR. NEWLON: Let's go off the record.

17 (Off the record from 5:03 p.m. until
18 5:04 p.m.)

19 THE EXAMINATION BY MR. PLYLER CONTINUES.

20 Q Doctor, I'm not sure if you've seen this record,
21 but you see that in June 30th of 2009, at Self
22 Regional in Greenwood, they did an MRI of the
23 plaintiff's head -- I'm sorry -- MRI of the
24 plaintiff's brain without and with contrast.

25 A Correct.

381

1 Q And the impression that they get from this MRI is
2 that it's got a normal head.

3 A Correct.

4 Q Now, after she left the emergency room on the --
5 the date of this incident, January 9th, 2009, she
6 went back to the emergency room about a week later
7 on January 15th, 2009, right?

8 A Correct.

9 Q The doctors, after seeing her, specifically
10 referred her to the Sports Medicine Clinic. And I
11 -- that's on page 120097.

12 THE VIDEOGRAPHER: We are going off the record
13 at 5:06 p.m.

14 MR. NEWLON: Ross, unless you're going to give
15 me a copy of the records with the rest of the
16 dates, what you need to do -- all you got to
17 do is when you reference the date -- or when
18 you reference your reference number is to give
19 the date of the record so I can find it.

20 MR. PLYLER: I gave you that, Jon. It's --
21 it's -- when she went back to the emergency
22 room on January 15th, 2009, but here's a stack
23 of everything that I'm looking at if you want
24 to look through there.

25 MR. NEWLON: All right.

1 THE VIDEOGRAPHER: Stand by.

2 MR. NEWLON: And what was the number?

3 MR. PLYLER: 120097.

4 MR. NEWLON: (Reads softly to himself.) Got
5 it.

6 THE VIDEOGRAPHER: Stand by. We are back on
7 the video record at 5:06 p.m.

8 Q The -- the doctors at the -- the emergency room on
9 January 15th, 2009, discharged the plaintiff and
10 told her to follow up with Sports Medicine Clinic,
11 right?

12 A Correct.

13 Q And she never went to that doctor or that clinic,
14 right? As far as you know.

15 A As far --

16 MR. NEWLON: Whoa. Whoa. Whoa. Whoa.

17 THE VIDEOGRAPHER: We are going off the record
18 at 5:07 p.m.

19 MR. NEWLON: Objection: calls for
20 speculation.

21 THE VIDEOGRAPHER: We are going back on the
22 record at 5:07 p.m.

23 Q Doctor, are you aware if -- if the plaintiff ever
24 went to Sports Medicine Clinic?

25 A I -- I'm not aware of that visit.

1 Q She goes back to the emergency room in March 26 of
2 2009. This is, again, before you ever saw her, and
3 that's -- record has been given to you 120102 and
4 120103.

5 A Correct. 3/21/09. That was before I -- I had
6 initially seen her.

7 Q Again, she's discharged and told to follow up with
8 -- with Southeast Neurosurgery and Spine. You'll
9 see in the -- in the clinical impression section of
10 this record.

11 A Correct.

12 Q Are you aware if she ever -- or you're not aware if
13 she ever went to Southeastern Neurosurgery and
14 Spine, right?

15 A I'm not aware that she did.

16 Q The next doctor -- in fact, really the next
17 doctor's door that she walks into is your own door
18 in -- on May 6th, 2009, right?

19 A I'm not aware if she saw another doctor between
20 then and my door, but, yeah. The -- the first
21 visit I have with her is 5/6/09, and it looks like
22 the last visit in the notes here is 3/21/09.

23 Q Okay.

24 A So if she did see somebody else, I'm certainly not
25 aware of it.

1 Q Now, between the date of the incident and your
2 visit, from your knowledge, the only places she
3 went are the emergency room at -- at Self?

4 A Yes. That -- from -- from the records that you've
5 given me, that's all I can see.

6 Q And at that -- at that hospital they did a CT of
7 the face, which was completely normal?

8 A That's correct.

9 Q A CT of the head that was completely normal?

10 A Correct.

11 Q A CT of the spine that was completely normal?

12 A Correct.

13 Q A CT of the head that was completely normal?

14 A Correct.

15 Q And at some point they did a MRI of the head, which
16 was completely normal?

17 A Correct.

18 Q When -- let's go back, Doctor, to the second time
19 that you saw this -- this -- the plaintiff, May
20 20th of 2009. That record begins in your packet at
21 50013. Wait.

22 A -- -11.

23 Q -- -11. Thank you. In that record, for the first
24 time, you mention -- you mention a -- a deviated
25 septum. In the notation on that record, it says

1 that "she had pain, trauma to the head and nose
2 with resulting headaches and deviated septum."

3 A Correct.

4 Q And you refer her to Dr. Jonathan King for this
5 particular issue, right?

6 A Yes, I did.

7 Q Now, a deviated septum can cause headaches, right?

8 A It could.

9 Q And you told me the way that you diagnose a
10 deviated septum is that you simply look in the
11 nose.

12 A Correct.

13 Q And you just -- you told me, I think, you just tilt
14 the head back, put a scope in the nose, and you can
15 see --

16 A Yes.

17 Q -- see it.

18 And when -- but when you did a full and
19 complete examination of this plaintiff on May 6th,
20 2009, you didn't see or notice a deviated septum?

21 A I did not record that in my notes, no.

22 Q And the reason we have our notes is so you can
23 record your thoughts, impressions, issues that you
24 find important so that when we come back later on a
25 day like today, you can tell us with some certainty

1 what you saw and what you thought, right?

2 A Correct.

3 Q And there's no mention of a deviated septum on that
4 initial evaluation?

5 A There is none.

6 Q And you told me that some of these CT scans that we
7 talked about, that they did at Self, wouldn't
8 ordinarily show a deviated septum?

9 A Correct.

10 Q But the CT scan that they did of the -- of the
11 plaintiff's face didn't show it?

12 A Did not.

13 Q The CT scan they did of the plaintiff's head did
14 not show it?

15 A Did not.

16 Q And the -- there was a subsequent CT scan of her
17 head on January -- when she went back to the
18 emergency room on January 15th, that didn't show it
19 to your knowledge, right?

20 A Did not.

21 Q Okay. So there's real -- no real evidence that the
22 deviated septum was there in the immediate days --
23 day and days after this incident with the ladder?

24 A No, there's not.

25 Q It doesn't show up until -- it's noted in your

B5
N5
Chapman

387

1 record of May 20th, 2009, about four months
2 afterwards?

3 A Correct.

4 Q In your opinion that you gave us earlier today, you
5 believe that postconcussive syndrome, headaches,
6 and memory loss were related to an injury she
7 sustained as a result of this ladder, right?

8 A Correct.

9 Q But you've also told me that it's possible that
10 symptoms, at least of a headache, can come from
11 high blood pressure?

12 A That is possible.

13 Q And symptoms of a headache, at least can -- can
14 come from a deviated septum?

15 A That is possible also.

16 Q And symptoms of a headache can also come from a
17 sinus infection, right?

18 A That is also possible.

19 Q In talking about postconcussion syndrome, though,
20 you would -- you referred her to Dr. Pusey, the
21 neurologist, for this particular issue?

22 A Yes, I did.

23 Q And you would rely on Dr. Pusey's opinion or
24 diagnosis in order to confirm that diagnosis and
25 then treat that diagnosis, wouldn't you?

1 A I would.

2 Q And you told us earlier that postconcussive
3 syndrome is really a syndrome of exclusion, meaning
4 if you can't find anything else that's objectively
5 wrong, we fall back to this particular diagnosis,
6 right?

7 A That is correct.

8 Q And you said that there's no -- that the symptoms
9 of this are totally subjective, meaning they have
10 to come from the patient herself.

11 A Correct.

12 Q You can't test for this kind of thing unless you do
13 a neuropsychological or neuropsychiatric test.

14 A No. Without neuropsychiatric testing, no.

15 Q And --

16 A There's no other testing.

17 Q And you didn't -- and -- and you didn't do that
18 kind of thing?

19 A No, I did not.

20 Q That's what you would refer her to Dr. Pusey to do.

21 A Correct.

22 Q You would leave that to him, the -- the
23 neurologist, to do any neuropsych testing --

24 A Yes, I would.

25 Q -- to confirm that? 389

1 You were going off what -- something that the
2 emergency room doctors indicated?

3 A Correct.

4 Q But there's no real independent evaluation on that
5 particular diagnosis, other than what the plaintiff
6 told you?

7 A At the time of the initial visit, right. That --
8 that was all I had is what -- what the plaintiff
9 had told me.

10 Q You -- and -- and in treating the plaintiff, you
11 have to rely on her to give you a -- an accurate
12 history?

13 A Yes, I do.

14 Q You have to rely on her to be -- to -- to -- to
15 tell you exactly what's going on with her --

16 A Yes, I do.

17 Q -- and what's been going on in her past?

18 A Yes, I do.

19 Q The last time that you saw this patient, the
20 plaintiff, was on July 2nd of 2009, right?

21 A Correct.

22 Q This is what I've given you as 50013 and 50014. I
23 was getting a little bit ahead of myself, but do
24 you have those records in front of you, Doctor?

25 A I do.

1 Q She comes in on this particular day, Doctor, and
2 her chief complaint that day was poison ivy.

3 A Yes, it was.

4 Q And you told me that the "chief complaint" is the
5 thing that when you walk in to the examination room
6 and you talk to that nurse, the first thing you say
7 that's bothering you the most is what the nurse
8 writes down as the chief -- as the chief complaint.
9 That how really -- it normally works in your
10 office?

11 A That's how it normally works.

12 Q And she came in that day with poison ivy.

13 A Yes, she did.

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] 391 [REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED]

5

[REDACTED]

6

[REDACTED]

7

[REDACTED]

8

[REDACTED]

9

[REDACTED]

10

[REDACTED]

11

[REDACTED]

12

[REDACTED]

13 Q Doctor, I'll -- I'll ask this again. She -- she
14 came in on July 2nd, 2009, with a chief complaint
15 of poison ivy. That's clear from your record,
16 right?

17 A Correct.

18 Q If she was still having headaches, would that be
19 more -- would that be more severe, in your mind,
20 than poison ivy?

21 THE VIDEOGRAPHER: We are going off the video
22 record at 5:18 p.m.

23 MR. NEWLON: Calls for speculation. The
24 record speaks for itself.

25 THE VIDEOGRAPHER: Stand by. We are going

1 back on the video record at 5:18 p.m.

2 Q Let me ask you this. She doesn't mention as her
3 chief complaint that day headaches, right?

4 A No, she doesn't.

5 Q She doesn't mention as her chief complaint that day
6 memory loss, right?

7 A No, she does not.

8 Q She does not mention as her chief complaint any
9 sensitivity to light?

10 A No, she does not.

11 Q She does not mention as her chief complaint
12 depression?

13 A No, she does not.

14 Q She does not mention as her chief complaint any
15 anxiety?

16 A No, she does not.

17 Q She does not mention as her chief complaint any
18 pain of any kind?

19 A No.

20 Q Your record of this particular visit on this
21 particular day mentions edema, which is general
22 swelling?

23 A Correct.

24 Q Your record of this particular day mentions
25 depression?

1 A Yes, it does.

2 Q Your record of this particular day mentions
3 headaches?

4 A Yes, it does.

5 Q And your record of this particular day mentions the
6 thyroid issues that we talked about a little
7 earlier?

8 A Yes, it does.

9 Q But your record doesn't mention anything about
10 postconcussion syndrome?

11 A No, it does not.

12 Q It does not mention anything about memory loss?

13 A No, it does not.

14 Q In fact, you said -- you told us today that your
15 opinion is that memory loss is -- is -- is related,
16 but there's no mention anywhere in your records of
17 anything about memory loss?

18 A No. I don't have memory loss in my records.

19 Q On August 21st, 2009, you filled out a student
20 health questionnaire for the plaintiff at -- at her
21 request, right?

22 A Yes.

23 Q I've given that to you as the -- the last three
24 pages of your packet, beginning 50173, and it's
25 dated August 21st, 2009.

1 A Correct.

2 Q This would've been about a month and a half after
3 you last saw her in -- in your office, right?

4 A Yes.

5 Q And it would've been about, yeah, seven/eight
6 months after the -- the incident with the ladder.

7 A Yes.

8 Q On the very bottom of this page, it asks you to --
9 to fill out medical conditions, anything that is
10 important under a physical assessment. And filled
11 out there is chronic IBS, right?

12 A Yes, there is.

13 Q A dysfunctional thyroid -- hyperthyroid, right?

14 A Correct.

15 Q Depression?

16 A Yes.

17 Q And anxiety?

18 A Yes.

19 Q No mention of headaches?

20 A No.

21 Q Sorry, Doctor. There's no mention of headaches,
22 right?

23 A No. No.

24 Q Okay.

25 A I'm sorry. I thought I had already answered that

395

1 one.

2 Q Okay.

3 A No, there's not.

4 Q There's no mention of memory trouble?

5 A No. Not --

6 Q No --

7 A -- on this form.

8 Q -- mention of short-term memory loss or long-term
9 memory loss?

10 A No.

11 Q No mention of dizziness? Of --

12 A No.

13 Q -- pain?

14 A No.

15 Q No mention of failure to organize thoughts properly
16 or any -- any other postconcussive-syndrome-type
17 symptom or diagnosis?

18 A No.

19 Q And postconcussion syndrome itself is not listed as
20 one of her issues?

21 A No, it's not.

22 MR. PLYLER: Doctor, that's all the questions
23 I have. Thank you.

24 REEXAMINATION

25 BY MR. NEWLON:

396

1 Q Doctor, I'm just going to kind of go back in
2 reverse chronological order. Looking at this, this
3 is August 21, 2009, you filled out this at -- for
4 Piedmont Tech College physical assessment.

5 A Correct.

6 Q I'm going to hand you what I'm going to mark as
7 Plaintiff's 1 to your deposition, the record,
8 August 2009.

9 Plaintiff's Exhibit No. 1, Letter from
10 University Specialty Clinics Diabetes &
11 Endocrinology Center, dated 8/21/09; 2
12 pages.

13 Q Where is that record generated from?

14 A The University Specialty Clinics Diabetes &
15 Endocrinology Center.

16 Q And what's the date of that -- that particular
17 record?

18 A August 21st, 2009.

19 Q That the same date as your report?

20 A Yes, it is.

21 Q If you'll look down the bottom of the first page,
22 where it talks about symptoms, was there any
23 reference to any symptoms that are consistent with
24 your opinion in this case?

25 A The last -- third line from the bottom starts the

1 sentence. "She complains of frequent headache,
2 nasal congestion, constipation, weight gain, dizzy,
3 depression, trouble sleeping." Then it goes on to
4 some of her medications.

5 Q Okay. So on August 21, 2009, she was having
6 headaches, according to that particular record?

7 A According to Dr. Tu Lin.

8 Q Okay. Thank you. I'll hang on to that. I'll have
9 to mark it.

10 A My pager --

11 Q Doctor, you were talking about -- you were asked
12 questions about memory loss. Clinically, when
13 someone has postconcussive syndrome, is memory loss
14 a potential byproduct of that?

15 A Yes, it is.

16 Q Okay. And while you -- in this particular case, as
17 I stated when you first were put under oath and
18 started being examined, you reviewed an entire body
19 of records for your -- to prepare for your opinion
20 today?

21 A Yes, I did.

22 Q And those records would include records that
23 predate this accident, as well as postdate this
24 accident?

25 A Yes, they do.

1 Q Okay. And in review of that entire body of
2 records, which would include pain management and
3 some other records, in particular the record that I
4 just showed you, do you recall -- do you have any
5 recollection whether or not there was ever a
6 mention as a memory loss as something she
7 complained of?

8 A In her initial letter to me, I'm sure there was
9 some memory loss listed. Find the page here and
10 read the sentence. (Reads softly to himself.)
11 Actually, reviewing her notes to me, I don't see
12 that she's actually listed memory loss in here.
13 (Reads softly to himself.) Okay. Memory loss is
14 listed in the -- towards the bottom of the page
15 after the -- after the initial car accident, but
16 that's probably where I'm confused. I don't see
17 actual memory loss listed from her in one of her
18 symptoms since the -- the actual ladder hit her in
19 the face.

Q Okay. So this memory loss, this is something that,
clinically, is a byproduct -- could be a byproduct
of postconcussive syndrome?

23 A Could definitely be.

24 Q But in her particular case, you have not seen a
25 specific instance of ³⁹⁹ -- where anybody has

1 identified her having chronic memory loss?

2 A No.

3 Q Okay. You still got that July 2nd, 2009, record?

4 A I do. Yes.

5 Q Okay. You were asked a litany of questions
6 regarding that record, what it did or it didn't say
7 or what the chief complaint was. Do you recall
8 that line of questioning?

9 A Yes, I do.

10 Q Okay. And she came in that day, as you've already
11 testified. She had a chief complaint, and that was
12 poison ivy?

13 A Yes.

14 Q Okay. Now, is there anywhere on that record that
15 says, "I am not having headaches"?

16 A No.

17 Q Okay. Are you familiar with Carolina Centers for
18 Advanced Pain -- Management of Pain?

19 A Yes, I am.

20 Q All right. Right after she saw you, she went to
21 Carolina Centers for Advanced Pain Management.
22 I'll mark that as Exhibit Plaintiff's 2.

23 Plaintiff's Exhibit No. 2, document from
24 Carolinas Center For Advanced Management
25 Of Pain, dated 7/7/09; 3 pages.

1 Q What's the date of that record?

2 A 7/7/09.

3 Q Okay. Did she complain of having headaches on
4 7/7/09, five days after she saw you?

5 A Yes, she does.

6 Q As a matter of fact -- I'll just hand all three
7 pages to you. Looking at the third page -- looking
8 at the third -- at the third page you got in your
9 hand -- there should be three. That -- there you
10 go. That third page, down at the bottom on the
11 right, does it talk about her poison ivy?

12 A It does. "Just getting over poison ivy."

13 Q Okay. So she goes to see him for -- complains of
14 headaches and acknowledges she had a poison ivy
15 problem?

16 A Yes.

17 Q Okay. Mr. Plyler indicated to you that her
18 complaint -- or the basis for her complaint is
19 totally subjective. I think you might've even
20 agreed with him. My question is: In this
21 particular case, are there any objective findings,
22 whether clinical or empirical or just situational,
23 you know, the etiology, anything to -- that would
24 be objective that would be consistent with her
25 headaches and a finding of postconcussive syndrome?

1 A The objective parts of it would come from the fact
2 that she's been hit in the face with a hard blow by
3 a heavy ladder. And then the fact that the CT scan
4 did come back negative for any other types of
5 injuries, the fact that she continued to have
6 headaches for months afterwards also would -- would
7 lead one to -- to conclude postconcussive syndrome,
8 so, in effect, those are objective also.

9 Q All right. And Mr. Plyler's also asked you a
10 number of things. And the question is: "Were they
11 possible? Could they possibly cause headaches?"
12 And I'd like to go through each of those with you
13 real quick. And I'm proffering this testimony
14 depending on the Court's ruling on the objections.

15 With regard to hypertension and headaches, is
16 there any record -- have you been shown any record
17 today or at any time prior that -- where a doctor
18 has opined or given an opinion or made a finding
19 that this lady was suffering from chronic headaches
20 as a result of a abnormal blood pressure condition?

21 A No.

22 Q Okay. Have you been provided or shown any medical
23 record or opinion of any doctor indicating that a
24 finding of a deviated septum has been a -- the
25 cause of chronic headache complaints at any time?

1 A No.

2 Q Okay. And with regard to sinus infection, have you
3 been shown any record that indicates that sinus
4 infection has caused this lady chronic headaches?

5 A No.

6 Q Okay. As matter of fact, when you saw her, did she
7 have a sinus infection?

8 A No.

9 Q Okay. Mr. Plyler indicated to you that between the
10 time of the March 2009 hospital visit that this
11 lady didn't see anybody until she came to see you.
12 Do you remember that?

13 A Yes, I do.

14 Q And the records -- medical records -- you rely on
15 medical records in -- and the information in there
16 in your practice, right?

17 A Yes, I do.

18 Q I'm going to hand you what I'm going to mark as
19 Plaintiff's 3 and 4 to your deposition, records
20 from Self Regional dated April 13th and, I believe,
21 April 15th or 16th.

22 Plaintiff's Exhibit No. 3, "Patient
23 Follow-Up Letter", dated 4/16/09; 1 page.
24 Plaintiff's Exhibit No. 4, "Patient Call
25 Back", dated 4/13/09; 1 page.

1 A April 13th, '09 and April 16th, '09.

2 Q Okay. Just if you would, I'm going to ask you a
3 question. I'd like you to take a moment and just
4 read those two records, and I just have one
5 question.

6 A Okay.

7 Q Following her March visit to the hospital, based on
8 your review of the records, did she attempt to see
9 a neurologist?

10 A Yes, she did.

11 Q And that is -- Mr. Plyler didn't show those records
12 to you during his examination, did he?

13 A No, he didn't.

14 Q Again, proffering testimony depending on the
15 Court's ruling, I have questions regarding earlier
16 questioning by Mr. Plyler.

17 It -- you were asked questions and brought up
18 insomnia or -- or complaints of insomnia at
19 different times in this lady's history. If her
20 only complaint in the case is headaches, what
21 clinically, from medical professional standpoint,
22 what clinically does insomnia have to do with
23 postconcussive syndrome?

24 MR. PLYLER: Object to the form.

25 A Insomnia typically does not have anything to do

1 with postconcussive syndrome.

2 Q I mean, if someone has postconcussive syndrome,
3 they may have trouble sleeping?

4 A Correct.

5 Q Okay. But if someone just has a condition of
6 insomnia where they have problems sleeping, does
7 that cause concussion?

8 A No.

9 Q Okay. Likewise, on the issue of depression, can
10 you have postconcussive syndrome and suffer
11 depression as a result?

12 A Yes, you can.

13 Q Okay. If you have depression, does depression
14 clinically cause postconcussive syndrome?

15 A No.

16 Q And, by the way, is there -- clinically, is there a
17 difference between an actual concussion and what
18 you call or what you've talked about as
19 postconcussive syndrome?

20 A Concussion is usually referred to when we're
21 talking about a head injury that is not able to be
22 visualized with a CAT scan or an MRI.

23 Q Okay.

24 A So concussion would be at the moment of when it
25 occurred your head was concussed. Postconcussive

1 syndrome is the syndrome that usually develops
2 afterwards with the sometimes memory loss, the
3 sometimes headaches that last for months and
4 months. So it's a fine -- fine-line distinction.
5 It's probably timing --

6 Q Okay.

7 A -- would -- would I have to refer to.

8 Q Can -- can someone who suffers or where someone
9 experiences a concussion in a particular episode,
10 can they develop postconcussive syndrome symptoms
11 days, weeks --

12 A Yes.

13 Q -- after that?

14 A Yes, they can.

15 Q That's not unusual?

16 A Not at all.

17 Q And, again, Doctor, you -- you've -- you've
18 reviewed these records in this particular case.
19 Despite some of the information presented during
20 defense examination, has your opinion in this case
21 changed in any way --

22 A No.

23 Q -- with regard to the cause of this lady's
24 headaches?

25 A No, it has not.

1 MR. NEWLON: Okay. Thank you. No further
2 questions.

3 MR. PLYLER: Just real briefly, a follow-up.

4 REEXAMINATION

5 BY MR. PLYLER:

6 Q I know you said that insomnia is not going to cause
7 a concussion, right?

8 A Correct.

9 Q But certainly insomnia can cause someone to have
10 headaches, right?

11 A There have been cases where that -- that can occur.

12 Q If you don't -- if you chronically can't sleep and
13 you're not getting sleep because of some other
14 medical issue, that can -- that can show itself as
15 a symptom of a headache?

16 A It can.

17 Q Just like depression can also manifest itself
18 physically in a person, right?

19 A Sure.

20 Q And you've seen that in your own experience?

21 A Yes, I have.

22 Q Would it be highly unusual for someone with
23 postconcussion syndrome to continue to have
24 postconcussion-syndrome-type symptoms over a year
25 after an -- an incident?

1 A With the limited cases I've seen, I've not seen
2 them go usually past a year.

3 MR. PLYLER: Thank you, Doctor.

4 FURTHER DEPONENT SAITH NOT.

5 Signing waived.

6 (Whereupon, there being no further
7 questions, the deposition was
8 concluded at 5:44 p.m.)

9 (*This transcript may contain quoted material.
10 Such material is reproduced as read or quoted
11 by the speaker.)

12 (**Certificate accompanies sealed original
13 only.)

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
CASE NO. 2010-CP-24-01236

Jennifer Harmon Scott,
Plaintiff,

vs.

Allen Lee Fortner and Jason
Chad Griffin,
Defendants.

VIDEO DEPOSITION OF JOHN ERGLE, M.D.

DATE TAKEN: May 23, 2012

TIME BEGAN: 11:51 a.m.

TIME ENDED: 12:41 p.m.

LOCATION: Piedmont Health Group Westside
1228 Highway 72 W
Greenwood, South Carolina 29649

REPORTED BY: Tara Scott

Notary Public for South Carolina

1 **APPEARANCES:**

2

JON E. NEWLON, ESQUIRE

3 McCravy, Newlon, & Sturkie, P.A.

1629 Bypass 72 NE

4 Greenwood, South Carolina

5

.....On behalf of the Plaintiff

6 JACK D. GRIFFETH, ESQUIRE

7 Collins & Lacy, P.C.

8 Post Office Box 5819

9 Greenville, South Carolina 29606

10

11

.....On behalf of the Defendants

12

13 CLIFF WILLIAMS

14 Argyle Multimedia

15

16

.....Videographer

17

18

19 **ALSO ATTENDING:** None

20

21

22 **STIPULATIONS:** The within deposition was taken pursuant to
23 the South Carolina Rules of Civil Procedure.

24 **WAIVER:** Examination and reading of the deposition are
25 waived by the witness and by the parties.

1	INDEX	
2		PAGE
3	Examination by Mr. Newlon.....	4
4	Examination by Mr. Griffeth.....	15
5	Re-Examination by Mr. Newlon.....	30
6	Certificate.....	38
7		
8		
9	Exhibits:	
10		
11	Defendant's Exhibit 1.....	15
12	Defendant's Exhibit 2.....	15
13	Plaintiff's Exhibit 1.....	35
14	Plaintiff's Exhibit 2.....	35
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 VIDEOGRAPHER:

2 We are going on the video record at camera time
3 11:51 a.m. This is the video deposition of John
4 Ergle, MD, taken by the Plaintiff in the matter of
5 Jennifer Harmon Scott, the Plaintiff, versus Allen
6 Lee Fortner and Jason Chad Griffin, the
7 Defendants. The case number is 2010-CP-24-01236
8 in the Court of Common Pleas, Eighth Judicial
9 Circuit, Greenwood County, South Carolina. Today
10 is Wednesday, May 23, 2012. We are in Greenwood,
11 South Carolina. The court reporter is Tara Scott
12 from the firm of Bazzle & Associates Court
13 Reporting. The videographer is Cliff Williams
14 from the firm of Argyle Multimedia, LLC. Will
15 counsel present please introduce themselves for
16 the record.

17 MR. NEWLON:

18 Jon Newlon for the Plaintiff, Ms. Scott.

19 MR. GRIFFETH:

20 Jack Griffeth of Collins & Lacy for the
21 Defendants.

22 VIDEOGRAPHER:

23 Will the court reporter please swear the witness.
24 JOHN ERGLE, MD, being duly sworn, testified as follows:

25 EXAMINATION BY MR. NEWLON:

1 Q. Dr. Ergle, what's the name of your practice?

2 A. **Piedmont Health Group.**

3 Q. How long have you been with Piedmont Health Group?

4 A. **I've been with Piedmont Health Group since 1997.**

5 Q. Where are they located?

6 A. **In Greenwood, South Carolina.**

7 **MR. GRIFFETH:**

8 We would stipulate for the record the Doctor's

9 expertise in the area of family medicine.

10 **EXAMINATION RESUMED BY MR. NEWLON:**

11 Q. Has Ms. Scott, Jennifer Harmon Scott, ever been a
12 patient of yours?

13 A. **Yes, sir.**

14 Q. Okay, and the defense has graciously stipulated to
15 your expertise, but just for the benefit of the
16 jury could you just cover your education and
17 training, and your current license?

18 A. **Sure. I have a bachelor's degree in Chemistry**
19 **from Furman University. I graduated in 1990, went**
20 **to medical school at University of South Carolina**
21 **School of Medicine. Graduated there in 1994.**
22 **Completed family practice residency here at Self**
23 **Regional Hospital in 1997, and I joined Piedmont**
24 **Health Group at that time where I've been in full-**
25 **time family practice since then. I am Board**

1 **Certified in family medicine.**

2 Q. Have you testified as an expert in family medicine
3 before?

4 A. **Yes.**

5 Q. Okay. How many patients do you see in a given
6 week?

7 A. **In a given week, probably approximately 120.**

8 Q. Do you remember Ms. Scott?

9 A. **Yes.**

10 Q. With regard to this particular case, in
11 preparation for your testimony, do you maintain a
12 chart for her?

13 A. **I do.**

14 Q. have you had an opportunity to look at that?

15 A. **Yes, sir.**

16 Q. You were also provided with a body of records that
17 pre-date and also post-date an incident that
18 occurred on January 9, 2009. Have you had an
19 opportunity to review those records before your
20 testimony today?

21 A. **I have.**

22 Q. Okay. To the extent you had any opinions in this
23 particular case, would you rely on not only your
24 chart but those body of records that you have
25 reviewed?

- 1 **A. Yes, sir.**
- 2 Q. This lady that came to see you, Ms. Scott, do you
- 3 remember basically when she came to see you what
- 4 her complaints were?
- 5 **A. Yes, sir.**
- 6 Q. What were they?
- 7 **A. May I find my note here? Let's see. I've got a**
- 8 **lot of stuff here. Can you help me with a number**
- 9 **or do I need to go get my actual chart?**
- 10 Q. Off the record.
- 11 **VIDEOGRAPHER:**
- 12 We're going off the record at camera time 11:55.
- 13 (OFF THE RECORD)
- 14 **VIDEOGRAPHER:**
- 15 We're going back on the record at camera time
- 16 11:55.
- 17 **EXAMINATION RESUMED BY MR. NEWLON:**
- 18 Q. Doctor, do you remember when it was the first time
- 19 that Ms. Scott came to see you?
- 20 **A. Yes, sir. We first saw her on November 3, 2010.**
- 21 Q. On that particular day, did she explain the
- 22 mechanics of an injury to you?
- 23 **A. She reported that in January of 2009 she was hit**
- 24 **in the face with a ladder.**
- 25 Q. Further in the remarks did she discuss what type

1 of injury she believes she sustained?

2 **A. She said she sustained nerve damage in her**
3 **forehead and a concussion.**

4 Q. Set those records down just for a second. Going
5 back in the body of records that you reviewed in
6 this case, do you know whether at some point
7 following this incident she complained of any
8 facial pain?

9 **A. Yes, sir.**

10 Q. Okay. You're aware of that?

11 **A. Yes, sir.**

12 Q. Okay. And on a number of occasions throughout the
13 year before she saw you.

14 **A. Yes, sir.**

15 Q. With regard to the ladder that she said that
16 struck her in the face, have you had an
17 opportunity to see that ladder in a photograph?

18 **A. I have.**

19 Q. Okay. In the review of the records in this
20 particular case, was she ever referred to
21 neurology before she came to see you?

22 **A. I believe so.**

23 Q. Would that have been for nerve blocks in her face?

24 **A. I believe so.**

25 Q. Okay. Do you recall seeing any records from

1 Carolina Pain Management, Dr. Hutchinson?

2 **A. I have.**

3 Q. Do you recall what Dr. Hutchinson actually did for
4 her?

5 **A. I believe he did an injection of some sort. I'd**
6 **have to look at the actual record to give you**
7 **details.**

8 Q. Okay. Was it for a nerve block?

9 **A. I believe so.**

10 Q. And it was in her face?

11 **A. Correct.**

12 Q. On this particular day, as you've already
13 indicated, that when she came to see you she gave
14 a history of being hit in the face with a ladder
15 with nerve damage to the forehead and a
16 concussion?

17 **A. Correct.**

18 Q. Did you ever send her to anyone to evaluate her
19 headaches or neuralgia?

20 **A. We subsequently sent her to neurology for, I**
21 **believe, evaluation of headaches.**

22 Q. Okay. Who would that have been exactly? Who
23 would you have sent her to?

24 **A. I believe she saw Dr. Wayne Sida, and another**
25 **episode I think she saw Dr. Bret Warner.**

1 Q. Okay. Did she see - is it in your chart - did you
2 - well, first of all, the neurology you sent her
3 to, is that part of the same Piedmont Health
4 Group?

5 **A. It is. We're part of the same practice. Yes,**
6 **sir.**

7 Q. Would you have received those records from Dr.
8 Sida as part of your practice?

9 **A. Yes, sir.**

10 Q. And maintained them in your chart?

11 **A. Yes, sir.**

12 Q. Okay. The record I'm referring to is dated May
13 11, 2011.

14 **A. Okay. Okay.**

15 Q. Dr. Sida gave an impression after examining this
16 lady. Did you have an opportunity to review that
17 impression?

18 **A. Yes, sir.**

19 Q. All right. Generally, what was that impression?

20 **A. His impression was a concussion with post-tropic**
21 **- excuse me, post-traumatic neuralgia form type**
22 **pain.**

23 Q. Did he have any other observations?

24 **A. Yes, sir. He said, "Interestingly, the pain has**
25 **spread out of the distribution of the original**

1 site of injury. Chronic pain can on occasion
2 spread beyond the confines of the original
3 peripheral nerve injury. Sensory disturbance
4 involving all three branches of the trigeminal
5 nerve, but also extends further posterior on the
6 right than typical for the distribution of the
7 trigeminal nerve."

8 Q. Okay. The original site of the injury, do you
9 know where that was?

10 A. I believe it was over the right side of her
11 forehead.

12 Q. Okay. The mechanics of this injury that she
13 reported to you, did she indicate where the ladder
14 hit her?

15 A. Over the right side of the forehead was what I had
16 noted.

17 Q. If you could go back to that note just to make
18 sure. On February 16, 2011 - excuse me - I'm
19 looking at your note, November 3, 2010, letter
20 HPI.

21 A. Correct.

22 Q. Also, January 9, "Hit in face with ladder."

23 A. Right.

24 Q. Is that your note?

25 A. Yes, sir.

1 Q. So the site of the injury would've been in her
2 face?

3 A. Yes, sir.

4 Q. All right. In looking at this impression right
5 here, looking at, "The site of any chronic pain
6 spreading", is this pain she's having - he does
7 talk about concussion, but is he talking about
8 pain in her face?

9 A. I believe so. Yes, sir.

10 VIDEOGRAPHER:

11 Going off the record at camera time 12:02.

12 (OFF THE RECORD)

13 MR. GRIFFITH:

14 Let me state an objection. Defective foundation.
15 Again, admittedly outside this doctor's scope of
16 expertise.

17 VIDEOGRAPHER:

18 Going back on the record at camera time 12:02.

19 EXAMINATION RESUMED BY MR. NEWLON:

20 Q. Doctor, hypothetically, an individual who is
21 complaining of post-traumatic neuralgic pain
22 that's spreading out from the original site of
23 injury in the face and going beyond the original
24 peripheral nerve injury - in a case like that is
25 that consistent with facial pain? Would that be

1 consistent with facial pain?

2 **A. I'm not sure I understand your question.**

3 Q. Yeah. Hypothetically speaking, Doctor, someone
4 who has suffering from pain that's spread out of
5 an original site of injury that would've been in
6 their face --

7 **A. Right.**

8 Q. -- and it's gone beyond those confines of a
9 peripheral nerve; would that be consistent with
10 facial pain?

11 **A. Facial pain. Yes.**

12 Q. Did you, in fact, treat this woman for facial
13 pain?

14 **A. Yes, sir.**

15 Q. In looking back at her medical records in this
16 particular case, had she complained of facial pain
17 from near the time of the original accident?

18 **A. Yes, sir.**

19 Q. Just for your benefit, I'm handing you the entire
20 body of records you already reviewed so you don't
21 have to go look them up, but as of looking back at
22 these records, what was the earliest date this
23 lady complained of facial pain?

24 **A. This looks like an ER visit on January 15, 2009.**

25 Q. Okay. Doctor, looking back at these records and

1 your recollection of this lady and your review of
2 your treatment of this lady, do you have an
3 opinion to a reasonable degree of medical
4 certainty whether or not this lady suffered facial
5 pain as a result of this ladder incident on
6 January 9, 2009?

7 **A. Yes, sir. I do believe the injury caused her to**
8 **have facial pain.**

9 Q. Okay. And that facial pain, is that something,
10 based on your review of the records is that
11 something that may be caused by soft tissue and/or
12 nerve damage to her face?

13 **A. Yes.**

14 Q. Is that your opinion to a reasonable degree of
15 medical certainty?

16 **A. Yes.**

17 Q. Okay. The treatment that you rendered this lady
18 and the treatment that you've seen, do you have an
19 opinion whether it was reasonable and necessary in
20 this case as it relates to her complaints of
21 facial pain?

22 **A. Yes, sir. I do believe it was reasonable and**
23 **necessary.**

24 Q. Thank you, Doctor. I have no further questions.
25 Answer any questions that Mr. Griffeth might have

1 for you.

2 **EXAMINATION BY MR. GRIFFETH:**

3 Q. Doctor, let me show you one more copy. That's a
4 copy of all of the records where you personally
5 treated the Plaintiff in this case. Is that
6 correct?

7 **A. I believe so.**

8 Q. Check that for me just to be sure, please.

9 **A. It looks correct.**

10 **MR. GRIFFETH:**

11 I'd move that into Evidence as Defendant's 1.

12 (WHEREUPON, MEDICAL RECORDS CONSISTING OF 10 PAGES WERE
13 MARKED DEFENDANT'S EXHIBIT 1 FOR IDENTIFICATION, AND
14 SELF REGIONAL RECORDS CONSISTING OF 21 PAGES WERE
15 MARKED DEFENDANT'S EXHIBIT 2 FOR IDENTIFICATION)

16 Q. Doctor, let me show you now a copy of what I
17 believe to be the records of Self Regional
18 Hospital, which were Ms. Harmon's first visit to
19 the ER. Can you look at those and tell me if you
20 have seen those before?

21 **A. Yes, sir. I have seen these before. Yes, sir.**

22 Q. Okay. Those, Doctor, I represent to you are the
23 entire record of her first visit to Self Regional
24 following the January 9, 2009 visit. Having
25 reviewed those records, Doctor, is there any

1 indication - any objective indication by anybody
2 at Self Regional, that she suffered a concussion?

3 **A. I don't see any reference to a concussion. No,**
4 **sir.**

5 Q. As a matter of fact, Doctor, my law partner took
6 your discovery deposition last week in this very
7 case.

8 **A. Right.**

9 Q. And so most of this is pretty fresh on your mind,
10 isn't it?

11 **A. Sure.**

12 Q. As a matter of fact, he asked you then if there
13 was any indication of - any objective indication
14 of concussion and your answer was, "There's no
15 indication of a concussion. Only an indication of
16 a contusion."

17 **A. Correct.**

18 Q. And a contusion is not the same of a concussion,
19 is it?

20 **A. No, sir.**

21 Q. You never diagnosed her with a concussion, did
22 you, Doctor?

23 **A. No, sir.**

24 Q. And you only saw her five times.

25 **A. That sounds about right.**

1 Q. And mainly you treated her for a thyroid injury.

2 **A. That was part of our treatment. Yes, sir.**

3 Q. Okay. And so her report to you of any concussion
4 was basically what she told you.

5 **A. Correct.**

6 Q. Any other report then after the initial visit to
7 Self Regional would've also been her patient
8 history of a concussion as she thought she had had
9 it; is that correct?

10 **A. I'm sorry. Could you re-state that?**

11 Q. Okay. It's safe to say then, Doctor, that she did
12 not have a concussion?

13 **A. Not that was reported to the Emergency Department
14 on the date she was first seen.**

15 Q. Do you have any indication that anybody ever
16 diagnosed her with a concussion, or isn't it true,
17 Doctor, that the only thing that the records show
18 are her own report that she thought she had had a
19 concussion?

20 **A. I'm not one hundred percent certain, but I don't
21 remember anything from my review of the records
22 that she had objective signs of a concussion.**

23 Q. Okay. Now, in terms of nerve damage, Doctor - the
24 reports of nerve damage were based solely on her
25 own report of history of nerve damage. Isn't that

- 1 correct? When you saw her.
- 2 **A. When I saw her? Yes, sir.**
- 3 Q. You did not diagnose her with nerve damage?
- 4 **A. No, sir, but her symptoms were consistent with a**
- 5 **nerve injury.**
- 6 Q. And that's why you sent her on to Dr. Sida.
- 7 **A. Correct.**
- 8 Q. And the review of all of those records that you
- 9 have before you - and without going through them,
- 10 let me see if I can hit the high points, Doctor.
- 11 **A. Sure.**
- 12 Q. When she went to the - to Self Regional after the
- 13 January 9, '09 event, the CT of the facial bones
- 14 were unremarkable.
- 15 **A. Correct.**
- 16 Q. CT head without contrast was unremarkable.
- 17 **A. Correct.**
- 18 Q. CT of the C-Spine, normal.
- 19 **A. Correct.**
- 20 Q. The CT of the head was unremarkable.
- 21 **A. Correct.**
- 22 Q. Then when she had an MRI of the brain on June 30th
- 23 of '09, that also was normal.
- 24 **A. I would have to look at that specifically.**
- 25 Q. You don't remember your testimony regarding it

1 last week?

2 **A. She had, I believe, some subtle possibilities on**
 3 **the MRI, but I'd have to look at it specifically**
 4 **to address that.**

5 Q. Let's go forward, Doctor. There are some
 6 diagnostic tests that were done after you saw her.

7 **A. Right.**

8 Q. Specifically an MRI of the head which was done on
 9 May 16, 2011. Do you recall that?

10 **A. I do.**

11 Q. Do you recall reviewing that record last week?

12 **A. Yes, sir.**

13 Q. Do you recall opining that that shows
 14 microvascular disease?

15 **A. I believe that was a possibility.**

16 Q. Okay. Blockages would be in the small blood
 17 vessels going to the brain?

18 **A. That would be what that would mean, yes, air.**

19 Q. That's what microvascular disease means, isn't it,
 20 Doctor?

21 **A. Correct. Yes, sir.**

22 Q. That can be caused by high cholesterol, age, a
 23 number of factors.

24 **A. Yes, sir.**

25 Q. It is not caused by trauma though, is it?

1 **A. No, sir.**

2 Q. And in your medical opinion to a reasonable degree
3 of medical certainty trauma does not cause
4 microvascular disease?

5 **A. Correct.**

6 Q. Basically, what that means is - if I understand it
7 doctor, and you correct me if I'm wrong - that
8 there are just little turns and crooks in what
9 would be the left vertebral artery as far as Ms.
10 Harmon is concerned.

11 **A. Right.**

12 Q. Is that correct?

13 **A. That's a different issue than the microvascular**
14 **disease, but yes. That was mentioned on the**
15 **report.**

16 Q. That was mentioned in that same report?

17 **A. On the MRI report. Yes, sir.**

18 Q. Then she had another scan of her head on December
19 9, 2011, which showed no flow in the left
20 vertebral artery due to hyperplasia. Isn't that
21 correct?

22 **A. Hypoplasia.**

23 Q. I'm sorry. Hypoplasia. Excuse me, Doctor. Thank
24 you. Hypoplasia means that the artery is just too
25 small, doesn't it?

- 1 **A. Correct.**
- 2 Q. Is that, in laymen's term, correct?
- 3 **A. Correct.**
- 4 Q. An occlusion would mean that the artery was
- 5 blocked in some regard. Is that correct?
- 6 **A. Correct.**
- 7 Q. And none of this is caused - none of those
- 8 conditions for Ms. Harmon would be caused by
- 9 trauma, would they?
- 10 **A. I wouldn't think so.**
- 11 Q. To a reasonable degree of medical certainty in
- 12 your opinion those are not caused --
- 13 **A. I would not think so. No, sir.**
- 14 Q. -- by trauma?
- 15 **A. Correct.**
- 16 Q. Now, she has complained of headaches, and
- 17 headaches can be caused by nasal congestion. Can
- 18 they not?
- 19 **A. Sure.**
- 20 Q. I believe when she first saw you she had nasal
- 21 congestion.
- 22 **A. Correct.**
- 23 Q. And on her first visit she also indicated to you
- 24 that she had chronic sinus pain.
- 25 **VIDEOGRAPHER:**

1 Going off the record at camera time 12:14.

2 **MR. NEWLON:**

3 I kind of let the question go a little bit. I'm
4 going to impose an objection as to beyond the
5 scope of his expertise and what he's testified to.
6 In this particular case, he's been asked to
7 testify to about facial pain that she has
8 experienced in this case as a result of trauma to
9 her forehead, nose. That facial pain either being
10 manifesting itself in soft tissue pain to her face
11 or nerve damage to her face. He has not been
12 asked to render an opinion as to whether her
13 headaches have anything to do with the injury that
14 was sustained on January 9, 2009. To the extent
15 there's any questioning about concussion, post-
16 concussive syndrome, or headaches, or sinus issues
17 trying to be related to those headaches, I'd ask
18 the court to exclude that questioning as being
19 unrelated to the purpose for the Doctor's
20 deposition and the opinions that he's already
21 rendered under direct examination.

22 **MR. GRIFFETH:**

23 Our response - and again, we'll flesh that out in
24 front of the court, would obviously be that the
25 Cross Examination gives us wide latitude for other

1 possible causes and other possible conditions, and
2 that all of that would go to the weight in
3 sufficiency, not to the admissibility of the
4 testimony.

5 **MR. NEWLON:**

6 My only continuation to that is that he's asking
7 the Doctor to offer opinions, rather than discuss
8 the treatment. He's asking the Doctor to offer
9 opinions regarding her headaches and whether or
10 not they're related to this case. That's the
11 basis for my objection. Whether he wants to talk
12 about those particular records and the events,
13 that's another matter to bring that out, but
14 asking him an opinion for which he's not been
15 presented in this case under Direct, that was my
16 objection.

17 **VIDEOGRAPHER:**

18 Going back on the record at camera time 12:16.

19 **EXAMINATION RESUMED BY MR. GRIFFETH:**

20 Q. Going back to looking at the record, when you
21 first saw her she complained of chronic sinus pain
22 at that time, didn't she?

23 **A. She complained of chronic sinus congestion.**

24 Q. Chronic sinus congestion. Thank you, Doctor.

25 **A. Yes, sir.**

1 Q. Look on October 27, 2011. She presents on that
2 day with cough, sinus congestion, pressure,
3 drainage, and a sore throat as I recall. Is that
4 correct?

5 **A. Yes, sir.**

6 Q. And you diagnosed that as a sinus infection.

7 **A. Yes, sir.**

8 Q. On November 10, 2011, you diagnosed her with
9 migraine headaches. Is that correct?

10 **A. She was diagnosed specifically with status**
11 **migrainosus, which is a prolonged migraine**
12 **headache.**

13 Q. Okay. Doctor, my understanding - again, from your
14 deposition last week, is that migraine headaches
15 are a vascular issue. Is that correct?

16 **A. Typically, yes, sir.**

17 Q. Migraine headaches are triggered normally by
18 foods, emotional stress, smells, smoking,
19 withdrawal from smoking, and a number of causes.
20 Is that correct?

21 **A. All those are a possibility. Yes, sir.**

22 Q. However, Doctor, trauma is not a cause of a
23 migraine headache, is it?

24 **A. I have not seen that relationship, no.**

25 Q. Okay. In your opinion to a reasonable degree of

1 medical certainty, is trauma not a factor that
2 typically causes a migraine headache?

3 **A. I would agree with that.**

4 Q. Now, in post-concussive syndrome cases, and in
5 particular Ms. Harmon's case, again my
6 understanding is you've never diagnosed her with
7 post-concussive syndrome?

8 **A. I have not. No, sir.**

9 Q. But in your opinion to a reasonable degree of
10 medical certainty, a post-concussive syndrome
11 would typically last only a few weeks or a month.
12 Isn't that correct?

13 **A. That's typical. Yes.**

14 Q. Now, you have not seen Ms. Harmon since November
15 10, 2011?

16 **A. I saw her one day this week, but it was for an
17 unrelated issue.**

18 Q. Okay. And other than that one time you've seen
19 her you've not seen her since November 10, 2011?

20 **A. I believe that's correct. Yes, sir.**

21 Q. Look back to the first visit if you will, Doctor,
22 and see if Ms. Harmon related to you any history
23 of hypertension.

24 **A. I do not recall any mention of hypertension.**

25 Q. Did she ever mention to you any concussion, laying

1 aside any possible concussion of January 9, '09?

2 Any concussion prior to that date?

3 **VIDEOGRAPHER:**

4 Going off the video record at camera time 12:19.

5 **MR. NEWLON:**

6 I'd just object to the question in the absence of
7 a proper foundation at trial. I know what the
8 incident that we're getting back to - which I
9 think was the 15 to 20 years prior incident of
10 which I don't have the records and we don't have
11 the records of. To that extent, talking about the
12 foundation for that, there's an objection to the
13 relevancy and the prejudice of that in the absence
14 of definitive findings and medical testimony
15 regarding the existence and persistence of that
16 condition up and to the time of this particular
17 incident.

18 **VIDEOGRAPHER:**

19 Going back on the video record at camera time
20 12:20.

21 **EXAMINATION RESUMED BY MR. GRIFFETH:**

22 Q. Let me ask you once again, Dr. Ergle, laying aside
23 any possible reference to a January 9, '09
24 incident. On the date that you first saw Ms.
25 Harmon or Ms. Scott, did she report to you any

1 concussion that she had ever received prior to
2 that date?

3 **A. I do not have any record of that. No, sir.**

4 Q. Today, Doctor, do you have those Self Regional
5 records that I handed you?

6 **A. Yes, sir.**

7 Q. We would move those in as Defendant's Exhibit
8 number 2. Now, Doctor, today you have opined that
9 Ms. Harmon has facial pain which is related in
10 some way to being struck by a ladder on January 9,
11 '09.

12 **A. Yes, sir.**

13 Q. All right. How did - and you were shown a
14 photograph of the ladder that supposedly hit her?

15 **A. Yes, sir.**

16 Q. Who provided you with that photograph?

17 **A. Mr. Newlon.**

18 Q. What kind of ladder, if you recall, was that?

19 **A. I believe it was a fiberglass ladder, maybe ten
20 feet or something. I'm not exactly sure.**

21 Q. When did you first see that photograph?

22 **A. Last week.**

23 Q. Last week? And let me ask you, Doctor, if you
24 know the weight of that ladder?

25 **A. I do not.**

1 Q. Okay. Have you done any studies on that ladder?

2 A. No, sir.

3 Q. You wouldn't propose to opine any opinion about
4 physics or the weight or fall, or the force with
5 which a ladder might strike someone, would you?

6 A. I would have no direct knowledge of that. No,
7 sir.

8 Q. And you weren't there on January 9, '09 when this
9 ladder fell, were you?

10 A. No, sir.

11 Q. Okay. Are you familiar with Ms. Harmon's
12 testimony as to exactly how the ladder struck her?

13 A. I am not.

14 Q. Were you given by Mr. Newlon a copy of her
15 deposition testimony about how the ladder struck
16 her?

17 A. I don't believe so.

18 Q. When were you asked by Mr. Newlon to render the
19 opinion related to the falling of the ladder and
20 her facial pain?

21 A. When was our first conversation about that, or
22 when did I first get notified?

23 Q. No, sir. I'm asking you when did Mr. Newlon ask
24 you to give an opinion about the proximate
25 relationship of being struck by the ladder to

1 facial pain?

2 **A. I'm not really sure when that first happened.**

3 **Q. Was it within the last week?**

4 **A. I believe we had briefly discussed Ms. Scott's**
5 **case prior to that, but I really don't recall**
6 **exactly how long ago that was.**

7 **Q. Would it have been since you gave your deposition**
8 **last week?**

9 **A. No, sir.**

10 **Q. Would it have been before that?**

11 **A. Yes, sir.**

12 **Q. Do you recall in your deposition last week being**
13 **asked if you had any other opinion about this case**
14 **other than what was reflected in your records and**
15 **that your answer was no?**

16 **A. Yes, sir.**

17 **Q. So last week in your deposition when asked if you**
18 **had an opinion you do not come forward with the**
19 **opinion about the proximate cause that you've**
20 **testified today here regarding the ladder. Is**
21 **that true?**

22 **A. I'm sorry. I don't quite understand your**
23 **question.**

24 **Q. Last week when you were asked, "Do you have any**
25 **other opinions," on page 39 of your deposition -**

1 and I can show it to you if we need to - you were
2 asked, "Do you have any other opinions about this
3 case other than what is reflected in your medical
4 records?" Your answer was, "No."

5 **A. But I believe my opinion during the deposition was**
6 **that her facial pain was likely the result of**
7 **trauma to her face.**

8 Q. Nothing was said about relating that to the ladder
9 though was there, Doctor?

10 **A. I guess so.**

11 Q. So the answer to my question is no?

12 **A. Correct.**

13 Q. Thank you very much. That's all I have.

14 RE-EXAMINATION BY MR. NEWLON:

15 Q. Doctor, have you been provided with a copy of your
16 deposition?

17 **A. Yes.**

18 Q. Do you have it with you?

19 **A. It's in my office.**

20 Q. We'll go off the record.

21 **VIDEOGRAPHER:**

22 Going off the record at camera time 12:25.

23 (OFF THE RECORD)

24 **VIDEOGRAPHER:**

25 Going back on the record at camera time 12:32.

1 **EXAMINATION RESUMED BY MR. NEWLON:**

2 Q. Doctor, you were asked some questions about a
3 prior deposition about a week ago. A deposition
4 that, in fact, was taken by one of the attorneys
5 for the defendants, correct?

6 **A. Correct.**

7 Q. In that deposition they asked you a number of
8 questions regarding your view of the record and
9 some of your opinions. Do you recall that?

10 **A. Yes, sir.**

11 Q. Earlier you were asked a question by Mr. Griffeth
12 about some testimony that I believe begins on page
13 398 and 39.

14 **A. Yes, sir.**

15 Q. I just want to - for accuracy of the record I'd
16 like to go over that with you.

17 **A. Okay.**

18 Q. This is an examination by Mr. Plyler starting at
19 page 38 at line 13. Question, "Since your last
20 visit with Ms. Scott have you received medical
21 records other than your own from the attorney for
22 Ms. Scott?" And your answer?

23 **A. "I have."**

24 Q. "Have you reviewed those records?"

25 **A. "Briefly."**

1 Q. "Have you formed any opinions in this case?"

2 A. **"Regarding what?"**

3 Q. "Anything."

4 A. **"That's somewhat of a vague question."**

5 Q. "I understand that. Has any attorney for Ms.

6 Scott asked you to form any opinion about Ms.

7 Scott?"

8 A. **"No."**

9 Q. "Is there - would your opinions be contained in a

10 medical record - your own medical records that

11 we've just been over?"

12 A. **"I'm not sure I understand your question."**

13 Q. "I mean, is it the records that we've been over

14 today, do those contain your entire evaluation of

15 Ms. Scott?"

16 A. **"Yes, sir."**

17 Q. "Do they contain your entire treatment that you've

18 done?"

19 A. **"From my perspective yes, sir."**

20 Q. In re-reading that testimony right then and there,

21 what was your understanding of the questing by Mr.

22 Plyler?

23 **VIDEOGRAPHER:**

24 Going off the video record at camera time 12:34.

25 **MR. GRIFFETH:**

1 Objection. Lack of - the foundation is defective.
2 In addition to that, the doctor cannot now opine
3 as to what his understanding was, rather the
4 questions and the answers speak for themselves.

5 **VIDEOGRAPHER:**

6 Going back on the video record at camera time
7 12:34.

8 RE-EXAMINATION RESUMED BY MR. NEWLON:

9 Q. Going back to this series of questioning, what was
10 your understanding of Mr. Plyler's request about
11 your opinions?

12 A. **My understanding was that he was asking was my**
13 **opinion and treatment of her contained in the**
14 **medical record.**

15 Q. Does your medical record contain all of your
16 opinions?

17 A. **I would not say it contains all of my opinions.**
18 **No, sir.**

19 Q. Is there anywhere in the medical records where you
20 state that Ms. Scott's facial pain most probably
21 resulted from this ladder incident on January 9,
22 2009?

23 A. **I don't believe that I stated that in those**
24 **specific words. No, sir.**

25 Q. Would that be an opinion that you would have

1 outside your records?

2 **A. Yes, sir.**

3 **Q.** Is that your opinion today?

4 **A. Yes, sir.**

5 **Q.** Mr. Griffeth handed you a body of records dated
6 January 9, 2009 and represented to you that there
7 was no report of concussion. I believe that's
8 Defense Exhibit 2. Do you recall that?

9 **A. Yes, sir.**

10 **Q.** Do you have a recollection in this case whether or
11 not in fact she was diagnosed with possible post-
12 concussive and acute concussion - or acute post-
13 concussive syndrome following this incident?

14 **VIDEOGRAPHER:**

15 Going off the video record at camera time 12:36.

16 **MR. GRIFFETH:**

17 Objection. Unresponsive to cross. That's all.

18 **VIDEOGRAPHER:**

19 Going back on the record at camera time 12:36.

20 **RE-EXAMINATION RESUMED BY MR. NEWLON:**

21 **Q.** Mr. Griffeth has indicated in these records that
22 are dated January 9, 2009 that she didn't complain
23 of post-concussive - there was no finding of post-
24 concussive syndrome on the day of the incident.
25 Do you remember that question?

1 **A. Yes, sir.**

2 Q. Being that the inference is that she did not
3 experience any post-concussive syndrome from that
4 question, are you aware that in fact she was
5 diagnosed with post-concussive syndrome?

6 **A. I believe that was mentioned by another physician**
7 **after that time.**

8 Q. Okay. I'm going to hand you what I'm going to
9 mark as Plaintiff's Exhibit 1 to your deposition,
10 a record from Self Regional Hospital dated January
11 15, 2009. Several days after this particular
12 incident. Was there a finding of possible post-
13 concussive syndrome?

14 (WHEREUPON, MEDICAL RECORD CONSISTING OF 1 PAGE WAS
15 MARKED PLAINTIFF'S EXHIBIT 1 FOR IDENTIFICATION, AND A
16 MEDICAL RECORD CONSISTING OF 1 PAGE WAS MARKED
17 PLAINTIFF'S EXHIBIT 2 FOR IDENTIFICATION)

18 **A. Yes, sir.**

19 Q. I'm also going to hand you a record that is now to
20 March 26, 2009, a couple of months after this
21 particular incident. In this particular Emergency
22 Record, clinical impression, was there a finding?

23 **A. Clinical impression was post-concussive acute**
24 **headache.**

25 Q. For purposes of your deposition today, by the

1 Plaintiff have you been asked to give an opinion
2 regarding whether or not Ms. Scott suffered
3 prolonged headaches as a result of this ladder
4 incident?

5 **A. Could you re-state that?**

6 Q. Yeah. Earlier you testified when I asked you
7 about facial pain that this facial pain she
8 experienced came from this accident. I believe
9 that was your opinion, correct?

10 **A. Correct.**

11 Q. Okay. At any time did I ask you to give an
12 opinion about her headaches?

13 **A. I don't believe so. No, sir.**

14 Q. In fact, have you had an opportunity to review
15 records from Dr. Hutchinson, including opinions by
16 him with regard to her facial pain?

17 **A. Yes, sir.**

18 Q. Is that consistent with your opinion?

19 **A. Yes, sir.**

20 Q. There were questions about CTs and MRI findings in
21 this particular case, that they were negative when
22 they were looking at her head and other parts of
23 her body. Does any of those findings preclude or
24 exclude soft-tissue injury to her face or possible
25 nerve damage in her face?

1 **A. No, sir.**

2 Q. You were asked questions about microvascular
3 disease and some other findings on a particular
4 MRI. Does that have anything to do with the soft-
5 tissue injury or possible nerve damage to her face
6 to which you opined?

7 **A. No, sir.**

8 Q. In any discussion about chronic sinus congestion
9 or hypertension, is there any clinical correlation
10 between that and your opinion? In other words, is
11 chronic sinus congestion or hypertension a cause
12 of possible nerve damage in her face or soft-
13 tissue injury as a result of a ladder strike?

14 **A. No, sir.**

15 Q. Thank you very much, Doctor. I have no further
16 questions.

17 **MR. GRIFFETH:**

18 That's all I have. Thank you, Doctor.

19 **VIDEOGRAPHER:**

20 This concludes the deposition of John Ergle, M.D.
21 We're going off the video record at camera time
22 12:41.

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

C E R T I F I C A T E

I, the undersigned, Tara Scott, Notary Public in
and for the State of South Carolina, do hereby certify
that the foregoing deposition of John Ergle, M.D. was
taken on the 23rd day of May 2012;

That the within deponent was sworn to tell the
truth, and that the foregoing is an accurate
transcription of the testimony taken under oath;

That all exhibits entered herein are attached
hereto (if requested by counsel) and made a part of
this statement under oath.

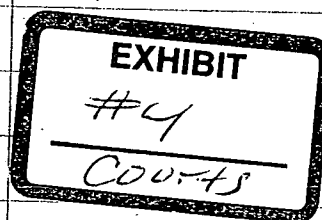
I further certify that I am neither counsel nor
solicitor to any of the parties in said suit, nor
interested in the event of the cause.

In witness whereof, I have hereunto set my hand
and seal on June 4, 2012

Tara Scott
Notary Public for South Carolina
My Commission Expires: 8/11/18

Court's Exhibit 4, Jury Question

If we answer NO to #1,
are we done?



Verdict Form

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

JENNIFER HARMON SCOTT,

Plaintiffs,

vs.

ALLEN LEE FORTNER AND JASON
CHAD GRIFFIN,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO. 10-CP-24-1236

VERDICT

1. Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendant's negligence proximately caused her injuries? (circle one) yes no

2. Did Defendants meet their burden of proving that Plaintiff was negligent and that her negligence contributed to her injuries? (circle one) yes no

(If the answer to question 2 is "yes," proceed to question 3. If the answer to question 2 is "no," proceed to question 4.)

3. We, the jury, find that the Plaintiff's and Defendant's responsibility for Plaintiff's damages should be apportioned as follows (Note: Percentages must total 100%):

(a) Defendants are responsible for _____%.

(b) Plaintiff is responsible for _____%.

(If Plaintiff's negligence is greater than 50%, that is, 51% or more, skip question 4, sign verdict form, and inform the bailiff that you've reached a verdict.)

4. What sum should be awarded to Plaintiff to compensate her for her actual damages? (Note: Do NOT reduce this sum by the percentages given in question 3; simply give the jury's verdict for the total damages which the Plaintiff incurred.)

\$ _____

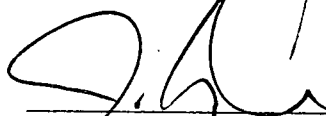
Duffin G. Donohue III
Foreman

October 4, 2012
Greenwood, South Carolina

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 6, 2013



Jon E. Newlon
1629 ByPass 72 NE
Greenwood, S.C. 29649
864/388-9100, 9104 (FAX)
jnewlon@mccravylaw.com
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24-01236

Jennifer Scott Harmon.....Appellant,

v.

Allen L. Fortner and Jason C. Griffin,.....Respondents.

PROOF OF SERVICE

RECEIVED

JUN 18 2013

SC Court of Appeals

I certify that I have served the Record on Appeal on Jack D. Griffeth and Ross B. Plyler by depositing a copy of the same in the United State Mail, postage prepaid, on June 18, 2013, addressed to each attorney of record at the addresses indicated below:

Jack D. Griffeth
Ross B. Plyler
P.O. Box 5819
Greenville, S.C. 29606
864-282-9105
Attorneys for Respondents

June 18, 2013



Jon E. Newlon, Bar #15617
McCravy, Newlon & Sturkie Law Firm, P.A.
1629 ByPass 72 NE
Greenwood, S.C. 29649
864-388-9100
jnewlon@mccravylaw.com
Attorney for Appellant