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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2010-CP-08-1801

Levern McCray, ... Respondent,

vs.

Jose W. Valle, ... Appellant,

RECORD ON APPEAL
VOLUME II OF II

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Doctor Neal - Examination by Ms. Mullis:

Q: Dr. Neal, can we have your professional address, please?

A: 1415 Barnwell Street, Columbia, South Carolina.

Q: Are you a physician licensed to practice in the State of South Carolina?

A: I am.

Q: And when were you licensed in South Carolina?

A: 1976.

Q: Can you describe to us your education and training in the medical field?

A: I was educated in the secondary school systems here in South Carolina. Graduated from Booker T. Washington High School in 1963. I attended Benedict College. Graduating with a BS in chemistry, mathematics and physics 1966. I later attended Harry Medical College in Nashville, Tennessee with a M.D. degree and a Master's in chemistry in 1971. I later stayed on at the teaching hospital of the George W. Herbert Hospital, which is a teaching arm of Harry 1971 to 72, straight internship. 1972 to 1973 for a residency in internal medicine. I then attended Vanderbilt University Medical Center, Nashville, Tennessee, 1973 to 1975 finishing the program in cardiology. I stayed at Harry's as an assistant professor of medicine,

1 Director of cardiac catheterization laboratory 1975 to
2 1976. After in private practice in the City of
3 Columbia in 1976.

4 Q: What area of medicine do you normally practice today.

5 A: Internal Medicine and Cardiology.

6 Q: What does internal medicine generally involve?

7 A: Internal medicine involves the entire body.

8 Q: And in your treatment of internal medicine, do you
9 treat individuals with traumatic injuries?

10 A: Yes I do. I was also the Medical Director for the
11 South Carolina Department of Corrections for about nine
12 years. I retired in 1995. During that time we treated
13 and evaluated a host of people with traumatic injuries.

14 Q: As the Medical Director for the Department of
15 Corrections, did you evaluate and give individuals
16 permanent impairment ratings?

17 A: Yes I did. As part of the job we did what's called a
18 fitness for duty exam to determine whether an
19 individual could return to his position and to classify
20 his disability rating at that point. I also worked for
21 the South Carolina Department of Vocational
22 Rehabilitation Disability examination arm for both the
23 State and Social Security. I am still seeing patients
24 for them and have done this for some 40 years.

25 Q: Can you explain to the jury exactly what a permanent

1 impairment rating is?

2 A: A permanent impairment rating is a rating in which an
3 individual has received the maximum improvement
4 possible through the use of surgery, physical therapy
5 or medication.

6 Q: Is that permanent impairment rating generally narrowed
7 down to a number that you give for an individual body
8 part?

9 A: It can be done in several ways. You can give a total
10 person disability. You can give a extremity disability
11 or you can do specific joint, the modality it's called.

12 Q: And I know that orthopedic doctors can give permanent
13 impairment ratings, what makes an internist uniquely
14 qualified to give permanent impairment ratings?

15 A: Orthopaedics generally follow patients until they have
16 done whatever surgery is necessary to correct their
17 problem. After that point they release them back to
18 the care of the internists. We take care of patients
19 for the rest of their lives. So we get to see the
20 impact of a disability to a greater extent then does an
21 orthopedic surgeon.

22 Q: Have you testified in court as a physician before?

23 A: Yes I have.

24 Q: In the field of internal medicine?

25 A: Yes.

1 Q: Have you been qualified as an expert to offer expert
2 testimony in the field of internal medicine?

3 A: I have.

4 Q: And in regard to permanent impairment ratings?

5 A: Yes, I have.

6 Q: Have you ever been denied by a court to testify as an
7 expert in internal medicine?

8 A: No, I have not.

9 Q: Are you currently in private practice now?

10 A: I am. I retired two years ago or at least I thought I
11 was. So many patient showed up at my house, I wound up
12 going back to work for three days a week.

13 Q: So you unsuccessfully retired two years ago?

14 A: That's correct.

15 Q: For how long?

16 A: About a year, 18 months, something like that.

17 Q: We are going to offer Dr. Neal as a physician expert in
18 the area of internal medicine and for the purposes of
19 offering an opinion in regard to impairment ratings.

20 The Court: Any objections or questions?

21 Mr. Allen: Yes, Your Honor.

22 The Court: Please approach.

23 (Counsel approaches bench)

24 The Court: Overruled. Pursuant to Rule 702, he has
25 sufficient education and experience.

1 Q: Did you have occasion to treat Levern McCray?

2 A: I have.

3 Q: How long have you been his doctor?

4 A: Back since the mid-1990s, but I recently saw him. He
5 disappeared for a long period of time and I saw him in
6 February of 09.

7 Q: In your treatment of him do you generally perform a
8 thorough physical examination?

9 A: I do.

10 Q: Do you take a detailed medical history?

11 A: I do.

12 Q: Do you conduct clinical and laboratory tests?

13 A: I do.

14 Q: And do you determine possible causes for his symptoms
15 and reported problems?

16 A: I do.

17 Q: When you are treating him do you eliminate causes of
18 each problem that he is reporting in order to rule out
19 what the possible causes are?

20 A: I do.

21 Q: And did you determine the cause of the problems that he
22 was reporting to you in relation to your treatment of
23 him?

24 A: I did.

25 Q: Okay. Did you treat him in relation to an automobile

1 collision that occurred on December 20 of 2008?

2 A: I did.

3 Q: When is the first time you saw him in relation to that?

4 A: December 30th, 2008

5 Q: Okay. In your records of Mr. McCray, prior to December

6 30, 2008, were you aware of any significant medical

7 problems that he had had?

8 A: He had none at that point.

9 Q: Any orthopedic problems, or you aware of him ever

10 breaking anything?

11 A: No.

12 Q: What were his complaints to you on December 30, 2008?

13 A: He indicated that he was involved in a motor vehicle

14 accident on 12-20-08. His truck was totaled. He had

15 fractured his left ankle and foreleg and it was a

16 head-on collision. He complained of joint pains,

17 myalgia, swelling, stiffness. He had shoulder pain on

18 the right. He had, what I thought was a rotator cuff

19 tear on that examination ...

20 Q: To where?

21 A: To the right shoulder.

22 Q: Okay. You had a rectal anal --- with cellulitis at

23 that particular time.

24 Q: Was that related to the accident?

25 A: He started taking narcotic preparations. The narcotic

- 1 preparations makes you constipated. You have large
2 constipated stools and they can tear as you pass them.
- 3 Q: His primary complaints were related to his left leg,
4 ankle, foreleg, his right shoulder. Is that correct?
- 5 A: That's correct.
- 6 Q: Any complaints to his back, neck or other parts of his
7 body at that time?
- 8 A: No.
- 9 Q: What kind of treatment did you provide at that time?
- 10 A: I put him on Procardia AC which is a steroid rectal
11 cream to apply four times a day. I put them on
12 Synecot(sp) which is a stool softener and laxative. I
13 put Levaquin 750, one a day for the infection. I
14 continued him on Valium that they started at Trident.
15 And continued him on the Oxycodone that he was on, the
16 Percocet for pain.
- 17 Q: I asked you, if I can approach the witness. The 12-30-
18 08, and it's doctor's records. Trying to read them is
19 challenging. The muscular skeletal joint pain, myalgia
20 ... What all were you reporting?
- 21 A: Joint pain, myalgia, swelling, stiffness, back pain,
22 shoulder pain.
- 23 Q: Do you know where the back pain was?
- 24 A: In the lower back.
- 25 Q: Then what was the next time you had occasion to treat

1 him?

2 A: The next time I saw him was January 13th of 2009.

3 Q: And what were his reports at that point?

4 A: At that point, he was still painful. He got off of the

5 Oxycodone on his own because it was affecting his

6 constipation. He had sex times two with pain over the

7 perineal body area. Now, at the time I saw him that

8 had stopped after he got off that oxycodone as well.

9 Q: So this was affecting his relations with his wife?

10 A: Correct. His father had died from prostate cancer

11 which concerned me at that particular point as well.

12 Q: And muscular skeletal reports included what?

13 A: Basically the same joint pain myalgia, swelling,

14 stiffness, back pain and he was as having some left

15 foreleg pains as well.

16 Q: Is that related to the left leg?

17 A: That's related to the left leg.

18 Q: When you were doing the physical exam of Mr. McCray,

19 some things you have to ask him and he reports to you,

20 is that correct?

21 A: That is correct.

22 Q: So when you're asking about pain, how do you verify the

23 patient is in pain?

24 A: Pain is a subjective assessment usually. And when we

25 say subjective that is something that someone tells

1 you. If a patients say they're hurting, I have no way
2 of knowing definitely whether they are hurting, but
3 there are some things that we can do in the physical to
4 justify or explain that. Number one, we can look at
5 the systolic blood pressure, the top blood pressure
6 number. If it is elevated that indicates that the
7 patient may truly be in pain. The second thing is we
8 can look for accessory signs such as pupil
9 constriction, sweating things of that nature which also
10 confirm that the patient may have pain. The most
11 reliable thing that we can do is try range of motion
12 movements.. And if someone has pain and you can only
13 move a joint so far and pain is at that point that they
14 can't stand going any further and you repeat that you
15 should hit that same number of degrees in the range of
16 motion each time on the patient. You shouldn't have
17 twenty degrees one time, thirty degrees the next time,
18 forty degrees the next. You should be able to
19 reproduce that same number of degrees. And if they do,
20 then we take the subjective complaint of pain at that
21 particular point and make it an objective assessment.

22 Q: So were you objectively verifying that Mr. McCray was
23 in pain?

24 Mr. Allen: Objection.

25 The Court: Basis?

1 Mr. Allen: Leading.

2 The Court: Please repeat the question. I couldn't hear you.

3 Q: Were you objectively verifying that Mr. McCray was in
4 pain?

5 The Court: Overruled.

6 A: Yes. I'm sorry.

7 The Court: That that's okay, sir. You may continue.

8 Q: The muscular skeletal reports include swelling. Is
9 swelling something that is an objective thing that you
10 can see?

11 A: It is an objective thing.

12 Q: You can compare both legs and tell that he has swelling
13 in his leg. Is that correct?

14 A: Correct.

15 Q: When is the next time you had occasion to see and
16 treat him?

17 A: The next time I saw him was one 1-27-09.

18 Q: What were the reports at that time?

19 A: The reports at this time was that he was still having
20 joint pain myalgia, swelling and stiffness, but he
21 reported a new problem of having poor memory.

22 Q: Specifically what was he talking about with poor
23 memory?

24 A: He actually got lost coming to the office. He had
25 trouble finding the office.

1 Q: How many years has Mr. McCray been coming to your
2 office?

3 A: Probably five.

4 Q: Because this was the office located where?

5 A: This was my office at Farrow Road.

6 Q: He had been coming there for five years?

7 A: Yes.

8 Q: And he had been there for two other times in the last
9 month?

10 A: That's correct.

11 Q: And he got lost coming to your office?

12 A: Correct.

13 Q: Had he reported other incidents of poor memory?

14 A: When I questioned him about it. He told me he had had
15 memory problems. Well, let me explain this. He said
16 he did poorly in school. He had trouble remembering
17 things and so fourth all of his life. And now this was
18 the first time that he had ever gotten lost going
19 somewhere. It was a little disturbing to me at that
20 particular point, but, you know, he still was on the
21 Valium, a sedative medication, which has side effects
22 of amnesia. So, maybe it could have been the Valium at
23 at that particular point, maybe it could because he had
24 taken it the night before. I had just decided to
25 observe him at that point, and see if anything else

1 happened. I gave him the standard tests, four colors,
2 four numbers at the beginning. Well, when he told me
3 that he had the memory problem. At the end of the
4 interview, I asked him to repeat those to me. He was
5 able to do two out of the four numbers and one out of
6 the four colors. So, at that particular point I
7 determined that he did have an acute memory problem but
8 at this time I really thought that it may be related to
9 the Valium. At that particular point, I wanted to
10 refer him to a Neurologist for further testing.

11 Q: Have you reviewed, it looks like you requested the
12 emergency room records on the initial visit on December
13 30, 2008. Were you aware of whether there was
14 initially a report of a head injury on the December 20,
15 2008?

16 A: There was, they even did a CT scan.

17 Q: So at that point you referred him to Dr. Rankey?

18 A: Correct.

19 Q: When is the next time you had occasion to see Mr.
20 McCray?

21 A: The next visit was to 2-25-09.

22 Q: What was he reporting at that time?

23 A: He still had pain in his left hip. His LS area, his
24 left foot and his left knee at this time.

25 Q: So the left foot and ankle we understand that was

1 broken. The left knee the same complaint. Was the
2 left hip a new complaint?

3 A: It was a new complaint. He was walking with crutches.
4 What happened is he could not put weight on that broken
5 ankle. It puts him basically on one leg and this
6 causes a rotational tilt deformity of the pelvis when
7 you walk like that. As you walk more, the more
8 exaggeration of the LS area that this movement occurs
9 and you develop pain.

10 Q: And by LS area?

11 A: The lumbar sacral, the low back.

12 Q: He was readjusting, is that correct?

13 A: Correct.

14 Q: And it effected a gait change?

15 A: Correct.

16 Q: So he was walking different?

17 A: That's correct.

18 Q: What did you do as far as treatment, did you change
19 anything?

20 A: At this particular time I left him on the same, his
21 laboratory work had come back I told that he had a
22 positive A and A, that's a antinuclear antibiotic and
23 he had a positive RNP. RNP is a nucleoside residue
24 that tells if you have a connective tissue disease. I
25 thought it was probably Sorensome(sp) Syndrome at this

1 point but the other diseases associated procainamide,
2 systemic lupus, these are all possibilities. But I
3 thought it was probably Sorensome syndrome.

4 Q: What effect would that have on his healing or his
5 ability to heal at this point?

6 A: It slows it down.

7 Q: When is the next time you had occasion to see him?

8 A: The next time I saw him was on 4-7-09.

9 Q: What was he reporting at that time?

10 A: He had left knee pain, left foot pain, he had had the
11 long screw in the ankle removed at this particular
12 point. He still had the other hardware. It just was
13 one screw that was removed. And he was wearing a soft
14 cast but still complaining of left hip pain and the LS
15 pain, the low back pain.

16 Q: Any change at that point?

17 A: No.

18 Q: At this point you are following him. Are you
19 prescribing any pain medication?

20 A: No, I was not. We tried non-steroids on him but it
21 wound up hurting his stomach so we didn't continue
22 anything.

23 Q: What did the non-steroids do to his stomach?

24 A: Made him nauseated, he had a stomach ache. You can
25 often bleed with those but I didn't see any signs of

1 bleeding. I just told him to stop taking them.

2 Q: When is the next time you had occasion to see him?

3 A: The next visit was 5-5-09.

4 Q: What were his complaints at that time?

5 A: Basically there was no change. He complained of poor
6 hearing on and off through the years and I told him
7 maybe we ought to get a hearing examination done.

8 Q: Was that related to the accident?

9 A: No it was not.

10 Q: What about the leg or foot?

11 A: The leg and foot he still complained of pain in those
12 areas without change.

13 Q: Is he still being treated by an orthopaedic at that
14 point?

15 A: He was.

16 Q: So you weren't the primary doctor dealing with the
17 treatment on that?

18 A: No.

19 Q: All right. What about the shoulder or the back?

20 A: He still complained of the low back pain on that
21 particular visit as well. Basically there was no
22 change from the previous visit.

23 Q: When was the next time you treated him?

24 A: The next visit was 4-7-2012.

25 Q: Do you know why the big gap?

1 A: I retired.

2 Q: So the gap in treatment didn't have anything to do with
3 Mr. McCray not wanting to be treated ...

4 Mr. Allen: Objection.

5 The Court: I haven't heard the whole question. Please state
6 the entire question.

7 Q: So the gap in treatment didn't have anything to do with
8 Mr. McCray not wanting to be treated it was because you
9 retired. Is that correct?

10 A: That is correct.

11 The Court: Overruled.

12 Q: Were you available to treat Mr. McCray from the last
13 time you treated him in 2009 until 2012?

14 A: I was not.

15 Q: Do you know if Mr. McCray was followed by another
16 internist during that time?

17 A: I don't know.

18 Q: So tell me again when was the next that you treated
19 him?

20 A: Was 4-7-2012.

21 Q: And at that time what were his complaints?

22 A: At this time he ...

23 Q: Are you up with me?

24 A: No I'm not. The first page I am missing.

25 Q: The 4-7-2012?

1 A: Right.

2 (Off the record)

3 Ms. Mullis: Your Honor, may I approach the witness?

4 The Court: You may.

5 Ms. Mullis: This is the 4-7-2012. The first page to
6 this.

7 Q: So what were his initial reports there?

8 A: This is the second page.

9 Q: Is it?

10 A: Yes, this is the second page. The first page is
11 missing.

12 Ms. Mullis: Neither one of us has it. Okay.

13 Q: When we get into the complaints of pain and stiffness
14 musculoskeletal, is he reporting neck pain at that
15 point?

16 A: He was complaining of pain and stiffness in the neck,
17 the bone and joints he complained of arthritis pain,
18 back pain, limitation of joint activity, limitation of
19 movement, loss of muscle strength, painful joint
20 stiffness, tenderness. He also complained of cramps
21 and rest. Limitations on movements and those were the
22 basic pains associated with musculoskeletal.

23 Q: And that was in the neck, is that correct?

24 A: That was in the neck and the bones and joints which
25 would include the lower back, the knees the ankles, et

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cetera.

Q: And as far as, am I correct that the ...

A: Is the abnormal things.

Q: Okay. So, was he making neurological complaints at that point as well?

A: He was. He was complaining of insomnia, numbness tingling, weakness in the arms and legs as well.

Q: What about new psychiatric complaints?

A: At this particular time he complained of anxiety.

Q: Do you know what he was anxious or depressed about?

A: His future.

Q: What about his leg at this point, this was April of 2012?

A: On the physical side of it, he had to the spine, the ribs, he had lordosis and paraproctium spasm that was present. He had limited spinal rib and pelvic stability. He had to the spine, ribs, pelvic strength and tone were diminished and he had impairment to the right upper extremity motion. The shoulder, elbow and wrist. Excuse me I take that back. The right upper extremity motion in shoulder, elbow and wrist were normal. The lower extremity he had joint enlargement and tenderness. The left upper extremity range of motion, the shoulder was restricted. The left upper extremity stability was abnormal, the left upper

1 extremity strength tone inability to produce a full
2 range of motion. The right lower extremity he showed
3 joint enlargement, joint tenderness. The motion to the
4 hip was restricted, the knee motion was restricted.
5 The right lower extremity, the knee with partial
6 resistance to opposition. The left lower extremity
7 showed that he had joint enlargement on inspection and
8 joint tenderness. The range of motion in the ankle was
9 restricted. The hip motion was restricted and the knee
10 motion was restricted. The left lower extremity
11 strength and tone, the ankle with partial resistance to
12 opposition, the hip with partial resistance to
13 opposition. The knee with partial resistance to
14 opposition.

15 Q: When you are talking about muscle spasm, what is a
16 muscle spasm?

17 A: Muscle spasm is a objective finding. You can't make
18 yourself have those. Those are involuntary.

19 Q: How do you, as a physician, tell if there is a muscle
20 spasm?

21 A: It's hard, it's stiff and there's difficulty on range
22 of motion.

23 Q: Do you physically put your hands on the patient?

24 A: Yes.

25 Q: And you have to feel the muscle itself?

1 A: Yes.

2 Q: When is the next time you had occasion to treat Mr.

3 McCray?

4 A: The next occasion was 5-5-2012.

5 Q: And his primary complaints related to this incident

6 were what?

7 A: His primary complaints were severe rectal pain, foot

8 and knee pains and memory loss.

9 Q: Was there anything you could do for the left foot and

10 knee pain.

11 A: No, I could not.

12 Q: What were you doing about the memory loss?

13 A: The memory loss at this particular point I had made a

14 referral earlier for him to see the neurologist and I

15 don't know what happened during that period of time.

16 I at this particular point was initiating a referral to

17 MUSC's School of Medicine to the Department of

18 Neurology.

19 Q: Were there any other complaints that he was making at

20 that point?

21 A: He was still having severe rectal pains and pains in

22 his foot and knee. He was having circumcised pain that

23 was parallel to the sole of his foot but which aches

24 throughout the ankle joint itself. He was having a

25 waking at night from the rectal pain. His wife was

1 with him on this visit and they were both complaining
2 of worsening of his memory at this point.

3 Q: What about his back and neck.

4 A: He was still having pains. He had pains in the lower
5 back area, the other hip area, as well as the three
6 different things that I just described in the ankle.

7 Q: And what about the right shoulder, had anything happen
8 with the right shoulder?

9 A: He was still walking on crutches and one of the things
10 that happens you don't walk with a crutch on the side
11 of the injury, you put it on the opposite side, your
12 good side and lean over as you walk to take some of the
13 weight off that extremity when you walk. It's just the
14 opposite of what you would think. You would think if
15 you had pain in the left foot that you would use the
16 crutch on the left but you switch it. As a result of
17 using it as he had, overuse syndrome he had pain in the
18 right shoulder as well as the left shoulder from that.

19 Q: And the next occasion you had to see him? Patient was
20 complaining of pain where?

21 A: He was ... This was a follow-up visit he was complaining
22 of severe ankle pain and foot and knee pains and still
23 memory loss. He was improved from his previous visit
24 and we had restarted the Loratab at that particular
25 point on his last visit. I was cautious about

- 1 restarting that because he was having rectal pain all
2 along. If he got constipated again he could have even
3 more problems out of that, that rectal pain, but
4 because he was complaining of so much pain on his
5 previous visit we restarted the Loratab at that
6 particular point. He was getting relief at this
7 particular point from that.
- 8 Q: Were you prescribing pain medication for Mr. McCray?
9 A: On that last visit I did.
- 10 Q: Had you been prescribing pain medication all along?
11 A: No but the orthopaedist had been giving him some.
- 12 Q: Do you know if Mr. McCray regularly took prescription
13 pain medication?
14 A: He wouldn't take it unless he absolutely had to.
- 15 Q: Why is that?
16 A: Because it made him feel goofy and he just didn't like
17 the feel of it?
- 18 Q: Do you know how it effected his ability to work?
19 A: If he's on these medications and working heavy
20 equipment, he really should not be working with those.
21 That's the same as driving under the influence.
- 22 Q: When is the next time you saw him after that?
23 A: 7-21-12.
- 24 Q: What were his complaints at that time?
25 A: Basically the same complaints of the ankle pains, foot,

1 knee, shoulder, lower back, hip and he had memory
2 problems.

3 Q: Any substantial change in his condition?

4 A: No.

5 Q: Anything that you did differently or could have done
6 differently at that point?

7 A: No.

8 Q: Anything else you did in regard to his treatment or
9 changed about his treatment?

10 A: No.

11 Q: And the next time you saw him after that?

12 A: I believe that was the last visit.

13 Q: So in your treatment of Mr. McCray, have you formed
14 opinions within a reasonable degree of medical
15 certainty, more likely then not, in relation to what
16 injuries were caused by the motor vehicle accident of
17 December 20th of 2008?

18 A: Yes.

19 Q: And we've heard from Dr. Spearman, specifically, in
20 relation to some of those, but we'll go ahead and ask
21 you as well, do you believe, obviously, the ankle that
22 was broken was more likely than not related to that
23 motor vehicle accident?

24 A: It was.

25 Q: Okay. And the knee injury that he is reporting today?

1 A: It was.
2 Q: And the hip pain on the left side that he is reporting
3 today?
4 A: It was.
5 Q: And the right shoulder pain that he is reporting today?
6 A: It was.
7 Q: And the neck pain that he is reporting today?
8 A: It was.
9 Q: And in your treatment of him, prior to this accident,
10 for at least 10 years are you aware of him having other
11 neck pain or was he having any neck pain just before
12 this accident?
13 A: None.
14 Q: So within a reasonable degree of medical certainty,
15 more likely than not, if he is reporting neck pain
16 today, would that have been related to the motor
17 vehicle accident of December 20th, 2008?
18 A: It would be.
19 Q: And the back pain, the lower back pain that he is
20 reporting. Would that have been related to the
21 accident?
22 A: It was.
23 Q: We discussed earlier about permanent impairment
24 ratings. Have you evaluated and can you provide
25 permanent impairment ratings for different body parts

1 for Mr. McCray?

2 A: I can. I did not type out a form or list, but I do
3 have an impairment rating for each of the areas.

4 Q: Okay. So, I'm going to ask you and we're just going to
5 run across these and assume that your testimony, if
6 it's fair, will be all given in a reasonable degree of
7 medical certainty more likely than not. And if you'll
8 just run through those permanent impairment ratings for
9 us.

10 A: The rating for the brain ...

11 Mr. Allen: Objection.

12 The Court: Basis?

13 Mr. Allen: Scope.

14 The Court: Overruled. The appropriate foundation.
15 Objection as to weight is not admissible. Go ahead.

16 A: The evaluation that I gave him for the brain is a work
17 up that is still going on. So, I referred him to a
18 neurologist at MUSC. The neurologist is currently in
19 the process of evaluating him now. I believe based on
20 my experience that he has a 52 percent impairment
21 rating to the brain. His cervical neck he has a 25
22 percent impairment rating. To the right shoulder a 30
23 percent impairment rating. To the left shoulder a 15
24 percent impairment rating. To the lower back a 28
25 percent impairment rating. To the right thumb a 20

1 percent impairment rating. To the left knee a 38
2 percent impairment rating. To the left leg a 28
3 percent impairment rating. To the left foot a 20
4 percent impairment rating. To the left ankle a 55
5 percent impairment rating. And to the chest a 5
6 percent impairment rating. These ratings are based on
7 for everything except the brain. A loss of range of
8 motion, muscle spasm, the need for continuing
9 medications and the swelling and hardware that is still
10 present in some of the ankle joint.

11 Q: And all of these ratings are your opinion based on your
12 experience in the field and your training as a medical
13 physician and your past experience in doing permanent
14 impairment ratings in the Department of Corrections and
15 your experience in doing ratings for vocational
16 rehabilitation, is that correct?

17 A: That's correct.

18 Q: And they are your opinions more likely then not, is
19 that correct?

20 A: That's Correct.

21 Q: Within a reasonable degree of medical certainty?

22 A: That's correct.

23 Q: And these permanent impairment ratings, are necessarily
24 ratings that are permanent. In other words they will
25 not get better and Mr. McCray will have these types of

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1 ratings or these injuries for the remainder of his
2 life?

3 A: He will.

4 Ms. Mullis: Those are all the questions I have.

5 The Court: Any Cross-Examination of the witness?

6 Mr. Allen: Yes, Your Honor. Very briefly.

7 The Court: You May Proceed.

8 Dr. Neal - Cross Examination by Mr. Allen:

9 Q: Hi. Dr. Green, I have some follow up questions for
10 you. You are board certified and you practice internal
11 medicine?

12 A: I was board certified up until I retired.

13 Q: You no longer have board certification in internal
14 medicine?

15 A: I do not.

16 Q: What about your board certification in cardiology, were
17 you ever board certified for that?

18 A: I was not.

19 Q: I saw on some of your letterhead that I got, up at the
20 top it said you are a specialist in internal medicine
21 and cardiology, did I see that right?

22 A: Correct.

23 Q: But currently you are not board certified in internal
24 medicine or cardiology?

25 A: No, I am not.

- 1 Q: You are definitely not an orthopaedic surgeon?
- 2 A: No.
- 3 Q: Would you think it would be fair for us to rely on Dr.
- 4 Spearman and Dr. Smith's opinions regarding these bone
- 5 joint issues that Mr. McCray may have suffered?
- 6 A: No, as I explained earlier, the orthopaedist takes care
- 7 of the patient as long as he has acute injury. Once
- 8 the acute injury is over they are referred back to the
- 9 primary care physician and that's the physician that
- 10 wrestles with these problems the rest of the patients
- 11 lives. So, the true evaluation as to impairment is
- 12 better suited in the hands of the family practitioner
- 13 and internist than an orthopaedist.
- 14 Q: You understand that Dr. Spearman did the surgery on Mr.
- 15 McCray?
- 16 A: Yes, I did.
- 17 Q: Did you understand that Mr. Smith also removed a screw
- 18 from his ankle?
- 19 A: Yes, he did.
- 20 Q: Did it himself?
- 21 A: Yes.
- 22 Q: I see a letter here from the Plaintiff's lawyer made to
- 23 your attention December 29, 2009.
- 24 A: Correct.
- 25 Q: You filled this out?

- 1 A: I did.
- 2 Q: You gave impairment ratings to the left foot and the
- 3 left leg at that point, correct?
- 4 A: Correct.
- 5 Q: You just said that a family doctor or an internist
- 6 would be in a better position because he is continuing
- 7 to treat the patient?
- 8 A: Correct.
- 9 Q: You understand that Mr. Smith saw Mr. McCray in March
- 10 of this year?
- 11 A: Yes.
- 12 Q: You also said that, to use your words that Mr. McCray
- 13 had disappeared for a while prior to him coming to see
- 14 you in 2008, do you recall that testimony?
- 15 A: That is correct.
- 16 Q: When was the last time you saw him before he, using
- 17 your term, disappeared?
- 18 A: It looks like the last visit that I saw him was 5-5-09.
- 19 Q: No, I'm talking about the first time that you saw him
- 20 related to this accident was December 30th, 2008,
- 21 correct?
- 22 A: That's correct.
- 23 Q: When was the most recent time that you saw him before
- 24 that?
- 25 A: Probably three years before.

1 Q: Do you know if he had been under the care of any other
2 doctors during those three years?

3 A: I know he was seeing a neurologist. I do recall that.

4 Q: When you mentioned your retirement, I assumed that you
5 were treating patients for various things including
6 maybe diabetes for example?

7 A: Yes.

8 Q: Okay. And when you retired can I presume that you gave
9 your patients a list of other doctors that they may
10 want to follow their care with?

11 A: No I was in a group of physicians, Dean Floyd, Billy
12 Lance, a nurse practitioner, I can't recall her name
13 right now. And when I left these physicians took over
14 following the patients at that particular point.

15 Q: I understand. The doctors that you worked with just
16 picked up your caseload when you went away?

17 A: That's correct.

18 Q: Did Mr. McCray ever follow up with any of your partners
19 after you retired?

20 A: I don't know.

21 Q: Do you still practice with them are not?

22 A: No.

23 Q: You mentioned a lot of areas of the body that you
24 believe Mr. McCray has got permanent impairment to as
25 a result of this accident, do you remember that last
line of questioning?

1 A: Yes.

2 Q: One of the things that I want to definitely ask you
3 about was a 52 percent rating to the brain. That is
4 your opinion?

5 A: That is my opinion.

6 Q: You also mentioned that you sent Mr. McCray to MUSC,
7 the neurologist.

8 A: I did.

9 Q: And you are not a neurologist?

10 A: I am not.

11 Q: You are not a neurosurgeon?

12 A: I am not.

13 Q: Do you have that letter in your file?

14 A: I do.

15 Q: Have you reviewed it?

16 A: I have.

17 Q: Did you read it in coming out with your opinion that he
18 has got a 52 percent impairment rating to the brain?

19 A: I did.

20 Q: Can you flip to it for me?

21 A: Okay.

22 Q: Do you agree with me that the chief complaint that you
23 sent Mr. McCray to MUSC was for memory problem?

24 A: Right.

25 Q: I suppose Dr. Faber did an examination of Mr. McCray
and gave his opinion regarding the complaint of memory

trouble?

A: Correct.

Q: And the history that Mr. McCray gave to Dr. Faber was that he's had memory problems his entire life, is that not correct?

A: That is correct.

Q: He also reported that there was no significant head trauma, correct?

A: He did.

Q: Anywhere on this two-page letter is there ever a reference to the December 20, 2008 motor vehicle accident?

A: No there is not.

Q: Also under examination at the bottom part it says musculoskeletal, do you see that portion?

A: Yes.

Q: Am I correct that it says full range of motion of all major joints without pain? Did I read that right?

A: You did.

Q: And then on the second page where it says strength, for the left lower extremity the patient has five out of five on the strength level, did I read that right?

A: You did.

Q: And his final conclusion is that he doesn't know what is causing memory problems, is that laymen's terms basically he came up with?

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1 A: That's correct.

2 Q: December 29, 2009, the report that you got, you got
3 some mention here of additional therapy that may be
4 needed in the further, do you see that?

5 A: I don't have that sheet.

6 Mr. Allen: Permission to approach, Your Honor.

7 The Court: You may.

8 Q: The document I handed you is that the document that you
9 filled out around December of 2009?

10 A: Correct.

11 Q: At that point you said that he was going to need
12 additional physical therapy for the rest of his life?

13 A: Yes.

14 Q: Do you have any knowledge that has been done.

15 A: It was.

16 Mr. Allen: That's all I have. Thank you.

17 The Court: Any redirect?

18 Ms. Mullis: Yes, Your Honor.

19 Doctor Neal - Redirect Examination by Ms. Mullis:

20 Q: The neurological work up that was done at the
21 University specialist clinics, were the impressions of
22 Doctor Faber that Mr. McCray had cognitive decline of
23 uncertain etiology?

24 A: That's correct.

25 ~~Q: Part of that was based on the fact that he reported no~~

significant head trauma?

A: That's correct.

Q: Do you know where he got his information that Mr. McCray had no significant head trauma?

A: From the patient.

Q: Okay. And, if Dr. Faber was aware that Mr. McCray had been in an accident on December 20, 2008 where he suffered head trauma and in fact had a CT scan in the emergency room that day, do you think that that would have changed his report of no significant head trauma?

Mr. Allen: Objection.

The Court: Sustained.

Q: Can Dr. Faber only report the information that is given to him by the patient?

A: I sent him a copy of all of my records. I'm not sure whether he read them or not, you'd have to ask him.

Q: Do you know if included in your records were the emergency room records with the CT scan from Trident Hospital in December of 2008?

A: No just my notes.

Q: And you have the records from Trident Hospital in December 20, 2008?

A: I do.

Q: So you were aware that Mr. McCray had head trauma in 2008?

A: I am.

- 1 Q: That he hit his head, is that correct?
- 2 A: That's correct.
- 3 Q: And that he had a CT scan in the emergency room?
- 4 A: That's correct.
- 5 Q: As a physician, do they do CT scans in emergency room
- 6 when there isn't a head trauma?
- 7 A: No.
- 8 Q: It hasn't been your experience, has it?
- 9 A: No.
- 10 Q: No, generally not. Mr. Allen asked you about permanent
- 11 impairment ratings that have been given to the left leg
- 12 and left foot on December 29th of 2009. You have got
- 13 it in front of you. Are those the exact same numbers
- 14 that you just gave me today?
- 15 A: Yes.
- 16 Q: Left foot is 28 percent. I'm sorry left foot is 20
- 17 percent and left leg is 28 percent?
- 18 A: Correct.
- 19 Q: So you've continued to be consistent with your
- 20 permanent ratings to Mr. McCray those haven't changed,
- 21 is that correct?
- 22 A: They have not.
- 23 Q: He asked you if you are board certified. Are you board
- 24 qualified?
- 25 A: I am.
- Q: ~~You just aren't taking the test?~~

- 1 A: Well, we get re-certified every two years. I retired
2 so why am I going to go back through the testing and
3 spent 800 bucks for that. It's just not necessary.
- 4 Q: What do you need to be board certified to do?
- 5 A: Nothing.
- 6 Q: Have you reviewed --- Oh, he asked you about whether or
7 not you should be referring to Dr. Spearman about
8 permanent impairment ratings?
- 9 A: Yes.
- 10 Q: Do you know when the last time Dr. Spearman saw Levern
11 McCray?
- 12 A: He told me but I don't remember.
- 13 Q: Would 2009 seem fair?
- 14 A: It sounds right.
- 15 Q: And the jury has heard from Dr. Spearman and his
16 opinions on his injury. Do you know what doctor Smith,
17 the orthopedic over at Moore was treating for Levern
18 McCray?
- 19 A: The ankle.
- 20 Q: Only the ankle?
- 21 A: Right.
- 22 Q: Was he treating any other part of him that you were
23 aware of?
- 24 A: No, he was not.
- 25 Q: What do you do what he did for Mr. McCray?
- A: Took the screw out.

1 Q: You saw him on December 30, 2008 in relation to this
2 accident, do you take a complete medical history when
3 you treat patients that you have a gap in treatment?

4 A: Yes. As a matter of fact on each visit I do a detailed
5 assessment.

6 Q: And are you required to get a complete medical history
7 in order to treat and diagnose patients?

8 A: It's not required but that I think you can get into a
9 bag of worms if you don't do it.

10 Q: If you don't know what's going on medically, how could
11 you treat it?

12 A: That's correct.

13 Q: Okay. Is Ms. McCray still in pain today from his left
14 leg?

15 A: He is.

16 Q: And from his left foot?

17 A: He is.

18 Q: And from his left knee?

19 A: Yes.

20 Ms. Mullis: Those are all the questions I have.

21 The Court: Any objection to the witness being excused from
22 the plaintiff?

23 Ms. Mullis: None.

24 The Court: From the Defendant?

25 Mr. Allen: No, Your Honor.

~~The Court: Doctor, you are excused.~~

1 (Doctor Neal excused)

2 The Court: Mr. Foreman ladies and gentlemen, I'm going to
3 give you a quick restroom break. During the break please do
4 not discuss the case and please leave your notepads in your
5 seats.

6 (Jury leaves courtroom 10:43)

7 The Court: Okay. I have two things I need to deal with one
8 of which is I have a note from a juror. I'm going to deal
9 with that second because I'm still sort of contemplating how
10 I'm going to handle that. The other Mr. Allen's objections
11 to Mr. Dailey's deposition. I've got to find this list.

12 Ms. Mullis: If I could make an attempt to simplify some of
13 that.

14 The Court: Sure.

15 Ms. Mullis: One of our problems is that we have marked a
16 couple of the exhibits that are in Ms. Dailey's deposition
17 that she refers to in her deposition and we thought it might
18 be confusing because she refers to them in her deposition by
19 a different exhibit number and page number. So, if we could
20 cross-reference those exhibits I won't be happy to not
21 readmit them as a separate exhibit in her deposition again.

22 The Court: Do you agree with that Mr. Allen?

23 Ms. Mullis: And it would present me from having to edit or
24 deal with that later.

25 Mr. Allen: Well, the exhibits that have already been
~~stipulated in I have no problem with that.~~

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1 The Court: That's what she's talking about.

2 Ms. Mullis: So those would eliminate those problems.

3 Mr. Allen: Once these are in they are in.

4 The Court: Okay.

5 Mr. Allen: But I don't know if it resolves my objection.

6 The Court: I don't really see a problem but, I mean, that
7 will help the court reporter. I mean, you want to do it
8 that way and then I'll agree to it, that's fine.

9 Ms. Mullis: So, Plaintiff's exhibit number, the one that is
10 identified as Plaintiff's Exhibit ID number five for
11 identification purposes?

12 The Court: Right. That's for id.

13 Ms. Mullis: So that she refers to and initials at the bottom
14 right-hand corner and I think we just --- I think we have to
15 redact all the arrest in ...

16 The Court: I don't think he has agreed to that document so
17 it is still under advisement.

18 Ms. Mullis: Okay. Let's see which other one. Oh, the copy
19 of the bag.

20 The Court: He hasn't agreed to that either.

21 Mr. Allen: Is that 17?

22 The Court: I have not. That will still be marked for id.

23 Ms. Mullis: Okay. And then Plaintiff's Exhibit 18 the
24 toxicology reports.

25 The Court: He agreed to that, didn't he?

~~Mr. Allen: That was ID, too?~~

1 The Court: I thought you agreed to the toxicology report.

2 Mr. Allen: No. My thing was ...

3 The Court: Or did you agree to the ... I can't remember.

4 I'll have to go back and walk at the transcript.

5 Mr. Allen: My position was that if the court is going to
6 find proper foundation and chain of custody I agree that she
7 produce those. My only objection to them is they are
8 somewhat cumulative and unnecessary for the jury. I mean
9 she's going to testify as to what the BAC level is in the
10 testimony.

11 The Court: The graphs would come in because they have a
12 tendency to confuse the jury because they wouldn't have a
13 clue as to what those graphs mean. I would be concerned
14 with them taken drafts one at a time and do their own,
15 because jurors can be, what's the word I'm looking for,
16 lately more and more they think that their role in the
17 finding is to be private investigators instead of listening
18 to the facts as they are actually produced in trial and make
19 a decision. So more and more I'm getting factual questions
20 from jurors --- Based on their experience, you know my
21 cousin who did so and so, what do you think, you know then
22 you end up with all those questions. I think those graphs
23 because they are highly scientific are appropriate for the
24 witness to use as she testifies in aiding and understanding
25 the scientific methodology that she employed to come up with
~~her analysis, but in terms of them being admissible for any~~

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1 purpose I think that they have a greater tendency to confuse
2 the jury. Now the report itself usually comes in. The
3 report of what the BAC level is would normally come in. I
4 mean there could be some argument that its cumulative but I
5 don't see the prejudice to it coming in. So we'll mark and
6 admit subject to your objection.

7 Mr. Allen: Thank you.

8 The Court: Madam Court Reporter, you can cross-reference the
9 numbers however you need to make it work for you.

10 Ms. Mullis: They are done on that already.

11 Mr. Allen: The other very brief, since it looks like that's
12 what we're doing. One of the depositions is a court's
13 exhibit. One of them is a plaintiff's exhibit.

14 The Court: They should all be courts exhibits. They are not
15 evidence. They do not go back to the jury.

16 Mr. Allen: That's all. Thanks.

17 The Court: Now, dealing with the objections to Ms. Dailey's
18 deposition. It appears to me after having read the
19 deposition that Mr. Jennings who covered the deposition
20 appeared to know it was taken de bene esse. He made very
21 extensive objections and grounds for those objections for
22 the record. So as to preserve whatever objection the
23 defendant wanted to make regarding the testimony. The
24 objection at page 48, line seventeen thru line two is
25 sustained. It was not responsive to the previous line of
~~questioning and recross. Page 46, I'm going backwards, page~~

46 ...

Ms. Mullis: Hang on because you have to ... page 48.

The Court: Line 17 thru page 49 line 2.

Ms. Mullis: So we can just stop it ...

The Court: Outside of the scope. However you want to do it.

Page 46 the objection was at line 20-22.

Ms. Mullis: Page 46?

The Court: Line 20-22. Yes to some extent but it was a

follow up question. I'm overruling that objection. I don't

see any prejudice. Page 24 is the next one in line. Again,

I'm going in a descending order. Line 5 thru page 25 line

7 the objection is overruled, it is not speculative it is

verified by the actual chain of custody. She is testifying

based on rational perception of what their normal procedure

would be and who she interacted with when she was employed

at Sled and it would have been one of those two individuals

that brought the sample from the evidence room up to the lab

and the actual chain of custody shows exactly who did that.

So, that would go to her memory, but it is not speculative.

That objection is overruled. The next is page 19 line 6.

That's overruled. It is an appropriate question. And

actually I'm trying to figure out because he did not make a

contemporaneous objection to that question. The question

is, and those are the results of the blood test of two? She

answers, José Valle.. And then the question is thank you.

~~And then Ms. Mullis says we're going to submit the entire~~

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1 South Carolina Law Enforcement Center jacket as Plaintiff's
2 Exhibit 1 and then Mr. Jennings says, and that would be what
3 pages, and she says pages 1 through 14, that's the entire
4 packet. Then he objects to that. Is that the objection you
5 actually were talking about?

6 Mr. Allen: Yes.

7 The Court: Okay.

8 Mr. Allen: To the extent ...

9 The Court: I will sustain that objection to the extent that
10 I'm going to take up each one of those just because a file
11 is kept in the ordinary course does not mean it just comes
12 in, it still has to have relevance and so that's only one
13 layer of the inquiry. Really in the business records
14 exception really deals with the veracity of the documents,
15 the fact they are kept in the ordinary course of business is
16 not likely that such documents are fabricated because they
17 are kept as a regular business record. That is one layer of
18 the inquiry. It still does not obviate the need to
19 determine if the document of itself is relevant which means
20 it doesn't make some issue consequence more or less
21 probable. And so I would prefer to take each one of those
22 individually especially since some of them are duplicates.
23 So that objection is sustained to the extent it really is
24 moot because we are already dealing with each exhibit
25 individually. So that is actually lines 9 through 25. That

1 that takes us to page 12, 11 through page 13 line 11. Ms
2 Dailey was stipulated to as an expert and that is at page 9
3 where Ms. Mullis offers her as an expert for a limited
4 purpose of testifying as a forensic toxicologist to verify
5 the report and test results of the sample taken in December
6 2008. Ms. Jennings indicates at line 21 he will object to
7 that with the stipulation that she is not going to give any
8 opinion, have any testimony regarding the effects of alcohol
9 of the defendant as well as anything, going to page 10 line
10 1, as well as anything that she has already told us
11 regarding the fact that she has not been at SLED and cannot
12 testify regarding instrumentation, things of that nature and
13 Ms. Mullis answers at line four, okay. We then fast forward
14 to page 12, line 11, where she is basically being asked some
15 background questions as to how the sample came to be at
16 Sled, page 12, as to how the sample came to be at Sled and
17 who drew the blood. These are all underlined foundational
18 questions that are appropriately asked of an expert. It is
19 really procedural to some extent it is not offered for the
20 truth and even if it were as an expert she can testify as to
21 hearsay, so the objection would be overruled. That goes
22 over to page 13 line 11. Let's see here. Actually, to some
23 extent it is cumulative because State has already testified
24 that she took the sample so. Also the objection is that Ms.
25 Dailey didn't produce the document but the document is part

1 of Sled's business record clearly and it would have been
2 transmitted to them for service of performing the test.
3 From the Sled Forensic Services Request Form, the paper that
4 comes in every time someone submits a sample. So apparently
5 that is a form that they use in-house and that is required
6 I would imagine by some form of regulation and it is part of
7 her file that was maintained by Sled as a part of the
8 testing of the sample. She clearly can testify that that
9 sample did come to her in a sealed bag with that evidence,
10 I mean with that information on it and she certainly would
11 have it with her in performing in the sample and is still a
12 part of Sled's record. I looked at the testimony regarding
13 the evidence bag. There was no contemporaneous objection
14 made therefore it would be waived. However even if a
15 contemporaneous objection had been made she clearly was able
16 to authenticate that that's a photocopy kept as a part of
17 Sled's record of the evidence bag and it would be
18 admissible. However all of that information regarding the
19 arrest, suspect or anything that connotes a criminal charge
20 needs to be redacted. She indicates that they take a
21 photocopy of the front and back of the evidence bag and that
22 that was the bag that contained the sample, the
23 toxicological analysis. And what would have been in the
24 evidence bag this was a blood sample. That's at page 11
25 line 22. Okay. So you all need to get together and redact

1 whatever needs to come off there and makes any reference to,
2 I don't know which number that is. Does that make any
3 reference to him being a criminal suspect or anything that
4 relates to any criminal charge all that needs to be redacted
5 in that document. I don't remember whether it's 17, I think
6 it's number 17. What number is the evidence bag?

7 Ms. Mullis: Exhibit 3 in the deposition that will be, and
8 no. Plaintiff's Exhibit 3 in Heather Dailey's deposition
9 marked as Plaintiff's exhibit for identification purposes
10 number 17 and will be as Plaintiff's Exhibit ... what number
11 are we at now?

12 Court Reporter: Number 19.

13 Ms. Mullis: Number 19 now.

14 The Court: And then that is subject to be redacted?

15 Ms. Mullis: Yes ma'am. Is that too confusing?

16 Mr. Allen: Why don't you just take the ID off and leave it
17 as 17?

18 Ms. Mullis: Because then we're going to add the front page
19 and it won't make any sense.

20 (Off the record discussion)

21 The Court: Is there an objection to the admissibility of
22 that? That's Plaintiff's Number 8 for ID.

23 Mr. Allen: Other than it being the first steps of the chain
24 have been testified to by the further steps down the chain
25 namely Heather Dailey getting it from the refrigerator was

1 never testified to.
2 The Court: She testified she got it from the refrigerator.
3 She said they ... well, I mean ...
4 Mr. Allen: That is my concern.
5 The Court: There is direct and circumstantial evidence. It
6 didn't walk out of the refrigerator she had to get it.
7 Mr. Allen: The way I read the deposition before I seen that
8 log I assumed that Brandon or Kimmie brought it to her and
9 handed it to her and that clearly wasn't the case based on
10 the document assuming that document is authentic.
11 The Court: It is authentic. I've seen too many of them.
12 That refrigerator is secured. If it's on here that is the
13 person who touched the sample and that is the person who got
14 out the refrigerator. It would go to weight and not
15 admissibility. It is clearly a document kept in the
16 ordinary course of business and generated by their computer
17 system and I'm not even certain if there required by
18 regulation to do this. I really don't know all of their
19 regulation so I'm not going to pretend that I know and I'm
20 not even clear if by statue they are required to do this.
21 So I'm not going to speculate on that either. Neither of
22 those issues or those observations, I don't know that either
23 one of them is disposale on the admissibility of document,
24 but it is a chain document and I have no reason to question
25 its veracity and knowing the internal controls that Sled has

1 because of their responsibility in testing samples I have no
2 reason to question the veracity. I'll note your objection.
3 It will be marked as Plaintiff's Eight. And she does may
4 reference to it and I'm referring to Ms. Dailey in her
5 testimony.

6 Mr. Allen: Yes she says that it exists somewhere, but she
7 never saw it I can guarantee you that.

8 The Court: Well I read the deposition yesterday before I
9 left and while I have a pretty good memory I don't remember
10 exactly what she said but it really doesn't matter the other
11 three witnesses from SLED testified about it. They were
12 able to authenticate it and confirm it's an internal
13 document and is generated by their computer system.

14 Ms. Mullis: So the remaining one is Plaintiff's Exhibit 5.

15 The Court: I've still got to think about that one.

16 Ms. Wallace: Yes ma'am. That is plaintiffs 17.

17 The Court: That is the evidence bag. You all need to
18 redirect that reference to him being a suspect or any of
19 that other stuff.

20 Ms. Mullis: Okay redacted successfully.

21 The Court: Juror 20 told the bailiff that she had written a
22 note on her pad she wanted me to have. I'm going to share
23 it with you all and then we will decide how we're going to
24 deal with it keeping in my perception is often reality.

25 Ms. Mullis: I'm sorry who was it?

1 The Court: Number 201. Will you please tell the judge that
2 half of the jurors are indirectly, in quotes, discussing the
3 case in the jury room. Why this is going on the rest of us
4 are discussing non case related things so as not to
5 participate in that discussion. I have tried to discourage,
6 I think that is those discussions but to no avail. There is
7 several ways I can handle this because really them
8 discussing the case is a matter of contempt, a matter of not
9 following the court's instructions. I could tell them that
10 it has come to my attention that there is the potential that
11 there has been indirect discussions of the case. That when
12 the court gives an instruction that it is to be strictly
13 adhered to. That it is not a matter of them, you know
14 whether they want to do it or not do it, but that it becomes
15 an issue of contempt and it comes to my attention that it
16 has continued then I'll have to individually voir dire each
17 one of them if it comes to my attention that they have
18 violated my instructions then I would have to advise them of
19 that right to self incrimination. I don't really want to go
20 that deep with it. I think a strict, and I got ahead of
21 myself I think perception is often reality and having dealt
22 with many many jurors and many many personalities of jurors,
23 I'm not certain that that is actually what's going on
24 because we are not in the jury room and the use of the word
25 indirectly means that's her perception that they are

1 discussing the case, does that mean that she doesn't
2 perceive it's happening, no that is her perception and
3 perception is reality. However my only other option would
4 be to individually, voir dire each juror and ask them have
5 you been discussing the case, have you violated the court's
6 instructions. As a result of you discussing the case have
7 you formed any fixed opinions even if they have formed fixed
8 opinions can you disabuse your mind of that and continue to
9 listen to the evidence and follow the law as it is
10 instructed and render a fair and impartial verdict. That
11 would take us about an hour to do by the time we do each
12 one. So I will give you all the option, it doesn't matter
13 to me. I tend to think a strict admonishment would work and
14 then say if it comes to my attention again that this is
15 going to be a whole different situation. When I say don't
16 discuss, it does not mean indirectly, it does not mean
17 directly, it means not at all and it is a very serious
18 undertaking that you remain impartial until you've heard all
19 the evidence and arguments in the law. So, I'll hear from
20 you all what you all think, what y'all's preference is?
21 Mr. Allen: With respect and indifference to the court and
22 Plaintiff's lawyer, I think the proper remedy is a mistrial.
23 The judge gave the instruction and the jury should not
24 consider evidence. It's not fair for them to start
25 deliberations ...

1 The Court: I don't know that they have that's why I have to
2 ... the Supreme Court has indicated that when a note like
3 this comes to me that I would have to individually voir dire
4 each one of them, and even if they told me they have
5 discussed it the mistrial is still not appropriate I still
6 have to the ask them have you formed a fixed opinion as a
7 result of what you've done. And if they tell me yes even
8 once I get a yes to that inquiry, I still have to ask them
9 can you disabuse your mind of that opinion and continue to
10 listen to this case and apply the law as the court instructs
11 and render a fair and impartial verdict. And if they answer
12 yes that's the end of the inquiry. The lease preferable
13 method is a mistrial. You first start with the curative
14 instructions, you start with voir dire, but don't just ...
15 because really discussing the case is a issue of contempt.
16 It is a issue of not following the court's instructions. It
17 is really between me and them and them going to jail. Okay.
18 Now as lay people, you know, it's a weird thing, and I say
19 weird I use that word tentatively. I don't think I've ever
20 had a jury prematurely discuss a case. People usually take
21 it so very seriously that they don't. One time I had to
22 reconstitute a jury because someone overheard a juror's wife
23 discussing a case in a break room or she thought she
24 overheard the juror's wife, who's a nurse in the physical
25 therapy department in a hospital. But what turned out

1 after I asked the juror, he said I never discussed it with
2 my wife. I've discussed after jury duty that I could not
3 talk about this case. Now, my wife may have made some,
4 because my wife is a little bit of a busy body, she might
5 have made some assumptions based on my temperament and my
6 disposition because she knows me but I never discussed it
7 with her. But I think, not think, I know what the case law
8 mandates and a mistrial would not be mandated in this
9 instance. We have two options. I can either give them a
10 strict admonishment or I can give individually voir dire
11 each and every one of them and ask them have you discussed
12 this case and violated the court's instructions?

13 Mr. Allen: I think I understand the court's ruling. There
14 is no way a mistrial is appropriate.

15 The Court: Not under these circumstances. I would have to
16 go beyond this inquiry because one juror is saying that
17 somebody is indirectly discussing it. I just can't take her
18 perception on it. I have to make an independent assessment
19 on whether the activity is actually taking place.

20 Mr. Allen: Then, taking that into light, I'm okay with a
21 strict admonishment.

22 The Court: Okay. Then what I will do is I'm going to tell
23 them, you are your brother's keeper and if it comes to my
24 attention what I'm going to have to do is I'm going to have
25 to individually talk to each one of you and under your oath

1 you're going to have to tell me what's going on and if you
2 violate the oath, I need to advise you that you could be
3 found in contempt of Court. This is a very serious
4 undertaking, that the parties only get one time in court,
5 the plaintiff and defense and they are entitled to a fair
6 and impartial trial of the case. But I don't think the
7 mistrial is mandated. I can't take one person's word that
8 somebody else is discussing the case and I have to talk to
9 each one of them and I would have to make an independent
10 assessment based on my perception of each juror whether they
11 are telling me the truth and whether the activity actually
12 took place. So, if you all are fine with me giving a strict
13 admonishment that's what we'll do and if not speak now or
14 forever hold your peace because it doesn't matter to me one
15 way or the other, individually voir dire or whether I give
16 them a strict admonishment. If you have any concern about
17 whether you think they are actually discussing it then you
18 need to have me voir dire each one of them and I will give
19 you that option. But based on somebody else's perception,
20 you know, I will give you all that option. What is the
21 Plaintiff's preference?

22 Ms. Mullis: That we do a panel wide admonishment.

23 The Court: Okay. And I'm not going to tell them who
24 told me. But I suspect if it continues she is going to tell
25 me and I'm going to get to the bottom of it. I will

1 individually voir dire each one of them. If somebody tells
2 me that they can't be fair and impartial, it is unreasonable
3 to think that somebody listens to testimony they are not
4 going to start formulating opinion, that's not --- I mean we
5 would like to believe that you don't do that but people
6 start formulating their opinions. What happens is once they
7 hear closing arguments and they hear the law that is applied
8 to that then they modify those opinions and those
9 perceptions because fortunately they are guided by the law
10 as to how they are supposed to process all that information
11 and what their function is. What is the defenses
12 preference? Admonishment or voir dire each juror?

13 Mr. Allen: Admonishment.

14 The Court: All right. Who is the next witness?

15 Ms. Mullis: Dr. Smith.

16 The Court: How long is that deposition. As I recall
17 that is an hour and eight minutes. Okay. We should be able
18 to get through that before lunch. What other witness do you
19 need to call?

20 Ms. Mullis: Heather Dailey.

21 The Court: Her deposition, as I understand you all told
22 me, is one hour?

23 Ms. Mullis: Yes, ma'am.

24 (Off the record discussion)

25 The Court: So it's an hour exactly. Okay. Number one

1 would not be admissible because there is no one to
2 authenticate that that label was generated by the South
3 Carolina Highway Patrol was it not or was it generated by
4 SLED. I really don't know that it's relevant in light of
5 the fact that the evidence bag comes in with the same label
6 on it. It would seem to me to be cumulative.

7 Ms. Mullis: Generated by SLED and SLED testified to it
8 it and that was the bag ...

9 The Court: Number one is LO818272 No. 1 South Carolina
10 Highway Patrol District and then on evidence it says that
11 same thing. There is no need to have them both. It has the
12 number on it. We've already dealt --- there was no move to
13 admit number three, correct, we've already moved, which is
14 the front of the ...

15 Ms. Mullis: Now you've got me confused.

16 The Court: This three attached to her deposition which
17 is the evidence of something, it's the front of the label
18 for the evidence bag and then the back of the label where
19 Ms. Staton's signature is.

20 Ms. Mullis: We've got that in. It came in under three.
21 We did it separately. So it's cumulative. That's fine with
22 us.

23 The Court: Number five is not relevant. The contents of
24 the file because the whole file is not coming in. I really
25 don't see any probative value that particular content has.

1 The requests to do the test she testifies to it, I just
2 don't see any purpose for it being admitted. Its
3 uncontroverted that they were asked to test a sample. And
4 there is replete evidence in the record as to when the
5 incident occurred, who was being tested and the rest of this
6 form deals with DUI whether it's blood and the officer's
7 signature when he, I guess, dropped it off. So that's
8 cumulative. Number seven is a chain of custody which is
9 cumulative because we already have the actual chain coming
10 in to the record. The urine collection report is under
11 advisement. I've already ruled that the charts which are 9,
12 1, 11, 12 and 13, while a demonstrative aide for the chemist
13 toxicologist in terms, in using in terms of how she, the
14 scientific methodology she employed to come to her opinion
15 are helpful demonstratively they would not aid the jury at
16 least going back that they would be cumulative. I've
17 already admitted the BA result which is 14 and then there is
18 another 14 so that is just a duplicate and then the last two
19 pages are duplicates of what we've already done. So that
20 should cover everything.

21 Ms. Mullis: So, I got confused with 8. I apologize.

22 The Court: Eight has been marked for i.d. I haven't
23 made a decision on it yet.

24 Ms. Mullis: Thank you.

25 The Court: You're welcome. So whoever that belongs to

1 it needs to be returned. I can't remember who gave me a
2 copy.

3 Ms. Mullis: Thank you.

4 The Court: We'll have the juries exhibit marked as a
5 court's exhibit and I'm going to give it to the court
6 reporter. Okay. We've covered everything. You've tried
7 the video and it works? Are you ready to proceed?

8 Ms. Mullis: We have it where it starts.

9 The Court: Okay are we ready? Okay. You can go ahead
10 and get the jury.

11 (Jury enters court room 11:44)

12 The Court: Ladies and gentlemen we appreciate your
13 patience. We had some matters of law that we needed to work
14 through so that we could continue with the proceedings. So
15 we appreciate your patience as we work through those
16 matters. We are now going to hear additional testimony by
17 deposition and I've already explained to you what a
18 deposition is so we will proceed with that when the
19 plaintiff is ready. You may proceed when you're ready

20 Ms. Mullis: This is the deposition of Doctor Smith.

21 (Video deposition of Dr. Bret Smith was played for Jury)

22 The Court: Mr. Foreman, Ladies and Gentlemen we are
23 going to take advantage of this break in testimony to take
24 our lunch recess. During the break you are not to discuss
25 this case in any manner whatsoever. You are not to have any

1 contact with anyone in or about the courthouse and you're
2 not to do any independent research of any type regarding the
3 facts and circumstances of this case. We will resume, let
4 me give you a little longer --- Give me one moment. We're
5 going to break until 2:15 which gives you about an hour and
6 20 minutes for lunch. It has come to the court's attention
7 and whether it's a matter of perception or reality that the
8 jury potentially has been prematurely indirectly discussing
9 this case. I need to strictly advise you that there is to
10 be absolutely no discussion whatsoever concerning the facts
11 and circumstances of this case. To begin to discuss what
12 you have heard and to begin to process that information
13 would be inappropriate. That is deliberations by its very
14 nature. And you're not allow to deliberate until you've
15 heard all of the evidence in this case. You've heard the
16 arguments of the parties and the instructions on the law by
17 the Court. The oath that you have taken as jurors is a very
18 serious undertaking. These parties in this case only get
19 one opportunity to try this case and it should be done
20 fairly. And according to the rules that have been mandated
21 by the Court. If I get any additional information that this
22 is taking place it becomes an issue of contempt by not
23 following the court's instructions. I have no doubt that
24 each of you are going to follow the Court's instructions
25 accordingly and that we will not have to go in that

1 direction, but out of an abundance of caution, I give this
2 additional instruction just to insure, and I know it's easy
3 for me to say that. Sometimes it very difficult, especially
4 since you're in that room together it's only natural to have
5 a temptation to want to discuss what you've heard, it's only
6 the nature of being a human being, being inquisitive so
7 that's natural. But, I need you all to strictly resist any
8 such temptation and have no discussion regarding the case.
9 I hope that you all have a great lunch and we will see you
10 at 2:15. Enjoy your lunch recess.

11 (Jury exits court room for lunch break 12:59)

12 The Court: Are there any exceptions to the curative of
13 instructions from the Plaintiff?

14 Ms. Mullis: None, Your Honor.

15 The Court: From the defense?

16 Mr. Allen: No, Your Honor.

17 The Court: Have a great lunch. See you all at 2:15.

18 (Court lunch break 1:02)

19 The Court: Are we ready to get started?

20 (Off the record discussion)

21 The Court: Bring the jury in.

22 (Jury enters court room at 2:26 p.m.)

23 The Court: You may be seated. Good afternoon ladies
24 and gentlemen. I hope that you all had a wonderful lunch
25 recess we are now going to resume testimony and anticipate

1 that we will finish the case today. There's some matters of
2 law that we need to take up, I'm going to kind of play it by
3 ear to see how we are going with it. Because normally
4 closing arguments take a little while and I would not want
5 us at 5:00 or 5:30 starting deliberations so we may have to
6 break a little early today and then have closing arguments
7 and instruction in the morning. So, I just wanted to give
8 that to you all for your planning purposes. Again, we
9 appreciate your patience and the Plaintiff may call its next
10 witness.

11 Ms. Mullis: This is Heather Dailey.

12 (Video deposition of Heather Dailey played)

13 Ms. Mullis: The Plaintiff rest.

14 The Court: Okay we will take a break. During this
15 break please do not discuss this case and please leave you
16 note pads in your seats. If you will go with the Bailiffs.
17 (Jury leave courtroom for break at 3:16)

18 The Court: You may be seated. The plaintiff has rested
19 are there any Motions?

20 Mr. Allen: Yes, Your Honor.

21 The Court: You may proceed.

22 Mr. Allen: The Defendant moves for a directed verdict
23 as to any claim for future medical expenses or costs. I
24 don't know if the Plaintiff is seeking it but ...

25 The Court: I don't think they are seeking any. I think

1 they are seeking future pain and suffering due to the
2 permanency that they allege with this injury.

3 Mr. Allen: The Defendant moves for a directed verdict
4 as to future economic damages. The testimony that the
5 Plaintiff is relying upon is Jay Welch. He's the only one
6 that talked about this future claim of maybe the Plaintiff
7 was going to be a supervisor and get additional compensation
8 for that role. I don't think his testimony every included
9 the words nor could his testimony be construed to include
10 the words reasonably certain to occur which is a standard of
11 proof for future damages.

12 The Court: I want to hear his full argument then I want
13 to hear your full response.

14 Ms. Mullis: Okay.

15 Mr. Allen: Lastly, the defendant moves to strike the
16 claim for punitive damages. The court erred in allowing the
17 blood alcohol content to come in. The proper chain was not
18 established. Therefore there was no proper foundation.
19 There was no full authentic copies of the SLED documents.
20 Further Defendant moves that any award for punitive damages
21 would be unconstitutional they fail to meet the factors in
22 Gamble and BMW.

23 The Court: You may respond.

24 Ms. Mullis: Your Honor, as to the future medicals. I
25 don't think he specifically said anything about future

1 medicals. Dr. Spearman and Dr. Smith had both testified
2 that they believe that there are future medicals

3 The Court: Did they say an amount?

4 Ms. Mullis: They did not.

5 The Court: Did they testify as to what the services
6 costs previously?

7 Ms. Mullis: They did not.

8 The Court: Whenever you talk about something being
9 future damages, I'll use the best example I can use is the
10 revision of a scar or something like that you generally have
11 someone come in and testify that future assistance is going
12 to be required and this what we anticipate it will cost. I
13 think that you have to have that in order to rise above it
14 being speculative. To simply say a person may need to come
15 back to the doctor is not enough unless, of course, you can
16 connect the dots said say this is what it costs previously
17 and this is what it probably will cost in the future.
18 Can't just throw out there he might to come back to the
19 doctor, he may need additional help. It has to be more
20 concrete than that.

21 Ms. Mullis: We think there is clear evidence to
22 support the future lost wages and future loss of income that
23 was testified to by not only Jay Welch who said that he
24 would have hired him as a supervisor and that Mr. McCray
25 would have in fact been his supervisor on his job site had

1 he not had the injury but Mr. McCray testified that he had
2 been a supervisor in the past and his other supervisor had
3 said that he could no longer do the job. We brought in
4 Oliver Wood who testified to the future lost wages as an
5 economic expert, he was qualified as an economic expert and
6 he gave an opinion in regard to the future loss economic
7 losses and present day value and we believe that that is
8 sufficient evidence to put in front of a jury in order to
9 beat summary judgment. The plaintiff also testified in
10 regard to his inability to be able to do that job. His
11 attempt to get the job in North Carolina. His loss of the
12 opportunity to do that job and what his lost was. He can no
13 longer hold certifications on a crane, he has a loss of
14 future income because cranes pay more than to work on a dump
15 truck and we think that is clearly sufficient evidence to
16 put in front of a jury in order to establish a claim for
17 future lost wages.

18 The Court: Have you addressed everything?

19 Ms. Mullis: The punitive damages aspect of the case.
20 Not only do we believe that we have put forth sufficient
21 evidence as to the punitive damages claim we believe the
22 plaintiff is entitled to a directed verdict as to the matter
23 of punitive damages. The defendant has offered no evidence
24 to the contrary that the defendant crossed over the center
25 line, violated a statute, and in fact was above at .013 in

1 alcohol blood when the collision occurred. It is a
2 violation of a statute, punitive damages, my client is
3 entitled to punitive damages award at this point as a matter
4 of law. We believe that the award of punitive damages at
5 this point is no longer discretionary to the jury and that
6 we are actually entitled to a jury charge along those lines

7 ...

8 The Court: I'm not dealing with charge conference right
9 now.

10 Ms. Mullis: Magnolia versus North Property Owners
11 Association, which is a case that came out on February 15 of
12 2012, which held ...

13 The Court: I'm very familiar with the case, I've read
14 it. I'm not dealing with charge conference. I need to hear
15 your motion.

16 Ms. Mullis: Yes ma'am.

17 The Court: We will deal with charge conference at the
18 charge conference.

19 Ms. Mullis: That punitive damages don't rest in the
20 jury's discretion but are recoverable as a matter of right.
21 So, at this point, we believe we have offered sufficient
22 evidence, we've established a clear chain of evidence from
23 and a chain of custody as to the blood alcohol level from
24 the nurse who came in and testified live, to the trooper who
25 testified that he verified and sealed the blood sample, each

1 trooper that took possession of it, each forensic
2 toxicologist that took possession of it at Sled down to the
3 forensic toxicologist who verified the blood sample and
4 analyzed it. We believe that's a proper chain, that the the
5 blood-alcohol level of .03 is sufficient evidence to go in
6 front of a jury that it demonstrates clear violation of a
7 statute. Reckless, willful, wanton conduct of the Defendant
8 and there is no evidence to the contrary. We think the
9 directed verdict should be denied on that and we think the
10 court should, in fact, grant a directed verdict to the
11 Plaintiff's favor as to punitive damages.

12 The Court: Anything further?

13 Ms. Mullis: We also believe that we are entitled to a
14 directed verdict as to liability against the defendant as to
15 the matter of liability. I think they are admitting
16 liability ...

17 The Court: They've admitted simple negligence not
18 proximate cause for the reasonableness of his treatment.

19 Ms. Mullis: Okay.

20 The Court: That is what they have admitted in their
21 answer. They have admitted simple negligence, they didn't
22 admit liability.

23 Ms. Mullis: I think we are entitled to a directed
24 verdict as to liability at least. So simple negligence and
25 at least the proximate cause of the emergency room, the EMS

1 bill. Certainly they can't dispute that and they have
2 offered no evidence to show otherwise. He had a broken leg
3 at the scene. There was no evidence to contradict it.
4 Clearly met the burden of proof with that. It's just a
5 matter of honestly how much the actual damages are as far as
6 medicals and what the jury can award, should award for
7 punitive damages at this stage. That's all we have.

8 The Court: Would you like to respond?

9 Mr. Allen: Well, I think the issue as to a directed
10 verdict --- it is a little bit odd the fact that I am making
11 a motion and defending a motion at the same time but in
12 terms of the directed verdict as to damages I think it would
13 be difficult for the plaintiff and the court to direct a
14 certain sum at this point.

15 The Court: I don't think that is what she's asking.
16 She is saying that I direct a verdict. In other words, that
17 there is uncontroverted evidence in this record is that your
18 client cross the center line and hit the Plaintiff and as a
19 result of that he incurred injuries. The amount of those
20 injuries is still a question or the amount of the care and
21 the costs of those injuries, but as a practical matter the
22 only evidence in the record is only susceptible to one
23 inference that he was hit by a car and it caused him injury.
24 I mean, there wasn't a ghost on the road so. There wasn't,
25 and when I say a ghost, like another car that was there that

1 caused the accident and fled or some other unidentified
2 occurring that caused some sudden emergency, some assumption
3 of the risk. None of those things. The only thing that
4 cause it --- the uncontroverted evidence in this record is
5 that it was a car accident and that it was caused by the
6 defendant by crossing the centerline. I haven't heard
7 anything to controvert that.

8 Mr. Allen: Right and in our answer we admitted simple
9 negligence. I don't think there is an issue of duty
10 breached frankly proximate cause as to some of this
11 treatment.

12 The Court: Well, if you admit proximate cause the only
13 thing to instruct the jury on is on the reasonableness of
14 his damages.

15 Mr. Allen: Right.

16 The Court: Then you all would just argue to the jury,
17 they will argue he is entitled to this amount, you would say
18 that he's not.

19 Mr. Allen: I might be putting the cart before the horse
20 a little bit but I'm fine if your verdict says we fine for
21 the plaintiff in the amount of blank damages.

22 The Court: Or we find for the plaintiff in the amount
23 of blank damages actual and then for actual or punitive.

24 Mr. Allen: sure.

25 The Court: Whenever the court is considering a motion

1 for directed verdict, the court is required to view all the
2 evidence and all reasonable inferences in the light most
3 favorable to the non-moving party. If more than one
4 inference can be drawn from the evidence the case must be
5 submitted to the jury. The court does not have the
6 authority to decide credibility issues nor to resolve
7 conflicts in the testimony and evidence. If the evidence
8 yields, however, more than one inference, a directed verdict
9 is not proper. As regards to future lost wages the
10 arguments that have been raised are issues that go to weight
11 because it is contradicted, well really and uncontradicted
12 because it's only at this point we have only heard the
13 testimony of Oliver Wood and Mr. Welch but it becomes one of
14 the weight the jury would accord that testimony. That being
15 that there was a future lost of wages. And so there is
16 testimony to support that and it would go to the jury and
17 therefore a motion for directed verdict on those grounds is
18 denied. As regards punitive damages, again, it is not for
19 the court to weigh credibility issues nor is it for the
20 court to resolve conflicts in testimony in evidence.
21 Punitive damages are required to be established by clear and
22 convincing evidence which is not only that you are aware,
23 not only that you were wrong or negligent but that you have
24 conscientiousness of wrong doing as always it is generally
25 a factual issue except in very rare circumstances. It

1 involves reckless, willful and wanton behavior which is
2 always generally a factual issue determination as well. And
3 that can be established by violation of a statute or some
4 common law duty. Again, those being factual issues for a
5 jury or the finder of fact to resolve. Of course, and what
6 we're referring to is the concept of negligence per se is
7 only evidence of reckless, willful and wanton behavior and
8 is not an establishment of reckless, willful and wanton
9 behavior. So the jury can give it whatever weight it
10 determines it should have. In determining whether there was
11 a conscious failure sufficient to meet clear and convincing
12 standard required for punitive damages. As regards to the
13 chain of custody on the blood alcohol level, I guess I'm
14 going to go at this a little, probably a little differently.
15 I sustained the defendant's objection regarding the
16 admissibility of the conviction pursuant to 56-5-6160 and I
17 stand by that ruling. The statute is mandatory it does not
18 allow the admissibility of a conviction. However it does
19 not preclude the parties from presenting any evidence that
20 bears on the culpability of a party in terms of their
21 behavior, their breach of a duty, proximate cause in terms
22 of causing an accident or causing, well actually causing
23 damage, not necessarily causing an accident because there
24 are other forms of negligence or other forms of negligent
25 behavior. So clearly there is nothing that precludes the

1 defense from presenting evidence regarding anything that
2 bears upon the behavior of the defendant on that night that
3 would have caused the accident as it bears on punitive
4 damages and those elements are applicable to punitive
5 damages. So I stand by those earlier rulings and I
6 incorporate those in this rule of directed verdict on that
7 basis because clearly they can present evidence of his
8 impairment. All of those things constitute a violation of
9 statute which is negligence per se and is also evidence of
10 reckless willful and wanton behaviors for the jury to give
11 it whatever weight it determines it should have in its fact
12 finding. As regards to the chain of custody case law's very
13 clear where a substance is to be analyzed and a fungible
14 item, usually meaning, of course, drugs, blood or urine, the
15 party offering the sample must establish a complete chain of
16 custody as far as practicable especially where the sample is
17 passed through several hands. The identity of the
18 individuals who acquired the evidence and what was done with
19 the evidence is between the taking and the analyses cannot
20 be left and must not be left injector. Once the party
21 offering that evidence is able to identify each person who
22 handled the evidence and that is established and the manner
23 of the handling is reasonably demonstrated, our courts have
24 held that there is no abusive discretion by the trial court
25 in admitting the evidence absence proof of tampering, bad

1 faith and ill motive. And it is also clear precedent that
2 the testimony from each custodian of fungible evidence is
3 not a prerequisite to establishing a chain of custody
4 sufficient to establish admissibility. When providing proof
5 of the chain it is not necessary to negate all possibility
6 of tampering so long as the parties seeking to admit the
7 evidence has establish complete chain of custody as far as
8 practicable. I find that the plaintiffs have met this
9 burden by a preponderance of the evidence. They have
10 established a chain as far as practicable, in fact, they
11 have provided a complete chain other than those individuals
12 at Sled who by direct testimony other than the individual
13 who took it from the evidence locker up to the toxicology
14 lab that is provided by the chain, the internal document
15 provided by Sled as to who was responsible for the movement
16 of that item. So, the Court finds that the chain has been
17 established as far as practicable and there's no basis for
18 directed verdict on that basis. The court bases its
19 decision on State vs. Williams, State vs. Smith, SCDSS vs.
20 Cochran, ex parte DHEC and State vs. Taylor, which are
21 well-established precedent on the subject. I think that
22 covers everything doesn't it? And it is not appropriate for
23 the court to conduct post-trial review of punitive damages
24 prior to an award. If, in fact, the jury awards a punitive
25 damage award it is appropriate for the court to review those

1 damages pursuant to the BMW factors of which not all three
2 of those factors have to be established and the
3 proportionality review the court must conduct. However, at
4 this point there is more than sufficient evidence and it is
5 susceptible of more than one inference for the jury to
6 determine whether in fact punitive damages are appropriate
7 under these circumstances as presented. Therefore the
8 motion for directed verdict on that basis is denied.

9 Now, I think the charge conference will take us a
10 little beyond 4:00, wouldn't you all agree? That's a little
11 late to be starting closing arguments.

12 Ms. Mullis: I would think.

13 The Court: Is the Plaintiff going to open and close?

14 Ms. Mullis: Yes, Your Honor.

15 The Court: How long do you all anticipate your closing
16 arguments will be?

17 Mr. Allen: Fifteen or twenty minutes for us.

18 Ms. Mullis: I would think forty-five total.

19 The Court: So that's an hour.

20 Ms. Mullis: No. Thirty and then maybe fifteen in
21 reply.

22 The Court: No. I was talking total.

23 Ms. Mullis: Oh I'm sorry.

24 (Off the record discussion)

25 The Court: Okay. So, I'm going to let the jury go home

1 and then we'll do charge conference. Is that acceptable
2 with everybody?

3 Mr. Allen: I don't have any witnesses, do you want me
4 to actually close.

5 The Court: That would be a good idea. You can
6 actually rest in front of the jury. Okay we can get the
7 jury.

8 (Jury enters courtroom at 3:42)

9 The Court: You may be seated. Mr. Allen, you may
10 proceed.

11 Mr. Allen: Your Honor, the defense has no witnesses and
12 we rest our case.

13 The Court: Mr. Foreman and ladies and gentlemen both
14 the Plaintiff and the Defendant have rested their cases.
15 The next part of the process would be closing argument and
16 the court's instructions and that process would take us well
17 beyond five o'clock. So what we are going to do is break
18 for this afternoon. We still have some matters of law that
19 we need to hash out and that would probably take us a little
20 beyond five. So, what we'll do is we'll starting with
21 closing argument and instruction in the morning at 9:30. So
22 you will come directly to your jury room at 9:30. Again,
23 please don't have any contact with anyone in or about the
24 courthouse. That is even more important now that you've
25 heard all the evidence in the case. Conversations are so

1 it's so interesting. It's natural to do that but I would
2 ask that you refrain from doing that because even an
3 innocent conversation requires you to process everything
4 that you've heard and then to draw conclusions based upon
5 that. And that by its very nature is deliberations and
6 you're required to do that only after you've heard all the
7 argument and the court's instructions so that you can have
8 the benefit of collective thought and reasoning in reaching
9 a verdict in this case. So I would ask that you say the
10 judge say that I can't talk about it so that takes you off
11 the hook. I hope that you all have a wonderful evening you
12 have been incredibly patient with us during this process and
13 very generous with us with your time and please know that do
14 not take it for granted. I hope you have a wonderful
15 evening and we'll see you in the morning at 9:30. If you'll
16 leave your notepads in your seats, we'll secure them during
17 the recess and we'll make sure that no one reads them. You
18 all have a good evening and we'll see you in the morning at
19 9:30.

20 (Jury exits the court room for the evening at 3:46).

21 The Court: You all take your seats. All right. We'll mark,
22 now that Mr. Allen has rested, we'll mark he motions
23 renewed, is that sufficient and denied based on previous
24 arguments and rules?

25 Ms. Mullis: Plaintiff renews her motions.

1 The Court: Denied based on court's previous ruling.

2 Mr. Allen: Same for me.

3 The Court: Denied based on court's previous ruling. Okay.
4 We'll mark those heard and denied. Restroom break. Then
5 we'll do charge conference.

6 (There was a court break)

7 The Court: I'll give the jury a general instruction
8 regarding their responsibility and my responsibility. Give
9 them a general instruction on expert witness testimony as
10 well as deposition testimony. I'll give them a general
11 instruction that they are to follow the law as instructed
12 and not to determine what the law should be but they are to
13 go on what they are instructed the law is. Then instruct
14 them on the burden of proof which is the preponderance of
15 the evidence. I will then define for them what negligence
16 is.

17 Ms. Mullis: If I could ask. Do you generally follow one set
18 of charges or have you done your own?

19 The Court: I've done my own.

20 Ms. Mullis: Okay.

21 The Court: These are my standard instructions. The defendant
22 has admitted that he has, he has admitted his liability and
23 the plaintiff is entitled to a verdict unless the proof on
24 the issue of damages and causation completely fails. So I
25 would instruct them that unless there is absolutely no proof

1 of damages that the plaintiff is entitled to a verdict just
2 based upon the law. I will then give them a boiler plate
3 instruction regarding when the opinion of an expert is
4 relied on to establish proximate cause. Most probably
5 standard. Then instruct on the elements of damages. Bear
6 with me just one moment. I will instruct on the elements of
7 damages which in this instance would be a laundry list with
8 the exception that he doesn't have any disfigurement. Which
9 would be scaring or otherwise.

10 Ms. Mullis: I think that there is circumstantial evidence of
11 a scar with the surgery.

12 The Court: But it's not going to be revised, is it? But he
13 didn't testify that he has a scar and that has affected his
14 life. When you say disfigurement you're talking about like
15 my arm, one arm is shorter than the other one or my body has
16 been --- I mean, you expect a scar with surgery.

17 Ms. Mullis: I think a scare is a disfigurement in any form.

18 The Court: But you don't have any testimony to support that
19 somehow that disfigurement has affected him. He didn't
20 testify that he had a scar and it has affected him somehow.

21 Ms. Mullis: Just the fact that he has disfigurement or a
22 scar ...

23 The Court: He didn't testify that he had disfigurement or a
24 scar.

25 Ms. Mullis: Smith and Spearman both testified that they cut

1 into him ...

2 The Court: He has not testified that I have a scar on this
3 side of my body and it has materially affected me.

4 Ms. Mullis: Thank you.

5 The Court: I will give the boilerplate instruction on pain
6 and suffering as well as mental suffering. I will then
7 instruct the life expectancy table which is, he's 59, his
8 testimony is he is 59 years old with a life expectancy
9 according to that table of 21.45 years. I assume based on
10 the testimony that there will be some indication about
11 aggravation of a preexisting condition so I will instruct
12 that using my standard instruction. Then give a standard
13 instruction on the burden of proof of damages. I will then
14 give the standard elements on punitive damages including the
15 clear and convincing standard as well as the definition of
16 reckless, willful and wanton behavior. I will then instruct
17 that there are certain standards that you must obey. Those
18 being common law standards as well as statutory standards.
19 Common Law standards being proper lookout duty to keep the
20 vehicle under control and the drivers duty to use ordinary
21 care. I will then instruct 56-5-1900 which is basically
22 crossing the centerline. 56-5-2930, the applicable portion
23 which it is unlawful for a person to drive a motor vehicle
24 within the state while under the influence of alcohol to the
25 extent that the person faculties to drive are materially and

1 appreciably, then instruct the inferences from 56-5-2950,
2 which is that the jury can infer if the alcohol
3 concentration was eight one hundreds of one percent or more
4 that the Defendant was under the influence but this simply
5 an inference. That inference is simply an evidentiary fact
6 for them to give whatever weight that they decide it should
7 have. I will then instruct them that violation of a statute
8 constitutes negligence; however that a violation in and of
9 itself does not constitute recklessness, willfulness or
10 wantonness but does it is evidence of recklessness,
11 willfulness and wantonness and it is such for the jury to
12 determine as fact finders the weight, value and effect it
13 will give to those elements. I'll then instruct them on the
14 remaining elements of punitive damages. Give the jury some
15 boilerplate language regarding being fair and impartial and
16 then instruct on the form of the verdict which is we the
17 jury unanimously find for the plaintiff dollars actual
18 damages or we the jury unanimously find for the Plaintiff
19 blank dollars actual damages and blank dollars punitive
20 damages. With of course a place for the foreperson to sign
21 and date the form. And there will be the usual language
22 about passion, prejudice, sympathy, you know all those other
23 factors cannot factor into their decision. When I say that
24 a concept is covered it means that I'm using my standard
25 instruction which does not mean I use the exact language

1 that you have proposed in your instructions but the concept
2 is covered. Defendants number one is covered by the Court's
3 standard instruction. Number two is covered by the Court's
4 most probably standard of an Expert. Expert opinions being
5 relied on to establish proximate cause. The Court will use
6 the standard instruction on punitive damages which is number
7 three as well as number four. The Court will use the
8 standard instruction of punitive damages which is defendants
9 number five as well as Court standard instruction on
10 punitive damages which is request number six. It's already
11 been marked as Court's exhibit. With regard to plaintiff's
12 request number one is inapplicable as the defense has
13 already admitted liability and the court does not need to
14 charge on negligence. The court uses standard instruction
15 on negligence in terms of violation of a statute or a
16 common-law duty as it regards willful, wanton and reckless
17 conduct. It will not use number two. There is no evidence
18 in the record and I'm referring to plaintiffs number three
19 that speed was exceeded, unless I missed something. The
20 testimony was that he crossed the centerline. And so I
21 would not instructed 56-5-1520 unless there's, I'm going to
22 take exception --- I'm going to give you an opportunity.
23 There is no indication that there was an intersection, a
24 curve, a bridge, a narrowing or otherwise that would
25 necessitate 56-5-1520(a). The Court will use standard

1 instruction on proper lookout which is number four. The
2 court will use as, already instructing the center line
3 statute which is number five and that's 56-5-1900. Number
4 four the Court will use the standard instruction on proper
5 lookout. I'm already instructing 56-5-1900 which is number
6 five. There is no indication that these parties were at an
7 intersection that they were approaching a crest, a grade or
8 a curve in the highway or what anybody's view was obstructed
9 so 56-5-1880, which is number six is not applicable. Number
10 seven is cumulative its proper lookout. Number eight, the
11 Court will use its in instruction regarding driving under
12 the influence.

13 Ms. Mullis: Tell me which one that will be again.

14 The Court: Number eight. I'm only charging 56-5-2930
15 subsection one. Two and three are inapplicable to the facts
16 of this case. There is no indication that there were any
17 other substances involved which caused impairment.

18 Ms. Mullis: Without objection.

19 The Court: Number nine is the .08. I will use my
20 instruction on the inference. I don't know that reckless
21 driving is really applicable in this case. I'm going to
22 think about it but I don't know that we need to instruct
23 reckless driving which is 56-5-2920. I'll think about that
24 a little bit. Number eleven is negligence per se which is
25 cumulative. The Court will use a standard instruction. The

1 Court will use a standard instruction on actual damages
2 which is twelve and thirteen. The Court will use the
3 standard instruction on damages which is fourteen. The
4 Court will use a standard instruction on actual damages
5 which is fifteen. As well as standard instruction on loss
6 of earning capacity which is sixteen. The Court is going to
7 use its standard instruction on the Mortality Table which is
8 number seventeen. The Court will use the standard
9 instruction on aggravation of pre-existing condition which
10 is eighteen. The Court will use the standard instruction on
11 mental suffering as well as pain and suffering which is
12 nineteen and twenty. As well as twenty-one. The Court will
13 use the standard instruction on twenty-two and I will also
14 ... I would not instruct that anyway because I think it is
15 too close to commenting on the facts. And I will use my
16 standard instruction on aggravation of pre-existing injury.
17 Number twenty-four is cumulative to the other request and
18 that's willful, wanton behavior and it's my standard
19 instruction. I'm using my standard instruction on punitive
20 damages which is twenty-five. Twenty-six again is
21 cumulative to what has already been submitted regarding
22 reckless, willful and wanton behavior. Twenty-seven is
23 cumulative to the other request, I forget what number it is
24 for reckless driving. Twenty-eight, the Court will use the
25 standard instruction on punitive damages. The Court will

1 use the standard instructions on twenty-nine and thirty.
2 And actually that's ... I don't know that thirty would be
3 something that we would read to a jury. I would have to
4 read that case again because I don't think that is something
5 that would be included in a jury instruction at any time but
6 I would not instruct it. I'm going to use my standard
7 instruction. Thirty-one is cumulative and I will use my
8 standard instruction on punitive damages and I'm not
9 instructing thirty-two which is insurance unless the
10 question comes up I'm not going to eject the issue of
11 insurance into the proceedings. We'll have those marked as
12 a court's exhibit. I'll heard any exceptions to the charges
13 proposed from the plaintiff?

14 Ms. Mullis: If I could have just a moment.

15 (Off the record)

16 Ms. Mullis: Your Honor, we are concerned about Defendant's
17 request to charge number six. You said you were using the
18 standard punitive damages charge. It says the purpose of
19 compensatory ...

20 The Court: I don't need you to read it to me. I'm not
21 instructing that.

22 Ms. Mullis: Nothing close?

23 The Court: When I say standard it means the concept of
24 punitive damages --- my instructions are neutral they state
25 the law period. They make no commentary on the facts or

1 what the jury should or should not do in their fact finding.
2 It simply gives them straight concept of the law and how
3 they are to apply it.

4 Ms. Mullis: And as to Plaintiff's request to charge number
5 three the issue of whether or not there is an issue of the
6 defendant approaching a curve. The plaintiff testified that
7 he came out of his driveway, that Mr. Valle was coming
8 around the curve, kept coming around the curve, crossed over
9 the center line and ran him off the road. Hit him directly
10 head-on and was coming around a curve. That was his
11 testimony. So that was why we had that charge request.

12 The Court: I will listen to the testimony and see if it's
13 applicable. It really becomes cumulative. I mean, he had
14 a duty to keep his vehicle under proper lookout ...

15 Ms. Mullis: As far as speed we believe that the car photos
16 themselves are demonstrative.

17 The Court: Yes, somebody was exceeding the speed limit. The
18 way car are built now. A car is designed to absorb thirty-
19 five miles of pressures which means you're going about
20 forty-five miles to do damage to a bumper which is not
21 always readily apparent on the outside but on the inside.

22 The way cars are made now, I could hit you going forty-five
23 and tear off the front of your car. I just can't, you can't
24 ... I can't make that assumption. There has to be some
25 evidence in the record that says somebody was exceeding the

1 speed limit. Somebody has to testify about the speed limit.
2 That the speed limit was this and the you estimate that the
3 person was going this. You can't speculate about that.
4 There has to be some basis of fact to argue that and I
5 listened very carefully and I didn't hear anybody say
6 anything about speed.

7 Ms. Mullis: The Plaintiff's request to charge number six
8 driving left of center of the roadway.

9 The Court: There's no evidence of that.

10 Ms. Mullis: When approaching ...

11 The Court: It says where a driver's view is obstructed
12 within such distance as to create a hazard in the event
13 another vehicle might approach from the opposite direction.
14 I'll listen to his testimony.

15 Ms. Mullis: Plaintiff's request to charge number 10. Any
16 person who drives a vehicle in a manner to indicate willful
17 or wanton disregard of the safety of other individuals is
18 guilty of reckless driving. He's driving drunk on the wrong
19 side of the road ...

20 The Court: It's a practical matter. He was arrested that
21 night. They's not going to charge him with reckless
22 driving.

23 Ms. Mullis: I'm giving the jury any opportunity for
24 violation of a statute for punitive damages ...

25 The Court: I said I need to think about it. What number

1 was that again?

2 Ms. Mullis: Plaintiff's request for charge number ten.
3 Renew our objection to plaintiffs request to charge number
4 fifteen for failure to charge disfigurement. We think just
5 the mere circumstantial evidence of testimony from Spearman
6 and Smith he had surgery, clearly has a scar, that
7 disfigurement should be charged.

8 The Court: There is no testimony that he had a scar, the
9 length of the scar, where it was located and then have your
10 client testify that it has affected his life. The mere fact,
11 that you have, as a matter of fact now surgery, depending on
12 how they do it depends you might have a one inch scar you
13 might have a five inch scar. It just depends. I don't know
14 what the nature of his scar is. It's speculative unless you
15 have some direct testimony bearing on it. If he had simply
16 said, I have a scar and it has affected my life. Maybe you
17 could argue substantially he has a scar and it has affected
18 him. As a matter of fact, my secretary had gallbladder
19 surgery, it was done laparoscopically. You can't even tell
20 she --- not that I've seen it but I know laparoscopy, they
21 do hysterectomy laparoscopy and they make three little
22 incisions and I cannot infer from that you have a scar and
23 it has appreciably affected how you live. I don't know
24 that. There was no testimony elicited regarding that. Now,
25 could you have elicited that testimony? Absolutely. He

1 could, people do it all the time. They say I had this
2 surgery and most times what people now testify about is they
3 had back surgery, they are going through your stomach now
4 and you have this six inch scar depending on if they go
5 through your stomach or not, on your stomach and they say I
6 have this horrible scar and it has affected me. That's the
7 other link. It has to have affected him. A scar in and of
8 itself, depending on him, how he feels about it. But the
9 record is absolutely devoid of any testimony from your
10 client that he had a scar and he considers that a element of
11 his damages and it has affected him. Now, if you had some
12 testimony about that then I would agree with you.
13 Circumstantially and evidentiary you could argue that he has
14 a scar and he could testify about it. That it has affected
15 him, it has affected the quality of his life but a surgeon
16 simply testifying that he had surgery has to rise above
17 speculation. You can't leave it to the jury to speculate or
18 surmise about it. Any other exceptions?

19 Ms. Mullis: Plaintiff's request to charge number 22. The
20 court can charge a per diem formula ...

21 The Court: I think that's an impermissible comment on the
22 facts. If you want to argue it, you can, but I'm going to
23 instruct them on the standard elements of pain and
24 suffering. Because for me to instruct that and you argue
25 it, it adds some credibility to it and that that is how they

1 should do it and there is no formula in South Carolina for
2 how you are to calculate pain and suffering. The only
3 barometer for a jury is that they do it calmly and coolly, I
4 believe is the language that's in the case law. But I'm not
5 going to instruct the jury that there is a formula by which
6 for them for calculate pain and suffering. You can argue
7 that however and that's standard for attorneys to argue per
8 diem. There are a myriad of methods but I'm not going to
9 instruct on that because I think that's an impermissible
10 comment on the facts. It takes me outside of instructing
11 the law and into advocacy.

12 Ms. Mullis: And Plaintiff's request to charge number 30. We
13 think the case law is clear at this point in South Carolina
14 the award of punitive damages does not rest in the jury's
15 discretion. It is recoverable as a matter of right. We
16 think the case law is clear on that. That it's not
17 discretionary that once they find that the plaintiff's
18 rights have been consciously willfully and recklessly
19 violated that they are required as a matter of law to award
20 punitive damages. I have it on a Westlaw cite.

21 (Off the record discussion)

22 Ms. Mullis: It's the Magnolia North Properties. I don't
23 know if it has a cite yet.

24 The Court: I'm not sure.

25 Ms. Mullis: Other than Plaintiff's request to charge number

1 32. We just think you're getting ahead of the ball game.
2 The Court: I'm sorry. I didn't hear you.
3 Ms. Mullis: We expect to hear a jury ...
4 The Court: If they ask for standard instruction on jury then
5 I will use it. I'm not going to inject insurance into it
6 unless they ask me that question.
7 Ms. Mullis: Can we get a copy of your standard instructions?
8 The Court: This is not a pretty work product and I have
9 three quarters of it memorized. I jump around and sometimes
10 I have it in one order and I go in a different order. It's
11 not something that I would want on the street it would be
12 embarrassing. I always say I'm going to redo it but I
13 don't. I'm just being honest.
14 (Off the record discussion)
15 The Court: It is our standard instructions that is just not
16 a work product that I would want floating about. It is
17 standard language. It's a straight statement of case law.
18 Are there any exceptions to the charge from the defendant?
19 Mr. Allen: Real quickly. I just think that Plaintiffs
20 charges four, five, six, seven and ten and when I say that
21 I basically ...
22 The Court: You need to slow down for me. Okay Plaintiffs
23 four, five. Four is proper look out, five is (coughing).
24 You said four, five and what other numbers?
25 Mr. Allen: Six, Seven and ten.

1 The Court: Six is driving left of center roadway, which is
2 the same as ... well, that's the other one. You said seven
3 and ten. Seven is cumulative. That's just proper lookout
4 again.

5 Mr. Allen: That's my point. I fill like a lot of these
6 are cumulative. The defense has admitted simple negligence
7 so I don't understand why we need all these statutes?

8 The Court: Because you've got to have reckless, willful and
9 wanton behavior. The violation of the statute is evidence
10 of reckless, willful and wanton behavior.

11 Mr. Allen: And then ...

12 The Court: If there were punitive damages were not a issue
13 it would not be instructed at all but it is a issue in this
14 case. So, if there has been a violation of common law duty
15 or statute it is evidence of reckless, willful and wanton
16 behavior. And the jury can give it whatever weight they
17 determine it should have.

18 Mr. Allen: I guess if alcohol wasn't a issue in this case
19 this wouldn't be a punitive case presumably and we wouldn't
20 be having these statutes ...

21 The Court: If you failed to keep proper control of your
22 vehicle and you come completely --- if you drop your cell
23 phone on the floor board of your car and you lean down to
24 get it and you hit somebody head on and cross the center
25 line. That's a punitive damage case. That's not only that

1 you are careless but before you look down on that floor
2 board and you're going to say I really shouldn't be doing
3 this because I can hit somebody. Either way it's the same
4 kind of thing. It's just careless. It's beyond just simply
5 being careless. It's a level beyond being careless.

6 Mr. Allen: I presume you're going to take Plaintiff's 30 and
7 31 under advisement and let us know tomorrow? I just don't
8 like the fact that these charges seem to impose a duty on
9 the jury to award punitive damages. My experience is ...

10 The Court: I have read that, as a matter of fact I read it
11 earlier this week about something else totally related, a
12 Order I was working on. Judges use different variations of
13 instructions. My instructions do not include that language
14 nor do I really feel it is necessary to include that
15 language. The only thing this case is saying is what black
16 letter precedent is on punitive damages cases in South
17 Carolina and if the judge wants to use that language it can.
18 You can't negate however the paragraph below that statement
19 that says it's still discretionary for the jury to determine
20 punitive damages. Then it also goes into the analysis of
21 reckless, willful and wanton behavior. In my estimation to
22 some extent it becomes a moot issue because once you
23 establish reckless, willful and wanton behavior by clear and
24 convincing evidence the jury is going to give punitive
25 damages if they feel it is appropriate under the

1 circumstances. So it really becomes, it's almost I want to
2 say Catch 22. It's really not the analysis I would apply to
3 it but it almost is because the only way they would reach
4 that is if they determined there's reckless, willful and
5 wanton behavior involved in the case. And they will be
6 instructed that if they feel it is appropriate that the
7 purpose of it is a deterrent, it's to punish and they
8 certainly have the ability to do that. The only thing this
9 proposition in this case stands for is if you want to
10 include that language that you can. It's not a error to
11 include that language and I believe the sentence that was
12 used by the trial judge in that case was ... and if punitive
13 damages were to be included the jury must ... I went too
14 far, I apologize. And it goes into the whole analysis about
15 Campbell and the Supreme Court saying that each State can
16 set it's own parameters about punitive damages. And really
17 the whole basis of the argument in this case was that
18 somehow it was a constitutional deprivation and that
19 punitive damages just aren't ... it still goes in that whole
20 analysis that punitive damages are unconstitutional. That's
21 really the whole scope of this. When it says that they are
22 entitled as a matter of right. They are simply commenting on
23 the fact that it is not a violation of due process or is not
24 a constitutional violation to award punitive damages, which
25 goes back into the whole Campbell analysis. Which is state

1 by state you can determine within certain bench marks the
2 proportionality review for punitive damages. So, it's sort
3 of in a way taken, actually the language that was used was
4 if you should find that the Plaintiff is entitled to recover
5 punitive damages in addition to actual damages it will be
6 your duty to include such damages in your verdict and award
7 such an amount that you may deem reasonable and proper in
8 light of the facts and circumstances. I don't know what
9 Judge Newman's punitive damages charge says so I don't know
10 in the full context of everything that it says.

11 Mr. Allen: Right.

12 The Court: I have no idea. I might call and ask him to send
13 it to me because I'm curious now.

14 Mr. Allen: I'm thinking it's somewhat informative that the
15 very next sentence is this instruction communicated to the
16 jury that it had the discretion to ...

17 The Court: That's what I said the very next paragraph ...

18 Mr. Allen: Okay.

19 The Court: The only thing, because the whole crux of this
20 argument is punitive damages basically are still
21 unconstitutional and they are not entitled to them. And by
22 saying that you know of course nobody wants to give up a
23 good fight but, I mean, it's a done deal. It's nothing new.
24 It's what South Carolina has always been that it is
25 constitutional to award punitive damages as a deterrent, as

1 punishment. And that once reckless, willful and wanton
2 behavior has been established by clear and convincing
3 evidence that it is appropriate. Now, I don't know how many
4 other judges use that language I have no idea, I've never
5 used it. But, as I read it, it simply says it is not a
6 error to use it. It doesn't mean I have to incorporate it
7 into my instruction and I don't know where I would even
8 incorporate it in my instruction. I think that my
9 instruction is an accurate statement of the law and punitive
10 damages and I'm probably going to use it. I'd have to see
11 that instruction in it's context. I couldn't just sort of
12 pull it out of the air and stick it somewhere.

13 Ms. Mullis: I guess our position also rest on the fact that
14 opposing counsel stood up in his opening argument and said
15 that the defendant was drunk and we think in light of that
16 admission in his opening argument that we certainly should
17 be entitled to have ...

18 The Court: I think you should argue that. I think you can
19 argue that his behavior was not only was he aware that he
20 was careless, not only was he careless but he had a
21 conscious awareness that he was being careless and that his
22 behavior rose to the level of reckless, willful and wanton
23 behavior. And if you need that benchmark by clear and
24 convincing evidence I will be hard press to believe a jury
25 would not do what it thought was appropriate which is in

1 their fact finding providence and their discretion. They
2 will be instructed that if you decide that an award of
3 actual damages are appropriate you can still aware an
4 additional amount of damages, which are called punitive
5 damages. This is why we have them and this is what the
6 purpose of them are and if you want to award them you
7 certainly can and here are the benchmarks for you to award.
8 And I don't know that adding that language will really make
9 a difference anyway because they still have the discretion.
10 They could, within their providence, as hard as you argue it
11 because everybody is socialized differently and has
12 different views about why they feel that his behavior did
13 not rise to the level of reckless, willful and wanton
14 behavior. I don't know. I have no idea. You know there
15 are some parts of this state you can't get a DUI conviction.
16 That's a part of how they socialize. There are some places
17 now where they are arresting people with a .05 and a .06
18 because they say the statute is just a presumption and if
19 you are materially and appreciably impaired, we don't care
20 if you have one drink or half a drink we're going to arrest
21 you and we're going to prosecute you. It just depends. It
22 hasn't made it that way this far down here, but, I mean in
23 places like the beach somebody can be a .40 and they can
24 find them not guilty. So it just depends. I don't know.
25 It depends on the juries perspective of what they interpret

1 as reckless, willful and wanton behavior and it is for you
2 all to argue that his behavior rises to that level and I'm
3 sure that Mr. Allen will argue the exact opposite
4 proposition. I'll think about it overnight. I'll see.
5 I'll think about the reckless driving. Do you all oppose
6 the charge of reckless driving, the instruction on reckless
7 driving. I've got to look back at his testimony to see if
8 there was a curve in the road, I've got to see. If there
9 was a curve in the road ...

10 (Off the record - talking)

11 The Court: He did testify that he observed a curve.
12 Generally this statute deals with, I don't know if you've
13 every driven in the upstate but when you on a curve, you
14 view if completely obstructed and there is a sign that says
15 your view is obstructed and there is to be no passing.
16 That's different then there simply being a little curve in
17 the road and that's what this statute is really about. It's
18 about when you're in a situation where on a crest or you're
19 coming up and you can't see a grade on the road or you're on
20 a curve, where your view, you can ignore the statute which
21 is where your view is obstructed. I'm not familiar with
22 that highway, so I don't really have any way of knowing what
23 it looks like.

24 Ms. Mullis: All I know is my client ...

25 The Court: You know there are some curves in the highway

1 where your view is not obstructed. There are some curves
2 where your view is completely obstructed and if you were to
3 try to do anything change lanes or otherwise where you know
4 that you're going to create a hazard because you know by
5 trying to pass you don't know who's coming and ... that's
6 why they have, solid line, I think it is.

7 Ms. Mullis: Right. A solid line.

8 (Off the record talking)

9 The Court: Have a good night. I will see you all in the
10 morning at 9:30.

11 (Court begins on 8-16-12)

12 The Court: ... Necessarily an indicator that the speed
13 limit was being exceeded. No one elicited from any witness
14 and it could of been elicited from a highway patrolman what
15 the speed was on the road and what he estimated the speed of
16 the vehicles to have been at the time of the incident and so
17 the records is devoid of any testimony regarding that so it
18 would be inapplicable. The second part of that deals with
19 driving at an appropriate or reduced speed when approaching
20 a crossing or going around a curb. Again this is
21 inapplicable there's no indication that the speed limit was
22 being exceeded while going around a curb, and that statue
23 was not designed well is inapplicable to the testimony as it
24 has been presented in this trial so I would not instruct
25 that. Similarly number six provides that and that's 56-5-

1 1880 no vehicle shall be driven on the left side of the
2 roadway under the following conditions. The testimony is
3 that the defendant crossed the centerline and came into
4 plaintiff's and caused the collision with the plaintiff in
5 this case, but there's been no --- This statute factually is
6 inapplicable it deals with pressed, abrade, or curve on the
7 highway and it contemplates circumstances where there is
8 pronounced curve in the highway. Where there, when the and
9 I think we discussed this at length yesterday and I looked
10 on Map Quest and I also looked at a picture from Google Maps
11 that Mrs. Mullis had regarding the road and I think probably
12 if I wanted to take judicial notice because it's a satellite
13 maps are there what you consider almost to a kin to an atlas
14 and while there's a slight bend in the road the road is not
15 curved and not least what I think is contemplated by this
16 statute and so factually it is inapplicable and I'm not going
17 to instruct it. Number ten although I think incredibly
18 cumulative I'm going to instruct which is reckless driving.
19 I think it is akin to keeping a proper look out in crossing
20 the centerline but I'm going to instruct those first two
21 lines which is 56-5-2920. The rest of that statute deals with
22 the penalties for reckless driving which would be
23 inapplicable and would not be appropriate to instruct. Also
24 as regard to number three the second half which is 56-5-
25 1520A deals with special hazards being present and there's

1 no evidence of special hazards or whether to make that
2 factually applicable. I think I've already ruled on number
3 thirty, in the event that I haven't out of an abundance
4 caution I'm not going to instruct it. It's not a part of my
5 standard instruction and I don't know in what context it was
6 instructed by the judge who did instruct it and what his or
7 her jury instruction how it reads. I do not feel it's
8 necessary to instruct it in my instruction, my instruction
9 is inapplicable an appropriate statement of the current and
10 prevailing law and I'm going to use that instruction on the
11 punitive damages and I think to some extent the instruction
12 is presented as out of context because the next paragraph
13 deals with the jury's discretion in determining whether in
14 fact the elements of willful, wanton, and reckless behavior
15 have been met and their authority to award punitive damages.
16 And I think I've already addressed thirty two which deals
17 with insurance. I have a standard instruction on insurance
18 if it comes up but I'm not going to interject insurance into
19 the preceding without the jury having asked that question.
20 Is the plaintiff ready to proceed?

21 Mrs. Mullis: I am Your Honor.

22 The Court: Is the defense ready to proceed?

23 Mr. Allen: Yes.

24 The Court: Ok do you all need to set up anything or are
25 we ready to go?

1 Mrs. Mullis: If I could just take a brief break before
2 we get started.

3 The Court: Ok. Defense ready to proceed?

4 Mr. Allen: Yes Your Honor.

5 (Jury In)

6 The Court: You may be seated, Mr. Foreman ladies and
7 gentlemen I hope that you all had a pleasant evening and I
8 hope that you all have had a good morning so far. We have
9 now reached the stage in the trial where you will hear
10 closing arguments and the courts instructions on the law.
11 You will hear from the plaintiff followed by the defense,
12 you will then again hear from the plaintiff. In our rules
13 and procedure the plaintiff gets to open and close meaning
14 that they have the last say since they have the burden of
15 proof. I would ask that you give the attorneys your
16 undivided attention. You may proceed Ms. Mullis.

17 **Closing by Ms. Mullis**

18 Ms. Mullis: In the beginning of this case we told you
19 that the case was about rules, responsibility, and justice,
20 and you've seen me follow a lot of rules in court. You've
21 seen me follow rules relating to chain of evidence and how
22 we get in the blood alcohol level of a defendant, of the
23 defendant Jose Valle who hit Levern McCray when he crossed
24 the centerline and hit him head on, on December 20, 2008.
25 You watched us bring in a nurse, the trooper that was there

1 on the scene, three trooper that touched the evidence and
2 moved it up to SLED, three SLED techs that moved it around,
3 and finally at the end of the day the video deposition of
4 the toxicology, toxicologist that tested the blood sample
5 and determined that he in fact was intoxicated. I have a
6 .103 alcohol level on the night that he came around the
7 corner hit Levern McCray head on when he crossed the
8 centerline. Those are the rules that I have to follow in
9 court to be able to present that evidence to you and part of
10 the reason I have to go through all of those hoops and
11 follow those rules is because the defendant Jose Valle isn't
12 taking responsibility for his actions here today for the
13 harm that he caused to Levern McCray. Levern McCray follows
14 rules himself, he was a Marine he served his country for
15 seven years. He worked as a heavy equipment operator, he
16 showed up for work everyday, he was reliable, he took test,
17 he was certified on a number of pieces of heavy equipment
18 and he followed the rules and the safety rules that he had
19 to follow everyday to operate that equipment. The jury has
20 rules that they have to follow in a case, when you're
21 deciding a case and the rules that you have to follow are to
22 fairly and justly evaluate the evidence and award a just
23 verdict and those and your verdict has to provide full
24 justice for the plaintiff. Where the rules again that we're
25 talking about today are the rules that Jose Valle was

1 responsible for following as the driver of a car. That he
2 keep a proper look out and slow down and be able to control
3 his car. That he not run his car head on into another
4 vehicle and we know and we know that he did that that night
5 because Levern McCray testified to it and because the
6 trooper when he went to the scene found Levern's car and Mr.
7 Valle's car on the wrong side of the road flipped, Mr.
8 Valle's car was upside down but both cars were on Levern
9 McCray's side of the road and they looked like this and
10 there's no evidence that indicates any thing otherwise.
11 Levern was on his way to work at 5:30 in the morning and
12 Jose Valle was on the wrong side do the road and he was
13 drunk. The second rule that Jose Valle violated was
14 obviously being on the wrong side of the road and hitting
15 Levern head on and again. There's no other evidence to
16 indicate anything other than what you've heard and what
17 you've seen and Mr. Valle isn't here to tell you anything
18 differently. The other rule is that you can't operate a
19 motor vehicle either under the influence of alcohol so that
20 it, the alcohol prevents your ability to operate your motor
21 vehicle or that you operate a vehicle with a blood alcohol
22 level of above .08 or above, .08 is the legal limit to
23 operate a car. You heard the testimony of the nurse that
24 took the blood, Jennifer Stayton came in here testified that
25 she took the blood. The trooper Thomas who came in here and

1 testified that he stood there while she took the blood and
2 then he sealed the blood. The next trooper, Williams who
3 took possession of the blood and put it in the refrigerator.
4 The next trooper, trooper Craven who took the blood out of
5 the refrigerator. The next trooper, Cochrane who took the
6 blood up to SLED, who handed it of to Doris Yarborough.
7 Doris Yarborough sealed it again at SLED, handed it off to
8 Patricia Crooks. Patricia Crooks verified that she had the
9 blood by using a barcode. She gave to Kimberly Davis Meares,
10 Kimberly Davis Meares then moved it from the refrigerator
11 upstairs to the toxicology department to Heather Dailey who
12 in December 20, 2008 called her Kimmie Davis because she
13 hadn't been married yet. But that forensic toxicologist then
14 tested the blood, there's a verified chain of evidence of
15 every single person that touched that blood and the forensic
16 toxicologist that tested it had tested thousands of samples
17 of blood. There is no reason to believe that that blood was
18 anything other than Jose Valle's blood and the fact of the
19 matter is that it was taken three hours after this accident
20 occurred and it was still .103. He had three hours before,
21 between the time of the accident when he got out of his
22 truck, didn't even check on the guy that he had hit head on.
23 Laid down in the street, passed out in the street we don't
24 know before his blood was even taken and it still tested
25 .103 and you'll have the toxicology report back with you

1 when you look at it. Those are the rules that Jose Valle
2 failed to comply with, these are the rules that he broke.
3 When you put all of those rules together, they also combined
4 are reckless driving, because he was on the wrong side of
5 the road, hit a car head on because he wasn't watching where
6 he was going, and he was operating a motor vehicle with a
7 drunk or with a blood alcohol level of above .08, so he's
8 also guilty of reckless driving. The reason the statutes are
9 significant is because you as a jury if you find that he
10 violated a statute it's evidence of what's called negligence
11 per se in the state of South Carolina. Now opposing
12 counsel's admitted negligence but once we have negligence
13 per se it's evidence that the defendant has acted
14 recklessly, willfully, and wantonly. And once we have
15 reckless, willful, wanton conduct in the state of South
16 Carolina the plaintiff is entitled once we've proven that
17 with clear and convincing evidence to an award punitive
18 damages and punitive damages are there to punish the
19 defendant for conduct in violation of the right of the
20 plaintiff and we'll asking for punitive damages as well but
21 lets talk about the injuries of the plaintiff and what
22 happened to him. In opening argument opposing counsel talked
23 about things that we agree on. He said that we agree that it
24 was a serious accident, that we agree that is was a severe
25 impact, that we agree that Levern McCray's ankle was broken,

1 that he had two surgeries, they're not really disputing the
2 medicals. He said forty five something thousand dollars in
3 medicals, that's what you're looking at right here, \$47,195
4 in medicals you've got a list of them you have all the
5 medicals attached to it, that's easy. He said we're not
6 really disputing the lost wages, his doctor wrote him out of
7 work you've got that submitted into evidence, the work
8 excuse written by the doctor. You've got a wage verification
9 form from his employer, that shows lost wages that Levern
10 testified to of \$25,198:50, that's a easy number as well but
11 that's just the starting point, because those are just the
12 actual dollars that were spent for his actual medical losses
13 and the actual dollar for dollar monetary loss that he loss
14 for being out of work for six months because a drunk driver
15 hit him head on and broke his legs. The other injury is the
16 future lost wages. The future lost wages that were testified
17 to were testified to by in the beginning Levern. Levern
18 McCray testified that he had been a supervisor before, that
19 he had had the opportunity to be a supervisor in a job site
20 before and that he had had twenty six years of experience on
21 working with the same company. He had co-workers that had
22 worked with him on the current sites that he's working on
23 now testify about a good worker he was and we brought in and
24 played the video deposition of Jay Welch who is the
25 superintendent that he was working under at the Dupont site

1 at the time of this accident and then again in 2011. That
2 superintendent supervises thousands of employees and when
3 the Dupont site was closed down was transferred to a site in
4 Tennessee and is currently on one of the largest
5 construction sites in North America managing a construction
6 site that's building a plant that's going to build solar
7 panels. He knows how to supervise and how to pick
8 supervisors and he knows a good employee when he sees one
9 because he's been doing this for thirty years and he
10 testified under oath that he could have chosen Levern to be
11 a supervisor for him that Levern would have been his
12 supervisor. And Levern has lost the opportunity to be a
13 supervisor, Jay Welch testified to and Levern testified that
14 he lost that opportunity when he went up to North Carolina
15 and that loss of opportunity to be a supervisor is a future
16 lost wages that Levern suffers and will suffer in the future
17 until the point where he retires. We brought in an economist
18 because that number has to be reduced to present day value
19 and I asked him is that conservative number because the
20 number that he was basing his estimate on was a five
21 thousand dollar number. That was a number that Levern
22 provided him, Jay Welch thinks the number fifteen thousand
23 dollars a year. We have given a conservative number to work
24 off of, we think that's a conservative estimate and that you
25 should award that future loss wages along with the lost

1 wages that Levern testified to for a total economic loss
2 reduced to present day value of \$73,619, again current
3 present day value that is an easy number. You reasonably
4 have the testimony in evidence that you could award more for
5 future damages. You could start from the \$25,000 that Levern
6 testified to and go up. You've got the documents in evidence
7 that Oliver Wood the charts that he showed you. Where he
8 shows you that, he's got seven more years to work and he's
9 estimating \$5,000 a year that loss could be as much as
10 \$15,000 a year and you can base your award on an amount more
11 than \$5,000 a year or you can take the conservative estimate
12 of the economist that we provided you and award the economic
13 damages here and that's fine with us and that's what we've
14 asked for. The final loss that we've talked about and final
15 witnesses that we've talked about Junior Goodman who
16 testified that he could no longer do the type of walking
17 around the job site that would be required by a supervisor.
18 So you saw three witnesses that related to his job Jay Welch
19 his superintendent, Junior Goodman who'd been his supervisor
20 before, and Marvin Mosely who currently works on the job
21 site with him in Georgia and the reason that's important is
22 because Levern has lost certification of pieces of equipment
23 that pay more if he can operate those equipment. If he can't
24 operate a crane he makes less money because he's lost the
25 certification to operate the crane because he can't crawl up

1 into the crane and you heard Marvin Mosely testify that
2 Marvin has been assigned to operate a backhoe that's got air
3 conditioning in it and Levern is suppose to be operating a
4 dump truck, but Marvin knows that Levern can't operate the
5 dump truck because of the clutch so they switched a piece of
6 equipment. Now who gives up operating a backhoe that's air
7 conditioned in Georgia in August if they don't believe the
8 guy is hurt, I'm just saying. That's the future loss wages,
9 that's the future economic loss. The other damages and the
10 main damages in this case are the damages that Levern
11 suffers as a person. Dr. Neal went through those damages
12 with you all and he went through them pretty fast. So I've
13 made a chart and I had some stuff on them and he had some
14 different stuff on them so I've tried to add what all he did
15 in break down and here's my understanding of where he went
16 and he sat on the stand and testified and you heard him
17 testify and nobody else contradicted his testimony on that
18 as to within a reasonable degree of medical certainty more
19 likely than not what permanent injury was. Permanent injury
20 is the lifetime injury that Levern will live with from the
21 date of the accident all the way through, till the time he
22 dies and there's different ways of trying to figure out to
23 compensate someone for permanent injury but Dr. Neal give
24 permanent impairment ratings and has given them for
25 vocational rehabilitation and for the Department of

1 Correction, so we asked him to give ratings on them. Which
2 means is your leg works perfectly it's a hundred percent and
3 if it works less it's a different percentage. So these are
4 the percentages of impairment. Dr. Neal said that the left
5 ankle had a 55% impairment, that the left foot had a 20%
6 impairment, so that's a total of a 75% impairment to his
7 left ankle and foot. Now we know that when Levern walked
8 into the emergency room he reported initially, obviously
9 that he had injured his left ankle and foot. That was the
10 first thing he said when he woke up. He woke up in the car,
11 he had been hit, he called his wife he said man my foot
12 hurts. That was the primary concern when he went into the
13 emergency room, that's what the doctor operated on, that's
14 what they put the brace on, that's what the equipment in his
15 leg on. The long screw was then removed and this the
16 hardware in his foot today. That's what he'll live with
17 unless they remove it. Now they can remove it but that's
18 another surgery. You heard Dr. Spearman testify in his
19 deposition about whether or not three years after this
20 accident if he continued to report pain if you would expect
21 that pain to improve at some point and he said well there
22 are two things, either he didn't properly rehab he didn't
23 get enough physical therapy and it didn't properly heal the
24 first time or because his ankle was so severe with the
25 fracture dislocation that I talked about earlier there's

1 more than likely damage within the joint to articular
2 surface so that he has traumatic arthritics with cartilage
3 that has been injured and there by continues to be painful,
4 which continues to cause swelling in the joint which
5 decreases his range of motion. I asked him about knee pain
6 and he said that because you've got that kind of equipment
7 that prevents the range of motion in your ankle even if he
8 hadn't broken his leg in two places that it would cause
9 additional knee pain because the ankle can't move the way
10 it's suppose to. So he's got to compensate by moving his
11 knee more and that because his ankle can't move the way it's
12 suppose to that he also has to compensate with his hip.
13 Would you expect to him have knee pain would that effect
14 this type of injury? Well he had knee pain at the beginning
15 and that if his ankle is stiff and doesn't bend then that
16 translate to increased stress about the knee and will cause,
17 can cause pain just from a change in date. Would that same
18 kind of immobilization and change in the date also cause hip
19 pain in the same area in the same leg? It can cause hip
20 pain, it can cause back pain and leg pain, lumbar spine pain
21 that would low back pain all the way down the leg and
22 problems with the back. Just to eliminate any issues with
23 whether or not he properly had physical therapy we went in
24 and asked Dr. Smith if he properly rehabed. In your notes
25 and history is there any question about whether or not he

1 had proper physical therapy? He did quite well he showed
2 good effort, moved along, progressed very nicely in the
3 records. He had proper physical therapy and had a nice
4 recovery. Dr. Smith didn't have any concerns about the
5 physical therapy or whether he completed physical therapy.
6 Dr. Spearman's opinion was that he likely at three years
7 after the accident if he was still have pain was having a
8 traumatic arthritics problem in his ankle. That is
9 consistent with what Dr. Neal found and that is consistent
10 with the left ankle and foot permanent impairment rating of
11 55% to the ankle, 20% to the foot and a 75% permanent
12 impairment rating. It's consistent with two orthopedic's
13 opinions and it's certainly consistent with a doctor who's
14 been treating him years before this accident, been treating
15 him years after this accident and it qualified by the court
16 to give permanent impairment ratings. The next things that
17 were rated by Dr. Neal were his back well his spine. So I
18 put it in spine, Dr. Neal broke it down into neck of 25%,
19 and low back of 28% to a 53% rating to his spine. Levern
20 reported his neck on 12-28-2008 when he went into the
21 emergency room, he said he had neck pain immediately, it's
22 not disputed it's in the medical records. He's been
23 reporting neck pain throughout the time the entire time. The
24 primary focus obviously has been this, so it overshadows a
25 lot of the other complaints but when you're in a car

1 accident that does this you have other injuries other than
2 just a broken leg. The neck and low back are explained in
3 the medical records, were reported in the medical records.
4 Levern McCray's testified to them, they're verified by the
5 doctors, Dr. Spearman says that he would expect that kind of
6 lower back pain from the change in gait as well. Levern's
7 reported the neck pain from the time he hit the emergency
8 room and the low back pain is in Dr. Neal's records
9 throughout, starting in 2009. Left knee 38% that one he
10 reported immediately, reported in the emergency room,
11 reported it throughout. Chest 5% reported it in the
12 emergency room, they did a CT scan of his chest to make sure
13 there were no other injuries. Reported it to Dr. Neal and
14 has told you on the stand he's got a lump or place right
15 here on his chest, still three years after the accident.
16 Left leg 28%, this is the damage from here to here
17 primarily. This is the hip part, this is where he's got a
18 change in gait where Spearman saying if he's reporting hip
19 pain it's because of the immobilization of the ankle and
20 because he can't move his ankle where all these bones and
21 ligaments move together. He had such a severe impact to his
22 ankle when it broke it had to of done damage all the way up.
23 Right thumb 20%, Spearman had to put, sow it all back on.
24 Right shoulder 30%, the right shoulder was reported to
25 Spearman nine days after the accident. They did an x-ray and

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1 the x-ray indicated that there was a possible fracture of
2 the glenoid and he ordered an MRI. Shortly there he
3 transferred his care from Charleston up to Columbia and
4 again the shoulder just got lost in the --- because Smith
5 then was treating the leg and the foot, removing screws, and
6 wasn't treating the right shoulder, Levern wasn't following
7 up. The left shoulder 15%, this isn't a very big permanent
8 impairment rating. The final permanent impairment rating is
9 a tough one it's a 52% permanent impairment rating to the
10 brain. Levern has said that he use to forget his homework
11 when he was a kid. He told the doctor that he thought he was
12 ok because he would go to the grocery store and forget
13 things, but after the accident he forgot how to get home
14 from the grocery store. Dr. Neal testified that he forgot
15 how to get to his office, that he been to coming to for
16 three years. He hit his head in the accident with testimony
17 from two different individuals on that. He had head trauma
18 that day, they did a CT scan they didn't find anything.
19 Sometimes head traumas are hard, sometimes they're easy. Dr.
20 Neal believes with a reasonable degree of medical certainty
21 more likely than not that the memory loss that Levern McCray
22 is having now is a result of this accident and gave him a
23 52% permanent impairment rating to his brain. These
24 permanent impairment ratings we're going to ask you to
25 compensate Levern for. Those numbers are hard, because there

1 isn't dollar way to do that. How do you compensate someone
2 for a lifetime loss of 75% use of your left ankle and foot?
3 He was fifty when this accident happened, he'll live till
4 he's 79, 80. The judge is going to charge you on he'll live
5 to age 79.8 so almost 80, 79 to 80. This based on the life
6 expectancy tables that are in the code in South Carolina.
7 They're giving to us to aid juries in being able to estimate
8 or assist us in estimating economic losses like Oliver Wood
9 because he used them and in estimating other damages. So you
10 can use them here with permanent impairment ratings or we
11 can use them up here when we're talking about other damages.
12 These may be easier to do literally dollar for dollar. If
13 you give him a dollar per percentage for every permanent
14 impairment he's got you can just run down that list. The
15 total of the percentage, per percentage per item of
16 permanent impairment the Levern McCray suffered at the hands
17 of a drunk driver that hit him head on after he crossed the
18 centerline is \$316,000 and that's the damage that he did
19 permanently to Levern on December 20, 2008. The last thing
20 that we're going to ask you to do today is award Levern
21 something for what he went through as a human. The harm that
22 he actually suffered as a person because all of these are
23 actual damages that he suffered and you're going to have a
24 jury verdict form back there with you and the first line of
25 it's going to be actual damages because opposing counsel's

1 not arguing whether or not he's entitled to the awarded
2 actual damages. He's already told you this was a serious
3 accident, we admit the defendant caused the accident, we're
4 not saying Mr. McCray did anything wrong, we admit he was
5 drunk. He gets actual damages. Literally it's about how much.
6 These are all actual damages the medical bills are actual
7 damages, the lost wages are actual damages, the permanency
8 the permanent impairment to each physical part of his body
9 is an actual damage that he suffered that day and the last
10 actual damage that he suffered is what he suffered as a
11 person, loss of enjoyment of life, mental anguish, and pain
12 and suffering. Pain and suffering is a material element of
13 damages which a recovery must be based, may be based. The
14 plaintiff is entitled to compensation for pain and suffering
15 directly resulting from the wrongful acts of the defendant.
16 I don't know how this couldn't hurt. The doctors believed
17 it hurt, they prescribed pain medication. Levern sat in his
18 car and called his wife told his wife it hurt. When he was
19 asked to describe his pain on a scale of one to ten, he told
20 them it was a twenty. He took pain medication until he
21 couldn't take it anymore and had to go back to work and
22 couldn't take the prescription pain medication anymore and
23 then he took over the counter pain medication until it
24 messed up his stomach so bad that he could take it anymore
25 and now he lives with it but he's got to live with it

1 because the defendant got drunk, drove his car, hit him head
2 on, crossed the centerline and did this to him. So know he's
3 entitled to have you compensate him for pain and suffering.
4 Pain and suffering compensates the injured person for the
5 physical discomfort and the emotional response to the
6 sensation of pain caused by the injury itself. It's based on
7 the nature and extent of the injuries and the condition of
8 the injured party before the injury as compared to the
9 condition afterwards. He was in good condition, he was a
10 hard worker before this incident happened. He didn't seem to
11 have any preexisting condition other than forgetting one or
12 two things at the grocery store when he went, forgetting his
13 homework when he was in school. He's entitled to
14 compensation from you for mental anguish, for loss of
15 enjoyment of life, and for pain and suffering and we talked
16 just briefly about per diem for the life expectancy tables.
17 That's one with which you can compensate someone for these
18 harms that he suffers as a person. You can compensate him in
19 a lump sum, you can compensate him for something in a
20 multiple of the medicals. So for instance if someone has
21 \$5,000 in medical bills they probably aren't hurt as bad as
22 someone that has \$50,000 in medical bills. So if you wanted
23 to compensate someone in a multiple of their medical bills
24 that would be unusual. Four times their medical bills, five
25 times their medical bills, whatever you think it's worth for

1 someone to live from age 55 to age 79 with the pain and
2 suffering and loss of enjoyment of life of that and these
3 permanent impairment. The other way to do it is a per diem
4 which is the value per day that he's going to live from the
5 date of the accident 12-20-2008 until the day that he is
6 estimated by statue to no longer be with us. He estimated by
7 statue to live until age 79.80 years, which when you
8 multiply it out by day is 8738.10 days, that's generally
9 hard to hear. So if you want to have an estimate of the
10 value of that then a per diem award would be appropriate
11 there. So if you were going to live with that pain twenty
12 four hours a day, seven days a week for 8,738.10 days I
13 would think a dollar an hour would be reasonable. I'll tell
14 you right now that I don't think Levern would take a dollar
15 a hour to live in the pain that he lives in. That he
16 testified that it hurts all the time everyday. Twenty four
17 dollars a day for 8,738 days is \$209,744, \$209,714.40. Those
18 are Levern McCray's actual damages the medical bills that
19 opposing counsel said that they admit that they caused when
20 his defendant Jose Valle who isn't here to take
21 responsibility for the harm that he cause Levern. These are
22 the medical bills that he admits that they caused,
23 \$47,195.70, the lost wages that he admits that they cause
24 the \$25,198.50. I suspect he's going to pick a fight over
25 the future lost wages I think again that's still a

1 conservative number. We're not asking you for the \$15,000 a
2 year that Jay Welch testified to and Jay Welch is a
3 superintendent. He's been working in that job for thirty
4 years, he's certainly knows how much Levern McCray could be
5 making as a supervisor. Certainly qualified to testify to
6 that and testified to you under oath that he would be his
7 supervisor if Levern could move around that work site. So
8 that's definitely a reasonable loss that we've proved by a
9 preponderance of the evidence. More likely than not would
10 Levern be a supervisor with Jay Welch making \$15,000 more a
11 year if he hadn't been hit by Jose Valle a drunk driver on
12 the wrong side of the road? Yeah. Lose of enjoyment of life
13 and pain and suffering, he's entitled to receive something
14 for pain and suffering under South Carolina law. He's
15 entitled to receive something the mental anguish and lose of
16 enjoyment of life and the pain and suffering and it's up to
17 the jury to decide what that number is and put a value on
18 the pain and the harm that he's suffered as a person and
19 that's a hard number and that's generally what we need
20 juries to do. The permanent injuries, those numbers again
21 they're hard numbers to come up with. These percentages just
22 give as a guide, they give as a guide they're an easy
23 number. Dr. Neal testified within a reasonable degree of
24 medical certainty as to what those numbers were and how they
25 translate. Just giving you the best guidance I can as to how

1 to compensate him for what those permanent injuries are but
2 these permanent injuries are different from that pain and
3 suffering these are two different numbers and this total
4 together is just the actual damages that Levern suffered and
5 again Jose Valle is not here to take responsibility for his
6 actions today. He could have walked in here and said I was
7 on the wrong side of the road, I wasn't paying attention to
8 what I was doing and I had been drinking and I was drunk and
9 I'm going to take responsibility for what I did and he
10 didn't do that and we're going to ask you to award punitive
11 damages against because we've proven by clear and convincing
12 evidence that he was on the wrong side of the road and that
13 he had been drinking alcohol that night and that he had been
14 drinking alcohol above a .08 which is the illegal limit to
15 drive in the state of South Carolina. Opposing counsels
16 right we definitely agree on a couple things. We definitely
17 agree that this was a serious accident, we definitely agree
18 that his client was drunk, we definitely agree that we
19 should be reasonable. We think these numbers are clearly
20 reasonable for the harm that was caused by Jose Valle and
21 the harm that Levern McCray suffered and the pain that he's
22 going to go through for the years from December 20, 2008 and
23 awarding anything less than full compensation for Levern,
24 awarding anything less than full justice including something
25 for his permanent injury and for his pain and suffering

1 anything less than full justice is injustice in this case.

2 Thank you.

3 The Court: Does anyone need to go to the restroom or is
4 everyone comfortable? You may proceed.

5 Mr. Allen: Thank you Judge.

6 The Court: You're welcome.

7 **Closing by Mr. Allen**

8 Mr. Allen: I don't have a calculator but I would
9 approximate that to be about \$670,000 not including the
10 punitive damages that she is going to ask for when she gets
11 up here afterwards, that's why we're here. I told you at the
12 beginning that this case is about being reasonable and told
13 you that at the end of this case I was going to stand up
14 here and ask you again for a fair and just reasonable
15 verdict. The plaintiff's lawyer said at the beginning of
16 this case that it is about giving fair to her client for the
17 injury that came about on December 20, 2008. She started her
18 opening around 9:58 and at 10:06 was the first time that she
19 ever mentioned anything about the actual injury. The first
20 seven minutes were talking about the defendant and the
21 defendant's conduct. The plaintiff's lawyer wants this case
22 to be about the defendant's conduct in the hopes that it
23 gets you worked up, angry, excited, a lot of passion and
24 emotion and compensate her client as a result of it. I'm
25 asking for just a reasonable number to compensate the

1 plaintiff for his injury. How are you going to do that? If
2 you'll look at the evidence that you've been presented with
3 the past three days. You saw the pictures, you saw them at
4 the beginning you saw them through the testimony you're
5 seeing them again. It's a series impact, I agree I told you
6 that at the beginning. It was a bad accident not a parking
7 lot fender bender, I agree. You heard from the plaintiff who
8 said he was in his lane and this car came into his lane he
9 had to get off the road, I agree. I've never made the
10 argument ever that this was not the defendants fault. When
11 you first get a case in, you get a complaint and then the
12 defendant has a chance to answer. In that answer from the
13 very beginning we said, defendant admits negligence for this
14 accident, nothing has changed. You heard from Dr. Spearman
15 he's the one that did the surgery on the day of the
16 accident, he spent two days in the hospital with the
17 surgery. He said the accident caused the fractured ankle and
18 required surgery, I agree. They thought of Dr. Moore in
19 Columbia he said it's his practice to take the screw out,
20 some doctors do some don't but he says it's my standard
21 protocol to take it out, no problem I agree. He also said
22 that he released him to full duty on May 21, 2009. January,
23 February, March, April, May about five months out of work,
24 I'm okay with that it's about \$25,000. You'll see loss wages
25 verification form. You also heard that the very next week

1 that he went back to work, he worked over fifty hours on a
2 heavy construction site. Has not missed one day, one hour
3 due to pain, discomfort, or inability to do his job as a
4 result to this accident. Three years without any treatment
5 from a doctor, nurse, doc in the box, urgent care center,
6 anything with complaints of problems, three years. You'll
7 see the prescription medicine chart that is attached to the
8 medical bills as well. Last prescription medicines were
9 according to that document was in May 2009. You didn't hear
10 any testimony even from the plaintiff saying, but my ankle
11 kills me and I take four Advil a day and you're definitely
12 not going to see any bills for that. Three years and three
13 months before a trial he goes back to Dr. Spearman and says
14 I got problems, my ankles bothering me. Alright lets do an
15 x-ray lets check it out. We do an x-ray, what do they find.
16 An osteophyte, a little bone that's gone off into the tibia
17 and he says in his deposition I'm not sure if that's causing
18 pain. I think it's swelling, I think it's scar tissue I'm
19 not sure let's do an injection and so far there have been no
20 follow up, no other visits planned, and no appointments with
21 any other specialist. \$47,195 in total medical bills I said
22 it was around forty-five, in overall I don't know if we're
23 fighting that much over the medical bills. I've got problems
24 with Dr. Neal which I'll talk about in a second, but about
25 \$45,000 in medicals 25 in loss wages, that's reasonable I

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1 think you should award it to him. I told you in the
2 beginning usually defense lawyers don't stand up here and
3 tell you, defendant admits fault, we think the injuries
4 related, and we think you ought to give him some money. I'm
5 doing that in this case because it's reasonable, it's fair.
6 What's not reasonable and what's not fair? Lets talk about
7 those things. Dr. Wood he takes a \$25,000 lost wage claim
8 where the plaintiff has actually lost money and turns it
9 into an additional \$73,000 in change. He's hired by the
10 plaintiff and paid \$350 a hour to come here and talk to you
11 all. How did he get to that number? Well, first thing he did
12 is when he got the questionnaire in and says when do you
13 plan to retire, it said 60, he said that's not good enough
14 lets stretch it out to 66, lets get another six years out of
15 this. What else did he say, personal services, a honey do
16 list, that people do not pay for, do not get paid for and
17 he's going to add that in there. There's been no testimony
18 that there's been one penny dollar spent on having services
19 done at his home, no maid, no cook, no lawn service,
20 nothing. He also didn't take in account his past incomes.
21 Plaintiff made \$90,000 the year after this accident, in 2005
22 he made fifty. His income has almost doubled in five years
23 and one of that last year was after this accident, but that
24 wasn't taken into account coming up with this number. Lastly
25 and the biggest thing, is he says and his numbers based upon

1 and the plaintiff already talked about it was the fact that
2 he would have been made foreman and according to Jay Welch
3 would have made \$15,000. I kind of think the plaintiff's
4 lawyer herself knows that that's not really reasonable and
5 you're not going to buy it, so she'll just do you the
6 courtesy of calling it conservative and saying \$5,000 a
7 year. A foreman position that the plaintiff has held for
8 three months in 2005, he's been doing this work for twenty
9 five years. That's roughly one percent of the total time
10 that he has been working with the same company, doing the
11 same work and we're to believe that had it not been for this
12 accident he would have automatically been given this foreman
13 position, that doesn't sound reasonable that doesn't sound
14 fair. What else did we hear about? We heard about the family
15 and friends. I never met them, never deposed them, never
16 talked to them but they said what I thought they were going
17 to say, which is Mr. McCray is a good guy but this accident
18 has really messed him up and he can't do things he use to.
19 What does the actual evidence show? Fifty hours a week the
20 day that he was released and has worked consistently since
21 then. Lastly, Dr. Neal and I think his bills are around
22 \$2,000, Twenty one twenty. I don't think that Dr. Neal is
23 reasonable and I'll tell you why. Dr. Neal is an internist
24 and a heart doctor, a non or certified internist and heart
25 doctor. Who when asked the question by me, is it fair for us

1 to assume that Dr. Smith and Dr. Spearman who've actually
2 been treating the plaintiff and actually board certified and
3 performed surgeries and procedures on them, can we take his
4 opinion over yours regarding how his ankles doing,
5 impairment and stuff like that, no. What about a neurologist
6 he did a work up on the plaintiff, he actually is board
7 certified neurologist, you sent it to him can we take his
8 opinion, no. He's an advocate, I could tell you why. Not
9 seeing the plaintiff for three years and then automatically
10 comes in his office. These impairments, two of which the
11 left shoulder and the brain must of surprised the
12 plaintiff's lawyer herself otherwise it would have been
13 printed and not written down in the last minute. Those
14 impairments to every single part of the plaintiff's body
15 other than his right leg, literally every single part, other
16 than the left leg, ankle and foot there's been no diagnosis
17 or treatment to any of those portions of his body. If he was
18 having these problems with his shoulders and his hips
19 wouldn't he have told Dr. Moore and Dr. Smith who are
20 orthopedic surgeons. Hey doc I know you are treating me for
21 my left foot and my ankle but you know as time has gone by
22 and I've still got this problem in my hip can you check it
23 out, nothing like that. They call this system what we're
24 doing called the Court of Common Pleas some people call it
25 court of commonsense. You are not to check out at the door

1 when you come through and sit in your chair and when you go
2 back in the deliberation room and talk about this case. You
3 use your commonsense, if it rings true you award it. If it
4 doesn't, doesn't seem fair, doesn't seem right, you don't
5 it's your discretion. There's a story where Abraham Lincoln
6 who was a lawyer before he was president. He was talking to
7 a witness on a stand and he said, who was an expert and he
8 said, what if, how many legs does a horse have and he said
9 four and he said well, Mr. Expert what if I told you that
10 the tail was also a leg and the expert said then I'd tell
11 you there was five. He said you tell me that and you'd be
12 wrong just because I tell you something the way it is
13 doesn't make it true. So just because you have an expert up
14 here saying it doesn't make it true. The judge will tell you
15 that and when she tells you that you can either believe all,
16 some, or none of a witnesses testimony. It's got to be fair,
17 it's got to be reasonable. Punitive damages she's going to
18 ask you for that as well, in your award. It's the jury's
19 discretion on whether they're going to award it or not, it's
20 completely your call. Whether the defendant's conduct rose
21 to such a level that it was a willful disregard to the
22 rights, safety and that by awarding damages you will deter
23 his conduct. I told you at the beginning the defendants not
24 here, won't be here. He's not going to hear about this
25 verdict, so any message that the plaintiff's lawyer gets up

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1 here and tells you to send, he will not receive it. Lawyers
2 try cases three times in front of people. First time is in
3 front of other people whether it's friends or colleagues,
4 some people hire groups to come into, they talk about ideas,
5 what's the case about that type of thing. They get a feel
6 before they do the second time which is what we've been
7 doing the past three days, which is the actual trial. The
8 third time is when they go back to their law firm and they
9 talk to their colleagues and law partners about what they
10 did right, what they did wrong, what they could have done,
11 should have done, we kind of do a postmortem on the whole
12 trial. This case is no different, the first time I talked to
13 someone about it and got their feelings, my focus group is
14 my wife. I told my wife that I'm trying a case and she's
15 always interested what the case is about. I said this case
16 is about a pretty bad accident, I'm not going to lie it was
17 a bad accident the defendant crossed the centerline
18 admittedly and caused a pretty bad impact and caused the
19 plaintiff to get surgery on his ankle, broke it. He took
20 five months out for work and then went back full duty no
21 complaints no problems working fine, \$45,000 medical bills,
22 \$25,000 lost wages. I asked her, what you think it's worth
23 how much is that, which is what I'm going to ask you all to
24 do. She told me, the rules prohibit me from telling you
25 what I personally believe a case is worth and I can't tell

1 you what she told me but I'll tell you this the number she
2 told me was a number that I thought was fair and reasonable
3 and just. I then said I got to add a little wrinkle, I got
4 to tell you that the defendant is not going to be in the
5 courtroom and that there's allegations that he was under the
6 influence and her response to me was is it a civil case and
7 I said yes. She said, well what does that have to do with
8 how badly the plaintiff is hurt? This is not a criminal
9 case. Judge Young on Monday told you that he's not calling
10 any criminal cases, so in the first six or seven minutes in
11 the opening when the plaintiff's talking to you about rules,
12 including statue, and all the stuff about police officers
13 and SLED agents and all the other stuff. Again, it's to make
14 it about a case that it's not about. This case is about a
15 reasonable value to give the plaintiff for the harm that he
16 suffered as a result of an accident. I trust that you will
17 return a fair and just and reasonable verdict. Thank you.

18 The Court: Is everybody comfortable? Does anyone need to
19 go to the restroom? You may proceed Mrs. Mullis.

20 **Reply closing by Ms. Mullis**

21 Ms. Mullis: Briefly, I promise. When Dr. Smith not Dr.
22 Spearman released Levern McCray to full duty, he released
23 him to full duty after six months. He testified in his
24 deposition that he was releasing him at MMI and we had that
25 whole jokes about MMI, what's MMI, maximum medical

1 improvement. I asked him what that was, he said I don't
2 really know. I said how long does it really take for him to
3 recover from this kind of break and this kind of surgery and
4 he's saying well about eighteen months. So he released him
5 from, to full duty to go to work but he knew full well when
6 he release him that even a year after the accident to a year
7 and a half after the accident that the bones in his leg
8 wouldn't have been fully healed for a year and a half. That
9 isn't really full duty. Eighteen months for bones to heal
10 especially in a severe break like that and he's still got
11 the piece of hardware in his leg today. Opposing counsel
12 knows full well that Levern is working in Georgia and that
13 he could work up to eleven to fourteen hours a day and
14 anywhere from five to seven days in a week. So despite what
15 he made in 2010 when you're working overtime eleven hours a
16 day, working six even seven hours in a week, numbers get big
17 pretty quick paying overtime in construction. That doesn't
18 mean he didn't have a loss in income. Future damages the
19 plaintiff is entitled to a verdict for actual damages and
20 your verdict should include an amount to cover any damages
21 that the evidence shows will be reasonably certain to occur
22 in the future. Future damages need not be proved to a
23 mathematically certainty and often must be approximated. We
24 didn't have to bring in an economic expert in here to do
25 math for you, Jay Welch testifying that he lost \$15,000 a

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1 year and the Jay Welch as a superintendent would have hired
2 him as a supervisor. The testimony of other supervisors that
3 he would have hire him as a supervisor. The testimony of
4 Levern that he couldn't do a supervisory position would have
5 been sufficient for future damages for lost wages.
6 Diminution of earning capacity during his entire life
7 expectancy and he's entitled to be compensated for that loss
8 and you can calculate those damages using the South Carolina
9 Mortuary Guide, table as a guide. His is a reasonable
10 compensation for a reasonable injury, that is reasonable.
11 That's a reasonable compensation for an injury that was
12 caused by the defendant. Actual damages in a negligence case
13 the judge is going to list them off to you. We narrowed them
14 down for you. Lost wages from work and impairment in the
15 ability to earn work in the future, first two you're going
16 to hear, medical expenses including rehab, physical therapy,
17 permanent physical injuries right there, future medical or
18 medical expenses, loss of family services, loss of family
19 services that exactly what Oliver Wood just put in a
20 numerical value for you. Just because isn't paying someone
21 like Mike Lewis, his brother, to come up and mow his grass
22 doesn't mean they're not entitled to be compensated for
23 that. This is an actual damage that he incurred and they're
24 entitled to be compensated for it under South Carolina law.
25 The judge will charge you on the law. Alteration of

1 lifestyle and then the list of pain and suffering, mental
2 anguish, and loss of enjoyment of life and it goes like this
3 physiological trauma, mental anguish, mental distress,
4 apprehension, anxiety, emotional injury, physiological
5 injury, depression, pain and suffering, and loss of
6 enjoyment of life. Again these are all actual damages that
7 he's entitled to for the conduct of the defendant. Why are
8 we talking about statutes? The reason we're talking about
9 statutes is because the defendant has to be held responsible
10 for his conduct and he isn't being held responsible for his
11 conduct and the harm that's been done to Levern McCray and
12 defendant had the opportunity to take responsibility for his
13 conduct and is just doing that today, because opposing
14 counsel was sent and he says we admitted in our answer in
15 our pleadings years ago that we admitted liability but he
16 was sent request to admit. Pleadings again from the
17 plaintiff that said, was the defendant driving under the
18 influence, I said request to admit defendant was driving
19 under the influence crossed the centerline into the east
20 bound land of 58748 which is Harbor Lake Drive on or about
21 Moncks Corner in South Carolina. Lack sufficient knowledge
22 or information to form belief, denied. So now today four
23 years later, three and a half years later he stands before
24 you and says oh no we admitted he crossed the centerline, we
25 admitted he hit him head on, we admitted he was drunk, but

1 this is the first time he's admitted it and the defendant
2 isn't here to admit it. The defendant isn't here to take
3 responsibility for his conduct and the injuries that he
4 caused Levern McCray. I asked he again another question, as
5 a direct and approximate result of the defendant driving
6 under the influence and crossing into the plaintiff's lane
7 he struck the plaintiff's vehicle head on.

8 Mr. Allen: Objection.

9 The Court: Bases?

10 Mr. Allen: Can we approach?

11 The Court: Yes. Ladies and gentlemen I have matter of
12 law that I need to take up with the attorneys. During this
13 break please do not discuss the case and please leave your
14 notepads in your seats.

15 (Jury Break at 11:14 a.m.)

16 The Court: What is the bases of your objection Mr.
17 Allen?

18 Mr. Allen: The bases of my objection is the request to
19 admit are not evidence, they are not pleadings, they're
20 simply discovery matters. They have not been admitted to so
21 therefore cannot be reference, have the court take judicial
22 notice of them. It was outside the scope of my closing and
23 most importantly the plaintiff's lawyer is trying to do a
24 slight of hand with saying the defendant's taking
25 responsibility or not taking responsibility when those

1 to go any further with it can be very misleading to the jury
2 because then it opens a real pandora's box about discovery
3 and all these other peripheral issues that really have
4 nothing to do with the case. So if your goal was to say that
5 they still were denying it you've gotten that in your
6 argument and lets move on.

7 Mrs. Mullis: It was just our concern that they had
8 opened the door with the answer.

9 The Court: I've already noted what your argument was.
10 The court has noted it and overruled.

11 Mrs. Mullis: Thank you.

12 The Court: We ready.

13 (Jury enters courtroom at 11:48 a.m.)

14 Reply closing continued by Mullis

15 Mrs. Mullis: The Defendant was reckless in his conduct,
16 that he was driving recklessly. You drink if you cross the
17 centerline and you hit another car head on I would say that
18 would be reckless driving. The statues violation of a statue
19 constitutes negligence per se is evidence of recklessness
20 and willfulness. It doesn't mean that it's necessarily but
21 it's within the jury's, the jury can find reckless, willful,
22 wonton, intentional conduct. When you drink and get behind
23 the wheel of a car you know that you can't operate a car
24 that well, obviously Mr. Valle can't, he can't even keep it
25 on the right side of the road, hit a car head on. If you

1 drive a car recklessly in disregard for the safety of other
2 persons it's considered reckless driving under the South
3 Carolina code. In South Carolina punitive damages are
4 awarded to punish the person causing the injury. To
5 vindicate the injured person's right, to make an example of
6 the person causing the harm so that he won't do it again and
7 that other people won't engage in similar conduct. It's a
8 deterrent, it isn't just to punish Mr. Valle it's to deter
9 other people from getting drunk and hitting other people
10 head on and breaking their legs and causing permanent
11 injuries like these. There's no formula for measuring
12 punitive damages, again this is within the purview of the
13 jury. You've got to come up with this number, it's a
14 reasonable number it's got to be a fair number but it's got
15 to be a just number. The character of the defendant's acts,
16 he was drunk it was 5:30 in the morning. Levern was on his
17 way to work, we don't know where Mr. Valle was going. We
18 assume that he was coming from somewhere that he had been
19 drinking. The nature and extent of the harm to the plaintiff
20 which the defendant caused. You've seen the harm, you've
21 heard him testify to it, he's going to suffer it for years.
22 The degree, the defendants degree of culpability whether
23 he's excepting responsibility for what he's doing, the
24 punishment that should be imposed, the defendant's awareness
25 or concealment. We sent out process servers, we sent out

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1 investigators...

2 Mr. Allen: Objection

3 The Court: As to ...

4 Mr. Allen: Relevance.

5 The Court: Please approach. Sustained ladies and
6 gentlemen you are to disregard Mrs. Mullis's last remark and
7 you give it absolutely no consideration in your
8 deliberations. You may continue.

9 Mrs. Mullis: The likelihood of whether the award will
10 deter the defendant or others from this type of conduct.
11 Send a message. And rather the award is reasonably related
12 to the harm likely to result from the conduct, it's directly
13 related. His drunk driving crossing over the centerline and
14 hitting Levern head on is the cause of these injuries. In
15 South Carolina the award of punitive damages does not rest
16 in the jury's discretion but is recoverable as a matter of
17 right. If we have proven by clear and convincing evidence
18 that the defendant was reckless, willful, and wonton in his
19 conduct. If he got in the car and recklessly drink alcohol
20 drove recklessly crossed the centerline hit Levern head on
21 and caused the injuries that he's testified to today and
22 that three other doctors have testified to, then you have a
23 duty to award punitive damages. In South Carolina the award
24 of punitive damages does not rest to the jury's discretion
25 but it recoverable as a matter of right. The jury has a duty

1 to award punitive damages if the jury finds the plaintiff's
2 right have been consciously, willfully, and recklessly
3 violated and if you should find the plaintiff is entitled to
4 recover punitive damages in addition to actual damages it
5 would be your duty to include such damages in your verdict.

6 Mr. Allen: Objection

7 The Court: Bases.

8 Mr. Allen: Mis-stating the law.

9 The Court: Overruled.

10 Mrs. Mullis: And award --- If you should find the
11 plaintiff is entitled to recover punitive damages in
12 addition to actual damages it would be your duty to include
13 such damages in your verdict and award such an amount that
14 you may deem reasonable and proper in light of the facts and
15 circumstances. You'll note that that charge has the word
16 reasonable in it. I haven't stood up here once and asked you
17 to be unreasonable. I've given you suggestions for numbers.
18 Opposing counsel admitted that his client was drunk crossed
19 the centerline. He's admitted to the medical bills, to the
20 past loss wages, I've offered suggestion for the permanent
21 injury he's entitled to receive and the separate award for
22 loss of enjoyment in life, mental anguish, and pain and
23 suffering and those are his actual damages and there will be
24 a line on the verdict form for you to put actual damages
25 because he's admitted negligence. Admitted simple negligence

1 he stood here and said that. The next thing we're going to
2 ask you to do is award punitive damages because there is no
3 evidence to the contrary. We've proved by the greater weight
4 of the evidence, we've clearly proved almost beyond a
5 reasonable doubt that Mr. Valle was drunk and crossed the
6 centerline and by clearing convincing evidence I present to
7 you that he did this and caused these injuries. We are
8 entitled to punitive damages and Levern McCray's entitled to
9 punitive damages award in this case and that is full justice
10 and he's entitled to that today and this is his only
11 opportunity to get that. This one shot, thank you.

12 The Court: Does anyone need to use the restroom? My
13 instructions are about thirty minutes so we're going to be
14 sitting another thirty minutes. Everybody comfortable, why
15 don't you all stand up and stretch a little bit.

16 (Jury complies)

17 (Charges by Court)

18 The Court: Mr. Foreman and ladies and gentlemen of the
19 jury you have heard the evidence and arguments of both
20 parties in this case. Levern McCray the plaintiff claims
21 that he has been injured by the action of Jose W. Valle the
22 defendant and bringing this lawsuit the plaintiff claims
23 that the defendant should compensate him for his injuries.
24 Under our constitution and code of laws only you the jury
25 can make the findings a fact in this case. I am not

1 permitted to indicate to you how I might feel about the
2 facts and evidence that have been presented and through out
3 this trial it has been my intention to be fair and impartial
4 toward each of the parties involved as well as their
5 attorneys. To determine the facts in this case you will have
6 to evaluate the credibility which is simply a legalistic
7 term meaning the believability of each witness who has
8 testified. Some of the things that you may consider as you
9 decide whether or not to believe a witnesses testimony about
10 a particular matter include: What was the manner and
11 appearance of the witness who testified, was he or she
12 straight forward or hesitant in answering, was the testimony
13 of a witness consistent or inconsistent, how did the witness
14 come to know the facts that he or she testified to or what
15 was his or her ability to know these facts, is there some
16 reason a witness would want to give testimony would it help
17 or hurt one side or the other in other words was the witness
18 bias or prejudice, and was the testimony of the witness
19 strengthened or weakened by other testimony or evidence. You
20 can believe as much or a little of each witnesses testimony
21 as you think proper. You may believe the testimony of a
22 single witness against that of many witnesses or just the
23 opposite. Of course you do not determine the truth merely by
24 counting the number of witnesses presented by each side.
25 Throughout this process ladies and gentlemen you have but

1 one objective to seek the truth regardless of it's source.
2 All rules of evidence ordinarily do not permit witnesses to
3 testify to opinions or conclusions. An exception to this
4 rule exist for witnesses we call expert witnesses. A witness
5 who by their education, training, and experience has become
6 an expert in some art, science, profession, or calling may
7 give an opinion as to the subject the witness claims to be
8 an expert in and may also give the reasons for that opinion.
9 You should consider any expert opinion given by a witness
10 like any other evidence, give it the weight you think it
11 deserves. If you decide that an expert witness's opinion is
12 not based on sufficient education and experience or if you
13 decide that the reasons given in support of the opinion are
14 not sound or that the opinion is out weighed by other
15 testimony and evidence you may disregard the opinion
16 entirely. An expert witnesses testimony is to be given no
17 greater weight than that of other witnesses simply because
18 the witness is an expert and you are not required to except
19 the expert's opinion even though it is uncontradicted. As I
20 instructed previously you have heard testimony by way of
21 depositions and as I previously explained the deposition can
22 be a written document or a video containing sworn testimony
23 given by a witness outside of court, in the presence for the
24 attorneys who may ask questions of the witness. This
25 testimony is entitled to the same consideration and is to be

1 judged by you as if the witness were here present and
2 testified and gave the testimony. It is then for you the
3 jury to determine the effect, value, weight, and truth of
4 the testimony given in the deposition. The same constitution
5 and laws ladies and gentlemen which designate and make you
6 the finders of the facts as I've just explained make me the
7 instructor of the law. You must except the law as I instruct
8 it, if I'm wrong there's another place and time for that
9 error to be corrected, but for this case you must apply the
10 law as I instruct it and this means that you should not be
11 concerned with what you may think the law is or should be
12 but only with what I instruct you the law actually is. Now
13 Mr. Foreman, ladies and gentlemen the plaintiff has the
14 burden of proving his claims in this case. He must meet this
15 burden by proving his claims by the greater weight or the
16 preponderance of the evidence. Again using my earlier
17 example, imagining a traditional set of scales, when the
18 case begins the scale are even. After all of the evidence
19 has been presented if the scale should remain evenly
20 balanced or if they should tip even slightly in favor of the
21 defendant then the plaintiff would have failed to have met
22 his burden of proof and your verdict would be in favor of
23 the defendant. If on the other hand the scale should tip
24 even slightly in favor of the plaintiff then the plaintiff
25 would have met their burden of proof and your verdict would

1 be for the plaintiff. A preponderance of the evidence means
2 evidence which as a whole shows that the facts sought to be
3 proven are more probable than not. Of course there's no way
4 to exercise or weigh evidence except through the exercise of
5 your good common sense and judgement. It is entirely a
6 mental process and the evidence you should give the most
7 weight to is that which convinces you of it's truth,
8 regardless of from whom or what source it has come.
9 Negligence means that a person has done something that a
10 reasonable person would not have done or has failed to do
11 something that a reasonable person would have done in the
12 same situation. It can be said that a negligent person again
13 has done something that a reasonable person would not have
14 done if faced with the same situation or on the other hand
15 that he has failed to do something that a reasonable person
16 would have done or both. I instruct you that the defendant
17 in this case Jose W. Valle or Valle I apologize if I'm
18 incorrectly pronouncing it has admitted he is liable. When
19 liability is admitted as in this case a plaintiff is
20 entitled to a verdict unless the proof on the issue of
21 damages and causation completely fails. So I would instruct
22 you ladies and gentlemen that unless there is absolutely no
23 proof of damages the plaintiff would be entitled to a
24 verdict for damages based upon the law as I will instruct
25 you. I further instruct you that if the opinions of experts

1 are relied on to establish approximate cause of an injury,
2 the expert must state with reasonable certainty that in his
3 or her professional opinion the plaintiff's injuries were
4 most probably resulted from the negligence of the defendant.
5 It is not necessary that the expert use the exact words most
6 probably. It is enough for the expert to state, that it is
7 the expert's professional opinion that the defendant
8 negligence was most likely one among the possible causes of
9 the plaintiff's injuries. Should you decide ladies and
10 gentlemen that the plaintiff is entitled to a verdict, your
11 next step would be to decide how much money the defendant
12 should be required to pay. We call such an award damages,
13 damages are divided into two categories, actual damages and
14 punitive damages. Actual damages are intended to compensate
15 the injured party, that is to put that party as close as
16 possible in the same position that they were in before the
17 incident occurred. In other words actual damages will be the
18 actual losses and expenses which the plaintiff has suffered
19 because of the other parties negligence. Punitive damages as
20 the name implies are awarded to punish a defendant or to
21 deter and vindicate him and other persons from similar
22 conduct. That is to make an example of the defendant, they
23 are sometimes called exemplary damages for that reason. I
24 will give you further instructions regarding punitive
25 damages after I first explain the elements of actual

1 damages. Actual damages for a plaintiff who has been
2 physically injured included pain and suffering, both present
3 past and future. As well as mental anguish impairment of
4 health or physical condition, the plaintiff may also claim
5 loss wages due to absence from work and reduced earning
6 ability for the future. As with all of the facts in this
7 case the plaintiff must prove his actual damages by the
8 greater weight or preponderance of the evidence. In
9 determining the amount of compensation for personal injuries
10 it is proper to take into consideration past and present
11 aspects of the injury. This would include physical and
12 mental pain and suffering endured, expenses incurred for
13 necessary medical treatment, loss of time and income which
14 resulted from the impairment of the ability to work and earn
15 a livelihood, the loss of enjoyment of life suffered as a
16 result of the injury which includes the injured persons
17 ability to participate in and derive pleasure from the
18 normal activities of daily life, and for the individuals
19 ability to pursue his talents, recreational interest,
20 hobbies, or advocations and any other losses which are
21 reflected by the character of the injury. The injured party
22 may also recover for such future damages as it is reasonably
23 certain will of necessity result from the injuries. The
24 principal underlying compensation for future damages is that
25 only one action can be brought and therefore only one

1 recovery had. It is proper to include in the estimate of
2 future damages compensation for loss of capacity for work or
3 attention to the plaintiff's ordinary business and future
4 pain and suffering as will with reasonable certainty result.
5 In arriving at an assessment of loss of future earning power
6 it is proper to take into consideration all matters which
7 relate to the issue of the impairment, the effect which that
8 impairment will have on the plaintiff's capacity to work
9 extend to which the impairment will impair the plaintiff's
10 earning capacity. The present value of all losses do to his
11 impaired earning power. In determining the loss of earning
12 capacity which may result in the future, the fact that the
13 plaintiff is making the same or more earnings since the
14 injury is but one factor to consider. Ladies and gentlemen
15 I instruct you that pain and suffering is a material element
16 upon which recovery may be based. I instruct you that the
17 law does not prescribe any definite standard by which to
18 compensate an injured person for pain and suffering and you
19 and you alone have the authority to determine the amount if
20 any to be allowed for pain and suffering and the law
21 requires that when making an award for pain and suffering
22 the jury shall exercise it's authority with calm and
23 reasonable judgement and that the damages shall be just and
24 reasonable in light of the testimony and evidence presented
25 in the case. I further instruct you that mental suffering,

1 apprehension, emotional upset, and anxiety past present or
2 expected in the future can be properly considered as an
3 element of damages. This would include anxiety,
4 apprehension, and mental suffering both past present and
5 future as may be reasonably expected. The amount of damages
6 for mental suffering cannot be exactly measured however the
7 damages if any shall be just and reasonable in light of the
8 testimony and evidence presented in the case. Ladies and
9 gentlemen if you find that the plaintiff was permanently
10 injured as a result of the defendant's actions you must then
11 decide how if at all that injury will affect the rest of the
12 plaintiff's life. A person's life expectancy is determined
13 by a life expectancy table which is a part of the laws of
14 the state of South Carolina. The life expectancy table is
15 only a estimate of the probable average remaining length of
16 life of all persons in our state of a given age. The
17 plaintiff is 59 years, is a 59 year old male with a life
18 expectancy of 21.45 years. This fact is to be considered by
19 you along with any other facts and circumstances in evidence
20 bearing on the plaintiff's life expectancy, including
21 occupation, habits, and health at the time of the injury in
22 deciding the amount of damages to be awarded to the
23 plaintiff. Ladies and gentlemen the defendant claims at the
24 time of the incident the plaintiff was suffering from an
25 existing physical defect. Even if you should find this to be

1 so, the mere fact of an existing defect would not prevent
2 the plaintiff from recovering damages from the defendant.
3 The defendant takes the plaintiff as he or she is found and
4 the plaintiff is entitled to recover damages resulting from
5 the aggravation of a preexisting condition. Under our laws
6 a person who negligently injures another is responsible for
7 all of the effects which are related to the incident and
8 this is true no matter what the plaintiff's physical
9 condition was when the incident occurred. It may seem that
10 if the plaintiff had been in good health the injury would
11 not have happened or that it would have been easier to cure,
12 that would in no way affect the defendant's liability. If
13 the presence of a disease or an existing physical condition
14 aggravates and prolongs the injury which in turn increases
15 the amount of damages then the plaintiff is entitled to
16 recover the increased amount as well as for any new or
17 additional injuries sustained in the subsequent accident.
18 Provided of course such aggravation or new injuries are the
19 natural and proximate result of the negligent acts or
20 admissions of the defendant. If you find that the plaintiff
21 had an existing physical impairment before the incident the
22 amount you award for actual damages should not include
23 damages for the existing impairment. Ladies and gentlemen
24 the plaintiff has the burden of proving his damages by the
25 greater weight or the preponderance of the evidence but this

1 does not mean that he must prove them to a mathematical
2 certainty or produce evidence of the precise amount of
3 damages he claims to have suffered, rather the evidence put
4 forth by the plaintiff should be such as to enable you the
5 jury to determine what amount of damages if any is fair,
6 just, and reasonable. Ladies and gentlemen if you the jury
7 should award actual damages you may also consider and award
8 punitive damages. Punitive damages are intended to punish
9 the wrongdoer for his extra ordinary and outrageous
10 misconduct and to serve as a deterrent to others and to the
11 defendant. Punitive damages are awarded to punish, deter,
12 and vindicate the rights of the plaintiff when the conduct
13 of the defendant is willful, wanton, or reckless. The words
14 reckless, willful, and wanton are words used to describe a
15 conscious failure to use reasonable care. In other words
16 while a negligent person is one who acts carelessly. A
17 person whose behavior is reckless, willful, and wanton is
18 not only careless in their actions but also is aware they
19 are being careless. In connection with that standard I
20 instruct you further that under our common law rules of the
21 road the operator of a motor vehicle, that our common law
22 rules of the road require the operator of a motor vehicle to
23 use the same care that would have been exercised by a person
24 of ordinary reason and prudence. If that person were driving
25 the same vehicle at the same time and place and under the

1 same circumstances. I further instruct you that a person
2 operating a motor vehicle on the public roads of this state
3 owes a duty to keep a proper look out for other vehicle upon
4 the highway. The duty is not merely one of looking but one
5 of observation. I instruct you that a motorist must look in
6 such an intelligent and careful manner as to enable him to
7 see a vehicle a person upon the highway and in the exercise
8 of ordinary care or caution for the safety of himself and
9 others. I further instruct you that a motorist who fails to
10 keep a proper look out or fails to see what a person of
11 ordinary care and prudence would have seen is guilty of
12 negligence. I further instruct you that under our common law
13 duties the driver of an automobile also has a duty to keep
14 the automobile under proper control, so that the driver is
15 able to slow down, stop, or turn the automobile to avoid
16 colliding with other vehicles, pedestrians, and objects
17 lawfully on the road. In addition to our common law
18 obligations and standards our state laws also define rules
19 which must be followed, 56-5-1900 driving on roadways laned
20 for traffic provides that whenever any roadway has been
21 divided into two or more clearly marked lanes for traffic
22 the following rules in addition to all others consistent
23 here with shall apply. A vehicle shall be driven as nearly
24 as practicable entirely within a single lane and shall not
25 be moved from the lane until the driver has first

1 ascertained that such movement can be made with safety. I
2 instruct you that code section 56-5-2930 provides that it is
3 unlawful for a person to drive a motor vehicle within this
4 state while under the influence of alcohol to the extent
5 that the person's faculties to drive are materially and
6 appreciably impaired. I further instruct you ladies and
7 gentlemen that 56-5-2950 subsection B provides as follows,
8 the amount of alcohol in the defendants blood at the time of
9 the accident as showed by chemical analysis of the defendant
10 breath or other bodily fluids may be considered by you in
11 deciding whether the defendant was under the influence. If
12 the alcohol concentration was eight one hundredths of one
13 percent or more it may be inferred that the defendant was
14 under the influence. This inference ladies and gentlemen is
15 simply an evidentiary fact to be considered by you along
16 with the other evidence in the case and you may give it the
17 effect value and weight you decide it should receive. I
18 further instruct you that code section 56-5-2920 provides
19 any person who drives any vehicle in a manner as to indicate
20 either a willful or wanton disregard for the safety of
21 persons or property is guilty of reckless driving. Ladies
22 and gentlemen I instruct you that while violation of a
23 statue constitutes negligence such violation does not by
24 itself constitute recklessness, willfulness, or wantonness.
25 However it does constitute evidence of recklessness,

1 willfulness, or wantonness and you may consider such
2 violation along with all the other facts and circumstances
3 surrounding the event to determine whether the defendant was
4 reckless, willful, or wanton. To support an award of
5 punitive damages the plaintiff must prove by clear and
6 convincing evidence that the conduct complained of included
7 a consciousness of wrong doing at the time of the conduct.
8 Clear and convincing ladies and gentlemen is a legal term
9 meaning more than just a preponderance of the evidence.
10 Clear and convincing proof leaves no substantial doubt, in
11 your mind, it is proof that establishes in your mind not
12 only that the proposition at issue is probable but that it
13 is highly probable. Punitive damages are awarded for the
14 benefit and in the public interest not as compensatory or
15 actual damages but in addition to such damages. Before
16 awarding punitive damages you must consider and weigh four
17 elements which may be pertinent to the facts of this case.
18 You must first consider the relationship between any
19 punitive damage award and the harm caused, any penalty
20 imposed should take into account the reprehensibility of the
21 conduct, the harm caused, the defendant's awareness of the
22 conduct's wrongfulness, the existence of similar past
23 conduct, the duration of the conduct, and any concealment.
24 Thus any penalty imposed should bear a relationship to the
25 nature and extent of the conduct and the harm caused

1 including the compensatory damage award made by you.
2 Secondly, any penalty imposed should take into account as a
3 mitigating factor any other penalty that may have been
4 imposed or which may be imposed for the conduct involving
5 any criminal or civil penalty or any other punitive damages
6 award arising out of the same conduct. Next you should
7 consider whether the award of and the amount of any punitive
8 damages award may deprive the defendant of any profits
9 derived from the improper conduct and whether the ill gotten
10 profit should be properly awarded to the plaintiff. Finally,
11 any award of punitive damages must be limited to punishment
12 and to this end the defendant's ability to pay any punitive
13 damage award should be considered. Ladies and gentlemen you
14 have been selected as fair and impartial jurors, sworn to
15 impartially try the facts of this case and when you comply
16 with your oath to do so then you will have fully complied
17 with your responsibility as jurors and no one will have the
18 right to criticize your verdict and you will have fully
19 discharged your duty as jurors in this case. You should not
20 be influenced by opinions or expressions of opinions if any,
21 which you may have heard outside of the evidence of the case
22 but you are to decide this case according to the testimony
23 that you have heard from the lips of the sworn witnesses and
24 the other evidence that has been introduced in this case.
25 There are two possible verdicts in this case there's no

1 significance whatsoever to the order in which I state these
2 possible verdicts, it is simply that one must be stated
3 first and you don't have to try to write this down because
4 the verdict form will go into the jury room with you. And it
5 reads as follows, as to the negligence cause of action we
6 the jury unanimously find for the plaintiff in the amount of
7 blank dollars actual damages or we the jury unanimously find
8 for the plaintiff in the amount of blank dollars actual
9 damages and blank dollars punitive damages. Again there's no
10 significance whatsoever to the order in which I've stated
11 these potential verdicts. Ladies and gentlemen your verdict
12 must be a unanimous one which means that all twelve of you
13 must agree in order to reach a verdict. I further instruct
14 you that your verdict cannot be based on passion, sympathy,
15 prejudice, emotion or any other consideration not found in
16 the evidence of this case. Again your verdict must be
17 unanimous which means that all twelve of you must agree. Mr.
18 Foreman it is your responsibility to fill out the verdict
19 form once the jury has reached a verdict it is also your
20 responsibility to sign and date the form. If the jury has
21 any questions during deliberations it's your responsibility
22 to write those questions out and what you will do is once
23 the jury has reached a verdict you'll knock on the door and
24 advice the bailiffs that the jury has reached a verdict or
25 if you have a question you should follow the same procedure.

1 Ladies and gentlemen I apologize that I did not explain this
2 earlier, the fore person is the person, they serve an
3 administrative function they fill out the verdict form they
4 don't have any greater vote or voice than you do it's a
5 completely random process that the court employs in
6 appointing a fore person so that a random cross section of
7 the community is represented but again that person does not
8 have any greater vote or voice than you do just purely an
9 administrative function. If you have any questions during
10 deliberation please know that there will be a delay in our
11 response and that does not mean we're ignoring you, there's
12 simply a procedure that we have to follow in answering your
13 questions, so if there is a question please know that there
14 will be a delay but that's because we are following
15 procedure that's mandated by case law. I'm now going to ask
16 that you return to your jury room but do not yet begin your
17 deliberations I have some matters of law that I need to take
18 up with the attorneys that may require further instruction
19 or clarification of an instruction. However if there's no
20 further instruction we will send in the evidence and the
21 verdict form along with your notebooks and at that time you
22 will be allowed to begin your deliberation. We have arranged
23 for your lunch to arrive by noon. Give us a little you know
24 it might be a little early or a little later but we'll
25 hopefully we sent it in early enough for it to be ready and

1 so that you'll have your lunch shortly. If you would go with
2 the bailiffs leave your notepads in your seats and do not
3 yet begin your deliberations.

4 (Jury break taken at 11:48)

5 The Court: Any exception from the plaintiff other than
6 those that we've already articulated in charge conference?

7 Mrs. Mullis: I thought we were charging 56-5-2933 I
8 heard inference but the one that says it's just unlawful to
9 drive with an alcohol concentration of .08. Did I miss that?

10 The Court: I will not instruct it. I instructed 2030 and
11 2950 which is the inference. I did not do 2933 which is
12 unlawful for a person driving a motor vehicle within the
13 state while his alcohol concentration is eight one hundredth
14 of one percent. Any exception to instructing that from the
15 defendant?

16 Mr. Allen: A couple of things, first and most
17 importantly I don't when that provision was enacted in the
18 code. I'm looking at the old school book and I don't even
19 see that provision in the code book. So to the extent it was
20 enacted after the date of this accident, I definitely have
21 a problem with it being charged. I also think that it might
22 confuse the jury on the intoxication level versus the
23 impairment, I think impairment is what we're dealing with
24 here, not necessarily intoxication.

25 The Court: That's why I said it's only an inference.

1 That's what the law says it's only an inference.

2 Mr. Allen: Then lastly my position is that what's been
3 instructed so far regarding all code sections are sections
4 is sufficient as a guide for whether punitive damages are
5 warranted, whether there's been a violation of statute.

6 Mrs. Mullis: My pocket part says history 2000 act number
7 390.

8 Mr. Allen: My pocket part says last thing in terms of
9 history is effective February 10, 2009.

10 Mrs. Mullis: That would be subsection five.

11 The Court: This seems to action in 2003 I've already
12 determined that. So that part that hadn't changed since
13 2003.

14 Mr. Allen: My understanding of law was always that .08
15 was a revocable presumption.

16 The Court: It is a revocable presumption that's why I
17 instructed it.

18 Mr. Allen: Well this code section seems to me that
19 saying that there's no presumption it's just your done,
20 which is confusing to me so I assume it would be confusing
21 to the jury as well.

22 The Court: There is some wrinkle with 2930 we don't even
23 instruct it in criminal cases, 2933. There's a wrinkle with
24 it because under the statute you can only be charged under
25 2933, they have to prove you were tested within two hours of

1 the arrest and it's always some issue with it and we only
2 charge material and appreciably and the .08 is merely an
3 inference. And the case law is very clear that it's only an
4 inference and that's how and the really actually under the
5 case law it's not a presumption it's just an inference and
6 the jury can consider it in the totality of the entire set
7 of circumstances, but I don't know that I have time right
8 now to go back through and go through all that case law and
9 determine why we do that. It's rare I will tell you this I
10 haven't seen the reference to 56-5-29, when they charge a
11 person with DUI they don't use 56-5-2933, they use 2930 and
12 there's some wrinkle with it and I'm trying to remember what
13 it is, I can't off the top of my head. The actual charge on
14 56-5-2933 is driving with an unlawful alcohol concentration
15 which is DUI per se but we have case law that says .08 is
16 only an inference it's not strict liability so I don't
17 remember what that case says but I know we don't instruct
18 2933 and I've been doing this a long time and I've never
19 instructed that even in DUI cases. There's a wrinkle of why
20 and I got to get to the bottom of why. Yes sir.

21 Mr. Allen: Just very briefly, sub section I says that
22 the fluids must be tested with two hours. Everyone can see
23 that it wasn't done within two hours and two it says a
24 person may not be prosecuted for both violations of 56-5-
25 2930 and a violation of this section. We clearly know the

1 defendant was charged with 56-5-2930 so I think it's
2 inapplicable.

3 The Court: The wrinkle with 2933 is you have to test
4 somebody within 2 hours that's why they never charge, that's
5 almost like a strict liability standard you'd be in DUI per
6 se. Statue is never used and I don't remember why. And the
7 other wrinkle with 2933 is there's a whole other set of
8 criteria to deal with proving it. One of which you have to
9 prove the person was lawfully arrested, you have to prove
10 the test was done within two hours, you have to prove the
11 machine was calibrated, it's like twelve different criteria
12 that you have to prove in order to charge somebody under
13 2933. Which is almost like a little misleading for me to
14 tell the jury that and not give them the rest of it because
15 I think in order for it to be applicable you would have to
16 prove that he was tested within two hours of the incident or
17 two hours of the arrest which as I recall the testimony it
18 was three hours. I'm not going to instruct 2933, 2933 is a
19 DUI per se statue and factually is not applicable in this
20 case. It has several requirements and the instruct on the
21 first part of that statue is misleading. The statue requires
22 that you be tested within two hours and your own argument
23 was the he was tested three hours later I believe.

24 Mrs. Mullis: Plaintiff's exhibit number five marked for
25 identification purposes indicates that the defendant Jose

1 Valle was arrested at 8:30 AM and plaintiff's exhibit number
2 seventeen indicated that the sample was taken at 8:45 AM.

3 The Court: That's not what the statute says it says
4 tested not blood drawn. There are another twelve, I cannot
5 charge just one part of the statute there are a bunch of
6 other elements to that statute that I would have to instruct.
7 That's why you can't charge somebody although the criminal
8 aspect this solely analogy that's why you never you can't do
9 both you do one or the other and that's why the state always
10 goes with materially, appreciably, or fair because they
11 never can have somebody tested within two hours that's very
12 rare. By the time you arrest them do a field sobriety test
13 on the side of the road and it also requires that all of it
14 be videotaped. There are a whole lot of requirements to that
15 statute because it's a per se statute and I just think
16 factually in this case it's not applicable but to some
17 extent I don't know that it really makes a difference
18 because the materially and appreciably standard is much
19 lower and by the time you charge because somebody can
20 materially and appreciably impaired at a point two. So I
21 don't know that a prejudice issue, I've instructed that he
22 is guilty of it if he is materially and appreciably impaired
23 which could be one drink or ten drinks and I have instructed
24 them that .08 is an inference which they can infer that he
25 was driving impaired. I just have some concerns about 2933

1 it's factual applicability to this case and the misleading
2 nature of charging one part of the statute without the other
3 parts of it because it is a per se statute. And it has other
4 elements and it also even within it makes reference to the
5 conviction and it just I don't know and to some extent it's
6 really cumulative I don't know that it's really, I just have
7 some real concerns about it being factual and applicable in
8 this case. Regarding the time of testing and when his and
9 some other nuances that go along with that statute. Are there
10 any other exceptions to the charges?

11 Mrs. Mullis: And then our per diem argument did a per
12 diem from the date of accident to the date of...

13 The Court: I said the past, present, or future.

14 Mrs. Mullis: I didn't know if you could instruct on the
15 21.45 years from the date of accident to the 79.3.

16 Mr. Allen: We're using two different numbers.

17 Mrs. Mullis: We're using two different numbers and I
18 don't want to confuse them.

19 The Court: Sometimes lawyers use different ones
20 sometimes they use the person's age at the time of the
21 incident, sometimes they use the person age at the time of
22 the accident I mean at the time of trial. The life
23 expectancy table itself most of the instructions that I've
24 know been giving the last few years we used the date of the
25 person at the time of the trial but that doesn't preclude

1 them from calculating it before then. Because everything I
2 say says past, present, and future aspects of the injury. So
3 I don't know that it, you we're talking about what less that
4 a year in his life expectancy because you know men live a
5 lot shorter time than women.

6 Mrs. Mullis: Three and half ...

7 The Court: --- with his age and the accident.

8 Mrs. Mullis: There was, his age and date of birth so it
9 would take it from.

10 The Court: I don't think that matters in the grand
11 scheme of things.

12 Mr. Allen: I just noticed that they start writing it
13 when you said it and it was different from what Mrs. Mullis
14 said that's the only reason I asked.

15 The Court: They react to a lot of things. I don't know
16 that you could isolate that one thing and I don't think you
17 can interpret what's in their minds. They might be hungry,
18 they might of just been tired of listening to me, who knows
19 I don't try to make those kind of speculative kinds of
20 assumptions about what jury is doing.

21 Mrs. Mullis: And then just renewing everything else.

22 The Court: What was his age at the time of the accident?

23 Mrs. Mullis: Fifty five.

24 The Court: What's the life expectancy? We'll look it up.

25 Mrs. Mullis: I have 29.80 from the date of accident.

1 The Court: Our standard instruction uses the age at the
2 time of the trial. The time that the he had injuries goes
3 into the past aspects of the injury which you've argued and
4 which I've instructed and actually doing it the way you've
5 done gives him less life expectancy it's only 79 years old
6 versus 80 years old the way I instructed it. But our
7 standard instruction, instructs that the person is as of
8 this time what their age is with the life expectancy of and
9 I know there's some confusion about it because I know when
10 I practiced law we always did it the time the accident
11 happened. But then of late I haven't had anybody request
12 that and actually though again doing the numbers, doing it
13 the way I did it gives him more life expectancy although it
14 seems like it's three years less when you calculate it at
15 the age he was at the time of the incident it's 79 years
16 old. Now doing it the way we did it's 80.45 years old. So
17 just a little more time. I would not instruct it I think
18 it's because I've already instructed on the past aspects of
19 the injury which all figure into the calculation and
20 actually I gave her more life expectancy doing it the way I
21 did it. Alright are there any exception from the defense?

22 Mr. Allen: None other than those previously argued.

23 The Court: Alright can you all go through the evidence
24 and make sure everything's in place so that we can make sure
25 the jury gets everything.

1 Mrs. Mullis: And is plaintiff's five out.

2 The Court: You know I never made a decision on that did
3 I and that's unusual. The problem is I would have to redact
4 so much of this form the only thing that would be left is
5 date and signature and it becomes cumulative because we have
6 her signatures of the seal on the box of the collection so
7 I'm going to mark it for ID only. By the time I redacted
8 everything that referred to the defendant DUI the only thing
9 that would be left would be her signature line on the form
10 so that would I think would create a issue for us with the
11 jury.

12 Mrs. Mullis: The video deposition of Dr. Smith had a
13 exhibit in the video deposition that I failed to submit.

14 Mr. Allen: Is it an x-ray? We've got like seven of them.

15 Mrs. Mullis: Can we just submit that without any
16 objections as plaintiff's exhibit 19.

17 The Court: Without objection?

18 Mr. Allen: Yes.

19 The Court: Marked and admitted.

20 (Plaintiff's Exhibit Number 19 was marked)

21 Mrs. Mullis: It was just he testified to it in his
22 deposition it becomes confusing.

23 (Jury deliberations begin at 12:29)

24 The Court: Alright the record should reflect that jury's
25 beginning it's deliberations at 12:29 and we will await

1 further instruction. If you all could hang around just a
2 little while for me to see if they once they get there lunch
3 then I can let you all go get some lunch as well. Generally
4 when we bring lunch in to them it takes them about twenty
5 minutes to eat then they might go down stairs and get some
6 air. So I would need you all, I hate to say that but I
7 probably to take a bit of an abbreviated lunch break and if
8 you all can go ahead and give your cell phone numbers to
9 Hope so we could have those as well.

10 (Court Break)

11 The Court: Ok we got a note from the jury. Is there a
12 wage verification form for his current rate of pay? As I
13 recall there was not. There was not, correct?

14 Mrs. Mullis: Correct.

15 The Court: And I would respond as, ladies and gentlemen
16 of the jury all of the evidence in this case has been
17 presented to you the court cannot answer back for questions.
18 You must consider the testimony and evidence that has been
19 submitted into the record for purposes of your deliberation.
20 You're not to speculate or draw any conclusions from this
21 response to your inquire. If you desire to have the
22 testimony of any witness replayed or rehear any portions of
23 the law please advice the bailiffs and we will accommodate
24 your request immediately. Is there any exception from the
25 plaintiff?

1 Mrs. Mullis: None Your Honor.

2 The Court: From the defense?

3 Mr. Allen: No.

4 The Court: You all have it marked as a court's exhibit
5 and they'll be instructed not to expose of it and to put it
6 with the evidence. We will wait further instruction. Just to
7 give it up and then make sure the bailiffs advise them
8 they're not to dispose of it. Ok we'll be at ease until we
9 get further instruction from the jury.

10 (Verdict Reached at 2:15)

11 The Court: Ok the jury has reached a verdict. Is there
12 anything before I bring in the jury from the plaintiff?

13 Mrs. Mullis: None from the plaintiff Your Honor.

14 The Court: From the defense?

15 Mr. Allen: No Your Honor.

16 The Court: Please bring in the jury.

17 (Jury In at 2:17 p.m.)

18 The Court: You may be seated. Mr. Foreman is it correct
19 that the jury has reached a verdict?

20 Foreman: Yes ma'am.

21 The Court: You can give the verdict form to the Clerk
22 for me please. Madam Clerk if you'll publish the verdict.

23 Clerk: In the court of common pleas of the ninth
24 judicial circuit case number 2011-CP-08-1801. State of
25 South Carolina, County of Berkeley, Levern McCray plaintiff

1 versus Jose Valle defendant. As to the negligent cause of
2 action we the jury unanimously find for the plaintiff in the
3 amount of \$500,000 actual damages and \$147,000 punitive
4 damages. Signed Isaac McElveen, August 16, 2012.

5 The Court: Mr. Foreman ladies and gentlemen we thank you
6 for your time and your attention to this case. I know that
7 jury service may seem incredibly thankless especially at the
8 rate that we pay you. I often refer to it as a small, small
9 being the operative word tax refund, but we hope that jury
10 service has been educational for you I hope that you've
11 learned it's nothing like television it's nothing like what
12 you see on Judge Judy, Judge Joe Brown, People Court, Judge
13 Mathis I'm trying to think of all the judge shows. I was
14 watching a new one the other day with Gloria Allren, she
15 must of had a gavel that was a big as this bench and I
16 laughed to myself I thought you know all the years I've been
17 on the bench I've never used a gavel. Probably we don't have
18 them for security reasons because somebody could grab it and
19 do something with it. You'd be amazed all the security
20 procedures and protocols we have the things you can't have
21 around in a courtroom because they can become dangerous in
22 one form or another. But I hope although I've been joking a
23 little I really hope in all sincerity that it has been
24 educational for you. I hope that you've learned how very
25 vital and important your service is to us. Berkeley County

1 which is Berkeley and Charleston are one circuit it's the
2 ninth circuit and we have, we have sixteen. How many
3 circuits we got in South Carolina? I can't remember I always
4 lose track. I think it's sixteen circuits but don't hold me
5 to it but of all those circuits the ninth circuit is one of
6 the biggest in the state ranking only next to probably
7 Richland County which of course is the capital and
8 Greenville County which is in the upstate. South Carolina
9 has the largest case files as per capita as per judge in the
10 nation at 5,000 filings per judge and even with that we
11 still dispose of cases faster, usually within 18 months than
12 states that have like three times the amount of judges that
13 we have. We only have forty, we have fifty one circuit
14 judges and that includes retired judges and active judges
15 and most states probably have four times that number. I have
16 some friends I go to the national judicial college more
17 frequently in the past than currently just because of the
18 overwhelming dockets that we have, but I have some friends
19 who are judges in Philadelphia and they have nine judges
20 that only hear homicide cases. That's nine judges all they
21 do is hear homicide cases they don't hear anything else. So
22 if you put that in proportion, fifty one judges for the
23 whole state of South Carolina for the circuit courts it sort
24 of gives you a variometer of the ratio, but even with that
25 and having had the opportunity to meet judges from all over

1 the country and look at systems from all over the country.
2 South Carolina really does an outstanding job of disposing
3 of cases and doing it very quickly. We could not do that
4 however without you all being willing to sit as fact finders
5 in cases and listen to the facts and to apply a very
6 complicated set of laws to those facts and render verdicts.
7 So I hope you know how very valuable your service is to us.
8 You're excused for the week this is the last case that we
9 will try and you are welcome to discuss this case if you
10 would like now that it is over. If someone should persist in
11 trying to speak with you however and it makes you
12 uncomfortable please contact the clerks office so we can
13 take the appropriate measures to protect your privacy. The
14 bailiff has your work excuses and do we have check to or are
15 those going to be mailed. Your checks will be mailed. I hope
16 that you all have a wonderful day and you're excused with
17 the court's profound thanks. Any post trial begins in a
18 moment. Oh and I meant to ask was there any request to pull
19 the jury. I knew there was something I was forgetting. From
20 the plaintiff?

21 Mrs. Mullis: None from the plaintiff.

22 The Court: From the defense?

23 Mr. Allen: None Your Honor.

24 The Court: Thank you all.

25 (Jury excused for the week at 2:21)

1 The Court: You may be seated. Are there any post trial
2 motions from the plaintiff?

3 Mrs. Mullis: None from the plaintiff Your Honor.

4 The Court: From the defense?

5 Mr. Allen: Defendant request ten days.

6 The Court: I hear post trial motions at the conclusion
7 of the case so it will never be more fresh to me than it is
8 right now and I prefer to rule contemporaneously so that you
9 all can be free to pursue whatever appellant measures you
10 think appropriate.

11 Mr. Allen: Defendant moves for judgment notwithstanding
12 the verdict or for a new trial failing to invoke new trial.
13 Based on the following grounds, a court error in not
14 granting a mistrial for exploring that as a remedy after
15 receiving a note from a juror that deliberations had started
16 before the case occurs. Court error in allowing the blood
17 alcohol content to be admitted without the proper foundation
18 the chain was not complete nor established as far as
19 practicable and there was no expert that gave testimony
20 regarding the blood alcohol content on the defendant's
21 impairment level. Court error in charging law related to the
22 DUI statute giving the courts prior ruling regarding
23 inadmissability of the DUI charge itself. Further it was
24 contrary to the evidence presented or against the greater
25 weight of the evidence. The verdict was grossly excessive so

1 as to be the result of some passion, prejudice, caprice or
2 some other influence outside the evidence that was
3 presented. The award is unduly liberal and a new trial
4 should be granted unless plaintiff remits an appropriate
5 amount. Court error in allowing an officer to testify as to
6 how the accident happened, Thompson vs South Carolina and
7 Gulledge vs McLaughlin stand for proposition that an officer
8 is not allowed to give that opinion. Court error in omitting
9 to charge that punitive damages are not a right and that
10 even if the jury find the standard for imposing punitive
11 damages hasn't been satisfied. Court error in not charging
12 defendant's request to charge number 4,5, and 6. The award
13 of punitive damages is unconstitutional and does not survive
14 the gamble or BMW factors. Court should grant a new trial in
15 a thirteen juror doctrine.

16 The Court: Would you like to respond?

17 Mrs. Mullis: I would Your Honor. We believe that there
18 was clearly sufficient evidence to show that, first the
19 chain of evidence and...

20 The Court: You can continue talking.

21 Mrs. Mullis: That the chain of evidence was complete
22 from the nurse all the way down through the troopers to the
23 forensic toxicologist to show that the blood alcohol was
24 properly taken, properly preserved and properly analyzed to
25 demonstrate that the blood alcohol of the defendant taken

1 after the accident was .103. The DUI itself was not admitted
2 into evidence the facts surrounding the DUI were the facts
3 that were in dispute and were clearly relevant to the case
4 at hand, were admissible, were relevant to the action, were
5 proved by a preponderance of the evidence, and in fact
6 proved by clear and convincing evidence supporting the award
7 of punitive damages in this case. As to the violation of the
8 statute, it was clear evidence of violation of the statute.
9 The police officer testified in regard not to what he cited
10 the defendant of but to the facts that he found at the
11 location. The location of the cars, the location of the
12 vehicles, the fact that he had conducted an investigation at
13 the time as to how or where the cars were located by giving
14 the jury the facts with which they could make a conclusion
15 that the defendant was on the wrong side of the road. As to
16 punitive damages the plaintiff has offered into evidence the
17 character of the defendant's acts which were of course the
18 driving while intoxicated with a .103 alcohol level, driving
19 on the wrong side of the road hitting the plaintiff head on.
20 We believe the character of the defendant's acts support the
21 punitive damages award of \$147,000. The nature and extent of
22 the harm to the plaintiff which the defendant caused was
23 extensive it was \$147,000, I'm sorry \$47,195.00 in medicals,
24 approximately \$73,000 in economic harms including pain and
25 suffering and permanent impairment ratings given by

1 testified to by Dr. Neal including two surgeries. The
2 defendant's culpability that added to the punitive damages
3 award is clear, he obviously drove drunk, crossed the
4 centerline, there's no doubt about who did it. His awareness
5 of the fact that he drank alcohol and drove his car goes to
6 support the punitive damages award. We don't know about the
7 existence of past or similar conduct. The likelihood that
8 \$147,000 punitive damages award will deter others in the
9 future we think is significant and the fact that the award
10 is reasonably related to the harm will certainly likely
11 result as well as the fact that the punitive damages award
12 is less than half of the actual damages award. So we think
13 it's clearly not disproportionately related to the actual
14 damages awarded in the case. Therefore we think opposing
15 counsel's motion should be denied on all accounts. Thank
16 you.

17 The Court: As regards to the post trial motion regarding
18 mistrial, the court stands by it's previous ruling. There is
19 absolutely no remote bases for the grant of a mistrial. Our
20 case law is very clear and that being precedent from the
21 Supreme Court that a mistrial is the absolute last resort,
22 it's not to be done lightly it is only to be done when an
23 error has been committed and that error cannot be corrected
24 by curative instruction. The court received a note, the note
25 said indirectly the note was based on one person perception

1 and the court had no valid proof that in fact premature
2 deliberations had occurred. Court gave the parties two
3 options, one a strict instruction or the opportunity to voir
4 dire each juror and to go from that point to determine if in
5 fact premature deliberations had occurred. Both parties
6 chose the strict admonition without objection and the court
7 stand by it's previous ruling and would reiterate there is
8 absolutely no grounds for a mistrial or the grant of a
9 mistrial at that point of the trial. As regards to the B.A
10 results the court finds consistent with it's previous ruling
11 and stands by and incorporates that ruling and those
12 findings of fact and conclusions of law which were stated
13 for the record. That the plaintiff provided, had the burden
14 and met that burden by proving the chain from it's inception
15 and proved that chain as far as practicable regarding the
16 frangible evidence that being the blood which was tested by
17 SLED regarding the defendant's B.A level. As regards to the
18 motion of a need for an expert on the effects of alcohol
19 there is nothing that requires the state, that requires an
20 expert to establish the effects of alcohol on a person. In
21 tandem with that there's nothing that precluded the defense
22 from calling an expert on that very issue, however there's
23 nothing in terms of the standard of proof or needing the
24 elements of a prima facie case that require the plaintiff to
25 of called an expert on the effects of alcohol on a person.

1 Our state law is very clear and provides that anything above
2 .08 creates and inference that person is driving impaired
3 which is a violation of statue and the court correctly
4 instructed that and in addition to the case law's very clear
5 that .08 merely creates an inference from which the jury can
6 determine if in fact the person was driving while materially
7 and appreciably impaired. Such that their ability to drive
8 and operate a motor vehicle safely for themselves and for
9 the regard of others is impaired. The court stands by it's
10 previous ruling. The court sustained the defendant's request
11 to not admit the defendant's conviction for driving under
12 the influence pursuant to 56-5-6160 so it can discern no
13 prejudice to the defendant. The case law's very clear and is
14 replete with examples of cases where 56-5-6160 and actually
15 there are three cases that deal with that issue and each of
16 them are almost exactly on point and they deal with the fact
17 that the conviction did not come in but the parties were not
18 precluded from introducing the underlying facts and
19 circumstances of the incident. That being the underlying
20 facts and circumstances of the persons criminal charge. The
21 statue very clearly states, that the conviction is not
22 admissible it does not say the underlying facts would be
23 inadmissible and there's nothing in case law that precludes
24 the plaintiff from having told the entire story. Which is
25 the entire story of what happened in this case, that being

1 the incident, the condition of the parties at the time of
2 the incident which includes the fact that Mr. Valle or Valle
3 however his name is pronounced was tested for presence of
4 alcohol and that that test was positive for alcohol and what
5 the results of that blood alcohol testing. As based on
6 Samuel vs Monzon and Doe vs Doe and Addyman, A-D-D-Y-M-A-N
7 vs Specialties of Greenville Incorporated, the court will
8 find that the verdict is not against the greater weight of
9 the evidence. Our case law is very clear if there is any
10 evidence to sustain the factual finding implicit in the
11 jury's verdict this court is required and bound to affirm
12 the jury's verdict. There's nothing in the record that
13 indicates that this verdict was actuated by caprice,
14 passion, prejudice or some arbitrary factor that is outside
15 of the evidence of this case. The jury's determination of
16 damages is entitled to substantial difference. The court is
17 not allowed to substitute it's judgement for that of the
18 jury especially where there is any evidence implicit in it's
19 factual findings to support their verdict. The court finds
20 the verdict is not grossly excessive so as to be a result of
21 passion, prejudice, caprice, or some influences outside the
22 evidence. In fact the plaintiffs in this case asked for a
23 whole lot more money than the amount that was awarded in
24 actual and punitive damages. The court found and stands by
25 it's ruling and incorporates it's findings of fact and

1 conclusions of law regarding the testimony of Officer, whose
2 now a retired gentleman, Officer Reginald, was at the time
3 Lance Corporal Reginald E. Thomas whose now retired, had
4 twenty one years of experience and testified that he had
5 investigated 100 to 150 accidents. The court found pursuant
6 to Rule 701 that he was entitled to provide a lay opinion.
7 He did not provide an opinion that required scientific
8 knowledge or employed any scientific methodology. He
9 provided opinion consistent with his experience and in the
10 role of his employment at the time which was the
11 investigating officer first on the scene and he provided a
12 lay opinion in that capacity, the court stands by it's
13 original ruling. My notes do not reflect that there was any
14 exception taken by the defense to not charge 4, 5, and 6 and
15 therefore unless I'm wrong it's not preserved because it was
16 not raised, but even if it were and alternatively I would
17 not have instructed that language in the same vein that I
18 would not have instructed the plaintiff's request that they
19 were entitled or they had a right to punitive damages. All
20 of this language that's been extrapolated really deals with
21 the constitutionality and the constitutionality in question
22 of punitive damages which is well settled in the state and
23 charged in the way it was requested is completely out of
24 context and would have not been factually applicable the
25 courts stands by it's standard charge of punitive damages

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1 which is an accurate statement of current and prevailing
2 law. The only the exceptions the defense made to the
3 instruction were those that were propounded by the plaintiff
4 and also observing number five it's almost word for word I'm
5 referring to defendants of the courts standard instruction
6 on punitive damages. The court finds pursuant to Gamble ---
7 to BMW vs Gore is it is required to provide a
8 proportionality review of the punitive damage award and I'm
9 gonna also provide a supplemental order with written
10 findings of fact and conclusions of law consistent with the
11 requirements of that post trial review. That the court and
12 it's consistent with BMW vs Gore the court's required to
13 look at the Gore guide post. One is the degree of
14 reprehensibility of the defendant's conduct. On a score of
15 1 to 10 when you look at reprehensibility of conduct in
16 public policy driving while impaired probably ranks up there
17 as a number eight. So I think when you talk about
18 reprehensibility of conduct there can really be no good
19 faith argument that someone driving impaired or even if he
20 were not impaired that he was so distracted such to cross
21 the centerline, that and was not able to keep control of his
22 vehicle that his conduct was certainly reprehensible. The
23 disparity between the actual or potential harm suffered by
24 the plaintiff in the amount of punitive and the amount of
25 the punitive damages award. Clearly there is no disparity

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1 between the actual or potential harm the record is replete
2 with examples that Mr. McCray's health has been
3 significantly depleted, that he cannot do what he did
4 before, and that he suffered significant harm from this
5 accident. So there's more than replete examples of the
6 actual harm he suffered and the amount of the punitive
7 damages award. And the third factor or guide post is the
8 difference between the punitive damages award by the jury in
9 civil penalties authorized or opposing comparable cases and
10 based on my experience on the bench a 1 to a 3.4 ratio is
11 well within the range of punitive damages awarded by juries.
12 As a matter of fact I've had larger punitive damages awards
13 and larger actual damages awards so this probably would be
14 moderate in terms of a comparison. The courts also looks at
15 the eight Gamble factors which can be relevant in so far as
16 the substance of the three Gore guide post. Although it is
17 not required to make specific findings of fact regarding
18 each of those Gamble considerations in the supplemental
19 order I will, but those eight Gamble considerations are the
20 defendants degree of capability. I think there would be no
21 question of that in that but for his conduct this accident
22 would not have happened. While the duration of the conduct
23 was second factor was short it was significant in it's
24 impact on the plaintiff. Third is the defendants awareness
25 or concealment, there is no indication in the record that he

1 concealed his conduct there's some evidence that he is
2 absconded and no one can find him but that certainly cannot
3 be held against him but certainly when someone drinks and
4 gets behind the wheel of a car they know that they are aware
5 of their impair ability to operate a motor vehicle. The
6 existence of similar past conduct, there's no evidence in
7 the record regarding any similar past conduct by the
8 defendant and five the likelihood the award will deter the
9 defendant or others from like conduct. I think it goes
10 without saying that a substantial award has or theoretically
11 according to public policy has that affect. Six whether the
12 award is reasonably related to the harm likely to result
13 from such conduct the award is reasonably related in that
14 the actual damages award is clearly within the facts of the
15 case and the evidence presented in the factual findings
16 implicit in the jury's verdict. The defendants ability to
17 pay the record actually is devoid of that but we know that
18 this is a UM coverage case and clearly there is the ability
19 to pay this verdict and any other factors deemed appropriate
20 which at this moment I cannot think of any that would bear
21 on the courts ruling however that does not preclude the
22 court from supplementing that factor at the time it provides
23 it's written order. So based on the Gamble and BMW vs Gore
24 factors and the proportionality review that is conducted and
25 will be supplemented by written order the courts finds that

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1 the proportionality is met, is well within the range and the
2 verdict will stand. There is no bases for the court to
3 exercise the thirteen juror doctrine and the court will deny
4 that request. I think I've covered everything. I will do a
5 Form Four indicating that post trial motions were heard and
6 denied and I'll do a supplemental order on the BMW vs Four
7 factors, I'll probably have it done sometime tomorrow and
8 send it up here for filing and so probably give it maybe,
9 probably next week sometime you all should get a copy of it.
10 It's been a pleasure you all have a good weekend.
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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
BERKELEY COUNTY

DEPOSITION OF LEWIS JAMES WELCH, JR.

LEVERN MCCRAY;

Plaintiff,

vs.

CASE NO. 2010-CP-08-1801

JOSE W. VALLE,

Defendant.

DEPONENT: LEWIS JAMES WELCH, JR.

DATE: August 30, 2011

TIME: 6:30 PM

LOCATION: Clark and Associates, Inc.
2133 Dorchester Road
North Charleston, South CarolinaREPORTED BY: Darah L. Nekola, Court Reporter
CLARK & ASSOCIATES, INC.
P.O. Box 73198
Charleston, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

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(No exhibits were marked.)

1 LEWIS JAMES WELCH, JR.,
2 having been first duly sworn, was examined and
3 testified as follows:
4 EXAMINATION
5 BY MS. MULLIS:
6 Q. State your full name for the record, please?
7 A. Lewis James Welch, Jr.
8 Q. Mr. Welch, what is your permanent residence
9 address?
10 A. Well, 186 Easy Street, Frisco City, Alabama.
11 Q. What brings you to South Carolina?
12 A. A job building a Kevlar plant for DuPont off
13 Cypress Garden Road.
14 Q. How long have you been here in South
15 Carolina on that work site?
16 A. March of '08.
17 Q. And what is your position on that work site?
18 A. Superintendent over construction.
19 Q. What does that entail?
20 A. Supervising just about everything. At the
21 beginning of the job, I only supervised the
22 riggers, the iron workers, and the equipment
23 operators. Right now I'm the project
24 superintendent. Everybody works for me.
25 Q. And about how many employees does that

1 involve?
2 A. Well, to start with whenever I first got
3 here, it was about 70, and then it ballooned up to
4 about 1,200 over the past three-and-a-half years.
5 Q. Okay. And is that job ending now? Have
6 you-all completed it?
7 A. Yes, ma'am. I'm going to leave one
8 operator, five insulators, two carpenters, and a
9 supervisor for the carpenters.
10 Q. Okay. How many hours a day does that job
11 site operate?
12 A. I'm there 12-and-a-half hours a day. It
13 ranges from five to seven days a week. We're only
14 allowed to work 13 days in a row without a break.
15 Q. Okay. And that's based on the company that
16 you work with?
17 A. Yes, ma'am.
18 Q. What company is that?
19 A. KBR.
20 Q. Is KBR based out of South Carolina?
21 A. No, ma'am. It's out of Houston, Texas.
22 Q. And you said that you came onto that job
23 site, you believe, in 2008?
24 A. March 15th of 2008.
25 Q. Was Levern McCray one of your employees?

1 A. Yes, ma'am.
2 Q. And what do you call Mr. McCray?
3 A. Mr. McCray.
4 Q. What type of job was Mr. McCray doing on
5 that work site in March of 2008?
6 A. He was running a crane for me.
7 Q. What kind of crane?
8 A. Large hydraulic.
9 Q. What does that involve?
10 A. Climbing up the steps to get up into the
11 seat. I have been an equipment operator off and on
12 my whole life. It's a muscular thing where you
13 have to grab the hands and pull up and put a lot of
14 pressure on your legs.
15 Q. Okay. What does that crane actually do?
16 A. We unloaded trucks, reload trucks, set
17 equipment, hung pipe, iron.
18 Q. So in March of 2008, for the entire year of
19 2008, how often would you see Vern on the job site,
20 Mr. McCray?
21 A. Six to seven days a week.
22 Q. And did you know him and recognize him on
23 site?
24 A. Yes, ma'am.
25 Q. Even with all of those people on the job

1 site, that could have been as many as a thousand
2 people, you recognized Mr. McCray?
3 A. Yes, ma'am.
4 Q. Okay.
5 A. He's in a safety meeting with me every
6 morning that he was there.
7 Q. So you knew him personally?
8 A. Yes, ma'am.
9 Q. And were you satisfied with his performance
10 in 2008?
11 A. Yes, ma'am.
12 Q. Did you ever reprimand him for any reason?
13 A. No, ma'am.
14 Q. Did he receive regular raises or promotions
15 while you were supervising him?
16 A. Ma'am, very seldom do you ever receive a
17 raise whenever you're Gold Key like Mr. McCray is.
18 They get a percentage more than anybody on the job.
19 Q. Okay. You will have to tell me what a Gold
20 Key is?
21 A. It's an individual that's worked for company
22 the a long time that has been an excellent
23 employee. They get an uplift over all other
24 employees for their valued service.
25 Q. Is that a higher rate of pay?

1 A. Yes, ma'am.
 2 Q. So do you know what his rate of pay was?
 3 A. 10 percent more than all individuals.
 4 Q. Okay.
 5 A. You would have to ask Mr. McCray because I
 6 don't look at personal things like that.
 7 Q. Yes, sir. And what would his position have
 8 been called? Is there a name for what he --
 9 A. Operator.
 10 Q. He's just an operator?
 11 A. Yes, ma'am.
 12 Q. So you know that he would be making as a
 13 Gold Key -- or a valued employee, 10 percent more
 14 than what other employees would be making?
 15 A. Yes, ma'am.
 16 Q. Do you specifically recall an incident on
 17 December 20th of 2008 when he was involved in an
 18 automobile collision?
 19 A. Yes, ma'am. There was probably 100 people
 20 that had already showed up, and a couple people
 21 asked me -- said Vern hasn't showed up yet. Which
 22 I thought was very rare because Mr. McCray usually
 23 comes in about the same time I do. And my phone --
 24 cell phone rang, and I answered. It was Mr.
 25 McCray. The police had already made it to the

1 Q. Do you know what hospital he was at?
 2 A. Let's see. It's kind of hard to remember.
 3 Q. That's okay. You know you went to a
 4 hospital.
 5 A. I know I went to the hospital over there off
 6 of 78. I know that's -- I can probably think of
 7 it.
 8 Q. That's fine.
 9 A. It has been many a moons since then.
 10 Q. In your 20 years of working on a job site
 11 and in construction, have you visited more than one
 12 employee in the hospital?
 13 A. Yes, ma'am.
 14 Q. Okay. Can you describe Mr. McCray's
 15 condition when you saw him in the hospital?
 16 A. Well, when I got there, I met his wife for
 17 the first time. Real nice lady. I walked around
 18 over to -- which would be his left, and they had
 19 his leg all wrapped up, casted up. I couldn't
 20 tell. His right wrist, arm, they had gauze. It
 21 was all wrapped up. He had something around his
 22 shoulder. I'm not sure what that -- I didn't
 23 really see anything other than -- there was a lot
 24 of IVs and --
 25 Q. Did you talk to him?

1 accident. The fire department was cutting him out
 2 of the car, and I told him to -- they were putting
 3 a cover over his face to keep the glass out of his
 4 eyes. And I told him to hang up the phone and let
 5 the people do their job.
 6 Q. Okay. Why was he calling you on his cell
 7 phone?
 8 A. Because he didn't want -- he wanted me to
 9 know that he was not going to be able to make it to
 10 work that morning.
 11 Q. Okay. Could you hear what was going on
 12 around him?
 13 A. Yes, ma'am. I called hear -- I assume it
 14 couldn't -- that it was the Jaws of Life cutting
 15 the car apart to get him out.
 16 Q. Okay. Did he explain to you what had
 17 happened to him?
 18 A. Somewhat. That he had been in an accident.
 19 I mean --
 20 Q. Did you see him later that day?
 21 A. It was after work.
 22 Q. Do you know what time about that would have
 23 been?
 24 A. Probably took me 30 minutes to get to the
 25 hospital, walk in. Must have been around 6:00.

1 A. Yes, ma'am, a little bit. He was kind of
 2 out of it.
 3 Q. Did he appear medicated to you?
 4 A. Yes, ma'am.
 5 Q. Did you see any cuts or bruises on his face?
 6 A. To be honest with you, I couldn't really
 7 say. I seen the thing on his shoulder, his leg,
 8 his arm. I was more concerned with just talking to
 9 him.
 10 Q. And after seeing him that day on
 11 December 20th of 2008, did you see him again after
 12 that point?
 13 A. Yes, ma'am. I came back to visit him.
 14 Q. Okay. And do you know how long it was
 15 between --
 16 A. Just a few days because very rarely do I get
 17 to go home, and it was coming up on Christmas, and
 18 I went to see my grandkids.
 19 Q. And you went to see him before you went home
 20 for Christmas?
 21 A. Yes, ma'am.
 22 Q. And then did you see him again after that?
 23 A. Whenever I hired him back. I talked to him
 24 several times on the phone.
 25 Q. So you checked in with him after December of

1 2008. So when is the next time you saw him face to
2 face?
3 A. I think it was about -- it was right before
4 we broke for Christmas. It was probably the 23rd.
5 Something. I can't -- I'm not going to swear to
6 that one, but it was pretty close.
7 Q. Okay. So that was the end of 2008. Did you
8 see him again in 2009?
9 A. Yes, ma'am.
10 Q. When did you see him again in 2009?
11 A. I can't remember the exact date when we -- I
12 know Vern went to work in June of '09. And it
13 seemed like it was all the way into 2010 whenever I
14 hired Vern back. I think it was in September.
15 It's hard to remember.
16 Q. That's okay. Did you hire him back onto the
17 same work site that you-all were at with the DuPont
18 plant?
19 A. Yes, ma'am.
20 Q. So he returned to work for you some time in
21 2009?
22 A. I believe it was 2010.
23 Q. Okay. Maybe even 2010. What did you hire
24 him back doing? Did he come back to work as an
25 operator at that point?

1 A. Yes, ma'am.
2 Q. And returned to work operating a crane?
3 A. No, ma'am.
4 Q. What did he start doing when he came back to
5 work?
6 A. Dirt equipment.
7 Q. What kind of -- why did he come back to work
8 doing dirt equipment?
9 A. Well, I already had all of the operators for
10 the cranes, plus it was hard for Mr. -- Vern to get
11 around.
12 Q. So you observed him on the work site when he
13 returned to work sometime in 2010; is that correct?
14 A. Yes, ma'am.
15 Q. And, again, you knew him personally?
16 A. Yes, ma'am.
17 Q. And had watched him operate cranes and work
18 on the work site before this accident in 2008?
19 A. Yes, ma'am. Before I hired a bunch of crane
20 operators, me and him made four critical lifts
21 running two cranes making big lifts. So yes, I
22 know Mr. Vern.
23 Q. And when you observed him on the site
24 working in 2010, how had his work or his physical
25 condition changed since before this accident?

1 A. Ma'am, I'll start this way. Construction
2 workers stick together. I would have brought Mr.
3 Vern back if he couldn't walk. His family would
4 have looked out for him out there on that job. He
5 doesn't have any kin people, but he has a lot of
6 family. We take care of our own. Mr. Vern has a
7 hard time walking. When we do our exercises in the
8 morning, he has a real hard time bending over to do
9 what we're supposed to do. We're required every
10 day to do the exercises before work.
11 My foreman that was my foreman, Mr. McCray
12 would have probably been my foreman. The younger
13 gentleman that's younger than Mr. McCray, Ed Nero,
14 I had to set up to be my foreman, which done an
15 excellent job, but also I would have setup Mr.
16 McCray other than Mr. Nero. He was the only
17 operator-foreman I had on the job.
18 Q. Why would it have been your preference to
19 have Mr. McCray do the job?
20 A. Experience.
21 Q. Okay. And why could he not come in and be
22 the foreman on that job site?
23 A. Because it's a lot of walking involved. And
24 it's foot pounding, stair climbing. I mean, our
25 building's probably got a thousand steps going up

1 to the top levels, and there's no way Mr. Vern --
2 we got the elevators running now, but before that
3 you had to climb the steps.
4 Q. Okay. So was it your opinion that he could
5 not physically perform the essential functions of
6 the job as a foreman?
7 A. Yes, ma'am.
8 Q. Okay. What is the difference in pay in what
9 he receives as an operator and what he would have
10 received as a foreman on that job?
11 A. It would have been in the neighborhood of \$5
12 an hour.
13 Q. And how many hours a week did they -- do you
14 generally work? I know that's hard.
15 A. That's real hard. I would go with an
16 average of 60.
17 Q. So you average about 60 hours a week?
18 A. Yes, ma'am. For the employees.
19 Q. And how many weeks a year would you average?
20 A. 52.
21 Q. 52 weeks?
22 A. Yes, ma'am. The only way you were off is if
23 you took vacation.
24 Q. And did Vern have vacation?
25 A. Yes, ma'am. I believe Mr. McCray -- in fact

1 Gold Keys get an extra week. So I would believe he
2 would get three weeks a year.
3 Q. Have you ever heard Vern complain to you
4 about pain in his foot?
5 A. Yes, ma'am.
6 Q. Have you ever seen Vern not do something
7 because of pain in his foot?
8 A. Not really, ma'am. I mean, he -- I will
9 repeat. He's a construction worker.
10 Q. Yes, sir, I understand. Have you ever
11 recommend Vern for a promotion within the company?
12 A. Well, no, ma'am. Because I couldn't.
13 Q. Did he ever attempt to do the position as a
14 foreman on another job site?
15 A. Yes, ma'am.
16 Q. Where was that?
17 A. It was a job in North Carolina. I know Bob
18 Foxx was the personnel man. His supervisor would
19 have been John Booker.
20 Q. Do you know how long he attempted to do that
21 foreman position?
22 A. I'm not really sure, ma'am.
23 Q. Do you know about when that would have been?
24 A. Shortly after they -- he went there in June
25 of --

1 A. No, sir.
2 Q. You never came to the accident scene?
3 A. No, sir.
4 Q. And if I understand it correctly, you saw
5 Mr. McCray at the hospital later on that afternoon
6 of December 20th, 2008?
7 A. After work.
8 Q. And then you said you followed up with him
9 in the hospital a couple of days --
10 A. Three days I believe.
11 Q. Before you-all broke for Christmas?
12 A. Yes.
13 Q. Is the next time you saw him September of
14 2010 when you hired him back to work on the DuPont
15 plant?
16 A. When I seen him, yes, sir.
17 Q. Do you know how long Mr. McCray has been an
18 operator?
19 A. Well, he got an award -- I'm not real sure
20 what month, for 50,000 work hours. And the average
21 person makes from 2,000 hours to 3,000 a year. So
22 I would say 25, 26, something like that years.
23 Q. So he has been holding the position of an
24 operator for 25 or 26 years to your knowledge?
25 About?

1 Q. 2009 or '10? Sorry.
2 A. It would be 2009.
3 Q. Okay. So sometime in June of 2009?
4 A. Yes, ma'am. It's kind of hard to keep up
5 between both jobs. Like I said, it's hard to keep
6 up for a thousand people, but I do know Mr. Vern.
7 Q. Yes, sir. If you were given an
8 opportunity -- I understand this job site is ending
9 at this point?
10 A. Yes, ma'am.
11 Q. If you were given an opportunity to rehire
12 Mr. McCray, would you rehire him?
13 A. Yes, ma'am.
14 MS. MULLIS: I think that's all of the
15 questions I have. Julian or Bennett may.
16 THE VIDEOGRAPHER: The time now is
17 6:51 p.m. We're off the record.
18 (Off-the-record discussion.)
19 THE VIDEOGRAPHER: The time is
20 6:53 p.m. We're on the record.
21 EXAMINATION
22 BY MR. ALLEN:
23 Q. All right. Mr. Welch, I just have a few
24 questions for you. I just want to make sure, you
25 were not a witness to this accident?

1 A. About. I couldn't swear it to because I --
2 me and Vern didn't work together that far back. I
3 have been an operator for almost 30 years.
4 Q. And I believe you told me before we got
5 started that at the end of a job you give people
6 recommendations on how good of an employee they
7 are, for lack of a better term?
8 A. Yep.
9 Q. And a few folks are going to get an
10 excellent rating?
11 A. Three of them.
12 Q. And Mr. McCray is one of those?
13 A. Yes, sir.
14 Q. Fair to say that he did his job pretty well?
15 A. Yes, sir.
16 Q. Didn't have any complaints with what he was
17 able to do?
18 A. No. No complaints.
19 MR. ALLEN: That's all I have. Thanks.
20 EXAMINATION
21 BY MS. MULLIS:
22 Q. But he can't be a foreman for you because of
23 his physical condition; is that correct?
24 A. Yes, ma'am.
25 Q. But other than that, you consider him a very

1 hard worker?

2 A. Yes, ma'am.

3 MS. MULLIS: That's all I have.

4 THE WITNESS: Well-respected. Helped
5 me train a bunch of the laborers that hired on that
6 job to be operators, and they have done an
7 excellent job too, but they won't get an excellent
8 rating from me.

9 MS. MULLIS: Thank you for your time.

10 THE VIDEOGRAPHER: The time now is
11 6:56 p.m. This concludes the video deposition of
12 Lewis James Welch, Jr. We're off the record.

13 (The deposition was concluded at
14 6:57 p.m.)
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1 STATE OF SOUTH CAROLINA.)

2 COUNTY OF CHARLESTON)

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4 I, Darah L. Nekola, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the witness in the
7 foregoing deposition was by me duly sworn to
8 testify to the truth, the whole truth and nothing
9 but the truth in the within-entitled cause; that
10 said deposition was taken at the time and location
11 therein stated; that the testimony of the witness
12 and all objections made at the time of the
13 examination were recorded stenographically by me
14 and were thereafter transcribed by computer-aided
15 transcription; that the foregoing is a full,
16 complete and true record of the testimony of the
17 witness and of all objections made at the time of
18 the examination; and that the witness was given an
19 opportunity to read and correct said deposition and
20 to subscribe the same.

21 Should the signature of the witness not
22 be affixed to the deposition, the witness shall not
23 have availed himself of the opportunity to sign or
24 the signature has been waived.

25 I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.
Witness my hand, I have hereunto
affixed my official seal on September 10, 2011 at
Charleston, Charleston County, South Carolina.

Darah L. Nekola
My commission expires
January 7th, 2018

Deposition of JAMES D. SPEARMAN, MD

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

2 COUNTY OF BERKELEY) Case No. 2010-CP-08-1801

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LEVERN MCCRAY,

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Plaintiff(s),)

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DEPOSITION OF:

-vs-

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JAMES D. SPEARMAN, MD

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JOSE W. VALLE,

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Defendant(s),)

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Given before John P. Crawford, Jr., Court Reporter
and Notary Public, at Lowcountry Orthopaedics and Sports
Medicine, 2880 Tricom Street, North Charleston, South
Carolina, on Thursday, July 12th, 2012, commencing
at 4:46 o'clock, p.m.

COPY

Deposition of JAMES D. SPEARMAN, MD

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Page 3

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

2 COUNTY OF BERKELEY) Case No. 2010-CP-08-1801

3

4 LEVERN MCCRAY,)

5)
Plaintiff(s),

6) DEPOSITION OF:

7 -vs-)

8) JAMES D. SPEARMAN, MD

9)

10 JOSE W. VALLE,)

11)
Defendant(s),

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1 Q. Are you board certified?
 2 A. I am board certified and have been recertified
 3 twice.
 4 Q. And in what area are you certified?
 5 A. Orthopaedic surgery.
 6 Q. And what does board certification entail?
 7 A. A very complex procedure. So basically, it's a
 8 test, but prior to the test, now for
 9 recertification and maintenance of certification,
 10 it requires multiple hours of self-study, taking
 11 some graded tests, and then taking a final exam.
 12 Q. And at the time of the events here in December of
 13 2008, were you board certified in orthopaedics?
 14 A. Yes.
 15 Q. And from the time that you started medical school
 16 until the time you were certified in orthopaedic
 17 surgery, how many years of training has that
 18 been?
 19 A. Orthopaedics requires you to be in practice for
 20 two years prior to taking your final
 21 certification exam. So, I graduated med school
 22 in 1983, I had six years of training, two years
 23 of practice in the Air Force, and my first
 24 certification was in '91.
 25 Q. And do you enjoy hospital privileges here in the

1 area?
 2 A. Yes. I have privileges at Trident Hospital and
 3 Sumnerville Medical Center.
 4 Q. And you treat orthopaedic injuries; is that
 5 correct?
 6 A. Yes.
 7 Q. And traumatic injuries; is that correct?
 8 A. Yes.
 9 Q. Individuals that have been involved in motor
 10 vehicle accidents?
 11 A. Yes.
 12 Q. Individuals that have broken bones; is that
 13 correct?
 14 A. Yes.
 15 Q. And ankle fractures like the one we have here?
 16 A. Yes.
 17 Q. How do you classify the severity of a fracture?
 18 A. We use different terminology for classifying
 19 fractures. A simple fracture with a, as in lay
 20 terms, a clean break might just be a, one single
 21 fracture line seen on an X-ray. A comminuted
 22 fracture means that it is in pieces, so to speak,
 23 and a complex or compound fracture is one that's
 24 not only comminuted but also through the skin
 25 with an open wound. So, typically now we just

1 label it as an open fracture meaning that it's
 2 through the skin. But, previous terminology
 3 included things such as compound and complex.
 4 Q. Okay. And what type of fracture was this?
 5 A. This was, it was a comminuted fracture. It was
 6 not compound. It did not come out through the
 7 skin, but it was, it involved not only the
 8 fibula, the small bone in the leg, but also
 9 involved the ligament connecting the two leg
 10 bones together, as well as the ligament that
 11 holds the medial or inside of the ankle, the
 12 tibia to the talus.
 13 Q. Is this a typical type of fracture that you
 14 normally treat?
 15 A. Yes.
 16 Q. Okay. How many of these types of fractures
 17 throughout your career as a doctor have you
 18 treated, generally?
 19 A. Hundreds.
 20 Q. Okay. And you performed surgery on Mr. McCray.
 21 Is this a typical type of surgery that you would
 22 perform as an orthopaedic surgeon?
 23 A. Yes.
 24 Q. What materials have you reviewed in connection
 25 with your opinions here today?

1 A. His operative note, his admission history and
 2 physical, and his office notes.
 3 Q. Okay.
 4 A. Post-operatively.
 5 MS. MULLIS: At this point, we're going to
 6 move to qualify Dr. Spearman as an expert in the
 7 field of orthopaedics and orthopaedic surgery.
 8 MR. ALLEN: I have no objection.
 9 Q. So, I'm sorry, what materials did you review in
 10 connection with your opinions here today?
 11 A. The operative note, his admission history and
 12 physical, his discharge summary, and his post-
 13 operative visits in our office.
 14 Q. Okay. Are these the types of medical records,
 15 charts, and reports that you normally rely on
 16 when you're treating and diagnosing patients?
 17 A. Yes.
 18 Q. And did you take a medical history of Mr. McCray
 19 or did someone in that you rely on take a medical
 20 history from Mr. McCray?
 21 A. I believe that I took the majority of his
 22 history.
 23 Q. And is that a common practice when you're
 24 diagnosing and treating patients?
 25 A. Sometimes the, we have medical assistants that

1 will take part of the history. This patient was
 2 involved in and in the ER, so it was a direct
 3 contact with me and the patient, and anything
 4 that was written previously by the nurses, the
 5 history that was taken when he presented to the
 6 ER.
 7 Q. Okay. And those medical records that you've
 8 reviewed and the medical history that you
 9 obtained from him, did that include reports from
 10 EMS and the individuals that treated him or
 11 triaged him from the scene that came into the
 12 emergency room?
 13 A. Yes.
 14 Q. Okay. And then, did you review the follow-up
 15 records from your office here, as well?
 16 A. Yes.
 17 Q. And tests that were ordered, including X-rays and
 18 CT scans?
 19 A. Yes.
 20 Q. Have you formed certain opinions in regard to
 21 your treatment and diagnosis of Mr. McCray?
 22 A. Yes.
 23 Q. May we assume that all of the opinions that you
 24 give here today are to a reasonable degree of
 25 medical certainty, unless you tell us otherwise?

1 A. Yes.
 2 Q. May we also assume that your opinions are to a
 3 more probable than not standard, unless you tell
 4 us otherwise?
 5 A. Yes.
 6 Q. On December 20th, 2008, did you have occasion to
 7 treat Lavern McCray at Trident Medical Center?
 8 A. Yes.
 9 Q. Why were you at Trident Medical Center?
 10 A. I was the orthopaedic doctor on-call and was
 11 called to see him regarding a rather significant
 12 ankle fracture.
 13 Q. Okay. And what was your understanding from the
 14 history reported to you by the patient, the EMS
 15 responders why he was brought into the emergency
 16 room on December 20th, 2008?
 17 A. That he was involved in a motor vehicle accident
 18 and had sustained a fracture in his ankle.
 19 Q. Okay. In front of you is Plaintiff's Exhibit
 20 One, which is a history and physical. That is a
 21 report from, it's my understanding, Trident
 22 Health Systems in Charleston, South Carolina, and
 23 dated 12-20-2008 from Mr. McCray's records?
 24 A. Yes.
 25 Q. So, what were the initial reports, based on that

1 record?
 2 A. The majority of this is the history of present
 3 illness, that he had an ankle fracture and a
 4 laceration to his hand, in addition to other
 5 contusions, and that he was admitted for fixing
 6 the ankle. His past medical history was fairly
 7 negative, and the physical exam just goes through
 8 the different items that were noted, specifically
 9 that his hips were working and without pain; his
 10 right leg was without pain; the left leg, he had
 11 some pain around his knee and ankle was swollen
 12 and tender. Further evaluation had X-rays that
 13 showed a fracture of his ankle, and then, in
 14 addition, he had a superficial laceration to the
 15 hand.
 16 Q. So, he had a laceration to his hand or a cut on
 17 his hand or thumb?
 18 A. Correct.
 19 Q. Did he also, it looks like, reported neck pain at
 20 the time? He has some mild cervical pain?
 21 A. Yes.
 22 Q. He reported lower leg pain, as well as knee pain;
 23 is that correct?
 24 A. Yes. He had pain in his knee, as well as around
 25 his ankle.

1 Q. He reported chest pain to the left of his
 2 sternum. Is that something that you commonly see
 3 in an individual that's been involved in a motor
 4 vehicle accident?
 5 A. Yes.
 6 Q. Why is that?
 7 A. If they don't have airbags and hit their chest on
 8 the steering wheel.
 9 Q. Okay. Any -- it looks like there were CT scans
 10 that were ordered of his spine?
 11 A. Correct. And those were negative.
 12 Q. Okay. The CT scans that were ordered of his
 13 spine -- I'll give you a copy of that but not
 14 admit it just because there is a long list of
 15 them -- they included CT scans of his neck, his
 16 head; is that correct?
 17 A. Yes.
 18 Q. X-rays of his knee; is that correct?
 19 A. Yes.
 20 Q. His thoracic spine, which would be where?
 21 A. Thoracic spine is the, in between the neck and
 22 the abdomen, so the chest, basically.
 23 Q. Okay. And then, his abdomen, as well?
 24 A. Right.
 25 Q. And his pelvis?

1 A. Yes.
 2 Q. As well as the ankle, which was a primary concern
 3 at that time?
 4 A. Yes.
 5 Q. Okay. And those were all ordered by you; is that
 6 correct?
 7 A. No. Those were all ordered by the ER physician
 8 prior to me arriving.
 9 Q. Okay. You're listed, it looks like at the top,
 10 as the referring doctor, and that was why I was
 11 asking you all this.
 12 A. Yes. But, those were all --
 13 Q. Ordered --
 14 A. They put that after they made me the admitting
 15 doctor.
 16 Q. Okay.
 17 A. But, they were ordered prior to my arrival.
 18 Q. Okay. But, would those have been CT scans that
 19 you would have reviewed in your treatment of him
 20 and --
 21 A. Yes.
 22 Q. Okay. So, after reviewing his condition and
 23 talking with Mr. McCray after reviewing the CT
 24 scans, what was the plan?
 25 A. To take him to the operating room and fix his

1 ankle.
 2 Q. Okay. And you have in front of you Plaintiff's
 3 Exhibit Two, which is an operative report?
 4 A. Yes.
 5 Q. So, what was the plan for the operation?
 6 A. Basically, to fix his ankle. His injury involved
 7 not only the fibula, which is a small bone, but
 8 also the ligament between the fibula and the
 9 tibia, as well as the ligaments on the medial
 10 side of the ankle, called the deltoid ligaments.
 11 And basically, with his fracture, his foot was
 12 taken out to the lateral or outside part of his
 13 leg and the ankle joint was essentially
 14 dislocated or pushed out beyond the limits of the
 15 confine of the two upper leg bone.
 16 Q. Was this a really bad break?
 17 A. Yes.
 18 Q. Okay. In fact, his foot was broken so bad it
 19 tore the ligaments loose; is that correct?
 20 A. It tore the ligaments on the medial side, and
 21 then the ligament between the two bones. So,
 22 from a standpoint of forces, the force applied to
 23 the inside part of his foot pushed his foot
 24 outwards, and sequentially, the ligaments on the
 25 inside part of his ankle tore allowing his foot

1 to move further, which then sheered the ligament
 2 between the two bones, and then the forces
 3 traveled up and actually split the fibula up
 4 above the ankle joint.
 5 Q. Okay. So, in repairing the break to his leg,
 6 what all did that require you to do?
 7 A. It required us to, one, replace the fibula or the
 8 small bone back into the proper position. We
 9 used a long plate that acts as a buttress against
 10 the side of the fibula. We used a long screw
 11 that goes from the fibula into the tibia to hold
 12 the two bones together so that the ligament
 13 between them could heal. And then, we made a
 14 separate incision on the inside of the ankle to
 15 go in and repair the ligaments, the deltoid
 16 ligaments on the medial side of the ankle.
 17 Q. And how do you reattach the ligaments to the
 18 bone?
 19 A. With sutures. We are able to, in most instances,
 20 there is enough tissue on both sides to simply
 21 just sew the ligament back to the bone where it
 22 came from.
 23 Q. Okay. And when you sew the ligament back to the
 24 bone, does it completely heal or does scar tissue
 25 form around it?

1 A. It usually has a pretty good healing pattern.
 2 The tissue itself, the tendon will, or ligament
 3 will grow back into the bone.
 4 Q. Okay. Will it be a hundred percent?
 5 A. Well, there's no way to say if it's going to be a
 6 hundred percent, but they usually heal relatively
 7 well.
 8 Q. Okay. And when you're referring to the plate
 9 that you placed in his leg, we've also marked a
 10 copy of X-rays that are marked as Plaintiff's
 11 Exhibit Three. Are those X-rays of Mr. McCray's
 12 foot that are accurate representations of the
 13 hardware that you installed in his foot to fix
 14 the fractures to his foot?
 15 A. Yes. Those are pictures of his ankle after the
 16 surgery has been performed.
 17 Q. Okay. And how many screws did that involve, do
 18 you know?
 19 A. We use the plate, we name them by the number of
 20 holes. There are seven holes in the plate, there
 21 are seven screws in the fixation component. One
 22 of the screws is an extra long screw and goes
 23 through the plate and transverses across into the
 24 tibia. There's a total of seven screws.
 25 Q. Okay. And the long screw that goes all the way

1 across, it goes through both bones; is that
2 correct?
3 A. Yes.
4 Q. Okay. And across the ankle joint, is that where
5 it's going?
6 A. It's above the actual joint. It goes into the
7 tibia. The tibia and the fibula, at their distal
8 ends, form sort of a U, and that creates the
9 ankle joint that holds the talus between it. So,
10 we recreate that U by putting the screw in there.
11 If we don't put that screw in, it allows the two
12 bones to separate, then it allows for too much
13 motion and can cause an increased chance of
14 having arthritis.
15 Q. Okay. And unlike where you simply just break an
16 arm and can put a cast on it, this has to be
17 screwed back together because of the severity of
18 the break; is that correct?
19 A. Yes.
20 Q. Okay. And you mention in the operative report
21 that there was a small fragment of the tibia that
22 was torn loose. How was that repaired?
23 A. That small fragment was actually part of that
24 ligament I talked about between the two bones,
25 and it just goes back up against the bone when we

1 doesn't cause any problems.
2 Q. Okay. What are the risks of removing the plate
3 from the leg?
4 A. Several risks of surgery, chance of infection,
5 chance of blood clot, chance of, you know,
6 injuring a nerve or vein or something that would
7 cause him more pain.
8 Q. Okay. Well, those aren't all the risks of
9 surgery. What are all the risks of surgery?
10 A. Well, there's a lot. You know, there is a risk
11 of --
12 Q. I bet you can run them off the top of your head.
13 A. There is a risk of anesthesia.
14 Q. Right.
15 A. Which includes death and all those other things
16 that can happen, nausea and vomiting and whatnot.
17 The removal of this plate could actually be done
18 under very minor anesthesia with some simple IV
19 sedation type things. So, the risk of anesthesia
20 aren't that great, so, for this procedure, taking
21 the plate out.
22 Q. Okay. You transferred Mr. McCray's care to an
23 orthopaedic surgeon up in Columbia because that's
24 where he lived; is that --
25 A. Correct.

1 push the two bones back together. So, that long
2 screw that we put in actually holds that small
3 piece in a position where it can heal.
4 Q. Okay. And at this point today, is that plate
5 still in Mr. McCray's leg?
6 A. As far as I know.
7 Q. Okay. It was the last time you saw him?
8 A. Yes.
9 Q. Okay. And when was the last time you saw Mr.
10 McCray?
11 A. Actually, I only saw him a couple of times after
12 his surgery, and then he transferred his care to
13 Columbia. So, the last time I saw him was on
14 January 29th of 09.
15 Q. Okay. Can that hardware ever be removed from his
16 leg?
17 A. Yes. It can.
18 Q. So, it could be removed if his leg got better; is
19 that correct?
20 A. Yes. And if, if the leg is healed, which usually
21 takes anywhere from eighteen months to two years
22 to get good, solid healing, and the plate is
23 close enough to the surface or causes any pain,
24 then sometimes we'll take it out. The,
25 oftentimes they just leave it in because it

1 Q. -- your understanding?
2 A. Yes.
3 Q. And the last time you saw him, it was your
4 understanding that he was going to have the screw
5 removed?
6 A. Yes. That screw, the long screw is called a
7 syndesmotic screw because it holds the
8 syndesmotic ligament together or the two bones
9 together so the syndesmotic ligament can heal.
10 However, even with the screw in there, there's
11 some micromotion and over a period of six to
12 eight weeks of the patient walking on it, there
13 can be enough motion to cause the screw to break.
14 Q. Okay.
15 A. So, oftentimes, we'll take the screw out before
16 it breaks. Sometimes it breaks before we get to
17 it, sometimes it doesn't ever break and doesn't
18 ever come out. But routinely, we try to remove
19 it at six to eight weeks.
20 Q. Okay. And it was your understanding that this
21 was causing him pain, so it was going to be
22 removed?
23 A. Yeah. We were going to go ahead and take it out.
24 Yes.
25 Q. Okay. Do you have your records from the, your

1 local records from Lowcountry Orthopaedics with
 2 you?
 3 A. Yes.
 4 Q. Okay. And I'm looking at the 12-29-08 record.
 5 This is his first office visit.
 6 MS. MULLIS: Do you all have those?
 7 Q. It looks like the first time he came in to see
 8 you, he was also reporting additional complaints
 9 from the accident. What additional complaints
 10 was he reporting to you at that time?
 11 A. Right shoulder pain and neck pain.
 12 Q. Okay. And you had also repaired, I'm sorry, the
 13 laceration to his thumb in the operating room --
 14 A. Yes.
 15 Q. -- when you did the repair to his ankle; is that
 16 correct?
 17 A. Yes.
 18 Q. Why was that done in the operating room?
 19 A. Because we went ahead and took him to the
 20 operating room before they had a chance to fix it
 21 in the ER.
 22 Q. Okay.
 23 A. So, I just told them I'd go ahead and fix it
 24 while I was in there.
 25 Q. While you're at it. Okay. So, at that time,

1 though, when he came into your office, he was
 2 reporting right shoulder pain and neck pain.
 3 What did you do about the right shoulder pain
 4 when he came into your office?
 5 A. We did an exam, and then looked, and ordered some
 6 X-rays of his shoulder. In reviewing the X-rays,
 7 there was a question of whether or not there was
 8 a fracture of the glenoid, which is the cup part
 9 of the shoulder joint. So, I recommended that
 10 perhaps he get an MRI of his shoulder to make
 11 sure there wasn't anything to either confirm or
 12 do away with the idea that maybe there was a
 13 crack in that glenoid.
 14 Q. Okay. And did you do any further treatment with
 15 him on the right shoulder?
 16 A. No.
 17 Q. Okay. There's also some notes that -- I had
 18 another question. Oh. As of 1-29-09, it looks
 19 like that was the last time that you saw him in
 20 the office before you released him. At that
 21 point, he was reporting to you that he had some
 22 decreased strength in his leg, and then you made
 23 a note regarding evidence of either bruising or
 24 injury to his nerve. Can you explain that?
 25 A. Yes. He had, besides the ankle fracture, in the

1 beginning, we had noted that he had had some knee
 2 pain, and I didn't elaborate on it further, but
 3 when he came in for that visit, he had noted
 4 decreased strength and sensation over the
 5 anterior portion of his leg. To have decreased
 6 strength in the leg muscles and loss of
 7 sensation, anterior portion of the leg, it would
 8 have most likely been due to an injury of the
 9 nerve that was higher up than his ankle. So, a
 10 fracture of his ankle, even though it was severe,
 11 would have not caused damage to the nerve that
 12 got the front part of his leg or the nerves that
 13 affect the muscles in the leg.
 14 He had this injury to his knee or pain
 15 around his knee, it could very well have been a
 16 bruise-type injury to his, to one of the nerves
 17 that traverse the knee, and at that point in
 18 time, it wasn't severe enough and it was early
 19 enough that I thought we should wait to see
 20 whether it resolved on its own or whether we
 21 needed to do studies to see if he had pinched a
 22 nerve further up.
 23 Q. Okay. So, as of January 29th, 2009, which was a
 24 month, little over a month after this accident,
 25 he was continuing to report swelling, knee pain,

1 weakness in his leg and around his knee to you;
 2 is that correct?
 3 A. Yes.
 4 Q. Okay. And you were looking at possibly nerve
 5 damage; is that correct?
 6 A. A possibility, yes, based on the findings of that
 7 visit.
 8 Q. And where does that specific nerve go or where in
 9 the leg would it be?
 10 A. One of the nerves, the peroneal nerve that gets a
 11 portion of the leg, crosses over the fibula just
 12 below the knee on the outside part of the leg.
 13 Q. Okay.
 14 A. The other one is deeper in the tissues, but could
 15 have been affected by some swelling in his leg.
 16 Q. Okay. And he's continuing to report decreased
 17 strength and function in his ankle, reduced range
 18 of motion and strength. Is that what you would
 19 expect at that point in his condition with his
 20 treatment?
 21 A. Certainly at a month after this surgery, he would
 22 still have decreased strength, decreased range of
 23 motion and pain because he hasn't come close to
 24 healing at four weeks or five weeks.
 25 Q. How long would you expect it to take after this

1 type of fracture and this type of surgery before
 2 he would reach what you would expect to be
 3 maximum medical improvement?
 4 A. Usually about six months. It takes normally
 5 eight weeks for the bone to heal and the
 6 ligaments to heal, and then it would take another
 7 two to four months of strengthening and range of
 8 motion to get him back close to normal.
 9 Q. Okay. So, if three and a half years after this
 10 accident, if he continues to report pain in his
 11 ankle and leg, would you expect that that pain
 12 would improve at some point?
 13 A. It could, depending on what's the cause, and
 14 without seeing him, I couldn't say. But, I can
 15 speculate on several things that can cause
 16 continued pain, one being that he never did
 17 adequate rehab, so he never got his strength and
 18 range of motion returned. Two would be that
 19 because his ankle injury was so severe with the
 20 fracture dislocation that I talked about earlier,
 21 there's more than likely damage within the joint
 22 to the articular surfaces, and so he has a
 23 traumatic arthritis with cartilage that has been
 24 injured and thereby continues to be painful and
 25 continues to cause swelling in the joint, which

1 decreases his range of motion.
 2 Q. Okay. So, is there a possibility that further
 3 surgery could help him in improving the pain or
 4 the range of motion in his ankle?
 5 A. Certainly. And again, not having seen him, but
 6 there's, typically in these cases, there's an
 7 option of arthroscopic debridement where we go
 8 into the ankle joint, remove any dead cartilage
 9 or injured cartilage or cartilage that's floating
 10 around, and also release any scar tissue that may
 11 have formed within the ankle joint, and even have
 12 the opportunity while their leg is numb or they
 13 are asleep to manipulate it and stretch the
 14 tissues a little bit and increase their range of
 15 motion.
 16 Q. Okay. And if he's reporting knee pain at this
 17 point, would you expect him to have knee pain
 18 that would have been affected by this type of
 19 surgery or this type of injury to his ankle?
 20 A. Well, he had knee pain in the beginning, and I
 21 don't know whether that's ever been evaluated
 22 with an MRI or exam, to any extent. But, if he
 23 has an ankle that is stiff and doesn't bend, then
 24 that translates to increased stress about the
 25 knee and will cause, can cause pain just from a

1 change in the gait.
 2 Q. Would that same kind of immobilization and change
 3 in the gait, could it also cause hip pain in the
 4 same area, in the same leg?
 5 A. Yeah. It can cause hip pain, it can cause back
 6 pain or leg pain. Certainly, if somebody has
 7 some mild degenerative changes in the lumbar
 8 spine and then their gait is altered, they'll
 9 have problems with pressure on the nerves simply
 10 from having a change in gait, and then they can
 11 get pain all the way down their leg from problems
 12 with their back, basically.
 13 Q. Okay. Does he have an increased likelihood with
 14 these, with the type of hardware that he's got in
 15 his ankle of developing arthritis? He was fifty-
 16 five years old at the time of this.
 17 A. He doesn't, the hardware doesn't affect whether
 18 he gets arthritis or not. It's just the injury
 19 itself and the fact that he had a significant
 20 injury to the actual joint surfaces is the most
 21 likely cause for him to develop a traumatic
 22 arthritis with degenerative changes.
 23 Q. Okay. Would you ever expect the ankle, even if
 24 we did some type of arthroscopic surgery, to
 25 improve the range of motion, to return to a

1 hundred percent range of motion?
 2 A. I would not expect it to go back to a hundred
 3 percent. But certainly, I don't know where he is
 4 now, but there is an option of doing it and
 5 improving the range of motion.
 6 Q. Okay. So, if he has limited range of motion now,
 7 there's an option of being able to do a surgery
 8 to possibly improve it?
 9 A. Yes.
 10 Q. Okay. And if he's continuing to report numbness
 11 in his leg today, would that be consistent with
 12 the type of injuries that we've discussed?
 13 A. Yes. And again, if he continues to have
 14 numbness, at some point in the past, it should
 15 have been evaluated to figure out, you know,
 16 where it was coming from, because you can get
 17 numbness down your leg, again, from a back injury
 18 or from a direct injury to the nerve in the leg,
 19 so.
 20 Q. Okay. And all the opinions that we've discussed
 21 and that you've given today are based on your
 22 education, training, years of experience as a
 23 practicing orthopaedic surgeon; is that correct?
 24 A. Yes.
 25 Q. And your opinions are within a reasonable degree

1 of medical certain; is that correct?
 2 A. Yes.
 3 Q. I don't have any further questions.
 4 MR. ALLEN: Let's take a break real quick.
 5 MS. MULLS: Yeah.
 6 (The deposition went off the record for a
 7 brief period of time.)
 8 CROSS EXAMINATION BY MR. ALLEN:
 9 Q. Doctor, I've got some follow up questions for
 10 you. Am I correct that the last time that you
 11 treated the plaintiff was approximately three and
 12 a half years ago?
 13 A. Yes.
 14 Q. Okay. You have not seen him in a professional
 15 capacity in three and a half years, correct?
 16 A. Correct.
 17 Q. Haven't seen him on the road or saw him at church
 18 or anything like that?
 19 A. Correct.
 20 Q. Have you reviewed any medical records or notes
 21 from any physicians or providers that have seen
 22 him since you last saw him?
 23 A. No.
 24 Q. You were asked a lot of questions about his
 25 current complaints, what they may or may not be

1 related to, a lot of ifs and buts, and I think
 2 you responded with a lot of coulds and woulds. I
 3 want to make sure I understand your testimony.
 4 Am I fair to assume that you cannot testify to a
 5 reasonable degree of medical certainty that any
 6 of his current complaints, whether it's the knee,
 7 the hip, the back, anything like that, is, in
 8 fact, related to the injury in December of 08?
 9 A. Could you restate that question?
 10 Q. Sure. Like I said, Ms. Mullis asked you some
 11 questions about some of his current complaints
 12 and asked could it possibly be related to the
 13 accident in December of 2008. My question is
 14 pretty simple, given the fact that you haven't
 15 seen this patient or known any of his subsequent
 16 care in three and a half years, am I fair to
 17 assume that you cannot testify to a reasonable
 18 degree of medical certainty what his current
 19 problems are related to?
 20 A. I can only testify to a reasonable degree of
 21 medical certainty that he could have residual
 22 ankle pain from the fracture that he had, he
 23 could have residual knee pain from the injury he
 24 sustained, and that he could have continuing
 25 complaints of pain in his extremity related to a

1 gait abnormality from the injury that he
 2 received.
 3 Q. But, you don't know that one way or the other, do
 4 you?
 5 A. No.
 6 Q. Let's go back in time, if we could, looking at
 7 the CT scans and X-ray results which you were
 8 handed but it wasn't made an exhibit, the CT of
 9 the neck, to your knowledge, that was a normal
 10 finding?
 11 A. Yes.
 12 Q. Do you know if he received any care for any neck
 13 problems?
 14 A. No.
 15 Q. CT of the head, to your knowledge, that was a
 16 normal finding, as well?
 17 A. Yes.
 18 Q. And you don't know if he's followed up with any
 19 type of doctor, whether it's a neurologist,
 20 neurosurgeon, or anyone who specializes in head
 21 injuries for this accident, do you?
 22 A. No. I do not know of any treatment he's had for
 23 that.
 24 Q. X-ray exam of the knee, can I assume that's the
 25 left knee that we're talking about?

1 A. Yes.
 2 Q. To your knowledge, was that a normal finding?
 3 A. It was a normal exam. Yes.
 4 Q. Do you know of any other studies or films, MRIs,
 5 CAT scans, or X-rays that were done to his knee
 6 after December 20, 2008?
 7 A. No.
 8 Q. CT of the thorax, that normal?
 9 A. Yes.
 10 Q. CT of the abdomen, that was normal?
 11 A. Yes.
 12 Q. CT of the pelvis, that was normal?
 13 A. Yes.
 14 Q. Okay. And you performed the surgery which we
 15 talked about, and then his first visit to your
 16 office was December 29, 2008, and he had had a
 17 new complaint of right shoulder pain, correct?
 18 A. Correct.
 19 Q. To your knowledge, he never voiced any complaints
 20 to you at the emergency room or any other time
 21 that you may have visited him while he was an
 22 inpatient for right shoulder problems; is that
 23 fair?
 24 A. Correct.
 25 Q. What about neck problems, did he ever voice to

1 you problems he was having with his neck while at
2 the ER or at the hospital?
3 A. I think -- yes. He did complain of neck pain in
4 the ER.
5 Q. Did you treat him for any neck problems?
6 A. I did not treat him for any neck pain.
7 Q. And when he came to your office for the first
8 time, December 29, 2008, and complained of neck
9 problems, what was your recommendation?
10 A. I suggested that he see our partner Dr. Patel,
11 who does neck pain treatment.
12 Q. He's here in your office?
13 A. Yes.
14 Q. To your knowledge, did he ever follow up with Dr.
15 Patel?
16 A. No.
17 Q. No, you don't know or no, he didn't?
18 A. Not to my knowledge.
19 Q. You did perform an X-ray of his right shoulder
20 and you mentioned that there was a possible
21 fracture of the glenoid?
22 A. Yes.
23 Q. But, it was your recommendation that he get an
24 MRI of the shoulder to confirm or rule out that
25 possible fracture, correct?

1 A. Correct.
2 Q. Do you know if that was ever done?
3 A. No.
4 Q. Otherwise, the ankle was doing well, post-op?
5 A. Well, doing as well as it was in the normal stage
6 of recovery.
7 Q. And then, one month later, there's a follow up on
8 January 29, 2009, and that was actually the last
9 time you saw the patient, correct?
10 A. Yes.
11 Q. And on that day, the patient reported a decrease
12 in strength in the leg?
13 A. Yes.
14 Q. And it was your recommendation for him to get
15 therapy for strengthening and range of motion?
16 A. Correct.
17 Q. Do you know if that was ever done?
18 A. I do not.
19 Q. And the way you left it with him, at least on
20 that day, was that you were going to, you
21 proposed to taking out the screw that you
22 referenced earlier in two to three weeks?
23 A. Correct.
24 Q. And at this point, he's out of a hard cast, I
25 guess, and he's into an air cast?

1 A. Yes.
2 Q. And then, the next note I have in your records is
3 February 2, 2009, where you get a call from
4 either him or his wife saying that they want to
5 transfer to a physician in the Columbia area?
6 A. Yes.
7 Q. To Dr. McBride or Dr. McFadden is the people that
8 you suggested?
9 A. Yes.
10 Q. Do you know who he followed up with?
11 A. Evidently, Dr. Smith, who's in Dr. McFadden's
12 group at the Moore Clinic.
13 Q. When did you learn that?
14 A. Talking with the lawyer.
15 Q. Today?
16 A. Yes.
17 Q. And then, I believe you testified earlier that,
18 given the nature of this injury and the procedure
19 that you performed, you expect the patient to
20 reach maximum medical improvement within six
21 months?
22 A. Typically, yes.
23 Q. That's all I have for you. Thank you.
24 RE-DIRECT EXAMINATION BY MS. MULLIS:
25 Q. Just briefly, he reported initially in the

1 emergency room knee pain; is that correct?
2 A. Yes.
3 Q. There was an X-ray done of his knee. Would there
4 have been an X-ray done of his knee if he was not
5 reporting knee pain?
6 A. No.
7 Q. He reported to you in his office knee pain and
8 you were concerned about knee pain a month and
9 nine days after this accident on January 29th of
10 2009; is that correct?
11 A. Yes.
12 Q. And you discussed knee, leg numbness, weakness in
13 the leg; is that correct?
14 A. Yes.
15 Q. If Mr. McCray has received no other injury to his
16 knee or had no other traumatic event that
17 occurred, no other motor vehicle accident, no
18 other fall or injury to his knee, could you say,
19 more likely than not within a reasonable degree
20 of medical certainty, that this incident on
21 December 20th of 2008 caused the knee pain that
22 he's currently having today?
23 A. Yes.
24 Q. Thank you.
25 RE-CROSS EXAMINATION BY MR. ALLEN:

1 Q. The knee pain that you evaluated him for, is it
 2 fair that you consider that to be soft tissue in
 3 nature which is why you ordered physical therapy?
 4 A. Yes. But, soft tissue can, it encompasses a lot
 5 of things. There was no evidence of a fracture
 6 in the bone on the X-ray, but to my knowledge, he
 7 never had an MRI, so it would most likely be soft
 8 injury.
 9 Q. Which is why you ordered physical therapy, as
 10 opposed to an MRI at this point. Your idea was
 11 to do a conservative measure which was order
 12 physical therapy and see if that solves the
 13 problem, fair?
 14 A. Yes.
 15 Q. But, to your knowledge, he never did that?
 16 A. Yes.
 17 Q. That's all I have. Thanks.
 18 RE-DIRECT EXAMINATION BY MS. MULLIS:
 19 Q. Would that include nerve damage?
 20 A. That's a possibility. We talked about the nerve
 21 damage.
 22 Q. So, he's asking you about the soft tissue injury.
 23 Could that include nerve damage, too?
 24 A. Yes.
 25 Q. Okay. Thank you. That's all. We're done.

1 STATE OF SOUTH CAROLINA)
 2 : C-E-R-T-I-F-I-C-A-T-E
 3 COUNTY OF CHARLESTON)
 4
 5 I, John P. Crawford, Jr., Court Reporter and Notary
 6 Public, certify that I did have James D. Spearman, MD to
 7 appear before me at 4:46 o'clock, p.m. on Thursday, July
 8 12th, 2012 at Lowcountry Orthopaedics & Sports Medicine,
 9 2880 Tricom Street, North Charleston, South Carolina;
 10 that the witness was sworn and cautioned to tell the
 11 truth, the pages constitute a true and accurate
 12 transcript of the testimony given at that time and
 13 place.
 14 I further certify that I am not of counsel or kin to
 15 any of the parties to this cause of action, nor am I
 16 interested in any manner in its outcome.
 17 IN WITNESS WHEREOF, I have hereunto set my hand and
 18 seal this the 17th day of July, 2012.
 19
 20
 21

22 Notary Public for South Carolina
 23 My Commission Expires: April 4th, 2022
 24
 25

1 Thank you.
 2
 3
 4 (Deposition concluded at 5:28 o'clock, p.m.)
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Deposition of JAMES D. SPEARMAN, MD

1 STATE OF SOUTH CAROLINA)
2 : C-E-R-T-I-F-I-C-A-T-E
3 COUNTY OF CHARLESTON)
4

5 I, John P. Crawford, Jr., Court Reporter and Notary
6 Public, certify that I did have James D. Spearman, MD to
7 appear before me at 4:46 o'clock, p.m. on Thursday, July
8 12th, 2012 at Lowcountry Orthopaedics & Sports Medicine,
9 2880 Tricom Street, North Charleston, South Carolina;
10 that the witness was sworn and cautioned to tell the
11 truth, the pages constitute a true and accurate
12 transcript of the testimony given at that time and
13 place.

14 I further certify that I am not of counsel or kin to
15 any of the parties to this cause of action, nor am I
16 interested in any manner in its outcome.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal this the 17th day of July, 2012.

19
20

21

22

Notary Public for South Carolina

23

My Commission Expires: April 4th, 2022

24

25

Clark and Associates Inc.

Page: 39

1	State of South Carolina	)	
2	County of Berkeley	)	
3	Levern McCray,	)	2010-CP-08-1801
4	Plaintiff,	)	
5	vs.	)	Video Deposition
6	Jose W. Valle,	)	of
7	Defendant.	)	Heather Dailey
8		)	
9		)	
10		)	
11		)	

12
13
14 Video deposition of Heather Dailey, taken before
15 Kathleen R. Tackett, CVR, a notary public in and for the
16 State of South Carolina, commencing at the hour of 10:17
17 a.m., Friday, August 10, 2012, at the office of Southern
18 Reporting, Inc., 7223 St. Andrews Rd., Columbia, South
19 Carolina.

20
21 Reported by
22 Kathleen R. Tackett, CVR
23
24
25

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12 Also Present: Jessica Oswald, Videographer
13

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18

19

EXHIBITS

20 Plaintiff's Exhibit No. 1, "SLED Toxicology Case 21 Jacket."	49
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22 Plaintiff's Exhibit No. 2, "South Carolina Law 23 Enforcement Division Forensic Services Laboratory Report."	49
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24 Plaintiff's Exhibit No. 3, Photocopy of evidence bag.	49
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25

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 Heather Dailey, being duly sworn and cautioned
14 to speak the truth, the whole truth, and
15 nothing but the truth, testified as follows:

16 EXAMINATION

17 BY MS. MULLIS:

18 Q And, if you will, state your full name for the
19 record for me.

20 A Heather Dailey.

21 Q And, Ms. Dailey, in December of 2008, where were
22 you employed?

23 A I was employed with the South Carolina Law
24 Enforcement Division in the toxicology lab.

25 Q Okay. And the South Carolina Law Enforcement

1 Division is commonly referred to as "SLED"; is that
2 correct?

3 A Yes, ma'am.

4 Q Okay. And what were you -- what position did you
5 do for SLED?

6 A I was a forensic toxicologist.

7 Q Okay. And what did being a forensic toxicologist
8 entail?

9 A It entailed analyzing blood, urine, or other
10 biological specimens for the presence or absence of
11 alcohol, poisons, or other drugs and then
12 interpreting those results for coroners,
13 pathologists, or in courts of law.

14 Q Okay. And what education or training did being a
15 SLED forensic toxicologist require?

16 A I have a bachelor's degree in biology with a
17 cognate in chemistry from the University of South
18 Carolina. Upon my hire at SLED, you fulfill at
19 least a full year of hands-on training followed by
20 two competency exams: one in alcohol, one in
21 drugs. Both oral competency exams and physical
22 competency exams where you have to analyze unknown
23 specimens for the -- for presence or absence of --
24 of drugs or alcohols and be accurate in those
25 results.

1 Q Okay. And how long were you employed as a forensic
2 toxicologist with SLED?

3 A About four years.

4 Q And, throughout the time that you were a forensic
5 toxicologist with SLED, how often did you have to
6 have certification or recertification at SLED?

7 A We -- we did competency exams from outside labs
8 about once every quarter.

9 Q And what does competency exams require?

10 A They were unknown specimens, and we had to perform
11 our normal analyses for drugs or alcohol, and the
12 -- our results were reported back to the outside
13 laboratories for -- for accuracy analysis and
14 reported back to us whether we were accurate or
15 not.

16 Q Okay. And during your -- how long were you with a
17 SLED again?

18 A About four years.

19 Q During your four years with SLED, about how many
20 competency exams did you complete?

21 A After my -- after my one year of training, about
22 one every quarter, so -- four -- twelve.

23 Q Okay. And, of the twelve competency exams that you
24 had to complete at SLED, did you ever fail to meet
25 the criteria requirements of any of those

1 competency exams?

2 A No, ma'am.

3 Q And, in your work with SLED, have you testified as
4 a result of -- or as to the results of toxicology
5 or the results of the biological specimens that
6 you've tested in the past?

7 A I have.

8 Q And have you testified in courts throughout the
9 state of South Carolina?

10 A Oh, yes, ma'am.

11 Q And has any court in the state of South Carolina
12 refused to qualify you as an expert for the
13 purposes of testifying as a forensic toxicologist
14 as to your results?

15 A Not one.

16 Q And when you are performing the tests on the
17 specimens -- the biological specimens at SLED, are
18 there a series of agency and departmental policies
19 and protocols that you're required to adhere to?

20 A Yes, there are.

21 Q And have you ever not adhered to those policies and
22 protocols?

23 A No, ma'am. Anytime there is a division with
24 protocols a -- you have to notate it and then say
25 why that was happening or why that actually

1 happened, and it has to be reported on the actual
2 lab report. If there's no mention, then all
3 protocols were followed as stated.

4 Q And can you just describe to us, generally, what
5 the protocol is for the testing of a biological
6 specimen at SLED?

7 A Once it comes into the -- to SLED, it is logged in,
8 transported up to the toxicology lab where it's
9 taken into our custody, and we would open the bag,
10 pipette an aliquot of sample out for analysis on
11 instrumentation.

12 Q Okay. And, in front of you, is a copy of a packet
13 of 14 pages. Do you recognize that packet?

14 A Yes, ma'am.

15 Q And is that a SLED packet?

16 A Yes, ma'am.

17 Q How do you know?

18 A It's got a copy of the lab report, and it's got a
19 photocopy of all of the entry data, the request for
20 services reports, a copy of the front and back of
21 the evidence bags as we received it, and my
22 instrumentation data.

23 Q Okay. And, in relation to the instrumentation
24 data, that's pages -- just briefly -- 9 through 13
25 in the packet in front of you. What is that?

1 A These are the printouts from the instrumentation
2 that we run blood-alcohol analyses on.

3 Q Okay. And what do you mean by "instrumentation"?
4 A That is what I can no longer answer.

5 Q Okay.

6 A You need a qualified -- a current toxicologist to
7 answer instrumentation questions.

8 Q Okay. Do you take the blood and test it with
9 instruments at -- or equipment at SLED?

10 A Yes, ma'am.

11 Q Okay. And the results included in this packet are
12 those test results from December of 2008; is that
13 correct?

14 A Let's see. It's dated on 1/2/09, so it would've
15 been after I'd received the sample.

16 Q Okay. And the instrumentation that you use at
17 SLED, is that instrumentation or the instruments
18 that you use at SLED is it calibrated --

19 A Yes, ma'am.

20 Q -- by SLED?

21 A Yes, ma'am. They are calibrated in-house on a
22 regular basis, and they must be calibrated
23 correctly; otherwise, we cannot run on those
24 instruments.

25 Q And it's calibrated for accuracy; is that correct?

1 A Yes, ma'am.

2 Q Okay.

3 (Off the record from 10:25 a.m. until
4 10:26 a.m.)

5 MR. JENNINGS: My objection was leading
6 question.

7 MS. MULLIS: Okay.

8 (On the video record at 10:26 a.m.)

9 Q Ms. Dailey, how do you know that the
10 instrumentation used at SLED is accurate?

11 A It is calibrated regularly, and we kept records of
12 every calibration at SLED. If there was anything
13 wrong with the calibration, then that instrument
14 was not allowed to be used.

15 Q Okay. Thank you.

16 MS. MULLIS: We're going to offer Ms. Dailey
17 as an expert for the limited purposes of
18 testifying as a forensic toxicologist to
19 verify the report and test results of the
20 sample taken in December of 2008.

21 MR. JENNINGS: And we will not object to that
22 with the stipulation that she's not going to
23 give any opinion -- have any testimony
24 regarding the effects of the alcohol on the
25 defendant as well as anything that she's

1 already told us regarding the fact that she's
2 not been at SLED and cannot testify regarding
3 instrumentation, things of that nature.

4 MS. MULLIS: Okay.

5 Q We referred to the packet in front of you. And you
6 stated that that was the packet from SLED.

7 A It appears to be a copy of the SLED lab jacket.
8 Yes, ma'am.

9 Q Okay. And what's the date on the SLED jacket?

10 A Let's see. The date on -- that this case was
11 written up on the front table of contents is
12 1/26/09.

13 Q And do you know who -- whose blood sample it is
14 from the case jacket?

15 A In the case jacket on the -- see -- you see on the
16 second page of the evidence bag, this is the seals
17 from whenever they were submitted, and it says the
18 subject's name was Jose Valle.

19 Q Okay. And you're referring to page -- and I've
20 numbered them at the bottom --

21 A Okay. Four.

22 Q -- for simplicity's sake. And that's page 4 of
23 that SLED toxicology -- and tell me what you're
24 calling it again?

25 A It's the -- it's a photocopy of the evidence bag.

1 Q Okay. So that is an actual photocopy of the
2 evidence bag?
3 A After it had been broken down, yes, ma'am.
4 Q Okay. And why is it backwards?
5 A Ma'am?
6 Q Why is it backwards --
7 A Oh.
8 Q -- on the page?
9 A Because there -- there's a photocopy of both the
10 front and the back of the evidence bags.
11 Q Okay. So where's the front of the bag?
12 A The front is on page 3.
13 Q And the back is on?
14 A Page 4.
15 Q Okay. And tell me exactly what these are
16 photocopies of.
17 A The evidence bag --
18 Q -- that --
19 A -- that was submitted for -- that contained the
20 sample for toxicological analysis.
21 Q And what would've been in the evidence bag?
22 A This was a blood sample.
23 Q Okay. And it was the blood sample of who?
24 A It is labeled as "Jose W. Valle."
25 Q Okay. And can you tell what the incident date of

1 that blood sample was?

2 A Incident date says 12/20/2008.

3 Q Okay. And where the blood sample came from?

4 A Berkeley.

5 Q And what officer provided the sample?

6 A Let's see. Investigating officer is Reginald

7 Thomas.

8 Q Okay. And can you tell what agency he came from?

9 A It says "South Carolina Highway Patrol" on the

10 request form.

11 Q Okay. And can you tell who drew the blood?

12 A Let's see. On the request form, the name and title

13 of licensed medical personnel, as you've numbered

14 on page 8, says Jennifer Stayton.

15 Q Okay.

16 (Off the video record at 10:30 a.m.)

17 MR. JENNINGS: My objection is all hearsay.

18 She did not produce this document, neither did

19 SLED. It's produced by another agency, and I

20 object that it's hearsay testimony.

21 MS. MULLIS: Okay. All right.

22 (On the video record at 10:31 a.m.)

23 Q And the information that you're receiving who

24 produced the specimen from is -- what document are

25 you referring to?

1 A I'm sorry?

2 Q Where in your packet are you -- you getting the
3 information on who drew the blood?

4 A From the SLED forensic services request form. It's
5 the paperwork that comes in every time someone
6 submits a sample.

7 Q Okay. Is it also on the evidence bag itself where
8 the investigative -- investigating officer's report
9 is?

10 A It is in the evidence bag.

11 Q Okay.

12 (Off the video record at 10:32 a.m.)

13 MR. JENNINGS: And, Pam, that's part of the
14 record -- Ms. Mullis, excuse me -- that's part
15 of the record where I'm saying it's hearsay;
16 that's not part of SLED's file.

17 MS. MULLIS: Okay.

18 MR. JENNINGS: And so I think it relies upon
19 that, and the investigative officer's report
20 would be hearsay.

21 MS. MULLIS: Okay.

22 MR. JENNINGS: If she wants to testify
23 regarding SLED'S forensic services request
24 form, I think she can. So my -- my objection
25 would

1 be that --

2 MS. MULLIS: You understand this was produced
3 by SLED, right?

4 MR. JENNINGS: Yeah, I understand that.

5 MS. MULLIS: Oh, okay.

6 MR. JENNINGS: But what I'm saying is that
7 this document -- if what my understanding is
8 correct, if we had the original evidence bag,
9 this would be what the trooper would've placed
10 on the bag and then -- and so that's something
11 that he would've produced and not been
12 produced by SLED.

13 MS. MULLIS: Okay

14 MR. JENNINGS: And so that's based on my --
15 testimony to anything that she talks about
16 regarding that particular item, which is on --
17 I'm not sure which page that's on -- that
18 number --

19 THE DEPONENT: Page 4.

20 MS. SHEETS It's on -- it's 4.

21 MR. JENNINGS -- on page 4, which is a copy of
22 the evidence bag that appears to be a
23 reproduction of a sticker placed on there by
24 the investigating officer. And I'm just
25 saying that's hearsay because SLED didn't

1 produce that.

2 MS. MULLIS: Okay.

3 MR. JENNINGS: And she would not have any
4 personal knowledge regarding anything other
5 than what's in SLED's file.

6 MS. MULLIS: Okay.

7 (On the video record at 10:33 a.m.)

8 THE EXAMINATION BY MS. MULLIS CONTINUES.

9 Q So, when you received this blood sample which is --
10 which a copy of the bag is No. 3 and No. 4 of your
11 file in front of you, what would you have actually
12 physically done with it?

13 A See, once a bag was submitted, we would inventory
14 it, which means we would -- we would be the one
15 after it's been transferred into our custody, we
16 would open the bag and remove the sample from the
17 box -- we -- we remove the label from the
18 submitting box, and we save also the specimen seal
19 to show that this -- specimen seals are actually on
20 the -- the vials of blood. So we remove those and
21 we save them so that -- for records of exactly how
22 the blood samples were labeled. So we inventory
23 the blood, make sure and compare the names, make
24 sure all the samples are labeled correctly, and
25 from then on we perform our analyses.

1 Q Okay. And did you perform the analysis on this
2 blood?

3 A I did.

4 Q Okay. And can you tell from looking at the copies
5 of No. 3 and No. 4 if you were the first person to
6 have opened or cut into this bag of blood?

7 A Yes, ma'am.

8 Q How?

9 A Because this -- on page 3 of the -- the front copy
10 of the evidence bag, the submitting officer would
11 have sealed the bag and written their -- initialed
12 and dated the date of that seal as it was
13 submitted. On the back, where I initialed it, is
14 where I resealed it after I opened it.

15 Q Okay.

16 A You have to seal and date -- or initial and date
17 every time you cut open the bag.

18 Q Okay. And you're referring to page 3, so the first
19 -- the front of the evidence bag --

20 A Is page 3.

21 Q Is that correct?

22 A Yes, ma'am.

23 Q And who was the sealing officer?

24 A It says "Sealing official: CR Cochrane."

25 Q Okay. And that's dated what date?

1 A 12/23/08.

2 Q Okay. And you're saying that those are his

3 initials at the top?

4 A Yes, ma'am.

5 Q Okay.

6 A CRC. They initial and date as well as we do.

7 Q The 12/23/2008?

8 A Yes, ma'am.

9 Q Okay. And then, on the back page --

10 A On the -- on --

11 Q -- page 4 -- I'm sorry. On the back of the bag.

12 So which initials are you referring to that you

13 know -- when did you test the sample?

14 A I first opened the bag on 12/31/08. My initials

15 are HHD.

16 Q Okay. And when you opened the bag, was it altered

17 in any way?

18 A No, ma'am. That would have to be noted if we find

19 the bag in any -- any way other than completely

20 sealed.

21 Q Okay. And did the bag appear to be contaminated

22 and preserved in its original form?

23 A It appeared to be in its original form. Did not

24 appear to have been tampered with.

25 Q Okay. Or -- and did the bag appear to be

1 substituted or mixed up with any other samples?

2 A No, ma'am.

3 Q But properly identified?

4 A Yes, ma'am.

5 Q Okay. And did you follow all established protocols

6 and procedures with SLED when you tested the

7 sample?

8 A Yes, ma'am.

9 Q Okay. And did you come up with results from your

10 testing of the sample?

11 A I did.

12 Q And what were your results?

13 A The results, as stated on my report, are a -- where

14 is the report? -- ah, this page -- an ethanol

15 content of 0.103.

16 MR. JENNINGS: What page?

17 Q On page 14; is that correct?

18 A Yes, ma'am.

19 Q And what document you're referring -- are you

20 referring to?

21 A My final law enforcement lab report -- toxicology

22 report

23 Q The forensic services laboratory report?

24 A Yes, ma'am.

25 Q And is that your signature at the bottom of the

1 page?

2 A Yes, ma'am.

3 Q And you said the results are 0.103; is that
4 correct?

5 A Yes, ma'am.

6 Q And those are the results of the blood test of who?

7 A Jose Valle.

8 Q Thank you

9 MS. MULLIS: And we're going to submit the
10 entire South Carolina Law Enforcement Division
11 jacket as Plaintiff's Exhibit 1.

12 MR. JENNINGS: And that would be what pages
13 of --

14 MS. MULLIS: It's 1 through 14. It's the
15 entire packet.

16 Q The other thing that was included in the packet is
17 -- yeah.

18 (Off the video record at 10:38 a.m.)

19 MR. JENNINGS: On the record, we object to
20 this being admitted into evidence. We don't
21 have any foundation regarding where the
22 originals are. We don't know if the originals
23 are, in fact, available. We don't know if
24 this is the complete package because Ms.
25 Dailey has not been an employee of SLED for

1 I'm not sure how many years yet. And so we
2 don't know if this is, in fact, the entire
3 copy of the document. And we believe and we
4 would object to anything other than her
5 identifying her own report and her own
6 analysis. I don't think she can authenticate
7 anything else that was prepared by any other
8 person at SLED.

9 MS. MULLIS: Okay.

10 MS. SHEETS: Same objection.

11 (On the video record at 10:39 a.m.)

12 MS. MULLIS: So Plaintiff's going to submit
13 the entire document as one exhibit. We're
14 also going to submit Exhibit 14 as Plaintiff's
15 Exhibit 2 individually, and Exhibit 3 and 4,
16 the copy of the evidence bag itself, as --

17 MR. JENNINGS: Plaintiff's 3.

18 MS. MULLIS -- Plaintiffs Exhibit 3
19 individually here.

20 Q And I'm going to refer you to No.2 in your packet
21 -- page 2.

22 A Okay.

23 Q No, that doesn't help. Keep going.

24 When a -- when evidence -- let's see here.

25 When a sample comes in to SLED, what is the

1 procedure at SLED for how it comes in when it's
2 delivered from highway patrol or a trooper?

3 A An officer will submit it to login. They will --
4 the evidence will be given a lab number -- will be
5 assigned a lab number. All -- and all the evidence
6 logged in. And then the submitting officer -- it
7 will be sealed in a SLED evidence bag. A
8 submitting officer will initial and date the seal.
9 It will be transferred up from login to the
10 toxicology department, where I take it into my
11 custody to perform all the analyses.

12 Q When a biological specimen is delivered to SLED by
13 a -- someone from the highway patrol or a law
14 enforcement agency, does anyone other than the
15 forensic toxicologist that tests the bag ever open
16 the bag, touch the sample --

17 A The sample itself, once it's been sealed in the
18 bag, the forensic toxicologist is the one who
19 unseals it.

20 Q Okay. Would anyone else at SLED ever touch the
21 actual physical biological specimen?

22 A Not -- not -- we pipette out an aliquot so -- and
23 we would reseal the bag. Once it's been pipetted,
24 then I would run analyses. If there was a drug
25 screen, we would pipette out the samples and label

1 them correctly. Someone else might have put them
2 on the instrument --

3 Q Uh-huh.

4 A -- for drug screens, but I did all of the alcohol
5 analyses.

6 Q Okay. When the biological specimen is brought in
7 to -- in to SLED, is it checked into an evidence
8 room?

9 (Off the video record at 10:42 a.m.)

10 MR. JENNINGS: Objection: leading.

11 MS. MULLIS: Okay.

12 (On the video record at 10:42 a.m.)

13 Q When a biological specimen is brought to SLED, does
14 it -- is it given directly to you?

15 A No. It comes in via login. Then a toxicology
16 courier will bring everything that -- that has been
17 slated for toxicology up from login to the
18 toxicology department where I will take all the
19 samples that were assigned to me, and I will take
20 them into my custody, inventory them, and then
21 begin my analyses.

22 Q So, within your packet in front of you, is a South
23 Carolina Department of Public Safety chain of
24 custody and evidence destruction form. Do you see
25 that form?

1 A Yes, ma'am.

2 Q And the last line on that is a form where CR

3 Cochrane would've delivered to SLED.

4 A Yes, ma'am.

5 Q And there's initials there -- DPY -- by the SLED

6 receipt. Do you know who DPY would be at SLED?

7 A That would be Doris Yarborough.

8 Q Okay. And Dolores [as spoken] Yarborough is who?

9 A A login technician at SLED.

10 Q Okay. And would Dolores [as spoken] Yarborough

11 have done any testing with the sample?

12 A No.

13 Q Okay. Would she -- what would she have done with

14 the sample?

15 A She would have assigned it its lab number and

16 placed the unopened box into the SLED evidence bag

17 for the officer which -- always in the presence of

18 the officer -- and he would have initialed and

19 dated the seal.

20 Q And other than Dolores [as spoken] Yarborough, who

21 else would have physically handled that biological

22 specimen or that bag at SLED?

23 A No one would've handled the specimen itself but the

24 -- the bag could -- would have been transported up

25 from login to the toxicology department by a

1 toxicology technician.

2 Q Okay. And who were the toxicology technicians at
3 SLED in December of 2008?

4 A They are Brandon Williams and Kimmie Davis.

5 Q So either Kimmie Davis or Brandon Williams, who are
6 lab technicians at SLED, would've brought it from
7 the evidence room up to you at the lab; is that
8 correct?

9 A Yes, ma'am.

10 Q And both of those individuals are employees of
11 SLED; is that correct?

12 A Yes, ma'am.

13 Q And both of the --

14 (Off the video record at 10:45 a.m.)

15 MR. JENNINGS: Object because this is all
16 speculation. She's saying either Brandon or
17 Kimmie, and she cannot say which one did it.

18 MS. MULLIS: Okay.

19 MR. JENNINGS: And there's no evidence, I
20 believe, on this particular document that
21 describes which one did it so it's speculative
22 and she's guessing. She has no personal
23 knowledge.

24 MS. MULLIS: Okay.

25 MS. SHEETS: Same objection.

1 (On the video record at 10:45 a.m.)

2 Q But any technician that would have transported from
3 the evidence room to you up at the lab -- would
4 they have altered, tampered with, or substituted
5 the sample or -- that blood sample in any way?

6 A No, ma'am. Because the bag was sealed and I was
7 the one to unseal it.

8 (Off the video record at 10:46 a.m.)

9 MR. JENNINGS: Same objection. We don't have
10 the original bag here. We don't know what
11 happened after the bag was -- without the
12 original, we don't know if, in fact, that
13 happened, and it's all speculation based upon
14 her past experiences and not regarding any
15 personal knowledge of whether or not that
16 happened in this particular case.

17 MS. SHEETS: Same objection.

18 (On the video record at 10:46 a.m.)

19 Q And we've previously looked at the bag itself or
20 the photocopies of the bag, and you verified that
21 you followed all the protocol and procedures at
22 SLED --

23 A I did.

24 Q -- to assure that the biological specimen that was
25 tested was in the same condition that it was when

1 it was delivered to SLED; is that correct?

2 A Yes, ma'am.

3 Q And not altered, tampered with, or substituted in
4 any manner?

5 A No, ma'am.

6 Q Okay. And the results that you received were --
7 are properly reflected in the report submitted as
8 Plaintiff's Exhibit 2?

9 A They are.

10 MS. MULLIS: That's all the questions I have.

11 EXAMINATION

12 BY MR. JENNINGS:

13 Q All right, Ms. Dailey, this is Donnell Jennings. I
14 just want to briefly discuss some things before we
15 get into, actually, your role in interpreting the
16 blood-alcohol content of the defendant in this
17 case.

18 It's my understanding that you're no longer an
19 employee of SLED; is that correct?

20 A That's correct.

21 Q Can you tell us of the time frames that you were
22 actually employed at SLED?

23 A I was -- let's see. I began in May of 2006, and I
24 left in March of 2010.

25 Q Okay. And you also indicated to Mr. Mullis -- Ms.

1 Mullis -- on direct examination that your first --
2 that you were there for almost four years, so you
3 were really there less than four years; is that
4 correct?

5 A So just -- just under four years.

6 Q Okay. And you also indicated that your first year
7 was really spent on hands-on training; is that
8 correct?

9 A Yes, sir.

10 Q And so is it safe to say from May of 2006 through
11 May of 2007 that was spent in in-house training --
12 on-the-job training?

13 A Yes, sir.

14 Q And, during that period of time, your first year,
15 you were not actually performing official testing;
16 is that correct?

17 A No, sir.

18 Q And so, in reality, you had from May '07 until --
19 what time did you leave in 2010?

20 A March, I believe.

21 Q And so you really had less than three years of
22 actual on-hands doing analysis? Or was it less
23 than two years? I mean, I just want to know
24 exactly when you actually were doing the testing
25 and not in training.

1 A Well, in training we have to -- we have -- have --
2 our alcohol training in specific we have to
3 correctly reanalyze more than 500 samples that have
4 been previously analyzed before we are deemed
5 qualified to do that. So I had -- at that time
6 completed all of my alcohol training which means
7 those 500 correctly reanalyzed samples plus --
8 let's see. If this was the end of 2008, then, you
9 know, more than a full year's worth of cases ever
10 since.

11 Q And so, specifically, looking at Plaintiff's
12 Exhibit No. 2 which is the SLED forensic services
13 laboratory report, when was the first time you were
14 authorized to sign one of these officially as
15 Heather H. Dailey, forensic toxicologist?

16 A After I had completed all of my comprehensive in-
17 house training.

18 Q Okay. And also, on direct examination, you advised
19 Ms. Mullis that you cannot answer instrumentation
20 questions. Can you explain to the jury why you
21 cannot?

22 A It's just because I've been gone for so long. If
23 they -- if SLED protocols had changed, if they --
24 and then I would not be up on that instrumentation.
25 I would not want to answer incorrectly exactly how

1 an instrument worked. It's been two and a half
2 years since I've had to study any of that theory
3 and -- and actually do this. I -- I - I know that
4 at the time I did all of my analyses, I was up to
5 date on everything and all of my qualifications,
6 including knowledge of the instrumentation, but I
7 would not want to answer incorrectly.

8 Q And, ma'am, we're not -- and I'm not questioning
9 your qualifications. I just want to make things
10 clear for the jury, okay? I'm not questioning your
11 qualifications at all, okay? Okay. This is not
12 that kind of examination, okay? I just want to
13 make sure certain things are --

14 (Off the record from 10:51 a.m. to
15 10:51 a.m.)

16 Q Ms. Dailey, isn't it true that you only had
17 personal knowledge regarding what you did with the
18 sample and your results?

19 A I'm sorry. I'm not sure I follow.

20 Q Okay. When it comes to your actual knowledge --
21 your direct knowledge -- you can only testify today
22 to the jury regarding what you did; is that
23 correct? Meaning, what you described to Ms. Mullis
24 already regarding your opening the bag and your
25 taking out a small sample of the blood for

1 analysis, that's your personal knowledge, correct?

2 A Yes -- yes, sir. I opened -- I was the first one to
3 open the evidence bag, yes, sir.

4 Q And anything else is not of your personal
5 knowledge, correct? You are basing it upon looking
6 at these records, but you really don't know what
7 happened prior to what you did; is that correct?
8 Personal, direct knowledge.

9 A I watched Kimmie and Brandon bring up evidence
10 every day, so I know that's what they did, and I
11 know they do it correctly.

12 Q But my --

13 A But I did not bring it up from login, no, sir.

14 Q But to answer my question directly, yes or no, your
15 personal knowledge only concerns your role in this
16 analysis of the blood sample; is that correct?

17 A Yes, sir.

18 Q And anything else would not be your personal
19 knowledge, correct? You have -- you didn't see
20 anyone do this? You're just saying that's what
21 normally happens, correct?

22 A A --

23 Q Yes or no, please, and then you can explain it.

24 A I guess "yes, sir." My --

25 Q Do you understand my question?

1 A I'm not sure I do. I'm sorry.

2 Q Okay. When I say "direct knowledge," I mean
3 something that you did, you heard, you saw. And
4 so, what my question is that your only personal,
5 direct knowledge to what you did yourself; is that
6 correct?

7 A Yes, sir.

8 Q Okay. And you don't -- even though there's some
9 other information in some -- some of the documents
10 shown you by counsel for the plaintiff, Ms. Mullis,
11 that's based upon you just reviewing these records.
12 You don't know who did what, is that correct, other
13 than what you did?

14 A (No response.)

15 Q I mean, you're saying, "Well Brandon or Kimmie did
16 this, that, and the other." You don't know if they
17 did in this case or not, do you, because you don't
18 see their name on any of these records; is that
19 correct? Do you see Brandon --

20 A It would be on -- it would be on the SLED official
21 chain of custody, but that is not in my possession.

22 Q And -- and that's my whole point. The best
23 evidence would be the actual file from SLED with
24 the original envelope in it which has on it the
25 list of everyone that's touched the -- the envelope

1 and/or the file; is that correct? And the chain of
2 custody that you've been shown today was prepared
3 by another agency; is that correct?

4 A That is not the SLED chain of custody.

5 Q And so you cannot testify today regarding the chain
6 of custody and what happened to this document, this
7 blood sample, before it came to you; is that
8 correct?

9 A Correct.

10 Q Okay. And there's no evidence in here of a SLED
11 chain-of-custody report, and that's available; is
12 that correct? Should be available.

13 A I'm not sure how you go about getting the
14 official --

15 Q Okay.

16 A -- SLED chain of custody, but we -- they do have an
17 actual SLED chain of custody, yes, sir.

18 Q And -- and isn't it true you can also get authentic
19 copies that are certified by SLED as authentic
20 copies of a -- of a file; is that correct? Or do
21 you know?

22 A I'm not sure how that's a change since I left.

23 Q But when -- but when you were working during this
24 time frame --

25 A When -- when I was working at this time frame, I

1 would've brought the original -- the entire
2 envelope. This does contain everything that would
3 have been in the original SLED envelope. This
4 would be the *Manila envelope that we see a lot
5 reports in. So the envelope does exist.
6 Everything is inside it. But, as I'm no longer
7 there, I don't have direct access to those anymore.
8 Q Well, apparently, everything's not inside it
9 because the SLED chain-of-custody report is not in
10 there; is that correct?
11 A That -- that doesn't go in the --
12 Q Okay. Okay.
13 A -- in the jacket, no, sir.
14 Q Now, when you were employed at SLED, did SLED have
15 a records custodian?
16 A I am not sure.
17 Q And would a records custodian be the best person to
18 authenticate any records from SLED? Someone
19 presently employed?
20 A I'm not sure how to get a verified chain of
21 custody.
22 Q Okay.
23 A I just know they do. I cannot remember, but you
24 can contact SLED and get one.
25 Q But you, sitting here today --

1 A To my knowledge.

2 Q -- and before the jury, cannot provide any chain-
3 of-custody testimony; is that correct?

4 A I know -- no, sir. I know what -- exactly what I
5 did.

6 Q And the only document you can really --

7 A If there's a verified chain of custody, then --
8 then I can say that, yes, those people actually
9 were the people who -- I know those initials and
10 that's a verified chain of custody, but, as far as
11 the analyses of the blood, what begins my contact
12 -- my contact with the sample begins on 12/31/2008.

13 Q Okay. Can you show me, out of the documents
14 submitted to you by Ms. Mullis, which documents
15 were actually produced or generated by you and
16 describe them for the jury, if you don't mind, page
17 by page.

18 A Let's see. Pages number 9 and 10 are the -- the
19 quantitation documents that is run on the
20 instrument that is used to quantify the actual
21 amount of a substance in a sample run in duplicate
22 because they must -- they must agree --

23 Q Okay.

24 A -- within plus or minus 5 percent. But this is --

25 Q But of the total -- of the total 14 documents that

1 have been described to the jury so far by Ms.
2 Mullis, how many of those documents were actually
3 -- what number were actually produced by you,
4 Heather Dailey, as forensic toxicologist for SLED?
5 A Let's see. I see I ran these -- the -- the five
6 pages of instrumentation analysis, my report. The
7 evidence bag is what was submitted to me, but I was
8 the one who broke it down to put it into the --
9 into the jacket -- into the case jacket. The
10 forensic services request is what is --
11 Q Well, I'm talking about --
12 A -- what comes in with the sample.
13 Q -- what was generated by you directly yourself.
14 A Physically generated?
15 Q Yes, ma'am.
16 A The instrument data and the report.
17 Q And so you can really just authenticate what you
18 did in this matter, correct, other than the
19 original documents being the best evidence; is that
20 correct?
21 A Let's see. We printed out our own request forms
22 that came in whenever they were submitted with the
23 case, so I -- I printed this out from -- from the
24 computer.
25 Q Describe for the jury what you're talking about so

1 they have a better idea of what you --

2 A The forensic services request form is scanned in at
3 the time of submission, but I would've printed
4 these off for my case jacket for my records.

5 Q But, to answer my question again, you did not
6 produce this record?

7 A I did not fill it out myself, no, sir; this comes
8 in with the evidence.

9 Q And so the only records that you produced would've
10 been the graphs as well as your final report; is
11 that correct?

12 A Yes, sir. That is correct.

13 Q And everything else would've been in the --
14 ostensibly in the SLED evidence bag or whatever --
15 or concerning this particular case; is that
16 correct?

17 A Yes, sir.

18 Q And the best way of knowing exactly what's in that
19 bag would be to actually have a physical copy of
20 the originals, correct?

21 A You -- this is the -- this is a physical copy of
22 the originals.

23 Q How do you know that this is the original if you've
24 not been at SLED for four years and you've not --

25 A They -- you cannot add or take anything away once

1 the report's been generated.

2 Q Okay.

3 A It would have to be documented.

4 Q And so you're saying, based upon your past
5 experience, you think this is a complete copy?

6 A Yes, sir.

7 Q Okay.

8 A Oh, I also did have -- we have to fill these out
9 when we break out the case. The table of contents
10 -- the analysts, whenever we're filling -- whenever
11 we're generating our reports, we have to fill out a
12 table of contents that says everything that would
13 be in the case file.

14 Q And so -- and so that's another document you would
15 have?

16 A I -- I filled it out, yes, sir.

17 Q And that's your handwriting, correct?

18 A Yes, sir.

19 Q Okay.

20 A I'm sorry. I forgot about that.

21 Q That's okay. And, also, you're not here today to
22 tell the jury or to give any expert opinions
23 regarding what -- what Mr. Valle allegedly had to
24 drink prior to the accident or when he was
25 drinking, anything regarding that; is that correct?

1 A No, sir.

2 Q And you're not here today to testify regarding the
3 effects of any alcohol consumed by Mr. Valle, the
4 defendant, and how it would've contributed to the
5 accident; is that correct?

6 A No, sir.

7 Q And you're simply here to try to authenticate and
8 verify the contents of this SLED jacket and report;
9 is that correct?

10 A Yes, sir.

11 Q And that you have direct knowledge of what you did
12 and what you produced, but the rest of the
13 documents are based upon your belief of what
14 happened typically when you were working; is that
15 correct?

16 A Yes, sir.

17 Q And wouldn't you agree that the best evidence would
18 be the original evidence, the -- the actual jacket
19 itself with the seal and with all this on it; is
20 that correct?

21 A Well, this --

22 Q Yes or no, and then you can qualify.

23 A Okay. Yes, sir. However, this is -- is everything
24 that would have been in my case jacket based on my
25 experience. In the lab, this is all that would've

1 been necessary to have in a finalized case file.
2 This is -- because this is the front and back of
3 the case jacket, and this is everything that
4 would've been required because everything that is
5 on my table of contents that I would've put in the
6 case jacket is -- is here.

7 Q You said earlier -- you kept -- you used the phrase
8 "appears to be." I was trying to figure what you
9 meant by "appears to be" regarding what you just
10 said and earlier on direct examination that it
11 appeared to be the original -- copies of the
12 originals. Are you saying now they are copies of
13 the originals?

14 A They appear to be simply because I do not have the
15 -- my actual case file in my hands. However,
16 everything that is here appears to be true and
17 accurate.

18 Q Okay. That's all I have. Thank you.

19 A Thank you.

20 REEXAMINATION

21 BY MS. MULLIS:

22 Q Just briefly to clarify a couple of things. You --
23 in order to complete certification --

24 MR. JENNINGS: Hold on one second.

25 MS. MULLIS: Okay.

1 (Off the record from 11:02 a.m. to
2 11:06 a.m.)

3 THE EXAMINATION BY MS. MULLIS CONTINUES.

4 Q Opposing counsel asked you about when you qualified
5 initially, and you said you had to correctly
6 analyze 500 samples before you were certified as a
7 forensic toxicologist; is that correct?

8 A Yes, ma'am.

9 Q And how long would that have taken you to do?

10 A It takes no more than a year. Usually, you -- we'd
11 -- I, personally, did my alcohol testing first,
12 which happened in the first six months of my
13 employment, and then I moved on to drug analysis.

14 Q Okay. So, after you had analyzed those 500 samples
15 correctly, could you then go ahead and start
16 analyzing samples for SLED?

17 A No, ma'am. We finish our entire program before we
18 actually get to start signing off on cases.

19 Q Okay. And -- and, in a given week, how many
20 samples would you generally analyze?

21 A Let's see. Once I got cases, depending on whether
22 you were working blood DUIs that week, I think I
23 got, generally, between 40 and 70 cases every week.

24 Q Forty to 70 samples to analyze a week?

25 A Forty -- -- 40 to -- 40 to 70 separate cases

1 whenever I was on blood to DUI rotation. It all
2 varied.

3 Q So you've literally analyzed how many samples in
4 your three-year career with SLED?

5 A I would estimate well over 2,000.

6 Q Okay. Opposing counsel ask you about protocols and
7 current protocols at SLED and your knowledge of
8 protocols. When we're talking about protocols, all
9 the protocols and policies that we've discussed are
10 all protocols and policies from December of 2008;
11 is that correct?

12 A Yes, ma'am.

13 Q Okay. And, when we were discussing the records
14 from SLED, the records that are in front of you in
15 this case file, are these SLED records records that
16 are kept at SLED within the normal course of
17 business at SLED?

18 A All of the case jackets are kept for at least --
19 in-house for at least a year, and then they get
20 moved upstairs to make room. And, once so many
21 years have passed, then they are housed off-site.
22 I don't know whether they still use a place called
23 "Iron Mountain," but they're not destroyed.

24 Q But are these regular records that are produced by
25 SLED --

1 A Oh, yes. Every --

2 Q -- in most --

3 A Every case jacket has a report like this. Some of
4 them have a lot more pages, but every case has a
5 jacket like this, and -- from the toxicology lab.

6 Q And they're kept within the normal course and scope
7 of business at --

8 A Yes, ma'am.

9 Q -- South Carolina Law Enforcement Division.

10 A Yes, ma'am.

11 Q And are these records that you reasonably rely on
12 as a forensic toxicologist in your duties as a
13 forensic toxicologist?

14 A Yes, ma'am.

15 Q Okay. And when you referred to the case jacket, I
16 just want to clarify for the record, you said pages
17 1 and 2 were a copy of both sides of the file
18 itself?

19 A We house everything in a -- in a manila envelope,
20 so this would've been -- we have the lab number on
21 the front of the envelope and then the back. If
22 they mail the report out to the case officer, they
23 stamp the date and they would've copied that as
24 well if it's necessary.

25 Q Okay. So that's pages 1 and 2; is that correct?

1 A It's labeled 1 and 2, yes, ma'am.

2 Q And then pages 3 and 4 are actually a copy of the
3 front and back of the physical evidence bag itself;
4 is that correct?

5 A Yes, ma'am.

6 Q Okay. And page 5 is labeled "Table of Contents."
7 Are those your initials in the upper right-hand
8 corner?

9 A Yes, ma'am.

10 Q Did you prepare that document?

11 A I did.

12 Q Is that your handwriting?

13 A Yes, ma'am.

14 Q And the case number in the upper left-hand corner,
15 is that the same case number as is on the front
16 page of the file number on page 1?

17 A This page? Yes, ma'am.

18 Q Okay. And is it also the same as on the evidence
19 bag which is pages 3 and 4?

20 A 0818272, yes, ma'am.

21 Q Okay. The table of contents toxicology case jacket
22 lists everything that was in the file at SLED; is
23 that correct?

24 A Yes, ma'am.

25 MR. JENNINGS Objection: leading.

1 Q Does it list everything in the file at SLED?

2 A Yes.

3 Q Does it include a chain-of-custody evidence bag
4 containing the label?

5 A The evidence bag containing label, yes. That's the
6 photocopy of pages 3 and 4.

7 Q And it's called, what, again? From the table of
8 contents.

9 A Let's see. The chain-of-custody evidence bag
10 containing label. That's pages 3 and four.

11 Q And why is it called a "chain of custody evidence
12 bag containing the label"?

13 A Because this was the evidence bag containing a
14 label. This was the label on the original box that
15 I inventoried. Whenever I inventoried anything, I
16 checked the -- the name on the labels with the --
17 make sure everything was accurate -- all the
18 labels. The label on the blood was the same as the
19 label on the -- on the outside of the box, and
20 whenever we broke down a bag -- which means we --
21 we took the labels off and put the evidence bag and
22 left them in the evidence bag, so that anyone in
23 the future could see exactly how the evidence came
24 labeled so

25 Q Okay. And, on the page 3 of that chain of custody

1 evidence bag containing the label, are those your
2 initials as the analyst?

3 A Yes, ma'am.

4 Q HHD?

5 A Those are my initials. That means it was assigned
6 to me.

7 Q Okay. And on page 4, which is the back side of
8 that, are those your initials on three different
9 dates?

10 A Those are my initials on -- in three different
11 dates, yes, ma'am.

12 Q Okay. And then we've already talked about page 5,
13 which is the table of contents. Page 6, bottom
14 right-hand corner, are those your initials?

15 A Yes, ma'am. We're supposed to initial every page
16 in the case jacket.

17 Q Okay. So are those your initials on the bottom of
18 page 6?

19 A Yes, ma'am.

20 Q And on the bottom of page 7?

21 A Yes, ma'am.

22 Q And that is the South Carolina Department of Public
23 Safety chain of custody and evidence destruction
24 form?

25 A Yes, ma'am.

1 Q And you would've printed and relied on that form;
2 is that correct?

3 (Off the video record at 11:13 a.m.)

4 MR. JENNINGS: Objection: leading.

5 MS. MULLIS: Okay. Go back on.

6 (On the video record at 11:13 a.m.)

7 Q And then, on page 8, the South Carolina Law
8 Enforcement Division urine/blood collection report,
9 are those your initials at the bottom right-hand
10 corner of that page?

11 A Yes, ma'am.

12 Q And on -- and we had already talked about 9, 10,
13 11, 12, and 13, which are your lab results, but
14 they all have your initials on them as well; is
15 that correct?

16 A Yes, ma'am.

17 Q And then, finally, your forensic services lab
18 report has your signature on it; is that correct?

19 A Yes, ma'am.

20 Q Okay. So that is your entire report and the entire
21 file from SLED, as far as you know?

22 A Yes, ma'am.

23 (Off the video record.)

24 MR. JENNINGS: I object to the last question as leading.

25 MS. MULLIS: Okay.

1 (On the video record.)

2 REEXAMINATION

3 BY MR. JENNINGS:

4 Q Just one more question, Ms. Dailey. In
5 extrapolating and actually doing your testing, you
6 actually only relied upon the blood sample itself
7 to -- to test in order to determine the BAC; is
8 that correct?

9 A Yes, sir.

10 Q So none of these other documents were relied upon
11 and you - and actually, as the forensic
12 toxicologist, testing the blood sample and using
13 your equipment to come up with the BAC level; is
14 that correct?

15 A (No response.)

16 Q As a forensic toxicologist -- I'm not talking about
17 chain of custody and things of that nature --

18 A Okay.

19 Q -- you only -- you only are relying upon the blood
20 itself --

21 A Yes, sir.

22 Q -- in order to do your job; is that correct?

23 A Yes, sir. Only the sample.

24 Q You're not relying upon these other documents
25 regarding how the -- you know, the blood-alcohol

1 content; is that correct?

2 A No, sir.

3 Q And so that stuff is stuff that is really not in
4 your expertise; it's really -- that's perfunctory.
5 Your expertise as a toxicologist is to render an
6 analysis; is that correct?

7 A Yes, sir.

8 Q And that means, in actuality, the only thing you
9 relied upon is really the blood itself; is that
10 correct?

11 A Yes, sir.

12 Q And none of these documents; is that correct?

13 A Note -- that's right.

14 Q That's all I have. Thank you.

15 REEXAMINATION

16 BY MS. MULLIS:

17 Q And what was the blood-alcohol result?

18 A The blood --

19 (Off the video record.)

20 MR. JENNINGS: I'm going to object. It's
21 outside the scope of my recross, and the
22 report itself is self-evident regarding what
23 the BAC is.

24 MS. MULLIS: Go ahead.

25 (On the video record.)

1 A My final report lists ~~the~~ blood-alcohol result at a
2 0.103.

3 Q Thank you. ~~That~~'s all we have.

4 MR. JENNINGS: Okay.

5 FURTHER DEPONENT SAITH NOT.

6 Signing waived.

7 (Whereupon, there being no further
8 questions, the deposition was
9 concluded at 11:15 a.m.)

10 Plaintiff's Exhibit No. 1, "SLED
11 Toxicology Case Jacket."

12 Plaintiff's Exhibit No. 2, "South
13 Carolina Law Enforcement Division
14 Forensic Services Laboratory Report."

15 Plaintiff's Exhibit No. 3, Photocopy of
16 evidence bag.

17 (*This transcript may contain quoted material.
18 Such material is reproduced as read or quoted
19 by the speaker.)

20 (**Certificate accompanies sealed original
21 only.)

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Transcript of the Testimony of
WILLIAM BRETT SMITH, M.D.

Date: July 18, 2012



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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
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COUNTY OF BERKELEY) C/A #: 2010-CP-08-1801
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Levern McCray,)
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vs.)
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Jose W. Valle,)
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Defendant.)

)

VIDEO DEPOSITION OF
WILLIAM BRETT SMITH, M.D.

Wednesday, July 18, 2012

5:39 p.m. - 6:47 p.m.

The video deposition of William Brett Smith, M.D., taken on behalf of the Plaintiff at the offices of Moore Orthopaedic Clinic, 104 Saluda Pointe Drive, Lexington, South Carolina, on the 18th day of July, 2012 before Jaime D. Newton, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

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Page 2	Page 4
1 APPEARANCES: 2 Pamela R. Mullis, Esquire 3 Mullis Law Firm 4 1229 Elmwood Avenue 5 Columbia, South Carolina 29201 6 Attorney for the Plaintiff 7 Shannon Furr Bobertz, Esquire 8 Turner Padgett Graham & Laney, P.A. 9 Bank of America Plaza 10 1901 Main Street, 17th Floor 11 Columbia, South Carolina 29201 12 Attorney for the Defendant 13 Robert R. Sansbury, III, Esquire 14 McAngus Goudelock & Courie, LLC 15 735 Johnnie Dodds Boulevard, Suite 200 16 Mt. Pleasant, South Carolina 29463 17 Attorney for the Defendant 18 Also present: 19 Randy Bradley, Videographer 20 INDEX 21 DR. SMITH: PAGE: 22 MS. MULLIS: EXAMINATION: 64 23 MS. BOBERTZ: EXAMINATION: 64 24 MS. MULLIS: RE-EXAMINATION: 70 25 Signature Sheet: 75 26 Videographer Certificate: 76 27 Certificate: 77 28 EXHIBITS 29 Plaintiff's Exhibit Number One: 44 30 (Work excuse) 31 STIPULATIONS 32 It is stipulated and agreed that this 33 deposition is being taken pursuant to the South 34 Carolina Rules of Civil Procedure. 35 It is stipulated by and between counsel and the 36 witness that the reading and signing of the following 37 deposition is hereby not waived. The signature sheet 38 is attached at page 75.	1 the whole truth and nothing but the truth? 2 THE WITNESS: I do. 3 MADAM COURT REPORTER: Thank you. 4 WILLIAM BRETT SMITH, M.D., having been duly sworn, 5 testifies and deposes as follows: 6 DR. SMITH - EXAMINATION BY MS. MULLIS: 7 Q: If you will state your full name for the record 8 and your professional address, please? 9 A: William Brett Smith. The address is 104 Saluda 10 Pointe Drive, Moore Orthopaedic Clinic, 11 Lexington, South Carolina. 12 Q: And are you a physician licensed to practice in 13 the State of South Carolina? 14 A: Yes. 15 Q: And where did you go to college and medical 16 school? 17 A: College was University of Delaware. Medical 18 School was Philadelphia College of Osteopathic 19 Medicine in Philadelphia. Residency was in 20 Columbus, Ohio at Ohio Health was the name of 21 the hospital system. Fellowship was at The 22 Orthopaedic Foot and Ankle Center, also in 23 Columbus, Ohio. 24 Q: Are you board certified? 25 A: Correct.
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1 VIDEOGRAPHER: Okay. We're on the record at 5:39 2 p.m. 3 MADAM COURT REPORTER: It is Wednesday, July 18, 4 2012. The time is 5:39 p.m. We are at Moore 5 Orthopaedic Clinic located at 104 Saluda Pointe 6 Drive in Lexington, South Carolina for the 7 videotaped deposition of Dr. Brett Smith in the 8 matter of Laverne McCray versus Jose Valle, 9 pending in the Court of Common Pleas, State of 10 South Carolina, County of Berkeley, Civil 11 Action Number 2010-CP-08-1801. My name is 12 Jaime Newton, a Notary Public and Court 13 Reporter. Operating the camera is Randy 14 Bradley. We are with Creel Court Reporting. 15 If counsel would introduce themselves and who 16 they represent. 17 MS. MULLIS: I'm Pamela Mullis. I represent the 18 Plaintiff, Laverne McCray. 19 MS. BOBERTZ: Shannon Bobertz her for Julian Allen. 20 I represent the Defendant. 21 MR. SANSBURY: Robert Sansbury. I represent the 22 Defendant. 23 MADAM COURT REPORTER: Dr. Smith, please raise your 24 right hand. Do you swear that the testimony 25 that you're about to give will be the truth,	1 Q: In what? 2 A: Orthopaedic surgery. 3 Q: And what does that entail? 4 A: It's the care of the muscular skeletal system 5 of the human being and it pertains to all 6 operative and non-operative treatment 7 modalities. I sub-specialize in foot and ankle 8 reconstructions specifically in my practice. 9 Q: What does sub-specializing entail? 10 A: So after your general residency in orthopaedic 11 surgery, you can choose to electively do 12 additional training and I chose to do an 13 additional year of training in foot and ankle 14 specific reconstruction. 15 Q: At the time of the events in 2009, were you 16 board certified? 17 A: Yes. I'm trying to think back. Yes. 18 Q: Sorry. 19 A: The dates, it's -- 20 Q: And from 2009 up until today, have you 21 continued to be board certified? 22 A: Yes. 23 Q: And specialized in foot and ankle -- what did 24 you say, foot and ankle -- 25 A: Reconstruction.

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1 Q: Okay. 2 A: Yeah, so my practice hasn't changed. 3 Q: Okay. And just if you can describe your work 4 history since graduating from medical school? 5 A: So graduation in medical school, residency or 6 internship in Columbus at Ohio Health, Doctor's 7 Hospital. Residency for an additional four 8 years after that, same hospital system. And 9 then the fellowship, that would have also been 10 in Columbus but with a practice called 11 Orthopaedic Foot and Ankle Center, which is a 12 private practice in the town that has the 13 fellowship that's offered in foot and ankle. 14 And then I came here in 2008 with the Moore 15 Clinic and have been here ever since. 16 Q: Okay. And the type of injuries that you 17 normally treat include traumatic injuries, is 18 that correct? 19 A: Yeah. Anything pretty much below the knee. 20 Q: Anything below the knee. Okay. 21 A: Yes, ma'am. 22 Q: Do those include individuals that have been 23 involved in motor vehicle wrecks? 24 A: Sure. 25 Q: So you see and treat patients that have broken	1 pattern, which would be open reduction internal 2 fixation, which in 2009 the current state of 3 treatment would be with plate and screw 4 fixation. That would be considered standard of 5 care. 6 Q: Okay. So a plate and screw fixation, what do 7 you mean by that? 8 A: So when we deal with a fracture, any fracture, 9 not just an ankle, we look at stability and 10 position. Those are the two key pieces. If 11 the bone is stable and will stay there, usually 12 that's when we treat with cast and splints, 13 different things. If it's not stable or it 14 can't stay where we want it to, that's usually 15 when the surgery starts to come into play. And 16 so what the plates and screws do is basically 17 hold the position for us while we let the body 18 do it's natural process of healing. And that 19 usually necessitates us opening the skin to put 20 those in. In this situation, for sure, it 21 would be required because of the nature of this 22 fracture is one that you cannot treat through 23 percutaneous incisions usually. You have to 24 open the skin. So open reduction, open the 25 skin. Internal fixation, that's the placing
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1 bones? 2 A: Yes. 3 Q: And ankle fractures? 4 A: Yes. 5 Q: So broken ankles? 6 A: Sure. 7 Q: All right. 8 A: Lots of those. 9 Q: Severe fractures? 10 A: I never met a good one. 11 Q: Okay. Including fractures that require 12 surgery? 13 A: Yes. 14 Q: And this surgical fracture was an open 15 reduction and internal fixation, is that 16 correct? 17 A: Yes. By Dr. Spearman in Charleston, South 18 Carolina. 19 Q: Would you consider that a minor broken bone? 20 A: I don't consider any broken bone minor. 21 Q: Okay. It's a surgery that required hardware, 22 is that correct? 23 A: So this type of fracture pattern is one that's 24 treated in this way. This would be considered 25 standard care for this type of fracture	1 screw pieces so the "RIF" that you see on the 2 notes, that's what that would describe. 3 Q: Okay. Is this a common type of fracture an 4 orthopaedic surgeon would treat? 5 A: Yes. This would be a fairly common injury 6 pattern that we would see. 7 Q: And a common type of procedure that an 8 orthopaedic surgeon would perform? 9 A: Yes. 10 Q: And would that include the removal of this type 11 of hardware? 12 A: Not all hardware needs to be removed. In this 13 situation specifically, the pattern of his 14 fracture was one where he had a, what was 15 called a syndesmotic screw placed, which is one 16 that is usually taken out from most people 17 usually somewhere, two, three, four months 18 after the injury. That's kind of a designed 19 plan. That screw goes in to hold something in 20 place while ligaments heal and then it's taken 21 out to allow for a little bit of motion between 22 the two bones that it's holding together. In 23 this case, taking it out is kind of the 24 preference. Not everyone will do that, but 25 it's a preference that I have for sure in this

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1 type of pattern or fracture. 2 Q: Okay. 3 MS. MULLIS: At this time we're going to move to 4 qualify Dr. Smith as an expert in the field of 5 orthopaedics and orthopaedic surgery. 6 MS. BOBERTZ: No objection. 7 Q: You've referred to your records. What records 8 are you referring to? 9 A: So these would be -- so actually, I just have 10 the same thing in writing as I have on my 11 screen here. 12 Q: Okay. 13 A: They're not too terribly different. This is 14 the first note that I would have seen Mr. 15 McCray would have been dated February 10th of 16 2009. And this would just have been my first 17 meeting with him after his return back to 18 Columbia from his treatment down in Charleston. 19 And it would have been -- he needed local 20 follow-up, lived in the area, something that 21 happens quite a bit when people are visiting 22 different areas and return with an injury. 23 Q: Okay. 24 A: They need someone to see them locally. It's 25 obviously an inconvenience to drive all the way	1 of the ones that included -- it looks like his 2 initial sort of notes, different things along 3 those lines when he was seeing the patient 4 initially. The diagnosis, admitting diagnosis 5 when he was admitted to the hospital, and then 6 it looks like also his surgical note in here 7 describes the procedure that he performed at 8 that time at Trident Medical Center in 9 Charleston, South Carolina. Yeah. So those 10 were all -- as a courtesy, we always request 11 the letters -- the notes, just so we have a 12 complete record and I like to have it on any 13 patient I see as a follow-up for another 14 doctor, just so I know exactly, you know, what 15 was going on. 16 Q: Does he include CT scans, x-rays or MRIs with 17 those records? 18 A: Let me see if I have the actual -- a lot of 19 times they don't -- I get the description of 20 it. I don't often get the actual disk or 21 images. Sometimes those don't show up. But I 22 do have the -- let's see. I have the x-ray 23 report of the ankle. Let me see if there's 24 anything else underneath it here. It looks 25 like I have the x-ray report of his dictation
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1 back to Charleston when someone lives in 2 Columbia. So as a courtesy we'll kind of take 3 over care for another surgeon. 4 Q: Okay. And you're referring to electronic 5 records that you have on a laptop computer. 6 You have Laverne McCray's medical records that 7 you've reviewed on your laptop there? 8 A: Correct, yeah. They're the same as the ones 9 written in front of me. 10 Q: And the medical records that you've reviewed 11 today for your testimony, would that include 12 the Moore Orthopaedic records that you have on 13 Mr. McCray? 14 A: That's all the notes that I have. So all the 15 different visits as well as any histories, 16 image reports, my dictations, all that stuff is 17 trapped within this computer. 18 Q: Do you have the Trident Medical Center records 19 on Mr. McCray as well, access to the surgical 20 notes from Charleston? 21 A: Let's see. So that would usually be under this 22 other medical section. And usually they're 23 kind enough to send those along to me. It 24 looks like I do have those. I have notes here 25 from Dr. Spearman. These would have been one	1 and I have the x-ray report, it looks like -- 2 yeah. And I don't have a CT scan report in 3 here, just the x-rays. 4 Q: Did you order additional x-rays, CT's or any 5 other test? 6 A: So I had ordered, in my own clinic, yes. I 7 ordered initial x-rays, of course, to see what 8 was going on at this point, to find out what's 9 going on with the patient. What had gone on 10 -- hardware was put inside of the person so I 11 kind of have an idea of where he's at. Plus, 12 also, assess healing because really his injury 13 was only a short time before that. He's still 14 in his acute post-op period in my mind. And, 15 of course, we need to know where he is in his 16 healing process so that we can start saying, 17 okay, you're here and now we need to hopefully 18 progress toward this part. And I need to know 19 where I can start him at, in terms of where I'd 20 plug him into my protocol if this were my 21 patient from the beginning. And so every 22 doctor has a little bit different feel for how 23 they do things. And so I'd say, okay, here's 24 where we are and let's go to the next step now 25 if we're ready for that. So I would have

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1 gotten my first x-rays and then I would have 2 followed him up with additional x-rays after 3 that, as needed, based on his healing process. 4 Q: Okay. And the medical histories and reports 5 that you received, the medical records and the 6 transferred medical records from Trident and 7 Low Country Orthopaedics, are these reports 8 that you regularly rely on in your diagnosis 9 and treatment of patients in your practice? 10 A: Absolutely. So I'd definitely like to know 11 that I have the information from the other 12 physician. If it's at all possible to obtain, 13 I will. It was possible in this case, they 14 were kind enough to give it to me quickly. 15 Q: And did you take a complete medical history of 16 Mr. McCray? 17 A: Yes, correct. 18 Q: And did you do a medical exam of him? 19 A: Correct. 20 Q: And your first occasion to see Mr. McCray I 21 show from your history, present illness on 22 February 10th of 2009, is that correct? 23 A: That would have been my first visit with him in 24 the Clinic. Correct. 25 Q: Okay. Showing as February 10th, 2009?	1 from my -- the issue, I think, there was a 2 motor vehicle collision from what he stated to 3 me. 4 Q: Okay. And was that consistent with your 5 examination of the traumatic injury? 6 A: An ankle fracture from a motor vehicle 7 collision, that's very reasonable. 8 Q: Okay. And was that consistent with the medical 9 records that you received from Trident and Low 10 Country Orthopaedic? 11 A: Let me see. I'll go back to Trident's. I 12 don't want to misspeak for Dr. Spearman and 13 what he wrote in his notes there, because I 14 read my own notes. So, "12/20 of 2008," this 15 is date of injury in Dr. Spearman's note. This 16 must be a follow-up note. Yeah. It's a 17 follow-up note. I'm sorry. Let me see if I 18 can get back to his first note. There we go. 19 His first note that he talks about here, 20 "Involved in motor vehicle accident on December 21 20th, 2008. Presented to the emergency 22 department." And Dr. Spearman must have 23 consulted as the on-call surgeon, I'm guessing. 24 Q: Okay. And it was your understanding that Dr. 25 Spearman had done the surgery down in
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1 A: Yes. 2 Q: And in your physical examination, how did Mr. 3 McCray present? 4 A: So he obviously has a normal appearing limb in 5 terms of his development. He obviously does 6 not have any amputation or loss of limb. So 7 those sorts of things are, you know, normal. 8 But then he has recently had a surgery, an 9 injury, so his examination is somewhat limited. 10 I can't expect him to do some of the functional 11 maneuvers I would expect someone who has not 12 had an acute injury to be able to do. And so 13 his exam is normal for an acute post-op 14 patient, but limited secondary to the acute 15 post-op period, which would be -- and he was, 16 obviously, right on track for that at the time 17 when I saw him initially. 18 Q: Okay. And why, exactly, was Mr. McCray coming 19 in to see you? 20 A: For a local follow-up in regards to this 21 injury. It apparently was more convenient to 22 see someone in the Columbia area versus 23 Charleston for him. 24 Q: Did you know what had happened to him? 25 A: In terms of what he tells me is what I know	1 Charleston and he just lived up in Columbia, so 2 he'd been transferred up here to you for 3 follow-up care? 4 A: Correct. And that's usually how this sort of 5 stuff occurs. Like if a person lives in 6 Charleston, I might do the same thing for a 7 patient for convenience. 8 Q: Okay. And when Mr. McCray came to you, and you 9 did your examination of him, did he have 10 swelling at the time of the examination? 11 A: Yes. 12 Q: And it's my understanding that he came in on -- 13 is it, "crutches?" It says, "He was not weight 14 bearing at the time." 15 A: It would have been an assistive device. 16 Q: It says, "He was neurologically in tact with 17 protective sensation." What does that mean? 18 A: That means he not insensate, so he's not 19 neuropathic. He has normal sensation in his 20 foot. He can feel the bottom of his foot, 21 which is important so you don't get wounds on 22 it. 23 Q: Okay. And it says, "Limited secondary to acute 24 pain." Was he reporting having pain at that 25 time?

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1 A: "Discomfort and pain in base," that's why I 2 said, "with the surgery, the recent -- that's 3 supposed to be "recent," not recurrent surgery. 4 Q: Okay. 5 A: Sorry. They mistyped that. 6 Q: Okay. 7 A: So his recent surgery. So he's acute post-op, 8 which would be limited pain, swelling, all 9 those things were quite normal at that point. 10 He would be, you know, in the acute post-op 11 period. Here it is the 9th or the 10th of 12 February. He's only, you know, not even eight 13 weeks from the surgery so he's still very early 14 on in the process at that point for a boney 15 injury like this. 16 Q: Okay. And is that what you would expect to see 17 as far as his current physical condition, 18 almost two months post-collision and post- 19 surgery? 20 A: This is -- yeah. If this is, say, my patient 21 at eight weeks, I would just be in the process 22 of starting to progress them toward weight 23 bearing and some early range of motion 24 activities, so at eight weeks coming in non- 25 weight bearing, that's where I'd want my	1 healing very nicely. So obviously when we look 2 at things in an acute post-op period, there are 3 things that are going to be sort of the 800 4 pound gorilla in the room, that will be the 5 wound. If it's not closing, there's nothing 6 covering the bone, that's a bad sign when you 7 see hardware. So, of course, the skin is the 8 most important thing early on in my mind. It's 9 the most fussy. Bone luckily is not so fussy 10 sometimes. So the bone at this point really 11 just kind of coming along nicely, but the skin 12 is healed thankfully. So he's over that first 13 hump, in my mind, which is getting the skin to 14 heal. 15 Q: So what do you mean by wound issues? 16 A: So apparently, at some point, prior to him 17 seeing me, there was, I guess, a little bit of 18 probably irritation or maybe a slight gapping 19 in the wound. Use Steri-Strips for it, which 20 is just kind of basically a butterfly to pull 21 it back together. 22 Q: Okay. 23 A: And it ended up going on to heal without any 24 incident, not an uncommon scenario with a high 25 energy trauma. You've got a lot of swelling,
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1 patient to be. So he's actually compliant with 2 the directions given to him, likely, from Dr. 3 Spearman. 4 Q: Okay. And throughout this deposition we're 5 going to ask you some of your opinions 6 regarding diagnosis and treatment of Mr. 7 McCray. And if we can assume that your 8 opinions here today are within a reasonable 9 degree of medical certainty, unless you tell us 10 otherwise? 11 A: I'll try to give reasonable -- 12 Q: Is that fair? All right. And if we can also 13 assume that your opinions are to a more 14 probable than not standard, unless you tell us 15 otherwise? 16 A: Sounds good. 17 Q: That will be fair. What was your plan for Mr. 18 McCray on February 10th of 2009? 19 A: So at this point, we talked to him about the 20 issue of assuming care because thinking he 21 isn't going back to Charleston. And I felt 22 that was very reasonable. There was apparently 23 some wound issues that he'd had early on and 24 they'd done some Steri-Strip to try to close 25 those down, but at this point his wound was	1 those stitches, you know, they're being 2 stretched with that swelling. And so when 3 sometimes you take those stitches out the 4 little superficial edges of the skin will gap 5 a tiny bit. That's a very common problem. So 6 we talked about that piece. X-rays we talked 7 about. Those looked appropriate for where he 8 was, eight weeks from surgery, and then I would 9 tell him -- basically I would plug him into my 10 protocol because he was at eight weeks and 11 that's when I would start weight bearing in a 12 patient of mine who had a similar injury. And 13 so we said, okay, let's start weight bearing at 14 that point. And I do a progression in terms of 15 weight bearing with mobile -- so he's got a 16 boot and I would want him in that boot to 17 weight bear and progress. And there's reasons 18 for that. They stem from weakness. Obviously, 19 his leg is weaker now because the muscles have 20 become de-conditioned by being immobilized so I 21 want to protect him from twisting or turning 22 his ankle. There's also that screw that needs 23 to come out at some point. So I'm also trying 24 to, hopefully, keep that screw in one piece so 25 that we can get it out. It's always easier to

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1 take out one whole screw than two pieces, for 2 sure. Keep the apple in the worm, it's always 3 easier to get it out in one piece. 4 Q: Okay. 5 A: So we put him into a high tied boot. It's 6 simply one of those black cam boots that you 7 see lots and lots of people in. That's all the 8 high tied boot is. And three weeks, and 9 basically that's a progression where they start 10 to put some weight, progressing each week until 11 hopefully at three weeks they're essentially 12 almost full weight bearing in that boot. And 13 so we're trying to get him, if you look at my 14 note, it says, "The fourteen mark." That's the 15 mark that I use for taking out a syndesmotomic 16 screw. 17 Q: Okay. 18 A: And so that's where I'm trying to get him to in 19 terms of before the next planned piece, which 20 is the removal of that single screw from 21 between the two bones. There's plate and screw 22 on the outside, and there's a screw going 23 across from the fibula bone to the bigger tibia 24 bone, holding it and that's the one we want to 25 take out. Between these two bones, there is	1 we'll have to put a screw back in or some other 2 device to hold that together. And that does 3 happen every once in a while. We say fourteen 4 weeks, but his body might have chosen a 5 different time frame than mine, and we don't 6 always know that. So that's why I always tell 7 them about the idea that they may have to have 8 something put back in if it doesn't heal along 9 in the timely fashion. And so that's kind of 10 all of the pieces we talked about at that 11 point. 12 Q: When you removed the screw that connects the 13 two bones, you said that you do a stress test. 14 What does a stress test involve? 15 A: So, basically, what we're doing is under a live 16 x-ray machine in the OR, that's kind of like an 17 x-ray movie machine, so it's realtime. We take 18 the ankle and we sort of rotate and turn and 19 pull, so we're trying to see if these two bones 20 gap open. I tell people it's a bit like a 21 chopstick. When you first get them in the 22 pack, they're nice and tight. That's how we 23 always want the ankle to be. When you have 24 this type of injury you've essentially taken 25 the chopsticks and made them do this. So when
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1 actually a few degrees of motion that's natural 2 and we want to let that happen when it's okay. 3 Right now we're still trying to let things heal 4 together, so that's why that screw needs to 5 stay, hopefully, in place before we take it out 6 at about fourteen weeks. And so we basically 7 set up a time frame to see me back in three 8 weeks. And at that point, that's when I said 9 we're going to start talking, because then he's 10 at about, you know, twelve, almost twelve weeks 11 at that point when he sees me back. And then 12 we would set up the surgery because then we're 13 getting pretty close to that fourteen week 14 mark. And in this situation, we also talk 15 about -- I do keep him in the boot a touch 16 longer. I have him start exercises after he 17 gets weight bearing, but I do have him 18 protected only because, again, I'm really 19 trying to protect that screw for a touch longer 20 to try to get it out a little bit more 21 comfortably for the patient. We do talk about 22 a stress exam. When I do take that screw out, 23 I do stress them under live x-ray image in the 24 OR to make sure that things have healed. If I 25 don't see healing, I do tell them that they	1 you fix it, you want the chopsticks to go back 2 together solid. So when we stress it, we want 3 those to not move. If it does this, that's 4 basically a negative, failed test and we 5 probably have to fix it again. So that's the 6 stress piece of it. 7 Q: So your plan, starting on February 10th, it 8 looks like from your note, was to completely 9 take him off of -- it says, "I want him off 10 this for the next three weeks." So you took 11 him off his leg for three weeks, is that 12 correct? 13 A: Where are you at here? 14 Q: I'm on mid-paragraph on your plan, February 15 10th. "I'm going to put him on a course for 16 ankle recovery." 17 A: Right. So in terms he's going into a boot. 18 He's going to start his early recovery in 19 weight bearing with no excessive activities, no 20 work, nothing too crazy, just really comfort 21 stuff. Some simple range of motion activities, 22 nothing to be overly stressed at this point. 23 Q: Right. 24 A: And then start the weight bearing progression 25 from there and keep going until we get to that

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1 point where we get the screw out. 2 Q: Okay. So is he doing physical therapy at this 3 point? 4 A: Not organized physical therapy. I'll allow him 5 to do some stuff, directed, that I can do. And 6 I give him some handouts that I will want him 7 to do, some very specific stuff. I don't put 8 them into directed physical therapy until later 9 because I need them to be able to control. I 10 don't want someone else pushing or pulling it 11 because they may go past what he should be 12 doing at that point. And so I just say, okay, 13 you do it because you'll protect yourself if it 14 starts to ache or get too sore, you'll back 15 off, and that's what I want him doing at that 16 point. So, yes, there is physical therapy but 17 it's not at this point quite yet in terms of 18 organized. 19 Q: Okay. So you had him immobilized for three 20 weeks, followed-up in three weeks and then had 21 him followed back up in March? 22 A: So that would have been 3/4 was the next time 23 I see him back and that's the weight bearing 24 progression gets progressed from there. We're 25 going to wean him off his crutches basically,	1 deal with a broken screw or not. Sometimes 2 you're fooled. In this case, it looked like it 3 was all in one piece thankfully, which is 4 always nicer. And then we set him up for the 5 surgery at that point to go have the screw 6 removed. 7 Q: And one of the things, of course, that jumps 8 out at me is, you went over all the risk and 9 benefits of this surgery. What are the risk 10 and benefits of the surgery? 11 A: So I break them into kind of two major groups. 12 There is the risk of a surgery in general. So 13 anesthesia is one of the things. And then, of 14 course, anytime we put an incision in the body 15 there's, of course, a chance of infection. You 16 know, wound issues non-healing, all of the 17 pieces of just what would be a surgery piece 18 itself. And then there's issues specific to 19 this surgery, which would be an ankle fracture 20 surgery. Specifically with this, there's a 21 part we've talked about already and I always 22 revisit this is if the screw comes out, it's 23 not stable, something goes back in. Not always 24 a screw. Sometimes there's other devices that 25 I use that are a little different, but
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1 getting him all the way to where he is 2 basically just walking in the boot, maybe a 3 crutch for balance. That's pretty common. 4 Those boots are not the most enjoyable things 5 to walk in for anyone. So I usually say, hey, 6 you know, use a crutch or a cane to balance 7 because it's safer. And then we talked about 8 the next piece which was setting up the 9 syndesmotomic screw removal. 10 Q: And that's still the plan at that point on 11 March 4th, 2009? 12 A: Yeah. X-rays were updated at that time, so 13 that would have been my next piece and 14 everything was moving along. Things were 15 showing signs of healing at that point. 16 Q: Go to March 31st, 2009. Did you update the x- 17 rays again at that point? 18 A: Yes. That's to make sure that - in this 19 situation now, essentially it's time, we're 20 going to go and we're going to say, okay, we've 21 got to go take this screw out. And we want to 22 make sure, is it broken. Because even in the 23 boot, it can break. I mean, it can happen. 24 It's a piece of metal. It can fatigue. So I 25 want to know going in, am I going to have to	1 something would have to go back. And that's, 2 of course, one of the bigger risk. And that's 3 really more an issue of not knowing until you 4 honestly get there and take the screw out, 5 because you won't know until you do it. And 6 then the, you know, outside of that, for that 7 piece of this surgery, that's kind of the major 8 risk issue is that thing, that syndesmosis is 9 not healed. We may have to go back and 10 reestablish it's connection. And that's sort 11 of - so outside of the regular general 12 surgical issues, there's also specific to this 13 one, kind of that piece in general. 14 Q: Okay. And those risk, what are general risk of 15 surgery? 16 A: So risk of being given an anesthetic. A person 17 can have a reaction to an anesthetic, they can 18 have respiratory depression, any of the known 19 issues with those types of things, there's a 20 risk with. We going to talk about the wound 21 issues because anytime you cut into the human 22 body, the wound may not close. There's always 23 a risk of things like blood clots, et cetera 24 that can occur, you know, all the different 25 things that we kind of go through related to

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1 just surgery of the human body in general, 2 outside of -- 3 Q: Specifically, with risk related to this type of 4 surgery with repairing fractures in a leg, the 5 risk go anywhere from infection -- 6 A: Well, this surgery is not about repairing a 7 fracture of the leg. 8 Q: Okay. 9 A: The fracture has already been repaired and it's 10 healing well. 11 Q: Okay. 12 A: The risk, as I stated, was directly at the 13 syndesmotomic issue as whether or not that 14 ligamentous tissue has healed and that would 15 have to be re-established if it didn't show 16 enough signs of healing when we stressed it 17 after that screw is removed. So that's the 18 specific risk orthopaedically related to this 19 problem outside the general risk of a surgery 20 on the human body. 21 Q: Would the risk include infection in the limb, 22 could they include loss of the limb? 23 A: That's what I said, wound issues, infections, 24 so all of the things I've already stated. 25 Q: Okay. And it looks like the next thing you did	1 I make my incision and a bit of IV sedation. 2 So it's not general anesthesia. This is what 3 we call local block with sedation. 4 Q: You'll have to tell me what that means? 5 A: So there's numbers of ways we can kind of block 6 the nerve signals for pain. In this case, if 7 I'm going to make an incision here, a small 8 incision, I can sometimes just infiltrate that 9 area with a localized medication for numbing, 10 something like Novocain, although I really 11 don't use Novocain. That's sort of a dental 12 thing, but similar medicine that we use the 13 same way. It numbs the tissue and in this case 14 we make a very small incision. The incision is 15 probably about a half a centimeter, because all 16 we need to do is get down to the point where we 17 can feel the head of the screw and then back it 18 out. And then usually a single stitch goes 19 in. So they get a little bit of sedation from 20 the anesthesiologist, give them some relaxation 21 so that they -- we call it sort of twilighting, 22 which means they take basically a nap. And 23 then we locally numb the area once they're kind 24 of comfortable. And then as soon as their skin 25 is numb, incise it, back out that screw. And
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1 on April 1st of 2009 was the actual surgery? 2 A: Correct. So that would be April 1 of 2009 he 3 had the left ankle retained, that would be the 4 hardware. That was the diagnosis. The 5 procedure was removal of that hardware. The 6 surgery itself went smoothly for the patient, 7 which is always a good thing. That's always 8 nice. And most of the note it just talks about 9 the actual surgery itself. And then the 10 radiograph piece at the bottom, that's kind of 11 the important piece there, is the stress fuse 12 after it was removed, the hardware was removed, 13 the stress fuse confirmed it was stable under 14 stress so it didn't have to have another 15 fixation put back in. So that's always a good 16 thing in these scenarios. 17 Q: How long does this type of surgery take 18 generally? 19 A: This type of surgery would -- probably 20 somewhere, maybe ten minutes. 21 Q: Okay. So how long would he have been under 22 anesthesia? Does he go under general 23 anesthesia for this? 24 A: No this is a -- traditionally, this is a local 25 block. I usually do a local block around where	1 while they're still sleeping, that's when I can 2 sort of stress them because they're relaxed and 3 comfortable and they're not feeling me messing 4 around with their ankle that's just, you know, 5 recovering from the surgery, which is nice. 6 Q: Are you literally taking a screwdriver and 7 removing the screw? 8 A: Yes. 9 Q: Okay. And he was on pain medication after the 10 surgery, is that correct? 11 A: Correct. 12 Q: Okay. 13 A: Because, you know, obviously once that local 14 numbing agent wears off after a few hours, it 15 is an incision on the skin, so we always want 16 to make sure they're as comfortable as they can 17 be for that. 18 Q: Okay. And you mentioned earlier about the 19 hardware. Under what circumstances would you 20 either leave in or remove this type of 21 hardware? 22 A: So in this scenario there's two separate pieces 23 of hardware that are interacting. There is the 24 plate and the screw combination that's fixed 25 the fracture and then there's this additional

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1 screw that's fixing really ligamentous tissue, 2 the syndemosis. The plate and screw 3 combination, that needs to stay in. At least, 4 we say, for about twelve months. Does that 5 have to come out, no. And the bulk of people, 6 if they don't have any problems will never have 7 that hardware removed because they're not 8 bothered by it, why go under another surgery if 9 you're not bothered. Now, it is possible that 10 people will become irritated by hardware and 11 need to have it removed and that's okay. It 12 happens and this is a common hardware for me to 13 remove for people that get irritated, 14 especially people who wear, say, a high boot 15 because it rubs on the ankle a little bit and 16 can irritate, and that's okay. But that's 17 definitely the lesser number. The bulk of 18 people don't really enjoy surgery so they don't 19 ever want to have something done if they don't 20 have to. The screw, that's a different one. 21 That's a planned screw that you put in, at 22 least in my mind, to be taken out at a 23 prescribed later date once we feel that 24 ligament tissue has healed. So there's two 25 different things at play here. There's the	1 its ability to go back to its natural motion, 2 which is what we'd like to do is restore the 3 body mechanics and the anatomy of the body. 4 And then, two, get away a potential source of 5 problem in the future. So, yes, if you left 6 the hardware, it likely would break, which is 7 a whole separate issue. 8 Q: Okay. So you generally remove it? 9 A: Correct. 10 Q: Is it generally common practice now to remove 11 those type of screws? 12 A: I'd say it's quite popular. I'd say probably 13 if you were to poll orthopaedic foot and ankle 14 surgeons, you'd probably get one answer. If 15 you were to poll orthopaedic surgeons in 16 general, I'd say you'd probably get a slightly 17 different answer. I mean, I'd say more of us 18 who are foot and ankle guys probably remove, 19 but I'd say that -- I'd say the majority would 20 probably say, yes. But there are plenty of 21 folks out there that don't remove them all the 22 time and that's their decision in their 23 practice. There's nothing wrong with that. 24 Q: More likely than now, would you expect the 25 screw to eventually break if left in the ankle?
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1 screw that needed to come out at about that 2 fourteen week mark, and then there's the plates 3 and screws that will stay unless they bother 4 the patient after a year. And so that is the 5 two different pieces that you're dealing with. 6 Q: So the screw was in there to repair a torn 7 ligament, is that correct? 8 A: Correct. 9 Q: And the screw had to be removed to -- 10 A: You could leave the screw and it would break. 11 And now you have a piece of broken hardware. 12 My issue is, and I guess there's a bit of 13 selfishness to that piece is that my sub- 14 speciality is foot and ankle reconstruction. 15 Somebody comes back to me years later with 16 broken hardware in and has other problems, now 17 I need to address possibly a more involved 18 problem and broken hardware. So I like to 19 remove those screws because I feel that, one, 20 it allows for that natural motion to regain 21 itself. And, two, a person doesn't have a 22 broken piece of hardware in them because if 23 they have pain, how do I know it's not a piece 24 of broken hardware versus some other issue. So 25 I think it takes -- one, it restores the body,	1 A: Yes. 2 Q: Okay. 3 A: That's the common trend we see is that it 4 breaks. It's a piece of metal, it fatigues 5 with time. Just like bending a paperclip a 6 thousand times, eventually it breaks. That's 7 what this screw would do as it wiggles back and 8 forth, it would eventually break. 9 Q: So it's your opinion that it would eventually 10 break and would need to be removed? 11 A: It if ever became an issue. 12 Q: Okay. It looks like he followed back up with 13 you two weeks later on April 14th? 14 A: And that would have been to get the suture out. 15 Q: Okay. 16 A: At that point, the skin's healed and take out 17 the suture and now things can kind of move 18 along a little bit more, I guess, more 19 interestingly at this point. Because we got 20 that screw out. Now, I'd like to see them 21 start getting back to more functional 22 activities and so this is where bracing and 23 therapy becomes part of the protocol. And I 24 like to move them very quickly at that point 25 into a therapy protocol, because unfortunately

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1 now he's been off his foot, hasn't been able to 2 really exercise and do all the stuff that we 3 obviously all like to do as humans. And at 4 this point, I'm sure, sick of being a surgical 5 patient. And so we like to try to get people 6 moving back again into therapies and getting 7 their strength back and starting to get their 8 range of motion and start to recover their 9 proprioception in their ankle, all the pieces 10 that have to sort of recovered at this point 11 that we've been sort of waiting while the body 12 was healing to let us do. 13 Q: What do you mean by bracing and therapy? 14 A: So a brace is a sport ankle brace, something 15 that would -- remember, obviously, his ankle is 16 now a touch weaker because it's been tied up 17 and it's not been able to be exercised in a 18 normal way so we want to protect that. So a 19 sport ankle brace helps obviously from him 20 turning his ankle. We wouldn't want him to do 21 that at this point. It probably wouldn't feel 22 so good for him. And then the therapy piece, 23 that's obviously the piece that's most 24 important to get the strength and that 25 endurance back in that ankle and the	1 participating in physical therapy at that 2 point? 3 A: So he'd basically completed his therapy. I 4 usually try to see them back just as they're 5 kind of finishing off the therapy. I like to 6 kind of assess where they are and say, okay, 7 you know, was it good? Did you, you know, get 8 something out of it? Was it worthwhile? Then 9 at that point for me, I start to -- you know, 10 I like to partner with my patient and discuss, 11 where are we? Are you feeling good? Would you 12 like to start doing more on your own and just 13 kind of -- are you good with the exercises? 14 Can you take over and do your own thing? Or 15 were you really feeling that you got a great 16 benefit from therapy and would you like to keep 17 doing a little bit more? Because, you know, 18 we're all a bit different. Some people respond 19 to having a personal trainer and some people 20 wouldn't. So some people, if they're getting 21 response and they're really feeling motivated 22 and they're doing wonderful with therapy, I'll 23 encourage that because, hey, the more recovery 24 the better. Other people say, you know, what? 25 I'm good. I've got it down. I want to do it
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1 proprioception and his balance back. 2 Q: So you were prescribing physical therapy at 3 this point, is that correct? 4 A: True. Yes. So now the actual prescribed and 5 directed therapy starts at this point because 6 he's ready for that. The body's healed enough 7 that we ready to start moving in that 8 direction. 9 Q: Generally, how much physical therapy has it 10 been your experience that a patient like this 11 would need? 12 A: So this type of injury can vary for sure. I'd 13 say somewhere, six to eight weeks would be 14 definitely the starting point for them. Some 15 people will definitely need more, other people 16 will need less, just like any other physical 17 conditioning in the human body. Some people 18 adapt quick and go to the Olympics and the rest 19 of us work in Columbia, South Carolina. 20 Q: Is physical therapy medically necessary for a 21 patient to recover from this type of surgery in 22 your opinion? 23 A: In my opinion, I feel, yes. 24 Q: It looks like the next time you saw him was on 25 May 21st, 2009. Had he been actively	1 on my own. And some people are more self 2 directed. I mean, there's nothing wrong with 3 either option. In his case, he'd been doing 4 great and so we kind of had finished off -- he 5 was just finishing out his therapy and so he 6 was doing well. A little bit of the start up 7 achiness and soreness, very common. Obviously, 8 there's a lot of scar tissue that develops in 9 the ankle after this type of trauma and so 10 having that stiffness in the morning, it's 11 going to be pretty common at this point. But 12 he seemed to be doing well and kind of wanting 13 to sort of get back to his life, which I can't 14 blame him. At this point, it's been a long 15 winter and spring and he's probably very tired 16 of it and ready to get going. That's great. 17 Q: So on May 21st of 2009, he had completed 18 physical therapy and felt like he had completed 19 physical therapy, is that correct? 20 A: He felt good about it and he wanted to kind of 21 go and do his own thing, which I encouraged. 22 I said, you know, that's great. And normally 23 at the end of therapy for my protocols, they're 24 given a home exercise plan by the therapist to 25 continue, obviously working and continuing to

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1 strengthen because there is still recovery that 2 has to go on. I'll tell most folks it probably 3 about a full year for recovery. And so I 4 encourage, you know, activities. If they're 5 someone who enjoys the gym and getting in, you 6 know, in exercise, I encourage them to get back 7 to those types activities or other activities 8 that they enjoy for fitness and overall health. 9 I want them to get back to those things so that 10 they feel like that they've gotten back to 11 those pieces of their life that maybe were 12 missing for a while. 13 Q: So you released him to return back to whatever 14 normal activities he wanted to return to? 15 A: At that point and then would encourage him to 16 slowly progress. Like anything else obviously, 17 he'd have to build himself back up, but that 18 progression was obviously reasonable at that 19 point. 20 Q: Okay. And on May 21st of 2009, the only pain 21 he was reporting to you was pain in the morning 22 in his ankle, is that correct? 23 A: Yes. So kind of start out with pain a little 24 stiffness, very common. And as he states here, 25 by the end of the day, he was feeling better	1 same day. I'm not sure what time I saw him in 2 my office, but it may be the end of the day so 3 there was no work left. So the next day he was 4 released to regular duties for his work and 5 allowed to follow-up with me as needed. 6 Q: Okay. Do you know what kind of work he did? 7 A: I couldn't recall at this point specifically. 8 Q: But you were releasing him to regular duty at 9 that point? 10 A: Yes. 11 Q: Do you recognize the document in front of you? 12 A: This one here? 13 Q: Yes. Is that your signature? 14 A: Yes. 15 Q: And that's a release to work, "Report of 16 Medical Examination for Laverne McCray," 17 releasing him to go back to work on 5/22/2009, 18 is that correct? 19 A: Correct. 20 MS. MULLIS: We'll just mark that as Plaintiff's 21 Exhibit One. 22 (Plaintiff's Exhibit Number One was marked for 23 identification purposes.) 24 Q: And it looks like on May 21st, 2009 your record 25 indicates that you believe that at that point
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1 and things had loosened up. That's fairly 2 classic for somebody this far out from the 3 surgery, stiffness in the morning. It feels 4 better as he starts to move it. And, you know, 5 overall he's kind of starting to feel like he's 6 getting back to his life. 7 Q: And is it my understanding that up until that 8 point you had been writing him work excuses? 9 A: Actually, every time he would see me in this 10 office, this is something I do for all my 11 patients. You have, obviously, a job need to 12 have something. It's important for them to, 13 you know, have their sort of clinical progress 14 documented and so that they can return to a 15 work environment and say, here's where I'm at. 16 Here's what I can be doing, and here's when I'm 17 going to be seeing him back. So I think those 18 pieces are important for both the patient and 19 if they need a work environment to be updated, 20 I think that's important. So we give these to 21 patients on a pretty regular basis if they need 22 them. He did. So we fill one out each time he 23 sees me. And at that point on the -- that 24 would be the 21st he saw me, but obviously the 25 next day was when he was going back, not the	1 he was at MMI. What is MMI? 2 A: Maximum medical improvement. It's a term 3 that's been forced on us doctors to use. 4 Q: What does it mean? 5 A: I have no idea. 6 Q: What does it mean to you? 7 A: Again, I have no idea. So this is something 8 that has been out there. I'll assume that 9 somewhere somebody decided that this is a term 10 that they have used, that they have reached 11 some position of healing. 12 Q: Okay. 13 A: That they are released from my direct care, 14 i.e., I don't see any real huge benefit to the 15 patient to have to come back to see my shiny 16 smiley face. And, unfortunately, I'm sure 17 waste their time and to come back and drive to 18 see me just to say, I'm doing fine, Doc. I 19 don't think that's right to do to a patient. 20 So if he's doing well at that point, I say, 21 well, you've reached the benefits of what I can 22 offer you in terms of where you are. And so at 23 this point I'll let you kind of go and do your 24 own thing. I think it's sort of an interesting 25 term. Because I think obviously at this point

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1 he's still going to have recovery going on for 2 quite a while. 3 Q: Okay. 4 A: But I say from my standpoint, you're good to 5 go. You don't have to keep driving over here 6 and burning fuel in your car to come see me. 7 Q: Okay. So let me try to put that in plain 8 terms, best I understand it, back at you. He 9 had reached a point where you couldn't do 10 anything else for him medically, is that fair? 11 A: He had reached the end of my treatment 12 protocol. 13 Q: Okay. 14 A: And had been doing well and felt it was time 15 for him to kind of go ahead and let him do his 16 own thing and not feel like he had to keep 17 coming back to my office. 18 Q: How much longer would you have expected him to 19 continue to medically improve after this point, 20 five months after this incident and surgery? 21 A: Well, I tell most all of my patients who have 22 this type of injury, it's probably, honestly 23 and truly, a twelve to eighteen month recovery 24 protocol where they'll still show signs of 25 improved endurance, decreases in swelling,	1 things can change over time after a traumatic 2 injury to the ankle. So if somebody's having 3 changes and pain, it's always a good idea to 4 come in and see what's going on. You know, you 5 might as well know what's going on as opposed 6 to sitting there and scratching your head and 7 guessing. So I bring him back in and have an 8 evaluation. 9 Q: Okay. So what was the result of your 10 examination? 11 A: So the first thing we look at is, looking at, 12 obviously, his physical exam. A little bit of 13 stiffness, lost a little bit of range of 14 motion, but honestly, a few degrees of loss of 15 range of motion after a severe injury that he 16 had, I'm going to give him that. That's not an 17 uncommon scenario. It may -- compared to the 18 opposite side, not be exactly the same. The 19 other ankle never had this injury so it's tough 20 sometimes. You'll maybe lose a little bit of 21 range of motion, but not -- thankfully, not 22 horrible. Most of his tenderness was along the 23 joint line. We know that there's often a lot 24 of scar tissue and inflammation that builds in 25 a joint after this type of trauma. So that's
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1 improvement range of motion, less stiffness, 2 less soreness, all those different things that 3 can go on, truly for a year to a year and a 4 half. And since he's five months out so 5 obviously, project from there how much longer. 6 Q: So whatever pain he was reporting on May 21st 7 2009, he could expect at that point that he 8 would likely have some improvement in the pain 9 that he was reporting on that day because he 10 would continue to have some medical 11 improvement? 12 A: You would hope. 13 Q: Okay. Now, the next time you saw him, I show 14 a record on March 29th of 2012? 15 A: Correct. 16 Q: And why did you have occasion to see him in 17 March of this year? 18 A: So he'd been asked to -- me to see him back 19 because he was starting to get some pain in the 20 ankle, the same one that had been treated 21 prior. And so he was also getting a little bit 22 of pressure in the front of his foot as well. 23 So they asked me to see him back to reevaluate 24 the ankle. Now, he's obviously several years 25 down the road from when we've last seen him and	1 kind of an issue you look at and, of course, 2 the big things you always concern yourself with 3 are post-traumatic arthritis problems. 4 Because, you know, now he's several years down 5 the road and the cartilages can be damaged 6 during the injury and you don't know it at the 7 time because everything looks okay, but the 8 damage has already been done at the cellular 9 level and can change. So, of course, x-rays 10 need to be done. One, you want to look at the 11 hardware because there's still the plate and 12 screws in there. Did they start to change? 13 Who knows. They could be changing or something 14 could have happened to that metal. You want to 15 always make sure of that. And, also, then more 16 importantly look and assess the joint. Did the 17 joint maintain itself? Is it surviving? Is it 18 staying, appearing healthy at this point or is 19 there changes that are going on. So looking at 20 this here, screws were fine, the plate was 21 fine. That's uncommon this far out to see 22 those changes but you never know until you 23 look. The alignment of the ankle was 24 appropriate so that means those ligaments had 25 healed because we took the screw out. We

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1 didn't see any instability and obviously after 2 years of walking; he hasn't shown any 3 instability of the syndemosis, so that means 4 that it's not widening. Those chopsticks 5 aren't gapping open. So, again, that's another 6 piece that we want to look at. And so we 7 compare them to the films from 2009 to the 8 ones in 2012 and make sure that they look 9 identical. They should ideally look identical 10 in that way if there's been changes. There's 11 a little bit of arthritic changes, some very 12 minimal ones. We're starting to see a little 13 early osteophyte, which is a little projection 14 of bone starting to form out on the front lip 15 of the tibia. And, you know, that can be very 16 consistent with someone who's had a traumatic 17 injury. 18 Q: What causes that? 19 A: Most of it's coming from some of the early 20 arthritic changes and some of the scar tissue 21 that's being built up in the ankle. And so -- 22 but the joint's base itself is maintaining 23 itself, so that means that the bulk of the 24 cartilage is maintaining, but there's probably 25 some changes to it. It's more at a	1 bulk of joint was maintaining itself. So 2 that's really the key. 3 Q: When you see that type of osteophyte on an x- 4 ray, what are you concerned about when you're 5 looking at that joint? 6 A: A small osteophyte like that, I'm not really 7 concerned. 8 Q: Are you concerned about possible instability 9 with the joint or potential instability with 10 the joint? 11 A: No. 12 Q: Okay. Is there anything correctively you would 13 want to do with that or -- 14 A: In terms of at that point, no. There's nothing 15 I would rush to do at all for someone who's got 16 a small osteophyte after this type of trauma 17 and their ankle's maintained, they've got good 18 alignment, they've got good cartilage spaces 19 and overall things are stable. It would be 20 something that I would just recommend that 21 there would be watchful waiting. And it would 22 be something to make sure we document and 23 understand it's there. And then treat it in 24 the most likely conservative fashion, which is 25 what we recommended here.
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1 microscopic, cellular level. 2 Q: And what is an osteophyte? 3 A: It's a small projection of bone that grows in 4 and around a joint, usually indicative of some 5 early arthritis. 6 Q: And what does that osteophyte do? 7 A: Do? Nothing, other than -- 8 Q: To the joint itself? Why is it growing there? 9 A: That's an excellent question. There's plenty 10 of books written on that as to what it actually 11 does. 12 Q: Well, why do you think it's growing there? 13 A: One of the theories as to why an osteophyte 14 forms is as the joint becomes arthritic, it 15 gets some solid stability, those osteophytes 16 are starting to try to limit motion to help the 17 arthritic pain so it doesn't allow the joint to 18 move as much. And it is what the body's trying 19 to do is help itself, maybe. And it is what it 20 is. But he was starting to show some very 21 small anterior osteophyte on the tibia. It 22 would be very common to see that after this 23 type of injury for sure. But still maintaining 24 the space in his cartilage, that means the 25 ankle cartilages were still doing okay and the	1 Q: Did you have any discussions with Mr. McCray 2 about removing the hardware at this point? 3 A: So in terms of discussion on hardware removal, 4 at this point, he wasn't having a tremendous 5 amount of pain over the hardware itself. So 6 not having a lot of hardware pain, I'm not 7 often going to say, well, go and rush to get 8 that out unless it was bothering him 9 specifically. Most of his complaints were 10 along the joint line itself, which speaks to 11 more of the joint and the joint based issues. 12 And so I said, well, we should probably treat 13 that specifically if the hardware's not 14 bothering you. And I recommended we trial an 15 injection into the ankle to see if we could 16 help just decrease some of the inflammation 17 around the scar tissue in that ankle. It's 18 probably built up over time. And see if that 19 can help to make him be more comfortable. 20 Q: And what do you think was causing that problem? 21 A: The scar tissue? 22 Q: What's causing the scar tissue? What's causing 23 the inflammation? What's causing his arthritic 24 changes in that ankle? 25 A: The injury that he had back in 2008.

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1 Q: Okay. 2 A: So it stems from the trauma. He's had a trauma 3 to his ankle and it's doing well, but trauma is 4 trauma. It creates scar. That's how the body 5 heals and so that piece is not an uncommon 6 scenario with this type of issue. 7 Q: Your notes and your history note that he 8 rehabed well. Is there any question about 9 whether or not he had proper physical therapy 10 or properly went through enough physical 11 therapy to have done what he needed to do to 12 properly rehab from this injury? 13 A: No. He did quite well. He showed good effort 14 and moved along and progressed very nicely in 15 regards to the physical therapy. So he made a 16 nice recovery for that piece, which is good. 17 Q: Is there anything that he could have done on 18 his own to have prevented this inflammation, 19 the problems that he's having now with his 20 ankle that he's reported or that you treated 21 him for in March of 2012? 22 A: I mean, as long as he's kept active and, you 23 know, kept up with his exercises there's 24 obviously nothing he can do to prevent any 25 post-traumatic changes in that way that the	1 of his pressure into his forefoot. And he's 2 got a bit of a callous. So laterally, a little 3 bit of tenderness. Of course, when I go push 4 on screws, everybody tells me that they usually 5 ache, but it was not normally bothering him, 6 day-to-day. But when I go and sort of mash on 7 it with my thumb, most people will tell you, 8 yes, that doesn't feel good, which is pretty 9 standard. But most of his issues seem to be 10 coming along the joint line itself and more 11 consistent with this type of post-traumatic 12 changes and a few years down the road. 13 Q: And what was the treatment that you gave him on 14 March 29th, 2012. 15 A: So we kind of just talked about it and said, 16 you know, one of the things that I normally 17 will do for folks who've had these injuries is 18 do an injection, an intra-articular injection 19 where we sterilely prep the skin and we inject 20 Marcaine, which is a numbing agent and Depo 21 Medrol, which is a corticosteroid. The idea is 22 to, one, that Marcaine piece is to try to give 23 them, you know, a little bit of reduction in 24 pain from the corticosteroid. Corticosteroid 25 can be a bit irritating at first. So we try to
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1 body may develop. He's done all the things he 2 can be asked to do and complied with them. So 3 the body will, unfortunately, heal the way it 4 wants to heal. 5 Q: Okay. And your review of the x-rays showed 6 that all of the hardware was fine and the 7 screws were all properly placed? 8 A: So they hadn't changed. That's the key is that 9 they don't show any signs of backing out or 10 loosening. 11 Q: And in your physical examination you did note 12 that he had some swelling in the ankle, is that 13 correct? 14 A: Right. 15 Q: And that he had some tenderness in the joint 16 line itself? 17 A: Yes. 18 Q: It says you noted some tenderness over the 19 hardware laterally and how else? 20 A: So tenderness over the laterally and then the 21 callosity, which is under his forefoot. So 22 he's got a bit of a callous building up under 23 his forefoot, just from pressures of putting 24 the foot down. So some of that range of motion 25 is decreased slightly. He may be putting more	1 give the joint a little bit of a break. The 2 corticosteroid is really what's going to help 3 with the inflammation and so once we put the 4 medicine there with him working the joint and 5 usually after a few days to let the medicine 6 work, it sometimes will help to decrease the 7 inflammation in that tissue and often give 8 patients increased comfort. It's not magic. 9 It's simply medicine and if it helps, it's a 10 great way to help people feel better and 11 hopefully try to avoid a surgical things. 12 Q: And you mentioned conservative treatment. Is 13 that be a conservative treatment? 14 A: That would be within my realm of conservative 15 treatment options. 16 Q: What are other conservative treatment options 17 here? 18 A: You can revisit therapy, but he'd already done 19 a good job and his motion was quite good. So 20 I didn't know if he was going to get a huge 21 benefit from repeating therapy at that point. 22 You could go back into an ankle brace but, 23 again, he didn't show signs of instability or 24 issues with that. His really was more 25 inflammatory type of component I felt was going

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1 on there, so this seemed to be of the 2 categories of things we would choose. If I 3 have instability, if I have weakness, those 4 might be other things, but when I have 5 inflammation, this would be kind of that column 6 and I would say, well, if I'm dealing with 7 inflammation, I'll use an anti-inflammatory. 8 This was a direct way to get it into the ankle. 9 Q: Okay. What other options are there of the less 10 conservative arena? 11 A: So outside of the arena is bracing therapy, 12 injections, oral non-steroidal medications, 13 doing nothing, which is always an option a 14 patient can choose. If those things were to 15 fail, then possibly something like an 16 arthroscopic debridement could be considered. 17 And then the question mark of the hardware 18 removal comes in, because if you're going to 19 undergo a surgery to clean out the scar tissue, 20 at the same time, a lot of patients, I'll say, 21 well, do you just want the hardware taken out 22 because you might as well get rid of it because 23 it could be a source of an issue or discomfort. 24 And so often they'll just say, while we're 25 doing this, rather than do one thing, get	1 if? 2 A: Like I said, if the injection helped, then he 3 felt better, he can get better. 4 Q: The arthritis is going to get better? 5 A: No. 6 Q: No? Because the arthritis can only get worse, 7 correct? 8 A: No. It can stay the same. 9 Q: Okay. But the arthritis isn't going to get 10 better, is that fair? 11 A: Well, if the arthritis is -- 12 Q: I guess we're going round, and round with it? 13 A: Right. So he has a very minimal arthritis, 14 mostly scar tissue and inflammation. 15 Q: Right. 16 A: And that can improve. 17 Q: Okay. 18 A: The arthritis may not even be a component 19 that's bothering him right now. And so we're 20 treating the inflammation and scar tissue 21 component of it, which is the soft tissue piece 22 and if that improves, that may be all he ever 23 has to deal with. And maybe he needs another 24 injection possibly. That's always a potential, 25 or maybe he does need something more. But
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1 everything -- you know, get the hardware out 2 and get the scope to clean out the ankle. 3 Q: Okay. Would you expect the condition that you 4 were seeing on March 29th of 2012 to get 5 progressively worse with age? 6 A: It's definitely a possibility. 7 Q: More like than not? 8 A: I'd say yes. 9 Q: Okay. Since he is twelve to eighteen months 10 out from the accident, in fact over three years 11 at this point, is the pain that he's reporting 12 now more likely than not the pain that he'll 13 continue to have without any further treatment? 14 A: That's hard to say because if you try the 15 injection and a person does well, they may do 16 well for a long, long time. If their body 17 maintains itself and the cartilages tend to 18 survive and the ankle is healthy, they may do 19 well long term. If the body doesn't handle the 20 inflammation as well or the arthritis 21 progresses, then, of course, they can go in the 22 other direction the pain can increase or the 23 dysfunction can increase. And those are only 24 things that time will tell. 25 Q: It's not going to get better at this point, is	1 that's the piece that we won't know, you know, 2 until time goes by. 3 Q: Okay. Okay. At some point, it looks like in 4 your evaluation -- I'm going to let you just 5 take a look at this. It's an ankle evaluation. 6 A: That's not my evaluation. 7 Q: It looks like a therapist record? 8 A: That's the therapist, yes. 9 Q: Are those records that you reviewed in your 10 evaluation? 11 A: They would -- depending, either the patient 12 will bring them to me and, you know -- a lot of 13 times the therapist will actually give them 14 this or a very similar form and say, here, take 15 this to your doctor. Or they'll email, you 16 know, fax them to me and they'll get put into 17 the EMR and I can actually then look them up 18 when they're in the room with me. So if the 19 patient's brought it, that's the most direct 20 way that I get a hold of it because they 21 actually carry it into my office. If the 22 therapist has been kind enough to send it to 23 me, then I also can get a hold of it. I won't 24 say that that happens. But most cases I -- 25 most cases, the patient will bring it to me,

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1 which is the best. 2 Q: Is that a therapist record that you have in 3 your records? Can you see? 4 A: Let's see. Hold on a second. Let's go to 5 rehab. Let's see this is 4/20 of 2009? Yes. 6 So this would have been in there and there's a 7 couple of notes in here from the therapist over 8 time. This would have been the one dated 4/20 9 of 2009. 10 Q: Okay. And it's talking about how he's 11 presenting in -- is it April of 2009? 12 A: So I'm guessing the date at the top is they 13 have is 4/20 of 2009. 14 Q: Got it. 15 A: And that would be the date of the evaluation. 16 Q: And that's typed. That may be the only thing 17 I can read. Can you read the part where it 18 says, patient presents? 19 A: So this is traditionally when I get these back 20 from a therapist, usually they do some sort of 21 small history. "Presents with left ankle 22 fracture from motor vehicle accident in 12 of 23 2008. ORAF with status post-pin removal two 24 weeks ago." That would have been the screw 25 that I removed.	1 pretty combination. 2 Q: All consistent with this type of injury? 3 A: Yeah. In this type of recovery. 4 Q: Okay. 5 MS. MULLIS: I don't think I have any other 6 questions. 7 DR. SMITH - EXAMINATION BY MS. BOBERTZ: 8 Q: Doctor, my name is Shannon Bobertz. I 9 represent the Defendant. I just have a couple 10 of follow up questions. 11 A: Sure. 12 Q: He had this accident in December of 2008, and 13 then surgery pretty quickly after that, is that 14 correct? 15 A: From Dr. Spearman's records, yes. 16 Q: And by the time he came to see you in February 17 2009, would you agree with me that he was 18 healing well at that point? 19 A: He was progressing along in the way I would 20 expect a person with this injury to heal. 21 Q: Okay. And, in fact, he continued to heal well 22 until you released him in May of 2009, is that 23 correct? 24 A: Yes. 25 Q: He never got an infection, is that correct?
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1 Q: Okay. 2 A: "Complaint of pain on bottom of heel and left 3 leg pain feels 'asleep' from posterior kind of 4 mid-thigh area." 5 Q: Talking about pain from post mid-thigh area. 6 A: That says, "Patient feels asleep." It's not 7 really a pain issue per se. So there he's just 8 saying some sort of leg discomfort. You know, 9 at this point, he's two weeks from surgery and 10 he's been tied up, you know, in terms of having 11 the leg non-weight bearing recently and now 12 he's just starting to get to weight bear so now 13 muscles that haven't been doing much in a long 14 time are starting to fire up and move, so 15 probably not uncommon for that. And bottom of 16 the heel pain; that's -- everybody, because he 17 hasn't been putting a whole lot of wight on 18 that foot for a long time and now those bones 19 are starting to get strong again, because he's 20 starting to put weight down on them and they're 21 getting themselves strong. And so the bottom 22 of the foot pain, leg pain, all of that stuff 23 very, very classic for this because lots of 24 things are now back to -- starting to move 25 again and getting worked out and that's a	1 A: Like I said, the only things that I have are 2 from one of the -- he relates to me the small 3 area where the wound had had a little gapping, 4 but that was treated with local care and it 5 seemed to resolve well. So nothing that 6 suggested a deep infection. There was no 7 return to the OR for a debridement so that 8 would kind of define to me a more severe 9 infection issue. So, no, none of that. 10 Q: Okay. And he did not require any other 11 surgeries, other than removal of the screw, is 12 that correct? 13 A: Correct. 14 Q: You actually released him to full duties back 15 in May of 2009, is that correct? 16 A: On the 21st, correct. 17 Q: And you did not give him any sort of impairment 18 rating at that time, is that correct? 19 A: I don't give an impairment rating. I just 20 released him at that time. If an impairment 21 rating is sought, there's a form sent to me 22 that I am then ask to fill out. 23 Q: Okay. And you have not done that for him, is 24 that right? 25 A: Unless there was one sent to me.

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1 Q: Okay. 2 A: I'm not going to sit here now and tell you I 3 remember. I get a lot of those in a day. 4 Q: That's all right. 5 A: I'm not going to recall one from 2009 right 6 now. 7 Q: And he actually did not see you for almost 8 three years, is that correct? 9 A: Uh-huh (affirmative response). 10 Q: So when he came back to you in March of 2012, 11 almost three years had passed since the time 12 you released in May of 2009, is that right? 13 A: Yes. 14 Q: When he came into see you in March of 2012, you 15 did, I believe, three x-rays of the ankle and 16 three x-rays of the foot, is that correct? 17 A: Correct. They would be my standard views that 18 I would request. 19 Q: And those views showed you no objective 20 problems that showed what was causing his pain, 21 is that correct? 22 A: So in terms of -- we speak to any changes 23 because I do have the comparison views from 24 2009, that's where I talk about that small 25 osteophyte.	1 correct? 2 A: All big scary stuff, didn't see any of that. 3 Q: Okay. And correct me if I'm wrong, but are you 4 deducing the scar tissue around his ankle 5 because of the swelling? 6 A: Correct. So obviously history and physical 7 examination is absolutely essentially. I know 8 we like to rely on lots of fancy test and stuff 9 anymore. But obviously if you listen to a 10 patient, oftentimes they'll tell you exactly 11 what's going on with them. And so in this case 12 he was having the swelling around his joint. 13 He was having some tightness and achiness and 14 soreness in that area. And so if we look at 15 the x-ray and we say, well, geez, there's not 16 a massive boney problem, then our second 17 component is soft tissue. Bone can't swell so 18 we know the bone's not swelling to cause the 19 problem. So the soft tissue would be what we 20 would deduce to be the problem and that's kind 21 of why I came to that conclusion. So the 22 question is, could you do a big fancy test? 23 MRI, for instance would be what some people -- 24 well, possibly could be reasonable. 25 Unfortunately, you have metal sitting in the
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1 Q: Right. 2 A: So it is a bit of a change. But other than 3 that, nothing glaring. There was no hardware 4 falling apart. There was no gross, you know, 5 disaster so to speak, that was screaming at you 6 saying, oh, my goodness. I think we found the 7 problem. 8 Q: Okay. And I believe you said that osteophyte 9 might not even be causing his pain, is that 10 correct? 11 A: Correct. It is noted. I obviously try to be 12 thorough in my evaluation and discuss what I 13 see. 14 Q: And you indicated the joint space looks good 15 and that's what you were wanting to see, is 16 that correct? 17 A: Correct. So when I compare from '09 from my 18 earlier x-rays to now, I want to know did that 19 joint space changed. It's here or if it 20 started and all of a sudden there's nothing. 21 Well, that's a change. So his looked very 22 symmetric which is always what we want to see. 23 Q: Okay. And I believe you noted in your notes 24 you didn't see any fractures, dislocations, 25 infections, anything of that nature, is that	1 ankle so now you have a magnet in metal. So 2 the results of that test are often less than 3 thrilling. So to put a person through an hour 4 long test to finally come up with pictures that 5 really aren't very helpful, I usually don't 6 love doing that to patients. 7 Q: Okay. And you actually injected him with 8 something that you thought would sort of 9 relieve his pain and also decrease the 10 swelling, is that correct? 11 A: Correct. 12 Q: Okay. And you actually have not seen him since 13 March of 2012 and it's now July 2012, is that 14 right? 15 A: Correct. So that was -- I saw him. We did the 16 injection and that was the last I got to see 17 the patient. 18 Q: Okay. And you have not recommended any further 19 surgery at this time, is that correct? 20 A: No. As long as he's doing well, I'd love to 21 save a patient surgery. 22 Q: You haven't also prescribed any formal physical 23 therapy at this time, is that correct? 24 A: No. 25 Q: Okay. And he hasn't been back in to tell you

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1 he isn't feeling on that ankle at this point, 2 is that correct? 3 A: I've not seen the patient back in terms of any 4 -- I'm sorry. My computer is -- computers that 5 make our lives better. Yeah. I was going to 6 say, and no request for medications either, so. 7 Q: Okay. And he doesn't have any other follow-up 8 scheduled with you at this time? 9 A: No. We left it open. If this injection helps 10 and I hope it does, I hope he can avoid seeing 11 doctors. That's always a good thing. 12 Q: Okay. 13 MS. BOBERTZ: I think that's all the questions I 14 have. 15 MS. MULLIS: Briefly. 16 DR. SMITH - RE-EXAMINATION BY MS. MULLIS: 17 Q: You said something about medications. Did you 18 prescribe any pain medication for Mr. McCray in 19 your treatment of him? 20 A: Of course. In the post-operative time frame. 21 Initially when we saw him, he obviously was 22 still acute and recovering. We used initial 23 pain medications at that point because he was 24 obviously still recovering. And then 25 immediately after the hardware removal, of	1 my standpoint. 2 Q: So you prescribed pain medication for Mr. 3 McCray on two occasions during your treatment 4 of him, is that correct? 5 A: Yes. One was in his acute kind of healing time 6 frame. The other one was obviously after we 7 did the initial -- the surgery on my end. It 8 was very appropriate. That's actually 9 exceptional. It's great. 10 Q: And on March 29th of 2012, tenderness aside, 11 when you physically examined Mr. McCray's ankle 12 he had swelling that you could see, is that 13 correct? 14 A: You could see some swelling around the ankle, 15 palpating as well. 16 Q: And in your treatment of him you injected his 17 ankle, is that correct? 18 A: Correct. 19 Q: Okay. So you stuck a needle into the ankle 20 itself or into the bone? 21 A: No, no, into the joint space. 22 Q: Into the joint space? 23 A: Yes. You try not to stick it into the bone. 24 It doesn't feel good. 25 Q: Does it hurt?
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1 course, yes. But then that was it. He did his 2 standard medications and antibiotics that I 3 give post-operatively and he never needed 4 anything else after that. 5 Q: So what kind of medication records do you have, 6 because I -- 7 A: I would have my -- everything I ever prescribed 8 the patient on my end is what we have in here. 9 Q: Okay. So did you start pain medication 10 prescriptions as of February 2009? 11 A: No. Actually, he was okay in terms of he had 12 enough. We refilled his medications on 3/4 of 13 2009 for Lortab. 14 Q: And Lortab is what? 15 A: Is a narcotic analgesic. 16 Q: So that's pain medication? 17 A: Correct. 18 Q: Thank you. And then when's the next time you 19 refilled pain medication? 20 A: That would have been his -- well, it was for 21 surgery on the 31st of March, I had prescribed 22 pain medication, antibiotic and anti-nausea 23 medicines. Those are my standards for people 24 who have had surgery. And we gave him his 25 prescriptions and that was what he needed from	1 A: The injection? 2 Q: Yes? 3 A: Well, obviously it's a needle stick, so there's 4 a pinch. But then it quickly goes away. 5 Q: Does the injection require that you put a 6 numbing agent in at first? 7 A: No. You numb the skin topically with a ethyl 8 chloride, which is a kind of a freezy spray. 9 It basically freezes the skin. It's like 10 putting an ice cube on the skin for a few 11 minutes. The same idea but you can do it with 12 this spray very quickly. It takes away a bit 13 of that pinch. And then once you get inside 14 the joint it's like sort of inflating a 15 balloon. There's a space available for the 16 fluid to go into so it sort of goes into that 17 potential space of the joint. 18 Q: So you stuck a needle in, injected stuff into 19 the joint. 20 A: Uh-huh (affirmative response). 21 Q: Is that correct? 22 A: Correct. 23 MS. MULLIS: That's all the questions I have. 24 MS. BOBERTZ: I don't have anything. 25 MS. MULLIS: Thank you.

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- 1 THE WITNESS: Okay.
- 2 VIDEOGRAPHER: Okay. We're off the record at 6:47
- 3 p.m.
- 4 (There being no further questions, the deposition
- 5 concluded at 6:47 p.m.)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2010-CP-08-1801

Levern McCray, ... Respondent,

vs.

Jose W. Valle, ...Appellant,

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.

Respectfully submitted,

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