

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 29 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Hon. Roger M. Young, Sr.
Circuit Court Judge

Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019
Petition for Rehearing Denied March 29, 2019

Gary Nestler and Julie Nestler Petitioners,

v.

Joseph E. Fields.....Respondent.

App. Case No. 2019-000707

APPENDIX VOLUME I

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2016-001541
Civil Action No. 2015-CP-10-0330

Gary Nestler and Julie Nestler,

Appellants,

v.

Joseph E. Fields,

Respondent.

RECORD ON APPEAL

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JUN 07 2017

SC Court of Appeals

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO: 2015-CP-10-0330

FILED
2016 APR 29 PM 3:26
JULIE J. STRONG
CLERK OF COURT

Gary Nestler and Julie Nestler
PLAINTIFF(S)

Joseph E. Fields
DEFENDANT(S)

Submitted by: Court

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: We, the Jury, find for the Plaintiff against the Defendant in the amount of \$7,117.50 actual damages.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Plaintiff, Gary Nestler and Julie Nestler	Defendant, Joseph E. Fields	\$7,117.50
		\$
		\$

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

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

Circuit Court Judge

2134
Judge Code

4/27/16
Date

SCRPC Form 4C (10/2011)

Page 1 of 2

R. 001

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

Daniel Slotchiver
ATTORNEY(S) FOR THE PLAINTIFF(S)

Paul Trainor and Alan Ross Belcher
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Heather Landry

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Gary Nestler and Julie Nestler,

Plaintiffs,

v.

Joseph E. Fields

Defendant.

IN THE COURT OF COMMON PLEAS
2015-CP-10-0330

VERDICT FORM

VERDICT

☒ We, the Jury, find for the Plaintiff against the Defendant in the amount of
\$ 7,117.50 actual damages.



FOREPERSON

26 APR 2016
DATE

☐ We, the Jury, find for the Plaintiff against the Defendant in the amount of
\$ _____ punitive damages.

FOREPERSON

DATE

R. 003

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Gary Nestler and Julie Nestler,

Plaintiffs,

v.

Joseph E. Fields,

Defendant.

IN THE COURT OF COMMON PLEAS
2015-CP-10-00330

**ORDER DENYING PLAINTIFFS'
MOTION FOR NEW TRIAL, AND
GRANTING DEFENDANT'S MOTION
FOR COSTS**

FILED
JUL 11 AM 9:47
CLERK OF COURT

BACKGROUND

A jury trial was held in the above captioned case beginning on April 25, 2016. Plaintiffs Gary Nestler and Julie Nestler¹ were present and represented by attorney Daniel Slotchiver. The underinsured motorist carrier, QBE North America, retained attorney Paul Trainor to assume the defense of the defendant Joseph E. Fields. The issues of duty and breach were admitted by the defendant, and therefore the only issues before the jury were causation and damages. On April 26, 2016, the jury returned a verdict in favor of the plaintiff in the amount of seven thousand, one hundred seventeen dollars and fifty cents. (\$7,117.50) in actual damages and zero dollars (\$0.00) in punitive damages. This Court granted the parties ten (10) days to file post-trial motions.

On May 6, 2016, Plaintiff filed a Motion for New Trial Absolute. That same day, Defendant filed a Motion for Costs Pursuant to Offer of Judgment.

STATEMENT OF FACTS

This action arises from a motor vehicle accident which took place on March 8, 2014 occurring on Highway 17 North in Mount Pleasant, South Carolina. Plaintiff Gary Nestler was driving a 2012 Ford Explorer that was stopped in traffic on highway 17 North when the defendant,

¹ Plaintiffs' complaint contains a claim for loss of consortium by Mrs. Nestler, however, that claim was not asserted at trial. Unless otherwise noted, plaintiff as used throughout will refer to Mr. Nestler.

Joseph Fields, driving a 1988 Nissan pick-up truck, rear-ended the plaintiff's vehicle. Plaintiff was transported by EMS to East Cooper Medical Center shortly following the accident.

Plaintiff's case-in-chief presented testimony from Joseph Fields (defendant), Julie Nestler (plaintiff's wife), Robert Schoderbek, M.D., and the plaintiff himself. The examination of the defendant was of short duration and involved the defendant admitting to liability. Mrs. Nestler's examination involved testimony regarding the effect of her husband's injuries on his participation in the family lifestyle, specifically his inability to participate in physical activities with the family that he had participated in prior to the accident.

Dr. Schoderbek was qualified as an expert in orthopedic medicine and testified regarding his treatment of Mr. Nestler which included referrals to other facilities for treatment. Dr. Schoderbek testified that Mr. Nestler's injuries were caused by the accident and that Mr. Nestler's treatment was a reasonable course of treatment. Dr. Schoderbek's final assessment of Mr. Nestler included an impairment rating of thirty two percent (32%) for the entire person. (Pl. Trial Ex. 2). On cross examination, Dr. Schoderbek indicated that his initial assessment of Mr. Nestler, sixteen months prior to the final assessment, included an impairment rating of only eight percent (8%) whole body impairment. Additionally, Dr. Schoderbek testified that he had discussed with Mr. Nestler the possibility of performing EMG tests and injections, along with a recommendation to see a neurologist, all of which were declined by Mr. Nestler. Testimony was also elicited that Dr. Schoderbek had recommended physical therapy two to three times per week for four weeks, and Mr. Nestler had only completed five appointments. Finally, evidence was presented that while Mr. Nestler had begun physical therapy at another facility, he was discharged for failure to return.

The plaintiff, Mr. Nestler, the final witness for the plaintiff's case-in-chief, testified to his background, lifestyle, facts regarding the date of the incident, and his injuries. Photographs of the

damage to Mr. Nestler's vehicle were admitted into evidence. (Pl. Trial Ex. 4). Mr. Nestler testified that his injuries prevented him from participating in physical activities that had been a part of his lifestyle prior to the accident including physical activities with his family, household chores, recreational athletic activities with friends, and activities performed as a volunteer fireman. Mr. Nestler testified that he stopped physical therapy because it was not helping to improve his physical condition. Additionally, Mr. Nestler testified that his refusal of EMG tests, injections, and a consult with a neurologist was because those recommendations would not cure his injuries. On cross examination, Mr. Nestler testified that he had not made a claim for injuries, prior to or subsequent to his claim in the instant case, which is consistent with his answers to interrogatories. (Def. Trial Ex. 2). However, defense counsel introduced into evidence a 2003 complaint in which Mr. Nestler, as the plaintiff, was involved in a rear-end accident and claimed permanent injury to his neck and back. (Def. Trial Ex. 3).

Based on Mr. Nestler's testimony, his answers to interrogatories, and the previously filed claim, the defense's request for a jury instruction on adverse inference was granted. (Ct. Trial Ex. 3). The jury was also instructed on its authority to award damages for personal injuries, pain and suffering, loss of enjoyment of life, prospective damages, future damages, and punitive damages, along with an instruction on plaintiff's duty to mitigate damages. (Ct. Trial Ex. 3). During deliberation, the jury requested a copy of plaintiff's medical bills which were not admitted into evidence during trial, and not provided to the jury during deliberation. (Ct. Trial Ex. 1). The jury made a second inquiry requesting the amount of plaintiff's medical bills which was provided to the jury in the amount of \$7,117.50. (Ct. Trial Ex. 2).

DISCUSSION

I. New Trial

Rule 59 of the South Carolina Rules of Civil Procedure authorizes the granting of a new trial “on all or part of the issues [] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State;” Rule 59, SCRPC. “The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” Howard v. Roberson, 376 S.C. 143, 149; 654 S.E.2d 877, 880 (Ct. App. 2007) (quoting Chapman v. Upstate RV & Marine, 364 S.C. 82, 88–89; 610 S.E.2d 852, 856 (Ct. App.2005)).

“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice.” Waring v. Johnson, 341 S.C. 248, 257; 533 S.E.2d 906, 911 (Ct. App. 2000). In the case of the former, the trial judge may order a new trial *nisi additur* or new trial *nisi remittitur*; in the case of the later, “the trial judge is required to grant a new trial absolute.” Id. “In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or *nisi* in a law case upon his disapproval of the verdict on factual grounds” Vinson v. Hartley, 324 S.C. 389, 404; 477 S.E.2d 715, 723 (Ct. App. 1996).

Rule 61 of the South Carolina Rules of Civil Procedure provides that:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every

stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, SCRCP. South Carolina's Supreme Court has explained that "[t]he admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion." Conner v. City of Forest Acres, 363 S.C. 460, 467; 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id.

Our appellate courts have held that in reviewing a jury's verdict "the jury does not have to believe uncontradicted testimony" because "[t]he fact that testimony is not contradicted directly does not render it undisputed." Vinson, 324 S.C. at 409-410. It remains in the jury's province to determine "the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation." Id. at 410. Furthermore, "[i]f there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm." Id. (quoting Hobgood v. Pennington, 300 S.C. 309, 313; 387 S.E.2d 690, 692 (Ct. App. 1989)).

A. New Trial Absolute

Under the thirteenth juror doctrine, the fact that "the trial judge is compelled to submit the issues to the jury" does not prevent the trial judge from granting a new trial absolute. Howard v. Roberson, 376 S.C. 143, 152; 654 S.E.2d 877, 881 (Ct. App. 2007). The South Carolina Supreme Court has explained the thirteenth juror doctrine as

a vehicle by which the trial court may grant a new trial absolute when [it] finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict.

The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Folkens v. Hunt, 300 S.C. 251, 254; 387 S.E.2d 265, 267 (1990) (internal citations omitted).

Several reasons have been held to provide a basis for a trial judge granting a new trial absolute including: "that justice has not prevailed," "the verdict is inconsistent and reflects the jury's confusion," or "[the] verdict is unsupported by evidence." Vinson, 324 S.C. at 404. (internal citations omitted). Additionally, "[a] trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate[.]" however, "[t]he jury's determination of damages . . . is entitled to substantial deference." Id. "If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute." Waring v. Johnson, 341 S.C. 248, 257; 533 S.E.2d 906, 911 (Ct. App. 2000).

South Carolina's Supreme Court has found a jury verdict in the amount of \$6,000.00 "irreconcilably inconsistent with the unchallenged evidence presented at trial []" that included medical bills and lost wages totaling "\$30,026 in undisputed damages." Dillon v. Frazer, 383 S.C. 59, 64; 678 S.E.2d 251, 253 (2009). The Court found such an award "grossly inadequate" demonstrating "that the verdict was actuated by improper motivation." Id. at 65. In reaching this decision, the Court found the jury's questions during deliberation (including whether any insurance had paid the plaintiff's medical bills and whether the plaintiff had been paid while he was not working), and the trial court's instructions that "those matters 'are not for your concern[.]'" in light of the verdict indicate that "that the jury failed to follow the court's instruction." Id. at 64.

In contrast, the Vinson court affirmed the trial court's denial of plaintiff's "motions for reformation of the verdict, new trial *nisi additur*, and new trial absolute." Vinson, 324 S.C. at 412. The court found that based on the plaintiff's testimony, the jury could have found that the injuries were not a result of the accident. Id. Additionally, the plaintiff's "credibility may have been seriously weakened by his first claiming lost wages, then withdrawing that claim when confronted with deposition testimony which indicated he had no lost wages and was not making such a claim." Id. Finally, the court found that "certain inconsistencies came out during Dr. Carlson's [the plaintiff's doctor] testimony which may have brought his credibility into question." Id. Based on a review of the trial court's record, the appellate court determined that "the trial court's ruling is not 'wholly unsupported by the evidence' nor is it 'controlled by an error of law[,]'" concluding "the trial judge did not abuse his discretion" Id.

In the case before this Court, the jury granted an award of damages in the exact amount of the plaintiff's medical bills, \$7,117.50. Additionally, only two (2) questions were received from the jury during deliberations, both of which were inquiries into the amount of the plaintiff's medical bills. Neither of the questions addressed whether or not plaintiff's medical bills had been paid. As such, this Court finds that the jury was not "actuated by improper motivation," nor confused about its duties. Additionally, evidence was elicited on cross examination from both Dr. Schoderbek and Mr. Nestler which may have cast doubt on the credibility of their testimony and the extent of the plaintiff's injuries. As such, this Court finds that evidence did exist that could sustain factual findings implicit in the jury's verdict. Therefore, this Court finds the jury's verdict was not unsupported by evidence, and plaintiff's motion for a new trial absolute is denied.



B. New Trial Nisi Additur

“The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” Waring v. Johnson, 341 S.C. 248, 256; 533 S.E.2d 906, 910 (Ct. App. 2000). “The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented.” Id. at 257. “A new trial *nisi additur* may be ordered when the verdict is merely insufficient based on the evidence.” Id. However, a trial judge is required to “offer compelling reasons for invading the jury’s province by granting a motion for *additur*.” Luchok v. Vena, 391 S.C. 262, 264; 705 S.E.2d 71, 72 (Ct. App. 2010) (quoting Green v. Fritz, 356 S.C. 566, 570; 590 S.E.2d 39, 41 (Ct. App. 2003) (noting that the trial judge’s “mere listing of [plaintiff’s] claimed damages . . . in [its] order does not constitute compelling reasons for invading the jury’s province. Green, 356 S.C. at 570)).

The Waring court affirmed the trial court’s granting of a new trial *nisi additur*, finding the trial court “articulated compelling reasons in [its] order justifying the grant of the *nisi additur*.” Waring, 341 S.C. at 261. The jury in Waring returned a verdict in “the exact amount of Waring’s medical bills.” Id. at 255. The trial court reasoned the jury had failed to consider pain and suffering based on the facts that Waring had received years of medical treatment, “underwent surgery for a condition which numerous doctors testified was aggravated by the wreck[,] . . . took advantage of every recommendation of her physicians[,] . . . will most likely suffer pain for the remainder of her life[, and] . . . [is] unable to continue her previous active lifestyle.” Id. at 260.

In contrast, the Luchok court found that the trial court improperly granted a new trial *nisi additur* because it failed to provide compelling reasons for invading the jury’s province. Luchok,

391 S.C. at 265. During trial Ms. Luchok was the only witness to testify in her case in chief. Id. at 264. Ms. Luchok's testimony indicated that she did not require an ambulance or seek immediate treatment, but rather "drove herself home after the accident." Id. While she went to her family doctor the next day, she did not begin chiropractic treatment until "more than three weeks after the accident[.]" and that treatment included "massages she received from a massage therapist who worked for the chiropractor." Id. The Luchok court found that the trial judge granted a new trial *nisi additur* because the jury award failed to cover all the chiropractic bills and that the chiropractic bills were "reasonable and necessary," which the Luchok court found were not compelling reasons and therefore overruled the trial court. Id. at 265.

In the case before this Court, evidence was received from the plaintiff including the testimony of the plaintiff's wife, treating physician, and the plaintiff himself. The evidence addressed the causal connection of the accident to the plaintiff's injuries, his pain and suffering, his loss of enjoyment of life, and the likelihood that his injuries will not improve. However, evidence was also elicited which may have impeached the plaintiff's credibility regarding the extent of his injuries and the reasonableness of his discontinuation of treatment. Additionally, the credibility of Dr. Schoderbek may have been impeached based on the two assessments of impairment which differed greatly. The court's duty is not to weigh the evidence or the credibility of witnesses, but rather to determine whether the verdict is insufficient based on the evidence. This Court finds that compelling reasons do not exist for invading the province of the jury, and therefore plaintiff's motion for a new trial *nisi additur* is denied.

II. Costs Pursuant to Offer of Judgment

On November 16, 2016, attorney Paul Trainor, on behalf of the underinsured motorist carrier, QBE North America ("QBE"), filed an offer of judgment ("Offer") with the Clerk of Courts.

The Offer was in the amount of forty thousand dollars (\$40,000) subject to offset of the full liability policy limits of twenty five thousand dollars (\$25,000) provided under defendant Joseph Fields' GEICO policy. As such, the Offer presented a net amount of fifteen thousand dollars (\$15,000) of potential underinsured motorist coverage under QBE's UIM. Plaintiff did not accept the Offer.

South Carolina Rules of Civil Procedure provide an exception of costs being awarded to the prevailing party where a statute or rule provides an express provision to the contrary, such as the statute and rule explained below. Rule 54, SCRPC. Subsection (e) of Rule 54 enumerates the taxable costs including among others: fees of the clerk, fees incurred in service of process, witness fees, and fees for the exemplification and copies of papers. Rule 54(e), SCRPC.

Pursuant to Rule 68, SCRPC, and S.C. Code Ann. § 15-35-400, "[i]f the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected" Rule 68, SCRPC. If the offer is not accepted "and the offeror obtains a verdict . . . at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment[,]" and "(3) if the offeror is a defendant, reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment." Rule 68, SCRPC.

In this case, plaintiffs failed to accept the Offer within the time prescribed by the Rule. The jury awarded a verdict in the amount of \$7,117.50 on April 26, 2016 that is less than half the Offer. Attorney Paul Trainor, on behalf of the defense, submitted a Motion for Costs Pursuant to Offer of Judgment. The affidavit of costs indicates the total administrative and court costs in the amount of \$1,313.11. Affidavit of Attorney Paul Trainor For Costs Pursuant to QBE North America's Offer of Judgment at ¶7, 1-2 Nestler v. Fields (2015-CP-10-00330). Pursuant to Rule 54(e), this Court



finds the costs listed in paragraph 7(c)-(j) are not taxable. This Court finds the costs listed in ¶7(a), (b), (k), and (l) are taxable. However, ¶7(k)'s Motion to Enforce Offer of Judgment has not been filed and as such is not a cost yet incurred. Therefore, this Court awards costs payable by the plaintiff to the defendant in the amount of \$364.68.

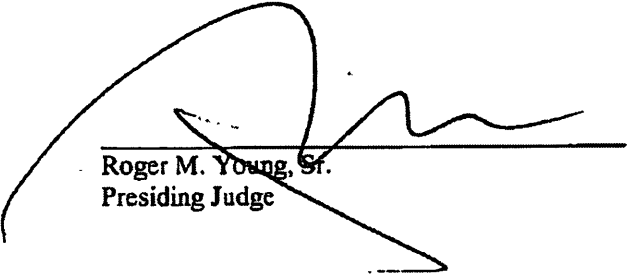
CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for a New Trial Absolute and *Nisi Additur* is DENIED; and it is further

ORDERED that Defendant's Motion for Costs is GRANTED in the amount of \$364.68.

IT IS SO ORDERED!

July 7, 2016
Charleston, South Carolina



Roger M. Young, Sr.
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER and JULIE NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS

Defendant.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2015-CP-10-00330

) ORDER GRANTING UIM CARRIER
) QBE NORTH AMERICA'S MOTION
) FOR SETOFF

2016 JUN -1 PM 2:41
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The above-styled action was tried before a jury in this Court on April 25 and 26, 2016, and a verdict was rendered in favor of Plaintiff in the amount of \$7,117.50. Prior to trial, Defendant Fields' liability carrier, GEICO, tendered \$20,000 of its \$25,000 liability limits, in exchange for a Covenant Not to Execute in favor of Defendant Fields. Upon filing of this action, QBE North America (QBE), as Underinsured Motorist Carrier, made an appearance and assumed the defense pursuant to S.C. Code Ann. § 38-77-160. Upon conclusion of the trial, counsel for QBE timely moved this Court to offset the verdict and resulting judgment by \$25,000, representing the full liability limits, and such Motion is hereby incorporated by reference in full.

Being statutorily bound to apply the aforementioned setoff, it is hereby

ORDERED, ADJUDGED, AND DECREED that judgment will be entered in the amount of \$7,117.50.

It is further **ORDERED, ADJUDGED, AND DECREED** that the judgment will be immediately marked as satisfied through payment of liability funds by GEICO.

AND IT IS SO ORDERED.

[Signature on following page]

Dated: May 24, 2016

T. L. Hyatt Jr.
~~The Honorable Roger M. Young, Sr.~~
Presiding Judge

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-10-00330

Gary Nestler and Julie Nestler

Joseph E. Fields

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court.

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This Form 4 is an addendum to this Court's Order Denying Plaintiffs' Motion for New Trial, and Granting Defendant's Motion for Costs.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Joseph E. Fields	Gary Nestler and Julie Nestler	\$364.68
		\$
		\$

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

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

Circuit Court Judge

2134
Judge Code

7/18/16
Date

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

CLERK OF COURT

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or printed text on the paper.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER AND JULIE NESTLER,
Plaintiff(s)

vs.

JOSEPH E. FIELDS,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 - CP - 10 - 0330

(Please Print)

Submitted By: DANIEL S. SLOTCHIVER

Address: SLOTCHIVER & SLOTCHIVER, LLP
44 STATE STREET, CHARLESTON, SC 29401

SC Bar #: 15129

Telephone #: 843-577-6531

Fax #: 843-577-0261

Other: kristen@slotchiverlaw.com

E-mail: dan@slotchiverlaw.com

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

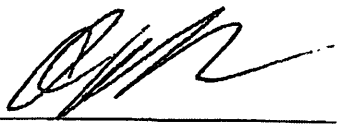
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☒ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☒ Personal Injury (350)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Other (699) | | |

Submitting Party Signature: 

Date: January 14, 2015

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

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0330

GARY NESTLER and JULIE NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS,

Defendant.

SUMMONS

(Motor Vehicle Accident, Negligence)

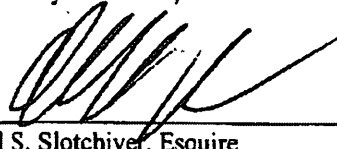
Jury Trial Demand

FILED
2015 JAN 15 PM 2:04
JULIE J. ARISTRONG
CLERK OF COURT

TO THE ABOVE-NAMED DEFENDANT AND HIS ATTORNEY

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is served upon you herewith, and to serve a copy of your answer to said Complaint on the subscriber at his office, Slotchiver & Slotchiver, L.L.P., within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default to be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,



Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, L.L.P.
44 State Street
Charleston, SC 29401
(843) 577-6531
dan@slotchiverlaw.com

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina

January 14, 2015

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON SC
29401-2810

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-10- 0330

GARY NESTLER and JULIE NESTLER,)
Plaintiffs,)
vs.)
JOSEPH E. FIELDS,)
Defendant.)

FILED
2015 JUN 15 PM 2:04
JULIE A. STRONG
CLERK OF COURT
COMPLAIN
(Motor Vehicle Accident Negligence)
Jury Trial Demanded

NOW COMES THE PLAINTIFF, above-named, complaining of the Defendant, above-named, to allege and show under this honorable Court as follows:

1. The Plaintiffs, Gary Nestler and Julie Nestler, are residents and citizens of the County of Charleston, State of South Carolina.
2. The Defendant, Joseph E. Fields, is upon information and belief a resident and citizen of the County of Charleston, State of South Carolina.
3. The Plaintiff, Gary Nestler, was, on or about the 8th day of March, 2014, the owner and operator of a 2012 Ford bearing State of South Carolina license tag number P260417, which motor vehicle was involved in the collision hereinafter described.
4. That on or about the 8th day of March, 2014, at the time of the collision hereinafter described, the Defendant, Joseph E. Fields, was the owner and operator of a 1988 Nissan bearing South Carolina license tag 4404EZ.

FOR A FIRST CAUSE OF ACTION
(Motor Vehicle Accident)

5. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through five as if restated herein verbatim.

6. That on the 8th day of March, 2014, at approximately 8:36 a.m., the Plaintiff was the operator of the aforesaid motor vehicle, which was traveling north bound on US Hwy 17 in Mount Pleasant, South Carolina.

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

7. That at the aforesaid time and place, the Defendant, Joseph E. Fields, was traveling north bound on US Hwy 17 in Mount Pleasant, South Carolina, when suddenly, and without any warning, Defendant was distracted and inattentive, careless, negligent, and reckless as he crashed into the rear of the Plaintiff's motor vehicle with great force, resulting in the Plaintiff sustaining serious and painful injuries as are hereinafter more fully described.

FOR A SECOND CAUSE OF ACTION

(Negligence)

8. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through eight as if restated herein verbatim.

9. That the Defendant was careless, negligent and reckless at the time and place aforesaid in the following particulars, to-wit:

- a) in failing to maintain a proper lookout;
- b) in failing to keep the motor vehicle under control;
- c) in failing to sound his horn or give any warning;
- d) in failing to stop, slow down, or yield the right-of-way;
- e) in failing to use that degree of care or caution which an ordinarily prudent person would have exercised under the same or similar circumstances; and
- f) in being otherwise careless, negligent and reckless.

ALL of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the dictates of ordinary prudence and the statutory laws of the State of South Carolina in such cases made and provided.

FOR A THIRD CAUSE OF ACTION

(Personal Injury)

10. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through ten as if restated herein verbatim.

11. That as a direct and proximate result of the aforesaid acts of the Defendant, the Plaintiff suffered great physical harm and injury, all of which has caused him extreme pain

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

and suffering and considerable medical treatment, both past and future. The Plaintiff has suffered and will suffer a loss of enjoyment of life, and has been otherwise injured and damaged, all to his detriment.

FOR A FOURTH CAUSE OF ACTION
(Loss of Consortium)

12. The Plaintiffs repeat and reiterate the allegations contained in paragraphs one through twelve as if restated herein verbatim.

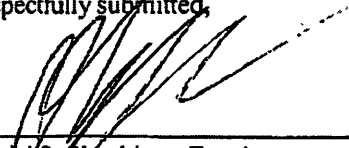
13. As a direct and proximate result of Defendant's negligence as described above, Plaintiff, Julie Nestler, suffered a loss of the services, society, and companionship of her lawful husband, Gary Nestler, with whom she is and was living with at the time of the events in question.

14. As a further direct and proximate result of the Defendants negligence, Plaintiff, Donna Mack, suffered damages for the expenses of care and treatment of her husband, Gary Nestler.

15. Defendant owes a duty of due care to the Plaintiff, Julie Nestler, which Defendant failed to meet, thereby causing substantial damage to said Plaintiff.

WHEREFORE, the Plaintiff prays for judgment against the Defendant on the First, Second, Third and Fourth Causes of Action in a sum that will fully and fairly compensate them for actual and punitive damages as a jury may deem appropriate, together with the costs of this action.

Respectfully submitted,



Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, L.L.P.
44 State Street
Charleston, SC 29401
(843) 577-6531
dan@slotchiverlaw.com

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina
January 14, 2015

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

GARY NESTLER and,
JULIE NESTLER)

Plaintiffs,)

v.)

JOSEPH E. FIELDS,)

Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-330

ANSWER FOR QBE INSURANCE
COMPANY AS THE UNDERINSURED
MOTORIST CARRIER PURSUANT
TO S.C. CODE ANN. § 38-77-160 ON
BEHALF OF DEFENDANT FIELDS
(Jury Trial Demanded)

COMES NOW, QBE Insurance Company, appearing on behalf of the Defendant Joseph Fields, pursuant to South Carolina Code Ann. § 38-77-160, and responds to the Complaint of the Plaintiff as follows:

AS A FIRST DEFENSE

1. It denies all allegations contained in Plaintiff's Complaint not specifically admitted, modified, or explained herein and demands strict proof thereof.
2. Upon information and belief, it admits the allegations contained in Paragraph 1 of the Complaint.
3. Upon information and belief, it admits the allegations contained in Paragraph 2 of the Complaint.
4. Upon information and belief, it admits the allegations contained in Paragraph 3 of the Complaint.
5. Upon information and belief, it admits the allegations contained in Paragraph 4 of the Complaint.
6. Paragraph 5 of the Complaint does not require a response. To the extent a response is required, it denies the same and demands strict proof thereof.
7. It admits the allegations contained in Paragraph 6 of the Complaint.

FILED
2015 APR 20 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT

8. It admits the allegations contained in Paragraph 7 of the Complaint only insofar as that Defendant was traveling northbound on US Hwy 17 in Mount Pleasant, South Carolina, and that a collision occurred between Plaintiff's vehicle and Defendant's vehicle. As to all remaining allegations contained in Paragraph 7 of the Complaint, it denies the same and demands strict proof thereof.
9. Paragraph 8 of the Complaint does not require a response. To the extent a response is required, it denies the same and demands strict proof thereof.
10. It denies the allegations contained in Paragraph 9 of the Complaint, including subparts (a) through (f) and demands strict proof thereof.
11. Paragraph 10 of the Complaint does not require a response. To the extent a response is required, it denies the same and demands strict proof thereof.
12. It lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint, and therefore denies the same and demands strict proof thereof.
13. Paragraph 12 of the Complaint does not require a response. To the extent a response is required, it denies the same and demands strict proof thereof.
14. It lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint, and therefore denies the same and demands strict proof thereof.
15. It lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the Complaint, and therefore denies the same and demands strict proof thereof.
16. Paragraph 15 of the Complaint draws a legal conclusion that does not require a response. To the extent a response is required, it denies the same and demands strict proof thereof.
17. The "Wherefore" Paragraph does not require a response from it. To the extent a response

is required, it denies the same and demands strict proof thereof.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Failure to State a Claim)

18. Further answering the Plaintiff's Complaint and as an affirmative defense, it would respectfully show that each and every cause of action set forth in the Complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Punitive Damages)

19. Further answering the Plaintiff's Complaint and as an affirmative defense, it would show the claim of the Plaintiff for punitive damages against it cannot be sustained because any award of punitive damages under South Carolina law by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness and the appropriate size of the punitive damages award, (2) is not adequately instructed on the limits of punitive damages imposed by the applicable principals of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the amount of an award of punitive damages in whole or in part on the basis of invidiously discriminatory characteristics including the resident wealth and corporate status of it, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity of the conduct or mental state that makes punitive damages permissible, and (5) is not subject to trial court and appellate court judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards would violate its due process and equal protection rights guaranteed by the 14th Amendment to the United States Constitution and by the South Carolina constitutional provisions providing for due process and equal protection and would be improper under the common law and public policies of the State of South Carolina.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Set off)

20. Further answering the Plaintiff's Complaint and as an affirmative defense, it would show that it is entitled to a set off for any and all monies previously paid to the Plaintiff as a result of the matters alleged herein.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Sudden Emergency)

21. Further answering Plaintiff's Complaint and as an affirmative defense, it show he was confronted with a sudden emergency situation caused by an occurrence or event over which he had no control and which was not created through his own negligence, which created an unavoidable accident and that Defendant acted as a reasonable and prudent person when faced with such an emergency.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Unavoidable Accident)

22. Further answering Plaintiff's Complaint and as an affirmative defense, it would show that any injuries and damages sustained by the Plaintiffs were due to and caused by an unavoidable accident that was unforeseeable or unpreventable.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE IT ALLEGES
(Reservation and Non-Waiver)

23. It reserves any and all applicable affirmative defenses as they become apparent during the course of discovery and litigation of this matter.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THIS DEFENDANT
ALLEGES
(Comparative Negligence)

24. Further answering the Plaintiff's Complaint and as an affirmative defense, it would show that pursuant to the doctrine of comparative negligence, the negligence and/or recklessness of the Plaintiff was greater than any negligence which may be established against the Defendant and therefore the Plaintiff is barred from recovery. It further alleges that any injury and damage

sustained by the Plaintiff were due to and caused by the negligence and/or willfulness of the Plaintiff combining, concurring and contributing with the negligence and/or willfulness if any on the part of the Defendant and that any amount of recovery award to the Plaintiff for the alleged injuries and damage shall be reduced by the Court based on the percentage of negligence and/or willfulness attributed to the Plaintiff.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THIS DEFENDANT
ALLEGES
(Negligence of a Third Party)**

25. Further answering the Plaintiff's Complaint and as an affirmative defense, it would show that any injuries and damages sustained by the Plaintiff were due to and caused by the sole negligent acts or omissions of some other person or persons other than the Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
(Insufficient Service of Process)**

26. It would show that the Plaintiff's service of process is insufficient and requests that this action be dismissed against it pursuant to SRCP 12(b)(4) and 12(b)(5).

Wherefore, having fully answered the allegations herein, this Defendant prays that this honorable Court:

- a) dismiss Plaintiff's claims if they are without merit;
- b) award this Defendant costs in defending this action; and
- c) grant any other relief the Court and jury may deem just and proper

[Signature block on following page]

Respectfully submitted,


Alan Belcher, Esq. SC Bar No.: 71686
Paul Trainor, Esq., SC Bar No.: 101405
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
843-720-3471
Fax: 843-720-3472

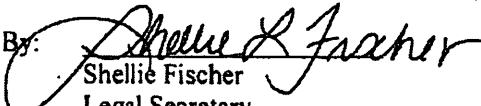
Charleston, South Carolina
Dated: April 17, 2015

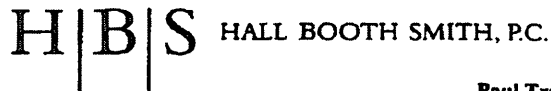
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th of April, 2015, a true copy of this
Answer For QBE Insurance Company as Potential Underinsured Motorist Carrier
Pursuant to SC Code Ann. § 38-77-160 on Behalf of Joseph Fields was served upon counsel
by mailing a copy properly addressed with sufficient postage affixed thereto as follows:

Daniel Slotchiver, Esq.
Slotchiver & Slotchiver, LLP.
44 State Street
Charleston, SC 29401

Attorney for Plaintiff

By: 
Shellie Fischer
Legal Secretary



Paul Trainor | 40 Calhoun Street, Suite 550
P: 843-720-3460 | Charleston, SC 29401
E: ptrainor@hallboothsmith.com | W: www.hallboothsmith.com
P: (843) 720-3460 F: 843-720-3458

April 17, 2015

VIA U.S. MAIL

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St Ste 106
Charleston, SC 29401-2210

Re: Gary Nestler and Julie Nestler v. Joseph E. Fields
Case No.: 2015-CP-10-330

Dear Ms. Armstrong:

Enclosed please find the original and one copy of *Answer for QBE Insurance Company as the Underinsured Motorist Carrier Pursuant to S.C. Code Ann. §38-77-160 On Behalf of Defendant Fields* in the above-referenced matter. Please file the original and return the clocked copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,


Shellie L. Fisher
Legal Secretary

/slf

Enclosure

cc: Daniel Slotchiver, Esq. (via U.S. Mail)

H|B|S HALL BOOTH SMITH, P.C.

Paul Trainor | 40 Calhoun Street, Suite 550
P: 843-720-3460 | Charleston, SC 29401
E: ptrainor@hallboothsmith.com | W: www.hallboothsmith.com
P: (843) 720-3460 F: 843-720-3458

April 22, 2016

VIA EMAIL AND U.S. MAIL

Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Re: Gary and Julie Nestler v. Joseph E. Fields
Case No.: 2015-CP-10-00330
HBS File No.: 6682.0023

Dear Dan:

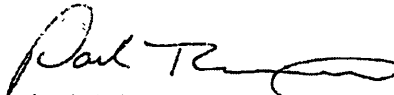
Please accept this correspondence as a formal withdrawal of various affirmative defenses asserted in QBE North America's Answer. At this time, QBE formally withdraws the following affirmative defenses:

- (1) Sudden emergency;
- (2) Unavoidable accident;
- (3) Comparative negligence;
- (4) Negligence of a third party; and
- (5) Insufficient service of process

If you require us to file an Amended Answer reflecting these withdrawals, please advise us whether you will consent to filing the same.

If you have any questions regarding this matter, please do not hesitate to contact our office.

Sincerely,



Paul Trainor

PT

cc: Julie Armstrong, Clerk of Court, Charleston County
The Honorable Roger M. Young, Sr. (via e-mail only)

CHARLESTON | ALLEN LEX BRENSWOLD, LLC | 1000 ...

USLAW

R. 031

HALL, BOOTH, SMITH, P.C.



Alan Belcher, SC Bar No. 771686
Paul Trainor, SC Bar No. 101405
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
843.720.3460 Telephone

Email: abelcher@hallboothsmith.com
ptrainor@hallboothsmith.com

APPEARING ON BEHALF OF QBE
INSURANCE COMPANY PURSUANT TO S.C.
CODE ANN. §38-77-160

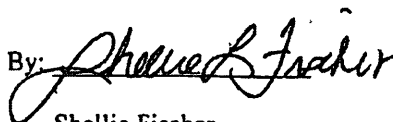
Charleston, South Carolina
November 10, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th of November, 2015, a true copy of this **UIM Carrier QBE Insurance Company's Offer of Judgment to Plaintiff** was served upon counsel by mailing a copy properly addressed with sufficient postage affixed thereto as follows:

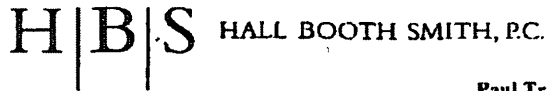
Daniel S. Slotchiver, Esq.
44 State Street
Charleston, SC 29401
843-5776531

Counsel for Plaintiff

By: 

Shellie Fischer
Legal Secretary

R. 033



Paul Trainor | 40 Calhoun Street, Suite 550
P: 843-720-3460 | Charleston, SC 29401
E: ptrainor@hallboothsmith.com | W: www.hallboothsmith.com
P: (843) 720-3460 F: 843-720-3458

April 17, 2015

VIA U.S. MAIL

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St Ste 106
Charleston, SC 29401-2210

Re: Gary Nestler and Julie Nestler v. Joseph E. Fields
Case No.: 2015-CP-10-330

Dear Ms. Armstrong:

Enclosed please find the original and one copy of **UIM Carrier QBE Insurance Company's Offer of Judgment to Plaintiff for \$40,000.00** in the above-referenced matter. Please file the original and return the clocked copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,

Shellie L. Fischer
Legal Secretary

/s/f

Enclosure

cc: Daniel Slotchiver, Esq. (via U.S. Mail)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER and JULIE NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS

Defendant.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2015-CP-10-00330

) UIM CARRIER QBE NORTH
) AMERICA'S NOTICE OF MOTION
) AND MOTION FOR SETOFF

2016 JUN - 1 PM 2:41
JULIE J. ARISTON
CLERK OF COURT

FILED

PLEASE TAKE NOTICE that QBE North America ("QBE") as Underinsured Motorist Carrier in the above-referenced matter, hereby moves for an Order pursuant to Rule 58, SCRCP, to apply a setoff in the amount of \$25,000.00, and to immediately mark the judgment as satisfied.

PROCEDURAL HISTORY

This action stems from a motor vehicle accident in Charleston County on March 8, 2014. After the accident, Defendant's liability carrier, GEICO, tendered \$20,000 of its \$25,000 liability limits in exchange for a Covenant Not to Excute in favor of Defendant. At that time, the undersigned made an appearance on behalf of QBE and assumed the defense of this matter.

This action was tried by a jury in Charleston County on April 25 and 26, 2016. At the conclusion of the trial, the jury rendered a verdict for \$7,117.50. Presiding Judge Young granted the parties ten (10) days to submit all post-trial motions, creating a deadline of May 6, 2016.

LEGAL ARGUMENT

"The very definition of UIM insurance mandates a set-off." Broome v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). (relying on S.C. Code Ann. § 38-77-160). Setoff is statutorily mandated, and allows the UIM Carrier to offset any funds paid by a defendant's

liability carrier. See id. at 342, 461 S.E.2d at 49. Moreover, "[t]he UIM statute does not require payment of the applicable policy limits as a precondition to collecting UIM benefits; however, the UIM carrier is entitled to a credit for any amount of liability coverage not exhausted in settlement." Kizer v. Kinard, 361 S.C. 68, 71, 602 S.E.2d 783, 785 (Ct. App. 2004) (citing Cobb v. Benjamin, 325 S.C. 573, 589, 482 S.E.2d 589, 597 (Ct. App. 1997)). In short, a UIM carrier is entitled to offset a judgment by a defendant's full liability limits, whether or not the liability funds were exhausted.

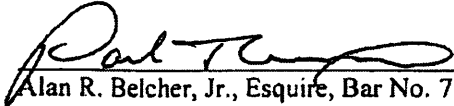
CONCLUSION

Based on the foregoing, QBE, as underinsured motorist carrier, is entitled to offset the verdict and subsequent judgment by \$25,000. The jury returned a verdict for \$7,117.50, and QBE respectfully requests this Court to mark the judgment as immediately satisfied from payments made by Defendant's liability carrier, GEICO.

Additionally, QBE reserves the right to file any additional post-trial motions, including those enforcing its Offer of Judgment filed November 16, 2015, and any other post-trial motions permitted by the South Carolina Rules of Civil Procedure, within the aforementioned time period.

[Signature block to follow]

HALL, BOOTH, SMITH, P.C.


Alan R. Belcher, Jr., Esquire, Bar No. 71686
Paul B. Trainor, Esquire, Bar No. 101405
40 Calhoun Street, Suite 550
Charleston, SC 29401
Telephone: (843) 720-3460
Facsimile: (843) 720-3458
abelcher@hallboothsmith.com
ptrainor@hallboothsmith.com

The 27 day of April, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **QBE North America's Notice of Motion and Motion for Setoff** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

This 4th day of May, 2016.

HALL, BOOTH, SMITH, P.C.

By: Veronica Ramirez
Veronica Ramirez
Legal Secretary to Paul Trainor
vramirez@hallboothsmith.com

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER and JULIE NESTLER,

☒ Plaintiff

v.

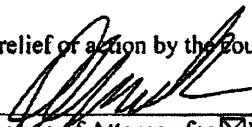
Joseph E. Fields.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2015-CP-10-0330

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Daniel S. Slotchiver, Bar No. 15129 Address: 44 State St., Charleston, SC 29401 phone: 843-577-6531 fax: 843-577-0261 e-mail: dan@slotchiverlaw.com other:		Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Post-Trial Motion Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☒ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief of action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		May 6, 2015 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

R. 039

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER and JULIE NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) CASE NO.: 2015-CP-10-00330

) NOTICE OF MOTION AND MOTION
) FOR NEW TRIAL ABSOLUTE

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2016 MAR 10 PM 1:59
JULIE E. ARMSTRONG
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that the above-named Plaintiff, Gary Nestler, by and through their undersigned attorney and pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, will move before Judge Roger Young of the Charleston County Court of Common Pleas, at such time, date and place as counsel may be heard, on the tenth day after service hereof for an Order granting Plaintiff's Motion for New Trial Absolute. This motion is made on the following grounds:

1. In the present action, Defendant admitted liability, and therefore, the only issue before the jury was causation and damages.
2. During the trial, Plaintiff proffered testimony regarding the past, present, and future damages sustained by Plaintiff as a direct and proximate cause of Defendant's negligence.
3. Plaintiff and Plaintiff's wife testified to Plaintiff's pain and suffering, mental anguish, loss of enjoyment of life, diminished capacity, and the injurious effects of Defendant's negligent conduct on Plaintiff both past, present, and future.
4. Plaintiff presented evidence by way of his treating physician regarding causation, as well as damages sustained, as well as the nature, extent, and frequency of medical treatment received by the Plaintiff in connection with this accident.

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R. 040

5. Further, Plaintiff's treating physician testified that there was no additional medical treatment available which would cure Plaintiff's injuries; thus Plaintiff would continue to suffer the same damages in the future.
6. Plaintiff's treating physician also testified as to Plaintiff's permanent impairment, giving the Plaintiff an overall permanent impairment rating of fifty-three (53%) percent.
7. Defendant argued that Plaintiff failed to mitigate their damages, yet failed to offer any expert testimony which would support their argument that Plaintiff's failure to obtain certain medical treatment(s) was the direct and proximate cause of Plaintiff's damages.
8. Prior to the commencement of trial Plaintiff notified the Counsel for the Defendant that they would not be seeking reimbursement for medical expenses in their prayer for relief, and Plaintiff did not include the medical expense in their case in chief.
9. However, Defendant introduced Plaintiff's medical bills and expenses into evidence over Plaintiff's objection to their relevance pursuant to Rule 401, S.C.R.E. as the amount of the medical bills did not have any tendency to make any material fact more or less probable.
10. Plaintiff also objected that the introduction of the medical bills would likely confuse the issues before the jury pursuant to Rule 403, S.C.R.E.; and that such evidence was cumulative and unnecessary in light of the introduction of Plaintiff's medical records and the testimony of the treating physician pursuant to Rule 402, S.C.R.E.
11. During closing arguments, Counsel for the Defendant made repeated insinuations to the jury that Plaintiff was trying to hide their medical bills in an attempt to cast

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dispersion on Plaintiff and their choice not to include these bills as damages claimed.

12. During juror deliberations, the jury returned a single question to the trial judge, requesting the exact amount of the Plaintiff's medical bills.
13. After trial on this matter, the jury returned a verdict in favor of the Plaintiff in the exact amount of the medical bills indicating that the jury believed the medical treatments received by Plaintiff were reasonable and necessary.
14. However, the jury failed to make any award damages actually claimed by the Plaintiff, including past, present, and future pain and suffering, mental anguish, loss of enjoyment of life, and diminished capacity.
15. Accordingly, there was no evidence in the record proffered by the Plaintiff to support the award by the jury for medical bills when they were not claimed as damages, and further, when there was no causational evidence regarding Plaintiff's failure to mitigate damages.
16. Finally, it appears that the jury's award was motivated by an improper purpose in awarding these damages based upon Defendant's introduction of same, and the arguments made during closing that Plaintiff had attempted to "hide" these bills from the jury.
17. Under the "thirteenth juror" doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the fact. *See, Gastineau v. Murphy*, 323 S.C. 168, 181, 473 S.E.2d 819, 827 (Ct. App. 1996); *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975).
18. The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a

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new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

19. Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993).
20. Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). *See also*, *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).
21. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. *See, Cock-n-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996); *McCourt by and Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993);
22. Our State's courts have held as a matter of law that where a jury has found Plaintiff's medical expenses to be reasonable and necessary, they are required to award pain and suffering, and may not simply award just the exact amount of the medical bills. *See, generally, Howard v. Roberson*, 376 S.C. 143, 157, 654 S.E.2d 877, 884 (Ct. App. 2007), *See, also, Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911

(Ct. App. 2000) (award damages for pain and suffering is grounds for a new trial *nisi addatur*).

23. The jury's verdict of damages not claimed by Plaintiff indicate that this verdict is inconsistent and reflects the jury's confusion and/or an award based upon an improper motive.
24. Further, assuming *in arguendo*, awarding the medical expenses introduced by Defense counsel was actually proper, the jury's verdict in the exact amount of medical bills fails as a matter of law when it fails to include an award for non-economic damages claimed by plaintiff. *See, generally, Waring*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000).

WHEREFORE, the Plaintiff, Gary Nestler, respectfully and humbly prays this honorable Court to enter an Order for a new trial absolute based upon the foregoing factual and legal basis as stated herein, along with any other further such arguments, memoranda, evidence and the like which may be submitted at the request of the Court, or as the interests of justice may so require. Finally, Plaintiff affirms pursuant to Rule 11, S.C.R.C.P. that no consultation is required to be made with opposing counsel regarding the instant motion and/or such consultation would serve no useful purpose.

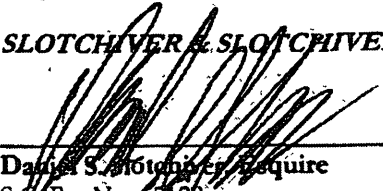
[SIGNATURE CONTAINED ON THE FOLLOWING PAGE]

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R. 044

Respectfully Submitted,

SLOTCHIVER & SLOTCHIVER, LLP



Daniel S. Slotchiver, Esquire

S.C. Bar No. 15129

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Telephone: (843) 577-6531

Facsimile: (843) 577-0261

dan@slotchiverlaw.com

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina

Thursday, May 5, 2016

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R. 045

FILED

2016 JUN -1 PM 4:36

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-00330

GARY NESTLER and JULIE NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS,

Defendant.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
NEW TRIAL ABSOLUTE**

The Plaintiff, Gary Nestler, by and through their undersigned attorney submits their Memorandum in Support of Plaintiff's Motion for New Trial Absolute.

Nature of the Case

On or about January 15, 2015, Plaintiff filed the above-styled action in the Charleston County Court of Common Pleas for the Ninth Judicial Circuit claiming damages arising from an automobile collision with the Defendant. Plaintiff alleged that the Defendant operated his vehicle in a careless, negligent, and reckless manner, and with the willful and wanton disregard for the safety of others. This matter came before the Court by way of a jury trial on or about April 25 and 26, 2016. Defendants admitted their negligence in connection with the collision, and the only issues at trial were causation and damages. Plaintiff claimed damages in the form of noneconomic damages, including past, present, and future pain and suffering, loss of enjoyment of life, diminished capacity, and mental anguish. At the conclusion of the trial, the jury returned a verdict in favor of the Plaintiff in the amount of \$ 7,117.50. The Court allowed all parties ten (10) days to submit all post-trial motions, and Plaintiff filed the present Motion for New Trial Absolute, pursuant to Rule 59, SCRPC.

Brief Reply to Defendant's Legal Arguments

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R. 046

Plaintiff hereby incorporates their previously cited legal basis for their motion, including all authority cited in same.

Defendant first contends that the “grounds for [Plaintiff’s motion] require this Court to improperly weigh (sic) evidence and evaluate credibility.” See, *Defendant’s Memorandum in Opposition to Motion for New Trial*, at p. 2. Defendant then, however, proceeds to engage in the very same exercise from which he argues the Court should abstain. See, *Id.* at pp. 2-3 (It was “made apparent at trial that Julie Nestler had an incentive to testify in favor of her husband” and “it is unquestioned that Plaintiff has an incentive to testify in favor of himself”; “Plaintiff’s credibility was significantly compromised” and “Dr. Schoderbek [cast] doubt on his [own] credibility.”) Defendant cannot have it both ways—telling the Court that they have no right to make determinations as to credibility, and then to simultaneously tell the Court what the jurors were thinking when they made their deliberations.

Defendant has introduced no evidence, affidavits, or the like which in any way support the contention that the jurors assembled on April 26, 2016 made any of the above-stated determinations regarding credibility and bias. Defendant has simply proffered unfounded, unsupported assertions in support his position to justify the verdict. Rather than turning to speculation as to the content of the hearts and minds of the jurors, this Court should instead focus on the factual basis as presented in Plaintiff’s motion. Specifically, that the only question asked by the jury during deliberations was the exact amount of the medical bills. The jury then returned an award in the exact amount provided to it by the Court. There is no question, and nothing contained in any of Defendant’s arguments, which suggests that this award represents anything but damages in the form of personal medical expenses. The question before the Court however, is whether such an award is even proper under the laws of this state.

Defendant’s second argument is that a jury can award damages in any amount they find appropriate—an assertion wholly unsupported at law. Juries are instructed prior to their deliberations

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as to what damages are proper to award, and what factors they may consider. Most notable to the present action is that the Plaintiff is not claiming damages in the form of medical bills. Accordingly, any award for damages not claimed by Plaintiff are a clear indicator that the jury was confused as to what it was to properly consider when awarding damages in the present matter.

Defendant argues that there is no "basis to support Plaintiff's contention that the medical bills constituted cumulative or unnecessary evidence" because the verdict suggests that the jury found "only Plaintiff's medical expenses as proximately resulting from Defendant's negligence." *Id.* at 4. Defendant misses the entire thrust of Plaintiff's argument—the jury never should have considered these medical bills. Plaintiff can think of nothing which is more exemplary of an "arbitrary and capricious" award than to allow a jury to decide what damages Plaintiff should have claimed, and then to award them that amount.

Defendant fails asserts that the bills were necessary to show "a lack of meaningful treatment," yet has failed to explain what, if anything, the medicals bills showed that was not already shown through the introduction of Plaintiff's medical records and the testimony of Dr. Schroderbeck. Defendant's entire closing arguments regarding the "lack of meaningful treatment" focused solely around the notations in Plaintiff's records regarding failure to attend therapy, and the testimony of Plaintiff's treating doctors. Therefore, the medical bills were unnecessarily repetitious and cumulative. Further, they confused the jury by putting information before them that should not have been considered—the cost of medical treatment. Defendant has provided no basis for the relevance of including the dollar figures associated with Plaintiff's treatment, and has failed to provide any basis which rebuts the fact that the jury awarded unclaimed damages.

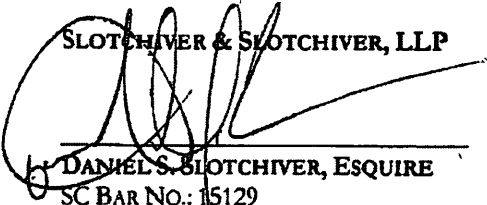
Conclusion

Defendant's memorandum has failed to provide this Court with any real, substantive basis for its position that this was a proper award. The jury made an award which was clearly the product of an improper consideration — the amount of Plaintiff's medical bills. Accordingly, based upon these

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arguments, and the arguments proffered in Plaintiff's motion, Plaintiff would respectfully request that the Court GRANT Plaintiff's Motion for New Trial.

Respectfully Submitted this 1st day of June, 2016.


SLOTCHIVER & SLOTCHIVER, LLP

DANIEL S. SLOTCHIVER, ESQUIRE

SC BAR NO.: 15129

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CHARLESTON, SOUTH CAROLINA 29401

(843) 577-6531 (PHONE)

(843) 577-0261 (FAX)

DAN@SLOTCHIVERLAW.COM

ATTORNEY FOR PLAINTIFFS

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R. 049

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER and JULIE
NESTLER,

Plaintiffs,

vs.

JOSEPH E. FIELDS,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-10-00330

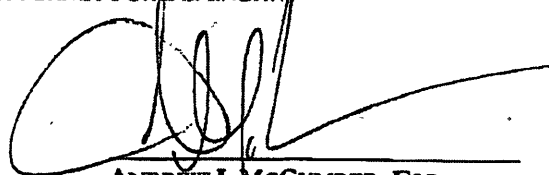
CERTIFICATE OF SERVICE

FILED
2016 JUN -1 PM 36
JULIE J. NESTLING
CLERK OF COURT

The undersigned hereby certifies that a true copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL ABSOLUTE** was served upon the following parties on the 1st day of June, 2016, via:

☒	UNITED STATES POSTAL SERVICE
☐	FACSIMILE
☒	ELECTRONIC MAIL

PAUL B. TRAINOR, ESQUIRE
HALL BOOTH SMITH, PC
40 CALHOUN STREET, SUITE 550
CHARLESTON, SC 29401
EMAIL ADDRESS: PTRAINOR@HALLBOOTHSMITH.COM
ATTORNEY FOR DEFENDANT



ANDREW J. McCUMBER, ESQ.
LITIGATION ASSOCIATE
SLOTCHIVER & SLOTCHIVER, LLP

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&
SLOTCHIVER,
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29401-2810

R. 050

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-330

Gary and Julie Nestler,

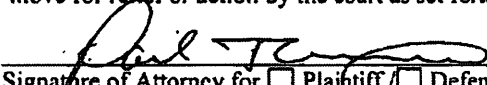
Plaintiff,

vs.

Joseph Fields,

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Daniel S. Slotchiver, Bar No. ____ Address: 44 State Street, Charleston, SC 29401 Phone: 843-577-6531 Fax ____ E-mail: dan@slotchiverlaw.com Other: ____		Defendant's Attorney: Paul Trainor, Bar No. 101405 Address: 40 Calhoun St., Ste 550, Charleston, SC 29401 Phone: 843-720-3460 Fax 843-720-3458 E-mail: ptrainor@hallboothsmith.com Other: ____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Costs Pursuant to Offer of Judgment Estimated Time Needed: ____ Court Reporter Needed: ☐ YES ☒ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☐ Defendant		5/6/16 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ____ ☐ Other: ____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: ____		JUDGE CODE ____ Date: ____	
CLERK'S VERIFICATION			
Collected by: ____ Date Filed: ____ ☐ MOTION FEE COLLECTED: \$ ____ ☐ CONTESTED - AMOUNT DUE: \$ ____			

SCCA 233 (11/2003)

R. 051

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2015-CP-10-00330
GARY NESTLER and JULIE NESTLER,	)	
	)	
Plaintiffs,	)	UIM CARRIER QBE NORTH
	)	AMERICA'S NOTICE OF MOTION
vs.	)	AND MOTION FOR COSTS
	)	PURSUANT TO OFFER OF
JOSEPH E. FIELDS	)	JUDGMENT
	)	
Defendant.	)	

FILED
MAR-6 PM 2:41
JUDGE ARSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that QBE North America ("QBE") as Underinsured Motorist Carrier in the above-referenced matter, hereby moves for an Order pursuant to Rule 68, SCRCF and S.C. Code Ann. § 15-35-400, for an award of costs pursuant to QBE's Offer of Judgment filed on November 16, 2015.

PROCEDURAL HISTORY

The undersigned was retained on or about April 20, 2015 by QBE, as Underinsured Motorist Carrier, to assume the defense of Defendant Joseph Fields in the above-styled action. Thereafter, on November 16, 2015, the undersigned, on behalf of QBE, filed an Offer of Judgment pursuant to Rule 68, SCRCF in the amount of \$40,000.00, offering Plaintiffs to take judgment against Defendant and QBE in the amount of \$15,000 in UIM funds, after application of the statutory setoff of \$25,000. Plaintiffs failed to accept this offer within twenty (20) days, and therefore the offer expired on December 6, 2015.

This matter was tried before a jury before this Court on April 25 and 26, 2016, at which time the jury rendered a verdict in the amount of \$7,117.50. At the time, this Court allowed the parties ten (10) days to submit all post-trial motions.

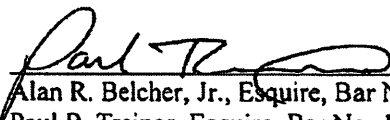
REQUEST FOR COSTS

Plaintiffs failed to obtain a verdict and subsequent judgment in excess of QBE's expired Offer of Judgment. Pursuant to Rule 68, SCRCP and S.C. Code Ann. § 15-35-400, QBE is entitled to all costs associated with defending this action. The total recoverable costs by QBE after December 6, 2015 is \$1,313.11. The undersigned hereby incorporates fully by reference the *Affidavit of Attorney Paul Trainor Pursuant to QBE's Offer of Judgment* itemizing each recoverable cost.

As such, QBE respectfully requests this Court to issue an Order requiring Plaintiffs to pay QBE \$1,313.11 for recoverable costs incurred after the expiration of QBE's Offer of Judgment.

Respectfully submitted,

HALL, BOOTH, SMITH, P.C.


Alan R. Belcher, Jr., Esquire, Bar No. 71686
Paul B. Trainor, Esquire, Bar No. 101405
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Telephone: (843) 720-3460
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abelcher@hallboothsmith.com
ptrainor@hallboothsmith.com

The 6 day of May, 2016
Charleston, South Carolina

R. 053

2015-CP-10-330

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of QBE North America's Notice of Motion and Motion for Costs Pursuant to Offer of Judgment upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

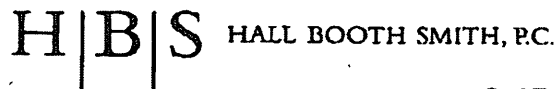
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

This 10th day of May, 2016.

HALL, BOOTH, SMITH, P.C.

By: Veronica Ramirez
Veronica Ramirez
Legal Secretary to Paul Trainor
vramirez@hallboothsmith.com

FILED
2016 MAY -6 PM 2:41
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____



Paul Trainor
P: 843-720-3460
E: ptrainor@hallboothsmith.com

40 Calhoun Street, Suite 550
Charleston, SC 29401
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May 6, 2016

VIA HAND-DELIVERY

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401-2210

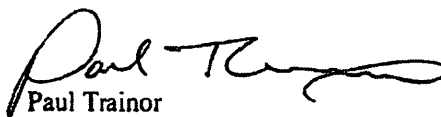
Re: Gary and Julie Nestler v. Joseph E. Fields
Case No.: 2015-CP-10-00330
HBS File No.: 6682.0023

Dear Ms. Armstrong:

Enclosed please find an original and one copy of the UIM Carrier QBE North America's Notice of Motion and Motion for Costs Pursuant to Offer of Judgment, Affidavit of Attorney Paul Trainor for Costs Pursuant to QBE North America's Offer of Judgment. Also enclosed is a proposed Order Granting the UIM Carrier QBE North America's Motion for Costs. If the Order meets Judge Young's approval, please have him sign the same, file the original Motion and Order, and return clocked copies to me in the enclosed self-addressed envelope I have provided.

By copy of this correspondence to opposing counsel, I am serving him with a copy of the Motion and Order. Thank you in advance for your assistance.

Sincerely,



Paul Trainor

PT/vr

Enclosures

cc: Daniel S. Slotchiver, Esq.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2015-CP-10-0330

Joseph E. Fields,

Respondent,

v.

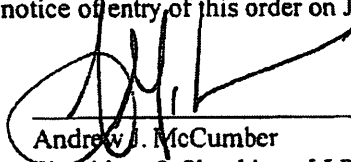
Gary Nestler and Julie Nestler.

Appellants.

NOTICE OF APPEAL

Gary Nestler and Julie Nestler appeal the Order of the Honorable Roger M. Young, Sr. dated July 7, 2016. Appellants received written notice of entry of this order on July 7, 2016.

July 22, 2016



Andrew J. McCumber
Slotchiver & Slotchiver, LLP
44 State Street
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(843) 577-6531
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FILED
2016 JUL 26 PM 2:32
JULIE J. ARMSTRONG
CLERK OF COURT

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July 22, 2016

VIA REGULAR MAIL

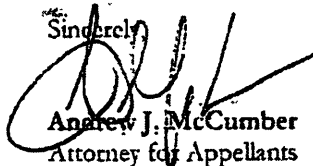
THE HONORABLE JULIE ARMSTRONG
CLERK OF COURT FOR CHARLESTON COUNTY
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2210

RE: Joseph E. Fields, Respondent v. Gary Nestler and Julie Nestler, Appellant
Case No.: 2016-CP-10-0330

Dear Ms. Armstrong:

Enclosed for filing is a notice of appeal in the above case. By copy of this letter I am serving same upon all counsel of record.

Sincerely,



Andrew J. McCumber
Attorney for Appellants

AJM/ssh
Enclosure (as stated)

cc: Paul B. Trainor, Esquire (Attorney for Respondent)
40 Calhoun Street, Suite 550
Charleston, SC 29401

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO.: 2015-CP-10-00330

GARY NESTLER)

PLAINTIFF(S))

v.)

TRANSCRIPT OF RECORD

JOSEPH E. FIELDS)

DEFENDANT(S))

Certified Original

Monday, April 25, 2016 - Tuesday, April 26, 2016

COMMENCING AT:

Charleston County Courthouse

Charleston, South Carolina

Before The Honorable Roger M. Young, Sr. , Judge

APPEARANCES:

For the Plaintiff:

Daniel Scott Slotchiver, Esquire

Slotchiver & Slotchiver, LLP

44 State Street

Charleston, South Carolina 29401

For the Defendant:

Paul Trainor, Esquire

Alan Belcher, Esquire

Hall Booth Smith, P.C.

40 Calhoun Street, Suite 550

Charleston, South Carolina 29401

Heather R. Landry, CVR
Official State Reporter

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(Appeared by video deposition; the transcript was marked as Plaintiff's Exhibit No. 3 for identification.)

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1 (Pretrial motions begin on April, 25, 2016 at 11:11
2 a.m.)

3 THE COURT: Everybody here to draw a jury?

4 MR. TRAINOR: Yes, Your Honor.

5 THE COURT: Anything we need to take up before these
6 folks come in?

7 MR. SLOTCHIVER: Judge, the only thing that I would ask
8 is that if Alan is going to sit at the table, I'd ask the he
9 list it as defense counsel also, even if he's not going to
10 be asking ---

11 MR. TRAINOR: It will under the name, everyone in our
12 firm, if that makes it easy.

13 MR. SLOTCHIVER: And then there is the issue of Julie
14 Nestler. We are prepared to withdraw the lost of consortium
15 claim but provided that we don't get beat over the head that
16 we're withdrawing it. If we are going to get beat over the
17 head about withdrawing it, we'll keep it in.

18 THE COURT: Do you plan on beating him over the head?

19 MR. TRAINOR: Yeah. No, that's fine. As long as we,
20 can put that on the record. And think the same goes for our
21 affirmative defenses.

22 THE COURT: So you wont' mention it?

23 MR. TRAINOR: Yes, Your Honor.

24 THE COURT: All right.

25 MR. SLOTCHIVER: Well, as to the defenses, we would

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1 like to address that to the Court.

2 THE COURT: What?

3 MR. SLOTCHIVER: Well, there were defenses that were
4 plead in the case including subversity (ph). You heard that
5 ---

6 THE COURT: You're admitting liability, aren't you?

7 MR. TRAINOR: Yeah. And I said I would withdraw ---

8 THE COURT: --- damages?

9 MR. TRAINOR: I sent him a withdraw, Mr. Slotchiver and
10 the Court, and a DUI enhancement. But we are admitting
11 liability.

12 THE COURT: So it's just about damages?

13 MR. SLOTCHIVER: And -- yes.

14 THE COURT: So it's no defenses.

15 MR. SLOTCHIVER: Okay.

16 THE COURT: And I'll just tell the jury you've admitted
17 it; your client was at fault. This is just to determine the
18 amount, if any, of damages.

19 MR. SLOTCHIVER: Yes, sir.

20 THE COURT: Okay.

21 MR. SLOTCHIVER: And we plead actual and punitive
22 damages.

23 THE COURT: And what?

24 MR. SLOTCHIVER: We plead actual and punitive damages.

25 THE COURT: Okay. Anything else?

1 MR. TRAINOR: No, Your Honor.

2 THE COURT: Well, we're moving pretty quick. Do you
3 guys want to, after we pick the jury, break for lunch? Or
4 do you want to make your openings? Or do you want to start
5 fresh after lunch?

6 MR. SLOCHIVER: I prefer to break for lunch and start
7 fresh.

8 THE COURT: All right. Okay. Do they have a panel out
9 there for us yet?

10 THE CLERK: I haven't brought them up yet.

11 THE COURT: Pardon?

12 THE CLERK: I have not brought them up yet.

13 THE COURT: Bring them up.

14 MR. SLOCHIVER: There's some other pretrial motions
15 that's involved. Maybe we can hear them?

16 THE COURT: We'll do those after we draw a jury.

17 MR. SLOCHIVER: Okay.

18 (The jury panel enters the courtroom at 11:18 a.m. and
19 the jury selection process begins. This portion of the
20 record was excluded at the request of the ordering
21 party.)

22 (The proceeding resumed at 1:46 p.m.)

23 THE COURT: All right. What pretrial motions are left?
24 Or readdressed?

25 MR. TRAINOR: I think we've already addressed most of

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1 them. I just wanted to, I guess, clarify on what we have
2 about whether drawing loss of consortium claim and the
3 affirmative defenses. I don't know that -- I think -- are
4 y'all still withdrawing that?

5 MR. SLOTCHIVER: We are.

6 MR. TRAINOR: Okay.

7 THE COURT: Okay.

8 MR. TRAINOR: Your Honor, other than that, I think it's
9 pretty straight forward. I'm not trying to -- it's a
10 straight up trial, I think.

11 THE COURT: Okay. No mentions of insurance.

12 MR. TRAINOR: Correct.

13 THE COURT: Be sure you let your clients know. If
14 they're called to testify, they're not to mention insurance.

15 MR. SLOTCHIVER: Yes, sir. And I want to ask you about
16 that since you brought that up. I don't know if you've done
17 this. I know that Judge Dennis and Judge Jefferson and
18 Judge and Judge Harrington have all given charges. And I
19 submitted one to you for your consideration basically
20 telling the jury that the elephant in the room is insurance.
21 And I just want to tell you how the insurance, liability
22 insurance, is still insurance, don't worry about that.
23 We've got it covered. And I bring that up to you for two
24 reasons. Number one, I submitted it to you because it's
25 being used throughout the State. Number two, is because so

1 many people in the courtroom today brought up insurance. In
2 all the years I've tried cases, I've never seen that ---

3 THE COURT: Do you have a jury charge on that?

4 MR. TRAINOR: I don't have a paper copy, no.

5 THE COURT: Huh?

6 MR. TRAINOR: I do not have a paper copy ---

7 THE COURT: Who did you submit it to? I don't have it.

8 LAW CLERK: I did receive it, I don't have a paper copy
9 of that jury charge.

10 THE COURT: Well, I need to see it. So e-mail it to me
11 or something because I don't know what he's referring to.

12 MR. SLOCHIVER: May I approach?

13 THE COURT: Yeah.

14 (Brief pause.)

15 THE COURT: Have you seen this?

16 MR. TRAINOR: Yes, Your Honor.

17 THE COURT: What are your thoughts?

18 MR. TRAINOR: I prefer not to have it. I don't know
19 where that came from or who wrote it generally. I think
20 these charges are quotes from cases or statutes. I
21 understand that it's a movement across the country to make
22 those charges. I just don't think it's appropriate right
23 now. I don't who wrote that. I don't know where it came
24 from.

25 MR. SLOCHIVER: Your Honor, I got it from Jeffrey

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1 Bellinger (ph) who has tried in other cases. And the reason
2 I thought it was relevant is because it's true; it really is
3 an elephant in the room. About a the third of the people
4 stood up and mentioned insurance claims. And it's just from
5 a fairness perspective just to say, "Don't worry about that.
6 Your job is to determine what are the damages." That's it.

7 THE COURT: Well, I don't know of any authority about
8 charging them at the beginning of the trial. I have one
9 that I used -- uses basically the same kind of thing that if
10 they come back during jury deliberations and say something
11 about insurance or if in anyway there's a reference to
12 insurance during the trial, I give it at that point. And it
13 basically says, you know, you've heard about insurance or
14 your question indicates you're talking about insurance,
15 please don't; there's lots of different types of coverage.
16 It doesn't matter if there is coverage; that has nothing to
17 do with liability. And just because somebody has insurance
18 doesn't mean it necessarily covers this. So I won't charge
19 it at the beginning. But if there's some indication that
20 they're talking about it or it comes up then I've got that
21 covered.

22 MR. SLOTCHIVER: Okay.

23 THE COURT: All right. What else?

24 MR. TRAINOR: I have it in my motions, it's my
25 understanding that Nestler's daughter was in car as well.

1 She may have been injured to some extent. Her case did
2 settle. I have a motion to any reference or mention to
3 those potential injuries, printing pictures of those
4 injuries, are not appropriate for this trial. She's
5 obviously not a party to this case.

6 THE COURT: Of the child?

7 MR. TRAINOR: Yes.

8 THE COURT: Were you planning on showing any?

9 MR. SLOTCHIVER: I wasn't planning on showing any
10 photographs of her, Your Honor. I was going to mention the
11 fact that she was in the vehicle.

12 THE COURT: Well, as long as you don't mention that she
13 was hurt.

14 MR. SLOTCHIVER: Well, even the defendant himself was
15 hurt in the case. But I think ---

16 THE COURT: But whether she got hurt doesn't have
17 anything to do with whether or not your client got hurt.

18 MR. SLOTCHIVER: Well, it's just factual. But if you
19 don't want me to mention the fact that she was hurt, I won't
20 mention it. I just thought it was factual because of the
21 impact that occurred. One of the things that we've dealt
22 with over the years is an argument that there's no mechanism
23 for injury; somebody couldn't be hurt. I wasn't planning to
24 put her medical bills; I wasn't planning to have her
25 testify. But he was transported to the hospital. His

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1 daughter was transported to the hospital ---

2 THE COURT: But the danger is is that they feel sorry
3 for them because of their child and on some level want to
4 compensate for the child's injury even though the child is
5 not a party and has settled out. So I think there's a risk
6 to that. I'll exclude references to the child.

7 MR. SLOTCHIVER: To the child's injuries or to the
8 child at all?

9 THE COURT: Well, I don't know why you want to mention
10 the child unless you mention the child's injury, but
11 specifically to the child's injuries.

12 MR. SLOTCHIVER: Okay.

13 THE COURT: Okay?

14 MR. SLOTCHIVER: Okay. I can still refer to the child
15 though and his -- the effect on his life that this injury
16 has had with reference to his interaction with his child?

17 THE COURT: Oh, for that, sure.

18 MR. SLOTCHIVER: Okay. Fair enough. Thank you.

19 THE COURT: All right.

20 MR. TRAINOR: Yeah. I put in a motion to bifurcate any
21 of those ---

22 THE COURT: Well, we only got two witnesses. Right?

23 MR. TRAINOR: Yeah, two.

24 THE COURT: It would probably take more time to
25 bifurcate it than it would to try it. Does that work?

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1 Let's just do it the old-fashioned way.

2 MR. TRAINOR: That's fine.

3 THE COURT: You got a doctor's testimony and I don't
4 know what else you have. And then you got the plaintiff
5 testifying again. Is the defendant coming back?

6 MR. TRAINOR: Yeah. I texted ---

7 THE COURT: Is he going to be testifying?

8 MR. TRAINOR: I don't know.

9 THE COURT: Okay.

10 MR. SLOTCHIVER: And, Your Honor, can we use
11 photographs in the opening? Is that okay with you? I don't
12 know you're ---

13 THE COURT: Well, if you agree that they are coming in.
14 Otherwise, I don't like to use any evidence until it becomes
15 evidence. If y'all agree to it, then fine. Otherwise, I
16 exclude it, no use of evidence until it's admitted.

17 MR. TRAINOR: I guess the last thing, Your Honor, is
18 Mr. Fields was served by publication at the beginning of
19 this lawsuit when a period of time of not being able to make
20 contact with him. I'd ask that that doesn't get brought up
21 (coughing in background) -- we're talking the plaintiff and
22 the defendant.

23 THE COURT: Do you have any reason to bring that up?

24 MR. SLOTCHIVER: I may.

25 THE COURT: Well, what -- what's the significance of

1 it?

2 MR. SLOTCHIVER: I will tell you the significance of
3 it. Your Honor, at one point the defendant gave sworn
4 testimony about the facts of the case. And that sworn
5 testimony was given just recently. If that becomes an issue
6 in some manner then it's relevant the reason he couldn't
7 have give it before to us is because he wasn't reachable.
8 Now, he may testify consistent if he takes the stand as to
9 what he said in which case it won't become an irate ---

10 THE COURT: As long as you don't bring up, oh, well
11 this case couldn't have been very important to you because
12 you didn't serve him for so long or whatever. I can't see
13 how it's relevant at all. So unless they open the door to
14 some kind of question that makes it relevant, it's
15 irrelevant.

16 MR. SLOTCHIVER: Okay.

17 THE COURT: Okay.

18 MR. TRAINOR: Thank you, Your Honor.

19 THE COURT: Anything else?

20 MR. TRAINOR: I do not believe so.

21 MR. SLOTCHIVER: None from the plaintiff.

22 THE COURT: I got a note from juror number 120,
23 Catherine Gallagher. It just got handed up before you guys
24 came back in. It says, "It has been brought to my attention
25 that the attorney for the plaintiff," that would be

1 Slotchiver, "is the brother of an individual represented by
2 the law office where I am employed." You got a brother
3 that's a lawyer?

4 MR. SLOTCHIVER: You know what? I haven't thought of
5 that. My brother Steve is a lawyer. He is the guardian for
6 little man in the James Brown case and appointed by the
7 Court. And Peter Shade is his court-appointed lawyer in
8 that case. And that would be what the connection would be.
9 I haven't even thought about that. But that's exactly what
10 it is.

11 THE COURT: So Peter Shade is representing somebody and
12 your brother works with Peter Shade?

13 MR. SLOTCHIVER: No, sir. My brother is a partner of
14 mine. My brother was appointed by the Court in the James
15 Brown lawsuit.

16 THE COURT: Okay.

17 MR. SLOTCHIVER: If you're familiar with it, all of the
18 estate for James Brown. He was appointed to be the lawyer
19 for little man, the little dude. They were arguing, they
20 call him little man. He was James Brown's youngest son.

21 THE COURT: Okay.

22 MR. SLOTCHIVER: When they appointed my brother Steve
23 to be the lawyer for little man, they also -- the Court also
24 appointed Peter Shade to be the lawyer for my brother in his
25 capacity as the guardian for little man.

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1 THE COURT: And so this lady works for Peter Shade?

2 MR. SLOCHIVER: Yes, sir. That would be the
3 connection. I don't know her.

4 THE COURT: I'll bring her in and ask her if that would
5 cause her to favor one way or the other.

6 MR. TRAINOR: Sure. That would be fine.

7 THE COURT: I can hardly make that out. Would you
8 bring number 120 in, please.

9 (Juror 120 is brought into the courtroom at 1:58 p.m.)

10 JUROR: Yes, sir.

11 THE COURT: Would you come around here a second.
12 You're Ms. Gallagher, Catherine Gallagher?

13 JUROR: Yes, sir.

14 THE COURT: I got your note and so I guess a question
15 that -- you work for Peter Shade?

16 JUROR: I do.

17 THE COURT: Okay. From what Mr. Slotchiver tells me,
18 his brother got appointed to represent someone known as a
19 little man in the James Brown litigation. And Peter
20 represents his brother who is the guardian.

21 JUROR: Steve is the guardian.

22 THE COURT: All right. Would that affect your ability
23 to be fair and impartial in this case either for or against
24 the plaintiffs or for or against the defense?

25 JUROR: No. I didn't even know he was the brother, but

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1 he does look like him. But, no.

2 THE COURT: Okay. All right. Thank you.

3 JUROR: I just wanted you to be aware of it.

4 THE COURT: Well, I appreciate you bringing that to our
5 attention. Thank you.

6 (Juror 120 exits the courtroom at 1:59 p.m.)

7 THE COURT: Is everybody okay with her staying on then?

8 MR. TRAINOR: Yes, Your Honor.

9 THE COURT: All right.

10 MR. SLOTCHIVER: Yes.

11 THE COURT: Anything else that we need to deal with?

12 MR. TRAINOR: I don't think so.

13 THE COURT: All right. You got -- your case is going
14 to be how many people testifying?

15 MR. SLOTCHIVER: Your Honor, we've got Gary Nestler,
16 Julie Nestler; we got the doctor's testimony and we may call
17 Mr. Fields.

18 THE COURT: Okay. All right. Well, we'll see where
19 that gets us today. And bring the jury in.

20 (The jury enters the courtroom at 2:01 p.m.)

21 THE COURT: All right, folks, welcome back. We'll
22 begin by having the clerk administer your oath to you. So
23 if you would, stand and raise your right hand.

24 (At 2:01 p.m. the jurors are duly sworn.)

25 THE COURT: All right. Thank you, folks. All right.

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1 Mr. Logan, number 205.

2 JUROR: Yes, sir.

3 THE COURT: I just appointed you the foreman of the
4 jury, all right?

5 JUROR: Thank you.

6 THE COURT: There's no extra pay involved. You just
7 write the verdict at the end, okay?

8 Okay, folks, let's begin by -- I'm just going to give
9 you a little overview of what we do. This is not a long
10 case. I anticipate that you will likely have it by
11 lunchtime tomorrow at the latest to do your deliberations.
12 But it's important to them. They have, you know, this
13 dispute. They haven't been able to resolve it, so they've
14 asked you to come and listen to it and then make a decision.

15 In a trial like this, in a civil case, the person who
16 brings the lawsuit is as I said is called the plaintiff.
17 The person who gets sued is the defendant. The plaintiff
18 has the burden of proof. When they bring a complaint, they
19 have to have prove what they allege. And so they have
20 alleged that there was this accident that took place and
21 Mr. Fields was at fault and should pay damages for the
22 injuries that they received as a result of the accident.
23 Mr. Fields has admitted that he is at fault in this case.
24 However, there is a dispute as the amount, if any, of
25 damages that should be paid in the case. And so they've

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1 asked you to resolve that. So you won't be hearing a lot of
2 evidence about the cause of the wreck. That has been
3 admitted. Most of the testimony that you'll hear will focus
4 on the medical issues and the damages that are a result of
5 that.

6 So burden of proof, that simply means the amount of
7 evidence that the side has to bring or show in order to
8 convince you that they should prevail in the case. The
9 burden of proof in a civil case is different than it is in a
10 criminal case. Maybe you served as a juror in a criminal
11 case and you got told then that when the State charges
12 somebody with a crime, then they have to prove that the
13 person committed the crime beyond a reasonable doubt. The
14 person doesn't have to prove that they're innocent. The
15 State has to prove they're guilty. And in a criminal case,
16 the burden of proof is substantial on the part of the State.
17 It's called beyond a reasonable doubt. Or stated another
18 way, it has to leave the jury firmly convinced of the
19 defendant's guilt before they can come back with a verdict
20 of guilty.

21 Well, in a civil case like this where it's a dispute
22 between two individuals, the burden of proof is not as high,
23 and the burden of proof that the plaintiff has to meet is
24 simply called a preponderance of the evidence. Or stated
25 another way, is whatever the party trying to prove more

1 likely true than not true, or sometimes called the greater
2 weight of the evidence. And if you're like me and a lot of
3 people are visual learners, you hear what I said but you go,
4 "I don't know what that means." And so a lot of times we
5 use the scales of justice that you see with Lady Justice out
6 there holding the weights in her hand. And so in this case
7 you would have the plaintiff in one hand, the defendant in
8 the other hand. We start out with the scales being even and
9 the greater weight or preponderance of the evidence simply
10 means the plaintiff has to tip the scale even if it's just
11 slightly in his favor that he met the burden of proof. On
12 the other hand, at the end of the trial, if you think the
13 scales are still even or maybe you think they tip in favor
14 of the defense, then the defendant is entitled to a verdict.
15 But if you feel like those scales tipped in favor of the
16 plaintiff, he has met the burden of proof and is entitled to
17 a verdict. And simply contrast that with a criminal case,
18 preponderance of the evidence means the State really has to
19 tip those scales a great deal. Well, it's not that it's
20 heavy or a bigger burden in a civil case.

21 Now, that the plaintiff gets to -- because they have
22 the burden of proof, they present their evidence first. And
23 so they'll get to call witnesses first, ask those witnesses
24 questions first. When a party calls a witness to the
25 witness stand and ask those questions, that's called direct

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1 evidence or direct examination. Then other side, though,
2 will get to ask questions and that's called
3 cross-examination. You've probably heard those words
4 before. And then I usually allow one follow-up round and so
5 we'll have direct, cross, redirect, recross, and then we
6 would move on to the next witness. So the plaintiff calls
7 their witnesses first, ask the questions of the witnesses
8 first. And then the defense will have the opportunity to
9 call any witnesses that they want to. But they're not
10 required to because, again, don't have a burden in this
11 case. They have admitted fault in causing the accident.
12 Again, this is simply about damages and how much, if any, is
13 owed in damages.

14 So the hardest part to sometimes remember about a
15 lawsuit is to keep an open mind until you've heard all of
16 the evidence. Because again, you're going to hear the
17 plaintiff's side first and then you'll hear anything that
18 the defendant wants to put up. But it's only until you've
19 heard all of the witnesses and you've seen all of the
20 evidence is it proper for you to begin your deliberations.
21 That's why whenever we take a break, I'll tell you, don't
22 begin deliberations or discussions about the case. And it's
23 really simple. It's a matter of fairness if you stop and
24 think about it. You haven't heard all of the evidence, so
25 how could you begin to discuss the case. So we ask you not

1 to do that throughout the trial; just wait till the end.
2 Again, this isn't gong to be a long trial. So it's not like
3 you have a long wait on that. But just something to keep in
4 mind. There's always two sides to every story and so you
5 need to hear both sides until you begin to make your mind
6 up.

7 I will tell you that we'll first start out with opening
8 statements. And opening statements are simply the lawyers
9 getting up and giving you a brief overview of what this case
10 is about, what the issues are, what the disputed facts are.
11 And then we'll move into direct examination of witnesses.
12 The thing I want you to remember about a opening statements,
13 and for that matter, any time the lawyers are speaking to
14 you, the lawyers were not witnesses. They weren't there;
15 they didn't see it happen. So what they say is not to be
16 considered by you as evidence. Evidence is when -- what a
17 witness tells you that they heard, they saw, they touched,
18 they felt, they smelled; that sort of thing. So when a
19 lawyer asks a question, that question is not evidence. The
20 answer to the question by the witness, that's evidence.
21 Okay. So kind of keep that in mind. Photographs, if any,
22 that's evidence. Any documents that I allow in, that's
23 evidence. But the lawyers getting up and talking is not
24 evidence. And sometimes we just like to tell you that up
25 front because you hear from the lawyers probably more than

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1 you hear from anybody in the trial. So it's easy to confuse
2 what they say as evidence. And again, they weren't
3 witnesses. They're not sworn in. And what they say is not
4 to be considered by you as evidence.

5 We all have roles in this trial. You as the jury are
6 judges of the facts. I'm the judge of the law. My job is
7 to make sure that both sides get a fair trial. I, like you,
8 don't have an interest in the outcome of the lawsuit, don't
9 know the folks that are involved. I know the lawyers, but I
10 don't know the individuals, and I don't know anything about
11 the case. I really didn't -- found out about it this
12 morning. So my job is just to simply make sure both sides
13 get a fair trial. And then at the end of the trial, I
14 instruct you on what the law is. And as I told you when we
15 were talking earlier, my job is to tell you what the law is
16 and then it's your duty to take that law and apply it to the
17 facts that you find. Because whatever you determine
18 factually, wherever there is a conflict in evidence as to
19 what actually did happen, you resolve it. And however you
20 resolve it, we're bound by that. But you are bound to take
21 the law that I tell you applies, apply it to the facts that
22 you find, and that's how you come up with a verdict at the
23 end of the trial.

24 So we will begin by having the opening statements; then
25 we'll move into the evidentiary portion of the trial; then

1 we'll come back with closing statements; then I'll charge
2 you on the law, go over the verdict form with you. I
3 anticipate we'll probably go until about five. Depending
4 on where we're at, we may break off a little bit earlier
5 than that if we -- if, you know, it would cause us to go
6 greatly over. You're going to hear some people testifying
7 live. You're going to hear some people testifying by
8 deposition. The doctor will testify by deposition, which is
9 just sworn statements taken outside. It's just hard to get
10 doctors scheduled to come in and out of court. So we have a
11 mechanism for being able to do that. But depending on how
12 long it takes and how long before we get to it, we may put
13 that off until the morning; we may get to it this afternoon.
14 I'm not sure. We'll play it by ear. So I will turn it over
15 now to the parties to begin with their opening statements,
16 then the plaintiff having the burden of proof gets to go
17 first. So Mr. Mr. Slotchiver, if you're ready, you may
18 begin.

19 OPENING STATEMENTS

20 MR. SLOTCHIVER: Thank you, Judge.

21 May 8th of 2014 may not be a day that is particularly
22 important or relevant to any of you. You may not even know
23 what you were doing on that day, but I can assure you with
24 my client Gary Nestler who is seated here at the table next
25 to me and his wife, Julie, it's a day they'll never forget.

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1 And the reason they'll never forget it is because that's the
2 day that his life changed. We'll talk about that and the
3 evidence will support it. Then we'll talk about how it
4 changed him with his family; how it changed him with the
5 civic responsibilities giving back to the community; and how
6 it changed him in the workplace.

7 On May 8th of 2014, the defendant, Mr. Fields, sitting
8 in the middle between his two lawyers, made the decision to
9 drive home from work. He was driving on Highway 17 and that
10 was the day of the Boone Hall Mud Run. Don't know if any of
11 you have heard of that before, but it's kind of like an
12 obstacle course for adults and children. And as he was
13 driving home, I believe the evidence will show that he was
14 speeding. He was driving recklessly. He took his eyes off
15 of the road for several seconds because he was distracted
16 looking at the people running on the side of the road.
17 While this occurred, he didn't realize that all the cars in
18 front of him are stopped. They were stopped waiting to turn
19 into Boone Hall. One of those cars was driven by Gary
20 Nestler. He was sitting, waiting to turn. He was with his
21 daughter in the vehicle and the two of them were going to
22 the mud run together. He's got, at the time, an
23 eleven-year-old daughter.

24 What you'll hear is that Mr. Fields, the defendant, saw
25 what was happening, slammed on his brakes, and ran smack in

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1 the back of Gary Nestler's vehicle. He was driving an
2 extra-large Ford Explorer or Expedition -- excuse me -- at
3 the time. And you'll see photographs, and I'll bring them
4 to you and I'll show them to you later on as we proceed, and
5 you'll see what happened. You'll see how the frame bent;
6 you'll see the damage to the back of vehicle; and you'll see
7 transportation pictures. Normally, when we come to the
8 civil trials, the Judge explained we have to deal with two
9 big factors. One is whose fault was it? And the second one
10 is what are the damages? In this case, the defendant has
11 admitted fault and the question before you is going to be
12 damages. So what you'll be hearing about today, primarily,
13 is about how it's affected Gary Nestler.

14 Let me tell you a little bit about Gary and Julie
15 Nestler. They are very interesting people. They live a
16 life that I think many people would want to emulate if they
17 could. Gary started out from New Jersey, went to -- he'll
18 tell you he went to school in Boston; moved down to
19 Charleston and went to work with the Medical University of
20 South Carolina. Will tell you he set up and he ran a
21 program there call CAM. And he worked there until he made a
22 shift in his career. He got a doctorate at the Medical
23 University for hospital management. And he decided to get
24 into the security world after 911; it had an impact on him.
25 And he'll tell you that he started doing an array of things.

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1 He worked at the University North Carolina Chapel Hill
2 teaching a course on security. He started volunteering and
3 he still volunteers at the Isle of Palms Fire Department.
4 He started working with SWAT assisting them. He started
5 working with the City of Charleston administrators
6 hand-in-hand with Mayor Riley. He works currently with the
7 new administration now with Mayor Tecklenburg. He also
8 started working for IBM and he travels excessively all over
9 the world in a global capacity dealing with security issues.

10 So what you'll hear is this is a person who gives to
11 the community, who goes to work. And the last thing we
12 haven't addressed that is most significant is his family.
13 Gary is married to Julie. They have one child, Aspen.
14 She's 11 years old. And they're a very, very close family.
15 And one thing that they do together is events. They are
16 very active together. He'll tell you about his lifestyle
17 before this occurred and his lifestyle afterwards. He'll
18 tell you about the fact that his daughter is an avid water
19 skier and he would go water ski with. He'll tell you that
20 she is an avid volleyball player. These are things that the
21 whole family would go and participate with. You'll even
22 hear from the doctor who will testify about how he himself
23 would see them out at the fields playing as a family. And
24 you'll hear that what's happened now as a result of the
25 injuries he sustained, which are nerve damages, you heard

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1 the Judge reference nerve earlier in the questions.
2 [0:32:45]. But because of the permanent nerve damage he
3 has, he can't do those things. He's limited. He has
4 actually gone in many way from a participant to a bystander
5 that watches. And it has an effect; it has an effect on him
6 every day. Can he still go to work? He'll tell you he
7 still goes to work. Can he still do his civic
8 responsibilities? Yes, he can. He can do those things.
9 They're effected by what's happened to him, but he manages
10 because he has to go to work and he has to make a living.
11 And he believes, as he'll tell you, that it's responsible to
12 give back to the community of where you live. That's how he
13 lives his life. But it still impacts him every day; the
14 impacts of the pain and it impacts him with restrictions.

15 Today you will hear testimony from very few people.
16 And the case is going to go by quite quickly. My job is to
17 present to you the evidence as efficiently as I can and for
18 you to have the tools that you need in order to go back and
19 make a decision. We will do that. You will hear from four
20 witnesses. You will hear first, I believe, from the
21 defendant Mr. Fields. We'll call the defendant and he'll
22 tell you what happened. He'll say what he says. We'll see
23 what he says today. And he'll talk about this wreck.

24 You'll hear from Julie Nestler. Julie herself is an
25 avid athlete. She works. She works in many ways, but

1 primarily, at this point, she works assisting people to get
2 in better shape. She's in the health world and she'll
3 describe it in full detail. And she'll tell you how this --
4 she moved from California; it's an active lifestyle. And
5 she'll tell you how it impacts Gary, that he can't do what
6 he used to do. He's not participating with the family. And
7 how it makes him feel useless.

8 Unfortunately, you'll hear from the physician, Dr.
9 Schoderbek. And I say unfortunately because he's going to
10 tell you that this is a permanent condition. There's
11 nothing they can do. There's nothing they can do to treat
12 the nerve damage. The only thing Gary hasn't done is he
13 hasn't done a nerve conduction study. And Dr. Schoderbek
14 will tell you the reason why he hasn't done it. Because it
15 doesn't fix the problem. The only thing it would do is tell
16 you which nerves were impacted. But it doesn't lead you to
17 fixing the problem. There's no cure. He has testified, or
18 will testify, you'll hear today, he has given Gary what's
19 called a permanent impairment rating. He has rated him with
20 a 52 percent permanent impairment to the upper extremity.
21 And he will translate that to a 32 percent impairment to the
22 whole person which will never go away. And he'll also tell
23 you what that really means in layman terms; that it means
24 you're going to deal with pain. You're going to have
25 issues. You're going to have some shaking of the arms. You

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1 can get by, you can deal with it, but you're never going to
2 be better.

3 What we're going to do today through the testimony is
4 try to give you an idea of the lifestyle that Gary lives.
5 How he lived his lifestyle before the wreck occurred and how
6 he lives it now. How it's impacted him and how it does
7 impact him on a daily basis. And we are going to break down
8 into those three sectors I talked about earlier: one is
9 civically, one is work-wise, and one is family. And at the
10 end, I'm going to ask you to come back with a verdict that
11 speaks the truth; that determines what the value is because
12 there's no other way to do it. We can't reverse time.

13 I want to thank you all for being here today. It
14 really is a unique system as the Judge stated earlier.
15 There are no other systems like it. It's an opportunity for
16 him to come in front of peers in the community, speak to
17 them. And you can judge; you can judge him. You can judge
18 Mr. Fields; you can judge his wife; you can judge Dr.
19 Schoderbek. And they will tell you everything that they
20 were asked. And you will have at the end of the day,
21 whether it's today or tomorrow, you'll have a full picture
22 of how this has impacted him. It doesn't take five days to
23 put this case forward. It's a very simple case. That's the
24 only witnesses you'll hear from: Gary, Julie, Dr.
25 Schoderbek, and the defendant. There's nobody else that's

1 going to testify. Thank you very much.

2 THE COURT: Mr. Trainor?

3 MR. TRAINOR: May it please the Court?

4 Good morning, ladies and gentlemen. It's afternoon
5 now. I'm here on behalf of the defendant Mr. Fields. And
6 as you've already heard, Mr. Fields is going to tell you
7 that this accident is his fault. He's taken responsibility
8 for that. As you've heard, he was driving down 17 on his
9 way home from third shift, took his eyes off the road for a
10 split second, tried to stop. He was driving a 1988 pick up
11 truck, no antilock brakes. So as he's driving, slams on his
12 brakes; the brakes lock up. He can't stop in time. We're
13 not here to talk about who is at fault. We're here to talk
14 about numbers. You're going to hear a lot of numbers. And
15 that's what this case is all about is numbers, dollars, and
16 cents.

17 There's a discussion about some permanent impairment
18 ratings; that's in plural ratings. There's two of them.
19 That was March 8, 2014. So that's a little over two years
20 ago now. What we're going to talk a lot about and I think
21 what's important to consider, or what, I think, we are
22 familiar with to some extent, are subjective complaints;
23 things that we complain of that are not verified and cannot
24 be verified. And then objective findings which are
25 medically verifiable problems. You're going to hear about a

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1 number of X-rays that Mr. Nestler went through. No obvious
2 acute injuries. There is a discussion -- will be a
3 discussion of a potential fracture in his left elbow.
4 You'll hear his doctor say I can't say with any certainty
5 whether or not there was. You'll hear about CT scans that
6 were conducted that showed degenerative issues. You'll hear
7 results of MRI scans showing degenerative issues.

8 Based on those, Mr. Nestler goes to Dr. Schoderbek who
9 is his orthopedist. Mr. Nestler and Dr. Schoderbek have a
10 personal and a professional relationship. And he goes and
11 Dr. Schoderbek says, okay, I want you to go see a spine
12 specialist. A spine specialist says no disc herniations, no
13 neural impingements. I think you need to continue and go to
14 physical therapy, do some chiropractic treatment. Dr.
15 Schoderbek agrees. He says you need to do this. They refer
16 Mr. Nestler to physical therapy, two to three times a week,
17 four to six weeks. And Mr. Nestler goes to three of those.
18 Mr. Nestler is told when he goes to his first physical
19 therapy visit he will have -- he has an excellent prognosis
20 if he is compliant with the physical therapy program. And
21 Dr. Schoderbek agreed with that, an excellent prognosis if
22 he was compliant with physical therapy. He receives in
23 total an hour and 35 minutes of physical therapy. At some
24 point later, Dr. Schoderbek refers Mr. Nestler to another
25 provider, Coastal Therapeutics, to do occupational therapy.

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1 You're going to hear Dr. Schoderbek say, "I referred him to
2 that provider because they are very good with the type of
3 injuries that he believes Mr. Nestler sustained." And that
4 recommendation is two to three times a week for six to eight
5 weeks. And Mr. Nestler goes to five of those visits.

6 At some point, about five months after this accident,
7 August 22, 2014, Dr. Schoderbek assesses Mr. Nestler with a
8 permanent impairment. Mr. Slotchiver referenced permanent
9 impairment, and that is not the initial permanent impairment
10 that was given. The initial permanent impairment was a
11 13 percent left upper extremity which converts to an
12 8 percent whole person. You may say well why -- where is
13 the discrepancy? Well, the discrepancy happens 16 months
14 later in December of last year, December of 2015, when at
15 Mr. Nestler's request he goes to see Dr. Schoderbek again
16 with no visits in between, no treatment in between, and he
17 goes back with the purpose of this litigation and asks for a
18 new permanent impairment rating; and he got it. It's four
19 times higher, 53 percent to 32 percent when the initial was
20 13 to 80 percent. You're going to hear Dr. Schoderbek in
21 talking about that second permanent impairment rating use
22 terms like, "Not thorough. I didn't put it in my records."
23 A learning curve and that he did his best to put together
24 that permanent impairment rating.

25 You'll hear that some of the statements in his records

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1 are exaggerated. Those are his words. You're going to hear
2 Dr. Schoderbek recommend it and Mr. Slotchiver alluded to
3 it, the ENG nerve conduction study. Four times; four times
4 his own physician recommended him to do this procedure, a
5 nerve conduction study, to figure out what was going on.
6 Mr. Nestler declined it every time. You're going to hear
7 Dr. Schoderbek say I recommended an injection twice. Mr.
8 Nestler declined to do that. Dr. Schoderbek referred Mr.
9 Nestler to a neurologist and Mr. Nestler refused that. In
10 addition to the combined nine physical therapy and
11 occupational therapy appointments that he did actually
12 attend.

13 Your job today as Judge Young and Mr. Slotchiver told
14 you is you're the finder of the facts. You're going to hear
15 a lot of testimony, you're going to see a lot of documents.
16 And it's your -- your job is to figure out what the facts
17 are. You can believe some of the testimony of any witness;
18 you can believe all of it; you can believe none of it.
19 That's your job, and that's the most import job here today.
20 Because nothing that Dan, Mr. Slotchiver, or I say is a
21 fact. We get to summarize the facts. We get to draw
22 inferences. But you all determine what the facts are. And
23 in doing that I ask, and Judge Young will tell you, you're
24 allowed to consider the credibility. Why people are
25 testifying the way they are? Any biases or motives that

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1 they have when they're offering their testimony. I think
2 that's going to be your most important tool today. In
3 addition to that, you're common sense. Y'all have life
4 experiences and you can use those and you use your common
5 sense today to reach a fair and just and reasonable verdict.
6 Again, I appreciate your time. We're going to do our best
7 to make it as easy for y'all as possible. I look forward to
8 working with you on this. Thanks.

9 THE COURT: All right. Call your first witness.

10 MR. SLOTCHIVER: We call Joseph Fields to the stand.

11 JOSEPH FIELDS, after being duly sworn, testified as
12 follows:

13 MR. SLOTCHIVER: May it please the Court?

14 DIRECT EXAMINATION

15 BY MR. SLOTCHIVER:

16 Q. Mr. Fields, you're the defendant in this lawsuit,
17 correct?

18 A. Yes, sir.

19 Q. And would you agree with me that on March 8th of 2014
20 that you did in fact collide into Gary Nestler's vehicle?

21 A. Yes.

22 Q. Would you agree with me that on that day you were
23 heading home from work and you were driving recklessly?

24 A. I wouldn't say recklessly, but yes.

25 Q. You would not say you were driving recklessly?

1 A. I was driving the same speed as everybody else.

2 Q. Okay. Mr. Fields do you remember signing an affidavit?

3 A. Yes.

4 MR. SLOTCHIVER: May I approach?

5 THE COURT: Uh-huh.

6 Q. Is this the copy of the affidavit that you signed? I
7 believe that's the original.

8 A. Yes, it is.

9 Q. Would you read the first two sentences of the third
10 paragraph, please.

11 A. (As read) As I was headed north on Highway 17, I could
12 see some people running in the annual mud race at Boone Hall
13 Plantation. I -- and recklessly took my eyes off the
14 roadway for several seconds while watching the participants.

15 Q. Okay. Does that refresh your recollection as to the
16 fact that you were in fact driving recklessly?

17 A. Well, sir, at the time that record there, it was
18 handwritten, taken away, typed up, and then brought back.
19 It's not my exact words, but it's very close.

20 Q. Sworn under oath, correct?

21 A. Yes.

22 Q. With a notary, correct?

23 A. Yes.

24 Q. You swore to it, correct?

25 A. Yes.

1 Q. Okay. So you did in fact state previously that you
2 were driving recklessly, correct?

3 A. I guess some might see it that way.

4 Q. Well, you took your eyes off the road for several
5 seconds, correct?

6 A. Yes.

7 Q. Okay. And you were traveling somewhere 45 to 50 miles
8 an hour, correct?

9 A. Yes.

10 Q. You know the speed limit is 45 miles per hour there,
11 correct?

12 A. Yes, sir.

13 Q. So you were driving between 45 and 50, you would be
14 speeding, correct?

15 A. Yes.

16 Q. And if you take your eyes off the road for several
17 seconds while you're watching the runners on the side of the
18 road, correct?

19 A. Yes.

20 Q. And you would agree with me that when you're traveling
21 at that speed, you're traveling somewhere around 70, 75 feet
22 per second?

23 A. I don't know the exact number; probably.

24 Q. And several seconds, is that three or four?

25 A. I couldn't tell you for sure.

1 Q. Okay. Well, let's call it four, okay. That's 300 feet
2 in four seconds without looking at the road, correct?

3 A. Sounds right.

4 Q. That's what you did, correct?

5 A. Yes.

6 Q. And then when you turned back around, you noticed my
7 client's vehicle stopped, correct?

8 A. Yes.

9 Q. And you slammed on your brakes?

10 A. Yes.

11 Q. And you started to skid, didn't you?

12 A. Yes.

13 Q. Okay. How far do you think you skid?

14 A. I honestly don't know.

15 Q. Fifty to 60 feet?

16 A. I honestly don't know.

17 Q. Did you look at the skid marks?

18 A. No, sir.

19 Q. Did it seem like it was a long time?

20 A. I couldn't tell you.

21 MR. SLOTCHIVER: I've got nothing further. Thank you,
22 sir.

23 CROSS-EXAMINATION

24 BY MR. TRAINOR:

25 Q. Just want to rewind a little bit. How old are you?

1 A. I'm going to be 33 in June.

2 Q. Where do you live right now?

3 A. In Huge, South Carolina.

4 Q. It's my understanding you got two jobs. Is that right?

5 A. Currently, yes.

6 Q. Where do you work?

7 A. Security at Isle of Palms at the Wild Dunes Resort and
8 I work at Walmart.

9 Q. Do you work both jobs on a daily basis?

10 A. Not everyday both. But several days, yes, both.

11 Q. On the day, March 8th, about 8:15 in the morning, where
12 were you coming from and where were you going to?

13 A. At that time, I was working my security job. I wasn't
14 working at Walmart currently then. I just got off the
15 overnight shift and I was heading home.

16 Q. Okay. Which way did you take home to get to Huge?

17 A. Highway 17 to 41.

18 Q. Is that 17 North?

19 A. I believe so.

20 Q. As you're driving, and correct me if I'm wrong, Boone
21 Hall is on your left?

22 A. Yes.

23 Q. Okay. You indicated you took your eyes off the road
24 for a couple seconds and you ran into the back of
25 Mr. Nestler's vehicle?

- 1 A. Yes.
- 2 Q. Is this accident your fault?
- 3 A. Yes, it is.
- 4 Q. You take responsibly for this accident?
- 5 A. Yes.
- 6 Q. You sorry that it happened?
- 7 A. Yes, sir.
- 8 Q. You were just asked some questions about an affidavit.
- 9 Did you write that affidavit?
- 10 A. No.
- 11 Q. Tell me how that affidavit came to be. Did someone
- 12 come to you and -- what was the circumstances under which
- 13 that was created?
- 14 A. I was at work and someone came to me. I don't remember
- 15 exactly what he said his occupation was. And asked me to
- 16 give my deposition and was told that I would probably would
- 17 have to go to court; just give the deposition and they would
- 18 use that in the court.
- 19 Q. You didn't know that person that came to you?
- 20 A. No, sir. Never met him before.
- 21 Q. Was he a private investigator?
- 22 A. I believe that's what he said his occupation was.
- 23 Q. Did he talk to you about the accident?
- 24 A. Yes.
- 25 Q. You didn't write that affidavit?

1 A. No.

2 Q. Do you know as we sit here today who wrote it?

3 A. No. They left, typed it up, and then came back.

4 Q. Came back and had you sign?

5 A. Yes.

6 Q. And notarized it right there?

7 A. Yes.

8 MR. TRAINOR: Give me one second, Mr. Fields. Mr.
9 Fields, I don't have any further questions. Thank you.
10 Redirect.

11 THE COURT: Redirect?

12 MR. SLOTCHIVER: Very briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. SLOTCHIVER:

15 Q. Mr. Fields, you remember him telling you he was a
16 private investigator, correct?

17 A. Yes.

18 Q. In fact, it's even in the affidavit, isn't it?

19 A. I believe so.

20 Q. You're welcome to look at it.

21 A. (Witness reviews document.) Okay.

22 Q. Is that correct?

23 A. Yes.

24 MR. SLOTCHIVER: I would like to mark this as an
25 exhibit.

1 THE COURT: Mark it as an exhibit.

2 MR. SLOTCHIVER: And I want to introduce it into
3 evidence.

4 THE COURT: You wish to ---

5 MR. TRAINOR: I have no objection.

6 THE COURT: It's admitted.

7 (Whereupon, Plaintiff's Exhibit Number 1, Affidavit,
8 was received into evidence.

9 Q. So, Mr. Fields, I just want to make sure we have this
10 right. The gentleman came to you, correct?

11 A. Yes.

12 Q. Identified himself as an investigator, correct?

13 A. Right.

14 Q. Asked you some questions about what happened?

15 A. Yes.

16 Q. You spoke to him about it?

17 A. Yes.

18 Q. He then left and typed it up?

19 A. Yes.

20 Q. He came back and he showed it to you for you to read,
21 correct?

22 A. Yes.

23 Q. And then you read it?

24 A. Yes.

25 Q. And then after you read it, it was truthful so you

1 signed it. Is that correct?

2 A. Yes.

3 Q. Okay. Under oath?

4 A. Yes.

5 Q. Okay.

6 MR. SLOTCHIVER: Thank you. I've got nothing further.

7 THE COURT: Recross?

8 MR. TRAINOR: Very briefly, Your Honor.

9 RECROSS-EXAMINATION

10 BY MR. TRAINOR:

11 Q. Mr. Fields, that affidavit, there's two words in it;
12 it's negligently and recklessly. At any point in your
13 conversation with that private investigator, did you use
14 either of those words?

15 A. No.

16 Q. Do you know the legal significance of either of those
17 words?

18 A. No, sir.

19 MR. TRAINOR: Thank you.

20 THE COURT: All right. You can step down. Next
21 witness.

22 MR. SLOTCHIVER: Thank you, Your Honor. We would call
23 Julie Nestler to the stand.

24 JULIE NESTLER, after being duly sworn, testified as
25 follows:

DIRECT EXAMINATION

BY MR. SLOTCHIVER:

Q. Julie -- I'm going to ask you some questions, okay?

A. Okay.

Q. Would you please tell the ladies and gentlemen of the jury a little bit about yourself: Where you are from and your educational background and what you do for a living.

A. Okay. Originally, I moved here 20 years ago from Los Angeles. And I made a profession in the hair industry. Then when I moved here, have always been with health and fitness but I am a -- switched gears and I'm a health and wellness coach as well as a spinning instructor at Primetime Fitness in Mount Pleasant. And I'm involved with nonprofit, board member of Parkman's Foundation with Pass It Forward Sports. We provide used sports equipment and funds or -- sorry. I'm trying to think of the word. The scholarships, I'm sorry, the scholarships for the children in the underserved areas in the community.

Q. And what do you do now? What is your primary occupation today?

A. Health and fitness coach as well as spinning instructor.

Q. Who is your family?

A. My family consists of my husband Gary, we've been married 16 years, and our daughter Aspen who is 13.

1 Q. She's at Moultrie, correct?

2 A. Correct; seventh grade.

3 Q. Seventh grade. Julie, I want to talk to you for a
4 little about Gary pre-wreck and Gary after-wreck, okay?

5 A. Okay.

6 Q. All right. So tell me a little bit about Gary, what he
7 was like prior to the wreck. And then we'll compare it to
8 what's happened.

9 A. How he was prior to the wreck is our entire existence
10 was around being physically fit. Everything that we did
11 socially as well as just being active. And to the point
12 where our first date was a kayak trip. It was always
13 surrounded around the ocean or hiking and we were always
14 physically active together. And it's just not like that
15 anymore.

16 Q. How about with your daughter? Activities that you guys
17 do as a family; not just you and Gary but also as a family.

18 A. Right. Right. Our family is very active. We have
19 spent so much time with our daughter being active with
20 waterskiing and volleyball and playing football in the park,
21 community theater. We are a very close group. And we're
22 active together as a unit.

23 Q. I made the reference earlier about a participant to a
24 bystander or to a watcher, an observer. Was Gary always a
25 participant?

1 A. Gary was always a participant especially with all of
2 our daughter's activities. Always out there bumping the
3 ball with her, the volleyball. Getting in the boat with her
4 and helping her as she learned how to ski and then went on
5 to compete. Everything, hands on deck whether it be by bike
6 riding, whether it be, like I said, water ski or volleyball,
7 playing out in the yard. Very active.

8 Q. Now, what do you know about the wreck that occurred?
9 Tell me about that day. And let's start with this, how was
10 Gary's health on the day of the wreck? Prior to it.

11 A. He was fine. He was going off to do an obstacle
12 course, having a daughter-daddy activity. His health was
13 fine.

14 Q. Had he done it before to know what he was getting into?

15 A. Yes. We had done it previously.

16 Q. The mud run?

17 A. Correct.

18 Q. And tell me what you know that occurred?

19 A. I was not there. I was participating in my fundraiser
20 that I do the Pattison Academy. And I got a phone call
21 saying that he had been in an accident and that he and -- he
22 and our daughter were on the way to the hospital.

23 Q. Now, walk us through what has occurred from that point
24 forward; the changes that you've seen. And I don't mean the
25 medical treatment. I just mean what effect this had.

1 A. Everything has fallen on my shift, which I understand.
2 I understand that as his wife it's my role. But there isn't
3 -- the things that he was able to do around the house and
4 the responsibilities that he had around the house within our
5 home, those responsibilities have changed. So it does
6 create an extra workload for me, which is fine. I
7 understand that. This is about him. But he -- the biggest
8 effect is just not being able to participate in the
9 lifestyle that we had before and be with our daughter and
10 participating as a family unit.

11 Q. Is Gary still able to go to work?

12 A. Yes.

13 Q. Does it affect him at work to your knowledge?

14 A. Yes, it effects him. But he does keep -- he protects
15 us to where he keeps -- he talks to me about it but he does
16 keep that part of it. He goes through his motions and he
17 tries to be as positive as he can.

18 Q. Is he the primary support of the family?

19 A. Yes, he is.

20 Q. And how about these activities? What happens now when
21 you go waterskiing and you go to do events?

22 A. It's all on my shift. As far as he will -- he will be
23 present but he doesn't participate. So I am double dipping
24 basically as a parent and helping our daughter with
25 everything that she has going on.

1 Q. Has it changed his attitude in general?

2 A. Absolutely.

3 Q. Can you please explain that to the jury.

4 A. Very positive family, but unfortunately --
5 unfortunately, there's depression. It changes his attitude
6 because it's frustrating. Because he can't participate and
7 be the father that he wants to be, to be the husband that he
8 wants to be, and be the man that he wants to be.

9 MR. SLOTCHIVER: Julie, thank you. If you'll answer
10 any questions that Mr. Trainor has for you.

11 THE COURT: Cross?

12 MR. TRAINOR: No questions for this witness, Your
13 Honor.

14 THE COURT: You may step down.

15 THE WITNESS: Thank you.

16 THE COURT: Next witness.

17 MR. SLOTCHIVER: We would call Dr. Schoderbek. And may
18 we approach briefly, Your Honor?

19 THE COURT: Uh-huh.

20 (Whereupon, a bench conference is held off the record
21 and out of the hearing of the jury panel.)

22 THE COURT: All right. Folks, the next witness is
23 going to testify to you or -- testify in the form of video
24 deposition. A deposition is testimony that's given outside
25 of the courtroom. It's given under oath. The lawyers are

1 there, they get to ask questions, direct, cross, that sort
2 of thing. Exactly the same as if they were testifying here.
3 The witness is placed under oath. The lawyers get to ask
4 questions. You are to treat the testimony exactly the same
5 as if the witness were testifying before you live. You
6 don't give it any extra weight because it's in this form, or
7 you don't give it any less weight. You decide how much
8 weight to give it based on all of the evidence that you hear
9 throughout the trial. All right. Ready?

10 MR. SLOTCHIVER: Yes, Your Honor.

11 MR. TRAINOR: Your Honor, may we approach one more
12 time?

13 THE COURT: Sure.

14 (Whereupon, a bench conference is held off the record
15 and out of the hearing of the jury.)

16 THE COURT: You'll hear at a point in the trial or in
17 the deposition where he's offered as an expert. Remember I
18 told you just a couple of minutes ago that when a witness
19 testifies, we normally just let them testify as to what they
20 heard, they saw, they touched, they felt, they smelled, that
21 sort of thing. We don't normally let witnesses give their
22 opinion about things. However, the law says when somebody
23 because of training or experience, education in a certain
24 field, rises to the level of expertise, we recognize that.
25 And if their testimony aides the jury, we let them come in,

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1 testify and give their opinion about certain matters that
2 are at issue in this trial. This witness will be offered as
3 an expert in what field?

4 MR. SLOCHIVER: Orthopedic medicine.

5 THE COURT: Orthopedic medicine. And the parties have
6 agreed that he is an expert in that field. So I will tell
7 you when we get to that point. Or when you get to that,
8 understand that the motion has been made to qualify him as
9 an expert. He is an expert within the field of orthopedic
10 medicine. And you will hear him give his opinion. You are
11 not required to give an expert's testimony any greater
12 weight simply because he is an expert. You decide how much
13 weight to give his testimony based on all of the evidence
14 that you'll hear throughout the trial. All right. Go
15 ahead.

16 (A videotaped deposition of the witness, Dr.
17 Schoderbek, began play at 2:52 p.m. and was paused at
18 3:52 p.m.)

19 THE COURT: Why don't we just take a break. It's been
20 two hours since we've been at it. And we'll take a break
21 and let everyone use this restroom. And then we'll -- it
22 looks like you've got about 30 minutes left on it?

23 MR. SLOCHIVER: Yes, sir. That's right.

24 THE COURT: Okay. Folks, why don't you go on back,
25 take a nature break. And we'll come back in about 5, 10

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1 minutes and finish this up. Don't begin deliberations or
2 discussions about the case. And we'll see you back in about
3 10 minutes.

4 (The jury exits the courtroom at 3:52 p.m.)

5 (A short recess is taken at 3:52 p.m. The proceedings
6 resume at 4:08 p.m. and the following is held on the
7 record.)

8 THE COURT: All right. Everybody back? Bring the jury
9 in.

10 (The jury enters the courtroom at 4:10 p.m.)

11 THE COURT: All right. Folks, we've got, what says 28
12 and a half minutes left with this witness. When we finish
13 with this, we'll break for the day and then resume tomorrow
14 morning with the last witness and then closing arguments, et
15 cetera. All right. So hit the play button.

16 (The videotaped deposition of the witness, Dr.

17 Schoderbek, resumed at 4:11 p.m. and concludes at 4:40
18 p.m.)

19 MR. SLOTCHIVER: Okay, Your Honor. That's the end of
20 the film.

21 THE COURT: All right. Okay, folks. Well, that will
22 be where we stop for today. I'm going to send you home
23 again with the instructions kind of like I gave you at
24 lunchtime. Don't talk to anybody about the case. Of
25 course, if you haven't talked to anybody at home yet, the

1 first thing they'll do when you walk in the door is like,
2 "Did you get picked?" And you would say, "Yes, I did. It's
3 an automobile accident case, but that's really all I can
4 talk to you about because the Judge said so. And I haven't
5 heard all the evidence in the case." And if you stop and
6 think about it just for a moment, you know, again, it's not
7 fair to these folks to have somebody else who is not in the
8 courtroom and not a juror telling you what they think about
9 a case that's going to influence you know matter what. So
10 it's not fair to these folks. You'll have this case
11 tomorrow morning to begin your deliberations. And after
12 it's over with, I promise, you can talk to anybody you want
13 to.

14 I also need to give you just some kind of standard
15 instructions we have. Don't reach out to anybody to try to
16 talk about the case. Don't go on social media and post
17 different things: Twitter, Facebook. You know, it's talking
18 about the case. And after the cases is over with, I'm not
19 trying to say you can't say anything, but say it after the
20 trial is over with. Otherwise, it just causes too many
21 problems. But after the trial is over with, you can post on
22 every social media you want to, and I don't care what you
23 have to say. Just don't do it during the trial. And if
24 anybody does approach you to talk to you about the case,
25 please report that back tomorrow morning when you come back.

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1 I'll leave you now and ask that you be in the jury room by
2 9:30 and we will try to get started shortly thereafter. So,
3 thank you for patience today and we'll see you in the
4 morning.

5 (The jury exits the courtroom at 4:41 p.m. and the
6 following is held on the record.)

7 THE COURT: All right. So you are going to have ---

8 MR. SLOCHIVER: We'll call Gary. I presume he's going
9 to take a considerable amount of time tomorrow; maybe an
10 hour and a half is my guess.

11 THE COURT: Okay.

12 MR. SLOCHIVER: But that's it. And then we'll rest
13 afterwards.

14 THE COURT: All right. Well, anything before we break
15 for the day?

16 MR. TRAINOR: No, Your Honor.

17 THE COURT: All right. How about let's order the jury
18 lunch in the morning so when you come in you have that stuff
19 ready. I don't care where you get it.

20 THE CLERK: Yes, sir.

21 THE COURT: All right. See y'all in the morning, 9:30.

22 MR. TRAINOR: Thank you, Your Honor.

23 MR. SLOCHIVER: Judge, one thing that would be helpful
24 if you don't mind, at some point before we do our closing
25 arguments, is it possible for us to see what your charge is?

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1 THE COURT: Yeah. We're pretty close. He's e-mailed
2 me what's he's put together. I'll take a look at it tonight
3 and send it back to him. We'll get it to you either later
4 tonight or in the morning depending on ---

5 MR. SLOTCHIVER: Thank you, sir.

6 MR. TRAINOR: Thank you.

7 THE COURT: Okay.

8 (The proceeding adjourned for the day at 4:43 p.m. and
9 will resume tomorrow, April 26th, at 9:30 a.m.)

10 - - - - -

11 (The proceeding resumed on Tuesday, April 26, 2016, at
12 9:35 a.m. and the following is held on the record.)

13 THE COURT: While we're waiting on the jurors, did you
14 guys have any problems with the jury charges?

15 MR. SLOTCHIVER: I do want to address two issues.
16 First, Your Honor, one of the charges deals with failure to
17 mitigate. And I don't believe there's any evidence to
18 support a failure to mitigate. In fact ---

19 THE COURT: Well, I don't know if there will. But I
20 think he must have asked for it.

21 MR. SLOTCHIVER: I understand that. But that's the
22 objection I have. Unless there is some evidence to support
23 it, I would ask that that be taken out.

24 THE COURT: Okay. Will there be? Do you -- or is that
25 just something you feel like ---

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1 MR. TRAINOR: Well, I think just in the grand scheme
2 and there is a portion of that -- let me see where it is.
3 Plaintiff's party reasonable care and diligence reduce
4 seriousness of injuries caused to include making a
5 reasonable attempt to ---

6 THE COURT: Yeah, I know what the charge is. Is there
7 going to be any evidence that he failed to mitigate?

8 MR. TRAINOR: Yes, Your Honor. I believe not following
9 up with the physical therapy program and seeing doctors and
10 taking the recommendations constitutes a failure to
11 mitigate.

12 MR. SLOTCHIVER: Dr. Schoderbek said it didn't make a
13 difference. He said it could not change anything ---

14 THE COURT: Let's see what the evidence is. I just
15 wanted to know where he was going with it.

16 MR. SLOTCHIVER: Fair enough. And the second thing,
17 Your Honor, is we had addressed the insurance issue
18 yesterday. I was a little concerned that in the
19 cross-examination of Mr. Fields, the issues came up about
20 the fact you work at Walmart, don't you? And you work as a
21 security guard. What he's attempting to do is to portray
22 Mr. Fields as a person of minimal means in an effort to gain
23 sympathy with the jury and for them to worry how in the
24 world is this guy going make payment. And I believe that
25 that is the type of evidence that can give way to either

1 insurance being discussed or at least to the charge that we
2 suggested about insurance. Because otherwise, it's
3 misleading them and that's exactly what the Court says you
4 can't -- you can't claim a guy has no money so how in the
5 world is he going to pay it, and then fall behind the shield
6 of you can't mention insurance because it's not fair.

7 THE COURT: So you want to ask for punitive damages but
8 let the jury know that he's got insurance?

9 MR. SLOTCHIVER: I want the jury to know he has
10 insurance period.

11 THE COURT: Or that there is insurance at play?

12 MR. SLOTCHIVER: Yes, that there is insurance at play.

13 THE COURT: I was going to do that.

14 MR. SLOTCHIVER: Or to disregard the issue of
15 insurance, not worry about insurance. And just give it a
16 more that they believe proper without considering it and let
17 the Court deal that issue. Otherwise, it's not fair to my
18 client. He's introduced -- he opened the door to it.

19 THE COURT: I don't believe that opened the door to
20 insurance. I think it opened the door to a proper
21 consideration of the factors that are allowed to be consider
22 by a jury for punitive damages, which you said you intend to
23 ask for.

24 MR. SLOTCHIVER: Well, if that were the case, we would
25 prefer to have actual damages with the charge of insurance

1 rather than to seek punitive damages at all. My concern is
2 he's been prejudiced at this point.

3 THE COURT: So you want to strike punitive damages?

4 MR. SLOTCHIVER: If it was a consideration that we
5 strike through the damages, we would give the jury the
6 charge about the fact that he has insurance. We would
7 strike any damages.

8 THE COURT: Well, I'm not going to view that. I'm not
9 going to give the charge. But I will strike punitive
10 damages if you want. Otherwise, we're going with the way
11 that it is.

12 MR. SLOTCHIVER: Well, I just want it on the record
13 that we object. We do think it's prejudicial. Okay.

14 THE COURT: Noted.

15 MR. SLOTCHIVER: The last thing, Your Honor, is we --
16 and can I preserve the right to bring that up again
17 depending on what the evidence comes up either opposing or
18 with ---

19 THE COURT: If something different comes up, then you
20 can make a different argument.

21 MR. SLOTCHIVER: Okay. Fair enough.

22 THE COURT: All right.

23 MR. SLOTCHIVER: I would like to open the deposition of
24 Dr. Schoderbek in order to give to the reporter the exhibit
25 that we referenced in the deposition but wasn't handed up.

1 THE COURT: Sure.

2 (The sealed transcript of Dr. Schoderbek was opened by
3 Plaintiff's Counsel and given to the court reporter.)

4 MR. TRAINOR: And, Your Honor, we handed up Dr.
5 Schoderbek's file yesterday. And I think all we need to do
6 is introduce it on the record. I don't think there's any
7 objection to it.

8 MR. SLOTCHIVER: No, there's no objection. It's been
9 redacted. But since I opened the original deposition,
10 should I leave this with the Court?

11 THE COURT: Go ahead.

12 (Whereupon, Plaintiff's Exhibit Number 3, Deposition
13 Transcript, was marked for identification.

14 (Brief pause.)

15 MR. SLOTCHIVER: We can step outside for a moment?

16 THE COURT: Sure.

17 (A brief break is taken at 9:42 a.m. The proceedings
18 resume at 9:58 a.m.)

19 THE COURT: All right. All the jurors are here.
20 Anything we need to deal with before they come in?

21 MR. SLOTCHIVER: I think we wanted to clarify that the
22 exhibits to the doctor's deposition will be introduced into
23 evidence?

24 THE COURT: What's unclear?

25 MR. SLOTCHIVER: We were told we had -- right now it's

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1 marked for identification purposes only. I was told I
2 should put it on the record that they're in evidence.
3 That's it.

4 THE COURT: Okay.

5 MR. TRAINOR: Same for Defendants Exhibit 1.

6 THE COURT: Both in.

7 (Whereupon, Defendant's Exhibit Number 1, Medical
8 Records, was received into evidence.)

9 (Whereupon, Plaintiff's Exhibit Number 2, Medical
10 Records, was received into evidence.

11 MR. SLOTCHIVER: Thank you, sir. Nothing else.

12 THE COURT: All right. Were you planning on calling
13 any witnesses?

14 MR. TRAINOR: No, Your Honor.

15 THE COURT: All right. And you just got one more?

16 MR. SLOTCHIVER: Yes.

17 THE COURT: All right. All right, then. Let's bring
18 the jury in.

19 (The jury enters the courtroom at 10:00 a.m. and the
20 following is held on the record.)

21 THE COURT: All right, folks. Welcome back. We are
22 going to now resume with the plaintiff calling the next
23 witness.

24 MR. SLOTCHIVER: Thank you, Your Honor. We will call
25 Dr. Gary Nestler to the stand.

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1 DR. GARY NESTLER, after being duly sworn, testified as
2 follows:

3 DIRECT EXAMINATION

4 BY MR. SLOCHIVER:

5 Q. Dr. Nestler, I'm going to stand back here when I talk
6 to you. If you can't hear me, let me know. That way you
7 can face the jury when you're talking. Would you please
8 start by telling us a little bit about your background:
9 where you were born and your educational background.

10 A. I was born in Jersey City, New Jersey. And I went to
11 Bayonne High School and graduated there in 1979. I went to
12 Northeastern University in Boston, Massachusetts and
13 graduated in 1983. Then I went on to work in New York City
14 in the office supply business. And then from there made my
15 way over to practice -- excuse me -- to attend Pacific
16 College of Oriental Medicine in New York and graduated
17 there. And then following that, I had an opportunity
18 through my college education -- pardon me -- I went with my
19 college roommate who moved down to Charleston. So he
20 convinced me to move to Charleston as opposed to moving to
21 Miami where I had an opportunity to practice medicine in
22 Miami. And I met up with the Medical University of South
23 Carolina. And they allowed me to come into their fold and
24 start a program known as Complementary Alternative Medicine
25 known as integrative medicine. And then while I was there,

1 I went back to get a doctorate in health administration,
2 policy, and leadership. I was working in the university
3 setting. And we opened up three clinics with a focus on
4 pain management and anesthesiology. I had a dual associate
5 professor appointment with the Department of Anesthesia and
6 OB/GYN and worked in the Hollings Cancer Center. And then
7 from there, that was my education.

8 Q. Okay. Let's back it up just a little bit, okay?

9 A. Yeah.

10 Q. So the medical degree that you got, this was in
11 oriental medicine?

12 A. Yes. It was in acupuncture, oriental medicine, and
13 nutraceutical medicine.

14 Q. And when you came to med -- did they ever have a
15 program like this before?

16 A. They did not. They did not have a program. But they
17 were very interested in having a program such as this. And
18 they actually ended up fully funding my department and made
19 me the Director of Complementary Alternative Medicine. And
20 as a result of that, I want to teach the residents and
21 colleges and all the rest of the physicians at the Medical
22 University on uses of integrative medicine.

23 Q. Okay. And when you say integrative medicine, what type
24 of stuff were you in charge of?

25 A. I was in charge of the acupuncture clinic there, or

1 actually four of them: working the Bone and Joint Center;
2 working at the Hollings Cancer Center; working in Anesthesia
3 and Perioperative Medicine in the hospital; and also working
4 in the OB/GYN practices in East Cooper, Mount Pleasant, and
5 in West Ashley and downtown. And also, I was in charge of
6 what's known as nutraceutical medicine which is herbal
7 medicine, homeopathic medicine, and then also the ones that
8 offer chiropractic care within the Medical University
9 setting. My job is to make sure that they align with the
10 Medical University's mission. And they went through all
11 kind of peer-reviewed journals. And they sat on the review
12 board just to make sure that they integrated with all the
13 other departments.

14 Q. Dr. Nestler, were these types of centers opening up
15 throughout the country?

16 A. They were, actually. They were very, very heavily
17 influenced by what happened 15 years ago in California and
18 it moved across the country. They always said that the East
19 Coast is 20 years behind the West Coast. And they opened up
20 a proliferation of them in New York right in my actual --
21 internship/residency at the Elmhurst Hospital.

22 Q. And while you were at -- you testified that you were
23 the director of that clinic. Did you have any other title
24 such as professorships? Did you teach?

25 A. Yes. I had an associate professorship. I actually was

1 the first one of its kind at the Medical University history
2 to be given an associate professor in both perioperative
3 medicine and also OB/GYN. And they also employed several
4 different clinicians, acupuncturists, therapists,
5 nutraceutical medicine folks as well. And I -- also being a
6 member of the Medical University, I was also the Assistant
7 Chair of the South Carolina Board of Medical examiners under
8 Dr. Luis Costa (ph) at the time. And then when my chairman
9 stepped down, they asked me to become the Chairman of the
10 South Carolina Board of Medical Examiners Acupuncture
11 Committee.

12 Q. How long did you stay at the Medical University?

13 A. I stayed there approximately six years.

14 Q. And when did you leave and why did you leave?

15 A. I left the Medical University in about -- I believe it
16 was 2002. And the reason why I left is because I come from
17 New York, over in that area. And 911 kind of hit me right
18 in the gut. I knew several people who had perished there,
19 most on first responder community. Because I used to live
20 next door to E1, which is the Emergency Rescue Team One.
21 And they were my next-door neighbors. They all perished.
22 And I came home when my wife called me at the clinic. I
23 actually canceled the four rooms that I had. I had 30
24 patients in the -- waiting, as well as the rest of the
25 OB/GYN clinic in Mount Pleasant. The Women's Health over in

1 Mount Pleasant -- we canceled the entire clinic; shut it
2 down, sent everybody home. Everybody was shocked. I
3 remember coming in and sitting on the couch. One of those
4 things you never forget, sitting on the couch and crying,
5 basically saying, "I think I'm going to change." Of course,
6 I'm gonna do what I think is the greater good. I go back to
7 my days when I was in high school and I was an EMT. My
8 first job in high school was actually -- or actually
9 eighth-grade was cleaning the back of an ambulance after an
10 accident. Not the best job, but it paid. And that got me
11 started and the rest my family is in medicine as well:
12 pharmacists, GI doc, internal medicine, orthopedics.

13 Q. Tell me what you did to change. What was your career
14 change? What did you start to do differently?

15 A. Well, what I did is I focused my efforts on what's
16 called emergency management or crisis management. And it
17 had to do with safety and security. And I started my own
18 crisis management company. And within the first six months
19 of me starting, I received several contracts of very large
20 auto rental companies on how they dealt with disaster such
21 as Rita and Katrina. So after Katrina happened, I was one
22 of their deployment folks that went down there, helped not
23 only settle their families but make sure their cars could be
24 moved out of harms way and what they're going to be doing in
25 the future. So my focus was in crisis and disaster

1 management. And then from there, transitioned to people
2 actually learning about me, what I was doing, learning about
3 my medical background as well. And that took a couple of
4 years. And then a company by the name of IBM approached me
5 and asked me if I would join them because they had a need to
6 fill with my skill set specialty in emergency management
7 working with the Department of Homeland Security with FEMA,
8 the Federal Emergency Management Agency.

9 Q. Well, let's slow it down for a second.

10 A. Sure.

11 Q. As this is happening, is this when you became involved
12 in your community program?

13 A. Yes.

14 Q. Would you please tell us a little bit about that.

15 A. So while I was launching my new career in crisis
16 emergency management -- actually, it wasn't a new career.
17 It started when I was much younger. So I kind of revisited
18 it but in a grander scale. I decided to go back and study
19 fire service; give back as a firefighter in the community,
20 and now it's a first responder. And I worked with the Isle
21 of Palms fire service and still do. Recently, promoted as a
22 captain in the fire service. But mostly now I'm relegated
23 to working and finding missing children on the beaches
24 during the summer, which happens a lot. I used to do a lot
25 of water calls. But because of my injury, I can't do that

1 on a jet ski. And I also can't go into a fire because I
2 can't carry a pack for an extended period of time. And I
3 can't don or take off a pack in the event of an emergency or
4 grab one of my fellow firefighters out if something should
5 happen, which often happens. So that's where I started my

6 ---

7 Q. As a fireman, you said you were a captain. Is that a
8 volunteer position?

9 A. Yes, it is. It's a volunteer position.

10 Q. Does it still come with things like a shield?

11 A. Yes, it does. As a matter of fact, I carry it in my
12 pocket every day.

13 Q. Do you have it with you today?

14 A. I do. And this I carry this just in case, and my wife
15 can tell you, there are countless times where we're on the
16 road and we see car accidents. And I have a responsibility
17 to get out and help. I can't just pass by. I can't just
18 fall under a good samaritan law because I'm a first
19 responder and I carry a 800 megahertz radio with me in the
20 car all the time. My family knows, you know, that it's on
21 when I'm traveling. So, you know, I take it seriously.

22 Q. In addition to working with the fire department, do you
23 work with the police?

24 A. I do. I work with the Charleston Police Department in
25 several capacities. One is I work with their SWAT team

1 mostly as a secondary commanding officer. As well as I work
2 with their command staff. I work with Chief Gregory Mullin
3 and Assistant Deputy Chief Tony Elder. And I work on their
4 command staff. So when there is an event, such as Mother
5 Emanuel, which again was a personal issue for me because of
6 knowing people who perished. I was part of their command
7 staff during that day and then 17 days following. So I
8 traditionally go and train with them. And in my training I
9 was picking up expended shell casing on the fire range when
10 they have their training, when SWAT has their training, or
11 instructing them on either evacuation, proper policies and
12 procedures on evacuation. Not only of the men and women who
13 put themselves in harms way, but also how they work
14 interoperably with bomb squads and dogs and stuff like that.

15 And in addition to that in the field, if I may, I also
16 was elected the chairperson of the Charleston Police Fund.
17 And my predecessor was Colonel Livingston who may or may not
18 be known. Or General Livingston I should say. And my
19 responsibility to the Charleston Police Fund is to help
20 raise money for good causes such as Camp Hope, which is on
21 the east side of downtown Charleston, to give kids a place
22 to go during the summer so they don't spend their time on
23 the street; body cameras, which I'm sure everybody has heard
24 -- I assume everybody has heard of. We raised a lot of
25 money for body cameras. Dogs, police dogs, we raised a

1 significant amount of money for several dogs. And then this
2 big one that we raised is Project Elimination which has been
3 in the news recently for the work that we're doing with
4 bringing communities and policing, relationships closer
5 together. And that came out of the tragedy and we've talked
6 to people like Ferguson and Baltimore and stuff like that.
7 And they're using this as a model. So, you know, I tried to
8 do that.

9 Q. When you talk about all those things with the fire
10 department with the SWAT with the police department, taking
11 the time and working after the shooting.

12 A. Yes.

13 Q. Was all of that on a volunteer basis?

14 A. Everything is on a volunteer basis. I do not get paid.

15 Q. This is separate from your job at IBM?

16 A. Very separate from my job.

17 Q. You had mentioned FEMA, the Federal Emergency
18 Management Act.

19 A. Yeah.

20 Q. Or Agency.

21 A. Agency.

22 Q. Tell us what you do with that.

23 A. Yes. So when you become a contractor the government,
24 and especially FEMA, you're given an identification that
25 says from here on in you swear to uphold public trust. And

1 when you do that, you're also giving this idea that says you
2 are now an official emergency response official. So that
3 means no matter where you go in the world, if you're
4 carrying that and there's a disaster, you have an obligation
5 to step up and basically say this is who I am and I'm here
6 to help. You can't walk away. I guess you can, but if
7 you're found out then you lose your credential. So there is
8 a public trust that develops.

9 Q. And Doctor, in the work you've done, have you ever
10 received any accommodations?

11 A. Yes, actually. I receive several accommodations. I
12 receive Firefighter Of The Year from the Isle of Palms Fire
13 Department. I received an award from the Charleston Police
14 Department for my efforts there; an accommodation from the
15 White House for my work that I do with them.

16 Q. Tell us what you've done with the White House.

17 A. Well, what I've done with the White Houses is that when
18 -- for instance, I'll give you the example with the latest
19 big event that everybody knows about, the AME shooting. We
20 had our seated government here: President Obama and
21 Mrs. Obama; we had Mrs. Clinton, Secretary of State Clinton,
22 Speaker Of The House John Boehner; we had Vice President and
23 Dr. Biden come to town. So my job was to serve as the
24 liaison to the Secret Service and their executive protection
25 service, PDB as it's called. And I was required and

1 requested by Mayor Joe Riley. I was given the credential as
2 an executive inside of the City, volunteer by the way, to be
3 the one point person of that liaison between the White
4 House. And when the White House called and said they've got
5 a problem, it doesn't go to anybody else but me. And then I
6 work with the incident commanders while in the field. So
7 that's one way that I worked in this event.

8 Q. Outside of these agencies, do you work with other
9 groups? Do you work with schools, for example?

10 A. I do. I was part and parcel to -- because of the
11 enormous amount of school shootings, especially post Sandy
12 Hook in Connecticut, Charleston especially, chosen school
13 systems under the prior administration, Superintendent
14 McGinley, along with the former North Charleston Police
15 Chief, John Zumalt (ph), Chief Greg Mullin, started a school
16 resource officer program. And because of my work in
17 emergency management and the work that I do, obviously on
18 SWAT with hostage negotiations and active shooters, my job
19 was to really kind of help them draft the policy and the
20 procedures of what you do when something like that terribly
21 happens. If you can imagine part of it is that the fact
22 that you have parents who just run to a school to make sure
23 that they can get their kids. That puts everybody in harms
24 way. So there has to be and policy procedure and it has to
25 be very transparent. So I worked with Mayor Joe Riley to

1 establish the school resource officer program that was
2 actually adopted in Charleston County as well. And they
3 work together. And I also work with a lot of the other
4 agencies. I was with Chief Andy Driggers in Charleston last
5 week because of what's going on in Charleston. You may or
6 may not see it, but the incredible amount of shootings that
7 have gone on in, you know, racial disparity.

8 Q. Globally, you take you work globally, your volunteer
9 work.

10 A. Yes.

11 Q. And can you tell us a little bit about that.

12 A. So that's my commercial work where I get paid for it.
13 I travel the world. IBM ---

14 Q. Well, let's -- we're going to go into your IBM work.
15 Let's talk about IBM. How did you get involved with them?
16 What is your position? Tell us what you do.

17 A. So, as I was stating earlier, I started a crisis and an
18 emergency management company. And I met a few guys from
19 here in Charleston who are all IBMers. And they found out
20 the work that I was doing. So they came to me and asked me
21 would I ever think of joining a big blue company. And I
22 said I really wasn't cut out for that. I'm more of an
23 entrepreneur. Started the Medical University, started that
24 program. When I was younger, started, you know, my paper
25 routes type of thing. So I always had that spirit. They

1 said that's what they're looking for. So after six months
2 of communication with them, and now eight years later I
3 understand the machine runs very slowly, they hired me. And
4 they put me on as the director of one of their programs.
5 Specifically at FEMA working with the new FEMA
6 administrator, Craig Fugate. So that's how I got to IBM.

7 Q. Okay. I think for most people including myself, people
8 think of IBM as being a computer. And they think of people
9 working for IBM selling or creating. Can you explain how it
10 really works?

11 A. Yes. So IBM is a big company. I have to be careful;
12 I'm on the record here. IBM is a big company and they have
13 many different lines of businesses. They have consulting
14 business, which is one of the largest consulting businesses
15 in the world. They have a computer hardware business that
16 they recently sold off. They've acquired things that
17 everybody uses on a daily basis like weather.com of which I
18 was part of the acquisition team. And they do a lot of --
19 you know, they sell a lot of software. They do a lot of work
20 on the Intel Space predicting when really bad things can
21 happen to bad people, and when bad people use bad things to
22 affect good people. So we do a lot of work in the terror
23 world. And that's what IBM does. And, you know, I rose
24 from a managing consultant to a senior management consultant
25 to an associate partner. Usually that trek takes a good 10

1 to 15 years. I'm glad to say with the 18 hours of work
2 sometimes, you know, I made it in 8 years. So my current
3 roll now, I've recently been promoted to the global public
4 safety and security segment leader. What that means is I
5 used to focus my efforts on emergency management and
6 bioterrorism, but now I have sort of a say in what goes on
7 worldwide.

8 Q. How often do you travel?

9 A. Weekly. I know where each bathroom and restaurant is
10 at Hartsfield Airport because I always travel from here to
11 Atlanta and then Atlanta to everywhere else. And I travel
12 around the world extensively. I think I made
13 around-the-world tours probably three or four times now.
14 And I've been in countries as far as Singapore and
15 Australia, you know, to Russia and California, you know,
16 Canada. You name it.

17 Q. If you weren't here today, where would you be?

18 A. I wasn't here today, I would probably be in Washington
19 D.C. or I would be in Singapore. And probably I would be in
20 Washington D.C. getting ready to go to Singapore because I
21 would sometimes stop in Washington D.C., we would get our
22 work orders if you will, and we then travel pretty
23 extensively. And we go usually for a day or two and we come
24 back.

25 Q. You were starting to tell us earlier about some of the

1 global events you've been involved with.

2 A. Yes, sir.

3 Q. And I had backed you up to give an understanding of
4 what you do.

5 A. Yes.

6 Q. Would you please talk about some of those, please.

7 A. Yeah, so part of my responsibility was, for instance,
8 working at the G8 Summit here back in Savannah, Georgia.
9 And I was the dignitary incident commander. So that means
10 all of the countries, France and Turkey and Russia, and
11 everybody who came in was pretty much on my watch. And what
12 that means is I just had to make sure that I communicated
13 with each team that was protecting these folks and if
14 something terribly went wrong, we knew exactly where they
15 were, where they were supposed to go, what they were supposed
16 to do. And if something horribly went wrong, you know, we
17 know exactly what hospital they would be sent to and how to
18 evacuate the dignitaries. Not that the general public was
19 any less important, but that wasn't my focus. I had counter
20 parts who did that. And my communication, again, was
21 directly with the Secret Service, FBI, counterintelligence,
22 CIA, bomb squads from multiple states because it was a G8
23 Summit so they pulled people as far as New Jersey, New York,
24 to come down and work that event.

25 The other things I was involved with globally, Japan's

1 Fukushima nuclear reactor disaster. I was called in as the
2 subject matter expert on emergencies and emergency
3 management to be able to set up what's known as hot zone,
4 cold zone, and warm zone. The hot zone is to stay away.
5 The warm zone is you can get a little close. The cold zone
6 is that's where everybody needs to be. So my job was to
7 make sure that I understand not only the lay of the land of
8 what was happening in Japan, but also how that was going to
9 then affect with the plume models that IBM has access to.
10 You know, what's going to happen here and northern part or
11 our -- you know, the northern hemisphere. Thailand,
12 recently the Thailand and Taiwan earthquake. I was there
13 two weeks beforehand. And then even prior to that I was
14 there one week before the aviation accident where the plane
15 came across the highway that actually I traveled on pretty
16 much every day with the president of, then president, of
17 Taiwan. So that kind of hit home. Chennia, India, the
18 Indian flood that just happened that killed many people.
19 And part of my job was to help a team down there, set up a
20 command-and-control center, which was about as big as this
21 room with, you know, maybe 50 or 70 monitors that different
22 organizations can look at and see who is actually needing
23 help with social media down to, you know, how they're
24 deploying their resources in general. And most of those
25 efforts -- all of the efforts are still ongoing 24/7, seven

1 days a week. Ankara, Turkey, you might've heard, there was
2 a terror bombing there that killed people. So I was
3 involved in that. And obviously, that's a little sensitive
4 information, but I think what I can disclose is, again, it
5 was around the command center and how they were going to
6 prepare for the next bombing, which they know is coming, and
7 what kind of intelligence and technology we can provide to
8 them that will tell you who the nefarious individuals are
9 and who they're connected to. Which is really the way it
10 starts and one person is identified and then within 30 to 40
11 seconds we can identify 15 to 20 with the software that's
12 out there, the technology that's out there. And then with
13 GPS technology, we were able to find those individuals and
14 hopefully stop them from creating further havoc. Saudi
15 Arabia ---

16 MR. TRAINOR: Your Honor?

17 THE COURT: Yes.

18 MR. TRAINOR: -- talk about this ---

19 THE COURT: Why don't we get to the accident that we're
20 here about.

21 MR. TRAINOR: And, Your Honor, is he reading something?

22 THE COURT: Well, I don't know what he's reading from.
23 But I think it's time we start focusing on the wreck, all
24 right?

25 MR. SLOTCHIVER: Well, I was trying to get his

1 background. If I can talk about his family a little bit
2 before the wreck.

3 THE COURT: Okay. Well, let's just . . .

4 MR. SLOTCHIVER: I'll be happy to.

5 THE COURT: All right.

6 MR. SLOTCHIVER: (continuing)

7 Q. Dr. Nestler, let's move beyond your work, beyond your
8 civic duties, and your volunteer work, and let's talk about
9 your family. Let's talk about your joy, your fun, your
10 activities, how life was prior to the wreck. But then, in a
11 few minutes, we'll talk about the wreck that occurred and
12 the impact it's had on your life. Okay?

13 A. Okay.

14 Q. Why don't you tell us about your family. About how
15 your life was; about the type of stuff that brought you joy.

16 A. Well, I have a beautiful family. My wife Julie, we're
17 married 16 years. We have one child, Aspen. And she's 13
18 going on 21. And we were a very active family. We took
19 bike rides almost every day to the beach. We played
20 football mostly on all weekends before we had the travel
21 volleyball team that my daughter participated in. We water
22 skied out on Johns Island and that was once or maybe twice a
23 week depending if she's in school or not. We traveled to
24 see my family in Connecticut and my mother in Florida. My
25 103-year-old grandmother in the South Florida, is well,

1 still alive as of today. And we had a very active
2 lifestyle. And I was participating in every single one of
3 the sporting events and also leisure. You know, when we
4 were sitting at the beach. It's very easy to sit at the
5 beach and, you know, veg out and swim in the ocean and do
6 things. Obviously, you know, as a firefighter I have to
7 carry a radio with me just in case something happens. But
8 nonetheless, that's what we used to do.

9 Q. You testified you travel a lot. How long would you
10 used to be gone? Or a better way to say this, would you be
11 home a lot to spend time with your family?

12 A. Yes. One of those conditions of working for IBM was
13 that I was never gone over a weekend and if my daughter had
14 an event, even if it was awards at the Moultrie Middle
15 School where she was getting an award for being an A/B honor
16 roll student, that I could come home, and I could be there.
17 And I have not missed one event as of yet. Which means that
18 sometimes I'll travel as far as Australia, and then come
19 back to be -- to be able to get, you know, back for a
20 volleyball tournament or what have you. And I planned the
21 trips accordingly.

22 Q. Let's move forward to March 8th of 2014.

23 A. Okay.

24 Q. Tell us about that day. How were you feeling when you
25 got up that morning?

1 A. Great.

2 Q. Any ailments?

3 A. No ailments.

4 Q. You've heard the doctor testified yesterday about the
5 fact that a year earlier you had shoulder issue and gotten
6 an injection?

7 A. Yep.

8 Q. Any problem with that?

9 A. Nope. Totally resolved.

10 Q. Had you returned to doing your regular activities?

11 A. Yes, I did; a hundred percent.

12 Q. Are you the type of person who if you have a mental
13 ailment goes to the doctor or learns what you have to do to
14 fix yourself?

15 A. Well, because of my background, I go over and above,
16 you know, kind of researching it is also a Type A
17 personalty. I want to make sure I understand why I'm going,
18 what I'm asking, and what particularly the ailment that I
19 see from my perspective is. And then I feel I can have an
20 educated conversation.

21 Q. And having work at the Medical University for several
22 departments, do you have personal knowledge or do you
23 personally know a lot of doctors and a lot of ---

24 A. I absolutely do.

25 Q. Friends and acquaintances?

1 A. Friends, acquaintances, business associates, people I
2 work with on a daily basis actually.

3 Q. Okay. Would you please walk us through what happened
4 on that day. Where were you going? Who were you with and
5 what occurred?

6 A. So in the morning we all got up. Or Julie yesterday
7 told you she was doing a charity ride for Pattison's Academy
8 for disabled children. And she was going to West Ashley off
9 of Bees Ferry. And my daughter Aspen and I were gonna go to
10 Boone Hall where there was this mud run. And I think it was
11 referred to yesterday as an obstacle course for adults and
12 kids.

13 Q. Aspen was 11 years old at the time?

14 A. Yes. She was 11 years old at the time. So we had a
15 robust breakfast. It was moderately cool. And we dressed
16 accordingly and packed the car with water to eat -- to drink
17 and shower after as you get very muddy. We learned that
18 already by doing it once. And then we got in the car and
19 Aspen got in the passenger right side; actually, the
20 passenger backseat. And we pulled out of the driveway and
21 we started our way over the connector.

22 Q. What were you driving?

23 A. I was driving a Ford Expedition, 2012, black, extra
24 long, XLT.

25 Q. And this is over at Boone Hall you were traveling to,

1 correct?

2 A. We were going to Boone Hall. That's where the event
3 was held.

4 Q. What happened?

5 A. Well, we were coming over to Boone Hall and we saw all
6 of the traffic starting to stop. And we pulled to the left
7 lane. In this case, it was, you know, the fast lane. It
8 was the closest to a cement median which had some trees in
9 it. So we stayed on the left-hand side. And we saw a
10 police officer there that was directing traffic. And I look
11 in my mirror to see if there's anybody behind me, just the
12 way you train to drive an emergency vehicle anyway is just
13 be aware. We call it situational awareness. Be aware of
14 your surroundings; rear -- right rearview mirror, left
15 mirror and back mirror constantly. And then I saw this car,
16 red vehicle, traveling at a very high rate of speed and I
17 thought, "I hope he stops. I hope he stops." And then
18 realizing that this guy was not gonna stop. So I just
19 remembered grabbing the wheel and then saying Aspen's name.
20 And then the next thing I heard were the screeches and I
21 just tried desperately to hold that wheel because I feared
22 that we would go right in the front of -- the car in front.
23 Well, we got hit and all I saw was at the ceiling. And I
24 thought, "What the heck just happened?" And I don't know
25 really where he hit, but the whole car jetted forward and

1 the forward driver past -- excuse me, the driver side went
2 over into the oncoming traffic. And all I saw out of the
3 corner of my eye was cars passing. And I thought, "I got --
4 I got to get out. I got to do something." And I turned and
5 I saw Aspen crying in the back and blood dripping from her
6 head. And I said, "Aspen, are you okay? Are you okay?"

7 Q. Well, we just want to talk about you for right now,
8 okay?

9 A. Sorry.

10 Q. All right.

11 A. My apologies.

12 Q. Speak up. That's okay. What happened next?

13 A. The next thing I knew, we had police officer coming and
14 asking me if I was okay. And I say, "No, I was not." I
15 could not feel my left arm at all. My head was pounding.
16 And my leg was underneath my brake and my seat was
17 positioned in such a way that it was -- the brackets where
18 off the floor and I was looking at the ceiling. And then
19 ---

20 Q. Let's take a quick stop.

21 A. Yep.

22 Q. Let me show you some photographs.

23 A. Okay.

24 Q. Have you seen all of these before?

25 A. I saw those. I saw that one. Saw that one. Saw that

1 one. Saw that one. And I saw that one. Saw that one. Saw
2 that one. Saw that one. Saw that one. Saw that one. And
3 then that one.

4 MR. SLOTCHIVER: Your Honor, at this time we would move
5 to introduce these all into evidence I believe without
6 objection.

7 THE COURT: All right. Are they marked individually or
8 as one?

9 MR. SLOTCHIVER: They can be marked as one, or we can
10 do it however ---

11 THE COURT: Do you have any objection to them coming
12 in?

13 MR. TRAINOR: No, Your Honor.

14 THE COURT: Okay.

15 (Whereupon, Plaintiff's Exhibit Number 4, Photographs,
16 was received into evidence.

17 MR. SLOTCHIVER: Your Honor, I would ask Dr. Nesbit to
18 come down. I want to show him the pictures, show them to
19 the jury, and let him explain.

20 THE COURT: All right. Can you step down?

21 (Witness complies.)

22 BY MR. SLOTCHIVER: (continuing)

23 Q. What is this picture?

24 A. That is the right passenger side of the rear. This is
25 the liftgate. And this is the side of the car that actually

1 . . .

2 Q. This one?

3 A. This the other side of the car that shows you here
4 where the liftgate was actually moved away from this.
5 That's another example that can you see here where the
6 window actually is -- towards the driver side. This is
7 their driver side door this and this the passenger door
8 which actually never ended up closing correctly because it
9 impact to the opposite side of the car. This is underneath
10 the car. Okay. So this is the spare tire. And this is the
11 frame that was bent under here (out of hearing of court
12 reporter.) Yeah, this was my seat. Usually it's straight
13 up, but in this case it was down. And when they took me out
14 they had to push it back to get me out of there. Another
15 picture of the driver's -- I'm sorry, the passenger side
16 rear door from a different perspective showing the backside.
17 Again, the back bumper was down. So right here, this is --
18 you can see that there is more of a separation than anything
19 else. What we call the crush zone.

20 Q. Where was his picture taken?

21 A. This picture was taken in the wreck scene, where the
22 wreck went to, where the car went to . . .

23 Q. That's why you're in the picture?

24 A. That's why I'm in the picture.

25 Q. Where were the other pictures taken? If they weren't

1 taken at the wreck, where were they taken? If they weren't
2 taken at the wreck scene, where were the cars transported
3 to? Where were the other pictures taken?

4 A. Well, these were all taken at the wreck -- that is the
5 place where the wreck went. This is the seat I was -- it's
6 kind of sheared here. It's the bracket. So it just ---

7 Q. That's the underpart of the seat was bracket where it
8 shows where it ripped up?

9 A. Yeah, so this is, again, if you can see the perspective
10 of the truck, you can see the inside of it. So this never
11 closed and the whole back door basically switched this way
12 and you can see here this is the -- actually moved to the
13 left towards the driver side. It should have actually . . .

14 Q. Only a few more. Here we go. What is that?

15 A. This is a frame of -- this is one of the things that
16 they teach you in firefighting where you're going to
17 extricate someone from the vehicle. You have to know where
18 your frames are. And this is a major frame. So if this
19 gets bent then that means that the back of the car has to
20 slide under. So because of the height of the vehicle and
21 the weight of the vehicle, that impact is so much that it
22 would actually cave-in as you can see here the cavity of and
23 then that would kind of push that and crush it in. That is
24 the piece -- in the carriage you say. Again, another
25 perspective where we can actually see this whole portion . .

1

.

2

Q. Who took this picture?

3

A. I don't know the person's name of the bystander that said I'm giving you a phone and my phone was sitting there. And he took it and he took the picture.

6

Q. Okay. You can have a seat.

7

(Witness complies.)

8

Q. So the wreck occurs and what happened -- and you're at the scene, what happened to you next?

9

10 A. Well, I remember the firefighter coming to the door and
11 prying the door open and asking me, you know, am I okay, am
12 I breathing. And I said yes, but I was obviously labor
13 breathing. And then I remember seeing a yellow vest of the
14 paramedic who I knew from working obviously at the Isle of
15 Palms. And he said, "Dr. Nestler, are you okay? Are you
16 okay?" And I said, "Yes. How is my daughter?" And then he
17 said, "You need to go to the hospital." And I said, "Why?"
18 And he said, "Well, because you don't remember what just
19 happened," because he asked. And I said, "Well, I know I
20 got into an accident. I'm not really sure what happened
21 except the guy was going at a high rate of speed behind me
22 and he just didn't stop." And I heard the skid marks. And
23 then I heard this big bam. And then the next thing I knew,
24 I was facing with oncoming traffic." And he said, "Well,
25 we're taking you out." You know, all the normal procedures.

1 "We're going to put you in a C-spine." You know, "Is your
2 neck hurting?" I said yes. Is my arm hurting? Yes. You
3 know, was my head hurting? Yes. And they asked me if my
4 foot was okay because they needed to remove that from
5 underneath the break. And to the best of my recollection
6 that's what happened. And they ---

7 Q. Is that the standard first responder's questions? They
8 go through a litany of things to ask you ---

9 A. Oh, absolutely. Yeah.

10 Q. Okay. And before we move on, one more thing I wanted
11 to cover with you.

12 MR. SLOTCHIVER: Can I see the Exhibit 1?

13 (Court reporter hands over exhibit.)

14 Q. You were here yesterday when the defendant testified,
15 correct?

16 A. Yes.

17 Q. And he had the chance to see the sworn affidavit that's
18 been introduced at Plaintiff's 1, correct?

19 A. Yep.

20 Q. Any reason to dispute what he is sworn to in this
21 affidavit?

22 A. No.

23 Q. Does that help to fill in some of the blanks?

24 A. Yes, absolutely.

25 Q. Okay. So they said you needed to go the hospital?

1 A. Needed to go to the hospital.

2 Q. Okay. Were you -- and we saw a picture with a collar
3 on you?

4 A. Right.

5 Q. Were you put on a backboard also?

6 A. Standard procedure is to do that.

7 Q. Okay. Walk us through what happened.

8 A. So the next thing I knew I was in the -- they took me
9 on a stretcher. They took me on a stretcher and I asked
10 about Aspen, how she was doing. They said she was fine.

11 Q. And we're not going ---

12 A. I understand.

13 Q. We're not going to talk about her.

14 A. Sorry.

15 Q. Okay.

16 A. So they put me in the ambulance and -- it was both of
17 us on backboards in an ambulance. I mean, I don't know how
18 else to say it. She was in the same condition I was,
19 backboard, neck brace.

20 Q. All right. You've always been the one assisting. How
21 did it feel -- what was going through your mind as you were
22 being a put in the neck brace?

23 A. It felt awful because you lose control and you couldn't
24 turn your head. And I know this. And I trained people and
25 I trained on it. But it's awful. And the thing that's

1 awful is you can't see around you, and when they put tape on
2 you or they take you off of your stretcher when they put you
3 in -- whatever the case may be, you are an object at that
4 time. Because their job or our jobs are to keep you alive,
5 safe, and breathing. That's our only job. When we transfer
6 you over from EMS over to the hospital, it's their job to do
7 the full assessment.

8 Q. Did you have any idea the extent of your injuries at
9 that time?

10 A. Oh, no. I thought it was a mere bump. At least that's
11 what I hoped.

12 Q. So you are transported to the hospital. Which
13 hospital?

14 A. East Cooper Hospital.

15 Q. And what happened there?

16 A. Well, the doctor saw me, said the same thing, "Dr.
17 Nestler, are you okay?" And they took me to a treatment
18 room and they ordered an X-ray, I believe. And then kept me
19 there for observation for a couple of hours. And in the
20 interim, they called my wife. Matter of fact, my wife
21 called us on the way to the hospital. And the paramedic
22 said, "You want -- do you want to answer that? And I did.
23 And I told Julie that we were involved in a wreck and we're
24 okay.

25 Q. And when you were released from the hospital, how were

1 you feeling?

2 A. Pretty crappy. Just like I got hit by a bus.

3 Q. What were your complaints? What was bothering you at
4 that point?

5 A. I had a terrible headache, number one. I had a
6 terrible pain in my left arm.

7 Q. You ever had a pain like that before?

8 A. Not like that. This was like a burning sensation and
9 it scared me. Because burning sensations are usually
10 indicative there's some, you know, neural issue; nerve
11 issue. And that scared me. But I didn't make anything of
12 it. I wanted to just get home, get everybody settled.
13 Julie came home, rested for the day, drank a lot of water,
14 put some ice on my elbow as instructed.

15 Q. Did it help?

16 A. Hmm?

17 Q. Did it help?

18 A. Not really. It started to in the first 20 minutes.
19 And then after, it stopped and then the following day I, you
20 know, I took -- I don't know what I did at that point
21 actually, after I said it wasn't helping.

22 Q. Dr. Schoderbek testified that you called him. Do you
23 remember that?

24 A. I do.

25 Q. When was that?

1 A. I think it was that day or the following day. Because
2 I think in between, I went Nason Medical for -- I got either
3 MRI or something. But I was still in significant amount of
4 pain and Dr. Schoderbek said come to my office and we'll
5 see. I said okay. So I made appointment and went into see.
6 And he was not there the first visit.

7 Q. I'm not asking you to memorize it or remember
8 everything in chronological order. But can you give us an
9 overview of the type of treatment that you received?

10 A. From the time I was in the hospital?

11 Q. (Non-verbal response.)

12 A. Well, it was known as the standard of care in emergency
13 rooms. Again, they pain scale you and determine if there is
14 any blood or evidence of blood or lacerations, if you lost
15 consciousness or not. If you didn't, they don't hospitalize
16 you overnight. If you did, you're there for observation.
17 Kept me for a couple of hours. Gave me something to drink.
18 Immediately give me an anti-inflammatory. I said I didn't
19 want this; they said you have to take it. So I did because
20 being in the hospital, I know they have certain criteria
21 they need to follow. And then after that, they said, you
22 know, it's time for you to go home. I went to Nason Medical
23 for -- you know, to see if there was anything else that was
24 wrong. And then I went to Dr. Schoderbek and visited with
25 his PA at the time.

1 Q. You went to him because he was a specialist?

2 A. I went him because he was a specialist. I went to him
3 also because, you know, obviously we have a personal
4 relationship. I trust him. And I went to him because he
5 solved the issue with my shoulder and I trusted the
6 judgment. And he said, "Okay, come see me."

7 Q. He solved the last issue you had?

8 A. He solved my shoulder issue in 2013.

9 Q. Right. Okay. So you went to him. You saw his PA.
10 Then you saw him.

11 A. Right.

12 Q. And I believe the testimony was you then went to a
13 course of some physical therapy.

14 A. Right. And I followed his recommendations, go to
15 physical therapy. And at that time, you know, he
16 recommended me to follow the course of therapy until I felt
17 in such time, you know, I didn't need it anymore, it was not
18 helping or it totally resolved.

19 Q. You heard testimony yesterday that he had recommended a
20 certain amount of therapies for a certain amount of weeks,
21 and that you did not follow that per the instructions. Is
22 that correct?

23 A. I heard that, but that's not really correct. I mean,
24 part of it is, it's a standard of care that they say we want
25 you to do the following. But the advices from Dr.

1 Schoderbek and other's, which we'll refer to later, I
2 believe is, "If it's helping you continue; if it's not,
3 stop."

4 Q. Was it helping?

5 A. To a certain point it was, and then it didn't help. It
6 actually aggravated it a bit. And they said that, the PT
7 folks at the -- the physical therapy -- the physical
8 therapist at the time said, "We're going to give you some
9 exercises to take home and see if works."

10 MR. TRAINOR: Your Honor, I'm going to make a hearsay
11 objection.

12 THE COURT: Sustained.

13 MR. SLOTCHIVER: (continuing)

14 Q. You still got nerve problems today?

15 A. Yes.

16 Q. If the physical therapy were helping you, would you
17 still be going to physical therapy?

18 A. If it was helping, absolutely. I would do anything to
19 make this go away.

20 Q. We'll talk about how it affects you in a few minutes.

21 A. Okay.

22 Q. I just want to go through the medical staff first.

23 Another topic that was brought up that Dr. Schoderbek
24 testified and I wanted to ask you about was the ENG testing.
25 What is your understanding? You've got a medical

1 background, what is your understanding of that test?

2 MR. TRAINOR: Objection, Your Honor. I don't think
3 he's qualified as a neurologist or an orthopedist. I don't
4 think he has -- he can't offer opinion as to what an ENG is.

5 MR. SLOCHIVER: Your Honor, he informed himself and
6 he's been attacked through -- or the doctor was attacked by
7 the fact he didn't do it. I think he has the right to
8 explain.

9 THE COURT: I'll allow him to testify. Go ahead.

10 THE WITNESS: You question again? I'm sorry.

11 MR. SLOCHIVER: Sure.

12 BY MR. SLOCHIVER: (continuing)

13 Q. What is your understanding of the ENG testing and can
14 you explain why you did not undergo it?

15 A. Well, an ENG testing is a diagnostic procedure that
16 helps determine where there's an issue, where the nerve
17 potentially would be hurting. It doesn't, and as Dr.
18 Schoderbek said in his deposition yesterday or the video
19 yesterday, it didn't change his course of treatment. He did
20 not want to do surgical intervention. I wasn't a surgical
21 intervention candidate at the time, at all. And he also
22 said after my researching ENG, you know, understanding the
23 side effects that can cause -- that it can cause. He put it
24 in terms that I guess resonated pretty hard. You know, it's
25 medieval torture. And being an acupuncturist, nationally

1 board-certified, putting a needle in somebody's arm that has
2 any sort of nerve issue is contradictory. You actually have
3 to put it on the other side and use courses of electrical
4 stimulation. Matter of fact, if you do have, you know, some
5 sort of neurology issue, you try to avoid acupuncture in the
6 whole body even though acupuncture deals with pain
7 successfully. So you take it off, you know, doing -- in
8 nutraceutical medicine and others. But, you know, an ENG
9 was not was going to solve the issue. It wasn't going to
10 say we see this and we're going to do this. It just wasn't.
11 And in all the literature, anybody can read, it talks about,
12 you know, ENG and it talks about nerve conduction testing.

13 MR. TRAINOR: Your Honor, I'm going to object again.

14 MR. SLOTCHIVER: We'll move on to the next topic.

15 THE COURT: All right.

16 Q. Doctor, what about the issue of -- let's back it up. A
17 year earlier you had was been described as a minor shoulder
18 issue. You had injection, correct?

19 A. Yes. I had tendinitis and that's an inflammation of
20 the bursa.

21 Q. One of the discussions you had with doctor dealt with
22 having an injection.

23 A. Right.

24 Q. As a result of this new injury, correct?

25 A. Right.

1 Q. What was your reason for not wanting to have that
2 injection?

3 A. Well, not only to have the injection was, again,
4 because if you -- sort of having an understanding of an
5 anatomy, okay. So if you look at a nerve as you do an
6 extension cord, and it has that rubber around the extension
7 cord and we're calling that the myelin sheath and that
8 surrounds the nerve, and you shear that off, you have
9 exposed wire. Touch the wire, you get shocked. If you
10 insert a needle into an area that has an exposed nerve,
11 chances are very likely that it will excite that nerve and
12 potentially you can cause further pain. So having done the
13 research, talking to Dr. Schoderbek, talking to others,
14 talking to Dr. Johnson, and making an educated decision
15 based upon peer-reviewed journals, being the type A
16 personality, I researching this, knowing that
17 corticosteroids also would cause almost a demyelination,
18 continued demyelination, of the tissue or, you know, of the
19 nerve and then the tissue around it so it would degrade the
20 tissue around it. So based upon that knowing, you know, I
21 asked Dr. Schoderbek, "Is this 100 percent certain that this
22 would solve the problem?" And his answer was, "No, it
23 won't. I can't give you that certainty." So together we
24 made the decision that this is not the course of action.
25 Q. You weighed pros and cons?

1 A. I did.

2 Q. One of the things that was described also was Neurontin
3 to help deal with the pain. Why were you unwilling to take
4 Neurontin? I know Dr. Schoderbek talked about it yesterday.
5 But in your words, what was your concern?

6 A. Neurontin is a miserable drug. It's a neurotoxin and
7 the side effects of a neurotoxin impair your cognitive
8 abilities to make any sort of decision. And I always have
9 to be on, no matter what. Even if I call correctly, even
10 Dr. Schoderbek said in his world, right? In his surgical
11 world, he always has to be on. So taking Neurontin -- he
12 would not support. And again, the Neurontin can cause
13 severe -- one of its side effects can cause severe numbness
14 and tingling as well, and G.I. issues. I mean, again, it's
15 open source information; you can look at it online and read
16 the label. It says do not take and it gives you a multitude
17 of reasons why you shouldn't take it. And then one of the
18 biggest things it says is don't drive heavy equipment after
19 taking Neurontin, period. So heavy equipment could be a
20 car. But I travel extensively; I rent cars throughout the
21 world. And it would impair my -- it impairs my -- let me
22 see if I can state this. It impairs my focus, you know,
23 which is why I have things -- I now tend to write things
24 down that I never wrote before. In my iPhone I carry
25 something called Evernote and I'm constantly dictating into.

1 Which before -- before this accident, I never did that.
2 Never. I even pride myself of actually having somewhat of a
3 photographic memory. And now even words don't come to me as
4 quick as they normally do. And to take Neurontin, that
5 would complicate it.

6 Q. Tell me about how this injury affects you. Tell me
7 about, first, the pain that you have. How often? What does
8 it feel like, scale of one to ten? Those types of things
9 that the jury can understand.

10 A. The pain is awful on a daily basis. I get up, I do my
11 very best to do the things that I can do that -- I do the
12 very best I can.

13 Q. I think some examples, perhaps, of things that -- of
14 how it affects you in your daily life. Whether it's getting
15 up; whether it's getting dressed; whether it's . . .

16 A. So brushing my teeth, pretty simple. Showering, it's a
17 little bit more difficult because I can't shampoo my hair
18 for a long period of time, not that I have much. As candid
19 as I can be, when I was growing up I was taught to wipe your
20 rear-end after you're done with your left hand because you
21 shake with your right. Having be counseled that way came in
22 pretty handy overseas especially in countries that, you
23 know, they do the same. So I used to wipe with my left, and
24 now I have to wipe with my right. It's difficult. It's
25 humiliating. Getting dressed, putting a suit on, is also

1 difficult because I found myself constantly leaning;
2 constantly leaning. When I'm on a plane, I have to always
3 ask for a different seat so that my arm -- but when I go
4 into the bathroom in these very tight quarters in an
5 airplane, I have to be very careful because if somebody hits
6 it, that will set it off.

7 Q. The doctor talked about a range of motion testing he
8 gave you. Would you please step down and show the jury your
9 range of motion and compare it to your right arm to your
10 left.

11 A. (Witness complies.) Obviously, my right arm (out of
12 hearing of court reporter). My left hand, goes about that
13 high -- and now I feel coldness and then tinglingness in the
14 left. I don't know if you can see my hand, but it's
15 starting to shake. And now it's in pain. So what I try to
16 is I adjust it. And I'll turn it and I'll rub it. Sort of
17 like now, now it's cold. Put my hand in the other hand, you
18 feel it; very, very cold as compared to this hand which is
19 warm. And I try to raise it again, you see my body, my
20 whole body adjusts when I try to raise it. And that's about
21 as high as I can raise it. And then -- I cannot carry my
22 bag. I can't carry that but in my right arm now. Pretty
23 much, that's it. Also, going to get breakfast or something
24 on the road, you know, I'll have my bag and pick it up and
25 I'll have tea. But I'm always afraid to carry tea in my

1 hand.

2 Q. Does the amount of activity or the type of activity
3 affect how it works?

4 A. It exacerbates it. More activity, the more it
5 exacerbates. Even being on the sidelines of my daughters
6 volleyball, I have to be very careful in jumping up. And,
7 you know, natural inclination is when, you know, she spikes
8 a ball is to cheer for her. Well, I'm a one-arm cheerer in
9 a sense. You know, I try to keep it -- you know, again, I'm
10 being very conservative so that, you know, I just can't -- I
11 can't do it.

12 Q. In all the research you've done and all the knowledge
13 that you have, is there anything that you know of that would
14 fix it?

15 A. The answer is no. And it's not only the research that
16 I've done. It was the conversations and the visits that
17 I've had with the physicians, and those who I know in the
18 medical world. And my uncle who is an orthopedic surgeon,
19 who has also published, says the same.

20 MR. TRAINOR: Your Honor, continued hearsay objection.

21 THE COURT: Sustained. Strike -- your witness didn't
22 testify.

23 THE WITNESS: Sorry.

24 A. So yes, in all the research that I've done looking at
25 the Board of Neurology, their peer-reviewed journals, you

1 know, going to, you know, Pub Med and all of the rest of the
2 publications that, you know, I still have access to ---

3 Q. You're not aware of anything?

4 A. No. Even going to the University of North Carolina
5 where I teach, no. Nobody knows of anything that's going to
6 solve this. Matter of fact -- well, I can't say because
7 they're not here.

8 Q. You mentioned something that I wanted to ask you about,
9 but I'm about done, which was you mentioned neurological
10 reviews. Yesterday the doctor talked about the fact that
11 one of the things he talked to you about was seeing a
12 neurologist.

13 A. Right.

14 Q. Why did you not do that?

15 A. Well, again, Dan, neurology -- let me see if I can put
16 it correctly. Having the conversation with Dr. Schoderbek
17 and Dr. Johnson without me researching basically called out
18 the fact that going to a neurologist is not going to give me
19 a solution to my problem. You make it another opinion.
20 They may tell you there are things that you can do in the
21 future that may help you or may hurt you. But it wasn't
22 like I got to a neurologist and say, "Oh, doctor, you found
23 the problem, you found the cure, now you can solve my
24 problem." Nothing. And I went to Dr. Schoderbek who has a
25 wonderful reputation, Dr. Johnson who is the specialist in

1 spine, neural issues; multiple conversations that I had.
2 You know, and he was the board -- he was the chairman of the
3 board at the Medical University of South Carolina. So I
4 think going to him was, you know, pretty substantial.
5 Should I go to a neurologist? It's not going to help you.
6 You're just getting another opinion. Just like an ENG,
7 you're just getting -- you're getting more information. But
8 that more information is not gonna yield a fix to this.
9 This is lifelong. It's in the notes. It's lifelong. It's
10 not going away.

11 Q. Are you still able to go to work?

12 A. I am.

13 Q. Do you compensate for it?

14 A. Every day.

15 Q. Are you still able to do your civic duties, your civic
16 volunteer work?

17 A. I am with restriction, as I've said earlier. Can't go
18 into a fire, you know. Even rendering medical care on the
19 beach to somebody stung by a jellyfish, I have to be real
20 careful not to expose myself. I'm always guarding, always
21 guarding.

22 Q. What about your family? We haven't discussed this.

23 How this restriction affects you and your family? You
24 talked briefly about it.

25 A. Well, I guess I'll start with my daughter. She's my

1 only. And she comes to me to solve some of her issues in
2 volleyball. So when I'm at a volleyball net -- and I don't
3 know if many of you know about volleyball, but you put both
4 hands up to return a ball or to bump a ball as they call it.
5 But I can't bump the ball without being in excruciating
6 pain. I can't bump the ball by raising both of my hands
7 above the net. So she wants to get better at serving or she
8 wants to get better at her position as a middle blocker, and
9 I'm supposed to be there with both hands to hit back. And
10 she gets a little frustrated. And she understands. But
11 she's been wonderfully human about it and not complaining to
12 me about it.

13 Water skiing has been tough because we're an active
14 family. I can't pull on the line in order to get up on the
15 skis. So that's done for me. And nothing's going to bring
16 that back. And she's an avid water skier invited to the
17 hall of fame. So she's wonderful at what she does. My wife
18 -- I'm sure I'll remember something about my daughter
19 without crumbling -- I'm grateful. I try to hide the best I
20 can from her what pain I go through. I wake up at 4:30,
21 5:00 o'clock in the morning to do whatever chores I need to
22 do so it doesn't really kind of bring any notice to it.
23 Julie has picked up a lot of work at the house, a ton of the
24 work at the house. And hard part is that she consistently
25 sleeps on the left side of the bed and I sleep on the right.

1 So there's no way I can turn on my left side and hold her at
2 night. We've tried the opposite but I don't sleep on the
3 left side of the bed. I guess it's a thing that I sleep
4 closer to the door. Holding hands, I've always got to hold
5 it with the right hand. That's it. When we're walking down
6 the street, again, because of my safety and security
7 background, I have to make sure I'm on the right side of
8 street in order to protect her or protect my family, which
9 leaves me a little exposed, but. Hugging, it's one arm.
10 Obviously, I can bend it a little bit and hold behind but
11 there's no pressure. Because when the pressure comes,
12 that's when the hurt starts; and it's each and every day.
13 Taking in groceries is a whole other issue. You know, I buy
14 one of those big super handles that they actually stopped me
15 in security, wanted to find out what it was, so I can carry
16 multiple bags in my right hand. But even doing that, you
17 know, I'm still restricted to a certain amount. Taking out
18 the garbage. It just has affected everything. I mean, I
19 don't even know how to quantify it anymore. I can tell you
20 from a quality standpoint, pardon the expression, it sucks.
21 There's nothing worse than not having a solution to what
22 this problem is. And as I'm told by professionals, other
23 than myself, other than the journals I've reviewed, having a
24 medical background and the training that I've done and
25 treated thousands of patients, this is frustrating beyond

1 words because I don't have a solution and nobody has a
2 solution. Testing, going and visit PT, ENG, neurologist,
3 spine surgeon, everybody has an opinion but nobody has an
4 answer. So, yeah, it affects my family life a lot. Sorry.

5 MR. SLOTCHIVER: I've got nothing further. If you can
6 answer any questions Mr. Trainor has.

7 THE COURT: All right. Well, why don't we take a ten
8 minute break so that you folks can use the restroom and get
9 freshened up. And we'll come back in ten minutes with
10 cross-examination, all right. And don't begin deliberations
11 or discussions about the case.

12 (The jury exits the courtroom at 11:13 a.m.)

13 THE COURT: All right. You can't talk to anybody
14 during the break about your testimony. So if you need to go
15 to the restroom, you can, but limit your communication to
16 somebody else.

17 (Witness exits the stand. A brief recess was taken at
18 11:13 a.m. and resumed at 11:30 a.m.)

19 THE COURT: I've had the clerk order lunch for them and
20 it's supposed to be here around 12. So I thought, well,
21 with the time backing up a little bit further, when you
22 finish, we'll just break because they need their lunch. And
23 then we'll come back and do charging and arguing after
24 lunch, okay. Did she go to get the jury? (Brief Pause.)
25 You can come back up on the stand.

1 (At 11:31 a.m. the witness, Dr. Gary Nestler, resumes
2 the stand.)

3 (The jury enters the courtroom at 11:32 a.m. and the
4 following is held on the record.)

5 THE BALIFF: All jurors present, Your Honor.

6 THE COURT: Okay, folks, we'll resume now with the
7 cross-examination of the witness. Mr. Trainor?

8 MR. TRAINOR: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. TRAINOR:

11 Q. Good morning Dr. Nestler.

12 A. Good morning, Mr. Trainor.

13 Q. I just want to clarify one thing from -- You are not a
14 biomechanical engineer. Is that correct?

15 A. I'm sorry, could you speak up?

16 Q. You're not a biomechanical engineer. Is that correct?

17 A. No, I'm not a biomechanical engineer.

18 Q. Not an accident reconstructionist?

19 A. No, I'm not an accident reconstructionist.

20 Q. Not an orthopedist?

21 A. No, I'm not an orthopedist.

22 Q. You're not a neurologist?

23 A. No, I'm not a neurologist.

24 Q. You're still currently working for IBM, correct?

25 A. Yes, sir. I am still working for IBM.

1 Q. You're still traveling with IBM?

2 A. Yes, sir.

3 Q. Or for IBM?

4 A. Yes, I'm still traveling with IBM.

5 Q. You're right handed. Is that correct?

6 A. That is correct.

7 Q. Okay. You heard Dr. Schoderbek say yesterday that he
8 believes, he assumes, that it's a nerve issue. Is that
9 correct?

10 A. Did Dr. Schoderbek assume that it was a nerve issue?
11 Yes, I think he pointed that out that it was a nerve issue.

12 Q. And that there were multiple MRI, CT scans that said
13 you have degenerative issues in your neck, correct?

14 A. Yes.

15 Q. You are aware of that?

16 A. Yes. That's what he stated in his deposition. That's
17 true.

18 Q. And you have no reason to dispute that?

19 MR. SLOTCHIVER: Your Honor, if he can just be allowed
20 to finish his responses. It seems like the rhythm is not
21 working. And before he finishes ---

22 THE COURT: Let him finish answering his question
23 before you ask the next one.

24 A. I'm sorry, could you go back to the question of the
25 MRI?

1 Q. Sure. As far as you're aware, you have degenerative
2 changes, issues in your neck, correct?

3 A. Yes. Can I explain it?

4 Q. I'm just asking whether you dispute that or not?

5 A. No, I don't dispute it.

6 Q. Okay.

7 A. But, you know, aging does that to you.

8 Q. Correct. It's a natural process ---

9 A. It's a natural bioprocess, right.

10 THE COURT: You got to let the witness finish his
11 answer before you start talking on to the next question.

12 MR. TRAINOR: Yes, Your Honor.

13 MR. TRAINOR: (continuing)

14 Q. You've never had any -- I think you testified you had
15 never had any neck issues or nerve issues prior to this to
16 this accident, correct?

17 A. I'm not sure what you mean by neck issues.

18 Q. Have you ever had any neck pain or problems in your
19 neck prior to this accident?

20 A. I mean, over the course of the years, you know, stiff
21 neck here and there.

22 Q. Nothing major?

23 A. Not that I would determine as major.

24 Q. You never had any injuries that affected your neck or
25 done anything like that?

1 A. Only in 2013 when I hurt my shoulder.

2 Q. Okay. That was a shoulder issue that didn't really
3 relate to your neck, correct?

4 A. Well, I mean, it did relate to my neck as soon as it
5 happened because my neck, I guess, pinched in layman's
6 terms. It was a vesiculation of the muscle tissue that
7 happened as a result of the an impingement -- excuse me, of
8 an acute inflammation of my bursa. And as a result with the
9 trapezius muscle and the insertion point on the back of the
10 neck, if you look at the back of the skull, that locks up in
11 non-technical terms. And, you know, it forced me to have
12 the inability to rotate my neck fully.

13 Q. That in technical terms, in regards to that shoulder
14 injury, that was tendinitis I believe?

15 A. It's the inflammation of bursa known as tendinitis,
16 correct.

17 MR. TRAINOR: Your Honor, may I approach?

18 THE COURT: Uh-huh.

19 MR. TRAINOR: Mark this just for identification
20 purposes only, Defense's Exhibit 2.

21 (Whereupon, Defendant's Exhibit Number 2,
22 Interrogatories, was marked for identification.)

23 Q. Dr. Nestler, I'm sure you remember, we submitted
24 interrogatories to you ---

25 MR. SLOTCHIVER: Can I see what you marked?

1 MR. TRAINOR: (Complies.)

2 BY MR. TRAINOR: (continuing)

3 Q. Dr. Nestler, I'm showing you is a copy of
4 interrogatories that were sent from us to you, and I believe
5 those are your answers. Is that correct? You can flip
6 through it if you like.

7 A. What am I looking for specifically?

8 Q. I'm just asking you that you to say that those are
9 questions that we submitted to you that your attorney signed
10 on your behalf as true and accurate statements of you. And
11 you're welcome to look through that if you like.

12 MR. SLOTCHIVER: Your Honor, may we approach?

13 (Whereupon, a bench conference is held off the record
14 and out of the hearing of the jury panel.)

15 BY MR. TRAINOR: (continuing)

16 Q. Dr. Nestler, I point you to ---

17 A. I'm not finish reading, if you don't mind.

18 THE WITNESS: Your Honor, may I finish reading?

19 THE COURT: Go ahead.

20 THE WITNESS: Thank you, sir.

21 (The witness reviews Defendant's Exhibit Number 2.)

22 A. Mr. Trainor, there's some black lines right here.

23 Q. Yes, sir.

24 MR. TRAINOR: Do you mind if I approach, Your Honor.

25 THE COURT: Go ahead.

1 MR. TRAINOR: Dan, do you mind approaching?

2 (Whereupon, a bench conference is held off the record
3 and out of the hearing of the jury panel.)

4 THE COURT: Excuse me. Can you send the jury out for
5 just a couple of minutes while we take up a matter of law.

6 (The jury exits the courtroom at 11:43 a.m. and the
7 following is held on the record.)

8 MR. TRAINOR: Your Honor, can we have this conversation
9 outside of the presence of the witness?

10 THE COURT: Sure.

11 THE WITNESS: What do I need to do?

12 THE COURT: Just a minute.

13 All right. Would you take him and just stand outside
14 the door just for a second. Go with that man right there.

15 (At 11:43 a.m. the witness exits the courtroom and the
16 following is held on the record.)

17 THE COURT: Okay. What are you trying to do with this?

18 MR. TRAINOR: Ten and 11, these are adopted ---

19 THE COURT: Let me see.

20 MR. TRAINOR: We asked have you ever been in an
21 accident that caused injuries and then the providers,
22 facilities, and injuries that stand. Answer, "None."
23 Number 11, "Have you ever made a claim for injuries
24 sustained in accident ever?" Answer, "None." That's not
25 true. There was a lawsuit filed prior to this one where he

1 claimed permanent neck injuries. I think I'm entitled to
2 impeach him on that. And, I mean, that is an adopted
3 admission in the discovery. I think that's a discovery
4 abuse that you mislead us. We didn't have the opportunity
5 to talk to those doctors, to subpoena those records. I
6 mean, we're left in the dark.

7 THE COURT: How did you find out about it?

8 MR. TRAINOR: Alan found it yesterday.

9 THE COURT: Just yesterday?

10 MR. TRAINOR: Yeah.

11 MR. SLOCHIVER: I'm not familiar with this, Judge.

12 MR. TRAINOR: You filed it.

13 THE COURT: Well, I guess you're getting ready to find
14 out if your client is familiar with it.

15 MR. SLOCHIVER: I am.

16 THE COURT: All right. So this stuff about medical
17 bills all that?

18 MR. TRAINOR: I'm going to cross him on that, but I'm
19 not going to put that up on the screen or anything like
20 that. I think I'm entitled to ask him -- I mean, I think
21 that's a -- even if they're not making a claim, I think I'm
22 entitled to say you've incurred \$7,000 in medical bills.

23 MR. SLOCHIVER: I don't think they're allowed to do
24 it. I think it's not relevant to the issue. What they're
25 trying to do is they're trying to lower the bar of his

1 damages. The amount of medical bills have nothing to do
2 with the damages he sustained. We hear that from the
3 insurance companies all the time. It's irrelevant. We
4 elected not to put them in. We're not asserting a claim for
5 loss for medical bills. And I don't believe it's
6 appropriate to put it in there.

7 THE COURT: I disagree. I mean, the fact that you
8 didn't ask to put it in doesn't mean that it is not
9 relevant. And it's the basis for their cross-examination.
10 If you didn't have any medical bills or they were small,
11 then obviously, the argument that I hear hundreds of times
12 is your damages couldn't have been very much if your medical
13 bills weren't very much.

14 MR. SLOTCHIVER: Your Honor, I would respectfully
15 disagree.

16 THE COURT: Well, you can. And you can appeal if you
17 think I'm wrong. But it's coming in for that reason because
18 it comes in every case for that reason.

19 MR. SLOTCHIVER: To show what the medical bills were?

20 THE COURT: To show what the medical bills were.
21 Normally, people put them in. But just because you didn't
22 put them in doesn't mean that they can't put them for the
23 purpose of showing that the damages weren't very
24 substantial. They're used for that purpose in almost every
25 trial.

1 MR. SLOTCHIVER: Well, if they're going ---

2 THE COURT: Is contested.

3 MR. SLOTCHIVER: If they're going to put them in then
4 we would ask that we modify the charge. We can talk about
5 that later on to include charge or medical bills.

6 THE COURT: Why didn't you ask for it?

7 MR. SLOTCHIVER: There's a movement throughout the
8 country of lawyers not asking for the medical bills. The
9 problem is it's unfairly prejudicial to the plaintiffs when
10 they have a small amount of medical bills and they have
11 substantial injuries. Six thousand dollars, \$7,000 in
12 medical bills doesn't equate to the injuries that he has but
13 is misleading to a jury if he uses them. So I wanted to --
14 it's not me that this is going on throughout the country and
15 that's why they put it in.

16 THE COURT: Okay. All right. Your strategy.

17 MR. TRAINOR: Thank you.

18 THE COURT: All right. Bring the witness back in.

19 (At 11:47 a.m. the witness reenters the courtroom and
20 resumes the stand.)

21 THE COURT: Have them bring the jury back in.

22 (The jury enters the courtroom at 11:48 a.m. and the
23 following is held on the record.)

24 THE BALIFF: All present, Your Honor.

25 THE COURT: All right. You may resume.

1 BY MR. TRAINOR: (continuing)

2 Q. Dr. Nestler, I'm going to rewind a little bit. Before
3 break I had asked you if you had sustained any acute neck
4 injuries prior to this accident, and I think you referenced
5 the one in 2013 with your neck and shoulder. Is that
6 correct?

7 A. It was my shoulder, yes.

8 Q. Well, I think you had said that there was some issue
9 that went up into your neck, correct?

10 A. Yes. If I can explain it again. My shoulder had
11 tendinitis which is an inflammation. And because of the
12 connection, it's not isolated from my neck.

13 Q. Can I point you to number ten on that page of your
14 discovery responses there.

15 A. Okay. I have it.

16 Q. It says, "State whether or not you've ever received any
17 injury in any accident or incident prior to or subsequent to
18 the date of the incident complained of this accident." If
19 so, state the details including date, place of incident,
20 names and addresses of parties, nature of injury sustained,
21 names and addresses of your physicians, and identify all
22 documents referring or related to such injury. And your
23 response to that was as to prior none. Is that correct?
24 That's what it says?

25 A. That is correct. Because it states here whether or not

1 I ever received any injury in any accident or incident.

2 Q. Correct. Exactly. Can you turn to number 11. (Brief
3 pause.) Are you there?

4 A. I'm there. I'm sorry. I apologize.

5 Q. Okay. It says state whether you ever filed or asserted
6 any claims for injuries, workers' come, Social Security
7 disability, prior or subsequent to the date of the incident
8 complained of this accident; full details, name and address
9 of each person and it continues. And you're answer to that
10 was none, correct?

11 A. What's the nine that's blacked out?

12 Q. That's a matter of law that has been taken up with the
13 Judge. My question to you is you answered none as to prior
14 claims involving personal injury, correct?

15 A. Personal injury?

16 Q. Filed or asserted any claim for injuries ---

17 A. Excuse me one second. (Brief pause.) I'm sorry, where
18 does it say personal -- do I have the right number eleven?

19 Q. It says filed or asserted any claims for injuries. Do
20 you see that?

21 A. No, I know, Mr. Trainor. I'm just -- I'm trying to
22 follow and you said the word personal injury.

23 Q. I apologize.

24 A. So coming from my field, I don't understand what that
25 means. Okay. What's your question, sir?

1 Q. And your response to that was none, correct?

2 A. State whether you have ever filed or asserted any claim
3 for injuries including workers' comp, Social Security
4 disability, prior to subsequent to the date incident
5 complaint. Well, I know for sure not including workers'
6 compensation or Social Security disability claims. Okay?

7 Q. Okay. And that's that it's none? You've never had
8 that?

9 A. (No response.)

10 Q. I mean, I'm just reading your answer to that
11 interrogatory.

12 A. Well, I mean, I -- I guess the word never or any
13 confuses me all the time.

14 Q. I can ---

15 A. I never -- never ---

16 Q. I can refresh your recollection, maybe. You did file a
17 claim for injuries sustained in a motor vehicle accident
18 before this accident, didn't you? And I'm happy to show you
19 ---

20 MR. TRAINOR: May I approach, Your Honor?

21 THE COURT: Yes.

22 MR. TRAINOR: If you wouldn't mind marking this for
23 identification purposes only.

24 (Whereupon, Defendant's Exhibit Number 3, Summons and
25 Complaint, was marked for identification.)

1 Q. Dr. Nestler, this is your name and your wife's name at
2 the top of that summons and complaint, isn't?

3 A. Yes, it is. This goes back to 2003.

4 Q. Correct. So your response of no claims made for
5 injuries sustained in an accident is not true. Is that
6 correct?

7 A. I guess at the time that we had our deposition I really
8 didn't recall this.

9 Q. But this wasn't in your deposition. This was in
10 interrogatories sent to you.

11 A. Okay.

12 Q. If you wouldn't mind flipping to, I think it's
13 paragraph -- I don't -- it may be page two?

14 A. Of which document?

15 Q. Of the summons -- your summons and complaint from your
16 prior claim.

17 A. Okay.

18 Q. If you wouldn't mind just reading me paragraph seven of
19 that.

20 A. (As read) That by reason of consequence of negligent
21 careless, recklessness, willfulness, wantonness of the
22 defendant and as direct to the proximate result thereof
23 plaintiff's vehicle was struck by the defendant's vehicle
24 resulting in multiple injuries to plaintiff Gary Nestler
25 including permanent injuries to various parts of his body

1 particularly to his back, neck, and other areas.

2 Q. Including permanent injuries to various parts of the
3 body particularly to his neck, back, and other areas,
4 correct?

5 A. Yes, sir.

6 Q. You didn't disclose that to us in your interrogatories,
7 did you?

8 A. I personally didn't disclose -- I didn't -- I don't
9 know what this all means so you have to help me get there.

10 Q. Well, I'm trying to help me get there. I'm confused.
11 We asked for providers related to a prior injury, which you
12 said there were none. There actually was one. We asked for
13 this providers. You never provided this providers. Who did
14 you go see as a result of this accident?

15 A. Which accident?

16 Q. The 2003 accident that I have your summons and
17 complaint right there that you sustained what appears to say
18 permanent neck injuries.

19 A. I apologize. I'm not sure if I recall that, who I saw
20 in 2003.

21 Q. You don't recall?

22 A. I don't believe I recall who I saw in 2003.

23 Q. You don't recall? Do you remember how long you
24 treated?

25 A. I don't.

1 Q. Did you see an orthopedist?

2 A. I would have to go back and look at the medical records
3 somehow, somewhere.

4 Q. Physical therapist? You really just have no idea who
5 you saw?

6 A. I don't recall.

7 Q. Did you also forget that you filed a lawsuit with the
8 same attorney?

9 A. I didn't recall.

10 Q. I believe you said in your direct examination, you
11 pride yourself on having a photographic memory. Is that
12 what you said?

13 A. Yes, actually I did, if I can explain.

14 Q. And you forgot that you had filed a lawsuit in regards
15 to neck injuries that you sustained before this accident?

16 A. Excuse me, Mr. Trainor.

17 Q. Dr. Nestler, can you please answer ---

18 A. Mr. Trainor, I'm going to ask -- answer the question.
19 Part of what's going on with me now, which is why I write
20 things down, because I don't remember certain things
21 sometimes.

22 Q. Are you saying that this accident -- you sustained a
23 brain injury in this accident?

24 A. I'm not saying that.

25 Q. Are you saying you ---

1 A. I'm not saying that.

2 Q. --- suffered memory loss?

3 A. Excuse me?

4 Q. Are you saying you suffered memory loss?

5 A. I'm not saying that either.

6 Q. Okay.

7 A. What I'm saying is my focus has been affected. I don't
8 know how; I don't know why; I don't know when. But before
9 this accident, I didn't need the notes that I write and
10 remember. I don't recall this even when you show this to me
11 just now. I don't recall this. And your question of who I
12 saw, when I saw, and how long I saw them, I don't recall.
13 Now that you showed it to me, okay, I recall it.

14 Q. You don't recall any of the doctors though,
15 conveniently?

16 A. I don't, sir.

17 Q. Okay.

18 A. I apologize.

19 Q. All right. Let's talk about this accident. You went
20 to East Cooper the day of the accident. Is that correct?

21 A. That's where Charleston County EMS took me.

22 Q. Correct. You underwent an X-ray on your left elbow,
23 correct?

24 A. I believe so.

25 Q. Okay. And you recall there were no abnormalities with

1 that X-ray?

2 A. If that's consistent with what the findings were from
3 the physician, yes.

4 Q. You were diagnosed with an elbow strain at that point,
5 correct?

6 A. If that's what's documented.

7 Q. Okay. A couple days later you I think you said you
8 called Dr. Schoderbek at some point either right after that
9 or a couple of days after the accident. You went to Nason
10 Medical Center, correct?

11 A. Yes, sir. I went to Nason Medical.

12 Q. They did a CT scan on your neck. Is that correct?

13 A. Best I can recall.

14 Q. Okay. And at that time, again, this is where we get
15 into the degenerative issues in your neck, correct?

16 A. Yes. I'm not sure what you mean by getting into the
17 degenerative issues.

18 Q. That's where we first see the degenerative issues is
19 that first CT scan, correct?

20 A. Okay.

21 Q. You then went to Dr. Schoderbek's office sometime later
22 that week, I believe, right?

23 A. I believe so if that's what is stated.

24 Q. Well, I mean, I'm asking you. I mean, it sounds like
25 you ---

- 1 A. I don't have the document.
- 2 Q. --- don't have a very good recollection of everything.
- 3 A. I don't have the documents in front of me. So if the
- 4 document is front of me, I can point you to ---
- 5 Q. Okay.
- 6 A. --- time and day ---
- 7 Q. Actually, it's March, March 8th, your first visit to
- 8 Dr. Schoderbek's office, orthopedic specialist in
- 9 Charleston, March 11th. Does that refresh your memory?
- 10 A. If that's what it shows on the paper; yes, sir.
- 11 Q. At that time your were diagnosed with cervical strain
- 12 and an elbow contusion. Do you recall that?
- 13 A. Again, I would have to look at the notes.
- 14 Q. Okay. That first visit I believe you were referred to
- 15 Olympic Physical Therapy from Dr. Schoderbek's PA, Erin
- 16 Watrobski. Do you recall that?
- 17 A. I remember going to physical therapy.
- 18 Q. Do you recall being referred two to three times a week
- 19 for four weeks?
- 20 A. I don't recall the amount of time. But I recall being
- 21 referred to physical therapy after I saw his PA.
- 22 Q. And if it were in the records it was two to three times
- 23 a week for four weeks, you wouldn't have any reason to
- 24 dispute that?
- 25 A. With the exception that with physical therapy generally

1 you go until you either you feel better or you come up with
2 that it is not really helping you.

3 Q. Okay. After that you went to Southeastern Spine at the
4 referral Dr. Schoderbek, correct?

5 A. Yes. If that's what stated in the document; yes, sir.

6 Q. You went and saw Dr. Don Johnson?

7 A. I did.

8 Q. Okay. And who referred you over there?

9 A. Dr. Schoderbek.

10 Q. Okay. So when you say, "That's what it says," you know
11 what I'm saying. Is that a fair statement?

12 A. Well, I'm just trying to be very specific with you
13 because you want me to be specific.

14 Q. So you went to Southeastern Spine at the request of Dr.
15 Schoderbek, correct?

16 A. As a referral from Dr. Schoderbek, yes.

17 Q. And you went and had an MRI conducted, correct?

18 A. Again, if the document showed that that's what the
19 procedure was doing, then I did.

20 Q. And you're aware that again that MRI showed
21 degenerative issues on the MRI, correct?

22 A. Yes, sir. That's correct.

23 Q. You had that conversation with Dr. Schoderbek and you
24 had that conversation with Dr. Johnson?

25 A. I've had that conversation with Dr. Johnson and Dr.

1 Schoderbek.

2 Q. Okay. And at the time you were informed that there was
3 no nonoperative treatment necessary, right?

4 A. For degenerative disease in your neck?

5 Q. Correct. You went ---

6 A. There's nothing indicated. I'm sorry.

7 Q. Go ahead. Dr. Don Johnson, you met with him to review
8 your MRI results, correct?

9 A. I went to him to find out what's going on with my
10 elbow.

11 Q. Correct. And you had an MRI on your neck?

12 A. Right.

13 Q. Because there was concern about neurological issues
14 that may have started in your neck radiating down your ---

15 A. Well, I don't think it was started. I think was it as
16 a result of -- if there was a connection between what was
17 going on in my neck. If there was anything going on in my
18 neck, what was going on in my elbow?

19 Q. That's what they were looking for?

20 A. That's what I was referred to.. I got into an accident
21 and I had extraordinary elbow pain. So Dr. Schoderbek
22 referred me out to the lead spine specialist, Dr. Don
23 Johnson.

24 Q. Correct. And you had an MRI and reviewed those MRI
25 results with Dr. Johnson?

1 A. That's correct.

2 Q. The spine specialist?

3 A. Yes, sir.

4 Q. And he said physical therapy and chiro. Do you recall
5 that?

6 A. Physical therapy and what?

7 Q. And chiropractic care. Do you recall that?

8 A. Again, yes. If that's in the notes, yeah.

9 Q. Okay. You have no reason to dispute that? If it's in
10 the notes ---

11 A. It seems like -- it would seem like from my perspective
12 a reasonable therapy.

13 Q. Those are your words.

14 A. Those are my words. It would seem in my opinion,
15 that's a reasonable therapy. Degenerative joint disease in
16 someone like you has started at 13. So over time you're
17 going to continue to have degenerative joint disease by the
18 nature of gravity and compression on the spine. The issue
19 was before me, why was I having this issue with my elbow?
20 And that's when I went to Dr. Johnson who is a spine
21 specialist to see was it related to a spinal cord issue or a
22 surgical issue.

23 Q. To see if there was neural impingement?

24 A. I can't weigh in on what his thoughts were.

25 Q. Well, you're aware though that he found no

1 significant neural impingement or no disc herniation. I
2 assume you're aware of that.

3 A. He found no disc herniation. I'm not sure there was no
4 neural impingement. I didn't see that.

5 Q. You didn't see that. But if it's in the records, you
6 wouldn't have any reason to dispute that?

7 A. I don't think they lie. I would hope not.

8 Q. He's a spine guy; he would know?

9 A. I would imagine. There were six other or five other
10 spine guys in his practice as well, I believe. So I'm
11 hoping they would know.

12 Q. At some point after that, you were referred to Coastal
13 Therapeutics, correct?

14 A. I don't recall the name, but . . .

15 Q. You remember any of the names of the providers, nurses,
16 physical therapists over there?

17 A. I don't.

18 Q. You heard Dr. Schoderbek testify yesterday that he
19 referred you to Coastal Therapeutics, correct?

20 A. Yeah, I mean, if I recall it, yeah. I didn't pay
21 attention to it.

22 Q. And you recall him saying he referred you two to three
23 times a week for six weeks, correct?

24 A. If that's what he put in his notes then that's correct.
25 But in the conversation that I had with him and

1 understanding physical therapy and understanding the
2 requirements in that I understand it, we had conversation
3 about I want you to go to the physical therapist until you
4 get better. And if you don't then you can stop.

5 Q. That was the conversation that you say you had with Dr.
6 Schoderbek?

7 A. And Dr. Johnson.

8 Q. Dr. Johnson is not here to testify.

9 A. Okay. Maybe it's in his notes.

10 Q. Okay. You heard Dr. Schoderbek say he referred you to
11 Coastal Therapeutics because they were very good at treating
12 his and your type of injuries. Do you recall him testifying
13 to that?

14 A. Not that specific.

15 Q. Okay. You don't remember that being the exact quote
16 that he said?

17 A. No.

18 Q. Okay. And I believe at that point you treated there
19 for -- well, let me guess. I think there were five visits.
20 Is that your recollection of how many times you went to
21 occupational therapy?

22 A. I don't know. If you're guessing, maybe five; maybe
23 nine. I just don't know. I don't recall.

24 Q. If your medical bills and your medical records said it
25 was five visits, you have any reason to dispute that?

1 A. Yeah. I mean, that would be inaccurate I'd imagine.

2 Q. Okay. After Coastal Therapeutics -- my understanding
3 your last day of treatment was June 20th of 2014. Does
4 that sound right to you?

5 A. Again, I would have to look at the records.

6 Q. Okay. But if the records say that you wouldn't have
7 any reason to dispute that?

8 A. I don't know. I would have to look at the records.

9 Q. You wouldn't have any reason to dispute that if it said
10 that, would you?

11 A. I don't know. If I look back and see June, whatever
12 the date was, and it was a Saturday, I would say no. I
13 didn't go on a Saturday. If the date was right, then maybe
14 so. I don't know. I'd have to look at the records.

15 Q. Do you recall your total medical expenses throughout
16 this entire -- all-encompassing treatment that you received
17 from this car accident, do you know how much the medical
18 bills are?

19 A. I don't know offhand.

20 Q. Okay. Does \$7,117.50 sound right to you?

21 A. I don't recall that fact, sir.

22 Q. Okay. Do you have any reason to dispute that your EMS
23 bill was \$409? And if you want, you can refer to your
24 interrogatories that are in front of you because I believe
25 you identified your expenses in that document. And I think

- 1 it may be number two or three.
- 2 A. Okay, \$409.
- 3 Q. \$409; East Cooper Medical Center, \$850.50, correct?
- 4 A. This what is says here.
- 5 Q. That's your hospital bill?
- 6 A. That says number two; yes, sir.
- 7 Q. Nason Medical Center \$912?
- 8 A. Yes, sir.
- 9 Q. And that includes the cost of a CT scan which you got
- 10 there I assume?
- 11 A. I don't know. There's no itemized accounting of what
- 12 \$912 encompasses.
- 13 Q. Dr. Schoderbek, total bill, \$738, correct?
- 14 A. That's what is says here.
- 15 Q. Olympic Physical Therapy, \$530, correct?
- 16 A. That's what is says here.
- 17 Q. Those are your responses to our interrogatories. So
- 18 those are your statements not mine.
- 19 A. Uh-huh.
- 20 Q. Southeastern Spine, \$481. Imaging Specialists, which
- 21 is an MRI, \$1,234, correct?
- 22 A. Okay.
- 23 Q. Coastal Therapeutics, which is on there for some
- 24 reason, but \$658. I'm happy to show you the bill if you'd
- 25 like to see it.

1 A. I have no reason to doubt you. You have some things
2 just not on this interrogatory.

3 Q. Chiropractic USA, \$1,305?

4 A. Okay.

5 Q. I know you're not doing the math in your head, but
6 \$7,117.50 in medical bills related to this accident. Is
7 that correct?

8 A. You're right, I'm not doing the math in my head. And
9 there's no total on this, so I'd have to trust -- I have to
10 trust you.

11 Q. \$7,117.50; let's talk about the treatment and your
12 recommendations of your doctor. I think you testified
13 earlier you trust Dr. Schoderbek's judgment, correct?

14 A. Yes, sir.

15 Q. That's why you went and saw him?

16 A. Correct.

17 Q. And you said you followed his recommendations?

18 A. I followed some of his recommendations, not all.

19 Q. Some of his recommendations. So the length of time
20 that you should have gone to physical therapy, you didn't
21 follow that?

22 A. Could you repeat that?

23 Q. The length of time, two to three times a week for four
24 weeks, that's a recommendation that you didn't follow?

25 A. No. That was a recommendation I followed.

1 Q. You followed up two to three times a week for four
2 weeks?

3 A. Yes, I followed that.

4 Q. Okay. You had four visits.

5 A. Okay.

6 Q. Can you clear me up on that the difference right there.

7 A. Yeah. The recommendation was this is what he's
8 recommending. And also if you that's helping you, continue
9 on for the first course of that recommendation; and if not,
10 then stop because we don't want to aggravate this.

11 Q. So now you're telling me today that you did what was
12 expected of you. You didn't finish the course of therapy
13 that was referred you.

14 A. It was a course of therapy that was recommended.

15 Q. And you did not complete that.

16 MR. SLOCHIVER: Your Honor, he's arguing with the
17 witness. He's explained completely.

18 THE WITNESS: I don't understand.

19 MR. TRAINOR: I can rephrase, Your Honor.

20 THE COURT: All right.

21 MR. TRAINOR: (continuing)

22 Q. Do you recall how many visits you went to Olympic
23 Physical Therapy?

24 A. I don't.

25 Q. Would it surprise you to know that you went for three

1 sessions of therapy?

2 A. I don't have an answer that would it surprise me. I
3 know I went following Dr. Schoderbek's recommendation
4 amongst other recommendations that he had made, and I
5 followed it. And when he said if it helps, you stay and you
6 continue on; and if you don't, you stop.

7 Q. If that's not in his records, that's not in his file,
8 that's you saying that he had that conversation with you.

9 A. I'm under oath and I just won't lie.

10 Q. You went to Coastal Therapeutics five visits, correct?

11 A. Again, I don't know Coastal to -- well, Coastal is not
12 on here -- Olympic Physical Therapy to Coastal Specialists,
13 therapeutic specialists, they're not ---

14 Q. You don't even know the name of the provider that you
15 went to?

16 A. I don't recall. If you showed it to me, I'd ---

17 Q. You heard Dr. Schoderbek mention that he referred you
18 to Coastal Therapeutics?

19 A. I've heard the word Coastal Therapeutics. But I don't
20 know if it's Coastal Therapeutics physical therapist. I
21 don't know what it's called, the official name of the
22 business. I know there are two places that I went to
23 physical therapy.

24 Q. Okay. You recall a discussion with Dr. Schoderbek
25 yesterday about a discharge form from that provider,

1 correct?

2 A. Yes. I remember that.

3 Q. And that discharge being a failure to return. Is that
4 correct?

5 A. Well, yes. Let me explain that. So failure to return
6 is something that the physical therapist write on their
7 charts if the patient doesn't return. Similar to when I was
8 seeing patients and the patient did not return, I put follow
9 up -- no follow up required or patient did not return.
10 Failure to return was they gave me very specific
11 instructions: go home put ice, put heat; being here, this is
12 not helping. We got it. We understand it. And I left it
13 to them. How they document is not up to me. I don't know.

14 Q. That was the conversation you had with the therapist?
15 That's what you're saying?

16 A. Yeah. That was a conversation I had with Dr.
17 Schoderbek if this doesn't help, "What do I do?" He said
18 just stop.

19 Q. So the note -- so you're saying that at some point you
20 had a conversation with Dr. Schoderbek and I presume your
21 providers at Coastal Therapeutics that said, "Hey, this
22 isn't working for me," and everyone agreed you can stop.

23 A. Well, I don't know if everyone agrees, okay. All I can
24 tell you is when I first went to Dr. Schoderbek, and Dr.
25 Schoderbek says, "Here's some of my recommendations." And

1 he made one of his recommendations to go to a physical
2 therapist. So I did. He didn't state go three times, ten
3 times a week. I don't recall that. But he said,
4 specifically, if this helps, continue; if it doesn't, stop.

5 Q. So you recall as of June 20th, which was your last
6 visit to Coastal Therapeutics, that Dr. Schoderbek had
7 approved you to go to more occupational therapy at Coastal
8 Therapeutics. I assume you remember that conversation.

9 A. I don't know. It says April 4th of 2014 that the date
10 of service here on this interrogatory.

11 Q. Well, those are your responses. I'm not terribly
12 concerned about those documents at this point. I understand
13 ---

14 A. No. But you're asking me about -- I'm sorry. My
15 apologies.

16 Q. I'm asking surely you remember a conversation with Dr.
17 Schoderbek when he approved additional occupational therapy
18 on June 20th at Coastal Therapeutics. He said you should
19 go to more physical therapy. You recall that conversation,
20 surely.

21 A. No. I don't call recall Dr. Schoderbek stating I need
22 to do anything in additional or further physical therapy.

23 Q. If that's in his records, you're saying there was a
24 different conversation had?

25 A. I don't know what's in -- you know what? I don't know

1 what's in his records. I heard it; I paid him as much
2 attention as I possibly can.

3 Q. Okay. And yesterday when we heard him testify
4 reference your July 11th visit with Dr. Schoderbek. He said
5 at that point he was still continuing to push physical
6 therapy. Do you recall that?

7 A. I don't, actually.

8 Q. Okay. There are four recommendations for a nerve
9 conduction study. Is that your recollection?

10 A. I guess if you count that in his records that it came
11 up to four.

12 Q. May 2nd, May 30th, July 11th, and August 22nd.

13 A. Okay.

14 Q. You didn't have that done is my understanding.

15 A. That's correct.

16 Q. It sounds like there's some concern of pain that it
17 would involve. Is that right?

18 A. Yes. And Dr. Schoderbek's words, it was medieval
19 torture that he wouldn't put himself through. And
20 understanding ENG and understanding the contraindications of
21 putting needles in places that have hyperactive nerves,
22 hypersensitive nerves, is contraindicated.

23 Q. And even with that, he still recommended four times,
24 didn't he?

25 A. He recommended it four times because as I stated

1 earlier it's something that he does as an orthopedist. He
2 will continue to recommend it and recommend it and recommend
3 it as a form of his record.

4 Q. And as he said, it's up to the patient whether they
5 follow my recommendations or not?

6 A. Well, he made many recommendations. So it's up to me
7 to decide if I'm going to do it with his counsel or with
8 someone else's counsel or, you know, opinion, and then my
9 own research.

10 Q. Are you ---

11 A. I'm an educated -- no. But I'm an educated person. I
12 have a medical degree. I know anatomy well enough to make
13 the determination that in listening to Dr. Schoderbek and
14 Dr. Johnson that this is going to be a journey of discovery.
15 We already know that -- I already know that I have pain in
16 my elbow, significant pain in my elbow even now. So to g
17 down and get an ENG that's going to tell me, okay, you have
18 exposed nerves, but there's no treatment.

19 Q. You have no idea what it would say.

20 A. There's no treatment. Dr. Schoderbek said -- Dr.
21 Johnson said, "There is no treatment for what you have."

22 Q. What Dr. Schoderbek said was that you should continue
23 with physical therapy and chiropractic care, I think is what
24 is in his record.

25 A. Okay.

1 Q. You were advised twice, May 30th and July 11th, to
2 undergo an injection. Do you recall that?

3 A. He offered as a recommendation to do a corticosteroid
4 injection.

5 Q. You declined that?

6 A. Yes, absolutely.

7 Q. The year prior, in October of 2013.

8 A. Yep.

9 Q. You had tendinitis in your shoulder.

10 A. Yes, I do.

11 Q. And an injection.

12 A. Yes, I did.

13 Q. Orally?

14 A. Because it's a different issue if it's tendinitis. The
15 difference between tendinitis and neuralgia is significant.

16 Q. Well ---

17 A. It's significant.

18 Q. Dr. Schoderbek diagnosed you with lateral
19 epicondylitis. You know that is, correct?

20 A. Yes, I do.

21 Q. It's tennis elbow.

22 A. In layman's terms.

23 Q. It's tendinitis in your elbow, correct?

24 A. Okay.

25 Q. Is that correct?

1 A. Yes, it is.

2 Q. You were advised on August 22nd to see a neurologist.

3 A. Okay.

4 Q. You didn't do that either.

5 A. Going back to what I said earlier in the conversations
6 that I've had with multiple physicians including Dr.
7 Schoderbek and Dr. Johnson and doing my head review, a
8 neurologist was not going to yield a resolution to the nerve
9 issue. And insofar as being diagnosed as lateral
10 epicondylitis, it will been an inflammation of that area
11 anyway except the nerve is exposed.

12 Q. Are you telling me that the doctor, Dr. Schoderbek, the
13 doctor you said follow his recommendation, you trust his
14 judgment, he's recommending things to you just because,
15 because it would've benefit you?

16 A. No, I didn't say that. So you never ---

17 Q. You admit seeing a neurologist may be beneficial to
18 you?

19 A. I'm sorry. I'm trying to answer your question. So
20 could you restate your question again.

21 Q. You didn't see a neurologist at any point.

22 A. Yes. I did not see a neurologist.

23 Q. That was in spite of Dr. Schoderbek's recommendation
24 that you see a neurologist?

25 A. I wouldn't put in spite of. I didn't see neurologist

1 because I spoke to Dr. Schoderbek, I spoke to Dr. Johnson,
2 and they both stated to me very clearly amongst others that
3 seeing a neurologist is not going to solve the problem.
4 It's giving you more information. But the more information
5 is not going to change their clinical methodology of
6 treatment. You have what you have, and you're stuck with
7 it. There is nothing to be done. You can try physical
8 therapy as a recommendation. You can try heat and ice, a
9 recommendation. You can try acupuncture, a recommendation.
10 You can try massage, a recommendation. You can try oral
11 medicine, a recommendation. But in the research and the
12 people that I have talked with, have all stated very
13 clearly, "Going to see neurologist may give you another
14 piece of information, but the outcome is going to be the
15 same Dr. Nestler, and I'm sorry." There is noting clinical
16 medicine can do for your nerve pain; nothing.

17 Q. You said earlier you would've done anything to get
18 better. You're talking -- any -- any -- you said anything,
19 anything. A neurologist would have provided more
20 information. That wasn't important to you at that time?

21 A. It's not a matter of importance, Mr. Trainor. It's a
22 matter of understanding the validity of the opinion and of
23 the medical treatments that are available out there. Doing
24 anything could potentially break the law. Being on opiates
25 can break the law, but I'll have no pain. And that's not