

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-287 (S.C. Ct. App. filed August 7, 2019)

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

**APPENDIX
VOLUME 1 OF 4**

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Christy Ford Allen

John A. Massalon

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Attorneys for Petitioner

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000419
Circuit Court Case No. 2013-CP-10-03251

RECEIVED

JAN 30 2017

SC Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

RECORD ON APPEAL
VOLUME I
PAGES 1-444

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Rosemary Connelly*

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² Plaintiff's Exhibit 7 consists only of Bates No. 302; Defendant's Exhibit 1 consists of Bates Nos. 302-303.

³ Plaintiff's Exhibit 8 consists only of Bates No. RMC 96; Defendant's Exhibit 2 consists of Bates Nos. RMC 93 and 96.

⁴ Certain pages, i.e., entire pages, of this exhibit were redacted at trial. The entirely redacted pages are omitted from this record.

⁵ As noted above, the three (3) depositions transcripts which comprise Court's Exhibit 1 are grouped with the other transcripts in this record.

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

FORM 4

JUDGMENT IN A CIVIL CASE

FILED

CASE NO. 2013-CP-10-3251

Rosemary Connelly
 PLAINTIFF(S)

2015 SEP -2 AM 10:19

Winsor Custom Homes, LLC; The Daniel Island
 Company, Inc.; Clarke Design Group, LLC;
 Karen A. Nelson; and John W. Edelen
 DEFENDANT(S)

JULIE J. ARMSTRONG
 CLERK OF COURT

Submitted by: _____ Attorney for: Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), 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.

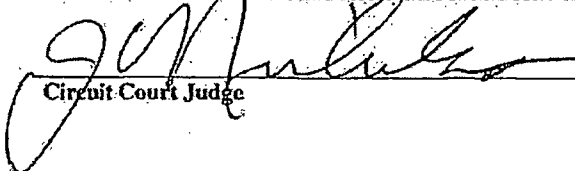
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This case caption is now "Rosemary Connelly v. Winsor Custom Homes, LLC" as all other Defendants previously named in the caption are no longer parties to this case.

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)
N/A		\$
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

2117
 Judge Code

8/27/15
 Date

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-10-3251

Rosemary Connelly
 PLAINTIFF(S)

Winsor Custom Homes, LLC
 DEFENDANT(S)

Submitted by: _____ Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

2015 SEP -3 AM 9:54
 FILED
 JULIE L. HORN, CLERK OF COURT

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:

The trial in this case came before this Court on August 24, 2015. Plaintiff was represented by Michael Gruenlow, Esq., Patrick Chisum, Esq., and Brian Holmes, Esq., of Gruenlow Law. Defendant was represented by Russell Hines, Esq., and Stephen Brown, Esq., of Young Clement Rivers, LLP.

On August 28, 2014, a unanimous jury found that Defendant was fifty percent (65%) negligent and that Plaintiff was fifty percent (35%) negligent. The jury found the Plaintiff suffered \$500,000.00 in actual damages. Therefore, after allocating the proportionate shares of liability, the Court finds that the Plaintiff is entitled to a judgment of \$325,000.00 against the Defendant.

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)
Plaintiff Rosemary Connelly	Winsor Custom Homes, LLC	\$325,000.00

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.

[Signature]
 Circuit Court Judge

2117
 Judge Code

9/2/15
 Date

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ROSEMARY CONNELLY)
Plaintiff,)
vs.)
WINSOR CUSTOM HOMES, LLC)
Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-10-3251

VERDICT FORM

1. DO YOU UNANIMOUSLY FIND THAT THE DEFENDANT'S BREACH OF DUTY PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES?

YES

NO

**IF YES, GO TO QUESTION 2.
IF NO, STOP.**

2. DO YOU UNANIMOUSLY FIND THAT THE PLAINTIFF WAS NEGLIGENT?

YES
 NO

**IF YES, GO TO QUESTION 3.
IF NO, GO TO QUESTION 4.**

3. IF YOU ANSWERED YES TO QUESTION NUMBER 1 AND YES TO QUESTION NUMBER 2, THEN ANSWER THIS QUESTION.

TAKING THE COMBINED NEGLIGENCE THAT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES AS A WHOLE, WHAT PERCENTAGE OF THAT NEGLIGENCE IS ATTRIBUTABLE TO THE PLAINTIFF AND WHAT PERCENTAGE IS ATTRIBUTABLE TO THE DEFENDANT?

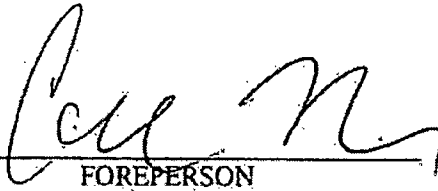
PLAINTIFF	<u>35</u> %
DEFENDANT	<u>65</u> %

NEGLIGENCE PERCENTAGES MUST TOTAL 100%.

IF THE PLAINTIFF'S PERCENTAGE OF THE COMBINED NEGLIGENCE IS LESS THAN THE DEFENDANT'S PERCENTAGE, GO TO QUESTION 4. IF THE PLAINTIFF'S PERCENTAGE OF THE COMBINED NEGLIGENCE IS GREATER THAN THE DEFENDANT'S PERCENTAGE, THEN STOP.

4. IF YOU ANSWERED YES TO QUESTION NUMBER 1, PLEASE STATE THE TOTAL AMOUNT OF DAMAGES, IF ANY, SUSTAINED BY THE PLAINTIFF DUE TO DEFENDANT'S NEGLIGENCE. IF YOU ANSWERED QUESTION 3, DO NOT REDUCE THIS AMOUNT BY ANY PERCENTAGE FROM THAT QUESTION.

\$ 500,000.00


FOREPERSON

Dated: August 28, 2015.

Charleston, S.C.

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-10-3251

Rosemary Connelly PLAINTIFF(S)	2016 JAN 28 PM 4:35 JULIE J. LAWSTED CLERK OF COURT	Winsor Custom Homes, LLC DEFENDANT(S)
Submitted by: _____		Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> 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.

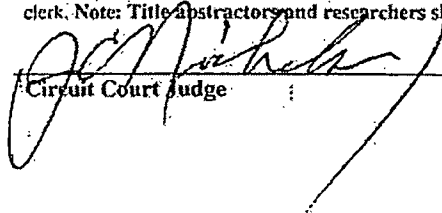
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This matter came before the Court on Defendant's post-trial motions filed on September 8, 2015 and argued before this Court on November 11, 2015. Defendant's Motions for New Trial Absolute and Remittitur are both denied.

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)
Plaintiff Rosemary Connelly	Winsor Custom Homes, LLC	\$325,000.00

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.

 _____ 2117 _____ 1/28/16
 Circuit Court Judge Judge Code Date

STATE OF SOUTH CAROLINA,)
 COUNTY OF BERKELEY)
 ROSEMARY CONNELLY,)
 Plaintiff,)
 vs.)
 WINSOR CUSTOM HOMES, LLC., THE)
 DANIEL ISLAND COMPANY, INC.,)
 CLARKE DESIGN GROUP, LLC.,)
 KAREN A. NELSON, & JOHN W.)
 EDELEN,)
 Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

2013-CP-10-3251

FILE NO.

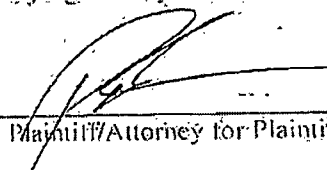
FILED
 2013 JUN -4 AM 11:45
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Charleston, South Carolina

Dated: June 4, 2013


 Plaintiff/Attorney for Plaintiff

Address: GRUENLOH LAW FIRM
 9 Broad Street, Suite C
 Charleston, South Carolina 29401
 (843) 474-1890
 (843) 577-0721 (facsimile)

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)
ROSEMARY CONNELLY,) CASE NO. 2013 CP-10-3251
Plaintiff,)
versus)
WINSOR CUSTOM HOMES, LLC., THE)
DANIEL ISLAND COMPANY, INC.,)
CLARKE DESIGN GROUP, LLC., KAREN A.)
NELSON, & JOHN W. EDELEN,)
Defendants.)

FILED
2013 JUN -4 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY
COMPLAINT
JURY TRIAL DEMAND

Plaintiff, Rosemary Connelly, complaining of Defendants Winsor Custom Homes, LLC., The Daniel Island Company, Inc., Clarke Design Group LLC, Karen A. Nelson, and John W. Edelen (hereinafter collectively as "Defendants") would, through her undersigned counsel, respectfully show unto this Honorable Court as follows:

PARTIES

1. Plaintiff Rosemary Connelly is a citizen of the State of South Carolina and resident of Charleston County.
2. Defendant Karen A. Nelson, (hereinafter "Nelson"), is a citizen of South Carolina and resident of Berkeley County and may be served at her residence of REDACTED
REDACTED
3. Defendant John W. Edelen, (hereinafter "Edelen"), is a citizen of the State of South Carolina and resident of Berkeley County and may be served at his residence of REDACTED
REDACTED
4. At all times relevant, Defendants Nelson and Edelen were/are the owners of the property located at REDACTED
5. Defendant Winsor Custom Homes, LLC, (hereinafter "Winsor"), is, upon information

and belief, a corporation organized and existing under the laws of South Carolina and authorized to do business in this State and may be served through its registered agent Jeffrey M. Thomas at 234 Seven Farms Drive, Suite 201-C, Daniel Island, SC 29492.

6. At all times relevant, Defendant Winsor was employed by and was acting as an agent of Defendants Nelson and Edelen.
7. Defendant The Daniel Island Company, Inc., (hereinafter "Daniel Island") is a corporation organized and existing under the laws of South Carolina and authorized to do business in this State and may be served through its registered agent Frank W. Brumley at 50 Broad Street, Charleston, SC 29401.
8. At all times relevant, Defendant "Daniel Island" is the developer of the master planned "lifestyle community" located on Daniel Island, South Carolina.
9. At all times relevant, Defendant "Daniel Island" owned, monitored and maintained the sidewalks and right of ways.
10. At all times relevant, Defendant Daniel Island monitored, regulated and governed any and all construction projects within the Daniel Island community.
11. Defendant Clarke Design Group, L.L.C., (hereinafter "Clarke") is a corporation organized and existing under the laws of South Carolina and authorized to do business in this State and may be served through its registered agent Phil Clarke at REDACTED
REDACTED
12. At all times relevant, Defendant Clarke was the designer of the construction project located at REDACTED and was employed by and was acting as an agent of Defendants Nelson, Edelen and Winsor.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this controversy in accordance with Article V, §11 of the South Carolina Constitution.
14. This Court has personal jurisdiction over Defendants pursuant to S.C. Code §36-2-802 & §36-2-803.
15. This Court is the proper venue for this controversy pursuant to S.C. Code §15-7-30.

FACTUAL ALLEGATIONS

16. Upon information and belief, Defendants Nelson and Edelen obtained the property located at REDACTED (hereinafter "the Premises") from Daniel Island Associates L.L.C., by Limited Warranty Deed on April 15, 2010.
17. Upon information and belief, Defendants Nelson and Edelen contracted with Defendant Winsor for the construction of a new home on the Premises prior to June 6, 2011.
18. Upon information and belief, Defendants Nelson and Edelen contracted with Defendant Clarke for the design of a new home on the Premises prior to June 6, 2011.
19. On June 6, 2011, the Premises were still under construction.
20. Prior to June 6, 2011, The Defendants or their agents erected a black plastic barrier fence which ran parallel to the sidewalk and was approximately three feet high.
21. The barrier was partially and inadequately secured to the ground on June 6, 2011.
22. On the date of June 6, 2011 the black plastic barrier fence was in disrepair and was encroaching on the sidewalk or right of way at various places along, within, and/or abutting the property line of the Premises and the sidewalk or right of way.
23. On June 6, 2011 at approximately 9:15 am, Plaintiff, accompanied by her friend Corey

- Smith, was jogging in the area of the Premises on the sidewalk or right of way.
24. Plaintiff was an invitee of the sidewalk or right of way at the sidewalk located directly in front of and at the Premises.
 25. The fact that the plastic barrier was inadequately secured to the ground was unknown to the Plaintiff as she approached the barrier.
 26. While the Plaintiff was jogging on the sidewalk located on the Premises, a gust of wind caused the black plastic barrier fence to suddenly and unexpectedly encroach further into the sidewalk or right of way.
 27. Plaintiff had no reason to know or to expect that the black plastic barrier fence would suddenly encroach into the sidewalk or right of way as she was jogging by the Premises.
 28. Plaintiff, while jogging on the sidewalk or right of way in front of the Premises, through no fault of her own, had her leg become entangled with the black plastic barrier fence that was intruding onto the sidewalk.
 29. The black plastic barrier entangled in Plaintiff's legs caused her to fall head first into the ground thereby causing severe injuries to the Plaintiff.
 30. Defendants had actual or constructive notice that the barrier erected at the Premises was erected, secured and/or maintained defectively.
 31. Defendants had actual or constructive notice that the barrier erected at the Premises was defective and unreasonably dangerous.
 32. Defendants had actual or constructive notice that the barrier erected at the Premises was in violation of building, maintenance, municipal and/or other codes and regulations and the law of South Carolina.
 33. The construction area lacked proper signage to warn of the defective and unreasonably

dangerous condition of the premises and sidewalk which contributed to the defective and unreasonably dangerous condition of the Premises.

34. Due to her fall, Plaintiff suffered significant injuries including, but not limited to, damage to her head, forehead, brain, nose, right shoulder, right knee and right foot, ribs and continues to suffer from ongoing reduced mobility and range of motion.
35. Due to her fall, Plaintiff has suffered from a loss of her sense of smell and taste that is likely to be a continuing and permanent condition.
36. Due to her fall, Plaintiff had to undergo medical treatment, including treatment for a concussion, an operation to correct her broken nose and other necessary medical treatment and expenses.

CAUSES OF ACTION

FOR A FIRST COUNT

NEGLIGENCE/NEGLIGENCE PER SE/GROSS NEGLIGENCE

37. Plaintiff incorporates all previous paragraphs by reference as if fully set forth herein.
38. At all times relevant, Defendants Nelson and Edelen, as owners of the Premises, owed Plaintiff a duty to exercise reasonable or ordinary care for her safety and well-being of persons passing by on the sidewalk at the Premises.
39. At all times relevant, Defendant Winsor, as builders and agents of the owners of the Premises, owed Plaintiff a duty to exercise reasonable and ordinary care for the safety and well-being of persons passing by on the at the Premises.
40. At all times relevant, Defendant Daniel Island, as owners of the sidewalk, owed Plaintiff a duty to exercise reasonable or ordinary care for her safety and well-being of persons passing by and using the sidewalk.
41. At all times relevant, Defendant Clarke, as designers of the construction project on the

Premises, owed Plaintiff a duty to exercise reasonable and ordinary care for the safety and well-being of persons passing by on the sidewalk at the Premises.

42. Defendants were negligent and/or grossly negligent in the following ways:
 - a. Failing to maintain the Premises in a safe condition free from defective and unreasonably dangerous conditions;
 - b. Failing to design and conduct construction at the Premises in such a way as to prevent unreasonably dangerous conditions on the Premises and on the sidewalk;
 - c. Failing to keep the defective and unreasonably dangerous condition on the Premises from encroaching into the sidewalk;
 - d. Failing to notice the defective and unreasonably dangerous condition on the Premises that was encroaching into the sidewalk;
 - e. Failing to remedy the defective and unreasonably dangerous condition on the Premises that was encroaching into the sidewalk;
 - f. Failing to warn Plaintiff of a hidden defective and unreasonably dangerous condition on the Premises;
 - g. Failing to keeping debris from the right of way during residential house construction at the Premises;
 - h. Failing to monitor the construction project on the Premises;
 - i. Failing to comply with all applicable federal, state and local laws, statutes and ordinance that apply to the building and maintenance of a new home construction;
43. Defendants' actions or inactions as outlined herein constitute negligence per se in that such conduct was in violation of building, maintenance, municipal and/or other codes and regulations of the State of South Carolina.

44. As a direct and proximate cause of the negligence, negligence per se and gross negligence, willful and wanton acts and omission of Defendants, Plaintiff suffered actual and consequential damages, which include but are not limited to physical pain and suffering, mental anguish, loss of enjoyment of life, medical bills and other damages.
45. By reason of the foregoing, Plaintiff is entitled to recover against the Defendants, jointly and severally, in the sum of such actual damages plus interest, and punitive damages to be determined by the jury, together with costs of this action.

WHEREFORE, The Plaintiff prays for judgment against Defendants, for actual, consequential and punitive damages, attorneys' fees and costs, plus interest and for other further relief as this Court may deem just and proper.

Respectfully Submitted,

GRUENLOH LAW FIRM
Counsel for the Plaintiff

By: 

Wm. M. Gruenloh SCBAR # 12418
Patrick Aulton Chisum SCBAR #100571
9 Broad Street, Suite C
Charleston, South Carolina 29401
(843) 474-1890
(843) 577-0721 (facsimile)
mike@gruenlohlaw.com

Date: June 4, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-3251

ROSEMARY CONNELLY,)
)
Plaintiff,)

v.)

WINSOR CUSTOM HOMES, LLC;)
THE DANIEL ISLAND COMPANY,)
INC.; CLARKE DESIGN GROUP, LLC;)
KAREN A. NELSON; and JOHN W.)
EDELEN;)
)
Defendants.)

ANSWER TO COMPLAINT
BY WINSOR CUSTOM HOMES, LLC
(JURY TRIAL DEMANDED)

FILED
2013 JUL 29 PM 3:51
JULIE A. ARISTAROUS
CLERK OF COURT

Defendant Winsor Custom Homes, LLC, (hereinafter "Defendant" or "Winsor"), answering the Complaint of Rosemary Connelly denies all allegations not hereinafter specifically admitted and answers the Plaintiff's Complaint as follows:

1. Winsor admits, upon information and belief, the allegations contained in Paragraph One of Plaintiff's Complaint.
2. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Two of Plaintiff's Complaint.
3. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Three of Plaintiff's Complaint.
4. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Four of Plaintiff's Complaint.
5. Defendant admits the allegations contained in Paragraph Five of Plaintiff's Complaint.

6. Paragraph 6 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny.

7. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Seven of Plaintiff's Complaint.

8. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Eight of the Plaintiff's Complaint.

9. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph Nine of the Plaintiff's Complaint.

10. Upon information and belief, Winsor admits the allegations contained in Paragraph Ten of Plaintiff's Complaint.

11. Winsor is without sufficient information to admit or deny the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. Paragraph 13 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny.

14. Paragraph 14 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny.

15. Paragraph 15 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny. Notwithstanding, Defendant denies these allegations and asserts that venue is properly in Berkeley County.

16. Defendant admits, upon information and belief, the allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. Defendant admits, upon information and belief, the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Defendant admits, upon information and belief, the allegations contained in Paragraph 18 of Plaintiff's Complaint.

19. Defendant admits the allegations contained in Paragraph 19 of Plaintiff's Complaint and would further state that it was open and obvious that the premises were under construction.

20. Defendant admits only so much of the allegations contained in Paragraph 20 of Plaintiff's Complaint as allege the construction requirements on Daniel Island where the subject premises is located require a barrier to be placed to contain dust and debris from the construction of residences along the perimeter of the property, except where traffic from construction vehicles may take place, which was erected during the initial stages of construction in accordance with Daniel Island requirements. The remaining allegations contained in Paragraph 20 of Plaintiff's complaint are denied.

21. Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint.

22. Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 23 of Plaintiff's Complaint.

24. The allegations contained in Paragraph 24 of Plaintiff's Complaint are conclusions of law about which Defendant is not required to admit nor deny. Notwithstanding,

to the extent the allegations contained in Paragraph 24 suggest any wrongdoing by Defendant, they are denied.

25. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 25 of Plaintiff's Complaint and therefore, denies them.

26. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 26 of Plaintiff's Complaint and therefore, denies them.

27. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 27 of Plaintiff's Complaint and therefore, denies them.

28. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 28 of Plaintiff's Complaint and therefore, denies them.

29. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 29 of Plaintiff's Complaint and therefore, denies them.

30. Defendant denies the allegations contained in Paragraph 30 of Plaintiff's Complaint and demands strict proof thereof.

31. Defendant denies the allegations contained in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof.

32. Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint and demands strict proof thereof.

33. Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint and demands strict proof thereof.

34. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 34 of Plaintiff's Complaint and therefore, denies them.

35. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 35 of Plaintiff's Complaint and therefore, denies them.

36. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 36 of Plaintiff's Complaint and therefore, denies them.

37. Responding to the allegations contained in Paragraph 37 of Plaintiff's Complaint, Defendant incorporates its answers to the preceding paragraphs as if fully restated herein.

38. The allegations contained in Paragraph 38 of Plaintiff's Complaint appear to be directed to Defendants other than Winsor and therefore no response is required by it. Notwithstanding, to the extent that the allegations contained in Paragraph 38 suggest any wrongdoing by Winsor, they are denied.

39. The allegations contained in Paragraph 39 of Plaintiff's Complaint are conclusions of law which Defendant is not required to admit nor deny. Notwithstanding, to the extent the allegations contained in Paragraph 39 suggest any wrongdoing by Defendant, they are denied.

40. The allegations contained in Paragraph 40 of Plaintiff's Complaint appear to be directed to Defendants other than Winsor and therefore no response is required by it. Notwithstanding, to the extent that the allegations contained in Paragraph 40 suggest any wrongdoing by Winsor, they are denied.

41. The allegations contained in Paragraph 41 appear to be directed to Defendants other than Winsor and therefore no response is required by it. Notwithstanding, to the extent that the allegations contained in Paragraph 41 suggest any wrongdoing by Winsor, they are denied.

42. Paragraph 42 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny. Notwithstanding, Defendant denies these allegations.

43. Paragraph 43 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny. Notwithstanding, Defendant denies these allegations.

44. Paragraph 44 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny. Notwithstanding, Defendant denies these allegations.

45. Paragraph 45 of the Complaint states a conclusion of law which Defendant is neither required to admit nor deny. Notwithstanding, Defendant denies these allegations.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

46. To the extent that the injuries and damages sustained by Plaintiffs were due to and caused or occasioned by the Plaintiffs' own acts, omissions and/or acts or omissions of comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness, which acts on the part of the Plaintiffs combined and contributed and concurred with any negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Defendant, which is denied, without which the alleged incident and resulting alleged damages would not have occurred or have been sustained, Defendant pleads such comparative negligence, recklessness, heedlessness, willfulness and wantonness on the part of the Plaintiffs as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs. Defendant is therefore entitled to a determination as to the percentage with which the Plaintiffs' own comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness contributed to this incident and the Plaintiffs' alleged injuries and damages and to the reduction of any sum awarded to them by an equal amount to the percentage of the Plaintiffs' own comparative negligent, careless, reckless, heedless, willful and wanton conduct.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

47. Plaintiff's claims are barred as Plaintiff had full knowledge of the risks and possible adverse effects pertaining to an open and obvious construction site, and proceeded to place herself near or in the construction area, and the injuries and damages allegedly sustained by Plaintiff of which she was so aware, and such risks were accepted and assumed by Plaintiff, and for that reason, any recovery against this Defendant should be diminished, reduced, offset or barred in accordance with the principles of assumption of the risk and/or informed consent.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

48. Specifically denying negligence, the Defendant avers that should negligence by the Defendant be found, whatever damages were suffered by the Plaintiffs, if any, were due to, were caused by and were the direct and proximate result of comparative negligence of which the Plaintiffs were at fault in excess of fifty percent.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

49. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6), SCRPC.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

50. Defendants would allege and show that any injuries and damages sustained by the Plaintiff as alleged in the Complaint, which are denied, were due to and were caused by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties over whom Defendants had no control, and Defendants plead such intervening and superseding negligence, carelessness, recklessness,

heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Complaint.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

51. Defendant had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known to them.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

52. Plaintiff's claims are barred by the doctrine of assumption of the risk and/or applicable statutory law of the State of South Carolina in that assuming, but not admitting, the area in question was dangerous, the Plaintiff was or should have been aware of such, assumed such risk and proceeded unreasonably, thus resulting in the alleged injury.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

53. Plaintiff's claims are barred, in whole or in part, by virtue of the fact that the construction site at all times relevant hereto, was maintained and complied with all applicable laws, ordinances, rules, regulations and industry standards to which construction activity is governed on Daniel Island, South Carolina.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

54. Venue in this action is improper.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

55. To the extent Plaintiffs' Complaint includes a claim for punitive damages, Plaintiffs' claims for punitive damages violate the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States and Article I of the Constitution of the State of South Carolina in the following particulars:

a. The Plaintiffs' claims for punitive damages violate the Fifth Amendment of the Constitution of the United States and Article I of the Constitution of the State of South Carolina for the following reasons:

i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendant for the same act or omission, and because an award of punitive damages can be imposed upon the Defendant, even though the Defendant was convicted or acquitted of a factually related defense in an underlying criminal proceeding; and

ii) The self-incrimination clause is violated because Defendant can be compelled to give testimony against them;

b. The Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments of the Constitution of the United States and Article I of the Constitution of the State of South Carolina because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;

c. The Plaintiffs' claim for punitive damages violates the Defendant's rights to access to the courts guaranteed by the Seventh and Fourteenth Amendments of the Constitution of the United States because the threat of an award of unlimited punitive damages chills the Defendant's exercise of that right;

d. The Plaintiffs' claims for punitive damages violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I of the Constitution of the State of South Carolina for the following reasons:

i) The standard or test for determining the requisite mental state of the Defendant for imposition of punitive damages is void for vagueness;

ii) Insofar as punitive damages are not measured against actual injury to the Plaintiffs and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of the Defendant's alleged egregious conduct;

iii) In cases involving more than one Defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given Defendant;

iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given Defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the Defendant is denied equal protection of law; and

v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

56. To the extent the Complaint includes a claim for punitive damages, punitive damages are inappropriate in this case since the Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

57. To the extent that the claims set forth in the Complaint do not fall within the applicable statute of limitations or statutory deadlines, said claims are barred.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

58. South Carolina recognizes no duty as alleged by the Plaintiffs, which acts as a bar to Plaintiffs' claims.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

59. Defendant was at all times acting in good faith and with legitimate purposes.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

60. Some or all of Plaintiffs' claims are barred by the doctrines of laches, waiver and/or estoppel.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE

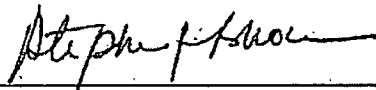
61. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and, thus, reserves the right to amend its Answer to assert such defenses.

WHEREFORE, having fully answered the Complaint herein, Defendant Winsor Custom Homes prays for an Order of this Court dismissing the Complaint with prejudice, requiring Plaintiffs to pay all costs of this action, including attorneys' fees, and granting such other and further relief as this Court may deem just and proper.

Defendant Winsor Custom Homes demands a trial by jury.

(SIGNATURE BLOCK ON FOLLOWING PAGE)

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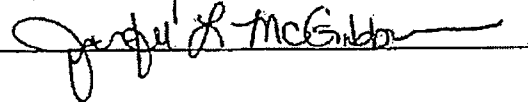
Attorneys for Defendant Winsor Custom Homes,
LLC

Charleston, South Carolina

Dated: July 29, 2013

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was
mailed to all counsel of record in this proceeding this 29
day of July, 2013.



STATE OF SOUTH CAROLINA)
) IN THE COURT OF
) COMMON PLEAS
COUNTY OF CHARLESTON) 2013-CP-10-03251
-----)

ROSEMARY CONNELLY,)
) PLAINTIFF)
 vs.) TRANSCRIPT OF RECORD)
))
WINSOR CUSTOM HOMES, LLC,)
) DEFENDANT)
-----)

AUGUST 24TH - 28TH, 2015
CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR.

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

WILLIAM M. GRUENLOH, ESQUIRE
PATRICK A. CHISUM, ESQUIRE
BRIAN R. HOLMES, ESQUIRE
ATTORNEYS FOR PLAINTIFF

RUSSELL G. HINES, ESQUIRE
STEPHEN L. BROWN, ESQUIRE
ATTORNEYS FOR DEFENDANT

SHARON VIZER,
CIRCUIT COURT REPORTER

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WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
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JEFFREY THOMAS				
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CHRISTINA CONNELLY				
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COURT REPORTER'S NOTE: JURY SELECTION BY JUDGE YOUNG

1 * * * MONDAY, AUGUST 24, 2015 * * *

2
3 THE COURT: All right. Please be seated. We got
4 a jury; is that correct?

5 MR. BROWN: Yes, sir, Your Honor.

6 MR. HOLMES: That's correct, Your Honor.

7 THE COURT: They are coming back at what, 9:30 in
8 the morning?

9 MR. HOLMES: I believe that's correct, Your Honor.

10 THE COURT: Okay. All right. This afternoon, we
11 need to -- what do we need?

12 MR. HOLMES: Your Honor, if you'd wait just a
13 moment, Mr. Hines and Mr. Gruenloh are out in the
14 hallway talking. They'll be back in just a moment.

15 THE COURT: Okay.

16 (PAUSE.)

17 THE COURT: Has the caption been modified to take
18 off, I guess, Daniel Island Company and Clark Design?
19 They are all out; right?

20 MR. BROWN: They are out, yes, sir.

21 THE COURT: But the caption hasn't been modified?

22 MR. BROWN: Not yet, Your Honor.

23 THE COURT: Okay.

24 (PAUSE.)

25 MR. GRUENLOH: Hello, Judge.

1 THE COURT: Okay. I was just looking at your
2 exhibits. Y'all want to talk about the exhibits first
3 or do you want to talk about these videos first?

4 MR. GRUENLOH: I think probably we can get through
5 the motions in limine and the exhibits pretty quickly,
6 and then maybe go to the -- the issue that the
7 defendants have with respect to the expert opinions.

8 THE COURT: All right. Looking at -- just looking
9 at the two -- it looks like both of you want the ENT
10 and both of you want Dr. Funcik's records; any other
11 duplications?

12 MR. GRUENLOH: No. The exhibits for Dr. Funcik
13 and Charleston ENT, we have agreed that they come in
14 subject to redactions and subject to any stipulations.
15 And the redactions, Your Honor, would only be as to
16 insurance --

17 THE COURT: All right. So --

18 MR. GRUENLOH: -- and as to the stipulations.

19 THE COURT: So you agree Dr. Funcik's will come in
20 and ENT -- anything else y'all have agreed on the
21 plaintiff's exhibits? And we'll do the defendant's
22 exhibits --

23 MR. HINES: Your Honor, let me ponder that,
24 because I don't think there is much left -- I don't
25 think -- I was trying to go through that to see what we

1 actually had.

2 THE COURT: You just want me to go through them?
3 What about the Nason Medical records; are y'all
4 agreeing on that?

5 MR. HINES: Yes, Your Honor.

6 THE COURT: All right. So that's okay.

7 MR. GRUENLOH: It is, Your Honor.

8 THE COURT: All right. Dr. Funcik is okay. ENT
9 is okay. Dr. Theobald's medical records.

10 MR. HINES: It's agreed.

11 THE COURT: Agreed. All right. Carolina
12 Radiology records?

13 MR. HINES: Is that part of one exhibit?

14 THE COURT: I don't know.

15 (Off-record discussion between counsel.)

16 COURT REPORTER: I'm sorry, are we on the record?

17 THE COURT: Pardon?

18 COURT REPORTER: Are we on the record?

19 THE COURT: I don't need all this on the record.
20 I don't need it on the record yet. Okay.

21 (WHEREUPON, a conference was held.)

22 MR. GRUENLOH: So there is no objection or dispute
23 other than, Your Honor.

24 THE COURT: Over Carolina Radiology?

25 MR. HINES: And it's part of what is now called

1 Plaintiff's 4, which we don't object to.

2 MR. GRUENLOH: That is correct.

3 THE COURT: All right. And we got medical bills
4 and a summary? Have you got an objection to that?

5 MR. HINES: No, Your Honor. No objection.

6 THE COURT: All right, then, we got these
7 affidavits, affidavit of Karen Nelson and affidavit of
8 John Edelen; y'all got an objection to those?

9 MR. BROWN: We wouldn't have an objection except
10 they say they're going to object now to the photos that
11 these people took, which we believe we can authenticate
12 in another fashion. So, yes, sir, we will object.

13 THE COURT: Okay. All right. Then we got Winsor
14 Custom Holmes LLC contract; any objection to that?

15 MR. HINES: No, Your Honor. There is no
16 objection. And I think the only slight qualification
17 is that we want to make sure we have any reference to
18 insurance taken out of that through appropriate
19 redaction.

20 THE COURT: And the building permit.

21 MR. HINES: No objection, Your Honor.

22 THE COURT: And we got Winsor building
23 photographs.

24 MR. HINES: Also, no objection.

25 THE COURT: Pardon?

1 MR. HINES: No objection, Your Honor.

2 THE COURT: All right. Then we got Daniel Island
3 Construction Guidelines; do we need that?

4 MR. GRUENLOH: I think we do, Your Honor.

5 THE COURT: Okay. Daniel Island?

6 MR. HINES: No objection.

7 THE COURT: No objection. Is it Daniel Island
8 Construction Company Guidelines, or the City of
9 Charleston guidelines?

10 MR. GRUENLOH: Daniel Island.

11 THE COURT: Pardon?

12 MR. GRUENLOH: Daniel Island.

13 THE COURT: Daniel Island has got different
14 guidelines than the city?

15 MR. GRUENLOH: They do. They say you have got to
16 put up a silt fence.

17 THE COURT: Pardon?

18 MR. GRUENLOH: They say you have to put up a silt
19 fence and they say you have to maintain it.

20 THE COURT: Well, that's the development
21 guidelines -- not zoning or anything with the City?

22 MR. GRUENLOH: Right.

23 THE COURT: All right. Photos of Rosemary
24 Connelly? Any objection to that?

25 MR. HINES: No, Your Honor.

1 THE COURT: Okay. All right. We got photos of
2 accident site.

3 MR. BROWN: We have an objection to those, Your
4 Honor.

5 THE COURT: Okay. Then we've got file of Mark
6 Schlosser.

7 MR. GRUENLOH: That's withdrawn, Your Honor.

8 THE COURT: Pardon?

9 MR. GRUENLOH: That's withdrawn. That exhibit is
10 withdrawn.

11 THE COURT: Oh, that's withdrawn. Okay. Then we
12 got overhead image of accident scene; any objection to
13 that?

14 MR. HINES: We do have an objection to that, Your
15 Honor.

16 MR. GRUENLOH: We don't need that to go back to
17 the jury, Your Honor.

18 THE COURT: All right. Illustration of all --
19 what's wrong with y'all's copy machine? Have you seen
20 this copy y'all gave me?

21 MR. GRUENLOH: Let me -- let me give you a
22 notebook, Your Honor --

23 THE COURT: I can hardly read it. Illustrations
24 of olfactory nerves; got any objection to that?

25 MR. HINES: My understanding is it's a

1 demonstrative aid.

2 THE COURT: That's probably for demonstrative
3 purposes, isn't it?

4 MR. HINES: Yes, Your Honor. My understanding is
5 that they were used during some video depositions that were
6 already taken --

7 THE COURT: You're not going to offer that in
8 evidence, you're just going to use that for
9 demonstrative purposes?

10 MR. GRUENLOH: Yes, sir.

11 THE COURT: All right. Photos of Rosemary
12 Connelly -- I've already covered that, hadn't we?

13 MR. BROWN: Yes, sir.

14 THE COURT: And we got cut-out of human skull
15 illustrating olfactory nerves -- that's for
16 demonstration, too, isn't it?

17 MR. GRUENLOH: Demonstrative, Your Honor, not to
18 go back.

19 THE COURT: All right. And we've got certain
20 scholarly articles related to traumatic anosmia -- how
21 do you pronounce that?

22 MR. GRUENLOH: Anosmia. It's a loss of sense of
23 smell.

24 THE COURT: Anosmia?

25 MR. GRUENLOH: Yes, Your Honor.

1 THE COURT: That's not going back?

2 MR. GRUENLOH: No, sir.

3 THE COURT: Okay. And we got the defendant's
4 photograph produced by Winsor?

5 MR. GRUENLOH: They got a new exhibit list, Your
6 Honor. I just want to make sure --

7 THE COURT: You have got a new one?

8 MR. HINES: Your Honor, if you have our amended --

9 THE COURT: All I've got is what's in your amended
10 pretrial brief.

11 MR. HINES: Then you have -- that's the best of
12 them.

13 THE COURT: All right. Y'all got any objections
14 to photographs by Winsor, further identified as Bates
15 No. 302 through 303?

16 MR. GRUENLOH: We do not.

17 THE COURT: No objection. All right. Photographs
18 RMC 93 and 96.

19 MR. GRUENLOH: No objection, Your Honor.

20 THE COURT: All right. Then we got Facebook
21 material produced by Mrs. Connelly in discovery further
22 identified as RMC 120 through 159.

23 MR. GRUENLOH: We do object to that, Your Honor.

24 THE COURT: Okay. All right. Then we got Coastal
25 Facial Plastic Surgery medical records.

1 MR. GRUENLOH: The same as Dr. Funcik's records,
2 our only objection is that it be redacted properly
3 subject to insurance and stipulations.

4 THE COURT: Then we got medical records of
5 Charleston ENT.

6 MR. GRUENLOH: Exactly the same, Your Honor.

7 THE COURT: And we got photographs produced by
8 Edelen & Nelson, identified as 32 through 40.

9 MR. GRUENLOH: We object to those.

10 THE COURT: You object?

11 MR. GRUENLOH: Yes, Your Honor.

12 THE COURT: All right. Then we got photographs
13 produced by plaintiff and further identified as Bates
14 No. RMC 104 through 105.

15 MR. GRUENLOH: No objection, Your Honor.

16 THE COURT: All right. Why don't -- if y'all
17 don't mind -- have y'all already marked all exhibits as
18 plaintiff's number whatever?

19 MR. GRUENLOH: We have not. We wanted to make
20 sure that we agreed on the redactions and everything.
21 We were going to make sure that we got them marked by
22 tomorrow morning.

23 THE COURT: All right. So you're going to mark
24 them and have them available for the court reporter in
25 the morning; is that correct?

1 MR. GRUENLOH: Yes, Your Honor.

2 THE COURT: All right. So that gets us to what?

3 The --

4 MR. GRUENLOH: The motions in limine.

5 THE COURT: The motions in limine.

6 MR. GRUENLOH: Your Honor, I believe we've reached
7 a stipulation on the motions in limine. Mr. Hines and
8 I had an email on this last night.

9 THE COURT: All right. Now, which motion in
10 limine are we talking about?

11 MR. GRUENLOH: Both motions in limine.

12 THE COURT: You got Bill -- regarding Bill
13 Connelly's profession, and you've got about prior
14 medical procedures.

15 MR. GRUENLOH: Correct. As to the motion for Bill
16 Connelly, the stipulation that we have reached is that
17 there shall be no reference to Bill Connelly as a P.I.
18 attorney, asbestos attorney, or plaintiff's attorney,
19 or any similar attorney.

20 THE COURT: Well, are you going to say he's a
21 lawyer, or what are you going to say -- anything?

22 MR. GRUENLOH: That's it.

23 THE COURT: Pardon? You're not going to identify
24 him as an attorney?

25 MR. HINES: I think lawyer or attorney is -- would

1 be --

2 THE COURT: So that's all you're going --

3 MR. GRUENLOH: We don't --

4 THE COURT: Personal injury --

5 MR. GRUENLOH: -- we don't have an issue --

6 THE COURT: -- or asbestoses or whatever?

7 MR. GRUENLOH: Plaintiff's P.I, asbestos
8 mesothelioma. Those are the things we have a problem
9 with that may unduly influence the jury and that's why
10 we've reached the stipulation.

11 THE COURT: All they are going to do is identify
12 him as an attorney?

13 MR. HINES: Lawyer or attorney, but no further
14 description besides being the spouse of the plaintiff.

15 THE COURT: So that motion in limine, y'all have
16 agreed on. And we got the motion in limine regarding
17 the plaintiff's prior medical procedure to buy Botox or
18 eyelid lift; is that right?

19 MR. GRUENLOH: Yes, Your Honor. So the
20 stipulation that we have reached on that is that there
21 shall be no reference to any prior esthetic or elected
22 procedures Rosemary Connelly received from Dr. Funcik.

23 THE COURT: So you're not going into those?

24 MR. HINES: Well, that's what -- no, Your Honor.
25 That's not quite my understanding -- is that the

1 language used would be -- would not specifically refer
2 to them, but would refer to on -- I believe Dr.
3 Funcik's deposition clearly references --

4 THE COURT: What does Dr. Funcik say --

5 MR. HINES: -- cosmetic surgery procedure --

6 THE COURT: What does he say in his deposition
7 about those procedures?

8 MR. HINES: He refers to cosmetic surgical
9 procedures, numerous instances, but -- because he
10 certainly gets into the fact that he had a preexisting
11 relationship with this patient, which is relevant --
12 because Dr. Funcik is the first doctor that saw the
13 plaintiff after the fall. Dr. Funcik is a facial
14 plastic surgeon and he -- he -- in his own testimony,
15 he -- he'll get into this. But --

16 THE COURT: Well, I'm not sure I understand what
17 y'all have agreed to. Are y'all going to go into Botox
18 and eyelift surgery or not?

19 MR. HINES: Not at all specifically, no.
20 That's -- what I'm suggesting is that -- that if we --
21 what we would go into -- and I don't think in any great
22 detail -- would be that she has seen Dr. Funcik, had a
23 prior relationship with him as a patient for cosmetic
24 surgical procedures. And, really, the point of that is
25 during Dr. Funcik's deposition, there was a --

1 testimony about the unpleasantness of having surgery.
2 And I think the door is open to discussing this person
3 has had elective procedures in the past, if we're going
4 to talk in this case about how it's unpleasant to have
5 nasal surgery. I understand that for this case. But I
6 think it's also fair to say I -- this is my first
7 surgery I've ever had with the doctor. And that's --
8 but I'm not talking about specifics, Botox --

9 THE COURT: Is that what y'all have agreed to?

10 MR. GRUENLOH: What we agreed to is that there
11 would be no specific -- no specifics. They're not
12 going to talk about Botox. They're not going to talk
13 about eyelids. They're not going to talk about -- you
14 know, anything like that, only that she had a
15 preexisting relationship with Dr. Funcik for the
16 purpose of some elective cosmetic procedure.

17 MR. HINES: Absolutely. And, certainly, we're not
18 be going to mention anything by name -- other than the
19 word "cosmetic". So I -- I certainly agree to that.

20 THE COURT: I mean if that's what you agreed on,
21 that's what you agreed on.

22 MR. HINES: That is -- my understanding that's
23 what we agreed on. I --

24 THE COURT: Okay.

25 MR. GRUENLOH: And the reason -- when you asked me

1 about Dr. Funcik's records, Your Honor, is -- because
2 that is our stipulation. There's a couple of places
3 there in his notes where he talks about specific
4 procedures like an eyelid surgery, et cetera, and we
5 intend to redact those based upon stipulation.

6 MR. HINES: Your Honor, I certainly have no
7 problem with that. In fact, I think his records are --
8 are exhibits -- for the same thing, a copy of the exact
9 same thing for both plaintiff and defendant.

10 THE COURT: Well, I don't -- I'm just throwing
11 this out to you, y'all can agree on whatever you want
12 to as far as the court is concerned. It's your trial.

13 What I don't understand if you're going to say
14 she's had cosmetic surgery, why do you want to hide
15 what it was? Then the jury is going to be sitting
16 there thinking, well, if she had cosmetic surgery, what
17 was it all about. I'm not -- I'm not sure why you're
18 doing that.

19 MR. GRUENLOH: Because -- because there's a number
20 of procedures that we just don't -- I asked Dr.
21 Schlosser, their expert, whether they had anything to
22 do with his opinion. He said no. And we think that
23 there is a stigma associated with some of those.
24 That's why I approached Mr. Hines and asked him if he
25 would stipulate on those things, and that's why we

1 reached the agreement last night.

2 THE COURT: Well, the agreement is that she had
3 some prior cosmetic surgery.

4 MR. GRUENLOH: And that's it. What we don't want
5 to do is we don't talk about tummy tucks, and they did
6 this and she -- he did that, and he did that, and he
7 did that.

8 THE COURT: All right. I mean, that's fine if
9 y'all have agreed on it.

10 MR. GRUENLOH: We have, Your Honor.

11 THE COURT: Okay. Does that cover the motions in
12 limine?

13 MR. HINES: Your Honor, I don't want to interrupt
14 -- there is one thing that I wanted to raise with the
15 Court, and it's on the basis of the pretrial brief that
16 the plaintiff provided you with, indicates that the
17 position is taken that the defendant admitted a certain
18 purpose for the -- for the silt fence at issue in this
19 case.

20 And, yes -- here it is. It's the idea that early
21 in the project, a black plastic barrier fence was
22 installed to help control construction debris from
23 blowing off the construction site on the property. The
24 fence is typically installed early in the project by a
25 subcontractor.

1 The main point here is the purpose of it being --
2 being -- there's no -- there's no question that in
3 response to this request to admit, which was served in
4 January of 2014, Your Honor -- about a year and a half
5 or so that -- that they've accurately recounted what it
6 said. It was a denial of a specific request and that
7 was the explanation given.

8 Since then -- and I'm asking this, Your Honor,
9 under Rule 36(b) that says that there -- you know, it
10 would be unjust to have that deemed admitted, and not
11 allow that to be withdrawn when, in the plaintiff's
12 deposition -- or rather the defendant's deposition, he
13 testified what the purpose of the silt fence is. The
14 document that you mentioned, the Daniel Island
15 Construction Guidelines, Your Honor, which were agreed
16 upon to be admitted into evidence, they say the silt
17 fence is for erosion control.

18 The point being is that in the interest of
19 justice, what the purpose that was reflected in that
20 document about a year and a half ago or so --

21 THE COURT: Well, first of all, let me say -- what
22 document -- are you planning on reading some requests
23 to admit to the jury? I mean, what --

24 MR. GRUENLOH: Yes, yes, Your Honor. I want to
25 use this to impeach him at the very least. And this

1 was given to us -- this was their response to request
2 to admit. You see the highlighted portion.

3 And our issue with --

4 THE COURT: Well, let me -- let me read it first;
5 okay?.

6 MR. GRUENLOH: Sure.

7 (PAUSE.)

8 THE COURT: All right. I assume the only time
9 you're going to be able to get into this will be --
10 unless you call him as a -- your own witness -- have
11 you covered all of this in the deposition?

12 MR. GRUENLOH: We -- we did not, Your Honor. And
13 that's -- that's my point. I never asked --

14 THE COURT: So you haven't asked these questions
15 in a deposition?

16 MR. GRUENLOH: The reason that I did not go into,
17 in any depth this specific issue, is because three
18 months before the deposition, we got this response in
19 the request to admit, that admitted the issue. And
20 now, the day of the trial, they want to turn back the
21 clock and ask the Court to act like that admission was
22 never made.

23 And the problem is we've taken Mr. Thomas'
24 deposition. I have taken the homeowner's deposition.
25 I took the architect's deposition, and we didn't really

1 ever go into this in any great depth because I had the
2 admission. And so it's just unduly prejudicial. I
3 mean, do I get to go back and depose all those people
4 again on the subject --

5 MR. HINES: Your Honor, I'm confused --

6 THE COURT: Don't interrupt him. Okay. I'll
7 listen to you, but don't interrupt him. I can't hear
8 both of you. She can't take it down, but she's not
9 taking this down.

10 MR. HINES: Certainly, Your Honor.

11 THE COURT: And I want to hear what you have to
12 say, but I can't listen to both of you at the same
13 time. Okay. Go ahead.

14 MR. GRUENLOH: The -- the point is simply this,
15 Your Honor, the case was filed two years ago. And that
16 response to the request to admission was made -- in
17 part, they're explaining their denial in the request to
18 admission, which I think is an improper denial, but it
19 certainly is part of their answer. In -- in a request
20 to admit, I got that before I took Jeff Thomas'
21 deposition, and I did not go into that in any great
22 depth because I had that admission --

23 THE COURT: Well, they denied it but then they
24 qualified it by keeping the site clean. So what are
25 you planning on doing with it? I mean --

1 MR. GRUENLOH: What I plan on doing is saying to
2 Mr. Thomas, isn't it true that the purpose of this
3 barrier is to keep your mess off the sidewalk.

4 THE COURT: Okay. I mean, so what --

5 MR. GRUENLOH: And when he says no, the purpose is
6 to --

7 THE COURT: At that time you can impeach him with/
8 the request to admit. What's your problem?

9 MR. HINES: Your Honor, here's my problem. I
10 understood Mr. Gruenloh just to tell the court, Your
11 Honor, now when I deposed Mr. Thomas, I didn't ask him
12 what the purpose of the silt fence was. At least
13 that's what I understood him to say. And let me
14 shuffle through my papers here.

15 THE COURT: I mean, the request to admit is there
16 for whatever it says and whatever it stands for, he can
17 use it. But I'm not going to limit him from using it.

18 MR. HINES: Your Honor, this is -- I want it to be
19 -- if you will allow me just a moment. Rule 36(b),
20 effect of admission -- any matter admitted under this
21 rule is conclusively established unless on motion, the
22 court permits withdrawal or amendment of admission,
23 subject to the provisions of 16 governing the amendment
24 of a pretrial order. The court may permit withdrawal
25 or amendment when presentation of the merits of the

1 action will be subserved thereby, and the party who
2 obtained the admissions fails to satisfy the court --
3 the party who obtained the admissions fails to satisfy
4 the court, that withdrawal or amendment will prejudice
5 him in maintaining his action or defense.

6 And, Your Honor, what I just heard the court argue
7 to -- what was argued to the court is when I took -- I
8 want to impeach Mr. Thomas. Say, Mr. Thomas, what's
9 the purpose of a silt fence. This is what happened.
10 This is his deposition, page 103. Just a couple of
11 follow-ups from Mr. Gruenloh to Mr. Thomas.

12 What is the purpose of a silt fence?"

13 Answer: "What is the purpose of a silt fence?"

14 "Yeah."

15 "It is to define the construction zone. As I
16 understand it, the silt fence is define -- is designed
17 to define the construction zone. It also keeps silt
18 from running into the grading system and running into
19 the marsh."

20 "Is one of the purposes of the silt fence where it
21 runs along the sidewalk to keep the sidewalk clear of
22 debris and other obstructions?"

23 Answer: "That's not stated as a specific purpose
24 of a silt fence."

25 My point is, Your Honor, in fairness it doesn't

1 ring true that that was not inquired upon in the
2 deposition for --

3 THE COURT: Well, it depends upon which is the
4 truth, whether the deposition is the truth or this is
5 the truth.

6 MR. HINES: But, Your Honor, I don't understand --
7 rule 1 of these rules says -- these rules shall be
8 construed to ensure that just, speedy, and inexpensive
9 determination of every action -- just, speedy, and
10 inexpensive. He examined the witness through
11 deposition on that very question.

12 And, furthermore, it's known. The documents that
13 plaintiff wants to introduce in this case, the Daniel
14 Island Construction Guidelines say what the purpose of
15 a silt fence is, to maintain -- it's for erosion
16 control.

17 Furthermore, Your Honor, the name of the fence is
18 a silt fence. I'm suggesting to his Honor, most
19 respectfully, that there is no plain prejudice that the
20 plaintiff has shown. And that this is -- well, it's an
21 unjust result to allow what is not correct to be -- to
22 confuse the jury or -- I mean, it's a patently -- it's
23 an unjust situation to use something the plaintiff is
24 going to ask a question that the purpose -- the
25 plaintiff knows obviously the purpose of it --- there's

1 no good reason that a trial should be conducted this
2 way with -- with people's rights at stake. Their
3 liability is at stake. I mean, this is a point that is
4 really, essentially, in-artfully drafted when a lawfirm
5 or perhaps communication with a -- you know, in the
6 infancy of a -- of a case, there were depositions.

7 One more point, Your Honor, and I'll wrap it up.

8 THE COURT: Okay.

9 MR. HINES: Mr. Gruenloh mentioned that oh, I
10 deposed the architect and I didn't get into this.
11 Well, the problem -- the problem we have -- I mean, we
12 can get to the bottom of this, Your Honor, if we don't
13 need to -- we -- I can order the transcript today. I
14 have not ordered a copy of the architect's transcript.
15 I don't believe Mr. Gruenloh did; that's why I haven't
16 ordered it.

17 He did ask the architect a lot about what the
18 purpose of a silt fence is. I'll represent to the
19 court -- because the architect's plan specifically say
20 on top left -- note: sediment control fencing must be
21 around the perimeter of the property.

22 Now, if Your Honor would perhaps put up -- allow
23 us to get that deposition, because I think that would
24 be very important for us to see if the court reporter
25 can get the transcript. I'll represent to the court

1 that issue was inquired into a great deal in the case,
2 and I think that would be a significant consideration
3 the representations that Your Honor --

4 THE COURT: Well, gentlemen, what I'm going to do
5 is -- I don't know what he's going to say under oath.
6 Okay. The way we'll deal with it whenever you get
7 ready to get into this issue, we'll let some in camera
8 testimony, let me hear what he's going to say. I may
9 make a decision then on whether I'm going to let him
10 use the request to admit. But I don't know what he's
11 going to say. I have no clue on what he's going to say
12 when he gets on the witness stand. He may say
13 something entirely different than what he said in the
14 deposition and in the requests to admit.

15 So at this point in time, I'm not going to
16 withdraw it. Okay. I may after I hear what he says,
17 and I hear some facts on the case. Okay.

18 MR. HINES: Very well, Your Honor. Thank you.

19 THE COURT: I'm not going to rule on that at this
20 point in time. I will take it under advisement and
21 I'll go in camera, listen to what he has to say, and
22 make a ruling at that time. Okay.

23 MR. GRUENLOH: And I just wanted to explain
24 myself, Your Honor. I was always taught not to ask one
25 too many questions, and what I didn't do is I didn't

1 take this out and put it in front of him. I got just
2 far enough so that I knew that I was going to be able
3 to impeach him at trial. At that point, which was in
4 2014, May of 2014 -- so a while ago -- they knew this
5 issue, and then we don't get this until yesterday.
6 That's my problem.

7 THE COURT: I understand. I understand. I'm not
8 -- I understand where you're coming from. I'm just not
9 going to rule until I hear the testimony. Okay.

10 All right. Any -- what else we got hanging?
11 Any other evidence issues?

12 MR. HINES: Your Honor, we do -- I guess they're
13 related. One is -- they relate to the expert witnesses
14 that the plaintiff has -- has --

15 THE COURT: Which expert are we talking about?

16 MR. HINES: There are two experts in particular
17 that this relates to, Dr. Thomas Funcik, he was
18 supposed --

19 THE COURT: I thought y'all did a video on him.

20 MR. HINES: We did, Your Honor.

21 THE COURT: Is he going to testify live or are you
22 going to use the video?

23 MR. GRUENLOH: We're going to use the video, Your
24 Honor.

25 THE COURT: Okay. What's your problem?

1 MR. HINES: Your Honor, the objection is to -- the
2 video deposition form, we don't have a court to rule on
3 his qualifications, his ability not -- this objection
4 is about his ability to offer an opinion in this case.

5 THE COURT: Did he offer an opinion?

6 MR. HINES: Oh, he did.

7 THE COURT: What was -- about what?

8 MR. HINES: About -- this is the doctor that
9 treated the plaintiff immediately after the accident
10 and performed surgery on her nasal bone -- and we
11 certainly don't have any objection to him testifying
12 about that. But one of the key disputes in this case,
13 from a damages standpoint, is whether the fall that
14 happened in June 2006 (sic) caused the problems with
15 the plaintiff's smell and taste that she's alleged in
16 this case. The plaintiff never saw Dr. Funcik for any
17 treatment related to smell and taste.

18 After she had already gone -- first, the accident
19 again, Your Honor, was June of 2011. The first
20 treatment that the records show for this smell and
21 taste issue is in April 2013. But the point I'm
22 making, Your Honor, is our -- our challenge here is to
23 Dr. Funcik's ability to offer an opinion as to the
24 cause of the smell and taste issue. That's it. And I
25 can explain that or put some more meat on that bone as

1 to why I would argue that it's not a reliable opinion,
2 but --

3 THE COURT: Well, you got a copy -- I think she
4 said you had a copy of the transcript, right?

5 MR. HINES: Yes, Your Honor.

6 THE COURT: Can I see the transcript and what the
7 questions were and what the answer was?

8 MR. HINES: Yes, Your Honor.

9 THE COURT: Is it in this book here?

10 MR. HINES: No, Your Honor.

11 THE COURT: What page and line? What page and
12 line?

13 MR. HINES: I'll have the page and line for you in
14 just one moment. There actually are a number of
15 different pages, Your Honor, where testimony --

16 THE COURT: Are you giving me this copy to use or
17 I'm going to give it back to you?

18 MR. HINES: Your Honor, I suppose -- of course, we
19 are on the record. I'd like for that to be marked as a
20 court's exhibit, so I can make a record of the
21 objection again. But obviously the court hasn't ruled
22 on the it. But I -- you can certainly keep that. I
23 can have another copy to file --

24 THE COURT: Does the plaintiff have a copy of this
25 deposition?

1 MR. GRUENLOH: Yes, Your Honor.

2 THE COURT: Do you have a copy I can have?

3 MR. GRUENLOH: Sure.

4 THE COURT: If you'll pass it up.

5 MR. GRUENLOH: Yes.

6 THE COURT: All right. Do you want to go on the
7 record for this motion about Funcik?

8 MR. GRUENLOH: Yes, Your Honor.

9 THE COURT: Okay. All right. Let's go on the
10 record. Will you mark that court's exhibit as to his
11 motion on the qualifications of Dr. Funcik to give an
12 opinion, a medical opinion.

13 (WHEREUPON, Court's Exhibit No. 1 was marked and
14 made a part of the record.)

15 THE COURT: All right. This is a motion in the
16 case of Rosemary Connelly, plaintiff, vs. Winsor Custom
17 Homes. The case number 2013-CP-10-3251. And there's a
18 video deposition of Dr. Funcik, and the court has
19 marked that video deposition as Court's Exhibit No. 1,
20 as to the defendant's motion to strike certain
21 testimony from Dr. Funcik's video deposition; is that
22 correct?

23 MR. HINES: That's correct, Your Honor.

24 THE COURT: All right. I'll be glad to hear you
25 on your motion. Please tell me what page and line

1 we're talking about striking.

2 MR. HINES: Your Honor, I think that I -- perhaps
3 this can best be shown -- there are a number of
4 instances in the record --

5 THE COURT: Well, let's go through them. Tell me
6 what line and page.

7 MR. HINES: Page 71.

8 THE COURT: Page 71?

9 MR. HINES: Yes, Your Honor, page 71 line 1.

10 THE COURT: All right. Page 71 line 1.

11 MR. HINES: And before -- Your Honor, I want to
12 make clear what I'm taking up with the Court right now
13 is not -- this is an objection that would be to this
14 entire -- the ability of Dr. Funcik to offer expert
15 opinion that is considered to be reliable on the
16 subject of causation, and with respect to the smell and
17 taste loss.

18 And where I'm coming from with that, Your Honor,
19 is of course is -- is Ford vs. Watson Motor Company,
20 for instance. The cite on that, just for the record,
21 389 SC 434, a 2010 Supreme Court case.

22 And if the court will indulge me just a moment,
23 I'm looking specifically at expert testimony received
24 in addition to scrutiny, relevant to other evidentiary
25 decisions, specifically in executing these gatekeeping

1 duties, the trial court must make three key preliminary
2 findings, which are fundamental to Rule 702, before the
3 jury may consider expert testimony. First, the trial
4 court must find the subject matter is beyond the
5 ordinary knowledge of the jury, thus requiring the
6 expert --

7 THE COURT: I'm familiar with all that; okay?
8 Let's get on with the motion. I'm very familiar with
9 Council and the other cases. Okay.

10 MR. HINES: Certainly, Your Honor, and the point
11 that I'm specifically trying to make is about the
12 substantively reliability of the testimony.

13 Now, with that Dr. Funcik never treated this
14 patient --

15 THE COURT: All right -- did you qualify -- did he
16 get qualified in this deposition?

17 MR. HINES: An objection was raised to it.

18 THE COURT: What page is his qualifications
19 referred to as far as testimony is concerned?

20 MR. HINES: Well, let me make this point, Your
21 Honor. There is no objection that he is qualified as
22 an ENT. The question is, is his opinion substantively
23 reliable, that third gatekeeping function based upon
24 the way he reached it --

25 THE COURT: Well, what was he offered as a -- what

1 was his specialty offered? What was he offered for?

2 MR. HOLMES: Your Honor, he was offered as a
3 treating physician of Rosemary Connelly. Also he gave
4 his expert medical opinions. He treated her in the
5 moment. He's also a board certified ENT. He's capable
6 of testifying.

7 THE COURT: He's a board certified ENT?

8 MR. HOLMES: Otorhinolaryngologist is the
9 technical term. But, yes, that's the long word for
10 ENT.

11 THE COURT: And he's a plastic surgeon; right?

12 MR. HOLMES: He's a plastic surgeon for the past
13 20 years of private practice, but he did a five year
14 residency as an ENT fully qualified.

15 THE COURT: So he's board certified as a plastic
16 surgeon?

17 MR. HOLMES: That's correct.

18 THE COURT: Y'all agreed to that; correct?

19 MR. HINES: I have no question that he is an ENT
20 and a plastic surgeon. Again, Your Honor, the question
21 I have is specifically related to him coming into Court
22 and saying, yes, this fall that happened June 6, 2011,
23 caused the smell and taste issue. And -- and I'm
24 pointing to a particular --

25 THE COURT: All right. When did Dr. Funcik start

1 treating her?

2 MR. HINES: That day, June 6th --

3 THE COURT: The same day?

4 MR. HINES: Your Honor, if you would ask the
5 question, when did he start treating her for the smell
6 and taste issue, the answer would be never. He did not
7 treat her for that issue.

8 THE COURT: All right. So as part of this
9 deposition, you want to strike Dr. Funcik's testimony
10 because you don't think he was qualified; is that
11 correct?

12 MR. HINES: I don't think he can issue a reliable
13 opinion, notwithstanding his qualifications in the
14 field. But as to this case, his opinion, again, it's
15 third gatekeeping factor, Your Honor, the substantive
16 reliability of the opinion --

17 THE COURT: All right. Let's go through the
18 testimony.

19 MR. HINES: And, Your Honor, I --

20 THE COURT: Page 71; right?

21 MR. HINES: Yes, sir, 71 line 1. I'll be happy to
22 read it into the record or simply allow the court to
23 read it. It actually goes on all the way through page
24 73, line 12.

25 THE COURT: Line 12?

1 MR. HINES: Yes, Your Honor.

2 THE COURT: So, you want to strike all that
3 testimony?

4 MR. HINES: Your Honor, not just that testimony,
5 in many -- you see in many different instances in this
6 deposition, he comes back and he offers an opinion as
7 to causation --

8 THE COURT: Well, I understand, but if we're -- if
9 he's going to edit it, I've got to know what pages and
10 lines he's going to take out. All right. You want to
11 strike page 71 line 1, all the way through page 33,
12 line 12; you want to strike all that?

13 MR. HINES: Your Honor, the answer to that is yes,
14 but I want to -- and I would invite plaintiff's counsel
15 to chime in on this. Prior to just a moment ago,
16 meeting in the hall and discussing this -- and I
17 explained to him that I don't have a line by line --
18 I'm working to do this as fast as I can. But what this
19 is, this is -- is that, I will sit with them this
20 afternoon if the court is doing other work, and I'll
21 get it finished in -- within -- hopefully within an
22 hour we can have it all hashed out.

23 What we want -- what I wanted to address, and I
24 believe we both thought it would make sense, is to
25 address this threshold issue. Because if you agree

1 with us that Dr. Funcik is not able to give his opinion
2 that is reliable on this issue, then -- then all of
3 that will need -- will need to come out. If you agree
4 that he is, of course, we'll preserve our objection,
5 but none of it needs to come out.

6 THE COURT: Well, on what basis am I going to make
7 that decision unless I read what he says? How -- how
8 can I sit here in a vacuum and make a decision; is my
9 question to you.

10 MR. HOLMES: Your Honor --

11 THE COURT: Yes, sir.

12 MR. HOLMES: -- if I may say something on
13 reliability. We believe that he is fully qualified to
14 testify as to causation because the issue goes to the
15 reliability of the science that Dr. Funcik was
16 testifying on. And the science is actually the
17 diagnosis and the causes of anosmia.

18 Now, the defense's own expert witness, Dr.
19 Schlosser, has testified during his -- his deposition,
20 that -- and I do have those lines. I'll be happy to
21 provide them to you. But specifically, Your Honor, he
22 said outright that the science really hasn't changed in
23 20 years. And Dr. Funcik agrees. That there is no
24 definitive test to determine the cause of anosmia. And
25 instead what it is, is it's an examination of the

1 totality of the circumstances.

2 That a board certified ENT, including Dr. Dozier,
3 Dr. Ghegan, Dr. Hester, is certainly qualified to
4 administer the smell test to determine that it exists,
5 and also in their medical opinions, to go ahead and
6 determine the cause.

7 THE COURT: Well, how do they make the
8 determination -- I believe she said she lost her sense
9 of smell and taste?

10 MR. HOLMES: They do it --

11 THE COURT: How do they determine that?

12 MR. HOLMES: They do it by evaluating the totality
13 of circumstances, and that's not something that's
14 uncommon. Dr. Schlosser, himself, has done it.

15 He testified during his own deposition that in a
16 prior case, he's testified under oath to traumatic
17 causation of anosmia based only on viewing medical
18 records, and the totality of the circumstances. And,
19 you know, that's -- that's common practice that science
20 has accepted. And it's a permanent condition, Your
21 Honor. There is no medical treatment. There is no
22 surgical intervention. Once it happens, it's for life.
23 Grant it --

24 THE COURT: Well, what -- what do they say causes
25 it?

1 MR. HOLMES: There are a few different causes.
2 There's viral ideologies --

3 MR. GRUENLOH: If I may, Your Honor -- and I'm
4 sorry, Brian -- there's no objection that Dr. Funcik --
5 and we've hatched this out -- that Dr. Funcik is a
6 board certified ENT who can go through the mechanics --
7 we've got a board here. This might help the judge.
8 And all the doctors went through this, including Dr.
9 Funcik.

10 There's no objection that he's qualified to say
11 based upon my -- the fact that I went to medical school
12 for this, I'm an ENT. ENTs are the only doctors that
13 are qualified to determine whether or not a sheer
14 injury happens when the brain goes forward when you
15 strike the concrete, and these microscopic nerve fibers
16 get sheered.

17 And so Dr. Funcik testifies that that's how this
18 happens, when you get a blow to the head, he's
19 testified to the mechanics of it. All right. And he
20 said, look, I learned that in medical school. There's
21 nobody but a board certified ENT, much less somebody
22 who's been seeing and has a history of treating
23 Rosemary Connelly -- because let's not forget that
24 while Dr. Schlosser, their expert, says that he can do
25 this, Dr. Funcik -- different than Dr. Schlosser --

1 actually examined her. He looked up in her nose. All
2 right.

3 Dr. Ghegan, which I think that they're going to
4 offer an opinion on as well, a Charleston ENT board
5 certified doctor, who she went to specifically to
6 determine what the cause of her sense of smell, so you
7 understand, they're going to come in here, I think --
8 he's getting to this argument -- and they're going to
9 ask you to exclude his opinion on causation. That's
10 why he saw her. Nobody but an ENT can do this.

11 All right. And they didn't lodge any objection to
12 his going through the mechanics of this. And if you
13 understand the mechanics of how this can happen, then
14 it's pretty easy to apply it.

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

16 MR. HINES: Your Honor, may I briefly follow-up on
17 that? And I want to make -- obviously I don't want to
18 waste the Court's time.

19 THE COURT: Pardon?

20 MR. HINES: Obviously, I don't want to waste the
21 Court's time. If I may make just a little follow-up --
22 at least for our record -- I'm not sure what the
23 court's ruling will be. But this is the point I want
24 to make -- and I think this might help me make it.
25 It's not -- this case is not about how a traumatic loss

1 of smell occurs, this case is about what if it.
2 happened -- if it occurred in this particular instance.
3 And so I think this -- this is testimony that's on
4 this, if the court will indulge me to read just a
5 little bit. This is actually page 71 line 7.

6 THE COURT: Page 71 line 7?

7 MR. HINES: Yes, sir.

8 THE COURT: Okay.

9 MR. HINES: He says -- no, Your Honor, forgive me.
10 I'll just start at one. The question is, are they
11 fragile -- and he's speaking about --

12 THE COURT: Where are you reading from?

13 MR. HINES: Page 71 line 1, Your Honor. And he's
14 talking about nerve filaments. And the question is
15 asked --

16 THE COURT: What are you taking about fragile?

17 MR. HINES: It's nerve filaments.

18 THE COURT: Okay. All right. Nerve filaments.
19 All right. I'm with you.

20 MR. HINES: Yes, Your Honor. I mean, Are they
21 fragile. You know, nerve tissue is kind of tough --

22 (Court Reporter interruption.)

23 THE COURT: She says slow down so she can get it
24 all down. Okay. Slow down just a little bit.

25 MR. HINES: *But the reason that this injury*

1 occurs, just mechanically -- it's a simple mechanical
2 principle. You know the brain has a little bit of
3 mobility within the skull, but this is fixed right
4 here, so just a little bit of movement, not a lot of
5 play and tethering (ph) in there. That's how anosmia
6 occurs as a result of trauma, just a forward injury.

7 Now, this is where I wanted to make a distinction.
8 He's explained the general principle: Now, what
9 happens in the next paragraph -- you know, I -- in
10 Mary's case -- he refers to Ms. Connelly as Mary --
11 Mary's case was a long time ago. And I was responsible
12 for, as the patient, the principle, you know, for the
13 nasal fracture and stuff -- which is the point I'm
14 trying to distinguish here, Your Honor, is that's not
15 the smell issue. That's the broken nose.

16 I mean, I had awareness and I hadn't reviewed it
17 that much -- meaning her file -- and it's been a
18 long -- I mean, I couldn't -- I mean, I believe that
19 this was the time and so forth, as we've talked about
20 in the cases, things have come back to me. And if I
21 look at her nose right here, I mean, the main area of
22 swelling I see, is an area about an inch above the
23 cribriform plate -- and about an inch below the
24 cribriform plate -- that has to do with the
25 mechanics -- so if the degree of swelling, and it

1 wasn't the most swollen nose I've ever seen. I've seen
2 people fall from three stories. I've seen people in
3 semi collisions. You know, I've seen the face be a bag
4 of bones. I've seen worse traumas. But this is some
5 very significant swelling. And the main focus -- I
6 don't know if she fell on concrete or whatever, but
7 there's a main focus of injury here, the main focus of
8 injury here -- and it looks like a frontal injury. And
9 so the pattern of swelling, and the pattern of the
10 point of impact, just seems sort of very consistent and
11 intuitive, that absolutely this injury could cause
12 anosmia.

13 And after we had our last deposition, like I said,
14 if somebody looked in the yellow pages for somebody to
15 see for a smell disorder, I probably wouldn't be the
16 first doc in town. But after I've spent time with you
17 guys -- meaning the lawyers -- and I wasn't
18 anticipating we were going to get into the whole
19 anosmia thing that much -- this is the treating
20 physician, Your Honor, who is saying I didn't even
21 expect to be asked about this -- is what he's saying --
22 anosmia is a loss of smell.

23 I did do a brief online literature review to see
24 if I was missing anything. If the testimony that I
25 gave was, you know, consistent with the state of the

1 literature. And even since then, today, when we met
2 before the deposition, and you explained to me -- that
3 was in reference to plaintiff's counsel -- when you
4 explained to me about the way -- the refrigerator
5 episode, where Mary became aware of the anosmia, when
6 her daughter noticed the refrigerator smelled to high
7 hell, and she didn't notice it -- that was a deposition
8 that he was referring to that had been taken just that
9 day. There was no transcript. And what he knew about
10 it was reported to him solely by plaintiff's counsel.

11 The more time I spend on this case, the more clear
12 it is to me that, yeah, anosmia can be caused by a
13 sinus infection and by surgical mishap, and by
14 medications -- and I think this is a typographical
15 error -- I believe he said idiopathic -- either way --
16 but as time goes on, we visit these facts and memories
17 come back to me, I think the three leading causes of
18 her anosmia are trauma, trauma, trauma.

19 So absolutely he says this is trauma. But, Your
20 Honor, I submit that there's other instances in this
21 record where -- I mean, he says -- he says, guys --
22 keep in mind, Your Honor, this was a video deposition
23 --

24 THE COURT: All right. What's -- what's the next
25 page and line you want to exclude?

1 MR. HINES: He also talks about -- well, you know,
2 what Your Honor -- I mean -- perhaps, I don't want to
3 belabor this point. My point is I think it's
4 incapsulated within that right there. But this -- and
5 I'll be happy to --

6 THE COURT: Is that all you want to exclude is
7 that portion?

8 MR. HINES: No, Your Honor. I want to exclude any
9 portion in this --

10 THE COURT: Am I going to have to read the whole
11 deposition and guess what you want to exclude, or are
12 you going to tell me what you want to exclude?

13 MR. HINES: Your Honor, I think perhaps the way of
14 going about this is --

15 THE COURT: Pardon?

16 MR. HINES: I think I've gone about this in a way
17 that is problematic, and I apologize. What I thought
18 we were going to argue right now was an issue on expert
19 qualification, and not a line by line deposition
20 examination, which I can certainly be prepared to do --

21 THE COURT: Well, I understand he's got to edit
22 the deposition -- the video tonight. I thought we were
23 going to see what's going to be excluded from the
24 deposition. Okay. And I can't do that unless you tell
25 me what you want excluded.

1 Now, do you want to take a break and you take a
2 look at it, so that we can go ahead and go through the
3 pages and the lines, so they'll know what to redact?
4 And I will rule on each one of them.

5 MR. HINES: Yes, Your Honor, I would like to do
6 that.

7 THE COURT: As far as Dr. Funcik -- he's a
8 qualified ENT. I don't know who else could make this
9 diagnosis other than an ENT. So I'm -- I'm just not
10 buying at this point in time into your argument that he
11 can't make that determination, especially since he was
12 the treating physician.

13 MR. HINES: And, Your Honor, I want to make --

14 THE COURT: But I will -- I do want to look at
15 what you want to exclude. I may exclude some of it and
16 not, so I don't know how else to proceed with this. If
17 you got a different viewpoint of how I can do it, I'll
18 -- please tell me.

19 MR. HINES: Your Honor, it appears at this point
20 what I need to do -- and I've made -- well, I've made
21 it more than halfway through this -- is to -- is to
22 finish with -- the looking at the deposition for line
23 by line objections. What I can do -- and I'll sit
24 right here in the courtroom and do it, and I can meet
25 with plaintiff's counsel. I could have a conference

1 via telephone with him -- but, candidly, I'm not able
2 to give line by line objections without --

3 THE COURT: Well, I don't know how else we're
4 going to deal with it other than do page and line.

5 MR. HINES: Well, Your Honor, what I'm -- this is
6 what I had been thinking -- and forgive me -- is that
7 if you -- if you had an opinion --

8 THE COURT: I've got an opinion that Dr. Funcik is
9 qualified to give an opinion as to his diagnosis.
10 Okay.

11 MR. HINES: He never diagnosed her as to the cause
12 of the loss of smell, Your Honor.

13 THE COURT: Well, I don't know. I haven't read it
14 yet.

15 MR. HOLMES: Your Honor, may I offer a piece of
16 testimony to you?

17 THE COURT: Pardon?

18 MR. HOLMES: On that topic -- may I offer a piece
19 of testimony to you?

20 THE COURT: Well, let's -- first of all, I want --
21 I want to give him time to at least let us know what
22 you want to exclude -- how much time do you need? And
23 we'll adjourn and come back and we'll go through it.
24 And I'm going to make a determination whether it's
25 going to be excluded or not excluded.

1. MR. HINES: Your Honor, thank you. I can do it --
2 it's 3:30 now. I'll have that by 4:00, if I could have
3 that time.

4 THE COURT: All right. We'll take a break until
5 4:00. Is there anywhere in here he gives an opinion as
6 to causation?

7 MR. HOLMES: Absolutely, Your Honor.

8 THE COURT: What page and number?

9 MR. HOLMES: During the redirection that Mr.
10 Gruenloh did, it starts on page 187 --

11 THE COURT: One eighty-seven?

12 MR. HOLMES: One eighty-seven, Your Honor, and it
13 starts at line 13 and goes from there.

14 THE COURT: Okay, 187 line 13.

15 MR. HOLMES: That's correct. And it goes from
16 there. And this is Dr. Funcik's reaffirming his prior
17 discovery deposition, and if you'll indulge me, I'll
18 read it.

19 Mr. Gruenloh asks -- I'll be very brief. You have
20 your deposition in front of you, doctor. Dr. Funcik
21 says, Yes. Mr. Gruenloh says, all right. I just want
22 to ask, I just want to follow-up on this point that Mr.
23 Hines has made that there's been some great change in
24 your testimony today as opposed to your testimony from
25 when you were giving your trial -- through your

1 deposition. And I'd like you to first turn to page 66
2 of your deposition. Do you have that in front of you?
3 What follows is a brief conversation. Mr. Hines saying
4 if you want to go through the whole thing because it's
5 a long answer. So I'll move to line four on page 188.

6 Mr. Gruenloh says, Well, what I'm going to direct
7 you to, doctor, is page 66, line 3, of your deposition
8 and the sentence that reads and I believe -- and if
9 you'd read along with me. This is the quote. And I
10 believe, I mean, I can say with -- like I'm very
11 comfortable saying that she banged her head forward and
12 there's nothing else in this, not her surgery or any
13 surgery I have done, or anything else that could like
14 remotely -- I really don't personally feel any doubt
15 that if she had anosmia, that it came from this injury.
16 I really don't doubt, like there's no reason to doubt
17 that."

18 Mr. Gruenloh asked if he read it correctly. Dr.
19 Funcik said, Yes. Mr. Gruenloh stated, Was that your
20 opinion on that date -- which was the date of the
21 original deposition -- Dr. Funcik said, Yes.

22 Mr. Gruenloh asked, and this was just this past
23 Wednesday, is that your opinion today? Dr. Funcik
24 said, Yes.

25 Dr. Funcik has taken a very hard line stance on

1 the fact that the trauma caused the anosmia. The
2 science stands. The science is established. He's
3 qualified to speak on it. I don't see another issue
4 where he wouldn't be qualified to speak on it.

5 MR. HINES: Your Honor, it sounds like -- I would
6 appreciate if we could -- if the Court's -- the court's
7 indulgence to take a look at this until four, and if we
8 can do that. --

9 THE COURT: Okay. We'll take a break until 4:00,
10 and then we'll come back and go through the pages and
11 lines and see where we go.

12 MR. GRUENLOH: Your Honor, I'm just looking to see
13 if there's anything else that we can clear up real
14 quick. There was one other issue with the Court's
15 indulgence that I wanted to raise -- as I was going
16 through the new pretrial brief, it occurred to me that
17 the defendants may come in with Mr. Thomas, who is the
18 corporate representative of Winsor Custom Homes, and
19 they may suggest that they are a mom and pop shop, and
20 that they -- you know, the economy has been bad, and
21 put in testimony regarding their wealth.

22 And I would just say to you that that's -- if they
23 get to do that, I would be able to bring in testimony
24 about the insurance policy.

25 And I just wanted to say, Your Honor, that in

1 advance of Mr. -- because I'm going to bring Mr. Thomas
2 in our case in chief, because he said some pretty
3 remarkable things. He admitted that he had a duty to
4 do this. He had no memory of the fence, even though he
5 said that he was out there daily. But he did say,
6 well, I don't have any employees anymore.

7 And I don't think that it's proper for them to
8 come in and say, I'm a poor construction worker. Here
9 I am with my wife. And if they get to do that, I think
10 we ought to be able to talk about the million dollar
11 insurance policy.

12 THE COURT: Well, are you -- are you talking about
13 them doing that -- are you still going to ask for
14 punitive? Have you withdrawn your request for
15 punitive?

16 MR. GRUENLOH: No, I have not withdrawn my request
17 for punitives.

18 THE COURT: I mean, I would think his financial
19 status on his case in chief doesn't have any relevance
20 as to punitive damages. And that's going to be
21 bifurcated out. So I don't know why you're going to be
22 going into his financial status during the case in
23 chief.

24 MR. HINES: Your Honor, I can tell you candidly,
25 there's been no thought at all about going into that.

1 I think the testimony was -- it's pretty brief in his
2 deposition -- it was, do you have any employees. It's
3 just me. I used to have nine --

4 THE COURT: Let's --

5 MR. HINES: The market has been tough.

6 THE COURT: Let me rephrase it. If you insinuate
7 to the jury that he's poor and he doesn't -- he's going
8 to have to pay this out of his pocket, then why
9 shouldn't the insurance come in?

10 MR. HINES: First of all, the rule, I think, is
11 quite --

12 THE COURT: I know what the rule says. Tell me
13 why, if you bring that issue up, why in clarity,
14 completeness to the jury, the insurance couldn't come
15 in -- if you've approached that? I don't know what
16 you're going to do. Yes, sir, Mr. Brown?

17 MR. BROWN: Would --

18 THE COURT: Pardon?

19 MR. BROWN: Would you like me to respond, Your
20 Honor?

21 THE COURT: Yes, sir.

22 MR. BROWN: I'm sorry.

23 THE COURT: I'd be happy for you to respond. I
24 don't mind all of you charming in -- chirping in --
25 excuse me.

1 MR. BROWN: We're not going to bring in that he's
2 some pauper, and that this thing is going to put him
3 out of business in any way.

4 THE COURT: Because if you do, I'm very -- I will
5 listen to them very strongly about bringing in the
6 insurance policies. Because for you to insinuate that
7 he's got to pay it out of his pocket, he doesn't have
8 the money, et cetera, et cetera, et cetera -- okay?

9 MR. BROWN: I --

10 THE COURT: Do you understand where I'm coming
11 from?

12 MR. BROWN: I hear you, Your Honor.

13 THE COURT: Okay.

14 MR. BROWN: We -- we're going -- it won't happen.
15 That's not what we're going to do. We'll agree to
16 disagree on the rule of it, but it's not going to
17 happen.

18 Now, what I do want to make clear to Your Honor,
19 because I don't want you to think that I talked out of
20 both sides of my mouth -- that at one time he had nine
21 employees for his company. At the time that this
22 incident occurred, he had none. He was the only
23 employee. There will be testimony to that effect.
24 That's not saying I'm a pauper and I can't pay this.

25 THE COURT: I don't have any problem with that.

1 MR. BROWN: Okay. That's --

2 THE COURT: I don't have any problem about him
3 talking about --

4 MR. GRUENLOH: The totality of that testimony,
5 Your Honor --

6 THE COURT: Pardon?

7 MR. GRUENLOH: The totality of that testimony --

8 THE COURT: Well, no, it could go towards -- I'm
9 going to let him -- if he's going to testify to only
10 that, that's fine.

11 MR. GRUENLOH: If it stops there. In his
12 deposition, he said the market has been brutal, you
13 know. And then --

14 THE COURT: He just said he wasn't going to say
15 that.

16 MR. GRUENLOH: Okay. I'm sorry, Your Honor, I get
17 worked up.

18 THE COURT: He says he's going to go under the
19 number of employees; correct?

20 MR. HINES: I don't even know if we'll go -- how
21 much we'll go into the number of employees. This is
22 really sort of -- I think -- I believe this is a
23 mountain out of a molehill. I don't think we've got a
24 problem with it.

25 THE COURT: As far as any insurance issues, have

1 you got any cases on what you were asking me to do?

2 MR. GRUENLOH: I'll have them for you if he goes
3 into it.

4 THE COURT: I need it beforehand.

5 MR. GRUENLOH: Yes, Your Honor.

6 THE COURT: When -- do you -- can you bring it to
7 me in the morning?

8 MR. GRUENLOH: I'll bring it to you in the
9 morning.

10 THE COURT: All right. Okay. Anything else that
11 we can cover before we take a break and come back?

12 MR. HINES: No, Your Honor.

13 THE COURT: If you can come up with an easier way
14 for -- to redact this deposition, I'll be happy to
15 listen to you.

16 MR. HINES: Your Honor, I think the best way --

17 THE COURT: I guess the real problem with this is
18 we're working in a vacuum because -- and I haven't read
19 the deposition, haven't seen the video, so I don't know
20 what all is out there as far as his testimony is
21 concerned.

22 MR. HINES: Your Honor, the only thing -- and I'll
23 say this -- I just want the Court to know. I thank the
24 court for any indulgence on this. This deposition --
25 and the parties have worked well on this case to do

1 things -- we stayed last Wednesday night, ended at 9:30
2 at night, and so we just got it -- the point is, we're
3 working as best we can. I guess -- I'm trying to let
4 the court know I'm sorry to not have the page and lines
5 for you right now, but this isn't the deposition we've
6 had for months and months. This is a deposition we got
7 recently. And, of course, we've been preparing for
8 this trial. So I think the best thing for me to do is
9 to take --

10 THE COURT: I mean, my point is if he's going to
11 do any redaction, he's got to know what page and line
12 to redact.

13 MR. HINES: He certainly does.

14 THE COURT: Okay. Otherwise it's not going to get
15 redacted.

16 MR. HINES: There's no doubt about -- the
17 logistics --

18 THE COURT: All right. I'll see you at 4:00.

19 MR. GRUENLOH: Your Honor, I have a suggestion on
20 how it might be easier --

21 THE COURT: Please do.

22 MR. GRUENLOH: -- and I hope you don't take this
23 as me being flippant. But these issues that he's
24 talked about, if anything, go to the weight of the
25 testimony. He cross examined Dr. Funcik for three

1 hours, and let the jury hear all of it, every single
2 bit of it. All right. You know, I've got some
3 objections to some of his questions to my doctors. Let
4 it come in. Let the jury see it all.

5 THE COURT: If y'all can agree on that, that's
6 fine.

7 MR. GRUENLOH: These are treating doctors --

8 THE COURT: Anything y'all want to agree on is
9 fine with me. I don't care. But if I'm going to have
10 to rule on striking some testimony, I need to know what
11 I'm striking. If he withdraws his objection to your
12 cross -- are you going to withdraw your objection to
13 the direct?

14 MR. HINES: Your Honor, I'm not in a position to
15 do that. The idea of sort of this free-for-all
16 concept, I just can't -- I can't even quite process
17 that right now, Your Honor. I think my -- my
18 objection -- I think I need to do a better job
19 expressing it to the Court. With 30 minutes leave, I
20 think maybe perhaps I can do that.

21 THE COURT: All right. Go do your thing. I'll
22 see you in 30 minutes.

23 MR. BROWN: While he's doing that, Your Honor --

24 THE COURT: Thirty-five minutes.

25 MR. BROWN: -- should counsel and I -- because

1 he'll be doing that, you don't need to be marking
2 exhibits...

3 (Off-record between counsel concerning exhibits.)

4 THE COURT: All right. You've got photographs of
5 --32 through 40 -- do y'all want to do those first?
6 What do you want to do first?

7 MR. GRUENLOH: Why don't we take them in order,
8 Your Honor. The Defendant's Exhibit No. 3, which is
9 the Facebook page --

10 THE COURT: Facebook material by Mrs. Connelly in
11 discovery.

12 MR. GRUENLOH: Yes, sir. We produced this to
13 defendants in discovery during deposition. I think --
14 and to be clear, what they asked for was a download
15 from a particular time period.

16 THE COURT: Let me see it.

17 MR. GRUENLOH: What they asked us for was a
18 download from a particular time period, everything on
19 her Facebook page, so that they could go through it.

20 We -- we almost had heard -- a hearing on a motion
21 to compel on this issue because we didn't think it had
22 anything to do with the case, but we eventually gave it
23 to them just in the interest of discovery.

24 At the deposition, they asked her about two
25 photos -- all right -- and asked her to try to put a

1 date on those photos. She was unable to put a date on
2 those photos. And then the other 50 pages or so of it,
3 is just Rosemary Connelly, and her friends, and
4 advertisements.

5 And my only point is this, Your Honor. It is
6 inappropriate -- we've got no problem if they use this
7 on cross, or whatever they want to do, but it is
8 inappropriate to send somebody's Facebook page -- their
9 whole Facebook page back to the jury. We're going to
10 have juror members back there looking at who she's
11 friends with, who -- you know, what her comments on
12 this person's page are, that person's page.

13 And so I think that, at the very least, the court
14 ought to withhold any ruling on the admissibility --

15 THE COURT: You want to put all of this into
16 evidence?

17 MR. BROWN: Absolutely, Your Honor. I'll be glad
18 to tell you why.

19 THE COURT: Please do.

20 MR. BROWN: She has -- she has sued for loss of
21 enjoyment of life after the accident. This goes
22 directly to the enjoyment of life she has had after the
23 accident. I've had Judge Roger Young allow the entire
24 after-an-incident go back to a jury. Judge Markley
25 Dennis has -- I know they're not binding on you, so I

1 don't mean that in a disrespectful way, Your Honor.

2 THE COURT: I'm sorry. What now?

3 MR. BROWN: I said other judges, and I know that's
4 not binding on you -- and I don't mean that in a
5 disrespectful way --

6 THE COURT: I understand.

7 MR. BROWN: But they let it all go in --

8 THE COURT: It's a persuasive argument.

9 MR. BROWN: And Judge Joe Anderson, in a six week
10 case we did up in Columbia, who claimed that something
11 had traumatized him and he had been injured from it,
12 allowed the entire Facebook after-the-incident go back
13 in to show what the enjoyment of life level was.

14 She's suing for loss of enjoyment of life. She's
15 suing for not having taste buds, yet they're pictures
16 of her in there with -- with an empty plate of food.
17 And the pictures of her dancing, and she claims she has
18 back injuries.

19 And, for instance, talking to her friends on what
20 she's doing. And yet the testimony will come in, and
21 it'll be, oh, since I can't smell, I've lost this
22 enjoyment of my life.

23 THE COURT: What's her dog have to do with it?

24 MR. BROWN: Judge, you can take one --

25 THE COURT: On page 134, there's just a picture of

1 a black dog; what's that got to do with anything?

2 MR. BROWN: That -- that she is enjoying --

3 THE COURT: She's enjoying her dog. So she can't
4 smell her dog, so she enjoys her dog?

5 MR. BROWN: She enjoys the dog. She's testified
6 she can't smell the dog.

7 THE COURT: Can't smell him when he's wet, huh?

8 MR. BROWN: Your Honor, I have -- I have in the
9 last several years -- I have not had a Judge not allow
10 me to get it to the jury from loss -- someone claims
11 loss of enjoyment of life. That is a -- a clear claim
12 in her complaint. And she also describes the day after
13 the accident happens, her description of it is in here,
14 Your Honor.

15 THE COURT: Where is that?

16 MR. BROWN: If you give me, Your Honor, one
17 second.

18 THE COURT: All right. The only thing I know to
19 do -- just sort of looking at it very briefly, my
20 inclination -- and I'll be glad to hear -- I mean,
21 if -- if -- if you are claiming loss of life, and she
22 gets on the stand and says that, then why wouldn't this
23 be relevant?

24 MR. GRUENLOH: Well, there may be pages that may
25 be relevant on cross examination, and that's why I

1 asked the Court's indulgence to see what comes in and
2 what they use. But, I mean, I don't have --

3 THE COURT: Obviously it's going to have to be
4 relevant.

5 MR. GRUENLOH: Right.

6 THE COURT: And I'm not saying it's relevant at
7 this point in time.

8 MR. GRUENLOH: It's the whole thing. That's my
9 problem.

10 THE COURT: I understand. I'm not saying it's all
11 relevant, but --

12 MR. GRUENLOH: Well, and I don't have --

13 THE COURT: Assume -- I assume she's going to
14 testify that she's had a loss of enjoyment of life, and
15 I don't know what she's going to say she's lost --

16 MR. GRUENLOH: Her smell and taste, sense of
17 taste.

18 THE COURT: All right. So why shouldn't she -- I
19 don't know -- I haven't looked at it, but why
20 shouldn't -- I don't know -- do you want to go through
21 this and see what you think should not be relevant?

22 MR. GRUENLOH: I can do that, but I think a better
23 way to do it would be -- they are going -- you're going
24 to see their cross examination of Rosemary Connelly
25 tomorrow, and that's the only way that this can come

1 in. I expect that they will show her portions of it.
2 And if they show her portions of it, then maybe those
3 can go back to the jury. But, I mean, you know, I
4 don't have a Facebook page, but as I understand it,
5 people can post things --

6 THE COURT: My inclination -- assuming she alleges
7 what you are saying she's alleging, why shouldn't it go
8 back? I mean, I tend to agree with Mr. Brown on that
9 issue.

10 MR. GRUENLOH: Because, Your Honor --

11 THE COURT: Because it's -- it's a -- sort of
12 a -- I guess, she's active in Facebook and it just sort
13 of shows a history of her activities. Quite frankly,
14 I'm astounded that people put all this stuff on
15 Facebook, but they do. But they are going to do it at
16 their own peril.

17 MR. GRUENLOH: Well, and that's part of --

18 THE COURT: In situations such as this.

19 MR. GRUENLOH: That's part of my problem, too.

20 THE COURT: I mean, it's sort of like, you know,
21 the workers comp case when somebody's got a bad back,
22 and they get the private detective to go out there
23 where he's picking -- picking up heavy stuff in his
24 yard coming in with a video. I mean, it's similar to
25 that.

1 MR. GRUENLOH: Agreed. And if there is such a
2 photo, and she's playing volleyball on the beach the
3 day after the accident, then I'm going to sit there and
4 I'm going to cower, and I'm not going to say too much
5 --

6 THE COURT: Mr. Brown, the problem I have is a
7 picture -- I noticed in here somewhere a bunch of
8 people dancing, is she one of them dancing?

9 MR. BROWN: That's her dancing. Yes, sir.

10 THE COURT: There must be 15 of them; how do you
11 know it's her?

12 MR. BROWN: We can identify her. She can identify
13 herself, Judge. She's involved in the picture.

14 THE COURT: Well, you better get her to identify
15 herself.

16 MR. BROWN: Well, we will.

17 THE COURT: Huh?

18 MR. BROWN: We will. She talks in here after the
19 accident, Your Honor, somebody is asking her, saying,
20 did you enjoy your trip? She just got back --

21 THE COURT: I mean, which one is her? I mean, how
22 are you going to identify all this?

23 MR. BROWN: That's her in the middle right there,
24 Your Honor.

25 THE COURT: Because no --

1 MR. BROWN: And there's another -- better picture
2 on her dancing. And there's a picture of her sitting
3 at the table eating. She can identify that --

4 THE COURT: Well, she didn't say she couldn't eat.
5 She just couldn't smell what she's eating.

6 MR. BROWN: No. She says she can't taste it
7 either. It tastes all bland to her. She doesn't --

8 MR. GRUENLOH: She's still got to eat.

9 THE COURT: That means you don't have to pick and
10 chose what you're going to eat; right?

11 MR. BROWN: There was a picture of a clear plate
12 in front of her on that picture. I'm not making light
13 of a serious situation --

14 THE COURT: It doesn't -- it doesn't say she
15 didn't eat.

16 MR. BROWN: I understand, Your Honor. I
17 understand Your Honor's point, but it is relevant to
18 that issue. It provides some evidence to that issue.

19 THE COURT: Is this her at the beach?

20 MR. BROWN: What page is that on, Your Honor?

21 THE COURT: Page 138 -- I just got a problem with
22 putting things in there that aren't relevant to her, is
23 my problem.

24 MR. GRUENLOH: Your Honor, I started to say
25 this -- and part of the issue, too, is the way that

1 Facebook works, is that other people can post things to
2 your account --

3 THE COURT: I know. I know.

4 MR. GRUENLOH: And -- and it doesn't -- if a
5 picture is posted on a particular date, it doesn't mean
6 that the picture was taken on that particular date.

7 THE COURT: I understand.

8 MR. BROWN: She's sharing a photo there.

9 THE COURT: Page 138, is that her standing by the
10 ocean?

11 MR. BROWN: I don't believe that's her. She's
12 sharing someone's photo.

13 THE COURT: So why should that go back is my
14 point? Unless somebody can identify -- unless somebody
15 can say, hey, that's not her. Somebody put that photo
16 on there and liked it, and they put it on her Facebook.
17 I don't have any problem with anything that is related
18 to her.

19 MR. BROWN: But what all of this shows is that
20 she's off -- as Your Honor said, enjoying life --

21 THE COURT: Some --

22 MR. BROWN: -- going back and forth with friends

23 --

24 THE COURT: -- somebody standing on ocean like
25 this.

1 MR. BROWN: And -- and she posted on her Facebook.

2 THE COURT: Did she post it?

3 MR. BROWN: Yes, sir. She posted -- she shared it

4 --

5 THE COURT: She posted it and said, I like that
6 picture.

7 MR. BROWN: She shared it, yes, sir. If she
8 shared it, my understanding is she put it on there,
9 yes, sir.

10 THE COURT: Well, what does that have to do with
11 her?

12 MR. BROWN: She's not laying around all miserable
13 like with her loss of enjoyment of life, but she's
14 going to have this jury try to claim she is. Judge,
15 she's still running "X" number of days a week. She is
16 going to exercise class or personal trainer three times
17 a week. She's doing push-ups "X" number of times a
18 week, and she's Facebooking.

19 THE COURT: You can bring all that out I'm sure.

20 MR. BROWN: I am. But, Your Honor, this is
21 another piece of evidence, and it's evidence that
22 juries these days find incredibly --

23 THE COURT: Who is -- who is this guy with the
24 beard on page 143? Who is that guy?

25 MR. BROWN: I believe that's a family member of

1 hers.

2 MR. GRUENLOH: I don't think so. I think that's
3 unduly prejudicial right there. Look at that picture.

4 THE COURT: Who is that guy? What does that have
5 to do with anything?

6 MR. BROWN: Well, we can -- we can --

7 THE COURT: Is this her? Is she in that picture?

8 MR. BROWN: That's her right there, Your Honor.
9 We have color copies that are okay. I'm sorry. They
10 gave you black and white.

11 THE COURT: She's got some kind of sandwiches
12 here. All right. My inclination is probably to let it
13 back -- okay -- unless you can point out some of these
14 pictures that don't have anything to do with anything
15 --

16 MR. GRUENLOH: I would just ask the Court's
17 indulgence --

18 THE COURT: We can redact it that way. Okay.

19 MR. GRUENLOH: Yeah, I would just ask the court's
20 indulgence --

21 THE COURT: Because it's her Facebook and she
22 posted it -- or somebody posted it. And it does show
23 what she's involved in over time, and you are arguing
24 loss of enjoyment of life. I don't know what being on
25 Facebook has to do with enjoyment of life, but that's

1 neither here nor there.

2 MR. GRUENLOH: If they don't use it, and they
3 don't show it to her -- show the picture to her, and
4 it's a picture of a dog or a picture of some man that's
5 been posted by somebody else, then that's the issue
6 that I have.

7 THE COURT: I don't have any problem excluding
8 that.

9 MR. GRUENLOH: Okay. Understood, Your Honor.

10 THE COURT: Like the picture of the dog, or the
11 picture of this bearded guy with a camera, I don't know
12 what that has to do with her.

13 MR. GRUENLOH: I will go through and I'll mark it
14 up. And then I would just ask that we revisit it after
15 it's --

16 THE COURT: I don't have any problem with that.
17 But my inclination is to let it in.

18 MR. GRUENLOH: Okay.

19 MR. BROWN: I finally found the date after the
20 accident -- if you want to know that -- or if -- if
21 you've now ruled, and you just want to move on, we can
22 do either way.

23 THE COURT: Do what?

24 MR. BROWN: You had asked the question, what did
25 she put on here after the accident.

1 THE COURT: Right.

2 MR. BROWN: You asked that question.

3 THE COURT: Right.

4 MR. BROWN: And here it is. It says, *hi, an*
5 *update, running yesterday I fell on the sidewalk and*
6 *fractured my nose. Thank goodness I didn't break any*
7 *teeth. The moral of this story, I guess, is running is*
8 *dangerous for our crowd. No, not really. As soon as I*
9 *can, I'll be back out there. In the meantime, I look*
10 *like I got hit with ten ugly sticks.*

11 Now, I think the relevance of that is she, to her
12 friends, is giving a report as to what sort of -- it's
13 not an excited utterance, but it's close to this is
14 what happened. No mention of that she tripped over
15 construction debris, which we now know construction
16 debris, from her testimony, is not construction debris,
17 Judge, it's a silt fence that was flapping and flopping
18 in the wind during a wind event.

19 THE COURT: Okay.

20 MR. BROWN: So --

21 THE COURT: Just take a look at it and I'll
22 consider anything you don't think has any relevance to
23 her whatsoever.

24 MR. GRUENLOH: Absolutely. We'll have it for you
25 tomorrow.

1 THE COURT: All right.

2 MR. GRUENLOH: The next exhibit that we objected
3 to and the last exhibit of the defendant's we objected
4 to is their exhibit number 6, Edelen and Nelson 32
5 through 40. Your Honor, these are the homeowner's
6 photos. I suspect -- sorry.

7 THE COURT: These are produced by Edelen and
8 Nelson; that's who owned the home?

9 MR. BROWN: Yes, sir.

10 MR. GRUENLOH: Yes, sir. I asked Mr. Thomas some
11 questions about these. And he didn't know when the
12 photos were taken. And my -- you know, he didn't take
13 them. And my objection is simply this: They are
14 unduly prejudicial and may lead to confusion because
15 Mr. Thomas can't put a date on them. They -- you know,
16 they may very well be able to get the homeowners into
17 court. And if the homeowners took these photos, and
18 they can authenticate them, that's another matter. But
19 that's my objection.

20 MR. BROWN: Your Honor, he's correct that --

21 THE COURT: Well, if you can't authenticate them,
22 how can you admit them?

23 MR. BROWN: Hang on a second, Your Honor. The one
24 thing he's correct is they can't authenticate them.
25 He's correct he didn't know the date they were taken.

1 But what he can identify is these photos show the home
2 at a certain stage of construction. For example, may I
3 -- may I just hold these for a second, Your Honor?

4 THE COURT: Yeah. Are they in any semblance
5 around June 6, 2011? I mean, I just sort of think you
6 need to give us some time around that timeframe.

7 MR. BROWN: Let me tell you what we can do, Your
8 Honor.

9 THE COURT: All right.

10 MR. BROWN: They have agreed there are photos out
11 there that --

12 THE COURT: I mean, the accident was on June 6,
13 2011. I mean, the photos, if they were before that or
14 after that -- a year before that, or six months after
15 that --

16 MR. BROWN: They have, in their evidence, a
17 picture that is dated on such and such a date. Okay.
18 And they claim it shows basically a sag in the silt
19 fence. You can look at this picture right here. And
20 in that particular picture, there are no front steps.
21 You can look at that -- look at that, Judge.

22 THE COURT: I understand, but when was it made?

23 MR. BROWN: After the front steps were put on --
24 the other pictures have specific dates. We know that
25 this picture is after that date.

1 THE COURT: Well, I don't have any problem
2 admitting them if you can verify the date to some
3 semblance of when this accident occurred. Otherwise,
4 how are you going to admit it? You got -- somebody has
5 got to get on there and say it accurately represents
6 the scene on June 6, 2011 -- or whenever it was taken.
7 And if it was taken in a remote time from that accident
8 date, I don't think it's relevant.

9 MR. BROWN: Then I agree with you there, Your
10 Honor.

11 THE COURT: Okay.

12 MR. BROWN: I think that presents the problem.
13 Because if you look at their trial brief, their
14 argument -- this whole case is that this fence degraded
15 over a period of time, starting back in -- what --
16 April or May -- April -- March -- March, 2010, and that
17 it degraded.

18 THE COURT: I don't have any problem admitting any
19 photograph if y'all authenticate it, and it has some
20 relevance in time as to the case.

21 MR. BROWN: Okay.

22 THE COURT: Okay.

23 MR. BROWN: All right.

24 THE COURT: I don't know what else to tell you.

25 MR. BROWN: We --

1 THE COURT: If you can't do that, I won't let it
2 in, and that goes to both sides.

3 MR. BROWN: Understood. If it goes to both sides
4 --

5 THE COURT: That goes to both sides. I mean, it's
6 got to be related in time to the accident, and have
7 some relevance as to the silt fence.

8 MR. GRUENLOH: It probably makes sense, Your
9 Honor -- and that's the last of my objections on the
10 defendant's exhibits -- since we're dealing with
11 photographs, one of the exhibits -- and here you go as
12 a softball -- as we've just been arguing about this --
13 but Plaintiff's Exhibit No. 8 --

14 THE COURT: Plaintiff's No. 8?

15 MR. GRUENLOH: Yeah. Let me hand up, Your Honor
16 --

17 (Off-record discussion between counsel.)

18 THE COURT: Are you talking about the photos of
19 the accident scene?

20 MR. BROWN: These are not the photos -- they are
21 called "accident scene", yes, sir, but these were taken
22 after the fact. And there is extensive testimony that
23 these photos -- so we have objected --

24 THE COURT: I mean my -- I say the same thing, if
25 you authenticate them properly, and put it in some type

1 of relevance as to the time of the accident, and make
2 it relevant, I'll admit them. If you don't, I won't
3 admit them.

4 MR. GRUENLOH: And I'll tell you the -- how we've
5 done that, Your Honor.

6 THE COURT: Okay.

7 MR. GRUENLOH: First of all, Cori Smith, who was
8 jogging with Ms. Connelly when she fell that day, she
9 went back the next day -- the next morning and she took
10 photos of it. And Rosemary Connelly was shown those
11 photos, and she said -- at least to one of them, yes,
12 that's what it looked like.

13 THE COURT: Well, if -- if you -- if that comes
14 out in testimony, they are going in. If it doesn't,
15 they won't.

16 MR. GRUENLOH: Got it.

17 MR. BROWN: And that was 96. And we agreed to put
18 that one in because you were able to tie it in. Both
19 Ms. Connelly and Ms. Smith said none of these pictures
20 look like the conditions that were there at the time of
21 the accident.

22 MR. GRUENLOH: That's not exactly true.

23 MR. BROWN: Now, hang on, hang on, please.

24 MR. GRUENLOH: I'm sorry.

25 MR. BROWN: I know, we're not -- we're good.

1 We're good. He knows we have a good relationship.
2 They said that exhibit -- picture 96 -- if I may show
3 it -- is as close as there is. And I can give you the
4 quotes from their depositions, both of them, on it. So
5 we didn't object to 96, because I felt like they put --
6 they had put in enough --

7 THE COURT: There it is. Okay.

8 MR. BROWN: Yes, sir. I'm sorry. I didn't object
9 to that one in their pack of photos because they had
10 this -- this comment -- this thing -- I know it's
11 somewhere in this area. It wasn't this bad. This is
12 not the condition it was in. But it's as close as I
13 can get to it. So that was an err on the side of
14 caution to let them have that one picture. I don't
15 know that you can establish it to be honest -- but all
16 these others were a day after.

17 And they all -- and the testimony is, they do not
18 reflect -- and I'll give you -- I mean, you can call
19 Ms. Smith to trial -- or we'll call Ms. Smith, and you
20 can examine her outside the presence of the jury,
21 Judge. But during the break, I went through -- this is
22 Ms. Connelly's and then I'll get to Ms. Smith.

23 Ms. Smith is who you put -- I'll go to Ms. Smith,
24 on page 70 of her deposition, she said with regard to
25 the -- picture 96, that looks more or less like what it

1 looked like laying down into the sidewalk. Then she
2 keeps going to about page 88 to 89, she goes, you know,
3 really, it looks worse. When we came upon it, the
4 material was down, and it was a little bit into the
5 sidewalk. But this looks worse. So these pictures are
6 taken after the accident and Ms. -- Ms. Connelly's
7 deposition testimony is just over and over, this is not
8 what was there. What was there was not what's in any
9 of these pictures. We can go picture by picture.

10 THE COURT: Well, I understand what's in the
11 deposition. But I'm going to go by what they say in
12 the courtroom, and you can impeach them accordingly.
13 Okay?

14 MR. BROWN: Okay.

15 THE COURT: If you still have an objection, remind
16 me and we'll do it in camera.

17 MR. BROWN: Yes, sir, Your Honor.

18 THE COURT: Okay. We'll do all this in camera and
19 decide what's going to go in and what's not going to go
20 in. Tomorrow, when y'all mark them, get the pictures
21 marked with different numbers so we can identify them
22 for the record tomorrow. That's the only way I know to
23 do it.

24 MR. BROWN: Okay.

25 THE COURT: I mean, and if they change their

1 testimony, you can impeach them with it. That's all I
2 know to tell you. I'm not going to sit here today and
3 say based on the deposition they took a year ago or
4 whenever, the pictures are admitted or not admitted.
5 Because I think it depends on what they say in the
6 courtroom under oath.

7 MR. BROWN: Well --

8 THE COURT: Now, if that's different from what
9 they said in the testimony, you can impeach them, and
10 we'll do it in camera.

11 MR. BROWN: Well, I guess -- I guess --

12 THE COURT: Or you can impeach them before the
13 jury if you want to.

14 MR. BROWN: Well, Your Honor, I --

15 THE COURT: Pardon?

16 MR. BROWN: Twenty something years of stupidity is
17 flaring up in my head, but he has his -- let's say he
18 has Ms. Connelly on the stand, and he takes the
19 picture, and he says, do you recognize this picture.
20 Yes. It's a picture that was taken the day after. I
21 move it into evidence. I don't have -- I can object, I
22 guess at that point in time, but I don't have the
23 opportunity to cross her on it.

24 THE COURT: Well because of the testimony in the
25 deposition --

1 MR. BROWN: You can do it in camera.

2 THE COURT: I'll do it in camera.

3 MR. BROWN: I understand.

4 THE COURT: And I'll let you do it. That's what
5 I'm telling you.

6 MR. BROWN: I understand.

7 THE COURT: I'll let you do that.

8 MR. GRUENLOH: Very good. And this is actually a
9 little bit simpler than that. Because RMC Number 96,
10 they told me that they have no objection. It's part of
11 their exhibit list by the way.

12 THE COURT: Well, they've already admitted to that
13 one.

14 MR. GRUENLOH: Yeah. Yeah, and that's the only
15 one I'll use with Ms. Connelly --

16 MR. BROWN: And the drop of blood, if you want the
17 drop of blood, you can have the drop of blood. If you
18 don't, I don't care.

19 THE COURT: That's fine. I mean, that's fine.

20 MR. GRUENLOH: Because it's a couple that -- you
21 know, we can work this out. I probably won't even use
22 them.

23 THE COURT: Okay. What about this overhead photo?

24 MR. GRUENLOH: We don't need it.

25 THE COURT: Overhead image -- you don't need it?

1 MR. GRUENLOH: We'll remove it. We will show, as
2 a demonstrative, but not ask to go back to the jury,
3 something similar to this.

4 THE COURT: Okay. Affidavit of Karen Nelson, all
5 these affidavits, are you going to deal with those by
6 deposition?

7 MR. GRUENLOH: Your Honor told me earlier, when we
8 were in the qualification room, that you were going to
9 rule against me --

10 THE COURT: I'm not going to let an affidavit in.
11 Okay.

12 MR. GRUENLOH: So I'll withdraw it.

13 THE COURT: I'm not going to do that. That's just
14 rank hearsay.

15 MR. GRUENLOH: I just preserve my right --

16 THE COURT: There is no way to cross examine an
17 affidavit.

18 MR. GRUENLOH: I just preserve my right to
19 designate some page lines.

20 THE COURT: That's fine. I have no problem if you
21 use a deposition, and the other side was there, and
22 they had an opportunity to cross examine. I don't have
23 a problem with that, using a deposition.

24 MR. GRUENLOH: Okay.

25 THE COURT: Now, for simplicity, if you want to

1 agree to the affidavit rather than than lines -- I
2 don't know. I don't know what --

3 MR. BROWN: What it is going to depend upon, Your
4 Honor, is how Your Honor rules on their photographs,
5 whether I'm able to authenticate them properly or date
6 them enough for Your Honor's comfort level when our
7 clients are on the stand.

8 THE COURT: Okay. All right.

9 MR. BROWN: So, in other words, I may call the
10 people and I may not have to, so I'm not trying to give
11 you a non-answer to that --

12 THE COURT: I mean, if you don't want to call the
13 people and you want to offer some of that deposition to
14 reply to his deposition -- or his excerpts, if you want
15 to use some excerpts, that's fine without calling them.
16 You are welcome to do that.

17 MR. BROWN: Understood. But like I said, I'm
18 either going to get the picture -- I'm going to do my
19 best to get the pictures in through my own client. If
20 that's not a course of action that I can get to, I'll
21 have them here, because they are under subpoena.

22 THE COURT: Okay. Anything else?

23 MR. BROWN: Not that I know of that we can solve.
24 But, Your Honor, I was only allowed the easy issues to
25 deal with, so.

1 MR. GRUENLOH: I just want to make sure -- and,
2 you know what, maybe I should wait for Mr. Hines to
3 come in. Rule 30 --

4 THE COURT: Tell Mr. Hines the -- the federal case
5 -- I understand Council was the leading case in South
6 Carolina on the experts.

7 MR. BROWN: He is aware of Council, Your Honor.

8 THE COURT: Okay. All right.

9 MR. GRUENLOH: I'm just a little bit worry that
10 we're going to get some page lines from the deposition
11 that there was no objection to, and I just want to
12 raise Rule 30(h)(9), that if they have not objected to
13 a question in a de bene esse trial deposition, that the
14 objection is waived.

15 Obviously I would be prejudiced if they don't make
16 an objection because I have no idea that I need to cure
17 the question. And I hope that we're not going to be
18 dealing with that issue, but...

19 THE COURT: De bene esse, don't hear that very
20 often anymore. Most young lawyers don't know what de
21 bene esse means.

22 MR. GRUENLOH: I don't think of myself as young
23 anymore, Your Honor.

24 THE COURT: Oh, okay. All right. Mr. Brown knows
25 what it means.

1 MR. GRUENLOH: It means trial deposition.

2 THE COURT: Pardon -- trial deposition. All
3 right. Anything else we can try to cover?

4 MR. BROWN: Your Honor, I think -- I think that
5 covers us with the exception of this other issue, so.

6 THE COURT: Anything from the plaintiff?

7 MR. GRUENLOH: Not at this time, Your Honor.

8 THE COURT: All right. Get those -- if you can,
9 get those marked so that you can bring them and give
10 them to the court reporter.

11 MR. BROWN: We'll go over them tonight.

12 THE COURT: Would y'all mind preparing a list also
13 of what y'all -- the number and what it is, and give it
14 to the court reporter, and have me a copy also?

15 MR. GRUENLOH: The number --

16 THE COURT: Exhibit 1, what it is. Exhibit 2,
17 what it is in Exhibit 2 in written form for the court
18 reporter and myself.

19 MR. GRUENLOH: Absolutely. I'll have a summary
20 tomorrow morning, then I'll also have all the exhibits
21 ready to go.

22 THE COURT: Right. And she can go ahead and we'll
23 put them into evidence.

24 MR. GRUENLOH: Oh, yeah, the binder that you have
25 up there actually has a copy of every single one of our

1 exhibits there, Your Honor.

2 THE COURT: The binder does?

3 MR. GRUENLOH: The binder does.

4 MR. BROWN: I believe we have -- are yours
5 numbered...

6 (Off-record discussion between counsel.)

7 MR. GRUENLOH: Your Honor, what Steve and I were
8 talking about is whether or not you would prefer --
9 like, if we have a group of photos, would you prefer
10 that we number them individually as exhibits, versus a
11 group of photos?

12 THE COURT: If you don't have any objection to any
13 of those photos, just do them as a group. If you have
14 got an objection, at least mark the ones that have an
15 objection, so we can identify that for the record.

16 MR. BROWN: They all have Bates -- like, for
17 example, in his exhibits, he's got something called --
18 just make up a number -- it's plaintiff's 3, and it's a
19 group of photos, but each one has a Bates number at the
20 bottom, so we can make a very clear record.

21 THE COURT: That's fine.

22 MR. BROWN: Is that okay --

23 THE COURT: Just as long as we can make a clear
24 record of what photograph we're talking about.

25 MR. BROWN: We can.

1 THE COURT: For the record -- that's all I'm
2 concerned with.

3 (PAUSE.)

4 THE COURT: All right. Mr. Hines, you have an
5 objection as to Dr. Funcik's deposition as to his
6 qualification; is that correct?

7 MR. HINES: That's correct, Your Honor.

8 THE COURT: I'll be glad to hear you.

9 MR. HINES: Your Honor, the objection that we have
10 with regard Dr. Funcik -- and this -- well, this
11 objection also goes to Dr. Ghegan. Perhaps we can take
12 these up at the same time. It's essentially the
13 same -- the same issue which is, yes, we are not
14 suggesting these doctors are not ENTs, that they don't
15 have the credentials to allow them to practice the
16 medicine that they practice.

17 What we are arguing on the basis, we -- we hashed
18 some of this out earlier in terms of what we mentioned,
19 that the record in this case does not support that
20 either of these doctors is capable of giving a reliable
21 opinion. I'm looking at Watson vs. Ford Motor Company,
22 the court's gatekeeping role with respect to expert
23 testimony, and the question of the substantive
24 reliability of testimony in view of the way in which
25 that testimony and opinion on the issue of causation --

1 causation -- on the way in which that was -- well,
2 supported by these doctors.

3 With respect to Dr. Ghegan, if I can specifically
4 address that is -- again, my argument is the same as to
5 both. That neither of these doctors, while qualified
6 in their fields of practice, cannot give a
7 substantially -- substantively reliable opinion of
8 shortcomings in the -- well, in the methodology in
9 terms of the -- the background data that they have to
10 make these opinions.

11 And let me just point to Dr. Ghegan -- Your Honor,
12 if you'll indulge me, I will read for you just a bit
13 from his deposition. And this is -- his deposition
14 on -- perhaps, I can do it this way. And counsel can
15 let me know if I -- I think I don't need this.

16 Dr. Ghegan's deposition makes it clear that he saw
17 the plaintiff for a single visit on April 4th of 2013.
18 He spent about 10 minutes of one-on-one --

19 THE COURT: Well, what kind of doctor was it? We
20 haven't talked about him yet.

21 MR. HINES: He is an ear, nose, and throat doctor,
22 Your Honor.

23 THE COURT: Is he a board certificated ENT?

24 MR. HINES: Yes, sir, he is.

25 THE COURT: Go ahead.

1 MR. HINES: And my issue is not, of course,
2 whether he's qualified to treat her when she arrives at
3 his office complaining of smell and taste, he's gone
4 beyond that. And he's offering an opinion in this case
5 that this loss of smell and taste is related to the --
6 the fall that happened on June 6, 2011.

7 And when he was deposed in this case, I asked Dr.
8 Ghegan -- Dr. Ghegan, what underlies your opinion. He
9 said, well, she came to my office and she told me that
10 she had suffered a broken nose and a concussion, and
11 that she had done that on -- a couple of years back,
12 and she treated with Dr. Funcik, who was the doctor that
13 originally -- initially saw the plaintiff right after
14 the fall. And she told me that she's having these
15 problems with her smell and taste.

16 And he also had the benefit of some additional
17 visits that were had by the plaintiff to his -- his
18 practice. The plaintiff saw two other doctors in
19 Charleston -- the practice is called Charleston ENT.
20 Dr. Ghegan, himself, only saw the plaintiff on this one
21 occasion, for one visit, for about 10 minutes.

22 I asked him, I said, you know, Doctor, your
23 opinion is that to a reasonable degree of medical
24 certainty, that the fall happened on June 6, 2011,
25 which she was treated by Dr. Funcik, caused the smell

1 and taste issue. Doctor, have you seen Dr. Funcik's
2 records? He said, no, I haven't seen them. So is it
3 possible that something could be in those records that
4 would be material to your opinion? I mean, that you
5 don't know about. He goes, not necessarily. I don't
6 think so, but there could be. But, Doctor, you don't
7 know what, if anything, is in there that's material and
8 I'm not talking to you about some hypothetical perhaps

9 --
10 THE COURT: I hate to interrupt you, but let me
11 ask you this question: Who else could make the
12 diagnosis of anosmia other than an ENT?

13 MR. HINES: I'm not -- Your Honor, an ENT is
14 appropriate to make that diagnosis.

15 THE COURT: Well, and we are talking about two
16 ENTs that you say can't make that diagnosis. It
17 appears to me, and I'll ask you the question, are you
18 talking about the weight and sufficiency of their
19 testimony, not as to the qualifications? Everything
20 I've heard from you so far is based upon the weight and
21 sufficiency of what was before the doctor in
22 establishing his -- his opinion, but not his
23 qualifications. Your -- your objection is on
24 qualifications, and I just -- I don't -- I'm not
25 following you.

1 MR. HINES: I understand, Your Honor. And so as
2 not to belabor the point -- I mean, I'm happy to -- I
3 understand both of these depositions -- in fact,
4 well -- Dr. Funcik is deposed twice, once for
5 discovery, and one for video for use at trial. The
6 other, Dr. Ghegan was deposed a single time for use at
7 trial.

8 THE COURT: Okay.

9 MR. HINES: I will represent to the court that
10 when they state what they did to put themselves in a
11 position to review relevant records -- you heard
12 earlier the totality of circumstances -- what it is
13 that they did to apprise themselves of that, and then
14 to my -- my argument -- and I won't, again --

15 THE COURT: Well, it may go to the validity of
16 their opinion, but it doesn't go to whether they're
17 qualified to make that opinion or not.

18 MR. HINES: Your Honor, I guess my point is they
19 are qualified to offer -- in a general sense, they are
20 qualified to diagnose a condition. And if they had a
21 substantial methodology that was appropriate, they
22 would be qualified to offer an opinion to the court.
23 But I'm honing in on the third gatekeeping function for
24 this expert opinion, which is reliability.

25 They can talk -- they can give a clinic on what

1 anosmia is or isn't. And I'm bringing it down to the
2 level of this case, and this fall, and whether or not
3 they can come into this courtroom and say to a degree
4 of medical certainty -- not that she has a condition
5 for anosmia, but that this fall on this date caused it.

6 And what you will see -- and I realize you're
7 coming into this probably -- very much in the cold --
8 the fall happened June 6, 2011. The first ever visit
9 to a doctor saying I'm having problems with smell and
10 taste was when the plaintiff saw Dr. Ghegan on April
11 4th of 2013 -- that's 22 months later.

12 Now, Dr. Ghegan is basing his opinion on
13 causation, on a single ten minute visit with the
14 patient, and the review of the records from his
15 practice -- there's a lot of records out there,
16 including the records from the doctor who treated the
17 plaintiff for this fall, Dr. Funcik. Dr. Ghegan says
18 I've never seen one, but I'm going to come into court
19 and I'm going to tell that jury that this fall caused
20 this condition.

21 My point is Dr. Ghegan is a smart doctor. I'm
22 sure a terrific doctor. He can tell us all about
23 anosmia. He can tell us all about how trauma can cause
24 it, but he can't reliably tell us how this fall caused
25 anosmia in this case.

1 And my argument is the same for Dr. Funcik. And I
2 would identify -- just when we spoke earlier -- short
3 comings in the reliability in terms of what underlies
4 their opinion, not from the standpoint of their skill
5 expertise, but for the factual data that they have to
6 rely on. And it sounds as if the court simply is not
7 inclined to -- well, to grant that motion or to agree
8 with my argument, and it would suffice for me to say
9 that if that is true, I'm happy to have these
10 depositions admitted as court's exhibits, and simply
11 move on.

12 But -- so -- I'm also happy to argue this as long
13 as the Court would appreciate hearing arguments, but
14 I'm hopeful that I can at least explain my argument and
15 the basis for it to the Court.

16 THE COURT: Thank you very much. Yes, sir.

17 MR. GRUENLOH: Your Honor, may I just present up
18 to the Court -- Mr. Hines just mentioned -- can I
19 approach?

20 THE COURT: Yes, sir.

21 MR. GRUENLOH: Dr. Ghegan's deposition, and if I
22 can just incorporate that into the record by reference.
23 And we would just say, in conclusion, Your Honor, that
24 everything that Mr. Hines has said today about those
25 issues go to the weight and sufficiency. He's already

1 done cross examination and the jury will hear that
2 cross examination assuming Your Honor rules that this
3 information should come in.

4 Board certified ENTs are the only folks who are
5 qualified to make this determination, and both Dr.
6 Funcik -- this is in their deposition transcripts --
7 both Dr. Funcik and Dr. Ghegan, sat in their offices
8 with Rosemary Connelly, long before there was a caption
9 on this case, and told Rosemary Connelly you have
10 traumatic anosmia caused from the fall, and this is how
11 it can happen.

12 So with that, Your Honor, we would ask the court
13 to deny the defendant's motion. We would request that
14 the de bene esse deposition be played in its totality.
15 And we have stipulated with the defendants that the
16 portions of the objections and the cross talk between
17 counsel will be removed if, in fact, that is the
18 court's ruling. Thank you, Your Honor.

19 THE COURT: All right. I'm going to mark the
20 video deposition, and the transcript of that video
21 deposition, taken on Friday, August 21, 2015, be marked
22 as Court's Exhibit No. 2 pursuant to the defendant's
23 motion. That motion is denied. Thank y'all very much.

24 MR. HINES: Thank you, Your Honor. From a
25 housekeeping perspective, I think Court's Exhibit 1 is

1 also -- well, includes both video depositions we've talked
2 about, that's Dr. Ghegan and Dr. Funcik. And it's also
3 Dr. Funcik's other deposition, which also --

4 THE COURT: All right. Exhibit -- I'm sorry --
5 the exhibit does cover both of them, so it's just
6 Court's Exhibit No. 1. Thank you very much. I
7 appreciate it.

8 (PAUSE.)

9 THE COURT: Let's plan on getting started at 9:30
10 in the morning. Is there anything else that we need to
11 tend to this afternoon?

12 MR. GRUENLOH: I don't think so, Your Honor, we
13 will be here with exhibits premarked and ready to go.
14 Unless there's anything that I'm unaware of, we ought
15 to be able to start with opening statements pretty
16 quickly.

17 THE COURT: If y'all want to come in at 9:15 -- if
18 y'all want to come on in at 9:15, she can be marking
19 the exhibits during that minor settlement.

20 MR. HINES: Thank you, Your Honor.

21 THE COURT: All right. See you in the morning.
22 Thank you very much.

23 MR. HINES: Thank you.

24 (WHEREUPON, the hearing was concluded for the
25 day.)

1 * * * TUESDAY, AUGUST 25, 2015 * * *

2
3 THE COURT: We've been waiting on some jurors. I
4 think we just got the last one.

5 (PAUSE.)

6 THE COURT: All right. Let me go back to
7 yesterday, I -- I had the court reporter to look and
8 see if the issue that was raised on Rule 36(b) was on
9 the record -- some of it was, some of it wasn't. And I
10 wanted to make sure that's put on the record for your
11 protection. Okay.

12 All right. I understand the plaintiff -- excuse
13 me -- the defendant would like to amend the request to
14 admit, and the particular request to admit was in
15 relation to the fence, and what the purpose of the
16 fence was; is that correct from the defendant's
17 standpoint?

18 MR. HINES: Yes, Your Honor, that is correct.

19 THE COURT: Do you -- do you want to mark those
20 requests as Court's Exhibit No. 2, so we'll know what
21 we are looking at --

22 MR. HINES: Yes, Your Honor.

23 THE COURT: Then also put on the record what
24 modification you would like to make.

25 MR. HINES: Your Honor, may I go through it like

1 this? May I present, just as quickly as possible, my
2 argument on that? And then in conclusion of it, mark
3 those things as Court's Exhibit --

4 THE COURT: I think you made a pretty long
5 argument yesterday.

6 MR. HINES: My concern is, I guess, that that
7 wasn't on the record, Your Honor. And particularly my
8 concern was --

9 THE COURT: All right. Let's get it marked first,
10 get the requests admitted that you want to amend, and
11 then -- as a Court's Exhibit -- mark them as a group as
12 Court's Exhibit No. 2.

13 MR. HINES: Thank you, Your Honor. After they're
14 marked --

15 THE COURT: Pardon?

16 MR. HINES: May I have them back? I would like to
17 return --

18 THE COURT: Yeah, you can mark them, and we'll
19 substitute copies.

20 MR. HINES: I've got them in order, so I didn't
21 know when the court was going to take this up. My
22 understanding from yesterday --

23 THE COURT: Pardon?

24 MR. HINES: My understanding from yesterday was
25 the court was intending to take this up --

1 THE COURT: I am, but I want to get all of this on
2 the record first, okay, because we didn't do it
3 yesterday and that was my fault. Go ahead and mark
4 them as Court's Exhibit 2, if you would, and I'll let
5 you substitute copies.

6 MR. HINES: Thank you, Your Honor.

7 (WHEREUPON, Court's Exhibit No. 2 was marked and
8 made a part of the record.)

9 THE COURT: All right. I understand on the
10 request to amend was request number one and the
11 response; is that correct?

12 MR. HINES: Yes, Your Honor, that is correct.

13 THE COURT: All right. What -- how do you want to
14 amend the request -- the request was "admit that the
15 defendant/Winsor Custom Homes LLC was solely
16 responsible for placing a black plastic barrier" --
17 paragraph 22 of the complaint. How do you want to
18 modify it or amend it?

19 MR. HINES: Your Honor --

20 THE COURT: Do you want to add to it or do you
21 want to change the whole thing?

22 MR. HINES: I want it to be withdrawn and not
23 admitted that the purpose of that fence is the purpose
24 the plaintiff has indicated in plaintiff's pretrial
25 brief, which I believe is having contained --

1 THE COURT: So -- so you want to substitute what
2 he testified to in his deposition; is that correct?

3 MR. HINES: Essentially, yes, that's exactly
4 right. I'd be happy to --

5 THE COURT: What did he testify to in his
6 deposition? It was used for silt, I believe you said;
7 is that correct?

8 MR. HINES: Yes. I believe he defined the
9 construction zone or area as erosion control. I'd be
10 happy to have exactly the language of his deposition
11 used.

12 THE COURT: So you want to delete the response on
13 the request to admit, and substitute the language in
14 his deposition; is that correct?

15 MR. HINES: Yes, Your Honor.

16 THE COURT: You can just give me the page and line
17 for the record from the deposition. You don't have to
18 quote it verbatim.

19 MR. HINES: Certainly. I might have to read that
20 particular page, Your Honor.

21 THE COURT: Okay.

22 MR. HINES: Your Honor, it's on page 103 to the
23 best of my recollection, as far as the actual line --
24 let me see if I can put --

25 THE COURT: Does the plaintiff know?

1 MR. GRUENLOH: I don't, Your Honor.

2 THE COURT: I apologize for springing this on you,
3 but I thought it was on the record yesterday and it
4 wasn't.

5 MR. HINES: And thank you for catching that, Your
6 Honor. It's on page 103 of Mr. Thomas's deposition.
7 It begins at line 7 and it goes through line 17.

8 THE COURT: All right. So that's what you want to
9 substitute for a response -- request to admit number
10 one; is that correct?

11 MR. HINES: Yes, Your Honor, with respect to the
12 purpose of the silt.

13 THE COURT: All right. Do you want to put a very
14 brief argument on the record, please, sir?

15 MR. HINES: Yes, Your Honor. My argument is this:
16 Rule 36, while it does allow for requests to be made
17 for admission, Rule 36(b) I think, in keeping with the
18 idea that all of the rules of procedure are to be
19 construed so as to achieve the just, speedy, and
20 inexpensive determination of every action -- "just"
21 being the operative word, Your Honor. That -- when in
22 this case, there was a response given to a request to
23 admit --

24 THE COURT: All right. Speak up. Okay?

25 MR. HINES: Certainly, Your Honor.

1 THE COURT: I'm having trouble hearing; so is the
2 court reporter. Speak up. Okay?

3 MR. HINES: Yes, Your Honor.

4 THE COURT: With your soft voice, it's going to
5 sound like you're yelling. So speak up, please, sir.

6 MR. HINES: If I may approach, maybe it will help
7 us all -- I will do my best. My voice --

8 THE COURT: Your voice doesn't carry very well.

9 MR. HINES: It's loud -- most people on drive
10 through windows -- as I go through life, Your Honor, I
11 encounter this. And the last that I want to have it is
12 here. So let me try to make this clear.

13 THE COURT: To you, it's going to sound like
14 you're yelling. So talk loud please.

15 MR. HINES: I feel like I'm yelling, Your Honor.

16 THE COURT: Right. Yell.

17 MR. HINES: I'm yelling. I'm yelling. Here's the
18 thing, the -- Rule 36 says that you may withdraw an
19 answer to request to amend unless -- this is a unique
20 standard. It's kind of like Rule 15 on the rule to
21 amend, the standard is unless the persons who obtained
22 the admission, can show material prejudice from the
23 withdrawal --

24 THE COURT: Well -- but, first of all, you got to
25 show it's important to the merits in the case. And I

1 think it is. Okay. I think --

2 MR. HINES: Which I think is the reason it's in
3 the plaintiff's pretrial brief, Your Honor, is because
4 they believe it's important.

5 Furthermore, in terms of showing prejudice, as I
6 understand it, the argument of my prejudice that was
7 made yesterday, whether or not it was on the record,
8 and here -- if that's the same argument today, but
9 the -- the basis for the alleged prejudice was, Your
10 Honor, we had this request to admit a long time ago,
11 back in January of 2014, that we planned our whole case
12 strategy around. Well, that wasn't exactly what seemed
13 to happen. Because when plaintiff, as I just showed
14 Your Honor, was specifically asked to -- when the
15 plaintiff's counsel specifically asked Mr. Thomas
16 what's the purpose of the silt fence, the response is
17 there for the record.

18 I could cite -- and I have the pages here
19 marked -- in other instances when counsel was examining
20 Mr. Thomas, where the clear -- the undeniable inference
21 of the question is acknowledge that a silt fence is for
22 silt protection. A number of different questions about
23 it.

24 And then, again, Your Honor, I believe it was said
25 yesterday that this was not only not used -- there was

1 a strategy involved with respect to Mr. Thomas'
2 question -- I think it was said yesterday that the --
3 that that question wasn't even asked, but perhaps that
4 was a bit -- bit of a misrecollection.

5 But on top of that, the -- the design professional
6 in this case, a man named Phil Clark, he was deposed in
7 this case. I never ordered his deposition transcript
8 because I didn't think plaintiff's counsel had ordered
9 it. He's not been identified as a witness. But after
10 yesterday's argument, I got a rush order of it and I
11 have his deposition transcript.

12 I thought it was said yesterday that I didn't even
13 ask Mr. Clark about it. I could show on about four or
14 five pages straight where that's asked numerous times,
15 and I'd be happy to put it in the record.

16 My point is, Your Honor, that prejudice claim --
17 there is no prejudice. It serves the interest of
18 justice on the merits to -- to let this issue -- to not
19 be hamstrung by a request to admit 18 months ago.

20 THE COURT: Okay. Thank you very much. What's
21 the plaintiff's position as to prejudice?

22 MR. GRUENLOH: Your Honor --

23 THE COURT: I do think it meets the first
24 requirement, that it's important to the merits of the
25 case for purposes of the silt fence, or whatever you

1 want to call it.

2 MR. GRUENLOH: Yes, Your Honor. In that case, I
3 won't argue that first point. The second point is
4 simply that it's unduly prejudicial to us at this
5 point. That response was provided to us in January of
6 2014 as we were preparing for Mr. Thomas' deposition,
7 which was the first deposition in this case.

8 And as Mr. Hines has just pointed out, we asked
9 the question. But at the point that we asked the
10 question, and he said what he said, we had that request
11 to admit, Your Honor, and we knew that it was
12 impeachment for the day that we got to court -- in the
13 event that we got to court, and so we didn't follow-up
14 on it.

15 We proceeded throughout the case as if we had had
16 that admission. It was a request to admit number one.
17 And, obviously, the court knows the importance of a
18 request to admit vs. an interrogatory response or a
19 request to produce. This is a request to admit.

20 And furthermore, Your Honor, they deny that
21 request to admit. And as they are required under the
22 rules, if there's some reason why you are denying a
23 request to admit, you must put that in there. And
24 that's what they did. And so that became a material
25 part of this case, a material admission in this case

1 that was present for every witness.

2 And as I said yesterday, I was trained not to ask
3 one question too many. And I try -- I try my best not
4 to do that. And so when I asked the question, what's
5 the purpose. And he says to me, the purpose is
6 something other than what he has provided to me in
7 their requests to admit. Then I know that I, at that
8 point, have an opportunity to impeach him in front of
9 the jury on that subject, my training is not to ask the
10 next question at the deposition. And that's exactly
11 what I did that day. And I believe that's exactly what
12 I did throughout the rest of the case.

13 THE COURT: All right.

14 MR. GRUENLOH: So, again, in short, Your Honor, I
15 believe it's unduly prejudicial.

16 THE COURT: All right. Thank you very much. As I
17 said yesterday, I'll take it under advisement --

18 MR. HINES: Your Honor --

19 THE COURT: Are y'all ready for opening
20 statements?

21 MR. HINES: I'm not quite ready just yet.

22 THE COURT: Have a seat, please. I've ruled.

23 MR. HINES: Your Honor, this is important.

24 THE COURT: Have a seat, please, sir.

25 MR. HINES: Certainly.

1 THE COURT: I said I'm going to take it under
2 advisement and I'll rule at an appropriate time, as I
3 said yesterday.

4 MR. HINES: Certainly, Your Honor.

5 THE COURT: Okay. Are y'all ready for opening
6 statements?

7 MR. GRUENLOH: The plaintiff is, Your Honor.

8 MR. HINES: Yes, Your Honor.

9 THE COURT: All right. Can you bring us the jury,
10 please.

11 THE BAILIFF: Yes, sir.

12 (WHEREUPON, the jury enters the courtroom at
13 approximately 10:08 a.m.)

14 THE BAILIFF: All jurors are present, Your Honor.

15 THE COURT: All right. Thank you very much. If
16 you'll swear the jury.

17 (WHEREUPON, the jury was sworn.)

18 THE COURT: All right. Caroline Taylor, where is
19 Caroline Taylor?

20 JUROR: Right here.

21 THE COURT: Ma'am, I'm going to appoint you as
22 forelady. If you'll swap seats with this gentleman.

23 (PAUSE.)

24 THE COURT: All right, ladies and gentlemen of the
25 jury, I'm just going to make some brief opening

1 statements to explain to you the full matter of the
2 trial. After I finish talking to you, the attorneys
3 are going to have an opportunity to make opening
4 statements.

5 In the opening statements, the attorneys will
6 present to you what they are planning on proving in the
7 case. After the opening statements are done by the
8 plaintiff and the defense attorneys, we'll start
9 testimony.

10 The plaintiff will call their witnesses and
11 they'll be sworn testimony from the witness stand. The
12 plaintiff will have the witness on what we call direct
13 examination. After the plaintiff's attorney finishes
14 questions of each witness, then the defense attorney
15 will have that witness on cross examination.

16 The difference between direct and cross
17 examination is on direct, you cannot ask a leading
18 question. On cross, you can ask leading questions. A
19 leading question is a question that suggests the
20 answer.

21 After all the testimony has been presented by the
22 plaintiff, the defense will offer their witnesses and
23 the rolls reversed. The defense will have the
24 witnesses on direct, and the plaintiff would have the
25 witness on cross.

1 After all the testimony has been taken, at that
2 time we'll have closing arguments by the plaintiff's
3 attorney and the defense's attorney. After the closing
4 arguments, I will charge you on the law that's
5 applicable in this particular case.

6 My job is to conduct the trial according to the
7 rules of court and the rules of evidence, and to charge
8 you the law as it exists in South Carolina and as is
9 applicable to this case. Your job is to be the fact
10 finder in the case. And I'll just give you a simple
11 example.

12 If there's an intersection collision, and both
13 parties say they had the green light, you're going to
14 have to determine factually which party had the green
15 light and which one had the red light. I will charge
16 you, you don't run a red light in South Carolina. But
17 that's just a simple example to try to explain to you
18 your job vs. my job in the process of this trial.

19 The attorneys job is to present their case in the
20 most favorable light of their clients. And they will
21 have different viewpoints as to what transpired and
22 what happened in this case. But you are going to have
23 to listen carefully to the testimony, make decisions as
24 to the facts as you see them, and as you believe the
25 facts to be.

1 Ready to to proceed with opening statements?

2 MR. GRUENLOH: We are, Your Honor.

3 THE COURT: Thank you, sir.

4 MR. GRUENLOH: Your Honor, this is the board that
5 we showed you yesterday, and I've shown this to the
6 defendant and they have no objection to me using it.

7 THE COURT: Yes, sir.

8 MR. GRUENLOH: Good morning everybody. We are
9 finally here. I know yesterday, you know, the whole
10 jury qualification process can feel a little bit like a
11 cattle call and a little bit like an invasion of your
12 privacy. And the reason for that is so that we can
13 put, in the box, the most fair and impartial jury that
14 we can find, and I think that we got it.

15 My name is Mike Gruenloh. I think you probably
16 know that by now. I, along with Patrick Chisum and
17 Brian Holmes from my office, have the pleasure of
18 representing Rosemary Connelly, who's the plaintiff in
19 the lawsuit.

20 Rosemary's husband and her daughter, Christina,
21 are here with us today and they're going to try to be
22 with us here all week -- gasp -- yeah, we'll probably
23 be here all week.

24 Mr. Thomas is with us. He's the corporate
25 representative of the defendant in this case, and that

1 is Winsor Custom Homes. And his counsel, Mr. Brown and
2 Mr. Hines. You'll hear from them after I'm done.

3 The judge -- as Judge Nicholson told you, you
4 folks are the fact finders. And, you know, lawyers
5 think -- we usually think we're pretty important, but
6 you folks are really the most important in this
7 courtroom, because you decide at the end of the day
8 what the facts are as they come in through the
9 witnesses, as they come in through the documents, and
10 as they come in from the photos, as they come in from
11 the doctors. And the photos and the doctors, we
12 believe, are so important in this case, so please look
13 at them very closely, and please listen very closely
14 when Rosemary's doctors are talking to you.

15 At the end of the trial, the judge is going to
16 give you a jury verdict form. All right. It's going
17 to ask a number of questions. And he's going to tell
18 you what the law is. And it's your job to apply the
19 facts to the law, and then to answer those questions
20 and we'll distill it down so that it won't be too many
21 questions.

22 One of the questions that you'll have to answer is
23 whether Winsor Custom Homes was negligent. That is
24 whether they failed to maintain a black plastic barrier
25 fence that went around a construction site, and that

1 they allowed to lay on the ground, go in the sidewalk,
2 and tripped my client. All right. And I'll get to
3 those facts in a second. But that's the first question
4 that you're going to have to answer. All right.

5 Another question that you're going to have to
6 answer that is so important, is whether or not when she
7 fell that day, and she hit her head on the concrete,
8 whether or not that fall is what caused her to lose her
9 sense of smell; and, likewise, have a greatly
10 diminished sense of taste.

11 On June 6, 2011 -- yes, 2011. We've been working
12 on this for a while. Rosemary Connelly woke up and she
13 did the same thing that she did most mornings. She
14 poured herself a cup of coffee. She walked outside and
15 she smelled the grass and the flowers in the garden.
16 She enjoyed her breakfast that day. And she drove to
17 meet her friend, Cori Smith, who lived on Daniel
18 Island. That's the reason that you were asked
19 questions about Daniel Island because that's where this
20 happened.

21 And Rosemary didn't know where they were going to
22 run that day. She knew that they were going to run.
23 Cori picked out the routes. And you'll hear from Cori.
24 We'll bring her in to talk to you. And they ran that
25 day about a two and a half, three mile route, and they

1 ran down by the park, and they ran and did sort of a
2 loop around, and came upon REDACTED Street.

3 At the time, REDACTED Street, like a lot of
4 places on Daniel Island at the time, was under
5 construction. Can you pull that first photo up?

6 This is REDACTED Street. And if you look at
7 the front of the property, this is -- what we refer to
8 as a black plastic barrier fence. It's also been
9 referred to as a silt fence. And you'll hear that
10 Daniel Island requires that these things go up before
11 the property -- before the construction starts. All
12 right.

13 They say to the builders, you've got to do this.
14 And not only do you have to construct one of these
15 fences, you can't just build it and forget about it,
16 you've got to maintain it. Okay. This is not what it
17 looked like on June 6, 2011.

18 All right. Can we get that right side up -- all
19 right -- everybody stand on your head. The black
20 plastic barrier on June 6, 2011 -- Pat, will show you
21 that photo in just a second -- didn't look like that
22 first photo that I showed you. It was laying on the
23 ground.

24 You'll hear from Mr. Thomas, who's the corporate
25 representative of Winsor, that it was 70 percent down.

1 That is was 70 percent down and that it was lying
2 partially in the sidewalk that day. All right. It had
3 been allowed to deteriorate to that point.

4 You'll hear from Mr. Thomas that he knew that this
5 was a problem, because he got warnings on other sites
6 before. He had gotten warnings about exactly this
7 problem, silt fences being down and not maintained.
8 All right. That was his duty, not just to put it up
9 and to forget about it, but to maintain it.

10 On that date, June 6, 2011, as they approached
11 that black plastic barrier fence, and as it was laying
12 partially obstructing the sidewalk, Ms. Connelly and
13 her friend, Cori -- her jogging partner -- and Cori,
14 you'll hear, they were kind of -- if the house is over
15 here, and the fence is kind of laying in the sidewalk
16 partially right here, as they were jogging along and
17 they saw that the fence was partially in the sidewalk,
18 they did what many of us may have done. And that's
19 they just sort of jogged over to the left a little bit,
20 because there was plenty of sidewalk there still.

21 But, Cori, as she was jogging to the left and
22 slightly behind her, had a good vantage point to see
23 exactly what happened that day. And Rosemary sort of
24 jogged a little bit to the left to avoid it. It was a
25 little bit of a windy day, and that black plastic

1 barrier -- it's kind of made of a light, almost like
2 hefty bag material -- all right. And it's supposed to
3 be attached to stakes that are pounded into the ground.
4 And it's supposed to be taut so that this sort of thing
5 can't happen, so that it can't get up into the air, and
6 so that it can't move.

7 And what happened was when it moved a little bit
8 in the wind, Cori Smith saw that it caught Rosemary's
9 right foot and she went forward. And the first thing
10 that hit the concrete sidewalk was her head and her
11 nose.

12 I'm not going to -- we get to argue in closing
13 arguments. I'm not going to give you a bunch of
14 adjectives right now about what happened that day.
15 Suffice it to say that her running partner had an extra
16 shirt with her that she gave to Rosemary. They were
17 trying to stop the blood.

18 Rosemary was in a daze. She has a concussion.
19 She had a broken nose. She had wrenched her back a
20 little bit. She had abrasions on her knee, on her
21 shoulder. But most importantly she got hit right here
22 (indicated), right in the middle of her head.

23 She -- unfortunately, her family was out of town
24 at this time, June 6, 2011. She got herself to a
25 doctor who she knew that was not too far away. And Dr.

1 Funcik, who is a board certified ENT, ear, nose, and
2 throat doctor, and also a plastic surgeon -- because
3 honestly, folks, when she hit the ground and she heard
4 her nose -- and I didn't say "hurt" her nose, I said
5 she heard her nose. She was afraid to death that her
6 nose and her face was ruined. And she got immediately
7 over to that doctor.

8 And he said, Rosemary, you are massively swollen.
9 There's nothing that I can do to really figure out
10 what's going on underneath there. But I can tell you,
11 if you have any concussion symptoms, if you have a
12 headache, if you have some of these other issues, you
13 need to get to a doctor.

14 So Rosemary went home. And a couple of days
15 later, Christina, who is here with us this week, she
16 came home from Clemson, where she was attending at the
17 time, and she saw her mom. And she was the first
18 member of her family to get home and -- do we have the
19 photo of -- you can see the swelling. You can see
20 where the blow to the head occurred. And that's the
21 point where her head and her nose made contact with the
22 concrete on that day.

23 And that first week, Rosemary wasn't thinking too
24 much about smelling. All right. There's a different
25 between smelling and breathing. All right. And that

1 first week, because of what's going on there, she
2 couldn't do this (indicated). She waited a couple of
3 days, layed in bed. And as the headache, and as the
4 dizziness, and as the nausea continued to build, she
5 went to Nason Medical. And on June 10, 2011, four days
6 later, she went to Nason and they did imaging, and the
7 doctors examined her. And they said, you've got a
8 broken nose. You've got a concussion. And, of course,
9 they evaluated the other injuries.

10 You're not going to hear a lot about the other
11 injuries. Because the thing that's really important to
12 us because the thing that's -- it's the thing that's
13 really so important to Rosemary, is that she has lost
14 her sense of smell. On that day, June 6, 2011, when
15 her head hit the concrete, she enjoyed her coffee and
16 could smell it in the morning. She never has again.

17 As she followed up with Dr. Funcik, she went back
18 to him. And Dr. -- as the swelling started to go down
19 a little bit, Dr. Funcik said, well, I can feel the
20 deformities in your nose, and so we're going to have to
21 operate on this. And so they did.

22 They waited a while, over two months. That's how
23 long it took for that initial swelling to go down
24 enough for the doctor to even go in and perform that
25 surgery.

1 He goes in and he fixes it in a procedure called
2 an open reduction. And what that is, is they are
3 essentially smoothing out those bony deformities and
4 putting everything right.

5 When he did that procedure, by the way, he did a
6 small procedure on the tip of her nose, and did
7 something called trimming her termenance (ph). I only
8 tell you that because we're not claiming anything about
9 that. Dr. Funcik will testify that those didn't have
10 anything to do with the accident. He just said, look,
11 if you're going to have those done, we might as well do
12 them while your nose is -- sorry to be gross -- while
13 your nose is open, and while you're under the
14 anesthesia.

15 Dr. Funcik told her on that day, and told her
16 before that day, that this surgery is going to take
17 about a year to settle down. Your nose is going to
18 take about a year to settle down, and it did.

19 After that date, she -- her nose was swollen. She
20 left that day with a cast after they did the surgery.
21 And, again, this is August of 2011.

22 And, look, I don't expect you guys to remember
23 these dates right now. If you're like me, dates
24 sometimes go in the left ear, out the right ear. But
25 you're going to hear these dates so many times in the

1 next few days, you guys probably will be able to stand
2 up and do this by Friday.

3 But it was August 24th, they did the surgery. Dr.
4 Funcik reported that the surgery was a success. And to
5 be clear, he got nowhere near the olfactory nerves when
6 he did that surgery. All right. He was down here.
7 All right. And he reported that there were no problems
8 from this surgery, but he did say it's going to take a
9 while before you can breathe again, before the nose
10 settles down. And so after the surgery, just like
11 after the trauma, Rosemary couldn't do this (indicate
12 inhale) -- couldn't inhale.

13 As time went by, that swelling started to go down.
14 and we get to May of 2011, and Christina comes home
15 from Clemson and the nose is looking better. It's been
16 nearly a year -- not quite a year -- since the August
17 surgery. And she walks by the refrigerator. And
18 Rosemary is the -- she is the -- sort of the --
19 responsible for the cooking and the cleaning in the
20 household.

21 And Christina walked by the refrigerator and it
22 smelled like something had died in the refrigerator.
23 And she and her mom had a conversation about it. And
24 her mom realized that she couldn't smell a thing, and
25 that she hadn't smelled a thing for sometime, since the

1 accident, since June 6, 2011.

2 It hadn't been quite a year since the surgery, and
3 so they did what many of us might do when they notice
4 something is wrong with us, she hoped and she prayed on
5 it. And as a family, they hoped and they prayed upon
6 it.

7 And as the year went along, and it got to the
8 point where it had been a year past the surgery. And
9 when they went perfume shopping that year for
10 Christmas, she realized that she couldn't smell any of
11 the perfumes and that it had been past a year. And so
12 she went to go see the doctors at Charleston ENT.

13 And she reported to them that I can't smell. I
14 think it's been going on since the accident. You'll
15 see the medical records where she indicates that the
16 duration of the problem was from June of 2011 on. And
17 she said, you know, I've really been noticing it for
18 the last six months, the last eight months. And
19 because, again, ladies and gentlemen, remember the
20 difference between breathing (indicated) and smelling.

21 So the doctors, Dr. Ghegan -- she saw three
22 doctors there, Dr. Ghegan, Dr. Hester, and Dr. Dozier,
23 all board certified ENTs. What we call treating
24 doctors. All right.

25 All of them looked at her nose. All of them

1 examined her. All of them asked her questions about
2 her prior medical history. All of them asked her --
3 all of them listened to her. Okay. What we want our
4 doctors to do, all of them listened to her.

5 And long before this lawsuit was ever filed,
6 Rosemary was sitting in Dr. Ghegan's office. Rosemary
7 was sitting with her doctor, Dr. Funcik, learned from
8 those doctors that that blow to the head had caused
9 something called anosmia. Anosmia is simply the loss
10 of the sense of smell. And traumatic anosmia is when
11 the olfactory nerves in the nose are severed.

12 That's what Rosemary's doctors, the ones who
13 examined her, the ones who she went to go see, that's
14 what they said to her. That's what they diagnosed her
15 with. That's what their records indicate. You'll get
16 a chance to see those.

17 All of them agree that she has anosmia. She's
18 been tested. They've examined her. There's no
19 disagreement on that.

20 You may be scratching your heads at this point,
21 because I told you that one of the questions you're
22 going to have to answer is whether or not when she hit
23 the concrete that day, whether that caused her loss of
24 sense of smell. There's only one doctor that you're
25 going to hear from that says something a little bit

1 different.

2 And the disagreement between that doctor, Dr.
3 Schlosser, who the defendants have hired to give an
4 opinion in this case, the only disagreement that he has
5 with the doctors who actually saw Rosemary and examined
6 her, when it comes time for us to ask him the question,
7 what caused this? You know what he says? "I don't
8 know." Rosemary's doctors know; the ones who she sat
9 in their office, who examined her, they know. You are
10 going to hear from them.

11 During this trial, we are going to have some --
12 well, I'll just say it -- we're going to have some
13 boring, tedious times. We're going to have some times
14 that I bet you're going to be on the edge of your seats
15 where your stomachs are a little bit nervous like mine
16 is right now. We're going to have some good times;
17 we're going to have some bad times.

18 One of the good times -- well, for me at least and
19 maybe I'm just a geek on this -- but I get excited
20 about this stuff. Because I don't know if you folks
21 did, but I didn't know anything about traumatic anosmia
22 before I started working on this case.

23 And so when I get to take a case like this, and I
24 learn this new science and this new medicine, sometimes
25 I'm sitting around with my friends, and we're playing

1 trivial pursuit, and I know the most random things
2 because of a case like this.

3 And you folks are going to get the opportunity to
4 hear from Rosemary's doctors. And they're going to
5 tell you exactly what they told her when they were
6 sitting in their office with her before this lawsuit
7 was ever filed, and that's this: That the olfactory
8 nerves -- can you pull that up as well, Pat? It
9 doesn't matter, we've got it here.

10 The olfactory are essentially extensions of the
11 brain. All right. This is a close-up of them. And
12 they come down from the brain through something called
13 the cribriform plate. And those nerves are
14 microscopic. They certainly can't be seen with the
15 naked eye. And they're so small, they can't even be
16 seen with a C. T. scan. There's no imaging that can
17 pick up these nerves.

18 Because they're so microscopic, they go through
19 these little tiny holes in the cribriform plate. And
20 the cribriform plate is kind of like the barrier
21 between your brain and your nasal passage. And so
22 these little nerves go down through there. They branch
23 out into your nose. And so when you smell a rose, it
24 sends that signal up to your brain and that's how we
25 smell.

1 What can happen, and what the doctors told
2 Rosemary had happened to her, is when you have a
3 significant blow to the head, especially the front of
4 the head as Rosemary had, it's a function of the rapid
5 acceleration and deceleration of the brain, inside the
6 skull. All right. And oftentimes when that happens,
7 people have something -- they have a concussion, just
8 like Rosemary did. And what happens is the brain moves
9 forward. You can see the space here is a little bit
10 more because we have naturally a little bit of space
11 between the brain and the skull.

12 But as that rapid acceleration happens, zero to 60
13 as you're going forward, then 60 to zero as you hit the
14 concrete, the brain comes forward. These microscopic
15 nerves can't stretch, so the brain goes. They become
16 taut. And what you have is, you have a sheering
17 injury. And when that's sheered like that, the sense
18 of smell doesn't work anymore.

19 And I think as we all sort of intrinsically know,
20 the sense of smell is intertwined with our sense of
21 taste. I don't know if you've ever had a really bad
22 cold and you -- you bite into your sandwich, and it
23 just isn't as good that day. All right. And that's
24 what Rosemary has been experiencing since June 6, 2011.
25 We'll bring her in and testify pretty shortly here

1 after opening statements, and you'll hear from her that
2 that is the case. That she could smell on the morning
3 of June 6, 2011, but she hasn't since that day.

4 I want you, ladies and gentlemen, to pay very
5 close attention to the questions that she's asked, not
6 only by me, but by Mr. Hines. And I want you to
7 remember the difference between being able to inhale
8 and breath, because they take issue. They say, well,
9 Rosemary, why didn't you notice this earlier? Why
10 didn't you go see a doctor?

11 Don't take it from me, take it from the people
12 who have experienced this. All right. Take it from
13 the people who were witnesses to the event, and take it
14 from the doctors who actually examined Rosemary and saw
15 her.

16 At the end of the trial, as I said, after the
17 judge has told you what the law is, after we've given
18 you our opening statements -- or excuse me -- our
19 closing statements, you'll be given a jury verdict
20 form, and it will have those questions on it.

21 And sometimes, you know, if you've watched a
22 lawyer show where they stand up and give an opening or
23 a closing statement, you've probably seen this: They
24 talk about the burden of proof and the preponderance of
25 the evidence. And there's an important distinction to

1 make between a criminal and a civil trial, and I'll let
2 Judge Nicholson do that. And he'll do it far better
3 than I ever could right now.

4 But our burden of proof is a preponderance of the
5 evidence. And if you've ever seen one of those opening
6 or closing statements from a lawyer, oftentimes the way
7 that is represented and explained is pretend that I'm a
8 scale, and pretend that I've got 50 sheets of paper in
9 this hand, and I've got 50 sheets of paper in this
10 hand. Okay.

11 And if I sort of do it like this, so this is our
12 side, and this is their side. And on my left-hand
13 side, the plaintiff's side, I place a single sheet of
14 paper so that there's 51 on this side, and the scale
15 tips ever so slightly, that's a preponderance of the
16 evidence. That's all you need to find, ladies and
17 gentlemen, in order to mark, yes, to those questions at
18 the end of the day.

19 We think it's going to be a lot more clear --
20 clearer now, because we're going to bring to you the
21 only witnesses who were there that day and saw the
22 accident. We are going to bring to you the only
23 doctors who examined Rosemary, and took the time to
24 listen to what she had to say and their opinions are
25 all the same. There's no question, the trauma that she

1 suffered on June 6, 2011, is what caused her loss of
2 sense of smell.

3 The medical bills aren't very high in this case
4 because there's no treatment. If we could ask you at
5 the end of the case to send her to the Mayo clinic and
6 reattach the nerve fibers and bring back her sense of
7 smell, I promise you, folks, that's what we'd be asking
8 for. But you'll hear from the doctors and everybody
9 agrees on this, that it's permanent and it's not coming
10 back.

11 Thank you so much for listening to me, and I ask
12 that you give the same courtesy to Mr. Hines.

13 THE COURT: Mr. Hines.

14 MR. HINES: Thank you, Your Honor. May it please
15 the court.

16 I'm going to step around here and try to get as
17 close to you all as I can, and at the same time as
18 close to the court reporter and the judge. I've
19 already had to raise my voice up and up and up, so
20 hopefully everyone can hear me. I'm blessed, I
21 suppose, with a eastern North Carolina twang, not so
22 much of a -- perhaps a booming Charleston voice to fill
23 up this courtroom. I hope everyone can hear me.

24 Now, who am I? I'm Russ Hines. Seeing as how I
25 know well -- as I'm just mentioning, my voice is not

1 always carrying all that well. I want to make sure --
2 if you're like me with names, perhaps -- Russ is short
3 for Russell. Hines, like the ketchup, is spelled. I'm
4 a lawyer. I work for a firm called Young Clement &
5 Rivers. And I'm here with some other folks.

6 Seated over at counsel table is Steve Brown. He
7 and I work together. And, perhaps, the most important
8 body is Ms. Sam -- Pam Sanford, our legal assistant,
9 who's keeping us together. And, of course, Mr. Thomas,
10 Jeff Thomas. He's a general contractor. He owns
11 Winsor Custom Homes, the defendant in this case.

12 Let's just -- of course, yesterday was a long day.
13 That was mentioned. And today is going to be a long
14 day. It's probably going to be a long week. And just
15 to let you know, of course, we absolutely appreciate
16 your service on this jury.

17 It is service. It is service in the sense that
18 it's absolutely a huge disruption and ordeal in the
19 middle of your lives. It puts you in the middle of
20 something that you had nothing to do with.

21 Of course, that's the reason you're here because
22 you had nothing to do with it. And thank you for being
23 able to tell us how this -- how this shakes out, and
24 use your best judgment, and your objective and honest
25 opinion.

1 But, you know -- well, of course, since we're --
2 since we know that we're going to be here, let me just
3 -- you know, let's cut to the chase. Why are we here?
4 What's this case about?

5 You've heard a lot from plaintiff's counsel. And
6 you've heard a whole lot from plaintiff's counsel about
7 what this case is about. And I'll tell you this right
8 now before I say anything else, if you don't hear
9 another word I say, if you take all of your brain power
10 and remember, as best you possibly can, just what you
11 were told by plaintiff's counsel -- every word -- and
12 not just what was said, how it was said. Just how
13 convincing and how absolutely assured you were of what
14 you were going to see in this case. How almost if you
15 weren't going to be here for a week, if it was this
16 clear.

17 I want you all, as best as it can be, burned into
18 your memories. Because what we're going to do in this
19 case, is we're not going to stand up in front of you
20 and talk. I'm not going to talk for that much longer.
21 I mean, that's the lawyers. We'll talk to you at the
22 end of the case, and we'll argue what the evidence
23 says. I want you all to think very critically and
24 carefully about what you were told -- that you were
25 told the evidence is going to say in this case.

1 Now, the reason we're here, of course, is we have
2 got a disagreement, but we don't disagree about
3 everything. We don't disagree Ms. Connelly fell on
4 June 6, 2011. We don't disagree that Ms. Connelly hurt
5 herself on June 6, 2011, and had a broken nose. And we
6 don't disagree that's a terrible thing. We hate that
7 she did. We're sorry for her. She has our sympathy.
8 She just doesn't have our agreement that it's our fault
9 and we should pay for this. That's why we're here.

10 I mean, we're here -- you're going to hear some
11 tough questions. If Ms. Connelly is deposed -- is put
12 on the stand today, I'm going to have to ask her some
13 tough questions, the kind of questions I don't want to
14 ask her, wouldn't want to ask anybody if we met her,
15 you know, on the street. But we're not on the street.
16 You guys aren't going to be here all week because we're
17 on the street.

18 You are taken away from your lives because this is
19 important. This is how we resolve disputes. This is
20 civil court. And believe it or not, as awkward as it
21 might be to be standing in front of folks that you're
22 in a lawsuit with, we're civil -- we're talking. And
23 what we're going to do is we're going to have a civil
24 conversation about what this evidence says.

25 In fact, I'm not even going -- you're going to see

1 what the evidence says, and then I'll make my argument.
2 And plaintiff's counsel will make his. And you guys
3 are going to tell us. So we are here, and the
4 questions we're going to ask are tough questions, but
5 we are here because they need to be asked. Because,
6 quite literally, in the truest sense of the word, Ms.
7 Connelly has sued us, and she's put us here. And
8 certainly she's allowed her claim, if she's got one.
9 There's nothing wrong at all with that. That's why --
10 that's another reason we're here is because her claim
11 is important, too. She has every right to do it, but
12 we've got every right to defend ourselves, and that's
13 what we're going to do.

14 And I hope -- my hope is that on presenting the
15 evidence, arguing the evidence, that you feel we do it
16 in a way that is fair, that's decent, doesn't treat
17 somebody in some sort of needlessly not nice way, but
18 asks and tries to present to you information that is
19 worthy of your consideration in figuring out --
20 figuring out what the deal is.

21 So, yeah, we've heard a lot about some medicine.
22 We heard a lot of different words. And I can assure
23 you, when you hear, I suspect, some video deposition
24 testimony that we play for you in this case, you're
25 going to hear me mangle a lot of different words, and

1 probably do some pretty good old fashion babbling from
2 time to time. Because the medicine -- it's a little
3 complicated -- the medicine gets a little complicated.

4 I want you to know that you were told that
5 treating physicians -- I want everyone to remember that
6 you were told you were going to hear from Ms.
7 Connelly's treating physicians, and you will. Just --
8 you'll see -- we'll see about that.

9 You were also told -- it isn't one doctor -- some
10 doctor that they pulled some guy, you know, out of
11 some -- some doctor's office somewhere, and they found
12 this guy to say, ah, not -- see about our doctor. See
13 if that's -- see if that's what he says. See if, you
14 know, see if you are impressed by him or not. That's
15 your decision.

16 Now, before we get there, let's not put the cart
17 before the horse. All right. The medicine is
18 interesting. I agree with plaintiff's counsel. I can
19 sit there in front of the computer, and I can say, this
20 is all kind of stuff, words I don't know, and it's
21 interesting how we smell and all these things. Keep in
22 mind, we're not here to learn.

23 This case doesn't -- to decide this case, you
24 don't need to know everything there is to know about a
25 nose or about how to smell. You've first got to figure

1 out when this fall happened, is Winsor responsible for
2 it. Should Winsor have to pay for it. Should -- in
3 particular, should Winsor have to pay Ms. Connelly for
4 it.

5 You heard the word "negligence" mentioned. I'm
6 not going to talk to you about the law. That's -- the
7 Judge will do that. That's the Judge's role. But as
8 far as -- if you want to note sometimes lawyers say
9 things about cases, reasonableness. And that's a two
10 way street. The question is, is there evidence that
11 Winsor did something unreasonable? Is there evidence
12 Ms. Connelly, perhaps, did something unreasonable?

13 So, you know, cutting to the chase now, trying to
14 move things along, you can see I got my notes up here
15 that I brought, but I think I've told you everything
16 that -- that I really need to tell you. Just listen
17 carefully, you know. You are all capable of doing
18 that. I -- I certainly don't think that you're going
19 to need to be spoon fed anything by me.

20 And at the end of the case, I'll make an argument.
21 I'll tell you what the evidence shows as far as, you
22 know, what the arguments -- our arguments. But until
23 then, thank you so much for being here. We need you
24 here. I think you can tell we've got a dispute. It's
25 reasonable and it's respectful, and we've got a

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1 dispute. And we need your good attention to help us
2 figure that out. So thank you.

3 THE COURT: Call your first witness, please.

4 MR. GRUENLOH: Your Honor, the plaintiff calls
5 Rosemary Connelly, the plaintiff.

6 ROSEMARY CONNELLY, after
7 having been duly sworn, testified as follows:

8 THE CLERK: Please be seated. Once you're seated,
9 please state your first and last name, spelling your
10 last name loudly and clearly into the microphone.

11 THE WITNESS: My name is Rosemary Connelly,
12 C-o-n-n-e-l-l-y.

13 MR. GRUENLOH: Please the court, Your Honor. May
14 I proceed?

15 THE COURT: Yes, sir.

16 DIRECT EXAMINATION BY MR. GRUENLOH:

17 Q. Good morning, Ms. Connelly. How are you?

18 A. Good morning.

19 Q. Have you ever done anything like this before

20 --

21 A. No, sir.

22 Q. -- bring a personal injury claim?

23 A. No, sir. Can you hear me?

24 Q. I can hear you, but maybe it would be a better
25 idea if you sort of stay over there by that microphone

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1 so everybody can.

2 A. Okay.

3 Q. Tell the jury where you live?

4 A. I live at REDACTED, Sullivan's
5 Island, SC REDAC].

6 Q. Okay. And I know it's hard because -- and I
7 do this all the time, too -- but when you're nervous a
8 little bit, slow down just a little bit.

9 A. Yes, sir.

10 THE COURT: Would the bailiff adjust that
11 microphone a little bit for her, please, if you would.

12 (PAUSE.)

13 BY MR. GRUENLOH:

14 Q. How long have you lived in the Charleston
15 area?

16 A. I've been here for 22 years.

17 Q. And are you married?

18 A. Yes, sir.

19 Q. Is your husband with us here today?

20 A. Yes, sir.

21 Q. What's his name?

22 A. Bill Connelly.

23 Q. And is your daughter here with us today?

24 A. Yes, sir.

25 Q. What's her name?

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1 A. Christina Connelly.

2 Q. Why is -- do you have another daughter?

3 A. Yes. My oldest daughter, Mary, just started
4 law school yesterday in Washington DC.

5 Q. Tell us, do you have any grand kids yet?

6 A. No, sir.

7 Q. Are you hopeful?

8 A. Yes, sir.

9 Q. What do you do for a living now?

10 A. Right now? Can I tell you my history, what I
11 did.

12 Q. Sure.

13 A. I don't know how this works but -- I was
14 fortunate enough to be a flight attendant for American
15 Airlines for about 17 years before we moved here. And
16 then when we moved here, my daughters were young. They
17 were one and a half and two and a half. My husband
18 traveled a lot for business -- he still travels a lot,
19 so I had to quit because I couldn't -- I didn't have
20 any family here and I couldn't -- you can't have two
21 parents that travel, nobody to raise the kids.

22 So I was -- as the lady said yesterday in that
23 jury thing, I was the C.E.O. of the household, plus I
24 was maintenance and I was the cook, the cleaner. I
25 subbed (ph) at school, Christ Our King. I worked at

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1 the school library at the elementary school while the
2 kids were young. I drove them around, gardened,
3 cooked, cleaned. I mean, you know, the normal drill
4 that somebody has to do in the house.

5 Q. Sure. Do you attend church anywhere?

6 A. Oh, yes. I go to Stella Maris Church.

7 Q. And are there any organizations that you are a
8 member of?

9 A. I've been on the board of the Magdalene House
10 of North Charleston since 2006.

11 Q. What's that? What's the Magdalene House?

12 A. It's -- it's a great thing. It's the only one
13 in the State of South Carolina. We don't charge for
14 the service. And women that are addicted, and have
15 been put in jail because of their addictions, are -- we
16 provide them free housing up to two years with
17 directors and all kinds of social support, and try to
18 get -- well, the main thing is we try to get them
19 reconnected with their children, and get them sober so
20 they can reintegrate in life.

21 Q. Let me ask you -- before we get to June 6,
22 2011 --

23 A. Yes, sir.

24 Q. Before that day, can you tell us how your
25 health was?

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1 A. Real good, good health.

2 Q. Did you have any problems with your --
3 particular problems with your sinuses or your
4 allergies?

5 A. I had normal colds, normal allergies I think
6 people here have. You know -- you know, we have
7 allergies here. You have colds. You go to the doctor.
8 If I had something, they gave -- either give me
9 something or not give me something, and it would clear
10 it up.

11 Q. How was your sense of smell before June 6,
12 2011?

13 A. I had one. I had a sense of smell.

14 Q. How was your -- how was your sense of taste
15 before that day?

16 A. I had a sense of taste.

17 Q. Let's talk for a moment about June 6, 2011.

18 A. Yes, sir.

19 Q. And tell us what did you do when you woke up
20 in the morning?

21 A. Well, I get up early because I go to bed
22 early. I make coffee. I had something light for
23 breakfast. I take the dogs out. And then a couple
24 times -- that particular morning, sir?

25 Q. Please.

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1 A. I -- I have a friend that I run with. And so
2 I leave my house 7:30, quarter to 8:00, then I drive
3 over to Daniel Island to her house, and then we run.

4 Q. When you woke up that morning, were you having
5 any problems with your sense of smell or your sense of
6 taste?

7 A. No, sir.

8 Q. Now, did you know the route that you were
9 going to run that day?

10 A. No. Cori lives there and so she -- and she's
11 like a little sergeant, and she tells me what I'm
12 doing. And she's a good motivator. So I don't live
13 there, so she just -- we have different routes. We
14 have one called the loop-de-lou (ph). We had a short
15 route. We had the lake route, so she tells me what
16 we're doing.

17 Q. What -- what kind of physical conditioning
18 were you in back in June 6, 2011 -- like how far could
19 you run?

20 A. Well, I had never run a day in my life. And
21 then I decided I wanted to take care of myself so I
22 could be around, you know. So she had built me up
23 through -- you know, it takes time. So I had been
24 running about three or four years. I mean, I couldn't
25 even run to the stop sign before I started. I hated

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1 it. But then I had gotten up to maybe 12 miles a week,
2 three miles at a time, which to me is phenomenal.

3 Q. Is that where you were in terms of your
4 physical conditions --

5 A. Yes.

6 Q. -- at that time?

7 A. Yes, sir.

8 Q. About how far could you run without stopping?

9 A. Three miles.

10 Q. And you indicated that you and Cori had run
11 before, and I think you said that you ran different
12 routes, did you have any idea what -- where you were
13 going to go that day on Daniel Island?

14 A. No, I didn't.

15 Q. Who made that decision?

16 A. Cori Smith.

17 Q. And do you have any specific recollection of
18 running that exact route ever before?

19 A. I'm sure we did, because there's not that many
20 routes that we run. I don't know -- you know, like I
21 said, it's a subdivision in there, and she'll just tell
22 me turn here, go straight, you know, but I'm sure we
23 ran those ways before.

24 Q. Let me ask you, ma'am, do you remember coming
25 upon REDACTED Street that day?

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1 A. Yes, sir.

2 Q. All right. Let me pull up the photo.

3 (PAUSE.)

4 Q. All right. Let me show you the photo of --
5 that we have of REDACTED Street, and let me ask you,
6 Rosemary, take a look at it. And the jury can all see
7 it. Does that accurately depict what REDACTED
8 Street looked like that day?

9 A. I would say yes. Maybe, you know, an inch
10 here or an inch there, but I would say overall, yes.

11 Q. Okay. When you were running, and as you came
12 upon this scene, can you describe for the jury exactly
13 how you were running in relation to Cori Smith?

14 A. I definitely can. Cori is a twin, and so she
15 said that in the womb, she was on the right side, and
16 she (ph) was on the left side. But I always thought it
17 was because I had to run on the left side, she had to
18 run on the right side. But I cannot run on the right
19 side. I can't do anything on the right side. I'm left
20 handed. So we were approaching -- we were running up
21 that street, and that's how we were running.

22 Q. Well, let me ask you, were you -- who was
23 closer to the black plastic barrier?

24 A. I was.

25 Q. Okay.

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1 A. That's on the right side of the street.

2 Q. Got it. And so -- just so I have this
3 straight in my mind, if you're running this way, and
4 the black plastic barrier is here -- then where is
5 Cori?

6 A. She's on my side, to the left side.

7 Q. Still on the left side?

8 A. Yes, sir.

9 Q. Okay. Did you see that when you came upon it
10 that day?

11 A. Well, when I run, I look forward. I look
12 down. And, yes, I saw there was plastic. I mean, I
13 avoided it. I tried to avoid it, to not go -- you
14 know, you adjust your running when you go -- and I run
15 a 10 minute mile. I'm not saying I'm running any great
16 distance here. Okay. And -- but I adjust to see what
17 kind of conditions are -- you know, if there's a stop
18 sign, I'm going to stop at the stop sign and look both
19 ways crossing the street. So, yeah, I saw that there
20 was something black, yes.

21 Q. When you and Cori run -- well, I'm
22 wondering -- do you have a recollection of whether or
23 not you were distracted that day? Were you talking,
24 were you --

25 A. No, I -- sir, I can't talk when I run. I can

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1 barely you know -- I mean like I said, you know, I came
2 to this late in life. And, you know, so -- no, we talk
3 when we have our breaks, but not when I'm running.

4 Q. Okay. Tell the jury as you came upon this
5 fence, to the best of your recollection, what happened?

6 A. Okay. I'm running down here. Cori is
7 running -- I'm on the right hand -- I'm on the right
8 hand side, and she's on the left hand side. And so
9 she's -- I'm running a little bit faster than she is to
10 get through there. You know, I put my foot down -- I
11 put my left foot down, you're running, you're running
12 you're running, you're running.

13 It was a windy day. I saw a fluttering motion
14 of this black plastic. The plastic is like garbage can
15 plastic, you know, that sort of -- you know, it's thin.
16 I ran to avoid it -- excuse me -- when I put my left
17 foot down, I had my right foot up, and it caught on the
18 plastic, and I fell forward, I -- toward my body.
19 Because, you know, if you've got your right foot up,
20 your body is going to move like that. And I hit my
21 head. And I hit it right here (indicated). Do you
22 want me to keep going?

23 Q. Can you, if you would, to the best of your
24 recollection, just sort of point to the area where you
25 believe that you hit your head?

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1 A. Well, I think that could be some blood on the
2 sidewalk. I don't know. Do you want me to stand up
3 and do that?

4 Q. If you could.

5 A. All right. I would say some place in here
6 (indicated).

7 Q. Okay. Okay. So that area -- let me ask you,
8 that -- the tarp area right there?

9 A. Right here, sir?

10 Q. Where it's sticking out a little bit?

11 A. This.

12 Q. Is that where you believe your foot caught?

13 A. I don't know if that was the exact site my
14 foot caught, but I know that I didn't -- it could have
15 been out, not -- it wasn't out that far. I don't know
16 exactly where my foot caught on this thing, if I'm
17 going to tell you the truth, but I know that it was
18 moving -- that plastic was moving, and then I went
19 down.

20 Q. You say that it was moving, was --

21 A. Yes, sir.

22 Q. -- there a hurricane going on that day?

23 A. No, sir.

24 Q. Okay. Describe the weather.

25 A. Oh, it was a great day. It wasn't real hot or

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1 anything. And it was a little breezy. It was breezy,
2 windy a little bit -- not, you know, a big deal, but it
3 was breezy and windy. It was a pretty day, clear day.
4 It was a beautiful day to be out there running, you
5 know.

6 Q. Okay. Describe for -- for the jury if you
7 could -- you said that there was some movement in the
8 fence as you approached it, can you tell them a little
9 bit more about that?

10 A. Okay. As I was approaching that fence, you
11 know, I've seen these sticks out there before, and I've
12 seen them when they're supposed to be attached to the
13 sticks -- supposed to go all across to the stick. And
14 so out of my peripheral -- you know, I'm running and I
15 see that this stuff is down, and I see it moving, you
16 know, like -- like a fluttery movement, you know,
17 like -- like it would move if you put a plastic bag
18 outside and it was breezy. So -- and I knew it was a
19 little bit on the sidewalk, so I adjusted my stride, so
20 did Cori, so we could run around it. But, you know,
21 there's room on the sidewalk to run around it.

22 Q. All right. So you go down, what's the first
23 thing that makes contact with the sidewalk?

24 A. I would think -- I mean, I don't know if
25 anyone has had an accident, but if it happens to you,

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1 it's a crazy time. I mean, I heard a noise and I -- I
2 felt -- I felt really like I was -- I thought maybe I
3 killed myself. I mean, I just went down, you know.
4 And I probably hit my head first because I torqued my
5 body. I had some scraping on my -- this side, you
6 know, and on my knee on that side. But immediately the
7 blood started pouring out of my nose like in clots.

8 And you said that Cori had an extra shirt, no.
9 She took the shirt off her back and gave to it me so --
10 to stop the clotting. But, you know, I was really in
11 a -- in a daze. It was -- I never had an injury like
12 that. So, you know, I just got up as much as I could,
13 and tried to get out of there, you know.

14 Q. Have you ever had a blow to your head like
15 that before?

16 A. No, sir.

17 Q. Have you been able to smell anything since
18 that accident?

19 A. No, sir.

20 Q. All right. What happened next?

21 A. Well, I told you that Cori gave me the shirt
22 off her back, and she didn't live too far from there,
23 so we walked home. And her little boy, Luke, was about
24 three at the time. Now, I had never seen blood like
25 this come out of your nose. It wasn't just like when

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1 you get a bloody nose, it was clotty. And so I had
2 the -- the t-shirt on my face. And I wanted to go
3 home. I don't know why I wasn't thinking, you know. I
4 didn't -- I was just not thinking. And so Cori was
5 there with her young son, and she tried to have me, you
6 know, go to the hospital or whatever, but I just wanted
7 to get in my truck and I went to see Dr. Funcik. He
8 was close by relatively speaking. And I -- you know, I
9 knew he was a nose guy. But I knew I had broken my
10 nose. The pain was incredible. And the sound, when
11 you hit your head, it's like (indicated) crack. So,
12 you know, that's what I did.

13 Q. Was there -- and I want to talk to you about
14 Dr. Funcik in a -- and the doctors that you went to go
15 see, was there -- do you have any memory of anybody
16 being at the site working that day as you guys came
17 upon 1376 Symthe Street?

18 A. Out of the corner of my eye, I saw people
19 there. I couldn't tell you how many, I couldn't tell
20 you what they were doing really. You know -- I mean,
21 Cori and I laughed later, because here's this young
22 woman that took her shirt off and she's in her bra, and
23 none of the guys came over to see how I was doing, you
24 know. I mean, nobody came and asked us if you were
25 okay -- if I was okay, so that's all I can tell you

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1 about that.

2 Q. Okay. You say she -- was it like one of those
3 sports bras?

4 A. Yes.

5 Q. Okay. All right. We don't want to -- we
6 don't want to get too crazy in the courtroom here. All
7 right. Now, you go to see Dr. Funcik?

8 A. Yes, sir.

9 Q. And just tell the jury what Dr. Funcik did.

10 A. Well, I went straight to his office and they
11 took me right in. And he came in, and to the best that
12 I can recall, you know, at the time, I think he cleaned
13 me up a little bit, you know.

14 And then he told me that I had most probably
15 fractured my nose, or broken my nose, but that it was
16 so swollen, you know -- and then he told me that
17 concussions -- what would happen if I had a concussion.
18 Like, for example, I would be sick to my stomach, not
19 to go to sleep right away. And if I had pounding in my
20 head, to go to the doctor. And so I didn't have anyone
21 at my house. My daughters were at school. My husband
22 was at work out of town, so I went home.

23 Q. Now, at that time after the accident, as you
24 go home after June 6, 2011, could you do this
25 (indicated inhaling)?

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1 A. No, sir.

2 Q. All right. What -- what happened next? Did
3 you go see any other doctors that week?

4 A. Well, that was like a Monday. Okay. My
5 daughter was due to come home from Clemson. She was
6 done with school that year. Wednesday, I think, or
7 Tuesday -- I'm not sure which day she came home, my
8 husband came home. He had been out of town for work.
9 Friday morning, we were both laying in bed, and I had a
10 pounding in my head that felt like DA-DA-DA, like my
11 blood was pounding in my ears.

12 And so I got -- I probably had it, you know, but
13 until my family came home -- I don't know, it was kind
14 of -- I just stayed in the house. But then when I had
15 that pounding in my head, I was afraid that maybe I had
16 a bleed in my brain, so I went over to Nason, which is
17 like an E.R.

18 Q. And what did they do for you at Nason?

19 A. Well, when I got there, they put me in a
20 wheelchair and took me in, and did some scans. And I
21 think they did a scan of my back, and I think they
22 looked at my knee. And then I think they did a scan of
23 my nose, you know, my head. And they said I had a --
24 had had a concussion. And, you know, there's nothing
25 to do for a concussion -- I don't think. And just to

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1 take it easy, and that I had broken my nose.

2 Q. And you may have just mentioned this -- I
3 apologize if you did -- but how was the rest of your
4 body feeling at that point when you went into Nason?

5 A. Oh, I was beat up. When I turned my body like
6 this, it turned my -- you know, it turned my body.
7 And, you know, I was beat up.

8 Q. At some point after you went to -- to Nason,
9 and they diagnosed you with a concussion, did you go
10 back to see Dr. Funcik?

11 A. Yes. He had told me to come back in a week --
12 approximately a week, so he could look at it. And --
13 because when I first went there, he said, you know,
14 it's too swollen and too messed up to be able to
15 tell -- excuse me -- what exactly was going on. But
16 wait a little bit, and then he wanted to see me again.
17 So maybe a week later, I went back to his office.

18 Q. And what -- what did he do for you then?

19 A. He told me that my nose was broken. And, you
20 know, right up in here (indicated) so.

21 Q. Did -- did y'all discuss, if anything, what he
22 could do for the broken nose?

23 A. Well -- yeah. He said that I would have to
24 have my nose fixed, but that it couldn't be right away
25 because it's still so swollen, and that you have to

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1 wait to the swelling goes down to see exactly what was
2 going on. That's what I understood that -- there had
3 to be an operation on my nose. As the swelling went
4 down, my nose was kind of crooked. And, you know,
5 that's -- you know, that's what he told me.

6 Q. You say that as the swelling went down, your
7 nose was kind of crooked?

8 A. Yes, sir.

9 Q. What do you mean by that?

10 A. Well, I know how my nose was before. I mean,
11 you know, I'm a woman. You know, I'm vain, I guess.
12 I -- I noticed my nose was not the same as my nose had
13 been before. You know, up here -- because, you know,
14 it was broken up here, right there (indicated).

15 Q. Did you eventually get that surgery?

16 A. Yes, sir. I got it at the end of August, the
17 year 2011.

18 Q. And, you know, I know that it may be difficult
19 for you to remember this -- and we'll certainly ask Dr.
20 Funcik this. But what did -- essentially, what did
21 they do in the surgery? Can you kind of just tell the
22 jury your -- your recollection of coming to Dr.
23 Funcik's office that day, and the rest of it?

24 A. Well, I was scared to death, you know, going
25 under the --

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1 COURT REPORTER: I'm sorry. If she could repeat
2 that.

3 A. Oh, I was scared, you know. But he puts you
4 under anesthesia. And then I woke up. I mean, that's
5 all I know about the whole thing, you know.

6 Q. Were you -- well, before we get to that -- how
7 was your breathing in the time between the accident,
8 June 6, 2011, and the operation that Dr. Funcik did --
9 and specifically, Rosemary, I want to know how was your
10 breathing through your nose?

11 A. I was very -- I was very swollen and congested
12 in there. I had just had a trauma to my head -- to my
13 nose. And my best friend said, you know, I looked
14 it -- it was -- one of those boxer's noses. It was --
15 my nose was swollen and it was big. So, no, my
16 breathing wasn't good. I was breathing through my
17 mouth.

18 Q. Were you worried about your sense of smell at
19 that point in time?

20 A. No, sir.

21 Q. Why not?

22 A. I didn't even know about it. I didn't even --
23 it's -- to be honest with you, it's something you take
24 for granted.

25 Q. Now, we talked about the surgery, August 24,

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1 2011, what was your understanding in terms of how long
2 it would take the nose to heal?

3 A. Dr. Funcik had told me, since I was older and
4 I have thick skin, that I could expect a year to go by,
5 that that's totally normal, not to freak out if a year
6 would go by and my nose wasn't still right. And so
7 that's pretty much what I expected, a year was going --
8 you know, another year was going to go by. And, you
9 know, the swelling would -- is going down, but it was
10 taking a very long time.

11 Q. Sure. Rosemary, I'm going to do this right
12 now because otherwise I might forget. I'm handing you
13 first what's been marked as Plaintiff's Exhibit No. 6,
14 and take a second to page through Exhibit No. 6.

15 A. Okay.

16 (PAUSE.)

17 BY MR. GRUENLOH:

18 Q. Did you, at some point, go to see a
19 chiropractor?

20 A. Yes, I did.

21 Q. What was the name of that chiropractor?

22 A. Dr. David Theobald, Mount Pleasant.

23 Q. Before this accident, had you ever had any
24 issues with your back?

25 A. No, sir.

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1 Q. Why did you go to see the chiropractor?

2 A. I went to see him four days after I fell.
3 It's because that motion of falling, I was in a lot of
4 -- I was in pain in that area. And, I mean, I -- I
5 didn't -- I couldn't lay down very comfortably, and I
6 was -- laying down or sitting up, or whatever. So I
7 was worried I had done something.

8 Q. Did -- what did Dr. Theobald do for you?

9 A. Well, they do that magic -- you know, with
10 their hands on your back and move you around, and a
11 bunch of -- move you around and stuff like that.

12 Q. Okay. And we won't spend a bunch of time on
13 this, but does Exhibit No. 6, do those appear to be the
14 records from Dr. Theobald and your treatment that --
15 that Dr. Theobald did to you?

16 A. Yes, it does.

17 Q. If you look sort of at the back -- well,
18 actually, let's do it this way. I'll give you
19 Plaintiff's Exhibit No. 4. And, Rosemary, does
20 Plaintiff's Exhibit No. 4 appear to be a summary of
21 your medical bills that you've incurred as a result of
22 this fall, and a copy of those medical bills?

23 A. Okay. The radiology, yes. Theobald, yes.
24 Thomas Funcik, yes --

25 Q. Let me just ask you -- what was the total for

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1 Dr. Theobald?

2 A. \$1,080.

3 Q. To the best of your knowledge -- and what's
4 the total for all of the doctors that have given you
5 treatment for this accident? Down at the bottom.

6 A. Well, the thing I want to add -- I mean,
7 because, you know, Dr. Funcik fixed the tip of my nose,
8 like I don't even know if that's in there, but I'm not
9 claiming any damages for that. Okay. So if this -- if
10 this amount is without that, then I could feel
11 comfortable saying it. So I see here \$13,244.70.

12 Q. All right. Now, back to Dr. Funcik --

13 MR. GRUENLOH: And, Your Honor, I don't believe
14 there are any objections to those exhibits.

15 THE COURT: Yeah, we'll cover that -- we'll take
16 that up just very shortly. Okay.

17 MR. GRUENLOH: Very good.

18 BY MR. GRUENLOH:

19 Q. Okay. So after the surgery, August 24th,
20 2011?

21 A. Yes, sir.

22 Q. First of all, do you have any understanding of
23 how the surgery went, the open reduction surgery that
24 Dr. Funcik did on you?

25 A. That it went well. I think he said it went

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1 well.

2 Q. To your knowledge were there any problems from
3 the surgery, any complications?

4 A. He told me that out of the ten worst noses he
5 did, I was one of the top ten, but I don't know if it
6 was true or not. You know, I'm not medical, so I know
7 he fixed my nose, you know.

8 Q. What was -- and I think you've testified it
9 was your understanding that it was going to take about
10 a year or so to settle down; is that right?

11 A. Yes, sir.

12 Q. As time went by, did you continue to see Dr.
13 Funcik and follow-up?

14 A. I'm sure I did when he told me I had to go.
15 But one thing I want to tell you, I have keloid, which
16 it -- it means, you know, that your body -- your skin
17 is kind of thick. Don't know if anyone knows keloid,
18 so I expected my nose to be stuffy and take a long
19 time. Because every other cut I've had takes a long
20 time to heal, so.

21 Q. And the time after the surgery, August 24,
22 2011, and the weeks and months after -- let me ask
23 you -- for example, the two or three months after the
24 surgery, could you do this (indicated)?

25 A. No, sir.

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1 Q. All right. And why was that?

2 A. Because I had a lot of congestion in my nose.

3 Q. How was the swelling at that point?

4 A. Well, the swelling to my head had gone down.

5 My swelling here was still, you know -- I mean, I
6 looked like I gone thru a bout with Mike Tyson, more or
7 less. But, you know, the swelling was going down. I
8 would put frozen peas, you know -- I did what Dr.
9 Funcik told me to do.

10 Q. Now, at that point in time, let's say -- so if
11 we're talking three months or so after the accident --
12 take three, four months after the accident, were you
13 concerned about your sense of smell?

14 A. No, sir.

15 Q. At any point during that time, do you have a
16 recollection of smelling your coffee?

17 A. No, sir.

18 Q. At any point in time, do you have a
19 recollection of smelling your garden, anything in your
20 garden?

21 A. No, sir.

22 Q. Tell the ladies and gentlemen of the jury
23 about the situation where Christina came home from --
24 from school.

25 A. Okay. I had the surgery at the end of August

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1 in 2011. And Chrissy went back -- everybody went back
2 to school or whatever, you know. Then when Chrissy
3 came home the next summer, you know, when she's on
4 break from Clemson early -- you know, they get out in
5 May, she said, Mom, something stinks in the
6 refrigerator. And I'm like, yeah -- well, I kind of
7 pride myself, you know, keeping kind of a good house.
8 And she opened the refrigerator and there was spoiled
9 food in there, and I hadn't smelled it. And I still
10 don't smell spoiled meat or spoiled food. And that was
11 probably early on, you know, in the summer.

12 And then as the summer progressed, I had this
13 old lab that finally died at the age of 14 in about
14 October of 2012. I remember that because that's when
15 he was getting sick. My husband came in the house and
16 goes, oh my, God, it smells like dog crap in here;
17 where did the dog crap. And I told him, I don't smell
18 any dog crap. And if anybody has a lab, you know when
19 they crap, they crap. So we looked for it, and he --
20 he found it, you know. And then I started thinking,
21 what the hell is wrong with me, you know. Something is
22 wrong.

23 And then at Christmastime, my girls were home
24 from school, and we have a -- a tradition, the three of
25 us go and shop for each other. And we like to get nice

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1 perfumes for each other for Christmas. And I can't
2 smell perfume. And I didn't know I couldn't smell
3 perfume. But I would be asking my daughters, is this
4 good, is this nice, is this a good one. And my
5 daughter is like, Mom, what's wrong with you? Okay.

6 So it's not -- let me just explain it in my
7 words. A loss of a sense of smell, I take it -- you
8 take it for granted. You don't -- I didn't know you
9 could lose it. And it was very gradual for me to
10 realize something is wrong here. Okay. Something is
11 wrong, you know. And so that's how that happened.

12 So I asked Dr. Funcik, what I would -- what do I
13 do. I thought maybe -- I mean, I didn't really know
14 you could lose a sense of smell. All right.

15 And he told me to go to an ENT, to the ear,
16 nose, and throat specialist. And he gave me the names
17 of the ear, nose -- not -- he just told me there's an
18 ear, nose, and throat specialist in Charleston --
19 Charleston ENT, the one that's closest to the house is
20 the one in Mount Pleasant, and so I made an appointment
21 to see Dr. Ghegan.

22 Q. And who is Dr. Ghegan?

23 A. He's an ear, nose, and throat doctor.

24 Q. Did you also get a chance to see some other
25 doctors in Charleston ENT?

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1 A. Yeah. They had me come back in and I saw Dr.
2 Hester, and then I saw Dr. Dozier.

3 Q. Let's talk about Dr. Ghegan. I think you said
4 in 2013, but do you remember roughly when you went to
5 go see Dr. Ghegan?

6 A. It was at the beginning of the year, the
7 beginning of the Spring.

8 Q. So Spring of 2013?

9 A. Yeah, I would say the beginning of the year.
10 You know, because you call. You don't get an
11 appointment right away. So I mostly -- it was at the
12 end of December when we were doing the Christmas
13 shopping. And then you get wrapped up in all that. So
14 I made an appointment, so it was the beginning of the
15 year in 2013 sometime that I made an appointment.

16 Q. What did -- well, did Dr. Ghegan examine you?

17 A. Yes. I went in there. I've never been to an
18 ENT. And I told him what had happened, that I had fell
19 -- fallen and I had broken my nose, and showed him
20 where I fell. And since then -- and just an awareness
21 and realization has come over me, I can't smell
22 anything, and is that possible? Is that something --
23 you know, I didn't know. I didn't know anything about
24 it. Those little fibers and all that stuff you guys
25 talk about, I never knew any of that stuff.

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1 So Dr. Ghegan said, yes, it is possible. And he
2 said the word, anosmia, or something like that, and
3 that's when -- when I started to know that there was
4 something wrong here. Okay.

5 Q. Did Dr. Ghegan give you a diagnosis?

6 A. He -- he said, when I told him how I had
7 fallen and when I had fallen, he said it was -- it was
8 caused by my fall. That that makes sense. That when I
9 fell -- because he explained it to me. And I'm not
10 going to use your words, but what I think is kind of
11 cool -- is that your brain is so protected -- kind of
12 cool the way it was made, right. But when I fell, I
13 hit it so hard that the brain moved so it didn't injure
14 my brain. Okay. And it hit against something and it
15 cut those nerves.

16 Q. What -- what you're saying to us right now is
17 that essentially what Dr. Ghegan told you in his
18 office?

19 A. Yes. And that makes sense to me.

20 Q. Do you remember Dr. Funcik saying that same
21 thing?

22 A. Yes, sir. Yeah.

23 Q. Now, did you continue to follow-up and go see
24 the doctors at Charleston ENT?

25 A. Yes. They told me to come back and I did, and

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1 I saw a different doctor. I mean, I don't know why I
2 saw a different doctor, but it's a practice. So they
3 gave me a different doctor and his name was Dr. Hester.

4 Q. Can you tell us what Dr. Hester did for you?

5 A. They put a spray in your nose with this gun
6 thing. And then they give you some kind of smell --
7 they put up smells in front of you. And I cannot -- I
8 can't swear 100 percent I was blindfolded, but I think
9 I was -- or I think I had something over my eyes, and
10 they put some smells in front of your nose.

11 Q. Now, did that happen two separate times?

12 A. No.

13 Q. Was -- was there -- let me ask you -- was
14 there a time when one of the doctors just put a few
15 smells in front of you, and then a time when the
16 doctors gave you a bigger test?

17 A. Yes.

18 Q. Okay. What I want to ask you about is -- tell
19 me about when the doctors just put a couple of smells
20 in front of you. And to the best of your memory -- I
21 know this has been a while -- but to the best of your
22 memory, tell the jury about that.

23 A. Okay. They get this -- like a gun thing --
24 they spray up your nose. I'm not supposed to put my
25 finger up my nose -- but you guys get it. And they

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1 spray it up your nose, and I don't know why. And
2 then -- I don't know if it was his assistant -- I think
3 it was his assistant. I don't know. And they put the
4 smells in front of your face. Okay. Now, they put
5 something that was very vaporous, like a bleach or
6 ammonia, and I don't smell it, but I reacted to it.
7 Because when you put anything like that close to your
8 nose, you're going to get that whoof -- you know what
9 I'm saying? And that was the test they gave me.

10 Q. Did -- the best of your recollection, did all
11 the doctors that you saw at Charleston ENT tell you
12 essentially the same thing that Dr. Funcik and Dr.
13 Ghegan had with respect to the cause?

14 A. Yes, sir.

15 Q. Now, tell us about the second test that you
16 took, the one with the -- the other -- the whole bunch
17 of smells.

18 A. I mean, I didn't know that there was tests for
19 smelling. I don't know that they test for smelling.
20 Okay. So when I -- I don't know who recommended it to
21 me that I go for this -- this is the state of the art
22 smell test. And it's like scratch and sniff, you know
23 how you do those things. And they give you these
24 little books. It's like five or six of these little
25 books. And they put you in a room, and then you fill

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1 out this paper, like the bubbles, you know, on a SAT
2 exam or whatever, and you slide the thing over. You
3 smell it. And then you say what it is -- you know, I
4 say what it is. And this stuff can be like tobacco
5 smoke, watermelon, just weird stuff. I don't know -- I
6 don't remember what stuff it was, lime, grass,
7 probably. You know, some very different things.

8 And I put my nose to it, you smell it, and then
9 they ask you a question -- I don't know the question
10 they ask you -- you have to put down the answer, like
11 which one is this, or something -- which one smells
12 like this, and that's what I did.

13 Q. Can you remember roughly how many smells you
14 had to smell on that second test?

15 A. Well, I know now how many there were. But at
16 the time, you know, it was five books. There's 40
17 questions.

18 Q. Was -- to your knowledge, was your diagnosis
19 of anosmia confirmed after you were given that 40
20 booklet test or --

21 A. Yes, yes, sir. Can I tell what happened?

22 Q. We'll get to it in a moment, please, ma'am.

23 A. All right.

24 Q. Has any doctor ever told you that a problem
25 with sinus infections is the cause of your lost of

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1 sense of smell?

2 A. No, sir.

3 Q. Has any doctor ever told you that your -- some
4 problem with your allergies is the cause of your loss
5 of sense of smell?

6 A. No, sir.

7 Q. Has any doctor ever told you that Dr. Funcik's
8 operation, where he did the open reduction surgery to
9 fix your broken nose, was the cause of your loss of
10 sense of smell?

11 A. No, sir.

12 Q. We've been talking a lot about your loss of
13 sense of smell -- and first, can you smell anything
14 today?

15 A. No.

16 Q. What about your taste, how is your sense of
17 taste?

18 A. I eat because you have to eat. But everything
19 is bland. My food tastes like cottage cheese with
20 saltine crackers. So I'm neutral to food. It's not --
21 it's not a pleasure for me anymore.

22 Q. Is there any doubt in your mind that you've
23 been unable to smell since the day that your head hit
24 the pavement?

25 A. No, sir.

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1 Q. What are you doing today to get treatment to
2 fix your anosmia?

3 A. There is no treatment. Those things don't
4 regrow -- those nerves don't regrow. If you lose your
5 sense of smell, you've lost your sense of smell.

6 Q. How do you know that?

7 A. The doctors told me that.

8 Q. Let me show you -- we don't need to go into
9 that -- we'll go into that later. Let me just ask you,
10 Rosemary, can you -- in your own words, just kind of
11 tell the jury how this has affected your life, your
12 loss of sense of smell as you described, your
13 diminished sense of taste as you've described, how has
14 that affected you since June 6, 2011?

15 A. Well, like I said, it was a very gradual thing
16 that happened. I didn't notice it right away. Now, I
17 notice it. I am a gardener. I love to garden and I
18 like to plant lilies that are fragrant. I do it on
19 purpose. I can't smell them.

20 My food is not, you know -- it's not a pleasure
21 to -- eating out, and eating and cooking was a
22 pleasure. I don't season right because I don't taste
23 it. I wouldn't smell -- like I can't smell fresh cut
24 grass. I plant rosemary in my garden and lavender and
25 I can't smell that. I like to make potpourri out of

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1 the lavender, you know, but I can't smell that.

2 Do I continue living? Yes, I do, because, you
3 know -- but is my life as it was before? No, it's not.
4 I don't have a sense of smell. So, you know, I can't
5 smell the ocean or even -- I was in Wal-Mart the other
6 day -- or Target, I think it was. And I was in the
7 soap area, you know, with the Tide and all that stuff.
8 And this lady goes, wow, does this smell good. I
9 didn't smell it. And I work at a furniture store. I
10 just started doing that. And I was arranging his
11 candles. And he said to me, what, you don't like my
12 candles? And I said I don't smell them. So, I don't
13 smell it.

14 The only good thing that came out of here is my
15 husband, who burns this horrible incense (ph) I use to
16 complain about it, but I don't do that anymore. No, I
17 don't smell anything. And that's just my quality of
18 life, and it -- I've accepted it, you know, but --

19 Q. Do they still let you cook?

20 A. Not too much, no. No.

21 MR. GRUENLOH: Okay. Thanks very much, Rosemary.
22 Please answer all of Mr. Hines questions.

23 THE WITNESS: Thank you.

24 THE COURT: All right, Madam Forelady, and ladies
25 and gentlemen of the jury, we're going to take a break

1 at this time. Please don't discuss the case amongst
2 yourselves. If you need anything, let the bailiffs
3 know. Do we have any smokers -- anybody smoke?

4 All right. If you need to smoke, let the bailiff
5 know. They'll take you to the proper place for
6 smoking. But please don't discuss the case amongst
7 yourselves. If there is anything you need, let the
8 bailiffs know. We'll take about a 15 or 20 minute
9 break.

10 (WHEREUPON, the jury leaves the courtroom at
11 approximately 11:28 a.m.)

12 THE COURT: Ms. Connelly, you may step down. And
13 during the break, don't discuss the case with anybody,
14 please, ma'am.

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. Thank you. We'll take
17 about a 15 or 20 minute break.

18 (WHEREUPON, a brief recess was taken.)

19 THE COURT: Anything from the plaintiff before we
20 bring the jury?

21 MR. GRUENLOH: No, Your Honor.

22 THE COURT: Anything from the defendant before we
23 bring the jury?

24 MR. GRUENLOH: One thing, Your Honor, I think
25 we've got this worked out. And I know you're not

1 making rulings on admissibility right now. But Your
2 Honor asked me to bring you the Facebook page.

3 THE COURT: Right. I understand there's been some
4 redactions to it all?

5 MR. GRUENLOH: There have --

6 THE COURT: Do you have any objection the way it
7 is now?

8 MR. HINES: It depends upon how it comes in, Your
9 Honor.

10 THE COURT: Pardon?

11 MR. HINES: It depends upon how it comes in.
12 That's the best way that I can say it.

13 THE COURT: Okay. All right. Before we get to
14 that, let me go through this exhibit list -- the
15 Plaintiff's Exhibit list. Dr. Funcik's medical
16 records, I understand it has been admitted without
17 objection; is that correct?

18 MR. HINES: Yes, sir.

19 THE COURT: Charleston ENT medical records has
20 been admitted without objection. Photographs of
21 Plaintiffs, summary of medical bills and expenses,
22 Nason Medical Center medical reports; Dr. David
23 Theobald medical records -- those have been admitted
24 without objection; correct?

25 (Plaintiff's Exhibits Nos. 1 - 6 admitted into

1 evidence.)

2 MR. HINES: Yes, Your Honor.

3 THE COURT: And then contract -- contractor, owner
4 for construction of single family home has been
5 admitted without objection; correct?

6 MR. BROWN: Subject to the insurance portion was
7 redacted, yes, sir.

8 THE COURT: All right. Then building permit
9 admitted without objection?

10 MR. HINES: Yes, Your Honor.

11 THE COURT: Then Daniel Island Architectural
12 Review Board Construction Guidelines admitted without
13 objection; correct?

14 MR. HINES: Yes, Your Honor.

15 (Plaintiff's Exhibits Nos. 9 - 11 admitted into
16 evidence.)

17 THE COURT: All right. As far as the defendant is
18 concerned, photos produced by Winsor, further
19 identified as Bates number 302-303, admitted without
20 objection; correct?

21 MR. GRUENLOH: Yes, Your Honor.

22 THE COURT: Photographs RMC 93, 96 without
23 objection?

24 MR. GRUENLOH: Yes, Your Honor.

25 (Defendant's Exhibits Nos. 1 & 2 admitted into

1 evidence.)

2 THE COURT: Coastal Facial Plastic Surgery medical
3 records, further identified as exhibit 1 with Dr.
4 Funcik's video deposition, admitted without -- without
5 objection after it's redacted as to insurance; correct?

6 MR. GRUENLOH: To the extent that it's precisely
7 the same as our exhibit number one. Then, yes, Your
8 Honor, there's no objection.

9 (Defendant's Exhibit No. 4 admitted into
10 evidence.)

11 THE COURT: All right. Medical records of
12 Charleston ENT, further identified as exhibit 2 Dr.
13 Funcik's video deposition, admitted without objection;
14 correct?

15 MR. GRUENLOH: The exact same answer as the last.

16 (Defendant's Exhibit No. 5 admitted into
17 evidence.)

18 THE COURT: All right. Photographs produced by
19 plaintiff of injuries further identified by Bates No.
20 RMC 104-105, admitted without objection; correct?

21 (Defendant's Exhibit No. 7 admitted into
22 evidence.)

23 MR. GRUENLOH: Yes, Your Honor.

24 THE COURT: Okay. All right. Now --

25 MR. GRUENLOH: Your Honor, there was one exhibit,

1 and I hope you didn't skip over it, the Edelen & Nelson
2 photographs that we had an argument about yesterday,
3 and I hope that I didn't --

4 THE COURT: Which one?

5 MR. GRUENLOH: Six, Exhibit No. 6. We do have an
6 objection to Exhibit No. 6.

7 THE COURT: I know, I didn't mention it.

8 MR. GRUENLOH: Okay. I just want to make sure.

9 THE COURT: Three and four, you have got an
10 objection to. Do you have an objection to these
11 building photographs on Plaintiff's exhibit?

12 MR. HINES: No, Your Honor -- oh, we do though --
13 if you mean the ones that -- there's two photographs
14 that we agree -- the photograph that are not
15 documented -- RMC 93 and RMC 96 -- if that's what
16 you're referring to.

17 THE COURT: I don't know. All I'm going is the
18 list -- number 7 says "building photographs,
19 photographs of accident site". I don't know what
20 pictures --

21 MR. GRUENLOH: If I could help out, the building
22 photographs is the picture that I showed in the opening
23 statements. And there's been no objection lodged to
24 that so far.

25 With respect to photographs of the accident site,

1 there are a number. And Your Honor may recall, those
2 are the ones showing the black plastic fence down,
3 they've got objections to a number of those
4 photographs. I haven't shown any of the ones that
5 they've got objections to so far. I'm not withdrawing
6 them, but I may not need them.

7 THE COURT: Okay.

8 MR. BROWN: On Exhibit 7, Your Honor, page two, I
9 think you indicated was demonstrative. We did object
10 to that.

11 MR. GRUENLOH: That's correct.

12 COURT REPORTER: Could I have the number on those?

13 THE COURT: The overheard objection -- they didn't
14 even offer. What -- what photographs on number 7,
15 building photographs -- how about getting the pictures,
16 give them to her, let's get them marked as 7 A, B, C,
17 so we can identify them please. Let's get them marked
18 so we can identify what we're talking about.

19 MR. GRUENLOH: They're -- they're already marked
20 up here, Your Honor.

21 THE COURT: Okay. Are they marked as a group or
22 individually?

23 MR. GRUENLOH: Two -- two photos.

24 THE COURT: Two photos.

25 MR. BROWN: And we object to page two.

1 MR. GRUENLOH: And I've only got the one page
2 because I withdrew the second page.

3 THE COURT: All right. So you withdrew the second
4 page?

5 MR. GRUENLOH: Yes, Your Honor.

6 THE COURT: You just got one page. All right.
7 No. 7 admitted without objection. All right, one
8 picture.

9 MR. BROWN: Yes, Your Honor.

10 THE COURT: No. 7 admitted without objection, the
11 picture of the building; right.

12 (Plaintiff's Exhibit No. 7 admitted into
13 evidence.)

14 THE COURT: All right. Now, as far as the
15 Facebook, I understand -- I haven't seen what's been
16 redacted, but I understand the defense has redacted a
17 lot of stuff that was irrelevant in -- in the
18 Facebook -- Ms. Connelly's Facebook. Now, do you have
19 any objection as it is redacted? You said it depends
20 on how it's coming in. I mean, either it comes in or
21 it doesn't come in.

22 MR. GRUENLOH: I believe that I will, but it will
23 depend upon the questions and answers, Your Honor.
24 Because I believe that they're going to show her some
25 photos that she's going to be able to authenticate or

1 say I know when this was taken. And I believe that
2 she's also going to testify to some of the photos that
3 may show her that she's not the one that posted those
4 photos.

5 THE COURT: Well, at some point in time, we're
6 going to have to have some means of identifying what
7 you're going to ask her about; okay. Mr. --

8 MR. HINES: Your Honor -- and I think it may be
9 pretty easy to do it.

10 THE COURT: Pardon?

11 MR. HINES: I'd be happy to hand you -- for your
12 Court's -- for your reference, Your Honor, a copy of
13 the redactions. With the redactions, there's actually
14 very few things left in it.

15 THE COURT: All right. Let me see. Have you
16 shown that to the plaintiff?

17 MR. GRUENLOH: They have, Your Honor.

18 MR. HINES: And my intention is going to be to
19 start with the day of the accident, and simply move
20 forward.

21 (PAUSE.)

22 THE COURT: All right. As it's been redacted,
23 tell me -- which ones you object to?

24 MR. GRUENLOH: Until I hear -- Your Honor, I have
25 not gone through with my client, and asked her if she

1 knows what these photos are, when they were taken,
2 whether she posted them. And until I hear those
3 things, I don't know whether or not I can give you an
4 objection to these things. And so until the testimony
5 comes in --

6 THE COURT: You are going to make him go through
7 every photograph on these 154 pages, and get it
8 authenticated by your client? Is that what you're
9 going to make him do?

10 MR. GRUENLOH: No, I'm not, Your Honor. But if
11 there's a photo --

12 THE COURT: Well, that's what I'm trying to get
13 you to tell me. Which ones do you think you may have
14 an objection to, so he can get it identified properly
15 by Ms. Connelly or not identified.

16 MR. GRUENLOH: I can't anticipate his questions.

17 THE COURT: Pardon?

18 MR. GRUENLOH: I can't anticipate what questions
19 he's going to ask.

20 THE COURT: I ain't worried about question? I'm
21 talking about the pictures. I don't care what his
22 question is. The question will be, photograph, like
23 comment, 21 people like us, do you recognize it -- he
24 can go through each one of these photographs if you
25 want to.

1 MR. GRUENLOH: If -- if the photos are properly
2 authenticated with Ms. Connelly, and she says that she
3 recognizes the photos, and she's the one that posted
4 the photos, then I don't have an objection.

5 THE COURT: Then what I'm going to do is let
6 him -- Mr. Hines, it's going to be your witness, give
7 her the redacted copies. Let her -- give her a chance
8 to look at it, and let her pick out which photographs
9 she cannot identify, please. And let's do this now
10 rather than having to send the jury out. Let's give
11 her an opportunity to look through it, and see which
12 ones she cannot identify. Okay.

13 MR. HINES: If I may approach, Your Honor?

14 THE COURT: Yes, sir.

15 (PAUSE.)

16 THE COURT: All right. Let's go on the record.

17 MR. HINES: I'm sorry. Your Honor, I'll ask Ms.
18 Connelly that question --

19 THE COURT: Please do.

20 BY MR. HINES:

21 Q. Ms. Connelly, I've just handed you what's been
22 -- what was marked for identification purposes as
23 Defendant's Exhibit 3.

24 A. Yes, sir.

25 Q. Thank you. We received these materials,

1 through the discovery in this case. It was produced to
2 us by your lawyers. Can you identify those -- identify
3 just the documents itself as -- as containing
4 information from your Facebook page?

5 A. Yes.

6 Q. If you would, please, would you look
7 through -- there's some photographs and -- on that
8 document, can you look through the photographs, and
9 tell me -- well, can you tell me -- if you can tell
10 me -- can you tell me when they were taken? Any of the
11 photos were taken?

12 A. Well, one thing I can tell you is I didn't
13 post because I don't know how. I don't know how to
14 take a picture and put it on the Facebook.

15 Q. Okay.

16 A. So none of these pictures I posted. All
17 right. The first one was during the summer. I was
18 with my girls. We were up in Chicago.

19 Q. You know maybe a better way to do this, Ms.
20 Connelly, would be to ask you -- I want to know whether
21 they were taken before or after June 6, 2011.

22 A. Okay. The first one, I'm not sure. I mean
23 that's been my profile picture for a long time, so I'm
24 not sure. The second one or --

25 Q. Ms. Connelly, just for our record -- I'm so

1 sorry to interrupt you and I apologize.

2 A. That's okay.

3 Q. When you're saying the first one, you're

4 referring to the one --

5 A. The page.

6 Q. That's on page -- RMC production 151?

7 A. Yes. This little one right here.

8 Q. Oh, excuse me. Understood.

9 A. That's my --

10 Q. Okay.

11 A. Yeah.

12 Q. Okay.

13 A. I don't know. The next one is a picture of me

14 and a young girl with a plate, and that was after --

15 COURT REPORTER: With a...? I'm sorry?

16 A. A plate -- with a plate. She's got a plate.

17 And I had given a baby -- a bridal shower for that girl

18 last year.

19 BY MR. HINES:

20 Q. You say last year or last June?

21 A. Last year, sometime last year.

22 Q. You can continue.

23 A. The next picture is a group of women. I'm not

24 in there. My aunt is with the Supreme Court Justice

25 Sonia Sotomayor -- but I didn't-- like I said, none of

1 the pictures I posted.

2 Q. I understand that. Would you let me know,
3 though, you don't dispute whether or not you are in the
4 photos? Let me know if you don't believe you are in
5 them.

6 A. I'm not in that photo. That much I know.

7 Q. Is -- is that the only one that you're not in
8 so far?

9 A. Yes.

10 Q. Okay.

11 A. The next photo with the women with her hands
12 up in the air, that says crazy aunt. There's a picture
13 of me, and I was there when my uncle died. And I would
14 think that was maybe two years ago.

15 The next picture is of me and my best -- one of
16 my best friend's daughters. I would say two years ago.

17 THE COURT: Is that one on RMC Production 130 at
18 the bottom of the page?

19 THE WITNESS: Yes, sir.

20 A. Okay. The next one is the same picture, I
21 think, let me see. They put it in different -- yeah,
22 because I'm still holding the dog. So they put it in a
23 different format. And so it's the same picture. And
24 then on the left hand side, there's a woman with
25 glasses, and I'm standing next to her. But you can't

1 see me too well, but that was about two years ago.

2 The next picture, I remember this, I was
3 dancing. My daughter had just graduated from Clemson
4 University, and so they -- her friends hosted a party.

5 Q. When did your daughter graduate from Clemson?

6 A. 2013 -- 2013 -- 2014.

7 Q. So that would have been approximately, I think
8 graduation was maybe in May --

9 A. Uh-huh.

10 Q. -- 2014?

11 A. Uh-huh. Okay. The next we have a lot of
12 black pages. The next picture it says what date it is,
13 it's December 13, 2013. My daughter's friends had a
14 party downtown, they invited my husband and I. And I'm
15 in between one of the girlfriends.

16 Q. So, Ms. Connelly, the date that's on that
17 picture is the date of?

18 A. I don't know if that was the date of the
19 party, I don't know.

20 Q. Approximately?

21 A. Yes. It was sometime in the beginning of the
22 year, December, not at Christmas. The next picture
23 that I show is November 8, 2013. It's got sparklers on
24 it. It is my friend's wedding -- my friend's
25 daughter's wedding. I don't know if that's me or not.

1 THE COURT: Are you in that picture?

2 A. I don't know. It's kind of hard to see.

3 MR. HINES: Your Honor, I'm happy to have that one
4 removed.

5 THE COURT: Pardon?

6 MR. HINES: I don't intend to ask her about that
7 picture. I'm happy to remove that.

8 THE COURT: You are going to take it out.

9 THE WITNESS: The next picture is -- my arms are
10 around my niece, and there's some cupcakes. And that's
11 approximately the date that it was taken. The next
12 picture that's there is production 147.

13 THE COURT: How about backing up to 144, if you
14 would please, ma'am. RMC Production 144, something is
15 written there?

16 THE WITNESS: Yes.

17 MR. HINES: Your Honor, my understanding is that
18 Ms. Connelly's own postings were not at issue. I could
19 be wrong. But, for instance, that -- there's no reason
20 for us to discuss that now as an evidentiary matter.
21 I'm trying to confirm that.

22 THE COURT: Is -- is that your posting?

23 THE WITNESS: I think so. I know how to type it.

24 THE COURT: That's her posting. All right.
25 Number 145, is that your posting?

1 THE WITNESS: Yes, sir.

2 THE COURT: Okay. All right. Then you're going
3 to 147, go ahead.

4 THE WITNESS: One forty-seven is a picture of two
5 sandwiches that my Cuban friend had made, two Cuban
6 sandwiches, but I didn't post the picture. I did not
7 post any of the pictures.

8 BY MR. HINES:

9 Q. How about the date of that photo, Mrs.
10 Connelly?

11 A. I would assume that whatever it says about
12 is -- when I saw it, you know. I don't know when she
13 took it, but...

14 (PAUSE.)

15 THE COURT: What's next, Mr. Hines?

16 MR. HINES: Your Honor, I'm finished with the
17 pictures. I was just jotting that note.

18 THE COURT: How about 149?

19 THE WITNESS: One forty-nine, yes. I was -- I
20 would say it was about that time. As you can see, my
21 nose was crooked:

22 THE COURT: All right. And 151?

23 THE WITNESS: That was taken at Easter time.
24 Because my husband only wears that Seersuckers suit at
25 Easter.

1 BY MR. HINES:

2 Q. And, of course, Easter would have been before
3 the accident?

4 A. Yes, sir.

5 Q. I'm certainly happy to have that removed.

6 MR. HINES: In fact -- well, you know what perhaps
7 we could do, Your Honor, at certainly --

8 THE COURT: All right. Let's take out the one
9 about the Supreme Court. She's not in that picture.
10 And the one at the wedding where it shows the sparkles
11 on 139, she's not in that picture. Take it out. And
12 129 was the Supreme Court, take it out.

13 Do you have any objection to the rest of them from
14 the plaintiff's standpoint? She's gone through every
15 one of them.

16 MR. GRUENLOH: No, Your Honor.

17 THE COURT: All right. As redacted as the court
18 just ruled, Defendant's Exhibit No. 3 will be admitted
19 without objection.

20 (Defendant's Exhibit No. 3 admitted into
21 evidence.)

22 THE COURT: All right. Anything else before we
23 bring the jury in?

24 MR. HINES: Well, Your Honor, I guess as far as
25 actually making those redactions -- because the page of

1 Ms. Connelly and her husband, with that picture from
2 Easter, I think that whole page can just come out.
3 Because that picture is the only thing on it. The page
4 that had Supreme Court photo, does have something that
5 I would ask about, and so I just want to make sure.

6 THE COURT: What do you want to know about it?
7 She says she's not in that picture.

8 MR. HINES: I'm not referring to the picture, Your
9 Honor. There's a posting underneath it --

10 THE COURT: Well, I'm not worried about that. I
11 said take the picture out.

12 MR. HINES: Absolutely, Your Honor.

13 THE COURT: Okay.

14 MR. HINES: Very well then. Thank you, Your
15 Honor.

16 THE COURT: Anything else?

17 MR. BROWN: Just got to figure out how to get that
18 picture out and leave the post in there is what we're
19 trying to figure out.

20 THE COURT: Well, -- before it goes to the jury,
21 y'all going to have to figure that out. Okay. That's
22 up to y'all. Anything else before we bring the jury?

23 MR. HINES: No. Thank you.

24 THE COURT: Bring us the jury, please.

25 (WHEREUPON, the jury enters the courtroom at

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1 approximately 12:08 p.m.)

2 THE COURT: Thank you very much. Cross
3 examination, please, sir.

4 MR. HINES: Thank you, Your Honor. May it please
5 the court.

6 CROSS EXAMINATION BY MR. HINES:

7 Q. Good morning, Ms. Connelly.

8 A. Good morning, Mr. Hines.

9 Q. Again, I'll do my very best for everybody
10 to -- to keep my voice up, so that all can hear. Ms.
11 Connelly, the fall that's at issue in this lawsuit
12 happened on June 6, 2011; correct?

13 A. Yes, sir.

14 Q. And it happened on the sidewalk in front of a
15 house under construction on REDACT Street on Daniel
16 Island?

17 A. Yes, sir.

18 Q. Specifically that address is 13 --

19 A. Thirteen seventy-six.

20 Q. And it happened when you were jogging with a
21 friend of yours named Cori Smith?

22 A. Yes, sir.

23 Q. And Ms. Smith is also a fitness trainer?

24 A. Yes, sir.

25 Q. Before the fall happened -- I mean before that

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1 day, you and Ms. Smith had been running together for
2 exercise on Daniel Island for -- well, about three
3 years?

4 A. Yes, sir.

5 Q. And y'all had been running on average about
6 three days a week?

7 A. Excuse me -- yes, sir.

8 Q. And you -- well, you don't always run on the
9 sidewalk; sometimes you'll run on the street?

10 A. Yes, sir.

11 Q. And you mentioned that you and Ms. Smith, when
12 you run, you run side-by-side?

13 A. Yes, sir.

14 Q. With you being to the -- to Ms. Smith's right?

15 A. I'm always on the right; she's always on the
16 left.

17 Q. And when you run, you run with your eyes down
18 and your eyes ahead?

19 A. Yes. I run -- I run looking forward, you
20 know. I run -- you're running along, and then you're
21 looking forward, yes.

22 Q. Well, what I asked you, Ms. Connelly, I just
23 want to make clear -- you run with your eyes down and
24 your eyes ahead?

25 A. Yes. You run -- you run looking ahead, and

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1 looking exactly where you are. You know, you run like
2 that. You're aware of your situation, what's going on.

3 Q. Well, and about that, you agree a person
4 should be aware of their surroundings?

5 A. Yes, sir.

6 Q. And you agree a person should always be
7 looking out for hazards?

8 A. Yes, sir.

9 Q. And you agree that that's for your own safety?

10 A. Yes, sir.

11 Q. Maybe even the safety of others?

12 A. Yes, sir.

13 Q. Of course, you don't live on Daniel Island,
14 you live on Sullivan's Island?

15 A. Yes.

16 Q. So you drive from your home on Sullivan's
17 Island, you meet with Ms. Smith on Daniel Island where
18 Ms. Smith lives?

19 A. Yes, on Bulline.

20 Q. That's the street, Bulline?

21 A. That's where she lives, Bulline.

22 Q. And this accident that happened on June 6th of
23 2011, it happened about in the middle area of the run?

24 A. Towards the end, you know, middle -- we loop
25 around, then go down that street, yes.

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1 Q. Well --

2 A. A mile and a half in probably on a two mile
3 run.

4 MR. HINES: Your Honor, may I unseal Ms.
5 Connelly's deposition.

6 THE COURT: Pardon?

7 MR. HINES: Your Honor, I'd like to unseal Ms.
8 Connelly's sworn deposition, and approach the witness.

9 THE COURT: Yes, sir. Okay.

10 MR. BROWN: Is it okay for him to do it, or do you
11 want him to present it to Your Honor?

12 THE COURT: Pardon?

13 MR. BROWN: Would you like him to present it to
14 you to unseal?

15 THE COURT: No, just go ahead and open it. Ladies
16 and gentlemen of the jury, while he's opening the
17 deposition, depositions are sworn testimony that's
18 taken prior to court. And a court reporter is present
19 taking everything down that's said in the deposition.
20 It is a sworn statement taken prior to court. And it's
21 normally done in cases so the lawyers will have prior
22 knowledge of what the witness is going to testify to.
23 The court reporter, such as here, is taking everything
24 down, the same thing that occurs at a deposition.

25 Please proceed, Mr. Hines.

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1 MR. HINES: Thank you, Your Honor. And may I
2 approach Ms. Connelly with this deposition?

3 THE COURT: Yes, sir.

4 BY MR. HINES:

5 Q. Ms. Connelly, the Judge just explained -- of
6 course, you remember when you were -- your
7 deposition --

8 A. Yes.

9 Q. -- was taken in this case?

10 A. Yes, sir.

11 Q. And you knew that testimony was under oath
12 just like it is right now?

13 A. Yes, sir.

14 Q. If you would, please, turn to page 33 line 22,
15 and just let me know, if you would, when you get there.

16 A. Okay. Yes, sir.

17 Q. Please read along with me. I'm going to read
18 out loud to the jury. "Can you tell me how far you
19 would have been running either in terms of mileage or
20 just the time that it would take?" And the answer,
21 "Well, I really hate it, but my goal was 12 to 13 miles
22 a week, and so however that broke down" -- and is
23 that -- question --

24 A. I don't see where you are, Mr. Hines.

25 Q. Okay. Let me consult my notes.

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1 A. I have a line -- I have that line.

2 Q. You know what --

3 A. Approximately the line I have --

4 Q. Look at page 33 line 22, and I'll have to beg
5 your pardon --

6 A. Okay.

7 Q. -- I've got a lot on this page and I wrote too
8 small for myself.

9 A. Okay.

10 Q. The question reads -- you are there now I
11 assume?

12 A. Yes.

13 Q. "How far along the course of your run were you
14 when it happened?" Answer: "I would say approximately
15 a mile and a half." Question: "Is that -- well okay.
16 So if you were running, you know, if that was to be a
17 four mile run or thereabouts, is it fair to say that,
18 you know, give or take, it's sort of the middle area of
19 your run?" Answer: "Yes." Is that your -- was that
20 your sworn testimony in your deposition?

21 A. And I just said pretty much the same thing,
22 sir. That I was running a mile and a half.

23 Q. Ms. Connelly -- and I -- I can understand it
24 is difficult as far as me asking the question, and me
25 thanking you for answering. But the question I asked

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1 you was, was -- were you in the middle area of the run?

2 A. I can't say exactly the middle area, and I
3 can't say that it was a three or four mile run. I know
4 where I was, and it was about a mile -- in fact, I
5 think it's like a mile and three fourths into. Now,
6 Cori changes it. She'll tell me to go left or
7 whatever, but I know that to run from her house to
8 where we were was about a mile and three quarters.

9 Q. So you were about a mile and three quarters
10 from Ms. Smith's house?

11 A. Probably, yes. I don't know exactly, but
12 probably yes.

13 Q. Give or take, you know, certainly ballpark?

14 A. Yes. Yes.

15 Q. Now, you had run past this house on **REDACTED**
16 Street -- the house where they are talking about, where
17 the construction was going on -- you've run past it a
18 number of times prior to the fall; hadn't you?

19 A. Yes, sir.

20 Q. And you never noticed -- well, I think that
21 this is a silt fence. I think in openings, it might
22 have been referred to as a black plastic fence, but the
23 documents have also called it a silt fence. But we're
24 talking about the fence, just so we're on the same page
25 -- as far as the terminology?

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1 A. Okay.

2 Q. But you've never noticed that fence in -- in
3 disrepair before?

4 A. I'm -- I'm neutral to that question. You
5 know, I never noticed it one way or the other. I'm
6 neutral to the question.

7 Q. So -- so for a yes or no answer, Ms. Connelly,
8 my question is just, you never noticed it before;
9 correct?

10 A. Well, no, I noticed that there's fencing up
11 always in construction sites. Did I notice that
12 particular construction site? No.

13 Q. And didn't notice it in disrepair?

14 A. I would say that I saw that construction site
15 as a maybe messy, you know, construction site, you
16 know.

17 Q. Turn with me, if you would, Ms. Connelly, to
18 page 69. This time I'm going to squint to make sure I
19 got this right. Page 69, line 18. Are you there?

20 A. Yes, sir.

21 Q. This picks up with your answer. "I know that
22 the house was under construction, but I didn't notice
23 black plastic particularly." Question: "And did
24 you -- did -- was it ever noticeable to you that it was
25 in any state of disrepair?" Answer: "No." That was

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1 your sworn testimony in your deposition?

2 A. Okay. Okay. That's fine, but that's pretty
3 much what I said. I mean, I didn't really notice it --

4 Q. Ms. Connelly, I asked you if that was your
5 sworn testimony --

6 A. Okay. Yes. That's what it says.

7 Q. I don't mean to be rude, I --

8 THE COURT: Mr. Hines, she can give an explanation
9 please. Give her an opportunity to give it, please,
10 sir. Ask questions and you answer them.

11 A. Yes, sir.

12 THE COURT: Then after you answer the question,
13 you can give an explanation; okay?

14 A. Yes, sir.

15 THE COURT: Please proceed.

16 MR. HINES: Thank you, Your Honor. And I
17 apologize for that.

18 BY MR. HINES:

19 Q. Certainly. Please give an explanation if it
20 you feel that it's appropriate.

21 A. Thank you.

22 Q. And, of course, your position in this case is
23 that that fence was in a state of disrepair at the time
24 of this accident?

25 A. I'm sorry. Did you say my physician?

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1 Q. Your position -- you've alleged that that
2 fence was in a state of disrepair at the time of the
3 accident?

4 A. I know -- I know that the sticks -- the fence
5 was not stapled to the sticks, that I know.

6 Q. Yeah, and the black plastic material of the
7 fence wasn't stapled in some areas?

8 A. Yes, sir.

9 Q. And prior to the fall some, but not a lot of
10 that material was on the sidewalk?

11 A. Yes, sir.

12 Q. And prior to the fall, you saw some of the
13 black plastic material on the sidewalk?

14 A. Yes, sir.

15 Q. And the black plastic material caught your
16 foot and caused you to fall?

17 A. Yes, sir.

18 Q. The morning of the accident, it was a windy,
19 gusty day?

20 A. It was not gusty. It wasn't like blowing.
21 You know, it was a windy day, but it wasn't like -- you
22 know, hurricane or anything. It was windy. It was
23 nice.

24 Q. Would you turn please, Ms. Connelly, in your
25 deposition, to page 44?

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1 A. I'm sorry?

2 Q. Page 44, if you would, at line 13.

3 A. Line 15, yes.

4 Q. And your answer at line 13, just follow along
5 with me, "It was a very -- it was a gusty, windy day.

6 All right". Was that --

7 A. Yes.

8 Q. -- your sworn testimony?

9 A. Yes, sir. It was a windy day, a gusty day. I
10 mean, you know, it's a relative term. It was a windy
11 day.

12 Q. And the black plastic material was moving?

13 A. Yes.

14 Q. You saw it flopping like a garbage bag in the
15 wind?

16 A. Not flopping, fluttering, you know, like
17 moving -- out of the corner of my eye, I saw movement.

18 Q. Turn to page 75, please.

19 A. Yes, sir.

20 Q. And this at line 21. If you would, please,
21 let me know when you are there.

22 A. Yes, sir.

23 Q. I'll pick up reading, and please follow along
24 with me. Question: "You're saying that the condition
25 of the material you encountered, wherever the fall

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1 occurred at the time that you got to it, looked
2 generally like what you've" -- Answer: "And in
3 different variations." Okay -- excuse me -- Question:
4 "Okay. Tell me about the different variations."
5 Answer: "Okay. I mean, it was just flopping. It was
6 just all down. I mean, I can't draw it exactly. It
7 was down." Question: "And what was it that was
8 flopping?" Answer: "Well, if it was between what was
9 supposed to be between sticks, supposed to be taut, if
10 it was down. It was moving, all that. It's like a
11 garbage bag in the wind." Was that your sworn
12 testimony?

13 A. Yes, sir. Movement, you know.

14 Q. And you ran around it?

15 A. Yes, sir.

16 Q. But something happened that the material blew
17 or came into contact with your foot?

18 A. Yes, sir.

19 Q. It was a windy day, you were lifting your foot
20 to run, something caught your foot, and it was this
21 black plastic material, that's all you know?

22 A. That's all I know, yes.

23 Q. But you don't know if the black plastic
24 material moved in some way?

25 A. I saw movement of that plastic material. I

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1 saw the stuff -- it wasn't, you know, I saw what was on
2 the sidewalk. I had my left foot down, sir. And I had
3 my right foot up to run, you know. And in the back,
4 something caught my foot. Okay. And it was -- this
5 plasticky like garbage bag stuff that was on the
6 sidewalk.

7 Q. Ms. Connelly, if you would, please turn with
8 me to 44 line 20, and please let know -- and I'll stop
9 saying this part -- if you would, just let me know when
10 you get there?

11 A. Yes.

12 Q. Yes. "Are you saying the material moved in
13 some way?" Answer: "I don't know". Was that your
14 sworn testimony?

15 A. Yes, sir. But I don't -- I don't know how it
16 moved. I mean, I -- I mean, let's face it when I --
17 when I caught my foot, I went down hard. Okay.

18 Q. You don't remember Ms. Smith saying anything
19 to you about the fall or what happened after the
20 fall -- immediately after that?

21 A. What do you mean by that, Mr. Hines? At the
22 site there?

23 Q. Yes.

24 A. She says, oh, my God, oh my God. The blood
25 was clotting out of my nose, so we were really freaked

1 out.

2 Q. But she didn't say anything about -- about
3 what had caused you to fall?

4 A. No. We were just concerned, what the hell do
5 we do now -- excuse my language. But what do we do to
6 stop this clotting coming out of my nose.

7 Q. And you don't remember saying anything to her
8 either about what had caused the fall?

9 A. I was in a daze, sir. I hit my head really
10 hard. I was kind of worried I had killed myself
11 almost. That's how it felt.

12 Q. So you do not remember saying anything to her?

13 A. Not necessarily, no. Not at this point, no.

14 Q. Looking at Defendant's Exhibit 2.

15 MR. HINES: Your Honor, if I may grab one thing
16 that I need to get.

17 (PAUSE.)

18 BY MR. HINES:

19 Q. Thank you for bearing with me on that, the
20 technical aspect. Now, Ms. Connelly, what is up there
21 is, again, that's Defendant's Exhibit 2, a specific
22 page in there. Can you -- I want to make sure that I
23 understand. If you don't mind me reaching to show
24 where you were running -- the direction you were
25 running -- I'm using this high-tech device to show you

1 with the portapotty is.

2 A. Do you want me to do it?

3 Q. Well, just let me know if I'm pointing to the
4 right spot.

5 A. Let me do it since I'm closer.

6 Q. Ms. Connelly, if you would just let me point
7 to it, I think I can move us along.

8 A. All right.

9 Q. Do you see -- I just wanted to make sure that
10 I understand that you're coming this way; correct?
11 Just really -- I'm not looking for an exact track --

12 A. I'm coming up -- do you see where that curve
13 was, and then I come down that way.

14 Q. So if we look at the top right of that
15 picture?

16 A. Yes. You come down the portalet.

17 Q. You would be running towards us; right? This
18 way is where we're heading.

19 A. Yes, and the plastic is on my right.

20 Q. On your right?

21 A. Yes, sir.

22 Q. Thank you. And let's see -- Ms. Sanford, if
23 you would please, put the other photo on this exhibit.
24 Ms. Connelly, this photo shows a blood stain from your
25 nose on the concrete?

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- 1 A. Yes, sir.
- 2 Q. Now, after the fall, you bled profusely?
- 3 A. Yes, sir.
- 4 Q. It was an unbelievable amount of blood?
- 5 A. It was a clotting. Okay. It was like a big
6 clot coming out of my nose. And my friend, Cori, took
7 off shirt and I bled into her shirt.
- 8 Q. Just -- do you agree or disagree that it was
9 an unbelievable amount of blood?
- 10 A. Yes. It was a lot of blood from -- you know,
11 a head injury, you have a lot of blood I think.
- 12 Q. And you were in shock?
- 13 A. I would say so. I was very dazed. I was very
14 scared, you know, nervous.
- 15 Q. But --
- 16 A. Just --
- 17 Q. Excuse me -- if you're not finished, please
18 do.
- 19 A. Oh, I'm sorry. Go ahead.
- 20 Q. But immediately after the fall, you got
21 yourself up on your own power?
- 22 A. Yes.
- 23 Q. And you walked back to Ms. Smith's house?
- 24 A. Yes, sir.
- 25 Q. And as we talked earlier, that was about a

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1 mile -- a mile and three quarters?

2 A. I don't know exactly how far it is. Okay. If
3 you want to figure it out exactly how far it is, but
4 I -- I know how to get to her -- from her house to
5 there now. So however long it took, we walked it back.
6 There was no running involved. We walked.

7 Q. And I want to be clear. I'm not trying to do
8 a, you know, specific measure --

9 A. I see too many of those shows, I think.

10 Q. What?

11 A. Special Victim Unit, you know.

12 Q. I promise you, if there's any special victim,
13 it's likely me. But I'm -- I'm not trying to get --
14 I'm not trying to get a specific measurement, I'm just
15 ball-parking.

16 A. Okay. All right.

17 Q. And earlier, you said ball-parking it, about a
18 mile and three quarters?

19 A. Okay.

20 Q. Isn't that right?

21 A. That's correct.

22 Q. Now, you were in a daze?

23 A. Yes, sir.

24 Q. And you were with your friend, Ms. Smith?

25 A. Yes, sir.

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1 Q. And so you drove yourself -- you drove
2 yourself home?

3 A. Yes, sir.

4 Q. And you drove yourself directly to Dr.
5 Funcik's office?

6 A. Yes, sir.

7 Q. Now, you were on Daniel Island?

8 A. Yes, sir.

9 Q. And Dr. Funcik's office is in Mount Pleasant?

10 A. Yes, sir.

11 Q. And is it on Highway 17 or here or where is it
12 in Mt. Pleasant?

13 A. It's on Highway 17, yes.

14 Q. Like if you were heading up -- sort of going
15 towards where the Wando High School is?

16 A. No. No. No.

17 Q. How far up?

18 A. Across the street from the Goodwill.

19 Q. Across from Goodwill?

20 A. Yeah, right up there, wherever that is. Okay.
21 Like around Brickyard.

22 Q. Around Brickyard?

23 A. Yes, sir.

24 Q. So as far as where East Cooper Hospital is,
25 would that have been closer than Dr. Funcik's office?

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1 A. In retrospect, I was an idiot not to go to a
2 hospital. Okay. But I wasn't thinking straight. I'm
3 sorry. I never had an injury like that. I didn't know
4 what to do. I didn't have any family around to call.
5 And, you know, I just -- I just did it so.

6 Q. Of course, Ms. Smith was there?

7 A. Yes.

8 Q. And she -- she told you, oh my God?

9 A. Yes.

10 Q. She was really upset?

11 A. Yes. Yes, very much so, yes.

12 Q. But she let you go ahead and drive?

13 A. She had a three year old son at the house
14 and -- and she has to work. But even if Ms. Smith had
15 told me she was going to take me to the hospital, I
16 would probably have said I wanted to go -- or go do my
17 thing. You know, that's just how I am.

18 Q. So you were clearheaded enough to say that?

19 A. No. I don't know what I was saying then. I
20 just know all I wanted to do was get in my truck and
21 get out of there, you know. It was -- I just wasn't
22 thinking straight. I just wanted to get out of there.
23 That's all I remember.

24 Q. Now, in fact -- this speck of blood, as you
25 were getting in your car, there was blood gushing out

1 of your nose?

2 A. I don't remember that. I remember that I had
3 that t-shirt up under my nose and my face, and I really
4 don't remember if I was gushing or if I was, you know,
5 dripping at that point, so -- I never even thought
6 about that so.

7 Q. Ms. Connelly, if you would, please, turn with
8 me to -- to page 84.

9 A. Of the deposition, sir?

10 Q. Yes, ma'am, 84, and line -- lines 9 and 10.
11 Once you get there --

12 A. Okay.

13 Q. -- I'll read it. Line 9, page 84.

14 A. Yes, sir.

15 Q. It picks up with your answer. "I was getting
16 in my car and blood was gushing out of my nose?"

17 A. Yes, sir.

18 Q. That was your sworn testimony?

19 A. Yes, sir.

20 MR. HINES: Ms. Sanford, if you would please help
21 me with Defendant's Exhibit 4, please.

22 BY MR. HINES:

23 Q. Ms. Connelly, are you able to see that?

24 A. Yes, sir. Yes, sir.

25 Q. That's a document that's included within

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1 Defendant's Exhibit 4. And it is -- do -- do you
2 recognize the date on that document?

3 A. Yes, sir.

4 Q. The date of the accident?

5 A. Yes. It was right after the accident, yes.

6 Q. And you recognize Dr. Funcik as the doctor?

7 A. Yes, sir.

8 Q. And as you mentioned, this is right after the
9 accident?

10 A. Yes, sir.

11 Q. Do you see on that note where it says
12 "Rosemary fell while jogging today"?

13 A. Yes, sir.

14 Q. And do you see on that note -- or -- or where
15 the note says there was no loss of consciousness or
16 other injury?

17 A. Yes, sir.

18 Q. And "she denies other injury"?

19 A. Can I explain something?

20 Q. Your Honor, I'm sure -- excuse me -- Ms.

21 Connelly, I'm sure your -- your lawyer will ask you
22 additional questions when it's his turn.

23 THE WITNESS: But can I ask something, Judge?

24 THE COURT: What's your question -- ask her the
25 question please, sir.

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1 BY MR. HINES:

2 Q. My question was, do you see on that form where
3 it say she denies other injury?

4 A. Yes.

5 MR. HINES: She said yes. I don't have any other
6 question about that.

7 THE COURT: Do you want to explain it?

8 A. Well, yeah, because --

9 THE COURT: You can explain any answer that you
10 give.

11 A. All right.. He asked me to read "there was no
12 loss of consciousness or other injury". And I mean --
13 I don't know what loss of consciousness mean. Did I
14 black out to the extent I had to be carried away, no.
15 That's what I think loss of consciousness means. I
16 think that you -- you know, you have to be resurrected
17 or whatever the word is, but I was in a daze after I
18 hit my head.

19 BY MR. HINES:

20 Q. Ms. Connelly, you've got a college degree?

21 A. Yes, sir.

22 Q. And you've got a graduate degree?

23 A. Yes, sir.

24 Q. An MBA?

25 A. In business, yes, sir.

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1 Q. And you don't know what loss of consciousness
2 means?

3 A. Well, I'll tell you why I say it like that,
4 because I was a flight attendant for 17 years. And the
5 FAA mandates that we go once a year for emergency
6 training procedures. And right in that -- it's a
7 manual that we carry so we can get everybody's butts
8 off the airport, okay, if there's ever an accident.
9 And the term "loss of consciousness" is something that
10 the FAA used. And what they mean is if there is a --
11 if there is a passenger that has a loss of
12 consciousness, what are my procedures. And I am to
13 look for someone who's flat out. I have to tilt their
14 head back, I have to breathe. So that's how I
15 understand the word "loss of consciousness".

16 Q. And maybe -- maybe the better way to go about
17 it is to say, do you think Dr. Funcik knows what loss
18 of consciousness means?

19 A. I know that he told me what to look for in
20 concussion --

21 Q. Well, I didn't ask you what he told you.

22 A. That I would assume so. He's a doctor. I
23 can't tell you that.

24 Q. Okay.

25 A. I can't tell you what -- you know, I know --

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1 if I told him I did not have loss of consciousness, --
2 and I assume I told him that, right -- or I believe he
3 asked that. But my definition of loss of consciousness
4 means you're flat out. Okay.

5 Q. Okay. We can ask Dr. Funcik about that.

6 A. Yes, sir.

7 Q. Do you see a little farther down at the
8 bottom -- the final paragraph says "it is unlikely, but
9 possible, that she may need open reduction of a nasal
10 fracture"?

11 A. Yes, sir.

12 Q. And you see the word in there where it says
13 "unlikely"?

14 A. Yes, sir. I also see "but possible".

15 Q. Do you see anything in there that says that
16 you were caused to trip while jogging?

17 A. No.

18 Q. So after that appointment with Dr. Funcik, he
19 didn't refer you to any treatment --

20 A. Not then, so. No, he told me to go home. He
21 said -- he told me not -- to look for stuff for
22 concussions -- I don't remember. I know I wanted to go
23 home. And I had a lot of pounding in my head and
24 swelling. I just wanted to go home.

25 Q. So Dr. Funcik just said, just go on home --

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1 A. And take it easy, girl.

2 Q. And watch yourself for concussions?

3 A. Yeah, take it easy.

4 Q. Okay. Now, you went home, of course, you --
5 you drove yourself?

6 A. Yes, sir.

7 Q. From his office back over to Sullivan's
8 Island?

9 A. Yes, sir.

10 Q. And nobody is there at your house?

11 A. No, sir.

12 Q. Correct -- no one is there?

13 A. My dogs. Nobody is there, yeah.

14 Q. So you're -- you're home alone?

15 A. Yes, sir.

16 Q. And you spent the night alone?

17 A. Yes, sir. Of course, I don't remember it. I
18 must have, you know.

19 Q. Your husband was in Chicago?

20 A. I know he was at work, and I know he -- I know
21 I couldn't contact him right away. I don't know if he
22 was in Chicago. He does business in Boston or New
23 York. He goes to the west coast. I can't tell you
24 exactly where my husband was on that day.

25 Q. Okay. But he's got an office in Chicago?

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1 A. Yes, sir.

2 Q. Now, you -- let me back just the tiniest bit
3 up. Obviously, since you drove home from Dr. Funcik's
4 office, he let you drove home -- excuse me -- he let
5 you drive home?

6 A. I don't remember -- I mean, I don't remember
7 him saying anything one way or the other. I just got
8 in my truck and drove home.

9 Q. But he didn't say, oh, my goodness, Ms.
10 Connelly, you can't drive in this condition?

11 A. No, I don't recall that. I got in my truck
12 and I went home. It's like a 10 minute drive, sir.

13 Q. At the time your daughter, Christina, was away
14 at the -- the lake house with friends or something, so
15 she wouldn't have been there?

16 A. I don't know exactly where she was. I don't
17 know when exactly her classes stopped at Clemson, but I
18 know she wasn't home.

19 Q. And your other daughter was -- hasn't made it
20 home from college?

21 A. Mary was in Chicago at Northwestern, and they
22 go until the end of June.

23 (PAUSE.)

24 Q. Ms. Connelly, do you still have up there with
25 you a copy of Defendant's Exhibit 3?

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1 A. This one you gave me, sir, yes, sir.

2 Q. If you'll keep that handy please.

3 A. Okay.

4 THE COURT: Mr. Hines, here's a copy if you need
5 it.

6 MR. HINES: I'll use mine, Your Honor. Thank you.

7 BY MR. HINES:

8 Q. Ms. Connelly, what this is, is some material
9 from your Facebook page; correct?

10 A. Yes, sir.

11 Q. And we were provided it in this lawsuit by
12 your lawyers?

13 A. Okay.

14 Q. And it actually seems to go date-wise from
15 most recent to least recent. So what I would like to
16 get you to do, if you would, is flip to the very back
17 page.

18 A. Okay.

19 Q. So we can try to go up in time.

20 A. All right, sir.

21 Q. Are you there, Ms. Connelly?

22 A. Yes.

23 Q. Now, and is -- are you able to see there --
24 we've got it on our monitors -- are you able to see
25 there that -- that's a posting you made on Facebook?

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1 A. Yes, sir.

2 Q. On June 7, 2011?

3 A. Yes, sir.

4 Q. The day after the accident?

5 A. Yes, sir.

6 Q. And just read along with me. "Hi, an update.
7 Running yesterday, I fell on the sidewalk and fractured
8 my nose. Thank goodness I didn't break any teeth. The
9 moral of the story, I guess, is running is dangerous
10 for our crowd. No, not really. As soon as I can, I'll
11 be back out there. In the meantime, look like I got
12 hit with ten ugly sticks".

13 A. Yes, sir.

14 Q. Does that post say anything about being
15 tripped at all?

16 A. No, sir.

17 Q. Now, about three or four days after the
18 accident, that gets us to -- it's three days --

19 A. My Facebook thing?

20 Q. No, no, ma'am. You can put that aside. Thank
21 you?

22 A. Okay.

23 Q. About three or four days after the accident --

24 A. Yes, sir --

25 Q. Does that get us to --

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1 A. After the accident?

2 Q. Yes, ma'am. So that would be?

3 A. Six, seven, eighth -- approximately ninth --

4 Q. Well --

5 A. Sixth, it happened; 7th, 8th, 9th, 10th. What
6 day do you want, sir?

7 Q. I'm going with three or four days after the
8 accident.

9 A. Okay.

10 Q. If the accident happened on the 6th, I'd start
11 counting after that day on the 7th.

12 A. Okay.

13 Q. So 8th, 9th, and 10th.

14 A. Okay.

15 Q. And, again, you know, that's -- you know,
16 that's just ball-parking, but I think that's where that
17 is though. Now, about three or four days after the
18 accident, you couldn't breathe and you realized you
19 injured your back; correct?

20 A. I couldn't breathe because I -- I was so -- I
21 couldn't breathe through my mouth. I mean, I have to
22 breathe. But I was congested in my nose from the fall.
23 And my back, at that point, I was sitting up in the
24 bed, and it felt like -- I mean, I've never really been
25 in an auto accident or anything, but it felt to me like

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1 something sticking in my back, so I was worried about
2 it, yes. I was beat up.

3 Q. But was your -- what you noticed about not
4 being able to breathe, wasn't that related to what you
5 noticed about your back injury?

6 A. I don't -- please -- I don't understand the
7 question, sir.

8 Q. Would you turn with me -- if you wouldn't
9 mind, please -- look at your deposition again.

10 A. Yes.

11 Q. And if you'll look on page 83 at line 6. The
12 question is: "Any other areas of pain?" Answer:
13 Seven -- "Well, later I developed -- I had raised --
14 about three or four days later, I couldn't breathe". I
15 think the word there is probably mispronounced --
16 breath. "And I realized I injured my back. I don't
17 know if I raised something up with torquing like that,
18 but it was very painful".

19 A. Yes, sir.

20 Q. And that --

21 A. What I mean in this is when I would breathe, I
22 had a pain in my back. It -- it hurt. So I was
23 worried I had broken something in there. That's what I
24 meant when -- when I said it hurt to breathe. It
25 hurt -- it hurt me there to breathe.

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1 Q. And you -- you were experiencing significant
2 back pain?

3 A. I was experiencing significant pain all over,
4 so it was just part of the ordeal, you know, excuse me.

5 Q. But your back hurt so much so that it hurt to
6 breathe?

7 A. It was a sharp pain when I would breathe, so
8 that had me worried that maybe I had done something
9 here, right here (indicated) where I torqued.

10 Q. To your back?

11 A. Yes.

12 Q. Ms. Sanford, if you would please for me, this
13 is going back to that exhibit -- Exhibit 4 is the
14 record from Nason Medical Center on June 10, 2011,
15 please. Thank you. Ms. Connelly, do you remember
16 going to Nason Medical Center?

17 A. Yes, sir.

18 Q. And the date of this record -- well, this is a
19 record from that visit; isn't it?

20 A. Yes. It was Friday morning, early in the
21 morning.

22 Q. Now, on that day, the record indicates some
23 chief complaints and concerns up there at the top;
24 doesn't it?

25 A. Yes, sir.

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1 Q. And are you able to see that well enough that
2 you can read it?

3 A. Yes.

4 Q. Would you read the chief complaints and
5 concerns. And then when you're finished with that, I
6 want you to let me know if it says anything about back
7 pain.

8 A. Okay. "Patient states that she has a severe
9 headache, facial pain accompanied with dizziness and
10 nauseous following trauma Monday morning. She states
11 that she tripped on some construction debris while
12 jogging on the sidewalk, causing her to fall face down
13 on to the pavement, leaving her with multiple abrasions
14 to her face and right knee."

15 "She was initially seen by a plastic surgeon" --
16 her plastic surgeon -- excuse me -- "however, no
17 imaging was performed of her facial bones or right
18 knee. Onset was five days ago. Severity
19 moderate/severe. Location, head face. Where: Street
20 sidewalk. Context, fall. Pertinent positives include
21 nausea, laceration. Pertinent negatives include loss
22 of feeling in arms, loss of feeling in legs, neck pain,
23 double vision, chest pain, vomiting, rash, abscess,
24 abdominal pain. Recent illness tingling. Right knee,
25 upon questioning of her right knee abrasion, patient

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1 states that she's experiencing some dull, achy right
2 knee pain, increased from walking and standing. She
3 denies any point tenderness."

4 Onset was five days ago. Severity, moderate
5 severe. Patient was injured on the right knee.
6 Pertinent positives include nausea. Pertinent
7 negatives include loss of feeling, trouble breathing,
8 double vision and vomiting".

9 Q. Thank you, Ms. Connelly. None of that
10 included any reference to back pain?

11 A. No.

12 Q. That same record, although it doesn't say
13 anything about back pain, it does say that you tripped
14 on some construction debris while jogging?

15 A. Yes, sir. Can I back up a minute about the
16 back pain? I was just thinking about it. They did
17 take a C.T. scan of my back.

18 Q. At Nason they did?

19 A. Yes, they did. So I must have said something.
20 I must have showed them how I fell.

21 Q. Let me ask you this --

22 A. Yes, sir.

23 Q. I might get to that in a moment. But your --
24 well, we've mentioned your husband, Bill Connelly.

25 A. Yes, sir.

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1 Q. And he's a lawyer?

2 A. Yes, sir.

3 Q. Now, I think there's a picture that we talked
4 about a little while ago, the one that -- the
5 portapotty on it and the sidewalk; do you remember that
6 one?

7 A. The one you showed me up here?

8 Q. Yeah.

9 A. Yes, sir. Yes, sir.

10 Q. Now, speaking of pictures --

11 COURT REPORTER: I'm sorry, I'm having a little
12 trouble hearing.

13 THE COURT: Sorry, what?

14 COURT REPORTER: I'm having a little trouble
15 hearing him if he could speak up.

16 MR. HINES: Thank you for the reminder. I'll try
17 -- try to project.

18 BY MR. HINES:

19 Q. After speaking with your husband, Ms. Smith,
20 Cori Smith, she took some pictures of where the fall
21 happened?

22 A. That's what they told me, yes. I wasn't
23 there.

24 Q. And that would have been -- well, after you
25 went to see Dr. Funcik?

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1 A. Yes, sir.

2 Q. But before you went to see Nason?

3 A. Yes, sir.

4 Q. And on the day after the accident, your
5 husband contacted some folks to threaten legal action,
6 about this fall; right?

7 A. I don't think he was threatening legal action
8 about this fall. I think he was just telling them what
9 happened. I think it was like, this is what happened
10 and do you guys have insurance and whatever --

11 MR. BROWN: Your Honor --

12 A. I don't know. I haven't read -- I wasn't -- I
13 didn't write the letter, so I don't know what he meant.

14 MR. BROWN: Your Honor --

15 MR. HINES: Your Honor, I think we've got a matter
16 of law to address.

17 THE COURT: Pardon?

18 MR. HINES: I think we have a matter of law to
19 address.

20 THE COURT: All right, Madam Forelady, ladies and
21 gentlemen of the jury, what we are going to do is break
22 for lunch at this time. Be back in the jury room at
23 2:30, and come -- when you come to the courthouse, come
24 straight to the jury room. Don't do any electronic
25 examination in this case on the computer, iPhone or

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1 anything. I want you to base your decision on what you
2 hear in the courtroom, not what you find on the
3 internet, or any other source.

4 So be back in the jury room at 2:30, and we'll get
5 started at that time. If you'll go with the bailiff,
6 he'll show you where you came in this morning, so
7 you'll know where to come. Have a good lunch.

8 (WHEREUPON, the jury leaves the courtroom at
9 approximately 12:48 p.m.)

10 THE COURT: Do you have any objection to the
11 testimony?

12 MR. HINES: I doubt they do, Your Honor. We
13 certainly do because Ms. Connelly --

14 THE COURT: I'm sorry? What?

15 MR. HINES: I'm not certain that the plaintiff
16 would have an objection to it, Ms. Connelly just said
17 that we have insurance, which is a pretty -- well, it's
18 a terrible thing to say in front of a jury trial.

19 THE WITNESS: I don't know if I said it, sir. I
20 don't remember. I mean, I'm just trying to talk. I
21 said --

22 THE COURT: Well, you asked her about her husband
23 writing a letter; right?

24 MR. HINES: I said did your husband write a letter
25 threatening legal action.

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1 THE COURT: Right.

2 A. And I said, no -- I said he was not
3 threatening --

4 THE COURT: Ma'am, please be quiet, please. Okay.

5 THE WITNESS: Yes, sir.

6 THE COURT: All right. What's -- what's your
7 question?

8 MR. HINES: She can't tell this jury, Your Honor,
9 that we've -- that we've got insurance. That's
10 absolutely not appropriate in this case, and it should
11 have been instructed to her by her counsel before she
12 testified. I mean, you can't open the door for
13 insurance by asking a question like that. If I -- if I
14 said, Ms. Connelly, of course, you've got insurance --
15 no, sure -- that would be my foot in my mouth. That's
16 not at all what happened here.

17 And I guess, you know, what I would appreciate
18 would be a moment to confer with my co-counsel to see
19 what we want to do with regard to a mistrial or
20 curative instructions-- I don't think an instruction
21 like that -- I don't think that can be cured.

22 THE COURT: Well, what is your objection? What
23 are you -- what are you asking the court to do?

24 MR. HINES: Well, certainly she needs to --

25 THE COURT: I'm sorry? What? What are you asking

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1 the court to do?

2 MR. HINES: Your Honor, the only thing to do is to
3 declare a mistrial.

4 THE COURT: Pardon? What are you asking the court
5 to do?

6 MR. HINES: I'm asking you to declare a mistrial
7 because she introduced insurance into this case and
8 that is absolutely wrong. And it's something that can
9 certainly never be cured with instruction. You can't
10 say, ladies and gentlemen, let me tell you not to
11 consider the fact that they have insurance --

12 THE COURT: Okay. Thank you very much. Read back
13 what she said to me, please, ma'am.

14 (Whereupon, the testimony was read back.)

15 MR. GRUENLOH: Your Honor, just for a little bit
16 of context, the exhibits that you have before you from
17 the defendants are their third iteration of exhibits.
18 Their first iteration of exhibits contains this letter,
19 and this group of emails.

20 And for precisely this reason, we objected to this
21 by interjecting this claim issue into the record at
22 this point -- all right. And we had this back and
23 forth, Russ Hines and I did, and they withdrew this
24 letter. All right. And I understood that this was not
25 going to come into this trial. So when they come and

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1 they ask -- start asking her about a legal claim and --
2 you know, she knows about this letter now, we've had
3 conversations about it. All she said was, no, I don't
4 really think he was making a legal claim. He was
5 saying, do you guys have insurance. And "do you guys
6 have insurance" is not the same thing as saying, you
7 guys have a million dollar policy. There is a big
8 difference between those two things.

9 And to the extent that the court disagrees with me
10 and thinks that for some reason this is going to
11 improperly influence the jury, I think that it can be
12 easily cured with a curative instruction that you are
13 not to consider whether the defendant has insurance or
14 not. All right.

15 Because nobody in this case -- and there's been no
16 evidence that they do have insurance, so that would be
17 our response to that, Your Honor. This -- a mistrial
18 would be way too severe at this point, if anything, a
19 curative instruction.

20 THE COURT: Thank you very much. Yes, sir.

21 MR. HINES: Your Honor, first of all -- and I
22 guess this is no reason to -- well, I don't understand
23 what opposing counsel just said about any agreement
24 that he or I had -- ever had. But this is really easy.
25 I'm not telling you that prepare a witness by telling

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1 them what to testify to, but I think you certainly
2 prepare them by telling them what not to testify --

3 THE COURT: Well, she said her husband called or
4 wrote -- or whatever -- and said, do you have
5 insurance. That's what she said. Okay. So why do you
6 think I should grant a mistrial on that?

7 MR. HINES: Because it's absolutely, fundamentally
8 not -- it's prejudicial and it cannot be cured, Your
9 Honor. That bell cannot be unrung. I mean, you can't
10 tell a jury, oh, listen don't consider if they've got
11 insurance because that's -- that doesn't come into a
12 trial, Your Honor. It's a fundamental defect in the
13 process that we're trying to achieve here.

14 I mean, just yesterday I thought we had a motion
15 hearing where they said -- listen, if they even so much
16 as hint that this guy could perhaps have a problem
17 with -- with his -- with his business during a market
18 downturn, then we want to get into insurance.. I
19 mean -- and I can assure you that I never said anything
20 at all to Mr. Gruenloh about not mentioning the fact
21 that she had -- her husband had presented --

22 THE COURT: All right. As far as the mistrial is
23 concerned, your motion is denied. I'll see y'all at
24 2:30. Have a good lunch.

25 MR. GRUENLOH: Your Honor, if I understand --

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1 THE COURT: Thank you very much. Ms. Connelly
2 during lunch, don't talk to anybody about your case --

3 THE WITNESS: And I'm sorry about that. I don't
4 really understand --

5 THE COURT: All right. Thank you very much.

6 (WHEREUPON, a lunch break was taken.)

7 THE COURT: All right. Before we broke for lunch,
8 there was a motion for a mistrial that the court denied
9 the motion. And the court was referring -- relying on
10 Gazelle vs. Piedmont Manufacturing Company, 193 S.E.
11 39; and Benjamin Keller vs. Pierce, Young, Angel 171
12 S.E. 2nd 352.

13 The court finds that the -- the plaintiff was
14 being asked about a letter that her husband wrote
15 about -- about her fall to Winsor Custom Homes, and
16 made the comment that her husband asked them "do you
17 have insurance". Number one, I don't think that places
18 the insurance issue before the Court. She was just
19 quoting what her husband asked the defendant.

20 If, in fact, it does, the court finds that it was
21 inadvertent -- it was inadvertently stated, it's not
22 grounds for a mistrial. However, I would be glad to
23 give a curative charge if the defendant so desire. Do
24 you want me to give a curative charge and strike it?

25 MR. HINES: Your Honor, the only reason that I

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1 don't want you to give a curative charge is because I
2 want to make sure the record --

3 THE COURT: I -- I didn't ask you -- my question
4 is very pointed: Do you want me to give a curative
5 charge; yes or no?

6 MR. HINES: Your Honor, this isn't disrespectful,
7 but I have to make a record here --

8 THE COURT: Pardon?

9 MR. HINES: I have to make a record, Your Honor.

10 THE COURT: You're making a record. Do you want
11 me to give a curative charge; yes or no?

12 MR. HINES: Your Honor, the record would be -- if
13 I was to tell you, no, Your Honor, I don't want one, in
14 Columbia a few years from now they're going to say,
15 well, you were offered a curative charge, Mr. Hines,
16 and you didn't take it. No, Your Honor, no curative
17 charge is appropriate. It cannot be cured. And,
18 therefore, I don't want a curative charge because it
19 cannot be cured.

20 THE COURT: Okay. Thank you very much. Anything
21 from the plaintiff?

22 MR. GRUENLOH: May I just proffer the whole
23 correspondence to the court, because I believe that I
24 just gave you the letter. And the email stream that's
25 attached with it --

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1 THE COURT: There's a stream of emails attached to
2 this. I don't know --

3 MR. GRUENLOH: Oh, there is. Okay.

4 THE COURT: There's two letters attached.

5 MR. GRUENLOH: I just wanted to point out the back
6 page indicates, please -- "please have owners contact
7 me with insurance information".

8 MR. HINES: Your Honor, let me -- let me make sure
9 that --

10 THE COURT: All right. I'll mark that as Court's
11 Exhibit No. 3 pursuant to the motion.

12 (WHEREUPON, Court's Exhibit No. 3 was marked and
13 made a part of the record.)

14 MR. GRUENLOH: And I also just wanted to ask Your
15 Honor -- if they're going to continue to ask her
16 questions about this, because they asked for her
17 interpretation of this. And when they ask for her
18 interpretation of this -- you know, I talked to her
19 about this --

20 THE COURT: That's -- that's fine. I've ruled,
21 Let's move on. Okay.

22 MR. GRUENLOH: I just want to make sure they're
23 not going to ask her any more questions about it.

24 THE COURT: All right. I've marked this as
25 Court's Exhibit No. 2, I believe -- or 3. All right.

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1 Anything else before we bring the jury?

2 MR. HINES: Your Honor, this just goes to making
3 the record on two points. I believe the question I
4 asked her --

5 THE COURT: Let me make -- let me make the record
6 very clear. The rules says when the Court has ruled,
7 there's no more argument. Have a seat and let's get
8 started please, sir. Let's follow the rules.

9 MR. HINES: Your Honor --

10 THE COURT: I don't care. You made your record.
11 Have a seat.

12 MR. HINES: But --

13 THE COURT: Have a seat.

14 MR. HINES: Your Honor, you were saying --

15 THE COURT: Have a seat, and we'll get started.
16 The rules say when the court has ruled, no more
17 argument. I have ruled. It's over. We are moving on.
18 Do you understand?

19 MR. HINES: I understand the Court's ruling.

20 THE COURT: Thank you very much. Bring us the
21 jury please.

22 (WHEREUPON, the jury enters the courtroom at
23 approximately 2:38 p.m.)

24 THE COURT: When you come in, just automatically
25 have a seat. Come on and have a seat. They're

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1 standing for you. Okay. All right. So just come in
2 and have a seat. Mr. Hines, you may continue cross
3 examination, please, sir.

4 MR. HINES: Thank you, Your Honor. May it please
5 the court.

6 THE BAILIFF: The jury is all here, Your Honor.

7 THE COURT: Thank you very much.

8 BY MR. HINES:

9 Q. Now, Ms. Connelly, I think when we left off,
10 we were date-wise talking about your visit to -- to
11 Nason Medical Center June 10, 2011.

12 A. Okay.

13 Q. Let's see, Ms. Sanford, would you please put
14 up --

15 MR. GRUENLOH: Your Honor, the plaintiff objects
16 to showing Ms. Connelly -- just her medical records, I
17 mean if there's a question.

18 THE COURT: What's your legal objection?

19 MR. GRUENLOH: That -- this is not her record.
20 She has no personal --

21 THE COURT: Overruled. Go ahead.

22 BY MR. HINES:

23 Q. Ms. Connelly --

24 A. Yes.

25 Q. If you would, maybe to make me look less

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1 foolish. I'm putting down the yardstick, so I'm just
2 going to try to point. I thought that was a good idea
3 earlier. I've come to rethink. Let's see here. I
4 wanted to ask you, on this record -- you are able to
5 see right in front of you?

6 A. Yes.

7 Q. As long as you can just look at that and --
8 you know. As long as we are reading together.

9 A. All right.

10 Q. That record, again, we know when it was --
11 about four days after the fall -- the fall being June
12 6th. And now here we are up to June 10th; isn't that
13 right?

14 A. Yes, sir.

15 Q. All right.. Are you able to see on there where
16 it makes reference to the review of symptoms?

17 A. Would it be under head injury? Chief
18 complaints?

19 Q. I'll tell you what -- I think you might need
20 to scroll down there. It's review of symptoms. Are
21 you able to see down a little farther -- now towards
22 the bottom of that page?

23 A. Yes, sir.

24 Q. Okay. On that report, do you see where it
25 says -- "with respect to respiratory, no S.O.B." -- I

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1 believe that means -- I mean, you would agree that
2 means shortness of breath?

3 A. I don't know what it means.

4 Q. You don't know what it means.

5 A. No.

6 Q. Okay. If you'll keep on going down the record
7 a little farther. You'll see under the physical exam
8 part -- let me see if we have that showing there -- I
9 think we might need to go down a little bit more.
10 Under physical exam, you see where under nose and
11 throat, it says "no nasal deformity"?

12 A. Yes, sir.

13 Q. And keep on going down under respiratory, do
14 you see where it says "normal to inspection"?

15 A. Yes, sir.

16 Q. And under muscular skeletal, you see there
17 where it says, "moderate swelling to bridge nose with
18 slight asymmetry to the right, no sign of septal
19 hematoma, vocalized tenderness of the right patella,
20 slight bilateral" -- I'm going to mess this one up --
21 "paracervical (ph) tenderness"?

22 A. Yes, sir.

23 Q. And that's -- that's under muscular skeletal;
24 right?

25 A. Yes.

1 Q. And that doesn't say anything about a back
2 injury?

3 A. No.

4 Q. And just finally on that note, if you'll
5 scroll down so she's able to see that -- it said
6 "assessment/plan" -- do you see that?

7 A. Yes.

8 Q. And it says "pain in joint right knee, right
9 knee contusion, headache, fracture right nasal bone,
10 concussion". And I believe PT means patient --
11 "patient instructed to follow-up with her P.C.P." --
12 which I believe means primary care physician -- "Dr.
13 Funcik next week as scheduled"?

14 A. Yes, sir.

15 Q. Okay. Nothing in there saying anything about
16 the back?

17 A. No.

18 Q. Ms. Sanford, are you able to keep on going
19 down -- I think the C.T. scans might be next. Okay.
20 Do you understand that --

21 MR. GRUENLOH: Your Honor, again, I'm going to
22 object. This is all hearsay.

23 THE COURT: Well, the medical records are there.
24 And they are in evidence, and he can ask her about her
25 own medical records.

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1 Ms. Connelly, let me explain something to you
2 please, ma'am. When you -- when he asks you a
3 question, you can answer the question yes or no, and
4 give an explanation, or you can say you don't know, or
5 you don't understand; okay?

6 A. Okay.

7 THE COURT: Please proceed, Mr. Hines.

8 A. Thank you.

9 BY MR. HINES:

10 Q. Ms. Connelly, when you go and you're treated
11 by a doctor, you give truthful and accurate
12 information?

13 A. Yes.

14 Q. And complete information?

15 A. As much as I can, of course, yes.

16 Q. And, of course, some of these doctors in this
17 case are going to testify in your case -- at least, you
18 know, that's -- is that your understanding?

19 A. Pardon me?

20 Q. You know what -- do you have reason to doubt
21 that the accuracy of your -- your doctor's records?

22 A. No, sir.

23 Q. Okay. You -- I thought you testified about
24 C.T. scans earlier. And if I was mistaken, maybe this
25 will short circuit it. But did Nason do a C.T. scan of

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1 your back?

2 A. All I know is, it says exam here, "C.T. of the
3 cervical spine". Okay. I'm not -- I've never had a
4 C.T. scan -- I don't think. I don't know what those
5 things are. Okay. I don't know what he was scanning
6 for. But it says here C.T. -- "C.T. of the cervical
7 spine."

8 Q. Do you see right below it says "history"?

9 A. "Pain in the neck", yes.

10 Q. So does that indicate that's not for back pain
11 to you?

12 A. Yes, it does. It's in the neck it said.

13 Q. There's another C.T. scan, Ms. Connelly, do
14 you see this one says "exam maxillofacial C.T."?

15 A. Yes, sir.

16 Q. You would agree that's not of your back? That
17 C.T. scan is not a scan of your back?

18 A. Not that I'm aware of. No, I would think
19 facial means face.

20 Q. And this one says "right knee"?

21 A. Yes, sir.

22 Q. And that's not a back?

23 A. No, sir.

24 Q. And finally C.T. of the head?

25 A. Yes, sir.

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1 Q. Do you see down where under impression, where
2 it says unremarkable, comma, enhanced C.T. of the head?

3 A. "Un-enhanced C.T. of the head", yes, sir.

4 Q. Okay. Would you go one more, please. Excuse
5 me -- then impression here on the right knee, I meant
6 to ask you that earlier -- do you see where it says
7 under "impression, unremarkable right knee"?

8 A. Yes, sir.

9 Q. Okay. And that report, I want to make sure
10 there's no disagreement about this, and I understand
11 what it is if there is. That report indicates that
12 you -- that doctor indicates you had a concussion?

13 A. Yes, sir.

14 Q. Is there any question that that doctor -- what
15 he's saying is based upon the complaints that you -- or
16 based upon -- the doctor is saying that based upon what
17 you told the doctor on that day, you had suffered a
18 concussion four days prior?

19 MR. GRUENLOH: Objection, Your Honor. Calls for
20 speculation. She doesn't know how the doctor --

21 THE COURT: I'll sustain the objection. There's
22 no way she knew what the doctor's opinion was.

23 MR. HINES: Very well. That's fine.

24 BY MR. HINES:

25 Q. You mentioned earlier you woke up that

1 morning?

2 A. Yes.

3 Q. And you and Mr. Connelly were there in bed in
4 the morning?

5 A. I don't think Billy was home -- oh, the
6 morning of the 10th?

7 Q. Yes.

8 A. Yes, uh-huh, very early.

9 Q. And you felt -- you explained how bad you felt
10 that day?

11 A. Yes, sir.

12 Q. And how worried you were about what was going
13 on?

14 A. Yes, sir.

15 Q. Well, when the -- so at Nason, were -- did the
16 doctors there give Mr. Connelly -- I mean, did they
17 tell him how you should -- how -- about precautions he
18 should take for you and how he should --

19 A. Billy didn't go with me, no.

20 Q. Oh, so he didn't drive you to Nason?

21 A. No, sir.

22 Q. Would you please, Ms. Sanford, are you able to
23 pull up Plaintiff's Exhibit 6. (Pause.) All right.
24 If you would please go down to -- there's some billing
25 information. Ms. Connelly -- and, Ms. Sanford, if you

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1 would scroll down so Ms. Connelly can see all of
2 that -- all I'm trying to get to here -- let's start on
3 that page.

4 A. Okay.

5 Q. I know you saw Dr. Theobald. Do you see on
6 this page where it's bills that relate to treatment you
7 had on certain dates?

8 A. Yes.

9 Q. And it looks like they have -- the dates sort
10 of go from the bottom -- from the top to the bottom --
11 meaning, the earliest date on this page is June 17th of
12 2013. It goes all the way down to January 1 -- it
13 should be 31st of 2014?

14 A. Yes.

15 Q. Go to the next page. Now, on this page, it
16 shows the similarly -- doesn't this show the dates of
17 treatment also? This time beginning 6-15-11 and going
18 to August 17th of '11?

19 A. Yes, sir.

20 Q. And you agree there's a -- between August 17th
21 of 2011, the last -- you know, the last date on that
22 one -- and if we could scroll up to refresh -- and then
23 June 17, 2013, you didn't have any visits with the
24 doctor --

25 A. That I don't know just from these papers

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1 you're showing me. I haven't seen his bills or
2 anything like that. So just from these two papers, I
3 don't know if there's a 2012.

4 Q. Okay. We will -- unless there's been some
5 sort of confusion, it's -- my understanding is your
6 lawyers put these in as his bills in evidence in this
7 case.

8 A. Right.

9 Q. If you will please keep going down, Ms.
10 Sanford, to the -- this right here. I thought you
11 testified earlier that you went to see Dr. Theobald
12 four days after the accident? Now, is it possible it
13 wasn't four days after --

14 A. Well, of course. Of course. Most definitely.
15 I don't think I said I went to see Dr. Theobald four
16 days -- I went to see Nason. If I said Dr. Theobald, I
17 was wrong. I'm sorry. I went to see Nason.

18 Q. And it looks like the first visit to Dr.
19 Theobald was on the 15th --

20 A. Yes, the next week, yes.

21 Q. About nine days after?

22 A. Yeah.

23 Q. Okay. And is that -- is that your patient
24 information there that you -- is that your handwriting?

25 A. Yes, sir.

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1 Q. If you'll scroll down please, Ms. Sanford, all
2 the way to the next page. And that continues to be
3 your handwriting?

4 A. Yes, sir.

5 Q. Do you see on the form where -- where it asks
6 you to describe your current health?

7 A. Yes, sir.

8 Q. And the word "great" is written with an
9 exclamation point?

10 A. Yes, sir.

11 Q. Ms. Sanford, would you keep on going down to
12 the next document. In fact, just keep on scrolling.
13 I'll tell you when to stop. Right there. If you'll go
14 up, please. So we can see the top. All the way to
15 that heading. Do you see on this page, Ms. Connelly,
16 it says "Rosemary Connelly", your name?

17 A. Yes.

18 Q. And the date of June 15, 2011?

19 A. Yes, it does.

20 Q. Now, that's -- that's not your handwriting, is
21 it?

22 A. No. That's Dr. Theobald's.

23 Q. I know that the handwriting is perhaps not as
24 dark as we might like, but if you can follow along with
25 me -- let me know if you think that I'm misreading or

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1 misinterpreting, but the words seem to me to say
2 "logging" -- excuse me -- "jogging on Daniel Island and
3 tripped on unsecured" -- looks like that's "C.O.N.S.T"
4 -- "construction debris and fell forward twisting, and
5 landing on R, circled, right shoulder"?

6 A. Yes, sir.

7 Q. Okay. So did you land on your right shoulder
8 when you fell?

9 A. Well, I was trying to explain -- when I fell,
10 my whole body torqued. Okay. The whole body twisted.
11 So, I fell -- yes, I did fall on that side of my body.
12 Okay. I fell on my face on that side of my body. I
13 fell here on this side of my body. I fell on my knee
14 on that side of my body, yes, sir.

15 MR. HINES: May I beg the court's indulgence just
16 for one moment?

17 THE COURT: Yes, sir.

18 (PAUSE.)

19 BY MR. HINES:

20 Q. Thank you, Ms. Connelly.

21 A. Is that all --

22 Q. No, I've got some more, but I just want to
23 thank you for your patience. But Ms. Sanford, if
24 you'll go down, there's -- you'll see there's just --
25 one page or two pages down -- where some more

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1 handwriting and talks about some visits, like this. We
2 can stop right here just for a moment. Ms. Connelly,
3 do you see what they call -- seems to be progress notes
4 there?

5 A. Yes, sir.

6 Q. And do you see it's a couple of columns on the
7 left, one says "date" and one says "visit"?

8 A. Yes.

9 Q. Okay. And it looks like that date begins
10 handwriting --

11 A. Yes.

12 Q. And it seems like that's the first visit on
13 6/15?

14 A. Yes, sir.

15 Q. And then you see date out -- the visit number
16 to the right. Ms. Sanford, would you scroll to the
17 next page -- I want to look -- I think visits 12 and
18 13. Do you see on these progress notes where it says
19 "date", it sure looks like 8/2. We can match --

20 A. Visit 12, sir?

21 Q. Visit 12, yes, ma'am.

22 A. All right.

23 Q. And it looks like that's in early August?

24 A. Okay.

25 Q. And then visit 13 also looks like it's, you

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1 know, maybe a week after -- not too long after -- I
2 know it's handwriting.

3 A. Yes, sir.

4 Q. Okay. Do you see on that top one where it
5 says "feels good, no complaints"?

6 A. Yes, sir.

7 Q. And then do you see the handwriting that says
8 "able to exercise fully"?

9 A. Yes, sir.

10 Q. And then a little further down, it says "no
11 complaints"?

12 A. Okay. Yes, sir.

13 Q. And at least, according to these records,
14 there's not another visit with Dr. Theobald until the
15 year 2013?

16 A. If that's what the records say. I thought I
17 had went to see him but...

18 MR. HINES: Ms. Sanford, if you would, go to Dr.
19 Funcik's note. It's the one -- it's the next note in
20 line. I believe it's about a week after that first
21 one. It's actually undated. And the next one in
22 sequence -- the 6/1 -- you'll see it on your page.
23 Right there. Thank you.

24 BY MR. HINES:

25 Q. Now, Ms. Connelly, does this appear to be the

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1 note from your next -- well, I'll tell you what, once
2 we -- it says right there, "Rosemary comes back for
3 re-evaluation"?

4 A. Yes.

5 Q. And it doesn't look like this is -- I know
6 that there's a gap there, but --

7 A. Sometime in the next week maybe, I don't know,
8 after Nason. Yeah. It says "Rosemary went to Nason
9 Medical Clinic".

10 Q. I can tell you, I think that's right -- about
11 a week.

12 A. Yeah.

13 Q. Do you see there where it says "with respect
14 to her nasal fracture, it seems to be progressing
15 nicely"?

16 A. Yes, sir.

17 Q. All right. And if you continue on a little
18 further down, it says "as expected, there is some
19 tenderness and swelling of the right paranasal area"?

20 A. Yes, sir.

21 Q. And it indicates that "our suspicion that --
22 suspicion that there is a non displaced or minimally
23 displaced nasal fracture has been confirmed"?

24 A. Yes.

25 Q. And keep on going down, you see it says, "we

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1 discussed her options". She has the option of letting
2 it heal conservatively vs. a reduction of the nasal
3 fracture".

4 A. Yes, sir.

5 Q. "Either way, she's likely to have some
6 deformity in the area"?

7 A. Yes, sir.

8 Q. "If she were my wife, because it is minimally
9 displaced, I would allow it to just simply heal for
10 about six weeks, then perform some B.I.D. digital
11 massage to try to make it as smooth as possible"?

12 A. Yes, sir. That's what it says.

13 Q. Do you know what "B.I.D. digital massage"
14 means?

15 A. No, I don't.

16 MR. HINES: Ms. Sanford, if you would, please, go
17 to the next one in the sequence, it's July 12th. Okay.

18 BY MR. HINES:

19 Q. Ms. Connelly, are you able to see that note?

20 A. Yes, sir.

21 Q. It appears to be about a month after the fall,
22 just over a month ago it starts -- I'm just trying to
23 date. This -- this seems?

24 A. Yes.

25 Q. About a month after the fall, you're back with

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1 Dr. Funcik?

2 A. Uh-huh.

3 Q. And it says that you returned that day -- in
4 that second sentence -- "she returns today reporting
5 that she notices swelling and prominence on the right
6 side"?

7 A. Yes, sir.

8 Q. "Where the fracture occurred"?

9 A. Yes, sir.

10 Q. "Along with some interment nasal bleeding and
11 some nasal obstruction on the right side"?

12 A. Yes, sir.

13 Q. So at that point, you were experiencing some
14 swelling; correct?

15 A. It was swollen, yes. My nose was swollen.

16 Q. And you reported that to Dr. Funcik?

17 A. Yeah. I mean he saw me, so I didn't need to
18 tell him, you know. He saw me.

19 Q. But just to make sure we're not looking at
20 something -- it says she is reporting that she notices?

21 A. Ah, well, I'm sure I told him that there's
22 swelling in here.

23 Q. So you noticed that you told the doctor?

24 A. I'm sure I did, yes.

25 Q. If you would go, Ms. Sanford -- you might need

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1 to scroll a little bit down -- now, it look likes under
2 assessment and recommendation?

3 MR. GRUENLOH: Your Honor, I'm really sorry to
4 interrupt, Mr. Hines, but could I please approach the
5 bench for just a moment.

6 THE COURT: Yes, sir.

7 (WHEREUPON, a bench conference was held.)

8 BY MR. HINES:

9 Q. Ms. Connelly, under assessment and
10 recommendation, it looks like here you see where "it's
11 at her convenience, I recommend proceeding with open
12 reduction of nasal fracture"?

13 A. Yes, sir.

14 Q. So the note we looked at just before that
15 talked about a -- simply letting it heal; do you
16 remember?

17 A. Yes.

18 Q. And now at this plan, Dr. Funcik is now
19 determined to proceed with the surgery?

20 A. Yes, sir.

21 Q. Please go to the next one, August 9th. Okay.
22 Ms. Connelly, here we are on August 9, 2011, with Dr.
23 Funcik?

24 A. Yes, sir. Yes, sir.

25 Q. "Rosemary comes in for her preoperative

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1 visit".

2 A. Yes, sir.

3 Q. "She fractured her nose a short time ago. In
4 addition to reducing the fracture, she wants to have
5 some refinements. We plan to take the hump down,
6 narrow her tip, and elevate the nasal tip".

7 A. Yes, sir.

8 Q. Now, you deny asking Dr. Funcik's for cosmetic
9 surgery on your nose?

10 A. We talked about that at my deposition, Mr.
11 Hines. I'm just going to tell you that I talked to --
12 I had a hook. My mother was --

13 COURT REPORTER: Your Honor, could you get her to
14 speak up.

15 THE COURT: Ms. Connelly, move closer to the
16 microphone and speak up so everybody can hear you
17 please, ma'am.

18 A. Yes, sir. I had a hooked nose. It was a
19 Nicaraguan (ph) hooked nose, okay. And it wasn't that
20 attractive. Okay. My brother had the same nose. He
21 said that what he was going to do, was raise the tip,
22 because it was like an eagle beak -- a bird beak is
23 what my nose looked like. Okay. And that's what he
24 told me he was going to do, refine the tip. That's all
25 he -- that's what he said to me.

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1 BY MR. HINES:

2 Q. I see. And I assume you -- you're going on
3 your recollection from that deposition testimony?

4 A. Yes, sir.

5 Q. Well, if you would, please -- do you have your
6 deposition in front of you?

7 A. Yes, sir.

8 Q. If you could go to -- well, page -- and again,
9 the question I just asked you -- in case we're unclear
10 is -- is to confirm or not confirm that you deny asking
11 Dr. Funcik for cosmetic surgery on your nose?

12 A. I don't think that's the right way for me to
13 answer that -- can I just say, I did not go to him for
14 cosmetic reasons. I went to him with a broken nose.
15 And he said while we're in there, he was going to raise
16 the tip of my nose.

17 Q. Well, do you -- you're not -- you had no
18 say-so in that?

19 A. That's a good question. He never showed me a
20 computer imaging what the nose would look like, so I
21 really didn't know what the nose was going to look
22 like. All I know is that I was frightened and scared
23 to have my nose worked on. That he was going to put me
24 under anesthesia. That he was going to operate on my
25 nose up here. And he said while I'm in here, I'm going

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1 to raise that awful tip of your nose. And I probably
2 agreed with him, I mean, I was almost 55 -- or 57
3 years -- or however old I was -- so that's -- that's
4 how we left it. We didn't have a drawing of the nose.
5 We didn't -- I didn't go there for a specific purpose
6 of having my nose fixed. I mean, you know,
7 cosmetically fixed is what I'm saying.

8 Q. Sure. And looking back at this -- at this
9 record, it is the -- this is the third sentence -- "in
10 addition to reducing the fracture, she wants to have
11 some refinements"?

12 A. Yes, sir.

13 Q. Are you saying that Dr. Funcik has not
14 reported that accurately?

15 A. No. I'm sure -- if I was going to have -- if
16 my nose was going to be operated on for -- because of
17 the trauma, I'm sure if he said, I can make it look
18 better than it does, I'm sure I said go for it. I
19 mean, you know.

20 Q. Now, I want you to look at your deposition,
21 please, on page 97, line 18?

22 A. Yes, sir.

23 Q. Please let me know once you get there.

24 A. Okay. I'm there.

25 Q. Question: "The last one, this is the one that

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1 I guess I wanted to make sure I understand. It's open
2 rhinoplasty, which is again -- we are as lay people,
3 you know, I -- well" -- as you can tell this is my
4 question of you -- "to get sort of" --

5 MR. GRUENLOH: Your Honor, I'm sorry. I have to
6 object to him just reading testimony in. If there's a
7 question that he's impeaching her on, that's one thing.
8 But just reading into the record testimony, we object
9 to that.

10 THE COURT: Well, I think he's going to ask her is
11 that what she said in her deposition -- is there a
12 question you're going to get to in that deposition?

13 MR. HINES: Your Honor, it's always cringe worthy
14 when I read my deposition transcripts. There's a lot
15 of --

16 THE COURT: Is there any question in the
17 transcript?

18 MR. HINES: Yes, sir.

19 THE COURT: Well, ask her the question, and ask
20 her did she make -- to read her answer, please, sir.

21 BY MR. HINES:

22 Q. Here's the question -- and this is about --
23 this is about those refinements, cosmetic type aspect
24 is what I asked. "Is it your testimony that's not
25 something that you requested?" That's page 98, line

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1 12. And then the answer on line 13 is "Absolutely
2 not"?

3 A. I'm saying it like that because after the
4 fact, you know -- I think he made my nose too small to
5 -- you know -- when I had in my mind -- I liked my nose
6 that was a hook -- maybe not as much hook, but I
7 think -- I think I say it in here. It's a nose. I'm
8 fine with it. I -- you know, it has a function, right.

9 But am I unhappy with it? No. Am I happy with it?
10 No. The bottom line is it's a nose. Okay. I didn't
11 go to him and tell him to remake my nose. I asked --
12 he said he would lift my tip.

13 Q. I thought earlier you said, Ms. Connelly, that
14 you wanted to make absolutely sure that you weren't
15 over compensated?

16 A. No, sir.

17 Q. To have the -- the dollar amounts taken out
18 for any billings associated with a cosmetic
19 procedure --

20 A. Yes, sir.

21 Q. -- right?

22 A. Yes. And that -- I'm not asking for that, no,
23 sir.

24 Q. And that was, you know, some number --
25 whatever it was -- and you paid for those things?

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1 A. Yes, sir.

2 Q. And you -- but -- and was it over a thousand
3 dollars?

4 A. Yes, sir.

5 Q. Probably over two or three?

6 A. I don't know exactly.

7 Q. But certainly you're not saying you paid for
8 those and you didn't -- that you didn't want?

9 THE COURT: Mr. Hines, we have -- it's getting
10 very repetitive. Okay.

11 MR. HINES: Certainly, Your Honor, I'll move on.

12 THE COURT: I mean, we've gone over and over and
13 over it. She's said the same thing at least a half a
14 dozen times. So let's move on please, sir. It's
15 getting very repetitive.

16 BY MR. HINES:

17 Q. Ms. Connelly, do you still have up there the
18 exhibit that is Defendant's Exhibit 3?

19 A. The Facebook stuff, yes, sir.

20 Q. Yes, ma'am.

21 A. Uh-huh.

22 Q. Would you go, please, to the page that has on
23 the bottom RMC Production 149?

24 A. Yes, sir.

25 MR. HINES: And, Ms. Sanford, if you could put

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1 that up for us please. Would you scroll down to where
2 we could see a little bit more of the middle of the
3 page -- bottom of the page says 149. Thank you.

4 BY MR. HINES:

5 Q. Do you see the picture that we've got there?

6 A. Yes, sir.

7 Q. And who's in that pictures?

8 A. My daughter, Mary, is the one in the little
9 tank top. I'm in the middle. And my daughter,
10 Christina, is the one with the dark top.

11 Q. Okay. And there's a date associated with that
12 on that page?

13 A. Yes.

14 Q. And it's August 9th of 2011 -- or at least the
15 date that's on that page?

16 A. Yes. The date that's on that page is August
17 9, 2011. I don't know if the picture was taken then.

18 Q. And as we were just talking about, that August
19 9th date, that -- it just so happens it's the same day
20 as the preoperative visit to Dr. Funcik?

21 A. Then it wasn't that day.

22 Q. But it -- it was near that day?

23 A. Maybe. I didn't put this post on, sir. I
24 didn't -- I don't know how to take any pictures and put
25 the post. And I don't know if you post a picture, it

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1 puts the date they put the post on, I don't know. You
2 know, I don't know that. I know how to type and make
3 that kind of stuff. But I don't know how -- you know,
4 I don't know how to put the pictures on Facebook.

5 Q. Well, I'm just saying -- I'm not trying to
6 hold you down to a specific day. I'm saying, give or
7 take, you know, it was around August 9, 2011, that
8 picture --

9 A. I would -- give or take. And it could be give
10 or -- you know, give or take either way. I don't know.

11 Q. But I'm talking, you know, a week either way
12 or --

13 A. That I don't know, sir.

14 Q. How much are we giving and how much are we
15 taking?

16 A. I'll give you -- you want ten days on other
17 side?

18 Q. Absolutely.

19 A. All right. That's fine. I mean, I really
20 don't know. I know we were in Chicago, but I really
21 don't know.

22 Q. In Chicago -- and, look, I would be -- I'm
23 happy to give a month on either side of that picture.

24 A. Well, like I said, I don't know the date of
25 that.

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1 Q. Okay.

2 A. I know it was posted. I know it says here
3 Rosemary Hartkorn Connelly, which is my name, changed
4 her profile picture, which I didn't do because I don't
5 know how to do it. So I think one of my girls saw it
6 and liked it with their mom, and they changed the
7 profile picture. And I think they probably changed it
8 on the date. I think that's how that works.

9 Q. And I understand about the technology part. I
10 don't have a Facebook page myself. I just want to
11 know, what we see in that photograph, is that showing
12 you -- give or take -- I mean, give or take a month,
13 either way -- on August 9th --

14 A. Well, we were -- it was summer because we were
15 wearing summer clothes.

16 Q. And so is that a yes?

17 A. Yes. I'll tell you, it was summer.

18 Q. And is that a yes, that give or take, a month
19 either way --

20 A. Yeah, give or take, yes. Yes, sir.

21 Q. You were speaking a moment ago about cosmetic
22 surgical procedures that -- with respect to that
23 preoperative note from Dr. Funcik. You, of course,
24 went to Dr. Funcik right away after this accident?

25 A. Yes.

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1 Q. And you had a preexisting doctor/patient
2 relationship with him?

3 A. Yes.

4 Q. For other cosmetic procedures?

5 A. Yes.

6 Q. And surgical procedures?

7 A. Yes.

8 Q. So that when he -- he did the surgery, and it
9 came up -- the next note -- Ms. Sanford, if you would,
10 it's August 24th -- and the reason I put that up just
11 to make sure that this note, just -- you'll see the
12 date, August 24, 2011, look likes that's the day of
13 your surgery?

14 A. Yes, sir.

15 Q. But that wasn't the first surgery that Dr.
16 Funcik ever performed on you?

17 A. No.

18 Q. And you had elective procedures that you
19 chose?

20 A. Yes, sir, that I paid for, yes.

21 Q. Now, you would agree that nowhere in any of
22 these notes that we've talked about with Dr. Funcik --
23 and I'll look at -- give you some dates, but we started
24 talking about Dr. Funcik on June 6th, the day of the
25 accident, and now we're up to August 24th?

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1 A. Okay.

2 Q. Nowhere in there is any complaint of a problem
3 with smell or with taste?

4 A. No. No.

5 Q. Okay. And you -- did you testify earlier that
6 Dr. Funcik referred you to Charleston ENT?

7 A. I called. I mean, he didn't give me a
8 referral letter or anything like that. I think he --
9 I'm sure he told me -- I'm sure he said there's
10 Charleston ENT, and call and make an appointment. So I
11 don't know, is that a referral? He just told me about
12 them, that that was my next -- my next step.

13 Q. Okay.

14 A. Okay.

15 MR. HINES: Ms. Sanford, could you put up April
16 1st of the notes from Charleston ENT. If you'd scroll
17 up please so we can see that letterhead, please.

18 BY MR. HINES:

19 Q. Ms. Connelly, you are able to see here that
20 that's a note from Charleston ENT Associates dated
21 April 4, 2013?

22 A. Yes, sir.

23 Q. And it indicates in that first sentence, "I
24 had the pleasure of seeing Rosemary Connelly in the
25 clinic today. She's a 57 year old lady who presents

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1 with chief complaint of decreased sense of smell and
2 taste"?

3 A. Yes, sir.

4 Q. We've talked about, you know, the records and
5 whether or not what they may -- what they show. If the
6 records show that this was a first visit that you made
7 with a doctor's office complaining about the loss of
8 smell and taste, you wouldn't disagree that that's the
9 first time you went to a doctor's office complaining of
10 --

11 A. I would disagree. Because I mentioned it to
12 Dr. Funcik --

13 THE COURT: Ms. Connelly, speak up. I can't hear
14 you.

15 A. Oh, I'm sorry. I don't -- I think the
16 question was -- would you rephrase the question?

17 Q. Yeah. Is this the first time that you ever
18 saw a doctor complaining about a problem with your
19 smell or taste?

20 A. It's the first time I went to an ENT doctor.
21 Okay. I had seen Dr. Funcik in the interim, and I'm
22 sure I mentioned something to him. But he had
23 already -- he had told me with my surgery to expect a
24 year, pretty much, of misery -- okay -- that it was
25 going to be a year before my nose would repair itself.

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1 So I just assumed that. But as far as going to an ENT,
2 who is an ear, nose, and throat, this is the first time
3 I went to their office, yes.

4 Q. And you're saying a year of misery?

5 A. Yeah. A year of -- yeah, a year of misery. I
6 expected the swelling to be -- I expected my nose to be
7 congested and swollen for about a year after the
8 surgery.

9 MR. HINES: Ms. Sanford, are you able to get Dr.
10 Funcik's note from May, 2013, please. Keep going on
11 down -- there. All right.

12 BY MR. HINES:

13 Q. This note, it's another Dr. Funcik note, isn't
14 it?

15 A. Yes, sir.

16 Q. And it's May 28, 2013?

17 A. Yes, sir.

18 Q. We were just looking at a note from doctor --
19 from Charleston ENT?

20 A. Yes.

21 Q. From -- I don't know, the beginning of April,
22 2013; right?

23 A. Yes, sir.

24 Q. So that's not quite two months prior to this
25 note we're looking at now?

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1 A. Yes, sir.

2 Q. Okay. Do you see where he writes in there
3 "when I saw her, it was a couple of days after her
4 injury. And she denied loss of consciousness. She has
5 seen a couple of ENTs to document" --

6 A. Yes.

7 Q. Does it seem there that that's news to him --

8 A. No, I don't think it was news to him. I -- I
9 don't know -- you know, we talked back and forth when
10 we were in the office. And the reason I went to an
11 ENT, I would never have known to go to an ENT unless a
12 doctor had told me that that was the next step. And I
13 know somewhere down the line -- I don't know the exact
14 date -- but I would assume it was Dr. Funcik, he was
15 the only guy I went to, said I suggest you go to an
16 ENT.

17 Q. Dr. Funcik will, of course, testify in this
18 case. Maybe he can --

19 A. I'm sorry?

20 Q. Dr. Funcik will testify and we'll move on.

21 A. Okay.

22 MR. HINES: Ms. Sanford, if you can, go back to
23 April 6th, 2013, note from Charleston ENT. There might
24 be some confusion. It's under that Charleston ENT.
25 I'm sorry. It's -- I guess our Exhibit 5, please.

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1 Q. Okay. Do you see here where it has a history
2 of present illness?

3 A. Yes, sir.

4 Q. And, of course, we've already talked about how
5 it said that you had come in with a chief complaint of
6 decreased smell and taste. And it continues, "she
7 states she has noticed it for the past six months, but
8 feels like it may have been present for the past couple
9 of years"?

10 A. Yes, sir.

11 Q. You told everybody this early on, when your
12 lawyer was asking you questions, you have not been able
13 to smell since the date of this accident?

14 A. No. No.

15 Q. But you didn't notice that as an issue until
16 six months before April 4, --

17 A. I think I have explained that in the sense
18 that it was a very gradual thing for me. I had a lot
19 of nasal congestion, a lot of swelling. It was the
20 realization that it was gradual. The smell -- the
21 smell ability was never there. It was an -- it was in
22 instances where I should be able to smell something
23 that family members called me, and said what the -- do
24 you know what I'm saying? So it was a very gradual
25 realization. I hope that answered your question.

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1 Q. But you would agree that that note doesn't say
2 anything about a gradual realization?

3 A. No, but -- no.

4 MR. HINES: Ms. Sanford, would you go to the
5 next -- the 26th of that month. You know what, let me
6 stop right there. Would you scroll back up to the very
7 bottom of that last one. I want to make sure we know
8 who those doctors are.

9 BY MR. HINES:

10 Q. Charleston ENT is a practice here in the area,
11 isn't it?

12 A. Yes, sir.

13 Q. And they've got a number of offices and a
14 number of doctors?

15 A. Uh-huh.

16 Q. And the doc that you first saw, was a doctor
17 named Dr. Ghegan?

18 A. Yes, sir.

19 Q. Mark Ghegan?

20 A. Yes.

21 MR. HINES: Now, if you would, please, Ms.
22 Sanford, go down to the next note. If you would go to
23 the second page to the bottom.

24 BY MR. HINES:

25 Q. Now, your next visit -- and I know we scrolled

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1 past it -- we'll go back up and confirm it. But I
2 think it's later that month following -- excuse me --
3 of April?

4 A. Yes, sir.

5 Q. April 26, 2013, if you'll -- the same month as
6 the first visit?

7 A. Uh-huh.

8 Q. And it's another doctor named Dr. Hester?

9 A. Yes, sir.

10 Q. Now --

11 MR. HINES: If you would go back up to the first
12 page, real quick.

13 BY MR. HINES:

14 Q. Do you see under history of present illness,
15 it says -- you see if I go to history of present
16 illness, and I -- go down -- and it says "eight months
17 ago, she began to notice that she did not have a good
18 sense of taste and smell"?

19 A. Yes, sir.

20 Q. Okay.

21 A. That's what it says.

22 MR. HINES: Would you go down a little further for
23 me, please, Ms. Sanford, to the recommendation part.

24 BY MR. HINES:

25 Q. And then it says -- do you see sort of where

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1 that green dot is -- "the identification of the taste
2 and smell disturbance was only eight months ago"?

3 A. Yes.

4 Q. Which certainly leaves the question --

5 A. Yes, sir.

6 Q. -- of the possibility of some return --

7 A. Yes, sir -- which to me, was good news.

8 Q. Now, the next visit in June of 2014 -- right
9 here. Do see in this -- go to the bottom -- I want to
10 make sure we get the doctor again, too. This note
11 here, another doctor in the same practice?

12 A. Yes.

13 Q. Dr. Dozier; right?

14 A. Uh-huh.

15 Q. Let's go up, and that was again June 26, 2014?

16 A. Yes, sir.

17 Q. And he's indicating there that -- stop right
18 there, please -- that he's -- that you're back in for a
19 follow-up regarding chief complaint of decreased smell
20 and taste?

21 A. Yes, sir.

22 Q. And do you see there where it gives a history,
23 and it mentions some specific complaints -- she's been
24 having nasal congestion, facial pressure, pain, foul
25 odor in her nose?

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1 A. Yes, sir.

2 Q. Okay. So after he's given that history, let's
3 go down to plan. Do you see where it says, "I have
4 discussed with the patient that I think she may have
5 developed some allergies"?

6 A. Yes, sir.

7 Q. "I'd like to try her on some Naperison (ph)
8 Nasal Spray, and I would like to get her set up for an
9 allergy skin test based on the results. We will make
10 some recommendations. I'm thinking that her terminant
11 hypertrophy is so severe that she may have drying of
12 normal nasal secretions, leading to the foul odor, and
13 that perhaps the Naperison spray will change the
14 bacteria milieu of her nasal cavity, and hopefully
15 alleviate these symptoms".

16 A. Yes.

17 Q. I'm not going to ask you about terminance or
18 any of the medical -- I'm just going to confirm these
19 --

20 A. Yes, that's what it says.

21 Q. Okay.

22 MR. HINES: Now, Ms. Sanford, please go to the
23 final note from -- this one from January -- January
24 16th, right there. Another note, if you'll go down, if
25 you wouldn't mind. Well, we all know -- I was going to

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1 show the letterhead, but Dr. Dozier is with Charleston
2 ENT; right?

3 A. Yes.

4 Q. The same doctor you were just seeing?

5 A. Yes, sir.

6 Q. And this says back in -- regarding chief
7 complaint of anosmia?

8 A. Yes, sir.

9 Q. We'll hear some testimony about that, but
10 that's -- that's the loss of your sense of smell?

11 A. Yes, sir.

12 Q. And it indicates that you were back in there
13 that day to take the smell test?

14 A. Yes, sir.

15 Q. Okay. And it says that based upon that smell
16 test, that you were consistent with the finding of
17 anosmia?

18 A. Yes, sir.

19 Q. Having loss of your smell?

20 A. Yes, sir.

21 Q. And it also says that they didn't have any
22 suspicions about you having -- you know, the word
23 malingering, I think that sort of means messing around
24 with the tests essentially; right? The note says that
25 you didn't have any problems with that?

ROSEMARY CONNELLY -- CROSS

1 A. Right.

2 Q. So let's get the dates right. You see Dr.
3 Funcik for the initial -- the accident that happens on
4 June 6, 2011. And we talked a lot about that treatment
5 there.

6 A. Yes.

7 Q. The first record with Charleston ENT is April
8 the --

9 THE COURT: Mr. Hines, if you have a question, ask
10 it. Okay. Don't testify. Ask questions. Okay. We
11 are not going to -- ask questions, please, sir.

12 MR. HINES: Yes, Your Honor.

13 THE COURT: If you have a question, ask it.

14 BY MR. HINES;

15 Q. Did you see Charleston ENT twice in April of
16 2013?

17 A. Yes, I did.

18 Q. Was your next visit with Charleston ENT over a
19 year later in June of 2014?

20 A. If it says that on my papers, that that's when
21 it was, yes.

22 Q. Did you file a lawsuit in this case on June
23 4, 2013?

24 A. If that's what it -- what the findings say,
25 yes.

ROSEMARY CONNELLY -- CROSS

1 Q. And the smell test that you took was in
2 January of this year?

3 A. Yes, sir.

4 Q. A couple odds and ends I had. You -- you and
5 Ms. Smith were running?

6 A. Yes.

7 Q. But y'all don't talk to one another while you
8 are running, do you?

9 A. No. I really can't talk when I exercise. I
10 can barely -- you know, I'm doing the best I can. I'll
11 put it to you that way.

12 Q. Would you turn please to page 70 of your
13 deposition?

14 A. Sure.

15 Q. At line -- line 7.

16 A. Yes, sir.

17 Q. "When you're running, do you" -- excuse me --
18 yeah -- Question: "Do you speak? Do you have any kind
19 of conversation with Ms. Smith during your run?"

20 Answer: "Yes."

21 A. Yes.

22 Q. But that was your sworn testimony?

23 A. Yes, sir. But I'm not -- I don't know.
24 Sometimes I talk to her, sometimes I don't. As a rule,
25 though, I don't talk when I exercise. I mean,

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1 that's...

2 MR. HINES: Ms. Sanford, would you put up a
3 picture -- it says RMC 96.

4 BY MR. HINES:

5 Q. Ms. Connelly?

6 A. Yes, sir.

7 Q. You testified earlier when -- when your
8 lawyers were asking you some questions that -- that
9 picture accurately represented the condition at the
10 time of the fall?

11 A. I'm not going to use the word "accurately",
12 sir, because these pictures were taken afterwards. I'm
13 saying similar. I don't think that -- in fact, I'm
14 sure that there wasn't that much of that black plastic
15 light material there, maybe an inch or two. I don't
16 know exactly. But I know I was running. If you see
17 the curve at the top of the page, I was running that
18 way, past the portapotty. Okay. And there was stuff
19 on the floor. I can't say accurately. All right. I
20 would say it is similar to what it was.

21 Q. So you can't say one way or the other if it
22 was -- if it accurately represents it -- or --

23 A. Well, I'm saying it was similar, yes, sir.
24 But I'm not saying exactly with the inches and
25 everything. I don't know that that one piece coming

ROSEMARY CONNELLY -- CROSS

1 out was as far out. I don't know. Would that have
2 been what I pulled on my foot, I don't know. But these
3 pictures were taken after the fact.

4 Q. Would you turn, please, to page 59 line 20 of
5 your deposition?

6 A. The deposition, sir?

7 Q. Yes, ma'am. Okay. If you are with me at line
8 20.

9 A. Okay.

10 Q. I see where you asked -- is the condition --
11 and 96 -- I think somewhere on that -- you'll see it
12 says in small letters RMC 96 -- "does it depict the
13 black plastic in the same condition as it was in at the
14 time of the fall"?

15 A. I say, "I don't know, because I can't say
16 exactly". So I was trying to be, you know, like,
17 really exact and truthful about this. I can't say it
18 was picture perfect just like that, but it was very
19 similar to this situation -- to these pictures that
20 you're showing me.

21 Q. Ms. Connelly, I know that your testimony
22 today -- you know, what -- you know, you've obviously
23 testified about the way this has impacted your sense of
24 smell?

25 A. Yes, sir.

ROSEMARY CONNELLY -- CROSS

1 Q. But you can't -- you can smell some things,
2 can't you?

3 A. Well, like I said in my deposition -- okay --
4 I said it's about 95 percent gone. I have like a
5 putrid odor, and it's kind of constant. Okay. I'm not
6 saying -- but I can't smell like -- even strong things,
7 but I can't smell subtle things. So I was really
8 trying to tell you what I could smell. If I couldn't
9 smell dog shit of a lab, I mean, that's pretty extreme.
10 That's very pungent. Okay. But I have an odor --
11 there is a foul odor in my nose that's constant. Okay.

12 Q. But you smell?

13 A. But I don't know what it is. It's not -- I
14 can't identify it. You know, I don't know what it is.
15 So I'm just telling you -- I don't want to tell you a
16 hundred percent I can't smell anything. I don't want
17 to say that to you.

18 Q. And I'm not asking you to say it to me, I was
19 talking about what you said to the jury earlier.

20 A. What did I say to the jury earlier?

21 Q. That you haven't smelled since the day of this
22 accident.

23 A. Oh, oh, well, I haven't smelled normally. I
24 haven't smelled -- and that's still very true. I can't
25 smell flowers. I can't smell rosemary. I can't smell

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1 cooking. I can't smell dog crap. I can't smell a
2 baby, a new baby smell, which is so cool. I can't
3 smell soap. I can't smell bath stuff you put in the
4 bath. Those kind of smells, which are normal smells
5 for me, I cannot smell them, sir. I can't distinguish
6 between -- like if it's lavender or if it's something
7 else, I -- I can't distinguish between them any longer.

8 Q. You agree your earlier answer didn't explain
9 quite as much as that? You said you can't smell,
10 hadn't smelled since June 6, 2011 --

11 A. No, sir. I haven't smelled since June 6th.

12 Q. Okay. And are you -- I want to make sure I
13 understand your testimony at this point. Do you deny
14 any responsibility for the accident?

15 A. Do I deny any responsibility for the accident?
16 I saw the plastic on the ground. I ran to avoid it.
17 Cori Smith ran a little behind me. I was -- I was
18 taking very safe precautions. I've never fallen
19 before. And I -- I know that my foot was up and it
20 caught on that plastic, sir. So to deny any
21 responsibility of it, I don't think I have
22 responsibility of it. I didn't cause that fall in any
23 way.

24 MR. HINES: Thank you for your time, Ms. Connelly.

25 THE WITNESS: Thank you, Mr. Hines.

ROSEMARY CONNELLY -- REDIRECT

1 THE COURT: Redirect?

2 MR. GRUENLOH: Thank you, Your Honor.

3 REDIRECT EXAMINATION BY MR. GRUENLOH:

4 Q. A few things to go through. Let's see how
5 quickly we can go through it. First of all, I wish I
6 had Mr. Hines' yardstick up here when -- when you're
7 talking about this isn't exactly what you saw on that
8 day?

9 A. Yes, sir.

10 Q. When you look at that photo?

11 A. Yes, sir.

12 Q. Explain to the jury what you mean by it wasn't
13 exactly like that?

14 A. Can I get up?

15 Q. What you can do, ma'am, is you can actually --

16 THE COURT: You can get up and point.

17 MR. GRUENLOH: You can actually draw on that.

18 THE COURT: You can draw on that.

19 A. I don't know how to do that, I'll just show
20 y'all. Okay. I'm running from there, way up at the
21 top.

22 Q. Yes, ma'am.

23 A. Cori is running on my left. She's a twin.
24 I'm running on the right. I thought it was because
25 that I liked the control, but it wasn't --

ROSEMARY CONNELLY -- REDIRECT

1 Q. And I don't mean to interrupt you, but all I
2 want to know is, what is it about that fence --

3 A. This right there. It wasn't that much over on
4 the sidewalk, sir.

5 Q. What about the rest of it, was it down like
6 that?

7 A. Yes, sir. And there was a lot of down fence,
8 sir.

9 Q. All right. Now, you were asked a number of
10 questions about the chiropractor you went to and --
11 gosh, I said to the jury we weren't going to focus on
12 this, but I guess now we have to. Pat, can you please
13 bring up let's see -- it's this page right here, it's
14 dated 6/15/11. The next one, go down one more, there
15 you go. Can you blow up from muscle spasm to notes
16 down there at the bottom? There we go.

17 All right. And this is June 15, 2011. Does
18 that, in notes, indicate that "patient complains of
19 pain throughout the entire left side of spine,
20 frequently states, I have never before had back pain,
21 even in labor, before this accident"?

22 A. Yes, sir.

23 Q. I think that's enough of Dr. Theobald. Why,
24 when you went to go see the doctors at Charleston
25 ENT -- and Mr. Hines showed you some of their records?

ROSEMARY CONNELLY -- REDIRECT

1 A. Yes, sir.

2 Q. Why did you go see him? What was your
3 complaint?

4 A. I didn't have a sense of smell, and I was
5 really concerned about it. Now that it had been shown
6 that I really didn't have a sense of smell, I was very
7 fearful. I was very concerned, something was wrong
8 with me.

9 MR. GRUENLOH: Pat, if you would pull -- if you
10 would, the second page of Exhibit No. 2 please.

11 BY MR. GRUENLOH:

12 Q. Now, Mr. Hines showed you a number of notes
13 from your doctors. And the good thing is we get to
14 hear from them as to what their interpretation of their
15 notes are. But what I want to talk to you about is
16 what you told the nurse that day, the person upon
17 admission.

18 A. Okay.

19 MR. GRUENLOH: And, Pat, blow up that box you see
20 on the left hand side -- there you go.

21 BY MR. GRUENLOH:

22 Q. And, ma'am, this is your April 4, 2013, visit
23 to Dr. Ghegan?

24 A. Yes, sir..

25 Q. And where it says "chief complaint", can you

ROSEMARY CONNELLY -- REDIRECT

1 read what that says at the top?

2 A. "Smell and taste."

3 Q. All right. And where it says

4 "characteristics", what does that say?

5 A. "Smell, limited taste."

6 Q. And does that have a zero with an "X" through
7 it?

8 A. Yes.

9 Q. All right. And then where it says "duration",
10 does it say "June 2011 broken nose"?

11 A. Yes, sir.

12 Q. Bring that down, Pat. Is that what you told
13 the nurse on that day?

14 A. If that's what it says in the records, that's
15 what I told the nurse.

16 MR. GRUENLOH: Let's look at RMC 79. There you go
17 back, Pat. And put up the -- actually if you can pull
18 up everything from the impression to the bottom of the
19 recommendations, and just blow that up as big as we
20 can. All right.

21 BY MR. GRUENLOH:

22 Q. Again, this is your June 4th visit to Dr.
23 Ghegan, the doctor you wanted to --

24 A. April 4th.

25 Q. Yes, ma'am. Did I say a different day?

ROSEMARY CONNELLY -- REDIRECT

1 A. Yeah.

2 Q. Okay. Your April 4th -- thank you -- your
3 April 4, 2013, visit to Dr. Ghegan, who you went to for
4 your loss of sense of smell?

5 A. Yes, sir.

6 Q. And up at the top, under his impression after
7 he had examined you, what did he list there?

8 A. "Anosmia."

9 Q. I'm sorry?

10 A. "Anosmia."

11 Q. All right. And the second sentence, Pat -- is
12 there any way we can just get that second sentence
13 blown up -- well, I think we can see it. If you -- if
14 you look at the second sentence of his recommendation
15 there, can you read that into the record?

16 A. "We discussed that I think most likely her
17 decreased sense of smell and subsequent decreased taste
18 are a result of the trauma a couple years ago."

19 Q. Is that what he told you that day?

20 A. Yes, sir.

21 Q. All right. Let's go to one of the other
22 records that Mr. Hines showed you, RMC 160. These are
23 all Charleston ENT. I'm sorry. There we are. And,
24 Pat, if you could see down there where it says
25 "assessment". Blow that up for me, would you? All

1 right. And number one -- can you see that on your
2 screen?

3 A. Yes, sir.

4 Q. Rosemary?

5 A. Yes, I can.

6 Q. What did Dr. Dozier write on his record that
7 day?

8 A. "Anosmia" which he told -- which I knew -- I
9 didn't know the word before. It was lack of smell.

10 Q. Is that what he told you, you had?

11 A. Yes, lack of smell.

12 Q. Okay. And by the way on number two, did he
13 tell you that you had no evidence of sinusitis on the
14 C.T. scan?

15 A. I was too freaked out with the lack of smell.
16 I never even heard anything else to be honest with you.

17 MR. GRUENLOH: Pat, finally, go to 169, the same
18 exhibit. All right. And if you could blow up just the
19 assessment down at the bottom. All right. Actually
20 get the special testing there, if you would. Sorry
21 about that, Pat. There we go.

22 BY MR. GRUENLOH:

23 Q. All right. Do you see where it says "special
24 testing"?

25 A. Yes, sir.

ROSEMARY CONNELLY -- REDIRECT

1 Q. All right. Do you remember that that was the
2 day on January 16, 2015, that you get -- were given the
3 bigger test?

4 A. The scratch and sniff, yes.

5 Q. Okay. That's not the one that you were
6 referring to earlier where they just gave you a couple
7 smells, was it?

8 A. No. That was where they stuck that thing up
9 my nose.

10 Q. Okay. Do you see under special testing where
11 it says a "smell identification test was performed. It
12 was scored according to the answer key provided, and
13 she got 13 out of 40 test items correct, which is
14 consistent with anosmia, but not suspicious for
15 malingering"?

16 A. Yes, sir.

17 Q. Okay. Is that -- were you told anything about
18 that on that day?

19 A. That's what he told me and I cried, because I
20 was -- I don't know -- it's like really? You know,
21 it's not coming back -- so yes.

22 Q. And then under that -- the assessment, do you
23 see where -- in Dr. Dozier's note?

24 A. Yes, sir.

25 Q. And what does that say?

1 A. "Anosmia."

2 Q. And where it says "plan", do you where it says
3 "I discussed with Ms. Connelly in detail the results of
4 her test. I suspect at this point, being several years
5 out from the injury, this is unlikely to improve"?

6 A. Yes, sir.

7 Q. Is that what Dr. Dozier told you?

8 A. Yes, sir.

9 Q. Have you been able to smell since that day?

10 A. No, sir. I haven't been able to smell since
11 the accident, sir.

12 MR. GRUENLOH: Pat, go to Plaintiff's Exhibit No.
13 1, please, sir.

14 BY MR. GRUENLOH:

15 Q. While Pat is finding RMC 50, let me ask you a
16 question about your -- oh, there you go. And if you
17 would, Pat, take that down a second, would you? All
18 right. Do you see the date on that document, 7/12/11?

19 A. Yes, I do.

20 Q: All right. And bring up that first paragraph.
21 And I want to make sure clear we're clear on this
22 because Mr. Hines showed you the doctor's note. Does
23 it indicate that just over a month ago you suffered a
24 nasal fracture at that -- in a fall. And at that time,
25 I -- meaning Dr. Funcik -- indicated that "I wanted to

ROSEMARY CONNELLY -- REDIRECT

1 follow her closely", first of all?

2 A. Yes. Yes; sir.

3 Q. Okay. Does it indicate that in the
4 intervening period you had a C.T. scan, which confirmed
5 the presence of a nasal fracture?

6 A. Yes, at Nason.

7 Q. And does it indicate that Dr. Funcik, in his
8 words and his notes, "from the first time I saw her, we
9 felt that it would be possible that she may need open
10 reduction of the nasal fracture"?

11 A. Yes, sir.

12 MR. GRUENLOH: Okay. Go to the second paragraph,
13 Pat.

14 BY MR. GRUENLOH:

15 Q. Does this note indicate that you were having
16 some nasal bleeding when you went to go see Dr. Funcik?

17 A. Okay.

18 Q. Is that what that indicates?

19 A. Yes, sir.

20 Q. Have you ever had any nasal bleeding before
21 you fell and hit your head on the concrete?

22 A. No, sir. I mean, you have the ordinary nose
23 bleeds as a kid, you know, where your mom sticks some
24 Kleenex up your nose. But not nose bleeds like I was
25 having.

ROSEMARY CONNELLY -- REDIRECT

1 Q. Okay. And it -- it talks about the trauma and
2 the swelling. Go down to where it says "examination",
3 Pat, the next paragraph. So with respect to the
4 swelling and the -- the nasal bleeding, does he
5 indicate that his examine -- examination reveals that
6 to be consistent with the history of trauma?

7 A. Yes, sir.

8 Q. All right. And does that record also indicate
9 that she has -- you see there sort of at the -- the
10 last part, that you have some palpable bony
11 deformities?

12 A. Okay.

13 Q. Is that what that indicates?

14 A. Yes, it says "palpable bony deformities of the
15 upper dorsal".

16 Q. Is that kind of what you were talking about
17 when you said your nose was a little bit wrenched over
18 to the side a little bit?

19 A. I don't know what upper dorsal is, but --

20 Q. All right.

21 A. It was -- it was crooked.

22 Q. You were asked some questions about your
23 Facebook page?

24 A. Yes, sir.

25 Q. And one of the photos -- we don't need to blow

ROSEMARY CONNELLY -- REDIRECT

1 this up -- but one of the photos has your profile
2 picture of you and your daughters?

3 A. Yes.

4 Q. Smiling together. And then as we go forward,
5 there's a picture of you celebrating your daughter's
6 graduation?

7 A. Yes.

8 Q. And there's some photos in here where you're
9 with people -- here's my question, Rosemary --

10 A. Yes, sir.

11 Q. -- when you found out that you couldn't --
12 that you had permanent anosmia, and that you weren't
13 ever going to be able to smell again, did you shut down
14 and stop living your life?

15 A. No. No.

16 Q. All right. Because you can't smell, does that
17 mean that you can't go out to the beach and watch the
18 seagulls?

19 A. No, of course not.

20 Q. Because you can't smell or taste anymore, does
21 that mean that you can't go to your daughter's
22 graduation?

23 A. Of course not.

24 Q. This is the two hundred pages or so of all the
25 questions that you were asked that day at your

ROSEMARY CONNELLY -- REDIRECT

1 deposition?

2 A. Okay.

3 Q. And you were asked a number of questions.

4 MR. GRUENLOH: Pat, if you would go to page 109,
5 two through 19. And if you can blow that up for the
6 jury so that they can see it too.

7 BY MR. GRUENLOH:

8 Q. Do you have your deposition in front of you?

9 A. Yes, I do, sir. Page 109?

10 Q. Yes. All right. And I'm going to be Mr.
11 Hines here.

12 A. Okay.

13 Q. Question: "Another thing that I've seen that
14 was -- well, I understand. I'll let you speak for
15 yourself, but I want to ask you about the idea of your
16 sense of smell and your sense of taste. Can you tell
17 me how, if at all, those senses have been affected by
18 the accident?" Can you please read your answer to the
19 jury?

20 A. "Okay. When the accident first happened,
21 obviously I wasn't aware of much, and I had a lot of
22 swelling up in here. After the swelling went down, I
23 noticed a lot of congestion. I noticed food was bland,
24 but I attributed it to my trauma, you know. Just being
25 it was a trauma. Let me put it to you that way. And

ROSEMARY CONNELLY -- REDIRECT

1 then more and more, I noticed I had no sense of smell.
2 It's very, very limited. And along with that is my
3 sense of taste. Food is bland to me. I can't taste
4 when I cook so."

5 Q. All right.

6 MR. GRUENLOH: And, Pat, go to page 158.

7 BY MR. GRUENLOH:

8 Q. And, Rosemary, I'm sorry. If you could follow
9 along and go to page 158 as well.

10 A. Sure.

11 Q. Actually just go to 159. And Rosemary
12 starting on page 158 at line 25, the question was:
13 "Prior to your August 2011 surgery" -- then going up to
14 the top of that page --

15 MR. GRUENLOH: Pat, we're looking for page 159.
16 There you go. And blow that up.

17 BY MR. GRUENLOH:

18 Q. So if we started over from the prior page it
19 reads, "Prior to your August 2011 surgery, do you
20 recall -- I think we went over this a little bit, but
21 do you recall having a sense of smell and a sense of
22 taste at that time?" And your answer? What was that,
23 Rosemary?

24 A. "I was normal, yes. I had a normal sense of
25 smell and a normal sense of taste."

1 Q. And then the question was: "So you were
2 normal prior to the surgery?" And then what was your
3 answer?

4 A. "No, prior to the fall, sir."

5 Q. All right. Question: "Oh, prior to the
6 fall?" You say "yes, sir". Then the next question is:
7 "How about between the fall and prior to the surgery?"
8 And what was your answer?

9 A. "As I explained, I had a lot of swelling of my
10 nose in that area. And so I was -- it took time for
11 the swelling to go down. And from the time of the
12 fall, there was a problem with my smell."

13 Q. Was that your testimony on that day?

14 A. Yes, sir.

15 Q. Has there been any change --

16 A. No, sir.

17 Q. -- in your testimony from then to now?

18 A. No, sir.

19 Q. Thanks, Rosemary. Those are all my questions.

20 THE COURT: All right. Mrs. Connelly, you may
21 step down, please.

22 THE WITNESS: Thank you, sir.

23 THE COURT: Where is the original deposition? Who
24 has it?

25 MR. HINES: I thought I handed it to Ms. Connelly.

1 THE COURT: Ms. Connelly, would you hand that to
2 the court reporter -- the deposition you had in your
3 hand, please, ma'am. Okay. Thank you very much. You
4 may step down. Be careful stepping down.

5 THE WITNESS: Thank you.

6 THE COURT: All right. Madam Forelady, and ladies
7 and gentlemen of the jury, we're going to take a short
8 break at this time. If you smoke, and you need a place
9 to go smoke, let the bailiffs know. If you need
10 anything, let the bailiffs know. Please don't discuss
11 the case amongst yourselves. I'll get you back in
12 about 15 or 20 minutes.

13 (WHEREUPON, the jury leaves the courtroom at
14 approximately 3:52 p.m.)

15 THE COURT: All right. I'm going to mark the
16 original deposition. It was opened, it was under seal,
17 as Court's Exhibit No. 4. The parties have agreed to
18 that. All right. Anything from the plaintiff before
19 we take a break?

20 MR. GRUENLOH: I don't believe so, Your Honor.

21 THE COURT: Pardon?

22 MR. GRUENLOH: I don't believe so.

23 THE COURT: Anything from the defendant?

24 MR. HINES: No thank you, Your Honor.

25 THE COURT: All right. Thank you very much. Let

1 me see the lawyers up here just a second before we
2 break.

3 (WHEREUPON, a bench conference was held.)

4 (WHEREUPON, Court's Exhibit No. 4 was marked and
5 made a part of the record.)

6 (WHEREUPON, a brief recess was taken.)

7 THE COURT: All right. Anything from the
8 plaintiff before we get started?

9 (Off-record discussion concerning video
10 depositions.)

11 MR. HINES: This is just purely housekeeping, Your
12 Honor, and this was brought to our attention by our
13 court reporter thankfully as far as putting something
14 on the record. My understanding -- I'm not even quite
15 sure what it is -- is there is something -- a
16 non-substantive redaction of an exhibit that needs to be
17 done to take out some personal information, like a
18 social security number or something perhaps? I don't
19 know --

20 THE COURT: I'm not sure what you're talking
21 about.

22 MR. HINES: I'm not either. So that's why it's a
23 real mess.

24 THE COURT: What are we talking about?

25 MS. CONNELLY: I found an additional redaction

1 that needs to be made to Defendant's Exhibit 4, and
2 probably to Plaintiff's Exhibit No. 1. And it's just
3 an inadvertent thing.

4 THE COURT: Just take it and redact it. Come get
5 it. You got a magic marker with you? She'll do it
6 with you afterwards. Okay. All right. Anything else
7 before we bring the jury?

8 MR. GRUENLOH: No, Your Honor.

9 THE COURT: Bring the jury, please.

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 4:14 p.m.)

12 THE BAILIFF: All the jurors are present, Your
13 Honor.

14 THE COURT: All right. Thank you very much. All
15 right, Madam Forelady, ladies and gentlemen of the
16 jury, I'm going to say something to you very briefly.
17 Normally during a trial, there's three or four ways
18 where evidence -- sworn testimony can be brought to
19 you: You listened to Mrs. Connelly. That was sworn
20 testimony live. Another way is to do a video
21 deposition.

22 And a video deposition is taped. You'll be able
23 to see the person testifying. The lawyers are present.
24 They ask the direct and the cross examination. And
25 normally video depositions are done to accommodate

1 doctors or other people where they have a busy
2 schedule, where they can do the video deposition, and
3 they don't have to come to court during business hours.

4 And it's -- I believe there's two -- going to be
5 two video depositions in this case. Dr. Ghegan, who
6 we're going to listen to very shortly, and Dr. Funcik
7 have given their testimony by video deposition.

8 Another way that you can bring testimony in the
9 courtroom is through a deposition. A deposition is
10 taken for the trial. And in that case, the lawyer
11 would have the deposition -- read the question and my
12 law clerk will probably sit on the witness stand and
13 pretend to be the witness and read the answer. So
14 that's a third way it can be done. That's not done
15 very often anymore. It used to be done before we had
16 all the video equipment, but that's not done very
17 often.

18 Or, the fourth way for testimony to be brought,
19 where the lawyers stipulate to facts. The lawyers have
20 agreed that those facts are the facts that would be
21 testified to if the witness was available or whatever
22 was available for you to see, so I would instruct you
23 as to this video deposition, assume that he is
24 testifying live in the courtroom. He was sworn and it
25 was sworn testimony. And it's as if the doctor is

1 testifying here live.

2 Plaintiff call your next witness.

3 MR. GRUENLOH: Your Honor, plaintiff calls Dr.
4 Mark Ghegan.

5 THE COURT: Okay. All right.

6 (WHEREUPON, the video deposition of Dr. Ghegan was
7 played for the jury.)

8 THE COURT: All right. Madam Forelady, ladies and
9 gentlemen of the jury, we're going adjourn at this
10 time. If you'd be back in the jury room at 9:30 in the
11 morning, and we'll get started at that time. Please
12 don't discuss the case amongst yourselves. And I don't
13 want you to do any electronic searching about this loss
14 of smell, or anything else. I want you to base your
15 decision on what you hear in the courtroom, not what
16 some website may tell you. I'll see you in the morning
17 at 9:30. Have a good evening.

18 (WHEREUPON, the jury leaves the courtroom at
19 approximately 5:40 p.m.)

20 THE COURT: Anything from the plaintiff before we
21 adjourn?

22 MR. GRUENLOH: I don't believe so, Your Honor.

23 THE COURT: Anything from the defendant?

24 MR. HINES: No, thank you.

25 THE COURT: See you in the morning at 9:30. Have

1 a good evening.

2 (WHEREUPON, the hearing was concluded.)

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1 * * * Wednesday, August 26, 2015 * * *

2

3 THE COURT: Is there anything from the plaintiff
4 before we bring the jury?

5 MR. GRUENLOH: Only, Your Honor, that we'll be
6 playing Dr. Funcik's video deposition this morning. It
7 is quite long.

8 THE COURT: Okay.

9 MR. GRUENLOH: And I just wanted to let the Court
10 know that.

11 THE COURT: Okay. That's fine.

12 MR. HINES: Your Honor, the only thing from the
13 defense is -- has to do with a housekeeping matter
14 about the Facebook exhibit, about the redactions that
15 the court ruled upon yesterday. Because of those, we
16 needed to do a few additional redactions. We have done
17 them and would like to make sure we get the proper
18 redacted exhibits to the court reporter.

19 THE COURT: Are you talking about taking out that
20 one picture?

21 MR. HINES: Correct, Your Honor.

22 THE COURT: The Supreme Court?

23 MR. HINES: There was that one, and I think there
24 was another one --

25 THE COURT: Oh, there was another one?

1 MR. HINES: There were two -- there were two
2 photos. It was very minor, but we just wanted to make
3 sure that -- so we don't -- we have it get lost in the
4 shuffle on those redactions --

5 THE COURT: Have you got it redacted yet, or are
6 we going to have to do it with a magic marker?

7 MR. HINES: We have it redacted, Your Honor --

8 THE COURT: Pardon?

9 MR. HINES: -- I'll be happy to hand that up.

10 THE COURT: You've already got it done. Give it
11 to the court reporter and substitute.

12 (PAUSE.)

13 (Defendant's Exhibit No. 3 was admitted into
14 evidence.)

15 THE COURT: All right. Anything else before we
16 bring the jury?

17 MR. GRUENLOH: Nothing from the plaintiff, Your
18 Honor.

19 THE COURT: All right. Bring us the jury, please,
20 sir.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 9:49 a.m.)

23 THE BAILIFF: All the jurors are present, Your
24 Honor.

25 THE COURT: Thank you very much.

1 MR. GRUENLOH: Your Honor, may it please the
2 Court?

3 THE COURT: Yes, sir.

4 MR. GRUENLOH: The plaintiff calls Dr. Funcik.
5 And I know the -- the Court gave an instruction
6 regarding the video. I don't know if that needs to be
7 given again.

8 THE COURT: All right. Ladies and gentlemen of
9 the jury, Dr. Funcik is going to testify by video
10 deposition, just like Dr. Ghegan did yesterday. And
11 the same instruction I gave you yesterday concerning
12 the video deposition applies to Dr. Funcik, and all the
13 other -- if there are any more videos -- I don't know
14 if there are or not, but we'll find out later on. If
15 you'll start the video please, sir.

16 Hold on -- hold on just a second. I understand
17 this video is what about three hours.

18 MR. GRUENLOH: It's a little bit more than that,
19 Your Honor. It's about three and a half.

20 THE COURT: All right. Probably an hour and a
21 half from now, we'll stop the video and take a break.
22 Okay. Because I do try to take a break every hour and
23 a half or so. Okay. So we'll stop somewhere during
24 the video.

25 All right. Please proceed.

1 (WHEREUPON, the video deposition of Dr. Funcik was
2 played for the jury.)

3 MR. HINES: Your Honor, we have a matter of law
4 that we need to take up.

5 THE COURT: Well, turn off the video.

6 (WHEREUPON, the video was stopped.)

7 THE COURT: Madam Forelady, members of the jury,
8 if y'all would go to the jury room, please. Don't
9 discuss the case amongst yourselves, please.

10 (WHEREUPON, the jury leaves the courtroom at
11 approximately 10:18 a.m.)

12 THE COURT: Yes, sir...

13 MR. HINES: Your Honor, just like the other day, I
14 guess we need to move again for a mistrial.
15 Dr. Funcik, you know, we could see in the testimony --
16 we can certainly play it back -- he just started
17 talking about her insurance company. Our position on
18 this, Your Honor -- and I'm not going to belabor this,
19 but the issue of insurance just doesn't need to be
20 banded about the courtroom. Just the very notion of
21 it, is it --

22 THE COURT: What did it say about insurance? Read
23 it to me.

24 THE LAW CLERK: "So when I initially saw her, I
25 handled it on a routine basis, which is to say that she

1 needs some reduction at some later time. But we
2 weren't ready to schedule the operating room and start
3 certifying her insurance company" --

4 MR. HINES: I think it says "pre-certifying" --

5 THE LAW CLERK: "Pre-certifying."

6 THE COURT: He's talking about the surgery, right?

7 MR. HINES: Sure. Yes, Your Honor.

8 THE COURT: That's not insurance in this case,
9 that's the surgery for -- I'd assume he's talking about
10 medical insurance. What does that have to do with this
11 case?

12 MR. HINES: Well --

13 THE COURT: And plus -- plus y'all have seen this
14 video, and y'all were supposed to have edited it, and
15 made proper objections. Now, you come in here in the
16 middle of the trial, after it's been edited, asking for
17 a mistrial.

18 MR. HINES: Your Honor, we did not edit the video.

19 THE COURT: You didn't look at the video?

20 MR. HINES: We looked at it, and we agreed upon
21 edits that we included --

22 THE COURT: Were you there? Did make objections?
23 Did you make an objection to this?

24 MR. HINES: To that during the deposition?

25 THE COURT: Yeah. Did you make an objection?

1 MR. HINES: No, Your Honor. It's not required for
2 me to do that.

3 THE COURT: Pardon?

4 MR. HINES: It is not required, under the rules,
5 to --

6 THE COURT: Did you make an objection as to the
7 insurance issue when you were taking the testimony?

8 MR. HINES: I can also show you, if you look on
9 the record, Your Honor, that -- the answer is no. But
10 let me also show you, if you look at the unedited
11 transcript, her own lawyer mentioned to me before, that
12 hey, we don't -- Doctor, I don't want you mentioning
13 anything about it -- he mentions insurance in the
14 unedited transcript. And we know that it was coming
15 out, that he mentions it. And I can show you the
16 unedited transcript --

17 THE COURT: All right. The motion for mistrial is
18 denied. Bring us the jury, please.

19 MR. HINES: Your Honor, can I just --

20 THE COURT: Thank you very much.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 10:22 a.m.)

23 THE BAILIFF: All the jurors are present, Your
24 Honor.

25 THE COURT: Thank you very much. All right.

1 Madam Forelady, and ladies and gentlemen of the jury,
2 during the deposition, Dr. Funcik had talked about
3 getting prior authorization for the insurance. He's
4 talking about medical insurance to pay for the surgery
5 on her nose. Whether she had medical insurance or
6 didn't have medical insurance is not a factor for you
7 to be considering in this case whatsoever. It's
8 immaterial, and I'm instructing you to disregard the
9 statement that the doctor made on getting prior
10 authorization as to insurance. And I will strike it
11 from the record.

12 So disregard it completely. It doesn't have
13 anything to do with this lawsuit, whether she had it or
14 didn't have it, or whether it paid or didn't pay it.
15 Please proceed with the video.

16 (WHEREUPON, the video resumed play.)

17 MR. GRUENLOH: Your Honor, may the plaintiff
18 publish to the jury the skull that Dr. Funcik is using
19 while he's speaking?

20 THE COURT: Yeah. That's fine.

21 MR. GRUENLOH: Ladies and gentlemen of the jury of
22 the jury, if you want to pass that around. Thank you,
23 Your Honor. Sorry for the interruption.

24 (WHEREUPON, the video resumed play.)

25 THE COURT: All right. Madam Forelady, I believe

1 we've been in the courtroom about an hour and 35
2 minutes. We'll take a break at this time. If you need
3 anything, let the bailiffs know. If the smoker needs
4 to smoke, let the bailiffs know, and they will take you
5 to a proper place. Please don't discuss the case
6 amongst yourselves. I'll get you back in about 15 to
7 20 minutes.

8 (WHEREUPON, the jury leaves the courtroom at
9 approximately 11:21 a.m.)

10 THE COURT: All right. We'll take a recess for 15
11 or 20 minutes.

12 MR. BROWN: Would Your Honor allow one quick thing
13 on the record?

14 THE COURT: Yes, sir.

15 MR. BROWN: If it's quick --

16 THE COURT: I'm sorry, what?

17 MR. BROWN: If it's quick? May I put one thing on
18 the record --

19 THE COURT: Yes, sir.

20 MR. BROWN: To make a record. This is quick. We
21 would respectfully object to the curative instruction
22 Your Honor gave sua sponte for the reasons we talked
23 about earlier in this case. We think insurance is a
24 bell that once rung cannot be unrung. We just simply
25 note that for the record.

1 THE COURT: Well, that's fine. I appreciate your
2 saying that. It was done sua sponte. I think the law
3 requires that. Okay. Thank you so very much.

4 MR. BROWN: Yes, Your Honor.

5 THE COURT: I'll see you in about 15 or 20
6 minutes.

7 (WHEREUPON, a recess was taken.)

8 THE COURT: Bring us the jury please. Do you have
9 an estimate of how much time we have left on the video?
10 I mean just a rough idea.

11 MR. GRUENLOH: I think we've got about an hour.

12 MR. CHISUM: We're on page 86 of the deposition,
13 and it looks like it goes to page --

14 THE COURT: We haven't even started Mr. Hines
15 cross yet, have we?

16 MR. CHISUM: No, Your Honor.

17 MR. GRUENLOH: About an hour, maybe a little bit
18 more.

19 THE COURT: Okay. Maybe we'll get it done one or
20 a little after.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 11:47 a.m.)

23 THE BAILIFF: All jurors are present, Your Honor.

24 THE COURT: Thank you very much. If you'll
25 continue the video please, sir.

1 (WHEREUPON, the video resumed play.)

2 THE COURT: Is that it?

3 MR. GRUENLOH: That's all, Your Honor.

4 THE COURT: All right, sir. Madam Forelady,
5 ladies and gentlemen of the jury, we are going to take
6 a belated lunch break. It's 10 minutes to 2:00. Be
7 back in the jury room at 3:15, we'll get started at
8 that time. Please don't discuss the case amongst
9 yourselves. We'll see you in about an hour and --
10 let's make it about 3:20. That will give you about an
11 hour and 25 minutes. Okay.

12 (WHEREUPON, the jury leaves the courtroom at
13 approximately 1:54 p.m.)

14 THE COURT: All right. We'll reconvene at 3:20.
15 See you then.

16 (WHEREUPON, a lunch break was taken.)

17 THE COURT: Anything from the plaintiff before we
18 bring the jury?

19 MR. GRUENLOH: Briefly, Your Honor. At the
20 deposition of Cori Smith, who is our next witness, she
21 was asked "Would you agree with me that -- I mean that
22 your opinion as to whether or not the tarp was
23 dangerous is just as good as really anybody else's". I
24 objected to that question, eliciting opinion testimony.
25 And then she said "I guess so". The reason I bring

1 this to the Court's attention now, is it's our
2 expectation the defendants will tend to elicit opinion
3 testimony from her as to whether or not it was
4 dangerous, et cetera. She came to that deposition
5 pursuant to a subpoena as a fact witness, and that's
6 why she's here today. And we think it's improper that
7 she be asked any opinion questions. She can be asked
8 questions about what her observations are.

9 THE COURT: Well, are they -- are y'all planning
10 on asking that?

11 MR. BROWN: I'll stay away from that, Your Honor.

12 THE COURT: Okay. All right. I mean I don't
13 think that she can -- she can -- she's a fact witness.
14 She can testify to what she saw, but I'm not going to
15 let her give an opinion as to whether it was dangerous
16 or not dangerous, one way or the other. Anything else?

17 MR. GRUENLOH: No, Your Honor.

18 THE COURT: Anything from the defendant --

19 MR. BROWN: No, Your Honor.

20 THE COURT: -- before we bring the jury -- all
21 right. Bring us the jury please.

22 (WHEREUPON, the jury enters the courtroom at
23 approximately 3:27 p.m.)

24 THE BAILIFF: All jurors are present, Your Honor.

25 THE COURT: Thank you very much. If you'll call

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1 your next witness, please.

2 MR. GRUENLOH: Your Honor, the plaintiff calls
3 Cori Smith to the stand.

4 THE COURT: Thank you very much.

5 CORI SMITH, after having been
6 duly sworn, testified as follows:

7 THE CLERK: Please be seated. Once seated,
8 please, state your first and last name, spelling your
9 last name loudly and clearly into the microphone.

10 THE WITNESS: Cori Smith, S-m-i-t-h.

11 DIRECT EXAMINATION BY MR. GRUENLOH:

12 Q. Good afternoon, Ms. Smith.

13 A. Good afternoon.

14 Q. Good afternoon, ladies and gentlemen. We have
15 for you Ms. Smith, who I hope is a very brief witness.
16 Can you first introduce yourself to the ladies and
17 gentlemen of the jury, Ms. Smith?

18 A. I'm Cori Smith.

19 Q. Tell us where you live.

20 A. I live on Daniel Island.

21 Q. Tell -- tell the ladies and gentlemen of the
22 jury what your address on Daniel Island is?

23 A. 1617 Bulline Street.

24 Q. Okay. And how long have you been living
25 there?

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1 A. For 10 years -- over 10 years.

2 Q. So if my math is right, you were living there
3 on June 6, 2011; is that right?

4 A. Yes, sir.

5 Q. Okay. And who do you live there with?

6 A. My three children and my husband.

7 Q. How old are your children now?

8 A. They are just 13, 10 next week, and almost
9 seven.

10 Q. Have you ever had to do anything like this
11 before, where you had to come up --

12 A. No, sir.

13 Q. -- and given an oath, and sit in front of a
14 jury?

15 A. No.

16 Q. Okay. Why don't we start this way: We know
17 who you are, and where you live, and who you live with
18 now. Why don't you tell the jury how you know Rosemary
19 Connelly?

20 A. We are friends and we work out together, and
21 we've known each other for a while.

22 Q. Give us some idea about how long you've known
23 each other?

24 A. About 15 years.

25 Q. Okay. How long before June 6, 2011, had you

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1 been running with Rosemary?

2 A. About five years.

3 Q. In the five years before June 6, 2011, had you
4 ever seen Rosemary fall before?

5 A. Never.

6 Q. How was -- well, before we get there -- what
7 do you do for a living?

8 A. I'm a personal trainer.

9 Q. All right. The day that you all were running,
10 June 6, 2011, were you running as friends or were you
11 her personal trainer on that day?

12 A. Friends. I am her trainer, but we also run as
13 friends.

14 Q. Can you -- as a personal trainer, can you sort
15 of give us your assessment of where Rosemary was at
16 that time in terms of her running ability, like how far
17 could she run without stopping?

18 A. We were up to about four miles at a time
19 without stopping.

20 Q. That day, did -- so at some point, did
21 Rosemary get to your house on June 6, 2011?

22 A. Yeah, that's where we would meet because I
23 knew the route I like to take, so.

24 Q. How did you -- well, who determined the routes
25 that you guys would run?

CORI SMITH -- DIRECT

1 A. Me.

2 Q. And did you have just one route or were there
3 a bunch of routes or...?

4 A. We took different routes.

5 Q. And generally, if you know, did Rosemary have
6 anything to do with picking the routes, or did she know
7 what the routes would be?

8 A. No.

9 Q. Tell us, if you could, what the route was that
10 you took that day on June 6, 2011?

11 A. Down, up [REDACTED]. Then we would turn
12 left on [REDACT] and circle it around, up [REDACT], and
13 then back to my house.

14 Q. On June 6, 2011, did you at some point run
15 past [REDACTED] Street?

16 A. Yes, sir.

17 Q. Before we get to that, let me ask you: Before
18 June 6, 2011; had Rosemary ever complained to you about
19 any physical problems?

20 A. No.

21 Q. What about her sense of smell, had she ever
22 complained to you about not being able to smell
23 something?

24 A. No, sir.

25 Q. Before June 6, 2011, had Rosemary ever

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1 complained to you about any back pain?

2 A. Never.

3 Q. What about her sense of taste, being able to
4 taste food, before June 6, 2011, had Rosemary ever said
5 to you, you know, I wish I could taste food better or
6 anything like that?

7 A. No, because it was one of our major topics,
8 was talking about food.

9 Q. Okay. Now, as you did the route that you were
10 talking about on June 6, 2011, and again what street
11 did you come down from -- from your house?

12 A. We go up REDACTED.

13 Q. Okay. And then?

14 A. Take a left on REDACTED -- REDACTED. I think it
15 is -- and then hook back on REDACTED.

16 Q. So you hook back on REDACTED. When you get to
17 REDACTED Street, can you give me some idea -- and
18 you know, if you can't tell me it was exactly a mile or
19 exactly two miles -- but can you give me some idea
20 about how far you had run from your house?

21 A. I think it's about half way.

22 Q. Were either of you wearing headphones or
23 carrying your cell phones or anything like that as you
24 were running?

25 A. No.

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1 Q. Do you have any recollection of you and
2 Rosemary having conversations back and forth while you
3 were running?

4 A. We didn't usually talk when we were running.

5 Q. Why is that?

6 A. Just because -- we just focus. I'm into my
7 running, and I just like to concentrate on it --

8 Q. When -- I'm sorry. When you get about half
9 way through your run, as you say, and you come upon --
10 as you're coming up to REDACTED Street, do you have
11 any recollection of Rosemary really dragging that day?
12 Was she fatigued or anything like that?

13 A. No, not at all.

14 Q. As you come to REDACTED Street, can you
15 kind of give the ladies and gentlemen of the jury -- if
16 REDACTED Street is on your right hand side, can you
17 kind of give them an idea of where you were in relation
18 to Rosemary?

19 A. I always run on the left, so I know I was to
20 the left of her. And I always get a little bit further
21 back, just because that's -- we always run a little bit
22 staggered.

23 Q. Okay. So if I'm running by the house -- and
24 I'm Rosemary -- and the house is over here, you're over
25 here?

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1 A. Yes, sir.

2 Q. Okay. Had you run by REDACTED Street
3 before?

4 A. Yes.

5 Q. Had you made any observations of what that
6 construction site looked like?

7 MR. BROWN: Objection, Your Honor, relevance.

8 THE COURT: Overruled. Go ahead.

9 A. I just observed that it was a little bit
10 messier than most of the sites on Daniel Island -- all
11 the sites on Daniel Island.

12 Q. Do -- we're obviously here today to talk about
13 this black plastic tarp, and what I want to know is, do
14 you have any recollection before the weeks leading up
15 to that -- first of all, do you have a recollection of
16 running that route before?

17 A. Yes, sir.

18 Q. And do you have a recollection of whether or
19 not that black tarp, that was in the front of the
20 house, was down?

21 A. Yes.

22 Q. And what was your recollection?

23 A. I just remember it being down --

24 MR. BROWN: Objection, Your Honor. We're talking
25 about weeks in advance.

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1 THE COURT: Pardon?

2 MR. BROWN: He's asked her questions about weeks
3 in advance --

4 THE COURT: I'll sustain the objection unless you
5 can correlate it into some type of time frame. Okay.

6 BY MR. GRUENLOH:

7 Q. Let me ask you about the week before. All
8 right. Do you have a specific recollection the week
9 before of seeing the tarp down?

10 A. Yes.

11 Q. And what was that recollection?

12 A. I remember it being down.

13 THE COURT: Objection? Do you have an objection?

14 MR. BROWN: The week before, I don't, Your Honor.

15 THE COURT: I'm sorry. What?

16 MR. BROWN: I won't -- I won't object to the week
17 before. I'll deal with that in another way.

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

19 BY MR. GRUENLOH:

20 Q. Now, you were saying that you have a memory of
21 it being kind of a messy site; can you tell us what you
22 mean by that?

23 A. I just remember the tarp being down, and that
24 all around that, just looked messier than what I was
25 used to seeing. There's a lot of construction going

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1 on, on Daniel Island, that I noticed it was a messier
2 site.

3 Q. As -- let me ask you, give, at some point, did
4 you take a photo of REDACTED Street and specifically
5 the sidewalk in front of REDACTED Street?

6 A. The next day.

7 MR. GRUENLOH: Pat, pull up RMC 96.

8 BY MR. GRUENLOH:

9 Q. Can you see that on your screen?

10 A. Yes, sir.

11 Q. Do you recognize this photo?

12 A. I do.

13 Q. Who took this photo?

14 A. I did.

15 Q. And tell me when you took this photo?

16 A. The following day.

17 Q. Now, as I understand your prior testimony,
18 you're kind of jogging past that portapotty and towards
19 us? Is that --

20 A. Yes.

21 Q. Okay. And on June 6, 2011, when Rosemary is
22 running -- well, you said she was running to your
23 right.. So would she have been the one closer to the
24 tarp or would you have?

25 A. She would have been.

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1 Q. Is this picture -- does it accurately
2 represent your memory of what the tarp looked like on
3 June 6, 2011?

4 A. Uh-huh, yes, sir.

5 Q. How was the weather that day?

6 A. It was nice. It was windy, but nice.

7 Q. When you say it was "windy", was there a
8 hurricane or some big wind storm?

9 A. No.

10 Q. Was it too windy to run in?

11 A. No.

12 Q. Tell the ladies and gentlemen of the jury what
13 happened as you and Rosemary ran past REDACTED
14 Street and came upon this black plastic barrier?

15 A. We were running past it, and it was fine, and
16 just going at a normal stride. And she stepped down
17 and the tarp kind of flew up a little bit and got her
18 foot, and she tripped and fell on her head.

19 Q. A couple things I want to go over on that.
20 First of all, did you see any movement in the tarp from
21 the wind as you were approaching it?

22 A. I mean it was moving just a little bit, like a
23 -- you could tell it was windy, but not crazy movement.

24 Q. Well, was it flopping up and down like a
25 garbage bag or something like that?

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1 A. No. No. It was like just fluttering like
2 wind would do to something.

3 Q. Okay. And you said that it -- it moved a
4 little bit and caught Rosemary's foot. Can you -- can
5 you tell us just a little bit about that? Just your
6 specific recollection.

7 A. I just -- her stride -- like foot down and
8 back foot back, and just caught up, and took her down.
9 Because it was like kind of -- looked a little like
10 slow motion, and then hit.

11 Q. What -- how did Rosemary hit? What portion of
12 her body hit the concrete?

13 A. On her head.

14 Q. Now, as she hit her head, did you help her get
15 up?

16 A. Yeah, I still remember it.

17 Q. Tell us what she looked like.

18 A. It was bad. It was really bad.. I mean,
19 Rosemary -- she was like I'm fine. I mean, she looked
20 just flustered and -- but she was bleeding. And it was
21 a bad sound, just makes me cringe.

22 Q. What do you mean it was a bad sound?

23 A. It just -- she went down hard on her face.

24 Q. Did you do anything to help her stop the
25 bleeding?

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1 A. I gave her my shirt. I mean, I don't know how
2 much that helped...

3 Q. I assume you had something on underneath?

4 A. Yes.

5 Q. Did you see anybody at the construction site
6 working that day?

7 A. There were a couple workers there that saw it.

8 Q. Anybody offer help or anything like that?

9 A. No. No, sir.

10 Q. Let's talk about what you did after you gave
11 her your shirt and you tried to stop the bleeding; tell
12 the folks what happened next.

13 A. I was hoping someone would come and ask for
14 help, so we could use a phone or something to call.
15 But she just said, let's get back as quick as possible.
16 We got back to my house and I wanted to drive her to
17 the hospital. But in true Rosemary fashion, she just
18 left, and I'm fine, and just left.

19 Q. Were your children or anybody there?

20 A. My youngest was there.

21 Q. Did Rosemary come into the house?

22 A. She did.

23 Q. And was she around your kids at all?

24 A. Yeah, Luke saw her. She was just kind of
25 trying to clean it up and...

CORI SMITH -- DIRECT

1 Q. Now, you said that in true Rosemary fashion,
2 she just got out of there, can you tell us where --
3 what was -- if you -- were you concerned?

4 A. I was concerned because of the sound of the
5 fall and the amount of blood, but she just was like --
6 she's just that type of person. I'm fine. I can go --
7 you know, saying -- she just -- I mean, I've never seen
8 her hurt, but just that's her attitude. Like, I can do
9 it. I can go. I can drive myself. And she knew I had
10 my kid there and she didn't want to bother me. That's
11 just the way she is so... And I've never seen anything
12 like that, so I didn't think I should take her to the
13 hospital in terms of -- I mean, obviously now I know
14 better.

15 Q. Was -- when she came into your house and --
16 and your young son was there, I mean was she still
17 bleeding?

18 A. Yes.

19 Q. What was going on at that point?

20 A. Yes, she was bleeding.

21 Q. Okay. Did you see her when she got in her
22 car?

23 A. She -- I mean, she was bleeding when she got
24 in the car. She had given me back my shirt. And I
25 think she just took a wad of toilet -- paper towels,

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1 and put them up there, and just kind of went off.

2 Q. Let me ask you a few questions: Do you -- do
3 you and Rosemary still try to work out together?

4 A. Yes, we do.

5 Q. Can she still run three or four miles?

6 A. No, not at all.

7 Q. Has -- to your knowledge, has she been able to
8 run three or four miles since June 6, 2011?

9 A. No.

10 Q. When -- well, tell me, when did you guys
11 start -- after the fall, when did you guys get back
12 together again for the purpose of working out?

13 A. It was closer to the spring, because I
14 remember wanting to like, give of the year, New Year's
15 resolution, but it was kind of closer to spring time.

16 Q. So if the accident is in June of 2011, you are
17 saying that it's the Spring of 2012?

18 A. Yes, sir.

19 Q. And so when you guys got back together in the
20 Spring of 2012 to -- you know, for the purpose of
21 physical fitness again, give us an idea of what types
22 of things you were doing?

23 A. Just more walking and stretching stuff, and
24 things like that. I would -- every time I tried to
25 move her along, she would just complain about her back,

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1 but mostly about just not being able to breathe through
2 it, and just it hinders your process a lot so.

3 Q. Why, as a -- I know this. I've had people
4 tell this to me. But tell us, as a personal trainer,
5 why is breathing an important thing?

6 A. It just helps you go progress more, breathing
7 oxygen, breathing out. A lot of people short breathe,
8 and so then feel fatigued a lot sooner. So I work with
9 a clients with breathing in and breathing out, and
10 that's how she got up to her mileage. And breathing in
11 through the nose, and out through the mouth, which a
12 lot of people don't know.

13 And that's how I upped her mileage and upped her
14 reps with push-ups and things like that. And after
15 that, I was just always on her about it, way more -- in
16 more of a concern than a teaching, way more of
17 harassing her about it. Like you need to breathe
18 right, and she would get frustrated and...

19 Q. Well, in the Spring of 2012, when y'all got
20 back together, could she breathe through her nose?

21 A. No, she did not.

22 Q. Did you, at some point -- you told us in your
23 deposition a little -- a little bit of teasing that
24 went on back and forth between you and her around that
25 time period, can you tell us -- tell the ladies and

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1 gentlemen of the jury about that.

2 A. Well, I call it teasing just because she was
3 constantly telling me the doctor has told her it would
4 get better, and that it would -- she kept saying I -- I
5 would harass her breathing because it kind of grossed
6 me out a little bit. Like, she'd get all snobby. And
7 I would say, you need to breathe and things like that.
8 And she'd always say I can't breathe, but it's going to
9 get better. It will be fine. The doctor said it would
10 take a while.

11 And then with her smelling, she -- I would tease
12 her about her inability to smell because she always
13 said it would get better. All the construction sites,
14 there's so many portapotties around. And I would use
15 them. And I always say, it's a good thing you can't
16 smell that, and stuff like that. Like, I would tease
17 her about it. Because before that, she would always be
18 like that was disgusting.

19 And the flowers, just because I know she loves
20 to garden. I mean, she's the one who used to bring me
21 herbs and stuff to plant. And after that, she -- just
22 -- I would joke to her, and be like, oh, right. You
23 can't smell that, so.

24 Q. Since the accident of June 6, 2011, have you
25 ever been around Rosemary and observed that she was

CORI SMITH -- CROSS

1 able to smell something?

2 MR. BROWN: Objection, Your Honor. It calls for
3 speculation. One person can't tell if another one can
4 smell.

5 MR. GRUENLOH: Your Honor, I simply asked if she
6 observed --

7 THE COURT: He said, has she observed it.

8 MR. BROWN: How to you observe someone smelling.
9 I'm not trying to argue, but --

10 THE COURT: I'll sustain the objection.

11 BY MR. GRUENLOH:

12 Q. Has -- since the accident in June of 2011, has
13 Rosemary Connelly ever said to you, boy, that smells
14 awful or that smells good?

15 A. No. And definitely the taste, I would tease
16 her about that, because it was almost like your friend
17 that goes on a diet, that can't eat with you any more.
18 I would literally be like you're no fun to talk to
19 about food. Because that was like a big joke with us.

20 MR. GRUENLOH: Thank you for answering my
21 questions.

22 THE COURT: Cross examination.

23 MR. BROWN: Thank you. May it please the court?

24 THE COURT: Yes, sir.

25 CROSS EXAMINATION BY MR. BROWN:

CORT SMITH -- CROSS

1 Q. Ms. Smith, I'm Steve Brown. Nice to meet you.

2 A. Nice to meet you, too.

3 Q. All right.

4 MR. BROWN: Madam Court Reporter, are you okay
5 with my voice?

6 COURT REPORTER: (Nodded affirmatively.)

7 BY MR. BROWN:

8 Q. I'll try to be quick and I'll try to be
9 organized.

10 A. Yes, sir.

11 Q. So bear with me. You testified just a moment
12 ago that the site at issue was messy the week before
13 not -- I mean, not messy the week before -- that --
14 that the black silt tarp -- black silt fence was down
15 the week before?

16 A. Yes, sir.

17 Q. You testified to that; correct?

18 A. Yes, sir.

19 Q. And I'm going to ask you to let me get your
20 deposition.

21 A. Okay.

22 Q. All right. And let's look --

23 THE COURT: Ms. Smith, do you have the deposition?

24 MR. BROWN: I'm going to get it right now, Your
25 Honor.

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1 THE COURT: If you'll give it to her, please, sir.

2 MR. BROWN: May I open it, Your Honor?

3 THE COURT: Yes, sir.

4 (PAUSE.)

5 BY MR. BROWN:

6 Q. These things are sealed in super plastic so
7 bear with me, and I'll throw this away in a moment.
8 When I refer to a page number, it'll just be a page
9 number at the top; okay?

10 A. Yes, sir.

11 THE COURT: Ms. Smith, he'll give you a page
12 number and a line -- the line numbers are written down
13 in columns; okay?

14 THE WITNESS: Okay.

15 BY MR. BROWN:

16 Q. All right. And let's look at page -- hang
17 on -- I can't read my own handwriting. Page 86.

18 A. Yes, sir.

19 Q. Okay. Start on line 6, question: "Not messy,
20 I'm trying to put a finer point in on that. I mean you
21 say that, yes, it was, that the fencing material was
22 down, or I don't know one way or another." Hang on a
23 second. Do you remember being -- okay. I'm sorry.
24 Keep going down. Question -- I'm on line 16 is where
25 I'm at. "And, again, I mean this is having to be

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1 annoying about it, but I understand you're saying that
2 you remember being down at some point prior to the
3 fall, but you're not able to say?". Answer: "I don't
4 remember to what extent it was down." Do you see that?

5 A. Yes, sir.

6 Q. And is that your testimony -- that was your
7 deposition testimony?

8 A. Yes, sir..

9 Q. Now, let's go to page 87.

10 A. Okay.

11 Q. Top of the page, line 2: "Are you able to say
12 if it was or was not down the week prior to the fall?"
13 Okay. Read your answer please for the jury.

14 A. "I don't remember."

15 Q. "With certainty" -- no, your answer was, "with
16 certainty" --

17 A. Oh, with certainty -- oh.

18 Q. -- was it down the week prior to the fall --

19 A. Oh, I was answering another question, "with
20 certainty" --

21 Q. And then, yes ma'am -- "your answer was --

22 A. "Yes, ma'am" -- "I don't remember".

23 Q. I don't remember. But you testified here a
24 moment ago that you remember it being down the week
25 before Ms. Connelly's incident, but your sworn

CORI SMITH -- CROSS

1 testimony in your deposition was you don't remember?

2 A. Right. I think I was just overwhelmed with
3 the question -- I had never done this sort of thing
4 before, and I got -- I thought he was asking me to go
5 back further in time, and I just...

6 Q. "With certainty, was it down the week prior to
7 the fall" -- you took that to mean that he wanted to
8 know something other than prior to the week before the
9 fall?

10 A.. I did get confused.

11 Q. Ma'am?

12 A. It was down -- I mean, it was down. And I
13 remember -- I run all the time on Daniel Island, and it
14 did not look like the other sites, so I vividly
15 remember that.

16 Q. When y'all are running, you were about a foot
17 behind?

18 A. More or less.

19 Q. More or less, a foot behind, Ms. Connelly?

20 THE BAILIFF: Your Honor, may we have a restroom
21 break?

22 THE COURT: Pardon?

23 THE BAILIFF: May we have a restroom break,
24 please?

25 THE COURT: We need a restroom break? Is that

CORI SMITH -- CROSS

1 correct? I mean, if you do, tell me, please.

2 MADAM FORELADY: I do.

3 THE COURT: All right. We'll take about a 10 or
4 15 break. Please don't discuss the case amongst
5 yourselves. I'll get you back in about 10 or 15
6 minutes. Thank you very much.

7 (WHEREUPON, the jury leaves the courtroom at
8 approximately 3:51 p.m.)

9 THE COURT: All right. We'll talk about a 10 or
10 15 minute break time, enough for them to cycle through
11 the restroom. Okay.

12 MR. BROWN: I'm sorry, I didn't hear the last
13 part, judge.

14 THE COURT: Enough time for them to cycle through
15 the bathroom, the 12 of them.

16 MR. BROWN: Oh, I apologize.

17 (WHEREUPON, a recess was taken.)

18 THE COURT: Are y'all ready?

19 MR. BROWN: Yes.

20 THE COURT: Bring us the jury please.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 4:00 p.m.)

23 THE BAILIFF: All jurors are seated, Your Honor.

24 THE COURT: Thank you very much, Mr. Brown.

25 MR. BROWN: Thank you, Your Honor.

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1 BY MR. BROWN:

2 Q. Ms. Smith --

3 A. Yes, sir.

4 Q. -- one quick point with regard to the
5 deposition we read just a moment ago -- you remember
6 giving that deposition; correct?

7 A. I do, yes, sir.

8 Q. And do you recall at the beginning you were
9 told that if you had any questions about anything being
10 asked of you, if you didn't understand them, or if they
11 were not clear --

12 A. Yes, sir.

13 Q. -- that you had the right to ask --

14 A. Yes, sir.

15 Q. Do me one favor, to help her, you and I talk
16 over each over --

17 A. Okay.

18 Q. -- and she's having to type --

19 A. I apologize --

20 Q. -- us both -- so, you know what I'm asking,
21 and you know what your answer is, but just give us one
22 second in between; okay? .

23 A. Yes, sir.

24 Q. And you never asked any clarification on that
25 one week before issue; did you?

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1 A. I think when he kept asking the week, it
2 started to mean to me the entirety of the week. Like,
3 did you go to school the week before Christmas? The
4 entirety of the week. And I run Monday, Wednesday,
5 Friday mornings usually, and I know for a fact it was
6 down Wednesday and Friday, but the entirety of the
7 week, I don't know if it was down Monday as well.
8 That's what it started sounding like to me, the
9 entirety of the week. Did you go to school the week
10 before Christmas? Yes, I went to school the week
11 before Christmas. And so I couldn't remember if it was
12 the entire week or just a second half of the week.

13 Q. You didn't -- you didn't clarify in any way --

14 A. That's what it meant to me, and that's how I
15 answered it, because I definitely remember it being
16 down on the Wednesday and Friday runs.

17 Q. Let's talk about -- pull up a picture that
18 plaintiff's counsel asked you about. And you testified
19 that this particular picture accurately represented the
20 conditions on the day that Ms. Connelly was hurt at the
21 location at issue? Would you pull that up, please, Ms.
22 Carlson(ph). And if you'll turn around.

23 A. I can see it.

24 Q. Can you see it there?

25 A. Yes, sir.

CORI SMITH -- CROSS

1 Q. Do you recall plaintiff's counsel asking you
2 about this picture?

3 A. Uh-huh, yes, sir.

4 Q. And he asked the question whether or not it
5 properly reflected -- accurately reflected what the
6 condition was on the day of the injury; correct?

7 A. Yes, sir.

8 Q. And your answer was yes?

9 A. Yes, sir.

10 Q. Is that -- is that still your answer?

11 A. Yes, sir.

12 Q. And there's no confusion of my question to
13 you; is it?

14 A. Right.

15 Q. You understand what I'm asking. All right.
16 Let's go, if we can, to page 89 -- actually 88 of your
17 deposition. And I'm going to start on page 15.

18 THE COURT: Page 15 or line 15?

19 MR. BROWN: I'm sorry, page 88 line 15, Your
20 Honor. I apologize. And I'm going to keep out a lot
21 of the mumbling, if I can, unless anyone objects, then
22 I'll put in the mumbling. "But would you agree that
23 this picture was being shown to you at the time is not
24 greatly different in terms of the way that the -- the
25 way it's depicted here -- my apologies -- what's

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1 depicted here is not greatly different than the scene
2 you and Mrs. Connelly encountered at the time of the
3 fall?" And your response was, "It's different. It
4 looks a little bit worse right here"; is that your
5 response?

6 A. Right, yes, sir.

7 Q. Okay. Speak clear in your microphone --

8 A. Yes, sir.

9 Q. -- a little bit louder. You can pull it to
10 you. And then you were asked, Okay -- you said, "It's
11 different. It looks a little bit worse." Then you
12 were asked, "Okay. That's what I mean, does it look a
13 little bit worse?" And you said, "It looks worse";
14 correct? Going up to the next page, page 89, line 1?

15 A. Yes, sir.

16 Q. And they kept pushing and said, "But it
17 doesn't look a lot worse" -- question -- and your
18 answer again was -- if you'd read for us line 4.

19 A. "It looks a little messier."

20 Q. "No. It looks worse." Line 4, "It looks
21 worse".

22 A. Oh, here are the numbers. "It looks worse."

23 Q. Okay. And then -- I'm sorry. Yeah, they're
24 on the left hand side. Those are the line numbers, I
25 apologize.

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1 A. That's okay.

2 Q. And you gone on -- and you say "That looks a
3 little bit messier." "Worser?" "Worse. It looks
4 worse." So as we sit here today, you cannot say that
5 that particular exhibit represents -- accurately
6 represents the conditions that you and Ms. Connelly
7 encountered at the time of the incident; correct?

8 A. It pretty much looked like that.

9 Q. But this one looks worse?

10 A. Does that -- it looked bad. It looked messy.

11 Q. It's -- you can explain your answer, but it's
12 a simple question. Does this picture look worse than
13 what was present on the day of the incident?

14 A. It looked a little bit messier.

15 Q. It looked a little bit messier on -- in this
16 picture?

17 A. Right.

18 Q. This picture looks a little messier than what
19 you encountered. Okay. But that wasn't your testimony
20 here today? You didn't qualify your answer to
21 plaintiff's counsel in any way?

22 A. Right. I mean -- right. Yes, sir.

23 Q. Now, if I recall correctly, counsel asked you
24 if there was any flapping, I believe, going on at the
25 time of the fall -- at the time y'all were running

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1 through, and the fall took place; do you recall that?

2 A. Was there any...?

3 Q. Flapping? Was it flapping?

4 A. Just light fluttering, a little bit.

5 Q. A light fluttering.

6 A. You could see it moving.

7 Q. But he asked a specific question, I think,
8 about flapping?

9 A. Uh-huh.

10 Q. And I thought you said, no; is that correct?
11 Do you remember that?

12 MR. GRUENLOH: Objection, that misstates the facts
13 and the testimony. That's not what I asked. I asked
14 if it was going up and down like a hefty bag.

15 THE COURT: Overruled. Ask the question. Give
16 her a chance to answer, please, before you fire another
17 one at her.

18 MR. BROWN: Yes, sir, Your Honor.

19 THE COURT: Please.

20 BY MR. BROWN:

21 Q. At the time, is it accurate to say that it --
22 talking about the silt fence -- had been flapping in
23 the breeze prior to the time that it made this last
24 move that caused the fall?

25 A. It was moving. I mean, I -- I understand

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1 that's why at most construction sites, it's not down
2 down because it can get windy.

3 Q. So you've seen other sites knocked -- with
4 these knocked down?

5 A. No. Most of them are flat across and smooth,
6 like tight.

7 Q. But you've seen them knocked down throughout
8 Daniel Island; correct?

9 A. No.

10 Q. You've never seen another one knocked down?

11 A. Not like this.

12 Q. Was there any flapping going on?

13 A. It was moving.

14 Q. Okay. Let's go now to your deposition,
15 please, at page 52 line 14. And the response to the
16 question whether or not it had been flapping in the
17 breeze prior to the time that it made this move, the
18 last move that caused the fall. Please read your
19 answer from line 14.

20 A. "There was flapping going on, you know, like
21 when there's flapping going on." And we're talking
22 about a vocabulary word, I don't -- I mean.

23 Q. I understand that and --

24 A. I don't understand --

25 Q. We just -- we're not allowed to have a back

CORI SMITH -- CROSS

1 and forth.

2 A. Okay.

3 Q. I appreciate it.

4 A. Yes, sir.

5 Q. We are just not allowed to. The rules don't
6 allow us to do that. And how was it moving? Describe
7 the movement.

8 A. I don't know what word to use. It was moving.

9 Q. And y'all saw it --

10 A. It was fluttering --

11 Q. Go ahead. I'm sorry.

12 A. I saw movement, like a sheet that would be
13 down would be moving. I assume that's why they're not
14 supposed to be down.

15 Q. And you saw movement as you and Mrs. Connelly
16 were coming in this direction; correct? Y'all were
17 down there and coming in this direction? When I say
18 down there, I'm pointing down to the portapotty --
19 y'all were coming in -- jogging in this direction;
20 correct?

21 A. Yes, sir.

22 Q. And y'all saw -- both saw movement ahead,
23 flapping, fluttering -- whatever?

24 A. Well, just like I would see the grass moving,
25 you know.

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1 Q. Okay.

2 A. You know, like it was -- you know how you
3 would see trees moving or just notice that it was
4 moving, like any observance through my -- observing on
5 the run.

6 Q. But earlier you said it was moving just a
7 little bit, that was your testimony --

8 A. Yeah, the same way like the grass -- like
9 those weeds right there, like the same way you can see
10 those kind of moving, and the flowers moving, things
11 were moving. It was -- it was a beautiful, slightly
12 windy day. That's how it appeared to me.

13 Q. Okay.. It was a windy day?

14 A. Yes, sir. I remember thinking it was a
15 beautiful day, and then it was just a little windy.

16 Q. And the movement that you saw was not
17 difficult for you or anyone to see; correct?

18 A. Well, for anybody to see? Like somebody --

19 Q. On the sidewalk in your position?

20 A. If they were looking at it, they could
21 probably -- I mean, I don't know what people -- like if
22 you were to walk by something, would you notice? I
23 don't -- I don't know if everyone would notice. I tend
24 to look around and be really observant when I'm
25 running.

CORI SMITH -- CROSS

1 Q. Okay. And that's important for any runner to
2 be observant for the conditions that are around them;
3 correct?

4 A. Yes, sir.

5 Q. And conditions can change at any moment; can't
6 they?

7 A. Yes, sir.

8 Q. All right. You testified there were workers
9 there; correct?

10 A. Yes, sir.

11 Q. And that the workers not come out to help you
12 in any way; is that correct?

13 A. Yes, sir.

14 Q. And when you said that there were workers
15 there, are you talking about workers on the job site?

16 A. Yes.

17 Q. And the specific site --

18 A. That specific site.

19 Q. Okay. Let's go to page 69, start at line 1.

20 Question: "There were people on the construction site?"

21 Answer: "Yes, I think there was." Question: "Do you
22 have any way of identifying who those people are?"

23 Answer: "I don't even know if they were on the
24 construction site. I just remember a couple of
25 workers."

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1 A. Right. I don't know if they were that
2 construction site -- I don't know who's employed by
3 that construction company. I honestly thought that's
4 what the question was.

5 Q. Okay.

6 A. I definitely saw workers on that site, but
7 there are other construction sites around there.

8 Q. And ma'am --

9 A. I don't know if they were employed by that
10 construction company --

11 Q. But I just asked you whether or not workers
12 that you had testified about were on this specific
13 construction site, that was my question less than a
14 minute ago. And you answered yes?

15 A. Yes, sir.

16 Q. Then I just read from your deposition where
17 you also testified under oath "I don't even know if
18 they were on the construction site"?

19 A. Meaning I don't know if they were employed by
20 that construction site. And that is -- sir, that is
21 honestly what I meant. I do not know. They were on
22 that construction site because I remember they were on
23 the house, and they were looking at us, bleeding, me
24 holding a towel -- or a shirt, sorry.

25 Q. Now, did you ever -- strike that. After the

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1 accident happened, Ms. Connelly was able to raise
2 herself up by herself; correct?

3 A. I helped her up.

4 Q. You helped her up?

5 A. Yeah.

6 Q. Okay.

7 A. I don't know if that was necessary. I mean, I
8 remember aiding her to get up. I mean, we were
9 definitely -- a lot going on lot --

10 COURT REPORTER: I'm sorry.

11 A. There was a lot going -- I mean, we were
12 scared.

13 BY MR. BROWN:

14 Q. Okay. And what -- what's the situation about
15 the shirt with the blood; what did you do?

16 A. I took off my shirt and gave it to her.

17 Q. Okay. And we were told that you had on a
18 sports bra for jogging, so that it was easy to -- in
19 other words, you weren't being indecent out in the
20 street so-to-speak?

21 A. Right.

22 Q. Okay. And she used that t-shirt of yours to
23 help stop the bleeding?

24 A. Yes, sir.

25 Q. And was there blood on the sidewalk from where

CORI SMITH -- CROSS

1 she had hit? ↓

2 A. Yes.

3 Q. Okay. And describe the bleeding that was
4 going on at this time. We've heard Ms. Connelly's
5 testimony, that it was just a massive amount of
6 bleeding; would you agree with that?

7 A. Yes.

8 Q. Let's go to the next page of this same
9 exhibit. Scroll it up a little for me. Did you take
10 this picture?

11 A. Uh-huh.

12 Q. And does this picture represent at least a
13 spot of blood and something -- over to the right -- is
14 that what's in this picture?

15 A. Yes, sir.

16 Q. And did you take any other pictures of blood
17 at the location of the accident?

18 A. I did not.

19 Q. So this is the only evidence we have of the
20 blood at the scene of this horrific fall that took
21 place?

22 A. Yeah. I wasn't even going to take the
23 pictures of the blood.

24 Q. And who asked you to take pictures?

25 A. Mr. Connelly.

CORI SMITH -- CROSS

1 Q. And when did he ask?

2 A. He asked me when he got home from his trip
3 that day.

4 Q. When he got home from his trip?

5 A. When he got home, he called me and asked me to
6 take them --

7 Q. So that --

8 A. -- that day.

9 Q. So that would have been the night of the --

10 A. Yes.

11 Q. Okay. And so you went and took them the next
12 day?

13 A. I did, yes, sir.

14 Q. Okay. And you don't know what time you took
15 them the next day; correct?

16 A. It was probably morning.

17 Q. It was probably morning.

18 A. It was the morning?

19 Q. And how did you get the pictures to Mr.
20 Connelly?

21 A. I think it was a camera.

22 Q. It was a camera?

23 A. I think so, yeah. Yes, sir.

24 Q. You gave him your whole camera, or did he send
25 you a camera or...?

CORI SMITH -- CROSS

1 A. No. I took them. And to be honest with you,
2 I don't really remember how I got the pictures to him.
3 I'm not really that computer savvy, and so I don't
4 remember if --

5 Q. Okay. Now, y'all have run this site before;
6 correct?

7 A. The route?

8 Q. Yes, ma'am.

9 A. Yes, we have.

10 Q. I'm sorry. The route. At least a dozen
11 times?

12 A. Yeah, probably a dozen times.

13 Q. And you said -- you said that there's no doubt
14 that it was windy when y'all were running; correct?

15 A. Yes, sir.

16 Q. Okay. And when you got the pictures of Mr.
17 Connelly, did you inquire about Mrs. Connelly's
18 condition?

19 A. Yes, sir.

20 Q. And had you spoken with Mrs. Connelly since
21 the time of the accident?

22 A. Absolutely.

23 Q. Okay. But you don't know when you got the
24 pictures to him; correct?

25 A. I don't remember the exact timeline, no.

CORI SMITH -- CROSS

1 Q. Okay. When you got back to your house -- well
2 first of all, you walked back to your house together;
3 right?

4 A. Yes.

5 Q. And that was over -- I think about a mile and
6 three quarters?

7 A. It was a little over a mile.

8 Q. Just a little over a mile -- not a mile and
9 three quarters?

10 A. A mile and a half.

11 Q. Okay.

12 A. It was a little bit more, like half.

13 Q. Now, when you got back, tell me what happened
14 at the house.

15 A. She was just trying to stop the bleeding and
16 wadded the paper towels on to it. And then she was
17 just kind of trying to wipe it off. And then -- we
18 were just kind of -- I was just trying to ask her if
19 she was okay. She said, I'm fine. I'll be fine. And
20 she...

21 Q. She got in her -- you told us that she got in
22 her truck and drove -- drove off; is that correct?

23 A. Yes, sir.

24 Q. And were you concerned about her driving?

25 A. Yes.

CORI SMITH -- CROSS

1 Q. Well, why didn't you drive her to the doctor,
2 or ER, or plastic surgeon, or wherever she was going?

3 A. I wish I had.

4 Q. But I'm just asking, why didn't you?

5 A. I had to get to work. I had a four year old
6 kid there -- a three year old kid there. And I just
7 was -- he was freaking out, looking at her. And
8 mothers understand, you kind of gravitate toward your
9 child, and I was just...

10 Q. Okay. And you said that the blood from it
11 freaked your three-year-old out?

12 A. Was he three -- two?

13 Q. I think he was -- during the deposition, you
14 referenced three.

15 A. Okay. Three.

16 Q. Two or three. I won't hold it to you.

17 A. Yes, sir.

18 Q. Who was with him when you were running?

19 A. My women that takes care of him.

20 Q. So you couldn't have asked her to stay a
21 little longer and call work, tell them you're going to
22 be late, and helped get her to a doctor?

23 A. I probably could have and probably should
24 have.

25 Q. Now, you testified that Ms. Connelly cannot

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1 run a three or four -- cannot run three to four miles
2 now at a time -- y'all do still run together; correct?

3 A. A little bit.

4 Q. Twice a week; right?

5 A. We try to.

6 Q. Okay. And how far do y'all run on those twice
7 a week visits?

8 A. I try to get her to go about three minutes at
9 a time.

10 Q. Okay. For a total distance of what?

11 A. It's probably about a third of a mile.

12 Q. So she runs a third of a mile now?

13 A. Maybe a half, if I push her.

14 Q. So that's the maximum she does?

15 A. Yes.

16 Q. And what is your understanding of why she
17 limits it that amount?

18 A. I think that she just has pain in her back and
19 she's not properly breathing, which is something I get
20 at with my clients.

21 Q. And but she does other physical -- she's able
22 to do other physical exercises with you as her trainer;
23 correct?

24 A. We are limited.

25 Q. She likes to do push-ups; correct?

CORI SMITH -- CROSS

1 A. She does like to do push-ups.

2 Q. She does a lot of push-ups, doesn't she?

3 A. We try to do push-ups --

4 Q. And what about the -- I'm sorry -- I cut you
5 off.

6 A. It's not -- it's actually good for the back,
7 so.

8 Q. And what other exercises does she do?

9 A. We try to do some arm weights. We try to do
10 some lunges, some core work, planks.

11 Q. And do y'all do this on the running days or on
12 other days?

13 A. I don't think we have a rhyme or reason to it,
14 just if we -- whatever we feel like working out.

15 Q. Okay. And how much are you paid per month for
16 your training?

17 A. Well, a lot of times we just -- she's a family
18 friend, so we just work -- we're workout partners. She
19 is a client of mine. And sometimes she'll pay me by
20 the hour for that, but not -- most of the time, we're
21 just running as friends.

22 Q. And when you're paid by the hour, how much is
23 that?

24 A. Is that relevant?

25 Q. That -- well, somebody can object if they

CORI SMITH -- CROSS

1 want, but I've asked the question. No one has objected

2 --

3 A. Okay.

4 Q. So I just ask how much --

5 A. It's \$50.

6 Q. \$50 an hour --

7 A. Yes, sir.

8 Q. -- to work out together?

9 A. Yes, sir.

10 MR. BROWN: Okay. I beg the court's indulgence.

11 Every moment I'm quiet, I'm cutting something off the
12 list. Okay.

13 THE COURT: Okay. It's getting real quiet.

14 BY MR. BROWN:

15 Q. When did you first go back and see Mrs.
16 Connelly after the accident?

17 A. I don't recall the exact give time.

18 Q. A day? A week? A month or two months?

19 A. Maybe -- I honestly don't want to answer
20 because I don't remember the exact time. And I'm
21 afraid if I say the wrong time.

22 Q. I'll try one more, and if you don't remember
23 that's fine. Was it before or after her surgery? did
24 you see her before her surgery?

25 A. Before, yes, sir.

CORI SMITH -- CROSS

1 Q. Okay. Now, you said your son was freaked out
2 at the -- at the blood coming out of Mrs. Connelly;
3 correct?

4 A. Yes, sir.

5 Q. Okay. And we've talked about -- you took a
6 picture of this blood, and you've -- you're not exactly
7 sure why you took the picture of the blood; correct?

8 A. I -- I think he was just curious about it, and
9 I was like, oh, I'll show you the blood. He's asking a
10 lot of questions and so -- it's just my way of saying
11 this is what happened.

12 Q. Okay. And then you were asked at your
13 deposition, "My son was so freaked out" -- this was
14 your answer -- "My son was so freaked out when he saw
15 the blood, maybe I just wanted to show a picture of her
16 blood".

17 A. Yes, oh, yeah, that's what I said.

18 Q. Your three-year-old was freaked out about the
19 blood, so you decided to go get a picture of it to show
20 him?

21 A. Yeah. He was asking a lot of questions about
22 it. And at one point, he actually wanted me to drive
23 him by the place where we were and...

24 Q. And then go to the one picture -- 96, Pam.
25 Are you able to specifically, not generally, but

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1 specifically show the point where Mrs. Connelly fell in
2 that picture? Where she tripped?

3 A. Right. If I point, right about there.

4 Q. Yes, ma'am.

5 A. Right around there, somewhere around there.

6 Q. Somewhere -- somewhere around there?

7 A. Yes.

8 Q. That's a fairly large area, would you agree?

9 A. Well, not if you're a person running, and
10 that's where you fall. That's actually the size of a
11 body, if you think of it. I just remember hearing a
12 loud bang.

13 Q. At times, y'all run in the street; correct?
14 You and Mrs. Connelly?

15 A. Yes, sir.

16 Q. Okay. And I'll be honest, I just sort of
17 don't understand this, but maybe --

18 A. You don't understand the running?

19 Q. No, I'm getting to my question. I'm
20 editorializing, which I shouldn't. You testified that
21 you teased Mrs. Connelly about the portapotties, and
22 not having to smell the portapotties. And you also
23 stated you would at times tease her about the flowers;
24 right?

25 A. Yes, sir.

CORI SMITH -- CROSS

1 Q. And did y'all used to stop and smell the
2 flowers when y'all would run?

3 A. Sometimes.

4 Q. And y'all still do it sometimes; correct?

5 A. I mean, she doesn't as much as I did.

6 Q. But now y'all still will stop and smell the
7 flowers; right?

8 A. Well, it's more of like a walking by, like you
9 smell cut grass, or dog poop in the street, like --
10 it's just part of -- I'm a runner, and it's just part
11 of an observing nature..

12 Q. Okay. But that wasn't my question.

13 A. Yes, sir.

14 Q. Do you and Mrs. Connelly stop and smell
15 flowers when y'all are out running, periodically take a
16 break and say, oh, look, that's beautiful, I --

17 A. I still do it out of habit, yes.

18 Q. Okay. And does she ever do it?

19 A. Well, she'll make the comment, I don't smell
20 it.

21 Q. But does she at least do it?

22 A. Does she attempt to?

23 Q. Yeah.

24 A. Not as much as, say, she -- not -- no.

25 Q. Okay. So -- but she still does try to do it?

CORI SMITH -- CROSS

1 In other words, she doesn't get into it as much as she
2 used to --

3 A. Well, she might -- she might lean over to
4 (indicated) and then shrug it off.

5 Q. And then you tease her about it?

6 A. No, I don't tease her anymore. Are you
7 kidding? I used to tease her perpetually, but all
8 right, you can't smell it. Because she always would
9 tell me, it was -- doctor told her it was coming back.
10 So, you joke to someone who is going to get better.
11 Obviously, you never tease somebody if it was a -- if I
12 knew it was something that was going to be perpetual.

13 Q. Okay.

14 A. The same way I teased her about her food. I
15 mean, I used to joke to her, I'd be like you're no fun
16 to talk to about food anymore. Do you think you would
17 ever do that to someone who can't taste it, no.

18 Q. Okay. Has -- has Mrs. Connelly ever told you
19 that she cannot completely smell?

20 A. Yes.

21 Q. Has she -- okay. Now --

22 A. I don't think she wants to make me feel bad, I
23 think she is just saying when I point something out,
24 she's like I can't smell that.

25 Q. And that comes out when y'all had talks about

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1 how the accident has affected her since the taste and
2 smell?

3 A. No. It's more of like, oh, I stink. And she
4 goes, don't worry, I can't smell it. So --

5 Q. So it just comes up at times?

6 A. Yeah.

7 Q. Okay.

8 A. Like, oh, that portapotty. I mean, they don't
9 smell great.

10 Q. And y'all like to talk about the food and
11 stuff; correct?

12 A. We always did, yes. I don't -- I know that
13 she and Billy, they used to eat out and that was their
14 passion, and I don't eat out -- I've got kids. So we
15 just used to just talk about our meals out and stuff.
16 It was fun for me.

17 Q. Okay. On page 20 -- I mean, page 60 of your
18 deposition, line 20, "Has Mrs. Connelly ever expressed
19 to you any thoughts about how this accident has
20 affected her sense of taste and smell?" Answer: "It's
21 come up." Question: "And what has she said about that
22 or how has it come up?" "It's come up because I --
23 well, because I, as a fitness person, like to talk
24 about food and healthy eating and stuff. And I
25 definitely noticed a difference in the way she talks

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1 about it now in terms of she can't smell and taste as
2 well as she used to".

3 A. Right.

4 Q. Okay. That's a difference between as well as
5 you used to and having a total inability to smell?

6 A. Absolutely. But I don't have her mouth, so I
7 don't know. I mean, she verbalizes to me that she does
8 not talk about food any more. She says I can't taste
9 it. It doesn't taste -- it doesn't mean as much to
10 me -- where as I used to -- oh, was it good? What did
11 you get, or I made this last night. You should have
12 tried it. And she would blow it off. Do you want the
13 recipe? No.

14 Q. And you said you no longer tease her about the
15 flowers; correct?

16 A. No.

17 Q. And I'd like to read on from your answer, "and
18 also when we're running, I'm a big like to smell the
19 flowers person. And she definitely doesn't get into it
20 as much as she used to, because I tease her about it".

21 A. Well, I --

22 Q. That's not past tense, that's when we're
23 running, I tease her about it --

24 A. -- I think the whole thing is that it was
25 always such a joke in terms of the doctor said it would

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1 come back. And so I would just say -- make little
2 jokes about it. And we are good friends. I never
3 knew -- I honestly -- she's not the type to put this on
4 me and make me feel bad ever.

5 Q. So --

6 A. I would feel bad for a friend, she was like
7 that, and she would always -- she would just always
8 tell me, I don't smell it.

9 Q. And she --

10 A. Oh, right, to me that's a little -- I mean --

11 Q. You --

12 A. I don't make fun of her. I don't make fun of
13 her like I give did when she first would talk about it.
14 Because back then, it was absolutely -- oh, don't you
15 think you should -- aren't you worried now. No, no,
16 the doctor said it's normal. So I would just make
17 jokes, like oh, right. And now I don't obviously make
18 comments because it's -- when you naturally smell all
19 the time, you don't realize that that could be
20 something that other people don't.

21 Q. I understand, but your answer was "when we are
22 running, I tease her about it"?

23 A. Okay.

24 Q. "I used to tease her about it" --

25 A. There might be little comments that come up.

CORI SMITH -- CROSS

1 I don't tease her like I used to.

2 Q. And, obviously, does it greatly upset her when
3 you say something to her?

4 A. We are good friends. I don't think she's
5 upset about it. She tries to stay positive. She does
6 stay positive.

7 Q. She is a very positive person, isn't she?

8 A. Right.

9 Q. And has a good life, doesn't she? Despite
10 dealing with whatever she's dealing with on the nose
11 issue or the food, she has a good life, doesn't she --

12 MR. GRUENLOH: Objection, Your Honor. I mean it
13 calls for --

14 THE COURT: I'll sustain the objection.

15 BY MR. BROWN:

16 Q. Does she indicate she likes to go out to eat
17 with her daughter?

18 A. I think she likes to spend family time with
19 her kids, yes.

20 Q. Okay. Do you know if they like to go out to
21 eat a lot?

22 A. I know the daughters love to, yes.

23 Q. Okay. Do you know if the momma goes with
24 them?

25 A. I would go with my kids if they asked me to go

CORI SMITH -- REDIRECT

1 out to eat, any time they asked. I hope my kids, at
2 that age, are still asking me to go out to eat all the
3 time.

4 Q. . Me too. . And because --

5 MR. BROWN: Well, I think I'm close to closing,
6 Your Honor, but I just want to make sure we've
7 clarified this, so I think I need a little bit more --
8 actually, beg the court's indulgence?

9 THE COURT: Yes, sir.

10 (PAUSE.)

11 MR. BROWN: You know what, Ms. Smith, I believe
12 you have answered all the questions that I have for
13 you, and I appreciate your answering them very, very
14 much. I'm sorry.

15 THE COURT: Thank you, sir. Redirect?

16 MR. GRUENLOH: Thank you, Your Honor.

17 REDIRECT EXAMINATION BY MR. GRUENLOH:

18 Q. Ms. Smith, you were asked a number of
19 questions about whether or not this looked the same as
20 the day that you and Rosemary ran by. Just to make
21 sure we're clear on this -- can you, in your own words,
22 tell the jury today, while you're under oath, tell us
23 does this depict what it looked like that day? And if
24 it doesn't -- if there's any little detail, just so we
25 can all be clear on it, if there's any little detail,

CORI SMITH -- REDIRECT

1 let us know what's different --

2 MR. BROWN: Objection, Your Honor. That just
3 calls for a narrative, asking the witness to give a
4 long narrative. There's no question --

5 THE COURT: Overruled. Go ahead.

6 A. Yes, sir. That's the way it looked.

7 BY MR. GRUENLOH:

8 Q. Okay. This is the way that it looked?

9 A. Yes, sir.

10 Q. Mr. Brown showed you some testimony from your
11 deposition, and I've got the rest of your testimony
12 here. And he was talking to you about whether or not
13 you noticed the fence being down the week before. Do
14 you remember that back and forth between you two?

15 A. Yes, sir.

16 Q. Let me show you the rest of your testimony on
17 that.

18 MR. GRUENLOH: Pat, can you pull up page 68 of her
19 deposition.

20 BY MR. GRUENLOH:

21 Q. And, Cori, can you go to that?

22 A. Yes, sir.

23 Q. And if you go to page 67 first, down at the
24 bottom, where it says -- and, Pat, you can stay right
25 there. The question starts on page 67. The question

CORI SMITH -- REDIRECT

1 is, "Probably. Okay: It's more probable than not, you
2 ran on REDACT Street the week before, do you recall
3 anything -- anything about this particular site?" And
4 your response was, "I remember noticing that it was
5 messy" -- do you see where I'm at?

6 A. Yes, sir.

7 Q. All right. And then the question was, "Do you
8 recall anything specifically" -- talking about the week
9 before -- "do you recall anything specifically about
10 the silt fence or the black fence that" -- and what was
11 your response when you were under oath that day?

12 A. "It was down."

13 Q. And that's your testimony today, isn't it?

14 A. Yes.

15 Q. Were you telling the truth then?

16 A. Yes.

17 Q. Are you telling the truth today?

18 A. Yes.

19 Q. Do you remember you told us that you went out
20 and took some pictures because Mr. Connelly was freaked
21 out because he was out of town, and he didn't know what
22 the site looked like, and he wanted to know what the
23 site looked like?

24 A. Yes, sir.

25 Q. Let me show you your testimony.

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1 MR. GRUENLOH: Pat, pull up page 91, 92.

2 BY MR. GRUENLOH:

3 Q. Cori, can you go to page 91?

4 A. Yes.

5 Q. You were asked about whether or not there were
6 workers at the site that day; do you remember that back
7 and forth?

8 A. (Nodded affirmatively.)

9 Q. If you read along with me at page 91 of your
10 deposition, beginning at line 19. "Okay. Do you
11 remember -- I thought your testimony was that you
12 remembered some workers being on the site at the time
13 of the fall. I mean, you don't -- I'm going to
14 assume -- and let me know if I'm wrong, but you don't
15 know how many or their names, or" -- And then your
16 answer, "No, the only thing I remember is that after
17 the fact, I remember saying that I thought it was weird
18 that no one asked if her -- if she -- if she was all
19 right. I mean, she's a bloody woman lying on the
20 sidewalk" -- was that your testimony?

21 A. Yes.

22 Q. Is there any doubt in your mind that there
23 were construction workers at REDACTED Street on June
24 6, 2011, when you and Mrs. Connelly ran by?

25 A. Yeah.

CORI SMITH -- REDIRECT

1 MR. GRUENLOH: Thank you for answering my
2 questions.

3 THE COURT: Ms. Smith, you may step down. Thank
4 you very much.

5 THE WITNESS: Thank you.

6 MR. GRUENLOH: Your Honor, may we approach?

7 THE COURT: Mr. Brown, do you want to mark that
8 deposition as a court's exhibit?

9 MR. BROWN: Yes, sir, Your Honor.

10 THE COURT: If you'll find it for me, I'll be
11 happy to.

12 MR. BROWN: I will get right on that.

13 THE COURT: Okay. If you'll mark that -- Court's
14 Exhibit what?

15 COURT REPORTER: Five.

16 THE COURT: Five. Okay.

17 (WHEREUPON, Court's Exhibit No. 5 was marked and
18 made a part of the record.)

19 (WHEREUPON, a bench conference was held.)

20 THE COURT: All right. Madam Forelady, I was
21 trying to talk to the lawyers to sort of get a feel for
22 how many more witnesses they had, and how long it was
23 going to take for this trial to bring it to its
24 conclusion.

25 Let me ask you this, is there any member of the

CORI SMITH -- REDIRECT

1 jury that cannot -- I know this morning there was some
2 traffic problems on James Island, I-26, and probably
3 other places -- is there anybody that cannot be here in
4 the morning at 9:00? If you've got children problems,
5 or problems please tell me now, because I'm thinking
6 about starting at 9:00. Unless somebody says they just
7 can't be here tomorrow at 9:00 -- is there anybody that
8 cannot be here tomorrow at 9:00?

9 See, my problem is if 10 of you show up at 9:00,
10 and two of you show up at 9:30 -- can all of you be
11 here at 9:00?

12 (All answered in affirmative.)

13 THE COURT: All right. Be here at 9:00 in the
14 morning, we'll get started at 9:00 in the morning.
15 Please don't discuss the case amongst yourselves or
16 anyone else, and don't do any electronic investigation
17 about the -- the issues in this case please. See you
18 in the morning at 9:00. Have a good evening.

19 (WHEREUPON, the jury leaves the courtroom at
20 approximately 4:46 p.m.)

21 THE COURT: All right. Let met see the lawyers up
22 here just a second please.

23 (WHEREUPON, a bench conference was held, and the
24 trial concluded for the day.)

25

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2

3 THE COURT: All right. Anything from the
4 plaintiff before we bring the jury?

5 MR. GRUENLOH: No, Your honor.

6 THE COURT: Did you work anything out with the
7 doctor?

8 MR. GRUENLOH: I did get a phone call back, and I
9 think that we've got everything that we need on the
10 exhibits. I've already discussed that with them today,
11 so our witnesses are going to be Mr. Thomas and
12 Christina, then the plaintiff anticipates resting.

13 THE COURT: So you're not going to be calling the
14 doctor?

15 MR. GRUENLOH: No, sir.

16 THE COURT: Okay. All right. All right. Bring
17 us the jury, please.

18 MR. HINES: Your Honor, may -- may it please the
19 court. Before the jury comes in -- I wanted -- this is
20 housekeeping-wise. You mentioned, I believe, the first
21 witness today is going to be Mr. Thomas, and I've made
22 that motion previously about the request to admit --

23 THE COURT: The first witness is what?

24 MR. HINES: I believe, Mr. Thomas, Jeff Thomas is
25 going to be the plaintiff's witness. And I think that

1 the issue will likely come up in this -- with this
2 witness about --

3 THE COURT: I thought we said we would listen to
4 some of them in camera whenever we're ready to do it.

5 MR. HINES: My mistake, Your Honor.

6 THE COURT: Isn't that what we said? Whenever you
7 get to the issue where you want to modify --

8 MR. HINES: Your Honor, my --

9 THE COURT: -- the request to admit? Is that what
10 you're talking about?

11 MR. HINES: My understanding from yesterday's
12 discussion from the bench was that perhaps --

13 THE COURT: I was just telling you my thoughts. I
14 haven't ruled yet. Okay.

15 MR. HINES: Thank you, Your Honor.

16 THE COURT: And I think I ruled from the bench,
17 and I said whenever we get into the issue of what the
18 purpose of the silt fence was, we would do an in
19 camera, and I would rule.

20 MR. HINES: Thank you, Your Honor.

21 THE COURT: Now, I haven't changed that. I was
22 telling you yesterday, for your information, that
23 wasn't on the record. I haven't ruled yet. And I will
24 still listen to your arguments at the appropriate time.

25 MR. HINES: Your Honor, I was -- I was mistaken.

1 Let me make clear, the last thing I want to do is argue
2 after you've ruled, so I'm going to sit down.

3 THE COURT: Okay. Thank you so very much. All
4 right. Anything else before we bring the jury?

5 MR. BROWN: No, Your Honor.

6 THE COURT: Okay. Thank you very much. Bring us
7 the jury.

8 COURT REPORTER: I marked the two video
9 depositions we listened to as court's exhibits.

10 (WHEREUPON, Court's Exhibits Nos. 6 & 7 marked
11 and made a part of the record.)

12 THE COURT: All right. I mean, just let me know
13 when we're going into that silt fence issue, and we'll
14 go in camera. Okay?

15 MR. HINES: Thank you, Your Honor.

16 MR. GRUENLOH: I could tell Your Honor it's just
17 going to be simply one question. And when he answers
18 as I expect he is, then I intend to show him the
19 request for admission.

20 THE COURT: I understand.

21 MR. GRUENLOH: And I will -- before I ask the
22 question, I'll say maybe --

23 THE COURT: Just let me know and I'll send the
24 jury out and listen to it in camera. I told him I
25 would do that.

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1 MR. GRUENLOH: Very good, Your Honor.

2 THE COURT: Okay.

3 (WHEREUPON, the jury enters the courtroom at
4 approximately 9:18 a.m.)

5 THE BAILIFF: All jurors are present, Your Honor.

6 THE COURT: Thank you very much. If the
7 plaintiffs would call their next witness, please, sir.

8 MR. GRUENLOH: Your Honor, the plaintiff calls the
9 corporate representative of Winsor Custom Homes, Jeff
10 Thomas.

11 THE COURT: Okay.

12 JEFFREY THOMAS, after having
13 been duly sworn, testified as follows:

14 THE CLERK: Please be seated. When seated, please
15 state your first and last name, spelling your last name
16 loudly and clearly into the microphone.

17 THE WITNESS: My name is Jeffrey Thomas. The last
18 name is spelled T-h-o-m-a-s.

19 MR. GRUENLOH: Good morning everybody.

20 DIRECT EXAMINATION BY MR. GRUENLOH:

21 Q. Good morning, Mr. Thomas.

22 A. Good morning.

23 Q. The property that we've been talking about
24 during this lawsuit, REDACTED Street, you were the
25 general contractor for that property; correct?

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1 A. Correct.

2 Q. All right. And a point of fact, your company,
3 Winsor Custom Homes, was the general contractor for
4 that company; correct?

5 A. Correct.

6 Q. And you're the owner of Winsor Custom Homes
7 and also the corporate representative?

8 A. I'm the owner of the company.

9 Q. Okay. And -- well, let me ask you, sir. Are
10 you denying any responsibility for this accident?

11 A. Yes.

12 Q. Are you denying that -- are you also denying
13 that it was foreseeable that someone could be passing
14 by on a public sidewalk, and that their foot could
15 catch on this fence and fall down?

16 MR. HINES: Objection, Your Honor. It calls for
17 speculation.

18 THE COURT: I'll sustain the objection. Rephrase
19 your question, please.

20 BY MR. GRUENLOH:

21 Q. Did you anticipate -- did you ever anticipate
22 that someone could be walking by or jogging by on the
23 public sidewalk in front of this construction site, and
24 trip and fall over this fence?

25 MR. HINES: Objection, Your Honor. It calls for

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1 a -- speculation --

2 THE COURT: Overruled. Go ahead.

3 A. Did I anticipate that someone jogging by could
4 trip on a silt fence? I -- I don't know that it ever
5 crossed my mind. But in a construction -- a place like
6 Daniel Island, where there's construction all over the
7 place, things happen. Things get moved around that are
8 beyond the control of the contractors. And, quite
9 frankly, I think anything can happen.

10 THE COURT: Mr. Thomas, let me -- let me say one
11 thing, please. You can answer questions yes or no, I
12 don't know, I don't understand, you can give any
13 explanation that you want to give. Okay. But listen
14 to the question, and answer the question, and give your
15 explanation.. Okay?

16 A. Okay. Yes, sir.

17 BY MR. GRUENLOH:

18 Q. Let me ask my question one more time, sir.

19 A. Yes.

20 Q. Did you anticipate that someone, who was
21 passing by on the public sidewalk, could have tripped
22 and fallen over this black plastic fence that was
23 laying on the ground?

24 A. No.

25 Q. But you are here today -- you've been here and

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1 you've seen all the testimony; correct?

2 A. Correct.

3 Q. All right. But you understand that your
4 lawyers are here suggesting that Ms. Connelly and Cori
5 Smith ought to have anticipated this and stayed away
6 from that? You understand that, don't you?

7 MR. HINES: Objection, Your Honor.

8 THE COURT: What's your legal objection?

9 MR. HINES: Attorney/client privilege. Didn't he
10 say what your lawyers are saying?

11 THE COURT: What's -- what's your legal objection?

12 MR. HINES: Hasn't he asked what your lawyers
13 position is -- what your lawyers --

14 THE COURT: I think he asked what his position is
15 through the attorneys, I believe.

16 MR. GRUENLOH: And, Your Honor, I wasn't referring,
17 -- to be clear, I wasn't referring to anything that
18 he's been told in confidence.

19 THE COURT: I understand.

20 MR. GRUENLOH: I'm just talking about what's
21 happening --

22 THE COURT: Just rephrase your question.

23 MR. GRUENLOH: Sure.

24 BY MR. GRUENLOH:

25 Q. You've been here in the courtroom all week;

JEFFREY THOMAS -- DIRECT

1 correct, sir?

2 A. I have.

3 Q. And you understand that Winsor Custom Homes'
4 position is that Cori Smith and Rosemary Connelly
5 should have anticipated that this was a problem, and
6 therefore it's their fault?

7 A. I don't know if I'm doing this right, but
8 there's an explanation needed here.

9 THE COURT: You can answer the question, then you
10 can give whatever explanation you want to give, please,
11 sir.

12 A. Okay. Ask me that question again, please.

13 BY MR. GRUENLOH:

14 Q. Sure. You understand that it's your company's
15 position, as has been expressed in this courtroom this
16 week -- that you've been here with us -- that it's
17 Rosemary Connelly and Cori Smith's fault that this
18 accident happened because they should have anticipated
19 it? Do you understand that that's the position that's
20 been expressed here, don't you, sir?

21 A. I don't totally know that that is the position
22 that I've seen from the past four days. I don't know
23 that that's come up.

24 Q. Are you saying to this jury right now -- I
25 want an answer on this question, and then we'll move on

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1 and cover some other subjects. But are you saying to
2 this jury right now that this was, in any part, Ms.
3 Connelly or Cori Smith's fault because they should have
4 anticipated that this fence could have caught her foot
5 and caused this fall?

6 A. I would say if you see a dangerous --
7 potentially dangerous situation in front of you, as
8 you're running, you should probably avoid it as far as
9 possible.

10 Q. You were out at the property on nearly a daily
11 basis as the general contractor, were you not?

12 A. I would say a daily basis, generally speaking.

13 Q. Is it your testimony that they should have
14 anticipated the dangerous condition, as you put it,
15 when they saw it? But you, as the general contractor,
16 when you went out there to that site every single day,
17 you should not have anticipated it?

18 MR. HINES: Objection, Your Honor. That assumes
19 facts not in evidence.

20 THE COURT: Overruled.

21 A. I didn't see this condition.

22 BY MR. GRUENLOH:

23 Q. Do you understand, sir -- I just want to know
24 right now, whether or not you're telling the ladies and
25 gentlemen of the jury -- because you've already said

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1 that you have no responsibility for this. What I want
2 to know is if you're telling these folks, under oath,
3 that you believe that Rosemary Connelly and Cori Smith
4 have responsibility for this accident because they
5 should have anticipated it?

6 A. I'm not always a believer in direct
7 responsibility. Things happen, accidents happen.

8 Q. My question to you is, are you telling these
9 ladies and gentlemen that Cori Smith and Rosemary
10 Connelly, that it was their fault because they should
11 have anticipated it?

12 MR. HINES: Objection, Your Honor. What's -- Ms.
13 Smith's fall?

14 THE COURT: Overruled.

15 BY MR. GRUENLOH:

16 Q. And please --

17 A. Can I say there -- there may not be an
18 absolute fault.

19 Q. All I want to know -- I don't want to talk
20 about philosophy or anything like that. I just want to
21 know the answer to a very simple question: Are you
22 saying to this jury that this was, in any part,
23 Rosemary and Cori Smith's fault -- that it was their
24 fault because they should have anticipated that this
25 fence could trip them? Is that what you're saying to

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1 these folks, that it was their fault?

2 A. I guess if you want a yes or no answer, the
3 answer is yes.

4 Q. Okay. And yet when I asked you earlier about
5 whether or not you could anticipate it, the contractor
6 who is out there every single day, who presumably walks
7 past the black plastic barrier every single day, you
8 said -- you kind of equivocated, do you remember? You
9 said, I'm not real sure. But you think -- it's pretty
10 clear in your mind now that it's their fault because
11 they should have anticipated it; is that what I
12 understand?

13 A. You know to the extent that I knew that the
14 silt fence was down -- okay -- I'm generally fixing the
15 silt fence as soon as possible -- as soon as humanly
16 possible. And I'm not on that site every single day of
17 the week.

18 Q. You do -- you do recall that when you
19 testified at your deposition under oath, that you told
20 me that you were out at the site on a daily basis;
21 correct?

22 A. I believe -- I believe what I testified was
23 that I'm on sites on a daily basis with general
24 exceptions.

25 Q. I have your sworn testimony here, and we can

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1 open it up.

2 A. Sure.

3 Q. But what I want to know right now is did you
4 tell me in your deposition that you were out there on a
5 daily basis?

6 A. I believe what I told you in the deposition --
7 and I could be wrong. This happened four years plus
8 ago. My deposition was a year ago. And I believe what
9 I said in my deposition was, yes, I am on the job site
10 to the extent possible. And I am on the job site --
11 I'll do a drive-by to the extent that I feel it's
12 necessary.

13 Q. Let me make sure I understand. So in the days
14 and weeks leading up to June 6, 2011, you were there on
15 a daily basis; correct?

16 A. I don't know.

17 Q. Well, let me come back to that. I want to ask
18 you a few questions about some of the work that you
19 have done out at Daniel Island. And I think you told
20 me that you participated in the construction of about
21 80 homes out at Daniel Island over the years; is that
22 right?

23 A. That's correct at the time, yes.

24 Q. And you've been a contractor, a general
25 contractor for going on 18, 19 years?

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1 A. Actually about 19 years in South Carolina, and
2 about four or five in Massachusetts.

3 Q. And the 80 homes that you have participated in
4 the construction of out at Daniel Island -- I mean,
5 Daniel Island is not the only work that your company
6 does? You do work in West Ashley?

7 A. We've done work in West Ashley, correct.

8 Q. And you do work -- you've done work in
9 Charleston?

10 A. Yes.

11 Q. All right. You've done work -- where else
12 have you done work, Sullivan's Island?

13 A. Sullivan's Island. I've done work in the City
14 of Charleston, Mount Pleasant, West Ashley,
15 unincorporated Berkeley County.

16 Q. That the 80 homes that you've done work on out
17 on Daniel Island, that's only about 30 percent -- I
18 believe you told me -- of your overall work in terms of
19 the homes that you've constructed?

20 A. Yeah. Again, I -- I still haven't done the
21 numbers. I reviewed that testimony. In numbers wise,
22 40 percent. Dollar volume wise, 50 percent. I'd
23 really have to look at the numbers. And I never --
24 following that deposition, I never even reviewed those
25 numbers.

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1 Q. Let me just make sure I've got something
2 straight before we go on today. Do you remember when
3 we took your deposition, and you were noticed as what's
4 called the corporate representative of Winsor Custom
5 Homes; do you recall that?

6 A. Yes. I'm not usually referred to as a
7 corporate representative. It's not a corporation like
8 you would think of IBM or Coca-Cola.

9 Q. All right. But for legal purposes, you
10 understood that when I took your deposition under oath,
11 you were the corporate representative of Winsor Custom
12 Homes; agree with me?

13 A. Yes.

14 Q. All right. And part of that was, you were
15 offered as the person most knowledgeable about things
16 having to do with Winsor Custom Homes; remember that?

17 A. Yes. The only person knowledgeable about
18 things that happen with Winsor Custom Homes.

19 Q. All right. And likewise, you were offered as
20 the person most knowledgeable about the black fence
21 that we've been talking so much about?

22 A. Correct.

23 Q. I just want to make sure before we go on,
24 you're not going to tell these folks here today -- a
25 couple of years now after we've taken your

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1 deposition -- I think well maybe at least a year, a
2 year and a half, you're not going to tell them that
3 there's somebody else more knowledgeable, are you?

4 A. Within my company?

5 Q. You're not going to tell them that there's
6 somebody more knowledgeable about Winsor Custom Homes
7 and this black fence, are you?

8 MR. HINES: Objection, Your Honor. That's just
9 vague.

10 THE COURT: What's your legal objection?

11 MR. HINES: The question is --

12 THE COURT: What's your legal objection?

13 MR. HINES: Well, asked and answered.

14 THE COURT: Overruled. Go ahead.

15 A. So could you ask me that again, because I'm --
16 I'm having trouble following what you're asking.

17 BY MR. GRUENLOH:

18 Q. Sure. You're not going to tell the ladies and
19 gentlemen of the jury today that there's somebody
20 else -- in other words, you're not going say, I don't
21 know, Mr. Gruenloh, you better go talk to somebody else
22 about that. You're not going to say that there's
23 somebody who has more information at Winsor than you do
24 about these events?

25 A. Am I not going to say that? I'm not going to

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1 say that to the extent that there's an element of these
2 events that we haven't talked about, that may require
3 the expertise of somebody else who has worked with me.

4 Q. Okay. Well, let me just be clear: As the
5 general contractor, you are the one who was responsible
6 for this site; correct?

7 A. Yes.

8 Q. All right. And even though you had
9 subcontractors working out there, you were responsible
10 for supervising and reviewing the subcontractor's work;
11 right?

12 A. Yes.

13 Q. And have you ever heard the old saying the,
14 the buck stops here? It was Harry Truman that first
15 said that. And I think it was in -- I think the Judge
16 can tell me if I'm wrong -- sorry, Judge. I think it
17 was in relation to him dropping the atomic bomb. And
18 he said, you know, there are other people that may have
19 done this, that and the other, but the buck stops here.
20 Are you familiar with that saying?

21 A. I'm familiar with it.

22 Q. All right. Does the buck stop with you as it
23 relates to the maintenance of your construction site?

24 A. I -- I would say that's -- I would say that's
25 accurate to the extent, however, there are certain

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1 trades -- for instance, my dry wall contractor, part of
2 their contract is to clean up all the dry wall, put it
3 in the dumpster and get it out of there. Okay. So is
4 it my responsibility to pick up the dry wall after he
5 drives away and all the dry wall falls out of dumpster
6 I would say it's part of his contract. It's the dry
7 wall contractor, so I can't say that unequivocally.

8 Now, is it my responsibility to call the dry
9 wall contractor? Yes, and tell him you've got dry wall
10 all over the street and it needs to be cleaned up and
11 get over there.

12 Q. Now, you recall that this lawsuit has been
13 pending for about two years? I'm sure you do.

14 A. Two? I thought it was four, but go ahead.

15 Q. Well, the lawsuit itself has been pending for
16 about two years; you recall that? Is that yes?

17 A. I honestly don't know when the suit was filed.
18 So if that's what you're telling me, and that's when it
19 was, then yes.

20 Q. I'll tell you what, whether it's four years or
21 two years, you and your attorneys have had an
22 opportunity for the last four to two years -- whatever
23 it is -- if you thought that it was anybody else's
24 responsibility, other than your company, you had an
25 opportunity to bring them into the courtroom and have

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1 them answer to this jury for what you thought they did
2 wrong?

3 MR. HINES: Objection, Your Honor. That's --

4 THE COURT: What is your legal objection?

5 MR. HINES: He has lawyers to represent him. He's
6 not a lawyer --

7 THE COURT: What's your legal objection?

8 MR. HINES: He's asking -- calling for a legal
9 opinion.

10 THE COURT: Overruled. Go ahead.

11 BY MR. GRUENLOH:

12 Q. Do you understand that, sir?

13 A. You've got to ask it again.

14 Q. Sure.

15 A. It's a complicated question.

16 Q. Well, let me just get right to the point.

17 You've not brought anybody else at any point in this
18 lawsuit, to your knowledge, and sued them and said
19 Subcontractor A or Subcontractor B, this is your fault,
20 not mine -- you've not done that at any point, have
21 you?

22 A. On advice of counsel, no.

23 Q. My point in all this, if you can start to see
24 the theme, sir, is I asked you whether you thought it
25 was -- because I asked you right away, do you bear any

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1 responsibility for this? And you said to me that you
2 did not; do you recall that?

3 A. I recall that.

4 Q. And then I asked you, if you thought that
5 Rosemary and Cori had any responsibility for causing
6 this accident. And we'll let these folks decide what
7 you answered. And now I just want to make sure you're
8 not here alleging today that there's any other party
9 that bears some legal responsibility that you're going
10 to point the finger at, are you?.

11 A. Is there any other party that I am going to
12 point the finger at? No.

13 Q. Okay. You agree that Winsor Custom Homes had
14 the responsibility, not only to construct the black
15 plastic fence, but also to maintain the black plastic
16 fence; don't you?

17 A. Yes.

18 MR. GRUENLOH: Pat, can you pull up --

19 BY MR. GRUENLOH:

20 Q. I want to ask you just some general questions
21 about this fence; and we went through some of these
22 things in your deposition.

23 MR. GRUENLOH: Can you pull up that March, 2011,
24 photo. There we go.

25

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1 BY MR. GRUENLOH:

2 Q. Do you have that in front of you, sir?

3 A. I do.

4 Q. Is that REDACTED Street?

5 A. Yes, it is.

6 Q. All right. And you were -- again, you were
7 the general contractor for that site; correct?

8 A. Yes.

9 Q. The black fence that we've been talking about
10 this whole trial, that's the black fence that goes
11 around that property there; right?

12 A. Right.

13 Q. And you've got a responsibility to put that up
14 pretty early in the process, would you agree with me?

15 A. Yes, I agree with that.

16 Q. And as a matter of fact, you know -- because
17 you've done a lot of work out at Daniel Island, that
18 the Daniel Island ARB requires you to put one of these
19 up; right?

20 A. Yes, they do.

21 Q. And you've become familiar with the Daniel
22 Island Guidelines that say what you have to do with
23 respect to these fences; haven't you?

24 A. Yes.

25 Q. And you know that if one of your fences like

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1 this goes into disrepair and is allowed to get into
2 disrepair, that Daniel Island can warn you; right?

3 A. Correct.

4 Q. And then they can fine you; correct?

5 A. They will fine you if you do not correct the
6 situation, yes.

7 Q. And they will warn you if it appears that you
8 have failed to maintain the fence; is that correct?

9 A. They will warn us; yes.

10 Q. Okay. So this thing -- this fence goes all
11 the way around the property lines; is that right?

12 A. It goes around the disturbed areas.

13 Q. Okay. And it is attached -- we can kind of
14 see in the photo, it's supposed to be attached to the
15 stakes? The stakes hold it up; right?

16 A. Correct.

17 Q. And it's -- I think you told me in your
18 deposition that the materials attach to the stakes by
19 staples; is that right?

20 A. Correct.

21 Q. Do you have a staple gun in your truck?

22 A. You know, I -- I have. And half of the time
23 when I go out and fix these things, I end up leaving
24 them -- leaving them on the job site. So I -- I get
25 them. I lose them. I get them. I lose them.

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1 Q. Back in March of 2011, you would agree with me
2 that this fence, if you kind of look at the front area,
3 it's starting to come down a little bit; do you see
4 that?

5 A. It is drooping, yes.

6 Q. This photo, by the way, this was taken from
7 the production of documents that Winsor Custom Homes
8 provided to us? You're aware of that, aren't you?

9 A. Yeah. I think this came from an elevation
10 certificate.

11 MR. GRUENLOH: Your Honor, if the court would like
12 a copy of this, I can -- because I'm probably not going
13 to have to look through it.

14 THE COURT: Okay. Thank you, sir.

15 MR. GRUENLOH: You're welcome.

16 BY MR. GRUENLOH:

17 Q. This, sir, I'll represent to you, and you
18 know -- you and your attorneys feel free to page
19 through it. I hope we can do it on break or something,
20 that way we don't waste everybody's time. But this is
21 the production of documents that when we asked your
22 attorneys a whole bunch of questions about, you know --
23 tell us everything you got on this case, tell us
24 everything that you got about this property -- this is
25 what was produced to us; you understand that?

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1 A. Yes.

2 Q. I'm going to put that right there for you.
3 The drooping that you were talking about -- and, again,
4 this -- that photo was produced to us in this
5 production; you're aware of that, right?

6 A. Yes, if I believe this came from the elevation
7 certificate.

8 Q. Okay. And you're not disputing that this
9 wasn't taken on March 21, 2011, are you?

10 A. I am not.

11 Q. So just back real quick to whose
12 responsibility this is -- you were aware that sometimes
13 your subs -- your subcontractors would have to sort of
14 use the middle of the fence as a -- as a step over, and
15 sometimes they would drag materials over it; is that
16 right?

17 A. That is right, yes.

18 Q. And what they're supposed to do -- you can't
19 really see in this photo -- but sort of way off to the
20 right over there where the driveway is, there's
21 supposed to be a construction entrance for them;
22 correct?

23 A. Correct.

24 Q. And that's where they are supposed to go?

25 A. Correct.

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1 Q. And at your deposition, we kind of talked
2 about this and the idea was, well, darn it, those subs.
3 I can't always be there to watch -- I can't always be
4 there to watch them. And sometimes they do this, and
5 they pull these -- this material over the top -- and
6 that's what causes these fences to start to come down;
7 do you remember you told me that?

8 A. That is one of the ways that the fences can
9 come down, yes.

10 Q. But you told me, but they don't do it while
11 I'm around?

12 A. If -- if I'm there, generally speaking, they
13 will not trash my silt fence.

14 Q. Let's take a look at the photo that Cori Smith
15 took on June 7, 2011.

16 MR. GRUENLOH: And, Pat, if it comes up upside
17 down -- there we go.

18 BY MR. GRUENLOH:

19 Q. You've been in the courtroom, you've seen this
20 photo?

21 A. I have seen it.

22 Q. You were here when Rosemary testified that
23 that's what it looked like on June 6, 2011, when she
24 was jogging by; have you not?

25 A. I was here. I believe that's what she

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1 testified. I heard -- I heard three different
2 testimonies about the condition of the silt fence the
3 day this picture was taken, or the day before this
4 picture was taken.

5 Q. Okay. Well, you understand just -- let's be
6 very clear about this -- you understand that Cori Smith
7 testified that she took that photo the day after on
8 June 7th; correct?

9 A. Yes.

10 Q. All right. And you understand that in part
11 because, as your lawyer said, you were contacted on
12 June 7th and said -- and you were told that there was
13 an injury out there; do you remember that?

14 A. Yes. I remember I was contacted by William
15 Connelly indicating that his client had tripped --

16 Q. So you --

17 A. -- on the sidewalk in front of one of my job
18 sites.

19 Q. So you knew on June the 7th, 2011, that
20 somebody had -- or at least it was alleged that
21 somebody had gotten hurt out there on this; right?

22 A. Yes. It was -- it was alleged.

23 Q. And going back to my original question, so you
24 know -- you were here when Cori Smith said that she
25 took this photo, because her husband asked her to go

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1 take a photo of what it looked like, you were here;
2 right?

3 A. Rosemary's husband?

4 Q. Right. Sorry.

5 A. Yes.

6 Q. And you were here, also, when Cori testified
7 just yesterday that she's the one that took the photo.
8 And you were here when she testified that that's what
9 it looked like, give or take an inch here or there, on
10 the day that they ran by, June 6, 2011?

11 A. Yeah. I believe that's what she said.

12 Q. You would agree with me that the condition of
13 the fence -- well, as it's depicted here in this photo,
14 that it's 70 percent down?

15 A. I think that's the number I talked about in my
16 deposition. And I would say, without measuring
17 anything, 70 percent is about right.

18 Q. I might argue with you today, that this is a
19 hundred percent down, but you've told me that it's 70
20 percent down; is that right?

21 A. Uh-huh.

22 Q. Yes?

23 A. Yes.

24 Q. I just do that for the court reporter.

25 A. Yes.

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1 Q. I'm not trying to be rude.

2 A. I understand.

3 Q. You agree that this was untidy; is that right?

4 A. Yes.

5 Q. And you agree that you would expect to be
6 warned by Daniel Island if they -- if somebody passed
7 by from the ARB and saw this, you would expect to be
8 warned for this; right?

9 A. I would.

10 Q. And you also told me at your deposition, that
11 you knew that this material was the type of material
12 that could get airborne if a good gust of wind came
13 through?

14 A. Yes.

15 MR. GRUENLOH: Your Honor, I think this might be
16 an appropriate time to take up the legal matter.

17 THE COURT: Okay. All right. Ladies and
18 gentlemen of the jury, I'm going to have to ask you to
19 go to the jury room. But let me explain something very
20 briefly first.

21 I'm not permitted to comment on the facts during
22 the course of this case. And sometimes when legal
23 issues come up, I want to be free to comment on the
24 facts with the lawyers, so I'm hearing this for the
25 first time just as you are, so I don't know what the

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1 facts are. And I want to be free to discuss the facts
2 with the attorneys, so I can comment on them. That's
3 the reason I ask you to leave the jury room (sic),
4 because if it -- I also have to make a determination
5 whether or not it's admissible under the rules of
6 evidence.

7 And in making that determination, I want to
8 discuss the facts with the lawyers, so I ask you to
9 leave the courtroom. Because if I decide it's not
10 admissible under the rules of evidence, I don't want
11 you to hear it. So that's the reason -- I'm not trying
12 to hide anything from you. The lawyers aren't trying
13 to hide anything from you. It's just the way I have to
14 deal with making my determination of whether it's
15 admissible or not admissible.

16 Please go to the jury room, don't discuss the
17 case. I'll get you back just as soon as we can.

18 (WHEREUPON, the jury leaves the courtroom at
19 approximately 9:49 a.m.)

20 THE COURT: All right. I understand we're
21 going -- I had taken the defendant's motion under Rule
22 36, to withdraw their request to admit as to the
23 purpose of the silt fence or the black plastic --
24 whatever you want to call it. And I would listen in
25 camera as to the questions and the answers by the

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1 defendant before I rule. And I will also give you an
2 opportunity to express anything new -- anything you
3 want to put on the record before I rule. Okay?

4 MR. HINES: Thank you, Your Honor.

5 THE COURT: All right. Please proceed.

6 MR. GRUENLOH: One question, Your Honor.

7 BY MR. GRUENLOH:

8 Q. Do you agree that the purpose of this fence is
9 to keep -- is to control construction debris from
10 blowing off the construction site onto the property of
11 others?

12 A. No.

13 MR. GRUENLOH: Your Honor, I said one question --
14 let me just ask one more question.

15 THE COURT: Okay.

16 MR. GRUENLOH: And lawyers always do that. I
17 don't know why I said that.

18 BY MR. GRUENLOH:

19 Q. Would you agree with me that one of the
20 purposes of this fence is to keep construction debris
21 from blowing off your property onto the property of
22 others?

23 A. I would agree that that is a minor benefit of
24 having the silt fence on the property.

25 Q. I understand your qualification, but is your

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1 answer to my question yes?

2 A. Yes, but it's not the primary purpose of a
3 silt fence.

4 Q. That's all.

5 THE COURT: Okay. Now, are you planning on
6 publishing the requests to admit?

7 MR. GRUENLOH: I am, Your Honor.

8 THE COURT: Because he did say it was one of the
9 purposes. And I think that's what it says, that's one
10 of the purposes -- I don't say it, but does it say one
11 of the purposes or the purpose. I don't remember. I'm
12 sorry.

13 MR. GRUENLOH: It says, "It is installed to help
14 control construction debris from blowing off the
15 construction site onto the property of others".

16 THE COURT: Okay. All right. Now, you want to
17 withdraw that; correct?

18 MR. HINES: Your Honor, and also -- I need to
19 supplement that by saying, yes, Your Honor, I do want
20 to withdraw it.

21 THE COURT: Are you going substitute anything or
22 you just want to flat withdraw it?

23 MR. HINES: I think it should be withdrawn
24 entirely, Your Honor.

25 THE COURT: Pardon?

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1 MR. HINES: I'm asking it to be withdrawn
2 entirely.

3 THE COURT: We had arguments before we started
4 trial, and all that's on the record. But if you have
5 anything new you want to tell me, I'll be glad to
6 listen to you.

7 MR. HINES: Yes, Your Honor. I think we have a
8 very unusual situation here because this is --
9 respectfully, Your Honor, this is gamesmanship, and
10 that's not how we decide cases.

11 What they are doing is they have something that
12 is no doubt a little bit of stray language in their
13 discovery response. They've told Your Honor, oh, no,
14 Your Honor, that's not straight language, the last 18
15 months we have been laboring under this.

16 Now, what I would like to put in evidence --
17 regardless if the court rules against me on this -- I
18 have excerpted from Mr. Thomas' deposition, when he was
19 deposed -- not just the one question and answer that
20 contained this, but all of the pages. This is -- now,
21 I want to be clear.

22 Every lawyer has an ethical responsibility, Your
23 Honor, to not present unmeritorious claims, regardless
24 of the way they might have stumbled upon having them to
25 the court. I think we can all agree to that.

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1 Now, this is Mr. Gruenloh examining Mr. Thomas.
2 Again, let's go down to number three. It says you must
3 install this -- this is his evidence that's in
4 evidence, Daniel Island ARB Guidelines. It says that
5 you must install erosion control measures. And then it
6 has in parenthesis "silt fence" end parenthesis, to the
7 perimeter of the property, correct? Answer:

8 "Correct."

9 Now, I want you to also remember, Your Honor,
10 that Mr. Gruenloh told you the other day, he never
11 asked Mr. Thomas about silt fences at his deposition --

12 THE COURT: He never what?

13 MR. HINES: He never asked Mr. Thomas about silt
14 fences at his deposition. He told you that, that this
15 is how he is being prejudiced. He said because he made
16 a strategic choice not to ask him. That's the first
17 purpose about asking.

18 Second, page 73, if you look at the top right
19 corner talking about this document right here --

20 (COURT REPORTER INTERRUPTION.)

21 MR. HINES: I apologize. I don't bother the judge

22 --

23 THE COURT: No, you're not bothering me. Just
24 calm down and speak slowly and loud. Take it easy.
25 Nobody is going to bite your head off. Just calm down.

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1 MR. HINES: Your Honor, I'm so sorry.

2 THE COURT: Calm down. Take it easy. Okay. Go
3 slow. Okay.

4 MR. HINES: Madam Court Reporter, my apologies.

5 THE COURT: I know you're nervous and that's
6 natural, but just calm down. Okay. Everything will be
7 fine. Just take it easy. Okay. All right. Please
8 proceed.

9 MR. HINES: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. HINES: All right. Here is my loud speaking
12 about slow speaking voice for the court reporter.

13 THE COURT: Right. Keep it that way, and you'll
14 be fine.

15 MR. HINES: Thank you. Now, Madam Court Reporter,
16 if you can hear me, this is a document I'd also like to
17 put in as a Court's Exhibit. It is a plan that is REDA
18 CTED
19 Street. It was asked about -- I don't have the
20 one with the exhibit sticker on it. But, Your Honor, I
21 can get it. This was asked of Mr. Thomas. There's a
22 note in the corner that says "note, sediment control
23 required on all sides at property line". I just wanted
24 you to know that.

25 Now, the question -- he's referring to this
document. Again, this is Mr. Gruenloh. We didn't ask

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1 any questions of Mr. Thomas -- we were told. "And if
2 you look at the top right hand corner, it says note,
3 settlement control requirement, all sides of the
4 property line. Maximum 20 foot access point allowed
5 along the street. Do you see that?" Mr. Thomas: "I
6 see that. It appears, though, that this note regarding
7 sediment control -- and when we're talking about
8 sediment control, are we talking about anything other
9 than silt fences? I would construe that to mean silt
10 fences."

11 It continues, Mr. Gruenloh: "And before you
12 stated that as you understood the sediment control,
13 that would be the same as the silt fencing that's
14 required, correct?" Mr. Thomas: "Yes."

15 "Did you and Phil Clark have any discussions
16 about this portion of the plan that I just mentioned
17 about the sediment control" --

18 THE COURT: Slow down.

19 MR. HINES: "The sediment control for silt
20 fences?" Answer: "No."

21 Mr. Gruenloh: "Okay. So it wouldn't be the
22 case that you would go to Phil Clark and ask him what
23 type of fencing is required or what sediment control
24 means?"

25 "No."

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1 Continuing, Mr. Gruenloh: "What's the purpose
2 of the silt fence?" excuse me -- yeah -- this is Mr.
3 Gruenloh. "Just a couple of follow-ups. What is the
4 purpose of a silt fence?"

5 Answer: "What's the purpose of the silt fence?"

6 "Yeah."

7 "It's to define the construction zone. And as I
8 understand it, the silt fence" -- excuse me -- "as I
9 understand it, the silt fence is designed to define the
10 construction zone, but also to keep silt from running
11 into the drainage system and running into the marsh".

12 "Is one of the purposes of the silt fence where
13 it runs along the sidewalk to keep the sidewalk clear
14 of debris and other obstructions?"

15 "That's not the stated specific purpose of the
16 silt fence."

17 And, Your Honor, I don't mean to read deposition
18 testimony to the Court --

19 THE COURT: All right. Now, -- what -- what are
20 you asking the court to do?

21 MR. HINES: I'm saying in the interest of justice
22 for two reasons, that Rule 36(b) -- and the reason I
23 mention rule number one, the whole goal here, Your
24 Honor, I understand --

25 THE COURT: Slow down.

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1 MR. HINES: The whole goal of what we're here to
2 do, and the reason we've got these folks in that room
3 right now, is so this can be fair. We went through
4 hours and hours worth of jury selection, is to be fair.
5 The cause of justice. If that's not what we're going
6 to do, there's no reason for any of us to be here.

7 The point is not only did Mr Thomas, under oath
8 time and time again, testify about a silt fence that he
9 was allegedly never asked about when plaintiff's
10 counsel was explaining to you why he was prejudiced;
11 not only do I have the transcript of the deposition
12 from the architect that plaintiff's counsel hadn't
13 ordered, and told you he never had asked the
14 architect -- well, I'll be happy to read all 10, 12 or
15 how many ever pages of questions -- when we've been
16 told by Your Honor that, but more than that -- more --
17 even if they were actually laboring under this, should
18 we decide cases based upon something we all know is
19 wrong? I can go look at their exhibit 11 if you'll let
20 me, Your Honor.

21 THE COURT: Anything else?

22 MR. HINES: Very quickly. Exhibit 11, they're
23 going to present this to the jury. Keep in mind, this
24 is the document they're going to use to say, we got an
25 obligation to maintain it. What does it say we've got

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1 an obligation to do? It's called erosion control
2 measures, silt fencing for the perimeter of the
3 property. I just want to be clear what we're doing,
4 because I like to make a record. I understand -- thank
5 you very much for your indulgence.

6 And one more thing at this point, Your Honor,
7 Rule 201 Rules of Evidence --

8 THE COURT: Give that back to the court reporter,
9 please.

10 MR. HINES: It allows his honor -- Your Honor, I'm
11 not just nervous because I want to move quickly for the
12 court, but I'm -- this is an issue that I care about
13 deeply, because I think it is -- I want to make a
14 record. It's not just -- it is not only prejudicial,
15 but it is not what a silt fence is. Perhaps I don't
16 know if plaintiff's counsel would like to argue this
17 silt fence is something other than this. But what I'm
18 suggesting to his honor, is that you may take judicial
19 notice of what the silt fence isn't what -- is supposed
20 to --

21 THE COURT: No, we're not talking any judicial
22 notice. But go ahead. Okay. Thank you.

23 MR. HINES: That's my argument, Your Honor. It's
24 not only not prejudicial, it's fundamentally unjust to
25 basically tell the jury a lie --

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1 THE COURT: Thank you so very much. I appreciate
2 your arguments. Thank you for slowing down and
3 speaking loud. Okay. I hope you will continue that,
4 okay, for my benefit and the jury's and the court
5 reporter, please.

6 MR. HINES: Pending your Court's ruling, Your
7 Honor, may I put these things in as Court's Exhibits
8 the --

9 THE COURT: You can put anything you want in as a
10 Court's Exhibit. Okay.

11 MR. HINES: Thank you.

12 THE COURT: All right. I'll be glad to hear you.

13 MR. GRUENLOH: Yes, sir. First I would
14 incorporate our earlier arguments on this. So as not
15 to belabor and waste a bunch of time, very quickly this
16 is a request for admission, not an interrogatory or
17 document request. The Court is very much aware of the
18 importance of requests for admission.

19 I would point out that they denied this request
20 for admission. And what they're required, under the
21 rules to do, is then explain why. That's part of this.
22 This was signed by Mr. Brown on January 10, 2014. And
23 I don't mean to point fingers at lawyers, but I just
24 heard about my ethical obligations and so I feel
25 compelled now to say this to Your Honor. This was put

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1 in on January 10, 2014, as their response.

2 I took the deposition of Mr. Thomas -- I think
3 three, maybe four months later in May of 2014. And in
4 all honesty, I did not remember asking him that
5 specific question. And I apologize very much to the
6 Court if I misspoke, but I think that what I said to
7 Your Honor a number of times in my previous arguments
8 is to the extent that we asked the question, I was
9 always taught not to ask one question too many.

10 I had this in my bag, Your Honor. And when he
11 gave me that response, I knew that there may come a day
12 where I would be able to pull out of my bag this
13 response and have him answer to the jury and impeach
14 him with it. And that's the impression and the
15 understanding -- I think rightfully so given it's a
16 request for admission -- that I've been laboring under
17 for two years. Apparently I asked some questions of
18 the architect, the same sort of situation, Your Honor.
19 I didn't go out and get a construction expert for the
20 purpose of coming in and saying what this -- the
21 purpose of this fence is. All right. If I knew that I
22 had to do that, because I didn't have this response,
23 then in all likelihood I would have done that, but I
24 didn't do that.

25 My argument, Your Honor, is simply it's too

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1 prejudicial at this point. At that deposition in May
2 of 2014, when they point the finger at me, I'm sorry,
3 but I've got to point the finger back at them. To the
4 extent those questions were answered, if they wanted to
5 withdraw, that was the time.

6 THE COURT: Okay. All right. Thank y'all very
7 much.

8 MR. HINES: Your Honor --

9 THE COURT: No, sir. Have a seat. Okay. Let me
10 back up. Anything you want to mark as a Court's
11 Exhibit, come mark. Real quick.

12 MR. HINES: Thank you, Your Honor.

13 THE COURT: I'm not listening to any more
14 arguments. Come mark what you want to mark.

15 MR. HINES: I just want to make sure the Court
16 knows this is an E.P.A. statement what silt --

17 THE COURT: Whatever you want to mark, mark.

18 (WHEREUPON, Court's Exhibit No. 8 was marked and
19 made a part of the record.)

20 THE COURT: Anything else you want to mark,
21 Mr. Hines, pursuant to this motion?

22 MR. HINES: Your Honor, I think I got it all
23 marked, and I thank you very much.

24 THE COURT: Pardon?

25 MR. HINES: No. Thank you, Your Honor.

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1 THE COURT: Okay. Thank you very much. All
2 right. This is the court's ruling: I'm going to rule
3 that you cannot withdraw it. However, based upon Mr.
4 Thomas' testimony, under oath this morning in camera,
5 where he said the requests to admit as far as debris
6 was one -- one reason for the fence, there was a minor
7 reason. And based upon the architect's requirement of
8 the silt fence, I will allow you to amend it -- however
9 you want to amend it, as to the purpose of the -- the
10 architect guidelines for protective silt.

11 Now, I will allow you to amend it, but I'm not
12 going to allow you to withdraw it. If -- he can read
13 or publish both of them to the jury. Now, y'all -- you
14 want to get together on how you want to amend it, and I
15 think the court can allow amendments during the course
16 of a trial based upon the testimony that's changed.
17 And I've heard his testimony. Based on his testimony,
18 I will allow you to amend it.

19 MR. HINES: Thank you, Your Honor, we will --

20 THE COURT: I'm not going to allow you to withdraw
21 it. Okay.

22 MR. HINES: Thank you.

23 THE COURT: Now, I'm going to take a short break.
24 Y'all get together on how you want to word this
25 amendment. Okay.

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1 MR. GRUENLOH: Thank you, Your Honor.

2 THE COURT: All right. Thank you very much.

3 MR. BROWN: Thank you, Your Honor.

4 THE COURT: Please don't discuss the case with
5 anyone during the break, please, sir, Mr. Thomas.
6 Okay.

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: Okay. You may step down.

9 (WHEREUPON, a brief recess was taken.)

10 THE COURT: All right. Have you got the amendment
11 that I can take a look at?

12 MR. HINES: I do, Your Honor.

13 THE COURT: Do you want this -- this Custom Homes
14 thing -- do you need it? I really don't want it, --

15 MR. GRUENLOH: If you don't want it, I'll take it
16 from you.

17 THE COURT: Okay. That's fine. I'll accept that
18 amendment. Are you ready?

19 MR. HINES: Yes.

20 THE COURT: I mean, do you want it -- at some
21 point in time, -- how do you want to mark it -- can you
22 get something typed?

23 MR. HINES: I can, Your Honor --

24 THE COURT: I guess this is okay. This is all
25 right. Let me give you this, if I could, and we'll

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1 mark it as -- however you want to mark it. All right.
2 Before the jury comes back, I have signed that order
3 modifying the caption, changing the caption to just
4 include Winsor Custom Homes and deleting the other
5 parties. All right.

6 Anything else before we bring the jury?

7 MR. HINES: No, Your Honor.

8 THE COURT: All right. Bring us the jury please,
9 sir.

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 10:39 a.m.)

12 THE BAILIFF: All jurors are seated, Your Honor.

13 THE COURT: Thank you very much. Please proceed.

14 MR. GRUENLOH: Thank you, Your Honor.

15 BY MR. GRUENLOH:

16 Q. All right. Mr. Thomas, do you remember when I
17 took your deposition on June 9, 2014, and I asked you
18 what the purpose of this silt fence is?

19 A. Yes.

20 Q. All right. And do you recall that your answer
21 was that "it's to define the construction zone"?

22 A. I recall that it was to define the
23 construction zone and to prevent silt from entering the
24 drainage system and the waterways.

25 Q. All right. And to be clear, I want to make

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1 sure I quote you right -- it's to define the
2 construction zone as I understand it -- "the silt fence
3 is designed to define the construction zone, but also
4 to keep silt from running into the drainage system and
5 running into the marsh" -- is that your recollection of
6 what you told me?

7 A. Yes, that's my recollection.

8 Q. All right. Let me show you, sir, you were --
9 you provided -- Winsor Custom Homes LLC provided a
10 response to some requests for admission. And I know
11 you're not a lawyer, but you understand what an
12 admission means, don't you, sir?

13 A. I can -- it could be something I admit. It
14 could be getting me into the circus. I don't know
15 which way -- the way you're phrasing it here.

16 Q. Well, this one is something that you admit in
17 a court --

18 A. Okay.

19 Q. -- interrogatories as being a fact.

20 MR. GRUENLOH: And, Pat, can you bring that up?

21 BY MR. GRUENLOH:

22 Q. And I want you to look at request number one.
23 And, again, when I asked you in your deposition you
24 told me that the purpose of the fence was to define the
25 construction zone, but also to keep silt from running

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1 into the drainage system; do you recall that?

2 A. I recall that.

3 Q. Okay. And the response to our request --
4 first our request was admit that "defendant Winsor
5 Custom Homes LLC was solely responsible for the
6 placement of the black plastic barrier referenced in
7 paragraph 22 of the complaint"; do you see where I've
8 read that from our request?

9 A. I see that, yes.

10 Q. And your response was denied. "Winsor Custom
11 Home's LLC was the general contractor for this project,
12 hired by the owners Karen Nelson and John Edelen." Let
13 me ask you first, were you blaming the owners at that
14 point? Were you saying that it was their
15 responsibility?

16 A. No.

17 Q. Okay. The next sentence is the one that I'm
18 really interested in, it says "Early in a project, the
19 black plastic barrier, a.k.a. fence, is installed to
20 help control construction debris from blowing off the
21 construction site onto the property of others"; have I
22 read that correctly?

23 A. You have -- you have read that correctly.

24 Q. All right. And if you turn to the back page
25 of this -- it's dated January 10, 2014; do you see

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1 that?

2 A. Yes.

3 Q. And it's signed by one of your lawyers there.
4 And underneath it says, "attorneys for defendant Winsor
5 Custom Homes" -- do you recall that?

6 THE COURT: Hold on just -- who is
7 putting scribbling on it --

8 THE WITNESS: My papers hit the screen.

9 THE COURT: Try to keep your papers off, because
10 it shows up on the screen, please, sir.

11 BY MR. GRUENLOH:

12 Q. Do you see this response that was provided to
13 us in January of 2014, was signed by one of your
14 attorneys, and it listed as attorneys for defendants,
15 Winsor Custom Homes?

16 A. Yes, I see that.

17 Q. We were talking about whether or not you were
18 on the site on a daily basis?

19 THE COURT: Let me interrupt you for just a
20 second, if I may.

21 Ladies and gentlemen, let me explain a couple of
22 things to you. During pretrial, we have in South
23 Carolina what is called discovery. And the parties
24 exchange interrogatories. Interrogatories are
25 questions that one party gives the other party to ask

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1 such as, what is the name of your witnesses and
2 addresses.

3 You also have requests to admit, when one party
4 sends the other party a request to admit certain facts.
5 And that's what he's been referring to on requests to
6 admit. And when they do admit it, it can be presented
7 in Court on those requests, whatever those responses
8 are. Please proceed.

9 MR. GRUENLOH: Thank you, Your Honor.

10 BY MR. GRUENLOH:

11 Q. We were talking about whether or not you were
12 at the site on a daily basis out at -- in June of 2011,
13 around that time; do you recall that? And you said you
14 weren't sure whether you were there every day et
15 cetera?

16 A. Yes.

17 Q. Do you recall that?

18 A. Yes.

19 MR. GRUENLOH: Your Honor, may I have permission
20 to unseal Mr. Thomas' original deposition?

21 THE COURT: Yes, sir.

22 MR. GREUNLOH: Thank you.

23 THE COURT: Ladies and gentlemen, when -- when
24 they take a deposition, the court reporter puts it
25 under seal, where it is opened in front of the Court at

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1 the Court's direction and in front of the jury, so it
2 hasn't been tampered with from the original deposition.
3 He is now -- and it actually has a gold seal on the
4 back of it, and he's now breaking this gold seal, and
5 opening the original deposition.

6 MR. GRUENLOH: Hey, Pat, real quick, can you go to
7 page 50, lines 7 through 16.

8 BY MR. GRUENLOH:

9 Q. And, Mr. Thomas, I'm going to hand you your
10 original deposition. Again, I'm looking at page 50,
11 lines 7 through 16. And actually, Mr. Thomas, if you
12 can start for me on page 49 -- Pat, you can stay where
13 you are at -- it's on page 50, because it's only one
14 line.

15 BY MR. GRUENLOH:

16 Q. All right. Have you found the page, Mr.
17 Thomas?

18 A. I'm on the page, which line?

19 Q. Page 49 line 25. And my question begins:
20 "Were you at REDACTED Street on a daily basis in
21 May/June time period of 2011?" And then there's an
22 objection.

23 MR. GRUENLOH: Pat, can you get that whole top
24 part blown up for us, from one through six. Thank you.
25 There we go.

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1 BY MR. GRUENLOH:

2 Q. So, again, sir -- I'm sorry. "Were you at
3 REDACTED Street on a daily basis in May/June time
4 period of June 2011" -- there's an objection. And your
5 response was what?

6 A. "By daily, do we mean every day?"

7 Q. And my question was: "What I meant was Monday
8 through Friday, pretty much every day?" And what was
9 your answer?

10 A. "Excepting other obligations."

11 Q. And then my question was: "All right. So
12 ordinarily, you were at the property on a daily basis
13 in May to June 2011 timeframe; correct?" And what was
14 your response?

15 A. "Yes."

16 Q. All right. So you would agree with me
17 excepting other obligations, that you were on that job
18 site on a daily basis? At least Monday through Friday;
19 correct?

20 A. I would say correct in -- and to add to that,
21 if I may, sometimes I'm not on the job depending on
22 what's going on with the job. If I know no
23 subcontractor is showing up, there may be no need for
24 me to go to the job. If the frame -- if I'm waiting
25 for the framer to show up for a week, and nothing else

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1 is happening on the job, I might drive-by once in that
2 week, just to check on the site, to make sure it's not
3 a mess.

4 Q. But your testimony on that date, just to be
5 clear and we won't belabor this anymore, this question:
6 "All right. So ordinarily you were at the property on
7 a daily basis in the May to June 2011 timeframe;
8 correct?" And your response was "yes", right?

9 A. Yes, excepting other obligations.

10 Q. And you weren't off in Bermuda or anything at
11 that time, were you?

12 A. I doubt it. My wife likes to go on vacation,
13 so we could have been. But as far as I know, four
14 years ago in May and June, I don't think I was on a
15 vacation.

16 MR. GRUENLOH: Pat, can you bring up RMC 968
17 again. It's the photo.

18 BY MR. GRUENLOH:

19 Q. You told me at your deposition under oath,
20 that you don't have any memory of being at the property
21 on June the 6th, 2011; do you recall that?

22 A. I recall that.

23 Q. And when we showed you this photo in your
24 deposition, RMC 96, that we've been talking about so
25 much, you told me that you cannot say that this is not

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1 what it looked like the day of the accident -- in other
2 words, you told me you didn't know whether it looked
3 like that the day of the accident or not, right?

4 A. Right. And we're talking about Monday, June
5 6th, correct?

6 Q. Correct.

7 A. Okay.

8 Q. Well, you don't know whether it looked like
9 this on Monday, June 6th, and you don't know whether it
10 looked like this on Tuesday, June 7th, do you?

11 A. I don't know the answer to that question.

12 THE COURT: Sir, you either know or you don't
13 know -- yes or no, or you don't know.

14 A. I don't know.

15 BY MR. GRUENLOH:

16 Q. Well, it appears that you knew on -- when we
17 took your deposition -- let's go to page 64 of your
18 deposition.

19 MR. GRUENLOH: Pat, can you pull that up? And
20 down at the bottom, Pat, line 24 to 25 is the beginning
21 of the question, page 64. Page 64.

22 BY MR. GRUENLOH:

23 Q. Okay. So the question that I asked you at
24 page 64, line 24 through 25, was "Do you have any
25 specific recollection of being at the property on or

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1 around June 6, 2011?" And what was your response on --
2 go to the next page, Pat.

3 A. "No."

4 MR. GRUENLOH: And, Pat, can you blow up two
5 through line 12. There we go.

6 BY MR. GRUENLOH:

7 Q. And we went on, I said, "All right. Is there
8 anything that you could point me to, whether it's your
9 memory or whether it's some documentary evidence that
10 would suggest that these pictures, which were marked as
11 exhibit number 6, do not accurately portray the
12 condition of the silt fence on June 7, 2011?" And your
13 response was?

14 A. "Anything physical, no."

15 Q. And then just to make sure we were on the same
16 page, at line 9, I said "And how about, do you have a
17 specific recollection where you could say to me, no,
18 no, that's not the way that it looked on June 7th,
19 2011?" And at the very bottom there on line 12, what
20 was your response?

21 A. Not a specific recollection.

22 Q. Okay. So you're not able to say to the ladies
23 and gentlemen of the jury, that this photo that we have
24 been talking about, the two witnesses have come in and
25 sworn under oath that that's what it looked like on

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1 June 6, 2011, so we are clear on this, you're not able
2 to say, no, sir, that's not what it looked like on June
3 6th, are you?

4 A. No. I'm not able to say that.

5 Q. And, likewise, if we go to June 7th, the next
6 day, you're not able say to the ladies and gentlemen
7 of the jury, no, no, that's not what it looked like,
8 are you?

9 A. No. I am not.

10 Q. Okay. We were talking about -- as your
11 lawyers brought up -- that you were informed by email
12 by Mr. Connelly on June 7th, that his wife had fallen;
13 do you recall that?

14 A. Yes. I recall that.

15 Q. You didn't accept responsibility for the
16 accident that day when you were contacted by Mr.
17 Connelly, did you? You didn't say, for example, my
18 bad. I've had some issues out there and I know that
19 that fence was down. Let me see what I can do to help
20 your wife. I'm so concerned about her. You didn't say
21 any of that, did you?

22 A. No. I was certainly concerned about anybody
23 getting hurt. I'm always concerned about people
24 getting hurt. But without any facts, no, I did not
25 take any responsibility for it.

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1 Q. You say that you were concerned, and we've got
2 the back and forth. I can show it to you if I need to.
3 But did you express any concern for Mr. Connelly's wife
4 to him when you replied?

5 A. No.

6 Q. In fact, what you did, sir, is you told him
7 that you would notify the owners; is that right?

8 A. Well, I think the letter that Mr. Connelly
9 wrote to me, asked me to notify the owners.
10 Consequently, in my email to him, I did notify the
11 owners. He asked me to notify my attorney. He asked
12 me to notify the owners and I notified them.

13 Q. But -- but you, in no way, accepted
14 responsibility for the accident on that day; did you,
15 sir?

16 A. I didn't know what happened.

17 Q. Did you, in any way, accept responsibility --

18 A. No.

19 Q. And you didn't, in any way, express any
20 concern for Ms. Connelly; did you?

21 A. No. I got a letter from some attorney in
22 Chicago. I had no idea what was going on.

23 Q. Well, what you told me in your deposition,
24 sir, is that upon receiving that notice from Mr.
25 Connelly, the next day you went out and you picked the

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1 black plastic barrier fence off of the sidewalk, put it
2 on the side, and put a rock on it so it couldn't blow
3 back into the sidewalk; that's what you told me, isn't
4 it?

5 A. Something like that. I'd have to reread it,
6 but, yes, if that's what's in the deposition, that's
7 what I said.

8 Q. So when you told me that you didn't have any
9 specific recollection of what the fence looked like on
10 June 7, 2011 -- and we've gone through that testimony.
11 We are going to go back to it. When you told me I
12 can't remember anything about that fence on June 7,
13 2011, I don't have a specific recollection of what it
14 looked like, if you went out there the next day and you
15 picked the fence up, and you put a rock down on it so
16 it wouldn't blow back into the sidewalk, that was not
17 truthful, was it, sir? You -- you knew what the
18 condition of the fence was on June 7th, didn't you?

19 A. No.

20 Q. Okay.

21 A. The accident was on June 6th. I received a
22 letter late in the day on June 7th. And as far as I
23 know -- this was, again, four years ago. My deposition
24 was three and a half years from the incident. I don't
25 know when I went out there and put the rock on it.

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1 Q. Let me -- let me just show you. You said that
2 you got the email late in the day. Let me just show
3 you the email, sir. And this is -- so you understand,
4 this is -- this is in this big stack of paper, and it's
5 Bates stamped for the record, 201, 304, 94, 606, so
6 your attorneys provided this to us. This was in your
7 email. Let me show you that. Take a moment to look at
8 that. Okay. First of all, do you see there's an email
9 in the middle there? We don't need this blown up here.
10 And the middle there, on June 7th, 2011, there's an
11 email at 12:11 p.m.; do you see that?

12 A. I see that, yes.

13 Q. And it says, "Attached please find the
14 correspondence. Please advise as soon as possible."
15 And it's got Mr. Connelly's name on it; right?

16 A. Yes.

17 Q. And that was the letter that was attached;
18 correct?

19 A. Correct.

20 Q. All right. And then your response comes at
21 5:30, later in the same day; do you recall that?

22 A. While I'm reading it, I recall it, yes.

23 Q. Okay. And you say, "Yeah, I just got this
24 email". And what you say back to Mr. Connelly --
25 rather than how is your wife or I accept responsibility

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1 is --

2 A. I didn't know it was his wife at the time. He
3 said it was his client.

4 Q. I see. So you said, "yeah, just got this
5 email. Sidewalk is and has been cleaned, but we don't
6 own the sidewalk". That's what you told him, right?

7 MR. HINES: Objection, Your Honor. I believe in
8 fairness, the entirety of that should be --

9 THE COURT: What's your legal objection?

10 MR. HINES: I think in fairness, he's entitled to
11 read -- particularly based --

12 THE COURT: You can -- what's your legal
13 objection?

14 MR. HINES: That he's admitting material, part of
15 that exchange --

16 THE COURT: Overruled.

17 MR. HINES: -- of that particular --

18 THE COURT: Overruled.

19 BY MR. GRUENLOH:

20 Q. So what you said is, "sidewalk is and has been
21 cleaned, but we don't own the sidewalk" -- isn't that
22 what you said, sir?

23 A. Yes, it is what I said.

24 Q. Let me show you your testimony.

25 MR. GRUENLOH: Pat, pull up page 76, line 13.

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1 through 23.

2 BY MR. GRUENLOH:

3 Q. Are you there on page 76 with me, sir?

4 A. I'm reading the highlighted --

5 Q. Oh, okay. All right. And I'll just direct
6 you -- what you really ought to do -- I mean, it's a
7 short cut, but we certainly haven't changed the
8 deposition testimony, but you've got the original there
9 in front of you. Okay.

10 And I was showing you the photos of the sidewalk
11 that day, RMC 96. And at line 13 I said, "Okay, do you
12 have a memory of what this silt fence looked like when
13 you went out and looked at it after having received the
14 email that you got from Mr. Connelly?" And what was
15 your response, sir?

16 A. It had to be cleaned up.

17 Q. And the question was: "Okay. What precisely
18 did you do to clean it up?" And what was your answer?

19 A. "Well, first, I got it off the street, put
20 something down on top of it so it wouldn't blow back
21 into the sidewalk, and then called somebody to put the
22 silt fence back in place."

23 Q. And you would have done that immediately,
24 right?

25 A. Well, I don't know when I did that.

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1 Q. Well, let me -- let me ask my question this
2 way: When I asked you, when you were under oath in
3 your deposition, do you recall that you told me that
4 you did -- that's something you did immediately?

5 A. Immediately to the extent that I was able to
6 get there.

7 Q. All right. Let's go to page 89, line 1
8 through 17. And if you look at the top of page 89.

9 MR. GRUENLOH: 89, lines 1 through 17, Pat. There
10 we go.

11 BY MR. GRUENLOH:

12 Q. Okay. My question was: "So would it be fair
13 to say that the clean-up that you did, specifically the
14 removal of the tarp from the sidewalk was done
15 immediately or within a day or so upon notification of
16 the accident?" Do you see there, that was my question
17 at the top?

18 A. Yes.

19 Q. And what was your answer?

20 A. "It's something I would have addressed
21 immediately and I believe I also shoveled some rock off
22 the driveway."

23 Q. You told me that it's something that you would
24 have addressed immediately. That was your testimony,
25 correct?

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1 A. Yes, but immediately to me means as soon as I
2 can get there. Immediately to me doesn't mean I get an
3 email, I drop everything I'm doing. You know, I've --
4 I've got other business going on. I've got a family of
5 five kids, a wife, football, soccer, baseball,
6 lacrosse. You know, I can't be everywhere at once. So
7 immediately to me would be it could have been that
8 afternoon, after I got this email at 5:30. It could
9 have been the following day.

10 Q. Okay. So it might have been June the 8th?

11 A. Perhaps.

12 Q. Well, let me ask you about that; when did you
13 clean it up?

14 A. When did I clean it up? Sitting here in the
15 stand, I don't know.

16 Q. Let me make sure that you understand my
17 question. After you had been informed that someone had
18 a fall and had been hurt out at your property, because
19 there was debris and a fence that was a problem, you
20 don't know exactly when you cleaned it up?

21 A. No. Like I said just a minute ago, it could
22 have been after I sent this email at 5:33 p.m. It
23 might have been the following day, which I believe
24 would now be a Wednesday. And what I would have done
25 is pulled the tarp off the street. You know, the

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1 letter referred to all sorts of construction debris, so
2 I was kind of confused. The silt fence to me isn't
3 construction debris, so I pushed the silt fence on --
4 off the sidewalk onto the grassy or dirt area, which
5 would be on the property.

6 And then I apparently shoveled the -- some
7 gravel off of the construction entrance, which is
8 required by Daniel Island, that we have a rock
9 construction entrance to the site. And then I called
10 my subcontractors, who are set up to do this with --
11 with the manpower and the tools to reset the silt
12 fence.

13 Q. Well, let me show you this, sir.

14 MR. HINES: Your Honor, I believe we have a matter
15 of law to address with the court.

16 THE COURT: Do you have an objection?

17 MR. HINES: I do, but I think it's a matter of
18 law.

19 THE COURT: Well, what's your objection? What's
20 your legal objection?

21 MR. HINES: I believe this is going to be wholly
22 irrelevant.

23 THE COURT: Pardon?

24 MR. HINES: I'm not sure where counsel is going.

25 THE COURT: Well, I -- come on up here.