

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

Civil Action No. 2009-CP-07-04592
Appellate Case No. 2012-206486

RECEIVED

MAR 31 2013

SC Court of Appeals

Jeffrey Johnson and Kristina Johnson Respondents,

v.

Beaufort County Appellant.

RECORD ON APPEAL

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

Civil Action No. 2009-CP-07-04592
Appellate Case No. 2012-206486

Jeffrey Johnson and Kristina Johnson Respondents,

v.

Beaufort County..... Appellant.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to
be included by any of the parties and not any other material.

[SIGNATURE PAGE FOLLOWS]

GRIFFITH, SADLER & SHARP, P.A.

By:



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Attorneys for the Appellant

March 19, 2013
Beaufort, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-070-4592

Jeffrey Johnson v. Jamie Thompson, et al

OCT - 6 AM 11:40

PLAINTIFF(S)

JAMIE THOMPSON
BEAUFORT COUNTY, S.C.
CLERK OF COURT

CHECK ONE:



JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.



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



ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other



ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other



DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:



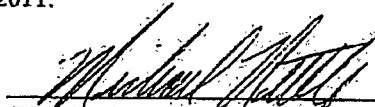
See attached order. (Formal order to follow)



Statement of Judgment by the Court:

Jury Trial on 10/4/2011. The Jury found as to the cause of action of negligence in favor of the Plaintiff.

Dated at Beaufort, South Carolina, this 6 day of October, 2011.


PRESIDING JUDGE - Michael G. Nettles

This judgment was entered on the 6 day of October 2011, and a copy mailed first class this 7 day of October, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Karl S. Brehmer Brown & Brehmer
PO Box 7966 Columbia, SC 29202

Marshall H Waldron Griffith, Sadler & Sharp
PO Box 570 Beaufort, SC 29901

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

Jamie Thompson

Jerri Ann Roséneau - Clerk of Court

CLERK OF COURT

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

2011 OCT 4 PM 3:56

COUNTY OF BEAUFORT

CLERK OF COURT
BEAUFORT COUNTY, S.C.

JEFFREY JOHNSON, et al
PLAINTIFF

vs.

BEAUFORT COUNTY,
DEFENDANT.

2009-CP-07-04592

VERDICT FORM

I.

NEGLIGENCE

We the jury, as to the cause of action of negligence, find for:

X Plaintiff,

_____ Defendant,

Foreman Signature

Date:

4 October 2011

*The verdict must be **UNANIMOUS**

*Please notify the Bailiff upon reaching a verdict

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO. 09-CP-7-~~4592~~

JEFFREY JOHNSON and
KRISTINA JOHNSON

Plaintiffs,

v.

BEAUFORT COUNTY,

Defendant.

COMPLAINT

JURY TRIAL DEMANDED

SEP 29 PM 2:51
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, SC

TO: THE ABOVE NAMED DEFENDANT:

1. Plaintiffs are citizens and residents of Beaufort County, South Carolina.
2. Defendant is a political subdivision of the State of South Carolina.
3. On April 15, 2009, at approximately 4 p.m., Jason Powell, an employee of Defendant, was operating a dump truck owned by Defendant on Parris Island Gateway Road when he lost control of the vehicle, left the roadway and crashed into Plaintiff's residence, causing extensive damage and rendering the residence uninhabitable.
4. Under the legal doctrine of respondeat superior, Defendant is liable for its employee Powell's negligent acts committed within the scope of his employment.
5. Through the actions of Powell, its employee, Defendant was negligent and reckless in one or more of the following ways:
 - a. Failing to keep a proper look out;
 - b. Failing to keep his vehicle under control;
 - c. Failing to keep his vehicle on the roadway;

e. Failing to execute proper maneuvers to avoid a collision.

6. The Plaintiffs have suffered damages as described herein as a direct and proximate result of Defendant's negligence:

a. The destruction and damages to their home, landscaping and real property;

b. The destruction of personal property, including but not limited to furniture and personal belongings that were located within their home and on their real property;

c. The costs and expenses of obtaining temporary and substitute housing; including moving and additional living costs;

d. The diminution of value of their home and real property;

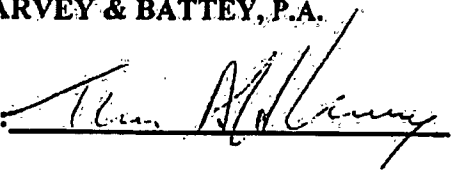
e. Plaintiffs have been forced to expend and be obligated for large sums money for attorney's fees and costs to bring this court action for the Defendant's failures to pay for the damages it caused and continues to cause;

WHEREFORE, Plaintiffs demand judgment against Defendant for such amount of damages as the trier of facts shall determine, and for such further relief as the Court deems just and proper.

Beaufort, South Carolina

Dated: 9/29, 2009

HARVEY & BATTEY, P.A.

By: 

THOMAS A. HOLLOWAY
JOSEPH L. O'BRIEN

Post Office Drawer 1107
1001 Craven Street
Beaufort, South Carolina 29901-1107
843-524-3109 telephone
843-524-6973 facsimile
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
JEFFREY JOHNSON and)
KRISTINA JOHNSON)
)
Plaintiffs,)
)
v.)
)
BEAUFORT COUNTY)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NUMBER: 2009-CP-07-4592

2009 NOV 18 PM 3:54
JEREMY H. JOSEPH
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ANSWER

TO: THOMAS A. HOLLOWAY, ESQUIRE, AND JOSEPH L. O'BRIEN, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFFS:

NOW COMES the Defendant, who denies each and every allegation in the Complaint not specifically admitted, and in answer to the Complaint states as follows:

1. As to Paragraph No. 1 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
2. As to Paragraph No. 2 of the Complaint, the Defendant admits the allegations contained therein.
3. As to Paragraph No. 3 of the Complaint, the Defendant admits that on April 15, 2009, Defendant's employee Jason Powell operated a dump truck on Parris Island Gateway, that the truck left the road and struck the Plaintiffs' residence which suffered extensive damage; the Defendant denies each and every allegation remaining in Paragraph No. 3 of the Complaint and demands strict proof thereof.
4. As to Paragraph No. 4 of the Complaint, the Defendant admits that the doctrine of respondeat superior imposes vicarious liability for the negligence of its employees

acting within the scope of their employment but denies the existence of any negligence in the instant matter.

5. As to Paragraph No. 5 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
6. As to Paragraph No. 6 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
7. The Defendant denies that the Plaintiff is entitled to the relief sought.

WHEREFORE, having answered the Complaint, the Defendant prays that the Complaint will be dismissed, for costs, and for such other and further relief as the Court may deem just and proper.

AFFIRMATIVE DEFENSES

As to each affirmative defense set forth below, the Defendant repeats and realleges all preceding paragraphs as fully and effectively as if set forth herein verbatim.

- A. The Defendant pleads the provisions of the South Carolina Tort Claims Act, South Carolina Code Section 15-78-10, *et seq.*, including all the immunities, limitations and defenses granted or preserved by the Act.
- B. The Defendant would show that the Plaintiff has failed to state a claim upon which relief may be granted, and the Complaint should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.
- C. The Defendant would show that pursuant to statute and common law, attorney fees may not be recovered from a South Carolina government entity.
- D. The Defendant would show that attorney fees are not recoverable against a government entity and, therefore, the Defendants moves to strike any demand for

attorney fees from the Complaint.

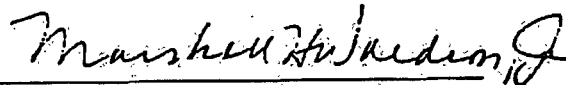
E. The Defendant reserves the right to timely assert any affirmative defense not currently known to the Defendant.

WHEREFORE, having fully answered the Complaint, the Defendant prays that the Court will dismiss the Complaint, award it costs and such other and further relief as the Court may deem just and proper.

DATED this 17th day of November 2009, in Beaufort, South Carolina and

Respectfully Submitted,

GRIFFITH, SADLER & SHARP, P.A.



MARSHALL H. WALDRON, JR.

P.O. Drawer 570

Beaufort, South Carolina 29901

(843) 521-4242 Telephone

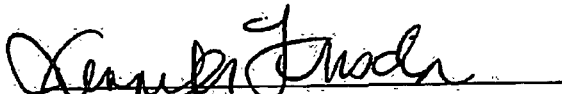
(843) 521-4247 Facsimile

ATTORNEY FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I, Jennifer Frischen, Legal Assistant to Marshall H. Waldron, Jr., LLC, hereby certify that on this 17th day of November 2009, I served the Defendant's Answer upon counsel for the Plaintiff by depositing same in the United States mail, postage prepaid to:

Thomas H. Holloway, Esquire
Post Office Box 1107
Beaufort, South Carolina 29901-1107


Jennifer Frischen

Beaufort, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT) 10 SEP -07 PM 3:38

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT
Case No: 09-CP-7-4592

Jeffrey Johnson and Kristina
Johnson)

Plaintiffs,)

**AMENDED COMPLAINT
(Jury Trial Demanded)**

vs.)

Beaufort County)

Defendants.)

To: The Above Named Defendant:

1. Plaintiffs are citizens and residents of Beaufort County, South Carolina.
2. Defendant is a political subdivision of the State of South Carolina.
3. On April 15, 2009, at approximately 4:00 p.m., Jason Powell, an employee of Defendant, was operating a dump truck owned by Defendant on Parris Island Gateway Road when he lost control of the vehicle, left the roadway and crashed into Plaintiffs' residence, causing extensive damage and rendering the residence uninhabitable.
4. Under the legal doctrine of respondeat superior, Defendant is liable for its employee Powell's negligent acts committed within the scope of his employment.
5. Through the actions of Powell, its employee, Defendant was negligent and reckless in one or more of the following ways:
 - a. Failing to keep a proper lookout;
 - b. Failing to keep his vehicle under control;

- c. Failing to keep his vehicle on the roadway;
- d. Failing to execute proper maneuvers to avoid a collision.

FOR A SECOND CAUSE OF ACTION

6. The Plaintiffs repeat 1 through 5 above as fully as if set forth verbatim herein.

7. The Defendant Beaufort County was negligent in entrusting a commercial vehicle that required the issuance of a commercial driver's license to operate to an unfit and unqualified employee, Jason Powell because the Defendant knew or should have known that Jason Powell had a history of driving at speeds greater than were reasonable under the circumstances.

8. The Defendant was negligent in entrusting its oversized, large commercial vehicle to Jason Powell, the operator, with a history of traveling too fast for the circumstances.

9. As a result of the negligent entrustment, the Plaintiffs sustained damage as a direct and proximate result of the Defendant's negligence:

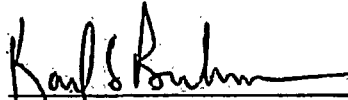
- a. The destruction and damages to their home, landscaping, and real property;
- b. The destruction of personal property, including but not limited to furniture and personal belongings that were located within their home and on their real property.
- c. The costs and expenses of obtaining temporary and substitute housing, including moving and additional living costs;

- d. The diminution of value of their home and real property;
- e. Plaintiffs have been forced to expend and be obligated for large sums of money for attorney's fees and costs to bring this court action for the Defendant's failure to pay for the damages it caused and continues to cause;

Wherefore, Plaintiffs demand judgment against Defendant for such amount of actual damages as the trier of the facts shall determine, and for such further relief as the Court deems just and proper.

BROWN & BREHMER

By:



Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorney for Plaintiffs

September 2, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT 2009 NOV 30 PM 1:22) CIVIL ACTION NUMBER: 2009-CP-07-4592
JEFFREY JOHNSON and JERRI ANN ROSENEAU)
KRISTINA JOHNSON BEAUFORT COUNTY, S.C.)
CLERK OF COURT)
Plaintiffs,)
v.) AMENDED ANSWER
BEAUFORT COUNTY)
Defendant.)

TO: THOMAS A. HOLLOWAY, ESQUIRE, AND JOSEPH L. O'BRIEN, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFFS:

NOW COMES the Defendant, who denies each and every allegation in the Complaint not specifically admitted, and for its Amended Answer to the Complaint states as follows:

1. As to Paragraph No. 1 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
2. As to Paragraph No. 2 of the Complaint, the Defendant admits the allegations contained therein.
3. As to Paragraph No. 3 of the Complaint, the Defendant admits that on April 15, 2009, Defendant's employee Jason Powell operated a dump truck on Parris Island Gateway, that the truck left the road and struck the Plaintiffs' residence which suffered extensive damage; the Defendant denies each and every allegation remaining in Paragraph No. 3 of the Complaint and demands strict proof thereof.
4. As to Paragraph No. 4 of the Complaint, the Defendant admits that the doctrine of respondeat superior imposes vicarious liability for the negligence of its employees

acting within the scope of their employment but denies the existence of any negligence in the instant matter.

5. As to Paragraph No. 5 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
6. As to Paragraph No. 6 of the Complaint, the Defendant denies each and every allegation contained therein and demands strict proof thereof.
7. The Defendant denies that the Plaintiff is entitled to the relief sought.

WHEREFORE, having answered the Complaint, the Defendant prays that the Complaint will be dismissed, for costs, and for such other and further relief as the Court may deem just and proper.

AFFIRMATIVE DEFENSES

As to each affirmative defense set forth below, the Defendant repeats and realleges all preceding paragraphs as fully and effectively as if set forth herein verbatim.

- A. The Defendant pleads the provisions of the South Carolina Tort Claims Act, South Carolina Code Section 15-78-10, *et seq.*, including all the immunities, limitations and defenses granted or preserved by the Act.
- B. The Defendant would show that the Plaintiff has failed to state a claim upon which relief may be granted, and the Complaint should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.
- C. The Defendant would show that pursuant to statute and common law, attorney fees may not be recovered from a South Carolina government entity.
- D. The Defendant would show that the incident complained of is the result of an unavoidable accident and, therefore, the Defendant is not liable for any damages the

Plaintiffs may have suffered.

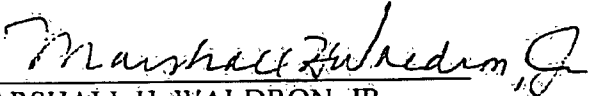
E. The Defendant reserves the right to timely assert any affirmative defense not currently known to the Defendant.

WHEREFORE, having fully answered the Complaint, the Defendant prays that the Court will dismiss the Complaint, award it costs and such other and further relief as the Court may deem just and proper.

DATED this 23rd day of November 2009, in Beaufort, South Carolina and

Respectfully Submitted,

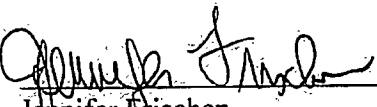
GRIFFITH, SADLER & SHARP, P.A.


MARSHALL H. WALDRON, JR.
P.O. Drawer 570
Beaufort, South Carolina 29901
(843) 521-4242 Telephone
(843) 521-4247 Facsimile
ATTORNEY FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I, Jennifer Frischen, Legal Assistant to Marshall H. Waldron, Jr., LLC, hereby certify that on this 23rd day of November 2009, I served the Defendant's Answer upon counsel for the Plaintiff by depositing same in the United States mail, postage prepaid to:

Thomas H. Holloway, Esquire
Post Office Box 1107
Beaufort, South Carolina 29901-1107


Jennifer Frischen

Beaufort, South Carolina

State of South Carolina)
County Of Beaufort)

In the Court of Common Pleas
Fourteenth Judicial Circuit
2009-CP-07-4592

Jeffrey Johnson and Kristina)
Johnson,)

Plaintiff,)

vs.)

Beaufort County,)

Defendant.)

Transcript of Record

October 3, 4, 2011
Beaufort, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge, and a Jury

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

Karl S. Brehmer, Esquire
Attorney for the Plaintiff

Marshall H. Waldron, Jr., Esquire
Attorney for the Defendant

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

Witness/Description Page No.

MONDAY, OCTOBER 3, 2011

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Justin Trotter

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Direct Examination by Mr. Brehmer	66
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William L. Brannon, Jr.

Voir Dire Examination by Mr. Brehmer	88
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Malcolm E. Bellamy

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Malcolm E. Bellamy, Jr.

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Norman Bettie

Direct Examination by Mr. Waldron 147

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End of Defendant's Case

TUESDAY, OCTOBER 4, 2011

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E X H I B I T S

2	No.	Description	EV.
3	P-1	Photograph	6
4	P-2	Photograph	6
5	P-3	Photograph	6
6	P-4	Photograph	6
7	P-5	Photograph	6
8	P-6	Photograph	6
9	P-7	Photograph	6
10	P-8	Photograph	6
11	P-9	Photograph	6
12	P-10	Photograph	6
13	P-11	Photograph	6
14	P-12	Photograph	6
15	P-13	Photograph	6
16	P-14	Photograph	6
17	P-15	Photograph	6
18	P-16	Photograph	6
19	P-17	Photograph	6
20	P-18	Photograph	6
21	P-19	Photograph	6
22	P-20	Photograph	6
23	P-21	Photograph	6
24	P-22	Photograph	6
25	P-23	Photograph	6

			5
1	No.	Description	EV.
2	P-24	Photograph	6
3	P-25	Photograph	6
4	P-26	Photograph	6
5	P-27	Response	36
6	P-28	Request for Admissions	37
7			
8	D-1	Enlarged Photograph	6
9	D-2	Enlarged Photograph	6
10	D-3	Doctor's Notes	32
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13	C-1	Consent Stipulation	6
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15	C-3	Request for Admission (Becomes P-28)	6
16	C-4	Deposition Transcript of Powell	181
17	C-5	Copy of Deposition Transcript of Bettel	182
18			
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23			
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25			

1 MONDAY, OCTOBER 3, 2011

2 (THE FOLLOWING EXHIBITS WERE STIPULATED TO BY COUNSEL PRIOR
3 TO TRIAL.)

4 (PHOTOGRAPHS INDIVIDUALLY MARKED INTO EVIDENCE AS
5 PLAINTIFFS' EXHIBITS 1 THROUGH 26.)

6 (ENLARGED PHOTOGRAPH MARKED INTO EVIDENCE AS
7 DEFENDANT'S EXHIBIT NUMBER 1.)

8 (ENLARGED PHOTOGRAPH MARKED INTO EVIDENCE AS
9 DEFENDANT'S EXHIBIT NUMBER 2.)

10 (STIPULATIONS MARKED INTO EVIDENCE AS COURT'S EXHIBIT
11 NUMBER 1.)

12 (RESPONSES MARKED INTO EVIDENCE AS COURT'S EXHIBIT
13 NUMBER 2.)

14 (REQUESTS FOR ADMISSION MARKED INTO EVIDENCE AS
15 COURT'S EXHIBIT NUMBER 3.)

16 THE COURT: The next case that we're selecting which
17 will be tried today and probably tomorrow morning is,
18 Madame Court Reporter, 2009-CP-07-4592, *Jeffrey Johnson and*
19 *Kristina Johnson vs. Beaufort County*. Want to tell you a
20 little bit about the case in order for you to determine
21 whether or not you know anything about it.

22 On April 15, 2009, Jason Powell, a Beaufort County
23 Department of Public Works employee, operated a large dump
24 truck on Parris Island Gate, a four-lane thoroughfare in
25 Beaufort, South Carolina. He, as he was driving the

1 And I'm going to ask that each of you stand as the
2 clerk administers the oath. Please stand and raise your
3 right hand.

4 (WHEREUPON, THE JURY IS SWORN.)

5 THE COURT: Mr. Foreman, ladies and gentlemen, y'all
6 have had a long morning. We are going to recess until
7 2:00, but once again do not discuss the case amongst
8 yourselves or with anyone else.

9 Mr. Schultz, I'm going to ask that you enforce that
10 rule when the jurors return to the jury room. You enforce
11 the rule. There will be no discussion about the case
12 whatsoever; it would be inappropriate to do so. I'm going
13 to ask that you enforce that rule.

14 Once again, no independent investigation. Don't talk
15 to anybody about the case. Don't talk amongst yourselves
16 about it. Do not look up anything on the Internet. I
17 think now we've got phones that have Internet. Don't look
18 up anything on your phones during the lunch break. You
19 need to base your decision on what transpires here in this
20 courtroom and the law as I charge it to you.

21 Everyone remain seated as the jury exits the
22 courtroom.

23 (THE JURY EXITS AT 12:39 P.M.)

24 THE COURT: All right, anything from the plaintiff
25 before we recess for lunch?

1 MR. BREHMER: Yes, sir. There is one issue that --
2 there are three exhibits that I've had identified as court
3 exhibits. Exhibit 2 and Exhibit 3 are requests for
4 admissions that have been admitted.

5 We had a conference with Your Honor back in chambers.
6 These two requests for admissions are responses to the
7 subpoenas that Mr. Waldron sent to cell phone providers.
8 He has admitted the authenticity of those records, okay?
9 And I would like to proffer those records to get a ruling
10 *in limine*, I guess, on the court as to whether I'll be able
11 to use these on my cross-examination of Mr. Powell, which I
12 anticipate probably being my second witness.

13 THE COURT: Very good. Be glad, be glad to hear
14 defense with regard to these particular evidentiary
15 documents. There are two, and he has asked -- what do you
16 say about whether or not, about the admissibility of them
17 with regard to the request to admit?

18 MR. WALDRON: I don't believe they are relevant, Your
19 Honor, because in his deposition testimony, Mr. Powell gave
20 his recollection as best he could of the cell phone
21 providers that he had, and he named two different names. I
22 subpoenaed the records, and I used exhaustive measures to
23 find out whether, whether, in fact, he had a cell phone
24 account with them.

25 I believe that the records Mr. Brehmer wants to admit

1 are correspondence or responses to that subpoena saying
2 they have no records. I'm not sure what relevance they
3 have, the fact that there's no information offered.

4 And we're going to publish to the jury the fact that
5 there are no cell phone records for this man. I don't see
6 how it has any relevance. Doesn't go to make any issue in
7 this case more or less likely. I don't think it has any
8 probative value at all.

9 THE COURT: What do you say about that, Mr. Brehmer?

10 MR. BREHMER: It does make it more or less likely,
11 Your Honor, because Mr. Powell knew well, good and well
12 that my contention in taking his deposition was to prove or
13 hopefully prove that he was using a cell phone at the time
14 of this accident.

15 I asked him the name of the provider. On page 26,
16 line 20 of his deposition, he said that the name of his
17 provider was Embarg, E-m-b-a-r-q, okay? I asked him then
18 the telephone number. He says he couldn't remember. I
19 asked him whose name the account was in. He said it was in
20 his name.

21 The purpose for me getting these records was, was to
22 show that on April the 15th, 2009, the telephone calls made
23 to and from that cell phone to see if it was provided. It
24 is my contention now that the relevance is he has misled me
25 so that I would not obtain those records, so that I can't

1 find out where that -- what that -- whether that phone was
2 being used at the time of this particular accident.

3 The relevance goes to his truth and veracity. It goes
4 to whether he was using the cell phone. Couple this with
5 the proposed testimony of Trooper -- the trooper that
6 investigated this accident, who's sitting in the courtroom,
7 Trooper Trotter. He's going to testify that at the time
8 when he arrived at the truck, that Mr. Powell's cell phone
9 was in the passenger's compartment outside of a holster in
10 the floor.

11 THE COURT: All right. Well, I think clearly that's
12 relevant, and I overrule your objection with regard to
13 relevance.

14 And really the request to admit really has to do with
15 whether or not they have to bring in someone from the cell
16 phone company to get around the hearsay. But apparently
17 you've admitted to the authenticity of it. So, therefore,
18 I think that it's admissible because you've admitted to the
19 authenticity of it. And I think it is relevant.

20 Of course, clearly you have an explanation, and you're
21 going to be given wide latitude in explaining why this
22 information was not obtained, or whether he legitimately
23 forgot. Whatever confusion it is, he's free to explain
24 that in any way, shape, or form. But certainly it's
25 relevant.

1 So, my ruling is that you will be able to introduce
2 that. It is relevant, and the fact that you've admitted to
3 its authenticity alleviates any objection with regard to
4 hearsay. Is that ---

5 MR. BREHMER: Yes, sir, that is.

6 THE COURT: Very good.

7 MR. BREHMER: Now, that document, it's either Court's
8 Exhibit 2 or Court's Exhibit 3 which are in the record, and
9 I would ask that those two documents be admitted into
10 evidence.

11 THE COURT: Okay, subject to the objection of the
12 defendant.

13 MR. WALDRON: Subject to my objection.

14 THE COURT: Very good, and you are protected on the
15 record in that regard.

16 MR. WALDRON: Yes, sir.

17 THE COURT: All right, I understand that really the
18 only issue is negligence and whether or not -- is ---

19 MR. BREHMER: Yes, sir.

20 THE COURT: I understand there's been -- would you
21 like to put on the record with regard to what the
22 stipulations are in that regard?

23 MR. BREHMER: The first exhibit, Court's Exhibit 1, I
24 prepared a typed exhibit pursuant to the rules as to the
25 stipulation of damages. And it has been marked, I believe,

1 as Court's Exhibit Number 1, and we would like to offer and
2 proffer it into evidence.

3 I have signed it as attorney for the plaintiff; Mr.
4 Waldron has signed it as the attorney for defendant. Hand
5 it up to the court. In essence, it says that the
6 plaintiffs' total damages are \$58,023, okay?

7 THE COURT: Very good.

8 MR. BREHMER: There has also been a stipulation that
9 Mr. Powell was in the course and scope of his employment
10 with Beaufort County at the time that this accident
11 happened. So, there's no question regarding agency.

12 THE COURT: All right.

13 MR. BREHMER: The only question for the jury to
14 resolve in this particular case is whether Mr. Powell
15 suffered from a sudden medical emergency that caused this
16 accident -- or that would eliminate any claim of negligence
17 by the plaintiff.

18 THE COURT: All right, is there a written stipulation
19 with regard to his acting within the scope of his
20 employment?

21 MR. BREHMER: No, sir. No, sir, but ---

22 MR. WALDRON: There is not, but neither is there going
23 to be a defense put forth that he was outside the scope.

24 THE COURT: All right. Well, I will allow Mr. Brehmer
25 to publish that stipulation in any way he sees fit ---

1 MR. BREHMER: Okay.

2 THE COURT: --- in that regard, if y'all are indeed
3 stipulating to that.

4 All right, I understand that the parties have agreed
5 to the stipulation with regard to the damages. Wouldn't
6 absolutely be necessary for the damages to be introduced to
7 the jury, but since y'all have agreed to it, I think it's
8 certainly appropriate to do that if y'all have agreed to do
9 that.

10 MR. BREHMER: Yes, sir.

11 THE COURT: All right, anything further?

12 MR. BREHMER: The only other thing that could possibly
13 be addressed by the court at this point in time is Mr.
14 Waldron took Dr. -- and I pronounce his name Bettie, okay,
15 because of my lack of knowledge, correct pronunciation.

16 THE COURT: Right.

17 MR. BREHMER: But anyway, there were several
18 objections that I would ask the court to rule on in Dr.
19 Bettie's deposition before Mr. Waldron was allowed to
20 publish those portions of the deposition.

21 THE COURT: All right. I imagine it's probably --
22 when do you anticipate ---

23 MR. BREHMER: That would be up to Mr. Waldron. It
24 would be after my case, I would think.

25 MR. WALDRON: It depends on who he calls. If he calls

1 THE COURT: All right.

2 MR. WALDRON: Your Honor, I have one that I'm going to
3 withdraw.

4 THE COURT: No need for us to look at it.

5 MR. WALDRON: Well, no, but I need to mark it out so
6 we don't read it.

7 THE COURT: Okay. Very good.

8 MR. WALDRON: Just so the record is clear, and it's
9 line 27, page -- I'm sorry, page 27, lines 18 through 20.

10 THE COURT: And you withdraw that objection?

11 MR. WALDRON: Yes, sir.

12 THE COURT: Okay. Very good. All right, anything
13 further before we recess for lunch?

14 MR. BREHMER: No.

15 MR. WALDRON: I think there's one other objection.

16 THE COURT: Let's, let's -- what are they denominated?

17 COURT REPORTER: Court's 2 and 3.

18 THE COURT: They are in evidence. Is that correct?

19 MR. BREHMER: Yes, sir.

20 THE COURT: Based on my previous ruling?

21 MR. WALDRON: Yes.

22 THE COURT: Okay.

23 (A PAUSE.)

24 THE COURT: They're in now, 26 and 27.

25 (RESPONSES MARKED INTO EVIDENCE AS PLAINTIFFS' EXHIBIT

1 NUMBER 27.)

2 (REQUESTS FOR ADMISSIONS MARKED INTO EVIDENCE AS
3 PLAINTIFFS' EXHIBIT NUMBER 28.)

4 MR. WALDRON: That's it.

5 MR. BREHMER: Is that it?

6 MR. WALDRON: We're done.

7 MR. BREHMER: Okay. Thank you.

8 THE COURT: Anything else? Of course, we only have
9 about fifty-five minutes, but we are going to start back at
10 2:00, 2:00 sharp.

11 MR. BREHMER: Okay.

12 THE COURT: And I hate to rush you for lunch, but
13 we're kind of trying to ---

14 MR. BREHMER: Yes, sir.

15 THE COURT: --- get things rolling so we can maybe try
16 to resolve it here today.

17 MR. BREHMER: Yes, sir.

18 THE COURT: So, we'll be back. We'll start at 2:00.

19 (OFF THE RECORD.)

20 THE COURT: All right, two things I wanted to put on
21 the record before we proceeded.

22 I understand that we have some straight-A students in
23 the courtroom. Their mother is their teacher, and they are
24 engaged in home schooling. So, I'm going to ask the
25 bailiff to ensure that when matters of law are discussed

1 plaintiff, and it's an important case to the defendant, and
2 I'm going to ask that you pay very close attention and
3 proceed forward with a very serious mind.

4 I do want to mention something else to you is that
5 when this trial is over and done with, if I make an error
6 with regard to the law, or if I let in evidence that I
7 shouldn't let in, those errors can be easily corrected.
8 However, if there's an error in regard to the findings of
9 fact, quite often those can't be corrected. So, pay very
10 close attention as you evaluate the evidence that comes
11 before you.

12 Mr. Brehmer, you are recognized.

13 MR. BREHMER: May it please the court, Your Honor?

14 THE COURT: Yes, sir.

15 MR. BREHMER: Ladies and gentlemen, my name is Karl
16 Brehmer, and I am representing Sergeant Jeffrey Johnson and
17 his wife, Kristina. They own a house over on Parris
18 Island, Gateway Road, okay, and they had purchased this
19 house shortly before this accident happened. Matter of
20 fact, the date of the accident is April the 15th 2009.

21 Sergeant Johnson and his wife, Kristina, had spent one
22 night in this house. They had gone to Texas where Sergeant
23 Johnson is from for a family event, okay, and whenever they
24 came back, their house had been damaged, and here's how
25 their house had been damaged.

1 Mr. Jason Powell, the gentleman sitting over with Mr.
2 Waldron, is a county of -- Beaufort County Public Works
3 employee. At the time of this accident, he was driver, a
4 driver of a triaxle dump truck, one of these large dump
5 trucks. And Mr. Powell lost control of that dump truck and
6 ran off the road and ended up in the side of Sergeant and
7 Kristina Johnson's house.

8 This is a photograph that was taken on the day of the
9 accident, and this is the Johnson home, and this is the
10 county dump truck inside it, okay? This is another
11 photograph, and these photographs are already in evidence.

12 The county's dump truck in the side of Mr. and Ms.
13 Johnson's home. Now, Mr. and Ms. Johnson were in the state
14 of Texas at the time all this happened visiting his family,
15 okay?

16 Now, I am a firm believer that if you want the correct
17 results, you need to tell the people that you're asking for
18 why they're here and what you want, okay? Here is your job
19 in this particular case, okay? There's only one issue, one
20 question, one major question that you have to answer, okay?

21 Mr. Powell has claimed that he suffered from a sudden
22 medical emergency, okay, and that he blacked out, and
23 that's the reason that he ran into the side of this house
24 with that dump truck, okay? Under South Carolina law, we
25 are a negligence-based system, okay, and there's no doubt

1 that he did something wrong because he left the roadway,
2 went across the yard, and hit the house, okay, but ---

3 MR. WALDRON: Your Honor, I object.

4 THE COURT: And the grounds for your objection?

5 MR. WALDRON: This is argument.

6 THE COURT: Okay, I'm going to give him some leeway to
7 explain with regard to what his perception of the facts
8 are. Your objection is overruled.

9 MR. WALDRON: Okay.

10 MR. BREHMER: But Mr. Powell's position is, is that he
11 couldn't be held responsible because he was passed out or
12 blacked out, presented with a sudden medical emergency.

13 Well, ladies and gentlemen, my job is to research the
14 issue and see if that is a valid position. We're going to
15 show you that that is not a valid position.

16 But to get back to the point I was trying to make to
17 you, the one question that you have to answer is do you
18 believe Mr. Powell suffered from a sudden medical
19 emergency, okay? If the answer is yes, they win. If the
20 answer is no, we win.

21 Now, they call this the opening statement, but in
22 actuality what it is is my opportunity to ask and
23 highlight, point out what I ask you to look for. Here's
24 what we're going to show you, okay?

25 We're going to offer a number of witnesses. The first

1 witness is going to be Trooper Justin Trotter, the
2 gentleman sitting back there with the highway patrol
3 uniform on. He was the investigating Officer, and what
4 Trooper Trotter is going to tell you is that whenever he
5 arrived at the scene of this accident and where the truck
6 was parked in the yard, and he went through the truck. He
7 found Mr. Powell's cell phone, okay, on the passenger's
8 floor out, outside of any holster or any case, and it was
9 in the floor.

10 We're also going to show you -- the reason that we're
11 pointing that out is, is because Mr. Powell has testified
12 in his deposition that he can have a cell phone in the
13 county truck, but it had to be in the holster. It couldn't
14 be used while was he operating. We're hopefully going to
15 prove to you that he was more than likely using the cell
16 phone.

17 The next thing that we're going to do is, is we're
18 going to show you through medical documentation that we
19 don't believe Mr. Powell's position. Mr. Powell went to a
20 doctor on April the 21st, six days after this accident
21 happened, and they have taken that doctor's deposition.
22 That doctor has given an opinion that he thinks that Mr.
23 Powell had an epileptic seizure.

24 Well, ladies and gentlemen, I have had Mr. Powell's
25 medical records reviewed by Dr. William Brannon, the man

1 sitting on the back row with the tie on next to Trooper
2 Trotter. Dr. Brannon is a retired professor from the
3 Medical University of South Carolina, and he taught
4 neurology there. He is a board-certified neurologist, and
5 he is going to tell you that he has reviewed the EEG that
6 was done on Mr. Powell. He has reviewed the MRI, and he
7 has reviewed the office notes.

8 He is also going to tell you that the diagnosis of a
9 epileptic seizure is a, quote, clinical diagnosis. I
10 didn't know what that meant, but what that means is you
11 can't use a test like a X-ray or EEG or MRI to definitively
12 say somebody's got or had a seizure. It -- you have to use
13 those tests in conjunction with the training, knowledge,
14 and observations, okay, to make that diagnosis. And what
15 Dr. Brannon is going to tell you in this particular case,
16 that it is his opinion to a reasonable degree of medical
17 certainty that there is not evidence to support the finding
18 of a epileptic seizure in this particular case, okay?

19 Now, those are the technical facts. Now, I'm a
20 practical kind of common sense -- some people call it horse
21 sense type thing, but I think, and we're going to show you
22 that a person's actions kind of tell you a lot about them.
23 We're going to show you the actions of Jason Powell don't
24 support an epileptic seizure. We submit to you that Mr.
25 Powell has told some tall tales, okay, and they're not

1 supported by the facts of this particular case.

2 In Mr. Powell's deposition, I specifically asked him.
3 I said Mr. Powell, did you have a cell phone? He said yes,
4 sir, I had a cell phone. What was that cell phone number?
5 I don't remember the number; I've changed phones. Okay.
6 So, I asked further questions. You know, that's a lawyer's
7 job. It's our to pin somebody down. Who was the carrier?
8 He told the carrier, okay? I kept on and on with my
9 questions. Finally the county said we'll get his cell
10 phone for the day and time of this accident.

11 Guess what, folks? We've had them. They been marked.
12 They're in evidence. The cell phone company that he says
13 was his carrier didn't even have an account for him, and he
14 said he had two phones with them. They said the particular
15 time, didn't have an account with them, okay?

16 Next thing, ladies and gentlemen, think about this:
17 Mr. Powell's actions. I want you to observe his actions
18 since this. This man is claiming that he had an epileptic
19 seizure on April the 15th 2009. He went to the doctor on
20 April the 21st of 2009 six days later at the county's
21 request, their doctor. And the doctor prescribed some
22 medications, okay, for him. To date, we haven't seen the
23 first evidence that that prescription's been filled.

24 The doctor told him to come back in three months so he
25 could clear him, or he could further evaluate him. He has

1 not been back since those three months. The doctor told
2 him don't drive until you come back. He left there driving
3 and has driven every place since, okay? He drove here
4 today.

5 Ladies and gentlemen, what we're going to hopefully
6 show you and hopefully point out to you is that he went to
7 Dr. Norman Bettel, and he explained the situation to Dr.
8 Bettel. And Dr. Bettel was sympathetic because he thought
9 he might lose his job. He gave him that opinion.

10 But, ladies and gentlemen, when you dig to the real
11 facts of this case, you dig to the real facts of this case,
12 what we're going to show you is that Jason Powell -- I'm
13 not one hundred percent sure he was messing with a cell
14 phone, but I think that that's a high, likely candidate and
15 that he lost control, and he was perfectly aware and
16 perfectly capable of controlling that truck at the time he
17 went off this road and ran into the back of this house,
18 okay?

19 Now, one thing that is for certain in this particular
20 case. That's the only question you have to answer, okay?
21 Was he able to control that truck? A more implicit
22 question in that is, is you have to evaluate is Jason
23 Powell's representations credible, taking all these other
24 facts that we found on the outside? One, he's fibbed to us
25 about his cell phone. Two, he hasn't done anything that

1 the doctor told him to do. And third, an independent
2 evaluation of his medical records don't support their
3 contention, okay?

4 Now, what are we asking for, okay? What are we asking
5 for? That has been stipulated to. Mr. -- or Sergeant
6 Johnson and Kristina Johnson sustained \$58,023 of damage to
7 their house. That is not in dispute. We have submitted
8 everything to the county, every item, and they have agreed
9 to it, and we have signed a stipulation that has been
10 entered into the court record in this particular case that
11 the damages sustained by the plaintiffs is \$58,023. That
12 is what we are asking for, not a penny more, not a penny
13 less, okay? We believe and submit to you that that is the
14 appropriate amount of damages for Sergeant and Kristina
15 Johnson for the damages done to their particular house.

16 Now, what we are asking you to do is, is you listen to
17 all the factual evidence in this particular case, and you
18 ask your questions because you're going to hear testimony
19 from Mr. Powell that the last time he has any recollection
20 of anything that day was whenever he went through the
21 traffic light at the Bi-lo, which is better than a mile and
22 a half, close to two miles from where the accident happened
23 and around several curves.

24 You're going to hear testimony that he admits it would
25 have taken at least five minutes to get from the traffic

1 light at the Bi-lo to the side of the Johnsons' house with
2 that dump truck. And the next time that he has any
3 recollection from the traffic light at the Bi-lo was when
4 the ambulance got to the scene and were helping him out of
5 the truck. Then I got him to estimate the amount of time
6 that it would have taken, best case scenario, for an
7 ambulance. He said about fifteen minutes. So, by his own
8 testimony, you're going to hear that he claims he was
9 passed out. He drove the truck two miles and was passed
10 out for twenty minutes.

11 Number of things. One, you couldn't drive a truck two
12 miles like that without having an accident. Two, ask
13 yourself. How many people have you ever known to pass and
14 stayed out for twenty minutes?

15 Ladies and gentlemen, y'all will evaluate the
16 evidence, but we're going to submit to you it's a pretty
17 easy question, and that Sergeant Johnson and his wife,
18 Kristina, are entitled to their \$58,020. Thank you.

19 THE COURT: Thank you, Mr. Brehmer.

20 Mr. Waldron, you're recognized.

21 MR. WALDRON: May it please the court?

22 THE COURT: Certainly.

23 MR. WALDRON: Ladies and gentlemen, Mr. Brehmer is
24 correct. We agree that the amount of damage, the amount
25 suffered by Sergeant and Ms. Johnson was 58,000 some odd

1 asking you to make that, but that's your job. Who's at
2 fault? Nobody's at fault, then we win, but if Jason Powell
3 is at fault in some way, then Sergeant Johnson wins, simple
4 as that.

5 I agree with Mr. Brehmer. You evaluate the
6 credibility of the witnesses. You evaluate the credibility
7 of the testimony. And we appreciate you being here. Thank
8 you.

9 Thank you, Your Honor.

10 THE COURT: Very good, Mr. Waldron.

11 Mr. Brehmer, you are recognized. You may call your
12 first witnesses.

13 MR. BREHMER: We call Trooper Justin Trotter, please.

14 THE COURT: Trooper Trotter, please come forward if
15 you could, please, sir. I'm going to ask if you could
16 place your left hand on the Bible and raise your right hand
17 as the clerk administers the oath.

18 JUSTIN J. TROTTER, BEING DULY
19 SWORN, TESTIFIES AS FOLLOWS:

20 THE COURT: Trooper Trotter, come up here and have a
21 seat in the witness chair. I'm going to ask that you pull
22 up real close to the microphone. Speak loudly, clearly,
23 and slowly in order that we can hear everything you've got
24 to say. And you can adjust the microphone accordingly.
25 There we go. You got two of them up there. All right,

1 let's start with your full name, Trooper Trotter.

2 WITNESS: Justin James Trotter.

3 THE COURT: Okay. Very good. Speak up loudly.

4 DIRECT EXAMINATION BY MR. BREHMER:

5 Q. Trooper, were you the trooper that investigated the
6 accident at Sergeant Johnson's house on April 15, 2009?

7 A. That's correct, sir.

8 Q. Okay, and was Mr. Jason Powell the driver of the dump
9 truck?

10 A. Yes, sir. He was.

11 Q. Now, when you arrived at the house, where was the dump
12 truck?

13 A. It was positioned inside the house. I believe inside
14 of the Johnsons' living room at the time.

15 Q. Okay. Now, in part of your investigation, did you go
16 around the truck?

17 A. Yes, sir, I did.

18 Q. Did you go inside the truck?

19 A. Yes, sir, I did.

20 Q. Did you find a cell phone inside the truck?

21 A. Yes, sir, I did. There was one placed on the -- well,
22 it was in the floorboard of the passenger's side of the
23 truck.

24 Q. Okay. Now, you see these holsters that are on the
25 side of your -- that people wear on their sides to hold a

1 cell phone in?

2 A. Yes, sir.

3 Q. Was it in one of those holsters, or was it outside of
4 a holster?

5 A. It was outside of a holster.

6 Q. Okay. So, it was outside the holster laying in the
7 floor?

8 A. Yes, sir. That's correct.

9 Q. Okay. Now, does this photograph, which is Defendant's
10 Exhibit 2, does that properly and accurately represent the
11 location of the truck against the house?

12 A. Yes, sir, it does.

13 Q. And does that appear -- how it appears?

14 A. Yes, sir.

15 Q. And is that fellow standing over there with the
16 trooper's hat on, is that you?

17 A. Yes, sir. That's me.

18 Q. And Defendant's Exhibit Number 1, does that, this,
19 this gray area right here on this side of the grass, is
20 that a sidewalk?

21 A. Yes, sir, it is.

22 Q. Okay, and does this photograph fairly and accurately
23 represent the short distance that the truck went across the
24 yard?

25 A. It does.

1 Q. Okay, and is Sergeant Johnson's house right on the
2 other side of this hedge?

3 A. That's correct. Yes, sir, it is.

4 Q. And how -- your best estimation from what you saw on
5 that day, how far was it from the edge of the road to the
6 side of the house that the truck struck?

7 A. 100, 150 yards.

8 Q. Yards or feet?

9 A. I'm sorry, sir, feet.

10 Q. Okay. So, not far?

11 A. Yeah. That, that's correct, sir.

12 Q. Now, Sergeant Johnson was not home at the time this
13 accident happened?

14 A. That's correct. There was nobody home at the time.

15 MR. BREHMER: Thank you, Trooper.

16 THE COURT: Cross-examination.

17 MR. WALDRON: Thank you, Your Honor.

18 CROSS-EXAMINATION BY MR. WALDRON:

19 Q. Trooper Trotter, did you take any measurements out
20 there of the distance that the truck traveled?

21 A. No, sir, I did not.

22 Q. So, the 100 to 150 feet is your best estimate at this
23 time?

24 A. That's correct, sir.

25 Q. And it's true, isn't it, that the truck didn't travel

1 as a trooper?

2 A. I couldn't tell you, sir. Probably hundreds.

3 Q. More than you care to remember?

4 A. Yes, sir.

5 Q. It's not unusual for things to fly around inside
6 vehicles ---

7 MR. BREHMER: Objection, Your Honor. That's
8 speculation.

9 THE COURT: I'll allow him to ask that. It's
10 something within the ordinary perception. I'll allow him
11 to ask it.

12 BY MR. WALDRON:

13 Q. When vehicles have collisions such as this, it's not
14 unusual, is it, for items to fly around inside the vehicle?

15 A. That's correct, sir.

16 Q. You didn't place any particular importance on the
17 location of that cell phone, did you?

18 A. No, sir. I just noted that it was in the floorboard
19 of the passenger's side.

20 Q. Where did you note it?

21 A. In my mental notes at the time.

22 Q. But you didn't put it on your, on your official
23 report, did you?

24 A. There's no place for it to be put.

25 Q. Okay, but you could have put it down on the legend at

1 the bottom, but it wasn't important enough to you to
2 include a note there, was it?

3 A. That's correct, sir.

4 Q. Trooper, did you take a look at the phone, open it up
5 to see if it was active? If anybody was on the other end?
6 Do anything to investigate whether or not Mr. Powell had
7 been using the phone?

8 A. No, sir, I did not.

9 Q. Mr. Powell didn't tell you that he'd been using the
10 phone?

11 A. No. No, sir. He could not remember.

12 Q. And you didn't suspect he was using the phone?

13 A. To -- I could not state for certain that he was or was
14 not using the phone at the time.

15 Q. But you didn't see the last number called, or if it
16 was in use at the time?

17 A. That's correct, sir.

18 MR. WALDRON: Thank you.

19 THE COURT: Any redirect?

20 And, Mr. Waldron, you know, a lot of judges handle it
21 differently, but I'm going to strictly adhere to the rules
22 that you have an obligation to object to anything that he
23 brings out in redirect that's new material.

24 MR. WALDRON: Yes, sir.

25 THE COURT: There will be no recross. Technically

1 there's no such thing as recross.

2 MR. WALDRON: Yes, sir.

3 THE COURT: Mr. Brehmer, you are recognized.

4 Redirect, if there is any.

5 MR. BREHMER: No.

6 THE COURT: Okay, you may step down. Very good.

7 WITNESS: Thank you, sir.

8 (THE WITNESS EXITS THE STAND.)

9 MR. BREHMER: We call Mr. Jason Powell and, Your
10 Honor, we call him as an adverse witness and request the
11 court's permission to lead.

12 THE COURT: Any, any objection from the defendant in
13 that regard?

14 MR. WALDRON: No, Your Honor.

15 THE COURT: I think he's squarely within the rules
16 allowed to do that.

17 MR. WALDRON: Yes, sir.

18 THE COURT: Yes, sir, if you could come around. I'm
19 going to ask you if you could come forward and place your
20 left hand on the Bible and raise your right hand as the
21 clerk administers the oath.

22 JASON L. POWELL, BEING DULY SWORN,
23 TESTIFIES AS FOLLOWS:

24 THE COURT: Watch your step. I'm going to ask you to
25 have a seat in the witness chair. Pull up real close to

1 that microphone. Speak loudly, clearly, and slowly in
2 order that we can hear everything that you've got to say.
3 And we're going to ask that you start with your full name,
4 please, sir.

5 WITNESS: My name is Jason Leonard Powell.

6 THE COURT: Very good. Mr. Brehmer, you are
7 recognized.

8 DIRECT EXAMINATION BY MR. BREHMER:

9 Q. Mr. Powell, you are, you're an employee of Beaufort
10 County, are you not?

11 A. Yes, sir, I am.

12 Q. And you were an employee on April 15, 2009, when you
13 collided with the side of my client's house?

14 A. Yes, sir.

15 Q. Okay, and you were working at that time, correct?

16 A. Yes.

17 Q. You were in the course and scope of your employment
18 with Beaufort County, correct?

19 A. Yes.

20 Q. Okay. Now, you ran the dump truck off the roadway and
21 through the hedge and into my clients' living room, didn't
22 you?

23 A. Yes.

24 Q. Okay, and you admit that the accident was your fault,
25 don't you?

1 MR. WALDRON: Objection.

2 THE COURT: I'll sustain, sustain the objection.

3 MR. BREHMER: Okay.

4 THE COURT: You can ask him what happened,

5 BY MR. BREHMER:

6 Q. What happened?

7 A. I was driving, going back to, going back to the yard,
8 and I got to the light and just that was that. I was
9 driving. I, I really couldn't -- I wasn't -- I might have
10 noticed I was driving, but I wasn't focused, you know?

11 Q. Okay.

12 A. I wasn't -- I was just driving and wasn't focused all
13 the way.

14 Q. You went a mile and a half, two miles from that light
15 til when you ran into the side of my clients' house, didn't
16 you?

17 A. Yes.

18 Q. Okay, and you went around several curves, did you not?

19 A. Yes.

20 Q. Okay, and it's, and your testimony is you don't
21 remember anything for the last mile and a half?

22 A. No, sir.

23 Q. Now, you had a cell phone on your person at the time
24 of this accident, didn't you?

25 A. Yes.

1 Q. Okay, and you had a holster for your side, did you
2 not?

3 A. Yes.

4 Q. Okay, and when you weren't using the cell phone, it
5 was in your holster, correct?

6 A. Yes.

7 Q. Do you have your holster today?

8 A. I have one now, but -- I have one now, but it's --
9 well, it's, it's same ones.

10 Q. Same one?

11 A. Same type.

12 Q. Can we see the holster, please?

13 A. Well, I would have to unbutton it from my belt.

14 Q. That'd be okay.

15 A. I would have to loosen my belt.

16 Q. That'd be fine.

17 THE COURT: If you need to stand up, feel free to do
18 so.

19 (A PAUSE.)

20 BY MR. BREHMER:

21 Q. This is your cell phone holster, correct?

22 A. Yes.

23 Q. Magnetic, correct?

24 A. Yes.

25 Q. Okay, and this is the cell phone that you had your

1 cell phone in, correct?

2 A. That's not the same one, but it's something, one
3 similar to it.

4 Q. Similar to it?

5 A. Yes.

6 Q. Now, you're an equipment operator, correct?

7 A. Yes.

8 Q. Okay, and you wear this on your belt all day long,
9 don't you?

10 A. Yes.

11 Q. And part of your job is getting up in and out of that
12 dump truck, correct?

13 A. Yes.

14 Q. And you run, you run a front-end loader, too?

15 A. Every now and then.

16 Q. Every now and then, you get up there in the equipment,
17 correct?

18 A. Yes.

19 Q. Okay, and that equipment shakes you, doesn't it?

20 A. Not, not, not at all.

21 Q. But these tractors have seat belts on them, don't
22 them?

23 A. Yes.

24 Q. Okay. You're required as part of the county to put
25 the seat belt on, don't you?

1 A. The seat belt doesn't strap around you like this.

2 Q. It sits across your waist, though, right?

3 A. Yes.

4 Q. And the reason being is you fall in a hole, that thing
5 will throw you forward and throw you off of it, won't it?

6 A. Yes.

7 Q. The point I'm making is your cell phone doesn't ever
8 pop out, does it?

9 A. No. Well, I mean, it has popped out.

10 Q. Yeah?

11 A. It has.

12 Q. Now, you've testified that your carrier at the time of
13 this accident was Embarq, didn't you?

14 A. Yes.

15 Q. Okay.

16 A. But wasn't sure. It's been a little while, so could
17 maybe have been Embarq or another carrier.

18 Q. You didn't say anything about not being sure in your
19 deposition, did you?

20 A. I don't think so.

21 Q. Okay. As a matter of fact, in your deposition when I
22 asked you, I said who is your cell phone provider. You
23 immediately responded Embarq, didn't you?

24 A. I believe so.

25 Q. And there was no qualification, was there?

1 A. No.

2 Q. As a matter of fact, I asked. I said: Could you spell
3 that? And you spelled it, didn't you?

4 A. Uh-huh.

5 Q. Is that a yes?

6 A. Yes.

7 Q. Okay, but you told me you couldn't remember the
8 number, correct?

9 A. No.

10 Q. You also went on to tell me that you had more than one
11 phone in your name, too?

12 A. Yes.

13 Q. Okay, that you had, you had two phones in your name,
14 one for you and one for your girlfriend?

15 A. Yes.

16 Q. Okay, and you couldn't remember the name or the
17 numbers at the time of this accident, right?

18 A. No, sir.

19 Q. Okay, and then the county promised to get your cell
20 phone records, didn't they?

21 A. Yes.

22 Q. Okay, but when your cell phone records were
23 subpoenaed, the cell phone provider didn't have anything
24 for you, did they?

25 A. No.

1 Q. Okay. They have nothing with your name on it,
2 correct?

3 A. No.

4 Q. You haven't been able to produce any cell phone
5 records for the date of this accident, have you?

6 A. No.

7 Q. Okay, but you had a cell phone, didn't you?

8 A. Yes..

9 Q. And you knew the cell phone, we were contending that
10 you were using your cell phone at the time of this
11 accident, didn't you?

12 A. Repeat that. Repeat.

13 Q. You knew that the Johnsons and I were contending you
14 were using your cell phone at the time of this accident,
15 didn't you?

16 A. No.

17 Q. Now, you also stated that you paid for your cell phone
18 on a monthly basis, didn't you?

19 A. Yes.

20 Q. It wasn't a prepaid thing, was it?

21 A. No.

22 Q. Okay. Now, you were not allowed to use the cell phone
23 while you were in the truck, were you?

24 A. Right.

25 Q. Okay, and had you gotten caught using the cell phone

1 while you were in the truck, then you would have been
2 dismissed as an employee, would you not?

3 A. Yes.

4 Q. Okay, because you would have violated one of the
5 safety regulations, correct?

6 A. Yes.

7 Q. And you did not want to lose your job, did you?

8 A. No.

9 Q. Now, you stated that your first memory was the
10 ambulance attendant getting you out after the wreck?

11 A. Yes.

12 Q. Okay, and it took you, what, I think four to five
13 minutes to get from the Bi-lo to the accident site, didn't
14 you?

15 A. Somewhere in there, yes..

16 Q. And the nearest hospital was about fifteen minutes
17 away, correct?

18 A. Yes..

19 Q. Okay. So, from the time you traveled to the Bi-lo to
20 the time that the ambulance got to you, a minimum of twenty
21 minutes had passed, correct?

22 A. Yes.

23 Q. Okay, and you have no recollection during that time
24 frame, do you?

25 A. No.

1 THE COURT: You need to answer audibly.

2 WITNESS: Yes, sir.

3 BY MR. BREHMER:

4 Q. Now, you've been confronted by Mr. Bellamy about this,
5 have you not?

6 A. Yes.

7 Q. Tell us who Mr. Bellamy is.

8 A. He's the superintendent. Well.

9 Q. Superintendent for what?

10 A. Public Works.

11 Q. Okay, and he's the head of the Beaufort County Public
12 Works, is he not?

13 A. Yes, sir.

14 Q. Okay, and what did he tell you about you passing out?

15 A. Well, he just said that, you know, he believed that,
16 you know, I just passed out. That it wasn't no phoney
17 thing. I was just, you know, just passed out.

18 Q. Now, you testify in your deposition that he told you
19 he did not believe you passed out, did you not?

20 A. I guess.

21 MR. BREHMER: All right, request permission to open
22 the original.

23 THE COURT: All right. Ladies and gentlemen of the
24 jury, in a lawsuit it begins with the filing of a summons
25 and complaint, and then the defendant is allowed to enter

1 an answer. And then there is a period of time where the
2 parties can engage in discovery, and one of those methods
3 used is by taking a deposition.

4 And typically these depositions take place at the
5 lawyer's office. The witnesses are put under oath and are
6 asked questions. Both lawyers are present; they ask
7 questions. They are allowed to cross-examine, and the
8 rules of evidence allow for the introduction of deposition
9 testimony into evidence. Sometimes they're published in
10 toto and you get to hear all of the evidence, and they also
11 can be used to impeach an individual's testimony. And need
12 to pay that very, very close attention.

13 Mr. Brehmer.

14 MR. BREHMER: Okay.

15 BY MR. BREHMER:

16 Q. Mr. Powell, page 65. And page number is in the upper
17 right-hand corner, the line numbers are on the left-hand
18 side. Okay, on page 65, line 8, my question was: Mr.
19 Bellamy told you he did not believe that you passed out.
20 And your answer was?

21 A. It was yes.

22 Q. Yes. Okay.

23 A. Yes.

24 Q. Now, also -- well, why don't you hold on to this?

25 I'll read from my copy. Direct your attention to page 66,

1 line 12. I ask you on page 66, line 10. I'm going to read
2 the question: And he -- and he being Mr. Bellamy -- told
3 you that he thought you was lying, didn't he? And your
4 response on line 12 was?

5 A. Yes.

6 Q. Okay, yes. Now, that was the director of the South
7 Carolina -- or the Beaufort County Department of Public
8 Works, correct?

9 A. Yes.

10 Q. Your boss?

11 A. Yes.

12 Q. Okay. Now, let's talk about your medical treatment.
13 You've not seen Dr. Norman Bettle since April the 21st of
14 2009, have you?

15 A. Yes.

16 Q. Yes, you have or yes, I am correct you have not seen
17 him since April 21, 2009?

18 A. If I ain't mistaken, I did see him again after.

19 Q. Okay. Dr. Bettle set you up an appointment for three
20 months, which would be in July of 2009, for a return visit,
21 did he not?

22 A. Don't remember.

23 Q. Okay. You didn't show up, did you?

24 A. I don't believe so. No, sir.

25 Q. You do not believe so?

1 A. No.

2 Q. Dr. Bettie told you not to drive until you came back
3 to him until July of 2009, correct?

4 A. Yes.

5 Q. And you drove from his office that day, did you not?

6 A. Yes.

7 Q. And you have driven every day since, have you not?

8 A. Yes.

9 Q. Okay, and you have never filled his prescription, have
10 you?

11 A. No.

12 Q. You haven't taken any medication, have you?

13 A. Yes.

14 Q. Okay. Now, you're not on any medication now for any
15 type of seizures, are you?

16 A. No.

17 Q. You haven't had a seizure in the last thirty months,
18 have you?

19 A. No.

20 Q. Okay. You never had one before either, have you?

21 A. Not that I know of, no.

22 Q. Don't have a family history of it?

23 A. Not sure.

24 Q. Okay. Done nothing to be treated for it?

25 A. Yes.

1 Q. Okay. Other than going to Dr. Bettel the one time,
2 you've done nothing, have you?

3 A. I seen different doctors.

4 Q. Okay. Now, Mr. Powell, but you gave me the wrong
5 information regarding your cell phone account, didn't you?

6 A. I wasn't sure at the time, but my ---

7 Q. You didn't, you didn't say you were not sure, did you?

8 A. No.

9 Q. What you said you weren't sure of was the number, but
10 you were sure of the provider, weren't you?

11 A. Yes.

12 Q. Okay. As a matter of fact, you even told me where the
13 provider was located, didn't you?

14 A. Yes.

15 Q. Okay. You spelled the provider's name for me,
16 correct?

17 A. Yes.

18 Q. Okay. You told me you have two accounts, correct?

19 A. Yes.

20 Q. You told me that both of them were in your name,
21 correct?

22 A. Yes.

23 Q. Matter of fact, I asked you. Could it be possible
24 that one of them was in your girlfriend's name or both of
25 them were in your girlfriend's name, and you said no, did

1 you not?

2 A. Yes.

3 Q. Okay. So, you knew I was looking for that cell phone
4 information, didn't you?

5 A. Yes.

6 Q. Okay, okay, and you intentionally misled me, didn't
7 you, sir?

8 A. Yes.

9 Q. Because you didn't want me to have those records, did
10 you?

11 A. Not unnecessarily, but...

12 Q. Not necessarily because you knew that I would find out
13 you were using that phone at the time this accident
14 happened, correct?

15 A. No, sir. No, sir.

16 MR. BREHMER: Thank you, sir.

17 THE COURT: Mr. Waldron, you are recognized.

18 MR. WALDRON: Thank you, Your Honor.

19 CROSS-EXAMINATION BY MR. WALDRON:

20 Q. Jason, let's get right to it. Were you using your
21 cell phone at the time of the accident?

22 A. No, sir.

23 Q. Did you intend to mislead Mr. Brehmer, or did you give
24 him misinformation?

25 A. No, sir.

- 1 Q. You didn't intend to mislead him?
- 2 A. No.
- 3 Q. You were mistaken when you gave him the name of the
- 4 phone company?
- 5 A. Yes.
- 6 Q. You had more than one cell phone account?
- 7 A. Yes.
- 8 Q. With more than one company?
- 9 A. Yes.
- 10 Q. Is your account still with Embarq?
- 11 A. No.
- 12 Q. You said that your -- well, strike that. Let's go
- 13 back to the beginning. How long have you worked for
- 14 Beaufort County?
- 15 A. It will be six years in November.
- 16 Q. Who hired you?
- 17 A. Ezekiel Miller.
- 18 Q. Zeke Miller?
- 19 A. Yes.
- 20 Q. Did you meet with Mr. Bellamy when you got hired?
- 21 A. Yes.
- 22 Q. Have you known Mr. Bellamy a while?
- 23 A. No.
- 24 Q. He knows your family, though, doesn't he?
- 25 A. Yes.

1 THE COURT: Rephrase the question.

2 BY MR. WALDRON:

3 Q. Jason, what happened out there that day?

4 A. I was driving down the road and got to the stoplight,
5 and I pulled off and everything, but when I got, got a
6 little ways down the road, I just, just blanked out.
7 Wasn't focused. I was driving, but I wasn't focused on
8 what was going on at the time. And when I woke, when I,
9 when I woked up, the guy from the ambulance was pulling me
10 out the truck.

11 Q. When you say I pulled off, does that mean you pulled
12 away from the -- you drove off from the light?

13 A. Yes.

14 Q. Okay, I'm going to ask you a very hard question,
15 Jason, and your answer is very important. In your
16 community, in the group of friends that you have and the
17 folks that you associate with, do you want to be known as a
18 person that -- do you ---

19 MR. BREHMER: I'm going to object, Your Honor.

20 THE COURT: I will sustain the objection.

21 BY MR. WALDRON:

22 Q. In the group of friends that you have, is it important
23 for you to maintain a certain status of health?

24 MR. BREHMER: Objection, Your Honor.

25 THE COURT: I'll sustain the, sustain the objection.

1 BY MR. BREHMER:

2 Q. Jason, are you proud of yourself?

3 A. Yes.

4 Q. Would you be ashamed if you had a medical condition?

5 MR. BREHMER: Objection, Your Honor. Whether he's
6 ashamed or whether he's not, the question is does he have
7 the condition or not.

8 MR. WALDRON: And I think he can testify as to ---

9 THE COURT: I'll allow him to ask the question.

10 BY MR. WALDRON:

11 A. Yes, in the way I would, but I prefer being healthy.
12 I prefer to be healthy.

13 Q. You don't want to admit -- I'll withdraw the question.
14 Had you ever had, prior to driving on April 15, 2009, any
15 kind of a seizure or a medical condition or a medical event
16 such as you had on that day?

17 A. No.

18 Q. Any, had you ever had any kind of an inkling or any
19 kind of a hint that you might have that problem?

20 A. No.

21 Q. Who paid the bill for the cell phone that you were
22 using?

23 MR. BREHMER: I'm going to object, Your Honor.

24 THE COURT: I'll overrule the objection if he knows.

25 BY MR. WALDRON:

1 questions that I have.

2 THE COURT: Redirect?

3 MR. BREHMER: None.

4 THE COURT: You may step down.

5 (THE WITNESS EXITS THE STAND.)

6 THE COURT: Okay, call your next witness.

7 MR. BREHMER: Call Dr. William Brannon.

8 THE COURT: Dr. Brannon, if you could come forward,
9 please, sir. Sir, place your left hand on the Bible and
10 raise your right hand as the clerk administers the oath.

11 WILLIAM L. BRANNON, JR., BEING
12 DULY SWORN, TESTIFIES AS FOLLOWS:

13 THE COURT: Sir, pull up real close to that
14 microphone, and I'm going to ask you to speak loudly,
15 clearly, and slowly so that we can hear everything that
16 you've got to say.

17 WITNESS: Thank you, sir.

18 THE COURT: Take a moment and get settled there. All
19 right, I'm going to ask you to state your full name,
20 please, sir.

21 WITNESS: Yes. I am William Lester Brannon, Jr.

22 THE COURT: Thank you, Dr. Brannon.

23 Yes, sir.

24 VOIR DIRE EXAMINATION BY MR. BREHMER:

25 Q. Dr. Brannon, are you presently employed?

1 A. Sort of. I do clinic at the V.A. Hospital every week.
2 I help some attorneys with their cases, and basically
3 mostly I'm retired from the University of South Carolina
4 School of Medicine, not the Medical University as you said
5 before.

6 Q. I'm sorry. I'm sorry. School of Medicine, I'm sorry.

7 A. That's okay. I taught there for twenty-two years, and
8 then for seven years I continued in their practice plan,
9 which is a private practice for the university. And before
10 that, I spent twenty years in the navy.

11 Q. You said that you taught at the university?

12 A. Yes.

13 Q. What did you teach?

14 A. Neurology and that -- well, let, let me start when I
15 was in the navy. I was in the academic portion of the navy
16 medicine, stationed for seventeen years at the National
17 Naval Medical Center in Bethesda, Maryland. And there I
18 set up a training program to train doctors who wanted to
19 become neurologists. And as part of that training program,
20 I had to set up a training program to teach them how to
21 read electroencephalograms, or EEGs.

22 That went fairly well, and then the army, navy, and
23 air force got together and decided that they would like for
24 me to set up a training program to train the technicians to
25 do the EEGs, so I did that, too.

1 Then the uniformed services decided to make a medical
2 school in Washington right on the third hole of my golf
3 course, and I was the first chairman of the Department of
4 Neurology for that. So, that put me in to designing a
5 teaching program for medical students who may or may not be
6 neurologists. All medical students need some basis in the
7 neurological illnesses, so I did that.

8 I worked with Georgetown University in teaching their
9 medical students. And in the neurology teaching, this is
10 not a classroom didactic kind of thing. It's hands on, go
11 to the bedside of a patient, show them how to examine the
12 patient, teach them how to arrange the symptoms into a
13 coherent diagnostic pattern, and then come to a conclusion
14 with the case.

15 I also did that with the University of South Carolina.
16 When I joined the medical faculty there, the medical school
17 was just starting, and so I put together the training
18 program for medical students there. I also taught
19 neurology to family practice doctors, to psychiatrists, and
20 to internal medicine specialists, all of this in the
21 context of the fact that I'm a clinical neurologist, that I
22 was practicing neurology at the time. And those patients,
23 by and large, that I used as, quote, teaching material or
24 demonstration cases were patients that I took care of, and
25 who had agreed before the fact that they would be willing

1 to share their medical problems with the students that I
2 would bring to their bedside.

3 So, I've been teaching and practicing, also doing some
4 research in the field of epilepsy and the field of EEG, in
5 the field of stroke, and in the field of muscle disease.

6 Q. Now, are you board certified?

7 A. Yes, sir. I was certified as a clinical neurologist
8 in 1969, and that certification was in perpetuity. More
9 recently, the boards have limited their certification to a
10 particular number of years. I don't have to re-take the
11 board, but I do, as a matter of ethical and moral
12 obligation, have to keep up with the requirements for
13 recertification. So, I wouldn't hesitate to go back and
14 sit for another exam if the need came up.

15 Q. Now, and your board certification is in neurology?

16 A. Yes.

17 Q. Now, tell us what your educational background is.
18 Where did you get your education beyond high school?

19 A. Well, I went to the University of South Carolina for
20 undergraduate school, and after three years there, in 1957
21 I went to medical school in Charleston, which was the only
22 school that was in South Carolina at the time. I graduated
23 from there in 1961. I then went to Portsmouth, Virginia,
24 to the naval hospital and served twelve months of
25 internship, rotating through pediatrics,

1 obstetrics/gynecology, internal medicine, and surgery.

2 And at the end of that twelve-month period, I then
3 went to Georgetown University in Washington, D.C., and I
4 studied four years under their program: three years at
5 Georgetown; a half year at the naval hospital in Bethesda,
6 Maryland; and a half year at the Armed Forces Institute of
7 Pathology. So, I had a fellowship year: half at
8 Georgetown, half at AFIP studying neuropathology. That is
9 looking at brains and seeing what's wrong with them
10 basically.

11 MR. BREHMER: Your Honor, at this time, we would move
12 to have Dr. Brannon qualified as an expert in the field of
13 neurology.

14 THE COURT: Any query with regard to his
15 qualifications?

16 MR. WALDRON: No, Your Honor.

17 THE COURT: Mr. Foreman, ladies and gentlemen of the
18 jury, ordinarily a witness cannot testify as to opinions.
19 Normally a lay witness can only testify as to things they
20 saw, heard, or felt. But there is an exception to that
21 rule with regard to expert witnesses.

22 If this court determines that testimony of an expert
23 will aid you in your deliberation process, they can be
24 qualified as an expert because of their education,
25 training, or expertise in a certain area and not only can

1 testify as to what they heard, saw, and felt. They can
2 also render their opinions in that field. I so qualify Dr.
3 Brannon as an expert in the field of neurology.

4 DIRECT EXAMINATION BY MR. BREHMER:

5 Q. Dr. Brannon, have you reviewed any documents in the
6 formation of any of your opinions in this particular case?

7 A. Yes, sir. I have reviewed medical records from Dr.
8 Bettlè, Norman Bettlè, his visit with Mr. Powell; the
9 report that he offered of an EEG; and a report of the
10 magnetic resonance image of the brain, so-called MRI.

11 I have reviewed records from Dr. Charles Shasis, who
12 is a neurologist here in Beaufort, and he saw Mr. Powell on
13 at least one occasion. Looks like maybe two occasions, in
14 April of '09 and again in August of '09.

15 He performed an EEG in his office and reported that as
16 normal at a time when Mr. Powell ---

17 MR. WALDRON: Objection. This goes beyond the
18 question, Your Honor.

19 THE COURT: I'll allow him to answer.

20 BY MR. BREHMER:

21 A. At a time when Mr. Powell was taking no medication.
22 And then Dr. Shasis obtained some more testing: a
23 computerized tomogram of the brain, or the skull which
24 contains the brain; a computerized tomogram of the cervical
25 spine. That is the upper neck. And then I reviewed

1 depositions of Dr. Bettle and the deposition of Mr. Powell.

2 Q. Okay.

3 A. So, those are the records that I reviewed. In
4 addition, I have reviewed this and electroencephalogram
5 that was provided by Dr. Bettle.

6 Q. Now, what is the significance of your review of the
7 encephalogram, commonly referred as a EEG, done on, on or
8 about April 19, 2009?

9 A. The date of this was April the 16th.

10 Q. 16th?

11 Q. Of 2009, and the recording was done in the middle of
12 the day. I guess I can't be very kind about reviewing this
13 EEG because it is a technical disaster. The only thing
14 that I can see in this EEG that makes any sense is the fact
15 that it had 60 cycle electrical artifact in it.

16 And EEG machine is an exquisitely sensitive
17 instrument. It amplifies brain waves something on the
18 order of 1 or 2 million times. So, any kind of
19 interference that's coming in will be recorded on paper.
20 And sources of interference, 60 cycle artifact -- which is
21 the electrical current, florescent lights, whatever -- is
22 the most common and is the most likely to provide an
23 interference.

24 The other sources of interference, I have seen
25 epilepsy reported in a patient who had an IV, and the

1 doctor interpreting the record did not look to see that
2 every time the spike came up was when the IV dripped.
3 Drip, drip, drip. Spike, spike, spike. And that patient
4 was sent to the emergency room in status epileptic as
5 meaning one seizure after another without any intervening
6 period of normalcy, and the patient was perfectly normal on
7 exam. So, a misinterpretation.

8 There are wires that go from the scalp to the machine,
9 and if those wires sway, sometimes a breeze -- I've seen a
10 breeze come into the room and wires sway, and that, that
11 provides an abnormality in the record.

12 So, this is an exquisitely sensitive instrument in
13 recording. And the best I can do for this would be to say
14 it's technically inadequate. It's uninterpretable. It
15 should have been repeated at the time or the next day or at
16 some time when they could have gotten a technically
17 satisfactory record. So, I don't agree with the
18 interpretation that this record shows anything other than
19 60 cycle electrical artifact.

20 Q. Could you explain to us why this particular one is
21 technically inadequate?

22 A. Well, because ---

23 WITNESS: May I approach the jury?

24 MR. BREHMER: Yes, please.

25 THE COURT: Yes, sir.

1 MR. BREHMER: If you -- let me ask Your Honor.

2 THE COURT: Yes, sir.

3 MR. BREHMER: Okay.

4 (THE WITNESS EXITS THE STAND.)

5 BY MR. BREHMER:

6 Q. Now, speak up, Doctor, because this nice lady -- wait,
7 wait. Wait, wait.

8 COURT REPORTER: He can't turn his back to me, please.

9 Q. Okay, don't turn your back, and speak up.

10 A. Well, you can see from this page, particularly this
11 line right here is just a blur. And if you take a
12 magnifying glass and count that out, you'll find that there
13 are 60 of these little wave forms.

14 Now, a normal EEG will have about 8, and they will not
15 be sharp as this is. It will be what's called sinusoidal,
16 or up or down, and it will be fairly symmetrical so that
17 the way this is recorded, you have -- this is the left side
18 the brain. This is the central part of the skull, and this
19 will be right side. So, there should be relative symmetry.
20 That is, they should look about the same in this region, as
21 well as in this region.

22 They don't look the same. They don't look the same
23 here. They don't look the same there. So, you can't
24 compare them. Pass that around to look at them. They're
25 all the same, and I must have four or five hundred of these

1 pages, and they all look the same. It's all that same
2 electrical artifact that's present in the record.

3 And I think that what Dr. Bettle should have done
4 would be to say this is a technically inadequate recording.
5 I need to do it again instead of saying that it shows
6 temporal spikes.

7 And I don't know what he was calling temporal spikes.
8 There are no temporal spikes, but if it was this in that
9 third line from the bottom, that's the electrocardiogram.
10 That's the EKG. That's the heart. And if he's calling
11 those spikes, then again that's just simply an error in
12 interpretation, but I don't know that that was the case.

13 He, he would have indicated on his -- in his report
14 that the abnormalcy should have been one, two, three, four,
15 five, six, six lines up from the bottom. And if you'll
16 look six lines up from the bottom, that's really no
17 different than six lines down from the top, which is the
18 comparable area on the other side.

19 So, and then I think the other issue that I would
20 bring out is that Dr. Shasis repeated this EEG at a later
21 time, and it was normal.

22 Q. All right.

23 (THE WITNESS RESUMES THE STAND.)

24 Q. Let's go into your last statement a little bit before
25 we move on to the next thing. Now, Dr. Shasis is the

1 doctor that Mr. Powell saw at a later time?

2 A. Yes.

3 Q. Okay. He did an EEG at a later date?

4 A. Yes.

5 Q. August, wasn't it?

6 A. I believe that's correct.

7 Q. Okay, and you said it was normal?

8 A. Yes.

9 Q. What is in layman's terms the significance of that
10 finding in August of a normal EEG as opposed to a
11 questionable abnormal one in April of -- April 16th of '09?
12 What -- I mean, you compare those. What's the
13 significance?

14 A. Well, if you accept that Dr. Bettles's EEG was accurate
15 that there were right temporal lobes spikes -- and a spike
16 is an abnormal wave form on the EEG -- if you accept that
17 that was the case, then those will not go away. They'll be
18 there forever and ever and ever as long as the right
19 temporal lobe is still working.

20 And so I think the fact that you have the record that
21 is beset with artifact and you have a record that's normal,
22 I would accept the normal record over the artifact-laden
23 record any time.

24 So, I think the significance is that it confirms the
25 artifactual nature of the first recording and states that

1 the second recording is really normal.

2 Q. All right. Now, just so that the record is clear and
3 everybody knows. Why does a neurologist order an EEG?
4 What -- why? Why that test? What does it tell us?

5 A. Well, it, it tells you what the electrical activity of
6 the brain is at the moment that the record is being
7 achieved or obtained. As I said, the problem is that most
8 practicing neurologists don't have a trained EEG
9 technician. Even at the university where I worked, the
10 technician was trained by me and needed my presence to look
11 at the recording while it was going on, while it was being
12 done to be sure there weren't any artifacts in it.

13 There are training programs for technicians. There's
14 board certification for technicians, and when you have a
15 certified -- or actually we call them registered
16 technicians -- then they can sort of be independent in
17 obtaining the record. And you know because they will pick
18 up an abnormality in the record very quickly. And if there
19 is any question, they'll call the doctor to come look at it
20 with them. So, that's one of the problems.

21 The second problem in, in EEGs is, as I mentioned, the
22 artifacts are so frequent and so common, and that limits
23 the effectiveness of that as a diagnostic test. And I get
24 the feeling from reviewing the records here that Dr. Bettel
25 sort of used the fact that he interpreted an abnormal EEG

1 to make the diagnosis of epilepsy. Well, Mr. Powell
2 doesn't have epilepsy.

3 The definition of epilepsy is that the seizures have
4 to be recurrent. Dr. Bettie opined right temporal lobe
5 epilepsy, which is kind of surprising for a person who has
6 been trained and fellowshipped in clinical neurophysiology
7 because right temporal lobe epilepsy, the designation
8 itself is archaic and was used in the past to refer to
9 people who mostly had personality disorders. That is,
10 right temporal lobe epilepsy. The term -- Mr. Waldron
11 refers to it -- partial epilepsy would be the term today.

12 There are two kinds of partial epilepsy. One is
13 simple partial epilepsy in which the patient will have a
14 motor disturbance such as a repetitive jerk. And as long
15 as long as the seizure is going on, that jerk, there's no
16 alteration of consciousness. They can look at it; they can
17 stop it. So, the definition of simple partial epilepsy is
18 dependent on not loss of consciousness.

19 The definition of complex partial epilepsy would be
20 that there are three stages. There is a premonition that
21 you may have heard of as an aura, a warning. There is a
22 motor event which is almost always automatic or automatic,
23 such as [WITNESS DEMONSTRATES BY MAKING SOUNDS WITH HIS
24 MOUTH] or eye blinking, not coherent motor activities such
25 as driving a motor vehicle.

1 And the third feature is amnesia. They forget what
2 happened during the automatistic portion but recall the
3 aura or the onset of the seizure and can tell you that I
4 had a distortion in my vision. Things looked too far.
5 Things looked too near. Things looked too big. Things
6 looked too small. I was confused. I was floating.

7 In, what, forty plus years of practicing neurology,
8 I've never heard a patient say I simply lost focus because
9 to lose focus implies that you know what's going on. You
10 know that something is amiss, and you can bring back to
11 focus if you pay attention. So, that terminology would be
12 exceedingly unusual.

13 Then a fourth factor, and this applies not only to the
14 partial seizures but to the generalized seizures which is
15 the other big category, is what's called postictal. The
16 term ictus means seizure. Postictal confusion.

17 So, you find a patient who's had an epileptic seizure.
18 When they come to, they don't say the ambulance was there
19 and woke me up. The ambulance people would have observed
20 the confusional state which they would then call a
21 postictal state for the doctors that are going to have to
22 see the patient at the hospital emergency room. So, I can
23 see nothing in these records which supports really a
24 diagnosis of epilepsy.

25 And I would make one further point. Excuse me. A

1 patient who has an area of damage in the temporal lobe
2 which is producing spikes on the EEG is highly, highly,
3 highly unlikely to go for a year with those spikes being
4 repetitive and not having another clinical event in the
5 absence of medication. So, I would submit that is the
6 evidence that this is certainly not a seizure, in my
7 opinion.

8 Q. So, do you hold an opinion to a reasonable degree of
9 medical certainty as to whether or not Mr. Powell had an
10 epileptic seizure on April 15, 2009?

11 A. I think not.

12 Q. Do, do you think you don't ---

13 A. I believe not. I know not.

14 Q. Do you hold an opinion?

15 A. I have the opinion that he did not have a seizure that
16 led to this accident or misadventure in the truck.

17 Q. And have you explained your rationale from the medical
18 records in your analysis?

19 A. Yes, sir.

20 Q. All right. Now, Doctor, is the diagnosis of an
21 epileptic seizure a clinical diagnosis?

22 A. It is.

23 Q. Would you mind telling the jury or defining what a
24 clinical diagnosis is as opposed to a diagnosis just based
25 on a test?

1 A. Yeah. Well, the diagnosis is, of course, based on the
2 acquisition of sufficient medical history from the patient,
3 or preferably from people who have witnessed the event, to
4 put together a scenario that is consistent with an
5 epileptic seizure. And if you start -- you have to start
6 with a knowledge of the classification of the epileptic
7 seizures. And as I mentioned, there are two big groups.
8 There's a generalized seizure, and this is what we know as
9 grand mal seizures or tonic-clonic seizures.

10 And the patient can't tell you this, but a witness has
11 to tell you that the patient falls out. They have an
12 initial stiffening. Then they have a response to that.
13 Then they have a jerking phase, and then they have a
14 postictal phase, and they don't remember this.

15 If they saw it coming, so to speak, then that takes it
16 out of the generalized category and puts it into the
17 partial seizure category that is complicated by generalized
18 seizures.

19 So, I won't bore you with the discussion of
20 generalized seizure, but if anything was a seizure in this
21 case, it would be a partial seizure. And as I mentioned
22 earlier, there are two types of partial seizures. One is
23 simple, in which consciousness is not lost. The patient
24 knows everything that's going on, is able to respond to the
25 environment appropriately, and the event passes. The

1 second is the component issue of a warning, an automatism,
2 and a postictal confusional state. And you can't see any
3 of those things.

4 Mr. Powell was not postictal at the time the medical
5 people got to him. He did not have a warning that anything
6 was going to happen. He simply says he lost focus, and
7 that doesn't make a seizure.

8 If he were having an automatism, then it would be, in
9 my opinion, very highly, highly, highly unlikely that he
10 could navigate a truck on a winding road accurately enough
11 to avoid running off the road. People who are having
12 automatic behavior just do not have appropriate motor
13 responses during that period of time.

14 And I guess one other factor is that -- I hadn't
15 thought about until I listened to the testimony -- is that
16 the event transpired over a period of twenty minutes.
17 Almost all seizures will not last more than two or three
18 minutes, if that long. So, that twenty minute spell would
19 almost never be a seizure but would be something else.

20 Q. All right. Now, one last issue. There was a
21 discussion that an MRI was done.

22 A. Yeah.

23 Q. Okay. I think it was done in April of '09. What was
24 the significance of that MRI and its findings?

25 A. Well, in the record you notice that when Dr. Bettles

1 ordered the MRI, he asked the people running the machine to
2 do what's called a temporal lobe protocol. And what this
3 means is that they focus their MRI on the temporal lobe,
4 and that's typical and should be done, and it was normal.

5 So, the MRI showed in Mr. Powell's case only that he
6 had some old sinusitis in the right maxillary sinus and in
7 two other sinuses, and that was all the abnormality -- that
8 was the only abnormality that came up.

9 The other thing he did was asked them to do contrast
10 enhancement, and what the contrast enhancement will do is
11 help the machine pick up areas that are very subtly
12 abnormal and would not be picked up on the routine imaging
13 without contrast. And that goes back to some other
14 technical issues that people who have epileptic seizure
15 originating from the temporal lobe will frequently have
16 small areas of congenital abnormalities of the temporal
17 lobe. Will show that that temporal lobe has been injured
18 in the past, and that contrast enhancement will help pick
19 that up. And none of those subtle abnormalities were
20 discovered here either.

21 Q. So, did all Mr. Powell's tests come back normal with
22 the exception of that one EEG?

23 A. Yes.

24 Q. And that EEG, that initial EEG that was done on April
25 16, 2009, in your opinion was flawed?

1 A. Yes.

2 Q. Because it had all these -- what did you call them
3 again?

4 A. Electrical artifacts, 60 cycle interference.

5 Q. Okay. So, it had too much interference to have any
6 substantive use?

7 A. Yes.

8 Q. And the EEG that was done in August after the one in
9 April was totally normal?

10 A. That's correct.

11 Q. And if you got one normal, you throw out the bad one?

12 A. Yes. Yes. That would take precedence over an
13 abnormal one.

14 Q. And your opinion is Mr. Powell had no epileptic
15 seizure on April 15, 2009?

16 A. That is my opinion.

17 Q. Thank you, and that's to a reasonable degree of
18 medical certainty it's more probable than not?

19 A. Yes, sir.

20 MR. BREHMER: Thank you, sir. Answer any questions
21 Mr. Waldron has.

22 THE COURT: Mr. Waldron, you are recognized.

23 MR. WALDRON: Thank you, Your Honor.

24 CROSS-EXAMINATION BY MR. WALDRON:

25 Q. Doctor, how do you know that Dr. Bettie's EEG had the

1 electrical interference?

2 A. I got the copies right there.

3 Q. I know, but how do you discern from that it's from
4 electrical interference?

5 A. Because if you count the wave forms, you'll find that
6 there are 60 wave forms per second there. And there's no
7 brain activity that goes at that rapid a rate.

8 Q. I guess my real question is do you know what caused
9 that electrical interference?

10 A. Probably florescent lights in the neighborhood.

11 Q. But you're not certain?

12 A. No. I don't know his laboratory, but there are two
13 things that are most common. One is that you use
14 florescent lights, and two, that the area in which the
15 recording is taken has not been isolated from the rest of
16 the area.

17 For example, in my lab at the naval hospital in
18 Bethesda, we had a wire case that was made from copper wire
19 and was grounded, and the patients had their EEGs inside
20 that case specifically to keep out wandering electrical
21 waves from the light fixtures.

22 Q. You haven't seen the facility that Dr. Bettel uses to
23 do his EEGs, have you?

24 A. No.

25 Q. So, you don't know whether the wiring has been

1 isolated?

2 A. Well, I almost do by virtue of the artifacts to the
3 record.

4 Q. Okay, but you're speculating on that. You don't know
5 for sure.

6 A. No. That's correct.

7 Q. And you don't know if the lights caused it or
8 something might have caused it?

9 A. Well, the other thing that would cause 60 cycle
10 electrical artifact in the, in the EEG in a well isolated
11 room would be improper application of the electrodes. The
12 electrodes have a resistance between the scalp and the
13 electrode. And you try to reduce that by using something
14 called electrode paste, and then you have to be sure the
15 thing is pressed down hard and essentially sealed. So, if
16 the technician in applying the electrode doesn't apply it
17 properly, then you may get 60 cycle artifact.

18 Now, the problem in -- not so much a problem, but the
19 reason I don't say that with this is that the 60 cycle is
20 in every channel, which means that all twenty-three
21 electrodes which are placed on the skull to do the test
22 would have to be improperly applied, and usually if one
23 channel is out of fix, then you say that's probably a
24 better explanation of poor application of electrodes.

25 Q. But again, Doctor, you don't know for sure how they

1 were applied or if they were misapplied because you didn't
2 see it.

3 A. No. That's correct.

4 Q. You didn't conduct any physical examination of Mr.
5 Powell, did you?

6 A. I did not.

7 Q. Never saw him until today?

8 A. That's correct.

9 Q. You've not afforded him any truth whatsoever?

10 A. I'm sorry?

11 Q. You've not afforded him any truth whatsoever?

12 A. No, sir.

13 Q. Epilepsy is fairly rare in our population. Would you
14 agree?

15 A. No.

16 Q. What percentage of our population has epilepsy?

17 A. I think the last figure I saw was somewhere around 125
18 cases per 100,000 population, which makes it in a sort of
19 middle range of occurrence.

20 Q. Well, that sounds to me like -- well, isn't that less
21 than one percent?

22 A. I don't know. I went to college to be an engineer.
23 Couldn't do mathematics and ended up in medicine.

24 Q. Isn't one of the prime features of the disease
25 unprovoked seizures?

1 A. Well, all -- yes. Yes. Okay.

2 Q. So, the first one, there's got to be a first one,
3 correct?

4 A. Well, you're talking about epilepsy, and you cannot
5 apply epilepsy to Mr. Powell's case because the definition
6 of epilepsy means recurrence of seizures.

7 Q. There's got to be a first time, doesn't there?

8 A. Well, yeah. If you look at people who have had one
9 epileptic seizure or one type of seizure that may be
10 epileptic, then the number expands dramatically. I mean,
11 hundreds of babies have single seizures. In fact, the
12 topic of my research in military medicine was what about
13 these patients that have only one seizure. And, and we
14 found that only sixteen percent of the patients that have
15 only one seizure go on to have recurrent seizures. So,
16 those patients were not considered epileptic.

17 And I studied personally, I think it was 240 or 250
18 patients, and that was reported to the American EEG Society
19 combined with the American Epilepsy Society some years ago.
20 And, and so I know where I'm coming from with that.

21 So, you can't consider a patient -- I could take
22 anybody in this courtroom and cause you to have a seizure,
23 but it would not be epilepsy.

24 Q. So, of the patients that you studied through your
25 particular paper, your research, while only sixteen, think

1 you said, had epileptic ---

2 A. Sixty-nine -- or sixteen percent. So, that would be
3 what?

4 Q. Okay.

5 A. Thirty-two patients out of a little more than two
6 hundred.

7 Q. But there was no doubt that the others had some form
8 of seizure. It just wasn't epilepsy.

9 A. Well, yeah, there was doubt whether it was a brain
10 seizure or not based on electrical activity. It depends on
11 -- I don't want to get too technical here.

12 Q. Well, Doctor, was there a medical event in the, in the
13 rest of those people which ---

14 A. Yes.

15 Q. --- caused them to be studied?

16 A. That's correct. They were patients that had been
17 referred for a diagnosis of possible epilepsy after having
18 had one seizure. It was called a single seizure study, and
19 that's still -- we -- a fair number of patients are
20 referred to a neurologist with a single seizure.

21 Those patients most often do not go on to have
22 epilepsy. Only sixteen percent of the time will they do
23 that. And how do you judge that? You judge it by whether
24 or not they have further seizures.

25 And here you've got a patient who had some event that

1 was probably not a seizure to begin with because it lasted
2 too long, there are too many features of a seizure absent
3 from the history, and there was no abnormality to support a
4 diagnosis.

5 Q. So, you don't dispute the fact that Mr. Powell had
6 some kind of event. What you do dispute is a diagnosis of
7 epilepsy?

8 A. Well, I think it was some kind of event. People don't
9 usually drive trucks into houses intentionally, I don't
10 think.

11 Q. Well, isn't one of the features of partial epilepsy,
12 and you describe the kind where you have the precursor, the
13 warning such as a funny smell or taste?

14 A. Yeah, yeah.

15 Q. Proceeding to automatism, I think you called it?

16 A. Yes.

17 Q. Where ---

18 A. The automatic movement or automatic behavior, motor
19 behavior.

20 Q. And isn't the behavior in that typical of
21 sleepwalking, you know, driving your vehicle? One can
22 perform functions normally ---

23 A. No.

24 Q. --- for a short period of time?

25 A. No. No.

1 Q. That's not true?

2 A. No, sir. I don't believe so. I don't believe so.
3 It's auto -- usually the most common thing is what's called
4 automatic purposeless movements, such as lip smacking,
5 chewing, eye blinking, sometimes head turning, sometimes
6 movement of an arm in a tonic posture. Not a purposeful
7 movement of the arm. The arm will come up and head will
8 look at the arm, and what those things tell you is what
9 part of the brain is firing abnormally to cause those
10 events.

11 Q. But didn't you describe one where there's the aura and
12 then a motor event?

13 A. Yes. It's an automatism; it's an automatic motor
14 event. Smacking of lips, blinking of eyes, turning of
15 head.

16 Q. I thought you said something about driving a vehicle.

17 A. No. I said if, if someone were having an automatism
18 while driving a vehicle, that vehicle would most likely run
19 off the road.

20 Q. As did Mr. Powell.

21 A. Well, not until he had negotiated several curves and,
22 and, and those kinds of things. The automatism usually
23 will not last more than a few seconds to a minute or so.

24 I've seen a patient, for example, a lady was ironing
25 her husband's shirt. And as the seizure encompassed her

1 activity, she continued simply to iron the shirt. And the
2 way she knew she had a seizure was the shirt was scorched
3 where the iron had continued to go over it twenty or thirty
4 seconds.

5 And that's the kind of thing you see in this
6 automatism with a complex partial seizure. You don't see
7 somebody -- as the story goes at Georgetown University
8 where I trained and taught was the beautiful young lady who
9 went downtown in Washington, D.C. in the 5:00 traffic.
10 Stopped her car, stood up, took off all of her clothes, and
11 attracted all of the bystanders coming around. That's just
12 too much of organized behavior to attribute that to a
13 seizure.

14 Similarly, someone who can navigate a large truck over
15 a period of a mile or two and calling that an automatism,
16 it's just too long. It doesn't make sense to those of us
17 who deal with epileptic seizures.

18 Q. Do you agree with me that there are different -- that
19 different doctors can reach different opinions based upon
20 the same test?

21 A. Well, I think you see that before us. Dr. Bettel came
22 to a conclusion, and I've challenged that conclusion, and
23 so yeah.

24 Q. And I think you testified that certain doctors who
25 specialize in neurology and who get board certified and

1 A. Well, yes, it's an authoritative journal mostly of
2 internal medicine vis neurology, yeah. Sure.

3 Q. And I'm going to read to you a statement and ask if
4 you disagree with this:

5 In some more complex automatisms, the subject
6 enters into the behaviors of sleepwalking while
7 fully awake up until the moment it starts. In
8 these episodes, which can last for longer periods
9 of time, the subject proceeds to engage in
10 activities he or she routinely perform such as
11 cooking, showering, driving a familiar route, or
12 even carry on conversation. Following the
13 episode, the subject regains consciousness often
14 feeling disoriented and has no memory of the
15 incident.

16 A. Well, like many things there, I think half truths in
17 there. What I don't agree with is that the, the
18 implication that the patient in the midst of an automatism
19 or seizure would have absolutely normal activities such as
20 driving a car or such as -- and I'm not sure I understand
21 what you mean by sleepwalking although awake.

22 If you're saying that the walking would be some sort
23 of automatism, I suppose that's possible, but again it
24 would lack organization and would lack purpose. So, the
25 two things that, that would have to be present to account

1 for those activities as seizures would be, one, that
2 they're generally purposeless, or that they are not
3 organized in their activity.

4 Q. One final question, doctor, or series of questions.
5 Mr. Brehmer paid you for your appearance today, didn't he?

6 A. Not yet.

7 Q. Do you expect to be paid by Mr. Brehmer?

8 A. I hope so.

9 Q. And how much do you charge? How much are you charging
10 for this event?

11 A. Well, I won't charge him any more than I would earn if
12 I were working in the clinic. And usually on Wednesdays
13 when I work at the V.A. clinic, I earn about \$1,500. So, I
14 suspect the day's activity will be \$1,500 plus the sandwich
15 over at Jimmy Johns, which I think was \$7, plus the cost of
16 operating the car. So, I'd have to add all that up.

17 Q. Have you charged him for reviewing the records?

18 A. I'm not sure.

19 Q. Expect to?

20 A. I will if I haven't, and I will charge him \$200 an
21 hour at that rate, again which is about what I make when I
22 go to clinic. I don't charge more than I would make if I
23 were working at something else in the real practice of
24 medicine.

25 MR. WALDRON: Thank you, Doctor.

1 undue surprise, and I don't think it's harmful to your
2 position in any way, shape, or form. So, I'm going to
3 allow him to testify in that regard. And I think it is
4 indeed admissible.

5 All right, you may step down.

6 WITNESS: Thank you, Your Honor.

7 (THE WITNESS EXITS THE STAND.)

8 IN-CAMERA HEARING CONCLUDES.

9 THE COURT: All right.

10 MR. BREHMER: We'll rest. Should we do that in front
11 of the jury or not? I mean...

12 THE COURT: Well.

13 MR. BREHMER: Or just tell you the plaintiff rests?

14 THE COURT: Well, I'll allow any motions at this time,
15 and then I am going to recognize you when the jury comes
16 out, and call your next witness, and you can indicate
17 you've rested.

18 But if there's no objection from the defendant, we'll
19 hear the motions at this time.

20 MR. WALDRON: Your Honor, are you asking for motions?
21 If you are, I'll move for a directed verdict at this point.

22 THE COURT: Okay. Be glad to hear from you.

23 MR. WALDRON: The plaintiff has the burden of showing
24 proximate cause, and all he's shown at this point is there
25 was ---

1 THE COURT: Wait a minute just a little bit. I don't
2 want to interrupt you, but actually the burden is on you to
3 prove an unavoidable accident.

4 MR. WALDRON: Well, sir, I would respectfully
5 disagree. If the plaintiff is going to file a negligence
6 action, isn't the burden on the plaintiff to prove by the
7 greater weight of the evidence all of the elements of the
8 tort of negligence?

9 THE COURT: Yes, and unavoidable accident is a
10 defense.

11 MR. WALDRON: Yes, sir.

12 THE COURT: All right. I'll hear through -- I don't
13 exactly follow your logic in that regard, but I'll be glad
14 to heard from you. The fact that he was driving a car was
15 not -- there is at least a scintilla of evidence that he
16 wasn't -- didn't maintain proper control, and that's
17 really, we -- the inquiry stops there. Then it's incumbent
18 upon you, the burden is on you to prove unavoidable
19 accident.

20 MR. WALDRON: That's correct.

21 THE COURT: Okay. So, what is it that they have not
22 established as far as a scintilla of evidence with regard
23 to the elements of negligence?

24 MR. WALDRON: They have not shown anything other than
25 Mr. Powell has an unexplained blackout or event. They've

1 brought in a doctor who opines that it's not an epileptic
2 seizure but does not give us any other indication other
3 than he had some kind of an event.

4 THE COURT: You're focusing on the unavoidable
5 accident. The issue is negligence.

6 MR. WALDRON: Yes, sir.

7 THE COURT: And the fact that he was driving an
8 automobile that ended up in his living room I think is a
9 scintilla of evidence of negligence.

10 MR. WALDRON: And I would argue counter to that that
11 that's *res ipsa*, which we don't allow in this state. *Res*
12 *ipsa loquitur* is not recognized in South Carolina. The
13 fact that he's driving a vehicle and ends up in a living
14 room without anything more -- in fact, when we raised the
15 specter of the unavoidable accident, we've got a -- you've
16 got an event and a happening without anything in between.
17 There is no proximate cause proven by the plaintiff.

18 THE COURT: How about the cell phone?

19 MR. WALDRON: The evidence is -- there's no evidence
20 whatsoever that he was using that cell phone.

21 THE COURT: Well, there is some evidence. There is
22 some evidence, isn't there?

23 MR. WALDRON: No, not that he was using the cell
24 phone, no, sir.

25 THE COURT: Well, there's evidence that it was ---

1 MR. WALDRON: It was in the vehicle.

2 THE COURT: That's correct.

3 MR. WALDRON: But there's -- in fact, the only
4 evidence is that he was not using the cell phone. Jason
5 testified he was not on the cell phone. That it had popped
6 out in the past. The trooper testified it's not usual,
7 especially in a collision of this force, for things to fly
8 around the cab of the truck. And the trooper did not give
9 us any information about the last call or the timing of
10 call because he didn't look. There not evidence that he --
11 none whatsoever that he was using that cell phone. Mere
12 presence in the vehicle doesn't mean he was using it.

13 THE COURT: All right, anything further?

14 MR. WALDRON: No, sir.

15 THE COURT: All right, be glad to hear from you, Mr.
16 Brehmer.

17 MR. BREHMER: Your Honor, there's a world of
18 information here. One, Mr. Powell had a duty and
19 responsibility to operate the vehicle with the presence of
20 mind of all other motorists on the road. He had a duty to
21 keep it under control, which means keeping it between the
22 ditches, so to speak.

23 He left the roadway. There's reasonable inference can
24 be drawn he was traveling too fast for conditions because
25 he left the roadway, crossed a brief area of yard, went

1 through a hedge, and into the plaintiffs' living room,
2 okay? By Mr. Powell's own admission, by Mr. Powell's own
3 admission, he traveled a minimum of a mile and a half, as
4 much as probably two miles with being impaired, not knowing
5 where, how, or why he was operating a vehicle on the
6 roadway.

7 So, there are many statutory violations of Title 56
8 that Mr. Powell has committed, also of the common law
9 operation of a motor vehicle. So, we think that we have
10 more than proved negligence or any of the particulars of
11 alleged against Mr. -- or against the county, and that it's
12 undisputed that, stipulated that that negligence was --
13 that violation of those standards was the proximate cause
14 of the \$58,000 worth of damage claim.

15 THE COURT: All right. All right, very good.

16 Well, your motion for directed verdict is noted but
17 overruled, but you are protected on the record in that
18 regard.

19 All right, anything further?

20 MR. WALDRON: No.

21 THE COURT: All right, we're ready for the jury.

22 MR. WALDRON: Judge, from a logistical standpoint, are
23 we going to put Mr. Bellamy on the stand? I guess Mr.
24 Brehmer is going to rest, and we'll put Mr. Bellamy on the
25 stand now, and the only other witness I have is Dr.

1 THE COURT: All right, Mr. Brehmer, you are
2 recognized. You may call your next witness.

3 MR. BREHMER: Your Honor, at this time the plaintiff
4 would rest.

5 THE COURT: Very good. All right.

6 Mr. Foreman, ladies and gentlemen of the jury, the
7 plaintiff has rested. At this time, the defendant has an
8 opportunity to present any evidence that they might have.

9 Mr. Waldron, you are recognized.

10 MR. WALDRON: Thank you, Your Honor. We'd call Mr.
11 Bellamy.

12 THE COURT: Mr. Bellamy, if you could come forward and
13 place your left hand on the Bible and raise your right hand
14 as the clerk administers the oath.

15 MALCOLM E. BELLAMY, JR., BEING
16 DULY SWORN, TESTIFIES AS FOLLOWS:

17 THE COURT: Have a seat in the witness chair there,
18 and pull up real close to the microphone, sir. Speak
19 loudly, clearly, and slowly in order that we can hear
20 everything that you've got to say, and let's start with
21 your full name, Mr. Bellamy.

22 WITNESS: I'm sorry. Malcolm Edwin Bellamy, Jr.

23 THE COURT: Very good.

24 Mr. Waldron, you are recognized.

25 MR. WALDRON: Thank you, sir.

1 Q. Did you have a subsequent conversation -- subsequent
2 meaning after the accident -- with Mr. Powell about whether
3 he -- strike that -- about his receipt of medical
4 treatment?

5 A. Yes, sir, I had several.

6 Q. Why?

7 A. Because I was not certain, based what he had told me,
8 that he was following up properly with his medical
9 treatment.

10 Q. Did the accusation of lying occur in that
11 conversation?

12 MR. BREHMER: I'm going to object, Your Honor. He's
13 already asked and answered.

14 THE COURT: I'll sustain the objection. You've asked
15 him if he's -- you've asked him about the allegations of
16 lying. He says he doesn't know.

17 MR. WALDRON: All right.

18 BY MR. WALDRON:

19 Q. Did Mr. Powell return to driving a vehicle immediately
20 after ---

21 MR. BREHMER: I'm going to object to that as well,
22 Your Honor.

23 THE COURT: What was the question?

24 MR. WALDRON: Asked him if, asked him if after this
25 later conversation, Mr. Powell at some point returned to

1 Q. Did you have any concentration and study or
2 specialization at the University of Pittsburgh?

3 A. No. An internship is in general, either surgical or
4 medically oriented, but not further specialized.

5 Q. And your residency at the University of California in
6 San Diego, when did you finish that?

7 A. In 2003.

8 Q. Did you have any special area of study there?

9 A. Not during my first three years in neurology,
10 generally neurology training. I did do a fellowship
11 thereafter in clinical neurophysiology and epilepsy.

12 Q. Are you currently board certified?

13 A. Yes.

14 Q. In what area or areas?

15 A. I'm board certified in neurology, and I'm also board
16 certified in clinical neurophysiology.

17 Q. Would you tell the jury, please, what the study of
18 neurology consists of?

19 A. Neurology deals with diseases of the nervous system.
20 That includes the brain, the spinal cord, and peripheral
21 nervous system, the nerves and arms, legs.

22 Q. Do you currently practice here in South Carolina?

23 A. That's right.

24 Q. And you're licensed to practice in this state?

25 A. Yes.

1 A. Yes, I did.

2 Q. Tell the jury what that history was.

3 A. Well, I take the history from my notes, which I
4 dictated after seeing Mr. Powell the very same day. I
5 dictated, dictated it, and it says he was involved in a
6 motor vehicle accident as a driver the week prior. He
7 drove a truck and lost suddenly awareness without warning,
8 and leading to a motor vehicle accident. He went to the
9 emergency room. He had a CT scan of the head which was
10 unremarkable. CT scan of the C-spine and his chest, which
11 were also fine. And then I went into detail, asking about
12 risk factors which could have led to this, at that point,
13 unexplained loss of consciousness.

14 Q. Did you get this history from Mr. Powell himself?

15 A. I believe. Yes, I did.

16 MR. WALDRON: Going down to line 21.

17 Q. Did you perform a physical examination on Mr. Powell?

18 A. Yes, I did.

19 Q. Tell me the results of that physical exam.

20 A. It was a normal neurological and brief cardiovascular
21 exam. There were no abnormalities found.

22 Q. Doctor, I'm going to show you what's previously been
23 marked as Defendant's Exhibit Number 1 from Bettie
24 deposition and ask if you can -- if you recognize that.

25 A. Yes. That's my note I generated from the visit.

1 Q. How soon following the visit did you generate that?

2 A. Well, as a -- I don't know exactly how soon after two
3 years I would -- I did it for this particular case. But in
4 general, I think ninety-five percent or more of my
5 dictations I did in between patients, following seeing the
6 patient. So, I see the patient, go to my room, and dictate
7 while the next patient is brought into the room.

8 Q. Is this kind of record normally kept now on your
9 computer system?

10 A. Yes.

11 Q. And these records are required -- you're required to
12 keep these records by statute, aren't you?

13 A. Yes.

14 Q. And as part of your medical training and experience,
15 you're trained to keep these records?

16 A. Yes.

17 Q. Correct, and this is the type of record that you
18 normally keep in your practice?

19 A. Yes.

20 MR. WALDRON: Going down to line 14.

21 Q. Doctor, as a result of your exam and the documents and
22 the material that you had available for review, namely the
23 EEG, and any other materials such as the hospital records
24 that you mentioned in one of your earlier answers, did you
25 come up with an assessment or evaluation of Mr. Powell?

1 A. Yes.

2 Q. Would you tell the jury what that is?

3 MR. WALDRON: And go to line 1 on 13.

4 A. I found it likely that he had an epileptic seizure,
5 leading to the motor vehicle accident.

6 MR. WALDRON: Going down to line 8.

7 Q. Doctor, is that opinion and assessment that you've
8 just given, is that stated to a reasonable degree of
9 medical certainty?

10 A. Yes.

11 Q. Have you seen Mr. Powell again since that April 21st
12 visit?

13 A. No.

14 Q. Doctor, based upon your review of Mr. Powell's
15 records, your recollection in meeting with him, and any
16 other records that you may have had, do you have any
17 knowledge that Mr. Powell had a history of seizures prior
18 to the incident on April 15, 2009?

19 A. No.

20 Q. Do you have any knowledge that Mr. Powell ever had a
21 seizure or similar episode prior to the incident on April
22 15, 2009?

23 A. No.

24 Q. Doctor, do you have any knowledge that Mr. Powell ever
25 had a head injury or similar other -- or similar problem

1 prior to the incident with the truck?

2 A. No.

3 Q. Do you have any knowledge that Mr. Powell consumed or
4 was prescribed any medication or other substance, or
5 consumed any other substances directly prior to the
6 incident on April 15, 2009?

7 A. No.

8 Q. Do you have any knowledge that Mr. Powell had a
9 chronic problem of any kind prior to the incident on April
10 15, 2009?

11 A. No.

12 MR. WALDRON: Go down to line 24.

13 Q. Doctor, what, what is your opinion?

14 A. It is that he had an epileptic seizure leading to that
15 event.

16 Q. Again, taking into consideration everything you know
17 about this case, including all of the factors that I've
18 just listed in the prior question, do you have a
19 professional opinion stated to a reasonable degree of
20 medical certainty as to the most probable cause of the
21 medical event that occurred on April 15, 2009, to Mr.
22 Powell?

23 A. It was a seizure, an epileptic seizure.

24 Q. Again taking into consideration all the factors listed
25 previously, do you have a professional opinion stated to a

1 reasonable degree of medical certainty whether the event
2 related to you by Mr. Powell most probably caused the motor
3 vehicle accident?

4 A. Yes.

5 Q. And what is that opinion?

6 A. That the seizure led to a -- to loss of consciousness,
7 or at least loss of the ability to maneuver the vehicle,
8 and led to the motor vehicle accident.

9 MR. WALDRON: Turning the page to line 8.

10 Q. And finally, taking into consideration all the factors
11 previously listed and everything that you know about Mr.
12 Powell, do you have a professional opinion stated to a
13 reasonable degree of medical certainty whether Mr. Powell
14 most certainly, most probably could have foreseen not only
15 the medical event, but what would happen to him while he
16 was driving the truck?

17 A. I don't think so. He would not have.

18 Q. Those are all the questions that I have. Thank you,
19 Doctor.

20 CROSS-EXAMINATION READ BY MR. BREHMER:

21 Q. You haven't seen him in over two years, have you?

22 A. No, I have not.

23 Q. Okay. You don't know whether he'd had a seizure in
24 the last two years or not, do you?

25 A. I have no idea.

1 Q. Okay. Now, if he was prone to having seizures,
2 wouldn't you expect him to have had one in the last two
3 years?

4 MR. BREHMER: Go down to line 8.

5 WITNESS: Line 8?

6 A. Well, I did discuss and I wrote it in the note that
7 having one seizure obviously increases the risk of having
8 further seizures, but it doesn't increase it to one hundred
9 percent. So, it is possible that he does not have further
10 seizures without treatment.

11 In addition, I also discussed with him treatment, and
12 he agreed to treatment. And the chance of becoming seizure
13 free on an anti-epileptic medication is about seventy,
14 seventy-five percent. So, it may well be that he still
15 takes medication up to today prescribed by somebody else
16 and has not had a seizure.

17 Q. But you don't -- you didn't prescribe any medication
18 for him, did you?

19 A. According to my note, I did.

20 Q. What did you prescribe?

21 A. Trileptal.

22 Q. Okay, and what was the dosage?

23 A. 300 milligrams twice daily.

24 Q. And how many for how long was that prescription to
25 last?

1 A. I do not have a copy of the -- a prescription was
2 given for one month with refills. I don't know how many
3 refills I gave him. I planned to see him back in three
4 months.

5 Q. Okay. Did he show back up?

6 A. No.

7 Q. Did he make an appointment?

8 A. Not to my knowledge.

9 Q. So, he wouldn't have been out -- so, he'd been out of
10 the prescription two years if he took it like you
11 prescribed it, right?

12 A. Unless he found another prescriber. I mean, it's up
13 to him to find another prescriber to...

14 Q. But we don't know that.

15 A. We don't know that.

16 Q. He found -- we don't know what he's seen, any other
17 the doctors. Is that...

18 A. That's correct.

19 Q. Okay.

20 A. That's correct.

21 Q. And the best information we have at this point, he
22 wouldn't have had enough medication to last three months
23 after the time you saw him, correct?

24 A. Uh-huh.

25 Q. Which we would have -- been about twenty-three months

1 ago, contract?

2 A. Yes.

3 Q. And you don't know if he'd had another seizure in that
4 period of time, do you?

5 A. I don't know.

6 Q. Okay. Now, you also had a MRI done, did you?

7 A. Yes.

8 Q. And it was done April the 23rd, was it not?

9 A. That's correct.

10 Q. Okay, and it was normal, was it not?

11 A. It was normal, yes.

12 Q. And the purpose that you did the MRI is because the
13 MRI takes a picture of the brain, correct?

14 A. Yes.

15 Q. Okay, and that's the purpose for which you did it,
16 right?

17 A. Uh-huh.

18 Q. Is that a yes?

19 A. Yes.

20 Q. Okay. Good. What you were looking for were lesions
21 or some type of evidence of a epileptic seizure, correct?

22 A. No. An epileptic seizure is a funct -- is an event,
23 so you can't see that on the MRI. MRI looks for structural
24 abnormalities which may have caused him to develop a
25 seizure disorder.

1 Q. Okay, and you found none?

2 A. No, there was nothing.

3 Q. It was normal?

4 A. It was normal.

5 Q. Okay, and so the MRI didn't show any evidence,
6 correct?

7 A. The M, the MRI did not show any evidence for
8 structural abnormality leading to the seizures, that's
9 correct.

10 Q. Okay, and this EEG that you did.

11 A. Uh-huh.

12 Q. It takes basically -- it records electrical activity
13 in the brain during the period that you're doing it,
14 correct?

15 A. Yes.

16 Q. And how long do they normally last?

17 A. Usually about thirty minutes.

18 Q. So, it captures the electrical activity in thirty
19 minutes, correct?

20 A. Yes.

21 Q. And the EEG was done the day after the incident,
22 correct?

23 A. I don't know what, what day the...

24 Q. April the 16th in the report date.

25 A. Yes.

1 Q. Is that correct?

2 A. Yes.

3 Q. That'd be the day after, right?

4 A. Yes.

5 Q. Okay. Now, the on -- that only captures what's going
6 on for the thirty minutes that you're being -- it's being
7 done, doesn't it?

8 A. Yes.

9 Q. Okay. It doesn't give a history of what has occurred
10 in the past, does it?

11 A. No.

12 Q. Okay, and it -- nor does it give you a prediction of
13 what's to occur in the future, correct?

14 A. That's correct.

15 Q. Okay. Now, the EEG, I noticed in your report the
16 indications that there was a denotion of a number of
17 artifacts. Are you familiar with that term?

18 A. Yeah. Of course.

19 Q. I think -- okay.

20 A. I think I dictated it, so.

21 Q. That's spikes and hills and valleys in the EEG,
22 correct?

23 A. Well, the artifacts are abnormalities of the tracing
24 which are not generated by brain waves but rather by
25 artifacts, by external sources, including you can get an

1 artifact from the 60 hertz power, 60 hertz Alpha. You can
2 get an artifact by just moving your eyes. You can get an
3 artifact by rubbing your head.

4 Q. Yeah.

5 A. All kinds of artifacts and, you know, there, there's a
6 certain pattern to artifacts. And usually you can
7 distinguish between a true brain wave and artifacts.

8 Q. But you could get artifacts by -- and these artifacts
9 would appear on a EEG as a spike or valley or by moving a
10 limb, or?

11 A. Yes, yes.

12 Q. Scratching your head or rubbing your nose?

13 A. Yes.

14 Q. Or blinking, even something as simple as blinking your
15 eye like you just did?

16 A. Yes.

17 Q. Okay.

18 A. Those are artifacts.

19 Q. That would cause artifacts, correct?

20 A. That's correct, yeah.

21 Q. Okay. Now, and now what about the EEG told you that
22 this man had epilepsy?

23 A. The EEG showed not just one but repetitive
24 abnormalities consistent with a focus within the brain
25 which can give or trigger an -- epileptic seizures.

1 Q. Were these in the form of artifacts?

2 A. No. Artifacts are not brain activity. They look
3 different to the trained eye and should be distinguished,
4 easily distinguished more or less easily.

5 Q. Okay.

6 A. By the trained eye. I mean, you know, it -- you
7 obviously -- they may look to you the same. They may not
8 look to me the same.

9 Q. Okay. What about another physician, a person, another
10 neurologist?

11 A. Uh-huh.

12 Q. Do y'all often disagree on what a E -- on what the EEG
13 shows?

14 A. Occasionally we disagree. The disagreement usually
15 comes in the form of possibly one discharge, and the
16 question is, is that one discharge an artifact or isn't it.
17 With repetitive discharges, it is more easily
18 distinguishable from artifacts.

19 It also depends on the training of the physician who
20 gives the second opinion. Like with all professions, I
21 guess you have better trained and less well trained
22 physicians giving opinions. So, if, for instance, the
23 chief of the epilepsy department at MUSC disagrees with my
24 EEG, well then I have another look at my EEG and consider
25 that I was wrong.

1 Q. Okay.

2 A. If a physician, be it neurologist or non-neurologist,
3 has less training than me in interpreting EEGs, and I
4 mentioned before I have -- I, I'm a board certified in
5 clinical neurophysiology and have a fellowship in that
6 area. So, if somebody gives an opinion who's less
7 qualified than me, then the chance that I'm right is much
8 higher.

9 Q. Okay. So, what you're saying in a nice way is that
10 physicians can disagree about ---

11 A. That's correct.

12 Q. --- the interpretation of results?

13 A. Yes. That's correct?

14 Q. Okay.

15 A. Of course.

16 Q. And it's basically a challenge between skill level or
17 knowledge and training?

18 A. Yes.

19 Q. Correct?

20 A. Yes. That's correct.

21 Q. Okay. Now, did you do anything to stop this man from
22 driving?

23 A. Not physically. I told him not to drive for at least
24 three months being seizure free.

25 Q. Okay, and you were planning on having him come back in

1 three months, correct?

2 A. Yes.

3 Q. And he never kept that appointment, too?

4 A. No.

5 Q. Okay. Was he supposed to drive until such time as you
6 -- he was cleared to drive by you?

7 MR. BREHMER: Go down to ---

8 WITNESS: 16? Is that where?

9 MR. BREHMER: Yeah, 16. 16, okay.

10 A. Well, I told him not to drive for at least three
11 months, and I wanted to see him back in three months.

12 Basically, I could have cleared him at that time, but it --
13 you know, some, some patients come back with a, with DMV
14 form for me to fill in, and others, you know, go back to
15 driving without it if the DMV hasn't objected. We don't
16 take a driver's license away or even report it to the DMV
17 and the state.

18 Q. Okay. Now, do you even know if his prescription was
19 filled?

20 A. No, I don't.

21 Q. Now, I didn't see your family -- see any family
22 history in your analysis.

23 A. Uh-huh.

24 Q. Correct?

25 A. I don't know whether you didn't see it. So, I don't

1 know if that's correct. I wrote one down: Family history,
2 no neurological or psychiatric, psychiatric diseases
3 reported.

4 Q. Yes.

5 A. You read it?

6 Q. Yes.

7 A. Okay. I took the family history.

8 Q. Yeah, but?

9 A. But there is no positive.

10 Q. No family history there?

11 A. There's no ---

12 Q. Right?

13 A. No positive family history for neurological or
14 psychiatric disorders. I did not write down whether there
15 was a family history of blood -- high blood pressure or
16 diabetes and so forth, yes.

17 Q. Well, the reason that we're here is for a neurological
18 disorder, correct?

19 A. Yes. Yes, there was no neurological disorder in the
20 family reported to me by the patient.

21 Q. Okay.

22 A. That's correct, yes.

23 Q. Now, let me ask you this. There's no family history.
24 This is isolated incident, isn't it?

25 A. Uh-huh.

1 Q. Okay. To the best of our knowledge, there hasn't been
2 an incident since. Okay, okay, the gentleman didn't keep
3 his return appointment, and the -- really the only thing
4 you're basing your analysis is -- on is an EEG, correct?

5 A. And the clinical event.

6 Q. And the clinical event, okay. Is -- if it actually
7 occurred the way he said it occurred, correct?

8 A. That's correct.

9 Q. If it didn't occur, if he was talking on a cell phone
10 and lost control of the truck and didn't have a seizure,
11 that would affect your evaluation, would it not?

12 A. Yes.

13 Q. Okay, and that would make you change your opinion,
14 would it not?

15 A. Well, if I clearly know that he -- there was any other
16 reason for him having the accident, then yes, it should
17 change my opinion. However, the EEG showed epileptic form
18 discharges, which are extremely rare to be seen in people
19 who do not have epilepsy.

20 Q. Okay.

21 A. So, the -- that's what I was alluding to when I said
22 it's high, it's a high specificity. It's specific what it
23 shows in abnormality as to a certain condition.

24 Q. But epilepsy is a clinical diagnosis.

25 A. That's right.

1 Q. Okay, and that -- and what that means is it takes an
2 EEG -- it takes -- EEG is a test?

3 A. Yes.

4 Q. That can be used in that diagnosis, but the fact that
5 the test comes back positive or abnormal is not conclusive,
6 is it?

7 A. No, it's not. It's -- epilepsy is a clinical
8 diagnosis of having a propensity to have unprovoked
9 seizures.

10 Q. Okay.

11 A. And if no seizures occur despite the EEG being
12 abnormal, then we don't talk about epilepsy.

13 Q. Okay.

14 A. Yes, that's correct.

15 Q. So, even if he had an abnormal EEG but has not had an
16 event, you can't diagnose epilepsy, can you?

17 A. That's correct.

18 Q. Okay. Now, when a person has an epileptic seizure, a
19 lot of times there are convulsions, correct?

20 A. Yeah, lots of times. I mean, it can be convulsive or
21 non-convulsive. There are different ways of presenting.

22 Q. Okay.

23 A. But it's usually.

24 Q. Sometimes they try to swallow their tongue, do they
25 not?

1 A. That's usually ascribed by standards, yeah. They
2 don't really swallow their tongue or try to swallow their
3 tongue but yes, it sounds like or looks like it. That's
4 correct.

5 Q. Yes?

6 A. Yeah.

7 Q. Looks like?

8 A. Yes, it may look like it.

9 Q. Okay, and they don't go up and recover real quickly
10 either, do they?

11 A. That really depends on the epileptic seizure, but if
12 you talk about generalize convulsions, they usually have a
13 postic -- postictal state, meaning there's some confusion
14 and some impairment going on even after the epileptic
15 seizure lasting usually for minutes, but sometimes only
16 seconds and sometimes for hours.

17 Q. Okay. Now, there's no loss of memory immediately
18 before an epileptic seizure, is there?

19 A. There is -- before the brain waves are not dysfunction
20 -- I mean, before an epileptic seizure occurs, there should
21 be no loss of memory. But if a seizure is prolonged, it
22 can lead to a memory impairment even proceeding the
23 seizure. In other words, you could potentially not
24 remember how if you had a funny feeling prior to having
25 your seizure as a warning sign or so on.

1 Q. And the person having the epileptic seizure would have
2 some warning that it was going on, would they not?

3 A. No, not always.

4 Q. Okay. Well.

5 A. Not always.

6 Q. Not always?

7 A. Some people have.

8 Q. But sometimes ---

9 A. Yes, some people do and some not.

10 Q. Okay, and those warning signs are sometimes the
11 feeling of faintness?

12 A. Feeling faint, feeling ---

13 Q. Weak?

14 A. Funny in the head, not being able to talk, not being
15 about to properly understand, funny taste in the mouth,
16 funny sense of smell, strange sense of smell, noise,
17 strange noise in the ear. All kinds of things can happen.

18 Q. Did Mr. Powell tell you in the interview that he was
19 there because his employer wanted him there?

20 A. If he did, I not write it. I did not dictate it, and
21 I can't remember two years later.

22 Q. Okay. Did Mr. Powell tell you that he'd had a
23 cellular phone on him at the time this incident occurred?

24 A. I don't know.

25 Q. Did -- okay. Did Mr. Powell tell you that he wore his

1 cellular phone in a holster on his belt?

2 A. No. I -- well, I don't know if he told me that.

3 Q. Did Mr. Powell tell you that when the truck came to
4 rest, he was taken from the truck? That the trooper
5 retrieved his cellular phone from the floor of the truck?

6 A. I don't think. I don't know. I don't think he told
7 me that.

8 Q. Did Mr. Powell tell you that he would have lost his
9 job had he been using the cellular phone while he was
10 driving the truck?

11 A. Probably not.

12 Q. Did you question him about his motivations for coming
13 to you?

14 A. Not really.

15 Q. Okay.

16 A. Having an incident like this and -- usually prompts a
17 visit to a physician and often to a neurologist.

18 Q. In any way, did you challenge anything that he told
19 you?

20 A. It was two years ago. I don't know; I don't know. I
21 don't know if -- I, I would if it makes no sense to me.

22 Q. Okay. If his history doesn't make sense to -- okay,
23 go ahead.

24 A. If his history doesn't make sense to me, what he tells
25 me, then I would. If it, if it's consistent with, with my

1 thinking at the time, what could have happened and so forth
2 based on his, on his account, then I would not necessarily
3 challenge him, no.

4 Q. Okay. All right. Now, did you do anything to follow
5 up with him as to why he did not keep his appointment in
6 July 2009?

7 A. I personally did not. We usually put patients on a
8 schedule. Like if I say I'll see you back in three months,
9 our office staff will put him on the schedule for three
10 months later. We call the patient to remind them a day
11 earlier. Now, if they don't show up, we usually do not
12 call back afterwards and ask them why they didn't show up.

13 Q. Okay. So, you didn't follow up then?

14 A. No.

15 Q. After he ---

16 A. No. The only reason -- I mean, my practices or my way
17 of practicing is such, which is not unusual from other
18 physicians, is I do not follow up with patients who don't
19 want to -- who don't show up unless there is a great
20 concern in terms of I found a brain tumor on his MRI, and
21 he doesn't show up for his follow-up appointment. Then he
22 would -- then we would make extra effort to get hold of
23 him.

24 Q. Okay. Thank you, Doctor.

25 A. You're welcome.

1 REDIRECT EXAMINATION READ BY MR. WALDRON:

2 Q. Doctor, did Mr. Powell give you any history that he
3 was talking on a telephone?

4 A. No.

5 Q. Talking on a cell phone at the time?

6 A. Well, not that I, that I remember or see from my
7 notes.

8 Q. And you just mentioned to Mr. Brehmer that you
9 wouldn't do -- you talked about the history making sense.
10 Did Mr. Powell, the history that Mr. Powell gave you, the
11 examination that you did, did that make sense to you?

12 A. It is consistent with many other patients I have seen
13 before with epilepsy having had a motor vehicle accident.

14 Q. Thank you, Doctor.

15 THE COURT: All right, Mr. Hyman, you may step down.

16 (THE WITNESS EXITS THE STAND.)

17 THE COURT: Any further witnesses?

18 MR. WALDRON: No, Your Honor. We rest.

19 THE COURT: Okay. Very good.

20 Anything in reply?

21 MR. BREHMER: No, sir.

22 THE COURT: All right, Mr. Foreman and ladies and
23 gentlemen of the jury, that concludes the presentation of
24 evidence in this case. When we reconvene in the morning,
25 we will begin with closing arguments, and then the charge

1 on the jury.

2 But until that time, it would be inappropriate for you
3 to begin discussing the case amongst yourselves with anyone
4 else. Do not do any independent investigation; do not look
5 up anything on the Internet. You need to base your
6 decision on what transpires here in this courtroom and the
7 law as I charge it to you.

8 I want to give those of you who have been selected on
9 the next trial, we originally scheduled that to go forward
10 at 2:00 but because of the delays this morning and the
11 length of this case, that case will not begin until 9:30
12 Wednesday morning.

13 This case is going to, this case tomorrow, we're going
14 to start back at 11:00. We have some other legal matters
15 that need to be resolved. So, each one of you need to be
16 here tomorrow at 11:00, 11:00 sharp. Do not discuss the
17 case with anyone.

18 And everyone remain seated as the jury exits the
19 courtroom.

20 (THE JURY EXITS AT 5:15 P.M.)

21 THE COURT: All right, anything from the plaintiff
22 before we recess for the evening?

23 MR. BREHMER: No.

24 THE COURT: Anything from defense?

25 MR. WALDRON: Your Honor, I'm going to have to move

1 for a directed verdict again. We can do that in the
2 morning if you prefer.

3 THE COURT: Okay. All right. We can note your motion
4 now; we can do that.

5 MR. WALDRON: You're prepared to deny it already?

6 THE COURT: Well, I'll be glad to hear anything that
7 you've got to say.

8 MR. WALDRON: For all the same reasons I have
9 reiterated before, only this time we have the deposition --
10 or the testimony of Dr. Bettie who without doubt says this
11 is a result of an epileptic seizure.

12 It was unforeseen, unforeseeable, unpredictable. Mr.
13 Powell had no idea it was coming on, which negates -- that,
14 that is the unavoidable accident or the unforeseen
15 accident.

16 THE COURT: Okay, Mr. Brehmer.

17 MR. BREHMER: Your Honor, Dr. Brannon's testimony is
18 the EEG that Dr. Bettie based his testimony from is of no
19 validity. It should have been thrown out. Shouldn't even
20 be considered. He explained why it was technically flawed.
21 The basis of Dr. Bettie's testimony is flawed because
22 really that, along with the testimony of the plaintiff,
23 okay?

24 Dr. Bettie said in his testimony if -- and I outlined
25 it. I'll bet we will probably hear this sometime again

1 tomorrow. But it's real interesting that if a person of
2 higher credentials such as a university professor came in
3 and said that -- gave a second opinion different from his,
4 that he would probably have to rethink his position. And
5 that was the testimony beginning page 23, line 22 through
6 page 24, line 8.

7 Well, Dr. Brannon has done just that and explained
8 exactly why Dr. Bettle was wrong. So, I am reasonably
9 confident that were Dr. Bettle here, he'd be reconsidering
10 his position about now.

11 THE COURT: All right. Well, it sounds to me like we
12 might have us a question of fact. What do you think, Mr.
13 Brehmer?

14 MR. BREHMER: I think maybe so.

15 THE COURT: I think we're squarely in that area, and
16 based on that, I do indeed deny your motion for a directed
17 verdict.

18 But before we conclude, I wanted to take this
19 opportunity to have a charge conference.

20 MR. BREHMER: Okay.

21 THE COURT: I'm going to charge the duty of the jury
22 and the judge. That the standard of proof is the
23 preponderance of the evidence. I'm going to charge the
24 credibility of the witnesses, how to evaluate expert
25 testimony, direct and circumstantial evidence. Negligence,

1 And as we mentioned in the very beginning of this trial,
2 closing arguments are very similar in form to opening
3 statements. But at this time, obviously we've heard all
4 the evidence.

5 And these very fine lawyers who have spent a good bit
6 of time with case, and they're familiar with the facts, the
7 ins and out of it, are going to be able to point to the
8 facts that have come from this witness stand and from the
9 depositions and from the documents and from the
10 stipulations, point to the facts that support their theory.
11 What they say is not evidence, but it will aid you
12 immensely in your deliberation process.

13 I'll recognize plaintiffs' counsel at this time. Yes,
14 sir.

15 MR. BREHMER: May it please the court, Your Honor?

16 Ladies and gentlemen, I told you yesterday in my
17 opening comments there's really only one question to answer
18 in this case. And that question is did Jason Powell have
19 an epileptic seizure, okay, and cause his dump truck to go
20 into this house. We submit to you that he did not, okay,
21 and why do we say that?

22 Well, let's talk about the common sense reasons to
23 start with. Mr. Powell admitted that he had a cell phone.
24 He had it in his truck. He had it in the cab of his truck,
25 and it was against the regulations of the county to use a

1 cell phone while operating a dump truck, okay? Then asked
2 him where was the cell phone. He said right here on his
3 side in his holster.

4 And then, ladies and gentlemen, we asked him what were
5 your cell phone provider? What was your cell phone number?
6 He said I changed my cell phone. I don't remember the
7 number.

8 Who was the provider? Embarq, E-m-b-a-r-q, was the
9 provider, okay, and he said -- how many accounts did you
10 have? Did you have the account? Was it in your name?
11 Yes. Was there more than one account in your name? Yes.
12 I had one for myself and one for my girlfriend, but both of
13 them were in my name.

14 Then, ladies and gentlemen, we made a request for
15 those records, and the response that we got are back right
16 here, and these documents are going to be in evidence.
17 They sent documents and requests to the two providers, or
18 Mr. Waldron did, and those statements came back that they
19 had no record or no account in Jason Powell's name, okay?
20 These are documents that have been admitted to. They're in
21 evidence that there was nothing.

22 Then on cross-examination yesterday, I got a little
23 stern with Mr. Powell, and I made him -- I pressed him.
24 The reason you -- you knew I wanted that information? Yes,
25 I knew you wanted it. And the reason you didn't give it to

1 me was because you wanted to mislead me. And his response
2 -- you heard it right up there on that stand -- was yes. I
3 wanted to mislead you. You know why? Because he didn't
4 want the documentation that would without a shadow of doubt
5 prove that he was on that cell phone.

6 Think about it, ladies and gentlemen. What jurors
7 bring to the courtroom is your common, everyday experience.
8 It's not uncommon to have one of those holsters for your
9 cell phone on your pants. I imagine all of us got them. I
10 got a couple of them. And, ladies and gentlemen, we submit
11 to you that to the impact of this accident wouldn't have
12 been sufficient to knock a cell phone out of a closed
13 container on somebody's side and cause it to land in the
14 floor here.

15 We submit to you what happened was he was on the cell
16 phone, or either he dropped that cell phone and was trying
17 to reach for it in the floor when he went off the road with
18 this truck and went into the side of this house, okay?
19 Ladies and gentlemen, those are the facts in this
20 particular case.

21 You heard Trooper Trotter who came in. Total
22 independent investigation. Where was it found? It was
23 found in the passenger's compartment in the floor.

24 We heard Mr. Powell admit that he tried to mislead us.
25 We've also heard his motivation and reason why: because he

1 would have lost job had they known he was using his cell
2 phone, or if he admits to using his cell phone while
3 operating that truck. But the net result is he ran that
4 truck into my clients' house and knocked the house off the
5 foundation.

6 Now, the second aspect of it, okay, the second aspect
7 of it. Mr. Powell claims he passed out. Well, let's talk
8 about the practical aspects of the statements before we get
9 into the medical testimony.

10 The practical aspects of it, when you examine what he
11 said, okay, he claims that he has no recollection for a
12 mile and half to two miles, and it would have taken him
13 four to five minutes to get from that location at the Bi-lo
14 to where he ran into my clients' house. He would have gone
15 around several pretty sharp curves and made some fairly
16 significant moves with that big truck, okay, during that
17 time frame.

18 Ask yourself when you're evaluating it what's the
19 probability of that occurring. It's about, we submit to
20 you, it's about as good as hitting the lottery.

21 But then again asked him how close was the nearest
22 hospital. It was fifteen minutes away. So, at a minimum,
23 okay, if the ambulance was called at the time the truck hit
24 the house, if it was called at that time, that -- there
25 would be a twenty minute gap in there that this man claims

1 that he was totally out.

2 Now, I'm forty-eight years of age, okay? From
3 practical experience, nobody passes out for that long,
4 okay? Dr. Brannon says no, there's no probability of that
5 occurring, okay? Just from the practical aspects of it.

6 Now, think about this. Go to the medical testimony.
7 Only thing that they have is, is testimony of the Dr.
8 Bettlé that saw him on April the 21st 2009. April 21st.
9 He had an EEG that was done on April the 16th 2009, the day
10 after the accident.

11 Dr. Brannon told you that the EEG was flawed because
12 it had too much static interference. That the EEG that was
13 being used showed artifacts, but that it was misread and
14 that it was not accurate, and that it should be thrown out,
15 okay? It should be totally redone because of the little
16 thing in there every 60 seconds. He said nobody's brain
17 works that fast, okay, and he says it should be -- I don't
18 know the word he used, but kind of like hills and valleys
19 instead of the peaks.

20 And he went on to point out that one of the places
21 that their doctor was -- appeared to be interpreting was
22 not even brain waves. It was the cardiac response to it.

23 The second thing that he said was, was that the EEG
24 that was done in August by Dr. Shasis -- which was
25 different, a different doctor -- was totally normal. And

1 the significance of what does that mean? You can't have
2 one that's abnormal and then have a normal one because the
3 condition, if it was there, it's always going to be there.

4 Now, ask yourself. They took Dr. Bettel's deposition,
5 but why didn't they bring Dr. Shasis's deposition to
6 explain that? Why didn't they do that?

7 In this case, we have proven our case and set out our
8 case, okay? They are the ones that are asserting and
9 making the claim that it was because of an epileptic
10 seizure. Under the law, what -- the way the rules go is if
11 they are making that assertion, they have the burden of
12 proof, of proving, okay?

13 MR. WALDRON: Your Honor.

14 MR. BREHMER: We don't have to prove anything.

15 MR. WALDRON: An objection.

16 MR. BREHMER: They have to ---

17 THE COURT: You may approach. Counsel, you may
18 approach the bench.

19 (OFF-THE-RECORD BENCH CONFERENCE.)

20 MR. BREHMER: Ladies and gentlemen, I'm going to move
21 on. And if I tell you part of the law that is inconsistent
22 with what Judge Nettles tells you, you follow what Judge
23 Nettles tells you.

24 But, ladies and gentlemen, in this particular case, we
25 submit to you that there is no proof that this gentleman

1 had an epileptic seizure. Dr. Brannon clearly identified
2 yesterday the reason that the gentleman did not have an
3 epileptic seizure. And he says the epileptic seizure
4 requires a repeat occurrence. It hasn't. If this
5 gentleman had had an epileptic seizure and he's gone
6 unmedicated, the probability of him doing thirty months --
7 and that's how long it's been; in two weeks, it will be
8 thirty months -- without another one is extremely remote if
9 he's not medicated, okay? And also there's no other
10 medical evidence to diagnose him.

11 Now, there was one subtle point yesterday in whenever
12 they read the deposition of Dr. Bettie that I want to point
13 out to you because in Dr. Bettie's testimony, I
14 cross-examined him because I knew that this was coming, and
15 I asked him. Okay, can doctors differ in opinions? He
16 said yes. He said yeah, doctors can differ in opinions,
17 and I asked him. I said, well, what would be the
18 requirement for you to get you to reevaluate your opinion?
19 And he says occasionally we disagree. The disagreement
20 usually comes in the form of possibility, one, discharge,
21 and the question is is that one discharge an artifact or it
22 isn't? With repetitive discharge, it's more easily
23 distinguishable from artifacts.

24 Now, it all depends on the training of the physician
25 who gives second opinions. Like all professionals, I guess

1 you have better trained and less well trained physicians
2 giving opinions, okay? So if, for instance, the chief of
3 the epilepsy department at MUSC disagrees with my EEG, well
4 then I'd have another look at my EEG and consider that I
5 was wrong.

6 Who disagrees with him, folks? Dr. William Brannon,
7 the doctor that taught at the medical school, taught
8 doctors how to be neurologists, taught doctors how to
9 interpret EEGs. Who's the expert in this particular case?
10 Who's the expert? And Dr. Brannon, I think it was
11 abundantly clear, said Dr. Norman Bettie was dead wrong,
12 dead, dead wrong.

13 But, you know, there's one thing that I brought up in
14 my opening. It's the practical aspects of it, okay, and I
15 think that to give everything a true consideration, you
16 have to consider the practical aspects of it as well, and
17 here is the practical aspects of it.

18 You can take Jason Powell's own actions, okay? Think
19 about it. Now, what are his own actions? One, the first
20 most glaring thing is, is that Dr. Norman Bettie told him
21 to come back in three months, okay, three months for a
22 follow up to determine whether he could operate a vehicle.
23 What did he do? He left there driving that day. He drove
24 every day thereafter, and he never went back for three
25 months, okay? He admits that he never refilled a

1 prescription, never has taken the medication, done
2 anything.

3 You know what? We submit to you as the plaintiffs
4 that there's a reason. Because once he left Norman
5 Bettles's office, he had what he needed. He had an excuse
6 not -- for the county not to fire him, okay? Jason Powell,
7 by his own actions -- or inactions is probably the better
8 term -- has shown and proven to us that he didn't have a
9 seizure that day. He didn't have a seizure at all.

10 There's three significant pieces of evidence in this
11 case, okay? The first pieces of evidence is the medical
12 that we have provided. The second piece of evidence is, is
13 the physical evidence that was found on the scene, and the
14 physical evidence that was failed to be produced by Mr.
15 Powell and lied about by Mr. Powell. The third proof of
16 evidence to show that Mr. Powell was not being honest and
17 candid with us is his own actions, ladies and gentlemen.

18 You know, they stood up here and claimed, well, we got
19 the evidence that just was a loss of consciousness. Did
20 you hear anybody say that? You see any evidence of that?
21 We submit to you what happened, he was either talking on
22 the phone and hit that curb where the sidewalk was, dropped
23 the phone, tried to reach down and got it, and the next
24 thing he knows, he's up against this house, okay. Next
25 thing he knows, he up against this house.

1 Ladies and gentlemen, this is not a case of any sudden
2 medical emergency. This is not a case of -- this is a case
3 of pure, simple negligent operation of a vehicle. Now, I'm
4 not saying Mr. Powell is a bad man, but I am going to say
5 Mr. Powell is not being truthful with us or with you.

6 My client sustained, and it's undisputed, \$58,023 of
7 damage in this case, and he and his wife are entitled the
8 monies that it took to fix the their house, \$58,023, and
9 that's what we're asking for. Not a penny more, not a
10 penny less. And they agreed to it. They agreed that
11 that's the amount. No dispute whatsoever.

12 Now, ladies and gentlemen, we all are human. Everyone
13 in this case evaluated things differently, and I'm going to
14 tell you how I evaluate things. There's two, two methods
15 or two, two guides that I use, and I tried to, tried to use
16 those throughout my life, and I've tried to bestow them on
17 my children.

18 And I'm like everybody else. I like to talk about
19 what's important to me. I'm the proud father of two very
20 fine boys. But the test that I use to determine whether
21 Karl Brehmer has done the right thing, tonight when I go
22 home, I eat dinner with my wife and the son that's still
23 home, okay, or my other son. If I can look those three
24 people square in the eye and tell them what I've done and
25 feel good about myself, I know that I've done the right

1 thing, okay? I know that I've done the right. And that's
2 what Sergeant and Kristina Johnson ask that you do.

3 The last test, I'm going to use it by way of example,
4 okay? Each and all of us judge things differently. Now,
5 when my youngest son who's now fourteen -- but when he was
6 a little boy, my mom bought him lots of Walt Disney videos.
7 We have more Walt Disney videos in my house than you can
8 shake a stick at. But when Andrew was little, he had one
9 that he just absolutely adored, and I've seen this movie so
10 many times, and it's the movie *Pinocchio*. And there's a
11 scene in that *Pinocchio* movie that I've like to share with
12 you.

13 The day before *Pinocchio* went and ventured out into
14 the world for the first time, he was in Geppetto's shop,
15 and the Blue Fairy, his creator, was there and Jiminy
16 Cricket was there. And *Pinocchio* was just like each and
17 every one of us. He didn't know what to expect from
18 others, okay, nor did he know how to hold himself out and
19 conduct himself to others, and he asked those questions of
20 those two. And the Blue Fairy looked at him -- it's all
21 very nice -- looked him square in the eye and said just let
22 your conscience be your guide. Just let your conscience be
23 your guide.

24 And that's all Sergeant Johnson and I ask. Let your
25 conscience be your guide because in this particular case,

1 Mr. Powell made the mistake. He significantly damaged my
2 clients' house and property, and we submit to you that we
3 are entitled to be reimbursed for that damage, \$58,023.

4 Thank you.

5 THE COURT: Thank you, sir.

6 Mr. Waldron, you are recognized.

7 MR. WALDRON: May it please the court?

8 THE COURT: Yes, sir.

9 MR. WALDRON: This is not a fairy tale; this is not a
10 Walt Disney movie. This is real life, and real life hard
11 decisions have to be made. We have laws that we have to
12 stick to. The fact that you may not like what the law is
13 in this case cannot change your decision. It must guide
14 you.

15 Just as you have to look at Sergeant Johnson and
16 Kristina Johnson, you also have to look at Mr. Powell. You
17 will have to look him square in the eye, and your decision
18 has to comport with what Judge Nettles will tell you is the
19 law. And when you do what's right, when you do what's
20 right according to the law, you'll look at your children
21 tonight over the dinner table and know that you've done the
22 right thing, and that's why you're here. That's why we've
23 got a jury of twelve to hear this case and decide what's
24 right.

25 Now, the plaintiffs' theory in this case is a good

1 THE COURT: Mr. Brehmer, you are recognized for reply.

2 MR. BREHMER: Ladies and gentlemen, now comes my time
3 to reply to any new matter that they brought up that I
4 didn't initially address. I can't plough the same ground
5 again, but they did bring up a very, very good point. I
6 want you to think about this in your evaluation as you
7 examine this because you have the facts, but I want to
8 point those facts out.

9 Dr. Brannon said yesterday you got epilepsy, you got
10 it the rest of your life, okay? That's something that's
11 not going to change, okay? Now, you can treat it, okay?
12 Now, then that's the first fact that's a really important
13 detail.

14 The second fact is we got from Mr. Powell, Mr.
15 Powell's not getting any treatment of any epilepsy. Not
16 getting any medication. He's not on any medication for it,
17 okay?

18 Third fact, the county, they put him back in a dump
19 truck, okay? You know what the conclusion to that is? The
20 county knows that the man didn't have an epileptic seizure
21 because you can't have it -- once you got it, you always
22 got it, okay? If it's not medicated -- you heard them all
23 -- it's going to happen again. And the county, by its own
24 admission, putting this man back in the truck says that
25 they know that what they're trying to sell you is a bill of

1 goods.

2 You don't have to take any -- you can take their
3 actions because they don't want to pay for my clients'
4 house. If you consider that and you consider the
5 genuineness of thinking oh, we don't owe you. Sudden
6 medical emergency. My employee has gotten no treatment,
7 not getting any treatment. All the medical doctors we have
8 said if you're not treated, it's going to happen again.
9 What do they do? They put him back in a truck. What does
10 that say? Why doesn't he just go we know this is a farce,
11 and that's what it is.

12 You look at all the evidence. You look at all the
13 evidence, ladies and gentlemen. Truly let your conscience
14 be your guide. This is your county.

15 THE COURT: Thank you, Mr. Bröhmer.

16 MR. BREHMER: Do you need me to move this, Your Honor?

17 THE COURT: If you could. Thank you.

18 (A PAUSE.)

19 THE COURT: Mr. Foreman, ladies and gentlemen of the
20 jury, you have paid very close attention throughout the
21 trial of this case, and you have the tools necessary to
22 find the truth in this case, but that's only part of it.
23 You've taken a solemn oath that you would listen to the
24 evidence, determine what the truth is, and apply it to the
25 law. In order to do that, you have to hear what the law

1 in evidence?

2 MR. WALDRON: No, sir.

3 THE COURT: All right, I'm going to ask Bailiff Bob if
4 he would get the documentary evidence and give them some
5 scratch paper and a pencil, and tell them to begin
6 deliberations.

7 MR. WALDRON: That's fine, Judge. Thank you.

8 BAILIFF: Is that the jury form?

9 MR. BREHMER: Verdict form.

10 THE COURT: Very good.

11 BAILIFF: I mean the verdict form.

12 THE COURT: I have given them the verdict form.

13 MR. BREHMER: The jury already has the verdict form.

14 BAILIFF: I beg your pardon, Your Honor.

15 THE COURT: And it is 12:10 now.

16 (OFF THE RECORD AS JURY DELIBERATIONS BEGIN AT 12:10
17 P.M.)

18 THE COURT: All right, I understand that they've
19 reached a verdict. Is there anything from the plaintiff
20 before we bring the jury out?

21 MR. BREHMER: No, sir, Your Honor.

22 THE COURT: Anything from defense?

23 MR. WALDRON: No, Your Honor.

24 THE COURT: All right, we're ready for the jury.

25 (THE JURY ENTERS AT 1:06 P.M.)

1 THE COURT: Mr. Foreman, have you reached a verdict?

2 FOREPERSON: Yes, we have, Your Honor.

3 THE COURT: Is it indeed unanimous?

4 FOREPERSON: Yes, it is.

5 THE COURT: I'm going to ask if you could to give the
6 verdict form to the bailiff.

7 (A PAUSE.)

8 THE COURT: Madame Clerk, I'm going to ask if you
9 could publish. The verdict form seems to be in order.

10 CLERK OF COURT: In the Court of Common Pleas, County
11 of Beaufort, *Jeffrey Johnson vs. Beaufort County*, case
12 number 2009-CP-07-04592, we, the jury, as to the cause of
13 action of negligence find for plaintiff.

14 THE COURT: All right, any additional requests for
15 polling from the defendant?

16 MR. WALDRON: No, Your Honor.

17 THE COURT: Very good. All right, Mr. Foreman, ladies
18 and gentlemen of the jury, thank you so much for your time
19 and dedication to this matter. I know that y'all had
20 places you'd rather be, hopefully it has not been that bad
21 of an experience. How many of you have never served on a
22 jury before?

23 (JURORS RAISE THEIR HANDS.)

24 THE COURT: You know, I'm fifty-two years old, and I
25 practiced law for twenty years and been on the bench for

1 court or federal court. But if you are subpoenaed for this
2 court, you've earned an exception, and you are going to be
3 paid handsomely for your services.

4 Madame Clerk, how much are they paid?

5 CLERK OF COURT: 12.50 a day plus their mileage.

6 THE COURT: 12.50 a day plus. That's hardly enough to
7 buy, go to the picture show and a piece of pie, but
8 nonetheless, it's a small token of our appreciation. Thank
9 you so much for your service.

10 You know, if you think about it, neither the plaintiff
11 nor the defendant wanted to be in this situation. And as
12 we go through life, we're only a breath away from
13 litigation ourselves. And every time I lay my head down on
14 the pillow at night, I thank God that we have a jury system
15 where judges don't resolve these matters, professional
16 jurors don't resolve these matters, but members of the
17 community do and for that, I'm grateful.

18 Thank you so much for your time. I'll see the jurors
19 back at 9:30 sharp in the morning, 9:30 sharp. Thank
20 y'all. You're free to leave.

21 (THE JURY EXITS AT 1:10 P.M.)

22 THE COURT: Be happy to entertain motions at this
23 time.

24 MR. WALDRON: Your Honor, although I would request the
25 normal ten days in which to file my post-trial motions, I

1 realize the court is traveling and probably will not be
2 back for some time.

3 I would move for a judgment notwithstanding the
4 verdict, and I would move for a new trial in the
5 alternative based upon all the arguments that I've made
6 before.

7 There is no proof, and as I said to the jury, there is
8 no proof that anything happened other than an unforeseen,
9 unpredictable incident. Counsel certainly asked questions
10 and raised inferences, but questions and inferences are not
11 proof. And without proof, the jury either had to be
12 speculating, or it's based on *res ipsa loquitur*, which is
13 not recognized in South Carolina. So, I would move for a
14 judgement notwithstanding the verdict, or in the
15 alternative for a new trial.

16 THE COURT: Mr. Brehmer, be glad to hear from you.

17 MR. BREHMER: Your Honor, it's undisputed that the
18 county dump truck left the roadway, lost control of the
19 vehicle, collided with plaintiffs' home. There's more than
20 adequate proof. There is, there was explanation provided
21 as to why. There was circumstantial evidence that the cell
22 phone was in the floor. The cell phone was not in its
23 case. Cell phone, jury could reasonably conclude that the
24 cell phone would have not dislodged from the carrier. It
25 had to be in use at the time.

1 The testimony of Mr. Powell was that it was the
2 county's requirement that he keep it in his holster while
3 he was operating the truck. Clearly in violation. There's
4 more than adequate evidence, factual basis to establish
5 negligence.

6 There is direct, or there is testimony that there was
7 no evidence from a medical standpoint of a sudden medical
8 emergency. Dr. Brannon, William Brannon testified to his
9 opinion to a reasonable degree of medical certainty it more
10 probably was not, that Mr. Powell did not have any form of
11 epileptic seizure.

12 THE COURT: All right, and that's accompanied by the
13 fact that he didn't receive treatment.

14 MR. BREHMER: Yes, didn't receive treatment.

15 THE COURT: And he was back driving.

16 MR. BREHMER: Driving.

17 THE COURT: He was driving days after.

18 MR. BREHMER: Yeah.

19 THE COURT: All right. I think that given all of
20 those factual circumstances, in order for me to grant a new
21 trial, there would certainly have to be compelling reasons
22 to do so. I think it's squarely within the parameters of
23 the jury to do that. And I don't find that there's
24 compelling reasons for me to disturb the jury's verdict.
25 You are protected on the record, however, in all respects.

1 Thank y'all so much.

2 Is there anything further?

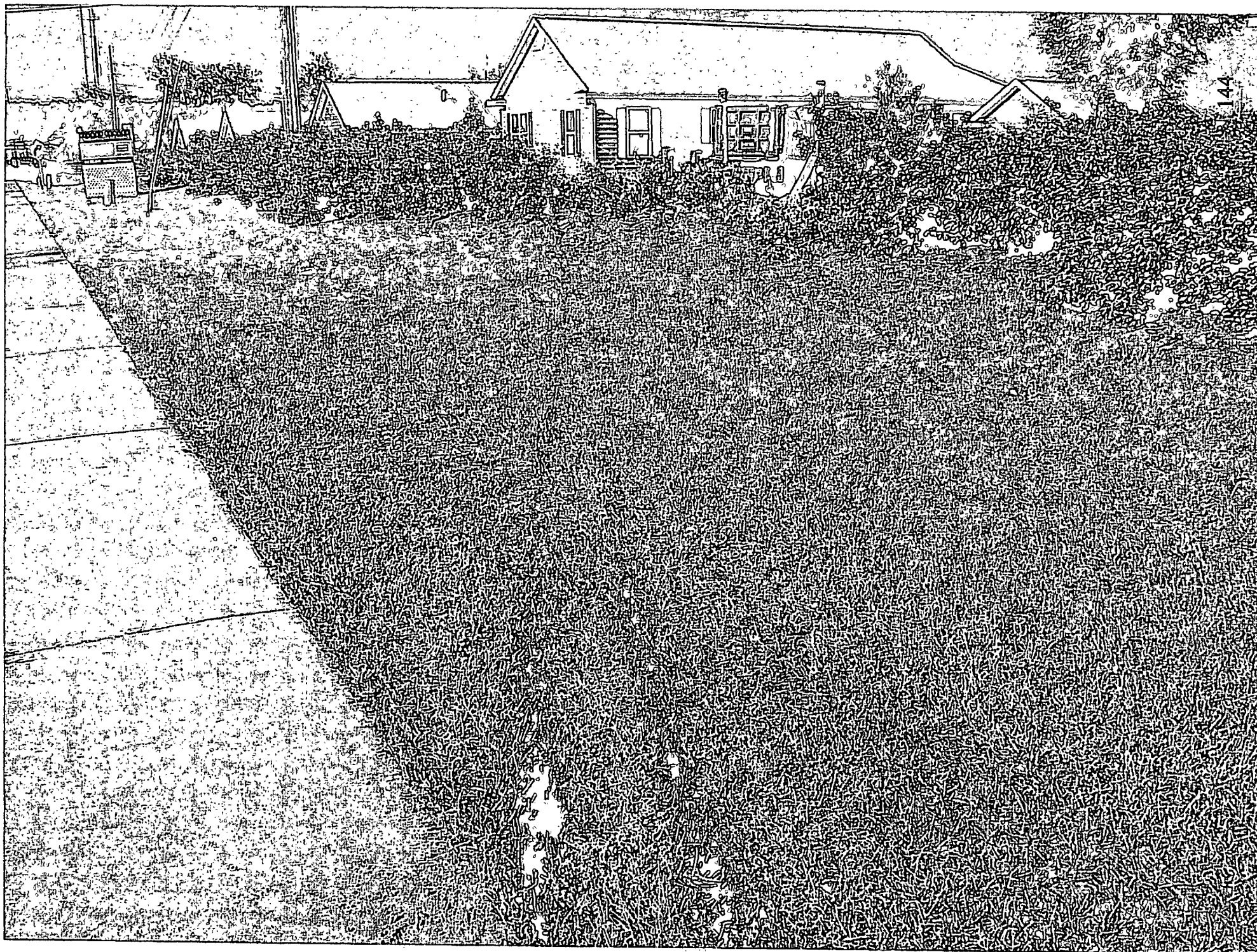
3 MR. WALDRON: Not from the defendant, no, Your Honor.

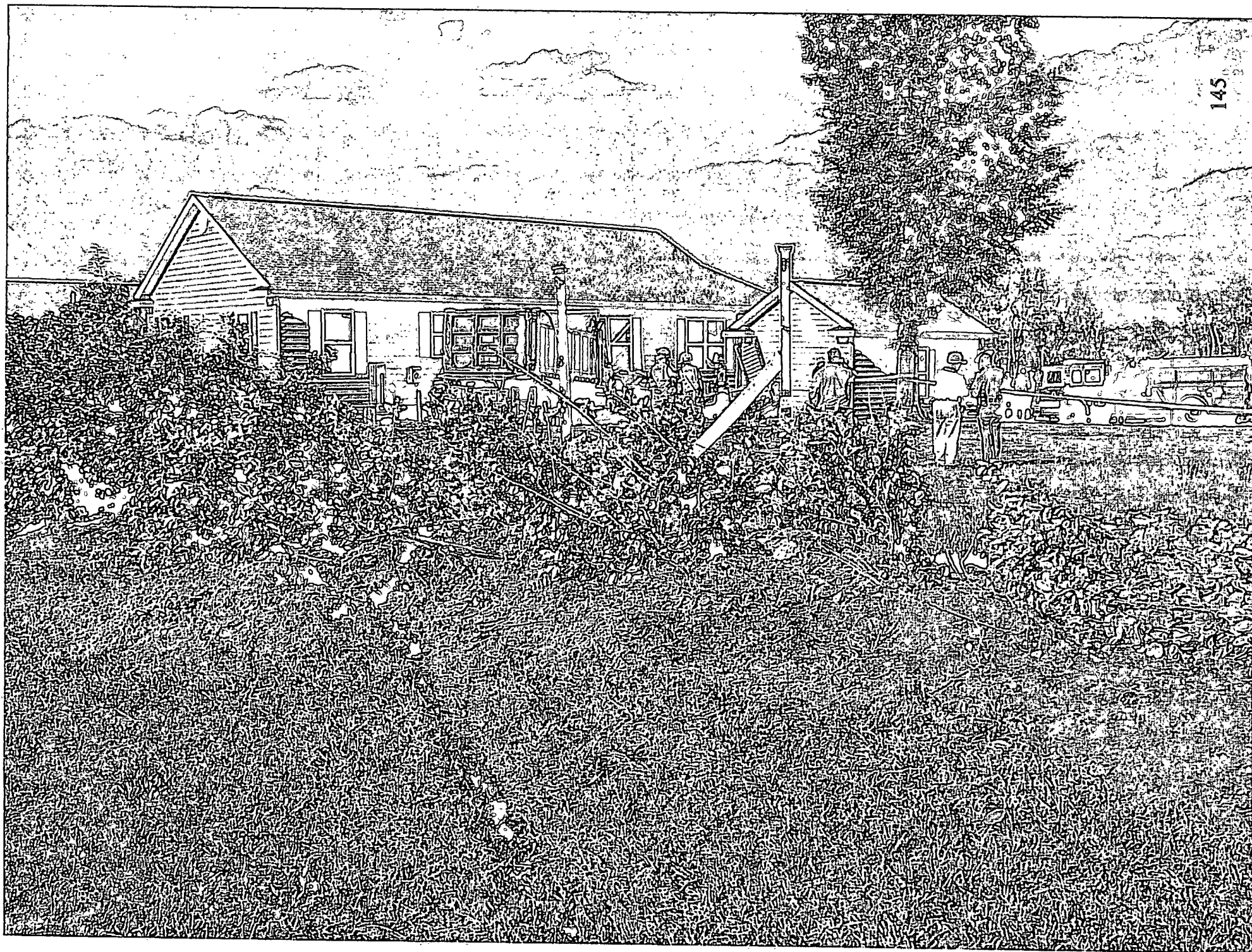
4 THE COURT: Anything from ---

5 MR. BREHMER: No, sir.

6 THE COURT: --- the plaintiff? Thank y'all for being
7 here.

8 --- END OF TRANSCRIPT OF RECORD ---





PHONE: 843-522-1420

FAX: 843-522-1460

PAUL MAZZEO, M.D.
NORMAN BETTLE, M.D.
ANNE TAYLOR, ANP
Coastal Neurology, P.A.
889 Ribault Road, Suite 310
Beaufort, S.C. 29902



NAME: POWELL, JASON
DATE OF EVALUATION: 4-21-09
CHIEF COMPLAINT: Spell of loss of consciousness

HISTORY OF PRESENT ILLNESS: Mr. Powell is a 23 year old right handed gentleman who was involved in a motor vehicle accident as a driver last week. He drove a truck and suddenly lost awareness without warning and drove the truck into a house. Luckily, noone was hurt significantly. Mr. Powell was brought to the emergency room via EMS and remembers the ride. He had a CT scan of the head, C spine, and thorax all of which did not reveal any abnormalities. He denies having taken over-the-counter or illegal drugs. He has not been particularly sleep deprived and the incident was about 4:00 p.m. He has no history of seizures, unexplained spells, head injuries with loss of consciousness or family history of seizures. He does not take any medications on a regular basis and has no chronic conditions.

An EEG, performed in our laboratory last week, showed frequent epileptiform discharges originating from the right anterior temporal head region.

MEDICATIONS: None.

ALLERGIES: None.

PAST MEDICAL HISTORY: No chronic diseases.

FAMILY HISTORY: No neurological or psychiatric diseases reported.

SOCIAL HISTORY: Single, works for the county as an operator. No use of alcohol or tobacco reported.

REVIEW OF SYSTEMS: A questionnaire evaluating 10 systems was completed by the patient and filed in the patient's chart. Snoring and some left shoulder pain are reported.

PHYSICAL EXAMINATION:

VITAL SIGNS:

H. 5'6", W. 147 lbs., BP 120/82, P. 72 regular, R. 18, T. 98.4.

MENTAL STATUS EXAM:

Patient is comfortable and cooperative with the exam. Thought content and processing appear normal. Affect is full-range. Attention, language, speech and memory appear normal.

SKIN:

Unremarkable.

CARDIOVASCULAR:

Heart beat is regular without overt murmurs, no carotid bruits.

CRANIAL NERVES:

Pupils are equally round and reactive to light, visual fields full (binocular confrontation testing), eye movements are conjugate and full in range, there is no nystagmus and no ptosis, undilated fundoscopic is unremarkable. Hearing normal to finger rub. Facial sensation and strength are normal. Tongue is midline and soft palate elevates symmetrically.

MOTOR:

Tone, bulk and strength are normal in all four extremities. No abnormal movements are noted.

COORDINATION:

Normal finger and foot tapping. Normal finger-to-nose and heel-to-shin testing.

REFLEXES:

Normal biceps, triceps, quadriceps and Achilles tendon reflexes. No Babinski sign.

SENSORY:

Normal to light touch without extinction.

STATION/GAIT:

No Romberg sign. Normal step and arm swing.

FP00912428000011

PAGE 2

POWELL, JASON
4-21-08**ASSESSMENT/PLAN:**

Spell with associated loss of motor control and consciousness with abnormal EEG supportive for a diagnosis of right temporal lobe epilepsy. I will order an MRI of the brain with temporal lobe protocol. In my estimate, the likelihood of seizure occurrence far exceeds 50%. Therefore, I offered Mr. Powell to initiate prophylactic antiepileptic treatment and he agreed. We will start with Titrated 300 mg twice daily and increase the dose to 600 mg as tolerated. I stressed to Mr. Powell that he is not to drive a vehicle for at least three months being seizure free. He also should not put himself in circumstances in which he could harm himself or others when having a seizure, eg., bathing in the bathtub unsupervised, swimming unsupervised, etc. I am planning on seeing Mr. Powell back in three months. He is asked to call me if he has another seizure in the meantime.

Norman Batta M.D.

NB/pt

0691242000011

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JEFFREY JOHNSON and
KRISTINA JOHNSON,

PLAINTIFFS,

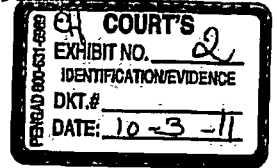
v.

BEAUFORT COUNTY,

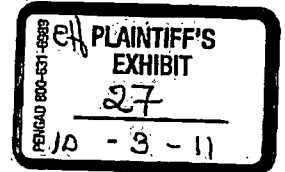
DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-07-4592



RESPONSES TO PLAINTIFF'S
REQUESTS FOR ADMISSION



TO: KARL S. BREHMER, Esquire, Attorney for the Plaintiff:

Defendant Beaufort County hereby responds to the Plaintiffs' Requests for Admission, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure.

Without waiving, and specifically preserving, any and all objections for assertion before or during trial, the Defendant responds to the Plaintiff's Request for Admission as follows:

1. Admit that the attached letter from CenturyLink dated 10/12/2010 is a true and authentic copy.

Response:

The Defendant objects to this request for admission on the grounds that it is irrelevant, not likely to lead to the discovery of admissible evidence and the document is not admissible at trial

Without waiving the objections, Request No. 1 is admitted.

2. Admit that the attached facsimile from Sprint Corporate Security is a true and accurate copy.

Response:

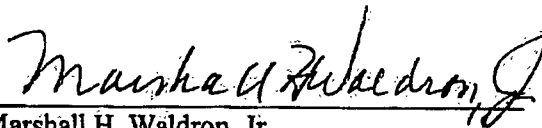
The Defendant objects to this request for admission on the grounds that it is irrelevant, not likely to lead to the discovery of admissible evidence and the document is not admissible at trial.

Without waiving the objections, Request No. 1 is admitted.

Dated this 16th day of November 2010 in Beaufort, South Carolina, and

Respectfully Submitted,

GRIFFITH, SADLER & SHARP, P.A.



Marshall H. Waldron, Jr.

P.O. Drawer 570

Beaufort, South Carolina 29901

(843) 521-4242 Telephone

(843) 521-4247 Facsimile

ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

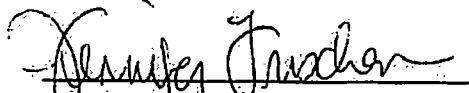
I, Jennifer Frischen, Legal Assistant to Marshall H. Waldron, Jr. hereby certify that on this 17th day of November 2010, I served the Defendant's Responses to Plaintiff's Requests for Admission upon counsel for the Plaintiff by depositing same in the United States mail, postage prepaid to:

Karl S. Brehmer, Esquire

Brown & Brehmer

Post Office Box 7966

Columbia, SC 29202


Jennifer Frischen

Beaufort, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Jeffrey Johnson and Kristina
Johnson)

Plaintiffs,)

vs.)

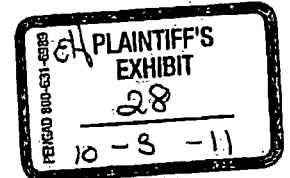
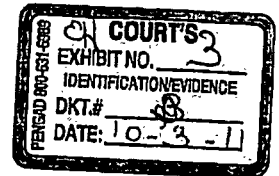
Beaufort County)

Defendants.)

IN THE COURT OF COMMON PLEAS

C/A No: 09-CP-7-4592

REQUESTS FOR ADMISSION



TO: MARSHALL H. WALDRON, JR., ESQ., ATTORNEY FOR DEFENDANT:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, the following constitute the Plaintiffs' Requests for Admission.

1. Admit that the attached letter from CentryLink dated 10/12/10 is a true and authentic copy.
2. Admit that the attached facsimile from Sprint Corporate Security is a true and accurate copy.

BROWN & BREHMER

By:

A handwritten signature in black ink, appearing to read "Karl S. Brehmer".

Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorney for Plaintiffs

November 8, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Jeffrey Johnson and Kristina
Johnson)

Plaintiffs,)

vs.)

Beaufort County)

Defendants.)

IN THE COURT OF COMMON PLEAS

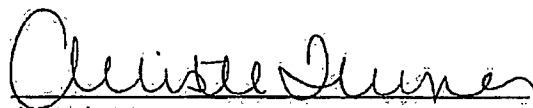
C/A No: 09-CP-7-4592

CERTIFICATE OF SERVICE

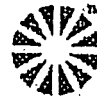
I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individual(s) by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Request for Admission

Served On: Marshall H. Waldron, Jr., Esq.
P.O. Drawer 570
Beaufort, SC 29901


Christle Turner

Columbia, South Carolina
November 8, 2010



CenturyLink™

Mailstop: KSOPKJ0402
5454 W. 110th Street
Overland Park, KS 66211
Fax: 913-254-5800

10/12/2010

Marshall Waldron, Jr.
Griffith, Sadler & Sharp, P.A.
600 Monson St.
Beaufort, SC 29901-0570

Your Case Number: 2009-CP-07-4592
CenturyLink Case Number: 2010-00004995

Dear Marshall Waldron, Jr.,

Pursuant to the above referenced case, a thorough search has been completed and no records were found for the following:

Target Information: Jason L. Powell, 250774325

Date Range: 04/15/2009

Comments: No records were found for the name and Social Security Number provided for the requested date.

For further questions or inquiries, please contact the CenturyLink Law Enforcement Support Team at 877-451-1980.

Sincerely,

Jennifer York
CenturyLink
Law Enforcement Support



SPRINT CORPORATE SECURITY, 6480 SPRINT PARKWAY, OVERLAND PARK, KS 66251

Facsimile

To: Marshall Waldron

From: Amy Ware

Fax: 8435214247

Company: Griffith Sadler & Sharp PA

Department: Legal Compliance

Date: October 27, 2010

Voice: 1-800-877-7330

Fax: 816-600-3161

Comments:

Sprint Case# 2010-278747

Total Pages: 3

Sprint
Corporate Security
Mailstop KSOPHM0206
6480 Sprint Parkway
Overland Park, KS 66251
Office: 913-315-0660 Fax: 816-600-3161
E-mail: amy.ware@sprint.com

Amy Ware
Subpoena Specialist

10/27/2010

Marshall Waldron
Griffith Sadler & Sharp PA
600 Monson Street
PO Drawer 570
Beaufort, SC 29901-0570

Your Case Number: 2009CP074592
Sprint Case Number: 2010-278747

Dear Marshall Waldron,

Pursuant to the above referenced case, a thorough search has been completed and no records were found for the requested numbers during the requested time period.

Request Type: CDR
Search Criteria: 4/15/2009 to 4/15/2009
Subscriber SSN: 250-77-4325
Subscriber Name: Jason Powell

Comments: A thorough search has been completed. No records were found for this target.

Request Type: Email
Search Criteria: 4/15/2009 to 4/15/2009
Subscriber SSN: 250-77-4325
Subscriber Name: Jason Powell

Comments: Email records are no longer maintained or retrievable by Sprint.

Request Type: Text Historic
Search Criteria: 4/15/2009 to 4/15/2009
Subscriber SSN: 250-77-4325
Subscriber Name: Jason Powell

Comments: No historic text messaging content was found for this request.

****CDMA TEXT MESSAGING**

CDMA text messaging content is no longer maintained as part of standard business practice.

****IDEN TEXT MESSAGING**

Due to the limitations of the IDEN network, Sprint may or may not have access to IDEN text messages. If available, IDEN text messaging is only retrievable for the most recent 7 day period.

Should you have any questions or further inquiries, please contact the Sprint
Subpoena Compliance Group at 866-259-7534,

Sincerely,

Amy Ware
Subpoena Compliance
Sprint Corporate Security

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER: 09-CP-07-4592

MOTION TO ALTER OR AMEND
Rule 59(e), SCRCP

11 OCT 18 PM 3:40
SHERIFF
JEFFERSON COUNTY, S.C.
CLERK OF COURT

MOTION TO ALTER OR AMEND
Rule 59(e), SCRCP

Defendant.

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Court at the Beaufort County Courthouse, Beaufort, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRPC, altering or amending his Order denying the Defendant's motions for a directed verdict and denial of all post-trial motions.

Counsel for the Defendant has not yet received written notice of the Court's Order denying the Defendant's post-trial motions, but nevertheless files the instant Motion at this time.

The Defendant would show the Court that the evidence, including the testimony of each and every witness at trial, is insufficient to support the Plaintiff's sole theory at trial, i.e. that the Defendant's employee was using his cell phone while driving. The evidence clearly establishes an unexpected and unforeseen event which, for which liability cannot attach to the Defendant. The Defendant moves the Court to reconsider his denial of the motions for

directed verdict and his denial of all post-trial motions and, instead, grant the Defendant's motion for a directed verdict, or in the alternative, a judgment notwithstanding the verdict.

DATED at Beaufort, South Carolina this 14th day October 2011, and

Respectfully submitted,

GRIFFITH, SADLER & SHARP, P.A.


MARSHALL H. WALDRON, JR.
Post Office Drawer 570
Beaufort, South Carolina 29901
Telephone (843) 521-4242
Facsimile (843) 521-4247
ATTORNEYS FOR THE PLAINTIFF

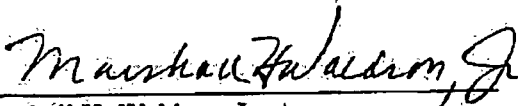
CERTIFICATE OF SERVICE

I certify that on this 14th day of October, I served the Defendant's Motion to Alter or Amend upon the Court and counsel by depositing same in the United States mail, postage prepaid to:

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, SC 29501

and

Karl S. Brehmer
Attorneys at Law
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202


Marshall H. Waldron, Jr.

Beaufort, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JEFFREY JOHNSON and
KRISTINA JOHNSON

Plaintiff,

vs.

BEAUFORT COUNTY

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER: 2009-CP-07-4592

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION
TO ALTER OR AMEND

2011 NOV 30 PM 3:05
JERRY A. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

NOW COMES Defendant Beaufort County, pursuant to Rule 59(e), SCRCP, and in support of its motion, pursuant to Rule 59(e), SCRCP, states as follows:

FACTS

The trial testimony was that on April 15, 2009, Jason Powell, a truck driver in the employ of the Beaufort County Department of Public Works, operated a large dump truck on Parris Island Gateway, a four-lane thoroughfare in Beaufort, South Carolina. Mr. Powell had no medical history of seizures, blackouts or any other physical condition that might affect his ability to drive a motor vehicle. He recalls leaving Lands End, on Lady's Island, en route to the Public Works' office and vehicle storage area. He remembers that he stopped for a red light in front of the Bi-Lo on Parris Island Gateway, the light turned green and he pulled away from the light. Mr. Powell recalls nothing more until he was removed from the truck and placed in the care of emergency personnel.

The facts adduced at trial showed that Mr. Powell drove normally away from the traffic light and remained on Parris Island Gateway until he approached a group of new homes in the Picket Fences subdivision. At that point, the truck left the right side of Parris Island Gateway

and traveled in a straight line over the curb, across the sidewalk, along the right-of-way, up a grade and over a berm, across a backyard, through a wood porch and into the side of the Plaintiffs' new house.

Following the incident, Mr. Powell's supervisor, Eddie Bellamy, insisted that Mr. Powell be seen by a doctor. Mr. Bellamy testified that he wanted Jason Powell to receive the medical attention he needed. Within a week of the accident, Mr. Powell was seen and evaluated by a neurologist, Dr. Norman Bettie. Dr. Bettie met with the patient, took a history and conducted a neurological and a cardiovascular exam. There were no abnormalities found. Dr. Bettie conducted an electroencephalogram (EEG) on Mr. Powell to evaluate for abnormal brain dysfunction. The doctor testified that one of the abnormal brain dysfunctions demonstrated by and EEG is epileptogenic dysfunction, meaning a propensity to have epileptic seizures.

Dr. Bettie testified that it was his professional opinion, stated to a reasonable degree of medical certainty, based upon his exam and upon the EEG, that the most probable cause of the accident that occurred on April 15, 2009, was a medical event that occurred to Mr. Powell. Dr. Bettie testified that Mr. Powell suffered an epileptic seizure. The physician stated that it was his opinion, stated to a reasonable degree of medical certainty, that the epileptic seizure led to a loss of consciousness or at least loss of ability to maneuver the vehicle, and that led to and caused the motor vehicle accident. Dr. Bettie's opinion is that Mr. Powell did not have an awareness of his condition leading to the accident.

The Plaintiffs introduced the testimony of Dr. William Brannon, a neurologist who reviewed the EEG conducted by Dr. Bettie. Dr. Brannon testified that there were artifacts on the EEG that he attributed to electrical signals in the facility where the EEG was conducted, that interfered with the test and rendered the EEG impossible to interpret.

LAW AND ARGUMENT

The plaintiff has the burden of proving each element of negligence. Negligence is not actionable unless it proximately causes the plaintiff's damage. Proximate cause is the direct cause of an injury. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125 (Ct. App. 2001). This burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care. King v. J. C. Penney Co., 238 S.C. 336, (1961); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417 (1940). No inference of negligence arises from the mere fact of injury. Covington v. Atlantic Coast Line Railway Co., 158 S.C. 194, (1930), cert. denied, 282 U.S. 858 (1930).

The defendant is not required to present evidence to refute the plaintiff's allegations; he may elect to put the plaintiff to strict proof of all the elements of his cause of action. Snow v. Columbia, 305 S.C. 544, 555 (Ct. App. 1991). That is exactly the case before the Court. Jeffrey and Kristina Johnson clearly suffered an injury. But, the mere fact of an injury is not evidence of negligence. Watson v. Ford Motor Co., 389 S.C. 434, 452-453 (2010). South Carolina does not permit the doctrine of *res ipsa loquitur*. Id. The plaintiffs offered no evidence as to causation or even foreseeable negligence. Their entire case rests upon the mere fact that the Defendant's truck hit their house and caused damage. *Res ipsa loquitur* is the only basis upon which the Plaintiffs might possibly recover and, therefore, the Defendant was entitled to a directed verdict.

The Plaintiffs' sole theory was that Jason Powell was on his cell phone at the time of the incident. They introduced the testimony of Trooper Trotter who told the jury that he found the cell phone on the floor of the truck. The trooper admitted on cross-examination that he did not check to see if the phone had been in use at the time of the crash. He did not check the call log, did not check to see if anyone was still on the phone. He thought so little of the phone that he

did not make any notation of it in his report and only made a mental note as to where he found the phone.

The Plaintiffs vigorously examined Jason Powell on his use of a cell phone. At no time did Mr. Powell admit that he used his phone while driving his truck. He admitted that he was less than honest during his deposition because he did not want the Plaintiffs to uncover his cell phone records. Mr. Powell certainly has reason to protect his privacy and prevent an outsider from perusing his phone records. However, there was no testimony that he, in fact, was on his phone or even trying to access his phone at the time of the crash. No witness testified of seeing Mr. Powell on the phone or that Mr. Powell had a habit of calling while driving or otherwise used a cell phone. There was a total lack of any evidence to support the Plaintiffs' theory. To the contrary, the physical evidence flies in the face of that theory. The tracks of the truck ran straight from the roadway, over the curb, across the sidewalk, along the grassy right-of-way all the way to the Plaintiffs' living room, none of which is consistent with using a cell phone.

The Plaintiffs may not rely solely on the fact that an accident occurred to prove their case under a negligence theory. Snow, supra; Watson, supra. Thus, in the absence of any admissible evidence in the record to support their liability claim, the jury impermissibly speculated as to the cause of the accident. Such a verdict cannot stand.

The Plaintiffs contend that the evidence of a truck leaving the highway and striking a house is circumstantial evidence of negligence sufficient to allow a jury to consider the issue. That is not the law. When circumstantial evidence is relied upon to establish negligence and liability, a plaintiff must show such circumstances as would justify the inference that the injuries were due to a negligent act on the part of the defendant; the matter may not be left to mere conjecture or speculation. Legette v. Smith, 265 S.C. 573, 577 (1975).

To quote Judge Ralph King Anderson in his Requests to Charge, "The touchstone of proximate cause in South Carolina is foreseeability. That is, foreseeability of some damage from a negligent act or omission is a prerequisite to its being a proximate cause of the damage for which recovery is sought...Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the complained of act." Dr. Bettie testified that Jason Powell could not have foreseen the emergency that directly led to this incident. There is no evidence to the contrary. The law requires only reasonable foresight. When the injury complained of is not reasonably foreseeable in the exercise of due care, there is no liability. Liability cannot rest on mere possibilities. The defendant cannot be charged with that which is unpredictable or that which could not be expected to happen. Where the cause of the plaintiff's damage may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing that his damage was the proximate result of the defendant's negligence. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79 (1998); Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490 (1994); Trivelas v. South Carolina Dep't of Transp., *supra*.

Stated in terms of the case presented to the jury in Beaufort County, the Johnsons had the burden of demonstrating that the damage to their house was proximately caused by the Jason Powell's negligence, that Mr. Powell committed an act or an omission which he should have foreseen would cause harm. Not only is there no evidence, direct or circumstantial, to carry that burden, there is medical evidence quite to the contrary. Dr. Brannon took issue with Dr. Bettie's EEG. What Dr. Brannon did not testify was that Jason Powell did not suffer an epileptic seizure. He limited his opinion to the fact that he could not tell what caused Mr. Powell to leave the roadway. He testified that he was not able to rely on the EEG. Dr. Brannon may have

undermined the reliability of Dr. Bettle's testing, but there was absolutely no evidence to contradict Dr. Bettle's opinion that this accident was unforeseeable and directly caused by a sudden medical emergency. Negligence requires foreseeability. This incident was not foreseeable. Any decision by the jurors resulted from res ipsa loquitur, which is specifically rejected in South Carolina law, or by sheer speculation. Neither is permissible.

The truck hit the house. Something must have gone wrong. It was not the Plaintiffs' fault. Therefore, the Plaintiffs should recover. There is no support for this verdict and it cannot be allowed to stand.

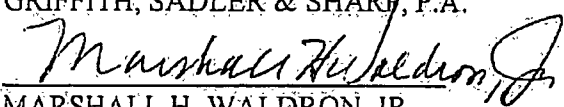
The Defendant respectfully urges the Court to reconsider the decision to deny the post-trial motions and the denial of the Defendant's motions for a directed verdict. The Defendant asks the Court to direct a verdict in its favor. In the alternative, the Defendant asks that the Court enter judgment notwithstanding the verdict.

By his signature below, counsel certifies that he presented a copy of this Memorandum to the Court and served a copy upon counsel for the Plaintiffs by service in hand.

DATED at Beaufort, South Carolina, this 29th day of November 2011, and

Respectfully submitted,

GRIFFITH, SADLER & SHARP, P.A.



MARSHALL H. WALDRON, JR.

Post Office Drawer 570

Beaufort, South Carolina 29901

Telephone: 843-521-4242

Fax: 843-521-4247

ATTORNEY FOR THE DEFENDANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

Civil Action No. 2009-CP-07-04592
Appellate Case No. 2012-206486

Jeffrey Johnson and Kristina Johnson..... Respondents,

v.

Beaufort County Appellant.

CERTIFICATE OF SERVICE

RECEIVED

MAR 31 2013

SC Court of Appeals

Marshall H. Waldron Jr.
Matthew D. Cavender
GRIFFITH, SADLER & SHARP, P.A.
600 Monson Street (29902)
PO Drawer 570
Beaufort, SC 29901-0570
(843) 521-4242
(843) 521-4247 (fax)
mwaldron@griffithsadlersharp.com
mcavender@griffithsadlersharp.com

Attorneys for the Appellant

I certify that I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on March 26, 2013, I placed a copy of the *Record on Appeal, Brief of Appellant, Reply Brief of Appellant*, and *Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

Karl S. Brehmer
L. Darby Plexico III
Brown & Brehmer
PO Box 7966
Columbia, SC 29201


Chautae Elmore



GRIFFITH SADLER SHARP
ATTORNEYS AT LAW

Matthew D. Cavender
Griffith, Sadler & Sharp, PA
600 Monson Street
PO Box 570
Beaufort, SC 29901
P 843.521.4242
F 843.521.4247
W griffithsadlersharp.com
E mcavender@griffithsadlersharp.com

E. MITCHELL GRIFFITH+
NANCY D. SADLER+
MARY E. SHARP+*
O. EDWORTH LIIPFERT, III
MICHAEL D. FREEMAN+
KELLY DENNIS DEAN
MATTHEW D. CAVENDER
MARSHALL H. WALDRON, JR.
(OF COUNSEL)
+ certified mediator
* also admitted in NC

March 26, 2013

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Johnson v. Beaufort County
Appellate Case No: 2012-206486
Civil Action No: 2009-CP-07-04592
GS&S File No: 9108

RECEIVED
MAR 31 2013
SC Court of Appeals

Dear Clerk Kitchings:

Enclosed for filing please find the original and 15 copies of the Record on Appeal, Brief of Appellant, and Reply Brief of Appellant, as well as the original and one copy of the Certificate of Counsel and Certificate of Service. Please return a clocked copy of each in the enclosed self addressed envelope.

With kind regards, I remain

Sincerely yours,

Matthew D. Cavender
MDC/cde
Enclosures
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