

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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May 17 2022

APPEAL FROM THE PICKENS COUNTY
Court of Commons Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

Appellate Case No. 2018-001423

John M. Burgess

Appellant,

v.

Katherine Hunter

Respondent.

APPENDIX

VOLUME II of III

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MATT SIMS-DIRECT BY MR. GARCIA

1 Q Now, did you rely on the 911 calls that you
2 heard to reach that conclusion?

3 A Yes, sir, they were a part of that.

4 Q Did you rely on the 911 call from the witness
5 that was standing on Leome Avenue?

6 A Yes, that was one of the -- that was one of the
7 pieces as well, one of the calls.

8 Q How about the EMS report, was that helpful in
9 determining the location of the collision?

10 A It was. It actually -- the EMS report actually
11 had GPS coordinates and an address on the form. And then
12 that, together with Ms. Hunter's statement in the call, in
13 the 911 call as well as the unidentified witness who --
14 the unidentified witness said she was standing here at
15 Leome looking towards Whitehorse and traffic was backed up
16 in the area. So, that would -- I mean, it would have to
17 put the collision in this area.

18 Q Okay. The EMS report said 3204 West Blue Ridge
19 Drive?

20 A Yes.

21 Q Okay. Do you know where that is?

22 A This area.

23 Q Okay. And you heard Mr. Burgess' testimony that
24 as he's being rolled back to the ambulance, that there are
25 vehicles between where the ambulance was and where his

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1 roll towards the ambulance was located?

2 A That's correct.

3 Q Would that put Mr. Burgess, or, at least, the
4 collision site a bit in front of where that spot is or
5 that dot is that you pointed out?

6 A It's possible, yes, sir. It could actually be
7 in this area. The ambulance was here. I probably don't
8 need to perform surgery today, I've got the shakes.

9 Q Is there any doubt at all as to where this
10 collision occurred?

11 A Not in my mind, not at this time, no, sir.

12 Q Where there any statements made by Ms. Hunter
13 that conflict with your opinion as to where it is that
14 this collision occurred?

15 A Yes. Yes, sir.

16 Q Okay. I want to turn your attention to this
17 recorded statement here at Line 104.. You can see why I
18 brought somebody else to handle this.

19 A Yes.

20 Q All right. We'll start at Line 104. All right.

21 I was pulling out from a side street. I
22 was making a left-hand turn, looking, you know, both ways
23 and I remember thinking there wasn't quite as much
24 traffic. I pulled out making a left-hand turn. I'm
25 looking around and it was like it came out of nowhere. I

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RECORD ON APPEAL
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1 looked in front of me, I pulled in the far left lane and
2 he was just like there.

3 Based on Ms. Hunter's statement right here
4 on Line 104 -- maybe we'll do this. Okay. Based on that
5 statement you just read, if you take Ms. Hunter's
6 statement as true, where would the collision have
7 occurred?

8 A In this area.

9 Q So, before the Hot Spot?

10 A Yes, sir.

11 Q Let's go to Line 151 of that statement. All
12 right. You have a statement here, not quite as detailed
13 as the last statement I just had you read.

14 It says, I guess he was moving really slow
15 because I know they can't go fast, but as soon as I looked
16 up in front of me from the turn, he was like right in
17 front of me.

18 If you take that statement as true, where
19 did this collision occur? In the same general vicinity?

20 A Same general area as I pointed out. Clearly
21 between Bramlett and the Hot Spot and well before the Hot
22 Spot.

23 Q Let's do this, as we read through these, so we
24 don't have to stress my guy over here about moving these
25 things back and forth, as we read through these, if the

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1 spot changes, let me know and I'll get the board up, I'll
2 get that photo up. But if not, just let me know if it's
3 in the same general location.

4 A Okay.

5 Q Let's try this. Let's go to --

6 Put Line 151 back up for me if you can.

7 All right. Let's move on from there. Let's go to Line
8 255.

9 All right. Again, this one might not be as
10 specific as the others, but let's try here.

11 Was there anything that distracted when you
12 the incident happened?

13 The response was, No, other than I was
14 looking around, you know, for traffic that I just somehow
15 did not see him on that moped.

16 Is there -- does that give you any
17 indication as to where this collision occurred?

18 A You know, I would -- it's not as clear. I would
19 read that -- Ms. Hunter's answer there that she was
20 looking around after she had made her turn, you know, in
21 the process of making her initial turn, which would -- the
22 way I read it, it's still in the same -- you know, close
23 to the same location between Bramlett and the Hot Spot.

24 Q Okay. I think we can get a little bit of
25 clarification here. We'll go down to Line 260 through

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1 269. Now, when you came -- the question is, When you came
2 off of Bramlett, is there a light there or do you have to
3 just pull out and cross over traffic?

4 The response is, There's no light. There's
5 no light. So sometimes, it can get really busy on that
6 road. There's a little median, so, you know, that's how
7 people kind of pull out into that median, kind of look and
8 wait for the traffic to clear. It was fair, I had -- I
9 thought I had a fairly clean path, but I was still kind of
10 looking to make sure, you know, cars weren't --

11 And apparently, some of these are inaudible
12 in the report here.

13 Then it continues, Then I had, though, they
14 were, anything like that. So, I was looking and making
15 sure everything was clear. And then I looked in front of
16 me and it was like he was right there and I was on top of
17 him before I realized it.

18 If you take that statement as true, where
19 did this collision occur?

20 A Between Bramlett and before the median ends
21 there before the Hot Spot, which is actually where the
22 median ends, wide median there ends after 200, a little
23 over 200 feet. And it's like 500 feet from the center of
24 Bramlett to the center of the Hot Spot property. So, very
25 quickly after turning off Bramlett would be what that

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1 tells me.

2 Q So, essentially, the same location?

3 A Yes, sir.

4 Q Okay. Now, I will turn to Line 298. Now, the
5 question here is, When did you first -- the question here
6 on 298 is, When did you first see the moped driver?

7 The response is, I didn't see him until
8 like I pulled out into that left-hand lane, looked in
9 front of me and there he was. It was like he came out of
10 nowhere.

11 Again, if you take that statement as true,
12 where did this collision occur?

13 A Same location, back toward the -- before the --
14 even before the Hot Spot.

15 Q Okay. And I'll ask you again, is that
16 consistent with what your opinion is about where this
17 collision occurred?

18 A No, sir, it's not.

19 Q Would you say they're near each other?

20 A No, sir.

21 Q Okay. Now, I want to turn your attention then
22 to Line 298 to 321. Excuse me, I was already there.
23 Let's move on. I want to turn your attention now to Line
24 161, so we'll go backwards just a little bit. All right.
25 On Line 161, starting at 158.

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1 The question is, When you turned from
2 Bramlett Road to Whitehorse Road, how far -- how long was
3 you on that road or about how many feet before you hit
4 him?

5 And the response is, I don't -- I'm not
6 sure exactly. I mean, it was all kind of -- it was less
7 than -- I don't know, I don't know, it's hard to guess. I
8 guess maybe a quarter of a mile up, not that far.

9 Is that different from the prior statements
10 that we just went through painstakingly here?

11 A Yes, sir. A quarter mile is a pretty large
12 contradiction to the other statements. A quarter mile
13 from Bramlett is going to be closer, a lot closer to the
14 location we pointed out earlier near Leome.

15 Q Okay. We haven't -- we haven't -- that's the
16 same statement we're reading from. We haven't changed
17 anything, correct?

18 A Correct.

19 Q And a quarter mile from Bramlett, where does
20 that put us approximately on this overhead shot?

21 A As I said, it puts us back in, back in this
22 area.

23 Q Okay.

24 A Mr. Garcia, if I could?

25 Q Yes, sir.

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1 A That would be in this area versus this area.

2 Q So, the several statements we went through at
3 first put us back between the Hot Spot and West Bramlett?

4 A Yes, sir, those first statements would be in
5 this area.

6 Q Okay.

7 A And then the quarter mile would be more in this
8 area.

9 Q Okay. Thank you. I'll ask you this, if we take
10 Ms. Hunter's prior statements as she looks up after
11 merging and there Mr. Burgess is and we combine that with
12 the verifiable location of the collision, do you have a
13 reasonable explanation stated to a reasonable degree of
14 certainty for an expert in your field of what Ms. Hunter
15 is doing when she merged in to where the collision occurs?

16 A That's hard to say what -- I don't know, a lot
17 of time, a lot of time would pass there, maybe 12, 14
18 seconds. But I think I know that she's not keeping a
19 proper lookout at that kind of distance and time can pass.
20 You know, because you can't have it both ways. It can't
21 be immediate, which is what the statement tells us in the
22 begin. Then from other evidence we know, the collision
23 actually happened a quarter mile away. Just after merging
24 and quarter of mile, they don't go together. So, I really
25 don't know what was going on for that time, but it doesn't

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1 appear that she was paying attention.

2 Q You can't tell us what was going on, but can you
3 tell us what wasn't going on?

4 A Yes, sir. I think what wasn't going on is that,
5 obviously, Ms. Hunter wasn't keeping a proper lookout or
6 looking for hazards that could be in the roadway.

7 Q Now, did you just discount Ms. Hunter's
8 statements regarding where it is the collision occurred?

9 A No, sir.

10 Q Okay.

11 A I try not to discount anything, not immediately.
12 But then there are pieces that you put more weight to,
13 obviously.

14 Q Why would you put more weight to some piece of
15 information versus another?

16 A Well, for example, all the examples that we just
17 ran through of turning left from Bramlett and then upon
18 merging, you know, there Mr. Burgess was. Well, that --
19 when you get 911 calls and you get witness statements and
20 you get other reliable documentation that the collision
21 didn't occur in that area, then you have to give that a
22 lot less weight and more weight to the other information.

23 Q Thank you. Now, do you have an opinion stated
24 to a reasonable degree of certainty for an expert in your
25 field regarding what lane Mr. Burgess was traveling in

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1 when the collision occurred, Mr. Sims?

2 A Yes, sir, I do.

3 Q And what lane do you believe he was traveling
4 in?

5 A The inside lane, the lane closest to the median.

6 Q Is that the left lane?

7 A It is the left lane.

8 Q Okay. How did you reach this conclusion?

9 A Well, based on the rest positions, rest position
10 of Mr. Burgess and his moped, the information that I
11 received on that, I actually -- actually, his statement,
12 Mr. Burgess' statement, Ms. Hunter's statement, I didn't
13 see any contradictions in any of the statements as to what
14 lane they were in at impact.

15 Q Do you have an opinion stated to a reasonable
16 degree of certainty for an expert in your field regarding
17 what lane Ms. Hunter was traveling in when the collision
18 occurred?

19 A Yes, sir, I do. The same lane.

20 Q The left lane?

21 A The left lane, yes, sir.

22 Q Again, how did you reach this conclusion?

23 A Based on, as I said, the statements, that was
24 one of the few things that seemed to be consistent with
25 both parties. The rest position of Mr. Burgess after

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1 impact in the median, he came to rest in the median.
2 The -- also, the damage profiles between the moped and the
3 car. All that is the totality of all that evidence.

4 Q Okay. Do you have an opinion stated to a
5 reasonable degree of certainty for an expert in your field
6 regarding where Mr. Burgess' moped was positioned within
7 that lane of travel when the collision actually occurred?
8 It's a slight distinction to what I asked you prior.

9 A Yes, sir, I think he was in the middle of the
10 lane.

11 Q Again, how did you reach this conclusion?

12 A Well, once again, it was based on statements as
13 well, what Mr. Burgess said, what Ms. Hunter said, he was
14 right in front of her. I would think practical person
15 would be driving, in Ms. Hunter's case, her vehicle
16 squared up pretty much in the center of the lane right in
17 front of her, that would tell me he's in the center of the
18 lane. He says in his statement he's in the center of the
19 lane. And also, there again, the evidence, the evidence
20 points to that as well.

21 Q When you say evidence, are you referring to the
22 damage profile of the vehicles?

23 A Yes, sir. The damage to the front, to the hood,
24 to the grill of the BMW, the damage to the rear of the
25 moped, and also the fact that Ms. Hunter said, I think in

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1 the last couple of statements, that she swerved to try to
2 avoid -- she swerved left to try to avoid Mr. Burgess.
3 And it all lines up at impact, he goes to the left into
4 the median area.

5 Q We'll get to some of the photos here, the damage
6 profile of the vehicles and we'll walk through that step
7 by step.

8 A Okay.

9 Q Do you have an opinion as stated to a reasonable
10 degree of certainty for an expert in your field regarding
11 the direction of travel for the moped prior to impact?

12 A Yes, sir, I think it was traveling straight
13 ahead in that left-hand lane.

14 Q Well, notice my question now. After impact, do
15 you have an opinion as to where it is that the moped goes?

16 A Oh, I thought you were saying before impact.
17 After impact, yes, sir. He goes off to the left into the
18 median, comes to rest in the median.

19 Q Okay. How did you reach this conclusion?

20 A Well, there again, it was based on the fact that
21 Ms. Hunter had taken evasive action, that she saw him at
22 the last second, swerved left. That lines up with the
23 damage to her car, the damage to the moped and that would
24 redirect the momentum and the force of just roughly a
25 4000-pound car going from right to left at impact into a

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1 maybe 400-pound unit, that would include Mr. Burgess and
2 the moped from somewhere in that range. It's, obviously,
3 ten times the mass. So, the mass and the speed of the BMW
4 will be displaced into the moped. The moped would take on
5 that momentum and the direction as well. Her swerve to
6 the left is what caused him go to the left into the
7 median.

8 Q Were there any statements made by the parties
9 that contradicted your opinion?

10 A No, sir.

11 Q Do you have an opinion regarding what happened
12 to the moped -- well, I think I've already asked you
13 questions very similar to that, I'm going to move on.
14 Well, I'll ask you this, do you have an opinion stated to
15 a reasonable degree of certainty as to what it is that
16 happens to the moped itself after contact was made? And
17 what I'm talking about here is what happens between that
18 point of impact and when it finally gets to its resting
19 location?

20 A Yes, sir, I do. If the moped is struck from the
21 rear and with an evasive action, input from Ms. Hunter
22 swerving to the left, it would cause -- at impact, it
23 would cause a rotation of the back wheel of the moped --
24 actually, the whole unit, the moped would rotate
25 clockwise. Because the force was being applied from right

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1 to left to that back wheel. And it would start a
2 clockwise rotation, left to right, which would cause the
3 moped to, at some point, become almost sideways. Left
4 side going forward, right side nearing the bumper of the
5 car. And at that point, shortly after that point, the
6 moped would -- the terminology is high side, it's what a
7 motorcycle or bicycle can do it or moped articulated
8 vehicle, meaning the front wheel turns independent to the
9 rest of the vehicle. And cause the moped to go down on
10 its left side. And that's what we see here with damage to
11 the left side of the moped as it slid out to rest and, you
12 know, it may have turned, spun, rotated or whatever to
13 rest. But the general center mass travel is going to be
14 in the direction of Ms. Hunter's vehicle was in at impact.
15 And that would produce the damage to the moped on the left
16 side. It would produce -- as Mr. Burgess went off to the
17 left side, it would produce his left side injuries as well
18 as leg, face, so forth.

19 Q This might be a little bit more clear once we
20 get the pictures up, but I want to ask you this, is there
21 a primary impact point and then a secondary impact point
22 that you can visualize on the SUV?

23 A Yes, there is.

24 Q Okay. I think it will be a lot easier to run
25 through that once we get the photos up, okay?

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1 A Yes, sir.

2 Q I'll ask you this, though, does that secondary
3 impact occur once that moped haws clockwise as you
4 explained?

5 A Yes, sir. I can explain and then we can show it
6 if that works.

7 Q Or we can wait until the photo gets up,
8 whatever.

9 A A secondary impact is just that, it's not the
10 immediate first impact. It's an impact after the moped
11 rotates clockwise and another part of it strikes the car.

12 Q Does the moped accelerate to the same speed as
13 the SUV even if it's for a fraction of a second?

14 A It does, yes, sir.

15 Q Was there anything unusual about the weather on
16 the day of the collision?

17 A Not from what I found out, no, sir. It was
18 clear from all indications. Cold, I think, but clear.

19 Q Was it in December?

20 A It was, yes, sir.

21 Q Okay. Now, what I want to do is I want to run
22 you through a video here that you produced for the purpose
23 of, essentially, demonstrating the scene to the jury. And
24 this video has already been admitted into evidence
25 previously. So, what I want to do while he's getting that

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1 video ready is I just want to run you all the way through
2 the video first and then I'll ask you some questions about
3 it, okay?

4 A Okay.

5 Q Has this video been altered in any way?

6 A No, sir.

7 Q I mean, other than trimming it a little bit for
8 getting it a bit more concise? Has it been sped up or
9 slowed down or anything of that nature?

10 A No, sir. I don't think it's been trimmed. I
11 don't remember. I don't think so.

12 Q Okay. How did you shoot that video? What
13 equipment do you use?

14 A I use just a little Go-Pro with a suction mount
15 on it. I attach it to the hood of my vehicle so that --
16 so that there's no obstruction, like the windshield.
17 It's, actually, out on the hood tethered to my grill for
18 safety. Because it has come loose before.

19 Q Now, we're at the stop sign here, maybe if we
20 back it up just a little, we can see the stop sign. Okay,
21 there's the stop sign. Now, what street are you traveling
22 on at this point?

23 A This is Bramlett.

24 Q Now, we'll play the video. Now, are turning on
25 to West Blue Bridge Drive here?

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1 A I am, left turn.

2 Q It is your understanding that this is the path
3 that Ms. Hunter took prior to the collision?

4 A It is, yes, sir. The school was actually behind
5 where this starts, yes, sir.

6 Q This road that we're merging onto here, is this
7 West Blue Ridge Drive, the road where the collision
8 occurred?

9 A It is, yes.

10 Q Now, once you merge -- we won't press play just
11 yet, but once you merge onto West Blue Ridge Drive, what
12 speed are you traveling throughout this video?

13 A Trying to keep it as close to 40 as possible,
14 between 40, 45, but trying to keep it around 40.

15 Q How did you confirm the speed you were
16 traveling?

17 A With my speedometer and also with the timer
18 there on the video.

19 Q Okay. What's the speed limit on this road?

20 A It's 45. That's the maximum speed.

21 Q Now, I want to do this. We're being fair to
22 Ms. Hunter, do you know exactly where it is that she
23 merged out?

24 A No, sir, I do not.

25 Q Okay. Now, if we apply a reasonable person

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1 standard to this, would you be able to tell me where a
2 reasonable person might merge out here?

3 A Well --

4 MR. MOORE: Your Honor, I'm not really sure
5 where this is going. This is not even relevant to
6 his analysis.

7 THE COURT: Where are you going with it and why
8 is it relevant?

9 MR. GARCIA: I'm simply trying to understand
10 where his opinion is as an expert in his field as to
11 a reasonable person might merge so that we can then
12 try to attempt to tie in where Ms. Hunter said the
13 collision occurred versus where Mr. Sims' opinion
14 regarding where the collision occurred, Your Honor.

15 MR. MOORE: Her position on where it occurred is
16 not relevant to his particular position.

17 THE COURT: Right. You're pitting witness.

18 MR. MOORE: Yes, sir.

19 MR. GARCIA: Okay. We'll move forward then.

20 BY MR. GARCIA:

21 Q Now, I'll ask you this, Mr. Sims, I'm going to
22 play this and can you tell me where to stop this video
23 when we get to the point where you believe this collision
24 occurred?

25 A Yes, sir.

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1 (WHEREUPON, a video was published.)

2 THE WITNESS: Okay. You didn't hear me.

3 BY MR. GARCIA:

4 Q Oh, okay.

5 A Back it up.

6 Q That's fine. Now, you also had images to rely
7 on, correct? You also had images, not just this video to
8 rely on in forming your opinions; is that correct?

9 A Yes.

10 Q Now, I want to turn your attention to some of
11 these videos -- or excuse me, these images. And we'll
12 start with the images of the SUV. All right. What does
13 this particular image tell you about the collision,
14 Mr. Sims?

15 A Well, this is the damage profile on the BMW.
16 Most of it, that's sort of close up. But it shows -- this
17 particular one shows the initial impact, which would be in
18 this area, any of this here. And the secondary, as the
19 moped rotates clockwise, part of it, I would say from the
20 secondary impact broke this.

21 Q Okay.

22 A But the initial impact would be the rack, the
23 metal rack on the back of the moped and possibly the
24 fender causing this damage.

25 Q Okay. Let's try another picture of the SUV as

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1 well. All right, same thing, can you just point to what
2 you term the initial impact point?

3 A Yes, sir. This area.

4 Q Okay. What would you point to as the secondary
5 impact point?

6 A This area.

7 Q I'm sorry, can you do that again?

8 A This area.

9 Q Okay. Is there -- is this area right here part
10 of that secondary impact point?

11 A Yes, sir, possibly. Definitely, I would say
12 this, probably that as well, yes, sir.

13 Q Do you have an opinion regarding what it is that
14 might have -- you referenced, if I remember correctly, the
15 rear rack of the moped in this area?

16 A Yes, sir.

17 Q Would you have an opinion what it is that will
18 cause this damage here?

19 A Probably just the impact with the exhaust, I
20 think it was, that came out that side, probably up here.
21 And possibly, foot pegs or something making those
22 scratches there.

23 Q Is that consistent with the moped yawing,
24 essentially, clockwise?

25 A It is, yes, sir.

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1 Q Okay. Now, we haven't addressed this area over
2 here on the right side -- or excuse me, if we're in the
3 vehicle, would be on the left side, the driver's side of
4 the SUV. How do we account for this damage here?

5 A You know, that was -- well, I would just simply
6 say I think that's induced damage from -- induced damage
7 is not necessarily contact damage, but damage from parts
8 and pieces, maybe flexing or torquing or whatever. When
9 this damage occurs, we can see the line here in the hood.
10 It's warped, for the lack of a better term, or torqued.
11 This is offset from the damage. And any of that, any of
12 that force or pressure would actually just cause this
13 piece to pop out. Because we actually have other photos
14 that shows there's no damage to that piece as well. And
15 you can't see any damage there either as far as contact
16 damage. Now, a piece is missing, but it doesn't look like
17 anything came in contact with it.

18 Q Okay. We'll look at the next photo of the BMW
19 here. I'll be honest with you, Mr. Sims, I don't think
20 it's substantially a different photo. Anything you
21 believe you need to add to this particular --

22 A Well, that's a little better maybe. You can see
23 the grill area here. There's no -- you can't see any
24 visible contact damage. It just looks like a piece just
25 popped out. And that could happen from the sitting in the

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1 driver's seat. Anytime I describe a damage, it could be
2 sitting in the driver's seat. That right-hand side, that
3 impact, torque being imposed changes the shape maybe just
4 momentarily of the hood and allows that piece to pop out.

5 MR. GARCIA: Your Honor, if I may, I'd like to
6 move these three moped photos into evidence.

7 MR. MOORE: No objection.

8 THE COURT: Okay. All right.

9 (WHEREUPON, Plaintiff's Exhibit No.s 12-14 were
10 marked for identification and received into
11 evidence.)

12 THE COURT: How much longer do you anticipate
13 your direct to be?

14 MR. GARCIA: I would say I'm very close to the
15 end, maybe another ten minutes or so.

16 THE COURT: Y'all okay? Do you need a break
17 right now? Okay.

18 All right, go ahead.

19 BY MR. GARCIA:

20 Q All right, we'll put up the images of the moped.
21 All right, I believe we're looking at the left side of the
22 moped?

23 A That's correct, yes, sir.

24 Q Okay. What -- let me ask you this, are these
25 scratches that you see here consistent with your opinion

MATT SIMS-DIRECT BY MR. GARCIA

1 of the moped falling on its left side?

2 A Yes, sir, they are. Here, here, even maybe some
3 here.

4 Q Okay. You know that piece we were referencing
5 from the BMW that's missing from the driver's side, is
6 that the piece, in your opinion, that's sitting right
7 there?

8 A It is, yes, sir.

9 Q Let's move to the next photo. We only have
10 three. All right, now we're looking at the right side of
11 the moped. Is this the rack that you referred to when
12 we're talking about that initial or that primary impact
13 point?

14 A It is. This metal rack would have protruded up
15 into the grill just under, just under the hood there and
16 caused that damage. And you can also -- you can also see
17 what appears to be some damage here to the right side of
18 the little cover of the rack, which would be indented with
19 a right to left or swerve to the left impact on the right
20 front. It's been referred to as corner or side. That's
21 not the corner or side, it's the right front, just right
22 of the center of Ms. Hunter's vehicle that made contact.
23 There's nothing, nothing on the side or corner. It was
24 all in the front. So, with a right to left swerve, you
25 could, you could expect to see damage to whatever point

MATT SIMS-DIRECT BY MR. GARCIA

1 comes in contact with the car, and, actually, the right
2 side of that point.

3 Q Okay. Do we see the muffler here that you
4 referred to as the culprit in that secondary impact mark
5 that we see on the SUV?

6 A Most likely, yes, sir, that's what I believe
7 came in contact with the BMW secondary, secondary.

8 Q Okay. We'll just turn to the next photo and
9 move through that one quickly if we can. Okay. Now, this
10 is just another image, essentially, from behind the moped.
11 Again, what you see here, is that consistent with what
12 your opinion is here today?

13 A Yes, sir, it is.

14 Q Okay. Is there anything about this photo that
15 gives you some indication as to that clockwise yaw or
16 rotation?

17 A Well, yes, sir, there again, if, if Ms. Hunter
18 swerves left, this rear wheel at impact will start to
19 rotate in this direction, which is clockwise. If you keep
20 going, just like a clock goes, it goes in this direction,
21 but it doesn't get all the way around. When it gets
22 probably here sideways, that's when the muffler would come
23 in contact with the car as well as the muffler would
24 almost be sideways in front of the car. At that point, it
25 would high side and go to the left, go down the left side,

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1 rotate out to rest. You can see also there the impact
2 it's made with the hood and grill, you can see damage to
3 that right-hand side of the rack cover there.

4 Q When that rack, essentially, creates that
5 primary impact point with the SUV, is there a moment there
6 where the SUV and the moped are clipped together?

7 A Possibly, a moment or a fraction of a second,
8 yes, sir. I mean, once it happens, you know, it's all
9 happening very fast, yes, sir.

10 Q We're talking fractions of a second?

11 A Possibly, yes, sir.

12 Q Do they stay hooked together?

13 A No, sir.

14 Q Why not?

15 A Well, the momentum -- the left -- the
16 leftward -- the swerve to the left starts the, starts the
17 rotation or the impact. They come together and the whole
18 movement starts the rotation and the separation follows
19 shortly thereafter. So, you talking fractions of a second
20 for that to happen.

21 Q In forming your opinion, did you consider other
22 alternatives?

23 A Yes, sir.

24 Q Did you consider whether Mr. Burgess cut in
25 front of Ms. Hunter before she could avoid Mr. Burgess?

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1 A Yes, sir, I did.

2 Q Is that a possibility?

3 A It's not. No, sir, it's not. I considered
4 that. I considered that possibility.

5 Q Okay. Did you consider whether Mr. Burgess
6 turned out in front of Ms. Hunter when he pulled out of
7 the Hot Spot such that Ms. Hunter could not avoid
8 Mr. Burgess?

9 A I did.

10 Q Okay. Was that a possibility?

11 A No, sir.

12 Q No, sir?

13 A No, sir. Mr. Burgess was clearly established in
14 his lane of travel, which was the left-hand lane, the
15 inside lane close to the median.

16 Q All right. Are there any other alternatives
17 that I might not be posing to you that you might have
18 considered?

19 A No, sir. Those were pretty much it. You know,
20 because there was, there was some contention early on
21 whether or not Mr. Burgess came out of the Hot Spot in
22 front of Ms. Hunter at an angle. But as the investigation
23 progressed and we found that actually the location was
24 further down the road and upon studying the damage profile
25 and so forth, the evidence just doesn't support that kind

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1 of theory.

2 Q I just have maybe two or three more questions
3 for you. Does Ms. Hunter have to slow down to a complete
4 stop to avoid making contact with Mr. Burgess?

5 A No, sir.

6 Q What speed would she need to slow down to?

7 A Well, she's -- you know, not to be funny or too
8 simple, but she has to slow down to his speed. I mean, if
9 he's going 25 or 30. You don't know exactly how fast he
10 was going, but whatever speed, he says around 30, then
11 she's behind him. And as we all know, if you're behind
12 someone, you're going the same speed, you will never catch
13 them. So all she has to do is slow down to his speed.
14 And within, you know, an inch or 20 feet or 50 feet or
15 whatever, she would never, she would never have made
16 contact if she could have slowed down to his speed in
17 time.

18 Q How many feet of travel would be covered, okay,
19 for a BMW -- for that SUV or for a SUV to reduce their
20 speed from, say, 45 to 30 miles per hour?

21 A I think it was -- take like 40 something feet,
22 yes, sir.

23 Q Okay. Is there anything that Mr. Burgess could
24 have done to avoid this collision?

25 A Not that I can see, no, not under those

MATT SIMS-DIRECT BY MR. GARCIA

1 circumstances.

2 Q Have all your opinions here today been stated to
3 a reasonable degree of certainty for an expert in your
4 field?

5 A Yes, they have.

6 MR. GARCIA: I don't have any further questions
7 for you. Please answer any questions Mr. Moore may
8 have. Thank you.

9 THE COURT: All right, ladies and gentlemen,
10 we've been going about two hours. We're going to
11 take a short break. We'll get back with you in about
12 10 or 15 minutes. Don't discuss the facts of the
13 case. Thank you very much.

14 Everyone else keep their seats. Keep your
15 seats.

16 (WHEREUPON, the jury left open court at
17 approximately 11:56.)

18 THE COURT: All right, Mr. Sims, you're free to
19 stand down. If you would, just don't discuss your
20 testimony.

21 THE WITNESS: Yes, sir. Thank you, sir.

22 THE COURT: All right.

23 (WHEREUPON, a short break was taken.)

24 THE COURT: All right, ready?

25 MR. MOORE: I'm ready.

MATT SIMS-CROSS BY MR. MOORE

1 MR. GARCIA: Yes, sir.

2 THE COURT: Okay.

3 (WHEREUPON, the jury came into open court at
4 approximately 12:13 p.m.)

5 THE COURT: All right, Mr. Moore,
6 cross-examination.

7 CROSS-EXAMINATION

8 BY MR. MOORE:

9 Q Mr. Sims, my understanding, of course, is that
10 you were not present at the scene of this accident?

11 A That's correct.

12 Q You got involved, basically, too late when you
13 were retained; am I right?

14 A I'm sorry?

15 Q When you were retained, it was too late for you
16 to go out to the scene and see if there were any skid
17 marks or any other physical evidence?

18 A Yes, sir. I don't think in this case there
19 would have actually been skid marks. But there could have
20 been some scuff marks, gouge marks or something, but, yes,
21 sir, I was involved way after all that.

22 Q And as a result, you are relying upon
23 statements, depositions, photographs, that type of thing
24 to reach your opinion; am I right?

25 A Yes, sir, and science, yes, sir.

MATT SIMS-CROSS BY MR. MOORE

1 Q Okay. And science. You were asked a number of
2 questions regarding Ms. Burgess' [verbatim] statement,
3 particularly where she was when the accident occurred.
4 You would agree with me that, number one, she was confused
5 about what happened based on that statement, right?

6 A Based on?

7 Q Her own words.

8 A Yes, sir, back down toward the Hot Spot, yes,
9 sir, before the Hot Spot.

10 Q For example, when she was asked about where the
11 accident occurred, she said Whitehorse Road instead of
12 Blue Ridge Highway, correct?

13 A Yes, sir, she did. Just missed the road name,
14 yes, sir.

15 Q What you were asked questions about had to do
16 with when she turned left off of Bramlett Road onto Blue
17 Ridge, that she was involve in the accident shortly after
18 she made her turn, correct?

19 A Yes, sir.

20 Q Okay. There's also testimony in that same
21 statement indicating they were almost a quarter of a mile
22 down the road; am I right?

23 A There is one statement, that's what said when I
24 said it was very conflicting because a quarter a mile is a
25 long ways from that location.

MATT SIMS-CROSS BY MR. MOORE

1 Q She never specifically said she was in front of
2 or beside the Hot Spot, did she, in that statement?

3 A No, sir. The statement just made it sound like
4 as soon as she merged, she looked up and there Mr. Burgess
5 was.

6 Q But your assumption is that's what she meant
7 rather than maybe a few seconds down the road, she had
8 this accident?

9 A Probably 10 to 12 seconds more down the road,
10 yes, sir.

11 Q Okay. Sure. There was another statement given,
12 also, was there not, by Mr. Burgess?

13 A Yes, sir.

14 Q And Mr. Burgess indicated that the accident
15 occurred some 20 to 30 yards away from the Hot Spot; am I
16 right?

17 A Up to 40, I think, yes, sir.

18 Q Twenty to 40 yards away?

19 A Yes, sir, that was -- I think that was the
20 initial statement and I considered that as well, yes, sir.

21 Q Okay. And based on your evaluation, that's
22 incorrect as well?

23 A Yes, sir, it was further.

24 Q Further down the road?

25 A Now, we know it was further down the road, yes,

MATT SIMS-CROSS BY MR. MOORE

1 sir.

2 Q So, both participants in this accident were
3 confused about some of the facts that you are relying upon
4 to reach your conclusion?

5 A Well, yes, sir. I was looking at it from the
6 standpoint of Mr. Burgess didn't run over Ms. Hunter,
7 Ms. Hunter ran over Mr. Burgess. You know, the car -- she
8 was driving the car which struck the moped, basically, so.

9 Q Well, the question is with regard to where the
10 accident happened?

11 A No, sir. The question is why she didn't see
12 him. Yes, sir.

13 Q But she did say in her statement and she was
14 very consistent about that, that it appeared he came out
15 of nowhere; am I right?

16 A Yes, sir, wherever it happened, he came.

17 Q She didn't see him until right before the
18 accident happened and he came out of nowhere?

19 A He was directly in front of her, yes, sir.

20 Q Okay. Now, when this accident happened, based
21 upon the evidence and the information you have,
22 Mr. Burgess had come out of the Hot Spot gas station; am I
23 right?

24 A That's information -- could you repeat the first
25 part of the question?

MATT SIMS-CROSS BY MR. MOORE

1 Q Sure. Before this accident happened, he had
2 been at the Hot Spot to make a phone call?

3 A Yes, sir.

4 Q And he had left the Hot Spot?

5 A According to the testimony, yes.

6 Q He's operating a moped; is he not?

7 A He is.

8 Q Speed limit for a moped is 25 miles per hour in
9 this state; am I right?

10 A Currently, yes, sir.

11 Q Okay. And the speed limit on the road he's
12 getting on, the Blue Ridge Highway, is 45 miles per hour;
13 am I right on that?

14 A Yes, sir. 45 is maximum speed limit. That
15 doesn't mean you can't go less than 45.

16 Q But there's also a statute that we've seen that
17 indicates he's not to get in that left lane if it causes
18 problems with traffic congestion and that type thing; am I
19 right?

20 A Yes, sir. Is that specific to a moped or was
21 that slower traffic?

22 Q Any slower moving traffic, you have to stay out
23 of the fast lane; am I right?

24 A Yes, sir, unless you're going to make a turn.

25 Q Make a turn.

MATT SIMS-CROSS BY MR. MOORE

1 A Or the exceptions that apply.

2 Q And you sat here through his testimony. He
3 wasn't at the point where he was making a turn when the
4 collision occurred; am I right?

5 A Well, he was preparing to make a turn. His plan
6 was to make the turn, yes, sir.

7 Q Okay. He hadn't slow down to make his turn, had
8 he?

9 A Well, I mean, when you're -- when you're driving
10 a moped, the law says you're going 25, he says he was
11 going 25 or 30, I mean, I don't think there's -- there's
12 not a lot of slowing down to do.

13 Q Had he prepared to make his turn at that point?

14 A I would say he was planning -- he had planned to
15 turn when he left the Hot Spot. I don't know if he should
16 have been in the left-hand lane at that point or not. I'm
17 just saying I think that's what his intentions were, so he
18 got in the left-hand lane.

19 Q Let me ask it a different way. Unless he's in
20 the process of making his left-hand turn, he's not
21 supposed to be in that left-hand lane, is he?

22 A Well, in the process or preparing?

23 Q No, in the process of making his turn. You can
24 prepare two miles down the road. But he's not in the
25 process of making his turn, is he?

MATT SIMS-CROSS BY MR. MOORE

1 A Well, you can't just get over there during the
2 turn. You have to -- you have to prepare to get over
3 there. I don't know exactly -- I really don't know
4 exactly what point he got over. But if -- you know, if he
5 got over 20, 30, 40 yards from the Hot Spot, then he --
6 it's questionable about the law, yes, sir.

7 Q Okay. In fact, we know he got into the left
8 lane back as far as the Hot Spot according to his own
9 testimony, correct?

10 A He said he came out and he --

11 Q Immediately got into the left lane?

12 A The road was clear and he immediately went over
13 into the left lane.

14 Q Which he should not have done because he's going
15 25 on a road where a lot of traffic is going 40 to
16 45 miles per hour; am I right?

17 A Well, we could argue that, but I don't know
18 that -- I think he was preparing to turn.

19 Q Okay. Now, he indicated initially in his
20 statement shortly after this accident that the accident
21 occurred some 20 to 30 yards beyond the Hot Spot, correct?
22 I think 20 to 40 yards.

23 A Yes, sir, I think one statement says 20, 30 and
24 then one goes up as high as 40.

25 Q Somewhere in that zone?

MATT SIMS-CROSS BY MR. MOORE

1 A Yes, sir.

2 Q That could not have happened, could it?

3 A Right. And I put -- just as I said to
4 Ms. Hunter's testimony made it sound like the accident
5 happened near Bramlett. I put less weight in that. And I
6 also put less weight in Mr. Burgess' testimony that it
7 happened near the Hot Spot as well.

8 Q Okay. So, you're relying upon, basically, the
9 EMS report and I believe the highway patrolman's report
10 indicating the GPS location primarily; am I right?

11 A There was -- there was always a witness.

12 Q Okay.

13 A That we heard. And Ms. Hunter herself in her
14 call, her 911 call mentioned all the businesses in that
15 area, but never mentioned the Hot Spot. So, this all puts
16 it further up the road.

17 Q Okay. Now, your testimony is that if the SUV is
18 traveling down the road and the moped has established
19 itself in the left-hand lane that there would have been a
20 rear-end collision, correct?

21 A Yes, sir.

22 Q Without swerving, correct?

23 A Yes, sir. I mean, under the same circumstances.

24 Q If that is the case, let's assume for the time
25 being that there is no swerving of the SUV to try to avoid

MATT SIMS-CROSS BY MR. MOORE

1 the collision, then the moped would be thrown or propelled
2 straight down the road; would it not?

3 A Generally, yes, sir.

4 Q Okay. Now, if there was a swerving from left to
5 right -- right to left, excuse me, of the SUV and,
6 basically, it hits the rear of the moped, I believe your
7 testimony is it then begins to rotate in a clockwise
8 rotation; am I right?

9 A That's correct.

10 Q Okay. Now, we know that as a result of this
11 accident, the moped ends up in the median, correct?

12 A Yes, sir.

13 Q So, if the moped was traveling in the center of
14 the lane, that would be to the moped's left, correct?

15 A That's correct, yes, sir.

16 Q And we know by the law of physics, if the moped
17 is traveling straight, there's got to be some sort of
18 force to push it over to the left?

19 A Yes.

20 Q Okay. And your testimony is that because there
21 was a connection between the moped and the SUV, that it
22 was pushed over to the left by virtue of the momentum of
23 the SUV?

24 A From the right to left connection, yes, sir.

25 Q Okay. Now, in fact, when there is an impact

MATT SIMS-CROSS BY MR. MOORE

1 between the faster moving SUV and the moped, the rear-end
2 collision, that's going to propel it forward; is it not?

3 A Yes, sir, it's all forward whether it's -- you
4 know, it's forward at an angle, though.

5 Q Okay.

6 A And that angle is to the left.

7 Q Okay. According to your testimony, if there's
8 this circular motion, spinning motion, then there was
9 impact to -- from the right-hand side of the SUV and then
10 a secondary impact; am I right?

11 A Yes, sir, the right front, just right of center
12 of the SUV, yes, sir.

13 Q All right. We're looking at a photograph of the
14 SUV after the accident, obviously?

15 A Yes, sir.

16 Q My understanding is the primary location of the
17 first hit, as you indicated, is up on top of the hood and
18 down directly beneath it; am I right?

19 A Yes, sir.

20 Q And then the secondary impact to the right of
21 that first impact; am I right?

22 A Yes, sir.

23 Q Down around the bumper?

24 A Yes, sir.

25 Q Okay. Now, that was caused by the rotation of

MATT SIMS-CROSS BY MR. MOORE

1 the moped after it's initially hit?

2 A Yes, sir, the rear rack causes the initial
3 impact and as the moped rotates clockwise to the right,
4 the right side, the --

5 Q In other words, when it rotates, the right side
6 is going to be more facing the SUV at that point?

7 A Yes, sir. The muffler and maybe the foot pegs
8 contact here.

9 Q All right. Now, we're looking at the photograph
10 of the moped, right?

11 A Yes, sir.

12 Q And we're looking at the right-hand side of that
13 moped and, also, directly, I guess, on top of it to some
14 extent, correct?

15 A Yes, sir.

16 Q And the damage we see there is that the moped
17 seat has been pushed forward, has it not?

18 A Yes, sir, somewhat possibly.

19 Q Normally, right here, there's room for this guy
20 to put his feet?

21 A Yes, sir.

22 Q It's not there anymore, is it?

23 A From that angle, it doesn't look like it, but
24 also --

25 Q Well, I mean --

MATT SIMS-CROSS BY MR. MOORE

1 A Can I explain?

2 Q Yes, sir. I'm not trying to interfere with you.

3 A Also, there's an angle here and we can see -- we
4 can look at this photo. Photos can be tricky. But it
5 also looks like this rack here is very offset to the top
6 of the wheel. In other words, it's not directly over the
7 wheel, it's offset to the left.

8 Q Okay.

9 A But when we look at another photo, it's not.
10 So, I can't -- I mean, that's very possible. It looks it
11 may be pushed forward some even here as well, yes, sir.

12 Q And that would be consistent with the direct
13 impact by the SUV with the moped to the rear, correct?

14 A Yes, sir, there was a major impact, initial
15 impact.

16 Q Pushes -- at that point, that impact pushes that
17 SUV forward?

18 A The moped, pushes the moped forward.

19 Q I'm sorry, yes, sir. Now, let's take a look at
20 the right-hand side of that photograph. Do you see any
21 scratches or damage to the right-hand side of that moped?

22 A No, sir, I can't. No, sir.

23 Q You indicated this muffler might have been
24 involved in the accident. Do you see damage to the
25 muffler there?

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1 A Well, the muffler, actually, in this photo is
2 covered by the guard here, so --

3 Q But what you see there?

4 A You can't see it there, no, sir, we can't. But
5 that's the clear rotation from a right to left impact.
6 It's going to rotate clockwise.

7 Q But you would expect there to be damage to the
8 right-hand side of that moped to some extent when it
9 rotates to the right; am I right?

10 A I would say there is damage to it, yes, sir.

11 Q Point to me, point to the jury, I don't see any
12 damage right here on the right-hand side of that moped?

13 A Well, I just explained, we can't see it. But it
14 wouldn't be, it wouldn't be up in here. This part
15 wouldn't come in contact with the car. It would be from
16 the foot pegs back. Just like -- you know, just like we
17 didn't get to see evidence on the scene, we didn't have an
18 abundance of photos here.

19 Q Okay.

20 A But, we're working with what we have.

21 Q Now, we're looking at the left-hand side -- or a
22 photograph from the left-hand side of the moped, right?

23 A Yes, sir.

24 Q This shows a good bit of damage on this side;
25 does it not? Scraping?

MATT SIMS-CROSS BY MR. MOORE

1 A Yes, sir.

2 Q Scraping, scraping, glass burst out here,
3 scraping here, correct?

4 A It does, yes, sir.

5 Q That's all from where it landed on its left-hand
6 side?

7 A Yes, sir.

8 Q We look at -- again, photographs are deceiving,
9 but it looks to be straight on; does it not? Carriage
10 part?

11 A Yes, sir, I believe that it is. There's another
12 photo that shows it better, but, yes, sir.

13 Q Then again, if we look at the seat, it's pushed
14 forward almost to the front of the moped?

15 A Yes, sir, it looks -- this photos looks better
16 as far as the seat, yes, sir.

17 Q Okay. Now, if the moped was moving from right
18 to left when this accident occurred, are you with me?

19 A I'm with you.

20 Q In other words, he is in the right-hand land and
21 starts switching into the left-hand lane just before this
22 accident occurs, the momentum is -- of the moped is in
23 which direction?

24 A Well, it's still straight ahead in his
25 direction, but it's not -- it's coming from right to left.

MATT SIMS-CROSS BY MR. MOORE

1 Q Because he's probably going towards the left; is
2 he not?

3 A At an angle, yes, sir.

4 Q At an angle. Okay. When the moped under that
5 circumstance is hit from the rear -- and there's no
6 question it got hit from the rear, correct?

7 A That's correct.

8 Q Did he get hit on the right-hand side -- did he
9 get on the right -- the left-hand side, correct?

10 A That's my opinion, yes, sir.

11 Q When he gets hit, as he's moving from right to
12 left, that's going to cause, number one, the moped to
13 shoot forward because it's getting hit by an SUV that's
14 going 45 miles per hour. But it's also going to continue
15 to the left to some extent, correct?

16 A No, sir, not in my opinion. It would -- it
17 would go -- if the moped -- what's the SUV doing? Is the
18 SUV in this situation swerving or going straight?

19 Q Well, that's a good point, let's do both of
20 them. If it hits him square in the back, he's still going
21 to go to some extent to the left because he's already
22 moving to the left; is he not?

23 A No, sir. The -- if this were two vehicles that
24 were similarly weighted or whatever, that would be true.
25 But with a pedestrian, a moped, a bicycle, so forth, the

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1 momentum difference is so great that not only the speed of
2 the SUV, but the direction as well will be taken by a
3 smaller unit, the ten times smaller unit. So, the moped
4 in the situation would be -- if the SUV is going straight,
5 the moped would be redirected and it'd go straight as
6 well.

7 Q So, it doesn't go to the left at all even though
8 it has initially been moving to the left?

9 A Not in this type collision between these two
10 units.

11 Q So, in other words, if it's moving right to
12 left, under that circumstances, it would straighten up and
13 go straight?

14 A If the car is going straight, the car weighs
15 4,000 pound, the moped and rider weigh 400, I mean, yes,
16 it's going to go straight. It's going to not only take on
17 the velocity of speed of the car, but it's going to take
18 on the direction as well.

19 Q Okay. Now, if the moped is moving right to left
20 under those same circumstances, then we have a veering or
21 swerving to the left, which way is the moped going to go?

22 A The car swerved?

23 Q Right to left. The moped going right to left.

24 A Then we'll have -- just under that condition,
25 the car would take the moped to the left.

MATT SIMS-CROSS BY MR. MOORE

1 Q Okay.

2 A Because the car is going to control which way
3 the units go regardless.

4 Q Okay. So, under that scenario, the moped will
5 end up into the median, because the median is to the left,
6 correct?

7 A Under -- yes, but we would have a few things
8 that would be different in that situation. And the
9 rotation would be different for one. Because I looked at
10 that, I looked at that situation. At that impact, the
11 moped would -- first of all, on the back, on the lid here,
12 the damage would most likely be to the left side of this
13 cover, not to the right side. The moped would actually
14 rotate counterclockwise and come into the car just as we
15 described, either except counterclockwise. This side
16 would be making contact with the car. So, there would be
17 secondary damage toward the center of the vehicle instead
18 of toward the right corner. Then the moped would high
19 side to the right and go down. All these scratches would
20 be on the other side, which you showed me there's nothing
21 on the other side. And Mr. Burgess would have right-side
22 injuries instead -- the same injuries on the right side
23 that he has on the left side.

24 Q When the moped and SUV come in contact, the
25 primary push or area -- direction of force is going to be

MATT SIMS-CROSS BY MR. MOORE

1 straight; is it not?

2 A It depends on what the car is doing.

3 Q Is the car not going straight?

4 A If -- I don't know which scenario you're asking
5 me about.

6 Q Well, again, if the car -- at the time -- just
7 before the collision occurs, the car is going straight; am
8 I right?

9 A Yes, before impact.

10 Q Okay. Then it swerves to the left to try to
11 avoid the collision; am I right?

12 A Yes, sir, according to Ms. Hunter, yes, sir.

13 Q So, when that type of impact occurs, whether the
14 moped is going straight or actually going from right to
15 left, would it not continue either to the left or turn
16 clockwise?

17 A If the car swerves to the left, then the moped
18 is going to go with the car to the left.

19 Q It would not -- do one or two things. One, it
20 will end up into the median without rotating or spinning.
21 Or it's going to spin because that vehicle was going to
22 cause it to go in a clockwise direction; am I right?

23 A Well, which way -- which way is --

24 Q I'm talking about when it's swerving.

25 A Okay, the car is swerving, but where is

MATT SIMS-CROSS BY MR. MOORE

1 Mr. Burgess in this scenario, where is he coming from? Is
2 he straight ahead?

3 Q I'm sorry, is coming from straight ahead.

4 A Okay.

5 Q This is when he's going right to left, the car
6 swerves to the left to avoid colliding him as he pulls
7 into that lane.

8 A Okay. That's the scenario I just described in
9 detail where the rotation is going to be opposite in that
10 situation. The rotation with the moped will be
11 counterclockwise. And the damage here will be on this
12 side instead of the other side. All this damage will be
13 on the right-hand side because the moped would rotate
14 counterclockwise and high side to the right instead of the
15 left.

16 Q Why is the moped going to go counterclockwise
17 when it was hit from the rear by the SUV as it swerves to
18 the left?

19 A Because if he's coming across from right to
20 left, his left side is going to be open, is going to be
21 opened up more. He's going to be at an angle. He's not
22 going to be straight as he would be in the scenario where
23 he's straight in the lane.

24 Q But the SUV hit him straight in the back, we
25 know that..

MATT SIMS-CROSS BY MR. MOORE

1 A Not -- well, what's his angle got to do with
2 anything then? I mean, you're asking me if he comes
3 across at an angle. If he comes across at an angle from
4 right to left, he will rotate counterclockwise. If he's
5 coming across from right to left and he's already square
6 in the lane --

7 Q Okay.

8 A -- then what's your question?

9 Q Let's assume he's square in the lane -- he's
10 moving from right to left, he's square in the lane?

11 A He's established.

12 Q He's established for however long and then the
13 collision occurs as the vehicle was swerving. He goes
14 clockwise; does he not?

15 A Yes, sir. That is my first -- that's my theory.

16 Q And if he's still -- if he's moving from right
17 to left, there is some momentum for him to continue moving
18 to the left; am I right?

19 A No, sir, not after the collision takes place.
20 The car overpowers.

21 Q Okay. Is there any evidence that you've seen of
22 spinning by this moped?

23 A I'm not sure what you mean by spinning. There's
24 evidence --

25 Q There was talk about it spinning in a

MATT SIMS-CROSS BY MR. MOORE

1 clockwise-type direction, is there any evidence that it
2 actually spun in a clockwise direction?

3 A I didn't say it spun, I said it rotated.

4 Q Okay, rotation?

5 A Yes, sir. The rotation is not -- rotation is
6 like from 12:00, 6:00 to 12:00 to maybe 3:00 to 9:00.
7 It's not a complete turn. When it rotates, it catches the
8 front of the vehicle, again, it's pushed in the direction
9 of the vehicle.

10 Q Do you have any evidence, from any of the
11 statements you have or any other evidence, showing that
12 rotation took place?

13 A Yes, sir.

14 Q Where is that evidence?

15 A The evidence is on the left side of this moped
16 and it's on the left-side injuries of Mr. Burgess.

17 Q Which is where the moped fell over after he had
18 gone into the median, correct?

19 MR. GARCIA: Your Honor, can I state an
20 objection, please?

21 THE COURT: What's your objection?

22 MR. GARCIA: Just respectfully, Mr. Moore, if he
23 would allow Mr. Sims to finish his answer.

24 THE COURT: Okay, let him finish his answer.

25 MR. MOORE: I understand.

MATT SIMS-CROSS BY MR. MOORE

1 BY MR. MOORE:

2 Q I apologize if I cut you off, I didn't mean to.

3 A That's all right.

4 Q Again, you know, if this is a rear-end collision
5 with a swerve, what you're saying is rotation going to --
6 from 12 o'clock to 3 o'clock?

7 A Yes, sir.

8 Q But if that occurs, then you would expect some
9 kind of damage on the right-hand side?

10 A Yes, sir. There's parts -- from midways back,
11 there's parts that we can't see in these photos, you know,
12 so the damage could be there. The damage, I would almost
13 guarantee is there, but we can't prove it, we can't see
14 it.

15 Q You can't see it?

16 A No, sir.

17 Q So, you don't know whether it's there or not?

18 A There was some contact made, yes, sir.

19 Q Okay. Now, with regard to the contact, how long
20 were these two vehicles in contact with one another?

21 A Well, as I testified on direct, it was -- it
22 was -- you know, I said momentarily, it was a fraction of
23 a second. It was a very short period of time.

24 Q Did you do any calculations to determine how
25 long these vehicles were in contact with one another?

MATT SIMS-CROSS BY MR. MOORE

1 A No, sir. But I don't have any evidence that
2 they were hung, that they were hung up. We know that
3 Mr. Burgess and his moped traveled -- based on all the
4 information I've seen, it traveled a certain distance
5 after impact to rest. And from everything I've seen, that
6 was undisturbed. So, when vehicles get tied together for
7 any period of time, then that's -- you know, that's not an
8 uncontrolled rest, that's a controlled rest. And you
9 wouldn't have this evidence of rotating and going down and
10 so forth.

11 Q If there was sufficient contact, like you say,
12 that causes the momentum, wouldn't that also cause the BMW
13 to make a first collision with the moped and actually run
14 over the moped?

15 A No, sir. That's why it didn't run over it
16 because -- well, if they stuck together, the chances of it
17 running over would be great.

18 Q That's what I'm saying.

19 A Yes, sir, I'm sorry, yeah.

20 Q So, we know if they stuck together long enough,
21 the SUV is going to run over the moped. That, obviously,
22 didn't happen here?

23 A That's correct.

24 Q However, to have the momentum to push them to
25 the left, you've got to have it having contact for a

MATT SIMS-CROSS BY MR. MOORE

1 sufficient time to have that momentum and push to the
2 left; am I right?

3 A And that's a fraction of a second.

4 Q But you don't know how long they were together?

5 A No, sir.

6 Q Didn't make any calculations to that effect?

7 A No, sir.

8 Q Okay. Did you determine, you know, the amount
9 of friction between those two vehicles at any point?

10 A No, sir, I didn't. I know the -- I know about
11 what those surfaces are, but I mean, it was a -- it was a
12 square contact inside of the corner, meaning if it had
13 been -- if the contact had been on the corner of the
14 vehicle, you could have some -- there could be what's
15 known in pedestrian as a fender ball, whatever, something
16 could come down the side or whatever, so some of the
17 momentum could be lost like that. But in this case, it's
18 over in the front. So, there was nothing lost or it
19 wasn't a glancing blow, it was a solid blow.

20 Q Okay. Now, there was some testimony earlier
21 about where this collision took place on Blue Ridge
22 Highway?

23 A Yes, sir.

24 Q Given what we've just gone through about the
25 contact between the SUV and the moped, and whether there

MATT SIMS-REDIRECT BY MR. GARCIA

1 was a right to left movement or a straight-on movement,
2 straight-on rear-end collision or a swerving to the left
3 rear-end collision, does it matter where on Blue Ridge
4 Highway this accident occurred?

5 A Just to get -- if you want to get the facts
6 right, it matters. I mean, I just want to know when I get
7 on the stand. If I had it in the wrong place, you'd
8 probably tell me, Mr. Moore.

9 Q Well, I probably would. But I'm just saying as
10 far as your analysis is concerned, though, it doesn't make
11 any difference, does it?

12 A It's just some of the facts, but as far as my
13 analysis to where they came in contact and where they came
14 to rest, that could have happened anywhere on that road.

15 MR. MOORE: Yes, sir. Thank you.

16 THE COURT: Redirect.

17 REDIRECT EXAMINATION

18 BY MR. GARCIA:

19 Q We'll come back to that in a moment. You were
20 asked about this statute and I believe -- let me ask you
21 this, I'll just ask you like this, Mr. Sims.

22 Since upon the roadway is restricted to
23 one-way traffic, we have upon all roadways any vehicles
24 proceeding at less than the normal speed -- then there's
25 this except here -- it's says, When overtaking and passing

MATT SIMS-REDIRECT BY MR. GARCIA

1 another vehicle proceeding in the same direction or when
2 preparing for a left turn at an intersection or private
3 road or driveway.

4 Does it say you have to be in the process
5 of making a left-hand turn?

6 A No, sir, it says, Preparing.

7 Q Does it give you any indication as to how many
8 feet you have to begin to prepare or you have to limit
9 that preparing to a certain number of feet?

10 A No, sir.

11 Q Is it somewhat open ended on whether you're
12 preparing to turn left or not?

13 A Yes, sir. I don't know what -- preparing could
14 mean different things to different people.

15 Q Based on the information that you reviewed in
16 this particular file, is it your understanding that
17 Mr. Burgess was preparing to turn left up the road when he
18 exits the Hot Spot?

19 MR. MOORE: Objection to the form, Your Honor.

20 THE COURT: Yeah, form. He's trying to read his
21 state of mind and he can't do that. He's not
22 qualified as an expert in that field.

23 MR. GARCIA: Understand. Thank you. Thank you.

24 BY MR. GARCIA:

25 Q I'll ask you this question, Mr. Sims, did you

MATT SIMS-REDIRECT BY MR. GARCIA

1 consider the potential for right to left movement of the
2 moped in front of Ms. Hunter before this collision
3 occurred?

4 A I did, yes, sir.

5 Q Was that a possibility based on the information
6 you had available to you?

7 A I considered it, but once I looked at all the
8 facts, it was not a possibility.

9 Q Following the cross-examination of Mr. Moore and
10 going through the details from his perspective what it is
11 he wanted you to look at, have you changed your opinion at
12 all today?

13 A No, sir.

14 Q Is your opinion -- can you state your opinion
15 again to a reasonable degree of certainty in your field of
16 expertise?

17 A Yes, sir. Quite simply, my opinion is that
18 Ms. Hunter was traveling down West Blue Ridge in the
19 left-hand lane of a four-lane road. Obviously, what I'm
20 talking about, ladies and gentlemen, two lanes in each
21 direction, she was in the left-hand lane nearest the
22 median. And Mr. Burgess was somewhere in front of her on
23 the moped. She didn't see him until the last second and
24 she swerved to the left to try to avoid, makes contact
25 with the right front, not right corner, not right side,

MATT SIMS-REDIRECT BY MR. GARCIA

1 right front of center of her car, the photos you've seen,
2 and her swerving motion, her momentum carries him in the
3 direction of her swerve, which is to the left and then to
4 the median. When -- after a rotation, as I described, of
5 a clockwise rotation, causing the initial damage and
6 secondary damage that you see on the moped, causing it to
7 rotate clockwise, then high side on the left side, come
8 down on the left side, scratch the left side of the moped
9 and caused Mr. Burgess injuries to the left side.

10 Q Is the resting location -- or maybe I should say
11 the resting location of the vehicles a critical part of
12 reconstructing a collision?

13 A Yes, sir, it's important. It's very important
14 if you can determine the areas of rest. Okay.

15 MR. GARCIA: I don't have any further questions.

16 MR. MOORE: Nothing further.

17 THE COURT: Thank you. You can step down.

18 All right, ladies and gentlemen, it's almost one
19 o'clock. Let's break for lunch and ask you to be
20 back at two o'clock. It's 12:50, that gives you a
21 little over an hour. Don't discuss the case, don't
22 do any independent research, don't visit the scene.
23 We'll see you back at two o'clock. Thank you.

24 (WHEREUPON, the jury left open court at
25 approximately 12:49 p.m.)

MATT SIMS-REDIRECT BY MR. GARCIA

1 THE COURT: All right, anything before we break?

2 MR. MOORE: No, sir.

3 MR. GARCIA: Your Honor, I'll say this. I'm
4 trying to figure out -- we'll move to the video
5 depositions now. I'm trying to figure out maybe the
6 order we can play them in to conform with the time
7 that we have to work with.

8 THE COURT: Well, that's good. I'm glad you're
9 doing that.

10 MR. GARCIA: Sure. Do you have a suggestion on
11 stop time today so you can just work through those?

12 THE COURT: No, sir, I don't.

13 MR. GARCIA: Okay.

14 (WHEREUPON, a lunch break was taken.)

15 THE COURT: All right, let's go.

16 MR. MOORE: We're doing videos now. My thought,
17 if you're okay with this, is probably take a break
18 after direct and then get to -- the first one is
19 going to be a long one.

20 THE COURT: What's long? How long?

21 MR. GARCIA: It's two hours and 40 minutes. I
22 think that direct is only about an hour.

23 MR. MOORE: Break at direct, then go to cross
24 from there.

25 THE COURT: We'll see. We'll see.

MATT SIMS-REDIRECT BY MR. GARCIA

1 MR. GARCIA: Okay.

2 THE COURT: All right, Mr. Teal.

3 (WHEREUPON, the jury came into open court at
4 approximately 2:00 p.m.)

5 THE COURT: All right, ladies and gentlemen,
6 welcome back. I think I told you yesterday that
7 evidence would come to you one of three ways, do you
8 remember that? The most common way is through oral
9 testimony from the witness stand. Well, you're about
10 to get oral testimony from the television. Or video,
11 whatever you want to call it. It's a video taped
12 deposition where everyone was present. Both sides
13 are represented and all please judge this by the same
14 standard that you judge all the other evidence in
15 this case and give it the weight that you think it
16 deserves. Okay.

17 All right.

18 MR. GARCIA: Your Honor, I'm calling
19 Dr. Brennan, the neurosurgeon from Florence via video
20 deposition.

21 (WHEREUPON, the video deposition of Dr. James
22 Brennan was published.)

23 (WHEREUPON, Plaintiff's Exhibit No. 15 was
24 marked for identification and received into
25 evidence.)

MATT SIMS-REDIRECT BY MR. GARCIA

1 (WHEREUPON, Court's Exhibit No. 3 was marked for
2 identification only.)

3 THE COURT: All right, ladies and gentlemen,
4 this may be a good time just to take a short break.
5 So, we'll take about five or ten minutes and get back
6 to you in just a minute.

7 (WHEREUPON, the jury left open court at
8 approximately 2:53 p.m.)

9 THE COURT: All right, anything?

10 MR. MOORE: I'm just stretching my leg.

11 THE COURT: Okay.

12 (WHEREUPON, a short break was taken.)

13 THE COURT: All right, we ready to go?

14 MR. GARCIA: Yes, sir.

15 THE COURT: Okay.

16 (WHEREUPON, the jury came into open court at
17 approximately 3:03 p.m.)

18 THE COURT: All right, let's resume.

19 (WHEREUPON, The deposition of Dr. James Brennan
20 was continued to be published.)

21 MR. MOORE: Judge, it looks like about 27 more
22 minutes of this, do you want to take break at this
23 point?

24 THE COURT: Yes.

25 All right, ladies and gentlemen, y'all take just

MATT SIMS-REDIRECT BY MR. GARCIA

1 a few minutes, get stretched and refreshed and we'll
2 get back with you in just a minute.

3 (WHEREUPON, the jury left open court at
4 approximately 4:21 p.m.)

5 THE COURT: Ask y'all to stay seated until the
6 jury exists the courtroom, please.

7 All right, take about five, ten minutes.

8 (WHEREUPON, a short break was taken.)

9 THE COURT: Okay.

10 (WHEREUPON, the jury came into open court at
11 approximately 4:33 p.m.)

12 THE COURT: Okay, crank it up. All right, ready
13 to go?

14 (WHEREUPON, the video deposition of Dr. James
15 Brennan was continued to be published.)

16 MR. MOORE: We're going to stop it there.

17 THE COURT: Okay.

18 Ladies and gentlemen, it's almost five o'clock,
19 so I think it's probably a good time to stop. Again,
20 don't discuss the case with anyone, don't go and do
21 research, don't visit the scene. Go home and forget
22 about it and we'll see you back and try to start
23 again at 10 o'clock in the morning. All right, thank
24 you, very much.

25

MATT SIMS-REDIRECT BY MR. GARCIA

1 (WHEREUPON, the jury left open court at
2 approximately 5:00 p.m.)

3 THE COURT: All right, what's left?

4 MR. GARCIA: I have a couple more videos,
5 they're not nearly as long as that. One is 30
6 minutes, the other one is an hour and 24. Then I
7 have a lifecare planner and a vocational expert. I
8 may call the Plaintiff's wife, I may not. I'm really
9 not sure at this point.

10 THE COURT: All right.

11 MR. MOORE: I'm going to recall the Defendant,
12 that will be relatively short. I have a witness who
13 will testify in regards to the cost of the spinal
14 service. And then I have an accident
15 reconstructionist that will be my longer witness.

16 THE COURT: All right. All right, see you at
17 10:00 in the morning.

18 (WHEREUPON, the proceedings were concluded for
19 the day to be reconvened on June 27, 2018.)
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MATT SIMS-REDIRECT BY MR. GARCIA

1 June 27, 2018.

2 THE COURT: All right, ready to go?

3 MR. GARCIA: Yes, sir, Your Honor.

4 MR. MOORE: Yes, sir.

5 THE COURT: Okay.

6 MR. GARCIA: Your Honor, just a quick --
7 hopefully so we can slide into the next video. We
8 have the first video is about half an hour. And the
9 next video after that is about an hour and 20 minutes
10 or so. I just -- I simply wanted to make sure on the
11 record that my objection regarding reference to the
12 surveillance video in Dr. Scott's video deposition
13 has been preserved.

14 THE COURT: I believe you've already done that
15 but now it's for sure. Okay.

16 MR. GARCIA: Thank you.

17 (WHEREUPON, the jury came into open court at
18 approximately 10:06 a.m.)

19 THE COURT: Hope y'all had a pleasant evening
20 last night. And enjoyed that kind of break in the
21 weather. That was really neat. All right, we're
22 ready to start again today. Okay.

23 MR. GARCIA: Thank you, Your Honor, The
24 Plaintiff calls the video deposition of
25 Dr. Loudermilk.

MATT SIMS-REDIRECT BY MR. GARCIA

1 (WHEREUPON, the video deposition of
2 Dr. Loudermilk was published.)

3 THE COURT: Is everybody good? I think they're
4 going right to -- you're okay? Oh, okay, I think
5 they're going right into another deposition.

6 Is that right?

7 MR. GARCIA: Yes, sir. We'll call now Dr. Scott
8 via video deposition. This will be the last medical
9 doctor we will call and the last video deposition
10 that we will use.

11 (WHEREUPON, the video deposition of Dr. Glenn
12 Scott was published.)

13 (WHEREUPON, Plaintiff's Exhibits Nos. 16-17 were
14 marked for identification and received into
15 evidence.)

16 (WHEREUPON, Court's Exhibits Nos. 4-5 were
17 marked for identification only.)

18 THE COURT: How long is the cross?

19 MR. GARCIA: Got 32 minutes up there, Your
20 Honor.

21 THE COURT: All right, we'll we've been going,
22 how about we take a short break. All right, take
23 about ten minutes, we'll get right back with you.

24 (WHEREUPON, the jury left open court, at
25 approximately 11:30 a.m.)

MATT SIMS-REDIRECT BY MR. GARCIA

1 (WHEREUPON, a short break was taken.)
2 (WHEREUPON, Court's Exhibit No. 6 was marked for
3 identification only.)
4 THE COURT: All right, y'all ready?
5 MR. GARCIA: Yes, sir.
6 MR. MOORE: Yes, sir.
7 THE COURT: Okay.
8 (WHEREUPON, the jury came into open court at
9 approximately 11:51 a.m.)
10 THE COURT: All right, welcome back.
11 Resume.
12 (WHEREUPON, the video deposition of Dr. Glenn
13 Scott was continued to be published.)
14 MR. MOORE: Can we approach?
15 (WHEREUPON, a bench conference was held in the
16 presence of the jury but out of the hearing of
17 the jury.)
18 THE COURT: All right, ladies and gentlemen of
19 the jury, we're just going to have to take a short
20 break. Ask y'all to retire to the jury room, we'll
21 get right back with you. Thank you.
22 (WHEREUPON, the jury left open court at
23 approximately 12:07 p.m.)
24 THE BAILIFF: Jury secured, Your Honor.
25 THE COURT: All right, thank you.

MATT SIMS-REDIRECT BY MR. GARCIA

1 MS. HUNTER: I'm sorry, I just don't feel very
2 good all of a sudden.

3 THE COURT: Ma'am, you need something to eat?

4 MS. HUNTER: I really don't know. I want to lay
5 my head down for a moment.

6 (WHEREUPON, a short break was taken.)

7 THE COURT: On the record, in the middle of
8 Dr. Scott's cross-examination, Mr. Moore's client has
9 taken ill. Apparently, had a fainting spell. And we
10 called EMS and she has refused to go to the hospital
11 because she says she's feeling better. So, what I
12 would intend to do is suspend for the day, see if she
13 recovers over night. We'll come back and start in
14 the morning where we are.

15 MR. MOORE: Yes, sir.

16 THE COURT: So, make a note it's Dr. Scott's at
17 15:34:46.

18 MR. MOORE: With 17:53 left.

19 THE COURT: Oh, I see what you're talking about.

20 MR. MOORE: Yes, sir.

21 THE COURT: Okay.

22 Okay, let's bring the jury.

23 (WHEREUPON, the jury came into open court at
24 approximately 12:39 p.m.)

25 THE COURT: All right. Ladies and gentlemen,

MATT SIMS-REDIRECT BY MR. GARCIA

1 unusual circumstances to say the least. Ms. Hunter
2 has taken ill. And she is being escorted to the
3 doctor's office. We anticipate that she'll be fine
4 tomorrow but we're going to suspend for the day. So,
5 but, of course, what we do tomorrow, if she is not
6 able to continue, then we would have to go in a
7 different direction. But as of now, we will ask
8 y'all to be back at -- well actually, ask you to call
9 back after 6:00.

10 Can we do that?

11 THE CLERK: Yes, sir.

12 Just be sure to listen to the message for jury
13 number one.

14 THE COURT: Okay.

15 THE CLERK: Because we will be releasing the
16 rest of the jury tonight. So, if it says you're
17 released, be sure and listen for the message
18 pertaining to jury number one.

19 THE COURT: So, at that time we will either tell
20 you to be back at 10:00 the in morning or that you're
21 released, okay. That's about all we can do. Please
22 do not worry about Ms. Hunter. And a medical doctor
23 is going to check her out, make sure she's okay. And
24 y'all have a good afternoon. Again, don't discuss
25 the case. It's got to be tempting to do that. I'm

MATT SIMS-REDIRECT BY MR. GARCIA

1 sure that people are asking you about it, just don't
2 do it. Y'all have made huge sacrifices to get this
3 strong. So, stay strong in your oath and have a
4 pleasant afternoon. Maybe it won't rain.

5 A JUROR: Will this be delayed until next week?

6 THE COURT: No, sir, it will not be delayed
7 until next week. It will either go forward tomorrow
8 or we will find a different resolution. Okay. All
9 right. Great. Thank y'all very much for everything
10 you're doing. Call in after 6:00 p.m. tonight and
11 remember to listen for jury number one, okay. All
12 right, thank you very much.

13 (WHEREUPON, the jury left open court and was
14 excused for the day at approximately 12:42 p.m.)

15 THE COURT: Okay, I don't know what else to tell
16 you.

17 MR. MOORE: Skip will call me once he realizes
18 what's going on. And I can notify whomever I need to
19 notify.

20 THE CLERK: I can give you my cell phone number.

21 MR. MOORE: Okay.

22 THE COURT: All right.

23 (WHEREUPON, the proceedings were concluded for
24 the day to be reconvened on June 28, 2018.)

25

MATT SIMS-REDIRECT BY MR. GARCIA

1 June 28, 2018

2 THE COURT: All right, Ms. Hunter, hope you're
3 feeling better.

4 MS. HUNTER: I am, thank you, Your Honor.

5 THE COURT: I hope is wasn't anything seriously
6 wrong.

7 MS. HUNTER: No, my blood sugar was low. I
8 hadn't eaten anything and I took some cold medicine.
9 But I feel better.

10 THE COURT: All right, well good. Good.

11 All right, we're ready to go?

12 MR. MOORE: Ready to go.

13 MR. GARCIA: Your Honor, I believe you wanted
14 the proposed jury charges.

15 THE COURT: All right.

16 MR. GARCIA: First thing.

17 THE COURT: Cheryl, if you'll get those.

18 All right, bring them in.

19 (WHEREUPON, the jury came into open court at
20 approximately 10:02 a.m.)

21 THE COURT: Good morning, ladies and gentlemen,
22 hope y'all had a good afternoon. I want to report
23 that everybody is back to 100 percent, we're ready to
24 go again. We're going to start right about where we
25 left off yesterday. All right.

JOEL LEONARD-DIRECT BY MR. GARCIA

1 (WHEREUPON, the video deposition of Dr. Glenn
2 Scott was continued to be published.)

3 THE COURT: Call your next witness.

4 MR. GARCIA: Thank you. Your Honor, the
5 Plaintiff calls Mr. Joel Leonard.

6 THE CLERK: Place your left hand on the Bible
7 raise your right hand.

8 Joel Leonard, after being duly sworn, testified
9 as follows:

10 THE CLERK: State your full name.

11 THE WITNESS: My name is Joel David Leonard.

12 THE CLERK: Please be seated.

13 DIRECT EXAMINATION

14 BY MR. GARCIA:

15 Q Good morning, Mr. Leonard.

16 A Good morning.

17 Q Mr. Leonard, where do you reside?

18 A Columbia, South Carolina.

19 Q Can you tell me a little bit about your
20 educational background? Where did you acquire your
21 undergraduate degree and in what discipline?

22 A I'm a graduate of Stonehill College and possess
23 a Bachelor of Arts in communications.

24 Q Okay. Where is Stonehill College?

25 A It's located in Easton, Massachusetts, about 20

JOEL LEONARD-DIRECT BY MR. GARCIA

1 minutes or so outside of Boston.

2 Q Did you acquire a Master's Degree?

3 A I do. I possess a Master's Degree from the
4 University of South Carolina?

5 Q Do you remember what year you completed your
6 Master's?

7 A I graduated in 1993. It's a Master's Degree in
8 rehabilitation counseling.

9 Q Following that, where were you employed?

10 A Upon graduating from that program, I worked for
11 the State of South Carolina in the South Carolina
12 Vocational Rehabilitation Department. I worked over a
13 number of years performing a variety of different jobs.

14 Q What state agency were you employed?

15 A It was the South Carolina Vocational
16 Rehabilitation Department.

17 Q If you can, what did you do for that state
18 agency?

19 A I held three positions during my tenure there.
20 I started out as a counselor, which, basically, involved
21 receiving individuals that had a type of potentially a
22 physical and/or psychological disability in working with
23 them towards competitive employment. As a field
24 counselor, you're maintaining a case with numerous
25 clients, attempting to deliver services, remove barriers

JOEL LEONARD-DIRECT BY MR. GARCIA

1 to employment and, hopefully, execute a successful
2 placement to gainful employment.

3 I then transitioned from that occupation to
4 that of a vocational evaluator, where I would meet with
5 individuals who were entering into the rehabilitation
6 process to help access them to determine goals and
7 activities and services that might allow them to be
8 successful.

9 From there, I became a special services
10 coordinator in which I worked on a partial day program and
11 inpatient comprehensive vocational rehabilitation program,
12 where individuals came in for a month, went through a
13 discipline of variety services, physical therapy,
14 occupational therapy, medical management, psychological
15 services, vocational services with the intent of producing
16 rehabilitation plans to help those individuals execute
17 vocational goals or independent goals, depending on the
18 severity of their disability in the community.

19 Q Is the eventual goal to, essentially, place
20 these individuals with an employer?

21 A Eventually, yes, sir.

22 Q Is there any requirement that a state citizen
23 needs to meet to be able to take advantage of these
24 services?

25 A Yes, there is. The requirements when I was

JOEL LEONARD-DIRECT BY MR. GARCIA

1 there covered not only -- there was eligibility that
2 covered financial issues, which, basically, meant what
3 your level of income is. But the primary degree of
4 eligibility was to determine whether or not it was likely
5 that the delivery of services would predictably impact in
6 an outcome supportive of gainful employment. A lot of
7 people would describe vocational rehabilitation services
8 as a -- generally, a more conservative approach to social
9 services program, which you have a point of entry here,
10 then exit with an intended goal of employment.

11 Q Okay. Did you move to private practice at some
12 point?

13 A I did.

14 Q What's the name the practice?

15 A In 1997, I set up -- well, I went just my name
16 at point, then transitioned it to Leonard and Associates.

17 Q Is that practice located in Columbia, South
18 Carolina?

19 A It is, yes.

20 Q Okay. What does the practice consist of,
21 Mr. Leonard?

22 A I provide, generally speaking, vocational
23 evaluation services and vocational consultation services,
24 primarily associated with contested issues. That is, I
25 provide vocational evaluations in individuals who

JOEL LEONARD-DIRECT BY MR. GARCIA

1 sustained work-related injuries and a determination of
2 their employability, their earning capacities according to
3 the resolution or the progression of the case. I do the
4 same thing with respect to civil, personal injury claims,
5 such as what brought me here today.

6 I serve as a consultant with the social
7 security administration, which I sit in on administrative
8 hearings with judges and answer questions about
9 employability. I provide services similar to this in
10 domestic proceedings where spouses, individuals are
11 separating their marriage and there's an earning capacity
12 as to one spouse in terms of imputing income and alimony
13 and child support. I am also a conference officer for the
14 public employee benefit program, which -- Public
15 Employment Benefit Authority, which used to be South
16 Carolina Retirement Systems. I handle their
17 administrative appeals for disability claims.

18 Then in addition to that, I provide other
19 consultative services across the scope of areas in terms
20 of working with individuals in goal identification, career
21 development type of stuff.

22 Q All right. Are you a certified rehabilitation
23 counselor?

24 A Yes, I am. I hold two National certifications,
25 a Certified Rehabilitation Counselor and a Certified

JOEL LEONARD-DIRECT BY MR. GARCIA

1 Vocational Evaluator, referred to as CRC and CVE.

2 Q How does one acquire those certifications?

3 A You possess to requisite educational experience
4 and level of hours experience if you're taking it right
5 out of graduate school and then you pass a National
6 examination.

7 Q Have you ever been certified by civil or
8 administrative court as an expert in vocational evaluation
9 and/or rehabilitation?

10 A I don't know if I have necessarily been
11 certified, but I have been admitted as an expert in
12 multiple court proceeding as a vocational consultant,
13 vocational rehabilitation consultant, vocational expert.
14 Semantics vary from one setting to another.

15 MR. GARCIA: Your Honor, I move to have
16 Mr. Leonard qualified as an expert in the field of
17 vocational evaluation and rehabilitation.

18 MR. MOORE: No objection.

19 THE COURT: Okay.

20 BY MR. GARCIA:

21 Q All right, Mr. Leonard, can you tell me what
22 percentage of your practice involves work for attorneys
23 seeking expert opinion for civil or workers' compensation
24 cases?

25 A I would estimate that roughly just -- not

JOEL LEONARD-DIRECT BY MR. GARCIA

1 individual, just the broad base of attorneys in general, I
2 would estimate that roughly 60 to 75 percent of my income
3 annually is derived from those types of services.

4 Q Okay. Of those attorneys for which you have
5 performed these evaluations, can you tell me what
6 percentage are plaintiffs and what percentage are for
7 defendants?

8 A I never know exactly at any one time.
9 Generally, my impression is that based upon what case load
10 coming in and out is that it varies anywhere from 60 to 40
11 one direction and the other. There may be a time where I
12 tend to be more heavy with plaintiff referrals and then
13 there tends to be times when I'm more heavy with defense
14 referrals. I don't limit my practice to any particular
15 side. I take referrals as they come and move forward to
16 delivery services if necessary in any aspect. I have no
17 conflicts from one side to the other.

18 Q What is your understanding of what it is that
19 you were hired to do in this case?

20 A I was specifically asked to access Mr. Burgess'
21 perspective employability and earning capacity relative to
22 the intervening event of the motor vehicle accident and
23 the alleged impact thereof. In terms of impact, I mean,
24 physical and any altercation to what we call his or
25 overall vocational profile.

JOEL LEONARD-DIRECT BY MR. GARCIA

1 Q Okay. Are your opinions today which you are set
2 to offer objective without influence from either party?

3 A Yes, they are.

4 Q Prior to your -- I'm assuming at some point, you
5 actually sat down with Mr. Burgess and evaluated him?

6 A That's correct, I met with him on two occasions.

7 Q Prior to your evaluation of Mr. Burgess, did you
8 review documents, wage records, medical opinions or
9 anything else?

10 A Yes, sir.

11 Q Okay. Did you use all of those?

12 A You mean every single document that I received
13 in the referral?

14 Q No, what I'm asking you is -- let me ask you
15 this, did you review wage records?

16 A I did.

17 Q Did you use medical opinions or review medical
18 opinions?

19 A Yes.

20 Q Okay. What takes place at your meeting with
21 Mr. Burgess?

22 A When I meet with the individual to conduct an
23 evaluation for the first time, we engage in a two-prong
24 exercise that consists of the formal vocational interview,
25 which is a long and detailed question and answer about

JOEL LEONARD-DIRECT BY MR. GARCIA

1 various facets of what we call a person's overall
2 vocational profile. An overall vocational profile is
3 something we all possess. It determines our ability to
4 enter and exit and access the labor market, age,
5 education, work history, skills, where we live and other
6 variety of factors to include our physical and/or
7 psychological health. So, we went through an extended
8 interview with that.

9 Then I also administered -- or my case
10 assistant administered in this case basic testing driven
11 by an attempt to determine academic standing and overall
12 reasoning and general intelligence. That would be another
13 factor that you would want to assess to determine a
14 person's overall vocational profile.

15 Q What is your understanding regarding
16 Mr. Burgess' educational background?

17 A He has what we refer to as a limited education.
18 I believe he completed the 10th and went part way through
19 the 11th. Or completed the ninth and went part way
20 through the 10th. I can't remember off the top of my
21 head. He does not have a high school diploma or a GED.

22 Q What did your evaluation reveal regarding
23 Mr. Burgess' vocational profile prior to the collision
24 we're here about?

25 A His vocational profile prior to the collision,

JOEL LEONARD-DIRECT BY MR. GARCIA

1 it had both what I would consider to be positive and
2 negative vocational factors in terms of his educational
3 standing, work history, skills, other placement profiles
4 and whatnot. But the determine of -- the determination of
5 what we call his premorbid vocational profile previous to
6 the event is that he retained access to the labor market
7 in an earning capacity.

8 Q What type of physical demand capacity jobs is
9 Mr. Burgess qualified to do based on his prior education
10 and work history?

11 A At present right now?

12 Q No. I would say at the time you first saw
13 him -- or excuse me, prior to the accident is what I meant
14 to ask you. Prior to this collision we're here about?

15 A Well, he would have likely been capable of
16 engaging in a wide range of different types of
17 occupations, primarily, to the low end of skilled
18 parameters. You know, I think within the context of some
19 discussions, you could have identified numerous
20 occupations, maybe might have been a janitor, a landscape
21 helper. He might have been able to fulfill orders or do
22 some type of warehouse work or whatnot. He also had some
23 past history of some engagement to some retail work
24 activity.

25 So, he had a constellation of occupations

JOEL LEONARD-DIRECT BY MR. GARCIA

1 across -- not a narrow -- not a wide range, but not a
2 narrow range, but he had a limited range of work activity.
3 But considered in a pre-injury or premorbid capacity, I
4 felt like he was capable of competitive employment.

5 Q Okay. Was Mr. Burgess employed at the time of
6 the collision we're here about?

7 A It is my understanding he was, yes.

8 Q In your opinion and to a reasonable degree of
9 certainty as an expert in your field, what was
10 Mr. Burgess' earning capacity at the time of the
11 collision?

12 A Well, my understanding is at the time of the
13 collision, based upon the evidence in the record and
14 various documentary information and discussions with him,
15 it was around \$400 a week.

16 Q Okay. Now, what did your evaluation and review
17 of records reveal regarding Mr. Burgess' earning capacity
18 following the collision?

19 A Well, within the timeline -- my conclusion at
20 the time I met him the first time or present altogether?

21 Q Present altogether?

22 A I have come to the conclusion and issued the
23 opinion, both with the documentary evidence that was
24 submitted previously as well as in follow up to that, to
25 bring us to current, I have reached a conclusion that at

JOEL LEONARD-DIRECT BY MR. GARCIA

1 present I do not consider Mr. Burgess to be capable of
2 traditional competitive gainful employment. And as such,
3 I would set forth an opinion where I believe he has no
4 residual earning capacity relative to the functional
5 effects of the motor vehicle accident.

6 Q Is that opinion stated to a reasonable degree of
7 certainty for an expert in your field?

8 A Yes, within a reasonable degree of professional
9 vocational certainty, more likely than not.

10 Q What is your understanding regarding
11 Mr. Burgess' physical limitations and/or restrictions?

12 A Well, at present, it's my understanding that I
13 would consider his physical profile, and that's referred
14 to what we call physio-vocational status, which is the
15 analysis and consideration of medical findings and
16 functional findings that determine what type of exertional
17 and physical activity a person can do. At present as well
18 as throughout the whole time I evaluated him, I would
19 consider him to have a job preclusive designation, that is
20 a functional designation that is not consistent with any
21 significant exertional work activity. And that's based
22 primarily upon the medical directives -- well, actually,
23 exclusively on the medical directives associated with this
24 case.

25 Q How do Mr. Burgess' current physical limitations

JOEL LEONARD-DIRECT BY MR. GARCIA

1 hinder his ability to find employment?

2 A Well, as I noted earlier, Mr. Burgess did not
3 have the best pre-injury vocational profiles, he had some
4 liabilities. However, in the world of work, you can count
5 for certain liabilities based upon your physical health
6 and what you can or cannot do. In this case, he has,
7 essentially, the same premorbid profile in terms of
8 educational standing, intellect capability and whatnot,
9 but post-injury, the variable that has seemingly
10 significantly changed is his ability to engage in
11 exertional work activity, physical functional tasks. So,
12 that really is the difference from a vocational
13 perspective in terms of endorsing work activity versus
14 provide the opinion I have right now, which is I do not
15 endorse work activity or consider him to be capable of
16 employment. So, basically, it's the residual erosion of
17 what he could physically do.

18 Q So, in your experience and in your opinion
19 stated to a reasonable degree of certainty for an expert
20 in your field, does Mr. Burgess fit the profile of an
21 individual that could potentially reeducate or retrain and
22 enhance or improve his vocational opportunities to the
23 extent that he is not longer vocationally disabled?

24 A I think that is unlikely based upon my
25 impressions of his overall vocational profile and

JOEL LEONARD-CROSS BY MR. MOORE

1 educational status and standing.

2 MR. GARCIA: I don't have any further questions.

3 Answer any questions Mr. Moore may have for you.

4 CROSS-EXAMINATION

5 BY MR. MOORE:

6 Q Mr. Leonard, when you're making your evaluation,
7 you take into account certain factors, do you not?

8 A I do, sir.

9 Q What you're doing is comparing those factors
10 before he has his injuries and his condition at that time
11 with those factors as they exist after the injury and his
12 condition at that time, am I right?

13 A That's a fair representation, yes.

14 Q All right. Now, the factor you consider would
15 be -- include his age, am I right on that?

16 A Yes, sir.

17 Q Okay. And that's important from an employment
18 standpoint because an employer is more likely to hire a
19 younger person with some type of experience as opposed to
20 an older person with some type of experience, am I right?

21 A Yes and no. Let's just say of all the factors
22 that I considered, age sort of falls to a side burner.
23 Yes, age is important, but it is more important relative
24 to vocational outcomes that you're focusing on. So,
25 without getting disgustingly into in-depth details, yes,

JOEL LEONARD-CROSS BY MR. MOORE

1 age is an important factor. It's not as overly directive
2 in an immediate sense when I start going down the list.
3 Thank you, I'm sorry.

4 Q That's fine. In other words, someone is more
5 likely to hire a younger person, such as Mr. Garcia,
6 rather than an old goat like me, right?

7 A In overall theory, yes, but sometimes, no. See,
8 I might like an old goat like you because you don't got
9 kids that you're going to miss work and you can show up to
10 my office. You know what I mean?

11 Q I understand.

12 A So, I purposely hire -- in my administrative
13 circumstance, I prefer older assistants for all those
14 reasons. So, that's the point I'm trying to make. It
15 depends on a variable with respect to the targeted area
16 that you're looking at work.

17 Q Okay. Another factor you consider is one's
18 education. I think you hit on this earlier. His
19 education is limited, is it not?

20 A It is, correct.

21 Q I think he had a 10th grade education, somewhat
22 into the 11th grade; is that right?

23 A That's my understanding, yes, sir.

24 Q Never got his GED?

25 A That's correct.

JOEL LEONARD-CROSS BY MR. MOORE

1 Q And the fact that he doesn't have a high school
2 diploma is going to limit him with regard to what jobs
3 he's going to have either before the accident or after the
4 accident, am I right?

5 A Yes, that's a fair statement.

6 Q Someone with further education, such as a
7 doctor, for example, they have to have that education to
8 get the job. If he doesn't have that education, he can't
9 get that type of job, am I right?

10 A Yes, there are occupations that are commensurate
11 to education, yes.

12 Q You also consider one's criminal history, do you
13 not?

14 A I do.

15 Q That's important because employers do look at
16 one's criminal history when they are hiring a potential
17 employee; is that correct?

18 A It's a perspective consideration, yes.

19 Q Okay. And this particular client had a criminal
20 history, did he not?

21 A That is my understanding, yes.

22 Q For example, he, I believe, had been arrested
23 and convicted on a felony for stealing from a former
24 employer, am I right?

25 A That is my understanding, yes.

JOEL LEONARD-CROSS BY MR. MOORE

1 Q Took about \$2,000 from that employer?

2 A Yes, sir.

3 Q An employer under those circumstances is going
4 to be reluctant to hire him, are they not?

5 A There are certain instances where that's
6 completely accurate, yes.

7 Q And that existed before this accident happened?

8 A That's correct.

9 Q That's a limitation that preexisted the
10 accident, it's not caused by the accident, right?

11 A I agree.

12 Q Now, he also -- at the time of the accident, one
13 thing you look at is his ability with regard to
14 transportation, to drive and get back and forth to work or
15 to other places involve in work, am I right?

16 A Yes.

17 Q In that respect, a driver's license is
18 important, is it not?

19 A That's correct.

20 Q At the time of this accident, he didn't have a
21 driver's license, did he?

22 A He did not.

23 Q He had lost that driver's license, and we just
24 talked about the criminal aspect, because he had been
25 convicted of DUI and leaving the scene, am I right?

JOEL LEONARD-CROSS BY MR. MOORE

1 A My understanding was DUI and driving under
2 suspension. Are you talking about the time of the
3 accident?

4 Q No, this is before that.

5 A I didn't have the details of leaving the scene.
6 I had a DUI and driving under suspension was what I was
7 understanding. I'm not saying he didn't leave the scene,
8 I just didn't --

9 Q All right. That's a limitation that he has
10 pre-accident, correct?

11 A That's correct.

12 Q All right. Actually, after the accident, that
13 got better, did it not?

14 A It did.

15 Q He now has a driver's license, correct?

16 A That's correct.

17 Q So in that respect, things have gotten somewhat
18 better after the accident?

19 A Somewhat better is a good representation, yes.

20 Q Now, you also consider his work history, am I
21 right?

22 A Yes.

23 Q At the time of the accident, do you know where
24 he was working?

25 A ESS Resins I believe was the name of the

JOEL LEONARD-CROSS BY MR. MOORE

1 employer.

2 Q He was a laborer there?

3 A That's correct.

4 Q And you indicated you felt like he was earning
5 \$200 per week -- \$400 a week?

6 A That's correct.

7 Q That equates yearly to about \$20,000?

8 A That's correct.

9 Q And yet, we look at his income tax statement,
10 have you seen this?

11 A I likely have.

12 Q Okay. And it indicated that year where he was
13 working, he earned a little bit more than \$7,000 gross
14 income, am I right?

15 A That's correct, he didn't work the entire
16 calendar year.

17 Q Well, he worked for seven months during that
18 year, did he not?

19 A That's what was reported to me.

20 Q So, if we annualize that, that's \$12,000 a year.
21 It's not 20, correct?

22 A That's correct.

23 Q And we also know he only worked there seven
24 months and part of that time was part time work there,
25 correct?

JOEL LEONARD-CROSS BY MR. MOORE

1 A We're not sure -- I'm not even sure he worked
2 there seven months.

3 Q But that's he told you, wasn't it?

4 A Within the context of the interview, yes.

5 Q Okay.

6 A But yes, it was my understanding is there was a
7 period of work where he was not full time, that it was
8 part time.

9 Q And before he worked at ESS Resins, he was
10 unemployed for a time period, was he not?

11 A That's correct.

12 Q Before that time, where did he work?

13 A Before that time, I believe he was at Farmer's
14 Market, which was a convenience store.

15 Q Okay. And how long did he work there?

16 A Well, it's hard to say exactly how long he
17 worked there because the documented evidence is difficult.
18 He's kind of variant in terms of dates on it.

19 Q Did you get any income tax statements from him
20 regarding that?

21 A I have income tax statements, but I don't have
22 W-2 statements. So, I have listed income, but I don't
23 know what the derivative source is for that.

24 Q And before he worked at the Farmer's Market,
25 where did he work?

JOEL LEONARD-CROSS BY MR. MOORE

1 A My understanding that the Farmers -- I may not
2 have this in the right order, there was work activity at
3 Family Dollar.

4 Q Is that where he was, basically, stealing from
5 his employer?

6 A That's where he was apparently let go for the
7 incident you're discussing?

8 Q The felony?

9 A Correct.

10 Q I'm assuming he got fired because of that,
11 right?

12 A I don't know what happened. You can assume
13 whatever you want, but I don't know.

14 Q Typically, an employer is not going to keep an
15 employee who has stolen about \$2,000?

16 A I wouldn't think so.

17 Q Okay. Where else has he worked?

18 A Prior to that, he has done some forklift and
19 warehouse work, and then there's some work at hotels.

20 Q Okay. Throughout this -- he's worked various
21 jobs during his work life history, correct?

22 A Yes, sir.

23 Q And during that work life history, it's kind of
24 spotty. He'll work at a job for a few months and then
25 he'll leave and there'll be a time where he's unemployed.

JOEL LEONARD-CROSS BY MR. MOORE

1 He'll get another piece of employment and then he'll be
2 unemployed for a time period there, correct?

3 A That would appear to be the case.

4 Q So, he has not been consistently employed
5 throughout his work life history, wouldn't you agree with
6 me on that?

7 A Based upon the evidence I have, I would agree
8 with that.

9 Q Okay. And that was going to be true probably in
10 the future if he had not been involved in this accident,
11 am I right on that?

12 A I can't for sure with respect to that. It's
13 certainly a possible consideration, but I don't know.

14 Q Does history not give you some kind of
15 indication as to what he's going to do in the future?

16 A It can be interpreted that way, yes.

17 Q And in the future, as we age, I feel this way
18 sometimes, we slow down, do we not?

19 A I mean, sure.

20 Q A lot of people retire about 65 or 66 just
21 because of that, correct?

22 A Well, I'm not sure why a lot of people retire,
23 but yes, you can physically roll yourself out of the labor
24 market from just tired, endurance and whatnot and physical
25 decline in health and whatnot advance in conditions.

JOEL LEONARD-CROSS BY MR. MOORE

1 Q Did Mr. Burgess indicate to you when he was
2 going to retire?

3 A No, he didn't.

4 Q You didn't ask him that?

5 A I didn't ask him that. He was 45 years old when
6 I met with him.

7 Q And another fact that you consider, I believe,
8 is his health, correct?

9 A Yes, sir.

10 Q Now, we want to talk about his injuries from
11 this accident, but let's talk his health prior to the
12 accident, okay?

13 A Yes, sir.

14 Q Are you aware that he had problems not only with
15 his low back that were chronic in nature, but, also, in
16 his cervical or his neck and shoulder region?

17 A Well, let me tell you what I was aware of based
18 upon the evidence that I had. I know that he had back
19 complaints, but, apparently, diagnostically had been
20 associated with his neck. There were also some complaints
21 in the record of low back complaints as well. So yes, I
22 was aware of that. The clinical documentation as to the
23 extent of such, I didn't have a lot of direction on that.

24 Q Okay. Were you aware that shortly before this
25 accident occurred that he had been referred to the pain

JOEL LEONARD-CROSS BY MR. MOORE

1 clinic to deal with those two problem areas?

2 A That is referenced in the record, yes.

3 Q Okay. All right. Were you aware that he also
4 broken, I think, a bone in his foot just prior to this
5 accident?

6 A I was not aware of that.

7 Q Okay. Were you aware that he had problems with
8 depression prior to this accident?

9 A Yes.

10 Q Anxiety?

11 A Yes.

12 Q Obsessive compulsive disorder?

13 A I was aware that that had been referenced. I
14 didn't have the same level of depiction with that, but I
15 was aware there was psychiatric history with Mr. Burgess
16 --

17 Q There's also -- I'm sorry, I didn't mean to
18 interrupt you.

19 A That's fine. You're fine.

20 Q You're also a reference in those records to
21 bipolar disorder, am I right?

22 A That's correct.

23 Q Some of these problems from a psychiatric
24 standpoint, not always every day, but that affect him to
25 getting a job and holding a job, can it not?

JOEL LEONARD-CROSS BY MR. MOORE

1 A That is possible, yes.

2 Q Okay. Were you aware that he had heart problems
3 before?

4 A I was.

5 Q You were or were not?

6 A I was. I think it was referenced in the record
7 at one point as to -- relative to pre-surgical stuff or
8 something to that effect.

9 Q And people can work with a heart problem,
10 obviously, but that can come back to bite you later on
11 down the road, particularly as you age, am I right?

12 A That's possible, yes.

13 Q And that's going to effect the longevity of his
14 ability to work, would it not?

15 A It could.

16 Q Okay. Now, my understanding at the present time
17 is your opinion is he can't work, am I right?

18 A That's correct.

19 Q And that's based upon his present physical
20 condition?

21 A That's correct.

22 Q Okay. All other factors set aside, your
23 concentrating on his physical condition as he is right
24 now?

25 A That is correct.

JOEL LEONARD-CROSS BY MR. MOORE

1 Q Okay. But he hasn't reached MMI, has he?

2 A Apparently not.

3 Q MMI being maximum medical improvement, am I
4 right?

5 A That's correct.

6 Q He hadn't had what's called an FC, or a
7 functional capacity exam?

8 A That's correct.

9 Q And you often use that to make a determination
10 as to what he might be able to do physically, correct?

11 A Yes, but I wouldn't advise that in this type of
12 case.

13 Q Were you aware that he had been tested for
14 having a spinal cord stimulator?

15 A I was aware of that.

16 Q You're aware, of course, he hasn't done that
17 yet?

18 A That's my understanding.

19 Q But that is an option that he has to take care
20 of some of the problems that he has complained about,
21 correct?

22 A Correct.

23 Q And I believe you were here to hear Dr. Scott's
24 deposition testimony that we saw by video?

25 A That's correct, and I read that deposition a

JOEL LEONARD-CROSS BY MR. MOORE

1 couple of times.

2 Q And you're aware that he is of the opinion that
3 the intent of that type surgery is to, number one, help
4 him with regard to the amount of medication he's involved
5 in, but it's also going to help him with regard to his
6 physical activity, is he not?

7 A The intent -- well, yes, to make him more for
8 functional.

9 Q Okay.

10 A With regards to physical activity, yes.

11 Q And when he is able -- if it goes according to
12 plan, which is this whole point in undertaking this
13 surgery, he's possibly going to be able to get back to
14 work at some position, am I right?

15 A No, I can't say that right now. It's a
16 possible consideration, it's a hopeful outcome --

17 Q But you --

18 A -- but to expect an outcome that's going to
19 happen, I can't say.

20 Q I apologize, I don't mean to interpret you.

21 A No, you're fine. No problem.

22 Q You haven't taken that into account in making
23 your evaluation at this point?

24 A I have. It's just that I don't think that the
25 evidence relative to that is directive enough for me to

JOEL LEONARD-REDIRECT BY MR. GARCIA

1 sufficiently say that the outcome is going to be what
2 you're discussing?

3 Q Okay. You don't have anything to go on at this
4 point, correct?

5 A With regard to that being a definitive outcome.

6 Q Because it hasn't been done yet?

7 A That's correct.

8 Q But if it's done, then there is, you would agree
9 me based on what Dr. Scott has said, that he might be able
10 to get a job which would reduce whatever exposure he might
11 have with regard to economic lost, am I right?

12 A That's a possibility.

13 Q As a matter of fact, because he didn't actually
14 earn that much when he was working at ESS Resins, he might
15 earn as much when he gets a potential new job as he had at
16 ESS Resins, in which case, he wouldn't have an economic
17 loss, am I right?

18 A If the circumstances fall out the way that
19 you're representing, that's possible.

20 MR. MOORE: Thank you, Mr. Leonard.

21 THE WITNESS: My pleasure.

22 REDIRECT EXAMINATION

23 BY MR. GARCIA:

24 Q Mr. Leonard, didn't Mr. Burgess work as a
25 cashier following -- or at the Farmer's Market following

JOEL LEONARD-REDIRECT BY MR. GARCIA

1 this breach of trust charge?

2 A He did.

3 Q So, is there any evidence that you observed that
4 the breach of trust had any impact at all on his
5 vocational status before this collision?

6 A Well, it certainly would have impact on it when
7 you look at it in global circumstances, but it didn't
8 follow a straight linear rule as to one outcome or one set
9 of circumstance resulting in another definitive outcome.
10 So, when you're talking about the placement factors, like
11 the things you're talking about, like the criminal record
12 and some of the other issues with the driving record, you
13 will see when I do an analysis of those, those sort of
14 fall into a secondary area because they can become very
15 gray and very clouded. It's not as distinctly stripped
16 and linear as a limited education or, for example, a
17 limited degree of literacy in which the impact is much
18 more frank and definitive.

19 So, for all of the placement issues which
20 we were discussing about, that tends to be a little bit --
21 like age, that tends to be much more gray and it can have
22 some come and go with it. In certain settings, it's going
23 to exclude you from work activity, other settings, it
24 might not.

25 Q You were cross-examined on some of his -- some

JOEL LEONARD-REDIRECT BY MR. GARCIA

1 of Mr. Burgess' physical complaints, if you will, before
2 this collision, but from your perspective, did that have
3 any effect on his earning capacity prior to this
4 collision?

5 A Well, it may have, but I don't have any
6 indication thereof. I mean, the earning capacity was what
7 he was earning. According to the documentary record and
8 what has been I believe stipulated to in terms of his
9 earning capacity, that's what it was. So, you know,
10 everyone encounters deficits in function that affect his
11 or her ability to access the labor market -- I shouldn't
12 say everyone, but a vast majority does. So, you work in
13 the face of those restrictions and those deficits or those
14 shortcomings, for lack of a better term, and you make what
15 you make, you earn what you earn and you work what you
16 work.

17 Q In cross-examination, you were asked about a
18 functional evaluation and it's usefulness in this kind of
19 setting. However, you said that you wouldn't recommend or
20 advise a functional capacity evaluation. Why not?

21 A I think if you were to do a functional capacity
22 evaluation, your outcome would likely come in a manner
23 that would potentially be prejudiced to the Defendant in
24 this matter, depending on the sophistication on the
25 evaluator who does it. A functional capacity evaluation

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1 is a series of tests that you take someone through with,
2 bend, carry various types of weights, you know, stoop,
3 kneel and you get measured on your performance with regard
4 to it. The problem is an overall global function. And a
5 lot of times, it will measure a person's overall
6 capability and can be not inclusive of a specific factor
7 as to the impairment that you're attempting to potentially
8 be held accountable for.

9 So, the term that I use is functional
10 contamination. I don't know if you -- on some cases and
11 many cases, you don't know if you're getting a functional
12 picture of what a person can do due to a singular
13 impairment or if you're getting a picture of what a person
14 can't due to the singular medical impairment and six other
15 conditions that he or she has. It's especially noticeable
16 in older individuals relative to what Mr. Moore was
17 talking about in terms of slowing down physically. So, in
18 a case like this, what I would advise the parties is that
19 you really want impairment specific commentary, you can
20 cut through the white noise and the chatter of outside
21 barriers.

22 Now, to be completely thorough, there are
23 times when the functional capacity evaluation can be given
24 and a person has a suite of medical problems, maybe
25 they're just involved within one of those medical

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1 problems. So, on occasion, I have seen those cases where
2 a person has done an FCE with a suite of medical problems
3 and the therapist is, you know, skilled enough to
4 understand how to address that one medical impairment.
5 Those are kind of far and few between. Because in terms
6 of functional deficit as to whether a person cannot lift
7 or carry or walk, a lot of times, you're relying on that
8 individual to stop the exercise when he or she has reached
9 an unsafe point and it's really hard to have an
10 understanding of what condition always contributed to
11 that.

12 So, in a case like this, it's much cleaner
13 and analytically to have impairment specific commentary,
14 which is what we have from Dr. Scott.

15 Q Doctor, you were asked about whether the effect
16 that a spinal cord stimulator may have on Mr. Burgess'
17 functional capacity, if you will, would alter your
18 opinion? Dr. Scott, stated that an optimistic outcome
19 after an implant of a spinal cord stimulator would be a
20 return to a light physical demand capacity. Do you
21 believe that Mr. Burgess, if he can achieve that light
22 physical demand capacity, would continue to have no
23 earning capacity at that point?

24 A If he could achieve a light physical capacity in
25 terms of a full range of light work activity, at that

JOEL LEONARD-REDIRECT BY MR. GARCIA

1 point, the issue as to whether the absence of a earning
2 capacity would be no question.

3 Q Okay. Is there anything you've heard during
4 cross-examination that changes your opinion as to
5 Mr. Burgess' earning capacity at this time?

6 A No. After looking at all the evidence and
7 meeting with him on two occasions, I do not believe that
8 the record as a whole, whether you're considering the
9 functional or the direct clinical or the combination
10 thereof, as well as some of the subjective assertions,
11 which really where you hope to be. I don't think that
12 that record as a whole provides support for the
13 endorsement or the expected performance of competitive
14 gainful employment at this point.

15 Q And is that opinion stated to a reasonable
16 degree of certainty for an expert in your field?

17 A It is, yes. All my opinions were offered within
18 a reasonable degree of professional vocational certainty,
19 more likely than that, 51 to 49.

20 MR. GARCIA: I don't have any further questions,
21 thank you.

22 MR. MOORE: No further questions.

23 THE COURT: Thank you, you may stand down.

24 Next witness.

25 MR. GARCIA: Next witness, Plaintiff calls Sarah

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1 Lustig.

2 Sarah Lustig, after being duly sworn, testified
3 as follows:

4 THE CLERK: State your full name for the record.

5 THE WITNESS: Sarah Kennerly Lustig.

6 THE CLERK: Please be seated.

7 THE WITNESS: Thank you. May I get a cup of
8 water? Thank you.

9 DIRECT EXAMINATION

10 BY MR. GARCIA:

11 Q Good morning, Ms. Lustig.

12 A Good morning.

13 Q Where do you reside?

14 A In Mt. Pleasant, South Carolina.

15 Q Can you please walk us through your educational
16 background and -- well, just your educational background,
17 please.

18 A My education is graduated from high school,
19 Wando High School in Mt. Pleasant, then went to nursing
20 school, Clemson University. I graduated the school
21 nursing in December of 2000. And following Clemson
22 University Bachelor of Science degree, I continued my
23 education through continuing education hours as a nurse in
24 rehabilitation lifecare planning and obtained two
25 certifications.

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1 Q Can you please state your work history in the
2 medical field?

3 A My work history in the medical field is
4 following in my nursing program, I worked on various
5 floors. I was trained as, we call it a float nurse or a
6 full nurse where I would be placed -- well, trained and
7 credentialed on all the floors and I would work units per
8 ratio. So, they would use me all over the hospital. And
9 the majority of my work was on the rehabilitation units,
10 neurology units, working with brain injury and spinal cord
11 injury. I worked as a registered nurse at the bedside
12 caring for patients for eight years. Before I graduated
13 as a nurse, I worked two years as a nurse extern as well.
14 Then in the last couple of years, I've picked up, again,
15 bedside nursing through a clinic at Medical University of
16 South Carolina.

17 Q Thank you. Are you certified as a lifecare
18 planner?

19 A Yes, I am certified.

20 Q Okay. What is involved in getting your
21 certification as a lifecare planner?

22 A Certification is where nurses in my industry
23 will continue their education through contact hours or
24 continuing education units. I had to study and complete a
25 course that took 120 hours to complete. It included 12

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1 modules. It was online. I was at home with babies, so I
2 was able to continue this education on my own time and
3 working as a registered nurse at the bedside. I completed
4 the criteria and became certified in 2007. And in 2011, I
5 obtained my second certification by reciprocity into
6 another field of rehabilitation certification. I'm sorry,
7 my first certification is through rehab and my second
8 certification is nursing based in lifecare planning, both.

9 Q Can you explain to us what a lifecare plan is,
10 please?

11 A A lifecare plan is a document that is used in
12 this type of circumstance. It's a tool. And it forecast
13 future medical care, goods and services that is related to
14 an alleged injury. And it forecasts all types of items.
15 The frequency of replacing that item over someone's life
16 and how much it would cost to provide that care to achieve
17 the optimal outcome medically.

18 Q How long have you been performing lifecare
19 plans?

20 A Since 2004.

21 Q Okay. What is the goal of a lifecare plan? You
22 might have answered this already, but what is the goal of
23 a lifecare plan?

24 A The goal of a lifecare plan is to rely on
25 evidence, such as much medical records, interviewing --

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1 using a nursing interview to interview the evaluatee, the
2 injured person, research, if necessary, get ready to
3 collaborate or speak to treating physicians or expert
4 providers, doctors that have been retained, and to gather
5 enough information to forecast what's reasonably certain
6 to accrue over someone's life that's related to the injury
7 and what services are needed.

8 So, the goal is to, again, provide a
9 document that can be followed lifelong. It's like a road
10 map of medical care. And the goal is to achieve optimal
11 healthcare and medical services. The optimal outcome to
12 return to previous baseline as best we can.

13 Q How many lifecare plans have you performed in
14 your career?

15 A Thousands, thousands. So, nurses diagnose the
16 human response to an illness or injury and we form a
17 nursing diagnoses. Once we have that diagnose, we work
18 through our nursing process, which is following
19 assessment, diagnosis, interventions that we can
20 implement. We identify outcomes and we reevaluate that
21 whole process. So, thousands of lifecare plans have been
22 written based on human response to an injury or an illness
23 of all types. Life population and lifecare plans include
24 both pediatric and adults.

25 Q All right. What percentage of those lifecare

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1 plans have been, for instance, a plaintiff versus a
2 defendant?

3 A So, I have referrals from both sides, both
4 defendants and plaintiffs. I have worked on cases that
5 both parties retained me and shared the costs for my
6 services. And, generally speaking, 30 to 40 percent are
7 retained by a defendant and the rest, the larger part by
8 plaintiff attorneys.

9 Q Why have you performed just a bit more for the
10 plaintiff versus the defendants?

11 A So, injured people hire plaintiff attorneys.
12 And plaintiff attorneys, as far as I understand, work for
13 that client to ascertain damages. So, in order to do
14 that, they hire lifecare planners. Defendants usually --
15 I get hired by plaintiff attorneys early on in a case
16 usually, if not, that means they've hired someone else.
17 Defense will call me and ask me to review the lifecare
18 plan that was produced by a plaintiff lifecare planner.
19 So, I'm just hired later on defendant cases and hired
20 early on the plaintiff. That's just the business -- it's
21 just the way it happens.

22 Q Do you charge the plaintiff any different than
23 you would charge the defendant?

24 A No, my services are the same for either party
25 and the charges are the same as well.

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1 Q If the Plaintiff hadn't retained you in this
2 particular case and the Defendant had contacted you, would
3 you have done anything different in this instance?

4 A No, the outcome would have been the same.

5 Q Okay. Were you retained to put together a
6 lifecare plan for Mr. Burgess?

7 A I would like to go back to that question. One
8 thing that changes when I'm retained by a defendant
9 attorney is that sometimes I am not able to -- or I don't
10 have privy to collaborating with the providers based on
11 HIPAA law. And I'm not sometimes able to speak to the
12 injured party based on just the way the industry is. So,
13 those are my limitations and I meant to say that. I'm
14 sorry.

15 Q Sure. How many times have you been qualified as
16 an expert in court as a lifecare planner?

17 A In court at trial, 35 times in 12 different
18 states.

19 Q Okay.

20 MR. GARCIA: At this time, the Plaintiff offers
21 the -- Ms. Lustig as an expert in the field of
22 lifecare planning?

23 MR. MOORE: No objection?

24 THE COURT: All right.
25

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1 BY MR. GARCIA:

2 Q All right. What's your understanding of what
3 you were hired to do for Mr. Burgess?

4 A I was hired to review medical records and decide
5 whether or not a lifecare plan would be necessary.

6 Q Okay. Before we go a bit further, have you
7 recently gone back and started working as a nurse with a
8 local clinic or anything along those lines?

9 A Yes. In the last couple of years, I have been
10 volunteering hours at Medical University of South Carolina
11 at clinic. And I try to pull four to eight hours a month
12 on top of my 60-hour work weeks. It's not a lot, but I am
13 trying to volunteer again.

14 Q I want to run you now through -- I want to ask
15 you some questions about the documents or the information
16 that you might rely on in forming your plans. And then I
17 want to ask you if you had those documents or information
18 available to you in this particular instance, okay. So,
19 what do -- let me ask you this, do lifecare planners
20 typically rely on medical records in forming their plans?

21 A Yes.

22 Q Did you have medical records available to you in
23 this case?

24 A Yes. From the beginning, of course, the
25 emergency urgent records, then multiple specialists were

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1 involved, plastic surgery, orthopedic spine surgery, spine
2 surgery, neurosurgery, pain management, orthopedic,
3 neurology, physical therapy rehab, so there were multiple
4 specialists involved. And yes, I had those to review.

5 Q Do lifecare planners typically rely on the
6 depositions of treating physicians?

7 A Yes. At that time when I turned the first
8 lifecare plan in, it was two years ago. I believe I had
9 one deposition, I believe, Dr. Loudermilk, who is the
10 physician, I believe, who recommended the spinal cord
11 stimulator trial, which was provided, and then, of course,
12 the surgery, which would follow.

13 Q At the time of this trial, did you have any
14 other depositions available to you? For instance,
15 Dr. Scott or Dr. Brennan?

16 A Probably Dr. Brennan. And yes, Dr. Scott. Yes,
17 I did. Because they both -- Scott and Loudermilk had two
18 each, two depositions each.

19 Q Do lifecare planners typically rely on future
20 medical treatment confirmation documents or something
21 along those lines?

22 A Do that refer on documents such as depositions?

23 Q No, what --

24 A I'm sorry.

25 Q -- I'm asking is do you have documents, for

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1 instance, that you'll submit to a physician or potentially
2 a treating physician to get an idea of what future medical
3 care an individual might need?

4 A Generally speaking, when I need to collaborate
5 with a physician, I fax them a cover letter, which is just
6 a few paragraphs, and it says, I'm Sarah Lustig, nurse, I
7 would like to speak to you for 10 or 15 minutes regarding
8 this injury. And so, I send them a letter. But there's
9 nothing about the lifecare plan in that letter. It's just
10 a document I use to get them on the phone. So, that's
11 what I send them.

12 Q Is there something you receive in return or
13 maybe submit after that initial conversation you may have
14 with a physician?

15 A Yes. Any time I speak to a physician, if you're
16 nurses, you would know that the verbal order, if we get a
17 verbal order or however, we document what the doctor says.
18 The nurses aid physician as well to ascertain what the
19 issue, diagnose, prognosis is. So, it's just natural for
20 me to get a physician on the phone. I go through the
21 process in five or ten minutes. You have to speak quickly
22 because doctors don't like to stay on the phone. And you
23 have to be prepared. So, I get them on the phone, we have
24 a collaboration and then I document and memorialize that
25 conversation in a letter. I call it a confirm letter,

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1 which, you know, confirming what we spoke about. And then
2 I fax it back. I sign it, I ask them to review it and
3 sign, they do and then their secretary or whoever faxes it
4 back to me. So, that's my document that confirms what we
5 spoke about. And that document includes all the items and
6 frequency of replacement of those items in the letter. So
7 that's, essentially, the skeleton of the lifecare plan.

8 Q Did you have those documents available to you in
9 this case?

10 A Yes, I did.

11 Q Do you remember how many?

12 A I had two, what I call, confirm letters from
13 Dr. Booker and Dr. Scott, yes.

14 Q Okay. I think you've already mentioned this.
15 Do you rely on conversations with physicians as well?

16 A Yes.

17 Q With these particular physicians?

18 A Yes, I do.

19 Q Do you rely on conversations with the patient at
20 times?

21 A Yes.

22 Q Did you have a conversation or several
23 conversations with Mr. Burgess?

24 A I've had three conversations with Mr. Burgess,
25 two in 2016 and one last week.

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1 Q Okay.

2 A Or may have been two weeks ago.

3 Q In forming these lifecare plans, do you also
4 rely, at times, on medical billing practice software or
5 something along those lines?

6 A Yes. And we learn about that through the
7 continuing education, contact hours, conferences and
8 meetings through my insured lifecare planners.

9 Q Did you use software in this case?

10 A So, it's software databases that I subscribe to
11 and pay for to ascertain reasonable charges. So yes, I
12 rely on databases.

13 Q Now, Ms. Lustig, why is it important to consult
14 with a physician in determining what to put in a lifecare
15 plan?

16 A I have ideas about what a patient would need
17 because I am a registered nurse. However, I have chosen
18 over the last 15 years to collaborate with physicians and
19 it's also accepted nationwide methodology for lifecare
20 planners to collaborate with doctors. And that is what I
21 do and what thousands of lifecare planners do to discuss
22 and collaborate based on my scope of practice, what I
23 believe the client, the patient would need and what the
24 physician believes his patient would need. And there are
25 lifecare planners that are not nurses, so you can be a

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1 physical therapist, social worker, case management. And
2 with a certain healthcare license, you can be a lifecare
3 planner. And they also collaborate with doctors as well
4 as.

5 Q Who's responsible for deciding what treatment
6 and care ultimately goes into a lifecare plan, Ms. Lustig?

7 A So, that's a great question. I recommend
8 nursing home care. Physicians will defer to me regarding
9 how many hours a patient would need for PCA, patient care
10 assistant, LPN, licensed practical nurse, registered
11 nurse, RN. So, they defer to me to figure out how many
12 hours someone would need. For example, how much time does
13 it take to take a bath or to bathe somebody? A nurse
14 knows that, a doctor wouldn't. So, there are items that I
15 recommend on my own. Of course, I still collaborate with
16 the physician. The majority of the items are recommended
17 and decided on by the physician after a collaboration has
18 taken place. And I guess a good example for that would be
19 like the medication, if it's not clearly recommended life
20 long in the records or a diagnostic or a surgery.

21 Q What is -- just for clarity's sake, what is your
22 role versus the physician's role?

23 A My role is to aid and providing evidence and
24 data in an organized fashion, in a quick fashion to
25 provide rationale for why a future lifecare plan is

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1 needed, life long. So, having all of this information,
2 organized in a fashion that I can get through it very
3 quickly, five to 10, 15 minutes with a physician on the
4 phone who is a treater or a hired expert. So, my role is
5 to ascertain the information based on evidence and to
6 memorialize that in a letter, get it to him so he make it
7 a part of his medical record and I have a copy as well.

8 Q Now, if you ask a physician if something should
9 be in a lifecare plan and the physician says no, do you
10 put that in the plan anyway?

11 A Depends on the item. So again, nurses are
12 capable of recommending many items within their scope of
13 practice. So, if I feel a certain equipment is safer
14 because I have done a home evaluation or something like
15 that, I might give the rationale to a physician and he
16 might agree to it then or defer to me on it. So, it
17 really depends on the item. So, if a physician says to
18 me, there is no surgery indicated for this client, then
19 I'm not going to put surgery in the lifecare plan.

20 Q I believe we've already established that you
21 have relied on opinions from Dr. Booker and Dr. Scott; is
22 that correct?

23 A Yes.

24 Q Why is Dr. Booker's opinion relevant?

25 A So, Dr. Booker has been the treating specialist.

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1 And I find -- I mean, I found Dr. Booker's relevant even
2 until the last couple of months. So, he's been providing
3 the pain management medications and oversight. So, he's
4 sort of the gatekeeper to the specialist.

5 Q And I'm sorry, go ahead.

6 A No, I'm done.

7 Q And as to Dr. Scott's opinion, why is
8 Dr. Scott's opinion relevant?

9 A Dr. Scott has provided physical examinations and
10 has provided documents that I have relied on that coincide
11 with what I'm seeing in the records.

12 Q Did both of those physicians agree with the
13 items in the lifecare plan?

14 A Yes. And I have what I call confirm letters
15 where they have signed off on the lifecare plan.

16 Q How did you reach a consensus with Dr. Booker
17 and Dr. Scott on what should be in the lifecare plan?

18 A Following a -- like I said before, a nationwide
19 accepted methodology that I employ on every case no matter
20 who I work for, defense or plaintiff, it's the same
21 methodology that thousands of lifecare planners employ to
22 come up with a lifecare plan, a tool that is used in the
23 courtroom to help decide what somebody will need life
24 long.

25 So, the methodology is reviewing

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1 information, documents, depositions, medical records,
2 client -- or nursing interviews or by phone, Skype or at a
3 home evaluation, research, collaborating with treating
4 specialists, doctors and/or hired experts. Then, of
5 course, pricing and coding and coming up with the value of
6 how much the services are going to be. Lifecare planners
7 will also document confirm letters and/or medical
8 questionnaires. They will try to, again, memorialize and
9 confirm what the physicians or other experts are saying.
10 Sometimes I speak to physical therapist. So, it's
11 multi-disciplinary when you have someone with so many
12 complex needs. But that's the methodology.

13 Q We talked a lot about what goes into the
14 lifecare plan, now we're just going to change directions a
15 little bit and talk about how it is that you arrive at a
16 cost for what is actually in the lifecare plan. So, how
17 do you determine the cost of the procedures and treatment
18 outlined in a particular lifecare plan?

19 A Following the education that I have learned by
20 being a lifecare planner, by understanding CPT codes,
21 common procedural terminology codes, that's the language
22 used by doctors that perform certain procedures.
23 Everything they do, there is a code attached to it. So,
24 I've learned how to use databases that I subscribe to. I
25 have books in my office. In the lifecare plan that you

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1 will likely see today will have all the resources that I
2 employed to come up with values for services.

3 Q Now, what is the standard methodology, if you
4 will -- if you haven't covered this already, what's the
5 standard methodology used in the lifecare plan industry?

6 A The subscribing to databases that are commonly
7 used by lifecare planners. And again, the books commonly
8 used. And these are books that are used in doctor
9 offices. They're -- like one example is called physician
10 fee guide reference. So, if a physician wonders how much
11 a service is going to cost, if does not have a biller or a
12 coder in his office, he would ask them to figure out --
13 I'm going to do this service or procedure, how much should
14 we charge for it. So, those are the same books that I use
15 as well. We learn to use those books and databases. We
16 learn that in lifecare planning education classes.

17 Q Is the process that you just described
18 considered to be accurate and reliable in determining the
19 cost of future medical treatment and care for the patient?

20 A Yes.

21 Q We're talking about a lifecare plan, let's go
22 ahead and put that up on the screen and we'll just go
23 through it step by step. So, Ms. Lustig, do you have the
24 lifecare plan in front of you?

25 A Yes.

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1 Q So, I just want to go through it just briefly
2 step by step and talk about what each one is, essentially.
3 So, the first one we have here, we have pain specialist,
4 the PCP physician says four times a year here if I'm
5 correct, then you have a cost. Just give us a little
6 insight on this first line we have here.

7 A So, the first line is a price or charge by
8 Dr. Loudermilk for a office visit with a CPT code of
9 99212, and he charges for that \$78. The second resource
10 is another patient record or charge found in the bills for
11 another CPT code 99214 that was used for an office visit.
12 The third resource is another record or bill from the
13 medical records from Dr. Booker for 99214 for a charge of
14 like \$116. So, those three resources can be used, have
15 been used and the varying codes are 99212 or 214, which
16 means that the doctor would have spent 10 minutes versus
17 25 minutes with the patient. And so, the average of those
18 two codes is \$116. So, for every year for the remainder
19 of his life, should this lifecare plan be employed, he
20 would need to follow with a PCP or pain management
21 specialist four times a year. Generally, it would be
22 quarterly or every three months.

23 Q We'll just move quickly to the next one, spinal
24 surgeon.

25 A This would be a preop and postop visit. You'll

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1 see the three resources again with the CPT code. Each
2 code has a fee. The first -- the first source is a
3 patient record bill with that charge. Then the other two
4 are two different books I use in my office, like what I
5 just mentioned earlier. And those three charges average
6 together for a preop/postop visit for the spinal cord
7 stimulator placement and any revision surgeries that have
8 been in his future, that would be \$354 a visit.

9 Q Okay. We'll turn to the next page here. Again,
10 a lumbar spinal cord stimulator permanent placement, the
11 M.D. fee?

12 A Right. So, this is the spinal cord stimulator
13 that needs to be placed based on the surgery of the spinal
14 cord stimulator trial that was successful. So now, we
15 need to place the permanent to provide the same benefit.
16 And this is the M.D. charge to insert the device. Those
17 codes are all listed with the prices. The three resources
18 are three different books that you can see a different
19 range. And when you average them all out, it's \$7,203 to
20 place it.

21 The next one is the anesthesia fee, so an
22 anesthesiologist has been to paid for his services or her
23 services. And that charge, based on all of the coding is
24 \$2,932. Then the facility fee, we have three resources
25 here. Using the database of The American Hospital

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1 Directory and the Healthcare Utilization Project database.
2 We have inpatient and outpatient. We have three sources
3 and the average of that is \$83,137.

4 Q So, when we're looking at the M.D. fee and the
5 facility fee, you're, essentially, giving us an average
6 here?

7 A Yes.

8 Q This an average for -- okay.

9 A Yes, that's correct. There are three different
10 sources that you can look at and decide which of those
11 sources you want to use or you can use an average.

12 Q Okay. We'll turn the Page 3 now, 3 of 5. And
13 here, we have a lumbar spinal cord generator charges M.D.
14 fee. Can you explain what that charge is meant to
15 represent?

16 A So, I won't worry you again with what I said
17 earlier, but this is the surgery that is needed to replace
18 the battery that needs to be replaced so often throughout
19 his life. It's the battery that's in the fat pocket of
20 your buttock area. And it's just a battery, so it doesn't
21 last forever. It's replaced every five to seven years.
22 And with that comes an M.D. fee to place it, an anesthesia
23 fee, of course, to provide the services to put him to
24 sleep, and then the facility fee. So, I've given you
25 three resources. The M.D. fee is 2,550, the anesthesia

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1 cost 2,097 and the facility fee is \$60,000.

2 Q Again, are you using an average here?

3 A Yes.

4 Q Okay.

5 A And again, there are varying -- you can see the
6 varying differences of resources.

7 Q Okay, we'll turn to Page 4. And so, now on this
8 page, the very first one is lumbar spinal cord stimulator
9 lead revision. What's a lead revision, Ms. Lustig?

10 A So, a lead revision, so you have the generator
11 that's placed in the fatty area of the buttock. And then
12 from the generator to the battery, there's a little wire
13 lead that is tunneled up along here, this vertebra spine,
14 and then the lead is placed by the surgeon, neurosurgeon
15 who -- where the pulse -- the impulses that are generated
16 from the spinal cord stimulator to block the pain. So,
17 that lead is placed in a certain area around whatever
18 nerves are being pinched or damaged. So, that's the lead
19 wire.

20 Q All right. So, despite the fact that it's a
21 permanent placement, there's still a need for lead
22 revision?

23 A Well, so the generator -- the batteries, we
24 know, do not last forever. The leads, there are patients
25 who never have to have their leads replaced their entire

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1 life, 20, 30, 40, 50 years. There are some patients,
2 though, where the leads migrate or there is another trauma
3 and it moves for whatever, so then they have to go in and
4 place it where it stops the pain. So it's rare, but it
5 does happen.

6 Q To a reasonable degree of certainty for an
7 expert in your field, is it your opinion that a lead
8 migration or the need for lead revision will be necessary?

9 A That would be the opinion of one of physicians.
10 Again, in the depositions that I remember reading, I don't
11 know the legal language that they finally opined on, but
12 they did say it was a possibility. So, that's why I have
13 it in the plan. So, it may have not happen. And usually,
14 if it is going to happen, it's going to happen in like the
15 first year, so. Again, though, if there's trauma five or
16 ten later and it migrates, it would have to be revised or
17 taken out and replaced. And sometimes you can go in and
18 take the original lead out and the generator just stays
19 right in place, so.

20 Q Then, of course, we have the corresponding
21 anesthesia fee and the facility fee as well?

22 A Correct.

23 Q This must be an outpatient procedure?

24 A Yeah. So, the M.D. fee to place the lead, that
25 would be a neurosurgeon, is \$4,043. The anesthesia fee to

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1 do the lead take out and replace is 2,693. The facility
2 fee, three different resources again are provided to you
3 and the average is \$7,377.

4 Q Okay. We'll turn to Page 5. Here, we start
5 seeing something a little bit different now. We have a
6 physical therapy evaluation. And I'll let you run through
7 this last page here, Ms. Lustig?

8 A Okay. So, this is physical therapy evaluation.
9 This would be a one-time evaluation post spinal cord
10 stimulator placement with 12 to 18 sessions to provide
11 services to the patient to learn how to be functional with
12 the spinal cord stimulator. It gets a little bit --
13 especially if the spinal cord stimulator is providing
14 another sensation, they have to get used to functioning
15 with that different sensation. The pain may be gone, but
16 they might feel something else. The new generators that
17 are being placed, I have heard that the patient feels
18 nothing, no pain, no different sensation. So, they are
19 getting better as time goes on. So, the therapy would
20 just be for him to gain strength and to increase his
21 functionality following his spinal cord stimulator without
22 pain, so.

23 Q We also have --

24 A Oh, and I meant to say the eval is 171, the
25 maintenance is 353 per visit and I have provided you

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1 patient bills with common CPT codes and then book
2 references so you can see a range of costs and I provided
3 you the average.

4 Q In that average, I think you included some local
5 facilities as well; is that correct?

6 A Right. The Neurontin is a monthly prescription.
7 This Neurontin is also called Gabapentin, it's a
8 neuropathic medication. It's specifically used in this
9 case for nerve pain. And he would take this 300-milligram
10 tablet three times a day, pill count 90 pills replaced
11 monthly and I provided CVS pharmacy in Easley. And that
12 prescription monthly is \$82.

13 The next item is MRI CT lumbar spine. This
14 would be compatible with the spinal cord stimulator.
15 Three to five more diagnostics over his life. And this
16 would be to do further examination on physical changes,
17 functional changes or disproportionate pain and/or spinal
18 cord stimulator or lead or generator oversight.

19 And then last, the shower seat is
20 self-explanatory. It's replaced every five years. And
21 that is because he a fall risk. And that is \$106. Going
22 back to diagnostic, it's \$1,637. And on both of those
23 last two items I have provided you with three different
24 resources to choose from.

25 Q So, your opinion stated to a reasonable degree

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1 of certainty for an expert in your field is that
2 Mr. Burgess lifecare plan totals \$538,000?

3 A Yes, \$538,397.

4 Q Okay. Could we agree that the next few
5 questions I ask you hear would be answered to a reasonable
6 degree of certainty for an expert in your field?

7 A Yes.

8 Q Does the plan contain future medical treatment
9 and costs that Mr. Burgess will incur as a result of the
10 injuries from this collision?

11 A Yes.

12 Q Do you consider the lifecare plan a conservative
13 estimate of Mr. Burgess' future needs?

14 A Yes.

15 Q Why conservative?

16 A Because it provides you a range of available
17 resources to choose from and it gives you an average. So
18 again, you will have some items that have three items -- or
19 there are averages. One may be low, medium and high range.
20 It's an average. So, you can choose to use which value
21 you want to.

22 Q Are these costs reasonably necessary?

23 A Yes.

24 Q Have you included costs in this plan that are
25 not related to the collision that we're here about?

SARAH LUSTIG-CROSS BY MR. MOORE

1 A No. And that is the -- going back to one of you
2 first questions, the goal of the lifecare plan is to
3 forecast those necessary goods, services and items that
4 are related to the injury, not preexisting conditions.

5 Q So, I asked you if they're reasonably necessary.
6 I'm going to ask you a slightly different question here.
7 Are the cost proposed for future medical expenses and the
8 costs themselves reasonable?

9 A Yes.

10 Q Okay.

11 MR. GARCIA: Ms. Lustig, thank you for your
12 time. I don't have any further questions for you.
13 Please answer any Mr. Moore may have.

14 THE WITNESS: Thank you.

15 CROSS-EXAMINATION

16 BY MR. MOORE:

17 Q Ms. Lustig, my understanding in general in
18 preparing your lifecare plan, what you've done is
19 determine what procedures need to be followed by the
20 plaintiff and then based upon information you got from
21 various sources, including doctors, hospital, et cetera,
22 determine what the cost is and apply that over his life
23 expectancy, is that fair to say?

24 A Over his life, yes.

25 Q Okay. And do you know what his life expectancy

SARAH LUSTIG-CROSS BY MR. MOORE

1 is?

2 A I did know that. We used the South Carolina
3 mortality table 19-1-150.

4 Q Okay, what is it?

5 A I don't remember the age, so the economist -- or
6 I don't know if we have one, but the economist would
7 usually use that. I can't remember the age off the top of
8 my head, but it was the South Carolina Mortality Table.
9 And that used and a mathematical formula that I come up
10 with in an Excel document, which you, basically, look up
11 the table in South Carolina based on their date of birth,
12 male versus female and you find the age, then I place that
13 age in the lifecare plan formula in Excel. I just
14 remember it off the top of my head.

15 Q I understand. But in your calculations, you
16 have indicated that on certain matters, he's going to have
17 to do it over so much time over the course of his life?

18 A Correct.

19 Q For example, I think the first injury we have
20 here --

21 Go back to the first page.

22 -- indicates four times I think per year in
23 his life period, correct?

24 A Correct.

25 Q Okay. And then you figured out four times

SARAH LUSTIG-CROSS BY MR. MOORE

1 whatever his life expectancy is times the costs to give
2 you the final figure there, am I right?

3 A That's right.

4 Q Okay. But you don't recall what that figure is?

5 A No. You just take it right off the table and
6 then I stick it in a formula.

7 Q Okay. All right. You've indicated that you did
8 not take into account his preexisting conditions in
9 preparing this lifecare plan, am I understanding that
10 correctly?

11 A Well, we, as nurses, take into account past
12 medical history because that's a part of our nursing
13 process is to -- when you do a nursing interview, you
14 understand the preexisting co-morbidities, so I did take
15 into account, yes, I did. But nothing in the plan is --
16 takes care of those issues.

17 Q Okay. Tell us what preexisting conditions you
18 took into account.

19 A All of them. So, whatever the past medical
20 history is noted in the records, plus what he told me in
21 the nursing interview.

22 Q What were those preexisting conditions that you
23 took into account? You said all of them, what are they?

24 A I don't have them memorized, you went through
25 them earlier. Cardiac disease, psych history. I mean, I

SARAH LUSTIG-CROSS BY MR. MOORE

1 don't have it memorized.

2 Q All right. On your first item of the primary
3 care physician, where you indicated he's going to have to
4 go in four times per year during the course of his
5 lifetime?

6 A Right, that's for the spinal cord stimulator and
7 pain management.

8 Q Okay. Do you know whether that has occurred
9 since the time this accident took place?

10 A No, because he doesn't have a spinal cord
11 stimulator.

12 Q I'm sorry?

13 A This is for the spinal cord stimulator.

14 Q Okay, this is after the spinal cord stimulator
15 has been put in?

16 A Right. He has had multiple visits, even with
17 Dr. Booker, but this four times a year is specifically to
18 care for and manage the reprogramming of the generator
19 that placed. It's, essentially, managed and operated by
20 the patient with like a remote control. You can probably
21 even use your cell phone now. But over time, it needs to
22 be reprogrammed by the physician overseeing it, by the rep
23 who is representing the spinal cord stimulator generator.
24 So. The four times a year is for the spinal cord
25 stimulator and for the Neurontin.

SARAH LUSTIG-CROSS BY MR. MOORE

1 Q And you got that information from Dr. Booker and
2 Dr. Scott?

3 A Yes.

4 Q Okay. Now, Dr. Booker, Christina Booker, is a
5 family physician, am I right?

6 A Yes.

7 Q Dr. Scott, obviously, is semi-retired, but he is
8 an orthopedist, as I understand, correct?

9 A I believe he is an orthopedic surgeon, spine
10 surgeon, I believe.

11 Q That's correct. Okay. Now, Dr. Scott, I'm sure
12 you possibly saw part of his deposition testimony being
13 presented here, has indicated he's only been peripheral
14 regard to spinal cord stimulator and the actual placement
15 and follow up with it?

16 A I'm sorry, I didn't understand that word,
17 peripheral?

18 Q In other words, he's not directly involved with
19 regard to the placement of the spinal cord stimulator and
20 the follow-up visits making sure it's operating correctly,
21 were you're aware of that?

22 A Yes, neither Dr. Booker nor Dr. Scott will be
23 involved in that. A neurosurgeon, Dr. Mena, actually, was
24 referenced in the deposition. So, a neurosurgeon would be
25 actually placing it.

SARAH LUSTIG-CROSS BY MR. MOORE

1 Q But I don't see where you have referenced where
2 you talked to Dr. Mena or anybody else who's actually
3 involved with the spinal cord stimulator to come up with
4 these particular figures?

5 A I wouldn't need to speak to her to come up with
6 these figures.

7 Q But four times per year to, basically, maintain
8 it needs someone who is involved with the spinal cord
9 stimulator, does it not?

10 A Well, in various documents, to include
11 depositions, there are conversations and testimony
12 regarding how to take care of a spinal cord stimulator
13 patient. So, taking that information along with the
14 confirmation letters I discussed with you earlier where
15 the doctors sign off on the plan. I originally had in the
16 first plan monthly visits. I have reduced it down to four
17 times a year because I have removed opioids from the
18 lifecare plan. So, the four times a year is capturing
19 what I have gleaned from deposition testimony regarding
20 the generator and some other pain management oversight to
21 include neuropathic agent medication.

22 Q Is it your testimony that the depositions that
23 were taken of the various doctors discussed how often the
24 follow-up visits were going to have to take?

25 A I don't believe you actually asked that question

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1 specifically, but with my experience, knowledge, skill and
2 education, I was able to glean enough information from the
3 testimony to I felt it would support four times a year.
4 Plus, I know that patients have to have the generator
5 battery remote control reprogrammed. They cannot do that
6 on their own. If he's getting over stimulated or it's not
7 covering him enough, he has to get it -- he has to get
8 help by the representative of the generator through the
9 physicians office. And that is why I put four times a
10 year and reduced from originally one time a month.

11 Q Let's make it clear, though, this is not based
12 on what Dr. Booker or Dr. Scott or any other doctor has
13 told you, am I right?

14 A No, absolutely, they endorsed one time a month
15 for life --

16 Q I understand endorsing --

17 A -- that's already been confirmed. So, I reduced
18 it to four times a year based on the information I gleaned
19 from you taking depositions. Whether you ask that
20 question specifically or not, I don't think you did, so I
21 had to make that decision.

22 Q So, it's your decision as to how often this is
23 done?

24 A It is done four times a year with generator
25 patients. Again, they cannot reprogram this device on

SARAH LUSTIG-CROSS BY MR. MOORE

1 their own.

2 Q Now, the next item has to do with spinal
3 surgery. And am I again understanding that this has to do
4 with the spinal cord stimulator?

5 A This has to do with placing the permanent
6 device. He's already has one surgery and tried it, it
7 worked, it gave him benefit. Now, we have to permanent
8 in. From the depositions, I gleaned that a neurosurgeon,
9 and I believe they referenced Dr. Mena --

10 Q Am I -- I'm sorry, go ahead.

11 A She would place the generator, permanent and
12 lead. And that would be the first surgery with both
13 device, the lead and the generator. I should have brought
14 it so you could see it.

15 Q Let me make sure I understand. The entry on the
16 first page says spinal surgeon one time preop and one time
17 postop?

18 A Right, that is the surgeon to place the
19 permanent.

20 Q Then the next item has to do with the spinal
21 cord stimulator permanent placement M.D. fee?

22 A Right. Again, that is Dr. Mena, the fee, as a
23 neurosurgeon to show up to the hospital and wash her hands
24 and get gloved up and gowned up to actually do the
25 procedure, to cut the patient and to put the device in.

SARAH LUSTIG-CROSS BY MR. MOORE

1 Q Okay. The first entry, though, has to do --
2 does he go to the doctor one time before surgery and one
3 time after surgery?

4 A Yes.

5 Q And that's to make sure, what? For example
6 Dr. Loudermilk has already testified he is a candidate for
7 spinal cord stimulator insertion. So, that decision has
8 already been made?

9 A Dr. Loudermilk, yeah, said that, but he is not a
10 neurosurgeon and he is not placing the generator or the
11 lead. So, he is having a neurosurgeon do that for him.

12 Q Okay. Now, on the spinal surgeon entry, that's
13 your second entry on the first page, you make reference to
14 the physician's fee reference.

15 A Are we still on Page 2?

16 Q No, ma'am, we're on one, I'm sorry?

17 A Okay.

18 Q What is that?

19 A What was the question?

20 Q What is the physician's fee reference?

21 A Oh, that's the second source -- that's a book
22 that I have in my office that I use to look up the CPT
23 code that a doctor would use to capture the service that
24 they are performing. And I use that book based on the zip
25 code of that client, patient, evaluatee, and that provides

SARAH LUSTIG-CROSS BY MR. MOORE

1 you the fee for that service.

2 Q Okay. Now, let's talk about that book. Number
3 one, the CPT code gives you, as I understand it, two to
4 throe possible charges for a particular procedure, am I
5 right?

6 A Depending on what book you use. So, there are
7 three books I use. Two books have three ranges, I
8 believe, 50, 70 percentile and 90 percentile. And one
9 book, I believe, has 50 and the 90. So yes, there are
10 different ways that you can obtain values.

11 Q The 50 percent column is based on what 50
12 percent of the -- 50 percent of the doctors charge less,
13 50 percent charge more, correct?

14 A So, I reread in my deposition with you and we
15 had a time figuring this out. It's hard to explain and I
16 hope that we don't read my deposition because you would be
17 so confused. If -- so this book captures hundreds of
18 thousands of charges for codes for doctors. And the 50th
19 percentile means that if I choose the 50th percentile of
20 all of those charges, what I'm picking is saying there's
21 going to be 50 percent more -- 50 percent of the charges
22 are higher and 50 percent of the charges are maybe lower.

23 Q So, it's an average?

24 A It's an average. So, I'm choosing in my
25 practice to go right in the middle. So, I usually use the

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1 75th percentile meaning that there are going to be higher
2 charges and there are going to be a little bit lower
3 charges, but that I'm going with the 75th percentile. And
4 I did not explain that well at all to you and I apologize.

5 Q If we use the 50 percent column, as I'll say,
6 that, basically, is the average. There's going to be 50
7 percent charges less, 50 percent charges more, correct?

8 A I don't -- yes.

9 Q Okay. At the 75 percent level or column, that
10 75 percent of it as opposed -- there's only 25 percent
11 less than that particular charge, am I right?

12 A There's 25 percent higher charges.

13 Q Okay. I think we're saying the same thing.

14 A I know, we had the same problem in the
15 deposition.

16 Q But in any event, what you've done is you took
17 the position between the 50 -- and whether it's 90 or
18 whatever, you took that middle column of either 75 or
19 70 percent, correct?

20 A I'm choosing 75th percentile.

21 Q Okay. Which is 75 -- it's in the 75th
22 percentile, so that means that is 75 percent that's higher
23 than 74 percent down below it, correct?

24 A That means that -- yeah, that they're going to
25 be a lot more charges that are going to be higher, so I'm

SARAH LUSTIG-CROSS BY MR. MOORE

1 going to go with the 75th percentile.

2 Q There will be -- you and I are talking --

3 A I don't know why we keep going back and forth on
4 this.

5 Q We're not being clear on this. The 50
6 percentile is, basically, the average. The 75 percentile,
7 you're going higher, correct?

8 A Yes, we're going higher, but we're not going to
9 the highest of 90 percentile.

10 Q Right.

11 A But no matter what charges you chose -- and
12 there are life planners that go 50 percentile, 70
13 percentile, so there are varying differences. No matter
14 what you choose, the charge is reduced to the zip code of
15 that client. So, if you have the same surgery in New
16 York, you're going to pay a lot more M.D., anesthesia and
17 hospital fee. If you have it in Anderson or whatever,
18 there's another zip code and that is adjusted. So, the
19 charge is adjusted per zip code.

20 Q Now, let me get you to skip over to Page 2.
21 Let's look at the last entry there. That has to do with
22 the lumbar spinal cord stimulator permanent placement
23 facility fee. And the amount that you there is \$83,137,
24 correct?

25 A Correct.

SARAH LUSTIG-CROSS BY MR. MOORE

1 Q Okay. And that is based on an average of the
2 three entries you have adjacent to that from the American
3 Hospital Director, specifically, St. Francis Hospital, am
4 I right?

5 A Yes.

6 Q Okay. The agency for Healthcare Research and
7 Quality, that's another one of those books you rely upon,
8 correct?

9 A It's a database source that I subscribe to and
10 pay for, yes.

11 Q And then the third is American Hospital
12 Directory Outpatient Services?

13 A Again, a database that I subscribe to and pay
14 for.

15 Q Now, I notice with St. Francis, they're charging
16 about \$150,000 for this facility fee, correct?

17 A Yes. You will see varying charges per hospital,
18 depending on what kind of system they are, what population
19 they serve, is it a teaching hospital or not, is it
20 private. There's so many things why hospitals charge what
21 they do. And so, yes, Greenville St. Francis downtown
22 charges \$150,000. And it's unfortunately not uncommon, I
23 see that charge with the bigger facilities.

24 Q But if we compare the hospital facility with the
25 outpatient facility, your third entry there, the

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1 outpatient is \$32,00 approximately, am I right?

2 A Yes. So, if you have the surgery placed and you
3 have no complications whatsoever, you can go home the same
4 day. And that's charge for what we call outpatient or
5 ambulatory patient centers, same day procedures, you're in
6 and out. And it's about \$30,000. If you stay overnight
7 or one or two nights, depending on what complication,
8 bleeding. Because of his preexisting history, he might
9 have complications and he might have to spend the night
10 and that would be a lot more money. So, the fee for this
11 service inpatient, again, is \$150,000.

12 Q But if we take the -- I'm using round figures
13 here, obviously, the \$32,000 rather than an \$83,000
14 average, he would actually save money by about \$50,000
15 going to the outpatient facility, would he not?

16 A Of course, he would save money, but if he's
17 going to have complications, saving money is not going to
18 be on his mind. So, the jury can see that there are
19 varying charges. You probably will have no complications,
20 so that is an outpatient fee. Should he have
21 complications, this is how much it cost to be in the
22 hospital for that procedure for those many days.

23 Q And you don't know whether there are going to be
24 any complications one way or the other, do you?

25 A I'm just a nurse, but based on his past medical

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1 history that I could not spit out to you right now, I
2 don't -- I mean, looking at him right now and from what I
3 recall from what you said earlier, I don't think he will
4 have many complications. But should he, that is how much
5 it costs.

6 Q Okay. Now, let's turn over to Page 3 of your
7 report.

8 A I would like to will say that Dr. Loudermilk in
9 his first deposition did say it would be an overnight --
10 he would spend the night.

11 Q Dr. Loudermilk was also assuming he was going to
12 the hospital, was he not?

13 A Yes. And I will say that he did also testify
14 that he might need an antibiotic intravenously overnight,
15 but I have not seen that to be a regular thing. So, I
16 still stand by what I just said earlier.

17 Q Let's go to Page 3. The last item there, the
18 spinal cord generator fee, facility fee. Another facility
19 fee we have here. But this one is one time for every five
20 to seven years of his life, correct?

21 A Correct.

22 Q Again, we come back to the question, you don't
23 know how many times that actually is, do you?

24 A All I can tell you is from experience.

25 Q And you have a figure there of \$337,006.

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1 Obviously, that is a multiple of the \$60,019 you have
2 there, correct?

3 A Right. The \$337,000 is how much it cost to
4 replace the generator that is held in the fat pocket of
5 his bottom. That is removed and replaced with a new
6 battery. And to do that over his life looking at an
7 average of outpatient facility fee and an inpatient
8 facility fee. So, you choose to go all outpatient fees,
9 then you could simply do some math and reduce the
10 inpatient charges out. But if you wanted to have an
11 average of outpatient/inpatient, this is how much it would
12 cost, so.

13 Q And along those same lines, if we do the same
14 analysis here, the hospital fee is going to be a whole lot
15 more than the outpatient fee, correct?

16 A Right, because if you're inpatient, you have
17 nurses, you have PT, you have social workers, case
18 managers, PCAs, LPNs, doctors, it's a hospital.

19 Q I understand. But you don't need that
20 necessarily --

21 A Hallways, multiple floors.

22 Q -- on an outpatient, do you.

23 A Outpatient, no. They don't have that many
24 people there. It's a quick in and out surgery. They
25 usually have three or four people manning that APC center.

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1 You might have a crash cart, but you're not going to have
2 a hospital.

3 Q And the amount -- the reasonable that you
4 figured with regard to the outpatient services is about
5 23,500 rounding it out, 23,500, correct.

6 A Twenty-three thousand dollars for just having
7 the outpatient center.

8 Q And roughly, a little bit more than times -- the
9 multiple you used is a little bit more than five times.
10 That's going to save almost \$200,000 if he goes to
11 outpatient method, would it not?

12 A I'd have to get a calculator, but yes, there's
13 no question, if you do all these surgeries outpatient
14 versus inpatient, there is going to be a wide range. If
15 you have a calculator or you have a smart phone, you can
16 do that math very quickly. I just don't know off the top
17 of my head.

18 Q But if we multiple the 23,374 by, roughly, five,
19 you're going to get about -- if my math is correct here,
20 about \$120,000 or thereabouts?

21 A I'm not going to even try.

22 Q Okay.

23 A You're taking the lowest of the three options,
24 multiply that over the six times -- every six years over
25 his left expectancy, yes.

SARAH LUSTIG-CROSS BY MR. MOORE

1 Q Okay. A number of the directories you are using
2 are giving you information as to what hospitals charge,
3 correct?

4 A Yes.

5 Q Okay. And that is based upon the master charge
6 list that a hospital might have as to what they actually
7 charge, correct?

8 A You asked me this in the deposition, I have
9 never heard of a master charge list, so I told you that I
10 didn't know how to answer that.

11 Q You aren't away of the fact that Medicaid,
12 Medicare, the federal government requires a hospital to
13 come up with certain charges for procedures?

14 A I have no idea what you're talking about. Never
15 heard of it.

16 Q All right. Are you aware then, different
17 question, as opposed to the charges, what the hospital is
18 actually paid for what services?

19 A No.

20 Q Would it, in your understanding, be less than
21 what they charge?

22 A I could not --

23 Q You don't know?

24 A I do not know, I said that in my deposition.
25 I've never -- I'm just not familiar with that language or

SARAH LUSTIG-CROSS BY MR. MOORE

1 whatever, the master charge list.

2 Q Let's go to Page 5 of your document. And on
3 that fifth page, you have listed medications. I never can
4 pronounce this.

5 A Neurontin.

6 Q Neurontin, thank you. The indication is one
7 prescription per month for life?

8 A Correct.

9 Q Is that what he's using now?

10 A Yes. Yes.

11 Q Now, with the spinal cord stimulator, that is
12 supposed to cut down on the amount of medications he's
13 supposed to have, correct?

14 A Yes, and that is why I removed the other
15 medications that I had in this plan two years ago.
16 Mainly, the opioid.

17 Q Yes, ma'am.

18 A Because there was a lot of testimony -- you
19 know, the doctor really wanted him to titrate off and, of
20 course, I want him, too, as well, any patient. So, no one
21 actually said to remove it from the plan, but I did.

22 Q Okay. Do you know whether the spinal cord
23 stimulator would also have the effect of reducing the
24 amount of this drug? Sorry, so I don't have to pronounce
25 it again?

SARAH LUSTIG-CROSS BY MR. MOORE

1 A So no, the deposition testimony and evidence
2 suggests that it is not going to get rid of all of his
3 pain, but the majority of it. There was a percentage that
4 one of the physicians gave that he might get 50, 60, 70
5 percent benefit from the spinal cord stimulator, so I
6 think the Neurontin would be safe to keep in the plan
7 lifelong due to the fact that this injury happened in
8 2013, five years ago. Whatever damage is done to the
9 nerves is irreversible at this point. And the spinal cord
10 stimulator may not provide a hundred percent relief, so he
11 may have -- I think he will need it lifelong.

12 Now, I will say, and I said this earlier,
13 generator changes are evolving -- generators are evolving.
14 Now, they have generators that the patient feels nothing.
15 I am so excited about that because usually they feel a
16 different sensation and not pain. So, it is possible that
17 if he gets the newer generation and it actually does stop
18 all of the pain completely, there is a chance he might not
19 need it. But he has leg weakness, he has muscle atrophy,
20 his leg gives out. So there is something going on there
21 that is not going to be corrected in the surgery. So, I
22 think the Neurontin will be safe for the nerve damage,
23 plus the spinal cord stimulator.

24 Q Now, you've indicated on that same page, I
25 believe, physical therapy. Would the physical therapy

SARAH LUSTIG-CROSS BY MR. MOORE

1 help him with regard to those particular problems?

2 A No, and -- well, yes, the physical therapy, of
3 course, helps with muscle atrophy and range of motion, but
4 for me, for him, I think he really does need the therapy
5 after he gets the spinal cord stimulator to get use to
6 having that device in his body. So, it is something to
7 get used to, especially if the device provides a little
8 bit of a sensation and he has to get used to the feeling.
9 I have patients that will have the device and when they
10 drive, push a peddle, bend over, pick weeds or whatever
11 position they're in, they will get an extra boost of a
12 charge or not any at all. So positional changes, he may
13 or may not have different types of pain, so he has to get
14 use to that. And that's also another reason to keep the
15 gabapentin on, the oral medication, because when the
16 device does not block pain for whatever reason based on
17 the position, the Neurontin in the body will help keep the
18 nerve calm.

19 Q Finally, you given us a sum total figure of
20 \$538,397, correct?

21 A Yes.

22 Q Now, whether it's reduced by what we just went
23 through or whatever, the final figure should be reduced to
24 present value, should it not?

25 A It can.

SARAH LUSTIG-REDIRECT BY MR. GARCIA

1 Q But you're not an economist, as I understand it.
2 Would you agree --

3 A No, I'm not going to reduce it to present day
4 value. An economist would do that. And usually they base
5 their projections on inflation and deflation over the next
6 30, 40, 50 years based on a hundred years of past history.
7 So, that's out of my scope.

8 Q You agree with me, though, however, your report
9 is for future cost over his lifetime, correct?

10 A Correct.

11 Q And what we're talking about today is monies
12 that would basically be invested to be paid out over that
13 lifetime, am I right? Do you know?

14 A Yes. So --

15 Q So, it doesn't take as much, basically, if you
16 invest it now, rather than having to pay that full amount
17 out today, you can actually reduce that down to an amount
18 that can be invested so it can be paid out over time?

19 A Well, that's what I'm trying to teach my
20 children.

21 Q I am, too.

22 A Good.

23 MR. MOORE: Thank you.

24 REDIRECT EXAMINATION

25 BY MR. GARCIA:

SARAH LUSTIG-REDIRECT BY MR. GARCIA

1 Q Ms. Lustig, you were asked about life expectancy
2 and you referenced the life expectancy table. This is --
3 I'll be honest with you, I tried to pull up the one from
4 scstatehouse.gov. It's very difficult to read, so just
5 bear with me here. Instead, I'm going to put up one
6 that's just slightly easier to read.

7 And 19-11-50, essentially, says when
8 necessary in a civil action or other litigation to
9 establish the life expectancy of a person the main period
10 in his life, whether he is living at the time or not, the
11 table below must be received in all courts and by all
12 persons having power to determine litigation is evidence.
13 Now, along with other evidence as to his health,
14 constitution and habits of the life expectancy of a
15 person.

16 THE COURT: Mr. Garcia, is there a question?

17 Because I will charge the jury on the law. Okay.

18 MR. GARCIA: Okay.

19 BY MR. GARCIA:

20 Q Ms. Lustig, is this the life expectancy statute
21 that you refer to in determining an individual's life
22 expectancy?

23 A Yes. And I will say if you have -- if you see
24 this, usually, I choose based on the date of the report
25 the life expectancy as of today, you know, or when the

SARAH LUSTIG-REDIRECT BY MR. GARCIA

1 this plan was produced, which was 6/22/18. So, on
2 6/22/18, I figured out his age. I went to the male column
3 and it gives you the life expectancy. Again, I stick that
4 range into another Excel document and it does all the math
5 for you.

6 Q So, he's 48 today. If you scroll down to 48
7 here for a male, it's 30.97. Is that the life expectancy
8 that you used in generating this report?

9 A Yes. Now, I did write -- my original plan was
10 two years ago -- so back two years ago, it would have been
11 two years higher. Does that make sense? It's adjusted
12 when your report is produced.

13 MR. GARCIA: Thank you, Ms. Lustig. I don't
14 have any further questions.

15 MR. MOORE: No further questions.

16 THE COURT: You may stand down.

17 THE WITNESS: Thank you.

18 THE COURT: All right, ladies and gentlemen,
19 we've been going for about two hours. We're going to
20 take a short break. All right, thank you. Don't
21 discuss the case.

22 (WHEREUPON, the jury left open court at
23 approximately 12:06 p.m.)

24 THE BAILIFF: The jury is secured, Your Honor.

25 THE COURT: All right. How many more do you

SARAH LUSTIG-REDIRECT BY MR. GARCIA

1 have?

2 MR. GARCIA: The Plaintiff rest its case, Your
3 Honor.

4 MR. MOORE: We will have three this afternoon
5 probably. Want to keep going?

6 THE COURT: Tell me what --

7 MR. MOORE: We have two short witnesses and one
8 expert witness on the accident reconstruction. I
9 don't think it's going to take forever, but it's
10 certainly a longer witness. So, I certainly think
11 we'll get that done, probably argument and charge
12 this afternoon, I would think.

13 THE COURT: Well, we'll see.

14 All right, do you have any motions?

15 MR. MOORE: No, sir. I mean, I think it's a
16 factual issue, sir.

17 THE COURT: All right. Okay.

18 Are you pursuing punitive damages?

19 MR. GARCIA: No, sir.

20 THE COURT: All right. Well, let's bring them
21 back. I'm sure they're going to -- give them a couple
22 minutes. If they're ready, yeah.

23 Mr. Moore, what length of time do you think it's
24 going to be?

25 MR. MOORE: Put Katie up, she shouldn't take 15

SARAH LUSTIG-REDIRECT BY MR. GARCIA

1 minutes. I have one witness who will take probably
2 15, 20 minutes. And then my expert probably will
3 take, I would think probably hour to hour and a half.
4 That last is a guess, but.

5 THE COURT: On your direct?

6 MR. MOORE: No, no, I think all together. I'm
7 guessing what Mr. Garcia does.

8 THE COURT: It still wouldn't get to it.

9 MR. MOORE: But if we get back from lunch,
10 whatever time you want to get back, that should be
11 two and a half hours, that still should be time to do
12 argument and charge, I would think, this afternoon.

13 THE COURT: It will be close, we'll see.

14 MR. MOORE: Yeah.

15 THE COURT: Tell them whenever they're ready to
16 knock and let us know.

17 (WHEREUPON, the jury came into open court at
18 approximately 12:14 p.m.)

19 THE COURT: All right. Ladies and gentlemen, I
20 hate to make you get up and down and back and forth,
21 but we have to put everything on the record. I wish
22 I could have come back in to tell you that we're
23 breaking for lunch. I ask you to be back -- it's
24 12:15, can you be back at 1:30? See you then. Don't
25 discuss the case.

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 (WHEREUPON, the jury left open court at
2 approximately 12:19 p.m.)

3 THE COURT: All right, see you at 1:30.

4 MR. GARCIA: Thank you, Your Honor.

5 MR. MOORE: Thank you.

6 (WHEREUPON, a lunch break was taken.)

7 (WHEREUPON, the jury came into open court at
8 approximately 1:33 p.m.)

9 THE COURT: All right, ladies and gentlemen,
10 welcome back. We're ready to recommence the trial.
11 I will tell you that before the lunch break, prior to
12 the lunch break that the Plaintiff had completed
13 their case, so we now move to the presentation of the
14 Defendant's case.

15 MR. MOORE: Judge, we would call Katie Hunter
16 back to the stand.

17 THE COURT: Please come around. You're still
18 under oath, ma'am.

19 DIRECT EXAMINATION

20 BY MR. MOORE:

21 Q Katie, you testified before and you realize
22 you're still under oath, correct?

23 A Yes.

24 Q All right. Let me ask you one more time to give
25 us your full name.

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 A Katherine Hunter.

2 Q You go by Katie; is that right?

3 A Yes, I do.

4 Q Where do you live?

5 A I live in Mt. Pleasant, South Carolina.

6 Q Now, this accident we've been talking about
7 occurred on December 10th, 2013, I believe. Where were
8 you living then?

9 A I was living in Clemson, South Carolina.

10 Q Okay. Where were you working at that time?

11 A Alexander Elementary. I was a special education
12 teacher.

13 Q Where is Alexander Elementary?

14 A It's on Bramlett Road in Greenville.

15 Q Okay. Now, on the date of this accident, had
16 you been at work?

17 A Yes, I had.

18 Q Okay. Now, typically, teachers, I just think
19 y'all get off at 3:00, it may be later than that, get off
20 sometime earlier in the afternoon. What time did you get
21 off that day?

22 A I did not get off until -- well, I left about, I
23 guess, 5:30.

24 Q Why is that?

25 A The following day, I had to go to another school

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 with the leadership team to -- they had a program that we
2 were considering implementing. I was a special education
3 teacher there and I had to prepare for stuff, so I had to
4 get materials. I, typically, stay late anyway. This day,
5 I particularly had to get things ready for the sub.

6 Q What time did you leave?

7 A 5:30.

8 Q Okay. Now, when you go home, give us a general
9 outline of the streets you take.

10 A Okay. I go Bramlett to take a left onto, I want
11 to say Whitehorse now because I've heard in this thing so
12 many times, Blue Ridge Highway, then you cross Whitehorse.
13 I would continue down and then take, I believe, I can't
14 recall now, it's been a few years since I taught there,
15 but I believe it was highway 21 to Highway 123. Then I
16 would get off at Issaqueena Trail and go up behind to our
17 neighborhood in Clemson.

18 Q Towards Clemson?

19 A Yeah, in the country.

20 Q All right. Now, which road did this accident
21 take place on?

22 A It took place on Blue Ridge Highway.

23 Q So, given the general route you've taken, you
24 had left school on Bramlett, correct?

25 A Yes.

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 Q Then turned left onto Bramlett?

2 A Yes, that's right.

3 Q Went some distance down the road, down Blue
4 Ridge Highway, then the accident occurred?

5 A That is correct.

6 Q Okay. Now, tell us a little bit about what you
7 recall about Blue Ridge Highway, how many lanes are there?

8 A There are four lanes, two going in each
9 direction, and a median, concrete median.

10 Q Okay. When you made your left turn off of
11 Bramlett Road, which lane did you get into?

12 A I merged into the left lane, the fast lane.

13 Q What's the speed limit there?

14 A Forty-five.

15 Q Okay. Do you recall how fast you're going?

16 A I think I was going about 40, 45.

17 Q Okay. Now, do you recall where on Blue Ridge
18 exactly this accident happened?

19 A I really don't recall exactly, somewhere around
20 the Hot Spot probably?

21 Q Tell us what you recall about the accident when
22 it occurred.

23 A I just recall that he was just suddenly -- it
24 just happened in such a flash, I really don't recall much
25 about it at all. But just I had seconds, maybe a couple

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 seconds to react to it.

2 Q Do you recall his vehicle, his moped being in
3 front of you?

4 A Yes.

5 Q When you saw it in front of you, what did you
6 do?

7 A I tried to my best to avoid him and to miss him.

8 Q Okay. Did you swerve to the left?

9 A I did.

10 Q Okay. Did your vehicle strike his moped?

11 A I believe it did, yes.

12 Q Do you know what part of your vehicle hit his
13 moped?

14 A The right front bumper.

15 Q Okay. Now, when that occurred, did you actually
16 run over his moped?

17 A No, I did not.

18 Q Okay. Did you stop your car as quickly as
19 possible?

20 A Yes.

21 Q When you stopped your car, did you see where his
22 moped ended up?

23 A I don't really remember looking at the moped, I
24 just remember -- it almost seemed like things were going
25 in slow motion at that point and I just saw him walking

KATHERINE HUNTER-DIRECT BY MR. MOORE

1 towards me. It was surreal.

2 Q Did you get out and to go meet him?

3 A Yes.

4 Q Was he conscious at that point?

5 A He was. He was.

6 Q We've seen some photographs. Was his face
7 bloody on the left-hand side?

8 A It did not look like that. That was -- not at
9 all. That must have been a few days after because he
10 didn't look nearly that bad when it first happened.

11 Q After you met him in the highway, did you go
12 back to your car?

13 A He went with me, yes, sat in my car.

14 Q Did you allow him to use your cell phone?

15 A No, he used it over the bluetooth in my car when
16 I called 911. And then he used his own cell phone to call
17 some people or someone.

18 Q In any event, he was conscious enough to carry
19 on a conversation with the 911 operator and whoever he
20 might have called?

21 A Yes, he was.

22 Q Okay. And, obviously, it upset you when this
23 accident happened, I assume?

24 A Oh, yes, very much, very much so.

25 Q All right.

KATHERINE HUNTER-CROSS BY MR. GARCIA

1 MR. MOORE: Answer any questions that counsel
2 might have.

3 THE COURT: Cross?

4 CROSS-EXAMINATION

5 BY MR. GARCIA:

6 Q Ms. Hunter, we spoke -- we had -- we went
7 through this three days ago or so. At that time, you told
8 me that your most reliable account of what it is that
9 occurred in this particular collision was given two days
10 after the collision in a statement; is that correct?

11 A I guess, yeah. Is that what I said? Yes,
12 probably so.

13 Q Do you still believe that?

14 A I really don't remember much about the details
15 of what happened.

16 Q Okay. Now, in that statement, you were asked if
17 you saw any blood on Mr. Burgess?

18 A Yes.

19 Q And that starts at Line 192. Can you just read
20 in what your response was on Line 194?

21 A Let's see. He had some blood around his nose,
22 his mouth, so I knew -- I figured he maybe hit his head.
23 I didn't know where he hit his head.

24 Q Thank you. Now, I also believe that the last
25 time we spoke, you had testified that you looked up, he

KATHERINE HUNTER-CROSS BY MR. GARCIA

1 was right in front of you?

2 A Yes. Yes.

3 Q Okay. Do you remember how close he was? I
4 believe you testified he was closer than the of that wall
5 there?

6 A You know, I -- you were asking me that and I had
7 to speculate to say that. I don't remember exactly, but,
8 yeah, he probably wasn't that close to me, but I really
9 cannot -- it's going to be speculation if I try to tell
10 you exactly where he was.

11 Q He was further away than that wall?

12 A I don't recall exactly where he was. I don't
13 want to speculate, I don't want to assume where he was.
14 I'm not sure where he was.

15 Q Do you remember your testimony on Monday?

16 A Yes, I do.

17 Q Okay.

18 A I remember it.

19 Q I'll ask you again then, in your testimony on
20 Monday, did you say that he was closer than that wall?

21 A Yeah, I do believe he was probably closer than
22 that wall. He was probably closer than that wall.

23 MR. GARCIA: I don't have any further questions.

24 MR. MOORE: Nothing further.

25 THE COURT: Thank you, ma'am. You may step

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 down.

2 MR. MOORE: Call Deborah Moorehead to the stand.

3 THE COURT: Okay.

4 THE CLERK: Place your left hand on the Bible,
5 please, and raise your right hand.

6 Deborah Moorehead, after being duly sworn,
7 testified as follows:

8 THE CLERK: State your full name for the record.

9 THE WITNESS: Deborah Edwards Moorehead.

10 THE CLERK: Please be seated.

11 DIRECT EXAMINATION

12 BY MR. MOORE:

13 Q Let me get your name, please.

14 A Deborah Edwards Moorehead.

15 Q Where do you live?

16 A Seneca, South Carolina.

17 Q Okay. What's your occupation?

18 A I'm a registered nurse.

19 Q Okay. And in addition to working as a
20 registered nurse, do you also sometimes serve as a
21 lifecare planner?

22 A Yes, sir.

23 Q Okay. In that capacity, are you requested from
24 time to time to determine the reasonable cost of certain
25 medical procedures?

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 A I am.

2 Q Okay. Tell us about your education or
3 professional background.

4 A I graduated from Clemson University College of
5 Nursing. I took a postgraduate -- several postgraduate
6 courses, the latest being in 2012 and became certified as
7 a nurse lifecare planner.

8 Q Have you testified before both in depositions
9 and in court as a lifecare planner?

10 A I have.

11 Q Is that correct?

12 A Yes.

13 Q Ever been rejected?

14 A No, sir.

15 Q Okay.

16 MR. MOORE: All right. I'm going to present her
17 as a lifecare planner expert.

18 MR. GARCIA: No objection.

19 THE COURT: All right.

20 BY MR. MOORE:

21 Q Now, I've retained you to testify in this case,
22 correct?

23 A Yes, sir.

24 Q What did I ask you to do?

25 A You asked me to give you the reasonable cost of

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 the insertion of a spinal cord stimulator.

2 Q Okay. How did you go about trying to determine
3 that reasonable cost?

4 A In all cases that I do, I try to contact the
5 medical provider to find out what the cost would be from
6 them. In this case, and in many cases, you're unable to
7 get them to give you a quote if you don't have all the
8 information about the patient or if you don't have the
9 surgery already scheduled.

10 So, in this case, I called a physician's
11 office that I knew did spinal cord stimulators and spoke
12 with the billing office person. And she said, of course,
13 she could not give me a quote because there was no surgery
14 scheduled. They'd have to wait until after the patient
15 came in.

16 And I said, Well, could you give me the
17 codes?

18 And by codes, I mean the procedural codes
19 that the physician would use to do the surgery.

20 And she said, Yes, ma'am, I'll give you the
21 codes.

22 So, she gave me the codes. And they were
23 codes that I had used before in other cases. I also took
24 another step and called -- they're two providers that are
25 most frequently for the spinal cord stimulator. And so, I

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 called one of those and confirmed the codes, that they
2 were still active and current and he said they were.

3 Q Okay.

4 A So, once I got those codes, then I went to --
5 when Mr. Moore had called me, he asked for a reasonable
6 price for the insertion of the stimulator. And in my
7 language, that would be the usual reasonable and customary
8 charges for that procedure.

9 Q Okay. Now, based upon that information, were
10 you able to gather information about the cost or
11 reasonable cost of that particular procedure?

12 A Yes, I was.

13 Q Okay. Now, again, in addition to any medical or
14 doctor sources, did you use any other sources to obtain a
15 monetary figure?

16 A Other than the physician and the manufacturing
17 company for the spinal cord stimulator representative, I
18 used several of the books that I have that lists the --
19 one of them is Med Fees and it list the usual reasonable
20 customary charges that physicians charge. And those
21 charges are based on thousands of procedures like those
22 that have been done over the past year.

23 Q And are these treatises or documents that you
24 utilize, are they regionalized? In other words, do they
25 give you a range for a particular procedure in say, the

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 upstate of South Carolina?

2 A Yes, they do. In the back of the book, it's
3 what's a geographical factor. And what that means is it
4 lists all the different states and the major cities and it
5 gives the geographical multiplier and you have to use that
6 to multiple out with the codes that are listed to find out
7 what it is in an area.

8 So, like in South Carolina -- well, let me
9 use North Carolina. In Charlotte, it would cost more than
10 it would than if it were in Gaffney or somewhere, there's
11 a different multiplier. In Boston -- in Massachusetts,
12 Boston the multiplier would be higher than it would be for
13 the rest of Massachusetts.

14 Q Now, in these books or treatises that you use,
15 do they give you several options as far as the costs are
16 concerned?

17 A Yes, they list the 50th, 75th and 90th
18 percentile.

19 Q What does that mean, 50, 75 and 90?

20 A Well, let's say the 50th percentile, 50 percent
21 or less use that fee that they charge. The 75th
22 percentile is 75 percent of the physician charge that or
23 less than 75 percent -- you know, 75 percent less. The
24 90th percentile, 90 percent of the physicians charge that
25 fee and less than they charge that. Now, I think that the

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 90th percentile is probably most likely the cash price
2 that you would have to consider. But I usually use the
3 middle of the road.

4 Q Now, the 50 percent would be the average then?
5 50 percent of doctors use less, 50 percent use more, am I
6 describing that correctly?

7 A Well, I never thought about 50 percent more.
8 I've always thought about it just as 50 percent less, but
9 if it's 50 percent, I guess it is 50 percent more.

10 Q Now, based upon that information, were you able
11 to come up with a figure as to the reasonable cost for the
12 spinal implant?

13 A Yes, I took the three codes that I was given at
14 the -- it was Piedmont Spine and Neuro Center, Dr. Mena's
15 office. I used those three codes and I looked them up to
16 see -- and those three codes, of course, one covered the
17 actually laminectomy or the spinal surgery to open the
18 area to do the implant, the implantation of the generator,
19 which is actually a little box that sends out the
20 impulses, and then the implantation of the electrical --
21 they call it an array, but it's a series of wires that are
22 used. So, then I took those and added those together,
23 then added the geographical factor for South Carolina.
24 Then I used the surgeon's fee as the second part of it,
25 then the -- I'm sorry, that's for the surgeon's fee. The

DEBORAH MOOREHEAD-DIRECT BY MR. MOORE

1 second part of it would be the anesthesia fee because it's
2 separate, and then the facility fee. Then added those
3 three together.

4 Q All right. So, you had three components added
5 together?

6 A Correct.

7 Q One is for the facility fee?

8 A Correct.

9 Q One the anesthesiologist?

10 A Uh-huh.

11 Q And one is for the surgeon?

12 A Correct.

13 Q And that's all wrapped up into one fee?

14 A Correct.

15 Q Okay. Now, with regards to the facility fee,
16 are there figures for both hospital and outpatient
17 facilities?

18 A There are, but I did ask the question where --
19 if Dr. Mena was doing the surgery, where she would do it
20 and they said it would be an outpatient procedure. And
21 there is a situation that if the person needs to, then
22 they stay overnight, but they're really not admitted,
23 they're just there for observation. And said that was
24 normally the way she did that procedure. But yes, sir,
25 there is a separate fee for that.

DEBORAH MOOREHEAD-CROSS BY MR. GARCIA

1 Q Normally, based upon your research and looking
2 into this matter, is the hospital fee dramatically higher
3 than that outpatient fee?

4 A Yes.

5 Q Now, again, coming back to this particular one,
6 what figure did you ultimately come up with as being
7 reasonable for this particular matter?

8 A For the outpatient facility, it was \$49,104.82.

9 MR. MOORE: Thank you. Answer any questions
10 counsel might have.

11 CROSS-EXAMINATION

12 BY MR. GARCIA:

13 Q Mr. Moorehead, do you also have a figure that
14 would include an inpatient fee?

15 A I did look that up. When I was asked when I met
16 with Mr. Moore if it would be done as an inpatient and I
17 did look that up and it was about \$20,000 higher. So, it
18 ranged somewhere between \$50,490 and \$57,155 in comparison
19 with \$29,351.

20 Q And we're comparing -- are we only comparing
21 outpatient versus inpatient?

22 A Correct.

23 Q Okay. And how does that change the total costs
24 of the full surgery?

25 A I just said it would be about \$20,000 higher.

DEBORAH MOOREHEAD-CROSS BY MR. GARCIA

1 Q Okay. Understood. Now, did you review any of
2 Mr. Burgess' medical records?

3 A No, sir, I did not.

4 Q In what instances would inpatient surgery and
5 the inpatient facility fee be required versus an
6 outpatient facility fee?

7 A It would be determined by the physician based on
8 several different factors. But the one that's foremost in
9 my mind is the condition of the individual that's going to
10 have to have the surgery.

11 Q You didn't review of Mr. Burgess' medical
12 records?

13 A No, I did not.

14 Q Okay. So, you don't know the condition of
15 Mr. Burgess?

16 A I do not.

17 Q Okay. Did you have an opportunity to speak to
18 Dr. Mena directly?

19 A No, I did not.

20 Q Okay. Are you aware that it was Dr. Mena that
21 had recommended the surgery for spinal cord --

22 A No, I did not.

23 Q Okay. And so, would you admit that there's a
24 potential for the need for inpatient surgery versus
25 outpatient surgery for Burgess?

DEBORAH MOOREHEAD-CROSS BY MR. GARCIA

1 A I could not make that determination.

2 Q Okay. You couldn't determine one way or the
3 other, though, is that fair?

4 A Absolutely.

5 Q Okay. Now, when we're talking about the cost of
6 this procedure, we're only talking about the procedure,
7 the facility fee, the physician fee. We're not also
8 talking about, for instance, maintenance down the line; is
9 that correct?

10 A No.

11 Q Okay. Are you aware of any kind of maintenance
12 that might have to be considered for this kind of
13 procedure?

14 A Well, there are two different types of
15 stimulators. One is a battery and one is rechargeable.
16 And so, there's always the possibility -- and I think the
17 life on it is nine years at the least.

18 Q Is the life the same on -- you mentioned two
19 types. Is the life the same on both?

20 A Well, on the rechargeable, I think you just keep
21 recharging it. On the one that's battery would be the
22 issue of redoing. But I'm not sure, I can't answer that
23 question.

24 Q Okay. Fair enough. Have you considered -- just
25 so we're clear here, have you considered any kind of

DEBORAH MOOREHEAD-CROSS BY MR. GARCIA

1 therapy or, say, counseling on how it is that -- on how to
2 use the actual device itself for the patient?

3 A No, sir. I was asked to give a reasonable cost
4 of the assertion. Now, I did ask if the patient had
5 had -- you know, I mentioned the fact that you have to
6 have a trial stimulator before you have the stimulator
7 implant. And was told that they had already had the
8 trial. And that psychological evaluation that you're
9 speaking of is usually done during that period.

10 Q I'm actually referring to a period shortly after
11 the procedure where the individual patient is counseled on
12 how to use the device itself and how to make it work in --
13 well, the environment that they're using it in.

14 A If there's an extra for that charge, it was not
15 considered with the estimate.

16 Q Okay. I understand. So --

17 MR. GARCIA: Well, I believe you answered all my
18 questions. Thank you very much.

19 THE WITNESS: Thank you.

20 MR. MOORE: No further questions.

21 THE COURT: Thank you, ma'am. You may step
22 down.

23 MR. MOORE: Call Dan Olson to the stand.

24 THE CLERK: Place your left hand on the Bible,
25 raise your right hand.

DAN OLSON-DIRECT BY MR. MOORE

1 Dan Olson, after being duly sworn, testified as
2 follows:

3 THE CLERK: State your full name for the record.

4 THE WITNESS: Daniel Norman Olson.

5 THE CLERK: Please be seated.

6 DIRECT EXAMINATION

7 BY MR. MOORE:

8 Q Let me get your name, please.

9 A I am Daniel Normal Olson.

10 Q Mr. Olson, where do you live?

11 A I live in Chapin, South Carolina.

12 Q What's your occupation?

13 A Well, I'm trying to get retired, but I'm an
14 engineer. I practice engineering for forensic purposes.

15 Q What group do you work with?

16 A The company I work with is called the Warren
17 Group in Irmo, South Carolina.

18 Q All right. Now, if you would, give us some of
19 your educational and professional background.

20 A Sure. I'm a farmer's son, I like to say from
21 southern Minnesota. That put me at the University of
22 Minnesota studying agriculture engineering. I did that
23 and got a Bachelor of Agriculture Engineering, but also
24 had a draft number of 45 at the same time. So, I chose
25 that I would rather serve in flight than on the ground and

DAN OLSON-DIRECT BY MR. MOORE

1 I joined the United States Air Force. That career worked
2 out fairly well. I did spend 20 years and one day in Air
3 Force.

4 The Air Force trained me to be a fighter
5 pilot, I did that. Went to war, came back, became a full
6 air controller and also then I became a flight safety
7 officer. That would probably be the beginning of where I
8 learned how to help people how to figure out what went
9 wrong when something bad happens. That's really what we
10 engineer for forensics purposes do. The first aircraft
11 accident I helped to investigate was a midair collision
12 that happened at McIntire Air National Guard base while I
13 was stationed in Louisiana.

14 While I was in the Air Force, I also went
15 to graduate school at the University of South Carolina and
16 got a Master of Science in mechanical engineer almost
17 simultaneously with retiring from the Air Force. I'm a
18 register licensed professional engineer in South Carolina,
19 in Georgia, Florida. I am in retired status in Alabama.
20 I've been working in engineer forensic purposes, also,
21 taught at Midlands Technical College kind of as an
22 interlude to engineering and doing that for now since
23 1997.

24 Q Let me ask you this, have you been retained in
25 the past as an accident reconstructionist?

DAN OLSON-DIRECT BY MR. MOORE

1 A Quite a few times, yes.

2 Q Not just regards to -- my assumption is that
3 also includes automobile vehicular accidents, correct?

4 A Automobile accidents, automobiles and two-wheel
5 vehicles, powered, non-powered, pedestrians, trucks, those
6 kinds of things, yes, sir.

7 Q Have you been presented as an expert witness in
8 accident reconstruction in the courtroom?

9 A Yes, sir.

10 Q Have you been accepted as an expert witness?

11 A Yes, I have.

12 Q Okay.

13 MR. MOORE: Your Honor, I'm going to present him
14 as our expert witness in accident reconstruction.

15 MR. GARCIA: No objection.

16 THE COURT: All right.

17 BY MR. MOORE:

18 Q All right. Now, when were you retained with
19 regard to this matter?

20 A We first opened this case on November 18th of
21 2014.

22 Q Okay. I believe I was the one who contacted
23 you, what did I ask you to do?

24 A You asked me -- well, we discussed the case and
25 we learned, I learned that there was contrasting positions

DAN OLSON-DIRECT BY MR. MOORE :

1 from the people involved in this and how the collision
2 occurred.

3 Q Okay.

4 A And that we -- you told me approximately where
5 it happened. You showed me some photographs. You showed
6 me some -- I was able to review some of the early
7 statements and testimony, the police officer's report.
8 But you asked me if I could reconcile the contrasts, the
9 differences between these two versions of how the
10 collision occurred with the physical evidence that was
11 available, with the statements that were available, what
12 people say, reconcile what people say with that physical
13 evidence and, of course, the laws, physical laws of
14 nature, physics.

15 Q Okay. Now, based upon your investigation of
16 this matter, where did this accident happen?

17 A Well, it happened -- we just heard the Defendant
18 talk about the road, it was Blue Ridge Highway.

19 Q Correct. All right. And what do you know about
20 Blue Ridge Highway, how is it set up?

21 A It's a four-lane road. It's not restricted
22 access, but it's four lanes where you can enter it from
23 various intersections. There is a median with a kind of
24 center turn lane in several places in this region where
25 we're talking about. The road is reasonably straight and

DAN OLSON-DIRECT BY MR. MOORE

1 flat.

2 Q Okay. And what's the speed out there?

3 A Forty-five.

4 Q Now, what type of vehicle was the Plaintiff
5 operating?

6 A That was -- it was a moped.

7 Q A moped, okay. Now, do you understand, in
8 general, speed restrictions on the moped?

9 A I believe the law requires they can't go over
10 30 miles per hour. And most of them have -- physically
11 can't do more than 35 miles per hour unless you modify
12 them. So, that's about as fast as they can go.

13 Q So, we've got a contrast there between a speed
14 limit of 45 miles per hour and a vehicle that will only go
15 30 miles per hour?

16 A Yes, sir.

17 Q Okay. Now, what is your understanding as to how
18 the Plaintiff got his moped onto the Blue Ridge Highway
19 just before this accident happened?

20 A There -- in the statements, there is what the
21 Plaintiff said he had stopped at a Hot Spot gas station to
22 make a phone call, and then was proceeding on the way to
23 get home. His objective was to go a little bit further
24 down the road to get to the Family Dollar. That was the
25 objective that he had, which is not all that far up the

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1 road, but is working his way towards home. His objective
2 was to go there. He come out the Hot Spot and entered the
3 roadway there.

4 Q Okay. All right. Now, with regard to the
5 Defendant, what type vehicle was she operating?

6 A She was operating a BMW X5.

7 Q That's an SUV?

8 A It is.

9 Q Do you know what route she was taking to get on
10 Blue Ridge Highway.

11 A She had come out of where her school was, a road
12 that's a little bit farther to the northeast of there.

13 Q Bramlett Road?

14 A Bramlett Road, yes. And entered onto -- crossed
15 over traffic, entered on there and was headed in the same
16 direction as the Plaintiff.

17 Q Which lane did she get into?

18 A She stated and testified that she was in the
19 left lane. There are two lanes that are headed that way.

20 Q Okay. Now, this sets up the scenario that you
21 were retained for?

22 A Yes.

23 Q My understanding, of course, obviously, there is
24 a collision between the moped and the BMW?

25 A Yes.

DAN OLSON-DIRECT BY MR. MOORE

1 Q What information did you have, first off, as to
2 where the moped ended up after the collision occurred?

3 A The understanding is that the moped and the
4 rider ended up in that median space where there's turn
5 lanes and where there's an intermediate -- the width of
6 that is about one travel lane. It's in between the two
7 lanes going south and one going north.

8 Q So, if I understand correctly, on Blue Ridge
9 Highway, you have a right-hand lane, a left-hand lane and
10 a median?

11 A A median.

12 Q So, the median is to the left of both of those
13 lanes?

14 A That's correct.

15 Q Okay. We know that the BMW was in the left lane
16 adjacent to the median, correct?

17 A That's correct.

18 Q When the collision occurred, which lane did the
19 collision occur in?

20 A It's my understanding that it was in that left
21 lane.

22 Q Okay. All right. Now, somehow another, based
23 upon that picture then, the moped has to be propelled or
24 going to the left at some point, am I right?

25 A Yes, sir.

DAN OLSON-DIRECT BY MR. MOORE

1 Q That would be after the collision occurred?

2 A Well, somehow after the accident occurred, it
3 ended up moving from where the collision was to the left.

4 Q Okay. All right. Now, I want you to step down
5 and draw some for us.

6 A Okay.

7 Q Start off with the simple proposition. First
8 off, let's draw a figure up there for the Blue Ridge
9 Highway with a median?

10 A Okay. There's a median. There's a
11 representation of a center lane and the representation of
12 the edge of the pavement. And keep in mind, this shows
13 north, but it's going -- but anyway, this is a
14 representative. Makes good use of the paper.

15 Q Okay. Now, put the box on there representing
16 the SUV.

17 A What I would --

18 Q Go ahead, put what you need to.

19 A Could I put the resting location first?

20 Q That's fine.

21 A That's the first bit of information that has a
22 good bit of reliability. And the resting location is in
23 here some place.

24 Q In that little rectangle?

25 A Yeah, you would put the moped here. We also

DAN OLSON-DIRECT BY MR. MOORE

1 know that -- we heard testimony that the Plaintiff
2 actually was ambulating at the time, was moving.

3 Q On the drawing you made there, that drawing,
4 that little rectangle is the moped after the collision
5 occurred?

6 A After the collision. That's one piece of
7 information that is pretty reliable. Everybody says
8 that's where he ended up.

9 Q Okay. Now, let's draw a box for the SUV?

10 A So, now we've got the SUV is coming along in
11 this direction down here.

12 Q Okay. Now, I want to go through several
13 assumptions with you if it's okay. If the moped is
14 directly in front of the SUV, okay, in that left-hand lane
15 and there's no movement by either one of those vehicles,
16 okay, to the left or to the right and there's a collision
17 between the two of them, both of them still going straight
18 ahead, which way does that moped go at that time?

19 A It goes straight.

20 Q Okay.

21 A Straight or a bit of a curve here. Without
22 anything -- they come into this collision with a velocity.
23 And velocity has got two components. It's a vector, we
24 called it -- we engineers call it a vector. You may have
25 heard about that in your high school math courses. Vector

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1 has magnitude, how big it is, and it has direction. So,
2 they would come into this thing with a certain velocity
3 that has their speed and the direction.

4 And in this scenario, talking about
5 Mr. Burgess, they're both headed in the same direction.
6 So, any -- the moped would have been going 30. I think
7 everybody agrees in this whole thing, this moped was doing
8 about 30. Then we agree we don't have any indication that
9 the -- Ms. hunter was doing anything but about 45, at the
10 most. But because of the big difference in the weight of
11 that BMW and that moped, the moped is going to be -- when
12 they contact each other, they're going to be suddenly
13 going the same speed for a moment in the same velocity.
14 And when there's something else to change that direction,
15 they're both going to go straight. And we would expect it
16 to find the moped out here somewhere.

17 Q Straight down the road still in the left-hand
18 lane?

19 A Still in the left-hand lane, yes, sir.

20 Q Now, let's change the scenario a little bit.
21 Let's assume that the moped is in that left lane. And
22 just before the collision, that the SUV swerves to the
23 left and makes contact with the rear of that moped.

24 A Okay.

25 Q What's going to happen to the moped under that

DAN OLSON-DIRECT BY MR. MOORE

1 circumstance?

2 A Well, let's put the moped --

3 Q You can actually, if you want to, Dan -- we've
4 got plenty of pages here. Not trying to be cheap. Redraw
5 this thing.

6 A That's the moped.

7 Q Okay. All right.

8 A Going straight.

9 Q Good.

10 A All right.

11 Q Now, why don't you draw in there like you did on
12 the other one the median and the lanes so we have some
13 point of reference.

14 A (The witness complies.)

15 Q So there, we're talking about the SUV is
16 obviously behind the moped and just before the collision,
17 it swerves to the left?

18 A Yes.

19 Q Okay. Tell us what happens with the moped under
20 that circumstance when the collision is with the rear of
21 the moped?

22 A Okay. You've got the SUV back here some place,
23 going like so. Okay. You got the back end of this one --
24 actually, the BMW would have started over here and would
25 have been aimed kind of in this direction. The -- it

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1 takes a little while for that BMW, which would have been
2 in the center, actually, to get moved over about two and a
3 quarter feet to make this collision happen where --
4 because we did have photographs of this BMW.

5 Q And I've actually got the photograph in my hand
6 here.

7 A Okay.

8 Q This is Exhibit 1 on the Plaintiff side, I
9 believe. And I believe that shows the aftermath of the
10 collision with regard to the SUV, am I right?

11 A Yes.

12 Q Okay. And the damage shown on the SUV is where?

13 A Yeah, just in between the headlight and the
14 grill. So, it's just inside the headlight on the right
15 front corner of BMW, the passenger side.

16 Q All right. Now, the impact in this scenario is
17 with the SUV swerving to the left?

18 A Yes.

19 Q Again, hitting the moped in the rear?

20 A Yes.

21 Q Where would the moped go after that impact?

22 A Well, that would have imparted -- because these
23 are two different vehicle, that's the center mass of this
24 combined moped and rider. If you're coming up here with a
25 force and this way headed slightly in, you're going to be

DAN OLSON-DIRECT BY MR. MOORE

1 on this side of center mass, it's going to cause a
2 rotation of that moped to the right.

3 Q So, when it turns to the right, that's
4 clockwise?

5 A If you're looking down on it, it would be
6 clockwise.

7 Q All right. If it's turning clockwise, does it
8 rotate to the left or the right or go straight?

9 A Initially, it's still -- for just a moment,
10 very, very small period of time, it's pushing the back end
11 of the back wheel over. This one is still -- the front
12 one is still on the ground. Going to cause this thing to
13 go in that direction.

14 Q To the right?

15 A To the right. Essentially, that, but that would
16 -- in this scenario, the moped would have been over here.

17 Q Okay. Now, I'm going to show you a couple other
18 photographs. And these are Exhibits 12 and 13 on behalf
19 of the Plaintiff, both of the moped. And Exhibit 12
20 shows -- I believe is a photograph of the moped from --
21 showing the left-hand side, correct?

22 A Yes.

23 Q Okay. And if you look at that photograph,
24 particularly the seat, what has happened, has it been
25 pushed forward?

DAN OLSON-DIRECT BY MR. MOORE

1 A Yes, the whole back end has been pushed forward.
2 There were some scratches on that side, on that left side.

3 Q All right. I'm going to show you Exhibit No.
4 13, which is basically to the rear of the moped. Does it
5 show -- basically, it shows damage from behind pushing
6 forward, correct?

7 A Yes.

8 Q And then a final photograph, 14, would be to the
9 right-hand side. Does it show any damage to the
10 right-hand side of the moped?

11 A It's not the best of all pictures, but I don't
12 see anything quite as severe on the right-hand side.

13 Q Okay. Now, when it's hit from the rear and
14 spins in a clockwise rotation and, ultimately, goes
15 somewhat to the right, which side is it going to fall on?

16 A It would fall on its left side.

17 Q But under those circumstances, it would not be
18 falling in the median, as I understand it, correct?

19 A It would twist it and it would fall and it would
20 either go straight ahead and off because of the initial
21 twisting and spinning of the moped, cause it initially
22 while it was still upright for that moment --

23 Q Okay.

24 A -- to travel to the right, then go down. And
25 then it would be -- the velocity of the -- combined

DAN OLSON-DIRECT BY MR. MOORE

1 velocity now, the velocity of the moped, then the velocity
2 that's imparted to it from the BMW would tend to push it
3 either straight or off to the right.

4 Q All right. Let's go to another page. I'm going
5 to get you to draw in there the outline for the median and
6 the two lanes. Now, I want you to draw in there, number
7 one, the SUV.

8 A (The witness complies.)

9 Q But on this scenario, what I want you to assume
10 is that the moped is coming from the right lane and
11 switching into the left lane and gets in front of the SUV.

12 A It --

13 Q It's obviously in front --

14 A It would have been in front.

15 Q Yes, correct.

16 A Where along here?

17 Q It really don't matter, just somehow another,
18 he's -- you've got the SUV in the right-hand lane in front
19 of the SUV?

20 A That's correct.

21 Q Changing from right lane to left lane to the
22 point where he is in front of the SUV just before the
23 collision takes place?

24 A Moving over and we get a little bit further down
25 the road here.

DAN OLSON-DIRECT BY MR. MOORE

1 Q Okay.

2 A And another collision.

3 Q Now, under that circumstance, with regard to the
4 moped, before the collision, you have movement from right
5 to left, am I right?

6 A Yes.

7 Q At an angle of some sort, but it's right to left
8 movement.

9 A It has some -- it's going down the road and we
10 can -- one of the things we can do with vectors is that we
11 can break them up into components to help us to analyze
12 them, understand them. And in this case, there's a
13 certain velocity of this moped in the direction that it's
14 traveling. And we can figure out whether it's straight up
15 the road, what part of that velocity is straight up the
16 road and what part of it is to the left. And for that
17 moped to end up over here, it had -- it came into this
18 collision with some amount of velocity from right to left
19 and it kept that amount of velocity. That's what causes
20 it to get moved after the collision to go off to the left.

21 Q Let's back up a little bit. Just before the
22 collision, you got the velocity or vector of moped going
23 at an angle from right to left, am I right?

24 A Yes.

25 Q Okay. Now, the SUV, on the other hand, is

DAN OLSON-DIRECT BY MR. MOORE

1 traveling behind the moped and it has a vector going
2 straight ahead, correct?

3 A It's mostly straight ahead, but you have to
4 consider the testimony that's there.

5 Q Well, I'm going to come to that. That will be
6 another scenario.

7 A Okay.

8 Q Bear with me. So, if that collision occurs --
9 and we're not talking about any swerving at that point in
10 time, but the collision occurs between the moped and the
11 SUV as the moped is moving from right to left, what
12 happens to the moped?

13 A It comes off there. And it -- well, it would
14 have that motion and would have been colliding, the
15 collision then would have been behind the center of mass,
16 then it would have spun left.

17 Q Okay.

18 A Fallen on his right side.

19 Q Okay. And we don't have any evidence of that?

20 A That's right.

21 Q Okay. Now, turn the page one more time.

22 A Okay.

23 Q Let's again draw in the median and the road.
24 All right. In this scenario, let's make a lot of the same
25 assumptions. We have the moped moving from right lane to

DAN OLSON-DIRECT BY MR. MOORE

1 left lane and the SUV going straight down the left lane.

2 A Okay.

3 Q Just before the collision, however, we have the
4 SUV swerving to the left.

5 A Okay.

6 Q And when the collision occurs, the SUV is in the
7 process of swerving to the left. The moped is moving
8 right to left, by that time, obviously, into the left
9 lane. What happens to the moped under those
10 circumstances?

11 A The same thing.

12 Q Okay.

13 A As we talked about earlier because of this --
14 because the moped is coming into this collision with some
15 velocity.

16 Q Okay.

17 A Some component of velocity from right to left.

18 Q All right.

19 A When this collision occurs, they separate almost
20 immediately?

21 Q Okay.

22 A And then the moped continues this way.

23 Q Goes to the left?

24 A Goes -- in this case, if it was both swerving,
25 it would be almost lined up, you know, but yet, still a

DAN OLSON-DIRECT BY MR. MOORE

1 little bit to the side. If the BMW is swerving, there
2 would still be this component of the front of the BMW
3 tending to move that right rear wheel.

4 Q Okay.

5 A Or the rear wheel -- not the right wheel, the
6 rear wheel, it's only got two, the moped, in this
7 direction --

8 Q When you say this direction, what --

9 A To the left, right to left --

10 Q Okay.

11 A -- which would cause the moped to spin clockwise
12 once again.

13 Q Where does it end up at that point?

14 A Where does it end up? Same place, over here.

15 Q It's going to end up in the median at that
16 point?

17 A Right.

18 Q Now, let me ask you something before we go
19 further with this. You've got a SUV, which is a much
20 larger vehicle, going 45 miles per hour and a much smaller
21 vehicle in the moped. When they collide, why doesn't the
22 SUV just run over the moped?

23 A Had to be in some braking.

24 Q When the two made contact, did they stick
25 together?

DAN OLSON-DIRECT BY MR. MOORE

1 A No, they didn't stick together.

2 Q Is it like two pool balls hitting together and
3 one goes shooting off in the distance?

4 A Pretty much so, yes.

5 Q So, it would be after the initial collision an
6 immediate separation of two vehicles?

7 A Yes.

8 Q Okay. Under the last scenario we're talking
9 about then, with the SUV swerving to the left and the
10 moped making a right to left motion when the collision
11 occurs, the moped is pushed forward and to the left? It
12 keeps going to the left?

13 A Keeps going to the left. There's nothing to
14 change what it's getting. It's getting a boost in its
15 forward component of velocity.

16 Q Okay. Now, of course, when that happens, when
17 it ends, the moped is in that left-hand median?

18 A Yes.

19 Q Okay. Is that consistent with what you found
20 out with regard to the physical evidence regarding how
21 this accident happened as to where the moped ended up?

22 A Well, that's the starting point that we had.

23 Q Okay. Now, is this scenario also consistent in
24 that you have the SUV swerving to the left?

25 A It's still consistent with that, yes.

DAN OLSON-DIRECT BY MR. MOORE

1 Q Okay. Now, given those four scenarios, which is
2 the more likely scenario, given the fact that the moped
3 ends up in the left-hand lane and the SUV was swerving to
4 the left at the point of contact?

5 A Still primarily, the component of the velocity
6 that the moped had at the moment of collision from right
7 to left, it had a forward, breaking up into going forward,
8 but it's angling off in the direction -- angling off and
9 starting here and end up going in that direction. So, you
10 block that into two components. Okay. Component of
11 velocity straight down the road, then you have this one to
12 get the result end. And what is useful about
13 understanding these vectors is that we know the collision
14 occurred in this lane, in this left lane, know he came to
15 rest in here. What was it that pushed him over there? It
16 was the result of the component of velocity already had.
17 The moped was in the process of moving right to left the
18 moment it was hit.

19 Q All right. Now, the second aspect to your
20 opinion, I understand it, that has to do with how much
21 notice or time that the Defendant had in operating her SUV
22 with regard to the moped moving in front of her in the
23 left-hand lane, am I right on that?

24 A Yes.

25 Q Did you make calculations regarding that?

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1 A I did.

2 Q Tell us what you found there.

3 A What I did -- because there was nothing out here
4 on this road to show us precisely what -- the term of art
5 we use, the point of collision or the area of collision.
6 There was no marks that were documented, tire marks, gouge
7 marks, those kind of things that were preserved. So, we
8 didn't know exactly from where between the Hot Spot and
9 the Family Dollar, but we got an idea. What was important
10 was the resting location. And now, what -- how far back
11 was the BMW when the moped started coming into the lane?

12 What I calculated was I took some friction
13 factors that are tabulated. And, of course, they vary
14 because you can have the moped sliding from like point
15 one -- point five to point seven friction factor,
16 depending upon the roadway, the moped, and a body; a
17 person that's sliding is about point eight or tumbling,
18 you know, a point of slowing down pretty good. So, what I
19 did is I took those friction factors and I used that
20 estimated speed of 45 miles per hour. The moped would
21 have been accelerated to 45 miles per hour under this
22 scenario and the agreed upon time of the speed that the
23 BMW was going. Is there variation in that? Maybe. But I
24 was doing this to get some idea of how much warning
25 Ms. Hunter had with the moped coming into the lane.

DAN OLSON-DIRECT BY MR. MOORE

1 I determined -- I could recite to you the
2 exact numbers that are in a document that I have, but
3 there's a certain distance that the moped slid after the
4 collision. I took that distance and I swung an arc on
5 here to determine where along this line it would have
6 traveled and found the center of the lane.

7 Q Explain a little bit more what you're doing
8 there. You found the resting point for the moped?

9 A I took the resting point for the moped as
10 point -- ground zero.

11 Q Okay. And then you say you swung an arc, what
12 do you mean?

13 A Well, I backed up -- I backed up until -- I took
14 the amount of distance that it had to slide from 45 to
15 come to stop here.

16 Q Okay.

17 A Calculated that distance. And one of them was
18 123 feet.

19 Q Is that the greatest distance?

20 A That's the greatest distance.

21 Q Is that the greatest distance in favor of the
22 Plaintiff at that point?

23 A Yes, it is.

24 Q Okay. Then once you got that distance, what do
25 you do?

DAN OLSON-DIRECT BY MR. MOORE

1 A Then I said what's 123 feet from here to the
2 point in the middle of the road.

3 Q All right.

4 A And that's their estimated place where the
5 collision occurred?

6 Q How do you determine what that particular point
7 is? You said you swung an arc?

8 A Well, yeah, that's -- we use a drafting program.
9 I had this drawn to scale and I took the 123 feet,
10 whatever the number is I was getting to precisely. And
11 it's like taking a string -- putting a string on here and
12 it's 123 feet long and going through here. And where that
13 line intersects the middle of the road, that's where I
14 said the collision would have occurred.

15 Q Okay. All right. Now, you've determined where
16 the collision is going to occur?

17 A That's right.

18 Q Then what's your next step in making this
19 evaluation?

20 A Now, we take the speed of the moped at 30, come
21 along and take that line that we -- we've got two points,
22 now I've got a straight line. I have extended that line
23 back and found where the moped would have crossed the
24 center line. Measured that distance, divided and used the
25 speed to determine how much time it took to get the moped

DAN OLSON-DIRECT BY MR. MOORE

1 from where it crossed the center line to where the
2 collision occurred.

3 Q Okay. So, he's going 30 miles per hour. That's
4 what, 44 feet per second, is that about right?

5 A Yes. Yes, sir.

6 Q Okay. All right.

7 A And then from here, with the BMW going 45, in
8 that same amount of time it took the moped to get from
9 here to here, where was the BMW? The BMW -- because the
10 BMW had to overtake. And the BMW was back -- when I
11 calculated -- it's a important number. Let me get it.
12 1.9 seconds.

13 Q Okay. Almost two seconds?

14 A Almost two seconds. And that would have been --
15 the BMW would have been 43 and a half feet behind the
16 moped at that time.

17 Q Okay.

18 A At the time the moped comes and starts entering
19 the left lane.

20 Q All right. Typically, how long does it take
21 someone to react to a danger once they realize it?

22 A Well, we're all different.

23 Q What's the range?

24 A Ranges around from a simple problem like oh,
25 I've got to step on the brakes, the only solution, that's

DAN OLSON-DIRECT BY MR. MOORE

1 about a second and a half of time. Well, that's the kind
2 of number that a lot of collision reconstructionists use
3 as pretty much a standard time for a healthy person,
4 alert, not an old person to see a threat, decide what to
5 do about it and then carry out an action. That would be
6 I've got something bad happen, I see something, I've got
7 to decide that to do. In this case, in her case, it was
8 to swerve and hit the brakes. Takes about a second and a
9 half. Nighttime will make that longer. Human factors
10 guys, I've studied this for years. I just read what they
11 write in their books. Those are the numbers they use for
12 typical. Is that what everybody does? I don't know, but
13 it's about.

14 Q So, if she had two seconds of warning and one
15 and a half seconds for reaction time, that gives her about
16 a half second to swerve, correct?

17 A Yes.

18 Q And that's what the testimony is that she
19 swerved to the left?

20 A Yes.

21 Q Just before the collision occurred?

22 A Yes.

23 Q Would the BMW have been able to stop within a
24 half second going 45 miles per hour?

25 A No, not 45.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Going 40 miles per hour?

2 A No. I didn't calculate that exact number what
3 it would take to stop, a panic stop 45, no.

4 Q Okay. So, under those circumstances, what's
5 your conclusion as to what happened?

6 A That the moped rider was -- had the -- for
7 whatever reason needed to be, wanted to be in that left
8 lane and took the left lane. And there was Ms. Hunter
9 coming up and there was a collision.

10 Q All right. Did the moped, in crossing over from
11 right lane to the left lane, give her sufficient room and
12 time to react and stop to avoid him?

13 A No.

14 MR. MOORE: All right. Answer any questions
15 that counsel might have of you.

16 CROSS-EXAMINATION

17 BY MR. GARCIA:

18 Q Good afternoon, Mr. Olson. I want you to stay
19 there just a moment if you can.

20 A Sure.

21 Q Let me ask you this, you've given us, if I
22 remember correctly, four different scenarios here? And
23 while you're looking through that, I believe that, at
24 least, one of scenarios has the BMW and the moped both
25 heading straight; is that correct?

DAN OLSON-CROSS BY MR. GARCIA

1 A One of them he asked me about was that way, yes.

2 Q We can remove that one, right?

3 A I don't think that's the way it is, right.

4 Q Can we remove that because we have credible
5 evidence that the BMW swerved to the left before making
6 contact with the moped?

7 A We have testimonial evidence that that happened.

8 Q Okay. Do we have any other evidence that that
9 happened?

10 A No.

11 Q No. Okay. But it's admitted that the BMW
12 swerved to the left before making contact with the moped;
13 is that correct?

14 A Correct.

15 Q So, can we eliminate one of these four
16 scenarios?

17 A Sure.

18 Q Okay. Good. Now, I want to ask you this. I
19 want to ask you a few general questions, all right? We
20 don't only have to take into account the velocity and the
21 magnitude of the moped in this particular collision, do
22 we? Do we also have to include the velocity and the
23 magnitude of the BMW?

24 A Yes, I did.

25 Q Did the moped accelerate up to the speed of the

DAN OLSON-CROSS BY MR. GARCIA

1 BMW at some point in the collision?

2 A Almost instantaneously.

3 Q Okay. Do these -- does the moped and the BMW
4 react like pool balls, where they hit each other and
5 there's no absorption of energy or crush damage or
6 anything along those lines?

7 A There was some crush damage on both of them?

8 Q Okay. Does that change your calculation, the
9 velocity vector and what happens after the collision
10 itself?

11 A No, it does not.

12 Q There's no absorption of energy at all?

13 A I didn't make these as energy calculations.

14 Q Okay. Now, you referenced -- you referenced a
15 diagram. I want to put something up on the board here.
16 It's something I received from your office.

17 A Sure.

18 Q And we'll try to get it as big as pebble here.
19 Now, I think that's consistent with some of the numbers
20 you've already given us; is that correct?

21 A Yes.

22 Q I'm just going to try to work through this and
23 make sense of it. I've had a long time to look at it,
24 right. It didn't make sense at first, I'm being honest
25 with you, and I think you gathered that the first time we

DAN OLSON-CROSS BY MR. GARCIA

1 spoke about it; is that fair?

2 A That's fair.

3 Q Okay. All right. Let's go through this then.
4 Here's what I want to ask you. Is this spot right here,
5 where the line comes down and the other line comes across,
6 is that meant to represent where the moped came to rest?

7 A Yes.

8 Q Okay. Good. I think you've already referenced
9 the 123 feet?

10 A Yes.

11 Q Now, let's go 123 feet back?

12 A Yes.

13 Q Now, I think this line right here is meant to
14 reference that 123 feet; is that correct?

15 A Yes.

16 Q All right. And that 123 feet, does it represent
17 where the moped is -- excuse me, where the moped came to
18 rest relative to where the collision initially occurred?

19 A It's actually the other way around, where the
20 collision occurred relative to where they came to rest.

21 Q Fair enough. So, this 123 feet represents the
22 distance between when the collision occurred and where the
23 moped came to rest, is that better stated?

24 A Yes.

25 Q Okay. Now, we've tot another number here and

DAN OLSON-CROSS BY MR. GARCIA

1 that's 86.92 feet. Can we go with 87 feet?

2 A Yes.

3 Q We've got this 86.92 feet. I want to ask you
4 this, what does this point right here and this point right
5 here represent?

6 A That's how far -- that's my calculation of how
7 far the moped traveled by getting -- from the moment it
8 crossed the center line to where the collision occurred.

9 Q Where's the moped located when the collision
10 occurs?

11 A Right in front of that, right there.

12 Q Is it in the center of this lane right here?

13 A That's what the testimonial evidence was.

14 Q Okay.

15 A The moped -- the rider said he was in the center
16 of the lane.

17 Q Was there any other testimony regarding the
18 location of the moped?

19 A I think it was -- there was nothing to
20 contradict that that I could find.

21 Q Was there anything to support it?

22 A I don't recall anything else besides that.

23 Q Did you review Ms. Hunter's recorded statement?

24 A I did.

25 Q Did she say that when she looked up that he was

DAN OLSON-CROSS BY MR. GARCIA

1 right in front of her?

2 A Right in front, yes.

3 Q Would you take that to mean that he's riding in
4 the center of the lane?

5 A No, not necessarily.

6 Q Why not?

7 A Right in front. I mean, you know, cross check
8 if you're driving a vehicle. You see something in front
9 of you. It's a bit relative. There was nothing to
10 specifically say that she saw him right through the
11 center.

12 Q Okay. We'll come back to that. Now, I want to
13 do this here, there's something that's missing from here
14 that you talked about. And I considered drawing it up and
15 I thought better of it, okay. So, we're going to have to
16 have a number outside of here that we don't see. Now, you
17 correct me if I'm wrong, okay. This point right here, I
18 believe it represents when Mr. Burgess first gets to -- in
19 your interpretation of what it is that transpired here,
20 it's the point where Mr. Burgess first reaches the very
21 center of this lane here, the center of the two lanes?

22 A Yes, sir, the center line.

23 Q Okay. So, the center line, thank you. As we
24 go, if I'm using the wrong terminology, you correct me,
25 okay?

DAN OLSON-CROSS BY MR. GARCIA

1 A Yes, sir.

2 Q Thank you. So, we have this distance traveled
3 between this center line and the center of the lane; is
4 that correct?

5 A Yes.

6 Q How long did that take? And while you're
7 looking, I believe you testified it was just under two
8 seconds?

9 A Yes, 1.97. Time impact -- yes, yes, 1.97.

10 Q Okay. Now, we have a little bit further back
11 from this line, which we don't see because it's not
12 represented on this particular diagram. But I believe you
13 stated that at the point where Mr. Burgess first hits that
14 center line, right?

15 A Yes.

16 Q At the point where he first hits that center
17 line, how far back is Ms. hunter?

18 A She's 130 feet, 130 and a half feet away from
19 the point of collision.

20 Q Got you. So, that would put her at about 43 and
21 a half feet behind this line?

22 A Behind him.

23 Q That's what I'm trying to represent here because
24 we don't see it, but you referenced it. So, at the point
25 where Mr. Burgess first hits this line right here?

DAN OLSON-CROSS BY MR. GARCIA

1 A Yes.

2 Q Based on your diagram?

3 A Yes.

4 Q Okay. Ms. Hunter would be 43 and a half feet
5 back?

6 A Behind him.

7 Q What's the significance to you of this point
8 right here? Why chart that point right there of when
9 Mr. Burgess first hits that center line?

10 A To give how much time that Mr. Burgess was --
11 could be readily recognized as a threat to Ms. Hunter.

12 Q Okay. I think I understand you. So, this point
13 right here is the first time that Ms. Hunter, in your
14 opinion, has noticed that Mr. Burgess is crossing into
15 this left lane; is that correct?

16 A Yes.

17 Q And she would have been how far back at that
18 point?

19 A 130 and a half from the point of collision.

20 Q Well, let me ask you slightly differently. She
21 would be how far back from this point right here?

22 A From that point, 43 and a half feet.

23 Q Now, is this diagram here a reasonable
24 interpretation of what it is that transpired in the
25 collision?

DAN OLSON-CROSS BY MR. GARCIA

1 A I believe it is.

2 Q Okay. We're missing a number here and I'm going
3 to keep referencing it. From this point back, 43 and a
4 half feet or so is where we'll find Ms. Hunter. And in
5 your opinion, that is the first time that she has noticed
6 that Mr. Burgess is coming into the left lane; is that
7 correct?

8 A I used that, yes. Yes, sir.

9 Q Okay. Why don't you believe that Ms. Hunter may
10 have had noticed slightly earlier than that?

11 A That's a positive, no doubt that the moped is a
12 threat. You've got traffic -- I'm basing this on my own
13 experience now. Traffic going down a two-lane road that's
14 not separated. You see the traffic. You have the
15 expectation that the lane is yours. If you're in the left
16 lane, you have that normal expectation that lane belongs
17 to you.

18 Q Sure.

19 A And until there is an indication that somebody
20 is trying to take it and you have to do something about
21 it.

22 Q Okay.

23 A And it was -- in my opinion, that is a great or
24 a good point to consider when somebody on the center line,
25 I got to do something about this. Something's happening.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Okay. Would the -- well, let me ask you this,
2 it is fair to assume that if your scenario is correct here
3 and your -- I think you've already stated this is a
4 reasonable interpretation what it is that transpired in
5 this collision?

6 A Yes.

7 Q If this is correct, is it fair to assume --
8 we're making some assumptions here, is that fair,
9 Mr. Olson?

10 A Well, we've used things that are reasonable to
11 help us reconcile, you know, within a certain realm of
12 probabilities.

13 Q And this is reasonable?

14 A I think it is.

15 Q Okay. So, would it be reasonable to state that
16 before Mr. Burgess begins to make his change into the left
17 lane, as your scenario poses -- before we go any further
18 with this scenario, would you agree that the Plaintiff
19 does not adopt this scenario as their own?

20 A I wasn't here during your prosecution of your
21 part of the case.

22 Q Okay. Fair enough. Would it be reasonable to
23 state, Mr. Olson, that the Plaintiff, before he begins
24 this crossing motion, as you've posed, is riding in the
25 center of the lane? He's riding in the center of the

DAN OLSON-CROSS BY MR. GARCIA

1 right lane before this crossing motion, as you pose,
2 begins?

3 A He may have.

4 Q Okay. Is it reasonable?

5 A Yes.

6 Q Okay. And so, it is reasonable to also conclude
7 from there that an individual who's keeping a proper
8 lookout would perceive this right to left motion into the
9 left lane before an individual reaches this -- before that
10 same moped or individual reaches that center line, is that
11 reasonable, too?

12 A It would depend on the rapidity of that motion,
13 something to get the driver -- get Ms. Hunter's attention
14 that something is bad about to happen. And in my
15 analysis, I used when the moped crosses that center line
16 as beginning of this analysis.

17 Q Yes, I understand that. I'm just asking a
18 slightly different question about that. You used a word
19 and I'll be honest with you, I missed it. You said
20 something about it depends on the what kind motion. Did
21 you say the fluidity of the motion?

22 A Rapidity. The violence of that or something
23 to -- there had to be something to catch the attention of
24 the driver in this case. People have studied these kinds
25 of things, the human factors guys. I don't hold myself

DAN OLSON-CROSS BY MR. GARCIA

1 out to be a human factors expert. I do read what they say
2 and apply it.

3 But for the purposes of this analysis, that
4 crossing of the center line now leaves no doubt that
5 something is happening. Could be -- you could -- I could
6 see that. I've seen riders changing lanes -- changing
7 from the left part to the right part. Depends upon how
8 rough the road is. When I ride, I rarely ride my
9 two-wheel vehicle in the middle of the road because it's
10 rough. Generally, I follow one of the tire paths. It's
11 worn, a lot smoother. If it's rougher, I'll move from one
12 to the other. You see that kind of motion on the part of
13 a rider on two wheels oftentimes. So, that motion -- I
14 would just offer my own experience, that a motion right to
15 left still in the lane is not something that should
16 trigger a hard braking swerving response.

17 Q We don't have to really speculate as to -- if
18 we're looking at this diagram here, we don't have to
19 speculate as to the, I think the term you used rapidity of
20 that motion?

21 A You might have to look that up to say it, but
22 the --

23 Q A suddenness?

24 A Suddenness, the -- something to attract their
25 attention. The attention-getting aspect of a maneuver on

DAN OLSON-CROSS BY MR. GARCIA

1 the part of another driver.

2 Q Now, if we're relying on this diagram, we don't
3 really need to guess on what the suddenness was, it would
4 be something like well, this kind of same motion here from
5 the center and moving along this line here, right?

6 A That's correct.

7 Q Okay. So, if we -- so we'll go back to that,
8 right. Because I asked you to answer whether an
9 individual perceived or whether it's reasonable for
10 Ms. Hunter to have perceived Mr. Burgess' right to left
11 movement as you posed it, before he gets to this line
12 right here?

13 A Let's -- let's take this and take that same path
14 of the moped.

15 Q Uh-huh.

16 A And extend it now to the middle of the right
17 lane.

18 Q Yes, let's do that.

19 A And it turns out if he's running at -- you have
20 a pointer?

21 Q Of course.

22 A May I?

23 Q Sure.

24 A Okay. What would happen, we take this pathway
25 that you see right along here.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Yes, sir.

2 A And from this center lane, let's say he was
3 going in the center of this lane. So, what that does, you
4 extend this out and we're going to extend it out another
5 86.92 feet.

6 Q Okay.

7 A At 30 miles an hour, that takes 6.197 seconds.

8 Q To get to the other center.

9 A To get from operating the center of the right
10 lane to crossing the center line, which is -- we'll let
11 the jury decide if that is a sudden maneuver worthy of
12 causing someone to slam on their brakes or swerve or not.

13 Q What I'm asking you, though, is would it be
14 reasonable to pose that Ms. Hunter may have perceived this
15 motion from right to left as you posed before this center
16 line right here. That's really my only question for you
17 and we can move on from there. Would it be reasonable to
18 subject that Ms. Hunter may have perceived Mr. Burgess'
19 right to left motion, as you posed, before this line, this
20 center line right here?

21 A There's a difference between perception and
22 recognition.

23 Q Okay. We'll use the term recognition. Is it
24 reasonable that Ms. Hunter may have recognized that
25 Mr. Burgess was making this right to left motion, again,

DAN OLSON-CROSS BY MR. GARCIA

1 as you posed, that the Plaintiff does not adopt --

2 MR. MOORE: Your Honor, he is getting into an
3 area outside of this witness' expertise. He's asking
4 about human factor issues, which he's not --

5 THE COURT: It's outside the area of his
6 expertise. Don't ask him to draw any conclusions or
7 make an opinion about it.

8 BY MR. GARCIA:

9 Q I have one, you have one. If we need to point
10 again, we can continue to point. All right, so let's stop
11 talking about where that started, right?

12 A Right.

13 Q Where that recognition or perception started.
14 If we take that -- if we understand that you're not trying
15 to put any human factors into this, now we can just drill
16 down right now. All right. We have this point where you
17 pose that he begins to cross and hits that center line,
18 right?

19 A Yes, sir.

20 Q And it would take two seconds from here to here
21 for the collision to occur?

22 A Yes.

23 Q Okay. And now, beyond this point, Ms. Hunter
24 would be at the moment she first perceives, in your
25 perspective, that Mr. Burgess is making this right to left

DAN OLSON-CROSS BY MR. GARCIA

1 motion, as you posed, would be right at this point right
2 here and she would be 43 and a half feet back?

3 A Yes.

4 Q I'll ask you this, back at that courtroom is 43
5 feet. From here at this stand to the back of that
6 courtroom is 43 feet. I'll either let you agree with me
7 on that or I'll let you measure it out right now.

8 A I wouldn't argue with that. If you've measured
9 it and you're saying 43 feet, it's -- well, I don't have a
10 calibrated eyeball, but that's pretty close.

11 Q Fair enough. I asked Ms. Hunter, when she first
12 perceived Mr. Burgess, when she first saw him, when she
13 first saw him and she said it was before that wall, right?

14 A No, she said it was inside that wall, that's
15 what I heard.

16 Q So, inside this wall?

17 A Yes.

18 Q So, when she first saw him, she was closer than
19 this wall right there; is that correct?

20 A Yes, that's what I heard.

21 Q If that's 43 feet and we're closer, but she
22 should have perceived at the 43 and a half foot mark when
23 Mr. Burgess hits that center line as you posed it, what
24 are we missing?

25 A Nothing.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Why not?

2 A Within the realm of uncertainty we have here,
3 that matches really well.

4 Q You think it matches really well.

5 A Yes, from the -- about the distance. She
6 doesn't have calibrated eyeballs either.

7 Q That's fair.

8 A And she said she's about -- inside is less than
9 the distance from her witness stand to the wall and you
10 say that's 43 feet, now, that's when she starts seeing,
11 recognizing that the moped is in front of her. It's when
12 the moped first comes into her path, it all matches up.

13 Q She stated in her recorded statement that she
14 looked forward and the moment she looked forward, she saw
15 him right in front of her. Is that correct or not?

16 A That she looked forward? I don't have any
17 reason to argue with you.

18 Q Okay. So, I ask you again, the first time she
19 sees him is inside your number where she should have seen
20 him. Can you reconcile that? Is she keeping a proper
21 lookout if the point in which you say she should have
22 perceived him because he's already on this center line,
23 she's actually closer than that point when she first sees
24 him? Can you reconcile that?

25 A Once again, you're getting into human factors.

DAN OLSON-CROSS BY MR. GARCIA

1 She's -- the moped initially is in that right lane. It's
2 not a threat to her. She recognizes it as a threat in
3 front of her at the moment it crosses that center line
4 into her lane and she estimated that to be about 43 feet,
5 which matches up with my calculations perfectly.

6 Q She also testified -- excuse me, she also stated
7 in her recorded statement that she has no idea where he
8 came from; is that correct?

9 A I believe that's correct.

10 Q Well, she has two seconds before it is that she
11 makes before this -- before there's a collision here,
12 according to your numbers, there are two seconds between
13 when Mr. Burgess first hits this line here that you
14 represented is meant to indicate when she can first see
15 Mr. Burgess making this right to left motion into her
16 lane?

17 A Correct.

18 Q Right. And it takes two seconds from here to
19 here for that to happen?

20 A Correct.

21 Q She says doesn't know where Mr. Burgess came
22 from.

23 A That's right.

24 Q Would she not have two seconds to see
25 Mr. Burgess moving from here to this point right here?

DAN OLSON-CROSS BY MR. GARCIA

1 A I don't think that's enough time for her to
2 avoid this collision.

3 Q That's not what I asked you, though. What I
4 asked you, though, if she had two seconds to see
5 Mr. Burgess moving from here to here, then she had that,
6 right?

7 A That's correct.

8 Q But she didn't testify she knew which direction
9 he was coming from --

10 A No, no, that's not my understanding of the --

11 MR. MOORE: So --

12 THE COURT: Wait, wait, Mr. Olson.

13 Go ahead, what?

14 MR. MOORE: My objection is the same one I said
15 earlier. He's getting beyond the scope of his
16 expertise. This is human factors.

17 THE COURT: Okay.

18 MR. MOORE: He's an accident reconstructionist.
19 They are two different disciplines here.

20 THE COURT: Okay.

21 MR. GARCIA: May I respond?

22 THE COURT: Yeah, what do you want to say?

23 MR. GARCIA: My response to that would be he
24 has, essentially, offered today as testimony and
25 he's, essentially, drawn this diagram out to give us

DAN OLSON-CROSS BY MR. GARCIA

1 an idea of how much time Ms. Hunter would have had
2 that to react, which is clearly a human factor.

3 THE COURT: Look, look, wait, wait. You're
4 making a jury argument to me? Confine your questions
5 of this individual and ask for his opinions that are
6 related to his expertise. That's the objection and
7 that's what my ruling is.

8 MR. GARCIA: Okay.

9 BY MR. GARCIA:

10 Q I'll ask you again then. What is this diagram
11 meant to represent?

12 A That is the outlier of all the uncertainty and
13 farthest distances that would have happened at.

14 Q Okay.

15 A With the uncertainty of the friction factors and
16 other things, the speed estimates and that sort of thing
17 that we have to deal with in this analysis.

18 Q And is it reasonable?

19 A I believe it is reasonable.

20 Q Okay. Well, let's look at just some of the
21 photos now. And you can have a seat.

22 A Okay. Can I get a cup of water?

23 THE COURT: Mr. Teal, please.

24 Come have a seat. All right.

25

DAN OLSON-CROSS BY MR. GARCIA

1 BY MR. GARCIA:

2 Q Sure. Now, is it your testimony that the only
3 way the moped ends up in the median is if there's this
4 right to left movement of the moped?

5 A Have to move from the center of that lane into
6 the -- it had to move left after the collision to get
7 there.

8 Q Sure, I'm talking before the collision.

9 A And that's where it got there, that bit of
10 velocity to make that happen.

11 Q Okay. Where does the contact occur in the lane
12 its? Does that make sense? When we talk about where the
13 collision occurred. In the lane itself, at what point in
14 the lane is contact made? Is it in the center of the
15 lane?

16 A If you recall drawing, that's where I drew it
17 happening. Because that was Mr. Burgess' testimony that
18 he was in middle. That's what I used.

19 Q Okay. I'll ask you this then, would the moped
20 still be moving from right to left once it gets to the
21 center of that left lane?

22 A Was it still moving -- yes. I mean, he was on
23 the way to get to the left. He was going to eventually
24 make a left turn farther up the road.

25 Q Okay. But there wouldn't be any more right to

DAN OLSON-CROSS BY MR. GARCIA

1 left movement once he's gotten to the center of the lane.
2 Why would he continue to go past the center of that lane.

3 A Did you ask him that? Said the collision was
4 there, the way you get there is -- the only way is to have
5 that right to left movement.

6 Q Well, your position is that the only way he ends
7 to the left is if Mr. Burgess is moving from right to
8 left. But we do know that Mr. Burgess is in the center of
9 the lane when the collision occurs?

10 A We have made that decision to analyze this with
11 him in the center of the lane. It could just as well --
12 and we can go into hypotheticals here until tomorrow.
13 But, you know, the other hypothetical is that he didn't
14 make it all the way, he made it only into that nicely
15 well-worn track for the right wheels, or all the way over
16 to the left, or was further down the road and raved to
17 make that left turn into the Family Dollar. All those
18 scenarios. Well, I made this assessment with what
19 Mr. Burgess said center. If you -- there's all kinds of
20 other hypothesis, but what I'm still convinced of that
21 there was motion right to left when this collision
22 occurred that caused him to get to the median.

23 Q So, there are various reasonable hypotheses for
24 how this exclusion occurred. And one of them, though, is
25 that Mr. Burgess is in the center of the lane when the

DAN OLSON-CROSS BY MR. GARCIA

1 collision is made, when the contact is made; is that
2 correct?

3 A That is what -- that's what his testimony is or
4 his statement is.

5 Q I'm asking you specifically about that
6 reasonable interpretation?

7 A If that was the case, that moped would have been
8 straight ahead or in the right lane in resting location.

9 Q Sure. I'm only asking you, though, is there
10 still a right to left component if the collision occurs at
11 the center of the lane?

12 A It has to be.

13 Q Okay.

14 A That's the only way it can get to the left, to
15 the median.

16 Q Well, if the collision occurs in the center of
17 the lane, the moped isn't moving from right to left
18 anymore, is it?

19 A How do you know that?

20 Q You don't know either, though?

21 A It has to be because you can't -- in your
22 scenario, and we talked about this, your scenario, what
23 would have happened is the back end of the moped would
24 have been spun around, put into a clockwise rotation, laid
25 it down of its left side and it would have gone either

DAN OLSON-CROSS BY MR. GARCIA

1 straight ahead or off to the right because of that
2 clockwise rotation that happens at the moment of
3 collision.

4 Q It's almost impossible to argue about this
5 clockwise rotation; is that correct?

6 A I think I even read about Mr. Sims' deposition
7 testimony talked about that clockwise rotation.

8 Q So, we're narrowing down points of contention,
9 right? We know that there must be a clockwise rotation
10 because -- well, there's an initial or primary impact
11 point here; is that correct?

12 A I don't know if you can determine from that
13 photograph if that's initial, if that's the luggage rack
14 that hits first and the tire -- we do know that the front
15 part of that BMW has that -- there's a soft spot there
16 behind the support by the bumper.

17 Q This year right here?

18 A No, down lower.

19 Q Here?

20 A That part.

21 Q Okay. You have your pointer there, too.

22 A Yeah, right in here. That part of the bumper is
23 resilient, is the word we use. It will bounce back. It
24 will collapse, absorb some energy, hit a much more solid
25 construction behind it, steel and energy absorbing foam

DAN OLSON-CROSS BY MR. GARCIA

1 that's behind it. And you see there's something pushed
2 back all the way to the left right up here. But this
3 bumper is sticking back out, that's because it bounced
4 back out.

5 Q Does the luggage rack stick out farther than any
6 other part of the moped?

7 A It appears -- it might be because of the crash
8 damage, it's hard to tell. Typically, it's just behind
9 the rear wheel.

10 Q I believe your file contained a photograph of a
11 very similar, I don't think it's the exact same one, but a
12 very similar moped. Maybe? I think we've already reached
13 a -- I wouldn't say agreement, but that rack sticks out a
14 little bit further than the rear tire on the moped?

15 A Not far, but it does.

16 Q Okay. Would that be the initial contact point
17 then?

18 A That bumper that -- that hood is behind the
19 bumper by several inches.

20 Q So, a reasonable interpretation may be that this
21 is the initial contact point, but it could be here as
22 well?

23 A Yes.

24 Q We just don't know?

25 A Don't know.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Okay. Can we say this, do you have primary
2 impact damage in this area right here?

3 A Yes.

4 Q Okay. Do we have some secondary damage that
5 gives us an idea of the rotation of this particular moped?

6 A There's a scratch down here. And there's --
7 this happening, this has a curve to it. I don't know. I
8 wish I could have looked at it to see if you could tell
9 which direction all that paint is smeared, but there was
10 some rotation happening.

11 Q We do have some damage right here, too, though,
12 right?

13 A Yes.

14 Q Okay. How do we account for the damage over
15 here?

16 A There is some discussion of that in other
17 people's testimony that it might be sympathetic damage.

18 Q Do you agree with that?

19 A I didn't get a chance to look at it.

20 Q Is it a reasonable -- is it a reasonable
21 interpretation of what is that going on here?

22 A It is.

23 Q Okay. So, we definitely agree there's a
24 clockwise rotation?

25 A I don't have anything to say that it would be

DAN OLSON-CROSS BY MR. GARCIA

1 different.

2 Q Okay. So, now that there is this clockwise
3 rotation of the moped once the collision is made, how far
4 does that rotation continue? And here's what I mean by
5 that, I'm thinking of 360-degrees, right. So, say the
6 moped just starts here. If it moves from here to here,
7 that would be 90-degrees, is that fair?

8 A Yes.

9 Q So, how far would that moped rotate?

10 A It could go 360, it could go 720, it could go --
11 it could have gone down and did that all the way to where
12 it came to rest?

13 Q Did it?

14 A I don't know.

15 Q Wouldn't there be certain scratch marks on the
16 moped itself that would give us an indication that it was
17 spinning in a direction if it did go down and was spinning
18 in that direction off to the right as you suggest?

19 A It didn't see them in the photographs.

20 Q Okay. So, we don't have any scratches that
21 suggest the moped hits the ground and is spinning around?

22 A No.

23 Q Do we?

24 A I don't think so.

25 Q Okay. Now, you pose to us that the only way the

DAN OLSON-CROSS BY MR. GARCIA

1 moped moves from the center of his lane to just inside the
2 median is if the moped brings in a right to left movement
3 into the collision; is that correct?

4 A Yes.

5 Q And your position is that the BMW, its right to
6 left movement, which is admitted, has no bearing on
7 that -- this -- the right to left momentum of the BMW
8 doesn't account for the moped being moved to the left?

9 A Because the rapid separation of the two
10 vehicles. In other words, it's like two vehicles one --
11 you know, they're both going to react to it. The massive
12 mass difference, weight difference about 10 times makes it
13 so that it's not much of an effect happens on the BMW. It
14 did slow it down some. There's some energy with it. I
15 didn't make any energy calculations. But then the moped
16 would have been propelled off in a forward direction, the
17 predominant velocity of the BMW.

18 Q You describe this massive difference in, what's
19 the term I'm looking for, momentum?

20 A No, mass.

21 Q Velocity?

22 A Mass. Where there is a massive difference in
23 momentum, but the momentum -- one of the reasons the
24 momentum analysis doesn't work well is because the shallow
25 angle difference. You get any minor variation in those

DAN OLSON-CROSS BY MR. GARCIA

1 calculations you can do with an angle would render a
2 calculation using momentum. Especially one of -- when I
3 went to collision reconstruction school, when they're
4 relative in line, everybody going the same way, you're
5 stuck not being able to use momentum.

6 Q Okay.

7 A So, using a momentum calculation is not terribly
8 reliable. Then the massive differences is -- momentum
9 works great for a T-bone collision with vehicles that are
10 relatively the same size.

11 Q You've described this massive difference in mass
12 between the BMW and the moped, correct?

13 A I did use massive, it's a large difference,
14 about 10 times.

15 Q About 10 times. Wouldn't that massive
16 difference account for the movement of the moped from the
17 center of the lane to the left?

18 A No. All it did was impart the forward velocity,
19 that boosted it from 30 to 45 or thereabouts.

20 Q Okay. As we're getting another image up here,
21 we do know that the BMW is moving from right to left
22 immediately before impact; is that correct?

23 A That is the testimony, yes.

24 Q Okay. And why -- I want you to explain this,
25 just another kind of theory, if you will. The moped is

DAN OLSON-CROSS BY MR. GARCIA

1 riding down the center lane and not making a right to left
2 movement as Mr. Burgess has testified to. But the BMW is
3 moving from right to left. Is there any kind of hooking
4 that is taking place here that would allow that BMW to,
5 essentially, snag that moped for even a brief moment and
6 move it from right to left?

7 A What that indicates to me is that -- rather than
8 that is that it collides with the back end of the moped.
9 And if it's running with those angels that you're talking
10 about, then that force that comes from the BMW, colliding
11 with the back end of the moped, would be behind, would
12 be -- here's the moped and we've got this happening. And
13 it would tend to knock it like this, spin it clockwise off
14 to the right in the scenario that you proposed to me.

15 Q So, there wouldn't be any hooking here that
16 would move that moped from right to left in your
17 estimation?

18 A That's correct.

19 Q Okay. Did you visit the scene?

20 A No.

21 Q Why not?

22 A Would have been senseless.

23 Q Why?

24 A It's nothing there to see that you can't see in
25 the photographs.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Well, there's, at least, a couple of things that
2 you can get from there, correct? For instance, I believe
3 in the diagram that you had up, you actually take a
4 measurement of the center of the lane and move it down
5 towards just inside the median; is that correct?

6 A (There was no response.)

7 Q There is a measurement there, is it not?

8 A Yes.

9 Q How did you arrive at that measurement?

10 A Those measurements come by the gift of Google.

11 Q And you're confident in those measurements and
12 Google's accuracy?

13 A Within a half foot.

14 Q Okay. How many automobile collisions have you
15 reconstructed?

16 A Hundreds.

17 Q Hundreds. How many times have you visited an
18 active scene?

19 A Hundreds.

20 Q Hundreds. But you didn't visit this active
21 scene?

22 A That's correct.

23 Q Okay.

24 A That happens often. You get involved in a case
25 such as this one that is this far removed from when the

DAN OLSON-CROSS BY MR. GARCIA

1 collision occurred, it's not a useful thing to do.

2 Q Now, is your purpose in attempting to
3 reconstruct this collision to give the jury an idea of
4 what it is that actually happened?

5 A Yes.

6 Q Okay. Is part of that reading some of the
7 statements of the parties, hearing their testimony and
8 getting an idea of what was going on before the collision
9 occurred?

10 A I did. I'm aware of some of the discussion,
11 activity just prior to the collision, yes.

12 Q Did you rely on any of that information?

13 A Only that path of travel from where the people
14 came from to where this collision occurred.

15 Q Well, isn't what's going on before the collision
16 a critical part of putting this entire -- all the pieces
17 of the puzzle together so you can reach a conclusion?

18 A Sometimes it very useful. Sometimes that's --
19 it did what I was looking for. And it confirmed the
20 direction of travel.

21 Q Okay. Have you discounted Ms. Hunter's
22 statements regarding when it is that she first perceived
23 Mr. Burgess?

24 A And it matches perfectly with this
25 reconstruction.

DAN OLSON-CROSS BY MR. GARCIA

1 Q All right. Let's put the overhead on for a
2 second. What does Ms. Hunter say about making her way
3 onto West Blue Ridge Drive?

4 A She came out of where she had been working. I
5 believe your pointing at the drive.

6 Q Is that West Bramlett?

7 A West Bramlett, yes. Makes a -- crosses over the
8 travel, gets into the left lane and proceeds.

9 Q Okay. Is that what she testified to, that she
10 proceeds when she gets into the left lane of travel?

11 A That's my understanding.

12 Q Okay. Let's move to Line 104. I was making a
13 left-hand turn, you see that right there, Line 103? We'll
14 start at Line 103. She was asked tell me about the
15 accident?

16 A I see it.

17 Q I was pulling out from the side street. I was
18 making a left-hand turn and I looked, you know, both ways.
19 And I remember thinking there wasn't quite as much traffic
20 as usual. I pulled out making a left-hand turn. I'm
21 looking around and it was like it came out of nowhere.

22 Is that consistent?

23 A Yes.

24 Q Okay. Let's move to Line 151. Now, it says, As
25 soon as I looked up in front of me from the turn, like, I

DAN OLSON-CROSS BY MR. GARCIA

1 was just -- he was right in front of me.

2 Is that consistent?

3 A The right in front of me is. You have to make
4 an inference about how far she proceeded from making her
5 left turn to where this happens. That -- there's nothing
6 in there that tells me what really transpired, how far
7 that distance is?

8 Q What about the as soon as part?

9 A As soon as?

10 Q Yeah.

11 A As soon as to a lot of people, you know,
12 that's -- you're getting into perception and
13 responsibilities and response again.

14 Q Okay. Let go to Line 255 then. Now, you
15 considered these statements in putting -- or
16 reconstructing this collision; is that correct?

17 A Yes.

18 Q Okay. Was there anything that distracted you
19 when the incident happened? Can we make any inferences
20 from this?

21 Her response is, No, other than I was
22 looking around, you know, for traffic and that I somehow
23 did not see him on that moped.

24 A That's what she said, yes.

25 Q Okay. And you believe that's still consistent

DAN OLSON-CROSS BY MR. GARCIA

1 with your position of how it is that this collision
2 occurred?

3 A Yes.

4 Q Okay. We'll go to Line 260 to 269. Now,
5 starting at 260, she's asked rather specifically, When you
6 came off of Bramlett Street, there is -- is there a light
7 there or do you have to pull out and just cross over --
8 excuse me, have to just pull out and cross over traffic?

9 And her response is, There is no light.
10 There's no light and sometimes it can get really busy on
11 that road. There's a little median, so, you know, that's
12 how people kind of pull out to that median and kind of
13 look and wait for traffic to clear. It was fair. I
14 had -- I thought I had a fairly clear path, but I was
15 still kind of looking to make sure, you know, cars
16 weren't, inaudible, and that I had enough -- they were --
17 and anything like that. So, I was looking around making
18 sure everything was clear. Then I looked in front of me
19 and it was like he was right there.

20 Again, can we make the inference that she's
21 saying she's looking around as she's crossing into West
22 Bramlett and the moment she looks forward from crossing
23 into -- from West Bramlett to West Blue Ridge that
24 Mr. Burgess is right there?

25 A If that was the case, then that collision didn't

DAN OLSON-CROSS BY MR. GARCIA

1 occur where everybody else thinks it is, somewhere between
2 the Hot Spot and the Family Dollar.

3 Q I certainly agree with you on that. We'll move
4 on. We'll go to Page 298 -- excuse me, Line 298. Now it
5 gets a little bit more specific, doesn't it? When did you
6 first see the moped driver?

7 And the response is, I mean, I didn't see
8 him until like I pulled out into that left-hand lane and
9 looked in front of me and there he was.

10 A Okay.

11 Q Would this put the collision even before the Hot
12 Spot?

13 A But it didn't.

14 Q That's not what I'm asking you. If we take this
15 statement as true, would this put the collision before the
16 Hot Spot? It almost has to, doesn't it?

17 A Once again, it's your concept of what time is
18 transpiring. Once again, you're asking me to make an
19 opinion in regard to human factors. I can tell you, I
20 crashed an airplane and walked away from it. That's the
21 longest three seconds of my life. I can recall it down to
22 every little speck in time. But I can't crawl inside
23 Ms. Hunter's head and discern what her internal clock is
24 registering on this statement. This is a relative
25 statement about what path she took. And that's what I

DAN OLSON-CROSS BY MR. GARCIA

1 used it for.

2 Q Okay. So, I pulled out into that left-hand lane
3 and looked in front of me.

4 That's simply a relative statement, it
5 doesn't tell you anything about the point in -- well, I'll
6 ask you just slightly differently. Strike that.

7 Let's put the overhead spot back up if you
8 can.

9 Just from a reasonableness standpoint,
10 Mr. Olson, when would she have pulled into this left-hand
11 lane?

12 A Somewhere probably before the Hot Spot, that's
13 about how long it would take. She said there wasn't much
14 traffic. Normally, she would do what you see a lot of
15 people do, pull into that left middle lane and wait for
16 the traffic to clear so they can have an easier
17 acceleration. Sounds to me like she was -- your
18 interpretation of that, she didn't have to do that that
19 night. So, she just pulled into the left lane and
20 proceeded. That's what I read into all that.

21 Q So, she pulled into that left-hand lane and as
22 soon as she looked forward from pulling into that
23 left-hand lane, she saw Mr. Burgess right in front of her?

24 A I don't know if you can put that kind of a clock
25 into this scenario. Because if you do, then we got

DAN OLSON-CROSS BY MR. GARCIA

1 Mr. Burgess saying -- telling you something that isn't
2 right about where he came. You have to take and reconcile
3 everything that they say and put it in context of the
4 physical evidence that you have. And that's what I did.
5 I don't know what you're trying to bring up with this.
6 You're even confusing me, so.

7 Q Well, there's one time that Ms. Hunter testifies
8 that -- or excuse me, in her statement said that when she
9 pulled out of here, the collision occurred about a quarter
10 mile up the road?

11 A You don't have a distance scale on your map, so.

12 Q So, you don't know where a quarter mile up the
13 road would be?

14 A Not on that particular drawing.

15 Q Well, I understood that you took all the pieces
16 of this collision and put them together. You relied on
17 some of the recorded statements of Ms. Hunter as well.
18 And at some point in her recorded statement, she states
19 that the collision occurred quarter mile up the road from
20 where she turned out. You don't know where that would be?

21 A That's within reason of where the collision
22 occurred, yes.

23 Q Okay.

24 A I have a map here that has a scale on it.

25 Q I thought you don't know where the collision

DAN OLSON-CROSS BY MR. GARCIA

1 occurred?

2 A Where we -- where the -- we know approximately
3 somewhere between Hot Spot and Family Dollar, yes.

4 Q Could you use your pointer and tell me
5 approximately where you think it occurred?

6 A Well, where we talked about. Let's see, let me
7 get a closer look at your map. Hot Spot, West Bramlett,
8 Hot Spot and Family Dollar.

9 Q Okay.

10 A This total distance -- the distance between
11 Bramlett Road and the Hot Spot is approximately 500 feet.

12 Q That's not a quarter of a mile, is it?

13 A A quarter a mile is 5,280 divided by four, 1700
14 something feet.

15 Q Okay.

16 A Once again, does she have a calibrated
17 speedometer, odometer in her head? It felt like to her.
18 That's what I read into it, it felt like a quarter mile.

19 Q Okay. Even the most reliable statements from
20 Ms. Hunter in your estimation aren't reliable?

21 A Where did you get that?

22 Q Well, I mean, we have --

23 THE COURT: Wait a minute, wait a minute.

24 You're pitting witnesses and that violates the rules.

25 MR. GARCIA: Okay. I'll move on. Thank you.

DAN OLSON-CROSS BY MR. GARCIA

1 BY MR. GARCIA:

2 Q Now, I believe your testimony was that the
3 collision occurred somewhere between the Family Dollar and
4 the Hot Spot?

5 A Yes.

6 Q Did you review any 911 calls?

7 A I don't recall reviewing 911 calls.

8 Q Okay. Did you know that there was a 911 call
9 made from an individual right here on Leome Avenue?

10 A I don't know that.

11 Q Okay. If there's an individual -- well, why
12 don't I play the 911 call for you?

13 A If you think it would be useful.

14 Q Okay.

15 THE COURT: All right, before you queue that up,
16 we're going to take a short break. Just be about
17 five to ten minutes the most.

18 Don't talk about the case yet. Thank you.

19 (WHEREUPON, the jury left open court at
20 approximately 3:29 p.m.)

21 THE COURT: All right, Mr. Olson, you may stand
22 down. Please don't discuss your testimony. Take
23 about five to ten minutes.

24 THE WITNESS: Yes, sir. Thank you.

25 (WHEREUPON, a short break was taken.)

DAN OLSON-CROSS BY MR. GARCIA

1 THE COURT: All right, Mr. Teal, the jury is
2 ready?

3 THE BAILIFF: They sent a note and said they're
4 ready to resume.

5 (WHEREUPON, the jury came into open court at
6 approximately 3:41 p.m.)

7 (WHEREUPON, Court's Exhibit No. 7 was marked for
8 identification only.)

9 THE COURT: All right, let's resume cross.

10 MR. GARCIA: Thank you.

11 BY MR. GARCIA:

12 Q Mr. Olson, I believe we left off with me asking
13 you where this collision occurred. What I want to do is
14 play audio for you of an individual that's standing here
15 on Leome. I think the audio speaks for itself. I'll just
16 go ahead and play the audio, okay?

17 A Yes, sir.

18 MR. MOORE: Your Honor, is he pitting witnesses
19 again?

20 THE COURT: I'm not sure where he's going with
21 it. We'll see I'm not sure what the purpose of it
22 is.

23 (WHEREUPON, 911 call played for the jury.)

24 MR. GARCIA: Okay.
25

DAN OLSON-CROSS BY MR. GARCIA

1 BY MR. GARCIA:

2 Q You heard that witness, did she say she was on
3 Leome?

4 A I heard Leome, yes.

5 Q And did she say she was looking towards
6 Whitehorse?

7 A Yes.

8 Q Can we agree then the collision occurs past this
9 point?

10 A It could have.

11 Q Okay. You didn't look into that 911 audio to
12 determine the location of this collision now, did you?

13 A No, but it doesn't add anything to the
14 reconstruction that we needed to do.

15 Q So, you don't believe the sequence of events
16 leading up to the collision play a key role or is
17 important information in determining what it is that
18 transpired in this collision?

19 A What you've just told me is close to the Family
20 Dollar, closer to the Family Dollar than what I had
21 originally used. I used the trooper's location. If you
22 get it closer to the Family Dollar, that's one more thing
23 that adds to the possibility that the moped rider was
24 crossing right to left because his stated destination was
25 Family Dollar. So, if he's farther up this road closer to

DAN OLSON-CROSS BY MR. GARCIA

1 Family Dollar past Leome, that adds more credibility to
2 the possibility he was changing lanes in front of her.

3 Q I'll ask you, where did this collision occur?
4 Do you know where it occurred?

5 A I know that it occurred between -- somewhere
6 between Hot Spot and Family Dollar.

7 Q Now, do you know it occurred somewhere between
8 Leome Avenue and Family Dollar?

9 A It may. It may have, but that's still between
10 the Hot Spot and Family Dollar. That little bit of
11 distance doesn't make a difference to my assessment,
12 except what you just told me. If it happens up here, that
13 adds one more thing for the jury to consider that the
14 rider was making a crossing maneuver from the right lane
15 setting himself up to turn left into Family Dollar.

16 Q I want to put this in front of you, sir. That's
17 the same diagram we had up, isn't it?

18 A Yes.

19 Q Where's the collision point for this on that
20 screen?

21 A If you want -- the collision that I chose?

22 Q Yes.

23 A Was in one of these -- ended being in one of
24 these turn outs, it could have been this one or this one,
25 either one.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Yes. But which collision point did you choose
2 in your diagram?

3 A I said, the resting point was in one of these
4 turn outs. One of these parts of the median, either here
5 or here. It doesn't matter how far from here to here,
6 except for that it was beyond where he would have normally
7 pulled out and it was just some place where he was headed
8 to Family Dollar. So the exact point along that road
9 makes no difference at all whatsoever.

10 Q Okay. So your opinion is that the sequence of
11 events leading up to the collision don't really matter in
12 this instance?

13 A Of course, they do. But setting those sequences
14 down into that level of precision that you seem to be
15 wanting are -- they're not reconcilable or are they
16 important to what happened and what problem was presented
17 to Ms. Hunter?

18 Q Was there any other information available to you
19 that set the collision point?

20 A Yes.

21 Q What?

22 A There was the latitude and longitude that was
23 that on the police officer's report.

24 Q Didn't you previously testify, Mr. Olson, in
25 your deposition that those reports are typically

DAN OLSON-CROSS BY MR. GARCIA

1 unreliable for setting location?

2 A They're not perfectly reliable because they
3 don't give you the point of collision. They just give you
4 information for the people that keep track of all that
5 information to plot that in their computer systems.

6 Q Did you testify that they're rarely reliable?

7 A I don't know if I said rarely, but I may have
8 said I don't often rely on them with great precision.

9 Q Okay.

10 A Especially in a situation, it wasn't -- we
11 weren't able to put down an exact point of collision.
12 That's what I testified earlier on in this. It doesn't
13 matter.

14 Q I'll ask you one more question, Mr. Olson. How
15 long -- traveling at 45 miles per hour, how long in
16 seconds is it going to take to get from West Bramlett
17 right over here to somewhere in this area right here?

18 A Could be as long as 15 seconds.

19 Q Okay. Is it relevant how much time it took
20 between when Ms. Katherine -- excuse me, Ms. Hunter first
21 merged onto West Blue Ridge Drive and where the collision
22 occurred?

23 A No.

24 Q It's not relevant to you?

25 A No.

DAN OLSON-CROSS BY MR. GARCIA

1 Q Okay. Was there any other information available
2 to you regarding where it is that that collision occurred?

3 A That's only relative to the width of the road,
4 not the distance down it.

5 Q Okay. Did you have the opportunity to review an
6 EMS report that stated where the EMS vehicle was located
7 at the time that they visited the scene?

8 A No.

9 Q Okay.

10 A I didn't -- once again I'm going to tell you
11 again because you keeping the same question, it doesn't
12 matter.

13 Q Okay. Mr. Olson, do you write articles from
14 time to time?

15 A Yes.

16 Q In those articles, do you state general opinions
17 regarding the reconstruction of collision scenes or
18 collisions themselves?

19 A I have probably written about some case studies
20 that have involved collisions.

21 Q Have you ever stated that determining resting
22 location is just one important piece of the puzzle needed
23 to put the accident or the sequence of events back
24 together?

25 A I have said that, yes.

DAN OLSON-REDIRECT BY MR. MOORE

1 Q But it wasn't important in this one?

2 A We have a resting location established and --
3 along the width of the road. Down the road doesn't
4 matter. The width was what was important.

5 Q So, the location of where the collision occurred
6 has no bearing on your opinion?

7 A Between the gas station and Family Dollar, no,
8 sir, be along there some place.

9 MR. GARCIA: I have no further questions. Thank
10 you for your time, Mr. Olson.

11 THE WITNESS: You're welcome.

12 THE COURT: Any redirect?

13 MR. MOORE: Yes, sir.

14 REDIRECT EXAMINATION

15 BY MR. MOORE:

16 Q Mr. Olson, you've been ad nauseam about where
17 this accident happened. We know it obviously happened on
18 Blue Ridge Highway. Does it matter with regard to your
19 calculations as to what happened in this particular matter
20 as to specifically where on Blue Ridge Highway this
21 accident happened?

22 A How far down between the two places, it does
23 not.

24 MR. MOORE: Okay. Thank you.

25 THE COURT: Okay. Thank you, you may stand

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 down.

2 THE WITNESS: Yes, sir. Thank you.

3 MR. MOORE: That would be the case for
4 Defendants.

5 THE COURT: All right. The Defense has rested,
6 is there any reply?

7 MR. GARCIA: In fact, there is, Your Honor. I'd
8 like to call back up my expert, Mr. Pelham Matt Sims.

9 THE COURT: Okay, you're still under oath.
10 You're still under oath.

11 THE WITNESS: Okay. I'm sorry.

12 PELHAM MATT SIMS, having been previously sworn,
13 testified as follows:

14 FURTHER REDIRECT EXAMINATION

15 BY MR. GARCIA:

16 Q Mr. Sims, is the resting location -- excuse me,
17 the location of the collision important in reconstructing
18 the sequence of events of a collision?

19 A Definitely, yes.

20 Q Okay. What's the importance of that resting --
21 or, excuse me, that collision point?

22 A Well, you just said it, determining the sequence
23 of events. I mean, the end of the collision sequence is a
24 part of the sequence of events. Now, if we're just
25 looking at static numbers and angles and so forth, which

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 is sometimes the difference between engineers and police
2 officers, reconstructionists. Human factors is a part of
3 accident reconstruction. I'm not a human factor expert
4 and don't present myself as one, but human factors is
5 actually a very vital part of accident reconstruction.
6 Because we have to look beyond sometimes maybe exactly
7 what happened into why it happened if we can determine
8 that. We can't always determine that. But the rest
9 position is the end of the sequence of events.

10 Q Okay. We referenced the diagram that was put
11 together by Mr. Olson. Is this diagram here, Mr. Sims,
12 consistent with the data and information that you have
13 available to you in reconstructing this collision?

14 A It is. It would be a part of what was available
15 to me, yes.

16 Q Okay. I want to address some of the images that
17 Mr. Olson has drawn on this particular board here. And I
18 can't -- if you can, if you can come over here and let's
19 just go through a couple of them. I'm not sure I'll be
20 able to tell you for sure which is which. I believe this
21 one is the one where Mr. Olson is drawing up what would
22 happen to this moped if he's moving straight in his lane
23 and the BMW swerves from right to left. Does that look
24 like the same one to you?

25 A I think so, yes.

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 Q Okay. What happens if this BMW moves from right
2 to left right before impact as you see here? What happens
3 to that moped?

4 A Well, as -- and I agree with Mr. Olson on a lot
5 of things, a lot things I don't agree with him on. But
6 you have to determine what to use and what not to use in
7 all these cases, or as I testified Tuesday, I guess it
8 was, which information you can put more weight in or less
9 weight. And in this case, Ms. Hunter stated that she
10 swerved, which makes total sense to me. And that was her
11 statement, I have no reason not to believe that, is that
12 she swerved just before impact. And that would effect the
13 impact and the rest position. If the BMW, which as we all
14 agreed on, is 10 times the mass of the moped, then that
15 change in direction on the BMW is actually going to change
16 the direction of the moped as well. And in this case, if
17 the moped is straight in its line directly in front and
18 the BMW swerves to the left, then the moped mass is
19 going -- momentum is going to be overtaken and moved in
20 the direction that the BMW is now headed.

21 And, you know, we've heard testimony about
22 the velocity would go from 30 to 45 or 40 or whatever, I
23 totally agree with that, but the direction would also
24 change. When you have a 10 to one mass, that moped and
25 rider is not going to interact and change the direction of

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 the BMW. It's going to -- the direction to the left of
2 the BMW would carry the moped in the same direction.

3 Also, we have other physical evidence to
4 support that. We have the pictures of the BMW that show
5 the impact to the vehicle. And I think we all agreed as
6 well, impact -- impact damage. It was my testimony this
7 was the initial impact, this was the secondary impact. I
8 agree, we all agree that the moped rotated clockwise. And
9 when that moped, if the rear end is here and sort of this
10 orientation and it rotates clockwise, again, you're
11 sitting in the BMW, you're looking out the windshield, a
12 clockwise rotation would be in this direction. And then
13 the moped is caught up with this part of the car, maybe a
14 footrest or whatever, as I testified as my opinion, and
15 this car is swerving to the left, that's going to change
16 the direction at that point of the moped as well. And
17 it's going toward to median with the BMW.

18 All of our damage to the moped would
19 support that as well to the left side after it went down
20 as we talked about, it high sided, rotated, went down to
21 the left. That's where all the scratches, everything are
22 on the left-hand side. The rider, Mr. Burgess, would be
23 deposited to the left and that's also where all his
24 injuries are, on his left side.

25 Q Now, we do agree that the moped rotated

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 clockwise; is that correct?

2 A Yes.

3 Q Okay.

4 A Which -- can I insert?

5 Q Yes, please.

6 A At that point, the clockwise rotation would
7 be -- and I don't know, ladies and gentlemen, if you
8 remember when I testified earlier, I used the corner here.
9 Clockwise rotation would be in this direction, which would
10 be to the right. But it wouldn't -- the rotation is going
11 to the right, but the center mass, because of the input of
12 the 10 times larger vehicle is going to be taking it to
13 the median. So, it is rotating to the right, I agree with
14 that, right or clockwise, but the center mass travel,
15 because everything, everything is on the front of the car.
16 It's not an angular collision to where it's -- if it were
17 a pedestrian, maybe a fender bump or something down the
18 side of the car, everything is on the front. So, the
19 moped was caught up in the front and redirected toward the
20 median.

21 Q If the -- in a different scenario that we have
22 not adopted, if the moped is moving from right to left and
23 coming across the nose of this BMW, what side of the moped
24 makes contact with the BMW?

25 A Well, it would be obvious to me it would be the

MATT SIMS-FURTHER RECROSS BY MR. MOORE

1 left side of the moped.

2 Q Is there any evidence to support that the left
3 side of the moped made contact with the BMW?

4 A No, sir. You would have the opposite. You
5 would have counterclockwise rotation, probably the
6 secondary impact to the left toward the center of the car.
7 You would have a right-hand high side.

8 Q In that scenario posed by Mr. Olson, what
9 happens to the rider?

10 A Well, the rider -- as I said, the rotation would
11 be opposite. The rider would mostly high side to the
12 right, have injuries to his right side.

13 Q We don't have any evidence that there's injury
14 to the right side of Mr. Burgess, do we?

15 A No, sir, not that I'm aware of.

16 Q Okay.

17 MR. GARCIA: I don't have any further questions.

18 Thank you.

19 FURTHER RECROSS-EXAMINATION

20 BY MR. MOORE:

21 Q Mr. Sims, you started off by being asked a
22 question regarding the location of the accident as being
23 important?

24 A Yes, sir.

25 Q And then the questions changed to the rest