

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE PICKENS COUNTY
Court of Commons Pleas

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 III of III

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MATT SIMS-FURTHER RECROSS BY MR. MOORE

1 position of the moped?

2 A That's correct.

3 Q Now, the testimony we have from Mr. Burgess as I
4 understand it is the moped ended up in the median, am I
5 correct?

6 A Yes, sir.

7 Q Based upon your -- the way you evaluated this,
8 does it matter where on Blue Ridge Road that collision
9 occurred to make your analysis?

10 A Mr. Garcia question was as it relates to the
11 sequence of events.

12 Q No, my question, my question.

13 A But you didn't ask me the same question.

14 Q I am asking the question, please.

15 A Okay. Okay.

16 Q Does it matter where on Blue Ridge Highway this
17 collision took place on the length of it as far as your
18 analysis is concerned?

19 A Well, yes, yes, it does.

20 Q Okay. So, as to the end relationship between
21 these two vehicles, the moped and the SUV, if the accident
22 occurred nearer to the gas station, would the ultimate
23 facts have been different?

24 A The interaction between the two vehicles is only
25 part of my analysis?

MATT SIMS-FURTHER RECROSS BY MR. MOORE

1 Q I understand that. But would the accident have
2 been different?

3 A If?

4 Q If it occurred nearer to the gas station than
5 where you're proposing it occurred?

6 A Given the same dynamics, no, sir.

7 Q Okay. So, if I understand your response there,
8 then where it occurs on Blue Ridge does not matter, but
9 the end result where the moped ends up is very important
10 to you, correct?

11 A Well, the other part of my analysis would be, as
12 I said earlier, trying to decide not only how, but why.

13 Q Of course, the why gets into the human factors
14 aspect, doesn't it?

15 A Well, yes, sir. And as I stated, the human
16 factor is part of the accident reconstruction.

17 Q But you are not a human factors expert by your
18 own testimony?

19 A I wasn't going to testify. Time and distance is
20 also part of accident reconstruction.

21 Q Of course.

22 A And time and distance is what the distance is
23 about, say a quarter of a mile we talked about or
24 whatever, which would -- which would get into, as
25 Mr. Olson said, 10 to 14 seconds or whatever travel time

MATT SIMS-FURTHER RE CROSS BY MR. MOORE

1 from Bramlett to the area that we all agree upon, which is
2 a long time. That's a long time to be driving a vehicle.

3 Q Okay. All right. Now, the second aspect of
4 your testimony on reply has to do with the position you're
5 taking that because of the mass of the SUV was some 10
6 times greater than the moped that when it struck the rear
7 of that moped, it, basically, hooked up with the moped and
8 caused it to go to the left. Am I understanding you
9 correctly?

10 A I'm not saying it hooked up with it, no, sir.
11 I'm saying there was an initial impact and a secondary
12 impact and that takes a fraction of a second or so. But
13 that initial impact and secondary impact is enough to
14 catch the moped and the swerving motion changed the
15 direction of the moped to the same direction as the BMW.

16 Q How long are those two vehicles in contact with
17 one another?

18 A I don't have any way of knowing. I would say a
19 fraction of a second.

20 Q Did you make any calculations whatsoever on
21 this?

22 A No, sir, I didn't.

23 Q Okay. And when a vehicle, such as an SUV,
24 strikes a moped like that from the rear, is not the moped
25 going to be catapulted forward immediately?

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RECORD ON APPEAL
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MATT SIMS-FURTHER RE-CROSS BY MR. MOORE

1 A It's going to be -- depends on the direction of
2 the --

3 Q But there is going to be a direction, a vector
4 going forward, is there not? Because that is the main
5 direction for the SUV?

6 A That's correct.

7 Q So, as a result of that impact, you're going to
8 have an immediate push on the SUV to where -- excuse me,
9 the moped to where it gets up to actually 45 miles per
10 hour and is actually moving away from the SUV at that
11 point?

12 A After the rotation, yes, sir.

13 Q Okay. And your position is, though, that it was
14 slow enough and there was enough contact there to make it
15 turn in a clockwise rotation to where there was a second
16 impact, correct?

17 A Yes, sir. We've all agreed on the clockwise
18 rotation.

19 Q Clockwise rotation, which would mean that the
20 second impact would occur on the right-hand side of the
21 moped, correct?

22 A Yes, sir, and to the right of the initial impact
23 on the BMW.

24 MR. MOORE: Thank you.

25 THE COURT: Okay. In response to his questions,

MATT SIMS-FURTHER REDIRECT BY MR. GARCIA

1 yes, briefly.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. GARCIA:

4 Q When we talk about rotation of the moped, we
5 start at zero degrees, how far does that moped rotate?

6 A Well, it's my opinion that it rotates far enough
7 for the -- I think the damage to the BMW is actually --
8 the scratches down toward the bottom are probably made by
9 possibly the muffler or the foot pegs. So, it has to get
10 complete pretty much sideways.

11 Q So, about 90 degrees?

12 A Yes, sir, I would say somewhere in that range.

13 Q What happens to the moped once it rotates to 90
14 degrees?

15 A Well, at that point after that, it starts to
16 separate and it's my opinion then it high sides from
17 friction, from tire friction values. And that's when the
18 moped high sides to the left and Mr. Burgess is ejected.

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

20 MR. MOORE: Nothing further.

21 THE COURT: All right. Thank you. You can step
22 down.

23 Anything else in reply?

24 MR. GARCIA: No, sir.

25 THE COURT: All right. Ladies and gentlemen,

1 it's after 4 o'clock. We have now completed -- if
2 you remember what I told you about the five parts of
3 the trial, we've completed the first two parts, the
4 opening statements and now all of the evidence and
5 testimony that you're going to receive is before you.
6 There won't be any more evidence presented. So, what
7 we have left are the arguments of the attorneys, my
8 charge to you on the law, then you all will retire to
9 deliberate. We're not going to start that process
10 tonight. So, I'm going to ask you to be back
11 tomorrow morning at 10 o'clock.

12 Y'all have been a great jury so far. Please
13 remember what I've told you, don't discuss with
14 anyone. It's got to be very tempting. And people,
15 I'm sure, who you're going to see are going to want
16 to talk to you about it. Don't go visit the scene,
17 don't do independent research, don't get on social
18 media. I hope y'all have a very pleasant night. See
19 you tomorrow at 10 o'clock.

20 (WHEREUPON, the jury left open court at
21 approximately 4:11 p.m.)

22 THE COURT: All right. Let's talk about the
23 charge a little bit.

24 MR. GARCIA: Your Honor, I need to make a
25 post-trial motion for directed verdict.

1 THE COURT: Okay, make your motion.

2 MR. GARCIA: Okay, my motion, Your Honor, is for
3 directed verdict. And the basis is that there is no
4 reasonable inference based on the facts presented
5 other than the Defendant was negligent and there is
6 no reasonable inference that there was any
7 contributory negligence on part of the Plaintiff.

8 THE COURT: Okay, motion denied.

9 MR. GARCIA: Thank you.

10 THE COURT: All right. Standard duties of the
11 judge and jury, credibility of witnesses, expert
12 witnesses, preponderance of the evidence, charge them
13 on negligence, charge them on comparative negligence.
14 I understand the property damage claim is waived?

15 MR. GARCIA: That's correct.

16 THE COURT: Violation of a statute. Then I'm
17 going to publish the only statutes that have been
18 presented to me are the moped is a cycle, shouldn't
19 go faster than 30, 15-5-165 -- excuse me, 56-5-165,
20 56-5-1555, and that the speed limit on mopeds,
21 56-5-1810, which is they stay to the right,
22 56-5-1560, which is don't drive at such a slow speed
23 as to impede normal reasonable traffic. Duty to keep
24 a proper outlook -- look out. Duty -- driver's duty
25 of care. Then actual damages, to include personal

1 injury. I don't know how they're going to do it, but
2 I am going to instruct them that future damages has
3 to be reduced to their present cash value, pain and
4 suffering, lost of enjoyment of life, mental
5 suffering, preexisting condition, loss of earning
6 capacity, life expectancy table.

7 MR. GARCIA: Your Honor, there's only one
8 statute that was missing from there. Unfortunately,
9 it was handwritten on the back of my proposed jury
10 charges.

11 THE COURT: Did you tell --

12 MR. MOORE: Yeah, I'm fine.

13 THE COURT: All right. Print it out.

14 MR. GARCIA: I'd like to just state one more
15 objection, Your Honor, as to the instruction of
16 reduction in any value of, for instance, medical
17 bills. There was no evidence presented at this trial
18 regarding the reduction of medical bills.

19 THE COURT: Future damages have to be reduced to
20 present value.

21 MR. GARCIA: Okay.

22 THE COURT: There is no evidence that's been
23 presented what that is.

24 MR. GARCIA: Okay.

25 THE COURT: So, I'm not sure how the jury is

1 going to deal with that. It's speculative. I'll
2 leave it to y'all to argue, but that's law and I'm
3 going to charge it.

4 MR. GARCIA: Okay. Thank you.

5 THE COURT: Okay. 10 o'clock.

6 MR. MOORE: See you tomorrow.

7 (WHEREUPON, the proceedings were concluded for
8 the day to be reconvened on June 29, 2018.)
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1 June 29, 2018

2 THE COURT: Anything before we bring them in?

3 MR. MOORE: No, sir.

4 MR. GARCIA: No, sir.

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

6 (WHEREUPON, the jury came into open court at
7 approximately 10:04 a.m.)

8 THE COURT: All right, Madam Forelady, ladies
9 and gentlemen, welcome back. As I told you
10 yesterday, we've completed the first two parts, we're
11 going into the last three parts. And I promise you
12 they will be shorter than the second part. So, you
13 all paid great attention throughout the course of the
14 trial, I ask you to continue to do so throughout the
15 closing arguments of these attorneys.

16 All right, Mr. Garcia.

17 CLOSING STATEMENT

18 MR. GARCIA: Thank you, Your Honor, may it
19 please the Court.

20 Mr. Moore.

21 Good morning, you've made it to the closing
22 statement of the case, essentially. For most of us
23 here today, we'll be done with this case. It will be
24 over with by the end of the day. Hopefully, we'll
25 carry some experiences from it going forward. We got

1 exposed to a process that maybe we wouldn't have been
2 exposed to otherwise. You heard a little bit about
3 accident reconstruction. You heard a little bit
4 about medical opinions and things about -- maybe more
5 things than you ever want to know about neurology and
6 neurosurgery and things of that nature, nerve
7 injuries. But after that, we're done, we're done
8 with this case for most of us. The exception would
9 be Mr. Burgess, of course, who will carry,
10 essentially, the effects of the center point of this
11 case for the rest of his life. Okay.

12 Now, before we can finish here, we have to -- I
13 need you, the jury, to resolve a couple things for
14 us, right? One of them is we have to determine
15 whether there's negligence in this case and whether
16 Ms. Hunter has been found to be negligent. We also
17 have to determine that -- one will be negligence,
18 right? I'm going to skip two for a second. Three
19 would be damages, the actual damages as a result of
20 this case. And I'm going to put those all in front
21 of you here shortly.

22 Number two is in the middle of those two. And
23 that's causation, right? That link between the
24 negligence that has been alleged and the damages he
25 suffered. I need your help in resolving that.

1 That's why we're here.

2 What I want to do is start first with negligence
3 and liability. So, we have -- as far as negligence
4 and liability is concerned, we have a few things to
5 somewhat consider here. We have the testimony of
6 Mr. Burgess as to what it is that transpired. I'll
7 be honest, his testimony about the collision itself
8 is somewhat limited, right? He tells you he came out
9 of the Hot Spot here at some point, is traveling down
10 the road in left lane. He was making his way
11 somewhere over in this area, but he didn't make it
12 there, right? He doesn't know what happened behind
13 him, he says he was looking forward. And there's
14 really no evidence otherwise.

15 He also can tell us something else, Mr. Burgess,
16 he can tell us about this liability and causation
17 portion -- excuse me, this liability and negligence
18 portion. He can tell us the location of the
19 collision, right? He can give us some kind of
20 reasonable idea of where it occurred. His testimony
21 was it occurred somewhere in this area right here.
22 So, we have that as information if you will, from --
23 and testimony from Mr. Burgess to help us kind of
24 decide this negligence issue.

25 We also have another -- the other party here, of

1 course, which is Ms. Hunter. And she can tell us a
2 few things about the collision itself. Although, I
3 believe that some of the things that we hear from
4 Ms. Hunter is potentially conflicted, okay? Now, we
5 have -- we've been told already that her best
6 recollection would be found on the recorded
7 statement. And that recorded statement is going to
8 be available to you, a transcript of it. You'll have
9 it available to you and you can look at it as you
10 need it. You don't have to take my word for any of
11 this. You will be able to verify it, see it
12 yourself. But what we do know is we have some
13 testimony of Ms. Hunter that suggests that the
14 collision occurred somewhere in this area before the
15 Hot Spot, okay? Actually, maybe a lot in the
16 recorded statement that suggest that, it occurred
17 somewhere over here, okay?

18 We have some testimony from her today -- or
19 excuse me, it must have been Monday, where she says
20 it occurred near the Hot Spot, okay? Then we also
21 have a statement from her in the recorded statement
22 that actually puts us somewhere over here again. She
23 says after she merged out, the collision occurs about
24 a quarter mile up the road. Somewhere in this area
25 over here.

1 So, we have the statements of Mr. Burgess, we
2 have the witness, Ms. Hunter, who's given us some
3 information about negligence and liability. We also
4 have third parties that don't really have any
5 interest in this case whatsoever. One of those would
6 be a 911 call, right, from an unknown party who
7 stated she was standing on Leome and looking towards
8 this direction at what has transpired. All right, so
9 she's on Leome. She states somewhere in this
10 direction over here. That's a third party. No
11 interest in the case whatsoever.

12 We also have the EMS record, right? That EMS
13 report says they're parked right in this area
14 somewhere over here. All right. And if we combine
15 that with some of Mr. Burgess' testimony that he was
16 wheeled from Ms. Hunter's vehicle onto a stretcher
17 and rolled back and put in the ambulance that's
18 somewhere in this area, well, that puts the collision
19 again somewhere in this area right here, right?

20 So, we've got the testimony of Mr. Burgess,
21 we've got the testimony of the Defendant, we also
22 have some third party that contributed some to this
23 discussion about negligence and who's responsible,
24 essentially, for this collision. And you've also
25 heard some testimony from experts who weren't there,

1 but because of their training and knowledge and
2 experience and understanding of technical
3 information, they can look at the information that's
4 available and issue an opinion to you and tell you
5 what it is that they believe happened. All right.

6 So, we'll start with Mr. Matt Sims. Matt is the
7 South Carolina Highway Patrol lieutenant. He'd be
8 very mad at me if I called him anything but
9 lieutenant. And he testified here. Now, remember,
10 Mr. Sims is a -- when he retired, he was the
11 supervisor of the MAIT investigation team, which is
12 an acronym that stands for Multidisciplinary Accident
13 Investigation Team. He gave you a lot of insight
14 what that means. He was actually part of the very
15 first team. And it's really become a very
16 instrumental part of the -- really, just the highway
17 patrol and the prosecution process as he testified,
18 right?

19 He told us a few things. Mr. Sims considered
20 all kinds of evidence. He told you that. He says he
21 looked at the recorded statement. He looked at the
22 911 calls. He looked at EMS reports. He looked at
23 the collision damage and whatnot on the vehicles. He
24 considered the resting location. And he didn't stop
25 just at what happened, but he also issued an opinion

1 has to why it happened. So, he had a lot of
2 information available to him. And his opinion was
3 that there was an issue with proper lookout. That
4 was his only -- that was really his only explanation
5 for what happened between here when Ms. Hunter turns
6 out and says she looks forward and there he is. And
7 over here, where the collision occurs, that's his
8 opinion. All right. He put it all together for you.

9 We also have -- we also have the Defendant's
10 expert, Mr. Olson, who's a very smart guy. I mean,
11 just -- I don't think there's any debating that.
12 However, his opinion is only as good as the
13 information that he had available to him and the
14 information that he relied upon. And I believe that
15 the testimony that we developed was that he really --
16 his only care was the resting location of the moped.
17 That it was just inside that median. Right? That
18 was it.

19 Now, he also had some other facts that he relied
20 upon, but he also admitted that those facts were
21 somewhat relative in nature. For instance, the
22 45 miles per hour that Ms. Hunter was driving at the
23 time of the collision and 30 miles per hour that
24 Mr. Burgess was traveling at the time of the
25 collision. We don't know the exact speed, but he

1 felt that those were reasonably acceptable and I'm
2 not sure I disagree with him. So, he gave us -- he
3 really -- he really only seemed to care about how
4 this collision occurred. But didn't seem to explain
5 to you why and I think that leaves a lot of questions
6 for us.

7 Now, he already mentioned to you that he failed
8 to consider really Ms. Hunter's statements as really
9 credible or reliable. I'm not sure I disagree with
10 him on that. He also said he failed to consider the
11 911 calls, which I think are very pertinent in this
12 case, right? It gives us a lot of insight to where
13 the collision occurred. We have Ms. Hunter who can
14 be heard on these 911 calls stating that well, she's
15 right before the Bi-Lo near the Family Dollar and the
16 Goodwill. There's no mention of the Hot Spot
17 whatsoever. I think that's very significant.
18 There's no mention of it in her 911 calls. Again, we
19 have the 911 call of that third party. He failed to
20 consider that. Said it wasn't really important in
21 this case. So, that's why that doesn't seem to
22 matter to him, only the what. Okay.

23 His own diagram that he put up suggests a few
24 things as well. Right. He stated that Ms. Hunter
25 should have seen Mr. Burgess when he hit that center

1 line. And that there would be a two second
2 separation when Mr. Burgess his that center line and
3 got over to the middle of the road. And that's where
4 the collision occurred. It would have been a two
5 second differential and she would have only been
6 43 feet, 43 and a half feet back from when she should
7 have first seen Mr. Burgess.

8 Now, I don't think that those numbers are
9 favorable. I'll let you decide that. I don't think
10 that's really favorable to Mr. Burgess because I
11 think a reasonable person might be able to conclude
12 that you might be able to see somebody coming in your
13 lane just a bit before they get to that center line.
14 But if we use that center line at that starting point
15 where Ms. Hunter can first see Mr. Burgess, we still
16 have a problem. Because Ms. Hunter testified that he
17 was closer than 43 feet when she first saw him. And
18 that doesn't line up with Mr. Olson's testimony to
19 you. Okay?

20 She also -- you have to consider this as well.
21 She has, according to Mr. Olson, two seconds between
22 when she sees Mr. Burgess and when the collision
23 occurs. Two seconds. Ms. Hunter's recorded
24 statements doesn't say anything about within those
25 two seconds what or from where Mr. Burgess is coming

1 from. Instead, she says, I have no idea where he
2 came from. In fact, she actually uses an interesting
3 word in her recorded statement. She actually says, I
4 looked up and there he was.

5 Now, I think there are some reasonable
6 inferences from look up that you can make. If I'm
7 looking around for traffic, I'm not sure the verbiage
8 you use to describe looking back forward is looking
9 up. I would think that looking up starts from this
10 position and that's looking up. That's a reasonable
11 inference, right?

12 There's another very interesting point that I
13 think Mr. Olson makes. And that's that the only way
14 that moped ends up in the median is if he has that
15 right to left movement. He put his diagram up for
16 you and shows you that. In that diagram, he draws
17 out that the collision occurs in the center of the
18 line. Now, that's very important because the
19 suggestion to you is by Mr. Olson, that as
20 Mr. Burgess is moving from right to left, which we
21 certainly don't adopt as true. It's inconsistent
22 with Mr. Sims, the highway patrolman's expert -- or
23 excuse me, opinion. Again, Lieutenant Sims. That's
24 inconsistent. However, he says the only way
25 Mr. Burgess ends up in that median or just inside

1 that median is if he's moving from right to left.

2 But he draws out the collision taking place in the
3 center of the lane.

4 So, I think we're left with a few questions from
5 there. If Mr. Burgess gets to the center lane and
6 that's where the collision occurs, why would he still
7 be moving right to left? Where is he going?
8 Wouldn't he just be traveling straight at that point?
9 There shouldn't be any right to left. He's already
10 gotten to where he's going if that's true. So, that
11 right to left movement leaves some questions, too, at
12 least, in my mind. Now, when Mr. Olson was
13 questioned on that, his response was, essentially,
14 well, maybe not in the middle of the lane, maybe a
15 little bit before he got to the middle of the lane,
16 right? Kind of got to be that way for his testimony
17 to make sense. Otherwise, it doesn't make sense.
18 He's not moving from right to left anymore when he
19 gets to the center of that lane, okay?

20 So, what we have is Mr. Olson being focused on
21 the what. And there doesn't seem to be any intention
22 on his part to focus on the why. I think there's
23 some reasonable inferences that can be drawn from
24 that as well. Now, I'll pose those to you. The
25 reasonable inference as to why Mr. Olson isn't

1 concerned with the what -- or excuse me, the why, is
2 well, it's not really favorable to the position he's
3 here to offer you. Okay. The why, however, was
4 stated very clearly by Mr. Sims, the Plaintiff's
5 expert.

6 Now, what I want to do is just play very briefly
7 here a video. But before I do that, I want to show
8 you something. I'm going to play this video, it's
9 about a minute long. So, I'll play the video and
10 I'll move right along. I'm going to try really hard
11 to stay quiet while I play the video, so bear with
12 me. But I do want to say a couple of things before
13 we play this video. There's going to be some point
14 where Ms. Hunter -- the video shows a vehicle coming
15 out onto West Blue Ridge Drive and it merges into the
16 left lane, okay? Now, it would be fair, that's not
17 real time video of what Ms. Hunter did on the day
18 we're here about, right? So, you're allowed to
19 decide for yourself as the jury, at what point she
20 merges on, right? And maybe a little bit before,
21 maybe a little bit after. That's in your hands, not
22 mine. Okay.

23 I also want to point out this, though, once
24 that -- once the video hits that point where the
25 vehicle merges out, remember that Mr. Sims, the

1 Plaintiff's expert testified, that he is traveling
2 somewhere between 40 and 45 miles per hour as he
3 heads down this road, okay? Now, what I want you to
4 do is just note for yourself how long after the merge
5 or where you think the merge probably occurred, how
6 long it takes to get to the Hot Spot right here,
7 okay? Then I want you to consider this, how long it
8 take to get to the point where the evidence suggests
9 that the collision occurred. All right. We'll do
10 that. What I want to do is this, too. In the video,
11 I believe it's somewhat difficult to see this
12 location right here that's marked at the point where
13 the EMS vehicle was. But it's actually very easy to
14 see this kind of car wash deal right here before we
15 get to that first driveway.

16 So, what I'll do is I'll play this video for
17 you. I may point out all right, there's the Hot
18 Spot. And then at some point, I'll point out here's
19 the car wash. I'll try not to say another word.
20 We'll take the video off and we'll move on from
21 there.

22 All right. Let's play that video.

23 (WHEREUPON, a video was played.)

24 MR. GARCIA: All right, I promised, but here I
25 go. First, we have to establish West Bramlett and

1 turn onto West Blue Ridge Drive, okay. There's the
2 Hot Spot coming up. To our left, here comes that car
3 wash and there it went. Now, you have his first turn
4 into that driveway here, right. I promise you I
5 won't say anything else, we'll move along.

6 So, back to Mr. Olson and why. He doesn't have
7 an explanation for why. He only gives us the what.
8 Mr. Sims, the Plaintiff's expert, does have an
9 explanation. He mentioned the only reasonable
10 explanation in his opinion is there wasn't a proper
11 lookout once we get over here into this area.

12 Now, you're going to hear a charge, you're going
13 to hear several charges from the Honorable Judge
14 Miller. And I'll tell you this, if there's any
15 charge that conflicts with what it is that I have
16 here, you listen to him, not to me. Okay. But one
17 of the charges you will hear among the various
18 charges is the duty to keep a lookout, to keep a
19 vehicle under control. So, I'm going to read this
20 charge for you.

21 A person using a public roads of the state owes
22 an urgent duty to keep a proper lookout for other
23 persons or objects on the road. The duty is not
24 merely one of looking, but one of observation. In
25 the exercise of due care or caution for the safety of

1 himself and others, the person must look in such an
2 intelligent and careful manner as to enable him to
3 see a person or object upon the highway.

4 Now, so we're clear here, I've added this
5 emphasis on looking and observation. I certainly
6 added this emphasis here as well.

7 A person who fails to keep a proper lookout and
8 fails to see what a person of ordinary care and
9 prudence would have seen is guilty of negligence.

10 So, what we just discussed in that first part,
11 right, that first part of resolving this case and
12 that's the negligence portion, the liability portion.

13 The second part that we talked about is that
14 causation link between the damages that Mr. Burgess
15 has sustained, has allegedly sustained and the
16 negligence that we're here alleging as well. So,
17 we're going to try to move on to that. Some damages
18 are a bit more obvious than others if I'm putting it
19 bluntly. I think it'll make sense in a moment, okay,
20 so I'll move on.

21 We'll start with the orbit socket, vision and
22 headaches. All right. These are fairly obvious.
23 This is a Mr. Burgess testified a few days after the
24 collision when he's in the hospital. There is
25 testimony regarding a blow out fracture to the left

1 orbital socket, which is fairly obvious here, what it
2 is that's related to. There's some discussion about
3 issues with his vision and double vision. And we
4 know that it resolves actually rather quickly,
5 according to Mr. Burgess. Once he had that surgery
6 sometime in January, he got better and the vision
7 issues resolved. The orbital socket was -- well, it
8 was repaired. So, there's a clear connection there
9 between the collision and the issue with the orbital
10 socket and the vision itself, all right.

11 We also have headaches and that took a little
12 bit longer. He saw Dr. Sherrill at Clemson Neurology
13 for his issues with his headache. And he also -- he
14 also -- fortunately, he found his way to
15 Dr. Sherrill, okay, because at Dr. Sherrill's office
16 that's where he gets that nerve conduction study
17 that's been referenced a few times, once by
18 Mr. Burgess himself and a few times by the physician
19 that we've heard testify here today, too, okay.
20 Those headaches clear up about a year or so. And
21 there aren't really consistent complaints of
22 headaches at this point.

23 So now, we get to the part that's been a bit
24 more hotly contested, if you will, throughout this
25 case, the causal link between Mr. Burgess' injury to

1 his spine and the collision we're here about. Okay.

2 So, we're going to move on to that.

3 Now, we do have opinions of the treating
4 neurosurgeon and we have a couple of opinions of
5 medical experts. So, I just want to run you through
6 some of this. The first opinion we see from
7 Dr. Brennan that clearly links the collision we're
8 here about to the spine injury and the surgery and
9 the result in impairment is Dr. Brennan. And, in
10 fact, he testified -- I wish I could make this a
11 little bit bigger.

12 Can we? No?

13 Well, I'll have to deal with this. He's asked,
14 essentially -- I'm going have to get a little closer.
15 He asked, essentially, can you now state to a
16 reasonable degree of medical certainty that it is
17 more likely than not that Mr. Burgess' condition for
18 which you provided surgery, the condition -- excuse
19 me, the condition causing leg pain and weakness, that
20 it is more likely than not that those conditions and
21 ensuing impairment were caused by the motor vehicle
22 collision we're here about today?

23 And his response was, Yes.

24 Clear yes. There didn't seem to be any doubt in
25 his mind.

1 Now, following extensive cross-examination by
2 Mr. Moore, on redirect, I asked him again -- getting
3 closer again. I asked him again, so I'd like to end
4 my line of questioning with you, Doctor, the same way
5 I kind of ended it previously. And that's based on
6 the information you have available to you right now,
7 in your opinion and to a reasonable degree of medical
8 certain, is it more likely than not the condition to
9 which Mr. Burgess presented to your office with, the
10 result in surgery is causal related to the automobile
11 collision he was involved with? His answer again was
12 yes.

13 Now, he touched on a lot of other subjects in
14 that deposition and in his testimony that we
15 presented to you via video deposition. Some of the
16 subjects that he touched on was prior complaints, all
17 right. We showed you some records for the proceeding
18 three or more months or so. And in those records, we
19 see some complaints of neck pain, neck issues.
20 Mr. Burgess isn't alleging that any of his neck
21 issues are related to this collision, okay. We also
22 know that if we take in connection with some of his
23 testimony regarding the leg that also it's not
24 disabling. Mr. Burgess was working right before this
25 collision occurred. In fact, he was on his way home

1 from work, okay. In fact, Dr. Brennan suggested the
2 back pain sounds more like muscular pain really. Not
3 necessary the nerve pain that Mr. Burgess is dealing
4 with right now. And it wasn't accompanied by leg
5 pain.

6 Now, you're -- maybe I shouldn't anticipate
7 anything, but I'll say this, you've heard that word
8 degenerative changes a few times here throughout this
9 trial. Especially, when we're dealing with the
10 medical experts. And I thought both Dr. Brennan and
11 Dr. Scott described it really well for me to
12 understand. Here's what we can understand from
13 Dr. Brennan's testimony, is that the degenerative
14 changes that are seen in Mr. Burgess' MRI at the
15 hospital are to be expected. Really, not usual.
16 It's something you would expect from an individual
17 his age. And those degenerative changes aren't what
18 we see after this collision. Really doesn't have
19 anything to do with it. The degenerative changes
20 pressing on his nerve, that didn't happen until after
21 the collision. We first see that after the collision
22 with an MRI that shows that there's an extrusion and
23 it's pressing on the nerve, okay. So, degenerative
24 changes aren't the same thing we're dealing with
25 here.

1 Dr. Brennan also touched on another subject. He
2 suggested that the degenerative changes -- if the
3 degenerative changes were somehow indicative of some
4 preexisting kind of condition or issue and that the
5 herniation preexisted this collision, well, then in
6 that MRI that we saw, it would likely be a less
7 hydration in the disk itself, he mentioned that,
8 right? I thought he put that really well. It really
9 helped me understand what's going on in this case,
10 too.

11 He also talked about something else. And you've
12 heard this other term that's come up, okay. I think
13 Dr. Brennan himself suggested somewhat uncomfortable
14 with the failed back syndrome or failed back surgery.
15 And the way he described that was well, he removed
16 the compression on the nerve after this extrusion
17 that's pressing on it following this collision, you
18 remove that compression, but the nerve damage
19 remains. And I'll never forget the way he described
20 it. You take a car, you roll it up on somebody's
21 foot and leave it there for ten seconds. You take a
22 car and you roll it up on somebody's foot and you
23 leave it there for ten minutes. You're going to see
24 a lot more damage to that foot if you leave the car
25 on that foot for ten minutes, right?

1 Now, he also compared the surgery to taking the
2 car off the foot, taking the car off of that foot,
3 do the surgery from his perspective. That's how he
4 described that analogy. So, his response is well,
5 it's not really an unexpected result to continue to
6 have nerve irritation when you have this compression
7 on the nerve for an extended period of time. That's
8 how he explained it. I thought it was very well put.
9 It helped me certainly understand what was going on
10 in this case as well.

11 So, we have the opinion of Dr. Brennan very
12 clearly put and we'll come back to him in a second.
13 Still on the issue of causation. But it will just be
14 briefly with Dr. Brennan again. From here, we'll
15 move to -- well, we have Dr. Scott. Dr. Scott has
16 some opinions regarding before and after, right? I
17 believe this was in cross-examination. He was asked,
18 Well, don't we see this before -- didn't we see this
19 same issue beforehand?

20 And Dr. Scott responds, Now, wait just a minute,
21 I'm not so sure that he had a true herniation,
22 particularly an extrusion. Matter of fact, he had
23 not had an extrusion before because it didn't show up
24 on his previous studies. So, I don't think I can go
25 along with that. He had degenerative change, but I

1 don't think he had an extruded fragment prior to this
2 accident.

3 Then he was later asked -- he was actually asked
4 multiple times, but there's only so much you can put
5 on the screen here. Have you heard anything, Doctor,
6 that changes your opinion about the causal
7 relationship between Mr. Burgess' current condition
8 and the collision we're here about?

9 His response was, No, sir.

10 I asked him again, Do you still believe that
11 Mr. Burgess' current condition is causally related to
12 the collision we're here about?

13 I do.

14 Now, there are some instances throughout Mr. --
15 or excuse me, Dr. Scott's testimony and Dr. Brennan's
16 testimony where they gave you some -- he's asked
17 about possibilities. Is it possible that it could be
18 this? Is it possible it could be that? And their
19 response was yeah, it's possible. It can happen.
20 But when he's asked to state to a reasonable degree
21 of medical certainty, both Dr. Brennan and Dr. Scott
22 give their opinions of what they really believe
23 happened here, which is that there's this causal
24 relationship between the collision and the injuries
25 that Mr. Burgess sustained. Right?

1 So, what we've done now is we've rather quickly
2 walked through the negligence and liability portion
3 of this claim. And we've also walked through the
4 causation portion of this claim. One that's in the
5 middle of negligence and the damages. We have to
6 make that link, okay? We've somewhat walked through
7 that.

8 There's one little missing piece I almost forgot
9 to put in front of you. That one little missing
10 piece is the spinal cord stimulator, all right? We
11 have some recommendations by Mr. Brennan, who,
12 essentially, suggests to -- or refers Mr. Burgess for
13 a spinal cord stimulator trial. And we also have
14 Dr. Scott in his independent evaluation, which was
15 really just a few months ago, states that in his
16 opinion, Mr. Burgess stands to benefit from the
17 spinal cord stimulator.

18 Now, we do know that Dr. Loudermilk -- you saw
19 his testimony, that was the shortest of the three
20 physicians. He says that the trial's conducted and
21 there was a 60 to 70 percent pain relief. All right.
22 And also, there's been a -- well, let me say this.
23 When we talk about what are the benefits of spinal
24 cord stimulator? The benefits are a reduction in
25 pain, that's obvious. Otherwise, why do we do it?

1 And the other is, well, a reduction of the dependency
2 of opioids, which is certainly admirable. That's a
3 good reason to have a spinal cord stimulator in the
4 opinion of the physicians.

5 I'll say this, though, Dr. Scott touches on this
6 subject here very briefly in his deposition. And if
7 you weren't paying very close attention, you may have
8 missed it. But there's a discussion about with the
9 spinal cord stimulator, you get rid of his pain, it's
10 gone. He should be fine again. But Dr. Scott
11 touched on that. He suggested, even though that pain
12 is gone, there's still neurological deficits. He
13 doesn't have that same function of his leg even
14 though that pain might be well reduced or maybe even
15 gone. Keep that in mind. That spinal cord
16 stimulator doesn't get Mr. Burgess right back to
17 work. That's not the assumption. It really isn't.
18 In fact, Dr. Scott's testimony was it would be an
19 optimistic result for Mr. Burgess to return for light
20 work, optimistic. He didn't say that he believed to
21 a reasonable degree of medical certainty or more
22 likely than not that the spinal cord stimulator would
23 get him back to work, or even that it would get him
24 back to light duty. That's not what he said. He
25 said it's a very optimistic result, okay?

1 So again, we walk through that liability and
2 negligence, that causal link between damages and the
3 opinions of the physicians. And I want to move to
4 now -- well, the damages. Let's go to the -- I
5 wouldn't say the first opportunity we've had to talk
6 about damages because we did speak briefly about the
7 impact on Mr. Burgess' vocational ability and his
8 return to work. We also talked briefly about the
9 current medical bills that he sustained. I
10 considered the opinions of other medical experts that
11 might be in contradiction to what it is that the
12 Plaintiff is alleging that there is a causal
13 relationship, but it would have been a blank page.
14 There's no physician who's testified here throughout
15 this week that would, essentially, state an opinion
16 to a reasonable degree of medical certainty that
17 Mr. Burgess' current condition is related to
18 something that preexisted this collision we're here
19 about. There just isn't. So, there isn't a page for
20 you to fill up on that, so I'll move on. Maybe.

21 All right. So, move to damages then. I'm going
22 to briefly run you through definitions and just very
23 brief explanations as to how they're valued. I'll
24 just speak in very general terms because you will get
25 specificity from the Honorable Judge Miller. Again,

1 if anything conflicts with what it is that he says,
2 you listen to him not to me. I hope there isn't a
3 conflict, but if there is, listen to him. I've got
4 to be clear about that, okay?

5 So, we'll start with current medical bills, kind
6 of self explanatory, right, current medical bills.
7 For medical bills to be recoverable, they must be
8 necessary, reasonable and caused by the injury.
9 We've already gone over really those three elements,
10 essentially. We also have the value of medical
11 bills. It's the reasonable value of medical
12 services. And I want to be clear about this, the
13 amount of bills charged is a factor, but it's
14 definitely not the only factor. It's not. It's one
15 of the factors we have in front of you. And,
16 ultimately, you must decide the reasonable value. As
17 difficult as that may sound, that's in your hands.

18 So, we'll move on to damages and what we know.
19 We show this -- this is an exhibit that you will have
20 available to you, okay? If I'm -- just backtrack
21 just a little bit. I glossed over some of the
22 evidence that you'll have available to you. You're
23 going to have that overhead image. You're going to
24 have those 911 calls. You'll have that video.
25 You'll have -- you'll, of course, have this. You'll

1 have the recorded statement. You'll have a lot of
2 evidence that's available to you and you'll have
3 access to it as you deliberate and try to come to a
4 decision about how to resolve this matter.

5 So, one of those is this right here. This
6 billing list, essentially. And if you'll bear with
7 me, I'm going to try to run through these very
8 quickly. We have, of course, Greenville County EMS
9 that picks up Mr. Burgess. We have the Greenville
10 Hospital System emergency room. And that's fairly
11 self explanatory as well. We have the date of
12 accident until 12/17/13, about seven days or so. You
13 have Parkins Health Radiology, that's some you might
14 be familiar with, that's the radiology department.
15 And you have a pretty broad range of dates here,
16 12/10/13 to 3/27/15, likelihood there is you have
17 MRIs from that -- or radiology from that first date,
18 but they continue for a period of time. And they
19 were billed, essentially, by the same department.

20 You have Palmetto Baptist, which is that short
21 stint after the collision where Mr. Burgess goes to
22 the emergency room. We have Clemson Eye Group that
23 evaluated Mr. Burgess and his eyes and, essentially,
24 said I don't think the eyes are the issue here,
25 you've got to go to UMG Plastic Surgery to have that

1 repair for that orbital socket blowout fracture.

2 Then, of course, we have the hospital fee for that.

3 So, that's already resolved by the 1/17/14.

4 We also have Upstate Bone and Joint. I want to
5 remind you about Upstate Bone and Joint. We touched
6 on that a few times throughout the trial. That's
7 Dr. Boyer. Dr. Boyer is an orthopedic doctor.
8 Mr. Burgess was referred to Dr. Boyer at some point
9 by the -- by the hospital on discharge and he ends up
10 over at Dr. Boyer's office. Dr. Boyer is treating
11 him for what he believes are issues that might be
12 related to his leg. Doesn't really seem to be
13 primarily focused on his back. At some point, he
14 seems to be, though, and he actually refers
15 Mr. Burgess to a neurosurgeon. That neurosurgeon, if
16 I remember correctly, didn't believe that Mr. Burgess
17 was a surgical candidate.

18 Now, I want to make sure we're clear about
19 something here because the next one we see, just a
20 couple down is Clemson Neurology where Dr. Sherrill
21 is at. By the time Dr. Boyer had sent Mr. Burgess to
22 that opinion with the neurosurgeon, which suggested
23 that he's concerned about some kind of issue that
24 might be related to the back, there was no nerve
25 conduction study. One hadn't been done. There was

1 no [indiscernible] that there's a relationship
2 between the leg pain that Mr. Burgess complained of
3 and the injury to his spine. We did have evidence of
4 an extrusion and we knew that Mr. Burgess was dealing
5 with a herniation at that time, but there's no
6 evidence yet that there's compression on the nerve
7 that's affecting the use of his leg and -- excuse me.

8 All right, let me see if I can get this going
9 again. All right. So, there's no evidence. There's
10 been a lot of talking, mostly by me. I'm being
11 honest, right. So, there's no evidence at this point
12 yet that the pain -- I just say this, there's no
13 objective evidence. We have subjective complaints
14 from Mr. Burgess. The physician suggest that there
15 could be this relationship here between what it is
16 he's complaining of, even though it may be documented
17 as thigh and hip pain. The physicians, both
18 Dr. Brennan and Dr. Scott, have essentially stated to
19 you that it's pretty consistent with an issue with
20 his spine at that point. However, by the time we get
21 over to Dr. Boyer at Upstate Bone and Joint, we still
22 don't have that nerve conduction study. But
23 Dr. Sherrill finally conducts a nerve conduction
24 study and his findings are there's a relationship.
25 There's something going on. There's evidence of an

1 issue with Mr. Burgess' spine that affecting the use
2 of his leg. And that's when you get this -- that's
3 actually two days before -- this nerve conduction
4 study is done two days Mr. Burgess' last visit with
5 Mr. Boyer. And at that point, Dr. Boyer turns over
6 the decision-making process, the medical
7 decision-making process to Dr. Sherrill and
8 Dr. Sherrill refers over to Dr. Brennan over at
9 Florence Neuro and Spine.

10 And as you know from that point, Dr. Brennan
11 immediately makes a recommendation for surgery. He
12 performs surgery to, essentially, remove the
13 compression from the nerve. We know the result of
14 the surgery itself. We have the hospital fee here
15 for the surgery.

16 And then, of course, at some point here towards
17 the end of Mr. Burgess' relationship with
18 Mr. Brennan, he's referred over to Piedmont
19 Comprehensive Pain Management for consideration for a
20 spinal cord stimulator. There was testimony that was
21 developed that Dr. Mena, another neurosurgeon who's
22 local was seeing Mr. Burgess. She's the one that
23 referred Mr. Burgess over to Dr. Loudermilk over at
24 Piedmont Comprehensive Pain Management. That's where
25 the procedure takes place for the spinal cord

1 stimulator trial.

2 So, we'll move past the current medical bills.
3 We also have alleged future medical bills, all right.
4 And you had some testimony presented to you on that
5 as well. We had future medical bills. Now, remember
6 I'm going to state some generalities here. Again,
7 you're going to get some very detailed instructions
8 from the Honorable Judge Miller. If there's any
9 conflict, you listen to his, not to mine. I hope
10 there isn't any conflict, but his are far more
11 important than mine, okay.

12 So, we'll say for future medical bills to be
13 recovered, it looks very similar to what we just went
14 through. Have to be necessary, reasonable, have to
15 be caused by the injury, okay. We also have how
16 medical bill are valued, a little bit more tricky,
17 right. We have a reasonable value of medical
18 services in the future. There's not a mathematical
19 certainty, it's often approximated. And, ultimately,
20 you must decide the reasonable value. And that's
21 going to be kind of a recurring theme here as we go
22 through some of these numbers or damages, that you
23 must did the reasonable value.

24 Now, you've been offered some -- a couple of
25 pieces of evidence in trying to make a determination

1 about what a reasonable value is of those future
2 medical services, okay. One of them was Sarah
3 Lustig, the lifecare planner, who testified. She's
4 an expert and she testified on behalf of Mr. Burgess
5 regarding his future medical expenses is. It's a
6 five-page report. She goes in -- I'll do this very
7 briefly here. She goes into pain specialist
8 physicians and the visit four times per year for his
9 life, the spinal surgeon and that just is one preop
10 and one postop. We also have that spinal cord
11 stimulator placement itself and the facility fee and
12 the physician's fee. Then you also have some other
13 things that you need to consider here, which is
14 the --

15 Now, the generator changes that we went through
16 just a little bit as well. You heard, I wouldn't say
17 conflicting testimony, just slightly different.
18 Ms. Lustig testified that the battery would need to
19 be changed five to seven years or so. We also heard
20 from the defendant's lifecare planner and expert
21 regarding battery changes and how often that would
22 be. She gave a number of about nine or so, nine
23 years. So, it's not terribly different, but there is
24 a slight difference there that you will need to
25 consider.

1 I'll note that all of Sarah's -- or Ms. Lustig's
2 numbers are really for inpatient, if I remember
3 correctly. And Ms. Morehead actually stated that the
4 cost for a spinal cord stimulator for inpatient was
5 somewhere around \$49,000 and some change, if I
6 remember correctly, and it would be a \$20,000
7 difference or so if it was an inpatient procedure.
8 So the first number was outpatient, then on
9 cross-examination, she testified it would be a
10 \$20,000 difference if it was an inpatient procedure.

11 Now, the difference in opinions is accounted for
12 by Ms. Lustig -- well, actually, Ms. Morehead
13 testified herself that there's certain conditions
14 that an individual may have that requires inpatient
15 versus outpatient in that procedure. And so, you
16 have to decide which one is applicable here.

17 We'll keep moving down the list. We also have
18 some provisions -- I want to make this clear that
19 Ms. Morehead wasn't here to testify -- the
20 defendant's expert wasn't here to testify about the
21 cost of maintenance of this item or really anything
22 else. She was here only to testify the cost of one
23 procedure, the implantation and that's it, the
24 permanent placement and that's that it. There wasn't
25 any other testimony about any other procedure or

1 followup or maintenance or generator or battery
2 maintenance or anything along those lines, okay. And
3 she admitted that very graciously.

4 So, we also just at the last page here, oh, you
5 can see some physical therapy evaluations, some
6 physical therapy maintenance and whatnot. I thought
7 she did something that was really fair here. And
8 maybe I wanted to argue with her a little bit about
9 it at first, remove something that may still have
10 been necessary. But she thought it was reasonable to
11 remove opioids from the medication list. Her thought
12 was well, we're doing the spinal cord stimulator to
13 help reduce the dependency on opioid, she went a step
14 further, get it out the way all together. No opioids
15 on her list at all. She only has Neurontin, which
16 is, if I remember correctly, a nerve medication that
17 Mr. Burgess is taking right now.

18 You also have some MRIs three to five times in
19 his lifetime, and she's calculated that as well. And
20 the last one is a shower sheet, fairly
21 self-explanatory. And she gives us a number of
22 \$538,397. Okay. And so on the next list, that will
23 be reflected. All right.

24 You can see the next issue we're going to talk
25 about is lost wages. And we'll move a little bit

1 faster here. Again, I'm going to give you some
2 general definition here. You're going to receive
3 very detailed instruction us from the Honorable Judge
4 Miller. If there's any conflict, you listen to his,
5 not mine. Typically, lost wages are defined as a
6 person's inability to sell labor or services in a
7 market accessible to that person. Here's what I mean
8 by that, I want to be clear on this. There might be
9 this one obscure job halfway across the world that
10 Mr. Burgess may still qualify for, but that's not
11 really how you define whether he has lost wages.
12 It's got to be in a market that's reasonably
13 accessible to Mr. Burgess himself, okay.

14 Now, the considerations for lost wages. We are
15 looking at all impairments of the capacity to work in
16 the past. So, from this date backwards, okay. We're
17 talking about lost wages up to this point. We also
18 have to consider the effect those impairments have on
19 the capacity to earn wages, okay.

20 Now, we've got some admissions here that I want
21 to publish to you now. I'll state to you this, the
22 Plaintiff has asked at some point throughout
23 discovery, we asked the Defendant to admit or deny
24 this statement. And the statement was, At the time
25 of the collision made subject by this action,

1 Plaintiff was working full time and earning
2 approximately 400 per week.

3 The response was, The Defendant would admit the
4 Plaintiff was earning \$10 per hour at the job he held
5 when the accident in question occurred and that this
6 would equate approximately to \$400 per week in gross
7 income, not reduced for taxes or other reductions.

8 Okay.

9 So, we'll move forward. What I did hear is
10 thought it was reasonable to essentially suggest that
11 Mr. Burgess would take two weeks of vacation per year
12 and 400 times 50 would put us at about 20,000 per
13 year over four years. We're at four and a half right
14 now, but you have plenty of numbers to work with. We
15 have four years of 20,000. We're alleging lost wages
16 in the amount of \$80,000. Again, you have to decide
17 that number. You ultimately have to. There are
18 other considerations and I'm sure you'll hear about
19 them today.

20 We also have loss of earning capacity. And now
21 we're talking about the inability to earn wages in
22 the future. Okay. Again, put some general kind of
23 statements here about how you reach this conclusion.
24 And I'm going to repeat this because it's very
25 important. You're going to hear some very specific

1 charges from the Honorable Judge Miller. If there's
2 any conflict here, you listen to him, not mine. I
3 hope there aren't any conflicts, but if there are,
4 his carry the weight, not mine.

5 Okay, so we'll define them. Very similar to
6 what we've just already looked at. A person's
7 inability to sell labor or services in the future.
8 And again, in the market accessible to a person.
9 We've already kind of gone over what that means, the
10 market that's accessible. Okay. And in those
11 considerations as well, consider all the impairments
12 on the capacity to work in the future. That sounds
13 very similar to the capacity to work prior to today.
14 The effect impairments will have on capacity to earn
15 future wages. Then, of course, use the life
16 expectancy table.

17 Now, this is a very specific charge as well that
18 we touched upon it very briefly in trial. And you'll
19 hear this charge today. It's really a copy paste.
20 And I'm fairly certain that this one is accurate, but
21 again, if there's any conflict between this and what
22 it is that you hear from the Judge Miller, you listen
23 to his, not mine.

24 So what this, essentially, says here is that --
25 it's a statute, a South Carolina statute and it says,

1 When necessary, in a civil action or other litigation
2 to establish the life expectancy of a person from any
3 period in his life, whether he is living at the time
4 or not, the table below must be received in all
5 courts and by all persons having power to determine
6 litigation as evidence, along with other evidence as
7 to his health, constitution and habits of the life
8 expectancy of the person.

9 You see some things here that we didn't really
10 touch on in the previous page, right, health,
11 constitution and habits, which are other
12 considerations actually in determining an individuals
13 lost earning capacity, okay.

14 In determining the age of a person as of any
15 particular time in periods of six months or more
16 beyond the last full year must be treated as one year
17 using the table below.

18 Now, I didn't pull the whole table up. I
19 believe you will get that from Judge Miller at some
20 point. I didn't use that whole table because it
21 would take up various pages, all right. But what I
22 did, though, is use the number 30 years, essentially,
23 and I did some math here. Thirty years equals 1560
24 weeks, equals 10,920 days and Mr. Burgess' age is
25 well 48 years old. Not quite 48, but we'll go ahead

1 and bump it up to 48 to make it easier to work with
2 here. So, we're going to see these numbers over and
3 over.

4 Now, here's the -- essentially, I would say this
5 is an example. Just understanding that only you can
6 decide and that they're are varying considerations
7 you can make, the only evidence that has been put in
8 front of you right now is a 30 year mark of 20,000 a
9 year and a total of \$600,000. Now, that number isn't
10 firm, that's something you need to work with, I'll
11 leave that in your hands.

12 So, we finish the -- essentially, the economic
13 damages portion here. These are -- I want to say
14 these are numbers that were more fixed and easily
15 identified, but that's not really fair. If I said
16 that, then I wouldn't be admitting that there's in
17 each and every one of these, there's elements of
18 interpretation, if you will. For instance, when
19 we're in current medical bills, we've got to look at
20 the reasonable value of those medical services and
21 just because he was billed that amount doesn't mean
22 it is a reasonable value. You can look at it as a
23 factor and use that as a reasonable value or you can
24 determine that well, maybe it shouldn't be that much.
25 Or you might look at it and say, actually, it should

1 be more. You can also look at future medical bills,
2 same thing. I want to say that it's somewhat fixed,
3 but it really isn't. There's many things that you
4 can consider in determining future medical bills as
5 well.

6 We also have lost wages. Again, I want to say
7 it should be pretty fixed, that one's easy. In fact,
8 it's probably the easiest number we have up here, but
9 it's still not all that easy. You still got other
10 considerations that you need to make. If I'm being
11 fair, Mr. Burgess worked for three months full time
12 prior to this collision, but there is some discussion
13 about him having some maybe inconsistent work
14 patterns before those three months as well. So,
15 those are all consideration for you. You can look at
16 his earning capacity at the time of the collision.
17 You can consider what it is that Mr. Joel Leonard,
18 the vocational expert, testified to regarding his
19 earning capacity at the time of the collision and
20 what he said about his earning capacity afterwards.
21 And you can put that together with all the knowledge
22 and experience that you bring to the table as well.
23 So, as much as I'd like to say these numbers are
24 fixed, well, they aren't. Okay. Something that you
25 need to work with.

1 Now, we move to an area here that is far more
2 difficult to calculate from my perspective. You
3 know, I wish, under these certain circumstances, that
4 I can bring somebody up here and they can just tell
5 us this is the value of pain and suffering, but I
6 can't. Because nobody will testify to it, quite
7 honestly. So, what we're left with is -- and I've
8 got to be very careful about how I say this. These
9 aren't suggestion, these are merely examples, okay?
10 I'm not telling you that's what you have to do.
11 These are just examples of how to calculate pain and
12 suffering. All right. And you're going to see a --
13 I'm going to give you this first before we go into
14 pain and -- before we go into some specific
15 calculations.

16 THE COURT: We need to take just a short recess.

17 MR. GARCIA: Sure. Sure.

18 THE COURT: Y'all go ahead and we'll get right
19 back with you. Take about 10 minutes.

20 (WHEREUPON, the jury left open court at
21 approximately 11:04 a.m.)

22 THE COURT: One of the jurors was in dire
23 straights. We'll take 10 minutes. Just had to --
24 they needed the washroom.

25 MR. GARCIA: Sure.

1 THE COURT: Take about 10 minutes.

2 (WHEREUPON, a short break was taken.)

3 THE COURT: I did get a note said they're ready
4 to resume.

5 (WHEREUPON, the jury came into open court at
6 approximately 11:19 a.m.)

7 (WHEREUPON, Court's Exhibit No. 8 was marked for
8 identification only.)

9 THE COURT: All right, ladies and gentlemen,
10 hope y'all are okay. Make sure you let us know if
11 you need another break.

12 Go ahead, resume.

13 MR. GARCIA: Thank you, Your Honor.

14 So, we left off somewhere around this area. And
15 I want to reiterate this, it's such an important
16 point. What we're going to talk about now, remember
17 I told you that I'd like to think that those first
18 four numbers are accurate or, you know, more fixed.
19 And I highlighted to you that well, kind of still
20 interpretation by the jury. That's a horrible set up
21 because it gets even more difficult coming up.

22 Now, from this point forward, what I wanted to
23 reiterate was, because I felt like it was very
24 important, that these aren't suggestions we're going
25 to talk about here, they're merely examples.

1 Ultimately, it's you that has to decide what kind of
2 number to attribute to these three specific damages
3 here that we're alleging, okay. And again, they're
4 just by way of example only.

5 So, what we'll do is move on to pain and
6 suffering. You've heard this line before. And
7 you're going to hear it again. These are somewhat
8 general terms regarding pain and suffering. You're
9 going to hear much more specific instruction from the
10 Honorable Judge Miller. If there's any conflict, you
11 listen to his, not mine, okay.

12 So, when we talk about pain and suffering, it's
13 defined as -- it kind of seems pretty obvious; but
14 let's go through it. Discomfort and emotional
15 response to pain and it's caused by the injury. They
16 stuck that word cause in there, so it's a causal
17 relationship to the pain and the negligence that
18 we're alleging here today. The considerations are
19 the type of injury, right, how long it lasts, both
20 past and future. So, there's going to be some pain
21 and discomfort and suffering that Mr. Burgess went
22 through as a result of this collision that have
23 resolved. Injury to the eye, the orbital socket -- I
24 shouldn't say the eye, let me fix that, the injury to
25 the orbital socket, the difficulty with vision up

1 until repair. You also have the headaches. Those
2 are things he's not really dealing with right now.
3 So, that's not really part of any future
4 consideration, that's more past.

5 Then you also have the condition of the person
6 before and after injury. And you can even use the
7 use of drugs to relieve pain as a consideration. All
8 right. Now, here's where we get to the difficult
9 part. It's the value for pain and suffering.
10 There's no market price and there's no exact
11 measurement. I'm going to repeat something that I've
12 said a few times already and, really, through all of
13 these is that the amount of damages, it's left to
14 you, the jury, only the jury can decide. So, what
15 you're going to see here is just an example,
16 essentially.

17 Now, I want to put this up here. And these are
18 other admissions. And we've kind of gone through
19 what admissions are. As part of discovery, we ask --
20 we send statements, essentially, to the Defendant and
21 we ask the Defendant to admit or deny these
22 statements. The first statement is, As a result of
23 the collision made subject by this action, Plaintiff
24 has suffered painful injuries.

25 Of course, the response was admitted. If it

1 wasn't, I wouldn't have it up there.

2 The next is, As a result of the collision made
3 subject by this action, Plaintiff has suffered
4 physical and mental anguish.

5 And again, wouldn't have it up here if it wasn't
6 in admitted, okay.

7 So, we'll move on now to calculations, okay? We
8 have that same statute that's going to be referenced
9 by the Honorable Judge Miller here shortly. We're
10 missing that table, like I admitted earlier, but we
11 have the same breakdown for you, the numbers that I
12 kind of extrapolated to be able to use in this
13 example. We have Mr. Burgess' life expectancy of 30
14 years or 1560 weeks and 1920 days. Now, in this
15 example, what you'll see is a valuation of
16 Mr. Burgess' time. All right. Again, just an
17 example, but it's a valuation of his time.

18 Now, we know that at the time of this collision,
19 Mr. Burgess was earning \$10 an hour. And we also
20 know that Mr. Burgess rest really well, a lot better
21 than me, that's for sure, he gets eight hours of
22 sleep per day, okay, so that leaves us with about 16
23 hours per day. So, we assign some value to that.
24 Here's the value when we assign just an estimation,
25 right? Examples, 10 hours, 16 hours a day, \$160 a

1 day, 10,920 days, there's your number. Okay. That's
2 pain and suffering. Again, an example. Only you can
3 decide.

4 Now, we'll move rather quickly through these now
5 because well, I kind of set that up, how these
6 examples are going to be. We've got loss of
7 enjoyment of life as well. Those sound similar, but
8 I want to take a quick moment to explain what the
9 differences are.

10 Now, loss of enjoyment of life, it's defined as,
11 The limitation on ability to participate in and enjoy
12 life. And remember this, you're going to get a very
13 specific instruction from the Honorable Judge Miller
14 regarding the loss of enjoyment of life. If there's
15 any difference between this and whatever you hear
16 from the Honorable Judge Miller, you listen to Judge
17 Miller, not me. So, we've got some definitions here,
18 some general terms. It's the limitation on the
19 ability to participate in and enjoy life. It's the
20 inability to pursue interest and hobbies, okay?

21 And before I get to value, I want to point out a
22 distinction between the two, pain and suffering and
23 loss of enjoyment of life. They sound somewhat
24 similar, but they really aren't. I'll put it like
25 this. Probably the best way for me to explain it to

1 you is let's say you have -- has nothing to do with
2 this case whatsoever. You got an individual that
3 would love to play soccer. That's weird, play
4 soccer. How about football, right? Let's play
5 football. Has a leg injury, loses a portion of their
6 leg. There's no pain, no residual pain, but they
7 can't do the things they love to do. So, there's a
8 distinction there. If he's not in pain anymore, he's
9 not entitled to anything? Well, there might be some
10 pain and suffering up to the point where the injury
11 is taken care of and resolved, maybe nerve irritation
12 or anything that comes along with that, but there's
13 no pain anymore. The only thing that's really left
14 is his inability to do things that he loves to do.
15 The thing that -- another way I've heard it put is
16 things that make life worth living. All right. It's
17 the things we do outside of our work environment.

18 So, this example that you're going to see is a
19 little bit different. We valued that at \$100 a week
20 in this example. Would it make sense to do it on an
21 hourly basis, not the entire time because, unless you
22 guys are living different than me, we don't have the
23 time to do the things we love to do all the time. We
24 have limited time to do that. So, the valuation is
25 different in that regard. So, what did here is we

1 have that 1560 weeks, we assign \$100 a week to it.
2 We went up with an example of loss of enjoyment of
3 life, right? Again, only you can decide that number.
4 That's entirely within your discretion.

5 We have mental anguish, too. Okay. Again,
6 deserves a distinction. We've gone through already
7 so I'll move quickly through these. These are
8 admission again. They're very similar to -- it's,
9 essentially, the same admission. All right. Mental
10 anguish, again, you're going to get some very general
11 terms here. If you hear something different in the
12 very specific instructions you will receive from the
13 Honorable Judge Miller, those carry the day, not
14 mine. So, ignore mine, listen to his, okay? It's
15 defined as a resulting mental sensation of pain and
16 it's a combination of, that's why that and is bolded
17 there, feelings of worry, fright, anxiety, grief and
18 embarrassment. And it's admitted, okay.

19 Now, we have a value of mental anguish here.
20 Again, it's very similar to what we've already gone
21 through. There's no marketplace. There's no exact
22 measure. The amount of damages is left to you, the
23 jury, and only you can decide. And I need to keep
24 reiterating that over and over. Again, you'll see
25 something that's very similar now. And I'll try to

1 give an idea of how it is we came up with this here.

2 Just an example, okay?

3 Again, you have the life expectancy tables. You
4 have that breakdown of 48 years old and the 30 years
5 and the 1500 weeks and the 10,920 days. And just the
6 example just, essentially, assigns \$40 a day. And
7 you see the numbers. So, put it all together, put it
8 all together and we end up with, essentially, this,
9 this total. Do you have to take back to try to make
10 sense.

11 Okay. Now, I don't want to stop here. I want
12 to do one more example that might be easier to work
13 with, might not be. But it's an alternative example,
14 if you will, and it certainly takes a lot less time
15 to go over, okay, so no worries. What we have here
16 is we have those same medical -- excuse me, the same
17 damages that are alleged up top. Then you so at time
18 examine. Again, just an example. Only you can
19 decide. It's not even a suggestion, just an example.
20 And what we've done is we've, essentially, combined
21 all these noneconomic damages like pain and suffering
22 and loss of enjoyment of life and mental anguish.
23 And we've taken that number from up top, taken that
24 number and put it down here and used, essentially, a
25 multiplier. 1.5, it's to you. You can use .5. I

1 won't be mad at you if you use a multiplier of three.
2 I promise you I won't be made at you about that
3 either. You can use any number you want right here
4 and you can use any number you want over there. But
5 in this example, we use this number that we derived
6 from over here and a multiplier of 1.5 to reach that
7 final total number.

8 That's all I have for you right now. I may
9 respond after Moore, I may not, but I appreciate your
10 time and attention throughout this week. Thank you
11 very much.

12 MR. MOORE: May it please the court?

13 THE COURT: Mr. Moore, yes, sir.

14 CLOSING STATEMENT

15 MR. MOORE: It's standard for an attorney at the
16 close of a case to stand up here and say we
17 appreciate your time and your attention to this. I
18 know you didn't have any choice in being here. I
19 know you're not getting paid a whole lot to do this.
20 But, in reality, I do appreciate your time and
21 efforts here today. This has been a long week.
22 You've heard a lot of testimony, some of which is
23 foreign to you. Now, you're being asked to put that
24 together and come up with a resolution of this case.

25 Now, in any case of this nature, as I indicated

1 in my opening, there are three parts you have to go
2 through to make an evaluation in the case. In
3 reality, you may only have to go through one. The
4 first part has to do with an evaluation of
5 reliability or responsibility for that. That's based
6 upon your determination of who's negligent and who's
7 at fault to cause the accident. The second aspect
8 has to do with what injures and damages the Plaintiff
9 has. And the third aspect are connecting those two
10 parts together where we go through the causation as
11 to whether the accident caused the injuries and
12 damages they're talking about or whether they're
13 related to something else. If you make a
14 determination that the accident is not the fault, not
15 the responsibility of my client, then you don't have
16 to go any further. That's it, it's over that one
17 time.

18 So, let's talk about first the liability part.
19 Now, obviously, what I'm going to tell you is I don't
20 think my client is responsible for the accident. You
21 may not agree with me. At which case, then I'm going
22 to go over with you some aspects as to what they're
23 claiming with regards to damages so you'll have our
24 position on that. Quite frankly, I don't think that
25 you really need to go through all that. My position

1 is that there is no liability in this case.

2 Let's talk a look at that. What we know is that
3 on December 10th, 2013, my client is driving her SUV,
4 she's coming home -- she's leaving school where she
5 teach, going some about 5:30, quarter of 6:00. She
6 goes down Bramlett Road, hits the intersection with
7 Blue Ridge Highway and, as we know, Blue Ridge
8 Highway is a four-line highway with a median in the
9 middle. It has a 45 mile per hour speed limit. My
10 client is going probably about 40 to 45 at the time.
11 There's nothing wrong with her doing that.

12 At the same time, the Plaintiff is operating a
13 moped. He's on a moped and as required by law,
14 actually, he can go no faster -- the speed limit for
15 the moped in contrast with the speed limit for the
16 highway is 25 miles per hour. He indicates he may
17 have been going 30 miles an hour. It doesn't really
18 matter. Obviously, he is going to be going slower
19 than most of the traffic on Blue Ridge Highway.
20 Because there is that disconnect between the highway
21 speed limit and the speed limit for the specific
22 moped, the law also provides a resolution of that to
23 allow traffic to follow freely. And there is a
24 statute which the Judge will charge you that a slower
25 moving vehicle is required to stay in the right-hand

1 lane until, if it's going to make a left-hand turn
2 lane, under it gets up close enough to that left-hand
3 turn lane so that it can shift safely and get in that
4 left-hand turn lane and turn.

5 Now, according to Mr. Burgess, he left the Hot
6 Spot gas station and immediately got into that
7 left-hand fast lane. In doing so, if that is the
8 case, he violated statute and that is negligence.

9 Now, our position is that actually didn't
10 happen. He probably did what was right. That he
11 stayed in the right-hand lane because he intended to
12 go up the road about a quarter mile or so and then
13 turn left and that he stayed in that right-hand lane
14 until he needed to switch lanes. Then he began to
15 switch from right to left lane when he was going to
16 go into a mall, strip mall to make a phone call. And
17 when he did so, he didn't give sufficient room in
18 front of the SUV which was traveling in the left-hand
19 lane and he caused the collision.

20 Now, you heard a number of questions from
21 plaintiff's counsel regarding where the accident
22 occurred on Blue Ridge Highway. It doesn't matter.
23 It absolutely does not matter with regard to how this
24 accident occurred. What matters is the relationship,
25 as you heard both accident reconstructionists testify

1 the relationship between the SUV and the moped at the
2 time of the accident. And that could have occurred
3 anywhere along the length of Blue Ridge Highway. So,
4 the arguments regarding where she was when she turned
5 before the Hot Spot and where it was that it actually
6 occurred, it doesn't matter. We think it probably
7 occurred and this makes sense, based on the evidence
8 we have, it occurred fairly close to the mall where
9 he was going. He hadn't gotten there yet, but it
10 fairly close to the mall. But those are the issues
11 that you have to consider.

12 Now, the guys who were really talking about how
13 this accident happened are the two expert witnesses
14 on accident reconstruction. The two parties here
15 really don't know a whole about what happened because
16 when it happened, it's obviously a traumatic event
17 and what their vision, their memory is going to be
18 concentrated on is what's happening at that present
19 time. So, you'll hear where, you know, for example,
20 my client says in her recorded statement she's on
21 White Horse Road. Well, obviously, she's not on
22 White Horse Road, she's on Blue Ridge Highway, she's
23 mistaken about that. There's some indication that
24 she may have seen him earlier on, then there's
25 contradicting testimony that she was a quarter mile

1 up the road. It doesn't matter. It does not matter.

2 What we do know is that there's a collision
3 between these two vehicles. We know that the moped
4 ended up in the median of the highway. In other
5 words, between the two directions traveling. Just
6 before his moped ends up in the median, there's a
7 collision. And at that time, according to his
8 testimony and his statement, he was in the middle of
9 the left lane.

10 Now, the question is going to be, how did he go
11 over to the middle of the left lane? Was he
12 traveling down that road, that lane of travel for
13 about a quarter of a mile improperly or did he shift
14 lanes from right to left as he was beginning to make
15 a left-hand turn? Plaintiff's expert says no, he was
16 in that lane throughout that time period and what
17 happens was just before the collision occurs, the SUV
18 realized that the moped was in front of it and she
19 made a quick swerve to the left to tried to avoid
20 colliding with the moped. The collision between the
21 two vehicles was to the rear portion of that moped.
22 And as a result of the turn and hitting the rear
23 portion, that caused, because there was a connection
24 between those two for a slight moment that the moped
25 was carried over into the left-hand lane by the

1 momentum of the SUV.

2 That theory is contrasted with our expert's
3 theory, Dan Olson, who stated, no, what happened was
4 that the moped was moving from the right lane into
5 the left lane and that there was a direction of
6 travel, obviously, from right to left and when the
7 collision occurred, that momentum carried over and it
8 took it into the median. He's also hit from behind
9 and that impact was going to cause him to go down the
10 road. So, you have a right to left movement and also
11 a movement down the road so that he ends up down the
12 road, not specifically where he was going, but,
13 certainly, to the left and in the median.

14 Now, Plaintiff's counsel has argued though he
15 was in the middle of the road, why would he continue
16 to be going left? Well, remember, his intent is that
17 within a short distance to make a left-hand turn.
18 So, he's going to move over as far as he can in that
19 lane to make that turn. So, he is going to be moving
20 from right to left and he's not going to stop in the
21 center of the lane, he's going to keep going until
22 he's in a position where he can safely make that turn
23 into that mall.

24 Now, how do you make a distinction between those
25 two theories and how this accident happened? I

1 submit to you -- now, we have a number of photographs
2 here. But if you look at the moped itself, and I,
3 specifically, am looking at Exhibit No. 12 here, if
4 you look closely at that moped, you will see that the
5 seat is almost jam up against the front of the moped.
6 That's caused by that collision. Normally, you would
7 have some room in this area for him to place his feet
8 and drive comfortably. But that's no longer there
9 because what has happened is the impact from the SUV
10 has caused the seat to be thrown forward, pushed
11 forward. There's no twisting there, it's just pushed
12 forward. And that would make sense because of the
13 direct impact between the SUV and the moped where it
14 hits the back of the moped and drives that seat
15 forward. Okay.

16 Now, according to plaintiff's expert, that would
17 cause a twisting or a spinning motion. It would be
18 counterclockwise, so when there's the 90-degree turn,
19 which he testified to, you have the right-hand side
20 of the moped facing momentarily to the front of the
21 SUV. Of course, if that happens, then you're going
22 to have an impact on that right-hand side from the
23 SUV striking the moped. If we look at Exhibit No.
24 14, you can look at it closely, there is no damage to
25 the right-hand side. No damage.

1 So, that particular theory doesn't work out
2 based upon the physical evidence that we have. We do
3 have damage to the left-hand side because the moped
4 fell to the left-hand side with the Plaintiff on it
5 and caused scratches and damages to that effect. And
6 you'll see that in the photographs as well.

7 Now, that particular scenario goes hand in glove
8 with our experts testimony the effect that he's
9 moving from right to left and the only way he gets
10 into the median is because he has that right to left
11 movement. Now, if he moving right to left, then he
12 has got -- if he's switching lanes, he has to get
13 adequate distance between his vehicle and the vehicle
14 following him so that vehicle doesn't have to slam on
15 brakes or try to swerve to try to avoid him.

16 Obviously, he didn't do that. And based upon Dan
17 Olson's testimony, again, you will see that when he
18 switched over from the right-hand lane into the
19 left-hand lane, he gave her approximately two seconds
20 distance. And a normal person normally has about a
21 second and a half of reaction. In other words, when
22 you see a danger and the danger would appear, as Dan
23 Olson has indicated, when he begins to cross over
24 that line, that separated line -- because before that
25 time, he's just in that lane, that's fine, there's

1 nothing wrong with it. But when he hits that line,
2 that's when she's going to notice that danger and at
3 that point in time, she has to react. Well, that
4 takes about a second and a half. And according to
5 his testimony, there's only two seconds differential,
6 so within that half second, what does she do, she
7 swerves to the left to try to avoid him, doesn't
8 quite miss him, hits the rear of his moped and the
9 moped again, moving from right to left ends up down
10 the road, but also in the median because he made an
11 improper switch in his lane. Again, that's
12 negligence on his part.

13 If, in fact, you agree with Dan Olson with
14 regard to his findings in this case, then all you
15 have to do is when the Judge gives you the verdict
16 form is indicate that you find for the Defendant and
17 your job is done.

18 Now, there's another aspect to this evaluation
19 that you need to take into account. You may find
20 that actually both parties are negligent in this
21 case, in which case, what the law requires you to do
22 is then to compare the two negligence of the parties
23 and to evaluate what percentage each party was at
24 fault. Their argument is, of course, that my client
25 is not paying proper attention. Our argument is that

1 he's making an improper switch in lanes and also was
2 in his -- and alternatively, was in that lane
3 improperly in the first place. If you find both of
4 them to be at fault, then what you're going to be
5 required to do is weigh that evidence and determine
6 who fault has what percentage. In other words, if
7 you find for -- the Plaintiff, find her to be
8 60 percent at fault, then that would mean that the
9 Defendant is 40 percent at fault. And the Judge will
10 tell you under those circumstances, you find for the
11 Defendant. The only way the Plaintiff recovers under
12 those circumstances is if he less than 50 percent at
13 fault. If you find him to be more than 50 percent at
14 fault in causing this accident, your verdict has to
15 be for the Defendant under those circumstances.

16 So again, two-step process. The first part is
17 is, basically, who's at fault, the Plaintiff or the
18 Defendant. If you find for the Defendant, you stop.
19 The second evaluation is what percentage of fault as
20 to each party? If you find that the Defendant is
21 more than 50 percent at fault, you stop. That's the
22 end of your work in this particular case.

23 Now, if you disagree with me, I hope you don't,
24 but if you disagree with me, I've got to address that
25 as well. The next step has to do with what injuries

1 and damages the Plaintiff is claiming. Now, we know
2 he's got a lot of injuries and damages, some of which
3 preexist. Some of which is easily distinguishable.
4 For example, he has had problems with anxiety,
5 depression, heart disease in the past, none of which
6 is really involved in this case, so you don't have to
7 consider those things. We also know that he had low
8 back problems and cervical problems. Again, he
9 doesn't have any cervical problems, but definitely
10 has low back problems that has something to do with
11 this accident.

12 I bring that up because less than a month before
13 this accident, he has gone to a doctor and the doctor
14 has basically referred him over to a pain clinic with
15 regard to his cervical region and his low back or his
16 lumbar region. Now, you don't get sent to a pain
17 clinic for no reason. He's got chronic low back
18 pain. And that's one of the areas he's complaining
19 about after this accident. So, first thing you have
20 to consider is okay, is that related to this accident
21 or is that related to something he had beforehand.
22 If it's related to something he had beforehand, you
23 don't take it into account in making your evaluation.

24 So, let's follow him after the accident. As a
25 result of this accident, again, he's pushed over

1 towards the median lane and the bike -- the moped
2 falls over, he's there and he has damage, as you can
3 see from the photographs, to the left side of his
4 face where his orbit has a fracture, right here. And
5 he has injury, and you heard the testimony, right
6 above his knee on the left-hand side. There is no
7 testimony at that point in time as to injury to his
8 low back. In fact, when the ambulance came there,
9 the EMT, the ambulance guys asked him a series of
10 questions about various areas of his body.

11 Asked him specifically, Did you hurt your back?

12 And the answer was, No, I don't hurt there.

13 When he's taken to the hospital, they again
14 asked him with regard to his back. And again, he
15 says, I don't hurt there.

16 Now, some three days later, he begins to develop
17 some kind of back problem because they didn't do an
18 MRI at that point in time. And the MRI shows that he
19 had degenerative changes in the lower part of his
20 back. You heard the term extrusion or protrusion of
21 disk, both of which can be caused by degenerative
22 changes. Those degenerative changes preexist this
23 accident. The question is going to be rather that's
24 caused by the degenerative changes he had or by the
25 trauma he has in the accident. Remember, when he

1 hits the ground, he's not hitting his back, he's
2 hitting his left leg. He's hitting the left side of
3 his face. There is no direct injury to his low back
4 as a result of this accident.

5 He's in the hospital for six days while they're
6 dealing with -- he has double vision actually from
7 the orbit injury. While he was there, they ask him
8 about his low back. And he specifically said -- this
9 is the Plaintiff, specifically said, I don't have any
10 low back pain, I don't have any radiating pain. I
11 know what radiating pain is and I don't have any at
12 this time. I do have problems with my left leg.
13 He's released from the hospital and referred over to
14 his family physician and then to an orthopedist.

15 The orthopedist deals and treats him -- and this
16 is Dr. Boyer, I believe, treats him with regard to
17 his left leg injury. They are not treating him for
18 his low back. Now, before he goes over to Dr. Boyer,
19 he is seen by Dr. Charles Kanos. Dr. Kanos is a
20 neurosurgeon in Greenville. Dr. Kanos looked at the
21 MRI they took in the hospital and indicated that it
22 didn't require surgery at that time. And he goes to
23 Dr. Boyer, Dr. Boyer is not even treating him for his
24 low back. He's treating him for his left hip and
25 thigh problem. They continue to do that for a couple

1 of months where he not complaining about radiating
2 pain.

3 Why is radiating pain important? The radiating
4 pain is caused by a nerve impingement, then the pain
5 follows that nerve down into the leg. On the other
6 hand, there's a similar symptom when he had an injury
7 to his left leg because the nerve goes down his left
8 leg. He can also have a direct injury to that left
9 leg which will cause similar symptoms. So, the
10 doctors are basically struggling with okay, is this
11 low back or is this left leg injury. We know he had
12 a direct injury to the left leg as a result of this
13 accident.

14 He, ultimately, is sent over to a neurologist.
15 And then that neurologist, ultimately, refers him
16 over to Florence for surgery. But before he's sent
17 over to Florence, he is again seen by Dr. Kanos, a
18 neurosurgeon, and Dr. Kanos indicates his problems
19 are not being caused by his low back, that he does
20 not need surgery. Nonetheless, what happens is he's
21 shipped off to Florence some three hours away to see
22 another doctor over there who undertakes surgery on
23 his low back indicating that the disk that we talked
24 about is impinging on a nerve. Now, he did what's
25 called a micro-discectomy. And you've heard it's a

1 minimal invasive type surgery where they go in, take
2 out the piece of the disk that's impinging on the
3 nerve and then sew him back up.

4 Now, the key to all this as to whether he has a
5 low back injury or actually a leg injury is does the
6 surgery that he has this Florence work? It doesn't.
7 The whole point in that surgery is to remove the
8 cause of the pain that he's complained about with
9 regards to his low back and with regard to pain going
10 into his leg. And it doesn't work. It's a failed
11 back surgery. And we asked the doctor about that.
12 You saw his long video. But you saw him squirming a
13 little bit when I asked him about this and trying to
14 explain why the surgery didn't work. He said, Well,
15 it might be nerve injury, it might be scarring. But
16 he also admitted it might be a misdiagnosis. They
17 don't know. We know there's not any scarring there
18 because all they did was minimally invasive, so they
19 only opened up a little bit and took something out.
20 There's no real scarring there. Don't know about the
21 nerve injury because nobody did any tests, but we do
22 know that we have a previous diagnosis of left leg
23 injury that they abandoned for whatever reason to try
24 to treat him for low back injury and the surgery for
25 low back surgery didn't work, which should imply to

1 you that maybe it's the left leg. They had it right
2 the first time.

3 Was that surgery necessary? Was it related to
4 this accident? That's nothing you're going to have
5 to think about if you get that far and make a
6 determination on. Our position is it looks to us
7 like than wasn't a unnecessary surgery. In fact, he
8 had a doctor tell him it wasn't necessary and yet,
9 they sought out another doctor some three hours away
10 to undertake a surgery and it didn't work.

11 Following that surgery, he goes back to
12 Dr. Brennan, the doctor in Florence, and Dr. Brennan
13 said, Well, I can't do anything more for you. You're
14 no longer a surgical candidate. So, they send him
15 back to have him take a look at whether he's a
16 candidate for spinal cord stimulator. And he goes to
17 see Dr. Loudermilk concerning that and Dr. Loudermilk
18 says I think he is. He's never had it done. This is
19 over three years ago and he's never undertaken to
20 have this done. But according to Dr. Loudermilk and
21 other doctors that have seen him, this will help him
22 tremendously with regard to the pain that's really
23 related at this point in time through this failed
24 back surgery. But it should help him out with regard
25 to that, but he's never done anything about it. It

1 will help him with regard to his drug use, his opioid
2 use. He will help him with regard to his ability to
3 move about. It will help possibly and we think
4 should help him get a job, which he doesn't have now
5 and hasn't had for the last five years. So he needs
6 to go ahead and kind of take this surgery, but for
7 whatever reason, has opted not to do so. Now, he'll
8 you he can't afford it, but it's kind of curious he
9 can afford that surgery, but can't do this actually
10 less strenuous surgery that we're talking about here.

11 Now, he goes and sees another doctor, Dr. Scott,
12 for an IME. Basically, Dr. Scott didn't treat him,
13 he was just trying to pull everything together.
14 Dr. Scott acknowledges, yes, he does have preexisting
15 low back problems, they are degenerative in nature m
16 but he thinks he has a traumatically caused herniated
17 disk. However, Dr. Scott is assuming throughout this
18 time that the complaints regarding his left leg are
19 actually, radiating pain and there's actually no
20 proof of that. In fact, most of the doctors felt
21 otherwise. In fact, other doctors felt like it was
22 unnecessary for him to have the surgery in the first
23 place.

24 What's important is -- I don't know if you
25 noticed this or not, but we Dr. Scott review a video

1 that had been taken of the plaintiff and it showed
2 the plaintiff riding a riding lawn mower, using it to
3 cut his grass. It showed him driving a car. It
4 showed him shopping, getting out of a car, going into
5 a store, walking without a cane, walking without
6 limitation and being steady on his feet. Dr. Scott
7 testified that when he came to see him some four to
8 five months later, the opposite was true. He was not
9 steady on his feet, he was walking with a cane. He
10 doesn't know whether he can ride a riding lawn mower
11 or not, but, you know. He didn't know whether he
12 could drive a car, but at the time, he actually
13 could. So, something happened to him between the
14 time he had the evaluation for the spinal cord
15 stimulator and the time he saw Dr. Scott.

16 So, Dr. Scott's examination is somewhat tainted
17 because we don't know what happened to him during
18 that time. But, obviously, something has happened
19 because the spinal cord stimulator examination is
20 some two years after the accident and, obviously,
21 Dr. Scott sees him probably two and a half years
22 afterwards. We don't know what's going on there, but
23 it's not related to this accident.

24 Now, having said all that and gone through the
25 medical testimony with you, then if you feel like

1 some of that is related, you need to take a look and
2 see what the costs are associated with that. I'm
3 going to quickly go through it. I'm not going to go
4 through it ad nauseam with you. With regard to the
5 category of his already expended medical expenses,
6 the one you need to take a look at and consider has
7 to do with the surgery that took place in Florence,
8 whether that was necessary or not, whether that was
9 relate to the accident. With regard to his future
10 medical expenses, what you need to take a look at is
11 two fold. One is if you consider the lifecare plan
12 that was presented and they gave a figure of
13 \$536,000, what's not included or considered in that
14 is that a number of those procedures they're talking
15 about are done in the hospital. As their own expert
16 indicated, when you do it in the hospital rather than
17 outpatient, it is tremendously higher. The surgery
18 that we're talking about can be done on an outpatient
19 basis. And if that is done, even according to their
20 own expert, that reduces that amount by some
21 \$200,000. In addition to that, they're other matters
22 that are taken into account which can be done by
23 local doctors or out of the hospital, not inpatient
24 at the hospital, but outpatient at a local facility
25 that will save an additional \$50,000. So, that will

1 reduce that amount of the future lifecare plan from
2 536,000 to less than -- if my math is right, to less
3 than \$300,000. In fact, probably less than \$200,000.
4 So, take that into account as well. So, take that
5 into account as well.

6 They then ask you to give him a recovery for
7 lost income up to the date of this trial and then
8 beyond for future lost income. Saying that he is
9 going to earn \$10 per hour. If he works 40 hours per
10 week, that would be \$400 per week times 50, so that
11 gives him \$20,000 per year. He's never made that
12 much. The last year when he worked and where he was
13 working at \$10 per hour, he made \$7,000 in seven
14 months. If you annualize that, it's about \$12,000.
15 If he's actually working at 40 hours per week, then
16 yes, it gets on up to \$20,000, but there's no
17 evidence that that has ever happened. In fact, if
18 you look at his work history, it is extremely spotty.
19 He's had times where he worked some place, then he'll
20 leave for whatever reason. He had one where he was
21 working for a store and he stole money from that
22 store. That's going to very much limit him as far as
23 his employment is concerned. He's has times where,
24 you know, he missed out because of illnesses. He's
25 had times because he doesn't have good

1 transportation. Such as the time when he had his
2 moped, he lost his license because of his DUI.

3 So, we have a guy with a very spotty record and
4 what they want you to believe is oh, he's going to be
5 able to work consistently 40 hours per week at this
6 level, that you should give him this for the rest of
7 his life, not taking into account that as he gets
8 older, he's probably going to slow down and at some
9 point in time, he's going to retire.

10 More importantly, if you listen to his own
11 rehabilitation expert, Joel Leonard, when he was
12 asked about this, Joel Leonard had made an evaluation
13 up to the time, but not including his having the
14 spinal cord stimulator being installed. At that
15 point in time, he's saying this guy can't work
16 because he has too many physical limitations.
17 However, if he has a spinal cord stimulator
18 installed, then there's a good likelihood that he'll
19 be able to find some type of work and that type of
20 work would probably be as much as he was earning
21 before, in which case, he will have absolutely no
22 economic loss.

23 In addition, you need to consider that they're
24 asking from the time of the accident to the present
25 day saying he's already lost this. But what's not

1 considered there is his determination not to have
2 this surgery for the spinal cord stimulator, which
3 would, of course, as we've indicated, allowed him to
4 work during that time. So, there's a great deal of
5 excess there with regard to their claim for loss
6 income.

7 Bottom line is, you're going to have a lot of
8 information to consider before you can reach a
9 decision on this, but you need to take it in order,
10 first deciding liability. And again, if you decide
11 in our favor on this that number one, she was not at
12 fault, that he was wrong when he changed lanes from
13 right lane to left lane, then you stop? If you think
14 that he was in that lane, but he was in that lane
15 improperly, that he is negligent and she was
16 comparatively negligent, then you have to compare the
17 negligent. Again, if you find that he is more than
18 50 percent at fault, you stop. Only when you make
19 decisions that he was in that lane and that he was
20 less than 50 percent at fault do you have to make the
21 evaluation regarding damages and injuries.

22 However, when you -- if you make that
23 calculation, you need to take into account that there
24 are a number of things that have been overstated
25 during the course of this testimony with regard to

1 what injuries and damages he has. You need to
2 question whether that back surgery is related to this
3 accident. You need to consider his preexisting
4 health. You need to consider the fact that he's
5 going to have the spinal cord stimulator installed
6 and that will reduce dramatically a lot of what he's
7 complaining about. You need to consider the fact
8 that when that is done, he's going to be probably
9 able to work and won't have any economic lost.

10 We have ask you, basically, to consider all the
11 testimony. Now, the judge is going to charge you on
12 the law in just a few minutes, but you apply the law
13 that he gives you to the evidence that's been
14 presented here over the past few days and that you
15 render a verdict that is fair based upon the evidence
16 to all the parties involved. If that fairness is
17 that my client is absolved of responsibility, then
18 that verdict should be for the defendant. But even
19 if you find for the plaintiff, again, I ask you to be
20 fair, but you be fair to what injuries are really
21 related to this accident and not the excessive amount
22 that's been placed on the board back here. We ask
23 simply that you be fair with regard to your
24 determination, thank you.

25 THE COURT: All right, briefly.

1 CLOSING STATEMENT

2 MR. GARCIA: Mr. Moore mentioned to you that
3 neither party here really knows what happened
4 regarding the collision. I went through some of that
5 with you. Mr. Burgess was looking forward. He
6 didn't see anything coming up from behind him.
7 Mr. Burgess also testified that he turned out
8 immediately into that left-hand lane. There's
9 nothing else here to testify to regarding how the
10 collision occurred, he's moving straight.

11 He also stated that Ms. Hunter doesn't really
12 know what happened. I posed that to you, too.
13 There's about 20 seconds there that we need to
14 account for to explain why she doesn't know what
15 happened, right? He also mentions it's irrelevant
16 whether Mr. Burgess was traveling 25 miles per hour
17 or whether he was traveling 30 miles per hour. I
18 think there's a relevance there he might be
19 overlooking. If Mr. Burgess had been traveling
20 25 miles an hour, I think it stands to reason that a
21 collision from a vehicle moving 45 miles per hour
22 versus 25 miles per hour is probably going to be
23 greater than a collision between a vehicle between 45
24 miles per hour and 30 miles per hour. I think that's
25 a reasonable inference that you've had before you

1 today, and really all this week.

2 Now, he also mentioned a statute about not
3 traveling in the left lane. And that statute simply
4 states that you shouldn't be in the left lane.
5 There's an exception there. If you're moving slower
6 than traffic, you shouldn't be in the left lane, but
7 there's an exception. And that's if you're preparing
8 to turn left. And, in fact, in cross-examination at
9 one point, the question was you can be preparing for
10 two miles, but he has to be in the process of
11 turning, right? That's not really it at all. The
12 statute says preparing. And the statute doesn't
13 really give us any indication of what preparing
14 means, what that time frame, what the number of feet
15 are, what the number of miles are. It doesn't say
16 anything about that, simply says you're preparing.
17 And Mr. Burgess was preparing to turn left. He was
18 making his way. He testified that he turned out of
19 that Hot Spot knowing he was preparing to turn left
20 less than a quarter mile up the road. Okay.

21 Now, regarding this right to left movement of
22 Mr. Burgess' moped before impact. There is
23 absolutely no evidence of that. The evidence we do
24 have is that Mr. Olson stated, the expert for the
25 defendant, that by the time Mr. Burgess gets to the

1 center of the lane, that's the first time she should
2 have seen him. He states that before the collision
3 occurs, there's two seconds. Now, Ms. Hunter was
4 asked repeatedly, do you know where he came from?
5 And she doesn't know. And maybe if I'm being fair,
6 maybe she wasn't asked repeatedly, but she stated
7 repeatedly, I have no idea where he came from. He
8 was just right in front of me. She has two seconds
9 to observe what's going on in front of her. And she
10 doesn't see any right to left movement. She doesn't
11 state it when she calls 911, this guy just jumped out
12 in front of me. She says, I just hit this guy. He's
13 really hurt. Two seconds. Doesn't see him coming
14 from anywhere. Just states he's right in front of
15 me.

16 I will agree with Mr. Moore on that Ms. Hunter
17 doesn't know what happened either. I agree. And
18 that's exactly what we're arguing about here, that
19 those 20 seconds when she turned onto Bramlett where
20 she says she's looking for traffic, then she looks
21 forward and the collision occurs.

22 There's a curious point that was brought up as
23 well that -- I think it was Exhibit 12 that was
24 referred to. Actually, it was Exhibit 14. That if
25 there was this clockwise rotation of the moped that

1 you would see damage on the right-hand side of the
2 moped. Then he shows you this image. He says
3 there's no damage there. I'm not sure I can agree
4 with Mr. Moore on there not being any damage there.
5 It doesn't matter what I think, it matters what you
6 think. What's curious, though, about that point is
7 that Mr. Olson agrees, clockwise rotation of the
8 moped. Mr. Moore says that the evidence doesn't bear
9 that out, but his expert said there was. So that's
10 just a curious point I wanted to make on that point
11 that was made by Mr. Moore.

12 Now, we've talked a lot about preexisting
13 conditions, and Mr. Burgess addressed that.
14 Mr. Moore mentioned that just one month before this
15 collision that he had been referred to a pain
16 specialist. I think Mr. Moore is asking you to make
17 this somewhat illogical leap that the pain management
18 referral was for his low back. And it wasn't, it was
19 actually for his neck. And you'll note that he never
20 made that appointment. In fact, he was asked why he
21 didn't and his response was, Pain management was not
22 for me. And that's actually been pretty consistent
23 for Mr. Burgess about he doesn't like opioids
24 medication, doesn't want to be on it, has done the
25 trials that questioned his veracity regarding that

1 issue. He's gone through that. In fact,
2 Dr. Loudermilk suggested that the opposite of drug
3 seeking, his requesting a spinal cord stimulator.

4 Mr. Burgess has been cast into doubt in some
5 respects on why it is that he hasn't done the spinal
6 cord stimulator just yet. He's testified he doesn't
7 have the money to do it, he can't. It's just not an
8 option for him. It wasn't available. And if it was,
9 he's testified that he would, okay.

10 Now, there was also some comments made about
11 there was no complaint of pain -- and this is a very
12 important point and one that's been touched on pretty
13 consistently throughout the trial, is that there was
14 no complaints of pain when he was picked up by EMS.
15 That's just not consistent. But even if it was,
16 there's reasonable explanations for it throughout the
17 entire timeline as well. First, when he's picked up
18 by EMS, the primary complaint, right under the injury
19 report, primary complaint, pain global. Very clear.
20 It's global pain. He hurt all over. That what he
21 testified to.

22 There was also some explanation by Dr. Brennan
23 and he touched on it, just very -- it was a very
24 short period, but he touched on it, Dr. Brennan did.
25 He wanted to bring to the attention of everyone in

1 the room that Mr. Burgess was on a spine board the
2 moment he was picked up from the scene. He lay down
3 in the back of the BMW, slides a spine board under
4 him, put him on a stretcher and they roll him to the
5 ambulance. And he stays laying down, essentially,
6 not on his feet for the next two days or so, maybe
7 even three. He's down. He's not moving. And
8 Dr. Brennan makes that distinction. Until he stands,
9 there isn't that perception of pain potentially.

10 Now, we do know when he gets to the emergency
11 room, there are some complaints of back pain and
12 there's even complaints of pain in the legs. I
13 believe it was an MRI note that says that there was
14 complaints of bilateral pain in the legs. And that's
15 why they did the MRI. So to suggest that there isn't
16 complaints of pain, both at EMS and when he gets to
17 the hospital is just not accurate. There are
18 complaints of pain. That's why we see the diagnostic
19 testing to try to figure out why it is that he's
20 having these leg issues.

21 Another thing to consider is he is complaining
22 of leg pain. We're not here alleging that he has
23 muscular pain in his back. In fact, the stuff that
24 preexist this condition, that back pain, that
25 muscular pain, the only relationship it has to the

1 pain that is limiting Mr. Burgess right now is the
2 word back. That's it. One of them is a nerve injury
3 caused by an extrusion in his disk and the other is
4 muscular pain. And it's clear that it wasn't
5 limiting beforehand. He was still working. He was
6 working 40 hours. He was working 40 hours at that
7 point and earning \$400 a week. That was admitted.

8 Now, there's also this discussion about no
9 complaints of pain or radiating pain in Mr. Burgess'
10 leg when he gets over to Dr. Boyer, that orthopedist.
11 Well, the physicians talked about that, right? The
12 physicians mentioned that they believed that the --
13 Dr. Brennan -- both Dr. Brennan and Dr. Scott, they
14 believed that the complaints of the thigh and leg
15 pain were consistent with the radiating pain issues
16 that he had as a result of the extrusion of his disk.
17 So, to -- and I think that he actually -- Mr. Moore
18 assigned a certain level of understanding of the
19 medical profession to Mr. Burgess, that he knows what
20 radiating pain is and he knows what it feels like and
21 that Mr. Burgess should have known at that time the
22 difference between leg pain and radiating pain. And
23 because Mr. Burgess didn't say radiating pain, that
24 must mean he didn't have radiating pain or some kind
25 of issue related to an extrusion of the disk that was

1 pressing on the nerve. I'm not sure that's fair.

2 Now, Mr. Moore also touched on Dr. Brennan's
3 testimony talking about failed back surgery. And he
4 said that Dr. Brennan opined that maybe that, you
5 know, the surgery [verbatim] is possibly from the
6 failed surgery or some kind of scarring from the
7 surgery itself, but that's not consistent with what
8 Dr. Brennan says when he's asked to state his opinion
9 to a reasonable degree of medical certainty, more
10 probably than not. What Dr. Brennan said is more
11 probably than not, his nerve pain, his leg pain are
12 related to the collision itself. Okay.

13 There's always this discussion about Dr. Boyer
14 and several physicians not agreeing that Mr. Burgess
15 had this radiating pain, the pain he was having in
16 his leg was related to a condition caused by an
17 extrusion of the disk in his spine. But that's not
18 really accurate either, we touched on that. Not
19 until Mr. Burgess gets to Dr. Sherrill at Clemson
20 Neurology do we have an objective finding of nerve
21 damage and nerve injury that shows that the pain that
22 he's complaining about is related to some kind of
23 nerve distribution that's related to the extrusion
24 and the nerve damage in his back.

25 So, there's a reasonable explanation for why the

1 physicians are searching for what's causing his leg
2 pain. They don't have that objective finding yet.
3 Once they get it, the course of treatment changes
4 immediately. He's referred over to Dr. Brennan and
5 surgery is performed. And keep in mind that
6 Dr. Brennan explained how important that time gap is,
7 that car -- that example he gave, that car sitting on
8 a foot for 10 minutes versus 10 seconds, okay?

9 Now, there was also a reference, a very loose
10 reference to a video. And you saw the deposition of
11 Dr. Scott. Dr. Scott was shown a video. You haven't
12 seen that video. You were shown a video and
13 Dr. Scott stated some observations or -- just,
14 essentially, observations of what it is that he saw
15 in the video. And when we were done with that, when
16 we were done with showing Dr. Scott that video, he
17 was asked again in his opinion to a reasonable degree
18 of medical certainty if he believed that the condition
19 that Mr. Burgess deals with today is causal related
20 to the collision we're here. And again, you'll find
21 that yes, it is, that's his opinion stated to a
22 reasonable degree of medical certainty.

23 Now, Mr. Moore wants to, essentially, testify
24 for you, but there's isn't -- he wants to testify as
25 the medical expert, but he isn't the medical expert.

1 This isn't a medical expert that states on the
2 defendant's behalf that the issues Mr. Burgess is
3 having is related to some other condition or some
4 preexisting the condition. The ones that testified
5 to you said quite the opposite. And it's reasonable
6 to infer that the reason there isn't a medical expert
7 here testifying on behalf of the defendant that
8 Mr. Burgess' condition is not related to the
9 automobile collision is because there isn't one.
10 That's a reasonable inference. There just isn't one
11 out there.

12 There was also some discussion about that
13 Mr. Burgess -- there's no evidence of him having
14 worked 40 hours a week at any point before this.
15 Remember, it was admitted that Mr. Burgess was
16 earning approximately \$400 per week, earning \$10 an
17 hour and that he was working 40 hours a week. That
18 was admitted.

19 Finally, there was some discussion about the
20 spinal cord stimulator returning Mr. Burgess to work.
21 And I believe that Mr. Moore's explanation was that
22 it should, for all accounts, it should return him to
23 work. Dr. Scott was asked specifically about this
24 and he said it is very optimistic to suggest that
25 Mr. Burgess could even return to light duty work once

1 he had a spinal cord stimulator. That there would
2 still be residual disability even if the pain was
3 resolved because there would still be this
4 neurological deficit that he's dealing with with his
5 left leg. So, there's no evidence -- there's no
6 medical evidence or no medical opinions in front of
7 you today that would suggest that if Mr. Burgess had
8 that spinal cord stimulator that he would be able to
9 return to work.

10 I'm so grateful for your time. I'm honored to
11 have been in front of you for this whole week. I'm
12 honored to have been in front of the Honorable Judge
13 Miller and shared this courtroom with Mr. Moore. And
14 I'm certainly honored to have represented my client
15 her, Mr. Burgess. Thank you very much. I appreciate
16 it.

17 JURY CHARGE

18 THE COURT: Okay. Is everyone good?

19 All right. During this trial, you and have
20 certain duties to perform. As trial judge, it's my
21 responsibility to preside over the trial of the case
22 and rule on the admissibility of the evidence offered
23 during the trial. It's also my duty to charge you
24 the law applicable to the case and it is your duty as
25 jurors to accept and apply the law as I now state it

1 to you.

2 As I told you in my opening comments, if you
3 think you have any idea as to what the law is or what
4 the law ought to be and it disagrees with what I now
5 tell you the law is, you've sworn an oath to set
6 aside your own opinion and apply the law precisely as
7 I state it to you.

8 I also remind you that in every case tried in
9 this courtroom before a jury, the jury is the sole
10 and exclusive judge of the facts and the trial judge
11 is not allowed by law to have an opinion about the
12 facts. So, don't think by anything I've said or done
13 throughout the course of the trial that I have such
14 an opinion. It is up to you all to determine what
15 the facts are.

16 Now, necessarily, you must determine the
17 credibility or believability of the witnesses who
18 testified. It becomes your duty as jurors to
19 evaluate the evidence and determine which evidence
20 convinces you that it is true. And in determining
21 the believability of witnesses who have testified,
22 you may believe one witness over several or several
23 over one. You may believe a part of the testimony of
24 a witness and reject the remaining part. You may
25 believe the testimony of a witness in its entirety or

1 reject in its entirety. You may consider whether the
2 witness has an interest in the result of the trial,
3 whether the witness is prejudiced towards either
4 party, the opportunity for the witness to have seen
5 the matters and things about which the witness
6 testifies -- or testified to and the way the witness
7 acts on the witness stand, or what we call a witness'
8 demeanor.

9 Now, the rules of evidence normally do not
10 permit witnesses to testify to opinions or
11 conclusions. An exception to this rule exists for
12 witnesses we call experts. A witness who by
13 education and experience has become expert in some
14 art, science or profession may give an opinion as to
15 relevant and material matter in which the witness has
16 been qualified as an expert and may also give the
17 reasons for that opinion. And you all should
18 consider any expert opinion given by any expert,
19 expert witness and like all the other evidence in
20 this case, give it the weight that you think it
21 deserves.

22 Now, the burden of proof in this case is by the
23 preponderance of the evidence. And preponderance of
24 the evidence simply means the greater weight of the
25 evidence. It is evidence that as a whole shows that

1 the facts sought to be proved is more likely true
2 than not true. And this can be illustrated by
3 imagining a set a scales. So when the case began,
4 the scales were even. After all the evidence has
5 been presented, if the scales remain even or if they
6 tip even slightly in favor of the defendant, the
7 plaintiff will have failed to met their burden of
8 proof and would not be entitled to recover in this
9 case. On the other hand, if the scales tip even
10 slightly favor of the plaintiff, then the plaintiff
11 will have met the burden and you should return a
12 verdict for the plaintiff.

13 Now, the plaintiff claims that the defendant was
14 negligent and should compensate the plaintiff for the
15 injuries the plaintiff suffered as a result of the
16 defendant's negligence. Negligence means that a
17 person has done something that a reasonable person
18 would not have done or has failed to do something
19 that a reasonable person would have done in the same
20 situation.

21 In order to prove that the defendant was
22 negligent, the plaintiff must prove by a preponderate
23 or greater weight of the evidence four things.
24 First, the plaintiff must prove by a greater weight
25 of the evidence that the defendant owed the plaintiff

1 a duty of care. Next, the plaintiff must prove by a
2 preponderance or greater weight of the evidence that
3 the defendant breached that duty by a negligent act
4 or omission. The plaintiff must also prove by a
5 greater weight of the evidence that he suffered
6 damages as a result of the breach of the duty. And
7 finally, the plaintiff just prove by a greater weight
8 of the evidence that the damages were proximately
9 caused by the defendant's breach of duty. Proximate
10 cause is something that produces a natural chain of
11 events, which in the end brings about the injury. It
12 is a direct cause of the injury.

13 To prove that the defendant's negligence
14 proximately caused the plaintiff's injury, the
15 plaintiff must prove causation in fact. This is
16 proven by showing that the injury would not have
17 occurred but for the defendant's negligence. The
18 plaintiff must also prove legal cause. And legal
19 cause is proven by showing that the injury was
20 foreseeable. This means that the injury occurred as
21 a natural and probable consequence of the defendant's
22 negligence. So, the plaintiff must prove that some
23 injury from the defendant's negligence was
24 foreseeable. Does not have to prove that the
25 particular injury that occurred was foreseeable.

1 However, the defendant cannot be held responsible for
2 things which could not be expected to happen.

3 Proximate cause does not mean the only cause. The
4 defendant's act can be a proximate cause of the
5 plaintiff's injury if it was, at least, one of the
6 direct and occurring causes of the injury.

7 Now, the defendant denies any negligence or
8 wrongdoing of any kind and the defendant denies any
9 legal responsible for any damages claimed by the
10 plaintiff. The defendant also claims that the
11 plaintiff was at fault in this event. The
12 defendant's position is, even if the jury finds that
13 the defendant was at fault, there was fault on the
14 part of both parties which caused the damages that
15 occurred. What we have in this case is a situation
16 where both sides claim the other is responsible for
17 the event and the damages.

18 In our state, we have a law known as comparative
19 negligence. This means that depending on your view
20 of the evidence, you may find both parties to be
21 negligent and both parties liable in some proportion.
22 Under this law, you, as the jury, must compare the
23 negligence or fault of the defendant, if any, with
24 the negligence or fault of the plaintiff, if any.

25 So, how do you make that comparison? You do it

1 in a very simple way by using percentages based on a
2 100 percent total. If you believe that both parties
3 shared fault in this case and that each party's fault
4 was a proximate cause of injuries or damages
5 sustained, you then decide or compare their fault.
6 By way of example, you may decide that one party was
7 30 percent at fault and the other party, therefore,
8 was 70 percent at fault. You may decide that one
9 party was 90 percent at fault and the other party was
10 10 percent at fault. You may decide the parties were
11 both 50 percent at fault or any combination that
12 totals 100 percent. In essence, what you do is
13 consider the conduct of the parties as a whole and
14 measure each side's contribution to the loss using
15 percentages.

16 In determining whether the plaintiff was
17 comparatively negligent, I tell you also that the
18 defendant bears the burden of proof in that regard.
19 That is, the defendant must prove by the greater
20 weight of the evidence that the plaintiff was
21 negligent and that the plaintiff's negligence was a
22 proximate cause of the plaintiff's own damages.
23 Please remember that the plaintiff's negligence, if
24 any, must have contributed proximately to the injury.
25 If you find the plaintiff was negligent, but that his

1 own negligence was remote and did not proximately
2 cause the injury, then the law of comparative
3 negligence would not apply. Likewise, you are to
4 only consider the conduct of the parties in
5 allocating these percentages. You may not consider
6 the action of others who are not parties to the case.

7 Of course, you may decide that the plaintiff was
8 not at fault at all. Please remember I'm not
9 suggesting that comparative negligence does or does
10 not apply in this case, or if it does apply, the
11 proper apportionment of liability between the
12 parties. Whatever you decide, please remember the
13 percentage must equal -- total must equal 100
14 percent. That is for you and you alone to decide as
15 the finders of the facts. I merely provide you with
16 the percentages that I did earlier by way of example.

17 I will give you written questions on a written
18 special verdict form to help you reach your verdict.
19 This form will have spaces for you to write your
20 decisions about the percentage of negligence, if any,
21 of both parties which proximately caused the
22 plaintiff's injuries. The first two questions on the
23 verdict form ask you to decide whether the Defendant
24 was negligent. And if so, whether the Defendant's
25 negligence was the proximate cause of the Plaintiff's

1 injuries.

2 Questions three and four asks the same question
3 about the negligence, any negligence by the
4 Plaintiff. Question five asks you to decide the
5 percentage of each party's negligence which
6 proximately caused the plaintiff's alleged injuries.
7 The percentages must add up, as I told you before, to
8 100 percent. Question six ask you if the Plaintiff's
9 negligence was greater than the Defendant's
10 negligence? If so, then the Plaintiff would not be
11 entitled to any damages and your verdict would be for
12 the defendant. If, however, you find that the
13 Plaintiff's negligence was equal to or less than the
14 negligence of the Defendant, then you would answer
15 question seven, which ask you to determine the total
16 amount of damages suffered by the plaintiff. So, do
17 not reduce the Plaintiff's total damages if you get
18 that far based on the percentage of negligence that
19 you assign to any party.

20 After you have answered the questions, I will
21 compute the amount of damages for which the Defendant
22 is responsible based on the percentage of the
23 Defendant's negligence which you have decided
24 proximately caused the Plaintiff's injuries. You are
25 to determine only the total amount of the Plaintiff's

1 damages and enter that figure on the form.

2 Now, South Carolina Code of Laws Section
3 56-5-1520 reads in part: A person shall not drive a
4 vehicle on a highway at a speed greater than is
5 reasonable and prudent under the conditions and
6 having regard to the actual and potential hazards
7 then existing. Speed must be so controlled to avoid
8 colliding with a person, vehicle or other on
9 conveyance on or entering the highway in compliance
10 with legal requirements and the duty of a person to
11 use care.

12 Code of Laws 56-5-165 reads in part: A moped is
13 a cycle with a motor of no more than 15 cubic
14 centimeters which is not capable of propelling the
15 vehicle at a speed greater than 30 miles per hour.

16 56-5-1555 reads in part: No person is to
17 operate a moped at a speed in excess of 25 miles per
18 hour.

19 56-5-1810 reads in part: On all roadways within
20 South Carolina, a vehicle which is traveling at less
21 than the normal speed of traffic at the time and
22 place and under the conditions then existing shall be
23 driven in the right-hand lane then available or as
24 close as practical to the right-hand curb or edge of
25 the roadway, except when overtaking and passing

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

4 56-5-1560 reads in part: No person shall drive
5 a motor vehicle at such a slow speed as to impede the
6 normal and reasonable movement of traffic except when
7 reduced speed is necessary for safe operation or in
8 compliance with the law.

9 Now, in this case, the parties claim that each
10 other failed to follow rules of statutes. I will
11 tell you that failure to follow the statutory rules
12 is negligence as a matter of law. If you find that
13 either party failed to follow a statutory rule, you
14 must then decide whether the failure contributed to
15 or caused any plaintiff's injury.

16 Now, I would also tell you that the driver of an
17 automobile has a duty to keep a proper lookout for
18 over vehicles on the road. This duty requires the
19 driver to watch tentatively so that the driver is
20 able to see a person or object on the highway. The
21 operator of a motor vehicle is required to use the
22 same care that would be used by a person of ordinary
23 reason and prudence if that person were driving the
24 same vehicle at the same time and place under the
25 same circumstances.

1 Now, if you decide that the plaintiff is
2 entitled to a verdict, your next step would be to
3 decide how much money the defendant should be
4 required to pay. Actual damages are to compensate
5 the plaintiff for the plaintiff's injuries or loss
6 and to put the Plaintiff as nearly as possible in the
7 same position that the Plaintiff was in before the
8 incident occurred. In other words, actual damages
9 would be the actual losses and expenses which the
10 Plaintiff has suffered because of the Defendant's
11 negligence. So, the Plaintiff must prove that
12 expenses caused by the injury were necessary and
13 reasonable.

14 Actual damages for a plaintiff who has been
15 physically injured include pain and suffering, both
16 past and future, as well as mental anguish,
17 impairment of health or physical condition.
18 Plaintiff may also claim lost wages due to absence of
19 work and reduced earning ability for the future. And
20 in determining the amount of compensation for
21 personal injury, it is proper to consider past and
22 presence aspects of the injury. This would include
23 physical and mental pain and suffering, expenses
24 incurred for necessary and reasonable medical
25 treatment, loss of time and income which resulted

1 from the impairment of the ability to work and earn a
2 livelihood, the loss of enjoyment of life suffered as
3 a result of the injury and any other losses which are
4 reflected by the character of the injury.

5 The injured party may recover for those future
6 damages that are reasonably sure to result from the
7 injuries. The principle underlining compensation for
8 future damages is that only one action can be brought
9 and therefore, only one recover may be had. Is it
10 proper to include in the estimate of future damages
11 compensation for loss of capacity for work, for
12 attention to the plaintiff's ordinary business,
13 future medical expenses and pain and suffering which
14 will with reasonable certainty result. Future
15 damages must be reduced to their present day cash
16 value.

17 Pain and suffering compensates the plaintiff for
18 physical discomfort and emotional response to the
19 sensation of pain caused by the injury. There is no
20 definite standard by which to compensate a plaintiff
21 for pain and suffering. You, the jury, have the
22 authority to determine the amount, if any, to be
23 allowed for pain and suffering using calm and
24 reasonable judgment to ensure that the damages are
25 just and reasonable in light of the testimony and the

1 evidence presented in the case.

2 The loss of enjoyment of life is an element of
3 actual damages separate and apart from pain and
4 suffering. Loss of enjoyment of life compensates a
5 plaintiff for limitations on a plaintiff's ability to
6 participate in, derive pleasure from the normal
7 activities of daily life or the individual's
8 inability to pursue their talents, recreational
9 interests, hobbies or advocations.

10 Mental suffering, apprehension, shock, fright,
11 emotional upset, humiliation and anxiety either
12 present or expected in the future can be properly
13 considered as an element of damages. The amount of
14 damages for mental suffering cannot be exactly
15 measured and is left to the sound discretion of you,
16 the jury. I will tell you that a defendant who
17 causes injuries to a plaintiff with a preexisting
18 condition must take the plaintiff as he finds him.
19 Although, not responsible for the preexisting
20 condition itself, the defendant would be liable for
21 any exacerbation of that condition caused by the
22 negligent conduct. So, Plaintiff can recover for
23 preexisting injuries only to the extent they were
24 aggravated by the defendant's actions. Any portion
25 of the injuries that were not caused by an act or

1 omission on the part of a defendant is not
2 compensable. You can award damages for any
3 aggravation of a preexisting condition, but not for
4 the original injury itself.

5 The loss or impairment of earning capacity
6 caused by personal injury is a proper element of
7 compensation. Earning capacity refers to the
8 capability of a person to sell their labor or
9 services in any market reasonably assessable to them
10 taking into consideration their general physical
11 functional impairments resulting from acts and
12 conduct of the defendant.

13 Earning capacity does not necessarily mean the
14 actual earnings that one who suffers an injury was
15 making at the time the injuries were sustained, but
16 refers to that which by virtue through training and
17 experience and business acumen possessed by that
18 person an individual is capable of earning. The loss
19 of earning capacity refers to damage to one's ability
20 to earn wages in the future.

21 And in determining the amount of compensation
22 due a plaintiff for loss or impairment of earning
23 capacity, you shall consider loss of future earning
24 power, which requires the consideration in all
25 matters that relate to the issue of any impairment.

1 Two, the effect which the impairment will have on the
2 plaintiff's capacity to work. Three, the extent to
3 which the disability will impair the plaintiff's
4 earning capacity. Four, the present value of all
5 losses due to plaintiff's impaired earning power and
6 such physical pain and suffering as reasonably
7 certain will of necessity result in the future from
8 the injuries to the plaintiff. Five, evidence of
9 what the plaintiff had previously earned when
10 employed in the past is a factor upon which to base
11 any loss or impairment of earning capacity.

12 And in determining the amount to be awarded for
13 impaired earning capacity, you should consider the
14 health of the injured party, his mental and physical
15 ability to maintain himself and his family before the
16 injury as compared with the condition in these
17 respects after the injury. The extent of the
18 impairment of earning capacity is to be arrived at by
19 comparing what the injured party was capable of
20 earning at or before the time of the injury and what
21 he is capable of earning after it occurred. And if
22 the plaintiff's injury and impaired or lost earning
23 capacity are permanent, recovery for the lost or
24 impair earning capacity should be granted for the
25 plaintiff's life expectancy. Therefore, if you

1 determine the plaintiff is entitled to damages for
2 impairment or loss of earning capacity, then you
3 shall calculate such damages using the life
4 expectancy table as a guide.

5 So, will tell you, we're getting there, if you
6 find the plaintiff was permanently injured as a
7 result of the defendant's actions, you must then
8 decide how, if at all, that injury will affect the
9 rest of the plaintiff's life. A person's life
10 expectancy is determined by a life expectancy table
11 which is part of the laws of our state. A life
12 expectancy table is only an estimate of the probable
13 average remaining length of the life of all persons
14 in our state at a given age. The plaintiff is 48
15 years old. A 48-year-old male with -- according to
16 our tables, life expectancy table has a life
17 expectancy of 30.97 years. This fact is to be
18 considered by you along with other facts and
19 circumstances in evidence bearing on the plaintiff's
20 life expectancy, including occupation, habit and
21 health at the time of the injury in determining the
22 amount of the damages, if any, to be awarded to the
23 plaintiff.

24 Ladies and gentlemen, there are normally, say,
25 two possibly verdicts you can come to in a case, but

1 that's true in this case. I provided -- you will
2 have this, I think it's self-explanatory, verdict
3 form which will help you go through, as I told you
4 before, the requirements of the law to examine
5 comparative negligence in this case. If you have
6 questions about it, I will be happy to try and assist
7 you in answering those questions. Not the answer to
8 the questions, but understanding what they're asking.

9 Ladies and gentlemen, I want to tell you that
10 your verdict must be unanimous. All 12 of you must
11 agree on the verdict. You should go through and
12 consider the evidence commonly and with measured
13 reason without passion, prejudice, bias or emotion.
14 You have no friends to reward, you have no enemies to
15 punish.

16 So, I'm going to excuse you all to your jury
17 room right now. And I think we are going -- I'm
18 going to ask the bailiff -- we're going to order some
19 lunch for you. I'm not sure what it's going to be.
20 I ask you not to consider your -- start considering
21 the evidence just yet. I need to go over my charge
22 on the law with the lawyers to make sure I didn't
23 misstate something or omit something. But when the
24 verdict form comes back with all the evidence in the
25 case, then y'all can begin your deliberations.

1 So, at this time, with the exception of,
2 Mr. Dosser --

3 Did I say that correctly?

4 -- will excuse you all to your jury room. Y'all
5 say goodbye, shared experience is over,
6 unfortunately. All right. Y'all go ahead.

7 (WHEREUPON, the jury left open court at
8 approximately 12:40 p.m.)

9 THE BAILIFF: The jury is secured, Your Honor.

10 THE COURT: Thank you, Mr. Teal.

11 This is always the most difficult part of any
12 trial that I perform, particularly in this case which
13 has been quite protracted. I can't let you go back
14 in there. You're just as qualified as each of those
15 person. Particularly in a trial that last a week,
16 you can understand why we need to have an alternate
17 because it happens frequently that people get sick or
18 ill or can't continue. But I can't let you go back.
19 I want to thank you for your service. Generally,
20 what they order around here is some pizza. If you
21 want to stick around here and have some pizza, you're
22 welcome to do it. But you're free to go, whatever
23 you want to do. I thank you sincerely for your
24 sacrifice and efforts this week. So, thank you, sir.
25 All right.

1 All right, any exceptions or objection to the
2 charge from the plaintiff?

3 MR. GARCIA: No objection.

4 MR. MOORE: No, sir.

5 THE COURT: Okay. Y'all want to look at this
6 verdict form make sure it's good, go through the
7 evidence and make sure it's all right and let's get
8 them going.

9 MR. GARCIA: Sure. Thank you.

10 (WHEREUPON, deliberations began at approximately
11 12:45 p.m.)

12 (WHEREUPON, Court's Exhibit No. 9-11 were marked
13 for identification only.)

14 (WHEREUPON, the jury came into open court at
15 approximately 3:05 p.m.)

16 THE COURT: Madam Forelady, I understand you've
17 reached a verdict?

18 THE FORELADY: We have.

19 THE COURT: All right, would you hand it to the
20 bailiff for me, please.

21 VERDICT

22 All right, publish the verdict.

23 THE CLERK: In this case of 2017-CP-39-428, John
24 Burgees, Plaintiff vs. Katherine Hunter, Defendant,
25 we, the jury, unanimously find as follows: Was the

1 Defendant negligent?

2 Yes.

3 Was the Defendant's negligence a proximate cause
4 of the plaintiff's injuries?

5 Yes.

6 Was the Plaintiff negligent?

7 Yes.

8 Was the Plaintiff's negligence the proximate
9 cause of the Plaintiff's injuries?

10 Yes.

11 Using the combined negligence that proximately
12 caused the Plaintiff's injuries to 100 percent, what
13 percentage of that negligence is attributable to the
14 Plaintiff and what percentage is attributable to the
15 Defendant?

16 Plaintiff 51 percent, Defendant 49 percent.

17 Was the Plaintiff's negligence as designated
18 above greater than 50 percent?

19 Yes.

20 Foreperson, Katie B. Atkins.

21 If this is your verdict and still your
22 verdict, so say you all by raising your right hand.

23 (WHEREUPON, all members of the jury raise their
24 right hand.)

25 THE COURT: Anything further of the jury from

1 the Plaintiff?

2 MR. GARCIA: No, sir.

3 THE COURT: From the Defense?

4 MR. MOORE: No, sir.

5 THE COURT: All right, Madam Forelady, ladies
6 and gentlemen of the jury, I want to thank you
7 sincerely and genuinely for your hard work. It's not
8 an easy task and you all did great. I want to -- I
9 hope that when you look back on this experience, you
10 will recognize how important it was and you have
11 fulfilled an incredible civic duty to the other
12 citizens of Pickens County and Greenville County as
13 well. But we thank you so much for your service.

14 You're now free to talk about it. You can go on
15 Facebook and post whatever you want about it. But I
16 will tell you this, if someone comes up and bothers
17 you about it and you don't want to talk about it and
18 they persist, you just let the clerk of court know
19 and we'll take care of that because we don't want
20 anyone to be harassed or intimidated from their
21 service as jurors.

22 With that, ladies and gentlemen, I thank you
23 very much. And guess what, you're excused for the
24 week. Thank you. Thank you.

25

1 (WHEREUPON, the jury came into open court at
2 approximately 3:05 p.m.)

3 THE COURT: Okay, any motions, anything?

4 MR. MOORE: No, sir.

5 MR. GARCIA: I just state a motion for a new
6 trial, Your Honor, based on the impropriety that was
7 alleged or, essentially, put on the record early
8 Tuesday morning and the same grounds -- same ground
9 for that motion, Your Honor.

10 MR. MOORE: Your Honor.

11 THE COURT: Yeah.

12 MR. MOORE: Just one thing. With regard to
13 that, there was never a motion placed on the record
14 so there's nothing really to correct.

15 THE COURT: Not only no motion, but no evidence
16 presented. And I'm frankly astounded by that. Your
17 motion is denied.

18 MR. GARCIA: Thank you, Your Honor.

19 (WHEREUPON, the proceedings were concluded.)
20
21
22
23
24
25

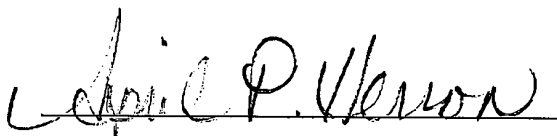
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Pickens County, South Carolina, on the
25-29 day of June, 201.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

August 1, 2019



APRIL P. HERRON, Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

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SC Court of Appeals

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), SCACR, I certify that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

December 9, 2019

/s/ Stephen N. Garcia

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE PICKENS COUNTY
Court of Commons Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

Appellate Case No. 2018-001423

John M. Burgess,

Appellant,

v.

Katherine C. Hunter,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. WERE FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL WHILE COUNSEL PRESENTED CASE TO JURY REVERSIBLE ERROR?
2. DID TRIAL JUDGE ERR IN DISMISSING PLAINTIFF'S MOTION FOR NEW TRIAL AT THE CONCLUSION OF CASE BASED ON PREVIOUSLY COMPLAINED OF FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL?
3. DID TRIAL JUDGE ERR IN DISMISSING PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL AS UNTIMELY WHERE THE AMENDED MOTION FOR NEW TRIAL WAS FILED EIGHT (7) DAYS AFTER PLAINTIFF'S/APPELLANT'S COUNSEL RECEIVED A SIGNED AFFIDAVIT FROM A JUROR?

STATEMENT OF THE CASE

This case centered on an automobile collision occurring on or about December 10, 2013 in which the Plaintiff/Appellant alleged Defendant/Respondent was liable for the injuries and ensuing damages sustained by the Plaintiff/Appellant. This case was called before the Court on June 25, 2018 for a Jury Trial. On June 29, 2019, the Jury rendered its verdict, finding that both the Plaintiff/Appellant and Defendant/Respondent were negligent, but assigning 51% liability to the Plaintiff/Appellant.

At the close of the first day of Trial and upon adjournment—and confirming Plaintiff's/Appellant's own observations—Plaintiff/Appellant was alerted that throughout the entire line of questioning of Defendant/Respondent and Plaintiff/Appellant, the Presiding Judge made numerous and continuous, overt facial expressions and gestures; upon learning of same, Plaintiff/Appellant had immediate cause for concern. Arriving in the courtroom on Day 2 of trial, Plaintiff's/Appellant's counsel immediately requested a meeting with the Presiding Judge and Defendant's/Respondent's counsel in the Judge's chambers to discuss the matter. At this meeting, it was the Plaintiff's/Appellant's counsel's intention to attempt to cure any actions that may have biased or

unduly influenced the jury while at the same time doing so in the least confrontational and in the most deferential manner possible. The meeting was contentious at best.

Upon return to the courtroom, the Presiding Judge stated that Plaintiff/Appellant had something to put on the record. Plaintiff/Appellant stated his objection to the facial expressions and other actions emanating from the bench; Plaintiff/Appellant specifically cited Canon 3 of Rule 501, SCACR.¹ Plaintiff/Appellant was promptly cutoff during his noting of objection on the record and accused of threatening the Presiding Judge; Plaintiff/Appellant was not afforded an opportunity to state his motion for mistrial, motion for recusal, or further develop his objection on the record.² No curative measures were taken by the Presiding Judge upon the Jury returning to the courtroom. Plaintiff/Appellant believed any further attempts to object on the various issues would have been futile considering the manner in which his prior objection was received by the Presiding Judge.

Trial proceeded, and the facial expressions and gestures continued throughout trial, however, without any further objection or statements from Plaintiff/Appellant. Other instances of note throughout trial included terse comments and ruling on objections against Plaintiff/Appellant where the Presiding judge admitted to having not heard the question(s) prompting the objection, to be developed more fully in Plaintiff's/Appellant's foregoing arguments. Following the Jury verdict, Plaintiff/Appellant made a post-trial Motion for New Trial "based on the impropriety that was alleged or, essentially, put on the record early Tuesday morning and the same grounds—the same ground for that motion," a reference to the previously stated objection regarding facial expressions and gestures during Plaintiff/Appellant counsel's direct examination of the

¹ R. p. 200, line 2 through p. 170, line 17.

² *Id.*

Plaintiff/Appellant and Defendant/Respondent on day one of trial.³ Again, Plaintiff/Appellant was cutoff by the Presiding Judge, who ultimately denied the Motion for New Trial.⁴

Within two hours of the verdict being rendered, Plaintiff's/Appellant's counsel received an unsolicited email from a Juror. Two days removed from trial and after several conversations between the Juror and Plaintiff's/Appellant's counsel, the Juror sent an email to Plaintiff's/Appellant's counsel that included an attached Letter which depicted in detail (1) the Presiding Judge's actions and (2) their effect on the Jury.⁵ Upon receipt of the Letter from the Juror, Plaintiff's/Appellant's counsel prepared an affidavit which, if signed by the Juror, would adopt the Letter as his sworn statement; the Affidavit was signed on July 3, 2018. On July 10, 2018, only seven (7) days removed from receiving the signed Affidavit of the Juror, Plaintiff/Appellant filed his Amended Motion for New Trial.⁶

On July 12, 2018, Defendant/Respondent filed her Brief in Opposition to Plaintiff's Amended Motion for New Trial.⁷ On July 17, 2018, Plaintiff/Appellant filed his Response to Defendant's Brief in Opposition to Plaintiff's Amended Motion for New Trial.⁸ Finally, on July 19, 2018, the Court issued an Order denying Plaintiff's Amended Motion for New Trial on the ground that the filing was untimely, and therefore, the Court did not have jurisdiction to grant a

³ R. p. 612, line 5 through line 9.

⁴ *Id.*

⁵ R. p. 15.

⁶ R. p. 6.

⁷ R. p. 18.

⁸ R. p. 22.

new trial. The Court also filed a memorandum opinion with its Order dated July 19, 2018.⁹

STANDARD OF REVIEW

The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.¹⁰ An appellate court may only reverse a trial court's decision regarding a new trial if the trial court abused its discretion in deciding a motion for new trial to the extent an error of law results.¹¹ Further, in general, the conduct of a trial is left largely to the sound discretion of the presiding judge, and the appellate court will not interfere unless it clearly appears that rights of the complaining party were abused or prejudiced in some way.¹² However, reference by a trial judge to an attorney's age, gender, *or competence* are improper and constitute reversible error upon a showing of prejudice.¹³

⁹ R. p. 28.

¹⁰ *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88-89 610 S.E.2d 852, 856 (Ct. App. 2005) (citing *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996); *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004).

¹¹ *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003).

¹² *State v. Bridges*, 278 S.C. 447, 298 S.E.2d 212 (1982).

¹³ *State v. Pace*, 361 S.C. 71, 447 S.E.2d 186 (1994), citing *State v. Mitchell*, 261 S.C. 425, 200 S.E. 2d 448 (1973).

ARGUMENT

- I. **FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL WHILE COUNSEL PRESENTED CASE TO JURY WAS REVERSIBLE ERROR.**
- II. **TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S MOTION FOR NEW TRIAL AT THE CONCLUSION OF CASE BASED ON PREVIOUSLY COMPLAINED OF FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL.**

Whether Facial Expressions and Gestures Amount to Influence or Tend to Bias Jury

Whether overt facial expressions and gestures have the potential to create bias or unduly influence a jury cannot be denied. Canon 3 of Rule 501, SCACR reads in pertinent part (emphasis added):

B. Adjudicative Responsibilities.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3 of Rule 501, SCACR specifically warns that a judge who manifest bias on any basis in a proceeding impairs the fairness therewith, and further, that facial expressions and body language, in addition to oral communications, can give jurors an appearance of judicial bias. It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties.¹⁴ Motions for a new trial have been granted where the remarks of a trial judge tended to impugn the credibility of counsel and to diminish her in the eyes of the jury.¹⁵ It is respectfully submitted that a judge *must* be alert to avoid behavior that may be perceived as prejudicial. The oral communications, facial expressions and gestures, and body language in the instant matter were all of a nature that had the potential to give an appearance of judicial bias.

Appellant recognizes that it has long been held that by failing to move for mistrial or recusal or requesting a curative instruction, Plaintiff may waive any error, failing to give the court the opportunity to cure or correct any perceived error.¹⁶ Appellant further recognizes that it has long been held that even attempting to make a motion for new trial after the verdict is rendered comes too late to avoid a waiver of the alleged error.¹⁷ However, Appellant points to *State v. Pace* as

¹⁴ *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994).

¹⁵ *Id.*

¹⁶ *Adams v. Orr*, 260 SC 90, 194 SE2d 232 (1973).

¹⁷ *State v. Penland*, 275 SC 537, 278 SE2d 765 (1981).

controlling on the instant matter.¹⁸

In *State v. Pace*, the trial judge's comments to the jury regarding a lady defense counsel's age and gender were deemed to have deprived the defendant of a fair trial, where the remarks of the court tended to impugn the credibility of counsel and diminish her in the eyes of the jury. In camera, the judge "chastised" defense counsel that a broad question she asked amounted to a fishing expedition. The defense counsel in *State v. Pace* did *not* state a *single* objection on the record and did not make a motion for new trial *at any point*. In addressing the defense counsel's failure to state an objection or to make a motion for a new trial, the Supreme Court of South Carolina stated, "As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile. Accordingly, we find no waiver of this issue."¹⁹

The facts in *State v. Pace* bear stark resemblance to the instant matter. The Presiding Judge's overt facial expressions, gestures, and other actions diminished Plaintiff's counsel in the eyes of the jury and deprived the Plaintiff of a fair trial. The Affidavit of Chris Lee highlights the effect the alleged actions had on the jury. In chambers, Plaintiff's counsel attempted to discuss his concerns regarding the facial expressions, gestures, and other actions brought to his attention during adjournment and the undersigned's effort was met with great hostility and accusations of threatening the Court.²⁰ Unlike the defense counsel in *State v. Pace*, the Plaintiff's/Appellant's

¹⁸ *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994).

¹⁹ *State v. Pace*, 316 S.C. 71 at 74, 447 S.E.2d 186 at 187 (1994)(citing *Dunn v. Charleston Coca-Cola Bottling*, 426 S.E.2d 756 (1993).

²⁰ In chambers, the Presiding Judge, within fifteen seconds and before the undersigned could complete his thought, began shouting at the undersigned, accused the undersigned of threatening him, and shouted at him to get out of

counsel, immediately upon returning to the courtroom, stated his objection and concerns on the record in a tone that could only be characterized as a demonstration of deference and discomfort with his position.²¹ Before the Plaintiff's/Appellant's counsel could finish his statement, he was interrupted by the Court. As the Plaintiff's/Appellant's attempted to step from behind his desk to address the Court, he was instructed to get back behind his desk with a shout.²² Plaintiff's/Appellant's counsel was accused of threatening the Presiding Judge in making his objection and cautioned to be careful of what he might accuse the Court moving forward.²³ After being accused a second time of threatening the Presiding Judge, Plaintiff's/Appellant's counsel, noticing that a motion for new trial and/or recusal was appropriate, stated, "May I respond?" The Presiding Judge responded with an emphatic, "No!"²⁴ Plaintiff/Appellant was not permitted to state any further objection or motion at that time. The Plaintiff/Appellant, being keenly aware of *State v. Pace*, believed any further discussion of the matter *or any discussion of any further alleged impropriety on the part of the Presiding Judge* would have been futile, and that the issues would not be waived in a subsequent motion for new trial or on appeal. Regardless, at the close of trial, the undersigned renewed his motion for a new trial citing the same grounds as his prior objection.²⁵

The strained discourse between Plaintiff's/Appellant's counsel and the Presiding Judge

chambers—even after the undersigned pleaded with him to allow him to explain his position.

²¹ R. p. 200, line 2 through p. 201, line 17.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ R. p. 612, line 5 through line 9.

continued throughout Day 2 of trial *in the presence of the Jury*. Shortly after stating his objection regarding facial expressions and gestures, Plaintiff's/Appellant's counsel attempted to object to a line of questioning regarding the citation of a statute; Plaintiff's/Appellant's counsel was chastised regarding the use of speaking objections.²⁶ However, a pattern of allowing speaking objections had already been established by Defendant's/Respondent's counsel on Day 1 of trial.²⁷ The speaking objections by Defendant's/Respondent's counsel continued *afterward* as well without admonition from the Court.²⁸ This discrepancy in the way the attorneys were treated *indeed* occurred in the presence of the Jury.

Whether the Actions Complained of Indeed Influenced or Biased Jury

Canon 3 of Rule 501, SCACR and *State v. Pace* clearly highlight the potential prejudice that may inure from the use of facial expressions and gestures emanating from the bench. If taken as true, the Affidavit of the Juror depicts undue influence exerted upon the Jury and the bias that ultimately ensued to the extent that Plaintiff/Appellant was not afforded a fair and impartial trial. The Affidavit highlights undue influence and bias that permeated throughout the Jury from Day One of trial and continuing throughout. The Affidavit also lends credibility to Plaintiff's/Appellant's concerns as stated on the record on Day Two of trial. The actions complained of and objected to at the start of Day Two indeed influenced and biased the jury.

²⁶ R. p. 206, line 9 through line 21.

²⁷ R. p. 97, line 18 through 21; *see also* R. p. 102, line 8 and 9; *see also* R. p. 103, line 19 through 21; *see also* R. p. 106, line 15 and 16; *see also* R. p. 119, line 21 and 22; *see also* R. p. 120, line 24; *see also* R. p. 122, line 11 and 12; *see also* R. p. 124, line 13 and 14; *see also* R. p. 136, line 19 and 20; *see also* R. p. 168, line 19 through 21; *see also* R. p. 185, line 4 and 5; *see also* R. p. 187, line 19 and 20.

²⁸ R. p. 266, line 4 through 6.

Even in the absence of the Affidavit, there is evidence of facial expressions and gestures emanating from the Court by the Court's own admission. It is worth noting that rather than denying or downplaying the use of facial expressions and gestures, the Presiding Judge instead chastised the Plaintiff's/Appellant's counsel stating, "You have no idea what my facial expressions are... You have no idea what is going through my mind."²⁹ While the Plaintiff/Appellant concedes that very point, the Plaintiff/Appellant would also argue that if Plaintiff/Appellant did not know what the Presiding Judge's facial expressions and gestures meant, then certainly the same can be said for the jury. It is highly unlikely that the Jury perceived the facial expressions and gestures as anything other than detrimental or prejudicial to the Plaintiff/Appellant and his counsel.

Whether the Actions Complained of Were Prejudicial In Nature

The case was decided narrowly—51% liability to the Plaintiff and 49% to the Defendant. A 1% difference drastically changes the outcome of this case.³⁰ If the margins were not so narrow, the argument might stand that even though the Presiding Judge's actions unduly influenced the jury and created bias within the jury, the actions were ultimately not prejudicial and had no bearing on the outcome. Plaintiff rejects even that argument. However, that argument is not available in the instant action. Even the slightest undue influence or biasing of the Jury by the Presiding Judge had the potential to have a drastic effect on the outcome of this case. The actions complained of were prejudicial in nature.

²⁹ R p. 200, line 2 through p. 201, line 17.

³⁰ R. p. 2.

III. TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL AS UNTIMELY WHERE THE AMENDED MOTION FOR NEW TRIAL WAS FILED EIGHT (7) DAYS AFTER PLAINTIFF'S/APPELLANT'S COUNSEL RECEIVED A SIGNED AFFIDAVIT FROM A JUROR?

Timeliness of Amended Motion for New Trial and Timeliness of Subsequent Notice of Appeal of the Order Dated July 19, 2018

On or about July 3, 2018, Plaintiff/Appellant received notice of an Affidavit signed by a juror that, upon information and belief, related directly to the grounds stated for the prior oral motion for new trial made on June 29, 2018 following dismissal of the jury.³¹ In an abundance of caution, both in preserving the right to submit upon appeal as well as to allow the Court an opportunity to question the Jurors, Plaintiff/Appellant filed his Amended Motion for New Trial based on Newly Discovered Evidence. The Amended Motion for New Trial was filed on July 10, 2018, which was 11 days after the jury was dismissed, but only 7 days following notice of the existence of an Affidavit signed by a Juror. Plaintiff's/Appellant's position is that the Amended Motion for New Trial was timely pursuant to *Gray v. Bryant*.³²

In *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), the Supreme Court held that amendment of a motion for new trial based upon newly discovered evidence is permissible if made within a reasonable time following discovery of new evidence even if made *after* the 10-day period allowed in S.C. Rules of Civil Procedure, Rule 59.³³ The *Gray* Court held that "Rule 59 and 60(b)

³¹ R. p. 15.

³² *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989).

³³ *Id.*

must be read together.”³⁴ The *Gray* Court went on to cite *Smith v. Quattlebaum*, 223 S.C. 384, 76 S.E.2d 154 (1953):

“In *Smith*, defendant moved for a new trial because of an after-discovered relationship of juror to plaintiff. The court ruled that the trial court had jurisdiction to hear a motion for a new trial because of the after or newly-discovered evidence exception. The Court stated further:

‘It is the duty of the trial judge to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention, even after sine die adjournment of court, by the granting of a new trial, if in its discretion, necessary. *Smith*, 76 S.E. (2d) at 157.’”³⁵

In the instant matter, Plaintiff’s Amended Motion for New Trial filed on July 10, 2018 was made within a reasonable time following notice of the newly discovered evidence. The newly discovered evidence does not disclose discussions during deliberations, and instead, highlight both the potential bias of the jury as well as improper communications between jurors prior to deliberations. Because it is the duty of the trial judge to ascertain the qualification of jurors and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention. Irrespective of same, the trial judge dismissed the Amended Motion for New Trial by Order dated July 19, 2018 as untimely. It is respectfully submitted that dismissal of Plaintiff’s/Appellant’s Amended Motion for New Trial was error.

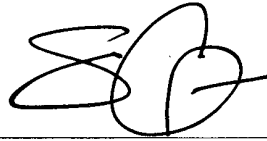
³⁴ *Id* at 287, 896.

³⁵ *Id*.

CONCLUSION

The facial expressions and gestures from the Court giving rise to this appeal were prejudicial in nature and constitute reversible error. Further, dismissal of the Plaintiff/Appellant's Amended Motion for New Trial as untimely was also error. It is respectfully submitted that a new trial should be granted in favor of the Plaintiff/Appellant and/or for any further relief the Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant John M. Burgess certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,



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January 16, 2020

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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant John M. Burgess certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identification and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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January 16, 2020

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess, ... Appellant,

v.

Katherine C. Hunter, ... Respondent.

BRIEF OF RESPONDENT

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DEC 30 2019
SC Court of Appeals

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STATEMENT OF THE CASE

This case involves a vehicular accident occurring on December 10, 2013, in Greenville County. The Appellant John Burgess alleges that the Respondent Katherine Hunter was negligent in the operation of her motor vehicle thereby causing a collision with the moped that he was operating on Blue Ridge Highway. The liability of the parties was hotly contested. Both sides presented the testimony of accident reconstruction expert witnesses who presented differing theories on the mechanics and cause of the accident.

The case was tried before Circuit Court Judge Edward W. Miller and a jury beginning on June 25, 2018, in Pickens County. The trial lasted five days. The jury heard testimony from the parties, lay witnesses, and expert witnesses, including medical providers and the accident reconstruction experts. The jury ultimately returned a verdict finding both parties to be negligent and allocated 51 percent of the fault to the Appellant, thereby barring his recovery. (R. 4-5).

As discussed in greater detail below, at the commencement of the second day of trial, the Appellant's counsel raised an issue with the trial judge regarding his conduct during the preceding day of trial, specifically the judge's "facial expressions" while counsel was conducting his examinations of the Respondent and then the Appellant. (R. 200). At that time, the Appellant's counsel advised the court that "I'm not necessarily asking for any recusal or anything along those

lines.” (R. 200). The Appellant did not at that point nor at any later time during the five-day trial make a request or motion, formal or informal, orally or in writing, for a curative instruction, for the recusal of the trial judge, or for a mistrial. There were also no other objections, contemporaneous or otherwise, made regarding the verbal or non-verbal conduct of the trial judge during the remainder of the trial.

On the fifth day of trial, the trial judge charged the jury, similar to the instruction given at the start of the trial, to the effect that the jury should not take anything the judge says or does to suggest that he has an opinion as to the facts of the case or the ultimate resolution. (R. 591). The Appellant did not object to that instruction nor request any further instructions be given. (R. 609).

After the verdict was returned and the jury was discharged with the consent of the parties, the Appellant made a motion for a new trial “based on the impropriety that was alleged or, essentially, put on the record early Tuesday morning and the same grounds -- same grounds for that motion.” (R. 612). That was the extent of the motion made. After the Respondent’s counsel briefly responded, the motion for new trial was denied. (R. 612).

The denial of that new trial motion was made on June 29, 2018. Thereafter, on July 10, 2018, which was more than ten days after the jury was discharged, the Appellant filed an Amended Motion for New Trial raising the same ground as before and this time accompanied by an affidavit of Christopher Lee, who was one

of the trial jurors. The Lee affidavit incorporated a letter that was purportedly written by the juror on July 1, 2018, after he had made contact with the Appellant's counsel. (R. 8-9). That letter describes what the Appellant challenges as the trial judge's "facial expressions, gestures, and lack of attention" given to his attorney while he presented the case. The letter also describes comments allegedly made by other jurors before and during jury deliberations and suggests how the trial judge's alleged conduct impacted other jurors and their decision-making. (R. 15-17).

On July 19, 2018, Judge Miller issued a Memorandum Opinion concluding that the Amended Motion for New Trial was not timely. In addition, Judge Miller ruled that the Lee affidavit was inadmissible under Rule 606(b), SCRE, and that there was no basis for granting a new trial. (R. 28-31).

The Appellant thereupon filed his appeal to this Court.

STANDARD OF REVIEW

The Respondent agrees with the Appellant that the issues raised on appeal are governed by an abuse of discretion standard of review. Specifically, this Court has explained that "[t]he grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. South Carolina Department of Corrections*, 386 S.C. 182, 687 S.E.2d 54, 56 (Ct. App. 2009).

ARGUMENTS

I. The trial court correctly ruled that the Appellant's Amended Motion for New Trial was untimely, and as a result, the trial court lacked jurisdiction to hear and adjudicate that motion.

As a threshold issue, the trial court ruled that the Amended Motion for New Trial filed by the Appellant John Burgess on July 10, 2018, was untimely, and as a result, the trial court was divested of jurisdiction to even consider that amended motion and the supporting affidavit of Christopher Lee filed therewith. (R. 28-29).¹ As the trial court points out, the Appellant made an oral motion for a new trial on June 29, 2018, immediately after the jury was discharged. (R. 612). That motion was denied on the record at that time. (R. 612). Rule 59(b), SCRPC, provides that “[t]he motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court, not later than 10 days thereafter.” Rule 59(b), SCRPC. Rule 59(b) does not provide for a successive or amended motion for new trial. In other words, Rule 59(b) does not authorize a litigant to make an oral motion for new trial immediately after the jury is discharged and then a second or successive or amended motion within the next ten days. *See, Gray v.*

¹ In *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006), the Supreme Court explained that “[j]urisdiction refers to the trial court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction.” 633 S.E.2d at 730, n.10.

Bryant, 298 S.C. 285, 379 S.E.2d 894, 896 (1989) (“Rule 59 does not provide any procedure by which a party can amend a motion for new trial or add new grounds after the expiration of the ten-day period”).

Of course, even where a new trial motion is filed within ten days, that requires the trial judge’s permission. Importantly, as the trial court also recognized, the ten-day deadline is absolute and not subject to extension under any circumstances. Rule 6(b), SCRCF, grants a trial court limited authority to extend certain deadlines but expressly excludes Rule 59 from that authority. *See, Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018). Here, the Appellant made his motion for new trial on June 29, 2018, and never made any request that the trial judge grant him ten days to make that motion. Certainly, there was no request for the trial judge to allow him the opportunity to file a second or amended motion.

Nonetheless, it is undisputed that the Amended Motion for New Trial was filed on July 10, 2018, which was beyond the ten-day limit allowed by Rule 59(b) anyways. Therefore, even if the Appellant had been granted leave of court to file a second or amended motion within ten days, that deadline would have expired on July 9, 2018. Thus, under either scenario, the Amended Motion for New Trial was untimely, and the trial court lacked jurisdiction to hear and adjudicate that motion. *See, In re Beard*, 359 S.C. 351, 597 S.E.2d 835, 838 (Ct. App. 2004) (“[t]he

established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motion has elapsed”).

In an attempt to argue that his Amended Motion for New Trial was timely filed, the Appellant cites to the case of *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), in which the Supreme Court held that “Rules 59 and 60(b) must be read together” and allowed the appellant to file a motion to amend his original motion to amend (which was still pending) where it was filed beyond the ten days for filing a motion to amend. 379 S.E.2d at 287. The Supreme Court relied on Rule 60(b)(2) and concluded that the newly discovered evidence -- consisting of a letter written to a newspaper by a juror on the same day the verdict was returned but not published until two weeks later -- “could not have been discovered in time to move for a new trial under Rule 59(b).” *Id.* Accordingly, the Supreme Court ruled that “appellant moved to amend his motion within a reasonable time after discovery of evidence of [the juror’s] bias and prejudice and, in fact, before the trial court had ruled on the original motion.” *Id.*

The Appellant’s reliance on *Gray*, however, is misplaced. Unlike the plaintiff in *Gray*, the Appellant never filed a motion to amend his original motion to amend. The Appellant never sought leave of the trial court to take any action. Moreover, the Appellant’s original motion for new trial had already been decided by the time that he filed his amended motion. And most importantly, unlike the

plaintiff in *Gray*, the Appellant could not rely on Rule 60(b)(2) because the newly discovered evidence was indeed discovered and known within the ten-day period after the jury was discharged. The affidavit of Christopher Lee attests that the juror communicated with the Appellant's counsel on June 29, 2018, just hours after the trial ended. (R. 15). In addition, the affidavit was signed on July 3, 2018, which was well within the ten-day period following the jury's discharge. (R. 15). By its express terms, Rule 60(b)(2) is not applicable where the newly discovered evidence could have been and indeed was discovered through the exercise of due diligence "in time to move for a new trial under Rule 59(b)," meaning within ten days of the date the jury was discharged. Rule 60(b)(2), SCRCP.

Thus, the circumstances in the case at bar are very different than those in *Gray*, and the Appellant cannot rely on the analysis in that case to argue that his Amended Motion for New Trial was timely filed. In short, the trial court was correct in ruling that it lacked jurisdiction to hear the Amended Motion for New Trial. That ruling should be affirmed.

II. The Appellant has failed to show that he was denied a fair trial based upon the alleged facial expressions, gestures, and “lack of attention” by the trial judge.

The Appellant John Burgess contends on appeal that he was denied a fair trial based upon the trial judge’s alleged “facial expressions, gestures, and lack of attention” given to his attorney while he presented the case. For the reasons discussed at length below, the Respondent rejects any contention that the parties, the Appellant included, did not receive a fair trial from the judge, the jury, and their counsel over the course of the five-day trial.

A. Basic Principles of Law

From the outset, there are several elementary principles of law that establish the framework for this discussion. It is well settled that “[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials.” *Aakjer v. Spagnoli*, 291 S.C. 165, 352 S.E.2d 503, 511 (Ct. App. 1987). “If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged.” *Id.* Moreover, “[p]erfection in human behavior is an unrealistic expectation. This principle applies as well to trial judges as it does to lesser mortals.” *Id.* (Citation omitted).

Nonetheless, it is also true that a “trial judge must act with absolute impartiality in the performance of judicial duties.” *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186, 187 (1994). Accordingly, a trial judge should refrain from remarks

that “impugn the credibility of counsel” and “diminish him ... in the eyes of the jury.” *Id.* “Reference by a trial judge to an attorney’s age, gender, or competence [is] improper.” *Id.*

At the same time, a trial judge has the “inherent authority to manage and conduct a trial.” *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5, 26 (2010). The Supreme Court has long recognized that “[a] trial judge is vested with a wide discretion in the conduct of a trial. He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court be preserved.” *State v. DeBerry*, 250 S.C. 314, 157 S.E.2d 637, 641 (1967). As to the presentation of evidence, Rule 611(a) of the South Carolina Rules of Evidence dictates that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” *See*, Rule 611(a), SCRE.

Therefore, while needing to demonstrate impartiality, the trial judge must nonetheless manage the trial, and with that comes the need to admonish parties, witnesses, and counsel. In addressing the related issue of a judge’s recusal based on partiality, the United States Supreme Court recognized that “judicial remarks

during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). An exception to that standard occurs where the judicial remarks “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Id.* The Supreme Court distinguished, however, “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” *Id.*

In sum, the standard for showing judicial bias or misconduct by the trial judge to vacate a jury’s decision and require a new trial is necessarily a high one. It should and does present a strenuous burden to meet. That high burden has not been met by the Appellant in this case.

B. Issue Preservation

This Court has held that “[g]enerally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision.” *State v. Thomason*, 355 S.C. 278, 584 S.E.2d 143, 148 (Ct. App. 2003). Similarly, the Supreme Court has ruled that “[i]t is the general rule that prejudicial remarks in the course of a trial made by the court must be seasonably objected to and an exception noted, in the

absence of which the question will not be ordinarily reviewed on appeal. In general, the exceptions must be taken at the time the remarks are made.” *Lipscomb v. Poole*, 247 S.C. 425, 147 S.E.2d 692, 697 (1966). The Supreme Court relied on its earlier decision in *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965), holding as follows:

If the defendant considered the remarks of the trial judge prejudicial, it was its duty to call the matter to the attention of the court at that time by proper objection or motion. There is no sound reason to place matters of this nature upon a different basis from other occurrences during the trial of a case, in which the duty has been placed upon litigants to make timely objection in order to preserve the right of review. The fact that counsel may have some hesitancy in making objection during the trial to remarks or conduct of the court, which are considered prejudicial, does not excuse the failure to do so. An objection timely made to improper remarks or conduct of the court during the trial will afford in many instances an opportunity for correction of the error at that time or the granting of a mistrial as the particular situation requires. The interest of the trial court is only to see that a fair trial is had and objections to improper remarks or conduct on its part will be received in that spirit.

141 S.E.2d at 134.

A recent decision of the California Court of Appeals is also instructive. In *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 Cal. App. 5th 525, 228 Cal. Rptr. 3d 120 (2018), the appellant complained that the trial judge denied him a fair trial by making “inappropriate facial expressions and gestures ... such as rolling its eyes, grimacing, shaking its head, pursing its lips, sighing and making

looks of disgust.” 228 Cal. Rptr. 3d at 133. The court recognized that “[i]t is obviously difficult on the paper record we receive on appeal to assess accusations that a trial court made inappropriate gestures in front of a jury.” *Id.* The court found it to be “critical for a litigant who believes a trial court is engaging in such misconduct to object immediately, thereby putting the court on notice of the need to correct its behavior and creating a record of the problem for appellate review.” *Id.* Most critically, the court held that “[i]n cases where the litigant believes the conduct indicates judicial bias or threatens the fairness of a trial proceeding, the appropriate response is a prompt motion for disqualification.” *Id.*

The Appellate Court of Connecticut is in accord. In *Schnabel v. Tyler*, 32 Conn. App. 704, 630 A.2d 1361 (1993), the appellant claimed that the trial judge showed bias in several ways including by his hand gestures. The court explained “as a general rule, even in cases alleging judicial bias, this court will not consider the issue on appeal where the party failed to make the proper motion for disqualification at trial.” 630 A.2d at 1367. Most importantly, “[f]ailure to request recusal or move for a mistrial represents the plaintiff’s acquiescence to the judge presiding over the trial.” *Id.*

In the case at bar, the Appellant alleges that the offending conduct by the trial judge occurred during the first day of trial while his counsel was conducting examinations of the Respondent and then the Appellant. There was no objection,

contemporaneous or otherwise, raised during that day of trial. There was no mention on the record of any issues or concerns with the judge's conduct, including facial expressions or gestures. At the beginning of the second day of trial, there was apparently a discussion in chambers, for which there is no record. In footnote 20 of his opening brief, the Appellant attempts to present his counsel's account of what occurred in chambers, but that is unsupported in the record and should be stricken.² When the trial began on the record that day, the Appellant's counsel raised the issue of "facial expressions" of the trial judge while he was conducting witness examinations the previous day. Importantly, the Appellant made no motion for recusal nor a motion for mistrial. His counsel, in fact, advised the court that "I'm not necessarily asking for any recusal or anything along those lines." (R. 200). He also did not request any curative instruction. Critically, there was no request for *any action* which would serve as a basis for the new trial that he now seeks. Then, the Appellant had four additional days of trial; yet, he never again raised any objection, contemporaneous or otherwise, to the judge's alleged

² It is well settled that discussions or objections made in chambers or off-the-record at a side bar have no substantive effect. In the case of *Benton v. Davis*, 248 S.C. 402, 150 S.E.2d 235 (1966), the Supreme Court rejected a party's claim that an objection to jury charges made in a chambers conference is sufficient. The Court explained that "[t]he duty to make timely objection to portions of the charge considered erroneous is not discharged by an objection made at an informal conference in the judge's chambers which is not recorded as a part of the record." 150 S.E.2d at 239. The holding from *Benton* has subsequently been reaffirmed in *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997), where the Court wrote: "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." 480 S.E.2d at 728.

conduct. He had four days to seek some corrective action if he believed that the judge's facial expressions or gestures were depriving him of a fair trial. He took no such action.

In *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996), this Court noted that the appellant failed to move for a corrective instruction or request a mistrial where objectionable evidence was presented and received before the judge was able to sustain the objection. This Court found that the appellant "got what it asked for at trial and cannot now be heard to complain." 479 S.E.2d at 79. The same principle is at play here. The Appellant had many opportunities -- orally on the record or by written motion -- to seek the judge's recusal or a mistrial if he truly believed that the judge's conduct rose to the level of depriving him of a fair trial. He took no action -- that is, not until he received an adverse verdict from the jury. At that point, it should be deemed too late. It was only after the Appellant lost that he now deems the trial judge's conduct as warranting a new trial (or what is in essence a belated mistrial). That, however, is not how our judicial system functions. A litigant cannot sit on his rights and then cry foul and seek *actual relief* only once he has lost. That is what the Appellant has done here. He raised an issue, sought no actual relief on that issue, sat on his rights for four days of trial, and waited until he lost to try to gain the advantage of a new trial. Accordingly, his objections to the judge's alleged conduct should be

deemed waived and not properly preserved for appellate review.³

C. Evidence of Bias or Impartiality by the Trial Judge

During the trial itself, the Appellant made no effort to present any record of the alleged misconduct by the trial judge. He provided on the record no description of any facial expressions or gestures that he now contends were so prejudicial that he was denied a fair trial. The Appellant suggests that he was prevented by the trial judge from making a record; however, with the exception of him raising the issue at the beginning of day two of the trial, there is no other mention, let alone an objection, during the remainder of the trial. The Appellant made no attempt, and was clearly not precluded, from offering at the very least a written submission that described the offending conduct.

³ The Appellant's reliance on the case of *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994), is misplaced. There is not a "stark resemblance" between the two cases, as the Appellant claims. The cases differ in many respects. The non-verbal facial expressions, gestures, and "lack of attention" towards Appellant's counsel by the trial judge, as alleged in the case at bar, pales in comparison to the derogatory, condescending, and sexist comments by the trial judge in *Pace* which were made directly to the jury. The alleged judicial conduct in the two cases is significantly different. There is no gender or racial component in the present case. There is no challenge to counsel's competence as there was in *Pace*. And, quite frankly, there is the difference between substantiated verbal statements made directly to the jury about the defense counsel in *Pace* versus the unsubstantiated, non-verbal conduct alleged in this case. In short, there is no fair comparison of the cases. In addition, while the Supreme Court recognized a "futility" exception to the contemporaneous objection requirement based upon the egregious scenario in *Pace*, the Court by no means suggested that such an exception would be applicable in lesser scenarios where an aggrieved litigant is still required to make a contemporaneous objection, and if merited, to make a motion for corrective action -- be it for a curative instruction, a recusal, or a mistrial.

At any rate, the trial judge adamantly denies such conduct. That is clear from his reaction when the Appellant's counsel first raised the point. (R. 201). Additionally, in his Memorandum Opinion, the trial judge writes: "the Court notes that it strongly disagrees with Mr. Garcia's improper and extraordinary exaggerations as to the Court's conduct at trial." (R. 29). The only "evidence" supporting the Appellant's position is the after-trial affidavit from juror Christopher Lee.

According to the Appellant, Juror Lee sent his counsel an email within a few hours after the jury was discharged. (R. 8, 15). That email is not in the record, and its contents are unknown. Thereafter, Juror Lee prepared a "to whom it may concern" letter dated July 1, 2018. (R. 16-17). That letter, which is incorporated by reference in the Lee affidavit, presents the only "evidence" of the alleged judicial misconduct and thus would merit a close examination in the event the affidavit was properly admissible. However, in his adjudication of the Amended Motion for New Trial, the trial judge ruled the Lee affidavit inadmissible under Rule 606(b) of the South Carolina Rules of Evidence. That ruling *has not been appealed*, and thus constitutes the law of the case. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

Even if the exclusion of the Lee affidavit had been appealed, the ruling was

a correct one. “As a general rule, juror testimony is inadmissible to impeach a jury verdict.” *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859, 867 (Ct. App. 2005). However, Rule 606(b), SCRE, creates a very narrow exception to that general rule and allows a juror to offer testimony as to “whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” Rule 606(b), SCRE. Rule 606(b) further provides:

Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, ... [n]or may a juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. As this Court has explained, “juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence.” *Ziegler*, 610 S.E.2d at 867. “External influence on a jury involves situations where jurors receive information during deliberations from some outside source.” *Id.*

In the case at bar, the Appellant does not present the Lee affidavit to show that the jurors received extraneous or external information from an outside source during their deliberations. Instead, the Lee affidavit is presented in an attempt to describe the alleged facial expressions, gestures, and “lack of attention” by the trial

judge during the trial itself. That is not a proper use of a juror affidavit per Rule 606(b). A juror affidavit cannot be used, in essence, to supplement the trial record to describe what the juror saw take place in the courtroom during the trial.

Moreover, the Lee affidavit is also used to describe juror comments allegedly made before and during deliberations in the juror room as well as to give Juror Lee's opinions on the impact of the judge's alleged conduct on other jurors. Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). Likewise, Juror Lee cannot speculate as to the decision-making process for other jurors.⁴

⁴ In this respect, the Supreme Court's observation in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), is most pertinent:

We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

661 S.E.2d at 372.

Thus, for these additional reasons, the Lee affidavit was correctly ruled inadmissible in accordance with Rule 606(b).

Nonetheless, even if the Court were to allow consideration of the Lee affidavit, it merits careful review for what it says and its accuracy when compared to the written record. As far as the description of the trial judge's conduct, Juror Lee claims that judge appeared disinterested because he would "glance at the clock" and "was always on his laptop." (R. 16). Of course, that is not abnormal or prejudicial conduct. Judges will look at the clock to determine how long testimony has proceeded and to assess when breaks should be taken. Judges will also use a laptop computer to keep abreast of other legal matters, review applicable rules, case law, or statutes as the case proceeds, prepare or review jury charges, and numerous other absolutely proper behaviors.

Juror Lee also states that the judge "rolled his eyes in frustration a few times" and rubbed his forehead. (R. 16). He suggests that the judge was "distracted" and did not pay attention so that he needed questions repeated to rule on objections. (R. 16). A review of the record shows that occurred one time during a five-day trial. (R. 187). Juror Lee alleges that the trial judge told the Appellant's counsel to "get to the point" and not to be "talking in circles." (R. 16). There is no such quote in the record. Juror Lee claims that the trial judge told the Appellant's counsel to "make it brief." (R. 16). In actuality, that occurred when

the Appellant's counsel rose to make his rebuttal argument, and the judge said, "All right, briefly." (R. 579). Of course, as discussed above, the trial judge has a responsibility to manage a trial, including encouraging counsel to be direct and to the point and not to be repetitive or cumulative and to move the trial along so as not waste the court's and jurors' time.

At any rate, a careful review of the trial demonstrates that the trial judge's conduct in the management of the trial was appropriate. For instance, the Appellant's counsel's examination of the Respondent, who remembered little of the accident, was lengthy and can be fairly characterized as repetitive and drawn out. Nonetheless, in response to "asked and answered" objections, the judge responded with "don't repeat yourself, please" -- hardly a harsh or condescending ruling. (R. 119). Shortly thereafter, upon facing another such objection, the judge allowed one more repetitive question rather than shutting down the questioning as many judges would rightfully do. (R. 121) ("I'll let one more time on this, then we're going to move on from this issue"). The Appellant's counsel himself candidly stated: "While the witness doesn't remember where the collision occurred, I've gone painstakingly through this." (R. 129). In short, if the jury found the Appellant's counsel to be "long winded and talking in circles," as Juror Lee states, that is a characterization that the Appellant's counsel brought to bear by his method of examination. (R. 16). A fair reading of the direct examination of

Katherine Hunter certainly supports that characterization. Additionally, the Appellant's closing argument, not including the reply, was twice as long as the defense's closing.

Furthermore, any suggestion by the Appellant that his counsel was not treated fairly in the trial judge's rulings on evidence is unsupported in the record. The Appellant prevailed on many objections, particularly the critical ones. As one prime example, in the Appellant's case-in-chief, the trial judge allowed the admission of a 911 call from an unidentified person who allegedly was at the accident scene despite that call being both hearsay and not subject to cross examination because the speaker is unknown. (R. 135). Moreover, it is worth noting that the Appellant has not appealed from a single trial ruling, evidentiary or otherwise. So clearly, he is not claiming prejudice from the trial court's evidentiary rulings.

D. Lack of Prejudice

The Appellant insists that the facial expressions, gestures, and "lack of interest" by the trial judge were prejudicial to his case. There is frankly no evidence to support that -- and certainly not clear and convincing evidence.⁵ The

⁵ In his brief, the Appellant does not discuss the standard of proof required to show prejudice. Under South Carolina law, the standard for evaluating alleged juror misconduct requires proof of the resulting prejudice by clear and convincing evidence. *See, Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489, 494 (2009) (Court explained that trial court found "no clear and convincing evidence that any of the twelve jurors ... were improperly influenced by [the juror's] misconduct"). *See*

Appellant's suggestion that the allocation of fault under the comparative negligence analysis could have been different had the trial judge conducted himself differently is pure speculation. There is no evidence that the jury's ultimate verdict was affected by the judge's conduct. The jury deliberated for over two hours on a Friday afternoon after a five-day trial. (R. 609). It is clear from the response to the polling of the jury following the reading of the verdict that all jurors agreed with the result. (R. 610). The Appellant could have requested the individual polling of the jurors but did not do so. Likewise, if the Appellant believed that the jury was impacted by the trial judge's conduct, he could have requested a post-verdict evidentiary hearing, but he did not do so. In short, without a showing of prejudice from the alleged improper conduct of the judge, the Appellant has no basis for overturning the jury's verdict. *See, State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004).

E. Curative Instructions

At the commencement of the trial, the trial judge gave the jury the following instruction:

So, I will tell you that you are the sole judges of the facts in this case. And the trial judge is not by law allowed to have an opinion about the facts in the case. It is up to

also, State v. Aldret, 333 S.C. 307, 509 S.E.2d 811, 814 (1999), *citing Hunt v. Methodist Hospital*, 240 Neb. 838, 485 N.W.2d 737 (Neb. 1992) ("party claiming juror misconduct has burden to prove prejudice by clear and convincing evidence"). That same standard should likewise be applied where there are allegations of judicial misconduct.

you to decide what to believe, what not to believe, what you think is true and correct and what you think is not true and correct. *So, don't think by anything I say or do throughout the course of the trial that I have an opinion, I do not.* You all are the sole judges of the facts.

(R. 55). (Emphasis added). Later, as part of his jury charge, the trial judge again told the jury as follows:

I also remind you that in every case tried in this courtroom before a jury, the jury is the sole and exclusive judge of the facts and the trial judge is not allowed by law to have an opinion about the facts. *So, don't think by anything I've said or done throughout the course of the trial that I have such an opinion. It is up to you all to determine what the facts are.*

(R. 591). (Emphasis added). Under South Carolina law, "[j]uries are presumed and bound to follow the instructions of the trial judge." *Buff v. South Carolina Dept. of Transportation*, 342 S.C. 416, 537 S.E.2d 279, 284, n.4 (2000).

The Appellant did not object to the charge as given by the trial judge. He also did not request any additional curative instruction to address what he is arguing as misconduct. (R. 609). Based on the instructions given to the jury, there is a presumption that the jury understood and followed those instructions, including the admonition that the judge's comments and actions during the trial do not reflect that he has an opinion as to the resolution of the case.

This very issue arose in the case of *Commonwealth v. Medina*, 64 Mass. App. Ct. 708, 835 N.E.2d 300 (2005), where the defendant alleged that the trial

judge denied him a fair trial “by making gestures, such as rolling her eyes during the defense’s closing argument.” 835 N.E.2d at 311. The court noted that “[i]t must be presumed that the jurors followed the judge’s instructions” and thus concluded: “the trial judge’s pointed instructions to the jury, directing them to disregard any notion of an opinion held by her respecting any aspect of the case or position taken by either party, were more than sufficient to cure any prejudice to the defendant.” 835 N.E.2d at 312.

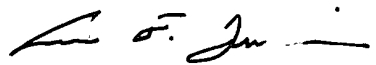
Similarly, in the present case, the trial judge’s instructions cured any claimed prejudice resulting from the alleged facial expressions or gestures by the trial judge. The judge instructed the jury that he had no opinions on the facts or the ultimate resolution of the case and to disregard anything he said or did during the trial as suggesting he had such an opinion. There is no reason to believe that the jurors did not follow those instructions as they are presumed by law to do. For this additional reason, the Appellant cannot demonstrate prejudice to overturn a jury verdict following a hotly contested five-day trial.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Katherine C. Hunter respectfully requests that this Court affirm the jury verdict in favor of the Respondent and the denial of the Appellant's motions for a new trial.

Respectfully submitted,

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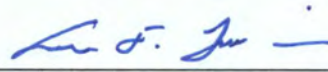
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December 30, 2019

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Katherine C. Hunter certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Katherine C. Hunter certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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December 30, 2019

RECEIVED

Sep 09 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

**MOTION SEEKING JUDICIAL NOTICE
and
MOTION FOR LEAVE TO SUPPLEMENT RECORD**

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COMES NOW APPELLANT, by and through undersigned counsel, and files this, his Motion Seeking Judicial Notice pursuant to Rule 1101, SCRE and Rule 201, SCRE, and/or, his Motion for Leave to Supplement Record pursuant to Rule 212(b), SCACR, and as grounds would allege:

MOTION TO TAKE JUDICIAL NOTICE

1. In preparation for oral arguments to be held September 15, 2021, Appellant became aware of statements made by the Presiding Judge made subject by this Appeal (hereinafter referred to as “Presiding Judge”) while testifying at the Judicial Merit Selection Committee public hearing held on November 18, 2020.
2. At this public hearing, the Presiding Judge made (1) various statements and/or admissions regarding his temperament, (2) statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal, and (3) other statements regarding expressions, gestures, treatment of counsel, etc.
3. Appellant takes the position that because the underlying, alleged error in the instant Appeal centers on the conduct of the Presiding Judge, that public, sworn testimony from the Presiding Judge regarding his temperament, mental state, and use of gestures and expressions at or during the trial made subject by this Appeal are adjudicative facts such that the statements fall within the scope of Rule 201, SCRE.
4. Further, it is the Appellant’s position that because the statements and transcripts of the public hearing are available at:
<https://www.scstatehouse.gov/JudicialMeritPage/TranscriptInfo2020/November182020/TranscriptsAndExhibits.php>, and because the statements are given under oath, that, consistent with Rule 201(b), SCRE, such statements are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

5. It is also submitted that judicial notice may be taken at any stage of the proceeding, consistent with Rule 201(f), SCRE.
6. The Appellant has also considered the potential hearsay issues, if applicable, associated with the admission of out-of-court statements, however, the Appellant argues that the statements made by the Presiding Judge and offered by the Appellant fall within exception 803(8), SCRE in that they are public records and/or statements of public office setting forth the activities of that office.
7. It is, therefore, respectfully submitted that, because of the above, and because the Court is being supplied with the necessary information consistent with Rule 201(d), the taking of judicial notice of the Presiding Judge's offered testimony at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is mandatory.

MOTION FOR LEAVE TO SUPPLEMENT RECORD

8. Alternatively, and/or in conjunction therewith, and in an abundance of caution, the Appellant seeks leave to Supplement the record to include portions of the transcript of the Presiding Judge from his testimony given at the Judicial Merit Selection Committee public hearing held on November 18, 2020.
9. Pursuant to Rule 212, ACR, Appellant seeks leave to include portions of the transcript centered on Presiding Judge's temperament, mental state, and use of gestures and expressions at or during the trial made subject by this appeal.

WHEREFORE, Plaintiff respectfully requests:

- (1) That the Court take judicial notice of the statements made the Presiding Judge at the Judicial Merit Selection Committee's public hearing held on November 18, 2020 regarding:

- a. Various statements and/or admissions regarding his temperament;
 - b. Statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal; and
 - c. Other statements regarding expressions, gestures, treatment of counsel, etc. by the Presiding Judge regarding;
- (2) That the Court grant leave to supplement the record with portions of the transcript of the Judicial Merit Selection Committee's public hearing held on November 18, 2020 regarding the Presiding Judge's:
- a. Various statements and/or admissions regarding his temperament;
 - b. Statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal; and
 - c. Other statements regarding expressions, gestures, treatment of counsel, etc. by the Presiding Judge.
- And,
- (3) That the Court grant any further relief the Court deems just and proper.

September 9, 2021
Greenville, SC

Garcia Law, LLC

By: 

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For Appellant

MEMORANDUM OF LAW

In support of his Motion Seeking Judicial Notice, and pursuant to Rule 240, SCACR, Plaintiff respectfully submits that the Court should take judicial notice of the transcript of the Presiding Judge's testimony given at the Judicial Merit Selection Committee public hearing held on November 18, 2020 and to include such testimony regarding the Presiding Judge's (1) various statements and/or admissions regarding his temperament, (2) statements regarding personal issues that affected his temperament and that occurred immediately before the trial made subject by this Appeal, and (3) statements regarding expressions, gestures, and treatment of counsels.

TAKING JUDICIAL NOTICE

On November 18, 2020, the Presiding Judge was called to testify by the Judicial Merit Selection Committee as per the ordinary course of judicial selection and approval. At this public hearing, the Presiding Judge made various admissions and/or statements regarding his temperament, courtroom demeanor, dealings with counsel, and most notably, statements regarding tragic, personal issues that admittedly had an impact on his courtroom demeanor during the trial made subject by this appeal. Specifically, when asked about concerns regarding poor judicial temperament, lack of patience, callousness and lack of care, the Presiding Judge discussed a personal tragedy that, by his own admission, affected his mood and that he recognized that he had been "a little cantankerous during that time." *See* Exhibit A, p. 13, line 8 through 24. The Presiding Judge's personal tragedy, by his own testimony, occurred in June 2018. Upon information and belief, the Presiding Judge's first day back in the court was for the trial made subject by the action.

In the same Judicial Merit Selection Committee hearing held on November 18, 2020, the Presiding Judge, when questioned regarding facial expressions and gestures, further testified that

he did not believe that his “conduct was quite as egregious as that comment would indicate.” *See* Exhibit A, p. 13, line 25 through p. 14, line 11.¹ Again in the JMSC hearing, the Presiding Judge testified, “I just have never considered myself to have a temperament issue. I acknowledge over the last couple of years, because of the tragedy [occurring in June of 2018] that – because of my [personal tragedy], that I have – I recognize that now. And when I was in the middle of it, I didn’t even – I didn’t know it.” *See* Exhibit A, p. 23, lines 6 through 10.

Applicability of Rule 201, SCRE to Appellate Court

The undersigned has carefully considered the applicability of Rule 201, SCRE as it pertains to original judicial notice by the Court of Appeals. Rule 1101(a), SCRE states, in pertinent part, that “the term ‘judge’ in these rules includes... judges of the Court of Appeals.” There are no qualifying exceptions deterring this Court from taking original judicial notice of an adjudicative fact. Rule 201(f), SCRE offers further guidance, and reads, “Judicial notice may be taken at any stage of the proceeding.” Also, the notes to Rule 201, SCRE reads in pertinent part:

“Subsection (f) is consistent with prior case law in this State. Cf. *State v. Squires*, 311 S.C. 11, 426 S.E.2d 738 (1992) (Supreme Court took judicial notice that infrared spectroscopy process had gained general acceptance in the scientific community); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905 (1940) (Supreme Court took judicial notice of dangerous qualities of gasoline and kerosene).”

The Court in *E.L. Masters, Sr. v. Rogers Development Group, S.C., Inc.*, 283 S.C. 251, 321 S.E.2d 194 (Ct. of App. 1984) cautions that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable. It stands to reason that so long as the threshold requirements for taking of judicial notice are met, the Appellate Court can take

¹ Note that the undersigned does not recall any involvement whatsoever in the Judicial Merit Selection Committee process; the undersigned does not recall making any comments or participating in any way with the selection process as a whole. Simply put, although the undersigned did receive notice and an invite to participate from the JMSC, the undersigned did not participate in any way.

original judicial notice of adjudicative facts. It is respectfully submitted that the Court of Appeals has clear authority to take original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

Whether Threshold Requirements for Taking of Judicial Notice have been Met

Rule 201(a), SCRE and Rule 201(b), SCRE delineate the threshold requirements that must be met before judicial notice can be taken. First, the judicial notice must be of an adjudicative fact. Second, the judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. It is the Appellant's position that the testimony of the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is both an adjudicative fact and one that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Black's Law Dictionary, 11th Edition (2019) defines an adjudicative fact as "a controlling or operative fact, rather than a background fact; a fact that is particularly related to the parties to a proceeding and that helps the tribunal determine how the law applies to those parties." The Appellant's Appeal is centered on the temperament of the Presiding Judge as well as the prejudicial effect of facial gestures and expressions made by the Presiding Judge throughout the course of trial. It is respectfully submitted that, without question, testimony of the Presiding Judge regarding admissions as to his temperament during the pendency of the trial made subject by this Appeal, his mental state during the pendency of the trial made subject by this appeal, and his position regarding facial gestures and expressions during the pendency of the trial made subject by the

Appeal are all facts related to the parties to the proceeding and all facts that help this Court determine how the law applies to the parties in the instant matter.

Further, it is respectfully submitted that the statements and/or admissions by the Presiding Judge are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The entirety of the transcript is available to the general public at <https://www.scstatehouse.gov/JudicialMeritPage/TranscriptInfo2020/November182020/TranscriptsAndExhibits.php> . Continuing, the testimony of the Presiding Judge at this public hearing is sworn and under oath to the extent that the veracity for truthfulness or accuracy cannot be questioned. The threshold requirements for taking original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 have been met.

Judicial Notice: Mandatory or Discretionary

It has long been held that Courts should take judicial notice of whatever is or ought to be known within the limits of their jurisdiction. *See State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935); *see also Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981). Rule 201, SCRE leaves less room for discretion: “A court *shall* take judicial notice if requested by a party and supplied with the necessary information.” *Id.* (emphasis added). The Appellant has supplied the necessary information to the Court by pointing the Court to the website in which the complete public transcript can be found as well as providing the Court with excerpts of the transcripts embodying the relevant testimony of the Presiding Judge as an Exhibit to this Motion. It is respectfully submitted that the taking of original judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020 is mandatory in nature pursuant to Rule 201(d), SCRE.

Potential Hearsay Issues Associated with Taking Judicial Notice

The undersigned has carefully considered the potential hearsay issues associated with taking judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020. The undersigned respectfully submits that the statements and/or admissions to which the Appellant seeks judicial notice, at a minimum, falls under the exception to hearsay found in Rule 803(8), SCRE. Specifically, Rule 803(8), SCRE reads:

“(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.” (Emphasis Added.)

The transcript, statements and/or admissions of which the Appellant seeks judicial notice is/are a record and/or report and/or statements of public offices setting forth the activities of the office or agency consistent with Rule 803(8), SCRE. While other exceptions may apply, the Appellant submits that the public records exception, at a minimum, applies. To wit, the undersigned respectfully submits that hearsay is not an impediment to the taking of judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

LEAVE TO SUPPLEMENT THE RECORD

Notwithstanding the aforementioned positions and arguments, the undersigned—in an abundance of caution—seeks leave from the Court to supplement the record to include excerpts and portions of the Presiding Judge’s statements and/or admissions made under oath at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020. The Appellant moves so under Rule 212(b), SCACR.

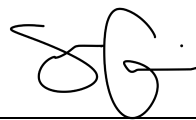
CONCLUSION

It is respectfully submitted that the threshold requirements for the taking of original judicial notice by the Court have been exceedingly met. The facts to which the Appellant seeks judicial notice are adjudicative in nature. The statements and/or admissions are in a form publicly available, reliable, and made under oath. Additionally, any potential concerns regarding hearsay are overcome by Rule 803(8), SCRE.

It is respectfully submitted that the Court should take judicial notice of the statements and/or admissions made by the Presiding Judge at the public hearing held by the Judicial Merit Selection Committee on November 18, 2020.

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For Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Katherine Hunter by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2021, addressed to her attorneys of record: **David L. Moore, Jr., Esq., P.O. Box 1509, Greenville, SC 29602** and **Andrew F. Lindemann, Esq., P.O. Box 6923, Columbia, SC 29260**.

September 9, 2021



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PUBLIC HEARINGS

November 18, 2020

Judicial Merit Selection Commission

REPORTER: Patricia Bachand

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF RICHLAND)
3

4 * * * * *

5 JUDICIAL MERIT SELECTION COMMISSION
6 TRANSCRIPT OF PUBLIC HEARINGS

7 * * * * *

8 BEFORE: SENATOR LUKE A. RANKIN, CHAIRMAN
9 REPRESENTATIVE G. MURRELL SMITH, JR.
10 SENATOR RONNIE A. SABB
11 REPRESENTATIVE CHRIS MURPHY
12 REPRESENTATIVE J. TODD RUTHERFORD
13 HOPE BLACKLEY-LOGAN
14 LUCY GREY MCIVER
15 ANDREW N. SAFRAN
16 J.P. "PETE" STROM
17 SENATOR SCOTT TALLEY
18 ERIN B. CRAWFORD, CHIEF COUNSEL

19 * * * * *

20 DATE: November 18th, 2020
21 TIME: 9:30 a.m.
22 LOCATION: Gressette Building, Room 105
23 1101 Pendleton Street
24 Columbia, South Carolina 29201
25 REPORTED BY: PATRICIA G. BACHAND, COURT REPORTER

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(No Information Requested.)

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1 you that part of our evaluative criteria that we take very
2 seriously both the letter and the spirit of the South
3 Carolina ethics laws. Any violation of those or appearance
4 of impropriety would be deemed very serious and weight --
5 worthy of heavy deliberations within our screening process
6 in the event that we would have to call you back.

7 Do you understand that this record will not
8 be closed until the formal release of the report of
9 qualifications? And so in the unlikely event that we would
10 need to call you back, you understand that we can do that,
11 correct?

12 MR. SHOEMAKE: Yes, sir.

13 CHAIRMAN RANKIN: All right. Shoemakes,
14 thank you all both for being here. And you'll see
15 Representative Rutherford tomorrow, perhaps. If I see you
16 on the road, I'll blow the horn.

17 MR. SHOEMAKE: Thank you, sir. I appreciate
18 it.

19 (Candidate excused.)

20 CHAIRMAN RANKIN: Based on a motion and
21 second, we are going to go into executive session at this
22 time.

23 (Off the record from 2:39 p.m. to 3:18 p.m.)

24 CHAIRMAN RANKIN: And we are back on the
25 record. During executive session, no votes were taken, no

1 decisions were made. And we are ready to proceed with the
2 next candidate. And that is Judge Miller, Sir, if you will
3 raise your right hand.

4 WHEREUPON,

5 THE HONORABLE EDWARD WALTER "NED" MILLER,
6 being duly sworn and cautioned to speak the truth, the
7 whole truth and nothing but the truth.

8 CHAIRMAN RANKIN: Have a seat. Before you
9 are the documents that you had previously prepared. And I
10 want to make sure that no additions or corrections need to
11 be made to those before we put them in the record.

12 JUDGE MILLER: Yes, sir. I think they're
13 fine.

14 CHAIRMAN RANKIN: All right. And no
15 objection to them being included?

16 JUDGE MILLER: No, sir.

17 CHAIRMAN RANKIN: Very well.

18 (EXHIBIT NO. 21 - JUDICIAL MERIT SELECTION
19 COMMISSION PERSONAL DATA QUESTIONNAIRE OF THE
20 HONORABLE EDWARD WALTER "NED" MILLER)

21 (EXHIBIT NO. 22 - JUDICIAL MERIT SELECTION
22 COMMISSION SWORN STATEMENT OF THE HONORABLE
23 EDWARD WALTER "NED" MILLER)

24 CHAIRMAN RANKIN: Judge Miller, you last
25 were screened with the JMSC, how long ago?

1 JUDGE MILLER: Six years.

2 CHAIRMAN RANKIN: Seems like weeks, perhaps,
3 right?

4 JUDGE MILLER: Yeah, time is flying by.
5 Yes, sir.

6 CHAIRMAN RANKIN: Very well. Well, welcome
7 back. And I just want to start by first reminding you how
8 we do this in our efforts to thoroughly investigate your
9 candidacy and your continued service on the bench. You're
10 aware that we focus on nine evaluative criteria. And we
11 also include your ballot box surveys, a study of your
12 application materials, a verification of your compliance
13 with the state ethics laws, a search of newspaper articles
14 in which your name appears, studies of previous screenings,
15 and a check for economic conflicts of interest.

16 There are three affidavits in opposition to
17 your campaign or your reelection -- we'll take those up
18 separately -- and those are met with witnesses, each
19 testifying.

20 Other than that, do you have anyone that you
21 have brought with you today?

22 JUDGE MILLER: No, sir, I do not.

23 CHAIRMAN RANKIN: Very well. All right.
24 You, sir, have the opportunity to make a brief opening
25 statement, if you'd like. Otherwise, we'll turn it over

1 for questions by staff and by members of the Commission.
2 The floor is yours.

3 JUDGE MILLER: Well, thank you very much,
4 Senator. I just would say that serving as a circuit judge
5 has been the highlight of my career. I find it to be a
6 challenge, and something that I thoroughly enjoy. And I
7 hope that you all will see fit to reappoint me to the
8 Commission, or nominate me for election. And I appreciate
9 you allowing me to be here. Thank you.

10 MR. CHAIRMAN: Very well. All right. Thank
11 you.

12 MS. WILKINSON: Good afternoon, Judge
13 Miller.

14 JUDGE MILLER: Yes, ma'am.
15 EXAMINATION BY MS. WILKINSON:

16 Q. Judge Miller, what do you think your reputation
17 is among attorneys who practice before you?

18 A. Well, I've been doing this for quite a while, so
19 I suspect it's a -- I've got a varied reputation, I would
20 think. But I hope that I'm viewed as fair and patient,
21 well versed in the subjects that come before me. And I
22 hope that I'm perceived as listening and being thoughtful
23 when I made a decision.

24 Q. The Commission received 790 ballot box surveys
25 regarding you, with 65 additional comments. The ballot box

1 surveys, for example, contained the following positive
2 comments:

3 "Judge Miller is one of that very best trial
4 judges in the state. He's smart, able to handle
5 contentious lawyers with ease. A nice -- he has a nice
6 touch with everyone in the courtroom, a good sense of humor
7 at just the right time, and a wonderful person. Judge
8 Miller has handled every hearing I have ever had before
9 him, in a very fair and reasonable manner. While I did not
10 get the result I hoped for, at every turn I've always felt
11 as though Judge Miller was trying to make the right
12 decision. Judge Miller is one of the best among the roster
13 of great judges in the Upstate. His ability and
14 willingness to address complex civil issues with a
15 pragmatic approach are qualities that make him an
16 invaluable part of the state court system. I would
17 enthusiastically welcome his return as a business court
18 judge in the Upstate."

19 Fourteen of the written comments did express
20 concern. Some of the comments indicated that you are
21 biased towards certain attorneys, and show favoritism in
22 the courtroom and in your rulings in the cases in which
23 these attorneys are involved. How would you respond to
24 those concerns?

25 A. Well, I -- I would disagree with that, with

1 respect to the findings. I don't deny that there are
2 attorneys that have appeared in front of me, who I
3 recognize as being excellent, outstanding attorneys, and
4 others who -- I mean, just to be perfectly honest, others
5 who I don't find to be quite as competent. But I do try to
6 treat every case fairly and make a decision based on the
7 merits of the case.

8 **Q. The majority of ballot box concerns indicated**
9 **that you have a poor -- the majority of ballot box concerns**
10 **indicated that you have poor judicial temperament, and that**
11 **you often exhibit a lack of patience and a sense of**
12 **frustration, and you can be at times callous and uncaring.**
13 **What response would you offer to the concerns regarding**
14 **your temperament?**

15 A. Well, I think that is a -- kind of a recent
16 development. In June of 2018, my wife of forty years died.
17 And I went through a low patch. She suffered from head and
18 neck cancer for twenty-six years. And I think that was a
19 very difficult time, and I'm not sure I even realized that
20 my mood, perhaps, had changed.

21 But I think I'm recovering from that. And but I
22 do think that's -- looking back on it, I recognize that I
23 think I was a little cantankerous during that time, I
24 guess.

25 **Q. Lastly, a few comments mentioned that your facial**

1 expressions and body language had indicated how you were
2 feeling about a case or a particular attorney or litigant.
3 How would you respond to the concerns raised about body
4 language and facial expressions?

5 A. Gosh, I don't know. I guess I could wear a mask.
6 I don't think that -- I know I -- I believe I know the case
7 that arose -- from which that comment arose, and it was
8 shortly after -- it was in June of 2018. I don't believe I
9 -- my conduct was quite as egregious as that comment would
10 indicate. I certainly try to be as impassive and even-
11 keeled as I can be in the courtroom.

12 MS. WILKINSON: Mr. Chairman, I would note
13 that the Upstate Citizens Committee reported Judge Miller
14 as qualified in the evaluative criteria of constitutional
15 qualifications, physical health, mental stability, and
16 experience. The Committee reported Judge Miller well
17 qualified in the evaluative criteria of ethical fitness,
18 professional and academic ability, character, reputation,
19 and judicial temperament.

20 Mr. Chairman, at this time, I would ask that
21 we move to the complaints.

22 CHAIRMAN RANKIN: All right. Judge Miller,
23 if you'll take a seat back there on the front row.

24 JUDGE MILLER: Yes, sir.

25 CHAIRMAN RANKIN: If you'll get right on the

1 Commission.

2 BY MS. WILKINSON:

3 Q. Judge Miller, you've heard Mr. Field's complaints
4 and Ms. Taillon -- Ms. Taillon's complaints. Did you
5 provide a written response to the Commission regarding
6 these complaints?

7 A. Yes, ma'am, I did.

8 Q. And how would you respond to those complaints
9 today?

10 A. Well, I would incorporate my written response.
11 And I never yelled or screamed in court. I may have gotten
12 firm, and I may have what he perceived as having a sharp
13 tone. This was after -- the way this case -- this case
14 originated out of Horry County.

15 There was a lawsuit filed here. Judge Baxley
16 transferred the case to Greenville County. Judge Few was
17 assigned the case. He took -- it was a complex case. He
18 took -- he handled the case. And the case was mediated, it
19 was set to be settled, and then Mr. Field filed his
20 grievance against Judge Few.

21 Judge Few recused himself. And shortly before
22 the settlement hearing, it was assigned to me. I didn't
23 seek it out. I didn't know Arthur Field, didn't know
24 anything about it.

25 I walked into the courtroom and it was filled

1 with -- there were 680 investors from all over the State of
2 South Carolina. It was not 40 million. I think I said
3 that, so I was in error. I think it was 38 and a half
4 million dollars that was criminal misappropriated from
5 these people.

6 They were very upset. I'm in the courtroom in
7 front of a lot of lawyers. There were -- I can't remember
8 all the lawyers that were in there. They were in -- they
9 were contained in the mediated global settlement agreement,
10 which I have right here, I can look it up.

11 But the Attorney General showed up because there
12 was an investigation going on. I had no idea about that.
13 And the case was very close to settling, but Mr. Field
14 refused to do it because he didn't want any records turned
15 over to it -- to the Attorney General.

16 So we had a meeting back in a jury room, with all
17 the lawyers and Mr. Field, who I believe was pro se, and I
18 insisted that any agreement that there be a provision that
19 his Fifth Amendment rights be protected. Which we did.

20 This is a long, convoluted case. And the case
21 settled. It was a class action and the case settled. A
22 receiver was appointed. My job, the only job I've ever had
23 in this whole eleven years, has been to monitor the
24 receiver.

25 So the state -- the Attorney General subpoenaed

1 the receiver, tried to subpoena the records. We got into a
2 -- I tried to defend and protect Mr. Field, pursuant to the
3 agreement, and I believe there was some accommodation
4 reached.

5 But what I -- what I remember about that part of
6 it was that corporate records are not -- do not have a
7 claim to the Fifth Amendment. So a number of those records
8 got turned over. He has claimed that I was -- or Ms.
9 Taillon claimed that I was the one that instigated -- or
10 was responsible for the indictment being issued. That is
11 totally false. The case progressed.

12 The receiver did a great job, I think. He's
13 still doing a great job, very thorough, trying to chase
14 down the assets.

15 MR. CHAIRMAN: Who is the receiver?

16 JUDGE MILLER: His name is Jerry Saad. He's
17 a -- he's a CPA in Greenville

18 A. Judge Few had arranged that he be appointed as
19 receiver. So at the settlement hearing, I followed through
20 with that and had him appointed.

21 I wasn't -- and it is my position, and I believe
22 Rule 66 would bear this out, and I think the case would
23 bear out, that the receiver acts as the arm of the court.
24 So any communication that I had with the receiver was not
25 ex parte.

1 Mr. Field seems to imply that I had some kind of
2 conspiracy against him. I did not. We were trying to
3 collect -- marshal the assets for distribution to the -- to
4 the victims or to the investors.

5 The CIF, his corporation, was modeled on Home
6 Gold. And it was very much -- I'm not the only judge to
7 have said that it was a Ponzi scheme and he was robbing
8 Peter to pay Paul. The South Carolina Revenue Board, I
9 believe, came in and said -- or Securities Commission said
10 -- stopped him from soliciting any more funds. And at that
11 time, he couldn't -- he couldn't rob Peter, and so he
12 couldn't pay Paul.

13 I mean, how much -- I'll be happy to keep going.
14 If there's specific allegations, I'd be -- I'll be happy to
15 answer them too. But I didn't yell at -- I believe I ever
16 yelled in court. I don't do that.

17 I look back in hindsight and there are some --
18 perhaps some unnecessary comments think made, that I
19 regret. And if I could go back and re-do it, I wouldn't
20 have used those particular -- that particular verbiage.

21 But Dr. Field, and this is outlined in the
22 various submissions from the attorney for the class and
23 from the receiver, obstructed most of his efforts to try
24 and collect funds. And it was very frustrating.

25 And with respect to the two -- the criminal

1 contempt in which I found him in direct criminal contempt,
2 by that time the second settlement agreement which settled
3 District Court cases, it's contained on the -- on the face
4 of the agreement, where he was -- Mr. Field was -- Dr.
5 Field was being sued in federal court.

6 There were -- I think two or three of those were
7 included in the global settlement. But in that settlement,
8 Dr. Field agreed to turn over the house, which was located
9 in a community in Greenville called Thornblade, that he
10 would list the receiver, CIF as a mortgagor on it.

11 He went -- there was some -- there was a hail
12 storm, there was damage to the roof. He got an estimate.
13 He found out that he could collect, and he went to the
14 insurance company and had CIF removed as a -- as a
15 mortgagor and as an insured.

16 He filed a claim. Somehow the lawyers for the
17 receiver found out about it, so he went back to State Farm
18 Insurance Company and got CIF reinstated and tried to
19 manipulate the administrative staff there to describe how
20 it happened, how they were removed and how they were put
21 back on.

22 Well, we -- he got up at a hearing, I can't
23 remember the exact date, and volunteered that it was some
24 clerical error on the -- caused by the insurance company.
25 So I said, "Okay. We're going to go find out."

1 And we did that. It turns out -- and in the
2 meantime, the check which was issued, and I have a copy of
3 it, for \$17,414 was sent to Dr. Field and his daughter, I
4 believe, and Ms. Taillon. They cashed the check.

5 They didn't tell CIF about it. And this was in
6 response to the -- right after the global settlement
7 agreement. When they found out about it, then we were able
8 to recover it. We had a hearing with the -- with the
9 insurance people. They testified. Dr. Field did not show
10 up at the hearing, and I held in contempt of court for
11 lying, and sentenced him to six months.

12 And I had not -- prior to that, I had not -- I'd
13 never imposed any sanctions on Dr. Field for any of his
14 conduct, which led the receiver and the attorneys to file
15 various motions to compel, or rules to show cause.

16 CHAIRMAN RANKIN: In regard, Judge Miller --

17 JUDGE MILLER: Yes, sir.

18 CHAIRMAN RANKIN: -- it's, again, our
19 purview here what do we have to work with --

20 JUDGE MILLER: Yes.

21 CHAIRMAN RANKIN: -- and again, the nine
22 evaluative criteria, as we try to distill what we're heard
23 and the voluminous records that have been submitted within
24 the realm of what is ours to address.

25 JUDGE MILLER: Yes, sir.

1 CHAIRMAN RANKIN: I have struggled to figure
2 out whether the complaint is one of temperament. And so if
3 -- which is a great concern of this body.

4 JUDGE MILLER: Yes, sir.

5 CHAIRMAN RANKIN: For a new judge, a judge
6 wannabe, temperament is an incredibly important thing.

7 JUDGE MILLER: Yes, sir.

8 CHAIRMAN RANKIN: Because again you are --
9 absent a magistrate level, you're what the majority of our
10 litigants, our jurors see on a day-to-day basic, for you to
11 give confidence to them about the state of the judiciary
12 are great concerns.

13 So if -- and I note that Mr. -- or Dr. Field
14 and Mrs. Taillon have left the room.

15 JUDGE MILLER: Yes, sir.

16 CHAIRMAN RANKIN: We're not broadcasting
17 this for anyone else to hear. So if they were here, maybe
18 we would get a "amen" or a thumbs up or a nod of the head.
19 So again, it is interesting that they've left. Maybe they
20 don't want to hear what you have to say.

21 But for at least our purposes, if this is a
22 temperament problem, where you are effectively -- again,
23 just kind of paraphrasing their theme, you're running
24 roughshod over them, being short, being -- struggling with
25 the -- your wife's illness and ultimate death, again, that

1 tragedy. If it is temperament, speak to us in our role as
2 trying to help discern whether you've got the right
3 temperament.

4 JUDGE MILLER: Okay. Yes, sir.

5 CHAIRMAN RANKIN: That was a long question.
6 But if you follow what I'm asking, it would help me at
7 least grapple with that. Again, if I'm correct and that's
8 their concern.

9 JUDGE MILLER: Yes, sir. I think that if
10 you -- there are thousands of pages of transcript. If you
11 were review all those pages, I think you would see that I
12 was respectful. I did -- I was courteous to them.

13 And so I did -- I acknowledge, I'm not going
14 to lie, that he was very frustrating. He frustrated all
15 the efforts of the receiver. And of course they came to
16 me, that's when I would be involved in it. I would hear
17 about the -- what he was not doing pursuant to the court
18 sanctioned settlement in which he agreed to do -- to help
19 and assist.

20 Additionally, all of the -- not all of it,
21 but the many times in these hearings, the victims of this
22 crime would be there. And they were actually the people
23 that I was concerned about. They were the ones that the
24 receivership is designed to benefit, and so I don't think
25 any -- any of them would complain about my temperament.

1 They were more interested in a pound of
2 flesh from Dr. Field. They were very, very upset about it.
3 And so I was trying to navigate a course between the class
4 and between trying to obtain and marshal the assets.

5 I don't -- I just have never considered
6 myself to have a temperament issue. And I acknowledge over
7 the last couple of years, because of the tragedy, that --
8 because of my wife's death, that I have -- I recognize that
9 now. And when I was in the middle of it, I didn't even --
10 I didn't know it. But I would not characterize myself as
11 having a bad temperament. But that's me.

12 And, you know, I'm not sure what anybody
13 else would say. I know that Dr. Field and his wife don't
14 like me. And I believe the reason that they filed this
15 complaint was the pending action is that the receiver has
16 filed -- has filed an action to domesticate the civil
17 judgment from South Carolina in Florida, so they are
18 pursuing the home in Florida.

19 The home in Florida was purchased by cash --
20 with cash in 2011. Arthur Field didn't move there in 2011.
21 He's been a South Carolina citizen until recently, until he
22 finished his probation. So they are -- they are pursuing
23 the case in Florida.

24 Dr. Field filed actions in federal court,
25 and they were dismissed. He has filed actions up here in

1 federal court, and it's been dismissed. So that is the
2 pending action that the receiver is pursuing at this time
3 is to have -- and why retired Chief Justice Toal is in the
4 case.

5 There is the Florida court, because of what
6 Dr. Field represented to the Florida court, thinks that the
7 South Carolina judgment is no good. So they are asking --
8 and he has referred it back to South Carolina for them to -
9 - for South Carolina to issue what is called a declaratory
10 order that says that, yes, it's a valid -- a valid judgment
11 -- civil judgment.

12 So when that was filed, they filed it at the
13 end of 2019. Couldn't have the hearing at that time
14 because of that legislative immunity. At the end -- and
15 then Covid was a part of this too. But then they asked for
16 a hearing again in -- the receiver asked for a hearing, and
17 we set a hearing. And then when I think all this -- these
18 actions got filed and that's when I heard about it again.

19 CHAIRMAN RANKIN: And, again, well off our -
20 - or out of our wheelhouse in terms of, again, these
21 criteria and what we're looking at --

22 JUDGE MILLER: Yes, sir. I'm sorry I --

23 CHAIRMAN RANKIN: No, no. I'm -- not your
24 response, but my question. And perhaps much of what we've
25 heard today, unless it deals with, again, one of the nine

1 areas that we look at. And for damn sure, not only you
2 made the newspaper, but Mr. Field -- or Dr. Field has as
3 well, so this is not some surprise outlier of subject.

4 Perhaps this complaint might be deemed as an
5 outlier, but -- and I guess for the record, let me just
6 say, in your years of servicing on the bench have you ever
7 had a complaint filed against you, other than Mr. Bryant's
8 two thousand --

9 JUDGE MILLER: You mean ODC?

10 CHAIRMAN RANKIN: ODC -- no, I'm talking
11 about before the Commission.

12 JUDGE MILLER: Oh, well, I did last time
13 with Mr. Bryant.

14 CHAIRMAN RANKIN: Other than Mr. Bryant?

15 JUDGE MILLER: No, sir, I have not.

16 CHAIRMAN RANKIN: So now, again, I'm
17 violating this, I'm kind of out of this -- out of our nine
18 areas. But I'm curious, has anybody -- either the
19 receiver, the victims, those who are seeking payment,
20 either one complained about your service, or more
21 importantly, taking Dr. Field's complaint that it won't
22 end, taking -- the receiver or the victims taking you to
23 task for just extending this for folly?

24 JUDGE MILLER: No, sir, I don't believe so.
25 And I think that the receiver file -- in the -- in the

1 submissions is an affidavit from the receiver, also
2 Attorney Stan Case from Spartanburg, and they -- I think
3 they have described my temperament and demeanor throughout
4 the course of the case.

5 And I acknowledge I am -- I am certainly not
6 perfect. And I -- this has caused me to do a lot of self-
7 examination. And I think that's a good thing. And I know
8 that there are ways and areas in which I need to improve.
9 And given the chance, I will -- I will certainly do that.

10 CHAIRMAN RANKIN: The comment that this
11 won't end, perhaps, is because the victims are still
12 seeking the be repaid.

13 JUDGE MILLER: Yes, sir. They -- I don't
14 believe the amounts -- I didn't bring an accounting with me
15 from the receiver, but I don't believe the amounts that Dr.
16 Field referenced are accurate. Most of the monies were --
17 they had -- the receiver had to sue, had to sell property,
18 and it -- it was arduous. And I believe that had Dr. Field
19 come forward and truly cooperated, this case would have
20 been over long ago. But that is not how it has played out.

21 CHAIRMAN RANKIN: Sharon, do you have any
22 more questions?

23 MS. WILKINSON: Mr. Chairman, I just want to
24 make sure that Judge Miller's written responses which he
25 had submitted to the Commission prior to this are made a

1 part of the record.

2 CHAIRMAN RANKIN: You don't object to that?

3 JUDGE MILLER: No, sir. I do not.

4 CHAIRMAN RANKIN: All right. Then they will
5 be made a part of the record. All right. Questions from
6 members of the Commission? Representative Smith.

7 REPRESENTATIVE SMITH: Let me just ask --
8 and I'm going to concentrate on Mr. Field. I was about to
9 call him Mr. Miller too. I won't make the same mistake.
10 So when Mr. Field filed a complaint against
11 you with the ODC in 2012, did he also make a motion to
12 recuse you?

13 JUDGE MILLER: I would suspect he did. I
14 don't -- I don't have that right in front of me. And I --
15 if I can comment on that, he has a -- had a history of
16 using recusal motions, continuous motions, grievances as a
17 -- as a strategy.

18 And that's borne out in the -- in the
19 plaintiff, that being the receiver's response to the latest
20 motion to recuse, about his history as an attorney before
21 he was disbarred, and also in this case.

22 REPRESENTATIVE SMITH: And that's kind of
23 the point that I see from the submissions that we have in
24 front of the Commission. 'Cause the easy thing is, Judge
25 Miller, as in every judge is -- you know, from my

1 experience, is when asked to recuse yourself, get off the
2 case; you got plenty of other cases you can handle.

3 JUDGE MILLER: Yes, sir.

4 REPRESENTATIVE SMITH: But I was presuming,
5 and that's what I'm trying to understand, is that you took
6 this more as a strategic move by Mr. Field to just keep
7 going down the line till he got a judge to which he thought
8 would be --

9 JUDGE MILLER: Yes, sir.

10 REPRESENTATIVE SMITH: -- thought would be
11 in his corner or more sympathetic to him.

12 JUDGE MILLER: Yes, sir. I did -- and
13 that's -- you know, maybe I should have gotten out a long
14 time ago. But the receiver and their lawyers wanted me to
15 stay in because of the complexity of it, and I understood
16 it. I was not -- I wasn't -- I didn't participate in any
17 of the actions that they pursued to recover assets. I just
18 monitored their conduct.

19 REPRESENTATIVE SMITH: So in cases -- and
20 you mentioned this earlier, Judge Few, now Justice Few, got
21 assigned the case, and it was designated as complex.

22 JUDGE MILLER: Yes, sir.

23 REPRESENTATIVE SMITH: And, obviously, when
24 you have a receiver court -- that's what we call it, right?

25 JUDGE MILLER: Yes.

1 REPRESENTATIVE SMITH: A receiver court,
2 that's that one -- that's the court the judge who is over
3 the receivership, right?

4 JUDGE MILLER: Yes, sir.

5 REPRESENTATIVE SMITH: And so at that point
6 it is your job to make sure that the receiver marshals the
7 assets and distributes them where they should be
8 distributed.

9 JUDGE MILLER: Yes, sir.

10 REPRESENTATIVE SMITH: And they have to --
11 they have -- they have a duty -- a fiduciary duty the to
12 receivership and/or to the -- to the, in this case the
13 victims, to make sure that they aggressively pursue the
14 assets in order for the restitution to occur.

15 JUDGE MILLER: Yes, sir. That's my
16 understanding.

17 REPRESENTATIVE SMITH: And so with that
18 happening in a receivership, it's important that a judge --
19 it's not just rotating around from you happen to be at a
20 hearing, common pleas, non-jury motions in January. And
21 then come March we have, you know Judge Stillwell come up
22 or -- that's not -- receiverships don't operate in that
23 fashion, do they?

24 JUDGE MILLER: Yes, sir. That's correct.

25 VICE CHAIRMAN SMITH: And so, you know, I

1 guess -- you know, and I'll just be forthright with you, in
2 my initial reaction to all this is: Why didn't you just
3 recuse yourself?

4 But then I think what I want to make sure
5 that this record is complete in this, is what we have seen
6 is that there are complaints and evidence that there were
7 issues with Mr. Field's using the ODC system as a weapon in
8 order to have a judge moved on or recused. And that not
9 only happened in these cases, it appears that it's happened
10 in other jurisdictions too. Is that your understanding?

11 JUDGE MILLER: Yes, sir. That's correct.

12 VICE CHAIRMAN SMITH: All right. In regards
13 to your temperament, I presume I'm kind of -- this is,
14 basically, Mr. Bryant's complaint and covering your
15 complaint. I look on here and I -- and it's not old age
16 and it's a -- so I'm not commenting on your age, but you're
17 68 years old.

18 JUDGE MILLER: Correct.

19 VICE CHAIRMAN SMITH: Mandatory retirement
20 is at --

21 JUDGE MILLER: I have to admit that.

22 VICE CHAIRMAN SMITH: Yes. Mandatory
23 retirement is at 72.

24 JUDGE MILLER: Yes, sir.

25 VICE CHAIRMAN SMITH: So this is your last

1 hurrah in front of this commission.

2 JUDGE MILLER: Yes, sir.

3 VICE CHAIRMAN SMITH: And so tell this
4 commission -- you know, you've said, and I appreciate your
5 comments, that -- and first, let me say this: I did not
6 know anything about your wife, and I am so sorry to hear
7 that. And I can only imagine the pain and the difficulty
8 that one endures. And that's certainly -- you know, you
9 want always to strive to be a -- be the best you can be as
10 a judge.

11 JUDGE MILLER: Yes.

12 VICE CHAIRMAN SMITH: But sometimes
13 circumstances deliver you some bad news, and it causes us
14 all to have a bad day from time to time. And I certainly
15 understand that. And it doesn't sound like you're making
16 excuses for it. You're just saying, "Look, it happened."

17 What assurances are you going to give this
18 commission, that at the end of all this, I'm not
19 accountable to anybody except to my profession and to my --
20 and to the judiciary, you don't have to come back here
21 again what that -- with -- that this is not going to be the
22 way that you operate in the future for your last four years
23 on the bench?

24 JUDGE MILLER: Well, I give you my word. I
25 have -- I think if you review most of my career, I think

1 I'm pretty well liked by the Bar. And this case has pushed
2 the limits, pushed the envelope for me.

3 And but I give you my word that -- and I
4 tell you, the -- it has caused me to look at myself and
5 recognize that I need to be more aware and more astute and
6 more conscious of those issues. Because I -- if you give
7 me the opportunity, I would like to finish my career and --
8 with a good reputation, not with a old sourpuss reputation
9 or however you want to describe it.

10 VICE CHAIRMAN SMITH: Well, and I would
11 point out we look at your ballot box comments.

12 JUDGE MILLER: Yes, sir.

13 VICE CHAIRMAN SMITH: And those are -- those
14 are anonymous comments. And sometimes we get accused of
15 letting the secretive process guide some of the questions
16 and/or decisions that this commission makes. And when I
17 look at this and the -- there's a specific one on judicial
18 temperament.

19 And so when I look at this, you have 467
20 people that responded to this said that you have -- you are
21 well qualified. And the people who said you're unqualified
22 is 15. So 1.9 percent. So that would seem to have an
23 indication that the people who appear in front of you --
24 and I've never appeared in front of you, that I'm aware of.

25 But people who appear in front of you are

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess, ... Appellant,

v.

Katherine C. Hunter, ... Respondent.

**RESPONDENT'S RETURN IN OPPOSITION TO
APPELLANT'S MOTION SEEKING JUDICIAL NOTICE AND
MOTION FOR LEAVE TO SUPPLEMENT RECORD**

On the eve of oral argument, the Appellant John M. Burgess has filed a Motion Seeking Judicial Notice and Motion for Leave to Supplement the Record. The Appellant requests that the Court take judicial notice or otherwise supplement the appellate record with a copy of the testimony of Circuit Court Judge Edward W. Miller before the Judicial Merit Selection Commission at a hearing held on

November 18, 2020, which was more than two years after this case was tried. The Respondent Katherine C. Hunter opposes that motion on numerous grounds.

First, Rule 210(c), SCACR, provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." Clearly, the testimony of Judge Miller before the Judicial Merit Selection Commission in November 2020 does not comply with Rule 210(c). Not only was that testimony not presented to the trial court at the time of trial, it is collateral and extraneous to the trial itself. Additionally, final briefs in this case were filed in December 2019, and as a result, the judge's testimony was not part of the record or available to the parties at the time of the briefing of the issues on appeal. The Appellate Court Rules, and specifically Rule 211, SCACR, is not designed to be an appellate equivalent of Rule 60(b) which allows the record to be supplemented with after-discovered evidence (that is, even assuming that a judge's testimony before the Judicial Merit Selection Commission even qualifies as admissible, probative evidence which is denied). Instead, Rule 212 is designed to supplement the *appellate* record with materials presented to the lower court but for whatever reasons had been left out of the appellate record.

Second, the Appellant's reliance on judicial notice is misplaced. This Court has held that "[a] fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available

sources of indisputable reliability." *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667, 674 (Ct. App. 2012). Clearly, the testimony of Judge Miller is not fact that is subject to judicial notice. Indeed, the testimony may be accurately characterized as subjective and opinion – not facts that are common knowledge or ascertainable by reference to sources that cannot be reasonably questioned. This Court further explained that "[a] trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof." *Id.* The Appellant is misusing the doctrine of judicial notice. He is actually asking the Court to accept Judge Miller's testimony as the proof itself, not as a judicially noticed fact. However, that testimony is collateral and extraneous to the case at bar. There is, in fact, no link established between Judge Miller's testimony and the trial in this case. Moreover, that testimony also lacks due process guarantees. Obviously, the Respondent was not a party to the proceeding before the Judicial Merit Selection Commission and was not afforded the opportunity to question or cross-examine the witness. It should also be noted that the Supreme Court in *Goss v. State*, 425 S.C. 101, 820 S.E.2d 373 (2018), ruled that the court may not take judicial notice of witnesses' testimony from another proceeding. That is precisely what the Appellant seeks with his current motion.

Third, the Appellant's argument that Judge Miller's testimony is hearsay that falls within an exception is also incorrect. The Appellant argues that the testimony, while an out-of-court statement offered for the truth of the matter asserted, is allowed

as an exception to the hearsay rule under Rule 803(8), SCRE. The Respondent disputes whether Judge Miller's testimony is a statement or report of an activity of a public office, but even if it qualifies as such, Rule 803(8), SCRE, expressly excludes "opinions, judgments, or conclusions [as being] outside the scope of Rule 803(8)'s public records exception." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249, 253 (Ct. App. 2014). As mentioned above, Judge Miller's testimony is properly characterized as opinion and conclusions; his testimony regarding his judicial temperament is inherently subjective.

In sum, the request for this Court to consider the testimony of Judge Miller before the Judicial Merit Selection Commission presents a dangerous precedent and one that significantly impacts public policy concerns. If the Court accepts Judge Miller's testimony as fact, then the parties should have the right to examine Judge Miller about his comments. Of course, subjecting judges to depositions and discovery in civil cases, particularly to explore issues related to their judicial conduct, temperament, and thought processes, should not be permitted. The Courts already recognize that a legislative privilege applies for the actions and decision-making of legislators. Similarly, the testimony of judges should not be allowed as well. However, in fairness, if this Court considers Judge's Miller's testimony as evidence in this case, due process attaches to that evidence, and the Respondent should not be denied the opportunity to probe the judge's responses. To be clear, the Respondent is not asking for that opportunity but rather makes that point to emphasize that there is

no basis in law or the public policy of this State for the testimony of a judge before the Judicial Merit Selection Commission to be used for any purpose other than that for which it was taken – to determine if the judge merits reappointment.

Based on the foregoing, the Respondent respectfully requests that the Court deny the Appellant's motion.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent
Katherine C. Hunter

September 15, 2021

RECEIVED

Sep 15 2021

SC Court of Appeals

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent, does hereby certify that service of the **Respondent's Return to Appellant's Motion Seeking Judicial Notice and Motion For Leave to Supplement Record** was made upon Appellant's counsel by email only this the 15th day of September 2021 as follows:

Stephen N. Garcia, Esquire
Garcia Law, LLC
Email: stephen@scgarcialaw.com

s/ Andrew F. Lindemann



Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

September 15, 2021

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

JAMES M. DAVIS, JR.†
Direct Dial: (803) 881-8922
Email: jim@ldlawsc.com

**Also Admitted in North Carolina
†Certified Mediator*

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: John M. Burgess v. Katherine Hunter
Appellate Case Number: 2018-001423
Civil Action Number: 2017-CP-39-0428
Claim Number: 21379503
Our File Number: 307.20053

Dear Ms. Kitchings:

Pursuant to Section (b)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), please find enclosed for filing the **Respondent's Return to Appellant's Motion Seeking Judicial Notice and Motion For Leave to Supplement Record** in the above referenced matter. By copy of this letter, I am serving a copy on Appellant's counsel by email only pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021).

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Stephen N. Garcia, Esquire (w/ Enclosure, Via Email Only)

RECEIVED
Sep 15 2021
SC Court of Appeals

The South Carolina Court of Appeals

John M. Burgess, Appellant,

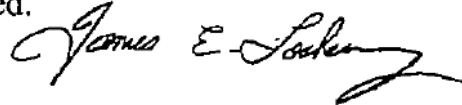
v.

Katherine C. Hunter, Respondent.

Appellate Case No. 2018-001423

ORDER

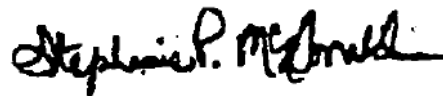
Pursuant to Rule 210(c) of the South Carolina Appellate Court Rules, the Appellant's motions requesting the Court take judicial notice and grant Appellant leave to supplement the record are denied.



J.



J.



J.

Columbia, South Carolina

cc:

Stephen N. Garcia, Esquire

Andrew F. Lindemann, Esquire

FILED
Oct 18 2021

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John M. Burgess, Appellant,

v.

Katherine C. Hunter, Respondent.

Appellate Case No. 2018-001423

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2022-UP-036
Heard September 15, 2021 – Filed February 2, 2022

AFFIRMED

Stephen N. Garcia, of Garcia Law Firm, LLC, of
Greenville, for Appellant.

Andrew F. Lindemann, of Lindemann & Davis, P.A., of
Columbia, for Respondent.

PER CURIAM: In this civil appeal, John M. Burgess asserts the trial court's facial expressions and gestures directed towards his counsel during trial prejudiced the jury and ultimately influenced the jury's verdict. Burgess also contends the

trial court erred in dismissing his motion for a new trial that followed the jury's verdict and in dismissing his amended motion for new trial. We affirm.

1. We find Burgess failed to preserve the issue regarding the trial court's facial expressions and gestures for appellate review. *See Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) ("Upon review, a trial [court]'s order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.'" (quoting *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990))); *id.* at 478–79, 567 S.E.2d at 854 (stating an appellate court's "review is limited to consideration of whether evidence exists to support the trial court's order" (quoting *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267)). In the present case, although Burgess's counsel, Stephen Garcia, had a contentious exchange with the trial court regarding the court's facial expressions, the exchange did not occur in front of the jury and Garcia failed to point to any evidence in the record describing the alleged prejudicial facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury. Further, Burgess failed to request a remedy for the prejudicial expressions and gestures—curative instructions, the court's recusal, or a mistrial. The trial lasted five days—Monday through Friday—and the expressions and gestures Burgess contends were prejudicial occurred on Monday. The contentious exchange between the trial court and Garcia occurred on Tuesday morning. Burgess failed to object or seek a remedy, orally or in writing, for the purported facial expressions and gestures the remainder of trial. Finally, while the tone and tenor of the trial court's question "are you threatening me" and the remarks that followed would have been intimidating and uncomfortable to respond to, they did not relieve Burgess of his duty to provide a sufficient record for this court's review on appeal. *See Parks v. Morris Homes Corp.*, 245 S.C. 461, 470, 141 S.E.2d 129, 134 (1965) ("The fact that counsel may have some hesitancy in making objection[s] during the trial to remarks or conduct of the court, which are considered prejudicial, does not excuse the failure to do so."); *State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) ("An appellant has a duty to provide [an appellate court] with a record sufficient for review of the issues on appeal."). Although Burgess contends a motion for a mistrial or the court's recusal would have been futile following his contentious exchange with the court, the record must contain an inkling of evidence describing the facial expressions being objected to or showing the expressions or gestures were made. *Cf. State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding an issue preserved for appellate review even though the attorney failed to object because the tone and tenor of the trial court's remarks rendered an objection futile and the trial court

made the prejudicial remarks about the attorney's gender on the record and in front of the jury).

2. Because we find Burgess failed to preserve for appellate review the issue related to the trial court's facial expressions and gestures, we decline to address whether the trial court erred in denying Burgess's motion for a new trial and his amended motion for a new trial that were based on the same grounds. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that appellate courts need not address remaining issues after deciding an issue that is dispositive of the appeal).

CONCLUSION

Based on the foregoing, the trial court's rulings are

AFFIRMED.

WILLIAMS, A.C.J., MCDONALD, J., and LOCKEMY, A.J., concur.

Feb 17 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PETITION FOR REHEARING

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Attorney for Appellant

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Attorney for Respondent

COMES NOW PLAINTIFF, by and through undersigned counsel, and files this, his Petition for Rehearing pursuant to Rule 221(a), SCACR, and in support of his Petition for Rehearing, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:

1. Although this Honorable Court states that the contentious exchange between Plaintiff's counsel and the Trial Court Judge did not occur in front of the jury, respectfully, this Honorable Court seemingly overlooks that the facial expressions and gestures occurred in the Jury's presence on Day 1 of trial and continued therewith, however, even if the complained of facial expressions and gestures had *not* continued after Day 1, Plaintiff was irreparably prejudiced by the facial expressions and gestures emanating from the Trial Court on Day 1;
2. Although this Honorable Court states that Plaintiff's counsel has failed to point to any evidence in the record describing the alleged prejudicial facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury, respectfully, this Honorable Court seemingly overlooks (1) that Plaintiff's counsel *did* place an objection on the record on Day 2 of trial (although Plaintiff's counsel was prevented from expanding on the objection) and (2) that the unsolicited Affidavit of the Juror submitted by Plaintiff at the trial level and at the appellate level recounts the very facial expressions and gestures giving rise to the this Appeal;
3. Although this Honorable Court states that Plaintiff's counsel failed to request a remedy for the prejudicial expressions and gestures, respectfully, this Honorable Court seemingly overlooks that Plaintiff's Counsel attempted to state further objections on the record but was denied the ability to speak by the Presiding Judge and was further

cautioned as to whether any further statements would be threatening to the Presiding Judge;

4. Although this Honorable Court states that Plaintiff's counsel failed to object or seek a remedy for the rest of trial (following Day 1), respectfully, this Honorable Court seemingly overlooks that Plaintiff's counsel attempted to make objections and even seek recusal on the record, but was denied the opportunity and accused (and cautioned) of threatening the Court, and further, that irrespective of whether continued, contemporaneous objections were placed on the record or not, the prejudicial effect of the Presiding Judges facial expressions and gestures on Day 1 of Trial irreparably prejudiced the Plaintiff; and
5. Although this Honorable Court states that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made, respectfully, this Honorable Court seemingly overlooks that Plaintiff attempted to introduce evidence of facial expressions and gestures from the perspective of a Juror at the trial level but that motion was denied, and further, Plaintiff has also attempted to submit that same evidence from a Juror to this Honorable Court for its review.

WHEREFORE, Plaintiff requests that the Appeal of the Orders originating from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard, and for any further relief the Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

Garcia Law, LLC

By: /s / Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191

604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
For Appellant

February 17, 2022

Greenville, SC

MEMORANDUM OF LAW

In support of his Petition for Rehearing, and pursuant to Rule 221(a), SCACR and Rule 240(c)(2), SCACR, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:

1. Although this Honorable Court states that the contentious exchange between Plaintiff's counsel and the Trial Court Judge did not occur in front of the jury, respectfully, this Honorable Court seemingly overlooks that the facial expressions and gestures occurred in the Jury's presence on Day 1 of trial and continued therewith, however, even if the complained of facial expressions and gestures had *not* continued after Day 1, Plaintiff was irreparably prejudiced by the facial expressions and gestures emanating from the Trial Court on Day 1;
2. Although this Honorable Court states that Plaintiff's counsel has failed to point to any evidence in the record describing the alleged prejudicial facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury, respectfully, this Honorable Court seemingly overlooks (1) that Plaintiff's counsel *did* place an objection on the record on Day 2 of trial (although Plaintiff's counsel was prevented from expanding on the objection) and (2) that the unsolicited Affidavit of the Juror submitted by Plaintiff at the trial level and at the appellate level recounts the very facial expressions and gestures giving rise to the this Appeal;
3. Although this Honorable Court states that Plaintiff's counsel failed to request a remedy for the prejudicial expressions and gestures, respectfully, this Honorable Court seemingly overlooks that Plaintiff's Counsel attempted to state further objections on the record but was denied the ability to speak by the Presiding Judge and was further

cautioned as to whether any further statements would be threatening to the Presiding Judge;

4. Although this Honorable Court states that Plaintiff's counsel failed to object or seek a remedy for the rest of trial (following Day 1), respectfully, this Honorable Court seemingly overlooks that Plaintiff's counsel attempted to make objections and even seek recusal on the record, but was denied the opportunity and accused (and cautioned) of threatening the Court, and further, that irrespective of whether continued, contemporaneous objections were placed on the record or not, the prejudicial effect of the Presiding Judges facial expressions and gestures on Day 1 of Trial irreparably prejudiced the Plaintiff; and
5. Although this Honorable Court states that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made, respectfully, this Honorable Court seemingly overlooks that Plaintiff attempted to introduce evidence of facial expressions and gestures from the perspective of a Juror at the trial level but that motion was denied, and further, Plaintiff has also attempted to submit that same evidence from a Juror to this Honorable Court for its review.

DISCUSSION

This Honorable Court has opined, in support of its Affirmation of the Trial Court's Final Judgment, that the contentious exchange between Plaintiff's Counsel and the Presiding Judge did not occur in the presence of the Jury, and further, that Plaintiff's Counsel failed to point to any evidence in the Record describing the alleged facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury. Further, this Honorable Court opines that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made and that Plaintiff failed to seek objections or remedy the rest of trial. Respectfully, the Appellant offers that this Honorable Court may have overlooked or misapprehended the facts and/or record in reaching its opinion. Specifically, the behavior of the Presiding Judge occurred on Day 1 of trial and continued therewith through the rest of trial. Plaintiff was denied the opportunity to state specific objections on the record by the Presiding Judge at the Trial.¹ Further, the Appellant has offered, as part of the Record on Appeal, an Affidavit that specifically highlights not only the observed facial expressions and gestures, but further, that jurors perceived the facial expressions and gestures and were influenced by them.²

First, Appellant has not argued that the contentious exchange between Plaintiff's counsel and the Presiding Judge are grounds, alone, for reversal of the Judgment appealed. That very contentious exchange only served the purpose of placing on the record the Plaintiff's objection(s) to what had been observed but not fully understood on Day 1 of trial. Appellant further pointed to the contentious exchange occurring at the start of Day 2 of trial to highlight that (1) the Presiding Judge did not deny making facial expressions and gestures that allegedly prejudiced the Jury

¹ R. p. 200-201 and p. 612 (Where Plaintiff's counsel was prevented, at both instances, of stating objections on the record.)

² R. p. 16-17.

during the contentious exchange, and that (2) the contentious exchange included the Presiding Judge's denial of Plaintiff 's counsel's attempt to make a record of the alleged facial expressions and gestures. What I ask this Honorable Court to reconsider is that the facial expressions and gestures occurring on Day 1 alone and cited as grounds for appeal and reversal created an insurmountable and irreparable bias with the Jury that could not be corrected by mere curative statements. Further, whether the facial expressions and gestures cited as grounds for reversal continued after Day 1 or not does not minimize the prejudicial effect of what occurred on Day 1 of trial. In essence, the Appellant argues that the damage had been done on Day 1 of trial and that this Honorable Court need not look any further than Day 1 of trial to determine that the *entire* trial for the Plaintiff had been tarnished by the Presiding Judge and that Plaintiff was prejudiced therewith.

Even if the Appellant conceded that a request for a curative statement and/or further objections may have minimized the prejudicial effect that the facial expressions and gestures had upon the Jury on Day 1 (or at any time thereafter), the Plaintiff was not afforded an opportunity to state his objections on the record.³ The Appellant argues that there was a sufficient record established by the Plaintiff's counsel at the beginning of Day 2 of trial to support reversal. Appellant further offers to this Honorable Court that apart from the objection(s) stated on the record at the beginning of Day 2 of trial, the Appellate Record *also* contains evidence describing the alleged, prejudicial facial expressions and gestures by way of the Juror Affidavit. Appellant submitted the unsolicited Affidavit of a Juror⁴ that alleges not only facial expressions and gestures emanating from the Presiding Judge but also how those expressions and gestures were allegedly

³ R. p. 200-201 and p. 612

⁴ R. p. 16-17.

perceived by the Jurors *prior to deliberations*.⁵ Appellant would also call to the attention of this Honorable Court that the Plaintiff was not fully aware of the breadth of the Jury's perception of the Presiding Judge's alleged facial expressions, gestures, and other behavior nor their effect on the Jury until *after* trial and only did later because a Juror contacted the Plaintiff's counsel immediately after the trial had concluded. Plaintiff attempted to introduce this Affidavit of Juror by motion to develop the record regarding the alleged facial expressions and gestures, but this Motion was dismissed by the Trial Court.⁶ The only method available to Plaintiff to make the Juror's Affidavit a part of the Trial Record is by way of motion. Plaintiff tracked the language of *Gray v. Bryant* and presented this Juror testimony to the Trial Court.⁷ This statement of the Juror was not available to the Plaintiff until after the trial had concluded, and the Plaintiff filed its motion consistent with *Gray v. Bryant*.⁸

CONCLUSION

Plaintiff attempted to place objection(s) on the record but was denied the opportunity to do so. Further, Plaintiff was irreparably harmed by the alleged facial expressions and gestures made by the Presiding Judge on Day 1 of trial. Plaintiff further attempted to develop the record regarding facial expressions and gestures after being alerted by a Juror that the facial expressions and gestures that occurred on Day 1 of trial. Plaintiff requests that the Appeal of the Orders originating

⁵ Appellant recognizes the precedence regarding the inadmissibility of statements made by jurors during deliberations and the potential exceptions therewith, however, Appellant notes that the Affidavit of Juror also includes alleged statements made by jurors prior to deliberations and during the pendency of the trial.

⁶ R. p. 6-31.

⁷ *Gray v. Bryant*, 298 S.C. 286, 379 S.E.2d 894 (1989).

⁸ *Id.* at 287; "It is our view that Rules 59 and 60(b) must be read together. Rule 60(b), S.C.R. Civ. P., reads in pertinent part: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard,
and for any further relief the Court deems just and proper.

Garcia Law, LLC

By: /s / Stephen N. Garcia
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For Appellant

February 17, 2022

Greenville, SC

Feb 17 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Katherine Hunter by email on February 17, 2022 and addressed to her attorney of record: **Andrew F. Lindemann, Esq., Andrew@LDH-Law.com.**

February 17, 2022

/s/ Stephen N. Garcia

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Attorney for Appellant

RECEIVED

Mar 10 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess,..... Appellant,

v.

Katherine C. Hunter,..... Respondent.

RETURN TO APPELLANT'S PETITION FOR REHEARING

The Appellant John M. Burgess has petitioned this Court for a rehearing of its recent unpublished opinion in *Burgess v. Hunter*, Op. No. 2022-UP-036 (S.C. Ct. App. filed February 2, 2022). In response, the Respondent Katherine C. Hunter submits that this Court properly ruled on the issues challenged by the Appellant in his petition for rehearing.

The Appellant asserts that trial judge denied his counsel the opportunity to place objections on the record. That is not supported by the record. The Appellant made no attempt on day one of the trial to make any objection, let alone a contemporaneous objection. He now claims that the "facial expressions and gestures" by the trial judge on day one of the trial were alone sufficient to deny him a fair trial. Yet, the Appellant cannot point to a single objection asserted on day one.

At the commencement of day two, there was an exchange between Appellant's counsel and the trial judge outside the presence of the jury, where counsel raised the issue of “facial expressions” of the trial judge while he was conducting witness examinations the previous day. Importantly, the Appellant made no motion for recusal nor a motion for mistrial. His counsel, in fact, advised the court that “I’m not necessarily asking for any recusal or anything along those lines.” (R. 200). He also did not request any curative instruction. Critically, there was no request for *any action* which would serve as a basis for the new trial that he now seeks.

Thereafter, the Appellant had four additional days of trial; yet, he never again raised any objection, contemporaneous or otherwise, to the judge’s alleged conduct. He had four days to seek some corrective action if he believed that the judge’s facial expressions or gestures were deriving him of a fair trial. He took no such action. Not a single contemporaneous objection was made throughout five days of trial. Moreover, to the extent he claims that the trial judge would not permit an oral objection to be made, that is not supported by the record. But most importantly, if the Appellant's counsel was not comfortable making an oral objection or an oral motion for recusal or an oral motion for a mistrial or an oral motion for a curative instruction, there was nothing stopping him from filing a written objection or motion. Again, the trial lasted five days. He was given many opportunities – for instance, each evening between the days of trial presented an opportunity to e-file a written objection or motion. Nothing was filed. It was not until the case was over and an adverse verdict returned, that the Appellant filed a written motion seeking relief. That was simply too late. A litigant cannot sit on its rights and then assert them only after he lost.

Next, as previously alluded to, the Appellant claims to have been “irreparably harmed” to a sufficient degree on day one of the trial to warrant a new trial. This is an argument made for

the first time on rehearing, which is not permissible. *See, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review). Nonetheless, the Appellant has not presented evidence of the judge's alleged "facial expressions and gestures" on day one, nor has he demonstrated any prejudice. Finally, as mentioned, there is certainly no contemporaneous objection or request for any relief – be it recusal or a mistrial or even a curative instruction – that was made on day one. This argument, therefore, should be rejected on procedural and substantive bases.

Finally, the Appellant contends that the record contains "evidence describing the alleged prejudicial facial expressions and gestures by way of the Juror Affidavit." This is presumably in response to the Court's ruling that the Appellant "failed to point to any evidence in the record describing the alleged prejudicial facial expression and gestures or demonstrating actual bias or prejudice from the judge or jury." (Slip Op. at 2). However, the Appellant fails to recognize that in his adjudication of the Amended Motion for New Trial, the trial judge ruled the Lee affidavit inadmissible under Rule 606(b) of the South Carolina Rules of Evidence. That ruling *was not appealed*, and thus constitutes the law of the case. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

Nonetheless, even if the Appellant had appealed the exclusion of the Lee affidavit, he would not prevail. The affidavit is presented in an attempt to describe the alleged facial expressions, gestures, and "lack of attention" by the trial judge during the trial itself. That is not a proper use of a juror affidavit per Rule 606(b). A juror affidavit cannot be used, in essence, to supplement the trial record after the fact to describe what the juror allegedly saw take place in the courtroom during the trial. Moreover, the Lee affidavit is also used to describe juror

comments allegedly made before and during deliberations in the juror room as well as to give Juror Lee's opinions on the impact of the judge's alleged conduct on other jurors. Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). Likewise, Juror Lee cannot speculate as to the decision-making process for other jurors. *See, Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008). *In fact, Lee never even states that the trial judge's conduct influenced his own decision in the case.* Finally, such commentary alleged made by other jurors is hearsay without an exception. Thus, for these additional reasons, the Lee affidavit was correctly ruled inadmissible in accordance with Rule 606(b).

Finally, the accuracy of the affidavit is highly questionable when compared to what can be gleaned from the official record of the trial.¹ As far as the description of the trial judge's conduct, Juror Lee claims that judge appeared disinterested because he would "glance at the clock" and "was always on his laptop." (R. 16). Of course, that is not abnormal or prejudicial conduct. Judges will look at the clock to determine how long testimony has proceeded and to assess when breaks should be taken. Judges will also use a laptop computer to keep abreast of other legal matters, review applicable rules, case law, or statutes as the case proceeds, prepare or review jury charges, and numerous other absolutely proper behaviors.

Juror Lee suggests that the judge was "distracted" and did not pay attention so that he needed questions repeated to rule on objections. (R. 16). A review of the record shows that

¹ The Court is also reminded that Juror Lee sent his counsel an email within a few hours after the jury was discharged. (R. 8, 15). That email was never produced and is not in the record. Thus, its contents are unknown. The Appellant's counsel had no explanation for why that email was not made a part of the record.

occurred one time during a five-day trial. (R. 187). Juror Lee alleges that the trial judge told the Appellant's counsel to "get to the point" and not to be "talking in circles." (R. 16). There is no such quote in the record. Juror Lee claims that the trial judge told the Appellant's counsel to "make it brief." (R. 16). In actuality, that occurred when the Appellant's counsel rose to make his rebuttal closing argument, and the judge said, "All right, briefly." (R. 579). Of course, the trial judge has a responsibility to manage a trial, including encouraging counsel to be direct and to the point and not to be repetitive or cumulative and to move the trial along so as not waste the court's and jurors' time. That is not inappropriate or prejudicial conduct by a trial judge. Thus, the Court is correct in its ruling that there is no competent evidence of the alleged prejudicial facial expressions and gestures.

In sum, the Court correctly affirmed the judgment entered in the court below. The Appellant is not entitled to a new trial absolute. The Respondent Katherine C. Hunter, therefore, respectfully requests that this Court deny the Appellant's petition for rehearing.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
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March 10, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

RECEIVED
Mar 10 2022
SC Court of Appeals

John M. Burgess,..... Appellant,

v.

Katherine C. Hunter,..... Respondent.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent, does hereby certify that service of the **Return to Appellant's Petition for Rehearing** was made upon Appellant's counsel by email only this the 10th day of March 2022 as follows:

Stephen N. Garcia, Esquire
Garcia Law, LLC
Email: stephen@scgarcialaw.com

s/ Andrew F. Lindemann



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March 10, 2022

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**Also Admitted in North Carolina
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Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: John M. Burgess v. Katherine Hunter
Appellate Case Number: 2018-001423
Civil Action Number: 2017-CP-39-0428
Claim Number: 21379503
Our File Number: 307.20053

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Amended Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Return to Appellant's Petition for Rehearing** in the above referenced matter. By copy of this letter, I am serving a copy on Appellant's counsel by email only pursuant to Section (d)(1) of the same Order.

Thank you for your assistance in this matter. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Stephen N. Garcia, Esquire (w/ Enclosure, Via Email Only)

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

**APPELLANT'S REPLY TO
RESPONDENT'S REPLY TO
APPELLANT'S PETITION FOR REHEARING**

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COMES NOW APPELLANT, at the request of this Honorable Court and by and through undersigned counsel, and files this, his Reply to Respondent's Return to Appellant's Petition for Rehearing pursuant to Rule 221(a), SCACR. Respondent, in his Reply, lists various points of contention regarding Appellant's Petition for Rehearing. I will attempt to address the various points chronologically.

Respondent argues that Appellant made no attempt on day one of trial to make any objection, let alone a contemporaneous objection, and further, that Appellant made no motion for mistrial or recusal on day one of trial.

Although the Respondent is factually correct in asserting that the Appellant made no attempt to make an objection on day one of trial, respectfully, the Respondent fails to recognize the realities of a civil trial, and specifically, the realities of the trial at issue in this instant matter. Specifically, Appellant's counsel was not aware that the facial expressions and gestures occurring on day one of trial were an issue at all, although he admittedly did have some concerns and suspicions. Simply put, the way the courtroom was situated did not allow the Appellant's counsel to simultaneously observe the testifying witness, jury, *and* Presiding Judge. It is not physically possible to do so. Instead, the Appellant's counsel relied on his staff, Appellant, and designated expert (who had been observing the trial on day one) to determine that an issue arose that required an objection or statement on the record. Quite frankly, Appellant's counsel did not make an objection on the record on day one because the Appellant's counsel was not aware of the gravity of the situation until day one had adjourned. The objection (and attempted oral motion for recusal) were made at the first possible moment after returning to the courtroom on day two of trial.

Respondent argues that Appellant made no objection in the subsequent four days of trial; Respondent further argues that Appellant is improperly arguing, for the first time, that the prejudicial effect of facial expressions and gestures on day one alone was enough to warrant a new trial.

This position is factually incorrect. The Appellant's counsel indeed attempted to state an objection on the record at the opening of day two of trial.¹ The record clearly demonstrates that Appellant's counsel was not done stating his objection to what transpired on day one of trial when he was cut off by the Court.² After being accused of threatening the Court and in an attempt to seek recusal and/or a mistrial, Appellant's counsel asked the Court whether he could respond, and the Court *denied* the Appellant's counsel the opportunity to respond.³ At a minimum, the Appellant's concerns regarding facial expressions and gestures that occurred throughout day one of trial were preserved, and any shortcomings in their detailed preservation were not because the Appellant's counsel failed to state objections, but rather, because the Court prohibited the Appellant's counsel from fully stating his objections and concerns. However, looked at more favorably, under the guidance of *State v. Pace*, the Appellant was not required to pursue any further objection(s) on the record because it was clear at that point that any further objection(s) would be futile at best.⁴

That leads us to the discussion regarding whether the Appellant now improperly argues, for the first time, that the prejudicial effect of facial expressions and gestures from the Court on day one alone is grounds for a new trial. This is not a new argument at all. The Appellant has consistently argued that the facial expressions and gestures emanating from the bench from day

¹ R. p. 200-201.

² *Id.*

³ *Id.*

⁴ *State v. Pace*, 361 S.C. 71, 447 S.E.2d 186 (1994).

one of trial were prejudicial in nature.⁵ The Appellant has also argued that the facial expressions and gestures emanating from the bench throughout the pendency of trial was prejudicial and grounds for a new trial.⁶ The argument that the facial expressions and gestures emanating from the bench on day one would alone be grounds for a new trial is encompassed within the entire position of the Appellant and not a new argument.

Respondent argues that it was not until the case was over and an adverse verdict returned that the Appellant filed a written motion seeking relief.

Again, this position ignores the realities of the case at hand. It was not until after trial that the Appellant received notice from a juror that the facial expressions and gestures occurring on day one and throughout trial were perceived by the jury and potentially biased the jury. It simply was not possible to anticipate that the facial expressions and gestures of which the Appellant had previously complained would present themselves as additional evidence in the form of an Affidavit by a juror.⁷ The Motion was filed to bring to the Court's attention that additional evidence existed that went directly to the issue of bias and the effect that the facial expression and gestures had on the jury.

⁵ See Appellant's Brief, page 12, line 14.

⁶ See Appellant's Brief, page 16.

⁷ Record, p. 15 through 17.

Respondent argues that the trial judge ruled on the admissibility of the Juror's Affidavit, and further, that the ruling of inadmissibility of the Juror's Affidavit was not appealed, thereby making the inadmissibility of the Juror's Affidavit the law of the case.

The Respondent argues that the trial judge has ruled on the issue of inadmissibility of the Juror Affidavit in his Order dated July 19, 2018.⁸ This position is misplaced. The trial judge ruled that the “Court does not have jurisdiction to rule on this motion because it is improvidently filed and improperly before the court.”⁹ The trial judge, in his Order, stated again, “[T]he Court does not have jurisdiction of the motion.”¹⁰ The Court, in dicta, stated it’s opinion regarding the potential admissibility of a juror’s affidavit, but did not specifically make any ruling or finding as to the admissibility of the juror’s affidavit itself. The only ruling made by the Court regarding the Amended Motion for New Trial is that it did not have jurisdiction to rule on the Motion.

Respondent now relies on *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) for the proposition that an unappealed ruling, right or wrong, is the law of the case. However, the doctrine of the law of the case only applies to an order or ruling which finally determines a substantial right... and where an Order does not specifically rule on the issue, such issue is not the law of the case.¹¹ The only issue specifically ruled upon was that the Court did not have jurisdiction to hear the motion. The issue of whether the Affidavit was admissible or not played no part in the Court’s decision to dismiss the motion. It is respectfully submitted that the inadmissibility of the affidavit is not the law of the case.

⁸ Order denying Amended Motion for new Trial, R. p. 31.

⁹ Record, p. 29.

¹⁰ *Id.*

¹¹ *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 785 S.E.2d 778, 785 (2013).

Respondent argues that a juror's affidavit cannot be used to supplement the trial record after the fact to describe what the juror allegedly saw take place.

The Respondent softened their position a bit by stating that Rule 606 draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. Respondent admits that the rule allows evidence of extraneous influence to be introduced. On this we agree. The Affidavit of the Juror was offered to the trial judge to vet the veracity of the juror and to consider the effect that the facial expressions and gestures may have had on the jury as a whole. The trial judge refused to entertain the Motion on jurisdictional grounds. The Appellant does not simply argue that the Affidavit should be considered part of the record. More precisely, the Appellant argues that by refusing to even entertain the Amended Motion, the Appellant was divested of the opportunity to make the Affidavit part of the record, and this was error.

WHEREFORE, Plaintiff requests that the Appeal of the Orders originating from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard, and for any further relief the Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

Garcia Law, LLC

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For Appellant

April 4, 2022

Greenville, SC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Reply to Respondent's Return to Appellants Petition for Rehearing on Katherine Hunter by email on April 4, 2022 and addressed to her attorney of record: **Andrew F. Lindemann, Esq., Andrew@LDH-Law.com.**

April 4, 2022

/s/ Stephen N. Garcia
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The South Carolina Court of Appeals

John M. Burgess, Appellant,

v.

Katherine C. Hunter, Respondent.

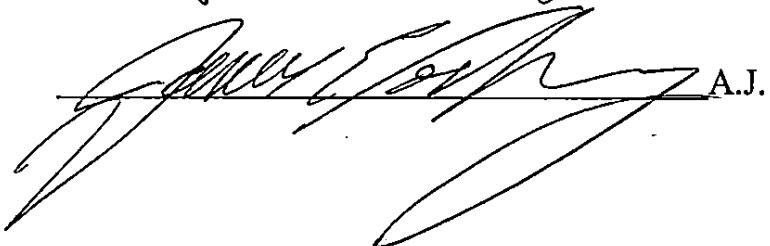
Appellate Case No. 2018-001423

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.



 A.J.

Columbia, South Carolina

cc:

Stephen N. Garcia, Esquire

Andrew F. Lindemann, Esquire

The Honorable Edward W. Miller

FILED
Apr 21 2022