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IN THE COMMON PLEAS COURT
PORTAGE COUNTY, OHIO

- - -

FLORENCE TOLSON,)	
)	
Plaintiff,)	
)	
vs.)	No. 92 CV 00428
)	
PINE LAKE LODGE, et al.,)	
)	
Defendants.)	

- - -

Deposition of VIRGIL HOWARD CHAMBERS, an Expert
Witness, called by the Plaintiff for cross-examination,
pursuant to the Rules of Civil Procedure, taken before me,
the undersigned, Stephanie R. Dean, a Stenographic
Reporter and Notary Public in and for the State of Ohio,
at the offices of Willis & Linnen Co., L.P.A., 789 West
Market Street, Akron, Ohio, on Thursday, the 13th day of
January, 1994, at 2:00 o'clock, p.m.

- - -

1 APPEARANCES:

2 On behalf of the Plaintiff:

3 Willis & Linnen Co., L.P.A.;

4 By: Mark C. Willis, Attorney at Law,
5 789 West Market Street,
Akron, Ohio 44303.

6 On behalf of the Defendants:

7 Gallagher, Sharp, Fulton & Norman;

8 By: Kenneth A. Calderone, Attorney at Law,
9 Sixth Floor, Bulkley Building,
10 1501 Euclid Avenue,
Cleveland, Ohio 44115.

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1 VIRGIL HOWARD CHAMBERS

2 of lawful age, an Expert Witness, having been first duly
3 sworn, as hereinafter certified, deposed and said as
4 follows:

5 CROSS-EXAMINATION

6 By Mr. Willis:

7 Q Mr. Chambers, would you please state your full name
8 for the record?

9 A Virgil Howard Chambers.

10 Q And your address?

11 A 776 -- correction on that. It is 2 Penrose Street,
12 Harrisburg, 17109.

13 Q That's Harrisburg, Pennsylvania?

14 A That's correct. I'm sorry.

15 Q What was that zip code?

16 A 17109.

17 Q Mr. Calderone has faxed me a copy of, I assume this
18 is your resume. Why don't we mark this as an
19 Exhibit real quick, and I'll ask you if that is, in
20 fact, what it is, and if that's complete.

21 A Page 1 isn't there. There it is, I'm sorry. What's
22 the date on it?

23 This is a typical resume that I would have on
24 file. It, by no means, reflects all my background
25 in water safety. (Indicating)

1 MR. WILLIS: Let's mark that as an
2 Exhibit.

3 (Plaintiff's Exhibit 1 was
4 marked for identification.)

5 By Mr. Willis:

6 Q And that document we're referring to is what she has
7 marked as Exhibit 1, correct?

8 A That's correct.

9 Q You say it does not reflect all your training --

10 A All my water safety training and experience.

11 Q What is it lacking?

12 A What is it lacking?

13 Q Yes.

14 A It is lacking a lot of the lifeguard experience that
15 I've had as summer employment, seasonal employment.

16 Q Anything else?

17 A I believe my Navy experience is somewhat sketchy
18 there, just highlighted, but I do have some
19 lifeguarding water safety experience in the United
20 States Navy. I'm not sure all the awards that I've
21 received are listed here. I have received lifeguard
22 competition recognition, and that's not listed here.

23 I'm trying to isolate those particular aspects
24 of my background that would relate to this case.
25 Like I said, there's other water safety experience

1 that I've had with -- well, that could be covered
2 under the consulting, considerable experience in
3 consulting with agencies, law firms and individuals
4 on boating and water safety in the area of
5 lifeguard, safety equipment and river hazards.
6 That's a catchall.

7 Q Do you have a more complete resume?

8 A No, I do not have a more complete resume.

9 Q How are you currently employed?

10 A I am employed by the Commonwealth of Pennsylvania as
11 a Boating and Water Safety Manager.

12 Q How long have you been so employed?

13 A Approximately 16 years.

14 Q And what are the duties of that job?

15 A I believe they're outlined in the resume there, but
16 basically what I do is direct boating and water
17 safety programs for the Pennsylvania Fishing &
18 Boating Commission, I review accidents, I conduct
19 classes, I develop and implement programs, deal with
20 the media when it comes to boating issues, help
21 write regulations, supervise a staff of
22 professionals.

23 Q This indicates you're Chief of the Pennsylvania
24 Fishing & Boating Commission, Boating Education
25 Division.

- 1 A That's correct.
- 2 Q Is that your official title?
- 3 A Yes, that's an official title.
- 4 Q You say "Boating and Water Safety Manager"?
- 5 A There's a number of official titles.
- 6 Q You wear a lot of hats?
- 7 A No, they're all the same title, it just depends on
8 how it appears. On a paycheck, it appears one way,
9 on my business card, it appears another way. For
10 clarity for the public, simplifying things, I say
11 I'm a Boating and Water Safety Manager, Chief of
12 Boating and Water Safety Education, Chief of Boating
13 Education. It appears a number of different ways,
14 but it's all the same.
- 15 Q Have you had any education, training or experience
16 in operating a public bathing beach?
- 17 A Yes.
- 18 Q And what education, training or experience would
19 that be?
- 20 A I worked for the Department of Forest & Waters in
21 the Commonwealth of Pennsylvania as a Head Lifeguard
22 during the summer of '69 and '70 in charge of a pool
23 and in charge of a bathing beach.
- 24 Q And that would be experience then as a lifeguard?
- 25 A That wouldn't be the only experience. Since 1969,

1 approximately every summer, until 1978, I
2 lifeguarded at a different facility.

3 Q Were all those State facilities?

4 A No, they were not. The only State facility was in
5 1969 and '70, and I believe in 1972 I also guarded
6 with the State. Other than that, it's been
7 municipal pools, county park and recreation
8 facilities.

9 Q In all those employments, were you working as a
10 lifeguard? Is that what you were doing?

11 A I was working as a lifeguard, Pool Manager,
12 Lifeguard Supervisor, but my duties did involve time
13 as a lifeguard, watching the people, being
14 responsible for the safety of the patrons.

15 Q Do you differentiate between lifeguarding and
16 lifesaving?

17 A There is a difference between lifeguarding and
18 lifesaving.

19 Q Do you have any special education, training or
20 experience with regards to lifesaving?

21 A I do. In the Navy, I was involved in lifesaving
22 skills and techniques as a first-class swimmer for
23 the United States Navy. I also have received,
24 through the American Red Cross, lifesaving training,
25 primarily junior lifesaving at one time, and then,

1 of course, senior lifesaving, that was then changed
2 to advanced lifesaving, and that program no longer
3 exists. It's basically under the umbrella of
4 lifeguard training or basic lifeguarding or Water
5 Safety Instructor, which I've been a Water Safety
6 Instructor since 1976, I believe, maybe '75.
7 Actually, I'm sorry, I'll correct that. I've been a
8 Water Safety Instructor since 1970, I believe it
9 was.

10 Q Have you had any education, training and experience
11 in water rescue?

12 A Yes.

13 Q What is that?

14 A I am Program Director for the National Association
15 for Search & Rescue. I am the Water Rescue Director
16 for NASR. I'm also the developer of the national
17 program in water rescue that has basically been
18 adopted by several states, including Florida,
19 Minnesota, Delaware, Connecticut, Pennsylvania, and,
20 of course, I've been involved in the water rescue
21 program in the State of Ohio.

22 Q Do you get involved in the actual hands-on, we'll
23 call it, water rescue?

24 A Yes.

25 Q Do you have an opinion whether there's a difference

1 between lifeguarding a lake and lifeguarding a pool?

2 A There is a difference between lifeguarding a lake
3 and lifeguarding a pool.

4 Q And what is your opinion?

5 A Lifeguarding a lake can be considered more technical
6 and more difficult primarily because with an open
7 body of water, you have factors such as the clarity
8 of the water, the bottom depth, the depth of the
9 water is not clearly marked as it is in a pool,
10 people are not sure where the bottom is, so you have
11 to be very careful in guarding.

12 There are many times debris in the water
13 arrive there through natural environmental
14 conditions, could be underwater brush or debris that
15 may be floating by, there could be currents that may
16 exist because of springs, and basically waterflows
17 that could exist in the open water condition on a
18 lake.

19 Q So would it be your opinion that lifeguarding a lake
20 is more difficult than lifeguarding a pool?

21 A I don't like to speak in absolutes, but, generally
22 speaking, yes.

23 Q Have you been to Pine Lake Lodge?

24 A Yes, I have.

25 Q How many times?

- 1 A Once.
- 2 Q When was that?
- 3 A The date?
- 4 Q Approximately.
- 5 A It was November 23 of this year, excuse me, of 1993.
- 6 Q When you were there, did they still have all the
- 7 docks and roped divider and diving boards and all
- 8 the apparatus in the water, or had that been removed
- 9 for the year?
- 10 A When I was there, there were docks in the water.
- 11 There was not -- I do not believe there was a
- 12 lifeline set up. The various apparatus like the
- 13 rings, the diving boards, the sliding boards,
- 14 everything was there. The main guard chair was
- 15 there. Basically I'm not really able to, with any
- 16 accuracy, tell you what was there as opposed to what
- 17 was there at the time of the accident because I'm
- 18 not sure what was there. When I was there, like I
- 19 said, the docks were out, and various apparatus was
- 20 there. There was not a lifeline across the small
- 21 lake at that time.
- 22 Q You're aware, though, they have an area roped off
- 23 for the bathing beach?
- 24 A Yes. I was shown where that line connects on the
- 25 one bank and then goes across behind the docks and

1 connects on the other side of the diving area, so I
2 was explained that.

3 (Conference was had between
4 Mr. Calderone and the Witness.)

5 By Mr. Willis:

6 Q What all did you do at Pine Lake Lodge when you were
7 there visiting?

8 A Basically I just examined the facility. I made some
9 very primitive tests on a concern with scanning,
10 lifeguard scanning and lifeguard reaction time of
11 how long it would take a lifeguard to go from
12 Point A to Point B, how effective a lifeguard would
13 be able to scan that particular facility in the area
14 of responsibility while sitting at the main chair,
15 and if they were down from the main chair. I also
16 talked to Mr. Bly on how he conducts his operation,
17 and on some of the aspects of the facility and the
18 guards.

19 Q Did he share with you any documents or records that
20 he keeps?

21 A No, he did not.

22 Q Did you measure the water depth in the diving area?

23 A No, I did not.

24 Q Do you have any idea how far off the water the
25 diving board -- we'll call them the platform level

1 boards are, the depths?

2 A From my experience, I would say they're one-meter
3 boards.

4 MR. CALDERONE: Let me make sure I
5 understand your question. You want to know
6 what the different --

7 MR. WILLIS: Heights of the boards are
8 from the water.

9 MR. CALDERONE: There are different boards
10 at different heights there.

11 MR. WILLIS: I'm talking about the lower
12 ones.

13 THE WITNESS: Right. It's a one-meter
14 board.

15 By Mr. Willis:

16 Q Were you shown which board Mr. Whitecloud had dove
17 off of?

18 A I believe I was.

19 Q Was that one of the one-meter boards?

20 A That's correct.

21 Q Who else was present when you were at Pine Lake
22 Lodge?

23 A Ken was there, and the other Attorney from that
24 firm.

25 Q Mr. Petrov?

- 1 A Yes, Mr. Petrov.
- 2 Q Did you throw Ken in to see how he did?
- 3 A No, he didn't go near the water.
- 4 Q And Mr. Bly, I take it?
- 5 A Yes, Mr. Bly was there.
- 6 Q Was there anybody else there?
- 7 A Yes, my transportation was there, Pam Dillon, who
- 8 lives north of Columbus.
- 9 Q Anybody else?
- 10 A No, I don't believe there was anybody else there.
- 11 Q What material have you reviewed in this case?
- 12 A What material have I reviewed?
- 13 Q Documents, treatises, depositions, other materials
- 14 that you've been provided. What all have you
- 15 reviewed in this case?
- 16 A We'll start with depositions. I did review the
- 17 deposition from Colleen Smith, I believe the
- 18 lifeguard who was on duty. I also reviewed the
- 19 deposition from Fil, who was the other lifeguard who
- 20 was on the premises at the time. I also reviewed
- 21 the deposition from Marvin Bly, the owner of the
- 22 facility. I also reviewed the deposition of
- 23 Veronica --
- 24 Q Kovan?
- 25 A -- Kovan, and I examined some documents that dealt

1 with the license of the facility. I examined the
2 Ohio Code, I believe, that dealt with swimming
3 facilities.

4 Q Let's stop there.

5 There's an Ohio Guide to Bathing Beaches,
6 paraphrasing, and there's an Ohio Administrative
7 Code with regard to regulations with swimming pools,
8 et cetera.

9 Which are you talking about? Both?

10 A I'll be perfectly honest with you, I looked at both
11 of those documents, and I did not really examine
12 them or scrutinize them very close. My basic
13 testimony or involvement in the case does not deal
14 with statute or law or code, it primarily deals with
15 what I refer to as standard of care.

16 Q We're going to talk about that.

17 What else did you review in this case?

18 A There were some photographs of the facility that
19 were available to me. Basically, as far as the
20 information that was supplied from Ken's office, I
21 believe that was the extent of it.

22 MR. CALDERONE: Didn't I give you the
23 Coroner's Report?

24 THE WITNESS: I'm sorry. There was the
25 Coroner's Report. Again, I glanced through

1 that. I'm not a medical doctor, so I don't --

2 By Mr. Willis:

3 Q Are there any documents that you would like to
4 review that you haven't seen or don't know if they
5 exist?

6 A Not at this point, not particularly that I can think
7 of.

8 Q You indicated you investigated these kind of
9 accidents for the State of Pennsylvania?

10 A No, I did not. I investigated boating and water
11 safety accidents. This is a lifeguarding type
12 situation. I do not normally get involved with
13 lifeguards in the State of Pennsylvania through my
14 job.

15 Q Consulting?

16 A Consulting, yes, but not through my job.

17 Q Now, that's what Mr. Calderone has supplied you.

18 What have you looked at on your own, books,
19 treatises, information?

20 A You mean particularly for this case, or things that
21 I've examined that I know exist that would relate to
22 this case? There are documents.

23 Q Let's talk about both. You can split that up.

24 A I did look at the lifeguarding text.

25 Q American Red Cross?

1 A American Red Cross, yes, the YMCA text on lifeguard.
2 I'm trying to think if there's anything else in
3 particular that I looked at for this case. I didn't
4 broaden my investigation for this case because I
5 took into consideration the training that the
6 lifeguard had, and as far as I was concerned, if
7 that's the way she was trained and that's the way
8 she was trained to act under the manuals that she
9 had, that would be fine, but there are other
10 manuals, the U.S. Lifesaving Association Manual that
11 I'm familiar with; there's a video, Making a
12 Difference, which is a lifeguard training video;
13 Drowning Fact & Myth, which is a video out by Water
14 Safety Productions, Mr. Frank Pia. There are a
15 number of things that I'm aware of.

16 MR. CALDERONE: He wants to know the
17 things that you relied upon in your making
18 your opinion in this case.

19 A It's difficult to say. It's a collection of really
20 all these things and my experience.

21 By Mr. Willis:

22 Q We talked about earlier -- are there any documents
23 or treatises that you're going to present at trial?
24 Are you aware of any that you plan on bringing to
25 trial in this case to cite or blow up as Exhibits?

1 A I am not.

2 Q I mean, you're not planning on coming in with the
3 YMCA, and say on this page it says this?

4 MR. CALDERONE: He is not, but I will.
5 I'm going to look at sections of the American
6 Red Cross Manual, and possibly the YMCA or
7 Ellis & Associates, different things like
8 that. I'll tell you up front, I've looked at
9 those manuals and I may use them with his
10 testimony, but as far as him bringing it in
11 to --

12 MR. WILLIS: Are you going to ask him to
13 identify it; is that what you're saying?

14 MR. CALDERONE: No. What I'm saying is
15 I'll tell you up front, I'm going to look at
16 those, I'm going to use them at trial. I've
17 not asked him to blow them up or anything. To
18 the extent you're asking him what he's going
19 to do at trial, he's going to tell you no,
20 because he's not going to do anything like
21 that, but I'll tell you, honestly, I am.

22 THE WITNESS: I may quote those manuals, I
23 may refer to standards.

24 By Mr. Willis:

25 Q In your opinion.

1 A In my opinion things that I've been involved with
2 and studies that I've conducted.

3 Q It's a foundation for your --

4 A It's a foundation for my experience and my opinion,
5 but I won't take the manual and refer to it
6 directly. I don't have it in my possession.

7 Q Have you prepared a written report in this case?

8 A I have not.

9 Q Did you review any type of in-service training
10 records by Pine Lake Lodge?

11 A I did not review any in-service training records.

12 Q What is your understanding with regards to any type
13 of in-service training out at Pine Lake Lodge?

14 A It's my understanding from my interview with Mr. Bly
15 that in-service training is not something that he
16 documents or has a formalized program. The training
17 that he reflected to me that was involved is guards
18 that come on duty or -- correct that. Guards that
19 come on to his service at the facility, he or Fil
20 will have them do some sort of basic swim test and
21 prove to their level of comfort and competence that
22 they are good swimmers and are able to handle
23 themselves in the water.

24 Q In your interview with Mr. Bly, did you question him
25 with regards to how he taught or trained lifeguards

1 to handle the facilities at Pine Lake Lodge?

2 A It was my understanding that what he said is when
3 they come on as staff or when they're employed,
4 there is some sort of an orientation or an initial
5 talk that he conducts. He had no record of that to
6 share with me.

7 Q Is that what he told you, or did you get that from
8 reading his deposition?

9 A He said that on the day that I talked to him when I
10 was at the facility. Whether that was in the
11 deposition or not, I don't recall. It may have
12 been.

13 Are you saying that it was?

14 Q It was.

15 Let me ask you, what are the facts of this
16 case as you understand them?

17 A All right. The facts of the case as I understand
18 them is that we have a day where Pine Lake Lodge was
19 open for swimming, it was a day that was unusually
20 cold and overcast for that time of year. My
21 understanding is that there was an employee or
22 company-type function going on at the facility at
23 the time. The on-guard lifeguard was a young lady
24 by the name of Colleen Smith who was in the main
25 lifeguard chair, basically there for the protection

1 of the patrons, but there was not people frequenting
2 the water. There were two younger children pretty
3 much in front of her that she was watching, along
4 with the responsibility of watching the rest of the
5 facility, and, at that time, there wasn't anybody
6 using the water.

7 A gentleman by the name of Mr. Whitecloud
8 approached the diving area, went off the board, and
9 I'm not certain exactly in what fashion he went off
10 the board, but his entry to the water was witnessed
11 by the lifeguard. She recognized that there was a
12 problem, left the guard stand, and went to find out
13 exactly what was wrong, and in the process, she saw
14 two children, older children, older than the initial
15 two children and asked them to go get Fil, who is
16 a -- let's refer to him as an off-duty or standby or
17 a backup lifeguard who is available at the facility.
18 And when she got to the diving area, she commenced
19 doing some surface dives. Fil got there, I
20 understand in a matter of seconds, started to
21 organize some sort of a search pattern. Whether
22 that was taken to fruition or not, he, anyway, ended
23 up in the water, and, my understanding, the first
24 dive brought Mr. Whitecloud to the surface, he was
25 taken from the water. It was assessed that

1 Mr. Whitecloud neither had respiration or
2 circulation, and CPR was started.

3 It's my understanding at some point during
4 this, the emergency medical services were notified
5 and arrived shortly after he was pulled out of the
6 water, and care then was turned over to the advanced
7 life support, and that is the incident as I was able
8 to gather it from the depositions and in talking to
9 Mr. Bly.

10 Q You read Colleen Smith's deposition?

11 A Yes, I did.

12 Q Do you remember her stating in her deposition that
13 at the time Mr. Whitecloud dove in the water, that
14 there were eight to ten people in the lake?

15 A I don't recall her saying that there were eight to
16 ten people in the water. No, I don't recall that.

17 Q You are aware that Mr. Whitecloud was intoxicated at
18 the time of this incident; are you not?

19 A It's my understanding he was under the influence.

20 Q Does the fact that he was intoxicated, under the
21 influence of alcohol, play into your opinion in this
22 case?

23 A In what respect?

24 Q In any respect.

25 A It does in a sense that because he was intoxicated

1 or under the influence, that chances of
2 resuscitation can be lessened, chances of in-water
3 coordination and ability can be impaired.

4 Q His abilities?

5 A Yes. And his judgment would be impaired.

6 Q Do you know how intoxicated he was?

7 A I would be -- I don't know. I believe -- I don't
8 know whether I was told or I read that it was over a
9 legal limit of intoxication. I'll say over .1 or a
10 .2.

11 Q .36?

12 A .36. Okay, I do recall someone saying that. I
13 think that was said out at Pine Lake Lodge.

14 Q And you understand that to be grossly intoxicated;
15 do you not?

16 MR. CALDERONE: Objection.

17 A I understand that to be an awful lot of blood
18 alcohol, but different people behave differently
19 under different levels of alcohol.

20 By Mr. Willis:

21 Q Do you remember reading in Colleen Smith's
22 deposition that she had seen him in the water prior
23 to this dive that he took, his last dive, we'll call
24 it?

25 A Yes.

1 Q Do you remember her indicating that she thought he
2 was intoxicated from her observations?

3 A I believe she said that she thought he may have been
4 intoxicated or under the influence.

5 Q You indicated when you were out there you did some
6 type of test to determine response.

7 A Yes.

8 Q I assume you did this to determine how long it took
9 Colleen to respond.

10 A Yes. Let me correct that. I took and determined
11 how long a lifeguard would respond.

12 Q And you did those tests yourself, right?

13 A Yes.

14 Q So really it would be accurate for maybe how you
15 would respond; is that correct?

16 MR. CALDERONE: Objection.

17 A No. I did not use all my speed or ability to react.
18 I did basically a moderate pace.

19 By Mr. Willis:

20 Q How did you conduct the test?

21 A Basically I sat at the lifeguard stand.

22 Q Main lifeguard stand?

23 A The main lifeguard stand where Colleen was said to
24 be sitting. I would scan the water to see how long
25 it would take me to scan the facility with two

1 children, roughly, off to my front, and possible
2 people that could enter the water to my right, and
3 people that possibly could enter the water to my
4 left, and I found that to be within a reasonable
5 limit, that if there were only a couple of people,
6 that would be very reasonable to scan that in less
7 than ten seconds.

8 Q Then what did you do?

9 A Then I was assuming that I saw a swimmer enter the
10 water from the diving board, I glanced in that
11 direction, and at that point I assumed that they did
12 not come up in a normal fashion. I left the guard
13 stand and jogged to the point where I would enter
14 the water at the diving board to see how long it
15 would take me to maintain -- to get contact with the
16 victim.

17 Q How much time did it take you to make this
18 observation that there was -- from the chair?
19 You're sitting in the chair, you're making an
20 observation there's a problem down in the diving
21 area.

22 A Right.

23 Q How much time did you offer for that?

24 A I witnessed what had happened, so we're just talking
25 a second. I saw him enter the water so I assumed

1 there was a problem.

2 Q Immediately upon that --

3 A Yes, that's what I assumed at that point.

4 Q Then you timed yourself to jog down to the water?

5 A Yes.

6 Q How much time?

7 A 14.2 seconds, I believe it was.

8 Q Did you enter the water then?

9 A I did not enter the water.

10 Q November. I understand.

11 Do you recall Colleen indicating that she
12 witnessed Mr. Whitecloud surface to the effect that
13 she thought she saw his hair on the surface of the
14 water?

15 A Yes.

16 Q And do you recall then that she waited a period of
17 time to ascertain whether he was going to come back
18 up?

19 A I don't recall whether she said she waited a period
20 of time, but I do recall her saying that she saw the
21 hair come to the surface. Again, since in the
22 deposition I believe she indicated she witnessed the
23 entry, the ten second scan is still within reason.

24 Q So I'm assuming from your test that you're assuming
25 it took her approximately 15 seconds to get down to

1 the point where she entered the water?

2 A No, I would assume it would take her less than that.
3 I was under a moderate jog. She was a younger, more
4 athletic person than I, she was also under a
5 situation of possible emergency, so she would have
6 probably moved faster than I did.

7 Q In your reviewing of this case, do you have an
8 opinion as to how long Mr. Whitecloud was under
9 water?

10 A Only -- I don't have an opinion. Only from what I
11 read. I have no opinion on how long he was under
12 water. From what I was able to gather, it was
13 approximately a minute, from the depositions or so,
14 give or take 30 seconds on each side. It didn't
15 appear very long. Maybe it was two minutes. I'm
16 not certain, but I'm not trying to guess in my
17 opinion how long it was. I'm only doing that from
18 statements of the deposition.

19 Q You're relying upon the evidence that you've read?

20 A That's right.

21 Q You don't have some opinion as to how long he was
22 under based on some education or training?

23 A No.

24 Q Let me ask you, in your experience, how long does it
25 take a human body to settle to the bottom of an

1 eight or nine foot depth?

2 A There's too many factors that come into play.

3 Q What factors would you have?

4 A If Mr. Whitecloud entered the water, which I expect
5 he did, in a slap of the water and not a cut dive,
6 the air, residual air in his lungs would be knocked
7 out, the air would be knocked out, and many times he
8 would go almost immediately to the bottom.

9 Otherwise, depending on his body composition,
10 if he did not hit the water where the air was
11 knocked out, he would possibly drift down a little
12 slower than he would if the air was knocked out.
13 Sometimes, and experience has shown that someone
14 who's entered the water suddenly and unexpectedly,
15 the air would be knocked out of them, and they would
16 go down just like a bag of bricks.

17 Q The evidence in this case seems to be that he dove
18 in. As you indicated, you don't know whether it was
19 a clean dive, we'll call it, but she also indicated
20 it wasn't a belly-flopper, and that he went under
21 water, and then his hair surfaced at some point
22 later. So I'm just wondering, in your mind, in your
23 experience, whether you have an opinion after the
24 hair surfaced, how long would it take him to settle
25 to the bottom?

1 MR. CALDERONE: Objection.

2 A I don't feel I can make that guess. Number one,
3 there is some confusion on the depth.

4 By Mr. Willis:

5 Q Let's assume --

6 A I don't recall the height of Mr. Whitecloud.

7 Q Six foot two.

8 A Six foot two.

9 Q And the depth of the water is between eight and nine
10 feet. Let's assume that.

11 A Mr. Bly indicated it might be as deep as 11 or 12
12 feet, but --

13 Q Let's assume from County records that it's between
14 eight and nine feet.

15 A If he's six foot two, and we're talking about eight
16 or nine feet, he's going to be there in a matter of
17 seconds.

18 Q Settling?

19 A Well, settling? Again, that's a hard one to call.
20 It depends on his body composition, it depends on
21 the water in his lungs. Settling, it could be as
22 long as a minute, or it could be longer than a
23 minute, but --

24 Q Let me ask you, what is your opinion in this case?
25 What is your opinion in this case?

1 A My opinion in this case?

2 Q Yes.

3 A That the lifeguard acted in a standard or reasonable
4 care.

5 Q You're talking about Colleen Smith?

6 A I'm talking about Colleen Smith and Fil.

7 Q And Fil. Once Fil was alerted, he reacted in a
8 standard of care?

9 A Right.

10 Q What about Mr. Bly and Pine Lake Lodge in operating
11 this thing, do you think this was set up in a
12 standard of -- to a standard of care?

13 A I don't believe that the way that the operation was
14 set up had any bearing on the actions of the
15 lifeguard or the situation at hand.

16 MR. CALDERONE: Let me just object. Why
17 don't you be a little more specific when
18 you're talking about the setup so I know what
19 you're talking about? I don't know whether
20 you're talking about the number of lifeguards
21 on duty or the recordkeeping or whatever. Ask
22 him in a little more detail.

23 By Mr. Willis:

24 Q The facts that you have relayed to me or what you
25 know -- I assume you know the beach front of Pine

1 Lake Lodge is approximately 500 feet, a little over
2 500 feet, the beach front, and there's one lifeguard
3 at the main chair, and that, by her testimony,
4 that's where she was sitting, and that there's eight
5 to ten people in the water.

6 I'm not talking about recordkeeping, I'm not
7 talking about -- I mean, as an aside, the
8 recordkeeping requirements what they were supposed
9 to do and they didn't do. We're not talking about
10 that. We're talking about hands-on common sense,
11 what's going on at the time approximately around
12 this incident.

13 A Since I have indicated I didn't see any problem with
14 the lifeguard's standard of care, I don't see any
15 problem with what you're saying.

16 Q In the facilities you've lifeguarded, do they allow
17 alcohol in those facilities?

18 A Some they have. The privates they have. Usually
19 the State or Federal facilities don't. I've worked
20 at them, but I really haven't lifeguarded there.

21 Q As you indicated earlier, intoxication can affect
22 your ability to swim.

23 A Yes.

24 Q Is it safe to assume your opinion would be if you've
25 got people drinking at a bathing beach, that would

1 heighten the duties on a lifeguard?

2 MR. CALDERONE: Objection.

3 A People that are intoxicated are high risk bathers,
4 and as a lifeguard knows, that whenever you have a
5 high risk bather you would have to pay more
6 attention to them when they're in the water.

7 By Mr. Willis:

8 Q If you were operating a facility like this or this
9 facility, would you allow alcohol on the premises?

10 MR. CALDERONE: Objection.

11 A I'm not a drinker.

12 By Mr. Willis:

13 Q I'm talking strictly from a safety standpoint.

14 A I probably -- that's a hard question to answer
15 because we're talking about a financial
16 consideration. Would outlawing drinking in my
17 facility then affect my ability to have certain
18 groups come in? Would outlawing alcohol at my
19 facility, you know, affect my business? I would
20 have to sit down and make some financial decisions
21 there. I typically -- to answer your question, I
22 probably would not because of --

23 Q For safety considerations?

24 A I don't -- for safety considerations, I have
25 lifeguards that will, you know, hopefully act in a

1 prudent, responsible manner. But basically for
2 personal considerations, I'm not one that feels that
3 you need alcohol to have fun.

4 Q Would it be prudent for a lifeguard who saw someone
5 they thought was intoxicated, to request that they
6 not get in the water?

7 MR. CALDERONE: Objection.

8 A A lifeguard -- it would be prudent for them to do
9 that if the person was going to enter the water
10 while they were witnessing it and they had the
11 ability to stop them. If someone was drinking or
12 intoxicated, wasn't under their realm of
13 responsibility, and drinking was permitted, I don't
14 know whether the lifeguard would need to take the
15 time to inform people who are drinking that they're
16 not allowed in the water by leaving the facility and
17 telling people. Are you following what I'm saying?

18 By Mr. Willis:

19 Q I follow what you're saying.

20 A It depends on the situation. I mean, if I was a
21 lifeguard, and there was someone who was
22 intoxicated, they were walking into the water, yes,
23 I would tell them that, "You will not be permitted
24 to enter the water when it appears that you're under
25 the influence."

1 By Mr. Willis:

2 Q If you saw someone you thought was intoxicated and
3 you saw them get up on the diving board to dive in,
4 would you whistle at them and say, "Hey, I don't
5 want you in the water"?

6 A If I had that opportunity, I probably would.

7 Q In this situation, Colleen did see him prior to
8 entering the water on the diving board, and she did
9 not do that.

10 I believe you are aware of that from reading
11 her deposition; are you not?

12 A I am. That takes us back to -- it sounds like
13 you're trying to confuse the issue here, because I
14 already said that I think she took a reasonable
15 standard of care, which means if I felt that she had
16 the ability, the time to stop that person before
17 that happened, that's not a reasonable standard of
18 care, but I was under the assumption, in my opinion,
19 that this person went right off, and the lifeguard
20 being 150, 60 feet away --

21 Q 193 feet.

22 A -- 193 feet away is not able to say, "Hold it,"
23 "Wait a minute." This person immediately just went
24 off the board. You really don't have time to react.

25 Q Had she been closer, would it make a difference?

1 A Possibly not. What do you mean? How close? Right
2 there on the dock of the diving area?

3 Q Yes.

4 A Possibly, yes.

5 Q She would have been in a better position?

6 A She would have seen -- she could have possibly have
7 seen him enter at a sooner point. She could have
8 seen his actions and second-guessed the fact that he
9 was going to come off the board.

10 Q That's where I'm asking the questions about the
11 setup that day. Colleen was told to be in the main
12 lifeguard chair and to watch the entire beach.

13 Is that your understanding?

14 A No.

15 Q What's your understanding?

16 A My understanding was she was in the central chair.

17 Q Right.

18 A Which enabled her to effectively watch the entire
19 beach, primarily the people. As a lifeguard, we
20 don't watch the beach, but we watch people. My
21 understanding is that there were two children in the
22 water in front of her, and, again, I don't recall
23 her -- from the deposition, you're saying there were
24 eight or nine people in the water. I don't recall
25 that being in her deposition.

1 MR. CALDERONE: Just to clarify that, you
2 can review her transcript. I think she did,
3 at one point, say there were eight or ten
4 people. To the extent that fact comes up, you
5 can review her transcript.

6 THE WITNESS: Is she saying they were in
7 the water?

8 By Mr. Willis:

9 Q Yes.

10 A I hate to quiz you on the deposition which I read,
11 but did she --

12 MR. CALDERONE: Just answer from the facts
13 that you know and are familiar with now and go
14 under that assumption. You can always study
15 it later.

16 By Mr. Willis:

17 Q I'm not trying to argue with you. I just want to
18 make sure that your opinion is based upon --

19 A The facts.

20 Q -- the facts. And the facts, I think, for the most
21 part, are in agreement -- there are some that are
22 going to be disputed, and it's going to depend on
23 the testimony of the individuals, and that's all. I
24 just want to make sure we're talking -- comparing
25 apples to apples, that's all, because given any -- I

1 could change the facts to make your opinion one way
2 or the other obviously, and I just want to make sure
3 that we're dealing with the facts in this case,
4 that's all.

5 You've had an opportunity to review
6 Mr. Kunsman's deposition, I take it?

7 A Yes.

8 Q I believe from reading that you find that he, for
9 the most part, doesn't have any real problem with
10 the lifeguards themselves; would you agree with
11 that?

12 A I think that's fair to say.

13 Q His problem is more with the -- his opinion is more
14 critical of the setup of the facility and how it was
15 being run at that time.

16 You're aware that the Ohio Department Guide to
17 Bathing Beaches indicates there's supposed to be one
18 lifeguard per every 300 linear feet?

19 A I'm aware that it does read that.

20 Q Does Pennsylvania have any similar type of
21 guidelines?

22 MR. CALDERONE: Objection.

23 A That's a difficult question. Not to my knowledge.
24 The Commonwealth of Pennsylvania does not have any
25 guidelines as such. I'm not going to say that a

1 county or municipality, township might not have some
2 special regulation.

3 By Mr. Willis:

4 Q What number do you feel comfortable with as a
5 standard of care for minimum beach front for a
6 lifeguard?

7 A Well, this is where I differ with some of the
8 standards or let's say the different regulations
9 that exist. I'm a believer in the number of
10 lifeguards that should be available for people in
11 the water or people that are bathing or swimming.
12 To go by square footage is sometimes an unfair
13 comparison and is not a good way to allow for the
14 number of guards per patrons, so in that respect,
15 it's -- I mean, if you have three people in the
16 water at a beach and the beach front is 500 feet,
17 there's no problem with having one lifeguard on
18 duty. But you're saying if you have 500 feet,
19 according to this 300, you have to have two
20 lifeguards on duty in order to meet the mandate or
21 the code, which doesn't make a lot of sense if
22 there's only three people in the water.

23 Q I gather then from that you're saying your feeling
24 is the standard of care for lifeguards is driven
25 more by the amount of people in an area than just

1 some number of feet on the beach?

2 A Yes.

3 Q Do you know how many square feet Pine Lake Lodge is,
4 the swimming area?

5 A No, I don't offhand.

6 Are you talking about this whole swimming area
7 with the line across?

8 Q The swimming area. The beach front.

9 A I could figure it out.

10 Q I've got 500 feet of beach front. What would you
11 guess from your --

12 A Again, what's the depth that goes from the beach
13 front back to the line?

14 Q What would be your estimate, 50 feet, more or less?

15 A Maybe.

16 Q Maybe 10 feet?

17 A Maybe a little more than that.

18 MR. CALDERONE: To the extent you're
19 asking him to estimate or to approximate
20 distances and everything else, I object.

21 MR. WILLIS: Your objection's noted.

22 MR. CALDERONE: No, I'm not going to allow
23 him to sit here and speculate on matters. If
24 you have questions about his opinion or
25 professional judgment things, that's fine. If

1 he didn't measure something, then I'm not
2 going to sit here and let him speculate on
3 different numbers.

4 By Mr. Willis:

5 Q What's your best estimate of the distance from the
6 bathing beach to the --

7 MR. CALDERONE: That's a nice way of
8 saying "make a guess."

9 MR. WILLIS: We're calling it an estimate.

10 MR. CALDERONE: Okay.

11 THE WITNESS: From the bathing beach? The
12 bathing beach is a semi circle or an arc, so
13 it's going to vary. If you want to -- I can
14 give you a range. I would say anywhere from
15 20 feet to maybe 75 feet or 100 feet maybe.
16 It's out where the last dock is. It could be
17 as much as that.

18 By Mr. Willis:

19 Q So with a 500 foot beach front, and the numbers that
20 you've talked about, even at 20 feet, you've got
21 10,000 square feet of swimming area, right?

22 A You're asking me to do mathematical calculations
23 here. I don't want to -- unless we put it down on
24 paper, I'm not going to say yes or no to these
25 things because I get too many zeros or you may say

1 10,000 where you really mean 100,000, or maybe it's
2 a thousand square feet. I'm not sure. I mean,
3 unless we sit down and do the calculations, I don't
4 want to guess.

5 Q You've got 500 feet of beach front. For it to be a
6 thousand, you would have two times 500. Twenty
7 would be 10,000. You can accept my word on that.

8 A All right.

9 Q I'll ask you to assume that. So there's at least
10 10,000 square feet at Pine Lake Lodge?

11 A That's probably accurate.

12 MR. CALDERONE: I object. Move to strike.

13 He's asked and answered the question.

14 By Mr. Willis:

15 Q Now, you're talking about the number of bathers in
16 this area. Obviously a lifeguard can only watch so
17 much water; is that safe to say?

18 A A lifeguard doesn't watch water, he watches people.

19 Q But he has to look over water to see people,
20 correct?

21 A Correct.

22 Q Have you reviewed the table in the Ohio
23 Administrative Code for the number of lifeguards
24 required in a swimming pool based on the number of
25 bathers and the square footage of the bathing of the

1 pool area?

2 A I saw that. I didn't feel it was applicable to the
3 bathing beach. I didn't really study it.

4 Q The Code section does not, it's for swimming pools.
5 I understand that. But my understanding is that
6 your opinion is that we don't look at how many
7 lineal feet we have, we look at how many bathers we
8 have in the area.

9 A That's a better way of doing it, yes, in my opinion.

10 Q So if Pine Lake Lodge -- strike that.

11 So that table in the Ohio Administrative Code,
12 would you find that to be reasonable?

13 MR. CALDERONE: Objection.

14 Go ahead.

15 A Because I didn't study it, I don't know.

16 By Mr. Willis:

17 Q If it would state that for one to fifty swimmers,
18 bathers in a 6,000 or more square foot facility, you
19 need two lifeguards, would you find that to be
20 unreasonable?

21 MR. CALDERONE: Objection. You're talking
22 about a swimming pool, right? That's what the
23 Code is all about.

24 MR. WILLIS: Correct.

25 MR. CALDERONE: He's asking for your

1 opinion about the square footage of swimming
2 pools now.

3 THE WITNESS: Repeat the question.

4 By Mr. Willis:

5 Q Assuming you have a pool of 6,000 or more versus --

6 A Let's give a dimension. That depends on -- are we
7 talking a rectangular pool, are we talking a pool
8 that is L-shaped, because, again, the lifeguard's
9 scanning technique and pattern is going to vary.

10 Q What's the easiest to scan, rectangle?

11 A Rectangle.

12 Q 6,000 square foot rectangle.

13 A What would the dimensions be?

14 Q 30 by 20.

15 A 30 by 20.

16 Q 300 by 20.

17 A See, this is the kind of problems we run into.

18 Q 100 yards, 20 feet wide.

19 A Hundred yards?

20 Q 300 feet is 100 yards.

21 A And you're saying the pool is 300 feet long?

22 Q Right.

23 A Okay.

24 Q You want 6,000 square feet in a rectangle?

25 A Okay.

1 Q 6,000 square feet, you have one to fifty bathers.

2 Are two lifeguards unreasonable?

3 A I don't think you understand what I mean. If you
4 have -- it depends on the location of the bathers.
5 We're talking about a 300 foot pool, and then we
6 have all the bathers in one end, then I wouldn't
7 hesitate to say that one guard would be sufficient.
8 But if we had them all spread out, the type of
9 people that were in the pool, because we're --
10 again, lifeguards are people watchers, the type of
11 people in the pool may indicate whether you would
12 want two lifeguards or -- see, there's all kinds of
13 variations here. You can have a lifeguard and a
14 competent lookout.

15 One of the things, I believe, if you have a
16 lifeguard available, but you have another set of
17 eyes watching, a junior lifeguard, or someone else,
18 that would be fine. Or you have a lifeguard who you
19 know those fifty people are on the swim team
20 members, one lifeguard would be sufficient. If you
21 have one lifeguard and 50 people are handicapped,
22 then you may want another lifeguard or possibly
23 three lifeguards, so there's too many variables.
24 That's why many times when I'm involved with setting
25 the number of lifeguards needed per square footage,

1 I said it depends on the user, the number of people
2 who are using the facility.

3 Q That's a very good point. Looking back at Pine Lake
4 Lodge, we don't have a 300 foot, we have 500 feet,
5 we've got people that are drinking, we've got
6 children, do you think it is your opinion that the
7 standard of care requires only one lifeguard to
8 watch 500 feet of water with the different
9 apparatuses they have in the water, diving
10 facilities and the individuals they did have that
11 day, intoxicated people and children?

12 A I believe that there was a reasonable standard of
13 care because we're talking about other variables.
14 The other thing you neglected to mention in your
15 statement now is the fact that it was a cold day.
16 It wasn't likely that people would be going into the
17 water or many people would. The other thing is the
18 location of the people were such that they were not
19 spread out.

20 Q See, that's back to the facts, and I think --

21 A In my opinion, that's the way I understand it. If
22 you're saying there was one person down at the far
23 end of the 500, and there was another person here,
24 and there were children here, then there could be an
25 argument on the number of lifeguards that would be

1 on duty. However, she was still able -- because in
2 the time that I was there, I would still, even with
3 eight people in that 500 foot, be able to scan in
4 ten seconds or less, and that's what I
5 basically -- as far as reasonable standard of care,
6 is that 10/20 rule for that situation. (Indicating)
7 Q You talked about scanning 10 seconds and 20 seconds
8 to get the diver -- not the diver, but the victim,
9 we'll call it, out of the water, right?
10 A To get to the victim, not necessarily out of the
11 water.
12 Q Twenty seconds to get to them?
13 A Get to them.
14 Q Do you think she got to him in 20 seconds?
15 A She got to the location in 20 seconds is my
16 understanding. Fil was actually the one that
17 brought Mr. Whitecloud out.
18 Q So she did not get to him within 20 seconds?
19 A She did not get to him in 20 seconds.
20 Q Had she been sitting in the lifeguard chair at the
21 diving area, do you think she would have had a
22 better chance of getting to him within 20 seconds?
23 A I can't answer that question. If you're saying that
24 if she would have had -- she didn't get to him in 20
25 seconds, but if she would have had 25 seconds, yes,

1 then I could say yes, because that's a different --
2 you could take five seconds off of that, but she
3 didn't need to because Fil got to him.

4 Q You think Fil got to him within 20 seconds?

5 A No. I'm saying Fil got to him, so the time in which
6 she would get to him was irrelevant then.

7 Q But it was beyond 30 seconds by the time Fil got
8 there; would you agree with that?

9 A Yeah, it was probably beyond 30 seconds.

10 Q She had to get out of her chair and run down there,
11 and if she had seen him go under and running down
12 there, she has to watch where she's running to get
13 around there, then she has to reacquaint herself to
14 where that body went under; is that correct?

15 A Are you talking about -- in her mind that probably
16 happens, yes.

17 Q Because the facts are she dove several times and
18 never found him. Had she been there, she would have
19 had a better opportunity to have a better fix of
20 where he went under and recovered him; would you
21 agree with that?

22 MR. CALDERONE: Objection.

23 A No, because I'm not convinced -- I'm not convinced
24 that he was recovered at the exact point he went
25 under.

1 Are you saying that that's the truth, where he
2 entered the water was where he was recovered from?

3 By Mr. Willis:

4 Q I don't think anybody knows, to be honest with you.

5 A Then I can't answer your question.

6 Q What we do know is Fil went on the board, dove in
7 and finds him, so I think it's safe to assume that
8 he -- where Whitecloud dove in, Fil dives in, he was
9 pretty much in the same area as where he went under.

10 MR. CALDERONE: That's your assumption.

11 MR. WILLIS: That's right.

12 By Mr. Willis:

13 Q I'm asking do you think that's a good assumption?

14 A No.

15 Q Why not?

16 A Because when Colleen was surface diving, she could
17 have been missing him by inches. There's no doubt
18 that Fil's recovering of Mr. Whitecloud had some
19 luck to it. I mean, we know a given location where
20 someone went down. As you go down and you surface
21 dive and you feel, the visibility was zero when
22 you're down there at that depth, you're feeling, she
23 could have been feeling under his arm, right beside
24 his head and not feel him, and when Fil went down,
25 he, for all I know, went down basically the same

1 location that Colleen was going down, and he made
2 contact. So it's really a difficult thing to say
3 that Fil made the contact because he went down
4 exactly where Whitecloud went down.

5 The facts as I see them remain that we have
6 two lifeguards here that acted in a very
7 responsible, prudent manner under a reasonable
8 standard of care, and on all the facts that I'm able
9 to gather, I don't think we can shake that, and it's
10 my understanding that you're trying to find that
11 there was some error on either Colleen or Fil's
12 part, and I don't think we're going to find that.

13 Q No, I really am not. I believe Colleen -- she could
14 have done things a little better maybe or a little
15 different which might have helped, but, in all, I
16 think she did the best that she could do, given
17 where she was located, given what conditions she was
18 put into.

19 I think the better scenario would be to have
20 half the beach closed if you're going to have one
21 person watching eight to ten people so that she has
22 a better idea of what's going on. I think a better
23 idea would be not to have people drinking at Pine
24 Lake Lodge, or allow them back in the water if
25 they're intoxicated, or have someone monitoring

1 those things. And so I want you to understand that
2 my problem is not really with the lifeguards
3 themselves, so to speak. Yes, Colleen could have
4 blown her whistle, she might have gotten Fil's
5 attention quicker, he might have gotten him out of
6 the water quicker, and these are maybes, but I think
7 the bone of contention here is with Pine Lake Lodge,
8 and I call it a setup of the facility earlier, and I
9 think that's really what I'm asking you is, do you
10 believe, is it your opinion that for a facility that
11 is allowing alcohol in there, knowing the people are
12 drinking alcohol, they know they have no visibility
13 in the water, that it is okay to have one lifeguard
14 watching people, eight to ten people over a 500 foot
15 beach front?

16 A See, that's not how I see the facts -- that's not
17 how I see the facts of the case.

18 Q Let's assume those are the facts of the case.

19 A We'll assume that the facts of the case are that
20 there are people drinking. Are you saying that the
21 people in the water are drinking, or the people at
22 the facility are drinking? The eight or ten people
23 in the water, are they drinking?

24 Q We don't know what the eight or ten people in the
25 water are doing. We know one of the persons in the

1 water, the lifeguard saw him prior, she knows he's
2 intoxicated. She says eight to ten, I assume that
3 means there's seven to nine other people, and I
4 don't know what they're doing, you don't know what
5 they're doing, she doesn't make any differentiation.
6 She says some of them are children in the kiddie end
7 of the pool, and I'm asking you to assume that. We
8 know one person's intoxicated.

9 A But that person is not in the water?

10 Q She sees him in the water at some point.

11 A Well, it's my understanding that she saw him in the
12 water at the point of entry.

13 Q She also testified that she saw him getting out of
14 the water earlier and just left. She was glad he
15 left because he was intoxicated.

16 A That's right. And that's an acceptable response for
17 a lifeguard to -- "Wow, that's over, that person is
18 out of here."

19 Q I agree with you.

20 A And that was some time --

21 Q Five or ten minutes before he came back.

22 A It was that short a period of time, five or ten
23 minutes? I was under the impression it was a little
24 longer than that because through the deposition he
25 played a volleyball game or something like this. So

1 I don't know because a lot --

2 Q She estimated, I think, five or ten minutes.

3 A He left, but when he came back, he came back
4 basically with some aggression in the sense that he
5 went right off the board into the water. It's not
6 like he contemplated --

7 Q What do you base that on?

8 A I base it on one of the documents that I read, and I
9 believe it would have been Colleen's, that she saw
10 him walk up to the board and enter the water.

11 Q He walked up to the board and entered the water.

12 A And approached the board and entered the water. I
13 don't know whether the word "walked" was used or
14 not.

15 Q But still my question is, do you feel that the setup
16 that they have there with the alcohol, no visibility
17 in the water or very low visibility in the water,
18 and the area that you're covering, is it reasonable
19 to put one lifeguard in charge of that much water
20 area with eight to ten people in the water --

21 A Yes.

22 Q -- knowing that one of them is intoxicated?

23 A It is reasonable to do that because there is also
24 another lifeguard on the premises who is in standby
25 status or off guard duty status, but is there and is

1 trained. With eight or ten people in the water, I
2 don't see utilizing two lifeguards to watch the
3 people. One lifeguard can very adequately supervise
4 or, let's say, watch eight or ten people and respond
5 with a 10/20 rule, which is probably the most rigid
6 form of standard that we have. Other facilities may
7 bend that a little bit, 15 to 30, 15 to 20 I've
8 heard. I've heard a number of different things.
9 Q Let's get your understanding of the 10/20 rule down
10 pat here. Ten to observe them, 20 to get to them?
11 A Twenty to get to them. But 20 to get to them does
12 not mean 20 to actually complete the rescue. Twenty
13 is to basically get to where you saw the person. I
14 mean, the facts of any accident is if a lifeguard
15 sees someone having difficulty, they get to them in
16 so many seconds, and they end up struggling with
17 this person and they don't have control. Is that in
18 violation of the 10/20 rule? No. Basically what
19 you're saying is a lifeguard should scan the area in
20 10 seconds, the people in the area, be able to scan
21 the people in 10 seconds, and then respond, be
22 within a 20-second response time to any point that
23 they're responsible for.

24 MR. CALDERONE: I wanted to clarify one
25 thing. Earlier he asked you if Colleen got to

1 him in 20 seconds.

2 Was that your application of the 10/20
3 rule?

4 THE WITNESS: Yes, I believe so. He was
5 telling me that Colleen did not make contact
6 with him in 20 seconds, but that wasn't her
7 fault. It wasn't because she didn't try. I
8 mean, the fact is she could have very well
9 made contact with him, but he alluded her
10 because of the conditions.

11 By Mr. Willis:

12 Q Had this been a pool, she would have got him on
13 first dive?

14 A Most likely. If that had been a pool, she most
15 likely would have had him the first time because of
16 the clarity of the water.

17 Q So the example you gave of someone struggling, is
18 that a violation at least they had the person in
19 that example, in this case in 20 seconds she was
20 unable to get to him? She may have missed him by
21 inches, as you've indicated --

22 A But that isn't in violation of the 10/20 rule.

23 Q You don't see it --

24 A I don't see that as a violation of the 10/20 rule,
25 because she was able to get to him in 20 seconds if

1 she would have saw him.

2 Q But that's the issue.

3 A The 10/20 rule states that you should be able to
4 scan the people in 10 seconds and get to that person
5 in 20.

6 Q Where is this 10/20 rule set out, in what documents?

7 A It appears in the Ellis & Associates Lifeguard
8 Training Manual.

9 Q Allyson?

10 A Ellis & Associates.

11 Q E-l-l-i-s?

12 A Yes. They're the ones that pretty much adopted it.
13 Let me explain this. They're water park lifeguards,
14 they're pool lifeguards, and the 10/20 rule is a
15 reasonable standard of care for a pool. When you go
16 to the open water, the rules -- there's a little bit
17 more latitude in the rules. I've talked to some of
18 the lifeguards at San Diego Lifeguard Service and I
19 asked them about a 10/20 rule, and basically they
20 indicated that it may take them longer than that.
21 The 10/20 rule is a standard for the water park
22 industries and many of the aquatic facilities -- I
23 guess just water park facilities. When we get into
24 open water, you've got more latitude. People don't
25 normally drown in less than a minute. In less than

1 a minute, they can be resuscitated. However,
2 remember we have complicating factors here.
3 Mr. Whitecloud was intoxicated. From a medical
4 standpoint, that may lessen the time in which it
5 takes someone to have respiratory arrest or cardiac
6 arrest.

7 Q You don't have an opinion with regards to that, do
8 you?

9 A Not --

10 Q You would leave that up to a doctor?

11 A I would leave that up to the doctor.

12 Q Or the Coroner, in this case.

13 A If this is the case, the Coroner, or some other --
14 I'm not sure whether the Coroner is knowledgeable
15 along that line. I would hope that he is, but there
16 are medical doctors, Emergency Room physicians that
17 are not knowledgeable when it comes to drowning
18 situations and the complications that exist, and the
19 different types of water that people drown in, the
20 temperature of the water that people drown in, and
21 the condition in which people drown whether they're
22 intoxicated or under the influence of some drug.

23 Q But you don't feel competent to render an opinion?

24 A That's correct.

25 MR. WILLIS: What is your experience

1 with -- what are we looking at, Ken?

2 MR. CALDERONE: I'm looking at the 10/20
3 rule, and I'm trying to clarify what we're
4 talking about, get to and areas and everything
5 else. That's what I'm looking at because I
6 want to get it straight.

7 Do you want to read it?

8 THE WITNESS: I believe the way it's
9 stated there is get to the area. They don't
10 say the victim, do they?

11 By Mr. Willis:

12 Q It says 20 seconds to reach the victim.

13 MR. CALDERONE: Where?

14 MR. WILLIS: "10 seconds to discover
15 distress, 20 seconds to reach the victim."

16 MR. CALDERONE: What's it say in .3?

17 MR. WILLIS: The area we scan cannot be
18 larger -- to effectively get to within 20
19 seconds.

20 THE WITNESS: Get to.

21 By Mr. Willis:

22 Q I mean, you know, you're talking about
23 technicalities and splitting hairs.

24 A That's what I'm saying, technicalities and splitting
25 hairs, that's dealing with a pool or a water park.

1 We really complicate the issue when we talk about
2 open water.

3 Q Do you apply the 10/20 rule to this case as a
4 standard of care?

5 A I think the 20 -- it's my opinion that the 10/20
6 rule is probably the most rigid standard that you
7 could have, and it does -- the lifeguard's reaction
8 does conform to the 10/20 rule. So under the most
9 rigid standard it does conform, but if I were to say
10 how long should it take a lifeguard to get to the
11 person in that facility, it very well may be more
12 than 20 seconds.

13 Q So you're saying that -- let me just get this
14 straight. You're saying that you think your opinion
15 is that Colleen --

16 A She was well within --

17 Q 10/20?

18 A She was well within any reasonable standard of care
19 that could be --

20 Q Any reasonable standard of care?

21 A Any reasonable standard of care. The most stringent
22 would be the 10/20, and I think that she was within
23 that, through my primitive testing.

24 Q In your experience with drowning victims or near
25 drowning victims -- how do I want to put this into a

1 question?

2 Do you have any recollection of the facts in
3 this case about what Tim Whitecloud had in his
4 lungs?

5 A I don't have any recollection.

6 Q They found some plant material, do you remember
7 reading that in the Autopsy Report?

8 A I believe so, but not for certain.

9 Q Do you remember Mr. Trocchio indicating that he had
10 mud or muck on his face?

11 A Yes, I do recall that.

12 Q And some of that out of his mouth or whatever?

13 A Yes, I do recall that.

14 Q In your mind, would that be consistent with him
15 being on the bottom of the lake?

16 A That would be consistent with the fact that at some
17 point that his face did come in contact with the
18 bottom. However, if my memory serves me correctly,
19 I believe that the lifeguard brought him up by his
20 feet or by his ankle. In that case, being the
21 height that he said, he could conceivably be just
22 several feet off the bottom and still be brought
23 down through the muck by pulling his ankle and his
24 head dropping down through --

25 Q That's conceivable?

1 A Very much so, yes.

2 Q I agree.

3 What about the fact that he's got this in his
4 lungs?

5 A Well --

6 Q He would have had to have sucked that into his
7 lungs; wouldn't he?

8 A You're asking me to render a medical opinion, and I
9 can make all kinds of hypotheses. Maybe during the
10 mouth to mouth resuscitation it could have been
11 aspirated in by the rescuer. I don't know how that
12 could have been aspirated into the lungs. There
13 could be a number of different explanations for
14 that, but I --

15 Q That's a puzzling issue in this case. What
16 different explanations can you arrive at as to how
17 he has -- he dives in, he surfaces, you see his
18 hair, then he settles back down, and he's rescued.

19 How does he get the muck, mud, whatever you
20 want to call it, in his face, in his lungs?

21 A In his face, I can give you a hypothesis. In his
22 lungs, I'm not sure whether that would cause him to
23 aspirate unless in this brief period of time that
24 we're talking about, if it is, indeed, a brief
25 period of time, he could still be actually breathing

1 or aspirating water as he was being brought up. I
2 don't know. Again, I think a medical doctor would
3 be best to answer that.

4 Q Do you have an opinion? Do you know if once people
5 suck in the water and fill their lungs with water,
6 do their lungs continue to expand and contract?

7 A I don't know that. The complicating issue was that
8 he was intoxicated, so that may cause the body to do
9 things that maybe wouldn't normally be done. Again,
10 I think a medical doctor could give you that
11 opinion.

12 Q We've got one.

13 Is it your experience that bodies, human
14 bodies when they settle to the bottom do it feet
15 first or head first?

16 A That depends on the composition of the person.

17 Q What do you mean "the composition"?

18 A Their weight distribution, whether the body
19 density -- whether it's a lot of adipost tissue
20 versus someone who has very dense body tissue, like
21 someone who is very muscular and big. It depends on
22 the amount of the air that might be in the lungs at
23 the time, whether the air was expelled on impact.
24 There could be a number of factors.

25 Q If there's any air in the lungs --

- 1 A That would probably give the person buoyancy to
2 be --
- 3 Q So his feet would settle first?
- 4 A So the feet may settle first. I'm not saying they
5 would. Neither may settle. He may just be in a
6 neutral buoyancy position, vertical, at angle, or
7 horizontal in the water.
- 8 Q At some point, Mr. Whitecloud settled to the bottom;
9 are we in agreement with that?
- 10 A No.
- 11 Q How did he get to the bottom?
- 12 A Like I said, if the lifeguard -- if he grabbed his
13 foot, very easily as you pull someone through the
14 water, the body will drop, and he could have used,
15 in pulling, he could have drug Mr. Whitecloud's face
16 through the muck at the bottom.
- 17 Q I agree with that. But where he found
18 Mr. Whitecloud he may not have been laying
19 immediately on the bottom, but he was pretty close
20 to the bottom; is that your recollection?
- 21 A He would have been within five feet of the bottom,
22 because if he was six foot tall, we could say as he
23 pulled him --
- 24 Q What's your recollection of the facts of where the
25 body was depthwise when Mr. Trocchio found him?

1 A I don't recall what the depth was he said he surface
2 dived to retrieve him.

3 Q He didn't surface dive, he dove off the board.

4 A Okay. I stand corrected then. Whatever.

5 Q Isn't it your recollection that he found him
6 basically at the bottom of the lake?

7 A I don't recall that. I could have read that, but I
8 don't -- what does that mean?

9 Q I'm trying to figure out how this guy settled to the
10 bottom of the lake --

11 A If he, in fact, did, you're saying?

12 Q He got to the bottom somehow.

13 A You're assuming that he was at the bottom. I'm not
14 in the assumption that he was laying on the bottom.

15 Q I'm not assuming he was laying flat on the bottom,
16 but within maybe a foot at the most.

17 A You mean his head was at a foot?

18 Q Mr. Trocchio indicates that he was laying basically
19 horizontal with maybe his foot up. He's guessing
20 this by the way he felt the body.

21 A I was going to say, that would be -- he would have
22 to feel more than just the foot if they're
23 horizontal. I would think it would be very
24 difficult to make that assumption when you're in
25 nonvisible water when you grab someone's foot. It

1 depends on was his knee bent up, was it down?

2 Q He said it felt like he was laying facedown with his
3 knee face up?

4 A If that's what he said.

5 Q He's the only person we have to rely on for that.

6 A Sure. That would be all the more reason that if he
7 pulled the foot, that his face would go down in the
8 muck.

9 Q I agree. But my question is, what is your opinion
10 as to how this guy surfaces and at some point
11 Colleen sees his hair, and at the next point they
12 get him, he's basically at the bottom, horizontal?
13 How does that happen?

14 A Did she say he surfaces and she saw his hair, or she
15 saw his hair as he went down? Maybe when he
16 entered -- the other thing I'm not in complete
17 understanding of is how he entered the water. You
18 said he dove, and I remember in reading the
19 deposition --

20 Q She said it wasn't graceful.

21 A Not that. I think there was testimony -- I don't
22 think it was Colleen as much as it was Veronica, she
23 said that he'd been practicing a flip, and he was
24 flipping -- it was his brother maybe -- do we have a
25 deposition from his brother?

1 Q Yes.

2 A Then there's another deposition that I did read that
3 he was practicing a flip, and he's not one to give
4 up on not mastering something he wanted to do. So
5 if he's doing a flip, that's a different type of
6 entry than doing a dive.

7 Q Yes.

8 A I mean -- and, again, I'm not sure whether it was a
9 front flip or a back flip, so I'm not really certain
10 how he did enter the water.

11 If he was intoxicated and he was doing flips,
12 chances are he did somewhat smack, and there is a
13 good chance that he knocked the air out of him and
14 he went down.

15 Q If he did do that, how long would it take him to
16 settle at the bottom, in your opinion?

17 A It probably wouldn't be more than a few seconds. If
18 you knock the area out of someone, they're going to
19 go down to the bottom in relatively a few seconds.
20 Again, depending -- I'm not sure of his body makeup.
21 I'm not sure how heavy this person was.

22 Q 185 pounds, six foot two.

23 A Are you talking muscle or are you talking fat?

24 Q Six foot two, muscular.

25 A He would probably go down a little faster than most

1 people.

2 Q Not much body fat.

3 Do you think he would still be sucking water
4 in when he hit the bottom?

5 A I don't know. He could. It's conceivable.

6 Q You don't have an opinion, though, one way or the
7 other?

8 A No.

9 Q I believe we talked about this earlier, but your
10 sole opinion as to any amount of time it took them
11 to get Tim Whitecloud out of the water is based
12 solely on what you've read in the depositions?

13 A Yes.

14 Q The fact of where his body was found or anything
15 like that does not play into your opinion as to how
16 long --

17 A No. I'm not doing any personal calculations or
18 scientific research on the rising and falling of
19 bodies and the recovery. No, I'm just doing it from
20 what I've read. And I probably should say my
21 experience on how long it would normally take me if
22 I would do that.

23 Q To expel all your air?

24 A Expel all my air and go to the bottom. And then if
25 there was somebody at the bottom, I would dive down

1 and grab them, bring them up, and how long it would
2 take me to get them out of the water. Those are my
3 assumptions through my own experience that --

4 Q But you're assuming you find them on the first dive,
5 right?

6 A Regardless of whether I find them on the first dive.
7 That amount of time that passes is variable. I
8 mean, I don't know. If I dive several times, it's
9 going to be more time. If I get them on the first
10 dive, it's going to be less time.

11 Q Do you have any understanding or education or
12 experience with timetables of the longer you're
13 under water what your survival rates are? Do you
14 know anything about that?

15 A A little bit, yes.

16 Q What's your understanding of that?

17 A It has a lot to do with recovery rate whether
18 someone -- depending on the temperature of the
19 water, the size of the victim, the age of the
20 victim, when is the last time they ate, whether they
21 were intoxicated or not, whether the water was clean
22 water or polluted water, dirty water. All of these
23 factors play a part in whether someone's going to
24 survive once they're resuscitated.

25 Q Where does time fit into that?

1 A Where does time -- normally speaking, the longer
2 you're under water, the less chance you have of
3 surviving. That's a normal assumption we can make.

4 Q What would you term acceptable at Pine Lake Lodge?

5 MR. CALDERONE: Objection.

6 By Mr. Willis:

7 Q What would be your opinion?

8 A What was the temperature of the water?

9 Q Let's assume -- we're talking about August. Let's
10 assume it's in the seventies or warmer.

11 A Or warmer? I thought it was a spring-fed lake.

12 I would imagine people have survived 15
13 minutes under water, 20 minutes. People have
14 survived an hour under water.

15 Q Those are rare cases, right?

16 A I don't think they're rare, no. Dr. Nemeroff has
17 over 200 cases that he has documented. I think
18 there have been a lot of people who could have been
19 resuscitated that have been under water that weren't
20 resuscitated because they assumed that they were
21 dead, because when they're brought up, they are
22 cold, they're pale, they're blue, they're not
23 breathing, and many people give up if there isn't
24 someone there who is trained to resuscitate.

25 Q My question is, your the Operation Manager now for

1 Pine Lake Lodge, what do you think would be
2 acceptable? What's your opinion?

3 MR. CALDERONE: Acceptable for what?

4 A I don't understand the question. Repeat the
5 question.

6 By Mr. Willis:

7 Q What would be acceptable to you as to the length of
8 time someone could be under water? Are you going to
9 apply the 10/20 rule?

10 A No.

11 Q Are you going to apply something more stringent?

12 A No.

13 MR. CALDERONE: The question assumes that
14 there is an acceptable standard for allowing
15 someone under water. I wouldn't accept that
16 people do go under water, but --

17 MR. WILLIS: Can we have you testify, too?
18 I mean, I don't want people going under water
19 either if I was the Operations Manager.

20 THE WITNESS: People do go under water.

21 MR. CALDERONE: It's like asking a doctor
22 what the acceptable standard of people you
23 allow to die on the operating table is.

24 By Mr. Willis:

25 Q At some point you're making a decision.

- 1 A I don't understand your question. I'm sorry.
- 2 Q If you were the Operation Manager, Facility Manager
3 at Pine Lake Lodge --
- 4 A Yes.
- 5 Q -- you're the Manager there. How would you go about
6 placing lifeguards, and what considerations would
7 you take into mind to do that as to where you placed
8 them?
- 9 A I believe I answered this question. I would place
10 lifeguards where the bathers basically were located,
11 if -- where people were in the water.
- 12 Q How close would you want them, lifeguards to the
13 bathers?
- 14 A It depends. If we have children, I would want the
15 person closer to the children, I would want them
16 within 20 seconds of reaction time from them.
- 17 Q If you had been the Operation Manager that day,
18 would you have used one lifeguard?
- 19 A I believe I would on duty. There was another
20 lifeguard on the premises. I would have had no
21 problem if all of a sudden the sun came out, the
22 temperature went up 20 degrees, and everybody there
23 wanted to go in the water. I still had another
24 lifeguard to handle the situation, or still had the
25 option of saying, "We're not going to do that."

1 Q Do you have any idea what -- let me ask what your
2 opinion would be.

3 What is a safe diving depth for a one-meter
4 board?

5 A This is an area that is being currently discussed
6 within the diving community. I don't want to -- I
7 wouldn't want to render an opinion on that because
8 it is something that is very controversial, and I
9 don't really have an opinion on diving boards.

10 Q You have no opinion as to what a safe depth is for a
11 one-meter board?

12 A I could tell you what a dangerous depth would be.

13 Q Do you have a minimum safe depth?

14 A See --

15 Q Obviously an inch would be dangerous.

16 A Right.

17 Q So you can say a lot of things are dangerous, but at
18 what level do we become minimum safe?

19 If you don't have an opinion, that's fine.

20 A I don't have an opinion on that. I really don't.

21 Q Now, as to dangerous, we talked about one inch, two
22 inch, foot.

23 How about eight feet, is that within
24 dangerous?

25 A I thought we understood I don't have an opinion on

1 this.

2 Q We had it about safe, but you said dangerous.

3 Is eight foot dangerous?

4 If you don't have an opinion about eight foot,
5 that's fine.

6 A I don't have an opinion.

7 MR. CALDERONE: I've not asked him to make
8 an opinion.

9 By Mr. Willis:

10 Q If you were to make an opinion on that, what would
11 you do? How would you come to your opinion?

12 A Basically with -- see, there's a number of factors
13 here. Right now in the diving community there is a
14 discussion whether the depth should be nine feet or
15 ten feet or eleven feet or twelve feet, and at what
16 point under that board does that depth continue? Do
17 we go out 20 feet from the board and continue with
18 the depth of nine feet? Do we go out 30 feet? Do
19 we only worry about ten feet off the board because
20 when they dive out? Are we talking about divers
21 going off the board, people that know how to dive
22 who normally go deep, or are we talking about -- are
23 we talking about recreational, someone that doesn't
24 know how to dive going off a board?

25 There are a number of variables along that

1 line and that's why I do not want to render an
2 opinion, because the Jury is still out, and I'm not
3 involved in that research.

4 Q If you were to render an opinion, though, you would
5 look at what's being published or printed by the
6 Experts in those fields?

7 A Yes, basically.

8 Q And you would pretty much accept that as the
9 standard?

10 A I would accept that as the standard.

11 Q Do you understand the facts of this case to be with
12 regards to the rescue, that once Colleen took off
13 out of her chair, she ran down there, she got in the
14 water, started doing some surface diving --

15 A Yes.

16 Q -- other people appeared in the water to attempt to
17 help.

18 A I believe so, yes.

19 Q Mr. Trocchio appeared on the scene, and organized
20 some type of search line.

21 A Was trying to organize a search line.

22 Q And he finally dove in, and on the first dive the
23 rescue was made. I mean, he got ahold of him and
24 brought him out of the water.

25 A I understand that, yes.

1 Q That's your understanding of the facts?

2 A Yes.

3 Q And what is your opinion then as to the amount of
4 time that elapsed then from the time Colleen took
5 off to the point Mr. Trocchio brought him out of the
6 water?

7 A From the time she took off from the guard stand?

8 Q Right.

9 A A couple of minutes, max. I mean -- less than a
10 couple of minutes.

11 Q You think -- it's your opinion all that took place
12 and happened under two minutes?

13 A It appears from the information that that's roughly
14 how long it took, a couple minutes.

15 Q Do you find that to be reasonable in your mind,
16 knowing what you know about lifeguarding?

17 A Yes, that seems to be reasonable. And since he was
18 under water and it did take some search, it's
19 reasonable. But, again, I'm saying it's less than a
20 couple minutes. It may have been less than a
21 minute. I'm not certain.

22 Q It could have been more than a couple minutes, too;
23 couldn't it?

24 A It could have been, but from the information I was
25 able to read, it didn't appear that it was that

1 long.

2 Q What gives you that recollection?

3 A Just the standard time and what actually happened,
4 what she did, what Fil did, and what actually
5 happened, it just doesn't register in my mind that
6 that would take more than several minutes to do, to
7 coordinate and to execute, you know, unless they
8 stopped and discussed it for a while, and that was
9 never really an issue, it just seemed things were
10 falling into place, which normally in the rescues
11 that I've been involved in in lifeguard situations,
12 that's what normally happens. Things happen, people
13 don't stand around. They do, they execute, and the
14 passage of time is sometimes very difficult to
15 surmise.

16 Q I agree with that 100 percent, that the perception
17 of time for the person involved is difficult to
18 perceive accurately.

19 A Right.

20 Q That's why I'm asking your opinion in reviewing all
21 that.

22 A And that's why I said what I said. In my
23 experience, if I was to do it with a cast of
24 lifeguards, it would be approximately that time that
25 I have indicated for that to be executed.

1 Q Would the time vary if you started using just the
2 average Joe, people off the street that --

3 MR. CALDERONE: Untrained lifeguards?

4 MR. WILLIS: That's an official title for
5 them. Untrained lifeguards

6 MR. CALDERONE: To execute this?

7 MR. WILLIS: Your search line.

8 MR. CALDERONE: I object to the question.
9 Go ahead.

10 THE WITNESS: It would, but, see, that
11 doesn't enter in because the operation hinges
12 upon two key people, and that is Colleen
13 Smith, the lifeguard, and Fil, the lifeguard.
14 If one of the nonlifeguards retrieved the
15 person, then that enters another scenario.

16 By Mr. Willis:

17 Q I guess my understanding of the facts are that, and
18 I have no problem with that, Colleen doing the
19 surface dive, Fil shows up on the scene at some
20 point after being --

21 A Sees a couple people in the water -- there were
22 people he wanted to get organized. It's my
23 understanding she did like three surface dives or
24 something before Fil got there, which wouldn't take
25 very much time at all.

1 Q I don't know. Three surface dives.

2 How long can she hold her breath? That's
3 difficult to say, right?

4 MR. CALDERONE: To the extent we're
5 talking about how many dives she did and
6 everything --

7 MR. WILLIS: We'll rely on the facts in
8 the deposition.

9 MR. CALDERONE: -- we'll rely on the
10 facts.

11 By Mr. Willis:

12 Q But at some point, Fil shows up over there, and he's
13 organizing people from the picnic pavilion that have
14 jumped in the water, and he organizes them in the
15 search line, and then has them go down, come back
16 up, go back to the furthest person back, go down --

17 A That's reasonable.

18 Q It's reasonable. I understand the lifeguard manual
19 teaches that; do they not?

20 A Yes, they do.

21 Q I'm not saying he did anything unreasonable. I'm
22 asking about the time to organize untrained people
23 after arriving on a scene after Colleen has done
24 three surface dives, three people are doing this two
25 or three times, and then you dive in, do you think

1 all that could take place within two minutes?

2 A I think it could take place within two minutes,
3 yeah.

4 Q And that's really -- you would agree that's hard to
5 judge?

6 A It's difficult to judge, but, like I said, if I
7 would try to reenact those situations, I could
8 definitely get that type of situation, that whole
9 scenario within the two minutes. Leave the guard
10 stand, run, ask someone to get Fil, enter the water,
11 make three surface dives, there's people in the
12 water, he tells them to do this, do that, he goes
13 off the board and recovers the person. That could
14 be done in two minutes.

15 Q Let's do some basic housekeeping here.

16 Have you ever given a deposition before?

17 A Yes.

18 Q How many times?

19 A Maybe a dozen.

20 Q Have you testified in trial before?

21 A No.

22 Q Never testified in a trial?

23 A No, not as an Expert Witness.

24 Q How about for the State of Pennsylvania in Water
25 Safety?

1 A No.

2 Q What are your charges in this case to date?

3 MR. CALDERONE: Objection.

4 A I'm sorry. I don't understand the question.

5 By Mr. Willis:

6 Q Your charge for this case?

7 A My charge for this case?

8 Q Yes.

9 A I basically get paid \$60 an hour for research or
10 work in my home.

11 Is that what you're asking?

12 Q Yes.

13 A And if I require travel, it's \$800 a day. If it's a
14 half day, it's \$400. I'm not getting paid that for
15 this particular day. I am getting paid somewhat
16 less than that, I believe, due to your firm.

17 Q How much time have you put in this case to date
18 approximately?

19 A With the day, the travel was one day for the Pine
20 Lake visit, traveled several hours, the time I spent
21 there I would consider that a day, even though my
22 travel time wasn't into the case, it's my time, and
23 the review of depositions and materials, I'm saying
24 I guess there's six to eight hours, maybe, or six to
25 ten hours, something like that.

1 Q What other standards do you recognize as reasonable
2 for the positioning of lifeguards in a facility like
3 Pine Lake Lodge? You've indicated -- we talked
4 about the 10/20, and you say it's reasonable under
5 any standards. I'm asking what other standards you
6 recognize as reasonable.

7 A A 15-minute -- strike that. A 15-second standard
8 would be reasonable in an open water facility, I
9 believe, and a 30-second time frame in getting to
10 someone in an open water facility would be
11 reasonable.

12 Q On top of the 15?

13 A On top of the 15 to 30. Again, I feel that that
14 would be reasonable in open water.

15 Q And you're considering Pine Lake Lodge open water?

16 A I would consider it open water.

17 Q Any other standards that you would accept as
18 reasonable?

19 A I'm not sure I understand the question.

20 Do you want me to explain what I thought was
21 done right?

22 Q I think you've already explained what you think the
23 lifeguards did was right.

24 Is there something else that we haven't talked
25 about that you thought was done right?

1 A The fact that the lifeguard was in the chair
2 watching the people, and for that type of day and
3 that amount of people in the water is not typical.
4 Many facilities that I have been associated with
5 would have a lifeguard at a compromising position,
6 meaning off the chair and not watching just because
7 the probability of an accident is -- of responding
8 to the accident isn't as great because of the number
9 of people in the water and the conditions, and the
10 ease it is in which to watch that number of people.

11 In a sense, I commend the lifeguard for being
12 on the chair watching the people rather than just
13 being off the chair walking around the area watching
14 the people because the chair is a vantage point.
15 You can see much more clearly the people in the
16 water than you could if you were down on the beach.

17 Q What else do you think was done right here, other
18 than what we have talked about, with reaction?

19 A We had another individual who was trained, another
20 lifeguard who was on, let's call it, standby or
21 basically backup where, under some conditions, one
22 lifeguard without any backup could conceivably exist
23 and it would still be something that would be
24 acceptable, but I think the plus was there were two
25 certified, two trained people there to deal with the

1 situation, even though the number of people in the
2 water and the conditions that were existing were not
3 such to indicate that you really needed two
4 lifeguards on duty.

5 Q Anything else that you think was done right?

6 A The reactions of the lifeguards in doing what they
7 did and when they did it within the time that we --
8 that I, in my opinion, assumed they did it was
9 commendable.

10 Q Anything else we've discussed at all?

11 A The time in which the emergency response unit showed
12 up. Someone apparently took it upon themselves to
13 contact the local ambulance, and with the time that
14 they showed up and the action which was done is
15 something that was very, very reasonable and
16 prudent. That's basically it.

17 Q Is there anything you think they did wrong?

18 A Under the situation, no, I don't think there's
19 anything that they did that was incorrect.

20 Q Is there anything that you think they could have
21 done better?

22 A Well, you could always say that things could have
23 been done better.

24 Q We're Monday morning quarterbacking here, I
25 understand that, but I'm asking for your opinion.

1 What could they have done better?

2 A She could have recovered him the first dive that she
3 went down, but that's a chance, that's not something
4 due to her lack of skills or lack of ability, that
5 was just the way the cards fell. She wasn't able to
6 make contact with him. Whether that would have made
7 anything different or not, I'm not sure. I'm not
8 sure of the amount of time she dove down and the
9 time that Fil dove down.

10 This person was intoxicated. We have to
11 assume that this person had some responsibility for
12 themselves in being intoxicated and entering the
13 water. We can't expect lifeguards and owners of
14 facilities to be responsible for all of our actions.
15 People have to take some responsibilities for their
16 own actions, people have to take some responsibility
17 for their own actions. It's unfortunate that he was
18 drinking, and it's unfortunate that this accident
19 occurred, but some of that responsibility, in fact,
20 most of the responsibility, has to fall upon the
21 person.

22 Q I think you've hit upon the real issue of this case.

23 Anything else that you think they could have
24 done better?

25 A I could -- not really. I mean, we could say that

1 Fil could have been on duty instead of on standby.
2 We could say that --

3 Q Would that be unreasonable for him to be on duty?

4 A I don't think it would have been necessary for him
5 to be on duty. I don't know that it would be
6 unreasonable. It wasn't necessary for him to be on
7 duty. It wasn't necessary for him to watch I guess,
8 as you said, eight people.

9 Q You indicated that you reviewed -- I thought I had
10 this marked. This has probably been marked as an
11 Exhibit five or six times in different depositions.

12 MR. WILLIS: Why don't you mark this as an
13 Exhibit so we can identify this?

14 (Plaintiff's Exhibit 2 was
15 marked for identification.)

16 By Mr. Willis:

17 Q I'm going to hand you what's been marked for
18 identification purposes as Exhibit No. 2 entitled
19 "Guide for Evaluation of Bathing Areas."

20 You have had an opportunity to review that;
21 haven't you?

22 A I'm not sure I saw this one.

23 THE WITNESS: Did I?

24 MR. CALDERONE: I don't know if you have
25 it here. I sent it to you.

1 By Mr. Willis:

2 Q If you don't have a recollection --

3 A I don't have a recollection -- well, wait a minute,
4 yes. "Provide one or more qualified lifeguards" --
5 I remember reading that in one of the documents.
6 "Provide elevated lifeguard stations." Okay, I
7 probably did review this. Yes, I did. I did review
8 this. I'm sorry.

9 Q That's fine. With regard to what you just read,
10 which is Section 6-D, "Lifeguards: Provide one or
11 more qualified lifeguards for each 300 linear feet
12 of bathing area shoreline," do you believe that to
13 be an unreasonable standard?

14 MR. CALDERONE: Objection.

15 A See, I don't feel that -- that's not reasonable if
16 you have 500 people. What are they saying? They're
17 saying provide one or more qualified lifeguards for
18 each 300 linear feet. If you have 300 linear feet
19 and you have 500 people in the water, how far out
20 are we going? Are we going out 50 feet, 100 feet,
21 200 feet? There are other factors.

22 By Mr. Willis:

23 Q I understand that.

24 A And that's why I sometimes question organizations,
25 State organizations, the bureaucracy that's involved

1 when they set a statement like that as a standard
2 because there's too many variables.

3 Q Would you term this a very stringent standard or a
4 very loose standard?

5 A I can't answer it. I really can't answer that. It
6 depends on how far out. It's pretty loose if you're
7 talking about 300 foot and you're only going out 10
8 feet. I mean, there's not much area there. But if
9 you're going out 300 feet, there's a lot more area.
10 If you're talking about -- how many people are you
11 talking about in the water? That has a lot to do
12 with it, the number of patrons using your facility.

13 One lifeguard is fine for 400 feet if there's
14 only seven people in the water, and they're there in
15 front of the lifeguard stand. He or she can still
16 watch that area if someone else enters, and then if
17 more people enter, then call on the backup lifeguard
18 to, "Hey, go on duty. You stand down here, and I'll
19 stand up here."

20 Many times these things are very ambiguous. I
21 don't know how they came up with that or why they
22 came up with it, but it leaves a lot of gray area
23 for me as a Manager of a facility or as a Head
24 Lifeguard.

25 Q It leaves a lot of gray area when you add the

1 multiple factors in that you indicated, but it's
2 pretty self-explanatory; isn't it?

3 A If it's a code or a statute that says you will
4 provide one or more lifeguards for each 300 linear
5 feet of bathing area, then it's straightforward.
6 Then if you have 300 feet of linear area of a beach,
7 then you should have a lifeguard or more there. I
8 mean, that's straightforward if that's what we're
9 doing.

10 Q The standards you're discussing that you think that
11 they met, the 10/20, 15/30 --

12 A That's the standard of care.

13 Q But would you consider those to be more stringent
14 than that?

15 A I would figure those to be more applicable to the
16 standard of care to the safety of patrons. That
17 doesn't, for me, really give me any acceptable
18 safety standard.

19 Q You indicated you helped write some regulations in
20 Pennsylvania.

21 A Not to lifeguarding.

22 Q With boating?

23 A Boating.

24 Q So you're not involved in any regulations or
25 anything with regards to lifeguarding?

1 A Yes, I am. I'm sorry. Yes, I am.

2 Q What ones?

3 A The number of lifeguards per bathers, number of
4 lifeguards per square foot in an area, but not
5 through my job. I'm also President of the
6 Pennsylvania Aquatic Council. The number of
7 counties in the Commonwealth of Pennsylvania are
8 considering or trying to get these kinds of
9 regulations off the books, and to get things that
10 make a little bit more sense for liability reasons.

11 Q Have you guys created some type of standard for
12 that?

13 A Basically we're developing a standard for that, and
14 it really has to deal with the ability of the
15 lifeguard, things like the 10/20 rule. That is more
16 appropriate than linear foot or square footage. The
17 10/20 rule, it's more appropriate to zone an area,
18 where the number of bathers are in a zone. The zone
19 would change with the number of bathers that would
20 be there, and that's what I'm currently working on.
21 But that is not to be confused with what I am
22 charged to do with the Commonwealth of Pennsylvania.
23 This is as an official -- as President of the
24 Aquatic Council, I have been asked to review some of
25 these things and become involved and help set some

1 standards for the different counties that are
2 responsible for these sorts of things, and actually
3 the counties -- the one county would be Allegheny
4 County, Department of Health.

5 Q Is that on Lake Erie?

6 A No, that's in Pittsburgh.

7 MR. CALDERONE: Off the record.

8 (Discussion had off record.)

9 By Mr. Willis:

10 Q Prior to testifying in this case at trial, are there
11 any additional people you plan to talk to, documents
12 you plan to review?

13 A I don't have any plans to talk to anybody or to
14 review any particular documents at this time, no.

15 Q You've had the opportunity of reading Mr. Kunsman's
16 deposition.

17 A That's correct.

18 Q What of his opinion do you disagree with? Let me
19 ask you, I guess, in that fashion.

20 A I don't recall anything particularly that I disagree
21 with in his deposition.

22 Q I believe --

23 A I can name some things I do agree with him on. I
24 can't recall anything that I particularly disagree
25 with. There are some things that I'm not really

1 sure what he really meant.

2 Q What are you not sure about?

3 A I'm not sure about why the diving depth is an issue.

4 MR. CALDERONE: That's a good question.

5 By Mr. Willis:

6 Q Is it possible that he hit -- I shouldn't say hit,
7 but ended up on a dive face into the muck?

8 A I'm sure it would be possible, but I would think
9 that would be reflected in the Coroner's Report, and
10 I did not see anything that indicated neck or spinal
11 injury.

12 Q We're talking about a soft bottom.

13 A Okay.

14 Q They said cervical spine injury couldn't be ruled
15 out. We don't know if there was or not, and I'm not
16 saying that there was. There's no abrasions,
17 contusions to speak of to the head or skull. I
18 think that basically comes down to the question of
19 how did he get the muck in his lungs.

20 A If you're opening up this to a spinal injury, then
21 it's a whole different ball of wax.

22 Q I'm not opening it up to a spinal injury. I'm not
23 saying his death is some result of a spinal injury.
24 I'm just questioning whether he did end up at the
25 bottom, dive in, hit bottom, talking a diving area

1 now in the eight to nine foot range, he's six foot
2 two, it doesn't take much to get to the bottom at
3 that point, depending on how he actually entered the
4 water. That's the main question.

5 A The eight or nine foot range, has that been
6 verified?

7 Q That's a county measurement, Portage County Health
8 Department measurements.

9 A They have an official measurement for that time?

10 Q Their official measurement was several years prior
11 to that.

12 A Because did not Mr. -- in his discussion with me,
13 and I think in his deposition he's talking ten to
14 twelve feet, so I --

15 Q But he also claims that he hasn't been able to make
16 it any deeper. If anything, it would be getting
17 shallower, and the depth measurements were made in
18 '85 by Portage County, so --

19 A I don't know the volume of water that goes into
20 that, whether his -- there's too many variables.
21 Like I say, I'm not sure why the depth of the water
22 is an issue.

23 Q I don't think it is an issue. I'm not saying it is.
24 I don't know.

25 A Back to the original question. You asked me if I

1 disagreed with anything about Mr. Kunsman's
2 deposition, and it's not that I disagree, I just
3 don't understand why that was brought in, because
4 even in his deposition, he sort of stops and catches
5 himself and doesn't pursue his line of thinking,
6 because, again, I think that he feels, I'm guessing,
7 the same why I do, that I'm not sure it's an issue.
8 He brought it up and then he dropped it, and it
9 wasn't pursued.

10 Q I don't want to put words in his mouth, but I think
11 it's -- I think there are questions about it and
12 those relate -- the depth relates to did he hit
13 bottom in some form or fashion? Is that how he got
14 the mud or muck in his lungs, hitting bottom and
15 sucking it in? And I don't know.

16 A There is another explanation which you asked me
17 before. People that are intoxicated, it has been
18 hypothesized and, in some cases, documented, I
19 guess, that when you're under water and you're
20 intoxicated, you lose your sense of direction,
21 vertigo, and sometimes someone will swim down toward
22 the bottom thinking that it is up, and drowning
23 victims have been found with gravel in their lungs,
24 and the explanation of that was they were in the
25 water, they were intoxicated, they were disoriented,

1 and instead of swimming up to safety or up to air to
2 the surface, they swam down to the bottom, and
3 aspirated and kept digging into the bottom and
4 drowned that way. Through inquiries and research
5 and you talk to other water safety experts, I think
6 that will come out.

7 Have you heard that before?

8 Q I have heard that.

9 My question is, do you think that's the case
10 here?

11 A I don't know. I don't know.

12 MR. CALDERONE: Since we don't know what
13 really happened --

14 By Mr. Willis:

15 Q That's the problem in any -- a lot of wrongful death
16 cases is we don't know.

17 You heard his explanation of the 10/20 rule,
18 or I shouldn't say heard, read, and I believe he
19 indicated, if I'm not mistaken in his deposition, 20
20 seconds to get to the victim, rescue the victim,
21 more or less, and I don't know exactly what word he
22 used, but was that your understanding of the 10/20?

23 A I don't recall exactly how he interpreted it. I
24 know that he alluded to the 10/20 rule, but I'm not
25 sure whether he interpreted to get to the location

1 or make the rescue or touch the victim. I know it
2 was in his deposition, but how he interpreted it,
3 I'm not certain.

4 Q You would be in agreement that a lake is more
5 difficult to lifeguard than a pool?

6 A It can be more difficult. Like I said, not always,
7 because you could have a pool that has a
8 configuration that might have some blind spots and
9 hidden areas, or you can have a small lake like Pine
10 Lake Lodge which might not be all that difficult to
11 guard as far as coverage and scanning.

12 Q Clarity of the waters makes it more difficult?

13 A It makes it more difficult when people go under,
14 definitely. It doesn't make it more difficult in
15 the scanning process.

16 Q The fact they allow alcohol would make it more
17 difficult in your opinion; would it not?

18 A If they permitted people to be intoxicated that were
19 in the water, yes. See, I don't -- I'm not certain
20 where that places an important part in the
21 lifeguard's --

22 MR. CALDERONE: That's okay. Just listen
23 to his question and answer. We've been here
24 for two hours already.

25 MR. WILLIS: You deposed him for three.

1 THE WITNESS: Ask the question again, if
2 you would, please.

3 By Mr. Willis:

4 Q With regards to the alcohol, how do you think it
5 plays into the lifeguarding situation?

6 A People that are intoxicated or under the influence
7 that are using -- that are in the water are high
8 risk patrons. That's how it plays a part.

9 Q So in other words, it puts a heavier strain on a
10 lifeguard?

11 A Any high risk patron, any high risk bather puts more
12 time on a lifeguard, yeah.

13 Q Is it typical for a facility to create an emergency
14 response program for their lifeguards?

15 A I don't think I understand your question.

16 Q When you lifeguard at different facilities, do they
17 not normally explain to you this is our emergency
18 response protocol, program or whatever?

19 A Many facilities will have emergency response
20 program, but apparently one fell into place because
21 the emergency squad was there.

22 Q That's up to the facility to educate their
23 lifeguards on; is that correct? I mean, that's not
24 something, there's no standard that American Red
25 Cross --

- 1 A There is a standard one that if there is an
2 emergency, someone calls 9-1-1 and reports the
3 emergency, that's the standard. However, the
4 variation of that is different for facilities. They
5 may have different numbers, they may have different
6 systems, they may have a button system, they may
7 have a number system and so forth, but the standard
8 of care is the -- the standard of care, correct
9 that. The standard system is the 9-1-1 system.
- 10 Q Mr. Chambers, have you been asked to render an
11 opinion in this case about anything that we have not
12 discussed today?
- 13 A I do not believe I have been asked to render an
14 opinion on anything we have not discussed today.
- 15 Q Do you have any opinion on anything to do with this
16 case that we have not discussed today?
- 17 A I do not believe I have an opinion on anything that
18 hasn't been alluded to. Maybe some of the issues I
19 feel need further investigation on whether there
20 was, in fact, people to the right of Colleen, and
21 whether, in fact, there were people in all 500, as
22 you say, linear feet. There seems to be some
23 question on that.
- 24 Q Factual questions?
- 25 A Factual questions.

1 Q And I agree there are some questions of fact here
2 which we're not going to resolve today.

3 A Right.

4 Q I'm just asking if you've got an opinion of
5 something we haven't talked about.

6 A No.

7 Q You're basing your opinion on the facts that you
8 understand --

9 A That I understand, correct.

10 Q And your opinion could change based on the change of
11 the facts; is that what you're saying?

12 A Yeah, it could on the change of the facts.

13 MR. WILLIS: I have no further questions.

14 MR. CALDERONE: Virgil, when this
15 deposition -- well, we won't waive.

16 - - -

17 (Deposition concluded at 4:20 o'clock, p.m.)

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C E R T I F I C A T E

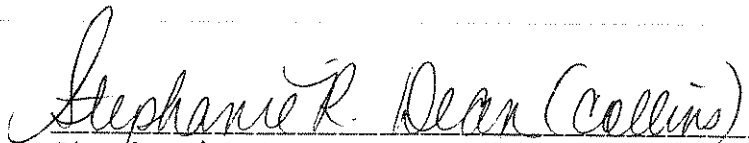
STATE OF OHIO,))
) SS:
SUMMIT COUNTY.)

I, Stephanie R. Dean, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named Witness, **VIRGIL HOWARD CHAMBERS**, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the Witness was by me reduced to Stenotypy in the presence of the Witness; afterwards transcribed by computer-aided transcription, and that the foregoing is a true and correct transcription of the testimony so given by the Witness as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, Counsel or Attorney of either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Akron, Ohio, on this 2nd day of August, 1995.


Stephanie R. Dean, Notary Public
in and for the State of Ohio.

My commission expires August 30, 1995.